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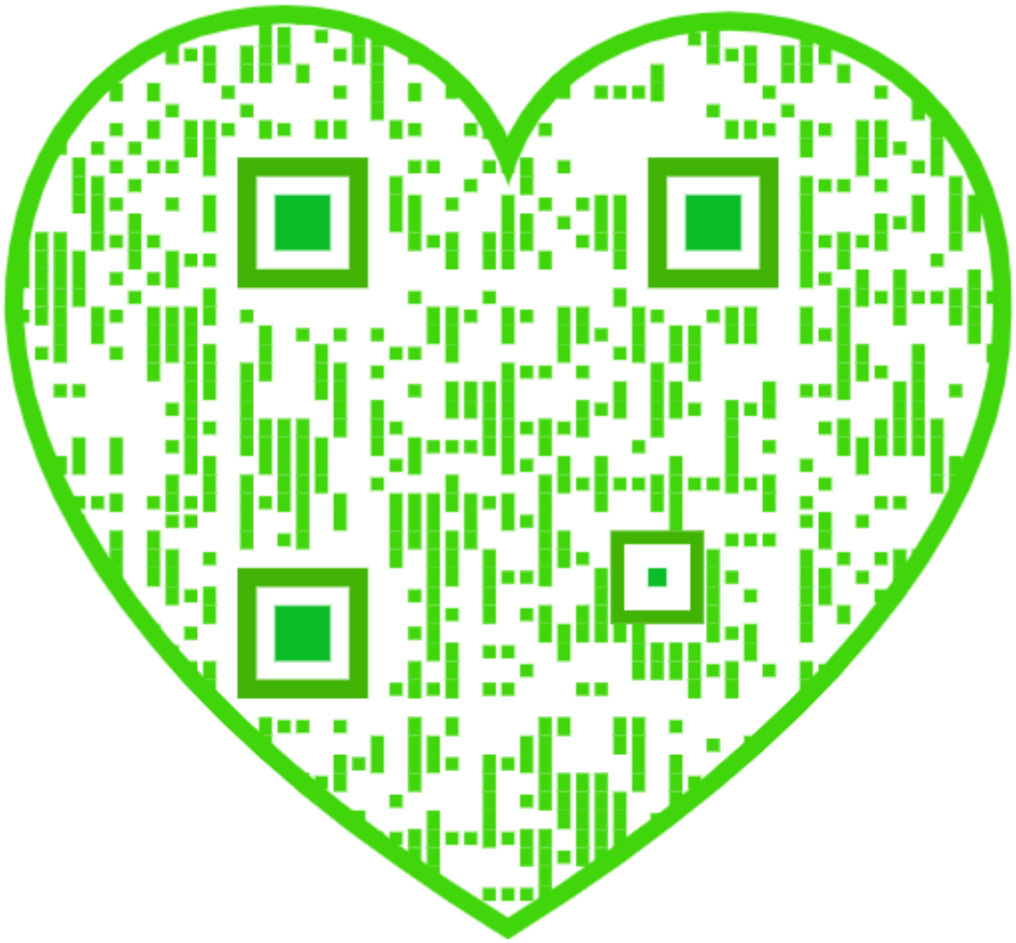

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I. AT COMMON LAW.

The remedy by interpleader was not unknown to the common law, but its application was confined to very narrow limits. The right existed in detinue,[1]

1. The only personal action in which the right of interpleader existed at common law was detinue which arose out of the joint bailment of property by the claimants to await the performance of covenants. When one of the bailors conceived that the covenants had been performed and brought detinue to recover the property, the bailee might then plead the fact of such bailment, that it was claimed by a third person in privity with plaintiff and that he was willing to deliver it to the party who was legally entitled to it. Thereupon a monition or notice called a process of garnishment might issue to compel such third person to appear and defend, or else disclaim his title. Russell *v.* Pottsville First Presb. Church, 65 Pa. St. 9, 14; 3 Reeves Hist. Com. L. c. 23, pp. 448–455; 2 Story Eq. Jur. § 801. The holder of title deeds cannot apply for protection against opposing claims. But trover for title deeds is within the Interpleader Act (1 & 2 Wm. IV, c. 58). Smith *v.* Wheeler, 3 Dowl. P. C. 431, 1 Gale 15, 163.

This practice was early adopted by the courts of Pennsylvania and extended to other forms of action. It is said that the want of a court of chancery rendered this necessary in order to prevent a failure of justice. Hence the practice was introduced of compelling a third person who claimed the property to become a party by rule or scire facias, founded on a suggestion of defendant. Russell *v.* Pottsville First Presb. Church, 65 Pa. St. 9; Tritt *v.* Crotzer, 13 Pa. St. 451; Wallace *v.* Clingen, 9 Pa. St. 49; Coates *v.* Roberts, 4 Rawle (Pa.) 100; Brooke *v.* Smith, 13 Pa. Co. Ct. 557; Alland *v.* Dollar Sav. Bank, 31 Pittsh. Leg. J. (Pa.) 80; Loughlin *v.* McCormick, 2 Wkly. Notes Cas.

and was applied to a few other cases, such as quare impedit, and writs of right of ward.[2]

II. IN EQUITY.

A. Definition and Nature of Bill. A bill of interpleader is defined to be a bill exhibited where two or more persons severally claim the same debt, duty, or thing from the complainant under different titles or in separate interests; and he, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty or deliver the property, is either molested by an action brought against him or fears that he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead, and state their several claims so that the court may adjudge to whom the matter or thing in controversy belongs.[3] A bill of inter-

(Pa.) 352; Vandegrift *v.* Freeman, 1 Wkly. Notes Cas. (Pa.) 109; McMunn *v.* Carothers, 2 Am. L. J. (Pa.) 133. It is defendant, however, who is to be protected, and he must in due time make the suggestion, show that the claimant is in privity with plaintiff, state his willingness to pay the money to the one found entitled to recover it, and pray for the substitution. Russell *v.* Pottsville First Presb. Church, 65 Pa. St. 9.

2. Russell *v.* Pottsville First Presb. Church, 65 Pa. St. 9, 14; 3 Reeves Hist. Com. L. 449; 2 Story Eq. Jur. § 801.

3. *Alabama.*— Johnson *v.* Maxey, 43 Ala. 521. See also Kyle *v.* Mary Lee Coal, etc., Co., 112 Ala. 606, 20 So. 851; Gibson *v.* Goldthwaite, 7 Ala. 281, 288, 42 Am. Dec. 592.

Connecticut.— Union Trust Co. *v.* Stamford Trust Co., 72 Conn. 86, 43 Atl. 555.

Georgia.— Davis *v.* Davis, 96 Ga. 136, 21 S. E. 1002; Burton *v.* Black, 32 Ga. 53; Adams *v.* Dixon, 19 Ga. 513, 65 Am. Dec. 608; Strange *v.* Bell, 11 Ga. 103; Griggs *v.* Thompson, Ga. Dec. 146.

Illinois.— Dickinson *v.* Griggsville Nat. Bank, 209 Ill. 350, 70 N. E. 593; McClintock *v.* Helberg, 168 Ill. 384, 48 N. E. 145; Kile *v.* Goodrum, 87 Ill. App. 462; Keller *v.* Bading, 64 Ill. App. 198. See also Cogswell *v.* Armstrong, 77 Ill. 139; Byers *v.* Sansom-Thayer Commission Co., 111 Ill. App. 575, 578.

Kansas.— Bennett *v.* Wolverton, 24 Kan. 284, 286 [*quoting* Abbott L. Dict.; Bouvier L. Dict.].

Maryland.— New York Nat. Park Bank *v.* Lanahan, 60 Md. 477.

Massachusetts.— Cobb *v.* Rice, 130 Mass. 231; Salisbury Mills *v.* Townsend, 109 Mass. 115.

Michigan.— Bliss *v.* French, 117 Mich. 538, 76 N. W. 73. See also Sprague *v.* Soule, 35 Mich. 35.

Mississippi.— Yarborough *v.* Thompson, 3 Sm. & M. 291, 41 Am. Dec. 626. See also Boyle *v.* Manion, 74 Miss. 572, 21 So. 530 (holding that interpleader will lie by one who is sued on an open account for timber cut from plaintiff's land, where the proceeds of the timber are also claimed by third persons who set up paramount title to the land); Anderson *v.* Wilkinson, 10 Sm. & M. 601.

Missouri.— Supreme Council L. of H. *v.* Palmer, 107 Mo. App. 157, 80 S. W. 699; Monks *v.* Miller, 13 Mo. App. 363.

Nevada.— Orr Water Ditch Co. *v.* Larcombe, 14 Nev. 53.

New Hampshire.—Farley *v.* Blood, 30 N. H. 354.

New Jersey.— Packard *v.* Stevens, 58 N. J. Eq. 489, 46 Atl. 250; Fitch *v.* Brower, 42 N. J. Eq. 300, 11 Atl. 330; Blake *v.* Garwood, 42 N. J. Eq. 276, 10 Atl. 874; Mount Holly, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117. See also Wakeman *v.* Kingsland, 46 N. J. Eq. 113, 18 Atl. 680.

New York.— Crane *v.* McDonald, 118 N. Y. 648, 23 N. E. 991 (holding that it is a conclusive answer to a contention that a bill of interpleader is unnecessary that the courts have rendered conflicting decisions upon the claims of defendants); Tauton *v.* Groh, 4 Abb. Dec. 358, 8 Abb. Pr. N. S. 385, 39 How. Pr. 147; American Press Assoc. *v.* Brantingham, 57 N. Y. App. Div. 399, 68 N. Y. Suppl. 285 (holding that where the owner of corporate stock has the corporation assign it to one person, and another afterward establishes a right thereto in an action against the owner, and both claim the stock from the corporation, and the person to whom the stock was assigned threatens to sue the corporation, the latter may maintain a bill of interpleader against the rival claimants to determine their rights and to restrain the threatened litigation); Bacon *v.* American Surety Co., 53 N. Y. App. Div. 150, 65 N. Y. Suppl. 738; Mercantile Safe Deposit Co. *v.* Huntington, 89 Hun 465, 35 N. Y. Suppl. 390, 2 N. Y. Annot. Cas. 215 (holding that an objection by one of two claimants of property that the depositary has no right to maintain interpleader because such claimant was clearly entitled to the property cannot be sustained where the court, on the hearing of the interpleader, decided that the other claimant was entitled to the property); Cady *v.* Potter, 55 Barb. 463; Drake *v.* Woodford, 11 N. Y. Suppl. 512; Delaware, etc., R. Co. *v.* Corwith, 5 N. Y. Suppl. 792; Saratoga County *v.* Seabury, 11 Abb. N. Cas. 461; Wilson *v.* Duncan, 11 Abb. Pr. 3; Fargo *v.* Arthur, 43 How. Pr. 193 (holding that an action of interpleader is proper where a reward has been publicly offered to any one who will furnish evidence to secure convic-

pleader is not a proceeding *in rem* and it seems that there is no way to compel a non-resident claimant to come in and interplead.[4]

tion of an offender, and several persons claim to have furnished the evidence and to be entitled to the sum offered); Bell *v.* Hunt, 3 Barb. Ch. 391 (holding that a bill of interpleader may be filed whenever it is a matter of doubt to which of defendants the fund in the complainant's hands actually belongs, so that he cannot safely pay it to either); Aymer *v.* Gault, 2 Paige 284; Yates *v.* Tisdale, 3 Edw. 71 (holding that where adverse claims were made against the managers of a lottery for a prize, one of the claimants holding the ticket and claiming the whole prize, and the other claiming a portion thereof, a bill of interpleader by the managers was sustained); Onpenheim *v.* Wolf, 3 Sandf. Ch. 571. See also Atkinson *v.* Manks, 1 Cow. 691; Bedell *v.* Hoffman, 2 Paige 199, 200.

Oregon.— North Pac. Lumber Co. *v.* Lang, 28 Oreg. 246, 42 Pac. 799, 52 Am. St. Rep. 780; Pope *v.* Ames, 20 Oreg. 199, 25 Pac. 393, holding that a merchant to whom goods have been consigned for sale on commission, and who claims no interest in the proceeds after deducting charges and commissions, may maintain a suit to compel the receiver of the consignor's property, and an attaching creditor, each of whom claims such proceeds from him, to litigate the title thereto between themselves.

Pennsylvania.—Philadelphia Sav. Fund Soc. *v.* Clark, 11 Wkly. Notes Cas. 118. See also Bridesburg Mfg. Co.'s Appeal, 106 Pa. St. 275, 276; Bennett *v.* Pennsylvania R. Co., 17 Pa. Co. Ct. 189, 190.

Rhode Island.—Providence Bank *v.* Wilkinson, 4 R. I. 507, 70 Am. Dec. 160; Greene *v.* Mumford, 4 R. I. 313.

South Dakota.— Sioux Falls Sav. Bank *v.* Lien, 14 S. D. 410, 85 N. W. 924.

Tennessee.— Continental Sav. Bank *v.* McClure, 104 Tenn. 607, 58 S. W. 240, holding that a bill alleging that, after issuance of letters to an executrix, complainant transferred a bank deposit belonging to the estate to the executrix, and that the will under which the executrix was appointed was not the testator's last will, which the executrix had suppressed, and which made a different distribution of the estate, which facts were not known to complainant bank when it transferred the fund to her credit, and asking leave to pay the money into court pending determination of title thereto, while not strictly a bill of interpleader, is not subject to demurrer, since the bank is entitled to the protection of the court in the payment of the fund.

Texas.— Bolin *v.* St. Louis, etc., R. Co., (Civ. App. 1901) 61 S. W. 444.

Utah.—Walker *v.* Bamberger, 17 Utah 239, 54 Pac. 108, holding that one holding stock in escrow, where no collusion appears, may require the parties interested to interplead and litigate their conflicting claims.

Vermont.— Wing *v.* Spaulding, 64 Vt. 83, 86, 23 Atl. 615.

Wisconsin.— See McDonald *v.* Allen, 37 Wis. 108, 111, 19 Am. Rep. 754; Bird *v.* Fake, 2 Pinn. 69, 70.

United States.— McWhirter *v.* Halsted, 24 Fed. 828; Louisiana State Lottery Co. *v.* Clark, 16 Fed. 20, 4 Woods 169. See also Pusey, etc., Co. *v.* Miller, 61 Fed. 401, 402.

England.— Laing *v.* Zeden, L. R. 9 Ch. 736, 43 L. J. Ch. 626, 31 L. T. Rep. N. S. 284 (holding that where there are two or more claimants of goods in the hands of a stakeholder, the only way in which he can protect himself is by filing a bill of interpleader. If instead of doing so he litigates with the claimants separately, he must pay the costs of the successful claimant); Tanner *v.* European Bank, L. R. 1 Exch. 261, 12 Jur. N. S. 414, 35 L. J. Exch. 151, 14 L. T. Rep. N. S. 414, 14 W. Rep. 675; Vyvyan *v.* Vyvyan, 4 De G. F. & J. 183, 8 Jur. N. S. 3, 31 L. J. Ch. 158, 5 L. T. Rep. N. S. 511, 10 Wkly. Rep. 179, 65 Eng. Ch. 142, 45 Eng. Reprint 1153 (holding that the owner of lands subject to a charge is entitled to file a bill against a person setting up conflicting claims to the benefit of the charge to have their rights declared and the estate discharged on payment of the money charged); Jones *v.* Turnbull, 5 Dowl. P. C. 591, 6 L. J. Exch. 166, M. & H. 106, 2 M. & W. 601; Crellin *v.* Leyland, 6 Jur. 733; Crawshay *v.* Thornton, 1 Jur. 19, 6 L. J. Ch. 179, 2 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 541 [*affirming* 7 Sim. 391, 8 Eng. Ch. 391, 58 Eng. Reprint 887]; Meynell *v.* Angell, 8 Jur. N. S. 1211, 32 L. J. Q. B. 14, 11 Wkly. Rep. 122; Johnson *v.* Shaw, 12 L. J. C. P. 112, 4 M. & G. 916, 43 E. C. L. 472; Dowson *v.* Macfarlane, 81 L. T. Rep. N. S. 67; Costello *v.* Martin, 15 Wkly. Rep. 548.

Canada.— Davidson *v.* Douglas, 12 Grant Ch. (U. C.) 181.

See 29 Cent. Dig. tit. "Interpleader," § 6. See also Adams Eq. 202; Story Eq. Pl. § 291.

"The definition of interpleader is not, and cannot, be now, disputed. It is where the plaintiff says, I have a fund in my possession in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs and I will bring the fund into court, and you shall contest it between yourselves." Hoggart *v.* Cutts, Cr. & Ph. 197, 204, 10 L. J. Ch. 314, 18 Eng. Ch. 197 [*quoted* in Byers *v.* Sansom-Thayer Commission Co., 111 Ill. App. 575, 578; Wing *v.* Spaulding, 64 Vt. 83, 86, 23 Atl. 615].

Interpleader by agent of corporation as against the corporation and a third party claimant see CORPORATIONS, 10 Cyc. 1344.

4. Walsh *v.* Rhall, 6 Kulp (Pa.) 483; Lindsey *v.* Barron, 6 C. B. 291, 60 E. C. L. 289; Patorni *v.* Campbell, 1 D. & L. 397, 7 Jur. 1139, 13 L. J. Exch. 85, 12 M. & W. 277; Colonial Bank *v.* Warden, 10 Jur. 745, 5 Moore P. C. 340, 13 Eng. Reprint 521; Harris *v.* Bank of British North America, 19 Ont. Pr. 51; *Re* Benfield, 17 Ont. Pr. 339.

B. Conditions Precedent to Filing Bill — 1. No Other Adequate Remedy. It should be made to appear that the complainant has no adequate remedy at law, for a bill of interpleader will not be entertained where he has a clear and unembarrassed legal remedy.[5] If a party sued can show a valid assignment of the fund he may set it up as a complete defense and need not file a bill of interpleader.[6] It is not necessary to file a bill of interpleader where the holder of the fund is already a party to a suit in chancery, brought by one of the claimants against the other to settle the right to the funds in his hands.[7] Where the fund is sufficient to meet the demands of all claimants there is no occasion for an interpleader.[8]

2. Conflicting Claimants. It is essential to the right to file the bill that there be two or more claimants to the fund or thing in dispute capable of interpleading and settling the matter between themselves.[9]

3. Complainant Without Interest and Neutral. A complainant cannot have an order that defendants interplead when one important question to be tried is

Effect of appearance by a non-resident in interpleader proceeding see Appearances, 3 Cyc. 507.

A bill of interpleader by a benefit society to determine conflicting claims to the proceeds of a certificate, the money being paid into court, is not a proceeding *in rem*; and a judgment by default against a claimant who is served outside the state, and who does not appear in the suit, is a nullity. Gary *v.* Northwestern Masonic Aid Assoc., (Iowa 1891) 50 N. W. 27.

Suit by an insurance company to compel two persons, who had brought separate actions against it on the same policy, to interplead, is not a proceeding *in rem*, so that personal notice may be dispensed with. Washington L. Ins. Co. *v.* Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123. An insurance company which has been garnished in another state by a creditor of the beneficiary, and sued in this state by the beneficiary, cannot at once, and before either case has proceeded to judgment, maintain a bill to require the two to interplead. Hartford L. Ins. Co. *v.* Weed, 75 Vt. 429, 56 Atl. 97.

5. *Illinois.*— Curtis *v.* Williams, 35 Ill. App. 518.

Iowa.— Hoyt *v.* Gouge, 125 Iowa 603, 101 N. W. 464.

Kansas.— Board of Education *v.* Scoville, 13 Kan. 17.

Maryland.— Fetterhoff *v.* Sheridan, 94 Md. 445, 51 Atl. 123.

Massachusetts.— Cobb *v.* Rice, 130 Mass. 231.

Missouri.— Hathaway *v.* Foy, 40 Mo. 540.

New York.— La Femina *v.* Arsene, 69 N. Y. App. Div. 285, 74 N. Y. Suppl. 749; Harvey *v.* Raynor, 32 Misc. 639, 66 N. Y. Suppl. 490; Schuyler *v.* Pelissier, 3 Edw. 191. Where, in a suit against an insurance company under an attachment levied on an adjusted claim due the attachment defendant, the company set up that a third person had sued for the fund, claiming under an alleged assignment, the fact that the company has a valid defense to the latter action by reason of the one-year limitation clause in its policy is not ground for denying the interpleader, since the company has a right to waive the defense. Grell *v.* Globe, etc., F. Ins. Co., 55 N. Y. App. Div. 612, 67 N. Y. Suppl. 253.

Rhode Island.— Fitts *v.* Shaw, 22 R. I. 17, 46 Atl. 42.

South Carolina.—Brock *v.* Southern R. Co., 44 S. C. 444, 22 S. E. 601.

Tennessee.—Carroll *v.* Parkes, 1 Baxt. 269.

Vermont.— Holmes *v.* Clark, 46 Vt. 22.

West Virginia.— Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 525.

Wisconsin.— McDonald *v.* Allen, 37 Wis. 108, 19 Am. Rep. 754.

United States.—Killian *v.* Ebbinghaus, 110 U. S. 568, 4 S. Ct. 232, 28 L. ed. 246.

See 29 Cent. Dig. tit. "Interpleader," § 3.

Interpleader at law.— In Pennsylvania it is held that a bill in equity to compel parties to litigate their rights will lie, notwithstanding the statute providing a remedy by inerpleader at law in cases for the recovery of money, where defendant disclaims all interest in the subject-matter. Wilbraham *v.* Horrocks, 8 Wkly. Notes Cas. 285; Penn Mut. Ins. Co. *v.* Watson, 2 Wkly. Notes Cas. 485, 3 Wkly. Notes Cas. 513.

6. Miller *v.* Withers, 188 Pa. St. 128, 41 Atl. 300.

7. Lane *v.* New York L. Ins. Co., 56 Hun (N. Y.) 92, 9 N. Y. Suppl. 52; Badeau *v.* Rogers, 2 Paige (N. Y.) 209.

In such case the holder of the fund should apply by petition in that suit for leave to pay the fund into court to abide the event of the litigation between the other parties. Badeau *v.* Rogers, 2 Paige (N. Y.) 209.

8. Lopez *v.* Kellogg, 65 N. Y. App. Div. 214, 72 N. Y. Suppl. 562.

9. *Georgia.*— Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 99 Ga. 286, 25 S. E. 686.

Illinois.— Partlow *v.* Moore, 184 Ill. 119, 56 N. E. 317.

Kentucky.— Staring *v.* Brown, 7 Bush 164.

Mississippi.— Snodgrass *v.* Butler, 54 Miss. 45.

New Jersey.— Briant *v.* Reed, 14 N. J. Eq. 271.

England.— Metcalf *v.* Hervey, 1 Ves. 248, 27 Eng. Reprint 1011.

See 29 Cent. Dig. tit. "Interpleader," § 1 *et seq.*

whether by reason of his own act he has rendered himself liable to each of them.[10] It is an undeviating rule that, where the complainant raises any question as to the amount of the claim which is the subject of litigation, this alone will be fatal to the right to maintain a bill of interpleader.[11] The position of the complainant should be one of continuous impartiality between the claimants, and it is essential that he claim no personal interest in or title to the subject-matter of the litigation;[12]

10. National L. Ins. Co. *v.* Pingrey, 141 Mass. 411, 6 N. E. 93; McGaw *v.* Adams, 14 How. Pr. (N. Y.) 461; Baker *v.* Australia Bank, 1 C. B. N. S. 515, 3 Jur. N. S. 187, 26 L. J. C. P. 93, 5 Wkly. Rep. 253, 87 E. C. L. 515; Desborough *v.* Harris, 5 De G. M. & G. 439, 3 Eq. Rep. 1058, 1 Jur. N. S. 986, 4 Wkly. Rep. 2, 54 Eng. Ch. 348, 43 Eng. Reprint 940; Cochrane *v.* O'Brien, 8 Ir. Eq. 241, 2 J. & L. 380; Farr *v.* Ward, 6 L. J. Exch. 213, 2 M. & W. 844, M. & H. 244.

Acknowledgment of the receipt of an assignment of a policy by the company does not constitute an acknowledgment of liability thereon to the assignee which prevents the company from filing a bill of interpleader, where the amount due on the policy is also claimed by another, who denies the validity of the assignment. Morrill *v.* Manhattan L. Ins. Co., 82 Ill. App. 410.

Stakeholder.— *Semble,* on the doctrine of interpleader that where the double claim has been occasioned by the act of the stakeholder, he has no right to file a bill of interpleader. Desborough *v.* Harris, 5 De G. M. & G. 439, 3 Eq. Rep. 1058, 1 Jur. N. S. 986, 4 Wkly. Rep. 2, 54 Eng. Ch. 348, 43 Eng. Reprint 940.

11. *California.*— Pfister *v.* Wade, 56 Cal. 43.

Missouri.— Glasner *v.* Weisberg, 43 Mo. App. 214.

New Jersey.— Williams *v.* Matthews, 47 N. J. Eq. 196, 20 Atl. 261.

New York.— Jackson *v.* Knickerbocker Athletic Club, 49 N. Y. App. Div. 107, 62 N. Y. Suppl. 1109; McHenry *v.* Hazard, 45 Barb. 657; Dodge *v.* Lawson, 19 N. Y. Suppl. 904, 22 N. Y. Civ. Proc. 112; Patterson *v.* Perry, 14 How. Pr. 505; Finlay *v.* American Exch. Bank, 11 How. Pr. 468; Chamberlain *v.* O'Connor, 8 How. Pr. 45.

Pennsylvania.— Bridesburg Mfg. Co.'s Appeal, 106 Pa. St. 275.

Tennessee.— Hely *v.* Lee, 108 Tenn. 715, 69 S. W. 273.

Vermont.— French *v.* Robrchard, 50 Vt. 43; Holmes *v.* Clark, 46 Vt. 22.

England.— Bignold *v.* Audland, 5 Jur. 51, 9 L. J. Ch. 266, 11 Sim. 23, 34 Eng. Ch. 23, 59 Eng. Reprint 781; Diplock *v.* Hammond, 23 L. J. Ch. 550, 2 Wkly. Rep. 500. 27 Eng. L. & Eq. 202; Mitchell *v.* Hague, 2 Sim. & St. 63, 25 Rev. Rep. 151, 1 Eng. Ch. 63, 57 Eng. Reprint 268.

See 29 Cent. Dig. tit. "Interpleader," § 1 *et seq.*

In other words complainant cannot bring defendants into a court of equity to settle a dispute with him under the pretense of compelling them to settle one between themselves. See cases cited *supra,* this note.

The amount due from a plaintiff cannot be the subject of controversy in an action of interpleader, which can only be maintained when plaintiff admits liability for the full amount claimed to one or the other of the claimants. Baltimore, etc., R. Co. *v.* Arthur, 90 N. Y. 234.

An interpleader as to the excess could not be awarded where one of defendants in his answer to a bill of interpleader made a claim against complainant beyond the amount admitted to be due, and which was not claimed by the other defendant. City Bank *v.* Bangs, 2 Paige (N. Y.) 570.

An order substituting a party as defendant in place of another should not be granted as to a sum which is only a portion of the amount of the alleged fund which plaintiffs seek to recover, since a defendant cannot have a person substituted in his place as to a part of plaintiffs' demand and interpose a defense as to the residue. Bender *v.* Sherwood, 15 How. Pr. (N. Y.) 258.

Stakeholder, seeking to retain part of stake, cannot file interpleader. If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader if he insists upon retaining either his commission or the duty. Mitchell *v.* Hayne, 2 Sim. & St. 63, 25 Rev. Rep. 151, 1 Eng. Ch. 63, 57 Eng. Reprint 268.

Where the depositary of a fund has a personal interest in contesting a question relating to part of the fund with one of the claimants of it, he cannot properly file a bill of interpleader respecting it. Moore *v.* Usher, 4 L. J. Ch. 205, 7 Sim. 383, 8 Eng. Ch. 383, 58 Eng. Reprint 884.

Effect of amendment.— When, after the filing of a complaint in interpleader, one of defendants alleges that a greater sum is due than plaintiff admits, whereupon plaintiff amends his complaint to make the allegation as to the amount agree with defendants' answer, there is no controversy as to the amount due, and plaintiff is entitled to relief. Orient Ins. Co. *v.* Reed, 81 Cal. 145, 22 Pac. 484.

12. *Illinois.*— Long *v.* Barker, 85 Ill. 431.

Kentucky.— Shehan *v.* Barnett, 6 T. B. Mon. 592.

Maryland.— Kerr *v.* Union Bank, 18 Md. 396.

Massachusetts.— Sprague *v.* West, 127 Mass. 471.

Mississippi.— Blue *v.* Watson, 59 Miss. 619.

Missouri.— Supreme Council L. of H. *v.* Palmer, 107 Mo. App. 157, 80 S. W. 699.

New Jersey.— Williams *v.* Matthews, 47 N. J. Eq. 196, 20 Atl. 261. See also Ludlow *v.* Strong, 53 N. J. Eq. 326, 31 Atl. 409.

New York.— Brackett *v.* Graves, 30 N. Y.

he should stand indifferent between defendants[13] and as respects the subject of the interpleader he must not have incurred a personal liability to either of defendants independent of the question between defendants themselves.[14] And a simple bill of interpleader cannot be sustained by a person who has lent his aid to further the interest of either of the claimants.[15] Where the party seeking to file a bill of interpleader has so committed himself to one of the claimants of the subject-matter that he does not stand in a position of absolute impartiality between them, he is not entitled to relief by way of interpleader.[16] And it is fatal to the complain-

App. Div. 162, 51 N. Y. Suppl. 895; Lawson *v.* Terminal Warehouse Co., 70 Hun 281, 24 N. Y. Suppl. 281.

Vermont.— French *v.* Robrchard, 50 Vt. 43.

Wisconsin.— Bird *v.* Fake, 2 Pinn. 69.

See 29 Cent. Dig. tit. "Interpleader," § 1 *et seq.*

Only when the complainant is, in good faith and without collusion, in a situation where it is impossible for him to decide with safety between adverse claimants, can the bill be filed. Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086.

Where an applicant has made an agreement with one of two contending parties to assist him in his endeavor to defeat the claim of the other, he so far identifies himself with the first party as to be guilty of "collusion." Murietta *v.* South American Co., 62 L. J. Q. B. 396, 5 Reports 380.

13. See cases cited *infra*, note 14.

He is under no duty to decide as to the contentions of rival claimants from whom he is entitled to be protected and may in good faith bring them and the fund into court and compel them to interplead. Pennsylvania R. Co. *v.* Stevenson, 63 N. J. Eq. 634, 54 Atl. 696. The complainant in a bill of interpleader is not called on to decide disputed questions of fact, nor to resolve doubtful points of law, under penalty of a dismissal of his bill. Having stated his danger, his indifference as between the several claimants, and his willingness to pay, he has done all that he is required to do. Byers *v.* Sansom-Thayer Commission Co., 111 Ill. App. 575.

Where two persons claim a municipal office, a bill of interpleader by the city will lie to determine their rights to the salary, since the city is not bound, at its peril, to determine which of the two has the legal title to the office. New York *v.* Flagg, 6 Abb. Pr. (N. Y.) 296.

14. *California.*— Pfister *v.* Wade, 56 Cal. 43.

District of Columbia.— Richardson *v.* Belt, 13 App. Cas. 197.

Illinois.— Whitbeck *v.* Whiting, 59 Ill. App. 520.

Michigan.— Sprague *v.* Soule, 35 Mich. 35.

Minnesota.— Cullen *v.* Dawson, 24 Minn. 66.

Missouri.— Supreme Council L. of H. *v.* Palmer, 107 Mo. App. 157, 80 S. W. 699.

New Jersey.— Ludlow *v.* Strong, 53 N. J. Eq. 326, 31 Atl. 409; Pickle *v.* Pickle, 10 N. J. L. J. 207.

New York.— New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592 [*reversing* 1 Abb. Pr. 417]; Sherman *v.* Partridge, 4 Duer 646; Wakeman *v.* Dickey, 19 Abb. Pr. 24; Atkinson *v.* Manks, 1 Cow. 691; Marvin *v.* Ellwood, 11 Paige 365; Shaw *v.* Coster, 8 Paige 339, 35 Am. Dec. 690. Where one who holds property to which conflicting claims are made voluntarily assumes the position of bailee as to one of the claimants, to the detriment of the other, he cannot maintain the action of interpleader. Cromwell *v.* American L. & T. Co., 57 Hun 149, 11 N. Y. Suppl. 144.

Vermont.— Lincoln *v.* Rutland, etc., R. Co., 24 Vt. 639.

West Virginia.— Stephenson *v.* Burdett, 56 W. Va. 109, 48 S. E. 846.

United States.—Wells *v.* Miner, 25 Fed. 533.

England.— Lindsey *v.* Barron, 6 C. B. 291, 60 E. C. L. 289; Horton *v.* Devon, 7 D. & L. 206, 4 Exch. 497, 19 L. J. Exch. 52; Patorni *v.* Campbell, 1 D. & L. 397, 7 Jur. 1139, 13 L. J. Exch. 85, 12 M. & W. 277; Poland *v.* Coall. Ir. R. 7 C. L. 108; Crawshay *v.* Thornton, 1 Jur. 19, 6 L. J. Ch. 179, 2 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 541; Wright *v.* Freeman, 48 L. J. C. P. 276, 40 L. T. Rep. N. S. 134.

See 29 Cent. Dig. tit. "Interpleader," § 1 *et seq.*

A party who by his own act is placed in a situation to be sued cannot call on the court to substitute another defendant. Belcher *v.* Smith, 9 Bing. 82, 1 L. J. C. P. 167, 2 Moore & S. 184, 23 E. C. L. 495. A bill of interpleader will not lie where complainant is charged with a liability founded on its own alleged promise, merely because there is a third person who will be the loser if the liability is established. Montpelier *v.* Capital Sav. Bank, 75 Vt. 433, 56 Atl. 89.

Where complainant, with respect to a fund in dispute, has entered into an independent contract with one defendant, in which the other defendant has neither part nor interest, an interpleader will not be decreed. Pratt *v.* Worrell, 66 N. J. Eq. 194, 57 Atl. 450.

Collusion between a party to whose right plaintiff in an interpleader bill has succeeded and another party claiming the fund from a bank under an order of another court is not sufficient ground for refusing an order of interpleader, so long as the party applying for the same does not appear to be a party to such collusion. Wehle *v.* Bowery Sav. Bank, 40 N. Y. Super. Ct. 97.

15. Marvin *v.* Ellwood, 11 Paige (N. Y.) 365.

16. Crawshay *v.* Thornton, 2 Myl. & C. 1, 1 Jur. 19, 6 L. J. Ch. 179, 14 Eng. Ch. 1, 40

ant's right to file the bill if he himself has brought into existence the rival claim.[17] But the fact that the holder of the fund has denied the right of one of the claimants in an action brought against him by the latter does not preclude him from filing a bill of interpleader.[18] It is no objection to a bill of interpleader that the complainant's chance of success in litigation respecting other property not in suit might be increased by the success of one of the parties rather than the other.[19] The object of a bill of interpleader is to protect a complainant standing in the situation of an innocent stakeholder, and when a recovery against him by one claimant of the fund might not protect him against a recovery by another claimant.[20]

4. COMPLAINANT IGNORANT OF RIGHTS OF CLAIMANTS. The complainant must show that he is ignorant of the rights of the parties upon whom he calls to interplead, or at least that there is a doubt as to which claimant the debt or duty belongs, so that he cannot safely pay or render it to one without risk of being made liable for the same debt or duty to the other.[21]

5. IDENTITY OF THING CLAIMED. It is a general rule that the fund, thing, or duty to which the parties make adverse claims must be one and the same and derived from the same source.[22] Where the demand of one claimant, if valid at all, is

Eng. Reprint 541 [*distinguished* in Attenborough *v.* London, etc., Dock Co., 3 C. P. D. 450, 47 L. J. C. P. 763, 38 L. T. Rep. N. S. 404, 26 Wkly. Rep. 58 (*reversing* 3 C. P. D. 373)].

17. Swain *v.* Bartlett, 82 Mo. App. 642.

18. It is only where plaintiff denies the right of one of the claimants in the interpleader itself that he can have no relief. Orient Ins. Co. *v.* Reed, 81 Cal. 145, 22 Pac. 484; Jacobson *v.* Blackhurst, 2 Johns. & H. 486.

19. Oppenheim *v.* Wolf, 3 Sandf. Ch. (N. Y.) 571.

20. Badeau *v.* Rogers, 2 Paige (N. Y.) 209; Heckmer *v.* Gilligan, 28 W. Va. 750.

21. *Alabama.*— Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

Georgia.— Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 99 Ga. 286, 25 S. E. 686.

Missouri.— Supreme Council L. of H. *v.* Palmer, 107 Mo. App. 157, 80 S. W. 699 (holding that a bill of interpleader will not lie unless there is doubt about the rights of the claimants, and a sufficiently vigorous assertion of right by each to put the indifferent stakeholder in danger of paying the fund to the wrong party if he decided the matter himself, and in danger of being sued if he takes no step); Sovereign Camp W. of W. *v.* Wood, 100 Mo. App. 655, 75 S. W. 377.

New Hampshire.— Parker *v.* Barker, 42 N. H. 78, 77 Am. Dec. 789.

New York.— Bassett *v.* Leslie, 123 N. Y. 396, 25 N. E. 386; Morgan *v.* Fillmore, Sheld. 62 (holding that where it appears that plaintiff is fully advised of the rights of the contending claimants and of the nature and extent of his liability to each, an action of interpleader will not lie); Sulzbacher *v.* National Shoe, etc., Bank, 52 N. Y. Super. Ct. 269 (holding that where one sued is in no danger of being required to pay twice, and with ordinary diligence can inform himself as to which of two claimants he should make payment, he will not be granted an order of interpleader); Wilson *v.* Duncan, 11 Abb. Pr. 3.

See 29 Cent. Dig. tit. "Interpleader," § 1 *et seq.*

22. In other words to justify the filing of a bill of interpleader the adverse claims upon the complainant must be identical so that an adjudication will settle the rights of all parties.

Alabama.— Wilkinson *v.* Searcy, 74 Ala. 243; Hayes *v.* Johnson, 4 Ala. 267.

Arkansas.— Southwestern Tel., etc., Co. *v.* Benson, 63 Ark. 283, 38 S. W. 341.

California.— Pfister *v.* Wade, 56 Cal. 43.

Connecticut.— Nash *v.* Smith, 6 Conn. 421, holding that it is no impediment to a bill of interpleader that the suits by which plaintiff is embarrassed are in form for breaches of his duty as an officer, by giving an undue preference among attaching creditors, providing such suits are founded on a controverted title to property, the subject of the bill in which defendants alone are interested, and it does not appear that plaintiff has given a voluntary preference to any of them.

Illinois.— Brocklehank *v.* Lasher, 109 Ill. App. 627; Byers *v.* Sansom-Thayer Commission Co., 111 Ill. App. 575, holding that the test as to whether a party is entitled to file a bill of interpleader is, Do defendants claim the same thing, and will the litigation between defendants determine the rights of each and all of defendants as against the complainant, as between themselves and as to the thing which is in dispute?

Indiana.— Northwestern Mut. L. Ins. Co. *v.* Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89.

Iowa.— Hoyt *v.* Gouge, 125 Iowa 603, 101 N. W. 464, holding that an action of interpleader will not lie where defendants are making claims against plaintiff under distinct and independent contracts, not necessarily in conflict, payment of one of which would not extinguish the other.

Michigan.— Wallace *v.* Sortor, 52 Mich. 159, 17 N. W. 794.

Missouri.— Supreme Council L. of H. *v.* Palmer, 107 Mo. App. 157, 80 S. W. 699.

New Jersey.— Ireland *v.* Kelly, 60 N. J.

against the other claimant personally, and not upon the fund in dispute, an interpleader is not proper.[23]

6. Complainant Not a Wrong-Doer. Where it appears that as to any of defendants the complainant is a wrong-doer, his bill of interpleader cannot be sustained.[24]

7. Complainant in Possession of Fund. A bill of interpleader cannot be maintained by a person not in possession of the property or fund in dispute;[25] consequently it is too late to file the bill after the fund has been paid over to one of the claimants.[26]

Eq. 308, 47 Atl. 51 (holding that where a person claims a fund because of an admitted contract with the holder of the fund, and another person claims a portion of such fund because of an agreement with the admitted contractor, the holder of the fund may file a bill for interpleader, and it is not necessary, to entitle the holder to file such bill, that the claimants each assert a right arising out of some alleged contract with such holder); Leddel *v.* Starr, 20 N. J. Eq. 274.

New York.— Bassett *v.* Leslie, 123 N. Y. 396, 25 N. E. 386 [*affirming* 57 Hun 588]; Dubois *v.* Union Dime Sav. Inst., 89 Hun 382, 35 N. Y. Suppl. 397; Saratoga County *v.* Deyoe, 15 Hun 526; Fulton Bank *v.* Chase, 2 Silv. Sup. 522, 6 N. Y. Suppl. 126; Freda *v.* Montauk Co., 26 Misc. 199, 55 N. Y. Suppl. 748 (holding that a defendant, sued for the use of plaintiff's teams, is not entitled to an order of interpleader, where claimant's debt against plaintiff was for the keep of the teams, since plaintiff and claimant do not claim the same money); Heyman *v.* Smadbeck, 6 Misc. 527, 27 N. Y. Suppl. 141.

Ohio.— Johnston *v.* Oliver, 51 Ohio St. 6, 36 N. E. 458.

Oregon.— North Pac. Lumber Co. *v.* Lang, 28 Oreg. 246, 42 Pac. 799, 52 Am. St. Rep. 780, holding that a bill of interpleader will not lie against defendants, some of whose claims are for unliquidated damages sounding in tort, and others against funds in complainant's possession.

Vermont.— Lincoln *v.* Rutland, etc., R. Co., 24 Vt. 639.

United States.— Wells *v.* Miner, 25 Fed. 533; Woodruff *v.* U. S., 5 Ct. Cl. 645.

England.— Greatorex *v.* Shackle, [1895] 2 Q. B. 249, 64 L. J. Q. B. 634, 72 L. T. Rep. N. S. 897, 15 Reports 501, 44 Wkly. Rep. 47 (holding that two claims by different estate agents against the same person for different sums in respect of commission, on the sale of the same house to a purchaser, are not such opposing or conflicting claims to the same debt as entitle defendant to an interpleader); Slaney *v.* Sidney, 3 D. & L. 250, 9 Jur. 995, 15 L. J. Exch. 72, 14 M. & W. 800; Farr *v.* Ward, 6 L. J. Exch. 213, M. & H. 244, 2 M. & W. 844.

See 29 Cent. Dig. tit. "Interpleader," § 6.

Claims not identical.— A court of law was not bound by the principles which governed courts of equity upon a bill of interpleader, and might give relief, although one of the parties had incurred to another a personal obligation independently of the questions of property, and the claims were not identical. Best *v.* Hayes, 1 H. & C. 718, 32 L. J. Exch. 129, 11 Wkly. Rep. 71.

23. Chamberlain *v.* Almy, 3 Misc. (N. Y.) 555, 23 N. Y. Suppl. 316; Delaware, etc., R. Co. *v.* Corwith, 5 N. Y. Suppl. 792, 16 N. Y. Civ. Proc. 312.

A broker, with whom money has been deposited as margins for sales of grain, and who thereupon makes contracts in his own name, for the sale of grain to third persons, which contracts he is unable to fulfil because his principal enjoins him from paying over said money, cannot maintain a bill of interpleader to determine whether his principal or said third persons are entitled to said money, since the latter's claim is against him personally, and not against the fund in his hands. Ryan *v.* Lamson, 153 Ill. 520, 39 N. E. 979 [*affirming* 44 Ill. App. 204].

24. *Alabama.*— Conley *v.* Alabama Gold L. Ins. Co., 67 Ala. 472.

Georgia.— Hatfield *v.* McWhorter, 40 Ga. 269.

Indiana.— Crane *v.* Burnstrager, 1 Ind. 165.

New Jersey.— Morristown First Nat. Bank *v.* Bininger, 26 N. J. Eq. 345; Mt. Holly, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117.

New York.— Fulton Bank *v.* Chase, 2 Silv. Sup. 522, 6 N. Y. Suppl. 126; American Tel., etc., Co. *v.* Day, 52 N. Y. Super. Ct. 128; Dodge *v.* Lawson, 19 N. Y. Suppl. 904, 22 N. Y. Civ. Proc. 112; Shaw *v.* Coster, 8 Paige 339, 35 Am. Dec. 690.

North Carolina.— Quinn *v.* Green, 36 N. C. 229, 36 Am. Dec. 46.

West Virginia.— Stephenson *v.* Burdett, 56 W. Va. 109, 48 S. E. 846, holding that a bill in the nature of a bill of interpleader cannot be maintained, if it discloses that plaintiff, in the event of the establishment of the claim of one defendant, would stand as to him in the attitude of a trespasser.

England.— Slingsby *v.* Boulton, 1 Ves. & B. 334, 35 Eng. Reprint 130.

25. *Missouri.*— Arn *v.* Arn, 81 Mo. App. 133.

New Jersey.— Mt. Holly, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117.

New York.— Pelham Hod Elevating Co. *v.* Baggaley, 12 N. Y. Suppl. 218; Marvin *v.* Ellwood, 11 Paige 365.

North Carolina.— Martin *v.* Maberry, 16 N. C. 169.

United States.— Killian *v.* Ebbinghaus, 110 U. S. 568, 4 S. Ct. 232, 28 L. ed. 246.

26. Henderson *v.* Watson, 23 Grant Ch. (U. C.) 355.

8. Complainant Without Laches.[27] A stakeholder should use reasonable diligence to bring the contending claimants into court.[28] It is no objection, however, to a bill of interpleader that other suits in equity or actions at law are pending against the complainant where none of the pending suits or actions could determine the rights of all parties.[29] But if he suffers one of the claimants to take judgment against him his liability has been adjudicated and he cannot compel the judgment creditor and other claimants of the fund to interplead.[30] And after judgments are obtained by two claimants of a fund against the debtor, it is too late for him to file a bill of interpleader. He is liable on both judgments.[31]

Plaintiff having parted with the property cannot sustain an interpleading bill against different claimants, upon an undertaking to pay over the value to the party entitled. Burnett *v.* Anderson, 1 Meriv. 405, 35 Eng. Reprint 723.

Where plaintiff bank by mistake paid funds on deposit to the wrong person under a forged power of attorney, it was not entitled to a bill of interpleader to compel the depositor to litigate his rights against the person into whose hands the money thus erroneously paid had ultimately come, since, to justify an interpleader, the complainant must have the funds in his hands to which claims are made by two or more parties. Philadelphia Sav. Fund Soc. *v.* Clark, 11 Wkly. Notes Cas. (Pa.) 118.

Compulsory payment.— Where the holder of the fund has paid it over to one of the claimants under a claim of right to which he was bound to submit, he may nevertheless maintain a bill of interpleader to protect himself from the demands of the other claimant. Nash *v.* Smith, 6 Conn. 421.

27. Laches generally see Laches, 16 Cyc. 150 *et seq.*

28. Gardner *v.* Quick, 8 Kan. App. 559, 54 Pac. 1034 (where property had been seized on execution, interplea, alleging ownership and claiming the return thereof, comes too late after two years); Dodds *v.* Gregory, 61 Miss. 351; U. S. Land, etc., Co. *v.* Bussey, 4 Silv. Sup. (N. Y.) 512, 7 N. Y. Suppl. 495 (where an action of replevin was brought in January, 1889, and defendant appeared and made a motion in the case February 4, and knew at the time that a non-resident was the real party in interest, a motion by defendant to interplead, and substitute the non-resident as defendant, made in June, was too late); De Zouche *v.* Garrison, 140 Pa. St. 430, 21 Atl. 450; Davis *v.* Myers, 8 Kulp (Pa.) 295; Good *v.* Briggs, 5 Kulp (Pa.) 199.

29. Grand Haven School Dist. No. 1 *v.* Weston, 31 Mich. 85; Kuhl *v.* Traphagen, 9 N. J. L. J. 343; Hamilton *v.* Marks, 5 De G. & Sm. 638, 64 Eng. Reprint 1278.

The institution of a suit in equity, by one of two claimants of a fund, without making the other claimant a party, for the purpose of enforcing payment from a stakeholder, is no bar to the subsequent institution by the stakeholder of an interpleader suit, or to the obtaining by him in the interpleader suit of an injunction extending as well to the prior proceedings in equity as to proceedings at law. Prudential Assur. Co. *v.* Thomas, L. R. 3 Ch. 74, 37 L. J. Ch. 202, 16 Wkly. Rep. 470.

30. *District of Columbia.*— Tralles *v.* Metropolitan Club, 18 App. Cas. 588.

Georgia.—Moore *v.* Hill, 59 Ga. 760. But see Griggs *v.* Thompson, Ga. Dec. 146, holding that it is no objection to a bill of interpleader that one of the claims against plaintiff has been carried into judgment.

Maryland.— Home L. Ins. Co. *v.* Caulk, 86 Md. 385, 38 Atl. 901; Union Bank *v.* Kerr, 2 Md. Ch. 460.

Massachusetts.— Provident Sav. Inst. *v.* White, 115 Mass. 112.

Mississippi.— Dodds *v.* Gregory, 61 Miss. 351.

Missouri. — Cheever *v.* Hodgson, 9 Mo. App. 565.

New Jersey.— Lozier *v.* Saun, 3 N. J. Eq. 325.

New York. — Baker *v.* Brown, 19 N. Y. Suppl. 258; McCrea *v.* Cook, 1 N. Y. City Ct. 385, where a third person, under examination in supplementary proceedings as indebted to the judgment debtor, has notice that the judgment debtor has assigned his claim to another, such third person must set up the assignment in opposition to an application for an order requiring him to pay over to the judgment creditor, since, on failure so to do, he cannot interplead the creditor in a suit by the assignee of the claim.

Pennsylvania. — De Zouche *v.* Garrison, 140 Pa. St. 430, 21 Atl. 450; Evans *v.* Matlack, 8 Phila. 271. See also Kistler *v.* Thompson, 3 Lack. Jur. 341, holding that the objection that a bill of interpleader filed by a garnishee after a judgment against him comes too late is untenable, where it appears that such judgment is a nullity.

Vermont.—French *v.* Robrchard, 50 Vt. 43.

Wisconsin.— Danaher *v.* Prentiss, 22 Wis. 311.

England.— **A bill of interpleader ought to be filed immediately after or before the commencement of proceedings at law, and ought not to be delayed till after a judgment or** verdict has been obtained. Larabie *v.* Brown, 1 De G. & J. 204, 26 L. J. Ch. 605, 5 Wkly. Rep. 538, 58 Eng. Ch. 159, 44 Eng. Reprint 702; Cornish *v.* Tanner, 1 Y. & J. 333.

See 29 Cent. Dig. tit. "Interpleader," § 39.

31. Yarborough *v.* Thompson, 3 Sm. & M. (Miss.) 291, 41 Am. Dec. 626; Haseltine *v.*

9. Privity of Title or Rights — a. In General. The doctrine of interpleader is essentially founded on the privity of rights or contracts between the parties. One of the essential elements of this equitable remedy is that all the adverse titles or claims to the thing or debt in dispute must be dependent on or derived from a common source. The remedy is not available where one of the claimants asserts a title paramount and adverse to the claims of the other parties.[32]

b. Application of Rule — (i) *To Bank Deposits.* Where several persons make adverse claims to money held on deposit by a bank, the latter may maintain a bill of interpleader against them.[33]

(ii) *To Death Benefits.* Where an insurance company is liable to one of two or more claimants to a death benefit, the company may file a bill of interpleader to compel the claimants to set up their respective claims.[34] But if it is

Brickey, 16 Gratt. (Va.) 116; Hechmer *v.* Gilligan, 28 W. Va. 750.

The maker of a note cannot maintain a bill of interpleader against an indorsee and an attaching creditor of the payee, after the former has obtained judgment by suit and the latter by garnishment against him, since, by neglecting to avail himself of his right to interplead the parties, he waived such right. McKinney *v.* Kuhn, 59 Miss. 186.

32. *Alabama.*— Kyle *v.* Mary Lee Coal, etc., R. Co., 112 Ala. 606, 20 So. 851.

Massachusetts.— Boston Third Nat. Bank *v.* Skillings, etc., Lumber Co., 132 Mass. 410.

New Jersey.—Morristown First Nat. Bank *v.* Bininger, 26 N. J. Eq. 345.

New York. — Crane *v.* McDonald, 118 N. Y. 648, 23 N. E. 991 (holding that there is sufficient privity between claimants to justify an interpleader against them, where they both claim title derived from a common source); McCreery *v.* Inge, 49 N. Y. App. Div. 133, 63 N. Y. Suppl. 158 (holding that there is no such privity between real estate brokers claiming commissions under independent contracts by reason of the same sale, nor is the principal's personal liability such a distinct fund in his hands as to authorize a bill of interpleader by the principal to determine which broker is entitled to the commission); U. S. Trust Co. *v.* Wiley, 41 Barb. 477; Lund *v.* Seaman's Bank, 37 Barb. 129, 20 How. Pr. 461.

Oregon.— North Pac. Lumber Co. *v.* Lang, 28 Oreg. 246, 42 Pac. 799, 52 Am. St. Rep. 780, holding that to justify a bill of interpleader there must be privity either of estate, title, or contract between the various claimants.

United States.— Wells *v.* Miner, 25 Fed. 533.

England.— Glyn *v.* Duesbury, 4 Jur. 1080, 9 L. J. Ch. 365, 11 Sim. 139, 34 Eng. Ch. 139, 59 Eng. Reprint 827.

See 29 Cent. Dig. tit. "Interpleader," § 10.

33. *Georgia.*— James *v.* Sams, 90 Ga. 404, 17 S. E. 962.

Illinois.— Fidelity F. Ins. Co. *v.* Illinois Trust, etc., Bank, 110 Ill. App. 92; Livingstone *v.* Montreal Bank, 50 Ill. App. 562.

Michigan.— Wayne County Sav. Bank *v.* Airey, 95 Mich. 520, 55 N. W. 355; People's Sav. Bank *v.* Look, 95 Mich. 7, 54 N. W. 629.

New York.— Helene *v.* Corn Exch. Bank, 96 N. Y. App. Div. 392, 89 N. Y. Suppl. 310; German Sav. Bank *v.* Friend, 61 N. Y. Super. Ct. 400, 20 N. Y. Suppl. 434 (holding that a savings bank cannot interplead an adverse claimant of a deposit who claims by title superior to that of the depositor, unless such adverse claimant is proceeding by process of law to enforce his rights); Progressive Handlanger Union No. 1 *v.* German Sav. Bank, 57 N. Y. Super. Ct. 594, 8 N. Y. Suppl. 545; Wells *v.* Corn Exch. Bank, 43 Misc. 377, 87 N. Y. Suppl. 480; Schweiger *v.* German Sav. Bank, 27 Misc. 123, 57 N. Y. Suppl. 356; Mercantile Safe-Deposit Co. *v.* Dimon, 25 N. Y. Suppl. 388; Pratt *v.* Myers, 18 N. Y. Suppl. 466, 28 Abb. N. Cas. 460; Flanery *v.* Emigrant Industrial Sav. Bank, 7 N. Y. Suppl. 2, 23 Abb. N. Cas. 40; Friedmann *v.* Platt, 4 N. Y. Suppl. 125; Smith *v.* Emigrant Industrial Sav. Bank, 2 N. Y. Suppl. 617; German Exch. Bank *v.* Excise Com'rs, 6 Abb. N. Cas. 394; Fletcher *v.* Troy Sav. Bank, 14 How. Pr. 383; Mulcahy *v.* Devlin, 2 N. Y. City Ct. 218; Bruggemann *v.* Metropolis Bank, 1 N. Y. City Ct. 86; Weber *v.* Savings Bank, 1 N. Y. City Ct. 70.

Pennsylvania.— Harrisburg Nat. Bank *v.* Hiester, 2 Pearson 255; Alland *v.* Dollar Sav. Bank, 31 Pittsb. Leg. J. 80.

West Virginia.— Dickeschied *v.* Wheeling Exch. Bank, 28 W. Va. 340.

United States.— Foss *v.* Denver First Nat. Bank, 3 Fed. 185, 1 McCrary 474; New York City Bank *v.* Skelton, 5 Fed. Cas. No. 2,739, 2 Blatchf. 14.

See 29 Cent. Dig. tit. "Interpleader," § 13.

34. *Illinois.*— Morrill *v.* Manhattan L. Ins. Co., 183 Ill. 260, 55 N. E. 656.

Maryland.— Emerick *v.* New York L. Ins. Co., 49 Md. 352.

Massachusetts. — Supreme Commandery U. O. of G. C. *v.* Merrick, 163 Mass. 374, 40 N. E. 183.

Missouri.— Heusner *v.* Mutual L. Ins. Co., 47 Mo. App. 336.

New Jersey.— Catholic Benev. Legion *v.* Murphy, 65 N. J. Eq. 60, 55 Atl. 497.

New York. — Sangunitto *v.* Goldey, 88

to the interest of the company to defeat any particular claimant it cannot compel the claimants to interplead;[35] and the same is true where there is a question as to whether the insurance company has rendered itself liable to more than one claimant,[36] or where it contests its liability on the policy.[37]

(III) *As to Agents and Bailees* — (A) *In General.* A strict bill of interpleader cannot be maintained by an agent or bailee to settle the conflicting claims of his principal or bailor and a stranger who claims the property by a distinct and independent title.[38] But where the claimant asserts a title derived from the

N. Y. App. Div. 78, 84 N. Y. Suppl. 989; Kirsop *v.* Mutual L. Ins. Co., 87 N. Y. App. Div. 170, 84 N. Y. Suppl. 95 (holding that where at the time a policy matured insurer might have properly paid the amount due thereon to the assignee on demand, but instead refused payment, and thereafter one of the assignors served it with notice of a claim to such proceeds, insurer was not thereafter entitled to an order of interpleader); Merchant *v.* Northwestern Mut. L. Ins. Co., 57 N. Y. App. Div. 375, 68 N. Y. Suppl. 406; McCormick *v.* Supreme Council C. B. L., 6 N. Y. App. Div. 175, 39 N. Y. Suppl. 1010; Travelers' Ins. Co. *v.* Healey, 86 Hun 524, 33 N. Y. Suppl. 911; Fanning *v.* Supreme Council C. M. B. A., 34 Misc. 258, 69 N. Y. Suppl. 622 [*affirmed* in 61 N. Y. App. Div. 190, 70 N. Y. Suppl. 437]; Keonig *v.* New York L. Ins. Co., 14 N. Y. St. 250; New England Mut. L. Ins. Co. *v.* Keller, 7 N. Y. Civ. Proc. 109.

Pennsylvania.— Penn Mut. Ins. Co. *v.* Watson, 2 Wkly. Notes Cas. 485.

West Virginia.— Hechmer *v.* Gilligan, 28 W. Va. 750.

United States.— Spring *v.* South Carolina Ins. Co., 8 Wheat. 268, 5 L. ed. 614; New York Provident Sav. L. Assur. Soc. *v.* Loeb, 115 Fed. 357 (holding that a bill of interpleader by a life-insurance company to determine the adverse rights of the two defendants to the proceeds of a life policy, averring plaintiff's right to deduct a certain sum from the face of the policy for a semiannual premium, may be maintained, although plaintiff's right to make the deduction was contested); McNamara *v.* New York Provident Sav. L. Assur. Soc., 114 Fed. 910, 52 C. C. A. 530 (holding that where a life-insurance company which issued a policy conditioned to pay a stated sum, less any indebtedness on account of the policy, on proof of death of the insured, filed a bill of interpleader against two defendants, each of whom claimed under the policy, setting forth in the bill all the facts, and that there was at the death of the insured a certain sum due for premium which was deducted from the face of the policy, and the balance, with interest, deposited in court, the existence of such indebtedness for premium, and deduction thereof in making such deposit, did not make complainant an interested party, so as to deprive the bill of its intended character as a pure bill of interpleader); Union Ins. Co. *v.* Glover, 9 Fed. 529.

England.— Fenn *v.* Edmonds, 5 Hare 314, 26 Eng. Ch. 314.

Canada. — *Re* Confederation Life Assoc., 19 Ont. Pr. 89; McElheran *v.* London Masonic Mut. Ben. Assoc., 11 Ont. Pr. 181.

See 29 Cent. Dig. tit. "Interpleader," § 14.

35. Conley *v.* Alabama Gold L. Ins. Co., 67 Ala. 472.

36. National L. Ins. Co. *v.* Pingrey, 141 Mass. 411, 6 N. E. 93; Fanning *v.* Catholic Mut. Ben. Assoc., 61 N. Y. App. Div. 190, 70 N. Y. Suppl. 437; Connecticut Mut. L. Ins. Co. *v.* Tucker, 23 R. I. 1, 49 Atl. 26 (holding that where an insurance company issued a policy on the life of P, payable at his death to his wife, if living, and, in case she died before him, to her children, and, on notice that the wife has assigned her interest to P, issued another policy, payable to his estate, there was a question as to whether the company was not liable on the original policy to the wife's children surviving after her death before that of P, and hence, as these two classes of claimants were not claiming under the same right, the company was not entitled to an order requiring them to interplead).

37. Brennan *v.* Liverpool, etc., Ins. Co., 12 Hun (N. Y.) 62; Hancock Mut. L. Ins. Co. *v.* Lawder, 22 R. I. 416, 48 Atl. 383, holding that where a life-insurance company files a bill of interpleader, and pays into court the amount payable under a policy issued by it, the question whether there was a misrepresentation in the application for the policy, or whether the beneficiary had an insurable interest in the life of the assured, cannot be raised, as such question is removed by the payment into court.

38. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

New Jersey. — Morristown First Nat. Bank *v.* Bininger, 26 N. J. Eq. 345.

New York.— U. S. *v.* Victor, 16 Abb. Pr. 153; Marvin *v.* Ellwood, 11 Paige 365.

United States. — Bartlett *v.* Sultan of Turkey, 23 Fed. 257, 23 Blatchf. 196.

England.— Nickolson *v.* Knowles, 5 Madd. 47, 56 Eng. Reprint 812, 21 Rev. Rep. 276; Watts *v.* Hammond, 3 Eq. Rep. 641, 3 Wkly. Rep. 312.

See 29 Cent. Dig. tit. "Interpleader," §§ 13, 18 *et seq.*

Since a bailee or agent cannot dispute the original title of the bailor or principal from whom he has received property, he is not entitled to an interpleader to settle con-

principal or bailor, the agent, bailee, or attorney may then file a bill of interpleader to ascertain who is entitled to the fund, although he may be entitled to retain a part of the money for commissions or fees.[39] In such case the bailee

flicting claims between them and a stranger, who claims an independent title. Vosburgh *v* Huntington, 15 Abb. Pr. (N. Y.) 254.

Thus a warehouseman whose lien for storage is not disputed cannot maintain a bill of interpleader to protect himself against the claim of his bailor and that of a third person who claims by an independent title. Hatfield *v.* McWhorter, 40 Ga. 269; Tyus *v.* Rust, 37 Ga. 574, 95 Am. Dec. 365; Bartlett *v.* Sultan of Turkey, 23 Fed. 257, 23 Blatchf. 196. Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, cannot maintain a bill of interpleader; but where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against contending claimants. Cooper *v.* De Tastet, Taml. 177, 12 Eng. Ch. 177, 48 Eng. Reprint 71.

Neither can an attorney maintain such a bill to settle the claim to money which he has collected for his client, where a mere stranger claims the money upon the ground that the security upon which the money was collected was originally obtained by his client wrongfully. Marvin *v.* Ellwood, 11 Paige (N. Y.) 365.

39. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Florida.— Sammis *v.* L'Engle, 19 Fla. 800.

Missouri.— Roselle *v.* Farmers' Bank, 119 Mo. 84, 24 S. W. 744.

New York.— Banfield *v.* Hager, 45 N. Y. Super. Ct. 428, 7 Abb. N. Cas. 318; Berry *v.* Mayhew, 1 Daly 54; Schuyler *v.* Hargous, 28 How. Pr. 245; Bleeker *v.* Graham, 2 Edw. 647.

Ohio.— Goddard *v.* Leech, Wright 476.

Oregon.—McFadden *v.* Swinerton, 36 Oreg. 336, 59 Pac. 816, 62 Pac. 12.

Pennsylvania.—Jordan's Appeal, 10 Wkly. Notes Cas. 37.

South Carolina.— Brock *v.* Southern R. Co., 44 S. C. 444, 22 S. E. 601; Norris *v.* Schroeder, McMull. Eq. 422.

West Virginia.— Hechmer *v.* Gilligan, 28 W. Va. 750.

England.—Robinson *v.* Jenkins, 24 Q. B. D. 275, 59 L. J. Q. B. 147, 62 L. T. Rep. N. S. 439, 38 Wkly. Rep. 360; Tanner *v.* European Bank, L. R. 1 Exch. 261, 12 Jur. N. S. 414, 35 L. J. Exch. 151, 14 L. T. Rep. N. S. 414, 14 Wkly. Rep. 675; Best *v.* Heyes, 3 F. & F. 113; Best *v.* Hayes, 1 H. & C. 718, 32 L. J. Exch. 129, 11 Wkly. Rep. 71; Suart *v.* Welch, 3 Jur. 237, 4 Myl. & C. 305, 18 Eng. Ch. 305, 41 Eng. Reprint 119; Attenborough *v.* London, etc., Dock Co., 47 L. J. C. P. 763, 38 L. T. Rep. N. S. 404, 26 Wkly. Rep. 583; Pearson *v.* Cardon, 2 Russ. & M. 606, 11 Eng. Ch. 606, 39 Eng. Reprint 525. See also Roberts *v.* Bell, 7 E. & B. 323, 3 Jur. N. S. 662, 90 E. C. L. 322.

Canada.— *Re* Canadian Pac. R. Co., 17 Ont. Pr. 277.

See 29 Cent. Dig. tit. "Interpleader," §§ 13, 18 *et seq.*

A receiver of funds arising from a sale of lands under order of the court, having a fund in his hands to which two persons were claimants, each of whom commenced against him an action in respect of that fund and obtained an injunction to restrain him from paying it over, may have his bill of interpleader against the two claimants, to compel them to settle the claim as between themselves. Winfield *v.* Bacon, 24 Barb. (N. Y.) 154.

Auctioneer, being a mere stakeholder, ordered to pay deposit money into court, on retaining his own claims on it, without prejudice. Yates *v.* Farebrother, 4 Madd. 239, 56 Eng. Reprint 694.

A wharfinger, who claims a lien on goods for wharfage, cannot interplead if the lien only attaches upon one of the parties by whom the goods are claimed. Braddick *v.* Smith, 9 Bing. 84, 1 L. J. C. P. 154, 2 Moore & S. 131, 23 E. C. L. 496.

A warehouseman who received successive orders, each purporting to come from his bailor, and each transferring title to a different person, both of the transferees claiming title to the property by virtue of the order transferring title to him, was entitled to a judgment requiring claimants to interplead. Beebe *v.* Mead, 101 N. Y. App. Div. 500, 92 N. Y. Suppl. 51.

A claim for warehouse rent is not such an interest in the subject-matter of a suit as will exclude a defendant from the protection of the Interpleader Act. Harwood *v.* Betham, 1 L. J. Exch. 180.

When a third person claims property in possession of a bailee by assignment, sale, or mortgage executed subsequent to the bailment, the bailee may compel the parties to interplead. Bechtel *v.* Sheafer, 117 Pa. St. 555, 11 Atl. 889.

Where a principal has created a lien in favor of another person, on funds in the hands of an agent, the agent may file a bill of interpleader against his principal and the other claimant. Smith *v.* Hammond, 6 Sim. 10, 9 Eng. Ch. 10, 58 Eng. Reprint 498.

The captain of a ship may file interpleader where parties claim adversely under the bill of lading, but it is otherwise where one of the parties claims by title paramount. Lowe *v.* Richardson, 3 Madd. 277, 56 Eng. Reprint 511. And interpleader will not lie where the claimants proceed *in rem* against the ship and not against the captain personally, the owners of the ship being the real parties in interest. Sablicich *v.* Russell, L. R. 2 Eq. 441, 14 Wkly. Rep. 913.

is a mere stakeholder exposed to conflicting claims by different persons claiming to be the owner of the property, and he may have them called into court to litigate their respective rights,[40] unless he is a stakeholder for an illegal enterprise.[41]

(B) *Of Bailor Who Has No Possessory Title.* Where a person is in possession of property as bailee to which the bailor himself has no possessory title but is merely a tortious possessor, and the rightful owner demands it of the bailee, the latter cannot compel the rightful owner and the bailor to interplead. He is himself liable to be deemed a wrongful possessor, if he should, after notice, withhold the property from the rightful owner. He must defend himself as best he can at law and is not entitled to the assistance of a court of equity to try merely legal titles in a controversy between different parties where there is no privity of contract between him and the alleged rightful owner.[42] The hardship of the case has frequently been adverted to by the authorities,[43] and in England a remedy has been provided by statute.[44]

(IV) *As to Landlord and Tenant.* A tenant from whom rent is demanded by two or more persons in privity of estate may file a bill of interpleader to ascertain to whom he should pay the rent.[45] But a tenant cannot compel his landlord to interplead with a stranger who claims the land by title paramount, for where there is no privity of tenure or of contract between the claimants, the rent should be paid to the landlord.[46]

40. Cobb *v.* Rice, 130 Mass. 231; *In re* Moore, 7 Kulp (Pa.) 97; Mason *v.* Hamilton, 5 Sim. 19, 9 Eng. Ch. 19, 58 Eng. Reprint 245.

41. Illegal race.— The court will not grant an interpleader where an action has been brought against the holder of a stake deposited with him to abide the event of an illegal race. Applegarth *v.* Colley, 2 Dowl. P. C. N. S. 223, 11 L. J. Exch. 350, 10 M. & W. 723.

42. Morristown First Nat. Bank *v.* Bininger, 26 N. J. Eq. 345; Bartlett *v.* Sultan of Turkey, 23 Fed. 257, 23 Blatchf. 196; Crawshay *v.* Thornton, 7 Sim. 391, 8 Eng. Ch. 391, 58 Eng. Reprint 887 [*affirmed* in 1 Jur. 19, 6 L. J. Ch. 179, 2 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 541].

43. Bartlett *v.* Sultan of Turkey, 23 Fed. 257, 23 Blatchf. 196.

44. Com. L. Proc. Act (1860), § 12. See Tanner *v.* European Bank, L. R. 1 Exch. 261, 12 Jur. N. S. 414, 35 L. J. Exch. 151, 14 L. T. Rep. N. S. 414, 14 Wkly. Rep. 675; Best *v.* Hayes, 1 H. & C. 718, 32 L. J. Exch. 129, 11 Wkly. Rep. 71.

45. The rule that a tenant cannot compel his landlord to interplead does not prevail where the claim of a third person arises by act of the landlord, subsequent to the commencement of the relation of landlord and tenant.

California.— Warnock *v.* Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209; Schluter *v.* Harvey, 65 Cal. 158, 3 Pac. 659; McDevitt *v.* Sullivan, 8 Cal. 592.

Indiana.— Hall *v.* Craig, 125 Ind. 523, 25 N. E. 538; Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515; White Water Valley Canal Co. *v.* Comegys, 2 Ind. 469.

Missouri.— Glaser *v.* Priest, 29 Mo. App. 1.

Nevada.— McCoy *v.* Bateman, 8 Nev. 126.

New York.— Van Zandt *v.* Van Zandt, 7 N. Y. Suppl. 706, 17 N. Y. Civ. Proc. 448.

Pennsylvania.— McCoy *v.* McMurtrie, 12 Phila. 180; Adams *v.* Beach, 1 Phila. 99.

West Virginia.— Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 525.

England.— Jew *v.* Wood, 3 Beav. 579, 43 Eng. Ch. 579, 49 Eng. Reprint 228, Cr. & Ph. 185, 18 Eng. Ch. 185, 10 L. J. Ch. 261; Townley *v.* Deare, 3 Beav. 213, 43 Eng. Ch. 213, 49 Eng. Reprint 83; Hodges *v.* Smith, 1 Cox Ch. 357, 29 Eng. Reprint 1202; Rickard *v.* Hyde, 2 Ir. Eq. 299; Doran *v.* Everitt, 2 Ir. Eq. 28; Glover *v.* Reynolds, 16 L. T. Rep. N. S. 113; Angell *v.* Hadden, 16 Ves. Jr. 202, 33 Eng. Reprint 961; Clarke *v.* Byne, 13 Ves. Jr. 383, 33 Eng. Reprint 338; Cowtan *v.* Williams, 9 Ves. Jr. 107, 32 Eng. Reprint 542; Dungey *v.* Angove, 2 Ves. Jr. 304, 2 Rev. Rep. 217, 30 Eng. Reprint 644.

See 29 Cent. Dig. tit. "Interpleader," § 24.

Unless the title is affected by some act done by the landlord subsequently to the lease a tenant cannot sustain a bill of interpleader against his landlord. Cook *v.* Rosslyn, 1 Giff. 167, 5 Jur. N. S. 973, 28 L. J. Ch. 833, 7 Wkly. Rep. 537.

When, upon the death of the lessor, conflicting claims for the rent are made by a devisee and the heirs of the lessor a bill of interpleader will lie by a tenant. Badeau *v.* Tylee, 1 Sandf. Ch. (N. Y.) 270.

46. Snodgrass *v.* Butler, 54 Miss. 45; Dodd *v.* Bellows, 29 N. J. Eq. 127; Johnson *v.* Atkinson, 3 Anstr. 798; Bermingham *v.* Tuite, Ir. R. 7 Eq. 221.

Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger, under a title adverse to that of the landlord. Dungey *v.* Angove, 2 Ves. Jr. 304, 2 Rev. Rep. 217, 30 Eng. Reprint 644. A tenant cannot in general require

(v) *As to Garnishees*—(a) *In General.* An impartial stakeholder summoned as garnishee may file a bill of interpleader to bring in other claimants of the fund in his hands.[47] But it is too late to do this if he answers and suffers judgment to go against him as garnishee,[48] and of course interpleader will not lie where the fund is not subject to garnishment.[49]

(b) *Simplified Practice Under Statutes.* In many jurisdictions the practice has been simplified by statutes providing in substance that where the disclosure of a garnishee or trustee shows that the whole or some part of the fund in his hands is claimed by a person other than the principal defendant, it is the duty of plaintiff, under the direction of the court, to take the necessary steps to make the claimant a party to the suit in order that his rights may be adjudicated.[50]

(vi) *As to Judgment Debtors.* Where a judgment debtor is in doubt as to

his landlord to interplead for the rent with an adverse claimant to whom the tenant has attorned; but he may do so where the adverse claimant is one to whom the tenant has always paid rent, supposing him to be the agent of the landlord. Seaman *v.* Wright, 12 Abb. Pr. (N. Y.) 304. A lessee cannot maintain a bill to compel his lessor and a claimant of the premises to litigate their rights to the rent, where the evidence tends strongly to show that the lessee obtained possession by collusion with the claimant, and for his benefit, in order to prejudice the lessor. Williams *v.* Halbert, 7 B. Mon. (Ky.) 184.

One who takes independent leases from two adverse claimants cannot, when sued by one of them for rent, compel the two to interplead. Standley *v.* Roberts, 59 Fed. 836, 8 C. C. A. 305.

47. *Delaware.*—Hastings *v.* Cropper, 3 Del. Ch. 165; Webster *v.* McDaniel, 2 Del. Ch. 297.

Michigan.— Moore *v.* Barnheisel, 45 Mich. 500, 8 N. W. 531.

Mississippi.— Warren *v.* Robins, 23 Miss. 309.

New Jersey.— Fitch *v.* Brower, 42 N. J. Eq. 300, 11 Atl. 330.

Oregon.— Fahie *v.* Lindsay, 8 Oreg. 474.

Pennsylvania.— Wright *v.* McGarry, 2 Chest. Co. Rep. 467; Kistler *v.* Thompson, 3 Lack. Jur. 341; Hamilton *v.* Hitner, 3 Montg. Co. Rep. 195; Wilbraham *v.* Horrocks, 14 Phila. 191; Rodgers *v.* Santa Clause Co., 27 Wkly. Notes Cas. 574; Moorhouse *v.* Lancashire Ins. Co., 16 Wkly. Notes Cas. 34; Wilbraham *v.* Horrocks, 8 Wkly. Notes Cas. 285; Wasserman *v.* Centennial Nat. Bank, 3 Wkly. Notes Cas. 475. See also Barnes *v.* Bamberger, 196 Pa. St. 123, 46 Atl. 303.

Texas.— Foy *v.* East Dallas Bank, (Civ. App. 1894) 28 S. W. 137.

Washington.— Mosher *v.* Bruhn, 15 Wash. 332, 46 Pac. 397.

Canada.— *Re* Anderson, 13 Ont. Pr. 21.

See 29 Cent. Dig. tit. "Interpleader," § 31.

Debt claimed by third person as assignee.— Where proceedings are taken to garnish a debt which is claimed by a third party as assignee, there is no power to direct an interpleader issue to try the validity of the alleged assignment. Kerr *v.* Fullarton, 3 Ont. Pr. 19.

Where an administrator of a mortgagor had been charged as garnishee of the mortgagee, and afterward discovered that the mortgagee had assigned the debt and mortgage to an assignee, who claimed that payment should be made to him, and the administrator filed his bill, making all interested parties, requiring them to interplead, and praying an injunction against the judgment, it was held to be a proper case of interpleader. Cannon *v.* Kinney, Sm. & M. Ch. (Miss.) 555.

Without inquiring into the validity of the attachment, a debtor on whom an attachment against his creditor has been served may maintain interpleader. Crane *v.* McDonald, 2 N. Y. St. 150; Standard Ins. Co. *v.* Hughes, 11 Ont. Pr. 220; Leech *v.* Williamson, 10 Ont. Pr. 226.

48. Mitchell *v.* Northwestern Mfg., etc., Co., 26 Ill. App. 295; Wabash R. Co. *v.* Flannigan, 95 Mo. App. 477, 74 S. W. 691; Holmes *v.* Clark, 46 Vt. 22.

A garnishee who appeals from a judgment before an alderman cannot have an issue in interpleader framed to determine the right to the money in his hands, although a reference made by agreement is vacated because made before issue joined. Davis *v.* Myers, 8 Kulp (Pa.) 295; Victoria Mut. F. Ins. Co. *v.* Bethune, 1 Ont. App. 398.

49. Franklin *v.* Southern R. Co., 119 Ga. 855, 47 S. E. 344.

50. *Alabama.*— Donald *v.* Nelson, 95 Ala. 111, 10 So. 317; Edwards *v.* Levinshon, 80 Ala. 447, 2 So. 161; Security Loan Assoc. *v.* Weems, 69 Ala. 584; Clark *v.* Few, 62 Ala. 243; Connoley *v.* Cheesborough, 21 Ala. 166; Marston *v.* Carr, 16 Ala. 325.

Maine.— Look *v.* Brackett, 74 Me. 347; Jordan *v.* Harmon, 73 Me. 259; Burnell *v.* Weld, 59 Me. 423.

Michigan.— Smith *v.* Holland, 81 Mich. 471, 45 N. W. 1017; Kennedy *v.* McLellan, 76 Mich. 598, 43 N. W. 641; Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284.

Minnesota.— Levy *v.* Miller, 38 Minn. 526, 38 N. W. 700, 8 Am. St. Rep. 691; McMahon *v.* Merrick, 33 Minn. 262, 22 N. W. 543; Mansfield *v.* Stevens, 31 Minn. 40, 16 N. W. 455.

whom he can safely pay the amount of the judgment it is his duty to file a bill of interpleader against the claimants and pay the debt into court to be held for the benefit of the party showing his right to receive it.[51]

(VII) *As to Proceeds of Commercial Paper.* Where there is a contest as to which of several claimants is entitled to the proceeds of commercial paper the party liable to pay may compel the claimants to interplead and litigate their own rights.[52]

(VIII) *As to Vendees of Property.* A vendee of property may file a bill in the nature of a bill of interpleader against his vendor and a third person who claims the property and pray a decree upon their claims that he may be secure in the payment of the purchase-money.[53] But it is otherwise where there is no privity between the vendor and the other claimant.[54]

(IX) *As to Contractors and Subcontractors.* Where there is a dispute between a contractor and a subcontractor or a person who has furnished material as to who is entitled to the balance of the contract price, the owner may file a bill in the nature of a bill of interpleader to have it determined to whom he shall pay the balance remaining in his hands.[55] But the owner cannot file a bill of interpleader against the contractor and those claiming liens for work done and material furnished.[56]

Missouri.— McKittrick *v.* Clemens, 52 Mo. 160.

Vermont.— Wheeler *v.* Winn, 38 Vt. 122. See 29 Cent. Dig. tit. "Interpleader," § 31.

Where defendant is garnished by a creditor of plaintiff, this is no ground for a separate suit in equity to compel plaintiff and the garnishing creditor to interplead, or to restrain the garnishment proceedings. Blair *v.* Hilgedick, 45 Minn. 23, 47 N. W. 310.

51. Fowler *v.* Williams, 20 Ark. 641; Fowler *v.* Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172.

52. *Arkansas.*— Herndon *v.* Higgs, 15 Ark. 389.

Minnesota.— Cullen *v.* Dawson, 24 Minn. 66; Rohrer *v.* Turrill, 4 Minn. 407.

New Jersey.— Briant *v.* Reed, 14 N. J. Eq. 271.

New York.— Howe Mach. Co. *v.* Gifford, 66 Barb. 597; Crane *v.* McDonald, 2 N. Y. St. 150; Van Buskirk *v.* Roy, 8 How. Pr. 425; Bell *v.* Hunt, 3 Barb. Ch. 391.

Pennsylvania.— Bechtel *v.* Sheafer, 117 Pa. St. 555, 11 Atl. 889.

England.— Regan *v.* Serle, 9 Dowl. P. C. 193, 1 Wils. P. C. 31; Gerhard *v.* Montagu, 61 L. T. Rep. N. S. 564, 38 Wkly. Rep. 76. See 29 Cent. Dig. tit. "Interpleader," § 16.

Interest in proceeds.— On a bill of interpleader to determine who was entitled to the proceeds of a certain note, it appeared that one defendant claimed the note as a gift from a decedent, of whom complainant was administrator, and had placed it in complainant's hands, to be collected and applied to a debt due from such defendant to complainant. The other defendants claimed that the note belonged to the estate of decedent, who was their mother. It was held that complainant had such an interest in the proceeds of the note that he could not maintain the bill. Wing *v.* Spaulding, 64 Vt. 83, 23 Atl. 615. See also Holmes *v.* Clark, 46 Vt. 22.

When two parties claim a right to a vessel which has been sold, and part of the proceeds is in the hands of a third party, in the form of a bill of exchange, that is a case for interpleader. Gibbs *v.* Gibbs, 6 Wkly. Rep. 415.

53. Todd *v.* Flournoy, 56 Ala. 99, 28 Am. Rep. 758; Darden *v.* Burns, 60 Ala. 362; Baltimore, etc., R. Co. *v.* Arthur, 10 Abb. N. Cas. (N. Y.) 147; Johnston *v.* Lewis, 4 Abb. Pr. N. S. (N. Y.) 150; Mt. Morris Nat. Bank *v.* Werk, 9 Ohio Dec. (Reprint) 770, 17 Cinc. L. Bul. 174.

54. French *v.* Howard, 3 Bibb (Ky.) 301; Blue *v.* Watson, 59 Miss. 619; Carrico *v.* Tomlinson, 17 Mo. 499. See also Trigg *v.* Hitz, 17 Abb. Pr. (N. Y.) 436; Tynan *v.* Cadenas, 7 N. Y. Civ. Proc. 305.

55. Newhall *v.* Kastens, 70 Ill. 156; Clarke *v.* Saloy, 2 La. Ann. 987; Illingworth *v.* Rowe, 52 N. J. Eq. 360, 28 Atl. 456; Montpelier *v.* Capital Sav. Bank, 75 Vt. 433, 56 Atl. 89, 98 Am. St. Rep. 834.

Where there was a controversy between an original contractor and his partner and the contractor's assignee respecting the right to a balance due on a building contract, the owner was entitled to maintain a bill of interpleader against all the parties, requiring them to interplead concerning their claims to the fund. Lapenta *v.* Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315.

56. The lienors have no concern with the state of account between the owner and the contractor, their remedy being by sale of the property. Hellman *v.* Schneider, 75 Ill. 422; Ammendale Normal Inst. *v.* Anderson, 71 Md. 128, 17 Atl. 1030; Dry Dock M. E. Mission Church *v.* Carr, 2 Barb. (N. Y.) 60. But see Westervelt *v.* Levy, 2 Duer (N. Y.) 354.

Building contractors, although required under the terms of their contracts to protect the owner from mechanics' liens, cannot maintain a bill of interpleader against the administrators of a deceased subcontractor to whom they owed a balance, and materialmen who furnished the deceased subcontractor

(x) *As to Executors and Administrators.* An executor or administrator cannot file a bill of interpleader or a bill in the nature of a bill of interpleader against the creditors and distributees of the estate and an adverse claimant of the assets, since a *bona fide* defense against the claim, although unsuccessful, will protect him against the creditors and distributees.[57] If a legatee is not described with exact accuracy in a will, and the description may in some respects be applicable to different persons each of whom claims the legacy, the executor may maintain a bill of interpleader for the determination of the person to whom the legacy is payable.[58] And where a decree ordering distribution would not protect the executor against adverse claimants it seems that he may file a bill of interpleader.[59]

(xi) *As to Sheriffs* — (a) *In England.* According to the English cases a sheriff is entitled to call upon an execution creditor and claimants of the property seized or its proceeds to interplead, unless he has acted dishonestly, or unless his conduct has prejudiced some of the parties;[60] but he cannot maintain his bill until

with materials for the building, where the subcontractor made no assignment of the sum due him, and created no lien thereon enforceable against it in the hands of the contractors, since the materialmen furnishing materials to a subcontractor are not entitled to mechanics' liens under the mechanics' lien law in force in this district. Richardson *v.* Belt, 13 App. Cas. (D. C.) 197.

57. Blue *v.* Watson, 59 Miss. 619.

An executor has such an interest in property which came into his hands as executor, and for which he issued by a person claiming by title paramount to his testator's, as to preclude him from calling on parties claiming under the will to interplead. Adams *v.* Dixon, 19 Ga. 513, 65 Am. Dec. 608.

A bill in the nature of a bill of interpleader, brought by the executor of a will to obtain instructions of court as to the execution of his trust, is not a proper mode to try the rights of creditors of a deceased person to collect their demands. Bradford *v.* Forbes, 9 Allen (Mass.) 365. An administrator filed a bill of interpleader against the next of kin of his intestate, and a person claiming to hold, as assignee, a policy of insurance issued to the intestate on his life, the proceeds of which were in plaintiff's hands, and defendants agreed that the court might take jurisdiction. It was held that, although the case was not properly one for interpleader, the court would entertain it as of a bill seeking instruction and protection from the court. Stevens *v.* Warren, 101 Mass. 564.

58. Morse *v.* Stearns, 131 Mass. 389.

59. Fox *v.* Sutton, 127 Cal. 515, 59 Pac. 939.

Interposition before answer.— Where a judgment creditor of one who is a legatee or distributee under a will begins a suit in the nature of a creditors' bill, making the debtor and the administrator with the will annexed parties, such administrator may interpose, before answer, an affidavit setting forth the grounds for interpleader, and praying that a claimant other than plaintiff be brought in, and required to litigate with plaintiff their respective rights to the fund. Cadiz First Nat. Bank *v.* Beebe, 62 Ohio St. 41, 56 N. E. 485.

60. Smith *v.* Critchfield, 14 Q. B. D. 873, 54 L. J. Q. B. 366, 54 L. T. Rep. N. S. 122, 33 Wkly. Rep. 920; Fenwick *v.* Laycock, 2 Q. B. 108, 1 G. & D. 532, 6 Jur. 341, 11 L. J. Q. B. 146, 42 E. C. L. 594; Cropper *v.* Warner, 1 Cab. & E. 152; Claridge *v.* Collins, 7 Dowl. P. C. 698, 3 Jur. 894; Allen *v.* Gibbon, 2 Dowl. P. C. 292; Ford *v.* Baynton, 1 Dowl. P. C. 357; Lea *v.* Rossi, 11 Exch. 13, 1 Jur. N. S. 384, 24 L. J. Exch. 280; Day *v.* Carr, 7 Exch. 883; Holt *v.* Frost, 3 H. & N. 821, 28 L. J. Exch. 55; Aylwin *v.* Evans, 52 L. J. Ch. 105, 47 L. T. Rep. N. S. 568; Northcote *v.* Beauchamp, 1 Moore & S. 158, 28 E. C. L. 487; Parker *v.* Booth, 1 Moore & S. 156.

Relief refused.— Where an under-sheriff, who was acting as attorney for certain creditors of defendant, informed them of a fieri facias at the suit of plaintiff having been placed in his hands to execute, by which means the issuing of a fiat in bankruptcy against defendant was accelerated, and plaintiff's execution thereby defeated, the court refused to grant the sheriff relief. Cox *v.* Balne, 2 D. & L. 718, 9 Jur. 182, 14 L. J. Q. B. 95. If, having seized goods in execution, which are claimed by another party, the sheriff delivers up part of the goods to the claimant, he thereby precludes himself from relief. Braine *v.* Hunt, 2 Cromp. & M. 418, 2 Dowl. P. C. 391, 3 L. J. Exch. 85; Kirk *v.* Almond, 2 L. J. Exch. 13. Where a sheriff's officer had notice, at the time of the seizure under a fieri facias that the goods seized were not the goods of the person against whom the writ issued, the court will not interfere to protect the sheriff. Tufton *v.* Harding, 6 Jur. N. S. 116, 29 L. J. Ch. 225, 1 L. T. Rep. N. S. 264, 8 Wkly. Rep. 122.

Where the sheriff seized goods which were under distress for rent due to the landlord, the court refused to grant him relief, although he had applied for indemnity to the execution creditor, which had been refused. Haythorn *v.* Bush, 2 Cromp. & M. 689, 2 Dowl. P. C. 641, 3 L. J. Exch. 210. This is also the rule in Canada. Flynn *v.* Cooney, 18 Ont. Pr. 321.

he has made a seizure of goods;[61] neither can he apply for relief after the goods have been sold and the proceeds paid over to the execution creditor;[62] and where the sheriff is placed in circumstances which give him an interest in either side, the court will not relieve him.[63] The sheriff need not wait until proceedings are commenced against him,[64] but he must not apply before a claim is made.[65] He should, however, apply immediately upon receiving notice of an adverse claim.[66]

(B) *In United States.* By statute in some jurisdictions the sheriff may compel the contesting claimants of the fund to interplead;[67] and so of the execution debtor and a third person who claims the property seized upon execution.[68] But it is doubtful if he can do this without statutory authority.[69]

61. Holton *v.* Guntrip, 6 Dowl. P. C. 130, M. & H. 324, 3 M. & W. 145; Moore *v.* Hawkins, 15 Reports 166, 43 Wkly. Rep. 235; Goslin *v.* Tune, 2 U. C. Q. B. 177.

Unless the goods or money in dispute be actually in his hands the sheriff cannot apply. Scott *v.* Lewis, 2 C. M. & R. 289, 4 Dowl. P. C. 259, 1 Gale 204, 4 L. J. Exch. 321, 5 Tyrw. 1083.

62. Anderson *v.* Calloway, 1 Cromp. & M. 182, 1 Dowl. P. C. 636, 2 L. J. Exch. 32, 3 Tyrw. 237; Inland *v.* Bushell, 5 Dow. P. C. 147, 3 Hurl. & W. 118.

63. Dudden *v.* Long, 1 Bing. N. Cas. 299, 3 Dowl. P. C. 139, 1 Scott 281, 27 E. C. L. 648.

If the under-sheriff is the execution creditor, or partner in business of the execution creditor, the sheriff is not entitled to relief. Ostler *v.* Bower, 4 Dowl. P. C. 605, 1 Hurl. & W. 653.

64. Green *v.* Brown, 3 Dowl. P. C. 337.

65. Isaac *v.* Spilsbury, 10 Bing. 3, 2 Dowl. P. C. 211, 3 Moore & S. 341; Smith *v.* Saunders, 37 L. T. Rep. N. S. 359.

The court will not interfere quia timet unless a claim to the property seized is actually made. Isaac *v.* Spilsbury, 10 Bing. 3, 2 Dowl. P. C. 211, 3 M. & S. 341, 25 E. C. L. 12.

Giving notice of a fiat in bankruptcy having issued is not equivalent to a claim by the assignees to the goods sold. Bently *v.* Hook, 2 Cromp. & M. 426, 2 Dowl. P. C. 339, 3 L. J. Exch. 87, 4 Tyrw. 229.

66. Mutton *v.* Young, 4 C. B. 371, 11 Jur. 414, 16 L. J. C. P. 165, 56 E. C. L. 371; Cook *v.* Allen, 1 Cromp. & M. 542, 2 Dowl. P. C. 11, 2 L. J. Exch. 199, 3 Tyrw. 586; Beale *v.* Overton, 5 Dowl. P. C. 599, 1 Jur. 544, 6 L. J. Exch. 118, M. & H. 172, 2 M. & W. 534; Dixon *v.* Ensell, 2 Dowl. P. C. 621; Devereux *v.* John, 1 Dowl. P. C. 548; Tufton *v.* Harding, 6 Jur. N. S. 116, 29 L. J. Ch. 225, 1 L. T. Rep. N. S. 264, 8 Wkly. Rep. 122.

Where it appeared that the sheriff had been guilty of neglect, the court refused to relieve him from any liability occasioned thereby. Brackenbury *v.* Laurie, 3 Dowl. P. C. 180.

67. Lawson *v.* Jordan, 19 Ark. 297, 70 Am. Dec. 596; Bates *v.* Lilly, 65 N. C. 232; Phillips *v.* Reagan, 75 Pa. St. 381.

The law of interpleader applied, where money had been paid to a sheriff to prevent a sale under execution, and the sheriff had deposited it in court, and it was proper for the court, on motion of plaintiffs in the writs, to compel claimants to interplead with reference thereto. Pennypacker's Appeal, 57 Pa. St. 114.

Where an issue is ordered in a sheriff's interpleader, the claimant, as plaintiff, must file a formal statement of his claim. The claim filed with the sheriff is insufficient. Provost *v.* Algeo, 8 Pa. Dist. 517, 22 Pa. Co. Ct. 592.

68. Bain *v.* Funk, 61 Pa. St. 185; Gotthold *v.* Von Minden, 17 Wkly. Notes Cas. (Pa.) 157; Prichett *v.* McWilliams, 2 Wkly. Notes Cas. (Pa.) 353; Kurtz *v.* Malony, 1 Wkly. Notes Cas. (Pa.) 84; Storrs *v.* Payne, 4 Hen. & M. (Va.) 506. But *compare* Maurer *v.* Sheafer, 116 Pa. St. 339, 9 Atl. 869; Furman *v.* Holmes, 6 Pa. Co. Ct. 162.

A sheriff notified by a third party, after levy of an execution on certain chattels, that they are subject to the lien of a mortgage given to such party, is not entitled to a rule for an interpleader, since his proper course is to sell the interest of the execution defendant in such chattels. Brill *v.* West End Pass. R. Co., 4 Wkly. Notes Cas. (Pa.) 139.

It is not imperative upon the sheriff, when the ownership of goods taken by him under execution is disputed, to ask for an interpleader issue. In clear cases he should not demand it. When the goods are exclusively in defendant's possession, he may presume the goods to be defendant's property, and runs no risk in levying on them as such. Bank *v.* Allen, 1 Del. Co. (Pa.) 277.

Where, after levy, the property was purchased by another without notice that a levy had been made, and a claim made by such purchaser against the sheriff, the latter could not have a bill of interpleader, since a title acquired subsequent to the levy could not be the subject of an interpleader. Rodgers *v.* Douglass, 9 Wkly. Notes Cas. (Pa.) 191.

Where third persons present to the sheriff an affidavit that they are the mortgagees and bailees of certain goods levied on as the property of defendant, and that as such they are entitled to possession of such goods, such persons and plaintiff will not be required to interplead. Manning *v.* Boothe, 14 Pa. Co. Ct. 95.

69. An application to the summary jurisdiction of the court from which the process issued is generally sufficient to settle the question of priorities and protect the sheriff. Parker *v.* Barker, 42 N. H. 78, 77 Am. Dec.

(c) *When Sheriff Wrong-Doer.* If, however, the sheriff seizes property claimed by a person against whom there is no execution, he is a wrong-doer if the claim be just and he cannot compel the claimant and the execution debtor to interplead.[70]

10. One Claim Equitable, the Other Legal. It is no objection to a bill of interpleader that the claim of one defendant is legal and that of the other equitable.[71]

11. Whether Complainant Must Have Been Sued. A bill of interpleader may be filed, although the holder of the fund in dispute has not been sued at all or has been sued by only one of the conflicting claimants.[72]

12. Acceptance of Indemnity. A person in possession of a fund who stands in the same relation in respect of the fund to each of the persons claiming it may accept an indemnity which is tendered to him by either and may pay over the

789; Shaw *v.* Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690; Shaw *v.* Chester, 2 Edw. (N. Y.) 405; Quinn *v.* Patton, 37 N. C. 48; Quinn *v.* Green, 36 N. C. 229, 36 Am. Dec. 46. See also Boston Third Nat. Bank *v.* Skillings, etc., Lumber Co., 132 Mass. 410.

When the sheriff is in doubt as to the appropriation of money collected he should make a statement of the facts and ask the appropriate order, upon notice to all parties concerned. Turner *v.* Lawrence, 11 Ala. 427; Henderson *v.* Richardson, 5 Ala. 349.

Deposit in court.— Where a controversy arises as to the application of money derived from the sale of a judgment debtor's property, the sheriff has a right to exonerate himself by bringing the money into court. Stebbins *v.* Walker, 14 N. J. L. 90, 25 Am. Dec. 499. See also Deposits in Court, 13 Cyc. 1030 *et seq.* A sheriff may relieve himself from responsibility to claimants by paying the money into court, making a full return of the facts out of which the controversy arose, notifying all the parties interested in the fund, and leaving them to apply to the court to determine the priority of their respective claims; and he should not be allowed to maintain a bill of interpleader. McDonald *v.* Allen, 37 Wis. 108, 19 Am. Rep. 754.

70. Parker *v.* Barker, 42 N. H. 78, 77 Am. Dec. 789; Shaw *v.* Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690; Dewey *v.* White, 65 N. C. 225; Slingsby *v.* Boulton, 1 Ves. & B. 334, 35 Eng. Reprint 130.

71. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Illinois.— Newhall *v.* Kastens, 70 Ill. 156.

Massachusetts.— Dixon *v.* National L. Ins. Co., 168 Mass. 48, 46 N. E. 430.

New York.— Richards *v.* Salter, 6 Johns. Ch. 445; Yates *v.* Bartlett, 2 Ch. Sent. 56; Schuyler *v.* Pelissier, 3 Edw. 191; Yates *v.* Tisdale, 3 Edw. 71, both holding that to entitle a person to file a bill of interpleader, it is not necessary that each of the adverse claimants should appear to have a legal claim against him; but it is sufficient if the claim of one is legal and of the other equitable.

Ohio.— Bridge *v.* Martin, 2 Ohio Dec. (Reprint) 410, 3 West. L. Month. 20.

See 29 Cent. Dig. tit. "Interpleader," § 8.

Both must claim the same subject adversely, however, not under each other. Glynn *v.* Locke, 2 C. & L. 21, 3 Dr. & War. 11, 5 Ir. Eq. 61.

But in England it is held that a bill of interpleader cannot be sustained upon equities; the claims must be founded on legal rights, and must refer to precisely the same subject-matter and not to collateral demands arising out of the right immediately in dispute. Langton *v.* Horton, 3 Beav. 464, 43 Eng. Ch. 464, 49 Eng. Reprint 182; Hurst *v.* Sheldon, 13 C. B. N. S. 750, 106 E. C. L. 749; Sturgess *v.* Claude, 1 Dowl. P. C. 505; Roach *v.* Wright, 1 Dowl. P. C. N. S. 56, 10 L. J. Exch. 267, 8 M. & W. 155; Putney *v.* Tring, 8 L. J. Exch. 271, 5 M. & W. 425; Barclay *v.* Curtis, 9 Price 661.

72. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Illinois.— Newhall *v.* Kastens, 70 Ill. 156.

New York.— Beebe *v.* Mead, 101 N. Y. App. Div. 500, 92 N. Y. Suppl. 51 (holding that a warehouseman, beset by adverse claimants to the goods deposited with him, may maintain an interpleader suit without waiting for the institution of an action for conversion by one of the claimants and then procuring an order requiring the other to interplead); Beck *v.* Stephani, 9 How. Pr. 193; Richards *v.* Salter, 6 Johns. Ch. 445.

Washington.— Daulton *v.* Stuart, 30 Wash. 562, 70 Pac. 1096.

England.— It is sufficient to support a bill of interpleader, that each of defendants has a claim to the matter in question, although one only can maintain an action at law; the principle being to prevent a plaintiff from being doubly vexed. It is therefore not necessary that he should have been actually sued. Morgan *v.* Marsack, 2 Meriv. 107, 35 Eng. Reprint 881.

Reason for rule.— The right to the remedy by interpleader is founded not on the consideration that a man may be subjected to double liability, but on the fact that he is threatened with double vexation in respect to one liability. Pfister *v.* Wade, 56 Cal. 43; Hoyt *v.* Gouge, 125 Iowa 603, 101 N. W. 464; Angell *v.* Hadden, 15 Ves. Jr. 244, 33 Eng. Reprint 747. A bill of interpleader may be entertained, although it is not absolutely necessary to do so for the protection of the complainant. Lozier *v.* Van Saun, 3 N. J. Eq. 325. But in order to sustain the bill there must be a well founded apprehension of danger

fund to the person giving such indemnity; but upon doing this his right to file a bill of interpleader is at an end.[73]

C. Parties.[74] Plaintiff or complainant is always the debtor or holder of the fund or thing in dispute and he continues to be a substantial and necessary party until he had fully rendered the debt, duty, or other thing required of him, after which the litigation proceeds among the claimants.[75] All persons claiming an interest in the fund or property in dispute, whether in their own right or as the lawful representatives of others, should be joined as parties defendant.[76] A

from conflicting claims to the fund in dispute. Blair *v.* Porter, 13 N. J. Eq. 267.

73. Marvin *v.* Ellwood, 11 Paige (N. Y.) 365.

A mere stakeholder is justified if there is the slightest doubt or risk arising from conflicting claims, in calling upon the person really interested on either side to indemnify him against such risk, and, if he refuses or neglects to do so, in filing a bill of interpleader in equity. Nelson *v.* Barter, 2 Hem. & M. 334, 10 Jur. N. S. 611, 10 L. T. Rep. N. S. 491 [*affirmed* in 10 Jur. N. S. 832, 33 L. J. Ch. 705, 12 Wkly. Rep. 999]. Plaintiff in interpleader is not bound to show the existence of an apparent title in each of defendants claiming the property, and a stakeholder is entitled to relief by suit of interpleader, and is not bound to accept an indemnity from either of the claimants, although the claimant offering it shows an apparent title. East India, etc., Dock Co. *v.* Littledale, 7 Hare 57, 27 Eng. Ch. 57.

Where a defendant has been indemnified by a third person for not delivering up property in his possession, he has no right to relief. Tucker *v.* Morris, 1 Cromp. & M. 73, 1 Dowl. P. C. 639, 2 L. J. Exch. 1.

Collusion.— The objection that a stakeholder has, by merely taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under the Interpleader Acts because he had identified himself with and must be taken to "collude" with the claimant who gave the indemnity, cannot be raised by that claimant himself, and the decisions in Tucker *v.* Morris, 1 Cromp. & M. 73, 1 Dowl. P. C. 639, 2 L. J. Exch. 1, and Belcher *v.* Smith, 9 Bing. 82, 1 L. J. C. P. 167, 2 Moore & S. 184, 23 E. C. L. 495, do not apply. Thompson *v.* Wright, 13 Q. B. D. 632, 54 L. J. Q. B. 32, 51 L. T. Rep. N. S. 634, 33 Wkly. Rep. 96.

74. Parties generally see EQUITY, 16 Cyc. 181 *et seq.*; PARTIES.

75. George *v.* Pilcher, 28 Gratt. (Va.) 299, 26 Am. Rep. 350.

One of the claimants cannot file a bill of interpleader; it can be filed only by the person in possession of the subject-matter or who has the duty in question to perform. Hathaway *v.* Foy, 40 Mo. 540; Arn *v.* Arn, 81 Mo. App. 133; Boyer *v.* Hamilton, 21 Mo. App. 520; Wenstrom Electric Co. *v.* Bloomer, 85 Hun (N. Y.) 389, 32 N. Y. Suppl. 903; Russell *v.* Pottsville First Presb. Church, 65 Pa. St. 9; Allison *v.* Elberson, 1 Wkly. Notes Cas. (Pa.) 388; Killian *v.* Ebbinghaus, 110 U. S. 568, 4 S. Ct. 232, 28 L. ed. 246.

An assignee in insolvency, who is himself a claimant of a fund in his possession, cannot be awarded an interpleader. Castner *v.* Twitchell-Champlin Co., 91 Me. 524, 40 Atl. 558.

Where an incorporated mutual benefit association is liable to one of two or more claimants for a death benefit, the treasurer of such association cannot file a bill of interpleader to have defendants litigate their claim, but such bill must be filed by the corporation itself. Hechmer *v.* Gilligan, 28 W. Va. 750. See also Stone *v.* Reed, 152 Mass. 179, 25 N. E. 49.

Use of terms "defendant" and "answer." — The fact that a party to an action of interpleader is denominated a "defendant," and his petition setting forth his cause of action is styled his "answer," does not change his real attitude or position in the case. Low *v.* Blinco, 10 Bush (Ky.) 331.

76. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 52 Am. Dec. 592, holding that defendants in a bill of interpleader cannot object that a third person was not made a party, where the want of him cannot affect their rights.

Georgia.— Bell *v.* Gunn, 94 Ga. 642, 21 S. E. 899, holding that to a petition of interpleader by a debtor against his creditor and the latter's creditors, who claim specific liens on the debtor's property as security for their demands, the creditors of the petitioner are necessary parties.

Illinois.— Newhall *v.* Kastens, 70 Ill. 156, holding that in a bill of interpleader against the contractor and subcontractor to compel them to litigate their rights as to a portion of the contract price for the erection of a building, it was proper to make those who had furnished materials and performed labor for the subcontractor, and who asserted liens therefor, parties defendant.

Missouri.— Under the Missouri statute a defect of parties is waived by a failure to demur to the bill. Scott-Force Hat Co. *v.* Hombs, 127 Mo. 392, 30 S. W. 183.

New Jersey.— Pratt *v.* Worrell, (Ch. 1904) 57 Atl. 450, holding that where, on the face of a bill seeking interpleader, it appears that other parties than defendants have a right to be heard regarding the fund in dispute, an interpleader will not be decreed.

New York.— Reynolds *v.* Ætna L. Ins. Co., 6 N. Y. App. Div. 254, 39 N. Y. Suppl. 885 (holding in an action of interpleader between two claimants of a life-insurance policy, an order awarding it to one of the claimants as against the other will not justify the insurance company in paying the amount to such

person who makes no claim to the subject-matter of litigation should not be made a party.[77]

D. Frame of the Bill[78] — 1. Necessary Averments — a. In General. The complainant should state his own rights showing that he is in possession of a fund in dispute as a mere stakeholder, and should state specifically the several claims of the contending parties that it may be seen that they are the fit subject for a bill of interpleader.[79]

b. Complainant's Interest and Status. Complainant should state in his bill that he claims no interest in the subject-matter himself, and should show affirmatively that he stands in the position of a mere stakeholder and is wholly indifferent between defendants.[80]

person, where it had knowledge of the fact that a third person, not a party to such interpleader action, held the legal title to the policy); Leavitt *v.* Fisher, 4 Duer 1. Finlay *v.* American Exch. Bank, 11 How. Pr. 468 (holding that where there is a fund due to an insolvent bank, and the holder of such fund (another bank) brings an interpleader suit against the respective claimants thereto, the proper parties to such suit are the receivers of the insolvent bank, the attaching creditors, and the sheriff, who has attached for them, but not the bill holders or check holders of such bank, because the latter have no lien on the fund, either as assignees in equity or otherwise).

North Carolina.— Miller *v.* Ellison, 38 N. C. 123; Hines *v.* Spruill, 22 N. C. 93.

Texas.— Bolin *v.* St. Louis Southwestern R. Co., (Civ. App. 1901) 61 S. W. 444, holding that where a bill of interpleader is filed, naming the various claimants of the fund in plaintiff's hands, a claimant not made a party by the bill may become so by entering a plea asserting an interest in the fund.

See 29 Cent. Dig. tit. "Interpleader," § 41.

77. *Indiana.*— Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515.

Michigan.— Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086.

Mississippi.— Browning *v.* Watkins, 10 Sm. & M. 482.

New Jersey.— Blake *v.* Garwood, 42 N. J. Eq. 276, 10 Atl. 874.

Vermont.— Gill *v.* Cook, 42 Vt. 140.

See 29 Cent. Dig. tit. "Interpleader," § 41.

78. Bills in equity generally see Equity, 16 Cyc. 216 *et seq.*

79. *Alabama.*— Conley *v.* Alabama Gold L. Ins. Co., 67 Ala. 472.

California.— Warnock *v.* Harlow, 96 Cal. 298, 31 Pa. 166, 31 Am. St. Rep. 209.

Georgia.— Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 99 Ga. 286, 25 S. E. 686.

Kentucky.— Starling *v.* Brown, 7 Bush 164.

Mississippi.— Snodgrass *v.* Butler, 54 Miss. 45; Anderson *v.* Wilkinson, 10 Sm. & M. 601.

New Jersey.— Varrian *v.* Berrien, 42 N. J. Eq. 1, 10 Atl. 875.

New York.— Shaw *v.* Coster, 8 Paige 339, 35 Am. Dec. 690; Mohawk, etc., R. Co. *v.* Clute, 4 Paige 384.

Tennessee.— McEwen *v.* Troost, 1 Sneed 186.

West Virginia.— Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 525.

See 29 Cent. Dig. tit. "Interpleader," § 47.

The bill lies only where the complainant admits some right or interest of defendants in the subject-matter and is unwilling to take the risk of deciding between them. McHenry *v* Hazard, 45 N. Y. 580 [*reversing* 45 Barb. 657]; Cohen *v.* Cohen, 35 Misc. (N. Y.) 206, 71 N. Y. Suppl. 481.

80. *Alabama.*—Kyle *v.* Mary Lee Coal, etc., Co., 112 Ala. 606, 20 So. 851.

Illinois.— Dickinson *v.* Griggsville Nat. Bank, 111 Ill. App. 183. Where it appears that the complainant in a bill of interpleader is under personal obligation to one of defendants in respect to the duty or thing in contest, so that the litigation under the bill will not determine that obligation, the bill must be dismissed. Byers *v.* Sansom-Thayer Commission Co., 111 Ill. App. 575.

Kentucky.— Hopkins *v.* Clayhrook, 5 J. J. Marsh. 234.

Maine.— Castner *v.* Twitchell-Champlin Co., 91 Me. 524, 40 Atl. 558.

Mississippi.— Anderson *v.* Wilkinson, 10 Sm. & M. 601.

Missouri.— Kortjohn *v.* Seimers, 29 Mo. App. 271.

New Jersey.— Williams *v.* Matthews, 47 N. J. Eq. 196, 20 Atl. 261.

New York.— Bernstein *v.* Hamilton, 26 N. Y. App. Div. 206, 49 N. Y. Suppl. 932; Bowery Nat. Bank *v.* New York, 4 N. Y. St. 565.

Tennessee.— McEwen *v.* Troost, 1 Sneed 186; State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 82.

Wisconsin.— Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21, holding that in order to justify an action of interpleader the bill must aver that plaintiff has not acted in a partisan manner as between the claimants.

England.— Cotter *v.* Bank of England, 2 Dowl. P. C. 728, 2 L. J. C. P. 158, 3 Moore & S. 180, 30 E. C. L. 499; Burnett *v.* Anderson, 1 Meriv. 405, 35 Eng. Reprint 723; Mitchell *v.* Hayne, 2 Sim. & St. 63, 25 Rev. Rep. 151, 1 Eng. Ch. 63, 57 Eng. Reprint 268; Cooper *v.* De Tastet, Taml. 177, 12 Eng. Ch. 177, 48 Eng. Reprint 71; Slingsby *v.* Boulton, 1 Ves. & B. 334, 35 Eng. Reprint 130; Langston *v.* Boylston, 2 Ves. Jr. 101, 30 Eng. Reprint 543.

See 29 Cent. Dig. tit. "Interpleader," § 47.

c. Claimants and Nature of Their Claims. The bill should show on its face that there are two or more persons *in esse*, making adverse claims to the fund or thing in dispute, capable of interpleading and litigating their respective rights; and should also state the nature of their several claims.[81] But complainant need not set out the opposing claims with particularity;[82] and he is not obliged to show that a *bona fide* controversy exists between the rival claimants.[83] He should

A bill by a common carrier, setting up a lien for freight, the correctness of which, however, is not shown to have been assented to, and asking that a delivery of the property be conditioned on its payment, does not show such a negation of interest in the matter as to allow complainant to demand the interpleading of the vendor of the consignee under the exercise of his right of stoppage *in transitu*, and of attaching creditors. Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

However, a bill in the nature of a bill of interpleader which states substantial grounds of equitable jurisdiction other than the mere fact that there are conflicting claims set up to a fund in the complainant's hands need not allege or assert by affidavit that the complainant is indifferent between the contesting parties and does not collude with either of them. Carter *v.* Cryer, (N. J. Ch. 1904) 59 Atl. 233; Van Winkle *v.* Owen, 54 N. J. Eq. 253, 34 Atl. 400; Koppinger *v.* O'Donnell, 16 R. I. 417, 16 Atl. 714.

81. *Georgia.*— Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 99 Ga. 286, 25 S. E. 686.

Illinois.— Partlow *v.* Moore, 184 Ill. 119, 56 N. E. 317.

Indiana.— Northwestern Mut. L. Ins. Co. *v.* Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89.

Kentucky.— Starling *v.* Brown, 7 Bush 164; Hopkins *v.* Claybrook, 5 J. J. Marsh. 234.

Mississippi.— Snodgrass *v.* Butler, 54 Miss. 45; Browning *v.* Watkins, 10 Sm. & M. 482.

Missouri.— Kortjohn *v.* Seimers, 29 Mo. App. 271.

New Jersey.— Briant *v.* Reed, 14 N. J. Eq. 271. See also Varrian *v.* Berrien, 42 N. J. Eq. 1, 10 Atl. 875.

New York.— Bassett *v.* Leslie, 123 N. Y. 396, 25 N. E. 386; Brackett *v.* Graves, 30 N. Y. App. Div. 162, 51 N. Y. Suppl. 895; Lennon *v.* Metropolitan L. Ins. Co., 20 Misc. 403, 45 N. Y. Suppl. 1033; Mahro *v.* Greenwich Sav. Bank, 16 Misc. 537, 40 N. Y. Suppl. 29. *Compare* Post *v.* Emmett, 40 N. Y. App. Div. 477, 58 N. Y. Suppl. 129.

Ohio.— Connecticut Mut. L. Ins. Co. *v.* Lea, 10 Ohio S. & C. Pl. Dec. 39, 7 Ohio N. P. 399.

Rhode Island.— Koppinger *v.* O'Donnell, 16 R. I. 417, 16 Atl. 714.

Tennessee.— McEwen *v.* Troost, 1 Sneed 186.

See 29 Cent. Dig. tit. "Interpleader," § 47. See also Story Eq. Pl. § 295.

Rule illustrated.— Accordingly a bill founded on a rumor or a mere expression of belief that there are adverse claimants is fatally defective (Kreiser *v.* New York, 46 N. Y. App. Div. 16, 61 N. Y. Suppl. 329; State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 82; Metcalf *v.* Hervey, 1 Ves. 248, 27 Eng. Reprint 1011); and it is equally defective if it does not state facts showing the court that there is a reasonable doubt as to which of the claimants is entitled to the fund or thing in dispute (Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480; Franklin *v.* Southern R. Co., 119 Ga. 855, 47 S. E. 344; Varrian *v.* Berrien, 42 N. J. Eq. 1, 10 Atl. 875; Hinsdale *v.* Bankers' L. Ins. Co., 72 N. Y. App. Div. 180, 76 N. Y. Suppl. 448; Mars *v.* Albany Sav. Bank, 64 Hun 424, 19 N. Y. Suppl. 791; Michigan Sav. Bank *v.* Coy, 45 Misc. 40, 90 N. Y. Suppl. 814; East India Co. *v.* Edwards, 18 Ves. 376, 34 Eng. Reprint 359). A mere pretext of a conflicting claim will not support the bill; the court is bound to see that there is a question to be tried. Michigan Sav. Bank *v.* Coy, 45 Misc. (N. Y.) 40, 90 N. Y. Suppl. 814; Stephenson *v.* Burdett, 56 W. Va. 109, 48 S. E. 846; Desborough *v.* Harris, 5 De G. M. & G. 439, 3 Eq. Rep. 1058, 1 Jur. N. S. 986, 4 Wkly. Rep. 2, 54 Eng. Ch. 348, 43 Eng. Reprint 940; Cochrane *v.* O'Brien, 8 Ir. Eq. 241, 2 J. & L. 380. It is not necessary that the right claimed by the third party should be an absolute right of property. Harwood *v.* Betham, 1 L. J. Exch. 180.

82. It is sufficient to state the claims made to him in such manner as to satisfy the court that there are opposing claims against which he is in equity entitled to protection until the rights of the claimants can be settled and he can pay with safety. Byers *v.* Sansom-Thayer Commission Co., 111 Ill. App. 575 (holding that the complainant in a bill of interpleader is not presumed to know all of the facts on which defendants severally claim the matter in issue, and is not therefore required to set forth in detail the alleged title of any of them); Supreme Lodge O. M. P. *v.* Raddatz, 57 Ill. App. 119; Robards *v.* Clayton, 49 Mo. App. 608; Stewart *v.* Fallon, (Ch. 1904) 58 Atl. 96; Briant *v.* Reed, 14 N. J. Eq. 271; Crane *v.* McDonald, 2 N. Y. St. 150 (holding that the fact that plaintiff, bringing an action of interpleader, described one of the claimants in his bill as an attaching creditor, where in fact he claimed as an equitable assignee, will not prejudice such claimant's claim, or his right to have the matter adjudicated after an interpleader has been allowed on plaintiff's complaint); Shaw *v.* Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690; State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 82; East India, etc., Dock Co. *v.* Littledale, 7 Hare 57, 27 Eng. Ch. 57.

83. Stevenson *v.* New York L. Ins. Co., 10 N. Y. App. Div. 233, 41 N. Y. Suppl. 964;

either allege that he is ignorant of the respective rights of the claimants or at least state facts showing that there is a reasonable doubt as to which claimant he may safely pay the debt or render the duty.[84] Where only one of the claimants is in a position to enforce the demand against the complainant a bill of interpleader will not lie;[85] and where it appears that the claim of the third person is frivolous or invalid an application for an order to interplead should be denied.[86]

d. Offer to Bring Fund Into Court. Where the subject-matter is money, or other property conveniently capable of manual delivery, the bill should contain an offer to bring it into court.[87]

Nassau Bank *v.* Yandes, 44 Hun (N. Y.) 55; Perkins *v.* Montgomery, 70 N. Y. Suppl. 136.

84. *Alabama.*— Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

Georgia.— Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 99 Ga. 286, 25 S. E. 686.

New Hampshire.— Parker *v.* Barker, 42 N. H. 78, 77 Am. Dec. 789.

New Jersey.— Illingworth *v.* Rowe, 52 N. J. Eq. 360, 28 Atl. 456.

New York.— Shaw *v.* Coster, 8 Paige 339, 35 Am. Dec. 690.

Tennessee.— State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 82.

See 29 Cent. Dig. tit. "Interpleader," § 47.

85. Brown *v.* Bacon, 27 Miss. 589; McCrea *v.* Cook, 1 N. Y. City Ct. 385.

A bill showing on its face that one of defendants has no claim to the debt due from the complainant is demurrable. Pusey, etc., Co. *v.* Miller, 61 Fed. 401.

86. Pustet *v.* Flannelly, 60 How. Pr. (N. Y.) 67.

Thus a bill of interpleader cannot be sustained where it appears from the bill itself that there can be no doubt as to which of defendants is entitled to the debt or duty claimed. Pfister *v.* Wade, 56 Cal. 43; Corning *v.* Strong, Smith (Ind.) 197; Varrian *v.* Berrien, 42 N. J. Eq. 1, 10 Atl. 875; Bassett *v.* Leslie, 123 N. Y. 396, 25 N. E. 386 [*affirming* 57 Hun 588, 10 N. Y. Suppl. 483]; Baltimore, etc. R. Co. *v.* Arthur, 90 N. Y. 234; New York, etc., R. Co. *v.* Haws, 56 N. Y. 175; Nassau Bank *v.* Yandes, 44 Hun 55; Delancy *v.* Murphy, 24 Hun 503; Buffalo Grape Sugar Co. *v.* Alberger, 22 Hun 349; Nassau Bank *v.* Ritzinger, 5 N. Y. St. 309; Mohawk, etc., R. Co. *v.* Clute, 4 Paige 384; McCullen *v.* Metropolitan L. Ins. Co., 2 Pa. Dist. 361; Koppinger *v.* O'Donnell, 16 R. I. 417, 16 Atl. 714.

87. *Connecticut.*— Nash *v.* Smith, 6 Conn. 421.

Indiana.— Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515 (holding that a bill of interpleader is not bad, because plaintiff alleges the bringing into court of a less sum of money than is due, where it contains an offer to pay what is due); McGarrah *v.* Prather, 1 Blackf. 299.

Kentucky.— Starling *v.* Brown, 7 Bush 164.

Louisiana.— Freyhan *v.* Berry, 49 La. Ann. 305, 21 So. 811.

Maryland.— Ammendale Normal Inst. *v.* Anderson, 71 Md. 128, 17 Atl. 1030; Chase *v.* Manhardt, 1 Bland 333.

Michigan.— Look *v.* McCahill, 106 Mich. 108, 63 N. W. 898.

Mississippi.— Blue *v.* Watson, 59 Miss. 619; Snodgrass *v.* Butler, 54 Misc. 45.

New Hampshire.— Parker *v.* Barker, 42 N. H. 8, 77 Am. Dec. 789.

New Jersey.— Supr me Conclave I. O. of H. *v.* Dailey, 61 N. J. Eq. 145, 47 Atl. 277.

New York.— Bassett *v.* Leslie, 123 N. Y. 396, 25 N. E. 386; Beebe *v.* Mead, 101 N. Y. App. Div. 500, 92 N. Y. Suppl. 51 (holding that in a suit by a warehouseman to compel adverse claimants of one thousand chests of tea deposited with him to interplead, it was sufficient for plaintiff to offer to deliver the tea to defendant who should be adjudicated to be its owner, and it was not necessary for him to produce the tea in court or deposit the chests with the clerk); American Press Assoc. *v.* Brantingham, 57 N. Y. App. Div. 399, 68 N. Y. Suppl. 285 (holding that where a corporation brings an interpleader suit to determine whether the person to whom a certificate of its stock has been assigned at the request of the owner thereof or the person who has established a right thereto in an action against the owner is entitled thereto, an order requiring the corporation to deposit a certificate of the same amount of stock with the clerk to await determination of the suit is erroneous, and will be modified by restraining a transfer of the certificate held by defendant, and by directing him to deposit with the clerk); Van Zandt *v.* Van Zandt, 7 N. Y. Suppl. 706, 17 N. Y. Civ. Proc. 448; New York *v.* Flagg, 6 Abb. Pr. 296 (holding that where a city brought action of interpleader against two adverse claimants of a municipal office to determine their rights to the salary, and the question of such right depended solely on the question of title to the office, which was then being litigated in quo warranto proceedings, there was no necessity that plaintiffs should pay into court the amount of such salaries); Shaw *v.* Coster, 8 Paige 339, 35 Am. Dec. 690; Mohawk, etc., R. Co. *v.* Clute, 4 Paige 384; Shaw *v.* Chester, 2 Edw. 405.

Pennsylvania.— Barnes *v.* Bamberger, 196 Pa. St. 123, 46 Atl. 303 (holding that payment of money into court is not a condition precedent to an order for interpleader); Rumbaugh *v.* Petersin, 17 Pa. Co. Ct. 79.

South Carolina.— Williams *v.* Walker, 2 Rich. Eq. 291, 46 Am. Dec. 53.

2. **Prayer For Relief.**[88] The prayer for relief should be that defendants may set forth their several titles, and may interplead and settle and adjust their demands between themselves.[89] The bill also usually prays an injunction to restrain the proceedings of the claimants, or either of them, at law, and this prayer should be accompanied by an offer to bring the money into court.[90]

3. **Verification.**[91] A bill of interpleader should be verified by the affidavit of complainant,[92] but the omission of the verification is an amendable defect.[93]

4. **Affidavit of Non-Collusion.** When a bill of interpleader is filed it should be accompanied by an affidavit of the complainant that there is no collusion between him and any of the parties defendant.[94]

Texas.— Williams *v.* Wright, 20 Tex. 499.

United States.— Gaines *v.* New Orleans, 27 Fed. 411 (holding that in a controversy between an individual on the one side, and several of the departments of a city government on the other, over a fund in the hands of a stakeholder, the equity practice in the federal court requires that the court shall order the fund to be paid into the registry of the court, when all of the parties interested, except one of the city departments, and the stakeholder, unite in asking that the fund be so paid in); Ætna Nat. Bank *v.* U. S. Life Ins. Co., 25 Fed. 531.

Order for payment of fund out of court after the trial of an issue between plaintiff in the original action and third parties, claimants must be entitled of the original action, and not of the issue founded on the interpleader. Stewart *v.* Smith, 1 Phila. (Pa.) 171.

Where only a portion of the fund is in dispute the residue should be paid to the rightful claimant at once and not retained in court until the termination of the litigation. Zihlman *v.* Zihlman, 75 Md. 372, 23 Atl. 1093; Feldman *v.* Grand Lodge A. O. U. W., 19 N. Y. Suppl. 73, 22 N. Y. Civ. Proc. 165. See also Koenig *v.* New York L. Ins. Co., 14 N. Y. Civ. Proc. 269, holding that where it appears that one interpleading in an action in the place of the original defendant as claiming a portion of the fund in suit can in no event be entitled to more than one third thereof, plaintiff, on making a proper application at special term, should be allowed to receive the remainder without awaiting the termination of the action.

88. Prayer for relief in bill generally see Equity, 16 Cyc. 224 *et seq.*

89. Story Eq. Pl. § 297. A bill of interpleader should ask that the several claimants be compelled to interplead and state their several claims, so that the court may adjudge to whom the same debt, duty, or other thing belongs. Chartiers Oil Co. *v.* Moore, 56 W. Va. 540, 49 S. E. 449.

90. Story Eq. Pl. § 297; Mohawk, etc., R. Co. *v.* Clute, 2 Paige (N. Y.) 384; Richards *v.* Salter, 6 Johns. Ch. (N. Y.) 445. See also, generally, Injunctions.

91. Verification of bill generally see Equity, 16 Cyc. 227, 366.

92. Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480; Schneider *v.* Seibert, 50 Ill. 284.

93. Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

94. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Georgia.— Davis *v.* Davis, 96 Ga. 136, 21 S. E. 1002; Tyus *v.* Rust, 37 Ga. 574, 95 Am. Dec. 365.

Illinois.— Byers *v.* Sansom-Thayer Commission Co., 111 Ill. App. 575 (holding that where a bill of interpleader contains an allegation that there is no collusion between the complainant and any of defendants, and such bill is verified by affidavit, it satisfies the rule which requires that the complainant filing such a bill must accompany it with an affidavit stating that there is no collusion between himself and any of the parties); Curtis *v.* Williams, 35 Ill. App. 518.

Kentucky.— Starling *v.* Brown, 7 Bush 164; Biggs *v.* Kouns, 7 Dana 405; Tobin *v.* Wilson, 3 J. J. Marsh. 63.

Maryland.— Ammendale Normal Inst. *v.* Anderson, 71 Md. 128, 17 Atl. 1030.

Michigan.— Bliss *v.* French, 117 Mich. 538, 76 N. W. 73.

Mississippi.— Blue *v.* Watson, 59 Miss. 619; Snodgrass *v.* Butler, 54 Miss. 45.

New Hampshire.— Farley *v.* Blood, 30 N. H. 354.

New York.— Crane *v.* McDonald, 118 N. Y. 648, 23 N. E. 991 (holding that testimony that plaintiff's offer to pay money over upon being indemnified was refused by both parties, taken in connection with his affidavit that the action was brought without collusion with either defendant, or with any person "in their behalf," justifies a finding that plaintiff acted in good faith. Williams *v.* Ætna L. Ins. Co., 8 N. Y. St. 567; Shaw *v.* Coster, 8 Paige 339, 35 Am. Dec. 690.

Oregon.— Fahie *v.* Lindsay, 8 Oreg. 474, holding that where plaintiff in a bill of interpleader stated under oath that there was no collusion between himself and either of defendants, and an order was made by the court requiring defendants to interplead with each other, evidence to prove collusion could not be received after the making of such order.

West Virginia.—Chartiers Oil Co. *v.* Moore, 56 W. Va. 540, 49 S. E. 449.

England.— Bignold *v.* Audland, 5 Jur. 51, 9 L. J. Ch. 266, 11 Sim. 23, 34 Eng. Ch. 23, 59 Eng. Reprint 781; Gibbs *v.* Gibbs, 5 Wkly. Rep. 243.

Affidavit of officer of corporation.— Where

E. Amendments.[95] An objection which goes rather to the frame of the bill than to its substantial equity may be cured by amendment.[96] But a bill cannot be so amended as to bring in a new party whose claim was unknown at the time of filing the original bill.[97]

F. Defendants' Pleadings and Motions Before Hearing — 1. Demurrer.[98] A bill which fails to show on its face a proper case for an interpleader is bad on demurrer.[99] And if complainant states a case in his bill which shows that one of

a bill of interpleader is filed by the officer of a company on behalf of the company, the affidavit annexed ought to state, not that plaintiff does not collude, but that, to the best of his knowledge and belief, the company do not collude with defendants. Bignold *v.* Audland, 5 Jur. 51, 9 L. J. Ch. 266, 11 Sim. 23, 34 Eng. Ch. 23, 59 Eng. Reprint 781, 10 L. J. Ch. 91.

Affidavit of solicitor.— Plaintiff in an interpleader suit being abroad, leave was given, *valeat quantum*, to file the bill without his affidavit of no collusion, but with an affidavit by his solicitor of his belief that there was no collusion. Larabrie *v.* Brown, 1 De G. & J. 204, 26 L. J. Ch. 605, 5 Wkly. Rep. 538, 58 Eng. Ch. 159, 44 Eng. Reprint 702 [*affirming* 23 Beav. 607, 53 Eng. Reprint 239]. Where in an interpleader suit there are several plaintiffs residing in different parts of the country, and there is evidence that they all conducted their business through the same agent and solicitor in London, the court will allow the bill to be filed upon an affidavit of no collusion by such agent and solicitor only, but will not thereupon grant the ordinary injunction till the hearing, but merely an interim order for a reasonable time upon an understanding that plaintiffs will themselves in the meantime make the requisite affidavit. Nelson *v.* Barter, 2 Hem. & M. 344, 10 Jur. 611, 10 L. T. Rep. N. S. 491 [*affirmed* in 10 Jur. 832, 33 L. J. Ch. 705, 12 Wkly. Rep. 999].

Affidavit of some of several complainants. — Where it appeared that there was not sufficient time subsequently to settling the bill for all of plaintiffs to make the usual affidavit as to collusion between themselves and defendants, the court permitted the bill to be filed upon the affidavit of some of plaintiffs only. Glover *v.* Reynolds, 16 L. T. Rep. N. S. 84.

In Connecticut it is not necessary to annex this affidavit to the bill. Green's Farms Consociated Presb. Soc. *v.* Staples, 23 Conn. 544; Nash *v.* Smith, 6 Conn. 421.

95. Amendment of bill generally see Equity, 16 Cyc. 335 *et seq.*

96. *Alabama.*— Kyle *v.* Mary Lee Coal, etc, Co., 112 Ala. 606, 20 So. 851; Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480; Conley *v.* Alabama Gold L. Ins. Co., 67 Ala. 472.

California.—Orient Ins. Co. *v.* Reed, 81 Cal. 145, 22 Pac. 484.

Delaware.— Hastings *v.* Cropper, 3 Del. Ch. 165.

New Jersey.— Briant *v.* Reed, 14 N. J. Eq. 271.

Texas.— Williams *v.* Wright, 20 Tex. 499.

See 29 Cent. Dig. tit. "Interpleader," § 53.

97. Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086; Wolf's Appeal, 4 Pa. Cas. 307, 7 Atl. 163.

98. Demurrer in equity generally see Equity, 16 Cyc. 261 *et seq.*

99. *Alabama.*— Meyer *v.* Bloch, 139 Ala. 174, 35 So. 705 (holding that a motion to strike an affidavit for interpleader is not a pleading, and hence cannot be attacked by demurrer); Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

Georgia.— Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 99 Ga. 286, 25 S. E. 686.

Illinois.— Hellman *v.* Schneider, 75 Ill. 422.

Maryland.— Home L. Ins. Co. *v.* Caulk, 86 Md. 385, 38 Atl. 901.

Massachusetts.— Sprague *v.* West, 127 Mass. 471.

Mississippi. — Browning *v.* Watkins, 10 Sm. & M. 482.

Missouri.— Cheever *v.* Hodgson, 9 Mo. App. 565.

New York.— Baker *v.* Brown, 64 Hun 627, 19 N. Y. Suppl. 258; Cromwell *v.* American L. & T. Co., 57 Hun 149, 1 N. Y. Suppl. 144; U. S. Trust Co. *v.* Wiley, 41 Barb. 477.

North Carolina.— Barker *v.* Swain, 57 N. C. 220.

Rhode Island.— Providence Bank *v.* Wilkinson, 4 R. I. 507, 70 Am. Dec. 160.

Tennessee.— Carroll *v.* Parkes, 1 Baxt. 269.

Vermont.— Lincoln *v.* Rutland, etc., R. Co., 24 Vt. 639.

Washington. — Carstens *v.* Gustin, 19 Wash. 403, 53 Pac. 550.

See 29 Cent. Dig. tit. "Interpleader," § 51.

Demurrer should be sustained: Where it appears by the bill that the complainant has a complete remedy at law. McDonald *v.* Allen, 37 Wis. 108, 19 Am. Rep. 754. Where the bill does not show that the complainant stands in such relation to the property as to make him an indifferent stakeholder. Stone *v.* Reed, 152 Mass. 179, 25 N. E. 49. Where the complainant failed to file an affidavit of non-collusion with any of defendants. Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Davis *v.* Davis, 96 Ga. 136, 21 S. E. 1002; Briggs *v.* Kouns, 7 Dana (Ky.) 405; Home L. Ins. Co. *v.* Caulk, 86 Md. 385, 38 Atl. 901; Bliss *v.* French, 117 Mich. 538, 76 N. W. 73 (holding, where a bill of interpleader showed that complainants were partners, that the affidavit of non-collusion was sufficient, although sworn to by one of them); Blue *v.* Watson, 59 Miss.

defendants is entitled to the debt or duty, both defendants may demur; the one on the grounnd that the complainant has a perfect defense at law against his claim, and the other on the ground that the complainant has neither a legal nor an equitable defense to his claim, and has therefore no right to call upon him to interplead with a third person who claims without right.[1] Where the bill shows affirmatively that neither of defendants is entitled to the money, a demurrer by either of them will be sustained which will virtually decide the cause as to both.[2] If defendants interplead without objection and go to trial on the issues, it is too late to raise the objection that the case is not a proper one for interpleader.[3] But a party is not always obliged to challenge the sufficiency of the bill by demurrer. There are cases in which he may safely answer and rely on the insufficiency of the evidence.[4]

2. MOTION TO DISMISS. Where the bill shows affirmatively that the case is not a proper one for interpleader, and it appears that it is not amendable so as to state a proper case, it may be dismissed on motion for want of equity.[5]

3. MOTION TO MAKE MORE DEFINITE AND CERTAIN. Where the allegations of the complaint are not as full and clear as could be desired, the remedy is not by demurrer but by motion that the complaint be made more definite and certain.[6]

619; Snodgrass *v.* Butler, 54 Miss. 45; Mt. Holy, etc., Turnpike Co. *v.* Ferree, 17 N. J. Eq. 117; Shaw *v.* Chester, 2 Edw. 405); but this has been disputed (Green's Farms Consociated Presb. Soc. *v.* Staples, 23 Conn. 544; Nash *v.* Smith, 6 Conn. 421; Nofsinger *v.* Reynolds, 52 Ind. 218). The fact that the money has not been paid into court and the bill contains no offer to bring it in has been considered ground for demurrer (McGarrah *v.* Prather, 1 Blackf. (Ind.) 299; Barroll *v.* Foreman, 86 Md. 675, 39 Atl. 273; Home L. Ins. Co. *v.* Caulk, 86 Md. 385, 38 Atl. 901; Parker *v.* Barker, 42 N. H. 78, 77 Am. Dec. 789); but in other cases this is not considered sufficient ground for demurrer, although the court may order the complainant to bring it in on the application of either of defendants (Nash *v.* Smith, 6 Conn. 421; Blue *v.* Watson, 59 Miss. 619. But see Snodgrass *v.* Butler, 54 Miss. 45).

Demurrer too broad.— If the bill states a proper case for interpleader as between two of defendants, but fails as to a third, a demurrer to the whole bill is too broad, it should be confined to the defective part of the bill. State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 82.

General demurrer when insufficient.— Although a bill cannot be maintained as a strict interpleader, yet, if there are other grounds for equitable relief stated in the adjustment of which a court of equity can give more adequate relief than a court of law, a general demurrer for want of equity is properly overruled. Hatfield *v.* McWhorter, 40 Ga. 269. So the omission to offer to bring fund into court must be specifically assigned in order that the proper amendment may be made. A general demurrer will not do. Williams *v.* Wright, 20 Tex. 499.

1. *Alabama.*— Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

Kentucky.— Starling *v.* Brown, 7 Bush 164.

New Hampshire.— Parker *v.* Barker, 42 N. H. 78, 77 Am. Dec. 789.

New Jersey.— Ter Knile *v.* Reddick, (Ch. 1898) 39 Atl. 1062; Briant *v.* Reed, 14 N. J. Eq. 271; Blair *v.* Porter, 13 N. J. Eq. 267.

New York.— Bassett *v.* Leslie, 123 N. Y. 396, 25 N. E. 286; Shaw *v.* Coster, 8 Paige 339, 35 Am. Dec. 690.

See 29 Cent. Dig. tit. "Interpleader," § 51.

2. Barker *v.* Swain, 57 N. C. 220.

On holding a complaint in the nature of a bill of interpleader insufficient on demurrer by all defendants but one, the suit may be dismissed as to all, where the object of the suit would be frustrated unless the demurring defendants be required to interplead. Union Trust Co. *v.* Stamford Trust Co., 72 Conn. 86, 43 Atl. 555.

3. Victor Camp W. of W. *v.* Rutledge, 133 Cal. 640, 65 Pac. 1105.

4. Partlow *v.* Moore, 184 Ill. 119, 56 N. E. 317.

5. Kyle *v.* Mary Lee Coal, etc., Co., 112 Ala. 606, 20 So. 851; Varrian *v.* Berrien, 42 N. J. Eq. 1, 10 Atl. 875; Quinn *v.* Patton, 37 N. C. 48; Holmes *v.* Clark, 46 Vt. 22.

If the danger be removed before final decree, the equity on which the bill relies will entirely fail, and the bill will be dismissed, although at the time of filing a bill of interpleader the complainant may have been really in danger of a twofold responsibility. Kern *v.* Union Bank, 18 Md. 396.

6. Crane *v.* McDonald, 118 N. Y. 648, 23 N. E. 991; Van Zandt *v.* Van Zandt, 7 N. Y. Suppl. 706, 17 N. Y. Civ. Proc. 448; Baltimore, etc., R. Co. *v.* Arthur, 10 Abb. N. Cas. (N. Y.) 147. Where, in a proceeding for an interpleader, the petition avers that two of defendants set up title to the note sued on as assignees for value, and demanded its proceeds from plaintiffs, and that the other defendant, the original payee of the note, claimed to be still the owner, and disclaims any interest in plaintiffs, and alleges that

4. Answer.[7] Defendants may by answer disclaim all interest in the fund, admit the complainant's right to file the bill, deny every averment upon which the bill rests for relief as a bill of interpleader, or set up distinct facts in bar of the relief prayed.[8] Any defendant may in his answer deny the allegations of the bill or set up new matter in bar of the relief sought.[9] But it seems that the amount of the fund or matter in the hands of the complainant, upon which hostile claims are alleged to have been made, must be taken to be as stated by the complainant, and cannot be controverted by the answers for the purpose of having it adjudicated.[10] Defendants are entitled to aver and prove any facts which show that the complainant is not entitled to maintain his bill; but upon a strict bill of interpleader any part of an answer calling for specific relief against the complainant should be stricken out on motion.[11]

5. Cross Bill.[12] Where no affirmative relief is sought against complainant a

they do not know the fact as to ownership of the rival claimants, and prays for an interpleader as to their respective rights and claims, it alleges, in the absence of a motion to make more definite, all of the substantive facts of a bill of interpleader. Funk *v.* Thomasson, 84 Mo. App. 490.

7. Answer in equity generally see Equity, 16 Cyc. 297 *et seq.*

8. *Alabama.*— Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

Illinois.— Sachsel *v.* Farrar, 35 Ill. App. 277.

Indiana.— Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515.

New Jersey.— Williams *v.* Matthews, 47 N. J. Eq. 196, 20 Atl. 261; Wakeman *v.* Kingsland, 46 N. J. Eq. 113, 18 Atl. 680; Hall *v.* Baldwin, 45 N. J. Eq. 858, 18 Atl. 976.

New York.— Shaw *v.* Coster, 8 Paige 339, 35 Am. Dec. 690.

North Carolina.— Quinn *v.* Patton, 37 N. C. 48.

See 29 Cent. Dig. tit. "Interpleader," § 50.

Disclaimer.— The proper way to set up the fact that the subject of plaintiff's action is not claimed by one who has been made a defendant by interpleader is by answer, disclaimer, or failure to plead at all, and not by motion to set aside or modify the order of interpleader. Such order may be made by the court on the affidavit of the principal debtor, and it is not for any alleged claimant to question that order. Franklin Bank *v.* Cincinnati, 10 Ohio S. & C. Pl. Dec. 545, 8 N. P. 517.

Counter-claim.— Where a complaint in the nature of a bill of interpleader alleged that a deposit was made in plaintiff's bank subject to depositor's order, with the privilege in E to draw on the fund for the completion of a certain building, a counter-claim alleging that plaintiff had accepted an order drawn by E in defendant's favor on the fund is demurrable for failure to show that the order was given for payment of bills due on the house, or any consideration for the order or its acceptance. National Sav. Bank *v.* Cable, 73 Conn. 568, 48 Atl. 428.

If defendants answer when they might have demurred successfully they can be allowed only such costs as might have been allowed on demurrer. Shaw *v.* Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690; Quinn *v.* Patton, 37 N. C. 48.

9. Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515; Williams *v.* Matthews, 47 N. J. Eq. 196, 20 Atl. 261; Wakeman *v.* Kingsland, 46 N. J. Eq. 113, 18 Atl. 680.

Every averment upon which the bill rests for relief as a bill of interpleader may be denied. When the answer denies the facts upon which the bill depends as a bill of interpleader, plaintiff is put to his proof before the case is ready for a decree as to whether the respondents should be required to interplead. Cress *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

Immaterial denials.— Denial of the allegations of the complaint as to the facts on which the claims of defendants are based is immaterial, since this is a matter to be litigated between them in case they are decreed to interplead. Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

Pleading contract.— Where a party, sued as having funds in his possession belonging to plaintiff, answers that the fund is claimed by B under a contract with plaintiffs, and pleads such contract, it is not necessary for the other claimant in his answer to make such contract a part of the pleading. Irvin *v.* Ratliff, 94 Ind. 583.

10. Adams *v.* Dixon, 19 Ga. 513, 65 Am. Dec. 608; Williams *v.* Matthews, 47 N. J. Eq. 196, 20 Atl. 261; Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

Amount of the fund in the hands of plaintiff, as stated in the bill, cannot be denied in the answer, except for the purpose of showing fraud or collusion on the part of plaintiff. Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

Where one defendant makes a claim beyond the amount admitted to be due and paid into court, and which is not claimed by the other defendants, he will be permitted to proceed at law to establish his right to that part of his demand which is not in controversy with the other defendants. City Bank *v.* Bangs, 2 Paige (N. Y.) 570.

11. Williams *v.* Matthews, 47 N. J. Eq. 196, 20 Atl. 261; Wakeman *v.* Kingsland, 46 N. J. Eq. 113, 18 Atl. 680.

12. Cross bill generally see Equity, 16 Cyc. 324 *et seq.*

cross bill is not admissible, for each defendant may have all the relief to which he is entitled without it upon his answer alone.[13] But where a defendant claims a larger sum than is admitted in the bill and seeks affirmative relief against the complainant, it is proper to file a cross bill in order to bring all the equities of the parties before the court.[14]

6. WAIVER OF OBJECTIONS TO BILL. Objections to a bill of interpleader that the complainant did not annex an affidavit that there was no collusion between him and any of the claimants;[15] that complainant did not offer to bring the property in controversy into court;[16] that the respective claims of defendants were not set out,[17] and that after defendants had interpleaded no replication was filed[18] are formal objections which should be taken by demurrer, and are waived by going to a hearing on the merits.

G. Replication.[19] Until the complainant is discharged he is more than a mere nominal party, and a decree in relation to his right to file the bill is first to be made. He has no right in the matter in controversy, but still there is something to be settled between him and defendants before the latter can litigate together. Hence if defendants admit the right of the complainant to file the bill and set up no defense which requires the taking of testimony, he should file a replication and then set down the cause for hearing and for a decree that they interplead and settle the matter between themselves; and the court then discharges the complainant with his costs and orders that defendants interplead.[20] But when the answers deny the facts upon which the bill depends as a bill of interpleader, the complainant is put to his proof before the case is ready for a decree as to whether defendants should be required to interplead.[21] Consequently if defendants put in answers denying the allegations of the bill or set up new matter in bar of the proceeding, the complainant must file a replication, where by the rules of pleading a reply is necessary, and the issues raised must be tried, in order to determine the preliminary question of the complainant's right to file the bill.[22]

13. Sammis *v.* L'Engle, 19 Fla. 800. See also Los Angeles *v.* Amidor, 140 Cal. 400, 73 Pac. 1049.

In a strict interpleader suit defendant cannot have relief by cross bill against the complainant. The only relief which can be given to a defendant in such a suit, as against the complainant, is a dismissal of the complainant's bill, and that a defendant may always obtain on answer alone and without a cross bill. Wakeman *v.* Kingsland, 46 N. J. Eq. 113, 18 Atl. 680.

Where a defendant defaults.— A cross bill in an interpleader suit is not necessary to sustain a decree for a successful defendant as against defendants who have defaulted. McNamara *v.* Provident Sav. L. Assur. Soc., 114 Fed. 910, 52 C. C. A. 530.

When the subject of the action by the plaintiff, as shown by his petition, is different from the subject of the action, as shown by the answer and cross petition of a third party who has been brought in to interplead, no interpleader should be allowed; and such answer and cross petition should be stricken from the files and the action proceed between the original parties. Johnston *v.* Oliver, 51 Ohio St. 6, 36 N. E. 458.

14. Owen *v.* Apel, 68 Ill. 391.

15. Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Biggs *v.* Kouns, 7 Dana (Ky.) 405; Cobb *v.* Rice, 130 Mass. 231.

Where an order to interplead is made without objection, and the interplea is heard on its merits, the fact that the chancellor might have required an affidavit of non-collusion before making the order is immaterial. Merchant's Nat. Bank *v.* Richards, 74 Mo. 77 [*affirming* 6 Mo. App. 454].

16. Cobb *v.* Rice, 130 Mass. 231.

17. Cobb *v.* Rice, 130 Mass. 231.

18. Cobb *v.* Rice, 130 Mass. 231.

19. Replication to bill generally see EQUITY, 16 Cyc. 320.

20. City Bank *v.* Bangs, 2 Paige (N. Y.) 570; Leonard *v.* Jamison, 2 Edw. (N. Y.) 136.

21. Crass *v.* Memphis, etc., R. Co., 96 Ala. 447, 11 So. 480.

22. *Connecticut.*— Bristol Sav. Bank *v.* Holley, 77 Conn. 225, 58 Atl. 691, holding that an answer to a bill of interpleader not replied to by any of the parties interpleading must be taken as true.

Minnesota.— Cullen *v.* Dawson, 24 Minn. 66.

Missouri.— Glasner *v.* Weisberg, 43 Mo. App. 214.

New Jersey.— Hall *v.* Baldwin, 45 N. J. Eq. 858, 18 Atl. 976.

New York.— City Bank *v.* Bangs, 2 Paige 570.

England.— Bolton *v.* Williams, 4 Bro. Ch. 297, 29 Eng. Reprint 901, 7 Rev. Rep. 286.

H. Bill in the Nature of a Bill of Interpleader. A bill in the nature of a bill of interpleader is distinguished from a bill of interpleader proper in that there are grounds of equitable jurisdiction other than the mere right to compel defendants to interplead, and the complainant may seek some affirmative equitable relief.[23]

I. Injunctive Relief.[24] In a proper case for a bill of interpleader the complainant may have an injunction restraining the claimants from further prosecution of their actions at law pending the litigation under the interpleader, provided he brings the fund in dispute into court.[25]

J. Payment Into Court Stops Interest.[26] Where a bill of interpleader is

287, 2 Ves. Jr. 138, 30 Eng. Reprint 561; Brymer *v.* Buchanan, 1 Cox Ch. 425, 29 Eng. Reprint 1232.

23. *Georgia.*— Steed *v.* Savage, 115 Ga. 97, 41 S. E. 272.

Mississippi.— Blue *v.* Watson, 59 Miss. 619, holding that a bill in the nature of an interpleader is maintainable, where the complainant is entitled on payment of the money to independent relief in addition to a discharge from liability to the adverse claimants; as, for instance, to enforce an equity of redemption when it is doubtful who owns the mortgage.

Nevada.— Orr Water Ditch Co. *v.* Larcombe, 14 Nev. 53.

New Jersey.— Carter *v.* Cryer, (Ch. 1904) 59 Atl. 233; Illingsworth *v.* Rowe, 52 N. J. Eq. 360, 28 Atl. 456.

New York.— Mohawk, etc., R. Co. *v.* Clute, 4 Paige 384 (holding that where there are other grounds of equitable jurisdiction in the case besides a mere right on the part of plaintiff to compel defendants to interplead, as where he is entitled to relief against the legal owner of the property and the legal title is in dispute, he may file a bill in the nature of a bill of interpleader and for relief against both claimants); Bedell *v.* Hoffman, 2 Paige 199.

West Virginia.— Stephenson *v.* Burdett, 56 W. Va. 109, 48 S. E. 846.

United States.— New York Provident Sav. L. Assur. Soc. *v.* Loeb, 115 Fed. 357; McNamara *v.* New York Provident Sav. L. Assur. Soc., 114 Fed. 910, 52 C. C. A. 530, holding that where a bill is good as in the nature of a bill of interpleader, and shows equities in favor of complainant entitling it to relief, a demurrer thereto should be overruled, even though it be not good as a pure bill of interpleader.

A bill in the nature of a bill of interpleader differs from a bill of interpleader in that the complainant by it seeks, not only to have the conflicting claims of defendants against himself, which he desires to discharge to the proper parties, adjudicated, but also some affirmative relief. Brocklebank *v.* Lasher, 109 Ill. App. 627.

24. Injunctive relief generally see INJUNCTIONS.

25. *Georgia.*— Atlanta *v.* McDaniel, 96 Ga. 190, 22 S. E. 896; James *v.* Sams, 90 Ga. 404, 17 S. E. 962.

Illinois.— Curtis *v.* Williams, 35 Ill. App. 518.

Maryland.— Weikel *v.* Cate, 58 Md. 105.

Michigan.— Bliss *v.* French, 116 Mich. 538, 76 N. W. 73, holding that complainants in a bill of interpleader, offering to pay the fund in dispute into court, are entitled to an injunction to restrain defendants from bringing their several actions to enforce their respective claims, only on bringing the money into court.

Mississippi.— Quin *v.* Hart, 85 Miss. 71, 37 So. 553.

Nebraska.— Hartford L., etc., Ins. Co. *v.* Cummings, 50 Nebr. 236, 69 N. W. 782.

New Jersey.— Fitzgerald *v.* Elliott, (Ch. 1889) 18 Atl. 579; Kuhl *v.* Traphagen, 9 N. J. L. J. 343.

New York.— New England Mut. L. Ins. Co. *v.* Odell, 50 Hun 279, 2 N. Y. Suppl. 873 (holding that where a life-insurance company admits that the amount insured is due on the policy, but denies a claim for dividends thereon, it cannot, in an action of interpleader against the claimants under the policy, tender the former amount, and enjoin the bringing of an action for dividends; the amount due from plaintiff not being the proper subject of controversy in such an action); Buffalo Grape Sugar Co. *v.* Alberger, 22 Hun 349; Mercantile Safe-Deposit Co. *v.* Dimon, 25 N. Y. Suppl. 388; New England Mut. L. Ins. Co. *v.* Keller, 7 N. Y. Civ. Proc. 109 (holding that where moneys due on a policy of insurance are claimed by the widow of the insured, by the administrator of the estate, and one half thereof by the insured's assignee for the benefit of creditors, the insurer may have an order staying proceedings in an action by the widow on such claim pending the trial of an interpleader action to determine their rights); New York *v.* Flagg, 6 Abb. Pr. 296; City Bank *v.* Bangs, 2 Paige 570 (holding that where one of defendants, in his answer to a bill of interpleader, made a claim against complainant beyond the amount admitted to be due, and which was not claimed by the other defendant, an injunction against his action at law to recover such excess would not be granted).

England.— Hills *v.* Renny, 5 Ex. D. 313, 49 L. J. Exch. 710, 42 L. T. Rep. N. S. 610, 29 Wkly. Rep. 328; Winter *v.* Bartholomew, 11 Exch. 704, 25 L. J. Exch. 62, 4 Wkly. Rep. 264; Carpenter *v.* Pearce, 27 L. J. Exch. 143.

See 29 Cent. Dig. tit. "Interpleader," § 46.

26. Payment of money into court generally see DEPOSITS IN COURT, 13 Cyc. 1030. See also *supra*, II, D, 1, d.

properly filed, the payment of the money into court stops the running of interest;[27] but if the fund is not paid into court it is proper to compute interest up to the rendition of the final decree.[28]

K. The Hearing and Relief Granted[29] — **1. Complainant Cannot Be Heard as to His Liability.** On a bill of interpleader complainant cannot be heard as to his liability, since it assumes that he is merely a stakeholder and stands impartial between the claimants.[30]

2. Effect of Disclaimer or Default. A bill of interpleader necessarily admits the indebtedness of complainant, and if one of two parties defendant withdraws all claim to the fund a decree that it be paid to the other is a matter of course.[31] Where one of defendants fails to interplead and is defaulted, the other, if he has answered, is entitled to the fund deposited in court and the complainant has no right to dispute his claim.[32] But when an execution creditor summoned by the sheriff to interplead does not appear, although the property seized may be released to the claimant, the court cannot bar the creditor's claim against the judgment debtor.[33] And where a defendant has appeared and admitted the complainant's right to file the bill, his claim cannot be barred without directing an issue between the claimants unless he disclaims.[34]

27. Clinton Bridge, etc., Works *v.* Darlington First Nat. Bank, 103 Wis. 117, 79 N. W. 47.

Where a bank is sued by adverse claimants to the same deposit, one of the claimants being the holder of a check which the bank refused to honor, and the suit of the claimant being for the amount of the deposit and interest, an order of interpleader discharging the bank on payment of the amount of the deposit into court, without requiring also payment of interest on the deposit, is erroneous. Helene *v.* Corn Exch. Bank, 96 N. Y. App. Div. 392, 89 N. Y. Suppl. 310.

28. Converse *v.* Ware Sav. Bank, 152 Mass. 407, 25 N. E. 733.

29. The burden of proof is upon claimant. Grass, etc., Mfg. Co. *v.* Gerhard, 11 Fed. Cas. No. 5,843.

30. Connecticut Mut. L. Ins. Co. *v.* Tucker, 23 R. I. 1, 49 Atl. 26, 91 Am. St. Rep. 590. After the order to interplead and the payment of the money into court he has no right to participate further in the litigation or object to any ruling or decision affecting the claimants only. National L. Ins. Co. *v.* Pingrey, 141 Mass. 411, 6 N. E. 93; Houghton *v.* Kendall, 7 Allen (Mass.) 72; St. Louis L. Ins. Co. *v.* Alliance Mut. L. Ins. Co., 23 Minn. 7; Lippman *v.* Warren, 94 Mo. App. 486, 68 S. W. 225.

31. Knight *v.* Yarborough, 7 Sm. & M. (Miss.) 179; Quakertown, etc., R. Co. *v.* Guarantors' Liability Indemnity Co., 209 Pa. St. 121, 58 Atl. 277.

32. *Alabama.*— Johnson *v.* Maxey, 43 Ala. 521.

Illinois.— Cogswell *v.* Armstrong, 77 Ill. 139.

Michigan.— Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086.

New York.— Washington L. Ins. Co. *v.* Lawrence, 28 How. Pr. 435.

United States.— McNamara *v.* Provident Sav. L. Assur. Soc., 114 Fed. 910, 52 C. C. A. 530, holding that where one defendant in a bill of interpleader establishes his title, and the other makes default, the court will decree payment of the fund, less plaintiff's costs, to the former, and a perpetual injunction against the latter, and also that he pay the costs of the former, together with the costs paid plaintiff.

England.— Ford *v.* Dilly, 5 B. & Ad. 885, 2 N. & M. 662, 27 E. C. L. 372 (holding that claimants neglecting to appear are precluded by the terms of the rule from enforcing their claims); Lucas *v.* London Dock Co., 4 B. & Ad. 378, 24 E. C. L. 170. See also Williams *v.* Richardson, 36 L. T. Rep. N. S. 505.

33. Doble *v.* Cummins, 7 A. & E. 580, 7 L. J. Q. B. 12, 2 N. & P. 575, W. W. & D. 682, 34 E. C. L. 309; Donniger *v.* Hinxman, 2 Dowl. P. C. 424.

Misconduct.— Where the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequently to the seizure, the court made an order that the execution creditor should be barred against the claimant, and the goods restored to the latter; the claimant to be at liberty to bring an action against the sheriff for misconduct, provided it should not turn out that he had been guilty of any; and also if there had been any misconduct in the execution creditor in giving directions to the sheriff, to bring an action against him. Lewis *v.* Jones, 2 Gale 211, 6 L. J. Exch. 51, 2 M. & W. 203.

34. McFarland *v.* Creath, 35 Mo. App. 112. To a bill of interpleader one of defendants demurred, and the other appeared, but did not demur or answer, but confessed the allegations of the bill. The court overruled the demurrer and sustained the bill, and thereupon, without other decree, ordered and decreed that the fund belonged to the demurrant, and that the same be paid to him. It was held error, in that such confession of the allegations of the bill was not

3. MODE OF TRIAL. The court in disposing of the questions in dispute is at liberty to adopt any recognized method of trial which will best accomplish justice in the particular case.[35]

4. DECREE[36] — a. Preliminary. Where a bill of interpleader is filed the better practice is first to determine whether such bill will lie. If it will not, it is useless to go further.[37] If it will, then upon bringing the property in dispute into court, the complainant is discharged from further liability, with his costs,[38] and the court orders that defendants interplead and litigate the matter in dispute between themselves, which in effect becomes a new and independent proceeding, as between a complainant and a defendant.[39]

a relinquishment of that defendant's claim to the fund, and a consent that it might go to the demurrant. Brattleboro First Nat. Bank *v.* West River R. Co., 46 Vt. 633.

35. Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269.

Trial by jury see JURIES.

A person sued before a justice of the peace may interplead adverse claimants either in the justice's court or on appeal where there is a trial *de novo*. Geller *v.* Puchta, 1 Ohio Cir. Ct. 30, 1 Ohio Cir. Dec. 18. Miss. Code (1871), § 656, allowing a party sued to disclaim interest and suggest a new claimant, who shall be made defendant in his stead, is as applicable to actions in justice of the peace courts as to actions in circuit courts. Moore *v.* Ernst, 54 Miss. 642.

Appellate court must try the case de novo, a bill of interpleader being of purely equitable cognizance. Duke *v.* Duke, 93 Mo. App. 244.

36. Decree in equity generally see EQUITY, 16 Cyc. 471 *et seq.*

37. **The only relief which can be given to a defendant** in interpleader, as against the complainant, is a dismissal of the complainant's bill, and this defendant may obtain on answer alone and without cross bill. Wakeman *v.* Kingsland, 46 N. J. Eq. 113, 18 Atl. 680.

38. **The only decree which can be made in favor of the complainant** and against defendants in a strict interpleader suit is that the complainant's bill was properly filed, giving him leave to bring the property in dispute into court, and allowing him costs out of the property, discharging him from further liability and directing defendants to interplead and settle the conflicting claims which they set up to the property among themselves. Newhall *v.* Kastens, 70 Ill. 156; Wakeman *v.* Kingsland, 46 N. J. Eq. 113, 18 Atl. 680. And where defendants do not contest the complainant's right to file the bill, this preliminary decree may be made without the taking of testimony. City Bank *v.* Bangs, 2 Paige (N. Y.) 570; Leonard *v.* Jamison, 2 Edw. (N. Y.) 136; Oppenheim *v.* Wolf, 3 Sandf. Ch. (N. Y.) 571; State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100.

Complainant does not occupy the position of an ordinary litigant, and is not required to prove the allegations of his bill that each defendant claims the fund, and he does not know to whom to pay it, merely because one defendant denies such allegations, where he offers to bring the money into court, and the answers disclose the fact that each defendant claims it. Morrill *v.* Manhattan L. Ins. Co., 82 Ill. App. 410.

The amount of the fund is not an issue to be settled by decree, although it may be inquired into, to ascertain whether the complainant can maintain the suit. Williams *v.* Matthews, 47 N. J. Eq. 196, 20 Atl. 261.

Where it appears that each defendant has claimed the fund in dispute, as shown by the answers to the bill, no further proof of the fact is necessary to entitle the complainant to a decree. Balchen *v.* Crawford, 1 Sandf. Ch. (N. Y.) 380.

Where one of the alleged claimants files a disclaimer, there being no contest among the original defendants, a decree that the fund remain in the register's hands until other claimants are brought in is erroneous. Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086.

39. *Arkansas.*— Temple *v.* Lawson, 19 Ark. 148.

California.— Where a bank interpleaded several parties in relation to the ownership of a fund in its hands, and defendants, without taking issue with plaintiff as to its right to compel them to interplead, litigated their claims thereto, and an interlocutory decree dismissing plaintiff from the cause was entered, plaintiff was released from any contract in relation thereto, and defendants could not afterward object to plaintiff's dismissal on payment of the fund into the court. San Francisco Sav. Union *v.* Long, 123 Cal. 107, 55 Pac. 708.

District of Columbia.— Lamon *v.* McKee, 7 Mackey 446.

Florida.—Sammis *v.* L'Engle, 19 Fla. 800.

Georgia.— Andrews *v.* Halliday, 63 Ga. 263.

Maine.— Gardiner Sav. Inst. *v.* Emerson, 91 Me. 535, 40 Atl. 551.

Michigan.— People's Sav. Bank *v.* Look, 95 Mich. 7, 54 N. W. 629.

Minnesota.— Cullen *v.* Dawson, 24 Minn. 66.

Missouri.— Glasner *v.* Weisberg, 43 Mo. App. 214. On a bill of interpleader there arise two litigations — one between plaintiff and all the defendants, as to whether they shall interplead; the other between defendants in case the order goes for plaintiff. Each litigation requires separate, dis-

b. Final. If the issues between defendants are ripe for decision, the court may at a single hearing dispose of the whole controversy, including as well the issues between the complainant and defendants as the issues between defendants themselves,[40] and make a final decree settling the rights of all parties at once;[41] and where sufficient appears on the pleadings to enable the court to adjudge between defendants it will proceed at once.[42] If, however, upon the discharge of the complainant the case is not ripe for hearing between the claimants the court should order an action or an issue formed between defendants as to their respective rights to the fund, and may order a reference to a master to ascertain and settle their rights, and upon the trial of this issue a final decree as between defendants is rendered.[43]

tinct pleadings. Duke *v.* Duke, 93 Mo. App. 244.

New Hampshire.— Farley *v.* Blood, 30 N. H. 354.

New Jersey.— Supreme Council O. of C. F. *v.* Bennett, 47 N. J. Eq. 39, 19 Atl. 785; Willson *v.* Salmon, 45 N. J. Eq. 257, 17 Atl. 815; Rowe *v.* Matteson, 7 N. J. Eq. 131.

New York.— Mason *v.* Rice, 85 N. Y. App. Div. 315, 82 N. Y. Suppl. 541; Kemp *v.* Dickinson, 22 Hun 593; Faivre *v.* Union Dime Sav. Inst., 59 N. Y. Super. Ct. 558, 13 N. Y. Suppl. 423; Sibley *v.* Equitable L. Assur. Soc., 56 N. Y. Super. Ct. 274, 3 N. Y. Suppl. 8, 15 N. Y. Civ. Proc. 316; City Bank *v.* Bangs, 2 Paige 570; Aymer *v.* Gault, 2 Paige 284 (holding that where one of defendants in a suit of interpleader is not served with process and does not appear, there must be a reference to a master to take proofs of the facts stated in the bill, so far as they relate to the right to file it as against the absent defendant); Bedell *v.* Hoffman, 2 Paige 199; Yates *v.* Tisdale, 3 Edw. 71; Leonard *v.* Jamison, 2 Edw. 136; Balchen *v.* Crawford, 1 Sandf. Ch. 380.

Oregon.—North Pac. Lumber Co. *v.* Lang, 28 Oreg. 246, 42 Pac. 799, 52 Am. St. Rep. 780.

Vermont.— Brattleboro First Nat. Bank *v.* *v.* West River R. Co., 46 Vt. 633.

Virginia.— George *v.* Pilcher, 28 Gratt. 299, 26 Am. Rep. 350.

Washington.— Bellingham Bay Boom Co. *v.* Brisbois, 14 Wash. 173, 44 Pac. 153, holding that one who brings a bill of interpleader to have adverse claims to a judgment against him determined, in accordance with Code Civ. Proc. § 153, and, disclaiming all interest, undertakes, pursuant to section 154, to deposit the amount due with the clerk of court, is entitled to be discharged from liability only to the extent of the sum actually paid into court.

See 29 Cent. Dig. tit. "Interpleader," § 68 *et seq.*

40. Each defendant occupies a position as plaintiff in a possessory action and must recover on the strength of his own title. Conway *v.* Caswell, 121 Ga. 254, 48 S. E. 956.

41. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Indiana.— If at the hearing the question between defendants is ripe for a decision the court decides it; and if it is not ripe for decision, directs an action, or an issue, or a reference to a master as may best suit the nature of the case. Ketcham *v.* Brazil Block Coal Co., 88 Ind. 515; Nofsinger *v.* Reynolds, 52 Ind. 218.

Minnesota.— Cullen *v.* Dawson, 24 Minn. 66.

New Jersey.— Condict *v.* King, 13 N. J. Eq. 375; Rowe *v.* Matteson, 7 N. J. Eq. 131.

New York.— City Bank *v.* Bangs, 2 Paige 570; Yates *v.* Tisdale, 3 Edw. 71.

England.— Bolton *v.* Williams, 4 Bro. Ch. 297, 29 Eng. Reprint 901, 7 Rev. Rep. 286, 287, 2 Ves. Jr. 138, 30 Eng. Reprint 561; Brymer *v.* Buchanan, 1 Cox Ch. 425, 29 Eng. Reprint 1232.

See 29 Cent. Dig. tit. "Interpleader," § 71.

42. Farley *v.* Blood, 30 N. H. 354.

The only question which can be litigated between defendants upon a strict bill of interpleader is the right to the property in dispute. Byers *v.* Sansom-Thayer Commission Co., 111 Ill. App. 575.

Must do equity between parties.—The court is not bound to award the fund wholly to the person having the legal title, but may so shape its decree and distribute the fund as to do complete equity between the parties. Whitney *v.* Cowan, 55 Miss. 626.

Where there are conflicting claims to the whole amount due under a contract which renders it unsafe for the party liable to determine whom to pay, he may avail himself of the statute of interpleader, although plaintiff claims only a part of the amount due under the contract involved, as the subject of an action is not necessarily the amount sought to be recovered by a plaintiff, but is the amount due on the contract itself. Franklin Bank *v.* Cincinnati, 10 Ohio S. & C. Pl. Dec. 545, 8 Ohio N. P. 517.

43. *Alabama.*— Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Florida.— Sammis *v.* L'Engle, 19 Fla. 800.

New Hampshire.— Farley *v.* Blood, 30 N. H. 354.

New Jersey.— Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269; Condict *v.* King, 13 N. J. Eq. 375.

New York.— Kemp *v.* Dickinson, 22 Hun

5. BILL RETAINED FOR OTHER RELIEF.[44] Where the bill contains a general prayer for relief and alleges facts sufficient to enable the court to see what are the rights of the parties, the bill will be retained and the proper relief will be granted, although the bill cannot be sustained as a strict bill of interpleader.[45]

6. REMOVAL OF CAUSE. When a complainant files a bill against a citizen of the same state and other claimants who are citizens of other states, the cause cannot be removed to a federal court before the complainant has fully performed the duty required of him and has been discharged, for until that time he continues to be a substantial and necessary party.[46]

7. COSTS AND ATTORNEY'S FEES.[47] Where a bill of interpleader is properly filed, complainant, upon being discharged, is entitled to his costs out of the fund deposited in court, if the property so deposited is of such a nature that it is available for the payment of costs.[48] A complainant is entitled to his costs out of the

593; Pepoon *v.* White, 2 Code Rep. 109; Atkinson *v.* Manks, 1 Cow. 691; City Bank *v.* Bangs, 2 Paige 570.

Ohio.— Goddard *v.* Leech, Wright 476.

Pennsylvania.— Pennypacker's Appeal, 57 Pa. St. 114; Stern *v.* Jones, 7 Kulp 19.

Vermont.— Brattleboro First Nat. Bank *v.* West River R. Co., 46 Vt. 633.

England.— Bosanquet *v.* Woodford, 5 Q. B. 310, Dav. & M. 419, 13 L. J. Q. B. 93, 48 E. C. L. 308; Linnit *v.* Chaffers, 4 Q. B. 762, Dav. & M. 14, 45 E. C. L. 761; Green *v.* Rogers, 2 C. & K. 148, 61 E. C. L. 148; Drake *v.* Brown, 2 C. M. & R. 270, 4 L. J. Exch. 313, 5 Tyrw. 1067; Lott *v.* Melville, 9 Dowl. P. C. 882, 5 Jur. 436, 10 L. J. C. P. 279, 3 M. & G. 40, 3 Scott N. R. 346, 42 E. C. L. 31; Allen *v.* Gibbon, 2 Dowl. P. C. 292; Bramidge *v.* Adshead, 2 Dowl. P. C. 59, 3 L. J. Exch. 54.

Canada.— Davidson *v.* Douglas, 12 Grant Ch. (U. C.) 181.

See 29 Cent. Dig. tit. "Interpleader," § 71 *et seq.*

44. Retaining bill for other relief generally see EQUITY, 16 Cyc. 106 *et seq.*

45. Hollister *v.* Lefevre, 35 Conn. 456; Heath *v.* Hurless, 73 Ill. 323; Bedell *v.* Hoffman, 2 Paige (N. Y.) 199; Goddard *v.* Leech, Wright (Ohio) 476.

46. Leonard *v.* Jamison, 2 Edw. (N. Y.) 136; George *v.* Pilcher, 28 Gratt. (Va.) 299, 26 Am. Rep. 350. To the same effect are Grover, etc., Sewing Mach. Co. *v.* Florence Sewing Mach. Co., 18 Wall. (U. S.) 553, 21 L. ed. 914, and Ward *v.* Arredondo, 29 Fed. Cas. No. 17,148, 1 Paine (U. S.) 410, which, however, were not interpleader cases.

47. Costs generally see COSTS, 11 Cyc. 1 *et seq.*

48. *Connecticut.*—Union Trust Co. *v.* Stamford Trust Co., 72 Conn. 86, 43 Atl. 555 (omission to tax costs either for or against a party to a bill of interpleader presents no ground of exception, it being equivalent to a decision that no costs should be taxed); Green's Farms Consociated Presb. Soc. *v.* Staples, 23 Conn. 544.

Illinois.— Voigt *v.* Kersten, 164 Ill. 314, 45 N. E. 543; Keller *v.* Bading, 64 Ill. App. 198.

Maryland.— Barth *v.* Rosenfeld, 36 Md. 604.

Michigan.— Wayne County Sav. Bank *v.* Airey, 95 Mich. 520, 55 N. W. 355; Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086.

Missouri.— Sovereign Camp W. of W. *v.* Wood, 100 Mo. App. 655, 75 S. W. 377; Franco-American Loan, etc., Assoc. *v.* Joy, 56 Mo. App. 433; Jordan *v.* Harrison, 46 Mo. App. 172; Glaser *v.* Priest, 29 Mo. App. 1.

New Hampshire.— Farley *v.* Blood, 30 N. H. 354.

New Jersey.— Wakeman *v.* Kingsland, 46 N. J. Eq. 113, 18 Atl. 680; Rahway Sav. Inst. *v.* Drake, 25 N. J. Eq. 220; Blair *v.* Porter, 13 N. J. Eq. 267, where a bill of interpleader, which in strictness should have been dismissed, was retained because such dismissal would be contrary to justice and prejudicial to both parties, costs should not be allowed to either party.

New York.— Atkinson *v.* Manks, 1 Cow. 691; Badeau *v.* Rogers, 2 Paige 209 (holding that the complainant in a suit of interpleader is entitled to his costs out of the fund only in those cases where the bill is necessarily and properly filed as against both defendants); Bedell *v.* Hoffman, 2 Paige 199 (holding that on a bill in the nature of an interpleader, complainant will not be allowed his costs out of the fund in controversy, where it appears that the bill was unnecessarily filed); Aymer *v.* Gault, 2 Paige 284; Thomson *v.* Ebbets, Hopk. 272; Canfield *v.* Morgan, Hopk. 224; Richards *v.* Salter, 6 Johns. Ch. 445. In Scharff *v.* Supreme Lodge K. of H., 96 N. Y. App. Div. 632, 89 N. Y. Suppl. 168, for some reason not explained by the court costs were not allowed.

Pennsylvania.—North-Western Masonic Aid Assoc. *v.* Marshall, 10 Pa. Co. Ct. 270 (holding that costs incurred on an interpleader in an action on an insurance policy, obtained by defendant to settle rival claims to the fund, must be paid out of the fund); Haubert *v.* Beckhaus, 13 Wkly. Notes Cas. 327 (holding that in an interpleader action by a sheriff against several parties claiming property on which he has levied, costs will not be allowed as a matter of course, but rest in the discretion of the court, and will not ordinarily be allowed where the creditor has acted in good faith); Jordan's Appeal, 10 Wkly. Notes Cas. 37.

fund in those cases only where the bill of interpleader is necessarily and properly filed as against both claimants,[49] and according to the weight of authority complainant is entitled, as a part of his costs, to an attorney's fee commensurate with the services of his counsel in the cause, eventually to fall on the claimant who was in the wrong and made the litigation necessary.[50] It has been held, however, that counsel fees will not be allowed out of the fund brought into court, where defendants are free from fraud.[51] And where it develops that the complainant has a substantial, although not a direct, interest in the result of the litigation, his solicitor's fees should not be allowed from the fund.[52] Where it appears that complainant acted collusively or in bad faith, the costs of the successful claimant may be taxed against him in both the trial and appellate courts.[53] The costs of all successful parties should eventually be taxed against the person who made the false claim and thus made a bill of interpleader necessary.[54] The bond,

Rhode Island.— Manchester Print Works *v.* Stimson, 2 R. I. 415.

Tennessee.— Daniel *v.* Fain, 5 Lea 258; State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100.

Texas.— Bolin *v.* St. Louis, etc., R. Co., (Civ. App. 1901) 61 S. W. 444.

Vermont.— Brattleboro First Nat. Bank *v.* West River R. Co., 46 Vt. 633.

West Virginia.— Swiger *v.* Hayman, 56 W. Va. 123, 48 S. E. 839.

United States.— Spring *v.* South Carolina Ins. Co., 8 Wheat. 268, 5 L. ed. 614; McNamara *v.* Provident Sav. L. Assur. Soc., 114 Fed. 910, 52 C. C. A. 530.

Canada.— Ontario Silver Co. *v.* Tasker, 15 Ont. Pr. 180; McElheran *v.* London Masonic Mut. Ben. Assoc., 11 Ont. Pr. 181.

See 29 Cent. Dig. tit. "Interpleader," § 76.

"Costs of petitioner herein."— In an action against a savings bank for a deposit, on an application by it under N. Y. Laws (1875), c. 321, § 25, to interplead adverse claimants to the deposit, the order of interpleader allowed "the costs of the petitioner herein." It was held that costs in the action to the time of the motion for interpleader on the bank's petition were meant. Bowery Sav. Bank *v.* Mahler, 45 N. Y. Super. Ct. 619.

When application should be made.— An application for costs in an interpleader action should be made before the decree discharging complainant, and after such decree has been entered the court has no power to make any allowance for costs. Temple *v.* Lawson, 19 Ark. 148.

No additional allowance.— In a suit by a warehouseman to compel adverse claimants of goods deposited with him to interplead, where no other relief than an order for interpleader was given by the judgment, and the value of the property was not involved, and plaintiff himself made no claim to the property, it was error for the court to award plaintiff an allowance of five per cent upon the value of the property. Beebe *v.* Mead, 101 N. Y. App. Div. 500, 92 N. Y. Suppl. 51.

49. Badeau *v.* Rogers, 2 Paige (N. Y.) 209.

50. *Massachusetts.*— Morse *v.* Stearns, 131 Mass. 389.

Missouri.— Christian *v.* National L. Ins. Co., 62 Mo. App. 35; Franco-American Loan, etc., Assoc. *v.* Joy, 56 Mo. App. 433.

New York.— German Exch. Bank. *v.* Excise Com'rs, 6 Abb. N. Cas. 394.

Tennessee.— Daniel *v.* Fain, 5 Lea 258.

Texas.— Stevens *v.* Germania L. Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824; Bolin *v.* St. Louis, etc., R. Co., (Civ. App. 1901) 61 S. W. 444.

United States.— Florida Internal Imp. Fund *v.* Greenough, 105 U. S. 527, 26 L. ed. 1157; Louisiana State Lottery Co. *v.* Clark, 16 Fed. 20, 4 Woods 169.

See 29 Cent. Dig. tit. "Interpleader," § 76.

51. Temple *v.* Lawson, 19 Ark. 148; Helmken *v.* Meyer, 118 Ga. 657, 45 S. E. 450; Meldrim *v.* Trinity Church, 100 Ga. 479, 28 S. E. 431 [but see McCall *v.* Walter, 71 Ga. 287]; New Jersey Mut. L. Ins. Co. *v.* Corbin, 12 Phila. (Pa.) 257; Great Council *v.* Adams, (Tex. Civ. App. 1903) 75 S. W. 560.

The discretion residing in courts of equity to award costs in actions of interpleader relates only to those costs which are denominated "general," or properly "costs in the case," and do not extend to costs said to be extraordinary, such as directing counsel fees to be paid out of the fund. Temple *v.* Lawson, 19 Ark. 148.

52. Groves *v.* Sentell, 153 U. S. 465, 14 S. Ct. 898, 38 L. ed. 785.

53. Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086; St. Louis L. Ins. Co. *v.* Alliance Mut. L. Ins. Co., 23 Minn. 7. See also Long *v.* San Francisco Super. Ct., 127 Cal. 686, 60 Pac. 464. Although a bill of interpleader by trustees will not lie to determine the right of two towns to tax a trust fund, yet where such suit has been suffered to go on without demurrer by a tacit consent to the solution of the questions pending between the towns and the trustees, and has thus been made to serve the interest of all parties, costs thereof will not be taxed against plaintiff. Greene *v.* Mumford, 4 R. I. 313.

54. *Illinois.*— Dickinson *v.* Griggsville Nat. Bank, 111 Ill. App. 183 [*affirmed* in 209 Ill. 350, 70 N. E. 593].

Michigan.— Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086.

Missouri.— Sovereign Camp W. of W. *v.* Wood, 100 Mo. App. 655, 75 S. W. 377, where complainant in a bill of interpleader is al-

undertaking, or recognizance for costs in interpleader proceedings is governed by the general rules relating to security for costs,[55] and is usually regulated by statute.[56]

8. REVIEW.[57] An order of interpleader puts an end to the case so far as the complainant is concerned and is appealable,[58] and an appeal from a final decree opens for consideration all prior orders and preliminary decrees made in the case.[59] Orders finally dismissing interpleaders, also dismissing an auxiliary petition by plaintiff to enjoin them from enforcing a judgment, and vacating an injunction previously granted, embody final decisions and are appealable, although the suit between the original parties is still pending.[60]

III. INTERPLEADER UNDER CODES AND SPECIAL STATUTES.

Under the code system of pleading a debtor may bring an action of interpleader under the same circumstances that justified the filing of a bill of inter-

lowed his costs out of the fund, these costs will be charged against the party whose claim to the fund is found to be invalid.

New Hampshire.— Farley *v.* Blood, 30 N. H. 354.

New York.— Winfield *v.* Bacon, 24 Barb. 154; Miller *v.* Watts, 4 Duer 203; Badeau *v.* Rogers, 2 Paige 209; Richards *v.* Salter, 6 Johns. Ch. 445. See also Barry *v.* Equitable Life Assur. Soc., 59 N. Y. 587.

Pennsylvania.— Black's Appeal, 106 Pa. St. 344; Hoerner *v.* Pine Grove Brewing Co., 8 Del. Co. 106, 14 York Leg. Rec. 87.

Rhode Island.— Manchester Print Works *v.* Stimson, 2 R. I. 415, holding that on a bill of interpleader plaintiff is entitled to his costs up to the time of the coming in of the answers, when he may retire from the case; and from that time the case is in the nature of a suit between defendants as adverse parties, and the party prevailing is entitled to his costs against the other.

Virginia.— Beers *v.* Spooner, 9 Leigh 153.

West Virginia.— Swiger *v.* Hayman, 56 W. Va. 123, 48 S. E. 839.

United States.— McNamara *v.* Provident Sav. L. Assur. Soc., 114 Fed. 910, 52 C. C. A. 530.

England.— Dowson *v.* Hardcastle, 2 Cox Ch. 278, 30 Eng. Reprint 129; Bowdler *v.* Smith, 1 Dowl. P. C. 417; Fenn *v.* Edmonds, 5 Hare 314, 26 Eng. Ch. 314; Mason *v.* Hamilton, 5 Sim. 19, 9 Eng. Ch. 19, 58 Eng. Reprint 245; Aldridge *v.* Mesner, 6 Ves. Jr. 418, 31 Eng. Reprint 1122.

See 29 Cent. Dig. tit. "Interpleader," § 76.

Where defendant, when sued separately by two plaintiffs, causes them to interplead, the losing party in the interpleader may be charged with the costs thereof, and of the action brought by himself, but not with the costs of the other action to which he was not a party. Morgan *v.* Perkins, 94 Ga. 353, 21 S. E. 574.

Where judgment is entered on a verdict against claimants without prejudice to the rights of claimants set up in their notice to the sheriff, claimants should not be compelled to pay the costs, as the parties stand where they did before the issue was ordered. Waverly Coal, etc., Co. *v.* McKennan, 110 Pa. St. 599, 1 Atl. 543.

Where the only cause of the suit is his unjust claim to property in the hands of plaintiff, costs of counsel fees, to be taxed as between solicitor and client, will not be allowed to the losing party to a bill of interpleader. Cobb *v.* Rice, 130 Mass. 231.

Costs against minor heirs.— Where, in an action to determine the respective rights of the minor heirs and the widow of a decedent to a beneficiary fund, the decree is modified in favor of the widow on her appeal, costs will not be allowed against the minor heirs. Catholic Ben. Assoc. *v.* Priest, 46 Mich. 429, 9 N. W. 481.

The discretion given to the court by the Interpleader Act includes the disposition of the whole costs, in order to effectuate justice between the parties. Hess *v.* Beates, 78 Pa. St. 429. Where an interpleader is ordered, on motion made under N. Y. Code Civ. Proc. § 820, the costs of the action are in the discretion of the court. Cronin *v.* Cronin, 9 N. Y. Civ. Proc. 137, 3 How. Pr. N. S. 184. See also Temple *v.* Lawson, 19 Ark. 148.

55. See COSTS, 11 Cyc. 1 *et seq.*

56. See the statutes of the several states.

In the absence of a statute requiring such security a third person substituted as defendant by order of interpleader cannot be required to give security for costs, although a non-resident and irresponsible. McHugh *v.* Astrophe, 1 Misc. (N. Y.) 218, 20 N. Y. Suppl. 877, 878; Gross, etc., Mfg. Co. *v.* Gerhard, 11 Fed. Cas. No. 5,843.

A non-resident claimant in an interpleader will not be required to give security for costs, when there is nothing to justify a presumption that he is acting in bad faith. Smith *v.* Stoddart, 14 Phila. (Pa.) 133. See also Linton *v.* Pollock, 5 Pa. Co. Ct. 243.

57. Review generally see APPEAL AND ERROR.

58. Lynch *v.* St. John, 8 Daly (N. Y.) 142; Feldman *v.* Grand Lodge A. O. U. W., 19 N. Y. Suppl. 73, 22 N. Y. Civ. Proc. 165; Hechmer *v.* Gilligan, 28 W. Va. 750. *Contra*, Standley *v.* Roberts, 59 Fed. 836, 8 C. C. A. 305.

59. Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

60. Standley *v.* Roberts, 59 Fed. 836, 8 C. C. A. 305.

pleader under the former practice. The code provision is merely a substitute for the original bill in equity and is governed by the same principles.[61] And where the debtor is sued by one of the claimants he may at any time before answer upon proof by affidavit that a person not a party to the action makes a demand against him for the same fund or property apply to the court, upon notice to such person and plaintiff, for an order to substitute the claimant as defendant in his place.[62]

61. *Indiana.*— Northwestern Mut. L. Ins. Co. *v.* Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89.

Iowa.— Hoyt *v.* Gouge, 125 Iowa 603, 101 N. W. 464.

Kansas.—Atchison *v.* Scoville, 13 Kan. 17.

New York.— Crane *v.* McDonald, 118 N. Y. 648, 23 N. E. 991.

Washington.—Daulton *v.* Stuart, 30 Wash. 562, 70 Pac. 1096; Seattle *v.* Turner, 29 Wash. 515, 69 Pac. 1083.

62. *Alabama.*— Coleman *v.* Chambers, 129 Ala. 615, 29 So. 58.

California.— San Francisco Sav. Union *v.* Long, (1898) 53 Pac. 907.

Indiana.— Northwestern Mut. L. Ins. Co. *v.* Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89; Mansfield *v.* Shipp, 128 Ind. 55, 27 N. E. 427.

Iowa.— Bixby *v.* Blair, 56 Iowa 416, 9 N.W. 318.

Kentucky.— Starling *v.* Brown, 7 Bush 164.

Massachusetts.— Brierly *v.* Equitable Aid Union, 170 Mass. 218, 48 N. E. 1090, 64 Am. St. Rep. 297.

Minnesota.— Hooper *v.* Balch, 31 Minn. 276, 17 N. W. 617.

Mississippi.— Moore *v.* Ernst, 54 Miss. 642.

Nebraska.— Jaques *v.* Dawes, 3 Nebr. (Unoff.) 752, 92 N. W. 570.

New York.— Sayer *v.* Beirne, 78 N. Y. App. Div. 491, 79 N. Y. Suppl. 696; Chapuis *v.* Long, 77 N. Y. App. Div. 272, 78 N. Y. Suppl. 1046 (holding that on the hearing of a motion for an interpleader, it is error to receive and consider affidavits which have not been served on the opposing parties, and which they have had no opportunity to answer); Wells *v.* National City Bank, 40 N. Y. App. Div. 498, 58 N. Y. Suppl. 125, 29 N. Y. Civ. Proc. 158 (holding that under Code Civ. Proc. § 820, providing that defendant in an action to recover upon a contract or to recover a chattel may, upon proof that a person not a party to the action makes a demand against him for the same debt or property, apply to the court for an order substituting such person, defendant is not entitled to the order upon the mere showing that a third person has made a demand for the same debt or property without collusion, but must show the facts upon which the claim is based, and that it has some reasonable foundation); Southwark Nat. Bank *v.* Childs, 39 N. Y. App. Div. 560, 57 N. Y. Suppl. 789 (holding that under Code Civ. Proc. § 820, which provides that where a third person makes a claim against a defendant for the debt sued for, without collusion with him, such defendant may pay the amount of the debt into court, and have the claimant substituted, and he be discharged of liability, a defendant who denies all liability to plaintiff cannot interplead a claimant); American Trust, etc., Bank *v.* Thalheimer, 29 N. Y. App. Div. 170, 51 N. Y. Suppl. 813; Woolworth *v.* Phœnix Mut. L. Ins. Co., 25 N. Y. App. Div. 629, 49 N. Y. Suppl. 512; Roberts *v.* Vanhorne, 21 N. Y. App. Div. 369, 47 N. Y. Suppl. 448 (holding that upon a motion for interpleader the affidavit must state facts showing that the third party's claim has some reasonable foundation, or that there is some reasonable doubt as to whether the stakeholder would be reasonably safe in paying over the money in controversy); Burritt *v.* Press Pub. Co., 19 N. Y. App. Div. 609, 46 N. Y. Suppl. 295; Schell *v.* Lowe, 75 Hun 43, 26 N. Y. Suppl. 991, 23 N. Y. Civ. Proc. 300; Sickles *v.* Wilmerding, 59 Hun 375, 13 N. Y. Suppl. 43; Dreyfus *v.* Casey, 52 Hun 95, 5 N. Y. Suppl. 65; Wilson *v.* Lawrence, 8 Hun 593; Wehle *v.* Bowery Sav. Bank, 40 N. Y. Super. Ct. 97; Midler *v.* Lese, 45 Misc. 637, 91 N. Y. Suppl. 148 (holding that under Municipal Court Act, Laws (1902), p. 1546, c. 580, § 187, providing that the court may permit a defendant to interplead in an action or contract, or in an action to recover a chattel, only where the application for leave to interplead is made "before answer," an order granting defendant leave to interplead in an action for "conversion of personal property," in which plaintiff claimed that defendant was liable to arrest, after defendant had answered by general denial, was void); Wells *v.* Corn Exch. Bank, 43 Misc. 377, 87 N. Y. Suppl. 480 (holding that where a defendant is sued for the same debt by different parties plaintiff in two different courts, one of which has equity jurisdiction and the other has not, the application by defendant for an order of interpleader to the court having no equity jurisdiction is properly denied, but defendant will be remanded for the relief sought to the court which has such jurisdictions); Master *v.* Bowery Sav. Bank, 31 Misc. 178, 63 N. Y. Suppl. 964; Butler *v.* Atlantic Trust Co., 28 Misc. 42, 59 N. Y. Suppl. 814 (holding that Code Civ. Proc. § 820, which provides that when a person not a party to the action makes a demand against defendant for the same debt or property the court may substitute such person in the place of defendant, and discharge defendant from liability on his payment into court the amount of the debt, for an order allowing it to deposit the money in question in court, and for the substitution of a third person, who is asserting claim to such money, as defendant, and such person alone opposes the

INTERPOSE. To place between; cause to intervene.[1]

INTERPRETARE ET CONCORDARE LEGES LEGIBUS EST OPTIMUS INTERPRETANDI MODUS. A maxim meaning "To interpret and reconcile laws so that they harmonize is the best mode of construction."[2]

INTERPRETATIO CHARTARUM BENIGNE FACIENDA EST UT RES MAGIS VALEAT QUAM PEREAT. A maxim meaning "Charters (or deeds) are to be interpreted liberally, so as rather to validate than nullify the transaction."[3]

INTERPRETATIO FIENDA EST UT RES MAGIS VALEAT QUAM PEREAT. A maxim meaning "Such a construction is to be made that the subject may have an effect rather than none."[4]

INTERPRETATION.[5] The determination of the meaning of a writing;[6] the art of finding out the true sense of any form of words,[7] that is, the sense in which

application, refusing either to take position squarely with respect to the nature of his claim, or to withdraw the assertion of the same, the motion will be granted); Chamberlain *v.* Almy, 3 Misc. 555, 23 N. Y. Suppl. 316; Clark *v.* Mosher, 5 N. Y. St. 84; McElroy *v.* Baer, 9 N. Y. Civ. Proc. 133.

North Carolina.— Maynard *v.* Virginia L. Ins. Co., 132 N. C. 711, 44 S. E. 405.

Ohio.— Johnston *v.* Oliver, 51 Ohio St. 6, 36 N. E. 458; Cozad *v.* Shannon, 7 Ohio Dec. (Reprint) 542, 3 Cinc. L. Bul. 865; Bridge *v.* Martin, 2 Ohio Dec. (Reprint) 410, 3 West. L. Month. 20; Ohio Rev. St. § 5016, which permits a defendant, before answer, in an action upon contract or for the recovery of personal property, to interpose an affidavit, and asks that opposing claimants interplead, was intended as auxiliary to the practice in chancery respecting interpleader, and to direct the practice in the particular classes of cases named, and was not intended to regulate the entire subject of interpleader. Cadiz First Nat. Bank *v.* Beebe, 62 Ohio St. 41, 56 N. E. 485.

Oklahoma.— Goodrich *v.* Williamson, 10 Okla. 588, 63 Pac. 974.

South Carolina.— Brock *v.* Southern R. Co., 44 S. C. 444, 22 S. E. 601, holding that an application for an order substituting another in place of defendant, made at the first term after an action is commenced, shows due diligence.

See 29 Cent. Dig. tit. "Interpleader," § 77 *et seq.*

In Missouri an interpleader may be made by answer. Davison *v.* Hough, 165 Mo. 561, 65 S. W. 731; Roselle *v.* Farmers' Bank, 119 Mo. 84, 24 S. W. 744; Atkinson *v.* Carter, 101 Mo. App. 477, 74 S. W. 502; Sullivan *v.* K. of F. M., 73 Mo. App. 43.

1. Century Dict.

To interpose a defense in an action, in a strictly narrow sense, is to plead it or set it up by answer. Rosa *v.* Butterfield, 33 N. Y. 665, 667. See Curtis *v.* Leavitt, 15 N. Y. 9, 154.

2. Bouvier L. Dict.

Applied in Stoughter's Case, 8 Coke 168*a*, 169*a*.

3. Trayner Leg. Max.

Applied in Bond *v.* Bunting, 78 Pa. St. 210, 219; Lombaert's Estate, 20 Phila. (Pa.) 129, 131; Clark *v.* Sigua Iron Co., 81 Fed. 310, 312, 26 C. C. A. 423; Bence *v.* Gilpin, L. R. 3 Exch. 76, 82, 37 L. J. Exch. 36, 17 L. T. Rep. N. S. 655, 16 Wkly. Rep. 705.

4. Bouvier L. Dict. [*citing* Broom Leg. Max. 543; Jenkins Cent. 198].

5. "'Construction' and 'interpretation' are often used to convey the same meaning though technically they convey different meanings." Texas Banking, etc., Co. *v.* Cohen, 47 Tex. 406, 413, 26 Am. Rep. 298 [*quoting* Lieber Leg. & Pol. Hermeneutics]. "Interpretation differs from construction in this: that it is used for the purpose of ascertaining the true sense of any form of words; while construction involves the drawing of conclusions regarding subjects that are not always included in the direct expression." Bloomer *v.* Todd, 3 Wash. Terr. 599, 612, 19 Pac. 135, 1 L. R. A. 111.

6. *In re* Sutro, 139 Cal. 87, 89, 72 Pac. 827.

7. *In re* Sutro, 139 Cal. 87, 89, 72 Pac. 827; Hilleary *v.* Skookum Root Hair Grower Co., 4 Misc. (N. Y.) 127, 130, 23 N. Y. Suppl. 1016; Rome *v.* Knox, 14 How. Pr. (N. Y.) 268, 272; Texas Banking, etc., Co. *v.* Cohen, 47 Tex. 406, 413, 26 Am. Rep. 298; Lieber Leg. & Pol. Hermeneutics 11 [*quoted* in People *v.* New York City Tax Com'rs, 95 N. Y. 554, 559].

"The principle enunciated by Horne Tooke in his Diversions of Purley, that a word has 'one meaning and one only,' has no application to cases arising under statutes where construction or interpretation is required, except, perhaps, in scientific matters. Worcester, in the preface to his dictionary, says: 'Though there may be found in Johnson's Dictionary many instances in which a distinction is made where there is little or no difference, yet the principle stated by Horne Tooke, that "a word has one meaning and one only" cannot be admitted without numerous exceptions. Take, for example, some very common words . . . the nouns law, letter, line, post; though the different senses in which these words are used may be, in some measure, in accordance with one original meaning of each, yet a single definition of each of the words would afford but very inadequate explanation. The original or etymological meaning of many words has become obsolete, and they have assumed a new or more modern meaning; many which retain their etymological meaning have other meanings annexed to them; many have both

their author intended to convey,[8] and of enabling others to derive from them the same idea which the author intended to convey;[9] the art of finding out or collecting the intention of a writer, either from his words, or from other conjectures, or from both;[10] the use of some other signs or marks, besides the words of the speaker or writer, in order to collect his meaning;[11] the mere finding of the true sense of the special form of words used.[12] (See CONSTRUCTION, and Cross-References Thereunder.)

INTERPRETATIO TALIS IN AMBIGUIS SEMPER FIENDA EST, UT EVITETUR INCONVENIENS ET ABSURDUM. A maxim meaning "In cases of ambiguity, such an interpretation should always be made, that what is inconvenient and absurd may be avoided."[13]

INTERPRETER. A person sworn by a court to interpret the testimony of a witness, when given in a language other than that commonly used by the court;[14] a person frequently appointed in foreign ports, to facilitate commercial intercourse between strangers and the inhabitants.[15] (Interpreter: Admissibility and Reception of Evidence Through, see CRIMINAL LAW; EVIDENCE. Appointment and Services of,[16] see ARMY AND NAVY; COURTS; CRIMINAL LAW. In Examination of Witness, see WITNESSES. In Taking—Acknowledgment, see ACKNOWLEDGMENTS; Depositions, see DEPOSITIONS.)

a literal and metaphorical meaning, and many both a common and technical meaning, all of which need explanation.' The primary general sense of a word often ramifies into different senses, as Webster illustrates in the preface to his dictionary. He says, in substance, that by attention to the different uses and applications of the word, we become able, in most cases, to arrive at a satisfactory explanation of the manner in which the same word comes to be used with different significations. Professor Whitney says that, 'both historically and with regard to present usage, it is impossible to draw a hard and fast line between these two sides of the language, either with respect to words or to their individual senses.'" People *v.* Buffalo, 57 Hun (N. Y.) 577, 579, 11 N. Y. Suppl. 314.

8. Lieber Leg. & Pol. Hermeneutics [*quoted* in Hilleary *v.* Skookum Root Hair Grower Co., 4 Misc. (N. Y.) 127, 130, 23 N. Y. Suppl. 1016].

9. Hilleary *v.* Skookum Root Hair Grower Co., 4 Misc. (N. Y.) 127, 130, 23 N. Y. Suppl. 1016; Rome *v.* Knox, 14 How. Pr. (N. Y.) 268, 272; Leiber Leg. & Pol. Hermeneutics 11 [*quoted* in People *v.* New York City Tax Com'rs, 95 N. Y. 554, 559].

10. Tallman *v.* Tallman, 3 Misc. (N. Y.) 465, 478, 23 N. Y. Suppl. 734.

11. Purdy *v.* People, 4 Hill (N. Y.) 384, 412 [*quoting* 1 Story Const. 392 note 384, and *citing* 2 Rutherford Inst. c. 7, § 2].

12. Jones *v.* Morris Aqueduct, 36 N. J. L. 206, 209.

Close interpretation (*interpretatio restricta*) is adopted if just reasons, connected with the formation and character of the text, induce us to take the words in their narrowest meaning. This species of interpretation has generally been called "literal," but the term is inadmissible. Black L. Dict. [*quoting* Lieber Leg. & Pol. Hermeneutics 54].

Extensive interpretation (*interpretatio extensiva*, called, also, "liberal interpretation" adopts a more comprehensive signification of the word. Black L. Dict. [*quoting* Lieber Leg. & Pol. Hermeneutics 58].

Extravagant interpretation (*interpretatio excedens*) is that which substitutes a meaning evidently beyond the true one. It is therefore not genuine interpretation. Black L. Dict. [*quoting* Lieber Leg. & Pol. Hermeneutics 59].

Free or unrestricted interpretation (*interpretatio soluta*) proceeds simply on the general principles of interpretation in good faith, not bound by any specific or superior principle. Black L. Dict. [*quoting* Lieber Leg. & Pol. Hermeneutics 59].

Limited or restricted interpretation (*interpretatio limitata*) is when we are influenced by other principles than the strictly hermeneutic ones. Black L. Dict. [*quoting* Lieber Leg. & Pol. Hermeneutics 60].

Predestined interpretation (*interpretatio predestinata*) takes place if the interpreter, laboring under a strong bias of mind, makes the text subservient to his preconceived views or desires. This includes artful interpretation (*interpretatio vafer*), by which the interpreter seeks to give a meaning to the text other than the one he knows to have been intended. Black L. Dict. [*quoting* Lieber Leg. & Pol. Hermeneutics 60].

13. Burrill L. Dict.

14. Amory *v.* Fellowes, 5 Mass. 219, 226. See also Com. *v.* Vose, 157 Mass. 393, 394, 32 N. E. 355, 17 L. R. A. 813; *In re* Norberg, 4 Mass. 81; Miller *v.* Lathrop, 50 Minn. 91, 93, 52 N. W. 274; Jackson *v.* French, 3 Wend. (N. Y.) 337, 339, 20 Am. Dec. 699; Parker *v.* Carter, 4 Munf. (Va.) 273, 287, 6 Am. Dec. 513.

He is to be distinguished from witnesses whose testimony he interprets, and is to be sworn. People *v.* Lem Deo, 132 Cal. 199, 201, 64 Pac. 265.

15. Amory *v.* Fellowes, 5 Mass. 219, 226.

16. Interpreter's fees as costs see 11 Cyc. 128 note 11.

INTERROGATORIES. A set or series of written questions drawn up for the purpose of being propounded to a party in equity, a garnishee, or a witness whose testimony is taken on deposition; a series of formal written questions used in the judicial examination of a party or a witness.[17] (Interrogatories: In General, see DEPOSITIONS. Answer or Failure to Answer as Evidence, see EVIDENCE. Appealability of Rulings in Respect to, see APPEAL AND ERROR. In Administration Proceedings, see EXECUTORS AND ADMINISTRATORS. In Admiralty, see ADMIRALTY. In Discovery, see DISCOVERY. In Equity, see EQUITY. In Garnishment Proceeding, see GARNISHMENT. In Injunction Proceedings, see INJUNCTIONS. To Jury, see JURIES.)

IN TERROREM. By way of threat, terror, or warning.[18]

IN TERROREM POPULI. Literally "To the terror of the people." A technical phrase necessary in indictments for riots.[19] (See, generally, RIOT.)

INTERRUPT. To stop or hinder by breaking in or upon; to prevent from proceeding; to disturb.[20] (See INTERRUPTION, and Cross-References Thereunder.)

INTERRUPTED. In its ordinary signification, hindered, stopped from proceeding.[21] (See INTERRUPTION, and Cross-References Thereunder.)

INTERRUPTIO MULTIPLEX NON TOLLIT PRÆSCRIPTIONEM SEMEL OBTENTAM. A maxim meaning "Repeated interruptions do not defeat a prescription once obtained."[22]

INTERRUPTION. The occurrence of some act or fact, during the period of prescription, which is sufficient to arrest the running of the statute of limitations.[23] (Interruption: Of Meeting or Assemblage, see DISTURBANCE OF PUBLIC MEETINGS. Of Rights in Easement, see EASEMENTS. Of Running of Statute of Limitations — In General, see LIMITATIONS OF ACTIONS; Effect on Adverse Possession, see ADVERSE POSSESSION.)

INTER SE or INTER SESE. Among themselves.[24]

INTERSECT.[25] To cross; literally, to cut into or between;[26] a word which imports the intersection of one line with another.[27] (See CROSS; INTERSECTION; and, generally, BOUNDARIES.)

INTERSECTING METHOD. A method used in surveying for determining the center of a section of land, pursued by running straight lines from the quarter

17. Black L. Dict. See also State *v.* Ludlow, 5 N. J. L. 772, 773, where it is said: "The usual technical meaning of the word in the court of chancery is a question in writing; its ordinary meaning in common discourse is a question."

18. Bouvier L. Dict. See also Phillips *v.* Ferguson, 85 Va. 509, 512, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837; Morris *v.* Burroughs, 1 Atk. 399, 404, 26 Eng. Reprint 253; Bird *v.* Randall, 3 Burr. 1345, 1352, 1 W. Bl. 373; Rhenish *v.* Martin, 1 Wils. C. P. 130, 131.

19. Bouvier L. Dict. See also Com. *v.* Runnels, 10 Mass. 518, 520, 6 Am. Dec. 148; Rex *v.* Hughes, 4 C. & P. 373, 374, 19 E. C. L. 560; Reg. *v.* Oglethorpe, 11 Mod. 114, 116.

20. Worcester Dict. [*quoted* in Brown *v.* State, 46 Ala. 175, 181]. See also Douglass *v.* Barber, 18 R. I. 459, 460, 28 Atl. 805.

21. Webster Unabr. Dict. [*quoted* in Brown *v.* State, 46 Ala. 175, 181].

"Interrupted service" see Atlanta Standard Tel. Co. *v.* Porter, 117 Ga. 124, 126, 43 S. E. 441.

22. Bouvier L. Dict. [*citing* 2 Inst. 654].

23. It is said to be either "natural" or "civil," the former being caused by the act of the party; the latter by the legal effect or operation of some fact or circumstance. Black L. Dict. See also Tyler *v.* Wilkinson, 24 Fed. Cas. No. 14,312, 4 Mason 397, 404; Howes *v.* Brushfield, 3 East 491, 494; Olney *v.* Gardiner, 1 H. & H. 381, 382, 8 L. J. Exch. 102, 4 M. & W. 496.

24. Black L. Dict. [*citing* Story Partn. § 405]. See also Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230, 234; Earl *v.* Howell, 14 Abb. N. Cas. (N. Y.) 474, 477; Boldero *v.* East India Co., 11 H. L. Cas. 405, 412, 11 Jur. N. S. 493, 13 L. T. Rep. N. S. 308, 13 Wkly. Rep. 792, 11 Eng. Reprint 1390; Prannath Roy Chowdry *v.* Ramrutton Roy, 8 Wkly. Rep. 29, 32.

25. Distinguished from "cross" in Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 16, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209. *Compare* Branagan *v.* Dulaney, 8 Colo. 408, 8 Pac. 669.

"Intersected by the middle line" see *In re* Springfield Road, 73 Pa. St. 127, 129. See also Pittsburg *v.* Cluley, 74 Pa. St. 259, 261.

26. State *v.* New Haven, etc., Co., 45 Conn. 331, 344.

27. Redfields *v.* Redfields, (N. J. Ch. 1888) 13 Atl. 600, 602. See also *In re* Springfield Road, 73 Pa. St. 127, 129. And *compare* Gage *v.* Chicago, 203 Ill. 26, 30, 67 N. E. 477 [*citing* Hyman *v.* Chicago, 188 Ill. 462, 59 N. E. 10].

corner on the east to the quarter corner on the west, and from the quarter corner on the south to the quarter corner on the north, side of the section; the center being the points where these two lines cross.[28] (See, generally, BOUNDARIES.)

INTERSTATE. Pertaining to the mutual relations of states; existing between, or including, different states.[29] (Interstate: Commerce, see CARRIERS; COMMERCE; NAVIGABLE WATERS. Commerce Commission, see COMMERCE.)

INTERSTICIAL ABSORPTION. In medical jurisprudence, a technical term applied to a case where a limb is shortened either from a fracture of the bone, or from the absorption of the extremity or neck of the femur or thigh bone, a result frequently arising from a violent contusion.[30]

INTERVAL. Any dividing tract in space, time, or degree.[31] (See, generally, TIME.)

INTERVALE. A tract of low ground between hills or along the banks of a stream, usually alluvial land enriched by the overflowing of the river, or fertilizing deposits of earth from the adjacent hill.[32]

INTERVENING. Coming between.[33] (Intervening: Cause, see NEGLIGENCE. Damages, see COSTS. See also INTERVENTION.)

INTERVENTION. In international law such an interference between two or more states as may (according to the event) result in a resort to force; while mediation always is, and is intended to be and to continue, peaceful only.[34] (Intervention: In General, see PARTIES. Appellate Procedure Affecting or Affected by, see APPEAL AND ERROR. By Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY. By Claimant of Property Attached or Levied on, see ATTACHMENT; EXECUTIONS; GARNISHMENT. By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. In Action By or Against — Partners, see PARTNERSHIP; Wife, see HUSBAND AND WIFE. In Equity, see EQUITY. In Proceedings in — Admiralty, see ADMIRALTY; Attachment, see ATTACHMENT; Bankruptcy, see BANKRUPTCY; Execution, see EXECUTIONS; Foreclosure, see MECHANICS' LIENS; MORTGAGES; Garnishment, see GARNISHMENT. To Set Aside Fraudulent Conveyance, see FRAUDULENT CONVEYANCES. Trial by Jury on, see JURIES.)

INTERVENTION AND THIRD OPPOSITION. In Louisiana, a proceeding substituted for the common-law action of replevin.[35] (See, generally, REPLEVIN.)

INTER VIVOS. Between living persons.[36] (Inter Vivos: Donation or Gift, see GIFTS.)

INTESTACY. See INTESTATE.

28. Gerke *v.* Lucas, 92 Iowa 79, 81, 60 N. W. 538.

29. Webster Int. Dict.

"Interstate business" see Bishop *v.* Middleton, 43 Nebr. 10, 16, 61 N. W. 129, 26 L. R. A. 446 [*citing* Singer Mfg. Co. *v.* Fleming, 39 Nebr. 679, 58 N. W. 226, 42 Am. St. Rep. 613, 23 L. R. A. 210].

30. Haire *v.* Reese, 7 Phila. (Pa.) 138, 141.

31. Century Dict.

"'An interval of not less than fourteen days' is equivalent to saying that fourteen days must intervene or elapse between the two dates." *In re* Railway Sleepers Supply Co., 29 Ch. D. 204, 207, 54 L. J. Ch. 720, 52 L. T. Rep. N. S. 731, 33 Wkly. Rep. 595. See also *In re* Miller's Dale, etc., 31 Ch. D. 211, 214, 55 L. J. Ch. 203, 53 L. T. Rep. N. S. 692, 34 Wkly. Rep. 192.

"At intervals" see Byrne *v.* Kansas City, etc., R. Co., 61 Fed. 605, 613, 9 C. C. A. 666, 24 L. R. A. 693 [*citing* Louisville, etc., R. Co. *v.* Gardner, 1 Lea (Tenn.) 688, 690].

32. Gould *v.* Dodd, 31 Nova Scotia 193, 194.

33. Webster Dict. [*quoted* in Matter of Lobrasciano, 38 Misc. (N. Y.) 415, 417, 77 N. Y. Suppl. 1040]. See also Stearns *v.* Brown, 1 Pick. (Mass.) 530, 532; Peasely *v.* Buckminster, 1 Tyler (Vt.) 264, 267.

"All intervening costs and damages" see Swan *v.* Piquet, 4 Pick. (Mass.) 465.

"Intervening agencies" see Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 524, 66 S. W. 221 [*citing* Ahern *v.* Oregon Tel., etc., Co., 24 Oreg. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635].

"Intervener" is a term sometimes applied to a person occupying the position of an interpleader in an action or proceeding. Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 129, 48 Pac. 638.

34. Black L. Dict.

35. Featherman *v.* Louisiana State Seminary, 8 Fed. Cas. No. 4,713, 2 Woods 71.

36. Burrill L. Dict.

IN TESTAMENTIS PLENIUS TESTATORIS INTENTIONEM SCRUTAMUR. A maxim meaning "In (the construction of) wills we are chiefly to seek for the intention of the testator." [37]

IN TESTAMENTIS PLENIUS VOLUNTATES TESTANTIUM INTERPRETANTUR. A maxim meaning "A will shall receive a more liberal construction than its strict meaning, if alone considered, would permit." [38]

IN TESTAMENTIS RATIO TACITA NON DEBET CONSIDERARI, SED VERBA SOLUM SPECTARI DEBENT; ADEO PER DIVINATIONEM MENTIS A VERBIS RECEDERE DURUM EST. A maxim meaning "In wills an unexpressed meaning ought not to be considered, but the words alone ought to be looked to; so hard is it to recede from the words by guessing at the intention." [39]

INTESTATE. A person who dies without making a will; [40] the condition of dying without having made any will.[41] (See, generally, DESCENT AND DISTRIBUTION.)

INTESTATUS DECEDIT, QUI AUT OMNINO TESTAMENTUM NON FECIT AUT NON JURE FECIT, AUT ID QUOD FECERAT REPTUM IRRITUMVE FACTUM EST, AUT NEMO EX EO HÆRES EXSTITIT. A maxim meaning "He dies intestate who either has made no will at all or has not made it legally, or whose will which he had made has been annulled or become ineffectual, or to whom there is no living heir." [42]

IN THE BOOK. As used in the recording acts, a term meaning in the records.[43] (See, generally, RECORDS.)

IN THE PRESENCE OF. In the sight of.[44]

IN THE VICINITY OF. Etymologically and by common understanding, a phrase meaning in the neighborhood.[45]

INTIMACY. A term which means nothing more than close and familiar acquaintance.[46]

INTIMATE. Close in friendship or acquaintance; familiar; CONFIDENTIAL,[47] *q. v.*

INTIMATION. A conclusion from something said.[48]

37. Trayner Leg. Max.

38. Broom Leg. Max.

39. Black L. Dict.

40. Matter of Cameron, 47 N. Y. App. Div. 120, 123, 62 N. Y. Suppl. 187; Messmann *v.* Egenberger, 46 N. Y. App. Div. 46, 50, 61 N. Y. Suppl. 556; Kent *v.* Hopkins, 86 Hun (N. Y.) 611, 613, 33 N. Y. Suppl. 767; *In re* Haughian, 37 Misc. (N. Y.) 457, 458, 75 N. Y. Suppl. 932; Thompson *v.* Carmichael, 3 Sandf. Ch. (N. Y.) 120, 129. See also Letchworth's Appeal, 30 Pa. St. 175, 179; Mowry *v.* Staples, 1 R. I. 10, 13; *In re* Twigg Estate, [1892] 1 Ch. 579, 581, 61 L. J. Ch. 444, 66 L. T. Rep. N. S. 604, 40 Wkly. Rep. 297.

Besides the strict meaning of the word there is also a sense in which intestacy may be partial; that is, where a man leaves a will which does not dispose of his whole estate, he is said to "die intestate" as to the property so omitted. Black L. Dict. To the same effect see Kent *v.* Hopkins, 86 Hun (N. Y.) 611, 613, 33 N. Y. Suppl. 767; Twisden *v.* Twisden, 9 Ves. Jr. 413, 425, 7 Rev. Rep. 254, 32 Eng. Reprint 661.

Where the word is used with reference to specific property it means a person who died without a will as to that property. N. Y. Code Civ. Proc. § 2514 [*quoted* in *In re* Haughian, 37 Misc. (N. Y.) 457, 458, 75 N. Y. Suppl. 932].

41. Den *v.* Mugway, 15 N. J. L. 330, 331.

42. Bouvier L. Dict. [*citing* Inst. 3. 1. pr.; Dig. 38. 16. 1; 50. 16. 64].

43. Handley *v.* Howe, 22 Me. 560, 563.

44. Hughes *v.* Com., 41 S. W. 294, 296, 19 Ky. L. Rep. 497.

45. Langley *v.* Barnstead, 63 N. H. 246, 247 [*quoted* in State *v.* Meek, 26 Wash. 405, 407, 67 Pac. 76, where the court said: "Whether a place is in the vicinity or the neighborhood of another place depends upon no arbitrary rule of distance or typography." See also *In re* Oil-Well Lease, 18 Ohio Cir. Ct. 885, 9 Ohio Cir. Dec. 860.

46. McCarty *v.* Coffin, 157 Mass. 478, 32 N. E. 659; Foster *v.* Hanchett, 68 Vt. 319, 321, 35 Atl. 316, 54 Am. St. Rep. 886. See also Collins *v.* Dispatch Pub. Co., 152 Pa. St. 187, 191, 25 Atl. 546, 34 Am. St. Rep. 636, where it is said: "In its ordinary signification, and as generally applied to persons, the word 'intimacy' would be understood to mean a proper friendly relation of the parties; but as employed in the article referred to . . . it conveys the idea of an improper relation, an intimacy at least disreputable and degrading."

47. Webster Int. Dict. See also Adams *v.* Stone, 131 Mass. 433, 434; Wilcox *v.* Moon, 63 Vt. 481, 486, 22 Atl. 80.

"Intimate acquaintance" see People *v.* McCarthy, 115 Cal. 255, 258, 46 Pac. 1073; People *v.* Levy, 71 Cal. 618, 623, 12 Pac. 791. See also *In re* McKenna, 143 Cal. 580, 583, 77 Pac. 461.

48. Miller *v.* Miller, 3 Serg. & R. (Pa.) 267, 270, 8 Am. Dec. 651.

INTIMIDATE. To make fearful — to inspire with fear.[49] (See ENCOURAGE; FORCE; INTIMIDATION.)

INTIMIDATION.[50] The act of making one timid or fearful, by a declaration of an intention or determination to injure another by the commission of some unlawful act.[51] (Intimidation: In General, see EXTORTION. As Ground For Divorce, see DIVORCE. In Procuring — Confession of Crime, see CRIMINAL LAW; Payment, see PAYMENT. Of Voter, see ELECTIONS. Of Wife, see ACKNOWLEDGMENTS; HUSBAND AND WIFE. In Procurement or Execution of Particular Contract or Instrument, see ACCORD AND SATISFACTION; ACKNOWLEDGMENTS; ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; BONDS; CHATTEL MORTGAGES; COMMERCIAL PAPER; CONTRACTS; DEEDS; MORTGAGES; PAYMENT; WILLS, and the like. See also INTERFERE; INTERFERENCE.)

INTO. To the inside of; within.[52]

IN TOTO ET PARS CONTINETUR. A maxim meaning "A part is included in the whole."[53]

INTOXICANTS. A word sometimes used as synonymous with intoxicating liquors.[54]

INTOXICATE. A term which relates generally to the use of strong drink.[55] (See, generally, DRUNKARDS; INTOXICATING LIQUORS.)

INTOXICATED. See, generally, DRUNKARDS.

49. Long *v.* State, 12 Ga. 293, 320. See also Carson *v.* Hartford, 48 Conn. 68, 90; Embry *v.* Com., 79 Ky. 439, 441; O'Neil *v.* Behanna, 182 Pa. St. 236, 243, 37 Atl. 843, 61 Am. St. Rep. 702, 38 L. R. A. 382; Judge *v.* Bennett, 52 J. P. 257, 36 Wkly. Rep. 103, 104.

50. Compared with "force."— "When the Code speaks of force, it means actual violence; and when it speaks of intimidation, it still means force; not actual and direct, but exerted upon the person robbed by operating upon his fears — the fear of injury to his person, or property, or character . . . Intimidation . . . is constructive force." Long *v.* State, 12 Ga. 293, 315, 320.

"Intimidation" has been limited in certain statutes "to such intimidation as would justify a magistrate in binding over the intimidator to keep the peace towards the person intimidated — in other words, to such intimidation as implies a threat of personal violence." Connor *v.* Kent, [1891] 2 Q. B. 545, 559, 17 Cox C. C. 354, 55 J. P. 485, 51 L. J. M. C. 9, 65 L. T. Rep. N. S. 573.

51. Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 514, 49 Am. Rep. 666. See also Judge *v.* Bennett, 52 J. P. 257, 4 Wkly. Rep. 103, 104.

52. Webster Int. Dict.

"Into, through, or under" see Roderick *v.* Aston Local Bd., 5 Ch. D. 328, 329, 334, 46 L. J. Ch. 802, 36 L. J. Rep. N. S. 328, 25 Wkly. Rep. 403.

"Into or out of" see The Maria, L. R. 1 A. & E. 358, 362, 16 L. T. Rep. N. S. 717, 15 Wkly. Rep. 143.

"Into the township" see Pompton Tp. *v.* Cooper Union for Advancement of Science and Art, 101 U. S. 196, 201, 25 L. ed. 803.

"Into court" see Converse *v.* Washburn, 43 Vt. 129, 132.

53. Bouvier L. Dict. [*citing* Dig. 50, 17, 113].

54. *In re* McLaughlin, 58 Vt. 136, 139, 4 Atl. 862. See also 14 Cyc. 1091.

55. Black L. Dict. [*quoted* in Ring *v.* Ring, 112 Ga. 854, 857, 38 S. E. 330].

INTOXICATING LIQUORS

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Adulteration of Liquor, see ADULTERATION.
Agency Generally, see PRINCIPAL AND AGENT.
Customs Duties on Liquor, see CUSTOMS DUTIES.
Illegal Contract Generally, see CONTRACTS.
Indictment or Information Generally, see INDICTMENTS AND INFORMATIONS.
Injunction Generally, see INJUNCTIONS.
Inspection of Liquor, see INSPECTION.
Introducing Liquor Into Indian Country, see INDIANS.
License Generally, see LICENSES.
Liquor as Article of Foreign and Interstate Commerce, see COMMERCE.
Master and Servant Generally, see MASTER AND SERVANT.
Penalty Generally, see PENALTIES.
Searches and Seizures Generally, see SEARCHES AND SEIZURES.
Selling Liquor on Sunday, see SUNDAY.
United States Revenue Laws, see INTERNAL REVENUE.

For General Matters Relating to Criminal Law and Procedure, see CRIMINAL LAW.
See also INTOXICATION, and Cross-References Thereunder.

I. TERMINOLOGY.[1]

A. Intoxicating Liquors — 1. IN GENERAL. In the absence of a statutory definition, this term is understood to include any liquor intended for use as a beverage or capable of being so used which contains such a proportion of alcohol that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink.[2] It is therefore permissible to show the proportion of alcohol contained in any liquor in dispute.[3] If this is very great, the courts may hold, without further evidence, that the liquor is "intoxicating";[4] if extremely small they may hold that it is not within the meaning of that term.[5] But otherwise the question must be determined upon testimony as to whether or not the liquor in question can and does actually produce intoxication when taken as a beverage.[6] When this term is defined by statute, the courts are bound by it and can neither enlarge nor restrict its signification; and any liquor which is named or plainly included in the statute must be held intoxicating as a matter of

1. For definitions of particular liquors and beverages see ALE, BEER, CIDER, RUM, WHISKY, etc.

2. *Arkansas.*— Foster *v.* State, 36 Ark. 258.
Kansas.— Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284.
Michigan.— People *v.* Hawley, 3 Mich. 330.
New York.— Tompkins County *v.* Taylor, 21 N. Y. 173.
Tennessee.— Moore *v.* State, 96 Tenn. 544, 35 S. W. 556.
Texas.— Malone *v.* State, (Cr. App. 1899) 51 S. W. 381.
See 29 Cent. Dig. tit. "Intoxicating Liquors," § 142.
A mixture of liquors is an intoxicating liquor, within the meaning of the statutes, if it may be taken in sufficient quantity to produce intoxication, and it is reasonable to presume that it may be used as a substitute for the ordinary drinks. State *v.* Reynolds, 5 Kan. App. 515, 47 Pac. 573. *Compare* Foster *v.* State, 36 Ark. 258, where it is said that the proportion of whisky or other ardent spirits to the other ingredients in a compound is to be mainly, if not solely, regarded in determining its character, and whether or not it is within the meaning of the statute.
Cordials.— On the issue as to whether or not a cordial is intoxicating, so as to make its sale prohibited by the statute, the test is not whether it is "reasonably susceptible of being used as an intoxicating beverage." Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699.

3. State *v.* Hughes, 16 R. I. 403, 16 Atl. 911.

4. Prussia *v.* Guenther, 16 Abb. N. Cas. (N. Y.) 230.

5. Tompkins County *v.* Taylor, 21 N. Y. 173, holding that the term "intoxicating liquor" does not apply to a beverage "containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect."

6. Godfreidson *v.* People, 88 Ill. 284; Hewitt *v.* People, 87 Ill. App. 367.

law, without inquiry into its actual properties, and even though, as a matter of fact, it is not capable of producing intoxication.[7]

2. Medicinal Preparations. A compound which is distinctively known and used as a drug, medicine, or toilet preparation, and which cannot practically be taken as a beverage for the sake of the alcohol which it contains, because of its repulsive taste or smell, because the effect of the alcohol is counteracted by the other ingredients, or because of its systematic effects if taken in excessive doses, is not within the statutes relating to intoxicating liquors, no matter how large a proportion of alcohol it may contain; and on the other hand, a medicinal preparation which is capable of being used as a beverage, and which contains such a percentage of alcohol that it will produce intoxication if drunk to excess, is within the meaning of such statutes, although it may contain other constituents which, either separately or in conjunction with alcohol, possess useful medicinal properties.[8] Although this is the generally accepted rule, some decisions have made the determination of the question depend upon the intention of the buyer, as to the use to be made of the compound, or upon the knowledge and intention of the seller.[9] And it must be observed that the applicable statute may be so broad in its terms as to include drugs and medicines which are entirely unfit to be used as beverages, provided only they contain alcohol.[10]

3. Bitters. The various infusions called "bitters," containing alcohol together with bitter herbs, barks, or other medicinal ingredients, are subject to the laws regulating the sale of intoxicating liquors, if, notwithstanding the presence of the medicinal ingredients, they are capable of being used as beverages and contain sufficient alcohol to produce intoxication when so used; but not if they are incapable of being used as drinks and where the alcohol is merely a necessary preservative or vehicle for the other constituents.[11]

7. State *v.* Intoxicating Liquors, 76 Iowa 243, 41 N. W. 6, 2 L. R. A. 408; Com. *v.* Timothy, 8 Gray (Mass.) 480; State *v.* Wittmar, 12 Mo. 407.

As used in the laws of Alabama, the term "intoxicating drinks" is not necessarily confined to such as are "spirituous, vinous, or malt liquors." Roberson *v.* State, 100 Ala. 123, 14 So. 869.

8. *Alabama.*— Wall *v.* State, 78 Ala. 417. And see Wadsworth *v.* Dunnam, 98 Ala. 610, 13 So. 597; Compton *v.* State, 95 Ala. 25, 11 So. 69.

Arkansas.— Davis *v.* State, 50 Ark. 17, 6 S. W. 388. *Compare* Foster *v.* State, 36 Ark. 258.

District of Columbia.— Mackall *v.* District of Columbia, 16 App. Cas. 301.

Georgia.— Bradley *v.* State, 121 Ga. 201, 48 S. E. 981; Colwell *v.* State, 112 Ga. 75, 37 S. E. 129; Chapman *v.* State, 100 Ga. 311, 27 S. E. 789. And see Gault *v.* State, 34 Ga. 533, holding that whisky by itself is not a "drug."

Illinois.— Walker *v.* Dailey, 101 Ill. App. 575.

Indiana.— Parker *v.* State, 31 Ind. App. 650, 68 N. E. 912.

Iowa.— State *v.* Laffer, 38 Iowa 422.

Kansas.— State *v.* Coulter, 40 Kan. 87, 19 Pac. 368; Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284.

Massachusetts.— Com. *v.* Ramsdell, 130 Mass. 68; Com. *v.* Hallett, 103 Mass. 452.

Texas.— Davis *v.* State, 36 Tex. Cr. 393, 37 S. W. 435. And see Reisenberg *v.* State, (Cr. App. 1905) 84 S. W. 585.

Vermont.— State *v.* Kezer, 74 Vt. 50, 52 Atl. 116; Russell *v.* Sloan, 33 Vt. 656.

West Virginia.— State *v.* Muncey, 28 W. Va. 494; State *v.* Haymond, 20 W. Va. 18, 43 Am. Rep. 787.

United States.— U. S. *v.* Stubblefield, 40 Fed. 454.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 146.

9. Holcomb *v.* People, 49 Ill. App. 73; Walker *v.* Dailey, 101 Ill. App. 575; State *v.* Kezer, 74 Vt. 50, 52 Atl. 116. *Contra*, Colwell *v.* State, 112 Ga. 75, 37 S. E. 129; State *v.* Muncey, 28 W. Va. 494.

In Mississippi it has been held that a druggist who in good faith sells tincture of ginger as a medicine cannot be convicted of selling intoxicating liquors because the purchaser diluted the drug with water and drank it as an intoxicant. Bertrand *v.* State, 73 Miss. 51, 18 So. 545.

10. See Gostorf *v.* State, 39 Ark. 450; State *v.* Gray, 61 Conn. 39, 22 Atl. 675; U. S. *v.* Cohn, 2 Indian Terr. 474, 52 S. W. 38.

11. Carl *v.* State, 89 Ala. 93, 8 So. 156; Carl *v.* State, 87 Ala. 17, 6 So. 118, 4 L. R. A. 380; Wall *v.* State, 78 Ala. 417; Com. *v.* Pease, 110 Mass. 412; King *v.* State, 58 Miss. 737, 38 Am. Rep. 344; James *v.* State, 21 Tex. App. 353, 17 S. W. 422.

Where the statute expressly includes in the definition of intoxicating liquors "any composition of which spirituous liquor is a part," it is held to be a violation of the law

4. Fruits Preserved in Spirits. The sale of fruit, preserved or flavored with a small proportion of brandy or other liquor, as a confection or preserve, and not so prepared with intent to evade the liquor laws, is not within statutes prohibiting the sale of intoxicating liquor.[12] But the sale of "brandy peaches," "brandy cherries," or the like, where the article really sold is the brandy or other liquor, and it is intended to be used as a beverage, and the addition of a little fruit is merely a device to evade the law, is within such statutes.[13]

B. Spirituous Liquors. The term "spirituous liquors" is not synonymous with the term "intoxicating liquors," nor can the two expressions be used interchangeably. All spirituous liquor is intoxicating; but there are varieties of intoxicating liquor which cannot properly be described as spirituous.[14] The latter term is properly restricted to such liquors as are produced by the process of distillation, and does not include wine, ale, beer, or other liquors which are not the product of the still,[15] unless the terms of a statute extend its signification so

to sell, as a beverage, "bitters" thus compounded, notwithstanding a United States excise tax has been paid thereon (showing that the article is classed as a medicine), and although the federal law requires no license for the sale of the same. State *v.* Wilson, 80 Mo. 303; State *v.* Lillard, 78 Mo. 136. And see State *v.* Neese, 38 S. C. 261, 16 S. E. 893.

12. Rabe *v.* State, 39 Ark. 204.

13. Ryall *v.* State, 78 Ala. 410; Musick *v.* State, 51 Ark. 165, 10 S. W. 225; Petteway *v.* State, 36 Tex. Cr. 97, 35 S. W. 646; U. S. *v.* Stafford, 20 Fed. 720.

14. Allred *v.* State, 89 Ala. 112, 8 So. 56; Blankenship *v.* State, 93 Ga. 814, 21 S. E. 130; McDuffie *v.* State, 87 Ga. 687, 13 S. E. 596; Com. *v.* Livermore, 4 Gray (Mass.) 18; Com. *v.* Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476; Clifford *v.* State, 29 Wis. 327.

In indictment.— In an indictment an allegation of the unlawful sale of "spirituous, vinous, and malt liquors" is held to be a sufficient allegation of the sale of "intoxicating" liquors contrary to law. State *v.* Reily, 66 N. J. L. 399, 52 Atl. 1005.

In instructions.— Where an information charged defendant with unlawfully selling "spirituous liquor," and the evidence showed the liquor sold to have been whisky, it was held that the fact that the court, in an instruction, referred to the liquor as "intoxicating," instead of spirituous," gave defendant no just cause for complaint. State *v.* Pritchard, 16 S. D. 166, 91 N. W. 583.

In title of statute.—A statute entitled "an act to prohibit the sale of spirituous liquors," which declares that it shall be unlawful for any person to sell intoxicating liquors, contains matter different from that expressed in its title, the term used in the body of the act being wider in its scope than the title. McDuffie *v.* State, 87 Ga. 687, 13 S. E. 596.

15. *Indiana.*— State *v.* Moore, 5 Blackf. 118.

Massachusetts.—Com. *v.* Livermore, 4 Gray 18; Com. *v.* Grey, 2 Gray 501, 61 Am. Dec. 476; Com. *v.* Jordan, 18 Pick. 228. *Compare* Com. *v.* Bathrick, 6 Cush. 247, holding that the offense of selling spirituous liquors may be committed by a sale of such liquor mixed in small quantities with other unknown ingredients, and called for and sold under the name of beer.

New Hampshire.— Walker *v.* Prescott, 44 N. H. 511.

New Jersey.— Fleming *v.* New Brunswick, 47 N. J. L. 231.

Tennessee.— Fritz *v.* State, 1 Baxt. 15 [*overruling* State *v.* Sharrer, 2 Coldw. 323]. And see Caswell *v.* State, 2 Humphr. 402.

West Virginia.— State *v.* Thompson, 20 W. Va. 674.

Wisconsin.— Clifford *v.* State, 29 Wis. 327.

England.— Atty.-Gen. *v.* Bailey, 1 Exch. 281, 17 L. J. Exch. 9.

Canada.— Reg. *v.* Blair, 24 N. Brunsw. 71, *quære.*

Beer is not included in the designation of either "vinous" or "spirituous" liquors as these terms are used in the statutes. Tinker *v.* State, 90 Ala. 647, 8 So. 855; State *v.* Brindle, 28 Iowa 512; Fritz *v.* State, 1 Baxt. (Tenn.) 15. But *compare* State *v.* Brown, 51 Conn. 1, holding that a complaint alleging the illegal sale of "spirituous liquor, to wit, one half gallon of beer," is good. And see State *v.* Watts, 101 Mo. App. 658, 74 S. W. 377.

Cider is neither a "spirituous," "vinous," nor "malt" liquor. Feldman *v.* Morrison, 1 Ill. App. 460; State *v.* Oliver, 26 W. Va. 422, 53 Am. Rep. 79. But *compare* Com. *v.* Reyburg, 122 Pa. St. 299, 16 Atl. 351, 2 L. R. A. 415.

In New York it is held that ale is within a statute prohibiting the sale of "strong or spirituous liquors." Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; Rau *v.* People, 63 N. Y. 277; Tompkins County *v.* Taylor, 21 N. Y. 173; Killip *v.* McKay, 13 N. Y. St. 5; Cayuga County *v.* Freeoff, 17 How. Pr. 442; Nevin *v.* Ladue, 3 Den. 43, 437.

In North Carolina it is held that the term "spirituous liquor" includes all liquors which contain alcohol and are capable of producing intoxication, whether distilled or not, and hence the term is applicable to such beverages as wine and lager beer. State *v.* Giersch, 98 N. C. 720, 4 S. E. 193.

as to make the term cover liquors which are not etymologically within its meaning.[16]

C. Fermented Liquors. This term is applicable to liquors which contain alcohol produced by the process of alcoholic fermentation, such as wines, ale, and beer. As stated in the preceding section, these liquors are not properly described as "spirituous," but it is a presumption of law that fermented liquors are intoxicating.[17] But if a statute forbids the sale of "fermented" liquor, it is not necessary, for the purposes of such statute, that the liquor sold should actually be intoxicating; it is enough to show that it was fermented.[18]

D. Malt Liquors. This term, in its common and popular usage, includes such liquors as beer, ale, porter, and stout, but not distilled liquors, although malt may enter into their composition, and is clearly inapplicable to wines and cider.[19] The courts decline to take judicial notice of all the varieties of liquor which may be thus designated, and are not willing to rule judicially that all malt liquors are intoxicating, unless it is so declared by statute.[20] It is a question for the jury, upon the evidence, whether or not the particular malt liquor was intoxicating.[21] But if the statute specifically forbids the unlicensed sale of "malt liquor," the question of the intoxicating properties of the liquor sold is immaterial; it is only necessary to determine whether it was a malt liquor.[22]

E. Vinous Liquors. Vinous liquor means liquor made from the fermented juice of the grape.[23]

16. In New Hampshire the statute provides that the words "spirituous liquors" shall be equivalent to "intoxicating liquors," and under this provision it is held that intoxicating wines and any malt liquor which is shown or admitted to be intoxicating may be described as "spirituous." State *v.* Lager Beer, 68 N. H. 377, 39 Atl. 255; Jones *v.* Surprise, 64 N. H. 243, 9 Atl. 384.

17. State *v.* Volmer, 6 Kan. 371. And see State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844.

British wine is included in the term "fermented liquor." Harris *v.* Jenns, 9 C. B. N. S. 152, 30 L. J. M. C. 183, 3 L. T. Rep. N. S. 408, 9 Wkly. Rep. 36, 99 E. C. L. 152.

Fermented beer is a term applicable to some of the various kinds of beer, such as spruce beer, spring beer, ginger beer, molasses beer, etc. Nevin *v.* Ladue, 3 Den. (N. Y.) 437.

18. People *v.* Kinney, 124 Mich. 486, 83 N. W. 147.

Cider.— If the statutes regulating the sale of intoxicants expressly include "fermented liquors," or are in terms made applicable to "fermented cider," these terms will cover the sale of hard cider, but not the sweet or unfermented apple juice.

Arkansas.— Berger *v.* State, (1889) 11 S. W. 765.

Illinois.— Hewitt *v.* People, 186 Ill. 336, 57 N. E. 1077 [*affirming* 87 Ill. App. 367]; Hertel *v.* People, 78 Ill. App. 109.

Kansas.— State *v.* Schaefer, 44 Kan. 90, 24 Pac. 92.

Michigan.— People *v.* Adams, 95 Mich. 541, 55 N. W. 461; People *v.* Foster, 64 Mich. 715, 31 N. W. 596.

Vermont.— State *v.* Thornburn, 75 Vt. 18, 52 Atl. 1039; State *v.* Waite, 72 Vt. 108, 47 Atl. 397.

United States.— Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 144.

And if the law prohibits or regulates the sale of "cider" by name, without any qualifying adjective, it must be held applicable to all cider, without regard to the stage of fermentation or to its intoxicating properties, and hence will include sweet cider. State *v.* Roach, 75 Me. 123; State *v.* McNamara, 69 Me. 133; Com. *v.* Dean, 14 Gray (Mass.) 99; State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844; *Ex p.* Noel, 6 Montreal Leg. N. 150. *Compare* Guptill *v.* Richardson, 62 Me. 257; Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570. In other cases the question whether or not cider is included within the terms of the statute is not one of law, but one of fact for the jury. State *v.* Biddle, 54 N. H. 379; Com. *v.* Reyburg, 122 Pa. St. 299, 16 Atl. 351, 2 L. R. A. 415.

In an indictment framed under a statute prohibiting the sale of "fermented or distilled liquor," an allegation of the sale of "intoxicating liquor" is good, where the liquor is further designated by name, so that the court may take judicial notice that it is fermented liquor. State *v.* Effinger, 44 Mo. App. 81.

19. Allred *v.* State, 89 Ala. 112, 8 So. 56.

20. Eaves *v.* State, 113 Ga. 749, 39 S. E. 318; Shaw *v.* State, 56 Ind. 188; State *v.* Starr, 67 Me. 242; Barnes *v.* State, (Tex. Cr. App. 1898) 44 S. W. 491.

21. Connolly *v.* Atlanta, 79 Ga. 664, 4 S. E. 263; Godfreidson *v.* People, 88 Ill. 284; Glasscock *v.* State, (Tex. Cr. App. 1898) 43 S. W. 989.

22. Eaves *v.* State, 113 Ga. 749, 39 S. E. 318. And see State *v.* O'Connell, 99 Me. 61, 58 Atl. 59.

23. Allred *v.* State, 89 Ala. 112, 8 So. 56; Adler *v.* State, 55 Ala. 16; Worley *v.* Spurgeon, 38 Iowa 465.

F. Liquor or Liquors. Either of these terms, standing alone, is too wide to have a precise legal signification, unless explained by the context or by necessary inferences from the subject-matter of the statute. When thus explained, however, the terms are commonly understood as including all varieties of intoxicating beverages, whether spirituous, vinous, or malt.[24]

G. Dram-Shop, Etc.[25] A dram-shop is a place where spirituous liquor is sold by the drink,[26] and is commonly called a saloon;[27] but the latter word has a much broader meaning.[28]

II. JUDICIAL NOTICE.[29]

A. As to Intoxicating Quality of Liquor. Under the well known doctrine of judicial cognizance the courts take judicial notice that whisky,[30] brandy,[31]

Cider.— Com. *v.* Roese, 1 Wilcox (Pa.) 253, holding that cider which has undergone the process of vinous fermentation, by which it has become possessed of the alcoholic quality of wine, is a "vinous liquor," within the meaning of the statute prohibiting the sale of such liquor without a license.

24. People *v.* Crilley, 20 Barb. (N. Y.) 246; State *v.* Brittain, 89 N. C. 574; Kizer *v.* Randleman, 50 N. C. 428; Hollender *v.* Magone, 38 Fed. 912.

In an indictment for the sale of liquor to a drunkard, an allegation which merely charges defendant with selling "one pint of liquor, at and for the sum of ten cents" without averring that the liquor was intoxicating, is insufficient. Ward *v.* State, 48 Ind. 293. But see State *v.* Beasley, 21 W. Va. 777, where it was held that, in a prosecution for the sale of spirituous liquor, testimony that witness called at defendant's place to get a "drink of liquor," and that he was furnished with "a glass of liquor," for which he paid ten cents, is sufficient to support a conviction.

25. See BAR-ROOM, 5 Cyc. 620.

26. Snow *v.* State, 50 Ark. 557, 9 S. W. 306.

In Illinois a dram-shop is defined by statute as a place where spirituous, vinous, or malt liquors are retailed by less quantity than one gallon. See Strauss *v.* Galesburg, 203 Ill. 234, 67 N. E. 836; People *v.* Harrison, 191 Ill. 257, 61 N. E. 99 (dissenting opinion); Hewitt *v.* People, 188 Ill. 336, 57 N. E. 1077; Dennehy *v.* Chicago, 120 Ill. 627, 12 N. E. 227; Wright *v.* People, 101 Ill. 126; Rank *v.* People, 80 Ill. App. 40; Feldman *v.* Morrison, 1 Ill. App. 460.

Dram-shop keeper defined see State *v.* Slate, 24 Mo. 530; State *v.* Owen, 15 Mo. 506; State *v.* Barnett, 110 Mo. App. 592, 85 S. W. 613; Mo. Rev. St. (1899) § 2990.

27. Snow *v.* State, 50 Ark. 557, 9 S. W. 306. And see Bryden *v.* Northrup, 58 Ill. App. 233, in which it is said: "While we often hear dram shops spoken of as saloons, and see them so mentioned in city ordinances, and on signs upon them may read, 'sample room,' 'family resort,' and, perhaps, other designations, yet no one has, as we verily believe, yet endeavored to attract custom by calling his dram-shop a 'studio' or 'salesroom.'"

28. Snow *v.* State, 50 Ark. 557, 9 S. W. 306, in which it is said: "To constitute a saloon, it is not necessary that ardent spirits should be offered for sale, or that it should be a business requiring a license under the revenue laws of the state."

29. See EVIDENCE, 16 Cyc. 649 *et seq.*

30. *Alabama.*— Freiberg *v.* State, 94 Ala. 91, 10 So. 703.

Arkansas.— Edgar *v.* State, 37 Ark. 219.

Florida.— Netso *v.* State, 24 Fla. 363, 5 So. 8, 1 L. R. A. 825; Frese *v.* State, 23 Fla. 267, 2 So. 1.

Georgia.— Hodge *v.* State, 116 Ga. 852, 43 S. E. 255.

Indiana.— Schlicht *v.* State, 56 Ind. 173; Eagan *v.* State, 53 Ind. 162; Klare *v.* State, 43 Ind. 483; Carmon *v.* State, 18 Ind. 450.

Kansas.— Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284.

Missouri.— State *v.* Williamson, 21 Mo. 496.

Nebraska.— Peterson *v.* State, 63 Nebr. 251, 88 N. W. 549.

New York.— Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; Rau *v.* People, 63 N. Y. 277.

Texas.— Douthitt *v.* State, (Cr. App. 1901) 61 S. W. 404; Maddox *v.* State, (Cr. App. 1900) 55 S. W. 832; Aston *v.* State, (Cr. App. 1899) 49 S. W. 385.

Wisconsin.— Briffitt *v.* State, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621.

United States.— U. S. *v.* Ash, 75 Fed. 651.

Whisky cocktail.— Courts take judicial notice that whisky cocktail, a compound of which whisky is the predominant element, is an intoxicating drink; and an indictment for the unlawful sale of whisky is sustained by proof of the sale of whisky cocktail. Galloway *v.* State, 23 Tex. App. 398, 5 S. W. 246; U. S. *v.* Ash, 75 Fed. 651.

31. *Connecticut.*— State *v.* Wadsworth, 30 Conn. 55.

Indiana.— Fenton *v.* State, 100 Ind. 598, blackberry brandy.

Kansas.— Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284.

Minnesota.— State *v.* Tisdale, 54 Minn. 105, 55 N. W. 903, French brandy, California brandy, or any other kind.

New York.— Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; Rau *v.* People, 63 N. Y. 277.

Vermont.— State *v.* Munger, 15 Vt. 290.

Virginia.— Thomas *v.* Com., 90 Va. 92, 17 S. E. 788.

gin,[32] rum,[33] porter,[34] ale,[35] wine,[36] and alcohol [37] are intoxicating liquors. It will also be judicially noticed that strong beer,[38] and according to some of the authorities lager beer,[39] are intoxicating liquors. And there are cases going further and holding that courts will take judicial notice that the term "beer," used without restriction or qualification, denotes intoxicating liquor.[40] As to other varieties of beer, or ordinary malt beer disguised under other names, their character as intoxicating or the reverse is a matter of evidence.[41] Where a statute expressly declares that beer or lager beer shall be deemed to be an intoxicating liquor [42] it is not necessary for the prosecution to prove, nor is it permissible for defendant to attempt to disprove, the actual intoxicating properties thereof.[43] Where a liquor is designated

32. State *v.* Wadsworth, 30 Conn. 55; Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284; Com. *v.* Peckham, 2 Gray (Mass.) 514; Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; Rau *v.* People, 63 N. Y. 277.

33. State *v.* Wadsworth, 30 Conn. 55.

34. Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; Nevin *v.* Ladue, 3 Den. (N. Y.) 437.

35. Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; Rau *v.* People, 63 N. Y. 277; Killip *v.* McKay, 13 N. Y. St. 5; Johnston *v.* State, 23 Ohio St. 556. And see Garst *v.* State, 68 Ind. 101; State *v.* Lemp, 16 Mo. 389. But *compare* Haines *v.* Hanrahan, 105 Mass. 480; State *v.* Biddle, 54 N. H. 379; State *v.* Barron, 37 Vt. 57.

Declared intoxicating by statute.— If the statute declares that ale shall be included among the intoxicating liquors within its meaning, it is not necessary for the jury to find as a fact that it is intoxicating. State *v.* Wadsworth, 30 Conn. 55.

36. Caldwell *v.* State, 43 Fla. 545, 30 So. 814; State *v.* Packer, 80 N. C. 439; Hatfield *v.* Com., 120 Pa. St. 395, 14 Atl. 151; Starace *v.* Rossi, 69 Vt. 303, 37 Atl. 1109, Italian sour wine. And see Wolf *v.* State, 59 Ark. 297, 27 S. W. 77, 43 Am. St. Rep. 34; Jackson *v.* State, 19 Ind. 312 (it is not judicially known that wine is not intoxicating); Reyfelt *v.* State, 73 Miss. 415, 18 So. 925. *Compare* Loid *v.* State, 104 Ga. 726, 30 S. E. 949 (holding that courts cannot take judicial notice that home-made blackberry wine is necessarily intoxicating); State *v.* Page, 66 Me. 418.

37. Snider *v.* State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350; State *v.* Intoxicating Liquors, 76 Iowa 243, 41 N. W. 6, 2 L. R. A. 408; Greiner-Kelley Drug Co. *v.* Truett, (Tex. Civ. App. 1903) 75 S. W. 536; Sebastian *v.* State, 44 Tex. Cr. 508, 72 S. W. 849. And see Bennett *v.* People, 30 Ill. 389. But see Winn *v.* State, 43 Ark. 151; State *v.* Witt, 39 Ark. 216; State *v.* Martin, 34 Ark. 340; Lemly *v.* State, 70 Miss. 241, 12 So. 22, 20 L. R. A. 645.

38. People *v.* Hawley, 3 Mich. 330; Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; Rau *v.* People, 63 N. Y. 277; Nevin *v.* Ladue, 3 Den. (N. Y.) 43, 437; Markle *v.* Akron, 14 Ohio 586. And see Tompkins County *v.* Taylor, 21 N. Y. 173; Cayuga County *v.* Freeoff, 17 How. Pr. (N. Y.) 442. *Compare* People *v.* Crilley, 20 Barb. (N. Y.) 246.

39. State *v.* Morehead, 22 R. I. 272, 47 Atl. 545; State *v.* Church, 6 S. D. 89, 60 N. W. 143. *Compare* Smith *v.* State, 113 Ga. 758, 39 S. E. 294; Eaves *v.* State, 113 Ga. 749, 39 S. E. 318, holding that the courts do not judicially know that all malt liquors are intoxicating. *Contra,* Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; Rau *v.* People, 63 N. Y. 277; People *v.* Schewe, 29 Hun (N. Y.) 122; Matter of Hunter, 34 Misc. (N. Y.) 389, 69 N. Y. Suppl. 908; Killip *v.* McKay, 13 N. Y. St. 5; People *v.* Hart, 24 How. Pr. (N. Y.) 289; People *v.* Zeiger, 6 Park. Cr. (N. Y.) 355.

40. Sothman *v.* State, 66 Nebr. 302, 92 N. W. 303; Peterson *v.* State, 63 Nebr. 251, 88 N. W. 549; State *v.* Currie, 8 N. D. 545, 80 N. W. 475; Maier *v.* State, 2 Tex. Civ. App. 296, 21 S. W. 974; Briffitt *v.* State, 58 Wis. 39, 16 N. W. 39, 46 Am. St. Rep. 621. And see State *v.* May, 52 Kan. 53, 34 Pac. 407; State *v.* Jenkins, 32 Kan. 477, 4 Pac. 809; State *v.* Teissedre, 30 Kan. 476, 2 Pac. 650; People *v.* Wheelock, 3 Park. Cr. (N. Y.) 9. *Contra,* Du Vall *v.* Augusta, 115 Ga. 813, 42 S. E. 265; Hansberg *v.* People, 120 Ill. 21, 8 N. E. 857, 60 Am. Rep. 549; State *v.* Ritzman, 8 Ohio S. & C. Pl. Dec. 685; State *v.* Sioux Falls Brewing Co., 5 S. D. 39, 58 N. W. 1, 26 L. R. A. 138.

41. Bell *v.* State, 91 Ga. 227, 18 S. E. 288 (rice beer); Connolly *v.* Atlanta, 79 Ga. 664, 4 S. E. 263 (new era beer); Com. *v.* Gavin, 160 Mass. 523, 36 N. E. 484; Com. *v.* O'Kean, 152 Mass. 584, 26 N. E. 97 (hop beer); Com. *v.* Blos, 116 Mass. 56 (schenck beer); Howorth *v.* Minns, 51 J. P. 7, 56 L. T. Rep. N. S. 316 (botanic beer).

42. See the following cases:

Indiana.— Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Douglas *v.* State, 21 Ind. App. 302, 52 N. E. 238.

Iowa.— State *v.* Cloughly, 73 Iowa 626, 35 N. W. 652.

Minnesota.— State *v.* Dick, 47 Minn. 375, 50 N. W. 362.

Missouri.— State *v.* Besheer, 69 Mo. App. 72; State *v.* Houts, 36 Mo. App. 265.

Nebraska.—Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27.

43. Com. *v.* Snow, 133 Mass. 575; Com. *v.* Bubser, 14 Gray (Mass.) 83; Com. *v.* Anthes, 12 Gray (Mass.) 29; State *v.* Thornton, 63 N. H. 114.

simply as cider, the fact that it is intoxicating must be established by evidence.[44] It will not be judicially noticed that hop pop is an intoxicating liquor.[45] Whether compounds of intoxicating liquors with other ingredients, whether put up upon a single prescription and for a single case, or compounded upon a given formula and sold under a specific name, as bitters, cordials, tonics, etc., are within or without a statute regulating the traffic in intoxicating liquors, is a question of fact for the jury, and not a question of law for the court.[46] Whatever, on the other hand, is generally and popularly known as a medicine, an article for the toilet, or for culinary purposes, and is not classed among the liquors ordinarily used as intoxicating beverages, such as paregoric, bay-rum, cologne, essence of lemon, etc., is without such a statute and may be so declared as a matter of law by the courts, and this notwithstanding such articles contain alcohol and in fact may produce intoxication.[47]

B. As to Kind of Liquors — Whether Spirituous, Etc. Likewise under the doctrine of judicial cognizance the courts will take judicial notice of the fact that whisky,[48] brandy,[49] gin,[50] rum,[51] and alcohol[52] are spirituous liquors; that beer,[53]

44. *Illinois.*— Hewitt *v.* People, 87 Ill. App. 367 [*affirmed* in 186 Ill. 336, 57 N. E. 1077]; Feldman *v.* Morrison, 1 Ill. App. 460.

Kansas.— See Topeka *v.* Zufall, 40 Kan. 47, 19 Pac. 359, 1 L. R. A. 387, peach cider.

Maine.— State *v.* Page, 66 Me. 418.

Massachusetts.— Com. *v.* Chappel, 116 Mass. 7. *Compare* Com. *v.* McGrath, 185 Mass. 1, 69 N. E. 340 (holding that cider is within a statute providing that any beverage which contains more than one per cent of alcohol by volume shall be deemed an intoxicating liquor); Com. *v.* Dean, 14 Gray 99.

New Hampshire.— State *v.* Biddle, 54 N. H. 379.

Compare State *v.* Hutchinson, 72 Iowa 561, 34 N. W. 421.

Hard cider is known to be intoxicating. Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570.

45. People *v.* Rice, 103 Mich. 350, 61 N. W. 540.

46. *Alabama.*— Allred *v.* State, 89 Ala. 112, 8 So. 56.

Florida.— Butler *v.* State, 25 Fla. 347, 6 So. 67.

Iowa.— State *v.* Gregory, 110 Iowa 624, 82 N. W. 335.

Kansas.— Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284.

Texas.— Johnson *v.* State, (Cr. App. 1902) 66 S. W. 552.

The rule or test is this: If the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible, by reason of the other ingredients, then it is outside the statute. But if, on the other hand, the intoxicating liquor remain as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, then it is within the statute. Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284.

47. Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284. *Compare* Mitchell *v.* Com., 106 Ky. 602, 51 S. W. 17, 21 Ky. L. Rep. 222 (holding that it is a matter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor); State *v.* Muncey, 28 W. Va. 494 (holding that essence of cinnamon is not judicially known not to be intoxicating).

48. *Alabama.*— Wall *v.* State, 78 Ala. 417.

Arkansas.— Edgar *v.* State, 37 Ark. 219.

Florida.— Frese *v.* State, 23 Fla. 267, 2 So. 1.

Georgia.— Hodge *v.* State, 116 Ga. 852, 43 S. E. 255.

Indiana.— Schlicht *v.* State, 56 Ind. 173; Eagan *v.* State, 53 Ind. 162; Carmon *v.* State, 18 Ind. 450.

Missouri.— State *v.* Williamson, 21 Mo. 496.

Nebraska.—Peterson *v.* State, 63 Nebr. 251, 88 N. W. 549.

Texas.— Aston *v.* State, (Cr. App. 1899) 49 S. W. 385.

United States.— U. S. *v.* Ash, 75 Fed. 651.

49. State *v.* Tisdale, 54 Minn. 105, 55 S. W. 903; State *v.* Munger, 15 Vt. 290.

50. State *v.* Wadsworth, 30 Conn. 55; Com. *v.* Peckham, 2 Gray (Mass.) 514.

51. State *v.* Wadsworth, 30 Conn. 55; State *v.* Mooty, 3 Hill (S. C.) 187. And see U. S. *v.* Angell, 11 Fed. 34.

52. Snider *v.* State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350.

53. *Indiana.*— Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Stout *v.* State, 96 Ind. 407; Myers *v.* State, 93 Ind. 251 [*overruling* Kurz *v.* State, 79 Ind. 488; Plunkett *v.* State, 69 Ind. 68; Shaw *v.* State, 56 Ind. 188; Schlosser *v.* State, 55 Ind. 82; Lathrope *v.* State, 50 Ind. 555; Klare *v.* State, 43 Ind. 483; Weis *v.* State, 33 Ind. 204]; Douglas *v.* State, 21 Ind. App. 302, 52 N. E. 238.

Kansas.— State *v.* Teissedre, 30 Kan. 476, 2 Pac. 650.

Kentucky.— Locke *v.* Com., 74 S. W. 654, 25 Ky. L. Rep. 76; Pedigo *v.* Com., 70 S. W. 659, 24 Ky. L. Rep. 1029.

Nebraska.— Peterson *v.* State, 63 Nebr. 251, 88 N. W. 549.

New Jersey.— Murphy *v.* Montclair Tp., 39 N. J. L. 673, malt.

North Dakota.— State *v.* Currie, 8 N. D. 545, 80 N. W. 475.

lager beer,[54] and ale[55] are malt liquors; and that hard cider[56] and beer[57] are fermented liquors.

III. POWER TO CONTROL TRAFFIC.

A. United States[58] — **1. In General.** The general government, in the exercise of its authority to raise revenue for its proper purposes, has power to impose a license-tax or duty upon the manufacture and sale of intoxicants, although the same business is a subject of police regulation by the states.[59] Further, congress has power to enact police regulations applicable in those districts and places over which it has direct or exclusive jurisdiction, such as the territories, and hence has constitutional authority to regulate or prohibit the traffic in intoxicating liquors therein.[60]

2. Licenses and Their Effect. A license granted under the United States internal revenue laws to carry on the business of a liquor dealer in a particular state named, although it has been granted in consideration of a fee paid, does not give the licensee power to carry on the business in violation of a state prohibitory law, nor does it relieve the holder from the necessity of taking out any license required by the laws of the state, if that is the system prevailing therein.[61]

B. States[62] — **1. Police Power.** Laws prohibiting, regulating, or restraining the manufacture and sale of intoxicants, enacted by the several states, are referable to, and are justified by, the police power of the state.[63]

Texas.— Maier *v.* State, 2 Tex. Civ. App. 296, 21 S. W. 974.

Wisconsin.— Briffitt *v.* State, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621.

United States.— U. S. *v.* Ducournau, 54 Fed. 138.

Contra.— Netso *v.* State, 24 Fla. 363, 5 So. 8, 1 L. R. A. 825; Hansberg *v.* People, 120 Ill. 21, 8 N. E. 857, 60 Am. Rep. 549; State *v.* Beswick, 13 R. I. 211, 43 Am. Rep. 26; State *v.* Sioux Falls Brewing Co., 5 S. D. 39, 58 N. W. 1, 26 L. R. A. 138.

54. Tinker *v.* State, 90 Ala. 647, 8 So. 855; Watson *v.* State, 55 Ala. 158; Waller *v.* State, 38 Ark. 656; Netso *v.* State, 24 Fla. 363, 5 So. 8, 1 L. R. A. 825; State *v.* Rush, 13 R. I. 198; State *v.* Goyette, 11 R. I. 592. And see Adler *v.* State, 55 Ala. 16.

55. Wiles *v.* State, 33 Ind. 206.

56. State *v.* McLafferty, 47 Kan. 140, 27 Pac. 843; State *v.* Schaefer, 44 Kan. 90, 24 Pac. 92; State *v.* Crawley, 75 Miss. 919, 23 So. 625; Eureka Vinegar Co. *v.* Gazette Printing Co., 35 Fed. 570.

57. Waller *v.* State, 38 Ark. 656; State *v.* Effinger, 44 Mo. App. 81.

58. See Commerce, 7 Cyc. 437.

59. U. S. *v.* Riley, 27 Fed. Cas. No. 16,164, 5 Blatchf. 204.

60. Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; U. S. *v.* Cohn, 2 Indian Terr. 474, 52 S. W. 38; Endleman *v.* U. S., 86 Fed. 456, 30 C. C. A. 186; Nelson *v.* U. S., 30 Fed. 112 [*affirming* 29 Fed. 202]; U. S. *v.* Stephens, 12 Fed. 52, 8 Sawy. 116.

61. *Arkansas.*— Pierson *v.* State, 39 Ark. 219.

Dakota.— Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355.

Illinois.— Block *v.* Jacksonville, 36 Ill. 301.

Indiana.— State *v.* Mathis, 18 Ind. App. 608, 48 N. E. 645.

Iowa.— Stommel *v.* Timbrel, 84 Iowa 336, 51 N. W. 159; State *v.* Baughman, 20 Iowa 497; State *v.* Stutz, 20 Iowa 488; State *v.* Carney, 20 Iowa 82; State *v.* McCleary, 17 Iowa 44.

Maine.— State *v.* Delano, 54 Me. 501.

Massachusetts.— Com. *v.* Sanborn, 116 Mass. 61; Com. *v.* McNamee, 113 Mass. 12; Com. *v.* Keenan, 11 Allen 262; Com. *v.* Holbrook, 10 Allen 200; Com. *v.* O'Donnell, 8 Allen 548; Com. *v.* Thorniley, 6 Allen 445.

Minnesota.— State *v.* Funk, 27 Minn. 318, 7 N. W. 359.

Missouri.— State *v.* Blands, 101 Mo. App. 618, 74 S. W. 3.

North Carolina.— State *v.* Downs, 116 N. C. 1064, 21 S. E. 689; State *v.* Hazell, 100 N. C. 471, 6 S. E. 404; State *v.* Joyner, 81 N. C. 534.

Tennessee.— Foppiano *v.* Speed, 113 Tenn. 167, 82 S. W. 222; Boyd *v.* State, 12 Lea 687.

Virginia.— Com. *v.* Sheckels, 78 Va. 36.

Wisconsin.— Peitz *v.* State, 68 Wis. 538, 32 N. W. 763.

United States.— Pervear *v.* Massachusetts, 5 Wall. 475, 18 L. ed. 608; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; McGuire *v.* Massachusetts, 3 Wall. 387, 18 L. ed. 226; *In re* Jordan, 49 Fed. 238.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 3.

62. See Commerce, 7 Cyc. 429, 437.

63. State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; License Cases, 5 How. (U. S.) 504, 12 L. ed. 256.

Duty to use impartially.— The police power of the state is to be used impartially and without unjust discrimination, and while, as between liquor selling and other callings less harmful to the public, the former may be discriminated against, there is no warrant for unjust discrimination as between individuals engaged in the same business.

2. Legislative Regulation. The several states, in the exercise of their power, and subject to the limitations and restrictions contained in the constitution of the United States or of the particular state, have full authority to enact any and all laws for the suppression of intemperance and minimizing the evils resulting from the traffic in intoxicating liquors, whether by totally prohibiting, or by restricting and licensing, the manufacture and sale of such liquors.[64] There is no inherent right in the people to engage in the traffic in intoxicants, in any such sense as to remove it from the legitimate sphere of legislative control.[65] Nor is there any vested right acquired by those already engaged in the liquor traffic which prevents its being afterward forbidden by statute.[66]

3. Dispensaries and State Agencies. Several of the states have adopted laws entirely prohibiting the manufacture and sale of intoxicating liquors by any private individual within the state, but vesting the exclusive right to sell such liquors in the state itself, acting through designated officers or public agents, or in its municipalities, at public offices called "dispensaries," the profit of the business accruing to the state or municipality, and the conduct of the dispensaries being surrounded with more or less severe restrictions. The validity of these statutes has generally been sustained,[67] although there are some decisions in which their constitutionality has been denied.[68]

State *v.* New Orleans, 113 La. 371, 36 So. 999, 67 L. R. A. 70.

64. *Delaware.*— State *v.* Allmond, 2 Houst. 612.

Illinois.— Schwuchow *v.* Chicago, 68 Ill. 444; Jones *v.* People, 14 Ill. 196.

Maine.— State *v.* Intoxicating Liquors, 95 Me. 140, 49 Atl. 670; State *v.* Gurney, 37 Me. 156, 58 Am. Dec. 782.

Maryland.— Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83.

Missouri.— State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.

New York.— Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657.

Texas.— Snearly *v.* State, (Cr. App. 1899) 52 S. W. 547. *Compare* Stallworth *v.* State, 16 Tex. App. 345, holding that the legislature has no authority to prohibit the gift of intoxicating liquors.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328.

United States.— Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Busch *v.* Webb, 122 Fed. 655; W. A. Vandercook Co. *v.* Vance, 80 Fed. 786.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 4.

Limitation upon power.— The power of a state to prohibit the sale of liquors, as a regulation of domestic commerce, is not analogous to or coextensive with the power of congress to regulate interstate and foreign commerce, since the latter is unlimited, while the former is subject to the restrictions imposed by the state constitution. Beebe *v.* State, 6 Ind. 501, 63 Am. Dec. 391.

Local statutes.— A state statute regulating the liquor traffic in one designated county of the state is not unconstitutional because local, the only limitation on the legislature being that the law must bear alike on all within the designated locality. Guy *v.* Cumberland County, 122 N. C. 471, 29 S. E. 771.

65. State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345.

66. Guy *v.* Cumberland County, 122 N. C. 471, 29 S. E. 771.

67. *Alabama.*— Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68.

Georgia.— Butler *v.* Merritt, 113 Ga. 238, 38 S. E. 751; Deal *v.* Singletary, 105 Ga. 466, 30 S. E. 765; Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181.

North Carolina.— Garsed *v.* Greensboro, 126 N. C. 159, 35 S. E. 254; Bennett *v.* Swain County, 125 N. C. 468, 34 S. E. 632.

South Carolina.— State *v.* Potterfield, 47 S. C. 75, 25 S. E. 39; State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345 [*overruling* McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410].

Virginia.— Farmville *v.* Walker, 101 Va. 323, 43 S. E. 558, 61 L. R. A. 125.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 5.

Power of municipal corporations and county boards to establish dispensaries see Lofton *v.* Collins, 117 Ga. 434, 43 S. E. 708, 61 L. R. A. 150; Severance *v.* Murphy, 67 S. C. 409, 46 S. E. 35.

Eligibility of county officers to be dispensary commissioners see Dallis *v.* Griffin, 117 Ga. 408, 43 S. E. 758.

68. Beebe *v.* State, 6 Ind. 501, 63 Am. Dec. 391; Donald *v.* Scott, 67 Fed. 854.

In Alabama a statute was held unconstitutional which gave to the commissioners and managers a direct personal, pecuniary interest in the business, and which conferred on the commissioners power to suspend the dispensary, thereby prohibiting the liquor traffic entirely or discontinuing it permanently, thereby putting in operation the license laws of the state and city. Mitchell *v.* State, 133 Ala. 65, 32 So. 132. See also Harlan *v.* State, 136 Ala. 150, 33 So. 858.

In Vermont a statute was held unconstitutional in so far as it authorized a public agent, appointed by the county commissioners, to purchase liquors at the expense of the

C. Territories. Under the congressional grants of legislative power to the territories, it is within their power to license and regulate liquor dealers, or to enact a local option law.[69]

D. Municipal Corporations — 1. Delegation of Power to Local Authorities. In the absence of specific constitutional restrictions, it is competent for the legislature of a state to empower its various municipal corporations to enact ordinances, each operative within the corporate limits, for the prohibition, licensing, or regulation of the traffic in intoxicating liquors. Such delegation to the municipalities of legislative control over this subject is not unlawful.[70] But limitations upon the legislative power in this regard may be found in the constitution of the state,[71] as, where it forbids the legislature to pass any act regulating the internal affairs of cities or towns,[72] or requires that all laws of a general nature shall be uniform in their operation.[73]

2. Delegation of Municipal Authority. Power granted by the legislature to a municipal corporation to prohibit, regulate, or license the sale of liquor, cannot be delegated by the municipality to any other body or individual. Thus, if the power is conferred upon the council of a city, it cannot be delegated by the council to the mayor.[74]

town for which he was appointed, without its assent, express or implied, and without giving indemnity to the town for the faithful execution of the duties of his agency. Atkins *v.* Randolph, 31 Vt. 226.

69. Territory *v.* Connell, 2 Ariz. 339, 16 Pac. 209; Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355. *Compare* Thornton *v.* Territory, 3 Wash. Terr. 482, 17 Pac. 896.

70. *Alabama.*— *Ex p.* Russellville, 95 Ala. 19, 11 So. 18; *Ex p.* Cowert, 92 Ala. 94, 9 So. 225. *Compare* Mitchell *v.* State, 133 Ala. 65, 32 So. 132.

Colorado.— Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208. But unless a grant of exclusive power to cities to regulate saloons is accepted and exercised by a given city, the general law regulating the sale of liquor remains in force therein. Mueller *v.* People, 24 Colo. 251, 48 Pac. 965.

Georgia.— Perdue *v.* Ellis, 18 Ga. 586.

Illinois.— Gunnarssohn *v.* Sterling, 92 Ill. 569.

Iowa.— State *v.* King, 37 Iowa 462.

Kentucky.— Falmouth *v.* Watson, 5 Bush 660; Mason *v.* Lancaster, 4 Bush 406.

Louisiana.— State *v.* Harper, 42 La. Ann. 312, 7 So. 446. But it has been held that a statute authorizing municipal corporations to prohibit the sale of liquors on Sunday in the various parishes of the state is invalid for delegating to those authorities the authority of the general assembly to legislate and that of the state to prosecute. State *v.* Baum, 33 La. Ann. 981 [*overruling* State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224].

Massachusetts.— Com. *v.* Fredericks, 119 Mass. 199.

Michigan.— Sherlock *v.* Stuart, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580.

Minnesota.— State *v.* Wheeler, 27 Minn. 76, 6 N. W. 423; State *v.* Dwyer, 21 Minn. 512; State *v.* Ludwig, 21 Minn. 202; St. Paul *v.* Troyer, 3 Minn. 291.

Ohio.— Bronson *v.* Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90; Burckholter *v.* McConnellsville, 20 Ohio St. 309.

Oregon.— State *v.* Haines, 35 Oreg. 379, 58 Pac. 39.

South Carolina.— Florence *v.* Brown, 49 S. C. 332, 26 S. E. 880, 27 S. E. 273; State *v.* Columbia, 17 S. C. 80.

Texas.— Davis *v.* State, 2 Tex. App. 425.

West Virginia.— Jelly *v.* Dils, 27 W. Va. 267; Moundsville *v.* Fountain, 27 W. Va. 182.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 7.

Regulating sales beyond corporate limits.— It is a general rule that the legislature cannot confer upon a municipal corporation powers which are to be exercised beyond the limits of the municipality; but a grant of authority to require licenses from persons selling liquor within one or two miles from the limits of a city is held to be a police regulation, having regard to the peace and good order of the city and therefore valid. Lutz *v.* Crawfordsville, 109 Ind. 466, 10 N. E. 411; Falmouth *v.* Watson, 5 Bush (Ky.) 660. *Compare* Strauss *v.* Pontiac, 40 Ill. 301.

71. See Yazoo City *v.* State, 48 Miss. 440, holding that, where the constitution inviolably devotes the moneys derived from license-fees to the school funds, any city charter or other legislative enactment attempting to divert these revenues to any other object is void.

72. State *v.* Camden, 40 N. J. L. 156. See also Riley *v.* Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352.

73. Bronson *v.* Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90.

74. Kinmundy *v.* Mahan, 72 Ill. 462; East St. Louis *v.* Wehrung, 50 Ill. 28; State *v.* Kantler, 33 Minn. 69, 21 N. W. 856; *In re* Wilson, 32 Minn. 145, 19 N. W. 723; Darling *v.* St. Paul, 19 Minn. 389; Riley *v.* Trenton,

3. Extent of Powers Granted — a. In General. In respect to the enactment of ordinances prohibiting or regulating the traffic in liquors, municipal corporations have only such powers as are expressly conferred upon them by their charters or by statute, or such as are necessarily or fairly implied in or incident to the powers expressly granted,[75] and their charters or enabling acts will be construed with a reasonable degree of strictness in this particular, the rule being that the power claimed must be shown to exist either explicitly or by proper implication, and that it is not sufficient to show merely that its exercise has not been forbidden.[76] If the statute designates the municipal board or officers who are to be vested with the authority of the municipality in this regard, its terms are to be taken as absolutely exclusive.[77] And if express power to control the sale of liquor is given to a city, village, or town, this will exclude any similar authority on the

51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352.

75. *Alabama.*— Norris *v.* Oakman, 138 Ala. 411, 35 So. 450.

Georgia.— Osburn *v.* Marietta, 118 Ga. 53, 44 S. E. 807; Sanders *v.* Butler Town Com'rs, 30 Ga. 679. Where a statute gives the authorities of a city the power to regulate and control the sale of liquor for medicinal and certain other specified purposes, they have no power to embark the city on its own account in the business of buying and selling liquors. Barnesville *v.* Murphey, 113 Ga. 779, 39 S. E. 413.

Indiana.— Carr *v.* Fowler, 74 Ind. 590.

Kansas.— An ordinance prohibiting the sale of hop tea and other liquors, which contain alcohol, but not in sufficient quantities to intoxicate, and which are commonly used as a beverage, is unauthorized and void. Fontana *v.* Grant, 6 Kan. App. 462, 50 Pac. 104. But an ordinance regulating their sale is valid. Lincoln Center *v.* Linker, 6 Kan. App. 369, 51 Pac. 807. See also *In re* Jahn, 55 Kan. 694, 41 Pac. 956; Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520.

Kentucky.— Com. *v.* Voorhies, 12 B. Mon. 361.

Missouri.— State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47.

North Carolina.— State *v.* Brittain, 89 N. C. 574.

Ohio.— Columbus *v.* Schaerr, 5 Ohio S. & C. Pl. Dec. 100.

Oregon.— Cranor *v.* Albany, 43 Oreg. 144, 71 Pac. 1042; State *v.* Haines, 35 Oreg. 379, 58 Pac. 39.

76. Henke *v.* McCord, 55 Iowa 378, 7 N. W. 623; Burlington *v.* Kellar, 18 Iowa 59; Sparta *v.* Boorom, 129 Mich. 555, 89 N. W. 435, 90 N. W. 681; Mt. Pleasant *v.* Vansice, 43 Mich. 361, 5 N. W. 378, 38 Am. Rep. 193; Winants *v.* Bayonne, 44 N. J. L. 114.

General welfare clause.— A clause in the charter of a city giving it power to make ordinances to provide for the "general welfare" of the city, to "suppress immorality," or to secure the public "health, order, and peace" does not give it authority to prohibit, regulate, or license the sale of intoxicating liquors. *In re* Sullivan, 21 D. C. 139; Com. *v.* Turner, 1 Cush. (Mass.) 493; Schlachter *v.* Stokes, 63 N. J. L. 138, 43 Atl. 571; Florence *v.* Brown, 49 S. C. 332, 26 S. E. 880, 27 S. E. 273, by an equally divided court. And see Mernaugh *v.* Orlando, 41 Fla. 433, 27 So. 34. But see Robinson *v.* Americus, 121 Ga. 180, 48 S. E. 924; Reese *v.* Newnan, 120 Ga. 198, 47 S. E. 560; Cunningham *v.* Griffin, 107 Ga. 690, 33 S. E. 664; Papworth *v.* Fitzgerald, 106 Ga. 378, 32 S. E. 363; Brown *v.* Social Circle, 105 Ga. 834, 32 S. E. 141; Fortner *v.* Duncan, 91 Ky. 171, 15 S. W. 55, 12 Ky. L. Rep. 788, 11 L. R. A. 188; Bailey Liquor Co. *v.* Austin, 82 Fed. 785, construing a South Carolina municipal charter. Neither the "general welfare" clause in the charter of a municipality nor a special power to "license and regulate" bar-rooms and saloons will give it the power to embark in the business of selling liquor by organizing a dispensary. Lofton *v.* Collins, 117 Ga. 434, 43 S. E. 708, 61 L. R. A. 150; Leesburg *v.* Putnam, 103 Ga. 110, 29 S. E. 602, 68 Am. St. Rep. 80. Such a clause does not authorize the passage of an ordinance making it penal for one who has lawfully purchased without the limits of the municipality alcoholic liquors to receive the same therein without paying a specific tax of a given amount for the privilege of so doing. Henderson *v.* Heyward, 109 Ga. 373, 34 S. E. 590, 77 Am. St. Rep. 384, 47 L. R. A. 366. A city, by reason of such a clause, has no right to exact an exorbitant tax or license from a person engaged in the sale of spirituous and fermented liquors at a place remote from the settled portion of such city, when it appears that no police supervision was ever taken over such place other than to demand and collect such license or fee. Salt Lake City *v.* Wagner, 2 Utah 400.

Enacting penalties.— Where the city is empowered to declare the keeping of liquor on hand for sale to be a nuisance, this does not carry with it the power to make it an offense for any person to have in his possession any intoxicating liquors. Sullivan *v.* Oneida, 61 Ill. 242. See also Fortner *v.* Duncan, 91 Ky. 171, 15 S. W. 55, 12 Ky. L. Rep. 788, 11 L. R. A. 188.

77. Featherstone *v.* Lambertville, 50 N. J. L. 507, 14 Atl. 599; Glentz *v.* State, 38 Wis. 549.

part of the county in which it is situated.[78] If the statute confers upon the municipality power either to prohibit or to license and regulate the sale of liquor, it is a matter wholly within the discretion of the municipal authorities whether the one or the other form of ordinance shall be adopted.[79] When a municipal corporation is invested with power to license or regulate the sale of intoxicating liquors, it has implied authority to make all such ordinances as may be necessary to make the grant of power effectual, and to preserve the public peace, good order and security against dangers arising from the traffic in such liquors.[80] Thus it is competent to pass an ordinance prohibiting not only the sale but also the bartering or giving away of liquor without a license,[81] or forbidding the sale of certain liquors in less quantities than a gallon, or the drinking of the same at the place of sale,[82] or designating the districts or precincts of the city within which the business of liquor selling shall be confined,[83] or prohibiting the giving of bogus prescriptions for liquor by physicians,[84] or its sale by druggists for other than medicinal purposes,[85] or providing that police officers shall have authority at any time to enter upon the premises of a licensed dealer to ascertain the manner in which he conducts his business and to preserve order.[86] It is only required that such ordinances should be within the scope of the powers granted,[87] and not unreasonable, unjust, or unduly oppressive.[88] It is clearly competent for a munici-

78. Wilson *v.* Whelan, 91 Ga. 461, 17 S. E. 906; Coulterville *v.* Gillen, 72 Ill. 599. And see Lutz *v.* Crawfordsville, 109 Ind. 466, 10 N. E. 411; Com. *v.* Helhack, 101 Ky. 166, 40 S. W. 245, 19 Ky. L. Rep. 278; Schwerman *v.* Com., 99 Ky. 296, 38 S. W. 146, 18 Ky. L. Rep. 585.

79. Schwuchow *v.* Chicago, 68 Ill. 444.

Selling and giving away.— Under a statute giving incorporated towns the exclusive right to license or prohibit the selling or giving away of intoxicating liquor within certain limits, an incorporated town may enact an ordinance prohibiting not only the sale, but also the giving away, of liquors. Litch *v.* People, 19 Colo. App. 421, 75 Pac. 1079.

80. Morris *v.* Rome, 10 Ga. 532; Schwuchow *v.* Chicago, 68 Ill. 444.

Suppressing "saloons."—A room in a hotel, set apart for the sale of intoxicating liquors at retail, is a "saloon," within the meaning of a statute granting to villages authority to suppress saloons for the sale of liquors. Rattenbury *v.* Northville, 122 Mich. 158, 80 N. W. 1012.

Limiting number of licenses.— The common council of a city, having power to regulate the sale of liquors, may limit the number of saloon licenses to be granted. State *v.* Northfield, 94 Minn. 81, 101 N. W. 1063.

81. Vinson *v.* Monticello, 118 Ind. 103, 19 N. E. 734.

82. Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520. And see Strauss *v.* Galesburg, 203 Ill. 234, 67 N. E. 836.

83. Strauss *v.* Galesburg, 203 Ill. 234, 67 N. E. 836; Swift *v.* People, 63 Ill. App. 453 (holding that the right to keep saloons in any and all quarters of a city is not an absolute right); *In re* Wilson, 32 Minn. 145, 19 N. W. 723. And see Gorrell *v.* Newport, 1 Tenn. Ch. App. 120.

Business and residence districts.— Under a statute providing that cities may prohibit sales of liquor in residence portions thereof, an ordinance prohibiting such sales is not void because the boundaries of the business and residence portions are not set forth therein. Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138.

84. Carthage *v.* Buckner, 4 Ill. App. 317.

85. Provo City *v.* Shurtliff, 4 Utah 15, 5 Pac. 302.

86. Com. *v.* Ducey, 126 Mass. 269.

87. Harris *v.* Livingston, 28 Ala. 577; McCrea *v.* Washington, 10 Ohio Dec. (Reprint) 29, 18 Cinc. L. Bul. 66.

Screen law.— Under a statute empowering towns to license, regulate, or restrain the sale of intoxicating liquors, a town is without authority to pass a penal ordinance requiring the removal during business hours of all screens and other obstructions to the view of the interior of saloons. Champer *v.* Greencastle, 138 Ind. 339, 35 N. E. 14, 46 Am. St. Rep. 390, 24 L. R. A. 768; Steffy *v.* Monroe City, 135 Ind. 466, 35 N. E. 121, 41 Am. St. Rep. 436. See also Bennett *v.* Pulaski, (Tenn. Ch. App. 1899) 52 S. W. 913, 47 L. R. A. 278. But an ordinance forbidding the use of screens during the hours when sales are prohibited is valid. Decker *v.* Sargeant, 125 Ind. 404, 25 N. E. 458.

88. **Arbitrary discrimination as to place of sale.**— An ordinance is not valid if it makes an arbitrary and unreasonable distinction between different parts of the city, or different places within the city, not founded on any public necessity or any inherent difference of suitability for the business, or if it improperly discriminates between persons. *Ex p.* Theisen, 30 Fla. 529, 11 So. 901, 32 Am. St. Rep. 36; Chicago *v.* Netcher, 183 Ill. 104, 55 N. E. 707, 75 Am. St. Rep. 93, 48 L. R. A. 261; People *v.* Cregier, 138 Ill. 401, 28 N. E. 812; Rowland *v.* Greencastle, (Ind. 1900) 58 N. E. 1031.

Excluding proprietor and agents.— A city cannot enact by ordinance that it shall be "unlawful for any barkeeper, clerk or agent,

pality, under such a general grant of authority, to ordain that all bar-rooms and saloons shall be closed on Sunday, and to prohibit, under penalties, the sale of liquor on that day,[89] and also on election days,[90] and to require that all such places shall close their doors and cease doing business at a designated hour of the night, and remain closed until a designated hour of the following morning.[91]

b. Power to Prohibit Sale — (I) *In General.* The grant to a municipal corporation, by charter or general statute, of power to "regulate," "license," or "tax" the sale of intoxicating liquors within its limits does not confer authority to adopt an ordinance totally prohibiting such sale.[92] And although the munic-

or any person whatever, to keep open or be or remain in such bar room, or other place where spirituous or intoxicating liquors are sold, between the hours of 10 o'clock p. m. and 4 o'clock a. m." State *v.* Thomas, 118 N. C. 1221, 24 S. E. 535. A city ordinance providing that it shall be unlawful for the proprietor of any saloon or place where liquor is sold and dispensed, and his clerks, agents, or employees, to enter such saloon on Sunday for any purpose whatever, without first obtaining a written permission from the mayor or recorder of the town in writing, stating the length of time he may remain in the saloon, is unreasonable and void. Newbern *v.* McCann, 105 Tenn. 159, 58 S. W. 114, 50 L. R. A. 476, opinion of the court being delivered by Wilkes, J.

Unreasonable regulation as to time of sales. — An ordinance forbidding licensed retailers to sell between the hours of six in the evening and six in the morning is unreasonable and invalid. Ward *v.* Greeneville, 8 Baxt. (Tenn.) 228, 35 Am. Rep. 700. And see Grills *v.* Jonesboro, 8 Baxt. (Tenn.) 247. So is an ordinance requiring the closing of all saloons whenever "any denomination of Christian people are holding divine service" anywhere in the town. Gilham *v.* Wells, 64 Ga. 192. And where the board of police commissioners of a city were authorized to order the closing of saloons "temporarily," whenever in their judgment the public peace required it, it was held that they had power to close the saloons only for a short and definite interval, and consequently an order that all saloons "be so temporarily closed until further notice" was void. State *v.* Strauss, 49 Md. 288.

89. *Georgia.*— Hood *v.* Von Glahn, 88 Ga. 405, 14 S. E. 564; Karwisch *v.* Atlanta, 44 Ga. 204.

Illinois.— Schwuchow *v.* Chicago, 68 Ill. 444.

Kentucky.— Megowan *v.* Com., 2 Metc. 3.

Louisiana.— Minden *v.* Silverstein, 36 La. Ann. 912.

Minnesota.— State *v.* Harris, 50 Minn. 128, 52 N. W. 387, 531; State *v.* Ludwig, 21 Minn. 202.

Ohio.— Piqua *v.* Zimmerlin, 35 Ohio St. 507.

Oregon.— Cranor *v.* Albany, 43 Oreg. 144, 71 Pac. 1042.

Tennessee.— Nashville *v.* Linck, 12 Lea 499.

Texas.— Gabel *v.* Houston, 29 Tex. 335.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 10.

90. Schwuchow *v.* Chicago, 68 Ill. 444; Iowa City *v.* McInnerny, 114 Iowa 586, 87 N. W. 498; State *v.* Ludwig, 21 Minn. 202; Paul *v.* Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902.

91. *Connecticut.*— State *v.* Welch, 36 Conn. 215.

Georgia.— Morris *v.* Rome, 10 Ga. 532.

Indiana.— Davis *v.* Fasig, 128 Ind. 271, 27 N. E. 726; Decker *v.* Sargeant, 125 Ind. 404, 25 N. E. 458.

Iowa.— Clinton *v.* Grusendorf, 80 Iowa 117, 45 N. W. 407.

Kentucky.— McNulty *v.* Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. L. Rep. 430.

Nebraska.— *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660.

New Jersey.— State *v.* Washington, 44 N. J. L. 605, 45 N. J. L. 318, 43 Am. Rep. 402.

Tennessee.— Bennett *v.* Pulaski, (Ch. App. 1899) 52 S. W. 913, 47 L. R. A. 278; Smith *v.* Knoxville, 3 Head 245.

Wisconsin.— Platteville *v.* Bell, 43 Wis. 488.

Canada.— McGill *v.* Brantford License Com'rs, 21 Ont. 665; Bright *v.* Toronto, 12 U. C. C. P. 433.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 9.

92. *Alabama.*— Brownrigg *v.* Livingston, 126 Ala. 93, 28 So. 616; *Ex p.* Cowert, 92 Ala. 94, 9 So. 225; *Ex p.* Anniston, 90 Ala. 516, 7 So. 779; *Ex p.* Reynolds, 87 Ala. 138, 6 So. 335; *Ex p.* Florence, 78 Ala. 419.

Arkansas.— Tuck *v.* Waldron, 31 Ark. 462.

Georgia.— Hill *v.* Decatur, 22 Ga. 203. *Compare* Osburn *v.* Marietta, 118 Ga. 53, 44 S. E. 807, holding an ordinance forbidding illegal sales valid.

Illinois.— Harbaugh *v.* Monmouth, 74 Ill. 367.

Indiana.— Sweet *v.* Wabash, 41 Ind. 7.

Iowa.— Cantril *v.* Sainer, 59 Iowa 26, 12 N. W. 753.

Louisiana.— Lincoln Parish Police Jury *v.* Harper, 42 La. Ann. 776, 7 So. 716; State *v.* Harper, 42 La. Ann. 312, 7 So. 446. See also Shreveport *v.* Draiss, 111 La. 511, 35 So. 727.

New Jersey.— Rossell *v.* Garon, 50 N. J. L. 358, 13 Atl. 26.

Ohio.— Bronson *v.* Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90; Akerman *v.* Lima, 8 Ohio S. & C. Pl. Dec. 430, 7 Ohio N. P. 92.

ipality may be given power to "restrain" the sale of intoxicants, this term is construed as equivalent to "restrict," and not as equivalent to "suppress," and hence does not authorize a prohibitory ordinance.[93] Such an ordinance, however, may be authorized by the express terms of the charter or statute.[94]

(II) *POWER TO PROHIBIT PARTICULAR SALES.* Under the ordinary grants of power to municipal corporations to make ordinances to license, regulate, or control the traffic in intoxicating liquors, it is competent for such bodies to prohibit the sale of liquor to minors, habitual drunkards, or other persons whose protection is deemed specially necessary;[95] to forbid sales to be made in unlicensed places;[96] and to provide that no liquor shall be kept or used in any refreshment saloon or restaurant.[97]

c. Power to License or Tax — (I) *IN GENERAL.* A municipal corporation has no inherent power to license or tax the business of liquor selling, and an ordinance to that effect is invalid, unless the necessary power is conferred by the charter of the municipality or by some general law of the state.[98] But it is competent for the state legislature to confer such power on the municipalities, and if

Oregon.— Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. 221.

Tennessee.— Bennett *v.* Pulaski, (Ch. App. 1899) 52 S. W. 913, 47 L. R. A. 278.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 10.

93. Mernaugh *v.* Orlando, 41 Fla. 433, 27 So. 34; Logan City *v.* Buck, 3 Utah 301, 2 Pac. 706, 3 Utah 307, 5 Pac. 564. See also St. Louis *v.* Smith, 2 Mo. 113. But see Smith *v.* Warrior, 99 Ala. 481, 12 So. 418, holding that a statutory provision authorizing towns to license, tax, regulate, and "restrain" the retailing of intoxicating liquors within their corporate limits empowers them to prohibit such sale altogether.

Partial prohibition.— Power given in a city charter to license, regulate, or restrain the sale of intoxicating liquors implies the right of partial prohibition. Provo City *v.* Shurtliff, 4 Utah 15, 5 Pac. 302. See also Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. 221.

94. "License and prohibit."— Where municipal authorities are specifically empowered to "license, regulate, and prohibit" the sale of intoxicating liquors, they may, by ordinance, provide for the issuing of licenses in one part of the municipality and prohibit the sale of liquor in another part, if the discrimination as to places is not arbitrary or unreasonable. People *v.* Cregier, 138 Ill. 401, 28 N. E. 812. See also Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208. And conversely, authority in a city charter to "restrain, prohibit, and suppress dram-shops" will sustain an ordinance licensing such houses and prescribing penalties for keeping one without a license. Emporia *v.* Volmer, 12 Kan. 622. But see State *v.* Fay, 44 N. J. L. 474.

"Restrain or prohibit."— A city charter which authorizes the passage of ordinances to restrain or prohibit the sale of intoxicating drinks supposes that the usual means by penalty will be resorted to; and the passage of an ordinance which declares that liquor shall not be sold is not within the spirit of the charter. Pekin *v.* Smelzel, 21 Ill. 464, 74 Am. Dec. 105.

"Prohibit tippling-houses."— A statute authorizing towns to prohibit tippling-houses or dram-shops does not empower the town to forbid sales of liquor in any quantity or for any purposes except medicinal and mechanical purposes. Strauss *v.* Pontiac, 40 Ill. 301.

95. State *v.* Austin, 114 N. C. 855, 19 S. E. 919, 41 Am. St. Rep. 817, 25 L. R. A. 283; Woods *v.* Prineville, 19 Oreg. 108, 23 Pac. 880. See also Washington *v.* Lasky, 29 Fed. Cas. No. 17,230, 5 Cranch C. C. 381, opinion of Cranch, C. J.

96. State *v.* Beverly, 45 N. J. L. 288. See also Burckholter *v.* McConnellsville, 20 Ohio St. 308.

97. State *v.* Clark, 28 N. H. 176, 61 Am. Dec. 611. But see Werner *v.* Washington, 29 Fed. Cas. No. 17,416*a*, 2 Hayw. & H. 175, holding that under a power to "regulate ordinaries, taverns," etc., and to "restrain tippling houses," a city cannot prohibit a regularly licensed tavern-keeper, in the usual course of his business as such, from selling liquors to his guests at the bar of the tavern or at their meals.

Dance-houses and shows.— A municipal corporation may, by ordinance, prohibit the sale of intoxicating liquor in dance-houses or other places where musical or theatrical entertainments are given, and where females attend as waitresses. *Ex p.* Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701.

98. *Georgia.*— Walker *v.* McNelly, 121 Ga. 114, 48 S. E. 718.

Indiana.— Carr *v.* Fowler, 74 Ind. 590; McFee *v.* Greenfield, 62 Ind. 21; Walter *v.* Columbia City, 61 Ind. 24; Cowley *v.* Rushville, 60 Ind. 327; Deutschman *v.* Charlestown, 40 Ind. 449; Steinmetz *v.* Versailles, 40 Ind. 249; Martinsville *v.* Frieze, 33 Ind. 507.

Iowa.— Burlington *v.* Kellar, 18 Iowa 59.

Kentucky.— Com. *v.* Voorhies, 12 B. Mon. 361.

Louisiana.— Shreveport *v.* Draiss, 111 La. 511, 35 So. 727.

Massachusetts.— Com. *v.* Locke, 114 Mass. 288.

adequate authority is granted, they may provide for the issuing of licenses to suitable persons and prohibit unlicensed sales.[99] But a statute granting such powers will be strictly construed in respect to the kinds or classes of municipal corporations included in it,[1] and in respect to the particular officers, boards, or corporate authorities who are empowered to grant the licenses.[2] Although the word "license" is the appropriate term to use in making such a grant of power, yet the intention to confer such authority upon municipal corporations may be inferred from the employment of other terms, such as "regulate," "restrain," or "tax."[3] Possessing authority to license the traffic, a municipal corporation may prescribe the procedure for obtaining a license, the terms on which licenses shall be granted, and the qualifications of the persons to whom they shall be granted.[4]

(II) *License-Fees*—(A) *In General.* A municipal corporation having the power to license dealers in intoxicating liquors has also authority to require such dealers to pay a fee for the privilege granted by a license, and to fix the amount of the same within reasonable limits,[5] provided the amount does not exceed the maximum authorized by the charter or statute,[6] and that the mode of fixing or estimating the amount shall conform to the terms of the legislative grant of

Michigan.—Mt. Pleasant *v.* Vansice, 43 Mich. 361, 5 N. W. 378, 38 Am. Rep. 193.

New Hampshire.—State *v.* Ferguson, 33 N. H. 424.

United States.—U. S. *v.* Kaldenbach, 26 Fed. Cas. No. 15,504, 1 Cranch C. C. 132.

Canada.—Hamel *v.* St. Jean Deschaillons Parish Corp., 20 Quebec Super. Ct. 301.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 11.

99. *California.*—*Ex p.* Braun, 141 Cal. 204, 74 Pac. 780.

Georgia.—Perdue *v.* Ellis, 18 Ga. 586.

Illinois.—Dennehy *v.* Chicago, 120 Ill. 627, 12 N. E. 227; Ammon *v.* Chicago, 26 Ill. App. 641.

Indiana.—Cheny *v.* Shelbyville, 19 Ind. 84; Lawrencehurg *v.* Wuest, 16 Ind. 337.

Michigan.—Sherlock *v.* Stuart, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580.

Minnesota.—Rochester *v.* Upman, 19 Minn. 108. See also State *v.* Priester, 43 Minn. 373, 45 N. W. 712.

Oregon.—*Ex p.* Schneider, 11 Oreg. 288, 8 Pac. 289.

Canada.—*Re* Boylan, 15 Ont. 13; *In re* Slavin, 36 U. C. Q. B. 159.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 11.

1. People *v.* Thornton, 186 Ill. 162, 57 N. E. 841.

2. Doster *v.* State, 93 Ga. 43, 18 S. E. 997; Mathis *v.* State, 93 Ga. 38, 18 S. E. 996; Cooke *v.* Mercer County, 51 N. J. L. 85, 16 Atl. 176.

3. *Illinois.*—Mt. Carmel *v.* Wahash County, 50 Ill. 69.

Iowa.—Keokuk *v.* Dressell, 47 Iowa 597. *Compare* Burlington *v.* Bumgardner, 42 Iowa 673.

Kansas.—Emporia *v.* Volmer, 12 Kan. 622.

Missouri.—St. Louis *v.* Smith, 2 Mo. 113.

North Carolina.—State *v.* Stevens, 114 N. C. 873, 19 S. E. 861.

Oregon.—Houck *v.* Ashland, 40 Oreg. 117, 66 Pac. 697; *In re* Schneider, 11 Oreg. 288, 8 Pac. 289.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 11.

Compare Leonard *v.* Canton, 35 Miss. 189, holding that a power in a city charter to "tax or entirely suppress all petty groceries" does not confer the right to license retailers of liquor, the word "license" being used in other parts of the charter to express its ordinary meaning.

4. Foster *v.* Board of Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194; Martens *v.* People, 85 Ill. App. 66.

Ordinance required.—A legislative grant of power to a municipal corporation to license, regulate, and prohibit the sale of intoxicating liquors does not authorize the authorities to issue a license for such sale without a regular ordinance specifying the time, manner, and amount of payment. People *v.* Crotty, 93 Ill. 180.

Recommendations of neighbors.—An applicant for a liquor license may be required before receiving such license to produce the written recommendation of four of his nearest neighbors. Whitten *v.* Covington, 43 Ga. 421. See also Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706.

Bonds.—The ordinance may also require licensed dealers to furnish bonds. *Ex p.* Schneider, 11 Oreg. 288, 8 Pac. 289.

In Minnesota the bond must run to the state. Minneapolis *v.* Olson, 76 Minn. 1, 78 N. W. 877.

Designating licensees.—An ordinance is not valid which directs that licenses shall be granted to certain named persons and to no others. *In re* Coyne, 9 U. C. Q. B. 448. See also *In re* Brodie, 38 U. C. Q. B. 580. *Compare* Terry *v.* Haldimand Tp., 15 U. C. Q. B. 380.

5. People *v.* Dwyer, (Cal. 1884) 4 Pac. 451; *Ex p.* Wolters, 65 Cal. 269, 3 Pac. 894; *In re* Stuart, 61 Cal. 374; Douglasville *v.* Johns, 62 Ga. 423; *Ex p.* Hinkle, 104 Mo. App. 104, 78 S. W. 317; Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. 221.

6. Drew County *v.* Bennett, 43 Ark. 364; State *v.* Chase, 33 La. Ann. 287. See also

authority to the municipality,[7] and to provide for the collection of the license-fee, as by designating the person to whom it shall be paid.[8] Further the exaction of license-fees by a municipality, although primarily intended only as a measure of police regulation, may legitimately be made a means of raising revenue for general purposes, if nothing to the contrary appears in the state laws, and if the fees exacted are not unreasonably great.[9]

(B) *Amount of Fees.* The amount which a municipal corporation may exact as a license-fee is not limited to the mere expense of issuing the license, but may include the cost of municipal supervision of the business, and be such as to place a reasonable restriction upon the number of saloons and the character and responsibility of the licensees.[10] But if the authority of the municipality is to license the traffic only, and not to prohibit it, it is not competent to fix the license-fee at so great an amount as to make it practically prohibitive.[11]

(C) *Differential and Discriminating Rates.* A municipal ordinance for licensing liquor dealers is not invalid because it fixes differential rates for license-fees, based on a reasonable and proper principle of classification, provided it does not discriminate between persons so as to make the burden of the tax fall unequally upon dealers in the same class.[12]

(III) *Providing For Revocaton of License.* A municipal corporation has authority to provide, as a condition to granting licenses, that the same shall be subject to forfeiture or revocation on the violation by the licensee of any of the statutes or ordinances regulating the sale of liquors.[13]

d. Power to Penalize Unlawful Sales. Authority to license and regulate the sale of liquor includes the power to provide that a sale without license, or in violation of the ordinances regulating the traffic, shall be subject to a penalty or shall be punishable as a misdemeanor.[14]

4. Concurrent Regulation by State and Municipalities — a. In General. A legislative grant of authority to a municipal corporation to enact ordinances in relation to the liquor traffic, unless explicitly made exclusive, does not repeal or supersede the general laws of the state on the same subject, but must be exercised

Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424.

7. Kniper *v.* Louisville, 7 Bush (Ky.) 599. See also Canova *v.* Williams, 41 Fla. 509, 27 So. 30.

8. *In re* Lawrence, 69 Cal. 608, 11 Pac. 217.

9. U. S. Distilling Co. *v.* Chicago, 112 Ill. 19; Kitson *v.* Ann Arbor, 26 Mich. 325; State *v.* Plainfield, 44 N. J. L. 118.

10. Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85; Marion *v.* Chandler, 6 Ala. 899; Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577; Perdue *v.* Ellis, 18 Ga. 586; Sweet *v.* Wabash, 41 Ind. 7.

11. Craig *v.* Burnett, 32 Ala. 728; *Ex p.* Burnett, 30 Ala. 461. *Compare Ex p.* Sikes, 102 Ala. 173, 15 So. 522, 24 L. R. A. 774; *Ex p.* Hinkle, 104 Mo. App. 104, 78 S. W. 317.

12. Amador County *v.* Kennedy, 70 Cal. 458, 11 Pac. 757; East St. Louis *v.* Wehrung, 46 Ill. 392.

Classification by amount of sales.— Allentown *v.* Gross, 132 Pa. St. 319, 19 Atl. 269.

Different rates in different cities.— Wiley *v.* Owens, 39 Ind. 429.

Unequal occupation taxes.— It is no objection to a city ordinance fixing the amount of license-fees that liquor dealers are required to pay a higher tax than persons pursuing certain other avocations. *Ex p.* Hurl, 49 Cal. 557; Columbia *v.* Beasly, 1 Humphr. (Tenn.) 232, 34 Am. Dec. 619. See also Tulloss *v.* Sedan, 31 Kan. 165, 1 Pac. 285.

13. Sprayberry *v.* Atlanta, 87 Ga. 120, 13 S. E. 197; Schwuchow *v.* Chicago, 68 Ill. 444; State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59. But see State *v.* Brown, 19 Fla. 563; State *v.* Columbia, 6 Rich. (S. C.) 404.

Revocation of license granted for definite time.— Although the grant of power to the municipality contains a provision that no license shall be granted for a less term than one year, this does not deprive the municipal authorities of the right, in the exercise of their power of regulation, to revoke a license for cause before the expiration of the year for which it was issued. State *v.* Dwyer, 21 Minn. 512.

14. *California.*— Matter of Guerrero, 69 Cal. 88, 10 Pac. 261.

Illinois.— Dennehy *v.* Chicago, 120 Ill. 627, 12 N. E. 227; King *v.* Jacksonville, 3 Ill. 305.

Minnesota.— State *v.* Gill, 89 Minn. 502, 95 N. W. 449.

Missouri.— Warrensburg *v.* McHugh, 122 Mo. 649, 27 S. W. 523.

New Jersey.— Hoboken *v.* Goodman, 68 N. J. L. 217, 51 Atl. 1092; Hershoff *v.* Bev-

in conformity therewith.[15] Hence a municipal ordinance and a state statute relating to the sale of liquors may both be operative and effective, although they cover the same ground, define the same or similar offenses, or make similar regulations as to the conduct of the business, if there is no irreconcilable repugnancy between them.[16] But if the grant of authority to the municipality is in terms made exclusive, its exercise will suspend or supersede the general laws so far as regards that municipality, so as to cut off any extraneous right to interfere in the management of the subject;[17] and also so that a compliance with the provisions of the municipal ordinance will furnish a complete protection against any provisions of the state statute, while a compliance with the terms of the statute may not suffice as a protection against the consequences of disobeying the ordinance.[18]

b. Concurrent Licenses or Taxes. The grant of a license by one jurisdiction as a state or county is not necessarily exclusive of the power of another jurisdiction as a municipal corporation to exact a license; and hence, although a state statute may make it an offense to sell liquor without a license from the state or county, this does not interfere with the power of a municipality, if duly authorized, to provide a license system of its own, and enact penalties for its violation.[19]

erly, 45 N. J. L. 288; Meyer *v.* Bridgeton, 37 N. J. L. 160.

New York. — Clintonville *v.* Keeting, 4 Den. 341.

South Carolina. — Charlestown City Council *v.* Heisembrittle, 2 McMull. 233.

United States. — Miller *v.* Ammon, 145 U. S. 421, 12 S. Ct. 884, 36 L. ed. 759.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 12.

Penalty in excess of charter powers see Shreveport *v.* Draiss, 111 La. 511, 35 So. 727.

15. *Illinois.* — Gardner *v.* People, 20 Ill. 430.

Kentucky. — Louisville *v.* Kean, 18 B. Mon. 9.

North Carolina. — State *v.* Witter, 107 N. C. 792, 12 S. E. 328; State *v.* Langston, 88 N. C. 692.

Texas. — *Ex p.* Ginnochio, 30 Tex. App. 584, 18 S. W. 82.

Washington. — Corbett *v.* Territory, 1 Wash. Terr. 431.

And see State *v.* Rushing, 140 Ala. 187, 36 So. 1007.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 13.

16. *Connecticut.* — State *v.* Welch, 36 Conn. 215.

Georgia. — Hood *v.* Von Glahn, 88 Ga. 405, 14 S. E. 564; Mayson *v.* Atlanta, 77 Ga. 662; Hill *v.* Dalton, 72 Ga. 314.

Illinois. — Dennehy *v.* Chicago, 120 Ill. 627, 12 N. E. 227; Pekin *v.* Smelzel, 21 Ill. 464, 74 Am. Dec. 105.

Indiana. — Ambrose *v.* State, 6 Ind. 351.

Minnesota. — State *v.* Langdon, 29 Minn. 393, 13 N. W. 187.

Missouri. — State *v.* Francis, 95 Mo. 44, 8 S. W. 1.

Nebraska. — Bailey *v.* State, 30 Nebr. 855, 47 N. W. 208.

New York. — Cohoes *v.* Moran, 25 How. Pr. 385.

Texas. — Craddock *v.* State, 18 Tex. App. 567; Angerhoffer *v.* State, 15 Tex. App. 613.

Virginia. — Thon *v.* Com., 31 Gratt. 887.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 13.

17. State *v.* Haines, 35 Oreg. 379, 58 Pac. 39; *Ex p.* Brown, 38 Tex. Cr. 295, 42 S. W. 554, 70 Am. St. Rep. 743.

Exclusive power to license. — If the legislature has declared that incorporated towns shall have the exclusive privilege of granting licenses, the county authorities have no power or right to interfere, in any manner whatever, with the subject; and the refusal of a town to grant any licenses does not confer power upon the county authorities to issue them. Coulterville *v.* Gillen, 72 Ill. 599; Phillips *v.* Tecumseh, 5 Nebr. 312; Clintonville *v.* Keeting, 4 Den. (N. Y.) 341.

18. *Alabama.* — Camp *v.* State, 27 Ala. 53.

Colorado. — Huffsmith *v.* People, 8 Colo. 175, 6 Pac. 157, 54 Am. Rep. 550; Hetzer *v.* People, 4 Colo. 45.

Dakota. — Territory *v.* Webster, 5 Dak. 351, 40 N. W. 535.

Illinois. — Bennett *v.* People, 30 Ill. 389.

Kentucky. — Com. *v.* Luck, 2 B. Mon. 296.

Minnesota. — State *v.* Nolan, 37 Minn. 16, 33 N. W. 36; State *v.* Wheeler, 27 Minn. 76, 6 N. W. 423.

Mississippi. — Licks *v.* State, 42 Miss. 316.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 13.

19. *Alabama.* — West *v.* Greenville, 39 Ala. 69.

Dakota. — Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577.

Indiana. — Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802; Lutz *v.* Crawfordsville, 109 Ind. 466, 10 N. E. 411. See also Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706 (holding that an ordinance requiring those who apply for a town license to obtain in the first place a license from the county commissioners, as provided by law, is a reasonable regulation); McKinney *v.* Salem, 77 Ind. 213.

Louisiana. — Petitfils *v.* Jeanerette, 52 La.

And on the same principle the fact that the state imposes a tax on the sale of intoxicating liquor does not preclude it from authorizing a city to impose an additional tax.[20]

c. Concurrent Penalties. Where the power to regulate the traffic in liquors is concurrent in the state and a municipal corporation (the grant of authority to the latter not having been made exclusive), the same unlawful act may constitute a punishable offense both under the state statute and the municipal ordinance, and proceedings may be taken against the offender under either,[21] unless in cases where the general law of the state expressly forbids such a duplication of criminal responsibility,[22] or where the municipal ordinance would be contrary to, or inconsistent with, the general statute.[23] A municipal corporation cannot, however, in the absence of express legislative authority so to do, enact a valid ordinance for the punishment of an offense against the liquor laws which constitutes an offense against a penal statute of the state.[24]

5. Conflict of Ordinance With General Law. No municipality can enact an ordinance, under claim of legislative authority, which would contravene or be inconsistent with the constitution of the state. Thus, if the constitution entirely prohibits the manufacture and sale of intoxicants, a city cannot lawfully license or authorize their sale.[25] Such ordinances must also conform to the constitutional guaranties of due process of law and protection of private rights.[26] Further municipal ordinances on this subject cannot set aside, limit, or enlarge the statute law of the state, unless the power of the municipality to do so can be shown in express terms or by necessary implication, as by the grant to it of exclusive power to regulate the traffic.[27] Where the legislature has conferred on a city power to

Ann. 1005, 27 So. 358. And see New Iberia *v.* Moss Hotel Co., 112 La. 525, 36 So. 552.

Minnesota. — State *v.* Fleckenstein, 26 Minn. 177, 2 N. W. 475; State *v.* Pfeifer, 26 Minn. 175, 2 N. W. 474.

Mississippi.—Drysdale *v.* Pradat, 45 Miss. 445.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 13.

20. Wolf *v.* Lansing, 53 Mich. 367, 19 N. W. 38.

21. *Alabama.*— Mobile *v.* Rouse, 8 Ala. 515.

Colorado.— Deitz *v.* Central, 1 Colo. 323.

Illinois.— Pekin *v.* Smelzel, 21 Ill. 464, 74 Am. Dec. 105.

Kansas.— Salina *v.* Seitz, 16 Kan. 143.

Kentucky. — Mullins *v.* Lancaster, 63 S. W. 475, 23 Ky. L. Rep. 436.

Minnesota. — State *v.* Harris, 50 Minn. 128, 52 N. W. 387, 531; State *v.* Langdon, 29 Minn. 393, 13 N. W. 187. And see Jordan *v.* Nicolin, 84 Minn. 367, 87 N. W. 915.

New York. — Cohoes *v.* Moran, 25 How. Pr. 385.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 13.

Penalties not cumulative.— But it seems that a conviction and punishment in the courts of either jurisdiction would be a bar to a prosecution for the same offense by the other jurisdiction. Wightman *v.* State, 10 Ohio 452.

22. Ind. Rev. St. (1881) § 1640. See Clevenger *v.* Rushville, 90 Ind. 258.

23. Iowa City *v.* McInnerny, 114 Iowa 586, 87 N. W. 498. See also Keokuk *v.* Dressell, 47 Iowa 597.

24. Moran *v.* Atlanta, 102 Ga. 840, 30 S. E. 298; Foster *v.* Brown, 55 Iowa 686, 8 N. W. 654.

25. State *v.* Leavenworth, 36 Kan. 314, 13 Pac. 591; State *v.* Topeka, 30 Kan. 653, 2 Pac. 587; Mt. Pleasant *v.* Vansice, 43 Mich. 361, 5 N. W. 378, 38 Am. Rep. 193; Dewar *v.* People, 40 Mich. 401, 29 Am. Rep. 545.

26. Baldwin *v.* Smith, 82 Ill. 162; Markle *v.* Akron, 14 Ohio 586; Gabel *v.* Houston, 29 Tex. 335; Tanner *v.* Alliance, 29 Fed. 196.

27. *Alabama.*— Mitchell *v.* State, 133 Ala. 65, 32 So. 132.

California.— *Ex p.* Stephen, 114 Cal. 278, 46 Pac. 86.

Iowa.— Burlington *v.* Kellar, 18 Iowa 59.

Kansas.— Eureka *v.* Davis, 21 Kan. 578.

Mississippi. — House *v.* State, 41 Miss. 737.

Missouri.— Warrensburg *v.* McHugh, 122 Mo. 649, 27 S. W. 523.

New Jersey.— State *v.* Fay, 44 N. J. L. 474. And see Von der Leith *v.* State, 60 N. J. L. 46, 37 Atl. 436.

New York.— Wood *v.* Brooklyn, 14 Barb. 425.

Ohio.— Thompson *v.* Mt. Vernon, 11 Ohio St. 688.

South Carolina.— Florence *v.* Brown, 49 S. C. 332, 26 S. E. 880, 27 S. E. 273; Zylstra *v.* Charleston, 1 Bay 382; McMullen *v.* Charleston, 1 Bay 46.

Virginia.— Morganstern *v.* Com., 94 Va. 787, 26 S. E. 402.

Illustrations.— A town ordinance prohibiting the sale of liquors within the corporate limits is void under a general state license law. State *v.* Brittain, 89 N. C. 574. And where the general law permits the sale of

pass an ordinance for the regulation and sale of intoxicating liquors, and prescribing what shall constitute the penalty for a violation thereof, an ordinance for the regulation of intoxicating liquors, failing to prescribe penalties within the limits fixed by the legislature, is void.[28]

6. Revocation of Grant of Power. The fact that a delegation to municipalities of authority to regulate and prohibit the sale of liquor was made by the permission of a state constitutional provision does not deprive the legislature of power to recall the authority.[29] The adoption of prohibition by constitutional enactment, or by statute, or the passage of a new statute providing a general system for licensing or regulating the traffic in liquors, repeals all inconsistent provisions in municipal charters and the ordinances adopted under them.[30] And where the provisions of a local option law are adopted in a county, a city in said county, previously invested with full and exclusive power to regulate the sale of intoxicating liquors, is thereby divested of all authority to make ordinances regulating or legalizing such sale.[31]

IV. Constitutionality of Liquor Laws.

A. Power of States as Limited by Federal Constitution — 1. Fourteenth Amendment. State statutes prohibiting the manufacture and sale of intoxicating liquors, or submitting the question of their sale to a popular vote under the local option system, or requiring dealers in such liquors to obtain a license for their sale, and vesting officials with a reasonable discretion in the selection of licensees, or imposing an occupation tax upon dealers, and regulating the time and manner of their sales and the conduct of their business, do not violate the provisions of the fourteenth amendment to the constitution of the United States,[32] since the right to engage in the sale of intoxicating liquors is not one of the privileges or immunities of citizens of the United States which the states are thereby forbidden

liquor in quantities above a certain measure, an ordinance cannot increase the minimum. Adams *v.* Albany, 29 Ga. 56. *Compare* Byers *v.* Olney, 16 Ill. 35.

28. Assaria *v.* Wells, 68 Kan. 787, 75 Pac. 1026.

29. Parsons *v.* People, 32 Colo. 221, 76 Pac. 666.

30. *Illinois.*— Ottawa *v.* La Salle County, 12 Ill. 339.

Iowa.— State *v.* Harris, 10 Iowa 441.

Kentucky.— Adams *v.* Stephens, 88 Ky. 443, 11 S. W. 427, 10 Ky. L. Rep. 1031.

Minnesota.— State *v.* Olson, 38 Minn. 150, 36 N. W. 446; State *v.* Peterson, 38 Minn. 143, 36 N. W. 443. *Compare* State *v.* Harris, 50 Minn. 128, 52 N. W. 387, 531.

Wisconsin.— Platteville *v.* McKernan, 54 Wis. 487, 11 N. W. 798. *Compare* State *v.* Brady, 41 Conn. 588; *In re* Thomas, 53 Kan. 659, 37 Pac. 171.

31. Turner *v.* Forsyth, 78 Ga. 683, 3 S. E. 649.

32. *California.*— *Ex p.* Campbell, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418; *Ex p.* Smith, 38 Cal. 702.

Connecticut.— State *v.* Gray, 61 Conn. 39, 22 Atl. 675.

Kansas.— State *v.* Durein, 70 Kan. 1, 78 Pac. 152, 70 Kan. 13, 80 Pac. 987; State *v.* Lindgrove, 1 Kan. App. 51, 41 Pac. 688.

Kentucky.— *Ex p.* Burnside *v.* Lincoln County Ct., 86 Ky. 423, 6 S. W. 276, 9 Ky. L. Rep. 635.

Louisiana.— State *v.* Mattle, 48 La. Ann. 728, 19 So. 748.

Michigan.— Whitney *v.* Grand Rapids, 71 Mich. 234, 39 N. W. 40.

Missouri.— *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10.

New Jersey.— Hoboken *v.* Goodman, 68 N. J. L. 217, 51 Atl. 1092.

New York.— People *v.* City Prison, 6 N. Y. App. Div. 520, 39 N. Y. Suppl. 582.

Ohio.— Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672.

South Dakota.— State *v.* Brennan, 2 S. D. 384, 50 N. W. 625.

Tennessee.— Webster *v.* State, 110 Tenn. 491, 82 S. W. 179.

Texas.— McGuire *v.* Glass, (1890) 15 S. W. 127; Bell *v.* State, 28 Tex. App. 96, 12 S. W. 410.

Vermont.— State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

United States.— Gundling *v.* Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725; Gray *v.* Connecticut, 159 U. S. 74, 15 S. Ct. 985, 40 L. ed. 80; Giozza *v.* Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599; Crowley *v.* Christensen, 137 U. S. 86, 11 S. Ct. 13, 34 L. ed. 620; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Bartemeyer *v.* Iowa, 18 Wall. 129, 21 L. ed. 929; Jacobs Pharmacy Co. *v.* Atlanta, 89 Fed. 244; *In re*

to abridge, nor can such restrictive statutes be said to deprive persons of liberty or property without due process of law, nor, if not entirely arbitrary in their discrimination between persons, do they deprive any one of the equal protection of the laws.[33]

2. Obligation of Contracts.[34] A state statute prohibiting, licensing, or regulating the manufacture or sale of intoxicating liquors is not obnoxious to the constitutional prohibition against laws impairing the obligation of contracts, although it may injuriously affect the business or the privileges of corporations or others possessing the right, by charter or legislative grant, at the time of its enactment, to manufacture or sell such liquors,[35] or cause the revocation or forfeiture of licenses for such manufacture or sale, previously granted by lawful authority,[36] or operate to prevent the performance of contracts previously made between individuals.[37]

3. Regulation of Commerce. The constitutional provision vesting in congress exclusive power to regulate commerce with foreign nations and among the several states operates in some instances as a restriction upon the authority of the several states in enacting laws for the regulation of the traffic in intoxicating liquors.[38]

4. Rights of Citizens of Other States.[39] Under the provisions of the federal constitution that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," it is held that a state cannot impose, for the privilege of doing business within its limits, a heavier license-tax upon non-residents than is required of its own citizens, and this applies to the traffic in intoxicating liquors.[40] And a state tax which necessarily discriminates in favor of the products and manufactures of the taxing state, and against the introduction and sale of goods produced in other states, is within the constitutional inhibition and void.[41] And so is a statute providing that no action of any kind shall be maintained, either in whole or in part, for intoxicating liquors sold in another state or country, since it assumes to deprive citizens of other states of rights of action to redress injuries to property.[42] But on the other hand a state law requiring dealers in liquor to take out a license is not invalid, as in conflict with this provision of the constitution, although it excludes non-residents from the privilege of obtaining a license, by limiting it to certain classes of its own citizens.[43]

B. Prohibition — 1. By Constitutional Enactment. The adoption of a constitutional provision entirely prohibiting the manufacture and sale of intoxicating liquors repeals and annuls all existing laws which permitted such manufacture and sale under licenses or other restrictions.[44] It limits the power of the legisla-

Hoover, 30 Fed. 51; State *v.* Walruff, 26 Fed. 178.

33. As to equal protection of the laws see Constitutional Law, 8 Cyc. 1058 *et seq.*

As to due process of law see Constitutional Law, 8 Cyc. 1080 *et seq.*

34. See Constitutional Law, 8 Cyc. 929 *et seq.*

35. Com. *v.* Certain Intoxicating Liquors, 115 Mass. 153; State *v.* Paul, 5 R. I. 185; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989.

36. La Croix *v.* Fairfield County Com'rs, 50 Conn. 321, 47 Am. Rep. 648; Coulson *v.* Harris, 43 Miss. 728; Reed *v.* Beall, 42 Miss. 472; Martin *v.* State, 23 Nebr. 371, 36 N. W. 554; Kresser *v.* Lyman, 74 Fed. 765.

37. People *v.* Hawley, 3 Mich. 330.

38. See Commerce, 7 Cyc. 419 *et seq.*

39. See Constitutional Law, 8 Cyc. 1036 *et seq.*

40. Gould *v.* Atlanta, 55 Ga. 678; State *v.* North, 27 Mo. 464; Crow *v.* State, 14 Mo. 237; Sinclair *v.* State, 69 N. C. 47; Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449.

41. Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691; Webber *v.* Virginia, 103 U. S. 344, 26 L. ed. 565; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347. But *compare* State *v.* Stucker, 58 Iowa 496, 12 N. W. 483.

42. *In re* Opinion of Justices, 25 N. H. 537.

43. *Indiana.*— Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664.

Maryland.— Trageser *v.* Gray, 73 Md. 250, 20 Atl. 905, 25 Am. St. Rep. 587, 9 L. R. A. 780.

Missouri.— Austin *v.* State, 10 Mo. 591.

Nebraska.— Mette *v.* McGuckin, 18 Nebr. 323, 25 N. W. 338.

United States.— Cantini *v.* Tillman, 54 Fed. 969; Kohn *v.* Melcher, 29 Fed. 433.

44. Prohibitory Amendment Cases, 24 Kan. 700; State *v.* Tonks, 15 R. I. 385, 5 Atl. 636.

ture so that a statute disregarding the constitutional prohibition and enacting a licensing system would be void.[45] But an act prohibiting the sale of liquor under a penalty until the seller has given bonds is not a licensing act,[46] and a statute permitting the sale of liquor for medicinal and mechanical purposes is not repugnant to a constitutional provision forbidding the grant of licenses.[47] Where the constitution prohibits the manufacture and sale of liquors "to be used as a beverage," this does not impliedly license such manufacture and sale for other purposes, and the legislature has power to go beyond the terms of the constitution, and prohibit the traffic for other purposes.[48] In Ohio the constitution provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the general assembly may by law provide against evils resulting therefrom." It is held that this applies as well to the wholesale as to the retail trade.[49] It does not by implication prevent the enactment of prohibitory legislation.[50] It does prohibit any statute authorizing licenses to be granted; but a law which provides for an assessment or tax on the business of trafficking in intoxicating liquors is not a license law.[51]

2. By Statute. A state statute absolutely prohibiting, within the limits of the state, the manufacture and sale of intoxicating liquors as a beverage is a lawful exercise of the police power of the state, and is not open to constitutional objection, either on considerations of natural right or of the specific limitations of state power.[52] Such a statute, although it may deprive persons of the right to

Compare State *v.* Dorr, 82 Me. 212, 19 Atl. 171; State *v.* Swan, 1 N. D. 5, 44 N. W. 492.

45. Butzman *v.* Whitbeck, 42 Ohio St. 223; State *v.* Tonks, 15 R. I. 385, 5 Atl. 636. *Compare* State *v.* Clark, 15 R. I. 383, 5 Atl. 635.

46. Langley *v.* Ergensinger, 3 Mich. 314.

47. People *v.* Collins, 3 Mich. 343.

48. State *v.* Kennedy, 16 R. I. 409, 17 Atl. 51; State *v.* Kane, 15 R. I. 395, 6 Atl. 783.

49. Senior *v.* Ratterman, 44 Ohio St. 661, 11 N. E. 321.

50. Gordon *v.* State, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749.

51. Anderson *v.* Brewster, 44 Ohio St. 576, 9 N. E. 683; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672; State *v.* Frame, 39 Ohio St. 399. *Compare* Butzman *v.* Whitbeck, 42 Ohio St. 223; King *v.* Cappellar, 42 Ohio St. 218; State *v.* Hipp, 38 Ohio St. 199.

52. *Alabama.*— Feibelman *v.* State, 130 Ala. 122, 30 So. 384.

California.— *Ex p.* Campbell, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418.

Connecticut.— State *v.* Wheeler, 25 Conn. 290.

Delaware.— State *v.* Allmond, 2 Houst. 612.

Georgia.— Blake *v.* State, 118 Ga. 333, 45 S. E. 249; Barker *v.* State, 118 Ga. 35, 44 S. E. 874; Rooney *v.* Augusta, 117 Ga. 709, 45 S. E. 72; Redding *v.* State, 91 Ga. 231, 18 S. E. 289; Bell *v.* State, 91 Ga. 227, 18 S. E. 288; Perdue *v.* Ellis, 18 Ga. 586.

Illinois.— Jones *v.* People, 14 Ill. 196.

Indiana.— Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424.

Iowa.— Jordan *v.* Wapello Dist. Ct., 74 Iowa 762, 38 N. W. 430; Drake *v.* Jordan, 73 Iowa 707, 36 N. W. 653; Drake *v.* Kaiser, 73 Iowa 793, 36 N. W. 652; Kaufman *v.* Dostal, 73 Iowa 691, 36 N. W. 643; Craig *v.* Florange, 71 Iowa 761, 32 N. W. 356; McLane *v.* Leicht, 69 Iowa 401, 29 N. W. 327; Martin *v.* Blattner, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244; State *v.* Donehey, 8 Iowa 396; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Kansas.— State *v.* Mugler, 29 Kan. 252, 44 Am. Rep. 634; Prohibitory Amendment Cases, 24 Kan. 700.

Kentucky.— Brown *v.* Com., 98 Ky. 652, 34 S. W. 12, 17 Ky. L. Rep. 1216; Stickrod *v.* Com., 86 Ky. 285, 5 S. W. 580, 9 Ky. L. Rep. 563; Anderson *v.* Com., 13 Bush 485; Sarris *v.* Com., 7 Ky. L. Rep. 299. But see Com. *v.* Fowler, 96 Ky. 166, 28 S. W. 786, 16 Ky. L. Rep. 360, 33 L. R. A. 839; Rauhold *v.* Com., 54 S. W. 17, 21 Ky. L. Rep. 1125.

Michigan.— People *v.* Gallagher, 4 Mich. 244; People *v.* Hawley, 3 Mich. 330.

Missouri.— Austin *v.* State, 10 Mo. 591.

Nebraska.— Hunzinger *v.* State, 39 Nebr. 653, 58 N. W. 194.

New York.— Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657; People *v.* Quant, 2 Park. Cr. 410.

North Carolina.— Guy *v.* Cumberland County, 122 N. C. 471, 29 S. E. 771.

Ohio.— Gordon *v.* State, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749; Markle *v.* Akron, 14 Ohio 586.

Rhode Island.— State *v.* Gravelin, 16 R. I. 407, 16 Atl. 914; State *v.* Guinness, 16 R. I. 401, 16 Atl. 910; State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767; State *v.* Mellor, 13 R. I. 666; State *v.* Amery, 12 R. I. 64.

South Dakota.— State *v.* Becker, 3 S. D. 29, 51 N. W. 1018.

Vermont.— State *v.* Lovell, 47 Vt. 493; State *v.* Conlin, 27 Vt. 318.

Virginia.— Savage's Case, 84 Va. 582, 619, 5 S. E. 563, 565.

United States.— Kidd *v.* Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 346; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed.

pursue a business which was previously lawful, and diminish the value of property devoted to brewing or distilling, cannot be said to deprive them of their liberty or property without due process of law,[53] nor does it, for similar reasons, violate the prohibition against impairing the obligation of contracts,[54] nor that which forbids discrimination against citizens of other states or citizens of the United States.[55] Neither is such a statute, if confined to persons and property fully within the jurisdiction of the state, invalid as a regulation of foreign or interstate commerce,[56] nor for conflict with the United States internal revenue laws, although it prevents persons holding government licenses from continuing in the business for which they were licensed.[57] And such a law, in so far as it prohibits the sale of liquors in existence at the time of its passage, is not an *ex post facto* law, since, if it lessens the value of such liquors, such civil consequence does not make it retroact criminally in such sense as to bring it within the constitutional prohibition against laws of that character.[58]

C. Local Option — 1. In General. A "local option" law, authorizing the municipal divisions of the state to decide by popular vote whether or not a prohibitive or restrictive liquor law shall be in force in their limits, if it is a complete enactment in itself, requiring nothing further to give it validity, and depending upon the popular vote for nothing but a determinaton of the territorial limits of its operation, is a valid and constitutional exercise of the legislative power.[59]

2. Delegation of Legislative Power. A local option law so framed is not

205; Foster *v.* Kansas, 112 U. S. 201, 5 S. Ct. 897, 28 L. ed. 629; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Bartemeyer *v.* Iowa, 18 Wall. 129, 21 L. ed. 929; License Cases, 5 How. 504, 12 L. ed. 256; Tanner *v.* Alliance, 29 Fed. 196; Kessinger *v.* Hinkhouse, 27 Fed. 883; Kansas *v.* Bradley, 26 Fed. 289; Weil *v.* Calhoun, 25 Fed. 865; *In re* Brosnahan, 18 Fed. 62, 4 McCrary 1.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 21.

Keeping liquor in one's possession, not for the purpose of making an illegal sale of it, nor for any other improper purpose, cannot be detrimental to the public in any way, and therefore is not subject to police regulation; and hence a statute which makes it unlawful for any person to "keep in his possession, for another, spirituous liquors" is unconstitutional. State *v.* Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847.

53. *Georgia.*— Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559.

Indiana.— Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424.

Iowa.— Shear *v.* Bolinger, 74 Iowa 757, 37 N. W. 164; Drake *v.* Jordan, 73 Iowa 707, 36 N. W. 653; Drake *v.* Kaiser, 73 Iowa 703, 36 N. W. 652; Dickinson *v.* Herb Brewing Co., 73 Iowa 705, 36 N. W. 651; Kaufman *v.* Dostal, 73 Iowa 691, 36 N. W. 643; McLane *v.* Leicht, 69 Iowa 401, 29 N. W. 327.

Kansas.— Prohibitory Amendment Cases, 24 Kan. 700.

Ohio.— Heck *v.* State, 44 Ohio St. 536, 9 N. E. 305.

Virginia.— Savage's Case, 84 Va. 619, 5 S. E. 565.

United States.— Kidd *v.* Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 346; Mugler *v.* Kansas, 123 U. S. 623, 2 S. Ct. 273, 31 L. ed. 205; Tanner *v.* Alliance, 29 Fed. 196; Kessinger *v.* Hinkhouse, 27 Fed. 883; Weil *v.* Calhoun, 25 Fed. 865.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 21. And see Constitutional Law, 8 Cyc. 1080 *et seq.*

Compare Wynehamer *v.* People, 13 N. Y. 378.

54. Com. *v.* Certain Intoxicating Liquors, 115 Mass. 153; People *v.* Hawley, 3 Mich. 330; State *v.* Paul, 5 R. I. 185; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989. And see Constitutional Law, 8 Cyc. 929 *et seq.*

55. Crowley *v.* Christensen, 137 U. S. 86, 11 S. Ct. 13, 34 L. ed. 620; Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923; Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929; Cantini *v.* Tillman, 54 Fed. 969; *In re* Hoover, 30 Fed. 51. And see Constitutional Law, 8 Cyc. 1036 *et seq.*

56. Pearson *v.* International Distillery, 72 Iowa 348, 34 N. W. 1; State *v.* Stucker, 58 Iowa 496, 12 N. W. 483; State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767; Kidd *v.* Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 346. And see Commerce, 7 Cyc. 419 *et seq.*

57. Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; State *v.* Baughman, 20 Iowa 497; State *v.* Carney, 20 Iowa 82. And see Internal Revenue.

58. State *v.* Keeran, 5 R. I. 497; State *v.* Paul, 5 R. I. 185. And see Constitutional Law, 8 Cyc. 1017 *et seq.*

59. *Alabama.*— *Ex p.* Cowert, 92 Ala. 94, 9 So. 225. But *compare* Morgan *v.* State, 81 Ala. 72, 1 So. 472.

Arkansas.— Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6.

Connecticut.— State *v.* Wilcox, 42 Conn. 364, 19 Am. Rep. 536.

Dakota.— Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355.

Georgia.— Caldwell *v.* Barrett, 73 Ga. 604.

unconstitutional as a delegation of legislative power to the people, the reference to the voters not being for the purpose of enabling them to make a law, but merely to accept or reject its provisions for their particular locality.[60] But the statute must be complete and perfect when it leaves the legislature; its terms or details cannot be left to the popular vote. It would not be competent for the legislature to leave it to the people to decide what kind of a liquor law they chose to have; only the question whether they will adopt a particular enactment can be referred.[61]

3. UNIFORMITY. Although a general local option law may be adopted in some parts of the state and rejected in others, it is not for that reason lacking in the "uniformity" required by the constitution, provided it was submitted in the same way to all the counties or other divisions of the state; nor does it fall within the inhibition of private, local, or special laws.[62] And in the absence of constitutional restraint, there is no great underlying principle of natural right and justice

Indiana.— Groesch *v.* State, 42 Ind. 547. But *compare* Meshmeier *v.* State, 11 Ind. 482; Maize *v.* State, 4 Ind. 342.

Iowa.— State *v.* Forkner, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206; State *v.* King, 37 Iowa 462.

Kentucky.— Gayle *v.* Owen County Ct., 83 Ky. 61; Com. *v.* Weller, 14 Bush 218, 29 Am. Rep. 407; Anderson *v.* Com., 13 Bush 485; Lowry *v.* Com., 36 S. W. 1117, 18 Ky. L. Rep. 481.

Louisiana.— Garrett *v.* Aby, 47 La. Ann. 618, 17 So. 238.

Maryland.— Slymer *v.* State, 62 Md. 237; Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83; Hammond *v.* Haines, 25 Md. 541, 90 Am. Dec. 77.

Massachusetts.— Com. *v.* Dean, 110 Mass. 357; Com. *v.* Bennett, 108 Mass. 27.

Michigan.— Friesner *v.* Charlotte, 91 Mich. 504, 52 N. W. 18; Feek *v.* Bloomingdale, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69; People *v.* Collins, 3 Mich. 343.

Minnesota.— State *v.* Cooke, 24 Minn. 247, 31 Am. Rep. 344.

Mississippi.— Lemon *v.* Peyton, 64 Miss. 161, 8 So. 235; Schulherr *v.* Bordeaux, 64 Miss. 59, 8 So. 201.

Missouri.— *Ex p.* Handler, 176 Mo. 383, 75 S. W. 920; State *v.* Watts, 111 Mo. 553, 20 S. W. 237; State *v.* Dugan, 110 Mo. 138, 19 S. W. 195; State *v.* Moore, 107 Mo. 78, 16 S. W. 937; *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10; State *v.* Pond, 93 Mo. 606, 6 S. W. 469.

Montana.— *In re* O'Brien, 29 Mont. 530, 75 Pac. 196.

New Jersey.— State *v.* Judge Gloucester County Cir. Ct., 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86; State *v.* Morris County Ct. C. Pl., 36 N. J. L. 72, 13 Am. Rep. 422.

New York.— Gloversville *v.* Howell, 70 N. Y. 287.

Ohio.— Stevens *v.* State, 61 Ohio St. 597, 56 N. E. 478; State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59; Van Wert *v.* Brown, 47 Ohio St. 477, 25 N. E. 59; Gordon *v.* State, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749.

Pennsylvania.— Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716. *Compare* Parker *v.* Com., 6 Pa. St. 507, 47 Am. Dec. 480.

South Dakota.— State *v.* Barber, (1904) 101 N. W. 1078.

Texas.— Hoover *v.* Thomas, 35 Tex. Civ. App. 535, 80 S. W. 859; McLain *v.* State, 43 Tex. Cr. 213, 64 S. W. 865; Sparks *v.* State, (Cr. App. 1898) 45 S. W. 493; Bowman *v.* State, 38 Tex. Cr. 14, 40 S. W. 796, 41 S. W. 635; Kimberly *v.* Morris, 10 Tex. Civ. App. 592, 31 S. W. 809; *Ex p.* Lynn, 19 Tex. App. 293; Holley *v.* State, 14 Tex. App. 505. And see Ray *v.* State, (Cr. App. 1904) 83 S. W. 1121. Earlier cases in this state holding local option laws unconstitutional (State *v.* Swisher, 17 Tex. 441; Stallworth *v.* State, 16 Tex. App. 345) have lost their force since the adoption of constitutional provisions authorizing the enactment of such laws (see Oak Cliff *v.* State, 97 Tex. 383, 79 S. W. 1; Sweeney *v.* Webb, 33 Tex. Civ. App. 324, 76 S. W. 766; Stephens *v.* State, (Cr. App. 1903) 73 S. W. 1056).

Vermont.— State *v.* Parker, 26 Vt. 357.

Virginia.— Savage's Case, 84 Va. 619, 5 S. E. 565.

United States.— Weil *v.* Calhoun, 25 Fed. 865. And see Busch *v.* Webb, 122 Fed. 655.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 16.

60. Caldwell *v.* Barrett, 73 Ga. 604; Groesch *v.* State, 42 Ind. 547; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487; Bancroft *v.* Dumas, 21 Vt. 456. And see cases cited in the preceding note.

61. *Ex p.* Wall, 48 Cal. 279, 17 Am. Rep. 425; Rice *v.* Foster, 4 Harr. (Del.) 479; State *v.* Weir, 33 Iowa 134, 11 Am. Rep. 115; Geebrick *v.* State, 5 Iowa 491; Turner *v.* Saxon, (Wash. 1889) 20 Pac. 685. But see Sweeney *v.* Webb, 33 Tex. Civ. App. 324, 76 S. W. 766.

Subdividing county.— Although the legislature itself may create new subdivisions of a county for local option purposes, it cannot authorize the commissioners' court to designate different subdivisions from those already in existence, even though its action in so doing results merely in accomplishing indirectly what it could lawfully do directly. *Ex p.* Heyman, 45 Tex. Cr. 532, 78 S. W. 349.

62. *Iowa.*— State *v.* Forkner, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206; State *v.* Shroeder, 51 Iowa 197, 1 N. W. 431.

Kentucky.— Com. *v.* Neason, 50 S. W. 66, 20 Ky. L. Rep. 1825.

which forbids the legislature to enact laws for a particular locality different from those applicable to other portions of the state, or which prohibits it from suspending the operation of general laws as to any particular locality, and hence a local option law cannot be declared invalid on any such ground; on the contrary, it is in furtherance of the right of local self-government.[63]

D. Licensing Laws — 1. In General. In the exercise of its power to regulate the traffic in intoxicating liquors, the legislature of a state may lawfully provide a system for the granting of licenses to sell at retail, imposing proper conditions and restrictions upon the granting of such licenses, prescribing the qualifications necessary to secure them, making it a punishable offense to sell without a license, and providing for the forfeiture or revocation of licenses for due cause. Such statutes do not violate the constitutional guaranties securing the just rights of the individual.[64] But there must be no unjust or arbitrary discrimination as to the privileges granted by the license or the amount of the fee payable therefor between individuals of the same class or doing business in the same locality.[65] The amount to be paid as a license-fee rests in the discretion of the legislature. It may be made so high as to operate as an effective restriction on the business,

Minnesota.— State *v.* Johnson, 86 Minn. 121, 90 N. W. 161.

Missouri.— *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10; State *v.* Pond, 93 Mo. 606, 6 S. W. 469. And see *Ex p.* Handler, 176 Mo. 383, 75 S. W. 920.

New Jersey.— State *v.* Judge Gloucester County Cir. Ct., 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

Ohio.— Gordon *v.* State, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 16.

63. Feek *v.* Bloomingdale Tp. Bd., 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69.

64. *Arizona.*— Territory *v.* Connell, (1888) 16 Pac. 209.

Arkansas.— Henry *v.* State, 26 Ark. 523.

California.— *Ex p.* McNally, 73 Cal. 632, 15 Pac. 368; Amador County *v.* Kennedy, 70 Cal. 458, 11 Pac. 757; *Ex p.* Benninger, 64 Cal. 291, 30 Pac. 846; *In re* Stuart, 61 Cal. 374.

Connecticut.— State *v.* Gray, 61 Conn. 39, 22 Atl. 675.

Georgia.— Sasser *v.* Martin, 101 Ga. 447, 29 S. E. 278.

Illinois.— Streeter *v.* People, 69 Ill. 595.

Indiana.— Haggart *v.* Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577; O'Dea *v.* State, 57 Ind. 31; Wiley *v.* Owens, 39 Ind. 429; Thomasson *v.* State, 15 Ind. 449.

Kentucky.— Com. *v.* Fowler, 98 Ky. 648, 34 S. W. 21, 17 Ky. L. Rep. 1209, 96 Ky. 166, 28 S. W. 786, 16 Ky. L. Rep. 360, 33 L. R. A. 839; Mason *v.* Lancaster, 4 Bush 406.

Louisiana.— State *v.* Mattle, 48 La. Ann. 728, 19 So. 748; State *v.* Boston Club, 45 La. Ann. 585, 12 So. 895, 20 L. R. A. 185.

Maine.— Lunt's Case, 6 Me. 412.

Maryland.— Cahen *v.* Jarrett, 42 Md. 571; Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226.

Massachusetts.— Com. *v.* Fredericks, 119 Mass. 199.

Minnesota.— State *v.* Priester, 43 Minn. 373, 45 N. W. 712; Winona *v.* Whipple, 24 Minn. 61; Rochester *v.* Upman, 19 Minn. 108.

Mississippi.— Schulherr *v.* Bordeaux, 64 Miss. 59, 8 So. 201; Rohrbacher *v.* Jackson, 51 Miss. 735.

Missouri.— State *v.* Searcy, 20 Mo. 489.

Nebraska.— Hunzinger *v.* State, 39 Nebr. 653, 58 N. W. 194; Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481; State *v.* Hardy, 7 Nebr. 377.

New Hampshire.— Lewis *v.* Welch, 14 N. H. 294; Pierce *v.* State, 13 N. H. 536.

New York.— People *v.* Meyers, 95 N. Y. 223; Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657; Ingersoll *v.* Skinner, 1 Den. 540.

Ohio.— Anderson *v.* Brewster, 44 Ohio St. 576, 9 N. E. 683; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672.

Pennsylvania.— *In re* Boyle, 190 Pa. St. 577, 42 Atl. 1025, 45 L. R. A. 399; *In re* De Walt, (1898) 40 Atl. 470; Com. *v.* Schoenhutt, 3 Phila. 20.

South Dakota.— Burke *v.* Collins, (1904) 99 N. W. 1112.

West Virginia.— Ward *v.* Taylor County Ct., 51 W. Va. 102, 41 S. E. 154.

United States.— Reymann Brewing Co. *v.* Brister, 179 U. S. 445, 21 S. Ct. 201, 45 L. ed. 269; Crowley *v.* Christensen, 137 U. S. 86, 11 S. Ct. 13, 34 L. ed. 620.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 17.

Constitutionality of statute authorizing rejection of application see Burke *v.* Collins, (S. D. 1904) 99 N. W. 1112.

65. People *v.* Harrison, 191 Ill. 257, 61 N. E. 99; Monmouth *v.* Popel, 183 Ill. 634, 56 N. E. 348; Cairo *v.* Feuchter, 54 Ill. App. 112 [*affirmed* in 159 Ill. 155, 42 N. E. 308]; Jung Brewing Co. *v.* Frankfort, 100 Ky. 409, 38 S. W. 710, 18 Ky. L. Rep. 855.

Classification of towns.— A statute fixing the amount of a license-fee at five hundred dollars a year in cities and towns whose voting population exceeds a certain number, three hundred dollars a year in all other cities and towns, and one hundred dollars a year for hotel or tavern keepers three or more miles distant from any city or town, is a reason-

or even so as to be practically prohibitive.[66] And since the licensing of persons to sell liquor is not an exercise of the taxing power of the state to raise revenue, but of the police power, it follows that the fixing of the fees for licenses is not governed by the constitutional provisions regulating taxation, such as those requiring equality and uniformity.[67] It is also competent for the legislature to require that licensed liquor dealers shall furnish bonds.[68] In regard to the revocation or forfeiture of licenses, it is to be observed that such a license is not a contract between the state or municipality and the licensee, in any such sense as to be within the constitutional prohibition against laws impairing the obligation of contracts.[69]

2. Requiring Assent of Neighbors. A statutory provision that a license shall not be granted unless the applicant obtains the recommendation or consent of a certain number of persons residing in his neighborhood, or of a majority or other proportion of the citizens or voters in the ward or district where he proposes to carry on business, is a lawful and proper police regulation, and is not objectionable on constitutional grounds.[70]

3. Discriminating Against Non-Residents. A statute which debars non-residents of the state from procuring a license for the sale of liquors, as by restricting that privilege to citizens of the state or to those who have resided for a certain length of time within its limits, is not obnoxious to those provisions of the federal constitution which secure the rights of citizens of the United States and of the several states.[71]

able graduation, and does not, in thus establishing a police regulation of the sale of liquors, discriminate unjustly between licensees. State *v.* Doherty, 3 Ida. 384, 29 Pac. 855.

Limiting number of licensed saloons.— A statute providing that in cities the number of saloons licensed shall not exceed one for each one thousand of population does not violate Mass. Const. pt. 1, § 6, as giving to persons having licenses unequal advantages or peculiar privileges. Decie *v.* Brown, 167 Mass. 290, 45 N. E. 765.

Discouraging employment of women in saloons.— An ordinance providing that the license-fee for keeping a saloon or bar shall be thirty dollars per quarter, but raising it to one hundred and fifty dollars a month in all cases where any woman is employed in the saloon or bar as a bartender, actress, dancer, etc., is not in conflict with a constitutional provision that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." *Ex p.* Felchlin, 96 Cal. 360, 31 Pac. 224, 31 Am. St. Rep. 223.

66. Tenney *v.* Lenz, 16 Wis. 566. And see *Ex p.* Hurl, 49 Cal. 557.

67. *Illinois.*— Lovingston *v.* Board of Trustees, 99 Ill. 564; King *v.* Jacksonville, 3 Ill. 305.

Indiana.— Thomasson *v.* State, 15 Ind. 449.

Maryland.— Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226.

Missouri.— State *v.* Hudson, 78 Mo. 302.

South Dakota.— State *v.* Buechler, 10 S. D. 156, 72 N. W. 114.

Wisconsin.— Rock County *v.* Edgerton, 90 Wis. 288, 63 N. W. 291; Richland County *v.* Richland Center, 59 Wis. 591, 18 N. W. 497.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 17.

But *compare* Parsons *v.* People, 32 Colo. 221, 76 Pac. 666.

68. McGuire *v.* Glass, (Tex. App. 1890) 15 S. W. 127; Bell *v.* State, 28 Tex. App. 96, 12 S. W. 410.

Sureties.— A statute providing that no persons engaged in the business of selling liquor may become sureties on the bonds of other dealers has been held to be unconstitutional. Kuhn *v.* Detroit, 70 Mich. 534, 38 N. W. 470. On the other hand it has been held that a statute which prevents any person from becoming a surety on more than two liquor bonds is not invalid. Wolcott *v.* Burlingame, 112 Mich. 311, 70 N. W. 831.

69. Coulson *v.* Harris, 43 Miss. 728; Reed *v.* Beall, 42 Miss. 472; Kresser *v.* Lyman, 74 Fed. 765.

70. *California.*— *Ex p.* Christensen, 85 Cal. 208, 24 Pac. 747; Purdy *v.* Sinton, 56 Cal. 133.

Florida.— State *v.* Brown, 19 Fla. 563.

Illinois.— Swift *v.* People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470.

Indiana.— State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Groesch *v.* State, 42 Ind. 547.

Louisiana.— New Orleans *v.* Macheca, 112 La. 559, 36 So. 590.

Maryland.— Cahen *v.* Jarrett, 42 Md. 571.

Mississippi.— Rohrbacher *v.* Jackson, 51 Miss. 735.

United States.— Crowley *v.* Christensen, 137 U. S. 86, 11 S. Ct. 13, 34 L. ed. 620; *In re* Hoover, 30 Fed. 51.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 17.

Compare Robison *v.* Miner, 68 Mich. 549, 37 N. W. 21.

71. Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Austin *v.* State, 10 Mo. 591; Mette *v.* McGuckin, 18 Nebr. 323, 25

4. Restriction to Particular Classes. A license law is not invalid or unconstitutional because it restricts the right to obtain licenses to such persons as are shown to be of good moral character and of good reputation in the community,[72] or to male citizens,[73] or to persons who have not previously employed women as waitresses in their saloons or bars.[74]

E. Regulation of Sale of Liquor — 1. In General. If the state allows the sale of intoxicating liquors, the legislature has power to regulate the business by such reasonable and proper restrictions and requirements as are necessary to protect the public safety, health, and morals against the evils likely to result from the traffic,[75] provided of course that such regulations do not contravene any provision of the constitution of the state,[76] or conflict with the constitution of the United States.[77]

2. Restrictions Upon Right to Sell — a. As to Particular Places. It is competent for the legislature to provide that a licensed dealer in liquors shall not sell in any other place than that specified in his bond.[78] And a statute prohibiting the sale of liquor in certain specified localities is not to be held unconstitutional merely because its application is limited and not general.[79] So the legislature may prohibit such sales in places where, by reason of the character of the place itself or of the neighborhood, the traffic is likely to be unusually dangerous or detrimental to the morals or good order of the community.[80]

N. W. 338; Reymann Brewing Co. *v.* Bristor, 92 Fed. 28; Kohn *v.* Melcher, 29 Fed. 433. And see Constitutional Law, 8 Cyc. 1036 *et seq.*

72. *In re* Bickerstaff, 70 Cal. 35, 11 Pac. 393; Thomasson *v.* State, 15 Ind. 449; *In re* Ruth, 32 Iowa 250; Gundling *v.* Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725.

73. Linkenhelt *v.* Garrett, 118 Ind. 599, 20 N. E. 708; Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706.

74. Foster *v.* Board of Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194.

75. *Massachusetts.*— Com. *v.* Burding, 12 Cush. 506; Com. *v.* Kendall, 12 Cush. 414.

New Jersey.— State *v.* Judge Gloucester County Cir. Ct., 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

Ohio.— Miller *v.* State, 3 Ohio St. 475.

Texas.— McGuire *v.* Glass, (App. 1890) 15 S. W. 127; Bell *v.* State, 28 Tex. App. 96, 12 S. W. 410.

Wisconsin.— State *v.* Ludington, 33 Wis. 107.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 18.

Sales by druggists.— The legislature has power to confine the sale of liquors for medical, scientific, or mechanical purposes to druggists (Koester *v.* State, 36 Kan. 27, 12 Pac. 339) and to require such druggists to make sworn reports of their sales of liquor to the prosecuting attorney of the county (People *v.* Henwood, 123 Mich. 317, 82 N. W. 70). So it is competent for the legislature to place druggists upon the same footing with others who retail liquor to be drunk as a beverage. Rosenham *v.* Com., 7 Ky. L. Rep. 590.

76. State *v.* Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847.

77. As by amounting to an unlawful interference with interstate commerce (State *v.* Kibling, 63 Vt. 636, 22 Atl. 613) or by an invalid discrimination against the citizens or the products of another state (State *v.* Deschamp, 53 Ark. 490, 14 S. W. 653; State *v.* Marsh, 37 Ark. 356).

78. People *v.* Brown, 85 Mich. 119, 48 N. W. 158.

79. Howell *v.* State, 71 Ga. 224, 51 Am. Rep. 259. And see Knight *v.* State, 88 Ga. 590, 15 S. E. 457; Crabb *v.* State, 88 Ga. 584, 15 S. E. 455; Griffin *v.* Com., 7 Ky. L. Rep. 300; State *v.* Joyner, 81 N. C. 534; Burckholter *v.* McConnellsville, 20 Ohio St. 308.

80. Illustrations.— It is competent to prohibit the sale, exchange, or giving away of liquors in brothels or houses of ill-fame (Schmeltz *v.* State, 8 Ohio Cir. Ct. 82, 4 Ohio Cir. Dec. 287; State *v.* Somerville, 3 Ohio S. & C. Pl. Dec. 422, 1 Ohio N. P. 422); in dance halls or other places where women or minors are employed as waiters or otherwise (*Ex p.* Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701; State *v.* Reynolds, 14 Mont. 383, 36 Pac. 449); or in the suburban or residence portion of a city (Rowland *v.* Greencastle, 157 Ind. 591, 62 N. E. 474; Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138); or within a certain distance of any church (Trammell *v.* Bradley, 37 Ark. 374; Butler *v.* State, 89 Ga. 821, 15 S. E. 763; State *v.* Snow, 117 N. C. 774, 23 S. E. 322; State *v.* Partlow, 91 N. C. 550, 49 Am. Rep. 652), school, college, or other institution of learning (Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6; Butler *v.* State, 89 Ga. 821, 15 S. E. 763; State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; Hatcher *v.* State, 12 Lea (Tenn.) 368; State *v.* Rauscher, 1 Lea (Tenn.) 96), soldiers' home or orphans' home (State *v.* Barringer, 110 N. C. 525, 14 S. E. 781; Driggs *v.* State, 52 Ohio St. 37, 38 N. E. 882), fair grounds, while a fair is in progress (State *v.* Stovall, 103 N. C. 416, 8 S. E. 900; Heck *v.* State, 44 Ohio St. 536, 9 N. E. 305),

b. As to Quantity Sold. It is competent for the legislature, as a measure of police regulation, to forbid the sale of liquor by the small measure, or in quantities less than a certain minimum.[81]

c. Sales to Particular Persons. The legislature may validly prohibit the sale of intoxicants to those classes of persons who are peculiarly liable to be injured or demoralized by their use, such as minors, habitual drunkards, and persons already under the influence of liquor.[82]

d. Days and Hours For Closing. No constitutional objection can be successfully urged against laws forbidding the sale of liquor on Sundays, election days, and other holidays,[83] or restricting the sale to certain hours of the daytime, or requiring saloons to be closed during the hours of the night.[84]

3. Conduct of Business — a. In General. Persons licensed to sell intoxicants may be subjected to such supervision and control, in the conduct of their business, as will tend to preserve good order, prevent violations of the law, discourage intemperate drinking, and minimize the dangers to the community or the harm to individuals resulting from the traffic in liquors.[85]

b. Inspection. On this principle the courts sustain the validity of laws providing for the official inspection of liquors, and the exaction of a fee for such inspection,[86] and laws subjecting liquor dealers to police surveillance, so far as to give police officers the right and power at all times to enter upon their premises for the purpose of ascertaining the manner in which the business is conducted.[87]

c. Displaying License. It is competent to require that a dealer in intoxicating liquors shall have his license posted and displayed in a conspicuous place on the premises.[88]

or polling-place (Centerville *v.* Miller, 51 Iowa 712, 2 N. W. 527; State *v.* Shroeder, 51 Iowa 197, 1 N. W. 431). A statute prohibiting liquor selling within a strip of two miles around an incorporated city or village, while it may be licensed both within and without that limit, being general in its application to all territory of the state falling within such description, is valid as an exercise of the police power. Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481.

81. *In re* Jahn, 55 Kan. 694, 41 Pac. 956; Com. *v.* Fowler, 96 Ky. 166, 28 S. W. 786, 19 Ky. L. Rep. 360, 33 L. R. A. 839; Stickrod *v.* Com., 86 Ky. 285, 5 S. W. 580, 9 Ky. L. Rep. 563; State *v.* Gloucester County, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

82. Allen *v.* State, 52 Ind. 486; Altenburg *v.* Com., 126 Pa. St. 602, 17 Atl. 799, 4 L. R. A. 543; Goldsticker *v.* Ford, 62 Tex. 385.

Indians.— A statute prohibiting the sale of intoxicating liquors to any Indian is a valid exercise of the police power. State *v.* Wise, 70 Minn. 99, 72 N. W. 843; U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182. And see Indians.

Students.— A statute prohibiting the sale of liquor to students of any institution of learning is valid and constitutional. Peacock *v.* Limburger, (Tex. Civ. App. 1902) 67 S. W. 518.

83. Crabb *v.* State, 47 Fla. 24, 36 So. 169; Thomasson *v.* State, 15 Ind. 449; Columbus *v.* Schaerr, 5 Ohio S. & C. Pl. Dec. 100; *Ex p.* Brown, (Tex. Cr. App. 1901) 61 S. W. 396. And see *supra*, III, D, 3, a.

84. Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768. And see State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

85. See State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313 (sustaining the validity of a law requiring liquor sellers to conduct their business in a room where no other kind of business is carried on, and prohibiting music or devices for amusement from being permitted therein); People *v.* City Prison, 6 N. Y. App. Div. 520, 39 N. Y. Suppl. 582 (holding that a law prohibiting the giving away of any food to be eaten on premises where liquor is sold is a valid exercise of the police power, and is not unconstitutional).

Restraining disorderly conduct.— A municipal ordinance providing that no gambling, profane swearing, blasphemous or grossly indecent language, or any indecency or disorderly conduct shall be permitted in any licensed tavern or saloon, is valid. *In re* Brodie, 38 U. C. Q. B. 580.

Prohibiting other business.— An ordinance providing that every person receiving a license to keep a dram-shop shall confine the business of his shop exclusively to the keeping and selling of liquor is within the power of the municipality and is not invalid as being in restraint of trade. *In re* Croome, 6 Ont. 188.

86. State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.

87. Com. *v.* Ducey, 126 Mass. 269.

88. Schwartz *v.* State, 32 Tex. Cr. 387, 24 S. W. 28; Bell *v.* State, 28 Tex. App. 96, 12

d. Screen Law. A law providing that on Sundays, and at other times when liquor saloons are required by law to be kept closed, no screen, curtain, or other obstruction shall be so placed as to prevent a clear view of the interior of the premises is a valid police regulation, and not open to objection on constitutional grounds.[89]

e. Employment of Women in Saloons. It is held to be a reasonable and proper exercise of the power of police regulation to forbid the employment of women in bar-rooms or drinking saloons, as waitresses, dancers, or otherwise.[90]

f. Excluding Women From Wine-Rooms, Etc. On similar principles it is held that a statute or ordinance prohibiting the presence of women, or the serving of liquor to them, in wine-rooms, bars, or saloons, especially if it applies only to the late hours of the evening or night, is a valid and constitutional police regulation.[91]

F. Taxation of Liquor Traffic — 1. In General. As a measure for the regulation or restriction of the traffic in intoxicating liquors, the legislature of a state has constitutional power to impose a tax upon the business of manufacturing or selling such liquors,[92] to enforce the collection of such taxes from the persons upon whom they are assessed, by distress, by the imposition of penalties for delinquency, or by the arrest of the delinquent,[93] and to make it a penal offense for any person to engage in the business without first paying the tax imposed.[94] Such a statute is primarily a regulation of a business deemed noxious or dangerous, and not a revenue law, and hence is to be considered, with reference to constitutional provisions, as a police regulation rather than as a tax law proper.[95]

S. W. 410; *Ex p.* Bell, 24 Tex. App. 428, 6 S. W. 197.

89. *Massachusetts.*— Com. *v.* Casey, 134 Mass. 194; Com. *v.* Costello, 133 Mass. 192.

Michigan.— Robison *v.* Haug, 71 Mich. 38, 38 N. W. 668.

Ohio.— Washington *v.* Gallagher, 5 Ohio S. & C. Pl. Dec. 562, 7 Ohio N. P. 511.

Rhode Island.— State *v.* Doyle, 15 R. I. 325, 4 Atl. 764.

Canada.— Reg. *v.* Martin, 21 Ont. App. 145.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 18. And see *supra*, III, D, 3, a.

90. Hoboken *v.* Goodman, 68 N. J. L. 217, 51 Atl. 1092; Bergman *v.* Cleveland, 39 Ohio St. 651.

In California a constitutional provision declares that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession," but a law forbidding the employment of women in saloons is not considered obnoxious to this clause. *Ex p.* Felchlin, 96 Cal. 360, 31 Pac. 224, 31 Am. St. Rep. 223. But *compare In re* Maguire, 57 Cal. 604, 40 Am. Rep. 125.

91. *Ex p.* Smith, 38 Cal. 702; Adams *v.* Cronin, 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61; Cronin *v.* Denver, 192 U. S. 115, 24 S. Ct. 220, 48 L. ed. 368; Cronin *v.* Adams, 192 U. S. 108, 24 S. Ct. 219, 48 L. ed. 365 [*citing* Crowley *v.* Christensen, 137 U. S. 86, 11 S. Ct. 13, 34 L. ed. 620]. And see Hoboken *v.* Greiner, 68 N. J. L. 592, 53 Atl. 693. *Compare In re* Maguire, 57 Cal. 604, 40 Am. Rep. 125.

92. *Alabama.*— *Ex p.* Marshall, 64 Ala. 266.

Georgia.— Brown *v.* State, 73 Ga. 38.

Louisiana.— State *v.* Volkman, 20 La. Ann. 585.

Michigan.— Westinghausen *v.* People, 44 Mich. 265, 6 N. W. 641.

Mississippi.— Portwood *v.* Baskett, 64 Miss. 213, 1 So. 105.

Ohio.— State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59; Senior *v.* Ratterman, 44 Ohio St. 661, 11 N. E. 321; Anderson *v.* Brewster, 44 Ohio St. 576, 9 N. E. 683; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672; State *v.* Frame, 39 Ohio St. 399. *Compare* State *v.* Hipp, 38 Ohio St. 199.

Pennsylvania.— Durach's Appeal, 62 Pa. St. 491.

Tennessee.— Kurth *v.* State, 86 Tenn. 134, 5 S. W. 593.

Texas.— Napier *v.* Hodges, 31 Tex. 287; State *v.* Bock, 9 Tex. 369; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737; Carr *v.* State, 5 Tex. App. 153; Harris *v.* State, 4 Tex. App. 131.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 19.

Fourteenth amendment.— A statute imposing an occupation tax on persons engaged in the business of selling liquor is not in conflict with the fourteenth amendment to the constitution of the United States. Giozza *v.* Tiernan, 148 U. S. 657, 13 S. Ct. 721, 37 L. ed. 599.

Privileges to dealers.— Neither is such a statute unconstitutional, although its effect may be to promote the interests of liquor dealers by deterring others from entering into the business. Haggart *v.* Stehlin, (Ind. 1892) 29 N. E. 1073.

93. Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Com. *v.* Byrne, 20 Gratt. (Va.) 165.

94. Tonella *v.* State, 4 Tex. App. 325; Languille *v.* State, 4 Tex. App. 312.

95. *Ex p.* Marshall, 64 Ala. 266; State *v.* Hudson, 78 Mo. 302; Senior *v.* Ratterman,

From the standpoint of constitutional restrictions or limitations such a law is to be regarded as imposing the tax on the business or occupation of liquor selling, and not on the individuals who may engage in it,[96] or upon their stock in trade or other property,[97] or upon the sales which they make.[98] Further, such a statute is to be distinguished from a licensing law. Although the constitution of the state may prohibit the grant of licenses to sell liquor, this will not prevent the legislature from laying a tax on the business, with the primary object of raising revenue and the secondary object of restricting or discouraging the business.[99]

2. Uniformity. The constitutional requirement of uniformity in taxation does not prevent the classification of occupations; and a statute imposing a tax on the business of liquor selling is not unconstitutional because the state permits other occupations to be pursued without taxation, nor because the liquor dealer is required to pay his tax in advance, while milder terms are imposed upon other vocations which also are taxed.[1] And while it is necessary that all persons pursuing the same occupation in the same way should be taxed alike, it is permissible for the legislature to divide liquor dealers into different classes, and discriminate between them in respect to the amount of taxation imposed, if the classification is based upon proper and reasonable grounds of distinction, such as the difference between manufacturing and retail selling,[2] or as to the character of the liquors dealt in,[3] or with reference to the locality where the business is carried on,[4] or to the relative volume of business done, the tax being graduated according to the amount of sales made by the particular dealer.[5] Similar distinctions may be made

44 Ohio St. 661, 11 N. E. 321. But *compare* Du Boistown *v.* Rochester Brewing Co., 9 Pa. Co. Ct. 442.

96. Hodgson *v.* New Orleans, 21 La. Ann. 301; Durach's Appeal, 62 Pa. St. 491.

97. Straub *v.* Gordon, 27 Ark. 625; Kenny *v.* Harwell, 42 Ga. 416; Kurth *v.* State, 86 Tenn. 134, 5 S. W. 593; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737.

98. Bohler *v.* Schneider, 49 Ga. 195.

99. Anderson *v.* Brewster, 44 Ohio St. 576, 9 N. E. 683; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672; State *v.* Frame, 39 Ohio St. 399. And see Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; Portwood *v.* Baskett, 64 Miss. 213, 1 So. 105.

As to Ohio statutes embracing other features which were held to bring them within the description of license laws rather than tax laws. *Compare* State *v.* Sinks, 42 Ohio St. 345; Butzman *v.* Whitbeck, 42 Ohio St. 223; King *v.* Cappellar, 42 Ohio St. 218; State *v.* Hipp, 38 Ohio St. 199.

Tax additional to license.— Unless restrained by constitutional provisions, it is competent for the state or a municipal corporation to impose an occupation tax upon liquor dealers in addition to the amount exacted from them for a license. But payment of the occupation tax cannot be made a condition precedent to the issuing of the license. State *v.* Bennett, 19 Nebr. 191, 26 N. W. 714.

1. Fahey *v.* State, 27 Tex. App. 146, 11 S. W. 108, 11 Am. St. Rep. 182. And see Thomasson *v.* State, 15 Ind. 449; Bolte *v.* New Orleans, 10 La. Ann. 321; Holberg *v.* Macon, 55 Miss. 112; Senior *v.* Ratterman, 44 Ohio St. 661, 11 N. E. 321.

Lien of tax.— The constitutional principle of uniformity is not violated by a law which creates a lien upon realty upon which a saloon is established, for the amount of the license imposed. Anderson *v.* Brewster, 44 Ohio St. 576, 9 N. E. 683.

2. Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672.

3. Timm *v.* Harrison, 109 Ill. 593; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672.

4. East St. Louis *v.* Wehrung, 46 Ill. 392; Helfrick *v.* Com., 29 Gratt. (Va.) 844.

Town and country.— A law imposing a higher tax upon liquor dealers in cities, villages, or towns than is levied upon those who pursue their business in country districts or at wayside inns or taverns, is not invalid for want of uniformity. Territory *v.* Connell, 2 Ariz. 339, 16 Pac. 209; Amador County *v.* Kennedy, 70 Cal. 458, 11 Pac. 757.

Bars on steamboats.— A law imposing a smaller license-tax on proprietors of bars or drinking saloons kept on steamboats owned and registered in the state than on owners of bars kept on land does not violate the clause of the constitution requiring equality and uniformity of taxation. State *v.* Rolle, 30 La. Ann. 991, 31 Am. Rep. 234; Kaliski *v.* Grady, 25 La. Ann. 576.

Different laws for different counties.— A statute imposing higher taxes or more onerous conditions on liquor dealers in one county of the state (by name) than are laid upon them by the general laws in force in the other counties is unconstitutional and void. Smith *v.* State, 90 Ga. 133, 15 S. E. 682.

5. Allentown *v.* Gross, 132 Pa. St. 319, 19 Atl. 269; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737. *Compare* East Feliciana Parish *v.* Gurth, 26 La. Ann. 140.

where the tax is imposed directly on the goods dealt in, but not so as to discriminate against the products of other states,[6] nor so as to grant a total exemption to some classes of liquors while others are taxed.[7]

G. Criminal and Penal Statutes — 1. Penalties For Illegal Traffic. It is constitutionally competent for the legislature of a state to provide for the enforcement of its prohibitive or restrictive liquor laws by declaring the punishment of persons illegally engaging in the traffic, or conducting it in an unlawful manner, by fine, imprisonment, or other penalties.[8]

2. Rules of Evidence. Statutes intended to facilitate prosecutions under the liquor laws, by admitting indirect proof, or making given facts presumptive evidence of the essential elements of the crime charged, are not invalid, if they do not infringe the constitutional rights of the accused by depriving him of his right of trial by jury, or of his exemption from being compelled to testify against himself, or of his right to be confronted with the witnesses against him, or otherwise.[9]

6. Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691; Tiernan *v.* Rinker, 102 U. S. 123, 26 L. ed. 103; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347.

7. State *v.* Bengsch, 170 Mo. 81, 70 S. W. 710. And see Davis *v.* Dashiel, 61 N. C. 114.

8. Com. *v.* Murphy, 10 Gray (Mass.) 1; Com. *v.* Clapp, 5 Gray (Mass.) 97; Luton *v.* Palmer, 69 Mich. 610, 37 N. W. 701. *Compare* Stephens *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1056.

Delegation to municipality.— The unlawful retailing of intoxicating liquors, or the keeping of tippling-houses, is an offense the punishment of which may constitutionally be delegated by the legislature to a municipality, as an offense cognizable by it under the police power. Howe *v.* Plainfield, 37 N. J. L. 145. And see Kehr *v.* Com., 83 S. W. 633, 26 Ky. L. Rep. 1234.

Keeping with intent to sell.— Although the mere possession of the instruments of crime is not an overt act punishable at common law, a statute is valid which makes it an offense to keep intoxicating liquors with intent to sell the same in violation of law. State *v.* Wheeler, 62 Vt. 439, 20 Atl. 601.

Heavier punishment of second offense.— A statute imposing a more severe penalty for a second offense of illegal liquor selling, or keeping liquor contrary to law, is not *ex post facto* as applied to a case where the second offense was committed after the passage of the law. State *v.* Woods, 68 Me. 409. But if both the first and second offense preceded the enactment of the law, then it would be unconstitutional, as applied to such a case, for it would aggravate the punishment of a crime already past. *In re* Ross, 2 Pick. (Mass.) 165.

Forfeiture of license.— The legislature may lawfully provide that conviction of a licensed liquor dealer, for any offense against the laws regulating his business, shall work a forfeiture of his license. La Croix *v.* Fairfield County Com'rs, 50 Conn. 321, 47 Am. Rep. 648; Martin *v.* State, 23 Nebr. 371, 36 N. W. 554. And where a druggist sells liquor in violation of his license, it is not unconstitutional to impose on him a penalty in addition to annulling his license. Com. *v.* Brothers, 158 Mass. 200, 33 N. E. 386.

Forfeiture of bond.— A provision in a liquor law that a conviction of the licensee for a violation of the law shall work a forfeiture of his bond is not unconstitutional as taking the property of the surety without due process of law, the bond being entered into in view of this provision of the law and therefore including it as a part of its obligation. Welch *v.* McKane, 55 Conn. 25, 10 Atl. 168.

Lien on property of third person.— A law providing that a judgment for a fine for a violation of the liquor law shall be a lien on the property of a third person used with his consent for the unlawful sale of liquor is not unconstitutional. Polk County *v.* Hierb, 37 Iowa 361; State *v.* Snyder, 34 Kan. 425, 8 Pac. 860; Hardten *v.* State, 32 Kan. 637, 5 Pac. 212.

9. **Delivery as evidence of sale.**— A statute that, in prosecutions for illegal sales of liquor, delivery in or from any place other than a dwelling-house shall be *prima facie* evidence of a sale, is not unconstitutional. Com. *v.* Rowe, 14 Gray (Mass.) 47; Com. *v.* Wallace, 7 Gray (Mass.) 222; Com. *v.* Williams, 6 Gray (Mass.) 1. And so of a statutory provision that, when a delivery is proved, it shall not be necessary to prove payment, but the delivery shall be sufficient evidence of a sale. State *v.* Hurley, 54 Me. 562; State *v.* Day, 37 Me. 244.

Notorious character or bad reputation of premises.— It is competent for the legislature to provide by law that it shall not be necessary to prove an actual sale of intoxicating liquors in any tenement, in order to establish the character of such premises as a common nuisance, but that the notorious character or reputation of the premises shall be evidence of that fact. State *v.* Thomas, 47 Conn. 546, 36 Am. Rep. 98; State *v.* Waldron, 16 R. I. 191, 14 Atl. 847; State *v.* Wilson, 15 R. I. 180, 1 Atl. 415.

Drinking on premises.— A statute is valid which enacts that, when a person is seen to drink liquor on the premises of one whose license only permits him to sell for consump-

3. Laws Relating to Pleading. The legislature has power to simplify the forms of indictment or complaint under the liquor laws, by authorizing the omission of such particulars or averments as are not necessary to inform the accused substantially of the nature and cause of the charge against him.[10] But this cannot be carried so far as to deprive him of his right to know of what he is alleged to be guilty and the exact nature of the charges against him.[11]

4. Rule as to Place of Sale. It has been held that a statute providing that the place where a delivery of liquor is made in the state shall be construed to be the place of sale thereof, and that any place to which any person shall ship any liquor for the purpose of delivering the same to a purchaser shall be construed and held to be the place of sale, is not unconstitutional as to shipments within the state.[12]

5. Right of Trial by Jury.[13] A trial by jury is not claimable as of right in prosecutions for petty offenses under the liquor laws, such as violations of municipal ordinances or police regulations restricting or limiting the traffic.[14] Nor is a jury constitutionally necessary in proceedings, as for contempt, for the punishment of a person who has violated an injunction restraining him from selling liquor.[15] And a statute is not unconstitutional which authorizes a magistrate or other inferior court to try offenses against the liquor laws, without a jury, in the first instance, provided it also gives the accused a free and unhampered right of appeal to a court which tries by jury.[16]

6. Measure of Punishment. In prescribing punishments for violations of the liquor laws, the legislature is limited by the constitutional provisions against excessive fines and cruel and unusual punishments.[17]

H. Search and Seizure Laws. Statutes authorizing the issuance of warrants to search for liquors alleged to be illegally kept for sale, and directing their seizure when found, and their forfeiture or destruction when the substance of the offense is established, after notice to and hearing of claimants, are not invalid

tion off the premises, it shall be *prima facie* evidence that the liquor was sold by the occupant with the intent that it should be drunk on the premises. Auburn *v.* Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705.

Illegal keeping open.— The legislature has power to enact that, on a trial for a violation of the liquor laws in keeping open a saloon on Sunday or other prohibited days, it shall be considered *prima facie* evidence of the guilt of the accused if it is shown that his place was lighted up on such day (Piqua *v.* Zimmerlin, 35 Ohio St. 507), or that persons were permitted to be and remain in the saloon or bar (State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313).

Possession of liquor as evidence of violation of law see State *v.* Cunningham, 25 Conn. 195; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487; State *v.* Higgins, 13 R. I. 330, 43 Am. Rep. 26 note.

Requiring druggists to produce prescriptions see State *v.* Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640.

10. State *v.* Schweiter, 27 Kan. 499 (not necessary to name vendee); Kiefer *v.* State, 87 Md. 562, 40 Atl. 377 (not necessary to specify kind of liquor); State *v.* McKenna, 16 R. I. 398, 17 Atl. 51; State *v.* Murphy, 15 R. I. 543, 10 Atl. 585; State *v.* Kane, 15 R. I. 395, 6 Atl. 783; State *v.* Beswick, 13 R. I. 211, 43 Am. Rep. 26 (omitting negative averments).

11. State *v.* Learned, 47 Me. 426; Hewitt *v.* State, 25 Tex. 722.

12. See State *v.* Patterson, 134 N. C. 612, 47 S. E. 808.

13. See, generally, Juries.

14. Hill *v.* Dalton, 72 Ga. 314; Floyd *v.* Eatonton, 14 Ga. 354, 58 Am. Dec. 559; State *v.* Conlin, 27 Vt. 318. And see People *v.* Baird, 11 Hun (N. Y.) 289; Pursifull *v.* Com., 47 S. W. 772, 20 Ky. L. Rep. 863; State *v.* Peterson, 41 Vt. 504. But *compare* Com. *v.* Saal, 10 Phila. (Pa.) 496.

15. Eilenbecker *v.* Plymouth County Dist. Ct., 134 U. S. 31, 10 S. Ct. 424, 33 L. ed. 801.

16. *Connecticut.*— State *v.* Brennan, 25 Conn. 278; Beers *v.* Beers, 4 Conn. 535, 10 Am. Dec. 186.

Kansas.— Emporia *v.* Volmer, 12 Kan. 622.

Maine.— Saco *v.* Woodsum, 39 Me. 258; Saco *v.* Wentworth, 37 Me. 165, 58 Am. Dec. 786.

Massachusetts.— Jones *v.* Robbins, 8 Gray 329.

Rhode Island.— State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767; *In re* McSoley, 15 R. I. 608, 10 Atl. 659; Littlefield *v.* Peckham, 1 R. I. 500.

17. People *v.* Haug, 68 Mich. 549, 37 N. W. 21.

Forfeiture of liquor.— A statute regulating the transportation of intoxicating liquors,

when framed with a due regard to the constitutional protection of persons and property against arbitrary and unreasonable proceedings.[18] And a statute which, without giving the right of search, authorizes the summary seizure of intoxicating liquors, without a warrant, when unlawfully kept or in process of illicit sale or transportation, is valid and constitutional.[19] Further, the provision commonly found in such statutes that if it shall be established, upon hearing, that the liquors seized were illegally kept for sale, or illegally transported, or otherwise as the case may be, the same shall be adjudged forfeited to the use of the state or municipality, or shall be destroyed, is not objectionable on constitutional grounds.[20]

I. Laws For Abatement of Liquor Nuisances. Statutes declaring that all buildings, tenements, or other places used for the illegal sale or keeping of intoxicating liquors shall be deemed common nuisances and treated as such, or abated by due proceedings, are valid and constitutional.[21] And if the corporate powers conferred upon a municipality are broad enough to authorize an ordinance declaring the selling of spirituous liquors a nuisance, and imposing a fine for the offense, such ordinance is valid.[22]

J. Civil Damage Laws. The so-called "civil damage" laws, which provide that certain classes of persons, relatives or personal representatives, upon sustaining injuries from the acts of an intoxicated person, or in consequence of his intoxication, habitual or occasional, shall have a right of action in damages against

and providing that a violation of its provisions shall cause a forfeiture of the liquor concerned, does not impose an excessive or unusual punishment. Com. *v.* Intoxicating Liquors, 172 Mass. 311, 52 N. E. 389.

18. *Connecticut.*— State *v.* Brennan, 25 Conn. 278.

Iowa.— Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Maine.— State *v.* Le Clair, 86 Me. 522, 30 Atl. 7; State *v.* Miller, 48 Me. 576; Gray *v.* Kimball, 42 Me. 299.

Massachusetts.— Allen *v.* Staples, 6 Gray 491.

Rhode Island.—*In re* Horgan, 16 R. I. 542, 18 Atl. 279; State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767; State *v.* Snow, 3 R. I. 64.

Vermont.— Gill *v.* Parker, 31 Vt. 610; Lincoln *v.* Smith, 27 Vt. 328.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 26.

Invalidating provisions.— A law of this kind which gives no opportunity to the party accused to defend his property requires no notice to him of the seizure, or provides no means by which he is to be informed when, where, or before whom the search warrant is returned, is held repugnant to the constitutional guaranties and void. Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am Dec. 381; Hibbard *v.* People, 4 Mich. 125.

19. Mason *v.* Lothrop, 7 Gray (Mass.) 354; Jones *v.* Root, 6 Gray (Mass.) 435; State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557. And see State *v.* McManus, 65 Kan. 720, 70 Pac. 700. But *compare* Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301; People *v.* Haug, 68 Mich. 549, 37 N. W. 21.

20. *Connecticut.*— Oviatt *v.* Pond, 29 Conn. 479; State *v.* Wheeler, 25 Conn. 290; State *v.* Brennan, 25 Conn. 278.

Kansas.— State *v.* McManus, 65 Kan. 720, 70 Pac. 700.

Massachusetts.— Com. *v.* Intoxicating Liquors, 172 Mass. 311, 52 N. E. 389; Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381.

Rhode Island.— State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767; *In re* McSoley, 15 R. I. 608, 10 Atl. 659. *Compare* State *v.* Snow, 3 R. I. 64.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 26.

21. *Illinois.*— Streeter *v.* People, 69 Ill. 595.

Indiana.— McLaughlin *v.* State, 45 Ind. 338.

Iowa.— McLane *v.* Granger, 74 Iowa 152, 37 N. W. 123; State *v.* Jordan, 72 Iowa 377, 34 N. W. 285; McLane *v.* Leicht, 69 Iowa 401, 29 N. W. 327; Martin *v.* Blattner, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244; Pontius *v.* Bowman, 66 Iowa 88, 23 N. W. 277; Pontius *v.* Winebrenner, 65 Iowa 591, 22 N. W. 646; Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19; Zumhoff *v.* State, 4 Greene 526; Our House No. 2 *v.* State, 4 Greene 172. And see Craig *v.* Werthmueller, 78 Iowa 598, 43 N. W. 606, removal and sale of fixtures, furniture, etc.

Kansas.— Topeka *v.* Raynor, 60 Kan. 860, 58 Pac. 557; State *v.* Crawford, 28 Kan. 726, 42 Am. Rep. 182.

Massachusetts.— Carleton *v.* Rugg, 149 Mass. 550, 22 N. E. 55, 14 Am. St. Rep. 446, 5 L. R. A. 193; Com. *v.* Howe, 13 Gray 26.

Rhode Island.— State *v.* Mellor, 13 R. I. 666; State *v.* Paul, 5 R. I. 185.

United States.— Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205; Schmidt *v.* Cobb, 119 U. S. 286, 7 S. Ct. 1373, 30 L. ed. 321.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 27.

22. Goddard *v.* Jacksonville, 15 Ill. 588, 60 Am. Dec. 773.

the person or persons who, by selling or giving him liquor, produced such intoxication, or contributed thereto, have always been sustained by the courts as constitutional enactments.[23]

K. Laws Affecting Property and Contracts. A law restricting or entirely prohibiting the sale of intoxicating liquor cannot be said to take away or destroy any vested right of property, in the constitutional sense; for the right to sell an article is not an essential element in the ownership of it.[24] And although the enactment of such a law may depreciate or destroy the value of property already devoted to the traffic in liquors, such as the plant of a brewery or the fixtures of a saloon, such incidental damage to individuals is not regarded as a valid objection to the constitutionality of the law.[25] It is within the power of the legislature to provide by law that no action of any kind shall be maintained for the recovery of the price of liquors illegally sold, or for the recovery of possession or for the value of liquors kept for sale in violation of law.[26] But it is doubtful whether a statute should be held valid which closes the courts of the state to all actions for the price of liquors sold in another state or country, particularly in its application to cases where the vendor was ignorant of the buyer's intention to make an illegal use of the goods sold, or, if he knew of it, did nothing to further or facilitate its execution.[27]

V. LOCAL OPTION.

A. In General — 1. NATURE AND EXTENT OF OPTION. The enactment of a local option statute does not give the people of any section or division of the state an unrestricted right to determine what kind of liquor law they will have or the limits of its operation; both in respect to the terms of the law and the boundaries of the election districts, the legislative permission must be strictly followed.[28]

23. *Indiana.*— Horning *v.* Wendell, 57 Ind. 171.

Kansas.— Werner *v.* Edmiston, 24 Kan. 147.

Massachusetts.— Howes *v.* Maxwell, 157 Mass. 333, 32 N. E. 152; Moran *v.* Goodwin, 130 Mass. 158, 39 Am. Rep. 443.

Michigan.— Cramer *v.* Danielson, 99 Mich. 531, 58 N. W. 476; Kreiter *v.* Nichols, 28 Mich. 496.

New Hampshire.— Bedore *v.* Newton, 54 N. H. 117.

New York.— Bertholf *v.* O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; Franklin *v.* Schermerhorn, 8 Hun 112; Baker *v.* Pope, 2 Hun 556.

Ohio.— Sibila *v.* Bahney, 34 Ohio St. 399.

Pennsylvania.— Mardorf *v.* Hemp, 4 Pa. Cas. 280, 6 Atl. 754.

Vermont.—Stanton *v.* Simpson, 48 Vt. 628.

Wisconsin.—State *v.* Ludington, 33 Wis. 107.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 28.

Joint liability of sellers.— The act is not unconstitutional in imposing upon a liquor seller liability in damages to the full extent of the results of an intoxication to which his own sales contributed in part only, for he is regarded as a joint tort-feasor. Sibila *v.* Bahney, 34 Ohio St. 399.

Liability of owner of premises.— A provision of a civil damage law, authorizing a recovery against the owner of the premises on which the liquor dealer conducts his business as a lessee, with the knowledge and consent of the lessor, is valid; the owner cannot complain that such a provision amounts to taking his property without compensation or without due process of law. Bertholf *v.* O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

24. *Connecticut.*—Oviatt *v.* Pond, 29 Conn. 479; State *v.* Wheeler, 25 Conn. 290.

Delaware.— State *v.* Allmond, 2 Houst. 612.

Maine.— Preston *v.* Drew, 33 Me. 558, 54 Am. Dec. 639.

Michigan.— Whitney *v.* Grand Rapids, 71 Mich. 234, 39 N. W. 40.

Rhode Island.— State *v.* Paul, 5 R. I. 185.

South Carolina.— State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345.

Texas.—*Ex p.* Kennedy, 23 Tex. App. 77, 3 S. W. 114.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 29.

25. Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205. And see *supra*, IV, B, 2.

26. Barrett *v.* Delano, (Me. 1888) 14 Atl. 288; Meservey *v.* Gray, 55 Me. 540; Thurston *v.* Adams, 41 Me. 419.

27. Opinion of Justices, 25 N. H. 537. *Compare* Reynolds *v.* Geary, 26 Conn. 179; Frank *v.* O'Neil, 125 Mass. 473; Knowlton *v.* Doherty, 87 Me. 518, 33 Atl. 18, 47 Am. St. Rep. 349; Meservey *v.* Gray, 55 Me. 540.

28. Com. *v.* King, 86 Ky. 436, 6 S. W. 124, 9 Ky. L. Rep. 653; Oxford *v.* Frank, 30

2. STATUTORY PROVISIONS. A local option statute is generally framed as a law for the prohibition or severe restriction of the sale of liquor, under penalties, with a provision that the various counties, towns, or other divisions of the state may severally hold elections to determine by popular vote whether they desire the law to be in force in their limits. Such a statute prescribes the precise form of the question or questions to be submitted to the voters,[29] and directs the manner of conducting the election and the proceedings preliminary thereto,[30] and provides that such elections shall not be held oftener than at certain intervals.[31] It is commonly made applicable to the entire state, although particular municipal divisions may be excepted from its operation, in order to save local laws already in force.[32] A constitutional provision requiring the legislature to frame and submit such a statute is not self-executing, and does not repeal existing laws, although it may leave the form of the statute to be enacted to the discretion of the legislature.[33] The right to hold an election on the question of permitting the sale of liquor may also be granted to a municipality by its charter or by a special law, where that is not forbidden by the constitution.[34]

3. LAWS SUBJECT TO ADOPTION. A local option election is not valid, nor its result effective, unless the question to be voted on was submitted to the people in the same form in which it was enacted by the legislature, any material variation being fatal to the proceedings.[35] Thus if the limitation of the prohibition

Tex. Civ. App. 343, 70 S. W. 426; Smith *v.* State, 42 Tex. Cr. 414, 57 S. W. 815; *Ex p.* Tummins, 32 Tex. Cr. 117, 22 S. W. 409.

As to constitutionality of local option laws see *supra*, IV, C.

29. See the statutes of the different states. And see Matter of Munson, 95 N. Y. App. Div. 23, 88 N. Y. Suppl. 509; Matter of Getman, 28 Misc. (N. Y.) 451, 59 N. Y. Suppl. 1013; Carey *v.* State, 70 Ohio St. 121, 70 N. E. 925.

Territory for which election may be ordered under Texas statutes see Nolan County Com'rs' Ct. *v.* Beall, 98 Tex. 104, 81 S. W. 526; Board *v.* Buchanan, 36 Tex. Civ. App. 411, 82 S. W. 194; Cantwell *v.* State, (Tex. Cr. App. 1905) 85 S. W. 19; Efird *v.* State, 46 Tex. Cr. 582, 80 S. W. 529; *Ex p.* Mitchell, (Tex. Cr. App. 1904) 79 S. W. 558; *Ex p.* Mills, 46 Tex. Cr. 224, 79 S. W. 555.

Consent of or petition by voters.— The laws in force in Iowa embody a modified form of the principle of local option, it being provided that privileges for the sale of liquor may be granted in cities and towns upon the filing of a statement of general consent, signed by a certain proportion of the resident voters, which statement shall be canvassed by the county board of supervisors and its sufficiency determined, and that their finding in the premises shall be effectual for the purposes contemplated, until revoked, and shall be entered of record. Iowa Code, §§ 2448–2452. And see *In re* Intoxicating Liquors, 120 Iowa 680, 95 N. W. 194; Schuneman *v.* Sherman, 118 Iowa 230, 91 N. W. 1064; McConkey *v.* Cedar County Dist. Ct., 117 Iowa 334, 90 N. W. 716; Meyer *v.* Hobson, 116 Iowa 349, 90 N. W. 85; Hill *v.* Gleisner, 112 Iowa 397, 84 N. W. 511; Green *v.* Smith, 111 Iowa 183, 82 N. W. 448; West *v.* Bishop, 110 Iowa 410, 81 N. W. 696; Cameron *v.* Fellows, 109 Iowa 534, 80 N. W. 567; Bartel *v.* Hobson, 107 Iowa 644, 78 N. W. 689; State *v.* Pressman, 103 Iowa 449, 72 N. W. 660; Clark *v.* Riddle, 101 Iowa 270, 70 N. W. 207. In Arkansas, on the other hand, a statute provides for the prohibition of the sale of liquor on the petition of a majority of the adult inhabitants of the district to be affected. See Bridewell *v.* Ward, 72 Ark. 187, 79 S. W. 762; Wilson *v.* Lawrence, 70 Ark. 545, 69 S. W. 570.

30. *Ex p.* Kennedy, 23 Tex. App. 77, 3 S. W. 114.

31. Wynne *v.* Williamson, 94 Ga. 603, 20 S. E. 436; State *v.* Barber, (S. D. 1904) 101 N. W. 1078.

32. Grantham *v.* State, 89 Ga. 121, 14 S. E. 892. And see Kirkpatrick *v.* Com., 95 Ky. 326, 25 S. W. 113, 15 Ky. L. Rep. 671.

Amendment.— The legislature, in amending the provisions of the local option law, cannot affect territory in which the law is already in force. *Ex p.* Elliott, 44 Tex. Cr. 575, 72 S. W. 837.

33. Stamper *v.* Com., 102 Ky. 33, 42 S. W. 915, 19 Ky. L. Rep. 1014; Mullins *v.* Lancaster, 63 S. W. 475, 23 Ky. L. Rep. 436; Com. *v.* Hurst, 62 S. W. 1024, 23 Ky. L. Rep. 365; Com. *v.* Bottoms, 57 S. W. 493, 22 Ky. L. Rep. 410.

34. Lafferty *v.* Huffman, 99 Ky. 80, 35 S. W. 123, 18 Ky. L. Rep. 17, 32 L. R. A. 203.

35. Com. *v.* Hardin County Ct., 99 Ky. 188, 35 S. W. 275, 18 Ky. L. Rep. 113; People *v.* Henwood, 123 Mich. 317, 82 N. W. 70; Grubbs *v.* Griffin, (Miss. 1899) 25 So. 663; Matter of Arnold, 32 Misc. (N. Y.) 439, 66 N. Y. Suppl. 557; Matter of Getman, 28 Misc. (N. Y.) 451, 59 N. Y. Suppl. 1013.

under the election is fixed by the law, it cannot be changed by the submission of a different proposition to the vote of the electors.[36]

4. EVIDENCE OF ADOPTION. In some jurisdictions it is held that the courts may take judicial notice of the fact that the local option law has become operative by popular vote in a particular district.[37] Generally, however, the statutes prescribe what shall be competent or sufficient evidence of that fact.[38] It is a general rule that in proceedings under a local option law, such as a prosecution for a violation of it, the fact of the law being in force being duly proved, it is not necessary for the state to present evidence that each of the necessary preliminary steps was taken, or of their regularity, this being presumed from the proof of the general result,[39] although it is open to defendant, in such a case, to impeach the validity

36. Lipari *v.* State, 19 Tex. App. 431. And see People *v.* Mosso, 30 Misc. (N. Y.) 164, 63 N. Y. Suppl. 588.

Illustrations.— Where the statute authorizes an election to determine whether or not the "sale" of intoxicating liquors shall be prohibited in the county, an election cannot be held to decide for or against the "gift or exchange" or the "sale, exchange, or barter" of such liquors. *Ex p.* Beaty, 21 Tex. App. 426, 1 S. W. 451; Steele *v.* State, 19 Tex. App. 425. Under a statute authorizing a popular vote upon the question whether or not liquor shall be sold within the district, a vote upon the question whether or not liquor shall be sold by the manufacturer thereof "in quantities not less than a quart" is nugatory, not being authorized by the statute, and the limitation as to the quantity being so intimately connected with the remainder of the proposition that it cannot be stricken out and the vote upheld. Reynolds *v.* Com., 106 Ky. 37, 49 S. W. 969, 20 Ky. L. Rep. 1681.

37. Combs *v.* State, 81 Ga. 780, 8 S. E. 318; Rauch *v.* Com., 78 Pa. St. 490.

38. Lloyd *v.* Dollisin, 23 Ohio Cir. Ct. 571, where such a statute was held to be constitutional.

How adoption proved.— In some states it is to be proved by certified copies of the result of the election as spread upon the records of a court. People *v.* Whitney, 105 Mich. 622, 63 N. W. 765; People *v.* Adams, 95 Mich. 541, 55 N. W. 461; People *v.* Murphy, 93 Mich. 41, 52 N. W. 1042; State *v.* Searcy, 111 Mo. 236, 20 S. W. 186; State *v.* Mackin, 51 Mo. App. 299; State *v.* Searcy, 46 Mo. App. 421; *In re* Rothwell, 44 Mo. App. 215; State *v.* Hutton, 39 Mo. App. 410; State *v.* Searcy, 39 Mo. App. 393. In others it is provided that an order of a court prohibiting the sale of liquor, as the result of an election, shall be *prima facie* evidence that all the requirements of the law have been complied with, and this, in connection with evidence of the publication of the order, shows the law to be in force in the district. Cantwell *v.* State, (Tex. Cr. App. 1905) 85 S. W. 18. The original minutes of the commissioners' court containing the orders going to make a valid local option law are admissible to prove the existence of the law. Holley *v.* State, 46 Tex. Cr. 324, 81 S. W. 957; Sebastian *v.* State, 44 Tex. Cr. 508, 72 S. W. 849; Morton *v.* State, 37 Tex. Cr. 131, 38 S. W. 1019; Wright *v.* State, 37 Tex. Cr. 3, 35 S. W. 150, 38 S. W. 811. Elsewhere the fact may be shown by an official certificate or record of the officers charged with the duty of determining the result of the election (Barton *v.* State, 43 Fla. 477, 31 So. 361; Combs *v.* State, 81 Ga. 780, 8 S. E. 318; Neighbors *v.* Com., 9 S. W. 718, 10 Ky. L. Rep. 594; Conrad *v.* State, 70 Miss. 733, 12 So. 85), and if proof of the publication or promulgation of the result is needed, this may be furnished by copies of the newspapers containing the notices, supported by the testimony of the publisher (Crouse *v.* State, 57 Md. 327; Armstrong *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1006. *Compare* Aston *v.* State, (Tex. Cr. App. 1899) 49 S. W. 393).

39. Blackwell *v.* Com., 54 S. W. 843, 21 Ky. L. Rep. 1240; Neighbors *v.* Com., 9 S. W. 718, 10 Ky. L. Rep. 594; People *v.* Whitney, 105 Mich. 622, 63 N. W. 765; People *v.* Adams, 95 Mich. 541, 55 N. W. 461; State *v.* Searcy, 39 Mo. App. 393.

In Texas the order for holding the election is *prima facie* evidence that all the steps necessary to give validity to such order have been taken. Morton *v.* State, 37 Tex. Cr. 131, 38 S. W. 1019. But this is not so where the order is invalid on its face, as when it shows that the election was ordered to be held more than thirty days from the date of the order, contrary to law. Curry *v.* State, 28 Tex. App. 475, 13 S. W. 752. It was formerly held that a person could not be convicted of violating the local option law unless the state proved that the required petition was first filed, and also that the result of the election was promulgated, the order of court for holding the election and that announcing the result being insufficient to show the adoption of the law. Henry *v.* State, (Tex. App. 1891) 16 S. W. 342; Carnes *v.* State, 23 Tex. App. 449, 5 S. W. 133; McMillan *v.* State, 18 Tex. App. 375. But it is now provided by statute that an order of court prohibiting the sale of liquor as the result of an election shall be *prima facie* evidence that all provisions of the law have been complied with. So that, at least in regard to the giving of the required notice, and the due conduct and holding of the election, a pre-

of the law by a successful attack upon any of the proceedings which were essential prerequisites to the due putting of the law in force.[40]

5. Operation and Effect of Adoption — a. In General. Where an election on the question of local option results in favor of its adoption, the effect is to put the prohibitive or restrictive liquor law into active operation in the district or territory affected,[41] so that thereafter any sale of liquor made within the district, save in accordance with such exceptions as may be set forth in the act, becomes a punishable offense.[42]

b. Effect on Existing Licenses or Privileges. The adoption of prohibition in any district or municipality, under the local option law, will revoke and annul any existing and unexpired licenses or privileges for the sale of liquor, so that a license or permission granted before the adoption of the law will be no protection to one who makes a sale after it.[43] If the law contains an express saving of vested rights, this will embrace previously acquired rights to sell by virtue of licenses already taken out and paid for, but will give no right either to obtain a new license or to sell without a license.[44]

c. Effect on Prior Liquor Laws. A local option law, when duly adopted and put in force in any given district, constitutes the exclusive system for the regula-

sumptive case is made out by showing the order of its court and its promulgation. Tex. Rev. Civ. St. (1895) art. 3390. And see Nelson *v.* State, (Tex. Cr. App. 1902) 75 S. W. 502; Davidson *v.* State, 44 Tex. Cr. 586, 73 S. W. 808; Sebastian *v.* State, 44 Tex. Cr. 508, 72 S. W. 849; *Ex p.* Schilling, 38 Tex. Cr. 287, 42 S. W. 553; Shields *v.* State, 38 Tex. Cr. 252, 42 S. W. 398; Wright *v.* State, 36 Tex. Cr. 35, 35 S. W. 287. The fact of publication of the order, as required by the statute, must be proved, either by an entry made by the county judge on the minutes of the commissioners' court, or a certified copy thereof, or by competent extraneous evidence, in which latter case the fact of publication is for the jury. Jones *v.* State, 38 Tex. Cr. 533, 43 S. W. 981.

40. Young *v.* Com., 14 Bush (Ky.) 161; Curry *v.* State, 28 Tex. App. 475, 13 S. W. 752. And see *infra*, V, B, 5, c, d.

41. Tatum *v.* State, 79 Ga. 176, 3 S. E. 907; Com. *v.* Lillard, 9 S. W. 710, 10 Ky. L. Rep. 561.

Effect of invalid election.— Where a precinct has voted in favor of prohibition, and thus adopted the law and put it into operation, and subsequently holds another election on the same question, which results in the same way, prohibition remains in force in the precinct, although the second election may be void because ordered prematurely. *Ex p.* Cox, 28 Tex. App. 537, 13 S. W. 862.

42. Garner *v.* State, 8 Blackf. (Ind.) 568; State *v.* Emery, 98 N. C. 768, 3 S. E. 810.

43. State *v.* Cooke, 24 Minn. 247, 31 Am. Rep. 344; *Ex p.* Lynn, 19 Tex. App. 293; Robertson *v.* State, 12 Tex. App. 541. *Compare* Watts *v.* Com., 78 Ky. 329.

Druggists' licenses.— In Missouri the adoption by a city or county of the local option law does not affect the right of a druggist therein to sell liquor on the prescription of a registered and practising physician, under the "druggist and pharmacist law" (Acts (1883), § 2). *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10; State *v.* Bevans, 52 Mo. App. 130; State *v.* Kaufman, 45 Mo. App. 656; State *v.* Williams, 38 Mo. App. 37. In Kentucky the result of an election under the local option law will be binding on druggists, if it was so written in the petition, notice, and order for the election, but not otherwise. Storms *v.* Com., 105 Ky. 619, 49 S. W. 451, 20 Ky. L. Rep. 1434; Smith *v.* Patton, 103 Ky. 444, 45 S. W. 459, 20 Ky. L. Rep. 165.

Distillers' privilege.— A special privilege given to distillers of spirits by a previous statute, allowing them to sell their own products in quantities of not less than a quart, is revoked and annulled by the adoption of the local option law, which, when put in force in any district, exclusively governs the sale of liquors therein. Com. *v.* Jarrell, 5 S. W. 763, 9 Ky. L. Rep. 572.

Home-made wines.— The adoption of the local option law revokes and repeals a special privilege previously given to persons making wines from grapes or berries of their own cultivation. Boldt *v.* State, 60 Ark. 600, 31 S. W. 460.

License suspended.— In New York it is held that a privilege to traffic in intoxicating liquors, where the business was lawfully being carried on at the time of an election under the local option law, is suspended, but not destroyed, by a vote cast in favor of prohibition, and that the privilege will be revived when the vote is reversed at another election, unless the owner thereof has by some act shown his intention to abandon the liquor traffic at that place. People *v.* Brush, 41 Misc. (N. Y.) 56, 83 N. Y. Suppl. 607 [*affirmed* in 92 N. Y. App. Div. 611, 86 N. Y. Suppl. 1144].

44. Griffin *v.* Atlanta, 78 Ga. 679, 4 S. E. 154; Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559.

tion of liquor selling in that locality, and has the effect to repeal, or at least to suspend during its continuance, all previous laws and provisions of laws which are inconsistent with its terms.[45] Thus if the licensing system was in force at the time of the adoption of local option no person thereafter has a right to obtain a license, and all authority previously existing in corporate bodies or boards of officers to grant licenses is taken away.[46] The penal clauses of prior laws are also suspended or abrogated; and hence no act in relation to intoxicating liquors, done after the adoption of the local option law, can be held a violation of any prior statute; if punishable at all, it must be punished as an offense against the local option law.[47] But if the law provides that it shall not affect localities in which the sale of liquor is already prohibited by law, it saves from repeal or suspension any prohibitory statutes in force in those places.[48] Where the law

45. *Dakota.*— Minnehaha County *v.* Champion, 5 Dak. 433, 41 N. W. 754.

Florida.— Mernaugh *v.* Orlando, 41 Fla. 433, 27 So. 34; Cason *v.* State, 37 Fla. 331, 20 So. 547; Butler *v.* State, 25 Fla. 347, 6 So. 67.

Georgia.— Tatum *v.* State, 79 Ga. 176, 3 S. E. 907; Turner *v.* Forsyth, 78 Ga. 683, 3 S. E. 649. *Compare* Smith *v.* State, 112 Ga. 291, 37 S. E. 441.

Kentucky.— Young *v.* Com., 14 Bush 161; Com. *v.* Jarrell, 5 S. W. 763, 9 Ky. L. Rep. 572. *Compare* Locke *v.* Com., 74 S. W. 654, 25 Ky. L. Rep. 76.

Maryland.— State *v.* Yewell, 63 Md. 120.

Minnesota.— State *v.* Hanley, 25 Minn. 429.

Mississippi.—State *v.* Vandenburg, (1900) 28 So. 835; Norton *v.* State, 65 Miss. 297, 3 So. 665; Wheeler *v.* State, 64 Miss. 462, 1 So. 632.

Missouri.— *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10; State *v.* Beam, 51 Mo. App. 368; State *v.* Hutton, 39 Mo. App. 410; State *v.* Weeks, 38 Mo. App. 566.

Pennsylvania.— Com. *v.* Mueller, 81* Pa. St. 127; Rauch *v.* Com., 78 Pa. St. 490.

Texas.— Rathburn *v.* State, 88 Tex. 281, 31 S. W. 189; Snearley *v.* State, 40 Tex. Cr. 507, 52 S. W. 547, 53 S. W. 696; Gibson *v.* State, 34 Tex. Cr. 218, 29 S. W. 1085; *Ex p.* Lynn, 19 Tex. App. 293; Robertson *v.* State, 5 Tex. App. 155.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 34.

Compare State *v.* Van Vliet, 92 Iowa 476, 61 N. W. 241; Vallance *v.* King, 3 Barb. (N. Y.) 548.

Suspension or repeal.— Where the local option law does not expressly repeal former liquor laws, and where it permits the holding of another election, after an interval of time, which may result in reversing the former vote, the doctrine is that its adoption does not annul or abrogate former laws, but merely suspends their operation, so that if thereafter local option ceases to be operative in the given locality, the former statutes will resume their vitality and force, without being reënacted. Mernaugh *v.* Orlando, 41 Fla. 433, 27 So. 34; Butler *v.* State, 25 Fla. 347, 6 So. 67; People *v.* Wade, 101 Mich. 89, 59 N. W. 438.

46. *Florida.*— Bonacker *v.* State, 42 Fla. 348, 29 So. 321; Butler *v.* State, 25 Fla. 347, 6 So. 67.

Georgia.— Tatum *v.* State, 79 Ga. 176, 3 S. E. 907. *Compare* Redding *v.* State, 91 Ga. 231, 18 S. E. 289; Bell *v.* State, 91 Ga. 227, 18 S. E. 288.

Kentucky.— Dearen *v.* Taylor County Ct., 98 Ky. 135, 32 S. W. 402, 17 Ky. L. Rep. 699; Cooper *v.* Shelton, 97 Ky. 282, 30 S. W. 623, 17 Ky. L. Rep. 157; Young *v.* Com., 14 Bush 161.

Louisiana.— Tangipahoa Parish *v.* Campbell, 106 La. 464, 31 So. 49.

Pennsylvania.— Com. *v.* Mueller, 81* Pa. St. 127; Rauch *v.* Com., 78 Pa. St. 490.

Texas.— Rathburn *v.* State, (Civ. App. 1895) 32 S. W. 45.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 34.

47. Cason *v.* State, 37 Fla. 331, 20 So. 547; Stringer *v.* State, 32 Fla. 238, 13 So. 450; State *v.* Beam, 51 Mo. App. 368. And see Book *v.* Com., 107 Ky. 605, 55 S. W. 7, 21 Ky. L. Rep. 1342. *Compare* State *v.* Smiley, 101 N. C. 709, 7 S. E. 904.

Offenses committed before local option.— Where persons, before the adoption of the local option law, had committed acts which would be punishable as offenses under the previously existing statutes, it is held that the coming into force of the local option law will exempt them from prosecution and punishment. Boone *v.* State, 12 Tex. App. 184. But the contrary has been held under the theory that the local option law only suspends, and does not repeal, the former statutes. People *v.* Wade, 101 Mich. 89, 59 N. W. 438. And see Aaron *v.* State, 34 Tex. Cr. 103, 29 S. W. 267.

No penalties prescribed.— If the local option law does not prescribe any penalties for illegal acts, such acts are punishable under the provisions of the former statutes. Winterton *v.* State, 65 Miss. 238, 3 So. 735.

Additional penalties.— Where the local option law provides that, "in addition to the penalties now prescribed by law," unlawful sales may be enjoined, this has the effect, by implication, to continue in force and incorporate the penaltics referred to. Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355.

48. McGruder *v.* State, 83 Ga. 616, 10 S. E. 281; Com. *v.* Weller, 14 Bush (Ky.)

contains exceptions in favor of certain classes of persons, such as druggists, their rights and responsibilities remain as under the existing statutes, unaffected by the adoption of the local option law.[49] If the election results in favor of licensing, it has no effect on any prior law; the general liquor law of the state is not abrogated by the mere holding of such election.[50]

d. Time of Taking Effect. The statute may provide that the local option law shall go into effect immediately upon an election being held and resulting in a majority in its favor,[51] or, as is more commonly the case, after due promulgation or publication of the result of the election, in which event a due and sufficient publication is a condition precedent to the taking effect of the law.[52] It is also competent for the local authorities to decide that the law shall take effect, as to their district, at some future time, if authority for such a course can be found in the statute.[53]

e. Territory Affected. Where a local option election is held in one of the larger divisions of the state, such as a county or a parish in Louisiana, the result is binding in all the smaller divisions included within its limits, such as cities or towns. Hence if the vote in the county as a whole results in favor of adopting the law, prohibition must be enforced in the cities and towns, although their votes, if separately considered, would show a majority against it.[54] But the converse of this rule is not everywhere accepted, and it has been held that where local option is in force in the lesser division, by virtue of an election held there, a subsequent election, held for the entire county, resulting against prohibition, will not repeal the law in effect in the smaller district.[55] Where the boundaries of an election district are unsettled or so uncertain that the limits of the territory

218, 29 Am. Rep. 407; Farris *v.* Com., 63 S. W. 615, 23 Ky. L. Rep. 580; Eastham *v.* Com., 49 S. W. 795, 20 Ky. L. Rep. 1639. And see State *v.* Hollingsworth, 100 N. C. 535, 6 S. E. 417.

49. Com. *v.* Powell, 62 S. W. 19, 22 Ky. L. Rep. 1932; Eastham *v.* Com., 49 S. W. 795, 20 Ky. L. Rep. 1639; Fitzgerald *v.* Hurley, 180 Mass. 151, 61 N. E. 815; *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10; State *v.* Williams, 38 Mo. App. 37.

Sale of domestic wines.— When the local option law contains a provision that it shall not interfere with the manufacture or sale of domestic wines or cider, it is held that the act does not take from the local authorities the power, under the general law, to issue a license to retail domestic wines in quantities less than a quart. Brown *v.* State, 79 Ga. 473, 4 S. E. 256.

50. Hearn *v.* Brogan, 64 Miss. 334, 1 So. 246. And see Zarresseller *v.* People, 17 Ill. 101.

51. See Com. *v.* Lillard, 9 S. W. 710, 10 Ky. L. Rep. 561; Com. *v.* Kevill, 108 Mass. 422; State *v.* Wenzel, 72 N. H. 396, 56 Atl. 918.

Statutory limitation.— Where, as in Alabama, it is provided by law that no penal act shall go into effect until thirty days after the adjournment of the legislature, this limitation must be taken into account in enacting a local option law, with reference to the time of its taking effect. Olmstead *v.* Crook, 89 Ala. 228, 7 So. 776.

52. See the statutes of the different states. And see Thurmond *v.* State, 46 Tex. Cr. 162, 79 S. W. 316; Phillips *v.* State, 23 Tex. App. 304, 4 S. W. 893.

53. Avoyelles Parish Police Jury *v.* Descant, 105 La. 512, 29 So. 976.

54. *Arkansas.*— Wallace *v.* Cubanola, 70 Ark. 395, 68 S. W. 485; Doss *v.* Moore, 69 Ark. 258, 63 S. W. 66.

Georgia.— Tatum *v.* State, 79 Ga. 176, 3 S. E. 907.

Kentucky.— Thompson *v.* Com., 103 Ky. 685, 45 S. W. 1039, 46 S. W. 492, 698, 20 Ky. L. Rep. 397; Smith *v.* Patton, 103 Ky. 444, 45 S. W. 459, 20 Ky. L. Rep. 165; Locke *v.* Com., 74 S. W. 654, 25 Ky. L. Rep. 76. *Compare* Com. *v.* Nelson, 57 S. W. 495, 22 Ky. L. Rep. 414; Com. *v.* Bottoms, 57 S. W. 493, 22 Ky. L. Rep. 410; Cole *v.* Com., 39 S. W. 1029, 19 Ky. L. Rep. 324.

Louisiana.— Avoyelles Parish Police Jury *v.* Descant, 105 La. 512, 29 So. 976; State *v.* Jackson, 105 La. 436, 29 So. 870; Garrett *v.* Aby, 47 La. Ann. 618, 17 So. 238. And see Avoyelles Parish Police Jury *v.* Marksville Corp., 107 La. 215, 31 So. 653; Avoyelles Parish Police Jury *v.* Mansura Corp., 107 La. 201, 31 So. 650.

Montana.— *In re* O'Brien, 29 Mont. 530, 75 Pac. 196.

Texas.— Williams *v.* Davidson, (Civ. App. 1902) 70 S. W. 987; Roper *v.* McKoy, 29 Tex. Civ. App. 470, 69 S. W. 459; Kidd *v.* Truett, 28 Tex. Civ. App. 618, 68 S. W. 310; Adams *v.* Kelley, 17 Tex. Civ. App. 479, 44 S. W. 529; *Ex p.* Fields, 39 Tex. Cr. 50, 46 S. W. 1127.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 34.

55. Aaron *v.* State, 34 Tex. Cr. 103, 29 S. W. 267; *Ex p.* Cox, 28 Tex. App. 537, 13 S. W. 862. And see State *v.* Smith, 26 Fla. 427, 7 So. 848.

supposed to be included cannot be ascertained, the election in such district is invalid and has no effect on the law.[56]

6. Effect of Change of Boundary. Where a local option law is in force in an entire district, and a portion of the district is cut off and joined to other territory under a new name, the law still remains operative through the part not thus severed.[57] And also, where a new district is carved out of one where prohibition is in force, the same law will continue in force in the new district.[58]

7. Effect of Rejection. If the election results in the rejection of the local option law, the previously existing statutes, regulating the sale of liquor, remain in full force and effect without being affected by the mere fact of the election.[59]

B. Submission of Question to Popular Vote — 1. Authority in General. The statutes on the subject generally provide that, upon the performance of certain preliminary conditions, usually including the filing of a sufficient petition, an order for a local option election shall be made by a designated authority, commonly a local court, but in some states the county commissioners or board of supervisors.[60] As a rule this authority has no discretion in the matter, beyond a determination of the legal sufficiency of the petition; but there is no constitutional objection to a statute which makes it the duty of such authority to decide whether the circumstances have arisen which require an election to be held.[61]

2. Application For Election — a. Necessity For Application. The application or petition for an election required by a local option law is a jurisdictional prerequisite; without such a petition, sufficient in respect to form and signatures, the authorities have no power to order an election and none can be legally held.[62]

b. Filing Application. Where the statute requires the application for an election to be filed with the town clerk, the county officers, or some other desig-

56. *Ex p.* Waits, (Tex. Cr. App. 1901) 64 S. W. 254.

57. Jones *v.* State, 67 Md. 256, 10 Atl. 216; Nelson *v.* State, (Tex. Cr. App. 1902) 75 S. W. 502; Medford *v.* State, 45 Tex. Cr. 180, 74 S. W. 768.

58. Prestwood *v.* State, 88 Ala. 235, 7 So. 259; Higgins *v.* State, 64 Md. 419, 1 Atl. 876.

Change of name.— Merely changing the name of a township will not have the effect of reversing its previous decision under the local option law. State *v.* Cooper, 101 N. C. 684, 8 S. E. 134.

New election.— The statute in Texas providing that no local option election shall be held "within the same prescribed limits, in less than two years after an election under this title has been held therein," does not prevent the holding of an election in a subdivision carved out of a precinct, although an election was held in such precinct less than two years before. *Ex p.* Brown, 35 Tex. Cr. 443, 34 S. W. 131.

59. Boswell *v.* State, 70 Miss. 395, 12 So. 446; Hearn *v.* Brogan, 64 Miss. 334, 1 So. 246; Price *v.* Cecil County, 98 Md. 346, 57 Atl. 215. And see Leftwich *v.* State, (Tex. Cr. App. 1900) 55 S. W. 571.

60. See the statutes of the different states. And see People *v.* Chandler, 41 N. Y. App. Div. 178, 58 N. Y. Suppl. 794; People *v.* Brunswick, 13 Misc. (N. Y.) 537, 35 N. Y. Suppl. 659; Sweeney *v.* Webb, 33 Tex. Civ. App. 324, 76 S. W. 766; State *v.* Harvey, 11 Tex. Civ. App. 691, 33 S. W. 885; Williams *v.* State, 35 Tex. Cr. 52, 31 S. W. 654; *Ex p.* Sublett, 23 Tex. App. 309, 4 S. W. 894.

61. State *v.* Judge Gloucester County Cir. Ct., 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

62. People *v.* Decker, 28 Misc. (N. Y.) 699, 60 N. Y. Suppl. 60; Akin *v.* State, 14 Tex. App. 142. And see *In re* Huntsville Local Option Election, 25 Ohio Cir. Ct. 535. *Compare* Matter of Bertrend, 40 Misc. (N. Y.) 536, 82 N. Y. Suppl. 940.

Premature petition.— A statutory provision that a second election on the question of local option shall not be held in less than two years from the first election does not prevent the voters from preparing a petition and presenting it to the proper authorities, within the two years, or the making of an order for the election, provided it is not to take place until the proper time. Keefer *v.* Hillsdale County, 109 Mich. 645, 67 N. W. 981.

Withdrawing petition.— After a petition for a local option election has been presented and an election ordered, the petition cannot be withdrawn and then presented again, so as to justify another order appointing a different day for the election. State *v.* Webb, 49 Mo. App. 407.

In Texas the statute expressly confers authority upon the commissioners' court to order a local option election, on their own motion and without a petition, whenever they deem it expedient; hence if a petition was filed, but was insufficient in substance, or lacked the requisite number of signatures, it may be disregarded as immaterial, and the order for the election will be presumed to have been made in the exercise of the court's discretion. Williams *v.* Davidson, (Civ. App.

nated authority, and especially where it provides that this must be done a certain number of days before the election, or before the making of an order therefor, the due filing of the application is a condition precedent to the holding of a valid election.[63]

c. Signers of Application. When the statutes prescribe that the petition shall be signed by a certain number of persons, or by a given percentage of the voters of the district, its sufficiency in respect to signatures is essential to the validity of the election, and it is generally held that compliance with the law in this particular must appear affirmatively in the proceedings.[64] The provisions of the statute are mandatory in respect to the qualifications of the persons signing the petition,[65] and their number, whether it be a fixed number or a certain percentage of the qualified voters.[66]

d. Form and Contents. If the statute prescribes the form of the petition, or what statements it shall contain, it must be exactly followed in all essential par-

1902) 70 S. W. 987; Lambert *v.* State, 37 Tex. Cr. 232, 39 S. W. 299. And see Cantwell *v.* State, (Cr. App. 1905) 85 S. W. 18.

63. Matter of Krieger, 59 N. Y. App. Div. 346, 69 N. Y. Suppl. 851; Matter of Eggleston, 51 N. Y. App. Div. 38, 64 N. Y. Suppl. 471; Matter of Sullivan, 30 Misc. (N. Y.) 682, 64 N. Y. Suppl. 303; People *v.* Bairbridge, 26 Misc. (N. Y.) 220, 56 N. Y. Suppl. 64.

Time of filing see Wilmans *v.* Bordwell, 73 Ark. 418, 84 S. W. 474.

In Texas, under a statute empowering the commissioners' court to order a local option election whenever a petition therefor is presented, such petition need not be filed prior to the convening of the court. Loveless *v.* State, 40 Tex. Cr. 131, 49 S. W. 98.

64. See Friesner *v.* Charlotte, 91 Mich. 504, 52 N. W. 18; Lester *v.* Miller, 76 Miss. 309, 24 So. 193; People *v.* Town Canvassers, 32 Misc. (N. Y.) 123, 66 N. Y. Suppl. 199; Roper *v.* Scurlock, 29 Tex. Civ. App. 464, 69 S. W. 456; Brantly *v.* State, 42 Tex. Cr. 293, 59 S. W. 892. *Compare* Matter of Newburgh, 97 N. Y. App. Div. 438, 89 N. Y. Suppl. 1065; Matter of Rice, 95 N. Y. App. Div. 28, 88 N. Y. Suppl. 512.

Sufficiency of the petition in this particular is to be judged and determined by the authorities charged with the duty of making the order for the election. Ferguson *v.* Monroe County, 71 Miss. 524, 14 So. 81.

The petition may be impeached for insufficiency in the signatures, by one interested in avoiding the election; but if it is regular and sufficient on its face, he must assume the burden of proving that it was not actually signed by a sufficient number of duly qualified persons. *Ex p.* Douthitt, (Tex. Cr. App. 1901) 63 S. W. 131; Ezzell *v.* State, 29 Tex. App. 521, 16 S. W. 782. Where objection is made to the genuineness of signatures to the petition, it is the duty of the board of supervisors to allow proof thereof to be made, and to adjourn their meeting until the next day for that purpose if necessary. Madison County *v.* Powell, 75 Miss. 762, 23 So. 425.

Withdrawing signature.— A person who signed the petition cannot withdraw from it after it has been acted upon by the county court, and while an appeal is pending in a superior court. *Ex p.* McCullough, 51 Ark. 159, 10 S. W. 259. And see Bordwell *v.* Dills, 70 Ark. 175, 66 S. W. 646.

Signatures by proxy.— Where the law requires a written petition of one third of the qualified electors "signed by themselves," names attached to the petition by third persons, although with the consent of the persons named, cannot be counted. Ferguson *v.* Monroe County, 71 Miss. 524, 14 So. 81.

Several petitions.— The names need not all be signed to the same petition. Two or more petitions, identical in terms, and together signed by the requisite number or percentage of voters, will answer the purpose of the statute, although neither one of them alone has the requisite number of signatures. Smith *v.* Patton, 103 Ky. 444, 45 S. W. 459, 20 Ky. L. Rep. 165; Tousey *v.* De Huy, 62 S. W. 1118, 23 Ky. L. Rep. 458; State *v.* Smith, 38 Mo. App. 618; State *v.* Weeks, 38 Mo. App. 566; Irish *v.* State, (Tex. Cr. App. 1894) 25 S. W. 633. *Compare* Williams *v.* Citizens, 40 Ark. 290.

65. See *Ex p.* Perkins, 34 Tex. Cr. 429, 31 S. W. 175.

Description of signers.— A petition which describes the petitioners as "citizens" sufficiently alleges that they are qualified voters. *Ex p.* Lynn, 19 Tex. App. 293.

Women signing.— Where the law requires the petition to be signed by a majority of the "adult residents" of the county, it is held that this includes women as well as men, and adult females may sign it, although they are not voters. Blackwell *v.* State, 36 Ark. 178.

Officers signing.— Officers, or members of an official board, whose duty it will be to order the election upon a proper petition being presented, may themselves sign the petition and canvass for other signers, and are not thereby disqualified from acting on it. Lemon *v.* Peyton, 64 Miss. 161, 8 So. 235. And see Hunter *v.* Senn, 61 S. C. 44, 39 S. E. 235.

66. Nall *v.* Tinsley, 107 Ky. 441, 54 S. W. 187, 21 Ky. L. Rep. 1167; Mahan *v.* Com., 56 S. W. 529, 21 Ky. L. Rep. 1807. See Matter of Rogers, 41 Misc. (N. Y.) 389, 84 N. Y. Suppl. 1024.

ticulars.[67] But if the law does not prescribe the requisites of such a petition, it is sufficient if it expresses in an intelligible manner the desire of the petitioners that a local option election be held.[68] An election will not be invalidated by trifling errors or omissions in the petition or by unimportant irregularities.[69]

e. Proceedings on Application. The directions of the statute as to the proceedings to be taken upon a petition, when it is duly filed, such as the requirement that it shall be entered upon the records, or that the authorities charged with the determination of its sufficiency shall make a record of their finding, are mandatory and disregard of them will invalidate the election.[70] And the same is true of statutory directions to govern the officials in their examination of the petition or in finding and declaring the result.[71]

f. Review of Proceedings. In Michigan the finding and determination of the board of supervisors as to the sufficiency of the petition for a local option election, and as to the requisite number of electors having signed the same, is final and conclusive and not subject to review.[72] But in other jurisdictions it has been held that the decision of the board of officers charged with this preliminary determination may be reviewed, at the instance of parties who have a proper standing for that purpose, either on appeal[73] or certiorari.[74]

3. Order For Election — a. Authority and Duty to Make Order. The power to make the order for a local option election must be exercised by the person or board to whom it is confided, and cannot be delegated; but the mere fact that the order recites that it was made by the court, while the statute confers the authority on the judge, is not enough to avoid the election, where the order is signed by the judge.[75] If the statute requires the order for election to be issued at the term of court next succeeding the filing of the petition, this is imperative, and an election held under an order issued at any other term of court is void.[76] But where the local authorities have power to order an election without any petition, their order so made is conclusive and unimpeachable.[77]

67. Tally *v.* Grider, 66 Ala. 119.

68. Dillard *v.* State, 31 Tex. Cr. 470, 20 S. W. 1106.

69. Matter of Clement, 29 Misc. (N. Y.) 29, 60 N. Y. Suppl. 328. And see Cantwell *v.* State, (Tex. Cr. App. 1905) 85 S. W. 19

Illustrations.— The election is not invalidated because the petition does not name a date for the election to be held (Puckett *v.* Snider, 110 Ky. 261, 61 S. W. 277, 22 Ky. L. Rep. 1718), or because it erroneously refers to the statute under which the proceedings are taken (Steele *v.* State, 19 Tex. App. 425), or contains unnecessary details in regard to the varieties of liquor against which the prohibition is asked (State *v.* Schmitz, 36 Mo. App. 550), or because it fails to set out the metes and bounds of the district for which the election is to be held, unless in a case where the district is other than one of the legal subdivisions of the county (*Ex p.* Perkins, 34 Tex. Cr. 429, 31 S. W. 175).

70. Wilson *v.* Hines, 99 Ky. 221, 35 S. W. 627, 37 S. W. 148, 18 Ky. L. Rep. 233; Covert *v.* Munson, 93 Mich. 603, 53 N. W. 733; Pitner *v.* State, 37 Tex. Cr. 268, 39 S. W. 662; *Ex p.* Smith, 34 Tex. Cr. 284, 30 S. W. 223. *Compare Ex p.* Williams, 35 Tex. Cr. 75, 31 S. W. 653.

71. Giddings *v.* Wells, 99 Mich. 221, 58 N. W. 64; *Ex p.* Segars, 32 Tex. Cr. 553, 25 S. W. 26.

72. Thomas *v.* Abbott, 105 Mich. 687, 63 N. W. 984; Covert *v.* Munson, 93 Mich. 603, 53 N. W. 733; Friesner *v.* Charlotte, 91 Mich. 504, 52 N. W. 18.

73. Ferguson *v.* Monroe County, 71 Miss. 524, 14 So. 81.

74. Miller *v.* Jones, 80 Ala. 89; State *v.* Robbins, 54 N. J. L. 566, 25 Atl. 471 [*reversing* 53 N. J. L. 555, 22 Atl. 481].

75. Olmstead *v.* Crook, 89 Ala. 228, 7 So. 776. And see Racer *v.* State, (Tex. Cr. App. 1903) 73 S. W. 968.

76. *Ex p.* Sublett, 23 Tex. App. 309, 4 S. W. 894. And see Com. *v.* McCarty, 76 S. W. 173, 25 Ky. L. Rep. 585; Cress *v.* Com., 37 S. W. 493, 18 Ky. L. Rep. 633.

Recital as to time of making.— The order is shown to have been made at a regular term of court by a recital that it was made on a given day, the courts taking judicial notice that a term of court began on that day. Loveless *v.* State, 40 Tex. Cr. 221, 49 S. W. 892.

In Kentucky if the judge fails to make the order at the first term after the petition is filed he may make it at the second term, and hence may, at such second term, correct a clerical error in the order. Tousey *v.* De Huy, 62 S. W. 1118, 23 Ky. L. Rep. 458. And the statute does not prevent the petition being filed at a special term of the court, called for the reception and filing of such petitions. Smith *v.* Patton, 103 Ky. 444, 45 S. W. 459, 20 Ky. L. Rep. 165.

77. Drechsel *v.* State, 35 Tex. Cr. 577, 34 S. W. 932.

b. Form and Contents of Order.[78] The order for holding a local option election should show the facts essential to jurisdiction, at least so far as concerns the existence and sufficiency of the petition on which it is based,[79] and should set forth the question or proposition to be submitted to the voters, in such exact accordance with the statute that no false or misleading issue may be presented to them.[80] It should designate with precision the district or division in and for which the election is to be held,[81] and should be directed to the officers authorized by law to hold the election.[82] It should also direct the proper officer to post notices of the election, unless this duty is already imposed upon him by the statute.[83]

c. Signing and Recording Order. The statutes commonly require that the order for election shall be duly signed by the court or officers making it and entered of record, and compliance with such provisions is essential to its validity.[84]

4. Notice of Election — a. Necessity For Notice. Local option statutes commonly provide that notices of the election shall be posted by the sheriff or other proper officer at certain places throughout the district, or published in certain newspapers, within a prescribed period preceding the election.[85] And where such statutory notices are not given the election should be set aside,[86] unless it fairly appears that no injury arose from the failure to give them.[87] It has been held that, although the law may have been partially complied with, yet if a less number of notices were posted than the statute expressly requires it is fatal defect.[88]

78. Interlineations.— The order is not invalidated by an interlineation made for the purpose of supplying an omission, where the minutes were approved by the commissioners with knowledge on their part that the order had been so completed. Bruce *v.* State, 36 Tex. Cr. 53, 35 S. W. 683.

79. Nall *v.* Tinsley, 107 Ky. 441, 54 S. W. 187, 21 Ky. L. Rep. 1167; State *v.* Bird, 108 Mo. App. 163, 83 S. W. 284. And see Com. *v.* Jones, 84 S. W. 305, 27 Ky. L. Rep. 16; State *v.* Robbins, 54 N. J. L. 566, 25 Atl. 471.

80. Matter of Munson, 95 N. Y. App. Div. 23, 88 N. Y. Suppl. 509; Dillard *v.* State, 31 Tex. Cr. 470, 20 S. W. 1106. *Compare* Matter of Rice, 95 N. Y. App. Div. 28, 88 N. Y. Suppl. 512; Thurmond *v.* State, 46 Tex. Cr. 162, 79 S. W. 316.

Exceptions.— Where the statute to be adopted prohibits the sale of liquor, except wine for sacramental purposes and alcoholic liquor for medicinal purposes, it is not necessary for the order for election to mention these exceptions; it has reference only to such sales as can be prohibited under the statute. Racer *v.* State, (Tex. Cr. App. 1903) 73 S. W. 968; Loveless *v.* State, 40 Tex. Cr. 221, 49 S. W. 892; Frickie *v.* State, 39 Tex. Cr. 254, 45 S. W. 810; Shields *v.* State, 38 Tex. Cr. 252, 42 S. W. 398. And see Sweeney *v.* Webb, 33 Tex. Civ. App. 324, 76 S. W. 766.

81. Irish *v.* State, (Tex. Cr. App. 1894) 25 S. W. 633.

Metes and bounds.— It is not necessary to set out the metes and bounds of the district, unless such district is a subdivision of a county other than an entire justice's precinct, town, or city. *Ex p.* Speagle, 34 Tex. Cr. 465, 31 S. W. 171. And see Williams *v.* Davidson, (Tex. Civ. App. 1902) 70 S. W. 987; Jordan *v.* State, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110; Kelley *v.* State, 37 Tex. Cr. 220, 38 S. W. 779, 39 S. W. 111.

82. Puckett *v.* Snider, 110 Ky. 261, 61 S. W. 277, 22 Ky. L. Rep. 1718; Com. *v.* Green, 98 Ky. 21, 32 S. W. 169, 17 Ky. L. Rep. 579; State *v.* Dugan, 110 Mo. 138, 19 S. W. 195; Nelson *v.* State, (Tex. Cr. App. 1902) 75 S. W. 502. *Compare* Kelley *v.* State, 37 Tex. Cr. 220, 38 S. W. 779, 39 S. W. 111.

83. Aaron *v.* State, 34 Tex. Cr. 103, 29 S. W. 267.

84. See the statutes of the different states. And see Thomas *v.* Abbott, 105 Mich. 687, 63 N. W. 984; Roper *v.* Scurlock, 29 Tex. Civ. App. 464, 69 S. W. 456; *Ex p.* Walton, 45 Tex. Cr. 74, 74 S. W. 314; Davidson *v.* State, 44 Tex. Cr. 586, 73 S. W. 808.

85. See the statutes of the different states. And see *Ex p.* Neal, (Tex. Cr. App. 1904) 83 S. W. 831; *Ex p.* Keith, (Tex. Cr. App. 1904) 83 S. W. 683.

86. Matter of O'Hara, 63 N. Y. App. Div. 512, 71 N. Y. Suppl. 613; Matter of Eggleston, 51 N. Y. App. Div. 38, 64 N. Y. Suppl. 471; Matter of Powers, 34 Misc. (N. Y.) 636, 70 N. Y. Suppl. 590; Matter of Sullivan, 34 Misc. (N. Y.) 598, 70 N. Y. Suppl. 374; Shields *v.* State, 38 Tex. Cr. 252, 42 S. W. 398; Hayes *v.* State, (Tex. Cr. App. 1897) 39 S. W. 106; *Ex p.* Kennedy, 23 Tex. App. 77, 3 S. W. 114; Haddox *v.* Clarke County, 79 Va. 677; *Re* Mace, 42 U. C. Q. B. 70. But *compare* Matter of France, 36 Misc. (N. Y.) 693, 74 N. Y. Suppl. 379; Matter of Rowley, 34 Misc. (N. Y.) 662, 70 N. Y. Suppl. 208.

87. Matter of La Fayette, 45 Misc. (N. Y.) 141, 91 N. Y. Suppl. 970 [*affirmed* in 93 N. Y. Suppl. 534]; Matter of O'Hara, 40 Misc. (N. Y.) 355, 82 N. Y. Suppl. 293.

88. *Ex p.* Conley, (Tex. Cr. App. 1903) 75 S. W. 301; Smith *v.* State, 19 Tex. App. 444.

b. Form and Contents of Notice. The notice of a local option election should designate, with reasonable certainty, the question or proposition to be voted on,[89] the district or territory to be affected,[90] and the time and place of holding the election,[91] and should bear the signatures of the court or officers ordering the election.[92] But it need not recite preliminary jurisdictional facts, if they have already been judicially found and determined.[93]

c. Posting or Publication of Notice. The statutory requirement for the posting of notices of the election is not duly observed unless the whole number of notices required are actually posted, by the proper authority, in the designated places, for the requisite number of days before the day fixed for holding the election.[94] Where the statute directs the giving of notice by publication in a newspaper, its directions as to the number of insertions and the length of time the publication must continue are mandatory, and their due observance is essential to the validity of the election.[95] It is also necessary that the newspaper in which the publication is made should have been selected by the proper authority.[96]

d. Proof of Notice. After an election has been held and the result declared, the courts will presume that the notices were duly posted for the required length of time;[97] but evidence is admissible to prove the contrary, for the purpose of invalidating the election.[98] And if the statute does not make any provision for recording the notice, a record entry of the notice is incompetent and immaterial to prove the publication of such notice.[99]

5. Election — a. Time of Holding. When a particular day for holding a local option election is fixed by the statute or by the authorities ordering it, it is

89. Matter of Woolston, 35 Misc. (N. Y.) 735, 72 N. Y. Suppl. 406. *Compare* People *v.* Edwards, 42 Misc. (N. Y.) 567, 87 N. Y. Suppl. 618.

90. Burroughs School *v.* Horry County, 62 S. C. 68, 39 S. E. 793; Nichols *v.* State, 37 Tex. Cr. 546, 40 S. W. 268; *Ex p.* Speagle, 34 Tex. Cr. 465, 31 S. W. 171.

91. *Ex p.* Mayes, 39 Tex. Cr. 36, 44 S. W. 831.

92. Thomas *v.* Abbott, 105 Mich. 687, 63 N. W. 984.

93. State *v.* Weeks, 38 Mo. App. 566.

94. Matter of Smith, 44 Misc. (N. Y.) 384, 89 N. Y. Suppl. 1006; Voss *v.* Terrell, 12 Tex. Civ. App. 439, 34 S. W. 170; Nelson *v.* State, (Tex. Cr. App. 1902) 75 S. W. 502; Hayes *v.* State, (Tex. Cr. App. 1897) 39 S. W. 106.

The election is not invalidated by the fact that one of the notices was posted only nine days before the election, instead of twelve as required by the law, where it appears that the voters had actual notice of the election. Norman *v.* Thompson, 30 Tex. Civ. App. 537, 72 S. W. 64.

If a less number of notices are posted than the law expressly requires, the election is not valid. *Ex p.* Conley, (Tex. Cr. App. 1903) 75 S. W. 301; Smith *v.* State, 19 Tex. App. 444.

Destruction of notice.— The fact that the notices or some of them, after having been properly posted, were torn down or blown away would not affect the validity of the election. Nelson *v.* State, (Tex. Cr. App. 1902) 75 S. W. 502; Bowman *v.* State, 38 Tex. Cr. 14, 40 S. W. 796, 41 S. W. 635.

Place of posting.— Nor is the election invalidated by the mere fact that two of the five notices posted in the county were posted in a single precinct. *Ex p.* Kennedy, 23 Tex. App. 77, 3 S. W. 114.

95. State *v.* Kampman, 75 Mo. App. 188; *In re* Lake, 26 U. C. C. P. 173.

Computation of time.— Where the statute requires the notice to be published for four consecutive weeks, and that the last insertion shall be within ten days next before the election, there must be twenty-eight days' notice of the election, exclusive of the first day of the notice and inclusive of the day of the election. State *v.* Kaufman, 45 Mo. App. 656; Bean *v.* Barton County Ct., 33 Mo. App. 635; Leonard *v.* Saline County Ct., 32 Mo. App. 633; State *v.* Tucker, 32 Mo. App. 620. In a case in Canada, under a statute requiring publication at least one month before the election, it was held that this meant at least one publication in each week of the month before the election, and for the purpose of reckoning weeks, it is necessary to begin with the day of the first publication, and not with the first day of an ordinary week. Hall *v.* South Norfolk, 8 Manitoba 430.

96. State *v.* Gloucester County, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86; West *v.* State, 35 Tex. Cr. 48, 30 S. W. 1069. And see State *v.* Baldwin, 109 Mo. App. 573, 83 S. W. 266.

97. Segars *v.* State, 35 Tex. Cr. 45, 31 S. W. 370. And see Keller *v.* State, 46 Tex. Cr. 588, 81 S. W. 1214. *Compare* James *v.* State, 21 Tex. App. 189, 17 S. W. 143.

98. Matkins *v.* State, (Tex. Cr. App. 1901) 62 S. W. 911; Frickie *v.* State, 39 Tex. Cr. 254, 45 S. W. 810.

99. Toole *v.* State, 88 Ala. 158, 7 So. 42.

void if held on any other day.[1] So if the law requires the election to take place within a designated number of days after the reception of the petition or after the date of the order an election held prematurely or after the prescribed time has expired, although regular in all other respects, is entirely invalid.[2] And the same result follows the disregard of a statutory provision that the local option election shall not be held within sixty days of any municipal or state election in the same city.[3] But a provision of the general election law of the state, requiring special elections to be held on Tuesday, does not apply to an election under the local option law.[4]

b. Conduct of Election. The formality and regularity of a local option election are to be tested by the terms of the statute under which it is held,[5] and by the general principles of the law relating to elections, where applicable.[6] There must be a strict compliance with any special provisions of the local option statute in regard to the officers who are to hold the election and their duties,[7] the hours for keeping the polls open,[8] the nature and scope of the question submitted to the voters,[9] the form of the ballots to be used,[10] the majority required to deter-

1. Loughran *v.* Hickory, 129 N. C. 281, 40 S. E. 46; Yates *v.* State, (Tex. Cr. App. 1900) 59 S. W. 275.

In Kentucky the law provides that, upon proper petition, a local option election may be held at the next regular state, town, city, or county election. And it is held that an election, under this provision, to take the vote of a city on the question of local option, held by the sheriff or coroner at a state election, is unauthorized and void, the act intending that, in a city or town, the vote shall be taken at a city or town election, under the control of those directly interested in municipal elections. Com. *v.* King, 86 Ky. 436, 6 S. W. 124, 9 Ky. L. Rep. 653.

In New York the statutes make special provisions as to the holding of local option elections at annual town meetings, or at special town meetings called for the purpose. See People *v.* Sackett, 15 N. Y. App. Div. 290, 44 N. Y. Suppl. 59^; Matter of Sullivan, 30 Misc. 682, 64 N. Y. Suppl. 303.

2. Puckett *v.* Snider, 110 Ky. 261, 61 S. W. 277, 22 Ky. L. Rep. 1718; State *v.* Ruark, 34 Mo. App. 325; Yates *v.* State, (Tex. Cr. App. 1900) 59 S. W. 275; King *v.* State, 33 Tex. Cr. 547, 28 S. W. 201; Winston *v.* State, 32 Tex. Cr. 59, 22 S. W. 138; Curry *v.* State, 28 Tex. App. 475, 13 S. W. 752.

3. *In re* Wooldridge, 30 Mo. App. 612. And see State *v.* Bowerman, 40 Mo. App. 576; State *v.* Searcy, 39 Mo. App. 393. *Compare* State *v.* Ruark, 34 Mo. App. 325.

4. State *v.* Judge Gloucester County Cir. Ct., 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

5. Lehman *v.* Porter, 73 Miss. 216, 18 So. 920; People *v.* Pierson, 64 N. Y. App. Div. 624, 72 N. Y. Suppl. 1123; Stick *v.* State, 23 Ohio Cir Ct. 392.

6. Jacoby *v.* Dallis, 115 Ga. 272, 41 S. E. 611. And see, generally, ELECTIONS.

Precinct not voting.— A local option election is not void because one of the precincts, or other political divisions of the district holding the election, chose to hold no election. *Ex p.* Schilling, 38 Tex. Cr. 287, 42 S. W. 553; *Ex p.* Covey, 9 Rev. Leg. 289.

7. James *v.* State, 21 Tex. App. 353, 17 S. W. 422. And see Puckett *v.* Snider, 110 Ky. 261, 61 S. W. 277, 22 Ky. L. Rep. 1718.

Misnomer of officer.— Where one acts as a *de facto* officer in conducting an election, the fact that he does so under the misnomer of "manager of the election," instead of "presiding officer," does not invalidate the election, so far as to lay it open to collateral attack. *Ex p.* Mayes, 39 Tex. Cr. 36, 44 S. W. 831.

Choice of poll clerk.— That two inspectors at a local option election chose one of their number as clerk of the polls, in violation of the statute, does not render the election void. People *v.* Pierson, 35 Misc. (N. Y.) 406, 71 N. Y. Suppl. 993 [*affirmed* in 64 N. Y. App. Div. 624, 72 N. Y. Suppl. 1123].

8. State *v.* Drake, 83 Wis. 257, 53 N. W. 496. But see Chamlee *v.* Davis, 115 Ga. 266, 41 S. E. 691; Hoover *v.* Thomas, 35 Tex. Civ. App. 535, 80 S. W. 859, holding that the provision of a statute regulating local option elections, providing the time within which the polls shall be opened, is not mandatory in the sense that its non-observance will vitiate an election, where a failure to comply strictly therewith did not operate to deprive any voter of an opportunity to vote.

9. Steele *v.* State, 19 Tex. App. 425. But *compare* Gayle *v.* Owen County Ct., 83 Ky. 61.

10. Prestwood *v.* Borland, 92 Ala. 599, 9 So. 223.

If the size, shape, or form of the ballots are not prescribed by the statute under which a local option election is held, these details are unimportant; it is only required that the ballots should express intelligibly the choice of the voters for or against the proposition submitted to them. Avoyelles Parish Police Jury *v.* Descant, 105 La. 512, 29 So. 976; Stick *v.* State, 23 Ohio Cir. Ct. 392; Hunter *v.* Senn, 61 S. C. 44, 39 S. E. 235.

Validity of viva voce election see Com. *v.* Doe, 108 Mass. 418.

mine the result,[11] and the qualifications of the voters.[12] But minor irregularities, not violating mandatory provisions of the statute, will not vitiate the election, unless it is shown that they changed the result.[13]

c. Contesting Election. The local option statutes commonly provide a method of contesting the declared result of an election held thereunder,[14] and make specific provisions as to the courts or boards which shall have jurisdiction of such proceedings,[15] the parties who may institute and defend such a contest,[16] and the grounds on which a contest may be made.[17] It has been held that the method of contesting the election, prescribed by the statute, is the exclusive remedy, so that an action at law will not lie, under the ordinary jurisdiction of the courts, to have the election declared void.[18] But in any case, where the contest is based on a claim that votes were illegally received or illegally excluded, the election will not be avoided unless it is shown, upon specific allegations and by an enumeration of the voters and votes, that the result would have been different but for the frands or irregularities of which complaint is made.[19]

d. Collateral Impeachment of Election. The validity of an election held under the local option law is not open to impeachment or attack in collateral proceedings,[20] such as an application for the grant of a license to sell liquor,[21] or a proceeding to revoke or cancel a license,[22] nor on a bill in equity to restrain the authorities from declaring the local option law to have been adopted at the election, or from putting it into force, on the ground that the complainant, a licensed dealer, would be injured in his business by the enforcement of local option.[23] In some states also it is held that a defendant, prosecuted for violating the local option law, cannot set up a defense attacking the validity of the election adopting the law;[24] but in others, such a defense is permissible, although the election is

11. See *infra*, V, B, 6, b.

12. Cole *v.* McClendon, 109 Ga. 183, 34 S. E. 384; Bowman *v.* State, 38 Tex. Cr. 14, 40 S. W. 796, 41 S. W. 635; Weil *v.* Calhoun, 25 Fed. 865. And see *Ex p.* Wood, (Tex. Cr. App. 1904) 81 S. W. 529.

13. Donovan *v.* Fairfield County Com'rs, 60 Conn. 339, 22 Atl. 847; Puckett *v.* Snider, 110 Ky. 261, 61 S. W. 277, 22 Ky. L. Rep. 1718; People *v.* Pierson, 64 N. Y. App. Div. 624, 72 N. Y. Suppl. 1123.

Disfranchisement of voters.— Illegal action on the part of the officers holding the election, in refusing to receive the votes of an entire class of the people, is not a minor irregularity, but a fatal defect, invalidating the election. *In re* Pounder, 19 Ont. App. 684.

14. See the following cases:

Georgia.— Drake *v.* Drewry, 112 Ga. 308, 37 S. E. 432; McMillan *v.* Bell, 105 Ga. 496, 30 S. E. 948.

Kentucky.— Erwin *v.* Benton, 84 S. W. 533, 27 Ky. L. Rep. 108; Locke *v.* Garnett, 42 S. W. 918, 19 Ky. L. Rep. 1059.

New York.— Matter of Bertrend, 40 Misc. 536, 82 N. Y. Suppl. 940.

Ohio.— Fike *v.* State, 25 Ohio Cir. Ct. 554.

Texas.—Norton *v.* Alexander, (Civ. App. 1902) 67 S. W. 787.

15. See Freeman *v.* Lazarus, 61 Ark. 247, 32 S. W. 680; Oxford *v.* Frank, 30 Tex. Civ. App. 343, 70 S. W. 426; Kidd *v.* Truett, 28 Tex. Civ. App. 618, 68 S. W. 310.

16. See Miller *v.* Drake, 113 Ga. 347, 38 S. E. 747; Matter of Bertrend, 40 Misc. (N. Y.) 536, 82 N. Y. Suppl. 940; Kidd *v.* Truett, 28 Tex. Civ. App. 618, 68 S. W. 310.

17. See Jossey *v.* Speer, 107 Ga. 828, 33 S. E. 718; Stinson *v.* Gardner, 97 Tex. 287, 78 S. W. 492; Norman *v.* Thompson, 96 Tex. 250, 72 S. W. 62; Lowery *v.* Briggs, (Tex. Civ. App. 1903) 73 S. W. 1062; Snead *v.* State, 40 Tex. Cr. 262, 49 S. W. 595.

18. Puckett *v.* Snider, 61 S. W. 277, 22 Ky. L. Rep. 1718. But *compare* Freeman *v.* Lazarus, 61 Ark. 247, 32 S. W. 680.

19. Jossey *v.* Speer, 107 Ga. 828, 33 S. E. 718; Giddings *v.* Wells, 99 Mich. 221, 58 N. W. 64; Matter of Bertrend, 40 Misc. (N. Y.) 536, 82 N. Y. Suppl. 940; People *v.* Hasbrouck, 21 Misc. (N. Y.) 188, 47 N. Y. Suppl. 109; Messer *v.* Cross, 26 Tex. Civ. App. 34, 63 S. W. 169.

20. Geib *v.* State, 31 Tex. Cr. 514, 21 S. W. 190; Desroches *v.* Cote, 19 Rev. Lég. 386. And see Matkins *v.* State, (Tex. Cr. App. 1900) 58 S. W. 108.

21. Underwood *v.* Fairfield County Com'rs, 67 Conn. 411, 35 Atl. 274; People *v.* Foster, 27 Misc. (N. Y.) 576, 58 N. Y. Suppl. 574; People *v.* Hamilton, 27 Misc. (N. Y.) 360, 58 N. Y. Suppl. 959.

22. Matter of Brown, 38 Misc. (N. Y.) 157, 77 N. Y. Suppl. 261.

23. Norton *v.* Alexander, 28 Tex. Civ. App. 466, 67 S. W. 787; Hill *v.* Roach, 26 Tex. Civ. App. 75, 62 S. W. 959; Harding *v.* McLennan County Com'rs' Ct., 25 Tex. Civ. App. 25, 65 S. W. 56.

24. Woodard *v.* State, 103 Ga. 496, 30 S. E. 522; State *v.* Cooper, 101 N. C. 684, 8 S. E.

presumed to have been regular and valid, and the party attacking it must assume the burden of proof.[25]

6. Determination and Declaration of Result — a. Canvassing Votes. It is essential to the validity of an election under the local option law that there should be at least a substantial compliance with the statutory directions as to canvassing the votes and as to the officers who are to perform that duty.[26] But the election is not vitiated by minor irregularities, such as the fact that an officer who had no right to take part in the canvass of votes was present at it and signed the statement in regard to it, where he did not actually participate in the counting of the votes.[27] And it is held that a canvassing board cannot be ordered to reconvene and recanvass the votes cast at the election, and reject for irregularities the returns from certain districts, unless they were wholly void.[28]

b. Majority Required. A tie vote, at a local option election, will not cause a change of the existing law;[29] that can be accomplished only by a majority vote,[30] after excluding ballots too informal or irregular to be counted.[31] Whether the majority required is a majority of the registered voters of the county or township, or a majority of those actually voting at the election, will depend upon the language of the statute.[32]

c. Certifying and Recording Result. Local option statutes commonly provide that a certified statement of the result of the election, prepared by the officers charged with the conduct of the election, or by the canvassing board, shall be filed in the local court, or with the officers having charge of the grant of licenses.[33]

134; State *v.* Emery, 98 N. C. 768, 3 S. E. 810.

25. Norman *v.* Thompson, 96 Tex. 250, 72 S. W. 62; *Ex p.* Douthitt, (Tex. Cr. App. 1901) 63 S. W. 131; Bowman *v.* State, 38 Tex. Cr. 14, 40 S. W. 796, 41 S. W. 635; Curry *v.* State, 28 Tex. App. 475, 13 S. W. 752. And see Young *v.* Com., 14 Bush (Ky.) 161; Com. *v.* Jones, 84 S. W. 305, 27 Ky. L. Rep. 16. *Compare* Anderson *v.* State, 39 Tex. Cr. 34, 44 S. W. 824.

In Florida, in prosecutions for offenses under the local option law, mere irregularities in the election are no defense, unless they show a want of authority to call the election, or that the canvass and the return were the result of fraud on the part of those canvassing and declaring the result. Barton *v.* State, 43 Fla. 477, 31 So. 361.

26. *Connecticut.*— State *v.* Bossa, 69 Conn. 335, 37 Atl. 977.

Florida.—Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183.

Mississippi.— Puckett *v.* State, 71 Miss. 192, 14 So. 452.

New York.— People *v.* Pierson, 64 N. Y. App. Div. 624, 72 N. Y. Suppl 1123 [*affirming* 35 Misc. 406, 71 N. Y. Suppl. 993].

Texas.— Burrell *v.* State, (Cr. App. 1901) 65 S. W. 914; Chapman *v.* State, 37 Tex. Cr. 167, 39 S. W. 113.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 43.

27. People *v.* Pierson, 35 Misc. (N. Y.) 406, 71 N. Y. Suppl. 993 [*affirmed* in 64 N. Y. App. Div. 624, 72 N. Y. Suppl. 1123].

28. People *v.* Pierson, 35 Misc. (N. Y.) 406, 71 N. Y. Suppl. 993 [*affirmed* in 64 N. Y. App. Div. 624, 72 N. Y. Suppl. 1123]. And see People *v.* Mosso, 30 Misc. (N. Y.) 164, 63 N. Y. Suppl. 588.

29. Temmick *v.* Owings, 70 Md. 246, 16 Atl. 719.

30. Siloam Springs *v.* Thompson, 41 Ark. 456, holding that where the statute provides that, if a majority of the votes cast in any county be not "for license," the county court cannot grant licenses, no license can be granted where there was no vote at all.

Mistake in order.— An order declaring the adoption of local option, which, through manifest inadvertence or a clerical error, shows that less than a majority of the votes cast were for prohibition, will not be invalidated thereby when, as a matter of fact, it is apparent from other parts of the same order that there was a majority for prohibition. *Ex p.* Burrage, 26 Tex. App. 35, 9 S. W. 72.

31. Prestwood *v.* Borland, 92 Ala. 599, 9 So. 223.

32. Jacoby *v.* Dallis, 115 Ga. 272, 41 S. E. 611; Chamlee *v.* Davis, 115 Ga. 266, 41 S. E. 691; Chalmers *v.* Funk, 76 Va. 717.

33. See the statutes of the different states. And see Com. *v.* Hoke, 14 Bush (Ky.) 668; Cress *v.* Com., 37 S. W. 493, 18 Ky. L. Rep. 633; Giddings *v.* Wells, 99 Mich. 221, 58 N. W. 64; *In re* Rothwell, 44 Mo. App. 215; People *v.* Adair, 44 Misc. (N. Y.) 444, 89 N. Y. Suppl. 376; Matter of Brown, 38 Misc. (N. Y.) 157, 77 N. Y. Suppl. 261; People *v.* Foster, 27 Misc. (N. Y.) 576, 58 N. Y. Suppl. 574; People *v.* Hamilton, 27 Misc. (N. Y.) 308, 360, 58 N. Y. Suppl. 584, 959; Hunter *v.* Senn, 61 S. C. 44, 39 S. E. 235.

By whom made.— The certificate may be made by a majority of the board of officers charged with its preparation. Fullwood *v.* State, 67 Miss. 554, 7 So. 432.

Presumption as to place of election.— The certificate need not show that the election was

The requirement of the statutes that the result of the election shall be recorded is imperative as to the fact of recording, but directory merely as to the time of making the record, the only essential being that the record shall have been made before proceedings are taken under the law.[34]

d. Order Declaring Result. Where the statute requires the local court to make and promulgate an order declaring the result of a local option election and putting the law in force if adopted by the voters, an order duly made in conformity thereto is presumptive evidence of the regularity and legality of the election and that the law was duly adopted and is in force.[35] It need not be in the precise words and form prescribed by the statute, a substantial compliance being sufficient,[36] and it is not vitiated by mere clerical errors, not affecting its substance,[37] nor by failure of the court to make the order at the precise time indicated.[38]

7. Publication of Result — a. Necessity For Publication. If the local option law makes no provision as to how the result of the election shall be announced, a verbal proclamation by the clerk at the court-house door will be sufficient.[39] But as a rule it is required that the result shall be published in all the newspapers in the district, or in certain designated papers; and such publication is a condition precedent to the taking effect of the law.[40] Under a statute requiring the result

held at the place fixed by law, as that will be presumed. Puckett *v.* State, 71 Miss. 192, 14 So. 452.

34. Blackwell *v.* Com., 54 S. W. 843, 21 Ky. L. Rep. 1240; Puckett *v.* State, 71 Miss. 192, 14 So. 452; *Ex p.* Walton, 45 Tex. Cr. 74, 74 S. W. 314.

35. Sebastian *v.* State, 44 Tex. Cr. 508, 72 S. W. 849; Cooper *v.* State, (Tex. Cr. App. 1901) 65 S. W. 916; Chapman *v.* State, 37 Tex. Cr. 167, 39 S. W. 113; Bruce *v.* State, 36 Tex. Cr. 53, 35 S. W. 683; Irish *v.* State, 34 Tex. Cr. 130, 29 S. W. 778.

36. Chamlee *v.* Davis, 115 Ga. 266, 41 S. E. 691; James *v.* State, 21 Tex. App. 353, 17 S. W. 422.

Form and contents of order.— The order, putting prohibition into force, need not specifically mention the exceptional cases in which the law allows liquors to be sold (as, for sacramental and medicinal purposes), for the law ingrafts these exceptions on the order; and if it declares that the sale of liquor is prohibited "absolutely," the last word may be treated as surplusage. Racer *v.* State, (Tex. Cr. App. 1903) 73 S. W. 968; Truesdale *v.* State, 42 Tex. Cr. 544, 61 S. W. 935; Armstrong *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1006; Zollicoffer *v.* State, (Tex. Cr. App. 1897) 38 S. W. 775; Bruce *v.* State, 36 Tex. Cr. 53, 35 S. W. 383; *Ex p.* Perkins, 34 Tex. Cr. 429, 31 S. W. 175; Gilbert *v.* State, 32 Tex. Cr. 596, 25 S. W. 632; *Ex p.* Burrage, 26 Tex. App. 35, 9 S. W. 72. It should specify or describe the territory to be affected, but is not invalidated by trifling inaccuracies or misdescriptions, not amounting to a material variance, nor preventing the legal ascertainment of the bounds of such territory. Efird *v.* State, 44 Tex. Cr. 447, 71 S. W. 957; Goble *v.* State, (Tex. Cr. App. 1901) 60 S. W. 966; Loveless *v.* State, 40 Tex. Cr. 131, 49 S. W. 98; Bruce *v.* State, 36 Tex. Cr. 53, 35 S. W. 683. An order showing that an election was held for the entire county need not also show that there was an election held in each of the various election precincts of the county; nor need it set out the vote by precincts. Armstrong *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1006; Barker *v.* State, (Tex. Cr. App. 1898) 47 S. W. 980. Nor need it state the date for which the election was ordered. Winston *v.* State, 32 Tex. Cr. 59, 22 S. W. 138; McDaniel *v.* State, 32 Tex. Cr. 16, 21 S. W. 684, 23 S. W. 989. Nor is it void for failure to recite that the prohibitory law is to remain in force only until another election may declare otherwise. Armstrong *v.* State, *supra*.

37. Sinclair *v.* State, 45 Tex. Cr. 487, 77 S. W. 621; Barker *v.* State, (Tex. Cr. App. 1898) 47 S. W. 980; Winston *v.* State, 32 Tex. Cr. 59, 22 S. W. 138; Thomas *v.* Com., 90 Va. 92, 17 S. E. 788.

38. Loveless *v.* State, 40 Tex. Cr. 221, 49 S. W. 892; *Ex p.* Burge, 32 Tex. Cr. 459, 24 S. W. 289.

39. Mackin *v.* State, 62 Md. 244.

40. Toole *v.* State, 88 Ala. 158, 7 So. 42; Lyon *v.* State, 42 Tex. Cr. 506, 61 S. W. 125; Strickland *v.* State, (Tex. Cr. App. 1898) 47 S. W. 720; Phillips *v.* State, 23 Tex. App. 304, 4 S. W. 893.

Order for publication.— The order of the commissioners' court declaring the result of the election need not order the publication of the result, nor direct the county judge to publish it, since the law makes it incumbent on him to attend to the publication. Drechsel *v.* State, 35 Tex. Cr. 577, 34 S. W. 932.

Delay in publication.— A delay of three years and a half in publishing the result was held not unreasonable, to such an extent as to invalidate the election, where caused by the fact that the clerk of the court neglected to make the necessary canvass and certificate until compelled by mandamus. State *v.* Mackin, 51 Mo. App. 299.

of the election to be publicly announced by one of the judges at the close of the polls, it will be presumed, in the absence of evidence to the contrary, that the result was duly declared in conformity with the law.[41]

b. Sufficiency of Publication. Where the law requires the notice to be published in all the newspapers of the county, a notice which is not published in all of them is ineffectual; but where the proper notice is published as soon as the invalidity of the former has been determined, the law will take effect after such second publication.[42] Where the statute requires the publication to be made in a paper to be designated by the local authorities, this provision must be strictly observed.[43] And where it is provided that the publication shall be had for four successive weeks, the law intends that the notice shall be published for four full consecutive weeks, or twenty-eight days, from the day of its first publication.[44] Where the direction of the statute is that the municipal body ordering the election shall publish the result, a notice signed by the mayor of a city, in compliance with an ordinance, will be sufficient.[45]

c. Proof of Publication. Where the statute requires the local judge to make a certificate of the fact of publication of the notice, and to enter the same on the minutes or records of the court, such entry is *prima facie* proof that the publication was duly made in compliance with the law.[46] But where the statute does not provide for the manner in which the publication shall be proved, oral testimony of the publisher of the paper in which the notice was printed is competent and sufficient.[47]

C. Repeal of Local Option — 1. By Subsequent Statute. A local option law, in force throughout the state or in certain districts only, is repealed and annulled by a subsequent general statute enacting a different system for the regulation of liquor selling,[48] or, as to a municipality, by the grant of a new charter authorizing the issue of licenses,[49] except in so far as the provisions of the new law may be consistent with the continued operation of the local option law,[50] or unless the new statute saves to the people of districts where local option is in force the right to vote on its continuance or repeal.[51]

2. Submission of Question of Repeal. Where constitutions or statutes authorize the people of a district which has adopted the local option law to hold another election, on the question of repealing the law or continuing it in force,[52] but only

41. Puckett *v.* Snider, 61 S. W. 277, 22 Ky. L. Rep. 1718.

42. Olmstead *v.* Crook, 89 Ala. 228, 7 So. 776. And see Wright *v.* State, 36 Tex. Cr. 35, 35 S. W. 287.

43. Moran *v.* Darby, 97 Mich. 186, 56 N. W. 347. *Compare* Sinclair *v.* State, 45 Tex. Cr. 487, 77 S. W. 621.

44. Phillips *v.* State, 23 Tex. App. 304, 4 S. W. 893. And see *Ex p.* Sullivan, (Tex. Cr. App. 1903) 75 S. W. 790; Lively *v.* State, (Tex. Cr. App. 1903) 72 S. W. 393; Lambert *v.* State, 37 Tex. Cr. 232, 39 S. W. 299.

Interrupted publication.— A break in the continuity of the publication, caused by injunction proceedings, which are thereafter dissolved, will not defeat the election. *Ex p.* Brown, 35 Tex. Cr. 443, 34 S. W. 131; McDaniel *v.* State, 32 Tex. Cr. 16, 21 S. W. 684, 23 S. W. 989.

45. State *v.* Dugan, 110 Mo. 138, 19 S. W. 195.

46. Nelson *v.* State, (Tex. Cr. App. 1902) 75 S. W. 502; Lively *v.* State, (Tex. Cr. App. 1903) 72 S. W. 393; Skipwith *v.* State, (Tex. Cr. App. 1902) 68 S. W. 278; Casey *v.* State, (Tex. Cr. App. 1900) 59 S. W. 884; Barham *v.* State, 41 Tex Cr. 188, 53 S. W. 109; Loveless *v.* State, 40 Tex. Cr. 221, 49 S. W. 892; Drechsel *v.* State, 35 Tex. Cr. 577, 34 S. W. 932.

47. State *v.* Dugan, 110 Mo. 138, 19 S. W. 195; State *v.* Baker, 36 Mo. App. 58; Ezzell *v.* State, 29 Tex. App. 521, 16 S. W. 782. *Compare* Armstrong *v.* State, (Tex. Cr. App. 1898) 47 S. W. 981.

48. Yunger *v.* State, 78 Md. 574, 28 Atl. 404; Kohlbrunner *v.* State, 67 Miss. 368, 7 So. 288. And see *In re* McGonnell, 24 Pa. Super. Ct. 642. *Compare Ex p.* Elliott, (Tex. Cr. 1903) 72 S. W. 837.

49. Tabor *v.* Lander, 94 Ky. 237, 21 S. W. 1056, 15 Ky. L. Rep. 8; Com. *v.* Lemon, 76 S. W. 40, 25 Ky. L. Rep. 522; Jett *v.* Com., 49 S. W. 786, 20 Ky. L. Rep. 1619; Com. *v.* Bogie, 1 S. W. 532, 8 Ky. L. Rep. 350.

50. Rush *v.* Com., 47 S. W. 586, 20 Ky. L. Rep. 775.

51. White *v.* Com., 50 S. W. 678, 20 Ky. L. Rep. 1942.

52. A constitutional provision directing the legislature to enact a local option law to be voted on "from time to time" by the people of counties, towns, cities, and certain

after a certain interval of time, an election held before the expiration of that period is inoperative and void.[53] Moreover the requirement that the new election shall be called for by a petition of the electors of the district, signed as directed by the statute, is jurisdictional.[54] As to the form of question submitted at the new election, it is considered that a vote taken on the question whether liquor shall be sold in the district sufficiently complies with the statutory direction for taking a vote on the question whether or not the prohibitory liquor law "shall become inoperative."[55] Where the prohibitory law has been put in force in an entire county or other division of the state, it is generally held that a city or town therein cannot hold a separate election to repeal the law as to itself; that is, the election to repeal the law cannot be called for a territory forming only a part of that for which the first election was held.[56]

3. Operation and Effect of Repeal. The effect of a second election, resulting in favor of allowing the sale of liquors within the district affected, is to abrogate, or at least suspend, the prohibitory law therein, and renew the force of such laws as were effective upon the subject before the adoption of local option.[57] But the rejection of the local option proposition, by a vote of the people, at a second election, is not considered to be technically such a "repeal" of the prohibitory law as will save previous offenders from punishment. Hence one who has committed a criminal offense under the prohibitory law, while it was in force, may be indicted and punished therefor after the new election which results in its rejection.[58]

VI. LICENSES AND TAXES.

A. Nature and Effect of License — 1. Definition of License.[59] A liquor license is a formal grant of permission or authority from the government or a state or municipality acting through its appointed agents to a selected individual, to engage in the sale, or manufacture for sale, of intoxicating liquors, that right

other named municipal subdivisions, and guaranteeing to voters, should they adopt local option, the right to hold another election after the expiration of a certain time, constrains the legislature to preserve the autonomy of the localities named, in order that the right to vote again upon the question may be conserved. *Ex p.* Wells, (Tex. Cr. App. 1904) 78 S. W. 928; *Ex p.* Heyman, 45 Tex. Cr. 532, 78 S. W. 349.

53. Savage *v.* Wolfe, 69 Ala. 569; Dawson *v.* State, 25 Tex. App. 670, 8 S. W. 820.

54. Wyatt *v.* Ryan, 113 Ky. 306, 68 S. W. 134, 24 Ky. L. Rep. 228; McMullen *v.* Berean, 29 Misc. (N. Y.) 443, 60 N. Y. Suppl. 578. See McNeely *v.* Morganton, 125 N. C. 375, 34 S. E. 510. *Compare* Matter of Bertrend, 40 Misc. (N. Y.) 536, 82 N. Y. Suppl. 940.

55. Taylor *v.* Com., 59 S. W. 482, 22 Ky. L. Rep. 1003.

56. Caldwell *v.* Grider, 88 Ala. 421, 7 So. 203; Thompson *v.* Com., 103 Ky. 689, 45 S. W. 1039, 46 S. W. 492, 698, 20 Ky. L. Rep. 397; Com. *v.* King, 86 Ky. 436, 6 S. W. 124, 9 Ky. L. Rep. 653; Tousey *v.* Stites, 66 S. W. 277, 23 Ky. L. Rep. 1738; *Ex p.* Elliott, (Tex. Cr. App. 1903) 72 S. W. 837; Adams *v.* Kelley, 17 Tex. Civ. App. 479, 44 S. W. 529. *Compare* Com. *v.* Bottoms, 50 S. W. 684, 20 Ky. L. Rep. 1929; Woodlief *v.* State, 21 Tex. App. 412, 2 S. W. 812; Whisenhunt *v.* State, 18 Tex. App. 491.

In Louisiana, where the prohibitory law has been adopted by a parish, a town situated therein may hold an election and decide in favor of the sale of liquors within its own limits, after twelve months have elapsed from the time of the parish election, but not before. De Soto Parish Police Jury *v.* Mansfield, 49 La. Ann. 796, 21 So. 598; Natchitoches Parish *v.* Natchitoches Parish, 49 La. Ann. 641, 21 So. 742.

57. George *v.* Winchester, 80 S. W. 1158, 26 Ky. L. Rep. 170; People *v.* Brush, 41 Misc. (N. Y.) 56, 83 N. Y. Suppl. 607 [*affirmed* in 92 N. Y. App. Div. 611, 86 N. Y. Suppl. 1144]; State *v.* Harvey, 11 Tex. Civ. App. 691, 33 S. W. 885; Thomas *v.* Com., 90 Va. 92, 17 S. E. 788. *Compare* State *v.* Fulkerson, 73 Ark. 163, 83 S. W. 934, 86 S. W. 817.

58. Com. *v.* Overby, 107 Ky. 169, 53 S. W. 36, 21 Ky. L. Rep. 843; Com. *v.* Hoke, 14 Bush (Ky.) 668. *Contra*, State *v.* Patrick, 2 Mo. App. Rep. 1149.

In Texas this rule is expressly enacted by statute. Tex. Pen. Code, art. 378*e*. And see Woods *v.* State, (Tex. Cr. App. 1903) 75 S. W. 37; Ezzell *v.* State, 29 Tex. App. 521, 16 S. W. 782. Earlier decisions, holding that prosecutions could not be had after the rejection of the law at the second election, are now inapplicable. See Dawson *v.* State, 25 Tex. App. 670, 8 S. W. 820; Wells *v.* State, 24 Tex. App. 230, 5 S. W. 830; Prather *v.* State, 14 Tex. App. 453; Freese *v.* State, 14 Tex. App. 31; Fitze *v.* State, 13 Tex. App. 372; Monroe *v.* State, 8 Tex. App. 343; Halfin *v.* State, 5 Tex. App. 212.

59. See, generally, Licenses.

being at the same time denied to the general public, and which exempts him from responsibility for certain acts incident to the business which, if done by unlicensed persons, are criminal offenses.[60]

2. Power and Authority to Grant Licenses — a. Statutory Authority in General. If there were no statutes prohibiting or restricting the sale of liquors, no license would be required, for any person might lawfully engage in the business; but on the other hand, where such statutes exist, licenses cannot be granted except on the authority of some statute, valid and operative in the particular community.[61] The enactment of a general license law, if intended to regulate the entire subject of the traffic in liquors, will by necessary implication repeal previously existing laws prohibiting such traffic,[62] and may repeal prohibitory laws locally in force in particular communities or parts of the state, and authorize them to grant licenses, if clearly so intended or specially made applicable to them,[63] although otherwise the rule should be applied that a general law cannot by implication repeal a local statute.[64]

b. Municipal Ordinances. The power and authority to grant licenses for the sale of liquors may be confided by the legislature to the several municipal corporations of the state.[65] And the enactment of an ordinance providing for the grant of licenses is a legislative function not a judicial act.[66] But authority thus delegated to the municipalities is a dormant power, and affords no authority to

60. "Three leading ideas are involved in the definition of a license under the liquor laws. First, it confers a special privilege or franchise, upon selected persons, to pursue a calling not open to all. Second, it legalizes acts which, if done without its protection, would be offenses against the statute. Third, it is a privilege granted as part of a system of police regulation, and herein is distinguishable from taxation." Black Intox. Liq. § 117.

License-tax distinguished.— The exaction of a fee for the privilege of obtaining a liquor license is an exercise of the police power of the state for the protection of the public welfare, and not an exercise of the power to levy taxation for the purpose of raising revenue. Lovingston *v.* Board of Trustees, 99 Ill. 564; Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; People *v.* Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344; Aulanier *v.* Governor, 1 Tex. 653; Rock County *v.* Edgerton, 90 Wis. 288, 63 N. W. 291. And see *supra*, IV, D. 1.

License as franchise.— In the case of New York *v.* Mason, 4 E. D. Smith (N. Y.) 142, it is said that the right to sell spirituous liquors, which, in the absence of any statutory provision, might be exercised by any one, has by statute been converted into a franchise, and can be exercised only by those who have actually obtained a license. But *compare* Carbondale *v.* Wade, 106 Ill. App. 654, where it is held that a license to sell intoxicating liquors, although legally issued, is not a franchise.

61. *Arkansas.*— Erb *v.* State, 35 Ark. 631.

Florida.— Strickland *v.* Knight, 47 Fla. 327, 36 So. 363.

Illinois.— Sullivan *v.* People, 15 Ill. 233.

Indiana.— Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424; Maize *v.* State, 4 Ind. 342. And see Deutschman *v.* Charlestown, 40 Ind. 449.

New Jersey.— Conover *v.* Gregson, (1905) 60 Atl. 31.

West Virginia.— Ward *v.* Taylor County Ct., 51 W. Va. 102, 41 S. E. 154.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 47.

Construction of license laws.— In respect to the authority to grant licenses and the proceedings to obtain them, the laws regulating the subject, being for the protection of the public and the promotion of important public interests, are to be strictly construed. *In re* Hoyniak License, 9 Kulp (Pa.) 368.

A statute fixing the amount of the tax to be collected for licenses to sell liquor does not authorize the granting of such licenses where not otherwise allowed by law. Hodges *v.* Metcalfe County Ct., 117 Ky. 619, 78 S. W. 177, 460, 25 Ky. L. Rep. 1706.

62. Cullen *v.* State, 42 Conn. 55; State *v.* Spokane Falls, 2 Wash. 40, 25 Pac. 903. And see Pursifull *v.* Com., 47 S. W. 772, 20 Ky. L. Rep. 863.

Whether the penalties denounced by the former law will be abrogated or not will depend upon whether they are consistent with those prescribed by the new act, or are duplicated therein, or may be regarded as cumulative. State *v.* Sutton, 100 N. C. 474, 6 S. E. 687.

63. Brown *v.* Com., 98 Ky. 652, 34 S. W. 12, 17 Ky. L. Rep. 1216; Sharon Borough *v.* Mercer County, 20 Pa. Co. Ct. 507; Barringer *v.* Florence, 41 S. C. 501, 19 S. E. 745.

64. Murdock's Petition, 149 Pa. St. 341, 24 Atl. 222. And see People *v.* Townsey, 5 Den. (N. Y.) 70.

65. See Parsons *v.* People, 32 Colo. 221, 76 Pac. 666; New Iberia *v.* Moss Hotel Co., 113 La. 1022, 37 So. 913; Licks *v.* State, 42 Miss. 316. And see *supra*, III, D, 1.

66. Harvey *v.* Dean, 62 Ill. App. 41.

issue licenses until it is called into life and put into operation by appropriate legislation by the municipal authorities.[67] The power to enact a licensing ordinance includes the power to make reasonable and proper regulations, and to impose reasonable conditions as to the localities or parts of the municipality where saloons may be established,[68] or as to the necessity of obtaining the consent of adjoining property-owners;[69] to fix the amount of the fee or tax to be paid, provided it is not so unreasonably high as to be prohibitive,[70] and to prescribe penalties for sales by unlicensed dealers.[71] But the ordinance must be a complete and certain enactment,[72] not in excess of the powers specifically granted to the municipality by the statute,[73] and not in conflict with the general laws of the state,[74] although an ordinance which contains invalid provisions is not to be accounted wholly void, if enough remains, after eliminating the invalid portions, to constitute a complete and effectual enactment.[75]

c. Boards or Officers Authorized. The authority and duty to grant liquor licenses, whether on behalf of the state or of a municipality, is intrusted by law to certain designated officers or boards of officers.[76] And it is a general rule that whatever court, officer, or board is invested with this power by the statute pos-

67. People *v.* Mount, 87 Ill. App. 194 [*affirmed* in 186 Ill. 560, 58 N. E. 360]; Ellis *v.* Burlington Excise Com'rs, 59 N. J. L. 151, 35 Atl. 795.

Form of enactment.— Whether the action of the municipality in this behalf may be taken by ordinance, by resolution, or by popular vote depends on the language of the applicable statute. See People *v.* Mount, 186 Ill. 560, 58 N. E. 360; Backhaus *v.* People, 87 Ill. App. 173; Seattle *v.* Clark, 28 Wash. 717, 69 Pac. 407.

Annual ordinance.— A city is not required, in the absence of charter or statutory provisions, to levy its license-taxes on sales of intoxicating liquor by annual ordinance, but has power to enact a general ordinance of this character, to remain in force until superseded or repealed in some legal manner. Canova *v.* Williams, 41 Fla. 509, 27 So. 30.

Authority of officers to enact.— In an action by a town to recover a liquor license fee, defendant cannot question the right of *de facto* township trustees who passed the ordinance to exercise their office. Redden *v.* Covington, 29 Ind. 118.

68. *Illinois.*— Martens *v.* People, 186 Ill. 314, 57 N. E. 871; Swift *v.* Klein, 163 Ill. 269, 45 N. E. 219.

Indiana.— Rowland *v.* Greencastle, 157 Ind. 591, 62 N. E. 474.

Michigan.— People *v.* Blom, 120 Mich. 45, 78 N. W. 1015.

Minnesota.— State *v.* Scatena, 84 Minn. 281, 87 N. W. 764.

Wyoming.— State *v.* Cheyenne, 7 Wyo. 417, 52 Pac. 975, 40 L. R. A. 71.

Discrimination.— In an ordinance of a municipality fixing saloon licenses, a discrimination between those doing business in incorporated cities and those without their limits is not invalid. *Ex p.* Stephen, 114 Cal. 278, 46 Pac. 86. And see *supra*, III, D, 3, c, (II), (C).

69. Martens *v.* People, 186 Ill. 314, 57 N. E. 871; Kansas City *v.* Flanders, 71 Mo. 281.

70. Wallace *v.* Cubanola, 70 Ark. 395, 68 S. W. 485; People *v.* Blom, 120 Mich. 45, 78 N. W. 1015. And see *supra*, III, D, 3, c, (II), (B).

71. Wallace *v.* Cubanola, 70 Ark. 395, 63 S. W. 485; Sweet *v.* Wabash, 41 Ind. 7; Stokes *v.* Schlacter, 66 N. J. L. 247, 49 Atl. 556.

72. People *v.* Mount, 186 Ill. 560, 58 N. E. 360. And see Holton *v.* Bimrod, 8 Kan. App. 265, 55 Pac. 505; Wolf *v.* Lansing, 53 Mich. 367, 19 N. W. 38.

73. Copeland *v.* Sheridan, 152 Ind. 157, 51 N. E. 474; Hamel *v.* St. Jean Deschaillons, 20 Quebec Super. Ct. 301.

Licensing separate sales.— Where the grant of authority to the municipality authorizes it to license the business of liquor selling, it is the business or traffic in liquors which is the only proper subject of a licensing ordinance, and a license-tax cannot be imposed on separate sales or separate acts of selling. Colusa County *v.* Seube, (Cal. 1898) 53 Pac. 654; San Luis Obispo County *v.* Greenberg, 120 Cal. 300, 52 Pac. 797; *Ex p.* Seube, 115 Cal. 629, 47 Pac. 596; *Ex p.* Mansfield, 106 Cal. 400, 39 Pac. 775.

74. *Ex p.* Sims, 40 Fla. 432, 25 So. 280; Petitfils *v.* Jeanerette, 52 La. Ann. 1005, 27 So. 358; State *v.* Priester, 43 Minn. 373, 45 N. W. 712. And see *supra*, III, D, 5.

75. *Arkansas.*— Wallace *v.* Cubanola, 70 Ark. 395, 68 S. W. 485.

Indiana.— Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706.

Louisiana.— Swords *v.* Daigle, 107 La. 510, 32 So. 94.

Nebraska.— State *v.* Hardy, 7 Nebr. 377.

Oregon.— Houck *v.* Ashland, 40 Oreg. 117, 66 Pac. 697.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 48.

76. Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284 (probate judge of a county); State *v.* Columbia, 17 S. C. 80 (city council); O'Driscoll *v.* Viard, 2 Bay (S. C.) 316 (clerk of the general sessions of the peace).

sesses it to the exclusion of all others,[77] and must exercise the authority personally, not being permitted in any circumstances to delegate it to any others.[78] Further the authority to grant licenses conferred by statute upon one board or officer may divest another of similar authority formerly possessed by him.[79] When the licensing authority consists of a board of officers, any statutory directions as to the majority required for the grant of a license, or as to the number of concurring votes, must be strictly observed.[80] A license issued by *de facto* officers is a sufficient protection to a person doing business under it.[81] In any case, however, the officer or board cannot exercise authority in regard to the grant of licenses without a statute or ordinance giving him the right to issue such licenses and prescribing the essential elements of the procedure to be followed,[82] or exceed the terms of the statute or ordinance in respect to the kinds of licenses to be issued,[83] although it is proper and permissible to invest him with a measure of discretion in passing upon applications for license, not amounting to an arbitrary power to grant or refuse.[84]

d. Repeal of License Laws. The repeal of a licensing statute, either directly or by implication from the enactment of an entirely different system for the regulation of the liquor traffic, takes away from all persons the right to apply for and obtain licenses, and from all municipal and other authorities the right to grant them.[85] And in this way particular municipalities may be deprived of the authority to issue licenses, previously granted to them by their charters or by special statutes.[86] But this is not the case where the new statute is intended only

77. *Georgia.*— Wiggins *v.* Varner, 67 Ga. 583.

Kentucky.— Schwearman *v.* Com., 99 Ky. 296, 33 S. W. 146, 18 Ky. L. Rep. 585.

New Jersey.— Cooke *v.* Mercer County Ct. C. Pl., 51 N. J. L. 85, 16 Atl. 176.

North Carolina.— State *v.* Voight, 90 N. C. 741.

Pennsylvania.— Zinner *v.* Com., (1888) 14 Atl. 431.

West Virginia.— Wilson *v.* Ross, 40 W. Va. 278, 21 S. E. 868.

78. Thorn *v.* Atlanta, 77 Ga. 661; Hennepin County *v.* Robinson, 16 Minn. 381; *In re* Krug, (Nebr. 1904) 101 N. W. 242; State *v.* Bayonne, 44 N. J. L. 114. *Compare In re* Bickerstaff, 70 Cal. 35, 11 Pac. 393.

79. See McCrea *v.* Billingslea, 89 Md. 767, 43 Atl. 42; Fitzgerald *v.* Hurley, 180 Mass. 151, 61 N. E. 815; State *v.* Pfeifer, 26 Minn. 175, 2 N. W. 474; *In re* Burgwyn, 133 N. C. 115, 45 S. E. 517.

80. Com. *v.* Moran, 148 Mass. 453, 19 N. E. 554; Orvis *v.* Thompson, 1 Johns. (N. Y.) 500.

81. Taber *v.* New Bedford, 177 Mass. 197, 58 N. E. 640; People *v.* McDowell, 70 Huu (N. Y.) 1, 23 N. Y. Suppl. 950; Montgomery *v.* O'Dell, 67 Hun (N. Y.) 169, 22 N. Y. Suppl. 412; Ward *v.* State, 2 Coldw. (Tenn.) 605, 91 Am. Dec. 270. But *compare* Cronin *v.* Stoddard, 97 N. Y. 271.

82. Backhaus *v.* People, 87 Ill. App. 173; State *v.* Andrews, 11 Nebr. 523, 10 N. W. 410; Houck *v.* Ashland, 40 Oreg. 117, 66 Pac. 697.

Unconstitutional statute.— Where a statute creating county boards of license commissioners is unconstitutional, the grant of a license by commissioners appointed thereunder is no defense to a prosecution for selling liquor without a license. Flaucher *v.* Camden, 56 N. J. L. 244, 28 Atl. 82.

83. State *v.* Turner, 5 Blackf. (Ind.) 253.

84. Thorn *v.* Atlanta, 77 Ga. 661; State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Pierce *v.* Com., 10 Bush (Ky.) 6. And see Deehan *v.* Johnson, 141 Mass. 23, 6 N. E. 240; State *v.* Dobson, 65 N. C. 346.

85. *Mississippi.*— Adams *v.* Fragiacomo, 71 Miss. 417, 15 So. 798; State *v.* B. & P. O. of E., 69 Miss. 895, 13 So. 255.

Ohio.— Hirn *v.* State, 1 Ohio St. 15.

Pennsylvania.— Com. *v.* Iron City Brewing Co., 146 Pa. St. 642, 23 Atl. 384; Altoona *v.* Stehle, 8 Pa. Dist. 25, 21 Pa. Co. Ct. 395.

Tennessee.— Dyer *v.* State, Meigs 237.

Texas.— State *v.* Robinson, 19 Tex. 478.

Washington.— Seattle *v.* Clark, 28 Wash. 717, 69 Pac. 407.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 47.

Effect of repeal.— The repeal of a licensing law does not give an unrestricted right to all persons to sell liquor; it either provides new penalties for unlawful sales, or revives the prohibitory and punitive features of the statutes formerly in force. Franklin *v.* Westfall, 27 Kan. 614; Com. *v.* Brennan, 103 Mass. 70.

86. *Dakota.*— Minnehaha County *v.* Champion, (1888) 37 N. W. 766.

Illinois.— People *v.* Thornton, 186 Ill. 162, 57 N. E. 841.

Iowa.— Burlington *v.* Kellar, 18 Iowa 59.

Kentucky.— Bergmeyer *v.* Greenup County, 44 S. W. 82, 19 Ky. L. Rep. 1599.

Mississippi.— Tupelo *v.* Beard, 56 Miss. 532.

North Carolina.— State *v.* Monger, 111 N. C. 675, 16 S. E. 229.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 47.

as a modification of the existing law, as by imposing additional restrictions or conditions,[87] or where the absence of any necessary incongruity between the two acts, or the effect of exceptions or saving clauses, may leave the power of granting licenses untouched as to a particular municipal corporation,[88] or as to particular classes of dealers or kinds of sales.[89]

3. Form and Validity of License — a. Formal Requisites — (I) *In General.* A license for the sale of intoxicating liquor must be in writing and signed by the officer or officers having authority to grant it.[90]

(II) *Recitals.* The license should recite such facts as will show with reasonable certainty the name of the licensee, the place of sale, the class of license, the kind of liquor permitted to be sold, and the authority granting it, together with any special recitals directed by the statute to be incorporated.[91]

(III) *Designation of Place of Sale.* Usually a license must designate the place where the licensed business is to be carried on, including, in some states, not only the street or part of a city where the licensee proposes to establish himself, but identifying the particular house,[92] and sometimes even the particular room or rooms in the house.[93]

b. Not Created by Parol or Implication. The law intending that licenses shall be in writing, a verbal permission, even from the officer authorized to grant licenses, and upon performance of all the requisite conditions, is not equivalent to a license.[94] Nor can any license be created, or the necessity of obtaining it be dispensed with, by mere inference or implication from the statute.[95]

c. Validity of License in General.[96] A person is not protected from criminal

87. *Georgia.*— Sanders *v.* Butler, 30 Ga. 679.

Indiana.— Walter *v.* State, 105 Ind. 589, 5 N. E. 735; Cassett *v.* State, 9 Ind. 87.

Kentucky.— Adams *v.* Stephens, 88 Ky. 443, 11 S. W. 427, 10 Ky. L. Rep. 1031.

Louisiana.— State *v.* Prats, 10 La. Ann. 785.

Missouri.— *Ex p.* Hinkle, 104 Mo. App. 104, 78 S. W. 317.

North Carolina.— State *v.* Sutton, 100 N. C. 474, 6 S. E. 687.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 47.

88. Hart *v.* State, 88 Ga. 635, 15 S. E. 684; State *v.* Neeper, 3 Greene (Iowa) 337; Aberdeen *v.* Saunderson, 8 Sm. & M. (Miss.) 662; State *v.* Carter, 28 S. C. 1, 4 S. E. 790.

A local option law does not repeal the laws authorizing the grant of licenses from the date of its passage, but only from the time of its adoption by the particular municipality. Zarreseller *v.* People, 17 Ill. 101.

89. Chamberlain *v.* State, 50 Ark. 132, 6 S. W. 524; Brown *v.* State, 79 Ga. 473, 4 S. E. 256.

90. State *v.* Moore, 14 N. H. 451; Cronin *v.* Stoddard, 97 N. Y. 271.

Extension of license to new place.— A certificate, on a license, of leave to change the place of business must be authenticated in the same way as the original license, and by the signature of the same officers. Com. *v.* Merriam, 136 Mass. 433.

91. Murphy *v.* Nolan, 126 Mass. 542; Pope *v.* State, 2 Swan (Tenn.) 611. And see Townsend *v.* State, 2 Blackf. (Ind.) 151.

92. See the statutes of the different states. And see Com. *v.* Merriam, 136 Mass. 433; Green *v.* Southard, 94 Tex. 470, 61 S. W. 705.

In Mississippi a license to sell liquors is not void because it fails to specify the house where the liquors may be sold. Goforth *v.* State, 60 Miss. 756.

In North Carolina it is no objection to such a license that it does not specify the particular place in the town where the licensee may sell, although he cannot carry on his business at more than one place in the same town. State *v.* Gerhardt, 48 N. C. 178.

Dwelling-house.— Where the statute provides that no license shall be granted to be exercised in any dwelling-house, a license which shows, in its descriptive part, that the building is occupied partly as a dwelling-house is void. Com. *v.* McCormick, 150 Mass. 270, 22 N. E. 911.

93. See Com. *v.* Cauley, 150 Mass. 272, 22 N. E. 909. *Compare* Com. *v.* Stratton, 150 Mass. 188, 22 N. E. 893.

94. State *v.* Moore, 14 N. H. 451; Lawrence *v.* Gracy, 11 Johns. (N. Y.) 179. And see State *v.* Brady, 14 R. I. 508.

95. Moog *v.* Hannon, 93 Ala. 503, 9 So. 596; Com. *v.* Matthews, 129 Mass. 485; State *v.* Cofield, 22 S. C. 301 (holding that a law declaring that no license shall be granted outside of cities and towns, and that it shall be unlawful to sell without a license, does not imply that liquors may be sold in cities and towns without a license); State *v.* McBride, 4 McCord (S. C.) 332.

96. **Proceedings to test validity.**— An information in the nature of *a quo warranto* lies to determine the right of a person to keep a dram-shop under a license alleged to be invalid. Handy *v.* People, 29 Ill. App. 99.

Estoppel to dispute validity.— City authorities who have granted a liquor license, received the fee, approved the bond, and at-

prosecution by a license which is void on its face, as from an evident want of authority to issue it,[97] or where it is affirmatively shown to have been issued without compliance with the statutory requisites.[98] But a license is not invalidated by mere irregularities in the proceedings leading to its issue,[99] nor, it seems, by fraud, unless practised by the party to whom it is issued.[1]

d. Collateral Attack on License. A license which appears on its face to have been regularly and duly issued cannot be impeached collaterally, as, in an action on the bond, or a prosecution for illegal selling, on the ground that it was improperly granted. So long as it remains unrevoked and not appealed from, it must be regarded as a valid license.[2]

4. Nature of Rights Conferred by License. A license for the sale of liquor is not a contract between the state or municipality granting it and the person to whom it is issued, in any such sense as to be within the protection of constitutional guaranties.[3] It gives no vested rights, such as cannot be abridged or abrogated by the legislative authority in the interests of the public,[4] nor is it in itself property or a right of property, in the ordinary meaning of those terms.[5] Hence a

tempted to revoke the license are estopped from setting up informalities in its issue. Oshkosh *v.* State, 59 Wis. 425, 18 N. W. 324.

97. Beckham *v.* Howard, 83 Ga. 89, 9 S. E. 784; Com. *v.* McCormick, 150 Mass. 270, 22 N. E. 911; Com. *v.* Hayes, 149 Mass. 32, 20 N. E. 456; Com. *v.* Whelan, 134 Mass. 206; Raleigh *v.* Kane, 47 N. C. 293; State *v.* Moore, 46 N. C. 276.

98. Russell *v.* State, 77 Ala. 89; People *v.* Davis, 45 Barb. (N. Y.) 494.

99. Braconier *v.* Packard, 136 Mass. 50; Goff *v.* Fowler, 3 Pick. (Mass.) 300; Lydick *v.* Korner, 13 Nebr. 10, 12 N. W. 838; Montgomery *v.* O'Dell, 67 Hun (N. Y.) 169, 22 N. Y. Suppl. 412; Flint *v.* Rowell, 15 N. Y. St. 572.

1. Rex *v.* Minshull, 1 N. & M. 277, 28 E. C. L. 535.

2. *Illinois.*— Hanks *v.* People, 39 Ill. App. 223. And see Genoa *v.* Van Alstine, 108 Ill. 555.

Indiana.— Hornaday *v.* State, 43 Ind. 306.

Kentucky.— Com. *v.* Graves, 18 B. Mon. 33.

Massachusetts.— Goff *v.* Fowler, 3 Pick. 300.

Missouri.— State *v.* Evans, 83 Mo. 319.

Nebraska.— Thomas *v.* Hinkley, 19 Nebr. 324, 27 N. W. 231.

South Carolina.— Charleston *v.* Hollenback, 3 Strobh. 355.

Texas.— Castellano *v.* Marks, (Civ. App. 1904) 83 S. W. 729.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 84.

Compare State *v.* Pressman, 103 Iowa 449, 72 N. W. 660.

3. *Alabama.*— Powell *v.* State, 69 Ala. 10.

California.— Hevren *v.* Reed, 126 Cal. 219, 58 Pac. 536.

Colorado.— Huffsmith *v.* People, 8 Colo. 175, 6 Pac. 157, 54 Am. Rep. 550.

Connecticut.— La Croix *v.* Fairfield County, 49 Conn. 591.

Dakota.— Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577.

Georgia.— Brown *v.* State, 82 Ga. 224, 7 S. E. 915.

Indiana.— State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424; McKinney *v.* Salem, 77 Ind. 213. And see State *v.* Harrison, 162 Ind. 542, 70 N. E. 877.

Iowa.— Columbus City *v.* Cutcomp, 61 Iowa 672, 17 N. W. 47.

Kansas.— Prohibitory Amendment Cases, 24 Kan. 700.

Maryland.— Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83.

Massachusetts.— Com. *v.* Brennan, 103 Mass. 70; Calder *v.* Kurby, 5 Gray 597.

Mississippi.— Wheeler *v.* State, 64 Miss. 462, 1 So. 632; Hearn *v.* Brogan, 64 Miss. 334, 1 So. 246.

Missouri.— Higgins *v.* Talty, 157 Mo. 280, 57 S. W. 724; State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

New York.— Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657.

Oregon.— State *v.* Horton, 21 Oreg. 83, 27 Pac. 165.

Texas.— Rowland *v.* State, 12 Tex. App. 418.

United States.— Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989.

4. *Illinois.*— Schwuchow *v.* Chicago, 68 Ill. 444.

Iowa.— McConkie *v.* Remley, 119 Iowa 512, 93 N. W. 505; West *v.* Bishop, 110 Iowa 410, 81 N. W. 696; McCoy *v.* Clark, 104 Iowa 491, 73 N. W. 1050.

Maryland.— Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83.

Mississippi.— Trost *v.* State, 64 Miss. 188, 1 So. 49.

New York.— Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657.

5. *California.*— Hevren *v.* Reed, 126 Cal. 219, 58 Pac. 536.

Georgia.— Sprayberry *v.* Atlanta, 87 Ga. 120, 13 S. E. 197.

Iowa.— McCoy *v.* Clark, 104 Iowa 491, 73 N. W. 1050.

Missouri.— Higgins *v.* Talty, 157 Mo. 280, 57 S. W. 724. *Compare* State *v.* Baker, 32 Mo. App. 98.

New Jersey.— Voight *v.* Newark Excise

license is not capable of being the subject of a chattel mortgage,[6] nor can it be attached or levied on and sold under execution.[7] It is not assignable, unless by statute, and with the consent of the licensing authorities,[8] and does not pass to the executor or administrator of a deceased licensee as assets of his estate;[9] but if a license has an actual commercial value, and can be sold, the purchaser taking the chances of obtaining the consent of the proper authorities to its transfer, it may constitute an asset of the licensee's estate in bankruptcy.[10] It is in effect a mere permit, affording protection to the holder against legal animadversion for acts which without its sanction would be illegal and punishable,[11] and all its privileges, although yet unexpired, are canceled and revoked by the repeal of the law which authorized its grant.[12]

5. RETROACTIVE EFFECT OF LICENSE. A license takes effect from the day of its issue; it does not relate back to the date of the petition, or of the order granting permission to obtain it, or to the date when the statutory conditions were complied with, so as to condone offenses against the statute prior to its actual issue.[13] And a license cannot be antedated so as to cover offenses already committed.[14]

6. LIMITATION OF RIGHTS SECURED BY LICENSE — a. License Subject to Existing Laws. The privileges secured by a license do not include the right to disregard

Com'rs, 59 N. J. L. 358, 36 Atl. 686, 37 L. R. A. 292.

United States.— Kresser *v.* Lyman, 74 Fed. 765.

Liquor-tax certificates in New York.— Under the present statutes in New York a liquor-tax certificate differs materially from a license granted under the former laws. It is not regarded as a mere permit or privilege, but is a contract with the state, and is recognized as a species of property. It is consequently protected by the general rules of law relating to property and property rights, and those rules may be invoked in any proceeding for the forfeiture or revocation of the rights which the certificate confers. *In re* Lyman, 160 N. Y. 96, 54 N. E. 577; Matter of Cullinan, 82 N. Y. App. Div. 445, 81 N. Y. Suppl. 567; Hilliard *v.* Giese, 25 N. Y. App. Div. 222, 49 N. Y. Suppl. 286; Frank *v.* Forgotston, 30 Misc. 816, 61 N. Y. Suppl. 1118. But since the certificate is only made property by virtue of the statute, its character as property is subject to all the provisions attached to it in its creation, including the provisions of the act for the revocation and cancellation of such certificates without a jury trial; and the constitutional prohibition against the taking of property without due process of law does not apply. Matter of Livingston, 24 N. Y. App. Div. 51, 48 N. Y. Suppl. 989.

6. Feigenspan *v.* Mulligan, 63 N. J. Eq. 179, 51 Atl. 191; McNeeley *v.* Welz, 166 N. Y. 124, 59 N. E. 697. *Contra,* see Crowley *v.* Fenry, L. R. 22 Ir. 96; *In re* O'Brien, L. R. 11 Ir. 213.

7. McNeeley *v.* Welz, 20 N. Y. App. Div. 566, 47 N. Y. Suppl. 310; *In re* Ulrich, 6 Pa. Dist. 408. But see Quinnipiac Brewing Co. *v.* Hackbarth, 74 Conn. 332, 50 Atl. 1023.

8. See *infra,* VI, I, 1.

9. People *v.* Sykes, 96 Mich. 452, 56 N. W. 12; *In re* Grimm, 181 Pa. St. 233, 37 Atl. 403; *In re* Blumenthal, 125 Pa. St. 412, 18 Atl. 395; *In re* Keating, 25 Pittsb. Leg. J. (Pa.) 454; U. S. *v.* Overton, 27 Fed. Cas. No. 15,979, 2 Cranch C. C. 42. *Compare* Lennig's Estate, 6 Pa. Dist. 249; *In re* McOmber, 3 Pa. Dist. 431.

10. *In re* Gilmer, L. R. 17 Ir. 1; *Ex p.* Royle, 46 L. J. Bankr. 85, 25 Wkly. Rep. 560. And see BANKRUPTCY, 5 Cyc. 351.

11. Com. *v.* Luck, 2 B. Mon. (Ky.) 296.

12. Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481; State *v.* Holmes, 38 N. H. 225. And see *supra,* V, A, 5, b.

13. *Arkansas.*— Edwards *v.* State, 22 Ark. 253.

Georgia.— See Reese *v.* Atlanta, 63 Ga. 344.

Indiana.— Keiser *v.* State, 78 Ind. 430 [*overruling* State *v.* Wilcox, 66 Ind. 557; Vannoy *v.* State, 64 Ind. 447].

Massachusetts.— Com. *v.* Welch, 144 Mass. 356, 11 N. E. 423; Bolduc *v.* Randall, 107 Mass. 121.

Missouri.— State *v.* Hughes, 24 Mo. 147; State *v.* Brooks, 94 Mo. App. 57, 67 S. W. 942; State *v.* Totman, 82 Mo. App. 56.

New York.— Kingston *v.* Osterhoudt, 23 Hun 66.

South Carolina.— State *v.* Mancke, 18 S. C. 81; Charleston *v.* Feckman, 3 Rich. 385.

United States.— U. S. *v.* Angell, 11 Fed. 34.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 107.

Contra.— Brown *v.* State, 27 Tex. 335.

14. Wiles *v.* State, 33 Ind. 206; Com. *v.* Welch, 144 Mass. 356, 11 N. E. 423; Zeglin *v.* Carver County, 72 Minn. 17, 74 N. W. 901.

Release of penalties.— Where the penalty for illegal sales consists in a fine to be paid to the municipality, it is held that antedating a license will operate as a release of such penalties incurred before its actual issue. Charleston *v.* Corleis, 2 Bailey (S. C.) 186. But this rule does not apply where an action for the recovery of the

any valid law; they are such only as can be exercised in conformity with, and in subordination to, the laws already in force. Hence the license is always impliedly subject to such statutes, ordinances, and police regulations as are lawfully in existence at the time it is granted, without words in the license expressly referring to such laws.[15] Thus it will not protect the licensee in selling to prohibited persons, such as minors and drunkards,[16] or at prohibited times,[17] or in prohibited places.[18]

b. Effect of Subsequent Laws. A licensee takes his permit subject to the contingency that there may be changes in the laws, adopted in the exercise of the police power, which will render his privilege less valuable or his responsibilities greater; and the fact of his holding a valid license, or of his having paid money for it, does not exempt him from the operation of statutes or ordinances subsequently passed imposing additional burdens upon licensed dealers, or subjecting their business to new restrictions or limitations.[19]

c. Restriction as to Place of Sale. The privileges conferred by a liquor license are restricted to the particular place designated in the license.[20] When that place is a house or building particularly described, the license may cover all parts of such house or building, so as to justify sales made in any of its rooms or apartments, or in several parts of it concurrently;[21] but this is not true as to

penalty has already been commenced before the issue of the license. Charleston *v.* Schmidt, 11 Rich. (S. C.) 343.

15. Baldwin *v.* Smith, 82 Ill. 162; Schwuchow *v.* Chicago, 68 Ill. 444; Horning *v.* Wendell, 57 Ind. 171; O'Flinn *v.* State, 66 Miss. 7, 5 So. 390; Maxwell *v.* Jonesboro, 11 Heisk. (Tenn.) 257.

16. Hedges *v.* Titus, 47 Ind. 145; Com. *v.* Tabor, 138 Mass. 496.

17. State *v.* Ambs, 20 Mo. 214; Lambert *v.* State, 8 Mo. 492.

18. Barnes *v.* State, 49 Ala. 342; Wilson *v.* State, 35 Ark. 414; Endleman *v.* U. S., 86 Fed. 456, 30 C. C. A. 186; U. S. *v.* Ash, 75 Fed. 651.

19. *Arkansas.*— Viefhaus *v.* State, 71 Ark. 419, 75 S. W. 585.

Indiana.— Nelson *v.* State, 17 Ind. App. 403, 46 N. E. 941.

Iowa.— State *v.* Mullenhoff, 74 Iowa 271, 37 N. W. 329.

Louisiana.— State *v.* Isabel, 40 La. Ann. 340, 4 So. 1. See Mandeville *v.* Band, 111 La. 806, 35 So. 915.

Michigan.— Reithmiller *v.* People, 44 Mich. 280, 6 N. W. 667.

New York.— People *v.* City Prison, 6 N. Y. App. Div. 520, 39 N. Y. Suppl. 582.

Pennsylvania.— Com. *v.* Sellers, 130 Pa. St. 32, 18 Atl. 541, 542.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 104.

Contra.— See State *v.* Andrews, 26 Mo. 171; Hannibal *v.* Guyott, 18 Mo. 515.

Invalidating license.— Where an order prohibiting the sale of liquor within three miles of a certain church is vacated, and a saloon license issued within that limit, the subsequent setting aside of the revocation order, during the term, will invalidate the license. State *v.* Doss, 70 Ark. 312, 67 S. W. 867.

Increasing license-fee.— It has been held that, after a license has been issued and paid for, municipal authorities cannot impose an additional tax on the licensee, or raise the license-fee for the unexpired term. Rome *v.* Lumpkin, 5 Ga. 447. *Contra,* Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424.

In Georgia it is held that a municipal corporation, having granted a license and received and retained the fee therefor, cannot by subsequent ordinance restrict the rights of the licensee with respect to the times when he is permitted to sell. Gilham *v.* Wells, 64 Ga. 192. *Compare* Cuthbert *v.* Conly, 32 Ga. 211.

20. *Alaska.*— U. S. *v.* Powers, 1 Alaska 180.

Delaware.— State *v.* Prettyman, 3 Harr. 570.

Maine.— State *v.* Walker, 16 Me. 241.

Missouri.— State *v.* Hughes, 24 Mo. 147.

New Hampshire.— Wason *v.* Severance, 2 N. H. 501.

New York.— People *v.* Davis, 45 Barb. 494.

Pennsylvania.— Zinner *v.* Com., (1888) 14 Atl. 431.

Texas.— Travis *v.* State, 37 Tex. Cr. 486, 36 S. W. 589; Pearce *v.* State, 35 Tex. Cr. 150, 32 S. W. 697.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 103.

Distiller's license.— In Pennsylvania nothing in the statutes relating to distillers' licenses limits the right to sell anywhere in the county. Britton *v.* Com., 105 Pa. St. 311.

Peddling.— A license to sell liquor at a designated building will not justify the licensee in peddling liquors with a team from house to house. Teoli *v.* Nardolillo, 23 R. I. 87, 49 Atl. 489.

21. St. Louis *v.* Gerardi, 90 Mo. 640, 3 S. W. 408. And see Hochstadler *v.* State, 73 Ala. 24; State *v.* Moody, 95 N. C. 656; Horan *v.* Travis County, 27 Tex. 226. But *compare* Thomas *v.* Arie, 122 Iowa 538, 98 N. W. 380.

detached buildings or additions, although these may be in a general sense parts of the same premises.[22]

d. As to Character or Quantity of Sales. A license to sell liquor for certain purposes therein specified, or in certain quantities, or restricted to certain kinds of liquor, cannot protect the licensee from prosecution for violating the laws of the state by sales made in excess of the permission which it grants, or contrary to its terms.[23]

e. Conditions Imposed on Licensee. The legislature of a state has full power to impose such conditions upon those licensed to sell liquor as may be deemed proper and requisite for the good of the community.[24] Such are the restrictions as to the persons to whom sales may be made, the days and hours for closing, the requirement that the license shall be conspicuously displayed in the saloon,[25] and the "screen law."[26] But the licensing authorities have no power to insert in a license any restriction, limitation, or condition which would be repugnant to the existing statutes, or in excess of the conditions which they impose.[27]

7. Duration of License. The time during which a license shall continue in

Whether two rooms in the same house, in which it is proposed to sell liquor, are in truth two distinct places, so that the applicant may be required to take out two licenses, is a question of fact; and the judgment of the licensing authorities, holding that they are distinct places, will not be disturbed on appeal, if the evidence justifies, although it may not require, that conclusion. Sanders *v.* Elberton, 50 Ga. 178.

22. *Kentucky.*— Com. *v.* Holland, 104 Ky. 323, 47 S. W. 216, 20 Ky. L. Rep. 581. *Compare* Crass *v.* Com., 56 S. W. 981, 22 Ky. L. Rep. 261.

Massachusetts.— Com. *v.* Estabrook, 10 Pick. 293.

Missouri.— State *v.* Fredericks, 16 Mo. 382.

New York.— *In re* Flanagan, 49 N. Y. App. Div. 99, 63 N. Y. Suppl. 531.

Canada.— Reg. *v.* Palmer, 46 U. C. Q. B. 262.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 103.

23. State *v.* Adams, 20 Iowa 486; Curd *v.* Com., 14 B. Mon. (Ky.) 386; Matter of Barnard, 48 N. Y. App. Div. 423, 63 N. Y. Suppl. 255.

Wholesale license does not protect licensee in selling by the small measure. Hainline *v.* Com., 13 Bush (Ky.) 350; Com. *v.* Donahue, 149 Pa. St. 104, 24 Atl. 188.

A license to sell "bottled goods" will not justify the keeping of beer on tap, to be drawn into the pitchers and other open vessels of customers, although sales be not made in less quantities than a quart. Harris *v.* People, 1 Colo. App. 289, 28 Pac. 1133.

Kinds of liquors.— Where licenses may be granted to sell fermented liquors only, such as wine, beer, and ale, a person holding such a license is not protected by it in making sales of spirituous or distilled liquors. Com. *v.* Jordan, 18 Pick. (Mass.) 228; Com. *v.* Markoe, 17 Pick. (Mass.) 465.

"On" and "off" licenses.— Where different kinds of licenses are granted for selling liquor to be drunk on the premises and selling for consumption off the premises, the latter imposes a limitation on the licensee, disregard of which will lay him open to prosecution. Com. *v.* Frost, 155 Mass. 273, 34 N. E. 334; Com. *v.* Mandeville, 142 Mass. 469, 8 N. E. 327; People *v.* Smith, 69 N. Y. 175.

Distillers.— One holding a distiller's license is not limited to sales to other dealers, but may sell to any one, provided he sells in quantities not less than one gallon. *In re* Lauck, 2 Pa. Super. Ct. 53.

Kind of business.— Under the liquor-tax law in New York, the kind of business to be carried on, to which a liquor-tax certificate applies, is to be determined by the application, it being held that the statement and the certificate are to be interpreted together. Matter of Ryon, 85 N. Y. App. Div. 621, 83 N. Y. Suppl. 123.

24. Lodano *v.* State, 25 Ala. 64. See also Hoboken *v.* Greiner, 68 N. J. L. 592, 53 Atl. 693. And see *supra*, IV, E, 2, 3.

25. Bell *v.* State, 28 Tex. App. 96, 12 S. W. 410; *Ex p.* Bell, 24 Tex. App. 428, 6 S. W. 197.

26. See *supra*, IV, E, 3, d; *infra*, VII, B, 10.

27. *In re* Mercersburg, 17 Pa. Co. Ct. 309; Reg. *v.* Mann, L. R. 8 Q. B. 235, 42 L. J. M. C. 35, 27 L. T. Rep. N. S. 847, 21 Wkly. Rep. 329; Reg. *v.* Wilkinson, 10 L. T. Rep. N. S. 370. *Compare In re* Indiana County, 6 Pa. Dist. 358; *In re* Gerstlauer, 5 Pa. Dist. 97; Seattle *v.* Clark, 28 Wash. 717, 69 Pac. 407; Matter of Greystock, 12 U. C. Q. B. 458.

A clause inserted in the licenses of hotelkeepers absolutely prohibiting the sale of liquor on certain days named (on which days, by the statute, sales would not be unlawful) is unauthorized and nugatory. *In re* Breslin, 45 Hun (N. Y.) 210.

A provision in a druggist's license, forbidding the sale of liquors to be drunk on the premises, is proper and valid, where the law makes a distinction, in respect to the fee charged, between licenses to druggists and to retail dealers. Spake *v.* People, 89 Ill. 617.

force is usually fixed by the statute, either at one year from its date or until the end of the current excise year.[28] Whatever be the term fixed by the statute, the local authorities have no power to grant a license for any other period, whether shorter or longer.[29] A licensee who sells or offers to sell after his license expires, and without procuring its renewal, is liable to prosecution.[30] But where a statute repealing or changing the license laws contains a saving of the rights of existing licensees, they will be permitted to continue their traffic until the expiration of the period for which their licenses were granted.[31]

8. PERSONS PROTECTED BY LICENSE — a. Principal and Agent. A licensed vendor of intoxicating liquors may employ an agent to carry on his business, and the agent will be under the protection of the license.[32] But where it is apparent that a pretended appointment of a person as a liquor seller's agent was in reality intended as a sale or transfer of the privilege granted by the license, it will be ineffectual, and the license will afford the pretended agent no protection.[33] And the removal of the licensee from the state, whereby he loses the required qualification of residence, will forfeit his rights under the license, so that he cannot thereafter continue the business by means of an agent.[34]

b. Servants. One who acts as the servant of a licensed dealer, in the sale of liquors, is not required to take out a license in his own name; the master's license protects the servant, provided he keeps within the law and makes no unlawful sales.[35]

c. Partners. A license granted to an individual, who is then a member of a firm, or who afterward associates a partner with him in the business, will confer

28. See the statutes of the different states. And see State *v.* Sumter County, 22 Fla. 1; Brown *v.* Lutz, 36 Nebr. 527, 54 N. W. 860; Disbrow *v.* Saunders, 1 Den. (N. Y.) 149.

29. Gurley *v.* State, 65 Ga. 157; State *v.* Simmons, 21 Kan. 685; State *v.* Moore, 84 Mo. App. 11; People *v.* Gainey, 8 Hun (N. Y.) 60.

Term of commissioners.— It is not necessary that the time covered by a license should begin and terminate with the term of office of the licensing commissioners who grant the license; they may grant a license to extend beyond their term of office, provided it does not exceed the statutory period, and does not begin to take effect after their term of office has expired. Hendersonville *v.* Price, 96 N. C. 423, 2 S. E. 155.

In New Hampshire, under the early statutes, it was held that the selectmen of towns might grant a license to keep a tavern for one particular day. Wason *v.* Severance, 2 N. H. 501.

30. U. S. *v.* Angell, 11 Fed. 34.

In Maryland a statute permits a trader, closing his business after the expiration of his license, to sell his old stock of liquors without renewing his license. But this does not authorize him to sell the same in small quantities at retail, and the fact that he sold at cost and under the advice of counsel is immaterial. Forwood *v.* State, 49 Md. 531.

31. *District of Columbia.*— Bush *v.* District of Columbia, 1 App. Cas. 1.

Indiana.— Lehritter *v.* State, 42 Ind. 482.

Kentucky.— Watts *v.* Com., 78 Ky. 329.

Missouri.— State *v.* Andrews, 28 Mo. 14.

New Hampshire.— Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376.

New York.— Matter of Hilliard, 25 N. Y. App. Div. 222, 49 N. Y. Suppl. 286.

32. State *v.* Keith, 37 Ark. 96; Runyon *v.* State, 52 Ind. 320; Pickens *v.* State, 20 Ind. 116; State *v.* Dudley, 33 Ind. App. 640, 71 N. E. 975; Barnes *v.* Com., 2 Dana (Ky.) 388. And see Duncan *v.* Com., 2 B. Mon. (Ky.) 281, 38 Am. Dec. 152.

Traveling agents.— It has been held that a liquor dealer, having a license from the city or county in which his store is kept, may send out agents and take orders in any part of the state for goods to be selected and forwarded from the stock kept in such store, and that he is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents. Haug *v.* Gillett, 14 Kan. 140. And see Riley *v.* Bancroft, 51 Nebr. 864, 71 N. W. 745; Gillen *v.* Riley, 27 Nebr. 158, 42 N. W. 1054; Stuchbery *v.* Spencer, 51 J. P. 181, 55 L. J. M. C. 141. But see People *v.* Newman, 99 Mich. 148, 57 N. W. 1073; People *v.* Lester, 80 Mich. 643, 45 N. W. 492.

33. Heath *v.* State, 105 Ind. 342, 4 N. E. 901; Com. *v.* Branamon, 8 B. Mon. (Ky.) 374. But see Keiser *v.* State, 58 Ind. 379; Brooker *v.* Wood, 5 B. & Ad. 1052, 3 L. J. K. B. 96, 3 N. & M. 96, 27 E. C. L. 442.

34. Krant *v.* State, 47 Ind. 519. *Compare* Pickens *v.* State, 20 Ind. 116; State *v.* McNeeley, 60 N. C. 232.

Removal into another county of the same state does not forfeit the license, unless the dealer is required by law to be and remain a resident of the county. Thompson *v.* State, 37 Ala. 151.

35. State *v.* Hunt, 29 Kan. 762; People *v.* Buffum, 27 Hun (N. Y.) 216.

no privilege on the firm or the unlicensed partner to make sales.[36] But on the other hand, where the license is issued to the firm, and before its expiration one partner buys out the others, or becomes the sole surviving partner, these changes do not prevent him from continuing to sell under the firm's license.[37]

B. Subjects of License or Tax — 1. In General. As a general rule all persons who engage in the business of selling intoxicating liquors, or who make such selling a part of their business, or who follow a business which customarily includes such selling, must procure a license.[38] But only such persons and places can be made subject to the license laws as are within the rightful control and local jurisdiction of the licensing authorities.[39]

2. Particular Persons and Occupations — a. Manufacturers. As a general rule, under the laws obtaining in most of the states, a manufacturer of liquors cannot engage in the retail trade, even though he sells only his own products, without taking out a license as a retailer.[40] But exceptions are sometimes made in favor of those who sell directly at the place of manufacture,[41] or who make the goods from the products of their own farms.[42]

b. Wholesalers. The statutes generally make a distinction between wholesale and retail licenses, in respect to the qualifications of the applicant, the amount of the fee required, and other particulars.[43] But if the statute prohibits the sale of

36. *Alabama.*— Long *v.* State, 27 Ala. 32. And see Wharton *v.* King, 69 Ala. 365.

Indiana.— Shaw *v.* State, 56 Ind. 188.

Iowa.— State *v.* McConnell, 90 Iowa 197, 57 N. W. 707.

Maine.— See Webber *v.* Williams, 36 Me. 512.

Virginia.— Com. *v.* Hall, 8 Gratt. 588.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 105.

37. Com. *v.* James, 98 Ky. 30, 32 S. W. 219, 17 Ky. L. Rep. 588; State *v.* Gerhardt, 48 N. C. 178; U. S. *v.* Davis, 37 Fed. 468; U. S. *v.* Glab, 25 Fed. Cas. No. 15,213, 1 McCrary 166. *Contra*, see State *v.* Zermuehlen, 110 Iowa 1, 81 N. W. 154.

38. Black Intox. Liq. § 139.

39. Voss *v.* Hagerty, 11 Ohio Dec. (Reprint) 408, 26 Cinc. L. Bul. 268. And see Page *v.* District of Columbia, 20 App. Cas. (D. C.) 469; Pikeville *v.* Huffman, 112 Ky. 360, 65 S. W. 794, 23 Ky. L. Rep. 1692; State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47; Williamson *v.* Norris, [1899] 1 Q. B. 7, 19 Cox C. C. 203, 62 J. P. 790, 68 L. J. Q. B. 31, 79 L. T. Rep. N. S. 415, 47 Wkly. Rep. 94.

Pullman cars.— The conductor of a Pullman railroad car who, without a license, sells liquors to passengers at a bar in the car, when the car is within the bounds of a given state, is liable to indictment for a violation of the laws of that state. "Whenever one of these palace cars crosses the line into this State it is within the jurisdiction of the laws of this State, and all persons who are transported by it are subject to those laws, and as much bound to obey them as any citizen of the State." La Norris *v.* State, 13 Tex. App. 33, 42, 44 Am. Rep. 699.

River steamers.— The owner of a saloon on board a steamer running between several towns cannot be compelled by the local authorities, other than those of the home port, to pay a license-fee. State *v.* Dennie, 51 La. Ann. 608, 25 So. 394.

40. See the statutes of the different states. And see State *v.* Stiefel, 74 Md. 546, 22 Atl. 1; Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226; State *v.* Schroeder, 43 Minn. 231, 45 N. W. 149; Jung Brewing Co. *v.* Talbot, 59 Ohio St. 511, 53 N. E. 51; Peitz *v.* State, 68 Wis. 538, 32 N. W. 763. *Compare In re* Biederman, 3 Pennew. (Del.) 284, 51 Atl. 602.

Necessity for brewery procuring license see State *v.* Schmulbach Brewing Co., 50 W. Va. 333, 49 S. E. 249.

41. See New Orleans *v.* Guth, 11 La. Ann. 405; Taylor *v.* Vincent, 12 Lea (Tenn.) 282, 47 Am. Rep. 338. *Compare* Webb *v.* State, 11 Lea (Tenn.) 662.

42. See Kettern *v.* State, 72 Ark. 90, 78 S. W. 758; State *v.* Jaeger, 63 Mo. 403; State *v.* Kennerly, 98 N. C. 657, 4 S. E. 47, holding that tolls earned by a grist-mill situated on a farm are not products of the farm, in the sense of a statute which imposes a license on the sale of liquors, except when sold by a person at the place of manufacture and manufactured from the products of his own farm. *Compare* Com. *v.* Gerstley, 18 Lanc. L. Rev. (Pa.) 222, 14 York Leg. Rec. 11.

One who sells wine made from grapes raised on his own farm, in quantities less than a quart, is in several states a retail dealer subject to the license laws. Mandeville *v.* Baudot, 49 La. Ann. 236, 21 So. 258; Kurth *v.* State, 86 Tenn. 134, 5 S. W. 593; Clemmons *v.* Com., 6 Rand. (Va.) 681.

43. See the statutes of the different states. And see Hunter *v.* State, 79 Ga. 365, 5 S. E. 134; People *v.* Greiser, 67 Mich. 490, 35 N. W. 87; State *v.* Newcomb, 107 N. C. 900, 12 S. E. 53.

Who are wholesalers.— Properly speaking the distinction between wholesale and retail trade should be made to depend not

liquor in any quantity without a license, or taxes the business of trafficking in liquors, wholesale dealers are subject to it equally with retail dealers.[44]

c. Brokers and Agents. A broker in liquors, who negotiates sales of liquor between other persons, or who solicits and forwards orders to a jobber or manufacturer, but who neither buys nor owns the liquors so sold, is not subject to the license laws nor to a statute taxing persons trafficking in liquors.[45] And a foreign brewer or distiller is not required to be licensed when he sells directly, or through a resident broker or agent, to customers within the state,[46] unless he maintains a depot or storehouse within the state, from which deliveries are made and where bills are collected.[47]

d. Physicians and Druggists. It is a general rule that druggists are not permitted, unless regularly licensed, to sell intoxicating liquors except distinctly in the character of medicines, or mixed with other ingredients and intended for medicinal use.[48] And the same rule applies to physicians.[49]

e. Public Agents. Public officers appointed to conduct the traffic in intoxicating liquors as a governmental agency, under the dispensary system or the system

solely upon the quantity sold, but also upon the purpose of the sale and the character of the purchaser. Black Intox. Liq. § 23. Thus in Tennessee it has been ruled that a wholesale liquor dealer is one who sells to purchasers in packages or quantities for the purposes of trade or to be resold, while a retail dealer is one who sells to consumers for the purposes of consumption. Webb *v.* Baird, 11 Lea (Tenn.) 667. And see State *v.* Lowenhaught, 11 Lea (Tenn.) 13. And in Minnesota it has been held that the statute regulating the sale of liquor and requiring licenses does not apply to persons doing a wholesale business exclusively and who sell only to other dealers. State *v.* Orth, 38 Minn. 150, 36 N. W. 103. But a later decision in that state is to the effect that the necessity for having a license depends solely on whether the sale is of a quantity less than five gallons, and not at all on the character of the seller's business. State *v.* Schroeder, 43 Minn. 231, 45 N. W. 149, 45 Minn. 44, 47 N. W. 308. And as a general rule the statutes make an arbitrary distinction by providing that all sales of less than a given quantity shall be considered sales at retail, and all sales above that quantity sales at wholesale. And even in the absence of such a statutory classification some courts have been willing to rest a distinction upon quantity alone. See Harris *v.* Livingston, 28 Ala. 577.

In Pennsylvania, under the acts governing the granting of licenses for the sale of liquor, a person may be granted a wholesale license to sell malt or brewed liquors only. Pittsburgh Brewing Co.'s Case, 29 Pittsb. Leg. J. 349. And the act of 1891 permits a bottler to sell by the keg, and therefore he does not need a wholesale license. *In re* Johnson, 7 Pa. Dist. 248, 20 Pa. Co. Ct. 464.

44. State *v.* Cummings, 17 Nebr. 311, 22 N. W. 545; Senior *v.* Ratterman, 44 Ohio St. 661, 11 N. E. 321; State *v.* Turner, 18 S. C. 103. And see State *v.* Benz, 41 Minn. 30, 42 N. W. 547.

45. Voss *v.* Hagerty, 11 Ohio Dec. (Reprint) 408, 26 Cinc. L. Bul. 268; Stuchbery *v.* Spencer, 51 J. P. 181, 55 L. J. M. C. 141. *Compare* Beitzell *v.* District of Columbia, 21 App. Cas. (D. C.) 49; People *v.* Newman, 99 Mich. 148, 57 N. W. 1073; Ruemmeli *v.* Cravens, 13 Okla. 342, 74 Pac. 908.

Where the statute makes it unlawful for any person without a state license to offer or expose for sale, or "solicit or receive orders for" spirituous liquors, an agent or commercial traveler for a liquor dealer must take out a license. State *v.* Swift, 35 W. Va. 542, 14 S. E. 135. *Compare* State *v.* Hoja, 66 Conn. 259, 33 Atl. 917.

46. McCarty *v.* Gordon, 16 Kan. 35.

47. Jung Brewing Co. *v.* Frankfort, 100 Ky. 409, 38 S. W. 710, 18 Ky. L. Rep. 855; Reymann Brewing Co. *v.* Brister, 179 U. S. 445, 21 S. Ct. 201, 45 L. ed. 269; Duluth Brewing, etc., Co. *v.* Superior, 123 Fed. 353, 59 C. C. A. 481. And see New York Breweries Corp. *v.* Baker, 68 Conn. 337, 36 Atl. 785.

48. *Illinois.*— Wright *v.* People, 101 Ill. 126. But see Moore *v.* People, 109 Ill. 499.

Kentucky.— Com. *v.* Powell, 62 S. W. 19, 22 Ky. L. Rep. 1932; Eastham *v.* Com., 49 S. W. 795, 20 Ky. L. Rep. 1639; Stormes *v.* Com., 49 S. W. 451, 20 Ky. L. Rep. 1434. See Anderson *v.* Com., 9 Bush 569. *Compare* Dearen *v.* Taylor County Ct., 98 Ky. 135, 32 S. W. 402, 17 Ky. L. Rep. 699.

Minnesota.— Rochester *v.* Upman, 19 Minn. 108.

Missouri.— See State *v.* Wells, 28 Mo. 565.

Nebraska.— Brown *v.* State, 9 Nebr. 189, 2 N. W. 214.

Tennessee.— Druggist Cases, 85 Tenn. 449, 3 S. W. 490.

Texas.— Prinzel *v.* State, 35 Tex. Cr. 274, 33 S. W. 350; Gibson *v.* State, 34 Tex. Cr. 218, 29 S. W. 1085.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 50.

49. Thomason *v.* State, 70 Ala. 20; Carson *v.* State, 69 Ala. 235; State *v.* Benadom, 79 Iowa 90, 44 N. W. 218; State *v.* Cloughly, 73 Iowa 626, 35 N. W. 652; State *v.* Fleming, 32 Kan. 588, 5 Pac. 19; Holt *v.* State, 62 Nebr. 134, 86 N. W. 1073.

of town agents, are not regarded as liquor dealers or dram-shop keepers, in such sense as to require licenses or be subject to the tax imposed on such persons.[50]

3. Clubs or Associations. According to some authorities a *bona fide* club organized for the usual purposes of such an association, to which the furnishing of liquors to its members is merely incidental, need not take out a license or pay a liquor tax.[51] But according to others it is considered that such an association, whatever be its purpose or composition, must take out a license or pay such tax in order to be justified in furnishing liquor to its members, and that if it does not do so it becomes liable to criminal prosecution,[52] and an unlicensed club is certainly not justified in selling its liquors to any other persons than the members and their guests.[53]

4. Hotels. Where statutes provide for the grant of licenses, or of a special kind of licenses, to keepers of "hotels," this word is to be understood as equivalent to the common-law term "inn," that is, it designates a public house kept for the entertainment and accommodation of travelers and strangers, open to all proper persons who apply, but in the character of transient guests, not as permanent lodgers.[54]

C. Necessity of Obtaining License — 1. In General. It is the traffic in

50. Terrell County Dispensary Com'rs *v.* Thornton, 106 Ga. 106, 31 S. E. 733. And see Black Intox. Liq. §§ 204, 205.

51. *Missouri.*— State *v.* St. Louis Club, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573.

Montana.— Barden *v.* Montana Club, 10 Mont. 330, 25 Pac. 1042, 24 Am. St. Rep. 27, 11 L. R. A. 593.

New York.— People *v.* Adelphi Club, 149 N. Y. 5, 43 N. E. 410, 52 Am. St. Rep. 700, 31 L. R. A. 510; People *v.* Hamilton, 17 Misc. 11, 39 N. Y. Suppl. 531. Decisions in this state under earlier statutes, although not free from conflict, generally held to the view that such a club could not dispense liquors without a license. People *v.* Andrews, 115 N. Y. 427, 22 N. E. 358, 6 L. R. A. 128; People *v.* Luhrs, 7 Misc. 503, 28 N. Y. Suppl. 498; People *v.* Sinell, 12 N. Y. Suppl. 40 [*affirmed* in 131 N. Y. 571, 30 N. E. 47]; People *v.* Bradley, 11 N. Y. Suppl. 594.

South Carolina.— State *v.* McMaster, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826.

Tennessee.— Tennessee Club *v.* Dwyer, 11 Lea 452, 47 Am. Rep. 298. *Compare* Tennessee Club *v.* Taxing Dist., 7 Lea 291.

Texas.— State *v.* Austin Club, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500. *Compare* Krnavek *v.* State, 38 Tex. Cr. 44, 41 S. W. 612.

Virginia.— Piedmont Club *v.* Com., 87 Va. 540, 12 S. E. 963.

England.— Newell *v.* Hemingway, 16 Cox C. C. 604, 53 J. P. 324, 58 L. J. M. C. 46, 60 L. T. Rep. N. S. 544.

Canada.— Reg. *v.* Slattery, 26 Ont. 148; Reg. *v.* Austin, 17 Ont. 743. *Compare* Reg. *v.* Hughes, 29 Ont. 179.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 51.

52. *District of Columbia.*— Army, etc., Club. *v.* District of Columbia, 8 App. Cas. 544.

Kentucky.— Kentucky Club *v.* Louisville, 92 Ky. 309, 17 S. W. 743, 13 Ky. L. Rep. 576.

Louisiana.— State *v.* Boston Club, 45 La. Ann. 585, 12 So. 895, 20 L. R. A. 185.

Michigan.— People *v.* Soule, 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494.

Mississippi.— Nogales Club *v.* State, 69 Miss. 218, 10 So. 574.

New Jersey.— State *v.* Essex Club, 53 N. J. L. 99, 20 Atl. 769.

North Carolina.— State *v.* Neis, 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412; State *v.* Lockyear, 95 N. C. 633, 59 Am. Dec. 287.

Ohio.— Cincinnati University Club *v.* Ratterman, 3 Ohio Cir. Ct. 18, 2 Ohio Cir. Dec. 11.

West Virginia.— State *v.* Shumate, 44 W. Va. 490, 29 S. E. 1001.

United States.— U. S. *v.* Giller, 54 Fed. 656.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 51.

53. People *v.* Andrews, 115 N. Y. 427, 22 N. E. 358, 6 L. R. A. 128; Bowyer *v.* Percy Supper Club, [1893] 2 Q. B. 154, 17 Cox C. C. 669, 57 J. P. 470, 69 L. T. Rep. N. S. 447, 5 Reports 472, 42 Wkly. Rep. 29; Newman *v.* Jones, 17 Q. B. 132, 50 J. P. 373, 55 L. J. M. C. 113, 55 L. T. Rep. N. S. 327; Woodley *v.* Simmonds, 60 J. P. 150. And see State *v.* Nickerson, 31 Kan. 545, 2 Pac. 654.

54. Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657; Bonner *v.* Welborn, 7 Ga. 296; People *v.* Jones, 54 Barb. (N. Y.) 311; Cromwell *v.* Stephens, 2 Daly (N. Y.) 15.

Boarding-house, restaurant, etc.— A boarding-house, kept for the entertainment of permanent lodgers, is not a "hotel," although it may occasionally and incidentally furnish accommodation to transient guests; and a restaurant or eating-house is not a "hotel," although it may occasionally furnish rooms for lodgers. But a house kept on the "European plan" is an inn. Kelly *v.* New York, 54 How. Pr. (N. Y.) 327; Ebner's Petition, 1 Woodw. (Pa.) 21. And see Matter of Brewster, 85 N. Y. App. Div. 235, 83

intoxicating liquors to which the license laws apply, not to the mere transfer of property in liquors.[55] Hence, while no person can with impunity engage in the business of liquor selling without compliance with those laws,[56] they do not apply to isolated sales, not within the spirit and purpose of the statute, as where an officer levies upon a quantity of liquor and sells it under an attachment or execution,[57] or where a similar sale is made by an assignee in insolvency,[58] or by an administrator of a deceased licensee, disposing of the stock in hand as a whole or in large quantities, and not in the way of retail trade,[59] or where a saloon business is sold *en bloc*.[60]

2. NUMBER OF LICENSES REQUIRED — a. Different Kinds of Business — (I) *IN GENERAL*. If a person conducts a business which is required by law to be licensed, but which is not mainly concerned with the selling of liquor, or to which the sale of liquor is merely incidental, his license to pursue the business in question will not authorize him to retail intoxicants, if such retailing by itself is made a subject for a separate license.[61] And where the statute provides for different kinds of liquor licenses, according to the nature of the business carried on, as where it distinguishes between hotels, bar-rooms, restaurants, and so on, the possession of a license of one kind will not protect sales made in another branch of the business.[62]

(II) *WHOLESALE AND RETAIL*. Where the statute discriminates between the wholesale and retail trade in liquors, and provides a different form of license for the two occupations, a wholesaler cannot sell at retail without having a retailer's license and *vice versa*.[63]

(III) *TAVERN LICENSE*. In several states it is held that a license to keep a tavern necessarily includes the privilege of furnishing liquor to guests and others seeking the accommodation of the tavern, that being a customary part of the

N. Y. Suppl. 564 [*reversing* 39 Misc. 689, 80 N. Y. Suppl. 666].

Necessary accommodations.— A license should not be granted to a public house, unless the accommodations are in a measure provided which are demanded by the locality, the habits of the people, and their wants. *In re* Morris, 2 Pa. Co. Ct. 79.

Raines' law hotels see Matter of Ryon, 85 N. Y. App. Div. 621, 83 N. Y. Suppl. 123; Matter of Brewster, 85 N. Y. App. Div. 235, 83 N. Y. Suppl. 564 [*reversing* 39 Misc. 689, 80 N. Y. Suppl. 666]; Matter of Purdy, 40 N. Y. App. Div. 133, 57 N. Y. Suppl. 629; Matter of Place, 27 N. Y. App. Div. 561, 50 N. Y. Suppl. 640; Matter of McMonagle, 41 Misc. (N. Y.) 407, 84 N. Y. Suppl. 1068.

55. See *Ex p.* Mason, 102 Cal. 171, 36 Pac. 401.

56. Johnson *v.* State, 60 Ga. 634. And see Holt *v.* State, 62 Nebr. 134, 86 N. W. 1073.

57. Fears *v.* State, 102 Ga. 274, 29 S. E. 463; Wildermuth *v.* Cole, 77 Mich. 483, 43 N. W. 889; State *v.* Johnson, 33 N. H. 441. But *compare* Standard Oil Co. *v.* Angevine, 6 Kan. App. 312, 51 Pac. 70; Nichols *v.* Valentine, 36 Me. 322.

58. Gignoux *v.* Bilbruck, 63 N. H. 22.

59. Williams *v.* Troop, 17 Wis. 463; Davies *v.* Evans, 62 J. P. 120, 77 L. T. Rep. N. S. 688.

60. Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150. And see Forwood *v.* State, 49 Md. 531; U. S. *v.* Angell, 11 Fed. 34.

Where a part owner of a saloon sold his interest therein to his partner, taking a note in part payment, the fact that the sale included an interest in intoxicating liquors, and that the seller had no license to sell liquors, the license being in the name of the other, did not render the sale illegal. Hagerty *v.* Tuxbury, 181 Mass. 126, 63 N. E. 333.

61. **A grocer who sells liquor must take out a liquor license, although he already haa a license to pursue the trade of a grocer.** Mobile *v.* Richards, 98 Ala. 594, 12 So. 793; State *v.* Sies, 30 La. Ann. 918; State *v.* Brackett, 41 Minn. 33, 42 N. W. 548.

Confectioner.— Liquor cannot be sold under a confectioner's license, notwithstanding it is locally the custom for confectioners to make such sales in their business. New Orleans *v.* Jane, 34 La. Ann. 667.

A licensed general merchant, if he carries in stock and sells spirituous liquors, must pay the special tax or license-fee required of liquor dealers. Burch *v.* Savannah, 42 Ga. 596; Kelly *v.* Dwyer, 7 Lea (Tenn.) 180. But *compare* Com. *v.* Wheeler, 79 Ky. 284; Jefferson Parish Police Jury *v.* Marrero, 38 La. Ann. 896; State *v.* Willard, 39 Mo. App. 251.

62. State *v.* Cahen, 35 Md. 236; Matter of Ryon, 85 N. Y. App. Div. 621, 83 N. Y. Suppl. 123; *In re* Vandegrift, 1 Pa. Cas. 218, 3 Atl. 103. See Smith *v.* State, 105 Ga. 724, 32 S. E. 127; Harland *v.* Adams, 76 Miss. 308, 24 So. 262.

63. Schumm *v.* Gardener, 25 Ill. App. 633; Flournoy *v.* Grady, 25 La. Ann. 591; People

business.[64] But elsewhere it is considered that no such privilege is implied in a tavern-keeper's license, and he cannot sell liquor without a retailer's license.[65]

b. Different Jurisdictions — (i) *Federal and State Laws.* The possession of a liquor license, obtained under the United States internal revenue laws, does not authorize the licensee to carry on the business in violation of the laws of the state, or relieve him from the necessity of taking out a license under the state laws also.[66]

(ii) *State and Municipalities.* The grant of a liquor license by a municipal corporation having authority therefor does not prevent the state itself from imposing a tax or license-fee concurrently upon the same dealer; and conversely the possession of a state license will not relieve him from the necessity of taking out a license from the city or town where he does business, if that also is required.[67]

(iii) *Different Municipal Corporations.* The fact that a liquor dealer holds a license from the county or other subdivision of the state does not exempt him from the duty of taking out the license required by another jurisdiction in the same territory, such as a city or incorporated town; for the requirement of a license, being in the nature of a restraint on the traffic, is equally and concurrently within the power of the two jurisdictions.[68]

c. Different Places. Where the same person maintains two or more bars, saloons, or other places for the sale of liquors, he must take out a separate license for each.[69]

v. Greiser, 67 Mich. 490, 35 N. W. 87; State *v.* Newcomb, 107 N. C. 900, 12 S. E. 53. And see *supra*, VI, B, 2, b.

64. Braswell *v.* Com., 5 Bush (Ky.) 544; Com. *v.* Kamp, 14 B. Mon. (Ky.) 385; Hannibal *v.* Guyott, 18 Mo. 515; Hirn *v.* State, 1 Ohio St. 15 [*overruling* Curtis *v.* State, 5 Ohio 324]; State *v.* Chamblyss, Cheves (S. C.) 220, 34 Am. Dec. 593. *Compare* St. Louis *v.* Siegrist, 46 Mo. 593.

65. Page *v.* State, 11 Ala. 849; State *v.* Cloud, 6 Ala. 628; Norcross *v.* Norcross, 53 Me. 163; State *v.* Woodward, 34 Me. 293; Kitson *v.* Ann Arbor, 26 Mich. 325; Savier *v.* Chipman, 1 Mich. 116; Overseers of Poor *v.* Warner, 3 Hill (N. Y.) 150; Benson *v.* Moore, 15 Wend. (N. Y.) 260.

66. See *supra*, III, A, 2.

67. *Alabama.*— Davis *v.* State, 4 Stew. & P. 83.

Georgia.— Decker *v.* McGowan, 59 Ga. 805. *Compare* Chastain *v.* Calhoun, 29 Ga. 333; Rome *v.* Lumpkin, 5 Ga. 447.

Kentucky.— Freeman *v.* Com., 8 Bush 139.

Louisiana.— State *v.* McAdams, 106 La. 720, 31 So. 187.

New York.— Furman *v.* Knapp, 19 Johns. 248.

Ohio.— Stevenson *v.* Hunter, 5 Ohio S. & C. Pl. Dec. 27, 2 Ohio N. P. 300.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 54.

But see Bennett *v.* People, 30 Ill. 389; *Ex p.* Schmitker, 6 Nebr. 108.

68. *Alabama.*— State *v.* Estabrook, 6 Ala. 653.

California.— *In re* Lawrence, 69 Cal. 608, 11 Pac. 217.

Colorado.— People *v.* Raims, 20 Colo. 489, 39 Pac. 341; Paton *v.* People, 1 Colo. 77; Meskew *v.* Highlands, 9 Colo. App. 255, 47 Pac. 846. *Compare* Hetzer *v.* People, 4 Colo. 45.

Dakota.— Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577.

Georgia.— Cuthbert *v.* Conly, 32 Ga. 211.

Indiana.— Emerich *v.* Indianapolis, 118 Ind. 279, 20 N. E. 795; Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706; Lutz *v.* Crawfordsville, 109 Ind. 466, 10 N. E. 411; Hedderich *v.* State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768; McKinney *v.* Salem, 77 Ind. 213; Sloan *v.* State, 8 Blackf. 361.

Kentucky.— Com. *v.* Helback, 101 Ky. 166, 40 S. W. 245, 19 Ky. L. Rep. 278.

Louisiana.— Benefield *v.* Hines, 13 La. Ann. 420.

Minnesota.— State *v.* Nolan, 37 Minn. 16, 33 N. W. 36; State *v.* Schmail, 25 Minn. 370; State *v.* Cron., 23 Minn. 140.

Missouri.— State *v.* Harper, 58 Mo. 530; State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471; State *v.* Sherman, 50 Mo. 265; Independence *v.* Noland, 21 Mo. 394.

North Carolina.— State *v.* Propst, 87 N. C. 560; Parsley *v.* Hutchins, 47 N. C. 159.

Pennsylvania.— Com. *v.* Sweitzer, 129 Pa. St. 644, 18 Atl. 569. And see Com. *v.* Rosenberg, 35 Pittsb. Leg. J. 68.

South Carolina.— State *v.* Mancke, 18 S. C. 81.

Wyoming.— State *v.* Cheyenne, 7 Wyo. 417, 52 Pac. 975, 40 L. R. A. 71.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 54.

Contra.— See State *v.* Pittman, 10 Kan. 593; Phillips *v.* Tecumseh, 5 Nebr. 312.

69. Adams *v.* Fragiacomo, 70 Miss. 799, 12 So. 552; Matter of Lyman, 59 N. Y. App. Div. 217, 69 N. Y. Suppl. 309; *In re* Pittsburg Brewing Co., 16 Pa. Super. Ct. 215; Reymann Brewing Co. *v.* Bristor, 92 Fed. 28.

3. WRONGFUL REFUSAL OR NEGLECT TO GRANT. The fact that the officers charged with the duty of issuing licenses have wrongfully or arbitrarily refused or neglected to issue a license to an applicant, he being eligible and having complied with the preliminary conditions, is no excuse for his engaging in the business without actually obtaining a license, and no defense to a prosecution for unlicensed selling.[70] And the refusal of the licensing authorities to grant any licenses whatever for the sale of liquor, within the territory of their jurisdiction, does not operate as a general license to all persons to pursue the traffic.[71]

4. IMPOSSIBILITY OF OBTAINING LICENSE. It is no justification to one selling liquor without a license, and no defense to a prosecution for unlicensed selling, that it was impossible for him to obtain a license, either because there was no provision for granting licenses in the particular district, or no officer competent to issue it, or for other reasons.[72]

5. PERFORMANCE OF CONDITIONS WITHOUT LICENSE. Compliance with all the conditions necessary to obtain a license is not equivalent to the actual issue of a license. Although a person may have presented a proper and sufficient application, executed the required bond, and tendered the proper fee, he cannot legally begin selling until he has received the license.[73]

Place for storage.— A liquor dealer who pays the tax or assessment for his regular place of business has the right to store all or a part of his liquors in a cooler or building apart from his place of business, without paying a second tax, provided no purchases or sales of liquors are made at such cooler. Hanson *v.* Luce, 50 Ohio St. 440, 34 N. E. 435 [*distinguished* in Jung Brewing Co. *v.* Talbot, 59 Ohio St. 511, 53 N. E. 51].

Manufacturers.— The Georgia statute imposing on dealers in liquors a specific tax for each place of business in each county where the same are manufactured or sold does not impose a tax on manufacturers of liquors therein mentioned who do not sell the same within the state. McNeely *v.* State, 114 Ga. 831, 40 S. E. 996.

70. *Georgia.*— Brock *v.* State, 65 Ga. 437.

Illinois.— Kadgihn *v.* Bloomington, 58 Ill. 229. But *compare* Prather *v.* People, 85 Ill. 36; Zanone *v.* Mound City, 11 Ill. App. 334.

Minnesota.— State *v.* Cron, 23 Minn. 140.

Mississippi.— See Hugonin *v.* Adams, (1903) 33 So. 497.

Missouri.— Kansas City *v.* Flanders, 71 Mo. 281; State *v.* Jamison, 23 Mo. 330; State *v.* Huntley, 29 Mo. App. 278.

Texas.— Curry *v.* State, 28 Tex. App. 477, 13 S. W. 773.

But *compare* Koch *v.* Com., 84 S. W. 533, 27 Ky. L. Rep. 122.

71. Com. *v.* Blackington, 24 Pick. (Mass.) 352; New York *v.* Mason, 4 E. D. Smith (N. Y.) 142; State *v.* Downer, 21 Wis. 274.

72. *Arkansas.*— State *v.* Tucker, 45 Ark. 55; Siloam Springs *v.* Thompson, 41 Ark. 456.

Georgia.— Reese *v.* Atlanta, 63 Ga. 344. And see Hodge *v.* State, 116 Ga. 852, 43 S. E. 255.

Indiana.— Indianapolis *v.* Fairchild, 1 Ind. 315. And see Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664.

Kentucky.— Rosenham *v.* Com., 2 S. W. 230, 8 Ky. L. Rep. 519.

Louisiana.— State *v.* Brown, 41 La. Ann. 771, 6 So. 638.

Massachusetts.— Bolduc *v.* Randall, 107 Mass. 121.

Michigan.— Smith *v.* Adrian, 1 Mich. 495.

Minnesota.— State *v.* Kantler, 33 Minn. 69, 21 N. W. 856; State *v.* Funk, 27 Minn. 318, 7 N. W. 359.

Missouri.— State *v.* McNeary, 88 Mo. 143.

Nebraska.— Hunzinger *v.* State, 39 Nebr. 653, 58 N. W. 194.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 56.

In New York, in a case where a new license law took effect in April, but the system of licenses therein provided did not take effect until July, it was held that one whose former license expired after the former date and before the latter was not liable to any penalty for selling without a license until the latter date. Rome *v.* Knox, 14 How. Pr. 268. And see Palmer *v.* Doney, 2 Johns. Cas. 346.

73. *Arkansas.*— State *v.* White, 23 Ark. 275.

Florida.— Roberts *v.* State, 26 Fla. 360, 7 So. 861.

Illinois.— Franklin *v.* Stringam, 56 Ill. App. 94. *Compare* Prather *v.* People, 85 Ill. 36.

Michigan.— People *v.* Gault, 104 Mich. 575, 62 N. W. 724.

Minnesota.— Jordan *v.* Bespalec, 86 Minn. 441, 90 N. W. 1052; State *v.* Bach, 36 Minn. 234, 30 N. W. 764.

Missouri.— State *v.* Huntley, 29 Mo. App. 278.

Texas.— Curry *v.* State, 28 Tex. App. 477, 13 S. W. 773.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 57.

In Indiana the rule on this subject is somewhat different. It is there held that, where an order for the issue of a license has been made, a failure to procure the license, or failure of the officer to issue it, would not

D. Eligibility For License — 1. Who May Obtain License — a. In General. No person has a vested right to have a license for the sale of intoxicating liquors issued to him.[74] The licensing authorities are justified in refusing the privilege to an insolvent or irresponsible party,[75] or one who cannot give his personal attention to the business.[76] And the qualifications prescribed by the statute must be taken as a strict limitation upon the right to grant such licenses.[77] Unless the statute forbids[78] licenses may be granted to married women,[79] corporations,[80] or partners.[81]

subject the licensee to prosecution for subsequent sales; but if he has not paid his money into the treasury, nor filed his bond, he is subject to prosecution. Dudley *v.* State, 91 Ind. 312; Schwarm *v.* State, 82 Ind. 470; Houser *v.* State, 18 Ind. 106. And pending an appeal from the order of court granting a license, the applicant may sell, if he tenders a proper bond and the license-fee, although the county auditor unlawfully refuses to issue the license. Padgett *v.* State, 93 Ind. 396. But where an ordinance prohibits the sale of liquors in a residence portion of a city, and provides that a city license shall be no defense, the payment of the license-fee, and the retention thereof by the city, do not create an estoppel against the enforcement of the ordinance. Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138, opinion by McCabe, J.

74. Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181; State *v.* Cheyenne, 7 Wyo. 417, 52 Pac. 975, 40 L. R. A. 71. *Compare* Harrison *v.* People, 195 Ill. 466, 63 N. E. 191; Miller *v.* Wade, 58 Ind. 91.

75. *In re* Cambridge Springs Co., 20 Pa. Co. Ct. 564.

76. Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332. See *In re* Krug, (Nebr. 1904) 101 N. W. 242; Huffman *v.* Walterhouse, 19 Ont. 186.

77. Burns' Appeal, 76 Conn. 395, 56 Atl. 611; State *v.* Cooper County Ct., 66 Mo. App. 96. And see *In re* Henery, 124 Iowa 358, 100 N. W. 43.

Druggists.— The courts, having a discretion in granting or refusing licenses to sell intoxicating liquors by measure in quantities not less than a quart, may grant such a license to a druggist. *In re* Susquehanna County, 3 Pa. Co. Ct. 616. And see *In re* Gillham, (Iowa 1904) 99 N. W. 179. And under a statute authorizing the issue of permits to druggists to sell liquor for medicinal and other purposes, it is not necessary that the holder of such a permit should he a pharmacist. Owens *v.* People, 56 Ill. App. 569.

Innkeepers.— It is sometimes provided that licenses may be granted only to persons who are keepers of hotels or inns, provided with a certain number of rooms for the accommodation of travelers. See People *v.* Hartmann, 10 Hun (N. Y.) 602; O'Rourke *v.* People, 3 Hun (N. Y.) 225. In New Jersey the applicant for a license is not required to be an inhabitant of the house in which he intends to keep an inn. State *v.* Hill, 52 N. J. L. 326, 19 Atl. 789.

Retail merchants.— Under a statute giving a licensed retailer of goods, wares, and merchandise an opportunity, under certain conditions, to secure a license to sell liquor at wholesale, such license cannot be granted to one who does not claim to be such a trader, but who is a hotel-keeper, and seeks to combine hotel-keeping and wholesale liquor selling. *In re* Mundy, 3 Pennew. (Del.) 282, 51 Atl. 605.

Officials disqualified.— Under a statute making it unlawful for "police officials" to be interested in the manufacture or sale of liquors, it is held that the mayor of a city does not come within that designation, although he is *ex officio* head of its police. People *v.* Gregg, 13 N. Y. Suppl. 114. Nor is an alderman disqualified by the statute, although, as a member of the common council, he shares in the power of that body to appoint and remove policemen. People *v.* Hannon, 13 N. Y. Suppl. 117.

78. Woodford *v.* Hamilton, 139 Ind. 481, 39 N. E. 47; State *v.* Golding, 28 Ind. App. 233, 62 N. E. 502.

79. Amperse *v.* Kalamazoo, 59 Mich. 78, 26 N. W. 222, 409; Hazell *v.* Middleton, 45 J. P. 540.

80. Enterprise Brewing Co. *v.* Grimes, 173 Mass. 252, 53 N. E. 855; *In re* Gulf Brewing Co., 11 Pa. Co. Ct. 346. *Compare* State *v.* St. Louis Club, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573.

Brewing companies.— In Pennsylvania a corporation organized under the laws of the state to engage in the brewing business may be granted a license to sell its product as a wholesale dealer. *In re* Brewing Co., 14 Pa. Super. Ct. 188; *In re* Pittsburg Brewing Co., 12 Pa. Super Ct. 129; *In re* Consumers' Brewing Co., 20 Pa. Co. Ct. 597. But stockholders in brewing or distilling companies are not permitted to take out a license to sell liquor at retail. *In re* Consumers' Brewing Co., *supra.*

Parlor-car company.— Where a company's charter authorized it to construct and purchase railway cars, with all convenient appendages and supplies for passengers traveling therein, which it might sell or use on such terms as it deemed proper, it was held that such company, under a proper license from the state, had the right to sell intoxicating liquors to its passengers. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

81. State *v.* Moniteau County Ct., 45 Mo. App. 387. And see Spaulding *v.* Nathan, 21 Ind. App. 122, 51 N. E. 742. But *compare*

Moreover, in the absence of a statute forbidding it a license may be granted to two persons jointly.[82]

b. Moral Character, Etc. Under statutory provisions that licenses may be granted only to persons of good moral character, the question of the fitness of the applicant must necessarily be determined by an examination of his conduct in particular instances. Unless otherwise provided by statute, there is no single and absolute criterion, but the licensing authorities must judge whether the acts and conduct shown are sufficient in themselves or as an index to character to disqualify him.[83] Specific disqualifications are, however, sometimes enumerated. Thus some statutes provide against the grant of a license to any person who has previously been convicted of crime,[84] particularly of violations of the liquor laws,[85] who is in the habit of becoming intoxicated,[86] or who does not keep an orderly law abiding house.[87]

c. Requirement as to Residence. A statutory requirement that the applicant for license shall be a citizen of the state, or a resident of the county or other district where he proposes to do business, is jurisdictional in its nature, and unless the petitioner satisfies the licensing authorities that he possesses this qualification they have no power to grant the license.[88]

State *v.* Scott, 96 Mo. App. 620, 70 S. W. 736.

82. State *v.* Hill, 52 N. J. L. 326, 19 Atl. 789.

83. Black Intox. Liq. § 162. And see Whissen *v.* Furth, 73 Ark. 366, 84 S. W. 500, 68 L. R. A. 161; Stockwell *v.* Brant, 97 Ind. 474.

Illustrations.— If it is shown that the applicant is a common gambler, or is in the habit of frequenting gambling houses, this is sufficient ground for refusing a license, although such conduct is not specified in the statute as a disqualifying cause. Groscop *v.* Rainier, 111 Ind. 361, 12 N. E. 694. And a license may be denied where it appears that the applicant is living with a woman in a state of open concubinage, and has had illegitimate children by her. Leader *v.* Yell, 16 C. B. N. S. 584, 10 Jur. N. S. 731, 33 L. J. M. C. 231, 10 L. T. Rep. N. S. 532, 12 Wkly. Rep. 915, 111 E. C. L. 584. So also it is proper to refuse a license to the keeper of a house of prostitution. Ouachita County *v.* Rolland, 60 Ark. 516, 31 S. W. 144.

Burden of proof.— When a remonstrance against the grant of a license, based on objections to the moral character of the applicant, is filed, and the question thus brought into issue, the burden is cast upon the petitioner of proving, by a preponderance of evidence, that he is not disqualified from obtaining the license by immorality or previous illegal conduct. Chandler *v.* Ruebelt, 83 Ind. 139; Goodwin *v.* Smith, 72 Ind. 113, 37 Am. Rep. 144.

When one of two joint petitioners for a license absconds, this is not necessarily a reason for refusing the license to the other. Polk County Com'rs *v.* Johnson, 21 Fla. 577.

84. See the statutes of the different states. And see People *v.* Lyman, 33 Misc. (N. Y.) 243, 68 N. Y. Suppl. 331; Reg. *v.* Vine, L. R. 10 Q. B. 195, 13 Cox C. C. 43, 44 L. J. M. C. 60, 31 L. T. Rep. N. S. 842, 23 Wkly. Rep. 649.

A pardon removes the disqualification arising from a previous conviction of felony. People *v.* Sackett, 17 Misc. (N. Y.) 406, 40 N. Y. Suppl. 414; Hay *v.* London Tower Division, 24 Q. B. D. 561, 54 J. P. 500, 59 L. J. M. C. 79, 62 L. T. Rep. N. S. 200, 38 Wkly. Rep. 414.

85. See the statutes of the different states. And see Bronson *v.* Dunn, 124 Ind. 252, 24 N. E. 749; Golden *v.* Bingham, 61 Ind. 198; Keiser *v.* Lines, 57 Ind. 431; State *v.* Kaso, 25 Nebr. 607, 41 N. W. 558; State *v.* Hanlon, 24 Nebr. 608, 39 N. W. 780; Babb *v.* Taylor, 2 Pa. Super. Ct. 38; *In re* Meitzler, 2 Pa. Co. Ct. 37; *In re* Bourjohn, 2 Pa. Co. Ct. 33.

As to what constitutes a violation of the liquor laws see Foster *v.* Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194; North *v.* Barringer, 147 Ind. 224, 46 N. E. 531; State *v.* Hambright, 33 Mo. 394; Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332.

As to what amounts to a "conviction" see Smith's Appeal, 65 Conn. 135, 31 Atl. 529; *In re* Thoma, 117 Iowa 275, 90 N. W. 581; Horton *v.* Central Falls License Com'rs, 19 R. I. 650, 35 Atl. 962.

86. See the statutes of the different states. And see Hill *v.* Perry, 82 Ind. 28; Grummon *v.* Holmes, 76 Ind. 585; Calder *v.* Sheppard, 61 Ind. 219, holding that, although the statute prohibits the grant of a license to a person "in the habit of becoming intoxicated," the fact that the applicant has once been seen drunk and sometimes takes a drink does not necessarily disqualify him.

87. See the statutes of the different states. And see Caudill *v.* Com., 66 S. W. 723, 23 Ky. L. Rep. 2139, holding that under a statute providing that no license shall be granted to any person "who does not keep an orderly, law-abiding house," it is proper to refuse a license to one who had been selling liquor without a license and to minors.

88. McGee *v.* Beall, 63 Miss. 455; People *v.* Davis, 36 N. Y. 77. And see *Ex p.* Laboyteaux, 65 Ind. 545; Doberneck's Appeal, 1 Pa. Super. Ct. 99. *Compare* Murphy *v.* Monroe County, 73 Ind. 483.

2. As to Places — a. In General. When the statute limits the districts for the grant of licenses, or makes restrictions as to the particular places or localities where bars or saloons may be licensed, its provisions are mandatory, and the licensing authorities have no power to grant licenses in disregard of them.[89]

b. Vicinity of Churches, Schools, or Dwellings. The authority to grant liquor licenses is sometimes further restricted by statutory provisions.[90] Thus some statutes relating to the authority to grant licenses provide that no license shall be granted for any place which is within a certain designated distance of a church,[91] school,[92] or

Foreign corporation.— That an applicant for a liquor license is a foreign corporation is a good reason for refusing to grant the license, even though the corporation be registered to do business in the state in which the application is made. *In re* Peter Schoenhofen Brewing Co., 8 Pa. Super. Ct. 141.

89. McAloon *v.* Pawtucket License Com'rs, 22 R. I. 191, 46 Atl. 1047. And see Hewitt's Appeal, 76 Conn. 685, 58 Atl. 231; Beckham *v.* Howard, 83 Ga. 89, 9 S. E. 784; New Martinsville *v.* Dunlap, 33 W. Va. 457, 10 S. E. 803.

Mercantile stores.— In New Jersey a license to sell liquors by a less measure than one quart cannot be granted for a place in which a grocery or other mercantile business is carried on. Peer *v.* Excise Com'rs, 70 N. J. L. 496, 57 Atl. 153.

Places of amusement.— Where the statute prohibits the grant of a license to sell liquors in any place of amusement, premises containing such a place cannot be licensed as a whole, although it would not be unlawful to grant a license in a certain part of the building, if there was no communication of any kind between the two parts. *In re* Martz, 12 Pa. Super. Ct. 521.

Separate rooms.— In Massachusetts a license may be granted to sell liquors in any room in a building, or in a back room, notwithstanding the statute forbidding partitions. Com. *v.* Barnes, 140 Mass. 447, 5 N. E. 252.

House not yet built.— Where the law requires the application for license to state the "building or place" where the business is to be carried on, a license cannot be granted for a building to be erected in the future. Warren Street Chapel *v.* Trenton Excise Com'rs, 56 N. J. L. 411, 29 Atl. 150.

Direct entrance.— In a statute forbidding the grant of licenses to sell liquor in any place "to which an entrance shall be allowed other than directly from a public traveled way," the word "direct" means straight and immediate, and an entrance to a bar-room requiring a circuitous or crooked route of travel from the highway thereto is such an entrance as the statute intends to prohibit. State *v.* Conley, 22 R. I. 397, 48 Atl. 200.

Residence of manufacturer.— A statute providing that licenses may be granted to manufacturers of wine and distillers of peach and apple brandy to retail at the place of manufacture or distillery does not authorize the designation of the distiller's residence as the place of sale. Com. *v.* Asbury, 104 Ky. 320, 47 S. W. 217, 20 Ky. L. Rep. 574. And see Com. *v.* Holland, 104 Ky. 323, 47 S. W. 216, 20 Ky. L. Rep. 581.

Inaccessible places.— In England the licensing justices have a discretion to refuse a license on the ground of the remoteness of the premises from police supervision, and the character and necessities of the neighborhood. Sharpe *v.* Wakefield, [1891] A. C. 173, 55 J. P. 197, 60 L. J. M. C. 73, 64 L. T. Rep. N. S. 180, 39 Wkly. Rep. 551.

90. See the statutes of the different states.

Construction of statute.— Statutes prohibiting the traffic in liquor within a limited distance of churches and schools should be liberally construed in favor of such institutions, and strictly against applicants for license. Matter of Place, 27 N. Y. App. Div. 561, 50 N. Y. Suppl. 640. And see Viefhaus *v.* State, 71 Ark. 419, 75 S. W. 585.

91. See *In re* Korndorfer, 49 N. Y. Suppl. 559; People *v.* Lammerts, 18 Misc. (N. Y.) 343, 40 N. Y. Suppl. 1107 (an uncompleted church not within the statute); Jones *v.* Moore County Com'rs, 106 N. C. 436, 11 S. E. 514 (uncompleted church within the statute).

Character of occupation.— A building, the main floor of which is used exclusively for church purposes, although other religious, charitable, literary, or patriotic societies, composed wholly or principally of members of the congregation, meet at times in other parts of the building, is "occupied exclusively as a church" within the meaning of the law. Matter of McCusker, 23 Misc. (N. Y.) 446, 51 N. Y. Suppl. 281; Matter of Zinzow, 18 Misc. (N. Y.) 653, 43 N. Y. Suppl. 714. But a building, the first floor of which is used for religious meetings, the rest being used as offices for directors and physicians, dormitories, and store-rooms, the whole constituting a mission for the reformation of fallen women, but not connected with any church, and with which no clergyman is associated, is not a "church." People *v.* Dalton, 9 Misc. (N. Y.) 249, 30 N. Y. Suppl. 407. And see Matter of Vail, 38 Misc. (N. Y.) 392, 77 N. Y. Suppl. 903. A Jewish synagogue devoted to religious uses, although also used as a meeting place for fraternal and benevolent societies composed of Jews, although not limited to members of the congregation, is "exclusively occupied as a church." Matter of McCusker, 47 N. Y. App. Div. 111, 62 N. Y. Suppl. 201.

92. See Com. *v.* McDonald, 160 Mass. 528, 36 N. E. 483; People *v.* Murray, 148 N. Y.

court-house,[93] or (in New York) unless certain conditions are complied with, within a limited distance of a building occupied exclusively as a dwelling.[94] As to how the prescribed distance is to be computed, the authorities are not uniform. Some hold that it must be measured by the nearest mode of access,[95] while others rule that it is to be measured in a straight or air line.[96] Under the New York statute the distance is to be measured between the "principal entrance" or "nearest entrance" of the saloon and of the church, school, or dwelling.[97] The New York statute, in so far as it makes the proximity of a church or school an impediment to the grant of a license, saves from its operation places where the liquor traffic had been lawfully carried on under licenses issued prior to its passage.[98]

E. Powers and Liabilities of Officers — 1. In General. Except in so far as they may be vested with a measure of discretion, officers charged with the grant of licenses must keep strictly within the limits of their powers and authority as prescribed by the statute.[99] Members of a board whose duty it is to pass on applications for liquor licenses disqualify themselves from acting on an application by signing the petition on which it is based.[1]

2. Fees and Compensation. The fees or compensation of licensing commissioners or boards are usually provided for by statute.[2]

3. Responsibility For Grant or Refusal of License. Licensing officers are not to be held answerable for mere mistakes or errors of judgment; but they are sub-

171, 42 N. E. 584; Matter of Lyman, 48 N. Y. App. Div. 275, 62 N. Y. Suppl. 846; People *v.* Murray, 5 N. Y. App. Div. 441, 16 Misc. 398, 38 N. Y. Suppl. 609, 39 N. Y. Suppl. 1130.

93. See State *v.* Witter, 107 N. C. 792, 12 S. E. 328.

94. See Matter of Ryon, 39 Misc. (N. Y.) 698, 80 N. Y. Suppl. 1114 [*affirmed* in 85 N. Y. App. Div. 621, 83 N. Y. Suppl. 123]; Matter of Vail, 38 Misc. (N. Y.) 392, 77 N. Y. Suppl. 903; Matter of Veeder, 31 Misc. (N. Y.) 569, 65 N. Y. Suppl. 517; Matter of Ruland, 21 Misc. (N. Y.) 504, 47 N. Y. Suppl. 561.

95. Warren Street Chapel *v.* Trenton Excise Com'rs, 56 N. J. L. 411, 29 Atl. 150.

96. U. S. *v.* Johnson, 12 App. Cas. (D. C.) 92; Com. *v.* Jones, 142 Mass. 573, 8 N. E. 603; Matter of Lewis, 26 Misc. (N. Y.) 532, 57 N. Y. Suppl. 676; *In re* Liquor Locations, 13 R. I. 733. *Compare* Matter of Underhill, 17 Misc. (N. Y.) 19, 39 N. Y. Suppl. 575, under earlier statute.

97. See Matter of McCusker, 23 Misc. (N. Y.) 446, 51 N. Y. Suppl. 281; Matter of Zinzow, 18 Misc. (N. Y.) 653, 43 N. Y. Suppl. 714; People *v.* Murray, 5 N. Y. App. Div. 441, 16 Misc. (N. Y.) 398, 38 N. Y. Suppl. 609, 39 N. Y. Suppl. 1130; Matter of McMonagle, 41 Misc. (N. Y.) 407, 84 N. Y. Suppl. 1068; Matter of Saunderson, 34 Misc. (N. Y.) 375, 69 N. Y. Suppl. 928; Matter of Veeder, 31 Misc. (N. Y.) 569, 65 N. Y. Suppl. 517; St. Thomas' Church *v.* New York Bd. of Excise, 20 N. Y. Suppl. 831.

Closing entrance.— An applicant cannot have a license where the nearest entrance to his building is within the prohibited distance of a school, although he offers to close up that entrance entirely. Macy *v.* Murray, 5 N. Y. App. Div. 66, 38 N. Y. Suppl. 903.

Opening new entrance.— The owner of a dwelling cannot defeat an application for license by cutting a new door into his house, for that very purpose, after the application has been filed. Matter of Cheney, 35 Misc. (N. Y.) 598, 72 N. Y. Suppl. 134.

98. See *In re* Hawkins, 165 N. Y. 188, 58 N. E. 884; People *v.* Murray, 148 N. Y. 171, 42 N. E. 584; Matter of Salisbury, 19 Misc. (N. Y.) 340, 44 N. Y. Suppl. 291; Leicht *v.* Board of Excise, 19 N. Y. Suppl. 1.

As to forfeiture of rights by abandonment or discontinuance of business see Matter of Lyman, 34 N. Y. App. Div. 389, 54 N. Y. Suppl. 294; People *v.* Hamilton, 25 N. Y. App. Div. 428, 49 N. Y. Suppl. 605 [*reversing* 21 Misc. (N. Y.) 375, 47 N. Y. Suppl. 190].

As to transfer of license and lease of premises to another see People *v.* Murray, 148 N. Y. 171, 42 N. E. 584; Matter of Lyman, 34 N. Y. App. Div. 389, 54 N. Y. Suppl. 294; Matter of Place, 27 N. Y. App. Div. 561, 50 N. Y. Suppl. 640; Matter of Zinzow, 18 Misc. (N. Y.) 653, 43 N. Y. Suppl. 714; People *v.* Excise Bd., 7 Misc. (N. Y.) 415, 27 N. Y. Suppl. 983.

99. State *v.* Moniteau County Ct., 45 Mo. App. 387; *In re* Opinion of Justices, 72 N. H. 605, 55 Atl. 943. And see Baldwin *v.* Smith, 82 Ill. 162; Com. *v.* Bair, 5 Pa. Dist. 488.

1. Powell *v.* Egan, 42 Nebr. 482, 60 N. W. 932; Foster *v.* Frost, 25 Nebr. 731, 41 N. W. 647; State *v.* Kaso, 25 Nebr. 607, 41 N. W. 558. And see Reg. *v.* Kent, 44 J. P. 298. But *compare* Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603; Lemon *v.* Peyton, 64 Miss. 161, 8 So. 235.

2. See the statutes of the different states. And see Zerger *v.* Quilling, 48 Ark. 157, 2 S. W. 662; State *v.* Bell, 119 Mo. 70, 24 S. W. 765; People *v.* Cortland County, 24 How. Pr. (N. Y.) 119.

ject to indictment when their action in granting or refusing licenses was prompted by corrupt motives, or amounts to a gross abuse of discretion or a plain dereliction of duty.[3] They are not personally liable in an action at law against them to recover damages alleged to have been sustained by their refusal to grant a license to plaintiff; the latter, if clearly entitled to a license, may enforce his rights by mandamus, but the proceeding on his application is so far judicial as to protect the officers from civil actions for damages,[4] and as they do not act as agents of the city or town but as public officers, in the absence of any statute to the contrary, the municipality is not answerable for their acts.[5]

F. Proceedings to Obtain License — 1. Application For License — a. Form and Requisites. While the petition for a license should contain all that the statute requires to appear in it, its substance is mainly to be regarded, and its form should not be judged by the strictest rules; and mere informalities in the application are not sufficient ground for refusing the license.[6] It should set forth the name and place of residence of the applicant,[7] the name of the owner of the premises where the liquor is to be sold,[8] the kind of business the applicant proposes to engage in, and the kind of liquors he asks leave to sell,[9] and should contain a reasonably certain and explicit description of the premises where it is proposed to carry on the business.[10] If required to contain the names of sponsors

3. *Kentucky.*— Com. *v.* Wood, 116 Ky. 748, 76 S. W. 842, 25 Ky. L. Rep. 1019.
Missouri.— State *v.* Kite, 81 Mo. 97.
New Hampshire.— Sargent *v.* Little, 72 N. H. 555, 58 Atl. 44.
New York.— People *v.* Jones, 54 Barb. 311; People *v.* Norton, 7 Barb. 477; People *v.* Worsley, 1 N. Y. Suppl. 748.
North Carolina.— Atty.-Gen. *v.* Guilford County, 27 N. C. 315.
England.— Rex *v.* Holland, 1 T. R. 692, 1 Rev. Rep. 362; Rex *v.* Hann, 3 Burr. 1716; Rex *v.* Athay, 2 Burr. 653; Rex *v.* Young, 1 Burr. 556.
See 29 Cent. Dig. tit. "Intoxicating Liquors," § 62.

4. Halloran *v.* McCullough, 68 Ind. 179; Bassett *v.* Godschall, 3 Wils. C. P. 121.

5. McGinnis *v.* Medway, 176 Mass. 67, 57 N. E. 210. And see MUNICIPAL CORPORATIONS.

6. Hearn *v.* Brogan, 64 Miss. 334, 1 So. 246.
All the jurisdictional facts to authorize the grant of a license must affirmatively appear on the face of the proceedings. State *v.* Seibert, 97 Mo. App. 212, 71 S. W. 95; Jones *v.* Thro, 2 Mo. App. Rep. 1303. But where the order of court granting the license recites all the necessary jurisdictional facts, the omission of the same from the petition is not reversible error. State *v.* Cauthorn, 40 Mo. App. 94.
Citizenship.— Where a petition for a liquor license states that petitioner is a citizen of the United States, and that he was born in Ireland, it is not fatally defective because it does not state in what manner petitioner became a citizen. *In re* Walsh, 208 Pa. St. 582, 57 Atl. 983 [*reversing* 24 Pa. Super. Ct. 87].
An alteration of a petition for a liquor license, which consists in erasing the name of the person to whom the registered voters supposed the license was to issue, and substituting the name of another person, affords a sufficient ground for refusing the license to the substituted person. Polk County Com'rs *v.* Johnson, 21 Fla. 577.
Amendment of petition see *In re* Rahns Tp., 13 Pa. Dist. 547; *In re* Fisler, 11 Pa. Dist. 526, 2 Blair Co. Rep. 220; *In re* Sherry, 12 Pa. Co. Ct. 129.

7. People *v.* Moriah Bd. of Excise, 91 Hun (N. Y.) 94, 36 N. Y. Suppl. 678. See Murphy *v.* Monroe County, 73 Ind. 483.
Corporation.— In the case of an application by a corporation, it is not necessary for the petition to show "the name and present address of the applicant, and how long he had resided there," as required by law in the case of an application by an individual. *In re* Brewing Co., 14 Pa. Super. Ct. 188.

8. *In re Miller*, 13 Pa. Super. Ct. 272; *In re* Donmoyer, 9 Pa. Co. Ct. 303.

9. Burns' Appeal, 76 Conn. 395, 56 Atl. 611; State *v.* Jefferson County Com'rs, 20 Fla. 425; Hearn *v.* Brogan, 64 Miss. 334, 1 So. 246; Brown *v.* Lutz, 36 Nebr. 527, 54 N. W. 860.

10. *Indiana.*— Mace *v.* Smith, 164 Ind. 152, 72 N. E. 1135; *Ex p.* Miller, 98 Ind. 451; Murphy *v.* Monroe County, 73 Ind. 483; Moran *v.* Creagan, 27 Ind. App. 659, 62 N. E. 61.
Kentucky.— Cravens *v.* Adair County Ct., 30 S. W. 414, 17 Ky. L. Rep. 71.
Missouri.— Tanner *v.* Bugg, 74 Mo. App. 196.
Nebraska.— Waugh *v.* Graham, 47 Nebr. 153, 66 N. W. 301.
New Jersey.— Orcutt *v.* Reingardt, 46 N. J. L. 337.
Pennsylvania.— *In re* Walker, 24 Pa. Super. Ct. 90.
Texas.— Green *v.* Southard, 94 Tex. 470, 61 S. W. 705. And see Cox *v.* Thompson, (Civ. App. 1905) 85 S. W. 34; Douthit *v.* State, 36 Tex. Civ. App. 396, 82 S. W. 352 [*modified* in 98 Tex. 344, 83 S. W. 795].

or sureties for the applicant, or the consent of adjoining property-owners, the application is fatally defective without this.[11] It should of course be signed by the applicant,[12] and must be filed the requisite length of time before the meeting of the court or board which is to pass upon it.[13]

b. Withdrawing and Renewal. A petitioner for license cannot withdraw his application without leave, and this will not be granted where the effect would be to block the application of a fit and suitable person.[14] But an order of the licensing authorities denying the application does not estop or prevent the petitioner from renewing his application or filing a new petition,[15] except in so far as the statute may forbid this to be done within a limited time after action taken on the first.[16]

c. Affidavit of Applicant. Where the law requires the applicant to file an affidavit, promissory in its nature, of his intention duly to observe all the requirements of the law, the license is void if issued without such an affidavit or if it does not contain the material statements required.[17] And the same is true of a provision requiring an affidavit that the signatures of persons joining in the petition or recommending it are genuine, and were not procured by fraud, bribery, or deception.[18]

d. Notice of Application. It is generally provided, by statute or ordinance, that notice shall be given, in some public manner, of all applications for liquor licenses, for a prescribed period of time, in order that persons interested in contesting particular applications may be fully informed when and where to take action. Compliance with such requirement is a jurisdictional requisite and essential to the validity of a license.[19]

e. Form and Contents of Notice. The notice is ordinarily required to set forth with reasonable certainty and without ambiguity the precise location of the premises where its privilege is to be exercised,[20] the right name of the applicant,[21] and the character of license he applies for.[22]

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 64.

11. *In re* Bridge, 56 N. Y. Suppl. 1105; *In re* Bailey, 5 Pa. Dist. 172.

Financial condition of surety.— The license will be refused where the petition does not certify that the surety who is on a bond previously executed by him and filed in the same court is worth four thousand dollars over and above all encumbrances and over and above any previous bonds he may be on as surety, as required by the Pennsylvania act of May 4, 1895. Beatty's Case, 2 Blair Co. Rep. (Pa.) 247.

12. It seems the omission of the signature from the body of the petition is not material, if the required affidavit, duly signed and verified, is indorsed thereon. State *v.* Heege, 37 Mo. App. 338.

13. Cooper *v.* Hunt, 103 Mo. App. 9, 77 S. W. 483; State *v.* Seibert, 97 Mo. App. 212, 71 S. W. 95.

14. *In re* Heilig, 2 Pa. Dist. 342, 12 Pa. Co. Ct. 538. And see *In re* Keiper, 21 Pa. Super. Ct. 512.

15. Knox *v.* Rainbow, 111 Cal. 539, 44 Pac. 175; *Ex p.* Citizens' League, 5 Montreal Super. Ct. 160. See Tross *v.* Elizabeth Bd. of Excise, 59 N. J. L. 97, 35 Atl. 646, opinion delivered by Van Syckle, J.

16. State *v.* Pancoast, 53 N. J. L. 553, 22 Atl. 122.

17. Russell *v.* State, 77 Ala. 89. See State *v.* Seibert, 97 Mo. App. 212, 71 S. W. 95; *In re* Brewing Co., 14 Pa. Super. Ct. 188.

18. State *v.* Sumter County Com'rs, 22 Fla. 364.

19. Pisar *v.* State, 56 Nebr. 455, 76 N. W. 869; Zielke *v.* State, 42 Nebr. 750, 60 N. W. 1010; Pelton *v.* Drummond, 21 Nebr. 492, 32 N. W. 593; State *v.* Murphy, 51 N. J. L. 250, 17 Atl. 157; *In re* Keiper, 21 Pa. Super. Ct. 512; Reg. *v.* Nicholson, [1899] 2 Q. B. 455, 68 L. J. Q. B. 1034, 81 L. T. Rep. N. S. 257, 48 Wkly. Rep. 52.

Republication after amendment.— After jurisdiction has been acquired by the filing of a proper petition and the publication of notice for the requisite time, the court may permit other freeholders to sign the petition and need not republish the notice after such amendment. Thompson *v.* Eagan, (Nebr. 1903) 97 N. W. 247; Livingston *v.* Corey, 33 Nebr. 366, 50 N. W. 263.

In Missouri, under the dram-shop law, no notice, general or special, of the application for license is required. State *v.* Moniteau County Ct., 45 Mo. App. 387.

20. Barnard *v.* Graham, 120 Ind. 135, 22 N. E. 112; Whitlock *v.* Bartholomew, 91 Iowa 246, 59 N. W. 76; Com. *v.* Bearce, 150 Mass. 389, 23 N. E. 99; Dexter *v.* Cumberland, 17 R. I. 222, 21 Atl. 347.

21. Com. *v.* Bearce, 150 Mass. 389, 23 N. E. 99; Braconier *v.* Packard, 136 Mass. 50.

22. *Ex p.* Clayton, 63 J. P. 788.

f. Publication of Notice. A statutory requirement that the notice shall be published for a certain length of time in one or more newspapers is jurisdictional, and a license cannot be lawfully granted without compliance with it.[23] Where the law leaves it to the applicant to select the paper in which the notice shall be published, the licensing board has no authority to select or designate it.[24] If he is required to have the notice published in the newspaper having the largest circulation in the county, the publication will not be declared invalid, on a dispute as to the circulation of the paper selected,[25] unless bad faith can properly be imputed to the applicant in making choice of the paper.[26]

2. Assent to or Recommendation of Application — a. In General. Where the statute requires the applicant's petition for a license to be indorsed or accompanied by a recommendation or petition signed by a certain number of qualified persons, or by a certain proportion of the voters or residents of the district, the licensing authorities have no power to issue a license unless this requirement has been complied with, and a license granted in disregard of it is void.[27] And ordinarily an annual renewal of a license cannot be granted without a new recommendation.[28] It has been held that the petition should bear the requisite number

23. Brown *v.* Lutz, 36 Nebr. 527, 54 N. W. 860; State *v.* South Omaha, 33 Nebr. 876, 51 N. W. 291; Pelton *v.* Drummond, 21 Nebr. 492, 32 N. W. 593. And see Sun, etc., Pub. Co. *v.* Bennett, 26 Pa. Super. Ct. 243.

Number of insertions.— Where the notice is required to be published for two weeks, if it is inserted in a daily paper it must be published every day, if in a weekly paper, once each week. Feil *v.* Kitchen Bros. Hotel Co., 57 Nebr. 22, 77 N. W. 344; State *v.* South Omaha, 33 Nebr. 876, 51 N. W. 291.

The failure to publish the mark of some of the petitioners who made their mark in signing the petition, and whose names are published, is not a material defect. State *v.* Sumter County Com'rs, 22 Fla. 1. And see Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603.

Language in which published.— It will be presumed, in the absence of legislative direction to the contrary, that the notice is to be published in the English language; and an ordinance designating a newspaper published in a foreign language, as the one in which the notices shall be printed, is void. State *v.* Jersey City, 54 N. J. L. 437, 24 Atl. 571.

Proof of publication.— The affidavit of the publisher of the newspaper is *prima facie* evidence of the due publication of the notice. Rosewater *v.* Pinzenscham, 38 Nebr. 835, 57 N. W. 563. And see Notices.

24. Feil *v.* Kitchen Bros. Hotel Co., 57 Nebr. 22, 77 N. W. 344; Rosewater *v.* Pinzenscham, 38 Nebr. 835, 57 N. W. 563; Smith *v.* Young, 13 Okla. 134, 74 Pac. 104; Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332.

25. Feil *v.* Kitchen Bros. Hotel Co., 57 Nebr. 22, 77 N. W. 344; Lambert *v.* Stevens, 29 Nebr. 283, 45 N. W. 457.

26. Goodwine *v.* Flint, 28 Ind. App. 36, 60 N. E. 1102.

27. *Alabama.*— Long *v.* State, 27 Ala. 32. An act requiring the applicant to secure a recommendation from a majority of the householders in the precinct is not inoperative because it provides no way of obtaining such a recommendation. Jones *v.* Hilliard, 69 Ala. 300.

Arkansas.— *Ex p.* Cox, 19 Ark. 688.

California.— Purdy *v.* Sinton, 56 Cal. 133.

Georgia.— Metcalf *v.* State, 76 Ga. 308.

Illinois.— Martens *v.* People, 85 Ill. App. 66.

Iowa.— McConkie *v.* Remley, 119 Iowa 512, 93 N. W. 505; Darling *v.* Boesch, 67 Iowa 702, 25 N. W. 887.

Kentucky.— Com. *v.* Elmore, 58 S. W. 369, 22 Ky. L. Rep. 510.

Mississippi.— House *v.* State, 41 Miss. 737.

Missouri.— Tanner *v.* Bugg, 74 Mo. App. 196.

Nebraska.— State *v.* Weber, 20 Nebr. 467, 30 N. W. 531.

New Jersey.— Bachman *v.* Phillipsburg, 68 N. J. L. 552, 53 Atl. 620; Van Nortwick *v.* Bennett, 62 N. J. L. 151, 40 Atl. 689.

North Carolina.— Hillsboro *v.* Smith, 110 N. C. 417, 14 S. E. 972; State *v.* Moore, 46 N. C. 276.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 66.

Personal signature required.— In Pennsylvania it is held that the signers of a petition must write their own names. Making their marks, or the authorized signing of their names by another, is not sufficient to give the court jurisdiction. *In re* Grant, 2 Pa. Co. Ct. 87.

Witnesses.— Although the statute requires, on application for a license, that the petitioners shall each sign in the presence of two witnesses, it does not require that the witnesses should subscribe or attest the signatures. State *v.* Sumter County Com'rs, 22 Fla. 1.

In Indiana, under the liquor law of 1859, no one but the applicant was required to sign his petition for a license. Hornaday *v.* State, 43 Ind. 306.

28. *In re* Halifax Liquor License, 10 Nova Scotia 257.

of signatures before its presentation to the licensing authorities, although the subsequent addition of signatures is no more than an irregularity.[29] In respect to substance it must contain each and all of the statements or representations required by the statute.[30]

b. Who May Sign Recommendation. The signers to such a recommendation must be such as the statute requires, whether adults, freeholders, taxpayers, citizens, residents of the district, heads of families, or otherwise according to the terms of the law.[31] Unless restrained by statute, one is not disqualified from signing such a petition by the fact that he has already signed the petition of another applicant, or a recommendation for a different kind of license.[32] One signing such a petition or recommendation may withdraw his name from it after the paper has been filed, but not after the licensing authorities have entered upon the consideration of it, nor where the effect of such withdrawal would be to deprive them of jurisdiction to consider the petition.[33]

c. Number of Signers Required. A statutory requirement that an application for a license shall be indorsed or recommended by a designated number of persons, or by a majority of the voters or taxpayers, is imperative; and a license issued without compliance with this provision is without jurisdiction and invalid.[34]

29. State *v.* Jefferson County Com'rs, 20 Fla. 425. But *compare* Matter of Lord, 32 Misc. (N. Y.) 223, 66 N. Y. Suppl. 252.

30. McCreary *v.* Rhodes, 63 Miss. 308; Loeb *v.* Duncan, 63 Miss. 89; Corbett *v.* Duncan, 63 Miss. 84; State *v.* Tullock, 108 Mo. App. 32, 82 S. W. 645.

31. See the statutes of the different states. And see the following cases:

Alabama.— Harlan *v.* State, 136 Ala. 150, 33 So. 858; Glenn *v.* Lynn, 89 Ala. 608, 7 So. 924.

Florida.— State *v.* Sumter County Com'rs, 22 Fla. 1.

Georgia.— See Wray *v.* Harrison, 116 Ga. 93, 42 S. E. 351; Ballew *v.* State, 84 Ga. 138, 10 S. E. 623. And see Kemp *v.* State, 120 Ga. 157, 47 S. E. 548.

Illinois.— People *v.* Griesbach, 211 Ill. 35, 71 N. E. 874 [*reversing* 112 Ill. App. 192].

Iowa.— State *v.* Mateer, 94 Iowa 42, 62 N. W. 684; State *v.* Greenway, 92 Iowa 472, 61 N. W. 239.

Louisiana.— Shepard *v.* New Orleans, 51 La. Ann. 847, 25 So. 542.

Maryland.— Cahen *v.* Jarrett, 42 Md. 571.

Mississippi.— Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603.

Nebraska.— Campbell *v.* Moran, (1904) 99 N. W. 498.

Pennsylvania.— *In re* Forst, 208 Pa. St. 578, 57 Atl. 991 [*affirming* 3 Pa. Super. Ct. 600].

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 66.

Fraud in qualification.— A deed of land, made by the petitioner for license to one or several persons, not in good faith or for value, but merely with a fraudulent intention to qualify them to sign his petition as freeholders, is a fraud on the law and will be held ineffective for that purpose. Bennett *v.* Otto, (Nebr. 1903) 94 N. W. 807; Colglazier *v.* McClary, 5 Nebr. (Unoff.) 332, 98 N. W. 670; Austin *v.* Atlantic City, 48 N. J. L. 118, 3 Atl. 65; Smith *v.* Elizabeth Bd. of Excise, 46 N. J. L. 312. So also, where an applicant for license procured two persons to take quarters in the same building with the proposed saloon, to qualify as signers, under an order requiring signatures of householders being heads of families, it was held a fraud, and that such persons could not be counted in making up the necessary number of signers. Bachman *v.* Phillipsburg, 68 N. J. L. 552, 53 Atl. 620.

A signature procured for a valuable consideration cannot be counted.— Theurer *v.* People, 211 Ill. 296, 71 N. E. 997 [*affirming* 113 Ill. App. 628].

32. Orcutt *v.* Reingardt, 46 N. J. L. 337; *In re* Meredith, 2 Pa. Co. Ct. 82. See Williams *v.* Bayonne, 55 N. J. L. 60, 25 Atl. 407.

A signature attached to both the petition and counter petition is to be counted, under the laws of Mississippi, against the granting of the license; but this does not preclude one who has signed both a petition and a counter petition from withdrawing his name from the latter by signifying his desire therefor by still another written petition. Perkins *v.* Henderson, 68 Miss. 631, 9 So. 897.

33. Harlan *v.* State, 136 Ala. 150, 33 So. 858; Green *v.* Smith, 111 Iowa 183, 82 N. W. 448; Bachman *v.* Phillipsburg, 68 N. J. L. 552, 53 Atl. 620; Orcutt *v.* Reingardt, 46 N. J. L. 337. And see Theurer *v.* People, 113 Ill. App. 628 [*affirmed* in 211 Ill. 296, 71 N. E. 997].

34. *Arkansas.*— *Ex p.* Cox, 19 Ark. 688.

Florida.— State *v.* D'Alemberte, 30 Fla. 545, 11 So. 905.

Georgia.— Metcalf *v.* State, 76 Ga. 308.

Illinois.— Harrison *v.* People, 195 Ill. 466, 63 N. E. 191.

Iowa.— State *v.* Mateer, 94 Iowa 42, 62 N. W. 684.

Louisiana.— Shephard *v.* New Orleans, 51 La. Ann. 847, 25 So. 542.

Missouri.— State *v.* Meyers, 80 Mo. 601; Scarritt *v.* Jackson County Ct., 89 Mo. App.

Where the requirement is that the petition shall be signed by a majority of the assessed taxpaying citizens, this description includes married and single women who own property in their own right and pay taxes assessed thereon and minors under guardianship who own property.[35] It seems there is no objection to uniting the signatures on several papers, recommending the same applicant, if they are exactly alike; but this cannot be done if there are material differences between the several petitions.[36]

d. Consent of Property-Owners. The statute at present in force in New York requires the applicant for a liquor-tax certificate to obtain the consent of the owners or agents of at least two thirds of the buildings occupied exclusively as dwelling-houses within two hundred feet of the location of the proposed saloon or liquor store.[37] In Iowa the statute provides that a written statement of consent from all the resident freeholders owning property within fifty feet of the building where the business of selling intoxicating liquors is carried on shall be filed.[38]

3. Remonstrances — a. In General. Under statutes providing for the filing of remonstrances or counter petitions by persons desiring to oppose the grant of a license to a particular applicant,[39] this right of opposition must be limited to the

585; State *v.* Moniteau County Ct., 45 Mo. App. 387; State *v.* Heege, 37 Mo. App. 338. And see State *v.* Kingsbury, 105 Mo. App. 22, 78 S. W. 641.

Nebraska.— Somers *v.* Vlazney, 64 Nebr. 383, 89 N. W. 1036.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 66.

Forged or unauthorized signatures.— Although it may appear on the face of the petition that the requisite number of persons have signed it, this does not preclude inquiry into the genuineness of the signatures; and if it be proved that so many of the signatures were forged or unauthorized as to reduce the number of genuine signatures below the required majority, it is proper to refuse the license. State *v.* Sumter County Com'rs, 22 Fla. 364. And see Wiseman *v.* St. Laurent Corp., 3 Montreal Super. Ct. 108.

Where several classes of persons are enumerated by statute a majority of each class need not sign; the petition is sufficient if signed by a majority of all the persons embraced in such classes. State *v.* Fort, 107 Mo. App. 328, 81 S. W. 476.

35. State *v.* Howard County Ct., 90 Mo. 593, 2 S. W. 788. But see Thompson *v.* Egan, (Nebr. 1903) 97 N. W. 247, holding that infants, although residents and heirs to estates of inheritance in real estate, are not qualified signers of a petition for the sale of liquors.

36. Collins *v.* Barrier, 64 Miss. 21, 8 So. 164; State *v.* Scott, 96 Mo. App. 620, 70 S. W. 736.

37. N. Y. Laws (1897), c. 312, § 10; Liquor Tax Law, § 17, subd. 8. And see Matter of Cowles, 34 Misc. (N. Y.) 447, 69 N. Y. Suppl. 756; Matter of Sherry, 25 Misc. (N. Y.) 361, 55 N. Y. Suppl. 421, consent cannot be given by lessee.

What constitutes a dwelling see Matter of Patterson, 43 Misc. (N. Y.) 498, 89 N. Y. Suppl. 437; *In re* Rasquin, 37 Misc. (N. Y.) 693, 76 N. Y. Suppl. 404; Matter of Lyman, 26 Misc. (N. Y.) 568, 57 N. Y. Suppl. 488; Matter of Lyman, 24 Misc. (N. Y.) 552, 53 N. Y. Suppl. 577; Matter of Ruland, 21 Misc. (N. Y.) 504, 47 N. Y. Suppl. 561.

No further consent for trafficking in liquor on the same premises shall be required so long as they shall be continuously used for such traffic. See Matter of Cowles, 34 Misc. (N. Y.) 447, 69 N. Y. Suppl. 756; Matter of MacVicker, 21 Misc. (N. Y.) 383, 47 N. Y. Suppl. 1008.

An exception is made, dispensing with the necessity of obtaining such consent when the premises were actually used and occupied for the sale of intoxicating liquor, or as a hotel, at the time the law took effect. See *In re* Loper, 165 N. Y. 618, 59 N. E. 1125; *In re* Kessler, 163 N. Y. 205, 57 N. E. 402; People *v.* Brush, 92 N. Y. App. Div. 611, 80 N. Y. Suppl. 1144 [*affirmed* in 179 N. Y. 93, 71 N. E. 731]; Matter of Moulton, 59 N. Y. App. Div. 25, 69 N. Y. Suppl. 14; Matter of Bridge, 36 N. Y. App. Div. 533, 55 N. Y. Suppl. 54; Matter of Ireland, 41 Misc. (N. Y.) 425, 84 N. Y. Suppl. 1100; Matter of Haight, 33 Misc. (N. Y.) 544, 68 N. Y. Suppl. 920; Matter of Harper, 30 Misc. (N. Y.) 663, 64 N. Y. Suppl. 524; Matter of Klevesahl, 30 Misc. (N. Y.) 361, 63 N. Y. Suppl. 741; People *v.* Lammerts, 18 Misc. (N. Y.) 343, 40 N. Y. Suppl. 1107; Matter of Ritchie, 18 Misc. (N. Y.) 341, 40 N. Y. Suppl. 1106.

Revocation of consent.— A consent given for this purpose by the owner of a dwelling may be revoked at any time before action is taken on the application. Matter of Adriance, 59 N. Y. App. Div. 440, 69 N. Y. Suppl. 314.

Additional consents cannot be filed after an application in which there was a false statement as to the number of dwellings affected. Matter of Bridge, 36 N. Y. App. Div. 533, 25 Misc. 213, 55 N. Y. Suppl. 54.

38. Iowa Code, § 2448. And see Kane *v.* Grady, 123 Iowa 260, 98 N. W. 771.

39. See the statutes of the different states. And see Hardesty *v.* Hine, 135 Ind. 72, 34

cases specified in the law;[40] but within those limits must be freely allowed by the licensing authorities without further conditions or restrictions.[41]

b. Filing Remonstrance. A remonstrance against the grant of a license cannot be considered unless filed as directed by the statute,[42] and within the time limited thereby.[43] On application to compel the authorities to grant a hearing on the petition and remonstrance, the court will not inquire into the truth or falsity of the facts alleged in the remonstrance; for that purpose it is sufficient if one is filed.[44]

c. Form and Requisites. The remonstrance should show that the persons signing it are qualified to do so, by being residents of the district, or registered voters, or whatever else the statute may require,[45] and should set forth the grounds on which objection to the grant of a license is based,[46] in such a specific manner and with such particularity as may inform the applicant precisely of the charge he is expected to meet, and raise an issue of fact for the consideration of the licensing authorities.[47] It should be directed against some individual applicant, and not join opposition to two or more.[48] But the names of the remonstrants need not all be signed to the same paper; they may exercise the right to remonstrate by separate papers directed against the same applicant.[49] Signatures to a remonstrance made by mark and not attested cannot be considered.[50] If the statute requires the remonstrance to be verified by affidavit, it cannot be considered unless sworn to.[51]

d. Who May Remonstrate.[52] As a rule any person who desires to contest an application for a license must follow the course prescribed by statute, as to filing a remonstrance, and take such other steps as may be required, else he cannot be

N. E. 701; Rhode Island Perkins Horse Shoe Co. *v.* Cumberland License Com'rs, 19 R. I. 643, 36 Atl. 2; Bryan *v.* Jones, 34 Ind. App. 701, 73 N. E. 1135; Bryan *v.* De Moss, 34 Ind. App. 473, 73 N. E. 156; Abbott *v.* Inman, (Ind. App. 1904) 72 N. E. 284.

As to constitutionality of such statutes see Wilcox *v.* Bryant, 156 Ind. 379, 59 N. E. 1049.

40. State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Com. *v.* Hawkins, 98 Ky. 176, 32 S. W. 409, 17 Ky. L. Rep. 743; Cravens *v.* Adair County Ct., 30 S. W. 414, 17 Ky. L. Rep. 71. *Compare* Woods *v.* Pratt, 5 Blackf. (Ind.) 377.

41. Reg. *v.* Bird, [1898] 2 Q. B. 340, 62 J. P. 422, 67 L. J. Q. B. 618, 79 L. T. Rep. N. S. 156, 46 Wkly. Rep. 528.

42. See Miller *v.* Wade, 58 Ind. 91; Vanderlip *v.* Derby, 19 Nebr. 165, 26 N. W. 707; Moores *v.* State, 4 Nebr. (Unoff.) 781, 96 N. W. 225.

43. Shaffer *v.* Stern, 160 Ind. 375, 66 N. E. 1004; Conwell *v.* Overmeyer, 145 Ind. 698, 44 N. E. 548; Flynn *v.* Taylor, 145 Ind. 533, 44 N. E. 546; Sexton *v.* Goodwine, 33 Ind. App. 329, 68 N. E. 929, 70 N. E. 999; Rogers *v.* Hahn, 63 Miss. 578; State *v.* Pearse, 31 Nebr. 562, 48 N. W. 391; Vanderlip *v.* Derhy, 19 Nebr. 165, 26 N. W. 707.

Renewal of application.— Where an application for license is withdrawn, or decided adversely to the applicant, and is afterward renewed, a remonstrance filed before the original hearing, and not withdrawn, may be considered as of continuing force, and effective against the grant of the license on the renewal of the application. Wilcox *v.* Bryant, 156 Ind. 379, 59 N. E. 1049; McLaughlin *v.* Wisler, 28 Ind. App. 61, 62 N. E. 73; Hensley *v.* Metcalfe County Ct., 115 Ky. 810, 74 S. W. 1054, 25 Ky. L. Rep. 204; Rhode Island Perkins Horse Shoe Co. *v.* Cumberland License Com'rs, 19 R. I. 643, 36 Atl. 2.

44. State *v.* Reynolds, 18 Nebr. 431, 25 N. W. 610.

45. Head *v.* Doehleman, 148 Ind. 145, 46 N. E. 585; *In re* Philadelphia L. and O. Soc., 185 Pa. St. 572, 40 Atl. 92.

46. Boomershine *v.* Uline, 159 Ind. 500, 65 N. E. 513; Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332. And see *In re* Chuya, 20 Pa. Super. Ct. 410.

47. Grummon *v.* Holmes, 76 Ind. 585; Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332; *In re* Justin, 2 Pa. Co. Ct. 22; Pizer *v.* Fraser, 17 Ont. 635.

48. Massey *v.* Dunlap, 146 Ind. 350, 44 N. E. 641. *Compare* Thompson *v.* Hiatt, 145 Ind. 530, 44 N. E. 486; Collins *v.* Barrier, 64 Miss. 21, 8 So. 164.

49. Flynn *v.* Taylor, 145 Ind. 533, 44 N. E. 546; Wilson *v.* Mathis, 145 Ind. 493, 44 N. E. 486.

50. Fakes *v.* Wilder, 70 Ark. 449, 69 S. W. 260.

51. *In re* Palmer, 3 Pa. Co. Ct. 314.

52. Liability of remonstrator.— It seems that an action may be maintained against a third person who opposes and obstructs plaintiff's application for a license, if he acts maliciously and from personal motives, and not as a matter of public duty. Claus *v.* Hardy, 31 Nebr. 35, 47 N. W. 418.

heard; and an unnamed party cannot be permitted to appear by attorney and oppose the application.[53] The statute may limit the right of remonstrance to certain classes of persons or to persons having a certain interest in the issue;[54] but in the absence of such restrictions it is competent for any person to file objections who has personal or property interests which might be affected by the grant of the license asked for.[55] The right of remonstrance may be exercised through an agent or attorney in fact duly appointed by power of attorney for that purpose.[56]

e. Withdrawing Remonstrance. Remonstrators against the grant of a license have no right, after the expiration of the time within which a remonstrance may be filed, to withdraw their names therefrom, so as to leave a less number of objectors than is required by law, or otherwise to defeat the object of the remonstrance.[57]

4. Hearing or Trial — a. In General. When an application for a license is met by a proper and sufficient remonstrance or counter petition, it is the duty of the licensing board to grant both parties a hearing and to receive relevant evidence on the issue presented. If they ignore the remonstrance and issue the license without a hearing, or if they reject the application without hearing the applicant, their action is illegal and reversible by the courts.[58]

b. Time For Hearing. Disregard of statutory directions that hearings on applications for licenses shall be had only at certain terms of court, meetings of the licensing authorities or on certain days, may invalidate licenses.[59] So, where

53. *Ex p.* Miller, 98 Ind. 451. *Compare* Darling *v.* Boesch, 67 Iowa 702, 25 N. W. 887; Lester *v.* Price, 83 Va. 648, 3 S. E. 529; Leigton *v.* Maury, 76 Va. 865.

54. See the statutes of the different states. And see Somers *v.* Vlazney, 64 Nebr. 383, 89 N. W. 1036; Feil *v.* Kitchen Bros. Hotel Co., 57 Nebr. 22, 77 N. W. 344.

Owners of neighboring property see Dexter *v.* Sprague, 22 R. I. 324, 47 Atl. 889; Lonsdale Co. *v.* Cumberland License Com'rs, 18 R. I. 5, 25 Atl. 655.

Legal voters see Shaffer *v.* Stern, 160 Ind. 375, 66 N. W. 1004; Masscy *v.* Dunlap, 146 Ind. 350, 44 N. E. 641; List *v.* Padgett, 96 Ind. 126; Moran *v.* Creagan, 27 Ind. App. 659, 62 N. E. 61.

Licensing officers.— It seems that it is not competent for the licensing officers to refuse an application for a license on account of an objection originated by themselves, unless they have taken the same steps in opposition to the application as are required of other remonstrants. Gascoyne *v.* Risley, 36 Wkly. Rep. 605.

55. Whissen *v.* Furth, 73 Ark. 366, 84 S. W. 500, 68 L. R. A. 161; Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332. But see State *v.* Moniteau County Ct., 45 Mo. App. 387.

56. Shaffer *v.* Stern, 160 Ind. 375, 66 N. E. 1004; Ragle *v.* Mattox, 159 Ind. 584, 65 N. E. 743; Ludwig *v.* Cory, 158 Ind. 582, 64 N. E. 14; Cochell *v.* Reynolds, 156 Ind. 14, 58 N. E. 1029; Castle *v.* Bell, 145 Ind. 8, 44 N. E. 2; James *v.* Nugent, 31 Ind. App. 697, 67 N. E. 195; Fried *v.* Nelson, 30 Ind. App. 1, 65 N. E. 216; White *v.* Fergeson, 29 Ind. App. 144, 64 N. E. 49.

A corporation may execute a remonstrance in its corporate name by its superintendent on the instruction of its general manager, the latter having the right so to instruct; a formal vote of the directors is not necessary. Lonsdale Co. *v.* Cumberland License Com'rs, 18 R. I. 5, 25 Atl. 655.

57. Sutherland *v.* McKinney, 146 Ind. 611, 45 N. E. 1048; White *v.* Prifogle, 146 Ind. 64, 44 N. E. 926; Conwell *v.* Overmeyer, 145 Ind. 698, 44 N. E. 548; State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; State *v.* Coleman, 34 Nebr. 440, 51 N. W. 1025. And see Davis *v.* Affleck, 34 Ind. App. 572, 73 N. E. 283; Sexton *v.* Goodwine, 33 Ind. App. 329, 68 N. E. 929, 70 N. E. 999. *Compare* Wiseman *v.* Dugas, 6 Montreal Super. Ct. 133.

58. *Nebraska.*— Hollembaek *v.* Drake, 37 Nebr. 680, 56 N. W. 296; Steinkraus *v.* Hurlbert, 20 Nebr. 519, 30 N. W. 940.

New Jersey.— State *v.* Matthews, 51 N. J. L. 253, 17 Atl. 154; Dufford *v.* Nolan, 46 N. J. L. 87.

Oklahoma.— Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332; Swan *v.* Wilderson, 10 Okla. 547, 62 Pac. 422.

Pennsylvania.—Matter of Doylestown Distilling Co., 9 Pa. Super. Ct. 96.

England.— Regina *v.* Walsall, 2 C. L. R. 100, 3 Wkly. Rep. 69; Reg. *v.* Sylvester, 8 Jur. N. S. 484, 31 L. J. M. C. 93, 5 L. T. Rep. N. S. 794.

After an application has been heard and refused, the licensing authorities have no right to strike off the judgment of refusal and grant a license without notice to the remonstrants. *In re* Kahrer, 12 Pa. Co. Ct. 12. But *compare* People *v.* Murray, 147 N. Y. 717, 42 N. E. 725 [*affirming* 87 Hun 393, 34 N. Y. Suppl. 426].

59. State *v.* Kennedy, 1 Ala. 31; McNeal *v.* Ryan, 56 N. J. L. 443, 28 Atl. 552;

the statute provides that on the filing of a remonstrance the licensing board shall appoint a day for a hearing, the board is bound to grant a hearing and fix a day for the same in the future,[60] the intention being that both sides shall be given a fair and reasonable opportunity to prepare and present their evidence.[61] Ordinarily it is within the power of the licensing authorities to continue or adjourn a hearing for a reasonable time.[62]

c. Questions Considered. On the hearing of an application for a license, the questions to be considered are the compliance of the applicant with the preliminary conditions, including the form and regularity of his petition, its recommendation by third persons, if that is required, and the publication of notice; the statutory qualifications of the applicant; and any issues of fact properly raised by remonstrances filed in the case;[63] and where the licensing authorities possess a certain measure of discretion, they are permitted to go further and consider the propriety and expediency of granting the license asked for in the particular case.[64] In Pennsylvania, by statute, licenses may be granted to citizens of temperate habits and good moral character; but only when the court is satisfied that the place to be licensed is "necessary" for the accommodation of the public. The question of this necessity is therefore to be considered and determined at the hearing on the application.[65]

Hinchman *v.* Stoepel, 54 N. J. L. 486, 24 Atl. 401.

Special meeting.— The licensing board may properly refuse a license applied for at a special meeting called for another purpose at which all the members of the board are not present. Riley *v.* Rowe, 112 Ky. 817, 66 S. W. 999, 23 Ky. L. Rep. 2168.

Suspension of rules.— The rules of a board of excise requiring applications for new liquor licenses to be granted at certain stated times cannot, at a meeting held at another time, be suspended for the purpose of granting such new license at once, because this would deprive those opposed to the license of a reasonable opportunity to be heard. Warren St. Chapel *v.* Trenton Excise Com'rs, 56 N. J. L. 411, 29 Atl. 150.

Sessions limited.— A statute limiting the sessions of the licensing board to ten days in any year, for the purpose of receiving applications for licenses, precludes them from granting a license after they have been in session ten days. People *v.* Albany County Excise Com'rs, 3 Park. Cr. (N. Y.) 501.

Unseasonable hour.— Where the law prohibits the board from convening and transacting business before nine o'clock A. M. on any day, an order made by the board before eight o'clock A. M., dismissing a remonstrance and granting a license, is void. Swan *v.* Wilderson, 10 Okla. 547, 62 Pac. 422.

60. State *v.* Hanlon, 24 Nebr. 608, 39 N. W. 780; Clark *v.* State, 24 Nebr. 263, 38 N. W. 752; State *v.* Reynolds, 18 Nebr. 431, 25 N. W. 610.

61. State *v.* Coleman, 34 Nebr. 440, 51 N. W. 1025; State *v.* Weber, 20 Nebr. 467, 30 N. W. 531; McNeal *v.* Ryan, 56 N. J. L. 443, 28 Atl. 552; *In re* Bowman, 167 Pa. St. 644, 31 Atl. 932.

62. Cox *v.* Burnham, 120 Iowa 43, 94 N. W. 265; Baxter *v.* Leche, 62 J. P. 630, 79 L. T. Rep. N. S. 138. *Compare* McNaughton *v.* Argyle, 5 Misc. (N. Y.) 457, 26 N. Y. Suppl. 229.

63. See Riley *v.* Rowe, 112 Ky. 817, 66 S. W. 999, 23 Ky. L. Rep. 2168; *In re* Tierney, (Nebr. 1904) 99 N. W. 518; Reg. *v.* Cotham, [1898] 1 Q. B. 802, 62 J. P. 435, 67 L. J. Q. B. 632, 78 L. T. Rep. N. S. 468, 46 Wkly. Rep. 512.

64. State *v.* Hanlon, 24 Nebr. 608, 39 N. W. 780; People *v.* Mills, 91 Hun (N. Y.) 144, 36 N. Y. Suppl. 371; *In re* Hilleman, 11 Pa. Super. Ct. 567. And see U. S. *v.* Johnson, 12 App. Cas. (D. C.) 545. See *infra*, VI, F, 5.

65. See *In re* Thomas, 169 Pa. St. 111, 32 Atl. 100 (holding that an application for a license may be denied by the judge to whom it is presented, on his individual opinion that it is not necessary); Reed's Appeal, 114 Pa. St. 452, 6 Atl. 910; *In re* Washington County Liquor Licenses, 11 Pa. Dist. 339; *In re* Howell, 10 Pa. Dist. 504; *In re* Philadelphia Licenses, 4 Pa. Dist. 201; *In re* Venango County Liquor Licenses, 28 Pa. Co. Ct. 209; *In re* Washington County, 8 Pa. Co. Ct. 169; *In re* Meredith, 2 Pa. Co. Ct. 82; *In re* Helling, 2 Pa. Co. Ct. 76; *In re* Severn, 2 Pa. Co. Ct. 75; *In re* Smith, 2 Pa. Co. Ct. 74; *In re* Justin, 2 Pa. Co. Ct. 22; *In re* Brendlinger, 11 Montg. Co. Rep. (Pa.) 93.

Meaning of necessary.— The word "necessary" as used in this statute is not to be construed in the strictest sense, nor taken to mean an indispensable necessity. It has reference to the reasonable requirements and convenience of the neighborhood, and also to the extent to which illegal means would be resorted to to secure supplies of liquor in case its sale was not licensed. *In re* Erie Licenses, 4 Pa. Dist. 167; *In re* Brownell, 11 Pa. Co. Ct. 404. And see *In re* Hallman Wholesale Liquor License, 10 Pa. Dist. 447.

Brewers' and distillers' licenses.— The stat-

d. Admissibility of Evidence. Issues of fact, raised by the petition and a remonstrance against it, are to be determined on competent evidence, under the rules governing civil trials in courts of law.[66] Evidence may be received bearing upon the personal fitness and moral qualifications of the applicant,[67] and upon the question of his being debarred from receiving a license by previous violations of the criminal laws,[68] as also with reference to the proximity of churches or schools, if that fact is made material by the statute.[69] The facts as to the number or sufficiency of the persons consenting to the application or recommending it, or the genuineness or good faith of their indorsement, or the truth of the facts which they certify, may also be brought into issue, and should be determined upon competent evidence.[70]

e. Burden of Proof. The applicant for a license must sustain the burden of proving every material fact necessary to entitle him to receive the privilege which he seeks.[71] But it seems that if a remonstrance affirmatively charges a previous violation of the law, or a previous revocation of the license, the remonstrants must sustain their allegations by evidence.[72] If the application is for the restoration or renewal of a license which had previously been revoked, it must be treated as a new application, throwing the burden of proof on the applicant.[73]

f. Procedure on Hearing. Where the hearing on an application for a license is held before a court, or before a board which acts in a judicial capacity, the proceedings are governed by the ordinary rules of judicial procedure in civil actions.[74] In some states the applicant must bear all the costs of an unsuccessful applica-

utory requirement that the place to be licensed shall be necessary for the accommodation of the public does not apply in the case of a brewer's or distiller's license, and hence an application for such a license cannot be denied on the ground of a want of public necessity. *In re* Gemas, 169 Pa. St. 43, 32 Atl. 88; *In re* Johnson, 156 Pa. St. 322, 26 Atl. 1066; *In re* Reigner, 11 Pa. Co. Ct. 401. *Compare In re* Johnson, 165 Pa. St. 315, 31 Atl. 203.

Wholesaler's license.— Doherneck's Appeal, I Pa. Super. Ct. 99; Doylestown Distilling Co.'s Appeal, 41 Wkly. Notes Cas. (Pa.) 313.

66. Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332. And see People *v.* Sackett, 17 Misc. (N. Y.) 405, 40 N. Y. Suppl. 413. See, generally, EVIDENCE.

Unsworn evidence.— As to the discretion of the licensing authorities in receiving unsworn testimony and permitting the expression of their opinions by persons present at the hearing see U. S. *v.* Douglass, 19 D. C. 99; Stockwell *v.* Brant, 97 Ind. 474.

67. Smith's Appeal, 65 Conn. 135, 31 Atl. 529; State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332. And see *In re* Wheelin, 134 Pa. St. 554, 19 Atl. 755.

68. Stockwell *v.* Brant, 97 Ind. 474.

69. Eslinger *v.* East, 100 Ind. 434.

70. *Arkansas.*— *Ex p.* McCullough, 51 Ark. 159, 10 S. W. 259.

Iowa.— Porter *v.* Butterfield, 116 Iowa 725, 89 N. W. 199; *In re* Intoxicating Liquors, 108 Iowa 368, 79 N. W. 260.

Maryland.— Devin *v.* Belt, 70 Md. 352, 17 Atl. 375.

New Jersey.— State *v.* Hill, 52 N. J. L. 326, 19 Atl. 789.

New York.— People *v.* Lyman, 163 N. Y. 602, 57 N. E. 1120.

Oklahoma.— Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 70.

71. *Arkansas.*— Whissen *v.* Furth, 73 Ark. 366, 84 S. W. 500, 68 L. R. A. 161.

Indiana.— Chandler *v.* Ruebelt, 83 Ind. 139; Goodwin *v.* Smith, 72 Ind. 113, 37 Am. Rep. 144.

Kentucky.— Hodges *v.* Metcalfe County Ct., 78 S. W. 177, 25 Ky. L. Rep. 1553.

Nebraska.— Brown *v.* Lutz, 36 Nebr. 527, 54 N. W. 860.

Oklahoma.— Smith *v.* Young, 13 Okla. 134, 74 Pac. 104; Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332.

Pennsylvania.— *In re* Foreman, 20 Pa. Super. Ct. 98; Kerns' Appeal, 38 Wkly. Notes Cas. 438. *Compare In re* Chambers, 18 Pa. Super. Ct. 412; *In re* Brown, 18 Pa. Super. Ct. 409; *In re* Quinn, 11 Pa. Super. Ct. 554.

England.— *Ex p.* Morgan, 23 L. T. Rep. N. S. 605.

72. Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332; *In re* Meredith, 2 Pa. Co. Ct. 82.

73. *In re* Rutherford, 2 Pa. Co. Ct. 78.

74. Fletcher *v.* Crist, 139 Ind. 121, 38 N. E. 472; Bryan *v.* Jones, 34 Ind. App. 701, 73 N. E. 1135; Bryan *v.* De Moss, 34 Ind. App. 473, 73 N. E. 156. See Weber *v.* Lane, 99 Mo. App. 69, 71 S. W. 1099; State *v.* Columbia, 17 S. C. 80. And see TRIAL.

Witnesses.— A license board has power to compel the attendance of witnesses and the production of books and papers, and to commit for contempt a witness who refuses to answer questions or to produce books or papers called for before the board. Rose-

tion ;[75] but in others, each of the parties (petitioner and remonstrant) bears his own costs.[76]

g. Grounds For Refusing License. It is proper for the court or licensing board to refuse to grant a license on proof that the petition has not been signed in good faith by the requisite number or majority of persons ;[77] that the applicant is not a person of good moral character ;[78] that he has been guilty of violations of the liquor laws,[79] as by selling to minors or drunkards, or keeping open at prohibited times ;[80] that he has maintained a disorderly house, has permitted the visits of prohibited persons,[81] or has violated the statute against the sale of adulterated liquors ;[82] or that his application is not made in good faith.[83] But it seems that covenants in deeds against the sale of intoxicating liquors on the premises will not prevent the granting of licenses for such sale.[84] And although in some states the licensing authorities are vested with a wide measure of discretion in this regard, yet even there they cannot refuse generally to grant any licenses at all, on account of their personal views as to the validity or propriety of the license law.[85]

h. Judgment or Decision. When the court or board for the hearing of applications for licenses consists of two or more members, a license cannot be issued except upon the concurrence of a majority; if they are equally divided the application fails.[86] The court or board need not, unless specially required by law, set forth in writing the grounds of its refusal to grant a particular application.[87]

water *v.* Pinzenscham, 38 Nebr. 835, 57 N. W. 563.

Open and close.— On application for a license and a remonstrance filed, the applicant has the right to open and close. Hill *v.* Perry, 82 Ind. 28.

Verdict.— Where the jury, on trial of an application, find that the applicant possesses all the statutory qualifications, a further finding by them that he is "not a fit man to sell intoxicating liquors" is a mere conclusion of law and may be disregarded. Miller *v.* Wade, 58 Ind. 91.

Submission to court.— The statute relating to the submission of an agreed case is not applicable to an application for a liquor license. North *v.* Barringer, 147 Ind. 224, 46 N. E. 531.

75. Miller *v.* De Armond, 93 Ind. 74.

76. *In re* Chesney, 2 Pa. Co. Ct. 474; *In re* Owen, 1 Pa. Co. Ct. 326.

77. State *v.* Sumter County Com'rs, 22 Fla. 364.

78. Lynch *v.* Bates, 139 Ind. 206, 38 N. E. 806; Hardesty *v.* Hine, 135 Ind. 72, 34 N. E. 701; Groscop *v.* Rainier, 111 Ind. 361, 12 N. E. 694.

79. *In re* Smith, 126 Iowa 128, 101 N. W. 875; *In re* Wilbelm, 124 Iowa 380, 100 N. W. 44; *In re* Henery, 124 Iowa 358, 100 N. W. 43.

As to violations of the law by bartenders, agents, etc., as affecting the right of the proprietor of the saloon to a renewal of his license see Pelley *v.* Wills, 141 Ind. 688, 41 N. E. 354; Doberneck's Appeal, 1 Pa. Super. Ct. 99; *In re* Rutherford, 2 Pa. Co. Ct. 78.

80. Bronson *v.* Dunn, 124 Ind. 252, 24 N. E. 749; Livingston *v.* Corey, 33 Nebr. 366, 50 N. W. 263; State *v.* Koso, 25 Nebr. 607, 41 N. W. 558; State *v.* Cass County, 12 Nebr. 54, 10 N. W. 571; *In re* Shettler, 13 Pa. Dist. 651; *In re* Erie Licenses, 4 Pa. Dist. 167; *In re* Quirk, 17 Pa. Co. Ct. 327; Leister's Appeal, 20 Wkly. Notes Cas. (Pa.) 224; Wright's Appeal, 1 Wilcox (Pa.) 85. *Compare In re* Butz, 13 Pa. Dist. 715.

81. Pelley *v.* Wills, 141 Ind. 688, 41 N. E. 354; Hardesty *v.* Hine, 135 Ind. 72, 34 N. E. 701; People *v.* Woodman, 5 N. Y. St. 318; *In re* Franklin County Liquor Licenses, 26 Pa. Co. Ct. 152; Reg. *v.* Miskin, [1893] 1 Q. B. 275, 57 J. P. 263, 67 L. T. Rep. N. S. 680; Sharp *v.* Hughes, 57 J. P. 104.

82. Livingston *v.* Corey, 33 Nebr. 366, 50 N. W. 263.

83. Evans *v.* Com., 95 Ky. 231, 24 S. W. 632, 15 Ky. L. Rep. 567.

84. Barnegat City Beach Assoc. *v.* Busby, 44 N. J. L. 627. *Compare In re* Trotter, 24 Pa. Super. Ct. 26; *In re* Fanning, 23 Pa. Super. Ct. 622; *In re* Snyder, 2 Pa. Dist. 785.

85. *In re* Indiana County Licenses, 6 Pa. Dist. 358. And see *infra*, VI, F, 5.

86. Hewitt's Appeal, 76 Conn. 685, 58 Atl. 231 (holding that the formal license by the county commissioners to sell liquor must issue in pursuance of a decision reached by all, or a majority, after consultation between themselves) ; *In re* Foreman, 20 Pa. Super. Ct. 98. And see Reg. *v.* O'Connell, L. R. 20 Ir. 625; Reg. *v.* Rogers, 56 J. P. 183; Reg. *v.* Cox, 48 J. P. 440. *Compare In re* Sperring, 7 Pa. Super. Ct. 131.

Rule as to majority required.— Where the aldermen of a city, by a vote which has the effect of a standing rule, decide that no liquor licenses shall be granted unless six aldermen assent thereto, this rule, while in force and acted upon, determines the effect of any vote upon granting a license, and if only five aldermen vote in favor of the applicant a license cannot be granted. Com. *v.* Moran, 148 Mass. 453, 19 N. E. 554.

87. *In re* Weaver, 20 Pa. Super. Ct. 95; *In re* Netter, 11 Pa. Super. Ct. 566.

It has been held that an order granting a license is insufficient where it does not appear affirmatively upon the face of the proceedings that the licensing authority has considered the application and petition, where one is required, and investigated and found that the statutes have been complied with in every particular and that the applicant possesses the requisite qualifications to be licensed.[88] As to the conclusive effect of a decision, it is held generally that if the hearing is before a court its judgment conclusively determines all the points which it is required to consider, so that these matters are *res judicata* on an application for a renewal of the license, unless fresh issues are raised by a remonstrance.[89] But no conclusive effect attaches to the decision when made by a board of municipal or other officers.[90]

5. Discretion as to Grant or Refusal of License. A few decisions hold that if a person who desires a liquor license brings himself within the terms of the law, by complying with all the statutory preliminaries and possessing the requisite moral and other qualifications, he is entitled as a matter of law to be licensed, and the license cannot be withheld from him.[91] But in most jurisdictions the doctrine is now well settled that the court or board charged with the duty of issuing licenses is invested with a sound judicial discretion, to be exercised in view of all the facts and circumstances of each particular case, as to granting or refusing the license applied for.[92] But this discretion is a sound judicial dis-

Placing reasons on file.— The court may, at any time during the session at which it has refused an application for a license, place on file its reasons therefor. *In re* American Brewing Co., 161 Pa. St. 378, 29 Atl. 22; *In re* Mead, 161 Pa. St. 375, 29 Atl. 21. And where the application was rightly refused, the decision is not invalidated by the fact that the court or board states a wrong reason for its action. Wilcox *v.* Bryant, 156 Ind. 379, 59 N. E. 1049.

In England licensing justices are required to state their reasons for refusing a license; if they omit to do so it constitutes a substantial defect in their decision. *Ex p.* Smith, 3 Q. B. D. 374, 26 Wkly. Rep. 682; Reg. *v.* Sykes, 1 Q. B. D. 52, 45 L. J. M. C. 39, 33 L. T. Rep. N. S. 566, 24 Wkly. Rep. 141; Reg. *v.* Eales, 44 J. P. 553, 42 L. T. Rep. N. S. 735.

88. State *v.* Fort, (Mo. App. 1904) 81 S. W. 476; State *v.* Page, (Mo. App. 1904) 80 S. W. 912.

89. *In re* Justin, 2 Pa. Co. Ct. 22. And see Hensley *v.* Metcalfe County Ct., 115 Ky. 810, 74 S. W. 1054, 25 Ky. L. Rep. 204; *In re* Pittsburg Brewing Co., 16 Pa. Super. Ct. 215.

90. See State *v.* Higgins, 84 Mo. App. 531; White *v.* Atlantic City, 62 N. J. L. 644, 42 Atl. 170; Smith *v.* Shann, [1898] 2 Q. B. 347, 67 L. J. Q. B. 819, 79 L. T. Rep. N. S. 77. *Compare* Cooper *v.* Hunt, 103 Mo. App. 9, 77 S. W. 483.

91. *California.*— Henry *v.* Barton, 107 Cal. 535, 40 Pac. 798.

Illinois.— Zanone *v.* Mound City, 11 Ill. App. 334.

Indiana.— Miller *v.* Wade, 58 Ind. 91.

New York.— The Liquor Tax Law of 1896 and 1897 deprives the officers empowered to issue certificates of any discretion, where the application is correct in form, and does not show on its face that the applicant is prohibited from trafficking in liquor; and the remedy, where the design of the applicant is to carry on a prohibited business, lies in invoking the power of the court to cancel the certificate after it is issued and punish the offender. People *v.* Hilliard, 28 N. Y. App. Div. 140, 50 N. Y. Suppl. 909. But see People *v.* Mills, 91 Hun 142, 36 N. Y. Suppl. 273; People *v.* Dalton, 7 Misc. 558, 28 N. Y. Suppl. 491; People *v.* Murray, 38 N. Y. Suppl. 177; People *v.* Brooklyn Bd. of Excise, 16 N. Y. Suppl. 798; Matter of Mundy, 59 How. Pr. 359; *Ex p.* Persons, 1 Hill 655, all of these cases are decided under earlier statutes.

Oregon.— McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 29 Pac. 1.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 73.

92. *Arkansas.*— *Ex p.* Clark, 69 Ark. 435, 64 S. W. 223; *Ex p.* Levy, 43 Ark. 42, 51 Am. Rep. 550; *Ex p.* Whittington, 34 Ark. 394.

Connecticut.— Batters *v.* Dunning, 49 Conn. 479.

District of Columbia.— U. S. *v.* District Com'rs, 6 Mackey 409.

Georgia.— Adams *v.* Gormley, 69 Ga. 743; Wiggins *v.* Varner, 67 Ga. 583. These decisions must be taken as overruling the earlier decisions in Rome *v.* Duke, 19 Ga. 93; State *v.* Justices Morgan County Inferior Ct., 15 Ga. 408.

Kansas.— Stanley *v.* Monnet, 34 Kan. 708, 9 Pac. 755.

Kentucky.— Pierce *v.* Com., 10 Bush 6; Louisville *v.* Kean, 18 B. Mon. 9; Dougherty *v.* Com., 14 B. Mon. 239; Nepp *v.* Com., 2 Duv. 546. *Compare* Hodges *v.* Metcalfe County Ct., 116 Ky. 524, 76 S. W. 381, 25 Ky. L. Rep. 772.

cretion and must be based upon solid legal reasons and not exercised arbitrarily or capriciously.[93] Thus the licensing authorities have no power to refuse all applications for license, without regard to the qualifications of the several applicants, on their personal views as to the wisdom or expediency of the law, or their personal attitude toward the liquor traffic.[94] But it is no abuse of discretion to refuse a license on the ground that the place where it is proposed to open the saloon or bar is not suitable for that purpose,[95] or that it has become a place of bad repute and a resort for disorderly persons,[96] or where, as between petitioners and remonstrants, there is an overwhelming majority against the grant of the license.[97]

6. Control or Review of Exercise of Discretion. In so far as the decision of the licensing authority or board, upon the grant or refusal of a particular application, is governed by the exercise of that legal discretion with which the law invests

Minnesota.— Hennepin County Com'rs *v.* Robinson, 16 Minn. 381.

Mississippi.— Perkins *v.* Ledbetter, 68 Miss. 327, 8 So. 507.

Missouri.— State *v.* Holt County Ct. Justices, 39 Mo. 521; Austin *v.* State, 10 Mo. 591. And see State *v.* Stiff, 104 Mo. App. 685, 78 S. W. 675.

Nebraska.— State *v.* Alliance, 65 Nebr. 524, 91 N. W. 387; State *v.* Cass County, 12 Nebr. 54, 10 N. W. 571.

New Jersey.— Van Nortwick *v.* Bennett, 62 N. J. L. 151, 40 Atl. 689, where it is said that the court of common pleas has discretion to refuse to grant the license provided for by law, but no power to say that it will issue some other form of license.

North Carolina.— Mathis *v.* Duplin County, 122 N. C. 416, 30 S. E. 23; Hillsboro *v.* Smith, 110 N. C. 417, 14 S. E. 972; Muller *v.* Buncombe County, 89 N. C. 171; Atty.-Gen. *v.* Guilford County, 27 N. C. 315.

Pennsylvania.— *In re* Sparrow, 138 Pa. St. 116, 20 Atl. 711; *In re* Randenbusch, 120 Pa. St. 328, 14 Atl. 148; Toole's Appeal, 90 Pa. St. 376; Schlaudecker *v.* Marshall, 72 Pa. St. 200; *In re* King, (1889) 16 Atl. 487; Leister's Appeal, 7 Pa. Cas. 509, 11 Atl. 387; *In re* Conway, 1 Pa. Cas. 43, 1 Atl. 727; *In re* Trotter, 24 Pa. Super. Ct. 26; *In re* Fanning, 23 Pa. Super. Ct. 622; Friedman's Appeal, 7 Pa. Super. Ct. 639; *In re* Sperring, 7 Pa. Super. Ct. 131. And see *In re* Franklin County Liquor Licenses, 12 Pa. Dist. 212; *In re* Nordstrom, 127 Pa. St. 542, 18 Atl. 601; *In re* Prospect Brewing Co., 127 Pa. St. 523, 17 Atl. 1090; *In re* Pollard, 127 Pa. St. 507, 17 Atl. 1087; *In re* Winder, 24 Pa. Co. Ct. 90.

Utah.— Perry *v.* Salt Lake City, 7 Utah 143, 25 Pac. 739, 998, 11 L. R. A. 446.

Virginia.— Ailstock *v.* Page, 77 Va. 386; French *v.* Noel, 22 Gratt. 454; *Ex p.* Yeager, 11 Gratt. 655.

West Virginia.— Hien *v.* Smith, 13 W. Va. 358.

Wyoming.— State *v.* Cheyenne, 7 Wyo. 417, 52 Pac. 975, 40 L. R. A. 71.

England.— Reg. *v.* Lancashire, L. R. 6 Q. B. 97, 40 L. J. M. C. 17, 23 L. T. Rep. N. S. 461, 19 Wkly. Rep. 204; Reg. *v.* Sheffield, 63 J. P. 595.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 73.

93. *Arkansas.*— *Ex p.* Levy, 43 Ark. 42, 51 Am. Rep. 550.

Kentucky.— Louisville *v.* Kean, 18 B. Mon. 9.

Nebraska.— State *v.* Allianee, 65 Nebr. 524, 91 N. W. 387.

New York.— People *v.* Brooklyn, 91 Hun 269, 36 N. Y. Suppl. 158; People *v.* Murray, 38 N. Y. Suppl. 177.

Pennsylvania.— *In re* Kelminski, 164 Pa. St. 231, 30 Atl. 301; *In re* Mead, 161 Pa. St. 375, 29 Atl. 21; *In re* Donoghue, 5 Pa. Super. Ct. 1; Doherneck's Appeal, 1 Pa. Super. Ct. 99.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 73.

Wrong decision.— An officer vested with a discretionary power to grant or refuse licenses does not abuse that discretion by a decision apparently wrong; such abuse consists in arbitrarily refusing the license, where he has decided that the facts exist which would entitle the applicant to a license. U. S. *v.* Douglass, 19 D. C. 99, James, J., delivering opinion of the court.

94. Atty.-Gen. *v.* Guilford County, 27 N. C. 315; Schlaudecker *v.* Marshall, 72 Pa. St. 200; *In re* Centre County Licenses, 9 Pa. Co. Ct. 376. And see People *v.* Brunswick Bd. of Excise, 13 Misc. (N. Y.) 537, 35 N. Y. Suppl. 659; People *v.* Claverack Excise Com'rs, 4 Misc. (N. Y.) 330, 25 N. Y. Suppl. 322; McNaughton *v.* Argyle Bd. of Excise, 5 Misc. (N. Y.) 457, 26 N. Y. Suppl. 229; Martin *v.* Symonds, 4 Misc. (N. Y.) 6, 23 N. Y. Suppl. 689. But *compare* People *v.* Randolph Excise Com'rs, 75 Hun (N. Y.) 224, 27 N. Y. Suppl. 41; People *v.* Warsaw Excise Com'rs, 4 Misc. (N. Y.) 547, 24 N. Y. Suppl. 739.

95. Hillsboro *v.* Smith, 110 N. C. 417, 14 S. E. 972. And see People *v.* Dalton, 7 Misc. (N. Y.) 558, 28 N. Y. Suppl. 491; People *v.* Brooklyn Bd. of Excise, 16 N. Y. Suppl. 798. But *compare* Gates *v.* Haw, 150 Ind. 370, 50 N. E. 299.

96. People *v.* Murray, 2 N. Y. App. Div. 607, 37 N. Y. Suppl. 1096.

97. Leister's Appeal, 7 Pa. Cas. 509, 11 Atl. 387.

them, it is not subject to be controlled or reviewed by the courts, and will not be interfered with except where arbitrary action on their part, or a plain abuse of discretion, is made to appear.[98]

7. Mandamus to Compel Issue of License.[99] Where a court or board of officers is invested with a judicial discretion as to the grant or refusal of licenses, and where in the exercise of such discretion it has examined and rejected a particular application for license, mandamus will not lie to review the case and compel the grant of a license, unless it shall appear that such discretion has been abused or exercised in an arbitrary and unlawful manner.[1] But if a license has been

98. *Connecticut.*— Hopson's Appeal, 65 Conn. 140, 31 Atl. 531. And see Burns' Appeal, 76 Conn. 395, 56 Atl. 611.

Iowa.— *In re* Henery, 124 Iowa 358, 100 N. W. 43; *In re* Gillham, (1904) 99 N. W. 179.

Kentucky.— Thompson *v.* Koch, 98 Ky. 400, 33 S. W. 96, 17 Ky. L. Rep. 941; Hoglan *v.* Com., 3 Bush 147; Nepp *v.* Com., 2 Duv. 546.

Missouri.— Cooper *v.* Hunt, 103 Mo. App. 9, 77 S. W. 483.

New York.— Matter of Schomaker, 15 Misc. 648, 38 N. Y. Suppl. 167; *In re* Bloomingdale, 38 N. Y. Suppl. 162; People *v.* Montgomery Excise Com'rs, 25 N. Y. Suppl. 873.

North Carolina.— Raleigh *v.* Kane, 47 N. C. 288.

Pennsylvania.— Reed's Appeal, 114 Pa. St. 452, 6 Atl. 910; *In re* Conway, 1 Pa. Cas. 43, 1 Atl. 727.

Virginia.— Ailstock *v.* Page, 77 Va. 386; French *v.* Noel, 22 Gratt. 454; *Ex p.* Yeager, 11 Gratt. 655.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 74.

99. **Mandamus** generally see Mandamus.

1. *Alabama.*—Ramagnano *v.* Crook, 88 Ala. 450, 7 So. 247; Ramagnano *v.* Crook, 85 Ala. 226, 3 So. 845; Dunbar *v.* Frazer, 78 Ala. 538. But under Ala. Code, § 3250, providing that a retail liquor license shall not be granted until the applicant produces to the judge of probate a written recommendation signed by twenty respectable householders and freeholders, etc., it is held that the duty of the probate judge to grant licenses properly applied for is ministerial and not judicial, and that the exercise thereof can therefore be enforced by mandamus. Harlan *v.* State, 136 Ala. 150, 33 So. 858.

Arkansas.— *Ex p.* Whittington, 34 Ark. 394.

Connecticut.— Malmo's Appeal, 72 Conn. 1, 43 Atl. 485; Batters *v.* Dunning, 49 Conn. 479.

District of Columbia.— U. S. *v.* Johnson, 12 App. Cas. 545; U. S. *v.* Douglass, 19 D. C. 99.

Florida.— Puckett *v.* State, 33 Fla. 385, 14 So. 834.

Georgia.— Eve *v.* Simon, 78 Ga. 120.

Illinois.— Crotty *v.* People, 3 Ill. App. 465. And see Swift *v.* People, 63 Ill. App. 453.

Indiana.— State *v.* Bonnell, 119 Ind. 494, 21 N. E. 1101; State *v.* Tippecanoe County, 45 Ind. 501.

Kansas.— Stanley *v.* Monnet, 34 Kan. 708, 9 Pac. 755.

Kentucky.— Heblick *v.* Judge Hancock County Ct., 10 S. W. 465, 10 Ky. L. Rep. 811.

Maryland.— Devin *v.* Belt, 70 Md. 352, 17 Atl. 375.

Minnesota.— State *v.* Northfield, 94 Minn. 81, 101 N. W. 1063; State *v.* Carver County Com'rs, 60 Minn. 510, 62 N. W. 1135.

Missouri.— State *v.* Weeks, 93 Mo. 499, 6 S. W. 266; State *v.* Stiff, 104 Mo. App. 685, 78 S. W. 675; State *v.* Higgins, 84 Mo. App. 531; State *v.* Hudson, 13 Mo. App. 61.

Nebraska.— State *v.* Pearse, 31 Nebr. 562, 48 N. W. 391; State *v.* Cass County, 12 Nebr. 54, 10 N. W. 571; Hamilton County *v.* Bailey, 12 Nebr. 56, 10 N. W. 539; State *v.* Hardy, 7 Nebr. 377.

New York.— People *v.* Norton, 7 Barb. 477; People *v.* Andrews, 54 N. Y. Super. Ct. 183; People *v.* Woodman, 15 Daly 20, 1 N. Y. Suppl. 335, 4 N. Y. Suppl. 554; *In re* Excise License, 38 N. Y. Suppl. 425; People *v.* Saratoga County Excise Com'rs, 7 Abb. Pr. 34. The Liquor Tax Law (1896), § 28, provides that if a judge or justice shall, upon a hearing, determine that a liquor tax certificate has been denied by the officer without good reason, he may make an order commanding such officer to grant the application. See People *v.* Hamilton, 27 Misc. 308, 58 N. Y. Suppl. 584.

North Carolina.—Barnes *v.* Wilson County Com'rs, 135 N. C. 27, 47 S. E. 737; Maxton *v.* Robeson County Com'rs, 107 N. C. 335, 12 S. E. 92; Jones *v.* Moore County Com'rs, 106 N. C. 436, 11 S. E. 514; Atty.-Gen. *v.* Guilford County, 27 N. C. 315.

Pennsylvania.— Com *v.* McClure, 204 Pa. St. 196, 53 Atl. 759; *In re* Johnson, 165 Pa. St. 315, 31 Atl. 203; *In re* Baylie, 144 Pa. St. 426, 22 Atl. 915; *In re* Sparrow, 138 Pa. St. 116, 20 Atl. 711; *In re* Collarn, 134 Pa. St. 551, 19 Atl. 755; *In re* Knarr, 127 Pa. St. 554, 18 Atl. 639; *In re* Raudenbusch, 120 Pa. St. 328, 14 Atl. 148; Schlaudecker *v.* Marshall, 72 Pa. St. 200; *In re* King, (1889) 16 Atl. 487; Com. *v.* Kerns, 2 Pa. Super. Ct. 59.

Canada.— Leeson *v.* Dufferin County License Com'rs, 19 Ont. 67; Baxter *v.* Hesson, 12 U. C. Q. B. 139.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 75.

refused to a properly qualified person, without any reason whatever, or without any reason which is valid and sufficient in law, but in the arbitrary or capricious exercise of the power vested in the licensing authorities redress may be had by mandamus.[2] Such is also the case where the only discretion vested in the licensing officer is as to the sufficiency of the surety,[3] or where the only duty he has to perform is merely ministerial, such as affixing his signature to the license.[4] But in any case the applicant cannot have this writ unless he shows that he possesses the statutory qualifications and has complied with all the statutory preliminaries to the grant of a license.[5]

8. RESTRAINING GRANT OF LICENSE. In some states it has been held that an injunction cannot be granted to restrain the licensing board or officers from granting a license to any particular applicant.[6] In others it appears that the writ may issue at the instance of the proper public officer, but not at the suit of a private individual who does not show that he will suffer any special damage by reason of the license being granted.[7] And when, in the particular district or municipality, the grant of licenses is prohibited by law, so that a license issued there would be nugatory and void, no writ of prohibition is necessary to restrain the grant of such license.[8]

9. APPEAL AND REVIEW[9] — a. Appeal — (I) *IN GENERAL.* In most of the states an appeal from the decision of the licensing authorities is provided by statute, or is recognized as proper under the general laws regulating the appellate jurisdiction of the courts.[10] Where such appeal is allowed to be taken to a county or

2. *Dakota.*—Territory *v.* McPherson, 6 Dak. 27, 50 N. W. 351.
Florida.—State *v.* Jefferson County Com'rs, 20 Fla. 425.
Illinois.— Zanone *v.* Mound City, 103 Ill. 552.
Kentucky.—George *v.* Winchester, 80 S. W. 1158, 26 Ky. L. Rep. 170.
Louisiana.— State *v.* New Orleans, (1904) 36 So. 999.
Missouri.— State *v.* Baker, 32 Mo. App. 98.
New York.— People *v.* Woodman, 15 Daly 20, 1 N. Y. Suppl. 335, 4 N. Y. Suppl. 554; People *v.* New York Excise Com'rs, 18 N. Y. Suppl. 621.
Pennsylvania.— *In re* Sparrow, (1890) 20 Atl. 692; *In re* Prospect Brewing Co., 127 Pa. St. 523, 17 Atl. 1090.
South Dakota.— Burke *v.* Collins, (1904) 99 N. W. 1112.
Canada.— Tremblay *v.* Point-au-Pic Corp., 13 Montreal Leg. N. 386.
See 29 Cent. Dig. tit. "Intoxicating Liquors," § 75.

3. State *v.* Ruark, 34 Mo. App. 325; Bean *v.* Barton County Ct., 33 Mo. App. 635.

4. Braconier *v.* Packard, 136 Mass. 50. opinion of the court by Morton, C. J.

5. Hippen *v.* Ford, 129 Cal. 315, 61 Pac. 929; Riley *v.* Rowe, 112 Ky. 817, 66 S. W. 999, 23 Ky. L. Rep. 2168; Deehan *v.* Johnson, 141 Mass. 23, 6 N. E. 240.

6. Leigh *v.* Westervelt, 2 Duer (N. Y.) 618; Northern Pac. R. Co. *v.* Whalen, 3 Wash. Terr. 452, 17 Pac. 890.

7. Seager *v.* Kankakee County, 102 Ill. 669; Nast *v.* Eden, 89 Wis. 610, 62 N. W. 409.

8. Beckham *v.* Howard, 83 Ga. 89, 9 S. E. 784. And see Regina *v.* Local Government Bd., 10 Q. B. D. 309, 52 L. J. M. C. 4, 48 L. T. Rep. N. S. 181.

9. Appeals see generally APPEAL AND ERROR.
Change of venue.— An appeal from the decision of the board of county commissioners on an application for a license is a civil action, within the meaning of the statute, in which a change of venue may be taken as in other cases. Blair *v.* Kilpatrick, 40 Ind. 312; State *v.* Vierling, 33 Ind. 99.
Procedure on reversal.— Where, on appeal, the bill of exceptions shows that the county court had no discretion in the matter, but should have granted the application, the appellate court will merely remand the case, with directions to grant the application. Hodges *v.* Metcalfe County Ct., 116 Ky. 524, 76 S. W. 381, 25 Ky. L. Rep. 772.

10. *Arkansas.*— Whissen *v.* Furth, 73 Ark. 366, 84 S. W. 500, 68 L. R. A. 161.
Connecticut.— Hopson's Appeal, 65 Conn. 140, 31 Atl. 531.
Indiana.— Wilson *v.* Mathis, 145 Ind. 493, 44 N. E. 486; Groscop *v.* Rainier, 111 Ind. 361, 12 N. E. 694; State *v.* Tippecanoe County, 45 Ind. 501; *Ex p.* Dunn, 14 Ind. 122.
Iowa.— *In re* Smith, 126 Iowa 128, 101 N. W. 875.
Kentucky.—Thompson *v.* Koch, 98 Ky. 400, 33 S. W. 96, 17 Ky. L. Rep. 941.
Nebraska.— Lydick *v.* Korner, 13 Nebr. 10, 12 N. W. 838.
Pennsylvania.— *In re* Goldman, 138 Pa. St. 321, 22 Atl. 23.
Virginia.— Lester *v.* Price, 83 Va. 648, 3 S. E. 529; *Ex p.* Lester, 77 Va. 663; Leigton *v.* Maury, 76 Va. 865.
See 29 Cent. Dig. tit. "Intoxicating Liquors," § 76.

circuit court, generally the judgment of that court is final, so that no further appeal can be taken to the court of last resort.[11] If the statute authorizing an appeal from the grant or refusal of a license omits to make special provisions as to the manner in which the appeal shall be taken and perfected, it must conform to the provisions of the general law on the subject; as, in regard to the bond required to be executed,[12] the time within which the appeal must be taken,[13] and the contents of the record on appeal.[14] The refusal to grant a license will not be disturbed on appeal, where the record shows that the denial of the application was in consequence of the fact that the applicant did not possess the qualifications required by law.[15] Upon appeal, the presumption arising from a regular record is that the court below had due regard to the number and character of the petitioners for the license, and that the license was refused for a legal reason, and not arbitrarily.[16]

(II) *Parties to Appeal.* An appeal from a decision refusing a license may be taken by the applicant.[17] And if the license is granted, those who have filed remonstrances or counter petitions may appeal.[18] In the latter case the municipal corporation or official board granting the license must be made a party.[19] Ordinarily the right of appeal is restricted to those who are thus necessary parties to the proceedings before the licensing board, or who have connected themselves with those proceedings by intervening in opposition to the application.[20] But in some states the right to appeal is accorded to any resident taxpayer.[21]

But see Jane *v.* Alley, 64 Miss. 446, 1 So. 497; State *v.* Wilson, 90 Mo. App. 154; State *v.* St. Louis County Ct., 47 Mo. App. 647; Bean *v.* Barton County Ct., 33 Mo. App. 635.

11. Malmo's Appeal, 72 Conn. 1, 43 Atl. 485; Smith *v.* Reister, 146 Ind. 527, 45 N. E. 699; Turner *v.* Rehm, 43 Ind. 208; Mueller *v.* Mayo, 38 Ind. 227; Brown *v.* Porter, 37 Ind. 206; Blair *v.* Vierling, 33 Ind. 269; Parke County *v.* Lease, 22 Ind. 261; Halverstadt *v.* Berger, (Nebr. 1904) 100 N. W. 934; Lester *v.* Price, 83 Va. 648, 3 S. E. 529. *Contra*, Thompson *v.* Koch, 98 Ky. 400, 33 S. W. 96, 17 Ky. L. Rep. 941; People *v.* Sackett, 15 N. Y. App. Div. 290, 44 N. Y. Suppl. 593.

12. Blair *v.* Rutenfranz, 40 Ind. 318; Blair *v.* Kilpatrick, 40 Ind. 312; Wright *v.* Harris, 29 Ind. 438; Hamilton *v.* McKinney, 65 S. W. 2, 23 Ky. L. Rep. 1341.

13. Lydick *v.* Korner, 13 Nebr. 10, 12 N. W. 838.

14. Persinger *v.* Miller, (Nebr. 1902) 90 N. W. 242; Waugh *v.* Graham, 47 Nebr. 153, 66 N. W. 301.

In Kentucky, where an appeal is taken to the circuit court from the judgment of the county court refusing to grant an application for a liquor license, the court must hear the case on a bill of exceptions only. Hodges *v.* Metcalfe County Ct., 116 Ky. 524, 76 S. W. 381, 25 Ky. L. Rep. 772; Meredith *v.* Com., 76 S. W. 8, 25 Ky. L. Rep. 455.

Trial de novo.— Where the trial of an appeal from the licensing authority is *de novo* (Head *v.* Doehleman, 148 Ind. 145, 46 N. E. 585), the taking of exceptions and filing a bill thereof is unnecessary (Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603).

15. *In re* Goldman, 138 Pa. St. 321, 22 Atl. 23. And see Malmo's Appeal, 73 Conn. 232, 47 Atl. 163; Wilson *v.* Mathis, 145 Ind. 493, 44 N. E. 486.

16. *In re* Shearer, 26 Pa. Super. Ct. 34.

17. *Ex p.* Dunn, 14 Ind. 122; Ludwig *v.* State, 18 Ind. App. 518, 48 N. E. 390; Lester *v.* Price, 83 Va. 648, 3 S. E. 529. And see Garrett *v.* St. Marylebone, 12 Q. B. D. 620, 48 J. P. 357, 53 L. J. M. C. 81, 32 Wkly. Rep. 646.

18. Ludwig *v.* State, 18 Ind. App. 518, 48 N. E. 390; Collins *v.* Barrier, 64 Miss. 21, 8 So. 164; Bachman *v.* Phillipsburg, 68 N. J. L. 552, 53 Atl. 620; Lester *v.* Price, 83 Va. 648, 3 S. E. 529.

A remonstrator cannot appeal from an order overruling his protest, but only from an order granting the license. Moores *v.* State, 58 Nebr. 608, 79 N. W. 163.

Attorney for contestants.— Where the statute allows opposition to the grant of a license to be filed by "qualified voters" of the district, an attorney representing a temperance society in proceedings before the licensing board cannot appeal from their order granting the license asked for, unless he himself is a qualified voter in the district. Clark *v.* Pratt, (Miss. 1892) 11 So. 631.

Unnamed opponents.— Where K files a petition or remonstrance beginning, "Now comes K. et al." but not naming those supposed to join with him, and he personally is made a party, but no one else by name, a stranger, claiming to have been included in K's pleading, cannot prosecute an appeal. Holford *v.* Kirkland, 71 Ark. 84, 71 S. W. 264.

19. Wood *v.* Riddle, 14 Oreg. 254, 12 Pac. 385. See People *v.* Sackett, 15 N. Y. App. Div. 290, 44 N. Y. Suppl. 593. *Compare* Murphy *v.* Monroe County, 73 Ind. 483.

20. Stokes *v.* Wall, 112 Ga. 349, 37 S. E. 383; State *v.* Lamberton, 37 Minn. 362, 34 N. W. 336; Gibboney's Appeal, 6 Pa. Super. Ct. 26.

21. Beard's Appeal, 64 Conn. 526, 30 Atl. 775; Ferguson *v.* Brown, 75 Miss. 214, 21

(III) *RIGHTS PENDING APPEAL.* In some states, where the licensing board grants a license against a remonstrance filed, it must revoke or recall the license upon an appeal being taken, until the appeal shall be determined; and this duty may be enforced by mandamus.[22] In Indiana it is provided by statute that an appeal taken from an order granting a license shall not estop the licensee from selling liquor thereunder until the close of the next term of the court at which such cause might lawfully be tried, and that he shall not be liable as a seller without license for sales made pending such appeal.[23]

(IV) *QUESTIONS CONSIDERED ON APPEAL.* As to the matters proper to be considered on the appeal the law varies in the different states. In some the case is tried *de novo* in the appellate court.[24] In others both the law and facts may be reviewed, but the reviewing court is restricted to the issues raised, and the evidence presented, before the licensing board.[25] In Pennsylvania an appeal from an order of the court of quarter sessions granting or refusing a license brings up nothing but the record; neither the evidence, the rulings of the court below on questions of evidence, nor the reasons for its judgment are before the reviewing court.[26]

So. 603; State *v.* Moore, 84 Mo. App. 11; White *v.* Atlantic City, 62 N. J. L. 644, 42 Atl. 170. And see State *v.* Alliance, 65 Nebr. 524, 91 N. W. 387.

22. Byrum *v.* Peterson, 34 Nebr. 237, 51 N. W. 829; State *v.* Bays, 31 Nebr. 514, 48 N. W. 270; State *v.* Bonsfield, 24 Nebr. 517, 39 N. W. 427; Watkins *v.* Grieser, 11 Okla. 302, 66 Pac. 332; Swan *v.* Wilderson, 10 Okla. 547, 62 Pac. 422. *Compare* State *v.* Barton, 27 Nebr. 476, 43 N. W. 249, holding that when such appeal is taken to the district court, and the action of the licensing authorities is there affirmed, mandamus will not issue to compel them to cancel the license until an appeal to the supreme court shall be determined.

A license issued after a reasonable time has elapsed to take an appeal from an order overruling a remonstrance, but before such appeal is actually taken, is valid, notwithstanding a notice of intention to appeal. Lydick *v.* Korner, 13 Nebr. 10, 12 N. W. 838. And see State *v.* Elwood, 37 Nebr. 473, 55 N. W. 1074.

23. Ind. Rev. St. (1897) § 5315. And see State *v.* Sopher, 157 Ind. 360, 61 N. E. 785; Padgett *v.* State, 93 Ind. 396; Ludwig *v.* State, 18 Ind. App. 518, 48 N. E. 390. But see Mullikin *v.* Davis, 53 Ind. 206; Young *v.* State, 34 Ind. 46; Molihan *v.* State, 30 Ind. 266, all decided under an earlier statute.

24. Groscop *v.* Rainier, 111 Ind. 361, 12 N. E. 694; Keiser *v.* Lines, 57 Ind. 431; Mason *v.* Ratcliffe, 27 Ind. App. 290, 60 N. E. 1099; Ludwig *v.* State, 18 Ind. App. 518, 48 N. E. 390; Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603; Lester *v.* Price, 83 Va. 648, 3 S. E. 529; Leigton *v.* Maury, 76 Va. 865.

25. *Connecticut.*—Malmo's Appeal, 73 Conn. 232, 47 Atl. 163.

Georgia.—Sanders *v.* Elberton, 50 Ga. 178.

Kentucky.— Hensley *v.* Metcalfe County Ct., 115 Ky. 810, 74 S. W. 1054, 25 Ky. L. Rep. 204; Thompson *v.* Koch, 98 Ky. 400, 33 S. W. 96, 17 Ky. L. Rep. 941.

Nebraska.— State *v.* Bonsfield, 24 Nebr. 517, 39 N. W. 427. And see Bennett *v.* Otto, (1903) 94 N. W. 807; Waugh *v.* Graham, 47 Nebr. 153, 66 N. W. 301; Livingston *v.* Corey, 33 Nebr. 366, 50 N. W. 263; Persinger *v.* Miller, 2 Nebr. (Unoff.) 807, 90 N. W. 242.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 79.

26. *In re* Branch, 164 Pa. St. 427, 30 Atl. 296; *In re* Berg, 139 Pa. St. 354, 21 Atl. 77; Leister's Appeal, 7 Pa. Cas. 509, 11 Atl. 387; *In re* Cramer, 23 Pa. Super. Ct. 596; *In re* Weaver, 20 Pa. Super. Ct. 95; *In re* Donovan, 9 Pa. Super. Ct. 647; Brown's Appeal, 2 Pa. Super. Ct. 63.

A decision can be reversed only when it is shown affirmatively that the action of the court below was illegal, arbitrary, or based on an invalid reason. Com. *v.* Kerns, 2 Pa. Super. Ct. 59. And see *In re* Donoghue, 5 Pa. Super. Ct. 1. Hence the appeal must fail if the record shows on its face a valid and legal reason for refusing the license (*In re* Cartus, 173 Pa. St. 27, 34 Atl. 214; *In re* Dunlap, 171 Pa. St. 454, 32 Atl. 1128; *In re* Sandcroft, 168 Pa. St. 45, 31 Atl. 948; Hollander's Appeal, 11 Pa. Super. Ct. 23; *In re* Snyder, 4 Pa. Super. Ct. 648; Gross' Appeal, 1 Pa. Super. Ct. 640), no review on the merits being permissible in that case, or if the record shows that the decision below was made on due hearing, the presumption then arising that the action of the licensing court was not arbitrary but based on legal reasons (*In re* Quinton, 169 Pa. St. 115, 32 Atl. 101; *In re* Gross, 161 Pa. St. 344, 29 Atl. 25; *In re* Chuya, 20 Pa. Super. Ct. 410; *In re* Welsh, 11 Pa. Super. Ct. 558; *In re* Quinn, 11 Pa. Super. Ct. 554; Doberneck's Appeal, 1 Pa. Super. Ct. 637).

Presumption as to court's action.— If the record does not disclose the reason on which the court below based its refusal to grant the license, it will be presumed on appeal that its action was not arbitrary, but governed by a valid legal reason, and this presumption will prevail until the contrary is made to appear affirmatively. *In re* Chuya, 20 Pa. Super. Ct. 410; *In re* Foreman, 20 Pa.

b. Certiorari to Review Proceedings. Where the action of the licensing court or board is regarded as judicial in its nature,[27] and not merely ministerial,[28] certiorari will lie to review its action in granting or refusing a license. But the investigation will not generally include a reëxamination of the evidence or a review of the decision on questions of fact, the purpose of the writ being confined to the correction of errors apparent on the record,[29] or the determination of disputed questions of jurisdiction.[30] Nor generally can this writ be brought where there was no objection or remonstrance against the grant of the particular license.[31] The right to sue out certiorari is given not only to the parties immediately involved in the contest, but also in several states to owners of property near the place asked to be licensed, or to any citizen or taxpayer.[32]

G. Bonds of Dealers[33] — **1. Necessity and Duty to Give.**[34] Where the statutes require licensed liquor dealers to give bonds, conditioned for their due observance of the laws or for the payment of fines, penalties, or damages recoverable against them, the giving of the required bond is a condition precedent to the issue of the license, and a license granted without the bond being given is not valid.[35] Such bonds are commonly required of all persons engaged in the

Super. Ct. 98; *In re* Chambers, 18 Pa. Super. Ct. 412; *In re* Brown, 18 Pa. Super. Ct. 409; *In re* Kilgore, 13 Pa. Super. Ct. 543; *In re* Meenan, 11 Pa. Super. Ct. 575; *In re* Di Nubile, 11 Pa. Super. Ct. 571; *In re* Sweeney, 11 Pa. Super. Ct. 569; *In re* Miller, 8 Pa. Super. Ct. 223; *In re* Cohen, 5 Pa. Super. Ct. 224.

27. Certiorari.— State *v.* Fort, 107 Mo. App. 328, 81 S. W. 476; Cooper *v.* Hunt, 103 Mo. App. 9, 77 S. W. 483; State *v.* Bennett, (Mo. App. 1903) 73 S. W. 737; State *v.* Schneider, 47 Mo. App. 669; State *v.* Heege, 37 Mo. App. 338; People *v.* Moriah Bd. of Excise, 91 Hun (N. Y.) 94, 36 N. Y. Suppl. 678; People *v.* Hasbrouck, 21 Misc. (N. Y.) 188, 47 N. Y. Suppl. 109; People *v.* Murray, 14 Misc. (N. Y.) 177, 35 N. Y. Suppl. 463; Matter of Semken, 13 Misc. (N. Y.) 488, 35 N. Y. Suppl. 471; People *v.* Claverack Excise Com'rs, 4 Misc. (N. Y.) 330, 25 N. Y. Suppl. 322; Leister's Appeal, 20 Wkly. Notes Cas. (Pa.) 224; Rhode Island Soc., etc. *v.* Budlong, (R. I. 1890) 25 Atl. 657; Dexter *v.* Cumberland, 17 R. I. 222, 21 Atl. 347.

28. Knox *v.* Rainbow, 111 Cal. 539, 44 Pac. 175; State *v.* Lamberton, 37 Minn. 362, 34 N. W. 336.

29. Jane *v.* Alley, 64 Miss. 446, 1 So. 497; Corbett *v.* Duncan, 63 Miss. 84; Cooper *v.* Hunt, 103 Mo. App. 9, 77 S. W. 483; State *v.* Bennett, (Mo. App. 1903) 73 S. W. 737; Houman *v.* Schulster, 60 N. J. L. 132, 36 Atl. 476; People *v.* Hamilton, 29 Misc. (N. Y.) 465, 61 N. Y. Suppl. 979; People *v.* Hasbrouck, 21 Misc. (N. Y.) 188, 47 N. Y. Suppl. 109; People *v.* Bennett, 4 Misc. (N. Y.) 10, 23 N. Y. Suppl. 695; People *v.* Waters, 4 Misc. (N. Y.) 1, 23 N. Y. Suppl. 691.

30. Croot *v.* Manitou, (Colo. App. 1904) 78 Pac. 313; State *v.* Tullock, 108 Mo. App. 32, 82 S. W. 645; State *v.* McDavid, 84 Mo. App. 47; Lonsdale Co. *v.* Cumberland License Com'rs, 18 R. I. 5, 25 Atl. 655. And see McCreary *v.* Rhodes, 63 Miss. 308.

31. Lexington *v.* Sargent, 64 Miss. 621, 1 So. 903. But *compare In re* Pollard, 127 Pa. St. 507, 17 Atl. 1087.

32. *Iowa.*— Darling *v.* Boesch, 67 Iowa 702, 25 N. W. 887.

Mississippi.— Deberry *v.* Holly Springs, 35 Miss. 385.

Missouri.— State *v.* Heege, 37 Mo. App. 338.

New Jersey.— State *v.* Paterson, (Sup. 1892) 25 Atl. 1098; Dufford *v.* Staats, 54 N. J. L. 286, 23 Atl. 667; Austin *v.* Atlantic City, 48 N. J. L. 118, 3 Atl. 65.

Rhode Island.— Rhode Island Soc., etc. *v.* Budlong, (1890) 25 Atl. 657; Dexter *v.* Cumberland, 17 R. I. 222, 21 Atl. 347.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 80.

33. See, generally, Bonds.

34. Criminal offense not to give.— Under a statute providing that any liquor dealer who shall engage in the business without making, executing, and delivering the required bond shall be guilty of a misdemeanor, where the bond is insufficient by reason of one of the sureties being disqualified, although it was given in good faith and is sufficient in form, and has been approved by the municipal authorities, he is subject to prosecution. Wolcott *v.* Burlingame, 112 Mich. 311, 70 N. W. 831.

35. *Indiana.*— Crutz *v.* State, 4 Ind. 385.

Maine.— State *v.* Shaw, 32 Me. 570.

Minnesota.— State *v.* Schreiner, 86 Minn. 253, 90 N. W. 401.

Missouri.— State *v.* Bennett, (App. 1903) 73 S. W. 737. See State *v.* Willard, 39 Mo. App. 251.

New York.— People *v.* Eckman, 63 Hun 209, 18 N. Y. Suppl. 654.

North Carolina.— Hendersonville *v.* Price, 96 N. C. 423, 2 S. E. 155.

Wisconsin.— State *v.* Fisher, 33 Wis. 154.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 86.

Validity of statute.— The legislature, having control of the traffic in liquor, has also the right, in addition to other civil and crim-

liquor traffic, although exceptions are sometimes made in favor of druggists and others.[36] It is of course essential that the conditions of the bond should contain nothing repugnant to the constitution, and no bond can be exacted under a statute which is not constitutionally valid.[37] Where a second bond is demanded and received by the licensing officer, under a mistaken belief that the bond first furnished was void, the second bond is not valid.[38]

2. **Form and Requisites.** A liquor dealer's bond must contain all the conditions required by the statute to be inserted,[39] but cannot impose any additional or more onerous conditions or duties upon the licensee.[40] It must recite or describe the laws which the obligor promises to obey, with such certainty that they may be clearly identified, and also the penalties or damages recoverable against him which it is intended to secure.[41] Particularity in regard to the correct designation of the obligee,[42] the amount of the penalty,[43] and the qualifications of the sureties[44] is essential. But although the bond of a liquor dealer does not conform strictly to the statute under which it was given, it may be enforced as a common-law obligation.[45] And such a bond is not invalidated by reason of mere clerical errors appearing on its face,[46] because it is not dated,[47] because of the failure of the principal to sign it,[48] because of a failure to particularly designate in the bond or license the house in which the liquors are to be sold[49] or because of omission

inal penalties prescribed for violations of the liquor laws, to require a bond conditioned for the observance of the liquor law by the licensee. Cullinan *v.* Burkard, 93 N. Y. App. Div. 31, 86 N. Y. Suppl. 1003.

36. Druggists.— Moore *v.* People, 109 Ill. 499; State *v.* Courtney, 73 Iowa 619, 35 N. W. 685; People *v.* Utley, 129 Mich. 628, 89 N. W. 349; State *v.* Ferguson, 72 Mo. 297.

Bottlers.— Com. *v.* Deibert, 12 Pa. Co. Ct. 504.

37. See Cassel *v.* Scott, 17 Ind. 514; Gorman *v.* Williams, 117 Iowa 560, 91 N. W. 819; Dunham *v.* Hough, 80 Mich. 648, 45 N. W. 497. *Compare Ex p.* Bell, 24 Tex. App. 428, 6 S. W. 197, holding that where a liquor dealer, having refused to give a bond as required by the statute, was arrested, and applied for his release on habeas corpus, alleging that the conditions of the bond were unconstitutional, it was held that, as he had never executed the bond, he had no right to be heard upon the validity of its conditions.

38. Howes *v.* Maxwell, 157 Mass. 333, 32 N. E. 152.

39. Sexson *v.* Kelley, 3 Nebr. 104; McMonigal *v.* State, (Tex. Civ. App. 1898) 45 S. W. 1038. See, however, State *v.* Harper, (Tex. 1905) 86 S. W. 920 [*reversing* (Civ. App. 1905) 85 S. W. 294].

40. *Illinois.*— Dowiat *v.* People, 92 Ill. App. 433 [*affirmed* in 193 Ill. 264, 61 N. E. 1059].

Maine.— Crosby *v.* Snow, 16 Me. 121.

New York.— Lyman *v.* Brucker, 26 Misc. 594, 56 N. Y. Suppl. 767.

South Carolina.— Walker *v.* Holtzclaw, 57 S. C. 459, 35 S. E. 754.

Texas.— State *v.* Wharton, 26 Tex. Civ. App. 262, 63 S. W. 915. See Meador *v.* Adams, 33 Tex. Civ. App. 167, 76 S. W. 238.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 87.

41. *Connecticut.*—Quintard *v.* Corcoran, 50 Conn. 34.

Illinois.— Dowiat *v.* People, 193 Ill. 264, 61 N. E. 1059.

Nebraska.— Plucknett *v.* Tippey, 45 Nebr. 342, 63 N. W. 845.

Pennsylvania.— Crawley *v.* Com., 123 Pa. St. 275, 16 Atl. 416.

Rhode Island.— Providence *v.* Bligh, 10 R. I. 208.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 87.

42. Minneapolis *v.* Olson, 76 Minn. 1, 78 N. W. 877; St. James *v.* Hingtgen, 47 Minn. 521, 50 N. W. 700; Sexson *v.* Kelley, 3 Nebr. 104. *Compare* Thomas *v.* Hinkley, 19 Nebr. 324, 27 N. W. 231, holding that the validity of the bond is not impaired by the fact that it runs to the village issuing the license, instead of to the state as it should.

Obligee described by title only.—Where the bond is required to be given to a public officer, it may be made payable to him by the designation of his office only, without either naming him or adding the words "and his successors in office." Redpath *v.* Nottingham, 5 Blackf. (Ind.) 267; Tripp *v.* Norton, 10 R. I. 125.

43. See Hawkins *v.* Litchfield, 120 Mich. 390, 79 N. W. 570; Garrison *v.* Steele, 46 Mich. 98, 8 N. W. 696; Greene County *v.* Wilhite, 29 Mo. App. 459. Jones *v.* State, (Tex. Civ. App. 1904) 81 S. W. 1010.

44. Matthews *v.* People, 159 Ill. 399, 42 N. E. 864; *In re* Schuylkill County, 24 Pa. Co. Ct. 571.

45. O'Brien County *v.* Mahon, 126 Iowa 539, 102 N. W. 446.

46. Dowiat *v.* People, 92 Ill. App. 433; Howes *v.* Maxwell, 157 Mass. 333, 32 N. E. 152.

47. Harper *v.* Golden, (Tex. Civ. App. 1897) 39 S. W. 623.

48. North *v.* Barringer, 147 Ind. 224, 46 N. E. 531.

49. Doutbit *v.* State, 98 Tex. 344, 83 S. W. 795 [*modifying* 36 Tex. Civ. App. 396, 82

of the name of the county in which the licensee's business is to be carried on.[50] And it has been held that it is not a defense to the surety of a hotel-keeper that the bond which attempts to designate the place of traffic by street and number designates a vacant lot across the street, opposite to the place where the hotel is in fact located.[51]

3. Approval and Filing. Where the statute requires a liquor dealer's bond to be approved by a local court, board, or officer, the provision is mandatory, and his license is not effective without such approval.[52] And this is also true of the filing or recording of the bond, if that is directed by the statute.[53] The approval of the bond cannot be delegated by the court or board charged with this duty.[54] The authorities required to pass upon the bond are vested with a considerable measure of judgment and discretion, particularly in regard to the sufficiency of the sureties; and unless it is shown that this discretion was unreasonably or arbitrarily exercised, or that they were actuated by illegal or improper motives in rejecting the bond,[55] the process of mandamus will not be used to compel their approval and acceptance of it.[56] And conversely their action in approving the bond will not be reviewed by the courts where they had jurisdiction, and no fraud is shown, and particularly where third persons have acted on their decision.[57]

4. Breach of Condition. The bond of a liquor dealer is broken by the commission of any offense against the laws for the observance of which it is conditioned,[58] by an abuse or misuse of the privilege which it confers, or by selling in

S. W. 352]; Morris *v.* Mills, (Tex. Civ. App. 1904) 82 S. W. 334.

50. State *v.* Sitterle, (Tex. Civ. App. 1894) 26 S. W. 764.

51. Cullinan *v.* Fidelity, etc., Co., 41 Misc. (N. Y.) 119, 83 N. Y. Suppl. 969.

52. Crutz *v.* State, 4 Ind. 385; Atty.-Gen. *v.* Huebner, 91 Mich. 436, 51 N. W. 1072; State *v.* Bennett, (Mo. App. 1903) 73 S. W. 737. And see O'Halloran *v.* Jackson, 107 Mich. 138, 64 N. W. 1046. *Compare* Harper *v.* Golden, (Tex. Civ. App. 1897) 39 S. W. 623.

Where the bond is filed with the clerk and retained by him, and the principal then engages in the sale of liquor, the sureties cannot plead, as a defense to the bond, that no formal approval was indorsed on the bond. Thomas *v.* Hinkley, 19 Nebr. 324, 27 N. W. 231.

Evidence of approval.— The filing and acceptance of a bond by the proper officer, and the issue of a license thereon, furnish presumptive evidence that it was duly approved. Prather *v.* People, 85 Ill. 36; Howes *v.* Maxwell, 157 Mass. 333, 32 N. E. 152. Proceeding of a city council, tantamount to approval of bond for liquor license, may be shown by parol. Dechard *v.* Drewry, 64 Ark. 599, 44 S. W. 351.

53. See Harper *v.* Golden, (Tex. Civ. App. 1897) 39 S. W. 623.

54. Garrison *v.* Steele, 46 Mich. 98, 8 N. W. 696. But *compare* Decherd *v.* Drewry, 64 Ark. 599, 44 S. W. 351.

55. Farr *v.* Anderson, 135 Mich. 485, 98 N. W. 6; Courtwright *v.* Newaygo, 96 Mich. 290, 55 N. W. 808; Warner *v.* Lawrence, 62 Mich. 251, 28 N. W. 844; Amperse *v.* Kalamazoo, 59 Mich. 78, 26 N. W. 222, 409; Potter *v.* Homer, 59 Mich. 8, 26 N. W. 208; McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 29 Pac. 1.

Liability of authorities.— A member of the council who refuses to vote for the approval of the bond, or to use his influence for its approval, is not liable in damages to the applicant for license, although he assigns no reason for his refusal, and although the city attorney has instructed the council that it is their duty to approve the bond. Amperse *v.* Winslow, 75 Mich. 234, 42 N. W. 823.

56. Divine *v.* Lakeview, 121 Mich. 433, 80 N. W. 109; Palmer *v.* Hartford, 73 Mich. 96, 40 N. W. 850; McHenry *v.* Chippewa Tp. Bd., 65 Mich. 9, 31 N. W. 602; Post *v.* Sparta Tp. Bd., 64 Mich. 597, 31 N. W. 535, 63 Mich. 323, 29 N. W. 721, 58 Mich. 212, 25 N. W. 52; Wolfson *v.* Rubicon Tp. Bd., 63 Mich. 49, 29 N. W. 486; Parker *v.* Portland, 54 Mich. 308, 20 N. W. 55; Goss *v.* Vermontville, 44 Mich. 319, 6 N. W. 684; *In re* Nordstrom, 127 Pa. St. 542, 18 Atl. 601. And see *In re* Branch, 164 Pa. St. 427, 30 Atl. 296. *Compare* Hawkins *v.* Litchfield, 120 Mich. 390, 79 N. W. 570, holding that where the council has in good faith, but without passing upon the sufficiency of the sureties, refused to accept a liquor bond, mandamus may issue, but should merely require the council to examine into its sufficiency and approve the bond if found sufficient.

57. Briggs *v.* McKinley, 131 Mich. 154, 91 N. W. 156.

58. State *v.* Depeder, 65 Miss. 26, 3 So. 80; Crouse *v.* Com., 87 Pa. St. 168.

What laws intended.— A bond conditioned for the due observance of the liquor laws binds the dealer to obey the laws as in force at the time of the execution of the bond. O'Flinn *v.* State, 66 Miss. 7, 5 So. 390.

quantities, or at times or places, or to persons, other than those allowed by the license.[59] The fact that an unlawful sale was made to a police or excise officer sent out to investigate the conduct of saloons and detect violations of the law makes it none the less a breach of the condition of the bond, provided the sale was not specially induced by anything said or done by the officer.[60]

Unless so worded as to include the observance of statutes thereafter to be passed, a liquor dealer's bond is not forfeited by a violation of an act or ordinance which was not in force at the time it was given. Jacobs *v.* Holgenson, 70 Conn. 68, 38 Atl. 914; State *v.* Cooper, (Ind. 1887) 13 N. E. 861; Crawley *v.* Com., 123 Pa. St. 275, 16 Atl. 416.

Sunday laws.— Where the bond is conditioned that the obligor will "duly observe all laws relating to intoxicating liquors," it is a breach of the bond to keep open his place of business on Sunday, although that is a violation of the statute in regard to Sunday, not of the liquor law. Quintard *v.* Corcoran, 50 Conn. 34.

Violation after surrender of license.— No action will lie on the bond for a violation of law after the liquor tax certificate has been surrendered for cancellation and rebate as authorized by the statute. Lyman *v.* Cheever, 168 N. Y. 43, 60 N. E. 1047.

59. Lightner *v.* Com., 31 Pa. St. 341. And see Cullinan *v.* O'Connor, 100 N. Y. App. Div. 142, 91 N. Y. Suppl. 628, sale on Sunday.

Sale to minors.— Cox *v.* Thompson, 96 Tex. 468, 73 S. W. 950; Qualls *v.* Sayles, 18 Tex. Civ. App. 400, 45 S. W. 839; Harper *v.* Golden, (Tex. Civ. App. 1897) 39 S. W. 623; State *v.* Curtis, 8 Tex. Civ. App. 506, 28 S. W. 134. And see People *v.* Eckman, 63 Hun (N. Y.) 209, 18 N. Y. Suppl. 654; Holly *v.* Simmons, (Tex. Civ. App. 1905) 85 S. W. 325; Coburn *v.* Gill, (Tex. Civ. App. 1901) 60 S. W. 974.

Permitting minor to enter and remain in saloon.— To render a liquor dealer and the sureties on his bond liable under a statute giving a cause of action to a parent whose minor child is permitted by the saloon-keeper to "enter and remain" in the saloon, it is necessary that such minor both enter the saloon and remain in it. If he enters the saloon and remains no longer than is necessary to procure a drink which is given to him by the saloon-keeper in good faith, believing him to be of age, then no liability arises against the saloon-keeper under the statute. Cox *v.* Thompson, 32 Tex. Civ. App. 572, 75 S. W. 819. And see Douthit *v.* State, 36 Tex. Civ. App. 396, 82 S. W. 352 [*modified* in 98 Tex. 344, 83 S. W. 795]; Ghio *v.* Stephens, (Tex. Civ. App. 1904) 78 S. W. 1084; Tinkle *v.* Sweeney, (Tex. Civ. App. 1904) 78 S. W. 248; Minter *v.* State, 33 Tex. Civ. App. 182, 76 S. W. 312. *Compare* Findley *v.* Holly, (Tex. Civ. App. 1905) 85 S. W. 24.

Belief as to age of minor.— While there is no civil liability for the mere sale of liquor to a minor under the honest and well founded belief that the purchaser was of full age (Tinkle *v.* Sweeney, (Tex. Civ. App. 1904) 78 S. W. 248), yet such belief is no defense to an action for a breach of the bond in permitting the minor to enter and remain in the saloon (Krick *v.* Dow, (Tex. Civ. App. 1904) 84 S. W. 245; Gillbreath *v.* State, (Tex. Civ. App. 1904) 82 S. W. 807; State *v.* Dittfurth, (Tex. Civ. App. 1904) 79 S. W. 52; Minter *v.* State, 33 Tex. Civ. App. 182, 76 S. W. 312; Cox *v.* Thompson, 32 Tex. Civ. App. 572, 75 S. W. 819).

Sale to students.— Daniels *v.* Grayson College, 20 Tex. Civ. App. 562, 50 S. W. 205.

Keeping disorderly house.— McGrimes *v.* State, 30 Ind. 140; State *v.* Whitener, 23 Ind. 124; Cullinan *v.* Stein, 177 N. Y. 574, 69 N. E. 1122; Cullinan *v.* Burkhard, 93 N. Y. App. Div. 31, 86 N. Y. Suppl. 1003; Cullinan *v.* New York Fidelity, etc., Co., 84 N. Y. App. Div. 292, 82 N. Y. Suppl. 695; Cunningham *v.* Porchet, 23 Tex. Civ. App. 80, 56 S. W. 574; State *v.* Curtis, 8 Tex. Civ. App. 506, 28 S. W. 134; Whitcomb *v.* State, 2 Tex. Civ. App. 301, 21 S. W. 976.

Gaming on premises.— McPherson *v.* Simmons, 63 Ark. 593, 40 S. W. 78; Lyman *v.* Kurtz, 166 N. Y. 274, 59 N. E. 903; Lyman *v.* Brucker, 26 Misc. (N. Y.) 594, 56 N. Y. Suppl. 767; Horan *v.* Travis County, 27 Tex. 226.

Responsibility for acts of another.— A liquor dealer's bond may be forfeited by unlawful sales made by his servant or authorized agent, but not where the person making the sale is shown to have been a mere intruder or interloper. O'Flinn *v.* State, 66 Miss. 7, 5 So. 390. And see Grady *v.* Rogan, 2 Tex. App. Civ. Cas. § 259. It is no defense to an action against a liquor dealer on his bond, either at common law or under the statutes, that the sale was made by an agent or servant contrary to the orders of the dealer. Greene County *v.* Wilhite, 29 Mo. App. 459. In Indiana it has been held that the dealer is not liable on his bond for the amount of a fine imposed on his bartender for an unlawful sale made without the obligor's authorization or knowledge. State *v.* Leach, 17 Ind. App. 174, 46 N. E. 549. And in New York while a saloon-keeper is liable for an act of his servant within the general scope of his authority, even though at variance with special instructions, yet he is not liable for such an act committed in pursuance of a deliberate purpose to injure his master by exposing him to liability. Cullinan *v.* Burkard, 93 N. Y. App. Div. 31, 86 N. Y. Suppl. 1003.

60. Lyman *v.* Oussani, 33 Misc. (N. Y.) 409, 68 N. Y. Suppl. 450; Tripp *v.* Flanigan, 10 R. I. 128.

5. Liability of Sureties. In order to fix the liability of the sureties on a liquor dealer's bond, it is not necessary to show a strict compliance with the statute in regard to the approval of the bond by the proper authorities,[61] or in regard to the justification of the sureties,[62] or the filing of the bond.[63] The extent of the liability of the sureties — whether to the full penalty of the bond or only to the amount of a particular fine or recovery — will depend upon the provisions of the statute under which the bond is executed;[64] and this is true also in regard to the particular kinds of fines, penalties, or recoveries against the principal for which the sureties may be held bound.[65] An action on the bond against the sureties may be defended on the ground that the bond does not comply with the statute in some matter of substance,[66] that the sureties were not notified (as required by law) of the prosecution or proceeding against their principal,[67] that the alleged unlawful sale was made at a place other than that covered by the license and the bond,[68] or that the statute authorizing such recoveries has been repealed without a saving clause.[69] So, where the principal obtained his license by means of false representations or deceit practised upon the licensing officers, this may invalidate the license and make any sale made by him a violation of the law, yet it does not warrant a recovery against his sureties, for the bond is intended to protect the public against violations of law under a license legally issued, but not against fraud in securing it.[70] But it is no defense to an action against a surety that his cosurety is dead,[71] that he himself has removed from the corporate limits,[72] or that the principal has sold his business to another, although without transferring the license or certificate.[73] And where the bond is conditioned for the payment of any judgment recovered against the principal, under the liquor laws, the sureties are bound by the judgment, and cannot retry the merits of the original suit.[74]

6. Actions For Breach — a. In General. An action on a liquor dealer's bond may be prosecuted in debt, trespass on the case, scire facias, or otherwise according to the nature of the obligation and the directions of the statute.[75] And in

61. Coggeshall *v.* Pollitt, 15 R. I. 168, 1 Atl. 413.

62. People *v.* Laning, 73 Mich. 284, 41 N. W. 424.

63. Brockway *v.* Petted, 79 Mich. 620, 45 N. W. 61, 7 L. R. A. 740.

64. Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; Lyman *v.* Rochester Title Ins. Co., 37 N. Y. App. Div. 234, 55 N. Y. Suppl. 770; Lightner *v.* Com., 31 Pa. St. 341; Com. *v.* Johnson, 8 Pa. Co. Ct. 378.

65. O'Brien County *v.* Mahon, 126 Iowa 539, 102 N. W. 446; Headington *v.* Smith, 113 Iowa 107, 84 N. W. 982; Ottumwa *v.* Hodge, 112 Iowa 430, 84 N. W. 533; Marshall County *v.* Knoll, 102 Iowa 573, 69 N. W. 1146, 71 N. W. 571; Uldrich *v.* Gilmore, 35 Nebr. 288, 53 N. W. 135; State *v.* Nutter, 44 W. Va. 385, 30 S. E. 67.

Surety on several bonds.— A person who becomes surety on the bonds of two or more liquor dealers will be liable on each, and the validity of such bonds will not be affected by a provision of the statute that no person who is a surety on one dealer's bond shall be permitted to become surety on another. Thomas *v.* Hinkley, 19 Nebr. 324, 27 N. W. 231.

66. Uldrich *v.* Gilmore, 35 Nebr. 288, 53 N. W. 135.

67. Margoley *v.* Com., 3 Metc. (Ky.) 405.

68. O'Banion *v.* De Garmo, 121 Iowa 139, 96 N. W. 739; Carter *v.* Nicol, 116 Iowa 519, 90 N. W. 352; Saffroi *v.* Cobun, 32 Tex. Civ. App. 79, 73 S. W. 828.

69. Thompson *v.* Bassett, 5 Ind. 535; Gullickson *v.* Gjorud, 89 Mich. 8, 50 N. W. 751.

70. Lyman *v.* Schermerhorn, 167 N. Y. 113, 60 N. E. 324; Lyman *v.* Kane, 57 N. Y. App. Div. 549, 67 N. Y. Suppl. 1065; Lyman *v.* Mead, 56 N. Y. App. Div. 582, 67 N. Y. Suppl. 254.

71. McMonigal *v.* State, (Tex. Civ. App. 1898) 45 S. W. 1038.

72. Wright *v.* Treat, 83 Mich. 110, 47 N. W. 243.

73. Cullinan *v.* Parker, 177 N. Y. 573, 69 N. E. 1122.

74. People *v.* Laning, 73 Mich. 284, 41 N. W. 424. And see 2 Black Judgm. § 587.

Conversely the liability of the sureties being secondary, and that of the principal primary, a judgment recovered against him is available to the sureties, under the doctrine of *res judicata*, as well as to him., Jenkins *v.* Danville, 79 Ill. App. 339.

75. Com. *v.* Thompson, 2 Gray (Mass.) 82; Anthony *v.* Krey, 70 Mich. 629, 38 N. W. 603; State *v.* Walker, 56 N. H. 176.

Action is upon contract.— A bond conditioned for the observance of the liquor law is in the nature of a contract for the obedience of the licensee to the provisions of the law; and the sum named in the bond is fixed as liquidated damages, and the action to recover the same is upon a contract obliga-

such an action neither the dealer nor his bondsmen can be heard to deny that the license was issued to him in conformity to law.[76] The previous conviction of the principal for a violation of the liquor law is not a prerequisite to a suit on the bond unless made so by statute.[77] Where the obligor has been prosecuted for the violation of law which is alleged as a breach of the condition of the bond, and has paid the fine and costs imposed upon him in such prosecution, no action can be maintained for the same cause on the bond.[78] Unless limited by its own terms or by the statute, the efficacy of a liquor bond is not exhausted by one recovery under it, for a fine or penalty, less than the penal sum of the bond, but it may stand for successive recoveries in distinct actions.[79] Where an action has been brought on the bond alone, and it has been determined that no recovery could be had on the bond, no recovery against the dealer individually can be sustained.[80] An action on the bond of a liquor dealer to recover fines against him for the illegal sale of liquor is a civil action, and therefore the state may take an appeal from the judgment therein.[81]

b. Persons Entitled to Sue — Parties. An action on a liquor dealer's bond may be prosecuted in the name and behalf of the state,[82] of the county,[83] by some public officer invested with authority in that behalf,[84] or by any private person aggrieved by the breach complained of, according to the directions of the statute.[85]

c. Pleading. The declaration or complaint in an action on a liquor dealer's bond should set forth all the material facts constituting the cause of action.[86]

tion, and not to recover a penalty. Cullinan *v.* Burkard, 93 N. Y. App. Div. 31, 86 N. Y. Suppl. 1003; Lyman *v.* Shenandoah Social Club, 39 N. Y. App. Div. 459, 57 N. Y. Suppl. 372.

76. Schullherr *v.* State, 68 Miss. 227, 8 So. 328.

77. State *v.* Pierce, 26 Kan. 777; Lyman *v.* Rochester Title Ins. Co., 37 N. Y. App. Div. 234, 55 N. Y. Suppl. 770; Granger *v.* Hayden, 17 R. I. 179, 20 Atl. 833; Coggeshall *v.* Pollitt, 15 R. I. 168, 1 Atl. 413.

In Connecticut, where the statute provides that, whenever a licensed liquor dealer shall be convicted of a violation of the law, and no appeal is pending, his bond shall become forfeited upon suit in such an action it is no defense to say that no sentence had been pronounced upon defendant in the criminal suit, where a verdict of guilty had been rendered. Quintard *v.* Knoedler, 53 Conn. 485, 2 Atl. 752, 55 Am. Rep. 149.

78. State *v.* Estabrook, 29 Kan. 739; Aiken *v.* Harbers, 6 Rich. (S. C.) 96.

Effect of imprisonment.— Where defendant was sentenced in the alternative (either to pay a fine or to suffer imprisonment), the fact that he has served out the term of imprisonment awarded to him is no defense to an action on the bond for the recovery of the fine. Stehle *v.* Com., 4 Pa. Cas. 172, 7 Atl. 169; Brown *v.* Com., 114 Pa. St. 335, 6 Atl. 152. And see People *v.* Eckman, 63 Hun (N. Y.) 209, 18 N. Y. Suppl. 654.

79. Lyman *v.* Shenandoah Social Club, 39 N. Y. App. Div. 459, 57 N. Y. Suppl. 372.

80. Carter *v.* Nicol, 116 Iowa 519, 90 N. W. 352.

81. State *v.* Nutter, 44 W. Va. 385, 30 S. E. 67.

82. State *v.* Larson, 83 Minn. 124, 86 N. W. 3, 54 L. R. A. 487; Douthit *v.* State, 98 Tex. 344, 83 S. W. 795 [*modifying* 36 Tex. Civ. App. 396, 82 S. W. 352]. *Compare* State *v.* Vinson, 5 Tex. Civ. App. 315, 23 S. W. 807.

In Iowa under Code, § 1538, a suit may be brought on a liquor dealer's bond in the name of the state, on the relation of any citizen of the county. The right given by this section is not inconsistent with Iowa Code, § 1532, which provides that the district attorney shall bring suit on such bond, but exists as a modification of the district attorney's power. State *v.* Humber, 73 Iowa 767, 34 N. W. 829; State *v.* De Kruif, 72 Iowa 488, 34 N. W. 607; State *v.* Martland, 71 Iowa 543, 32 N. W. 485.

83. O'Brien County *v.* Mahon, 126 Iowa 539, 102 N. W. 446.

84. Adams *v.* Cox, 80 Miss. 561, 32 So. 117; Lyman *v.* Perlmutter, 166 N. Y. 410, 60 N. E. 21; Lyman *v.* Rochester Title Ins. Co., 37 N. Y. App. Div. 234, 55 N. Y. Suppl. 770; People *v.* Eckman, 63 Hun (N. Y.) 209, 18 N. Y. Suppl. 654; People *v.* Groat, 22 Hun (N. Y.) 164.

Successor in office.— In Rhode Island, although the statute requiring the dealer to give bond to the town or city treasurer makes no provision for the bond's running to the successors in office of such treasurer, an action may be maintained by such successor on a bond so running. Granger *v.* Hayden, 17 R. I. 179, 20 Atl. 833.

85. Cunningham *v.* Porchet, 23 Tex. Civ. App. 80, 56 S. W. 574; Daniels *v.* Grayson College, 20 Tex. Civ. App. 562, 50 S. W. 205; Edgett *v.* Finn, (Tex. Civ. App. 1896) 36 S. W. 830; McGuire *v.* Glass, (Tex. App. 1890) 15 S. W. 127.

86. Jacobs *v.* Hogan, 73 Conn. 740, 49 Atl. 202 (an allegation of the execution of the bond imports an allegation of its delivery);

It is sufficient to set out the substance of the condition alleged to have been broken, without copying the whole language of the bond;[87] and it must be alleged that they occurred after the execution of the bond and while it continued in force;[88] but the particular acts assigned as a breach of the condition must be charged with certainty and without duplicity, and in such terms as to bring them clearly within the scope and intent of the condition,[89] and at the place covered by the license.[90]

d. Evidence. The bond sued on being one given by a licensed liquor dealer, it is necessary either to put the license in evidence or to show facts from which it may be conclusively inferred.[91] If the breach of condition complained of is a violation of law amounting to a criminal offense, the record of defendant's trial and conviction therefor is *prima facie* evidence of the breach, although probably not conclusive.[92] On questions as to the admissibility, weight, and relevancy of evidence the rules governing ordinary civil actions should be applied.[93]

e. Trial and Judgment. Instructions to the jury should be carefully framed, so as to leave to their determination all questions of fact, while placing clearly before them the legal conclusions from the terms of the bond and of the statute.[94] In an ordinary action on a liquor dealer's bond, judgment can be rendered against the sureties alone, without the principal.[95]

H. Fees and Taxes — 1. Liability in General. A municipal corporation has no power to levy a tax on liquor dealers, or to exact a license-fee from them, except

Gullickson *v.* Gjorud, 89 Mich. 8, 50 N. W. 751 (approval of the bond by the proper authorities should be alleged); Earl *v.* State, 33 Tex. Civ. App. 161, 76 S. W. 207. And see Bonds, 5 Cyc. 822 *et seq.*

Where the suit is brought by a private individual, under statute, it is not necessary for him to refer to such statute, as the court will take judicial notice of it. Lucas *v.* Johnson, (Tex. Civ. App. 1901) 64 S. W. 823. And see Cullinan *v.* Fidelity, etc., Co., 41 Misc. (N. Y.) 119, 83 N. Y. Suppl. 969.

87. Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. 398.

88. Redpath *v.* Nottingham, 5 Blackf. (Ind.) 267; Lyman *v.* Siebert, 31 Misc. (N. Y.) 285, 65 N. Y. Suppl. 367; Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. 398; Maier *v.* State, 2 Tex. Civ. App. 296, 21 S. W. 974; Brady *v.* Chamblis, 3 Tex. App. Civ. Cas. § 148.

89. *California.*— Eureka *v.* Diaz, 89 Cal. 467, 26 Pac. 961.

Connecticut.— Jacobs *v.* Holgenson, 70 Conn. 68, 38 Atl. 914.

Indiana.— State *v.* Golding, 28 Ind. App. 233, 62 N. E. 502; Boles *v.* McCarty, 6 Blackf. 427.

Iowa.— Jones County *v.* Sales, 25 Iowa 25.

Michigan.— Wright *v.* Treat, 83 Mich. 110, 47 N. W. 243.

New York.— Cullinan *v.* Fidelity, etc., Co., 41 Misc. 119, 83 N. Y. Suppl. 969.

Texas.— State *v.* Curtis, 8 Tex. Civ. App. 506, 28 S. W. 134; Whitcomb *v.* State, 2 Tex. Civ. App. 301, 21 S. W. 976; Maier *v.* State, 2 Tex. Civ. App. 296, 21 S. W. 974; Grady *v.* Rogan, 2 Tex. App. Civ. Cas. § 259. And see Patton *v.* Williams, 35 Tex. Civ. App. 129, 79 S. W. 357.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 93.

90. Adams *v.* Miller, 81 Miss. 613, 33 So. 489.

91. Lucas *v.* Johnson, (Tex. Civ. App. 1901) 64 S. W. 823.

92. Jacobs *v.* Holgenson, 70 Conn. 68, 38 Atl. 914; Welch *v.* McKane, 55 Conn. 25, 10 Atl. 168; Albrecht *v.* State, 62 Miss. 516; Webbs *v.* State, 4 Coldw. (Tenn.) 199.

93. See, generally, Evidence. And see Cullinan *v.* Parker, 177 N. Y. 573, 69 N. E. 1122; Cullinan *v.* Hosmer, 100 N. Y. App. Div. 148, 91 N. Y. Suppl. 607; Cullinan *v.* Quinn, 95 N. Y. App. Div. 492, 88 N. Y. Suppl. 963; Cullinan *v.* Rorphuro, 93 N. Y. App. Div. 200, 87 N. Y. Suppl. 570; Lyman *v.* Mead, 56 N. Y. App. Div. 582, 67 N. Y. Suppl. 254; Lyman *v.* Gramercy Club, 39 N. Y. App. Div. 661, 57 N. Y. Suppl. 376; Holley *v.* Simmons, (Tex. Civ. App. 1905) 85 S. W. 325; Poynor *v.* Holzgraf, 35 Tex. Civ. App. 233, 79 S. W. 829; Cox *v.* Thompson, 32 Tex. Civ. App. 572, 75 S. W. 819; Scalfi *v.* State, 31 Tex. Civ. App. 671, 73 S. W. 441; Dickson *v.* Holt, 30 Tex. Civ. App. 297, 70 S. W. 342; Cunningham *v.* Porchet, 23 Tex. Civ. App. 80, 56 S. W. 574; Edgett *v.* Finn, (Tex. Civ. App. 1896) 36 S. W. 830.

94. Cox *v.* Thompson, 32 Tex. Civ. App. 572, 75 S. W. 819; Scalfi *v.* State, 31 Tex. Civ. App. 671, 73 S. W. 441; Merzbacher *v.* State, (Tex. Civ. App. 1896) 36 S. W. 308; Smith *v.* Geer, 10 Tex. Civ. App. 252, 30 S. W. 1108.

Where the facts are undisputed, the question whether a principal and surety in an excise bond are liable thereon is a question of law. Lyman *v.* Gramercy Club, 39 N. Y. App. Div. 661, 57 N. Y. Suppl. 376.

95. Com. *v.* Stringer, 78 Ky. 56. And see Knott *v.* Peterson, 125 Iowa 404, 101 N. W. 173.

under authority of its charter or a general law.[96] But on the other hand the state has power to tax the liquor traffic, although it be carried on in violation of a municipal ordinance.[97] Liability for the payment of the tax or fee will depend upon the terms of the statute or ordinance, in respect to the kinds of liquor taxable,[98] the persons or corporations who are subject to the assessment,[99] and as to the classification of occupations and the exemption of particular persons or kinds of business.[1] Under a statute providing that dealers shall pay a license-tax, amounting to a certain percentage, on the total amount of their purchases, the tax is payable on the full cost price of the liquor taxed, without deduction of the amount of the internal revenue tax paid by the distiller.[2]

2. AMOUNT — a. Power to Fix Amount of Fee. The amount of a liquor tax to be assessed by municipal corporations, or of the license-fees which they may exact, may be fixed absolutely by their charters, by a general statute,[3] or by a legislative provision that it shall not exceed or shall not be less than a certain limit,[4] in either of which cases the municipal corporation will have no power to charge more or less than the sum fixed by the statute.[5] On the other hand it may be left to the discretion of the municipality, to fix by ordinance,[6] by

96. State *v.* Cloud, 6 Ala. 628; McCowan *v.* Davidson, 43 Ga. 480; Parker *v.* Wayne County, 104 N. C. 166, 10 S. E. 137. And see Merced County *v.* Helm, 102 Cal. 159, 36 Pac. 399.

97. Conwell *v.* Sears, 65 Ohio St. 49, 61 N. E. 155.

98. State *v.* Kauffman, 68 Ohio St. 635, 67 N. E. 1062 (holding that a statute imposing a tax on the business of trafficking in intoxicating liquors, and any spirituous, vinous, or malt liquors, includes a malt liquor or beverage which contains less than two per cent of alcohol and is not intoxicating); Simpson *v.* Serviss, 3 Ohio Cir. Ct. 433, 2 Ohio Cir. Dec. 246.

99. See Rathburn *v.* State, 88 Tex. 281, 31 S. W. 189.

Breweries and distilleries.— Where an ordinance provides that every person, firm, or corporation carrying on a brewing or distilling business, and all depots or agencies of breweries or distilleries, and wholesale dealers in malt liquors, shall pay a license-fee, each brewery or distillery, and each depot or agency of any brewery or distillery, or other wholesale establishment, is required to pay a separate license-fee. Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857.

Solicitors and agents.— A person does not personally owe a license-tax or fee for conducting the business of a retail dealer in liquors, when he is simply a solicitor for or in the employ of a retail dealer. Swords *v.* Le Blanc, 111 La. 416, 35 So. 622.

1. See Albertson *v.* Wallace, 81 N. C. 472.

Druggists see Hubbell *v.* Ebrite, 8 Ohio S. & C. Pl. Dec. 116, 7 Ohio N. P. 122; Druggist Cases, 85 Tenn. 449, 3 S. W. 490. And see *supra*, VI, B, 2, d.

Grocers see New Orleans *v.* Clark, 42 La. Ann. 9, 7 So. 58.

Social clubs see Nashville Hermitage Club *v.* Shelton, 104 Tenn. 101, 56 S. W. 838. And see *supra*, VI, B, 3.

Sales at manufactory see Wash *v.* Lewis, 5 Ohio S. & C. Pl. Dec. 371, 5 Ohio N. P. 391.

Manufactures from raw material.— Whisky, produced by distilling and refined by age into marketable and drinkable whisky is not "raw material," within the meaning of a statute exempting from taxation those manufacturing from the raw material. Block *v.* Lewis, 5 Ohio S. & C. Pl. Dec. 370, 7 Ohio N. P. 543.

Wholesaler.— Who is a wholesale dealer, within the meaning of a statute imposing a tax on such persons, is a question of fact to be determined on the testimony of experts in the trade. Bohler *v.* Schneider, 49 Ga. 195.

A brewer of beer is not one "engaged in distilling and rectifying alcoholic or malt liquors," within the meaning of a statute requiring a higher license-fee from such persons. State *v.* Weckerling, 38 La. Ann. 36.

2. Williams *v.* Iredell County Com'rs, 132 N. C. 300, 43 S. E. 896.

3. See Territory *v.* McPherson, 6 Dak. 27, 50 N. W. 351; *In re* Pittston, 7 Kulp (Pa.) 527; McGuigan *v.* Belmont, 89 Wis. 637, 62 N. W. 421; Custin *v.* Viroqua, 67 Wis. 314, 30 N. W. 515.

4. See Swarth *v.* People, 109 Ill. 621; Fulton *v.* Blythe, 30 S. W. 1018, 17 Ky. L. Rep. 341; Sargent *v.* Little, 72 N. H. 555, 58 Atl. 44; State *v.* Howe, 95 Wis. 530, 70 N. W. 670.

5. Drew County *v.* Bennett, 43 Ark. 364. *Compare* Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424.

6. See Williams *v.* West Point, 68 Ga. 816; Wolf *v.* Lansing, 53 Mich. 367, 19 N. W. 38; Baker *v.* Panola County, 30 Tex. 86.

Time of fixing.— A statute empowering city councils to license the sale of liquor, and providing that a license shall not extend beyond the year in which it is granted, and giving them power to determine the amount of the fee, does not require that the amount of the fee shall be fixed every year, but the amount once fixed will remain until changed. People *v.* Mount, 186 Ill. 560, 58 N. E. 360.

popular vote, or otherwise,[7] the amount of the tax which may be assessed or the amount of the fee which may be exacted.

b. Reasonableness of Amount. The legislature of a state, having unlimited control over the liquor traffic, may, if it chooses to license the business, fix the amount of the license-fee at any sum in its absolute discretion, and no one can complain that the amount so fixed is excessive or prohibitive; and the same rule applies in the case of a municipal corporation which, by its charter or a general statute, possesses full control over the traffic.[8] But if a municipality is given authority only to license the business, not to prohibit or suppress it altogether, its discretion as to the amount of the fee to be charged is limited, and an ordinance fixing such a fee as would be unreasonably great or practically prohibitory would be invalid.[9]

c. Pro-Rata Fee For Short Term. In several states provision is made by statute for a proportional reduction in the annual license-fee or tax in case the dealer obtains his license or permit after the beginning of the year or discontinues his business before its expiration.[10]

d. Classification of Municipalities. It is competent for the legislature to classify the municipal corporations of the state, according to their form of organization, or according to their population, fixing different rates of taxation or license-fees for the several classes, so that such fees shall be higher in cities than in villages, or shall increase in proportion to the number of inhabitants.[11] And where the statute provides that the population of a municipality shall be ascertained for this purpose, by the last preceding state or federal census, this method of fixing the population is exclusive, and the number of inhabitants cannot be shown by parol or by any unofficial enumeration.[12]

3. Levy and Assessment. A tax on intoxicating liquors, or on the traffic therein, directed by statute to be levied and collected by the local authorities,

Limitation as to amount.— In Missouri it has been held that towns cannot levy a tax for a dram-shop license larger than that levied for state purposes. Paris *v.* Graham, 33 Mo. 94. But in Louisiana it has been held otherwise. Jones *v.* Grady, 25 La. Ann. 586. And see Fuselier *v.* St. Landry Parish, 107 La. 221, 31 So. 678.

7. See State *v.* Janesville, 90 Wis. 157, 62 N. W. 933.

8. Dennehy *v.* Chicago, 120 Ill. 627, 12 N. E. 227; New Orleans *v.* Clark, 42 La. Ann. 9, 7 So. 58; Goldsmith *v.* New Orleans, 31 La. Ann. 646; Tenney *v.* Lenz, 16 Wis. 566.

9. *Ex p.* Sikes, 102 Ala. 173, 15 So. 522, 24 L. R. A. 774; Craig *v.* Burnett, 32 Ala. 728; *Ex p.* Burnett, 30 Ala. 461; Merced County *v.* Fleming, 111 Cal. 46, 43 Pac. 392; *Ex p.* Felchlin, 96 Cal. 360, 31 Pac. 224, 31 Am. St. Rep. 223; Sweet *v.* Wabash, 41 Ind. 7; Cheny *v.* Shelbyville, 19 Ind. 84; Berry *v.* Cramer, 58 N. J. L. 278, 33 Atl. 201.

Evidence as to reasonableness inadmissible. — It has been held that the question whether an ordinance imposing a license-tax is in fact prohibitory is a question for the court, to be determined from the ordinance itself, and evidence that it is prohibitive is not admissible. Merced County *v.* Fleming, 111 Cal. 46, 43 Pac. 392. But see *Ex p.* Sikes, 102 Ala. 173, 15 So. 522, 24 L. R. A. 774; Sweet *v.* Wabash, 41 Ind. 7; Wiley *v.* Owens, 39 Ind. 429.

It will not be presumed as a matter of law that a fee of fifty dollars a month for retail liquor licenses is oppressive or unreasonable. *Ex p.* Guerrero, 69 Cal. 88, 10 Pac. 261; *Ex p.* Hurl, 49 Cal. 557.

10. See the statutes of the different states. And see Engelthaler *v.* Linn County, 104 Iowa 293, 73 N. W. 578; David *v.* Hardin County, 104 Iowa 204, 73 N. W. 576; Kusta *v.* Kimberly, 10 Ohio Dec. (Reprint) 789, 28 Cinc. L. Bul. 379.

11. *Alabama.*— Spann *v.* Lowndes County, 141 Ala. 314, 37 So. 369; Foster *v.* Burt, 76 Ala. 229.

Idaho.— See Normoyle *v.* Latah County, 5 Ida. 19, 46 Pac. 831.

Minnesota.— Kelly *v.* Faribault, 83 Minn. 9, 85 N. W. 720.

New York.— People *v.* Lyman, 163 N. Y. 602, 57 N. E. 1120; People *v.* Hilliard, 85 N. Y. App. Div. 507, 83 N. Y. Suppl. 204 [*affirmed* in 176 N. Y. 604, 68 N. E. 1122]; Matter of Lyman, 26 Misc. 629, 57 N. Y. Suppl. 869; People *v.* Medberry, 17 Misc. 8, 39 N. Y. Suppl. 207.

Pennsylvania.— Com. *v.* McGroarty, 148 Pa. St. 606, 24 Atl. 91; Com. *v.* Miller, 126 Pa. St. 157, 17 Atl. 623; Com. *v.* Smoulter, 126 Pa. St. 137, 17 Atl. 532; Com. *v.* Robinson, 9 Pa. Super. Ct. 569; Com. *v.* Shoup, 9 Pa. Co. Ct. 289.

12. State *v.* Keaough, 68 Wis. 135, 31 N. W. 723.

New York statute construed see *In re* McGreivey, 161 N. Y. 645, 57 N. E. 1116; Lyman *v.* McGreivey, 159 N. Y. 561, 54 N. E. 1093; Matter of Steenburgh, 24 Misc. 1, 53

must be assessed as the law directs, in respect to the time of making the levy,[13] as to the persons or property to be assessed for taxation,[14] and as to the amount or rate of the tax.[15] Where a tax for carrying on the liquor business has by mistake been assessed against the wrong premises, it cannot several years thereafter be assessed against the premises actually used for the business, the property having in the meantime been sold for general taxes to one who had no notice of the liquor tax.[16]

4. Lien on Property. The legislature has power to make a liquor tax a lien on the premises where the business is carried on, although owned by another person and merely leased by the liquor seller, provided the owner leased his property for that very purpose or had actual or constructive knowledge that it was used for that purpose.[17] Moreover it is competent to make the lien of the tax paramount to all other liens or encumbrances, whether created by mortgage or otherwise,[18] although, in the absence of such a statutory provision, the tax lien will take rank merely from the time of its assessment, not displacing prior charges.[19]

5. Payment and Collection — a. Payment in Advance. Where the license law requires the fee for a license to be paid in advance, no valid license can be issued without full payment of the fee at or before its issuance; the law is peremptory, and leaves no discretion to the licensing officers to waive or modify its terms.[20] Further the whole amount must be paid. The payment of a less sum than that fixed by law as the price of a license is not to be regarded as good *pro tanto*, and does not authorize any license to be issued.[21]

b. To Whom Payment Made. The power to license the traffic in intoxicating liquors, and to impose a tax or license-fee on dealers, includes the power to provide for its collection by designating some public officer to whom the tax or fee shall be paid.[22] This officer is usually the treasurer or other fiscal agent of the municipality issuing the license.[23]

N. Y. Suppl. 197; Baker *v.* Bucklin, 22 Misc. 560, 50 N. Y. Suppl. 739.

13. Hubbell *v.* Polk County, 106 Iowa 618, 76 N. W. 854. And see Newton *v.* McKay, (Iowa 1905) 102 N. W. 827, Deemer, J., delivering the opinion of the court.

14. Lucas County *v.* Leonard, 107 Iowa 593, 78 N. W. 203.

15. Wade *v.* State, 22 Tex. App. 629, 3 S. W. 786. And see Parker *v.* Wayne County Com'rs, 104 N. C. 166, 10 S. E. 137.

16. Lohaus *v.* Hoggerty, 7 Ohio Cir. Ct. 408, 4 Ohio Cir. Dec. 657.

17. Guedert *v.* Emmet County, 116 Iowa 40, 89 N. W. 85; David *v.* Hardin County, 104 Iowa 204, 73 N. W. 576; *In re* Smith, 104 Iowa 199, 73 N. W. 605; Simpson *v.* Serviss, 3 Ohio Cir. Ct. 433, 2 Ohio Cir. Dec. 246.

18. Burfiend *v.* Hamilton, 20 Mont. 343, 51 Pac. 161; Pioneer Trust Co. *v.* Stich, 71 Ohio St. 459, 73 N. E. 520; Simpson *v.* Serviss, 3 Ohio Cir. Ct. 433, 2 Ohio Cir. Dec. 246; People's Bldg., etc., Assoc. *v.* Hanson, 7 Ohio S. & C. Pl. Dec. 179, 5 Ohio N. P. 162.

Not retroactive.— A statute postponing all liens, mortgages, conveyances, and encumbrances to the lien of the liquor tax does not apply to liens, etc., created before the act was passed. Finn *v.* Haynes, 37 Mich. 63.

19. Ferry *v.* Deneen, (Iowa 1900) 82 N. W. 424; David *v.* Hardin County, 104 Iowa 204, 73 N. W. 576; Smith *v.* Skow, 97 Iowa 640, 66 N. W. 893.

20. *Illinois.*— Munsell *v.* Temple, 8 Ill. 93; Backhaus *v.* People, 87 Ill. App. 173; Handy *v.* People, 29 Ill. App. 99.

Indiana.— Ristine *v.* Clements, 31 Ind. App. 338, 66 N. E. 924.

Kentucky.— Under the statute requiring an applicant for liquor license to pay, in addition to the regular fee, a percentage on any illegal sales, a license is properly denied where the applicant does not tender such amount, but has violated the law so frequently that he cannot tell the amount. Evans *v.* Com., 95 Ky. 231, 24 S. W. 632, 15 Ky. L. Rep. 567. A druggist's license to sell liquor, although not paid for, protects him, where his offer to pay, made in good faith, was declined. Storms *v.* Com., 105 Ky. 619, 49 S. W. 451, 20 Ky. L. Rep. 1434.

Mississippi.— McWilliams *v.* Phillips, 51 Miss. 196.

Nebraska.— Fry *v.* Kaessner, 48 Nebr. 133, 66 N. W. 1126; Claus *v.* Hardy, 31 Nebr. 35, 47 N. W. 418. *Compare* State *v.* Cornwell, 12 Nebr. 470, 11 N. W. 729.

New Mexico.— Sandoval *v.* Meyers, 8 N. M. 636, 45 Pac. 1128.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 100.

21. Spake *v.* People, 89 Ill. 617. *Compare* Wicker *v.* Siesel, 80 Ga. 724, 6 S. E. 817.

22. *In re* Lawrence, 69 Cal. 608, 11 Pac. 217. And see Amador County *v.* Kennedy, 70 Cal. 458, 11 Pac. 757.

23. Severance *v.* Kelly, 86 Ky. 522, 6 S. W. 386, 9 Ky. L. Rep. 708; Williams *v.* Com., 13 Bush (Ky.) 304; State *v.* Slack, 52 N. J.

c. Medium of Payment. As a general rule officers charged with the collection of license-fees can receive nothing but cash in payment. A note given in payment of such a fee is void; and if the statute requires the fee to be paid before the license is issued, a license granted upon receipt of such a note is likewise invalid.[24] In a few states, however, it is held that, while the taking of a note in such cases is not regular, yet it does not invalidate the license, and the note may be collected by suit.[25] State or municipal obligations, such as warrants or certificates of indebtedness, may be receivable in payment of license-fees, if the terms of the law authorizing the tender of such obligations in payment of public charges are broad enough to include license-fees.[26]

d. Enforcing Payment. A license tax or fee is not a "debt" in the ordinary sense of the word; the methods of collecting such tax or fee are those only which are authorized by the statute; and if the law does not provide for its collection by a civil action or suit, no such action can be maintained.[27] In several states, however, the statutes on this subject are so framed as to authorize, either directly or by necessary implication, the collection of unpaid license-fees by ordinary suit or action.[28] In other states the collection of delinquent license-fees is to be enforced by execution and levy on property,[29] or by distress.[30] If an action for such a tax or fee is brought unlawfully or without authority, equity may take cognizance of a bill to restrain its prosecution.[31]

6. Disposition of Moneys Collected. The fund created by licensing the sale of intoxicating liquors is under the absolute control of the legislature, unless restrained by some provision of the constitution.[32] Thus license-fees do not necessarily belong exclusively to the municipalities issuing the licenses, but it is competent to provide, as has been done in several states, that a certain proportion of such moneys shall be paid over to the state for the general uses of the state,[33]

L. 113, 18 Atl. 687; Lyman *v.* McGreivey, 25 N. Y. App. Div. 68, 48 N. Y. Suppl. 1035; Davis *v.* Patterson, 12 Pa. Super. Ct. 479; South Bethlehem *v.* Hemingway, 16 Pa. Co. Ct. 103; Stevenson *v.* Deal, 2 Pars. Eq. Cas. (Pa.) 212; Williams *v.* Reed, 4 Pa. Dist. 690, 8 Kulp 79.

24. *Arkansas.*— Hencke *v.* Standiford, 66 Ark. 535, 52 S. W. 1.

Indiana.— Ristine *v.* Clements, 31 Ind. App. 338, 66 N. E. 924.

Michigan.— Doran *v.* Phillips, 47 Mich. 228, 10 N. W. 350.

Mississippi.— McWilliams *v.* Phillips, 51 Miss. 196.

Missouri.— Craig *v.* Smith, 31 Mo. App. 286.

Nebraska.— Zielke *v.* State, 42 Nebr. 750, 60 N. W. 1010.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 100.

25. Powers *v.* Decatur, 54 Ala. 214; Appling County *v.* McWilliams, 69 Ga. 840; Searcy *v.* Lawrenceburg, 50 S. W. 534, 20 Ky. L. Rep. 1920; Fulton *v.* Blythe, 30 S. W. 1018, 17 Ky. L. Rep. 341.

26. Lee *v.* Roberts, 3 Okla. 106, 41 Pac. 595. *Compare* East St. Louis *v.* Wehrung, 46 Ill. 392, holding that where a statute authorizes the issue of certificates of indebtedness by a board of police commissioners, and provides that the same shall be receivable in payment of city "taxes," they cannot be used to pay the fee for a liquor license, as such fee is not a tax.

27. Hencke *v.* Standiford, 66 Ark. 535, 52 S. W. 1; Chicago *v.* Enright, 27 Ill. App. 559; State *v.* Fragiacomo, 70 Miss. 799, 14 So. 21; State *v.* Adler, 68 Miss. 487, 9 So. 645; State *v.* Piazza, 66 Miss. 426, 6 So. 316; O'Harra *v.* Cox, 42 Miss. 496. But see Thibodeaux *v.* State, 69 Miss. 683, 13 So. 352; State *v.* Thibodeaux, 69 Miss. 92, 10 So. 58, both cases construing a statute now repealed.

28. Sacramento *v.* Dillman, 102 Cal. 107, 36 Pac. 385; *Ex p.* Benjamin, 65 Cal. 310, 4 Pac. 23; Marshall County *v.* Knoll, 102 Iowa 573, 69 N. W. 1146, 71 N. W. 571; Hunter *v.* Lisso, 35 La. Ann. 230; Amite City *v.* Clementz, 24 La. Ann. 27; Hall *v.* Bastrop, 11 La. Ann. 603; Aulanier *v.* Governor, 1 Tex. 653. *Compare* Crawford County *v.* Laub, 110 Iowa 355, 81 N. W. 590; New *v.* State, 34 Tex. 100.

29. Sasser *v.* Adkins, 108 Ga. 228, 33 S. E. 881; Hight *v.* Fleming, 74 Ga. 592; Com. *v.* Byrne, 20 Gratt. (Va.) 165. *Compare* Brewer *v.* Nutt, 118 Ga. 257, 45 S. E. 269.

30. Wood *v.* Thomas, 38 Mich. 686.

31. Portwood *v.* Baskett, 64 Miss. 213, 1 So. 105. And see Tiernan *v.* Rinker, 102 U. S. 123, 26 L. ed. 103. *Compare* Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654.

32. Rock County *v.* Edgerton, 90 Wis. 288, 63 N. W. 291.

33. People *v.* Williams, 162 N. Y. 240, 56 N. E. 625; Lyman *v.* McGreivey, 25 N. Y. App. Div. 68, 48 N. Y. Suppl. 1035 [*affirmed* in 159 N. Y. 561, 54 N. E. 1093]; Balogh *v.* Lyman, 6 N. Y. App. Div. 271, 39 N. Y. Suppl. 780; Brown County *v.* Aberdeen, 4

or, if collected by a city or town, to the county treasurer for the use of the county.[34] In other states the money is to be collected by the county officers and distributed, wholly or in part, to the municipalities severally issuing the licenses.[35] And this duty may be enforced by mandamus,[36] or by appropriate action.[37] In others such moneys are collected by the local authorities to be used wholly for local purposes.[38] The legislature may direct that moneys raised in this way shall be exclusively appropriated[39] to specific public, educational, or charitable uses.[40]

7. Refunding or Recovering — a. Recovery of Excessive or Illegal Fee. Where a person applying for a liquor license voluntarily pays the whole amount demanded of him, although the charge is illegal, or the amount demanded, in consequence of a misapprehension of the law, or of the invalidity of a particular statute or ordinance, is in excess of the sum which might lawfully be exacted, he cannot recover back the amount paid or the illegal excess.[41] But the rule is otherwise where the payment was not voluntary, but was obtained by extortion, fraud,

D. 402, 31 N. W. 735; State *v.* Buechler, 10 S. D. 156, 72 N. W. 114; State *v.* Seattle, 31 Wash. 149, 71 Pac. 712; State *v.* Spokane Falls, 2 Wash. 40, 25 Pac. 903. See, however, Deposit *v.* Devereux, 8 Hun (N. Y.) 317, decided under earlier statute.

34. Winona *v.* Whipple, 24 Minn. 61. See State *v.* Bailer, 91 Minn. 186, 97 N. W. 670.

35. Waverly *v.* Bremer County, 126 Iowa 98, 101 N. W. 874; Sheridan Dist. Tp. *v.* Frahm, 102 Iowa 5, 70 N. W. 721; Grosse Pointe *v.* Wayne County, 85 Mich. 44, 48 N. W. 153; Marquette County *v.* Ishpeming, 49 Mich. 244, 13 N. W. 609; Aberdeen *v.* Saunderson, 8 Sm. & M. (Miss.) 663; Com. *v.* Martin, 170 Pa. St. 118, 32 Atl. 624; Stroudsburg Borough *v.* Shick, 24 Pa. Super. Ct. 442; Schuylkill Haven Borough *v.* Schuylkill County, 10 Pa. Dist. 494.

36. East Saginaw *v.* Saginaw County, 44 Mich. 273, 6 N. W. 684; People *v.* Decatur Tp. Bd., 33 Mich. 335.

37. Fox Lake *v.* Fox Lake Village, 62 Wis. 486, 22 N. W. 584.

38. Mt. Carmel *v.* Wabash County, 50 Ill. 69.

39. Hunt *v.* New York, 47 N. Y. App. Div. 295, 62 N. Y. Suppl. 184; Allegany County *v.* Wellsville, 90 Hun (N. Y.) 23, 35 N. Y. Suppl. 516.

40. Public schools see Eminence *v.* Wilson, 103 Ky. 326, 45 S. W. 81, 20 Ky. L. Rep. 29; Hawkesville *v.* Board of Education, 99 Ky. 292, 35 S. W. 1034, 18 Ky. L. Rep. 208; Common School Dist. *v.* Vanceburg, 46 S. W. 1, 20 Ky. L. Rep. 369; State Bd. of Education *v.* Aberdeen, 56 Miss. 518; State *v.* Fenton, 29 Nebr. 348, 45 N. W. 464.

Inebriates' home see People *v.* Brooklyn Bd. of Police, 63 N. Y. 623.

Poor fund see Winneconne *v.* Winneconne, 122 Wis. 348, 99 N. W. 1055; Churchill *v.* Herrick, 32 Wis. 357.

Repair of roads see Krzykwa *v.* Croninger, 200 Pa. St. 359, 49 Atl. 979; Flannigan *v.* Wilkes-Barre Tp., 10 Kulp (Pa.) 100.

41. *Alabama.*— Welch *v.* Marion, 48 Ala. 291.

Georgia.— Tatum *v.* Trenton, 85 Ga. 468, 11 S. E. 705; Williams *v.* West Point, 68 Ga. 816; Thomson *v.* Norris, 62 Ga. 538 [*limiting* Callaway *v.* Milledgeville, 48 Ga. 309]. And see Silver *v.* Sparta, 107 Ga. 275, 33 S. E. 31.

Indiana.— Brazil *v.* Kress, 55 Ind. 14; Edinburg *v.* Hackney, 54 Ind. 83; Sullivan *v.* McCammon, 51 Ind. 264; Ligonier *v.* Ackerman, 46 Ind. 552, 15 Am. Rep. 323.

Iowa.— Guedert *v.* Emmet County, 116 Iowa 40, 89 N. W. 85; Kraft *v.* Keokuk, 14 Iowa 86.

Kentucky.— Providence *v.* Shackelford, 106 Ky. 378, 50 S. W. 542, 20 Ky. L. Rep. 1921.

Louisiana.— New Iberia *v.* Moss Hotel Co., 112 La. 525, 36 So. 552.

Massachusetts.— Emery *v.* Lowell, 127 Mass. 138.

Mississippi.— Tupelo *v.* Beard, 56 Miss. 532.

New York.— Baker *v.* Bucklin, 43 N. Y. App. Div. 336, 60 N. Y. Suppl. 294.

North Carolina— Bailey *v.* Raleigh, 130 N. C. 209, 41 S. E. 281, 58 L. R. A. 178.

Ohio.— Hornberger *v.* Case, 9 Ohio Dec. (Reprint) 434, 13 Cinc. L. Bul. 511.

Wisconsin.— Custin *v.* Viroqua, 67 Wis. 314, 30 N. W. 515.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 102.

But see Marshall *v.* Snediker, 25 Tex. 460, 78 Am. Dec. 534.

Voluntary payment.— The rule is that if the payment is made without protest, and not to procure the release of plaintiff's person or property from arrest or seizure, and not compelled by the exhibition of compulsory process or its actual or threatened enforcement, and without the use of any force, fraud, duress, or intimidation on the part of the municipality or its officers or agents, then the payment is considered as made voluntarily. Edinburg *v.* Hackney, 54 Ind. 83.

Business necessities.— One who pays an excessive sum, demanded in good faith, for a liquor license, merely because of the necessities of his business, cannot recover back the excess, as the payment is voluntary. Custin *v.* Viroqua, 67 Wis. 314, 30 N. W. 515.

force, or moral or legal compulsion, as in such a case he may recover back the amount or the illegal excess.[42]

b. Refunding Money on Refusal or Cancellation of License. As a general rule a person who has paid the fee for a liquor license on making his application therefor cannot recover it back upon the subsequent refusal of the license, in consequence of his failure to comply with other conditions, or for other sufficient reasons;[43] nor where an appeal from the order of the licensing authorities results in a decision adverse to his right to obtain the license;[44] nor where a license already granted is revoked or canceled by those having authority to take such action,[45] nor where the privileges which the license confers are abrogated by the adoption of a law or ordinance prohibiting all sales of liquor within the territory covered by it.[46] And *a fortiori* a person who voluntarily pays the liquor tax, and afterward abandons the business because he is unwilling or unable to furnish the required bond, cannot recover the amount of the tax so paid.[47]

c. Rebate on Surrender of Certificate. In New York it is provided by statute that the holder of a liquor-tax certificate may voluntarily surrender the same for cancellation and receive a rebate of the amount paid for the unexpired terms provided the certificate has at least one month to run at the time of the surrenders and that the holder has ceased the selling of liquor under it,[48] and provided that no arrest or indictment or other prosecution provided for by the statute is pending against him at the time of the surrender or within thirty days thereafter,[49]

42. Edinburg *v.* Hackney, 54 Ind. 83.

Threats.— An action will lie against a municipal corporation to recover back money paid to its officers for a liquor license under threats of fine and imprisonment. Princeton *v.* Vierling, 40 Ind. 340. But *compare* Colglaizer *v.* Salem, 61 Ind. 445.

Protest.— In some cases it has been held that if the payment is made under a formal protest this will remove the objection that the party paid voluntarily and will authorize him to recover. Catoir *v.* Watterson, 38 Ohio St. 319; Baker *v.* Cincinnati, 11 Ohio St. 534; Doolittle *v.* Luzerne County, 6 Kulp (Pa.) 495. But it is doubtful whether this exception would be universally allowed, unless the statute specifically provides for such protest. See Emery *v.* Lowell, 127 Mass. 138.

43. Johnson *v.* Atkins, 44 Fla. 185, 32 So. 879; Scalzo *v.* Sackett, 30 Misc. (N. Y.) 543, 63 N. Y. Suppl. 820; McLeod *v.* Scott, 21 Oreg. 94, 26 Pac. 1061, 27 Pac. 1; Trainor *v.* Multnomah County, 2 Oreg. 214; Hague *v.* Ashland, 91 Wis. 629, 65 N. W. 508. *Compare* Zeglin *v.* Carver County, 72 Minn. 17, 74 N. W. 901, holding that where the applicant filed the necessary bond and paid the required fee, and the municipal authorities granted and tendered him a license different from that for which he had applied, because running for a different period of time, he was not bound to accept such license, and that he could maintain an action to recover back his money. *Contra*, State *v.* Lincoln, 6 Nebr. 12.

In South Dakota a statute provides that in case a license is denied the money paid to the county treasurer shall be returned to the applicant "upon the warrant of the board of county commissioners." It has been held that the word "warrant," as here used, simply means authority, and not the municipal security known as a "county warrant." State *v.* Buechler, 10 S. D. 156, 72 N. W. 114.

44. Monroe County *v.* Kreuger, 88 Ind. 231.

In Nebraska and New York the rule is otherwise. See Chamberlain *v.* Tecumseh, 43 Nebr. 221, 61 N. W. 632; Lydick *v.* Korner, 15 Nebr. 500, 20 N. W. 26; People *v.* Sackett, 15 N. Y. App. Div. 290, 44 N. Y. Suppl. 593.

45. McGinnis *v.* Medway, 176 Mass. 67, 57 N. E. 210; Parrent *v.* Little, 72 N. H. 566, 58 Atl. 510; Toman *v.* Westfield, 70 N. J. L. 610, 57 Atl. 125; Matter of Lyman, 28 Misc. (N. Y.) 278, 59 N. Y. Suppl. 828. *Compare* Martel *v.* East St. Louis, 94 Ill. 67; Thayer County School Dist. No. 34 *v.* Thompson, 51 Nebr. 857, 71 N. W. 728, holding that if the license is canceled without any fault on the part of the licensee, he is entitled to a repayment *pro tanto* of the sum paid for the unexpired term.

46. Peyton *v.* Hot Spring County, 53 Ark. 236, 13 S. W. 764. See, however, Nurnberger *v.* Barnwell, 42 S. C. 158, 20 S. E. 14.

In Ohio the Dow law (Act May 14, 1886) provides for the refunding of a proportionate amount of taxes or assessments paid by liquor dealers where the traffic is subsequently prohibited by the municipalities to which the taxes have been paid. State *v.* Rouch, 47 Ohio St. 478, 25 N. E. 59.

47. Curry *v.* Tawas Tp., 81 Mich. 355, 45 N. W. 831.

48. See People *v.* Lyman, 67 N. Y. App. Div. 446, 73 N. Y. Suppl. 987 [*affirmed* in 173 N. Y. 605, 66 N. E. 1114]; Lyman *v.* Cheever, 31 Misc. (N. Y.) 100, 63 N. Y. Suppl. 809.

49. See People *v.* Cullinan, 168 N. Y. 258, 61 N. E. 243; Matter of Seitz, 32 Misc. (N. Y.) 108, 65 N. Y. Suppl. 462; People *v.* Cullinan, 95 N. Y. App. Div. 598, 88 N. Y.

or that if he has been indicted or prosecuted the proceedings have been discharged or dismissed on the merits.[50] This right of rebate on surrender is in the nature of a chose in action,[51] and while it inures to the benefit of an assignee of the certificate, the latter cannot enforce it when his assignor has disabled himself from doing so.[52] It cannot be claimed in any case where the certificate was originally void because obtained by fraud or false statements in the application,[53] nor after proceedings have been commenced to revoke the certificate.[54] The method of applying for and obtaining the payment of the rebate provided by the statute is exclusive, and all the conditions must be complied with.[55]

I. Transfer of Rights — 1. License Not Assignable. A license to sell liquor is not assignable or transferable, unless by the aid of a statute, and even where one takes an assignment of the license, on buying or leasing the licensee's business, and continues to sell at the same place, and otherwise in obedience to the law, he is not protected by the license.[56]

2. Statutes Authorizing Transfer of Licenses. In some of the states it is provided by statute that the holder of a liquor license may sell and assign the same, transferring his rights under it, with the consent and approval of the licensing authorities.[57] Application for a transfer of a license should be made by a peti-

Suppl. 1022; People *v.* Cullinan, 90 N. Y. App. Div. 606, 85 N. Y. Suppl. 1142, holding that the mere fact that the licensee has had his saloon open on Sunday does not prevent him from obtaining the rebate, where no complaint or prosecution in regard to such violation of the law is pending.

50. See People *v.* Lyman, 69 N. Y. App. Div. 406, 74 N. Y. Suppl. 1104 [*affirmed* in 173 N. Y. 604, 66 N. E. 1114]; People *v.* Lyman, 53 N. Y. App. Div. 470, 65 N. Y. Suppl. 1062 [*affirmed* in 168 N. Y. 669, 61 N. E. 1113].

51. Niles *v.* Mathusa, 20 N. Y. App. Div. 483, 47 N. Y. Suppl. 38.

52. People *v.* Hilliard, 81 N. Y. App. Div. 71, 80 N. Y. Suppl. 792 [*affirmed* in 178 N. Y. 582, 70 N. E. 1106]; People *v.* Lyman, 59 N. Y. App. Div. 172, 69 N. Y. Suppl. 111; People *v.* Lyman, 27 N. Y. App. Div 527, 50 N. Y. Suppl. 497; Knapp *v.* Scanlin, 36 Misc. (N. Y.) 756, 74 N. Y. Suppl. 458.

53. *In re* Lyman, 163 N. Y. 536, 57 N. E. 745; People *v.* Lyman, 33 Misc. (N. Y.) 243, 68 N. Y. Suppl. 331.

54. Matter of Johnson, 18 Misc. (N. Y.) 498, 42 N. Y. Suppl. 1074.

55. People *v.* Lyman, 53 N. Y. App. Div. 470, 65 N. Y. Suppl. 1062 [*affirmed* in 168 N. Y. 669, 61 N. E. 1133]; Ging *v.* Sherry, 32 N. Y. App. Div. 354, 52 N. Y. Suppl. 1003; People *v.* Lyman, 25 Misc. (N. Y.) 217, 55 N. Y. Suppl. 76.

56. *Florida.*— State *v.* Sumter County Com'rs, 22 Fla. 1.

Indiana.— Heath *v.* State, 105 Ind. 342, 4 N. E. 901; Strahn *v.* Hamilton, 38 Ind. 57; Godfrey *v.* State, 5 Blackf. 151.

Iowa.— Lewis *v.* U. S., Morr. 199.

Kentucky.— Com. *v.* Bryan, 9 Dana 310.

Missouri.— Mitchell *v.* Branham, 104 Mo. App. 480, 79 S. W. 739.

Nebraska.— State *v.* Lydick, 11 Nebr. 366, 9 N. W. 560.

New Jersey.— Semple *v.* Flynn, (Ch. 1887) 10 Atl. 177.

New York.— Sanderson *v.* Goodrich, 46 Barb. 616; Alger *v.* Weston, 14 Johns. 231.

North Carolina.— State *v.* McNeeley, 60 N. C. 232.

Pennsylvania.— *In re* Blumenthal, 125 Pa. St. 412, 18 Atl. 395; *In re* Templeton, 4 Lanc. L. Rev. 242. And see *In re* Keiper, 21 Pa. Super. Ct. 512; Cronin *v.* Sharp, 16 Pa. Super. Ct. 76.

Wisconsin.— State *v.* Bayne, 100 Wis. 35, 75 N. W. 403.

Canada.— Reg. *v.* Booth, 3 Ont. 144.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 108.

57. See the statutes of the different states. And see Cullinan *v.* Kuch, 177 N. Y. 303, 69 N. E. 597; People *v.* Lyman, 156 N. Y. 407, 50 N. E. 1112; Matter of Lyman, 59 N. Y. App. Div. 217, 69 N. Y. Suppl. 309; Albany Brewing Co. *v.* Barckley, 42 N. Y. App. Div. 335, 59 N. Y. Suppl. 65; Niles *v.* Mathusa, 20 N. Y. App. Div. 483, 47 N. Y. Suppl. 38; Matter of Bradley, 22 Misc. (N. Y.) 301, 49 N. Y. Suppl. 1100; Matter of Jenney, 19 Misc. (N. Y.) 244, 44 N. Y. Suppl. 84; Niles *v.* Mathusa, 19 Misc. (N. Y.) 96, 44 N. Y. Suppl. 88; People *v.* Manzer, 18 Misc. (N. Y.) 292, 41 N. Y. Suppl. 1075; Rubenstein *v.* Kahn, 5 Misc. (N. Y.) 408, 25 N. Y. Suppl. 760; *In re* Umholtz, 191 Pa. St. 177, 43 Atl. 75; Laib *v.* Hare, 163 Pa. St. 481, 30 Atl. 163; *In re* McCabe, 11 Pa. Super. Ct. 560; *In re* McKibbins, 11 Pa. Super. Ct. 421; *In re* Umholtz, 9 Pa. Super. Ct. 450; *In re* Kellar, 9 Pa. Dist. 340, 23 Pa. Co. Ct. 251; *In re* Leahy, 3 Pa. Dist. 472, 14 Pa. Co. Ct. 430; *In re* Beese, 28 Pa. Co. Ct. 353; *In re* Hotel Cambridge License, 20 Pa. Co. Ct. 229; *In re* Quirk, 17 Pa. Co. Ct. 327; *In re* Leibeknecht, 14 Pa. Co. Ct. 571; *In re* Rohm, 14 Pa. Co. Ct. 202; *In re* Burns, 14 Pa. Co. Ct. 174; *In re* Kornman, 13 Pa. Co. Ct. 147; *In re* Summa, 12 Pa. Co. Ct. 667; *In re* Hedrick, 7 Dauph. Co. Rep. (Pa.) 166; *In re* Dalphy, 8 Del. Co. (Pa.) 410, 15 York Leg. Rec. 204; *In re* Doyle, 6 Kulp (Pa.)

tion, setting forth the facts essential to a full understanding of the case on the part of the authorities and to enable them to exercise an intelligent judgment on the propriety of consenting to the proposed transfer.[58] Opposition to the transfer may be made by any person having a real interest in the matter and who would be aggrieved by the granting of the application.[59] The licensing authorities are vested with a discretion to grant or withhold their consent to the application, and unless it appears that their refusal was arbitrary or an abuse of such discretion, they will not be compelled, by mandamus, to approve the proposed transfer.[60] But generally an appeal is allowed from their decision, not for the purpose of reviewing the facts, but to determine questions of jurisdiction and procedure, and to test the legality of their action with reference to an alleged arbitrary or unlawful refusal of the application.[61]

3. Death of Licensee. Upon the death of a licensee, the privileges conferred by the license do not pass to or vest in his personal representatives, nor are they authorized to continue the business at retail, although they do not require a transfer of the license to enable them to dispose of the stock as a whole.[62]

4. Rights of Creditors of Licensee. A liquor license, being in the nature of a trust personal to the licensee and not transferable except with the approval of the licensing authorities, is not an asset which can be subjected to the claims of his general creditors by the ordinary processes of law.[63]

J. Revocation of Licenses — 1. Power and Authority to Revoke. A license to sell liquor being neither a contract nor a right of property, but merely a temporary permit to do that which would otherwise be unlawful, the authority which granted it always retains the power to revoke it, either for due cause of forfeiture, such as a violation of the laws regulating the traffic, or upon a change of policy and legislation in regard to the sale of liquors; and such revocation cannot be complained of as a breach of contract, or as unlawfully divesting the licensee of his rights or his property.[64] But justice and reason alike deny the power to

356; *In re* Gerke Brewing Co., 23 Pittsb. Leg. J. (Pa.) 420.

Reconsidering action on application.— The excise commissioners, in granting an application to transfer a liquor license, completely perform the judicial duty imposed on them, leaving only the ministerial duty of issuing their certificate of transfer; and they cannot afterward reconsider their action on the ground that they had overlooked certain objections which had been interposed to the application. People *v.* Wells, 11 Misc. (N. Y.) 239, 32 N. Y. Suppl. 973.

Imposing conditions.— The licensing authorities cannot impose upon the parties conditions to their approval of the proposed transfer, other than such as may be authorized by the statute. Class' Appeal, 6 Pa. Super. Ct. 130.

58. Matter of Cullinan, 39 Misc. (N. Y.) 646, 80 N. Y. Suppl. 626; *In re* McKibbins, 11 Pa. Super. Ct. 421; *In re* Nacrelli, 8 Del. Co. (Pa.) 20.

59. Lester *v.* Price, 83 Va. 648, 3 S. E. 529. *Compare In re* Nacrelli, 8 Del. Co. (Pa.) 20, holding that a remonstrance intended merely to aid in the collection of a debt by delaying the transfer of the license will not be considered on a petition for such transfer.

60. *In re* Blumenthal, 125 Pa. St. 412, 18 Atl. 395; *In re* Breen, 2 Pa. Dist. 652.

61. People *v.* Brooklyn Excise Com'rs, 12 Misc. (N. Y.) 296, 34 N. Y. Suppl. 22; *In re* McCabe, 11 Pa. Super. Ct. 560.

As to the parties entitled to appeal see Wakeman's Appeal, 74 Conn. 313, 50 Atl. 733; *In re* McCabe, 11 Pa. Super. Ct. 560.

62. People *v.* Sykes, 96 Mich. 452, 56 N. W. 12; Williams *v.* Troop, 17 Wis. 463; U. S. *v.* Overton, 27 Fed. Cas. No. 15,979, 2 Cranch C. C. 42. See, however, *In re* Theis, 6 Pa. Co. Ct. 396. And see *supra*, VI, A, 4. See Executors and Administrators, 18 Cyc. 174.

63. Quinnipiac Brewing Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023; Gilday *v.* Warren, 69 Conn. 237, 37 Atl. 494; Semple *v.* Flynn, (N. J. Ch. 1887) 10 Atl. 177; McNeeley *v.* Welz, 20 N. Y. App. Div. 566, 47 N. Y. Suppl. 310; Koehler *v.* Olsen, 68 Hun (N. Y.) 63, 22 N. Y. Suppl. 677; Germantown Brewing Co. *v.* Booth, 162 Pa. St. 100, 29 Atl. 386; *In re* Ulrich, 6 Pa. Dist. 408; *In re* Summa, 2 Pa. Dist. 651; *In re* Breen, 13 Pa. Co. Ct. 141.

64. *Georgia.*— McGehee *v.* State, 114 Ga. 833, 40 S. E. 1004; Sprayberry *v.* Atlanta, 87 Ga. 120, 13 S. E. 197; Brown *v.* State, 82 Ga. 224, 7 S. E. 915. Municipal authorities may revoke a license at any time, without refunding the money paid, or any part of the same, and although the licensee may have invested money in liquors or in fixtures for retailing them. Melton *v.* Moultrie, 114 Ga. 462, 40 S. E. 302. And a municipal corpo-

revoke a license duly granted, upon a mere arbitrary exercise of the will of the authorities and without due cause of complaint against the licensee.[65]

2. Effect of Subsequent Legislation. A license to sell liquor is revoked or annulled by the repeal of the law authorizing the grant of such licenses, or by any change in the legislation of the state or district inconsistent with the further exercise of the rights conferred by the license, such as the adoption of a prohibitory statute or a local option law.[66]

3. Grounds For Revocation. A liquor license may be revoked for fraud practised upon the licensing officers in obtaining it,[67] as where the application for license contained material false statements or false representations,[68] or a materially erroneous or false description of the premises intended to be licensed,[69] or

ration does not render itself liable in damages by revoking a license, although the licensee has given no cause for revocation. Ison *v.* Griffin, 98 Ga. 623, 25 S. E. 611.

Illinois.— Carbondale *v.* Wade, 106 Ill. App. 654.

Iowa.— McConkie *v.* Remley, 119 Iowa 512, 93 N. W. 505; Ottumwa *v.* Schaub, 52 Iowa 515, 3 N. W. 529; Hurber *v.* Baugh, 43 Iowa 514.

Kansas.— See Newman *v.* Lake, 70 Kan. 848, 79 Pac. 675.

Maryland.— Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83.

Massachusetts.— Young *v.* Blaisdell, 138 Mass. 344; Com. *v.* Brennan, 103 Mass. 70; Calder *v.* Kurby, 5 Gray 597.

Minnesota.— State *v.* Dwyer, 21 Minn. 512.

Nebraska.— Martin *v.* State, 23 Nebr. 371, 36 N. W. 554; Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481.

New Jersey.— Hoboken *v.* Goodman, (Sup. 1902) 51 Atl. 1092.

New York.— *In re* Cullinan, 87 N. Y. App. Div. 47, 83 N. Y. Suppl. 1025; People *v.* Tighe, 5 Hun 25; People *v.* Woodman, 4 N. Y. Suppl. 532. Under the present statute the right to engage in the sale of liquors granted by a liquor tax certificate cannot be revoked except for the cause and in the manner prescribed by the statute. *In re* Lyman, 160 N. Y. 96, 54 N. E. 577.

Ohio.— Hirn *v.* State, 1 Ohio St. 15.

Oregon.— State *v.* Horton, 21 Oreg. 83, 27 Pac. 165.

Virginia.— Davis *v.* Com., 75 Va. 944; Hogan *v.* Guigon, 29 Gratt. 705.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 113.

Order granting license may be rescinded. Hagan *v.* Boonton, 62 N. J. L. 150, 40 Atl. 688; Sights *v.* Yarnalls, 12 Gratt. (Va.) 292.

65. See State *v.* Dwyer, 21 Minn. 512; Lantz *v.* Hightstown, 46 N. J. L. 102; *In re* Flosser, 8 Kulp (Pa.) 343; Pehrson *v.* Ephraim, 14 Utah 147, 46 Pac. 657. *Compare* Ison *v.* Griffin, 98 Ga. 623, 25 S. E. 611.

Unreasonable ordinance.—An ordinance providing that, upon a second conviction for keeping open a tippling-house on Sunday, the license and the money paid therefor shall be forfeited and remain forfeited, although upon an appeal and trial *de novo* an acquittal takes place, is so oppressive and unreasonable that in this particular it is void. McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516.

66. Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481; Hirn *v.* State, 1 Ohio St. 15; Com. *v.* Jones, 10 Pa. Co. Ct. 611; Hogan *v.* Guigon, 29 Gratt. (Va.) 705. And see *supra*, V, A, 5, b; VI, A, 6, b.

67. Decker *v.* Elizabeth Bd. of Excise, 57 N. J. L. 603, 31 Atl. 235; Lantz *v.* Hightstown, 46 N. J. L. 102; *In re* Barrett, 11 Pa. Dist. 649, 26 Pa. Co. Ct. 178. And see Matter of Lyman, 28 Misc. (N. Y.) 278, 59 N. Y. Suppl. 828, holding that where a town has voted against the issue of liquor licenses under a local option law, a license issued in good faith by the county treasurer, before he learned of the action of the town, to an applicant who was aware of such action when he applied for the license, is subject to revocation.

68. See *In re* Hawkins, 165 N. Y. 188, 58 N. E. 884; *In re* Lyman, 163 N. Y. 536, 57 N. E. 745; *In re* Kessler, 163 N. Y. 205, 57 N. E. 402 [*reversing* 44 N. Y. App. Div. 635, 60 N. Y. Suppl. 1141]; Matter of Ryon, 85 N. Y. App. Div. 621, 82 N. Y. Suppl. 123; *In re* Moulton, 59 N. Y. App. Div. 25, 69 N. Y. Suppl. 14 [*affirmed* in 168 N. Y. 645, 61 N. E. 1131]; *In re* Tonatio, 49 N. Y. App. Div. 84, 63 N. Y. Suppl. 560; *In re* Smith, 48 N. Y. App. Div. 423, 63 N. Y. Suppl. 255; Matter of McMonagle, 41 Misc. (N. Y.) 407, 84 N. Y. Suppl. 1068; Matter of Brewster, 39 Misc. (N. Y.) 689, 80 N. Y. Suppl. 666; Matter of Cullinan, 39 Misc. (N. Y.) 646, 80 N. Y. Suppl. 626; *In re* Rasquin, 37 Misc. (N. Y.) 693, 76 N. Y. Suppl. 404; Matter of Lyman, 34 Misc. (N. Y.) 296, 69 N. Y. Suppl. 781; Matter of Haight, 33 Misc. (N. Y.) 544, 68 N. Y. Suppl. 920; *In re* Auerbach, 31 Misc. (N. Y.) 44, 64 N. Y. Suppl. 602; Matter of Harper, 30 Misc. (N. Y.) 663, 64 N. Y. Suppl. 524; Matter of Halbran, 30 Misc. (N. Y.) 515, 63 N. Y. Suppl. 1024; Matter of Fall, 26 Misc. (N. Y.) 611, 57 N. Y. Suppl. 858; Matter of Lyman, 23 Misc. (N. Y.) 710, 53 N. Y. Suppl. 52.

69. *In re* Hoyniak, 9 Kulp (Pa.) 368.

Hotel license.— Where, at the time an application was made for a license for a hotel, some of the bedrooms of the hotel did not comply with the law as to floor area and cubic feet of space, it must be revoked. Matter of Ryon, 39 Misc. (N. Y.) 698, 80 N. Y. Suppl.

where the applicant did not, when so required by the statute, obtain the consent of the owners of adjoining property,[70] or if he has failed to pay the license-fee or otherwise to comply with the conditions imposed upon him.[71] Moreover the license may be revoked when the licensee has been guilty of a breach of its conditions or an offense against the criminal laws, more particularly the laws regulating the sale of liquor.[72] If the statute directs the revocation of the license upon his "conviction" of such an offense, there must first have been a final judgment, conclusively establishing guilt, rendered by a court of competent jurisdiction;[73] but when the cause of revocation is specified as a "violation" of the laws, the licensing authorities may act upon other evidence than a judgment of conviction.[74] In such a proceeding it is no defense that the alleged unlawful act was committed by the bartender or other employee of the licensee, without the knowledge of the latter and contrary to his general orders, for it is his duty to exercise such a close supervision of his business as will render the commission of unlawful acts impossible.[75] And where the same person holds several licenses for as many

1114. But the law requiring that the hotel shall contain ten furnished rooms for guests, the license will not be revoked merely because there were not ten such rooms at the time the application was made, where the applicant was engaged in constructing the rooms, which were shortly afterward completed. Matter of Purdy, 40 N. Y. App. Div. 133, 57 N. Y. Suppl. 629.

70. Lyman *v.* Murphy, 33 Misc. (N. Y.) 349, 68 N. Y. Suppl. 490. See Matter of Pierson, 32 Misc. (N. Y.) 293, 66 N. Y. Suppl. 546; Matter of Johnson, 18 Misc. (N. Y.) 498, 42 N. Y. Suppl. 1074.

71. *In re* Umholtz, 9 Pa. Super. Ct. 450. And see *In re* Gerstlauer, 5 Pa. Dist. 97.

72. State *v.* Schmidtz, 65 Iowa 556, 22 N. W. 673; People *v.* Woodman, 4 N. Y. Suppl. 532; *In re* Stegmaier Brewing Co., 11 Pa. Dist. 691. *Compare* Anderson's Case, 2 Blair Co. Rep. (Pa.) 44.

Place of sale.— A license may be revoked on the ground that the business is conducted at a place other than that designated in the license. Com. *v.* Joseph Kohnle Brewing Co., 1 Pa. Super. Ct. 627. *Compare In re* Lyman, 160 N. Y. 96, 54 N. E. 577; McLeod *v.* State, 33 Tex. Civ. App. 170, 76 S. W. 216.

Quantity sold.— It is cause for the revocation of a license that the holder has violated its terms by selling liquor in greater or less quantities than the license permits. Meenan's Appeal, 11 Pa. Super. Ct. 579.

If a person licensed only to sell liquors not to be drunk on the premises sells liquor to be drunk thereon, this is not a ground for revoking his certificate under the New York Liquor Tax Law. Matter of Lyman, 27 Misc. (N. Y.) 327, 57 N. Y. Suppl. 888.

Sales to minors, etc.— People *v.* Woodman, 15 Daly (N. Y.) 136, 3 N. Y. Suppl. 926; Com. *v.* McCandless, 3 Pa. Dist. 30; *In re* Eick, 17 Pa. Co. Ct. 50; *In re* Garey, 11 Pa. Co. Ct. 468; *In re* Tierney, 11 Pa. Co. Ct. 406.

Sales on Sunday.— Matter of Cullinan, 68 N. Y. App. Div. 119, 74 N. Y. Suppl. 182; *In re* McLaughlin, 24 Pa. Co. Ct. 92.

Sales at prohibited hours.— Matter of Lyman, 28 N. Y. App. Div. 209, 50 N. Y. Suppl. 898; Matter of Lyman, 28 N. Y. App. Div. 127, 50 N. Y. Suppl. 977.

Keeping disorderly house.— Com. *v.* Elliott, 4 Pa. Dist. 89, 16 Pa. Co. Ct. 122; Com. *v.* Simmons, 4 Pa. Dist. 35; *In re* Gordon, 16 Montg. Co. Rep. (Pa.) 25; Gerver's Case, 7 Northam. Co. Rep. (Pa.) 382. And see *In re* Steidell, 12 Luz. Leg. Reg. (Pa.) 22.

Permitting gambling on the premises.— Ballentine *v.* State, 48 Ark. 45, 2 S. W. 340; Brockway *v.* State, 36 Ark. 629; Matter of Cullinan, 88 N. Y. App. Div. 6, 84 N. Y. Suppl. 492.

Failure to keep license posted.— Matter of Michell, 41 N. Y. App. Div. 271, 58 N. Y. Suppl. 632.

Failure to expose place of sale to public view.— State *v.* Harrison, 162 Ind. 542, 70 N. E. 877.

Former acquittal.—Where the evidence justifies the revocation of the license, the fact that a criminal prosecution was formerly instituted against the licensee, based on the same facts, and resulted in his discharge or acquittal, constitutes no defense to the proceeding for revocation. Matter of Schuyler, 32 Misc. (N. Y.) 221, 66 N. Y. Suppl. 251.

73. *In re* Lyman, 160 N. Y. 96, 54 N. E. 577; Matter of Lyman, 44 N. Y. App. Div. 507, 60 N. Y. Suppl. 805.

Conviction.— A verdict of a jury, not followed by a judgment, is not such a "conviction" as the law intends (Com. *v.* Kiley, 150 Mass. 325, 23 N. E. 55) nor is a sentence entered upon a plea of *nolo contendere* (White *v.* Creamer, 175 Mass. 567, 56 N. E. 832).

74. Jefferson County *v.* Mayr, 31 Colo. 173, 74 Pac. 458; Miles *v.* State, 53 Nebr. 305, 73 N. W. 678; *In re* Kocher, 12 Pa. Dist. 513, 27 Pa. Co. Ct. 432; *In re* Genova, 3 Pa. Dist. 722; Rodden *v.* Providence License Com'rs, (R. I. 1891) 21 Atl. 1020.

75. People *v.* Meyers, 95 N. Y. 223; People *v.* Woodman, 15 Daly (N. Y.) 136, 3 N. Y. Suppl. 926; Matter of Cullinan, 39 Misc. (N. Y.) 636, 80 N. Y. Suppl. 607; Matter of Lyman, 29 Misc. (N. Y.) 524, 61 N. Y. Suppl.

different places, they may all be revoked for a violation of law committed at any one of such places; for the law deals with the person of the licensee, and will not allow a person who breaks the law at one place to enjoy its protection at another.[76]

4. Notice to Licensee. If the statute directs that the holder of a license shall be notified of the institution of proceedings to revoke the same, and be summoned to appear and show cause against the complaint, the proceedings will be void unless these requisites are complied with.[77] But if the license itself contains the conditions of forfeiture, as prescribed by the law or ordinance under which it was granted, the licensee, on conviction of a violation of the law, is not entitled to notice of the forfeiture or revocation of his license.[78]

5. Proceedings Before Licensing Officers — a. In General. As a general rule the jurisdiction for the revocation of a license is vested in the same board, court, or officer possessing the power and authority to grant licenses.[79] Proceedings for the revocation of a license before the licensing board or officers must be founded on a complaint, setting forth with reasonable certainty the grounds alleged for forfeiting the license,[80] and be supported by competent evidence,[81] and the holder of the license must be given an opportunity to be present and be heard,[82] and to obtain and present witnesses in his behalf.[83] The law does not, however, require the same strictness of proceedings or proof in these cases that is

946; *In re* Moyer, 20 Pa. Co. Ct. 663; *In re* Gordon, 16 Montg. Co. Rep. (Pa.) 25.

76. Matter of Lyman, 59 N. Y. App. Div. 217, 69 N. Y. Suppl. 309 [*affirming* 32 Misc. 210, 67 N. Y. Suppl. 48].

77. *Kentucky.*— Plummer *v.* Com., 1 Bush 26.

Massachusetts.— Young *v.* Blaisdell, 138 Mass. 344. And see Com. *v.* Hamer, 128 Mass. 76.

New Jersey.— Lambert *v.* Rahway, 58 N. J. L. 578, 34 Atl. 5.

New York.— Matter of Lyman, 26 Misc. (N. Y.) 300, 56 N. Y. Suppl. 1020; People *v.* Utica Bd. Excise, 17 Misc. 98, 40 N. Y. Suppl. 741. And see Matter of Cullinan, 94 N. Y. App. Div. 445, 88 N. Y. Suppl. 164, necessity of notice to assignee of tax certificate.

Virginia.— Lillienfeld *v.* Com., 92 Va. 818, 23 S. E. 882.

Washington.— See Holppa *v.* Aberdeen, 34 Wash. 554, 76 Pac. 79.

Wisconsin.— Oshkosh *v.* State, 59 Wis. 425, 18 N. W. 324; Gaertner *v.* Fond du Lac, 34 Wis. 497.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 116.

Notice to partners.— Where a liquor license is in form a proper license to a partnership, it is not necessary that notice of the hearing to be had upon an application to revoke it should be given to more than one member of the firm. Com. *v.* Bearce, 150 Mass. 389, 23 N. E. 99. And see Matter of Cullinan, 68 N. Y. App. Div. 119, 74 N. Y. Suppl. 182.

78. Sprayberry *v.* Atlanta, 87 Ga. 120, 13 S. E. 197. And see Martin *v.* State, 23 Nebr. 371, 36 N. W. 554; Wallace *v.* Reno, (Nev. 1903) 73 Pac. 528.

79. Hevren *v.* Reed, 126 Cal. 219, 58 Pac. 536; Sullivan *v.* Borden, 163 Mass. 470, 40 N. E. 859; Dolan's Appeal, 108 Pa. St. 564.

Delegation of authority.— Where the statute vests the power to revoke licenses exclusively in the common council of a city, the council cannot, by ordinance or otherwise, delegate such power to a police justice. Lambert *v.* Rahway, 58 N. J. L. 578, 34 Atl. 5.

Disqualification of officer.— Where one of the members of the board hires a minor to buy liquor, so as to obtain evidence against the dealer, he is incompetent to sit as a member of the board on a hearing to revoke the license, so that if he sits the action of the board revoking the license is void. State *v.* Bradish, 95 Wis. 205, 70 N. W. 172, 37 L. R. A. 289.

80. Brubaker *v.* State, 89 Ind. 577; State *v.* Lamos, 26 Me. 258; State *v.* Tomah, 80 Wis. 198, 49 N. W. 753.

81. People *v.* Poughkeepsie Excise Com'rs, 2 N. Y. App. Div. 89, 37 N. Y. Suppl. 485.

If the evidence satisfies the board, they should revoke the license, although the character and motives of the witnesses may not be above reproach, and although they may have acted as spies or obtained their knowledge surreptitiously. People *v.* Becker, 3 N. Y. St. 202.

Swearing witnesses.—If witnesses are called, it is imperative that they should be sworn. Omission to swear the witnesses is fatal and justifies quashing the proceedings. Providence License Com'rs *v.* O'Conner, 17 R. I. 40, 19 Atl. 1080.

Certificate of conviction.— Where the cause of forfeiture alleged is the conviction of defendant, in a competent court, of a violation of the liquor laws, a proper certificate of such conviction is all the evidence that is necessary. Martin *v.* State, 23 Nebr. 371, 36 N. W. 554.

82. State *v.* Northfield, 41 Minn. 211, 42 N. W. 1058.

83. People *v.* McGlyn, 131 N. Y. 602, 30 N. E. 864; Deignan *v.* Providence License Com'rs, 16 R. I. 727, 19 Atl. 332.

necessary in actions or special proceedings in courts.[84] It is no bar to such a proceeding that it is founded on some act or offense for which a criminal prosecution is pending against the licensee, or for which he has already been convicted.[85]

b. Restraining or Compelling Action. Mandamus may issue to compel a licensing board to convene and take action on a petition for the revocation of a license,[86] or even to compel them to make an order revoking the license, if it is plain that their refusal to do so is unwarranted by the proven facts and an abuse of discretion.[87] And conversely a writ of prohibition may be used to restrain the board from revoking a license, if it is shown that they have no power to take the contemplated action.[88] A stay of proceedings cannot be granted by a circuit court to prevent a city council from revoking a license pending an appeal from an order of that court refusing a temporary injunction against the council in such proceedings.[89]

c. Review of Proceedings. The decision or order of a licensing board revoking a license may be reviewed by the courts on proper proceedings,[90] as upon a writ of certiorari.[91] But this writ does not bring up the facts, or authorize a review of the decision on the merits. It is only concerned with questions of jurisdiction, abuse of discretion, or erroneous conclusions of law.[92]

6. Judicial Proceedings — a. Parties. Under the liquor tax law in New York judicial proceedings for the revocation of a certificate may be instituted by any citizen who is a taxpayer of the county,[93] against the holder of record of the certificate,[94] joining also the county treasurer who issued it, in cases where he is a proper party.[95] But an application to discontinue the proceeding may not be made by the respondent, but only by the party who instituted the proceeding.[96]

b. Pleading. The petition must show the complainant's right to bring such proceeding,[97] and state with reasonable certainty and precision the facts on which

84. People *v.* Haughton, 41 Hun (N. Y.) 558; People *v.* Wright, 3 Hun (N. Y.) 306, 5 Thomps. & C. 518; State *v.* Beloit, 74 Wis. 267, 42 N. W. 110.

Where a city council has prescribed by ordinance how a license shall be revoked, it is necessary, so long as the ordinance remains in effect, to proceed in the manner prescribed by it. Carbondale *v.* Wade, 106 Ill. App. 654.

85. La Croix *v.* Fairfield County, 50 Conn. 321, 47 Am. Rep. 648; Cherry *v.* Com., 78 Va. 375.

86. People *v.* Becker, 3 N. Y. St. 202.

87. State *v.* Johnson, 37 Nebr. 362, 55 N. W. 874; Swan *v.* Wilderson, 10 Okla. 547, 62 Pac. 422; State *v.* Kellogg, 95 Wis. 672, 70 N. W. 300. *Compare* Haslem *v.* Schnarr, 30 Ont. 89; Reg. *v.* Burnside, 8 U. C. Q. B. 263.

88. Hevren *v.* Reed, 126 Cal. 219, 58 Pac. 536.

89. McLellan *v.* Janesville, 99 Wis. 544, 75 N. W. 308.

90. State *v.* Schmidtz, 65 Iowa 556, 22 N. W. 673; People *v.* McGlyn, 131 N. Y. 602, 30 N. E. 864; People *v.* Forbes, 52 Hun (N. Y.) 30, 4 N. Y. Suppl. 757.

Collateral proceedings.— The act of the board in revoking a license will not be reviewed in a proceeding to which it is not a party, as in a criminal prosecution for acts done after the revocation. Com. *v.* Wall, 145 Mass. 216, 13 N. E. 486, Field, J., delivering the opinion of the court.

91. Deignan *v.* Providence License Com'rs, 16 R. I. 727, 19 Atl. 332; Gaertner *v.* Fond du Lac, 34 Wis. 497. *Compare* State *v.* Schroff, 123 Wis. 98, 100 N. W. 1030.

Effect of expiration of license.— An appeal from an order dismissing a writ of certiorari to review the action of a city council in revoking a liquor license will be dismissed, where prior to the hearing the license has expired by lapse of time. Holppa *v.* Aberdeen, 34 Wash. 554, 76 Pac. 79.

92. People *v.* Flushing Bd. Excise Com'rs, 24 Hun (N. Y.) 195; *In re* Carlson, 127 Pa. St. 330, 18 Atl. 8; Rodden *v.* Providence License Com'rs, (R. I. 1891) 21 Atl. 1020.

93. N. Y. Liquor Tax Law (1897), c. 312, § 28, subd. 2. And see People *v.* McGowan, 44 N. Y. App. Div. 30, 60 N. Y. Suppl. 407; Matter of Halbran, 30 Misc. (N. Y.) 515, 63 N. Y. Suppl. 1024; Matter of Lyman, 23 Misc. (N. Y.) 710, 53 N. Y. Suppl. 52.

94. Matter of Cullinan, 39 Misc. (N. Y.) 641, 80 N. Y. Suppl. 186.

Assignee of certificate.— When the certificate has been lawfully assigned, as the statute permits, proceedings for its revocation should be brought against the assignee, and in such a case the original holder is not a necessary party. Matter of Lyman, 53 N. Y. App. Div. 330, 65 N. Y. Suppl. 673; Matter of Michell, 41 N. Y. App. Div. 271, 58 N. Y. Suppl. 632; Nieland *v.* McGrath, 29 Misc. (N. Y.) 682, 62 N. Y. Suppl. 760.

95. See Matter of Seymour, 47 N. Y. App. Div. 320, 62 N. Y. Suppl. 25.

96. Matter of Cullinan, 39 Misc. (N. Y.) 558, 79 N. Y. Suppl. 582.

97. People *v.* McGowan, 44 N. Y. App. Div. 30, 60 N. Y. Suppl. 407.

the application is based,[98] and be properly verified.[99] The answer should conform to the ordinary rules of pleading, and contain an explicit denial of the allegations which the respondent means to controvert.[1]

c. Evidence. A liquor license will not be revoked for a breach of its conditions or a violation of the laws unless the evidence in support of the charges is clear and convincing.[2] The essential fact that the respondent holds a license must be proved by the complainant or petitioner.[3] But if the respondent claims to be within any exception in the statute which would save him from the ordinary consequences of the act complained of he must assume the burden of proving this contention.[4]

d. Trial and Judgment. On proceedings for the revocation of a license, it is the duty of the court to give the respondent a full and fair hearing.[5] But he is not entitled to a trial by jury as a matter of constitutional right.[6] It is no bar to

98. Voight *v.* Newark, 59 N. J. L. 358, 36 Atl. 686, 37 L. R. A. 292; Matter of Halbran, 30 Misc. (N. Y.) 515, 63 N. Y. Suppl. 1024; Meenan's Appeal, 11 Pa. Super. Ct. 579. And see *In re* Campbell, 8 Pa. Super. Ct. 524.

Formal pleadings not necessary.— Proceedings under the statute to vacate a liquor license do not call for formal pleadings, nor are they within the purview of the rules regulating pleadings under the Practice Act. Burns' Appeal, 76 Conn. 395, 56 Atl. 611.

Allegations on information and belief.— Under a statute which requires the petition to state the facts on which the application is based, a petition merely averring that the petitioner "believes" that certain facts exist, or that the respondent has committed an act in violation of law, without stating the grounds of his information and belief, is insufficient, and will not justify an order revoking the certificate. *In re* Peck, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888. But the statute is sufficiently complied with, although the application merely states the grounds on information and belief, when it is accompanied by affidavits, made a part of it, which state, on the personal knowledge of the affiants, facts justifying the cancellation of the certificate. Matter of Cullinan, 76 N. Y. App. Div. 362, 78 N. Y. Suppl. 466 [*affirmed* in 173 N. Y. 610, 66 N. E. 1106]; Matter of Cullinan, 40 Misc. (N. Y.) 423, 82 N. Y. Suppl. 337.

Grounds not alleged.— The certificate can be revoked, if at all, only on the grounds alleged in the petition. It is immaterial that the evidence, taking a wider range, may disclose other grounds which would have been sufficient if pleaded. Nor can the petitioner, on an appeal, urge matters not presented in his petition. Matter of Plass, 71 N. Y. App. Div. 488, 76 N. Y. Suppl. 2; Matter of Purdy, 40 N. Y. App. Div. 133, 57 N. Y. Suppl. 629.

Amendment on appeal.— The original petition cannot be amended on appeal by the addition of grounds for the revocation of the license shown by the evidence but not alleged. Matter of Plass, 71 N. Y. App. Div. 488, 76 N. Y. Suppl. 2.

99. People *v.* McGowan, 44 N. Y. App. Div. 30, 60 N. Y. Suppl. 407.

1. See Matter of Schuyler, 63 N. Y. App. Div. 206, 71 N. Y. Suppl. 437; Matter of Cullinan, 39 Misc. (N. Y.) 646, 80 N. Y. Suppl. 626.

Default for want of answer.— Under the statute providing that after service of a petition to revoke a liquor tax certificate and an order to show cause, the judge may revoke the certificate, unless the holder files a verified answer raising an issue as to some material point in the petition, in which event the judge must take proof, otherwise the order may be granted by default, this does not dispense with the petition stating jurisdictional facts, and authorize the court to revoke the certificate on default, as the legislature cannot raise a presumption of guilt from an omission of the accused to testify. *In re* Peck, 167 N. Y. 391, 60 N. E. 775, 53 L. R. A. 888. And see Matter of Cullinan, 41 Misc. (N. Y.) 392, 84 N. Y. Suppl. 1075 [*affirmed* in 89 N. Y. App. Div. 613, 85 N. Y. Suppl. 1129]; Matter of Cullinan, 40 Misc. (N. Y.) 583, 83 N. Y. Suppl. 9.

2. *In re* Matey, 9 Kulp (Pa.) 215. And see *In re* Cullinan, 86 N. Y. Suppl. 1046; Matter of Brewster, 85 N. Y. App. Div. 235, 83 N. Y. Suppl. 564; Matter of Cullinan, 75 N. Y. App. Div. 301, 78 N. Y. Suppl. 118; Matter of Whittaker, 63 N. Y. App. Div. 442, 71 N. Y. Suppl. 497; Matter of Cullinan, 39 Misc. (N. Y.) 354, 79 N. Y. Suppl. 840; *In re* Ryon, 83 N. Y. Suppl. 123; *In re* Gillespie, 3 Pa. Dist. 461.

3. Brubaker *v.* State, 89 Ind. 577.

4. Matter of Lyman, 28 N. Y. App. Div. 127, 50 N. Y. Suppl. 977.

5. State *v.* Hudson County Ct. C. Pl., (N. J. Sup. 1901) 48 Atl. 1013.

6. State *v.* Schmidtz, 65 Iowa 556, 22 N. W. 673; Voight *v.* Newark Excise Com'rs, 59 N. J. L. 358, 36 Atl. 686, 37 L. R. A. 292; *In re* Lyman, 161 N. Y. 641, 57 N. E. 1115; People *v.* Brooklyn Police, etc., Com'rs, 59 N. Y. 92; Matter of Lyman, 46 N. Y. App. Div. 387, 61 N. Y. Suppl. 884; Cherry *v.* Com., 78 Va. 375.

Reference and proceedings before referee see Matter of Cullinan, 97 N. Y. App. Div. 122, 89 N. Y. Suppl. 683; Matter of Cullinan, 93 N. Y. App. Div. 540, 87 N. Y. Suppl. 817; Matter of Plass, 71 N. Y. App. Div.

the prosecution of the proceedings that an action is already pending on the licensee's bond,[7] that the license has expired by lapse of time since the commencement of the proceedings,[8] or that a former application for the revocation of a license issued for the same place, but to a different person, based on the same grounds, was denied.[9] The right to costs, except in so far as expressly regulated by the statute, rests in the discretion of the court.[10]

e. Appeal and Review. On appeal from an order revoking a liquor license the appellate court will not review the facts or retry the issues of fact, but will presume that the court of first instance based its decision on proper and sufficient evidence.[11]

7. Effect of Revocation. The revocation of a liquor license extinguishes all rights and privileges acquired or held under it, and makes all future sales by the former licensee unlawful.[12] It does not bar a criminal prosecution against him for the same statutory offense which constituted the ground for revoking the license.[13]

VII. Regulation of Traffic.[14]

A. In General. The traffic in intoxicating liquors is not *malum in se*. The sale of such products is not an offense at common law, but, in the absence of a prohibitive or restrictive statute, is lawful and free to all persons. Hence punitive or restrictive measures against any individual engaging in the traffic can only be based upon the terms of some valid and operative law or ordinance.[15] In determining what statute is operative at a given time, attention should be paid to the general rule that a general statute relating to the traffic in intoxicating liquors, intended to cover the whole ground and to contain the entire law on the subject, and which establishes a different system, or adds new offenses or prescribes different penalties, will repeal by implication, if not expressly, all existing laws on the same subject in force in the same jurisdiction.[16] And a general

488, 76 N. Y. Suppl. 2; Matter of Halbran, 30 Misc. (N. Y.) 515, 63 N. Y. Suppl. 1024; *In re* Bridge, 56 N. Y. Suppl. 1105.

7. Matter of Lyman, 32 Misc. (N. Y.) 621, 67 N. Y. Suppl. 502.

8. Matter of Lyman, 48 N. Y. App. Div. 275, 62 N. Y. Suppl. 846 [*affirming* 28 Misc. 408, 59 N. Y. Suppl. 968]; Matter of Schuyler, 32 Misc. (N. Y.) 221, 66 N. Y. Suppl. 251.

9. Matter of McCusker, 47 N. Y. App. Div. 111, 62 N. Y. Suppl. 201.

10. Young *v.* Blaisdell, 138 Mass. 344; Lyman *v.* Murphy, 33 Misc. (N. Y.) 349, 68 N. Y. Suppl. 490.

11. Conner *v.* Com., 16 S. W. 454, 13 Ky. L. Rep. 403; Matter of Lyman, 62 N. Y. App. Div. 616, 70 N. Y. Suppl. 822; *In re* Carlson, 127 Pa. St. 330, 18 Atl. 8; Meenan's Appeal, 11 Pa. Super. Ct. 579; Moyer's Appeal, 8 Pa. Super. Ct. 475; Reg. *v.* Crothers, 11 Manitoba 567.

12. Melton *v.* Moultrie, 114 Ga. 462, 40 S. E. 302; Matter of Washburn, 32 Misc. (N. Y.) 303, 66 N. Y. Suppl. 732; People *v.* Lyman, 25 Misc. (N. Y.) 217, 55 N. Y. Suppl. 76; Neuman *v.* State, 76 Wis. 112, 45 N. W. 30.

13. State *v.* O'Connor, 58 Minn. 193, 59 N. W. 999.

14. As to power to regulate and constitutionality of regulations see *supra*, III; IV, E.

15. State *v.* Elff, 49 Ind. 282; Coulson *v.* Cass County, 12 Ind. 558; Holmes *v.* Welch, 12 Ind. 555; State *v.* Hafsoos, 1 S. D. 382, 47 N. W. 400; Black Intox. Liq. § 402.

16. *Arkansas.*— Galloway *v.* State, 60 Ark. 362, 30 S. W. 349.

Georgia.—See Barker *v.* State, 118 Ga. 35, 44 S. E. 874.

Indiana.—State *v.* Cooper, (1887) 13 N. E. 861. *Compare* Shea *v.* Muncie, 143 Ind. 14, 46 N. E. 138.

Kentucky.— Rice *v.* Com., 61 S. W. 473, 22 Ky. L. Rep. 1793. *Compare* Raubold *v.* Com., 54 S. W. 17, 21 Ky. L. Rep. 1125.

Louisiana.—See State *v.* Gray, 111 La. 853, 35 So. 952.

Maryland.— State *v.* Yewell, 63 Md. 120.

Michigan.—Sparta *v.* Boorom, 129 Mich. 555, 89 N. W. 435, 90 N. W. 681.

New Hampshire.—State *v.* Perkins, 26 N. H. 9.

New Jersey.— State *v.* New Brunswick, 2 N. J. L. J. 240.

United States.—U. S. *v.* Warwick, 51 Fed. 280.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 121.

This rule does not apply where there is no necessary inconsistency between the two statutes, or where the later relates to a narrower subject or to a different aspect of the general subject. State *v.* Williams, 10 Tex. Civ. App. 346, 30 S. W. 477; State *v.* Rosenberg, 7 Tex. Civ. App. 487, 27 S. W. 293.

liquor law, containing no exceptions, will be operative in all parts of the state, including all of its cities or other municipal corporations, unless there is something showing an intention to exempt them.[17] And conversely a local statute regulating the liquor traffic in a city or district may operate as a repeal or suspension of the general law of the state on the same subject so far as concerns the particular locality.[18] Statutes on this subject are to be construed by the same rules which are applicable in statutory interpretation in general, unless particular principles for their construction have been ordained by law,[19] and while their criminal or penal provisions cannot apply retroactively, they may take effect upon rights existing under licenses already issued, or limit or forbid the future sale of property already in existence at the time of their enactment.[20]

B. Particular Regulations — 1. Quantity Sold. In many of the states statutes are in force prohibiting the sale, by unlicensed dealers, of intoxicating liquors in quantities less than a certain minimum, or classifying dealers into wholesalers and retailers and providing that the former shall not be permitted to sell less than a certain quantity at a time,[21] or providing for different kinds of licenses or permits, the one permitting the sale of liquor to be drunk on the premises, and the other authorizing its sale only when it is not to be consumed at the place of sale.[22]

2. Purpose of Sale. Statutes entirely prohibiting the sale of intoxicating liquors, or subjecting the traffic to severe restrictions, frequently contain exceptions permitting such sale, under certain regulations, for medical, mechanical, chemical, and sacramental purposes;[23] and if such exceptions are not expressly

Amending statute.—A statute amending an earlier statute, by striking out the word "spirituous" wherever it occurs, and inserting in place thereof the word "intoxicating," does not repeal the earlier statute Com. *v.* Herrick, 6 Cush. (Mass.) 465.

Dispensary law.—A special act establishing a dispensary in a town does not repeal the general statute making it a misdemeanor to retail liquor without a license, although it prohibits the county commissioners from issuing a license to retail in said town, and provides that such a license, if issued, shall be no protection to one selling under it. State *v.* Smith, 126 N. C. 1057, 35 S. E. 615. And see Bailey Liquor Co. *v.* Austin, 82 Fed. 785.

17. Pettit *v.* People, 24 Colo. 517, 52 Pac. 676; Com. *v.* McCandless, 9 Pa. Cas. 167, 12 Atl. 440; Jordan *v.* State, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110; State *v.* Fisher, 33 Wis. 154.

18. Hubbard *v.* Lancaster, 127 Ala. 157, 28 So. 796; Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Cotton *v.* State, 62 Ark. 585, 37 S. W. 48.

19. Cox *v.* Burnham, 120 Iowa 43, 94 N. W. 265. And see Lynch *v.* Murphy, 119 Mo. 163, 24 S. W. 774; Cranor *v.* Albany, 43 Oreg. 144, 71 Pac 1042.

20. Stickrod *v.* Com., 86 Ky. 285, 5 S. W. 580, 9 Ky. L. Rep. 563. And see Nelson *v.* State, 17 Ind. App. 403, 46 N. E. 941. See *supra*, VI, A, 6, b.

21. See the statutes of the different states. And see the following cases:

Illinois.— Tipton *v.* People, 156 Ill. 241, 40 N. E. 838; Jackson *v.* People, 126 Ill. 139, 18 N. E. 286.

Kentucky.—McNulty *v.* Toof, 116 Ky. 202, 75 S. W. 258, 75 S. W. 430; Stickrod *v.* Com., 86 Ky. 285, 5 S. W. 580, 9 Ky. L. Rep. 563.

Maine.—State *v.* Davis, 23 Me. 403.

Minnesota.—State *v.* Brackett, 41 Minn. 33, 42 N. W. 548; State *v.* Benz, 41 Minn. 30, 42 N. W. 547.

New York.—People *v.* Vosburgh, 76 Hun 562, 28 N. Y. Suppl. 208; People *v.* Quant, 12 How. Pr. 83.

Pennsylvania.—Com. *v.* Watson, 2 Pa. Dist. 526.

South Carolina.—State *v.* Turner, 18 S. C. 103.

Tennessee.—Phillips *v.* State, 2 Yerg. 458.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 133.

Meaning of "wholesale."— A statute permitting the sale of liquor in "wholesale quantities," but without specifying the amount, is not incapable of execution; and where the legislature has fixed the quantity which a manufacturer may sell at one gallon or more, in the same or another statute, that quantity may be deemed to be the intent of the legislature in the use of the word "wholesale." Lloyd *v.* Dollisin, 23 Ohio Cir. Ct. 571.

As to criminal prosecutions see *infra*, IX.

22. See the statutes of the different states. And see Strauss *v.* Galesburg, 203 Ill. 234, 67 N. E. 836; State *v.* Pratt, 52 N. J. L. 306, 19 Atl. 607; Fagan *v.* State, 47 N. J. L. 175; *In re* Charge to Sussex County Grand Jury, 7 N. J. L. J. 17; Sanderlin *v.* State, 2 Humphr. (Tenn.) 315; State *v.* Drake, 86 Tex. 329, 24 S. W. 790; State *v.* Perry, 44 Tex. 100.

23. See the statutes of the different states. And see Donnell *v.* State, 2 Ind. 658; State

made, it has been held that they will be implied by the courts in proper cases.[24] Under another system a special form of license is issued, permitting the licensee to make sales for these purposes only.[25]

3. PURITY AND QUALITY OF LIQUORS.[26] Laws have frequently been enacted against the adulteration of liquor, sold or intended for sale, with any substance that is poisonous in its nature or deleterious to human health.[27] Some statutes make such adulteration of liquor a criminal offense.[28] Others provide that the impure, vitiated, or adulterated condition of any liquors sold shall constitute a full defense to an action for the recovery of their price or value.[29] Others provide for a system of inspection of liquors offered for sale,[30] or require dealers to take an oath that they will not adulterate the liquors which they offer for sale, and to furnish a bond conditioned upon their due observance of this promise,[31] or require all bottles or packages containing liquor to be stamped with a certificate of its purity.[32]

4. SALES TO PROHIBITED PERSONS. It is an important feature of systems for regulating the traffic in intoxicating liquors that dealers should be forbidden to sell such liquors to certain classes of persons especially liable to be injured, morally or physically, by their use, such as minors, habitual drunkards, persons intoxicated at the time, and idiots or insane persons.[33]

5. SALES ON CERTAIN DAYS. Laws regulating the traffic in intoxicating liquors frequently forbid their sale on Sunday or the keeping open of saloons or bars on that day.[34] In many states this regulation is left to the care of the different

v. Swallum, 111 Iowa 37, 82 N. W. 439; Becker *v.* Betten, 39 Iowa 668.

A municipal ordinance which does not contain the exceptions found in the general law of the state (permitting the sale for medical and other such purposes), or which contains some of such exceptions but not all, is to that extent invalid. Hurdland *v.* Hardy, 74 Mo. App. 614; Akerman *v.* Lima, 8 Ohio S. & C. Pl. Dec. 430, 7 Ohio N. P. 92.

24. Hottendorf *v.* State, 89 Ind. 282; Thomasson *v.* State, 15 Ind. 449. *Compare* State *v.* Brown, 31 Me. 520; State *v.* Thornburg, 16 S. C. 482.

25. See the statutes of the different states. And see Com. *v.* Mandeville, 142 Mass. 469, 8 N. E. 327; State *v.* Perkins 26 N. H. 9.

26. See, generally, ADULTERATION.

27. See the statutes of the different states. And see *Ex p.* Kohler, 74 Cal. 38, 15 Pac. 436.

28. See State *v.* Stanton, 37 Conn. 421; State *v.* Bixman, 162 Mo. 1, 62 S. W. 828; Meyer *v.* State, 54 Ohio St. 242, 43 N. E. 164; Vester *v.* State, 2 Ohio S. & C. Pl. Dec. 170, 1 Ohio N. P. 240.

29. See Clohessy *v.* Roedelheim, 99 Pa. St. 56, holding that such a statute applies only in cases where the quality or value of the liquor sold has been impaired by the impurity or adulteration.

30. See Stephens *v.* Henderson, 120 Ga. 218, 47 S. E. 498; People *v.* Lawton, 30 Mich. 386; Smith *v.* Kibbee, 9 Ohio St. 563; Catherwood *v.* Collins, 48 Pa. St. 480.

31. See State *v.* Summers, 142 Mo. 586, 44 S. W. 797; State *v.* Ferguson, 72 Mo. 297; Levi *v.* State, 4 Baxt. (Tenn.) 289; Hall *v.* State, 9 Lea (Tenn.) 574; State *v.* Martin, 3 Heisk. (Tenn.) 487.

Druggists.— In Tennessee it is held that these statutory provisions apply to druggists. Newman *v.* State, 7 Lea (Tenn.) 617. But a different rule obtains in Missouri. State *v.* Hughes, 35 Mo. App. 515.

32. See *Ex p.* Kohler, 74 Cal. 38, 15 Pac. 436; Phœnix Brewing Co. *v.* Rumbarger, 181 Pa. St. 251, 37 Atl. 340, 59 Am. St. Rep. 647.

33. See the statutes of the different states. And see the following cases:

Iowa.— Harlan *v.* Richmond, 108 Iowa 161, 78 N. W. 809.

Ohio.— Bankhardt *v.* Freeborn, 42 Ohio St. 52.

South Carolina.— City Council *v.* Van Roven, 2 McCord 465.

Texas.— Cox *v.* Thompson, 32 Tex. Civ. App. 572, 75 S. W. 819.

Canada.— *In re* Arkell, 38 U. C. Q. B. 594; *In re* Brodie, 38 U. C. Q. B. 580; Matter of Greystock, 12 U. C. Q. B. 458; *In re* Barclay, 12 U. C. Q. B. 86; Ross *v.* York County, etc., 14 U. C. C. P. 171.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 127.

As to criminal prosecutions see *infra*, IX.

34. See the statutes of the different states. And see the following cases:

Indiana.— Morris *v.* State, 47 Ind. 503; Parker *v.* State, 27 Ind. 393; State *v.* Drischel, 26 Ind. 154; Hingle *v.* State, 22 Ind. 462; Wood *v.* State, 21 Ind. 276; State *v.* Thomasson, 19 Ind. 99; Thomasson *v.* State, 15 Ind. 449; Rosenbaum *v.* State, 4 Ind. 599.

Michigan.— Kurtz *v.* People, 33 Mich. 279, holding that a statutory provision that all saloons for the sale of liquor shall be "closed" on Sunday means that sales of liquor shall be entirely stopped on that day, and the traffic shut off effectually, so that

municipalities; and generally a grant of exclusive power to a municipal corporation to regulate the liquor traffic, when executed by the enactment of an ordinance forbidding sales on Sunday, will supersede or suspend the operation of the general law of the state on the same subject.[35] Sales of liquor on Sunday may also be prohibited by the general laws relating to the cessation of business on that day, although not specifically forbidden by the liquor laws.[36] And although the statute may not make it an offense to sell on Sunday, yet if it limits the rights of a licensed dealer, by excepting sales so made from the protection of his license, then a sale on Sunday is punishable as an unlicensed sale.[37] And conversely if the license laws do not prohibit sales on Sunday, such a sale is not punishable as an unlicensed sale, although it may be a criminal offense under another and distinct statute.[38] Sales of intoxicating liquors on holidays[39] and election days[40] are often prohibited by statute.

6. HOURS OF CLOSING. A further regulation commonly found in statutes relating to the traffic in intoxicating liquors is that saloons and bars shall be closed during certain hours, although this matter is frequently left to the control of the municipalities.[41]

drinking and the conveniences for drinking shall be no longer accessible.

New Jersey.— Richards *v.* Bayonne, 61 N. J. L. 496, 39 Atl. 708, holding that an ordinance that "no person licensed to keep a restaurant or beer saloon shall keep open on the Sabbath" means that the proprietors of public houses shall temporarily cease to entertain the public, and is not void for uncertainty.

Pennsylvania.— Sifred *v.* Com., 104 Pa. St. 179; Com. *v.* Gedikoh, 101 Pa. St. 354; Com. *v.* Sassaman, 2 Del. Co. 333.

Tennessee.— State *v.* Barker, 4 Sneed 554.

Exceptions as to druggists and drug stores see Edis *v.* Butler, 11 Ohio S. & C. Pl. 245, 8 Ohio N. P. 183; McNeill *v.* State, 92 Tenn. 719, 23 S. W. 52.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 130.

Exceptions as to keepers of hotels, inns, and eating-houses see District of Columbia *v.* Reuter, 15 App. Cas. (D. C.) 237; *In re* Breslin, 45 Hun (N. Y.) 210; Matter of Cullinan, 41 Misc. (N. Y.) 3, 83 N. Y. Suppl. 581 [*affirmed* in 93 N. Y. App. Div. 427, 87 N. Y. Suppl. 660].

35. *Arkansas.*— McCuen *v.* State, 19 Ark. 636.

Colorado.— Mueller *v.* People, 24 Colo. 251, 48 Pac. 965; Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995; Huffsmith *v.* People, 8 Colo. 175, 5 Pac. 157, 54 Am. Rep. 550; Cunningham *v.* People, 1 Colo. App. 155, 27 Pac. 949.

Florida.— *Ex p.* Peacock, 25 Fla. 478, 6 So. 473.

Missouri.— State *v.* Francis, 95 Mo. 54, 8 S. W. 1; State *v.* Binder, 38 Mo. 450.

Nebraska.— Sanders *v.* State, 34 Nebr. 872, 52 N. W. 721.

Oregon.— Palmer *v.* State, 2 Oreg. 66.

Texas.— Craddock *v.* State, 18 Tex. App. 567.

Virginia.— Thon *v.* Com., 31 Gratt. 887.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 130.

36. See Com. *v.* Naylor, 34 Pa. St. 86.

37. Beardsley *v.* State, 49 Ind. 240. And see Matter of Breslin, 7 N. Y. St. 764.

38. People *v.* Krank, 110 N. Y. 488, 18 N. E. 242.

39. See the statutes of the different states. And see State *v.* Atkinson, 139 Ind. 426, 39 N. E. 51; Com. *v.* Shaw, 152 Mass. 510, 25 N. E. 837; Com. *v.* Francis, 152 Mass. 508, 25 N. E. 836; Moore *v.* Kelley, 136 Mich. 139, 98 N. W. 989; People *v.* Ackerman, 80 Mich. 588, 45 N. W. 367; People *v.* Hobson, 48 Mich. 27, 11 N. W. 771; Reithmiller *v.* People, 44 Mich 280, 6 N. W. 667. *Compare* Ruge *v.* State, 62 Ind. 388.

As to criminal prosecutions see *infra*, IX.

40. See the statutes of the different states. And see the following cases:

Indiana.— State *v.* Hirsch, 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170; Qualter *v.* State, 120 Ind. 92, 22 N. E. 100; State *v.* Kidd, 74 Ind. 554; State *v.* Christman, 67 Ind. 328.

Kentucky.— Com. *v.* Murphy, 95 Ky. 38, 23 S. W. 655, 15 Ky. L. Rep. 411.

Ohio.— Schuck *v.* State, 50 Ohio St. 493, 34 N. E. 663.

Pennsylvania.— Kane *v.* Com., 89 Pa. St. 522, 33 Am. Rep. 787; *In re* Tenth Ward Election, 5 Pa. Dist. 287; Com. *v.* Rogers, 1 Del. Co. 517.

Tennessee.— Wooster *v.* State, 6 Baxt. 533.

Texas.— Jones *v.* State, 32 Tex. Cr. 533, 25 S. W. 124; Janks *v.* State 29 Tex. App. 233, 15 S. W. 815; Lawrence *v.* State, 7 Tex. App. 192; Haines *v.* State, 7 Tex. App. 30.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 129.

As to criminal prosecutions see *infra*, IX.

41. See the statutes of the different states. And see the following cases:

Connecticut.— State *v.* Hellman, 56 Conn. 190, 14 Atl. 806; State *v.* Brady, 41 Conn. 588.

Massachusetts.—Com. *v.* Kelley, 177 Mass. 221, 58 N. E. 691.

7. Character and Arrangement of Premises. The business of a licensed dealer in intoxicating liquors is subject to public regulation and control, in respect to the character and arrangement of the premises where the business is conducted.[42]

8. Orderly Conduct. It is a common requirement that licensed dealers shall keep good order in their houses;[43] and where this is required, and the dealer placed under bonds to fulfil this obligation, he has the right to eject from his premises persons creating a disturbance therein.[44] And where in addition the statute prohibits music and the presence of lewd women in premises used for the sale of liquor, the authorities of a city have no power to authorize balls to be conducted on such premises.[45]

9. Registration of Sales. A statute requiring liquor dealers to keep a record of their sales and to make periodical reports of the same to designated officers within a specified time is mandatory as to the time of making the report.[46] It is not necessary that the report should be in the exact form prescribed by the statute, if it contains all the items and details which the law requires.[47] Such a statute, when applicable to druggists, includes liquors dispensed by them on the prescription of physicians.[48]

10. Screens and Other Obstructions to View. In several of the states statutes provide that during the days and times when licensed saloons are required by law to be kept closed, or, in some states, at all times, all screens, curtains, blinds, or other obstructions which might prevent a clear view of the interior of the premises from the outside shall be removed, or that no such obstructions shall be "placed or maintained."[49] Statutes containing such provisions have been construed as apply-

Nebraska.— *Ex p.* Wolf, 14 Nebr. 24, 14 N. W. 660.

North Carolina.— Paul *v.* Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902.

Tennessee.— Bradford *v.* Jellico, 1 Tenn. Ch. App. 700.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 131.

As to criminal prosecutions see *infra*, IX.

42. See the statutes of the different states. And see State *v.* Donahue, 120 Iowa 154, 94 N. W. 503; Garrett *v.* Bishop, 113 Iowa 23, 84 N. W. 923; State *v.* Bussamus, 108 Iowa 11, 78 N. W. 700; Bartel *v.* Hobson, 107 Iowa 644, 78 N. W. 689; Ritchie *v.* Zalesky, 98 Iowa 589, 67 N. W. 399.

Separate bar in tavern.— A licensed tavern-keeper may have his bar-room in an apartment which is not connected by any doorway with his main building, but separate from it, and may there sell liquor without violating the law, provided this separate room constitutes in good faith a part of the licensed tavern. Gray *v.* Com., 9 Dana (Ky.) 300, 35 Am. Dec. 136.

Stalls, booths, or inclosures.— A municipal ordinance directing that no licensed liquor dealer shall construct any stall, booth, or other inclosure in or in connection with any room or place in any building where liquor is sold, which could be used as a place for lounging or drinking or for any immoral purpose, is valid and proper, and cannot be held unreasonable or oppressive. State *v.* McGregor, 88 Minn. 74, 92 N. W. 509; State *v.* Barge, 82 Minn. 256, 84 N. W. 911.

Chairs and seats prohibited.— A city ordinance, regulating the license and sale of intoxicating liquors, which provides that no chairs or seats shall be placed in a saloon, and fixes a penalty for any violation thereof, is reasonable and valid. Brown *v.* Lutz, 36 Nebr. 527, 54 N. W. 860.

43. See the statutes of the different states.

44. Hampton *v.* State, (Tex. Cr. App. 1901) 65 S. W. 526.

45. Cunningham *v.* Porchet, 23 Tex. Civ. App. 80, 56 S. W. 574.

Lewd women.— A city may by ordinance prohibit females from entering places where intoxicating liquors are sold for immoral purposes. State *v.* Nelson, 10 Ida. 522, 79 Pac. 79, 67 L. R. A. 808.

46. State *v.* McEntee, 68 Iowa 381, 27 N. W. 265 [*distinguishing* Abbott *v.* Sartori, 57 Iowa 656, 11 N. W. 626].

47. Barnard *v.* Houghton, 34 Vt. 264. And see Reg. *v.* Elborne, 19 Ont. App. 439.

48. State *v.* Chamberlin, 74 Iowa 266, 37 N. W. 326.

49. See the statutes of the different states. And see Paul *v.* Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902.

The maintenance of any forbidden obstruction comes within the penalty of the law, notwithstanding the fact that the obstruction existed when the license was granted. Com. *v.* Sawtelle, 150 Mass. 320, 23 N. E. 54.

View from street or alley.— Where the law requires the removal, during prohibited hours, of all screens which may obstruct a view of the bar from the street or alley, it is sufficient to show, in the case of a saloon situated on an alley, that the alley was at the time open to the use of the general public, and a dedication need not be proved. People *v.* Kennedy, 105 Mich. 75, 62 N. W. 1020.

ing to all persons,[50] and places coming within the scope of the purpose for which it was enacted;[51] and it is immaterial what purpose may have influenced the party in putting up the obstructions complained of, if they have in fact the effect of cutting off the view.[52] The law intends that there shall be a clear view of the whole of the room or place used for the selling of liquors, and an obstruction concealing any part of it is within the prohibition of the statute.[53] But it is necessary that the screen or other obstruction should materially interfere with the view of the interior of the premises, or of the business conducted there; and whether it does or not is a question of fact.[54] If the particular statute is not restricted to any days or times, it is violated by the placing or maintaining of a screen or other obstruction on Sunday, as well as on any other day, although the law requires the dealer to close his saloon entirely on that day and cease doing business.[55] Generally the violation of a statute of this character constitutes an indictable offense,[56] and the mere fact that a person indicted under the law holds a license is no defense.[57]

C. Applicability to Druggists and Physicians. Statutes prohibiting or regulating the sale of intoxicating liquors are applicable to druggists and physicians, unless exceptions or special provisions are made in their favor.[58] But the statutes usually allow them to dispense liquors for medicinal use, either by way of exception to the general prohibitions of the law, or under a special form of license or permit,[59] or it may be left to the municipal corporations of the state to

50. Com. *v.* Rourke, 141 Mass. 321, 6 N. E. 383. And see Com. *v.* Kelley, 140 Mass. 441, 5 N. E. 834.

Druggists.—The screen law applies to druggists. Com. *v.* Brothers, 158 Mass. 200, 33 N. E. 386.

Wholesalers.— Wholesale dealers in liquors are subject to the screen law, if they give away liquors by the glass to be drunk on the premises. Ritchie *v.* Zalesky, 98 Iowa 589, 67 N. W. 399.

51. Nelson *v.* State, 17 Ind. App. 403, 46 N. E. 941; People *v.* Carrel, 118 Mich. 79, 76 N. W. 118.

52. Com. *v.* Moore, 145 Mass. 244, 13 N. E. 893.

53. Nelson *v.* State, 17 Ind. App. 403, 46 N. E. 941; Com. *v.* Worcester, 141 Mass. 58, 6 N. E. 700; Componovo *v.* State, (Tex. Civ. App. 1897) 39 S. W. 1114.

Bar in inside room.— If the licensee keeps his bar in a middle room in the building, to which entrance is usually had from the street by a door from the street into the front room and thence by a door into the middle room, screens on the windows of the front room, which interfere with a view of the door into the middle room, are a violation of the law. Com. *v.* Kane, 143 Mass. 92, 8 N. E. 880.

Slat blind on window.— To sustain a conviction it is sufficient to show that a slat blind was placed on the window of a saloon, and that persons on the outside could not see through it except by stooping down. Com. *v.* Costello, 133 Mass. 192.

Partitions as obstructions to view of interior of premises see Com. *v.* Barnes, 140 Mass. 447, 5 N. E. 252; People *v.* White, 127 Mich. 428, 86 N. W. 992; Shultz *v.* Cambridge, 38 Ohio St. 659; State *v.* Andrews, 82 Tex. 73, 18 S. W. 554.

54. Com. *v.* McDonough, 150 Mass. 504, 23 N. E. 112.

Colored glass.— The law is not violated by the presence of opaque or colored glass in such a position that it does not interfere with the view from the outside of the interior of the room where the liquor is sold. Matter of Plass, 71 N. Y. App. Div. 488, 76 N. Y. Suppl. 2.

55. Com. *v.* Casey, 134 Mass. 194; Com. *v.* Auberton, 133 Mass. 404.

56. State *v.* Mathis, 18 Ind. App. 608, 48 N. E. 645; Com. *v.* Costello, 133 Mass. 192.

57. Com. *v.* Salmon, 136 Mass. 431.

58. See the following cases:

Iowa.— State *v.* Harris, 122 Iowa 78, 97 N. W. 1093.

Kentucky.— Lawson *v.* Com., 66 S. W. 1010, 23 Ky. L. Rep. 1983.

Michigan.— People *v.* Remus, 135 Mich. 629, 98 N. W. 397, 100 N. W. 403.

Mississippi.— King *v.* State, 66 Miss. 502, 6 So. 188.

Missouri.— State *v.* Summers, 142 Mo. 586, 44 S. W. 797.

59. See the following cases:

Colorado.— Canfield *v.* Leadville, 7 Colo. App. 453, 43 Pac. 910.

Iowa.— State *v.* Aulman, 76 Iowa 624, 41 N. W. 379; State *v.* Courtney, 73 Iowa 619, 35 N. W. 685; State *v.* Mercer, 58 Iowa 182, 12 N. W. 269.

Maine.— Pollard *v.* Allen, 96 Me. 455, 52 Atl. 924.

Michigan.— People *v.* Longwell, 136 Mich. 302, 99 N. W. 1.

Mississippi.— Henwood *v.* State, 41 Miss. 579.

Missouri.— State *v.* Roller, 77 Mo. 120; State *v.* Brown, 18 Mo. App. 620; State *v.* Johnson, 17 Mo. App. 156.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 135.

Sales made in bad faith.— Where the intention of the statute is that sales shall be

make such exceptions or give such special permission.[60] In either case the privileges of such persons, being exceptions to the general law, are to be strictly construed.[61] Where a druggist is authorized to sell only on the prescription of a physician, a druggist who is himself a duly qualified physician cannot lawfully sell on his own prescription.[62]

D. Public Agents — 1. Appointment and Tenure. An agent appointed in a city or town to purchase intoxicating liquors for the municipality, and having the exclusive right to sell the same for permitted purposes, is not considered a city or town officer. His situation is not an office, but an employment, which ceases if not renewed at the end of the year, and he does not hold over until his successor is chosen.[63] Where the statute imperatively requires the selectmen, councilmen, or other municipal officers to appoint such an agent, they may be compelled to take action in that behalf, and are punishable for their neglect or refusal to do so.[64] They should not appoint one of their own number to act as such agent.[65] Such an agent cannot act at all until he has given the bond and received the certificate provided for by the statute.[66] And to support an action by the town against the agent, it must be shown by legal evidence that the latter was duly appointed as such agent.[67]

2. Powers and Duties. The powers of a town agent are strictly limited by law. If authorized only to sell, he cannot buy on behalf of the town.[68] The agent is held to a strict compliance with the law in respect to keeping a record of his sales and the accounts of his agency.[69] Although in possession of liquor purchased under his agency, he is not the owner of it, both the liquor and the money received from the sale of it belonging to the town.[70] He must keep strictly within the bounds of his authority[71] in regard to the terms of his purchases and sales, not being allowed to buy or sell on credit, unless the statute so permits.[72] And if a town agent violates the law by making sales for forbidden purposes, or to persons to whom he is not allowed to sell, he is liable to indict-

made by druggists only for medicinal, mechanical, or chemical purposes, such sales are illegal if made with the knowledge or belief that the liquor is to be used as a beverage; and the fact that it was furnished on a prescription is not necessarily a defense to the druggist, for he is punishable if he sells in bad faith, knowing or believing that the prescription was false. Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656; Com. *v.* Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449.

Who are druggists.— The word "druggist" as used in a statute regulating sales of alcohol by druggists does not apply to a commission merchant, although he deals principally in alcohol. Mills *v.* Perkins, 120 Mass. 41.

Discretion of druggist.— Under a statute providing that druggists "may" sell intoxicating liquors on proper application, such sale is discretionary with the druggist, and if he refuses to make such a sale he is not required to give a reason for his refusal, nor is he liable in an action for damages for such refusal. Treahey *v.* Holliday, 43 Kan. 29, 22 Pac. 1004.

60. Carthage *v.* Carlton, 99 Ill. App. 338; Jacobs Pharmacy Co. *v.* Atlanta, 89 Fed. 244. *Compare* McNulty *v.* Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. L. Rep. 430, holding that a provision in an ordinance prohibiting druggists from dispensing spirituous liquors between certain hours of the night is invalid, a druggist not being permitted to dispense liquors as a beverage at any time.

61. State *v.* Brown, 60 N. H. 205; State *v.* Shaw, 58 N. H. 72. And see Stormes *v.* Com., (Ky. 1898) 47 S. W. 262; State *v.* Ham, 64 N. J. L. 49, 44 Atl. 845; McBean *v.* Sears, 11 Ohio S. & C. Pl. Dec. 269, 8 Ohio N. P. 189.

62. Tilford *v.* State, 109 Ind. 359, 10 N. E. 107; State *v.* Anderson, 81 Mo. 78; State *v.* Carnahan, 63 Mo. App. 244. *Contra*, Boone *v.* State, 10 Tex. App. 418, 38 Am. Rep. 641.

63. State *v.* Weeks, 67 Me. 60. But see Dover *v.* Twombly, 42 N. H. 59.

64. State *v.* Woodbury, 35 N. H. 230.

65. Richards *v.* Columbia, 55 N. H. 96. *Compare* Rowe *v.* Edmands, 3 Allen (Mass.) 334.

66. Com. *v.* Pillsbury, 12 Gray (Mass.) 127; Atkins *v.* Randolph, 31 Vt. 226.

67. Foxcroft *v.* Crooker, 40 Me. 308.

68. Kidder *v.* Knox, 48 Me. 551.

69. Wenham *v.* Dodge, 98 Mass. 474. And see State *v.* Brattleboro, 68 Vt. 520, 35 Atl. 472.

70. Lemington *v.* Blodgett, 37 Vt. 215. And see Washington *v.* Eames, 6 Allen (Mass.) 417.

71. Backman *v.* Charlestown, 42 N. H. 125. And see Lauten *v.* Allenstown, 58 N. H. 289; Butler *v.* Northumberland, 50 N. H. 33.

72. Chamlee *v.* Davis, 115 Ga. 266, 41 S. E. 691; Mansfield *v.* Stoneham, 15 Gray (Mass.)

ment and punishment, his official character being no protection to him, and notwithstanding that he is also liable to have his agency revoked and to a suit upon his bond.[73]

3. LIABILITY ON BONDS. Public agents for the purchase and sale of liquor are liable on their bonds for any violation of the laws restricting their right to sell or for a failure to account for the goods bought or money received by them in their official capacity.[74]

VIII. PENALTIES.

A. Actions and Defenses — 1. RIGHT AND GROUNDS OF ACTION. To sustain an action at law for the recovery of a penalty for a violation of the liquor laws, it must appear that defendant is amenable to a valid statute or ordinance, in force at the time of the act complained of,[75] and not repealed at the time of suit brought, unless the repealing act saves pending rights of action.[76] A municipal corporation or public officer is not precluded from maintaining such an action by the fact that the unlawful sale was made to a police detective or "spotter" employed and sent to defendant for that purpose, provided the sale was not specially induced by anything he said or did.[77] A criminal prosecution, resulting in the imposition of a fine or penalty, which is paid, will be a bar to a subsequent action at law to recover a penalty for the same illegal act.[78]

2. FORM OF ACTION. Generally a penalty for a violation of the liquor laws is recoverable in a civil action,[79] but under some statutes it may be recovered in a criminal proceeding.[80] Where a remedy is provided by statute a penalty can be enforced only by a strict pursuance of such remedy.[81]

3. JURISDICTION AND VENUE.[82] Such an action must be brought before a court or magistrate having jurisdiction thereof, that is to say jurisdiction not only with respect to the nature of the suit and the amount of the fine or penalty recoverable,[83]

149; Great Falls Bank *v.* Farmington, 41 N. H. 32.

73. State *v.* Putnam, 38 Me. 296; State *v.* Fairfield, 37 Me. 517; State *v.* Keen, 34 Me. 500; State *v.* Fisher, 35 Vt. 584; State *v.* Parks, 29 Vt. 70.

Not liable for refusal to sell.— A town agent is not liable to any person in damages for refusing under any circumstances to sell intoxicating liquor. Dwinnels *v.* Parsons, 98 Mass. 470.

74. Powesheik County *v.* Ross, 9 Iowa 511; Wenham *v.* Dodge, 98 Mass. 474; Dover *v.* Twombly, 42 N. H. 59 (holding that the office of agent for the purchase and sale of spirituous liquors is an annual office, and the official bond covers the official year only, although the agent may, by reappointment or holding over, continue in office longer); Guy *v.* McDaniel, 51 S. C. 436, 29 S. E. 196.

75. Newlan *v.* Aurora, 17 Ill. 379; Harp *v.* Com., 61 S. W. 467, 22 Ky. L. Rep. 1792.

76. Mullinix *v.* People, 76 Ill. 211; Leyner *v.* State, 8 Ind. 490; Wright *v.* Smith, 13 Barb. (N. Y.) 414.

77. Tripp *v.* Flanigan, 10 R. I. 128. And see Onondaga County Excise Com'rs *v.* Backus, 29 How. Pr. (N. Y.) 33. *Contra*, People *v.* Chipman, 31 Colo. 90, 71 Pac. 1108; Walton *v.* Canon City, 14 Colo. App. 352, 59 Pac. 840; People *v.* Braisted, 13 Colo. App. 532, 58 Pac. 796.

78. Jenkins *v.* Danville, 79 Ill. App. 339.

79. *Colorado.*— McIntosh *v.* Pueblo, 9 Colo. App. 460, 48 Pac. 969.

Illinois.—Jacksonville *v.* Block, 36 Ill. 507.

Iowa.— State *v.* Shawbeck, 7 Iowa 322; State *v.* Koehler, 6 Iowa 398.

Kentucky.— Harp *v.* Com., 61 S. W. 467, 22 Ky. L. Rep. 1792.

Maine.— *In re* Ricker, 32 Me. 37.

Maryland.— McCracken *v.* State, 71 Md. 150, 17 Atl. 932.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 197.

Action of debt.— People *v.* Bartow, 27 Mich. 68; Durr *v.* Com., 9 Pa. Cas. 188, 12 Atl. 507. But see Specht *v.* Com., 24 Pa. St. 103.

Attachment.—In Mississippi an action may be commenced by attachment to recover the penalty for the illegal sale of liquor. Adams *v.* Evans, (Miss. 1896) 19 So. 834; Adams *v.* Johnson, 72 Miss. 896, 17 So. 682.

80. *In re* Ricker, 32 Me. 37; People *v.* Hart, 1 Mich. 467; Charleston *v.* King, 4 McCord (S. C.) 487; State *v.* Helfrid, 2 Nott & M. (S. C.) 233, 10 Am. Dec. 591.

Waiver of civil action.— A right to be tried by civil action, instead of by indictment, for selling liquor on Sunday, may be waived. State *v.* Cartee, 48 Mo. 481; State *v.* Hurley, 48 Mo. 481; State *v.* Cronyn, 48 Mo. 480; State *v.* Riedle, 48 Mo. 480; State *v.* Schienaman, 48 Mo. 479; State *v.* Saxauer, 48 Mo. 454; State *v.* Warnke, 48 Mo. 451.

81. Druggist Cases, 85 Tenn. 449, 3 S. W. 490, distress warrant.

82. **Change of venue** see Lyman *v.* Gramercy Club, 28 N. Y. App. Div. 30, 50 N. Y. Suppl. 1004.

83. Jacksonville *v.* Block, 36 Ill. 507; Hamilton *v.* Carthage, 24 Ill. 22.

but also territorial jurisdiction of the place or locality where the alleged offense was committed.[84]

4. PARTIES. Under some statutes an action of this kind is to be brought in the name of the state,[85] under others, by municipal authorities,[86] and under others by public officers specially appointed or specially clothed with authority for that purpose.[87] If such officers refuse or neglect to perform their duty, the suit may be brought in their names by a private individual,[88] and in some states, irrespective of such refusal or neglect, the right to sue is given to any citizen.[89] A parent can maintain an action for the penalty given by a statute for selling liquor to a minor child, although the minor was emancipated, and may maintain it after the child reaches his majority.[90] As to defendants in such an action, it is properly brought against any person who is within the terms of the statute or ordinance under which the penalty is sought.[91] If two or more joined in the commission of the offense, the action may be brought against them jointly or severally.[92]

5. DEFENSES. An action to recover such a penalty may be defended on the ground of the invalidity of the statute or ordinance under which it is brought,[93] but not on the ground of ignorance or mistake of fact,[94] or because defendant holds a license from another jurisdiction,[95] or because the authorities wrongfully refused to grant him a license,[96] or on the ground that the same offense exposes

84. Andrews *v.* Harrington, 19 Barb. (N. Y.) 343. *Compare* Carrier *v.* Bernstein, 104 Iowa 572, 73 N. W. 1076.

85. Rogers *v.* Alexander, 2 Greene (Iowa) 443; Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. 398.

86. King *v.* Jacksonville, 3 Ill. 305; Gloversville *v.* Howell, 70 N. Y. 287; Charleston *v.* King, 4 McCord (S. C.) 487.

The mayor and aldermen of cities being required by statute to institute proceedings, on being informed of the commission of an offense and being furnished with proof, it is held that their being furnished with proof is not a preliminary necessary to be shown in evidence as the basis of the authority of the prosecutor to bring the suit. Portland *v.* Rolfe, 37 Me. 400.

Where a bond is erroneously executed to a village in its corporate name, instead of to the state, the county attorney is not authorized, of his own motion, and without the consent of the village, to prosecute the same in its corporate name. St. James *v.* Hingtgen, 47 Minn. 521, 50 N. W. 700.

87. Overseers of the poor see Manchester *v.* Herrington, 10 N. Y. 164; Horton *v.* Parsons, 37 Hun (N. Y.) 42; Kingston Almshouse Com'rs *v.* Osterhoudt, 23 Hun (N. Y.) 66.

Commissioners of excise see Delaware County Excise Com'rs *v.* Sackrider, 35 N. Y. 154; People *v.* Groat, 22 Hun (N. Y.) 164; Cattaraugus County Excise Com'rs *v.* Willey, 2 Lans. (N. Y.) 427; Hess *v.* Appell, 62 How. Pr. (N. Y.) 313; Hait *v.* Benson, 18 How. Pr. (N. Y.) 302; Saratoga County Excise Com'rs *v* Doherty, 16 How. Pr. (N. Y.) 46.

88. Sutter *v.* Fauble, 25 Hun (N. Y.) 195; Pomroy *v.* Sperry, 16 How. Pr. (N. Y.) 211; Thayer *v.* Lewis, 4 Den. (N. Y.) 269.

Discontinuance by officer's consent.— When an action is thus brought, the public officers who should have instituted it, and in whose names it is brought by a private citizen, cannot consent to its discontinuance, without the consent of the person by whom it was commenced. Record *v.* Messenger, 8 Hun (N. Y.) 283; Wright *v.* Smith, 13 Barb. (N. Y.) 414.

89. Church *v.* Higham, 44 Iowa 482; Com. *v.* Gay, 153 Mass. 211, 26 N. E. 571, 852; Benalleck *v.* People, 31 Mich. 200. *Compare* Oechslein *v.* Passaic, 2 N. J. L. J. 85.

90. Hamer *v.* Eldridge, 171 Mass. 250, 50 N. E. 611.

91. See Stewart *v.* Waterloo Turn Verein, 71 Iowa 226, 32 N. W. 275, 60 Am. Rep. 786 (clubs); Day *v.* Frank, 127 Mass. 497 (surety on liquor dealer's bond); Anderson *v.* Van Buren Cir. Judge, 130 Mich. 697, 90 N. W. 692 (druggists); Bachman *v.* Brown, 57 Mo. App. 68 (holding that under a statute imposing a penalty on "every dramshop keeper or any other person" who shall sell or give liquor to a minor, it is held that the words "any other person" mean any one representing a dramshop keeper, or temporarily in charge of his business when the offense is committed).

92. Jacksonville *v.* Holland, 19 Ill. 271; Tracy *v.* Perry, 5 N. H. 504; Brown *v.* Hoit, Smith (N. H.) 53; Hall *v.* McKechnie, 22 Barb. (N. Y.) 244; Ingersoll *v.* Skinner, 1 Den. (N. Y.) 540.

93. McNulty *v.* Toof, 116 Ky. 202, 75 S. W. 258, 25 Ky. L. Rep. 430.

94. State *v.* Chamberlin, 74 Iowa 266, 37 N. W. 326; Stein *v.* Adams, (Miss. 1898) 23 So. 269. *Compare* Gilbert *v.* Hendricks, 2 Brev. (S. C.) 161.

95. Sweet *v.* Wabash, 41 Ind. 7. And see *supra*, VI, C, 2, b.

96. Deitz *v.* Central, 1 Colo. 323; Charleston *v.* Hollenback, 3 Strobh. (S. C.) 355. See *supra*, VI, C, 3.

him to indictment or to another and different ground of action,[97] or that he acted in the transaction only as the servant of another, or that the unlawful sale was made by his barkeeper.[98] In an action to recover a penalty for selling liquor to minors, an answer alleging that the action was not brought in good faith, but for the purpose of blackmail, is demurrable.[99]

6. PROCESS AND APPEARANCE. An action to recover a penalty under the liquor laws, being generally civil in its nature, may be commenced by summons or complaint in the ordinary form.[1] The process should be indorsed with the title of the statute or a sufficient description of it.[2]

7. PLEADING. The declaration or complaint should show the authority of plaintiff to sue,[3] and that the statute or ordinance under which it is brought is in force,[4] and should designate with certainty the particular law under which a recovery is claimed.[5] Its allegations should be certain and specific,[6] particularly with reference to the time and place of the alleged offense,[7] the kind and quantity of liquor sold, if an unlawful sale is the gist of the offense,[8] and the name of the person to whom the sale was made, if it is known to plaintiff.[9] But it need not negative exceptions,[10] or allege knowledge or intent on the part of defendant where that is not an essential element of the offense.[11] It has been held that in debt to recover a penalty for selling liquor without a license, an allegation that the offense was committed "against the law in that behalf made and provided" is sufficient, the usual and better form, "against the form of the statute," not being essential.[12]

8. EVIDENCE. In an action of this kind it is not necessary to prove the defendant's guilt beyond a reasonable doubt,[13] nor is direct evidence required in all instances, circumstantial evidence being generally admissible,[14] and its weight and sufficiency being tested by the ordinary rules.[15] There should, however, be positive evidence to bring the case within the prohibition of the statute in respect to the time and place of sale and the purchaser.[16] And the intoxicating quality of the liquor sold must be proved if that fact is controverted.[17] If the ordinance

97. Whalin *v.* Macomb, 76 Ill. 49; Blatchley *v.* Moser, 15 Wend. (N. Y.) 215. And see State *v.* Scampini, 77 Vt. 92, 59 Atl. 201.

98. Roberts *v.* O'Conner, 33 Me. 496; Draper *v.* Fitzgerald, 30 Mo. App. 518.

99. Headington *v.* Smith, 113 Iowa 107, 84 N. W. 982.

1. Mitchell *v.* State, 12 Nebr. 538, 11 N. W. 848. And see People *v.* Bennett, 5 Abb. Pr. (N. Y.) 384.

2. Oliver *v.* Larzaleer, 5 N. J. L. 513; Ripley *v.* McCann, 34 Hun (N. Y.) 112; Perry *v.* Tynen, 22 Barb. (N. Y.) 137; Avery *v.* Slack, 17 Wend. (N. Y.) 85.

3. State *v.* Taylor, 68 Miss. 730, 9 So. 894.

4. Eastham *v.* Com., 49 S. W. 795, 20 Ky. L. Rep. 1639.

5. See Smith *v.* Adrian, 1 Mich. 495; Charleston *v.* Chur, 2 Bailey (S. C.) 164.

As to the necessity of designating the particular section of the statute alleged to have been violated and under which a recovery is sought see Benalleck *v.* People, 31 Mich. 200; Kee *v.* McSweeney, 15 Abb. N. Cas. (N. Y.) 229.

6. Benalleck *v.* People, 31 Mich. 200; Washington *v.* Greenwood, (Miss. 1898) 23 So. 258.

7. New Gloucester *v.* Bridgham, 28 Me. 60.

8. See New Gloucester *v.* Bridgham, 28 Me. 60; Murphy *v.* Montclair Tp., 39 N. J. L. 673; Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. 398.

9. See Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138; Kee *v.* McSweeney, 15 Abb. N. Cas. (N. Y.) 229. But *compare* State *v.* Muse, 20 N. C. 463.

10. Cullinan *v.* Criterion Club, 39 Misc. (N. Y.) 270, 79 N. Y. Suppl. 482. And see McNeil *v.* Collinson, 128 Mass. 313; Com. *v.* Murphy, 2 Gray (Mass.) 510.

11. Jamison *v.* Burton, 43 Iowa 282. And see Roberge *v.* Burnham, 124 Mass. 277. *Compare* Perry *v.* Edwards, 44 N. Y. 223.

12. Brown *v.* Hoit, Smith (N. H.) 53.

13. Roberge *v.* Burnham, 124 Mass. 277; Cox *v.* Thompson, (Tex. Civ. App. 1905) 85 S. W. 34, holding that plaintiff is required to establish his case only by a preponderance of the evidence.

14. Vallance *v.* Everts, 3 Barb. (N. Y.) 553.

15. See State *v.* O'Conner, 4 Ind. 299; Clark *v.* Adams, 80 Miss. 219, 31 So. 746; Auburn Excise Com'rs *v.* Merchant, 103 N. Y. 143, 8 N. E. 484; Horton *v.* Parsons, 40 Hun (N. Y.) 224; Hall *v.* McKechnie, 22 Barb. (N. Y.) 244; Herley *v.* Kettle, (Tex. Civ. App. 1901) 65 S. W. 48. And see EVIDENCE, 17 Cyc. 817 *et seq.*

16. See Princeville *v.* Hitchcock, 101 Ill. App. 588; Rowland *v.* Greencastle, 157 Ind. 591, 62 N. E. 474.

17. Laugel *v.* Bushnell, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266 [*affirming* 96 Ill. App. 618]; Stein *v.* Adams, (Miss. 1898) 23 So. 269; Killip *v.* McKay, 13 N. Y. St. 5.

prohibits the sale of liquor entirely, except for specified purposes, defendant has the burden of proving that the sale in question was for such a purpose.[18] And if the charge is selling without a license, the burden is on him to prove that he has a license, if such be the fact.[19] In an action to recover a penalty for selling liquor without a license, evidence is admissible of sales prior to the earliest day named in the complaint.[20] Where two persons are engaged as partners in selling liquor without a license, a sale by one is the act of both, and may be given in evidence against the partner who did not make the sale in an action against him alone for the penalty.[21]

9. Trial. Instructions by the court in an action of this character are governed by the ordinary rules.[22] It is not improper to direct a verdict for plaintiff, if the evidence justifies and requires it,[23] and it has been held that a verdict of "guilty" is substantially responsive to the issue.[24]

10. Amount Recoverable. Where the unlawful act alleged is a breach of some specific provision of the liquor laws, such as selling without a license, plaintiff can recover only one penalty, although he may prove several distinct transactions within the prohibition of the law.[25]

11. Judgment. In a civil action for a penalty under the liquor laws, the judgment against defendant can be only for a sum of money; it cannot include a sentence of imprisonment, or other coercive measures against his person.[26] A judgment imposing the penalty prescribed for a second offense, when the complaint does not allege it to be a second offense, is erroneous.[27]

12. Costs. It is sometimes required by statute that a person prosecuting for penalties in the name of a municipal officer shall give a covenant to both the officer and the municipality to pay all costs and indemnify them.[28] But security for costs is not always required in actions brought to recover penalties.[29] In an action by a city to recover the penalty for violating an ordinance as to sales of intoxicating liquors, a sum as attorney's fees cannot be incorporated in the judgment as costs, unless the law makes provision for such costs.[30]

13. Appeal and Review. In actions of this kind, unless special provision is made by statute, the ordinary rules will be applicable, in respect to the right of appeal and proceedings to secure an appeal;[31] and in respect to the action which the reviewing court may take on questions concerning the sufficiency of the process and pleadings,[32] and the admissibility and weight of the evidence presented at the trial.[33]

B. Disposition of Penalties Recovered. Penalties recovered in such

18. Gunnarssohn *v.* Sterling, 92 Ill. 569; Flora *v.* Lee, 5 Ill. App. 629.

19. Deitz *v.* Central, 1 Colo. 323; Smith *v.* Adrian, 1 Mich. 495; Smith *v.* Joyce, 12 Barb. (N. Y.) 21; Potter *v.* Deyo, 19 Wend. (N. Y.) 361. *Compare* Buffalo *v.* Smith, 8 Misc. (N. Y.) 348, 28 N. Y. Suppl. 690.

20. Deitz *v.* Central, 1 Colo. 323.

21. Smith *v.* Adrian, 1 Mich. 495.

22. See Cobliegh *v.* McBride, 45 Iowa 110; Cullinan *v.* Trolley Club, 65 N. Y. App. Div. 202, 72 N. Y. Suppl. 629. And see Trial.

23. Fielding *v.* La Grange, 104 Iowa 530, 73 N. W. 1038.

24. Deitz *v.* Central, 1 Colo. 323. But see Charleston *v.* Weikman, 2 Speers (S. C.) 371.

25. Washburn *v.* McInroy, 7 Johns. (N. Y.) 134. *Compare* Deyo *v.* Rood, 3 Hill (N. Y.) 527; Jones *v.* State, (Tex. Civ. App. 1904) 81 S. W. 1010.

Exposing for sale and selling on Sunday.— Under a city ordinance prohibiting the exposing for sale and selling of liquor on Sunday, a party is not liable to two penalties for the same act — one for exposing for sale, and the other for selling. Brooklyn *v.* Toynbee, 31 Barb. (N. Y.) 282.

26. *In re* Sorenson, 29 Mich. 475. And see *In re* Hanson, 36 Me. 425.

Execution against the person see Chemung County Excise Com'rs *v.* Harvey, 39 How. Pr. (N. Y.) 191.

27. Garvey *v.* Com., 8 Gray (Mass.) 382; Norton *v.* State, 65 Miss. 297, 3 So. 665.

28. Thayer *v.* Lewis, 4 Den. (N. Y.) 269.

29. Albrecht *v.* State, 62 Miss. 516; Edwards *v.* Brown, 67 Mo. 377.

30. Gipps Brewing Co. *v.* Virginia, 32 Ill. App. 518.

31. See Roberts *v.* O'Conner, 33 Me. 496; Levant *v.* Varney, 32 Me. 180.

32. Deitz *v.* Central, 1 Colo. 323; Delany *v.* Washington, 7 Fed. Cas. No. 3,755, 2 Cranch C. C. 459.

33. Anna *v.* Leird, 36 Ill. App. 49; Clark *v.* Adams, 80 Miss. 219, 31 So. 746; Jackson *v.* Sandman, 18 N. Y. Suppl. 894; Cox *v.*

actions accrue, according to the direction of the statute, to the use of the state, the municipality, or public institutions,[34] reserving in some states a share, usually one half, for the informer or prosecuting witness.[35] This share cannot be remitted, after judgment, by a pardon from the executive.[36]

IX. CRIMINAL PROSECUTIONS.

A. Criminal Offenses — 1. In General — a. Nature and Elements of Offense. Offenses against the liquor laws, such as illegal sales of intoxicants, keeping liquor in possession with intent to dispose of it unlawfully, illegally transporting liquor from place to place, and the like, are statutory crimes, not being indictable or punishable at common law.[37] It is therefore a general rule that if a sale of intoxicating liquor, or any other act in relation to it, is made the basis of a prosecution, the act complained of must be shown to be within the terms of some valid and operative statute.[38] And if the law simply prohibits the act under penalty of a fine, to be collected by suit, it does not create an indictable offense.[39] But as the statutory offense is committed by the doing of the prohibited act, a guilty or criminal intent is not a necessary part of the offense,[40] and defendant cannot

Thompson, (Tex. Civ. App. 1905) 85 S. W. 34.

34. See State *v.* Noel, 73 Iowa 682, 35 N. W. 922; Frame *v.* State, 53 Ohio St. 311, 45 N. E. 5; Com. *v.* McGuirk, 78 Pa. St. 298.

Where the proceeding is by indictment, in which no person is named as private prosecutor, the whole penalty goes to the county. State *v.* Smith, 64 Me. 423.

35. Pierce *v.* Hillsborough County, 57 N. H. 324; Jefferson County *v.* Reitz, 56 Pa. St. 44. *Compare* State *v.* Lesterjette, 3 Hill (S. C.) 287.

Several persons may lawfully combine to give information of a violation of the liquor law, and to obtain the statutory penalty therefor, and such penalty will be divided among them by the final decree according to their agreement. Webster *v.* Hall, 60 N. H. 7.

Compromise.— It is not necessary for the informer to claim his half of the penalty until there is a recovery, and then he may do so by motion to have it paid to him; and an informer who sues for the penalty is entitled to one-half the amount paid by defendant to compromise the case. Hull *v.* Welsh, 82 Iowa 117, 47 N. W. 982.

Wrongful award to prosecutor.— Although the penalty for a second offense may belong wholly to the state, it is no ground of complaint on the part of the offender that the court awarded half of it to the prosecutor. *In re* Ricker, 32 Me. 37.

36. State *v.* Williams, 1 Nott & M. (S. C.) 26. And see U. S. *v.* Harris, 26 Fed. Cas. No. 15,312, 1 Abb. 110.

37. State *v.* Johnson, 61 Iowa 504, 16 N. W. 534; Com. *v.* Wheeler, 79 Ky. 284; Com. *v.* Simrall, 3 Ky. L. Rep. 395; State *v.* Hafsoos, 1 S. D. 382, 47 N. W. 400; State *v.* Gilliland, 51 W. Va. 278, 41 S. E. 131, 90 Am. St. Rep. 793, 57 L. R. A. 426.

Statutes strictly construed.— For this reason the offense must be brought plainly within the terms of the statute. Thus, if the law requires each "dealer" in liquors to pay a tax to the state, the act of making a single sale of an entire stock of liquors, without paying the tax, is not a violation of the law, for a "dealer" is one who makes successive sales as a business. Overall *v.* Bezeau, 37 Mich. 506.

Grade of offenses.— The offense of selling intoxicating liquor in contravention of a state statute, although punishable by imprisonment, is not an "infamous crime," in such sense that it must be prosecuted by presentment or indictment, within a constitutional provision in that behalf. State *v.* Nolan, 15 R. I. 529, 10 Atl. 481. And see U. S. *v.* Maxwell, 26 Fed. Cas. No. 15,750, 3 Dill. 275. And the various offenses under the liquor laws are not as a rule of the grade of felonies, being regarded and punished simply as misdemeanors. McGehee *v.* State, 114 Ga. 833, 40 S. E. 1004; People *v.* Charbineau, 115 N. Y. 433, 22 N. E. 271; Hill *v.* People, 20 N. Y. 363; People *v.* Brown, 16 Wend. (N. Y.) 561; State *v.* Comings, 28 Vt. 508.

38. Cheezem *v.* State, 2 Ind. 149; State *v.* Johnson, 61 Iowa 504, 16 N. W. 534; Com. *v.* Dixon, 1 Wilcox (Pa.) 211; Prather *v.* State, 12 Tex. App. 401.

Retroactive statute.— While statutes prohibiting sales of liquor under particular circumstances, or for particular purposes, cannot constitutionally apply to transactions completed before their passage, and which were innocent at the time, there is no reason why they should not prevent the future sale of property already in existence when they were enacted. Stickrod *v.* Com., 86 Ky. 285, 5 S. W. 580, 9 Ky. L. Rep. 563.

39. Sturgeon *v.* State, 1 Blackf. (Ind.) 39; People *v.* Osmer, 24 How. Pr. (N. Y.) 451. *Compare* State *v.* Emery, 98 N. C. 768, 3 S. E. 810.

40. Bradley *v.* State, 121 Ga. 201, 48 S. E. 981; Daxanbeklar *v.* People, 93 Ill. App. 553; Backhaus *v.* People, 87 Ill. App. 173; Com. *v.* Holstine, 132 Pa. St. 357, 19 Atl. 273; Cantwell *v.* State, (Tex. Cr. App. 1905) 85 S. W. 18; Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395.

excuse himself by showing that he acted through oversight, forgetfulness, or mistake ;[41] and conversely if his acts do not amount to a violation of the statute, they will not be rendered unlawful by the motive or purpose which actuated him.[42]

b. Applicability of Laws and Ordinances. It being necessary to bring the prosecution within the terms of some existing and operative statute or ordinance,[43] it should be noted that the operation of a law may be suspended or repealed, so far as to prevent prosecutions under it, by the enactment of a later statute, especially if the new law is more comprehensive in its terms, or prescribes different or more severe penalties.[44] Moreover if the law or ordinance under which the prosecution is instituted is of recent adoption, or has been repealed and reënacted, or suspended and then revived, it must be made clearly to appear that the alleged offense was committed at a time when it was in force.[45] Again, an act which would be punishable under the general law of the state may be within the terms of a municipal ordinance also, and then the question under which law the prosecution must be brought depends upon whether or not the municipality had exclusive power to regulate the traffic and prescribe penalties for illegal acts.[46] And two or more offenses may be created and defined by the same statute, consisting of different acts, although grouped together in general language, and especially where the terms employed are in the disjunctive.[47] Further the terms of two statutes may be mutually exclusive. Thus one cannot be convicted of the offense of selling liquor without a license in a county where the sale of liquor is entirely prohibited under the local option law, adopted and in force in that county.[48]

2. Liquors Prohibited. The liquors against which the various prohibitive or restrictive statutes are aimed are such as are capable of producing intoxication when used as a beverage, and which are commonly used for that purpose.[49] They may be described in the statutes by the use of such general terms as "intoxicating" or "spirituous" liquors, or more specifically as "vinous," "fermented," "malt," "brewed," or "distilled" liquors, or even by their individual names.[50] In the latter case no issue can be raised as to the intoxicating properties of the particular liquor; the only question is whether it comes within the terms of the statute.[51] Also it is competent for the legislature to define the term "intoxicating liquor" by directing that all liquors shall be included within that term which contain more than a certain proportion of alcohol.[52]

41. State *v.* Swallum, 112 Iowa 37, 82 N. W. 439.

42. Dobson *v.* State, 57 Ind. 69.

43. Acree *v.* Com., 13 Bush (Ky.) 353; Com. *v.* Logan, 12 Gray (Mass.) 136; Marxhausen *v.* Com., 29 Gratt. (Va.) 853. And see *supra*, IX, A, 1, a.

44. See Bailey *v.* Com., 64 S. W. 995, 23 Ky. L. Rep. 1223; State *v.* Callahan, 109 La. 946, 33 So. 931; State *v.* McCoy, 86 Minn. 149, 90 N. W. 305; Davey *v.* Galveston County, 45 Tex. 291; Countz *v.* State, 41 Tex. 50; May *v.* State, 35 Tex. 650; Fleeks *v.* State, (Tex. Cr. App. 1904) 83 S. W. 381.

45. See Bennett *v.* People, 16 Ill. 160; Newlan *v.* Aurora, 14 Ill. 364; Zinner *v.* Com., (Pa. 1888) 14 Atl. 431; Com. *v.* Toogood, 4 Pa. Co. Ct. 282; Johnson *v.* State, 3 Lea (Tenn.) 469, 31 Am. Rep. 648; State *v.* Fleming, 7 Humphr. (Tenn.) 152, 46 Am. Dec. 73; Dyer *v.* State, Meigs (Tenn.) 237.

46. See Ambrose *v.* State, 6 Ind. 351; State *v.* Langdon, 31 Minn. 316, 17 N. W. 859; State *v.* Zeigler, 46 N. J. L. 307.

47. See Streeter *v.* People, 69 Ill. 595; State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Schilling *v.* State, 116 Ind. 200, 18 N. E. 682; Com. *v.* Bralley, 3 Gray (Mass.) 456.

48. Batty *v.* State, 114 Ga. 79, 39 S. E. 918; Collins *v.* State, 114 Ga. 70, 39 S. E. 916; Tinsley *v.* State, (Ga. 1900) 35 S. E. 303.

49. See the statutes of the different states. And see People *v.* Cox, 45 Misc. (N. Y.) 311, 92 N. Y. Suppl. 125; Com. *v.* Wenzel, 24 Pa. Super. Ct. 467; *Ex p.* Gray, (Tex. Cr. App. 1904) 83 S. W. 828; State *v.* Good, 56 W. Va. 215, 49 S. E. 121.

In Alabama the provisions of the statute prohibiting the sale of liquor to minors extend to any fermented liquor commonly used as a beverage; it is not necessary that the liquor should be intoxicating. Merkle *v.* State, 37 Ala. 139.

50. As to the meaning of these and other similar terms see *supra*, I.

51. Com. *v.* Reyburg, 122 Pa. St. 299, 16 Atl. 351, 2 L. R. A. 415.

52. State *v.* Gravelin, 16 R. I. 407, 16 Atl. 914; State *v.* Hughes, 16 R. I. 403, 16 Atl.

3. SPECIFIC OFFENSES AGAINST LIQUOR LAWS — a. Manufacture of Liquors. If the manufacture or brewing of liquors has not been prohibited by law, it is a lawful pursuit, and sales of the product in packages or casks, according to the custom of brewers and distillers, are lawful, the authority to make implying the authority to sell.[53] But in most states the manufacture of liquors is not permitted except by persons who have obtained a license and who comply with certain conditions.[54]

b. Illegal Transportation.[55] Statutes prohibiting the transportation of liquors from place to place within a state[56] apply to the conveyance of liquors from one place to another in the same city or town, as their carriage from wholesale to retail dealers.[57] These statutes are primarily directed against express companies and other common carriers, but may include all persons doing the prohibited acts.[58]

c. Illegal Possession. In some of the states the statutes are so framed as to make it a punishable offense to keep or have in one's possession intoxicating liquors at certain times or places, or without complying with certain conditions, although he may intend them for his own use, or although his purpose in regard to them is not otherwise unlawful.[59]

d. Unlawful Keeping For Sale. The statutory offense of keeping liquors with

911; State *v.* Guinness, 16 R. I. 401, 16 Atl. 910.

53. Scanlan *v.* Childs, 33 Wis. 663.

54. See the statutes of the different states. And see Com. *v.* Certain Intoxicating Liquors, 115 Mass. 153; State *v.* Ross, 58 S. C. 444, 36 S. E. 659; State *v.* Lovell, 47 Vt. 493.

What constitutes manufacture.—Liquor obtained by running beer made of corn through the process of distillation once is made in violation of a statute prohibiting the distillation of spirituous liquors from corn. State *v.* Summey, 60 N. C. 496.

Manufacturing and selling are distinct acts, and where a brewery is outside the limits of a city, the brewer is not guilty of carrying on the business of "manufacturing" malt liquor within the city, merely because his beer is sold in the city. Consumers' Brewing Co. *v.* Norfolk, 101 Va. 171, 43 S. E. 336.

55. As to the introduction of liquor into the Indian country see INDIANS.

56. See the statutes of the different states. And see Com. *v.* Beck, 187 Mass. 15, 72 N. E. 357.

57. State *v.* Campbell, 76 Iowa 122, 40 N. W. 100; Com. *v.* Waters, 11 Gray (Mass.) 81.

58. State *v.* Reilly, 108 Iowa 735, 78 N. W. 680.

A station agent who, on delivery of a package of intoxicating liquor on the platform, carries it into the freight house, conveys it "from one place to another within the state" within the meaning of the statute. State *v.* Rhodes, 90 Iowa 496, 58 N. W. 887, 24 L. R. A. 245.

The driver of a team belonging to one who undertakes with his own wagons to deliver liquors to purchasers is punishable under a statute which forbids the transportation of liquors by "any common carrier, or any person in the employ of any common carrier, or any other person." State *v.* Campbell, 76 Iowa 122, 40 N. W. 100.

No obligation to transport.— Common carriers and express agents, when criminally prosecuted for the transportation and delivery of liquor, under these statutes, cannot allege in defense that they acted merely as agents or carriers and were compelled to do what they did; for the law neither requires nor permits common carriers to do illegal acts, and they are not bound to transport any particular commodities, if thereby they incur a penalty. State *v.* Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706. In the absence of such a statute it is the duty of a common carrier to receive and transport liquors. Southern Express Co. *v.* State, 107 Ga. 670, 33 S. E. 637, 73 Am. St. Rep. 146, 46 L. R. A. 417.

Record of consignments.— A statute requiring expressmen to keep a book open for the inspection of officers, and to enter plainly therein the date of reception of each package of liquor received for transportation into a no-license town, and also a correct transcript of the marks, as well as the date of delivery, is violated where an expressman brings liquors into a no-license city or town, and transports them to the place of delivery, without first making in his book the entries showing the consignor and consignee. Com. *v.* Shea, 185 Mass. 89, 69 N. E. 1066.

59. See the statutes of the different states. And see State *v.* Clark, 28 N. H. 176, 61 Am. Dec. 611.

Carrying liquor to church, within the meaning of a statute forbidding it, is committed when a person attending religious exercises at a given church has in his buggy a bottle containing whisky, and the buggy is left standing within one or two hundred yards of the church building during the exercises; and it is no defense that he took the liquor with him to be used by his wife in case of a sudden attack of illness. Bice *v.* State, 109 Ga. 117, 34 S. E. 202.

The South Carolina dispensary law forbids the "manufacture, sale, barter, or exchange,

intent to sell the same[60] unlawfully is an entirely distinct crime from the illegal sale or offer for sale of such liquors, and the liability of the offender to prosecution for the one offense, or the fact that he has already been convicted for it, will not prevent his prosecution and punishment for the other,[61] and to complete the offense of unlawful keeping it is not necessary to show a sale or attempt to sell, or that the liquors were exposed or offered for sale.[62] And although defendant is licensed or otherwise authorized to sell the liquors, under certain conditions, yet his actual intention to dispose of them unlawfully or in violation of those conditions will expose him to prosecution under the statute.[63] It is not necessary that he should own the liquor in question; for he may keep it for unlawful sale, although it is the property of a third person;[64] and he is equally guilty, although he does not intend that the unlawful sales shall be made by himself, but by his clerk or servant or some other person.[65] The place of unlawful keeping must of course be within the jurisdiction, but the place of intended sale is not generally material, except on the question whether it was within or without the state.[66] Where the statute specifies the different liquors which it shall be unlawful thus to keep, separate offenses may be committed by the concurrent keeping of several kinds of the designated liquors.[67] But in any case the unlawful purpose or intention is of the essence of the offense and must be clearly made out.[68]

receipt or acceptance for unlawful use, delivery, storing, or keeping in possession" of intoxicating liquors, except as authorized by the act. The words "for unlawful use" here refer only to the receipt or acceptance of such liquors, and the storing or keeping in possession of liquor which is not stamped as required by the law is illegal, irrespective of the use for which it is intended. State *v.* Chastian, 49 S. C. 171, 27 S. E. 2. The terms "storing" and "keeping in possession" involve the idea of continuity or habit; but it is not essential that the liquor should be kept in possession for an unlawful use. Easley *v.* Pegg, 63 S. C. 98, 41 S. E. 18. Where one purchases intoxicating liquor for his own use from persons outside the state and carries it into the state, and does not comply with the regulations of the dispensary law after its arrival in the state, such liquor is "contraband" within the meaning of that statute. State *v.* Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567. But the law does not apply to a social club, some of whose members individually keep at the club house liquors for their own personal use. Donald *v.* Scott, 76 Fed. 554.

60. See the statutes of the different states. And see Paulk *v.* Sycamore, 104 Ga. 728, 31 S. E. 200; State *v.* Riley, 86 Me. 144, 29 Atl. 920.

61. Griffin *v.* Atlanta, 78 Ga. 679, 4 S. E. 154; Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559; State *v.* Harris, 64 Iowa 287, 20 N. W. 439; State *v.* Head, 3 R. I. 135.

62. Com. *v.* Meskill, 165 Mass. 142, 42 N. E. 562; Com. *v.* Welch, 140 Mass. 372, 5 N. E. 166; Com. *v.* Henderson, 140 Mass. 303, 5 N. E. 832; Com. *v.* Fraher, 126 Mass. 56; Com. *v.* McCue, 121 Mass. 358; State *v.* McGlynn, 34 N. H. 422. See, however, Houtsch *v.* Jersey City, 29 N. J. L. 316, holding that under an ordinance providing that no licensed tavern-keeper shall expose intoxicating liquors for sale on Sunday, merely having them exposed at the bar, without some affirmative act offering to make a sale of them, is not an offense.

63. Rooney *v.* Augusta, 117 Ga. 709, 45 S. E. 72; State *v.* Connelly, 63 Me. 212.

64. State *v.* Stevens, 119 Iowa 675, 94 N. W. 241; State *v.* Gruner, 25 R. I. 129, 54 Atl. 1058.

65. State *v.* Norton, 67 Iowa 641, 25 N. W. 842; State *v.* Kaler, 56 Me. 88.

66. State *v.* Viers, 82 Iowa 397, 48 N. W. 732 (holding that the intent need not be to sell the liquor in or from the same building in which it is kept); Com. *v.* Ryan, 160 Mass. 172, 35 N. E. 673 (holding that the offense is committed by a person who has intoxicating liquor in his pocket, intending to sell it in violation of law); Com. *v.* McConnell, 11 Gray (Mass.) 204 (holding that it is a violation of the statute to have liquor in a wagon attached to a horse, under circumstances tending to show that the possessor is carrying and peddling it from house to house).

Keeping for boarders.—Liquor in the possession of the keeper of a boarding-house in "kept for sale," where he keeps it to be dispensed under an agreement that boarders who pay the regular price shall be entitled to have it to drink with their meals when called for. State *v.* Wenzel, 72 N. H. 396, 56 Atl. 918.

Keeping for export.—If the statute prohibits the keeping of liquor with intent to sell the same contrary to law, not specifying that the sale must be intended to be made within the state, the offense is committed by keeping the liquors within the state, although the intention is to sell and export them to another state. State *v.* Guinness, 16 R. I. 401, 16 Atl. 910.

67. Hans *v.* State, 50 Nebr. 150, 69 N. W. 838.

68. Com. *v.* Ramsdell, 130 Mass. 68. *Compare* State *v.* Cloyd, 34 Nebr. 600, 52 N. W. 579.

e. Carrying on Business of Liquor Selling. To constitute the offense of engaging in or carrying on the business of liquor selling without a license, or without the payment of the tax, there must be both an intention to traffic in liquors as a business and also one or more actual transactions in pursuance of that intention; neither of these elements is sufficient without the presence of the other.[69] And an occasional sale of liquor by one pursuing a different occupation, although it may be incidental to his business, does not make him an offender against the statute;[70] although, on the other hand, it is not necessary to a conviction to show that the traffic in liquors was his sole occupation or the principal part of his business.[71] A single unlawful sale is not enough to constitute this offense,[72] unless it is shown to have been made in pursuance of an intention to engage in or to continue the business, or unless it is shown to be part of an actual and continuous business.[73]

f. Being a Common Seller. In several states it is made an offense to be a "common seller" of intoxicating liquors.[74] If the statute does not declare how many separate sales must be shown in order to convict of this offense, it is sufficient if the jury are satisfied from the evidence that selling liquor was the common and ordinary business of defendant, and they will be authorized to find him guilty without proof of any particular or fixed number of sales.[75] But in some states the law provides that three several sales of liquor shall be sufficient evidence of the character of defendant as a common seller.[76] This provision is valid and constitutional,[77] and under it it is the duty of the court to instruct the jury that proof of three sales is enough evidence to warrant a verdict of guilty.[78] It should also be noticed that the separate sales and the "being a common seller" are distinct offenses, so that one may be convicted and punished for each illegal sale which he makes, and if he makes three or more such sales, he may also be punished for being a common seller.[79]

Judge's opinion as to purpose.— Where the statute directs the imposition of a fine if "in the opinion of the justice" the liquor was kept for sale, this means a properly formed judicial opinion. Lincoln *v.* Smith, 27 Vt. 328.

69. U. S. *v.* Bonham, 31 Fed. 808. And see Gambill *v.* Schmuck, 131 Ala. 321, 31 So. 604; Banchor *v.* Warren, 33 N. H. 183.

70. Weil *v.* State, 52 Ala. 19; Bryant *v.* State, 46 Ala. 302; Moore *v.* State, 16 Ala. 411; U. S. *v.* Mickle, 26 Fed. Cas. No. 15,763, 1 Cranch C. C. 268; U. S. *v.* Jackson, 26 Fed. Cas. No. 15,455, 1 Hughes 531. And see Schweyer *v.* Oberkoetter, 25 Ill. App. 183.

71. Koopman *v.* State, 61 Ala. 70; Harris *v.* State, 50 Ala. 127. *Compare* Lillensteine *v.* State, 46 Ala. 498.

72. McReynolds *v.* State, 26 Tex. App. 372, 9 S. W. 617; Williams *v.* State, 23 Tex. App. 499, 5 S. W. 136; Merritt *v.* State, 19 Tex. App. 435; Wells *v.* State, 18 Tex. App. 417; Halfin *v.* State, 18 Tex. App. 410; Mansfield *v.* State, 17 Tex. App. 468; Standford *v.* State, 16 Tex. App. 331.

Making a single sale of a stock of liquors in one lot is not a violation of a statute requiring each "dealer" in liquors to pay a special tax. Overall *v.* Bezeau, 37 Mich. 506, opinion of Cooley, C. J.

73. Abel *v.* State, 90 Ala. 631, 8 So. 760; State *v.* Chandler, 15 Vt. 425.

74. See State *v.* Davis, 23 Me. 403; Foster *v.* Haines, 13 Me. 307. And see succeeding notes.

Common seller defined.— A common seller is one who sells frequently, usually, customarily, habitually. State *v.* O'Conner, 49 Me. 594, 597. He is one who sells commonly spirituous or forbidden liquors without license. Moundsville *v.* Fountain, 27 W. Va. 182, 194.

The offense of a "common seller" consists in a frequent repetition of the act of selling without authority; and upon common principles there must be such a continuation, or rather repetition of unlawful sales, as would prove the allegation, in the complaint, of being a common seller. State *v.* Nutt, 28 Vt. 598, 602.

Place of business.— Although these statutes primarily contemplate the case of one who has a fixed place of business where he carries on the sale of liquor, yet it is held that one who travels about with liquors on his person, making sales of the same, may be indicted as a common seller. State *v.* Grames, 68 Me. 418.

Ignorance of intoxicating quality of liquor. —A person may be convicted under these statutes, although he did not know or suppose the liquor sold by him to be intoxicating. Com. *v.* Boynton, 2 Allen (Mass.) 160.

75. State *v.* O'Connor, 49 Me. 594; State *v.* Day, 37 Me. 244.

76. Com. *v.* Graves, 97 Mass. 114; Com. *v.* Rumrill, 1 Gray (Mass.) 388; Com. *v.* Perley, 2 Cush. (Mass.) 559; Com. *v.* Tubbs, 1 Cush. (Mass.) 2; Com. *v.* Odlin, 23 Pick. (Mass.) 275; State *v.* Williams, 6 R. I. 207.

77. Com. *v.* Burns, 9 Gray (Mass.) 132.

78. Com. *v.* Kirk, 7 Gray (Mass.) 496.

79. Com. *v.* Porter, 4 Gray (Mass.) 426; State *v.* Johnson, 3 R. I. 94.

g. Maintaining Liquor Nuisance. Statutes making it an indictable offense to maintain a liquor nuisance[80] are primarily directed against the place rather than the acts done there; that is, criminality under these statutes lies not so much in making illegal sales of liquor, or the like, as in the use or maintenance of a building or place for such unlawful purposes.[81] And it is not necessary that the sale of liquor should be the main purpose of the place or one of its main purposes.[82] But defendant must be connected with the nuisance by showing that he owned or controlled the place.[83] And it is essential to constitute the offense that unlawful or forbidden acts should have been performed at the place in question, which may consist, according to the various statutes, in sales of liquor in violation of some law or ordinance,[84] or in sales for an unlawful purpose by one who holds a license or permit authorizing him to sell for lawful purposes,[85] or sales by a licensed dealer at prohibited times, as on Sunday,[86] or in the illegal storage or keeping of liquors for sale,[87] or in permitting the assembling of vicious persons or other disorderly conduct on the premises.[88] The offense may be committed by one who permits his servants to make illegal sales of liquor,[89] or by a landlord who knowingly permits his tenant to use the premises in such a manner as to constitute a nuisance.[90]

h. Keeping Place for Unlawful Sale. In many states the statutes[91] make it an offense to keep or maintain a tenement for the unlawful keeping or sale of liquor,[92] or to keep a "public bar,"[93] or a "place of public resort" for illicit selling or

80. See the statutes of the different states. And see State *v.* Stanley, 84 Me. 555, 24 Atl. 983; Com. *v.* McDonough, 13 Allen (Mass.) 581; Com. *v.* Roland, 12 Gray (Mass.) 132; Meyer *v.* State, 42 N. J. L. 145.

81. State *v.* Waynick, 45 Iowa 516; State *v.* Lewis, 63 Kan. 265, 65 Pac. 258. And see State *v.* Frahm, 109 Iowa 101, 80 N. W. 209.

What constitutes a building, place, or tenement see Cameron *v.* Fellows, 109 Iowa 534, 80 N. W. 567; State *v.* Dieffenbach, 47 Iowa 638 (farmhouse); Com. *v.* Purcell, 154 Mass. 388, 28 N. E. 288 (hotel); Com. *v.* Patterson, 153 Mass. 5, 26 N. E. 136 (lot of land with detached buildings used together); Com. *v.* Baker, 152 Mass. 337, 25 N. E. 718 (incorporated club); Com. *v* Welsh, 110 Mass. 359.

82. State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838.

83. Brecount *v.* State, 5 Ind. 499. *Compare* State *v.* Snyder, 108 Iowa 205, 78 N. W. 807; State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

84. State *v.* Johnson, 61 Iowa 504, 16 N. W. 534; State *v.* Waynick, 45 Iowa 516.

A single sale of liquor contrary to law is not sufficient to make the place a common nuisance. Nicholson *v.* People, 29 Ill. App. 57; Miller *v.* State, 3 Ohio St. 475. *Compare* State *v.* Reyelets, 74 Iowa 499, 38 N. W. 377. See State *v.* McIntosh, 98 Me. 397, 57 Atl. 83.

Drinking on premises.— In North Dakota a place where liquors are sold in violation of the statute is a common nuisance, whether or not drinking on the premises is permitted. State *v.* Fraser, 1 N. D. 425, 48 N. W. 343.

85. Craig *v.* Werthmueller, 78 Iowa 598, 43 N. W. 606; State *v.* Webber, 76 Iowa 686, 39 N. W. 286.

Druggists or pharmacists selling for unlawful purposes, or otherwise in violation of their permits, may be guilty of maintaining a liquor nuisance. Hall *v.* Coffin, 108 Iowa 466, 79 N. W. 274; State *v.* Salts, 77 Iowa 193, 39 N. W. 167, 41 N. W. 620; State *v.* Shank, 74 Iowa 649, 38 N. W. 523; State *v.* Davis, 44 Kan. 60, 24 Pac. 73; State *v.* Donovan, 10 N. D. 203, 86 N. W. 709; State *v.* McGruer, 9 N. D. 566, 84 N. W. 363.

86. State *v.* Morehead, 22 R. I. 272, 47 Atl. 545; State *v.* Wacker, 71 Wis. 672, 38 N. W. 189.

87. Dosh *v.* U. S. Express Co., (Iowa 1903) 93 N. W. 571; Latta *v.* U. S. Express Co., (Iowa 1902) 92 N. W. 68; State *v.* Lewis, 63 Kan. 265, 65 Pac. 258.

88. See Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478; Skinner *v.* State, 120 Ind. 127, 22 N. E. 115; Howard *v.* State, 6 Ind. 444; State *v.* Tabler, 34 Ind. App. 393, 72 N. E. 1039; Wilson *v.* Com., 12 B. Mon. (Ky.) 2.

Single act.— Where the law provides that houses where drunkenness, quarreling, and breaches of the peace are carried on, to the disturbance of others, shall be deemed nuisances, a place where such acts are done but once is a nuisance. State *v.* Pierce, 65 Iowa 85, 21 N. W. 195.

89. State *v.* Moore, 49 S. C. 438, 27 S. E. 454.

90. Com. *v.* Hayes, 167 Mass. 176, 45 N. E. 82.

91. See the statutes of the different states.

92. See Com. *v.* Mullen, 166 Mass. 377, 44 N. E. 343.

A tenement may consist of two rooms used together and immediately connected together. Com. *v.* Fraher, 126 Mass. 56. And see Com. *v.* Welch, 147 Mass. 374, 17 N. E. 895.

93. See Com. *v.* Rogers, 135 Mass. 536.

drinking,[94] or a place "where it is reputed that intoxicating liquors are sold or kept for sale,"[95] or the like.[96] If the statutory offense consists in keeping a place "for" the unlawful sale of liquor, there must be a purpose to use it in that manner,[97] although that need not be the sole or the main purpose of the building.[98] But if the statute is directed against the maintenance of a place "where" liquors "are" unlawfully sold, the fact of selling at such place is the essential thing, not the intent in regard to the use of the place.[99] The charge cannot be successfully met by anything less than a proper license or authority to sell.[1] And the "keeping" of a place for the unlawful sale of liquor is a distinct offense from any act of unlawful selling.[2]

i. Employment or Admission of Prohibited Persons. By statute[3] in several jurisdictions, it is an indictable offense to permit minors to enter and remain in, or loiter about, a saloon or bar-room,[4] or persons of bad character to assemble there, at any time,[5] or to suffer any person at all to enter during prohibited days or hours,[6] or to employ women in such places as waitresses or otherwise.[7]

94. See O'Keefe *v.* State, 24 Ohio St. 175.

As to what constitutes such a place see Bandalow *v.* People, 90 Ill. 218 (street or alley adjoining a brewery where people congregate daily for the purpose of drinking beer); State *v.* Peak, 66 Kan. 701, 72 Pac. 237; Irwin *v.* Martinsville, 9 Ohio Dec. (Reprint) 31, 10 Cinc. L. Bul. 76; State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844.

95. See State *v.* Moriarty, 50 Conn. 415; State *v.* Buckley, 40 Conn. 246; State *v.* Morgan, 40 Conn. 44.

An inclosed park, containing several acres of land, within which is an uninclosed and uncovered platform for dancing, from which beer is sold, is not within the statute. State *v.* Barr, 39 Conn. 40.

96. See State *v.* Sowers, 111 N. C. 685, 16 S. E. 315, construing a statute making it unlawful to "erect any stand" or place of business for the purpose of selling liquor within two miles of a church or schoolhouse, and holding that a sale of liquor within the prohibited limits does not constitute the offense without proof that a stand or place of business was erected.

97. Ramsey *v.* State, 11 Ark. 35.

98. Com. *v.* Fleckner, 167 Mass. 13, 44 N. E. 1053; Com. *v.* Burke, 114 Mass. 261.

99. See Nace *v.* State, 117 Ind. 114, 19 N. E. 729; State *v.* Viers, 82 Iowa 397, 48 N. W. 732; People *v.* Bacon, 117 Mich. 187, 75 N. W. 438; Belle Centre *v.* Welsh, 11 Ohio Dec. (Reprint) 41, 24 Cinc. L. Bul. 176. And see People *v.* Congdon, (Mich. 1904) 100 N. W. 266.

1. Keilkopf *v.* Denver, 19 Colo. 325, 35 Pac. 535; State *v.* Mullenhoff, 74 Iowa 271, 37 N. W. 329.

2. Smith *v.* Com., 6 B. Mon. (Ky.) 21; Oshe *v.* State, 37 Ohio St. 494. And see Maynard *v.* Eaton Cir. Judge, 108 Mich. 201, 65 N. W. 760.

3. See the statutes of the different jurisdictions.

4. See Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. 620.

Knowledge or belief of defendant.— It is no defense that the accused did not know that the person in question was a minor, or believed him to be of full age. State *v.* Kinkead, 57 Conn. 173, 17 Atl. 855; State *v.* Meyer, (Tex. Civ. App. 1893) 23 S. W. 427.

Consent of parent.— Where the statute forbids the keeper of a dram-shop to allow a minor to be in his saloon or to play at games there, without the written consent of the minor's parent, a mere verbal consent of such parent is no defense to a prosecution. State *v.* Johnson, 44 Mo. App. 84.

Length of stay.— In a prosecution for allowing a minor to loiter in defendant's saloon, if it is shown that there was a loitering, the length of time during which it was permitted is immaterial. Armstrong *v.* State, 14 Ind. App. 566, 43 N. E. 142.

Arrest of minor.— In New York it is provided by statute that any child under the age of sixteen years found in a place where intoxicating liquors are sold must be arrested and brought before a proper magistrate, who may commit the child to any charitable reformatory. N. Y. Pen. Code, § 291. And see People *v.* Angie, 74 N. Y. App. Div. 539, 77 N. Y. Suppl. 832.

5. Marshall *v.* Fox, L. R. 6 Q. B. 370, 40 L. J. M. C. 142, 24 L. T. Rep. N. S. 751, 19 Wkly. Rep. 1108; Belasco *v.* Hannant, 3 B. & S. 13, 9 Cox C. C. 203, 8 Jur. N. S. 1226, 31 L. J. M. C. 225, 6 L. T. Rep. N. S. 577, 10 Wkly. Rep. 867; Parker *v.* Green, 2 B. & S. 299, 9 Cox C. C. 169, 8 Jur. N. S. 409, 31 L. J. M. C. 133, 6 L. T. Rep. N. S. 46, 10 Wkly. Rep. 316, 110 E. C. L. 299; Whitfield *v.* Bainbridge, 12 Jur. N. S. 919; Murphy *v.* Ahern, 18 Wkly. Rep. 71.

6. See Wilson *v.* State, 19 Ind. App. 389, 46 N. E. 1050.

7. *In re* Maguire, 57 Cal. 604, 40 Am. Rep. 125; Bergman *v.* Cleveland, 39 Ohio St. 651. And see *supra*, IV, E, 3, e.

Evasion of statute.— Where the proprietor of a saloon, immediately upon the enactment of such a statute, discharged her female employees and then entered into a partnership with them for the purpose of conducting the same business, it was held that this was an indictable infraction of the

j. Keeping Disorderly House. A person who sells liquor and permits it to be drunk on his premises is liable to indictment for keeping a disorderly house, when those to whom he sells it behave in such a manner as to disturb the neighborhood.[8] A house may be disorderly by reason of a habitual violation of the law regulating the sale of liquor.[9] Keeping a place where liquors are sold in a disorderly manner is sometimes by statute a criminal offense.[10]

k. Keeping Tippling-House. It is sometimes made a statutory offense to keep a tippling-house.[11]

l. Permitting Drunkenness. Permitting drunkenness on the premises where liquor is sold is sometimes, by statute, an indictable offense.[12]

m. Permitting Gaming. Permitting premises where liquor is sold to be used for purposes of betting or gambling is in some jurisdictions a statutory offense.[13]

n. Unlawful Sales — (i) *Sale in General* — (a) *Elements of Offense.* To constitute the offense of making an illegal sale of liquor, there must have been a "sale" within the ordinary meaning of that term, unless it is associated, in the statute, with other words which may have the effect of broadening its scope.[14] But to establish an illegal sale it is not necessary to show that defendant was the owner of the liquor sold,[15] that he made any profit out of the sale,[16] that he made

spirit of the law. Walter *v.* Com., 88 Pa. St. 137, 32 Am. Rep. 429.

8. State *v.* Burchinal, 4 Harr. (Del.) 572. And see DISORDERLY HOUSES, 14 Cyc. 486 *et seq.*

9. *In re* Charge to Grand Jury, 10 N. J. L. J. 116.

10. See the statutes of the different jurisdictions. And see Overman *v.* State, 88 Ind. 6.

11. See the statutes of the different jurisdictions. And see Cable *v.* State, 8 Blackf. (Ind.) 531; Moore *v.* State, 9 Yerg. (Tenn.) 353; Dunnaway *v.* State, 9 Yerg. (Tenn.) 350. See also DISORDERLY HOUSES, 14 Cyc. 486 *et seq.*

12. See the statutes of the different jurisdictions. And see Hope *v.* Warburton, [1892] 2 Q. B. 134, 56 J. P. 328, 61 L. J. M. C. 147, 66 L. T. Rep. N. S. 589, 40 Wkly. Rep. 510; Ethelstane *v.* Oswestry, 33 L. T. Rep. N. S. 339.

Licensee's knowledge of drunkenness necessary.— Somerset *v.* Wade, [1894] 1 Q. B. 574, 58 J. P. 231, 63 L. J. M. C. 126, 70 L. T. Rep. N. S. 452, 10 Reports 105, 42 Wkly. Rep. 399.

Drunkenness of licensee.— A licensed dealer cannot be convicted of the offense of permitting drunkenness on the premises by reason of getting drunk in his own bar. Lester *v.* Torrens, 2 Q. B. D. 403, 46 L. J. M. C. 280, 25 Wkly. Rep. 691; Warden *v.* Tye, 2 C. P. D. 74, 46 L. J. M. C. 111, 35 L. T. Rep. N. S. 852.

13. See the statutes of the different jurisdictions. And see Davis *v.* Stephenson, 24 Q. B. D. 529, 17 Cox C. C. 73, 54 J. P. 565, 59 L. J. M. C. 73, 62 L. T. Rep. N. S. 436, 38 Wkly. Rep. 492; Dyson *v.* Mason, 22 Q. B. D. 351, 16 Cox C. C. 575, 53 J. P. 262, 58 L. J. M. C. 55, 60 L. T. Rep. N. S. 265; Bond *v.* Evans, 21 Q. B. D. 249, 52 J. P. 612, 57 L. J. M. C. 105, 59 L. T. Rep. N. S. 411, 36 Wkly. Rep. 767; Somerset *v.* Hart, 12 Q. B. D. 360, 48 J. P. 327, 53 L. J. M. C. 77; Redgate *v.* Haynes, 1 Q. B. D. 89, 45 L. J. M. C. 65, 33 L. T. Rep. N. S. 779; Bosley *v.* Davies, 1 Q. B. D. 84, 45 L. J. M. C. 27, 33 L. T. Rep. N. S. 528, 24 Wkly. Rep. 140; Sims *v.* Pay, 16 Cox C. C. 609, 53 J. P. 420, 58 L. J. M. C. 39, 60 L. T. Rep. N. S. 602. See also GAMING, 20 Cyc. 890 *et seq.*

14. Winter *v.* State, 133 Ala. 32, 31 So. 717 (selling or giving away); Roberson *v.* State, 100 Ala. 37, 14 So. 554 ("selling, giving or otherwise disposing"); State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089 ("sell, furnish or give away").

"Disposing of" liquors is so far different from "selling" them that the former offense may be proved without showing that the defendant received any compensation for the liquor which he disposed of. State *v.* Deusting, 33 Minn. 102, 22 N. W. 442, 53 Am. Rep. 12.

In Texas to constitute a violation of the local option law, there must be a sale alleged and proved. Stephens *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1056. And the sale is the offense, without regard to the purchaser's becoming intoxicated. Terry *v.* State, 44 Tex. Cr. 411, 71 S. W. 968.

15. *Alabama.*— Winter *v.* State, 133 Ala. 176, 32 So. 125; Taylor *v.* State, 121 Ala. 24, 25 So. 689.

Arkansas.— Evans *v.* State, 54 Ark. 227, 15 S. W. 360.

Connecticut.—State *v.* Wadsworth, 30 Conn. 55.

Georgia.— Brownlow *v.* State, 112 Ga. 405, 37 S. E. 733.

Missouri.— State *v.* Morton, 42 Mo. App. 64.

Pennsylvania.— Com. *v.* Heffner, 8 Leg. Gaz. 166.

Texas.— Keith *v.* State, 38 Tex. Cr. 678, 44 S. W. 847.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 159.

16. Ladwig *v.* State, 40 Tex. Cr. 585, 51 S. W. 390.

the sale in person, if another acted for him with his authority or consent,[17] that the liquor should be the only article transferred between the parties, or that the price paid for it should be severable from that paid for other things included in the same purchase.[18] If the statute is specifically directed against unlawful sales, it is not necessary to show an engaging or continuing in the business; a single sale, without legal justification, constitues the offense.[19] But the sale may be deprived of criminality by the character of the person to whom it is made.[20]

(B) *What Constitutes a Sale.* The offense of illegally selling liquor is not committed by a bargain or executory contract for a sale. There must be a completed sale, which passes the property,[21] consummated by the act of the parties as distinguished from the operation of the law,[22] and amounting to a vending and purchasing of the particular commodity.[23] It is not necessary that the liquor should have been paid for by the purchaser.[24] But there must have been a delivery of the liquor to him,[25] which, however, is sufficiently established by proof that the purchaser helped himself to a drink or a bottle of liquor, in the presence of the owner, and handed the latter the price or left it in a place accessible to him.[26]

(C) *Sale on Credit.* An illegal sale of liquor is none the less a violation of law because it is made on credit, instead of for cash. It is not a gift, if there is an understanding or expectation that payment shall be made; and it is immaterial that the law furnishes no means of enforcing payment.[27]

17. Johnson *v.* State, 83 Ga. 553, 10 S. E. 207.

18. Com. *v.* Worcester, 126 Mass. 256. And see State *v.* Hall, 39 Me. 107.

19. People *v.* Kropp, 52 Mich. 582, 18 N. W. 368; Com. *v.* Coolidge, 138 Mass. 193; State *v.* Mooty, 3 Hill (S. C.) 187.

20. Street *v.* Hall, 29 Vt. 165 (sale to a town agent); Wood *v.* Smith, 23 Vt. 706 (sale by one licensed vendor to another).

21. State *v.* Shields, 110 La. 547, 34 So. 673; Banchor *v.* Warren, 33 N. H. 183; Blasingame *v.* State, (Tex. Cr. App. 1905) 85 S. W. 275; White *v.* State, (Tex. Cr. App. 1905) 85 S. W. 9.

Conditional sale.— The fact that a sale of whisky was on a condition which was not complied with does not remove it from the inhibition of the statute. Taylor *v.* State, 121 Ala. 24, 25 So. 689.

22. Hamilton *v.* Goding, 55 Me. 419.

23. Schaffner *v.* State, 8 Ohio St. 642 (holding that administering of liquor as a medicine, by a physician to a patient, is not a "sale" thereof); Reg. *v.* Westlake, 21 Ont. 619 (holding that a purchase of the day's receipts of a bar by a person who is not a licensed dealer does not make him guilty of illegally selling the liquors sold during the day).

Furnishing liquor to boarders with meals, by the keeper of a restaurant or boarding-house, may constitute the offense of selling without license. See Nicrosi *v.* State, 52 Ala. 336; Lauer *v.* District of Columbia, 11 App. Cas. (D. C.) 453; State *v.* Lotti, 72 Vt. 115, 47 Atl. 392; State *v.* Intoxicating Liquors, 44 Vt. 208.

24. State *v.* Greenleaf, 31 Me. 517. *Compare* State *v.* Quinn, 25 Mo. App. 102.

25. Riley *v.* State, 43 Miss. 397; Markle *v.* Akron, 14 Ohio 586. *Compare* Kimball *v.* People, 20 Ill. 348.

A sale is implied from the fact that liquor in a saloon was set before and drunk by one calling for it. Auburn Excise Com'rs *v.* Merchant, 34 Hun (N. Y.) 19 [*affirmed* in 103 N. Y. 143, 8 N. E. 484].

The offense is complete when the vendor delivers the liquor, although the purchaser does not drink it nor intend to drink it; his motive in buying the liquor, and the disposition he makes of it, are alike immaterial. Com. *v.* Geary, 146 Mass. 139, 15 N. E. 363; Dillman *v.* People, 4 N. Y. Wkly. Dig. 251.

Delivery alone is not a violation of the law; it may be evidence of a sale, but does not constitute a sale. State *v.* Prescott, 67 N. H. 203, 30 Atl. 342.

26. Winter *v.* State, 132 Ala. 32, 31 So. 717; Roberson *v.* State, 99 Ala. 189, 13 So. 532; Com. *v.* Geary, 146 Mass. 139, 15 N. E. 363; State *v.* Wiggin, 20 N. H. 449; State *v.* McMinn, 83 N. C. 668.

Absence or ignorance of owner.— If the witness merely helped himself to the liquor and left some money, and it is not shown that defendant was present, or knew of it, or received the money, there is not enough to convict. State *v.* Ferrell, 22 W. Va. 759. And see Roberson *v.* State, 99 Ala. 189, 13 So. 532.

Stealing from dealer.— A violation of law is not established by proof that a person stole a bottle of liquor from defendant's store, the latter knowing nothing of it until afterward, when the person told him to charge it in his account, which defendant refused to do and threatened to prosecute. Moss *v.* State, (Tex. Cr. App. 1898) 44 S. W. 833.

27. *Alabama.*— Perkins *v.* State, 92 Ala. 66, 9 So. 536.

Georgia.— Lupo *v.* State, 118 Ga. 759, 45 S. E. 602.

(D) *Barter or Exchange.* As a "sale" is a transfer of property for a price in money, an indictment for selling liquor unlawfully is not sustained by evidence which shows an exchange or barter, whether of the same or some other commodity.[28]

(E) *Payment in Services or in Kind.* In some states the courts have stretched the meaning of the word "sale" to make it include the giving of liquor in return for the grain or fruit out of which it was distilled,[29] or in payment for services rendered.[30]

(F) *Gift or Loan.* A "gift," as distinguished from a "sale," means a gratuitous transfer of property without any equivalent. Hence, if the statute prohibits merely the "sale" of liquor, it is not an indictable offense to give it away.[31] A gift of liquor is, however, sometimes specifically forbidden by statute,[32] or may be included in such broad terms of prohibition as "selling or disposing of," or "sell or furnish."[33] Even under such statutes, it is no offense to give liquor in one's own house to his family, domestic servants, or invited guests, as a mere act of kindness or hospitality, and with no purpose to evade or break the law.[34] A loan

Maine.— Emerson *v.* Noble, 32 Me. 380; State *v.* Greenleaf, 31 Me. 517.

Massachusetts.— Com. *v.* Hogan, 97 Mass. 120; Com. *v.* Burns, 8 Gray 482.

Mississippi.— Riley *v.* State, 43 Miss. 397.

Oregon.— State *v.* Cutting, 3 Oreg. 260.

Texas.— A sale of liquor for checks of a company, redeemable at its store in goods, will sustain a conviction for violating the local option law. Ford *v.* State, 45 Tex. Cr. 288, 77 S. W. 800.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 159.

28. Robinson *v.* State, 59 Ark. 341, 27 S. W. 233; Gillan *v.* State, 47 Ark. 555, 2 S. W. 185; Stevenson *v.* State, 65 Ind. 409. *Contra*, Com. *v.* Abrams, 150 Mass. 393, 23 N. E. 53; Keaton *v.* State, 36 Tex. Cr. 259, 38 S. W. 522; Bruce *v.* State, 36 Tex. Cr. 53, 39 S. W. 683.

29. Com. *v.* Clark, 14 Gray (Mass.) 367; Stanley *v.* State, 43 Tex. Cr. 270, 64 S. W. 1051. *Contra*, see Maxwell *v.* State, 120 Ala. 375, 25 So. 235.

30. Bescher *v.* State, 32 Ind. 480; Mason *v.* Lothrop, 7 Gray (Mass.) 354. And see Griffin *v.* State, 115 Ga. 577, 41 S. E. 997.

Hire of buggy.— The delivery of whisky as compensation for the use of a buggy, in performance of an agreement so to do, is a sale of the whisky. Paschal *v.* State, 84 Ga. 326, 10 S. E. 821.

31. *Alabama.*— Williams *v.* State, 91 Ala. 14, 8 So. 668; Young *v.* State, 58 Ala. 358.

Arkansas.— Gillan *v.* State, 47 Ark. 555, 2 S. W. 185.

Georgia.— McGruder *v.* State, 83 Ga. 616, 10 S. E. 281.

Illinois.— Siegel *v.* People, 106 Ill. 89.

Indiana.— Keiser *v.* State, 82 Ind. 379; Harvey *v.* State, 80 Ind. 142; Stevenson *v.* State, 65 Ind. 409.

Iowa.— State *v.* Briggs, 81 Iowa 585, 47 N. W. 865; State *v.* Hutchins, 74 Iowa 20, 36 N. W. 775. *Compare* State *v.* Harris, 64 Iowa 287, 20 N. W. 439.

Kansas.— See State *v.* Standish, 37 Kan. 643, 16 Pac. 66.

Kentucky.— Com. *v.* Dickerson, 76 S. W. 1084, 25 Ky. L. Rep. 1043.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Massachusetts.— Com. *v.* Packard, 5 Gray 101.

Oregon.— Wood *v.* Territory, 1 Oreg. 223.

Texas.— Finley *v.* State, (Cr. App. 1898) 47 S. W. 1015; Holley *v.* State, 14 Tex. App. 505.

32. See the statutes of the different states. And see Litch *v.* People, 19 Colo. App. 421, 75 Pac. 1079; Meadows *v.* State, 121 Ga. 362, 49 S. E. 268; State *v.* Handler, 178 Mo. 38, 76 S. W. 984; State *v.* Gibson, 121 N. C. 680, 28 S. E. 487.

33. See Dukes *v.* State, 77 Ga. 738; State *v.* Deusting, 33 Minn. 102, 22 N. W. 442, 53 Am. Rep. 12; Wood *v.* Territory, 1 Oreg. 223; State *v.* Tague, 76 Vt. 118, 56 Atl. 535; State *v.* Freeman, 27 Vt. 520.

34. *Alabama.*— Reynolds *v.* State, 73 Ala. 3.

Illinois.— Cruse *v.* Aden, 127 Ill. 231, 20 N. E. 73, 3 L. R. A. 327; Albrecht *v.* People, 78 Ill. 510.

Indiana.— Austin *v.* State, 22 Ind. App. 221, 53 N. E. 481.

Iowa.— State *v.* Hutchins, 74 Iowa 20, 36 N. W. 775.

Kansas.— State *v.* Standish, 37 Kan. 643, 16 Pac. 66.

Kentucky.— Powers *v.* Com., 90 Ky. 167, 13 S. W. 450, 11 Ky. L. Rep. 964. And see Com. *v.* Day, 95 Ky. 120, 23 S. W. 952, 15 Ky. L. Rep. 466.

Maryland.— Cearfoss *v.* State, 42 Md. 403.

Pennsylvania.— Com. *v.* Heckler, 168 Pa. St. 575, 32 Atl. 52; Com. *v.* Carey, 151 Pa. St. 368, 25 Atl. 140.

Vermont.— State *v.* Jones, 39 Vt. 370.

Where a saloon-keeper invites others to his saloon on Sunday, unlocks the door and admits them and gives them beer, which they drink, it is a violation of the statute. Johnson *v.* Chattanooga, 97 Tenn. 247, 36 S. W. 1092.

of liquor with the understanding that it is to be repaid in other liquor of the same kind is not a sale.[35]

(G) *Devices to Conceal Sale.* In any case where a sale or gift of liquor would be contrary to law, the courts will discountenance any trick, artifice, or subterfuge intended to evade its terms. No matter what the disguise or pretense, it is enough to sustain a conviction if liquor was actually sold or given in violation of the law.[36]

(H) *Acting as Agent For Another.* Where one person assists another in procuring liquor, either by conducting him to the place where it is sold, or acting as his messenger in going there and bringing back the liquor, he is not guilty of selling the liquor to his principal, notwithstanding both the money and the goods may pass through his hands, provided he had no interest in the liquor or in the price, and acted as the agent or intermediary of the buyer, and not of the seller.[37]

Furnishing ale and wine to boarders at an inn or boarding-house, as a part of their meals, constitutes a sale of intoxicating liquors, and not a giving away of the same at one's private dwelling, within the permission of the statute. State *v.* Lotti, 72 Vt. 115, 47 Atl. 392.

"Dwelling."— A person who gives away liquor in a room in which no business is conducted, but which is not his dwelling, is not within the protection of a statute permitting such giving when it takes place "at private dwellings or their dependencies." State *v.* Danforth, 62 Vt. 188, 19 Atl. 229.

Treating customers.— It is against the law for a traveling agent of a retail liquor dealer, soliciting orders in the country, to be filled at the home place, to give a drink of whisky to a prospective customer. State *v.* Jones, 88 Minn. 27, 92 N. W. 468.

Gratuitously furnishing liquor to musicians hired by an innkeeper to attend a dance at his house is a violation of the statute, as their relation to him is not that of members of his family or servants. State *v.* Jones, 39 Vt. 370.

35. Huby *v.* State, 111 Ga. 842, 36 S. E. 301; Skinner *v.* State, 97 Ga. 690, 25 S. E. 364; Ray *v.* State, 46 Tex. Cr. 176, 79 S. W. 535. *Compare* Leach *v.* State, (Tex. Cr. App. 1899) 53 S. W. 630.

36. Rabe *v.* State, 39 Ark. 204; Devine *v.* State, 4 Iowa 443; Com. *v.* Thayer, 8 Metc. (Mass.) 525; Harper *v.* State, 85 Miss. 338, 37 So. 956; State *v.* McMinn, 83 N. C. 668.

Pretended sale of some other article.— A device by which one party pretends to sell, and the other to buy, turpentine, when in fact the intention is to buy and sell whisky, is not effective as an evasion of the law. Looney *v.* State, 43 Ark. 389. So where a different article, such as tobacco, groceries, or meat, is actually bought and sold, and the parties pretend that the liquor which is furnished or delivered with it is a gift or treat, whereas the price paid really covers the cost of the liquor, or the liquor is the actual subject of their bargain, and the other article only a subterfuge, it is a violation of the law. Marcus *v.* State, 89 Ala. 23, 8 So. 155; Archer *v.* State, 45 Md. 33; Com. *v.* Thayer, 8 Metc. (Mass.) 525; Kober *v.* State, 10 Ohio St. 444.

Sandwiches with drinks.— Under a statute permitting hotel-keepers to serve liquor to their guests at meals, a violation of the law is committed where nothing in the shape of a meal accompanies the liquor ordered and consumed by a customer except a sandwich, and especially where the sandwich is neither ordered, eaten, nor paid for by the customer, and is no more than a perfunctory adjunct to the drink. Matter of Schuyler, 63 N. Y. App. Div. 206, 71 N. Y. Suppl. 437; Matter of Cullinan, 41 Misc. (N. Y.) 3, 83 N. Y. Suppl. 581; Matter of Kinzel, 28 Misc. (N. Y.) 622, 59 N. Y. Suppl. 682; Matter of Lyman, 28 Misc. (N. Y.) 408, 59 N. Y. Suppl. 968.

Where defendant sold pasteboard checks, and then accepted such checks in exchange for beer, such acts constituted a sale of the beer. Billingsley *v.* State, 96 Ala. 114, 11 So. 408. *Compare* Massey *v.* State, 74 Ind. 368.

A banker selling bills of lading at his bank to all persons applying, thereby enabling them to obtain intoxicating liquors at a freight depot, is guilty of selling the liquors. State *v.* Snyder, 108 Iowa 205, 78 N. W. 807.

A blind tiger is a place in which intoxicating liquors are sold by a device whereby the party selling the same is concealed from the person buying. See Rowe *v.* Com., 70 S. W. 407, 24 Ky. L. Rep. 974; Smith *v.* State, 42 Tex. Cr. 414, 57 S. W. 815. Thus where two persons went into a room above a saloon and placed ten cents each on a dumb-waiter, and stepped into an adjoining room for a few minutes, and when they came back they found two glasses of beer and some cigars on the waiter and the money gone, it was held a sale of the beer. Henry *v.* State, 113 Ind. 304, 15 N. E. 593. On the same principle there is an illegal sale, although the price of the liquor is not handed directly to the seller, if it is deposited in his presence in a place which is accessible to him. State *v.* McMinn, 83 N. C. 668; State *v.* Cooper, 26 W. Va. 338. And see Hargrove *v.* State, (Tex. Cr. App. 1903) 76 S. W. 926.

37. *Alabama.*— Maxwell *v.* State, 140 Ala.

But if it appears that the alleged intermediary was in reality the owner of the liquor, he is guilty of making a sale,[38] and so if he really acts as the agent of the seller, rather than of the purchaser,[39] or solicits and receives orders for the sale of liquor,[40] or solicits others to join with him in the purchase of a quantity of liquor, and receives and distributes it,[41] or if the pretended agency is a mere trick or subterfuge to evade the law.[42] This is a question for the jury upon all the facts and circumstances of the case,[43] and even if the agent acted in good faith

131, 37 So. 266; Maples *v.* State, 130 Ala. 121, 30 So. 428; Bonds *v.* State, 130 Ala. 117, 30 So. 427; McClellan *v.* State, 118 Ala. 122, 23 So. 732; Du Bois *v.* State, 87 Ala. 101, 6 So. 381; Bryant *v.* State, 82 Ala. 51, 2 So. 670; Morgan *v.* State, 81 Ala. 72, 1 So. 472; Campbell *v.* State, 79 Ala. 271; Amos *v.* State, 73 Ala. 498.

Arkansas.— Whitmore *v.* State, 72 Ark. 14, 77 S. W. 598.

Florida.— Anderson *v.* State, 32 Fla. 242, 13 So. 435.

Georgia.— Black *v.* State, 112 Ga. 29, 37 S. E. 108; Williams *v.* State, 107 Ga. 693, 33 S. E. 641; Cunningham *v.* State, 105 Ga. 676, 31 S. E. 585; Evans *v.* State, 101 Ga. 780, 29 S. E. 40; Jones *v.* State, 100 Ga. 579, 28 S. E. 396; White *v.* State, 93 Ga. 47, 19 S. E. 49. But see Grant *v.* State, 87 Ga. 265, 13 S. E. 554; Paschal *v.* State, 84 Ga. 326, 10 S. E. 821.

Illinois.— Carthage *v.* Munsell, 203 Ill. 474, 67 N. E. 831; Hogg *v.* People, 15 Ill. App. 288.

Kansas.— State *v.* Cairns, 64 Kan. 782, 68 Pac. 621, 58 L. R. A. 55. See, however, State *v.* Peak, 66 Kan. 701, 72 Pac. 237.

Massachusetts.— Com. *v.* Williams, 4 Allen 587.

Mississippi.— Waddle *v.* State, (1898) 24 So. 311; Johnson *v.* State, 63 Miss. 228. But see Wortham *v.* State, 80 Miss. 205, 32 So. 50.

Missouri.— State *v.* Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406.

North Carolina.— State *v.* Taylor, 89 N. C. 577.

Texas.— Chote *v.* State, (Cr. App. 1904) 83 S. W. 377; Kirby *v.* State, 46 Tex. Cr. 584, 80 S. W. 1007; James *v.* State, 45 Tex. Cr. 592, 78 S. W. 951; Johnson *v.* State, (Cr. App. 1903) 77 S. W. 225; Redd *v.* State, (Cr. App. 1903) 77 S. W. 214; Crawford *v.* State, (Cr. App. 1903) 76 S. W. 576; Brown *v.* State, (Cr. App. 1903) 76 S. W. 475; Cook *v.* State, 45 Tex. Cr. 412, 76 S. W. 463; Burrell *v.* State, (Cr. App. 1901) 65 S. W. 914; Reed *v.* State, (Cr. App. 1898) 44 S. W. 1093; Treue *v.* State, (Cr. App. 1898) 44 S. W. 829; Phillips *v.* State, (Cr. App. 1897) 40 S. W. 270; Key *v.* State, 37 Tex. Cr. 77, 38 S. W. 773; Bowman *v.* State, (Cr. App. 1896) 35 S. W. 382; Way *v.* State, 36 Tex. Cr. 40, 35 S. W. 377; Vanarsdale *v.* State, 35 Tex. Cr. 587, 34 S. W. 931; Hood *v.* State, 35 Tex. Cr. 585, 34 S. W. 935; Wright *v.* State, 35 Tex. Cr. 581, 34 S. W. 935. *Compare* Taylor *v.* State, (Cr. App. 1903) 77 S. W. 221; Bruce *v.* State, (Cr. App. 1899) 53 S. W. 867.

West Virginia.— State *v.* Thomas, 13 W. Va. 848.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 160.

38. Mitchell *v.* State, 141 Ala. 90, 37 So. 407; State *v.* Smith, 117 N. C. 809, 23 S. E. 449; Bills *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1047; Treadaway *v.* State, 42 Tex. Cr. 466, 62 S. W. 574; Armstrong *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1006.

Grocer supplying customers.— If a storekeeper does not keep liquors for sale at his store, but makes himself an agent and carrier merely to procure them for division and distribution among his customers, this is an illegal sale under the statute of Vermont. State *v.* Buck, 37 Vt. 657. *Compare* U. S. *v.* Howell, 20 Fed. 718.

In Alabama it has been held that a person delivering liquors not owned by him, and which he is not authorized to sell, to another, under an agreement by which the latter pays him the price, to be used in replacing the liquor sold, is not a mere agent of the transferee to replace the liquor delivered, but a seller. Taylor *v.* State, 121 Ala. 24, 25 So. 689.

39. Skidmore *v.* Com., 57 S. W. 468, 22 Ky. L. Rep. 409; Com. *v.* Williams, 4 Allen (Mass.) 587. And see Cantwell *v.* State, (Tex. Cr. App. 1905) 85 S. W. 18; Ashley *v.* State, 46 Tex. Cr. 471, 80 S. W. 1015.

40. Levy *v.* State, 133 Ala. 190, 31 So. 805.

A brewer's or dealer's traveling agent, who simply solicits orders for liquors in the territory which he covers, but makes no sales, and has nothing to do with the deliveries, is not guilty of selling without a license. Com. *v.* Cochran, 1 Pa. Super. Ct. 479; Com. *v.* Munk, 38 Wkly. Notes Cas. (Pa.) 159. And see Salter *v.* Columbus, 121 Ga. 829, 49 S. E. 734. But it is otherwise if, in addition to taking orders, he sells and delivers the goods to customers out of a stock carried with him. Shuster *v.* State, 62 N. J. L. 521, 41 Atl. 701; Com. *v.* Smith, 16 Pa. Co. Ct. 644.

41. Hunter *v.* State, 60 Ark. 312, 30 S. W. 42. But *compare* Whitmore *v.* State, 72 Ark. 14, 77 S. W. 598; Wilson *v.* Com., 76 S. W. 1077, 25 Ky. L. Rep. 1085; Miller *v.* Com., 76 S. W. 515, 25 Ky. L. Rep. 848; Creasy *v.* Com., 76 S. W. 509, 25 Ky. L. Rep. 893.

42. Penner *v.* Com., 111 Ky. 604, 64 S. W. 435, 23 Ky. L. Rep. 774; State *v.* Morton, 42 Mo. App. 64; Hartgraves *v.* State, (Tex. Cr. App. 1897) 43 S. W. 331.

43. Skidmore *v.* Com., 57 S. W. 468, 22 Ky. L. Rep. 409; Strickland *v.* State, (Tex. Cr. App. 1898) 47 S. W. 720.

this will not exempt the real seller from responsibility if the sale was otherwise unlawful.[44]

(I) *Entrapping Defendant.* It is no defense to a prosecution for an illegal sale of liquor that the purchase was made by a "spotter," detective, or hired informer.[45]

(J) *Knowledge and Intent of Seller*[46] — (1) IGNORANCE AS A DEFENSE. In a prosecution for the illegal sale of intoxicating liquor, it is no defense that the seller did not know that the liquor sold by him was intoxicating, or that he believed it was not intoxicating, if in fact it was.[47] And a similar rule is applied in case of other mistakes of fact.[48] Unlawful sale of spirituous liquors is not excused by the fact that the seller, acting under the advice of his counsel, believed that the particular sale was not a violation of the law.[49]

(2) PURPOSE OR INTENT OF SALE — (a) IN GENERAL. Where a sale of intoxicating liquor is made by one who has no authority to sell for any purpose whatever, it is a general rule that the reasons which prompted him, the spirit or intention with which he made the sale, or the purpose which he expected the sale to subserve, are entirely immaterial, and cannot excuse him from the legal consequences of his act.[50]

(b) SALE FOR USE AS MEDICINE. In some states it is held that, although the statutes may forbid the sale of liquor in general terms, yet a sale made with the actual and *bona fide* intention that the liquor shall be used only as medicine, and not as a beverage, is not a criminal offense, the law implying an exception in such

44. McLeod *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1090.

45. *Illinois.*— Evanston *v.* Myers, 172 Ill. 266, 50 N. E. 204 [*reversing* 70 Ill. App. 205].

Indiana.— Rater *v.* State, 49 Ind. 507.

Michigan.— People *v.* Rush, 113 Mich. 539, 71 N. W. 863; People *v.* Everts, 112 Mich. 194, 70 N. W. 430.

Missouri.— State *v.* Lucas, 94 Mo. App. 117, 67 N. W. 971.

Texas.— Lambert *v.* State, 37 Tex. Cr. 232, 39 S. W. 299. And see People *v.* Chipman, 31 Colo. 90, 71 Pac. 1108 [*distinguishing* Wilcox *v.* People, 17 Colo. App. 109, 67 Pac. 343; Ford *v.* Denver, 10 Colo. App. 500, 51 Pac. 1015].

46. As to knowledge and good faith of seller to minors and drunkards see *infra*, IX, A, 3, n, (IV), (B), (2).

47. *Alabama.*— Compton *v.* State, 95 Ala. 25, 11 So. 69; Carl *v.* State, 89 Ala. 93, 8 So. 156.

Iowa.— Peters *v.* Jefferson County Dist. Ct., 114 Iowa 207, 86 N. W. 300; State *v.* Valure, 95 Iowa 401, 64 N. W. 280; State *v.* Lindoen, 87 Iowa 702, 54 N. W. 1075.

Kansas.— State *v.* Moulton, 52 Kan. 69, 34 Pac. 412; State *v.* Schaefer, 44 Kan. 90, 24 Pac. 92.

Maine.— State *v.* Eaton, 97 Me. 289, 54 Atl. 723.

Massachusetts.— Com. *v.* O'Kean, 152 Mass. 584, 26 N. E. 97; Com. *v.* Daly, 148 Mass. 428, 19 N. E. 209; Com. *v.* Savery, 145 Mass. 212, 13 N. E. 611; Com. *v.* Hallett, 103 Mass. 452; Com. *v.* Goodman, 97 Mass. 117; Com. *v.* Boynton, 2 Allen 160, opinion of the court by Hoar, J.

Michigan.— People *v.* Ingraham, 100 Mich. 530, 59 N. W. 234.

Rhode Island.— State *v.* Hughes, 16 R. I. 403, 16 Atl. 911.

Texas.— Williams *v.* State, 45 Tex. Cr. 477, 77 S. W. 215; Penn *v.* State, 43 Tex. Cr. 608, 68 S. W. 170; Allen *v.* State, (Cr. App. 1900) 59 S. W. 264; Gilmore *v.* State, 37 Tex. Cr. 178, 39 S. W. 105. *Compare* Patrick *v.* State, 45 Tex. Cr. 587, 78 S. W. 947.

Vermont.— State *v.* Thomasi, 67 Vt. 312, 31 Atl. 780.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 161.

But see State *v.* Chambers, 2 Ohio Dec. (Reprint) 647, 4 West. L. Month. 275.

48. Com. *v.* Green, 163 Mass. 103, 39 N. E. 775 (holding that in a prosecution against the servant of an innkeeper for the unlawful sale of liquor, the fact that the sale was innocently made under the belief that the persons to whom the liquor was sold were guests is no defense); State *v.* Thomasi, 67 Vt. 312, 31 Atl. 780 (holding that it is no defense to a charge of violating a statute prohibiting the sale of lager beer that the accused did not know that the substance sold was lager beer).

49. State *v.* Downs, 116 N. C. 1064, 21 S. E. 689.

50. Wortham *v.* State, 80 Miss. 205, 32 So. 50; State *v.* Downs, 116 N. C. 1064, 21 S. E. 689; Williams *v.* State, 45 Tex. Cr. 477, 77 S. W. 215; Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395. *Compare* Espy *v.* State, 47 Ala. 533.

Proceeds to go to charity.— A sale of liquor without a license is none the less a violation of the law because the seller intended at the time to devote the proceeds to charitable uses. U. S. *v.* Dodge, 25 Fed. Cas. No. 14,974, Deady 186.

cases.[51] But in others no such exception is admitted unless explicitly stated in the statute.[52] But if the vendor is authorized to sell for medical purposes, as a druggist for example, he is not guilty of an offense if he acts in good faith and in a reasonable belief that the liquor is to be used as medicine, although the purchaser may secretly intend to use it as a beverage, and does so use it.[53]

(K) *Place of Sale.* A licensed liquor dealer may take orders, personally or by agent, from persons residing outside the district covered by his license, for goods to be selected and forwarded from the stock kept in his licensed store; and in this case the sale is made at such store, and he is not indictable for unlicensed sales.[54] But if the order is taken by an agent who has authority to bind his principal by accepting or rejecting such orders, and the liquor is consigned to him, and by him distributed to the customers, the sale is completed at the place of delivery to the buyer.[55] A licensed dealer who receives, at his place of business, an order for liquor from a place in which he has no license, and fills it by selecting the liquor from his stock and delivering it to an express company or other carrier

51. Hottendorf *v.* State, 89 Ind. 282; Nixon *v.* State, 76 Ind. 524; Elrod *v.* State, 72 Ind. 292; Hooper *v.* State, 56 Ind. 153; Jakes *v.* State, 42 Ind. 473; Leppert *v.* State, 7 Ind. 300; Donnell *v.* State, 2 Ind. 658; State *v.* McAdoo, 80 Mo. 216; State *v.* Mitchell, 28 Mo. 562; State *v.* Larrimore, 19 Mo. 391. And see State *v.* Wray, 72 N. C. 253 [*approved* in State *v.* Wool, 86 N. C. 708], sale in good faith and upon the prescription of a physician. *Compare* State *v.* Dalton, 101 N. C. 680, 8 S. E. 154.

52. *Alabama.*— Carl *v.* State, 89 Ala. 93, 8 So. 156; Thomason *v.* State, 70 Ala. 20; Carson *v.* State, 69 Ala. 235.

Arkansas.— Chew *v.* State, 43 Ark. 361: Woods *v.* State, 36 Ark. 36, 38 Am. Rep. 22.

Colorado.— Chipman *v.* People, 24 Colo. 520, 52 Pac. 677.

Georgia.— Chapman *v.* State, 100 Ga. 311, 27 S. E. 789.

Kansas.— State *v.* Fleming, 32 Kan. 588, 5 Pac. 19; Salina *v.* Seitz, 16 Kan. 143.

Maine.— State *v.* Brown, 31 Me. 520.

Massachusetts.— Com. *v.* Sloan, 4 Cush. 52; Com. *v.* Kimball, 24 Pick. 366.

South Carolina.— State *v.* Thornburg, 16 S. C. 482.

Tennessee.— Druggists Cases, 85 Tenn. 449, 3 S. W. 490; Phillips *v.* State, 2 Yerg. 458.

Texas.— Greiner-Kelley Drug Co. *v.* Truett, (Civ. App. 1903) 75 S. W. 536; Snead *v.* State, 40 Tex. Cr. 262, 49 S. W. 595; Nichols *v.* State, 37 Tex. Cr. 546, 40 S. W. 268: Miller *v.* State, 37 Tex. Cr. 35, 38 S. W. 772.

Vermont.— State *v.* Chandler, 15 Vt. 425.

53. Owens *v.* People, 56 Ill. App. 569; Taylor *v.* Pickett, 52 Iowa 467, 3 N. W. 514; People *v.* Hinchman, 75 Mich. 587, 42 N. W. 1006, 4 L. R. A. 707.

The mere statement of the purchaser that he wanted the liquor for medicine would not be enough to justify and protect the seller, if the latter did not believe such statement, and the liquor was not in fact so used. McGuire *v.* State, 37 Miss. 369.

In Massachusetts it has been held that the druggist is protected in making the sale if either the buyer or seller intends that the liquor shall be used as medicine. Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656; Com. *v.* Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449.

54. *Alabama.*— Newman *v.* State, 88 Ala. 115, 6 So. 762.

Illinois.— Coffeen *v.* Huber, 78 Ill. App. 455.

Iowa.— State *v.* Colby, 92 Iowa 463, 61 N. W. 187; Gross *v.* Scarr, 71 Iowa 656, 33 N. W. 223.

Mississippi.— Pearson *v.* State, 66 Miss. 510, 6 So. 243, 4 L. R. A. 835.

Nebraska.— Gillen *v.* Riley, 27 Nebr. 158, 42 N. W. 1054. And see Harding *v.* State, 65 Nebr. 238, 91 N. W. 194.

Pennsylvania.— Garbracht *v.* Com., 96 Pa. St. 449, 42 Am. Rep. 550; Com. *v.* Smith, 16 Pa. Co. Ct. 644.

Texas.— Weldon *v.* State, 36 Tex. Cr. 34, 35 S. W. 176. *Compare* Bogle *v.* State, 42 Tex. Cr. 389, 55 S. W. 830; Lafferty *v.* State, (Cr. App. 1896) 35 S. W. 374.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 162.

Contra.— Swift *v.* State, 108 Tenn. 610, 69 S. W. 326.

As to construction of statutes prohibiting soliciting or receiving orders see State *v.* Ascher, 54 Conn. 299, 7 Atl. 822; State *v.* Wheat, 48 W. Va. 259, 37 S. E. 544.

In North Carolina, by statute, the place of delivery to the purchaser of intoxicating liquors is made the place of sale. N. C. Acts (1903), c. 349, § 2. And see State *v.* Patterson, 134 N. C. 612, 47 S. E. 808.

55. *Alabama.*— Brooks *v.* State, 105 Ala. 133, 16 So. 698.

Arkansas.— Berger *v.* State, 50 Ark. 20, 6 S. W. 15.

Illinois.— Popel *v.* Monmouth, 81 Ill. App. 512; Spring Valley *v.* Henning, 42 Ill. App. 159.

Iowa.— Taylor *v.* Pickett, 52 Iowa 467, 3 N. W. 514.

Kansas.— State *v.* Cohen, 65 Kan. 849, 70 Pac. 600.

Massachusetts.— Com. *v.* Eggleston, 128 Mass. 408.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 162.

to be delivered to the purchaser, does not violate the law, although the carrier agrees to collect the price, for the sale is made at the place where the goods are separated from the general stock and delivered to the carrier, such delivery being delivery to the consignee.[56] But irrespective of the place where the bargain was made or the order received, if the seller, by his own hands or the hands of his servant or agent, carries the liquor to the purchaser, without any intermediate delivery to or through a common carrier, and delivers the liquor to the purchaser at the latter's place, and there receives the pay for it, the sale is made at the place of delivery, and if the vendor is not licensed to sell there he is indictable.[5] Where a person, living and doing business in a territory within which a sale of intoxicating liquors is prohibited, receives at his home an order from a person living in another state for intoxicating liquor at an agreed price and in pursuance of such order delivers such liquor at a railroad station within the prohibited territory for shipment to the purchaser at his home in another state, the transaction is a sale of liquor within the prohibited territory.[58]

(L) *Joint and Several Sales.* The sale of liquor to two distinct persons at the same time and place constitutes two distinct offenses, and not one offense only.[59] But where the liquor is furnished in answer to the demand of one person, at one time and by a single act, it can constitute but one act of furnishing, and the party

56. *Alabama.*— Pilgreen *v.* State, 71 Ala. 368.

Arkansas.— Smith *v.* State, (1891) 16 S. W. 2; Herron *v.* State, 51 Ark. 133, 10 S. W. 25; State *v.* Carl, 43 Ark. 353, 51 Am. Rep. 565.

Illinois.— Carthage *v.* Munsell, 203 Ill. 474, 67 N. E. 831 [*affirming* 105 Ill. App. 119]; Carthage *v.* Duvall, 202 Ill. 234, 66 N. E. 1099; Brechwald *v.* People, 21 Ill. App. 213.

Kansas.— State *v.* Cairns, 64 Kan. 782, 68 Pac. 621, 58 L. R. A. 55.

Kentucky.— James *v.* Com., 42 S. W. 1107, 19 Ky. L. Rep. 1045 [*distinguished* in Teal *v.* Com., 57 S. W. 464, 22 Ky. L. Rep. 350]. But it is now otherwise by statute. St. (1903) § 2557B, subd. 4.

Massachusetts.— Frank *v.* Hoey, 128 Mass. 263; Lynch *v.* O'Donnell, 127 Mass. 311; Kline *v.* Baker, 99 Mass. 253; Finch *v.* Mansfield, 97 Mass. 89. *Compare* Com. *v.* Hugo, 164 Mass. 157, 41 N. E. 123; Com. *v.* Burgett, 136 Mass. 450.

Nebraska.—Harding *v.* State, 65 Nebr. 238, 91 N. W. 194.

New Hampshire.— Banchor *v.* Warren, 33 N. H. 183.

Pennsylvania.— Com. *v.* Fleming, 130 Pa. St. 138, 18 Atl. 622, 17 Am. St. Rep. 763, 5 L. R. A. 470.

Texas.— Weathered *v.* State, (Cr. App. 1901) 60 S. W. 876; Freshman *v.* State, 37 Tex. Cr. 126, 38 S. W. 1007. And see Harris *v.* State, (Cr. App. 1905) 85 S. W. 284, 1198.

West Virginia.— State *v.* Flanagan, 38 W. Va. 53, 17 S. E. 792, 45 Am. St. Rep. 836, 22 L. R. A. 430; State *v.* Hughes, 22 W. Va. 743.

Wisconsin.— Sarbecker *v.* State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624.

United States.— U. S. *v.* Lackey, 120 Fed. 577.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 162.

57. *Arkansas.*— Blackwell *v.* State, 42 Ark. 275; Yowell *v.* State, 41 Ark. 355.

Georgia.— Doster *v.* State, 93 Ga. 43, 18 S. E. 997; Bagby *v.* State, 82 Ga. 786, 9 S. E. 721.

Iowa.— Carter *v.* Bartel, 110 Iowa 211, 81 N. W. 462; Cameron *v.* Fellows, 109 Iowa 534, 80 N. W. 567.

Massachusetts.— Com. *v.* Greenfield, 121 Mass. 40.

Missouri.— State *v.* Houts, 36 Mo. App. 265.

New Jersey.— State *v.* Shuster, 63 N. J. L. 355, 46 Atl. 1101.

New York.— People *v.* Capen, 26 Hun 377.

North Carolina.— State *v.* Sykes, 104 N. C. 694, 10 S. E. 191.

Pennsylvania.— Com. *v.* Hess, 148 Pa. St. 98, 23 Atl. 977, 33 Am. St. Rep. 810, 17 L. R. A. 176; Com. *v.* Holstine, 132 Pa. St. 357, 19 Atl. 273.

Tennessee.— Bryant *v.* State, 89 Tenn. 581, 15 S. W. 253.

Texas.— Davidson *v.* State, 44 Tex. Cr. 586, 73 S. W. 808; Bruce *v.* State, 36 Tex. Cr. 53, 35 S. W. 383; Northcutt *v.* State, 35 Tex. Cr. 584, 34 S. W. 946.

Vermont.— State *v.* Comings, 28 Vt. 508.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 162.

58. State *v.* Groves, 121 N. C. 632, 28 S. E. 403.

59. Com. *v.* Dove, 2 Va. Cas. 26. And see Henry *v.* State, 113 Ind. 304, 15 N. E. 593; Com. *v.* Very, 12 Gray (Mass.) 124. But *compare* State *v.* McAdams, 106 La. 720, 31 So. 187.

Contra.—Southern Express Co. *v.* State, 114 Ga. 226, 39 S. E. 899; Knight *v.* State, 88 Ga. 590, 15 S. E. 457; Crabb *v.* State, 88 Ga. 584, 15 S. E. 455; Dunn *v.* State, 82 Ga. 27, 8 S. E. 806, 3 L. R. A. 199; State *v.* Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706 [*approving* State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557].

incurs but one penalty, although several persons may join in drinking it.[60] Where two persons join in selling liquor without a license, they incur only a single penalty.[61]

(II) *Sales Without License*—(A) *In General.* Where a valid and operative statute[62] provides a system of granting licenses, and prohibits all persons from selling liquor without procuring such license, under penalty of prosecution and punishment,[63] the obtaining of a license is an absolute prerequisite to the right to sell; no substitute for it will avail, and no excuse for a failure to obtain it will be heard,[64] unless the vendor can bring himself within an excepted or privileged class.[65] And if the person prosecuted has no license at all, and therefore no authority to sell under any circumstances, it makes no difference that the sales made were also in violation of the Sunday law,[66] and the quantity of liquor included in the sale is immaterial,[67] as is also the fact that the sale was made to a minor or other prohibited person.[68] And a single act of selling is sufficient to constitute the offense.[69]

(B) *Sales by Producers or Manufacturers.* The license laws of the various states frequently contain provisions exempting from their terms persons who

compare U. S. *v.* Gordon, 25 Fed. Cas. No. 15,233, 1 Cranch C. C. 58.

60. State *v.* Barron, 37 Vt. 57. But see Com. *v.* Hogan, 97 Mass. 120.

Purchase for joint consumption.— The purchase of liquor by one of three persons for their joint consumption, with money contributed in part by each, does not constitute a sale by the purchaser to the other two, and he cannot legally be convicted on such facts for an unlawful sale of liquor. Com. *v.* Peters, 2 Pa. Super. Ct. 1.

61. Tracy *v.* Perry, 5 N. H. 504.

62. Bogart *v.* New Albany, Smith (Ind.) 38; Manning *v.* State, 36 Tex. 670. And see Wells *v.* State, 118 Ga. 556, 45 S. E. 443.

Where a local option law is submitted to the popular vote, and a town has voted against the grant of licenses, thereafter an indictment may be found against any one selling in the town without a license. Garner *v.* State, 8 Blackf. (Ind.) 568; State *v.* Funk, 27 Minn. 318, 7 N. W. 359.

The repeal of a licensing law takes away all the rights of the holders of existing and unexpired licenses, so that thereafter they are indictable for selling, unless they comply with the new law. State *v.* Mullenhoff, 74 Iowa 271, 37 N. W. 329. And see *supra*, VI, A, 6, b.

Retroactive effect of law.— A law requiring a license applies to the sale of liquors owned by the seller at the time of its passage. Com. *v.* Logan, 12 Gray (Mass.) 136.

63. People *v.* Brown, 16 Wend. (N. Y.) 561. And see State *v.* Darling, 77 Vt. 67, 58 Atl. 974. *Compare* Espy *v.* State, 47 Ala. 533.

Selling or furnishing.— Under the statute in Vermont, either selling or furnishing intoxicating liquors without a license constitutes a separate and distinct offense. State *v.* Woodward, 25 Vt. 616.

64. State *v.* Scampini, 77 Vt. 92, 59 Atl. 201. And see *supra*, VI, C, 3, 4, 5.

License for part of time.— Proof that defendant, during a part of the time embraced in an indictment for being a common seller of liquor, was authorized to sell, is not an answer to the whole indictment. Com. *v.* Putnam, 4 Gray (Mass.) 16.

Revocation.— The holder of a license to sell liquors cannot, although the same was lawfully granted, lawfully sell thereunder after the license has been duly revoked. McGehee *v.* State, 114 Ga. 833, 40 S. E. 1004. And see *supra*, VI, J, 7.

65. **As to exception of "merchants"** under Kentucky statute see Com. *v.* McGeorge, 9 B. Mon. (Ky.) 3; Cole *v.* Com., 8 Dana (Ky.) 31.

As to the right of an importer of liquor from one state to another to sell in the original package without a license see Pierce *v.* State, 13 N. H. 536; Leisy *v.* Hardin, 135 U. S. 100, 10 S. Ct. 681, 35 L. ed. 128; License Cases, 5 How. (U. S.) 504, 12 L. ed. 256; Black Intox. Liq. §§ 66–79. And see COMMERCE, 7 Cyc. 429 *et seq.*

The sale of liquor at a military canteen, established at an encampment of state troops, by authority of the commanding officer, on territory within the jurisdiction and control of the state, without a license from the proper state or local authorities, is illegal. Com. *v.* Joyce, 22 Pa. Co. Ct. 397.

66. O'Brien *v.* State, 91 Ala. 25, 8 So. 560; Williams *v.* Augusta, 111 Ga. 849, 36 S. E. 607; Moran *v.* Atlanta, 102 Ga. 840, 30 S. E. 298; Crone *v.* State, 49 Ind. 538; People *v.* Krank, 110 N. Y. 488, 18 N. E. 242.

67. State *v.* Corll, 73 Ind. 535.

68. State *v.* Rairorf, 64 N. J. L. 412, 45 Atl. 786.

69. *Florida.*— Dansey *v.* State, 23 Fla. 316, 2 So. 692; Frese *v.* State, 23 Fla. 267, 2 So. 1.

Missouri.— Kansas *v.* Muhlback, 68 Mo. 638.

Ohio.— Ohio *v.* Shanks, Tapp. 13.

South Carolina.— State *v.* Cassety, 1 Rich. 90; State *v.* Glasgow, Dudley 40.

Vermont.— State *v.* Paddock, 24 Vt. 312; State *v.* Bugbee, 22 Vt. 32.

raise fruit and manufacture wine or cider on their own property;[70] and sometimes also brewers and distillers selling their own products, with the usual restriction that their sales may only be made "on the premises" or "at the place of manufacture."[71]

(c) *Sales by Druggists and Physicians.* A general license law applicable to all persons alike requires a druggist or physician to take out a license before he may lawfully sell or dispense intoxicating liquors, even for the special purposes of his business.[72] But the statutes commonly make exceptions or special provisions[73] in favor of druggists or pharmacists,[74] or provide for them a special form of license or permit,[75] authorizing them to sell certain kinds or classes of liquors[76]

Virginia.— Lewis *v.* Com., 90 Va. 843, 20 S. E. 777.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 164.

70. See the statutes of the different states. And see Koban *v.* State, 72 Ark. 407, 81 S. W. 235; State *v.* Jaeger, 63 Mo. 403; State *v.* Miller, 104 Mo. App. 297, 78 S. W. 643; State *v.* Nash, 97 N. C. 514, 2 S. E. 645. *Compare* Hewitt *v.* People, 87 Ill. App. 367 [*affirmed* in 186 Ill. 336, 57 N. E. 1077]; St. Paul *v.* Troyer, 3 Minn. 291; Michels *v.* State, 115 Wis. 43, 90 N. W. 1096.

"Grapes or berries."— Where the statute allows the sale of wine made from "grapes or berries" grown by the seller, this does not include wine made from peaches or from wild berries not grown on his premises. Galloway *v.* State, 60 Ark. 362, 30 S. W. 349.

Native wines.— A statute authorizing the sale without license of "native wine or cider manufactured in this commonwealth" means wine made in the commonwealth, and does not include wine made in any other state of the Union. Com. *v.* Petranich, 183 Mass. 217, 66 N. E. 807.

Cider see Hewitt *v.* People, 186 Ill. 336, 57 N. E. 1077; Current *v.* Com., 1 A. K. Marsh. (Ky.) 121; Com. *v.* Boyden, 183 Mass. 1, 66 N. E. 202; Com. *v.* Mahoney, 152 Mass. 493, 25 N. E. 833.

Who is manufacturer.— A person who takes raw wine and puts it through a process which clarifies and refines it, by adding an ingredient thereto, is a manufacturer of wine within the meaning of a statute on that subject. State *v.* Bohnenkamp, 88 Mo. App. 172.

Sale by agents.— A producer or manufacturer who has the right, under these statutes, to sell his own products without a license, may make his sales by an agent acting as such in good faith. Jeffries *v.* State, 52 Ark. 420, 12 S. W. 1015; State *v.* Hart, 107 N. C. 796, 12 S. E. 378.

71. *Arkansas.*— Hubman *v.* State, 61 Ark. 482, 33 S. W. 843. And see Jeffries *v.* State, 52 Ark. 420, 12 S. W. 1015.

Kentucky.— Creekmore *v.* Com., 12 S. W. 628, 11 Ky. L. Rep. 566.

Missouri.— State *v.* Wyl, 55 Mo. 67; State *v.* Heard, 64 Mo. App. 334; Rich Hill *v.* Coleman, 63 Mo. App. 615.

North Carolina.— State *v.* Hazell, 100 N. C. 471, 6 S. E. 404; State *v.* Wallace, 94 N. C. 827.

Wisconsin.— Peitz *v.* State, 68 Wis. 538, 32 N. W. 763. And see Joseph Schlitz Brewing Co. *v.* Superior, 117 Wis. 297, 93 N. W. 1120.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 166.

72. State *v.* Gray, 61 Conn. 39, 22 Atl. 675; State *v.* Bissell, 67 Iowa 616, 25 N. W. 831; Brown *v.* State, 9 Nebr. 189, 2 N. W. 214.

73. See Jones *v.* State, 68 Ala. 559; Com. *v.* Fowler, 98 Ky. 648, 34 S. W. 21, 17 Ky. L. Rep. 1209; Stormes *v.* Com., (Ky. 1898) 47 S. W. 262; People *v.* Beach, 93 Mich. 25, 52 N. W. 1035.

74. Who are druggists.— It is not necessary for a druggist or apothecary to manufacture or compound medicines to constitute him a druggist within the meaning of such a statute. Hainline *v.* Com., 13 Bush (Ky.) 350. *Compare* State *v.* Chandler, 15 Vt. 425, in which it is held that the keeping and selling by a retailer of some of the articles used by apothecaries does not constitute him an apothecary, within the meaning of the law, but there must be combined therewith skill in the preparation of medicines.

Merchants as druggists see State *v.* Steele, 84 Mo. App. 316; State *v.* Goff, 66 Mo. App. 491.

"Registered pharmacist" see State *v.* Kampmann, 81 Mo. App. 205; State *v.* Workman, 75 Mo. App. 454; State *v.* Randall, 73 Mo. App. 463; State *v.* Feagan, 70 Mo. App. 406; State *v.* Suess, 20 Mo. App. 423.

75. See State *v.* Gray, 61 Conn. 39, 22 Atl. 675; Powell *v.* Com., 66 S. W. 818, 23 Ky. L. Rep. 2167; Com. *v.* Pierce, 147 Mass. 161, 16 N. E. 705; Watson *v.* State, 42 Tex. Cr. 13, 57 S. W. 101.

When clerk or assistant to pharmacist is protected by his employer's permit or license see Gault *v.* State, 34 Ga. 533; State *v.* Mullenhoff, 74 Iowa 271, 37 N. W. 329; State *v.* Gibson, 61 Mo. App. 368, opinion of the court by Bond, J.

76. Vardeman *v.* State, 108 Ga. 774, 33 S. E. 643 (holding that a statute authorizing druggists to sell "pure alcohol" for medicinal purposes does not legalize a sale of rye whisky in a county where local option is in force); Hurdland *v.* Hardy, 74 Mo. App. 614.

"Spirituous liquors or wine," as these terms are used in a statute regulating sales by druggists, do not include beer. State *v.*

for medical and mechanical purposes,[77] or on the prescription of a physician.[78] An unlawful sale, beyond the scope, purpose, or permission of the druggist's license, should be prosecuted under the special statute applicable to such licenses, and not under the general law prohibiting unlicensed selling.[79] In order to hold a physician liable for a violation of the local option law, there must be an illegal sale, brought about by virtue of his act; and merely giving a prescription will not justify a conviction.[80]

(D) *Sales Not Authorized by License.* A license for the sale of liquor cannot protect the holder from criminal prosecution if he makes sales at times or places, or to persons, or for purposes, prohibited by the express terms of his license or by the general laws of the state or applicable municipal ordinances.[81]

(III) *Sale or Keeping Open at Prohibited Times*—(A) *In General.* In many of the states it is made a criminal offense to "keep open" a bar-room or saloon on certain days or after certain hours.[82] While the laws also commonly prohibit the sale of liquor at such times, the sale and the keeping open for sale are entirely distinct and independent offenses,[83] so that no actual sale of liquor is necessary to complete the offense of keeping open, and on an indictment for the latter offense, it need not be alleged or proved that defendant sold any liquor.[84]

Thompson, 20 W. Va. 674. And see *supra*, I, B.

77. *Colorado.*— Prowitt *v.* Denver, 11 Colo. App. 70, 52 Pac. 286.

Pennsylvania.— Com. *v.* Porter, 10 Phila. 217.

South Dakota.— State *v.* Dunning, 14 S. D. 316, 85 N. W. 589.

Tennessee.— Druggist Cases, 85 Tenn. 449, 3 S. W. 490.

West Virginia.— State *v.* Cox, 23 W. Va. 797.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 167.

78. State *v.* Manning, 107 Mo. App. 51, 81 S. W. 223; State *v.* Davis, 76 Mo. App. 586; State *v.* Carnaham, 63 Mo. App. 244; State *v.* Atkinson, 33 S. C. 100, 11 S. E. 693.

Recording prescription see Sarrls *v.* Com., 83 Ky. 327.

Canceling prescription see Snead *v.* State, 40 Tex. Cr. 262, 49 S. W. 595.

79. Rhoads *v.* Com., (Pa. 1886) 6 Atl. 245.

In Missouri a druggist is not amenable to the dram-shop law, but to the law governing sales of intoxicating liquors by druggists. State *v.* Witty, 74 Mo. App. 550; State *v.* Alexander, 73 Mo. App. 605; State *v.* Goff, 70 Mo. App. 295; State *v.* Williams, 69 Mo. App. 284; State *v.* Coday, 69 Mo. App. 70; State *v.* McAnally, 66 Mo. App. 329.

80. Williams *v.* State, (Tex. Cr. App. 1903) 77 S. W. 783.

81. *Georgia.*— Rooney *v.* Augusta, 117 Ga. 709, 45 S. E. 72; Gantt *v.* State, 34 Ga. 533.

Indiana.— State *v.* Hamilton, 75 Ind. 238.

Iowa.— State *v.* Kriechbaum, 81 Iowa 633, 47 N. W. 872; Pearson *v.* International Distillery, 72 Iowa 348, 34 N. W. 1.

Massachusetts.— Com. *v.* Banks, 156 Mass. 233, 30 N. E. 1014; Com. *v.* Murray, 138 Mass. 508; Com. *v.* Tabor, 138 Mass. 496.

New Hampshire.— Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376; State *v.* Perkins, 26 N. H. 9.

New York.— Matter of Cullinan, 41 Misc. 3, 83 N. Y. Suppl. 581.

Oklahoma.—Ruemmeli *v.* Cravens, 13 Okla. 842, 74 Pac. 908.

Pennsylvania.— *In re* Washington County Licenses, 6 Pa. Co. Ct. 377.

Vermont.— State *v.* Scampini, 77 Vt. 92, 59 Atl. 201; State *v.* Parks, 29 Vt. 70.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 168.

Prohibited liquors.— One who has a license merely to sell beer is as fully liable for a sale of spirits or wine as though he had no license at all. Gersteman *v.* State, 35 Tex. Cr. 318, 33 S. W. 357.

82. See the statutes of the different states.

Continuing offense.— A statute of this character contemplates but a single offense, whether the saloon is opened once or many times during the same day. People *v.* Cox, 70 Mich. 247, 38 N. W. 235.

In Connecticut a statute forbids the keeping open, on certain days, of any place where intoxicating liquors are "reputed" to be sold. See State *v.* Ryan, 50 Conn. 411; State *v.* Cady, 47 Conn. 44; State *v.* Barr, 39 Conn. 40.

83. State *v.* Ambs, 20 Mo. 214; People *v.* Chase, 41 N. Y. App. Div. 12, 58 N. Y. Suppl. 292; Weaver *v.* Mount Vernon, 6 Ohio S. & C. Pl. Dec. 436, 7 Ohio N. P. 374; Hudson *v.* Geary, 4 R. I. 485.

84. *District of Columbia.*— Sullivan *v.* District of Columbia, 20 App. Cas. 29; Lehman *v.* District of Columbia, 19 App. Cas. 217.

Georgia.— Williams *v.* State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; Hall *v.* State, 3 Ga. 18.

Illinois.— Baldwin *v.* Chicago, 68 Ill. 418; Koop *v.* People, 47 Ill. 327. *Compare* Weidman *v.* People, 7 Ill. App. 38.

Ohio.— State *v.* Heibel, 54 Ohio St. 321, 43 N. E. 328.

Washington.— State *v.* Binnard, 21 Wash. 349, 58 Pac. 210.

(B) *What Is "Keeping Open."* To constitute this offense, it is not necessary that the place should be kept open in the same manner as on ordinary and lawful days. It is enough if it is so kept that access may be had thereto on the prohibited day, and facilities afforded for obtaining liquor, and it is not material whether the access is by a front door, side door, or back door, or whether the door is kept open or is only opened on application for admittance.[85] In some states the law takes no regard of the purpose for which the place was opened, it being held that the criminality of the act is not obviated by the fact that the purpose was innocent and harmless.[86] But in others it is considered that there is no violation of the law if there was imperative necessity for opening the place, and the purpose of doing so did not contemplate any unlawful act.[87] It is also a rule that, although the bar-room or saloon itself may not be open to the public, yet if other rooms in the house, connected with the bar-room, and habitually or occasionally used for drinking purposes, are accessible to persons desiring liquor, such rooms are regarded as a part of the saloon, and while they are open the saloon is not closed as the law requires.[88]

(C) *Sundays.* The sale of liquor on Sunday may be punishable as an offense against the general Sunday law prohibiting the prosecution of business on that day.[89] But in many jurisdictions such sales are expressly forbidden by

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 158.

Compare Lincolnton *v.* McCarter, 44 N. C. 429.

85. *Colorado.*— Harris *v.* People, 21 Colo. 95, 39 Pac. 1084.

Illinois.— Kroer *v.* People, 78 Ill. 294.

Indiana.— State *v.* Mathis, (App. 1898) 50 N. E. 398.

Michigan.— People *v.* Crowley, 90 Mich. 366, 51 N. W. 517; People *v.* Beller, 73 Mich. 640, 41 N. W. 827; People *v.* Cummerford, 58 Mich. 328, 25 N. W. 203.

Ohio.— Munzebrock *v.* State, 10 Ohio Dec. (Reprint) 277, 29 Cinc. L. Bul. 388.

Virginia.— Morganstern *v.* Com., 94 Va. 787, 26 S. E. 402.

Merely opening the door of a saloon on Sunday or another prohibited day does not in some states constitute the statutory offense, if no drinking is permitted or intended. Patten *v.* Centralia, 47 Ill. 370; Weidman *v.* People, 7 Ill. App. 38; Munzebrock *v.* State, 10 Ohio Dec. (Reprint) 277, 29 Cinc. L. Bul. 389.

86. *Georgia.*— Monses *v.* State, 78 Ga. 110; Klug *v.* State, 77 Ga. 734; Hall *v.* State, 3 Ga. 18.

Iowa.— Rosenthal *v.* Hobson, (1898) 77 N. W. 488.

Michigan.— People *v.* Talbot, 120 Mich. 486, 79 N. W. 688; People *v.* Taylor, 110 Mich. 491, 68 N. W. 303; People *v.* Waldvogel, 49 Mich. 337, 13 N. W. 620, holding that it is a violation of the law to open the saloon on Sunday for the purpose of cleaning up the premises, although no liquor is then sold.

Tennessee.— McKinney *v.* Nashville, 96 Tenn. 79, 33 S. W. 724. And see Martin *v.* State, 112 Tenn. 582, 79 S. W. 131. But see Blalock *v.* State, 108 Tenn. 185, 65 S. W. 398, holding that it is not an offense under the statute if the proprietor of a saloon admits persons to his place for the purpose of extinguishing a fire; nor is it unlawful for him to admit persons to his restaurant, separated from the saloon by a locked door, when they go there for the purpose of getting something to eat.

Texas.— Croell *v.* State, 25 Tex. App. 596, 8 S. W. 816. And see Knox *v.* State, (Cr. App. 1903) 77 S. W. 13.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 158.

87. Lehman *v.* District of Columbia, 19 App. Cas. (D. C.) 217; Hannan *v.* District of Columbia, 12 App. Cas. (D. C.) 265; Purefoy *v.* People, 65 Ill. App. 167; Miller *v.* State, 68 Miss. 533, 9 So. 289, holding that the opening of a bar-room on Sunday, not for the purpose of dispensing liquor, but in response to the knock of an officer, to allow him to search for a person, although a crowd follows him into the bar, is not a violation of the statute.

88. *District of Columbia.*— Sullivan *v.* District of Columbia, 20 App. Cas. 29.

Georgia.— Harmon *v.* State, 92 Ga. 455, 17 S. E. 666; Hussey *v.* State, 69 Ga. 54; Harvey *v.* State, 65 Ga. 568.

Michigan.— People *v.* Schottey, 116 Mich. 1, 74 N. W. 209; People *v.* Koob, 109 Mich. 358, 67 N. W. 320; People *v.* Whipple, 108 Mich. 587, 66 N. W. 490; People *v.* Hughes, 97 Mich. 543, 56 N. W. 942; People *v.* Ringsted, 90 Mich. 371, 51 N. W. 519; People *v.* Hughes, 90 Mich. 368, 51 N. W. 518; People *v.* Cox, 70 Mich. 247, 38 N. W. 235; People *v.* Higgins, 56 Mich. 159, 22 N. W. 309.

Mississippi.— Elkin *v.* State, 63 Miss. 129.

Ohio.— Lederer *v.* State, 5 Ohio Cir. Ct. 623, 3 Ohio Cir. Dec. 303.

89. Vogleson *v.* State, 9 Ind. 112. And see State *v.* Heard, 107 La. 60, 31 So. 384. *Compare* Com. *v.* Naylor, 34 Pa. St. 86. See SUNDAY.

In Missouri it was formerly the rule that the sale or giving away of intoxicating

statute.[90] The laws prohibiting such sales are generally applicable to all persons alike, although sometimes directed primarily against dealers in liquors.[91] The duration of the closed period is generally understood to be from midnight to midnight.[92] The quantity sold is immaterial,[93] as is also the particular kind of liquor sold.[94] To a prosecution for selling liquor on Sunday, it is no defense that the accused held a proper license for the sale of liquor; the statute prohibiting the traffic on that day, it is punishable as if there were no license.[95] Exceptions are generally made by the statute so as to allow the keepers of hotels and boarding-houses to supply liquor to their *bona fide* guests, on Sunday, with and as a part of their meals.[96]

liquors on Sunday was not an indictable offense, unless it was shown that the acts were done for the accommodation of customers and were a continuation of the usual occupation of the week. State *v.* Burnett, 77 Mo. 570; State *v.* Huffschmidt, 47 Mo. 73; State *v.* Crabtree, 27 Mo. 232. But now it is held that prosecuting one's regular business on Sunday, and selling liquor on Sunday, are distinct offenses, and in a prosecution for selling on Sunday it is not necessary to prove that the sale was made in pursuance of the regular business of the seller. State *v.* Bearden, 94 Mo. App. 134, 67 S. W. 973; State *v.* Lucas, 94 Mo. App. 117, 67 S. W. 971.

90. See the statutes of the different states. And see Atkinson *v.* State, 33 Ind. App. 8, 70 N. E. 560; *In re* Cullinan, 93 N. Y. App. Div. 427, 87 N. Y. Suppl. 660 [*affirming* 41 Misc. 3, 83 N. Y. Suppl. 581]; *In re* Cullinan, 86 N. Y. Suppl. 1046.

Delivery on Sunday.— Where a saloon-keeper sells beer on Saturday, with an agreement to keep it on ice for the purchaser until Sunday, and then on Sunday hands it out to him through a broken glass in the door it is a violation of the Sunday liquor law. Wallis *v.* State, (Tex. Cr. App. 1904) 78 S. W. 231.

Religious belief as defense.— It is no defense to a prosecution under a statute against selling liquor on Sunday that defendant was a Jew, and conscientiously believed that the seventh day of the week ought to be observed as the Sabbath. Com. *v.* Hyneman, 101 Mass. 30.

Exposing for sale.— An ordinance providing that no licensed tavern-keeper shall expose for sale intoxicating liquors on Sunday is not violated by merely having liquors exposed at the bar, without some affirmative act offering to make sale of them. Houtsch *v.* Jersey City, 29 N. J. L. 316.

91. See the statutes of the different states.

Tavern-keeper.— Where the law makes it an offense for any "tavern keeper or other person" to sell liquor on Sunday, it is held that the words "other person" mean any person engaged in the business of selling liquor. Jensen *v.* State, 60 Wis. 577, 19 N. W. 374. And where the law provides that "no house keeper shall sell any strong liquor on Sunday," it is held that a tavern-keeper is a housekeeper in the contemplation of the act. State *v.* Fearson, 2 Md. 310.

Licensee.— Where an ordinance makes it an offense to keep open on Sunday "any saloon or place licensed under this ordinance," it is necessary to prove that defendant was a licensed saloon-keeper. Bloomington *v.* Strehle, 47 Ill. 72.

Servant or agent of licensee see Banks *v.* Sullivan, 78 Ill. App. 298; Minden *v.* Silverstein, 36 La. Ann. 912; Moore *v.* State, 64 Nebr. 557, 90 N. W. 553.

Keeper of tippling-house see Thomason *v.* State, 92 Ga. 456, 17 S. E. 858; Hall *v.* State, 3 Ga. 18; Koop *v.* People, 47 Ill. 327.

Druggists see Edwards *v.* State, 121 Ind. 450, 23 N. E. 277; Tilford *v.* State, 109 Ind. 359, 10 N. E. 107; Barton *v.* State, 99 Ind. 89; State *v.* Wool, 86 N. C. 708.

Clubs see Mohrman *v.* State, 105 Ga. 709, 32 S. E. 143, 70 Am. St. Rep. 74, 43 L. R. A. 398; Marmont *v.* State, 48 Ind. 21.

92. See Kroer *v.* People, 78 Ill. 294; Augerhoffer *v.* State, 15 Tex. App. 613.

93. Schlict *v.* State, 31 Ind. 246; State *v.* Eskridge, 1 Swan (Tenn.) 413.

94. State *v.* Baden, 37 Minn. 212, 34 N. W. 24.

95. State *v.* Sodini, 84 Minn. 444, 87 N. W. 1130; State *v.* Ambs, 20 Mo. 214. And see Crabb *v.* State, 47 Fla. 24, 36 So. 169.

Municipal license subject to general law.— Where the grant of power, in a municipal charter, to regulate the traffic in liquor, is expressly made subject to a condition that the power granted shall only be exercised subject to the general law of the state regulating the manner of conducting the business by the licensee, a statute prohibiting the sale of liquor on Sunday is operative in the municipality, and a municipal license is no defense to a prosecution under the statute. Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995.

96. *Connecticut.*— State *v.* Gregory, 47 Conn. 276.

Delaware.— Hall *v.* State, 4 Harr. 132.

District of Columbia.—Lehman *v.* District of Columbia, 19 App. Cas. 217.

Massachusetts.— Com. *v.* Regan, 182 Mass. 22, 64 N. E. 407; Com. *v.* Moore, 145 Mass. 244, 13 N. E. 893; Com. *v.* Molter, 142 Mass. 533, 8 N. E. 428; Com. *v.* Hagan, 140 Mass. 289, 3 N. E. 207.

New York.— Cullinan *v.* O'Connor, 100 N. Y. App. Div. 142, 91 N. Y. Suppl. 628; Matter of Cullinan, 93 N. Y. App. Div. 427, 87 N. Y. Suppl. 660 [*affirming* 41 Misc. 3,

(D) *Holidays.* The statutes quite generally prohibit the sale of liquor on "public" or "legal" holidays.[97] If the particular enactment does not enumerate these days, they must be ascertained by reference to the statutes declaring what days shall be legal holidays for commercial and other purposes.[98]

(E) *Election Days.* In many states it is made a criminal offense to keep open a bar or saloon, or to sell liquor on the day of holding an election,[99] or to give away intoxicants on such days.[1] When the law specifies the prohibited time as the "day" or the "entire day" of an election, it means a day of twenty-four hours, extending from midnight to midnight, and it is not lawful to sell liquor or open the saloon in the evening after the polls have closed.[2]

83 N. Y. Suppl. 581]; Matter of Schuyler, 63 N. Y. App. Div. 206, 71 N. Y. Suppl. 437; *In re* Breslin, 45 Hun 210; Van Zant *v.* People, 2 Park. Cr. 168. *Compare* People *v.* Murphy, 5 Park. Cr. 130.

Pennsylvania.— Com. *v.* Naylor, 34 Pa. St. 86. *Compare* Omit *v.* Com., 21 Pa. St. 426.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 179.

Compare Cooper *v.* State, 88 Ga. 441, 14 S. E. 592; Lederer *v.* State, 5 Ohio Cir. Ct. 623, 3 Ohio Cir. Dec. 303.

97. See the statutes of the different states. And see People *v.* Kriesel, 136 Mich. 80, 98 N. W. 850 (statute includes holidays created after its passage); People *v.* Hobson, 48 Mich. 27, 11 N. W. 771.

Christmas day see Reithmiller *v.* People, 44 Mich. 280, 6 N. W. 667.

Fourth of July see Nelson *v.* State, 17 Ind. App. 403, 46 N. E. 941; People *v.* Thielman, 115 Mich. 66, 72 N. W. 1102, 39 L. R. A. 218; People *v.* Whipple, 108 Mich. 587, 66 N. W. 490.

Labor day see Com. *v.* Francis, 152 Mass. 508, 25 N. E. 836.

Thanksgiving day see People *v.* Ackerman, 80 Mich. 588, 45 N. W. 367.

98. People *v.* Thielman, 115 Mich. 66, 72 N. W. 1102, 39 L. R. A. 218; Reithmiller *v.* People, 44 Mich. 280, 6 N. W. 667. And see Brennan *v.* Roberts, 125 Iowa 615, 101 N. W. 460. But *compare* State *v.* Atkinson, 139 Ind. 426, 39 N. E. 51; Ruge *v.* State, 62 Ind. 388, holding that a statute making a given day a holiday "for all purposes of presenting" bills and notes "for payment and acceptance and giving notice for their dishonor" does not bring it within the act prohibiting liquor selling on "any legal holiday."

99. See the statutes of the different states. And see State *v.* Hirsch, 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170.

"Municipal election." — An election by a city, under a statute authorizing cities to construct water-works is a "municipal election" within the meaning of the statute. State *v.* Kidd, 74 Ind. 554.

A primary election, held by a political party to select candidates for office, is within a statute prohibiting the sale of liquor on the day of "any election." State *v.* Hirsch, 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170.

An election for school director is not within the purview of the statute. Stout *v.* State, 43 Ark. 413.

Ward election.— Under the laws of Pennsylvania, when a special election is being held in one of the wards of a city, the sale of liquor is prohibited in that ward only, and licensed houses in other wards are not required to be closed. *In re* Tenth Ward Election, 5 Pa. Dist. 287; *In re* Liquor Dealers, 19 Pa. Co. Ct. 329. But in Indiana a contrary rule is in force. Qualter *v.* State, 120 Ind. 92, 22 N. E. 100.

Meaning of "state election" see Rose *v.* State, 107 Ga. 697, 33 S. E. 439.

Void election.— If a municipal election was absolutely void, because there was no authority to hold it, a person who kept his saloon open or sold liquor on the day on which it was held is not liable to punishment. Reuter *v.* State, 43 Tex. Cr. 572, 67 S. W. 505. But it is otherwise where the only irregularity in the election was that it was held on a wrong date, in consequence of a misconstruction of the law by the officers. Wear *v.* State, 35 Tex. Cr. 30, 26 S. W. 68, 29 S. W. 1082.

"Liquor shop." — Under a statute forbidding the keeping open of a liquor shop on election day, any house where liquor is kept and sold is included in the prohibition, notwithstanding other articles may be sold in the same shop or through its primary use may be as a dwelling-house. Wooster *v.* State, 6 Baxt. (Tenn.) 533.

In Connecticut, where the law forbids the keeping open on election day of any place where intoxicating liquors are "reputed" to be sold, the reputation applies to any time, and to sales lawfully made under a license. State *v.* Cady, 47 Conn. 44.

1. Wolf *v.* State, 59 Ark. 297, 27 S. W. 77, 43 Am. St. Rep. 34 (holding that under such a provision it is no defense that the giving of the liquor had no reference to the election and was not intended to influence votes); State *v.* Edwards, 134 N. C. 636, 46 S. E. 766 (license no defense); Keith *v.* State, 38 Tex. Cr. 678, 44 S. W. 847.

In Maryland it has been held that the giving of liquor in one's own house on the day of an election, to a friend, in the way of hospitality, is a violation of the statute. Cearfoss *v.* State, 42 Md. 403.

2. *Georgia.*— Rose *v.* State, 107 Ga. 697, 33 S. E. 439.

(F) *Certain Hours.* Statutes[3] and municipal ordinances usually make it an offense to sell intoxicating liquors,[4] or to keep open a place used for such sale,[5] during certain designated hours, sometimes making an exception in favor of hotels.[6]

(IV) *Sales to Prohibited Persons*—(A) *In General.* Under the statutes[7] punishing the sale of liquor to persons who are peculiarly liable to be injured or demoralized by its use,[8] it is generally held that it is incumbent on the seller to know that his customer is under no disability, and he cannot defend on the ground of his ignorance of the fact that the purchaser was one of a class to whom it is forbidden to sell.[9]

(B) *Minors*—(1) In General. By the provisions of the statutes in many states it is made an indictable offense,[10] for any person, whether a licensed dealer or not,[11] and whether acting in his own person or by a servant or agent,[12] to sell,[13]

Kentucky.— Com. *v.* Murphy, 95 Ky. 38, 23 S. W. 655, 15 Ky. L. Rep. 411.

Ohio.— Schuck *v.* State, 50 Ohio St. 493, 34 N. E. 663.

Pennsylvania.— Kane *v.* Com., 89 Pa. St. 522, 33 Am. Rep. 787; Com. *v.* Rogers, 1 Del. Co. 517.

Texas.— Jones *v.* State, 32 Tex. Cr. 533, 25 S. W. 124; Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815; Lawrence *v.* State, 7 Tex. App. 192; English *v.* State, 7 Tex. App. 171; Haines *v.* State, 7 Tex. App. 30.

In Tennessee, under a statute defining "election day" to be from sunrise to sunset, a person selling liquor after sunset on the day of an election is not guilty of the statutory offense. Wooster *v.* State, 6 Baxt. 533.

3. See the statutes of the different states.

4. See *Ex p.* Roach, 104 Cal. 272, 37 Pac. 1044.

5. McCarty *v.* Atlanta, 121 Ga. 365, 49 S. E. 287; Baldwin *v.* Chicago, 68 Ill. 418; People *v.* James, 100 Mich. 522, 59 N. W. 236; Jeffrey *v.* Weaver, [1899] 2 Q. B. 449, 63 J. P. 663, 68 L. J. Q. B. 817, 81 L. T. Rep. N. S. 193, 47 Wkly. Rep. 638; Lloyd *v.* Barnett, 64 J. P. 708, 82 L. T. Rep. N. S. 804.

What constitutes.— A person engaged in business in a building in which a saloon was located entered the saloon during prohibited hours to remove a defect in a water-pipe, and prevent water from escaping into the basement. After being in, he, without request, swept out the saloon, and then remained talking with the barkeeper a few minutes. It was held that the barkeeper, in permitting him to remain in the saloon after the time required to repair the water-pipe, was keeping the saloon open contrary to law. People *v.* Lundell, 136 Mich. 303, 99 N. W. 12.

6. State *v.* Eckert, 74 Minn. 385, 77 N. W. 294.

A licensed vendor cannot keep open during the prohibited hours, and sell liquor in connection with meals furnished to the participants in a ball, although it has long been the custom to do so. *In re* Whitney, 142 N. Y. 531, 37 N. E. 621.

7. See the statutes of the different states.

As to the constitutionality of such statutes see *supra*, IV, E, 2, c.

8. See State *v.* Gutekunst, 24 Kan. 252; State *v.* Hyde, 27 Minn. 153, 6 N. W. 555.

9. Ulrich *v.* Com., 6 Bush (Ky.) 400; Com. *v.* Barnes, 138 Mass. 571; Com. *v.* Uhrig, 138 Mass. 492; State *v.* Hartfiel, 24 Wis. 60. And see *infra*, IX, A, 3, n, (IV), (B), (2). See, however, Sherras *v.* De Rutzen, [1895] 1 Q. B. 918, 59 J. P. 440, 64 L. J. M. C. 218, 72 L. T. Rep. N. S. 839, 15 Reports 388, 43 Wkly. Rep. 526, holding that under a law forbidding the furnishing of liquor to a constable while on duty, it must be shown that the seller knew that the constable was on duty.

10. See State *v.* Amor, 77 Mo. 568; State *v.* Slaughter, 17 Mo. App. 142.

The ownership of the liquor sold or given to a minor is immaterial; it is the voluntary delivery of the liquor into the possession of a minor that the law denounces and punishes. Hill *v.* State, 62 Ala. 168.

11. *Indiana.*— State *v.* Hamilton, 75 Ind. 238.

Iowa.— Cobleigh *v.* McBride, 45 Iowa 116.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Minnesota.— State *v.* McGinnis, 30 Minn. 48, 14 N. W. 256.

Pennsylvania.— Com. *v.* Terry, 15 Pa. Super. Ct. 608.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 171.

But *compare* People *v.* Bird, (Mich. 1904) 100 N. W. 1003, 67 L. R. A. 424; State *v.* Whitter, 18 W. Va. 306.

Sale by minor to minor.— It is unlawful for one minor to furnish liquor to another minor. Com. *v.* Kirby, 12 Pa. Co. Ct. 175.

Sale by druggists and physicians see State *v.* Thompson, 73 Iowa 282, 34 N. W. 857; State *v.* Douglass, 73 Iowa 279, 34 N. W. 856; State *v.* McBrayer, 98 N. C. 619, 2 S. E. 755.

12. Maier *v.* State, 2 Tex. Civ. App. 296, 21 S. W. 974. And see *infra*, IX, A, 4 f, (IV), (H).

13. Ward *v.* State, 45 Ark. 351; Siegel *v.* People, 106 Ill. 89; Com. *v.* Murphy, 155 Mass. 284, 29 N. E. 469. And see Parker *v.* State, (Tex. Cr. App. 1905) 84 S. W. 822.

Where it is made an offense to "sell or give" liquor to a minor, it is immaterial whether the transaction constituted in law a sale or a gift. Hamer *v.* Eldridge, 171 Mass. 250, 50 N. E. 611.

Barter or loan.— Neither selling nor giving is included in a case where the transac-

give,[14] or furnish[15] any intoxicating liquor to a minor.[16] And such prohibited act may be prosecuted as a separate offense, although it constitutes also an indictable offense against the laws forbidding sales on Sunday or sales without a license, or the like.[17]

(2) INTENT, KNOWLEDGE, OR GOOD FAITH OF SELLER. Where the statute defines the offense as "knowingly" selling intoxicating liquor to a minor, the knowledge of the seller is an essential element of the offense and must be proved, his knowledge including such facts as he could have ascertained by the exercise of proper prudence and diligence.[18] If the statute does not expressly make the knowledge of the purchaser's minority a part of the offense, it is held in several of the states that the seller is not guilty if he made the sale in good faith, after exercising due caution and diligence, and in the reasonable and honest belief that the purchaser was an adult, although he was in fact a minor.[19] But in other states it is held that the seller of liquor is bound to determine for himself, at his peril, whether or not the purchaser is a minor, and if he sells to one who is in fact under age, he is criminally liable, although he was actually ignorant of the fact, and although he honestly believed that the purchaser was of full age.[20]

tion is shown to have been a barter or loan. Coker *v.* State, 91 Ala. 92, 8 So. 874; Gillan *v.* State, 47 Ark. 555, 2 S. W. 185; Cooper *v.* State, 37 Ark. 412.

14. Miller *v.* State, 55 Ark. 188, 17 S. W. 719; Blodgett *v.* State, 97 Ga. 351, 23 S. E. 830; Simons *v.* State, 25 Ind. 331.

15. Com. *v.* Herman, 4 Pa. Dist. 412.

16. Coker *v.* State, 91 Ala. 92, 8 So. 874 (holding that a minor whose civil disabilities as such have been removed by a decree in chancery, is still a minor within the meaning of the statute prohibiting sales of intoxicating liquors); Boatright *v.* State, 77 Ga. 717 (holding that the fact that his father was in the habit of sending the minor to defendant's place for liquor would constitute no defense to a prosecution for other sales made to the minor on his own account).

That a minor is carrying on business for himself is no defense to a prosecution for selling liquor to him. Pounders *v.* State, 37 Ark. 399. But *compare* Brosee *v.* State, 5 Ind. 75, where it is held that a sale at wholesale to a minor who is engaged in business as a merchant would not be within the meaning or intent of the statute.

17. Blair *v.* State, 81 Ga. 629, 7 S. E. 855; McNeil *v.* Collinson, 130 Mass. 167.

18. Loeffler *v.* District of Columbia, 15 App. Cas. (D. C.) 329; Gray *v.* State, 44 Tex. Cr. 470, 72 S. W. 169; Fielding *v.* State, (Tex. Cr. App. 1899) 52 S. W. 69; Henderson *v.* State, (Tex. Cr. App. 1897) 38 S. W. 618; Wakefield *v.* State, (Tex. Cr. App. 1894) 28 S. W. 470; Jones *v.* State, 32 Tex. Cr. 110, 22 S. W. 149; Garner *v.* State, 28 Tex. App. 561, 13 S. W. 1004; Walker *v.* State, 25 Tex. App. 448, 8 S. W. 644; Koblenschlag *v.* State, 23 Tex. App. 264, 4 S. W. 888; Williams *v.* State, 23 Tex. App. 70, 3 S. W. 661; Hunter *v.* State, 18 Tex. App. 444, 51 Am. Rep. 319; Carson *v.* Devault, 12 Montreal Leg. N. 20.

What constitutes due diligence see McGuire *v.* State, (Tex. 1891) 15 S. W. 917; Pressler *v.* State, 13 Tex. App. 95.

19. *Alabama.*— Hill *v.* State, 62 Ala. 168; Bain *v.* State, 61 Ala. 75; Adler *v.* State, 55 Ala. 16; Marshall *v.* State, 49 Ala. 21.

Georgia.— Harkey *v.* State, 89 Ga. 478, 15 S. E. 552; Reich *v.* State, 63 Ga. 616.

Indiana.— Ross *v.* State, 116 Ind. 495, 19 N. E. 451; Behler *v.* State, 112 Ind. 140, 13 N. E. 272; Mulreed *v.* State, 107 Ind. 62, 7 N. E. 884; Kreamer *v.* State, 106 Ind. 192, 6 N. E. 341; Hunter *v.* State, 101 Ind. 241; Swigart *v.* State, 99 Ind. 117; Holmes *v.* State, 88 Ind. 145; Payne *v.* State, 74 Ind. 203; Robinius *v.* State, 63 Ind. 235; Ball *v.* State, 50 Ind. 595; Goetz *v.* State, 41 Ind. 162; Brown *v.* State, 24 Ind. 113; Rineman *v.* State, 24 Ind. 80; Farbach *v.* State, 24 Ind. 77; State *v.* Kalb, 14 Ind. 403.

Michigan.— People *v.* Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385; Faulks *v.* People, 39 Mich. 200, 33 Am. Rep. 374. *Compare* People *v.* Curtis, 129 Mich. 1, 87 N. W. 1040, 95 Am. St. Rep. 404; People *v.* Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270.

Ohio.— Aultfather *v.* State, 4 Ohio St. 467; Miller *v.* State, 3 Ohio St. 475.

South Dakota.— State *v.* Sanford, 15 S. D. 153, 87 N. W. 592; State *v.* Bradley, 15 S. D. 148, 87 N. W. 590. *Compare* State *v.* Sasse, 6 S. D. 212, 60 N. W. 853, 55 Am. St. Rep. 834.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 172.

20. *Arkansas.*— Pounders *v.* State, 37 Ark. 399; Edgar *v.* State, 37 Ark. 219; Crampton *v.* State, 37 Ark. 108; Redmond *v.* State, 36 Ark. 58, 38 Am. Rep. 24.

Connecticut.— State *v.* Kinkead, 57 Conn. 173, 17 Atl. 855.

Illinois.— Farmer *v.* People, 77 Ill. 322; McCutcheon *v.* People, 69 Ill. 601; Flynn *v.* Galesburg, 12 Ill. App. 200.

Iowa.— McCoy *v.* Clark, (1899) 81 N. W. 159; Harlan *v.* Richmond, 108 Iowa 161, 78 N. W. 809; Fielding *v.* La Grange, 104 Iowa 530, 73 N. W. 1038; State *v.* Thompson, 74 Iowa 119, 37 N. W. 104; Jamison *v.* Burton, 43 Iowa 282.

Kentucky.— Ulrich *v.* Com., 6 Bush 400.

(3) Consent of Parent or Guardian. In the absence of a statute changing the general rule, it is no defense to a prosecution for selling liquor to a minor that his parent or guardian authorized or consented to the sale.[21] But in several states such sale is permitted on the written authorization of the parent or guardian, under special statutes to that effect.[22] For this purpose, however, a mere oral consent is not sufficient,[23] nor one which is general and unlimited as to time or quantity.[24] With such authorization the dealer may make any sale to a minor which comes within the terms of the permission and would otherwise be lawful;[25] without it he is not justified in selling to the minor for any purpose whatever,[26] and it makes no difference that the minor had neither parent nor guardian who could give the required consent.[27]

(4) Delivery to Minor as Agent for Another. Where a minor purchases liquor, not for his own consumption, but for the use of an adult, as whose agent or messenger he is acting, and to whom the sale might lawfully be made, the seller must inform himself of the fact of the minor's agency. If he ascertains this fact by inquiry, by the presentation of a written order, or by other sources of information, and the fact is as alleged, he sells to the adult, and is not guilty of selling to the minor.[28] But if the principal is not disclosed, so that, for all the seller

Massachusetts.— Com. *v.* Barnes, 138 Mass. 511; Com. *v.* Uhrig, 138 Mass. 492.

Mississippi.— Under a statute making it an offense to procure liquor for a minor, unless the person be the minor's parent or guardian, knowledge that the one for whom the liquor is procured is a minor is not necessary to the offense. Jenkins *v.* State, 82 Miss. 500, 34 So. 217.

Missouri.— State *v.* Bruder, 35 Mo. App. 475.

New York.— People *v.* Werner, 174 N. Y. 132, 66 N. E. 667. See Perry *v.* Edwards, 44 N. Y. 223.

Oregon.— State *v.* Gulley, 41 Oreg. 318, 70 Pac. 385; State *v.* Chastain, 19 Oreg. 176, 23 Pac. 963.

Pennsylvania.— Com. *v.* Terry, 15 Pa. Super. Ct. 608; *In re* Carlson, 127 Pa. St. 330, 18 Atl. 8.

West Virginia.— State *v.* Baer, 37 W. Va. 1, 16 S. E. 368; State *v.* Gilmore, 9 W. Va. 641; State *v.* Cain, 9 W. Va. 559.

Wisconsin.— State *v.* Hartfiel, 24 Wis. 60.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 172.

21. *Alabama.*— Adler *v.* State, 55 Ala. 16.

Georgia.— Boatright *v.* State, 77 Ga. 717.

Indiana.— State *v.* Clottu, 33 Ind. 409.

Massachusetts.— Com. *v.* Finnegan, 124 Mass. 324.

North Carolina.— State *v.* Lawrence, 97 N. C. 492, 2 S. E. 367.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 173.

22. See the statutes of the different states.

Consent of stepfather sufficient.— Jones *v.* State, 46 Tex. Cr. 517, 81 S. W. 49.

23. Blahut *v.* State, 54 Ark. 538, 16 S. W. 582; Hill *v.* State, 37 Ark. 395; State *v.* Coenan, 48 Iowa 567; Com. *v.* Davis, 12 Bush (Ky.) 240; State *v.* Bruder, 35 Mo. App. 475. But see Randall *v.* State, 14 Ohio St. 435.

24. Dixon *v.* State, 86 Ga. 754, 13 S. E. 87; Gill *v.* State, 86 Ga. 751, 13 S. E. 86, 12 L. R. A. 433; Hamer *v.* People, 104 Ill. App. 555 [*affirmed* in 205 Ill. 570, 68 N. E. 1061]; Connolly *v.* People, 42 Ill. App. 36; Grepel *v.* State, 32 Ohio St. 167. *Contra*, Smith *v.* State, 132 Ala. 38, 31 So. 552; Mascowitz *v.* State, 49 Ark. 170, 4 S. W. 656.

25. Smith *v.* State, 132 Ala. 38, 31 So. 552. *Compare* Supernant *v.* People, 100 Ill. App. 121.

26. Rucker *v.* State, (Tex. Cr. App. 1894) 24 S. W. 902. And see State *v.* Fairfield, 37 Me. 517. *Compare* Atkinson *v.* State, 46 Tex. Cr. 229, 79 S. W. 31, holding that the provision of the local option law that intoxicants may be sold as a medicine in local option territory, in case of actual sickness, is inconsistent with, and to that extent suspends, the law prohibiting sales to minors without the written consent of the parent or guardian.

27. Blair *v.* State, 81 Ga. 629, 7 S. E. 855; Herchenbach *v.* State, 34 Tex. Cr. 122, 29 S. W. 470.

28. *Arkansas.*— Wallace *v.* State, 54 Ark. 542, 16 S. W. 571.

Connecticut.— State *v.* McMahon, 53 Conn. 407, 5 Atl. 596, 55 Am. Rep. 140.

Illinois.— Short *v.* People, 96 Ill. App. 638.

Massachusetts.— O'Connell *v.* O'Leary, 145 Mass. 311, 14 N. E. 143; St. Goddard *v.* Burnham, 124 Mass. 578; Com. *v.* Lattinville, 120 Mass. 385.

Mississippi.— Monaghan *v.* State, 66 Miss. 513, 6 So. 241, 4 L. R. A. 800.

Missouri.— State *v.* McLain, 49 Mo. App. 398.

North Carolina.— State *v.* Walker, 103 N. C. 413, 9 S. E. 582.

Ohio.— Randall *v.* State, 14 Ohio St. 435; Pollard *v.* State, 4 Ohio Dec. (Reprint) 30, Clev. L. Rec. 35.

Texas.— Laing *v.* State, 9 Tex. Civ. App. 136, 28 S. W. 1040. *Compare* Horsky *v.* State, (Cr. App. 1896) 36 S. W. 443.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 174.

knows to the contrary, he is selling to the minor for the latter's own use, he is guilty of the statutory offense, although in fact the minor was only acting as messenger for another.[29]

(5) Purchase by Adult For Use of Minor. Where a minor and an adult go together to a liquor saloon, and the adult "treats" the minor, calling for liquor for both and paying for the whole, the sale is to the adult, and the dealer is not guilty of selling to the minor.[30] But this may constitute a "giving" of liquor to the minor, under statutes prohibiting such gifts, the dealer being considered as participating in the act of the person treating,[31] or a "furnishing" of the liquor.[32] If an adult acts merely as an agent or messenger for a minor, buying liquor for the latter with the latter's own money, the dealer is not indictable if he did not know or suspect that the adult was so acting.[33] But he is guilty if he knew that the minor was the real purchaser.[34] A person who at a minor's request and with his money buys liquor for him and delivers it to him is not guilty of selling to the minor.[35] But such a transaction violates a statute against furnishing liquor to a minor.[36]

When verbal order a protection.— A liquor dealer is not guilty of furnishing liquor to a minor, where the liquor is delivered to him on a verbal order from his parent, to be carried to him, and he actually carries it without consuming or parting with any of it; but if the message is a fabrication, and the minor consumes the liquor, the dealer is guilty, the risk being on him where the minor does not produce a written order. Dixon *v.* State, 89 Ga. 785, 15 S. E. 684.

Necessity of written order.— In some states it is unlawful to deliver liquor to a minor, as the agent or messenger of another, without a written order therefor. See State *v.* Fairfield, 37 Me. 517; Yakel *v.* State, 30 Tex. App. 391, 17 S. W. 943, 20 S. W. 205. See, however, Waldstien *v.* State, 29 Tex. App. 82, 14 S. W. 394.

29. *Arkansas.*— Neely *v.* State, 60 Ark. 66, 28 S. W. 800, 46 Am. St. Rep. 148, 27 L. R. A. 503; Siceluff *v.* State, 52 Ark. 56, 11 S. W. 964.

Indiana.— Holmes *v.* State, 88 Ind. 145; Sumner *v.* State, 4 Ind. App. 403, 30 N. E. 1105.

Massachusetts.— Com. *v.* Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449; Com. *v.* Fowler, 145 Mass. 398, 14 N. E. 457.

Mississippi.— Ritcher *v.* State, 63 Miss. 304.

New York.— Ross *v.* People, 17 Hun 591.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 174.

Where the statute prohibits the sale or delivery of liquor to a minor either for his own use or for the use of any other person, the act of delivering liquor to a minor is equally unlawful whether or not the fact of his acting as agent for another is disclosed. Com. *v.* O'Leary, 143 Mass. 95, 8 N. E. 887; People *v.* Garrett, 68 Mich. 487, 36 N. W. 234.

30. Ward *v.* State, 45 Ark. 351; State *v.* Peo, 1 Pennew. (Del.) 525, 42 Atl. 662; Siegel *v.* People, 106 Ill. 89; Bartman *v.* State, 38 Tex. Cr. 543, 43 S. W. 984.

31. Page *v.* State, 84 Ala. 446, 4 So. 697; Topper *v.* State, 118 Ind. 110, 20 N. E. 699; Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522; Nelson *v.* State, 111 Wis. 394, 87 N. W. 235, 87 Am. St. Rep. 881. *Compare* Kurz *v.* State, 79 Ind. 488.

Liability of person treating.— Irrespective of the liability of the seller, there may be a criminal responsibility on the part of the person who "treats" the minor, if the statute prohibits either the giving or furnishing of liquors to minors. Such a law does not apply to liquor dealers alone, but also to one who buys liquor and furnishes it to the minor. Com. *v.* Davis, 12 Bush (Ky.) 240; Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

32. People *v.* Neumann, 85 Mich. 98, 48 N. W. 290; State *v.* Best, 108 N. C. 747, 12 S. E. 907; State *v.* Munson, 25 Ohio St. 381.

33. Gillan *v.* State, 47 Ark. 555, 2 S. W. 185. *Compare* State *v.* Scoggins, 107 N. C. 859, 12 S. E. 59, 10 L. R. A. 542.

34. Liles *v.* State, 88 Ala. 139, 7 So. 196; Starling *v.* State, 34 Tex. Cr. 295, 30 S. W. 445.

35. Bryant *v.* State, 82 Ala. 51, 2 So. 670; Young *v.* State, 58 Ala. 358; Cox *v.* State, (Miss. 1888) 3 So. 373; Johnson *v.* State, 63 Miss. 228. *Compare* Eagle *v.* State, 87 Ala. 38, 6 So. 300. But see Foster *v.* State, 45 Ark. 361.

Procuring liquor for minor.— Under a statute making it an offense for any one except his parent or guardian to procure liquor for a minor, knowledge that the one for whom it is procured is a minor is not necessary to constitute the offense. Jenkins *v.* State, 82 Miss. 500, 34 So. 217.

Causing sale of liquor to minor.— Where one purchases liquor for a minor, he is guilty of causing liquor to be sold to a minor, although he did not disclose the name of his principal to the seller. Vincent *v.* State, (Tex. Cr. App. 1900) 55 S. W. 819.

36. Burnett *v.* State, 92 Ga. 474, 17 S. E. 858.

(c) *Students.* In some states it is made an offense to sell or furnish liquor to students of any school, academy, or college.[37]

(d) *Slaves.* Statutes were at one time generally in force in the slave-holding states forbidding the sale of liquor to slaves and sometimes to "free persons of color" without the written consent or permission of the owner.[38]

(e) *Habitual Drunkards.* Under the statutes[39] making it an indictable offense for any person[40] to sell or give[41] intoxicating liquors to a habitual drunkard, or a person of known intemperate habits,[42] the intent and purpose of the sale

37. See the statutes of the different states. And see Farrall *v.* State, 32 Ala. 557; State *v.* Richter, 23 Minn. 81.

Seller's knowledge.— To constitute the offense it is not necessary that the seller should know or have reason to believe that the purchaser is a student. Peacock *v.* Limburger, 95 Tex. 258, 66 S. W. 764.

The age of the student is not material; unless the statute expressly applies only to such pupils as are minors, its prohibition is equally effective against sales to those who may have reached their majority. State *v.* Cooper, 35 Mo. App. 532; Daniels *v.* Grayson College, 20 Tex. Civ. App. 562, 50 S. W. 205.

38. See the following cases:

Alabama.— Harrington *v.* State, 36 Ala. 236; Powell *v.* State, 27 Ala. 51; Lodano *v.* State, 25 Ala. 64; Boltze *v.* State, 24 Ala. 89.

Georgia.— Pannell *v.* State, 29 Ga. 681; Reinhart *v.* State, 29 Ga. 522; Hines *v.* State, 26 Ga. 614.

Louisiana.— State *v.* Lyons, 3 La. Ann. 154.

Mississippi.— Murphy *v.* State, 28 Miss. 637.

North Carolina.— Page *v.* Luther, 51 N. C. 413; State *v.* McNair, 46 N. C. 180.

South Carolina.— State *v.* Elrod, 12 Rich. 662; State *v.* Brock, 11 Rich. 447; State *v.* Bierman, 1 Strobh. 256; State *v.* Behrman, Riley 82; State *v.* Evans, 3 Hill 190; State *v.* Schroder, 3 Hill 61.

Tennessee.—Jennings *v.* State, 3 Head 520; Brown *v.* State, 2 Head 180; Pulse *v.* State, 5 Humphr. 108.

Texas.— Smith *v.* State, 24 Tex. 547; Allen *v.* State, 14 Tex. 633.

Virginia.— Johnson *v.* Com., 12 Gratt. 714.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 170.

39. See the statutes of the different states.

40. **It is immaterial whether the seller had a license or not;** the statutes are not confined to licensed dealers, but are applicable to all persons. Fitzenrider *v.* State, 30 Ind. 238; State *v.* McGinnis, 30 Minn. 52, 14 N. W. 258.

One who merely acts as the agent of drunkard, in going to the saloon and procuring liquor for him with his money, does not commit the offense. Young *v.* State, 58 Ala. 358. *Compare* Jenkins *v.* State, 82 Miss. 500, 34 So. 217.

41. Walton *v.* State, 62 Ala. 197 (holding that a bar-keeper who sells liquor to a third person, with knowledge that a man of known intemperate habits is to join in the drinking of it, and permits such intemperate person to drink the liquor at his bar or in his presence, is guilty of the statutory offense); Church *v.* Higham, 44 Iowa 482; Albrecht *v.* People, 78 Ill. 510 (holding that such a statute does not apply to the case of a person who treats a friend to liquor at his private house as an act of hospitality).

Sale after notice.— In some states it is made an offense for a liquor dealer to sell liquor to a person, usually a habitual drunkard, after his relatives have given the dealer written notice not to do so. See the statutes of the different states. And see Dolan *v.* State, 122 Ind. 141, 23 N. E. 761. See Engle *v.* State, 97 Ind. 122; State *v.* Pritchard, 16 S. D. 166, 91 N. W. 583. In North Dakota it is held that the sale of liquor after such a notice is a different offense from selling liquor to a habitual drunkard, so that the former offense may be committed whether or not the person in question is in the habit of becoming intoxicated. State *v.* Donovan, 10 N. D. 203, 86 N. W. 709.

42. **A habitual drunkard** is one who is in the habit of becoming intoxicated, or one who commonly or frequently is drunk, not that he is constantly or universally drunk.

Alabama.— Tatum *v.* State, 63 Ala. 147.

Illinois.— Kammann *v.* People, 124 Ill. 481, 16 N. E. 661; Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335.

Iowa.— Harlan *v.* Richmond, 108 Iowa 161, 78 N. W. 809.

Kansas.— State *v.* Shinn, 63 Kan. 638, 66 Pac. 650.

Massachusetts.— Com. *v.* McNamee, 112 Mass. 285.

Pennsylvania.—Ludwick *v.* Com., 18 Pa. St. 172.

Vermont.— State *v.* Pratt, 34 Vt. 323.

United States.— Northwestern Mut. L. Ins. Co. *v.* Muskegon Nat. Bank, 122 U. S. 501, 7 S. Ct. 1221, 30 L. ed. 1100; Knickerbocker L. Ins. Co. *v.* Foley, 105 U. S. 350, 26 L. ed. 1055.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 177.

A drunkard is one whose habit is to get drunk — one whose ebriety has become habitual. The terms "drunkard," "common drunkard," and "habitual drunkard" all mean the same thing. Com. *v.* Whitney, 5 Gray (Mass.) 85.

Question of fact.— Whether or not a man is a habitual drunkard, or a person of known intemperate habits, is a question of fact for the jury, to be determined upon competent evidence in each particular case. Kammann

are generally immaterial,[43] as is also the quantity of liquor sold.[44] In a prosecution under such statutes, it is necessary to show that the purchaser was in the habit of becoming intoxicated, or was a habitual drunkard, at the time the sale was made,[45] but not that he was drunk at that particular time, as that is not a part of the offense.[46] It is generally held to be unnecessary to constitute the offense that the seller should have knowledge of the buyer's intemperate habits, and that ignorance or mistake of fact in that regard is no defense to the indictment.[47] But in several states it has been decided that defendant must be acquitted if he shows that he was ignorant of the purchaser's habits, and that there were no facts known to him, or discoverable by observation or proper care, to warn him.[48]

(F) *Intoxicated Persons.* Under statutes[49] making it a punishable offense for any person[50] to sell or give[51] intoxicating liquors at retail[52] to a person who is in a state of intoxication at the time,[53] it has been held that is not necessary, to constitute the offense, that the seller should know his customer to be intoxicated at the time, and his ignorance of the purchaser's condition is no defense.[54]

(V) *SALES AT PROHIBITED PLACES*—(A) *In General.* To convict a defendant of the offense of selling liquor at a prohibited place, it must be shown that the place in question was within the territorial jurisdiction of the prosecuting

v. People, 124 Ill. 481, 16 N. E. 661; Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335; Harrison *v.* Ely, 120 Ill. 83, 11 N. E. 334; Murphy *v.* People, 90 Ill. 59; State *v.* Pratt, 34 Vt. 323.

43. Hill *v.* State, 62 Ala. 168; Wolfe *v.* Johnson, 45 Ill. App. 122.

Sale as medicine.— It is unlawful for a saloon-keeper to sell liquor to a person whom he knows to be a habitual drunkard, even though the statement is made by the purchaser that a physician ordered it for sickness in his family. McDonald *v.* Casey, 84 Mich. 505, 47 N. W. 1104.

44. Schmaedeke *v.* People, 63 Ill. App. 662. *Compare* Maxwell *v.* State, 27 Ala. 660; Walker *v.* Com., 75 S. W. 242, 25 Ky. L. Rep. 401.

45. Dolan *v.* State, 122 Ind. 141, 23 N. E. 761; Zeizer *v.* State, 47 Ind. 129.

46. Fountain *v.* Draper, 49 Ind. 441; Fink *v.* Garman, 40 Pa. St. 95.

47. *Connecticut.*— Barnes *v.* State, 19 Conn. 398.

Illinois.— Humpeler *v.* People, 92 Ill. 400; Mapes *v.* People, 69 Ill. 523.

Iowa.— State *v.* Ward, 75 Iowa 637, 36 N. W. 765; Dudley *v.* Sautbine, 49 Iowa 650, 31 Am. Rep. 165.

Minnesota.— State *v.* Heck, 23 Minn. 549.

North Dakota.—State *v.* Donovan, 10 N. D. 203, 86 N. W. 709.

West Virginia.— State *v.* Farr, 34 W. Va. 84, 11 S. E. 737; State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315; State *v.* Cain, 9 W. Va. 559.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 177.

"Known intemperate habits."— In Pennsylvania, where the law forbids the sale of liquor to a person of "known intemperate habits," it is held that the habits must be known to the community, but not necessarily to the seller; that is, although the seller may have no personal knowledge that his customer is a drunkard, the statutory offense is committed if he sells liquor to one who in fact is intemperate in his habits, and who bears that reputation in the neighborhood in which he lives. Com. *v.* Zelt, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602. See Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102.

48. McCormack *v.* State, 133 Ala. 202, 32 So. 268; Williams *v.* State, 48 Ind. 306; Deveny *v.* State, 47 Ind. 208; Allison *v.* State, 47 Ind. 140; Farrell *v.* State, 45 Ind. 371; Com. *v.* McNeff, 145 Mass. 406, 14 N. E. 616; Miller *v.* State, 5 Ohio St. 275.

49. See the statutes of the different states.

50. The prohibition is not confined to licensed dealers, the offense may be committed by any person. Altenburg *v.* Com., 126 Pa. St. 602, 17 Atl. 799, 4 L. R. A. 543.

51. **Sale to agent.**— Where liquor is bought for the use of a drunken man by an agent or messenger authorized by him, the fact of the agency being known to the seller, the sale may be considered as made directly to the principal. Schullherr *v.* State, 68 Miss. 227, 8 So. 328.

Third person "treating."— Where one man "treats" another to liquor when the latter is drunk, the seller may be guilty of the offense of "disposing of" liquor to an intoxicated person, if not of the offense of "selling" to him, although the sober companion paid for it. State *v.* Hubbard, 60 Iowa 466, 15 N. W. 287. And see Scatchard *v.* Johnson, 52 J. P. 389, 57 L. J. M. C. 41.

52. Buell *v.* State, 72 Ind. 523.

53. **Meaning of intoxicated.**— The word "intoxicated" as used in these statutes is to be taken in its ordinary sense, and means intoxicated by the use of alcoholic liquors. State *v.* Kelley, 47 Vt. 294. *Compare* Simpson *v.* State, 93 Ga. 196, 18 S. E. 526.

What amounts to intoxication see State *v.* Pierce, 65 Iowa 85, 21 N. W. 195; Com. *v.* Trimble, 150 Mass. 89, 22 N. E. 439; Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102.

54. Church *v.* Higham, 44 Iowa 482; Com. *v.* Julius, 143 Mass. 132, 8 N. E. 898; Whitton *v.* State, 37 Miss. 379; Cundy *v.* Le Cocq,

authority,[55] and a place other than that where he was licensed or duly authorized to sell,[56] and if the prohibition is against the sale within the limits of a designated or described district, precinct, or territory, it must appear that the sale was made within such limits,[57] or, if the traffic is forbidden in certain places described by their character or general use, it must be proved that the place of sale was of the statutory kind or character.[58]

(B) *Sale Out of Territory Covered by License.* An indictment, as for selling liquor without a license, may be maintained against a person who holds a license, but who makes sales at a place other than that designated in his license, or outside of the city, county, or district covered by the license.[59]

(C) *Vicinity of Churches and Schools.* In several of the states general or special acts prohibit the sale of liquor within a prescribed distance of any church, or of certain designated religious edifices,[60] or within a certain distance of any

13 Q. B. D. 207, 48 J. P. 599, 43 L. J. M. C. 125, 51 L. T. Rep. N. S. 265, 32 Wkly. Rep. 769.

55. People *v.* Rush, 113 Mich. 539, 71 N. W. 863; People *v.* Bouchard, 82 Mich. 156, 46 N. W. 232, 9 L. R. A. 106; Hutchins *v.* State, (Tex. Cr. App. 1897) 40 S. W. 996. And see Com. *v.* Louisville, etc., Packet Co., 80 S. W. 154, 25 Ky. L. Rep. 2098.

56. State *v.* Young, 70 Mo. App. 52. See Bell *v.* Hamm, 127 Iowa 343, 101 N. W. 475. And see *supra*, VI, A, 6, c.

57. *Alabama.*— Gilmore *v.* State, 125 Ala. 59, 28 So. 382; Long *v.* State, 103 Ala. 55, 15 So. 565; Jennings *v.* Russell, 92 Ala. 603, 9 So. 421.

Colorado.— Meskew *v.* Highlands, 9 Colo. App. 255, 47 Pac. 846.

Georgia.— Barker *v.* State, 118 Ga. 35, 44 S. E. 874; Brown *v.* State, 104 Ga. 525, 30 S. E. 837; Dukes *v.* State, 77 Ga. 738.

Iowa.— Carter *v.* Fred Miller Brewing Co., 111 Iowa 457, 82 N. W. 930; Albia *v.* O'Harra, 64 Iowa 297, 20 N. W. 444.

Kentucky.— See Davis *v.* Com., 82 S. W. 277, 26 Ky. L. Rep. 597.

North Carolina.— State *v.* Hampton, 77 N. C. 526.

Wisconsin.— Joseph Schlitz Brewing Co. *v.* Superior, 117 Wis. 297, 93 N. W. 1120.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 178.

58. Place of public resort see State *v.* Danforth, 62 Vt. 188, 19 Atl. 229; Shaw *v.* Carpenter, 54 Vt. 155, 41 Am. Rep. 837; State *v.* Preston, 48 Vt. 12.

Refreshment saloon or restaurant see State *v.* Hogan, 30 N. H. 268.

Bar-room see Beizer *v.* State, 79 Ga. 326, 4 S. E. 257.

Wine-room see Denver *v.* Domedian, 15 Colo. App. 36, 60 Pac. 1107.

Theater or place of amusement see *In re* Gartenstein, 15 Pa. Co. Ct. 612; State *v.* White, 7 Baxt. (Tenn.) 158.

Camp-meetings see Meyers *v.* Baker, 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580; People *v.* Rush, 113 Mich. 539, 71 N. W. 863; Kramer *v.* Marks, 64 Pa. St. 151.

Agricultural fair see Theis *v.* State, 54 Ohio St. 245, 43 N. E. 207; State *v.* Long, 48 Ohio St. 509, 28 N. E. 1038; Heck *v.* State, 44 Ohio St. 536, 9 N. E. 305.

Soldiers' home see Dempsey *v.* District of Columbia, 1 App. Cas. (D. C.) 63.

Election grounds see Manis *v.* State, 3 Heisk. (Tenn.) 315; Anthony *v.* State, 41 Tex. Cr. 393, 55 S. W. 61.

Place of manufacture see Ottawa *v.* La Salle County, 12 Ill. 339; Com. *v.* Asbury, 104 Ky. 320, 47 S. W. 217, 20 Ky. L. Rep. 574; Creekmore *v.* Com., 12 S. W. 628, 11 Ky. L. Rep. 566; State *v.* Hazell, 100 N. C. 471, 6 S. E. 404.

Dwelling-house see State *v.* Camp, 64 Vt. 295, 24 Atl. 1114.

59. *Indiana.*— Tron *v.* Lewis, 31 Ind. App. 178, 66 N. E. 490.

Iowa.— Carter *v.* Nicol, 116 Iowa 519, 90 N. W. 352.

Kansas.— State *v.* Copp, 34 Kan. 522, 9 Pac. 233.

Massachusetts.— Murphy *v.* McNulty, 145 Mass. 464, 14 N. E. 532.

New York.— *In re* Lyman, 160 N. Y. 96, 54 N. E. 577.

North Dakota.— State *v.* Hilliard, 10 N. D. 436, 87 N. W. 980.

Pennsylvania.— Com. *v.* Holstine, 132 Pa. St. 357, 19 Atl. 273; Com. *v.* Francis, 24 Pa. Co. Ct. 186; Com. *v.* Smith, 16 Pa. Co. Ct. 644; Com. *v.* Mikesell, 1 Lehigh Co. L. J. 123, 35 Pittsb. Leg. J. 149, 18 York Leg. Rec. 113.

United States.—U. S. *v.* Cline, 26 Fed. 515; U. S. *v.* Shriver, 23 Fed. 134.

Canada.— Reg. *v.* Palmer, 46 U. C. Q. B. 262.

And see *supra*, VI, A, 6, c.

60. See the statutes of the different states. And see Carlisle *v.* State, 91 Ala. 1, 8 So. 386; Viefhaus *v.* State, 71 Ark. 419, 75 S. W. 585; Blake *v.* State, 118 Ga. 333, 45 S. E. 249; Hart *v.* State, 88 Ga. 635, 15 S. E. 684; Matter of Place, 27 N. Y. App. Div. 561, 50 N. Y. Suppl. 640.

Removal of church.— Where the statute forbade the sale of liquor within three miles of a particular church in a certain county, a sale within that distance from its site was held unlawful, although the church had been removed before the sale in question. State *v.* Eaves, 106 N. C. 752, 11 S. E. 370, 8 L. R. A. 259. And see Ashurst *v.* State, 79 Ala. 276.

What constitutes church.— An indictment cannot be supported by evidence of a sale

school, academy, or other institution of learning.[61] Under a statute of this character, it is held that the prohibition applies to the territory covered by radii extending in all directions, for the prescribed distance from the point at which the church or school is situated.[62]

(VI) *Sales in Prohibited Quantities.* A sale of liquor in a less quantity than that permitted by the vendor's license may be punished as an unlicensed sale.[63] In determining the quantity sold, it has been decided that, although the quantity sold and paid for may be greater than the statutory minimum, yet if only a portion of it is delivered at the time, the rest remaining, subject to the

within the prescribed distance of a house conveyed primarily for educational purposes, with permission to hold religious exercises therein on suitable occasions, which is ordinarily used for a school-house, but in which there is preaching at stated intervals. State *v.* Midgett, 85 N. C. 538.

What sales prohibited.— The statutes are directed against the sale of such articles as would have a tendency to produce intoxication and consequent disturbance, not articles of food which are not of that description. Kramer *v.* Marks, 64 Pa. St. 151; Fetter *v.* Wilt, 46 Pa. St. 457. But see Rogers *v.* Brown, 20 N. J. L. 119.

Actual sale.— In order to make out a case under such a statute, it must be shown that there was an actual sale; a mere bargain for a sale, the goods to be sent by express from another town, although payment is made at the time of the contract, is not enough. Herron *v.* State, 51 Ark. 133, 10 S. W. 25.

61. See the statutes of the different states. And see Love *v.* Porter, 93 Ala. 384, 9 So. 585; De Bois *v.* State, 34 Ark. 381; State *v.* Knotts, 131 N. C. 705, 42 S. E. 444; Webster *v.* State, (Tenn. 1903) 75 S. W. 1020; Brinkley *v.* State, 108 Tenn. 475, 67 S. W. 796; State *v.* Tarver, 11 Lea (Tenn.) 658; Lea *v.* State, 10 Lea (Tenn.) 478; Brewer *v.* State, 7 Lea (Tenn.) 682.

In Arkansas the statute provides that the sale of liquors shall be prohibited within three miles of any school-house or church, where a petition to that effect, signed by a majority of the inhabitants residing within the district to be affected, has been presented to the county court. Viefhaus *v.* State, 71 Ark. 419, 75 S. W. 585; Wilson *v.* Thompson, 56 Ark. 110, 19 S. W. 321; *Ex p.* McCullough, 51 Ark. 159, 10 S. W. 259; Gazola *v.* State, 45 Ark. 458; Williams *v.* Citizens, 40 Ark. 290; Blackwell *v.* State, 36 Ark. 178.

Sale on steamboat.— This offense may be committed by selling liquor from a steamboat on the waters of a navigable river, if it is within the limited distance at the time. Boyd *v.* State, 12 Lea (Tenn.) 687.

A sale by a manufacturer, within the limited distance, of a barrel of whisky, to the treasurer of a club, to be distributed by him among the club members for private consumption is within such a statute. Harrison *v.* State, 96 Tenn. 548, 35 S. W. 559.

Sale in vacation.— The law applies to a sale made in the vacation of the school; it is not necessary that the school should be in session at the time. Tillery *v.* State, 10 Lea (Tenn.) 35.

Destruction of school buildings.— The fact that the buildings of a college have been destroyed does not suspend the operation of the statute. State *v.* Edwards, 47 La. Ann. 688, 17 So. 246.

62. *Alabama.*— Love *v.* Porter, 93 Ala. 384, 9 So. 585.

Georgia.— Butler *v.* State, 89 Ga. 821, 15 S. E. 763.

Iowa.— State *v.* Greenway, 92 Iowa 472, 61 N. W. 239.

Massachusetts.— Com. *v.* Jones, 142 Mass. 573, 8 N. E. 603; Com. *v.* Everson, 140 Mass. 434, 5 N. E. 155; Com. *v.* Jenkins, 137 Mass. 572; Com. *v.* Whelan, 134 Mass. 206.

Rhode Island.— *In re* Liquor Locations, 13 R. I. 733.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 178.

63. *Illinois.*— Schumm *v.* Gardener, 25 Ill. App. 633.

Kentucky.— See Friedman *v.* Com., 83 S. W. 1040, 26 Ky. L. Rep. 1276.

Massachusetts.— See Com. *v.* Poulin, 187 Mass. 568, 73 N. E. 655.

Mississippi.— Whittington *v.* State, 62 Miss. 796.

Missouri.— State *v.* Quinn, 170 Mo. 176, 67 S. W. 974, 70 S. W. 1117 [*affirming* 94 Mo. App. 59, 67 S. W. 974]. And see State *v.* Piper, 41 Mo. App. 160.

North Carolina.— State *v.* Bradley, 132 N. C. 1060, 44 S. E. 122.

United States.— U. S. *v.* Squaugh, 27 Fed. Cas. No. 16,370, 1 Cranch C. C. 174.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 180.

Single sale.— An act inflicting a penalty on "each and every vendor of any measure less than one gallon of intoxicating liquor" applies to one guilty of only a single sale, as well as to a regular vendor. Woody *v.* State, 32 Ga. 595.

Drinking on premises.— In some states there is a sale by retail, irrespective of the quantity, if the liquor or any part of it is drunk on the premises. Wrocklege *v.* State, 1 Iowa 167; Adair *v.* Com., 56 S. W. 530, 21 Ky. L. Rep. 1818.

Difference between wholesale and retail sales see Beiser *v.* State, 79 Ga. 326, 4 S. E. 257; Tripp *v.* Hennessy, 10 R. I. 129; Harrison *v.* State, 96 Tenn. 548, 35 S. W. 559.

buyer's call, in the seller's custody and not separated from the bulk of his stock, he may be indicted for the sale of that portion which was delivered to the purchaser, if that is within the statute.[64] But it is otherwise if the liquor sold is separated from the bulk out of which it is drawn, and set apart for the purchaser's use, although it is not all paid for at one time, and although it is taken away in small quantities.[65] If more than the statutory minimum is sold and delivered to one purchaser at the same time, it is immaterial that it is put up in small packages or bottles,[66] unless this is specially forbidden by the statute.[67] If liquor is delivered to several different persons in separate bottles or glasses, each holding less than the required amount, it is a sale at retail, although the aggregate amount may exceed the statutory limit, and although one person may pay for the whole.[68] If several different kinds of liquor are sold to the same purchaser at the same time, it is no violation of the law if the entire purchase amounts to more than the statutory minimum, although the quantity of each kind sold may be below the limit.[69] A statutory provision of this kind cannot be evaded by any trick or device,[70] but the guilt of the accused may depend on the good faith and belief of the parties.[71]

(VII) *SALES FOR PROHIBITED PURPOSES.* A license to sell liquor for certain purposes therein specified cannot protect the licensee from criminal prosecution for violating the laws of the state by selling liquor for other purposes than those named.[72] If the license permits the sale of liquor "not to be drunk on the premises," it is immaterial whether or not the liquor was actually drunk there, if it was sold with the understanding or intent that it should be.[73] On the other hand the seller is not absolutely bound to prevent the consumption of the liquor on the premises, although he should do what he can to prevent it.[74] If the statute simply forbids the drinking of the liquor "on the premises," or forbids its sale for that purpose, it is held that to convict the seller it is necessary to show that

64. *Indiana.*— Murphy *v.* State, 1 Ind. 366.

Kentucky.— Mahan *v.* Com., 56 S. W. 529, 21 Ky. L. Rep. 1807.

Maine.— State *v.* Cottle, 15 Me. 473.

Michigan.— People *v.* Luders, 126 Mich. 440, 85 N. W. 1081.

Mississippi.— Thomas *v.* State, 37 Miss. 353.

North Carolina.— State *v.* Kirkham, 28 N. C. 384.

Rhode Island.— Tripp *v.* Hennessy, 10 R. I. 129.

Virginia.— McKeever *v.* Com., 98 Va. 862, 36 S. E. 995; Richardson *v.* Com., 76 Va. 1007.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 180.

The giving of sundry drinks of liquor in payment of a certain sum, the seller to have credit for each drink, and *toties quoties* until the debt is satisfied, is a violation of the law against retailing without license. State *v.* Poteet, 86 N. C. 612.

65. Dobson *v.* State, 57 Ind. 69; State *v.* Bell, 47 N. C. 337.

66. Bach *v.* State, 61 Ark. 326, 33 S. W. 210; State *v.* Holder, 133 N. C. 709, 45 S. E. 862. *Compare* Kaufmann *v.* Hillsboro, 45 Ohio St. 700, 17 N. E. 557.

67. Paola *v.* Williford, 64 Kan. 859, 69 Pac. 331.

68. Klein *v.* State, 76 Ind. 333; Griffin *v.* Com., 66 S. W. 1034, 23 Ky. L. Rep. 2205; Com. *v.* Very, 12 Gray (Mass.) 124. *Compare* Johnson *v.* State, 63 Miss. 228.

69. Cobb *v.* Billings, 23 Me. 470; Browne *v.* Hilton, 23 Pick. (Mass.) 319; Reg. *v.* Cunerty, 26 Ont. 51.

70. Griffin *v.* Com., 66 S. W. 817, 23 Ky. L. Rep. 1992.

71. Scott *v.* State, 25 Tex. Suppl. 168, holding that where defendant's license permitted him to sell in quantities of a quart or more, and the liquor in question was sold in an ordinary brandy bottle, of the kind commonly called "quart bottles," but in reality holding less than a quart, if the parties acting in good faith regarded the quantity as a quart, the court would so regard it, unless the quantity sold fell so far short of being a quart as to show an evident attempt to evade the law. And see Parker *v.* State, 31 Ind. App. 650, 68 N. E. 912.

72. Spake *v.* People, 89 Ill. 617; State *v.* Salts, 77 Iowa 193, 39 N. W. 167, 41 N. W. 620; State *v.* Yager, 72 Iowa 421, 34 N. W. 188; State *v.* Adams, 20 Iowa 486; State *v.* Hunt, 29 Kan. 762; State *v.* Shackle, 29 Kan. 341; Curd *v.* Com., 14 B. Mon. (Ky.) 386.

73. Wrocklege *v.* State, 1 Iowa 167; Com. *v.* Luddy, 143 Mass. 563, 10 N. E. 448. *Compare* Chevalier *v.* Com., 8 B. Mon. (Ky.) 379.

74. Jones *v.* State, 96 Ala. 56, 11 So. 192; Christian *v.* State, 40 Ala. 376.

When consent presumed.— If he permits

the place of the drinking was a place over which he had the legal right to exercise authority and control.[75] But the expression "on or about the premises" is more comprehensive, and includes places not within the direct control of the seller, but which are so near his premises, and so situated in relation thereto, as to be within the mischief intended to be remedied.[76]

(VIII) *SALES NOT PROHIBITED.*[77] By way of exception to the laws forbidding the sale of intoxicating liquors, under penalty of prosecution, the statutes commonly permit practising physicians to administer liquor to their patients as medicine,[78] or to issue prescriptions for that purpose,[79] while holding them criminally responsible for an abuse of their privileges or evasions of the law.[80] And correlatively, druggists or pharmacists,[81] holding the necessary license or permit,[82] are authorized to sell or dispense intoxicating liquors,[83] on the written prescription[84]

the liquor to be drunk in his house and in his presence, without objection, it will be presumed that he consented thereto. Cochran *v.* State, 26 Tex. 678.

75. Daly *v.* State, 33 Ala. 431; Downman *v.* State, 14 Ala. 242; Swan *v.* State, 11 Ala. 594; Shields *v.* State, 95 Ind. 299; Stout *v.* State, 93 Ind. 150; Stockwell *v.* State, 85 Ind. 522; O'Connor *v.* State, 45 Ind. 351; Matter of Lyman, 25 Misc. (N. Y.) 638, 56 N. Y. Suppl. 359; Deal *v.* Schofield, L. R. 3 Q. B. 8, 8 B. & S. 760, 37 L. J. M. C. 15, 17 L. T. Rep. N. S. 143, 16 Wkly. Rep. 77; Bath *v.* White, 3 C. P. D. 175, 26 Wkly. Rep. 617; Cross *v.* Watts, 13 C. B. N. S. 239, 9 Jur. N. S. 776, 32 L. J. M. C. 73, 7 L. T. Rep. N. S. 463, 11 Wkly. Rep. 210, 106 E. C. L. 239.

76. Whaley *v.* State, 87 Ala. 83, 6 So. 380; Powell *v.* State, 63 Ala. 177; Pearce *v.* State, 40 Ala. 720; Patterson *v.* State, 36 Ala. 297; Brown *v.* State, 31 Ala. 353; Easterling *v.* State, 30 Ala. 46.

77. As to sales by producers or manufacturers without license see *supra*, IX, A, 3, n, (II), (B).

As to sales by druggists and physicians without license see *supra*, IX, A, 3, n, (II), (C).

78. See the statutes of the different states. And see Brinson *v.* State, 89 Ala. 105, 8 So. 527.

79. Blakely *v.* State, 73 Ark. 218, 83 S. W. 948; Battle *v.* State, 51 Ark. 97, 10 S. W. 12; Parker *v.* Com., 12 S. W. 276, 11 Ky. L. Rep. 454; State *v.* Scott, 20 Mo. App. 418; Gordon *v.* State, (Tex. Cr. App. 1903) 73 S. W. 398.

80. State *v.* Anthony, 52 Mo. App. 507. And see Kyle *v.* State, 18 Ind. App. 136, 47 N. E. 647.

Illustrations.— Where a physician sells liquor to persons who apply therefor on their own suggestion, and not because of his prescription as their medical adviser, the fact that he is a practising physician is no defense to a prosecution for illegally selling intoxicating liquors. State *v.* Cloughly, 73 Iowa 626, 35 N. W. 652. And where he makes out a prescription and fills it himself, as a druggist, he is not justified, as against a prosecution for illegal selling, unless the prescription was issued at the request of the purchaser or someone acting for him. State *v.* Hensley, 94 Mo. App. 151, 67 S. W. 964. And a physician who gives a prescription for liquor to one who to his knowledge is not in need of the same, to enable the latter to obtain the liquor for one who required it, is guilty of giving a false prescription. State *v.* Berkeley, 41 W. Va. 455, 23 S. E. 608. And see Williams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 1209.

In Texas it is provided by statute that any physician giving a prescription to be used for obtaining liquor, to any one who is not actually sick, and without a personal examination of such person, shall be punished. On the application of this statute see Walker *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1052; Tex. Pen. Code, art. 405. And see McLain *v.* State, 43 Tex. Cr. 213, 64 S. W. 865; West *v.* State, 40 Tex. Cr. 575, 51 S. W. 247; McQuerry *v.* State, (Tex. Cr. App. 1897) 40 S. W. 990; Stovall *v.* State, 37 Tex. Cr. 337, 39 S. W. 934. This statute does not prevent a physician from writing such a prescription, in good faith, for himself. Hawk *v.* State, 44 Tex. Cr. 560, 72 S. W. 842.

81. State *v.* Shanks, 98 Mo. App. 138, 71 S. W. 1065; State *v.* Hammack, 93 Mo. App. 521. And see State *v.* Von Haltschuherr, 72 Iowa 541, 34 N. W. 323.

A druggist who is also a physician cannot sell liquor without first making out a written prescription as the law requires. Tilford *v.* State, 109 Ind. 359, 10 N. E. 107; State *v.* Bailey, 73 Mo. App. 576; State *v.* Pollard, 72 Mo. App. 230.

82. State *v.* Benadon, 79 Iowa 90, 44 N. W. 218; Watson *v.* State, 42 Tex. Cr. 13, 57 S. W. 101.

83. Harper *v.* State, 3 Lea (Tenn.) 211; Greiner-Kelley Drug Co. *v.* Truett, (Tex. Civ. App. 1903) 75 S. W. 536. *Compare* Watson *v.* State, 42 Tex. Cr. 13, 57 S. W. 101.

84. Com. *v.* Reynolds, 89 Ky. 147, 12 S. W. 132, 20 S. W. 167, 11 Ky. L. Rep. 445; State *v.* Russell, (Mo. App. 1903) 73 S. W. 297; State *v.* Searcy, 46 Mo. App. 421; State *v.* Robertson, 24 Mo. App. 232; Greiner-Kelley Drug Co. *v.* Truett, (Tex. Civ. App. 1903) 75 S. W. 536.

Prescription must precede sale.— A prescription, although given in good faith, will not legalize a sale made before the prescription was written. State *v.* Hensley, 94

of a practising physician,[85] calling for their use as medicine.[86] The statutes also commonly provide what shall constitute a sufficient prescription for this purpose, or what it shall contain.[87]

4. Persons Liable[88] — a. In General. To sustain a conviction under the liquor laws, it is not always necessary to show that the illegal sale, or other act, was the personal act of defendant, or was done in his presence, for he may be guilty if it was done in his interest and behalf, with his authority or consent, by persons in his employment or under his control.[89] In the case of a prosecution against an infant, the ordinary rule of law, as to showing capacity to commit crime, is applicable.[90]

b. Landlord and Tenant. The owner of premises where liquor is sold or kept for sale contrary to law is not guilty of an offense if he leased them for a lawful purpose, and did not affirmatively assent to such unlawful use; mere failure to prevent, or attempt to prevent, the illegal acts of his tenant, does not subject him to liability.[91] But under some of the statutes on the subject if the landlord leased the premises for that purpose, or if, with knowledge of the fact, he authorizes or permits the unlawful acts of the tenant he is liable.[92] It is

Mo. App. 151, 67 S. W. 964; State *v.* Hale, 72 Mo. App. 78.

Separate prescription for each sale.— There must be a separate prescription for each sale. Carrington *v.* Com., 78 Ky. 83. And a druggist will not be justified in selling liquor more than once on the same prescription. Danville *v.* Forman, 102 Ky. 496, 43 S. W. 682, 19 Ky. L. Rep. 1553; State *v.* May, 33 S. C. 39, 11 S. E. 440. And see Edwards *v.* State, 121 Ind. 450, 23 N. E. 277.

85. State *v.* McMinn, 118 N. C. 1259, 24 S. E. 523, holding that a dentist is not a "physician" within the meaning of the law.

86. People *v.* Safford, 5 Den. (N. Y.) 112.

87. See Caldwell *v.* State, 18 Ind. App. 48, 46 N. E. 697; State *v.* Hammack, 93 Mo. App. 521.

Need not be an order.— To constitute a prescription, it is not necessary that the writing should be in the form of an order on the druggist requesting him to furnish the article, but it is sufficient that it is prescribed for the patient. State *v.* Bluefield Drug Co., 43 W. Va. 144, 27 S. E. 350.

A verbal prescription is not enough; it must be in writing. Irish *v.* State, (Tex. Cr. App. 1894) 25 S. W. 634. *Compare* Bain *v.* State, 61 Ala. 75.

The name of the patient must be stated in the prescription. Caldwell *v.* State, 18 Ind. App. 48, 46 N. E. 697; State *v.* Bluefield Drug Co., 43 W. Va. 144, 27 S. E. 350.

Necessity for use.— Where the statute requires the prescription to specify that the liquors are absolutely necessary, a prescription which omits the word "absolutely" is insufficient. State *v.* Tetrick, 34 W. Va. 137, 11 S. E. 1002. So where the law requires that the prescription shall state that the liquor is prescribed as a "necessary remedy." State *v.* Bowers, 65 Mo. App. 639; State *v.* Nixdorf, 46 Mo. App. 494.

As to signature and date see Edwards *v.* State, 121 Ind. 450, 23 N. E. 277; State *v.* Clevenger, 25 Mo. App. 653.

As to quantity of liquor see Kyle *v.* State, 18 Ind. App. 136, 47 N. E. 647; State *v.* Bluefield Drug Co., 43 W. Va. 144, 27 S. E. 350.

88. **Corporations not liable.**— Under Ohio Rev. St. §§ 4364–21, 6943, subjecting to a penalty whoever buys or furnishes intoxicating liquors to a minor, a corporation is not liable to indictment for the unlawful sale of intoxicating liquors to a minor, as the words "whoever" and "person," employed in the statutes, are intended to refer to natural persons. Leo Ebert Brewing Co. *v.* State, 25 Ohio Cir. Ct. 601.

89. *Minnesota.*— State *v.* O'Connor, 58 Minn. 193, 59 N. W. 999.

Mississippi.— Fahey *v.* State, 62 Miss. 402; Gathings *v.* State, 44 Miss. 343.

Pennsylvania.— Com. *v.* Valer, 29 Leg. Int. 188.

South Carolina.— State *v.* Borgman, 2 Nott & M. 34 note.

Tennessee.— Blalock *v.* State, 108 Tenn. 185, 65 S. W. 398.

Texas.— Casey *v.* State, (Cr. App. 1902) 67 S. W. 415; Freedman *v.* State, 37 Tex. Cr. 115, 38 S. W. 993.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 182.

90. Cagle *v.* State, 87 Ala. 38, 93, 6 So. 300; Com. *v.* Mead, 10 Allen (Mass.) 398. And see Infants, 22 Cyc. 622.

91. Crocker *v.* State, 49 Ark. 60, 4 S. W. 197; State *v.* Ballingall, 42 Iowa 87.

But in Massachusetts the law requires the owner of property which is being used for the illegal sale of liquor, when he has notice of such use, to take reasonable measures to eject the occupant, and if he fails to do this he is liable to punishment. Mass. Pub. St. c. 101, § 9; Com. *v.* Wentworth, 146 Mass. 36, 15 N. E. 138.

92. See the statutes of the different states. And see State *v.* Potter, 30 Iowa 587; State *v.* Shanahan, 54 N. H. 437.

Mere knowledge, by an owner of leased premises, that they are being used for the unlawful sale of liquor, does not expose him

essential that he should have such control of the premises as to be able to prevent or stop the illegal use of them, by eviction of the tenant or otherwise.[93]

c. Husband and Wife. Unless it is otherwise as the result of statutory enactments[94] a husband is criminally responsible for illegal sales, or other infractions of the liquor laws, made or done by his wife in his presence, or by his command, or with his knowledge and consent, or when she acts as his servant or agent;[95] but not if her acts were done in his absence, unless it is shown to the satisfaction of the jury that they were done by his command or authority.[96] And if a married woman commits an offense against the liquor laws, of her own free will, not in the presence of her husband, and independent of any coercion or control by him, she herself is criminally liable and he is not.[97] The fact that a husband who was the manager of his wife's grocery store sold liquor at the store did not render the wife liable, when the sale was made without her knowledge, and contrary to her express orders and his promise to refrain from selling liquor there.[98] If a husband and wife are jointly concerned in the unlawful act — as, in maintaining a liquor nuisance or unlawfully retailing spirits — they may be jointly indicted and both convicted.[99] And the conviction of a wife for selling intoxicating liquors is not a bar to a prosecution against the husband for a sale made by the wife in his presence, unless it is shown that the offense charged is one for which the wife was convicted.[1]

to punishment under the statute of Maine, for maintaining a liquor nuisance; there must be proof of his permission or consent. State *v.* Stafford, 67 Me. 125.

Scienter of landlord.— As to the facts and circumstances sufficient to charge the landlord with knowledge of the unlawful use of his property see Cordes *v.* State, 37 Kan. 48, 14 Pac. 493.

In Massachusetts a person is guilty of keeping a building for the unlawful sale of liquor who knowingly permits another person to keep liquor therein for such purpose, although he himself does not intend to make any sales. Com. *v.* Reed, 162 Mass. 215, 38 N. E. 364; Com. *v.* Lynch, 160 Mass. 298, 35 N. E. 854.

Lien on property for fine and costs see Snyder *v.* State, 40 Kan. 543, 20 Pac. 122; Pfefferle *v.* State, 39 Kan. 128, 17 Pac. 828; Cordes *v.* State, 37 Kan. 48, 14 Pac. 493.

93. Koester *v.* State, 36 Kan. 27, 12 Pac. 339; Com. *v.* Wentworth, 146 Mass. 36, 15 N. E. 138; State *v.* Bates, 62 Vt. 184, 19 Atl. 229.

94. See HUSBAND AND WIFE.

95. *Alabama.*— Seibert *v.* State, 40 Ala. 60.

Georgia.— Lucas *v.* State, 92 Ga. 454, 17 S. E. 668; Faircloth *v.* State, 73 Ga. 426.

Massachusetts.— Com. *v.* Pratt, 126 Mass. 462; Com. *v.* Carroll, 124 Mass. 30; Com. *v.* Kennedy, 119 Mass. 211; Com. *v.* Barry, 115 Mass. 146; Com. *v.* Reynolds, 114 Mass. 306. And see Com. *v.* Hyland, 155 Mass. 7, 28 N. E. 1055.

North Dakota.— State *v.* Ekanger, 8 N. D. 559, 80 N. W. 482; State *v.* Rozum, 8 N. D. 548, 80 N. W. 477.

Pennsylvania.— Com. *v.* Newhard, 3 Pa. Super. Ct. 215; Com. *v.* Costello, 1 Wilcox 182.

South Carolina.— State *v.* Geuing, 1 McCord 573.

Vermont.— State *v.* Leonard, 72 Vt. 102, 47 Atl. 395.

England.— Reg. *v.* Smith, 7 Wkly. Rep. 162.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 184.

Husband constructively present see Com. *v.* Flaherty, 140 Mass. 454, 5 N. E. 258; Com. *v.* Gormley, 133 Mass. 580.

96. *Alabama.*— Seibert *v.* State, 40 Ala. 60.

Massachusetts.— Com. *v.* Hill, 145 Mass. 305, 14 N. E. 124; Com. *v.* Coughlin, 14 Gray 389.

Missouri.— State *v.* Baker, 71 Mo. 475.

England.— Allen *v.* Lumb, 57 J. P. 377.

Canada.— Reg. *v.* McGregor, 26 Ont. 115.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 184.

Contra.— See State *v.* McDaniel, Houst. Cr. Cas. (Del.) 506.

97. *Indiana.*— Pennybaker *v.* State, 2 Blackf. 484.

Kentucky.— Smith *v.* Com., 48 S. W. 1081, 20 Ky. L. Rep. 1164.

Massachusetts.— Com. *v.* Daley, 148 Mass. 11, 18 N. E. 579; Com. *v.* Welch, 97 Mass. 593; Com. *v.* Whalen, 16 Gray 25; Com. *v.* Burk, 11 Gray 437; Com. *v.* Murphy, 2 Gray 510.

New Hampshire.— State *v.* Haines, 35 N. H. 207.

South Carolina.— City Council *v.* Van Roven, 2 McCord 465.

Canada.— Reg. *v.* Williams, 42 U. C. Q. B. 462.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 184.

98. Thurman *v.* Adams, 82 Miss. 204, 33 So. 944.

99. Com. *v.* Tryon, 99 Mass. 442; Com. *v.* Hamor, 8 Gratt. (Va.) 698.

1. State *v.* Leonard, 72 Vt. 102, 47 Atl. 395.

d. Partners.[2] An indictment for a violation of the liquor laws may be maintained against partners who were jointly concerned in the illegal act,[3] or against the one who alone committed it.[4] But if one partner sells liquor unlawfully, in the absence of the other, and without his knowledge or consent, the latter is not liable,[5] except in states where the common-law rule has been changed by statute;[6] but he is equally responsible if the sale was made in his presence or with his acquiescence or consent.[7]

e. Clubs.[8] According to some of the authorities, if liquors are furnished to its members by a club organized and conducted in good faith, with a limited and selected membership, really owning its property in common and formed for social, literary, or other purposes, to which the furnishing of liquors to its members is merely incidental, neither it nor its officers or servants are guilty of violating the law regulating or prohibiting the sale of intoxicants;[9] but there are a number of decisions to the contrary.[10] All agree that if the pretended club is a mere device to evade the license laws, with no principle of selection as to membership, and with no real purpose but to provide its frequenters with a convenient method of obtaining a drink whenever desired, it conducts an illicit traffic, and is liable to the laws.[11]

f. Agents or Servants — (i) *In General.* As a general rule the master's

2. See PARTNERSHIP.

3. Ellison *v.* Com., 69 S. W. 765, 24 Ky. L. Rep. 657. And see Scott *v.* State, (Tex. Cr. App. 1904) 82 S. W. 656.

4. Blahut *v.* State, 34 Ark. 447.

5. Acree *v.* Com., 13 Bush (Ky.) 353.

6. See the statutes of the different states. And see Waller *v.* State, 38 Ark. 656; Robinson *v.* State, 38 Ark. 641; Phillips *v.* State, 95 Ga. 478, 20 S. E. 270; Whitton *v.* State, 37 Miss. 379.

7. State *v.* Neal, 27 N. H. 131; State *v.* Scoggins, 107 N. C. 959, 12 S. E. 59, 10 L. R. A. 542.

Consent implied.— Although the mutual agency of partners in an unlawful transaction cannot be implied, yet if their stock in trade, the furniture and fixtures of the shop, and the run of custom indicate an unlawful trade in selling liquors, and this is confirmed by proof of a sale of liquor to a prohibited person by one of the partners, the jury may find the assent and guilty participation of the other. State *v.* Bierman, 1 Strobh. (S. C.) 256.

8. As to liability for failure to procure license see *supra*, VI, B, 3.

9. Com. *v.* Geary, 146 Mass. 139, 15 N. E. 363; Com. *v.* Ewig, 145 Mass. 119, 13 N. E. 365; Com. *v.* Pomphret, 137 Mass. 564, 50 Am. Rep. 340; Klein *v.* Livingston Club, 177 Pa. St. 224, 35 Atl. 606, 55 Am. St. Rep. 717, 34 L. R. A. 94; Com. *v.* Smith, 2 Pa. Super. Ct. 474; Graff *v.* Evans, 8 Q. B. D. 373, 46 J. P. 262, 51 L. J. M. C. 25, 46 L. T. Rep. N. S. 347, 30 Wkly. Rep. 380; Black Intox. Liq. § 142. *Compare* Com. *v.* Alfa, 24 Pa. Super. Ct. 454.

10. *Alabama.*— Martin *v.* State, 59 Ala. 34.

Georgia.— Mohrman *v.* State, 105 Ga. 709, 32 S. E. 143, 70 Am. St. Rep. 74, 43 L. R. A. 398.

Indiana.— Marmont *v.* State, 48 Ind. 21.

Iowa.— State *v.* Mercer, 32 Iowa 405.

Maryland.— State *v.* Eastern Social, etc., Club, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64; Chesapeake Club *v.* State, 63 Md. 446. But see Seim *v.* State, 55 Md. 566, 39 Am. Rep. 419, decided under an earlier and less stringent statute.

Pennsylvania.— See Com. *v.* Steffner, 2 Pa. Dist. 152.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 186.

11. *Illinois.*— People *v.* Law, etc., Club, 203 Ill. 127, 67 N. E. 855, 62 L. R. A. 884; Rickart *v.* People, 79 Ill. 85.

Indiana.— Marmont *v.* State, 48 Ind. 21.

Iowa.— State *v.* Mercer, 32 Iowa 405.

Kansas.— State *v.* Horacek, 41 Kan. 87, 21 Pac. 204, 3 L. R. A. 687.

Massachusetts.— Com. *v.* Smith, 102 Mass. 144.

Mississippi.— Harper *v.* State, 85 Miss. 338, 37 So. 956.

Missouri.— State *v.* Tindall, 40 Mo. App. 271.

Nebraska.— Sothman *v.* State, 66 Nebr. 302, 92 N. W. 303.

New York.— Cullinan *v.* Trolley Club, 65 N. Y. App. Div. 202, 72 N. Y. Suppl. 629; Lyman *v.* Gramercy Club, 39 N. Y. App. Div. 661, 57 N. Y. Suppl. 376; People *v.* Andrews, 50 Hun 591, 3 N. Y. Suppl. 508.

Pennsylvania.— Com. *v.* Tierney, 148 Pa. St. 552, 24 Atl. 64 [*affirming* 29 Wkly. Notes Cas. 194]; Com. *v.* Brem, 5 Pa. Super. Ct. 104.

Texas.— Krnavek *v.* State, 38 Tex. Cr. 44, 41 S. W. 612; Sutton *v.* State, (Cr. App. 1897) 40 S. W. 501.

United States.— U. S. *v.* Wittig, 28 Fed. Cas. No. 16,748, 2 Lowell 466.

England.— Lynam *v.* O'Reilly, [1898] 2 Ir. 48; National Sporting Club *v.* Cope, 64 J. P. 310, 82 L. T. Rep. N. S. 352, 48 Wkly. Rep. 446.

Canada.— Reg. *v.* Charles, 24 Ont. 432.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 186.

license protects his servant or agent;[12] and, on the other hand, to constitute one a dealer in liquors, so as to subject him to the statutes regulating the traffic, it is not necessary that he should conduct the business in person; it is sufficient if he keeps liquors and employs clerks or servants to dispense them.[13]

(II) *Personal Liability of Servant or Agent.* Where the offense charged is an illegal sale of liquor, that is, a sale without license or to a prohibited person or at a prohibited time or place, it is no defense that the accused acted merely as the agent or servant of another; if the circumstances are such that the principal would have been guilty if he had made the sale in person, his clerk or employee also is individually punishable.[14] And in case of other offenses, such as keeping open at prohibited times, keeping liquor for sale unlawfully, or keeping or maintaining a liquor nuisance, it is generally held that a clerk or servant who assists in the specific acts or conduct charged is equally guilty with his principal and may be indicted and punished,[15] especially where a statute extends the prohibition to persons employed in such capacities,[16] although some of the cases hold the servant excused if he acted in his master's presence or under

12. Rana *v.* State, 51 Ark. 481, 11 S. W. 692; Lane *v.* State, 37 Ark. 272; Johnson *v.* State, 37 Ark. 98; State *v.* Keith, 37 Ark. 96; State *v.* Hunt, 29 Kan. 762. And see *supra*, VI, A, 8, b.

Agent licensed.— If the person who makes the sale holds a license, he cannot be indicted for an unlawful sale, although he acted only as the agent of another person, who owned the liquors and who was not licensed. That is, a licensed dealer has the right to sell his own or any other person's liquor. State *v.* Keith, 37 Ark. 96.

13. See Schultz *v.* State, 32 Ohio St. 276; State *v.* Moore, 49 S. C. 438, 27 S. E. 454; State *v.* Dow, 21 Vt. 484.

14. *Alabama.*— Abel *v.* State, 90 Ala. 631, 8 So. 760; Marshall *v.* State, 49 Ala. 21.

Arkansas.— Baird *v.* State, 52 Ark. 326, 12 S. W. 566; Berning *v.* State, 51 Ark. 550, 11 S. W. 882; Rana *v.* State, 51 Ark. 481, 11 S. W. 692; State *v.* Devers, 38 Ark. 517; State *v.* Keith, 37 Ark. 96; Cloud *v.* State, 36 Ark. 151.

Georgia.— Loeb *v.* State, 115 Ga. 241, 41 S. E. 575; Butler *v.* Augusta, 100 Ga. 370, 28 S. E. 164; Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559.

Iowa.— State *v.* Kriechbaum, 81 Iowa 633, 47 N. W. 872; State *v.* Finan, 10 Iowa 19.

Massachusetts.— Com. *v.* Brown, 154 Mass. 55, 27 N. E. 776, 13 L. R. A. 195; Com. *v.* Sinclair, 138 Mass. 493; Com. *v.* Hadley, 11 Metc. 66.

Michigan.— People *v.* De Groot, 111 Mich. 245, 69 N. W. 248; People *v.* Drennan, 86 Mich. 445, 49 N. W. 215; People *v.* Lester, 80 Mich. 643, 45 N. W. 492.

Missouri.— State *v.* Bryant, 14 Mo. 340; Hays *v.* State, 13 Mo. 246; State *v.* Lucas, 94 Mo. App. 117, 67 S. W. 971; State *v.* Brown, 93 Mo. App. 543, 67 S. W. 711; State *v.* O'Connor, 65 Mo. App. 324. *Compare* State *v.* Russell, 99 Mo. App. 373, 73 S. W. 297; State *v.* Hammack, 93 Mo. App. 521.

New Hampshire.— Wason *v.* Underhill, 2 N. H. 505.

New York.— Orange County Excise Com'rs *v.* Dougherty, 55 Barb. 332.

Oregon.— State *v.* Chastain, 19 Oreg. 176, 23 Pac. 963.

Texas.— Tardiff *v.* State, 23 Tex. 169; Burnett *v.* State, 42 Tex. Cr. 600, 62 S. W. 1063; Bogle *v.* State, 42 Tex. Cr. 389, 55 S. W. 830; Davidson *v.* State, 27 Tex. App. 262, 11 S. W. 371; La Norris *v.* State, 13 Tex. App. 33, 44 Am. Rep. 699. And see Pigford *v.* State, (Cr. App. 1903) 74 S. W. 323.

Vermont.— State *v.* Bugbee, 22 Vt. 32.

Wisconsin.— Mayer *v.* State, 83 Wis. 339, 53 N. W. 444; Peitz *v.* State, 68 Wis. 538, 32 N. W. 763.

Canada.— Reg. *v.* Howard, 45 U. C. Q. B. 346; Lambe *v.* Jobin, 12 Montreal Leg. N. 407.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 188.

Ignorance or mistake of fact is no excuse; the agent or servant is bound to ascertain, at his own peril, whether his employer is duly licensed to sell. State *v.* Chastain, 19 Oreg. 176, 23 Pac. 963; Tardiff *v.* State, 23 Tex. 169; Witherspoon *v.* State, 39 Tex. Cr. 65, 44 S. W. 164, 1096.

An exemption of "sales of cider by the makers thereof" from the operation of the statutes restricting the sale of intoxicating liquors extends to sales by the makers through their servants, and protects the servant as well as the master. Com. *v.* Mahoney, 152 Mass. 493, 25 N. E. 833.

15. *Alabama.*— Marshall *v.* State, 49 Ala. 21.

Iowa.— State *v.* Finan, 10 Iowa 19.

Maine.— State *v.* Sullivan, 83 Me. 417, 22 Atl. 381; Roberts *v.* O'Conner, 33 Me. 496.

Michigan.— People *v.* Rice, 103 Mich. 350, 61 N. W. 540.

New Hampshire.— State *v.* McGuire, 64 N. H. 529, 15 Atl. 213; State *v.* McGregor, 41 N. H. 407.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 188.

16. See State *v.* Stucker, 33 Iowa 395; State *v.* Sullivan, 83 Me. 417, 22 Atl. 381; Tardiff *v.* State, 23 Tex. 169; Ramey *v.* State, (Tex. Cr. App. 1901) 61 S. W. 126; Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815.

his control and direction, but guilty if the master was absent and the servant in control.[17]

(III) *Several Liability of Master and Servant.* Where an offense against the liquor laws is committed by a servant or agent, under the general or special authorization of his employer, the latter as well as the former will be indictable, and both may be convicted and punished.[18]

(IV) *Liability of Master For Acts of Servant* — (A) *In General.* As a general rule the owner or proprietor of a saloon or bar is responsible for the criminal acts of his servant or agent done within the scope of the latter's general employment, or in the course of the general business authorized by the master; and the master is answerable for such acts done by the servant or agent, whether in or out of his proper or usual employment, when done by the master's command or with his knowledge and consent.[19]

(B) *Knowledge or Consent of Master* — (1) In General. If the whole course of the master's business is unlawful, as if he keeps liquor for sale without a license, he is responsible for any sales made by his clerks or servants, whether or not he knew of the particular sale or consented thereto, and no matter what his orders to them may have been.[20] And the same rule applies where the particular sale was made with the knowledge and consent of the principal, or in pursuance of his express command or of a general authority to his agent or servant to sell unlawfully.[21] But if the general course of the business is lawful,

17. Com. *v.* Burns, 167 Mass. 374, 45 N. E. 755; Com. *v.* Brady, 147 Mass. 583, 18 N. E. 568; Com. *v.* Murphy, 145 Mass. 250, 13 N. E. 892; Com. *v.* Galligan, 144 Mass. 171, 10 N. E. 788; Com. *v.* Sinclair, 138 Mass. 493; Com. *v.* Churchill, 136 Mass. 148; Com. *v.* Dowling, 114 Mass. 259; Com. *v.* Maroney, 105 Mass. 467 note; Com. *v.* Kimball, 105 Mass. 465. And see State *v.* Russell, 99 Mo. App. 373, 73 S. W. 297. *Compare* Com. *v.* Burke, 114 Mass. 261.

18. *Arkansas.*— Lewis *v.* State, 21 Ark. 209.

Georgia.— Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559.

Massachusetts.— Com. *v.* Merriam, 148 Mass. 425, 19 N. E. 405.

Michigan.— People *v.* Ackerman, 80 Mich. 588, 45 N. W. 367.

Missouri.— Schmidt *v.* State, 14 Mo. 137.

New York.— French *v.* People, 3 Park. Cr. 114.

Tennessee.— Thompson *v.* State, 5 Humphr. 138.

Texas.— Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 188.

19. *Arkansas.*— Edgar *v.* State, 45 Ark. 356.

Connecticut.—State *v.* Basserman, 54 Conn. 88, 6 Atl. 185.

Georgia.— Rooney *v.* Augusta, 117 Ga. 709, 45 S. E. 72; Snider *v.* State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350; Loeb *v.* State, 75 Ga. 258.

Kentucky.— Locke *v.* Com., 112 Ky. 864, 69 S. W. 763, 24 Ky. L. Rep. 654.

Maine.— State *v.* Wentworth, 65 Me. 234, 20 Am. Rep. 688.

Massachusetts.— Com. *v.* Hurley, 160 Mass. 10, 35 N. E. 89.

Mississippi.— Fullwood *v.* State, 67 Miss. 554, 7 So. 432.

Missouri.— State *v.* Quinn, 40 Mo. App. 627; State *v.* Durkem, 23 Mo. App. 387; State *v.* Reiley, 75 Mo. 521.

Nebraska.— Martin *v.* State, 30 Nebr. 507, 46 N. W. 621.

Texas.— Collins *v.* State, 34 Tex. Cr. 95, 29 S. W. 274.

United States.— U. S. *v.* Voss, 28 Fed. Cas. No. 16,628, 1 Cranch C. C. 101.

Unauthorized Sunday sales.— An employer is not liable for the sale of liquor on Sunday by an agent employed by him on week-days, without proof of knowledge by him of the unlawful acts charged on Sunday, and without proof of authority, express or implied, to act as agent on Sunday. State *v.* Burke, 15 R. I. 324, 4 Atl. 761. *Compare* Martin *v.* State, 30 Nebr. 507, 46 N. W. 621.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 189. And see Principal and Agent.

20. Lane *v.* State, 37 Ark. 272; Johnson *v.* State, 37 Ark. 98; State *v.* Keith, 37 Ark. 96; Noecker *v.* People, 91 Ill. 494. But see State *v.* Bohles, Rice (S. C.) 145.

21. *Georgia.*— Rooney *v.* Augusta, 117 Ga. 709, 45 S. E. 72; Kinnebrew *v.* State, 80 Ga. 232, 5 S. E. 56; Forrester *v.* State, 63 Ga. 349.

Kansas.— State *v.* Falk, 51 Kan. 298, 32 Pac. 1122; State *v.* Skinner, 34 Kan. 256, 8 Pac. 420.

Kentucky.— Com. *v.* Major, 6 Dana 293.

Massachusetts.— Com. *v.* Kelley, 140 Mass. 441, 5 N. E. 834; Com. *v.* Nichols, 10 Metc. 259, 43 Am. Dec. 432.

Minnesota.— State *v.* Mueller, 38 Minn. 497, 38 N. W. 691.

New Hampshire.— State *v.* Wiggin, 20 N. H. 449.

the master is not criminally liable for illegal sales made by his clerk, servant, or agent, without his knowledge or consent, express or implied, or in his absence and in disobedience to his commands or instructions,[22] except where the statutes are so broad as to hold the master responsible for all acts of his employees, whether authorized or permitted by him or not.[23] Where the evidence shows it must be shown that the order was given honestly and in good faith, and with the intention and expectation that it would be obeyed; connivance on the part of the employer will destroy the effect of such an order; and this is a question for the jury. State *v.* Wentworth, 65 Me. 234, 20 Am. Rep. 688; Com. *v.* Stevens, 153 Mass. 421, 26 N. E. 992, 25 Am. St. Rep. 647, 11 L. R. A. 357; Com. *v.* Rooks, 150 Mass. 59, 22 N. E. 436; Hugill *v.* Merrifield, 12 U. C. C. P. 269. And see State *v.* Barnett, 110 Mo. App. 584, 85 S. W. 615.

Relation of master and servant.— It is a good defense that the person who made the sale was not the clerk, servant, or agent of defendant, and had no right to act for him, or that he was employed in another capacity, and was acting beyond the scope of his employment. Wreidt *v.* State, 48 Ind. 579; Anderson *v.* State, 39 Ind. 553; Minden *v.* Silverstein, 36 La. Ann. 912; Com. *v.* Hagan, 152 Mass. 565, 26 N. E. 95. *Compare* State *v.* Brown, 31 Me. 520.

Knowledge or consent.— All that is necessary to be proven is the knowledge or consent of defendant in the particular instance in controversy; the prosecution cannot be required to show his knowledge of, and consent to, the general violation of law by the servant or agent. Com. *v.* Rooks, 150 Mass. 59, 22 N. E. 436. Where the evidence shows a sale by a servant in his master's shop of his master's goods there kept for sale, it becomes incumbent upon the principal to show that the sale was made, not only without his knowledge, but also without his consent, express or implied, in order to escape liability. Kling *v.* State, 77 Ga. 734. And see People *v.* Utter, 44 Barb. (N. Y.) 170. *Compare* Com. *v.* Hayes, 145 Mass. 289, 14 N. E. 151. And in rebuttal of his contention in that behalf, it is proper for the prosecution to show his presence at the time the sale was made, not as conclusively establishing his complicity, but as a fact from which the jury may infer his knowledge and consent. Com. *v.* Rooks, 150 Mass. 59, 22 N. E. 436; People *v.* Baumann, 52 Mich. 584, 18 N. W. 369. Whether the facts show knowledge on the part of defendant of sales made by his clerk or bar-keeper is a question of fact for the jury. Neideiser *v.* State, 6 Baxt. (Tenn.) 499.

Pennsylvania.— Zeigler *v.* Com., 10 Pa. Cas. 404, 14 Atl. 237.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 190.

22. *Alabama.*— Seibert *v.* State, 40 Ala. 60; Patterson *v.* State, 21 Ala. 571.

Connecticut.— Morse *v.* State, 6 Conn. 9.

Illinois.— Grosch *v.* Centralia, 6 Ill. App. 107.

Indiana.— Lathrope *v.* State, 51 Ind. 192; Thompson *v.* State, 45 Ind. 495; O'Leary *v.* State, 44 Ind. 91; Hanson *v.* State, 43 Ind. 500; Lauer *v.* State, 24 Ind. 131; Wetzler *v.* State, 18 Ind. 35; Hipp *v.* State, 5 Blackf. 149, 33 Am. Dec. 463; Pennybaker *v.* State, 2 Blackf. 484; Rosenbaum *v.* State, 24 Ind. App. 510, 57 N. E. 156.

Iowa.— State *v.* Hayes, 67 Iowa 27, 24 N. W. 575. *Compare* Dudley *v.* Sautbine, 49 Iowa 650, 31 Am. Rep. 165.

Massachusetts.— Com. *v.* Stevens, 153 Mass. 421, 26 N. E. 992, 25 Am. St. Rep. 647, 11 L. R. A. 357; Com. *v.* Rooks, 150 Mass. 59, 22 N. E. 436; Com. *v.* Wachendorf, 141 Mass. 270, 4 N. E. 817; Com. *v.* Dunbar, 9 Gray 298; Com. *v.* Putnam, 4 Gray 16; Com. *v.* Nichols, 10 Metc. 259, 43 Am. Dec. 432.

Minnesota.— State *v.* Mueller, 38 Minn. 497, 38 N. W. 691.

Missouri.— State *v.* Shortell, 93 Mo. 123, 5 S. W. 691; State *v.* Reiley, 75 Mo. 521; State *v.* McGrath, 73 Mo. 181; State *v.* Baker, 71 Mo. 475. And see State *v.* Heinze, 45 Mo. App. 403; Kirkwood *v.* Autenreith, 21 Mo. App. 73. *Compare* State *v.* McGinnis, 38 Mo. App. 15; Draper *v.* Fitzgerald, 30 Mo. App. 518; Greene County *v.* Wilhite, 29 Mo. App. 459; State *v.* Durkem, 23 Mo. App. 387.

Nebraska.— Moore *v.* State, 64 Nebr. 557, 90 N. W. 553.

North Carolina.— State *v.* Neal, 133 N. C. 689, 45 S. E. 756.

Ohio.— Anderson *v.* State, 22 Ohio St. 305.

Pennsylvania.— Com. *v.* Johnston, 2 Pa. Super. Ct. 317.

Rhode Island.— State *v.* Burke, 15 R. I. 324, 4 Atl. 761.

Tennessee.— Neideiser *v.* State, 6 Baxt. 499.

Texas.— Wadsworth *v.* State, 35 Tex. Cr. 584, 34 S. W. 934; Gaiocchio *v.* State, 9 Tex. App. 387.

Canada.— Austin *v.* Davis, 7 Ont. App. 478; Hugill *v.* Merrifield, 12 U. C. C. P. 269.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 190.

Good faith required.— Where the defense is that the illegal sale was made by the servant or agent in disobedience to an order or direction requiring him not to make such sales,

23. *Arkansas.*— Mogler *v.* State, 47 Ark. 109, 14 S. W. 473; Cloud *v.* State, 36 Ark. 151. See, however, Wilson *v.* State, 64 Ark. 586, 43 S. W. 972.

District of Columbia.— Lehman *v.* District of Columbia, 19 App. Cas. 217.

Georgia.— Snider *v.* State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350; Boatright *v.*

that the alleged unlawful sale of liquor was made in defendant's saloon or bar by his servant or agent, this raises a presumption that defendant authorized the sale or knew of it and consented to it,[24] which defendant may rebut by competent evidence.[25]

(2) Sales to Minors. In some states it has been held that a saloon-keeper cannot be convicted for a sale of liquor to a minor, made without his knowledge or consent, and in disobedience to his orders by his servant or agent.[26] But in others, the master has been held criminally responsible even under these circumstances.[27]

(3) Sales to Drunkards or Intoxicated Persons. So also as to sales to habitual drunkards or drunken men by a servant or agent, in some jurisdictions the master is liable in any event;[28] in others, only if the sale was made with his knowledge and consent, and not where it was made in disobedience to his orders given in good faith.[29]

g. Persons Aiding and Abetting. Any person who aids and abets or assists in or procures an unlawful sale of intoxicating liquors may be indicted as a principal in the transaction, such offense being a misdemeanor.[30]

State, 77 Ga. 717; Loeb *v.* State, 75 Ga. 258. *Compare* Johnson *v.* State, 83 Ga. 553, 10 S. E. 207.

Illinois.— Noecker *v.* People, 91 Ill. 494; Mullinix *v.* People, 76 Ill. 211; McCutcheon *v.* People, 69 Ill. 601.

Iowa.— State *v.* McConnell, 90 Iowa 197, 57 N. W. 707.

Maine.— State *v.* Stewart, 31 Me. 515.

Maryland.— Carroll *v.* State, 63 Md. 551, 3 Atl. 29.

Michigan.— People *v.* Longwell, 120 Mich. 311, 79 N. W. 484; People *v.* Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; People *v.* Blake, 52 Mich. 566, 18 N. W. 360. *Compare* People *v.* Hughes, 86 Mich. 180, 48 N. W. 945; People *v.* Parks, 49 Mich. 333, 13 N. W. 618.

Mississippi.— Teasdale *v.* State, (1887) 3 So. 245; Fahey *v.* State, 62 Miss. 402; Gathings *v.* State, 44 Miss. 343; Riley *v.* State, 43 Miss. 397.

West Virginia.— State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315.

England.— Police Com'rs *v.* Cartman, [1896] 1 Q. B. 655, 18 Cox C. C. 341, 60 J. P. 357, 65 L. J. M. C. 113, 74 L. T. Rep. N. S. 726, 44 Wkly. Rep. 637; Mullins *v.* Collins, L. R. 9 Q. B. 292, 43 L. J. M. C. 67, 29 L. T. Rep. N. S. 838, 22 Wkly. Rep. 297.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 190, 191.

Keeping saloon closed.— A saloon-keeper, being bound to see that his saloon is closed on the days and during the hours the law requires it to be closed, is liable for the act of his bar-keeper in keeping it open at prohibited times (People *v.* Lundell, 136 Mich. 303, 99 N. W. 12), without authority and contrary to instructions (People *v.* Possing, (Mich. 1904) 100 N. W. 396; People *v.* Kriesel, 136 Mich. 80, 98 N. W. 850). *Contra*, Beane *v.* State, 72 Ark. 368, 80 S. W. 573.

24. *Georgia.*— Johnson *v.* State, 83 Ga. 553, 10 S. E. 207; Forrester *v.* State, 63 Ga. 349.

Indiana.— Hofner *v.* State, 94 Ind. 84; Molihan *v.* State, 30 Ind. 266.

Maine.— State *v.* Wentworth, 65 Me. 234, 20 Am. Rep. 688.

Massachusetts.— Com. *v.* Perry, 148 Mass. 160, 19 N. E. 212; Com. *v.* Houle, 147 Mass. 380, 17 N. E. 896; Com. *v.* Nichols, 10 Metc. 259, 43 Am. Dec. 432. *Compare* Com. *v.* Stevenson, 142 Mass. 466, 8 N. E. 341; Com. *v.* Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707.

Mississippi.— Fullwood *v.* State, 67 Miss. 554, 7 So. 432.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 190.

But see State *v.* Mahoney, 23 Minn. 181; State *v.* Williams, 3 Hill (S. C.) 91.

25. Kirkwood *v.* Autenreith, 21 Mo. App. 73; Anderson *v.* State, 22 Ohio St. 305.

26. Thompson *v.* State, 45 Ind. 495; Hanson *v.* State, 43 Ind. 550; Ihrig *v.* State, 40 Ind. 422; Lauer *v.* State, 24 Ind. 131; Com. *v.* Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449; Com. *v.* Stevens, 153 Mass. 421, 26 N. E. 992, 25 Am. St. Rep. 647, 11 L. R. A. 357; State *v.* Kittelle, 110 N. C. 560, 15 S. E. 103, 28 Am. St. Rep. 698, 15 L. R. A. 694.

27. Mogler *v.* State, 47 Ark. 109, 14 S. W. 473; Cloud *v.* State, 36 Ark. 151; Johnson *v.* State, 83 Ga. 553, 10 S. E. 207; Boatright *v.* State, 77 Ga. 717; State *v.* Weber, 111 Mo. 204, 20 S. W. 33; State *v.* McGinnis, 38 Mo. App. 15.

28. Mullinix *v.* People, 76 Ill. 211; George *v.* Gobey, 128 Mass. 289, 35 Am. Rep. 376.

29. O'Leary *v.* State, 44 Ind. 91; Hipp *v.* State, 5 Blackf. (Ind.) 149, 33 Am. Dec. 463; People *v.* Parks, 49 Mich. 333, 13 N. W. 618; State *v.* Shortell, 93 Mo. 123, 5 S. W. 691; Zeigler *v.* Com., 10 Pa. Cas. 404, 14 Atl. 237; Com. *v.* Titlow, 28 Pa. Co. Ct. 341.

30. *Alabama.*— Bonds *v.* State, 130 Ala. 117, 30 So. 427; Cagle *v.* State, 87 Ala. 38, 6 So. 300.

Illinois.— Johnson *v.* People, 83 Ill. 431.

Kansas.— State *v.* Shenkle, 36 Kan. 43, 12 Pac. 309; State *v.* Lord, 8 Kan. App. 257, 55 Pac. 503.

h. Purchasers. The purchaser of liquor which is sold in violation of law, although he knows the sale to be illegal, cannot be held guilty of any offense, on the ground of his soliciting or tempting the seller to violate the law, or on the ground of his having aided and abetted the crime to the mere extent of buying the liquor.[31]

i. Joint Liability. Two persons may be jointly indicted for an offense against the liquor laws, and both convicted if the proof warrants it, or one defendant may be convicted, although no case is made against the other.[32] It is not necessary, to sustain a joint indictment, that the two defendants should have participated in the unlawful act in the same manner or to the same degree, for all who are criminally connected with the wrongful act are principals.[33]

5. Distinct and Continuing Offenses — a. Separate Offenses in Same Act. In prosecutions under the liquor laws, where the liquor is furnished in answer to a single call, at one time and by a single act, it can constitute but one act of

Michigan.— People *v.* Barnes, 113 Mich. 213, 71 N. W. 504.

Texas.— Pigford *v.* State, (Cr. App. 1903) 74 S. W. 323; Burnett *v.* State, 42 Tex. Cr. 600, 62 S. W. 1063; Wolfe *v.* State, 38 Tex. Cr. 537, 43 S. W. 997; Beuchert *v.* State, 37 Tex. Cr. 505, 40 S. W. 278.

Vermont.— State *v.* Cox, 52 Vt. 471.

England.— Wilson *v.* Stewart, 3 B. & S. 913, 9 Cox C. C. 354, 9 Jur. N. S. 1130, 32 L. J. M. C. 198, 8 L. T. Rep. N. S. 277, 11 Wkly. Rep. 640, 113 E. C. L. 913; Owen *v.* Langford, 55 J. P. 484.

Unpaid assistant.— It has been held to be no defense, for a person indicted as having aided or assisted in an illegal sale of liquor, that he was not interested in the saloon or the liquor sold and was not employed by the seller, but assisted him in the particular transaction merely as a matter of accommodation and without any pay or reward. State *v.* Herselus, 86 Iowa 214, 53 N. W. 105; Beck *v.* State, 69 Miss. 217, 13 So. 835. But see State *v.* Keith, 46 Mo. App. 525.

Promoter of illegal business.— A wholesale liquor dealer who sets up a retailer in business, indorses his application for a license, and, on failure to secure a license, encourages him to engage in the business without it, and is present in the saloon when unlawful sales are made, and is in fact the chief beneficiary of the business, although it is not conducted in his name, is equally guilty with the retailer of making the illegal sales. Webster *v.* State, 110 Tenn. 491, 75 S. W. 1020, 82 S. W. 179.

Conducting customer to place of sale.— One does not become an accomplice or participant in an unlawful sale of liquor merely because he conducts a customer, at the latter's request, to the person who is selling, and is present at the sale, if he has no interest in the business and is not employed by the seller. Black *v.* State, 112 Ga. 29, 37 S. E. 108. But see Foster *v.* State, 45 Atl. 361.

Bogus prescription.— Where a physician assists a person to buy liquor in a local option district, by giving him an illegal prescription, the physician thereby becomes a party to the sale, and an accomplice of the seller, and each may be convicted of making an unlawful sale. McLain *v.* State, 43 Tex. Cr. 213, 64 S. W. 865.

31. *Alabama.*— Harrington *v.* State, 36 Ala. 236.

Connecticut.— State *v.* Teahan, 50 Conn. 92.

Iowa.— Wakeman *v.* Chambers, 69 Iowa 169, 28 N. W. 498, 58 Am. Rep. 218.

Kansas.— State *v.* Cullins, 53 Kan. 100, 36 Pac. 56, 24 L. R. A. 212.

Massachusetts.— Com. *v.* Willard, 22 Pick. 476.

Minnesota.— State *v.* Baden, 37 Minn. 212, 34 N. W. 24.

New Hampshire.— State *v.* Rand, 51 N. H. 361, 12 Am. Rep. 127.

Tennessee.— Harney *v.* State, 8 Lea 113. *Compare* State *v.* Bonner, 2 Head 135.

Texas.— Keith *v.* State, 38 Tex. Cr. 678, 44 S. W. 847.

Vermont.— State *v.* Clark, 66 Vt. 309, 29 Atl. 461.

West Virginia.— State *v.* Miller, 26 W. Va. 106.

Canada.— Reg. *v.* Southwick, 21 Ont. 670; Reg. *v.* Heath, 13 Ont. 471.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 182.

32. *Connecticut.*— State *v.* Wadsworth, 30 Conn. 55.

Kansas.— State *v.* Sterns, 28 Kan. 154.

Missouri.— State *v.* Edwards, 60 Mo. 490.

New Hampshire.— Tracy *v.* Perry, 5 N. H. 504.

North Carolina.— State *v.* Simmons, 66 N. C. 622.

Pennsylvania.— Two or more persons acting in concert in unlawful measures to secure the enforcement of the liquor laws — as, by using artifice or persuasion to induce a tavern-keeper to sell liquor on Sunday — are guilty of a conspiracy. Com. *v.* Leeds, 9 Phila. 569.

33. Com. *v.* Moore, 157 Mass. 324, 31 N. E. 1070; State *v.* Caswell, 2 Humphr. (Tenn.) 399.

Agent or servant.— Two persons may be convicted of maintaining a liquor nuisance, or of unlawful selling, if both participated in the act, although one simply assisted the other as an agent or clerk, and did not act as

furnishing or selling, and the party incurs but one penalty, although it may be drunk by several persons.[34] But the same unlawful act may expose the offender to punishment either under the local option law or under that prohibiting sales without a license,[35] or it may constitute a violation of the general Sunday law and at the same time be punishable as an unlicensed sale;[36] and a sale to a minor may also be punishable under the statute forbidding sales without license,[37] and a person may be convicted of being a "common seller" of liquors, and also of the same several sales which were relied on to prove the former offense.[38]

b. Continuing or Separate Offenses. Where the statute provides that no person shall "sell intoxicating liquors without a license," it describes an offense which may be committed by a single act, and which is not a continuing offense, in any such sense that a repetition of the act or an intention to repeat it is an essential element of the crime.[39] But keeping liquor for sale may be a continuing offense and may be alleged with a *continuando*.[40]

c. Persons Entitled to Prosecute. The statutes sometimes designate the officials who shall institute criminal proceedings under the liquor laws,[41] although they do not always exclude the right of a private citizen to make complaint and instigate a prosecution.[42]

B. Procedure — 1. Application of Statutes and Ordinances — a. In General. To authorize a conviction on a charge of illegally selling or otherwise trafficking in intoxicating liquors, it must clearly appear that the prosecution was based upon a statute or ordinance which was in force before the commission of the alleged offense,[43] and which made it a crime and prescribed a penalty or punishment.[44] Where two laws are concurrently in force, covering the same ground, the prose-

a copartner. French *v.* People, 3 Park. Cr. (N. Y.) 114; State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838. *Compare* Com. *v.* Murphy, 145 Mass. 250, 13 N. E. 892; Com. *v.* Galligan, 144 Mass. 171, 10 N. E. 788.

34. State *v.* Barron, 37 Vt. 57.

The retailing of liquors to two distinct persons, although at the same time and place, constitutes two distinct offenses. Com. *v.* Dove, 2 Va. Cas. 26.

Different sales to same person.— As each sale of liquor without a license constitutes a distinct and separate offense, different and distinct offenses may be committed by selling to the same persons at different times. State *v.* Small, 31 Mo. 197.

35. Baird *v.* State, 52 Ark. 326, 12 S. W. 566; Mazzia *v.* State, 51 Ark. 177, 10 S. W. 257; State *v.* Hutton, 39 Mo. App. 410; Webster *v.* Com., 89 Va. 154, 15 S. E. 513.

36. O'Brien *v.* State, 91 Ala. 25, 8 So. 560; Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577; People *v.* Furman, 85 Mich. 110, 48 N. W. 169; People *v.* Krank, 110 N. Y. 488, 18 N. E. 242. *Compare* Von der Leith *v.* State, 60 N. J. L. 590, 40 Atl. 1132.

37. State *v.* Brown, 51 Conn. 1; Blair *v.* State, 81 Ga. 629, 7 S. E. 855; State *v.* Sonnerkalh, 2 Nott & M. (S. C.) 280; Vincent *v.* State, (Tex. Cr. App. 1900) 55 S. W. 819.

In Massachusetts a person may be liable to the several penalties provided by the statute for selling liquor to a minor, giving liquor to him, and allowing him to loiter upon his premises on the same occasion. McNeil *v.* Collinson, 130 Mass. 167.

38. State *v.* Johnson, 3 R. I. 94. And see *supra*, IX, A, 3, f.

39. *Florida.*— Dansey *v.* State, 23 Fla. 316, 2 So. 692; Frese *v.* State, 23 Fla. 267, 2 So. 1.

Michigan.— People *v.* Kropp, 52 Mich. 582, 18 N. W. 368.

Missouri.— Kansas City *v.* Muhlback, 68 Mo. 638.

South Carolina.— State *v.* Cassety, 1 Rich. 90; State *v.* Glasgow, Dudley 40.

Vermont.— State *v.* Paddock, 24 Vt. 312; State *v.* Bugbee, 22 Vt. 32; State *v.* Chandler, 15 Vt. 425.

40. Com. *v.* Hersey, (Mass. 1887) 9 N. E. 837.

Each sale a separate offense.— State *v.* Darling, 77 Vt. 67, 58 Atl. 974.

41. See State *v.* Wolfarth, 42 Conn. 155; Delaware County Excise Com'rs *v.* Sackrider, 35 N. Y. 154; State *v.* Glennon, 3 R. I. 276; Fenner *v.* State, 3 R. I. 107; *In re* Barker, 56 Vt. 14.

42. See Com. *v.* Murphy, 147 Mass. 577, 18 N. E. 418. *Compare* State *v.* Severine, 2 S. D. 238, 49 N. W. 1056.

43. *Illinois.*— Newlan *v.* Aurora, 14 Ill. 364.

Iowa.— State *v.* Reyelts, 74 Iowa 499, 38 N. W. 377.

Kansas.— State *v.* Stevens, 68 Kan. 576, 75 Pac. 546.

North Carolina.— State *v.* Newcomh, 126 N. C. 1104, 36 S. E. 147; State *v.* Plunket, 23 N. C. 115.

Texas.— Head *v.* State, (Cr. App. 1895) 29 S. W. 789.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 215.

44. See State *v.* Buskirk, 20 Ind. App. 496, 48 N. E. 871; People *v.* Brown, 85 Mich. 119, 48 N. W. 158.

cution may be instituted under either,[45] as is sometimes the case in regard to a local option law, in force in the particular locality, and the general liquor law of the state,[46] or a municipal ordinance and the general statute.[47] Where the law divides dealers in liquor into several classes, making different provisions as to each, a prosecution against an offending party must be brought under that statute or part of the statute which governs his particular calling.[48]

b. As to Form of Proceeding. Whatever form of proceeding, principal or collateral, the statute may prescribe for the prosecution of offenses against the liquor laws must be followed, or the judgment or sentence will have no legal foundation.[49] But generally, wherever the law makes a particular act, done in contravention of the liquor laws, an offense or a misdemeanor, without directing the form of proceeding for its punishment, such proceeding properly takes the form of a criminal prosecution founded on an indictment or presentment by a grand jury.[50]

c. Effect of Repeal or Change of Law. When a later statute repeals or changes a prior liquor law, if it expressly reserves rights accrued under the repealed law as to offenses committed or punishments incurred thereunder, the repeal or change will not affect the right to prosecute for penalties incurred under the earlier law; but if the repealing act contains no such saving clause, a conviction rendered in a pending prosecution for a violation of the earlier statute cannot be sustained.[51]

45. See Wells *v.* State, 118 Ga. 556, 45 S. E. 443; State *v.* Holt, 69 Minn. 423, 72 N. W. 700; People *v.* Safford, 5 Den. (N. Y.) 112; State *v.* Loftis, 49 S. C. 443, 27 S. E. 451.

In Massachusetts one who makes three or more sales of intoxicating liquor in violation of Mass. St. (1852) c. 322, § 7, may be prosecuted under that section for the several sales, instead of being prosecuted under section 12, for being a common seller. Com. *v.* Porter, 4 Gray 426.

46. See Bailey *v.* Com., 64 S. W. 995, 23 Ky. L. Rep. 1223; Bishop *v.* Lane, 94 Mich. 461, 53 N. W. 1093; People *v.* Murphy, 93 Mich. 41, 52 N. W. 1042; State *v.* Smith, 126 N. C. 1057, 35 S. E. 615; Smith *v.* State, (Tex. Cr. 1899) 49 S. W. 373; Pitner *v.* State, 37 Tex. Cr. 268, 39 S. W. 662.

Where two local option elections have been held, and both resulted in favor of prohibition, a prosecution for violating the law can be maintained under either, if both were conducted in accordance with the statute. Weathered *v.* State, (Tex. Cr. App. 1901) 60 S. W. 876.

47. McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; Kemp *v.* State, 120 Ga. 157, 47 S. E. 548.

No license granted by municipality.— Where a municipality has been invested with power to regulate the liquor traffic, and has decided that no licenses shall be granted, a prosecution may be maintained under the general law of the state, for selling liquor in such municipality without a license. State *v.* Swanson, 85 Minn. 112, 88 N. W. 416; State *v.* Arbes, 70 Minn. 462, 73 N. W. 403; Burchard *v.* State, 2 Oreg. 78; Com. *v.* Frantz, 135 Pa. St. 389, 19 Atl. 1025; State *v.* Hoeppner, 9 Wash. 680, 38 Pac. 157.

48. Knox City *v.* Whiteaker, 87 Mo. App. 468. And see State *v.* Shanks, 98 Mo. App. 138, 71 S. W. 1065.

Illustration.— Thus the owner of a drug store is amenable to prosecution under the druggist law, but not under the dram-shop law; but this does not apply to the wife of such a person, selling liquor without a license, or to a clerk who is not a registered pharmacist. State *v.* Back, 99 Mo. App. 34, 72 S. W. 466; State *v.* Jordan, 87 Mo. App. 466; State *v.* Davis, 76 Mo. App. 586.

49. Downs *v.* State, 19 Md. 571, holding that where the statute directs a proceeding in the civil courts, founded on an application or remonstrance, for the revocation of the offender's license, the offense cannot be tried on indictment or presentment.

50. *Iowa.*— State *v.* Schilling, 14 Iowa 455.

Louisiana.— State *v.* Hollin, 12 La. Ann. 677.

Michigan.— People *v.* Smith, 118 Mich. 73, 76 N. W. 124; People *v.* Hart, 1 Mich. 467.

Minnesota.— State *v.* Kobe, 26 Minn. 148, 1 N. W. 1054.

Nebraska.— State *v.* Sinnott, 15 Nebr. 472, 19 N. W. 613.

New York.— People *v.* Charbineau, 115 N. Y. 433, 22 N. E. 271; Behan *v.* People, 17 N. Y. 516; People *v.* Olcese, 41 Misc. 102, 83 N. Y. Suppl. 973; People *v.* Stevens, 13 Wend. 341.

Ohio.— Harper *v.* State, 7 Ohio St. 73.

Tennessee.— Glenn *v.* State, 1 Swan 19.

Texas.— Haines *v.* State, 7 Tex. App. 30.

Virginia.— Tefft *v.* Com., 8 Leigh 721.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 215.

51. *Connecticut.*— State *v.* Ryan, 68 Conn. 512, 37 Atl. 377.

Illinois.— Mullinix *v.* People, 76 Ill. 211.

Indiana.— Whitehurst *v.* State, 43 Ind. 473.

2. JURISDICTION.[52] The jurisdiction for the trial of offenses against the liquor laws depends upon statutory provisions, and is sometimes conferred upon the police courts, justices of the peace, or other inferior magistrates;[53] and sometimes upon the county, district, or superior courts, either exclusively,[54] or concurrently with the inferior courts up to the limit of jurisdiction of the latter.[55] It is essential that the offense should appear to have been committed within the territorial jurisdiction of the court trying it.[56]

Kansas.— State *v.* Schmidt, 34 Kan. 399, 8 Pac. 867.

Massachusetts.— Com. *v.* Sullivan, 150 Mass. 315, 23 N. E. 47; Com. *v.* Edwards, 4 Gray 1.

Mississippi.— Winterton *v.* State, 65 Miss. 238, 3 So. 736; Teague *v.* State, 39 Miss. 516.

New York.— People *v.* Van Pelt, 4 How. Pr. 36; People *v.* Townsey, 5 Den. 70.

Pennsylvania.— Sanders *v.* Com., 117 Pa. St. 293, 11 Atl. 63.

Texas.— Loveless *v.* State, (Cr. App. 1899) 49 S. W. 601; Lawhon *v.* State, 26 Tex. App. 101, 9 S. W. 355; Boone *v.* State, 12 Tex. App. 184.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 215.

52. See CRIMINAL LAW, 12 Cyc. 196 *et seq.*

53. See the statutes of the different states. And see the following cases:

Arkansas.— Goad *v.* State, (1904) 83 S. W. 935; Marianna *v.* Vincent, 68 Ark. 244, 58 S. W. 251.

Connecticut.— State *v.* Beecher, 25 Conn. 539; Pardee *v.* Platt, 20 Conn. 402.

District of Columbia.— Gassenheimer *v.* District of Columbia, 6 App. Cas. 108.

Illinois.— King *v.* Jacksonville, 3 Ill. 305.

Indiana.— State *v.* Woulfe, 58 Ind. 17. *Compare* Lichtenstein *v.* State, 5 Ind. 162.

Iowa.— Griffin *v.* Painter, 65 Iowa 60, 21 N. W. 181; Albertson *v.* Kriechbaum, 65 Iowa 11, 21 N. W. 178; State *v.* Knowles, 57 Iowa 669, 11 N. W. 620; State *v.* Shawbeck, 7 Iowa 322; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Kansas.— State *v.* Muntz, 3 Kan. 383; State *v.* Allphin, 2 Kan. App. 28, 42 Pac. 55.

Kentucky.— McTigue *v.* Com., 99 Ky. 66, 35 S. W. 121, 17 Ky. L. Rep. 1418; Coe *v.* Standiford, 11 B. Mon. 196; Lowry *v.* Com., 36 S. W. 1117, 18 Ky. L. Rep. 481; Hord *v.* Com., 32 S. W. 176, 17 Ky. L. Rep. 570; Com. *v.* Collins, 10 Ky. L. Rep. 445; Com. *v.* O'Brien, 9 Ky. L. Rep. 439.

Massachusetts.—Com. *v.* Meskill, 165 Mass. 144, 42 N. E. 562; Com. *v.* Peto, 136 Mass. 155; Com. *v.* Carr, 11 Gray 463; Com. *v.* Murphy, 11 Gray 53.

Michigan.— *In re* Buddington, 29 Mich. 472.

New Jersey.—Miller *v.* Camden, 63 N. J. L. 501, 43 Atl. 1069; Greeley *v.* Passaic, 42 N. J. L. 87.

New York.— People *v.* Chase, 41 N. Y. App. Div. 12, 58 N. Y. Suppl. 292; People *v.* Koenig, 9 N. Y. App. Div. 436, 41 N. Y. Suppl. 283; People *v.* Bagley, 41 Misc. 97, 83 N. Y. Suppl. 766; People *v.* Mulkins, 25 Misc. 599, 54 N. Y. Suppl. 414.

North Carolina.—State *v.* Petterson, (1887) 4 S. E. 45. *Compare* State *v.* Snow, 117 N. C. 778, 23 S. E. 323.

Oregon.— State *v.* Haines, 35 Oreg. 379, 58 Pac. 39.

Rhode Island.— State *v.* Nolan, 15 R. I. 529, 10 Atl. 481; State *v.* Fletcher, 13 R. I. 522.

South Carolina.— State *v.* Adams, 49 S. C. 518, 27 S. E. 523; State *v.* Pickett, 47 S. C. 101, 25 S. E. 46.

Vermont.— State *v.* Nutt, 28 Vt. 598; *In re* Dougherty, 27 Vt. 325; State *v.* Conlin, 27 Vt. 318. *Compare* State *v.* Peck, 32 Vt. 172.

Wisconsin.— Hepler *v.* State, 58 Wis. 46, 16 N. W. 42.

Canada.—McGilvery *v.* Gault, 17 N. Brunsw. 641.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 216.

54. See the statutes of the different states. And see the following cases:

Georgia.— Williams *v.* Augusta, 111 Ga. 849, 36 S. E. 607.

Maine.— State *v.* Pierre, 65 Me. 293; State *v.* Stinson, 17 Me. 154.

Minnesota.— State *v.* Anderson, 47 Minn. 270, 50 N. W. 226; State *v.* Bach, 36 Minn. 234, 30 N. W. 764.

Texas.— *Ex p.* Valasquez, 26 Tex. 178.

West Virginia.— Eckhart *v.* State, 5 W. Va. 515.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 216.

55. See the statutes of the several states. And see the following cases:

Colorado.— Langan *v.* People, 32 Colo. 414, 76 Pac. 1048.

Dakota.— People *v.* Sweetser, 1 Dak. 308, 46 N. W. 452.

Iowa.— State *v.* Adams, 81 Iowa 593, 47 N. W. 770.

Missouri.— State *v.* Back, 99 Mo. App. 34, 72 S. W. 466.

Nebraska.— *In re* Chenoweth, 56 Nebr. 688, 77 N. W. 63; Sanders *v.* State, 34 Nebr. 872, 52 N. W. 721. See *Ex p.* Maule, 19 Nebr. 273, 27 N. W. 119.

Ohio.— Wightman *v.* State, 10 Ohio 452.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 216.

56. Jackson *v.* State, 19 Ind. 312; People *v.* Boudouin, 19 Misc. (N. Y.) 665, 44 N. Y. Suppl. 1055.

It is the place of the offense, not that of the residence of defendant, which determines the jurisdiction of the court. Com. *v.* Hersey, (Mass. 1887) 9 N. E. 837; State *v.* Hoffman, 46 Vt. 176.

3. LIMITATIONS.[57] If the liquor law does not itself prescribe the time within which prosecutions must be brought, it will be determined by reference to the general statute of limitations fixing the period for the prosecution of misdemeanors and other similar offenses.[58]

4. PRELIMINARY PROCEEDINGS — a. Complaint or Affidavit. Where the proceedings before the inferior court or committing magistrate are required to be based on or supported by a complaint or affidavit of a public or private prosecutor,[59] it should be sufficiently full and explicit to charge the commission of an offense,[60] and it will generally be held good if it contains all the averments which the statute prescribes.[61] It should be duly verified,[62] and it has been held that it must aver

Place of sale.— Where liquors are illegally sold through an agent who does business and takes orders at one place and forwards them to his principal in another place to be filled, the prosecution must be brought in the place where, according to legal principles, the sale was completed. People *v.* De Groot, 111 Mich. 245, 69 N. W. 248. As to determining the place of sale see *supra*, IX, A, 3, n, (K).

In **Iowa**, where orders for intoxicating liquors, subject to approval, are taken in one county, and approved in another, and then delivered in the first county, jurisdiction of the offense is in the courts of either county. State *v.* Kriechbaum, 81 Iowa 633, 47 N. W. 872. And in the same state it is held that the provision of the code that when a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either of the counties, applies to a criminal prosecution for keeping a liquor nuisance. State *v.* Rockwell, 82 Iowa 429, 48 N. W. 721.

57. See CRIMINAL LAW, 12 Cyc. 254 *et seq.*

58. *Arkansas.*— Fitzpatrick *v.* State, 37 Ark. 373.

Florida.— Frese *v.* State, 23 Fla. 267, 2 So. 1.

Georgia.— Patton *v.* State, 80 Ga. 714, 6 S. E. 273.

Kansas.— State *v.* Pfefferle, 36 Kan. 90, 12 Pac. 406.

Maine.— State *v.* Cofren, 48 Me. 364.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 217.

In **New Hampshire** an indictment for selling liquors without a license is not barred by the statute limiting prosecutions on penal statutes. State *v.* Rundlett, 33 N. H. 70; Coburn *v.* Odell, 30 N. H. 540.

Violation of two statutes.— Where the same act may amount to a violation of either or both of two statutes having different periods of limitation, the question must be determined by reference to the law under which a conviction is sought. Thus a sale of liquor on Sunday, in violation of a statute in that behalf, is not merely a "desecration of the Sabbath," for which a prosecution must be commenced within six months after the offense; but a prosecution for such unlawful sale is not barred until after the expiration of two years. Shepler *v.* State, 114 Ind. 194, 16 N. E. 521.

59. See Com. *v.* Intoxicating Liquors, 142 Mass. 470, 8 N. E. 421; Pattee *v.* Thompson, (N. H. 1898) 41 Atl. 265; State *v.* Collins, 12 R. I. 478; *Ex p.* Sonier, 34 N. Brunsw. 84.

Hired informer.— It is no defense to a prosecution for selling liquor on Sunday that the prosecuting witness was hired to obtain evidence of violations of the law, where defendant was not induced or persuaded by him to make the illegal sale, but furnished it in answer to a simple call. Baehner *v.* State, 25 Ind. App. 597, 58 N. E. 741.

60. See State *v.* Lockstand, 4 Ind. 572; West *v.* State, 32 Ind. App. 161, 69 N. E. 465; People *v.* Cramer, 47 N. Y. Suppl. 1039, 12 N. Y. Cr. 469; Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468.

Alleging place of sale see Sparta *v.* Boorom, 129 Mich. 555, 89 N. W. 435, 90 N. W. 681; Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468; State *v.* Sykes, 104 N. C. 694, 10 S. E. 191; State *v.* Rozum, 8 N. D. 548, 80 N. W. 477.

Alleging time of sale see Com. *v.* McIvor, 117 Mass. 118; Com. *v.* Walton, 11 Allen (Mass.) 238; Com. *v.* Hersey, (Mass. 1887) 9 N. E. 837; People *v.* Shaver, 37 N. Y. App. Div. 21, 55 N. Y. Suppl. 701.

Alleging quantity sold see Thompson *v.* Com., 103 Ky. 685, 45 S. W. 1039, 46 S. W. 492, 698, 20 Ky. L. Rep. 397.

Alleging name of purchaser see State *v.* Burgess, 4 Ind. 606; People *v.* Shaver, 37 N. Y. App. Div. 21, 55 N. Y. Suppl. 701.

Alleging sale to habitual drunkard see Parker *v.* State, 4 Ohio St. 563.

Negativing exceptions see Thompson *v.* Com., 103 Ky. 685, 45 S. W. 1039, 46 S. W. 492, 698, 20 Ky. L. Rep. 397; People *v.* Drennan, 86 Mich. 445, 49 N. W. 215.

61. Hosea *v.* State, 47 Ind. 180; Farrell *v.* State, 45 Ind. 371; O'Connor *v.* State, 45 Ind. 347.

Quoting statute.— An affidavit on which is based a warrant for a violation of a certain section of a municipal ordinance relating to the sale of liquor, which quotes the section, but fails to state in what manner it was violated, is defective. Marietta *v.* Alexander, 86 Ga. 455, 12 S. E. 681.

62. Qualter *v.* State, 120 Ind. 92, 22 N. E. 100, holding that where the record on appeal shows that the affidavit on which the prosecution was based was sworn to, the omission of the magistrate's seal to the jurat is not ground for reversal. And see People *v.* Haas, 79 Mich. 449, 44 N. W. 928.

By whom sworn to.— Although the statute provides that the complaint must be

positively the facts constituting the offense, an allegation merely on information and belief not being sufficient.[63]

b. Warrant or Summons. The process employed to bring the accused before the court is not ordinarily required to recite the facts constituting the alleged offense.[64] If the proceeding is criminal, it must contain an order to arrest defendant, a mere summons to appear not being sufficient.[65] If he appears and defends, without making any objection, he will be held to have waived any supposed defects or irregularities in the process, in its issuance, or in the manner of its service, and cannot thereafter have it quashed or set aside.[66]

c. Preliminary Hearing. Under some statutes no preliminary examination of a person accused of violating the liquor laws is allowed,[67] and under others it is unnecessary.[68] But where such a proceeding is had, evidence sufficient to make out a *prima facie* case will justify the holding of the accused.[69] The rule that one should not be subjected to trial for two separate and distinct offenses at one time has no application to preliminary examinations before a justice for a violation of the liquor laws.[70] Some special provisions as to the duties of the prosecutor and the committing magistrate are found in the statutes.[71]

5. Indictment or Information[72] — a. Nature and Requisites — (i) *In General.* An indictment for a violation of the liquor laws should be in the name of the state.[73] It need not contain the name of the complainant or prosecutor,[74] or a statement of the penalty, forfeiture, or other punishment incurred,[75] or generally a recital of any preliminary proceedings.[76] It need not allege that such violation was committed "with force and arms."[77] It will not be vitiated by the introduc-

sworn to by a "credible person," it is not necessary that the officer's jurat should show that the person verifying it was of that description. Burk *v.* State, 44 Tex. Cr. 541, 72 S. W. 585.

63. People *v.* Haas, 79 Mich. 449, 44 N. W. 928; People *v.* Schottey, 66 Mich. 708, 33 N. W. 810; *In re* Morton, 10 Mich. 208; State *v.* Graffmuller, 26 Minn. 6, 46 N. W. 445; Mowery *v.* Camden, 49 N. J. L. 106, 6 Atl. 438; Roberson *v.* Lambertville, 38 N. J. L. 69; People *v.* Cramer, 47 N. Y. Suppl. 1039, 12 N. Y. Cr. 469; People *v.* Henschel, 12 N. Y. Suppl. 46; Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468. But the allegation that defendant did not have a license to sell liquor may be made on information and belief. People *v.* Cramer, *supra*. But see Deveny *v.* State, 47 Ind. 208.

Actual knowledge not necessary.— It is not necessary, in a prosecution under the prohibitory law, that the prosecuting witness should have actual personal knowledge of the transactions charged in the information; it is sufficient if he has notice or knowledge thereof, and had the offenses in contemplation when he verified the information which the witnesses testified to, and for which defendant was convicted. State *v.* Etzel, 2 Kan. App. 673, 43 Pac. 798. And see State *v.* Coggins, 10 Kan. App. 455, 62 Pac. 247; Holton *v.* Haist, 8 Kan. App. 856, 55 Pac. 468; State *v.* Hughes, 8 Kan. App. 631, 56 Pac. 142; State *v.* Tegder, 6 Kan. App. 762, 50 Pac. 985; Lincoln Center *v.* Linker, 6 Kan. App. 369, 51 Pac. 807. It is no defense to a complaint for an unlawful sale of liquor that at the time of making the complaint the complainant's only knowledge of the offense was by information from others. Com. *v.* Crawford, 9 Gray (Mass.) 129. See State *v.* Dale, 3 Wis. 795.

64. Megowan *v.* Com., 2 Metc. (Ky.) 3; Jett *v.* Com., 49 S. W. 786, 20 Ky. L. Rep. 1619; People *v.* Bennett, 107 Mich. 430, 65 N. W. 280; State *v.* Tall, 56 Wis. 577, 14 N. W. 596.

65. State *v.* Leach, 38 Me. 432, opinion by Shepley, C. J.

66. Mayson *v.* Atlanta, 77 Ga. 662; State *v.* Longton, 35 Kan. 375, 11 Pac. 163.

67. See State *v.* Lund, 49 Kan. 209, 30 Pac. 518.

68. See Harper *v.* State, 7 Ohio St. 73; State *v.* Scampini, 77 Vt. 92, 59 Atl. 201.

69. People *v.* Berry, 107 Mich. 256, 65 N. W. 98.

70. People *v.* Shuler, 136 Mich. 161, 98 N. W. 986.

71. See the statutes of the different states.

Noting time of filing complaint see State *v.* Perkins, 58 Vt. 722, 5 Atl. 894.

Notifying district attorney see People *v.* Schatz, 50 N. Y. App. Div. 544, 64 N. Y. Suppl. 127, 15 N. Y. Cr. 38.

Filing testimony see State *v.* Kirkpatrick, 52 Kan. 50, 34 Pac. 415.

As to recognizance see Scovern *v.* State, 6 Ohio St. 288; Chittenden County *v.* Mitchell, 23 Vt. 131.

72. See Indictments and Informations, 22 Cyc. 157 *et seq.*

73. Rogers *v.* Alexander, 2 Greene (Iowa) 443; State *v.* Stinson, 17 Me. 154.

74. State *v.* Cottle, 15 Me. 473.

75. State *v.* Stinson, 17 Me. 154; Com. *v.* Tuttle, 12 Cush. (Mass.) 502.

76. Liggett *v.* People, 26 Colo. 364, 58 Pac. 144. See State *v.* Carpenter, 20 Ind. 219.

77. State *v.* Munger, 15 Vt. 290.

tion of unnecessary averments or any other matter which may be treated as surplusage,[78] or because of merely clerical errors in spelling and the like.[79] The name of defendant must of course be given if known,[80] and a substantial misnomer of defendant will be ground for a plea in abatement.[81]

(II) *CERTAINTY.* The indictment must be drawn with such a degree of legal certainty as to identify the particular transaction complained of, to the end that the court may be able to judge whether the facts alleged are sufficient in law to support a conviction, and to enable the accused to understand exactly what charge he is called upon to meet, and to plead a judgment in bar of a second prosecution for the same offense.[82] In particular, in charging a sale of liquor or other act, which may or may not be a crime, the facts or circumstances which render the act unlawful and criminal must be distinctly alleged.[83] And if the same transaction may constitute either of two offenses, according to the presence or absence of a particular fact, that fact should be affirmed or denied as the case may be.[84] But the indictment will not be vitiated by grammatical errors not materially affecting its certainty,[85] or by the use of the phrase "then and there," as a con-

78. *Kentucky.*— Com. *v.* Helback, 101 Ky. 166, 40 S. W. 245, 19 Ky. L. Rep. 278.

Maine.— State *v.* Hatch, 94 Me. 58, 46 Atl. 796; State *v.* Pillsbury, 47 Me. 449; State *v.* Staples, 45 Me. 320.

Massachusetts.— Com. *v.* Penniman, 8 Metc. 519.

New York.— People *v.* Townsey, 5 Den. 70; Hodgman *v.* People, 4 Den. 235.

Ohio.— Kappes *v.* State, 25 Ohio Cir. Ct. 723.

Texas.— Segars *v.* State, (Cr. App. 1899) 51 S. W. 398.

West Virginia.— State *v.* Hall, 26 W. Va. 236.

79. State *v.* Clark, 3 Ind. 481.

Omissions not necessarily fatal see Walter *v.* State, 105 Ind. 589, 5 N. E. 735; State *v.* Rhodes, 2 Ind. 321; Com. *v.* Burke, 15 Gray (Mass.) 408; Com. *v.* Butler, 1 Allen (Mass.) 4.

80. Segars *v.* State, 40 Tex. Cr. 577, 51 S. W. 211.

Sale by agent.— An indictment against the owner of a saloon for sales of liquor to a minor made by his clerk need not set out the name of the clerk. Loeb *v.* State, 75 Ga. 258.

81. Lawrence *v.* State, 59 Ala. 61; State *v.* Murphy, 55 Vt. 547.

82. *Arkansas.*— Scales *v.* State, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768. *Compare* Williams *v.* State, 47 Ark. 230, 1 S. W. 149.

Delaware.— State *v.* Solio, 4 Pennew. 138, 54 Atl. 684.

Georgia.— Maddox *v.* State, 118 Ga. 32, 44 S. E. 806; Barker *v.* State, 117 Ga. 428, 43 S. E. 744; O'Neil *v.* State, 116 Ga. 839, 43 S. E. 248. And see Loeb *v.* State, 75 Ga. 258.

Iowa.— Hintermeister *v.* State, 1 Iowa 101.

Kansas.— State *v.* Ratner, 44 Kan. 429, 24 Pac. 953; State *v.* Brannon, 6 Kan. App. 765, 50 Pac. 986; State *v.* Knoby, 6 Kan. App. 334, 51 Pac. 53.

Kentucky.— Com. *v.* Riley, 14 Bush 44; Com. *v.* White, 18 B. Mon. 492; Bridgeford *v.* Lexington, 7 B. Mon. 47; Com. *v.* Traylor, 45 S. W. 356, 450, 20 Ky. L. Rep. 97; Com. *v.* Middleton, 8 Ky. L. Rep. 264.

Maine.— State *v.* Lane, 33 Me. 536.

Maryland.— State *v.* Kiefer, 90 Md. 165, 44 Atl. 1043.

Michigan.— Anderson *v.* Van Buren Cir. Judge, 130 Mich. 695, 90 N. W. 694; People *v.* Minnock, 52 Mich. 628, 18 N. W. 390; Benalleck *v.* People, 31 Mich. 200.

Missouri.— State *v.* Cox, 29 Mo. 475; State *v.* Manning, 87 Mo. App. 78; State *v.* Anthony, 52 Mo. App. 507.

New Jersey.— Roberson *v.* Lambertville, 38 N. J. L. 69.

New York.— People *v.* Bates, 61 N. Y. App. Div. 559, 71 N. Y. Suppl. 123, 15 N. Y. Cr. 469; People *v.* Olmsted, 74 Hun 323, 26 N. Y. Suppl. 818.

North Carolina.— State *v.* Farmer, 104 N. C. 887, 10 S. E. 563.

Oregon.— See Cunningham *v.* Berry, 17 Oreg. 622, 22 Pac. 115.

Pennsylvania.— See Seifried *v.* Com., 101 Pa. St. 200.

South Dakota.— State *v.* Brennan, 2 S. D. 384, 50 N. W. 625.

Texas.— State *v.* Smith, 35 Tex. 132; Alexander *v.* State, 29 Tex. 495; Burch *v.* Republic, 1 Tex. 608.

Vermont.— State *v.* Wooley, 59 Vt. 357, 10 Atl. 84.

Virginia.— Com. *v.* Hatcher, 6 Gratt. 667.

United States.— U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 219.

Immaterial averments, although tending to confuse, are not necessarily fatal. Stone *v.* State, (Miss. 1890) 7 So. 500.

83. People *v.* Olmsted, 74 Hun (N. Y.) 323, 26 N. Y. Suppl. 818. And see State *v.* Cox, 29 Mo. 475.

84. Roberson *v.* State, 100 Ala. 123, 14 So. 869; State *v.* Auberry, 7 Mo. 304; Reg. *v.* Hoggard, 30 U. C. Q. B. 152.

85. State *v.* Whitney, 15 Vt. 298.

densed repetition of the charge as to time and place, before subsequent material averments.[86] Where the sale was made by defendant's servant or agent, it may be charged as a sale by defendant,[87] and if the charge is against defendant as the agent of another, the circumstances of his agency need not be set forth, the fact itself being disclosed.[88]

(III) *Bill of Particulars.* A bill of particulars may be ordered if authorized by the statute or the practice of the court.[89]

(IV) *Following the Statute.* An indictment which follows the language of the statute in describing the offense charged will generally be sufficient.[90] If the statute prescribes a form to be followed in indictments, it is sufficient to use such form, provided it describes a punishable offense, and adequately informs defendant of the nature and cause of the accusation against him,[91] even though it would be bad for uncertainty if tested by common-law rules.[92]

(V) *Disjunctive Allegations.* The allegation, in an indictment, of several acts, articles, or agencies, connected by the disjunctive particle "or," may lay it open to the objection of uncertainty, by reason of the consequent doubt as to which particular thing is intended,[93] unless the statute authorizes a charge in

86. See State *v.* Hopkins, 5 R. I. 53.

87. State *v.* McChance, 110 Mo. 398, 19 S. W. 648. And see Waller *v.* State, 38 Ark. 656.

88. State *v.* Caldwell, (Miss. 1895) 17 So. 372. *Compare* State *v.* Stacks, (Miss. 1900) 26 So. 962.

89. See Indictments and Informations, 22 Cyc. 371. But *compare* Lauer *v.* District of Columbia, 11 App. Cas. (D. C.) 453; People *v.* Congdon, (Mich. 1904) 100 N. W. 266; Westbrooks *v.* State, 76 Miss. 710, 25 So. 491.

90. State *v.* Hoard, 123 Ind. 34, 23 N. E. 972; Skinner *v.* State, 120 Ind. 127, 22 N. E. 115; Shilling *v.* State, 5 Ind. 443; Zumhoff *v.* State, 4 Greene (Iowa) 526; State *v.* Looker, 54 Kan. 227, 38 Pac. 288; State *v.* Tanner, 50 Kan. 365, 31 Pac. 1096; State *v.* Schweiter, 27 Kan. 499; Lincoln Center *v.* Linker, 6 Kan. App. 369, 51 Pac. 807; People *v.* Telford, 56 Mich. 541, 23 N. W. 213; State *v.* Crooker, 95 Mo. 389, 8 S. W. 422; State *v.* Atkins, 40 Mo. App. 344; Boldt *v.* State, 72 Wis. 7, 38 N. W. 177. But see State *v.* Brown, 8 Mo. 210.

Where the statute simply designates the offense, and does not in express terms name its constituent elements, the indictment must sometimes be expanded beyond the statutory terms. See State *v.* Gavigan, 36 Kan. 322, 13 Pac. 554.

An amendment to the statute will necessitate the drawing of the indictment in accordance with the statute as amended. Taylor *v.* State, (Tex. Cr. App. 1899) 50 S. W. 343.

A complaint on a municipal ordinance which substantially follows the language of the ordinance under which the prosecution is brought will in general be sufficient. Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. 305. And see Byars *v.* Mt. Vernon, 78 Ill. 11. And this is so, if it states the legal effect of the ordinance, without setting it out literally. Woods *v.* Prineville, 19 Oreg. 108, 23 Pac. 880. But on the other hand, although the complaint may quote the ordinance, yet it is defective if it fails to show in what manner the ordinance was violated. Marietta *v.* Alexander, 86 Ga. 455, 12 S. E. 681.

Not necessary to follow precisely.— Weed *v.* State, 55 Ala. 13 [*overruling* Bryan *v.* State, 45 Ala. 86]; People *v.* Husted, 52 Mich. 624, 18 N. W. 388; State *v.* Nation, 75 Mo. 53 (using conjunctive when statute was disjunctive); State *v.* Barnett, 110 Mo. App. 592, 85 S. W. 613.

91. State *v.* Learned, 47 Me. 426.

92. State *v.* Murphy, 15 R. I. 543, 10 Atl. 585. See State *v.* Comstock, 27 Vt. 553.

93. See People *v.* Gilkinson, 4 Park. Cr. (N. Y.) 26; *Ex p.* Hogue, 3 L. C. Rep. 94.

"Selling or giving." — An indictment which charges that defendant did unlawfully "sell or give away" intoxicating liquors, where the statute makes either of these acts an offense, is fatally defective. State *v.* Fairgrieve, 29 Mo. App. 641; People *v.* Norton, 76 Hun (N. Y.) 7, 27 N. Y. Suppl. 851. And see Raisler *v.* State, 55 Ala. 64; State *v.* Colwell, 3 R. I. 284.

Charging defendant as principal or agent. — An indictment is bad for uncertainty which alleges that the liquor in question was "kept or deposited" by defendant "or by some other person with his consent." State *v.* Morna, 40 Me. 129.

Alternative description of liquor.— It has been held that an indictment is fatally defective for uncertainty, when it alleges an unlawful sale of 'spirituous or intoxicating liquor," or of "spirituous, vinous, or malt liquor," or of "ale and beer or wine," following the language of the statute.

Arkansas.— Thompson *v.* State, 37 Ark. 408.

Connecticut.— Smith *v.* State, 19 Conn. 493. But see Barth *v.* State, 18 Conn. 432.

Georgia.— Grantham *v.* State, 89 Ga. 121, 14 S. E. 892. But *compare* Eaves *v.* State, 113 Ga. 749, 39 S. E. 318.

Kentucky.— Locke *v.* Com., 63 S. W. 795,

the alternative,[94] or unless the several terms thus employed are synonymous or mutually explanatory.[95]

(VI) *DUPLICITY.* An indictment under the liquor laws is duplicitous if it charges two or more distinct offenses in the same count.[96] But if the allegation of one of the offenses is legally insufficient, or shows a lack of jurisdiction in the court,[97] or if otherwise it may be rejected as surplusage, leaving a good count, this relieves the indictment of the charge of duplicity.[98] And where two or more acts are so connected that each represents a stage in the same offense, although each act alone would constitute an offense, they may be coupled in one count.[99] Again a statutory offense may be single, although it may require or

23 Ky. L. Rep. 740; Raubold *v.* Com., 63 S. W. 781, 23 Ky. L. Rep. 735.

Massachusetts.— Com. *v.* Grey, 2 Gray 501, 61 Am. Dec. 476.

Wisconsin.— Clifford *v.* State, 29 Wis. 327. But *compare* State *v.* Boucher, 59 Wis. 477, 18 N. W. 335, where it is said that where a complaint charges the selling of "intoxicating or malt liquors," the word "or" may be deemed to show the kind of intoxicating liquors intended.

But there are decisions to the contrary.

Alabama.— Cost *v.* State, 96 Ala. 60, 11 So. 435; Powell *v.* State, 69 Ala. 10.

New York.— Osgood *v.* People, 39 N. Y. 449.

South Carolina.— Florence *v.* Berry, 61 S. C. 237, 39 S. E. 389.

Virginia.— Thomas *v.* Com., 90 Va. 92, 17 S. E. 788; Morgan *v.* Com., 7 Gratt. 592.

West Virginia.— Cunningham *v.* State, 5 W. Va. 508.

94. McClellan *v.* State, 118 Ala. 122, 23 So. 732; Smith *v.* Warrior, 99 Ala. 481, 12 So. 418.

95. State *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321.

Illustrations.— Thus an indictment charging defendant as a "liquor dealer or keeper of a bar-room" is not in the alternative, since the words "dealer" and "keeper" are synonymous. Hofheintz *v.* State, 45 Tex. Cr. 117, 74 S. W. 310. So of an indictment charging, in the language of the statute, that defendant used a "certain building or place" for the purpose of unlawfully selling liquor. State *v.* Dixon, 104 Iowa 741, 74 N. W. 692.

96. See Pope *v.* People, 26 Ill. App. 44; Allen *v.* State, (Tex. App. 1890) 13 S. W. 998; Reg. *v.* Bennett, 1 Ont. 445.

Illustrations.— A statute providing that a person shall not sell certain liquors "in less quantities than one gallon nor suffer the same" to be drunk on the premises, states two distinct offenses, and one count in an indictment, setting out the words of the statute, charges two offenses and is bad for duplicity. Miller *v.* State, 5 How. (Miss.) 250. And see State *v.* Ball, 27 Nebr. 601, 43 N. W. 398. But *compare* Overshiner *v.* Com., 2 B. Mon. (Ky.) 344. But a charge that defendant "did keep, and was concerned, engaged and employed in owning and keeping intoxicating liquors to sell" does not charge two distinct offenses and is not bad for duplicity. Vaughn *v.* State, 5 Iowa 369. And the same is true of an indictment which charges that in a certain building defendant kept intoxicating liquors for sale and did then and there sell the same. State *v.* Baughman, 20 Iowa 497; State *v.* Becker, 20 Iowa 438.

Duplicitous indictment see People *v.* Keefer, 97 Mich. 15, 56 N. W. 105.

Indictments not duplicitous.— See the following cases:

Arkansas.— Bridges *v.* State, 37 Ark. 224.

Indiana.— Henry *v.* State, 113 Ind. 304, 15 N. E. 593; Stout *v.* State, 93 Ind. 150.

Iowa.— State *v.* King, 37 Iowa 462.

Maine.— State *v.* Lang, 63 Me. 215.

Massachusetts.— Com. *v.* Igo, 158 Mass. 199, 33 N. E. 339; Com. *v.* Dolan, 121 Mass. 374; Com. *v.* Curran, 119 Mass. 206; Com. *v.* Dillane, 11 Gray 67.

Michigan.— People *v.* Aldrich, 104 Mich. 455, 62 N. W. 570; People *v.* Wade, 101 Mich. 89, 59 N. W. 438.

Montana.— State *v.* McGinnis, 14 Mont. 462, 36 Pac. 1046; State *v.* Marion, 14 Mont. 458, 36 Pac. 1044.

Ohio.— State *v.* Conner, 30 Ohio St. 405; Kappes *v.* State, 25 Ohio Cir. Ct. 723.

Oregon.— Cranor *v.* Albany, 43 Oreg. 144, 71 Pac. 1042.

South Carolina.— State *v.* Beckroge, 49 S. C. 484, 27 S. E. 658.

South Dakota.— State *v.* Donaldson, 12 S. D. 259, 81 N. W. 299.

Tennessee.— Webb *v.* State, 11 Lea 662.

Vermont.— State *v.* Clark, 44 Vt. 636.

Virginia.— Morganstern *v.* Com., 94 Va. 787, 26 S. E. 402.

97. State *v.* Smouse, 50 Iowa 43.

98. State *v.* Wickey, 57 Ind. 596, 54 Ind. 438; State *v.* Bradley, 15 S. D. 148, 87 N. W. 590; Jordan *v.* State, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110; State *v.* Bielby, 21 Wis. 204.

Illustration.— In an indictment for selling liquor on Sunday, an averment that defendant had no license is merely surplusage, and does not render the indictment bad for duplicity. State *v.* Hutzel, 53 Ind. 160.

99. This rule applies where the indictment charges that defendant owned and kept liquors with intent to sell them, exposed and offered them for sale, and sold them (State *v.* Burns, 44 Conn. 149), that he "did offer to sell, sell, and suffer to be sold" (State *v.* Nolan, 15 R. I. 529, 10 Atl. 481), that he "did presume to be a retailer and did sell"

admit several distinct acts as its constituent elements, as in the case of "retailing liquors" or being a "common seller." And here an indictment is not duplicitous for setting out the various component acts.[1] And it may also properly charge all the different modes or ways in which the same offense may be committed.[2] Nor is there any objection to the use of several terms to designate one and the same place.[3] And an indictment may properly charge a sale to a person named and to divers other persons.[4]

(VII) *JOINDER OF COUNTS.* The general rule that two or more offenses of the same grade, punishable with similar penalties, committed in the same jurisdiction by the same defendant, and belonging to the same general group or class of crimes, may be joined in separate counts of the same indictment, applies to prosecutions for violations of the liquor laws.[5]

(VIII) *ALLEGING FORMER CONVICTION.* Where the prosecution is for a second offense against the liquor laws, and a prior conviction for a similar offense becomes material, with a view to the measure of punishment, the indictment should contain such a description of the former conviction as will identify the case and enable defendant to find the record.[6] But if the statute does not

to a person named (Com. *v.* Wilcox, 1 Cush. (Mass.) 503), or that he "unlawfully did sell and was interested in the sale" of certain liquors (Davis *v.* State, 50 Ark. 17, 6 S. W. 388). And there is no duplicity in charging that he "did sell and did offer to sell, by himself and by an agent." Barnes *v.* State, 20 Conn. 232. And see People *v.* Paquin, 74 Mich. 34, 41 N. W. 852; Luton *v.* Newaygo County Cir. Judge, 69 Mich. 610, 37 N. W. 701.

1. Zumhoff *v.* State, 4 Greene (Iowa) 526; Com. *v.* Broker, 151 Mass. 355, 23 N. E. 1137.

2. Pettit *v.* People, 24 Colo. 517, 52 Pac. 676; State *v.* Plastridge, 6 R. I. 76.

3. State *v.* Brady, 16 R. I. 51, 12 Atl. 238; State *v.* Tracey, 12 R. I. 216; Conley *v.* State, 5 W. Va. 522.

4. People *v.* Huffman, 24 N. Y. App. Div. 233, 48 N. Y. Suppl. 482; People *v.* Haren, 35 Misc. (N. Y.) 590, 72 N. Y. Suppl. 205.

5. *Georgia.*— Williams *v.* State, 107 Ga. 693, 33 S. E. 641.

Illinois.— Pope *v.* People, 26 Ill. App. 44.

Iowa.— State *v.* Schuler, 109 Iowa 111, 80 N. W. 213; State *v.* Ruferty, 70 Iowa 160, 30 N. W. 391; State *v.* Howorth, 70 Iowa 157, 30 N. W. 389; Walters *v.* State, 5 Iowa 507.

Kansas.— State *v.* McLaughlin, 47 Kan. 143, 27 Pac. 840.

Maryland.— State *v.* Blakeney, 96 Md. 711, 54 Atl. 614.

Massachusetts.— Com. *v.* Bearce, 150 Mass. 389, 23 N. E. 99; Com. *v.* Gillon, 2 Allen 502; Com. *v.* Clark, 14 Gray 367; Com. *v.* Moorhouse, 1 Gray 470.

Missouri.— State *v.* Klein, 78 Mo. 627.

Nebraska.— Hans *v.* State, 50 Nebr. 150, 69 N. W. 838.

South Carolina.— State *v.* Atkinson, 33 S. C. 100, 11 S. E. 693.

Tennessee.— Tillery *v.* State, 10 Lea 35.

Texas.— Elsner *v.* State, 30 Tex. 524; Witherspoon *v.* State, 30 Tex. Cr. 65, 44 S. W. 164, 1096.

Virginia.— Peer's Case, 5 Gratt. 674.

Repugnancy.— Where two counts of an indictment charge a sale of liquor without license, and another count charges a violation of the local option law, the two sets of counts are irreconcilably repugnant, and the indictment is insufficient in law. Butler *v.* State, 25 Fla. 347, 6 So. 67.

In New York, under a statute providing that each indictment shall charge but one crime, except that a crime may be alleged in separate counts as committed in a different manner, and where the act complained of constitutes different crimes such crimes may be charged in separate counts, it is held to be contrary to the statute for an indictment to charge sales of liquor in the same town, at different times and to different persons, each sale being alleged in a separate count. People *v.* O'Donnell, 46 Hun 358. And see People *v.* Harmon, 49 Hun 558, 2 N. Y. Suppl. 421. But where an indictment charged in one count that defendant sold liquor in quantities less than five gallons to a certain person, at a certain time and place, without a license, and a second count alleged that he sold liquor to be drunk on the premises to the same person at the same time and place, in violation of two distinct sections of the statute respectively, it was held that if there was a sale of less than five gallons to be drunk on the premises, it was a crime under both such sections, and might be charged in separate counts, as the case came within the proviso to the statute. People *v.* Charbineau, 115 N. Y. 433, 22 N. E. 271.

6. State *v.* Bartley, 92 Me. 422, 43 Atl. 19; State *v.* Wyman, 80 Me. 117, 13 Atl. 47; State *v.* Lashus, 79 Me. 504, 11 Atl. 180; State *v.* Small, 64 N. H. 491, 14 Atl. 727. But see State *v.* Freeman, 27 Vt. 523.

If an indictment alleges an impossible date as the time of the prior conviction it is defective, although this will not vitiate the indictment as to the new offense charged therein. State *v.* Dorr, 82 Me. 341, 19 Atl. 861. And see State *v.* Bartley, 92 Me. 422, 43 Atl. 19.

The record of the prior conviction need not

provide any different or increased penalty for a second offense, an allegation in the indictment that defendant had been previously convicted of a similar offense is proper ground for demurrer.[7]

(IX) *VERIFICATION.* An information or complaint for a violation of the liquor law, filed under a statute requiring its verification, must be sworn to by the officer and in the manner directed in the statute.[8]

b. Allegations as to Particular Elements of Offense — (I) *CHARACTER OR OCCUPATION OF ACCUSED.* If the statute upon which an indictment is founded makes the act charged an offense only when it is done by a person belonging to a particular class, or possessing a certain qualification, or pursuing a given business, as, where he is a "licensed retailer," "merchant," "druggist," or "wholesale dealer," so that the crime can be committed only by one who is so situated, the indictment must show on its face that the accused comes within the class designated by the statute.[9] So also if the statute imposes different penalties upon one class of persons from those imposed upon another class for doing the same act, the indictment must show the class to which defendant belongs.[10] But if the character or occupation of defendant is not an essential ingredient of the offense, as where the statute forbids all persons without distinction to do the particular act, it is not necessary that the indictment should contain any such averment.[11]

(II) *INTENT.* In an indictment under the liquor laws it is not generally necessary to allege any special criminal intent; an allegation that defendant knowingly and wilfully did the act complained of being sufficient.[12] However, in cases

be set forth particularly, but a brief allegation of the fact, giving the necessary data, will be enough. State *v.* Robinson, 39 Me. 150.

7. Seick *v.* State, 94 Md. 71, 50 Atl. 436.

8. See the statutes of the different states. And see State *v.* Moseli, 49 Kan. 142, 30 Pac. 189; State *v.* Ladenberger, 44 Kan. 261, 24 Pac. 347; State *v.* Blackman, 32 Kan. 615, 5 Pac. 173.

As to verifications on information and belief see State *v.* Huffman, 51 Kan. 541, 33 Pac. 377; State *v.* Becker, 3 S. D. 29, 51 N. W. 1018; State *v.* Brennan, 2 S. D. 384, 50 N. W. 625; State *v.* Butcher, 1 S. D. 401, 47 N. W. 406. And see *supra*, IX, B, 4, a.

9. *Arkansas.*— State *v.* Martin, 34 Ark. 340.

Kansas.— State *v.* Shinn, 63 Kan. 638, 66 Pac. 650.

Kentucky.— Herine *v.* Com., 13 Bush 295.

Maryland.— Bode *v.* State, 7 Gill 326.

Minnesota.— State *v.* Heitsch, 29 Minn. 134, 12 N. W. 353.

Missouri.— State *v.* Lisles, 58 Mo. 359; State *v.* Andrews, 26 Mo. 169; State *v.* Runyan, 26 Mo. 167; State *v.* Stock, 95 Mo. App. 65, 68 S. W. 579; State *v.* Shafer, 82 Mo. App. 58; State *v.* Ryan, 30 Mo. App. 159. Under Rev. St. (1889) c. 58, relating to the sale of intoxicating liquors by druggists, a druggist must be indicted as such for an unlawful sale of liquor. State *v.* Carnahan, 63 Mo. App. 244; State *v.* Rafter, 62 Mo. App. 101; State *v.* Baskett, 52 Mo. App. 389.

New York.— People *v.* Page, 3 Park. Cr. 600.

North Carolina.— State *v.* Farmer, 104 N. C. 887, 10 S. E. 563.

South Carolina.— State *v.* Thomas, 7 Rich. 481.

South Dakota.— State *v.* Bradford, 13 S. D. 201, 83 N. W. 47.

Tennessee.— State *v.* Bradshaw, 2 Swan 627. See, however, Brown *v.* State, 2 Head 180, holding that it is sufficient if the character or occupation of defendant appears in evidence, or is otherwise satisfactorily established before rendition of judgment.

Texas.— State *v.* Cronin, 39 Tex. 171; McQuerry *v.* State, 40 Tex. Cr. 571, 51 S. W. 247. And see Williams *v.* State, (Cr. App. 1904) 81 S. W. 1209. *Compare* Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815.

Virginia.— Glass *v.* Com., 33 Gratt. 827.

Wisconsin.— Jensen *v.* State, 60 Wis. 577, 19 N. W. 374.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 221.

10. Baer *v.* Com., 10 Bush (Ky.) 8; Bode *v.* State, 7 Gill (Md.) 326.

11. *Arkansas.*— State *v.* Butcher, 40 Ark. 362.

Illinois.— Johnson *v.* People, 83 Ill. 431.

Kentucky.— Com. *v.* Rucker, 14 B. Mon. 228.

Maryland.— State *v.* Edlavitch, 77 Md. 144, 26 Atl. 406.

Massachusetts.— Com. *v.* Luddy, 143 Mass. 563, 10 N. E. 448; Com. *v.* Pearson, 3 Metc. 449.

Minnesota.— State *v.* McGinnis, 30 Minn. 48, 14 N. W. 256.

Missouri.— Austin *v.* State, 10 Mo. 591.

North Carolina.— State *v.* Farmer, 104 N. C. 887, 10 S. E. 563.

South Carolina.— State *v.* Schroeder, 3 Hill 61.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 221.

12. Lederer *v.* State, 11 Ohio Dec. (Reprint) 31, 24 Cinc. L. Bul. 153; State *v.*

where the intent is an essential part of the offense such special criminal intent on the part of defendant should be alleged.[13]

(III) *Knowledge or Notice.* If it is an essential ingredient of the offense charged that defendant should have known the special facts which make the sale unlawful, such knowledge should be alleged in the indictment;[14] but in all cases where ignorance or mistake of fact would not constitute a defense, such an allegation is not needed.[15]

(IV) *Showing Unlawful Nature of Act*—(A) *In General.* If the act complained of would not be contrary to law unless done in a particular manner, for a particular purpose, or at a particular time or place, the indictment must allege circumstances showing it to have been a violation of the statute.[16] But if the essential facts are set forth, it is not technically necessary to allege that the offense was "unlawfully" committed.[17]

(B) *Referring to the Statute.* As a general rule it is not necessary for an indictment for a violation of the liquor laws to state specifically, by particular reference thereto, the statute violated by the acts alleged to be a crime.[18] But if different sections of the same statute, on the subject of the liquor traffic, impose different penalties, or distinguish between sales made under different circumstances, the indictment should show which section defendant is charged with violating.[19] And the same rule obtains where two statutes are in force, and the acts charged might constitute an offense under either.[20] But except in such cases

Pearis, 35 W. Va. 320, 13 S. E. 1006. And see State *v.* Abbott, 31 N. H. 434. *Compare* Hinkle *v.* Com., 75 S. W. 231, 25 Ky. L. Rep. 313.

13. See the statutes of the different states.

Keeping liquor with intent to sell see Com. *v.* Gillon, 148 Mass. 15, 18 N. E. 584; State *v.* Prescott, 67 N. H. 203, 30 Atl. 342.

Intent that liquor shall be drunk on premises see Bilbro *v.* State, 7 Humphr. (Tenn.) 534; Sanderlin *v.* State, 2 Humphr. (Tenn.) 315.

14. State *v.* Benjamin, 49 Vt. 101. And see Struble *v.* Nodwift, 11 Ind. 64.

Sufficiency of allegation of knowledge of age of purchaser see Jones *v.* State, 46 Tex. Cr. 517, 81 S. W. 49.

15. **Properties of liquor sold.**—The indictment need not allege that the liquor sold by defendant was known by him to be intoxicating. State *v.* Carson, 2 Ohio Dec. (Reprint) 81, 1 West. L. Month. 333.

Sale at prohibited place.—An indictment charging an unlawful sale of liquor within two miles of an agricultural fair is not defective in failing to charge knowledge on the part of defendant that such fair was being held within said distance. State *v.* Fromer, 6 Ohio S. & C. Pl. Dec. 374, 7 Ohio N. P. 172.

Minority of purchaser.—If the statute prohibiting the sale of liquor to minors does not provide that the act must be "knowingly and wilfully" done to constitute the offense, it is not necessary that these words should appear in the indictment. Com. *v.* Sellers, 130 Pa. St. 32, 18 Atl. 541, 542.

Keeping place for unlawful sale or liquor nuisance.—As to the averment of knowledge on the part of defendant in prosecutions for this offense see Hinkle *v.* Com., 75 S. W. 231, 25 Ky. L. Rep. 313; State *v.* Stanley, 84 Me. 555, 24 Atl. 983; State *v.* Ryan, 81 Me. 107, 16 Atl. 406; State *v.* McGough, 14 R. I. 63.

16. Ulmer *v.* State, 61 Ala. 208; State *v.* Burkett, 51 Kan. 175, 32 Pac. 925; State *v.* Umphrey, 40 Mo. App. 327. And see People *v.* Gregg, 59 Hun (N. Y.) 107, 13 N. Y. Suppl. 114.

"Contrary to law."—A complaint alleging that defendant sold liquors "contrary to law," but without setting forth in what manner he violated the excise law, is insufficient. Cortland *v.* Howard, 1 N. Y. App. Div. 131, 37 N. Y. Suppl. 843. And see State *v.* Schmidt, 57 N. J. L. 625, 31 Atl. 280.

Keeping open on Sunday.—Under a statute which simply requires that saloons "shall be closed" on Sunday, it is not necessary for an indictment to allege that the saloon was kept open for the purpose of doing an unlawful business. State *v.* Donaldson, 12 S. D. 259, 81 N. W. 299. And see O'Neil *v.* State, 116 Ga. 839, 43 S. E. 248.

17. Walbert *v.* State, 17 Ind. App. 350, 46 N. E. 827; Farris *v.* Com., 111 Ky. 236, 63 S. W. 615, 23 Ky. L. Rep. 580; State *v.* Shanks, Tapp. (Ohio) 13.

18. State *v.* Allen, 32 Iowa 248; State *v.* Freeman, 27 Iowa 333.

19. Benalleck *v.* People, 31 Mich. 200; State *v.* Leavitt, 63 N. H. 381. And see State *v.* Thompson, 44 Iowa 399.

20. Camp *v.* State, 27 Ala. 53. And see Olmstead *v.* State, 89 Ala. 16, 7 So. 775; Stone *v.* State, (Miss. 1890) 7 So. 500; Seifried *v.* Com., 101 Pa. St. 200.

In Massachusetts a complaint which charges an unlawful sale of intoxicating liquor "contrary to the form of the statute in such case made and provided" need not allege more specifically whether the offense was in violation of one or the other of two

as these, the statute, if a public act, need not be specially pleaded, and it is sufficient to refer to the statute generally, without a reference to the section imposing the particular penalty.[21]

(c) *Conclusion.* Where one statute defines an offense against the system of excise of the state, and another statute prescribes the punishment, the indictment must conclude in the plural form, "against the statutes in such case made and provided"; but if the offense is fully defined, both as to its constituent elements and its punishment, in one of the statutes, although the other may impose another and further penalty, the indictment may well conclude in the singular form.[22] Unless the statute expressly requires that all indictments shall allege the offense to have been committed "against the peace and dignity" of the state this formula is not necessary in an indictment for a statutory misdemeanor under the liquor laws.[23]

(v) *Adoption and Violation of Local Option Law.* In some states it is held that an indictment for selling liquor in violation of a local option law need not contain a statement of all the formalities necessary to render the law operative, or even an allegation that it was in force in the particular jurisdiction; for such laws, although local, are public, and the courts will take judicial notice of them.[24] In others it is necessary to allege that the local option law had been adopted and was in force in the particular locality, as the result of an election held for that purpose.[25] In some this allegation may be general, and it is not necessary to set

statutes passed in different years. Com. *v.* Keefe, 7 Gray 332.

21. Kee *v.* McSweeney, 15 Abb. N. Cas. (N. Y.) 229. And see State *v.* Snow, 117 N. C. 778, 23 S. E. 323.

Statutes which forbid any person to sell or give away intoxicating liquors within a certain territory is a public statute, although of local application, and need not be specially pleaded in an indictment. Carson *v.* State, 69 Ala. 235; Powers *v.* Com., 90 Ky. 167, 13 S. W. 450, 11 Ky. L. Rep. 964. And the same is true of an act prohibiting the sale of liquor within a certain distance of a designated locality. State *v.* Wallace, 94 N. C. 827.

In Ohio the decisions sanction the practice of indicating the law alleged to have been violated by referring to the numbered sections of the Revised Statutes. Oshe *v.* State, 37 Ohio St. 494.

22. *Indiana.*— King *v.* State, 2 Ind. 523.

Maine.— Butman's Case, 8 Me. 113.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

New York.— Kane *v.* People, 8 Wend. 203.

Rhode Island.— State *v.* Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

South Carolina.— State *v.* Robbins, 1 Strobh. 355.

23. State *v.* Miller, 24 Conn. 519; State *v.* Tall, 56 Wis. 577, 14 N. W. 596.

24. *Alabama.*—Bogan *v.* State, 84 Ala. 449, 4 So. 355.

Georgia.— Combs *v.* State, 81 Ga. 780, 8 S. E. 318.

Maryland.— Jones *v.* State, 67 Md. 256, 10 Atl. 216; Slymer *v.* State, 62 Md. 237.

Mississippi.— State *v.* Bertrand, 72 Miss. 516, 17 So. 235. For earlier decisions inconsistent with this rule and no longer of force see Harris *v.* State, (1893) 12 So. 904; West *v.* State, 70 Miss. 598, 12 So. 903; McDonald *v.* State, 68 Miss. 728, 10 So. 55; Loughridge *v.* State, (1888) 3 So. 667; Norton *v.* State, 65 Miss. 297, 3 So. 665.

Virginia.— Hargrave *v.* Com., (1895) 22 S. E. 314; Thomas *v.* Com., 90 Va. 92, 17 S. E. 788; Savage's Case, 84 Va. 582, 5 S. E. 563.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 225.

In Kentucky by statute all the technical allegations with reference to the adoption of the local option law are dispensed with and it is simply necessary to state "that the act or acts charged were committed in a territory where the said act was in force." St. (1903) § 2557*b*. And see Crigler *v.* Com., (Ky. 1904) 83 S. W. 587. Prior to this statute it was necessary to allege with great prolixity and detail, the submission of the question of local option to the people of the district to which it was to be applied, and their adoption at the polls of its provisions. See Edmonson *v.* Com., 110 Ky. 510, 62 S. W. 1018, 22 Ky. L. Rep. 1902; Com. *v.* Cope, 107 Ky. 173, 53 S. W. 272, 21 Ky. L. Rep. 845; Com. *v.* Shelton, 99 Ky. 120, 35 S. W. 128, 18 Ky. L. Rep. 30; Com. *v.* Green, 98 Ky. 21, 32 S. W. 169, 17 Ky. L. Rep. 579; Locke *v.* Com., 69 S. W. 763, 24 Ky. L. Rep. 654; Tatum *v.* Com., 65 S. W. 449, 23 Ky. L. Rep. 1533; Mahan *v.* Com., 56 S. W. 529, 21 Ky. L. Rep. 1807; Blackwell *v.* Com., 54 S. W. 843, 21 Ky. L. Rep. 1240; Com. *v.* Neason, 50 S. W. 66, 20 Ky. L. Rep. 1825; Com. *v.* Pippin, 40 S. W. 252, 19 Ky. L. Rep. 270; Throckmorton *v.* Com., 35 S. W. 635, 18 Ky. L. Rep. 130; Com. *v.* Throckmorton, 32 S. W. 130, 17 Ky. L. Rep. 550; Neighbors *v.* Com., 9 S. W. 718, 10 Ky. L. Rep. 594; Com. *v.* Reynolds, 4 Ky. L. Rep. 623.

25. *Arkansas.*— Wilson *v.* State, 35 Ark. 414.

forth in detail all the various steps which were necessary to the legal adoption of the law,[26] while in others great particularity of statement is required, and each essential step in the process of submitting and adopting a local option law must be set forth.[27] In any event the indictment must clearly show that the alleged offense was committed in a district or locality where the local option law was in force.[28] So long as the local option law is in force, an indictment cannot be well drawn under the general law;[29] but after the repeal of a local option law the general law revives and forms the basis for indictments; and recitals of the local option law, in an indictment found after its repeal, may be treated as surplusage.[30]

(VI) *Violation of Local Regulations.* Where an indictment is intended to charge a violation of a local statute or regulation, or of a municipal ordinance, it must be framed with special reference thereto rather than to the general liquor law, and must contain such allegations as to bring the case plainly within the terms of the law on which it is based,[31] unless it is otherwise provided by statute.[32]

(VII) *Allegation of Place of Offense* — (A) *In General.* An indictment for a violation of the liquor laws should contain an allegation of the place where the offense is charged to have been committed, so as to show that it is within the jurisdiction of the court, and also for the purpose of informing the accused of the particular transaction for which he is prosecuted.[33] In a number of cases it has

Michigan.— People *v.* Adams, 95 Mich. 541, 55 N. W. 461.

Minnesota.— State *v.* Hanley, 25 Minn. 429.

New York.— People *v.* Bates, 61 N. Y. App. Div. 559, 71 N. Y. Suppl. 123, 15 N. Y. Cr. 469.

North Carolina.— State *v.* Chambers, 93 N. C. 600.

Texas.— Alford *v.* State, 37 Tex. Cr. 386, 35 S. W. 657; Lowery *v.* State, (Cr. App. 1896) 34 S. W. 956. And see Watkins *v.* State, (Cr. App. 1903) 77 S. W. 799; Hollar *v.* State, (Cr. App. 1903) 73 S. W. 961.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 225.

26. State *v.* Searcy, 111 Mo. 236, 20 S. W. 186; State *v.* Dugan, 110 Mo. 138, 19 S. W. 195; State *v.* Searcy, 39 Mo. App. 393; State *v.* Houts, 36 Mo. App. 265.

27. Randall *v.* Tillis, 43 Fla. 43, 29 So. 540; Cook *v.* State, 25 Fla. 698, 6 So. 451; Williams *v.* State, 44 Tex. Cr. 235, 70 S. W. 213; Hartsel *v.* State, (Tex. Cr. App. 1902) 68 S. W. 285; Casey *v.* State, (Tex. Cr. App. 1900) 59 S. W. 884; Wilson *v.* State, (Tex. Cr. App. 1900) 55 S. W. 68; Shilling *v.* State, (Tex. Cr. App. 1899) 51 S. W. 240; Loveless *v.* State, 40 Tex. Cr. 221, 49 S. W. 892; Bateman *v.* State, (Tex. Cr. App. 1898) 44 S. W. 290; Brown *v.* State, (Tex. Cr. App. 1897) 39 S. W. 578; Hall *v.* State, 37 Tex. Cr. 219, 39 S. W. 117; Kelley *v.* State, 37 Tex. Cr. 220, 38 S. W. 779, 39 S. W. 111; Dollins *v.* State, (Tex. Cr. App. 1897) 38 S. W. 775; Key *v.* State, 37 Tex. Cr. 77, 38 S. W. 773; Gaines *v.* State, 37 Tex. Cr. 73, 38 S. W. 774; Stewart *v.* State, 35 Tex. Cr. 391, 33 S. W. 1081; Williams *v.* State, 35 Tex. Cr. 52, 31 S. W. 654; McMillan *v.* State, 18 Tex. App. 375. And practically to the same effect see Croom *v.* State, 25 Tex. App. 556, 8 S. W. 661; Ninenger *v.* State, 25 Tex. App. 449, 8 S. W. 480.

28. Maddox *v.* State, 42 Tex. Cr. 509, 60 S. W. 960; Matkins *v.* State, (Tex. Cr. App. 1900) 58 S. W. 108; Raby *v.* State, 42 Tex. Cr. 56, 57 S. W. 651. *Compare* State *v.* Johnson, 86 Minn. 121, 90 N. W. 161, holding that an indictment for selling beer in a village after it has voted against the issuance of licenses is not defective in failing to allege that the beer sold was to be consumed within the village.

29. State *v.* Vandenburg, (Miss. 1900) 28 So. 835.

30. Territory *v.* Pratt, 6 Dak. 483, 43 N. W. 711.

31. Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802; State *v.* Graeter, 6 Blackf. (Ind.) 105; Meyer *v.* Bridgeton, 37 N. J. L. 160; Brown *v.* Van Wert, 4 Ohio Cir. Ct. 407, 2 Ohio Cir. Dec. 622; Masca *v.* State, 3 Ohio Cir. Ct. 9, 2 Ohio Cir. Dec. 6 (allegation as to grade or class of city necessary); Campbell *v.* Schofield, 29 Leg. Int. (Pa.) 325. *Compare* Griffin *v.* State, 115 Ga. 577, 41 S. E. 997.

32. Mitchell *v.* State, 141 Ala. 90, 37 So. 407; Cost *v.* State, 96 Ala. 60, 11 So. 435; Boon *v.* State, 69 Ala. 226; Powell *v.* State, 69 Ala. 10. But see Camp *v.* State, 27 Ala. 53.

Municipal court will take judicial notice of the ordinances of their own municipalities, and therefore an information in such a court for a violation of an ordinance of the city need not set out the ordinance; and such information being sufficient in the municipal court, it is also sufficient in the district court on appeal. Foley *v.* State, 42 Nebr. 233, 60 N. W. 574.

33. *Alabama.*— Hafter *v.* State, 51 Ala. 37; Harris *v.* State, 50 Ala. 127.

Kentucky.— Young *v.* Com., 14 Bush 161; Grimme *v.* Com., 5 B. Mon. 263.

Minnesota.— State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

been held sufficient to name the county as the place of sale,[34] without the necessity of specifying any city, town, or other place in the county, unless the prosecution is brought under a local option law or other statute which may be in force in certain parts of the county and not in others.[35] And even where this is the case, it is not considered necessary to particularize further than by naming the city, town, precinct, or other municipal subdivision.[36] It is not generally requisite to describe the house or building where the sale was made, by its street and number, or by any physical description,[37] unless the indictment is for keeping a place for the unlawful sale of liquor, or maintaining a liquor nuisance, or a similar offense,

Mississippi.— Loughridge *v.* State, (1888) 3 So. 667.

New Jersey.— Rogers *v.* State, 58 N. J. L. 220, 33 Atl. 283.

New York.— Blasdell *v.* Hewit, 3 Cai. 137.

Texas.— See Bogard *v.* State, (Cr. App. 1900) 55 S. W. 494. But *compare* Cochran *v.* State, 26 Tex. 678.

Virginia.— Arrington *v.* Com., 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242; Com. *v.* Head, 11 Gratt. 819.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 227.

But see State *v.* Jaques, 68 Mo. 260; State *v.* Cottrill, 31 W. Va. 162, 6 S. E. 428.

An allegation that the liquor was sold in a certain town is sufficient to show that the sale was made within the county in which the town was situated. People *v.* Cramer, 47 N. Y. Suppl. 1039, 12 N. Y. Cr. 469.

Local option district divided.— Where a local option law was adopted in a certain district, part of which is afterward cut off and joined to other territory, receiving a new name, it is not necessary, in an indictment for a violation of the law in the portion of the district not cut off, specifically to allege that the offense was not committed in the part of the district which was cut off; an allegation that the offense was committed in the district, by its original name, is sufficient. Jones *v.* State, 67 Md. 256, 10 Atl. 216. And see Woods *v.* State, (Tex. Cr. App. 1903) 75 S. W. 37.

34. *Georgia.*— Hussey *v.* State, 69 Ga. 54.

Indiana.— State *v.* Schreiber, 98 Ind. 333; Werneke *v.* State, 49 Ind. 202; Howard *v.* State, 6 Ind. 444; State *v.* Shearer, 8 Blackf. 262.

Iowa.— Zumhoff *v.* State, 4 Greene 526. And see State *v.* Jacobs, 75 Iowa 247, 39 N. W. 293.

Kansas.— State *v.* Allen, 63 Kan. 598, 66 Pac. 628.

Missouri.— State *v.* Young, 70 Mo. App. 52.

North Carolina.— State *v.* Emery, 98 N. C. 668, 3 S. E. 636.

Wisconsin.— State *v.* Hickok, 90 Wis. 161, 62 N. W. 934.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 227.

Contra.— Grimme *v.* Com., 5 B. Mon. (Ky.) 263.

The caption or introduction should definitely name the state and county; and when this is done, the name of the state need not be repeated in the counts, and the county may thereafter be referred to as "the said county of A," or as "the county aforesaid." State *v.* Thompson, 44 Iowa 399; State *v.* Muntz, 3 Kan. 383; State *v.* Lavake, 26 Minn. 526, 6 N. W. 339, 37 Am. Rep. 415; State *v.* Shaw, 35 N. H. 217.

An indictment for selling liquor within three miles of a church, in violation of a statute in that behalf, should lay the venue in the county in which the liquor was sold, rather than in the county in which the church was situated. Butler *v.* State, 89 Ga. 821, 15 S. E. 763.

35. State *v.* Weaver, 83 Ind. 542; Young *v.* Com., 14 Bush (Ky.) 161; Buck *v.* State, 61 N. J. L. 525, 39 Atl. 919; Woods *v.* State, (Tex. Cr. App. 1903) 75 S. W. 37; Holden *v.* State, 41 Tex. Cr. 411, 55 S. W. 337; Smith *v.* State, (Tex. Cr. App. 1899) 49 S. W. 373; Williams *v.* State, 38 Tex. Cr. 377, 43 S. W. 115. But see State *v.* Roach, 74 Me. 562.

36. *Connecticut.*— State *v.* Basserman, 54 Conn. 88, 6 Atl. 185.

Massachusetts.— Com. *v.* Martin, 108 Mass. 29 note; Com. *v.* Cummings, 6 Gray 487. *Compare* Com. *v.* Barnard, 6 Gray 488.

Michigan.— People *v.* Ringsted, 90 Mich. 371, 51 N. W. 519.

New York.— People *v.* Polhamus, 8 N. Y. App. Div. 133, 40 N. Y. Suppl. 491.

Texas.— Woods *v.* State, (Cr. App. 1903) 75 S. W. 37.

Virginia.— Savage's Case, 84 Va. 619, 5 S. E. 565.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 227.

37. *Iowa.*— State *v.* Becker, 20 Iowa 438. But *compare* Norris' House *v.* State, 3 Greene 513.

Massachusetts.— Com. *v.* Clapp, 5 Gray 97; Com. *v.* Stowell, 9 Metc. 569.

Michigan.— People *v.* Aldrich, 104 Mich. 455, 62 N. W. 570.

Mississippi.— King *v.* State, 66 Miss. 502, 6 So. 188.

Missouri.— State *v.* Kurtz, 2 Mo. App. Rep. 913.

Nebraska.— Peterson *v.* State, 64 Nebr. 875, 90 N. W. 964.

New York.— Schwab *v.* People, 4 Hun 520.

Ohio.— Picket *v.* State, 22 Ohio St. 405.

South Dakota.— State *v.* Donaldson, 12 S. D. 259, 81 N. W. 299.

Texas.— Cochran *v.* State, 26 Tex. 678; Burch *v.* Republic, 1 Tex. 608.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 227.

in which case the place of the alleged offense must be described with sufficient certainty to identify it.[38]

(B) *Place as Element of Offense.* There are some cases in which the place of its commission is so far a material element of an offense as to require it to be stated with great particularity; as where the prosecution is based on a statute forbidding the sale of liquor within a limited distance of a church, school, agricultural fair, or the like,[39] where a licensed dealer is charged with selling at a place not covered by his license,[40] or with a violation of the screen law or any other law regulating the conduct of business on licensed premises,[41] although it is otherwise if the offense charged is not affected by his possession or want of a license.[42] Where the law relating to the sale of intoxicating liquors distinguishes between local option and other territory, as to the fine for selling without a license, an indictment for selling without a license should allege whether the sale occurred within or out of local option territory.[43]

(VIII) *Alleging Time of Offense*—(A) *In General.* An indictment for an unlawful sale of liquor should always contain an allegation of the time when the sale charged was made.[44] In some jurisdictions this allegation must specify

38. *Arkansas.*— Adams *v.* State, 64 Ark. 188, 41 S. W. 423.

Iowa.— State *v.* Pinckney, 111 Iowa 34, 82 N. W. 450; State *v.* Dixon, 104 Iowa 741, 74 N. W. 692; Wrocklege *v.* State, 1 Iowa 167.

Kansas.— State *v.* Thurman, 65 Kan. 90, 68 Pac. 1081; State *v.* Walters, 57 Kan. 702, 47 Pac. 839; Kansas City *v.* Smith, 57 Kan. 434, 46 Pac. 710; State *v.* Stearns, 28 Kan. 154; West *v.* Columbus, 20 Kan. 633; Hagan *v.* State, 4 Kan. 89; State *v.* Muntz, 3 Kan. 383. And see State *v.* Reno, 41 Kan. 674, 21 Pac. 803.

Maine.— State *v.* Cox, 82 Me. 417, 19 Atl. 857.

Massachusetts.— Com. *v.* Stowell, 9 Metc. 569.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 227.

39. *Alabama.*— Gilmore *v.* State, 125 Ala. 59, 28 So. 382; Block *v.* State, 66 Ala. 493.

Arkansas.—See Blackwell *v.* State, 36 Ark. 178.

Indiana.— Bouser *v.* State, Smith 408.

Kentucky.— Hinkle *v.* Com., 66 S. W. 1020, 23 Ky. L. Rep. 1979; Com. *v.* Slaughter, 12 Ky. L. Rep. 893.

Mississippi.— Ragan *v.* State, 67 Miss. 332, 7 So. 280.

New Jersey.— Kelty *v.* State, 61 N. J. L. 407, 39 Atl. 711.

Ohio.— State *v.* Ritzman, 8 Ohio S. & C. Pl. Dec. 685; State *v.* Fromer, 6 Ohio S. & C. Pl. Dec. 374, 7 Ohio N. P. 172.

Tennessee.— State *v.* Odam, 2 Lea 220.

Texas.— Gage *v.* State, (Cr. App. 1903) 76 S. W. 459.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 227.

40. State *v.* Church, 4 W. Va. 745.

41. Slentz *v.* State, 27 Ind. App. 700, 557, 61 N. E. 956, 793; Com. *v.* Gibbons, 134 Mass. 197; Utsler *v.* Territory, 10 Okla. 463, 62 Pac. 287. And see Davis *v.* State, 52 Ind. 488.

42. State *v.* Boggess, 36 W. Va. 713, 15 S. E. 423. *Compare* People *v.* Sweetser, 1 Dak. 308, 46 N. W. 452; State *v.* Young, 73 Mo. App. 602.

43. Cousins *v.* State, 46 Tex. Cr. 87, 79 S. W. 549.

44. *Alabama.*— Olmstead *v.* State, 92 Ala. 64, 9 So. 737.

Georgia.— Phillips *v.* State, 86 Ga. 427, 12 S. E. 650.

Indiana.— State *v.* Zeitler, 63 Ind. 441; Clark *v.* State, 34 Ind. 436.

Massachusetts.— Com. *v.* Kingman, 14 Gray 85; Com. *v.* Adams, 1 Gray 481; Com. *v.* Thurlow, 24 Pick. 374.

Missouri.— Louisiana *v.* Anderson, 100 Mo. App. 341, 73 S. W. 875.

Texas.— Thurman *v.* State, 45 Tex. Cr. 569, 78 S. W. 937.

Vermont.— State *v.* O'Keefe, 41 Vt. 691; State *v.* Kennedy, 36 Vt. 563.

West Virginia.— State *v.* Bruce, 26 W. Va. 153.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 228.

"On or about."— As to the sufficiency of a charge that the offense was committed "on or about" a certain specified day, the authorities are not harmonious. In some jurisdictions such an allegation is held good at common law; in others, it is considered insufficient; in others, it passes muster by the aid of a statute. See the following cases:

California.— People *v.* Aro, 6 Cal. 207, 65 Am. Dec. 503.

Connecticut.— State *v.* Tuller, 34 Conn. 280; Rawson *v.* State, 19 Conn. 292.

Indiana.— Ruge *v.* State, 62 Ind. 388; Effinger *v.* State, 47 Ind. 235; Farrell *v.* State, 45 Ind. 371; State *v.* Slentz, 27 Ind. App. 557, 61 N. E. 793.

Iowa.— State *v.* Schilling, 14 Iowa 455; Cokely *v.* State, 4 Iowa 477.

Kansas.— State *v.* Harp, 31 Kan. 496, 3 Pac. 432.

Massachusetts.— Com. *v.* Purdy, 147 Mass. 29, 16 N. E. 745.

Minnesota.— State *v.* Lavake, 26 Minn. 526, 6 N. W. 339, 37 Am. Rep. 415.

not only the year but also the month and the day of the month.[45] But in others chiefly under statutes providing that an indictment shall not be rendered invalid for stating imperfectly the time at which the offense was committed, where time is not of the essence of the offense, a precise statement of the time is not required, a general allegation being accepted as sufficient.[46] Of course the allegation must show the offense to have been committed within the statutory period of limitations,[47] and an exact statement of the date may be necessary to connect the elements of the offense,[48] or to show that a law recently adopted was in force at the time of its commission.[49]

(B) *Sale on Prohibited Days.* An indictment for unlawfully selling liquor on Sunday must distinctly name that day as the day of the commission of the offense.[50] It is not sufficient to allege the date of the transaction, by specifying the day of the month and the year;[51] and on the other hand, if the offense is charged to have been committed on Sunday, the indictment is not vitiated by the further allegation that it was on a certain day of the month, which in fact was

Missouri.— State *v.* Major, 81 Mo. App. 289. But see State *v.* McAnally, 105 Mo. App. 333, 79 S. W. 990.

Texas.— State *v.* McMickle, 34 Tex. 676; State *v.* Elliot, 34 Tex. 148; Keith *v.* State, 38 Tex. Cr. 678, 44 S. W. 847.

Vermont.— State *v.* O'Keefe, 41 Vt. 691.

United States.— Fish *v.* Manning, 31 Fed. 340.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 228.

"Then and there."— It is usual and proper to repeat allegations of time and place, before material averments in the same count, by the use of the phrase "then and there." But it is said that a count alleging that defendant did "then and there" unlawfully sell liquor, no other reference to time being made in that count, is demurrable, although a definite time was fixed in the preceding count. State *v.* Bruce, 26 W. Va. 153, opinion of the court by Snyder, J.

Surplusage.— If the allegation of time undertakes more than is necessary as, specifying a day of the week, when that does not enter into the offense, the surplus matter may be rejected; it is no ground for quashing the indictment. State *v.* Fletcher, 13 R. I. 522.

45. Clark *v.* State, 34 Ind. 436; Com. *v.* Adams, 1 Gray (Mass.) 481; Com. *v.* Griffin, 3 Cush. (Mass.) 523; State *v.* Pischel, 16 Nebr. 490, 608, 20 N. W. 848, 21 N. W. 468; State *v.* Kennedy, 36 Vt. 563. And see Com. *v.* Traverse, 11 Allen (Mass.) 260, Dewey, J., delivering the opinion of the court.

46. *Alabama.*— Atkins *v.* State, 60 Ala. 45.

Iowa.— State *v.* Wambold, 72 Iowa 468, 34 N. W. 213.

Kansas.— State *v.* Nagley, 8 Kan. App. 812, 57 Pac. 554.

Kentucky.— Smithers *v.* Com., 12 Ky. L. Rep. 636.

Michigan.— People *v.* Husted, 52 Mich. 624, 18 N. W. 388, holding that a complaint for not closing a saloon at nine o'clock is not bad because nine o'clock of the evening is not specified.

Mississippi.— De Marco *v.* State, 59 Miss. 355.

Missouri.— State *v.* Findley, 77 Mo. 338; State *v.* Small, 31 Mo. 197.

New York.— People *v.* Polhamus, 8 N. Y. App. Div. 133, 40 N. Y. Suppl. 491; New York *v.* Mason, 4 E. D. Smith 142. But *compare* People *v.* Olmsted, 74 Hun 323, 26 N. Y. Suppl. 818; Blasdell *v.* Hewit, 3 Cai. 137.

South Carolina.—State *v.* Anderson, 3 Rich. 172.

Virginia.— Arrington *v.* Com., 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242; Savage's Case, 84 Va. 582, 5 S. E. 563.

Canada.— Reg. *v.* Wallace, 4 Ont. 127; Reg. *v.* Collier, 12 Ont. Pr. 316.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 228.

47. Com. *v.* Neason, 50 S. W. 66, 20 Ky. L. Rep. 1825.

48. State *v.* Chiles, 64 Kan. 453, 67 Pac. 884.

49. O'Reilly *v.* State, (Tex. Cr. App. 1905) 85 S. W. 8; Hollar *v.* State, (Tex. Cr. App. 1903) 73 S. W. 961.

50. Shepler *v.* State, 114 Ind. 194, 16 N. E. 521; Frasier *v.* State, 5 Mo. 536.

Hour of sale.— It is sufficient to allege that the liquor was sold on Sunday, without stating specifically the hour of the sale. State *v.* Heard, 107 La. 60, 31 So. 384.

Manner of describing.— The day of the commission of the offense may be described as "the first day of the week commonly called Sunday," or as "the Sabbath day," or "the Lord's day," or otherwise according to the language of the statute.

Illinois.— Kroer *v.* People, 78 Ill. 294.

Indiana.— Henry *v.* State, 113 Ind. 304, 15 N. E. 593.

Massachusetts.— Com. *v.* McKiernan, 128 Mass. 414.

Minnesota.— State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

Missouri.— State *v.* Braun, 83 Mo. 480; State *v.* Kock, 61 Mo. 117; State *v.* Roehm, 61 Mo. 82.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 228.

51. Robinson *v.* State, 38 Ark. 548; Gilbert *v.* State, 81 Ind. 565; Gelbert *v.* Com., 3 Lack. Jur. (Pa.) 374.

some other day of the week,[52] nor by a lack of precision or certainty in specifying the date.[53] Where the prosecution is for selling liquor or keeping open a saloon on an election day, it is not sufficient to charge that the offense was committed "on an election day," but it must further be alleged that an election was in fact held on that day,[54] and in some states the indictment must show what was the nature and purpose of the election,[55] and if it was a local election, the place where it was held and the place where the offense was committed must both be described, so as to show that the former included the latter.[56]

(c) *Continuando.* Where the offense charged is continuous, consisting of a succession of acts, or a prohibited traffic carried on from day to day, it may be laid with a *continuando*, as by alleging it to have been committed on a certain specified day "and on divers other days and times" between such day and the date of finding the indictment.[57] This form of allegation is not proper where the offense charged consists of a single act; but if the date specified is within the period of limitation and is laid with certainty, the further allegation as to "divers other days" may be rejected as surplusage.[58]

(IX) *Purpose of Sale.* The purpose of defendant in making the sale for which he is prosecuted is not generally necessary to be stated in the indictment.[59]

52. *Arkansas.*—Marquardt *v.* State, 52 Ark. 269, 12 S. W. 562.
Indiana.—Roy *v.* State, 91 Ind. 417.
Kentucky.—Megowan *v.* Com., 2 Metc. 3.
Maryland.—Hoover *v.* State, 56 Md. 584.
Massachusetts.—Com. *v.* Newton, 8 Pick. 234; Com. *v.* Kingsbury, 5 Mass. 106.
Missouri.—Frasier *v.* State, 5 Mo. 536.
New York.—People *v.* Ball, 42 Barb. 324.
North Carolina.—State *v.* Drake, 64 N. C. 589.
Tennessee.—State *v.* Eskridge, 1 Swan 413.
See 29 Cent. Dig. tit. "Intoxicating Liquors," § 228.
But see Werner *v.* State, 51 Ga. 426.

53. State *v.* Effinger, 44 Mo. App. 81; Brown *v.* State, 16 Nebr. 658, 21 N. W. 454. *Compare* Effinger *v.* State, 47 Ind. 235; Summit *v.* Hahr, 66 N. J. L. 333, 52 Atl. 956, holding that where a complaint instead of specifying a single offense covered violations of the law on every Sunday between January 1 and July 2, in a certain year, and for a long time prior thereto, it should be dismissed as vague and uncertain.

54. State *v.* Stamey, 71 N. C. 202; Gieb *v.* State, 31 Tex. Cr. 514, 21 S. W. 190; Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815; Prather *v.* State, 12 Tex. App. 401. *Contra*, State *v.* Powell, 3 Lea (Tenn.) 164; State *v.* Irvine, 3 Heisk. (Tenn.) 155.

55. Newman *v.* State, 101 Ga. 534, 28 S. E. 1005; Reuter *v.* State, 43 Tex. Cr. 572, 67 S. W. 505; Steinberger *v.* State, 35 Tex. Cr. 492, 34 S. W. 617; Borches *v.* State, 33 Tex. Cr. 96, 25 S. W. 423; Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815; Hoskey *v.* State, 9 Tex. App. 202.

56. State *v.* Weaver, 83 Ind. 542.
In **Texas** it is not essential that an indictment for keeping open a saloon during an election should allege that the offense was committed in defendant's voting precinct, village, town, or city. Patton *v.* State, 31 Tex. Cr. 20, 19 S. W. 252; Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815. But under an earlier statute it was otherwise. Smith *v.* State, 18 Tex. App. 454; Zweifel *v.* State, 16 Tex. App. 154. An information for keeping open a saloon on an election day is not defective because alleging simply that the election was in a certain numbered precinct of a certain county, without stating what kind of a precinct it was. Miller *v.* State, 44 Tex. Cr. 99, 69 S. W. 522.

57. Our House No. 2 *v.* State, 4 Greene (Iowa) 172; State *v.* Cofren, 48 Me. 364; State *v.* Cottle, 15 Me. 473; Com. *v.* Manning, 164 Mass. 547, 42 N. E. 95; Com. *v.* Dunn, 111 Mass. 426; Com. *v.* Kingman, 14 Gray (Mass.) 85; Com. *v.* Snow, 14 Gray (Mass.) 20; Com. *v.* Hoye, 9 Gray (Mass.) 292; Com. *v.* Keefe, 9 Gray (Mass.) 290; State *v.* Ingalls, 59 N. H. 88.
In **South Carolina** the Dispensary Act provides that, in an indictment for selling liquor, it shall be competent to charge a series of sales on the same or on divers days; this authorizes an allegation that defendant sold liquor on a certain day "and on divers other days before and since." State *v.* Prater, 59 S. C. 271, 37 S. E. 933.

58. *Florida.*—Dansey *v.* State, 23 Fla. 316, 2 So. 692.
Kentucky.—South *v.* Com., 79 Ky. 493.
Massachusetts.—Com. *v.* Rhodes, 148 Mass. 123, 19 N. E. 22; Com. *v.* Walton, 11 Allen 238; Com. *v.* Kendall, 12 Cush. 414; Com. *v.* Bryden, 9 Metc. 137.
Missouri.—State *v.* Major, 81 Mo. App. 289.
New York.—People *v.* Gilkinson, 4 Park. Cr. 26.
Vermont.—State *v.* Munger, 15 Vt. 290.
See 29 Cent. Dig. tit. "Intoxicating Liquors," § 228.

59. Stapf *v.* State, 33 Ind. App. 255, 71 N. E. 165, not necessary to allege that sale was for gain. And see Anderson *v.* People, 63 Ill. 53; Louisiana *v.* Anderson, 100 Mo. App. 341, 73 S. W. 875.

But where the sale would be unlawful only if it was made with the purpose or intention that the liquor should be used "as a beverage," the indictment is fatally defective if it fails to charge that purpose or intention.[60] And the rule is the same where the statute only forbids the sale of liquor, by an unlicensed person or by a dealer having a limited license, when it is sold with the purpose or intention that it shall be "drunk on the premises."[61] But it is not necessary to allege that the liquor was drunk on the premises, or that it was drunk anywhere, because that is not necessary to complete the offense.[62] Sometimes the necessity of charging the purpose of the sale will be sufficiently met by a negative allegation to the effect that the liquor was not sold for any of the specially excepted and permitted uses, as under a general prohibitory law, forbidding all sales except for medical, scientific, or mechanical purposes.[63]

c. Allegations as to Liquor — (I) *DESCRIPTION AND PROPERTIES IN GENERAL.* In an indictment for an unlawful sale of liquor, in the description of the article sold, it will generally be sufficient to follow the language of the statute on which the prosecution is founded.[64] And if the statute prohibits the sale of several enumerated kinds of liquor, in the disjunctive, the indictment may properly allege the sale of each and all of them conjunctively.[65] But the liquor proved to have been sold must come within the general terms of the indictment.[66]

(II) *SPECIFYING PARTICULAR KIND OF LIQUOR.* An indictment for the unlawful sale or keeping of liquors need not specify the particular kind of liquor which it is expected to prove at the trial. It may describe the article as "spirituous" or "intoxicating" liquor, or use any other general term employed in the

Purpose of sale to minor.— A complaint for unlawfully selling intoxicating liquor to a minor need not allege either that the sale was made for his own use, or the use of his parent, or for the use of any other person. Com. v. O'Leary, 143 Mass. 95, 8 N. E. 887. And see Com. v. Murphy, 155 Mass. 284, 29 N. E. 469.

60. *Indiana.*— Allman v. State, 69 Ind. 387; Dowdell v. State, 58 Ind. 333.

Kansas.— State v. Shinn, 63 Kan. 638, 66 Pac. 650.

Maine.— State v. Dunlap, 81 Me. 389, 17 Atl. 313.

Michigan.— People v. Hinchman, 75 Mich. 587, 42 N. W. 1006, 4 L. R. A. 707; People v. Quinn, 74 Mich. 632, 42 N. W. 604. *Compare* People v. Hamilton, 101 Mich. 87, 59 N. W. 401.

Missouri.— State v. Buckner, 20 Mo. App. 420.

New Hampshire.— State v. Abbott, 31 N. H. 434.

Pennsylvania.— Com. v. Porter, 31 Leg. Int. 398.

South Dakota.— State v. Hafsoos, 1 S. D. 382, 47 N. W. 400.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 229.

61. *Indiana.*— Blough v. State, 121 Ind. 355, 23 N. E. 153; State v. Woolsey, 92 Ind. 131; Vanderwood v. State, 50 Ind. 26; Layton v. State, 49 Ind. 229; State v. Shearer, 8 Blackf. 262; State v. Freeman, 6 Blackf. 248; Wood v. State, 9 Ind. App. 42, 36 N. E. 158.

Iowa.— Wrocklege v. State, 1 Iowa 167; Hintermeister v. State, 1 Iowa 101.

Massachusetts.— Com. v. Moulton, 10 Cush. 404; Com. v. Dean, 21 Pick. 334.

Missouri.— State v. Williamson, 19 Mo. 384. *Compare* State v. Auberry, 7 Mo. 304.

New York.— Schwab v. People, 4 Hun 520.

Ohio.— Picket v. State, 22 Ohio St. 405.

Tennessee.— Bilbro v. State, 7 Humphr. 534.

Sale on Sunday.— Where the statutory offense consists not merely in selling liquor on Sunday, but in selling it to be drunk on the premises, or "as a beverage," this fact also must be averred and proved. Morel v. State, 89 Ind. 275; Dowdell v. State, 58 Ind. 333; Layton v. State, 49 Ind. 229; Morris v. State, 47 Ind. 503. *Compare* Com. v. Young, 15 Gratt. (Va.) 664; State v. Charlton, 11 W. Va. 332, 27 Am. Rep. 603; Allen v. State, 5 Wis. 329.

62. Eisenman v. State, 49 Ind. 511.

63. State v. Shackle, 29 Kan. 341.

64. See Com. v. Morgan, 149 Mass. 314, 21 N. E. 369; State v. Spaulding, 61 Vt. 505, 17 Atl. 844.

65. *Alabama.*— State v. Whitted, 3 Ala. 102.

Georgia.— Kemp v. State, 120 Ga. 157, 47 S. E. 548.

Indiana.— Kreamer v. State, 106 Ind. 192, 6 N. E. 341.

Kentucky.— Farris v. Com., 111 Ky. 236, 63 S. W. 615, 23 Ky. L. Rep. 580. And see Jones v. Com., 104 Ky. 468, 47 S. W. 328, 20 Ky. L. Rep. 651.

Maine.— State v. Cottle, 15 Me. 473.

Minnesota.— State v. McGinnis, 30 Minn. 52, 14 N. W. 258.

Mississippi.— Lea v. State, 64 Miss. 201, 1 So. 51.

Missouri.— State v. Nations, 75 Mo. 53.

See 29 Cent. Dig. tit. "Intoxicating Liquors." § 230.

66. Brantly v. State, 91 Ala. 47, 8 So. 816; Barker v. State, 117 Ga. 428, 43 S. E. 744.

statute, without naming any particular liquor.[67] And, where the statutes prohibit the unlicensed sale of "spirituous, vinous, or malt liquors," it has been held that the particular kind of liquor alleged to have been sold, whether spirituous, vinous, or malt, need not be named in the indictment by either of those terms; it is sufficient to allege that defendant sold "intoxicating liquor."[68]

(III) *Showing as to Properties of Liquor.* If the indictment describes the liquor sold as being of a certain general class as, "malt liquor" or "vinous liquor," and in this respect follows the language of the statute, it is not necessary further to allege that it was intoxicating.[69] But otherwise the intoxicating properties of the liquor in question must appear from the language employed in the indictment.[70] Liquors which are not actually intoxicating, but which the statute declares shall be considered intoxicating within the meaning of the law, may be described as "intoxicating" in an indictment on that statute.[71]

(IV) *Averment of Name of Liquor.* Where the indictment names the particular kind of liquor sold as "whisky," "beer," or the like, it must further allege that the same was intoxicating liquor, or spirituous liquor, or otherwise according to the statute,[72] unless the article named is a liquor of the intoxicating

67. *Alabama.*— Powell *v.* State, 69 Ala. 10. *Compare* State *v.* Raiford, 7 Port. 101.

Arkansas.— State *v.* Witt, 39 Ark. 216.

Connecticut.— State *v.* Teahan, 50 Conn. 92.

Dakota.— People *v.* Sweetser, 1 Dak. 308, 46 N. W. 452.

Florida.— Brass *v.* State, 45 Fla. 1, 34 So. 307; Dansey *v.* State, 23 Fla. 316, 2 So. 692.

Georgia.— Maddox *v.* State, 118 Ga. 32, 44 S. E. 806; Williams *v.* State, 89 Ga. 483, 15 S. E. 552.

Indiana.— Buell *v.* State, 72 Ind. 523; Plunkett *v.* State, 69 Ind. 68; Hooper *v.* State, 56 Ind. 153; State *v.* Hannum, 53 Ind. 335; Hammond *v.* State, 48 Ind. 393; Connell *v.* State, 46 Ind. 446; Leary *v.* State, 30 Ind. 360; State *v.* Mondy, 24 Ind. 268; State *v.* Carpenter, 20 Ind. 219; Downey *v.* State, 20 Ind. 82; Fetterer *v.* State, 18 Ind. 388; Simpson *v.* State, 17 Ind. 444; State *v.* Mullinix, 6 Blackf. 554.

Iowa.— State *v.* Donahue, 120 Iowa 154, 94 N. W. 503; Foreman *v.* Hunter, 59 Iowa 550, 13 N. W. 659; State *v.* Whalen, 54 Iowa 753, 6 N. W. 552.

Kansas.— State *v.* Whisner, 35 Kan. 271, 10 Pac. 852; State *v.* Brooks, 33 Kan. 708, 7 Pac. 591; State *v.* Sterns, 28 Kan. 154; Lincoln Center *v.* Linker, 7 Kan. App. 282, 53 Pac. 787.

Kentucky.— Cockerell *v.* Com., 114 Ky. 296, 73 S. W. 760, 24 Ky. L. Rep. 2149.

Maine.— State *v.* Dorr, 82 Me. 341, 19 Atl. 861.

Massachusetts.— Com. *v.* Bennett, 108 Mass. 30, 11 Am. Rep. 304; Com. *v.* Clark, 14 Gray 367; Com. *v.* Ryan, 9 Gray 137; Com. *v.* Timothy, 8 Gray 480; Com. *v.* Conant, 6 Gray 482; Com. *v.* Odlin, 23 Pick. 275.

Minnesota.— State *v.* Heck, 23 Minn. 549.

Missouri.— State *v.* Rogers, 39 Mo. 431; State *v.* Blands, 101 Mo. App. 618, 74 S. W. 3; State *v.* Kurtz, 64 Mo. App. 123. *Compare* Neales *v.* State, 10 Mo. 498.

New Hampshire.— State *v.* Blaisdell, 33 N. H. 388.

New Jersey.— State *v.* Farnum, 66 N. J. L. 397, 52 Atl. 956. *Compare* State *v.* Fox, 16 N. J. L. 152.

New York.— People *v.* Wheelock, 3 Park. Cr. 9.

North Carolina.— State *v.* Downs, 116 N. C. 1064, 21 S. E. 689; State *v.* Packer, 80 N. C. 439.

Oregon.— Frisbie *v.* State, 1 Oreg. 248.

Texas.— Cochran *v.* State, 26 Tex. 678; Wilson *v.* State, (Cr. App. 1900) 55 S. W. 68; Frickie *v.* State, 39 Tex. Cr. 254, 45 S. W. 810.

Vermont.— State *v.* Reynolds, 47 Vt. 297.

Virginia.— Savage's Case, 84 Va. 582, 5 S. E. 563.

United States.— U. S. *v.* Gordon, 25 Fed. Cas. No. 15,233, 1 Cranch C. C. 58.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 231.

68. Wills *v.* State, 69 Ind. 286; Plunkett *v.* State, 69 Ind. 68; Garst *v.* State, 68 Ind. 101; Coverdale *v.* State, 60 Ind. 307; Hooper *v.* State, 56 Ind. 153; State *v.* Hannum, 53 Ind. 335; Carpenter *v.* State, 20 Ind. 282; Downey *v.* State, 20 Ind. 37; Simpson *v.* State, 17 Ind. 444; Callahan *v.* State, 2 Ind. App. 417, 28 N. E. 717; State *v.* McGinnis, 30 Minn. 52, 14 N. W. 258. But *compare* Weishrodt *v.* State, 50 Ohio St. 192, 33 N. E. 603.

69. State *v.* Gill, 89 Minn. 502, 95 N. W. 449; State *v.* Jenkins, 64 N. H. 375, 10 Atl. 699.

70. Ward *v.* State, 48 Ind. 293 (holding that an indictment charging the selling of "liquor," without any averment that it was intoxicating liquor, will be quashed); Cousins *v.* State, 46 Tex. Cr. 87, 79 S. W. 549. But *compare* Brass *v.* State, 45 Fla. 1, 34 So. 307, holding that an indictment charging the accused with carrying on the business of a dealer in liquors is sufficient, although it does not allege in terms that the liquors were intoxicating.

71. Com. *v.* Timothy, 8 Gray (Mass.) 480; State *v.* McKenna, 16 R. I. 398, 17 Atl. 51.

72. Butler *v.* State, 25 Fla. 347, 6 So. 67; Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9

properties of which the courts will take judicial notice.[73] If the particular liquor named in the indictment is referred to by name in the statute, it is unnecessary to add such an allegation, for if it is prohibited by the statute it is immaterial what its properties may be.[74]

(v) *Allegation as to Quantity Sold.* Under some statutes an indictment for an unlawful sale of intoxicating liquors should contain an allegation setting forth the quantity of liquor sold;[75] but under others this allegation is unnecessary,[76] and it is never required in cases where the quantity of liquor sold is entirely immaterial to the particular offense charged.[77] Where the quantity is to be specified, it should be given according to the established and recognized measures. An allegation that defendant sold "one drink," "one glass," or the like has sometimes been held sufficient,[78] although in other cases it has been considered so uncertain as to vitiate the indictment.[79]

(vi) *Showing Quantity to Be Less Than Minimum Permitted.* Where the indictment is upon a statute which makes it an offense to sell liquors in quantities less than a certain minimum, it must show on its face that the sale charged was of a quantity within the statutory restriction.[80] Some cases hold

L. R. A. 664; State *v.* Jones, 3 Ind. App. 121, 29 N. E. 274.

Videlicet.— If the article sold belongs to the doubtful class, of which the courts are not willing to take judicial notice in respect to their properties, and if it is not named in the statute, the best method is to lay it under a *videlicet*; as for example "intoxicating liquor, to wit, beer." Here, although beer in general may be of a kind intoxicating or not, so that the word does not necessarily mean beer that is intoxicating, yet the term "intoxicating liquor" controls. State *v.* Brown, 51 Conn. 1. And see Cockerell *v.* Com., 115 Ky. 296, 73 S. W. 760, 24 Ky. L. Rep. 2149.

73. *Indiana.*— Schlicht *v.* State, 56 Ind. 173; Eagan *v.* State, 53 Ind. 162; Carmon *v.* State, 18 Ind. 450.

Maryland.— State *v.* Camper, 91 Md. 672, 47 Atl. 1027.

Michigan.— People *v.* Webster, 2 Dougl. 92.

Missouri.— State *v.* Dengolensky, 82 Mo. 44; State *v.* Williamson, 21 Mo. 496.

Texas.— Daniels *v.* Grayson College, 20 Tex. Civ. App. 562, 50 S. W. 205.

Virginia.— Tefft *v.* Com., 8 Leigh 72.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 233.

74. State *v.* Jenkins, 64 N. H. 375, 10 Atl. 699; State *v.* Thornton, 63 N. H. 114.

75. *Indiana.*— Walter *v.* State, 105 Ind. 589, 5 N. E. 735; Mullen *v.* State, 96 Ind. 304; State *v.* Zeitler, 63 Ind. 441; Manvelle *v.* State, 58 Ind. 63; Hubbard *v.* State, 11 Ind. 554.

Massachusetts.— Com. *v.* Dean, 21 Pick. 334. *Compare* Com. *v.* Conant, 6 Gray 482.

Missouri.— State *v.* Arbogast, 24 Mo. 363; Neales *v.* State, 10 Mo. 498.

New York.— Blasdell *v.* Hewit, 3 Cai. 137.

Texas.— Cousins *v.* State, 46 Tex. Cr. 87, 79 S. W. 549.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 234.

In Virginia a charge of selling ardent spirits, to be drunk where sold, without license, must contain the words "by retail." Boyle *v.* Com., 14 Gratt. 674. But *compare* Brock *v.* Com., 6 Leigh 634.

Penalties different.— An indictment for keeping an unlicensed saloon, which does not show whether defendant is charged with selling by the quart or in larger quantities, is fatally uncertain, where the penalties prescribed are different. State *v.* Clayton, 32 Ark. 185.

Quantity unknown.— An allegation in an indictment for unlicensed selling, that the precise quantity of liquor sold is unknown, is sufficiently certain. Kilbourn *v.* State, 9 Conn. 560.

76. Com. *v.* Greenwell, 8 Ky. L. Rep. 609; State *v.* Kuhn, 24 La. Ann. 474; White *v.* State, 11 Tex. App. 476; Allen *v.* State, 5 Wis. 329.

77. *Alabama.*— Block *v.* State, 66 Ala. 493, where the law prohibits the sale of any liquor, without regard to the quantity, to be drunk on the premises of the seller.

Arkansas.— McCuen *v.* State, 19 Ark. 636, sale of liquor on Sunday.

Connecticut.— State *v.* Teahan, 50 Conn. 92, keeping intoxicating liquors with intent to sell the same unlawfully.

Indiana.— Brow *v.* State, 103 Ind. 133, 2 N. E. 296 (selling liquor to a drunkard or a person intoxicated at the time); State *v.* Corll, 73 Ind. 535; Plunkett *v.* State, 69 Ind. 68; Berry *v.* State, 67 Ind. 222.

Massachusetts.— Com. *v.* Clark, 14 Gray 367; Com. *v.* Brown, 12 Metc. 522; Com. *v.* Churchill, 2 Metc. 118; Com. *v.* Eaton, 9 Pick. 165.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 234.

78. Wrocklege *v.* State, 1 Iowa 167; State *v.* Reed, 35 Me. 489, 58 Am. Dec. 727; New Gloucester *v.* Bridgham, 28 Me. 60; State *v.* Fanning, 38 Mo. 359. And see State *v.* Rust, 35 N. H. 438.

79. Haver *v.* State, 17 Ind. 455; Cool *v.* State, 16 Ind. 355.

80. *Arkansas.*— State *v.* Chambless, 45 Ark. 349.

that this allegation is sufficiently made by charging a sale "in a less quantity than a quart," or otherwise according to the statute, without adding a specification of a precise quantity,[81] while others require the statement of some particular quantity which shall be known as a measure less than the statutory minimum.[82] An indictment charging a sale of a known and definite quantity of liquor, as one pint or one gill, which as a matter of arithmetic is less than the quantity named in the statute, has been held sufficient without an additional allegation that the sale was "in a less quantity" than the statutory minimum.[83] But according to other decisions this form of averment is not sufficient unless it adds that defendant sold no more than the amount named, or that the sale was of a quantity less than that fixed by law as the limit.[84] It seems that it will be sufficient to allege the sale of a definite measure of liquor "the same being then and there less than" the statutory limit,[85] or to follow the words of the statute and lay the precise quantity under a *videlicet*.[86] But if the same statute, in its different clauses, prescribes different quantities or limits for different persons or under different conditions, the indictment must clearly show under which clause defendant is prosecuted, which **may** involve a precise statement of the quantity he is alleged to have sold.[87]

(VII) *Allegation of Price Paid.* If the indictment alleges a "sale" of liquor, it is held that that term sufficiently imports the payment of a price, and hence it is not necessary to specify any price for which the liquor was sold, or, if the price is stated in an ambiguous or uncertain manner, that will not vitiate the indictment.[88]

Indiana.— Grupe *v.* State, 67 Ind. 327; State *v.* Mondy, 24 Ind. 268.

Mississippi.— Blakely *v.* State, 57 Miss. 680.

Missouri.— State *v.* Baskett, 52 Mo. App. 389; State *v.* Wilkson, 36 Mo. App. 373; State *v.* Greenhagen, 36 Mo. App. 24; State *v.* Stephens, 1 Mo. App. Rep. 500.

North Carolina.— State *v.* Hazell, 100 N. C. 471, 6 S. E. 404; State *v.* Shaw, 13 N. C. 198.

Compare Com. *v.* Brown, 12 Metc. (Mass.) 522; Com. *v.* Eaton, 9 Pick. (Mass.) 165.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 235.

81. State *v.* Jacks, 54 Ind. 412; State *v.* Mondy, 24 Ind. 268; Redding *v.* Com., 3 B. Mon. (Ky.) 339; Com. *v.* Bartholomew, 33 S. W. 840, 17 Ky. L. Rep. 1133.

82. State *v.* Sills, 56 Mo. App. 408; State *v.* Ryan, 30 Mo. App. 159; State *v.* Shaw, 1 N. C. 198.

83. State *v.* Wyman, 42 Minn. 182, 43 N. W. 1116; State *v.* Bach, 36 Minn. 234, 30 N. W. 764; State *v.* Lavake, 26 Minn. 526, 6 N. W. 339, 37 Am. Rep. 415. And see State *v.* Scampini, 77 Vt. 92, 59 Atl. 201.

84. Com. *v.* Odlin, 23 Pick. (Mass.) 275; State *v.* Fanning, 38 Mo. 409; People *v.* Bradt, 46 Hun (N. Y.) 445, 10 N. Y. Suppl. 157.

In Indiana the courts have several times vacillated from one side of this question to the other, although the doctrine finally accepted appears to be that the specification of a particular quantity is not alone sufficient. See Quinn *v.* State, 123 Ind. 59, 23 N. E. 977; Urbahns *v.* State, 72 Ind. 602; Grupe *v.* State, 67 Ind. 327; Arbintrode *v.* State, 67 Ind. 267, 33 Am. Rep. 86; State *v.* Zeitler, 63 Ind. 441; State *v.* Mondy, 24 Ind. 268; Smith *v.* State, 23 Ind. 132; McCool *v.* State, 23 Ind. 127; Reams *v.* State, 23 Ind. 111; Wood *v.* State, 21 Ind. 276; Struckman *v.* State, 21 Ind. 160; Willard *v.* State, 4 Ind. 407.

85. Zarresseller *v.* People, 17 Ill. 101; Quinn *v.* State, 123 Ind. 59, 23 N. E. 977; Smith *v.* State, 23 Ind. 132.

86. Com. *v.* Odlin, 23 Pick. (Mass.) 275; State *v.* Arbogast, 24 Mo. 363; State *v.* Baldwin, 56 Mo. App. 423.

87. State *v.* Sutton, 100 N. C. 474, 6 S. E. 687. And see Com. *v.* Risner, 47 S. W. 213, 20 Ky. L. Rep. 538; State *v.* Greenhagen, 36 Mo. App. 24; State *v.* Ryan, 30 Mo. App. 159.

88. *Iowa.*— Clare *v.* State, 5 Iowa 509.

Kansas.— State *v.* Muntz, 3 Kan. 383.

Missouri.— State *v.* Rogers, 39 Mo. 431; State *v.* Fanning, 38 Mo. 359; State *v.* Ladd, 15 Mo. 430. *Compare* Neales *v.* State, 10 Mo. 498.

Nebraska.— State *v.* Pischel, 16 Nebr. 409, 608, 20 N. W. 848, 21 N. W. 468.

Rhode Island.— State *v.* Hines, 13 R. I. 10.

Wisconsin.— State *v.* Downer, 21 Wis. 274.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 236.

In Indiana the statute provides that no indictment shall be quashed for omitting to state the price of any matter or thing in any case where the value or price is not of the essence of the offense; and consequently it is not now necessary to state the price in an indictment for an unlawful sale of liquor. Ind. Rev. St. (1894) § 1825, subd. 9. And see State *v.* Allen, 12 Ind. App. 528, 40 N. E. 705. For decisions on this subject prior to this statute see Forkner *v.* State, 95 Ind. 406; Schlicht *v.* State, 56 Ind. 173; State *v.* Jacks, 54 Ind. 412; Eagan *v.* State, 53 Ind.

d. Designation or Description of Purchaser — (i) *Alleging Name of Purchaser.* While it has been held in a number of cases that an indictment for an unlicensed or otherwise unlawful sale of liquor must set forth the name of the person to whom the sale was made, or, if the name is not known to the prosecutor or the grand jury, that fact must be stated as an excuse for not giving it,[89] such an allegation is generally held to be unnecessary, so that an indictment which is otherwise sufficiently certain will not be quashed merely because it fails to name the purchaser of the liquor.[90] Where the offense charged is not a single act of

162; Farrell *v.* State, 45 Ind. 371; O'Connor *v.* State, 45 Ind. 347; Cool *v.* State, 16 Ind. 355; Hubbard *v.* State, 11 Ind. 554; State *v.* Downs, 7 Ind. 237; Segur *v.* State, 6 Ind. 451; Miles *v.* State, 5 Ind. 215; Snyder *v.* State, 5 Ind. 194; State *v.* Lockstand, 4 Ind. 572; Hare *v.* State, 4 Ind. 241; Divine *v.* State, 4 Ind. 240.

89. *Alabama.*— Dorman *v.* State, 34 Ala. 216.

Delaware.— State *v.* Walker, 3 Harr. 547.

Indiana.— Ashley *v.* State, 92 Ind. 559; McLaughlin *v.* State, 45 Ind. 338; State *v.* Burgess, 4 Ind. 606; Blodget *v.* State, 3 Ind. 403; State *v.* Stucky, 2 Blackf. 289; Herron *v.* State, 17 Ind. App. 161, 46 N. E. 540. *Compare* Hipes *v.* State, 18 Ind. App. 426, 48 N. E. 12.

Iowa.— State *v.* Allen, 32 Iowa 491. But see State *v.* Becker, 20 Iowa 438.

Kentucky.— Wilson *v.* Com., 14 Bush 159; Com. *v.* Benge, 13 Ky. L. Rep. 591; Yost *v.* Com., 6 Ky. L. Rep. 110.

Maryland.— Capritz *v.* State, 1 Md. 569.

Massachusetts.— Com. *v.* Dean, 21 Pick. 334. But see Com. *v.* Davis, 11 Gray 457.

Minnesota.— State *v.* Schmail, 25 Minn. 368.

Nebraska.— Martin *v.* State, 30 Nebr. 421, 46 N. W. 618; State *v.* Pischel, 16 Nebr. 490, 608, 20 N. W. 848, 21 N. W. 468.

New Jersey.— Flanagan *v.* Plainfield, 44 N. J. L. 118; Roberson *v.* Lambertville, 38 N. J. L. 69.

North Carolina.— State *v.* Stamey, 71 N. C. 202; State *v.* Faucett, 20 N. C. 239.

Ohio.— Stewart *v.* State, 25 Ohio Cir. Ct. 438.

Rhode Island.— State *v.* Doyle, 11 R. I. 574.

South Carolina.— State *v.* Couch, 54 S. C. 286, 32 S. E. 408; State *v.* Jeffcoat, 54 S. C. 196, 32 S. E. 298; State *v.* Steedman, 8 Rich. 312; State *v.* Schroder, 3 Hill 61.

Texas.— Drechsel *v.* State, 35 Tex. Cr. 580, 34 S. W. 934; Martin *v.* State, 31 Tex. Cr. 27, 19 S. W. 434; Dixon *v.* State, 21 Tex. App. 517, 1 S. W. 448. *Compare* State *v.* Heldt, 41 Tex. 220; Cochran *v.* State, 26 Tex. 678.

Canada.— Reg. *v.* Cavanagh, 27 U. C. C. P. 537.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 238, 239.

Reason for the rule.— The reason for requiring the indictment to state the name of the purchaser is that it may be sufficiently certain to inform the accused, without reasonable doubt or ambiguity, of the particular charge which he is called upon to meet, distinguishing the particular sale which the prosecution expects to prove from any other transaction in defendant's business; and also to enable him to plead an acquittal or conviction in bar of a subsequent prosecution for the same offense. See State *v.* Schmail, 25 Minn. 368; Dixon *v.* State, 21 Tex. App. 517, 1 S. W. 448.

In Missouri, where the prosecution is under Rev. St. § 4621, requiring a druggist selling intoxicants to have a prescription setting forth the name of the person for whom the liquor is prescribed, an indictment for selling liquor, charging defendant as a druggist, must name the party to whom the sale was made. State *v.* Martin, 108 Mo. 117, 18 S. W. 1005; State *v.* Major, 81 Mo. App. 289; State *v.* Cassity, 49 Mo. App. 300; State *v.* Harris, 47 Mo. App. 558.

90. *Arkansas.*— State *v.* Bailey, 43 Ark. 150; Johnson *v.* State, 40 Ark. 453; McCuen *v.* State, 19 Ark. 630; State *v.* Parnell, 16 Ark. 506, 63 Am. Dec. 72.

Colorado.— Langan *v.* People, 32 Colo. 414, 76 Pac. 1048.

Dakota.— People *v.* Sweetser, 1 Dak. 308, 46 N. W. 452.

Florida.— Dansey *v.* State, 23 Fla. 316, 2 So. 692; Jordan *v.* State, 22 Fla. 528.

Georgia.— Wells *v.* State, 118 Ga. 556, 45 S. E. 443; Hancock *v.* State, 114 Ga. 439, 40 S. E. 317; Newman *v.* State, 101 Ga. 534, 28 S. E. 1005; Hill *v.* Dalton, 72 Ga. 314; Carter *v.* State, 68 Ga. 826.

Illinois.— Myers *v.* People, 67 Ill. 503; Rice *v.* People, 38 Ill. 435; Cannady *v.* People, 17 Ill. 158.

Kansas.— State *v.* Moseli, 49 Kan. 142, 30 Pac. 189; Junction City *v.* Webb, 44 Kan. 71, 23 Pac. 1073; State *v.* Whisner, 35 Kan. 271, 10 Pac. 852; State *v.* Brooks, 33 Kan. 708, 7 Pac. 591; State *v.* Schweiter, 27 Kan. 499; Lincoln Center *v.* Linker, 5 Kan. App. 242, 47 Pac. 174.

Louisiana.— State *v.* Brown, 41 La. Ann. 771, 6 So. 638; State *v.* Kuhn, 24 La. Ann. 474.

Mississippi.— State *v.* Caldwell, (1895) 17 So. 372; Lea *v.* State, 64 Miss. 201, 1 So. 51; Riley *v.* State, 43 Miss. 397.

Missouri.— State *v.* Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; State *v.* Jaques, 68 Mo. 260; State *v.* Rogers, 39 Mo. 431; State *v.* Fanning, 38 Mo. 359; State *v.* Spain, 29 Mo. 415 [*overruling* Neales *v.* State, 10 Mo. 498]; State *v.* Ladd, 15 Mo. 430; State *v.* McAnally, 105 Mo. App. 333,

sale, but a continuous business, such as keeping liquors for unlawful sale, or unlawfully pursuing the business of liquor selling, or maintaining a liquor nuisance, although it may be necessary to prove one or more sales or offers to sell, it is not necessary to allege the name of the purchaser or purchasers.[91]

(II) *How Purchaser Is Described.* If the name of the purchaser is to be inserted in the indictment, he may be described by the name by which he is commonly and usually known, although it may differ from his right name; and if he is commonly known by two or more names, he may be described by one or all of them.[92] If the name of the purchaser has not been discovered, he may be described as "a person to the jurors unknown."[93] Where the sale was made to an agent, whose principal was disclosed, it should be alleged as a sale to the principal; but if the principal was not disclosed, it may be laid as a sale to the agent.[94] An indictment for selling to one named person will not sustain a conviction for selling to another person,[95] although the indictment may properly charge the sale of liquor to two persons in the same count.[96]

(III) *When Sales Made to Prohibited Persons.* An indictment for an unlawful sale of liquor to a person within one of the prohibited classes must set forth the name of the purchaser,[97] and clearly show the illegal nature of the act

79 S. W. 990; State *v.* Back, 99 Mo. App. 34, 72 S. W. 466; State *v.* Ford, 47 Mo. App. 601; State *v.* Houts, 36 Mo. App. 265.

New York.— Osgood *v.* People, 39 N. Y. 449; People *v.* Polhamus, 8 N. Y. App. Div. 133, 40 N. Y. Suppl. 491; People *v.* Adams, 17 Wend. 475.

Pennsylvania.— Com. *v.* Baird, 4 Serg. & R. 141; Com. *v.* Schoenhutt, 3 Phila. 20.

South Dakota.—State *v.* Williams, 11 S. D. 64, 75 N. W. 815; State *v.* Boughner, 5 S. D. 461, 59 N. W. 736; State *v.* Burchard, 4 S. D. 548, 57 N. W. 491.

Tennessee.— State *v.* Staley, 3 Lea 565; State *v.* Hickerson, 3 Heisk. 375; State *v.* Harris, 2 Sneed 224; State *v.* Weaks, 7 Humphr. 522; State *v.* Carter, 7 Humphr. 158.

Vermont.— State *v.* Munger, 15 Vt. 290. But see State *v.* Higgins, 53 Vt. 191.

Virginia.— Com. *v.* Smith, 1 Gratt. 553; Hulstead *v.* Com., 5 Leigh 724; Com. *v.* Dove, 2 Va. Cas. 26.

Washington.— State *v.* Bodeckar, 11 Wash. 417, 39 Pac. 645.

West Virginia.—State *v.* Chisnell, 36 W.Va. 659, 15 S. E. 412; State *v.* Ferrell, 30 W. Va. 683, 5 S. E. 155; State *v.* Pendergast, 20 W. Va. 672.

Wisconsin.— State *v.* Gummer, 22 Wis. 441; State *v.* Bielby, 21 Wis. 204.

United States.— U. S. *v.* Gordon, 25 Fed. Cas. No. 15,233, 1 Cranch C. C. 58. But see Nelson *v.* U. S., 30 Fed. 112, where it is held that in an indictment for the unlawful sale of liquor the name of the purchaser, if known, ought to be alleged as a convenient means of identifying the transaction, although the omission to state the name is not sufficient cause for the reversal of the judgment on error.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 238, 239.

91. Hornberger *v.* State, 47 Nebr. 40, 66 N. W. 23; State *v.* Dellaire, 4 N. D. 312, 60 N. W. 988; State *v.* Doyle, 15 R. I. 527, 9 Atl. 900; Mansfield *v.* State, 17 Tex. App. 468.

92. Henry *v.* State, 113 Ind. 304, 15 N. E. 593; Com. *v.* Trainor, 123 Mass. 414; Com. *v.* Melling, 14 Gray (Mass.) 388.

The christian name of the purchaser is not necessary. State *v.* Brown, 31 Me. 520. And see State *v.* Cameron, 86 Me. 196, 29 Atl. 984.

Residence and occupation unnecessary.— State *v.* Hines, 13 R. I. 10.

93. Com. *v.* Early, 161 Mass. 186, 36 N. E. 794; Com. *v.* Griffin, 105 Mass. 175; Com. *v.* Hitchings, 5 Gray (Mass.) 482; State *v.* Carter, 7 Humphr. (Tenn.) 158.

If the name was really known to the grand jury, it has been made a question what effect that fact would have upon an indictment alleging the name to be unknown. In Indiana it is thought that such an indictment ought not to be sustained. Blodget *v.* State, 3 Ind. 403. But in New York it is said that the knowledge of the grand jurors of the name of the purchaser is of no importance, where the case has proceeded to trial without preliminary objection. People *v.* Bradley, 11 N. Y. Suppl. 594.

94. See Kemp *v.* State, 120 Ga. 157, 47 S. E. 548; Com. *v.* O'Leary, 143 Mass. 95, 8 N. E. 887; Com. *v.* Very, 12 Gray (Mass.) 124; Com. *v.* McGuire, 11 Gray (Mass.) 460; State *v.* Wentworth, 35 N. H. 442.

95. Com. *v.* Taggart, 8 Gratt. (Va.) 697.

96. Peer's Case, 5 Gratt. (Va.) 674.

As to alleging a sale to a particular person, by name, "and to divers other persons," see Walters *v.* State, 5 Iowa 507; Yost *v.* Com., 6 Ky. L. Rep. 110; People *v.* Huffman, 24 N. Y. App. Div. 233, 48 N. Y. Suppl. 482; People *v.* Schmidt, 19 Misc. (N. Y.) 458, 44 N. Y. Suppl. 607; People *v.* Adams, 17 Wend. (N. Y.) 475; State *v.* Cassety, 1 Rich. (S. C.) 90.

97. Myers *v.* People, 67 Ill. 503; Com. *v.* Pfaff, 5 Pa. Dist. R. 59, 17 Pa. Co. Ct. 302.

by describing him with reference to his age, if a minor,[98] his color or status, if that is essential to the offense,[99] his habits of intoxication, in the case of a habitual drunkard,[1] or his intoxicated condition at the time of the sale, if that is the gist of the offense.[2] Moreover if it is essential to the crime that the seller should have had previous notice of the condition or status of the purchaser, either with reference to his habits of intoxication or his minority, the fact of such notice must be distinctly set forth in the indictment.[3]

e. Allegation of Scienter of Defendant. Where the offense charged is a sale to a minor, a drunken person, or an inebriate, it is generally held unnecessary to charge in the indictment that defendant had knowledge of the age, condition, or habits of the purchaser,[4] although a scienter must be laid, where the statutory offense is "knowingly" making such a sale,[5] in which case it seems it is sufficient to aver that the act was "unlawfully and knowingly" done.[6]

f. Negativing Exceptions and Defenses — (i) *Denying Authority in General.* Where the statute denies the right to sell liquors to all persons except duly appointed town agents or other public officials, it is necessary to allege in an indictment for an unlawful sale that defendant was not such an agent or official.[7] This is sufficiently done by averring that he was not "a legally appointed agent" for such sale, or that he made the sale "without being duly appointed and authorized therefor."[8] But no such allegation is necessary where the prosecution is for an offense which would not be excused by defendant's public position or his authority as a public agent, such as maintaining a liquor nuisance or keeping a place for the illegal sale of liquors.[9]

(ii) *Denying Permission of Parent or Guardian.* Where the sale of

98. Lindner *v.* State, 93 Ind. 254.

It is sufficient to describe the purchaser as being a person "then and there under the age of twenty-one years," and it is not necessary to give his age more exactly. Shaffer *v.* State, 106 Ind. 319, 6 N. E. 818; Brinkman *v.* State, 57 Ind. 76; State *v.* Allen, 12 Ind. App. 528, 40 N. E. 705. There is also authority for the proposition that the use of the word "minor" in such an indictment, without anything more, sufficiently describes the person's age. Waller *v.* State, 38 Ark. 656; Supernant *v.* People, 100 Ill. App. 121; Com. *v.* Sullivan, 156 Mass. 229, 30 N. E. 1023; Com. *v.* O'Brien, 134 Mass. 198; State *v.* Boncher, 59 Wis. 477, 18 N. W. 335.

99. Com. *v.* Ewing, 7 Bush (Ky.) 105, holding that where the statute forbids the sale of liquor to "any white person under the age of twenty-one years," an indictment is defective which does not allege both that the purchaser was a minor and a white person.

Sales to slaves see Com. *v.* Hatton, 15 B. Mon. (Ky.) 537; Com. *v.* Cook, 13 B. Mon. (Ky.) 149.

Sales to voters.— An indictment under a statute making it unlawful to give liquor to any voter on the day of an election need only allege that the person to whom the liquor was given was a legally qualified voter, without stating the facts qualifying him as such. State *v.* Pearis, 35 W. Va. 320, 13 S. E. 1006.

1. Dolan *v.* State, 122 Ind. 141, 23 N. E. 761. And see Wiedemann *v.* People, 92 Ill. 314, holding that the indictment is fatally defective if it does not allege that the habit of intoxication existed at the time of the sale charged.

2. Berry *v.* State, 67 Ind. 222. And see State *v.* Conner, 30 Ohio St. 405.

3. State *v.* Smith, 122 Ind. 178, 23 N. E. 714; Geraghty *v.* State, 110 Ind. 103, 11 N. E. 1; State *v.* Hyde, 27 Minn. 153, 6 N. W. 555.

4. Loeb *v.* State, 75 Ga. 258; Mapes *v.* People, 69 Ill. 523; Werneke *v.* State, 50 Ind. 23, 49 Ind. 210; Ward *v.* State, 48 Ind. 289; State *v.* Cain, 9 W. Va. 559.

5. Com. *v.* Bell, 14 Bush (Ky.) 433; Ault-father *v.* State, 4 Ohio St. 467; Miller *v.* State, 3 Ohio St. 475.

6. Woods *v.* State, (Tex. Cr. App. 1893) 20 S. W. 915; State *v.* De Paoli, 24 Wash. 71, 63 Pac. 1102.

7. State *v.* Savage, 48 N. H. 484; State *v.* Shaw, 35 N. H. 217. And see Davis *v.* State, 39 Ala. 521. *Compare* Com. *v.* Tuttle, 12 Cush. (Mass.) 502.

8. Com. *v.* Grady, 108 Mass. 412; Com. *v.* Murphy, 2 Gray (Mass.) 510; State *v.* O'Donnell, 10 R. I. 472; State *v.* Barker, 3 R. I. 280; State *v.* Johnson, 3 R. I. 94.

Joint defendants.— In a complaint against A and B for an unlawful sale of liquor, an allegation that A and B were not agents of the town will be held sufficient, as importing that neither of defendants was such an agent. State *v.* Wadsworth, 30 Conn. 55, Sanford, J., delivering the opinion of the court.

9. State *v.* Lang, 63 Me. 215; Com. *v.* Brusie, 145 Mass. 117, 13 N. E. 378; Com. *v.* Locke, 114 Mass. 288; Com. *v.* Bennett, 108 Mass. 30, 11 Am. Rep. 304; Com. *v.* Edds, 14 Gray (Mass.) 406.

liquor to a minor is lawful when made in pursuance of the consent or permission of his parents or guardian, an indictment for selling to such a person must negative the giving of such permission by each and all of the persons who might have given it and in each of the modes in which it might have been given.[10]

(III) *NEGATIVING LICENSE*— (A) *Necessity.* The indictment must contain an allegation denying the existence of a license or authority in defendant to make the sale complained of, when that fact is a necessary ingredient of the offense charged, or where the possession of such a license would have rendered the sale lawful.[11] But if the question of a license is not material to the offense, if the elements of the offense are complete without the additional fact of the sale having been unlicensed, or if the act charged amounts to an offense whether committed by a licensed or unlicensed person, then no averment in regard to a license is needed.[12]

(B) *Form and Sufficiency of Allegation.* An allegation denying the possession of a license by defendant must be sufficiently specific to show the commission of a statutory offense.[13] If the statutes authorize the grant of various kinds of

10. *Alabama.*— Freiberg *v.* State, 94 Ala. 91, 10 So. 703; Page *v.* State, 84 Ala. 446, 4 So. 697; Weed *v.* State, 55 Ala. 13; Agee *v.* State, 25 Ala. 67; Lindsay *v.* State, 19 Ala. 560.

Arkansas.— Mogler *v.* State, 47 Ark. 109, 14 S. W. 473. An indictment charging the sale of liquor to a minor without the written consent of his parents, but not negativing the consent of his guardian, is bad on demurrer. State *v.* Emerick, 35 Ark. 324.

Georgia.— Heyman *v.* State, 64 Ga. 437; Newman *v.* State, 63 Ga. 533. Where the indictment merely alleged the want of permission or consent from the mother of the minor, but no demurrer was interposed, and the evidence showed that the father was dead and that no guardian had been appointed, it was held sufficient to sustain a conviction. Reich *v.* State, 63 Ga. 616.

Kentucky.— Com. *v.* Hadcraft, 6 Bush 91; Com. *v.* Kenner, 11 B. Mon. 1.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522; Franklin *v.* State, 12 Md. 236.

South Carolina.— State *v.* Boice, Cheves 77.

Tennessee.— Taylor *v.* State, 7 Humphr. 510, holding that where verbal permission is sufficient to authorize the sale, an indictment which only negatives written permission is defective.

Texas.— State *v.* Shwartz, 25 Tex. 764; Lantznester *v.* State, 19 Tex. App. 320. *Compare* Payne *v.* State, 74 Ind. 203; State *v.* Shoemaker, 4 Ind. 100.

11. *Alabama.*— Koopman *v.* State, 61 Ala. 70.

Indiana.— State *v.* Carpenter, 20 Ind. 219; Howe *v.* State, 10 Ind. 423. *Compare* Farrell *v.* State, 45 Ind. 371; O'Connor *v.* State, 45 Ind. 347.

Massachusetts.— Com. *v.* Luddy, 143 Mass. 563, 10 N. E. 448; Com. *v.* Byrnes, 126 Mass. 248; Com. *v.* Tuttle, 12 Cush. 502; Com. *v.* Thurlow, 24 Pick. 374.

New Hampshire.— State *v.* Savage, 48 N. H. 484. To the same effect see State *v.* Adams, 6 N. H. 532.

New Jersey.— Fredericks *v.* Passaic, 42 N. J. L. 87.

North Carolina.— State *v.* Holder, 133 N. C. 709, 45 S. E. 862.

Texas.— State *v.* Horan, 25 Tex. Suppl. 271.

Virginia.— Com. *v.* Hampton, 3 Gratt. 590.

Canada.— Woodhouse *v.* Hogue, 3 Rev. Lég. 442, 3 L. C. Rep. 93.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 242.

Compare Jefferson *v.* People, 101 N. Y. 19, 3 N. E. 797.

In Kentucky a complaint alleging that defendant kept a tippling-house is sufficient under the statute, and it is not necessary to add an averment that it was kept without a license to keep a tavern. Com. *v.* Harvey, 16 B. Mon. 1; Com. *v.* Allen, 15 B. Mon. 1.

Sale by agent.— An indictment for selling liquor without a license need not allege that the owner of the liquor had no license; if defendant was the agent of a licensed owner, he can show that fact on the trial. State *v.* Devers, 38 Ark. 517.

12. Glass *v.* State, 45 Ark. 173. And see Langan *v.* People, 32 Colo. 414, 76 Pac. 1048.

Sales on Sunday.— Stein *v.* State, 50 Ind. 21; Ginz *v.* State, 44 Ind. 218; Hulsman *v.* State, 42 Ind. 500; Lehritter *v.* State, 42 Ind. 383. *Compare* Vogel *v.* State, 31 Ind. 64.

Sales to minors.— State *v.* Gowgill, 75 Ind. 599; Johnson *v.* State, 74 Ind. 197; Meyer *v.* State, 50 Ind. 18.

Maintaining liquor nuisance.— State *v.* Donahue, 120 Iowa 154, 94 N. W. 503; State *v.* Collins, 11 Iowa 141; State *v.* Teissedre, 30 Kan. 476, 2 Pac. 108, 650; Com. *v.* Shaw, 5 Cush. (Mass.) 522.

Violating local option law.— An indictment for selling liquor in a local option district need not allege that the sale was made without license, as no license could legally be granted. Reynolds *v.* Com., 106 Ky. 37, 49 S. W. 969, 20 Ky. L. Rep. 1681. And see State *v.* Handler, 178 Mo. 38, 76 S. W. 984; Ikard *v.* State, 46 Tex. Cr. 605, 79 S. W. 32.

13. Sufficient allegations see State *v.* Tulip, 9 Kan. App. 454, 60 Pac. 659; State *v.* Greg-

licenses, classified according to the occupation of the licensee, the quantity which he is permitted to sell, the place of consumption, or the kinds of liquor to be dealt in, and the indictment undertakes to negative the various forms of license severally by name, it must deny particularly the existence of each sort of license which might have justified the sale, with a specific reference to each of the sources from which such license might have been derived.[14] It has been held, however, that an indictment is sufficient which negatives the existence in defendant of some individual form or kind of license, with the addition of a general phrase, sufficiently broad and comprehensive, denying all license or authority.[15] And the courts have sustained the sufficiency of indictments which merely deny defendant's right or authority to sell, by the use of a general formula, without specific references to statutes or to particular kinds of licenses.[16] In the case of joint defend-

ory, 27 Mo. 231; State *v.* Owen, 15 Mo. 506; State *v.* Scampini, 77 Vt. 92, 59 Atl. 201; Laliberte *v.* Fortin, 2 Quebec 573.

Insufficient allegations see State *v.* Buskirk, 18 Ind. App. 629, 48 N. E. 872; Robinson *v.* State, (Tex. Cr. App. 1903) 75 S. W. 526.

Denial by implication.— A complaint for selling liquor without a license, which does not specifically state that no license had been obtained, may still be sufficient if it is clearly implied that such was the fact. State *v.* Tall, 56 Wis. 577, 14 N. W. 596; State *v.* Constantino, 76 Vt. 192, 56 Atl. 1101. And see Webster *v.* Com., 7 Dana (Ky.) 215, holding that an indictment charging defendant with keeping a tippling-house, "not under pretense of keeping a tavern," is good after verdict, as those terms manifestly imply that he had no license.

Where the statute imposes a penalty for selling liquor without paying the occupation tax, an indictment for selling "without first having obtained a license" is not sufficient. State *v.* Terry, 35 Tex. 366. And see Com. *v.* Young, 15 Gratt. (Va.) 664.

14. *Georgia.*— See Hardison *v.* State, 95 Ga. 337, 22 S. E. 681; Mathis *v.* State, 93 Ga. 38, 18 S. E. 996.

Indiana.— O'Brien *v.* State, 63 Ind. 242; Henderson *v.* State, 60 Ind. 296; Meier *v.* State, 57 Ind. 386; Burke *v.* State, 52 Ind. 461. See, however, Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802.

Kansas.— State *v.* Pitzer, 23 Kan. 250; State *v.* Pittman, 10 Kan. 593.

Massachusetts.— Com. *v.* Crossley, 162 Mass. 515, 39 N. E. 278; Com. *v.* Roberts, 1 Cush. 505; Com. *v.* Thayer, 5 Metc. 246. *Compare* Com. *v.* Shaw, 5 Cush. 522.

Minnesota.— State *v.* Nerbovig, 33 Minn. 480, 24 N. W. 321.

Missouri.— State *v.* Haden, 15 Mo. 447.

New Hampshire.— State *v.* Blaisdell, 33 N. H. 388. See, however, State *v.* Adams, 6 N. H. 532.

New Jersey.— Fleming *v.* New Brunswick, 47 N. J. L. 231. And see State *v.* Webster, 10 N. J. L. 293.

Texas.— Williamson *v.* State, 41 Tex. Cr. 461, 55 S. W. 568.

Vermont.— State *v.* Sommers, 3 Vt. 156. *Compare* State *v.* Clark, 23 Vt. 293; State *v.* Munger, 15 Vt. 290.

Virginia.— See Peer's Case, 5 Gratt. 674.

Wisconsin.— See Neuman *v.* State, 76 Wis. 112, 45 N. W. 30; Sires *v.* State, 73 Wis. 251, 41 N. W. 81.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 243, 244.

15. People *v.* Gilkinson, 4 Park. Cr. (N. Y.) 26. But *compare* Com. *v.* Lynn, 107 Mass. 214.

In Missouri a form which is much in use and which is held sufficiently broad is as follows: "Without his then and there having a dramshop keeper's license, innkeeper's license, or any other legal authority to sell said intoxicating liquor at said place, in manner and form aforesaid, contrary to the form of the statute," etc. State *v.* Sutton, 25 Mo. 300; State *v.* Owen, 15 Mo. 506; State *v.* Hornbeak, 15 Mo. 478. *Compare* State *v.* Fanning, 38 Mo. 409.

The addition of such a general phrase will sometimes save the indictment from objection to one or more of the particular specifications. Thus, under a complaint charging a sale of liquor by defendant, he not being authorized to sell under the provisions of a cited statute, which had been repealed, nor by any legal authority whatever, it was held that the allegation as to the statute might be rejected as surplusage. Com. *v.* Peto, 136 Mass. 155. And see Com. *v.* Baker, 10 Cush. (Mass.) 405.

16. Powell *v.* State, 69 Ala. 10; Com. *v.* Dunn, 14 Gray (Mass.) 401; Norton *v.* State, 65 Miss. 297, 3 So. 665. And see State *v.* Webster, 10 N. J. L. 293; State *v.* Clark, 23 Vt. 293. But see State *v.* Sommers, 3 Vt. 156.

Illustrations see Bogan *v.* State, 84 Ala. 449, 4 So. 355; Sills *v.* State, 76 Ala. 92; McCreary *v.* State, 73 Ala. 480; Boon *v.* State, 69 Ala. 226; Elam *v.* State, 25 Ala. 53; Higgins *v.* People, 69 Ill. 11; Coverdale *v.* State, 60 Ind. 307; State *v.* Buckner, 52 Ind. 278; State *v.* Ashcraft, 11 Ind. App. 406, 39 N. E. 199; Howell *v.* State, 4 Ind. App. 148, 30 N. E. 714; Com. *v.* Chadwick, 142 Mass. 595, 8 N. E. 589; Com. *v.* Fredericks, 119 Mass. 199; Com. *v.* Dunn, 111 Mass. 425; Com. *v.* Chisholm, 103 Mass. 213; Com. *v.* Clark, 14 Gray (Mass.) 367; Com. *v.* Kingman, 14 Gray (Mass.) 85; Com. *v.* Boyle, 14 Gray (Mass.) 3; Com. *v.* Roland, 12 Gray (Mass.) 132; Com. *v.* Keefe, 7 Gray (Mass.) 332;

ants an allegation that they did the act complained of, "not being a licensed retailer" or otherwise according to the terms of the statute, although expressed in the singular, sufficiently negatives the qualification of each of them.[17]

(IV) *NEGATIVING EXCEPTIONS*— (A) *In General.*[18] As a general rule, where the enacting clause of the statute describes the offense with certain exceptions, it is necessary to state in the indictment all the circumstances which constitute the offense and to negative the exceptions; but where there are exceptions or provisos contained in separate and subsequent clauses or provisions of the statute, or in another statute, they need not be noticed in the indictment, but defendant may show them in his defense.[19] But a negative, exception, or proviso, which is descriptive of the offense, as distinguished from one which affords matter of excuse merely, must be met by an allegation in the indictment, irrespective of the question of its position in the statute.[20] But it is of course unnecessary to

Com. *v.* Conant, 6 Gray (Mass.) 482; Com. *v.* Clapp, 5 Gray (Mass.) 97; Com. *v.* Lafontaine, 3 Gray (Mass.) 479; Com. *v.* Wilson, 11 Cush. (Mass.) 412; Com. *v.* Tower, 8 Metc. (Mass.) 527; Elbow Lake *v.* Holt, 69 Minn. 349, 72 N. W. 564; West *v.* State, 70 Miss. 598, 12 So. 903; Trost *v.* State, 64 Miss. 188, 1 So. 49; State *v.* Wishon, 15 Mo. 503; State *v.* Hines, 13 R. I. 10; State *v.* Munger, 15 Vt. 290; State *v.* Riffe, 10 W. Va. 794.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 243.

17. State *v.* Wadsworth, 30 Conn. 55; Com. *v.* Sloan, 4 Cush. (Mass.) 52; State *v.* Burns, 20 N. H. 550. But *compare* State *v.* Holder, 133 N. C. 709, 45 S. E. 862.

18. As to the general rules in regard to negativing exceptions in statutes see INDICTMENTS AND INFORMATIONS.

19. *Alabama.*— Sims *v.* State, 135 Ala. 61, 33 So. 162; Carson *v.* State, 69 Ala. 235.

Arkansas.— State *v.* Mullins, 67 Ark. 422, 55 S. W. 211.

Connecticut.— State *v.* Wadsworth, 30 Conn. 55.

Florida.— Baeumel *v.* State, 26 Fla. 71, 7 So. 371.

Georgia.— Tigner *v.* State, 119 Ga. 114, 45 S. E. 1001.

Illinois.— Metzker *v.* People, 14 Ill. 101.

Indiana.— Kinser *v.* State, 9 Ind. 543; Brutton *v.* State, 4 Ind. 601.

Iowa.— State *v.* Van Vliet, 92 Iowa 476, 61 N. W. 241; State *v.* Curley, 33 Iowa 359; State *v.* Beneke, 9 Iowa 203.

Maine.— State *v.* Keen, 34 Me. 500; State *v.* Lane, 33 Me. 536.

Maryland.— Dode *v.* State, 7 Gill 326.

Massachusetts.— Com. *v.* Shaw, 5 Cush. 522.

Missouri.— State *v.* Jaques, 68 Mo. 260; State *v.* Buford, 10 Mo. 703.

New Hampshire.— State *v.* McGlynn, 34 N. H. 422.

New York.— Jefferson *v.* People, 101 N. Y. 19, 3 N. E. 797.

Tennessee.— State *v.* Staley, 3 Lea 565.

Vermont.— State *v.* Freeman, 27 Vt. 523.

Virginia.— Com. *v.* Hill, 5 Gratt. 682.

United States.— U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520; U. S. *v.* Cook, 17 Wall. 168, 21 L. ed. 538.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 245.

It is not necessary to negative a proviso in the act, exempting from its operation all sales made to town agents within a certain time after the act took effect or sales by one agent to another at any time. State *v.* Wade, 34 N. H. 495. And where the prosecution is under a statute which prohibits the employment of any female waiters in a saloon, but with a proviso excepting the wife or daughter of the proprietor, it is not necessary that the indictment should negative the exception. Walter *v.* Com., 88 Pa. St. 137, 32 Am. Rep. 429. And so on a complaint, under a statute, for not keeping a saloon closed after nine o'clock at night, it is not necessary to negative any action by the town council extending the time for closing until ten o'clock, as permitted by a proviso to the act. People *v.* Richmond, 59 Mich. 570, 26 N. W. 770.

Exception as to incorporated towns.— Where the statute contains a proviso that its terms shall not apply to incorporated towns and cities, it is not necessary to aver that the offense was not committed in a town or city; for that is not a part of the description of the offense, but only matter of defense. Hicks *v.* State, 108 Ga. 749, 32 S. E. 665; Johnson *v.* State, 60 Ga. 634; State *v.* Thompson, 2 Kan. 432; Howard *v.* Com., 33 S. W. 1115, 17 Ky. L. Rep. 1195; State *v.* Tamler, 19 Oreg. 528, 25 Pac. 71, 9 L. R. A. 853.

20. State *v.* Miller, 24 Conn. 522; State *v.* Keen, 34 Me. 500; Holt *v.* State, 62 Nebr. 134, 86 N. W. 1073; State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754.

Prescription for invalid.— Where the statute prohibits any physician from prescribing liquor for any person unless such person is actually sick, the indictment must charge that the person for whom the prescription was given was not sick; failing in this it is fatally defective. Frank *v.* Com., 15 S. W. 877, 13 Ky. L. Rep. 833; Stovall *v.* State, 37 Tex. Cr. 337, 39 S. W. 934.

Exception as to hotel-keepers.— Where the statute, by way of exception, permits hotel-keepers to furnish liquor to their guests at times when its sale in general would be unlawful, it is held in some states that an indictment for an unlawful sale should allege that defendant was not a hotel-keeper. Kiefer

negative any exception or proviso which, if established, would not excuse or protect defendant in respect to the particular offense with which he is charged.[21]

(B) *Exception as to Particular Uses.* If the same section or clause of a statute which prohibits the sale of intoxicating liquors contains also an exception in favor of their sale for certain permitted uses as, medical, pharmaceutical, mechanical, or sacramental purposes, or if the exception points directly to the character of the offense and makes a part of the description of it, the indictment must meet the exception with a negative allegation.[22] But if the exception is contained in a different section or part or proviso of the statute, it is not necessary to aver that the sale was not for any of the permitted purposes.[23]

(C) *Exception of Particular Liquors.* Where a statute prohibiting the sale of intoxicating liquors under certain circumstances contains an exception in favor of particular kinds of liquor, such as home-made wines and cider, it is not generally necessary, in an indictment for an unlawful sale, to negative the exception; it is matter of defense for the accused.[24] It is not necessary to negative an exception in the statute which permits the sale or keeping for sale of foreign imported liquors in the original casks or packages.[25]

(D) *Exception as to Druggists and Physicians.* Where the sale of liquor

v. State, 87 Md. 562, 40 Atl. 377; State *v.* Russell, 69 Minn. 499, 72 N. W. 837; State *v.* Jarvis, 67 Minn. 10, 69 N. W. 474. But in other states it is considered unnecessary to negative this exception. Lehman *v.* District of Columbia, 19 App. Cas. (D. C.) 217; People *v.* Crotty, 22 N. Y. App. Div. 77, 47 N. Y. Suppl. 845; People *v.* Haren, 35 Misc. (N. Y.) 590, 72 N. Y. Suppl. 205.

Exception as to distillers see *Ex p.* Moley, 7 L. C. Jur. 1.

Exception as to wholesalers see State *v.* Buskirk, 18 Ind. App. 629, 48 N. E. 872.

21. State *v.* Hale, 72 Mo. App. 78; State *v.* Ford, 47 Mo. App. 601.

22. *Arkansas.*— State *v.* Scarlett, 38 Ark. 563.

Indiana.— Kinser *v.* State, 9 Ind. 543; Peterson *v.* State, 7 Ind. 560; Lemon *v.* State, 4 Ind. 603; Brutton *v.* State, 4 Ind. 601.

Kansas.— Prohibitory Amendment Cases, 24 Kan. 700.

Missouri.— State *v.* McAdoo, 80 Mo. 216.

New Hampshire.— State *v.* Abbott, 31 N. H. 434.

New Jersey.— Roberson *v.* Lambertville, 38 N. J. L. 69.

Ohio.— Hirn *v.* State, 1 Ohio St. 15.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 246.

Compare People *v.* Rall, 135 Mich. 510, 98 N. W. 3.

23. *Florida.*—Baeumel *v.* State, 26 Fla. 71, 7 So. 371.

Iowa.— State *v.* Beneke, 9 Iowa 203.

Kentucky.— Throckmorton *v.* Com., 35 S. W. 635, 18 Ky. L. Rep. 130.

Massachusetts.— Com. *v.* Burding, 12 Cush. 506.

New Jersey.— State *v.* Townley, 18 N. J. L. 311.

North Carolina.— State *v.* Joyner, 81 N. C. 534.

Rhode Island.— State *v.* Duggan, 15 R. I. 403, 6 Atl. 787.

Texas.— Williams *v.* State, 37 Tex. Cr. 238, 39 S. W. 664.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 246.

Doctrine of federal courts.— It appears to be the doctrine of the federal courts that, even where the exception is in the enacting clause, still, if it is "not so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted," then it is not necessary to allege that the accused is not within the exception. U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538. Hence it is not necessary, in an indictment for a violation of the act of congress forbidding the sale of intoxicating liquor in Alaska, to allege that such sale was not made for mechanical, medicinal, or scientific purposes. Nelson *v.* U. S., 30 Fed. 112.

24. State *v.* Mullins, 67 Ark. 422, 55 S. W. 211; Kemp *v.* State, 120 Ga. 157, 47 S. E. 548; Wells *v.* State, 118 Ga. 556, 45 S. E. 443; Hancock *v.* State, 114 Ga. 439, 40 S. E. 317; Com. *v.* Petranich, 183 Mass. 217, 66 N. E. 807; Com. *v.* Shea, 115 Mass. 102; Com. *v.* Martin, 108 Mass. 29 note; Becker *v.* State, 8 Ohio St. 391. But *compare* State *v.* Bengsch, 170 Mo. 81, 70 S. W. 710; Williamson *v.* State, 41 Tex. Cr. 461, 55 S. W. 568.

25. State *v.* Gurney, 37 Me. 149; Com. *v.* Gay, 153 Mass. 211, 26 N. E. 571, 952; Com. *v.* Gagne, 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 442; Com. *v.* Waters, 11 Gray (Mass.) 81; Com. *v.* Purtle, 11 Gray (Mass.) 78; Com. *v.* Edwards, 12 Cush. (Mass.) 187; Com. *v.* Hart, 11 Cush. (Mass.) 130; State *v.* Shaw, 35 N. H. 217; State *v.* McGlynn, 34 N. H. 422; State *v.* Blaisdell, 33 N. H. 388; State *v.* Fuller, 33 N. H. 259. And see State *v.* Crowell, 30 Me. 115.

Sufficient negative averment.— If the indictment undertakes to negative the exception, it is sufficiently done by an averment that the liquor in question was not wine or spirituous liquor imported into the United

charged in an indictment would have been lawful if made on the prescription of a physician, by virtue of an exception in the statute, the existence of such prescription must be negatived in the indictment by an allegation substantially following the language of the statute.[26] Where, however, the statute prohibits the sale of liquor under certain circumstances, and, in another section or in a proviso, authorizes druggists or physicians to sell for certain purposes or under certain conditions, it is not necessary, in an indictment on the statute, to allege that defendant is not within the excepted classes.[27] And even where the exception is contained in the enacting clause as, by a provision that "it shall not be lawful for any person except druggists to sell liquor," there are authorities holding that it is not necessary to negative the exception.[28] But if the indictment undertakes to deny the authority of defendant as a druggist or physician, the allegation in that respect must be as broad, as specific, and as certain as the language of the statute.[29]

g. Description of Particular Offenses — (I) *Illegal Manufacture.* An indictment for the illegal manufacture of intoxicating liquors for sale need not allege the kind or quantity of liquor made, nor aver that it was manufactured for the purpose of sale within the state.[30]

(II) *Illegal Transportation.* An indictment or complaint for the illegal transportation of intoxicating liquors[31] should clearly and distinctly state the places from which and to which the liquor was being conveyed,[32] that it was done

States from any foreign port or place. State *v.* Brown, 31 Me. 520.

26. *Alabama.*— Dean *v.* State, 100 Ala. 102, 14 So. 762, holding that it is correct to aver that the liquor was sold without the written prescription of a "licensed physician," although the statute only uses the word "physician."

Arkansas.— Thompson *v.* State, 37 Ark. 408, holding that under an act making it an offense to sell liquor without the prescription of a graduated physician or regular practitioner of medicine, the indictment must negative the prescription of both.

Indiana.— Shepler *v.* State, 114 Ind. 194, 16 N. E. 521.

Missouri.— State *v.* Bradford, 79 Mo. App. 346. And see State *v.* Harris, 47 Mo. App. 558.

North Carolina.— State *v.* Stamey, 71 N. C. 202.

Texas.— Fleeks *v.* State, (Cr. App. 1904) 83 S. W. 381.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 248.

27. *Alabama.*— Bogan *v.* State, 84 Ala. 449, 4 So. 355.

Florida.— Baeumel *v.* State, 26 Fla. 71, 7 So. 371.

Georgia.— Oglesby *v.* State, 121 Ga. 602, 49 S. E. 706.

Iowa.— State *v.* Mercer, 58 Iowa 182, 12 N. W. 269.

Maryland.— Parker *v.* State, 99 Md. 189, 57 Atl. 677.

Michigan.— People *v.* Shuler, 136 Mich. 161, 98 N. W. 986; People *v.* Sullivan, 83 Mich. 355, 47 N. W. 220; People *v.* Robbins, 70 Mich. 130, 37 N. W. 924. And see People *v.* Curtis, 95 Mich. 212, 54 N. W. 767. But *compare* People *v.* Telford, 56 Mich. 541, 23 N. W. 213.

Minnesota.— State *v.* Corcoran, 70 Minn. 12, 72 N. W. 732.

Missouri.— State *v.* Moore, 107 Mo. 78, 16 S. W. 937; State *v.* Taylor, 73 Mo. 52; State *v.* Jaques, 68 Mo. 260. But *compare* State *v.* McBride, 64 Mo. 364.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 248.

But see Throckmorton *v.* Com., 35 S. W. 635, 18 Ky. L. Rep. 130; Com. *v.* Porter, 10 Phila. (Pa.) 217; Watson *v.* State, 42 Tex. Cr. 13, 57 S. W. 101; Gamble *v.* State, (Tex. Cr. App. 1900) 57 S. W. 95.

28. *Ex p.* Fedderwitz, (Cal. 1900) 62 Pac. 935; People *v.* Taylor, 110 Mich. 491, 68 N. W. 303; Surratt *v.* State, 45 Miss. 601.

29. People *v.* Gault, 104 Mich. 575, 62 N. W. 724; People *v.* Aldrich, 104 Mich. 455, 62 N. W. 570; People *v.* Decarie, 80 Mich. 578, 45 N. W. 491; People *v.* Haas, 79 Mich. 449, 44 N. W. 928.

30. Com. *v.* Clark, 14 Gray (Mass.) 367.

31. In South Carolina the Dispensary Act of 1895 prohibits the transportation of alcoholic liquors within the state, and enacts a penalty against any person "handling contraband liquors in the night-time." If an indictment intended to charge an illegal transportation of liquors unnecessarily alleges it to have been done "in the night-time," the words quoted may be rejected as surplusage. State *v.* Pickett, 47 S. C. 101, 25 S. E. 46. But if the indictment is brought under the latter provision of the statute, an allegation charging defendant with "hauling" liquors is not equivalent to a charge of "handling" the same. State *v.* Adams, 49 S. C. 518, 27 S. E. 523.

32. State *v.* Lashus, 79 Me. 541, 11 Atl. 604; Com. *v.* Keefe, 143 Mass. 467, 9 N. E. 840; Com. *v.* Hutchinson, 6 Allen (Mass.)

with intent to sell the liquor within the state, if that is a statutory part of the offense,[33] and that defendant knew the liquor to be intoxicating;[34] but it need not be alleged that the liquor was not in the original packages in which it was imported.[35]

(III) *Keeping Liquors For Unlawful Sale.* An indictment for this offense will generally be sufficient if it substantially follows the language of the statute.[36] It need not state who was the owner of the liquor illegally kept,[37] but must distinctly allege a "keeping" by defendant,[38] for the purpose of sale,[39] by defendant himself and not by another person,[40] and should also allege the place of the commission of the offense, that is, the place of keeping the liquors,[41] and the place where it was intended that they should be sold, if that is a statutory part of the crime.[42] The indictment should also negative the license or authority of defendant.[43] As the offense may be a continuing one, the time may be laid with a *continuando*.[44]

(IV) *Carrying on Business.* An indictment for being a common seller of liquor, or engaging in the business of liquor selling, without due license or authority, is sufficient if it follows substantially the language of the statute in alleging the occupation of defendant.[45] It is not necessary that the indictment should allege any particular sale, or any number of sales, or give the details of any transaction constituting a part of the forbidden traffic.[46] But it should allege

595; Com. *v.* Reily, 9 Gray (Mass.) 1; State *v.* Pickett, 47 S. C. 101, 25 S. E. 46.

33. State *v.* Murch, (Me. 1886) 7 Atl. 115; Com. *v.* Certain Intoxicating Liquors, 138 Mass. 506.

34. State *v.* McDonough, 84 Me. 488, 24 Atl. 944.

35. Com. *v.* Waters, 11 Gray (Mass.) 81.

36. Com. *v.* Sprague, 128 Mass. 75; Com. *v.* Gilland, 9 Gray (Mass.) 3.

37. Lincoln *v.* Smith, 27 Vt. 328.

38. State *v.* Campbell, 12 R. I. 147.

39. State *v.* Mohr, 53 Iowa 261, 5 N. W. 183 (holding that an indictment charging defendant with keeping liquor "for the purpose of sale" is sufficient, although the statute uses the words "with intent to sell"); State *v.* Murphy, 15 R. I. 543, 10 Atl. 585 (holding that, although the statute defines the offense as keeping liquor "for the purpose of sale and delivery," an indictment is not fatally defective for omitting the words "and delivery").

40. State *v.* Miller, 48 Me. 576; State *v.* Learned, 47 Me. 426; State *v.* Moran, 40 Me. 129; State *v.* Robinson, 33 Me. 564.

41. See State *v.* Bennett, 95 Me. 197, 49 Atl. 867; Com. *v.* Kern, 147 Mass. 595, 18 N. E. 566; Lincoln *v.* Smith, 27 Vt. 328.

42. In Maine the complaint must show that the liquor was intended for sale in the city or town where it was kept. Barnett *v.* State, 36 Me. 198.

In Massachusetts an allegation of an intent "unlawfully to sell the same within the commonwealth" is sufficient, although not alleging an intent to sell in the place where the liquor was kept. Com. *v.* Gillon, 148 Mass. 15, 18 N. E. 584.

In New Hampshire and Rhode Island, it is not necessary to aver that the liquor was intended to be sold within the state. State *v.* Perkins, 63 N. H. 368; State *v.* Guinness, 16 R. I. 401, 16 Atl. 910.

43. Com. *v.* Byrnes, 126 Mass. 248.

44. Com. *v.* Hersey, (Mass. 1887) 9 N. E. 837.

45. Cost *v.* State, 96 Ala. 60, 11 So. 435; State *v.* Cottle, 15 Me. 473; Com. *v.* Hoye, 11 Gray (Mass.) 462; Com. *v.* Leonard, 8 Metc. (Mass.) 529; Com. *v.* Kimball, 7 Metc. (Mass.) 304; Goodhue *v.* Com., 5 Metc. (Mass.) 553; People *v.* Paquin, 74 Mich. 34, 41 N. W. 852; State *v.* Woodward, 25 Vt. 616.

Sufficient allegations see Roberts *v.* State, 26 Fla. 360, 7 So. 861; People *v.* Scott, 90 Mich. 376, 51 N. W. 520; People *v.* Quinn, 74 Mich. 632, 42 N. W. 604; Luton *v.* Newaygo County Cir. Judge, 69 Mich. 610, 37 N. W. 701.

Insufficient allegations see *In re* Clisham, 105 Cal. 674, 39 Pac. 37; Robinson *v.* State, (Tex. Cr. App. 1903) 75 S. W. 526.

In Alabama it has been held that to constitute an occupation or vocation within the meaning of the liquor statutes it must be pursued during some length of time. While a protracted length of time is not necessary, a single act is not enough to amount to a violation of the law. Hence an indictment which alleges merely that defendant "did distil" liquors without a license is insufficient, under a statute punishing the prosecuting or carrying on of the business of distilling without a license. Johnson *v.* State, 44 Ala. 414.

46. Dansey *v.* State, 23 Fla. 316, 2 So. 692; Com. *v.* Wood, 4 Gray (Mass.) 11; Com. *v.* Edwards, 4 Gray (Mass.) 1; Com. *v.* Hart, 11 Cush. (Mass.) 130; Com. *v.* Odlin, 23 Pick. (Mass.) 275; Com. *v.* Pray, 13 Pick. (Mass.) 359; People *v.* Breidenstein, 65 Mich. 65, 31 N. W. 623. But *compare* Com. *v.* Thurlow, 24 Pick. (Mass.) 374;

the time of the commission of the offense charged,[47] and the place,[48] and should describe the kind of liquors dealt in by defendant, so far as to show that they were within the prohibition of the statute.[49] Two persons may be jointly indicted under these statutes, and the regular course of pleading is to make the averment specific as to each, and negative the license or authority of each.[50]

(v) *Acts and Omissions in Conduct of Business.* Where a prosecution is founded on a statute regulating the manner of conducting the business of a liquor dealer, or prescribing or forbidding particular acts in the management of such business, particular care must be taken in the indictment to insert clear and specific allegations bringing both defendant and the acts or omissions complained of within the terms of the statute.[51]

(vi) *Keeping Open at Prohibited Times.* An indictment for keeping open a saloon or bar on Sunday, a public holiday, or any other time when the law requires such places to be closed, must distinctly show that defendant was the owner or proprietor of the place in question, or at least responsible for its being open.[52] It will generally be sufficient if it clearly shows that defendant kept a place for the sale of liquor, that the day charged was a prohibited day, and that he kept it open, or failed to keep it closed on such day, and that the purpose was to sell liquor, or afford an opportunity for its purchase.[53]

People *v.* Heffron, 53 Mich. 527, 19 N. W. 170.

Duplicity.— If, after the averment that defendant was a common seller, it is added that he "did then and there, as aforesaid, sell and cause to be sold to divers persons, to the jurors unknown, divers quantities of strong liquors," the indictment charges but one offense, and is not bad for duplicity. State *v.* Churchill, 25 Me. 306; State *v.* Stinson, 17 Me. 154. And see State *v.* Nutt, 28 Vt. 598. And even if a particular sale of a definite quantity to a named person is set out in the same count, in addition to the charge of the general offense, this will not vitiate the indictment. Goodhue *v.* Com., 5 Metc. (Mass.) 553. A count charging defendant with being a common seller of intoxicating liquors may be included in the same indictment with counts charging distinct sales to particular persons. Com. *v.* Moorhouse, 1 Gray (Mass.) 470.

47. If the indictment avers that defendant, at a certain place, on a certain day, and at said place from said day to the day of finding the indictment, "was then and there a common seller of intoxicating liquors," it lays the time with sufficient certainty. Com. *v.* Kingman, 14 Gray (Mass.) 85; Com. *v.* Snow, 14 Gray (Mass.) 20; Com. *v.* Woods, 9 Gray (Mass.) 131; Com. *v.* Kendall, 12 Cush. (Mass.) 414; Com. *v.* Tower, 8 Metc. (Mass.) 527.

48. Harris *v.* State, 50 Ala. 127; Com. *v.* Jones, 7 Gray (Mass.) 415.

49. Allred *v.* State, 89 Ala. 112, 8 So. 56; Com. *v.* Wilcox, 1 Cush. (Mass.) 503; People *v.* Webster, 2 Dougl. (Mich.) 92.

50. Com. *v.* Colton, 11 Gray (Mass.) 1.

51. See Atkinson *v.* State, 33 Ind. App. 8, 70 N. E. 560.

Violation of screen law see Com. *v.* Brothers, 158 Mass. 200, 33 N. E. 386; Com. *v.* Keefe, 143 Mass. 467, 9 N. E. 840; Com. *v.* Gibbons, 134 Mass. 197; Com. *v.* Costello, 133 Mass. 192; People *v.* Kennedy, 105 Mich. 75, 62 N. W. 1020.

Admission of prohibited persons.— Under the statute prohibiting the keeping of a wine-room in connection with a saloon, into which females are permitted to enter from the outside, or from the saloon, and be supplied with liquor, an information which fails to allege that the females came from the outside, or from the saloon, charges no offense. Walker *v.* People, 5 Colo. App. 37, 37 Pac. 29. But under a law prohibiting liquor dealers from permitting minors "to loiter" in their saloons or places of business, an affidavit which states that defendant permitted such a person "to loiter and be" in and about a room where intoxicating liquors were sold as a beverage is sufficient. Armstrong *v.* State, 14 Ind. App. 566, 43 N. E. 142.

Disorderly house.— An indictment which charges defendant with keeping a disorderly liquor shop, and sets forth the particular disorderly acts of those allowed to drink at defendant's shop, is good at common law. State *v.* Hoard, 123 Ind. 34, 23 N. E. 972.

Registration of sales see Helfrick *v.* Com., 29 Gratt. (Va.) 844.

Adulteration of liquors see State *v.* Rogers, 39 Mo. 431; State *v.* Melton, 38 Mo. 368; State *v.* Hayes, 38 Mo. 367; State *v.* Crowley, 37 Mo. 369; Woodworth *v.* State, 4 Ohio St. 487.

52. State *v.* Gluck, 41 Minn. 553, 43 N. W. 483.

53. People *v.* Wheeler, 96 Mich. 1, 55 N. W. 371; People *v.* Hobson, 48 Mich. 27, 11 N. W. 771; State *v.* Sannerud, 38 Minn. 229, 36 N. W. 447; State *v.* Olson, 38 Minn. 150, 36 N. W. 446; State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

Prohibited hours.— A complaint in a criminal prosecution in a justice's court, charging defendant, a licensed saloon-keeper, with keep-

h. Keeping Place For Unlawful Sale — (1) *In General.* An indictment for "keeping a place" or "maintaining a tenement" for the unlawful keeping or sale of intoxicating liquors may properly describe the offense substantially in the language of the statute.[54] Thus the character of the place as a tippling-house, dram-shop, public drinking saloon, or the like, may be alleged in the words employed in the statute.[55] But the indictment must clearly show that the place was kept or maintained by defendant,[56] in the character of an owner or proprietor,[57] for the specific purpose of the illegal keeping or sale of liquors,[58] and that the liquors so kept or sold were of the character intended by the statute.[59] But it is not generally necessary to allege any specific instances of selling.[60] Care should be taken in charging this offense to avoid the error of duplicity; but an indictment is not bad because it contains two counts setting forth the same offense in the same manner, with slight verbal variations,[61] or because it alleges that

ing his place of business open after the hour of eleven o'clock in violation of law is sufficient, although it does not charge a sale of liquors after such hour. State *v.* Clemmensen, 92 Minn. 191, 99 N. W. 640.

It is not necessary to allege that the place was kept open "to the encouragement of idleness, gaming, drinking, and other misehavior" (Fant *v.* People, 45 Ill. 259); nor to specify whether defendant was a wholesale or retail dealer, if the law applies to either (People *v.* Talbot, 120 Mich. 486, 79 N. W. 688).

54. *Arkansas.*— State *v.* Adams, 16 Ark. 497.

Connecticut.— Rawson *v.* State, 19 Conn. 292; Barth *v.* State, 18 Conn. 432.

Indiana.— State *v.* Hoard, 123 Ind. 34, 23 N. E. 972.

Iowa.— State *v.* Price, 75 Iowa 243, 39 N. W. 291.

Maine.— State *v.* Hadlock, 43 Me. 282.

Massachusetts.— Com. *v.* Purdy, 147 Mass. 29, 16 N. E. 745; Com. *v.* Davenport, 2 Allen 299; Com. *v.* Kimball, 7 Gray 328.

Rhode Island.— State *v.* McGough, 14 R. I. 63.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 255.

55. *Maine.*— An indictment alleging that defendant at a certain time and place "unlawfully did keep a drinking house and tippling shop, contrary to the form of the statute" is sufficient. State *v.* Rollins, 77 Me. 380; State *v.* Collins, 48 Me. 217; State *v.* Casey, 45 Me. 435.

Massachusetts.— See Com. *v.* Hickey, 126 Mass. 250.

Rhode Island.— State *v.* Tracey, 12 R. I. 216, holding that an indictment for keeping "a certain grog shop and tippling shop" is not bad for uncertainty.

South Dakota.— Yankton *v.* Douglass, 8 S. D. 441, 66 N. W. 923.

Texas.— Bush *v.* Republic, 1 Tex. 455.

Vermont.— See State *v.* Stone, 54 Vt. 550.

Virginia.— Burner *v.* Com., 13 Gratt. 778.

Wisconsin.— See State *v.* Gumber, 37 Wis. 298.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 255.

Tippling-house.— In Kentucky under the statute as to tippling-houses an indictment charging that defendant "did then and there, in said house, keep a tippling house, without first having obtained a license then and there to keep a tavern" is held to be good and sufficient. Com. *v.* Riley, 14 Bush (Ky.) 44; Com. *v.* Turner, 4 B. Mon. (Ky.) 4; Morrison *v.* Com., 7 Dana (Ky.) 218. But a charge that he kept a tippling-house "by" then and there selling liquor at retail without a license, etc., is not good because it does not charge that it was done in a house kept by him for that purpose, which is necessary to make out the statutory offense. Woods *v.* Com., 1 B. Mon. (Ky.) 74; Our *v.* Com., 9 Dana (Ky.) 30. Similar decisions are also found in Indiana. See Shilling *v.* State, 5 Ind. 443; State *v.* Zimmerman, 2 Ind. 565.

56. Campbell *v.* State, 62 N. J. L. 402, 41 Atl. 717; Kern *v.* State, 7 Ohio St. 411; Miller *v.* State, 3 Ohio St. 475. And see Pettihone *v.* State, 19 Ala. 586; Com. *v.* Gallagher, 145 Mass. 104, 13 N. E. 359.

57. State *v.* Nickerson, 30 Kan. 545, 2 Pac. 654. *Compare* Com. *v.* Sampson, 113 Mass. 191.

58. Com. *v.* Kimball, 7 Gray (Mass.) 328. And see Hensley *v.* State, 6 Ark. 252, holding that under a statute prohibiting the keeping of a grocery "for" the retailing of ardent spirits without a license, an indictment charging that defendant kept a grocery "and did" retail spirits without a license is not good.

59. Topeka *v.* Raynor, 8 Kan. App. 279, 55 Pac. 509.

60. State *v.* Wickwire, 16 Ind. App. 348, 45 N. E. 195; State *v.* Dorr, 82 Me. 157, 19 Atl. 157; Anderson *v.* Van Buren Cir. Judge, 130 Mich. 697, 90 N. W. 692. But *compare* Hipes *v.* State, 18 Ind. App. 426, 48 N. E. 12; Braswell *v.* Com., 5 Bush (Ky.) 544; State *v.* Parkersburg Brewing Co., 53 W. Va. 591, 45 S. E. 924.

61. State *v.* Brady, 16 R. I. 51, 12 Atl. 238; State *v.* Doyle, 15 R. I. 527, 9 Atl. 900.

Illustrations.— An averment that defendant kept a tenement "used for the illegal sale and illegal keeping of intoxicating liquors" is not bad on the ground of duplicity. Com. *v.* Foss, 14 Gray (Mass.) 50. See Com. *v.* Stowell, 9 Metc. (Mass.)

defendant sold intoxicating liquor to a certain person at such place.[62] The indictment should also negative defendant's license to keep or sell liquors, but this may be done by using the word "unlawfully" or alleging that the place was used for the "illegal" sale or keeping of liquors.[63]

(II) *MAINTAINING LIQUOR NUISANCE.* An indictment for the maintenance of a liquor nuisance will generally be held sufficient if it describes the offense in the words of the statute.[64] It must show that the place complained of was a common nuisance,[65] that it was used for the illegal sale or keeping of liquor [66] by defendant in the character of an owner or proprietor, or as having control of the place, if that is a part of the statutory offense,[67] or as the lessor of the property knowing the tenant's purpose to use it as a nuisance,[68] and that liquors were there kept for the purpose, and with the intention of selling them contrary to law.[69] It must be averred either that defendant sold liquors at the place mentioned, or that he kept them there for the purpose of selling.[70] But if the "keeping" is sufficiently charged, no allegation of specific sales will be necessary.[71] Since maintaining a nuisance is a continuing offense, it may be alleged to have been kept and maintained on a day named "and on divers other days and times" prior to the indictment.[72] An information charging one with keeping a liquor nuisance should not allege that he kept a place where intoxicating liquors "are sold," but should state that such liquors "were then and there sold." [73] Where an indictment for keeping a liquor nuisance alleged that defendant used a building for the illegal keeping and sale of liquor, with time and place in the usual manner, but the alle-

569. And so an information for keeping a place where various kinds of liquors were sold, stored for sale, etc., in violation of law, charges only one offense — that is, the keeping of the place in violation of the statute. Anderson *v.* Van Buren Cir. Judge, 130 Mich. 697, 90 N. W. 692.

62. Segars *v.* State, 35 Tex. Cr. 45, 31 S. W. 370.

63. Com. *v.* Edds, 14 Gray (Mass.) 406; Anderson *v.* Van Buren Cir. Judge, 130 Mich. 697, 90 N. W. 692.

64. See Skinner *v.* State, 120 Ind. 127, 22 N. E. 115; State *v.* Welch, (Me. 1887) 7 Atl. 475; Com. *v.* Ferden, 141 Mass. 28, 6 N. E. 239; Com. *v.* Ryan, 136 Mass. 436; Com. *v.* Wright, 12 Allen (Mass.) 190; Com. *v.* Davenport, 2 Allen (Mass.) 299; Com. *v.* Quinn, 12 Gray (Mass.) 178; Com. *v.* Kelly, 12 Gray (Mass.) 175.

65. Com. *v.* Howe, 13 Gray (Mass.) 26. And see State *v.* Freeman, 27 Iowa 333.

Conclusion.— As this offense is statutory and does not depend upon the existence of a state of facts which would be sufficient to constitute a nuisance at common law, it is not necessary that the indictment should conclude with the common-law formula "to the common nuisance of all the citizens," etc., if the facts stated bring the case within the statute; but it should conclude "against the form of the statute," etc. Com. *v.* Howe, 13 Gray (Mass.) 26. And see State *v.* Rhodes, 2 Ind. 321.

Scienter.— As against the person who kept the nuisance, it is not necessary to allege that he knew the place he so kept to be a common nuisance. State *v.* Ryan, 81 Me. 107, 16 Atl. 496.

66. State *v.* McEnturff, 87 Iowa 691, 55 N. W. 2; Com. *v.* Hill, 4 Allen (Mass.) 589; State *v.* Marston, 64 N. H. 603, 15 Atl. 222. And see State *v.* Dodge, 78 Me. 439, 6 Atl. 875, holding that where the statute defines as nuisances places "used" for the illegal sale of liquor, it is not sufficient to charge the maintenance of a saloon "resorted to" for such illegal sale.

67. See State *v.* Schilling, 14 Iowa 455; State *v.* Nickerson, 30 Kan. 545, 2 Pac. 654.

68. State *v.* Pierce, (Me. 1888) 15 Atl. 68.

69. State *v.* Adams, 81 Iowa 593, 47 N. W. 770; State *v.* Price, 75 Iowa 243, 39 N. W. 291; Com. *v.* Hill, 4 Allen (Mass.) 589; Com. *v.* Kelly, 12 Gray (Mass.) 175; State *v.* Crabtree, 27 Mo. 232.

70. State *v.* Hass, 22 Iowa 193. And see State *v.* Freeman, 27 Iowa 333.

71. State *v.* Dorr, 82 Me. 157, 19 Atl. 157.

Duplicity.— If allegations of keeping or maintaining the place in question as a common nuisance are coupled with allegations of specific unlawful sales, this does not make the indictment charge more than one offense or lay it open to the objection of duplicity. Gitchell *v.* People, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147; Nicholson *v.* People, 29 Ill. App. 57; State *v.* Niers, 87 Iowa 723, 54 N. W. 1076; State *v.* Winebrenner, 67 Iowa 230, 25 N. W. 146; State *v.* Dean, 44 Iowa 648; State *v.* McLaughlin, 47 Kan. 143, 27 Pac. 840; Com. *v.* Galligan, 155 Mass. 54, 28 N. E. 1129.

72. State *v.* Welch, (Me. 1887) 7 Atl. 475; Com. *v.* Sheehan, 143 Mass. 468, 9 N. E. 839; Com. *v.* Dunn, 111 Mass. 426; Com. *v.* Welsh, 1 Allen (Mass.) 1; Com. *v.* Hoye, 9 Gray (Mass.) 292; Com. *v.* Keefe, 9 Gray (Mass.) 290; State *v.* Prater, 59 S. C. 271, 37 S. E. 933.

73. Johnson *v.* People, 44 Ill. App. 642.

gation that he thereby rendered himself guilty of keeping a nuisance was made with a blank space for the time left unfilled, it was held that the indictment was not deficient on this ground.[74] A second clause of a count of an indictment for maintaining a liquor nuisance need not repeat the allegation of time.[75]

(III) *Description of House or Place.* In regard to the allegation of place, there is a distinction between criminal proceedings against the person guilty of maintaining the nuisance and proceedings, quasi-criminal in their nature, for the abatement of the nuisance itself. In the latter case the place must be described with great exactness and particularity.[76] But in an indictment against the owner or keeper of the alleged nuisance, it is not essential that its location should be designated with any special degree of precision or minuteness.[77] The description necessary sometimes depends upon the provisions of the statute or ordinance upon which the prosecution is based.[78]

i. Allegation of Sale or Gift — (I) *In General.* An unlawful sale of intoxicating liquor should be alleged in an indictment by the technical word "sell," although other terms may be held sufficiently definite if they clearly import the same thing.[79] An indictment intended only to allege a sale, but charging con-

74. State *v.* Buck, 78 Me. 193, 3 Atl. 573.

75. State *v.* Brady, 16 R. I. 51, 12 Atl. 238.

76. Zumhoff *v.* State, 4 Greene (Iowa) 526. And see State *v.* Waltz, 74 Iowa 610, 38 N. W. 494 [*distinguished* in State *v.* Manatt, 84 Iowa 621, 51 N. W. 73].

77. See the following cases:

Connecticut.— Barth *v.* State, 18 Conn. 432.

Illinois.— Daxanheklar *v.* People, 93 Ill. App. 553.

Indiana.— Fletcher *v.* State, 54 Ind. 462; Howard *v.* State, 6 Ind. 444.

Iowa.— State *v.* Becker, 20 Iowa 438; State *v.* Schilling, 14 Iowa 455; State *v.* Kreig, 13 Iowa 462.

Kansas.— State *v.* Knoby, 6 Kan. App. 334, 51 Pac. 53.

Maine.— State *v.* Wiseman, 97 Me. 90, 53 Atl. 875; State *v.* Cox, 82 Me. 417, 19 Atl. 857; State *v.* Hall, 79 Me. 501, 11 Atl. 181.

Massachusetts.— Com. *v.* Quinlan, 153 Mass. 483, 27 N. E. 8; Com. *v.* Lee, 148 Mass. 8, 18 N. E. 586; Com. *v.* Hersey, 144 Mass. 297, 11 N. E. 116; Com. *v.* Welsh, 1 Allen 1; Com. *v.* Hill, 14 Gray 24; Com. *v.* Logan, 12 Gray 136; Com. *v.* Skelley, 10 Gray 464.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 257.

78. In Ohio, where the place of sale must be described as a place of public resort, it is held sufficient to aver that it was a tavern, eating-house, bazaar, restaurant, grocery, or coffee-house, as all these terms import a place to which the public resort; but it is not sufficiently described by calling it a "room," as this word bears no such import. Aultfather *v.* State, 4 Ohio St. 467.

In Texas an information charging that in a certain local option precinct defendant kept "a blind tiger" is sufficient as charging the keeping of a place for the unlawful sale of intoxicating liquors. Segars *v.* State, 35 Tex. Cr. 45, 31 S. W. 370. But where the essence of the offense is the maintenance of a saloon within the residence portion of a city, contrary to a municipal ordinance, the allegations must plainly show that the place came within the prohibitions of that portion of the ordinance defining and describing a "residence portion." Tejszeaski *v.* Dallas, (Cr. App. 1898) 45 S. W. 569.

79. *Indiana.*— State *v.* Leppert, 7 Ind. 355.

Kansas.— State *v.* Muntz, 3 Kan. 383.

Massachusetts.— Com. *v.* Roberts, 1 Cush. 505.

Missouri.— State *v.* Williamson, 19 Mo. 384.

Texas.— State *v.* Smith, 35 Tex. 132.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 258.

"Retail" imports a sale in small quantity, and hence some cases hold that an allegation that defendant "did retail" liquor to a person named sufficiently charges that he sold the liquor. Wrocklege *v.* State, 1 Iowa 167; Com. *v.* Kimball, 7 Metc. (Mass.) 304; State *v.* Chapman, 25 W. Va. 408.

"Sell and retail" is a proper form of words to use in charging the offense of retailing liquor without a license. State *v.* Mooty, 3 Hill (S. C.) 187. And see State *v.* Young, 5 Coldw. (Tenn.) 51.

"Give," as used in a statute prohibiting the giving of liquor to a minor, is synonymous with "furnish" and "supply," and includes a sale to the minor. Com. *v.* Davis, 12 Bush (Ky.) 240.

Purpose of sale.— An indictment for selling or bartering liquor need not aver in terms that it was done "for purposes of gain." Schlicht *v.* State, 56 Ind. 173. And so, under a statute providing that no unlicensed person shall "barter, sell, exchange, or otherwise dispose of, for his gain or benefit, any spirituous liquors," it is not necessary for the indictment to allege that the sale charged was made by defendant "for his gain or benefit." Anderson *v.* People, 63 Ill. 53. And see Arrington *v.* Com., 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242.

The omission of the auxiliary verb "did" which should have been joined with the words

junctively that defendant "did sell and give away," or "did sell, barter, and give away" intoxicating liquors, will generally be sustained as against objections on the ground of indefiniteness or duplicity, the unnecessary additional words being rejected as surplusage.[80] And conversely, although the statute uses additional or cumulative terms, it does not follow that the indictment must employ them all.[81] It is not proper to charge, in the disjunctive, that defendant "sold or gave away," or "sold or otherwise disposed of" the liquor in question, for this renders the indictment objectionable on the ground of uncertainty.[82] If a sale is properly alleged it is not necessary to add an averment of the delivery of the liquors.[83] If the sale in question was not made by defendant in person, but by his servant or agent, it is not considered necessary to name such servant or agent;[84] but if defendant is charged as the agent or servant of another, the character in which he acted and his relation to his employer should be pleaded.[85]

(II) *Evasions or Devices to Conceal a Sale.* Where the illegal transaction amounted in law to a sale of liquor, it is generally sufficient for the indictment simply to charge a sale, without setting forth the particular manner in which it was accomplished, or the devices, subterfuges, or evasions which may have been resorted to for the purpose of making it; and under such an allegation all the facts necessary to constitute a sale may be proved.[86] Under some statutes it must be specifically alleged that the transaction was a pretext to evade the law.[87]

"sell and dispose of" is not fatal upon a motion in arrest. State *v.* Whitney, 15 Vt. 298.

80. *Indiana.*— Eagan *v.* State, 53 Ind. 162; Leary *v.* State, 39 Ind. 360; Steel *v.* State, 26 Ind. 92; Hatfield *v.* State, 9 Ind. App. 296, 36 N. E. 664.

Iowa.— State *v.* Finan, 10 Iowa 19.

Kansas.— State *v.* Ratner, 44 Kan. 429, 24 Pac. 953. And see State *v.* Tulip, 9 Kan. App. 454, 60 Pac. 659.

Louisiana.— State *v.* Fant, 2 La. Ann. 837.

Missouri.— State *v.* Pittman, 76 Mo. 56. And see State *v.* Schleuter, 110 Mo. App. 7, 83 S. W. 1012.

Nebraska.— State *v.* Ball, 27 Nebr. 601, 43 N. W. 398. But *compare* Smith *v.* State, 32 Nebr. 105, 48 N. W. 823; State *v.* Pischel, 16 Nebr. 490, 608, 20 N. W. 848, 21 N. W. 468.

North Dakota.— State *v.* Kerr, 3 N. D. 523, 58 N. W. 27.

South Dakota.— State *v.* Bradley, 15 S. D. 148, 87 N. W. 590.

Texas.— Jordan *v.* State, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110. But *compare* Flock *v.* State, (Tex. App. 1892) 18 S. W. 414.

Vermont.— State *v.* Brown, 36 Vt. 560; State *v.* Woodward, 25 Vt. 616.

Wisconsin.— Boldt *v.* State, 72 Wis. 7, 38 N. W. 177, 35 N. W. 935.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 258, 259.

81. Needham *v.* State, 19 Tex. 332.

82. Raisler *v.* State, 55 Ala. 64; State *v.* Fairgrieve, 29 Mo. App. 641; State *v.* Colwell, 3 R. I. 284.

83. Bennett *v.* State, (Tex. Cr. App. 1899) 50 S. W. 947.

In Massachusetts it is not necessary that an indictment for an unlawful sale of liquor in violation of St. (1885) c. 215, § 17, should set forth in detail the acts and circumstances constituting the sale, in order to authorize the admission of a delivery without payment as evidence of a sale under section 34 of the same statute. Com. *v.* Rowe, 14 Gray 47.

84. State *v.* Brown, 31 Me. 520; State *v.* Stewart, 31 Me. 515.

In Arkansas it seems that the name of the servant or agent should be given, if it is intended to charge the act as a sale by the master or principal. But if the latter is indicted for being "interested in" an unlawful sale, it is not necessary to name the subordinate through whom the sale was made. O'Bryan *v.* State, 48 Ark. 42, 2 S. W. 339.

85. State *v.* Caldwell, (Miss. 1895) 17 So. 372; Behrens *v.* State, 42 Tex. Cr. 629, 62 S. W. 568. And see State *v.* Higgins, 53 Vt. 191.

86. *Dakota.*— People *v.* Sweetser, 1 Dak. 308, 46 N. W. 452.

Florida.— Caldwell *v.* State, 43 Fla. 545, 30 So. 814.

Iowa.— Devine *v.* State, 4 Iowa 443.

Massachusetts.— Com. *v.* Thayer, 8 Metc. 525.

Virginia.— Arrington *v.* Com., 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 258, 259.

87. See Wendt *v.* State, 32 Nebr. 182, 49 N. W. 351; Stallworth *v.* State, 16 Tex. App. 345. But *compare* McMillan *v.* State, 18 Tex. App. 375.

In Alabama it has been held that an indictment under the act of Feb. 19, 1883, for an evasion of the prohibitory laws, must allege: (1) A place where liquor is furnished, or some device used to furnish liquor, in violation or evasion of law; (2) a place or de-

6. Evidence — Proof and Variance[88] — a. Burden of Proof — (I) *In General.* In prosecutions for violations of the liquor laws the burden is upon the government to establish by evidence the existence of each of the essential constituents of the offense charged,[89] except where statutes make a given act or state of facts presumptive evidence of the intent of the accused or of his guilt.[90] Where the prosecution is for a violation of statutes or ordinances regulating the conduct of the business of liquor selling, by persons authorized to engage in it, the state must assume the burden of proving facts sufficient to show such a violation.[91] Where the prosecution is under a local option law, it is generally held that the state must assume the burden of showing the law to have been in force at the time and place of the alleged offense.[92]

(II) *Matters of Defense.* Where a sale of intoxicating liquor has been shown as charged, if defendant claims that the sale was not unlawful, because coming within the terms of an exception or proviso in the statute, or because made for specially permitted purposes, or under other circumstances which would relieve him from criminal responsibility, the burden is on him to establish this defense.[93] This rule applies for instance where he claims that the particular liquor sold was such as he might lawfully sell, because not prohibited by the statute or excepted from its terms,[94] or where he claims to have made the sale in the character of a town agent[95] or for a purpose which is permitted, or not forbidden, by

vice so constructed as to conceal the person who furnishes the liquor; and (3) a sale of liquor in violation or evasion of law, by a person at the time concealed. Boggus *v.* State, 78 Ala. 26.

88. See, generally, Criminal Law, 12 Cyc. 379 *et seq.*; Indictments and Informations.

89. Com. *v.* Locke, 114 Mass. 288; Com. *v.* Dowdican, 114 Mass. 257, holding that in a prosecution for keeping a tenement used for the illegal sale of liquors, the government has the burden to show, by evidence confined to the time covered by the indictment, that defendant kept the place, and that it was kept for the purpose of illegally selling liquor during that time, and the presumption is that it was kept for a legal purpose. And see Com. *v.* Owens, 114 Mass. 252 (holding that it is not necessary in a prosecution for keeping a tenement used for the illegal sale of liquors to prove that defendant kept such tenement during the whole of the alleged time, or that the sole business carried on therein was the illegal sale of liquor, or that the premises were in other respects a nuisance or disorderly, or that the accused had no authority to sell); State *v.* Wade, 63 Vt. 80, 22 Atl. 12. *Compare* Com. *v.* Certain Intoxicating Liquors, 116 Mass. 24.

90. Peterson *v.* State, 64 Nebr. 875, 90 N. W. 964.

91. Screen law.— Com. *v.* Brothers, 158 Mass. 200, 33 N. E. 386; Com. *v.* Keefe, 140 Mass. 301, 4 N. E. 576.

Arrangement or fitting of premises.— State *v.* Barge, 82 Minn. 256, 84 N. W. 911; Benson *v.* State, 39 Tex. Cr. 56, 44 S. W. 167, 1091.

Adulteration of liquors.— Cheadle *v.* State, 4 Ohio St. 477.

Bell-punch law.— Gaiocchio *v.* State, 9 Tex. App. 387.

92. Carnes *v.* State, 23 Tex. App. 449, 5 S. W. 133; Donaldson *v.* State, 15 Tex. App. 25. And see Jordan *v.* State, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110. See also *infra*, IX, B, 6, b, (III), (G).

93. Gunnarssohn *v.* Sterling, 92 Ill. 569; Shear *v.* Green, 73 Iowa 688, 36 N. W. 642; State *v.* Cloughly, 73 Iowa 626, 35 N. W. 652; State *v.* Curley, 33 Iowa 359; State *v.* Banghman, 20 Iowa 497; State *v.* Becker, 20 Iowa 438; State *v.* Guisenhause, 20 Iowa 227; State *v.* O'Connor, 65 Mo. App. 324; Moliter *v.* State, 10 Ohio Dec. (Reprint) 324, 20 Cinc. L. Bul. 323.

Oath against adulteration.— On an indictment for selling liquor without filing the oath and bond against adulteration, as required by the statute, where the evidence shows a sale, the burden is on defendant to show that he had complied with the statute. State *v.* Finn, 38 Mo. App. 504. And see Cheadle *v.* State, 4 Ohio St. 477.

94. Tinker *v.* State, 96 Ala. 115, 11 So. 383; Com. *v.* Leo, 110 Mass. 414; Com. *v.* Dean, 110 Mass. 357; Com. *v.* Murphy, 10 Gray (Mass.) 1. And see Prather *v.* State, 12 Tex. App. 401. *Compare* Com. *v.* Livermore, 2 Allen (Mass.) 292.

Domestic wines.— Where the statute makes an exception in favor of wines or cider made from fruits grown within the state, defendant must assume the burden of showing that the liquor which he sold answered that description. State *v.* Harris, 64 Iowa 287, 20 N. W. 439; State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083.

Imported liquors.— Where defendant claims the right to sell the liquors in question, as being the importer or the agent of the importer, the burden is on him to prove himself to be such. State *v.* Robinson, 49 Me. 285; Com. *v.* Zelt, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602. *Compare* State *v.* Mosier, 25 Conn. 40.

95. State *v.* Shaw, 35 N. H. 217; State *v.* McGlynn, 34 N. H. 422.

the statute,[96] or to persons to whom he might lawfully sell at the particular time, although sales to others would have been illegal.[97] In a prosecution under a statute which makes it an offense to keep without a license a "place in which it is reputed that intoxicating liquors are sold," the burden is on defendant to show that such reputation is not well founded.[98]

(III) *LICENSE.* In cases where a license to sell is relied on as a defense to the prosecution, the government is not bound to produce any evidence in support of the negative allegation that the sale was made without license, but on the contrary defendant must assume the burden of proving that he was duly licensed.[99] And if defendant was the agent, servant, or barkeeper of a dealer, he must pro-

96. Moral *v.* State, 89 Ind. 275; Leppert *v.* State, 7 Ind. 300; Howard *v.* State, 5 Ind. 516; State *v.* Emery, 98 N. C. 768, 3 S. E. 810; Miles *v.* State, 5 W. Va. 524.

97. Lehman *v.* District of Columbia, 19 App. Cas. (D. C.) 217; Com. *v.* Towle, 138 Mass. 490, both holding that where an innkeeper is charged with selling liquor on Sunday, he must assume the burden of proving that the purchasers were *bona fide* guests of his inn or hotel.

98. State *v.* Morgan, 40 Conn. 44.

99. *Arkansas.*— Flower *v.* State, 39 Ark. 209; Williams *v.* State, 35 Ark. 430.

Colorado.— Liggett *v.* People, 26 Colo. 364, 58 Pac. 144.

Georgia.— Mitchell *v.* State, 97 Ga. 213, 22 S. E. 386; Sharp *v.* State, 17 Ga. 290.

Illinois.— Noecker *v.* People, 91 Ill. 468.

Indiana.— Taylor *v.* State, 49 Ind. 555; Shearer *v.* State, 7 Blackf. 99.

Kansas.— State *v.* Crow, 53 Kan. 662, 37 Pac. 170; State *v.* Goff, 10 Kan. App. 286, 61 Pac. 680; State *v.* Harlan, (App. 1899) 58 Pac. 274. Earlier decisions in this state were inconsistent with the rule which now appears to be in force. See State *v.* Nye, 32 Kan. 201, 204, 4 Pac. 134, 136; State *v.* Kuhuke, 26 Kan. 405.

Kentucky.— Haskill *v.* Com., 3 B. Mon. 342; Orme *v.* Com., 55 S. W. 195, 21 Ky. L. Rep. 1412.

Maine.— State *v.* Woodward, 34 Me. 293; State *v.* Crowell, 25 Me. 171.

Massachusetts.— Com. *v.* Regan, 182 Mass. 22, 64 N. E. 407; Com. *v.* Rafferty, 133 Mass. 574; Com. *v.* Curran, 119 Mass. 206; Com. *v.* Belou, 115 Mass. 139; Com. *v.* Shea, 115 Mass. 102; Com. *v.* Carpenter, 100 Mass. 204; Com. *v.* Ryan, 9 Gray 137; Com. *v.* Lahy, 8 Gray 459; Com. *v.* Tuttle, 12 Cush. 502; Com. *v.* Kelly, 10 Cush. 69. *Compare* Com. *v.* Locke, 114 Mass. 288; Com. *v.* Babcock, 110 Mass. 107.

Michigan.— Smith *v.* Adrian, 1 Mich. 495.

Minnesota.— State *v.* Ahern, 54 Minn. 195, 55 N. W. 959; State *v.* Bach, 36 Minn. 234, 30 N. W. 764; State *v.* Schmail, 25 Minn. 370.

Mississippi.—Fairly *v.* State, 63 Miss. 333; Pond *v.* State, 47 Miss. 39; Thomas *v.* State, 37 Miss. 353; Easterling *v.* State, 35 Miss. 210.

Missouri.— State *v.* Edwards, 60 Mo. 490; State *v.* Lipscomb, 52 Mo. 32; Schmidt *v.* State, 14 Mo. 137; State *v.* Stephens, 70 Mo. App. 554; State *v.* Geise, 39 Mo. App. 189; State *v.* Wilson, 39 Mo. App. 114; State *v.* McNeary, 14 Mo. App. 410.

Nebraska.— Hornberger *v.* State, 47 Nebr. 40, 66 N. W. 23.

New Hampshire.— State *v.* Shaw, 35 N. H. 217; State *v.* McGlynn, 34 N. H. 422; State *v.* Foster, 23 N. H. 348, 55 Am. Dec. 191; State *v.* Simons, 17 N. H. 83.

New Jersey.— Plainfield *v.* Watson, 57 N. J. L. 525, 31 Atl. 1040; Jackson *v.* Camden, 48 N. J. L. 89, 2 Atl. 668; Fredericks *v.* Passaic, 42 N. J. L. 87.

New York.— Jefferson *v.* People, 101 N. Y. 19, 3 N. E. 797; People *v.* Maxwell, 83 Hun 157, 31 N. Y. Suppl. 564; Smith *v.* Joyce, 12 Barb. 21; Potter *v.* Deyo, 19 Wend. 361.

North Carolina.— State *v.* Sorrell, 98 N. C. 738, 4 S. E. 630; State *v.* Emery, 98 N. C. 668, 3 S. E. 636; State *v.* Morrison, 14 N. C. 299. *Compare* State *v.* Evans, 50 N. C. 250.

Oregon.— State *v.* Cutting, 3 Oreg. 260.

Pennsylvania.— Com. *v.* Wenzel, 24 Pa. Super. Ct. 467; Com. *v.* Dilbo, 29 Leg. Int. 150.

Rhode Island.— State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838; State *v.* Higgins, 13 R. I. 330, 43 Am. Rep. 26 note.

South Carolina.— State *v.* Geuing, 1 McCord 573.

Texas.— Lucio *v.* State, 35 Tex. Cr. 320, 33 S. W. 358.

Vermont.— State *v.* Nulty, 57 Vt. 543.

Washington.— State *v.* Shelton, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064.

United States.— U. S. *v.* Nelson, 29 Fed. 202; U. S. *v.* Devlin, 25 Fed. Cas. No. 14,955.

Canada.— Matter of Barrett, 28 U. C. Q. B. 559.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 278.

But see Hepler *v.* State, 58 Wis. 46, 16 N. W. 42; Mehan *v.* State, 7 Wis. 670, both holding that the state must produce some presumptive evidence that defendant had no license, before he can be called on to prove the contrary.

Maintaining liquor nuisance.— In Massachusetts it has been held that the rule requiring defendant to produce or prove his license, if he has one, does not apply to an indictment for a nuisance by keeping a building used for the unlawful sale and keeping of liquors. Com. *v.* Leo, 110 Mass. 414; Com. *v.* Lahy, 8 Gray 459. But *compare* Com. *v.* Shea, 115 Mass. 102.

duce or prove his principal's license, if he seeks to justify under it.[1] But if the holding of a license, instead of being a defense to the action, is a constituent element of the offense, the particular statute applying only to licensed dealers, then the averment in regard to license is affirmative rather than negative, and it devolves upon the prosecution to show that defendant was licensed.[2] And it has been held that where defendant is charged with aiding and abetting another in the unlawful sale of liquor, the burden is on the state to prove that the latter had no license.[3]

(IV) *Authority to Sell For Special Purpose.* Where defendant claims that he had authority to sell for certain special purposes, as for medicinal, mechanical, or sacramental use, the burden is on him to prove such authority, and to show that the sale shown by the prosecution was made for such a purpose.[4]

(V) *Special Authority For Particular Sale.* Where defendant seeks to justify a sale of liquor to a minor, under the written order or consent of the parent or guardian of the minor, as he may do in some states, the burden is upon him to prove his defense; it need not be negatived by the evidence for the prosecution.[5] And the rule is the same where defendant's justification is that he sold on the requisition of a physician,[6] or on the certificate of the purchaser stating the purpose for which he wanted the liquor.[7]

b. Admissibility and Weight of Evidence — (I) *In General* — (A) *Admissions and Declarations of Accused.* The prosecution may put in evidence a previous voluntary statement or declaration of defendant, amounting to an admission that he was carrying on the business of a liquor dealer,[8] or that he intended to engage in or continue in that business,[9] or an admission of his guilt, or an offer to plead guilty, or a desire to compromise or settle the complaint,[10] or

1. Rana *v.* State, 51 Ark. 481, 11 S. W. 692; State *v.* McNeary, 14 Mo. App. 410.

2. State *v.* Brady, 41 Conn. 588; Bloomington *v.* Strehle, 47 Ill. 72; Jordan *v.* Nicolin, 84 Minn. 370, 87 N. W. 916; State *v.* Whitter, 18 W. Va. 306.

3. Berning *v.* State, 51 Ark. 550, 11 S. W. 882.

4. *Florida.*— Baeumel *v.* State, 26 Fla. 71, 7 So. 371.

Georgia.— Hines *v.* State, 93 Ga. 187, 18 S. E. 558.

Illinois.— Harbaugh *v.* Monmouth, 74 Ill. 367.

Iowa.— State *v.* Kriechbaum, 81 Iowa 633, 47 N. W. 872; State *v.* Guisenhause, 20 Iowa 227.

West Virginia.— Miles *v.* State, 5 W. Va. 524.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 279.

5. *Alabama.*— Freiberg *v.* State, 94 Ala. 91, 10 So. 703; Adler *v.* State, 55 Ala. 16; Farrall *v.* State, 32 Ala. 557.

Arkansas.—Pounders *v.* State, 37 Ark. 399; Edgar *v.* State, 37 Ark. 219.

Georgia.— Graham *v.* State, 121 Ga. 590, 49 S. E. 678; Dixon *v.* State, 89 Ga. 785, 15 S. E. 684; Ridling *v.* State, 56 Ga. 601.

Illinois.— Monroe *v.* People, 113 Ill. 670.

Texas.— Hannaman *v.* State, (Cr. App. 1895) 33 S. W. 538; Kuhn *v.* State, 34 Tex. Cr. 85, 29 S. W. 272; Jones *v.* State, 32 Tex. Cr. 110, 22 S. W. 149; Reynolds *v.* State, 32 Tex. Cr. 36, 22 S. W. 18. And see Patton *v.* State, 42 Tex. Cr. 496, 61 S. W. 309; Slaughter *v.* State, (Cr. App. 1893) 21 S. W. 247; Payne *v.* State, (App. 1892) 19 S. W. 677.

West Virginia.— State *v.* Cain, 9 W. Va. 559.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 280.

Compare McGuire *v.* State, 13 Sm. & M. (Miss.) 257.

6. Atkins *v.* State, 60 Ala. 45.

7. Com. *v.* Perry, 148 Mass. 160, 19 N. E. 212.

8. See State *v.* Hogan, 67 Conn. 581, 35 Atl. 508; Rush *v.* Com., 47 S. W. 586, 20 Ky. L. Rep. 775.

A business card containing defendant's name and address and the words "dealer in imported wines and liquors," and admitted to have been printed for defendant, is admissible in behalf of the prosecution. Com. *v.* Twombly, 119 Mass. 104.

Promise not to sell.— Evidence that some months before the offense charged defendant promised not to sell any more liquor on certain conditions is not admissible to prove that he kept liquors for sale at the time charged. Com. *v.* Purdy, 147 Mass. 29, 16 N. E. 745.

9. Com. *v.* Davenport, 2 Allen (Mass.) 299; Com. *v.* Kimball, 24 Pick. (Mass.) 366; Com. *v.* Dixon, 1 Wilcox (Pa.) 211; State *v.* McGill, 65 Vt. 604, 27 Atl. 429. *Compare* People *v.* Werner, 174 N. Y. 132, 66 N. E. 667.

10. Com. *v.* Kyne, 162 Mass. 146, 38 N. E. 362; Com. *v.* Slosson, 152 Mass. 489, 25 N. E. 835; Com. *v.* Callahan, 108 Mass. 421; Neuman *v.* State, 76 Wis. 112, 45 N. W. 30.

a declaration showing his ownership or possession of the place in question.[11] But exculpatory statements made by the accused, whether at the time of the alleged offense or afterward, are not generally admissible in his favor.[12]

(B) *Testimony of Spies and Informers.* In prosecutions under the liquor laws, the testimony of "spotters," detectives, or paid informers is admissible.[13]

(C) *Documentary Evidence.* The essential facts in a prosecution under the liquor laws may be proved by documentary evidence, when the papers offered are in the nature of public records,[14] or records which the law requires defendant himself to keep,[15] or writings made by the accused,[16] or distinctly connected with his business.[17] And where the law requires a written application or request for liquor as a justification for a sale of it, such applications are proper to be received in evidence.[18]

(D) *Circumstantial Evidence* — (1) IN GENERAL. A conviction for a violation of the liquor laws may be supported by circumstantial evidence alone, if it is sufficient to satisfy the jury beyond a reasonable doubt.[19] And even where the defense is supported by the positive testimony of witnesses, there may be circumstantial evidence strong enough to overcome such testimony and to warrant a conviction.[20]

(2) SHIPMENT OR DELIVERY OF LIQUORS TO DEFENDANT. To convict a defendant of carrying on the business of a liquor dealer, of having liquor in his possession with intent to sell, of maintaining a liquor nuisance, or as showing the means

11. State *v.* Wambold, 74 Iowa 605, 38 N. W. 429; Com. *v.* Dearborn, 109 Mass. 368; Com. *v.* Collins, 16 Gray (Mass.) 29; Com. *v.* Hildreth, 11 Gray (Mass.) 327.

12. Sills *v.* State, 76 Ala. 92; State *v.* Miller, 53 Iowa 84, 4 N. W. 838; State *v.* Greenleaf, 31 Me. 517.

13. State *v.* Rollins, 77 Me. 380.

14. State *v.* Sannerud, 38 Minn. 229, 36 N. W. 447; State *v.* Olson, 38 Minn. 150, 36 N. W. 446; State *v.* Peterson, 38 Minn. 143, 36 N. W. 443, in which cases it is held that the records of a municipal officer, showing to whom licenses have been issued, the amount paid, and the location of the places licensed, are competent evidence of all the matters shown thereby. *Compare* State *v.* Beaumier, 87 Me. 214, 32 Atl. 881, holding that the records of the assessors of taxes, showing that the building occupied by the respondent was assessed to another person as owner, are not admissible on a prosecution for maintaining a liquor nuisance in the building.

Local option records.— As to the admissibility of official papers connected with a local option election, such as the proceedings of the board of canvassers, their returns, and the proclamation of the result see Crouse *v.* State, 57 Md. 327; State *v.* Emery, 98 N. C. 768, 3 S. E. 810.

A liquor dealer's bond is admissible in evidence, and it is no objection that the original bond is offered instead of a certified copy. Componovo *v.* State, (Tex. Civ. App. 1897) 39 S. W. 1114.

15. State *v.* Huff, 76 Iowa 200, 40 N. W. 720; State *v.* Cummins, 76 Iowa 133, 40 N. W. 124; State *v.* Smith, 74 Iowa 580, 38 N. W. 492; State *v.* Mullenhoff, 74 Iowa 271, 37 N. W. 329; State *v.* Thompson, 74 Iowa 119, 37 N. W. 104; State *v.* Elliott, 45 Kan. 525, 26 Pac. 55; Com. *v.* Stevens, 155 Mass. 291, 29 N. E. 508; State *v.* Shelton, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064.

16. State *v.* Munger, 15 Vt. 290, holding that a bill of sale, including intoxicating liquors, made out by defendant and receipted by him in his own handwriting is competent evidence to prove a sale, and the purchaser need not be produced. And see Goad *v.* State, 73 Ark. 625, 83 S. W. 935.

17. State *v.* Kriechbaum, 81 Iowa 633, 47 N. W. 872, holding that the books of an express company, showing the shipment and delivery of liquors to the person to whom defendant is alleged to have sold, are material, as tending to show the sale.

Tags bearing names and words taken from cases of beer in defendant's wagon are competent evidence against him in a prosecution for having liquors in possession with intent to sell the same without a license, where the words thereon are material. Com. *v.* Patten, 151 Mass. 536, 25 N. E. 20.

18. State *v.* Gregory, 110 Iowa 624, 82 N. W. 335; State *v.* Thompson, 74 Iowa 119, 37 N. W. 104.

19. *Kansas.*— State *v.* Schoenthaler, 63 Kan. 148, 65 Pac. 235.

Massachusetts.—Com. *v.* Murphy, 153 Mass. 290, 26 N. E. 860; Com. *v.* Keenan, 148 Mass. 470, 20 N. E. 101; Com. *v.* Norton, 16 Gray 30; Com. *v.* Maloney, 16 Gray 20. And see Com. *v.* Campbell, 116 Mass. 32.

Missouri.— State *v.* McCabe, 94 Mo. App. 122, 67 S. W. 973; State *v.* Jonas, 73 Mo. App. 525.

New York.— Vallance *v.* Everts, 3 Barb. 553; People *v.* Hulbut, 4 Den. 133, 47 Am. Dec. 244.

Texas.— Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395.

20. McManigal *v.* Seaton, 23 Nebr. 549, 37 N. W. 271.

and opportunity to make an unlawful sale, it is permissible to prove the shipment and delivery of liquors to him by express or otherwise.[21]

(3) Liquor Found on Premises. On an indictment for keeping liquor for unlawful sale, maintaining a liquor nuisance, carrying on the business of liquor selling, or the like, the discovery of liquor on defendant's premises is proper and admissible evidence against him, especially where attempts to conceal the liquor are shown, or where the quantity discovered was so great as to be inconsistent with the theory that it was intended for his personal use.[22] And evidence may be admitted of the finding of liquors in other places than defendant's house or shop, or other than the place of the commission of the alleged offense, provided it is shown that defendant used such other places, or resorted thereto, or had access thereto, and provided there is some evidence to connect him with the liquors discovered.[23] It is necessary that the time of finding the liquors should

21. *Alabama.*— McIntosh *v.* State, 140 Ala. 137, 37 So. 223.

Arkansas.— Hanlon *v.* State, 51 Ark. 186, 10 S. W. 265. And see Goad *v.* State, 73 Ark. 625, 83 S. W. 935.

Connecticut.— State *v.* Mead, 46 Conn. 22.

Indiana.— Klepfer *v.* State, 121 Ind. 491, 23 N. E. 287.

Iowa.— State *v.* Hart, 84 Iowa 215, 50 N. W. 981; State *v.* Kriechbaum, 81 Iowa 633, 47 N. W. 872.

Massachusetts.—Com. *v.* Hughes, 165 Mass. 7, 42 N. E. 121; Com. *v.* Neylon, 159 Mass. 541, 34 N. E. 1078; Com. *v.* Jennings, 107 Mass. 488.

Texas.— McKinley *v.* State, (Cr. App. 1904) 82 S. W. 1042; Sinclair *v.* State, 45 Tex. Cr. 487, 77 S. W. 621.

Vermont.— State *v.* Kibling, 63 Vt. 636, 22 Atl. 613.

Evidence as to a custom of telephoning orders for whisky to a certain town, which orders were often given by one person for a number of others, and which were filled by the goods being sent to the parties as directed by the message, is properly excluded where defendant and those for whom he dealt are not shown to have had any knowledge of such custom. Sinclair *v.* State, 45 Tex. Cr. 487, 77 S. W. 621.

22. *Connecticut.*— State *v.* Cunningham, 25 Conn. 195.

Georgia.— Cole *v.* State, 120 Ga. 485, 48 S. E. 156; Smith *v.* State, 105 Ga. 724, 32 S. E. 127; Hussey *v.* State, 69 Ga. 54.

Iowa.— State *v.* Wright, 98 Iowa 702, 68 N. W. 440; State *v.* Baskins, 82 Iowa 761, 48 N. W. 809.

Kansas.— State *v.* Sheppard, 64 Kan. 451, 67 Pac. 870; State *v.* Pfefferle, 36 Kan. 90, 12 Pac. 406.

Maine.— State *v.* Beaumier, 87 Me. 214, 32 Atl. 881; State *v.* Burroughs, 72 Me. 479; State *v.* Stevens, 47 Me. 357.

Massachusetts.— Com. *v.* Foster, 182 Mass. 276, 65 N. E. 391; Com. *v.* Tate, 178 Mass. 121, 59 N. E. 646; Com. *v.* Lufkin, 167 Mass. 553, 46 N. E. 109; Com. *v.* Brothers, 158 Mass. 200, 33 N. E. 386; Com. *v.* Murphy, 153 Mass. 290, 26 N. E. 860; Com. *v.* Lynch, 151 Mass. 358, 23 N. E. 1137; Com. *v.* Keenan, 148 Mass. 470, 20 N. E. 101; Com. *v.* Tenney, 148 Mass. 452, 19 N. E. 556; Com. *v.* Finnerty, 148 Mass. 162, 19 N. E. 215; Com. *v.* Gillon, 148 Mass. 15, 18 N. E. 584; Com. *v.* Downey, 145 Mass. 377, 14 N. E. 165; Com. *v.* Welch, 142 Mass. 473, 8 N. E. 342; Com. *v.* McCullow, 140 Mass. 370, 5 N. E. 165; Com. *v.* Cronin, 117 Mass. 140; Com. *v.* Powers, 116 Mass. 337; Com. *v.* Shaw, 116 Mass. 8; Com. *v.* Welsh, 110 Mass. 359; Com. *v.* Doe, 108 Mass. 418; Com. *v.* Webster, 6 Allen 593; Com. *v.* Boyden, 14 Gray 101; Com. *v.* Lamere, 11 Gray 319; Com. *v.* Blood, 11 Gray 74; Com. *v.* Timothy, 8 Gray 480.

Michigan.— People *v.* Hicks, 79 Mich. 457, 44 N. W. 931.

Minnesota.— State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675; State *v.* Lewis, 86 Minn. 174, 90 N. W. 318.

Nebraska.— Peterson *v.* State, 63 Nebr. 251, 88 N. W. 549; Parsons *v.* State, 61 Nebr. 244, 85 N. W. 65.

South Carolina.— State *v.* Nickels, 65 S. C. 169, 43 S. E. 521; State *v.* Green, 61 S. C. 12, 39 S. E. 185.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 293, 295.

23. State *v.* Illsley, 81 Iowa 49, 46 N. W. 977; Com. *v.* Lyons, 160 Mass. 174, 35 N. E. 312; Com. *v.* Hurley, 160 Mass. 10, 35 N. E. 89; Com. *v.* Moore, 157 Mass. 324, 31 N. E. 1070; Com. *v.* Vahey, 151 Mass. 57, 23 N. E. 659; Com. *v.* Finnerty, 148 Mass. 162, 19 N. E. 215; Com. *v.* McCullow, 140 Mass. 370, 5 N. E. 165; Com. *v.* Pierce, 107 Mass. 487.

Evidence too remote.— On a trial for violating the local option law, evidence that whisky had been seen in other stores in the town where defendant had his store should not be admitted, unless defendant is in some way connected with the possession of such whisky. Efird *v.* State, 44 Tex. Cr. 447, 71 S. W. 957. So also one charged with the illegal keeping of intoxicating liquors in a dwelling-house and its appurtenances cannot be convicted on proof that he kept liquors in a stable not used in connection with the house, where the stable was used exclusively by defendant, and the house exclusively by another person. State *v.* Kelleher,

coincide, at least approximately, with the time of the commission of the alleged offense as laid in the indictment.[24] But evidence of this kind is none the less admissible because it was procured by an illegal and unauthorized search of the premises.[25] Such evidence having been introduced, it is of course open to defendant to explain his possession of the liquors and show the same to have been lawful.[26]

(4) Bar-Room Furniture and Appliances on Premises. In such cases it is competent to show, as against defendant, that the premises in question were fitted up as a bar-room, or contained the paraphernalia or implements of liquor selling, such as a bar, beer-pump, whisky-glasses and the like.[27] But these things must be shown to have been contemporary with the offense charged; and evidence of the condition of the premises at a day subsequent to the finding of the indictment is not admissible.[28]

(5) Character and Reputation of Defendant's Place. The character of the place kept by defendant may be shown by circumstantial evidence, tending to disclose the purpose for which it was used or the kind of business carried on there;[29] but evidence of the reputation of the place — or what people say as to its character or uses — should not be admitted,[30] except where the statutes make such reputation a pertinent fact in the prosecution or declare it to be competent evidence.[31]

(6) Number and Condition of Persons Visiting Place. As tending to show the character of the place kept by defendant, or the kind of business carried on there, it is permissible to prove that it was resorted to by large numbers of persons at unusual times or under suspicious circumstances, that persons were seen going in sober and coming out drunk, or were found in an intoxicated condition on the premises, or that they carried jugs or pails there empty and brought them away full.[32] But such testimony should be confined to the place kept or

81 Me. 346, 17 Atl. 168. And see State *v.* Johnson, 92 Iowa 768, 61 N. W. 195.

24. Com. *v.* Neylon, 159 Mass. 541, 34 N. E. 1078; Com. *v.* Sullivan, 156 Mass. 229, 30 N. E. 1023; Com. *v.* Page, 6 Gray (Mass.) 361; State *v.* Shaw, 58 N. H. 73; Castleman *v.* State, (Tex. Cr. App. 1898) 44 S. W. 494; State *v.* White, 70 Vt. 225, 39 Atl. 1085.

25. State *v.* Burroughs, 72 Me. 479; Com. *v.* Welsh, 110 Mass. 359.

26. Com. *v.* Wellington, 146 Mass. 566, 16 N. E. 446.

27. *Iowa.*— State *v.* Wambold, 74 Iowa 605, 38 N. W. 429.

Kansas.— State *v.* O'Connor, 3 Kan. App. 594, 43 Pac. 859.

Massachusetts.— Com. *v.* Collier, 134 Mass. 203; Com. *v.* Wallace, 123 Mass. 400; Com. *v.* Powers, 123 Mass. 244; Com. *v.* Campbell, 116 Mass. 32; Com. *v.* Whalen, 16 Gray 23; Com. *v.* Boyden, 14 Gray 101; Com. *v.* Lamere, 11 Gray 319; Com. *v.* Lincoln, 9 Gray 288.

Michigan.— People *v.* Hicks, 79 Mich. 457, 44 N. W. 931.

Minnesota.— State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675.

Missouri.— Kirkwood *v.* Autenreith, 11 Mo. App. 515.

New Hampshire.— State *v.* Harrington, 69 N. H. 496, 45 Atl. 404.

New York.— People *v.* Hulbut, 4 Den. 133, 47 Am. Dec. 244.

Oklahoma.— Utsler *v.* Territory, 10 Okla. 463, 62 Pac. 287.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 295.

28. Topeka *v.* Chesney, 66 Kan. 480, 71 Pac. 843.

29. Com. *v.* Barnes, 138 Mass. 511; Com. *v.* Connors, 116 Mass. 35; State *v.* Haley, 52 Vt. 476.

30. *Iowa.*— State *v.* Fleming, 86 Iowa 294, 53 N. W. 234.

Kentucky.— Ballowe *v.* Com., 44 S. W. 646, 19 Ky. L. Rep. 1867.

Massachusetts.— Com. *v.* Eagan, 151 Mass. 45, 23 N. E. 494.

Mississippi.— Cook *v.* State, 81 Miss. 146, 32 So. 312.

Vermont.— State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 297.

31. See State *v.* Morgan, 40 Conn. 44; State *v.* Wilson, 15 R. I. 180, 1 Atl. 415; State *v.* Kingston, 5 R. I. 297.

32. *Iowa.*— State *v.* McConnell, 90 Iowa 197, 57 N. W. 707.

Massachusetts.— Com. *v.* Vincent, 165 Mass. 18, 42 N. E. 332; Com. *v.* Brothers, 158 Mass. 200, 33 N. E. 386; Com. *v.* Kelley, 152 Mass. 486, 25 N. E. 835; Com. *v.* Meaney, 151 Mass. 55, 23 N. E. 730; Com. *v.* Finnerty, 148 Mass. 162, 19 N. E. 215; Com. *v.* Gillon, 148 Mass. 15, 18 N. E. 584; Com. *v.* Moore, 147 Mass. 528, 18 N. E. 403; Com. *v.* Wallace, 143 Mass. 88, 9 N. E. 5; Com. *v.* Dowdican, 114 Mass. 257; Com. *v.* Kennedy, 97 Mass. 224; Com. *v.* Leighton,

controlled by defendant, or its appurtenances,[33] and to the time of the offense as charged in the indictment,[34] and must be direct and positive and not hearsay.[35]

(7) Efforts to Avoid Detection. On a prosecution for keeping liquors for unlawful sale, or maintaining a liquor nuisance, or a similar offense, it is proper to admit evidence of efforts on the part of defendant or other persons present on the premises to avoid detection, on the approach or entry of the police, as by trying to hide liquor, or destroying or throwing away the bottles containing it, or pouring it out, or otherwise making away with the material evidences of guilt.[36] And the same is true of arrangements to guard the door or give an alarm upon the entrance of intruders.[37]

(E) *Previous Conviction or Acquittal.* A prior conviction of defendant may be alleged and proved where its effect will be to increase the penalty for the offense on trial,[38] and the fact is also admissible in evidence on the question of defendant's intent with reference to the liquors or the premises in question, or as tending to show the character of his business,[39] provided it appears that the building or place alleged is the same in both instances,[40] and defendant is identified as the person formerly convicted,[41] and the former conviction is shown to have taken place before the commission of the offense on trial.[42] A former conviction may also be pertinent evidence as affecting the credibility of defendant or tending to show his general character.[43] An acquittal of defendant on a former prosecution may be admitted in evidence in his behalf when the offense charged was the

7 Allen 528; Com. *v.* Maloney, 16 Gray 20; Com. *v.* Higgins, 16 Gray 19; Com. *v.* Taylor, 14 Gray 26.

Michigan.— People *v.* Berry, 107 Mich. 256, 65 N. W. 98.

South Carolina.— State *v.* Marchbanks, 61 S. C. 17, 39 S. E. 187.

Vermont.— State *v.* Pratt, 34 Vt. 323.

33. Douglass *v.* State, 72 Ind. 385, holding that on a prosecution for maintaining a liquor nuisance, it is error to admit testimony that crowds gathered in the street or on the sidewalks in front of defendant's shop or place of business.

34. State *v.* Engleman, 66 Kan. 340, 71 Pac. 859. See, however, Com. *v.* Finnerty, 148 Mass. 162, 19 N. E. 215.

35. State *v.* Fleming, 86 Iowa 294, 53 N. W. 234. And see Williamson *v.* State, (Tex. Cr. App. 1897) 40 S. W. 286.

36. State *v.* Fertig, 70 Iowa 272, 30 N. W. 633; Com. *v.* Acton, 165 Mass. 11, 42 N. E. 329; Com. *v.* Hurley, 158 Mass. 159, 33 N. E. 342; Com. *v.* Sullivan, 156 Mass. 487, 31 N. E. 647; Com. *v.* Nally, 151 Mass. 63, 23 N. E. 660; Com. *v.* Ham, 150 Mass. 122, 22 N. E. 704; Com. *v.* McHugh, 147 Mass. 401, 18 N. E. 74; Com. *v.* Locke, 145 Mass. 401, 14 N. E. 621; Com. *v.* Daily, 133 Mass. 577; Com. *v.* Kahlmeyer, 124 Mass. 322; Com. *v.* Wallace, 123 Mass. 400.

37. Com. *v.* Edds, 14 Gray (Mass.) 406.

38. Maguire *v.* State, 47 Md. 485; State *v.* Fagan, 64 N. H. 431, 14 Atl. 727. And see Reg. *v.* Queens, 15 N. Brunsw. 485.

Mode of proof.— In the absence of an extended record, the docket entries are admissible to show a prior conviction, and will be sufficient proof thereof, unless a question of identity is raised. State *v.* O'Connell, (Me. 1888) 14 Atl. 291; State *v.* Robbins, (Me. 1888) 13 Atl. 584; State *v.* Lashus, 79 Me. 504, 11 Atl. 180; State *v.* Neagle, 65 Me. 468.

Time of proof.— The proof of a prior conviction must be made before verdict. State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844.

39. State *v.* Neagle, 65 Me. 468; Com. *v.* Line, 149 Mass. 65, 20 N. E. 697. See State *v.* McGill, 65 Vt. 547, 27 Atl. 430.

Defendant's knowledge.— On a prosecution for maintaining a liquor nuisance and unlawfully selling liquor, the record of prior prosecutions of defendant, with his plea of guilty in each case, is admissible to show that the sales made on his premises were made with his knowledge and consent. State *v.* Beam, 1 Kan. App. 688, 42 Pac. 394.

40. State *v.* Hall, 79 Me. 501, 11 Atl. 181; Com. *v.* Austin, 97 Mass. 595.

41. State *v.* Lashus, 79 Me. 504, 11 Atl. 181.

The indictment or conviction of another person is not generally admissible in evidence. Thus the fact that a third person was charged with illegally keeping liquors in the same barn, on the same day as that on which defendant was charged, has no tendency to show that defendant was not guilty. Com. *v.* Moore, 157 Mass. 324, 31 N. E. 1070. But on the other hand, where defendant is prosecuted for selling liquor on Sunday as the servant of B, a conviction of B on the charge of being engaged as a liquor dealer, and as such making a sale of liquor on the same day on which defendant was charged with an illegal sale, is admissible on the issue as to whether the business in which defendant was engaged belonged to B. Bradley *v.* State, (Tex. Cr. App. 1903) 75 S. W. 32.

42. Com. *v.* Daley, 4 Gray (Mass.) 209.

43. See Levine *v.* State, 35 Tex. Cr. 647, 34 S. W. 969.

same, or substantially similar to, the one on trial;[44] but not where the two offenses are so dissimilar that his acquittal on the one charge could prove nothing as to his innocence of the other.[45]

(F) *Degree of Proof — Variance* — (1) In General. The evidence for the prosecution must correspond with the allegations of the indictment,[46] and must identify the transaction complained of and cover the various elements of the offense,[47] establishing the guilt of defendant beyond a reasonable doubt, if the proceeding is distinctively criminal, although a mere preponderance of evidence will be sufficient to justify a recovery in a penal action at law for the fine imposed by the statute.[48] The burden resting upon defendant to prove that any affirmative defense set up by him is sustained by such evidence as is sufficient in criminal prosecutions generally.[49]

(2) Evidence Proving Different Offense. Where the indictment charges one offense and the evidence proves another, the variance is fatal and a conviction cannot be sustained.[50] But where the indictment charges different offenses in different counts, evidence offered under one count may properly be considered by the jury under the other count, if it tends to support the charge therein made.[51]

(II) *Proof of Particular Facts* — (A) *Character or Occupation of Accused.* Where the fact that defendant is engaged in a particular business or

44. See Com. *v.* Doyle, 132 Mass. 244. *Compare* State *v.* Wold, 96 Me. 401, 52 Atl. 909.

Conclusiveness.— On a trial for maintaining a liquor nuisance, evidence that defendant had been acquitted on a charge of keeping the identical liquor with intent to sell it, although not a bar to the present prosecution, is properly admitted, since a judgment on a particular point is, as between the parties, conclusive in relation to such point, although the subject-matter of the two suits be different. State *v.* Dewey, 65 Vt. 196, 26 Atl. 69. But where, under one indictment for selling liquor within five miles of a church, it was found that the place where the liquor was sold was more than that distance from the church, this does not estop the state from proving on another indictment that the same place was less than five miles from the church. State *v.* Williams, 94 N. C. 891, opinion of the court by Ashe, J.

45. State *v.* Miller, (Kan. 1901) 64 Pac. 1033; State *v.* Barber, 2 Kan. App. 679, 43 Pac. 800. And see State *v.* Conlin, 27 Vt. 318. But see State *v.* Turner, 63 Kan. 714, 66 Pac. 1008.

46. Com. *v.* Bossidy, 112 Mass. 277; Norton *v.* State, 65 Miss. 297, 3 So. 665. And see O'Brien *v.* State, 109 Ga. 51, 35 S. E. 112; Ballowe *v.* Com., 44 S. W. 646, 19 Ky. L. Rep. 1867; Fossdahl *v.* State, 89 Wis. 482, 62 N. W. 185.

47. *Alabama.*— Olmstead *v.* State, 92 Ala. 64, 9 So. 737, holding that it is not necessary that the particular sale be so described by the witness as to time and place that it could be pleaded in bar of another indictment for the same offense, as defendant could not be again convicted upon the evidence of the same witness that he had bought liquor within the time mentioned in the indictment.

Massachusetts.— Com. *v.* Costello, 133 Mass. 192.

Missouri.— Springfield *v.* Ford, 40 Mo. App. 586.

New Hampshire.— State *v.* Shanahan, 54 N. H. 437.

New Jersey.— Gulick *v.* State, 50 N. J. L. 468, 14 Atl. 751.

Texas.— Bonats *v.* State, 29 Tex. 183.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 300.

48. Proctor *v.* People, 24 Ill. App. 599. And see Robinius *v.* State, 67 Ind. 94.

Sufficient evidence see Cole *v.* State, 120 Ga. 485, 48 S. E. 156; Burden *v.* State, 120 Ga. 198, 47 S. E. 562; State *v.* Durein, 70 Kan. 1, 78 Pac. 152, 70 Kan. 13, 80 Pac. 987; State *v.* Douglas 69 Kan. 676, 77 Pac. 697; Kelly *v.* Com., 83 S. W. 99, 26 Ky. L. Rep. 1038; State *v.* Gillespie, 104 Mo. App. 400, 79 S. W. 477; Hays *v.* State, (Tex. Cr. App. 1904) 83 S. W. 201; Haynes *v.* State, (Tex. Cr. App. 1904) 83 S. W. 16; Rippey *v.* State, (Tex. Cr. App. 1904) 81 S. W. 531; Corzine *v.* State, (Tex. Cr. App. 1904) 80 S. W. 85; Arnold *v.* State, 46 Tex. Cr. 110, 79 S. W. 547; Terry *v.* State, (Tex. Cr. App. 1904) 79 S. W. 317.

Insufficient evidence see Tobin *v.* District of Columbia, 22 App. Cas. (D. C.) 482; Erwin *v.* Cartersville, 120 Ga. 150, 47 S. E. 512; Patterson *v.* Batesville, (Miss. 1904) 37 So. 560; Scales *v.* State, (Tex. Cr. App. 1904) 83 S. W. 380.

49. Effinger *v.* State, 9 Ohio Cir. Ct. 376, 6 Ohio Cir. Dec. 717. See Com. *v.* Pendergast, 138 Pa. St. 633, 21 Atl. 12. And see Criminal Law, 12 Cyc. 496.

50. Miller *v.* Colorado Springs, 3 Colo. App. 309, 33 Pac. 74; Robinson *v.* Com., 6 Dana (Ky.) 287; State *v.* Therrien, 86 Me. 425, 29 Atl. 1117; State *v.* Apperger, 80 Mo. 173. *Compare* Olmstead *v.* State, 89 Ala. 16, 7 So. 775.

51. State *v.* Otten, (Kan. 1900) 60 Pac. 1132; State *v.* Morehead, 22 R. I. 272, 47 Atl. 545.

occupation is an essential element of the offense charged, this fact must be established by the evidence for the prosecution.[52] It may be proved by official registers or other public records,[53] or by the testimony of witnesses who have observed defendant in the pursuit of his business;[54] but it is not permissible to receive evidence of public repute or common report as to the nature of defendant's occupation.[55]

(B) *License or Authority.* Where defendant undertakes to prove that he was duly licensed, as a defense to the prosecution, the best evidence on this point is the license itself,[56] and it is not impeachable on the ground of a want of compliance with the conditions necessary to obtaining it.[57] The license or authority relied on must cover the date or period of time charged in the indictment,[58] and must be sufficient in law to authorize defendant to sell or deal in the particular liquors specified in the indictment,[59] or for the purposes therein described,[60] or to pursue the particular kind of business or branch of liquor selling which would take him out of the penal provisions of the statute,[61] and the license must be available to defendant himself;[62] and if different licenses are required at the same time by different authorities, defendant must produce or prove all of them.[63] If the prosecution undertakes to prove that defendant was licensed, the fact may be shown by the records of the licensing court or board,[64] by the proper officer's receipt for the tax,[65] or by the admissions of defendant.[66] Where the allegation to be proved is that defendant had no license, it is competent to show the fact by the records of the licensing court or board, containing the names of all persons to whom licenses have been issued, and not including defendant's,[67] by the testi-

52. Archer *v.* State, 10 Tex. App. 482. And see Patrick *v.* State, 45 Tex. Cr. 587, 78 S. W. 947.

Dram-shop keeper see State *v.* Kurtz, 64 Mo. App. 123; State *v.* Douglass, 48 Mo. App. 39.

Druggist see State *v.* Tanner, 50 Kan. 365, 31 Pac. 1096; State *v.* Shanks, 98 Mo. App. 138, 71 S. W. 1065; State *v.* Paul, 87 Mo. App. 47; State *v.* Marchand, 25 Mo. App. 657.

Time as to which evidence admissible.— Evidence that defendant is the occupant of a tenement in which a bar-room is kept need not be confined to the period of time laid in the indictment as that during which he applied it to the criminal use of a bar-room, although the proof of such criminal use must be; but his occupation both before and after such period may be given in evidence, as affording proof of his occupation during such period. State *v.* Knott, 5 R. I. 293. And see Wood *v.* State, 9 Ind. App. 42, 36 N. E. 158.

53. State *v.* Bradford, 79 Mo. App. 346; State *v.* Quinn, 40 Mo. App. 627; State *v.* Elam, 21 Mo. App. 290.

54. State *v.* Roben, 39 Iowa 424; Com. *v.* Dowdican, 114 Mass. 257; Com. *v.* Norton, 16 Gray (Mass.) 30; Bradley *v.* State, (Tex. Cr. App. 1903) 75 S. W. 32.

55. Cobleigh *v.* McBride, 45 Iowa 116; Warner *v.* Brooks, 14 Gray (Mass.) 107. And see State *v.* Fisher, 35 Vt. 584.

56. Com. *v.* Spring, 19 Pick. (Mass.) 396; Jordan *v.* Nicolin, 84 Minn. 370, 87 N. W. 916; State *v.* Barnett, 110 Mo. App. 592, 85 S. W. 613; State *v.* Repetto, 66 Mo. App. 251.

57. Com. *v.* Putnam, 4 Gray (Mass.) 16; State *v.* Evans, 83 Mo. 319. And see Com. *v.* Cauley, 150 Mass. 272, 22 N. E. 909. See *supra*, VI, A, 3, d.

58. Com. *v.* Welch, 144 Mass. 356, 11 N. E. 423; Com. *v.* Putnam, 4 Gray (Mass.) 16; U. S. *v.* Angell, 11 Fed. 34. See Trost *v.* State, 64 Miss. 188, 1 So. 49, Arnold, J., delivering the opinion of the court.

59. Com. *v.* Thayer, 8 Metc. (Mass.) 525; Huffstater *v.* State, 5 Hun (N. Y.) 23; Lucio *v.* State, 35 Tex. Cr. 320, 33 S. W. 358.

60. Provo *v.* Shurtliff, 4 Utah 15, 5 Pac. 302.

61. See Smith *v.* Com., 4 Ky. L. Rep. 261; Com. *v.* Rourke, 141 Mass. 321, 6 N. E. 383; State *v.* Heise, 7 Rich. (S. C.) 518.

62. Dahmer *v.* State, 56 Minn. 787.

63. Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138. See Prather *v.* People, 85 Ill. 36.

64. Waller *v.* State, 38 Ark. 656; Com. *v.* Bolkom, 3 Pick. (Mass.) 281; State *v.* Sannerud, 38 Minn. 229, 36 N. W. 447; State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

65. Curry *v.* State, 35 Tex. 364.

66. Com. *v.* Cameron, 141 Mass. 83, 6 N. E. 547.

67. State *v.* Schmidt, 34 Kan. 399, 8 Pac. 867; State *v.* Nye, 32 Kan. 201, 204, 4 Pac. 134, 136; State *v.* Schweiter, 27 Kan. 499; Holton *v.* Bimrod, 8 Kan. App. 265, 55 Pac. 505; State *v.* Shaw, 32 Me. 570; Briggs *v.* Rafferty, 14 Gray (Mass.) 525; Com. *v.* Foss, 14 Gray (Mass.) 50; Com. *v.* Tuttle, 12 Cush. (Mass.) 502; Com. *v.* Kimball, 7 Metc. (Mass.) 304.

Evidence as to revoked or forfeited license see Com. *v.* Hamer, 128 Mass. 76; Com. *v.* Moylan, 119 Mass. 109.

mony of the officer whose duty would be to issue the license or collect the tax,[68] or by the admissions of defendant.[69]

(c) *United States License as Evidence.* Where the prosecution is for such offenses as being a "common seller" of liquors, keeping liquors for unlawful sale, maintaining a nuisance, or engaging in the business of liquor selling without proper authority, the fact that defendant has paid the special tax as a retail liquor dealer, under the laws of the United States, is admissible in evidence for the purpose of showing what his business is, or that he keeps liquor for sale, or generally on the question of intent.[70] This fact may be proved by a book containing a record of the names of persons paying special taxes, kept at the office of the collector of internal revenue, as required by the federal statute,[71] by a properly examined and certified copy of the record of special taxes kept by the collector of internal revenue,[72] by the written return made by defendant to the collector,[73] or by the testimony of a witness that he saw a government license, issued to defendant, hanging on the wall of his bar-room.[74] But such evidence does not raise a conclusive presumption against defendant,[75] and it is competent for defendant in rebuttal to explain his possession of the license or to show the purpose for which he procured it.[76]

(d) *Criminal Knowledge or Intent.* Under the general rule that, where a statute makes a given act indictable, proof of a violation of the law is sufficient to warrant a conviction without proof of a guilty intent, it is not necessary, on an indictment for selling liquor without a license, to prove a criminal intent in order

68. Mayson *v.* Atlanta, 77 Ga. 662; Elkins *v.* State, 13 Ga. 435; People *v.* Paquin, 74 Mich. 34, 41 N. W. 852; Hornberger *v.* State, 47 Nebr. 40, 66 N. W. 23.

69. Pendergast *v.* Peru, 20 Ill. 51. And see Collins *v.* State, (Tex. Cr. App. 1905) 84 S. W. 585.

70. *Arkansas.*— Liles *v.* State, 43 Ark. 95.

Connecticut.—State *v.* Teahan, 50 Conn. 92.

Iowa.— Colby *v.* Fitzgerald, (1903) 94 N. W. 491. *Compare* State *v.* Stutz, 20 Iowa 488.

Kentucky.— Throckmorton *v.* Com., 49 S. W. 474, 20 Ky. L. Rep. 1508.

Maine.— State *v.* O'Connell, 82 Me. 30, 19 Atl. 86; State *v.* Gorham, 65 Me. 270.

Maryland.— Guy *v.* State, 96 Md. 692, 54 Atl. 879, 90 Md. 29, 44 Atl. 997.

Massachusetts.— Com. *v.* Uhrig, 146 Mass. 132, 15 N. E. 156; Com. *v.* Brown, 124 Mass. 318; Com. *v.* Keenan, 11 Allen 262.

Mississippi.— Burnett *v.* State, 72 Miss. 994, 18 So. 432. See Snyder *v.* State, 78 Miss. 366, 29 So. 78.

Missouri.— State *v.* Munch, 57 Mo. App. 207.

Nebraska.— Fruide *v.* State, 66 Nebr. 244, 92 N. W. 320.

Rhode Island.— State *v.* Mellor, 13 R. I. 666.

Texas.— Martin *v.* State, (Cr. App. 1901) 61 S. W. 486; Clark *v.* State, 40 Tex. Cr. 127, 49 S. W. 85; Treue *v.* State, (Cr. App. 1898) 44 S. W. 829; Pitner *v.* State, 37 Tex. Cr. 268, 39 S. W. 662; Henderson *v.* State, (Cr. App. 1897) 39 S. W. 116. And see Terry *v.* State, (Cr. App. 1904) 79 S. W. 317. *Compare* Anderson *v.* State, (Cr. App. 1896) 37 S. W. 859.

Vermont.— State *v.* Intoxicating Liquors, 44 Vt. 208.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 298½.

71. State *v.* Gorham, 65 Me. 270.

Federal regulation forbidding production of records.— An instruction issued by the United States commissioner of internal revenue, directing collectors and their deputies to refuse to produce, in criminal prosecutions of liquor dealers in the state courts, the returns made to the collectors, or the lists showing payment of the federal liquor taxes, or to give information derived from official sources as to the fact of such payments, is valid and in accordance with the federal laws. *In re* Weeks, 82 Fed. 729.

Explanation of abbreviations.— Testimony as to the meaning of the letters "R. L. D." (retail liquor dealer) in such record is admissible, if the witness has such special knowledge as will enable him to testify in relation thereto. State *v.* O'Connell, 82 Me. 30, 19 Atl. 86; State *v.* White, 70 Vt. 225, 39 Atl. 1085.

72. State *v.* Howard, 91 Me. 396, 40 Atl. 65; State *v.* O'Connell, 82 Me. 30, 19 Atl. 86; State *v.* Wiggin, 72 Me. 425; Gerstenkorn *v.* State, (Tex. Cr. App. 1898) 44 S. W. 501; Gersteman *v.* State, 35 Tex. Cr. 318, 33 S. W. 357; State *v.* White, 70 Vt. 225, 39 Atl. 1085; State *v.* Spaulding, 60 Vt. 228, 14 Atl. 769.

73. State *v.* Teahan, 50 Conn. 92.

74. Com. *v.* Brown, 124 Mass. 318.

75. State *v.* O'Connell, 82 Me. 30, 19 Atl. 86; State *v.* Intoxicating Liquors, 80 Me. 57, 12 Atl. 794; Com. *v.* Uhrig, 146 Mass. 132, 15 N. E. 156; Com. *v.* Keenan, 11 Allen (Mass.) 262; Williamson *v.* State, 41 Tex. Cr. 461, 55 S. W. 568.

76. Com. *v.* Austin, 97 Mass. 595; Fruide *v.* State, 66 Nebr. 244, 92 N. W. 320; Barnes *v.* State, (Tex. Cr. App. 1898) 44 S. W. 491.

to convict.[77] Defendant's knowledge of the commission of the unlawful act, when necessary to be proved by the state, may be shown by direct testimony of witnesses,[78] or circumstantially by proof of his opportunities for observation, his presence about the premises, or other means of obtaining knowledge.[79]

(E) *Connecting Defendant with Unlawful Acts Shown.* A conviction cannot be sustained on proof which shows a violation of the liquor laws but fails to connect defendant with the unlawful act or state of facts established.[80] But this connection may be shown by inferential or circumstantial evidence.[81] Thus a defendant may be convicted of making an illegal sale of liquor, although he was not visible to the purchaser, if there is evidence connecting him with the transaction, and from which the jury may infer that he was the seller.[82] Proof that defendant offered or was requested by another to procure liquor for him, and received the money therefor, and shortly after delivered the liquor to such person, puts the burden on defendant to explain where and from whom he got the liquor, and authorizes a conviction where he gives no explanation or one which the jury believe to be a mere subterfuge.[83] When an unlawful sale is shown to have been made in defendant's presence, by a third person, defendant's guilt may be established by evidence of his participation in the act, or, if he took no part in it, that he was the proprietor of the place and the third person was his agent or servant.[84]

77. Com. *v.* Holstine, 132 Pa. St. 357, 19 Atl. 273.

Acting on professional advice.— On an indictment for selling spirituous or vinous liquor, evidence that persons supposed to be learned in the law had advised defendant, before he sold the beverage in question, that it was not a violation of the law to do so, is not admissible. Hinton *v.* State, 132 Ala. 29, 31 So. 563.

Intent of purchaser.— The intention of the purchaser to evade or disregard the law is not material, and questions addressed to him with reference to such intention are properly excluded. Delaney *v.* State, 51 N. J. L. 37, 16 Atl. 267.

78. State *v.* Lewis, 86 Minn. 174, 90 N. W. 318.

79. State *v.* Rhodes, 90 Iowa 496, 58 N. W. 887, 24 L. R. A. 245; De France *v.* Traverse, 85 Iowa 422, 52 N. W. 247; Elwood *v.* Price, 75 Iowa 228, 39 N. W. 281. And see State *v.* Harrington, 69 N. H. 496, 45 Atl. 404; Dittfurth *v.* State, 46 Tex. Cr. 424, 80 S. W. 628.

80. Henry *v.* State, 64 Ark. 662, 43 S. W. 499; State *v.* Findley, 45 Iowa 435; Taylor *v.* State, (Tex. Cr. App. 1899) 50 S. W. 343; Loveless *v.* State, (Tex. Cr. App. 1899) 49 S. W. 601; Clark *v.* State, 40 Tex. Cr. 127, 49 S. W. 85; Ledford *v.* State, 32 Tex. Cr. 567, 25 S. W. 123.

Identifying defendant.— On the trial of S for being a common seller of liquors, the testimony of a witness that he had bought liquor at the place in question "from a man they called S," and who "looked pretty near like the defendant," but whom he would not swear to have been S, is not sufficient evidence of a sale by defendant. Com. *v.* Snow, 14 Gray (Mass.) 385. So where the person who bought the liquor, and who made an affidavit before the county attorney that defendant sold it to him, testifies on the trial that he does not believe defendant was the man who sold the liquor, there cannot be a conviction. Hendricks *v.* State, (Tex. Cr. App. 1894) 25 S. W. 124.

81. See Jones *v.* State, 136 Ala. 118, 34 So. 236; Com. *v.* Kelley, 116 Mass. 341.

82. Thompson *v.* State, 109 Ga. 272, 34 S. E. 579; Johnson *v.* Atlanta, 79 Ga. 507, 4 S. E. 673; Sanders *v.* State, 74 Ga. 82; Stamper *v.* Com., 102 Ky. 33, 42 S. W. 915, 19 Ky. L. Rep. 1014; Roach *v.* State, (Tex. Cr. App. 1905) 84 S. W. 586; Williamson *v.* State, (Tex. Cr. App. 1896) 33 S. W. 977; State *v.* Ferrell, 22 W. Va. 759.

83. *Alabama.*— Thomas *v.* State, 117 Ala. 134, 23 So. 636.

Arkansas.— Dixon *v.* State, 67 Ark. 495, 55 S. W. 850.

Georgia.— Mack *v.* State, 116 Ga. 546, 42 S. E. 776; Billups *v.* State, 107 Ga. 766, 33 S. E. 659; Silver *v.* State, 105 Ga. 838, 32 S. E. 22.

Kentucky.— Hinkle *v.* Com., 66 S. W. 1020, 23 Ky. L. Rep. 1979.

Mississippi.— Waddle *v.* State, (1898) 24 So. 311; Wiley *v.* State, 74 Miss. 727, 21 So. 797.

Texas.— Taylor *v.* State, (Cr. App. 1903) 75 S. W. 536; Sebastian *v.* State, 44 Tex. Cr. 508, 72 S. W. 849; Grimes *v.* State, 44 Tex. Cr. 503, 72 S. W. 589; Latham *v.* State, (Cr. App. 1903) 72 S. W. 182; Young *v.* State, (Cr. App. 1902) 66 S. W. 567; Crawford *v.* State, (Cr. App. 1900) 58 S. W. 1006; Dorsett *v.* State, (Cr. App. 1900) 58 S. W. 1003; Johnson *v.* State, (Cr. App. 1898) 44 S. W. 834; Brignon *v.* State, 37 Tex. Cr. 71, 38 S. W. 786; Blodgett *v.* State, 37 Tex. Cr. 70, 38 S. W. 783; Willis *v.* State, 37 Tex. Cr. 82, 38 S. W. 776.

Vermont.— State *v.* Hassett, 64 Vt. 46, 23 Atl. 584.

West Virginia.—State *v.* Thomas, 13 W. Va. 848.

84. *Alabama.*— Wright *v.* State, (1901) 29 So. 864.

And even though defendant was not present at the time, his conviction may be sustained on proof that he was the proprietor of the place, or owner of the business carried on there, and that the actual seller was acting under his orders or directions or as his employee.[85]

(F) *Evidence of Sale by Servant or Agent.* An indictment or complaint alleging an unlawful sale of liquor by defendant is supported by proof that he sold it by his clerk, servant, or agent.[86] But in this case it is necessary to identify the seller as the agent or employee of defendant, or at least to adduce evidence from which the jury may reasonably infer such a connection between them.[87] And further it must be shown that the sale was made in the presence of the principal, or with his knowledge and assent, or by his direction or authority.[88] But such knowledge, consent, and authority, if not directly proven, may be made out by inference from circumstances sufficient to induce the belief that

Arkansas.— Berning *v.* State, 51 Ark. 550, 11 S. W. 882.

Georgia.— Blankinship *v.* State, 112 Ga. 402, 37 S. E. 732; Cook *v.* State, 100 Ga. 72, 25 S. E. 919.

Kentucky.— Neighbors *v.* Com., 9 S. W. 718, 10 Ky. L. Rep. 594. See Lucker *v.* Com., 4 Bush 440.

Massachusetts.— Com. *v.* Moore, 157 Mass. 324, 31 N. E. 1070; Com. *v.* Murphy, 147 Mass. 525, 18 N. E. 403.

Michigan.— People *v.* Baumann, 52 Mich. 584, 18 N. W. 369.

Texas.— Kitchens *v.* State, (Cr. App. 1902) 70 S. W. 82; Wade *v.* State, (Cr. App. 1898) 43 S. W. 995; Stiles *v.* State, (Cr. App. 1898) 43 S. W. 993; Hartgraves *v.* State, (Cr. App. 1897) 39 S. W. 661.

Wisconsin.— State *v.* Beloit, 74 Wis. 267, 42 N. W. 110.

85. *Illinois.*— Fisher *v.* People, 103 Ill. 101.

Indiana.— Pierce *v.* State, 109 Ind. 535, 10 N. E. 302; Hogan *v.* State, 76 Ind. 258.

Kansas.— State *v.* Collins, 8 Kan. App. 398, 57 Pac. 38.

Kentucky.— Locke *v.* Com., 113 Ky. 864, 69 S. W. 763, 24 Ky. L. Rep. 654; Lucker *v.* Com., 4 Bush 440.

Massachusetts.—Com. *v.* Lattinville, (1890) 25 N. E. 972; Com. *v.* Murphy, 147 Mass. 525, 18 N. E. 403.

Missouri.— State *v.* Dugan, 110 Mo. 138, 19 S. W. 195; State *v.* McCabe, 94 Mo. App. 122, 67 S. W. 973.

South Carolina.— State *v.* Prater, 59 S. C. 271, 37 S. E. 933.

Texas.— Needham *v.* State, 19 Tex. 332; Clark *v.* State, 40 Tex. Cr. 127, 49 S. W. 85; Gerstenkorn *v.* State, (Cr. App. 1898) 44 S. W. 501; Bruce *v.* State, 36 Tex. Cr. 53, 39 S. W. 683; Jordan *v.* State, (Cr. App. 1897) 38 S. W. 782.

Vermont.— State *v.* Barron, 37 Vt. 57.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 306.

86. *Connecticut.*— State *v.* Curtiss, 69 Conn. 86, 36 Atl. 1014.

Indiana.— Molihan *v.* State, 30 Ind. 266.

Iowa.— State *v.* McConnell, 90 Iowa 197, 57 N. W. 707.

Massachusetts.—Com. *v.* Park, 1 Gray 553.

Michigan.— See People *v.* Possing, 137 Mich. 303, 100 N. W. 396.

New York.— Amerman *v.* Kall, 34 Hun 126.

Ohio.— Parker *v.* State, 4 Ohio St. 563.

Texas.— Clark *v.* State, 40 Tex. Cr. 127, 49 S. W. 85.

87. *Alabama.*— Perkins *v.* State, 92 Ala. 66, 9 So. 536. And see Morgan *v.* State, 81 Ala. 72, 1 So. 472.

Indiana.— Anderson *v.* State, 39 Ind. 553.

Maine.— State *v.* Brown, 31 Me. 520.

Massachusetts.— Com. *v.* Sullivan, 156 Mass. 229, 30 N. E. 1023; Com. *v.* Keenan, 152 Mass. 9, 25 N. E. 32. In this state it is held that evidence of sales of liquor on the premises in the absence of defendant by other persons is admissible, without other evidence that they were his agents except that tending to show that he kept the tenement. Com. *v.* Edds, 14 Gray 406.

Missouri.— State *v.* Quinn, 40 Mo. App. 573.

New Hampshire.—State *v.* Foster, 23 N. H. 348, 55 Am. Dec. 191.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 288, 306.

But *compare Ex p.* Parks, 8 N. Brunsw. 237.

Wife of defendant.— As to showing defendant's wife to have acted as his agent in selling liquors see Com. *v.* Hyland, 155 Mass. 7, 28 N. E. 1055; Com. *v.* Kennedy, 119 Mass. 211; Com. *v.* Reynolds, 114 Mass. 306; Com. *v.* Hurley, 14 Gray (Mass.) 411; Com. *v.* Coughlin, 14 Gray (Mass.) 389; State *v.* Roberts, 55 N. H. 483; State *v.* Colby, 55 N. H. 72; Com. *v.* Dwyer, 29 Pa. Co. Ct. 73.

Sales by concubine.— The presumption of agency does not attach to sales made by a woman living with a man as his concubine; and in such a case it must be shown by evidence that she acted as his agent in making the sale complained of. U. S. *v.* Bonham, 31 Fed. 808.

88. *Arkansas.*— Beane *v.* State, 72 Ark. 368, 80 S. W. 573.

Indiana.— Wreidt *v.* State, 48 Ind. 579.

Iowa.— Goods *v.* State, 3 Greene 566.

Massachusetts.— Com. *v.* Lafayette, 148 Mass. 130, 19 N. E. 26; Com. *v.* Hayes, 145 Mass. 289, 14 N. E. 151; Com. *v.* Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707; Com. *v.* Williams, 4 Allen 587; Com. *v.* Gil-

defendant directed or assented to the acts of the servant or agent.[89] Defendant may show in his defense that the sale in question was made without his knowledge and in disobedience of his positive orders to his servant or agent to make no such sales as that complained of; but the prosecution may contradict this evidence, or show that such orders were not given in good faith or with the expectation that they would be obeyed.[90] But evidence of previous general instructions of this kind is immaterial where it is admitted or conclusively appears that the particular sale charged was made with the knowledge of the master;[91] and such evidence is not competent in favor of the clerk or servant when he is personally charged with the sale.[92] On a trial for selling without a license, the presumption is that the vendor is the owner of the liquor sold,[93] and when the sale was made by the accused in person, the ownership of the liquor is immaterial, unless he justifies under a license to the owner.[94]

(G) *Ownership or Possession of House or Place.* Where it is necessary to show the ownership or proprietorship of the accused in the house or place where the illegal sales were made, or where the liquors were unlawfully kept, or the nuisance maintained, or otherwise as the case may be, this may be done by evidence of his statements or admissions, previously made, that he was the owner or proprietor of the place,[95] or by the direct testimony of witnesses,[96] or by circumstantial

lon, 2 Allen 505; Com. *v.* Fitzgerald, 14 Gray 14; Com. *v.* Putnam, 4 Gray 16.

Minnesota.—State *v.* Mahoney, 23 Minn. 181.

Ohio.— Parker *v.* State, 4 Ohio St. 563.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 306.

But *compare* State *v.* Stockman, 5 Kan. App. 888, 58 Pac. 1006.

Presumption of innocence.— The fact that a man employs a servant to conduct a business expressly authorized by statute, and that the servant makes an unlawful sale in the course of it, does not necessarily overcome the presumption of innocence, merely because the business is liquor selling, and may be carried beyond the statutory limits. Com. *v.* Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707; People *v.* Utter, 44 Barb. (N. Y.) 170.

In Georgia the proprietor of a tippling-house which is kept open by his clerk on Sunday must show that it was done, not only without his knowledge, but also without his consent, express or implied, in order to shield himself from punishment. Klug *v.* State, 77 Ga. 734.

Presumption as to Sunday sales.— Proof of sales of liquor on Sunday by defendant's barkeeper presumptively establishes defendant's guilt. State *v.* Terry, 105 Mo. App. 428, 79 S. W. 998; Com. *v.* McGonigal, 1 Lehigh Co. L. J. (Pa.) 34.

89. Kirkwood *v.* Antenreith, 11 Mo. App. 515; Amerman *v.* Kall, 34 Hun (N. Y.) 126. And see Com. *v.* Perry, 148 Mass. 160, 19 N. E. 212.

Defendant's admissions of proprietorship and of having a license, and testimony that he kept the place, are evidence that sales made there were made by him or by his authority. Com. *v.* Chadwick, 142 Mass. 595, 8 N. E. 589. And see State *v.* Bonney, 39 N. H. 206.

Proof of sales by the master is admissible, as tending to show that the sale by the servant was with the assent and by the authority of the master. State *v.* Wentworth, 65 Me. 234, 20 Am. Rep. 688. *Compare* State *v.* Austin, 74 Minn. 463, 77 N. W. 301.

Evidence that liquors were kept on the premises for sale during a time prior to that specified in the indictment, and that the clerk during the same time had made sales to other persons is relevant to the issue. State *v.* Shaw, 58 N. H. 73. And see Com. *v.* Rooks, 150 Mass. 59, 22 N. E. 436.

90. Barnes *v.* State, 19 Conn. 398; Com. *v.* Coughlin, 182 Mass. 558, 66 N. E. 207; Com. *v.* Stevens, 155 Mass. 291, 29 N. E. 508; Com. *v.* Nash, 135 Mass. 541; State *v.* Sodini, 84 Minn. 444, 87 N. W. 1130; State *v.* McCance, 110 Mo. 398, 19 S. W. 648. And see State *v.* Pierce, 111 Mo. App. 216, 85 S. W. 663. *Compare* Loeb *v.* State, 75 Ga. 258.

91. State *v.* Mueller, 38 Minn. 497, 38 N. W. 691.

92. Com. *v.* Tinkham, 14 Gray (Mass.) 12. And see Fassinow *v.* State, 89 Ind. 235.

93. Rana *v.* State, 51 Ark. 481, 11 S. W. 692.

94. Evans *v.* State, 54 Ark. 227, 15 S. W. 360.

95. State *v.* Wambold, 74 Iowa 605, 38 N. W. 429; Com. *v.* Chadwick, 142 Mass. 595, 8 N. E. 589; Com. *v.* Dearborn, 109 Mass. 368; Com. *v.* Stoehr, 109 Mass. 365; Com. *v.* Hildreth, 11 Gray (Mass.) 327.

96. Com. *v.* Dow, 12 Gray (Mass.) 133; Leftwich *v.* State, (Tex. Cr. App. 1900) 55 S. W. 571; Drye *v.* State, (Tex. Cr. App. 1900) 55 S. W. 65.

Illustrations.— A witness who had observed defendant's conduct and conversation at the time and on the premises may be asked "who assumed to be the proprietor and to control the premises" (State *v.* Cook, 30 Kan. 82, 1 Pac. 32), or what he had seen defendant "doing with reference to the place in question" (Com. *v.* Fisher, 138 Mass. 504). And, on a trial for maintaining a hotel as a liquor

evidence connecting defendant with the place in question in the character of a proprietor.[97] And similar evidence may be used to rebut defendant's contention that he had previously sold or leased the premises to a third person.[98] Evidence that defendant had previously applied for or obtained a license to sell liquor at the place in question is admissible as tending to show him to be the keeper or proprietor of the place.[99] On an indictment for keeping a tenement for the illegal sale of liquor, evidence that defendant kept it at a certain time, when it was not used unlawfully, is competent in connection with evidence that he kept it for the sale of liquor at other times.[1] A deed of the premises from defendant to his wife will not raise the presumption that she is the proprietor of the business, where it appears that he and his family live on the premises and that he conducts the business.[2] Defendant cannot show that a third person, claimed by him to be the proprietor of the place where the liquor was sold, attempted to employ another as bar-tender.[3] Evidence that a warrant was served on a third person, on a charge of keeping liquor in the same place ten days before the present complaint is not competent as to ownership.[4]

(H) *Evidence in Case of Joint Parties.* It has been held that upon an indictment charging two persons jointly with an unlawful sale of liquor one of them may be convicted, although the evidence does not show any participation by the other,[5] and this being so evidence of a sale by one of defendants is admissible against the other.[6] According to other decisions the evidence must show the joint participation of defendants in the unlawful act, or it will not warrant a conviction.[7]

(I) *Evidence as to Purchaser* — (1) IDENTIFICATION OF PURCHASER. Where the indictment charges an unlawful sale of liquor to a particular person by name, the proof must correspond with the allegation, and the indictment will not be sustained by evidence of a sale to a different person,[8] and the name of the pur-

nuisance, where a witness has testified to sales made in barns appurtenant to the hotel, he may be allowed to state that he supposed, from the fact that defendant kept his horses in the barn and had control of the hotel, that he also had control of the barns. State *v.* Arnold, 98 Iowa 253, 67 N. W. 252.

97. **Name on sign.**— It is permissible to show that the premises bore a sign (as of an inn, tavern, or bar-room) with defendant's name upon it as proprietor. Com. *v.* Sisson, 126 Mass. 48; Com. *v.* Certain Intoxicating Liquors, 122 Mass. 36; Com. *v.* Owens, 114 Mass. 252; State *v.* Wilson, 5 R. I. 291. *Compare* Com. *v.* Madden, 1 Gray (Mass.) 486.

Control of premises.— On a trial for keeping and selling liquors, evidence to show that defendant had control of the room in which the liquors were found is admissible. State *v.* Green, 61 S. C. 12, 39 S. E. 185.

Carrying the key.— The fact that defendant keeps the key of the house and uses it to give admittance to persons seeking to enter is evidence that he is the proprietor. Com. *v.* Clynes, 150 Mass. 71, 22 N. E. 436; Com. *v.* Merriam, 148 Mass. 425, 19 N. E. 405.

Frequenting the place.— An inference that defendant is the owner or proprietor of the place may also be drawn from the fact that he has constantly been seen in and about the premises, especially when coupled with evidence of acts of ownership or control on his part. Com. *v.* Hughes, 165 Mass. 7, 42 N. E. 121; Com. *v.* Mead, 153 Mass. 284, 26 N. E. 855; Com. *v.* McIvor, 117 Mass. 118; Com. *v.* Haher, 113 Mass. 207; Com. *v.* Boyden, 14 Gray (Mass.) 101; Com. *v.* Hoye, 9 Gray (Mass.) 292. And see Com. *v.* Hogan, 11 Gray (Mass.) 315. But *compare* Plunkett *v.* State, 69 Ind. 68, where it appeared that the house was in the actual possession and occupancy of another.

98. State *v.* Hughes, 3 Kan. App. 95, 45 Pac. 94; Com. *v.* Hughes, 165 Mass. 7, 42 N. E. 121; Com. *v.* Mason, 116 Mass. 66; People *v.* Bradt, 46 Hun (N. Y.) 445, 10 N. Y. Suppl. 157.

99. Com. *v.* Sullivan, 156 Mass. 229, 30 N. E. 1023; Com. *v.* Andrews, 143 Mass. 23, 8 N. E. 643.

1. Com. *v.* Carney, 108 Mass. 417.

2. State *v.* Neeson, 101 Iowa 733, 64 N. W. 409.

3. State *v.* Bane, 1 Kan. App. 537, 42 Pac. 376.

4. Com. *v.* Brown, 136 Mass. 171.

5. State *v.* Sterns, 28 Kan. 154; State *v.* Simmons, 66 N. C. 622; State *v.* Prater, 59 S. C. 271, 37 S. E. 933.

6. State *v.* Wadsworth, 30 Conn. 55; State *v.* McLaughlin, 47 Kan. 143, 27 Pac. 840; Peterson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 977.

7. Farrell *v.* State, 3 Ind. 573; State *v.* Mathieson, 77 Iowa 485, 42 N. W. 377.

8. *Indiana.*— Wreidt *v.* State, 48 Ind. 579. And see Brown *v.* State, 48 Ind. 38.

Kentucky.— Cornett *v.* Com., 64 S. W. 415, 23 Ky. L. Rep. 773.

chaser must be proved with due certainty and without material variance.[9] The indictment is supported by proof that the sale was made to the named person through his servant or messenger,[10] that he himself was the agent of an undisclosed principal,[11] or that he made the purchase jointly with another person who is not named.[12] Where the indictment charges a joint sale to two or more persons by name, it is generally held that proof of a sale to either of them will warrant a conviction,[13] and an allegation of a sale to a named person "and divers other persons" will admit evidence of a sale to a person other than the one named.[14] And the failure of the state to prove the name of the purchaser is immaterial when defendant himself has given the requisite proof.[15]

(2) Evidence Under Allegation of Sale to Person Unknown. Where the sale is alleged to have been made to "a person unknown" to the complainant or the grand jury, there can be no conviction if the sale is shown to have been made to a person who actually was known to the complainant or the jurors at the time of preferring the indictment.[16]

(J) *Place of Offense*—(1) In General. Under an indictment for a violation of the liquor laws, the evidence as to the place of commission of the offense must show that it was within the territorial jurisdiction of the court.[17] And the evidence must correspond strictly with the allegation, when the averment of place

Massachusetts.—Com. *v.* Fitzgerald, 2 Allen 297; Com. *v.* Blood, 4 Gray 31.

Mississippi.— Hudson *v.* State, 73 Miss. 784, 19 So. 965.

Missouri.— State *v.* Hays, 36 Mo. 80; State *v.* Yockey, 49 Mo. App. 443.

North Carolina.— State *v.* Tucker, 127 N. C. 539, 37 S. E. 203.

Texas.— Arnold *v.* State, (Cr. App. 1905) 85 S. W. 18; Wolf *v.* State, (Cr. App. 1905) 85 S. W. 8; Poe *v.* State, (Cr. App. 1898) 44 S. W. 493; Drechsel *v.* State, 35 Tex. Cr. 580, 34 S. W. 934.

Virginia.— Com. *v.* Taggart, 8 Gratt. 697.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 274.

Compare State *v.* Coulter, 40 Kan. 87, 19 Pac. 368; State *v.* Conner, 30 Ohio St. 405.

9. Mitchell *v.* State, 63 Ind. 276; Meyer *v.* State, 50 Ind. 18; State *v.* Drake, 33 Kan. 151, 5 Pac. 753; Com. *v.* Dillane, 1 Gray (Mass.) 483; State *v.* Feeny, 13 R. I. 623.

Illustration.— An indictment for a sale of liquor "to a certain person whose name is Mary Garland" is not supported by proof of a sale to a person whose name at the time of the sale was Mary Garland, but who, before the indictment was found, acquired a new surname by marriage. Com. *v.* Brown, 2 Gray (Mass.) 358.

10. Hall *v.* State, 87 Ga. 233, 13 S. E. 634; Dukes *v.* State, 79 Ga. 795, 4 S. E. 876.

11. Com. *v.* Woods, 165 Mass. 145, 42 N. E. 565; Com. *v.* Gormley, 133 Mass. 580; Com. *v.* Remby, 2 Gray (Mass.) 508; Com. *v.* Kimball, 7 Metc. (Mass.) 308.

12. Ryan *v.* State, 32 Tex. 280; Parker *v.* State, 45 Tex. Cr. 334, 77 S. W. 783; Terry *v.* State, 44 Tex. Cr. 411, 71 S. W. 968; Sparks *v.* State, (Tex. Cr. App. 1898) 45 S. W. 493. But *compare* Brown *v.* State, 48 Ind. 38.

13. Hall *v.* State, 87 Ga. 233, 13 S. E. 634; Dukes *v.* State, 79 Ga. 795, 4 S. E. 876; People *v.* Dippold, 30 N. Y. App. Div. 62, 51 N. Y. Suppl. 859; People *v.* Huffman, 24 N. Y. App. Div. 233, 48 N. Y. Suppl. 482; McKeever *v.* Com., 98 Va. 862, 36 S. E. 995. But *compare* Tyler *v.* State, 69 Miss. 395, 11 So. 25.

14. State *v.* Finan, 10 Iowa 19; State *v.* Wolff, 46 Mo. 584. But see Moore *v.* State, 79 Ga. 498, 5 S. E. 51.

15. Stolte *v.* State, 115 Ind. 128, 17 N. E. 258.

16. *Georgia.*— Moore *v.* State, 79 Ga. 498, 5 S. E. 51.

Kentucky.— Yost *v.* Com., 6 Ky. L. Rep. 110.

Massachusetts.— Com. *v.* Pratt, 145 Mass. 248, 13 N. E. 886; Com. *v.* Thornton, 14 Gray 41; Com. *v.* Herrick, 12 Gray 125. *Compare* Com. *v.* Luddy, 143 Mass. 563, 10 N. E. 448. Such an allegation is supported by proof of a sale to a person whose name was known to the complainant, if the latter, at the time of making the complaint, did not know that the sale was to that person. Com. *v.* Hendrie, 2 Gray 503.

Missouri.— Hays *v.* State, 13 Mo. 246. *Compare* State *v.* Ladd, 15 Mo. 430.

Virginia.— Morgenstern *v.* Com., 27 Gratt. 1018. *Compare* Hustead *v.* Com., 5 Leigh 724.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 274.

Contra.— See State *v.* Coulter, 40 Kan. 87, 19 Pac. 368.

17. *Arkansas.*— Henry *v.* State, 64 Ark. 496, 43 S. W. 498.

Indiana.— Garst *v.* State, 68 Ind. 37; Long *v.* State, 56 Ind. 206; Deck *v.* State, 47 Ind. 245; Jackson *v.* State, 19 Ind. 312; Sohn *v.* State, 18 Ind. 389.

Missouri.— State *v.* Chilton, 39 Mo. App. 51.

Texas.— Newbury *v.* State, (Cr. App. 1898) 44 S. W. 843.

Virginia.— Savage's Case, 84 Va. 582, 5 S. E. 563.

is material to the description of the offense.[18] If the indictment charges the commission of the offense within a certain municipality, as a town, city, district, or precinct, it is not supported by evidence which shows the place to have been beyond the limits of such municipality or within the limits of another.[19]

(2) IDENTIFICATION OF PARTICULAR PREMISES. Where the place is an essential element of the offense, and the indictment describes the building, tenement, or shop with particularity, the proof must correspond with reasonable certainty to the allegations, or there can be no conviction. This is the case where the indictment is for maintaining a liquor nuisance,[20] or selling liquor to be drunk on the premises where sold.[21] But reasonable intendments will be made to uphold the description of the premises as given in the evidence.[22]

(3) SALE WITHIN PROHIBITED LIMITS. Where the prosecution is under a statute prohibiting the sale of liquor within given limits of distance from a certain municipality or institution, the evidence must show with precision that the offense was committed within the forbidden zone,[23] and also that the place or institution was of the kind intended by the statute.[24]

(K) *Time of Offense*—(1) IN GENERAL. The evidence must show that the acts charged in the indictment were done within the period of limitations,[25] for which purpose it is generally necessary that there should be positive testimony as to the year when the events occurred,[26] and also that the offense charged was committed before the filing of the information or finding of the indictment.[27] Moreover, if the law or ordinance under which the prosecution is brought is of recent adoption, or has been repealed or suspended, and reënacted or revived, it

18. Bryant *v.* State, 62 Ark. 459, 36 S. W. 188; Hagan *v.* State, 4 Kan. 89; Moore *v.* State, 12 Ohio St. 387.

Keeping for sale.— Where the indictment alleges the illegal keeping of intoxicating liquors for sale, rather than the maintenance of a tenement for that purpose, a variance as to the place is not material. Com. *v.* Kern, 147 Mass. 595, 18 N. E. 566.

Screen law.— In a complaint for a violation of the screen law, the fact that the licensed premises are described as a certain room, while the license produced in evidence covers that room and also the cellar, does not constitute a material variance. Com. *v.* Keefe, 140 Mass. 301, 4 N. E. 576.

19. *Georgia.*— Mitchell *v.* State, 97 Ga. 213, 22 S. E. 386.

Massachusetts.— Com. *v.* Heffron, 102 Mass. 148.

Mississippi.— Botto *v.* State, 26 Miss. 108; Legori *v.* State, 8 Sm. & M. 697.

New Jersey.— State *v.* Ham, 64 N. J. L. 49, 44 Atl. 845; Buck *v.* State, 61 N. J. L. 525, 39 Atl. 919.

North Carolina.— State *v.* Emery, 98 N. C. 668, 3 S. E. 636.

Ohio.— Moore *v.* State, 12 Ohio St. 387.

Texas.— Hood *v.* State, 35 Tex. Cr. 585, 34 S. W. 935.

Virginia.— Savage's Case, 84 Va. 582, 5 S. E. 563.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 272.

Compare State *v.* Williams, 3 Hill (S. C.) 91.

20. Lowrey *v.* Gridley, 30 Conn. 450; State *v.* Gurlagh, 76 Iowa 141, 40 N. W. 141; Com. *v.* Hersey, 144 Mass. 297, 11 N. E. 116; Com. *v.* Bacon, 108 Mass. 26; Com. *v.* Cogan, 107 Mass. 212; Com. *v.* Heffron, 102 Mass. 148; Com. *v.* Welch, 2 Allen (Mass.) 510; Com. *v.* Boyden, 14 Gray (Mass.) 101; Com. *v.* Shattuck, 14 Gray (Mass.) 23; Com. *v.* Godley, 11 Gray (Mass.) 454; Com. *v.* McCaughey, 9 Gray (Mass.) 296; State *v.* Marchbanks, 61 S. C. 17, 39 S. E. 187.

21. Schilling *v.* State, 116 Ind. 200, 18 N. E. 682; Compher *v.* State, 18 Ind. 447.

22. State *v.* Rohrer, 34 Kan. 427, 8 Pac. 718.

23. Alhia *v.* O'Harra, 64 Iowa 297, 20 N. W. 444, holding that under an indictment for the sale of liquor within two miles of the limits of a city, the legal establishment of those limits cannot be inquired into, and the *de facto* limits may be shown by parol. And see Henry *v.* State, 71 Ark. 574, 76 S. W. 1071; Driggs *v.* State, 52 Ohio St. 37, 38 N. E. 882.

24. State *v.* Midgett, 85 N. C. 538.

25. Buckner *v.* State, 56 Ind. 207; State *v.* Cofren, 48 Me. 364; State *v.* Shelton, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064.

26. Josephdaffer *v.* State, 32 Ind. 402; State *v.* Tissing, 74 Mo. 72.

27. *Arkansas.*— Dixon *v.* State, 67 Ark. 495, 55 S. W. 850.

Georgia.— White *v.* State, 93 Ga. 47, 19 S. E. 49; Patton *v.* State, 80 Ga. 714, 6 S. E. 273.

Illinois.— Doner *v.* People, 92 Ill. App. 43.

Kansas.— State *v.* Reick, 43 Kan. 279, 23 Pac. 577.

Massachusetts.— Com. *v.* Sullivan, 123 Mass. 221; Com. *v.* Dillane, 1 Gray 483.

Texas.— Billings *v.* State, 41 Tex. Cr. 253, 53 S. W. 854.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 267, 303.

must be clearly shown that the offense was committed at a time when it was in force.[28] But it is not always necessary that the time proved should be coextensive with the time laid in the indictment.[29]

(2) SINGLE UNLAWFUL SALE. Where the prosecution is for a single unlawful act of liquor selling, so that time is not of the essence of the offense, the time need not be proved strictly as charged, but it will be sufficient to show that the act was done at any time before the date of the indictment and within the period of limitations, although at a different day or time from that alleged.[30] It has been held that proof of a number of sales about the time alleged in the indictment, and prior to the finding thereof, is sufficient to warrant a conviction.[31]

(3) CONTINUING OFFENSE. Where the offense charged is continuous in its nature, as maintaining a liquor nuisance, being a common seller, keeping liquors for unlawful sale, etc., and the indictment lays the time with a *continuando*, the evidence as to time need not be as broad as the allegation, but it will be sufficient if the offense is shown to have been committed during any part of the time charged.[32] And under a complaint for keeping a liquor nuisance on divers days between a day named and the day of filing the complaint, evidence of what took place on the day the complaint was filed is admissible to show the intent with which the liquors were kept.[33] According to some of the decisions where the

28. Patton *v.* State, 80 Ga. 714, 6 S. E. 273; Bennett *v.* People, 16 Ill. 160; Newlan *v.* Aurora, 14 Ill. 364; State *v.* Dunning, 14 S. D. 316, 85 N. W. 589; Witherspoon *v.* State, 39 Tex. Cr. 65, 44 S. W. 164, 1096.

29. Com. *v.* Higgins, 16 Gray (Mass.) 19, holding that proof that defendant maintained a building for the illegal sale of liquors for a single day will support an indictment for maintaining the same during a year.

30. *Arkansas.*— Fitzpatrick *v.* State, 37 Ark. 373.

Florida.— Dansey *v.* State, 23 Fla. 316, 2 So. 692.

Georgia.— Watts *v.* State, 120 Ga. 496, 48 S. E. 142; Cole *v.* State, 120 Ga. 485, 48 S. E. 156; Green *v.* State, 114 Ga. 918, 41 S. E. 55.

Indiana.— Fowler *v.* State, 85 Ind. 538; Buckner *v.* State, 56 Ind. 207. And see West *v.* State, 32 Ind. App. 161, 69 N. E. 465.

Iowa.— State *v.* Curley, 33 Iowa 359. And see State *v.* Malling, 11 Iowa 239.

Kansas.— State *v.* Elliott, 45 Kan. 525, 26 Pac. 55; Emporia *v.* Volmer, 12 Kan. 622; State *v.* Peak, 9 Kan. App. 436, 58 Pac. 1034; State *v.* Mitchell, 4 Kan. App. 743, 46 Pac. 541.

Louisiana.— State *v.* Stover, 111 La. 92, 35 So. 405.

Massachusetts.— Edwards *v.* Woodbury. 156 Mass. 21, 30 N. E. 175; Com. *v.* Kerrissey, 141 Mass. 110, 4 N. E. 820; Com. *v.* Mahoney, 134 Mass. 220; Com. *v.* Maloney, 16 Gray 20; Com. *v.* Carroll, 15 Gray 409; Com. *v.* Burk, 15 Gray 404; Com. *v.* Dillane, 11 Gray 67; Com. *v.* Leonard, 9 Gray 285; Com. *v.* Kelly, 10 Cush. 69.

Mississippi.— Miazza *v.* State, 36 Miss. 613. *Compare* Hyman *v.* State, 74 Miss. 829, 21 So. 971.

Missouri.— State *v.* Small, 31 Mo. 197; State *v.* Barnett, 110 Mo. App. 584, 85 S. W. 615; State *v.* Lantz, 90 Mo. App. 15; State *v.* Bradford, 79 Mo. App. 346; State *v.* Carnahan, 63 Mo. App. 244; State *v.* Heinze, 45 Mo. App. 403.

New Hampshire.— State *v.* Rundlett, 53 N. H. 70.

New York.— People *v.* Krank, 46 Hun 632 [*affirmed* in 110 N. Y. 488, 18 N. E. 242]; Tiffany *v.* Driggs, 13 Johns. 253.

South Carolina.— State *v.* Green, 61 S. C. 12, 39 S. E. 185; State *v.* Anderson, 3 Rich. 172.

Texas.— Drye *v.* State, (Cr. App. 1900) 55 S. W. 65; Loveless *v.* State, (Cr. App. 1899) 44 S. W. 508; Monford *v.* State, 35 Tex. Cr. 237, 33 S. W. 351.

Vermont.— State *v.* Whipple, 57 Vt. 637; State *v.* Munger, 15 Vt. 290.

Virginia.— Loftus *v.* Com., 3 Gratt. 631.

Wisconsin.— Boldt *v.* State, (1888) 35 N. W. 935.

United States.— U. S. *v.* Birch, 24 Fed. Cas. No. 14,595, 1 Cranch C. C. 571; U. S. *v.* Burch, 24 Fed. Cas. No. 14,682, 1 Cranch C. C. 36; Virginia *v.* Smith, 28 Fed. Cas. No. 16,966, 1 Cranch C. C. 46.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 273.

31. Koch *v.* State, 32 Ohio St. 353. But see Boldt *v.* State, 72 Wis. 7, 38 N. W. 177.

32. *Connecticut.*— State *v.* Moriarty, 50 Conn. 415.

Florida.— See Dansey *v.* State, 23 Fla. 316, 2 So. 692.

Massachusetts.— Com. *v.* Hersey, 144 Mass. 297, 11 N. E. 116; Com. *v.* Lamere, 11 Gray 319; Com. *v.* Armstrong, 7 Gray 49; Com. *v.* Wood, 4 Gray 11.

New York.— New York *v.* Mason, 4 E. D. Smith 142.

Ohio.— Clinton *v.* State, 33 Ohio St. 27.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 273.

33. Com. *v.* Carney, 152 Mass. 566, 26 N. E. 94; Com. *v.* Moore, 147 Mass. 528, 18 N. E. 403; Com. *v.* Shea, 14 Gray (Mass.) 386.

offense is of this character and the time is laid with a *continuando*, it is held that the evidence must be confined to acts which happened within the days alleged, and proof of anything prior to such days cannot be admitted.[34] But it is generally held that the indictment may be sustained by evidence of acts prior to the time charged, if within the period of limitations.[35]

(4) SALE ON PROHIBITED DAYS. Where the indictment charges a sale of liquor on Sunday, it must be proved to have been made on that day of the week, but not necessarily on the day of the month specified; evidence of a sale on any Sunday within the period of limitations will sustain a conviction.[36] Where the indictment alleges, and the evidence shows, a sale or keeping open on an election day, it may be presumed, to support a conviction, that an election was in fact held on that day.[37] Evidence to show that a defendant charged with keeping open a saloon on an election day was told that it was not an offense to open it after the close of the polls is not admissible as a defense.[38]

(L) *Evidence as to Liquor Sold* — (1) QUANTITY. Under an indictment based on a statute prohibiting the sale of liquor in quantities "less than" a certain minimum, it is necessary to show that the sale charged was of a quantity below the statutory limit.[39] But where defendant is charged with selling one quart, one pint, or any other specific quantity of liquor, it is not necessary to prove a sale of the exact quantity mentioned in the indictment, but only that the quantity sold was less than the statutory minimum.[40] Nor is it necessary that the evidence

34. Dansey *v.* State, 23 Fla. 316, 2 So. 692 (holding that the rule applies only to offenses which are continuous in their nature, and not to a sale of liquor without a license); Brevaldo *v.* State, 21 Fla. 789; State *v.* Small, 80 Me. 452, 14 Atl. 942; Com. *v.* Slosson, 152 Mass. 489, 25 N. E. 835; Com. *v.* Purdy, 146 Mass. 138, 15 N. E. 364; Com. *v.* Briggs, 11 Metc. (Mass.) 573.

In **Massachusetts**, when the offense charged is continuous in its character, as that of being a common seller of liquors, but is alleged to have been committed on a particular day, evidence of sales before or after that day is not admissible. Com. *v.* Gardner, 7 Gray (Mass.) 494; Com. *v.* Elwell, 1 Gray (Mass.) 463.

35. *Iowa.*— State *v.* Arnold, 98 Iowa 253, 67 N. W. 252; State *v.* Wamhold, 72 Iowa 468, 34 N. W. 213.

Kansas.— State *v.* Reno, 41 Kan. 674, 21 Pac. 803.

Oklahoma.— Utsler *v.* Territory, 10 Okla. 463, 62 Pac. 287.

Oregon.— State *v.* Ah Sam, 14 Oreg. 347, 13 Pac. 303.

Rhode Island.— State *v.* Knott, 5 R. I. 293.

Vermont.— State *v.* White, 70 Vt. 225, 39 Atl. 1085. And see State *v.* Haley, 52 Vt. 476.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 273.

36. *Arkansas.*— Marre *v.* State, 36 Ark. 222.

Illinois.— Koop *v.* People, 47 Ill. 327.

Indiana.— Paneake *v.* State, 81 Ind. 93, holding that if the evidence shows a sale on some Sunday within two years before the finding of the indictment, it need not fix the precise Sunday within that time.

Kentucky.— Megowan *v.* Com., 2 Metc. 3.

Missouri.— Webb City *v.* Parker, 103 Mo. App. 295, 77 S. W. 119.

New York.— It is sufficient if the sale is proved to have been made on a day which was a Sunday, although the day of the month specified in the indictment fell on a Monday. People *v.* Ball, 42 Barb. 324.

North Carolina.— State *v.* Bryson, 90 N. C. 747.

Texas.— Tackaberry *v.* State, (Cr. App. 1903) 72 S. W. 384.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 273.

The year of the offense must be proved; it is not enough to show that the sale was made on a Sunday and on a given day of the month, although in point of fact that day of the month, in a year which was within the period of limitations, did fall on a Sunday. Lehritter *v.* State, 42 Ind. 383.

37. State *v.* Powell, 3 Lea (Tenn.) 164. But *compare* Neimann *v.* State, (Tex. Cr. App. 1903) 74 S. W. 558.

38. Steinberger *v.* State, 35 Tex. Cr. 492, 34 S. W. 617.

39. State *v.* Brosius, 39 Mo. 534.

40. *Georgia.*— Harris *v.* State, 114 Ga. 436, 40 S. E. 315.

Kentucky.— Tatum *v.* Com., 59 S. W. 32, 22 Ky. L. Rep. 927.

Maine.— State *v.* Robinson, 39 Me. 150.

Massachusetts.— Com. *v.* Dillane, 11 Gray 67; Com. *v.* Buck, 12 Mete. 524.

Minnesota.— State *v.* Tisdale, 54 Minn. 105, 55 N. W. 903.

Missouri.— State *v.* Andrews, 28 Mo. 17; State *v.* Cooper, 16 Mo. 551; State *v.* Hale, 72 Mo. App. 78. *Compare* State *v.* Weiss, 21 Mo. 493.

New Hampshire.— State *v.* Connell, 38 N. H. 81; State *v.* Moore, 14 N. H. 451.

Vermont.— State *v.* Paddock, 24 Vt. 312.

should describe the quantity sold in terms of any standard measures, such expressions as a "drink," a "glass," or a "dram" being sufficient to warrant a finding that it was below the permitted quantity,[41] nor even that any witness should expressly state the quantity sold if there is evidence that it was less than the statutory minimum.[42] Where the testimony shows a sale at one time of several measures of liquor, each singly below the minimum, but aggregating more than that quantity, the circumstances must determine whether the transaction amounted to one sale of the whole or separate sales of the component parts.[43]

(2) KIND OF LIQUOR SOLD. Where the indictment in describing the liquor alleged to have been sold uses general terms, such as "intoxicating liquor," "spirituous liquor," or the like, following the language of the statute, the proof will be sufficient if it shows a sale of any specific kind of liquor coming within the general term employed.[44] Where a general term is used and a particular liquor is named under a *videlicet*, this will excuse the prosecution from strict proof, unless the matter should become essentially descriptive of the offense.[45] But if the indictment charges the sale of a specific kind of liquor by name, not accompanied by general descriptive terms, it must be proved as alleged.[46] For

Virginia.— Brock *v.* Com., 6 Leigh 634.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 265.

Statutory maximum.— Where the prosecution is under a statute forbidding the sale of liquors in quantities of a quart or more, it is not necessary for the state to show that the quantity sold was not a drop less than a legal quart; as for instance, where the liquor was sold in an ordinary brandy bottle, commonly known as a quart bottle, but really holding something less than a quart. Scott *v.* State, 25 Tex. Suppl. 168.

41. Sappington *v.* Carter, 67 Ill. 482; Hamilton *v.* State, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491; State *v.* Connell, 38 N. H. 81; Lacy *v.* State, 32 Tex. 227.

42. Keiser *v.* State, 84 Ind. 229.

43. Klein *v.* State, 76 Ind. 333. And see Weireter *v.* State, 69 Ind. 269. *Compare* Olmstead *v.* State, 90 Ala. 634, 8 So. 668.

44. *Delaware.*— State *v.* Bennet, 3 Harr. 565, holding that an indictment for selling spirituous liquor is sustained by proof of the sale of common cordial.

Indiana.— Deveny *v.* State, 47 Ind. 208.

Massachusetts.— Com. *v.* Morgan, 149 Mass. 314, 21 N. E. 369; Com. *v.* Leonard, 11 Gray 458; Com. *v.* Burns, 9 Gray 287; Com. *v.* Giles, 1 Gray 466; Com. *v.* White, 10 Metc. 14.

Mississippi.— Noonan *v.* State, 1 Sm. & M. 562.

Missouri.— State *v.* Rogers, 39 Mo. 431.

New Hampshire.— State *v.* Wright, 68 N. H. 351, 44 Atl. 519.

Rhode Island.— State *v.* Campbell, 12 R. I. 147.

Texas.— Prinzel *v.* State, 35 Tex. Cr. 274, 33 S. W. 350.

Vermont.— See State *v.* Scampini, 77 Vt. 92, 59 Atl. 201.

Liquor not of general class described.— Where the indictment charges defendant with selling "spirituous, vinous, or malt liquors," it must be shown that he sold one or more of the kinds of liquors mentioned, and proof that the liquor sold was intoxicating is not sufficient, without further proof that it was either spirituous, vinous, or malt. Brantley *v.* State, 91 Ala. 47, 8 So. 816. So an indictment for unlawful sales of "spirituous and intoxicating liquors" is not supported by proof of sales of liquors which are intoxicating but not spirituous. Com. *v.* Livermore, 4 Gray (Mass.) 18. And under an indictment charging defendant with being a common seller of spirituous liquor, evidence of the sale of ale, porter, and cider is not admissible. State *v.* Adams, 51 N. H. 568.

45. McCuen *v.* State, 19 Ark. 630; Bruguier *v.* U. S., 1 Dak. 5, 46 N. W. 502; State *v.* Watts, 101 Mo. App. 658, 74 S. W. 377; Frisbie *v.* State, 1 Oreg. 248. *Compare* Lindsay *v.* State, 19 Ala. 560; Loid *v.* State, 104 Ga. 724, 30 S. E. 961; State *v.* Smith, 38 Mo. App. 618.

46. *Arkansas.*— Williams *v.* State, 35 Ark. 430.

Indiana.— Dant *v.* State, 106 Ind. 79, 5 N. E. 870.

Iowa.— State *v.* Hesner, 55 Iowa 494, 8 N. W. 329.

Kansas.— Lincoln Center *v.* Linker, 5 Kan. App. 242, 47 Pac. 174.

Kentucky.— Locke *v.* Com., 74 S. W. 654, 25 Ky. L. Rep. 76; Cockerell *v.* Com., 115 Ky. 296, 73 S. W. 760, 24 Ky. L. Rep. 2149.

Missouri.— State *v.* Heinze, 45 Mo. App. 403.

Texas.— Lacy *v.* State, 32 Tex. 227; Cousins *v.* State, 46 Tex. Cr. 87, 79 S. W. 549; Galloway *v.* State, 23 Tex. App. 398, 5 S. W. 246, holding that an indictment for the unlawful sale of "whisky" is supported by proof of a sale of "whisky cocktail."

Washington.— State *v.* Shelton, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064.

Contra.— See Frisbie *v.* State, 1 Oreg. 248.

Intent.— Proof of sales of liquor other than that for which a conviction is sought is admissible upon the question of the intent with

the purpose of proving the particular kind of liquor which was sold, it is proper to admit the direct testimony of a witness, who need not be an expert or a chemist, that it was whisky, or otherwise as the case may be,[47] or the fact that the witness called for the particular kind of liquor alleged to have been sold, and received liquor purporting to be of that kind, especially with testimony that it looked, smelled, or tasted like the kind of liquor alleged,[48] notwithstanding the fact that defendant sold it under a different name, or swears that it was of a different kind, as to which he may be contradicted by any pertinent evidence.[49] That the liquor was intoxicating, and such as might not lawfully be sold, may be shown by defendant's entreaty to the purchaser not to report the matter to the grand jury.[50] It is admissible to introduce in evidence a bottle containing liquor, provided it is fully identified by the witness as the liquor which he bought from defendant.[51] Stamps, tags, and labels, on kegs and barrels in defendant's place of business may also be admissible for the purpose of determining the variety of liquor in question.[52]

(3) Proof of Intoxicating Properties of Liquor — (a) In General. On a trial for keeping or selling intoxicating liquors in violation of law, it is necessary to show by the evidence that the liquor in question was intoxicating,[53] except in

which the sale was made, defendant justifying under a druggist's license. Dobson *v.* State, 5 Lea (Tenn.) 271.

47. *Alabama.*— Merkle *v.* State, 37 Ala. 139.

Dakota.— Territory *v.* Pratt, 6 Dak. 483, 43 N. W. 711.

Iowa.— State *v.* Miller, 53 Iowa 84, 154, 209, 4 N. W. 838, 900, 1083.

Massachusetts.— Com. *v.* Dowdican, 114 Mass. 257.

Nebraska.— Burrell *v.* State, 25 Nebr. 581, 41 N. W. 399.

Texas.— Mitchell *v.* State, (Cr. App. 1897) 40 S. W. 284.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 291.

48. *Illinois.*— Kammann *v.* People, 26 Ill. App. 48 [*affirmed* in 124 Ill. 481, 16 N. E. 661].

Indiana.— Taylor *v.* State, 113 Ind. 471, 16 N. E. 183.

Iowa.— State *v.* Cloughly, 73 Iowa 626, 35 N. W. 652; Baurose *v.* State, 1 Iowa 374.

New Jersey.— State *v.* Marks, 65 N. J. L. 84, 46 Atl. 757.

Texas.— Parker *v.* State, 39 Tex. Cr. 262, 45 S. W. 812.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 316.

49. See State *v.* Hickman, 54 Kan. 225, 38 Pac. 256; Com. *v.* Dobbyn, 14 Gray (Mass.) 44; Matkins *v.* State, (Tex. Cr. App. 1900) 58 S. W. 108; Sparks *v.* State, (Tex. Cr. App. 1898) 45 S. W. 493; Williamson *v.* State, (Tex. Cr. App. 1898) 43 S. W. 983; Brown *v.* State, (Tex. Cr. App. 1897) 39 S. W. 578; Leavering *v.* State, (Tex. Cr. App. 1896) 33 S. W. 976.

Price paid as evidence.— Where it appears that the liquor was sold under the name of cider, but that fifty cents was paid for a pint of it, it is proper to admit evidence that other dealers in the same town were selling cider at fifty cents a gallon. Sparks *v.* State, (Tex. Cr. App. 1898) 45 S. W. 493.

50. Carroll *v.* State, 80 Miss. 349, 31 So. 742.

51. Com. *v.* Stevens, 142 Mass. 457, 8 N. E. 344; Matkins *v.* State, (Tex. Cr. App. 1900) 58 S. W. 108; Drye *v.* State, (Tex. Cr. App. 1900) 55 S. W. 65; McDonald *v.* State, (Tex. Cr. App. 1899) 49 S. W. 589.

Unidentified bottles.— It is error to permit bottles of whisky to be exhibited to the jury which have not been identified as the same bottles which were bought from defendant. Hollar *v.* State, (Tex. Cr. App. 1903) 73 S. W. 961.

Tasting or smelling contents.— On a prosecution for maintaining a liquor nuisance, it is error to permit the jury to taste or smell the contents of a bottle seized on defendant's premises. State *v.* Lindgrove, 1 Kan. App. 51, 41 Pac. 688. On the issue as to whether or not a certain medicinal preparation was intoxicating, an offer to introduce in evidence bottles of it, to be smelled, drunk, or tasted by the jury, was properly overruled, as tending to make the jurors witnesses. Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699. But *compare* State *v.* McCafferty, 63 Me. 223, search and seizure process under Me. Rev. St. c. 27, §§ 22, 34.

52. Com. *v.* Collier, 134 Mass. 203; State *v.* Wright, 68 N. H. 351, 44 Atl. 519.

53. *Indiana.*— Kurz *v.* State, 79 Ind. 488; Plunkett *v.* State, 69 Ind. 68; Lathrope *v.* State, 50 Ind. 555; Klare *v.* State, 43 Ind. 483; Josephdaffer *v.* State, 32 Ind. 402; Houser *v.* State, 18 Ind. 106.

Massachusetts.— Com. *v.* Hardiman, 9 Gray 136.

Nebraska.— Burrell *v.* State, 25 Nebr. 581, 41 N. W. 399.

Texas.— Seales *v.* State, (Cr. App. 1904) 83 S. W. 380; Benson *v.* State, 39 Tex. Cr. 56, 44 S. W. 167, 1091.

Canada.— Reg. *v.* Grannis, 5 Manitoba 153; Reg. *v.* Bennett, 1 Ont. 445.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 265, 316.

cases where the court may take judicial notice of this fact,[54] or where the liquor is shown to be of a kind which the statute declares shall be deemed intoxicating.[55] But generally, where it was sold under some disguise or fanciful name, with a view to eluding the law, it is a question of fact for the jury whether or not it was intoxicating liquor.[56] The fact that the liquor sold was intoxicating may be shown by any competent evidence whether direct or circumstantial.[57] It is competent to show sales other than those upon which the state elects to try defendant, in order to show the purposes for which the liquor in question was sold and purchased.[58]

(b) OPINIONS OF WITNESSES. On this issue a witness may testify without being an expert, if he has had personal experience or observation such as to enable him to form a correct opinion.[59] But such testimony will not be admissible unless it

Question of intent.—Where defendant knew that he was selling brandy cherries, the only issue was whether such sale was a sale of spirituous liquors, and evidence to show intent was not admissible. Petteway *v.* State, 36 Tex. Cr. 97, 35 S. W. 646.

Defendant's knowledge or belief.— In Farrell *v.* State, 32 Ohio St. 456, 30 Am. Rep. 614, it is held that defendant may show that he both bought and sold the liquor in question with the understanding and belief that it was not intoxicating liquor. But *compare* State *v.* Gill, 89 Minn. 502, 95 N. W. 449.

54. See Com. *v.* Peckham, 2 Gray (Mass.) 514; Barnes *v.* State, (Tex. Cr. App. 1898) 44 S. W. 491; State *v.* Barron, 37 Vt. 57.

55. Com. *v.* Shea, 14 Gray (Mass.) 386. And see State *v.* O'Connell, 99 Me. 61, 58 Atl. 59; Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677; State *v.* Dick, 47 Minn. 375, 50 N. W. 362.

56. State *v.* Wall, 34 Me. 165; Prussia *v.* Guenther, 16 Abb. N. Cas. (N. Y.) 230.

57. Dant *v.* State, 83 Ind. 60. And see State *v.* Schultz, 79 Iowa 478, 44 N. W. 713; State *v.* Mathieson, 77 Iowa 485, 42 N. W. 377; Com. *v.* Savery, 145 Mass. 212, 13 N. E. 611; Com. *v.* Pease, 110 Mass. 412; State *v.* Peterson, 41 Vt. 504; State *v.* Good, 56 W. Va. 215, 49 S. E. 121.

Drunken men about premises.— Where defendant alleges that the liquor sold by him was not intoxicating, it is proper to admit evidence that drunken men were seen about his place of business about the time of the sale in question, or that men were seen to go into the place sober and come out drunk. Com. *v.* O'Donnell, 143 Mass. 178, 9 N. E. 509; Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395.

Whisky in stock.— Testimony that defendant had whisky in stock at his place of business about the time of the alleged sale, and that persons who drank the beverage sold became intoxicated, is admissible on this question. State *v.* Adams, 44 Kan. 135, 24 Pac. 71; State *v.* Pfefferle, 36 Kan. 90, 12 Pac. 406. *Compare* Nelson *v.* State, 53 Nebr. 790, 74 N. W. 279.

Proof of fortifying liquor.— Evidence that native wine, found in defendant's place of business, and which he was selling as agent, had been fortified by spirits, rendering it intoxicating, that it was not so fortified when delivered to him by his principal, and that defendant kept in the place material for so fortifying it, is sufficient to authorize the submission to the jury of the question whether the spirits were added by defendant. Com. *v.* Lufkin, 167 Mass. 553, 46 N. E. 109.

Labels.— On an issue as to the intoxicating properties of liquors alleged to have been unlawfully sold by defendant, evidence as to how defendant's bitters were labeled is irrelevant. Carson *v.* State, 69 Ala. 235.

Tests applied by witness.— The jury may be warranted in finding the liquor to be intoxicating merely on the testimony of a witness who saw and smelled it but did not taste it. Haines *v.* Hanrahan, 105 Mass. 480.

58. Carl *v.* State, 87 Ala. 17, 6 So. 118, 4 L. R. A. 380; State *v.* Coulter, 40 Kan. 87, 19 Pac. 368; Satterfield *v.* State, (Tex. Cr. App. 1898) 44 S. W. 291; Dane *v.* State, 36 Tex. Cr. 84, 35 S. W. 661. But *compare* Malone *v.* State, (Tex. Cr. App. 1899) 51 S. W. 381.

Sale on other days.— Where the question is as to the quality of the liquor sold on a Sunday, and it is not disputed that intoxicating liquor was sold at the same place on week days, a conviction will not be disturbed. People *v.* Beller, 73 Mich. 640, 41 N. W. 827.

59. *Alabama.*— Carl *v.* State, 87 Ala. 17, 6 So. 118, 4 L. R. A. 380.

Indiana.— West *v.* State, 32 Ind. App. 161, 69 N. E. 465.

Kansas.— State *v.* Crawford, (App. 1900) 61 Pac. 316.

Kentucky.— Cockerell *v.* Com., 115 Ky. 296, 73 S. W. 760, 24 Ky. L. Rep. 2149; Rush *v.* Com., 47 S. W. 585, 10 Ky. L. Rep. 673.

Massachusetts.— Com. *v.* Peto, 136 Mass. 155; Com. *v.* Leo, 110 Mass. 414; Com. *v.* White, 15 Gray 407; Com. *v.* Taylor, 14 Gray 26.

New York.— People *v.* Henschel, 12 N. Y. Suppl. 46.

Texas.— Terry *v.* State, 44 Tex. Cr. 411, 71 S. W. 968; Stewart *v.* State, 37 Tex. Cr. 135, 38 S. W. 1143; Green *v.* State, (Cr. App. 1896) 35 S. W. 967. And see Patrick *v.* State, 45 Tex. Cr. 587, 78 S. W. 947; Faucett

is clearly established that the witness speaks of a liquor proved or admitted to be identical with that sold by defendant.[60]

(c) Effects of Use. On the question of the intoxicating properties of the liquor sold by defendant, testimony of witnesses that they drank it and became intoxicated in consequence, or that it produced symptoms of alcoholic intoxication in them, is competent,[61] provided they speak of liquor identical with that sold by the accused,[62] and is sufficient evidence on the point, unless successfully contradicted.[63]

(d) Chemical Analysis. To show that the liquor in question was intoxicating, or that it contained the percentage of alcohol designated in the statute as sufficient to make it intoxicating, it is competent to put in evidence the result of a chemical analysis made by a qualified chemist, there being proper proof of identity.[64]

(iii) *Evidence of Particular Offenses*—(a) *Unlawful Sale of Liquors*—(1) Sale in General. To convict a defendant of an unlawful sale of liquor, there must be evidence of a completed transaction,[65] which amounts in law to a sale as distinguished from other forms of dealing with the article.[66] But it is not

v. State, (Cr. App. 1903) 73 S. W. 807; Racer *v.* State, (Cr. App. 1903) 73 S. W. 807.

Vermont.— State *v.* Twenty-Five Packages of Liquor, 38 Vt. 387. *Compare* State *v.* Peterson, 41 Vt. 504.

Virginia.— Savage *v.* Com., 84 Va. 582, 619, 5 S. E. 563, 565.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 316.

60. Terry *v.* State, 44 Tex. Cr. 411, 71 S. W. 968.

61. *Alabama.*— Costello *v.* State, 130 Ala. 143, 30 So. 376; Brantley *v.* State, 91 Ala. 47, 8 So. 816.

Georgia.— Tharpe *v.* State, 89 Ga. 748, 15 S. E. 647. And see Finch *v.* State, 120 Ga. 174, 47 S. E. 504.

Kansas.— State *v.* Adams, 44 Kan. 135, 24 Pac. 71.

Kentucky.— Parrott *v.* Com., 6 Ky. L. Rep. 221.

Mississippi.— Luncnberger *v.* State, 74 Miss. 379, 21 So. 134; Fairly *v.* State, 63 Miss. 333.

Nebraska.— Kerr *v.* State, 63 Nebr. 115, 88 N. W. 240.

Pennsylvania.— Com. *v.* Reyburg, 122 Pa. St. 299, 16 Atl. 351, 2 L. R. A. 415.

South Carolina.— State *v.* Robison, 61 S. C. 106, 39 S. E. 247.

Texas.— Parker *v.* State, (Cr. App. 1903) 75 S. W. 30; Taylor *v.* State, 44 Tex. Cr. 437, 72 S. W. 181; McDaniel *v.* State, (Cr. App. 1901) 65 S. W. 1068; Matkins *v.* State, (Cr. App. 1901) 62 S. W. 911; Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395; Barker *v.* State, (Cr. App. 1898) 47 S. W. 980; Hartgraves *v.* State, (Cr. App. 1897) 43 S. W. 331; Christian *v.* State, (Cr. App. 1897) 39 S. W. 682; Brigham *v.* State, (Cr. App. 1897) 39 S. W. 572; Kemp *v.* State, (Cr. App. 1897) 38 S. W. 987. And see Murry *v.* State, 46 Tex. Cr. 128, 79 S. W. 568.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 291.

62. Taylor *v.* State, (Tex. Cr. App. 1899) 50 S. W. 343.

63. Knowles *v.* State, 80 Ala. 9.

64. *Maine.*— State *v.* Piche, 98 Me. 348, 56 Atl. 1052.

Massachusetts.— Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677; Com. *v.* Boyle, 145 Mass. 373, 14 N. E. 155; Com. *v.* Magee, 141 Mass. 111, 4 N. E. 819; Com. *v.* Bentley, 97 Mass. 551.

Missouri.— State *v.* Wills, 106 Mo. App. 196, 80 S. W. 311.

Nebraska.— Kerr *v.* State, 63 Nebr. 115, 88 N. W. 240.

New York.— People *v.* Kastner, 101 N. Y. App. Div. 265, 91 N. Y. Suppl. 1004.

Rhode Island.— State *v.* McKenna, 16 R. I. 398, 17 Atl. 51.

Texas.— Bailey *v.* State, (Cr. App. 1902) 66 S. W. 780.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 291.

Variation in analysis.— In a prosecution for the illegal sale of liquors, the state need not show that the liquor alleged to have been sold complied strictly in analysis with the commercial article known by that name. State *v.* Cunningham, 2 Mo. App. Rep. 887.

65. Fleming *v.* State, 106 Ga. 359, 32 S. E. 338, holding that the fact that defendant had agreed to sell a certain quantity of whisky for a certain price, and was about to draw it from a barrel, when he was interrupted by the entrance of the police, does not show a sale.

66. Guy *v.* State, 96 Md. 692, 54 Atl. 879. See, however, Martin *v.* State, (Tex. Cr. App. 1901) 61 S. W. 486.

Exceptions — Sale or furnishing.— Where the statute prohibits the selling, giving, or furnishing of liquor, although the evidence may not clearly make out a sale, it does not follow that defendant must be acquitted; for if it tends to establish either a sale or a furnishing, it must go to the jury. State *v.* Hassett, 64 Vt. 46, 23 Atl. 584. Where the statute concerns any one who shall "sell or be concerned in selling," and the indictment charged that defendant "sold" liquors, it will be supported

always necessary to prove each separate element of a contract of sale. Thus, while payment of money is a distinctive feature of a sale, and tends strongly to prove it,[67] the other circumstances in the case may establish a sale without any evidence of the passing of a consideration.[68] If the parties have attempted to cloak or disguise the transaction or to evade the law by a subterfuge, evidence is admissible to show the real character of their dealings, and will justify a conviction if it satisfies the jury that a sale was actually intended and accomplished.[69] The fact that defendant on certain occasions refused to sell liquors to persons who wished to buy it has no tendency to contradict or control evidence that he

by proof that he was concerned in selling them. Needham *v.* State, 19 Tex. 332.

In Connecticut it has been held that a conviction for the illegal sale of intoxicating liquors is sustained by proof that defendant kept such liquors with intent to sell contrary to law. State *v.* Teahan, 50 Conn. 92.

Proof of buying instead of selling.— Under an indictment for "selling" liquor, a person cannot be convicted on evidence showing that he was a purchaser. State *v.* Miller, 26 W. Va. 106.

67. Loveless *v.* State, 40 Tex. Cr. 131, 49 S. W. 98.

Evidence as to payment.— It is sufficient to sustain a verdict of guilty if the evidence shows that a person put down money in defendant's presence and carried away a bottle of liquor without objection. Liles *v.* State, 43 Ark. 95; McClure *v.* State, 43 Ark. 75; Latham *v.* State, (Tex. Cr. App. 1903) 72 S. W. 182. But an indictment for selling without license is not supported merely by proof that liquor was drunk on defendant's premises by his invitation. State *v.* Quinn, 25 Mo. App. 102. And see State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844. And in a prosecution for a sale of whisky on Sunday, where the witness was so drunk at the time of the alleged offense as to be unable to testify whether the liquor was sold or given to him, or whether or not he paid for it, it was held that the evidence was not sufficient to sustain a conviction. Keller *v.* State, 23 Tex. App. 259, 4 S. W. 886. A sale may be inferred from the fact that a waiter carried wine from the bar into the eating room, and brought back money. Com. *v.* Reichart, 108 Mass. 482.

68. *Arkansas.*— Hill *v.* State, 37 Ark. 395.

Kentucky.— Smith *v.* Com., 31 S. W. 471, 17 Ky. L. Rep. 416.

Massachusetts.— Com. *v.* Stevens, 153 Mass. 4, 26 N. E. 96.

New Hampshire.— State *v.* Simons, 17 N. H. 83.

New York.— Auburn City Excise Com'rs *v.* Merchant, 34 Hun 19.

Delivery as evidence.— In Maine and Massachusetts, by statute, in prosecutions for selling liquor contrary to law, the delivery of liquor is presumptive evidence of a sale of it, and sufficient to warrant a conviction if not controlled by other evidence. State *v.* Day, 37 Me. 244; State *v.* Fairfield, 37 Me. 517; Com. *v.* Gavin, 148 Mass. 449, 18 N. E. 675, 19 N. E. 554; Com. *v.* Taylor, 113 Mass. 4; Com. *v.* Pillsbury, 12 Gray (Mass.) 127; Com. *v.* Harrison, 11 Gray (Mass.) 310; Com. *v.* Thrasher, 11 Gray (Mass.) 57.

Taking orders for liquor.— To prove a sale by defendant, it is proper to show that orders for liquor were sent to him, by written message or by telephone, and that liquor was accordingly delivered or shipped to those ordering it. State *v.* Johnson, 86 Minn. 121, 90 N. W. 161; State *v.* Priester, 43 Minn. 373, 45 N. W. 712. And the books of an express company are competent evidence to show the shipment and delivery of goods to the buyer. State *v.* Kriechbaum, 81 Iowa 633, 47 N. W. 872.

Order on third person.— If it is shown that defendant gave to a person desiring to buy liquor a written order on a third person for such liquor, and received the money for it, it is evidence of a sale by defendant. Hunter *v.* State, 55 Ark. 357, 18 S. W. 374; State *v.* Briggs, 81 Iowa 585, 47 N. W. 865.

Confessions or admissions of defendant are also proper evidence. Thus his admission, in a stipulation where he attempts to justify under a revoked license, that he sold the liquor as charged, is sufficient evidence to warrant a conviction. Neuman *v.* State, 76 Wis. 112, 45 N. W. 30.

69. Reese *v.* Newnan, 120 Ga. 198, 47 S. E. 560. See New Gloucester *v.* Bridgham, 28 Me. 60; Archer *v.* State, 45 Md. 33; State *v.* Scoggins, 107 N. C. 959, 12 S. E. 59, 10 L. R. A. 542.

This principle is illustrated by the cases, frequently occurring, where defendant, on being applied to for liquor, refuses to sell it, or says he has none for sale, but leads the way to another part of his premises, where the purchaser "finds" liquor, and defendant "finds" the price, or where defendant pretends that the liquor belongs to a third person, but nevertheless receives the money for it. See Roberson *v.* State, 100 Ala. 37, 14 So. 554; Stultz *v.* State, 96 Ind. 456; Knox *v.* State, (Tex. Cr. App. 1903) 77 S. W. 13.

Sale disguised as gift.— Where the parties state that the money which passed between them was the price of some other article sold at the same time, and that the liquor delivered from the one to the other was given without consideration or as a bonus, it is for the jury to determine from the evidence whether there was a sale of liquor disguised by a subterfuge or trick. See Marcus *v.* State, 89 Ala. 23, 8 So. 155; State *v.* Simons, 17 N. H. 83.

made the particular sale charged, and is not admissible on that issue.[70] An unlawful sale of intoxicating liquor may be proved by other witnesses than the purchaser.[71]

(2) Sale, Gift, or Exchange. Where the statute prohibits the sale of liquor by certain persons or under certain conditions, and the indictment distinctly charges a sale, there can be no conviction on evidence which proves a gift or exchange of liquor, as distinguished from a sale.[72]

(3) Proof of Sales Other Than Those Counted on. Where an indictment for the unlawful sale of liquor contains but a single count, the prosecution should not be allowed to go to the jury upon evidence of more than one transaction, and if evidence of several sales has been introduced the state should be required to elect.[73] And where, on an indictment for illegal selling, the prosecution has proved one unlawful sale, it is error to admit evidence of other sales,[74] unless they all constitute one transaction, or the further evidence is necessary to identify the offender or to prove motive or knowledge,[75] or unless the whole series must be proved to make out the offense.[76] But evidence of other sales than that

70. Barnes *v.* State, 20 Conn. 254; Corley *v.* State, 87 Ga. 332, 13 S. E. 556; Com. *v.* Bickum, 153 Mass. 386, 26 N. E. 1003; Com. *v.* Barlow, 97 Mass. 597; Becker *v.* State, (Tex. Cr. App. 1899) 50 S. W. 949; Stewart *v.* State, 37 Tex. Cr. 135, 38 S. W. 1143.

71. Com. *v.* Tinkham, 14 Gray (Mass.) 12. And see State *v.* Robison, 61 S. C. 106, 39 S. E. 247.

72. *Alabama.*— New Decatur *v.* Lande, 93 Ala. 84, 9 So. 382; Williams *v.* State, 91 Ala. 14, 8 So. 668.

Arkansas.— Gillan *v.* State, 47 Ark. 555, 2 S. W. 185.

Illinois.— Birr *v.* People, 113 Ill. 645; Humpeler *v.* People, 92 Ill. 400; Wlecke *v.* People, 14 Ill. App. 447.

Indiana.— Harvey *v.* State, 80 Ind. 142; Kurz *v.* State, 79 Ind. 488; Massey *v.* State, 74 Ind. 368; Stevenson *v.* State, 65 Ind. 409. But *compare* Dant *v.* State, 106 Ind. 79, 5 N. E. 870; Baker *v.* State, 2 Ind. App. 517, 28 N. E. 735.

Massachusetts.— Com. *v.* Worcester, 126 Mass. 256; Com. *v.* Packard, 5 Gray 101.

Oregon.— Wood *v.* Territory, 1 Oreg. 223.

Texas.— Bottoms *v.* State, (Cr. App. 1903) 73 S. W. 16; Efird *v.* State, 44 Tex. Cr. 447, 71 S. W. 957; Alexander *v.* State, (Cr. App. 1901) 60 S. W. 763; Largin *v.* State, 37 Tex. Cr. 574, 40 S. W. 280; Keller *v.* State, 23 Tex. App. 259, 4 S. W. 886. *Compare* Gaines *v.* State, 37 Tex. Cr. 73, 38 S. W. 774.

Vermont.— See State *v.* Freeman, 27 Vt. 520.

West Virginia.— State *v.* Cooper, 26 W. Va. 338.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 269.

Contra.— Dahmer *v.* State, 56 Miss. 787.

73. *Connecticut.*— State *v.* Miller, 24 Conn. 522.

Mississippi.— Stone *v.* State, (1890) 7 So. 500.

Missouri.— State *v.* Fierline, 19 Mo. 380.

New York.— Hodgman *v.* People, 4 Den. 235.

Ohio.— Stockwell *v.* State, 27 Ohio St. 563.

Texas.— Walker *v.* State, (Cr. App. 1903) 72 S. W. 401.

Distinct offenses.— Where the indictment is for selling and also for soliciting orders for intoxicating liquors, the prosecuting attorney is not required to elect on which count he will proceed. Williams *v.* State, 107 Ga. 693, 33 S. E. 641.

As to the sufficiency of such election see State *v.* Rudy, 9 Kan. App. 69, 57 Pac. 263; State *v.* Gomes, 9 Kan. App. 63, 57 Pac. 262; State *v.* Ferguson, 8 Kan. App. 810, 57 Pac. 555; State *v.* Collins, 8 Kan. App. 398, 57 Pac. 38; State *v.* Keenan, 7 Kan. App. 813, 55 Pac. 102; State *v.* Webb, 7 Kan. App. 423, 53 Pac. 276.

74. *Kansas.*— State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623; State *v.* Hughes, 3 Kan. App. 95, 45 Pac. 94; State *v.* Marshall, 2 Kan. App. 792, 44 Pac. 49.

Mississippi.— Ware *v.* State, 71 Miss. 204, 13 So. 936; Naul *v.* McComb City, 70 Miss. 699, 12 So. 903; Stone *v.* State, (1890) 7 So. 500; Bailey *v.* State, 67 Miss. 333, 7 So. 348; King *v.* State, 66 Miss. 502, 6 So. 188.

Missouri.— State *v.* McGrath, 73 Mo. 181; State *v.* Fierline, 19 Mo. 380; State *v.* Roberts, 33 Mo. App. 524.

New York.— People *v.* Andrus, 74 N. Y. App. Div. 542, 77 N. Y. Suppl. 780; Hodgman *v.* People, 4 Den. 235. *Compare* People *v.* Henschel, 12 N. Y. Suppl. 46.

Texas.— Belt *v.* State, (Cr. App. 1904) 78 S. W. 933; Grimes *v.* State, 44 Tex. Cr. 542, 72 S. W. 862; Efird *v.* State, 44 Tex. Cr. 447, 71 S. W. 957. *Compare* Lynn *v.* State, (Cr. App. 1893) 22 S. W. 878.

West Virginia.— State *v.* Chisnell, 36 W. Va. 659, 15 S. E. 412. *Compare* Com. *v.* Leonard, 9 Gray (Mass.) 285. But see State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089; State *v.* Croteau, 23 Vt. 14, 54 Am. Dec. 90; State *v.* Smith, 22 Vt. 74.

75. King *v.* State, 66 Miss. 502, 6 So. 188. And see State *v.* Arnold, 98 Iowa 253, 67 N. W. 252.

76. See State *v.* Stephens, 70 Mo. App.

counted on, made on similar occasions, is admissible on the question of intent,[77] to show defendant's authorization or acquiescence in sales made by his wife or employees,[78] or to show his general system of conducting his business,[79] or the purpose for which the particular sale was made.[80] The state is not restricted in its evidence to proof of sales which were testified to before the grand jury.[81] And where the proceeding is by information, which is verified both by the prosecuting attorney and the complaining witness, it is not error to permit evidence to be introduced on the trial showing sales of liquor other than those of which the prosecuting witness had knowledge.[82]

(4) SALE WITHOUT LICENSE. To establish the commission of this offense, it is necessary to prove a sale by defendant, as in other cases,[83] or a sale in violation of the terms or conditions of his license.[84] On an indictment for violating a municipal ordinance, by selling without a license, evidence of the population of the city and county, and the annual sales of liquor and the profits thereon, is properly rejected, because the reasonableness of the ordinance, if questioned, is for the court.[85] When the prosecution is for retailing liquors without having paid the occupation tax therefor, one cannot be convicted of this offense without proof that a tax was imposed on such occupation,[86] and it is error to exclude the sheriff's receipt for the tax, offered in evidence by defendant to prove that he had paid the tax.[87] The accused may show that he was a druggist or physician and dispensed the liquor in good faith as a medicine or on a prescription.[88] A conviction for selling liquor without a dramshop license will not be disturbed, where the only evidence presented by the accused was a merchant's license, and two wit-

554; Lillienfeld *v.* Com., 92 Va. 818, 23 S. E. 882.

77. Com. *v.* Coughlin, 182 Mass. 558, 66 N. E. 207; Com. *v.* Sinclair, 138 Mass. 493; Dobson *v.* State, 5 Lea (Tenn.) 271; Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395.

78. Sellers *v.* State, 98 Ala. 72, 13 So. 530; Hensly *v.* State, 52 Ala. 10; Pearce *v.* State, 40 Ala. 720.

79. Bennett *v.* State, (Tex. Cr. App. 1899) 50 S. W. 945. But *compare* Blasingame *v.* State, (Tex. Cr. App. 1905) 85 S. W. 275.

80. State *v.* Elliott, 45 Kan. 525, 26 Pac. 55; State *v.* Coulter, 40 Kan. 87, 19 Pac. 368; Leftwich *v.* State, (Tex. Cr. App. 1900) 55 S. W. 571.

81. Green *v.* State, 114 Ga. 918, 41 S. E. 55; Davis *v.* State, 105 Ga. 783, 32 S. E. 130; Com. *v.* Phelps, 11 Gray (Mass.) 73.

82. State *v.* Whit, 63 Kan. 882, 65 Pac. 234; State *v.* Wood, 49 Kan. 711, 31 Pac. 786; State *v.* Estlinbaum, 47 Kan. 291, 27 Pac. 996; State *v.* Reno, 41 Kan. 674, 21 Pac. 803; State *v.* Rudy, 9 Kan. App. 69, 57 Pac. 263; State *v.* Tegder, 6 Kan. App. 762, 50 Pac. 985. *Compare* State *v.* Nulty, 47 Kan. 259, 27 Pac. 995; State *v.* Hescher, 46 Kan. 534, 26 Pac. 1022; State *v.* Brooks, 33 Kan. 708, 7 Pac. 591; State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623.

Statement indorsed on information.—Where the proceeding is by information, and the prosecuting attorney files therewith a statement of evidence taken by him, relating to sales made by the accused, and no other specification of sales to be given in evidence is filed, the state should be confined to proving the sales specified in the statement. State *v.* Lawson, 45 Kan. 339, 25 Pac. 864. See Com. *v.* Giles, 1 Gray (Mass.) 466.

83. Fisher *v.* People, 103 Ill. 101; People *v.* Hicks, 79 Mich. 457, 44 N. W. 931; Monford *v.* State, 35 Tex. Cr. 237, 33 S. W. 351.

Proof of a single sale of intoxicating liquors will support an indictment under a statute forbidding retailing without a license. Lawson *v.* State, 55 Ala. 118.

Presumption as to ownership of liquor.—The presumption, on a trial for selling liquor without a license, is that the vendor is the owner of the liquor sold. Rana *v.* State, 51 Ark. 481, 11 S. W. 692.

The offense of selling liquors without a license and of keeping such liquors with intent to sell without a license are distinct offenses, and the fact that an indictment for both of them avers that they were committed on the same day does not raise a presumption that they arose out of one transaction, namely, the sale of liquors without a license, which liquors, up to the time of sale, defendant had kept with intent to sell them without a license. State *v.* Ryan, 68 Conn. 512, 37 Atl. 377.

84. Com. *v.* Davis, 121 Mass. 352. *Compare* Huffstater *v.* State, 5 Hun (N. Y.) 23.

Sunday sale.—An indictment for selling liquor without a license is supported by proof of such a sale on Sunday, although another provision of the statute makes it indictable to sell on Sunday with or without a license. Com. *v.* Harrison, 11 Gray (Mass.) 310; People *v.* Krank, 110 N. Y. 488, 18 N. E. 242.

85. Elk Point *v.* Vaughn, 1 Dak. 113, 46 N. W. 577.

86. Scott *v.* State, (Tex. Cr. App. 1904) 82 S. W. 656.

87. Curry *v.* State, 35 Tex. 364.

88. Lindsay *v.* Com., 99 Ky. 164, 35 S. W. 269, 18 Ky. L. Rep. 49.

nesses testified, positively to the purchase of liquor from the accused prior to the date of such license.[89]

(5) Sales by Druggists and Physicians. In a prosecution for the violation of a statute forbidding druggists to sell liquor except on prescription of a physician, it is not necessary for the state to present evidence negativing the exception, but it is for defendant to make good his justification.[90] And the rule is the same where the statute prohibits pharmacists from selling liquor "as a beverage."[91] Where the prosecution is against a physician for giving a false prescription, his good faith in the matter must be established to the satisfaction of the jury.[92]

(6) Sale For Unlawful Purpose. In a prosecution for illegally selling liquor to be drunk on the premises where sold, it is not necessary to show that the liquor was in fact drunk on the premises, although the indictment so alleges.[93] But the place of sale, the place where it was intended the liquor should be consumed, and the intention of the seller in regard to its consumption are material to the offense, and should be proved as alleged.[94] A prosecution for selling liquor for an unlawful purpose cannot be sustained by proof that it was sold for a proper purpose but in an irregular manner.[95]

89. State *v.* Wheeler, 87 Mo. App. 580.

90. State *v.* Russell, 99 Mo. App. 373, 73 S. W. 297; State *v.* Emery, 98 N. C. 768, 3 S. E. 810.

The written prescriptions are the best evidence. McBean *v.* Sears, 11 Ohio S. & C. Pl. Dec. 269, 8 Ohio N. P. 187; Hubbell *v.* Ebrite, 8 Ohio S. & C. Pl. Dec. 116, 7 Ohio N. P. 220.

Evidence inadmissible for this purpose.— Evidence for defendant that the liquor was called for and sold to be used as a medicine is not admissible; it is not equivalent to showing that it was sold on prescription. State *v.* Hendrix, 98 Mo. 374, 11 S. W. 728. And where the statute directs what the prescription shall contain and how it shall be preserved, it is proper to exclude oral evidence merely of the fact that the purchaser had a prescription. State *v.* Davis, 76 Mo. App. 586. Nor is the prescription itself admissible unless it is shown to have been issued by a "regularly registered and practising physician," as the statute directs. State *v.* Millikan, 24 Mo. App. 462.

Evidence of the legal registration of the physician is material, and it is error to exclude it. State *v.* Morgan, 96 Mo. App. 343, 70 S. W. 267.

The good faith of the physician who issued the prescription is not material. State *v.* Bevans, 52 Mo. App. 130.

91. Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656. And see Com. *v.* Duprey, 180 Mass. 523, 62 N. E. 726.

92. Mullins *v.* State, (Tex. Cr. App. 1902) 68 S. W. 272; McQuerry *v.* State, 40 Tex. Cr. 571, 51 S. W. 247; West *v.* State, 35 Tex. Cr. 48, 30 S. W. 1069; State *v.* Berkeley, 41 W. Va. 455, 23 S. E. 608.

Admissible evidence.—Evidence of the number of prescriptions for liquor given by defendant to various persons within a specified time is competent on the question of his good faith. State *v.* Atkinson, 33 S. C. 100, 11 S. E. 693. And for the same purpose it may be shown that the purchaser had a brother who was a physician and druggist, with whom he was on good terms, and that he had to pass the door of his brother's store on his way to defendant's office. Rowe *v.* Com., 70 S. W. 407, 24 Ky. L. Rep. 974.

93. Com. *v.* Luddy, 143 Mass. 563, 10 N. E. 448. And see Gulick *v.* State, 50 N. J. L. 468, 14 Atl. 751.

94. Powell *v.* State, 63 Ala. 177; Daly *v.* State, 33 Ala. 431; Brown *v.* State, 31 Ala. 353; Schilling *v.* State, 116 Ind. 200, 18 N. E. 682; Stout *v.* State, 93 Ind. 150; O'Connor *v.* State, 45 Ind. 351; Compher *v.* State, 18 Ind. 447; Com. *v.* Coe, 9 Leigh (Va.) 620.

Consent presumed.— A person who permits liquor to be drunk in his house, or on his premises, in his presence and without objection, will be presumed to consent thereto. Casey *v.* State, 6 Mo. 646; Cochran *v.* State, 26 Tex. 678; Scott *v.* State, 25 Tex. Suppl. 168.

Evidence of intention.— The fact that defendant furnished glasses or other conveniences for mixing or drinking the liquors which he sold is evidence to show that he intended the liquors to be drunk on the premises. Shields *v.* State, 95 Ind. 299; Sanderlin *v.* State, 2 Humphr. (Tenn.) 315.

Forbidding drinking on premises.—The fact that defendant told persons who bought liquor from him that it could not be drunk on the premises, or forbade them to drink it there, does not prove that it was not sold with the intention that it should be consumed on the spot; for the other circumstances of the case may show that such a declaration on his part was merely perfunctory and not meant to be heeded, especially where it appears that purchasers paid no attention to such remark except to step into an adjoining room or place and drink their liquor there. See Eisenman *v.* State, 49 Ind. 511; Rater *v.* State, 49 Ind. 507; Stone *v.* State, 30 Ind. 115; Wood *v.* State, 9 Ind. App. 42, 36 N. E. 158.

95. State *v.* White, 31 Kan. 342, 2 Pac. 598.

(7) SALE TO MINORS. To convict a defendant of the offense of selling liquor to a minor, it must be proved that there was a sale of the liquor,[96] and that the purchaser was under age at the time.[97] Where the law is such that the offense is not committed unless the seller knows the purchaser to be a minor, such knowledge on the part of defendant must be affirmatively proved by the evidence for the state.[98] In other cases where defendant is not guilty if he made the sale in the reasonable and honest belief that the purchaser was of age, it is for him to show the existence of such belief and the reasons for it.[99] It is not permissible for the jury to make their finding as to the belief and good faith of defendant depend upon their impressions of the age of the alleged minor, as formed from their observation of his appearance on the witness' stand.[1] Where defendant is accused and being prosecuted for a violation of the local option law, evidence

96. Ehrich *v.* White, 74 Ill. 481; Fehn *v.* State, 3 Ind. App. 568, 29 N. E. 1137; State *v.* Walterstradt, 74 Minn. 292, 77 N. W. 48.

Payment as evidence of sale see Birr *v.* People, 113 Ill. 645; Huber *v.* People, 87 Ill. App. 120; City Council *v.* Van Roven, 2 McCord (S. C.) 465.

Sale to minor as agent or through an agent see Gillan *v.* State, 47 Ark. 555, 2 S. W. 185; Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656.

Sufficiency of evidence.— Evidence that a minor drank beer in defendant's saloon, that he carried no beer in there with him, and that no other person except the bar-tender was in the saloon at the time, although raising a strong suspicion, is not sufficient to convict of selling liquor to such minor. State *v.* Bach Liquor Co., 67 Ark. 163, 55 S. W. 854.

Proof of sale not sufficient to show furnishing see Leo Ebert Brewing Co. *v.* State, 25 Ohio Cir. Ct. 601.

97. Pounders *v.* State, 37 Ark. 399; Edgar *v.* State, 37 Ark. 219; Dolke *v.* State, 99 Ind. 229; Ehlert *v.* State, 93 Ind. 76; Vangorden *v.* State, 49 Ind. 518.

Opinion of witnesses.— A witness who testifies to the general appearance of the person to whom the sale was made may give his opinion as to the age of such person. Com. *v.* O'Brien, 134 Mass. 198; Garner *v.* State, 28 Tex. App. 561, 13 S. W. 1004. But *compare* Walker *v.* State, 25 Tex. App. 448, 8 S. W. 644, where hearsay evidence was admitted to show the status of the person to whom the liquor was sold.

Hearsay and general reputation cannot generally be received as competent evidence of the age of the person in question. Peterson *v.* State, 83 Md. 194, 34 Atl. 834. But *compare* Tucker *v.* State, 24 Ala. 77.

98. Reynolds *v.* State, 32 Tex. Cr. 36, 22 S. W. 18; Hunter *v.* State, 18 Tex. App. 444, 51 Am. Rep. 319.

Knowledge of the purchaser's minority may be brought home to defendant indirectly. On this point it is proper to admit evidence of the purchaser's general physical appearance, of his declarations, communicated to defendant or circulated generally through the community, that he was of age, of defendant's long acquaintance with him, of inquiries addressed to him by the accused as to his age and his answers thereto, of warnings to defendant from the purchaser's father, of the habits of the purchaser as to drinking liquor in company with his parents or with their consent, and of any other pertinent fact. Carwile *v.* State, (Tex. Cr. App. 1903) 72 S. W. 376; Sinclair *v.* State, (Tex. Cr. App. 1903) 70 S. W. 218; Eckert *v.* State, (Tex. Cr. App. 1902) 68 S. W. 682; Earl *v.* State, (Tex. Cr. App. 1902) 66 S. W. 839; Smith *v.* State, (Tex. Cr. App. 1902) 66 S. W. 780; Cleveland *v.* State, (Tex. Cr. App. 1902) 66 S. W. 550; Bivens *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1007; Stone *v.* State, (Tex. Cr. App. 1897) 39 S. W. 367; Sears *v.* State, 35 Tex. Cr. 442, 34 S. W. 124; Reed *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1074; Schurzer *v.* State, (Tex. Cr. App. 1894) 25 S. W. 23; Randall *v.* State, (Tex. Cr. App. 1893) 22 S. W. 411; Gaines *v.* State, (Tex. Cr. App. 1893) 21 S. W. 367; Pressler *v.* State, 13 Tex. App. 95.

It is error to permit the state to ask a witness whether, at the time of the alleged offense, the purchaser, by reason of his physical appearance, would be taken by a person of ordinary observation to be a minor. Koblenschlag *v.* State, 23 Tex. App. 264, 4 S. W. 888.

99. Thomasson *v.* State, 15 Ind. 449.

Sufficiency of evidence as to belief see Ross *v.* State, 116 Ind. 495, 19 N. E. 451; Behler *v.* State, 112 Ind. 140, 13 N. E. 272; Goetz *v.* State, 41 Ind. 162; Brown *v.* State, 24 Ind. 113; State *v.* Kalb, 14 Ind. 403.

In **Pennsylvania** the act of May 27, 1897, relating to the prosecution of liquor dealers, provides that defendant may "offer by way of defense evidence of the circumstances under which the liquor was furnished," but one who avails himself of this privilege must also assume the burden imposed by the proviso to the act, which declares that "the burden of proof shall rest upon the defendant to show that the intoxicating liquor was not furnished to a minor either knowingly or negligently." See Com. *v.* Terry, 15 Pa. Super. Ct. 608; Com. *v.* Baumler, 20 Pa. Co. Ct. 273.

1. Robinius *v.* State, 63 Ind. 235; Ihinger *v.* State, 53 Ind. 251; Stephenson *v.* State, 28 Ind. 272.

that the purchaser was a minor should not be admitted against the accused in aggravation of the offense.[2]

(8) SALE TO INTOXICATED PERSONS. To convict a defendant of selling liquor to a person who was intoxicated, there must be proof of the drunken condition of the purchaser[3] at the time of the alleged sale to him.[4] Proof of this will raise a presumption that defendant knew of his intoxicated state, and further proof of such knowledge is not necessary in the first instance.[5]

(9) SALE TO HABITUAL DRUNKARDS. To warrant a conviction for this offense, it must be shown that defendant made a sale of liquor,[6] to a person who, at or about the date of the sale was a common drunkard or a person of intemperate habits.[7] The fact of the purchaser's habits may be established by the testimony of any competent witness,[8] including the drunkard himself.[9] And such habits may be proved by testimony to numerous and repeated instances of intoxication on his part.[10] If it is necessary for the prosecution to prove that the seller had knowledge of the intemperate habits of the purchaser,[11] this fact may be shown by direct testimony or by proof of such circumstances as will warrant the jury in inferring that he had such knowledge.[12]

(10) SALE OR KEEPING OPEN AT PROHIBITED TIMES. The offense of selling liquor or keeping open a saloon on Sunday or at other prohibited times may be established by evidence that the place was open, or was accessible to visitors, although not by the usual entrance, and that defendant or his employees were seen in the place, together with other persons who had no business there except to get liquor;[13] or that, on the place being raided, many persons were observed to

2. Campbell *v.* State, 37 Tex. Cr. 572, 40 S. W. 282.

3. Brow *v.* State, 103 Ind. 133, 2 N. E. 296.

4. Kammann *v.* People, 124 Ill. 481, 16 N. E. 661 [*affirming* 26 Ill. App. 48].

5. Brow *v.* State, 103 Ind. 133, 2 N. E. 296.

6. Pergande *v.* People, 36 Ill. App. 169; State *v.* Oeder, 80 Iowa 72, 45 N. W. 543.

7. Mapes *v.* People, 69 Ill. 523; Miller *v.* State, 107 Ind. 152, 7 N. E. 898; Zeizer *v.* State, 47 Ind. 129.

8. Tatum *v.* State, 63 Ala. 147; Stanley *v.* State, 26 Ala. 26; Murphy *v.* People, 90 Ill. 59; Mapes *v.* People, 69 Ill. 523.

9. Tatum *v.* State, 63 Ala. 147. *Compare* Barnes *v.* State, 19 Conn. 398, holding that if the purchaser has testified simply to the sale of liquor to him by defendant, he cannot be compelled, on cross-examination, to say whether or not he is a common drunkard.

10. Barnes *v.* State, 20 Conn. 232; Smith *v.* State, 19 Conn. 493; Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335; Murphy *v.* People, 90 Ill. 59; Mapes *v.* People, 69 Ill. 523; State *v.* Skillicorn, 104 Iowa 97, 73 N. W. 503.

11. **Necessity for showing vendor's knowledge.**— In some states this must be proved affirmatively by the evidence for the prosecution. See State *v.* Alderton, 50 W. Va. 101, 40 S. E. 350. In others ignorance of the purchaser's habits is matter of defense and must be proved by defendant. Allison *v.* State, 47 Ind. 140; State *v.* Ward, 75 Iowa 637, 36 N. W. 765. And see *supra*, IX, A, 3, n, (IV), (E).

12. *Alabama.*— Atkins *v.* State, 60 Ala. 45; Smith *v.* State, 55 Ala. 1; Elam *v.* State, 25 Ala. 53.

Connecticut.— Wickwire *v.* State, 19 Conn. 477.

Illinois.— Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335.

Massachusetts.— Com. *v.* McNeff, 145 Mass. 406, 14 N. E. 616.

Ohio.— Crabtree *v.* State, 30 Ohio St. 382; Adams *v.* State, 25 Ohio St. 584.

Vermont.— State *v.* Wooley, 59 Vt. 357, 10 Atl. 84.

General reputation.— While the intemperate habits of the person to whom the sale was made cannot be proved by general reputation or general notoriety in the community, yet such evidence is admissible to prove defendant's knowledge of the habits of such person, on the theory that what is generally known in the community is evidence to be weighed by the jury in determining whether it is known to the accused; but such evidence is not conclusive. Tatum *v.* State, 63 Ala. 147; Stallings *v.* State, 33 Ala. 425; Adams *v.* State, 25 Ohio St. 584. *Compare* Smith *v.* State, 55 Ala. 1; Stanley *v.* State, 26 Ala. 26.

Inquiries by defendant.— Defendant may show in his own behalf that, before the alleged sale, he inquired of several of the buyer's acquaintances whether he was in the habit of getting intoxicated, and what their answers were. Crabtree *v.* State, 30 Ohio St. 382.

Notice not to sell as evidence of knowledge see McCormack *v.* State, 133 Ala. 202, 32 So. 268.

13. *Arkansas.*— Warwick *v.* State, 48 Ark. 27, 2 S. W. 253.

Georgia.— Klug *v.* State, 77 Ga. 734.

Massachusetts.— Com. *v.* McNeese, 156 Mass. 231, 30 N. E. 1021.

rush out by the back way;[14] or by evidence that persons seen to go into the place came out drunk[15] or bringing bottles of liquor with them;[16] or by the testimony of a witness that he bought liquor at the place and time alleged.[17] To warrant a conviction for this offense, it is not necessary to show that the liquor sold was drunk on the premises.[18] A charge for exposing liquor for sale on Sunday is not sustained by proof of defendant's admission that he had violated the Sunday laws.[19]

(B) *Illegal Transportation.* On a trial for transporting liquors from place to place, having reasonable cause to believe that they were intended for unlawful sale, it is competent to show that defendant, on several occasions within a short time, had received other considerable quantities of liquor, at the same railroad station, for transportation by him,[20] or that he had frequently delivered similar packages at the same place, which were found to contain liquor.[21] On the question of his having cause to believe that the liquors were intended to be sold in violation of law, it is competent to show that the consignee was engaged in the business of liquor selling, or that the place of delivery was used for that business, or that sales were actually made there.[22] It is necessary to prove the place from which and the place to which the liquor was carried, as laid in the indictment;[23] but not that defendant began and completed the transportation, it being sufficient if he aided and assisted in it.[24] Nor is it necessary that he be the owner of the liquor,[25] nor that he knew that the liquor was intended for sale in violation of law.[26] It is sufficient to show that he had reasonable cause to believe that the liquor was intended for unlawful sale.

(C) *Keeping Liquors For Unlawful Sale.* To secure a conviction for the offense of keeping liquor with intent to sell the same in violation of law,[27] there

Minnesota.— State *v.* Sodini, 84 Minn. 444, 87 N. W. 1130.

Missouri.— State *v.* Meagher, 49 Mo. App. 571.

New York.— People *v.* Clark, 61 N. Y. App. Div. 500, 70 N. Y. Suppl. 594. See People *v.* Ryan, 86 N. Y. App. Div. 524, 83 N. Y. Suppl. 657.

Texas.— Moncla *v.* State, (Cr. App. 1902) 70 S. W. 548.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 312.

But see City Council *v.* Talck, 3 Rich. (S. C.) 299, where the open door was explained by the fact that the weather was very warm and that was the only means of ventilating the room where defendant usually sat and ate, and his clerk testified positively that nothing was sold on the day alleged, and a new trial was granted on conviction of defendant.

Readiness for business.— Evidence that defendant was in his saloon on Sunday and ready for business, and would have made a sale, but for the appearance of the county attorney, is admissible to show that he was keeping the place open for traffic. Ramey *v.* State, (Tex. Cr. App. 1901) 61 S. W. 126.

14. McKinney *v.* Nashville, 96 Tenn. 79, 33 S. W. 724. *Compare* People *v.* Owens, 148 N. Y. 648, 43 N. E. 71 [*affirming* 91 Hun 344, 36 N. Y. Suppl. 755].

15. Com. *v.* Leighton, 140 Mass. 305, 6 N. E. 221. But *compare* Caldwell *v.* State, 18 Ind. App. 48, 46 N. E. 697, holding that, on the trial of a druggist for selling liquor on Sunday without a prescription, evidence that after the sale the buyer was intoxicated is irrelevant.

16. Com. *v.* Stevens, 153 Mass. 4, 26 N. E. 96.

17. Herod *v.* State, 41 Tex. Cr. 597, 56 S. W. 59.

18. Harris *v.* People, 1 Colo. App. 289, 28 Pac. 1133.

19. Grimes *v.* Jersey City, 29 N. J. L. 320.

20. Com. *v.* Commeskey, 13 Allen (Mass.) 585; Com. *v.* McConnell, 11 Gray (Mass.) 204.

21. Com. *v.* Currier, 164 Mass. 544, 42 N. E. 96.

22. Com. *v.* Loewe, 162 Mass. 518, 39 N. E. 192; Com. *v.* Harper, 145 Mass. 100, 13 N. E. 459 (evidence is admissible that the consignee was generally known and reported in the community to be a liquor seller); Com. *v.* Kenney, 115 Mass. 149; Com. *v.* McLaughlin, 108 Mass. 477; Com. *v.* Waters, 11 Gray (Mass.) 81, holding that defendant cannot introduce evidence that the person to whom the liquors were conveyed had been tried on a charge of keeping the same liquors with intent to sell, and had been acquitted.

23. State *v.* Libby, 84 Me. 461, 24 Atl. 940.

24. Com. *v.* Currier, 164 Mass. 544, 42 N. E. 96.

25. Com. *v.* McCluskey, 116 Mass. 64.

26. Com. *v.* Babcock, 110 Mass. 107.

27. See the statutes of the different states.

Instances of variance see Com. *v.* Tay, 146 Mass. 146, 15 N. E. 503; Com. *v.* Welch, 140 Mass. 372, 5 N. E. 166; Com. *v.* Henderson, 140 Mass. 303, 5 N. E. 832; Com. *v.* Atkins, 136 Mass. 160; Com. *v.* Carolin, 2

must be proof that intoxicating liquors[28] were kept by defendant[29] with the intention on his part to sell them unlawfully within the jurisdiction.[30] Although it is not necessary to show a sale, the fact of unlawful sales by defendant on recent occasions is competent evidence of the intent with which the liquor was kept.[31] For this purpose it is proper to admit evidence of the discovery of liquor on defendant's premises, in large quantities, or under suspicious circumstances;[32] evidence as to the condition of the room or place where the liquors were kept, with reference to its appointments and fixtures;[33] evidence that drunken men have been seen coming from the place;[34] and evidence of efforts on the part of defendant to evade or escape detection.[35] The admissions or declarations of the accused are likewise admissible for the same purpose.[36] Testimony that it has been a matter of public report and notoriety that intoxicating liquors were sold by defendant is not admissible.[37]

(D) *Being a Common Seller.* Under statutes making it an offense to be a common seller of intoxicating liquors without a license, and providing that proof of three several sales by an unlicensed person shall be sufficient evidence to convict, the jury are not merely authorized but required to convict on such proof being made.[38] The three sales are not necessarily to be proved by the direct testimony of witnesses, but may be established by well combined circumstantial evidence, provided it satisfies the jury.[39] A defendant cannot be found guilty of

Allen (Mass.) 169; State *v.* La Rose, 71 N. H. 435, 52 Atl. 943.

28. Hollingsworth *v.* Atlanta, 79 Ga. 503, 5 S. E. 37; State *v.* Hitchcock, 68 N. H. 244, 44 Atl. 296.

29. State *v.* McCann, 61 Me. 116; Com. *v.* Certain Intoxicating Liquors, 116 Mass. 21; Com. *v.* Grant, 116 Mass. 17 (defendant need not own liquor); Com. *v.* Cleary, 105 Mass. 384 (keeping on a single occasion will support a conviction).

30. Com. *v.* Berry, 109 Mass. 366; Com. *v.* Blood, 11 Gray (Mass.) 74.

31. *Connecticut.*— State *v.* Hartwick, 49 Conn. 101; State *v.* Mead, 46 Conn. 22; State *v.* Raymond, 24 Conn. 204.

Iowa.— State *v.* Sartori, 55 Iowa 340, 7 N. W. 604; State *v.* Munzenmaier, 24 Iowa 87.

Massachusetts.— Com. *v.* Gavin, 148 Mass. 449, 18 N. E. 675, 19 N. E. 554; Com. *v.* Hoar, 121 Mass. 375; Com. *v.* Fitzgerald, 14 Gray 14.

Nebraska.— Hans *v.* State, 50 Nebr. 150, 69 N. W. 838.

New Hampshire.— State *v.* McGlynn, 34 N. H. 422.

32. *Iowa.*— State *v.* Arie, 95 Iowa 375, 64 N. W. 268; State *v.* Zimmerman, 78 Iowa 614, 43 N. W. 458; State *v.* Shank, 74 Iowa 649, 38 N. W. 523.

Maine.— State *v.* McCann, 61 Me. 116.

Massachusetts.— Com. *v.* Martin, 162 Mass. 402, 38 N. E. 708; Com. *v.* Shea, 160 Mass. 6, 35 N. E. 83; Com. *v.* Canny, 158 Mass. 210, 33 N. E. 340; Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389; Com. *v.* Tenney, 148 Mass. 452, 19 N. E. 556; Com. *v.* Fisher, 138 Mass. 504; Com. *v.* Matthews, 129 Mass. 487; Com. *v.* Levy, 126 Mass. 240; Com. *v.* Gallagher, 124 Mass. 29; Com. *v.* Berry, 109 Mass. 366; Com. *v.* Certain Intoxicating Liquors, 116 Mass. 24; Com. *v.* Shaw, 116 Mass. 8; Com. *v.* Hayes, 114 Mass. 282; Com. *v.* Purtle, 11 Gray 78; Com. *v.* Blood, 11 Gray 74.

New Hampshire.— See State *v.* Gorman, 58 N. H. 77.

Pennsylvania.— See Com. *v.* Johnston, 5 Pa. Super. Ct. 585.

Rhode Island.— See State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838.

Vermont.— Lincoln *v.* Smith, 27 Vt. 328.

Presumption of intent to sell from possession of liquors see State *v.* Cunningham, 25 Conn. 195; Durfee *v.* State, 53 Nebr. 214, 73 N. W. 676.

33. Com. *v.* Powers, 123 Mass. 244.

34. Com. *v.* Shea, 160 Mass. 6, 35 N. E. 83; Com. *v.* McKenna, 158 Mass. 207, 33 N. E. 389; Com. *v.* Mead, 140 Mass. 300, 3 N. E. 39; Com. *v.* Berry, 109 Mass. 366.

35. Com. *v.* Lynch, 164 Mass. 541, 42 N. E. 95; Com. *v.* Wallace, 123 Mass. 400; Com. *v.* Shaw, 116 Mass. 8.

36. Com. *v.* Purdy, 147 Mass. 29, 16 N. E. 745. And see Com. *v.* Henderson, 140 Mass. 303, 5 N. E. 832; Com. *v.* Cummings, 121 Mass. 63.

37. Cohleigh *v.* McBride, 45 Iowa 116.

38. State *v.* Day, 37 Me. 244; Com. *v.* Barker, 14 Gray (Mass.) 412; Com. *v.* Lamere, 11 Gray (Mass.) 319; Com. *v.* Kirk, 7 Gray (Mass.) 496; Com. *v.* Rumrill, 1 Gray (Mass.) 388. And see Com. *v.* Graves, 97 Mass. 114.

Negativing exceptions.— It is incumbent on the state, in a trial for this offense, to prove that the sales relied on were not such as defendant might lawfully make without a license. Com. *v.* Livermore, 2 Allen (Mass.) 292.

39. State *v.* Hynes, 66 Me. 114; Com. *v.* Powderly, 148 Mass. 457, 19 N. E. 781; Com. *v.* Van Stone, 97 Mass. 548; Com. *v.* Cotter, 97 Mass. 336; Com. *v.* Dady, 7 Allen (Mass.)

being a common seller of liquor simply because he has paid the United States tax as a retail liquor dealer.[40] Evidence that defendant kept a public house, and had upon it an innkeeper's sign is irrelevant and inadmissible; because one may be licensed as an innkeeper without the right to sell liquors, and it cannot be presumed that he violated the law.[41]

(E) *Carrying on Liquor Business.* Where the indictment charges that defendant "engaged in," "pursued," or "carried on" the business of liquor selling without a license, as distinguished from the offense of making an unlawful sale, there must be some evidence of continuance in the business, or that selling liquor was defendant's occupation;[42] and a single act of sale is not sufficient to establish this fact,[43] although it may go to the jury if there are circumstances indicating that such sale was made in the course of the seller's usual business.[44]

(F) *Keeping a Place For Unlawful Sale.* On an indictment for maintaining a liquor nuisance, or a place used for the unlawful sale of liquors, there must be evidence of something more than defendant's mere purpose or intention to use the premises in such manner.[45] It is not necessary to prove an act of sale or offer to sell,[46] and proof of a single unlawful sale will not be sufficient to convict.[47] But it is competent to put in evidence specific instances of illegal selling, as the unlawful intent may be inferred from the unlawful sales.[48] The evidence must make out the particular offense charged, as distinguished from other forms of violation of the liquor laws,[49] and show a keeping or maintaining by defendant as the owner or proprietor of the place,[50] or distinctly connect him with the offense.[51] And the character of the place, if more particularly described in the statute, must also be shown by the evidence.[52] On this question, and as to the nature of defendant's business, and his purpose or intent, the discovery of liquors on the premises, especially if under suspicious circumstances, is competent evidence, as also the presence of the materials and implements for pursuing the traffic, the

531; Com. *v.* Webster, 6 Allen (Mass.) 593; Com. *v.* Snow, 14 Gray (Mass.) 385; Com. *v.* Munn, 14 Gray (Mass.) 361; Com. *v.* Boyden, 14 Gray (Mass.) 101; Com. *v.* Mahony, 14 Gray (Mass.) 46; Com. *v.* Tubbs, 1 Cush. (Mass.) 2.

40. State *v.* O'Connell, 82 Me. 30, 19 Atl. 86; State *v.* Intoxicating Liquors, 80 Me. 57, 12 Atl. 794.

41. Com. *v.* Madden, 1 Gray (Mass.) 486.

42. Grant *v.* State, 73 Ala. 13; Lemons *v.* State, 50 Ala. 130; Barnes *v.* State, 44 Tex. Cr. 473, 72 S. W. 177; Hodge *v.* State, (Tex. Cr. App. 1898) 43 S. W. 994. And see Wade *v.* State, 22 Tex. App. 629, 3 S. W. 786.

Admissibility of evidence.— Evidence that a person is reputed to deal illegally in liquors is not admissible to show that such is his business. Warner *v.* Brooks, 14 Gray (Mass.) 107. But it may be shown that before commencing to sell he told various persons that he intended to sell liquors, that casks and barrels were seen in his yard, and that a man was seen unloading them there. Com. *v.* Davenport, 2 Allen (Mass.) 299.

43. Lawson *v.* State, 55 Ala. 118; Bryant *v.* State, 46 Ala. 302; Anderson *v.* State, 32 Fla. 242, 13 So. 435.

44. Com. *v.* Coolidge, 138 Mass. 193.

45. State *v.* Harris, 27 Iowa 429; Com. *v.* Welsh, 1 Allen (Mass.) 1.

46. State *v.* Lord, 8 Kan. App. 257, 55 Pac. 503; Com. *v.* Boyle, 145 Mass. 373, 14 N. E. 155. *Compare* State *v.* Tierney, 74 Iowa 237, 37 N. W. 176.

47. Overman *v.* State, 88 Ind. 6; Com. *v.* Hagan, 152 Mass. 565, 26 N. E. 95; Com. *v.* Hayes, 150 Mass. 506, 23 N. E. 216; Com. *v.* Patterson, 138 Mass. 498. And see People *v.* Remus, 135 Mich. 629, 98 N. W. 397, 100 N. W. 403. But *compare* State *v.* Reyelts, 74 Iowa 499, 38 N. W. 377; Com. *v.* Kerrissey, 141 Mass. 110, 4 N. E. 820.

48. State *v.* Skillicorn, 104 Iowa 97, 73 N. W. 503; State *v.* Thompson, 74 Iowa 119, 37 N. W. 104; State *v.* Sartori, 55 Iowa 340, 7 N. W. 604; State *v.* Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650; State *v.* Stanley, 84 Me. 555, 24 Atl. 983; Com. *v.* Barnes, 138 Mass. 511; Com. *v.* Ryan, 136 Mass. 436; Com. *v.* Aaron, 114 Mass. 255; Com. *v.* McCurdy, 109 Mass. 364; Com. *v.* Greenen, 11 Allen (Mass.) 241; Com. *v.* Farrand, 12 Gray (Mass.) 177; People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213.

49. State *v.* Gumber, 37 Wis. 298. *Compare* Com. *v.* Finnegan, 109 Mass. 363; Com. *v.* Buxton, 10 Gray 9.

50. Com. *v.* Churchill, 136 Mass. 148. And see Com. *v.* Locke, 148 Mass. 125, 19 N. E. 24.

51. State *v.* O'Connor, 3 Kan. App. 594, 43 Pac. 859. And see State *v.* Harris, 64 Iowa 287, 20 N. W. 439; Com. *v.* Dunbar, 9 Gray (Mass.) 298.

52. State *v.* Dugan, 52 Kan. 23, 34 Pac. 409; State *v.* Reno, 41 Kan. 674, 21 Pac. 803; State *v.* Plastridge, 6 R. I. 76; State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844; State *v.* Paige, 50 Vt. 445.

presence of drunken men about the place, evidences of recent drinking, and attempts to hide the liquor or otherwise to escape detection.[53] But evidence of the general reputation of the place or tenement kept by defendant is not admissible,[54] unless by statute.[55] The admissions or declarations of the accused are admissible for the prosecution.[56] The proof must also correspond with the allegations of the indictment in respect to the place of the alleged offense,[57] and the time of its commission,[58] and the character of the liquors charged to have been kept or sold.[59]

(G) *Violation of Local Option Law.* On an indictment for a violation of the local option law, it is generally held that it must be alleged and proved that the provisions of that law had been put in force or become operative,[60] at the time,[61] and in the district of the commission of the alleged offense,[62] and also in some states that the forms of law were duly complied with in holding the election and declaring or publishing the result.[63] But in some states the doctrine

53. State *v.* Oder, 92 Iowa 767, 61 N. W. 190; State *v.* Farley, 87 Iowa 22, 53 N. W. 1089; State *v.* Fleming, 86 Iowa 294, 53 N. W. 234; State *v.* Baskins, 82 Iowa 761, 48 N. W. 809; State *v.* Illsley, 81 Iowa 49, 46 N. W. 977; State *v.* Fertig, 70 Iowa 272, 30 N. W. 633; State *v.* Norton, 41 Iowa 430; Com. *v.* McCabe, 163 Mass. 98, 39 N. E. 777; Com. *v.* Hughes, 154 Mass. 598, 28 N. E. 1055; Com. *v.* Gay, 153 Mass. 211, 26 N. E. 571, 852; Com. *v.* Lattinville, (Mass. 1890) 25 N. E. 972; Com. *v.* Kelley, 152 Mass. 486, 25 N. E. 835; Com. *v.* Vahey, 151 Mass. 57, 23 N. E. 659; Com. *v.* Meaney, 151 Mass. 55, 23 N. E. 730; Com. *v.* Moore, 147 Mass. 528, 18 N. E. 403; Com. *v.* Wallace, 143 Mass. 88, 9 N. E. 5; Com. *v.* Everson, 140 Mass. 292, 2 N. E. 839; Com. *v.* Kahlmeyer, 124 Mass. 322; Com. *v.* McCluskey, 123 Mass. 401; Com. *v.* Gafley, 122 Mass. 334; Com. *v.* Conneally, 108 Mass. 480.

54. Com. *v.* Eagan, 151 Mass. 45, 23 N. E. 494.

55. State *v.* Wilson, 15 R. I. 180, 1 Atl. 415; State *v.* Kingston, 5 R. I. 297; State *v.* Spaulding, 61 Vt. 505, 17 Atl. 844.

56. State *v.* Cleary, 97 Iowa 413, 66 N. W. 724; Com. *v.* Line, 149 Mass. 65, 20 N. E. 697.

57. State *v.* Verden, 24 Iowa 126; Com. *v.* Patterson, 153 Mass. 5, 26 N. E. 136; Com. *v.* Lee, 148 Mass. 8, 18 N. E. 586; Com. *v.* Buckley, 147 Mass. 581, 18 N. E. 571; Com. *v.* Hersey, 144 Mass. 297, 11 N. E. 116; Com. *v.* Kinsley, 108 Mass. 24; Com. *v.* Welch, 2 Allen (Mass.) 510; Com. *v.* McArty, 11 Gray (Mass.) 456; Com. *v.* Godley, 11 Gray (Mass.) 454; Com. *v.* McCaughey, 9 Gray (Mass.) 296; O'Keefe *v.* State, 24 Ohio St. 175.

58. Com. *v.* Carney, 152 Mass. 566, 26 N. E. 94; Com. *v.* Rooney, 142 Mass. 474, 8 N. E. 411; Com. *v.* Mitchell, 115 Mass. 141; Com. *v.* Ryan, 108 Mass. 415; Com. *v.* Higgins, 16 Gray (Mass.) 19.

59. See Com. *v.* Heywood, 105 Mass. 187.

60. *Florida.*— Butler *v.* State, 25 Fla. 347, 6 So. 67.

Kentucky.— Taylor *v.* Com., 40 S. W. 383, 19 Ky. L. Rep. 351. *Compare* Young *v.* Com., 14 Bush 161.

Mississippi.— Bryant *v.* State, 65 Miss. 435, 4 So. 343.

Texas.— Donaldson *v.* State, 15 Tex. App. 25.

Canada.— Reg. *v.* Elliott, 12 Ont. 524; Reg. *v.* Walsh, 2 Ont. 206.

Repeal.— In a prosecution for violating the local option law, defendant must prove that the law had been repealed, if he relies on such repeal as a defense. Loveless *v.* State, (Tex. Cr. App. 1899) 49 S. W. 601.

61. Combs *v.* State, 81 Ga. 780, 8 S. E. 318; Webb *v.* State, (Tex. Cr. App. 1900) 58 S. W. 82; Ladwig *v.* State, 40 Tex. Cr. 585, 51 S. W. 390; Wartelsky *v.* State, 38 Tex. Cr. 629, 44 S. W. 510; Scott *v.* State, (Tex. Cr. App. 1898) 44 S. W. 495.

62. Butler *v.* State, 25 Fla. 347, 6 So. 67; Crigler *v.* Com., (Ky. 1904) 83 S. W. 587; Bryant *v.* State, 65 Miss. 435, 4 So. 343; Bottoms *v.* State, (Tex. Cr. App. 1903) 73 S. W. 16, 20, 963; Parker *v.* State, 39 Tex. Cr. 262, 45 S. W. 812.

Description and boundaries of district see Lively *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1048; Goble *v.* State, 42 Tex. Cr. 501, 60 S. W. 968; Casey *v.* State, (Tex. Cr. App. 1900) 59 S. W. 884; Lewis *v.* State, (Tex. Cr. App. 1899) 49 S. W. 603; Sutton *v.* State, (Tex. Cr. App. 1897) 40 S. W. 501.

63. Stick *v.* State, 23 Ohio Cir. Ct. 392; Snead *v.* State, (Tex. Cr. App. 1899) 49 S. W. 597; Stallworth *v.* State, 18 Tex. App. 378; McMillan *v.* State, 18 Tex. App. 375.

Proof as to order for election see Matkins *v.* State, (Tex. Cr. App. 1900) 58 S. W. 108; Abbott *v.* State, 42 Tex. Cr. 8, 57 S. W. 97; Ladwig *v.* State, 40 Tex. Cr. 585, 51 S. W. 390; Crowder *v.* State, (Tex. Cr. App. 1899) 49 S. W. 375; Wright *v.* State, (Tex. Cr. App. 1897) 38 S. W. 811.

Proof as to order declaring result see Simmons *v.* State, (Tex. Cr. App. 1902) 67 S. W. 502; Truesdale *v.* State, 42 Tex. Cr. 544, 61 S. W. 935; Allen *v.* State, (Tex. Cr. App. 1900) 59 S. W. 264; Segars *v.* State, (Tex. Cr. App. 1899) 51 S. W. 238; Crockett *v.* State, 40 Tex. Cr. 173, 49 S. W. 392; Barker *v.* State, (Tex. Cr. App. 1898) 47 S. W. 980; Newbury *v.* State, (Tex. Cr. App. 1898) 44 S. W. 843.

Proof as to publication of result see Toole *v.* State, 88 Ala. 158, 7 So. 42; Lively *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1048;

prevails that the court may take judicial notice of the adoption of the local option law, and that it is not necessary for the prosecution to prove this fact, nor to show, in the first place, that the requisite formalities were observed.[64]

(H) *Evidence on Prosecution of Club.* On an indictment for selling liquor without a license, defendant may show that he was acting as a member or employee of a *bona fide* social club, where, by the local law, such associations are not required to take out a license in order to be permitted to dispense liquors to their own members.[65] But the state may show that the pretended club was but a fraudulent contrivance or device to cover the unlicensed sale of liquor, which fact may be established by evidence of any pertinent facts tending to expose its real nature or the pretense under which it masquerades.[66]

7. Trial — a. Conduct of Trial — (I) *In General.* Trials for violations of the liquor laws are governed by the ordinary rules of criminal procedure[67] in respect to such matters as the time for making a motion to dismiss,[68] the grant or refusal of continuances or adjournments,[69] the authority of attorneys specially appointed to prosecute,[70] the presence of spectators in the court,[71] or the swearing of witnesses, the conduct of their examination, and the order of presenting evidence.[72]

(II) *Defendant's Plea.* In prosecutions under the liquor laws, the plea of "not guilty" is the general issue, and puts in issue every material fact.[73]

Truesdale *v.* State, 42 Tex. Cr. 544, 61 S. W. 935; Johnson *v.* State, (Tex. Cr. App. 1900) 55 S. W. 968; Ladwig *v.* State, 40 Tex. Cr. 585, 51 S. W. 390; Malone *v.* State, (Tex. Cr. App. 1899) 51 S. W. 381; Loveless *v.* State, 40 Tex. Cr. 221, 49 S. W. 892; Crockett *v.* State, 40 Tex. Cr. 173, 49 S. W. 392; Armstrong *v.* State, (Tex. Cr. App. 1898) 47 S. W. 981.

Proof as to certificate of canvassing board see Tatum *v.* Com., 65 S. W. 449, 23 Ky. L. Rep. 1533, 59 S. W. 32, 22 Ky. L. Rep. 927; Com. *v.* Day, 23 S. W. 193, 15 Ky. L. Rep. 385.

Notices of election.— If defendant claims that the notices of the election were not posted as required by law, the burden is on him to prove the fact. Bowman *v.* State, 38 Tex. Cr. 14, 40 S. W. 796, 41 S. W. 635; Irish *v.* State, 34 Tex. Cr. 130, 29 S. W. 778.

Petition for election.— If defendant contends that this petition was not signed by the requisite number of voters, the burden is on him to prove the fact. Blackwell *v.* Com., 54 S. W. 843, 21 Ky. L. Rep. 1240. But *compare* Carnes *v.* State, 23 Tex. App. 449, 5 S. W. 133.

64. Combs *v.* State, 81 Ga. 780, 8 S. E. 318; State *v.* Watts, 39 Mo. App. 409; State *v.* Searcy, 39 Mo. App. 393; Rauch *v.* Com., 78 Pa. St. 490. And see *supra*, V, A. 4.

65. Com. *v.* Geary, 146 Mass. 139, 15 N. E. 363; Com. *v.* Pefferman, 12 Pa. Super. Ct. 202.

As to the necessity for taking out license see *supra*, VI, B, 3.

66. Com. *v.* Ryan, 152 Mass. 283, 25 N. E. 465; Com. *v.* Jacobs, 152 Mass. 276, 25 N. E. 463; Arnold *v.* State, 38 Tex. Cr. 1, 40 S. W. 734.

67. See Criminal Law, 12 Cyc. 519 *et seq.* And see Hendrick *v.* State, (Tex. Cr. App. 1904) 83 S. W. 711.

68. People *v.* Haas, 79 Mich. 449, 44 N. W. 928.

69. Johnson *v.* State, 60 Ga. 634.

Time to prepare for trial.— Where the summons to appear before a magistrate was served on defendant less than an hour before the time fixed for his appearance, and although he was present he refused to plead or to ask for an adjournment, whereupon the magistrate entered a conviction, it was held that the proceedings were contrary to natural justice, and the conviction was quashed. Reg. *v.* Eli, 10 Ont. 727.

70. State *v.* Becker, 3 S. D. 29, 51 N. W. 1018.

71. Nuzum *v.* State, 88 Ind. 599, holding that the presence of several ladies belonging to a temperance society, in the court-room during the trial of a case for selling liquor to a minor, cannot be presumed to have exercised any undue influence on the jury.

72. Vann *v.* State, 140 Ala. 122, 37 So. 158; People *v.* Cox, 70 Mich. 247, 38 N. W. 235; Bailey *v.* State, 67 Miss. 333, 7 So. 348; Benson *v.* State, 39 Tex. Cr. 56, 44 S. W. 167, 1091.

73. Plainfield *v.* Batchelder, 44 Vt. 9.

A special plea, when it merely states matters of justification or such as would constitute a defense on the merits, may properly be stricken out, for such matters would be admissible under the general issue. Trost *v.* State, 64 Miss. 188, 1 So. 49.

A former conviction for the same offense may be given in evidence under the general issue, in a prosecution before a justice for illegal liquor selling; but if it is pleaded in bar, a replication that the conviction was for another offense than the one charged is sufficient. State *v.* Conlin, 27 Vt. 318.

Nolo contendere.— In Massachusetts a defendant in such a prosecution cannot be adjudged guilty on a plea of *nolo contendere*, unless it appears by the record that the plea

(III) *Election Between Counts or Offenses.* In prosecutions for violations of liquor laws the general rules as to election between counts or offenses apply.[74] Where the law provides that the granting of a new trial shall place the parties in the same position as if no trial had been had, the prosecution on such new trial may elect to proceed upon a different sale from that relied on in the former trial.[75]

(IV) *Trial by Jury.* The constitutional right of one charged with a violation of the liquor laws to claim a trial by jury has been discussed in an earlier section.[76] As to the competency of jurors, it is held that members of societies or associations formed for the purpose of enforcing the liquor laws and securing the prosecution of offenders are disqualified;[77] but not where the society, although designed to promote temperance among its own members, does not endeavor to compel others to obey the laws.[78] The fact that a person as constable is specially charged with enforcing the liquor law does not disqualify him from acting as a juror on a trial for maintaining a liquor nuisance in another precinct.[79]

b. Questions For Jury — (I) *In General.* In trials under the liquor laws, as in other cases, whether or not evidence is competent or admissible is a question for the determination of the court;[80] but its effect is for the jury, and the court should not direct their verdict unless there is a total want of evidence or an entire lack of conflict; although the testimony is conflicting, it must not be rejected, but must be left to the jury to consider.[81] Whether defendant had a license is a question of fact; but the nature and extent of the authority it conferred on him is matter of law for the court.[82] And so whether or not a transaction was a sale of

was received with the consent of the prosecutor. Com. *v.* Adams, 6 Gray (Mass.) 359.

Pleading guilty to one count and not guilty to another.— Where the first of two counts charged defendant with having been a common seller of liquor during a certain time, and the second alleged a single sale within the same time, and defendant pleaded guilty to the second and not guilty to the first count, it was held that he might nevertheless be tried and convicted upon the first count, and judgment rendered thereon against him, and a *nolle prosequi* entered on the second count. Com. *v.* Mead, 10 Allen (Mass.) 396. And see Com. *v.* Jenks, 1 Gray (Mass.) 490.

74. See Indictments and Informations. And see the following cases:

Alabama.— Wilson *v.* State, 136 Ala. 114, 33 So. 831; Hughes *v.* State, 35 Ala. 351; Elam *v.* State, 26 Ala. 48.

Indiana.— Lebkovitz *v.* State, 113 Ind. 26, 14 N. E. 363, 597; Long *v.* State, 56 Ind. 182, 26 Am. Rep. 19.

Massachusetts.— Com. *v.* O'Hanlon, 155 Mass. 198, 29 N. E. 518; Com. *v.* Clynes, 150 Mass. 71, 22 N. E. 436, holding that the fact that defendant in a complaint charging the keeping of a nuisance in a certain "tenement," by selling liquors, occupied one room, does not require the state to elect in which one of the rooms was the tenement.

North Carolina.— State *v.* Farmer, 104 N. C. 887, 10 S. E. 563, holding that where an indictment against a physician for giving fraudulent prescriptions for liquor is in several counts, each of which charges the giving of a prescription to a different person, the state may be compelled to elect on which count it will proceed.

Ohio.— Stick *v.* State, 23 Ohio Cir. Ct. 392.

Tennessee.— Murphy *v.* State, 9 Lea 373.

Vermont.— State *v.* White, 70 Vt. 225, 39 Atl. 1085.

As to the sufficiency of election see State *v.* Durlin, 70 Kan. 1, 78 Pac. 152, 70 Kan. 13, 80 Pac. 987; State *v.* Moulton, 52 Kan. 69, 34 Pac. 412; State *v.* Lund, 49 Kan. 663, 31 Pac. 309; State *v.* Guettler, 34 Kan. 582, 9 Pac. 200; State *v.* O'Connell, 31 Kan. 383, 2 Pac. 579; State *v.* Crimmins, 31 Kan. 376, 2 Pac. 574; State *v.* Nagley, 8 Kan. App. 812, 57 Pac. 554; State *v.* Saxton, 2 Kan. App. 13, 41 Pac. 1113.

As to the specification of offenses under the Vermont statute see State *v.* Wooley, 59 Vt. 357, 10 Atl. 84; State *v.* Smith, 55 Vt. 57; State *v.* Rowe, 43 Vt. 265; State *v.* Bacon, 41 Vt. 526, 98 Am. Dec. 616.

75. State *v.* Dow, 74 Iowa 141, 37 N. W. 114.

76. See *supra*, IV, G, 5.

77. Com. *v.* Moore, 143 Mass. 136, 9 N. E. 25, 58 Am. Rep. 128.

78. State *v.* Estlinbaum, 47 Kan. 291, 27 Pac. 996.

79. State *v.* Cosgrove, 16 R. I. 411, 16 Atl. 900.

80. Townsend *v.* State, 2 Blackf. (Ind.) 151.

81. Levy *v.* State, 133 Ala. 190, 31 So. 805; Gilmore *v.* State, 125 Ala. 59, 28 So. 382; Sullivan *v.* District of Columbia, 20 App. Cas. (D. C.) 29; State *v.* Pierce, 111 Mo. App. 216, 85 S. W. 663; State *v.* Spence, 87 Mo. App. 577; State *v.* La Rose, 71 N. H. 435, 52 Atl. 943.

82. Com. *v.* Asbury, 104 Ky. 320, 47 S. W. 217, 20 Ky. L. Rep. 574. See also State *v.*

liquors may be a question for the court, if it depends on the legal consequences of proved or admitted facts;[83] but it is for the jury if the facts are in controversy, if it depends on the intention of the parties,[84] or if there was an attempt to evade the law by a trick, device, or subterfuge.[85] The alleged agency of the accused, either as acting for the seller or the buyer, is also a question which should be left to the jury;[86] and the same is true of questions concerning the location, description, or character of premises constituting the scene of the alleged offense.[87] And generally all controverted questions of fact are to be determined by the jury.[88]

(II) *Intent, Knowledge, or Notice.* It is the province of the jury to determine questions concerning the intent of defendant in the transaction complained of;[89] his knowledge of facts which, if known to him, would make the particular sale unlawful;[90] or his honesty of purpose or good faith, when set up as a defense or justification.[91]

Spence, 87 Mo. App. 577; Jefferson *v.* People, 101 N. Y. 19, 3 N. E. 797.

83. State *v.* Shields, 110 La. 547, 34 So. 673; State *v.* McAdams, 106 La. 720, 31 So. 187. And see Com. *v.* Poulin, 187 Mass. 568, 73 N. E. 655.

84. Hale *v.* State, 36 Ark. 150; Keiser *v.* State, 82 Ind. 379; State *v.* Greenleaf, 31 Me. 517.

85. *Georgia.*— Turner *v.* State, 121 Ga. 154, 48 S. E. 906.

Kentucky.— Com. *v.* Hurst, 62 S. W. 1024, 23 Ky. L. Rep. 365; Adair *v.* Com., 56 S. W. 530, 21 Ky. L. Rep. 1818.

Maryland.— Archer *v.* State, 45 Md. 33.

Massachusetts.— Com. *v.* Smith, 102 Mass. 144.

Missouri.— State *v.* Stephens, 70 Mo. App. 554; State *v.* Clark, 18 Mo. App. 531.

Ohio.— Kober *v.* State, 10 Ohio St. 444.

86. Banks *v.* State, 136 Ala. 106, 34 So. 350; Baker *v.* Com., 64 S. W. 657, 23 Ky. L. Rep. 898; Leak *v.* Com., 64 S. W. 521, 23 Ky. L. Rep. 932; State *v.* Tibbetts, 35 Me. 81; Hertzler *v.* Geigley, 196 Pa. St. 419, 46 Atl. 366, 79 Am. St. Rep. 724. *Compare* State *v.* Shields, 110 La. 547, 34 So. 673; Harris *v.* State, (Tex. Cr. App. 1905) 85 S. W. 1198; Harris *v.* State, (Tex. Cr. App. 1905) 85 S. W. 284; Blasingame *v.* State, (Tex. Cr. App. 1905) 85 S. W. 275.

87. State *v.* Kinkead, 57 Conn. 173, 17 Atl. 855; Com. *v.* Lee, 148 Mass. 8, 18 N. E. 586; Com. *v.* Everson, 140 Mass. 434, 5 N. E. 155; People *v.* Scranton, 61 Mich. 244, 28 N. W. 81.

Appurtenances.— The question as to what constitutes the appurtenances of the premises of a person charged with the unlawful sale of liquor is one of fact for the jury. Stout *v.* State, 93 Ind. 150.

88. State *v.* Norris, 59 N. H. 536 (holding that whether a temperance camp-meeting is a public assembly convened for the purpose of "religious worship" is a question of fact); State *v.* Ross, 58 S. C. 444, 36 S. E. 659 (holding that whether defendant is a "manufacturer" of liquor is a question for the jury); People *v.* Locy, 124 Mich. 180, 82 N. W. 826 (holding that the question whether or not curtains or screens in a saloon were so removed during closing hours as to afford a full view of the interior is for the jury).

Adoption of local option.— Where the accused denies that local option was legally adopted by the county, it is error to take the question from the jury by charging that local option was in force in the county at the time of the alleged offense. Ezzell *v.* State, 29 Tex. App. 521, 16 S. W. 782. But where no question is raised as to the legality of the adoption of the law in the particular district, or where there is uncontradicted evidence of its existence, the court, in its instructions, may assume that the law is in force, and it is not necessary to submit the question in detail to the jury. Shilling *v.* State, (Tex. Cr. App. 1899) 51 S. W. 240; Benson *v.* State, 39 Tex. Cr. 56, 44 S. W. 167, 1091; Bruce *v.* State, 36 Tex. Cr. 53, 39 S. W. 683.

89. Harris *v.* State, 50 Ala. 127; Meadows *v.* State, 121 Ga. 362, 49 S. E. 268.

90. Elam *v.* State, 25 Ala. 53. And see Crabtree *v.* State, 30 Ohio St. 382; Neideiser *v.* State, 6 Baxt. (Tenn.) 499.

91. Coker *v.* State, 91 Ala. 92, 8 So. 874; Com. *v.* Bishman, 138 Pa. St. 639, 21 Atl. 12.

Sale for permitted purpose.— It is for the jury to find whether a sale of liquor was made, as claimed by defendant, in good faith, for use as a medicine or for any other purpose permitted by law. Redding *v.* State, 91 Ga. 231, 18 S. E. 289; Owens *v.* People, 56 Ill. App. 569; Mitchell *v.* State, 63 Ind. 574; Leppert *v.* State, 7 Ind. 300; Howard *v.* State, 5 Ind. 516; Zapf *v.* State, 11 Ind. App. 360, 39 N. E. 171; State *v.* Flusche, 79 Iowa 765, 44 N. W. 698; State *v.* Hoagland, 77 Iowa 135, 41 N. W. 595; State *v.* Huff, 76 Iowa 200, 40 N. W. 720; State *v.* Cummins, 76 Iowa 133, 40 N. W. 124; State *v.* Cloughly, 73 Iowa 626, 35 N. W. 652; State *v.* Knowles, 57 Iowa 669, 11 N. W. 620; Mills *v.* Perkins, 120 Mass. 41; Brooks *v.* State, 65 Miss. 445, 4 So. 343; Haynie *v.* State, 32 Miss. 400. And see White *v.* State, 45 Tex. Cr. 597, 78 S. W. 1066.

Instructions to servants.— Whether or not defendant's orders to his employees not to make sales at prohibited times or to prohibited persons were given in good faith and

(III) *Character and Properties of Liquor.* While there are some well known alcoholic beverages which are judicially known to be intoxicating,[92] it is generally a question of fact to be submitted to the jury whether a given liquor is "intoxicating," "spirituous," "vinous," "malt," or otherwise according to the language of the statute, and especially where the liquor in question was disguised by being mixed with other substances, or sold under a fanciful or deceptive name.[93]

(IV) *Identity, Character, or Condition of Purchaser.* Where two persons go together to a saloon for a drink, it is for the jury to find, if the fact is disputed, to which of them the sale was made.[94] Where a defendant is charged with selling liquor to an intoxicated person, or to a habitual drunkard, the question of the inebriated condition of the one, or the intemperate habits of the other, is a question of fact for the jury.[95]

c. **Instructions** — (I) *In General.* On a trial for a violation of the liquor laws the rules as to instructions in criminal prosecutions generally are applicable.[96] Accordingly, in trials for offenses of this character, it has been held that the court should instruct the jury as to the existence and applicability of the statute covering the case;[97] the essential elements of the offense charged,[98] the instructions being carefully restricted to the specific offense alleged in the indictment, as distinguished from all similar but distinct crimes;[99] as to the time within which[1] and the place

meant to be obeyed is a question for the jury. State *v.* Wentworth, 65 Me. 234, 20 Am. Rep. 688; Com. *v.* Riley, 157 Mass. 89, 31 N. E. 708; Moore *v.* State, 64 Nebr. 557, 90 N. W. 553.

92. See *supra*, II, B.

93. *Alabama.*— Hinton *v.* State, 132 Ala. 29, 31 So. 563; Wadsworth *v.* Dunnam, 98 Ala. 610, 13 So. 597; Allred *v.* State, 89 Ala. 112, 8 So. 56.

Iowa.— State *v.* Bussamus, 108 Iowa 11, 78 N. W. 700; State *v.* Laffer, 38 Iowa 422.

Kansas.— State *v.* May, 52 Kan. 53, 34 Pac. 407; Topeka *v.* Zufall, 40 Kan. 47, 19 Pac. 359, 1 L. R. A. 387.

Maine.— State *v.* Piche, 98 Me. 348, 56 Atl. 1052; State *v.* Starr, 67 Me. 242; State *v.* Wall, 34 Me. 165; State *v.* Stewart, 31 Me. 515.

Massachusetts.— Com. *v.* Savery, 145 Mass. 212, 13 N. E. 611; Com. *v.* Magee, 141 Mass. 111, 4 N. E. 819.

New Hampshire.— State *v.* Biddle, 54 N. H. 379.

New York.— Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; People *v.* Schewe, 29 Hun 122, 1 N. Y. Cr. 360.

North Carolina.— State *v.* Scott, 116 N. C. 1012, 21 S. E. 194; State *v.* Lowry, 74 N. C. 121.

Pennsylvania.— Com. *v.* Reyburg, 122 Pa. St. 299, 16 Atl. 351, 2 L. R. A. 415; Com. *v.* Beldham, 15 Pa. Super. Ct. 33.

Texas.— See Hendrick *v.* State, (Cr. App. 1904) 83 S. W. 711.

Vermont.— State *v.* Barron, 37 Vt. 57. And see State *v.* Kibling, 63 Vt. 636, 22 Atl. 613.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 326.

94. Edgar *v.* State, 45 Ark. 356; Com. *v.* Woods, 165 Mass. 145, 42 N. E. 565.

95. Smith *v.* State, 55 Ala. 1; Gallagher *v.* People, 29 Ill. App. 397 [*affirmed* in 120 Ill. 179, 11 N. E. 335]; Kammann *v.* People, 26 Ill. App. 48, 24 Ill. App. 388 [*affirmed* in 124 Ill. 481, 16 N. E. 661]; State *v.* Pratt, 34 Vt. 323.

96. See Criminal Law, 12 Cyc. 611 *et seq.* And see McIntosh *v.* State, 140 Ala. 137, 37 So. 223; McCormack *v.* State, 133 Ala. 202, 32 So. 268 (abstract charges are properly refused); Winter *v.* State, 133 Ala. 176, 32 So. 125 (a charge already given in substance need not be repeated); Cantwell *v.* State, (Tex. Cr. App. 1905) 85 S. W. 19; White *v.* State, (Tex. Cr. App. 1905) 85 S. W. 9; Mills *v.* State, (Tex. Cr. App. 1904) 82 S. W. 1045; Murry *v.* State, 46 Tex. Cr. 128, 79 S. W. 568.

Duty to define dram-shop (see Cross. *v.* People, 66 Ill. App. 170), original package (see Com. *v.* Swihart, 138 Pa. St. 629, 21 Atl. 11), and malt liquor (see State *v.* O'Connell, 99 Me. 61, 58 Atl. 59).

97. Jordan *v.* State, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110. And see Com. *v.* Blood, 11 Gray (Mass.) 74.

98. State *v.* Skillicorn, 104 Iowa 97, 73 N. W. 503; State *v.* Adams, 49 S. C. 518, 27 S. E. 523.

99. Taylor *v.* State, 68 Ark. 468, 60 S. W. 33; People *v.* Hilliard, 119 Mich. 24, 77 N. W. 306; Keith *v.* State, 38 Tex. Cr. 678, 44 S. W. 847; State *v.* Hassett, 64 Vt. 46, 23 Atl. 584.

1. See Moore *v.* State, 65 Ind. 382; State *v.* Miller, 114 Iowa 396, 87 N. W. 281; State *v.* Malling, 11 Iowa 239; Com. *v.* Hurley, 158 Mass. 159, 33 N. E. 342; State *v.* Ross, 58 S. C. 444, 36 S. E. 659.

Time of offense.—An instruction which permits the jury to find defendant guilty on proof of acts committed before the enactment of the statute under which he is prosecuted, or at a time beyond the statutory period of limitation, is erroneous. State *v.* Shank, 79 Iowa 47, 44 N. W. 241; State *v.* Jacobs, 75 Iowa 247, 39 N. W. 293; Webb *v.* State, (Tex. Cr. App. 1900) 58 S. W. 82. But such error

where[2] the offense must be shown to have been committed in order to warrant a conviction; as to any presumptions of law arising in the case;[3] and as to their province in regard to questions of law and of fact.[4] As in other criminal cases the instructions will be erroneous if there is no evidence in the case to support them or to which they are applicable;[5] and the court should not charge on the weight of the evidence.[6] It is proper, however, to instruct the jury that they are to weigh and estimate the value of the testimony and give to it such effect as they think it ought to have.[7] A special instruction on circumstantial evidence may be given if required by the nature of the evidence before the jury.[8]

(11) *Agency or Representation of Accused.* Where the alleged illegal sale was made by a servant or agent of the accused, the jury should be instructed as to the necessity of knowledge and consent on his part, and as to the circumstances under which they may infer such knowledge and consent as from his presence at the time, the general course of his business, or other pertinent facts.[9] If the defense is that the unlawful sale was made contrary to the proprietor's

is harmless where the only evidence in the case relates to transactions for which defendant, so far as regards the time, might legally be convicted. State *v.* Huff, 76 Iowa 200, 40 N. W. 720; Monroe *v.* Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520; State *v.* Pfefferle, 36 Kan. 90, 12 Pac. 406.

2. Peterson *v.* State, 64 Nebr. 875, 90 N. W. 964; Matkins *v.* State, (Tex. Cr. App. 1901) 62 S. W. 911; Leftwich *v.* State, (Tex. Cr. App. 1900) 55 S. W. 571.

3. See Winter *v.* State, 133 Ala. 176, 32 So. 125.

4. See Mullinix *v.* People, 76 Ill. 211.

5. *Arkansas.*— Hanlon *v.* State, 51 Ark. 186, 10 S. W. 265.

Georgia.— See Kinnebrew *v.* State, 80 Ga. 232, 5 S. E. 56.

Iowa.— State *v.* Skillicorn, 104 Iowa 97, 73 N. W. 503.

Kentucky.— Rowe *v.* Com., 70 S. W. 407, 24 Ky. L. Rep. 974.

Missouri.— State *v.* Hensley, 94 Mo. App. 151, 67 S. W. 964.

Texas.— Harris *v.* State, (Cr. App. 1905) 85 S. W. 1198; Harris *v.* State, (Cr. App. 1905) 85 S. W. 284; Blasingame *v.* State, (Cr. App. 1905) 85 S. W. 275; Ratliff *v.* State, (Tex. Cr. App. 1904) 78 S. W. 936. And see Arnold *v.* State, 46 Tex. Cr. 110, 79 S. W. 547.

Vermont.— State *v.* Wade, 63 Vt. 80, 22 Atl. 12.

Compare People *v.* Bacon, 117 Mich. 187, 75 N. W. 438, holding that a charge that among other things the posting of a United States internal revenue receipt in the room was made presumptive evidence of the sale of liquor was not misleading, although there was no evidence as to such a receipt in the case, where, in another instruction, the court stated correctly the facts which must be found from the evidence to warrant a conviction.

6. State *v.* Blackman, 134 N. C. 683, 47 S. E. 16; Williams *v.* State, 45 Tex. Cr. 477, 77 S. W. 215; Barham *v.* State, 41 Tex. Cr. 188, 53 S. W. 109; Bennett *v.* State, 40 Tex. Cr. 445, 50 S. W. 946; Snead *v.* State, 40 Tex. Cr. 262, 49 S. W. 595.

7. Klug *v.* State, 77 Ga. 734; Com. *v.* Christie, 145 Mass. 232, 13 N. E. 614; Com. *v.* Molter, 142 Mass. 533, 8 N. E. 428. And see Lincoln Center *v.* Bailey, 64 Kan. 885, 67 Pac. 455.

Evidence of spy or informer.— The court is not bound to charge that the testimony of a spy or informer "is to be received with great caution and distrust"; and there is no error in the refusal so to charge if the jury are properly instructed as to the matters which they may take into consideration in weighing the evidence of the witness. Com. *v.* Ingersoll, 145 Mass. 231, 13 N. E. 613; Com. *v.* Mason, 135 Mass. 555; Com. *v.* Trainor, 123 Mass. 414; Com. *v.* Whitcomb, 12 Gray (Mass.) 126; State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838; Reg. *v.* Fearman, 22 Ont. 456; Reg. *v.* Strachan, 20 U. C. C. P. 182. A proper instruction is that the jury should consider all the circumstances tending to diminish or fortify the credit of the witness, and decide for themselves what confidence should be placed in him. Com. *v.* Whitcomb, 12 Gray (Mass.) 126.

8. See State *v.* Stevens, 119 Iowa 675, 94 N. W. 241; Becker *v.* State, (Tex. Cr. App. 1899) 50 S. W. 949.

9. *Connecticut.*— State *v.* Curtiss, 69 Conn. 86, 36 Atl. 1014.

Georgia.— Kinnebrew *v.* State, 80 Ga. 232, 5 S. E. 56.

Indiana.— Hofuer *v.* State, 94 Ind. 84.

Massachusetts.— Com. *v.* Rooks, 150 Mass. 59, 22 N. E. 436; Com. *v.* Lafayette, 148 Mass. 130, 19 N. E. 26; Com. *v.* Houle, 147 Mass. 380, 17 N. E. 896; Com. *v.* Stevenson, 142 Mass. 466, 8 N. E. 341; Com. *v.* Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707.

Mississippi.— Bollis *v.* State, (1890) 7 So. 390.

Rhode Island.— State *v.* McGough, 14 R. I. 63.

Texas.— See Taylor *v.* State, (Cr. App. 1903) 77 S. W. 221. *Compare* Holley *v.* State, 46 Tex. Cr. 324, 81 S. W. 957.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 334.

orders to his servants, the jury should be instructed to consider whether such orders were given in good faith and with the intention that they should be obeyed.[10] If defendant claims to have acted as the agent of the buyer,[11] or attempts to justify as the employee of one having a license,[12] and there is evidence to support his contention, he is entitled to an instruction upon the circumstances which would relieve him from liability, on the ground of such agency or employment.

(III) *Intent, Knowledge, or Good Faith.* Where the charge is selling liquor to a minor or drunkard, defendant's right to an instruction on the question of his knowledge of the purchaser's age or habits, or his grounds for a reasonable belief on the subject, or good faith in making the sale, will depend on whether the statute makes such knowledge an essential part of the offense, or permits ignorance or an honest mistake to be shown in defense.[13] Where the liquor is claimed to have been sold in good faith, for use as a medicine or for other permitted purposes, the jury should be instructed concerning defendant's knowledge and good faith.[14]

(IV) *Character and Properties of Liquor.* Where an issue is raised as to the properties of the liquor sold by defendant, the court should instruct the jury as to the meaning of the word "intoxicating," as applied to a beverage,[15] except in cases where the statute expressly defines this term;[16] and should charge that defendant must be acquitted unless the evidence proves beyond a reasonable doubt that the liquor which he sold was intoxicating liquor and of the kind charged in the indictment.[17] But the court should not charge, or assume in its instructions, that the liquor in question was intoxicating,[18] except in the cases

10. Com. *v.* Coughlin, 182 Mass. 558, 66 N. E. 207; Com. *v.* Rooks, 150 Mass. 59, 22 N. E. 436.

11. *Alabama.*— Banks *v.* State, 136 Ala. 106, 34 So. 350.

Arkansas.— Taylor *v.* State, 68 Ark. 468, 60 S. W. 33.

Kansas.— State *v.* Smith, 51 Kan. 120, 32 Pac. 927.

Kentucky.— Chinn *v.* Com., 33 S. W. 1117, 17 Ky. L. Rep. 1205. See also Doores *v.* Com., 76 S. W. 2, 25 Ky. L. Rep. 459.

Texas.— Grimes *v.* State, 44 Tex. Cr. 503, 72 S. W. 589; Treadaway *v.* State, 42 Tex. Cr. 466, 62 S. W. 574; Campbell *v.* State, 37 Tex. Cr. 572, 40 S. W. 282.

Wisconsin.— Boldt *v.* State, 72 Wis. 7, 38 N. W. 177.

12. See Glass *v.* State, 68 Ark. 266, 57 S. W. 793; Burke *v.* State, 72 Ind. 392; People *v.* Drennan, 86 Mich. 445, 49 N. W. 215; Burnett *v.* State, 42 Tex. Cr. 600, 62 S. W. 1063.

13. *Alabama.*— Jones *v.* State, 100 Ala. 88, 14 So. 772.

Indiana.— Hunter *v.* State, 101 Ind. 241.

Iowa.— State *v.* Huff, 76 Iowa 200, 40 N. W. 720.

Massachusetts.— Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656; Com. *v.* Stevens, 155 Mass. 291, 29 N. E. 508; Com. *v.* McNeff, 145 Mass. 406, 14 N. E. 616.

Michigan.— People *v.* Riley, 71 Mich. 349, 38 N. W. 922.

Texas.— Williamson *v.* State, (Cr. App. 1897) 40 S. W. 286; Slaughter *v.* State, (Cr. App. 1893) 21 S. W. 247.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 335.

14. State *v.* Gregory, 110 Iowa 624, 82 N. W. 335; Rowe *v.* Com., 70 S. W. 407, 24 Ky. L. Rep. 974; Com. *v.* Tate, 178 Mass. 121, 59 N. E. 646; Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656.

Sufficiency of instructions as to good faith see People *v.* Shuler, 136 Mich. 161, 98 N. W. 986; Miller *v.* State, 5 Ohio St. 275; White *v.* State, 45 Tex. Cr. 602, 79 S. W. 523.

15. State *v.* Gregory, 110 Iowa 624, 82 N. W. 335; Taylor *v.* State, (Tex. Cr. App. 1899) 49 S. W. 589; Decker *v.* State, 39 Tex. Cr. 20, 44 S. W. 845. And see Kinnebrew *v.* State, 80 Ga. 232, 5 S. E. 56.

16. State *v.* Wittmar, 12 Mo. 407.

17. *Alabama.*— Costello *v.* State, 130 Ala. 143, 30 So. 376.

Arkansas.— Crawford *v.* State, 69 Ark. 360, 63 S. W. 801.

Iowa.— State *v.* Spiers, 103 Iowa 711, 73 N. W. 343.

Michigan.— People *v.* Rice, 103 Mich. 350, 61 N. W. 540; People *v.* Ingraham, 100 Mich. 530, 59 N. W. 234.

Mississippi.— King *v.* State, 58 Miss. 737, 38 Am. Rep. 344.

Missouri.— State *v.* Kolb, 39 Mo. App. 45; State *v.* Smith, 38 Mo. App. 618.

Texas.— Bailey *v.* State, (Cr. App. 1902) 66 S. W. 780; Robinson *v.* State, (Cr. App. 1899) 49 S. W. 386; Christian *v.* State, (Cr. App. 1897) 39 S. W. 682.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 336.

18. See *supra*, IX, B, 7, b, (III).

Such an instruction is not prejudicial to defendant, so as to be ground for reversal, if neutralized by other parts of the charge, or justified by the uncontradicted evidence. See

where this fact may come within the judicial cognizance;[19] but may instruct and direct the jury in regard to the evidence which it is proper for them to consider in determining this issue.[20] The court is not obliged to charge that the jury must find that the liquor sold by defendant produced intoxication in the purchaser, as it is not necessary to convict for a sale of intoxicating liquor that the buyer should have been made drunk by the use of the liquor sold.[21] It is erroneous for the court to tell the jury that the fact that certain bitters made the purchaser drunk is proof that they were spirituous liquor, this being an instruction on the weight of the evidence.[22]

(v) *Illegal Sales.* On trial for an illegal sale of liquor, the court should explain to the jury the meaning of "sale" as a legal transaction,[23] and, if the evidence requires it, should discriminate between a sale, a gift, an exchange, and other forms of transfer, so as not to permit a conviction for one on proof of another.[24] Instructions should not be so framed as to permit the jury to convict for a sale to a different purchaser than the one specified in the indictment,[25] or a sale made at a time when it would be lawful,[26] or without proof of some one specific sale.[27] If there is evidence in the case to justify it, it is proper to instruct the jury that they must find defendant guilty if they are satisfied that his conduct in the particular transaction was only a subterfuge, device, trick, or evasion to disguise or mask an unlawful sale.[28] On a charge of selling to a prohibited person, it is proper to instruct the jury as to what constitutes a sale,[29] and to explain to them the status, character, habits, or other condition of the purchaser which would render it unlawful;[30] but not to take from them the question of defendant's

Berger *v.* State, (Ark. 1889) 11 S. W. 765; Nuzum *v.* State, 88 Ind. 599; State *v.* Lindoen, 87 Iowa 702, 54 N. W. 1075.

19. State *v.* Tisdale, 54 Minn. 105, 55 N. W. 903; Sebastian *v.* State, 44 Tex. Cr. 508, 72 S. W. 849. And see State *v.* Baker, 36 Mo. App. 58.

20. Territory *v.* Pratt, 6 Dak. 483, 43 N. W. 711; State *v.* Jarrett, 35 Mo. 357; State *v.* Gravelin, 16 R. I. 407, 16 Atl. 914.

21. Matkins *v.* State, (Tex. Cr. App. 1901) 62 S. W. 911; Frickie *v.* State, 40 Tex. Cr. 626, 51 S. W. 394.

22. Fairly *v.* State, 63 Miss. 333.

23. *Alabama.*— Winter *v.* State, 133 Ala. 176, 32 So. 125.

Iowa.— See State *v.* Miller, 114 Iowa 396, 87 N. W. 281.

Kentucky.— Tatum *v.* Com., 59 S. W. 32, 22 Ky. L. Rep. 927.

North Dakota.— State *v.* Thoemke, (1902) 92 N. W. 480.

Texas.— Krnavek *v.* State, 38 Tex. Cr. 44, 41 S. W. 612. *Compare* Williams *v.* State, 45 Tex. Cr. 477, 77 S. W. 215.

Contra.— State *v.* Green, 69 Kan. 865, 77 Pac. 95.

24. *Alabama.*— Winter *v.* State, 133 Ala. 176, 31 So. 717.

Georgia.— Palmer *v.* State, 91 Ga. 164, 16 S. E. 976; McCollum *v.* State, 34 Ga. 405.

Illinois.— Birr *v.* People, 113 Ill. 645.

Iowa.— State *v.* Briggs, 81 Iowa 585, 47 N. W. 865; State *v.* Reinhartz, 69 Iowa 224, 28 N. W. 566.

Mississippi.— Attlesy *v.* State, (1892) 12 So. 210.

North Dakota.— State *v.* Thoemke, (1902) 92 N. W. 480.

Texas.— Matkins *v.* State, (Cr. App. 1901) 62 S. W. 911; Williams *v.* State, (Cr. App. 1900) 57 S. W. 650.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 343.

25. Bennett *v.* State, 40 Tex. Cr. 445, 50 S. W. 946; Poe *v.* State, (Tex. Cr. App. 1898) 44 S. W. 493; Carter *v.* State, (Tex. Cr. App. 1897) 40 S. W. 267; Lafferty *v.* State, (Tex. Cr. App. 1896) 35 S. W. 373; Hannaman *v.* State, (Tex. Cr. App. 1895) 33 S. W. 538.

26. See Lucas *v.* State, 92 Ga. 454, 17 S. E. 668; Kammann *v.* People, 26 Ill. App. 48; Breeland *v.* State, (Tex. Cr. App. 1899) 50 S. W. 722.

27. Boldt *v.* State, 72 Wis. 7, 38 N. W. 177. And see Olmstead *v.* State, 92 Ala. 64, 9 So. 737.

28. *Alabama.*— Winter *v.* State, 133 Ala. 176, 32 So. 125.

Arkansas.— Baker *v.* State, 58 Ark. 625, 26 S. W. 10.

Iowa.— State *v.* Fleming, 86 Iowa 294, 53 N. W. 234.

Kansas.— See State *v.* Green, 69 Kan. 865, 77 Pac. 95.

Massachusetts.— Com. *v.* Ewig, 145 Mass. 119, 13 N. E. 365.

Texas.— Vanarsdale *v.* State, 35 Tex. Cr. 587, 34 S. W. 931; Kearley *v.* State, (Cr. App. 1896) 33 S. W. 975.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 343.

29. See Walton *v.* State, 62 Ala. 197.

30. Mullinix *v.* People, 76 Ill. 211; Com. *v.* Trimble, 150 Mass. 89, 22 N. E. 439; Com. *v.* Fowler, 145 Mass. 398, 14 N. E. 457, C. Allen, J., delivering the opinion of the court.

knowledge, or of what would constitute due diligence on his part in seeking information.[31] Instructions relative to a charge of keeping open a saloon or bar at a prohibited time are erroneous if so framed as to permit the jury to convict where the evidence shows that it was opened for a lawful purpose.[32] Where the defense is that the sale was made for a lawful and permitted purpose, the jury should be instructed as to the purposes which would be lawful and as to the circumstances they may consider in determining the purpose of the particular sale and the question of defendant's good faith.[33] If the defense of a license is interposed, the jury should not be permitted to disregard the evidence on that point, but should be instructed as to the legal effect of a license if proved.[34]

(VI) *KEEPING FOR SALE.* On a trial for this offense, it is not improper to instruct the jury that the finding of liquor on defendant's premises is presumptive evidence that he kept it for sale, provided they are told this presumption is rebuttable and are instructed as to the burden of proof and the right of an individual to keep liquors for lawful purposes.[35] The effect of such evidence and the general question of defendant's purpose are matters which must be left to the jury.[36]

(VII) *CARRYING ON BUSINESS.* As there is a fundamental distinction between the offense of engaging in, or carrying on, the business of liquor selling and the offense of making an unlawful sale or sales, the difference should be pointed out to the jury, and instructions which confuse the two crimes or tend to mislead the jury are erroneous.[37] But the jury may be told that they may find defendant guilty if satisfied that selling liquor was his common and ordinary business, without proof of any particular number of sales.[38]

(VIII) *MAINTAINING LIQUOR NUISANCE.* The offense of keeping a place for the unlawful sale of liquor, or maintaining a liquor nuisance, being distinguishable both from that of unlawful selling and from that of keeping liquor for unlawful sale, the jury should be instructed as to the differences, and instructions are erroneous which tend to mislead them or to permit a conviction of one offense

31. McGuire *v.* State, (Tex. App. 1891) 15 S. W. 917.

32. Sullivan *v.* District of Columbia, 20 App. Cas. (D. C.) 29; People *v.* Bowkus, 109 Mich. 360, 67 N. W. 319; People *v.* Kridler, 80 Mich. 592, 45 N. W. 374; People *v.* Beller, 73 Mich. 640, 41 N. W. 827; People *v.* Minter, 59 Mich. 557, 26 N. W. 701; Levine *v.* State, 35 Tex. Cr. 647, 34 S. W. 969.

Evidence of lawful purpose necessary.— Defendant is not entitled to an instruction directing the jury to acquit him if they find the place was opened only for a lawful purpose, when there is no evidence in the case to show that it was opened for any other purpose than the traffic in liquors. Seyden *v.* State, 78 Ga. 105; Croell *v.* State, 25 Tex. App. 596, 8 S. W. 816.

33. State *v.* Skillicorn, 104 Iowa 97, 73 N. W. 503; State *v.* Field, 89 Iowa 34, 56 N. W. 276; State *v.* Aulman, 76 Iowa 624, 41 N. W. 379; State *v.* Young, 36 Mo. App. 517. And see State *v.* Von Haltschuherr, 72 Iowa 541, 34 N. W. 323.

Defendant entrapped.— On trial for selling liquor as a druggist contrary to law, the court properly refused to instruct that defendant could not be convicted if he was entrapped into making the sale by a detective, although the public authorities were in no way concerned in setting the trap. People *v.* Curtis, 95 Mich. 212, 54 N. W. 767.

34. Liggett *v.* People, 26 Colo. 364, 58 Pac. 144; State *v.* Skillicorn, 104 Iowa 97, 73 N. W. 503; State *v.* Drake, 33 Kan. 151, 5 Pac. 753; State *v.* Conley, 1 Kan. App. 124, 41 Pac. 980.

35. State *v.* Stevens, 119 Iowa 675, 94 N. W. 241; State *v.* Hale, 91 Iowa 367, 59 N. W. 281; State *v.* Shank, 74 Iowa 649, 38 N. W. 523; Com. *v.* Keenan, 148 Mass. 470, 20 N. E. 101. *Compare* Com. *v.* Foster, 182 Mass. 276, 65 N. E. 391; Com. *v.* Canny, 158 Mass. 210, 33 N. E. 340.

36. Com. *v.* Foster, 182 Mass. 276, 65 N. E. 391; Com. *v.* McManus, 161 Mass. 64, 36 N. E. 675; Com. *v.* Kane, 150 Mass. 294, 22 N. E. 903; Com. *v.* Kennedy, 108 Mass. 292; State *v.* Norris, 65 S. C. 287, 43 S. E. 791; State *v.* Nickels, 65 S. C. 169, 43 S. E. 521.

37. Williams *v.* State, 23 Tex. App. 499, 5 S. W. 136; La Norris *v.* State, 13 Tex. App. 33, 44 Am. Rep. 699. And see Witherspoon *v.* State, 39 Tex. Cr. 65, 44 S. W. 164, 1096; McReynolds *v.* State, 26 Tex. App. 372, 9 S. W. 617.

38. State *v.* O'Connor, 49 Me. 594. See People *v.* Robinson, 135 Mich. 511, 98 N. W. 12; People *v.* Hicks, 79 Mich. 457, 44 N. W. 931.

In Massachusetts the statute provides that three several sales of liquor shall be sufficient evidence of the character of the defendant as a common seller. Under this provision, it is the duty of the court to instruct the jury that proof of three sales is enough

on proof of another.[39] The jury should also be instructed, where the evidence requires it, concerning the effect of finding liquor on the premises as evidence,[40] the proof necessary to connect him with the offense as the keeper or proprietor of the place, or as being interested in the business or in control of the place,[41] and as to the proof of a license or authority on his part, or the want of it.[42]

d. Verdict and Findings.[43] In prosecutions under the liquor laws, a general verdict of guilty or not guilty will generally be sufficient.[44] A general verdict is not insufficient because it fails to specify on which of several counts in the indictment it is founded.[45] If a special verdict or finding is made, it is essential that it should find every fact which is necessary to establish defendant's guilt under the indictment.[46]

8. Appeal and Review — a. In General. Appeals from convictions for viola-

evidence to warrant a verdict of guilty. Com. *v.* Kirk, 7 Gray 496.

39. *Iowa.*— State *v.* Skillicorn, 104 Iowa 97, 73 N. W. 503; State *v.* Price, 75 Iowa 243, 39 N. W. 291.

Kansas.— State *v.* Lund, 51 Kan. 124, 32 Pac. 926.

Kentucky.— Hinton *v.* Com., 7 Dana 216.

Maine.— State *v.* Stanley, 84 Me. 555, 24 Atl. 983.

Massachusetts.— Com. *v.* McNeff, 145 Mass. 406, 14 N. E. 616; Com. *v.* Aaron, 114 Mass. 255.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 340.

Notorious character of premises see State *v.* Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838.

Failure to define a common nuisance, and to declare who is a keeper of a common nuisance, is not error, where a common nuisance as alleged in the information was defined. State *v.* Lord, 8 Kan. App. 257, 55 Pac. 503.

40. State *v.* Stevens, 119 Iowa 675, 94 N. W. 241; State *v.* Illsley, 81 Iowa 49, 46 N. W. 977; State *v.* Shank, 79 Iowa 47, 44 N. W. 241.

41. See State *v.* Durein, 70 Kan. 1, 78 Pac. 152, 70 Kan. 13, 80 Pac. 987; Com. *v.* Jennings, 107 Mass. 488; State *v.* Gravelin, 16 R. I. 407, 16 Atl. 914; State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

42. State *v.* Wamhold, 74 Iowa 605, 38 N. W. 429; Com. *v.* Hill, 4 Allen (Mass.) 589.

43. See Criminal Law, 12 Cyc. 686 *et seq.*

Form of verdict.—On a prosecution for selling liquor without a license, a verdict finding defendant "guilty of aiding in selling whisky" is sufficient to sustain judgment, its meaning being clear. Johns *v.* State, 78 Miss. 663, 29 So. 401. But the court is not authorized to enter a verdict of "guilty" against one indicted for keeping a nuisance consisting of a tippling shop, when three of the jury, upon being polled, refuse to concur in such verdict, but answer "guilty of keeping a bar there." State *v.* Wright, 5 R. I. 287.

Rejecting surplusage in a verdict see Rhoads *v.* Com., (Pa. 1886) 6 Atl. 245.

Assessment of fine by jury see Sampson *v.* State, 107 Ala. 76, 18 So. 207; Allen *v.* State, (Tex. App. 1890) 13 S. W. 998; Charleston *v.* Weikman, 2 Speers (S. C.) 371.

Convicting one defendant on joint indictment see Com. *v.* Gavin, 148 Mass. 449, 18 N. E. 675, 19 N. E. 554; Com. *v.* Cook, 12 Allen (Mass.) 542.

44. State *v.* Nowlan, 64 Me. 531; State *v.* McCann, 61 Me. 116; *In re* Butman, 8 Me. 113. And see State *v.* Brown, 31 Me. 520.

45. Williams *v.* State, 107 Ga. 693, 33 S. E. 641; Bruguier *v.* U. S., 1 Dak. 5, 46 N. W. 502.

Separate verdicts need not be returned upon each count of an information; it is sufficient if the findings of the jury upon the different counts are separately and definitely stated in one verdict. State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623.

Where a general verdict is returned on an indictment containing several counts, if the court finds that one of the counts was not sustained, defendant may be sentenced on the other, a *nolle prosequi* being entered as to the count not sustained. Com. *v.* Jenks, 1 Gray (Mass.) 490; Jones *v.* State, 67 Miss. 111, 7 So. 220. *Compare* Com. *v.* Munn, 14 Gray (Mass.) 364.

46. State *v.* Bradley, 132 N. C. 1060, 44 S. E. 122. And see State *v.* Blair, 72 Iowa 591, 34 N. W. 432.

Want of license or authority see Com. *v.* Certain Intoxicating Liquors, 148 Mass. 124, 19 N. E. 23; Com. *v.* Dooly, 6 Gray (Mass.) 360; State *v.* Wissenhunt, 98 N. C. 682, 4 S. E. 533; State *v.* Kirkham, 23 N. C. 384.

Time of offense.— If, upon a special verdict, it does not appear that the offense was committed before the filing of the information, the judgment must be arrested. Virginia *v.* Leap, 28 Fed. Cas. No. 16,964, 1 Cranch C. C. 1. But see State *v.* Kibling, 63 Vt. 636, 22 Atl. 613.

Character and properties of liquors see State *v.* Wadsworth, 30 Conn. 55 (holding that the jury need not find that the liquor sold, kept, or dealt in by defendant was intoxicating liquor where it was proved to be of one of the kinds of liquor commonly or judicially known to be intoxicating (such as brandy, rum, or gin) or of a kind specially declared by the statute to be intoxicating); People *v.* Cox, 45 Misc. (N. Y.) 311, 92 N. Y. Suppl. 125.

tion of the liquor laws, unless special provisions are made by statute, are governed by the rules applicable in criminal prosecutions generally.[47] A conviction will not be sustained where, pending the appeal, the statute under which the prosecution was had has been repealed[48] or adjudged unconstitutional by the court of last resort.[49]

b. Right of Appeal. Although the statute defining and punishing offenses against the liquor laws may not specifically allow appeals from conviction, yet such right may generally be claimed under the general statutes granting the accused an appeal in cases of misdemeanor.[50] Where a prosecution under a municipal ordinance regulating the sale of liquor is civil in form, and not strictly criminal in its character, the right of appeal may belong to the municipality as well as to defendant.[51]

c. Questions Considered on Appeal. The appellate court will not consider objections to the indictment, information, or complaint which were of such a character as to be waived by pleading or cured by verdict,[52] or objections to the evidence or the instructions or other rulings of the court not duly excepted to or which have been waived by defendant's conduct at the trial.[53]

d. What Record Must Show. A conviction cannot be sustained on appeal if the record fails to show the presentation of evidence of each of the facts essential to constitute the offense on trial,[54] including such facts, where they are severally necessary, as the place of commission of the alleged offense,[55] the sale of liquor to the particular person named in the indictment,[56] defendant's knowledge of circumstances making the sale unlawful,[57] that the occupation tax, non-payment of which made the sale unlawful, had been duly levied before the sale alleged,[58] or that the local option law was duly in force at the place and time charged.[59]

e. Review. On appeal from a conviction for violating the liquor laws, the judgment will be affirmed where no error appears,[60] and where there was some

47. See CRIMINAL LAW, 12 Cyc. 792 *et seq.*

Amendments. — The appellate court will not allow amendment of such a defect as the failure of the complaint sufficiently to allege the time of the offense. A motion for this purpose should have been made in the court below. State *v.* Kennedy, 36 Vt. 563.

Time of appeal see *In re* Ricker, 32 Me. 37.

Appeal-bond see Everly *v.* State, 10 Ind. App. 15, 37 N. E. 556.

Recognizance on appeal see Wade *v.* State, 41 Tex. Cr. 580, 56 S. W. 337; Landers *v.* State, (Tex. Cr. App. 1898) 44 S. W. 161.

48. Dawson *v.* State, 25 Tex. App. 670, 8 S. W. 820; Wells *v.* State, 24 Tex. App. 230, 5 S. W. 830.

49. People *v.* Snyder, 14 How. Pr. (N. Y.) 78.

50. State *v.* Cady, 47 Conn. 44; State *v.* Butt, 25 Fla. 258, 5 So. 597; Com. *v.* Brunner, 2 Lehigh Val. L. Rep. (Pa.) 377. *Compare* Dearth *v.* State, 17 Ind. 523.

Certiorari see People *v.* Farwell, 4 Mich. 556; Staates *v.* Washington, 44 N. J. L. 605, 43 Am. Rep. 402.

51. Kirkwood *v.* Autenreith, 11 Mo. App. 515.

52. State *v.* Falk, 46 Kan. 498, 26 Pac. 1023; Com. *v.* Purdy, 147 Mass. 29, 16 N. E. 745; Com. *v.* O'Keefe, 123 Mass. 252; State *v.* Houts, 36 Mo. App. 265; State *v.* Powell, 3 Lea (Tenn.) 164. But *compare* Canfield *v.* Leadville, 7 Colo. App. 453, 43 Pac. 910.

53. Hornberger *v.* State, 5 Ind. 300; State *v.* Shenkle, 36 Kan. 43, 12 Pac. 309; People *v.* Bennett, 107 Mich. 430, 65 N. W. 280. And see Miles *v.* State, 5 Ind. 239.

54. See State *v.* Forkner, 94 Iowa 733, 62 N. W. 683.

Evidence taken before information.—Where the bill of exceptions does not contain the testimony taken before the state's attorney before the filing by him of the information under the statute, an objection that the information was not based on the evidence required by the statute will not be considered. State *v.* Brennan, 2 S. D. 384, 50 N. W. 625.

55. Garst *v.* State, 68 Ind. 101; State *v.* Prather, 41 Mo. App. 451.

56. Wreidt *v.* State, 48 Ind. 579.

57. Ferrell *v.* State, 48 Ind. 118.

58. Petteway *v.* State, 36 Tex. Cr. 97, 35 S. W. 646.

59. Com. *v.* Day, 23 S. W. 193, 15 Ky. L. Rep. 385; State *v.* Prather, 41 Mo. App. 451; Yates *v.* State, (Tex. Cr. App. 1900) 59 S. W. 275; Johnson *v.* State, (Tex. Cr. App. 1898) 44 S. W. 834; Treue *v.* State, (Tex. Cr. App. 1898) 44 S. W. 829; Tyrell *v.* State, (Tex. Cr. App. 1898) 44 S. W. 159.

60. State *v.* Peterson, 70 Iowa 760, 30 N. W. 388.

Instructions.— Where objection is made to instructions given by the trial court, and the evidence is not in the record, the appellate court will not assume for the purpose of finding error that there was no evidence to support or justify the instructions in question. State *v.* Smith, 71 Vt. 331, 45 Atl. 219.

evidence on every material point to support a verdict of guilty,[61] which, although it was conflicting, might have justified such a verdict.[62]

f. Harmless Error. The judgment will not be reversed for error which was not harmful to the appellant. This rule applies where the action of the court to which objection is made, although actually erroneous, did not result in prejudice to any substantial rights of the accused;[63] where facts or qualifying circumstances which should have been adverted to in the instructions were either admitted or proved by the testimony;[64] or where the charge of the court was theoretically too broad or would have authorized a conviction on a state of facts not laid in the indictment or warranted by the statute, but the evidence was strictly confined to the limits of the indictment and the statute.[65] And a similar principle applies where the objection is to mere verbal inaccuracies of the court in defining or explaining the terms used in the law,[66] or to remarks improperly made by the judge, but cured by the explicit terms of the charge.[67]

g. New Trial. A new trial may be granted on appeal from a conviction under the liquor laws where there was a total failure of evidence on some essential point,[68] or on the ground of newly discovered evidence, if not merely cumulative,[69] or because of surprise.[70]

9. Sentence[71] and Punishment — a. In General. When the statute specifies the amount of fine or term of imprisonment to be imposed as a penalty for the violation of the liquor laws, the court has no discretion in regard to the punishment, but must enter the sentence directed by the statute.[72] And this applies also to

61. Howell *v.* State, 4 Ind. App. 483, 31 N. E. 88; Lynch *v.* People, 16 Mich. 472; Thornhill *v.* Stephany, 66 N. J. L. 171, 48 Atl. 573; Barham *v.* State, 41 Tex. Cr. 188, 53 S. W. 109. And see State *v.* Terry, 105 Mo. App. 428, 79 S. W. 998; McDaniel *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1068. *Compare* State *v.* Henderson, 52 S. C. 470, 30 S. E. 477.

62. Ross *v.* State, 116 Ind. 495, 19 N. E. 451; Williamson *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1088. And see Meadows *v.* State, 121 Ga. 362, 49 S. E. 268.

63. *Connecticut.*— State *v.* Duffy, 57 Conn. 525, 18 Atl. 791.

Kentucky.— Farris *v.* Com., 111 Ky. 236, 63 S. W. 615, 23 Ky. L. Rep. 580.

Maine.— New Gloucester *v.* Bridgham, 28 Me. 60.

Massachusetts.— Com. *v.* Cashman, 8 Allen 580.

New York.— People *v.* Dippold, 30 N. Y. App. Div. 62, 51 N. Y. Suppl. 859.

Rhode Island.— State *v.* Gruner, 25 R. I. 129, 54 Atl. 1058.

Texas.— Shilling *v.* State, (Cr. App. 1899) 51 S. W. 240; Snead *v.* State, (Cr. App. 1899) 49 S. W. 597; Morris *v.* State, (Cr. App. 1898) 44 S. W. 510.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 354.

64. See Davis *v.* State, 93 Ga. 45, 18 S. E. 998; State *v.* Shank, 79 Iowa 47, 44 N. W. 241; Hornberger *v.* State, 47 Nebr. 40, 66 N. W. 23; Leftwich *v.* State, (Tex. Cr. App. 1900) 55 S. W. 571.

65. McGruder *v.* State, 83 Ga. 616, 10 S. E. 281, holding that a charge that if defendant gave liquor away it would be the same as if he sold it, although erroneous, is harmless, where the evidence proves a sale and not a gift. And see Langan *v.* People, 32 Colo. 414, 76 Pac. 1048. *Compare* Chipman *v.* People, 24 Colo. 520, 52 Pac. 677.

Illustrations.— An instruction which would make the accused liable for a sale made without his knowledge or consent is not reversible error, where the evidence shows that he was present when the sale was made by his clerk. Johnson *v.* State, 85 Ga. 553, 10 S. E. 207. And see Loeb *v.* State, 75 Ga. 258. And an instruction which would authorize the jury to convict on evidence of a sale at a time beyond the period of limitations or before the statute was in force is not prejudicial, where there is no evidence in the case of a sale at any such time. Hofheintz *v.* State, 45 Tex. Cr. 117, 74 S. W. 310. And see State *v.* Wilgus, 32 Kan. 126, 4 Pac. 218; Megowan *v.* Com., 2 Metc. (Ky.) 3.

66. Cooper *v.* State, 88 Ga. 441, 14 S. E. 592; Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395.

67. People *v.* Scranton, 61 Mich. 244, 28 N. W. 81.

68. Garst *v.* State, 68 Ind. 37.

69. Winsett *v.* State, 57 Ind. 26.

70. See Liggett *v.* People, 26 Colo. 364, 58 Pac. 144.

71. Form, sufficiency, and amendment of conviction under New Brunswick statutes see Reg. *v.* Perley, 25 N. Brunsw. 43; Reg. *v.* Sullivan, 24 N. Brunsw. 149; Reg. *v.* Blair, 24 N. Brunsw. 72; *Ex p.* Golding, 19 N. Brunsw. 47; Reg. *v.* Harshman, 14 N. Brunsw. 317; *Ex p.* Breeze, 8 N. Brunsw. 395; Reg. *v.* French, 4 N. Brunsw. 121.

72. Johnson *v.* People, 1 Ill. 351; People *v.* Brown, 85 Mich. 119, 48 N. W. 158; Morris *v.* People, 2 Thomps. & C. (N. Y.) 219; Foote *v.* People, 2 Thomps. & C. (N. Y.) 216. And see State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

the nature of the penalty or punishment to be awarded.[73] If the statute does not authorize punishment by imprisonment only a fine can be imposed.[74] It is otherwise where the law allows a judgment of fine or imprisonment or both.[75] As to sentencing defendant to pay a fine and to be imprisoned in default of payment, or to stand committed until the fine shall be paid, authority for such a judgment must be found in the statute.[76] The severity of the sentence may also vary, if the statute so directs, according to the occupation of the accused, as whether or not he is a licensed dealer, or a dram-shop keeper,[77] or a druggist.[78] The duty of fixing the amount of the fine to be imposed is sometimes cast by law upon the jury.[79] It has been held that a conviction and fine for retailing liquor without a license does not operate as a license to retail for a year.[80]

b. Applicability of Laws and Ordinances. Although the statute prohibiting the particular act for which defendant has been convicted may prescribe no penalty for its violation, he may still be subject to sentence if there is a general law respecting the punishment of misdemeanors, or enacting penalties for infractions of the law not otherwise provided for, or punishing all persons transacting without a license any business for which a license is required by law.[81] If the statute is tainted with unconstitutional provisions, he cannot be punished at all, if the invalidity affects the whole; but it is otherwise if the invalid provisions may be eliminated, leaving enough of the statute to sustain the conviction.[82] He may be liable to concurrent penalties under several laws or ordinances;[83] but in case

The minimum penalty at least must be inflicted, and cannot be reduced by the court. State *v.* Faber, 28 Nebr. 803, 44 N. W. 1137; Davidson *v.* State, 27 Tex. App. 262, 11 S. W. 371.

Ascertaining amount of fine.— Where one factor in the penalty is a county occupation tax, not fixed by general law, but levied by the county commissioners, the amount of such a levy is not a matter of judicial knowledge, but should be alleged and proved, so that the fine may be assessed within the statutory limits. Eley *v.* State, (Tex. App. 1890) 13 S. W. 998; White *v.* State, 11 Tex. App. 476; Spears *v.* State, 8 Tex. App. 467.

73. Newman *v.* State, 101 Ga. 534, 28 S. E. 1005 (revocation of license, as part of punishment); Com. *v.* Kelly, 9 Gray (Mass.) 259 (giving bond conditioned for future obedience to the liquor laws); State *v.* Hicks, 101 N. C. 747, 7 S. E. 707 (labor on the public roads).

The abatement of a liquor nuisance is no part of the penalty for maintaining it; and defendant may be punished by fine and imprisonment, although the place has been abated. State *v.* Lee, 65 Kan. 698, 70 Pac. 595; State *v.* Engborg, 63 Kan. 853, 66 Pac. 1007.

74. People *v.* Cowles, 16 Hun (N. Y.) 577 [*affirmed* in 77 N. Y. 331]; State *v.* Thompson, 2 Ohio Dec. (Reprint) 30, 1 West. L. Month. 158; Akin *v.* State, 14 Tex. App. 142; Van Noy *v.* State, 14 Tex. App. 69.

75. People *v.* Minter, 59 Mich. 557, 26 N. W. 701; People *v.* Henschel, 12 N. Y. Suppl. 46; Quinney *v.* Com., 1 Mona. (Pa.) 158.

76. See Harris *v.* Com., 23 Pick. (Mass.) 280; People *v.* Rouse, 72 Mich. 59, 40 N. W. 57; People *v.* Stock, 157 N. Y. 681, 51 N. E. 1092 [*affirming* 26 N. Y. App. Div. 564, 50 N. Y. Suppl. 483]; People *v.* Shaver, 37 N. Y. App. Div. 21, 55 N. Y. Suppl. 701; People *v.* Hazard, 23 Misc. (N. Y.) 477, 52 N. Y. Suppl. 670.

In New Hampshire one convicted of selling spirituous liquors cannot be discharged by the court, with directions that execution for the fine and costs issue against his property. State *v.* Robinson, 17 N. H. 263.

In Colorado, where a municipal charter provided for a commitment of persons convicted of selling liquors without a license, when they had no real or personal estate with which to pay the judgment, it was held to be error to commit a defendant until payment of his fine and costs, without first ordering an execution to ascertain if he had any property to satisfy the judgment. Deitz *v.* Central, 1 Colo. 323.

77. See Baer *v.* Com., 10 Bush (Ky.) 8; State *v.* Heckler, 81 Mo. 417; Com. *v.* Zelt, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602; Com. *v.* Lukan, 10 Pa. Dist. 95.

78. State *v.* Hoagland, 77 Iowa 135, 41 N. W. 595.

79. See the statutes of the different states. And see Weed *v.* State, 55 Ala. 13; Scott *v.* State, (Tex. Cr. App. 1904) 82 S. W. 656, the jury may consider the fact that defendant did not know that the compound sold was intoxicating in mitigation of punishment.

80. State *v.* McBride, 4 McCord (S. C.) 332.

81. Daniels *v.* State, 150 Ind. 348, 50 N. E. 74; Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226; People *v.* Olcese, 41 Misc. (N. Y.) 102, 83 N. Y. Suppl. 973.

82. State *v.* Gurney, 37 Me. 156, 58 Am. Dec. 782; Lambert *v.* Rahway, 58 N. J. L. 578, 34 Atl. 5. See Miller *v.* Camden, 63 N. J. L. 501, 43 Atl. 1069, construing the provisions of the charter of the city of Camden.

83. Whalin *v.* Macomb, 76 Ill. 49; Com. *v.* Watson, 2 Pa. Dist. 526.

of conflicting statutes or progressive changes in the law the sentence should be determined in accordance with the latest expression of the legislative will.[84] And where a local option law is in force at the place of the offense, the penalty which it prescribes, rather than that under the general liquor law, must be applied.[85] And generally, where different offenses are defined by different sections of the same statute, or by successive statutes, with varying penalties, the court must take care to impose on a convicted defendant only that sentence which applies to his particular offense and is warranted by the applicable statute or section.[86]

c. Joint Defendants. Two or more persons may be jointly indicted for a violation of the liquor laws, and if both are found guilty, the full punishment may be imposed on each.[87] The judgment should be several against each for the full penalty, and not joint.[88]

d. Separate Counts or Offenses. Under an indictment charging several violations of the liquor law in as many counts, where defendant is found guilty on all, a separate sentence should be rendered on each count.[89] It is error to render judgment for an aggregate fine or for a term of imprisonment in gross; the punishment awarded under each count should be specified.[90] A fine for two separate offenses under the liquor laws, although both are proved, cannot be imposed where only one was charged.[91]

e. Successive Convictions. Under statutes authorizing a more severe punishment upon a second or subsequent offense, it is generally held that the increased penalty cannot be inflicted unless the fact that the crime charged is a second offense is alleged in the complaint or indictment.[92] And both or all of the offenses

Liability for damages.— The fact that defendant may be liable to pay damages, at the suit of a third person, for injuries resulting from an unlawful sale of liquor, will not relieve him from the penalties imposed by law for such sale considered as a public offense. Mulcahey *v.* Givens, 115 Ind. 286, 17 N. E. 598.

84. Burgamy *v.* State, 114 Ga. 852, 40 S. E. 991; Com. *v.* Fletcher, 157 Mass. 14, 31 N. E. 687. *Compare* Robinson *v.* State, 26 Tex. App. 82, 9 S. W. 61.

85. Edmonson *v.* Com., 110 Ky. 510, 62 S. W. 1018, 22 Ky. L. Rep. 1902; Baker *v.* Com., 64 S. W. 657, 23 Ky. L. Rep. 898; Pursifull *v.* Com., 47 S. W. 772, 20 Ky. L. Rep. 863.

86. *Dakota.*— People *v.* Sweetser, 1 Dak. 308, 46 N. W. 452.

Indiana.— Taylor *v.* State, 49 Ind. 555.

Iowa.— *Ex p.* Tuichner, 69 Iowa 393, 28 N. W. 655; State *v.* Winstrand, 37 Iowa 110; State *v.* Shaw, 23 Iowa 316; State *v.* McGrew, 11 Iowa 112.

Kentucky.— Farris *v.* Com., 111 Ky. 236, 63 S. W. 615, 23 Ky. L. Rep. 580; Edmonson *v.* Com., 110 Ky. 510, 62 S. W. 1018, 22 Ky. L. Rep. 1902; Stovall *v.* Com., 4 B. Mon. 359.

Massachusetts.— Com. *v.* Fontain, 127 Mass. 452.

Oregon.— State *v.* Combs, 19 Oreg. 295, 24 Pac. 235.

Tennessee.— Brown *v.* State, 2 Head 180. See 29 Cent. Dig. tit. "Intoxicating Liquors," § 357.

87. People *v.* Sweetser, 1 Dak. 308, 46 N. W. 452; Com. *v.* Brown, 12 Gray (Mass.) 135; Com. *v.* Sloan, 4 Cush. (Mass.) 52; Com. *v.* Griffin, 3 Cush. (Mass.) 523; Com. *v.* Tower, 8 Metc. (Mass.) 527.

88. People *v.* Walbaum, 1 Dak. 308, 46 N. W. 452; Miller *v.* People, 47 Ill. App. 472; Com. *v.* Harris, 7 Gratt. (Va.) 600; Reg. *v.* Ambrose, 16 Ont. 251. But *compare* Lemons *v.* State, 50 Ala. 130, holding that when two persons are jointly indicted for carrying on the business of retailing liquor without a license, a joint fine may be assessed against them, if they acted as a partnership in carrying on the business, or a separate fine against each, if they acted individually.

89. *Connecticut.*—Barnes *v.* State, 19 Conn. 398.

Illinois.— Fletcher *v.* People, 81 Ill. 116; Kroer *v.* People, 78 Ill. 294.

Iowa.— State *v.* Leis, 11 Iowa 416.

Massachusetts.— Tuttle *v.* Com., 2 Gray 505.

Nebraska.— Nichols *v.* State, 49 Nebr. 777, 69 N. W. 99; Burrell *v.* State, 25 Nebr. 581, 41 N. W. 399.

Texas.— Loveless *v.* State, 49 S. W. 601. See 29 Cent. Dig. tit. "Intoxicating Liquors," § 359.

90. Johnson *v.* People, 83 Ill. 431; Mullinix *v.* People, 76 Ill. 211. And see Wrocklege *v.* State, 1 Iowa 167. But *compare* Jordan *v.* State, 40 Tex. Cr. 189, 49 S. W. 371.

91. Bridgeford *v.* Lexington, 7 B. Mon. (Ky.) 47. And see Anderson *v.* Van Buren Cir. Judge, 130 Mich. 697, 90 N. W. 692.

92. State *v.* Zimmerman, 83 Iowa 118, 49 N. W. 71; Garvey *v.* Com., 8 Gray (Mass.) 382; Norton *v.* State, 65 Miss. 297, 3 So. 665; Carey *v.* State, 70 Ohio St. 121, 70 N. E. 955. And see State *v.* Haynes, 35 Vt. 570.

The expression "third offense," as used in

must have been committed after the enactment of the law which authorizes such increased penalties; that is, the penalty for a second conviction cannot be imposed on a defendant because he had been before convicted under a previous law.[93] It is also generally required that the two offenses shall have been violations of the same statute or provision, or of those of similar character.[94]

f. Excessive Punishments. The punishments to be inflicted for violations of the liquor laws, when not absolutely fixed by statute, rest very much in the discretion of the trial court, but are of course subject to the constitutional provisions against excessive fines and cruel and unusual punishments.[95]

10. Costs and Fees. The sentence against one convicted of a violation of the liquor laws will generally include the payment of the costs,[96] including witness' fees,[97] and in some jurisdictions a fee to the attorney conducting the prosecution,[98] although in others such fee is payable by the county.[99]

11. Lien For Fine and Costs. In several of the states it is provided by statute[1] that property occupied and used for the sale of liquor,[2] with the consent and knowledge[3] of the owner thereof,[4] shall be subject to a lien in favor of the state for all fines and costs imposed for violations of the liquor laws upon the tenant or

the Michigan prohibitory liquor law, signifies the third offense which has been legally ascertained and determined, and in that sense is equivalent to "third conviction." *In re* Buddington, 29 Mich. 472.

93. State *v.* Sanford, 67 Conn. 286, 34 Atl. 1045. And see Huyser *v.* Com., 116 Ky. 410, 76 S. W. 174, 25 Ky. L. Rep. 608.

94. State *v.* Haynes, 36 Vt. 667. And see State *v.* Sawyer, 67 Vt. 239, 31 Atl. 285.

95. See Criminal Law, 12 Cyc. 963 *et seq.* And see the following cases:

Colorado.— Cardillo *v.* People, 26 Colo. 355, 58 Pac. 678.

Florida.— Baeumel *v.* State, 26 Fla. 71, 7 So. 371; Frese *v.* State, 23 Fla. 267, 2 So. 1.

Georgia.— McCollum *v.* State, 119 Ga. 308, 46 S. E. 413, 100 Am. St. Rep. 171.

Idaho.— State *v.* Nelson, 10 Ida. 522, 79 Pac. 79, 67 L. R. A. 808.

Illinois.— See Johnson *v.* People, 1 Ill. 351.

Iowa.— State *v.* Meloney, 79 Iowa 413, 44 N. W. 693; State *v.* Huff, 76 Iowa 200, 40 N. W. 720; State *v.* Price, 75 Iowa 243, 39 N. W. 291; State *v.* Baker, 74 Iowa 760, 38 N. W. 380; State *v.* Fertig, 70 Iowa 272, 30 N. W. 633; State *v.* Little, 42 Iowa 51; Walters *v.* State, 5 Iowa 507.

Kentucky.— Bergmeyer *v.* Com., 3 Ky. L. Rep. 823.

Mississippi.— Haynes *v.* State, (1898) 23 So. 182.

Missouri.— *Ex p.* Swann, 96 Mo. 44, 9 S. W. 10; *Ex p.* Bedell, 20 Mo. App. 125.

Texas.— White *v.* State, 11 Tex. App. 476.

Wisconsin.— Hepler *v.* State, 58 Wis. 46, 16 N. W. 42; Briffitt *v.* State, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621.

Canada.— Reg. *v.* Cameron, 15 Ont. 115; Reg. *v.* Elliott, 12 Ont. 524.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 361.

96. See the statutes of the different states.

In Pennsylvania the jury is authorized by statute, on acquittal, to direct that the prosecutor shall pay the costs. See Com. *v.* Ream, 1 Pa. Co. Ct. 33.

97. See State *v.* A. B. C., 68 N. H. 441, 40 Atl. 1065.

98. See State *v.* McEnturff, 87 Iowa 691, 55 N. W. 2; Dyer *v.* State, 9 Yerg. (Tenn.) 395.

99. See Schulte *v.* Keokuk County, 74 Iowa 292, 37 N. W. 376; Foster *v.* Clinton County, 51 Iowa 541, 2 N. W. 207; People *v.* Jackson County, 31 Mich. 116.

1. See the statutes of the different states.

2. McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171 (homestead property not exempt); Com. *v.* Duncan, 84 S. W. 526, 27 Ky. L. Rep. 86.

3. Cordes *v.* State, 37 Kan. 48, 14 Pac. 493, holding that knowledge sufficient to excite the suspicions of a prudent man, and to put him upon inquiry, is equivalent to knowledge of the ultimate fact. And see State *v.* Mateer, 105 Iowa 66, 74 N. W. 912; State *v.* Maloney, 6 Ohio S. & C. Pl. Dec. 209, 4 Ohio N. P. 197; State *v.* Somerville, 3 Ohio S. & C. Pl. Dec. 422, 1 Ohio N. P. 422.

Where the property belongs to a non-resident, he may be charged with knowledge of the unlawful use made of the property by proof that his agent in charge of the property had such knowledge, although he had directed such agent not to rent the property for such use. Financial Assoc. *v.* State, 6 Kan. App. 206, 49 Pac. 696.

4. Cordes *v.* State, 37 Kan. 48, 14 Pac. 493.

Where a wife constitutes her husband the general manager of her real estate, and he knowingly leases it for the unlawful sale of liquor, the state has a lien on the property for fines imposed on the seller. Hardten *v.* State, 32 Kan. 637, 5 Pac. 212. And see Pfefferle *v.* State, 39 Kan. 128, 17 Pac. 828.

Subsequent purchasers.— In Kansas the lien attaches to the property from the date of the conviction of the tenant, and all conveyances made after that date are subject to the lien. Snyder *v.* State, 40 Kan. 543, 20 Pac. 122. In Iowa any person purchasing the property after the filing of a petition to subject it to the statutory lien takes it sub-

occupant of the premises.[5] This lien is enforceable by an action at law in behalf of the state,[6] to which the owner of the property at the time of the trial is the only necessary defendant.[7]

X. SEARCH, SEIZURE, AND FORFEITURE.

A. Nature and Grounds in General — 1. STATUTORY PROVISIONS. The statutes familiarly known as "search and seizure laws," which have been adopted in a number of the states, are intended to aid in the suppression of the unlawful traffic in liquors, by authorizing proceedings *in rem* against the illicit property itself, resulting in its forfeiture or destruction, and connected with a criminal liability on the part of the person who has illegally kept them or dealt in them.[8] These statutes are not unconstitutional if they do not authorize unreasonable searches, and if they make due provision for hearing the claims of parties in interest,[9] but they are not to be construed retrospectively.[10]

2. PROPERTY SUBJECT TO SEIZURE. The liquor being contraband, or kept or intended for illegal sale, it is not always necessary, to justify its seizure, that it should be at the time in the possession of the owner.[11] Under proper conditions it may be seized in the hands of an express company or other carrier,[12] or of a warehouseman.[13] Liquor purchased by municipal officers illegally and without authority, or illegally held by them, may also be seized under this process,[14] and so may liquor which has already been taken by an officer from a person engaged

ject to the result of such proceedings. State *v.* Mateer, 105 Iowa 66, 74 N. W. 912.

5. Pfefferle *v.* State, 39 Kan. 128, 17 Pac. 828, holding that the amount of the lien is determined *prima facie* by the amount of the fine and costs embraced in the judgment in the criminal action.

6. State *v.* Mateer, 105 Iowa 66, 74 N. W. 912; Bonesteel *v.* Downs, 73 Iowa 685, 35 N. W. 924; Hardten *v.* State, 32 Kan. 637, 5 Pac. 212; Financial Assoc. *v.* State, 6 Kan. App. 206, 49 Pac. 696.

7. State *v.* Mateer, 105 Iowa 66, 74 N. W. 912.

8. See the statutes of the different states. And see State *v.* Dowdell, 98 Me. 460, 57 Atl. 846; State *v.* Grames, 68 Me. 418 (holding that such statutes, in their reference to searches and seizures, apply to places and property, and are not to be extended to process against the person); State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650 (holding that a steamboat is a place, within the meaning of a statute providing that "any store, shop, warehouse, other building, or place in said city or town" may be searched under a warrant for the seizure of liquors).

9. State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675. And see *supra*, IV, H.

10. McLane *v.* Bonn, 70 Iowa 752, 30 N. W. 478; Bound *v.* South Carolina R. Co., 57 Fed. 485.

11. See Gray *v.* Davis, 27 Conn. 447.

12. St. Louis Southwestern R. Co. *v.* Gans, 69 Ark. 252, 62 S. W. 738; State *v.* American Express Co., 118 Iowa 447, 92 N. W. 66; State *v.* U. S. Express Co., 70 Iowa 271, 30 N. W. 568; State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557. *Compare* State *v.* Intoxicating Liquors, 98 Me. 464, 57 Atl. 798.

Goods in transit.—A seizure of liquors upon a complaint for keeping the same cannot be sustained where the proof shows that the liquors were seized while being transported, when another and distinct statute provides for a seizure while in transit. State *v.* Roach, 74 Me. 562.

When destination is a federal institution.—Intoxicating liquors found in a railroad station in transit to a soldiers' home on federal territory within the state are not liable to seizure, although they are to be sold by the storekeeper of the home. State *v.* Intoxicating Liquors, 78 Me. 401, 6 Atl. 4.

Liquors imported into state.—The provision of the act of congress called the "Wilson Act" (26 U. S. St. at L. 313 [U. S. Comp. St. (1901) p. 3177]), that intoxicating liquors shall be subject to seizure and confiscation by the police power of the state "upon arrival in such state" does not mean that liquor shall be so subject on its entrance within the borders of the state, nor on delivery to the consignee, but on reaching its destination. *In re* Langford, 57 Fed. 570. Liquors shipped from one state to another by express are in transit while in possession of the express company and an action lies against a dispensary constable individually for wilful and malicious seizure of liquor in transit shipped for personal use. Smith *v.* Lafar, 67 S. C. 491, 46 S. E. 491. Liquor imported into a state from another before the passage of the Wilson Act became subject to the existing state laws immediately upon the enactment of that statute. Tinker *v.* State, 90 Ala. 638, 8 So. 814.

13. State *v.* Creeden, 78 Iowa 556, 43 N. W. 673, 7 L. R. A. 295; State *v.* Intoxicating Liquors, 50 Me. 506.

14. State *v.* Intoxicating Liquors, 68 Me. 187; Androscoggin R. Co. *v.* Richards, 41 Me. 233.

in illegally transporting it, and still held by the officer;[15] but liquor may not be taken from the possession of a receiver of a federal court.[16] It is necessary that an intention to make an unlawful sale or other disposition of the property should exist at the time of the complaint;[17] but such an intention on the part of a bailee or agent of the owner, having present possession of the liquors, is sufficient, although the actual owner may have been innocent of it.[18] The seizure should include only the liquors described or specified in the warrant,[19] and may or may not, according to the statute, include the casks or vessels containing them,[20] and the appliances or implements of the business.[21] The seizure of vehicles used in the transportation of intoxicating liquor is sometimes provided for by statute.[22]

3. GROUNDS FOR SEIZURE. The usual ground on which such statutes authorize the search for and seizure of liquors is that the same were kept or intended for sale in violation of law.[23] This severe process should not be used for the mere purpose of scraping up evidence on which to found a prosecution.[24] A conviction of the seller is no bar to a proceeding of this kind against the liquors.[25]

B. Information or Complaint — 1. IN GENERAL. Proceedings for a search for and seizure of liquor kept for unlawful sale are generally required to be founded on a proper information or complaint,[26] filed in the proper court and correctly entitled,[27] except where the statute allows the seizure of contraband liquor without a warrant, in which case the complaint may be made after the seizure as well as before.[28] A motion to quash such a complaint is addressed to the discretion of the trial court, and its action thereon forms no basis for an exception.[29]

2. COMPLAINANT OR INFORMER. The complaint or information in proceedings

15. Allen *v.* Staples, 6 Gray (Mass.) 491.

16. Bound *v.* South Carolina R. Co., 57 Fed. 485.

17. State *v.* Intoxicating Liquors, 85 Me. 304, 27 Atl. 178; State *v.* McGowan, (Me. 1886) 5 Atl. 561. But see State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345, holding that the Wilson Act (26 U. S. St. at L. 313 [U. S. Comp. St. (1901) p. 3177]) renders liquors imported into the state subject to the laws of the state, although imported for a citizen's own personal use.

18. Com. *v.* Intoxicating Liquors, 163 Mass. 42, 39 N. E. 348; Com. *v.* Certain Intoxicating Liquors, 107 Mass. 396. But *compare* State *v.* Intoxicating Liquors, 63 Me. 121.

19. State *v.* Smith, 54 Me. 33; Arthur *v.* Flanders, 10 Gray (Mass.) 107. See, however, Com. *v.* Intoxicating Liquors, 113 Mass. 13, holding that the seizure is not invalidated by the fact that some liquor was seized which was not intoxicating.

20. See the statutes of the different jurisdictions. And see Black *v.* McGilvery, 38 Me. 287; *Ex p.* Breeze, 8 N. Brunsw. 390.

21. See Iler Brewing Co. *v.* Campbell, 66 Kan. 361, 71 Pac. 825; Collins *v.* Noyes, 66 N. H. 619, 27 Atl. 225.

22. See the statutes of the different states. And see Kent *v.* Willey, 11 Gray (Mass.) 368; Dobbins *v.* Gaines, 52 S. C. 176, 29 S. E. 401.

23. *Iowa.*— The jury must find, not only that the liquor was kept with intent to be sold, but that the intention was to sell it in violation of law. State *v.* Harris, 36 Iowa 136. And see State *v.* Certain Intoxicating Liquors, 92 Iowa 762, 60 N. W. 630.

Maine.— State *v.* Malia, (1886) 5 Atl. 562; State *v.* Learned, 47 Me. 426. There must have been an intention to sell the liquor in the city or town where it was kept, although not necessarily in the shop or other building where it was found. State *v.* Robinson, 33 Me. 564. And see State *v.* Gurney, 33 Me. 527. Proof of unlawful intent at the time of seizure is not necessary. It is sufficient if it existed at the time of making the complaint. State *v.* McGowan, (1886) 5 Atl. 561.

Massachusetts.— It is not one of the elements of the offense that liquor should have been actually sold at the place in question, and this circumstance, or the mere finding of liquors on the premises, is not enough without proof of the intention. Com. *v.* Intoxicating Liquors, 142 Mass. 470, 8 N. E. 421; Com. *v.* Certain Intoxicating Liquors, 105 Mass. 595.

United States.— See U. S. *v.* Fifty Cases of Distilled Spirits, 83 Fed. 1000.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 367.

24. Reg. *v.* Walker, 13 Ont. 83.

25. Sanders *v.* State, 2 Iowa 230.

26. See the statutes of the different jurisdictions. And see *Ex p.* Stevenson, 8 N. Brunsw. 391; Reg. *v.* Heffernan, 13 Ont. 616; Reg. *v.* Doyle, 12 Ont. 347.

27. Com. *v.* Certain Intoxicating Liquors, 97 Mass. 601.

28. State *v.* Intoxicating Liquors, 58 Vt. 594, 4 Atl. 229. And see State *v.* Intoxicating Liquors, 80 Me. 91, 13 Atl. 403; Fenner *v.* State, 3 R. I. 107.

29. State *v.* Smith, 54 Me. 33.

of this kind is generally directed to be made by a citizen or resident of the county,[30] by a legal voter,[31] or by a credible resident,[32] although sometimes it may also be made by a public officer.[33]

3. Form and Contents — a. In General. The complaint or information will be generally sufficient if it follows the language of the statute or the forms which it prescribes, without greater particularity of averment.[34] But it should always contain a showing of probable cause to believe that liquor is unlawfully kept in the place and for the purpose described, or complainant's averment of his actual belief that it is so kept,[35] and should allege ownership of the liquors in some specific person,[36] as well as the illegality of the keeping or the intention to sell the liquor in violation of law,[37] and a description of the liquors to be searched for, with approximate certainty as to kind and amount.[38] In Vermont it has been held that the complaint need not be signed by the complainant, although the statute requires it to be reduced to writing by the magistrate.[39]

b. Description of Place. The complaint or information must also describe the location of the property to be searched for, or of the premises to be searched, and this must be done with as much precision and accuracy as the circumstances will permit.[40] It has been held that the description will be sufficiently certain if

30. Com. *v.* Intoxicating Liquors, 113 Mass. 13.

31. State *v.* Intoxicating Liquors, 44 Vt. 208.

32. State *v.* Thompson, 44 Iowa 399. And see State *v.* Blair, 72 Iowa 591, 34 N. W. 432.

33. See State *v.* McCann, 67 Me. 372; *In re* Moore, 66 Fed. 947. *Compare* Foster *v.* Clinton County, 51 Iowa 541, 2 N. W. 207.

34. State *v.* Howley, (Me. 1887) 9 Atl. 620; State *v.* Welch, 79 Me. 99, 8 Atl. 348; Com. *v.* Certain Intoxicating Liquors, 122 Mass. 14; Com. *v.* Hazeltine, 108 Mass. 479; Com. *v.* McLaughlin, 108 Mass. 477; Com. *v.* Grady, 108 Mass. 412; Com. *v.* Intoxicating Liquors, 107 Mass. 216; Com. *v.* Intoxicating Liquors, 13 Allen (Mass.) 52; *In re* Young, 15 R. I. 243, 3 Atl. 3; *In re* Hoxsie, 15 R. I. 241, 3 Atl. 1; State *v.* Twenty-Five Packages of Liquor, 38 Vt. 387.

35. State *v.* Devine, (Me. 1888) 13 Atl. 128; State *v.* Welch, 79 Me. 99, 8 Atl. 348; Com. *v.* Certain Intoxicating Liquors, 105 Mass. 595; Com. *v.* Leddy, 105 Mass. 381; Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

36. State *v.* Intoxicating Liquors, 64 Iowa 300, 20 N. W. 445. See Com. *v.* Certain Intoxicating Liquors, 116 Mass. 27. But *compare* Com. *v.* Intoxicating Liquors, 116 Mass. 21, where it seems that an allegation that the liquor is kept for illegal sale by "a person unknown" may be sufficient.

37. *Iowa.*— State *v.* Thompson, 44 Iowa 399. It is not necessary to allege that defendant has sold any liquor in violation of law. State *v.* Blair, 72 Iowa 591, 34 N. W. 432.

Maine.— State *v.* Erskine, 66 Me. 358. It is not necessary to allege that the liquors were intended for sale by defendant himself. State *v.* Howley, (1887) 9 Atl. 620. *Compare* State *v.* Miller, 48 Me. 576.

Massachusetts.—Com. *v.* Certain Intoxicating Liquors, 4 Allen 593. The complaint should also negative the right, license, or authority of defendant to sell the liquors. Com. *v.* Certain Intoxicating Liquors, 110 Mass. 416.

New Hampshire.— State *v.* Spirituous Liquors, 68 N. H. 47, 40 Atl. 398.

Rhode Island.— *In re* Young, 15 R. I. 243, 3 Atl. 3; *In re* Hoxsie, 15 R. I. 241, 3 Atl. 1.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 371.

38. Mallett *v.* Stevenson, 26 Conn. 428; State *v.* Brennan, 25 Conn. 278; Com. *v.* Certain Intoxicating Liquors, 110 Mass. 416; Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52; State *v.* Lager Beer, 70 N. H. 454, 49 Atl. 575; *In re* Fitzpatrick, 16 R. I. 60, 11 Atl. 773.

39. Gill *v.* Parker, 31 Vt. 610.

40. *Connecticut.*— Hornig *v.* Bailey, 50 Conn. 40.

Iowa.— State *v.* Thompson, 44 Iowa 399.

Maine.— State *v.* Knowlton, 70 Me. 200.

Massachusetts.— Com. *v.* Intoxicating Liquors, 146 Mass. 509, 16 N. E. 298; Com. *v.* Intoxicating Liquors, 140 Mass. 287, 3 N. E. 4; Com. *v.* Certain Intoxicating Liquors, 122 Mass. 36; Com. *v.* Certain Intoxicating Liquors, 122 Mass. 8; Com. *v.* Certain Intoxicating Liquors, 117 Mass. 427; Com. *v.* Intoxicating Liquors, 113 Mass. 455; Com. *v.* Intoxicating Liquors, 113 Mass. 208; Com. *v.* Intoxicating Liquors, 113 Mass. 13; Com. *v.* Certain Intoxicating Liquors, 110 Mass. 499; Com. *v.* Certain Intoxicating Liquors, 110 Mass. 182; Com. *v.* Certain Intoxicating Liquors, 107 Mass. 386; Com. *v.* Certain Intoxicating Liquors, 105 Mass. 181; Com. *v.* Certain Intoxicating Liquors, 6 Allen 596; Com. *v.* Certain Intoxicating Liquors, 4 Allen 601.

Vermont.— State *v.* Twenty-Five Packages of Liquor, 38 Vt. 387; Lincoln *v.* Smith, 27 Vt. 328.

Canada.— *Ex p.* Caldwell, 8 N. Brunsw. 393.

it is such as would be required in a deed to convey a specific parcel of realty,[41] or if it leaves no discretion to the officer as to what place he is to search, but fully directs him in that respect.[42] Where the statute does not authorize a warrant for the search of a dwelling-house unless it is alleged to be a place of common resort for tippling purposes, or to be kept as a dram-shop, the complaint must so describe it.[43]

c. Verification. The information or complaint must be verified[44] by the oath or affirmation[45] of the complainant or informant,[46] asserting the truth of the allegations of the complaint, or that the affiant has reason to believe and does believe such allegations to be true.[47] The jurat should be in due form;[48] but neither this nor the verification itself forms a part of the complaint, in any such sense that the prosecution is required to prove all the facts detailed in the oath.[49] A special form of affidavit is required to be made, in some states, when the warrant is for the search of a dwelling-house.[50]

4. Issues, Proof, and Variance. On the trial of a proceeding of this kind, the issue concerns the liability of the liquors to forfeiture, and of defendant to the statutory penalty, and not the facts set forth by the complainant in his affidavit, as the grounds of his information or belief.[51] And while the proof should correspond with the allegations, and a complaint framed under one statute will not support a seizure where the facts proved establish a liability under another and distinct statute,[52] yet immaterial differences between the charge and the proofs as in the description of the place will not constitute a fatal variance, if not amounting to a failure of evidence.[53]

C. Search Warrant — 1. Necessity of Warrant. Unless authorized by a statute, an officer cannot justify entering a building and searching for intoxicating liquors, and seizing liquors found there, although the same were illegally kept by the owner of the premises, unless he had and acted under a warrant.[54]

2. Requisites and Sufficiency — a. In General. A search warrant issued in pursuance of such a statute is a sufficient justification for the officer acting under it, where the magistrate has jurisdiction, and the face of the warrant itself discloses sufficient ground for his judicial action.[55] The search warrant should be duly

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 374.

41. State *v.* Bartlett, 47 Me. 388.

42. State *v.* Intoxicating Liquors, 44 Vt. 208.

43. Com. *v.* Leddy, 105 Mass. 381. And see Com. *v.* Certain Intoxicating Liquors, 116 Mass. 27; Com. *v.* Certain Intoxicating Liquors, 110 Mass. 182.

44. Downing *v.* Porter, 8 Gray (Mass.) 539; Allen *v.* Staples, 6 Gray (Mass.) 491.

45. State *v.* Devine, (Me. 1888) 13 Atl. 128; State *v.* Welch, 79 Me. 99, 8 Atl. 348.

46. Com. *v.* Certain Intoxicating Liquors, 122 Mass. 8, holding that where two persons sign the complaint both should make oath to it.

47. Lowrey *v.* Gridley, 30 Conn. 450. But see State *v.* Patterson, (N. D. 1904) 99 N. W. 67; State *v.* McGahey, 12 N. D. 535, 97 N. W. 865, both holding that a search warrant cannot issue on an affidavit made on information and belief and not otherwise corroborated.

48. Com. *v.* Certain Intoxicating Liquors, 128 Mass. 72. And see State *v.* Smith, 54 Me. 33.

49. Com. *v.* Intoxicating Liquors, 142 Mass. 470, 8 N. E. 421; Com. *v.* Certain Intoxicating Liquors, 105 Mass. 181.

50. See the statutes of the different states. And see Sanders *v.* State, 2 Iowa 230.

51. State *v.* Plunkett, 64 Me. 534. And see Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596.

52. State *v.* Roach, 74 Me. 562.

53. Com. *v.* Certain Intoxicating Liquors, 122 Mass. 36; Com. *v.* Certain Intoxicating Liquors, 117 Mass. 427. And see Reg. *v.* Dibblee, 34 N. Brunsw. 1.

54. Reed *v.* Adams, 2 Allen (Mass.) 413; *In re* Germain, 21 R. I. 531, 45 Atl. 552; *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; Bound *v.* South Carolina R. Co., 57 Fed. 485.

Stale warrant no protection.— A warrant to search for intoxicating liquors remains in force only for a reasonable length of time; and an unexplained and hence apparently needless delay for three days in the execution of such a warrant is unreasonable and therefore unlawful. State *v.* Guthrie, 90 Me. 448, 38 Atl. 363.

Duty of judge to issue see State *v.* Fulkerson, 73 Ark. 163, 83 S. W. 934, 86 S. W. 817.

55. Sleeth *v.* Hurlbert, 25 Can. Sup. Ct. 620. And see Guptill *v.* Richardson, 62 Me. 257; Thurston *v.* Adams, 41 Me. 419. And see Sheriffs and Constables.

signed[56] and officially sealed if the statute so requires,[57] and should recite that it was founded upon the oath required by the statute,[58] and name the complainant,[59] and contain such other statements as are necessary to make it a complete and legal instrument.[60] It should direct the officer to search the premises described,[61] and seize the described liquors if found there;[62] and may, if the statute so provides, also include a direction to arrest the respondent,[63] and should order the officer to make due return of the warrant.[64]

b. Showing as to Probable Cause. If the statute requires the warrant to recite that probable cause has been shown for the search which it authorizes, or that the magistrate is satisfied from the testimony of witnesses that such cause exists, the requirement is imperative and the recital cannot be omitted.[65]

c. Description of Liquors. The warrant should describe, with as much certainty and particularity as is practicable, the liquors for which the officer is to search and which he is to seize on discovery, both in respect to the kind[66] and the quantity.[67]

Where a search warrant, valid at the time it was issued, has been legally executed by an officer, he cannot be affected by any omission of the magistrate in the subsequent proceedings in the case. Gray *v.* Davis, 27 Conn. 447.

56. See Com. *v.* Certain Intoxicating Liquors, 135 Mass. 519.

57. See Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

58. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 599.

59. Guenther *v.* Day, 6 Gray (Mass.) 490. And see Downing *v.* Porter, 8 Gray (Mass.) 539.

60. Allen *v.* Staples, 6 Gray (Mass.) 491.

As to special recitals where the place to be searched is a dwelling-house see McGlinchy *v.* Barrows, 41 Me. 74; State *v.* Staples, 37 Me. 228; Com. *v.* Leddy, 105 Mass. 381; Com. *v.* Certain Intoxicating Liquors, 97 Mass. 332.

61. State *v.* Connolly, 96 Me. 405, 52 Atl. 908, holding that the warrant is not vitiated by an additional direction to search the person of the respondent, if the officer has reason to believe that liquors are concealed about his person, where no search of the person is actually made.

In Maine the complaint and search warrant may be issued together as one instrument. State *v.* Erskine, 66 Me. 358.

62. State *v.* Markuson, 7 N. D. 155, 73 N. W. 82. And see State *v.* Eldred, 8 Kan. App. 625, 56 Pac. 153.

63. See Adams *v.* McGlinchy, 66 Me. 474; State *v.* Leach, 38 Me. 432; State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650; State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675.

64. Com. *v.* Certain Intoxicating Liquors, 97 Mass. 62.

65. State *v.* Whalen, 85 Me. 469, 27 Atl. 348; Jones *v.* Fletcher, 41 Me. 254; McClinchy *v.* Barrows, 41 Me. 74; State *v.* Spirituous Liquors, 39 Me. 262; State *v.* Spencer, 38 Me. 30; State *v.* Staples, 37 Me. 228; Com. *v.* Certain Intoxicating Liquors, 108 Mass. 19; Com. *v.* Certain Intoxicating Liquors, 105 Mass. 178; Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 599. *Compare* Holland *v.* Seagrave, 11 Gray (Mass.) 207.

In Connecticut the warrant need not state that a complaint has been made, etc., all this appearing in the complaint and justice's certificate, both on the same paper with the warrant. Hornig *v.* Bailey, 50 Conn. 40.

66. See cases *infra*, this note.

Form of description.— It is usual and sufficient to describe the liquors by general terms followed by the specification of several particular kinds under a *videlicet*. Thus, "spirituous and intoxicating liquors, to wit, whisky, rum, brandy, gin, and ale." State *v.* Robinson, 33 Me. 564; Com. *v.* Intoxicating Liquors, 13 Allen (Mass.) 561; State *v.* Whiskey, 54 N. H. 164.

Officer's authority limited by description.— If the warrant directs the seizure of "certain intoxicating liquors," and then, under a *videlicet*, specifies certain particular kinds, the officer will not be justified in seizing any other kinds than those specified; for here the *videlicet* limits the general expression preceding it by what follows. Mallett *v.* Stevenson, 26 Conn. 428. But on the other hand the fact that some of the kinds of liquor specified are not found at all will not invalidate the seizure of those kinds which are found. Com. *v.* Intoxicating Liquors, 13 Allen (Mass.) 52.

67. See cases *infra*, this note.

Form of description.— In respect to the quantity, the following form of statement, or any form equivalent thereto, will be held sufficient: "A certain quantity" of some specified kind or kinds of liquor, "being about and not exceeding one hundred gallons," or some other specified quantity. "contained in certain barrels, kegs, jugs, jars, bottles, and other vessels." Downing *v.* Porter, 8 Gray (Mass.) 539; *In re* Horgan 16 R. I. 542, 18 Atl. 279; State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767.

Limit of authority as to quantity seized.— Of course the officer is not bound to find the entire quantity mentioned in the war-

d. Description of Place. The search warrant must contain a description of the premises to be searched so specific and accurate as to avoid any unnecessary or unauthorized invasion of the right of privacy. To this end it should identify the property in such a manner as to leave the officer no doubt and no discretion as to the premises to be searched.[68] And to justify the search of barns, stables, or other outbuildings of the house, they must be mentioned in the warrant; but this may be done by describing the premises as a certain "dwelling house and its appurtenances."[69] A warrant directing the search of the dwelling-house of a named person authorizes the search only of the house occupied by him, and it is trespass if the officer searches a house owned by him but occupied by another.[70] But it is no objection to the warrant that it directs the search of several different places, if all are sufficiently described.[71]

e. Variance From Complaint. The proceedings will be invalidated by any substantial variance between the complaint and the warrant, as for instance in the description of the premises to be searched;[72] but not by differences which arise out of merely superfluous or unimportant statements or details.[73]

3. Execution of Warrant.[74] The warrant must be executed by the officer to whom it is directed or another officer having legal authority to serve such warrants.[75] Unlike a common-law warrant, it may be executed at night as well as in the daytime,[76] and an entry may be obtained by force if necessary.[77] If so commanded the officer should arrest the person of the respondent,[78] and if the statute so directs close the shop, building, or tenement used for the illegal traffic.[79] Persons who are guilty of resisting or obstructing the officer in the per-

rant. If he seizes and returns a less quantity, but of the same kind, it is not an invalid seizure. Com. *v.* Intoxicating Liquors, 97 Mass. 63; Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52. And it seems he may also be justified in seizing a larger quantity than that specified in the warrant, although this point is not free from doubt. See State *v.* Brennan, 25 Conn. 278.

68. State *v.* Thompson, 44 Iowa 399; State *v.* Bennett, 95 Me. 197, 49 Atl. 867; State *v.* Minnehan, 83 Me. 310, 22 Atl. 177; State *v.* Knowlton, 70 Me. 200; State *v.* Erskine, 66 Me. 358; State *v.* Robinson, 49 Me. 285; State *v.* Bartlett, 47 Me. 388; State *v.* Robinson, 33 Me. 564; Com. *v.* Intoxicating Liquors, 150 Mass. 164, 22 N. E. 628; Com. *v.* Certain Intoxicating Liquors, 122 Mass. 36; Com. *v.* Certain Intoxicating Liquors, 116 Mass. 342; Com. *v.* Certain Intoxicating Liquors, 115 Mass. 145; Com. *v.* Certain Intoxicating Liquors, 109 Mass. 371; Com. *v.* Certain Intoxicating Liquors, 97 Mass. 334; Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596; Downing *v.* Porter, 8 Gray (Mass.) 539; Reg. *v.* McGarry, 24 Ont. 52.

Effect of misdescription.— It is no defense to the proceeding for the forfeiture of the liquor, and for the punishment of the person unlawfully keeping it, that the liquor was found in a different building from that described in the warrant. State *v.* Plunkett, 64 Me. 534.

69. State *v.* Woods, 68 Me. 409; State *v.* Burke, 66 Me. 127; Jones *v.* Fletcher, 41 Me. 254. And see also Lowrey *v.* Gridley, 30 Conn. 450; Com. *v.* Intoxicating Liquors, 146 Mass. 509, 16 N. E. 298; State *v.* Twenty-Five Packages of Liquor, 38 Vt. 387.

70. McGlinchy *v.* Barrows, 41 Me. 74. And see Paquet *v.* Emery, 87 Me. 215, 32 Atl. 881; Flaherty *v.* Longley, 62 Me. 420; Com. *v.* Newton, 123 Mass. 420; Com. *v.* Leddy, 105 Mass. 381.

71. Gray *v.* Davis, 27 Conn. 447.

72. Com. *v.* Certain Intoxicating Liquors, 115 Mass. 145.

73. State *v.* Chartrand, 86 Me. 547, 30 Atl. 10; State *v.* Bartlett, 47 Me. 388; Com. *v.* Certain Intoxicating Liquors, 122 Mass. 14; Com. *v.* Certain Intoxicating Liquors, 107 Mass. 216; Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52.

74. See, generally, Process.

75. See State *v.* Hall, 78 Me. 37, 2 Atl. 546; Gaillard *v.* Cantini, 76 Fed. 699, 22 C. C. A. 493 (holding that the chief state constable of South Carolina, not being subject to the order of a judge, has no authority to execute the process of the courts); *In re* Moore, 66 Fed. 947.

Right of officer to take a third person with him when he executes warrant see Reg. *v.* Ireland, 31 Ont. 267.

76. State *v.* Brennan, 25 Conn. 278; State *v.* Bennett, 95 Me. 197, 49 Atl. 867; Com. *v.* Hinds, 145 Mass. 182, 13 N. E. 397.

77. Androscoggin R. Co. *v.* Richards, 41 Me. 233.

78. State *v.* Dunphy, 79 Me. 104, 8 Atl. 344. See Heath *v.* Intoxicating Liquors, 53 Me. 172; State *v.* Miller, 48 Me. 576; Mason *v.* Lothrop, 7 Gray (Mass.) 354; Jones *v.* Root, 6 Gray (Mass.) 435.

79. State *v.* Markuson, 7 N. D. 155, 73 N. W. 82.

formance of his duty in the execution of the warrant may be punished under the proper form of proceeding.[80]

4. Officer's Return. The officer's return to the search warrant should show his official authority to execute it,[81] and that the place searched was the identical place to which the warrant directed him,[82] and the liquors seized the same as those described in the complaint and warrant.[83] If he arrested the respondent, due return of this fact should also be made.[84] The return is admissible in evidence as part of the record, and the inventory therein is conclusive until the contrary appears.[85]

5. Status of Property Under Seizure. Property seized on a warrant of this kind is regarded, in the interval between its seizure and the final judgment in the case, as in the custody of the law, and hence it cannot be taken from the officer by proceedings in replevin.[86] A person whose liquor has been forfeited as having been unlawfully kept for sale, and ordered to be delivered to a certain town, ceases to have such an interest in it as would enable him to sue the officer seizing it for his failure to deliver it to the town.[87]

6. Care of Property Seized. In keeping the liquor seized, the officer is only bound to exercise such a degree of care and diligence as prudent men use in the care of their own goods.[88]

7. Seizure Without Warrant. In several states the laws empower an officer to seize liquor whenever found by him under circumstances which would have justified his search for and seizure of it if armed with a warrant, and also authorize him, without a warrant, to arrest any person found in the act of illegally transporting liquor.[89] But having so acted, and still retaining the liquor in his custody,[90] he must then proceed to make a complaint[91] and take out a warrant within a reasonable time in the regular mode prescribed by the statute,[92] and thereupon he should seize the liquors *nunc pro tunc*, and make his return that the liquors were seized on such warrant.[93] To justify the arrest of the respondent without a warrant, it is not necessary to prove that a warrant was afterward procured

80. See Reg. *v.* Hodge, 23 Ont. 450.

81. Com. *v.* Certain Intoxicating Liquors, 97 Mass. 63. And see State *v.* Twenty-Five Packages of Liquor, 38 Vt. 387.

82. Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596.

83. State *v.* Hall, 81 Me. 34, 16 N. E. 329.

84. See State *v.* Connolly, 96 Me. 405, 52 Atl. 908; State *v.* Stevens, 47 Me. 357.

85. State *v.* Howley, 65 Me. 100; State *v.* Lang, 63 Me. 215.

Parol evidence as to the date of the seizure is admissible to sustain the complaint, but not to contradict the return. State *v.* McCann, 59 Me. 383.

86. Anheuser-Busch Brewing Assoc. *v.* Fullerton, 83 Iowa 760, 50 N. W. 56; Lemp *v.* Fullerton, 83 Iowa 192, 48 N. W. 1034, 13 L. R. A. 408; Fries *v.* Porch, 49 Iowa 351; Weir *v.* Allen, 47 Iowa 482; State *v.* Harris, 38 Iowa 242; Funk *v.* Israel, 5 Iowa 438; Ring *v.* Nichols, 91 Me. 478, 40 Atl. 329; Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290; State *v.* Barrels of Liquor, 47 N. H. 369. And see Senior *v.* Pierce, 31 Fed. 625, where the property was in the possession of an officer of a state court.

87. Johnson *v.* Perkins, 48 Vt. 572.

88. Perkins *v.* Gibbs, 29 Vt. 343.

89. See the statutes of the different states. And see State *v.* Lindgrove, 1 Kan. App. 51, 41 Pac. 688; State *v.* Bradley, 96 Me. 121, 51 Atl. 816.

90. State *v.* Howley, 65 Me. 100 (holding that an officer cannot obtain a warrant unless he seized and has kept the liquors. Where he attempted to seize them, but was prevented by a scuffle with the respondent, during which the liquors were destroyed, the warrant will not be issued); Com. *v.* Intoxicating Liquors, 113 Mass. 13 (holding that an officer's right to a warrant is not destroyed by the fact that he delivered a part of the liquors seized to a third person who claimed to own them).

91. See State *v.* McCann, 59 Me. 383; State *v.* Intoxicating Liquors, 58 Vt. 594, 4 Atl. 229.

Allegations of complaint.— The officer is not required to insert in his complaint an allegation, which would be false, that the liquors which he has seized "are" still "kept and deposited" by defendant. State *v.* Le Clair, 86 Me. 522, 30 Atl. 7. On the contrary, as the property is now in his own custody, the complaint should allege that the liquors "were" unlawfully kept and deposited in the place where he found them, and that they "were" then and there intended for sale contrary to law. State *v.* Dunphy, 79 Me. 104, 8 Atl. 344.

92. Kent *v.* Willey, 11 Gray (Mass.) 368, officer failing so to do is liable as a trespasser. And see Weston *v.* Carr, 71 Me. 356.

93. State *v.* Dunphy, 79 Me. 104, 8 Atl. 344.

against the liquors seized at the same time.[94] But to justify this course, the officer must have reasonable proof, or probable cause to believe, that the respondent is criminally liable, and mere cause to suspect him is not enough.[95]

D. Proceedings For Forfeiture — 1. Nature of Action. The proceeding authorized by the search and seizure laws, being for the purpose of forfeiting property, on the ground that it is kept for an illegal and criminal purpose, is in the nature of a criminal action, although the form of it is assimilated to that of a civil action.[96] Yet it is not a criminal proceeding in the strict sense of the term, but is rather to be regarded as a proceeding *in rem*, against the liquor for its condemnation as forfeited property, and the complaint is in the nature of a libel.[97]

2. Jurisdiction. Where the proceedings in the first instance are before a court of limited or inferior jurisdiction, the facts essential to its jurisdiction must appear on the face of the proceedings, otherwise there will be no presumption in favor of the jurisdiction.[98] The jurisdiction of a justice is not limited or affected by the value of the liquors seized.[99] In Massachusetts the court for criminal business has jurisdiction of this proceeding.[1]

3. Notice to Claimants. The liquor having been seized by the officer and his return made, the next step in the proceedings is to give notice of the hearing to the person from whose possession the liquor was taken and to claimants generally. This notice being provided for by statute is essential to the validity of all further proceedings.[2] The notice should describe correctly the liquors seized[3] and the place where they were found.[4] But one who has entered an appearance as a claimant of the liquors cannot object to defects or omissions in the notice or the service thereof.[5]

94. Kennedy *v.* Favor, 14 Gray (Mass.) 200.

95. Kennedy *v.* Favor, 14 Gray (Mass.) 200; Mason *v.* Lothrop, 7 Gray (Mass.) 354.

If the arrest of the person was illegal, that will not affect the validity of the proceedings against the property. State *v.* Bradley, 96 Me. 121, 51 Atl. 816.

96. State *v.* Arlen, 71 Iowa 216, 32 N. W. 267; State *v.* Certain Intoxicating Liquors, 40 Iowa 95; Part of Lot 294 *v.* State, 1 Iowa 507; State *v.* Intoxicating Liquors, 80 Me. 57, 12 Atl. 794; State *v.* Robinson, 49 Me. 285; Hibbard *v.* People, 4 Mich. 125; State *v.* One Bottle of Brandy, 43 Vt. 297.

Distinct from prosecution.— The proceeding against the liquors is entirely distinct from any prosecution against the person alleged to have kept them unlawfully; and in such a prosecution it is immaterial what sentence was passed upon the liquors. State *v.* McCann, 61 Me. 116. And see State *v.* McManus, 65 Kan. 720, 70 Pac. 700; State *v.* Miller, 48 Me. 576; State *v.* Learned, 47 Me. 426.

97. State *v.* Burrows, 37 Conn. 425; Hine *v.* Belden, 27 Conn. 384; State *v.* Barrels of Liquor, 47 N. H. 369. And see Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 561; 2 Black Judgm. § 799. *Compare* State *v.* McMaster, (N. D. 1904) 99 N. W. 58.

98. State *v.* Intoxicating Liquors, 80 Me. 91, 13 Atl. 403; Guptill *v.* Richardson, 62 Me. 257; Jones *v.* Fletcher, 41 Me. 254.

99. State *v.* Arlen, 71 Iowa 216, 32 N. W. 267. But see Sullivan *v.* Oneida, 61 Ill. 242.

1. Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 561.

2. Com. *v.* Certain Intoxicating Liquors, 128 Mass. 72; Voetsch *v.* Phelps, 112 Mass. 407 (holding that the omission of the notice will not invalidate the previous steps; it will not make the prior act of seizing the liquors a trespass); Johnson *v.* Williams, 48 Vt. 565 (holding that a judgment for the destruction of liquors unlawfully kept for sale is valid, although the owner received no notice of the proceeding, where the keeper of the liquors was notified, such notice being all that the statute requires).

Recording notice.— The issuing of the notice is a ministerial act, and need not be recorded. Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

Time of notice.— In Massachusetts the law requires that notice shall be given to the keeper or claimant of the seized liquors within twenty-four hours after the seizure. This time is exclusive of Sunday. Com. *v.* Certain Intoxicating Liquors, 97 Mass. 601. And see Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

Summoning claimants as witnesses.— The failure to summon claimants as witnesses as required by statute does not affect the jurisdiction of the court or invalidate the proceedings. Com. *v.* Certain Intoxicating Liquors, 108 Mass. 290.

3. Ring *v.* Nichols, 91 Me. 478, 40 Atl. 329; Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 599.

4. Com. *v.* Intoxicating Liquors, 146 Mass. 509, 16 N. E. 298; Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 599.

5. State *v.* Brennan, 25 Conn. 278; State *v.* Miller, 48 Me. 576; State *v.* Bartlett, 47 Me. 388; Com. *v.* Certain Intoxicating

4. Rights of Claimants. On the proper notice being given, any person who claims to be the owner of the liquors in question may be made a party to the proceedings,[6] and may set up and maintain any right to the liquors which is set forth specifically in his written claim filed in the case.[7] The lien of a carrier or warehouseman will not defeat the condemnation of the liquors, especially if he was implicated in the owner's unlawful purpose with regard to them.[8] In South Carolina the claimant of liquors may maintain claim and delivery against the officer who has seized them, the statutory remedy not being exclusive.[9]

5. Trial. The proceedings are governed by the ordinary rules applicable in civil actions.[10] The owner or claimant must be allowed to interpose proper pleas,[11] and must be given a full and fair hearing.[12] A proceeding for the seizure and condemnation of liquors under a search warrant is not one in which a trial by jury is claimable as of right.[13]

6. Evidence. There can be no judgment of forfeiture of the liquors seized unless the allegations of the complaint are proved by competent evidence.[14] But it is enough for the prosecution to make out a *prima facie* case if there is no evidence in defense.[15] The essential facts to be proved are that, at the place alleged in the complaint,[16] the intoxicating liquors seized by the officer[17] were kept with the unlawful intention to sell them contrary to law[18] in the city, town,

Liquors, 13 Allen (Mass.) 561; Com. *v.* Certain Intoxicating Liquors, 6 Allen (Mass.) 596.

6. State *v.* Barrels of Liquor, 47 N. H. 369. And see State *v.* Intoxicating Liquors, 73 Me. 278.

7. State *v.* Intoxicating Liquors, 61 Me. 520.

Not necessary to state facts as to purchase. — It is not necessary that the claimant should set forth in his claim the person from whom, the place where, or the time when, the liquors were bought by him. The fact of ownership constitutes the foundation of his claim, and the right to possession rests in such ownership with no intention to keep or sell the same in violation of law. State *v.* Intoxicating Liquors, 69 Me. 524.

8. State *v.* Creeden, 78 Iowa 556, 43 N. W. 673, 7 L. R. A. 295; State *v.* Intoxicating Liquors, 50 Me. 506.

9. Moore *v.* Ewbanks, 66 S. C. 374, 44 S. E. 971.

10. State *v.* Barrels of Liquor, 47 N. H. 369; State *v.* Tufts, 56 N. H. 137.

11. **Sufficiency of plea** see State *v.* Brennan, 25 Conn. 278; State *v.* Barrels of Liquor, 47 N. H. 369.

12. Gill *v.* Bright, 41 L. J. M. C. 22, 25 L. T. Rep. N. S. 591, 20 Wkly. Rep. 248. And see State *v.* Intoxicating Liquors, 72 Vt. 22, 47 Atl. 107.

After a default, the right of the claimant to be heard is at the discretion of the court. Com. *v.* Intoxicating Liquors, 113 Mass. 23.

13. Sothman *v.* State, 66 Nebr. 302, 92 N. W. 303; State *v.* Intoxicating Liquors, 55 Vt. 82. But see *In re* McSoley, 15 R. I. 608, 10 Atl. 659.

14. Com. *v.* Intoxicating Liquors, 113 Mass. 23.

Evidence obtained in other proceedings. — A complaint may be maintained, although founded on evidence obtained by means of former proceedings, instituted for the purpose of gaining possession of the building in which the liquors were kept, and without any actual knowledge on the part of the complainants in the former proceedings as to the liquors or the vessels containing them. Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

Warrant or return as evidence. — The original complaint and warrant are admissible in evidence. State *v.* Bartlett, 47 Me. 396. Where the warrant, besides directing the seizure of the liquors, authorizes the arrest of the keeper, when such liquors are found, the fact that the liquors have been found is to be proved by competent evidence under oath, and not by the return of the officer. State *v.* Stevens, 47 Me. 357. And see State *v.* Howley, 65 Me. 100.

Depositions may be used as in ordinary civil cases. State *v.* Barrels of Liquor, 47 N. H. 369.

Declarations as to the ownership of the liquor, made by a claimant in whose possession it was found, are admissible in evidence. *In re* Horgan, 16 R. I. 542, 18 Atl. 279.

15. State *v.* Intoxicating Liquors, 58 Vt. 594, 4 Atl. 229.

Preponderance of evidence. — The proceeding being civil, and not criminal, a mere preponderance of the evidence is sufficient to sustain it. Kirkland *v.* State, 72 Ark. 171, 78 S. W. 770, 105 Am. St. Rep. 25.

16. Com. *v.* Certain Intoxicating Liquors, 117 Mass. 427; State *v.* Twenty-Five Packages of Liquor, 38 Vt. 387.

17. State *v.* Bartlett, 47 Me. 396, holding that the identity of the liquors seized may be established by the testimony of the officer who executed the warrant.

Proof of intoxicating properties of liquor see State *v.* McKenna, 16 R. I. 398, 17 Atl. 51; State *v.* Twenty-Five Packages of Liquor, 38 Vt. 387.

18. State *v.* Intoxicating Liquors, 109 Iowa

or other district where they were kept or deposited.[19] To authorize a forfeiture of the liquors, it is sufficient to show that they were kept with intent to sell them contrary to law, although it is not alleged or proved by whom the intention was entertained.[20] But the person charged as thus keeping liquors cannot be convicted unless it is shown that he himself had the intention to sell them in violation of law.[21] If the respondent justifies under a license or authority to sell, the burden is on him to prove it.[22]

7. JUDGMENT.[23] The ground of condemnation of the liquor seized must correspond with that set forth in the statute. But where the law denounces the keeping of liquor for illegal "sale or distribution," the court may condemn for either of the alternative causes, both being named in the complaint, as the case presents itself to the court on proof.[24] A judgment for the destruction of the liquors should describe them with reasonable certainty.[25]

8. APPEAL AND REVIEW. The statutes commonly provide for summary proceedings before a magistrate or inferior court, in the first instance, with a right of appeal to the intermediate or *nisi prius* court,[26] and sometimes an appeal from the latter court to the court of last resort.[27] Any person who appears and files a claim to the liquors in question becomes thereby a party defendant, and acquires the right to appeal from the judgment.[28] On such appeal the facts will not be reviewed where the evidence below was not conflicting,[29] nor will the judgment be reversed on objections not properly raised in the court below.[30] Certiorari does not lie to quash the proceedings of a police court in issuing a warrant for the seizure of intoxicating liquors.[31]

9. COSTS. The right to costs and the liability therefor depend upon the provisions of the statute under which such a proceeding is brought.[32]

E. Recovery of Liquors Wrongfully Seized. If it is adjudged that the liquors were not liable to seizure and forfeiture, it is the right of the claimant to have them returned to him; and where the statute provides for a return of the liquors seized "if it is not proved" that they were kept for illegal sale, this is held to apply to cases where the proceedings are quashed for defects in matters of form.[33] The fact that intoxicating liquors unlawfully kept for sale in a pro-

145, 80 N. W. 230; State *v.* Robinson, 33 Me. 564; Com. *v.* Certain Intoxicating Liquors, 115 Mass. 142.

Evidence admissible as to intention see State *v.* Mead, 46 Conn. 22; State *v.* Intoxicating Liquor, 109 Iowa 145, 80 N. W. 230; State *v.* McEvoy, 69 Iowa 63, 28 N. W. 437; Com. *v.* Certain Intoxicating Liquors, 110 Mass. 500; Com. *v.* Certain Intoxicating Liquors, 105 Mass. 595.

19. State *v.* Robinson, 33 Me. 564; State *v.* Gurney, 33 Me. 527; *In re* Young, 15 R. I. 243, 3 Atl. 3.

20. State *v.* Intoxicating Liquors, 109 Iowa 145, 80 N. W. 230; State *v.* Learned, 47 Me. 426.

21. State *v.* Learned, 47 Me. 426.

22. Com. *v.* Certain Intoxicating Liquors, 122 Mass. 8.

23. See, generally, JUDGMENTS.

Vacation of judgment see Fries *v.* Porch, 49 Iowa 351.

Conclusiveness as to intent.—Where intoxicating liquor is seized, and a person not named in the complaint appears and claims title thereto, a judgment ordering a return of the liquor to the claimant is not conclusive as to the intent with which it was kept by him. Com. *v.* Reed, 162 Mass. 215, 38 N. E. 364.

24. State *v.* Twenty-Five Packages of Liquor, 38 Vt. 387.

25. Craig *v.* Werthmueller, 78 Iowa 598, 43 N. W. 606.

26. See the statutes of the different states. And see State *v.* Maxwell, 36 Conn. 157; State *v.* Robinson, 49 Me. 285; *In re* McSoley, 15 R. I. 608, 10 Atl. 659.

27. See the statutes of the different states. But *compare* Sothman *v.* State, 66 Nebr. 302, 92 N. W. 303.

28. State *v.* Burrows, 37 Conn. 425. See Com. *v.* Intoxicating Liquors, 110 Mass. 188.

29. State *v.* Intoxicating Liquors, 58 Vt. 594, 4 Atl. 229.

30. See State *v.* Thompson, 44 Iowa 399; Leslie *v.* Com., 107 Mass. 215; Com. *v.* Certain Intoxicating Liquors, 4 Allen (Mass.) 593.

31. Lynch *v.* Crosby, 134 Mass. 313.

32. Nichols *v.* Polk County, 78 Iowa 137, 42 N. W. 627; Garrett *v.* Polk County, 78 Iowa 108, 42 N. W. 618; Byram *v.* Polk County, 76 Iowa 75, 40 N. W. 102; Com. *v.* Certain Intoxicating Liquors, 14 Gray (Mass.) 375; Fay *v.* Barber, 72 Vt. 55, 47 Atl. 180.

33. Com. *v.* Certain Intoxicating Liquors, 103 Mass. 454. And see Ewings *v.* Walker, 9 Gray (Mass.) 95, a demand for the return of

hibited district were seized under an invalid search warrant does not affect the court's jurisdiction, or entitle the owners to recover the liquors or their value.[34]

XI. ABATEMENT AND INJUNCTION.[35]

A. Nature and Grounds — 1. Statutory Provisions. In several states statutes have been enacted declaring that houses or tenements kept for the unlawful sale of intoxicating liquors shall be deemed public nuisances; allowing any citizen of the county to maintain a bill for an injunction, or authorizing the district attorney to file an information; giving jurisdiction to chancery to enjoin the nuisance; and in some cases authorizing its abatement by the removal and sale or destruction of the liquors, vessels, and implements of the trade, and the closing up of the building.[36] Such statutes are valid and constitutional.[37] But in the absence of such a statute equity cannot take jurisdiction of an application by a private person for an injunction against an unlicensed or unlawful liquor-shop, although the keeping of it might constitute a public nuisance, unless the petitioner could show some special and individual damage sustained by him in consequence of it.[38] And even where these statutes are in force, they do not authorize any private individual to abate the statutory nuisance by force, as by breaking into the building and destroying the liquors found there; this can be done only by the proper officers, and only by the warrant of due legal proceedings.[39]

2. Nature of Remedy. An action to secure the abatement of a nuisance is rather in the nature of a criminal proceeding than a civil action;[40] but a bill for an injunction is purely a civil proceeding, and is not affected by the fact that the nuisance complained of may also be a breach of the criminal law.[41] And it may be cumulative of other remedies, and available even though the other remedies are complete and adequate.[42]

3. Grounds For Abatement or Injunction. In order to constitute a place kept

the liquors and a refusal are a conversion of the property.

Action for damages for detention.— In Iowa under the statute as to actions for the recovery of intoxicating liquor, the owner of such liquor suing to recover damages from an officer who refuses to return them when ordered so to do, must allege and prove that he owned and kept them with a lawful intent, and not for the purpose of sale contrary to law. Walker *v.* Shook, 49 Iowa 264.

34. Ferguson *v.* Josey, 70 Ark. 94, 66 S. W. 345.

35. See, generally, Injunctions; Nuisances.

36. See the statutes of the different states. And see State *v.* Prouty, 115 Iowa 657, 84 N. W. 670; State *v.* Estep, 66 Kan. 416, 71 Pac. 857; State *v.* Lord, 8 Kan. App. 257, 55 Pac. 503; State *v.* Nelson, (N. D. 1904) 99 N. W. 1077; State *v.* Donavan, 10 N. D. 610, 88 N. W. 717.

37. Davis *v.* Auld, 96 Me. 559, 53 Atl. 118. And see *supra*, IV, I.

Ordinances.— Municipal corporations may adopt ordinances substantially similar to the statutes outlined above, if their charter powers are broad enough to cover the subject. Laugel *v.* Bushnell, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266 [*affirming* 96 Ill. App. 618]; Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301; Goddard *v.* Jacksonville, 15 Ill. 588, 60 Am. Dec. 773; Topeka *v.* Raynor, 8 Kan. App. 279, 55 Pac. 509.

38. *Alabama.*— Pike County Dispensary *v.* Brundidge, 130 Ala. 193, 30 So. 451.

Missouri.— State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47; State *v.* Uhrig, 14 Mo. App. 413.

Pennsylvania.— Campbell *v.* Scholfield, 29 Leg. Int. 325.

Texas.— Manor Casino *v.* State, (Civ. App. 1896) 34 S. W. 769.

Washington.— Northern Pac. R. Co. *v.* Whalen, 3 Wash. Terr. 452, 17 Pac. 890.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 401.

39. State *v.* Stark, 63 Kan. 529, 66 Pac. 243, 88 Am. St. Rep. 251, 54 L. R. A. 910; Jones *v.* Chanute, 63 Kan. 243, 65 Pac. 243; Corthell *v.* Holmes, 87 Me. 24, 32 Atl. 715; Brown *v.* Perkins, 12 Gray (Mass.) 89; State *v.* Paul, 5 R. I. 185.

40. State *v.* Crawford, 28 Kan. 743.

41. State *v.* Collins, 68 N. H. 299, 44 Atl. 495; State *v.* Collins, 74 Vt. 43, 52 Atl. 69. And see Davis *v.* Auld, 96 Me. 559, 53 Atl. 118.

Injunction as "penalty." — Under a statute providing that persons dealing in liquors shall, under certain circumstances, be subject to all the "penalties" prescribed by the statutes governing the traffic, this word includes the remedy by injunction against the maintenance of a liquor nuisance. State *v.* Van Vliet, 92 Iowa 476, 61 N. W. 241; State *v.* Greenway, 92 Iowa 472, 61 N. W. 239.

42. Legg *v.* Anderson, 116 Ga. 401, 42 S. E. 720.

for the sale of liquor a nuisance under these statutes, it is necessary that the traffic conducted there, or the purpose to which the place is devoted, should be unlawful.[43] The statute may be applicable only to places used for unlawful selling at retail,[44] or may, as in Iowa, apply to all places used for the unlawful manufacture, sale, or keeping for sale of intoxicating liquors.[45] It is not generally applicable to a person who conducts the business under the authority and protection of a license,[46] unless he exceeds its permission or abuses the privileges which it grants.[47] This is also the case with regard to a druggist who sells unlawfully,[48] or a hotel conducted as to its bar in an illegal manner.[49] The owner of leased premises may be liable under the statute, where it is shown that he both knew of the fact that the property was used in such a manner as to make it a nuisance, and permitted such use and consented thereto.[50] In West Virginia it is necessary, to justify an injunction or an order for the abatement of the nuisance, that the keeper of the place should first have been convicted of the offense of unlawful selling at the place described.[51]

4. Voluntary Discontinuance of Business. A liquor nuisance cannot be abated or enjoined unless it continues to exist at the time of suit brought;[52] and hence no order for abatement or injunction will issue if it appears that the parties themselves have voluntarily abated the nuisance or discontinued the unlawful business,[53] unless the circumstances justify a decree forbidding defendant to renew the nuisance or resume the business,[54] which may be the case where its discontinu-

43. Lofton *v.* Collins, 117 Ga. 434, 43 S. E. 708, 61 L. R. A. 150. See Britton *v.* Guy, 17 S. D. 588, 97 N. W. 1045.

It is not necessary that such place should be kept in a disorderly manner (Howard *v.* State, 6 Ind. 444); or that the proprietor should permit the drinking of liquor on the premises (State *v.* Fraser, 1 N. D. 425, 48 N. W. 343); or that he should know that the liquor sold at his place was intoxicating (State *v.* Hughes, 16 R. I. 403, 16 Atl. 911).

Fake club.— A corporation claiming to be a social club, requiring no qualification for membership, except the payment of an initiation fee of one dollar, for which fee there is issued a membership card and twenty tickets, "good for five cents for games and supplies" which tickets are received in exchange for drinks, and the members are permitted to buy such coupons at fixed prices to be exchanged for drinks, is a fraudulent device to evade the revenue laws of the state, and the place where such sales are made is a public nuisance, which will be abated. Cohen *v.* King Knob Club, 55 W. Va. 108, 46 S. E. 799.

Restriction as to place.— In an action to abate a liquor nuisance, an injunction cannot be granted against the proprietors of the business because of their illegal sale of liquor elsewhere than in the building described. State *v.* Frahm, 109 Iowa 101, 80 N. W. 209; Clark *v.* Riddle, 101 Iowa 270, 70 N. W. 207. See Hill *v.* Dunn, (Iowa 1902) 90 N. W. 705.

44. See the statutes of the different states.

45. Craig *v.* Werthmueller, 78 Iowa 598, 43 N. W. 606.

46. See De Blanc *v.* New Iberia, 106 La. 680, 31 So. 311, 56 L. R. A. 285. And see cases cited *infra*, note 47.

Defects in a license, or in a licensee's bond, not affecting its inherent validity, but capable of correction or amendment, do not expose him to the penalties of keeping a liquor nuisance, if his conduct of the business is not otherwise illegal. Clark *v.* Riddle, 101 Iowa 270, 70 N. W. 207.

A dispensary where intoxicating liquors are openly sold in good faith, under color of lawful authority, although in fact operated in violation of law, is not what is commonly known as a "blind tiger," subject to be abated or enjoined. Cannon *v.* Merry, 116 Ga. 291, 42 S. E. 274.

47. Tron *v.* Lewis, 31 Ind. App. 178, 66 N. E. 490; State *v.* Gifford, 111 Iowa 648, 82 N. W. 1034; State *v.* Webber, 76 Iowa 686, 39 N. W. 286; State *v.* Davis, 44 Kan. 60, 24 Pac. 73. And see Fears *v.* State, 102 Ga. 274, 29 S. E. 465.

48. State *v.* Salts, 77 Iowa 193, 39 N. W. 167, 41 N. W. 620; State *v.* Davis, 44 Kan. 60, 24 Pac. 73; State *v.* Donovan, 10 N. D. 203, 86 N. W. 709; State *v.* McGruer, 9 N. D. 566, 84 N. W. 363.

49. Com. *v.* Purcell, 154 Mass. 388, 28 N. E. 288.

50. State *v.* Severson, 88 Iowa 714, 54 N. W. 347; State *v.* Stafford, 67 Me. 125.

51. Hartley *v.* Henretta, 35 W. Va. 222, 13 S. E. 375.

52. State *v.* Frahm, 109 Iowa 101, 80 N. W. 209.

53. Patterson *v.* Nicol, 115 Iowa 283, 88 N. W. 323; Sharp *v.* Arnold, 108 Iowa 203, 78 N. W. 819; Merrifield *v.* Swift, 103 Iowa 167, 72 N. W. 444; Eckert *v.* David, 75 Iowa 302, 39 N. W. 513; State *v.* Strickford, 70 N. H. 297, 47 Atl. 262; State *v.* Saunders, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646; Miller *v.* State, 3 Ohio St. 475; State *v.* Sundry Persons, 2 Ohio Dec. (Reprint) 435, 3 West. L. Month. 92.

54. Judge *v.* Kribs, 71 Iowa 183, 32 N. W. 324.

ance was of suspiciously recent occurrence.[55] The owner of premises whose tenant is alleged to have maintained a nuisance thereon may escape liability by showing that, upon discovering the facts, he terminated the lease and ousted the tenant, or earnestly endeavored to do so, and caused the cessation of the illegal traffic.[56] But to make this defense available, the respondent must assume the burden of proving[57] that the nuisance has been abated permanently[58] and effectually and in good faith.[59]

B. Who May Maintain Proceedings. A proceeding for the abatement or injunction of a liquor nuisance may be instituted by certain designated public officers,[60] or generally by any private citizen of the county where the nuisance is kept,[61] without the necessity of obtaining the consent or concurrence of the prosecuting officers.[62] And the right to prosecute the action to judgment is not lost by plaintiff's removal from the county after the commencement of the suit.[63] But the action cannot be instituted by a citizen of another county,[64] nor do the statutes give one citizen the right to intervene in such an action when commenced by another citizen.[65]

C. Against Whom Proceedings May Be Brought. The proprietor or keeper of the place in question is generally the person against whom such proceedings may be brought.[66] But if the premises are leased to a tenant, the owner

55. See Halfman *v.* Spreen, 75 Iowa 309, 39 N. W. 512; Danner *v.* Hotz, 74 Iowa 389, 37 N. W. 969.

56. Morgan *v.* Koestner, 83 Iowa 134, 49 N. W. 80; Eckert *v.* David, 75 Iowa 302, 39 N. W. 513; Shear *v.* Brinkman, 72 Iowa 698, 34 N. W. 483; Drake *v.* Kingsbaker, 72 Iowa 441, 34 N. W. 199.

57. State *v.* Sundry Persons, 2 Ohio Dec. (Reprint) 435, 3 West. L. Month. 92.

Presumption of continuance of notice.— A liquor nuisance, shown to have existed recently, before action to enjoin it, will be presumed to continue, in the absence of evidence to the contrary. McCoy *v.* Clark, (Iowa 1899) 81 N. W. 159.

58. State *v.* Sundry Persons, 2 Ohio Dec. (Reprint) 435, 3 West. L. Month. 92.

59. Elwood *v.* Price, 75 Iowa 228, 39 N. W. 281.

60. See Walker *v.* McNelly, 121 Ga. 114, 48 S. E. 718; Pottenger *v.* State, 54 Kan. 312, 38 Pac. 278; State *v.* Lynch, 72 N. H. 185, 55 Atl. 553; State *v.* Patterson, (N. D. 1904) 99 N. W. 67.

61. Legg *v.* Anderson, 116 Ga. 401, 42 S. E. 720; Fuller *v.* McDonnell, 75 Iowa 220, 39 N. W. 277 (holding that a methodist clergyman, appointed to preach in a particular town for a year, and intending to reside there as long as permitted by the church authorities, and no longer, is a citizen of the county in which the town lies); State *v.* Sioux Falls Brewing Co., 2 S. D. 363, 50 N. W. 629.

Legal voters.— A petition for the abatement of a liquor nuisance, purporting to be signed by twenty legal voters, as required by the statute, may be amended by substituting a legal voter for a petitioner who is not one. State *v.* Collins, 68 N. H. 46, 36 Atl. 550.

Issue as to citizenship.— An answer denying knowledge or information sufficient to form a belief as to whether plaintiff is a citizen of the county is equivalent merely to a general denial, and therefore raises no issue as to plaintiff's residence or citizenship. Craig *v.* Hasselman, 74 Iowa 538, 38 N. W. 402.

62. Wood *v.* Baer, 91 Iowa 475, 59 N. W. 289; State *v.* Bradley, 10 N. D. 157, 86 N. W. 354.

Counsel.— The petitioner, being a citizen of the county, may employ counsel to prosecute the action, without an appearance by the prosecuting attorney. Maloney *v.* Traverse, 87 Iowa 306, 54 N. W. 155; State *v.* Bradley, 10 N. D. 157, 86 N. W. 354.

63. Judge *v.* Kahl, 74 Iowa 486, 38 N. W. 173.

64. Applegate *v.* Winebrenner, 66 Iowa 67, 23 N. W. 267.

65. Conley *v.* Zerber, 74 Iowa 699, 39 N. W. 113.

66. Tron *v.* Lewis, 31 Ind. App. 178, 66 N. E. 490; Martin *v.* Blattner, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244.

Partners.— Where it appears that two persons, as partners, are owners of the nuisance, only one of whom is made a party, the other must be brought into court before a final decree can be made. Shear *v.* Green, 73 Iowa 688, 36 N. W. 642.

Manager of business.—By the "keeper" of a nuisance is meant not only the owner of the place or business, but any other person who is in possession and control of the place and the liquors, and who manages the unlawful business. Schultz *v.* State, 32 Ohio St. 276.

Master and servant.— If one defendant is the sole proprietor, or has sole charge of the premises, and the other only kept or maintained the premises as his servant, under his direct personal supervision, the latter cannot be convicted. State *v.* Gravelin, 16 R. I. 407, 16 Atl. 914.

Trespasser.— To be the keeper of a liquor nuisance, so as to subject the place to condemnation as such, under N. D. Rev. Codes (1899), § 7605, the person must be an occupant under a claim of right, and not a mere

of the property, although taking no direct part in the business, is properly made a defendant, and may be convicted,[67] provided he knew of the use which was being made of the premises and consented thereto or acquiesced therein.[68]

D. Actions and Proceedings — 1. JURISDICTION AND VENUE. To the validity of proceedings under these statutes, it is essential that there should be jurisdiction in the particular court in which the action is brought,[69] that the place in question should be described in the petition or complaint,[70] and that such place should be within the territorial jurisdiction of the court.[71] A county is not a party to such an action, within the meaning of a statute providing that a change of venue may be had where the county in which the action is brought shall be a party.[72]

2. DEFENSES. Aside from defenses consisting of a denial of the various facts necessary to make out the case for the complainant, it is held that an injunction already granted to restrain defendant from maintaining a liquor nuisance at the place in question, although it has not been enforced, is a bar to a second action by another citizen seeking the same relief.[73] It is no defense that defendant's violation of the law was the result of a mistake of law,[74] or that the liquors were sold in the original packages of importation.[75]

3. PLEADINGS. The petition or complaint for an injunction against a liquor nuisance or for its abatement must describe the place where the alleged nuisance is maintained,[76] allege the several facts and unlawful acts constituting the nuisance,[77] and connect the persons named as defendants with the offense complained

transient and naked trespasser therein. State *v.* Nelson, (N. D. 1904) 99 N. W. 1077.

67. Bell *v.* Glaseker, 82 Iowa 736, 47 N. W. 1042; State *v.* Douglas, 75 Iowa 432, 39 N. W. 686; Martin *v.* Blattner, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244; State *v.* Marston, 64 N. H. 603, 15 Atl. 222; State *v.* Collins, 74 Vt. 43, 52 Atl. 69.

Property occupied by trespassers.— But an injunction will not lie against persons whose property was occupied by trespassers, who erected a shanty thereon and sold liquors unlawfully, of which the owners had no knowledge until the petition was served on them, when they abated the nuisance. State *v.* Lawler, 85 Iowa 564, 52 N. W. 490.

Mortgagees of the property cannot be made liable to injunction, without a showing that they had possession of the property, or some right to the possession or control of it. State *v.* Massey, 72 Vt. 210, 47 Atl. 834.

Bankrupt estate.— State courts have jurisdiction to enjoin or abate a liquor nuisance maintained on property belonging to the estate of a bankrupt, this being a matter of police regulation, which does not interfere with the bankruptcy jurisdiction of the federal courts. Radford *v.* Thornell, 81 Iowa 709, 45 N. W. 890.

68. State *v.* Grim, 85 Iowa 415, 52 N. W. 351; State *v.* Massey, 72 Vt. 210, 47 Atl. 834.

Owner's knowledge.— The owner should not be enjoined on proof merely that the place had the reputation of being a liquor nuisance, where he lived in another town and had no knowledge of such reputation. State *v.* Price, 92 Iowa 181, 60 N. W. 514. But proof of such reputation may be sufficient, when coupled with evidence that the owner occupied a room in the building and was frequently seen about the place. Carter *v.* Steyer, 93 Iowa 533, 61 N. W. 956. And see Hamilton *v.* Baker, 91 Iowa 100, 58 N. W. 1080. The landlord's statement to a prospective tenant that if he took the hotel he would have to sell liquor is admissible as tending to show the owner's knowledge of sales of liquor subsequently made there. State *v.* Davis, 69 N. H. 350, 41 Atl. 267.

69. State *v.* Saxton, 2 Kan. App. 13, 41 Pac. 1113, holding that a justice of the peace has jurisdiction of an action to abate a liquor nuisance.

70. State *v.* Piper, 70 N. H. 282, 47 Atl. 703.

71. Buck *v.* Ellenbolt, 84 Iowa 394, 51 N. W. 22, 15 L. R. A. 187.

72. State *v.* Stewart, 74 Iowa 336, 37 N. W. 400.

73. Steyer *v.* McCauley, 102 Iowa 105, 71 N. W. 194; Dickinson *v.* Eichorn, 78 Iowa 710, 43 N. W. 620, 6 L. R. A. 721. See Carter *v.* Steyer, 93 Iowa 533, 61 N. W. 956.

74. State *v.* Gifford, 111 Iowa 648, 82 N. W. 1034.

75. State *v.* Bowman, 79 Iowa 566, 44 N. W. 813.

76. State *v.* Reno, 41 Kan. 674, 21 Pac. 803.

77. Abrams *v.* Sandholm, 119 Iowa 583, 93 N. W. 563; State *v.* Marston, 64 N. H. 603, 15 Atl. 222; State *v.* Lundergan, 74 Vt. 48, 52 Atl. 70; State *v.* Massey, 72 Vt. 210, 47 Atl. 834; Cohen *v.* King Knob Club, 55 W. Va. 108, 46 S. E. 799.

License or authority to sell, on the part of defendant, need not be negatived by the complaint. Com. *v.* Brusie, 145 Mass. 117, 13 N. E. 378.

Purpose of defendant.— The proceeding is maintainable, although the bill fails to al-

of.[78] Any essential allegations of the complaint which are well pleaded and which are not controverted by the answer, or all of them, if no answer is filed, are taken as true, and require no evidence in their support.[79] A general denial does not put in issue the allegation of the petition as to the complainant's residence in the county,[80] and no reply is necessary to an answer which merely alleges that the suit is brought in bad faith and for the purpose of annoying defendant.[81] An answer which does not deny that the nuisance existed and was being maintained at the time the action was brought, but merely alleges that afterward defendant obtained and now holds a permit to sell liquor, is demurrable.[82]

4. EVIDENCE. The burden of proving the facts necessary to sustain the decree sought is generally on plaintiff or complainant.[83] It is not necessary that these facts should be proved beyond a reasonable doubt, a mere preponderance of the evidence being sufficient.[84] The burden is on defendant to prove that admitted sales were legal,[85] that he was acting under a license or permit,[86] or any other affirmative defense.[87] The complainant may make out his case by showing the finding of large quantities of liquor on the premises, the presence of bar furniture, the fact that drunken men frequented the premises, and the like,[88] or by showing the fact of defendant having paid the United States special tax as a liquor dealer,[89] or by showing the general reputation of the place in question.[90] Certificates showing the purchase of liquor from defendant, although not shown to be public records, are competent evidence,[91] and depositions may be used as in other civil actions.[92] And where the petition charges a continuing offense, evidence of illegal sales *post litem motam* is competent.[93]

5. TRIAL OR HEARING. Where an injunction is sought, the court may submit issues on conflicting evidence to a jury and be guided by their finding.[94] Where the trial is before a jury, the instructions should be framed with a careful regard

lege that defendant intends to continue the illegal use complained of. Wright *v.* O'Brien, 98 Me. 196, 56 Atl. 647.

Insufficient to state facts on information and belief.— Wheaton *v.* Slattery, 96 N. Y. App. Div. 102, 88 N. Y. Suppl. 1074.

78. Com. *v.* Gallagher, 145 Mass. 104, 13 N. E. 359; State *v.* Batcheller, 66 N. H. 145, 20 Atl. 931.

Charging owner's knowledge of or permission for unlawful use of premises see Gray *v.* Stienes, 69 Iowa 124, 28 N. W. 475; State *v.* Collins, 74 Vt. 43, 52 Atl. 69.

79. Overton *v.* Schindele, 85 Iowa 715, 50 N. W. 977; Peisch *v.* Linder, 73 Iowa 766, 33 N. W. 133; Bloomer *v.* Glendy, 70 Iowa 757, 30 N. W. 486.

80. Kaufman *v.* Dostal, 73 Iowa 691, 36 N. W. 643; Shear *v.* Green, 73 Iowa 688, 36 N. W. 642; Littleton *v.* Harris, 73 Iowa 167, 34 N. W. 800.

81. McQuade *v.* Collins, 93 Iowa 22, 61 N. W. 213.

82. Rice *v.* Schlapp, 78 Iowa 753, 41 N. W. 603; Tibbetts *v.* Burster, 76 Iowa 176, 40 N. W. 707; Halfman *v.* Spreen, 75 Iowa 309, 39 N. W. 512.

83. Bowen *v.* Hale, 4 Iowa 430. And see State *v.* Mathieson, 77 Iowa 485, 42 N. W. 377.

84. Davis *v.* Auld, 96 Me. 559, 53 Atl. 118.

Weight and sufficiency of evidence see State *v.* Hibner, 115 Iowa 48, 87 N. W. 741; Hall *v.* Coffin, 108 Iowa 466, 79 N. W. 274; Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111; Craig *v.* Plunkett, 82 Iowa 474, 48 N. W. 984; State *v.* Schultz, 79 Iowa 478, 44 N. W. 713; State *v.* Mathieson, 77 Iowa 485, 42 N. W. 377; Pottenger *v.* State, 54 Kan. 312, 38 Pac. 278; State *v.* Wheldon, 6 Kan. App. 650, 49 Pac. 786; State *v.* Davis, 69 N. H. 350, 41 Atl. 267; State *v.* Collins, 68 N. H. 299, 44 Atl. 495; Matter of Hunter, 34 Misc. (N. Y.) 389, 69 N. Y. Suppl. 908.

85. Shear *v.* Green, 73 Iowa 688, 36 N. W. 642.

86. Hawks *v.* Fellows, 108 Iowa 133, 78 N. W. 812; Ritchie *v.* Zalesky, 98 Iowa 589, 67 N. W. 399.

87. Farley *v.* Hollenfeltz, 79 Iowa 126, 44 N. W. 243.

88. State *v.* Williams, 90 Iowa 513, 58 N. W. 904; Nichols *v.* Thomas, 89 Iowa 394, 56 N. W. 540; State *v.* Severson, 88 Iowa 714, 54 N. W. 347; Littleton *v.* Harris, 73 Iowa 167, 34 N. W. 800; Com. *v.* Kane, 150 Mass. 294, 22 N. E. 903; State *v.* Collins, 68 N. H. 299, 44 Atl. 495. *Compare* State *v.* Nelson, (N. D. 1904) 99 N. W. 1077.

89. State *v.* Lincoln, 73 Vt. 221, 51 Atl. 9.

90. State *v.* Dominisse, (Iowa 1904) 99 N. W. 561; State *v.* Gegner, 88 Iowa 748, 56 N. W. 182; Farley *v.* O'Malley, 77 Iowa 531, 42 N. W. 435.

91. State *v.* Huff, 76 Iowa 200, 40 N. W. 720.

92. Rancour's Petition, 68 N. H. 172, 20 Atl. 930.

93. Hall *v.* Coffin, 108 Iowa 466, 79 N. W. 274.

94. State *v.* Harrington, 69 N. H. 496, 45 Atl. 404.

to the rights of defendant.[95] Continuances may be granted, as in other cases, for good and sufficient cause.[96]

6. Judgment and Enforcement Thereof — a. Abatement. The statutes provide for the abatement of an existing nuisance by seizing and destroying the liquor, removing from the building all articles used in carrying on the business, and closing the place for a definite period, as a year. When the fact of the nuisance has been established, an order for its abatement in this manner is not only justified, but it is error for the court to refuse it.[97] When the place has thus been closed by order of the court, it is unlawful for defendant to reopen it within the prescribed time; but this is only upon condition that the officer has fully and faithfully complied with the directions of the statute and of the order, in closing the place and posting notices.[98]

b. Injunction. A temporary injunction to restrain a liquor nuisance may issue on a satisfactory showing to the court by affidavits or other *ex parte* proofs,[99] and this may be dissolved on defendant's showing good cause against it,[1] or the injunction may be made permanent at any time while the case remains on the docket of the court for action,[2] and thereafter may be modified to suit a changed state of the law or of the circumstances of the case,[3] or may be dissolved or vacated for fraud practised in obtaining it or for other sufficient reasons.[4] The injunction should forbid defendant to carry on the business or conduct the saloon or bar complained of as a nuisance,[5] and should designate with reasonable certainty the place to which its prohibition is intended to apply;[6] but should not

95. State *v.* Huff, 76 Iowa 200, 40 N. W. 720; State *v.* Goff, 62 Kan. 104, 61 Pac. 683.

96. See Ellwood *v.* Price, 73 Iowa 84, 34 N. W. 618.

97. State *v.* Adams, 81 Iowa 593, 47 N. W. 770; McClure *v.* Braniff, 75 Iowa 38, 39 N. W. 171.

Time and place of making order.— The order of abatement need not be made at the time of a plea of guilty or of the sentence to pay a fine, but may be made on any subsequent day of the same term. State *v.* Sundry Persons, 2 Ohio Dec. (Reprint) 435, 3 West. L. Month. 92. But it seems that the judge has no authority to make such an order at chambers. *In re* Harmer, 47 Kan. 262, 27 Pac. 1004.

Contents of order.— The directions in regard to the abatement of the nuisance should be sufficiently explicit to guide the officer in the discharge of his duty. Howard *v.* State, 6 Ind. 444. It should distinctly describe the property to be removed from the place in question. Craig *v.* Werthmueller, 78 Iowa 598, 43 N. W. 606.

How executed.— In most states the order of abatement is directed to, and is to be executed by, a public officer. But in Ohio the order is not to be so directed; it is an order addressed to the person who has been convicted of maintaining the nuisance, and his obedience to it may be enforced, if the nuisance continues, by attachment for contempt of court. Schultz *v.* State, 32 Ohio St. 276; Miller *v.* State, 3 Ohio St. 475.

98. McCoy *v.* Clark, 109 Iowa 464, 80 N. W. 538; State *v.* Clark, 62 Vt. 278, 19 Atl. 981.

Effect of abatement of action.— Where an action to abate a liquor nuisance has abated by the death of the principal defendant, and the cause of action does not survive, judgment cannot be rendered for the destruction of the property alleged to have been unlawfully used, nor for the closing of the place, as such remedies are incidental to the main remedy, the abatement of the nuisance, which was abated by defendant's death. State *v.* McMaster, (N. D. 1904) 99 N. W. 58.

99. Powers *v.* Winters, 106 Iowa 751, 77 N. W. 509; McCoy *v.* Clark, 104 Iowa 491, 73 N. W. 1050; Tibbetts *v.* Burster, 76 Iowa 176, 40 N. W. 707; Shear *v.* Brinkman, 72 Iowa 698, 34 N. W. 483; Pontius *v.* Bowman, 66 Iowa 88, 23 N. W. 277; Pontius *v.* Winebrenner, 65 Iowa 591, 22 N. W. 646; Littleton *v.* Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19.

1. State *v.* Reymann, 48 W. Va. 307, 37 S. E. 591.

2. Cunningham *v.* Gaynor, 87 Iowa 449, 54 N. W. 248.

3. Denby *v.* Fie, 106 Iowa 299, 76 N. W. 702.

4. Cameron *v.* Tucker, 104 Iowa 211, 73 N. W. 601; Seddon *v.* State, 100 Iowa 378, 69 N. W. 671; Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111.

5. Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478.

Railroad warehouse used for storage.— A decree to restrain the maintenance of an intoxicating liquor nuisance, consisting in defendant railroad using its warehouse and depot for the storage and delivery of C. O. D. packages of intoxicating liquor, was not erroneous for failing to make an exception in favor of liquor lawfully transported and stored, as such transaction would not be affected by the decree. Dosh *v.* U. S. Express Co., (Iowa 1904) 99 N. W. 298.

6. Carter *v.* Bartel, 110 Iowa 211, 81 N. W. 462; Ver Straeten *v.* Lewis, 77 Iowa 130, 41

go further than the prayer of the bill, in respect, for example, to the traffic in a given kind of liquor, such as beer, as to which no relief is asked.[7]

7. Contempt Proceedings For Violation of Injunction. If the person enjoined persists in maintaining the nuisance, or otherwise disobeys the lawful order of the court, it is a contempt for which he may be punished.[8] It has been held that such a proceeding is criminal in its nature.[9] It is to be begun by an information,[10] or affidavits presented to the court, charging a violation of the injunction,[11] and may properly be brought in the name of the state, and need not be instituted by the same person who was plaintiff in the original action for injunction.[12] Defendant is not entitled to a trial by jury.[13] Punishment as for contempt may be awarded against defendant violating the injunction, whether he directly engages in the prohibited business,[14] or knowingly and willingly allows another person to continue it,[15] and also against his servants and employees;[16] but not against a third person, who was not a party to the injunction proceedings and is ignorant of the decree.[17] The facts constituting the alleged violation of the injunction should be established by satisfactory evidence given by competent and credible witnesses.[18] And defendant may set up and must prove any facts relied on as showing cause why he should not be adjudged guilty of contempt.[19] The punishment for the

N. W. 594; State *v.* Massey, 72 Vt. 210, 47 Atl. 834.

7. Kaufman *v.* Dostal, 73 Iowa 691, 36 N. W. 643.

8. Drady *v.* Polk County Dist. Ct., 126 Iowa 345, 102 N. W. 115; Davis *v.* Auld, 96 Me. 559, 53 Atl. 118; Schultz *v.* State, 32 Ohio St. 276. And see Bartel *v.* Hobson, 107 Iowa 644, 78 N. W. 689; Peck *v.* Conner, 82 Iowa 725, 47 N. W. 977.

Dormancy of injunction.— An injunction perpetually enjoining a liquor nuisance does not become dormant by the mere lapse of time; and the fact that more than five years have elapsed since it was issued is no reason why a person who violates its prohibition should not be punished for contempt. State *v.* Durein, 46 Kan. 695, 27 Pac. 148.

Second conviction.— Where one has been punished for contempt in violating an injunction against the sale of intoxicating liquors, he may be punished on a subsequent conviction for contempt for acts done after the prior conviction. Rosenthal *v.* Hobson, (Iowa 1898) 77 N. W. 488.

Irregular decree will support proceeding.— Ohlrogg *v.* Worth County Dist. Ct., (Iowa 1904) 99 N. W. 178.

Lien of fine on premises see Cameron *v.* Kapinos, 89 Iowa 561, 56 N. W. 677.

9. McGlasson *v.* Scott, 112 Iowa 289, 83 N. W. 974; Grier *v.* Johnson, 88 Iowa 99, 55 N. W. 80.

County attorney need not appear.— Brennan *v.* Roberts, 125 Iowa 615, 101 N. W. 460.

10. McGlasson *v.* Scott, 112 Iowa 289, 83 N. W. 974; Bartel *v.* Hobson, 107 Iowa 644, 78 N. W. 689. And see Brennan *v.* Roberts, 125 Iowa 615, 101 N. W. 460.

11. State *v.* Markuson, 5 N. D. 147, 64 N. W. 934.

12. Fisher *v.* Cass County Dist. Ct., 75 Iowa 232, 39 N. W. 283.

13. Manderscheid *v.* Plymouth County Dist. Ct., 69 Iowa 240, 28 N. W. 551; State *v.* Durein, 46 Kan. 695, 27 Pac. 148; State *v.* Markuson, 7 N. D. 155, 73 N. W. 82, 5 N. D. 147, 64 N. W. 934; State *v.* Murphy, 71 Vt. 127, 41 Atl. 1037.

14. Sloan *v.* Johnson, 86 Iowa 750, 53 N. W. 268; McGlasson *v.* Johnson, 86 Iowa 477, 53 N. W. 267.

Pretended sale and repurchase.— Defendant cannot escape punishment for contempt, on the defense that he sold the property after the decree and had no further connection with it until he repurchased it, some time after the commission of the acts constituting the alleged violation of the injunction, where the evidence shows an attempt to evade the law by a merely fictitious sale of the property. Wagner *v.* Holmes, 88 Iowa 728, 55 N. W. 473.

15. England *v.* Johnson, 86 Iowa 751, 53 N. W. 268.

16. Hawks *v.* Fellows, 108 Iowa 133, 78 N. W. 812.

17. Pearson *v.* Cass County Dist. Ct., 90 Iowa 756, 57 N. W. 871; Newcomer *v.* Tucker, 89 Iowa 486, 56 N. W. 499.

Illustrations.— A tenant of the original defendant, who was not a party to the proceedings, and is ignorant of the decree made therein, cannot be punished for contempt in disobeying the injunction. Newcomer *v.* Tucker, 89 Iowa 486, 56 N. W. 499. But see Sweeny *v.* Traverse, 82 Iowa 720, 47 N. W. 889; Silvers *v.* Traverse, 82 Iowa 52, 47 N. W. 888, 11 L. R. A. 804. And the same principle applies to a subsequent purchaser of the premises, or his lessee. Buhlman *v.* Humphrey, 86 Iowa 597, 53 N. W. 318.

18. See Cotant *v.* Hobson, 98 Iowa 318, 67 N. W. 255; Hinkle *v.* Smith, 90 Iowa 761, 57 N. W. 891; Barton *v.* Mahaska County Dist. Ct., 90 Iowa 742, 57 N. W. 611; Ver Straeten *v.* Lewis, 77 Iowa 130, 41 N. W. 594; Goetz *v.* Stutsman, 73 Iowa 693, 36 N. W. 644; State *v.* Mitchell, 3 S. D. 223, 52 N. W. 1052.

19. Landt *v.* Remley, 113 Iowa 555, 85 N. W. 783; West *v.* Bishop, 111 Iowa 410, 81 N. W. 696.

Mistake of law.— Defendant's mistake of

contempt is not necessarily the same as the penalty fixed by law for the original offense of maintaining the nuisance.[20]

8. Appeal and Review. The statutes generally allow an appeal, both from the judgment granting an injunction or ordering the abatement of the nuisance,[21] and from a judgment punishing defendant for contempt in violating the injunction.[22] On such appeal the reviewing court may correct the form of the order or decree if irregular,[23] reduce the punishment if excessive,[24] or reverse the judgment for any fatal defects;[25] but it will not review questions proper for the determination of the trial court,[26] nor reverse for a mere conflict in the evidence, when there was evidence to sustain the conviction.[27]

9. Costs and Fees. Under statutes allowing an attorney's fee, in cases of this kind, it is the duty of the court, if there is any contention as to the amount to be taxed, to hear evidence as to the value of the services rendered by the attorney[28] and fix his fee accordingly, the amount resting very much in its discretion.[29] The provision of the statute as to fees applies as well to actions prosecuted by the county attorney in the name of the state as to those prosecuted by a private citizen in his own name,[30] and the fee may be chargeable upon the county, if it cannot be collected from defendant.[31] The supreme court may also allow an attorney's fee for prosecuting the appeal.[32] The costs of the action are chargeable to defendant if unsuccessful, and may be made a lien on the premises;[33] and if defendant wins, the costs may be taxed against plaintiff, provided it appears the action was brought maliciously and without probable cause.[34]

XII. Civil Damage Laws.

A. In General — 1. Nature of Remedy. Civil damage laws create a new right of action, unknown to the common law.[35] A proceeding thereunder is not a criminal prosecution[36] or an action for the recovery of a fine or penalty;[37] it is

law, in thinking that the particular sales made by him as of imported liquors in the original packages were not in violation of the law, is no excuse for violating the injunction. State *v.* Bowman, 79 Iowa 566, 44 N. W. 813.

20. Goetz *v.* Stutsman, 73 Iowa 693, 36 N. W. 644. See Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

Amount of fine see Beatty *v.* Roberts, 125 Iowa 619, 101 N. W. 462.

Payment of attorney's fees and costs see Johnson *v.* Roberts, (Iowa 1904) 101 N. W. 1131; Brennan *v.* Roberts, 125 Iowa 615, 101 N. W. 460.

21. See State *v.* Donovan, 10 N. D. 610, 88 N. W. 717.

22. State *v.* Markuson, 5 N. D. 147, 64 N. W. 934; *Ex p.* Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678.

23. See Koehl *v.* Judge Div. B. Civil Dist. Ct., 45 La. Ann. 1488, 14 So. 352.

24. State *v.* Meloney, 79 Iowa 413, 44 N. W. 693.

25. State *v.* Douglas, 75 Iowa 432, 39 N. W. 686.

26. State *v.* Davis, 69 N. H. 350, 41 Atl. 267.

27. State *v.* Bowman, (Iowa 1900) 82 N. W. 493; Drake *v.* Freehan, 80 Iowa 768, 45 N. W. 576; Sickinger *v.* State, 45 Kan. 414, 25 Pac. 868.

28. Craig *v.* Werthmueller, 78 Iowa 598, 43 N. W. 606.

29. Campbell *v.* Manderscheid, 74 Iowa 708, 39 N. W. 92.

Proper amount for fee see Nichols *v.* Thomas, 89 Iowa 394, 56 N. W. 540; Farley *v.* Geisheker, 78 Iowa 453, 43 N. W. 279, 6 L. R. A. 533; Farley *v.* O'Malley, 77 Iowa 531, 42 N. W. 435.

30. State *v.* Douglas, 75 Iowa 432, 39 N. W. 686. And see Farr *v.* Seaward, 82 Iowa 221, 48 N. W. 67.

31. See Sims *v.* Pottawattamie County, 91 Iowa 442, 59 N. W. 68; Newman *v.* Des Moines County, 85 Iowa 89, 52 N. W. 105.

32. State *v.* Gifford, 111 Iowa 648, 82 N. W. 1034; Hamilton *v.* Baker, 91 Iowa 100, 58 N. W. 1080.

33. Cameron *v.* Gminder, 89 Iowa 298, 56 N. W. 502.

34. Clark *v.* Riddle, 101 Iowa 270, 70 N. W. 207.

35. Campbell *v.* Harmon, 96 Me. 87, 51 Atl. 801. And see Cruse *v.* Aden, 127 Ill. 231, 20 N. E. 73, 3 L. R. A. 327 (holding that it was not a tort at common law either to sell or give intoxicating liquors to a strong and able-bodied man); Struble *v.* Nodwift, 11 Ind. 64 (holding that at common law a seller of liquors could not be held liable for improper use made of the liquors, unless he knew of the intended improper use). And see Westbrook *v.* Miller, 98 N. Y. App. Div. 590, 90 N. Y. Suppl. 558.

36. Lossman *v.* Knights, 77 Ill. App. 670.

37. Reinhardt *v.* Fritzsche, 69 Hun (N. Y.) 565, 23 N. Y. Suppl. 958; Willett *v.* Viens,

simply an action of tort founded on the statute.[38] And where the common-law system of pleading is in force "case" is the proper form of action under such statute.[39]

2. Statutory Provisions. A civil damage law, being highly penal in its character, and in derogation of the common law, should receive a strict construction,[40] and does not operate retroactively, unless there are express words to that effect.[41] It is a general law of the state, applicable even in counties where the traffic in liquors was regulated by special laws, at the time of its enactment,[42] but has no extraterritorial operation or effect.[43] The effect of the repeal of a civil damage law is to destroy all rights of action previously acquired under it, even in the case of pending suits, unless the repealing act contains a saving clause.[44]

B. Grounds of Action — 1. In General. To sustain an action under a civil damage law, there must have been a "sale," a "gift," or a "furnishing" according to the terms of the statute of intoxicating liquor by defendant,[45] which caused or contributed to[46] a state of intoxication, or of habitual intemperance, on the part of the person so supplied with liquor,[47] in consequence of which the acts or omissions of the intoxicated person or drunkard have caused actual damage or injury to plaintiff[48] of such a character as to come within the terms of the

2 Quebec 514; Sauvage *v.* Trouillet, 3 Montreal Super. Ct. 276.

38. Campbell *v.* Harmon, 96 Me. 87, 51 Atl. 801.

The cause of action is not assignable.— McGee *v.* McCann, 69 Me. 79.

Survival of right of action.— In so far as the right of action accrues to a person dependent for support upon a husband or father, who is disqualified by intemperance from earning a living, it is not lost by the death of such husband or father, caused by such intemperance, but becomes fixed thereby. Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409; Mason *v.* Shay, 5 Ohio Dec. (Reprint) 31, 1 Am. L. Rec. 553. But *compare* Davis *v.* Justice, 31 Ohio St. 359, 27 Am. Rep. 514.

39. Schafer *v.* Boyce, 41 Mich. 256, 2 N. W. 1; Friend *v.* Dunks, 37 Mich. 25.

In Illinois it seems that the proper form of action is not "case" but "debt." Confrey *v.* Stark, 73 Ill. 187.

40. Schulte *v.* Schleeper, 210 Ill. 357, 71 N. E. 325; Fentz *v.* Meadows, 72 Ill. 540; Meidel *v.* Anthis, 71 Ill. 241; Freese *v.* Tripp, 70 Ill. 496; Schneider *v.* Hosier, 21 Ohio St. 98; Northern Pac. R. Co. *v.* Whalen, 149 U. S. 157, 13 S. Ct. 822, 37 L. ed. 686 [*affirming* 3 Wash. Terr. 452, 17 Pac. 890]. But see Trice *v.* Robinson, 16 Ont. 433.

Construction.—Such a statute should not be construed so strictly as to defeat its purpose. While its character should not be enlarged, it should be interpreted, where the language is clear and free from ambiguity, according to its true intent and meaning, having in view the evil to be remedied and the object to be obtained. Gardner *v.* Day, 95 Me. 558, 50 Atl. 892; Mead *v.* Stratton, 87 N. Y. 493, 41 Am. Rep. 386. A civil damage law should also be construed as a part of the general liquor legislation of the state, so as to be binding, without specially bringing it home to them, on persons taking out licenses under the general law. Baker *v.* Pope, 2 Hun (N. Y.) 556, 5 Thomps. & C. 102.

41. Reinhardt *v.* Fritzsche, 69 Hun (N. Y.) 565, 23 N. Y. Suppl. 958.

42. Mardorf *v.* Hemp, 4 Pa. Cas. 280, 6 Atl. 754.

43. Goodwin *v.* Young, 34 Hun (N. Y.) 252.

44. Curran *v.* Owens, 15 W. Va. 208; Farrell *v.* Drees, 41 Wis. 186.

Effect of the enactment of subsequent laws in pari materia or affecting the general subject of liquor selling see Reed *v.* Thompson, 88 Ill. 245; Roth *v.* Eppy, 80 Ill. 283; Mulcahey *v.* Givens, 115 Ind. 286, 17 N. E. 598; State *v.* Cooper, 114 Ind. 12, 16 N. E. 518; Quinlan *v.* Welch, 141 N. Y. 158, 36 N. E. 12; Reinhardt *v.* Fritzsche, 69 Hun (N. Y.) 565, 23 N. Y. Suppl. 958.

45. See Judge *v.* Jordan, 81 Iowa 519, 46 N. W. 1077; Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77; St. Goddard *v.* Burnham, 124 Mass. 578; Dudley *v.* Parker, 132 N. Y. 386, 30 N. E. 737.

The use of intoxicating drinks by the saloon-keeper himself is not a "traffic" in liquors, within the meaning of a statute giving a right of action on the license bond for injuries arising from such traffic. Curtin *v.* Atkinson, 36 Nebr. 110, 54 N. W. 131.

In Iowa, in an action for damages by a wife for the sale of liquor to her husband, the fact that the liquor drunk by the husband was bought by other persons does not preclude a recovery. Carrier *v.* Bernstein, 104 Iowa 572, 73 N. W. 1076.

46. Schafer *v.* State, 49 Ind. 460; Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77; McGee *v.* McCann, 69 Me. 79.

47. McEntee *v.* Spiehler, 12 Daly (N. Y.) 435.

48. Gilmore *v.* Mathews, 67 Me. 517.

In Texas a parent may recover a penalty, under the statute, for selling liquor to his minor son, without proof that he was in any way injured or damaged by the sale. Kruger *v.* Spachek, 22 Tex. Civ. App. 307, 54 S. W. 295; Qualls *v.* Sayles, 18 Tex. Civ. App. 400, 45 S. W. 839.

statute.[49] But it is not necessary that an action should also be maintainable against the intoxicated person on the same state of facts,[50] or that the seller should have known of the purchaser's intemperate habits,[51] or should have been able to anticipate the particular injury which resulted.[52] Plaintiff may maintain his action without regard to the fact that the particular sale in question is also a criminal offense,[53] and may pursue defendant personally, although the latter may also be liable on his bond,[54] and may have separate and successive actions for every separate injury caused by defendant's acts.[55]

2. ILLEGALITY OF SALE. As a general rule the civil damage laws make it an essential prerequisite to the maintenance of an action thereunder that the sale or furnishing of liquor causing the intoxication complained of should have been illegal, as being contrary to the provisions of some statute as to the liquor traffic.[56]

3. INJURIES TO PERSON. "Injury to the person," as founding a right of action under the civil damage laws, means actual physical violence, or physical harm or suffering, sustained by plaintiff at the hands of the intoxicated person.[57] It is not necessary that plaintiff should be a relative of the drunken man. A stranger who is injured in his person by the violent or reckless conduct of the drunken man, as by being set upon and beaten, or shot and wounded, or thrown out of his carriage, may recover damages against the person who supplied the liquor which caused the intoxication.[58] But such a statute does not contemplate a recovery for injuries sustained, in consequence of intoxication, by the drunken man himself.[59]

4. INJURIES TO PROPERTY. Under these statutes a plaintiff may recover damages for direct injury to property of his, or for the loss of property belonging to

49. Confrey *v.* Stark, 73 Ill. 187; Albrecht *v.* Walker, 73 Ill. 69; Fentz *v.* Meadows, 72 Ill. 540; Keedy *v.* Howe, 72 Ill. 133; Kellerman *v.* Arnold, 71 Ill. 632.

50. Quain *v.* Russell, 8 Hun (N. Y.) 319.

51. Edwards *v.* Woodbury, 156 Mass. 21, 30 N. E. 175.

52. Lafler *v.* Fisher, 121 Mich. 60, 79 N. W. 934.

53. Goldsticker *v.* Ford, 62 Tex. 385.

54. Mulcahey *v.* Givens, 115 Ind. 286, 17 N. E. 598.

55. Kennedy *v.* Saunders, 142 Mass. 9, 6 N. E. 734.

56. *Indiana.*— Mitchell *v.* Ratts, 57 Ind. 259. And see State *v.* Cooper, (1887) 13 N. E. 861.

Iowa.— Weitz *v.* Ewen, 50 Iowa 34. There being no statutory prohibition against the sale of beer, except one forbidding its sale to a minor, an intoxicated person, or a habitual drunkard, no action can be maintained by a wife for the sale of beer to her husband, if it is not alleged that he is one of the prohibited persons. Myers *v.* Conway, 55 Iowa 166, 7 N. W. 481; Woody *v.* Coenan, 44 Iowa 19; Jewett *v.* Wanshura, 43 Iowa 574.

Kentucky.— Rogers *v.* Hughes, 87 Ky. 185, 8 S. W. 16, 10 Ky. L. Rep. 68.

Massachusetts.— O'Connell *v.* O'Leary, 145 Mass. 311, 14 N. E. 143.

Michigan.— Peacock *v.* Oaks, 85 Mich. 578, 48 N. W. 1082.

Ohio.— Sibila *v.* Bahney, 34 Ohio St. 399; Baker *v.* Beckwith, 29 Ohio St. 314; Miller *v.* Gleason, 18 Ohio Cir. Ct. 374, 10 Ohio Cir. Dec. 20; Russell *v.* Tippin, 12 Ohio Cir. Ct. 52, 5 Ohio Cir. Dec. 443; Mason *v.* Shay, 5 Ohio Dec. (Reprint) 194, 3 Am. L. Rec. 435; Granger *v.* Knipper, 2 Cinc. Super. Ct. 480.

South Dakota.— Sandige *v.* Widmann, 12 S. D. 101, 80 N. W. 164.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 420.

57. See *infra*, XII, B, 6.

The injury must be some unlawful damage or hurt, and anything done in lawful self-defense is not actionable. Smith *v.* Wilcox, 47 Vt. 537.

Injury to a wife's health caused by overwork for want of proper support by an inebriate husband is not included. Elshire *v.* Schuyler, 15 Nebr. 561, 20 N. W. 29. And see McClellan *v.* Hein, 56 Nebr. 600, 77 N. W. 120.

Driving wife out of house.— Where an intoxicated husband, without actual violence, but by abusive language and intimidation, drove his wife out of the house and kept her out for several hours, it was held that she had been injured in her person, so as to sustain an action. Peterson *v.* Knoble, 35 Wis. 80.

If a drunken husband assaults and beats his wife, she has a good cause of action against the dealer who furnished him the liquor. Wilson *v.* Booth, 57 Mich. 249, 23 N. W. 799.

58. King *v.* Haley, 86 Ill. 106, 29 Am. Rep. 14; English *v.* Beard, 51 Ind. 489; Wesnieski *v.* Vanek, (Nebr. 1904) 99 N. W. 258; Bodge *v.* Hughes, 53 N. H. 614; Dudley *v.* Parker, 132 N. Y. 386, 30 N. E. 737.

59. Brooks *v.* Cook, 44 Mich. 617, 7 N. W. 216, 38 Am. Rep. 282. *Compare* Buckmaster *v.* McElroy, 20 Nebr. 557, 31 N. W. 76, 57 Am. Rep. 843.

him, when caused by the intoxication produced by defendant's sale or furnishing of liquor.[60]

5. INJURIES TO MEANS OF SUPPORT — a. In General. A civil damage law, which provides an action for injuries to "means of support," creates a new right of action, and it is not necessary, to sustain such action, that the injury should be a common-law injury or one before remediable by action.[61] The wife has an interest in her husband's capacity to perform labor as a means of support; and if his intoxication, habitual or otherwise, so impairs his mental or physical powers as to incapacitate him for work or business, or results in accidents or injuries which produce the same result, the wife sustains an actionable injury,[62] irrespective of the habits of her husband, with reference to industry or idleness, before the acts complained of,[63] and without regard to the fact that she has independent means of her own, or that she is competent to earn her own living;[64] but there must be an impairment of his support of her, or capacity to support her, and she cannot found her action on a mere diminution of his estate or of what she expects to inherit if she survives him.[65] A wife's right of support is not, however, limited to the bare necessaries of life, but embraces comforts suitable to her situation and her husband's condition in life.[66] A liquor dealer may be as much liable for causing the continuance of a condition or state of affairs which injures the wife in her means of support as for causing such an injury in the first place.[67] A right of action for this species of injury is not confined to wives. A husband may maintain an action for injury to his means of support by the loss of his wife's services caused by intoxication;[68] and for the same reason a parent,

60. Kilburn *v.* Coe, 48 How. Pr. (N. Y.) 144.

Money squandered by drunken husband.— A wife may recover damages by reason of her money being spent by her husband for liquor, or squandered by him while intoxicated, or in the saloon of the liquor seller. Greenlee *v.* Schoenheit, 23 Nebr. 669, 37 N. W. 600.

Wife's property sold.— Where a husband takes personal property of his wife and sells it while drunk to the liquor dealer or to another, or sells or trades it for liquor, she will have a right of action. Woolheather *v.* Risley, 38 Iowa 486; Mulford *v.* Clewell, 21 Ohio St. 191.

Where a horse is killed by the reckless driving of the drunken man, or by being run into by a team recklessly driven by him, the owner may recover its value against the liquor dealer who sold the liquor which caused the intoxication. Dunlap *v.* Wagner, 85 Ind. 529, 44 Am. Rep. 42; Flower *v.* Witkovsky, 69 Mich. 371, 37 N. W. 364.

Recovery for loss of slave see Skinner *v.* Hughes, 13 Mo. 440; Harrison *v.* Berkley, 1 Strobh. (S. C.) 525, 47 Am. Dec. 578.

61. Volans *v.* Owen, 74 N. Y. 526, 30 Am. Rep. 337.

The term "means of support" embraces all those resources from which the necessaries and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income. Meidel *v.* Anthis, 71 Ill. 241; Schneider *v.* Hosier, 21 Ohio St. 98.

62. Tipton *v.* Schuler, 87 Ill. App. 517; Elshire *v.* Schuyler, 15 Nebr. 561, 20 N. W. 29; Schneider *v.* Hosier, 21 Ohio St. 98.

If the husband, without being incapacitated for labor, falls into such idle and dissolute habits that he is unable to obtain any employment, or so neglects his opportunities for earning money that his family become objects of public charity his wife has a right of action. Roth *v.* Eppy, 80 Ill. 283; Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

Imprisonment for crime committed while drunk.— Where the husband's earning capacity is taken away by his being imprisoned for a crime committed while drunk his wife may bring an action. Loftus *v.* Hamilton, 105 Ill. App. 72; Homire *v.* Halfman, 156 Ind. 470, 60 N. E. 154; Beers *v.* Walhizer, 43 Hun (N. Y.) 254. But see Dennison *v.* Van Wormer, 107 Mich. 461, 65 N. W. 274; Bradford *v.* Boley, 167 Pa. St. 506, 31 Atl. 751.

Abandonment of wife.— Where a husband by his use of intoxicating liquors and cruel treatment compels his wife to take refuge away from his home and flees to parts unknown, leaving the wife destitute, she may have her action against the saloon-keepers who caused his intoxication. Waxmuth *v.* McDonald, 96 Ill. App. 242.

63. Woolheather *v.* Risley, 38 Iowa 486; Rouse *v.* Melsheimer, 82 Mich. 172, 46 N. W. 372.

64. Hackett *v.* Smelsley, 77 Ill. 109.

65. Confrey *v.* Stark, 73 Ill. 187; Radley *v.* Seider, 99 Mich. 431, 58 N. W. 366.

66. Thill *v.* Pohlman, 76 Iowa 638, 41 N. W. 385; Gorey *v.* Kelly, 64 Nebr. 605, 90 N. W. 554. And see Herring *v.* Ervin, 48 Ill. App. 369. *Compare* Bellison *v.* Apland, 115 Iowa 599, 89 N. W. 22.

67. Lloyd *v.* Kelly, 48 Ill. App. 554; League *v.* Ehmke, 120 Iowa 464, 94 N. W. 938.

68. Moran *v.* Goodwin, 130 Mass. 158, 39 Am. Rep. 443. And see Aldrich *v.* Sager, 9 Hun (N. Y.) 537.

dependent wholly or in part on the earnings of his child, may sue to recover for injury from such cause to his means of support.[69]

b. Death of Husband. It is generally held that the death of plaintiff's husband, resulting as the consequence of his intoxication, caused or contributed to by the liquor furnished him by defendant, is such an injury to her "means of support" as will enable her to maintain an action under the statute.[70]

6. Disgrace and Mental Suffering. Mental suffering alone does not constitute a cause of action under the civil damage laws. That is, plaintiff's sorrow, fear, or anxiety caused by the conduct toward her of the intoxicated husband or other relative, or mortification or disgrace caused by the publicity of his degradation, or estrangement or loss of his society and companionship, will not alone entitle her to recover, without proof of actual injury to person, property, or means of support.[71] But if a foundation for actual damages has been laid, these various elements of injury to the susceptibilities or happiness or social standing of plaintiff may be taken into account as a ground for the award of exemplary damages.[72]

69. Lossman *v.* Knights, 89 Ill. App. 437; Reath *v.* Cook, 16 Ind. App. 146, 44 N. E. 808; De Puy *v.* Cook, 90 Hun (N. Y.) 43, 35 N. Y. Suppl. 632. But *compare* Volans *v.* Owens, 74 N. Y. 526, 30 Am. Rep. 337 [*reversing* 9 Hun 558].

70. *Illinois.*— Mayers *v.* Smith, 121 Ill. 442, 13 N. E. 216; Flynn *v.* Fogarty, 106 Ill. 263; Schroder *v.* Crawford, 94 Ill. 357, 34 Am. Rep. 236; Hackett *v.* Smelsley, 77 Ill. 169; Emory *v.* Addis, 71 Ill. 273; Johnson *v.* Gram, 72 Ill. App. 676.

Indiana.— Nelson *v.* State, 32 Ind. App. 88, 69 N. E. 298; Baecher *v.* State, 19 Ind. App. 100, 49 N. E. 42.

Iowa.— Fox *v.* Wunderlich, 64 Iowa 187, 20 N. W. 7; Richmond *v.* Shickler, 57 Iowa 486, 10 N. W. 882; Ward *v.* Thompson, 48 Iowa 588; Rafferty *v.* Buckman, 46 Iowa 195.

Maine.— Gardner *v.* Day, 95 Me. 558, 50 Atl. 892.

Michigan.— Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

Nebraska.— Schiek *v.* Sanders, 53 Nebr. 664, 74 N. W. 39; Fitzgerald *v.* Donoher, 48 Nebr. 852, 67 N. W. 880; Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; Chmelir *v.* Sawyer, 42 Nebr. 362, 60 N. W. 547; Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

New Hampshire.— Squires *v.* Young, 58 N. H. 192.

New York.— Lawson *v.* Eggleston, 164 N. Y. 600, 59 N. E. 1124 [*affirming* 28 N. Y. App. Div. 52, 52 N. Y. Suppl. 181]; Mead *v.* Stratton, 87 N. Y. 493, 41 Am. Rep. 386; McCarty *v.* Wells, 51 Hun 171, 4 N. Y. Suppl. 672; Davis *v.* Standish, 26 Hun 608.

Pennsylvania.— Fink *v.* Garman, 40 Pa. St. 95.

South Dakota.— Garrigan *v.* Kennedy, (1904) 101 N. W. 1081; Garrigan *v.* Thompson, 17 S. D. 132, 95 N. W. 294, (1904) 101 N. W. 1135; Stafford *v.* Levinger, 16 S. D. 118, 91 N. W. 462, 102 Am. St. Rep. 686. But see Harrington *v.* McKillop, 132 Mass. 567; Barrett *v.* Dolan, 130 Mass. 366, 39 Am. Rep. 456; Kirchner *v.* Myers, 35 Ohio St. 85, 35 Am. Rep. 598; Davis *v.* Justice, 31 Ohio St. 359, 27 Am. Rep. 514; Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

The failure of the husband to furnish support during his lifetime is immaterial. In an action on a bond, given by a liquor dealer, to recover for the death of plaintiff's husband, due to intoxication resulting from an unlawful sale of liquor to him by the dealer, the fact that the husband had failed to furnish the wife support was no defense. Knott *v.* Peterson, 125 Iowa 404, 101 N. W. 173.

Remarriage after husband's death.— On the question of whether or to what degree a woman is injured in her means of support, by reason of defendant's sales of liquor to her husband, causing his intoxication and death, it may be shown that she has since married again. Sharpley *v.* Brown, 43 Hun (N. Y.) 374.

71. *Illinois.*— Flynn *v.* Fogarty, 106 Ill. 263; Brantigan *v.* While, 73 Ill. 561; Albrecht *v.* Walker, 73 Ill. 69; Meidel *v.* Anthis, 71 Ill. 241; Freese *v.* Tripp, 70 Ill. 496.

Indiana.— Koerner *v.* Oberly, 56 Ind. 284, 26 Am. Rep. 34.

Iowa.— Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77; Jackson *v.* Noble, 54 Iowa 641, 7 N. W. 88; Calloway *v.* Laydon, 47 Iowa 456, 29 Am. Rep. 489; Kearney *v.* Fitzgerald, 43 Iowa 580.

Michigan.— Cramer *v.* Danielson, 99 Mich. 531, 58 N. W. 476; Sissing *v.* Beach, 99 Mich. 439, 58 N. W. 364; Johnson *v.* Schultz, 74 Mich. 75, 41 N. W. 865; Clinton *v.* Laning, 61 Mich. 355, 28 N. W. 125.

Ohio.— Mulford *v.* Colwell, 21 Ohio St. 191. *Compare* Kear *v.* Garrison, 13 Ohio Cir. Ct. 447, 7 Ohio Cir. Dec. 515.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 455.

72. *Iowa.*— League *v.* Ehmke, 120 Iowa 464, 94 N. W. 938; Ward *v.* Thompson, 48 Iowa 588.

Michigan.— Lucker *v.* Liske, 111 Mich. 683, 70 N. W. 421; Radley *v.* Seider, 99 Mich. 431, 58 N. W. 366; Friend *v.* Dunks, 37 Mich. 25.

New Hampshire.— Fortier *v.* Moore, 67 N. H. 460, 36 Atl. 369.

7. Care of Intoxicated Person. It is sometimes provided by statute that one who sells liquors and makes another drunk shall pay a reasonable sum for taking care of such drunken person.[73]

8. Proximate Cause of Injury — a. In General. To justify a recovery under the civil damage law, it must appear that the intoxication of the person in question was the proximate cause of the injury complained of.[74] It has been held, however, that it is not necessary that the injury should be the natural or probable result of the intoxication; it is enough if it was its actual and direct result.[75]

b. Sale Causing Death of Purchaser. If liquor sold to a man and causing his intoxication sets up such functional or systematic disorders as result in his death, the illegal sale to him is the immediate or direct cause of death.[76] But it is not necessary, to found an action on the injury sustained by reason of the death, that the sale of the liquor or the resulting intoxication should have been the immediate cause of death; it is sufficient if it was the proximate cause.[77] And this is the case where the man's drunken condition so far deprives him of the normal use of his faculties, physical or mental, as to render him incapable of taking care of himself or of protecting himself against dangers to which he may be exposed, and he meets his death by an accident, such as drowning, freezing, or being thrown from a carriage or run over by a railroad train, to which he would not have exposed himself, or from which he could have saved himself, if he had not been stupefied or rendered helpless by intoxication.[78] But if the death of

West Virginia.— Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

Wisconsin.— Peterson *v.* Knoble, 35 Wis. 80.

73. See Brannan *v.* Adams, 76 Ill. 331; Schulte *v.* Menke, 111 Ill. App. 212; Sansom *v.* Greenough, 55 Iowa 127, 7 N. W. 482; Stanley *v.* Potter, 2 Ohio Dec. (Reprint) 105, 1 West. L. Month. 391.

No compensation for caring for person injured by drunken person.— Schulte *v.* Schleeper, 210 Ill. 357, 71 N. E. 325.

74. Schulte *v.* Schleeper, 210 Ill. 357, 71 N. E. 325; King *v.* Haley, 86 Ill. 106, 29 Am. Rep. 14; Schmidt *v.* Mitchell, 84 Ill. 195, 25 Am. Rep. 446; Sauter *v.* Anderson, 112 Ill. App. 580; Neuerberg *v.* Gaulter, 4 Ill. App. 348; McCarty *v.* State, 162 Ind. 218, 70 N. E. 131; Currier *v.* McKee, 99 Me. 364, 59 Atl. 442; Garrigan *v.* Kennedy, (S. D. 1904) 101 N. W. 1081.

Proximate cause.— If a man driving with his wife is so drunk as to be unable to control the team, and by his mismanagement of the horses brings about an accident so that they are both injured, his intoxication is the proximate cause of the injury to the wife. Mulcahey *v.* Givens, 115 Ind. 286, 17 N. E. 598. And see Dunlap *v.* Wagner, 85 Ind. 529, 44 Am. Rep. 42. So where two intoxicated men engage in a scuffle, and one of them has his leg broken, with the result that his wife, who is dependent on his labor for her support, is injured in her means of support, his intoxication is the proximate cause of such injury. Thomas *v.* Dansby, 74 Mich. 398, 41 N. W. 1088. And the liability of defendant, in actions under these statutes, for injury to the means of support, is not confined to cases of injury resulting from drunkenness, immediately and during its continuance, but extends as well to cases where the injury results from insanity, sickness, or disability induced by the intoxication. Mulford *v.* Clewell, 21 Ohio St. 191.

Remote cause.— If A sells liquor to B, and, an altercation arising, throws a glass at B, which misses him and injures C, the injury is not the proximate consequence of the sale of the liquor to B. Lueken *v.* People, 3 Ill. App. 375. A wife cannot maintain an action for damages received by her by falling on a slippery sidewalk while following her intoxicated husband to see where he obtained liquor. Johnson *v.* Drummond, 16 Ill. App. 641. A saloon-keeper is not liable for money stolen from a person while intoxicated on liquor sold to him in the former's saloon. Gage *v.* Harvey, 66 Ark. 68, 48 S. W. 898, 74 Am. St. Rep. 70, 43 L. R. A. 143. The murder of plaintiff's husband in a saloon is not proximately caused by the fact that the proprietor of the place kept his house in a disorderly manner, in such sense as to found a right of action for damages. State *v.* Knotts, 24 Ind. App. 477, 56 N. E. 941.

75. Neu *v.* McKechnie, 95 N. Y. 632, 47 Am. Rep. 89. And see Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708. But see Schulte *v.* Menke, 111 Ill. App. 212; Stanley *v.* Potter, 2 Ohio Dec. (Reprint) 105, 1 West. L. Month. 391.

76. Wanack *v.* Alexander, 78 Ill. App. 356; Bobier *v.* Clay, 27 U. C. Q. B. 438.

77. Hart *v.* Duddleson, 20 Ill. App. 618; Sellars *v.* Foster, 27 Nebr. 118, 42 N. W. 907; McClay *v.* Worrall, 18 Nebr. 44, 24 N. W. 429; Davis *v.* Standish, 26 Hun (N. Y.) 608.

A suicide may be attributable to a sale of liquor and the resulting intoxication. Neu *v.* McKechnie, 95 N. Y. 632, 47 Am. Rep. 89; Blatz *v.* Rohrbach, 42 Hun (N. Y.) 402.

78. *Illinois.*— Smith *v.* People, 141 Ill. 447, 31 N. E. 425; Schroder *v.* Crawford, 94 Ill. 357, 34 Am. Rep. 236; People *v.* Brumback, 24 Ill. App. 501.

one who receives an injury while intoxicated can be traced as the natural and probable result of any new or intervening cause, such as reckless exposure of himself or an unnecessary surgical operation, the action will not lie.[79] Where the drunken man, in consequence of his abusive language, is assaulted and killed by a third person, there is no liability to the widow for the death; for in such a case it cannot be presumed that the deceased, if sober, might not have given the same provocation.[80] A man's fixed habits of intemperance cannot be considered, in a legal sense, the cause of his receiving a fatal injury while drunk, although, but for such habits, he might not have drunk the liquor which intoxicated him on the day of his death.[81]

c. Commission of Crime by Intoxicated Person. It is a generally accepted rule that the sale of liquor to a man who becomes intoxicated thereby, and in that condition commits a crime, may be considered the proximate cause of injuries to third persons resulting from such crime. This rule is applied in cases where an innocent third person is assaulted and beaten or shot by a drunken man,[82] or where a widow sues for injury to her means of support in consequence of her husband having been murdered by the intoxicated person.[83]

9. Sale Contrary to Notice. In several states the statutes provide that the wife or other relative of a habitual drunkard may give notice to liquor sellers not to furnish him with liquor, and that, if the prohibition of the notice is violated, an action for damages may be maintained.[84] To sustain the action it is necessary that the notice should have been given by a person entitled to do so,[85] and concerning a person who is at the time in the habit of drinking to excess,[86]

Indiana.— Dunlap *v.* Wagner, 85 Ind. 529, 44 Am. Rep. 42; Nelson *v.* State, 32 Ind. App. 88, 69 N. E. 298; Boos *v.* State, 11 Ind. App. 257, 39 N. E. 197; Wall *v.* State, 10 Ind. App. 530, 38 N. E. 190. These decisions criticize and practically overrule certain earlier decisions in the same state, such as Collier *v.* Early, 54 Ind. 559; Krach *v.* Heilman, 53 Ind. 517.

Massachusetts.— McNary *v.* Blackburn, 180 Mass. 141, 61 N. E. 885.

Nebraska.— Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940; Sellars *v.* Foster, 27 Nebr. 118, 42 N. W. 907; Curran *v.* Percival, 21 Nebr. 434, 32 N. W. 213; Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27.

New York.— Mead *v.* Stratton, 87 N. Y. 493, 41 Am. Rep. 386; McCarty *v.* Wells, 51 Hun 171, 4 N. Y. Suppl. 672; Davis *v.* Standish, 26 Hun 608.

Pennsylvania.— Fink *v.* Garman, 40 Pa. St. 95.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 426.

79. Schmidt *v.* Mitchell, 84 Ill. 195, 25 Am. Rep. 446.

80. Shugart *v.* Egan, 83 Ill. 56, 25 Am. Rep. 359. And see Roach *v.* Kelly, 194 Pa. St. 24, 44 Atl. 1090, 75 Am. St. Rep. 685.

81. Tetzner *v.* Naughton, 12 Ill. App. 148. And see Bissell *v.* Starzinger, 112 Iowa 266, 83 N. W. 1065.

82. King *v.* Haley, 86 Ill. 106, 29 Am. Rep. 14; Thomas *v.* Dansby, 74 Mich. 398, 41 N. W. 1088; Bacon *v.* Jacobs, 63 Hun (N. Y.) 51, 17 N. Y. Suppl. 323. But *compare* Swinfin *v.* Lowry, 37 Minn. 345, 34 N. W. 22.

83. *Illinois.*— Munz *v.* People, 90 Ill. App. 647. And see Pickard *v.* Teatro, 34 Ill. App. 398. But *compare* Baker *v.* Summers, 201 Ill. 52, 66 N. E. 302.

Michigan.— Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

Nebraska.— Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940.

New York.— Neu *v.* McKechnie, 95 N. Y. 632, 47 Am. Rep. 89; Jackson *v.* Brookins, 5 Hun 530.

Canada.— McCurdy *v.* Swift, 17 U. C. C. P. 126.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 427.

84. See the statutes of the different states. And see State *v.* Cooper, 114 Ind. 12, 16 N. E. 518. See Riden *v.* Grimm, 97 Tenn. 220, 36 S. W. 1097, 35 L. R. A. 587.

Right of action under civil damage law not affected.— A statute of this character does not interfere with a plaintiff's right of action under the general provisions of the civil damage law. That is, an action may be maintained under the latter statute, for an injury to person, property, or means of support without showing that such a notice was given. Lane *v.* Tippy, 52 Ill. App. 532; Lloyd *v.* Kelly, 48 Ill. App. 554.

Injury not necessary.— One who has given the statutory notice to a liquor dealer can recover the damages specified in the statute for a sale contrary to such notice without showing any injury to person or property by reason of such sale. Fay *v.* Williams, (Tex. Civ. App. 1897) 41 S. W. 497.

85. Engle *v.* State, 97 Ind. 122.

86. Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

In Ohio it has been held that the notice may be served in anticipation of the habit of drunkenness being formed, or a debauch

and to one who is at the time engaged in the business of selling liquors.[87] No great strictness is observed in regard to the form and contents of the notice; it need not follow the language of the statute, if it gives all the necessary information and expresses the prohibition in intelligible terms.[88] But the statutory directions as to the manner of serving the notice should be strictly observed.[89] It is no defense to such an action that the liquor seller could not read the notice,[90] or that he did not know that the person who obtained the liquor was the person named in the notice.[91]

C. Defenses — 1. In General. Actions under the civil damage laws may be defended on the ground of the absence of any of the statutory elements of a right of action.[92] It is not a defense that the person in question had been a habitual drunkard for a long time before defendant began selling to him,[93] nor that a part of the liquor consumed by him was bought from other sellers, if that sold to him by defendant did in fact contribute to the intoxication which caused the injury, complained of.[94]

2. License or Permission. It is no defense to an action under the civil damage laws that the defendant had been duly licensed to sell intoxicating liquors.[95] And one is not estopped to sue because he signed defendant's petition for a

being indulged in, and as a means of prevention thereof, and the seller cannot ignore it because the person against whom he is warned is not at the time a drunkard or intoxicated. Kolling *v.* Bennett, 18 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 81.

87. Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485. And see Snyder *v.* Launt, 1 N. Y. App. Div. 142, 37 N. Y. Suppl. 408, holding that the notice may be served on persons who have no license to sell liquors as well as on those who have.

88. Taylor *v.* Carroll, 145 Mass. 95, 13 N. E. 348; Tate *v.* Donovan, 143 Mass. 590, 10 N. E. 492; Kennedy *v.* Saunders, 142 Mass. 9, 6 N. E. 734.

The relationship of the person giving the notice to the inebriate need not be disclosed by the notice; but if it is not, it must be shown that defendant knew that it was given by one of the persons entitled under the statute, and it is not sufficient that he had reasonable cause to believe that such was the case. Sackett *v.* Ruder, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391.

Necessity for and manner of signing see Finnegan *v.* Lucy, 157 Mass. 439, 32 N. E. 656; Thornley *v.* Reilly, 17 Ont. App. 204; Gleason *v.* Williams, 27 U. C. C. P. 93.

89. See Casey *v.* Painter, 50 Ohio St. 527, 38 N. E. 24; Reagan *v.* Wooten, (Tex. App. 1890) 16 S. W. 546.

Service on employee.— Where the statute requires the notice to be served upon "the person so selling," service on one of his employees is not sufficient. Eilke *v.* McGrath, 100 Ky. 537, 38 S. W. 877, 18 Ky. L. Rep. 928.

Proof of service.— It is not necessary to show the service of the notice by the testimony of witnesses who were present, but the fact may be established by other evidence. Russell *v.* Tippin, 12 Ohio Cir. Ct. 52, 5 Ohio Cir. Dec. 443.

90. Cayionnette *v.* Girard, 28 L. C. Jur. 177, 1 Montreal Super. Ct. 182.

91. Weber *v.* Wiggins, 11 Ohio Cir. Ct. 18, 5 Ohio Cir. Dec. 84.

92. King *v.* Haley, 86 Ill. 106, 29 Am. Rep. 14, purchaser not intoxicated.

Ignorance of minority.— It is no defense that the vendor had reason to believe and did believe that the purchaser was not a minor, if the statute does not provide that the sale must be knowingly made to a minor in order to create a liability. McGuire *v.* Glass, (Tex. App. 1890) 15 S. W. 127.

93. Lane *v.* Tippy, 52 Ill. App. 532; Ford *v.* Cheever, 105 Mich. 679, 63 N. W. 975; Friend *v.* Dunks, 37 Mich. 25.

94. *Illinois.*— Hackett *v.* Smelsley, 77 Ill. 109; Emory *v.* Addis, 71 Ill. 273; O'Halloran *v.* Kingston, 16 Ill. App. 659.

Indiana.— Fountain *v.* Draper, 49 Ind. 441; Smiser *v.* State, 17 Ind. App. 519, 47 N. E. 229.

Iowa.— Kearney *v.* Fitzgerald, 43 Iowa 580; Woolheather *v.* Risley, 38 Iowa 486.

Kansas.— Werner *v.* Edmiston, 24 Kan. 147.

Massachusetts.— Bryant *v.* Tidgewell, 133 Mass. 86.

Michigan.— Steele *v.* Thompson, 42 Mich. 594, 4 N. W. 536.

Nebraska.— Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409; Johnson *v.* Carlson, 1 Nebr. (Unoff.) 368, 95 N. W. 788.

New Hampshire.— Bodge *v.* Hughes, 53 N. H. 614.

New York.—Lawson *v.* Eggleston, 164 N. Y. 600, 59 N. E. 1124 [*affirming* 28 N. Y. App. Div. 52, 52 N. Y. Suppl. 181].

Ohio.— Sibila *v.* Bahney, 34 Ohio St. 399; Boyd *v.* Watt, 27 Ohio St. 259.

95. Roth *v.* Eppy, 80 Ill. 283; Struble *v.* Nodwift, 11 Ind. 64; Carrier *v.* Bernstein, 104 Iowa 572, 73 N. W. 1076; Stahnka *v.* Kreitle, 66 Nebr. 829, 92 N. W. 1042; Jones *v.* Bates, 26 Nebr. 693, 42 N. W. 751, 4 L. R. A. 495; Warrick *v.* Rounds, 17 Nebr. 411, 22 N. W. 785; Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

license.[96] But it has been held that plaintiff's consent or permission that liquor should be sold to the person in question, whether express or tacit, or by withdrawing a notice not to sell, will prevent a recovery,[97] provided the consent was given voluntarily, and not obtained by threats or coercion.[98] But according to other decisions such consent or permission is no defense, at least where the consequences exceeded anything that might reasonably have been anticipated from the sale authorized.[99] And consent given to the sale of liquor by other persons than defendant, or to the sale of liquor by defendant on other occasions, will not defeat the action, if there was no consent to the particular sale which caused the intoxication complained of.[1] Where a third person is injured by an intoxicated minor, it is no defense to his action against the seller that the sale was made to the minor with the consent of the latter's father.[2]

3. Contributory Act or Negligence. A recovery cannot be sustained where it appears that the death of the person who was the means of support of plaintiff was the result of his own wilful and unlawful conduct.[3] A wife cannot recover damages from the seller of liquor, for injuries committed by her husband upon herself or her property, while he was intoxicated, if she contributed to his intoxication, by purchasing liquor for him, or drinking with him, or neglecting such steps as she might have taken to prevent his intoxication.[4] And a similar rule applies where the action is brought by a stranger to recover damages for injuries caused by a drunken person.[5] But the act of one who buys and drinks liquor, or takes liquor offered to him, or deliberately drinks himself into a condition of helplessness, is not such concurring negligence on his part as will prevent a recovery for injuries sustained by him or by his relatives.[6]

4. Release or Discharge. A release or discharge of defendant from liability may be pleaded in defense to an action under the civil damage laws, but must be

96. Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

97. Kruger *v.* Spachek, 22 Tex. Civ. App. 307, 54 S. W. 295; Tipton *v.* Thompson, 21 Tex. Civ. App. 143, 50 S. W. 641. See Roach *v.* Springer, (Tex. Civ. App. 1903) 75 S. W. 933. *Compare* Tarkington *v.* Brunett, (Tex. Civ. App. 1899) 51 S. W. 274.

98. Lloyd *v.* Kelly, 48 Ill. App. 554; Jewett *v.* Wanshura, 43 Iowa 574; Thomas *v.* Dansby, 74 Mich. 398, 41 N. W. 1088.

99. Maloney *v.* Dailey, 67 Ill. App. 427; Kliment *v.* Corcoran, 51 Nebr. 142, 70 N. W. 910; Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245.

1. Rafferty *v.* Buckman, 46 Iowa 195; Roach *v.* Springer, (Tex. Civ. App. 1903) 75 S. W. 933; Tarkington *v.* Brunett, (Tex. Civ. App. 1899) 51 S. W. 274.

2. Flower *v.* Witkovsky, 69 Mich. 371, 37 N. W. 364.

3. Sauter *v.* Anderson, 112 Ill. App. 580.

4. Kearney *v.* Fitzgerald, 43 Iowa 580; Engleken *v.* Hilger, 43 Iowa 563; McDonald *v.* Casey, 84 Mich. 505, 47 N. W. 1104; Rosecrants *v.* Shoemaker, 60 Mich. 4, 26 N. W. 794; Elliott *v.* Barry, 34 Hun (N. Y.) 129. But see Radley *v.* Seider, 99 Mich. 431, 58 N. W. 366. *Contra*, Warrick *v.* Rounds, 17 Nebr. 411, 22 N. W. 785.

In Illinois such circumstances are rather to be considered in mitigation of damages than as a bar to the action. Reget *v.* Bell, 77 Ill. 593; Hackett *v.* Smelsley, 77 Ill. 109; Lloyd *v.* Kelly, 48 Ill. App. 554; Hanewacker *v.* Ferman, 47 Ill. App. 17.

Compulsory purchase.— The fact that the wife bought liquor and took it home to her husband will not defeat her recovery, if she did it under compulsion or to keep him at home. Ward *v.* Thompson, 48 Iowa 588; Kearney *v.* Fitzgerald, 43 Iowa 580.

Furnishing money.— The act of the wife in letting her husband have money from the family store deposited in her keeping, although she knows he intends to go on a debauch, is not such contributory negligence on her part as will prevent a recovery. Bradford *v.* Boley, 167 Pa. St. 506, 31 Atl. 751. Nor will she be barred of her action merely because she sometimes let him have money when he was drunk, or let him have money on the particular occasion, in the absence of proof that he obtained the liquor which made him drunk by means of such money. Huff *v.* Aultman, 69 Iowa 71, 28 N. W. 440, 58 Am. Rep. 213; Rafferty *v.* Buckman, 46 Iowa 195.

5. Hays *v.* Waite, 36 Ill. App. 397 (holding that one who treats another and furnishes him with liquor cannot recover damages from the saloon-keeper for injuries inflicted by such person, who becomes intoxicated and stabs the person treating); Flower *v.* Witkovsky, 69 Mich. 371, 37 N. W. 364; Bertholf *v.* O'Reilly, 8 Hun (N. Y.) 16.

6. Weymire *v.* Wolfe, 52 Iowa 533, 3 N. W. 541; Davies *v.* McKnight, 146 Pa. St. 610, 23 Atl. 320; Fink *v.* Garman, 40 Pa. St. 95; Littell *v.* Young, 5 Pa. Super. Ct. 205. And see Bissell *v.* Starzinger, 112 Iowa 266, 83 N. W. 1065.

given by one having authority to compromise. If the statute gives a right of action both to the wife and minor children of the intoxicated person, the wife cannot compromise the claim of the children, at least without the authority and approval of the court.[7]

D. Persons Entitled to Sue — Parties Plaintiff — 1. In General. The right of action under the civil damage laws is not confined to the relatives of the intoxicated person, but, as these statutes are usually framed, extends to any stranger who may be injured, in one of the ways specified, by the acts of the drunken man,[8] including his employer, who is deprived of his services by his intoxication and consequent inability to work,[9] or any person who may take charge of and provide for the intoxicated person;[10] but not generally the town or poor district upon which the man becomes dependent, in consequence of injuries sustained while intoxicated, if he did not previously draw support therefrom.[11] The intoxicated person himself sometimes has a right of action against the liquor seller;[12] but in no case can the liquor seller recover damages from the intoxicated person for injuries sustained in consequence of the acts or behavior of the latter.[13]

2. Husbands and Wives. A husband may maintain an action for injury to his means of support, where his wife's intoxication, caused by defendant, prevents her from caring for his house and children and so deprives him of her services.[14] And a wife may sue for injuries sustained in consequence of the intoxication of her husband.[15] And she does not lose a right of action once accrued by her subsequent divorce from her husband.[16] And although by his death she ceases technically to be a "wife," and becomes a "widow," this does not prevent her from suing, it being sufficient if she sustained the relation of wife at the time of the intoxication which caused his death.[17]

3. Parents and Children. A father may maintain an action against one causing the intoxication of his son, when he is thereby deprived of the son's services and put to expense in caring for him, or, although the son be an adult, if he is unable to support the family without the assistance given by the son, and of which the latter's intoxication deprives him.[18] And an action may be maintained by

7. Johnson *v.* McCann, 61 Ill. App. 110; Zimmermann *v.* Smiley, 62 Nebr. 204, 86 N. W. 1059.

8. English *v.* Beard, 51 Ind. 489; Flower *v.* Witkovsky, 69 Mich. 371, 37 N. W. 364; Bodge *v.* Hughes, 53 N. H. 614; Aldrich *v.* Sager, 9 Hun (N. Y.) 537; Jackson *v.* Brookins, 5 Hun (N. Y.) 530.

Poor, dependent relation may sue.— Fitzgerald *v.* Donoher, 48 Nebr. 852, 67 N. W. 880.

9. Landrum *v.* Flannigan, 60 Kan. 436, 56 Pac. 753; Duroy *v.* Blinn, 11 Ohio St. 331; Northern Pac. R. Co. *v.* Whalen, 149 U. S. 157, 13 S. Ct. 822, 37 L. ed. 686. But *compare* Streever *v.* Birch, 62 Hun (N. Y.) 298, 17 N. Y. Suppl. 195.

10. Brannan *v.* Adams, 76 Ill. 331. *Compare* Sansom *v.* Greenough, 55 Iowa 127, 7 N. W. 482.

11. Hollis *v.* Davis, 56 N. H. 74.

12. Buckmaster *v.* McElroy, 20 Nebr. 557, 31 N. W. 76, 57 Am. Rep. 843; Littell *v.* Young, 5 Pa. Super. Ct. 205. But *compare* People *v.* Linck, 71 Ill. App. 358; Brooks *v.* Cook, 44 Mich. 617, 7 N. W. 216, 38 Am. Rep. 282.

An administrator cannot maintain an action for the death of his intestate caused by the sale of liquors to the latter. Couchman *v.* Prather, 162 Ind. 250, 70 N. E. 240.

13. Aldrich *v.* Harvey, 50 Vt. 162, 28 Am. Rep. 501.

14. Landrum *v.* Flannigan, 60 Kan. 436, 56 Pac. 753; Moran *v.* Goodwin, 130 Mass. 158, 39 Am. Rep. 443. And see *supra*, XII, B, 5. But see Warren *v.* Englehart, 13 Nebr. 283, 13 N. W. 401.

15. McVey *v.* Williams, 91 Ill. App. 144. And see *supra*, XII, B, 5.

Legality of marriage.— If the action is brought by a wife or widow, she must prove her lawful marriage. Good *v.* Towns, 56 Vt. 410, 48 Am. Rep. 799.

16. Nordin *v.* Kjos, 13 S. D. 497, 83 N. W. 573.

17. *Illinois.*— Hackett *v.* Smelsley, 77 Ill. 109.

Michigan.—Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

Nebraska.— Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

New York.— Jackson *v.* Brookins, 5 Hun 530.

Ohio. — Schneider *v.* Hosier, 21 Ohio St. 98.

18. Lossman *v.* Knights, 77 Ill. App. 670; McNary *v.* Blackburn, 180 Mass. 141, 61 N. E. 885; Volans *v.* Owen, 74 N. Y. 526, 30 Am. Rep. 337; Stevens *v.* Cheney, 36 Hun (N. Y.) 1. *Compare* Veon *v.* Creaton, 138 Pa. St. 48, 20 Atl. 865, 9 L. R. A. 814.

a dependent widow against one who caused the intoxication of the son who supported her, or contributed to her support.[19] Where a husband and wife are divorced, the right of action for selling liquor to their son is in the parent with whom he lives.[20] Under some statutes an action may be brought by the mother without reference to whether the father is alive or not.[21] Where a father is rendered incapable, by his intoxicated habits, of providing for his family, his minor children may sue for the injury to their means of support.[22] And the fact that the widow of the drunkard has recovered a judgment under the civil damage law will not prevent her from maintaining another action in behalf of her infant son as his guardian.[23]

4. JOINDER OF PLAINTIFFS. In a few states it has been held that a wife and her minor children, although they may be entitled to separate actions, may join as plaintiffs in suing for loss of their means of support against one who has furnished liquor to the husband and father.[24] But elsewhere it is the rule that the rights of each party in interest must be worked out by a separate action, and that the wife and children cannot properly join as plaintiffs.[25] Where the wife sues, she need not join, as co-plaintiff with her, the husband whose intoxication caused the injury complained of.[26]

E. Persons Liable — Parties Defendant — 1. IN GENERAL. The provisions of civil damage acts determine who are subject to liability thereunder.[27] Thus under some statutes an action may be brought against licensed dealers in liquor,[28] and under others it may be maintained against any person[29] whose sale or furnishing of liquor[30] has caused or contributed in an appreciable degree to the intoxica-

A father who voluntarily assumes the support of an indigent adult son can recover against one who, by furnishing liquor to the son, rendered him helpless and a burden on his father. Clinton *v.* Laning, 61 Mich. 355, 28 N. W. 125.

19. Eddy *v.* Courtright, 91 Mich. 264, 51 N. W. 887; McClay *v.* Worrall, 18 Nebr. 44, 24 N. W. 429; Peavy *v.* Goss, 90 Tex. 89, 37 S. W. 317; Frobese *v.* Peavy, (Tex. Civ. App. 1897) 43 S. W. 900.

20. Lossman *v.* Knights, 77 Ill. App. 670.

21. McNeil *v.* Collinson, 130 Mass. 167; McMaster *v.* Dyer, 44 W. Va. 644, 29 S. E. 1016.

22. Bloedel *v.* Zimmerman, 41 Nebr. 695, 60 N. W. 6; Quinlen *v.* Welch, 69 Hun (N. Y.) 584, 23 N. Y. Suppl. 963 (this right of action belongs to a posthumous child); Taylor *v.* Carroll, 145 Mass. 95, 13 N. E. 348 (in Massachusetts children who have attained their majority and may be able to support themselves by their own exertions may sue). *Compare* Jury *v.* Ogden, 56 Ill. App. 100, holding that a daughter who left the family home, after she became of age, because of her father's abuse of her while he was drunk cannot maintain such an action.

Legitimacy.— If an action is brought by a child he must prove that he is legitimate. Good *v.* Towns, 56 Vt. 410, 48 Am. Rep. 799. But see Goulding *v.* Phillips, 124 Iowa 496, 100 N. W. 516.

23. Secor *v.* Taylor, 41 Hun (N. Y.) 123.

24. Helmuth *v.* Bell, 150 Ill. 263, 37 N. E. 230 [*affirming* 49 Ill. App. 626]; Wall *v.* State, 10 Ind. App. 530, 38 N. E. 190; Jones *v.* Bates, 26 Nebr. 693, 42 N. W. 751, 4 L. R. A. 495; Wardell *v.* McConnell, 23 Nebr. 152, 36 N. W. 278; Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27; Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

25. *Iowa.*— Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77; Huggins *v.* Kavanagh, 52 Iowa 368, 3 N. W. 409.

Kansas.— Durein *v.* Pontious, 34 Kan. 353, 8 Pac. 428.

Maine.— McGee *v.* McCann, 69 Me. 79.

Michigan.— Thomas *v.* Dansby, 74 Mich. 398, 41 N. W. 1088; Johnson *v.* Schultz, 74 Mich. 75, 41 N. W. 865; Larzelere *v.* Kirchgessner, 73 Mich. 276, 41 N. W. 488; Rosecrants *v.* Shoemaker, 60 Mich. 4, 26 N. W. 794.

New York.— Secor *v.* Taylor, 41 Hun 123; Franklin *v.* Schermerhorn, 8 Hun 112.

Washington.— Delfel *v.* Hanson, 2 Wash. 194, 26 Pac. 220.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 440.

26. Mitchell *v.* Ratts, 57 Ind. 259; Wright *v.* Tipton, 92 Tex. 168, 46 S. W. 629.

27. See the statutes of the various states.

28. Nathan *v.* Bloomington, 46 Ill. 347 (holding that the fact that the dealer's license was clandestinely taken out in the name of his wife does not relieve him from liability); Paulson *v.* Langness, 16 S. D. 471, 93 N. W. 655.

29. Wood *v.* Lentz, 116 Mich. 275, 74 N. W. 462. And see Terre Haute Brewing Co. *v.* Newland, 33 Ind. App. 544, 70 N. E. 190.

30. See Kreiter *v.* Nichols, 28 Mich. 496, holding that one whose beer was taken without his permission by the intoxicated person is not liable for damages resulting from the intoxication.

Treating a friend to a glass of liquor as a mere act of kindness or hospitality, without any purpose of gain or profit, does not ex-

tion from which the right of action springs,[31] including not only retailers, but also brewers or distillers who sell by the cask or barrel from their place of business,[32] and including one who is a partner in business with a licensed dealer.[33] The fact that a dealer may be liable on his bond does not prevent the maintenance of a personal action against him.[34]

2. MASTER AND SERVANT. A liquor dealer is responsible for actionable injuries under the civil damage laws, caused by sales of liquor made by his agents or servants within the general scope of their employment, although the particular sale was made without the knowledge or consent of the master.[35] But he is not responsible for the acts of a mere trespasser or volunteer.[36] If the statute imposes a liability upon "any person" who shall cause the intoxication of another, the person who actually sells the liquor may be personally liable, although he acts only as the clerk or servant of another.[37]

3. IMMEDIATE AND REMOTE VENDOR. The statutory liability rests upon the immediate not the remote vendor of the liquor; so that if the liquor passes through several hands, only the person who made the last sale, to the person who became intoxicated by it, is responsible.[38] So if two separate liquor dealers furnish liquor at different times to the same person, producing two separate fits of intoxication, with an interval of sobriety between, and injury results from the second intoxication, the first seller is not liable therefor.[39]

4. JOINT TORT-FEASOR. If several persons by selling or furnishing liquor contribute to an intoxication which results in actionable injuries under the civil damage laws, their responsibility is that of joint tort-feasors, so that they are jointly and severally liable, and a recovery against one without satisfaction will not bar an action against another.[40] But a defendant is only liable for damages resulting from the particular act or state of affairs to which he contributed; and

pose the host to liability under the civil damage law. Cruse *v.* Aden, 127 Ill. 231, 20 N. E. 73, 3 L. R. A. 327.

31. Hall *v.* Germain, 131 N. Y. 536, 30 N. E. 591. And see Johnson *v.* Johnson, 100 Mich. 326, 58 N. W. 1115.

32. Clears *v.* Stanley, 34 Ill. App. 338.

33. Weber *v.* Wiggins, 11 Ohio Cir. Ct. 18, 5 Ohio Cir. Dec. 84.

34. Mulcahey *v.* Givens, 115 Ind. 286, 17 N. E. 598; Jones *v.* Bates, 26 Nebr. 693, 42 N. W. 751, 4 L. R. A. 495.

35. *Illinois.*— Kennedy *v.* Sullivan, 136 Ill. 94, 26 N. E. 382 [*affirming* 34 Ill. App. 46]; Keedy *v.* Howe, 72 Ill. 133; Layton *v.* Deck, 63 Ill. App. 553. Where the employee is in good faith instructed not to sell to a person who is in the habit of becoming intoxicated, and wilfully disobeys his orders, the principal is not liable to exemplary damages. Brantigam *v.* While, 73 Ill. 561; Fentz *v.* Meadows, 72 Ill. 540; Keedy *v.* Howe, 72 Ill. 133.

Indiana.— Barnaby *v.* Wood, 50 Ind. 405; Boos *v.* State, 11 Ind. App. 257, 39 N. E. 197.

Iowa.— Worley *v.* Spurgeon, 38 Iowa 465.

Massachusetts.—George *v.* Gobey, 128 Mass. 289, 35 Am. Rep. 376.

Michigan.— Gullikson *v.* Gjorud, 82 Mich. 503, 46 N. W. 723; Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801; Kreiter *v.* Nichols, 28 Mich. 496, liable, although in a particular sale his instructions are disobeyed.

Missouri.— Skinner *v.* Hughes, 13 Mo. 440.

New Hampshire.— Bodge *v.* Hughes, 53 N. H. 614.

New York.— Smith *v.* Reynolds, 8 Hun 128.

Texas.— Manning *v.* Morris, 28 Tex. Civ. App. 502, 67 S. W. 906.

Canada.— Austin *v.* Davis, 7 Ont. App. 478.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 435.

36. Kreiter *v.* Nichols, 28 Mich. 496. And see Kennedy *v.* Sullivan, 136 Ill. 94, 26 N. E. 382.

37. Barnaby *v.* Wood, 50 Ind. 405; Worley *v.* Spurgeon, 38 Iowa 465.

38. Bush *v.* Murray, 66 Me. 472; Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940.

If the seller knew or had good reason to believe when he sold the liquor that the purchaser intended to share it with another person, and the latter does afterward become intoxicated by it and causes damage, the seller will be liable to the person injured. Dudley *v.* Parker, 55 Hun (N. Y.) 29, 8 N. Y. Suppl. 600. And see Gullikson *v.* Gjorud, 82 Mich. 503, 46 N. W. 723.

39. Barks *v.* Woodruff, 12 Ill. App. 96.

40. *Illinois.*—Stanley *v.* Leahy, 87 Ill. App. 465; Coleman *v.* People, 78 Ill. App. 210; Buckworth *v.* Crawford, 24 Ill. App. 603; O'Leary *v.* Frisbey, 17 Ill. App. 553.

Indiana.— Fountain *v.* Draper, 49 Ind. 441. But *compare* Baker *v.* McCoy, 58 Ind. 215.

Iowa.— Faivre *v.* Manderscheid, 117 Iowa 724, 90 N. W. 76; Jackson *v.* Noble, 54 Iowa 641, 7 N. W. 88; Kearney *v.* Fitzgerald, 43 Iowa 580.

Kansas.— Werner *v.* Edmiston, 24 Kan. 147.

therefore there is no joint liability among sellers who supplied the person with liquor at different times, even on the same day, producing separate and distinct intoxications.[41] But where the habitual drunkenness of a husband or other relative forms the cause of action, all who have contributed to induce or confirm the habit are liable in damages, although there was no concert or connection between them.[42] In case of a joint liability plaintiff is entitled to but one satisfaction, and the payment or release of a judgment against one of the parties jointly liable will prevent a recovery against the others, or prevent the enforcement of judgments which may have been recovered against the others.[43]

5. Sureties on Dealer's Bond. The civil damage laws sometimes allow an action on a licensed dealer's bond in the same circumstances which would give a right of action against him personally.[44] The liability of the sureties extends to exemplary as well as compensatory damages,[45] and is not released by the fact that the illegal sales were made by a bar-tender instead of by their principal in person,[46] or by irregularities in the proceedings to obtain the license, or in the bond itself, which do not absolutely nullify it.[47] And their liability, having once attached, for an injury consisting in the habitual or continuous intoxication of plaintiff's husband or other relative, continues throughout the period of such habit or condition of intoxication, whether it terminates during the license year or continues

Massachusetts.— Bryant *v.* Tidgewell, 133 Mass. 86.

Michigan.— Bowden *v.* Voorheis, 135 Mich. 648, 98 N. W. 406; Franklin *v.* Frey, 106 Mich. 76, 63 N. W. 970; Steele *v.* Thompson, 42 Mich. 594, 4 N. W. 536.

Nebraska.— Gorey *v.* Kelley, 64 Nebr. 605, 90 N. W. 554; Jones *v.* Bates, 26 Nebr. 693, 42 N. W. 751, 4 L. R. A. 495; Wardell *v.* McConnell, 23 Nebr. 152, 36 N. W. 278; McClay *v.* Worrall, 18 Nebr. 44, 24 N. W. 429; Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27; Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

Ohio.— Boyd *v.* Watt, 27 Ohio St. 259; Reugler *v.* Lilly, 26 Ohio St. 48.

Pennsylvania.— Taylor *v.* Wright, 126 Pa. St. 617, 17 Atl. 677.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 436.

But see Morenus *v.* Crawford, 15 Hun (N. Y.) 45; Jackson *v.* Brookins, 5 Hun (N. Y.) 530; Crane *v.* Hunt, 26 Ont. 641.

Where one protracted and continuous spree ends in death or other disaster, all the sellers who have furnished liquor to the drunkard during its progress are liable for the result. Mayers *v.* Smith, 121 Ill. 442, 13 N. E. 216 [*affirming* 25 Ill. App. 67]; Taylor *v.* Wright, 126 Pa. St. 617, 17 Atl. 677.

41. Flint *v.* Gauer, 66 Iowa 696, 24 N. W. 513; Richmond *v.* Shickler, 57 Iowa 486, 10 N. W. 882; Huggins *v.* Kavanagh, 52 Iowa 368, 3 N. W. 409; Jewell *v.* Welch, 117 Mich. 65, 75 N. W. 283; Miller *v.* Patterson, 31 Ohio St. 419. And see Stahnka *v.* Kreitle, 66 Nebr. 829, 92 N. W. 1042, construing Nebr. Comp. St. c. 50, § 15.

42. Keller *v.* Lincoln, 67 Ill. App. 404; Lane *v.* Tippy, 52 Ill. App. 532; Arnold *v.* Barkalow, 73 Iowa 183, 34 N. W. 807; Cox *v.* Newkirk, 73 Iowa 42, 34 N. W. 492; Rantz *v.* Barnes, 40 Ohio St. 43; Boyd *v.* Watt, 27 Ohio St. 259. *Compare* Tetzner *v.* Naughton, 12 Ill. App. 148; Hitchner *v.* Ehlers, 44 Iowa 40; Kirchner *v.* Myers, 35 Ohio St. 85, 35 Am. Rep. 598, all holding that where the injury to plaintiff consists in the intemperate habits of the husband or other relative, causing his demoralization and general besotted condition, and leading to a debauch in which he loses his life, or from which other special injury results, those dealers who have contributed to his habitual intoxication cannot be jointly sued with those who caused the particular fit of intoxication proximately causing the injury.

43. Emory *v.* Addis, 71 Ill. 273; Putney *v.* O'Brien, 53 Iowa 117, 4 N. W. 891; Comstock *v.* Hopkins, 61 Hun (N. Y.) 189, 15 N. Y. Suppl. 908.

Release of one defendant operating as release of all see Aldrich *v.* Parnell, 147 Mass. 409, 18 N. E. 170 [*distinguishing* Jewett *v.* Wanshura, 43 Iowa 574]. And see Kearney *v.* Fitzgerald, 43 Iowa 580 [*approving* Woolheather *v.* Risley, 38 Iowa 489].

Dismissal as to one defendant after verdict and judgment against the other see Buckworth *v.* Crawford, 24 Ill. App. 603.

Causes of action distinct.— Where the causes of action in two suits against different defendants are in fact distinct, although the declarations are identical in form, the acceptance by plaintiff of a sum of money in discharge of one suit will be no defense in the other case. Miller *v.* Patterson, 31 Ohio St. 419.

44. Martin *v.* West, 7 Ind. 657; Breeding *v.* Jordan, 115 Iowa 566, 88 N. W. 1090; Horst *v.* Lewis, (Nebr. 1904) 98 N. W. 1046; Rintleman *v.* Hahn, 20 Tex. Civ. App. 244, 49 S. W. 174.

45. Richmond *v.* Shickler, 57 Iowa 486, 10 N. W. 882.

46. Reath *v.* State, 16 Ind. App. 146, 44 N. E. 808.

47. Breeding *v.* Jordan, 115 Iowa 566, 88 N. W. 1090; Thomas *v.* Hinkley, 19 Nebr. 324, 27 N. W. 231.

longer.[48] Whether plaintiff must first recover a judgment against the principal before suing the sureties depends on the conditions of the bond. Such a course is not necessary where the bond stipulates that the principal will not do certain acts, the breach of which gives rise to an action under the civil damage laws, such as selling to an intoxicated person, and the bond is conditioned for the due performance of such covenant.[49]

6. Owner or Lessor of Premises. In several states the civil damage laws also give a right of action against the owner or lessor of property, who knowingly permits the sale of liquor on the premises, for actionable injuries caused by such sale.[50] But this does not make him a joint tort-feasor with the saloon-keeper.[51] To hold the owner responsible it is necessary to establish by clear and satisfactory proof both his knowledge that the premises were used for the sale of liquor,[52] and his consent to such use.[53]

F. Actions[54] **— 1. Limitation of Actions.** An action under the civil damage law is an action of tort, and is governed by the provision of the statute of limitations relating to such actions, unless specially regulated by the same law which gives the right of action.[55] The period of limitation begins to run from the date of selling or furnishing the liquors, rather than from the day when the resulting intoxication caused loss or injury to plaintiff.[56]

2. Pleadings — a. Allegations of Complaint. The sufficiency of a complaint

48. Wardell *v.* McConnell, 23 Nebr. 152, 36 N. W. 278. And see Coleman *v.* People, 78 Ill. App. 210.

49. Brandt *v.* State, 17 Ind. App. 311, 46 N. E. 682; Anthony *v.* Krey, 70 Mich. 629, 38 N. W. 603.

50. See Schroder *v.* Crawford, 94 Ill. 357, 34 Am. Rep. 236; Bennett *v.* Levi, 19 N. Y. Suppl. 226.

Who liable.— Such a statutory provision does not apply to the owner of property who himself sells liquor therein, but to owners who permit others to occupy and use the property for such purposes. Barnaby *v.* Wood, 50 Ind. 405. Nor does it apply to persons having only reversionary or contingent interests in the property, and who do not control the letting. Castle *v.* Fogerty, 19 Ill. App. 442. But a wife owning a building and knowingly permitting her husband to carry on the business of liquor selling therein is liable. Mead *v.* Stratton, 87 N. Y. 493, 41 Am. Rep. 386. And one who subsequent to the bringing of an action under the civil damage law purchases from a party defendant real property on which a lien is sought to be established takes it subject to the judgment in such action. O'Brien *v.* Putney, 55 Iowa 292, 7 N. W. 615.

Steamboat not a building.— The statute does not apply to the owner of a steamboat navigating a river, which has a bar-room on board where the sales complained of were made. Such a vessel is not a "building or premises," within the meaning of the statute. Rouse *v.* Catskill, etc., Steamboat Co., 133 N. Y. 679, 31 N. E. 623 [*affirming* 59 Hun 80, 13 N. Y. Suppl. 126].

51. McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548.

The owner and the tenant may be joined as defendants in one action. Buckham *v.* Grape, 65 Iowa 535, 17 N. W. 755, 22 N. W 664; Loan *v.* Hiney, (Iowa 1879) 1 N. W. 587; La France *v.* Krayer, 42 Iowa 143; Jackson *v.* Brookins, 5 Hun (N. Y.) 530. But this is not necessary; for an action may first be prosecuted to judgment against the saloon-keeper, and the judgment afterward established as a lien on the premises in a suit against the owner. McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548.

52. Myers *v.* Kirt, 64 Iowa 27, 19 N. W. 846; Mead *v.* Stratton, 8 Hun (N. Y.) 148.

Sufficiency of evidence as to knowledge see Johnson *v.* Grimminger, 83 Iowa 10, 48 N. W. 1052; McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548; Wing *v.* Benham, 76 Iowa 17, 39 N. W. 921; O'Rourke *v.* Piatt, 67 Hun (N. Y.) 71, 21 N. Y. Suppl. 1118; Campbell *v.* Schlesinger, 1 N. Y. Suppl. 220.

Knowledge on the part of a resident agent, to whom the non-resident principal confides the entire management and control of the premises, is imputable to the principal. Hall *v.* Germain, 131 N. Y. 536, 30 N. E. 591.

53. Meyers *v.* Kirt, 57 Iowa 421, 10 N. W. 828.

Proof of consent.— Such consent is not necessarily established by proof of circumstances tending to show knowledge merely. Cox *v.* Newkirk, 73 Iowa 42, 34 N. W. 492. But it may be inferred from such circumstances and from knowledge of the illegal sales under such conditions as would properly call forth a protest, and a failure to make any objection. Loan *v.* Etzel, 62 Iowa 429, 17 N. W. 611.

54. Venue see Horst *v.* Lewis, (Nebr. 1904) 98 N. W. 1046.

Parties see *supra*, XII, D, E.

Abatement of actions under civil damage acts see Abatement and Revival, 1 Cyc. 68.

55. Emmert *v.* Grill, 39 Iowa 690; Durein *v.* Pontious, 34 Kan. 353, 8 Pac. 428; O'Connell *v.* O'Leary, 145 Mass. 311, 14 N. E. 143.

56. Emmert *v.* Grill, 39 Iowa 690.

in such an action or of particular allegations thereof is to be determined by the rules applicable in civil actions generally.[57] It should allege with reasonable certainty a sale, gift, or furnishing of liquor by defendant to the person intoxicated [58] at a designated time,[59] that the injury counted on occurred in consequence of the resulting intoxication,[60] and the nature and extent of the injury which plaintiff has thereby suffered.[61] It has been held that it is not necessary for the complaint to state the particular kind of liquor sold,[62] or that defendant knew that the purchaser was intoxicated,[63] or to allege that the sale was not made in good faith or for a lawful purpose,[64] or to particularly describe the place of sale, unless where a lien on the premises is claimed.[65] The cause of action may under some of such statutes be alleged as a continuing one.[66] Exemplary damages are not the subject of a claim in such sense that it is necessary to make an averment thereof in the declaration or complaint.[67]

b. Issues, Proof, and Variance. Under the general rules as to issues, proof, and variance to actions under the civil damage laws, it is necessary that plaintiff's evidence should correspond with the allegations of the complaint.[68] But exact proof is not required as to the time laid in the complaint,[69] or the place of sale.[70]

57. See PLEADING. And see Wanack *v.* People, 187 Ill. 116, 58 N. E. 242; Munz *v.* People, 90 Ill. App. 647; Mitchell *v.* Ratts, 57 Ind. 259; Myers *v.* Kirt, 64 Iowa 27, 19 N. W. 846; Hayes *v.* Phelan, 4 Hun (N. Y.) 733; Riden *v.* Grimm, 97 Tenn. 220, 36 S. W. 1097, 35 L. R. A. 587.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 441.

In the absence of specific statutory directions a declaration thereunder will be sufficient if it would be good at common law. Kehrig *v.* Peters, 41 Mich. 475, 2 N. W. 801.

Sufficiency of particular allegations.— As to taking care of intoxicated person see McVey *v.* Williams, 91 Ill. App. 144; Struble *v.* Nodwift, 11 Ind. 64. As to knowledge and consent of owner of premises see Judge *v.* O'Connor, 74 Iowa 166, 37 N. W. 131; Judge *v.* Flournoy, 74 Iowa 164, 37 N. W. 130; McGee *v.* McCann, 69 Me. 79. As to manner of death of intoxicated husband see Smiser *v.* State, 17 Ind. App. 519, 47 N. E. 229; Eddy *v.* Courtright, 91 Mich. 264, 51 N. W. 887.

Incapacity of consent on the part of the intoxicated person must be alleged where the action is for wrongfully causing his death by furnishing him with liquor. Bissell *v.* Starzinger, 112 Iowa 266, 83 N. W. 1065.

Negativing defenses.— It is not necessary for the declaration or complaint to anticipate and negative any matters of defense, such as contributory negligence. Beem *v.* Chestnut, 120 Ind. 390, 22 N. E. 303.

Amendment.— The declaration or complaint in an action of this kind may be amended by the insertion of additional allegations, provided they do not introduce a new cause of action. Chase *v.* Kenniston, 76 Me. 209. And see Brandt *v.* State, 17 Ind. App. 311, 46 N. E. 682; Fletcher *v.* Forler, 83 Mich. 52, 46 N. W. 1023, 10 L. R. A. 80.

58. Ford *v.* Ames, 36 Hun (N. Y.) 571. See Ditton *v.* Morgan, 56 Ind. 60.

59. Carrier *v.* Bernstein, 104 Iowa 572, 73 N. W. 1076.

60. Schwarm *v.* Osborn, 59 Ind. 245. But see Nowotny *v.* Blair, 32 Nebr. 175, 49 N. W. 357.

61. See Wilson *v.* Booth, 57 Mich. 249, 23 N. W. 799; Roberts *v.* Taylor, 19 Nebr. 184, 27 N. W. 87.

Injury to means of support see Gardner *v.* Day, 95 Me. 558, 50 Atl. 892; Roberts *v.* Taylor, 19 Nebr. 184, 27 N. W. 87; Hill *v.* Berry, 75 N. Y. 229; Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

62. Walser *v.* Kerrigan, 56 Ind. 301; Edwards *v.* Brown, 67 Mo. 377.

63. Fletcher *v.* Forler, 83 Mich. 52, 46 N. W. 1023, 10 L. R. A. 80. And see McMahon *v.* Dumas, 96 Mich. 467, 56 N. W. 13; Wright *v.* Treat, 83 Mich. 110, 47 N. W. 243. But see Markert *v.* Hoffner, 5 Ohio Dec. (Reprint) 335, 6 Am. L. Rec. 670.

64. Lucas *v.* Johnson, (Tex. Civ. App. 1901) 64 S. W. 823. But *compare* Struble *v.* Nodwift, 11 Ind. 64.

65. Gustafson *v.* Wind, 62 Iowa 281, 17 N. W. 523.

66. Wood *v.* Lentz, 116 Mich. 275, 74 N. W. 462.

67. Gustafson *v.* Wind, 62 Iowa 281, 17 N. W. 523.

68. See Morenus *v.* Crawford, 51 Hun (N. Y.) 89, 5 N. Y. Suppl. 453.

Illustrations.— A complaint alleging injury to plaintiff's means of support is not sustained by proof which shows an injury to her person. Hackett *v.* Smelsley, 77 Ill. 109. And see McLees *v.* Niles, 93 Ill. App. 442. But although the declaration alleges that the intoxication which caused the injury complained of was caused wholly by defendant, yet there is no fatal variance when the proof shows that it was caused only in part by the sales which he made. Brannon *v.* Silvernail, 81 Ill. 434; Roth *v.* Eppy, 80 Ill. 283; Edwards *v.* Woodbury, 156 Mass. 21, 30 N. E. 175.

69. Arnold *v.* Barkalow, 73 Iowa 183, 34 N. W. 807; Kruger *v.* Spachek, 22 Tex. Civ. App. 307, 54 S. W. 295.

70. Gustafson *v.* Wind, 62 Iowa 281, 17 N. W. 523.

And similarly it has been held that as to other immaterial averments exact proof will not be required.[71]

3. Evidence — a. Presumptions and Burden of Proof. The burden is on plaintiff to establish each of the facts necessary to constitute his cause of action,[72] but is on defendant to prove the legality of the sales made by him or any other affirmative defense.[73]

b. Admissibility. The evidence in actions under the civil damage law is to be strictly limited to the issues in the case,[74] and must be of such a character as to be admissible under the general rules applicable in civil actions.[75] Where injury to the means of support is counted on, a judgment obtained by plaintiff in an action against another party for injury accruing thereto at the same period is admissible to show the actual extent of the wrong done by defendant.[76] And where the death of a husband is relied on as the cause of action, evidence tending to show that his death was the result of frequent intoxication caused by liquor sold him by defendant is admissible.[77] Evidence as to the number, age, and sex of plaintiff's children is not admissible to affect the question of damages.[78] In a wife's action under such a statute, her husband is a competent witness in her behalf.[79]

c. Weight and Sufficiency. Although an action under the civil damage laws is

71. Schroder *v.* Crawford, 94 Ill. 357, 34 Am. Rep. 236.

72. Macleod *v.* Geyer, 53 Iowa 615, 6 N. W. 21; Larzelere *v.* Kirchgessner, 73 Mich. 276, 41 N. W. 488. *Compare* Flynn *v.* Fogarty, 106 Ill. 263, holding that where plaintiff shows the death of her husband as the result of intoxication brought about by liquor sold or furnished to him by defendant, the jury may infer an injury to her means of support, so that she will be entitled to at least nominal damages.

73. League *v.* Ehmke, 120 Iowa 464, 94 N. W. 938; Jarozewski *v.* Allen, 117 Iowa 632, 91 N. W. 941; Worley *v.* Spurgeon, 38 Iowa 465; Haney *v.* Mann, (Tex. Civ. App. 1904) 81 S. W. 66; McQuade *v.* Hatch, 65 Vt. 482, 27 Atl. 136.

74. McLees *v.* Niles, 93 Ill. App. 442; Terre Haute Brewing Co. *v.* Newland, 33 Ind. App. 544, 70 N. E. 190; Gough *v.* State, 32 Ind. App. 22, 68 N. E. 1043. And see Roth *v.* Eppy, 80 Ill. 283.

Defendant's bond as a licensed dealer is admissible, when the action is on the bond, or when plaintiff's right of action depends on the conditions of the bond. See Brandt *v.* State, 17 Ind. App. 311, 46 N. E. 682; Smith *v.* Anderson, 82 Mich. 492, 46 N. W. 729; Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940.

75. See Evidence, 16 Cyc. 821. And see Lloyd *v.* Kelly, 48 Ill. App. 554 (holding that the wife may testify that her husband wished to bring liquor into the house and drink it there, and that she objected); Theisen *v.* Johns, 72 Mich. 285, 40 N. W. 727 (holding that it is not proper to admit evidence that the person in question had drunk liquor at other places than defendant's saloon); Dubois *v.* Miller, 5 Hun (N. Y.) 332 (holding that the admission of evidence of sales of liquor made to plaintiff's husband, prior to the passage of the statute, is improper); Tarkington *v.* Brunett, (Tex. Civ. App. 1899) 51 S. W. 274 (holding that it is error to admit evidence of suits brought against other saloon-keepers).

Admissibility of husband's declarations in action by wife see Mayers *v.* Smith, 121 Ill. 442, 13 N. E. 216; Judge *v.* Jordan, 81 Iowa 519, 46 N. W. 1077; Ketcham *v.* Fox, 52 Hun (N. Y.) 284, 5 N. Y. Suppl. 272; Richards *v.* Moore, 62 Vt. 217, 19 Atl. 390.

Financial condition of husband.— Evidence of the property and financial condition of plaintiff's husband is admissible as showing plaintiff's means of support. Manzer *v.* Phillips, (Mich. 1905) 102 N. W. 292.

Habits of husband.— It is proper to receive evidence of the husband's general habits with reference to drinking, or his general condition with regard to intoxication, during the period covered by the action. League *v.* Ehmke, 120 Iowa 464, 94 N. W. 938; Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

Conviction for selling without license.— Evidence that defendant had been several times convicted of selling liquor without a license, both before and since the cause of action arose, is admissible for the purpose of affecting the weight of his testimony. Morenus *v.* Crawford, 51 Hun (N. Y.) 89, 5 N. Y. Suppl. 453.

76. Engleken *v.* Webber, 47 Iowa 558.

77. Squires *v.* Young, 58 N. E. 192.

78. Welch *v.* Jugenhoimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77; Huggins *v.* Kavanagh, 52 Iowa 368, 3 N. W. 409; Boydan *v.* Haberstumpf, 129 Mich. 137, 88 N. W. 386; Thomas *v.* Dansby, 74 Mich. 398, 41 N. W. 1088; Johnson *v.* Schultz, 74 Mich. 75, 41 N. W. 865; Larzelere *v.* Kirchgessner, 73 Mich. 276, 41 N. W. 488; Manzer *v.* Phillips, (Mich. 1905) 102 N. W. 292. *Compare* Ward *v.* Thompson, 48 Iowa 588; Garrigan *v.* Thompson, (S. D. 1904) 101 N. W. 1135; Garrigan *v.* Kennedy, (S. D. 1904) 101 N. W. 1081.

79. Davenport *v.* Ryan, 81 Ill. 218.

penal in its nature, and hence the allegations of the complaint must be fully proved, it is not a criminal proceeding, and therefore it is not necessary that the evidence should exclude all reasonable doubt. Plaintiff may recover on a mere preponderance of the evidence, and circumstantial as well as direct evidence may be sufficient.[80]

d. Proof as to Particular Matters — (I) *Sale by Defendant.* As the sale or furnishing of liquor by defendant is an essential element of the right of action under the civil damage laws, plaintiff must assume the burden of proving this fact.[81] It may be established by direct testimony, or made out indirectly or inferentially by proving various facts and circumstances.[82] Thus proof that the person alleged to have been made drunk by defendant was seen to enter the latter's place sober and come out intoxicated may raise a presumption that such person obtained intoxicating liquor there.[83] And where the intoxication of such person is proved, and some circumstances connecting defendant with it, it is for the jury to determine whether defendant sold or furnished the liquor which caused it,[84] and circumstantial evidence in that behalf may be so strong as to justify them in disregarding the positive denials of defendant or his witnesses.[85] Defendant may of course produce any proper evidence to controvert such allegation; but generally his refusal to furnish liquor to the party in question on other occasions or under other circumstances is not a material fact;[86] nor is evidence

80. *Illinois.*— Woods *v.* Dailey, 211 Ill. 495, 71 N. E. 1068; Coleman *v.* People, 78 Ill. App. 210; Brown *v.* Butler, 66 Ill. App. 86; Robinson *v.* Randall, 82 Ill. 521; Hall *v.* Barnes, 82 Ill. 228. And see Heffernan *v.* Bail, 109 Ill. App. 231.

Maine. — Chase *v.* Kenniston, 76 Me. 209.

Massachusetts.— Roberge *v.* Burnham, 124 Mass. 277. *Compare* Com. *v.* Finnegan, 124 Mass. 324.

Michigan.— McMahon *v.* Dumas, 96 Mich. 467, 56 N. W. 13.

Nebraska.— McDougall *v.* Giacomini, 13 Nebr. 431, 14 N. W. 150.

New York.— O'Connor *v.* Conzen, 102 N. Y. 702, 7 N. E. 369.

Ohio.— Lyon *v.* Fleahmann, 34 Ohio St. 151; Kolling *v.* Bennett, 18 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 81.

South Dakota.— See Garrigan *v.* Thompson, (1904) 101 N. W. 1135; Garrigan *v.* Kennedy, (1904) 101 N. W. 1081.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 449.

81. Jones *v.* Bates, 26 Nebr. 693, 42 N. W. 751, 4 L. R. A. 495.

Habitual drunkenness.— Where a recovery is sought on the ground of sales of liquor which have caused habitual drunkenness, the proof should show that defendant had sold a sufficient number of times to aid materially in bringing about such a condition. Siegle *v.* Rush, 173 Ill. 559, 50 N. E. 1008. And see Maloney *v.* Dailey, 67 Ill. App. 427.

Sale on Sunday.— Plaintiff is not precluded from proving that the sale complained of was made on Sunday by the fact that such evidence would also show a criminal offense. Maloney *v.* Dailey, 67 Ill. App. 427.

Subsequent sales.— Evidence of the intoxication of the party after defendant went out of business and another person took the saloon is not admissible, in the absence of any further showing that defendant contributed to such intoxication. Peacock *v.* Oaks, 85 Mich. 578, 48 N. W. 1082.

82. *Iowa.*— Judge *v.* Jordan, 81 Iowa 519, 46 N. W. 1077.

Michigan.— Wilson *v.* Booth, 57 Mich. 249, 23 N. W. 799.

Nebraska.— Schiek *v.* Sanders, 53 Nebr. 664, 74 N. W. 39; Curran *v.* Percival, 21 Nebr. 434, 32 N. W. 213.

New York.— Campbell *v.* Schlesinger, 48 Hun 428, 1 N. Y. Suppl. 220; Astheimer *v.* O'Pray, 16 N. Y. Suppl. 470.

Vermont.— Richards *v.* Moore, 62 Vt. 217, 19 Atl. 390; Stanton *v.* Simpson, 48 Vt. 628.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 451.

Inference of sale rather than gift. — If plaintiff's husband was accustomed to deal with defendant, a liquor seller, the jury may infer that the liquor which he is shown to have obtained from defendant was sold and not given, although it was neither paid for nor charged. Rafferty *v.* Buckman, 46 Iowa 195.

Defendant's license as evidence of sale see Schliek *v.* Sanders, 53 Nebr. 664, 74 N. W. 39.

The record of the indictment and conviction of a liquor seller for unlawful sales, which does not show that the sales were made to the party in question in the present suit, is not admissible. Applegate *v.* Winebrenner, 67 Iowa 235, 25 N. W. 148.

83. Hanewacker *v.* Ferman, 47 Ill. App. 17; Curran *v.* Percival, 21 Nebr. 434, 32 N. W. 213. *Compare* Lovelan *v.* Briggs, 32 Hun (N. Y.) 477.

84. Brown *v.* Butler, 66 Ill. App. 86; Bell *v.* Zelmer, 75 Mich. 66, 42 N. W. 606.

85. McManigal *v.* Seaton, 23 Nebr. 549, 37 N. W. 271; Curran *v.* Percival, 21 Nebr. 434, 32 N. W. 213; Morenus *v.* Crawford, 51 Hun (N. Y.) 89, 5 N. Y. Suppl. 453.

86. Wolfe *v.* Johnson, 152 Ill. 280, 38 N. E. 886; McManigal *v.* Seaton, 23 Nebr. 549, 37

admissible on this issue that he had instructed his servants not to sell to the party.[87]

(II) *Liability of Lessor of Premises.* That the owner of leased premises knew they were being used for the sale of liquor, and consented thereto, a fact necessary to charge him with liability under the civil damage law as above stated[88] may be proved by circumstantial evidence, sufficient to charge him with such knowledge constructively and from which his consent may be implied.[89]

(III) *Nature and Extent of Injury.* Whether plaintiff claims damages for injury to his person, property, or means of support, it is incumbent on him to prove, not only the fact of actual injury received, but also the extent to which he has been damaged by the intoxication resulting from defendant's acts.[90]

(IV) *Intoxication as Cause of Injury.* To sustain an action of this kind, it is necessary for plaintiff to prove that the person in question became intoxicated on a particular occasion, or, as the case may be, contracted habits of intemperance,[91] that such intoxication was either caused or contributed to in an appreciable degree by the acts of defendant,[92] and that the particular injury complained of was sustained in consequence of such intoxication or intemperate habits.[93] Applying the general rules relating to the admissibility of declarations

N. W. 271; Richards *v.* Moore, 62 Vt. 217, 19 Atl. 390.

87. Houston *v.* Gran, 38 Nebr. 687, 57 N. W. 403. But *compare* Ketcham *v.* Fox, 52 Hun (N. Y.) 284, 5 N. Y. Suppl. 272.

88. See *supra*, XII, E, 6.

89. McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548; Cox *v.* Newkirk, 73 Iowa 42, 34 N. W. 492; Hall *v.* Germain, 131 N. Y. 536, 30 N. E. 591; Ketcham *v.* Fox, 52 Hun (N. Y.) 284, 5 N. Y. Suppl. 272; Campbell *v.* Schlesinger, 48 Hun (N. Y.) 428, 1 N. Y. Suppl. 220; Conklin *v.* Tice, 1 N. Y. Suppl. 803; Reid *v.* Terwilliger, 3 N. Y. St. 704.

90. See Roth *v.* Eppy, 80 Ill. 283; Applegate *v.* Winebrenner, 67 Iowa 235, 25 N. W. 148.

Injury to means of support.— A wife suing for injury to her means of support may testify as to the amount necessary to support the family in circumstances suitable to its condition (Warrick *v.* Rounds, 17 Nebr. 411, 22 N. W. 785), as to the amount of her husband's earnings when sober (Brandt *v.* McEntee, 53 Ill. App. 467), and that his earnings were devoted to the support of his family (Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245). And it may be shown how much he had paid to defendant for liquor during the time covered by the complaint. Ward *v.* Thompson, 48 Iowa 588. And see Horn *v.* Smith, 77 Ill. 381. But evidence that defendant owed the deceased husband for work at the time of his death, and subsequently refused to pay the money to plaintiff, is not admissible. Karau *v.* Pease, 45 Ill. App. 382. The widow should not be permitted to show inconveniences which she has suffered since the husband's death nor any circumstances calculated merely to work upon the sympathies of the jury. Flynn *v.* Fogarty, 106 Ill. 263. Defendant is entitled to show, as bearing on plaintiff's means of support, that, since the death of her husband, she has married again. Sharpley *v.* Brown, 43 Hun (N. Y.) 374. But evidence as to the widow's indifference to the death of her husband, and of her previous declarations that she wished he would die, offered for the purpose of showing that she did not value his life, or the support afforded by him, at anything, is irrelevant and immaterial. Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27.

91. As to what constitutes intoxication and what evidence is sufficient to prove it see Blatz *v.* Rohrbach, 60 Hun (N. Y.) 169, 14 N. Y. Suppl. 458; Goram *v.* Cable, 17 N. Y. Suppl. 662; Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102; Fuller *v.* Valiquette, 70 Vt. 502, 41 Atl. 579.

92. *Illinois.*— Baker *v.* Summers, 201 Ill. 52, 66 N. E. 302.

Iowa.— Macleod *v.* Geyer, 53 Iowa 615, 6 N. W. 21. It is not enough to show that defendant sold liquor to plaintiff's husband while the latter was intoxicated, without showing that it contributed in an appreciable degree to such intoxication. Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77.

Maine.— Chase *v.* Kenniston, 76 Me. 209.

New York.— McCarty *v.* Wells, 51 Hun 171, 4 N. Y. Suppl. 672; Astheimer *v.* O'Pray, 16 N. Y. Suppl. 470; Ackerman *v.* Betz, 11 N. Y. St. 355.

Pennsylvania.— Taylor *v.* Wright, 126 Pa. St. 617, 17 Atl. 677.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 450.

93. Horn *v.* Smith, 77 Ill. 381; Westphal *v.* Austin, 41 Ill. App. 648, 39 Ill. App. 230; Murphy *v.* Curran, 24 Ill. App. 475; Hart *v.* Duddleson, 20 Ill. App. 618.

Injury from accident.— As to proof that intoxication was the cause of an accident suffered by the intoxicated person which caused his death or serious bodily harm see Meyer *v.* Butterbrodt, 146 Ill. 131, 34 N. E. 152 [*affirming* 43 Ill. App. 312]; Wall *v.* State, 10 Ind. App. 530, 38 N. E. 190; Colburn *v.* Spencer, 177 Mass. 473, 59 N. E. 78;

or statements in evidence, statements of the intoxicated person as to how he received the injury in question are not generally admissible.[94]

(v) *Character and Habits of Intoxicated Person.* Evidence of the age of the person through whose intoxication the injury is alleged to have been sustained and of his habits and circumstances prior to the sales by defendant is competent generally,[95] and evidence is admissible of his habits of drinking or of his being a habitual drunkard, when that fact is necessary to make out plaintiff's case,[96] or to show the effect on him of the sales made by defendant,[97] or to show defendant's knowledge of his condition or habits,[98] and under proper conditions on the question of damages.[99] The character or habits of such person in respect to other matters may also become important as bearing on the nature or extent of the injury sustained, or on the measure of damages, and may then be put in evidence.[1]

(vi) *Pecuniary Condition of Intoxicated Person.* Where the injury alleged is to plaintiff's means of support, it is proper to receive evidence of the pecuniary condition of the person whose intoxication caused the injury, at the time of the alleged wrongful sales of liquor to him, and of the amount of his earnings and savings, and of his habits of industry and thrift, and the like, to enable the jury to estimate the amount of damage plaintiff has sustained.[2]

(vii) *Nature and Properties of Liquor.* In an action under the civil damage law, it must be proved that the liquor sold by defendant was intoxicating; but this may be shown either by the direct testimony of witnesses or by evidence that the person who bought and drank it was shortly afterward drunk, without any intervening cause.[3]

4. Damages — a. In General. The damages in an action under the civil damage law are to be measured by the directions of the statute, if any are prescribed therein,[4] otherwise they are to be determined by the jury under the instructions of the court.[5] Defendant is liable only for the damages which he has caused or contributed to, although it may be difficult to separate such damages from those

McMahon *v.* Dumas, 96 Mich. 467, 56 N. W. 13; Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708; Poffenbarger *v.* Smith, 27 Nebr. 788, 43 N. W. 1150; Sellars *v.* Foster, 27 Nebr. 118, 42 N. W. 907; Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27; McCarty *v.* Wells, 51 Hun (N. Y.) 171, 4 N. Y. Suppl. 672.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 450.

94. Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

95. Lloyd *v.* Kelly, 48 Ill. App. 554; Dunlavey *v.* Watson, 38 Iowa 398; Doty *v.* Postal, 87 Mich. 143, 49 N. W. 534; Friend *v.* Dunks, 39 Mich. 733.

96. Smith *v.* People, 141 Ill. 447, 31 N. E. 425 [*affirming* 38 Ill. App. 638].

97. Shull *v.* Arie, 113 Iowa 170, 84 N. W. 1031; Huff *v.* Aultman, 69 Iowa 71, 28 N. W. 440, 58 Am. Rep. 213.

98. Lawson *v.* Eggleston, 164 N. Y. 600, 59 N. E. 1124 [*affirming* 28 N. Y. App. Div. 52, 52 N. Y. Suppl. 181].

99. See Bellison *v.* Apland, 115 Iowa 599, 89 N. W. 22; Huff *v.* Aultman, 69 Iowa 71, 28 N. W. 440, 58 Am. Rep. 213; Gustafson *v.* Wind, 62 Iowa 281, 17 N. W. 523; Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

1. Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208; Gintz *v.* Bradley, 53 Ill. App. 597; Sackett *v.* Ruder, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391.

2. *Illinois.*— Maloney *v.* Dailey, 67 Ill. App. 427; Clears *v.* Stanley, 34 Ill. App. 338; Mayers *v.* Smith, 121 Ill. 442, 13 N. E. 216. *Compare* McCann *v.* Roach, 81 Ill. 213.

Iowa.— Fox *v.* Wunderlich, 64 Iowa 187, 20 N. W. 7.

Michigan.— Lafler *v.* Fisher, 121 Mich. 60, 79 N. W. 934; Weiser *v.* Welch, 112 Mich. 134, 70 N. W. 438; Friend *v.* Dunks, 37 Mich. 25.

Nebraska.— Kliment *v.* Corcoran, 51 Nebr. 142, 70 N. W. 910; Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27.

New York.— Dubois *v.* Miller, 5 Hun 332.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 448.

3. Smith *v.* People, 141 Ill. 447, 31 N. E. 425; Kennedy *v.* Sullivan, 34 Ill. App. 46; Schlosser *v.* State, 55 Ind. 82; Haines *v.* Hanrahan, 105 Mass. 480; Wilson *v.* Booth, 57 Mich. 249, 23 N. W. 799.

Presumption as to character of liquor.— It is error to instruct the jury that liquors drunk by the decedent in defendant's saloon should be presumed to be intoxicating. Kuhlman *v.* Cole, 5 Nebr. (Unoff.) 302, 98 N. W. 419.

4. See Krach *v.* Heilman, 53 Ind. 517; Theisen *v.* Johns, 72 Mich. 285, 40 N. W. 727; Wesnieski *v.* Vanek, (Nebr. 1904) 99 N. W. 258.

5. Miller *v.* Gleason, 18 Ohio Cir. Ct. 374, 10 Ohio Cir. Dec. 20.

caused by other dealers.[6] His liability may extend to injury resulting from the dissolute habits of the person in question, induced by his sales to such person, after such sales have ceased.[7] Plaintiff's recovery is limited to his individual injury, although others may also have a right of action on the same state of facts against the same defendant.[8] The loss, suffering, or trouble of the person who was intoxicated by defendant's liquor is not to be taken into account, except in so far as it may have reacted upon plaintiff; for injury or damage to the drunkard is not the cause of action, but injury or loss to a third person caused by his intoxication.[9] In such an action a wife may recover for the expense of medicine and medical attendance made necessary by the husband's sickness or by injuries sustained by him while drunk, or for additional care and nursing which she was obliged to bestow upon him, or for the expenses of her own sickness caused by her exertions in caring for him.[10] The damages should not be increased for the reason that plaintiff has agreed to give half the amount recovered to his counsel for his services.[11]

b. Injury to Means of Support. Where the action is brought by a wife or a dependent relative for injury to the means of support, the measure of damages is the diminution resulting to plaintiff's present and future means of support.[12] A wife cannot be allowed compensation for the loss of the society and companionship of her husband or for estrangement between them resulting from his habits.[13] His previous intemperate habits may be taken into account as affecting the measure of damages.[14] In case of his death the widow's recovery may include the expense of his final sickness and funeral.[15] For the purpose of estimating the

6. Bellison *v.* Apland, 115 Iowa 599, 89 N. W. 22; Huggins *v.* Kavanagh, 52 Iowa 368, 3 N. W. 409.

7. Stahnka *v.* Kreitle, 66 Nebr. 829, 92 N. W. 1042. And see Lucker *v.* Liske, 111 Mich. 683, 70 N. W. 421.

8. Rosecrants *v.* Shoemaker, 60 Mich. 4, 26 N. W. 794.

9. Borgasen *v.* Eklund, 96 Ill. App. 443.

10. Coleman *v.* People, 78 Ill. App. 210; Thomas *v.* Dansby, 74 Mich. 398, 41 N. W. 1088; Wightman *v.* Devere, 33 Wis. 570.

11. Clinton *v.* Laning, 61 Mich. 355, 28 N. W. 125.

12. Mulford *v.* Clewell, 21 Ohio St. 191.

Amount of money spent for liquor.— In order to ascertain the amount of damage suffered by plaintiff, where the sales complained of extended over a considerable period of time, evidence may be given of the amount of money withdrawn from the support of the family, from week to week, and used in the purchase of liquor in defendant's saloon. Hudson *v.* Weston, 23 Ill. App. 487. And see Hutchinson *v.* Hubbard, 21 Nebr. 33, 31 N. W. 245. But the amount spent for liquor, which otherwise would have been devoted to the support of plaintiff, is not by itself the measure of damages, where a substantial injury is shown, such as the husband's loss of his position or incapacity to work. Kolling *v.* Bennett, 18 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 81.

Diminished earning capacity.— Where the intoxication resulted in an accident to the drunken man, disabling him temporarily or permanently, the damages may be measured by the difference between his earnings after the injury and the amount he would otherwise have earned. Thomas *v.* Dansby, 74 Mich. 398, 41 N. W. 1088.

The period for which damages are to be computed is the time during which the husband could furnish no support or only a partial support, by reason of his intoxication or habitual drunkenness. Warrick *v.* Rounds, 17 Nebr. 411, 22 N. W. 785.

Plaintiff partly self-sustaining.— Plaintiff's recovery is not limited by the fact that he may, in the past, have partly supported himself; for the duty to support, and probability of future support, as well as the fact of past support, are to be taken into consideration. Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208; Hackett *v.* Smelsley, 77 Ill. App. 109; Houston *v.* Gran, 38 Nebr. 687, 57 N. W. 403.

Money lost.— The recovery may include money lost or stolen from the intoxicated person while drunk in defendant's saloon, and which otherwise would have gone to the support of his family. Franklin *v.* Schermerhorn, 8 Hun (N. Y.) 112.

Conjectural damages.— The recovery cannot include any elements of damage which are merely conjectural. Hence evidence is not admissible as to what the deceased drunkard would have done in any particular business transaction if he had lived. Karau *v.* Pease, 45 Ill. App. 382. And see Flynn *v.* Fogarty, 106 Ill. 263.

13. Ganssly *v.* Perkins, 30 Mich. 492; Kerkow *v.* Bauer, 15 Nebr. 150, 18 N. W. 27.

14. Goodenough *v.* McGrew, 44 Iowa 670; Uldrich *v.* Gilmore, 35 Nebr. 288, 53 N. W. 135.

15. Betting *v.* Hobbett, 142 Ill. 72, 30 N. E. 1048; Mason *v.* Shay, 5 Ohio Dec. (Reprint) 31, 1 Am. L. Rec. 553.

injury to a wife's means of support, her husband's expectation of life must be taken into account, and the standard annuity tables may be used for this purpose, if it is shown that he was a sound and healthy man.[16]

c. Exemplary Damages — (1) *In General.* Generally such statutes, either expressly or by necessary implication, authorize the recovery of exemplary damages under proper conditions.[17] It is first of all necessary that plaintiff should show actual damages; for without this foundation no vindictive damages can be allowed.[18] And the general rule is that to justify exemplary damages, it must be shown that defendant's conduct was wilful, wanton, reckless, malicious, oppressive, or otherwise aggravated and deserving of punishment.[19] The amount to be allowed as exemplary damages rests very much in the sound discretion of the jury.[20] It is generally held that exemplary damages may be given in a proper case, notwithstanding defendant is also liable to be fined or otherwise punished under the criminal law for the same sale or gift of liquor.[21] Exemplary damages may be recovered against the owner or lessor of the premises, who has knowingly permitted them to be used for the sale of liquor; but a case must be made therefor against him individually, as by showing some malicious or blameworthy conduct

16. Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708; Sellars *v.* Foster, 27 Nebr. 118, 42 N. W. 907; King *v.* Bell, 13 Nebr. 409, 14 N. W. 141; Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409; Davis *v.* Standish, 26 Hun (N. Y.) 608; Hall *v.* Germain, 14 N. Y. Suppl. 5.

17. Mason *v.* Shay, 5 Ohio Dec. (Reprint) 194, 3 Am. L. Rec. 435. And see cases *infra*, succeeding notes. *Contra*, Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

Purpose of allowance.— Exemplary damages are allowed only by way of example, or as a warning to deter defendant and others from similar transgressions, and not by way of punishment. Meidel *v.* Anthis, 71 Ill. 241. And see Boydan *v.* Haberstumpf, 129 Mich. 137, 88 N. W. 386.

Suit on bond.— It has been held that exemplary damages cannot be recovered when such an action is brought on the liquor seller's bond. Cobb *v.* People, 84 Ill. 511; Garrigan *v.* Thompson, 17 S. D. 132, 95 N. W. 294.

In Iowa exemplary damages are not recoverable where the cause of action is the habitual drunkenness of plaintiff's husband, rather than the injury resulting from a particular fit of intoxication. Flint *v.* Gauer, 66 Iowa 696, 24 N. W. 513; Richmond *v.* Shickler, 57 Iowa 486, 10 N. W. 882.

18. Brantigam *v.* While, 73 Ill. 561; Coufrey *v.* Stark, 73 Ill. 187; Albrecht *v.* Walker, 73 Ill. 69; Fentz *v.* Meadows, 72 Ill. 540; Keedy *v.* Howe, 72 Ill. 133; Kellerman *v.* Arnold, 71 Ill. 632; Meidel *v.* Anthis, 71 Ill. 241; Freese *v.* Tripp, 70 Ill. 496; Schimmelfenig *v.* Donovan, 13 Ill. App. 47; Miller *v.* Hammers, 93 Iowa 746, 61 N. W. 1087; Gilmore *v.* Mathews, 67 Me. 517.

19. *Illinois.*— Kellerman *v.* Arnold, 71 Ill. 632; Meidel *v.* Anthis, 71 Ill. 241; Freese *v.* Tripp, 70 Ill. 496; Murphy *v.* Curran, 24 Ill. App. 475; Holmes *v.* Nooe, 15 Ill. App. 164; Kadgin *v.* Miller, 13 Ill. App. 474.

Kansas.— Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

Michigan.— Bowden *v.* Voorheis, 135 Mich. 648, 98 N. W. 406; Peacock *v.* Oaks, 85 Mich. 578, 48 N. W. 1082; Larzelere *v.* Kirchgessner, 73 Mich. 276, 41 N. W. 488; Ganssly *v.* Perkins, 30 Mich. 492; Kreiter *v.* Nichols, 28 Mich. 496.

New York.— Wilber *v.* Dwyer, 69 Hun 507, 23 N. Y. Suppl. 395; Rawlins *v.* Vidvard, 34 Hun 205; Franklin *v.* Schermerhorn, 8 Hun 112.

West Virginia.— Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 456.

In Iowa when a wife is entitled to actual damages for injury to her means of support, she is also entitled, as a matter of law, to exemplary damages under Code, § 1557. Thill *v.* Pohlman, 76 Iowa 638, 41 N. W. 385 [*distinguishing* Goodenough *v.* McGrew, 44 Iowa 670]. And see Fox *v.* Wunderlich, 64 Iowa 187, 20 N. W. 7.

In Ohio it has been held that a right to actual damages being shown, the jury may also assess exemplary damages without proof of actual notice or other special circumstances of aggravation. Schneider *v.* Hosier, 21 Ohio St. 98.

20. Schimmelfenig *v.* Donovan, 13 Ill. App. 47; Goodenough *v.* McGrew, 44 Iowa 670; Larzelere *v.* Kirchgessner, 73 Mich. 276, 41 N. W. 488. And see Shafer *v.* Patterson, 4 Ohio Dec. (Reprint) 167, 1 Clev. L. Rec. 84.

21. *Illinois.*— Brannon *v.* Silvernail, 81 Ill. 434. *Compare* Albrecht *v.* Walker, 73 Ill. 69.

Iowa.— Fox *v.* Wunderlich, 64 Iowa 187, 20 N. W. 7.

Kansas.— Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

New York.— Cook *v.* Ellis, 6 Hill 466, 41 Am. Dec. 757.

Ohio.— Roberts *v.* Mason, 10 Ohio St. 277.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 456.

But see Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; Schafer *v.* Smith,

on his part, aside from the circumstances which justify the award of exemplary damages against the tenant.[22]

(II) *Circumstances Aggravating Damages.* A claim for exemplary damages must be based on some positive wrong wilfully inflicted on or caused to plaintiff, or some gross neglect of his rights.[23] Such damages are properly awarded in cases where defendant has wilfully furnished liquor to an inebriate after notice not to do so, or against the protest or remonstrance of the drunkard's wife, plaintiff in the action,[24] or has supplied liquor to a person who, as he must have perceived, was drunk at the time,[25] or to a habitual drunkard, with knowledge of his intemperate habits,[26] or to a person whom he knew to be a minor.[27] And it has been held that such damages may be allowed on proof that defendant's act in selling the liquor, or his course of business including the particular sale, was illegal, as where he sells without a license.[28]

d. Reduction or Mitigation of Damages. On the part of defendant, for the purpose of reducing damages, evidence may be given of his honest endeavors to prevent injury to plaintiff and of his having been deceived or misled by tricks or artifices,[29] and he may show that other saloon-keepers, by furnishing liquors, contributed to the same injury of which the plaintiff complains,[30] or that the sales complained of were made by his bar-tender or servant, without his knowledge or consent, and in disobedience to his positive orders honestly given.[31] But the fact that a deceased person to whom liquors were furnished had accumulated property which plaintiffs inherited on his death does not go to mitigate damages but rather to enhance them.[32]

e. Excessive Damages. The determination of the amount of damages to be allowed in a case of this kind rests very much in the discretion of the jury, and their award will not be set aside or reduced, on the ground of its being excessive, unless it is plain that the circumstances do not justify so great an allowance and that the jury has abused its discretion in the matter.[33]

63 Ind. 226; Koerner *v.* Oberly, 56 Ind. 284, 26 Am. Rep. 34; Struble *v.* Nodwift, 11 Ind. 64.

22. Campbell *v.* Harmon, 96 Me. 87, 51 Atl. 801; Reid *v.* Terwilliger, 116 N. Y. 530, 22 N. E. 1091; Ketcham *v.* Fox, 52 Hun (N. Y.) 284, 5 N. Y. Suppl. 272; Rawlins *v.* Vidvard, 34 Hun (N. Y.) 205; Bennett *v.* Levi, 19 N. Y. Suppl. 226.

23. Peacock *v.* Oaks, 85 Mich. 578, 48 N. W. 1082; Larzelere *v.* Kirchgessner, 73 Mich. 276, 41 N. W. 488.

The foundation of exemplary damages rests upon the wrong done wilfully to the complaining party, and wrong done without reference to that party will not authorize their recovery. Ganssly *v.* Perkins, 30 Mich. 492.

24. Siegle *v.* Rush, 173 Ill. 559, 50 N. E. 1008; Wolfe *v.* Johnson, 152 Ill. 280, 38 N. E. 886; McMahon *v.* Sankey, 133 Ill. 636, 24 N. E. 1027; McEvoy *v.* Humphrey, 77 Ill. 388; Brantigam *v.* While, 73 Ill. 561; Hanewacker *v.* Ferman, 47 Ill. App. 17; Rouse *v.* Melsheimer, 82 Mich. 172, 46 N. W. 372; Larzelere *v.* Kirchgessner, 73 Mich. 276, 41 N. W. 488; Steele *v.* Thompson, 42 Mich. 594, 4 N. W. 536; Ganssly *v.* Perkins, 30 Mich. 492; Miller *v.* Gleason, 18 Ohio Cir. Ct. 374, 10 Ohio Cir. Dec. 20.

Sales made by defendant after the commencement of the action may be proved and considered by the jury on the question of exemplary damages. Bean *v.* Green, 33 Ohio St. 444.

25. Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208 [*affirming* 67 Ill. App. 466]; Kennedy *v.* Sullivan, 136 Ill. 94, 26 N. E. 382; Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625; Manzer *v.* Phillips, (Mich. 1905) 102 N. W. 292.

26. England *v.* Cox, 89 Ill. App. 551; Weitz *v.* Ewen, 50 Iowa 34; Kear *v.* Garrison, 13 Ohio Cir. Ct. 447, 7 Ohio Cir. Dec. 515. And see Johnson *v.* Schultz, 74 Mich. 75, 41 N. W. 865.

27. Weiser *v.* Welch, 112 Mich. 134, 70 N. W. 438.

28. Neu *v.* McKechnie, 95 N. Y. 632, 47 Am. Rep. 89; Davis *v.* Standish, 26 Hun (N. Y.) 608. *Compare* Albrecht *v.* Walker, 73 Ill. 69.

29. Bates *v.* Davis, 76 Ill. 222.

30. Jackson *v.* Noble, 54 Iowa 641, 7 N. W. 88; Ennis *v.* Shiley, 47 Iowa 552; Hemmens *v.* Bentley, 32 Mich. 89.

31. Betting *v.* Hobbett, 142 Ill. 72, 30 N. E. 1048; Mayers *v.* Smith, 121 Ill. 442, 13 N. E. 216; Brantigam *v.* While, 73 Ill. 561; Fentz *v.* Meadows, 72 Ill. 540; Keedy *v.* Howe, 72 Ill. 133; Freese *v.* Tripp, 70 Ill. 496; Steele *v.* Thompson, 42 Mich. 594, 4 N. W. 536.

32. Houston *v.* Gran, 38 Nebr. 687, 57 N. W. 403.

33. Schneider *v.* Hosier, 21 Ohio St. 98, where two hundred dollars was not considered as excessive.

What damages are excessive see the following cases:

5. TRIAL — a. Questions For Jury. In an action under the civil damage law, the following questions of fact should be submitted to the jury and determined by them: Whether there was a sale, gift, or furnishing of liquor by defendant;[34] whether intoxication was produced by the liquor so sold or furnished;[35] whether the liquor sold or furnished by defendant caused or contributed to the injury complained of;[36] whether plaintiff, by his acts or conduct, voluntarily contributed to the injury in question;[37] what was the proximate cause of the injury sustained;[38] whether the injury was wilfully committed;[39] and where plaintiff seeks to subject the premises where the liquor was sold to the lien of a judgment against the seller, whether the property was leased for the purposes of such sale.[40]

b. Instructions.[41] In such an action the jury should be properly instructed by the court concerning the facts which plaintiff must prove to make out a case.[42] Where the issues and evidence in the case require it instructions should be given as to the proof of a sale by defendant, distinguishing, where necessary, between a sale, a gift, and a "furnishing" of liquor;[43] as to the responsibility of defendant for the acts of his agents or employees;[44] as to the necessity of showing that the beverage sold by defendant was an intoxicating liquor,[45] and that it induced intoxication in the person who drank it,[46] and as to what constitutes "intoxication";[47] as to defendant's knowledge or cause of belief concerning the habitual drunkenness, minority, or other peculiar condition of the purchaser, if that is an element of the case;[48] as to the effect of plaintiff's consenting to or authorizing the sale in question, or contributing to the injury resulting;[49] as to defendant's liability as dependent upon the question whether the liquor sold or furnished by him caused or contributed to the intoxication from which the injury arose;[50] and

Illinois.— McEvoy *v.* Humphrey, 77 Ill. 388; Brown *v.* Butler, 66 Ill. App. 86; Marschall *v.* Laughran, 47 Ill. App. 29; Hudson *v.* Weston, 23 Ill. App. 487.

Iowa.— Bunyan *v.* Loftus, 90 Iowa 122, 57 N. W. 685.

Kansas.— Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

Nebraska.— Gorey *v.* Kelley, 64 Nebr. 605, 90 N. W. 554; Schiek *v.* Sanders, 53 Nebr. 664, 74 N. W. 39; Curran *v.* Percival, 21 Nebr. 434, 32 N. W. 213; Roberts *v.* Taylor, 19 Nebr. 184, 27 N. W. 87; Warrick *v.* Rounds, 17 Nebr. 411, 22 N. W. 785.

New York.— Bennett *v.* Levi, 19 N. Y. Suppl. 226; Conklin *v.* Tice, 1 N. Y. Suppl. 803.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 458.

34. Smith *v.* People, 141 Ill. 447, 31 N. E. 425; Goodman *v.* Hailes, 59 Ohio St. 342, 52 N. E. 829. See *supra*, XII, F, 3, d, (I).

35. Tipton *v.* Schuler, 87 Ill. App. 517.

36. Cornelius *v.* Hultman, 44 Nebr. 441, 62 N. W. 891; Chmelir *v.* Sawyer, 42 Nebr. 362, 60 N. W. 547.

37. Huff *v.* Aultman, 69 Iowa 71, 28 N. W. 440, 58 Am. Rep. 213. See *supra*, XII, C, 3.

38. Botwinis *v.* Allgood, 113 Ill. App. 188; Jaroszewski *v.* Allen, 117 Iowa 632, 91 N. W. 941; McMahon *v.* Dumas, 96 Mich. 467, 56 N. W. 13; Doty *v.* Postal, 87 Mich. 143, 49 N. W. 534; Cornelius *v.* Hultman, 44 Nebr. 441, 62 N. W. 891; Davies *v.* McKnight, 146 Pa. St. 610, 23 Atl. 320. See *supra*, XII, B, 8; XII, F, 3, d, (IV).

39. Snow *v.* Carpenter, 49 Vt. 426. This is a question of fact for the jury, under proper instructions as to what constitutes a wilful act.

40. Goodman *v.* Hailes, 59 Ohio St. 342, 52 N. E. 829.

41. See, generally, TRIAL.

42. Baker *v.* Summers, 201 Ill. 52, 66 N. E. 302.

43. Miller *v.* Hammers, 93 Iowa 746, 61 N. W. 1087; Lafler *v.* Fisher, 121 Mich. 60, 79 N. W. 934; Sterling *v.* Callahan, 94 Mich. 536, 54 N. W. 495; Jones *v.* Bates, 26 Nebr. 693, 42 N. W. 751, 4 L. R. A. 495.

44. Kennedy *v.* Sullivan, 136 Ill. 94, 26 N. E. 382; Shull *v.* Arie, 113 Iowa 170, 84 N. W. 1031.

45. Smith *v.* People, 141 Ill. 447, 31 N. E. 425; Walker *v.* Dailey, 101 Ill. App. 575; Dolan *v.* McLaughlin, 46 Nebr. 449, 64 N. W. 1076.

46. Shorb *v.* Webber, 188 Ill. 126, 58 N. E. 949; Munz *v.* People, 90 Ill. App. 647; Gintz *v.* Bradley, 53 Ill. App. 597. *Compare* Corkings *v.* Meier, 112 Ill. App. 655.

47. Shorb *v.* Webber, 188 Ill. 126, 58 N. E. 949; Smith *v.* People, 141 Ill. 447, 31 N. E. 425; Lafler *v.* Fisher, 121 Mich. 60, 79 N. W. 934; Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102. And see King *v.* Haley, 86 Ill. 106, 29 Am. Rep. 14.

48. Solomon *v.* State, 71 Miss. 567, 14 So. 461; Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102; Lucas *v.* Johnson, (Tex. Civ. App. 1901) 64 S. W. 823.

49. McDonald *v.* Casey, 84 Mich. 505, 47 N. W. 1104; Rosecrants *v.* Shoemaker, 60 Mich. 4, 26 N. W. 794; Tarkington *v.* Brunett, (Tex. Civ. App. 1899) 51 S. W. 274.

50. McMahon *v.* Sankey, 133 Ill. 636, 24

as to the liability of joint defendants, or of persons whose sales have all contributed to the intoxication complained of.[51] The jury should also be instructed as to the necessity of finding that the intoxication in question was the proximate and not the remote cause of the injury complained of, and as to the meaning of these terms, as applied to the circumstances in evidence.[52] If plaintiff claims an injury to the "means of support," the meaning of this term should be explained to the jury, and proper instructions given to enable them to estimate the extent of the injury.[53] And instructions on the subject of damages should be so framed as to inform the jury of the extent of their discretion in the matter, the considerations they may properly take into account, and the propriety of allowing exemplary damages.[54] The court should be particularly careful to avoid giving instructions, or using expressions in its charge, which might tend to prejudice the jury against the one party or the other, or to give the one an advantage as against the other.[55]

6. Judgment — a. In General. The judgment in an action against several defendants, under the civil damage law, should be against them *in solido*, and not divided;[56] and if it is in favor of several plaintiffs, it should not attempt to distribute among them the amount recovered.[57] The judgment, if against a saloonkeeper, is conclusive on the sureties on his bond;[58] but a judgment against the owner of the premises where the liquor was sold is not conclusive on the lessee, the seller, if he was not made a party to the action or notified to defend it.[59]

b. Lien on Premises.[60] Under statutes declaring that judgments recovered under the civil damage laws shall be liens on the property used or occupied by defendant for the purposes of the liquor traffic,[61] plaintiff acquires no interest in

N. E. 1027; Morley *v.* Moulton, 45 Ill. App. 304; League *v.* Ehmke, 120 Iowa 464, 94 N. W. 938; McNary *v.* Blackburn, 180 Mass. 141, 61 N. E. 885; Uldrich *v.* Gilmore, 35 Nebr. 288, 53 N. W. 135.

51. Kennedy *v.* Whittaker, 81 Ill. App. 605; Moreland *v.* Durocher, 121 Mich. 398, 80 N. W. 284; Gorey *v.* Kelley, 64 Nebr. 605, 90 N. W. 554.

52. Baker *v.* Summers, 201 Ill. 52, 66 N. E. 302; Meyer *v.* Butterhrodt, 146 Ill. 131, 34 N. E. 152; Smith *v.* People, 141 Ill. 447, 31 N. E. 425; Kennedy *v.* Whittaker, 81 Ill. App. 605; Gullikson *v.* Gjorud, 82 Mich. 503, 46 N. W. 723; Nichols *v.* Winfrey, 90 Mo. 403, 2 S. W. 305; Scott *v.* Chope, 33 Nebr. 41, 49 N. W. 940.

53. McMahon *v.* Sankey, 35 Ill. App. 341 [*affirmed* in 133 Ill. 636, 24 N. E. 1027]; Thill *v.* Pohlman, 76 Iowa 638, 41 N. W. 385; Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

54. *Illinois.*— Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208; Kennedy *v.* Sullivan, 136 Ill. 94, 26 N. E. 382; Ludwig *v.* Suger, 84 Ill. 99.

Iowa.— Shull *v.* Arie, 113 Iowa 170, 84 N. W. 1031. And see Knott *v.* Peterson, 125 Iowa 404, 101 N. W. 173.

Michigan.— Larzelere *v.* Kirchgessner, 73 Mich. 276, 41 N. W. 488.

Nebraska.— Roberts *v.* Hopper, 55 Nebr. 599, 76 N. W. 21.

Ohio.— Sibila *v.* Bahney, 34 Ohio St. 399. See 29 Cent. Dig. tit. "Intoxicating Liquors," § 461.

55. Hanewacker *v.* Ferman, 152 Ill. 321, 38 N. E. 924; Shorb *v.* Webber, 89 Ill. App. 474 [*affirmed* in 188 Ill. 126, 58 N. E. 949] (holding that the jury should not be instructed that plaintiff has a decided advantage and that the law should be strictly construed in behalf of defendant); Nichols *v.* Winfrey, 90 Mo. 403, 2 S. W. 305 (holding that the court is not required to instruct the jury that the presumption of law is that defendant's business as a saloonkeeper is licensed by the state, and that he is in the peace of the state and entitled to the protection of its laws, there being no issue on that point).

56. Buckworth *v.* Crawford, 24 Ill. App. 603, holding that plaintiff, having obtained a verdict against two defendants, jointly and severally liable, may be dismissed as to one and take judgment against the other.

57. Helmuth *v.* Bell, 150 Ill. 263, 37 N. E. 230, holding that this will not render the judgment void, since the attempted distribution may be rejected as surplusage.

58. Wanack *v.* People, 187 Ill. 116, 58 N. E. 242.

59. Burkman *v.* Jamieson, 25 Wash. 606, 66 Pac. 48.

60. See the statutes of the different states.

61. Where part of the property is occupied as a homestead, the court must specifically fix the part of the property to which the lien attaches. Engleken *v.* Webber, 47 Iowa 558. See Arnold *v.* Gotshall, 71 Iowa 572, 32 N. W. 508.

Where the premises are occupied under a lease from a tenant for life, the estate in remainder is not liable to the lien. Dugan *v.* Neville, 49 Ohio St. 462, 31 N. E. 1080; Mullen *v.* Peck, 49 Ohio St. 447, 31 N. E. 1077. And see Castle *v.* Fogerty, 19 Ill. App. 442.

the property, nor does any lien attach, until the judgment has been rendered,[62] and then it does not displace or override previously attaching valid liens by mortgage or otherwise.[63] It is not necessary that the saloon-keeper and his landlord should be joined in the same action. A judgment may first be recovered against the saloon-keeper, and afterward established as a lien on the premises in an action against the landlord.[64] In an action against the latter, it is necessary to show that the owner of the property knew of its use as a saloon, or for the traffic in liquors, and consented thereto.[65] A judgment against the tenant is not conclusive as to the amount to which the property should be charged, if the landlord was not a party to the proceedings.[66]

7. COSTS.[67] It has been held that under a civil damage act providing that the damage in all cases arising thereunder, together with the costs of suit, shall be recoverable in an action of trespass on the case before any court of competent jurisdiction, plaintiff, if entitled to recover at all, is entitled to costs where the claim for damages brings the case within the jurisdiction of a court of record.[68]

8. APPEAL AND REVIEW.[69] The judgment in an action under the civil damage laws will not be reversed on account of the admission of improper testimony, if it is not shown to have injured the appellant;[70] or on account of conflicting evidence, if there is enough to sustain the verdict;[71] or where the verdict, although not in harmony with the charge of the court, is sustained by evidence sufficient to make a case under the complaint without material variance.[72]

XIII. RIGHTS OF PROPERTY AND CONTRACTS.

A. Property and Possession of Liquors — 1. RIGHTS OF PROPERTY. Intoxicating liquors, although put under the ban of the law whenever owned, kept, or transferred for any illegal purpose, are nevertheless, when not so held or dealt in,

62. Bellinger *v.* Griffith, 23 Ohio St. 619; Hart *v.* Corlett, 4 Ohio Dec. (Reprint) 181, 1 Clev. L. Rec. 92.

An injunction forbidding the sale of the property alleged to be liable to the lien, granted pending proceedings in the action against the saloon-keeper, should be dissolved. Bonesteel *v.* Downs, 73 Iowa 685, 35 N. W. 924.

Sale pending suit.— The owner and lessor of the building, after the commencement of a suit against him under the statute, cannot, by a voluntary conveyance of the premises without consideration, defeat the lien of plaintiff for whatever judgment may be recovered. La Roche *v.* Brewer, 8 Ohio Cir. Ct. 508, 5 Ohio Cir. Dec. 432.

63. Bell *v.* Cassem, 158 Ill. 45, 41 N. E. 1089, 29 L. R. A. 571; Goodenough *v.* McCoid, 44 Iowa 659.

64. McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548. See Flint *v.* Gauer, 66 Iowa 696, 24 N. W. 513.

The proceeding against the owner of the premises is not an equitable action to establish a lien, but an action at law, and the owner is entitled to a trial by jury to decide upon the facts which are necessary to make the property liable. Loan *v.* Hiney, 53 Iowa 89, 4 N. W. 865.

65. Johnson *v.* Grimminger, 83 Iowa 10, 48 N. W. 1052; Myers *v.* Kirt, 64 Iowa 27, 19 N. W. 846; Loan *v.* Etzel, 62 Iowa 429, 17 N. W. 611; Meyers *v.* Kirt, 57 Iowa 421, 10 N. W. 828; Cobleigh *v.* McBride, 45 Iowa 116; Dugan *v.* Neville, 49 Ohio St. 462, 31 N. E. 1080; Mullen *v.* Peck, 49 Ohio St. 447, 31 N. E. 1077. And see *supra*, XII, E, 6.

Extent of owner's knowledge.— The property will be liable if the owner, knowing that the entire business carried on by his lessee was unlawful, consented to the use of the property for that purpose, although he did not know of the particular sales complained of. Wing *v.* Benham, 76 Iowa 17, 39 N. W. 921.

Sales before discovery by owner.— The property may become liable by reason of sales made prior to the time when it was shown that the owner first learned of the sales, for the statute does not contemplate that the judgment may be split up and a part only charged as a lien on the building. Arnold *v.* Barkalow, 73 Iowa 183, 34 N. W. 807.

66. McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548; Buckham *v.* Grape, 65 Iowa 535, 17 N. W. 755, 22 N. W. 664. But *compare* Blakney *v.* Green, 9 Ohio Dec. (Reprint) 570, 15 Cinc. L. Bul. 143.

67. See, generally, COSTS.

68. Purvis *v.* Segar, 132 Mich. 167, 93 N. W. 261.

69. See, generally, APPEAL AND ERROR.

70. Johnson *v.* McCann, 61 Ill. App. 110.

71. Hutchinson *v.* Hubbard, 21 Nebr. 33, 31 N. W. 245; Miller *v.* Gleason, 18 Ohio Cir. Ct. 374, 10 Ohio Cir. Dec. 20.

72. Kolling *v.* Bennett, 18 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 81.

property, and entitled as such to the protection of the law.[73] Thus, in the absence of a judicial determination that a particular place, or the sale of liquor there, constitutes a nuisance, the place cannot be broken open and the liquors destroyed by persons whose relatives and friends frequent the place and obtain liquor there.[74] Intoxicating liquors may properly be the subject of taxation;[75] may be levied upon under mesne process, attachment, or execution;[76] and may be the subject of theft or larceny.[77] One who is engaged in an illegal traffic in intoxicating liquors cannot recover for the loss of profits caused by the interruption thereof.[78]

2. Recovery of Possession. In the absence of a statute to the contrary, the owner of liquors may maintain trover, trespass, replevin, or other appropriate action against any person who has tortiously deprived him of the possession of them,[79] or recover them from the possession of an officer who has wrongfully seized them on attachment or execution as the property of a stranger,[80] or have his action against a carrier, charged with their transportation and delivery to him, and by whose fault or negligence they have been lost or destroyed.[81] But in several states statutes have been enacted forbidding the maintenance of any action for the recovery of the possession or value of any intoxicating liquors. They have been held to apply, however, only where the liquors in question were kept for an illegal purpose, or sold or held for sale in violation of law.[82]

B. Validity of Contracts and Conveyances — 1. In General. Where the illegal sale of liquor enters into any contract as an inseparable part of its consideration, or the terms or conditions of the contract are inseparably connected with the illicit traffic in liquors, it is against public policy and immoral and therefore void.[83] And such a contract is not validated by the subsequent repeal of the

73. State *v.* Allmond, 2 Houst. (Del.) 612; Brown *v.* Perkins, 12 Gray (Mass.) 89; State *v.* McMaster, (N. D. 1904) 99 N. W. 58.

Liquors kept for sale contrary to law are regarded by the law as having no lawful value, or no value for lawful purposes. Oviatt *v.* Pond, 29 Conn. 479. But see Howe *v.* Jolly, 68 Miss. 323, 8 So. 513.

74. Brown *v.* Perkins, 12 Gray (Mass.) 89.

75. See Taxation.

76. State *v.* Johnson, 33 N. H. 441. And see Attachment, 4 Cyc. 568.

77. See Larceny.

78. Kane *v.* Johnston, 9 Bosw. (N. Y.) 154. And see Smith *v.* Dinkelspiel, 91 Ala. 528, 8 So. 490.

79. Hamilton *v.* Goding, 55 Me. 419; Sullivan *v.* Park, 33 Me. 438; Booraem *v.* Crane, 103 Mass. 522; Breck *v.* Adams, 3 Gray (Mass.) 569; Fuller *v.* Bean, 30 N. H. 181; Harrison *v.* Nichols, 31 Vt. 709. But *compare* Plummer *v.* Harbut, 5 Iowa 308.

80. Smith *v.* Dinkelspiel, 91 Ala. 528, 8 So. 490; Niles *v.* Fries, 35 Iowa 41; Monty *v.* Arneson, 25 Iowa 383; Marienthal *v.* Shafer, 6 Iowa 223; Priest *v.* Pinkham, 18 N. H. 520. But *compare* Cooley *v.* Davis, 34 Iowa 128.

Damages against officer.— The owner of intoxicating liquors, suing to recover damages against an officer who had been adjudged to have no authority for their detention, must allege and prove that he owned and kept them with a lawful intent, and not for the purpose of sale contrary to law. Walker *v.* Shook, 49 Iowa 264.

Liquors seized under search and seizure law.— The owner of liquors seized by virtue of a warrant in due form against him, under the search and seizure law, cannot replevy them from the possession of the officer who executed the process. Weir *v.* Allen, 47 Iowa 482; State *v.* Harris, 38 Iowa 242; Musgrave *v.* Hall, 40 Me. 498. And see *supra*, X, C, 5.

81. Bowen *v.* Hale, 4 Iowa 430. *Compare* Sommer *v.* Cate, 22 Iowa 585.

82. Donohue *v.* Maloney, 49 Conn. 163; Robinson *v.* Barrows, 48 Me. 186; Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290; Dolan *v.* Buzzell, 41 Me. 473; Jones *v.* Fletcher, 41 Me. 254; Preston *v.* Drew, 33 Me. 558, 54 Am. Dec. 639; Sullivan *v.* Park, 33 Me. 438; Barron *v.* Arnold, 16 R. I. 22, 11 Atl. 298; Harrison *v.* Nichols, 31 Vt. 709.

Scope of statute.— A statute prohibiting the maintenance of "any action of any kind" for the recovery of the possession or value of liquors embraces actions of replevin, trespass, and trover, as well as assumpsit. Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290.

Illegal attachment.— Such a statute prohibits a recovery in an action of trespass for the value of liquors kept for illegal sale which had been attached and taken away by an officer as the property of a third person. Oviatt *v.* Pond, 29 Conn. 479.

83. Buck *v.* Albee, 27 Vt. 190; Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605. And see Contracts, 9 Cyc. 676 *et seq.*

Applications of rule.— A plaintiff cannot recover for work and labor done for defendant, consisting of his personal services rendered in defendant's employment of selling liquors unlawfully. Goodwin *v.* Clark, 65

law which made the sale or traffic in liquors unlawful.[84] But these principles do not apply to an insurance upon a stock of liquors, which is an enforceable contract, even though the property was illegally kept for sale.[85] And if a judgment has been recovered upon the contract, or for the price of the liquors illegally sold, it is not voidable on account of the illegality of the original consideration.[86] Whether or not one can recover from his agent the proceeds of illegal sales of liquors is to be determined in accordance with general rules which have been fully stated elsewhere in this work.[87]

2. Contracts of Sale — a. In General. Wherever a statute prohibits the sale of liquor except by a person holding a license or permit, or prohibits the sale altogether, a contract for the sale of liquor made by a person not so protected, or made under any other circumstances amounting to a violation of law, is void, and the seller cannot maintain an action against the purchaser for the price or value.[88]

Me. 280; Timson *v.* Moulton, 3 Cush. (Mass.) 269. No action lies upon a warranty given upon the sale of a horse, the price of which was paid in spirituous liquors, which the purchaser could not legally sell. Howard *v.* Harris, 8 Allen (Mass.) 297. Where an assignment of rent is made in consideration of liquors the assignee cannot maintain an action for its recovery. Davis *v.* Slater, 17 Iowa 250. There cannot be any recovery on a contract, an inseparable part of which was an attempted assignment of a license to sell liquors (Sanderson *v.* Goodrich, 46 Barb. (N. Y.) 616); or on a bond given by the resident agent of a foreign brewing company to account for the proceeds of liquor sold by him, when neither the principal nor the agent had any authority to sell liquors at the place where the agent did business (Fred Miller Brewing Co. *v.* Stevens, 102 Iowa 60, 71 N. W. 186). But although liquors were illegally sold, if there has been an actual payment for them by a bill of sale of goods, such bill is not invalidated by the illegality of the sale. Carter *v.* Clark, 28 Conn. 512. And a contract restricting the retail traffic in intoxicating liquors in a town, or restricting a party generally in respect to such traffic, cannot be considered against public policy and is therefore valid. Sell *v.* Branen, 70 Ill. App. 471; Harrison *v.* Lockhart, 25 Ind. 112. And see Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.

84. Hathaway *v.* Moran, 44 Me. 67; Webber *v.* Howe, 36 Mich. 150, 24 Am. Rep. 590.

85. Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759; Hinckley *v.* Germania F. Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124; Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687. And see Fire Insurance.

86. Smith *v.* Leddy, 50 Iowa 112; Bonney *v.* Bowman, 63 Miss. 166; Shumaker *v.* Reed, 3 Pa. Dist. 45, 13 Pa. Co. Ct. 547.

87. See Contracts, 9 Cyc. 557 *et seq.* And see Galligan *v.* Fannan, 7 Allen (Mass.) 255; King *v.* McEvoy, 4 Allen (Mass.) 110; Ruemmeli *v.* Cravens, 13 Okla. 342, 74 Pac. 908; Hertzler *v.* Geigley, 196 Pa. St. 419, 46 Atl. 366, 79 Am. St. Rep. 724.

88. *Alabama.*— Kelly *v.* Burke, 132 Ala. 235, 31 So. 512; Moog *v.* Hannon, 93 Ala. 503, 9 So. 596.

Connecticut.— McMahon *v.* Boden, 39 Conn. 316. And see New York Breweries Corp. *v.* Baker, 68 Conn. 337, 36 Atl. 785.

Illinois.— Wempen *v.* Girard, 84 Ill. App. 130; Farrow *v.* Vedder, 19 Ill. App. 305.

Indiana.— Woodford *v.* Hamilton, 139 Ind. 481, 39 N. E. 47; Mullikin *v.* Davis, 53 Ind. 206.

Iowa.— Stoneman *v.* Whaley, 9 Iowa 390. And see Shawyer *v.* Chamberlain, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411.

Kansas.— Dreyfus *v.* Goss, (1903) 72 Pac. 537; Alexander *v.* O'Donnell, 12 Kan. 608; Dolson *v.* Hope, 7 Kan. 161.

Kentucky.— Creekmore *v.* Chitwood, 7 Bush 317; Vannoy *v.* Patton, 5 B. Mon. 248.

Maine.— Hathaway *v.* Moran, 44 Me. 67; Dearborn *v.* Hoit, 41 Me. 120; Cobb *v.* Billings, 23 Me. 470.

Massachusetts.— Galligan *v.* Fannan, 7 Allen 255. And see Jones *v.* McLeod, 103 Mass. 58.

Michigan.— Loranger *v.* Jardine, 56 Mich. 518, 23 N. W. 203.

Minnesota.—Solomon *v.* Dreschler, 4 Minn. 278.

Mississippi.— See Sanford *v.* Starling, etc., Co., 69 Miss. 204, 10 So. 449, holding that the statute prohibiting actions for the recovery of debts for liquors sold in less quantities than one gallon applies only to purchases on credit from licensed dealers.

Nebraska.— P. Schoenhofen Brewing Co. *v.* Whipple, 2 Nebr. (Unoff.) 704, 89 N. W. 751.

New Hampshire.— Jones *v.* Surprise, 64 N. H. 243, 9 Atl. 384; Bliss *v.* Brainard, 41 N. H. 256; Coburn *v.* Odell, 30 N. H. 540; Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617; Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376; Caldwell *v.* Wentworth, 14 N. H. 431; Lewis *v.* Welch, 14 N. H. 294; Pray *v.* Burbank, 10 N. H. 377.

New Jersey.— Carteret Club *v.* Florence, 3 N. J. L. J. 208.

New York.— Smith *v.* Joyce, 12 Barb. 21; Best *v.* Bauder, 29 How. Pr. 489; Griffith *v.* Wells, 3 Den. 226.

Pennsylvania.— Evans *v.* Hall, 45 Pa. St. 235.

Further such a contract is incapable of ratification or of supporting a new promise to pay the price.[89] If the invalidity of the contract grows out of a prohibitory statute of the state where the sale was made and completed, the seller will not be helped to a recovery by the mere fact that he holds a license under the federal laws.[90] A contract for the purchase and sale of liquors is not invalidated by statutes subsequently enacted, unless they are expressly made retroactive,[91] or by the neglect or omission to comply with statutory conditions after the sale, such as keeping a record of sales, or reporting them to designated officers.[92] As a general principle the invalidity of a contract of this kind can be taken advantage of only by the parties or their privies, not by mere strangers or persons collaterally interested.[93]

b. Place of Sale. A contract made in one state for the sale of liquors to be delivered in another state, such as would be valid at common law, and which is not shown to be invalid where made, will enable the seller to maintain an action for the price in the state where the delivery is made, notwithstanding that, if made in the latter state, the contract would have been void.[94] But this rule is of no avail in the face of statutes such as have been enacted in several states, providing that there shall be no recovery on a contract of this kind, where the purchaser

Texas.— See Eberstadt *v.* Jones, 19 Tex. Civ. App. 480, 48 S. W. 558.

Vermont. — Harrison *v.* Nichols, 31 Vt. 709; Briggs *v.* Campbell, 25 Vt. 704; Boutwell *v.* Foster, 24 Vt. 485; Bancroft *v.* Dumas, 21 Vt. 456. *Compare* Aiken *v.* Blaisdell, 41 Vt. 655. The statute prohibiting the sale of intoxicating liquors is no defense to an action for the purchase-price of methyl or wood alcohol, as it is a poison, which is not intended and cannot be used as a beverage. Fabor *v.* Green, 72 Vt. 117, 47 Atl. 391.

Washington. — Bach *v.* Smith, 2 Wash. Terr. 145, 3 Pac. 831.

Wisconsin.— Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605; Gorsuth *v.* Butterfield, 2 Wis. 237.

United States. — Miller *v.* Ammon, 145 U. S. 421, 12 S. Ct. 884, 36 L. ed. 759; Lang *v.* Lynch, 38 Fed. 489, 4 L. R. A. 831. Where liquor is sold to a druggist for the express purpose of enabling him to retail it as a beverage, in violation of law, the price cannot be recovered by suit, even though the sale itself was not illegal. Kohn *v.* Melcher, 43 Fed. 641, 10 L. R. A. 439, construing Iowa Code, § 1550.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 468 and 474. And see CONTRACTS, 9 Cyc. 478.

Sale not shown to be illegal.— The mere fact that an indebtedness was contracted for the purchase and consumption of intoxicating liquors does not constitute ground for a court of equity to refuse its aid in enforcing it. Sis *v.* Boarman, 11 App. Cas. (D. C.) 116.

Rule applicable to sales by manufacturers or distillers.— O'Bryan *v.* Fitzpatrick, 48 Ark. 487, 3 S. W. 527. *Compare* Wetherell *v.* Jones, 3 B. & Ad. 221, 1 L. J. K. B. 139, 23 E. C. L. 104. But see Scanlan *v.* Childs, 33 Wis. 663.

89. Kelly *v.* Burke, 132 Ala. 235, 31 So. 512; Ludlow *v.* Hardy, 38 Mich. 690. But see Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605.

90. Daniels *v.* McCabe, 6 Fed. Cas. No. 3,567, 3 Cliff. 114.

91. Anheuser-Busch Brewing Assoc. *v.* Bond, 66 Fed. 653, 13 C. C. A. 665.

92. Barnard *v.* Houghton, 34 Vt. 264.

93. Ellsworth *v.* Mitchell, 31 Me. 247; McGunn *v.* Hanlin, 29 Mich. 476; Brower *v.* Fass, 60 Nebr. 590, 83 N. W. 832. *Compare* *Ex p.* Neal Loan, etc., Co., 58 S. C. 269, 36 S. E. 584.

94. *Kansas.*— Westheimer *v.* Weisman, 60 Kan. 753, 57 Pac. 969.

Maine.— Torrey *v.* Corliss, 33 Me. 333.

Massachussetts.— Orcutt *v.* Nelson, 1 Gray 536.

Michigan. — Monaghan *v.* Reid, 40 Mich. 665; Webber *v.* Donnelly, 33 Mich. 469; Roethke *v.* Philip Best Brewing Co., 33 Mich. 340; Kling *v.* Fries, 33 Mich. 275.

Nebraska. — Wagner *v.* Breed, 29 Nebr. 720, 46 N. W. 286; P. Schoenhofen Brewing Co. *v.* Whipple, 2 Nebr. (Unoff.) 704, 89 N. W. 751.

New Hampshire.— Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

Rhode Island.— Schlesinger *v.* Stratton, 9 R. I. 578; Read *v.* Taft, 3 R. I. 175.

Vermont.— Erwin *v.* Stafford, 45 Vt. 390; Backman *v.* Mussey, 31 Vt. 547; Street *v.* Hall, 29 Vt. 165; McConihe *v.* McMann, 27 Vt. 95.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 469.

Delivery in another state.— In Alabama it has been held that a statute (Ala. Code (1896), § 3524), providing that all sales or agreements to sell liquors are void if the seller has not a license, has no application to a sale of liquor made by a wholesale dealer doing business in another state, and having no license in Alabama; the subject of the sale being also in another state, and to be there delivered. Shiretzki *v.* Kessler, (Ala. 1904) 37 So. 422.

buys with a view to violating the laws of his own state, although the contract would have been good where made. Such legislation is valid and enforceable.[95] And a statute forbidding local agents of non-resident manufacturers or dealers to solicit or take orders for liquors to be shipped into the state, the purpose being to sell them there in violation of law, will prevent a recovery on an order so taken and filled, although the contract would have been valid in the state where completed.[96] If a contract for the sale of liquor is void in the state where made, it is void everywhere, and the seller cannot maintain an action for the price in the state where the goods are delivered.[97] Hence the right to maintain an action for the price of liquors sold frequently depends upon the determination of the place where the contract was made. This is a question to be decided upon various applicable principles of the law of contracts.[98] Many elements may enter into it, but the most important to be considered are the place where the order was given,[99] the place where delivery of the goods is made,[1] and the character of the sale as final or conditional.[2] Where an order for liquors is taken by an agent and forwarded to his principal in another state, who fills the order and delivers the goods to a carrier for transportation to the purchaser, it is generally held that the place of the contract is the place where the order is so filled.[3] But according to some

95. J. & J. Eager Co. *v.* Burke, 74 Conn. 534, 51 Atl. 544; Fishel *v.* Bennett, 56 Conn. 40, 12 Atl. 102; Donahoe *v.* Coleman, 46 Conn. 319; Carter *v.* Clark, 28 Conn. 512; Reynolds *v.* Geary, 26 Conn. 179; Pollard *v.* Allen, 96 Me. 455, 52 Atl. 924; Knowlton *v.* Doherty, 87 Me. 518, 33 Atl. 18, 47 Am. St. Rep. 349; Meservey *v.* Gray, 55 Me. 540; Barnard *v.* Field, 46 Me. 526; Dearborn *v.* Hoit, 41 Me. 120; Frank *v.* O'Neil, 125 Mass. 473; Lindsey *v.* Stone, 123 Mass. 332; Charlton *v.* Donnell, 100 Mass. 229; Finch *v.* Mansfield, 97 Mass. 89; Bligh *v.* James, 6 Allen (Mass.) 570; Savage *v.* Mallory, 4 Allen (Mass.) 492.

96. J. & J. Eager Co. *v.* Burke, 74 Conn. 534, 51 Atl. 544; State *v.* Ascher, 54 Conn. 299, 7 Atl. 822.

In New Hampshire the earlier cases (Holden *v.* Brooks, 66 N. H. 184, 20 Atl. 247; Jones *v.* Surprise, 64 N. H. 243, 9 Atl. 384; Dunbar *v.* Locke, 62 N. H. 442; Lang *v.* Lynch, 38 Fed. 489, 4 L. R. A. 831) construing such a statute were subsequently reversed on the ground that the statute was unconstitutional in that it attempted to regulate interstate commerce (Doherty *v.* Cotter, 68 N. H. 37, 38 Atl. 499; Durkee *v.* Moses, 67 N. H. 115, 23 Atl. 793).

97. *Indiana.*— Keiwert *v.* Meyer, 62 Ind. 587, 30 Am. Rep. 206.

Maine.— Dudley *v.* Buckfield, 51 Me. 254.

Massachusetts.— Portsmouth Brewing Co. *v.* Smith, 155 Mass. 100, 28 N. E. 1130.

Minnesota.— Theo. Hamm Brewing Co. *v.* Young, 76 Minn. 246, 79 N. W. 111, 396.

Nebraska.— Tredway *v.* Riley, 32 Nebr. 495, 49 N. W. 268, 29 Am. St. Rep. 447.

Pennsylvania.— Silverman *v.* Rumbarger, 4 Pa. Super. Ct. 439.

98. See CONTRACTS, 9 Cyc. 664 *et seq.*

99. *Indiana.*— Keiwert *v.* Meyer, 62 Ind. 587, 30 Am. Rep. 206.

Massachusetts.—Dolan *v.* Green, 110 Mass. 322; Abberger *v.* Marrin, 102 Mass. 70.

Michigan.— Webber *v.* Howe, 36 Mich. 150, 24 Am. Rep. 590; Webber *v.* Donnelly, 33 Mich. 469.

New Hampshire.— Boothby *v.* Plaisted, 51 N. H. 436, 12 Am. Rep. 140.

Rhode Island.— Schlesinger *v.* Stratton, 9 R. I. 578.

Vermont.— Bacon *v.* Hunt, 72 Vt. 98, 47 Atl. 394; Beverwick Brewing Co. *v.* Oliver, 69 Vt. 323, 37 Atl. 1110; Erwin *v.* Stafford, 45 Vt. 390; Backman *v.* Mussey, 31 Vt. 547; Territt *v.* Bartlett, 21 Vt. 184.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 469, 475.

1. *Iowa.*—Brown *v.* Wieland, 116 Iowa 711, 89 N. W. 17, 61 L. R. A. 417; Gipps Brewing Co. *v.* De France, 91 Iowa 108, 58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386.

Louisiana.— State *v.* Shields, 110 La. 547, 34 So. 673.

Massachusetts.— Sherley *v.* McCormick, 135 Mass. 126.

Michigan.— Myers *v.* Carr, 12 Mich. 63.

Nebraska.— Wagner *v.* Breed, 29 Nebr. 720, 46 N. W. 286.

New Hampshire.— Felton *v.* Fuller, 29 N. H. 121.

Vermont.— Dame *v.* Flint, 64 Vt. 533, 24 Atl. 1051.

United States.— Garfield *v.* Paris, 96 U. S. 557, 24 L. ed. 821.

See 29 Cent. Dig. tit. "Intoxicating Liquors," §§ 469, 475.

2. Wilson *v.* Stratton, 47 Me. 120; Mack *v.* Lee, 13 R. I. 293; Schlesinger *v.* Stratton, 9 R. I. 578. And see Wasserboehr *v.* Boulier, 84 Me. 165, 24 Atl. 808, 30 Am. St. Rep. 344.

3. J. & J. Eager Co. *v.* Burke, 74 Conn. 534, 51 Atl. 544; Snider *v.* Koehler, 17 Kan. 432; McCarty *v.* Gordon, 16 Kan. 35; Williams *v.* Feiniman, 14 Kan. 288; Carstairs *v.* O'Donnell, 154 Mass. 357, 28 N. E. 271; Merchant *v.* Chapman, 4 Allen (Mass.) 362; Lynch *v.* Scott, 67 N. H. 589, 30 Atl. 420; Fuller *v.* Leet, 59 N. H. 163. But see Starace *v.* Rossi,

decisions the sale is made at the place where the agent takes the order, if his action is final and binding on the principal; but otherwise if the order is to be subject to the principal's approval before it is filled.[4]

c. Knowledge of, or Participation in, Buyer's Unlawful Purpose. Mere knowledge on the part of the seller of intoxicating liquor that the buyer intended to make an illegal use thereof will not defeat a recovery, if the seller did not in any way participate in the unlawful design.[5] But if the seller actively participates in the purchaser's illegal purpose, it puts him in the position of an accomplice and defeats his action to recover the price.[6]

69 Vt. 303, 37 Atl. 1109; Erwin *v.* Stafford, 45 Vt. 390; Backman *v.* Wright, 27 Vt. 187, 65 Am. Dec. 187.

4. Sachs *v.* Garner, 111 Iowa 424, 82 N. W. 1007; Taylor *v.* Pickett, 52 Iowa 467, 3 N. W. 514; Tegler *v.* Shipman, 33 Iowa 194, 11 Am. Rep. 118; Rindskopf *v.* De Ruyter, 39 Mich. 1, 33 Am. Rep. 340.

5. *Alabama.* — McWhorter *v.* Bluthenthal. 136 Ala. 568, 33 So. 552, 96 Am. St. Rep. 43, 131 Ala. 642, 31 So. 559.

Indiana.— Moore *v.* Winstead, 24 Ind. App. 56, 55 N. E. 777. *Compare* Terre Haute Brewing Co. *v.* Hartman, 19 Ind. App. 596, 49 N. E. 864.

Iowa.— Louisville Second Nat. Bank *v.* Curren, 36 Iowa 555; Whitlock *v.* Workman, 15 Iowa 351.

Kansas.— Williams *v.* Davidson, 64 Kan. 707, 68 Pac. 650; Westheimer *v.* Nutt, 34 Kan. 731, 10 Pac. 168; Samuel Bowman Distilling Co. *v.* Nutt, 34 Kan. 724, 10 Pac. 163; Feineman *v.* Sachs, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547; Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730, 50 Pac. 956.

Maine.— Banchor *v.* Mansel, 47 Me. 58.

Massachusetts.— If one sells intoxicating liquor to another, with the knowledge that the purchaser intends to resell the same contrary to law and with a view to such resale, then he cannot recover. If, however, he sells it knowing that the purchaser intended to sell it illegally, but is wholly indifferent as to whether he does so or not, the fact being, as the purchaser well knows, that he has no care, concern, or desire as to such resale, and that his only motive in selling to the purchaser is to sell in the usual course of business, then he may recover. Fuller *v.* Hunt, 182 Mass. 299, 65 N. E. 390; Graves *v.* Johnson, 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355, 156 Mass. 211, 30 N. E. 818, 32 Am. St. Rep. 446, 15 L. R. A. 834. And see Wasserboehr *v.* Morgan, 168 Mass. 291, 47 N. E. 126; Frank *v.* O'Neil, 125 Mass. 472; Lindsey *v.* Stone, 123 Mass. 332; Richards *v.* Woodward, 113 Mass. 285; Hotchkiss *v.* Finan, 105 Mass. 86; Adams *v.* Couilliard, 102 Mass. 167; Webster *v.* Munger, 8 Gray 584; Dater *v.* Earl, 3 Gray 482; Orcutt *v.* Nelson, 1 Gray 536; Foster *v.* Thurston, 11 Cush. 322. But *compare* Ely *v.* Webster, 102 Mass. 304; Bligh *v.* James, 6 Allen 570; Savage *v.* Mallory, 4 Allen 492.

Michigan.—Gambs *v.* Sutherland, 101 Mich. 355, 59 N. W. 652; Webber *v.* Donnelly, 33 Mich. 469; Kling *v.* Fries, 33 Mich. 275.

Missouri.— Curran *v.* Downs, 3 Mo. App. 468.

New Hampshire.— Jones *v.* Sanborn, 68 N. H. 602, 40 Atl. 393; Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927; Lauten *v.* Rowan, 59 N. H. 215; Corning *v.* Abbott, 54 N. H. 469; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205; Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617; Gassett *v.* Godfrey, 26 N. H. 415.

New York.— Kneiss *v.* Seligman, 5 How. Pr. 425.

Vermont.— Erwin *v.* Stafford, 45 Vt. 390; Tuttle *v.* Holland, 43 Vt. 542; Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154; Backman *v.* Wright, 27 Vt. 187, 65 Am. Dec. 187; Smith *v.* Allen, 23 Vt. 298.

United States.— Green *v.* Collins, 10 Fed. Cas. No. 5,755, 3 Cliff. 494.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 470.

Contra.— Bowie *v.* Gilmour, 24 Ont. App. 254; Smith *v.* Benton, 20 Ont. 344.

6. *Alabama.*— McWhorter *v.* Bluthenthal, 136 Ala. 568, 33 So. 552, 96 Am. St. Rep. 43, 131 Ala. 642, 31 So. 559.

Iowa.— Tegler *v.* Shipman, 33 Iowa 194, 11 Am. Rep. 118; Davis *v.* Bronson, 6 Iowa 410.

Kansas.— Geineman *v.* Sachs, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547.

Maine.— Banchor *v.* Mansel, 47 Me. 58.

Nebraska.— Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020.

New Hampshire.— Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927.

New York.— Kneiss *v.* Seligman, 5 How. Pr. 425.

Vermont.— Aiken *v.* Blaisdell, 41 Vt. 655; Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154; Backman *v.* Wright, 27 Vt. 187, 65 Am. Dec. 187.

United States.— Kohn *v.* Melcher, 43 Fed. 641, 10 L. R. A. 439.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 470.

Sale with a view to unlawful resale.— The seller is not entitled to recover if the sale was made with a view to the unlawful resale of the liquor, or for the purpose of enabling the purchaser to resell it unlawfully. Rindskoff *v.* Curran, 34 Iowa 325; Tegler *v.* Shipman, 33 Iowa 194, 11 Am. Rep. 118; Whitlock *v.* Workman, 15 Iowa 351; Dalter *v.* Laue, 13 Iowa 538; Wilson *v.* Stratton, 47 Me. 120; Storz *v.* Finklestein, 46 Nebr. 577, 65 N. W. 195, 30 L. R. A. 644; Smith *v.* Allen, 23 Vt. 298; Territt *v.* Bartlett, 21 Vt. 184.

3. Note For Price of Liquors.[7] Where the purchaser of liquors gives his note for the price, it may be collected by suit if the sale was not in any way contrary to law.[8] But no action can be maintained upon a note given for the price of liquors sold by the payee in violation of law.[9] And it is immaterial that the note was made in another state, if the sale of the liquor was in violation of the laws of the state where the action is brought.[10] But to make this defense available, defendant must assume the burden of proving that the sale was unlawful, as by showing that the seller had no license, or that the sale was for a purpose not permitted by the statute, or to a person to whom it is unlawful to sell,[11] except where the local statute casts upon the payee the burden of proving affirmatively the validity of the sale in question.[12] If the note is given in settlement of an account, or for the purchase of several kinds of articles, including some items of intoxicating liquors unlawfully sold by the payee to the maker, the illegal part of the consideration taints the whole, and no part of the note can be collected by suit.[13] But although the note may thus be invalid as between the original parties, it will still be good in the hands of a *bona fide* holder for value, acquiring it before maturity and without notice of the illegality of the consideration,[14] except where

7. See Commercial Paper, 7 Cyc. 747, 881; Contracts, 9 Cyc. 567.

8. Holmes *v.* Ebersole, 12 Ind. 392; Andover *v.* Kendrick, 42 N. H. 324; Rahter *v.* Lancaster First Nat. Bank, 92 Pa. St. 393. And see Shiretzki *v.* Kessler, (Ala. 1904) 37 So. 422.

The repeal of the statute which made the sale unlawful will not give validity to a note executed in consideration of a sale made while the statute was in force. Holden *v.* Cosgrove, 12 Gray (Mass.) 216; Gorsuth *v.* Butterfield, 2 Wis. 237.

9. *Iowa.*— Tolman *v.* Johnson, 43 Iowa 127.

Kansas.— Glass *v.* Alt, 17 Kan. 444.

Maine.— Webster *v.* Sanborn, 47 Me. 471.

Massachusetts.— Weil *v.* Golden, 141 Mass. 364, 6 N. E. 229; Orcutt *v.* Symonds, 107 Mass. 382; Nourse *v.* Pope, 13 Allen 87; Baker *v.* Collins, 9 Allen 253; Hubbell *v.* Flint, 13 Gray 277.

New York.— Turck *v.* Richmond, 13 Barb. 533. And see Wagner *v.* Scherer, 89 N. Y. App. Div. 202, 85 N. Y. Suppl. 894.

Vermont.— *In re* Lemerise, 73 Vt. 304, 50 Atl. 1062; Miller *v.* Lamery, 62 Vt. 116, 20 Atl. 199; Streit *v.* Sanborn, 47 Vt. 702; Converse *v.* Foster, 32 Vt. 828; Briggs *v.* Campbell, 25 Vt. 704.

England.— Scott *v.* Gillmore, 3 Taunt. 226, 12 Rev. Rep. 641.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 471.

Compare Overall *v.* Bezeau, 37 Mich. 506.

The consideration must be directly connected with the unlawful sale, in order to invalidate the note, and not merely collaterally. Thus, where the sale of liquor is illegal, it is no defense to a promissory note that the maker bought liquor from one who was indebted to the payee for rent, and, in payment for the liquor, assumed the debt for rent, and executed the note therefor; for here the consideration for the note is the rent and not the liquor. Bower *v.* Webber, 69 Iowa 286, 28 N. W. 600.

Note of third person.— Where a third person gives his note to a vendor in payment for liquors unlawfully sold to the vendee, such third person, not having paid the note, cannot recover from the vendee the amount of the note in an action for money paid, since, the note being void, because given for an illegal consideration, the maker is not liable on it. Perkins *v.* Cummings, 2 Gray (Mass.) 258.

10. Fuller *v.* Bean, 30 N. H. 181; Gassett *v.* Godfrey, 26 N. H. 415; Converse *v.* Foster, 32 Vt. 828. *Compare* Monaghan *v.* Reid, 40 Mich. 665, where a note given in Michigan for liquor purchased in New York was held not to be invalid.

11. *Alabama.*— Collins *v.* Jones, 83 Ala. 365, 3 So. 591.

Iowa.— Ressegieu *v.* Van Wagenen, 77 Iowa 351, 42 N. W. 318.

Massachusetts.—Brigham *v.* Potter, 14 Gray 522.

New Hampshire. — Doe *v.* Burnham, 31 N. H. 426.

Rhode Island.— Craig *v.* Proctor, 6 R. I. 547.

12. Brigham *v.* Potter, 14 Gray (Mass.) 522; Doolittle *v.* Lyman, 44 N. H. 608.

13. *Iowa.*— Quigley *v.* Duffey, 52 Iowa 610, 3 N. W. 659; Taylor *v.* Pickett, 52 Iowa 467, 3 N. W. 514; Braitch *v.* Guelick, 37 Iowa 212.

Kansas.— Falk *v.* Ferd. Heim Brewing Co., 10 Kan. App. 716, 62 Pac. 716.

Maine.— Deering *v.* Chapman, 22 Me. 488, 39 Am. Dec. 592.

Mississippi.— Cotten *v.* McKenzie, 57 Miss. 418.

New Hampshire. — Kidder *v.* Blake, 45 N. H. 530; Coburn *v.* Odell, 30 N. H. 540.

North Carolina.— Covington *v.* Threadgill, 88 N. C. 186.

Ohio.— Widoe *v.* Webb, 20 Ohio St. 431, 5 Am. Rep. 664.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 471.

14. *Maine.*— Wing *v.* Ford, 89 Me. 140, 35 Atl. 1023; Hapgood *v.* Needham, 59 Me.

the statute declares that it shall be absolutely void, in which case even an innocent holder cannot enforce it.[15]

4. Mortgage of Liquors. In some states it has been decided that a mortgage of intoxicating liquors, being in the nature of a conditional sale, is invalid, except perhaps in cases where each of the parties holds a license or other necessary authority to buy and sell such goods.[16] But in others it is considered that such a mortgage must be held good as between the parties to it, and as against creditors of the mortgagor, and as possessing sufficient validity to sustain an action by the mortgagee against one taking the property from his possession without authority.[17]

5. Lease of Premises For Saloon Purposes. A lease of premises to be used as a saloon or bar-room is not invalid, where the parties intend only the lawful conduct of a lawful business, and on such a lease an action will lie for the recovery of rent.[18] But the courts will not allow a recovery on a lease made with a view to the illegal sale of liquor on the premises.[19] Generally where the lessor

442; Field *v.* Tibbets, 57 Me. 358, 99 Am. Dec. 779; Baxter *v.* Ellis, 57 Me. 178.

Massachusetts.— Cazet *v.* Field, 9 Gray 329.

New Hampshire.— Great Falls Bank *v.* Farmington, 41 N. H. 32; Doe *v.* Burnham, 31 N. H. 426; Norris *v.* Langley, 19 N. H. 423.

Rhode Island.— See Cobb *v.* Doyle, 7 R. I. 550.

Texas.— Campbell *v.* Jones, 2 Tex. Civ. App. 263, 21 S. W. 723.

Vermont.— Converse *v.* Foster, 32 Vt. 828; Pindar *v.* Barlow, 31 Vt. 529.

Wisconsin.— Johnson *v.* Meeker, 1 Wis. 436.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 471.

An assignee with notice of illegality cannot recover. Braitch *v.* Guelick, 37 Iowa 212.

One who paid nothing for a note and agreed to make payment only in case he should succeed in collecting it cannot recover. Oakes *v.* Merrifield, 93 Me. 297, 45 Atl. 31.

A purchaser after maturity cannot recover (Bissell *v.* Gowdy, 31 Conn. 47; Barlow *v.* Scott, 12 Iowa 63), unless it is otherwise provided by statute (Wing *v.* Ford, 89 Me. 140, 35 Atl. 1023; Field *v.* Tibbetts, 57 Me. 358, 99 Am. Dec. 779).

Proof of character of holder.— Where defendant has proved that the note was given for liquor sold in violation of law, it is then incumbent on plaintiff to show that he is a holder for value and without notice, without which he cannot recover. Rock Island Nat. Bank *v.* Nelson, 41 Iowa 563; Cottle *v.* Cleaves, 70 Me. 256. But if he shows that he purchased the note for value in due course of business, and under circumstances not calculated to awaken suspicion, it will be presumed, until the contrary is shown, that he had no notice of the illegality. Swett *v.* Hooper, 62 Me. 54; Baxter *v.* Ellis, 57 Me. 178.

A purchaser of negotiable paper is not put upon inquiry by mere knowledge that the payee is engaged in selling liquor, so as to make it his duty to find out whether the consideration of the note was not the unlawful sale of liquor. Bottomley *v.* Goldsmith, 36 Mich. 27.

15. See Dillingham *v.* Blood, 66 Me. 140; Streit *v.* Sanborn, 47 Vt. 702.

16. C. D. Smith Drug Co. *v.* Emporia First Nat. Bank, 60 Kan. 184, 55 Pac. 851; Flersheim *v.* Cary, 39 Kan. 178, 17 Pac. 825; Gerlach *v.* Skinner, 34 Kan. 86, 8 Pac. 257, 55 Am. Rep. 240; Korman *v.* Henry, 32 Kan. 49, 343, 3 Pac. 764, 4 Pac. 262; Hay *v.* Parker, 55 Me. 355.

17. Cobb *v.* Farr, 16 Gray (Mass.) 597; Bagg *v.* Jerome, 7 Mich. 145. And see U. S. *v.* Three Hundred and Seventy-Two Pipes Distilled Spirits, 28 Fed. Cas. No. 16,505, 5 Sawy. 421.

18. McKeever *v.* Beacon, 101 Iowa 173, 70 N. W. 112; Goodall *v.* Gerke Brewing Co., 56 Ohio St. 257, 46 N. E. 983; Zink *v.* Grant, 25 Ohio St. 352; Weitzel *v.* Slavin, 13 Ohio Cir. Ct. 221, 7 Ohio Cir. Dec. 155.

License obtained after lease made.— Such a lease is not void merely because a license has not been obtained by the tenant at the time it is made, where there is nothing to show an intention or understanding of the parties that the business should be carried on without a license. Kerley *v.* Mayer, 10 Misc. (N. Y.) 718, 31 N. Y. Suppl. 818.

Lease of premises in prohibited place.— A lease is not void because the property is situated within the prohibited distance from a school-house, where it does not appear that a license could not have been obtained by transfer from other premises, as allowed by the statute. Shedlinsky *v.* Budweiser Brewing Co., 17 N. Y. App. Div. 470, 45 N. Y. Suppl. 174.

A lease containing no provision with reference to the sale of liquor on the premises, and with no parol contract providing for such sale, is not avoided by the subsequent use of the premises for that purpose. Kittredge *v.* Allemania Soc., 3 Ohio S. & C. Pl. 217, 3 Ohio N. P. 312.

19. Mitchell *v.* Scott, 62 N. H. 596.

In Ohio the use of the premises by the tenant for the unlawful sale of liquor renders the lease void at the election of the lessor;

discovers that the premises, leased for a lawful purpose, are being used for the illegal sale of liquor, he may cancel the lease and recover possession of the property by an action of forcible entry and detainer or other appropriate proceeding.[20]

C. Recovery of Price of Liquor Sold — 1. No Recovery on Illegal Sale. It is a good defense to an action to recover the price of liquors sold by plaintiff to defendant that the sale was contrary to law.[21] But a recovery may be had where the sale was made before the enactment of the statute forbidding such sales,[22] or after the repeal of a statute which merely provided that there should be no recovery on liquor contracts,[23] although the repeal of a law which absolutely prohibited sales of a particular kind, or declared liquor contracts to be absolutely void, cannot give a right of action on a contract made in contravention of the statute while it was in force.[24] And it seems that an award of arbitrators giving to one of the parties credit for liquors illegally sold cannot be overturned on that ground, although he could not have maintained an action at law for the same item.[25]

2. Accounts Including Other Items. Where a plaintiff's cause of action embraces several demands, some of which are for liquors illegally sold, he can recover nothing if the contract or transaction was entire and inseverable and the consideration cannot be apportioned between the legal and illegal items.[26] But if the price or consideration is separable, separate prices or distinct agreed values being placed on the prohibited goods and on the lawful items, plaintiff may recover for so much of the whole as is not affected by the illegality of the rest;[27] and the same rule applies if the unlawful items are waived, withdrawn, or stricken out by consent.[28] In an action on a current account, defendant has the burden of proving, if such is his contention, that part of it was for liquor illegally sold.[29] If partial payments are made on an account, consisting partly of charges for liquors illegally sold, and partly of other and valid charges, it is the right of the parties to apply them to the illegal items if they so choose, or of the creditor to make such application in the absence of an appropriation by the debtor;[30] but if

but where the lease was made for the purpose of having the premises so used, and this purpose is afterward accomplished by the tenant, the lease becomes void as to both parties. Justice *v.* Lowe, 26 Ohio St. 372.

20. People *v.* Bennett, 14 Hun (N. Y.) 63; McGarvey *v.* Puckett, 27 Ohio St. 669.

21. See *supra*, XIII, B, 2, a.

Settlement of partnership.— Where articles of partnership contemplate the sale of liquors, and the stock on dissolution contains such goods, and on settlement one partner is charged with the price of them, and is authorized to pay certain debts incurred in their purchase, the other partner, when sued for contribution, cannot set up the liquor law in defense of the items paid for such debts. McGunn *v.* Hanlin, 29 Mich. 476.

22. Torrey *v.* Corliss, 33 Me. 333.

23. Gorsuth *v.* Butterfield, 2 Wis. 237; Bird *v.* Fake, 1 Pinn. (Wis.) 290.

24. Hathaway *v.* Moran, 44 Me. 67. See Parsons *v.* Bridgham, 34 Me. 240.

25. Davis *v.* Wentworth, 17 N. H. 567.

26. Ladd *v.* Dillingham, 34 Me. 316. See Barrett *v.* Delano, (Me. 1888) 14 Atl. 288; Gaitskill *v.* Greathead, 1 D. & R. 359, 16 E. C. L. 42.

Liquor and vessels.— If intoxicating liquors are illegally sold, with an agreement that the vessels containing them, which are sold at the same time, may be returned and the buyer credited with the price charged, no action lies to recover the price of the vessels not returned; the sale, being illegal, vitiates the entire contract. Holt *v.* O'Brien, 15 Gray (Mass.) 311. And see Wirth *v.* Roche, 92 Me. 383, 42 Atl. 794.

27. Carleton *v.* Woods, 28 N. H. 290; Walker *v.* Lovell, 28 N. H. 138, 61 Am. Dec. 605.

Tavern bill.— Although a bill rendered by an innkeeper includes charges for liquors which he had no authority to sell, he may still recover so much of it as is chargeable for board and lodging and other proper accommodations. Burnyeat *v.* Hutchinson, 5 B. & Ald. 241, 24 Rev. Rep. 345, 7 E. C. L. 138; Gilpin *v.* Rendle, 1 Selw. 61; Philippe *v.* Desmarais, 28 L. C. Jur. 291. And see Towle *v.* Blake, 38 Me. 528; Cochrane *v.* Clough, 38 Me. 25; Chase *v.* Burkholder, 18 Pa. St. 48.

28. Cochrane *v.* Clough, 38 Me. 25; Chase *v.* Burkholder, 18 Pa. St. 48.

29. Overstreet *v.* Brubaker, 98 Mo. App. 75, 71 S. W. 1090. But *compare* Graves *v.* Ranger, 52 Vt. 424.

30. Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268; Philpott *v.* Jones, 2 A. & E. 41, 4 L. J. K. B. 65, 4 N. & M. 14, 29 E. C. L. 40; Crookshank *v.* Rose, 5 C. & P. 19, 24 E. C. L. 432. And see Plummer *v.* Erskine, 58 Me. 59.

no appropriation is made by the parties, the law will first apply the payments to the legal items.[31]

3. Limitation of Amount of Recovery. In some of the states statutes have been enacted forbidding tavern-keepers and other dealers in intoxicating liquors to sell the same to any person on credit, beyond a designated small amount. Such a law prevents the maintenance of an action for the recovery of the price of liquors sold, except in the statutory amount.[32]

4. Actions — a. In General. In an action for the price of liquors sold, the defense of illegality must be set up by defendant if he means to rely on it;[33] and the question whether or not the sale was illegal, in so far as it depends on matters of fact, is for the jury,[34] under proper instructions from the court.[35]

b. Pleadings. In an action to recover the price of liquors sold, the declaration or complaint need not allege that the sale was authorized by law or by plaintiff's license,[36] for if defendant relies on the illegality of the sale as a defense, he must allege and prove it, and this cannot be done under the general issue,[37] but must be specially pleaded, and by a plea setting forth every fact essential to show that the sale was contrary to law.[38]

c. Evidence. In most jurisdictions, in an action for the price of liquors sold, it is not incumbent on plaintiff, in the first instance, to prove that he was duly licensed or authorized to make the sale; on the contrary, if defendant relies on the illegality of the sale, he must assume the burden of proving it.[39] In a few jurisdictions, however, the rule is otherwise.[40] The admissibility and sufficiency

31. Solomon *v.* Deschler, 4 Minn. 278; Dunbar *v.* Garrity, 58 N. H. 575.

32. *Illinois.*— Sappington *v.* Carter, 67 Ill. 482. *Compare* Smith *v.* Hickman, 68 Ill. 314.

Mississippi.— Brittain *v.* Bethany, 31 Miss. 331.

New Hampshire.—Hilton *v.* Burley, 2 N. H. 193.

North Carolina.— Kizer *v.* Randleman, 50 N. C. 428.

Vermont.— Peters *v.* Slack, 13 Vt. 590; Wood *v.* Barney, 2 Vt. 369.

United States.— Koones *v.* Thomee, 14 Fed. Cas. No. 7,926, 1 Cranch C. C. 290.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 477.

33. See Smith *v.* Joyce, 12 Barb. (N. Y.) 21.

As to the practice in Pennsylvania, under the statute providing that every suit on an account for liquors shall abate, and that plaintiff shall pay double costs see Ratajizyk *v.* Matyazwich, 1 Lack. Leg. N. (Pa.) 331.

34. Dunbar *v.* Locke, 62 N. H. 442.

35. See Husted *v.* O'Donnell, 118 Mass. 424.

36. Maher *v.* Dougherty, 8 Gray (Mass.) 437.

37. Cassidy *v.* Farrell, 109 Mass. 397; Horan *v.* Weiler, 41 Pa. St. 470. *Compare* Dixie *v.* Abbott, 7 Cush. (Mass.) 610.

38. Bluthenthal *v.* McWhorter, 131 Ala. 642, 31 So. 559; Suit *v.* Woodhall, 116 Mass. 547; Bligh *v.* James, 5 Allen (Mass.) 106; Horan *v.* Weiler, 41 Pa. St. 470.

39. *Maine.*— Pollard *v.* Allen, 96 Me. 455, 52 Atl. 924.

Massachusetts. — Portsmouth Brewing Co. *v.* Smith, 155 Mass. 100, 28 N. E. 1130; Wilson *v.* Melvin, 13 Gray 73. And see Jones *v.* McLeod, 103 Mass. 58.

Nebraska.— Gillen *v.* Riley, 27 Nebr. 158, 42 N. W. 1054.

New York.— Smith *v.* Joyce, 12 Barb. 21.

Pennsylvania.— Horan *v.* Weiler, 41 Pa. St. 470.

Rhode Island. — Craig *v.* Proctor, 6 R. I. 547.

South Carolina.— Herlock *v.* Riser, 1 McCord 481.

See 29 Cent. Dig. tit. "Intoxicating Liquors," § 481.

Violation of local option law.— Where defendant alleges that the liquor in question was sold to him in a county where the local option law was in force at the time, it is not enough for him to show that there was a contract to sell in that county, but he must also prove the actual consummation of the sale by the delivery of the goods there. Clohessy *v.* Roedelheim, 99 Pa. St. 56.

40. Solomon *v.* Dreschler, 4 Minn. 278; Garland *v.* Lane, 46 N. H. 245; Bliss *v.* Brainard, 41 N. H. 256; Carlton *v.* Bailey, 27 N. H. 230. *Compare* Olson *v.* Hurley, 33 Minn. 39, 21 N. W. 842; Kidder *v.* Norris, 18 N. H. 532.

In Alabama it is, by statute, provided that "no person must obtain a judgment . . . upon any account, any item of which is for vinous or spirituous liquors in less quantities than one quart, without producing . . . a license showing his authority to retail at the date of such item." Code (1896), § 3522. And see Carter *v.* Fischer, 127 Ala. 52, 28 So. 376; Stallings *v.* Lee, 123 Ala. 464, 26 So. 211; Rasberry *v.* Pulliam, 78 Ala. 191.

In Michigan under a statute providing that, to entitle the seller to recover, there must be "positive proof" that the liquors sold were imported from abroad and sold in the original packages, it was held that this re-

of evidence offered to show that the vendor of liquors knew that the purchaser was a person of intemperate habits[41] or that he intended to sell them in violation of law[42] are to be determined in accordance with the general rules on the subject.[43]

D. Recovery of Money Paid For Liquor — 1. Right of Recovery — a. In General. Although an executory contract for the illegal sale of liquor may be rescinded and partial payments reclaimed,[44] yet if the contract has been fully executed, no action will lie, at common law, to recover back the price or value of the liquors paid.[45] But in several states statutes have been enacted providing that all payments for liquors sold illegally shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise and agreement to repay the same on demand.[46] It is generally necessary that a repayment shall have been demanded and refused.[47] The Iowa statute applies to all illegal sales made by any person whomsoever.[48]

b. Legality of Sale. An action of this kind cannot be sustained unless it is

quirement was not met where an account was presented, opposite each item of which were added the words "imported and sold in the original packages," and defendant admitted the correctness of the account. Niles *v.* Rhodes, 7 Mich. 374.

41. Collins *v.* Jones, 83 Ala. 365, 3 So. 591.

42. Oakes *v.* Merrifield, 93 Me. 297, 45 Atl. 31; Charlton *v.* Donnell, 100 Mass. 229; Crary *v.* Pollard, 14 Allen (Mass.) 284; Savage *v.* Mallory, 4 Allen (Mass.) 492; Kellogg *v.* Moore, 2 Allen (Mass.) 266; Merchant *v.* Chapman, 2 Allen (Mass.) 228; Briggs *v.* Rafferty, 14 Gray (Mass.) 525; Poultney *v.* Mackey, 13 Gray (Mass.) 280; Hubbell *v.* Flint, 13 Gray (Mass.) 277; Mack *v.* Lee, 13 R. I. 293.

43. See, generally, Evidence.

44. Smith *v.* Grable, 14 Iowa 429; Stansfield *v.* Kunz, 62 Kan. 797, 64 Pac. 614. And see McGunn *v.* Hanlin, 29 Mich. 476. *Compare* Caldwell *v.* Wentworth, 14 N. H. 431.

45. Connally *v.* McConnell, 1 Pennew. (Del.) 133, 39 Atl. 773; Mudgett *v.* Morton, 60 Me. 260; Ellsworth *v.* Mitchell, 31 Me. 247.

A garnishee is not permitted to deduct, out of the effects and credits in his hands, a demand against the principal defendant for money paid on the illegal sale of intoxicating liquors. Thayer *v.* Partridge, 47 Vt. 423.

46. See the statutes of the different states. And see the cases cited *infra*, this note.

Validity.— Such a statute is valid and constitutional, as an exercise of the police power, and is not objectionable as interfering with interstate commerce. Connolly *v.* Scarr, 72 Iowa 223, 33 N. W. 641.

Effect of repeal.— The right of action given by these statutes is a vested right in all persons who have paid money on such illegal sales, and is not affected by subsequent changes in the law. Dewey *v.* Dolan, 121 Mass. 9; Adams *v.* Goodnow, 101 Mass. 81; Peters *v.* Goulden, 27 Mich. 171.

Limitation.— An action under these statutes is barred only at the end of the same period which would bar a valid promise or agreement to pay the money in question; it is not a penal action such as is barred in two years. Woodward *v.* Squires, 41 Iowa 677.

Claim assignable.— A claim for the repayment of moneys paid on an illegal sale of liquors is assignable. Sellers *v.* Arie, 99 Iowa 515, 68 N. W. 814.

Purchase for illegal purpose.— Although the purchaser bought the liquor for the purpose and with the intention of reselling it in violation of law, this will not prevent him from maintaining an action on the statute. Yerteau *v.* Bacon, 65 Vt. 516, 27 Atl. 198.

Proportional recovery.— If a single payment in money is made for a stock in trade, only a part of which consisted of liquor, the purchaser may recover the proportional amount paid for the liquor. Jacobs *v.* Stokes, 12 Mich. 381; McGuinness *v.* Bligh, 11 R. I. 94.

Medium of payment.— Where the purchaser gave his note for the price of the liquors, he will not be able to maintain this action until he has paid the note. Carlin *v.* Heller, 34 Iowa 256; Orcutt *v.* Symonds, 107 Mass. 382. Such a statute does not extend to payments made in real estate; and the foreclosure of a mortgage, made to secure the price of liquors illegally sold, has the effect of a payment of the debt and makes absolute the title of the mortgagee. Carter *v.* Clark, 28 Conn. 512; McLaughlin *v.* Cosgrove, 99 Mass. 4.

47. Foley *v.* Leisy Brewing Co., 116 Iowa 176, 89 N. W. 230; Schober *v.* Rosenfield, 75 Iowa 455, 39 N. W. 706; Oswald *v.* Moran, 8 N. D. 111, 77 N. W. 281.

48. Tobert *v.* Clough, 72 Iowa 220, 33 N. W. 639 (licensed retailer selling at wholesale); Becker *v.* Betten, 39 Iowa 668 (manufacturer). *Compare* Kohn *v.* Melcher, 29 Fed. 433.

Liability of agent.— An action will lie against an agent, who sold in violation of law, provided he received the price, and any part of it was received as his own money, but not otherwise. Foley *v.* Leisy Brewing Co., 116 Iowa 176, 89 N. W. 230; Sellers *v.* Arie, 99 Iowa 515, 68 N. W. 814; Schober *v.* Rosenfield, 75 Iowa 455, 39 N. W. 706.

shown that the sale of liquor in question was in violation of some positive law of the state.[49]

c. Place of Sale. The statutes under consideration do not authorize a recovery of the price where the contract of sale was made and completed in another state,[50] even though the seller knew of the buyer's purpose to dispose of the liquors in violation of law, and assisted and participated in such unlawful purpose to such an extent as would have deprived him of the right to sue for the price.[51]

2. Form of Action. An action on a statute of this character is an action of contract and not in tort,[52] and where the common-law system of pleading prevails, the proper form of action is assumpsit, as for money had and received.[53] The claim for money paid on such an illegal sale may also be pleaded as a set-off or counter-claim, in cases where such a plea would otherwise be permissible.[54]

INTOXICATION. A synonym of "inebriety" or "drunkenness," implying or evidenced by undue and abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently.[1] (Intoxication: As Affecting — Admissibility or Weight and Sufficiency of Evidence, see Criminal Law; Evidence; Competency of Witness, see Witnesses; Running of Statute of Limitations, see Limitations of Actions; Testamentary Capacity, see Wills; Validity of Contract, see Contracts; Deeds; Drunkards. As Defense to Contract, see Drunkards. As Evidence of Contributory Negligence, see Negligence. As Excuse For Crime, see Criminal Law. As Ground For — Divorce, see Divorce; Ejection of Passenger, see Carriers; Refusing to Receive Passenger, see Carriers; Rescission of Contract, see Contracts. Burden of Proving, see Criminal Law. Of Juror as Ground For New Trial, see Criminal Law; New Trial. Of Passenger, see Carriers. Of Witness as Ground For New Trial, see Criminal Law. See also, generally, Drunkards; Intoxicating Liquors.)

INTRA. Within; in; by; near.[2]

IN TRADITIONIBUS SCRIPTORUM (CHARTARUM) NON QUOD DICTUM EST, SED QUOD GESTUM (FACTUM) EST, INSPICITUR. A maxim meaning "In the delivery of writings (deeds) not what is said but what is done is to be considered."[3]

INTRALIMINAL. When used with reference to mining property rights conferred by a lode location, a term which embraces all within its boundaries down to the center of the earth.[4] (See, generally, Mines and Minerals.)

49. Foley *v.* Leisy Brewing Co., 116 Iowa 176, 89 N. W. 230; Hurlburt *v.* Fyock, 73 Iowa 477, 35 N. W. 482; Church *v.* Simpson, 25 Iowa 408.

On a sale by a partnership, where one of the partners had a license to sell liquors, the action cannot be sustained unless it is shown that the other sold the liquor, the presumption of law being that the partner sold it who had a right to sell it. Webber *v.* Williams, 36 Me. 512.

50. Brown *v.* Wieland, 116 Iowa 711, 89 N. W. 17, 61 L. R. A. 417; Dolan *v.* Green, 110 Mass. 322; Abberger *v.* Marrin, 102 Mass. 70; Bollinger *v.* Wilson, 76 Minn. 262, 79 N. W. 109, 77 Am. St. Rep. 646.

Presumption as to place of payment.— Where the contract of sale was entered into within the state, the presumption is that payment was intended to be made, and was in fact made, in the state, in the absence of evidence to the contrary. Connolly *v.* Scarr, 72 Iowa 223, 33 N. W. 641.

51. Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; Bollinger *v.* Wilson, 76 Minn. 262, 79 N. W. 109, 77 Am. St. Rep. 646.

52. Foley *v.* Leisy Brewing Co., 116 Iowa 176, 89 N. W. 230.

53. Friend *v.* Dunks, 37 Mich. 25; Laport *v.* Bacon, 48 Vt. 176.

54. Tolman *v.* Johnson, 43 Iowa 127; Roethke *v.* Philip Best Brewing Co., 33 Mich. 340; Delahaye *v.* Heitkemper, 16 Nebr. 475, 20 N. W. 385; Gorman *v.* Keough, 22 R. I. 47, 46 Atl. 37.

1. Standard L., etc., Ins. Co. *v.* Jones, 94 Ala. 434, 441, 10 So. 530.

2. Burrill L. Dict. [*citing* Calvini Lex.].

"Intra fauces terræ" see Passenger Cases, 7 How. (U. S.) 283, 538, 12 L. ed. 702.

3. Bouvier L. Dict.

Applied in Thoroughgood's Case, 19 Coke 136*a*, 137*a*. See also State *v.* Peck, 53 Me. 284, 299; Fairbanks *v.* Metcalf, 8 Mass. 230, 237; Dawson *v.* Hall, 2 Mich. 390.

4. Jefferson Min. Co. *v.* Anchoria-Leland Min., etc., Co., (Cal. 1904) 75 Pac. 1070.

IN TRANSITU. During the transit, or removal from one place to another.[5] (In Transitu: Stoppage in, see CARRIERS; SALES.)

INTRASTATE COMMERCE. A term which may include the duty of a common carrier to receive all proper goods offered to it for transportation, to make no undue discrimination between shippers of a like class, and to transport with reasonable expedition.[6] (See, generally, COMMERCE. See also INTERSTATE.)

INTRA VIRES. As relates to corporations, a term applied to the discretion and acts of the board of directors which are within the scope of their lawful authority.[7] (See, generally, CORPORATIONS.)

INTRINSIC VALUE.[8] The true value of a thing, its inherent, and essential value, not depending on accident, place or person, but the same everywhere and to everyone.[9] (See INVOICE VALUE; VALUE.)

INTRODUCED.[10] As applied to evidence, given;[11] admitted and considered in the cause.[12]

INTRODUCTORY. Serving to introduce something; prefatory; preliminary.[13]

INTROMISSION. A term partly legal, partly mercantile, signifying dealings in stock, goods, or cash of a principal coming into the hands of his agent, to be accounted for by the agent to his principal.[14]

INTRUDER. One who thrusts himself in, or enters where he has no right;[15] one who enters upon land without either right of possession or color of title;[16] one who, on the death of the ancestor, enters on the land unlawfully, before the heir can enter.[17] (Intruder: In Public Office, see OFFICERS. On Land, see FORCIBLE ENTRY AND DETAINER; ESTATES. See also ENCROACH; ENCROACHMENT; INTRUSION.)

INTRUSION.[18] An entry by a stranger, after a particular estate of freehold is

1073, 64 L. R. A. 925, where it is said: "The property rights conferred by a lode location . . . [under U. S. Rev. St. (1878) § 2322, U. S. Comp. St. (1901) p. 1425] are twofold, intraliminal, and extraliminal or extralateral. The first embraces all within its boundaries down to the center of the earth; the second, while depending for its existence upon something within such boundaries, may nevertheless be exercised, under certain conditions, beyond those boundaries."

5. Bouvier L. Dict. See also Hopkins *v.* Baker, 78 Md. 363, 380, 28 Atl. 284, 22 L. R. A. 477; Conley *v.* Chedic, 7 Nev. 336, 341; Chandler *v.* Fulton, 10 Tex. 2, 13, 60 Am. Dec. 188; Passenger Cases, 7 How. (U. S.) 283, 523, 12 L. ed. 702; License Cases, 5 How. (U. S.) 504, 594, 12 L. ed. 256; Dickins *v.* Beal, 10 Pet. (U. S.) 572, 576, 9 L. ed. 538; Castillero *v.* U. S., 2 Black (U. S.) 17, 368, 17 L. ed. 360; *In re* Welman, 29 Fed. Cas. No. 17,407, 20 Vt. 653, 658; *Ex p.* Rosevear China Clay Co., 11 Ch. D. 560, 565, 573, 48 L. J. Bankr. 100, 40 L. T. Rep. N. S. 730, 27 Wkly. Rep. 591; Cowas-Jee *v.* Thompson, 3 Moore Indian App. 422, 429, 18 Eng. Reprint 560, 5 Moore P. C. 165, 13 Eng. Reprint 454.

6. Swift *v.* Philadelphia, etc., R. Co., 64 Fed. 59, 68, comparing the term with "interstate commerce."

7. Pittsburg, etc., R. Co. *v.* Dodd, 115 Ky. 176, 193, 72 S. W. 822, 74 S. W. 1096, 24 Ky. L. Rep. 2057.

8. Distinguished from "market value" in Douglas *v.* Merceles, 25 N. J. Eq. 144, 146.

9. State Bank *v.* Ford, 27 N. C. 692, 698.

10. "Introduced" into the Indian country see U. S. *v.* Four Bottles Sour-Mash Whisky, 90 Fed. 720, 723.

11. Jones *v.* Layman, 123 Ind. 569, 572, 24 N. E. 363; Kennedy *v.* Divine, 77 Ind. 490, 492. See also Brock *v.* State, 85 Ind. 397.

12. Stair *v.* Richardson, 108 Ind. 429, 431, 9 N. E. 300 [*citing* Beatty *v.* O'Connor, 106 Ind. 81, 5 N. E. 880].

13. Century Dict.

"Introductory words" see Fox *v.* Phelps, 17 Wend. (N. Y.) 393, 398 [*citing* Hogan *v.* Jackson, Cowp. 299].

14. Stewart *v.* McKean, 3 C. L. R. 460, 10 Exch. 675, 678, 24 L. J. Exch. 145, 3 Wkly. Rep. 216, 29 Eng. L. & Eq. 383.

15. Webster Dict. [*quoted* in O'Donnell *v.* McIntyre, 16 Abb. N. Cas. (N. Y.) 84, 88].

"Intruded themselves into" see Reg. *v.* Willats, 7 Q. B. 516, 519, 9 Jur. 509, 14 L. J. M. C. 157, 2 New Sess. Cas. 5, 53 E. C. L. 516.

"'Intruding' was used in the old books, not in the sense of turning anybody out, but of taking the vacant possession immediately after the death of the ancestor, before the heir or devisee entered." Howard *v.* Shrewsbury, L. R. 17 Eq. 378, 399, 43 L. J. Ch. 495, 29 L. T. Rep. N. S. 862, 22 Wkly. Rep. 290 [*distinguishing* Crowther *v.* Crowther, 23 Beav. 305, 308, 26 L. J. Ch. 702, 53 Eng. Reprint 120].

16. Miller *v.* McCullough, 104 Pa. St. 624, 630.

17. Bouvier L. Dict. [*quoted* in O'Donnell *v.* McIntyre, 16 Abb. N. Cas. (N. Y.) 84, 86].

18. Distinguished from "trespass" in People *v.* Walsh, 96 Ill. 232, 255, 36 Am. Rep. 135. See TRESPASS.

determined, before him in reversion or remainder.[19] At common law, one of the modes of ouster of a freehold;[20] a writ which lies against him who enters after the tenant in dower, or any other tenant for life, and holds out him in reversion or remainder.[21] (See INTRUDER; and, generally, ESTATES.)

INTRUST. To deliver in trust, to confide to the care of, to commit to another with confidence in his fidelity.[22] (See CHARGE; EMPLOY; and, generally, TRUSTS.)

INTRUSTED. Deposited.[23]

INURE.[24] To take or have effect; to operate.[25] (See CAUSE.)

IN USE. In employment.[26]

INUTILIS LABOR, ET SINE FRUCTU, NON EST EFFECTUS LEGIS. A maxim meaning "Useless labor and without fruit is not the effect of law."[27]

INVALID.[28] Having no force, effect or efficacy;[29] null; void.[30]

INVASION. A word which necessarily supposes organization and military power or force.[31] (See EXPEDITION; and, generally, WAR.)

INVEIGLE. To decoy,[32] *q. v.*; to beguile; to entice, *q. v.*; to seduce; to

19. As when a tenant for life dieth seised of certain lands and tenements, and a stranger cometh thereon after such death of the tenant, and before any entry of him in reversion or remainder. Hulick *v.* Scovil, 9 Ill. 159, 170 [*citing* 3 Blackstone Comm. 169]; Boylan *v.* Deinzer, 45 N. J. Eq. 485, 491, 18 Atl. 119; Birthright *v.* Hall, 3 Munf. (Va.) 536, 540]. See also Martindale *v.* Troop, 3 Harr. & M. (Md.) 244, 250.

20. Hulick *v.* Scovil, 9 Ill. 159, 170.

21. Piercy *v.* Gardner, 3 Hodges, 103, 107 [*quoting* Termes de la Ley], where it is also said: "'Intrusion' says Finch [Finch L. p. 195] is after the death of tenant for life, be it a man's own life, or another man's in dower or by courtesy."

22. Webster Dict. [*quoted* in Smith *v.* Marden, 60 N. H. 509, 510].

23. See 13 Cyc. 821 note 3.

"Intrusted" implies some privity between the owner or person having the right of disposing of the goods, and him in whose favor a lien is claimed. Sargent *v.* Usher, 55 N. H. 287, 290, 20 Am. Dec. 208. Within a statute providing that every person having any goods, effects, or credits of the principal defendant intrusted or deposited in his hands or possession, "intrusted" means something more than mere possession. Staniels *v.* Raymond, 4 Cush. (Mass.) 314, 316.

As used in connection with other words see the following phrases: "Anyways intrusted" (Boyer *v.* Norwich, [1892] A. C. 417, 418, 56 J. P. 692, 61 L. J. P. C. 46, 67 L. T. Rep. N. S. 30); "intrusted in the hands" (Avery *v.* Monroe, 172 Mass. 132, 133, 51 N. E. 452, 70 Am. St. Rep. 250); "intrusted to be pastured" (Smith *v.* Marden, 60 N. H. 509, 512); "intrusted with" (Rex *v.* Bakewell, R. & R. 26); "intrusted with merchandise" (Cairns *v.* Page, 165 Mass. 552, 554, 43 N. E. 503); "intrusted . . . with the duty of seeing" (Copithorne *v.* Hardy, 173 Mass. 400, 402, 53 N. E. 915); "intrusted with the possession of" (Fuentes *v.* Montis, L. R. 4 C. P. 93, 97, 38 L. J. C. P. 95, 19 L. T. Rep. N. S. 364, 17 Wkly. Rep. 208; Wood *v.* Rowcliffe, 6 Hare 183, 191, 31 Eng. Ch. 183; Sheppard *v.* Union Bank, 7 H. & N. 661, 668, 8 Jur. N. S. 264, 31 L. J. Exch. 154, 5 L. T. Rep. N. S. 757, 10 Wkly. Rep. 299; Hatfeild *v.* Phillips, 11 L. J. Exch. 425, 428, 9 M. & W. 647; Phillips *v.* Huth, 10 L. J. Exch. 65, 67, 6 M. & W. 572); "person intrusted with the mail" (U. S. *v.* Bowman, 3 N. M. 201, 203, 5 Pac. 333).

24. Distinguished from "descend" in Hinson *v.* Booth, 39 Fla. 333, 346, 22 So. 687. See Godwin *v.* King, 31 Fla. 525, 535, 13 So. 108.

25. Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa 234, 240, 91 N. W. 1081 [*citing* Anderson L. Dict.].

"Inure to the benefit of any carrier" see Joyce Ins. § 3551.

"Inure wholly . . . of such pensioner" see Holmes *v.* Tallada, 125 Pa. St. 133, 135, 17 Atl. 238, 11 Am. St. Rep. 880, 3 L. R. A. 219.

26. Astor *v.* Merritt, 111 U. S. 202, 213, 4 S. Ct. 413, 28 L. ed. 401.

27. Bouvier L. Dict. [*citing* Wingate Leg. Max. 38].

28. This compound word has precisely the same meaning as the two words 'not valid,' 'in,' as a prefix of 'valid,' being used in a privative or negative sense." Hood *v.* Perry, 75 Ga. 310, 312.

Distinguished from "defective" or "insufficient" in Rich *v.* Chicago, 187 Ill. 396, 399, 58 N. E. 306; Kuester *v.* Chicago, 187 Ill. 21, 26, 58 N. E. 307.

29. Webster Dict. [*quoted* in Hood *v.* Perry, 75 Ga. 310, 312; Rich *v.* Chicago, 187 Ill. 396, 399, 58 N. E. 306; State *v.* Casteel, 110 Ind. 174, 182, 11 N. E. 219].

30. Webster Dict. [*quoted* in Hood *v.* Perry, 75 Ga. 310, 312; Rich *v.* Chicago, 187 Ill. 396, 399, 58 N. E. 306; State *v.* Casteel, 110 Ind. 174, 182, 11 N. E. 219]. See also Lawrence *v.* Hornick, 81 Iowa 193, 195, 46 N. W. 987.

"Invalid pensioners" see Mass. Rev. L. (1902) p. 700.

31. Boon *v.* Ætna Ins. Co., 40 Conn. 575, 585; Drinkwater *v.* Royal Exch. Assur. Co., Wilm. 282, 290.

32. State *v.* McCoy, 2 Speers (S. C.) 711, 716; State *v.* Miles, 2 Nott & M. (S. C.) 1, 4. See also 13 Cyc. 432.

wheedle;[33] to persuade to something bad by deceptive arts or flattery, or by any artful or seductive means.[34] In a legal sense, to induce a party to come within the jurisdiction of the court by some scheme, subterfuge, fraud, trick, device, or misrepresentation, that he may be served with process.[35] (To Inveigle: Apprentice, see APPRENTICES. Child or Other Person, see KIDNAPPING. Female, see ABDUCTION. Husband or Wife, see HUSBAND AND WIFE. Servant, see MASTER AND SERVANT. See also DECEPTION; DECOY; DEVICE; ENTICE.)

INVENIENS LIBELLUM FAMOSUM ET NON CORRUMPENS PUNITUR. A maxim meaning "He who finds a libel and does not destroy it, is punished."[36]

INVENTION. See, generally, PATENTS.

INVENTORY. A well-known business term[37] having a well-defined meaning in commercial circles[38] and used to designate articles of merchandise or personal property, that the same may be distinguished without any attempt to describe in detail the properties of each article;[39] an itemized list or schedule;[40] a list or catalogue of goods and chattels, containing a full, true, and particular description of each, with its value, made on various occasions, as on the sale of goods, decease of a person, storage of goods for safety;[41] a list or schedule or enumeration of property, setting out the names of the different articles either singly or in classes;[42] a list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights, and credits, and, in some cases, the land and tenements, of a person or persons;[43] an itemized list of the various articles constituting a collection, estate, stock in trade, etc., with their estimated or actual values;[44] an itemized list or enumeration of property, article by article;[45] an account or catalogue of goods, with the value, marks, or particular description thereof annexed; a list or catalogue of property, merely;[46] an itemized list of goods or valuables, with their

33. People *v.* De Leon, 47 Hun (N. Y.) 308, 310; State *v.* McCoy, 2 Speers (S. C.) 711, 716; State *v.* Miles, 2 Nott & M. (S. C.) 1, 4; *In re* Kelly, 46 Fed. 653, 655; Worcester Dict. [*quoted* in U. S. *v.* Ancarola, 1 Fed. 676, 683, 17 Blatchf. 423]; Webster Dict. [*quoted* in Higgins *v.* Dewey, 13 N. Y. Suppl. 570, 571].

34. People *v.* De Leon, 47 Hun (N. Y.) 308, 310; State *v.* Miles, 2 Nott & M. (S. C.) 1, 4; Webster Dict. [*quoted* in Huggins *v.* Dewey, 13 N. Y. Suppl. 570, 571]; Worcester Dict. [*quoted* in U. S. *v.* Ancarola, 1 Fed. 676, 683, 17 Blatchf. 423].

"Inveiglement" in its ordinary sense is a word which implies the acquiring of power over another by means of deceptive or evil practices, not accompanied by actual force. People *v.* De Leon, 109 N. Y. 226, 229, 16 N. E. 46, 4 Am. St. Rep. 444; People *v.* Fitzpatrick, 57 Hun (N. Y.) 459, 461, 10 N. Y. Suppl. 629.

35. Webster Dict. [*quoted* in Higgins *v.* Dewey, 13 N. Y. Suppl. 570, 571].

36. Bouvier L. Dict.

Applied in Lamb's Case, Moo. 237.

37. Witt *v.* Banner, 20 Q. B. D. 114, 117, 57 L. J. Q. B. 141, 58 L. T. Rep. N. S. 34, 36 Wkly. Rep. 115.

38. Peet *v.* Dakota F. & M. Ins. Co., 1 S. D. 462, 469, 47 N. W. 532.

39. Peet *v.* Dakota F. & M. Ins. Co., 1 S. D. 462, 469, 47 N. W. 532.

"According to the best English writers, the word 'inventory' includes a description of a person, as well as those parts of his dress or other matters which are particularly specified. Thus Shakespeare speaks of a lady being inventoried: 'I will give out divers schedules of my beauty. It shall be inventoried, and every particle and utensil labeled to my will.'" Taylor *v.* Bullen, 5 Exch. 779, 786, 20 L. J. Exch. 21, per Pollock, C. B.

40. The term being as comprehensive as the term "itemized inventory." Roberts *v.* Sun Mut. Ins. Co., 19 Tex. Civ. App. 338, 345, 48 S. W. 559.

41. Encyclopædic Dict. [*quoted* in Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 630, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70].

42. Silver Bow Min., etc., Co. *v.* Lowry, 5 Mont. 618, 621, 6 Pac. 62 [*citing* Bouvier L. Dict.].

"The schedule required we understand to be an inventory, and an inventory of a single article is made by naming the article." Smith *v.* Commonwealth Ins. Co., 49 Wis. 322, 327, 5 N. W. 804.

43. Bouvier L. Dict. [*quoted* in Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 630, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70].

44. Black L. Dict. [*quoted* in Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 630, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70.

45. Philadelphia Fire Assoc. *v.* Calhoun, 28 Tex. Civ. App. 409, 412, 67 S. W. 153.

In a statute requiring a just and true inventory to be made of goods levied on under a fieri facias the word "inventory," means a list of the individual articles. Lloyd *v.* Wyckoff, 11 N. J. L. 218, 224 [*citing* Watson *v.* Hoel, 1 N. J. L. 158].

46. Cramer *v.* Oppenstein, 16 Colo. 495, 498, 27 Pac. 713.

estimated worth; specifically the annual account of stock taken in any business;[47] the account of an executor or administrator, to the correctness of which he is sworn — particularly as to all claims against him belonging to the estate.[48] Sometimes the term is used as synonymous with APPRAISEMENT,[49] *q. v.* (Inventory: Of Assigned Property, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; CORPORATIONS. Of Attached Property, see ATTACHMENT. Of Bankrupt's Property, see BANKRUPTCY. Of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS. Of Exempt Property, see EXEMPTIONS. Of Insolvent's Property, see INSOLVENCY. Of Property Taken Under Execution, see EXECUTIONS. Of Rights of Inheritance by Heir, see DESCENT AND DISTRIBUTION. Of Ward's Estate, see GUARDIAN AND WARD. Of Wife's Separate Estate, see HUSBAND AND WIFE. On Dissolution of Corporation, see CORPORATIONS.)

IN VENTRE SA MERE. Literally "In his mother's womb."[50] (In Ventre Sa Mere: Child — Injuring or Killing, see ABORTION; HOMICIDE; NEGLIGENCE; Rights of,[51] see DESCENT AND DISTRIBUTION; WILLS.)

IN VERBIS NON VERBA SED RES ET RATIO QUÆRENDA EST. A maxim meaning "In words, not the words, but the thing and the meaning is to be inquired into."[52]

INVEST. To employ for some profitable use; convert into some other form of wealth, usually of a more or less permanent nature;[53] to surround with or place in; to place so that it will be safe and yield a profit.[54] As used in connection with money or capital, to give money for some other property;[55] to lay out money for some other kind of property,[56] usually of a permanent nature; literally, to clothe money in some thing;[57] to lay out money in some permanent form so as to produce an income;[58] to lay out (money or capital) in business with the view of obtaining an income or profit;[59] to place money so that it will yield a profit.[60] (See INVESTMENT, and Cross-References Thereunder.)

47. Webster Dict. [*quoted* in Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 630, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70].

48. Lloyd *v.* Lloyd, 1 Redf. Surr. (N. Y.) 399, 403.

49. Logan's Estate, 1 Pa. Co. Ct. 76, 77.

50. Bouvier L. Dict. See also Penfield *v.* Tower, 1 N. D. 216, 219, 46 N. W. 413; Fulmer's Estate, 2 C. Pl. (Pa.) 65, 67; Scattergood *v.* Edge, 12 Mod. 278, 286, Treby, C. J.

After-born brothers and sisters see 14 Cyc. 44.

51. Right to recover for death of father see DEATH, 13 Cyc. 327 note 55.

52. Bouvier L. Dict. [*citing* Jenkins Cent. 132].

53. Century Dict. [*quoted* in San Diego County Sav. Bank *v.* Barrett, 126 Cal. 413, 415, 58 Pac. 914; Stramann *v.* Scheeren, 7 Colo. App. 1, 42 Pac. 191, 195].

54. Drake *v.* Crane, 127 Mo. 85, 103, 29 S. W. 990, 27 L. R. A. 653; Neel *v.* Beach, 92 Pa. St. 221, 226.

"Invested" was held to mean "expended or used" in Hubbard *v.* Brainard, 35 Conn. 563, 572, where the court said: "For it is employed to describe an expenditure of earnings in a business, for the purchase of raw material and machinery and the payment of debts, and not a permanent location of funds by way of investment for the purpose of rental or income."

55. Neel *v.* Beach, 92 Pa. St. 221, 226 [*quoted* in Drake *v.* Crane, 127 Mo. 85, 103, 29 S. W. 990, 27 L. R. A. 653].

56. Drake *v.* Crane, 127 Mo. 85, 103, 29 S. W. 990, 27 L. R. A. 653; Neel *v.* Beach, 92 Pa. St. 221, 226; Webster Dict. [*quoted* in Shoemaker *v.* Smith, 37 Ind. 122, 129].

57. Webster Dict. [*quoted* in Shoemaker *v.* Smith, 37 Ind. 122, 129].

58. People *v.* Feitner, 56 N. Y. App. Div. 280, 284, 67 N. Y. Suppl. 893 [*citing* Bouvier L. Dict.].

59. Webster Dict. [*quoted* in San Diego County Sav. Bank *v.* Barrett, 126 Cal. 413, 415, 58 Pac. 914]; State *v.* Bartley, 41 Nebr. 277, 284, 59 N. W. 907; People *v.* Feitner, 167 N. Y. 1, 10, 60 N. E. 265, 82 Am. St. Rep. 698; State *v.* Young, 18 Wash. 21, 25, 50 Pac. 786].

60. Anderson L. Dict. [*quoted* in Stramann *v.* Scheeren, 7 Colo. App. 1, 42 Pac. 191, 195].

"A sum is 'invested' whenever its amount is represented by anything but money." People *v.* New York Tax Com'rs, 23 N. Y. 242, 243.

Loan or purchase.— "The term 'invest' is used in a sense broad enough to cover the loaning of the money, but does not restrict to that mode of investment." Shoemaker *v.* Smith, 37 Ind. 122, 129. It has a significance which includes loans made by the discount of paper, or loans made on commercial paper. Colorado Sav. Bank *v.* Evans, 12 Colo. App. 334, 56 Pac. 981, 983. The term, however, does not necessarily indicate the purchase of property or stocks, or a loan on negotiable securities; it implies the outlay of money in some permanent form, so as to yield an in-

INVESTIGATION. A minute inquiry; a scrutiny; a strict examination.[61] (Investigation: Congressional, see UNITED STATES. Legislative, see STATES. See also EXAMINATION.)

INVESTMENT.[62] A term which has no technical definition, as applied to money.[63] In common parlance, the term means the putting out of money on interest,[64] either by way of loan or purchase of income-producing property;[65] a form of property viewed as a vehicle in which money may be invested;[66] the loaning or putting out of money at interest, so as to produce an income;[67] some species of property from which an income or profit is expected to be derived in

come. Desobry *v.* Tete, 31 La. Ann. 809, 816, 33 Am. Rep. 232.

"Money loaned is 'invested' in a debt against the borrower." State *v.* Bartley, 39 Nebr. 353, 368, 58 N. W. 172, 177, 23 L. R. A. 67.

Money paid for a note, and especially a note bearing interest, may with entire propriety be said to be invested in that note. Jennings *v.* Davis, 31 Conn. 134, 140.

A promise to pay at a future date is not a a sum invested. People *v.* Barker, 147 N. Y. 31, 40, 41 N. E. 435, 29 L. R. A. 393.

The value of a seat in a stock exchange is not capital invested in business in this state. People *v.* Feitner, 167 N. Y. 1, 9, 60 N. E. 265, 82 Am. St. Rep. 698.

Limited to personalty.—The word "invest," in a will directing that the share of certain beneficiaries should be invested, was construed as capable of being limited and applicable to personalty. Matter of Tatum, 61 N. Y. App. Div. 513, 516, 70 N. Y. Suppl. 634.

"Faithfully use, invest, and handle said money" see Scottish-American Mortg. Co. *v.* Massie, 94 Tex. 339, 344, 60 S. W. 544.

"Invest in" see Evans *v.* Winston, 74 Ala. 349, 352.

"Invest or use" see Crawford *v.* Wearn, 115 N. C. 540, 542, 20 S. E. 724.

"Invested in 2½ per cent. consols" see *In re* Pratt, [1894] 1 Ch. 491, 496, 63 L. J. Ch. 484, 70 L. T. Rep. N. S. 489, 8 Reports 601.

"To be invested" see New England Mut. L. Ins. Co. *v.* Phillips, 141 Mass. 535, 540, 6 N. E. 534.

61. Worcester Dict. [*quoted* in Mora *v.* Great Western Ins. Co., 10 Bosw. (N. Y.) 622, 628].

62. Distinguished from: "Deposit" see State *v.* McFetridge, 84 Wis. 473, 515, 54 N. W. 1, 998, 20 L. R. A. 223. See also Frankenfield's Appeal, 11 Wkly. Notes Cas. (Pa.) 373, 374. **"Power to sell"** see Smith *v.* Stephenson, 45 Iowa 645, 647.

A certificate of the receiver of an insolvent bank, to the effect that an administrator had deposited certain funds belonging to an estate in a bank prior to its insolvency was not an investment. Germania Safety Vault, etc., Co. *v.* Driskill, 66 S. W. 610, 613, 23 Ky. L. Rep. 2050.

63. San Diego County Sav. Bank *v.* Barrett, 126 Cal. 413, 416, 58 Pac. 914; State *v.* Bartley, 41 Nebr. 277, 284, 59 N. W. 907; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 392, 8 Am. Dec. 243; State *v.* Young, 18 Wash. 21, 25, 50 Pac. 786.

It implies the contractual relation of purchaser and seller or borrower and lender. State *v.* Bartley, 41 Nebr. 277, 284, 59 N. W. 907 [*quoted* in State *v.* Young, 18 Wash. 21, 25, 50 Pac. 786].

64. Drake *v.* Crane, 127 Mo. 85, 103, 29 S. W. 990, 27 L. R. A. 653 [*citing* Una *v.* Dodd, 39 N. J. Eq. 173]; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 392, 8 Am. Dec. 243.

65. San Diego County Sav. Bank *v.* Barrett, 126 Cal. 413, 416, 58 Pac. 914; Drake *v.* Crane, 127 Mo. 85, 103, 29 S. W. 990, 27 L. R. A. 653; Una *v.* Dodd, 39 N. J. Eq. 173, 186; Anderson L. Dict. [*quoted* in Stramann *v.* Scheeren, 7 Colo. 1, 42 Pac. 191, 195]. See also Shoemaker *v.* Smith, 37 Ind. 122; Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299; New England Mut. L. Ins. Co. *v.* Phillips, 141 Mass. 535, 540, 6 N. E. 534; Neel *v.* Beach, 92 Pa. St. 221, 226.

In its most comprehensive sense it is generally understood to signify the laying out of money in such manner that it may produce a revenue, whether the particular method be a loan or the purchase of stocks, securities, or other property. San Diego County Sav. Bank *v.* Barrett, 126 Cal. 413, 416, 58 Pac. 914; Drake *v.* Crane, 127 Mo. 85, 103, 29 S. W. 990, 27 L. R. A. 653; Una *v.* Dodd, 39 N. J. Eq. 173.

The general understanding of the term is taking a given sum of money and placing it where it will produce an income, either as the profit of capital in a commercial venture, or in the form of interest earned by bonds, stocks, and other securities. People *v.* Feitner, 167 N. Y. 1, 10, 60 N. E. 265, 82 Am. St. Rep. 698.

Colorable transfer.—The use of the term "investment" in a stipulation with one of the parties to a suit of the manner of the making of the investment is inconsistent with the idea of a merely colorable transfer, which is designed to conceal the misappropriation of the money, but implies an actual investment. Butler *v.* Walsh, 48 N. Y. App. Div. 459, 462, 62 N. Y. Suppl. 913.

66. Oxford Eng. Dict. (Murray ed. 5 c) [*quoted* in *In re* Rayner, [1904] 1 Ch. 176, 182, 73 L. J. Ch. 111, 89 L. T. Rep. N. S. 681, 52 Wkly. Rep. 273].

"Investment in real estate" see Hartford First Unitarian Soc. *v.* Hartford, 66 Conn. 368, 374, 34 Atl. 89.

67. State *v.* Bartley, 41 Nebr. 277, 284, 59 N. W. 907 [*quoted* in State *v.* Young, 18 Wash. 21, 25, 50 Pac. 786].

It may include discounting notes. Drake *v.* Crane, 127 Mo. 85, 103, 29 S. W. 990, 27

the ordinary course of trade or business, as distinguished from speculation.[68] The term is often used as synonymous with "securities."[69] (Investment: By Agent, see PRINCIPAL AND AGENT. By Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. By Bank, see BANKS AND BANKING. By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. By Guardian, see GUARDIAN AND WARD. By Husband, see HUSBAND AND WIFE. By Trustee, see TRUSTS. Company, see BANKS AND BANKING. Of Proceeds on Sale of Homestead, see HOMESTEAD. See also INVEST.)

INVIOLATE.[70] Unhurt; uninjured; unpolluted; unbroken.[71]

INVITAT CULPAM QUI PECCATUM PRÆTERIT. A maxim meaning "He encourages a fault who overlooks a transgression."[72]

INVITATION.[73] A term whose legal import is known, and may be used to express the relation between an owner or occupier of land and one who comes thereon under certain circumstances;[74] the act, not only of requesting or bidding, but in that of alluring or attracting, or in a situation which in itself is attractive or alluring.[75] (Invitation: To Person — Charged With Trespass, see TRESPASS; Injured on Premises, see NEGLIGENCE.)

INVITE.[76] To allure, to attract.[77] (See INVITATION.)

INVITO BENEFICIUM NON DATUR. A maxim meaning "A benefit is not conferred on one who is unwilling to receive it; that is to say, no one can be compelled to accept a benefit."[78]

L. R. A. 653 [*citing* Una *v.* Dodd, 39 N. J. Eq. 173]. See DISCOUNTING.

68. Oxford Eng. Dict. (Murray ed. 5 b) [*quoted* in *In re* Rayner, [1904] 1 Ch. 176, 182, 73 L. J. Ch. 111, 89 L. T. Rep. N. S. 681, 52 Wkly. Rep. 273].

In its broadest sense the word embraces all kinds of property in which wealth may be invested. Penfield *v.* Tower, 1 N. D. 216, 227, 46 N. W. 413.

69. *In re* Rayner, [1904] 1 Ch. 176, 188, 191, 73 L. J. Ch. 111, 89 L. T. Rep. N. S. 681, 52 Wkly. Rep. 273, where Vaughan Williams, L. J., observed: "In my judgment, property in the shape of railway shares falls within the meaning both of the words 'moneys invested' and of the word 'securities.'"

Not applicable to bank capital.— "When, in connection with the power to invest, other ways are pointed out in which funds may be invested besides in banking business, . . . [it was] . . . held to be a forced use of the term 'investment' to apply it to an active capital employed in banking, since it is usually applied to a more permanent and inactive disposition of money; and, although it might extend to banking, yet it ought not to receive that interpretation, where another sense, more obvious and consistent with the general objects of the incorporation, can be given to it." Scott *v.* Depeyster, 1 Edw. (N. Y.) 513, 532 [*citing* People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243].

70. The word "is derived from the latin word '*inviolatus*,' which is defined by Ainsworth to mean 'not corrupted, immaculate, unhurt, 'untouched.'" Webster Dict. [*quoted* in Flint River Steam Boat Co. *v.* Roberts, 2 Fla. 102, 114, 48 Am. Dec. 178].

71. Webster Dict. [*quoted* in Flint River Steam Boat Co. *v.* Roberts, 2 Fla. 102, 114, 48 Am. Dec. 178].

72. Peloubet Leg. Max. [*citing* Halkerstine Max. 70].

73. Distinguished from: "License" see Beehler *v.* Daniels, 18 R. I. 563, 565, 29 Atl. 6, 49 Am. St. Rep. 790, 27 L. R. A. 512. Mere passive acquiescence see Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 373, 87 Am. Dec. 644.

A mere permission or license by a railroad company to cross its road is not an invitation to do so. Weldon *v.* Philadelphia, etc., R. Co., 2 Pennew. (Del.) 1, 11, 43 Atl. 156 [*citing* Wright *v.* Boston, etc., R. Co., 142 Mass. 296, 300, 7 N. E. 866].

74. Turess *v.* New York, etc., R. Co., 61 N. J. L. 314, 318, 40 Atl. 614, where the court said: "[The] invitation which creates such a relation may be express, as when the owner or occupier of the land, by words invites another to come on it, or make use of it or something thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used."

75. Texas, etc., R. Co. *v.* Brown, 11 Tex. Civ. App. 503, 505, 33 S. W. 146. See also Wilson *v.* New York, etc., R. Co., 18 R. I. 491, 493, 29 Atl. 258. See ENTICE.

76. "Invited error" see Western Union Tel. Co. *v.* Bowen, 97 Tex. 621, 624, 81 S. W. 27, 28; Gresham *v.* Harcourt, 93 Tex. 149, 157, 53 S. W. 1019; 3 Cyc. 242 note 38.

77. Webster Dict. [*quoted* in Texas, etc., R. Co. *v.* Brown, 11 Tex. Civ. App. 503, 505, 33 S. W. 146].

78. Black L. Dict. [*citing* Broom Max. 699 note; Dig. 50, 17, 69].

Applied in Whitney's Estate, 3 Pa. Co. Ct.

INVITUS NEMO REM COGITUR DEFENDERE. A maxim meaning "Nobody is compelled against his will to defend his own." [79]

IN VOCIBUS VIDENDUM NON A QUO SED AD QUID SUMATUR. A maxim meaning "In discourses, it is to be considered not from what, but to what, it is advanced." [80]

INVOICE.[81] In commercial transactions a written account of the particulars of merchandise shipped or sent to a purchaser, consignee, factor, etc., with the value or prices and charges annexed;[82] an account or catalogue of goods, with the value, marks, or particular description thereof annexed; a list or catalogue of property merely;[83] a list of goods sold and the prices charged for them, or the goods consigned and the value at which the consignee is to receive them;[84] a list or account of goods or merchandise sent or shipped by a merchant to his correspondent, factor, or consignee, containing the particular marks of each description of goods, the value, charges, and other particulars;[85] a list sent to a purchaser, factor, consignee, etc., containing the items, together with the prices and charges, of merchandise sent or to be sent to him;[86] a statement on paper concerning goods sent to a customer for sale or on approval; it usually contains the price of the goods sent, the quality and the charges upon them made to the consignee;[87] a mere detailed statement of the nature, quantity, or cost of the goods or price of the things invoiced, and is as appropriate to a bailment as a sale;[88] a writing made on behalf of an importer, specifying the merchandise imported, and its cost or value.[89] The invoice of goods sometimes means the goods themselves.[90] (Invoice: Of Imports,[91] see CUSTOMS DUTIES. Use of as Evidence, see EVIDENCE. See also INVENTORY, and Cross-References Thereunder.)

498, 511; Pennell *v.* Roy, 3 De G. M. & G. 126, 135, 17 Jur. 247, 22 L. J. Ch. 409, 1 Wkly. Rep. 237, 52 Eng. Ch. 98, 43 Eng. Reprint 50.

79. Morgan Leg. Max.

80. Bouvier L. Dict. [*citing* Ellesmere Postn. 62].

81. **Distinguished from bill** or evidence of sale (see Sturm *v.* Boker, 150 U. S. 312, 328, 14 S. Ct. 99, 37 L. ed. 1093); inventory (see Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 631, 36 S. E. 821, 78 Am. St. Rep. 276, 52 L. R. A. 70. See also INVENTORY); "proceeds" (see Tradesmen's Nat. Bank *v.* National Surety Co., 169 N. Y. 563, 568, 62 N. E. 670).

82. Merchants' Exch. Co. *v.* Weisman, 132 Mich. 353, 356, 93 N. W. 869 [*citing* Bouvier L. Dict.; Century Dict.]; Pipes *v.* Norton, 47 Miss. 61, 76 (where it is said: "An invoice of goods is merely another term for bill rendered"); Tradesmen's Nat. Bank *v.* National Surety Co., 169 N. Y. 563, 568, 62 N. E. 670.

An invoice, like a bill of lading, is regularly made out when the cargo is completed, and is *prima facie* evidence of value, and no more, and is uniformly admissible in evidence. Graham *v.* Pennsylvania Ins. Co., 10 Fed. Cas. No. 5,674, 2 Wash. 113.

It is usually a paper made out by the owner or shipper of a cargo. Paine *v.* Maine Mut. Mar. Ins. Co., 69 Me. 568, 571.

83. Cramer *v.* Oppenstein, 16 Colo. 495, 498, 27 Pac. 713.

84. Southern Exp. Co. *v.* Hess, 53 Ala. 19, 22.

85. Black L. Dict. [*quoted* in Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 630, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70].

86. Standard Dict. [*quoted* in Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 630, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70].

87. Encyclopædic Dict. [*quoted* in Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 630, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70].

88. Sturm *v.* Baker, 150 U. S. 312, 328, 14 S. Ct. 99, 37 L. ed. 1093.

89. Black L. Dict. [*quoted* in Pierce *v.* Southern Pac. Co., (Cal. 1897) 47 Pac. 874, 877].

90. Sturm *v.* Williams, 38 N. Y. Super. Ct. 325, 342, where it is said: "The word . . . is sometimes used to designate things of which it is the frequent accompaniment or evidence.

As evidence of receipt of goods see Field *v.* Moulson, 9 Fed. Cas. No. 4,770, 2 Wash. 155.

As evidence of title.—"An invoice is neither a bill of sale nor evidence of a sale, and, standing alone, furnishes no proof of title." Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 630, 23 L. ed. 214 [*quoted* in Kentucky Refining Co. *v.* Globe Refining Co., 104 Ky. 559, 572, 47 S. W. 602, 20 Ky. L. Rep. 778, 84 Am. St. Rep. 468, 42 L. R. A. 353]. Standing alone, it is never regarded as evidence of title. Sturm *v.* Boker, 150 U. S. 312, 328, 14 S. Ct. 99, 37 L. ed. 1093. The term "invoice," as used in an insurance policy on outward shipments and homeward, for account of certain persons, to be consigned to them by "invoice," and bill of lading, carries no implication of ownership. It is well understood that an invoice usually accompanies goods that are consigned to a factor for sale, as well as in the case of a purchase. Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76, 79, 3 Keyes 17.

91. Entry of goods at custom-house made

INVOICE PRICE. The amount at which the goods are invoiced to the purchaser;[92] the cost or value of the property at the shipping point.[93] (See Cost Price; Invoice.)

INVOICE VALUE. A term which may be equivalent to shipping value.[94] (See Intrinsic Value; Invoice; Value.)

INVOLUNTARY.[95] Not voluntary or willing; contrary or opposed to will or desire; independent of volition or consenting action of mind; unwilling; unintentional; not accidental.[96] (Involuntary: Assignment, see Insolvency. Bankruptcy, see Bankruptcy. Discontinuance, see Dismissal and Nonsuit. Insolvency, see Insolvency. Manslaughter, see Homicide. Nonsuit, see Dismissal and Nonsuit. Payment, see Payment. Termination of Action, see Dismissal and Nonsuit. Trespass, see Trespass. Trustee, see Trusts.)

INVOLUNTARY SERVITUDE. The condition of a person compelled to do services for another;[97] compulsory imprisonment at hard labor without pay.[98] (Involuntary Servitude: As Punishment For Crime, see Criminal Law. Constitutional Prohibition, see Constitutional Law.)

INVOLVE. To roll up, or develop; to comprise, to contain, to include by

by invoice and provision made for bond in lieu of certified invoice see 12 Cyc. 1139.

92. Plank *v.* Gavila, 3 C. B. N. S. 807, 811, 6 Wkly. Rep. 210, 91 E. C. L. 807.

Sometimes it means the prime price or cost of goods, although there is no invoice in fact. Sturm *v.* Williams, 38 N. Y. Super. Ct. 325, 342.

As used in an open policy of insurance it means the prime cost; the value which, upon a total loss, the insured is entitled to recover. Le Roy *v.* United Ins. Co., 7 Johns. (N. Y.) 343, 354.

The invoice price of an article is a circumstance to be considered in determining what is its actual value, but it is far from conclusive on the question. Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 631, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70.

93. Pierce *v.* Southern Pac. Co., (Cal. 1897) 47 Pac. 874, 877.

94. Anderson *v.* Morice, L. R. 10 C. P. 609, 614.

95. "**Involuntary**" is an antonym of "voluntary," and therefore, in this sense, includes "accidental." Kennedy *v.* Ætna L. Ins. Co., 31 Tex. Civ. App. 509, 511, 72 S. W. 602.

Distinguished from "undesigned" or "unintentional" see Smouse *v.* Iowa State Traveling Men's Assoc., 118 Iowa 436, 439, 92 N. W. 53 [*citing* McCarthy *v.* Traveler's Ins. Co., 15 Fed. Cas. No. 8,682, 8 Biss. 362]. See also Barry *v.* U. S. Mutual Acc. Assoc., 23 Fed. 712.

96. Century Dict. [*quoted* in Kennedy *v.* Ætna L. Ins. Co., 31 Tex. Civ. App. 509, 511, 72 S. W. 602].

The act of holding and using an instrument or weapon, the movement of which is the immediate cause of hurt to another, cannot be called an "involuntary" act, though its particular effect in hitting and hurting another is not within the purpose or intent of the party doing the act; and where a person raised his stick for the purpose of parting his dog and another's, and in so doing accidentally struck and injured such other, the act was unintentional, but not involuntary. Brown *v.* Kendall, 6 Cush (Mass.) 292, 294.

"Involuntary action" see 9 Cyc. 443.

"Involuntary deposit" defined see N. D. Rev. Codes (1899), § 4002; Okl. Rev. St. (1903) § 2826; S. D. Civ. Code (1903), § 1354.

"Involuntary service" see U. S. *v.* Ancarola, 1 Fed. 676, 683, 17 Blatchf. 423. See also Robertson *v.* Baldwin, 165 U. S. 275, 17 S. Ct. 326, 41 L. ed. 715.

An "involuntary trust" is one which is created by operation of law. Cal. Civ. Code (1903), § 2217; Mont. Civ. Code (1895), § 2952; N. D. Rev. Codes (1899), § 4256; S. D. Civ. Code (1903), § 1609. See also Farmers', etc., Bank *v.* Kimball Milling Co., 1 S. D. 388, 392, 47 N. W. 402, 36 Am. St. Rep. 739.

97. Wharton L. Lex. [*quoted* in *In re* Thompson, 117 Mo. 83, 89, 22 S. W. 863, 38 Am. St. Rep. 639, 20 L. R. A. 462].

An indenture purporting to bind a child of negro descent to an apprenticeship as involving involuntary servitude see *In re* Turner, 24 Fed. Cas. No. 14,247, 1 Abb. 84.

In its constitutional meaning the term applies to a relation attempted to be created by an indenture by which a free woman of color above twenty-one years of age binds herself to serve the obligee as a menial servant for twenty years. *In re* Clark, 1 Blackf. (Ind.) 122, 125, 12 Am. Dec. 213.

The denial of equal accommodations in inns, public conveyances, and places of public amusement does not impose involuntary servitude, within the meaning of the thirteenth amendment. *In re* Civil Rights Cases, 109 U. S. 3, 23, 3 S. Ct. 18, 27 L. ed. 835.

98. *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89. See Arthur *v.* Oakes, 63 Fed. 310, 318, 11 C. C. A. 209, 25 L. R. A. 414.

The term includes enforced labor. State *v.* West, 42 Minn. 147, 153, 43 N. W. 845. See also State *v.* Topeka, 36 Kan. 76, 85, 12 Pac. 310, 59 Am. St. Rep. 529.

rational or logical construction;[99] to connect with something as a natural or logical consequence or effect; to include necessarily; to imply.[1]

I. O. U. A memorandum of debt, consisting of three letters, a sum of money, and the debtor's signature.[2] (See, generally, COMMERCIAL PAPER.)

IPSÆ LEGES CUPIUNT UT JURE REGANTUR. A maxim meaning "The laws themselves desire that they should be governed by right."[3]

IPSISSIMIS VERBIS. In the very same words; in the exact words.[4]

IPSO FACTO. By the fact itself;[5] by the very act itself;[6] by the mere fact.[7]

99. Holman *v.* Taylor, 31 Cal. 338, 340 [*quoted* in Copertini *v.* Oppermann, 76 Cal. 181, 185, 18 Pac. 256].

1. Webster Dict. [*quoted* in State *v.* Barr, 8 Ohio S. & C. Pl. Dec. 541, 543, 5 Ohio N. P. 435].

Synonymous terms.— In its more exact and literal signification, the word is synonymous with "comprise" or "embrace." St. John *v.* West, 4 How. Pr. (N. Y.) 329, 332. Sometimes it is used as synonymous with the word "effect." St. John *v.* West, 4 How. Pr. (N. Y.) 329, 332. As used in a statute relating to a freehold, the word is sometimes used as synonymous with the word "relate." Wyatt *v.* Larimer, etc., Irr. Co., 18 Colo. 298, 306, 33 Pac. 144, 36 Am. St. Rep. 280. See also Taylor *v.* Pierce, 174 Ill. 9, 12, 50 N. E. 1109 [*citing* Sandford *v.* Kane, 127 Ill. 591, 20 N. E. 810].

"**Involve . . . the merits**" see Hoye *v.* Chicago, etc., R. Co., 65 Wis. 243, 245, 27 N. W. 309, 310; Vesper *v.* Farnsworth, 40 Wis. 357, 359; McLeod *v.* Bertschy, 33 Wis. 176, 180, 14 Am. Rep. 755; Kewaunee County *v.* Decker, 28 Wis. 669, 673; Oatman *v.* Bond, 15 Wis. 20, 25; Matteson *v.* Curtis, 14 Wis. 436, 473; Clark *v.* Langworthy, 12 Wis. 441, 445. See also Chouteau *v.* Parker, 2 Minn. 118, 121.

"**Involved**" is a word sometimes used, according to the context, as synonymous with "affected." Williams *v.* Western Union Tel. Co., 61 How. Pr. (N. Y.) 305, 308.

"**Heavily involved in debt**" see Nashville First Nat. Bank *v.* Nashville Trust Co., (Tenn. Ch. App. 1901) 62 S. W. 392, 403.

"**Subject-matter involved** means the possession, ownership or title to the property or other valuable thing which is to be determined by the result of the action." Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier, 63 Hun (N. Y.) 297, 299, 17 N. Y. Suppl. 786, construing Code Civ. Proc. § 3253.

"'**Involving,**' as used by the constitution, in fixing the appellate jurisdiction of this court, implies that a constitutional question was raised in and submitted to the trial court, and that such court had the opportunity to pass upon it." Bennett *v.* Missouri Pac. R. Co., 105 Mo. 642, 645, 16 S. W. 947 [*quoted* in Ash *v.* Independence, 145 Mo. 120, 126, 46 S. W. 749].

"**Involving title to real estate**" see State *v.* Elliott, 180 Mo. 658, 660, 79 S. W. 696; Dunn *v.* Miller, 96 Mo. 324, 333, 9 S. W. 640. See also Rhodes *v.* Frankfort Chair Co., 79 S. W. 768, 25 Ky. L. Rep. 2042.

2. Black L. Dict. See also 7 Cyc. 573.

An I. O. U. professes to be the result of an account stated in respect of a debt due. Lemere *v.* Elliott, 6 H. & N. 656, 659, 7 Jur. N. S. 1206, 30 L. J. Exch. 350, 4 L. T. Rep. N. S. 304.

"**I. O. U. for deposit**" see 4 Cyc. 1053 note 80.

3. Bouvier L. Dict. [*citing* Coke Litt. 174*b*].

Applied in: Altham's Case, 8 Coke 148*a*, 152*a*; Rooke's Case, 5 Coke 99*b*, 100*a*; Butler's Case, 3 Coke 25*a*, 32*b* [*quoting* Cato]; Bankrupts' Case, 2 Coke 24*b*, 25*b*.

4. Applied to the statement of the language of a deceased witness. Burrill L. Dict. [*citing* Summons *v.* State, 5 Ohio St. 325, 344]. See also Townsend *v.* Jemison, 7 How. (U. S.) 706, 719, 720, 12 L. ed. 880.

5. Bouvier L. Dict. [*quoted* in State *v.* Lansing, 46 Nebr. 514, 528, 64 N. W. 1104, 35 L. R. A. 124, where it is said: "By the mere fact, a proceeding *ipso facto* void is one which has not *prima facie* validity but is void *ab initio*"]. See also the following cases: Blythe *v.* Ayers, 96 Cal. 532, 572, 31 Pac. 915, 19 L. R. A. 40; Platte Water Co. *v.* Northern Colorado Irr. Co., 12 Colo. 525, 532, 21 Pac. 711; State *v.* Deal, 24 Fla. 293, 318, 4 So. 899, 12 Am. St. Rep. 204; Kinsley *v.* Chicago, 124 Ill. 259, 361, 16 N. E. 260; Pfirmann *v.* Henkel, 1 Ill. App. 145, 150; Harrison *v.* State, 22 Md. 468, 484, 85 Am. Dec. 658; State *v.* Elliott, 180 Mo. 658, 662, 79 S. W. 696; Vasseur *v.* Benton, 1 Mo. 296, 300; Puhr *v.* Grand Lodge G. O. of H., 77 Mo. App. 47, 62; State *v.* Lansing, 46 Nebr. 514, 517, 64 N. W. 1104, 35 L. R. A. 124; Whittemore *v.* Gibbs, 24 N. H. 485, 487; Mershon *v.* Williams, 63 N. J. L. 398, 406, 44 Atl. 211; Parish *v.* Rogers, 20 N. Y. App. Div. 279, 282, 46 N. Y. Suppl. 1058; Allegheny County *v.* Gibson, 90 Pa. St. 397, 411, 35 Am. Rep. 670; Coates *v.* Street, 2 Ashm. (Pa.) 12, 23; Pinson *v.* Ivey, 1 Yerg. (Tenn.) 296, 331; Tyler *v.* Whitney, 8 Vt. 26, 28; Lane *v.* Magdeburg, 81 Wis. 344, 347, 51 N. W. 562; Passenger Cases, 7 How. (U. S.) 283, 554, 12 L. ed. 702; License Cases, 5 How. (U. S.) 504, 594, 12 L. ed. 256; U. S. *v.* Davis, 25 Fed. Cas. No. 14,930, 5 Mason 356, 363; Lancashire, etc., R. Co. *v.* Bolton Union, 15 App. Cas. 323, 331, 54 J. P. 532, 60 L. J. Q. B. 118, 63 L. T. Rep. N. S. 358; Baker *v.* Brent, Cro. Eliz. 679, 680; 16 Cyc. 350.

6. Rapalje & L. L. Dict. [*quoted* in State *v.* Lansing, 46 Nebr. 514, 528, 64 N. W. 1104, 35 L. R. A. 124].

7. Anderson L. Dict. [*quoted* in State *v.* Lansing, 46 Nebr. 514, 528, 64 N. W. 1104, 35 L. R. A. 124].

IPSO JURE. By the law itself; by the mere operation of law.[8]

IRA HOMINIS NON IMPLET JUSTITIUM DEL. A maxim meaning "The wrath of a man does not fulfil the justice of God."[9]

IRON. A metal, the most abundant and the most important of all those used in the metallic form.[10]

IRRATIONAL. Insane.[11] (See, generally, INSANE PERSONS.)

IRREDEEMABLE GROUND-RENT. A rent preserved to himself and his heirs by the grantor of land out of the land itself.[12] (See, generally, GROUND-RENTS.)

IRREGULAR.[13] Not according to rule; improper or insufficient, by reason of departure from the prescribed course.[14] (Irregular: Heir, see DESCENT AND DISTRIBUTION. Judgment, see JUDGMENTS. Process, see PROCESS. See also IRREGULARITY.)

IRREGULAR INDORSEMENT. A term applied when, at the inception of a note, a person other than the payee writes his name upon its back;[15] an indorsement in blank by third persons above the name of the payee, or when the payee does not indorse at all.[16] (See INDORSE; INDORSEMENT; and, generally, COMMERCIAL PAPER.)

IRREGULARITY.[17] A neglect of order or method;[18] not according to the

8. Black L. Dict. [*citing* Calvin Lex.].

9. Morgan Leg. Max.

10. Century Dict.

May embrace steel.— According to the connection the word may sometimes embrace steel. Hart *v.* Standard Mar. Ins. Co., 22 Q. B. D. 499, 501, 502, 6 Aspin. 368, 58 L. J. Q. B. 284, 60 L. T. Rep. N. S. 649, 37 Wkly. Rep. 366.

"Iron ore" see Earnshaw *v.* Cadwalader, 145 U. S. 247, 259, 12 S. Ct. 851, 36 L. ed. 693; Francklyn *v.* U. S., 119 Fed. 470.

"Iron safe clause" see 19 Cyc. 761.

"Manufactures, articles, vessels, and wares . . . of . . . iron" see Robertson *v.* Rosenthal, 132 U. S. 460, 463, 10 S. Ct. 120, 33 L. ed. 392.

11. State *v.* Leehman, 2 S. D. 171, 179, 49 N. W. 3, where it is said: "'Sanity' and 'insanity' are terms more frequently found in the books than 'rational' and 'irrational,' but we suspect that it is more the result of habit and convenience than because of any inherent or substantial difference in their meaning. Webster gives 'rational' and 'irrational' as synonyms for 'sane' and 'insane.'"

12. Wilson *v.* Iseminger, 185 U. S. 55, 59, 22 S. Ct. 573, 46 L. ed. 804 [*citing* Wallace *v.* Harmstad, 44 Pa. St. 492, 495; McQuigg *v.* Morton, 39 Pa. St. 31; Bosler *v.* Kuhn, 8 Watts & S. (Pa.) 183, 185].

13. **Distinguished from "erroneous"** see 16 Cyc. 535 note 14.

14. Black L. Dict. See also 17 Cyc. 1162 note 60.

"Irregular . . . conduct" see Shelton *v.* Derby, 27 Conn. 414, 422.

"Irregular heirs" see 14 Cyc. 104 note 55.

"Irregular indorser" see Schultz *v.* Howard, 63 Minn. 196, 202, 65 N. W. 363, 56 Am. St. Rep. 470; 7 Cyc. 740, 728 note 19.

"Irregular or improper conduct" see Shelton *v.* Derby, 27 Conn. 414, 422.

"Irregular proceedings" see Cobbossee Nat. Bank *v.* Rich, 81 Me. 164, 170, 16 Atl. 506.

15. Carter *v.* Long, 125 Ala. 280, 289, 28 So. 74 [*citing* Eudora Min., etc., Co. *v.* Barclay, 122 Ala. 506, 26 So. 113; Ledbetter, etc., Land, etc., Assoc. *v.* Vinton, 108 Ala. 644, 18 So. 692; Hullum *v.* State Bank, 18 Ala. 805; Chaddock *v.* Vanness, 35 N. J. L. 517, 10 Am. Rep. 256; Rey *v.* Simpson, 22 How. (U. S.) 341, 16 L. ed. 260; 2 Randolph Com. Pap. §§ 831, 832, 833].

16. Bellows Falls Bank *v.* Dorset Marble Co., 61 Vt. 106, 108, 17 Atl. 42. See also Metropolitan Bank *v.* Muller, 50 La. Ann. 1278, 1279, 24 So. 295, 69 Am. St. Rep. 475.

17. "[It] is a very general word."— Callahan *v.* Coplen, 7 Brit. Col. 422, 428.

Compared with illegality.— It is said to be but another word for "illegalities." Brown *v.* Brown, 50 N. H. 538, 554. See also 2 Cyc. 527.

Distinguished from: Errors of law (see Silcox *v.* Lang, 78 Cal. 118, 124, 20 Pac. 297 [*citing* Abbott L. Dict.]; Valerius *v.* Richard, 57 Minn. 443, 447, 59 N. W. 534 [*citing* Hayne New Trial, § 100]. Jurisdictional defects see Corn Exch. Bank *v.* Blye, 119 N. Y. 414, 418, 23 N. E. 805. "Nullity" see Wilson *v.* Simmons, 89 Me. 242, 254, 36 Atl. 380 [*quoting* Cobbossee Nat. Bank *v.* Rich, 81 Me. 164, 170, 16 Atl. 506. See also Johnson *v.* Hines, 61 Md. 122, 130; Jenness *v.* Lapeer County Cir. Judge, 42 Mich. 469, 471, 4 N. W. 220; Iowa Min. Co. *v.* Bonanza Min. Co., 16 Nev. 64, 73. *Compare* Holmes *v.* Russel, 9 Dowl. P. C. 487.

"Any irregularity" see *Ex p.* Johnson, 25 Ch. D. 112, 114, 53 L. J. Ch. 309, 50 L. T. Rep. N. S. 157, 32 Wkly. Rep. 175.

"For irregularity" see Clark *v.* Fulse, 2 N. J. L. 263, 264.

18. McHugh *v.* Pundt, 1 Bailey (S. C.) 441, 444.

Fraud may be included within the meaning of the word. Smithson *v.* Smithson, 37 Nebr. 535, 541, 56 N. W. 300, 40 Am. St. Rep. 504.

Mistake of a form of action is not an irregularity. McHugh *v.* Pundt, 1 Bailey (S. C.) 441, 444.

regulations ;[19] the doing of some act at an unreasonable time, or in an improper manner ;[20] the technical term for every defect in practical proceedings,[21] or the mode of conducting an action or defense, as distinguished from defects in pleadings ;[22] a comprehensive term including all formal objections to practical proceedings ;[23] the want of adherence to some prescribed rule or mode of proceeding ;[24] the doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done ;[25] omitting to do something necessary to the orderly progress of the action, or doing it at an improper time ;[26] the failure to observe that particular course of proceeding which, conformable with the practice of the court, ought to have been observed in the case ;[27] a deviation from certain minor provisions of the statutes, designed to secure method and convenience in procedure ;[28] a violation or nonobservance of established rules and practices, although it is oftener applied to forms or rules of procedure in practice than to a nonobservance of the law in other ways.[29] (See, generally, APPEAL AND ERROR ; TRIAL.)

IRRELEVANCY. See IRRELEVANT.

IRRELEVANT.[30] In general, a term which has the signification of not pertinent,

19. Callahan *v.* Coplen, 7 Brit. Col. 422, 428, where it is said: "Its nearest equivalent is the word 'informality,' not according to form."

20. Iowa Min. Co. *v.* Bonanza Min. Co., 16 Nev. 64, 73.

21. *Ex p.* Gibson, 31 Cal. 619, 625, 91 Am. Dec. 546; Barton *v.* Saunders, 16 Oreg. 51, 55, 16 Pac. 921, 8 Am. St. Rep. 261; 3 Chitty Pr. 509 [*quoted* in Emeric *v.* Alvarado, 64 Cal. 529, 599, 2 Pac. 418]; Burrill L. Dict. [*quoted* in Prior *v.* Hall, 13 N. Y. Civ. Proc. 83, 87].

22. Barton *v.* Saunders, 16 Oreg. 51, 55, 16 Pac. 921, 8 Am. St. Rep. 261 [*citing* Hurd Habeas Corpus 333; Tidd Pr. 435]; 3 Chitty Pr. 509 [*quoted* in Emeric *v.* Alvarado, 64 Cal. 529, 599, 2 Pac. 418; *Ex p.* Gibson, 31 Cal. 619, 625, 91 Am. Dec. 546].

"Irregularities," as applied to judicial proceedings, does not include false allegations of fact, made as the foundation for a suit in which the allegations are to be proved or disproved. This is equally true whether they are falsely made by mistake or design. Everett *v.* Henderson, 146 Mass. 89, 14 N. E. 932, 4 Am. St. Rep. 284.

23. Burrill L. Dict. [*quoted* in Prior *v.* Hall, 13 N. Y. Civ. Proc. 83, 87].

"It is a comprehensive term, including all formal objections to practical proceedings, and is of three descriptions, viz.: first, such deviations as constitute a total nullity; secondly, such as are mere irregularities, and can only be objected to in a reasonable time, and subject to certain qualifications; and thirdly, the non-observance of certain rules or enactments that have been deemed merely directory." 3 Chitty Pr. 509 [*quoted* in Emeric *v.* Alvarado, 64 Cal. 529, 599, 2 Pac. 418].

24. Downing *v.* Still, 43 Mo. 309, 317; Orvis *v.* Elliott, 65 Mo. App. 96, 100 [*quoting* 1 Tidd Pr. 512]; Chambers *v.* Coleman, 9 Dowl. P. C. 588, 594 [*quoting* Tidd Pr. 512].

It consists either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it in an unreasonable time or improper manner. Bronk *v.* State, 43 Fla. 461, 469, 31 So. 248, 99 Am. St. Rep. 119; Jenness *v.* Lapeer County Cir. Judge, 42 Mich. 469, 471, 4 N. W. 220; Turrill *v.* Walker, 4 Mich. 177, 183; State *v.* Wear, 145 Mo. 162, 194, 46 S. W. 1099; Showles *v.* Freeman, 81 Mo. 540, 543; Murray *v.* Purdy, 66 Mo. 606, 611; Jones *v.* Hart, 60 Mo. 351, 356; Hirsh *v.* Weisberger, 44 Mo. App. 506, 510; Corn Exch. Bank *v.* Blye, 119 N. Y. 414, 418, 23 N. E. 805; Hall *v.* Munger, 5 Lans. (N. Y.) 100, 113; Bowman *v.* Tallman, 2 Rob. (N. Y.) 632, 635; Farrington *v.* Root, 10 Misc. (N. Y.) 347, 349, 31 N. Y. Suppl. 126; *In re* Wiltse, 5 Misc. (N. Y.) 105, 115, 25 N. Y. Suppl. 733; Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 15 N. Y. Suppl. 249, 253; Barton *v.* Saunders, 16 Oreg. 51, 55, 16 Pac. 921, 8 Am. St. Rep. 261; State *v.* Norton, 69 S. C. 454, 459, 48 S. E. 464; Treasurers *v.* Bordeaux, 3 McCord (S. C.) 142, 144; *Ex p.* Sewartz, 2 Tex. App. 74, 80 [*citing* Hurd Habeas Corpus 333; 3 Chitty Gen'l Pr. 509]; Salter *v.* Hilgen, 40 Wis. 363, 365 [*citing* McNamara, Nullities & Irregularities 4]; Tidd Pr. 512 [*quoted* in *Ex p.* Gibson, 31 Cal. 619, 625, 91 Am. Dec. 546].

25. Bouvier L. Dict. [*quoted* in Prior *v.* Hall, 13 N. Y. Civ. Proc. 83, 87; Cosgrove *v.* Butler, 1 S. C. 241, 243].

26. Darby *v.* Shannon, 19 S. C. 526, 535.

27. Cooley Const. Lim. (5th ed.) 504, 505 [*quoted* in Kelly *v.* People, 115 Ill. 583, 590, 4 N. E. 644, 56 Am. Rep. 184].

28. Wilson *v.* Simmons, 89 Me. 242, 254, 36 Atl. 380 [*citing* Black Int. L. 340; Dillon Mun. L. §§ 604, 605].

29. State *v.* Des Moines, 96 Iowa 521, 535, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186; McCain *v.* Des Moines, 174 U. S. 168, 175, 19 S. Ct. 644, 43 L. ed. 936.

30. "The word irrelevant is comparatively of modern introduction." Seward *v.* Miller, 6 How. Pr. (N. Y.) 312, 313.

or of not applicable.[31] In the law of evidence, not relevant; not relating or applicable to the matter in issue; not supporting the issue.[32] (Irrelevant: Evidence — In Civil Action, see EVIDENCE; In Criminal Prosecution, see CRIMINAL LAW. Pleading — At Law, see PLEADING; In Equity, see EQUITY.)

IRREMOVABLE FIXTURES. See FIXTURES.

IRREPARABLE. That which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured;[33] that which cannot be repaired, retrieved, put back again, or atoned for.[34]

IRREPARABLE INJURY.[35] A term which means that the injury must be a grievous one, a material one, and not adequately reparable in damages.[36] (Irreparable Injury: As Ground For — Appeal, see APPEAL AND ERROR; Relief by Injunction, see INJUNCTION.)

IRRESISTIBLE. That cannot be successfully resisted or opposed.[37] (Irresistible: Impulse — Generally, see INSANE PERSONS; As Affecting Criminal Responsibility, see CRIMINAL LAW.)

IRRESISTIBLE SUPERHUMAN CAUSE. A phrase sometimes construed as equivalent to the term ACT OF GOD,[38] *q. v.*; and refers to those natural causes, the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ.[39] (Irresistible Superhuman Cause: Affecting Liability — For Flowage, see WATERS; For Negligence, see NEGLIGENCE; In Action For Collision, see COLLISION; Of Carrier, see CARRIERS. Causing Collision, see COLLISION. Excuse For Non-Performance of Contract, see CONTRACTS. See also ACCIDENT; ACCIDENT INSURANCE; ACT OF GOD; INEVITABLE ACCIDENT.)

IRRESPECTIVE OF BENEFITS. Without deduction for benefits.[40]

IRREVOCABLE. Not to be recalled or revoked.[41]

In England it is used in parliamentary debate in that country to signify "unassisting, unrelieving," which are in accordance with the etymology of the word. Seward *v.* Miller, 6 How. Pr. (N. Y.) 312, 313.

"In Scotland, according to Mr. Elphinstone, it has been for a considerable period a jurisprudential word, and is there used in the same sense as the more appropriate word irrelative. It has, I believe, uniformly received the same interpretation in the courts in this country, where it has been very generally used." Seward *v.* Miller, 6 How. Pr. (N. Y.) 312, 314.

31. Scofield *v.* State Nat. Bank, 9 Nebr. 316, 320, 2 N. W. 888, 31 Am. Rep. 412.

"Irrelevant or redundant matter" see Nichols *v.* Jones, 6 How. Pr. (N. Y.) 355, 358.

"Irrelevancy" in an answer see People *v.* McCumber, 18 N. Y. 315, 321, 72 Am. Dec. 515 [*citing* Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103]. See also Black L. Dict.

32. Black L. Dict.

33. Bettman *v.* Harness, 42 W. Va. 433, 437, 26 S. E. 271, 36 L. R. A. 566.

34. Gause *v.* Perkins, 56 N. C. 177, 179, 69 Am. Dec. 728.

35. **"[A term] well marked and defined in the books."** — Insurance Co. of North America *v.* Bonner, 7 Colo. App. 97, 42 Pac. 681, 682.

36. Insurance Co. of North America *v.* Bonner, 7 Colo. App. 97, 42 Pac. 681, 682; Western Union Tel. Co. *v.* Rogers, 42 N. J. Eq. 311, 314, 11 Atl. 13.

37. Webster Int. Dict.

By "irresistible force" is meant such an interposition of human agency as is, from its nature, a power absolutely uncontrollable. Brousseau *v.* The Hudson, 11 La. Ann. 427, 428 [*citing* Story Bailm. §§ 25, 489, 511]; The Ourust, 18 Fed. Cas. No. 10,540, 6 Blatchf. 533 [*citing* Story Bailm. § 25].

"Irresistible violence" is a term which may be used as synonymous with "*vis major.*" Walker *v.* British Guarantee Assoc., 18 Q. B. 277, 286, 16 Jur. 885, 21 L. J. Q. B. 257, 83 E. C. L. 277.

38. Ryan *v.* Rogers, 96 Cal. 349, 353, 31 Pac. 244; Fay *v.* Pacific Imp. Co., 93 Cal. 253, 261, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188; Clay County *v.* Simonsen, 1 Dak. 403, 46 N. W. 592, 596.

39. Ryan *v.* Rogers, 96 Cal. 349, 353, 31 Pac. 244; 1 Cyc. 758 note 8.

40. Enoch *v.* Spokane Falls, etc., R. Co., 6 Wash. 393, 400, 33 Pac. 966. See also St. Louis, etc., R. Co. *v.* Anderson, 39 Ark. 167, 171; Leroy, etc., R. Co. *v.* Ross, 40 Kan. 598, 603, 20 Pac. 197, 2 L. R. A. 217; Little Miami, etc., R. Co. *v.* Callett, 6 Ohio St. 182, 184; Grisy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

41. MacGregor *v.* Gardner, 14 Iowa 326, 341.

The word may mean a thing, or denote a right or power, which cannot be annulled or vacated, except for a sufficient cause; it may mean "unalterable" or "irreversible," Houston *v.* Houston City St. R. Co., 83 Tex. 548, 557, 19 S. W. 127.

"Their attorney irrevocable" see Napier *v.* McLeod, 9 Wend. (N. Y.) 120, 121.

"Written consent, irrevocable" see Mutual Reserve Fund Life Assoc. *v.* Boyer, 62 Kan. 31, 39, 61 Pac. 387, 50 L. R. A. 538.

IRRIGATE. Primarily, according to the Latin word from which it is derived, to convey water to or upon anything, and, more generally, to wet or moisten anything; and the ordinary definition in our language is to water lands, whether by channels, by flooding, or simply by sprinkling.[42] (See WATERS.)

IRRIGATION. In its primary sense, a sprinkling, or watering; yet, according to the best lexicographers, it has an agricultural or special signification: the watering of lands by drains or channels.[43] In its popular sense, the application of water to land for the production of crops;[44] the operation of causing water to flow over lands for nourishing plants;[45] a proper mode of using water by a riparian proprietor; the lawful extent of the use depending upon the circumstances of each case.[46] (See, generally, WATERS.)

IS.[47] The present indicative singular of the substantive verb "to be,"[48] which may have, however, when applied to a transaction yet to come, a future signification.[49] So, too, when warranted by the context or by the intent with which it is used, the word may refer to something in the past.[50]

IS DAMNUM DAT QUI JUBET DARE; EJUS VERO NULLA CULPA EST CUI PARERE NECESSE EST. A maxim meaning "He occasions a loss who gives orders to cause it; but no blame attaches to him who is under the necessity of obeying."[51]

ISH. In the law of Scotland, a term essential to a valid lease.[52]

ISLAND. A body of land surrounded by water.[53] (Island: Accretion to Shore, see NAVIGABLE WATERS; WATERS. Adverse Possession, see ADVERSE POSSESSION. Grants of Swamp Land Including Partly Submerged Island, see PUBLIC LANDS. Jurisdiction of Offenses Committed on, see CRIMINAL LAW. Ownership of, see BOUNDARIES. Title to, see NAVIGABLE WATERS; WATERS.)

IS QUID ACTIONEM HABET AD REM RECUPERANDAM IPSAM REM HABERE VIDETUR. A maxim meaning "He is regarded as having possession of the thing itself who hath an action to recover it."[54]

42. The method of obtaining the water with which to irrigate has nothing to do with the process of irrigation, or the meaning of the word, and will not be held to imply the conveying of water by ditches. Charnock *v.* Higuerra, 111 Cal. 473, 476, 44 Pac. 171, 52 Am. St. Rep. 195, 32 L. R. A. 190.

43. Worcester Dict. [*quoted* in Platte Water Co. *v.* Northern Colorado Irr. Co., 12 Colo. 525, 529, 21 Pac. 711].

44. Paxton, etc., Irr. Co. *v.* Farmers', etc., Irr., etc., Co., 45 Nebr. 884, 894, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853 [*citing* Platte Water Co. *v.* Northern Colorado Irr. Co., 12 Colo. 525, 21 Pac. 711], where the court said: "The use of water for the purpose of irrigation clearly implies the means of conducting it to the land to which it is applied."

45. Webster Dict. [*quoted* in Platte Water Co. *v.* Northern Colorado Irr. Co., 12 Colo. 525, 529, 21 Pac. 711].

46. Jones *v.* Adams, 19 Nev. 78, 83, 6 Pac. 442, 3 Am. St. Rep. 788.

"Irrigation canal" is defined in Cobbey Annot. St. Nebr. (1903) § 6754.

47. "Is" instead of "are" in an indictment see State *v.* Lee, Ping Bow, 10 Oreg. 27, 28.

48. See Fisher *v.* Ford, 12 A. & E. 654, 40 E. C. L. 327; Hargreaves *v.* Hopper, 1 C. P. D. 195, 45 L. J. C. P. 105, 33 L. T. Rep. N. S. 530, 24 Wkly. Rep. 186.

"Is on file" see Erickson *v.* Barber, 83 Iowa 367, 369, 49 N. W. 838.

"Is being held" see Theis *v.* State, 54 Ohio St. 245, 43 N. E. 207, referring to an agricultural fair.

"Is visiting" see Morgan *v.* Boyer, 39 Ohio St. 324, 326, 48 Am. Rep. 454.

49. Barzizas *v.* Hopkins, 2 Rand. (Va.) 276, 293. See also Hammond *v.* Buchanan, 68 Ga. 728, 731; Providence, etc., R. Co. *v.* Yonkers F. Ins. Co., 10 R. I. 74, 77; Lindsay *v.* Allen, 112 Tenn. 637, 649, 82 S. W. 171; *In re* Pulborough Parish, [1894] 1 Q. B. 725, 58 J. P. 572, 63 L. J. Q. B. 497, 70 L. T. Rep. N. S. 639, 1 Manson 172, 9 Reports 395, 42 Wkly. Rep. 388.

"Is to be" as meaning "must be" see White *v.* Disher, 67 Cal. 402, 404, 7 Pac. 826.

Used in the sense of "can be" see Griswold *v.* Edson, 32 Minn. 436, 437, 21 N. W. 475 [*citing* Bigelow *v.* Ames, 18 Minn. 527].

50. See Collins *v.* Carr, 118 Ga. 205, 206, 44 S. E. 1000; Hilgendorf *v.* Ostrom, 46 Ill. App. 465, 470; Delaware Bay, etc., R. Co. *v.* Markley, 45 N. J. Eq. 139, 149, 16 Atl. 436. See also Hall *v.* Brackett, 62 N. H. 509, 511, 13 Am. St. Rep. 588. But *compare* Tummins *v.* State, 18 Tex. App. 13, 14.

51. Morgan Leg. Max.

52. *In re* Queensberry Leases, 1 Bligh 339, 522, 4 Eng. Reprint 127. See also Burrill L. Dict. [*citing* Bell Dict.].

53. Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 635, 30 N. W. 469, holding that a body of submerged land, although covered by an aquatic vegetation, is not an island. See Goff *v.* Cougle, 118 Mich. 307, 311, 76 N. W. 489, 42 L. R. A. 161.

54. Morgan Leg. Max.

IS QUI DOLO MALE DESIIT POSSIDERE PRO POSSESSORE HABETUR. A maxim meaning "He who has fraudulently ceased to possess is still a possessor."[55]

ISSUABLE. In practice, leading to, or producing an issue; relating to an issue or issues.[56] (Issuable: Defense, see PLEADING. Plea or Answer, see PLEADING.)

ISSUE.[57] **A. In Its Ordinary Sense.** As a noun, the act of sending or causing to go forth; a moving out of any enclosed place; egress;[58] the act of passing out; exit; egress or passage out;[59] the ultimate result or end.[60] As a verb, to send out,[61] to send out officially;[62] to send forth;[63] to put forth;[64] to deliver,[65] for use,[66] or authoritatively;[67] to put into circulation;[68] to emit;[69]

55. Morgan Leg. Max.

56. Burrill L. Dict.

The "issuable terms" were Hilary and Trinity, so called because in them issues were made up for the assizes. Wharton L. Lex.

57. Distinguished from "allotment" in Nelson Coke, etc., Co. *v.* Pellatt, 4 Ont. L. Rep. 481, 489.

As used in connection with other words see the following phrases: "Abide by the issue" (Niagara F. Ins. Co. *v.* Scammon, 35 Ill. App. 582, 586); "and for default of such issue to the use and behoof of all and every other the issue of my body" (Allgood *v.* Blake, L. R. 7 Exch. 339, 347); "And her issue" (Atkinson *v.* McCormick, 76 Va. 791, 796); "any issue joined" (Schumacher *v.* Mehlberg, 96 Mo. App. 598, 600, 70 S. W. 910); "contract in issue" (Pember *v.* Congdon, 55 Vt. 58, 59); "date of issue" (Gage *v.* McCord, 5 Ariz. 227, 233, 51 Pac. 977); "die without legal issue" (Tinsley *v.* Jones, 13 Gratt. (Va.) 289, 298); "dying without issue" (Kimball *v.* Penhallow, 60 N. H. 448, 451; Emmons *v.* Caines, 3 Barb. (N. Y.) 243, 247); "dying without lawful issue" (Arnold *v.* Brown, 7 R. I. 188, 195); "failing such issue" (Cooper *v.* Macdonald, L. R. 16 Eq. 258, 271, 42 L. J. Ch. 533, 28 L. T. Rep. N. S. 693, 21 Wkly. Rep. 833); "have no male issue" (Bell *v.* Scammon, 15 N. H. 381, 391); "if he shall live to have issue" (Arnold *v.* Brown, 7 R. I. 188, 196); "if he should die without issue" (Downing *v.* Wherrin, 19 N. H. 9, 85); "issue and allotment" of corporate stock (Nelson Coke, etc., Co. *v.* Pellatt, 4 Ont. L. Rep. 481, 489); "issued and taken" (Orlando First Nat. Bank *v.* King, 36 Fla. 25, 29, 18 So. 1); "issues and profits" (Stewart *v.* Phelps, 71 N. Y. App. Div. 91, 95, 75 N. Y. Suppl. 526); "issuing an order" (Thomas *v.* Abbott, 105 Mich. 687, 691, 63 N. W. 984); "issuing out of a court" (Burton *v.* Delaplain, 25 Mo. App. 376, 379); "lawful issue as aforesaid" (Taylor *v.* Taylor, 63 Pa. St. 481, 484, 3 Am. Rep. 565); "leaving issue" (Martin *v.* Holgate, L. R. 1 H. L. 175, 187, 35 L. J. Ch. 789, 15 Wkly. Rep. 135); "on which it issued" (Mollison *v.* Eaton, 16 Minn. 426, 10 Am. Rep. 150); "shall issue" (Lambert *v.* Haskell, 80 Cal. 611, 616, 22 Pac. 327); "their living issue" (Hemenway *v.* Draper, 91 Minn. 235, 236, 97 N. W. 874); "the issue to which the interrogatory relates" (Churchill *v.* Ricker, 109 Mass. 209, 211); "wait for orders to issue" (White *v.* Reed, 60 Mo. App. 380, 384); "without issue" (Newton *v.* Griffith, 1 Harr. & G. (Md.) 111, 116); "without leaving lawful issue" (Haring *v.* Van Buskirk, 8 N. J. Eq. 545, 548).

58. Webster Dict. [*quoted* in Coley *v.* Lewis, 91 N. C. 21, 24].

59. Worcester Dict. [*quoted* in Coley *v.* Lewis, 91 N. C. 21, 24].

60. Niagara F. Ins. Co. *v.* Scammon, 35 Ill. App. 582, 586.

61. State *v.* Pierce, 52 Kan. 521, 35 Pac. 19; The American Pig Iron Storage Co. *v.* State Bd. of Assessors, 56 N. J. L. 389, 394, 29 Atl. 160 [*quoting* Century Dict.].

62. Potter *v.* Lainhart, 44 Fla. 647, 673, 33 So. 251 [*quoting* Century Dict.; Webster Dict.].

63. Folks *v.* Yost, 54 Mo. App. 55, 59 [*citing* Anderson L. Dict.; Webster Dict.]; Corning *v.* Meade County, 102 Fed. 57, 62, 42 C. C. A. 154.

64. State *v.* Pierce, 52 Kan. 521, 35 Pac. 19.

65. State *v.* Pierce, 52 Kan. 521, 528, 35 Pac. 19.

"A county warrant or order is 'issued' when made out and placed in the hands of a person authorized to receive it, or is actually delivered or taken away. So long as a county warrant or order is not delivered or put into circulation, it is not 'issued.'" State *v.* Pierce, 52 Kan. 521, 528, 35 Pac. 19. See also American Bridge Co. *v.* Wheeler, 35 Wash. 40, 43, 76 Pac. 534.

66. Sisk *v.* Citizens' Ins. Co., 16 Ind. App. 565, 45 N. E. 804, 805 [*quoted* in American Bridge Co. *v.* Wheeler, 35 Wash. 40, 43, 76 Pac. 534; Century Dict.].

67. American Bridge Co. *v.* Wheeler, 35 Wash. 40, 43, 76 Pac. 534.

68. State *v.* Pierce, 52 Kan. 521, 35 Pac. 19; Folks *v.* Yost, 54 Mo. App. 55, 59 [*citing* Anderson L. Dict.; Webster Dict.]; Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309, 341 [*quoted* in American Pig Iron Storage Co. *v.* State Bd. of Assessors, 56 N. J. L. 389, 394, 29 Atl. 160; Century Dict.].

"To issue tax bills then, as ordinarily understood, necessarily includes delivery to some one; just as municipal bonds may be written out or printed and signed, but they are not issued until sent out, delivered or put into circulation." Folks *v.* Yost, 54 Mo. App. 55, 59.

69. State *v.* Pierce, 52 Kan. 521, 35 Pac. 19; Folks *v.* Yost, 54 Mo. App. 55, 59 [*citing* Anderson L. Dict.; Webster Dict.]; Corning *v.* Meade County, 102 Fed. 57, 62, 42 C. C. A. 154 [*quoted* in American Bridge Co.

to go out;[70] to go forth as authoritative or binding;[71] to proceed or arise from;[72] to proceed as from a source.[73]

B. In Relation to Property — 1. In General. The word "issue" is susceptible of three meanings: 1. It may describe a class of persons who are to take as joint tenants with the parties named. 2. It may be descriptive of a class who are to take at a definite and fixed time as purchasers; and 3, it may denote an indefinite succession of lineal descendants who are to take by inheritance. Whenever this word is used either in a deed or will, it must be used in one of these senses.[74]

2. In the Sense of Descendants.[75] In its legal sense, as used in statutes and wills, and deeds, and other instruments, issue means descendants,[76] lineal descend

v. Wheeler, 35 Wash. 40, 43, 76 Pac. 534; Century Dict.].

70. Burrill L. Dict.

71. Potter *v.* Lainhart, 44 Fla. 647, 673, 33 So. 251.

72. Burrill L. Dict.

73. Century Dict. [*quoted* in Potter *v.* Lainhart, 44 Fla. 647, 673, 33 So. 251].

74. Mendenhall *v.* Mower, 16 S. C. 303, 311.

75. Distinguished from "children" and "heirs" in Smith *v.* Chapman, 1 Hen. & M. (Va.) 240, 292. See also Bodine *v.* Brown, 12 N. Y. App. Div. 335, 338, 42 N. Y. Suppl. 202, where it is said: "While the word 'issue' would be included within the broader definition of the word 'heir,' a devise to heirs might include a class not included within a devise to his 'issue.'"

76. *Georgia.*— Hertz *v.* Abrahams, 110 Ga. 707, 711, 717, 36 S. E. 409, 50 L. R. A. 361.

Indiana.— Lamb *v.* Medsher, (Ind. App. 1905) 74 N. E. 1012, 1014. See also Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190.

Maryland.— Weybright *v.* Powall, 86 Md. 573, 578, 39 Atl. 421; Lyles *v.* Digges, 6 Harr. & J. 364, 373, 14 Am. Dec. 281.

Massachusetts.— Dexter *v.* Inches, 147 Mass. 324, 326, 17 N. E. 551; Holland *v.* Adams, 3 Gray 188, 193.

Mississippi.— Jordan *v.* Roach, 32 Miss. 481, 612.

New Hampshire.— Jenkins *v.* Jenkins, 64 N. H. 407, 408, 14 Atl. 557.

New Jersey.— Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 485; Price *v.* Sisson, 13 N. J. Eq. 168, 177.

New York.— Chwatal *v.* Schreiner, 148 N. Y. 683, 687, 43 N. E. 166; Soper *v.* Brown, 136 N. Y. 244, 248, 32 N. E. 768, 32 Am. St. Rep. 731; Drake *v.* Drake, 134 N. Y. 220, 224, 32 N. E. 114, 17 L. R. A. 664; Wilson *v.* Wilson, 76 N. Y. App. Div. 232, 234, 78 N. Y. Suppl. 408; Emmet *v.* Emmet, 67 N. Y. App. Div. 183, 185, 73 N. Y. Suppl. 614; Cochrane *v.* Kip, 19 N. Y. App. Div. 272, 277, 46 N. Y. Suppl. 148; Bodine *v.* Brown, 12 N. Y. App. Div. 335, 338, 42 N. Y. Suppl. 202; Soper *v.* Brown, 65 Hun 155, 157, 20 N. Y. Suppl. 30; Harrison *v.* McAdam, 38 Misc. 18, 21, 76 N. Y. Suppl. 701; U. S. Trust Co. *v.* Tobias, 4 N. Y. Suppl. 211, 213; Matter of Cornell, 5 Dem. Surr. 88, 89.

Pennsylvania.— Wistar *v.* Scott, 105 Pa. St. 200, 215, 51 Am. Rep. 197; Taylor *v.* Taylor, 63 Pa. St. 483, 484, 3 Am. Rep. 565.

Rhode Island.— Pearce *v.* Rickard, 18 R. I. 142, 145, 26 Atl. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472 [*citing* 1 Jarman Wills 89; 2 Redfield Wills (2d ed.) 35 *et seq.*; 2 Williams Exrs. 999].

South Carolina.— Beckam *v.* De Saussure, 9 Rich. 531, 549 [*citing* Coke Litt. 25; 2 Jarman Wills]; Burleson *v.* Bowman, 1 Rich. Eq. 111 [*citing* 2 Jarman Wills 25; 2 Redfield Wills 396].

Tennessee.— Ridley *v.* McPherson, 100 Tenn. 402, 404, 43 S. W. 772.

Virginia.— Tinsley *v.* Jones, 13 Gratt. 289, 292.

England.— Hickling *v.* Fair, [1899] A. C. 12, 15, 68 L. J. P. C. 15; Morgan *v.* Thomas, 9 Q. B. D. 643, 646, 51 L. J. Q. B. 556, 47 L. T. Rep. N. S. 281, 31 Wkly. Rep. 106; *In re* Birks, [1900] 1 Ch. 417, 420, 69 L. J. Ch. 124, 81 L. T. Rep. N. S. 741; Ralph *v.* Carrick, 11 Ch. D. 873, 885, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505 [*quoted* in Drake *v.* Drake, 3 N. Y. Suppl. 760, 761] (where it is said: "In ordinary parlance the *prima facie* meaning of issue is children. In legal documents its *prima facie* meaning is 'descendants'"); Bradley *v.* Cartwright, L. R. 2 C. P. 511, 520, 36 L. J. C. P. 218, 16 L. T. Rep. N. S. 587, 15 Wkly. Rep. 922; Fairfield *v.* Bushell, 32 Beav. 158, 161, 55 Eng. Reprint 62; Rhodes *v.* Rhodes, 27 Beav. 413, 416, 54 Eng. Reprint 162; Ross *v.* Ross, 20 Beav. 645, 52 Eng. Reprint 753; Doe *v.* Rucastle, 8 C. B. 876, 65 E. C. L. 876; Pruen *v.* Osborne, 11 Sim. 132, 134, 34 Eng. Ch. 132, 59 Eng. Reprint 824; King *v.* Melling, 1 Vent. 225, 229; Leigh *v.* Norbury, 13 Ves. Jr. 340, 33 Eng. Reprint 321; Sibley *v.* Perry, 7 Ves. Jr. 522, 531, 6 Rev. Rep. 183, 32 Eng. Reprint 211; Davenport *v.* Hanbury, 3 Ves. Jr. 257, 260, 3 Rev. Rep. 91, 30 Eng. Reprint 999.

The term does not include heirs at law of a person dying without children. Bodine *v.* Brown, 12 N. Y. App. Div. 335, 338, 42 N. Y. Suppl. 202.

The word applies to those only who are of the blood of the testator or person named as the parent (Barnes *v.* Greenzebach, 1 Edw. (N. Y.) 41, 46; Arnold *v.* Brown, 7 R. I. 188, 195), and does not comprehend those who have acquired the name or character of children by marriage (Barnes *v.* Greenzebach, *supra*), or adoption (Theobald *v.* Fugman, 64 Ohio St. 473, 482, 60 N. E. 606; Hartwell *v.* Tefft, 19 R. I. 644, 646, 35 Atl. 882, 34 L. R. A. 500).

ants;[77] offspring;[78] legitimate offspring[79] It *ex proprio vigore* indicates succession,[80] and is a word which lends itself very easily to the expression of representation.[81] When unconfined by any indication of an intention to the contrary it includes all descendants,[82] of every degree[83] and every generation;[84] all the descendants in all generations;[85] a line of descendants;[86] all lineal descendants;[87] the whole line of lineal descendants;[88] lineal descendants generally;[89] lineal descendants indefinitely;[90] descendants to an indefinite degree;[91] descendants generally;[92] all future descendants;[93] all persons in the line of descent;[94] an

77. Hemenway *v.* Draper, 91 Minn. 235, 236, 97 N. W. 874; Taft *v.* Taft, 3 Dem. Surr. (N. Y.) 86, 88; Kingsland *v.* Rapelye, 3 Edw. (N. Y.) 1, 6.

78. Black *v.* Cartmell, 10 B. Mon. (Ky.) 188, 193.

79. Allen *v.* Markle, 36 Pa. St. 117, 118. The word "issue" in deeds, wills, and other conveyances must be held to mean legitimate issue, unless the context is such as to require a different meaning, or the circumstances surrounding the execution of the paper are such as to make the words import other than legitimates. Johnstone *v.* Taliaferro, 107 Ga. 6, 20, 3 S. E. 931, 45 L. R. A. 95.

80. Bedford's Appeal, 40 Pa. St. 18, 21.

81. Dexter *v.* Inches, 147 Mass. 324, 325, 17 N. E. 551 [*citing* Robinson *v.* Sykes, 23 Beav. 40, 51, 2 Jur. N. S. 895, 26 L. J. Ch. 782, 53 Eng. Reprint 16; Ross *v.* Ross, 20 Beav. 645, 52 Eng. Reprint 753].

82. Hilliker *v.* Bast, 64 N. Y. App. Div. 552, 553, 72 N. Y. Suppl. 301; Bodine *v.* Brown, 12 N. Y. App. Div. 335, 338, 42 N. Y. Suppl. 202 [*citing* Drake *v.* Drake, 134 N. Y. 220, 224, 32 N. E. 114, 17 L. R. A. 664]; Hartwell *v.* Tefft, 19 R. I. 644, 646, 35 Atl. 882, 34 L. R. A. 500 [*citing* Pearce *v.* Richard, 18 R. I. 142, 26 Atl. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472]. See also Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 485.

83. *California.*— *In re* Cavarly, 119 Cal. 406, 410, 51 Pac. 629 [*citing* Jarman Wills 109].

Hawaii.— Rooke *v.* Queen's Hospital, 12 Hawaii 375, 382.

New Jersey.— Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 485.

New York.— Chwatal *v.* Schreiner, 148 N. Y. 683, 687, 43 N. E. 166; Soper *v.* Brown, 136 N. Y. 244, 249, 32 N. E. 768, 32 Am. St. Rep. 731; Emmet *v.* Emmet, 67 N. Y. App. Div. 183, 185, 73 N. Y. Suppl. 614.

Pennsylvania.— Wistar *v.* Scott, 105 Pa. St. 200, 215, 51 Am. Rep. 197.

South Carolina.— Beckam *v.* De Saussure, 9 Rich. 531, 546 [*citing* Coke Litt. 25; 2 Jarman Wills 328]; Burleson *v.* Bowman, 1 Rich. Eq. 111.

England.— *In re* Birks, [1900] 1 Ch. 417, 418, 69 L. J. Ch. 124, 81 L. T. Rep. N. S. 741; Ralph *v.* Carrick. 11 Ch. D. 873, 874, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505 [*citing* Ross *v.* Ross, 20 Beav. 645, 52 Eng. Reprint 753].

At an early day it was held in its primary sense, when not restrained by the context, to be co-extensive and synonymous with "descendants," comprehending objects of every degree. But it came to be apparent to judges there that such a sense given to the term would in most cases defeat the intention of the testator; and hence in the latter cases there is a strong tendency, unless restrained by the context, to hold that it has the meaning of "children." 2 Jarman Wills 328 [*quoted* in Drake *v.* Drake, 3 N. Y. Suppl. 760, 761].

84. Kingsland *v.* Rapelye, 3 Edw. (N. Y.) 1, 6. See also Soper *v.* Brown, 65 Hun (N. Y.) 155, 157, 20 N. Y. Suppl. 30 [*affirmed* in 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731].

85. Luddington *v.* Kime, 1 Ld. Raym. 203, 205.

86. Doe *v.* Taylor, 10 Q. B. 718, 724, 59 E. C. L. 718.

87. Jackson *v.* Jackson, 153 Mass. 374, 377, 26 N. E. 1112, 25 Am. St. Rep. 643, 11 L. R. A. 305; Hills *v.* Barnard, 152 Mass. 67, 73, 25 N. E. 96, 9 L. R. A. 211; Bigelow *v.* Morong, 103 Mass. 287, 289; Martin *v.* Holgate, L. R. 1 H. L. 175, 184, 35 L. J. Ch. 789, 15 Wkly. Rep. 135; Weldon *v.* Hoyland, 4 De G. F. & J. 564, 565, 5 L. T. Rep. N. S. 96, 65 Eng. Ch. 440, 45 Eng. Reprint 303; Freeman *v.* Parsley, 3 Ves. Jr. 421, 423, 30 Eng. Reprint 1085.

88. Wistar *v.* Scott, 105 Pa. St. 200, 214, 215, 51 Am. Rep. 197; Tinsley *v.* Jones, 13 Gratt. (Va.) 289, 292. See also Stanley *v.* Chandler, 53 Vt. 619, 624.

89. Wistar *v.* Scott, 105 Pa. St. 200, 215, 51 Am. Rep. 197. See also Kimball *v.* Penhallow, 60 N. H. 448, 451.

90. Arnold *v.* Alden, 173 Ill. 229, 239, 50 N. E. 704; Holland *v.* Adams, 3 Gray (Mass.) 188, 193. *Compare* Thomas *v.* Levering, 73 Md. 451, 458, 21 Atl. 367, 23 Atl. 3 [*quoting* 2 Redfield Wills 38 note 5], where it is said: "The term 'issue,' in its primary signification, imports 'children,' and that it is a secondary meaning, by which it has been held to include the issue of issue in an indefinite descending line. It is susceptible, more naturally than 'children,' of including all descendants, but the primary sense certainly is that of direct issue. And it is only in a secondary sense that it includes descendants."

91. Matter of U. S. Trust Co., 36 Misc. (N. Y.) 378, 380, 73 N. Y. Suppl. 635.

92. Wright *v.* Mercein, 34 Misc. (N. Y.) 414, 416, 69 N. Y. Suppl. 936 [*citing* Chwatal *v.* Schreiner, 148 N. Y. 683, 688, 43 N. E. 166].

93. Bradley *v.* Cartwright, L. R. 2 C. P. 511, 520, 36 L. J. C. P. 218, 16 L. T. Rep. N. S. 587, 15 Wkly. Rep. 922.

94. Wilson *v.* Wilson, 76 N. Y. App. Div. 232, 234, 78 N. Y. Suppl. 408.

entire line of descent[95] without regard to the degree of proximity or remoteness from the original stock or source;[96] the issue of issue in an indefinite descending line;[97] issue to the remotest generation;[98] all issue to the latest time;[99] the whole posterity;[1] all persons having a common ancestry;[2] remote offspring,[3] all the remotest descendants;[4] latest descendants;[5] all the offspring or descendants of the person whether heirs or not.[6] Accordingly it is quite well established that the term "issue" may include GRANDCHILDREN,[7] *q. v.*, as well as CHILDREN,[8] *q. v.*,

95. Haldeman *v.* Haldeman, 40 Pa. St. 29, 35.

96. Ridley *v.* McPherson, 100 Tenn. 402, 405, 43 S. W. 772. See also Robinson *v.* Sykes, 23 Beav. 40, 51, 2 Jur. N. S. 895, 26 L. J. Ch. 782, 53 Eng. Reprint 16.

97. Arnold *v.* Alden, 173 Ill. 229, 239, 50 N. E. 704; 2 Redfield Wills § 3, c. 1, pp. 37–42 [*quoted* in Thomas *v.* Levering, 73 Md. 451, 458, 21 Atl. 367, 23 Atl. 3].

The words "without issue," when applied to dispositions of real estate, *ex vi termini*, mean an indefinite failure of issue, if there be nothing in the will restricting it to a failure at the time of the death of the first devisee, or to some other time or event. Newton *v.* Griffith, 1 Harr. & G. (Md.) 111, 116.

98. Bryden *v.* Willett, L. R. 7 Eq. 472, 475. See also Haydon *v.* Wilshere, 3 T. R. 372, 373. *Compare* Taft *v.* Taft, 3 Dem. Surr. (N. Y.) 86.

99. Maxwell *v.* Call, 16 Fed. Cas. No. 9,323, 2 Brock. 119.

1. Bradley *v.* Cartwright, L. R. 2 C. P. 511, 515, 36 L. J. C. P. 218, 16 L. T. Rep. N. S. 587, 15 Wkly. Rep. 922 [*citing* Roddy *v.* Fitzgerald, 6 H. L. Cas. 823, 10 Eng. Reprint 1518].

2. Travers *v.* Wallace, 93 Md. 507, 513, 49 Atl. 415; Thomas *v.* Higgins, 47 Md. 439; Ridley *v.* McPherson, 100 Tenn. 402, 404, 43 S. W. 772 [*citing* Bouvier L. Dict.]; Morgan *v.* Thomas, 9 Q. B. D. 643, 646, 51 L. J. Q. B. 556, 47 L. T. Rep. N. S. 281, 31 Wkly. Rep. 106.

3. Soper *v.* Brown, 65 Hun (N. Y.) 155, 157, 20 N. Y. Suppl. 30.

4. Drake *v.* Drake, 134 N. Y. 220, 237, 32 N. E. 114, 17 L. R. A. 664; Robinson *v.* Sykes, 23 Beav. 40, 51, 2 Jur. N. S. 895, 26 L. J. Ch. 782, 53 Eng. Reprint 16; Ross *v.* Ross, 20 Beav. 645, 52 Eng. Reprint 753.

5. Maynard *v.* Wright, 26 Beav. 285, 291, 53 Eng. Reprint 908.

6. Black *v.* Cartmell, 10 B. Mon. (Ky.) 188, 193.

7. *Mississippi.*— Jordan *v.* Roach, 32 Miss. 481, 612.

New Hampshire.— Kimball *v.* Penhallow, 60 N. H. 448, 451.

New Jersey.— Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 486 [*quoting* 2 Williams Exrs. 999].

New York.— Soper *v.* Brown, 136 N. Y. 244, 246, 32 N. E. 768, 32 Am. St. Rep. 731.

Pennsylvania.—Parkhurst *v.* Harrower, 142 Pa. St. 432, 435, 21 Atl. 826, 24 Am. St. Rep. 507; Powell *v.* Domestic Missions, 49 Pa. St. 46, 53.

South Carolina.— Buist *v.* Dawes, 4 Rich. Eq. 421, 428; Burleson *v.* Bowman, 1 Rich. Eq. 111.

United States.— Cutting *v.* Cutting, 6 Fed. 259, 264, 6 Sawy. 396 [*citing* Adams *v.* Law, 17 How. 417, 15 L. ed. 149]; Ingraham *v.* Meade, 13 Fed. Cas. No. 7,045, 3 Wall. Jr. 32.

England.— Haydon *v.* Wilshere, 3 T. R. 372, 373; Cook *v.* Cook, 2 Vern. Ch. 545, 546, 23 Eng. Reprint 952.

"It is only where the word 'issue' is not qualified or explained that it is construed to include grandchildren as well as children." Arnold *v.* Alden, 173 Ill. 229, 239, 50 N. E. 704.

8. *California.*— *In re* Winchester, 140 Cal. 468, 469, 74 Pac. 10; Newman's Estate, 75 Cal. 213, 219, 16 Pac. 887, 7 Am. St. Rep. 146; *In re* McDonniel, Myr. Prob. 94, 96.

Massachusetts.— Dexter *v.* Inches, 147 Mass. 324, 325, 17 N. E. 551.

New Hampshire.— Kimball *v.* Penhallow, 60 N. H. 448, 451.

New Jersey.— Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 487.

New York.— Soper *v.* Brown, 136 N. Y. 244, 246, 32 N. E. 768, 32 Am. St. Rep. 731.

Pennsylvania.— *In re* Eyre, 205 Pa. St. 561, 566, 55 Atl. 541; Parkhurst *v.* Harrower, 142 Pa. St. 432, 435, 21 Atl. 826, 24 Am. St. Rep. 507; Carroll *v.* Burns, 108 Pa. St. 386, 393; Wistar *v.* Scott, 105 Pa. St. 200, 213, 51 Am. Rep. 197; Robins *v.* Quinliven, 79 Pa. St. 333, 336.

Rhode Island.— Pearce *v.* Rickard, 18 R. I. 142, 146, 26 Atl. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472.

South Carolina.— Buist *v.* Dawes, 4 Rich. Eq. 421, 428.

United States.— Adams *v.* Law, 17 How. 417, 422, 15 L. ed. 149.

England.— Edyvean *v.* Archer, [1903] A. C. 379, 383, 72 L. J. P. C. 85, 89 L. T. Rep. N. S. 4; Heasman *v.* Pearse, L. R. 7 Ch. 275, 277, 41 L. J. Ch. 705, 709, 26 L. T. Rep. N. S. 299, 20 Wkly. Rep. 271; Martin *v.* Holgate, L. R. 1 H. L. 175, 187, 35 L. J. Ch. 789, 15 Wkly. Rep. 135; Morgan *v.* Thomas, 9 Q. B. D. 643, 646, 51 L. J. Q. B. 556, 47 L. T. Rep. N. S. 281, 31 Wkly. Rep. 106; *In re* Birks, [1900] 1 Ch. 417, 420, 69 L. J. Ch. 124, 81 L. T. Rep. N. S. 741 [*reversing* [1899] 1 Ch. 703, 708, 711, 68 L. J. Ch. 319, 80 L. T. Rep. N. S. 257, 47 Wkly. Rep. 374]; *In re* Warren, 26 Ch. D. 208, 216, 53 L. J. Ch. 787, 50 L. T. Rep. N. S. 454, 32 Wkly. Rep. 641; Ralph *v.* Carrick, 11 Ch. D. 873, 882, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505; *In re* Hopkins, 9 Ch. D. 131, 47 L. J. Ch. 672, 26 Wkly. Rep. 629; *In re* Veale, 4 Ch. D. 61, 67; Hobgen *v.* Neale, L. R. 11 Eq. 48, 40 L. J. Ch. 36,

and may be equivalent to HEIRS,[9] *q. v.*, or HEIRS OF THE BODY,[10] *q. v.*,

23 L. T. Rep. N. S. 681, 19 Wkly. Rep. 144; Bryden *v.* Willett, L. R. 7 Eq. 472, 475; *In re* Merricks, L. R. 1 Eq. 551, 35 L. J. Ch. 418, 12 Jur. N. S. 245, 14 L. T. Rep. N. S. 130, 14 Wkly. Rep. 473; Loveday *v.* Hopkins, Ambl. 273, 27 Eng. Reprint 183; Fairfield *v.* Bushell, 32 Beav. 158, 161, 55 Eng. Reprint 62; Marshall *v.* Baker, 31 Beav. 608, 613, 9 Jur. N. S. 396, 7 L. T. Rep. N. S. 303, 11 Wkly. Rep. 78, 54 Eng. Reprint 1275; Baker *v.* Bayldon, 31 Beav. 209, 54 Eng. Reprint 1118; Tatham *v.* Vernon, 29 Beav. 604, 7 Jur. N. S. 814, 4 L. T. Rep. N. S. 531, 9 Wkly. Rep. 822, 824, 54 Eng. Reprint 762; Rhodes *v.* Rhodes, 27 Beav. 413, 417, 54 Eng. Reprint 162; Maynard *v.* Wright, 26 Beav. 285, 290, 53 Eng. Reprint 908; Smith *v.* Horsfall, 25 Beav. 628, 630, 53 Eng. Reprint 776; *In re* Jones, 23 Beav. 242, 243, 53 Eng. Reprint 95; Waldron *v.* Boulter, 22 Beav. 284, 285, 52 Eng. Reprint 1117; Bradshaw *v.* Milling, 19 Beav. 417, 23 L. J. Ch. 603, 52 Eng. Reprint 412; Pope *v.* Pope, 14 Beav. 591, 594, 21 L. J. Ch. 276, 51 Eng. Reprint 411; Edwards *v.* Edwards, 12 Beav. 97, 50 Eng. Reprint 997; Carter *v.* Bentall, 2 Beav. 551, 559, 4 Jur. 691, 9 L. J. Ch. 303, 48 Eng. Reprint 1295; McGregor *v.* McGregor, 1 De G. F. & J. 63, 71, 45 Eng. Reprint 282; 2 Jarman Wills 101, 107; Lanphier *v.* Buck, 2 Dr. & Sm. 484, 34 L. J. Ch. 650; Williams *v.* Teale, 6 Hare 239, 250, 31 Eng. Ch. 239; Lambert *v.* Peyton, 8 H. L. Cas. 1, 11, 11 Eng. Reprint 325; Benn *v.* Dixon, 11 Jur. 812, 16 Sim. 21, 39 Eng. Ch. 21, 60 Eng. Reprint 780; Louis *v.* Louis, 9 Jur. N. S. 244, 7 L. T. Rep. N. S. 666; *In re* Smith, 58 L. J. Ch. 661, 662; Barraclough *v.* Shillito, 53 L. J. Ch. 841, 32 Wkly. Rep. 875; Clay *v.* Pennington, 6 L. J. Ch. 183, 7 Sim. 370, 8 Eng. Ch. 370, 58 Eng. Reprint 879; Swift *v.* Swift, 5 L. J. Ch. 376, 377, 8 Sim. 168, 8 Eng. Ch. 168, 59 Eng. Reprint 67; Slater *v.* Dangerfield, 16 L. J. Exch. 139, 15 M. & W. 263; Minter *v.* Wraith, 13 Sim. 52, 60, 36 Eng. Ch. 52, 60 Eng. Reprint 21; Pruen *v.* Osborne, 11 Sim. 132, 134, 135, 34 Eng. Ch. 132, 59 Eng. Reprint 824; Cook *v.* Cook, 2 Vern. Ch. 545, 23 Eng. Reprint 952; Leigh *v.* Norbury, 13 Ves. Jr. 340, 344, 33 Eng. Reprint 321; Sibley *v.* Perry, 7 Ves. Jr. 522, 532, 6 Rev. Rep. 183, 32 Eng. Reprint 211; Buckingham *v.* Sellick, [1872] W. N. 136; Grove *v.* Marshall, [1872] W. N. 43, 44; *In re* Hall, [1871] W. N. 136, 137; *In re* Dreweatt, [1868] W. N. 68, 106; Fitzherbert *v.* Heathcote [*cited* in Bayley *v.* Morris, 4 Ves. 788, 794, 31 Eng. Reprint 408].

9. *Indiana.*— Allen *v.* Craft, 109 Ind. 476, 482, 9 N. E. 919, 58 Am. Rep. 425 [*citing* Hawkins Wills 189].

Maryland.— Travers *v.* Wallace, 93 Md. 507, 513, 49 Atl. 415 [*citing* Thomas *v.* Higgins, 47 Md. 439].

New York.— Cochrane *v.* Kip, 19 N. Y. App. Div. 272, 277, 46 N. Y. Suppl. 148.

North Carolina.— Taylor *v.* Smith, 116 N. C. 531, 534, 21 S. E. 202.

Virginia.— See Gish *v.* Moomaw, 89 Va. 345, 366, 15 S. E. 868.

Compare In re McDonniel, Myr. Prob. (Cal.) 94, 96.

10. *Hawaii.*— Rooke *v.* Queen's Hospital, 12 Hawaii 375, 382.

Indiana.— Anderson L. Dict. [*quoted* in Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190]; Lamb *v.* Medsker, (App. 1905) 74 N. E. 1012, 1014 [*citing* 3 Jarman Wills (Randolph & Talcott ed. 200)].

Kentucky.— Black *v.* Cartmell, 10 B. Mon. 188, 193.

Maryland.— Weybright *v.* Powell, 86 Md. 573, 578, 39 Atl. 421; Shreve *v.* Shreve, 43 Md. 382, 384; Chelton *v.* Henderson, 9 Gill 432, 437.

Massachusetts.— Holland *v.* Adams, 3 Gray 188, 193.

New Jersey.— Den *v.* Schenck, 8 N. J. L. 29, 39.

New York.— New York L. Ins., etc., Co. *v.* Viele, 161 N. Y. 11, 19, 55 N. E. 311, 76 Am. St. Rep. 238; Chwatal *v.* Schreiner, 148 N. Y. 683, 687, 43 N. E. 166; Soper *v.* Brown, 136 N. Y. 244, 247, 32 N. E. 768, 32 Am. St. Rep. 731; Drake *v.* Drake, 134 N. Y. 220, 225, 32 N. E. 114, 17 L. R. A. 664; Hilliker *v.* Bast, 64 N. Y. App. Div. 552, 553, 72 N. Y. Suppl. 301; Harrison *v.* McAdam, 38 Misc. 18, 21, 76 N. Y. Suppl. 701; Kingsland *v.* Rapelye, 3 Edw. 1, 6.

Pennsylvania.— Grimes *v.* Shirk, 169 Pa. St. 74, 81, 32 Atl. 113; O'Rourke *v.* Sherwin, 156 Pa. St. 285, 291, 27 Atl. 43; Nes *v.* Ramsey, 155 Pa. St. 628, 632, 26 Atl. 770; Shalters *v.* Ladd, 141 Pa. St. 349, 358, 21 Atl. 596; Eichelberger's Estate, 135 Pa. St. 160, 172, 19 Atl. 1006, 1014; Carroll *v.* Burns, 108 Pa. St. 386, 393; Wistar *v.* Scott, 105 Pa. St. 200, 214, 51 Am. Rep. 197; Robins *v.* Quinliven, 79 Pa. St. 333, 335; Taylor *v.* Taylor, 63 Pa. St. 481, 483, 3 Am. Rep. 565; Dodson *v.* Ball, 60 Pa. St. 492, 500, 100 Am. Dec. 586; Powell *v.* Domestic Missions, 49 Pa. St. 46, 53; Angle *v.* Brosius, 43 Pa. St. 187, 189; Guthrie's Appeal, 37 Pa. St. 9, 16; George *v.* Morgan, 16 Pa. St. 95, 107; Pennock's Estate, 11 Phila. 623, 626.

South Carolina.— Beckam *v.* De Saussure, 9 Rich. 531, 546.

Tennessee.— Bouvier L. Dict. [*quoted* in Ridley *v.* McPherson, 100 Tenn. 402, 405, 43 S. W. 772].

Virginia.— Tinsley *v.* Jones, 13 Gratt. 289, 292 [*quoting* 2 Jarman Wills 329, 331].

England.— Bradley *v.* Cartwright, L. R. 2 C. P. 511, 520, 36 L. J. C. P. 218, 16 L. T. Rep. N. S. 587, 15 Wkly. Rep. 922; Allgood *v.* Blake, L. R. 7 Exch. 339, 355; Jordan *v.* Adams, 9 C. B. N. S. 483, 7 Jur. N. S. 973, 30 L. J. C. P. 161, 4 L. T. Rep. N. S. 775, 9 Wkly. Rep. 593, 99 E. C. L. 482; Slater *v.* Dangerfield, 16 L. J. Exch. 139, 15 M. & W. 263; Doe *v.* Collis, 4 T. R. 294, 300.

"Lawful issue" is synonymous with "heirs of the body." Kingsland *v.* Rapelye, 3 Edw. (N. Y.) 1, 6.

without regard to degree.[11] But the words, issue of his body, are more flexible than the words, heirs of his body,[12] and courts more readily interpret the former as the synonym of children, and a mere *descriptio personarum*, than the latter.[13] The word "issue" is a word of broader import than descendant[14] and may include the children of a living parent as well as the children or descendants of one who is dead.[15] The term is *nomen collectivum*,[16] *nomen generalissimum*,[17] or *genus generalissimum*;[18] it takes in the whole generation *ex vi termini*,[19] and must always have its effect accordingly, unless there be a clear manifestation of intention in the context to use it in the restricted sense of issue living at the death.[20] But the word issue may be *designatio personæ*,[21] and may indicate a particular class in being at a special time.[22] It is a word capable of being used in different senses,[23] even in different clauses of the same instrument,[24] and whether in a will it shall be held to mean "descendants" or "children" depends upon the intention of the testator as derived from the context or the entire will, or such extrinsic circumstances as can be considered.[25] The meaning of the word may be restricted,[26] and its true interpretation must be found from the connection in which it is used,[27] *noscitur a sociis*;[28] and whatever be the *prima facie* meaning of the word it will yield to the intention of a testator to be collected from the will.[29] It may when such appears to have been the intent with which the word is used have the restricted import of CHILDREN,[30] *q. v.*

11. Harrison *v.* McAdam, 30 Misc. (N. Y.) 18, 21, 76 N. Y. Suppl. 701 [*citing* Soper *v.* Brown, 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731].

12. Daniel *v.* Whartenby, 17 Wall. (U. S.) 639, 643, 21 L. ed. 661 [*quoted* in Strain *v.* Sweeny, 163 Ill. 603, 607, 45 N. E. 201]; Lees *v.* Mosley, 5 L. J. Exch. 78, 84, 1 Y. & C. Exch. 589; Doe *v.* Collis, 4 T. R. 294, 300; Evans *v.* King, 21 Ont. App. 519, 523.

13. Daniel *v.* Whartenby, 17 Wall. (U. S.) 639, 643, 21 L. ed. 661 [*quoted* in Strain *v.* Sweeny, 163 Ill. 603, 607, 45 N. E. 201]; Slater *v.* Dangerfield, 16 L. J. Exch. 139, 15 M. & W. 263, 273.

14. Hillen *v.* Iselin, 144 N. Y. 365, 374, 39 N. E. 368.

15. Hillen *v.* Iselin, 144 N. Y. 365, 374, 39 N. E. 368.

16. *Georgia.*— Hertz *v.* Abrahams, 110 Ga. 707, 711, 717, 36 S. E. 409, 50 L. R. A. 361.

Maryland.— Shreve *v.* Shreve, 43 Md. 382, 384.

New York.— Kingsland *v.* Rapelye, 3 Edw. 1, 6.

Pennsylvania.— Allen *v.* Marble, 36 Pa. St. 117, 118.

Tennessee.— Pointer *v.* Rust, 7 Humphr. 532, 533.

Virginia.— Tinsley *v.* Jones, 13 Gratt. 289, 292 [*quoting* 2 Jarman Wills 329, 331].

England.— Doe *v.* Collis, 4 T. R. 294, 296; Maynard *v.* Wright, 26 Beav. 285, 291, 53 Eng. Reprint 908; King *v.* Melling, 1 Vent. 225, 229.

17. Wistar *v.* Scott, 105 Pa. St. 200, 216, 51 Am. Rep. 197; Bradley *v.* Cartwright, L. R. 2 C. P. 511, 515, 36 L. J. C. P. 218, 16 L. T. Rep. N. S. 587, 15 Wkly. Rep. 922; Robinson *v.* Sykes, 23 Beav. 40, 51, 2 Jur. N. S. 895, 26 L. J. Ch. 782, 53 Eng. Reprint 16.

18. Haydon *v.* Wilshere, 3 T. R. 372, 373.

19. Doe *v.* Collis, 4 T. R. 294, 296.

20. Tinsley *v.* Jones, 13 Gratt. (Va.) 289, 292 [*quoting* 2 Jarman Wills 329, 331].

21. Luddington *v.* Kime, 1 Ld. Raym. 203, 205.

22. Pearce *v.* Rickard, 18 R. I. 142, 146, 26 Atl. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472 [*citing* Slater *v.* Dangerfield, 16 L. J. Exch. 139, 15 M. & W. 263].

23. Lees *v.* Mosely, 5 L. J. Exch. 78, 84, 1 Y. & C. Exch. 589. See also Edwards *v.* Bibb, 43 Ala. 666, 672; Sibley *v.* Perry, 7 Ves. Jr. 522, 532, 6 Rev. Rep. 183, 32 Eng. Reprint 211; Allan *v.* Backhouse, 2 Ves. & B. 65, 67, 13 Rev. Rep. 23, 35 Eng. Reprint 243.

24. *In re* Warren, 26 Ch. D. 208, 53 L. J. Ch. 787, 50 L. T. Rep. N. S. 454, 32 Wkly. Rep. 641; *In re* Hopkins, 9 Ch. D. 131, 47 L. J. Ch. 672, 26 Wkly. Rep. 629; Rhodes *v.* Rhodes, 27 Beav. 413, 54 Eng. Reprint 162; Carter *v.* Bentall, 2 Beav. 551, 4 Jur. 691, 9 L. J. Ch. 303, 48 Eng. Reprint 1295; Ridgeway *v.* Munkittrick, 1 Dr. & War. 84.

25. Chwatal *v.* Schreiner, 148 N. Y. 683, 43 N. E. 166; Drake *v.* Drake, 3 N. Y. Suppl. 760, 761 [*quoting* Ralph *v.* Carrick, 11 Ch. D. 873, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505]; Taft *v.* Taft, 3 Dem. Surr. (N. Y.) 86, 88 [*citing* 4 Kent Comm. 278 note].

26. Palmer *v.* Dunham, 125 N. Y. 68, 25 N. E. 1081; Palmer *v.* Horn, 84 N. Y. 516; Harrison *v.* McAdam, 38 Misc. (N. Y.) 18, 21, 76 N. Y. Suppl. 701; Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565; Adams *v.* Law, 17 How. (U. S.) 417, 15 L. ed. 149].

27. Travers *v.* Wallace, 93 Md. 507, 513, 49 Atl. 415 [*citing* Thomas *v.* Higgins, 47 Md. 439]; Daly *v.* Greenberg, 69 Hun (N. Y.) 228, 230, 23 N. Y. Suppl. 582.

28. Thomas *v.* Higgins, 47 Md. 439, 451.

29. Lees *v.* Mosley, 5 L. J. Exch. 78, 84, 1 Y. & C. Exch. 589. See also Arnold *v.* Alden, 173 Ill. 229, 238, 239, 50 N. E. 704.

30. *California.*— *In re* Winchester, 140 Cal. 468, 74 Pac. 10 [*citing* Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146]; Newman's Estate, 75 Cal. 213, 219, 16 Pac. 887, 7 Am. St. Rep. 146.

3. Word of Limitation or of Purchase — a. In Deeds. In a deed the word

Georgia.— Johnstone *v.* Taliaferro, 107 Ga. 6, 20, 32 S. E. 931, 45 L. R. A. 95.

Hawaii.— Rooke *v.* Queen's Hospital, 12 Hawaii 375, 382.

Illinois.— Arnold *v.* Alden, 173 Ill. 229, 239, 50 N. E. 704.

Indiana.— Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190.

Kentucky.— Moore *v.* Moore, 12 B. Mon. 651, 655; Drain *v.* Violett, 2 Bush 155, 157.

Maryland.— Thomas *v.* Levering, 73 Md. 451, 458, 21 Atl. 367, 23 Atl. 3; Shreve *v.* Shreve, 43 Md. 382, 401; Chelton *v.* Henderson, 9 Gill 432, 437; McPherson *v.* Snowden, 19 Md. 197, 229.

Massachusetts.— Jackson *v.* Jackson, 153 Mass. 374, 377, 26 N. E. 112, 25 Am. St. Rep. 643, 11 L. R. A. 305; Hall *v.* Hall, 140 Mass. 267, 270, 2 N. E. 700; King *v.* Savage, 121 Mass. 303, 306; Bigelow *v.* Morong, 103 Mass. 287, 289.

Minnesota.—Hemenway *v.* Draper, 91 Minn. 235, 237, 97 N. W. 874.

Mississippi.— Jordan *v.* Roach, 32 Miss. 481, 612.

New Hampshire.— Kimball *v.* Penhallow, 60 N. H. 448, 451; Crockett *v.* Robinson, 46 N. H. 454, 464.

New Jersey.— Ballentine *v.* De Camp, 39 N. J. Eq. 87, 89; Feit *v.* Vannatta, 21 N. J. Eq. 84; Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 485; Price *v.* Sisson, 13 N. J. Eq. 168, 178.

New York.—Chwatal *v.* Schreiner, 148 N. Y. 683, 43 N. E. 166; Cochrane *v.* Schell, 140 N. Y. 516, 539, 35 N. E. 971; Soper *v.* Brown, 136 N. Y. 244, 249, 32 N. E. 768, 32 Am. St. Rep. 731; Drake *v.* Drake, 134 N. Y. 220, 225, 32 N. E. 114, 17 L. R. A. 664; Palmer *v.* Dunham, 125 N. Y. 68, 73, 25 N. E. 1081; Palmer *v.* Horn, 84 N. Y. 516, 521; Emmet *v.* Emmet, 67 N. Y. App. Div. 183, 185, 73 N. Y. Suppl. 614; Palmer *v.* Dunham, 52 Hun 468, 470, 6 N. Y. Suppl. 213; Harrison *v.* McAdam, 38 Misc. 18, 21, 76 N. Y. Suppl. 701; Wright *v.* Mercein, 34 Misc. 414, 416, 69 N. Y. Suppl. 936; Chwatal *v.* Schreiner, 3 Misc. 192, 195, 23 N. Y. Suppl. 206; Drake *v.* Drake, 3 N. Y. Suppl. 760, 761; Mowatt *v.* Carrow, 7 Paige 328, 32 Am. Dec. 641.

North Carolina.— Doe *v.* Gibson, 49 N. C. 425, 428.

Ohio.— Theobald *v.* Fugman, 64 Ohio St. 473, 482, 60 N. E. 606; Harkness *v.* Corning, 24 Ohio St. 416, 425.

Pennsylvania.— *In re* Gerhard, 160 Pa. St. 253, 255, 28 Atl. 684; O'Rourke *v.* Sherwin, 156 Pa. St. 285, 291, 27 Atl. 43; Peirce *v.* Hubbard, 152 Pa. St. 18, 21, 25 Atl. 231; Robinson's Estate, 149 Pa. St. 418, 426, 24 Atl. 297; Parkhurst *v.* Harrower, 142 Pa. St. 432, 433, 21 Atl. 826, 24 Am. St. Rep. 507; Shalters *v.* Ladd, 141 Pa. St. 349, 358, 21 Atl. 596; Reinoehl *v.* Shirk, 119 Pa. St. 113, 12 Atl. 806; Wistar *v.* Scott, 105 Pa. St. 200, 214, 51 Am. Rep. 197; Robins *v.* Quinliven, 79 Pa. St. 333; Taylor *v.* Taylor, 63 Pa. St. 481, 483, 486, 3 Am. Rep. 565; Crawford *v.* Forest Oil Co., (1904) 57 Atl. 47, 53; Sheet's Appeal, 52 Pa. St. 257, 261; Angle *v.* Brosius, 43 Pa. St. 187, 189; Powell *v.* Board of Domestic Missions, 49 Pa. St. 46, 53; Bedford's Appeal, 40 Pa. St. 18, 21; Westenberger *v.* Reist, 13 Pa. St. 594, 600; Duffy's Estate, 16 Pa. Co. Ct. 300, 302; Matter of Weltmer, 1 Pearson 415, 416.

Rhode Island.— Pearce *v.* Rickard, 18 R. I. 142, 148, 26 Atl. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472.

South Carolina.— Buist *v.* Dawes, 4 Rich. Eq. 421, 428; Burleson *v.* Bowman, 1 Rich. Eq. 11.

Tennessee.— Aydlett *v.* Swope, (1875) 17 S. W. 208, 209.

United States.— Adams *v.* Law, 17 How. 417, 422, 15 L. ed. 149.

England.— Martin *v.* Holgate, L. R. 1 H. L. 175, 35 L. J. Ch. 789, 15 Wkly. Rep. 135; Ralph *v.* Carrick, 11 Ch. D. 873, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505; *In re* Hopkins, 9 Ch. D. 131, 47 L. J. Ch. 672, 26 Wkly. Rep. 629; Bryden *v.* Willett, L. R. 7 Eq. 472, 475 [*citing* Carter *v.* Bentall, 2 Beav. 551, 4 Jur. 691, 9 L. J. Ch. 303, 48 Eng. Reprint 1295]; Baker *v.* Bayldon, 31 Beav. 209, 54 Eng. Reprint 1118; Ross *v.* Ross, 20 Beav. 645, 653, 52 Eng. Reprint 753; Tawney *v.* Ward, 1 Beav. 563, 8 L. J. Ch. 319, 17 Eng. Ch. 563, 48 Eng. Reprint 1059; Ridgeway *v.* Munkittrick, 1 Dr. & War. 84; Jennings *v.* Newman, 3 Jur. 748, 1068, 10 Sim. 219, 16 Eng. Ch. 219, 59 Eng. Reprint 596; Peel *v.* Catlow, 2 Jur. 759, 7 L. J. Ch. 273, 9 Sim. 372, 16 Eng. Ch. 372, 59 Eng. Reprint 400; Needham *v.* Smith, 6 L. J. Ch. O. S. 107, 4 Russ. 318, 28 Rev. Rep. 107; Fitzgerald *v.* Field, 4 L. J. Ch. O. S. 170, 1 Russ. 416, 25 Rev. Rep. 97, 46 Eng. Ch. 370, 38 Eng. Reprint 162; Campbell *v.* Sandys, 1 Sch. & Lef. 281, 9 Rev. Rep. 33; Sibley *v.* Perry, 7 Ves. Jr. 522, 6 Rev. Rep. 183, 32 Eng. Reprint 211; Reeves *v.* Brymer, 4 Ves. Jr. 692, 31 Eng. Reprint 358.

Canada.— Evans *v.* King, 21 Ont. App. 519, 532.

Intention is required for the purpose of limiting the sense of the word, restraining it to children only. Pearce *v.* Rickard, 18 R. I. 142, 145, 26 Atl. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472 [*citing* Pope *v.* Pope, 14 Beav. 591, 594, 21 L. J. Ch. 276, 51 Eng. Reprint 411; Carter *v.* Bentall, 2 Beav. 551, 4 Jur. 691, 9 L. J. Ch. 303, 48 Eng. Reprint 1295; Hockley *v.* Mawhey, 3 Bro. Ch. 82, 29 Eng. Reprint 420, 1 Ves. Jr. 143, 30 Eng. Reprint 271, 1 Rev. Rep. 93; Slater *v.* Dangerfield, 16 L. J. Exch. 139, 15 M. & W. 263; Bernard *v.* Mountague, 1 Meriv. 422, 434, 35 Eng. Reprint 729; Haydon *v.* Wilshere, 3 T. R. 372; Cook *v.* Cook, 2 Vern. Ch. 545, 23 Eng. Reprint 952; Leigh *v.* Norbury, 13 Ves. Jr. 340, 32 Eng. Reprint 321; Freeman *v.* Parskey, 3 Ves. Jr. 421, 30 Eng. Reprint 1085; Davenport *v.* Hanbury, 3 Ves. Jr. 257, 3 Rev. Rep. 91, 30 Eng. Reprint 999; Jarman Wills 89; 2 Redfield Wills (2d ed.) 35 *et seq.*; 2 Williams Exrs. 999].

issue, as to real property, is not the apt word of inheritance, and does not in itself convey a fee,[31] but is always taken as a word of purchase.[32]

b. In Wills. In a will the term "issue" may be employed either as a word of purchase or of limitation, according to which sense will best effectuate the testator's intention.[33] It is usually construed as a word of limitation,[34] and not of

A clear intention must appear in order to restrain the usual sense of the word. Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 485.

A slight indication in other parts of the will that such was the meaning of the testator is sufficient. Emmet *v.* Emmet, 67 N. Y. App. Div. 183, 185, 73 N. Y. Suppl. 614.

The use of the word "parent" in connection with "issue" indicates that the latter word is intended to mean children. Arnold *v.* Alden, 173 Ill. 229, 239, 50 N. E. 704; Harrison *v.* McAdam, 38 Misc. (N. Y.) 18, 21, 76 N. Y. Suppl. 701; Matter of U. S. Trust Co., 36 Misc. (N. Y.) 378, 380, 381, 73 N. Y. Suppl. 635 [*citing* Soper *v.* Brown, 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731; U. S. Trust Co. *v.* Tobias, 4 N. Y. Suppl. 211, 21 Abb. N. Cas. 392; Ross *v.* Ross, 20 Beav. 645, 653, 52 Eng. Reprint 753; Pruen *v.* Osborne, 11 Sim. 132, 34 Eng. Ch. 132, 59 Eng. Reprint 824; Sibley *v.* Perry, 7 Ves. Jr. 522, 6 Rev. Rep. 183, 32 Eng. Reprint 211. *Compare* Ralph *v.* Carrick, 11 Ch. D. 873, 48 L. J. Ch. 801, 40 L. T. Rep. N. S. 505.

Where a power is given to appoint among "issue" followed by a limitation over in their favour, and then it is declared that the "children" shall take in equal shares, the word "children" does not cut down the strict technical meaning of the word "issue." *In re* Warren, 26 Ch. D. 208, 216, 53 L. J. Ch. 787, 50 L. T. Rep. N. S. 454, 32 Wkly. Rep. 641; Harrison *v.* Symons, 14 Wkly. Rep. 959.

31. Mendenhall *v.* Mower, 16 S. C. 303, 311.

32. *California.*— *In re* McDonniel, 1 Myr. Prob. 94, 95.

Indiana.— McIlhinny *v.* McIlhinny, 137 Ind. 411, 415, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489 [*citing* Elphinstone Int. Deeds 318, 319; 2 Washburn Real Prop. (5th ed.) 654, 655]; Nelson *v.* Davis, 35 Ind. 474, 478.

Maryland.—Thomas *v.* Higgins, 47 Md. 439, 445.

Minnesota.— Whiting *v.* Whiting, 42 Minn. 548, 550, 44 N. W. 1030.

New Jersey.— Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475, 485; Price *v.* Sisson, 13 N. J. Eq. 168, 177.

Pennsylvania.— *In re* Bacon, 202 Pa. St. 535, 542, 52 Atl. 135 [*quoting* 2 Blackstone Comm. 115]; Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565; Powell *v.* Board of Domestic Missions, 49 Pa. St. 46, 53.

Tennessee.— Ridley *v.* McPherson, 100 Tenn. 402, 404, 43 S. W. 772.

Texas.— Hancock *v.* Butler, 21 Tex. 804, 814 [*citing* Fearne Rem. 490].

England.— Bagshaw *v.* Spencer, 2 Atk. 570, 582, 26 Eng. Reprint 741, 1 Ves. 142, 27 Eng. Reprint 944 [*citing* Coke Litt. 205]; Doe *v.* Collis, 4 T. R. 294, 299.

See DEEDS, 13 Cyc. 664 note 20.

33. *Indiana.*— McIlhinny *v.* McIlhinny, 137 Ind. 411, 415, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489.

Maryland.— Lyles *v.* Digges, 6 Harr. & J. 364, 369, 14 Am. Dec. 281.

New Jersey.— Preston Est. [*quoted* in Zabriskie *v.* Wood, 23 N. J. Eq. 541, 546].

New York.—Chwatal *v.* Schreiner, 148 N. Y. 683, 687, 43 N. E. 166; Drake *v.* Drake, 134 N. Y. 220, 225, 32 N. E. 114, 17 L. R. A. 664; Palmer *v.* Horn, 84 N. Y. 516, 519; Emmet *v.* Emmet, 67 N. Y. App. Div. 183, 185, 73 N. Y. Suppl. 614; Schoonmaker *v.* Sheely, 3 Den. 485, 490 [*quoted* in Tayloe *v.* Gould, 10 Barb. 388, 395].

Pennsylvania.— Parkhurst *v.* Harrower, 142 Pa. St. 432, 435, 21 Atl. 826, 24 Am. St. Rep. 507; Shalters *v.* Ladd, 141 Pa. St. 349, 358, 21 Atl. 596; Taylor *v.* Taylor, 63 Pa. St. 481, 483, 3 Am. Rep. 565; Powell *v.* Board of Domestic Missions, 19 Pa. St. 46, 53; Findlay *v.* Riddle, 3 Binn. 139, 162, 5 Am. Dec. 355, 365.

Texas.— Hancock *v.* Butler, 21 Tex. 804, 814.

Virginia.— Smith *v.* Chapman, 1 Hen. & M. 240, 290.

United States.— Daniel *v.* Whartenby, 17 Wall. 639, 21 L. ed. 661.

England.— Stockdale *v.* Nicholson, L. R. 4 Eq. 359, 365, 36 L. J. Ch. 793, 16 L. T. Rep. N. S. 767, 15 Wkly. Rep. 986; Woodhouse *v.* Herrick, 3 Eq. Rep. 817, 1 K. & J. 352, 365, 24 L. J. Ch. 649, 3 Wkly. Rep. 303; Goodright *v.* Pullyn, 2 Ld. Raym. 1437, 1440; Luddington *v.* Kime, 1 Ld. Raym. 203, 205; Slater *v.* Dangerfield, 16 L. J. Exch. 139, 15 M. & W. 263; Lees *v.* Mosley, 5 L. J. Exch. 78, 1 Y. & C. Exch. 589; Doe *v.* Collis, 4 T. R. 294, 300; Roe *v.* Grew, Wilm. 272, 2 Wils. C. P. 322 [*quoted* in Culham-Clinton *v.* Newcastle, [1902] 1 Ch. 34, 49, 71 L. J. Ch. 53, 85 L. T. Rep. N. S. 439, 50 Wkly. Rep. 83].

Canada.— Evans *v.* King, 21 Ont. App. 519, 523.

34. *Indiana.*—Granger *v.* Granger, 147 Ind. 95, 97, 44 N. E. 189, 46 N. E. 80, 36 L. R. A. 186, 190 [*quoting* Anderson L. Dict.]; Lamb *v.* Modsker, (Ind. App. 1905) 74 N. E. 1012, 1014; Allen *v.* Craft, 109 Ind. 476, 482, 9 N. E. 919, 58 Am. Rep. 425; Gonzales *v.* Barton, 45 Ind. 295, 296.

Kentucky.— Moseby *v.* Corbin, 3 A. K. Marsh. 289, 291.

Maryland.— Wybright *v.* Powell, 86 Md. 573, 578, 39 Atl. 421; McPherson *v.* Snowden, 19 Md. 197, 228; Chelton *v.* Henderson,

purchase;[35] unless there be controlling words, clearly showing that a contrary meaning was intended by its use;[36] but if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning, and to be applied only to children or to descendants of a particular class, or at a particular time, it is to be construed as a word of purchase, and not of limitation, in order to effectuate the intention of the testator.[37] Accordingly words of superadded

9 Gill 432, 437; Lyles *v.* Digges, 6 Harr. & J. 364, 373, 14 Am. Dec. 281; Horne *v.* Lyeth, 4 Harr. & J. 431, 439.

New York.— Hilliker *v.* Bast, 64 N. Y. App. Div. 552, 553, 72 N. Y. Suppl. 301; Kingsland *v.* Rapelye, 3 Edw. 1, 6.

Pennsylvania.— Hill *v.* Giles, 201 Pa. St. 215, 217, 50 Atl. 758; O'Rourke *v.* Sherwin, 156 Pa. St. 285, 291, 27 Atl. 43; Nes *v.* Ramsay, 155 Pa. St. 628, 632, 26 Atl. 770; Parkhurst *v.* Harrower, 142 Pa. St. 432, 435, 21 Atl. 826, 24 Am. St. Rep. 507; Shalters *v.* Ladd, 141 Pa. St. 349, 358, 21 Atl. 596; Reinoehl *v.* Shirk, 119 Pa. St. 108, 113, 12 Atl. 806; Carroll *v.* Burns, 108 Pa. St. 386, 393; Wistar *v.* Scott, 105 Pa. St. 200, 213, 51 Am. Rep. 197; Robins *v.* Quinliven, 79 Pa. St. 333, 335; Middleswarth *v.* Blackmore, 74 Pa. St. 414, 419; Kleppner *v.* Laverty, 70 Pa. St. 70, 72; Taylor *v.* Taylor, 63 Pa. St. 481, 483, 3 Am. Rep. 565; Powell *v.* Board of Domestic Missions, 49 Pa. St. 46, 53; Angle *v.* Brosius, 43 Pa. St. 187, 189; Powell *v.* Board of Domestic Missions, 49 Pa. St. 46, 53; *In re* James, 1 Dall. 47, 48, 1 L. ed. 31.

Rhode Island.— Pearce *v.* Rickard, 18 R. I. 142, 148, 26 Atl. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472 [*quoting* 4 Kent Comm. 278].

South Carolina.— Beckam *v.* De Saussure, 9 Rich. 531, 546; Williams *v.* Caston, 1 Strobh. 130, 133.

Tennessee.— Ridley *v.* McPherson, 100 Tenn. 402, 404, 43 S. W. 772; Aydlett *v.* Swope, (1875) 17 S. W. 208, 209.

Texas.— Hancock *v.* Butler, 21 Tex. 804, 814.

Virginia.— Smith *v.* Chapman, 1 Hen. & M. 240, 292. See also Gish *v.* Moomaw, 89 Va. 345, 366, 15 S. E. 868.

England.— Bradley *v.* Cartwright, L. R. 2 C. P. 511, 520, 36 L. J. C. P. 218, 16 L. T. Rep. N. S. 587, 15 Wkly. Rep. 922; Bagshaw *v.* Spencer, 2 Atk. 570, 582, 26 Eng. Reprint 741, 1 Ves. 142, 27 Eng. Reprint 944; Jellicoe *v.* Smythe, 18 C. B. 860, 866, 114 E. C. L. 860; Jordan *v.* Adams, 9 C. B. N. S. 483, 502, 7 Jur. N. S. 973, 30 L. J. C. P. 161, 4 L. T. Rep. N. S. 775, 9 Wkly. Rep. 593, 99 E. C. L. 482; *Re* Wynch, 27 Eng. L. & Eq. 375, 381; Roddy *v.* Fitzgerald, 6 H. L. Cas. 823, 10 Eng. Reprint 1518 [*quoted* in Pelham-Clinton *v.* Newcastle, [1902] 1 Ch. 34, 49, 71 L. J. Ch. 53, 85 L. T. Rep. N. S. 439, 50 Wkly. Rep. 83]; Lees *v.* Mosley, 5 L. J. Exch. 78, 84, 1 Y. & C. Exch. 589; *Re* Wilmot, 76 L. T. Rep. N. S. 415, 416, 45 Wkly. Rep. 492; Doe *v.* Collis, 4 T. R. 294, 300.

Canada.— Evans *v.* King, 21 Ont. App. 519, 523, 532 [*citing* Bowen *v.* Lewis, 9 App. Cas. 890, 54 L. J. Q. B. 55, 52 L. T. Rep. N. S. 189].

Devise to A and his issue creates estate tail.— Bowen *v.* Lewis, 9 App. Cas. 890, 54 L. J. Q. B. 55, 52 L. T. Rep. N. S. 189; Sandes *v.* Cooke, L. R. 21 Ir. 445; Hockley *v.* Mawbey, 3 Bro. Ch. 82, 29 Eng. Reprint 420, 1 Ves. Jr. 143, 30 Eng. Reprint 271, 1 Rev. Rep. 93; Woodhouse *v.* Herrick, 3 Eq. Rep. 817, 1 Kay & J. 352, 24 L. J. Ch. 649, 3 Wkly. Rep. 303; Roddy *v.* Fitzgerald, 6 H. L. Cas. 823, 10 Eng. Reprint 1518; Pelham-Clinton *v.* Newcastle, 69 L. J. Ch. 875, 49 Wkly. Rep. 12; Simmons *v.* Simmons, 5 L. J. Ch. 198, 8 Sim. 22, 8 Eng. Ch. 22, 59 Eng. Reprint 9; Williams *v.* Williams, 51 L. T. Rep. N. S. 779, 33 Wkly. Rep. 118 [1884] W. N. 198; 2 Jarman Wills 414.

Bequests of personalty are not within the rule that issue is *prima facie* a word of limitation. Knight *v.* Ellis, 2 Bro. Ch. 570, 29 Eng. Reprint 312; Matter of Wynch, 5 De G. M. & G. 188, 2 Eq. Rep. 1025, 18 Jur. 659, 23 L. J. Ch. 930, 2 Wkly. Rep. 570, 43 Eng. Reprint 842 [*affirming* 22 L. J. Ch. 750, 1 Sm. & G. 427, 65 Eng. Reprint 187].

"Issue" is not even in legal construction so appropriate a word of limitation as the word "heirs." Hancock *v.* Butler, 21 Tex. 804, 814.

35. *Kentucky.*— Moseby *v.* Corbin, 3 A. K. Marsh. 289, 291.

Maryland.— Chelton *v.* Henderson, 9 Gill 432, 437.

New York.— Drake *v.* Drake, 134 N. Y. 220, 225, 32 N. E. 114, 17 L. R. A. 664; Hilliker *v.* Bast, 64 N. Y. App. Div. 552, 553, 72 N. Y. Suppl. 301.

Pennsylvania.— Parkhurst *v.* Harrower, 142 Pa. St. 432, 435, 21 Atl. 826, 24 Am. St. Rep. 507; Shalters *v.* Ladd, 141 Pa. St. 349, 358, 21 Atl. 596 [*citing* Reinoehl *v.* Shirk, 119 Pa. St. 108, 113, 12 Atl. 806].

Tennessee.— Aydlett *v.* Swope, (1875) 17 S. W. 208, 209.

England.— Roddy *v.* Fitzgerald, 6 H. L. Cas. 823, 10 Eng. Reprint 1518 [*quoted* in Pelham-Clinton *v.* Newcastle, [1902] 1 Ch. 34, 49, 71 L. J. Ch. 53, 85 L. T. Rep. N. S. 439, 50 Wkly. Rep. 83]; Slater *v.* Dangerfield, 16 L. J. Exch. 139, 15 M. & W. 263.

36. Chilton *v.* Henderson, 9 Gill (Md.) 432, 437; Shalters *v.* Ladd, 141 Pa. St. 349, 21 Atl. 596; Aydlett *v.* Swope, (Tenn. 1875) 17 S. W. 208, 209.

37. *California.*— *In re* McDonniel, Myr. Proh. 94, 95.

Indiana.— Shimer *v.* Mann, 99 Ind. 190, 192, 50 Am. Rep. 82.

Maryland.— Timanus *v.* Dugan, 46 Md. 402, 417; McPherson *v.* Snowden, 19 Md. 197, 229; Horne *v.* Lyeth, 4 Harr. & J. (Md.) 431, 439.

Mississippi.— Jordan *v.* Roach, 32 Miss. 481, 612.

limitation which would not control the legal effect of the words "heirs of the body" have frequently been held to give the word "issue" the operation of a word of purchase.[38] So also a direction that issue shall take a vested interest at a certain period is a context inconsistent with issue being a word of limitation, and the issue take as purchasers.[39] When issue is used as a word of limitation, it expresses the quantity of the estate, in its indefinite duration, and all the rights which are incident to the estate.[40]

4. In the Sense of Rents and Profits. The word "issue" is an apt term to indicate the rents and profits derived from realty.[41]

C. In Commercial Law.[42] As a noun, a class or series of bonds, debentures, etc., comprising all that are emitted at one and the same time;[43] the first delivery of the instrument, complete in form to a person who takes it as holder.[44] As applied to negotiable paper, its delivery for use and circulation.[45] As applied to bonds, it usually includes delivery,[46] but it does not invariably do so.[47] It may mean "executed" under some circumstances and "delivered" under others.[48] It is said to include not only the delivery of the bonds, but all preceding acts of signature and preparation,[49] and registration according to law.[50] In this connection, it is used in two distinct senses; sometimes when the bonds are merely authorized; and, also, when they are actually executed anddelivered for value.[51] As applied to a license, it means filled out and delivered to the applicant therefor.[52]

New York.— Hilliker *v.* Bast, 64 N. Y. App. Div. 552, 553, 72 N. Y. Suppl. 301; Tayloe *v.* Gould, 10 Barb. 388, 395.

Pennsylvania.— Hill *v.* Giles, 201 Pa. St. 215, 217, 50 Atl. 758; O'Rourke *v.* Sherwin, 156 Pa. St. 285, 291, 27 Atl. 43; Nes *v.* Ramsay, 155 Pa. St. 628, 632, 26 Atl. 770; Wistar *v.* Scott, 105 Pa. St. 200, 215, 51 Am. Rep. 197; Middleswarth *v.* Blackmore, 74 Pa. St. 414, 419; Kleppner *v.* Laverty, 70 Pa. St. 70, 72; Taylor *v.* Taylor, 63 Pa. St. 481, 483, 484, 3 Am. Rep. 565; Miller's Appeal, 52 Pa. St. 113; Powell *v.* Domestic Missions, 49 Pa. St. 46, 54; Angle *v.* Brosius, 43 Pa. St. 187, 189.

South Carolina.— Buist *v.* Dawes, 4 Rich. Eq. 421, 428, holding that the words "surviving him" had this effect.

Tennessee.— Ridley *v.* McPherson, 100 Tenn. 402, 404, 46 S. E. 772; Aydlett *v.* Swope, (Tenn. 1875) 17 S. W. 208, 209.

England.— Morgan *v.* Thomas, 9 Q. B. D. 643, 645, 51 L. J. Q. B. 556, 47 L. T. Rep. N. S. 281, 31 Wkly. Rep. 106; Wythe *v.* Thurlston, Ambl. 555, 27 Eng. Reprint 355; Ross *v.* Ross, 20 Beav. 645, 52 Eng. Reprint 753; Bradshaw *v.* Melling, 19 Beav. 417, 23 L. J. Ch. 603, 52 Eng. Reprint 412; Hockley *v.* Mawbey, 3 Bro. Ch. 82, 84, 29 Eng. Reprint 420, 1 Ves. Jr. 143, 30 Eng. Reprint 271, 1 Rev. Rep. 93; Jordan *v.* Adams, 9 C. B. N. S. 482, 502, 7 Jur. N. S. 973, 30 L. J. C. P. 161, 4 L. T. Rep. N. S. 775, 9 Wkly. Rep. 593, 99 E. C. L. 482; Roddy *v.* Fitzgerald, 6 H. L. Cas. 823, 827, 10 Eng. Reprint 1518; Luddington *v.* Kime, 1 Ld. Raym. 203, 205; *Re* Wilmot, 76 L. T. Rep. N. S. 415, 416, 45 Wkly. Rep. 492; Haydon *v.* Wilshere, 3 T. R. 372; Cook *v.* Cook, 2 Vern. Ch. 545, 23 Eng. Reprint 952; Leigh *v.* Norbury, 13 Ves. Jr. 340, 33 Eng. Reprint 321; Freeman *v.* Parsley, 3 Ves. Jr. 421, 30 Eng. Reprint 1085; Davenport *v.* Hanbury, 3 Ves. Jr. 257, 3 Rev. Rep. 91, 30 Eng. Reprint 999.

Canada.— Evans *v.* King, 21 Ont. App. 519, 523.

38. Evans *v.* King, 21 Ont. App. 519, 523. See also Lyles *v.* Digges, 6 Harr. & J. (Md.) 364, 373, 14 Am. Dec. 281; Blackhouse *v.* Wells, 1 Eq. Cas. Abr. 184, 21 Eng. Reprint 976.

39. *Re* Wilmot, 76 L. T. Rep. N. S. 415, 416, 45 Wkly. Rep. 492.

40. Williams *v.* Caston, 1 Strobh. (S. C.) 130, 133.

41. Lindley's Appeal, 102 Pa. St. 235, 256. In English law the goods and profits of the lands of a defendant against whom a writ of distringas or "distress infinite" has been issued, taken by virtue of such writ, are called "issues." Black L. Dict. [*citing* 3 Blackstone Comm. 280; 1 Chitty Cr. L. 351].

42. See Date of Issue, 13 Cyc. 261.

43. Black L. Dict.

44. Mass. Rev. L. (1902) p. 653; Pa. Laws (1901), 220; 45 & 46 Vict. c. 61, § 1.

45. Germania Sav. Bank *v.* Suspension Bridge, 73 Hun (N. Y.) 590, 594, 26 N. Y. Suppl. 98. See also Kansas Mut. L. Ins. Co. *v.* Coalson, 22 Tex. Civ. App. 64, 73, 54 N. W. 388; Yesler *v.* Seattle, 1 Wash. 308, 322, 25 Pac. 1014.

46. Potter *v.* Lainhart, 44 Fla. 647, 673, 33 So. 251; Heman *v.* Larkin, 99 Mo. App. 294, 298, 73 S. W. 218.

47. Potter *v.* Lainhart, 44 Fla. 647, 673, 33 So. 251.

48. Moller *v.* Galveston, 23 Tex. Civ. App. 693, 700, 57 S. W. 1116 [*citing* Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685].

49. Perkins County *v.* Graff, 114 Fed. 441, 444, 52 C. C. A. 243 [*citing* Corning *v.* Meade County, 102 Fed. 57, 42 C. C. A. 154].

50. Douglass *v.* Lincoln County, 5 Fed. 775, 779, 2 McCrary 449.

51. Wright *v.* East Riverside Irr. Dist., 138 Fed. 313, 323.

52. Maggett *v.* Roberts, 112 N. C. 71, 73, 16 S. E. 919.

As applied to a patent it means delivered.[53] As applied to an insurance policy "issued" is indicative of the completion, signing up, and execution of the instrument, making it ready for delivery.[54] In a popular sense a corporation engaged in organization is said to issue stock when it obtains subscriptions for it.[55]

D. In Pleading. A single certain and material point issuing out of the allegations of the plaintiff and defendant;[56] a single material point of law or fact depending in the suit, which, being affirmed on the one side and denied on the other, is presented for determination;[57] a point in dispute between parties[58] on which they put their cause to trial;[59] a claim on one side denied by the other;[60] that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleadings;[61] some question, either of fact or law disputed between the parties, and mutually proposed and accepted by them as the subject for decision.[62] In technical strictness, the term when used with reference to pleadings, signifies the disputed point or question.[63] An issue arises on the pleadings where a fact, or conclusion of law, is maintained by one party and controverted by the other;[64] where both parties rest the fate of the cause upon the truth of the fact in question;[65] when both the parties join upon somewhat that they refer unto a trial to make an end of the plea.[66] Issues are classified and distinguished as follows: General and special; material and immaterial;

53. Northern Pac. R. Co. *v.* Barden, 46 Fed. 592, 617.

54. Stringham *v.* Mut. Ins. Co., 44 Oreg. 447, 457, 75 Pac. 822. See also Spencer *v.* Myers, 73 Hun (N. Y.) 274, 279, 26 N. Y. Suppl. 371.

A certificate of a beneficial society is not "issued," until it has been delivered to and accepted by the member. Logsdon *v.* Supreme Lodge F. U. of A., 34 Wash. 666, 670, 76 Pac. 292.

55. American Pig Iron Storage Co. *v.* State Bd. of Assessors, 56 N. J. L. 389, 394, 29 Atl. 160.

56. Avon Mfg. Co. *v.* Andrews, 30 Conn. 476, 488 [*quoting* 1 Chitty Pl. 652]; Richardson *v.* Smith, 80 Md. 94, 96, 30 Atl. 570; Barth *v.* Rosenfeld, 36 Md. 604, 617 [*quoting* 1 Chitty Pl. 653]; Bassett *v.* Johnson, 2 N. J. Eq. 154, 157 [*quoting* 2 Tidd Pr. 665].

57. People *v.* Slauson, 85 N. Y. App. Div. 166, 167, 83 N. Y. Suppl. 107 [*citing* Webster Int. Dict.; Simonton *v.* Winter, 5 Pet. (U. S.) 141, 8 L. ed. 75].

To constitute an issue, there must be an affirmative on one side and a negative on the other. Black L. Dict.

The production of an "issue" is the object as well as the end and effect of the system or process of pleading; and when, by means of this process, the parties have arrived at a specific point affirmed on the one side and denied on the other, they are said to be "at issue," (*ad exitum*, that is, "at the end" of their pleading;) and the emergent question itself is termed "the issue;" being designated, according to its nature, as an "issue in fact," or an "issue in law." Burrill L. Dict.

Issue joined means an issue of fact reached by the parties, as distinguished from cases where the defendant does not plead or appear, and thus no issue is raised. Solomons *v.* Chesley, 57 N. H. 163, 164.

58. Wolcott *v.* Wigton, 7 Ind. 44, 48; Hays *v.* Hays, 23 Wend. (N. Y.) 363, 370.

59. Wolcott *v.* Wigton, 7 Ind. 44, 48.

"Trying the issue" see U. S. *v.* Greene, 100 Fed. 941, 944.

60. Hays *v.* Hays, 23 Wend. (N. Y.) 363, 370.

"By the 'matter in issue' is to be understood that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings." Morgan *v.* Burr, 58 N. H. 470, 471.

An issue now may be of an affirmative upon an affirmative; as if defendant pleads he was born in France, and plaintiff replies he was born in England, this is a good issue. Tomlin *v.* Burlace, 1 Wils. C. P. 6.

61. Vaughan *v.* Morrison, 55 N. H. 580, 592 [*citing* King *v.* Chase, 15 N. H. 9, 16, 41 Am. Dec. 675].

The "issue joined" between parties may embrace various distinct grounds of defense. — Pointer *v.* Rust, 7 Humphr. (Tenn.) 532, 533.

62. Riggs *v.* Chapin, 7 N. Y. Suppl. 765, 767 [*citing* Tyler Stephen Pl. 147].

A particular question of fact is something different from, and less than, an issue. Gale *v.* Priddy, 66 Ohio St. 400, 404, 64 N. E. 437.

63. Seller *v.* Jenkins, 97 Ind. 430, 438 [*citing* Stephen Pl. 25].

64. Leach *v.* Pierce, 93 Cal. 614, 619, 29 Pac. 235; Kan. Civ. Code, art. 14 (Gen. St. (1901) §§ 4708–4711) [*quoted* in McDermott *v.* Halleck, 65 Kan. 403, 407, 69 Pac. 335]; N. Y. Civ. Code Proc. § 248) [*quoted* in Mora *v.* Great Western Ins. Co., 23 Bosw. (N. Y.) 622, 629]; Ohio Rev. St. § 5128 [*quoted* in Columbus, etc., R. Co. *v.* Thurstin, 44 Ohio St. 525, 528, 9 N. E. 232].

65. Bassett *v.* Johnson, 2 N. J. Eq. 154, 157 [*quoting* 3 Blackstone Comm. 315; Jacob L. Dict.].

66. 3 Blackstone Comm. 313 [*quoted* in White *v.* Emblen, 43 W. Va. 819, 823, 28 S. E. 761; Eberhardt *v.* Sanger, 51 Wis. 72, 77, 8 N. W. 111].

formal and informal; real and feigned;[67] and of law and of fact.[68] A general issue is raised by a plea which briefly and directly traverses the whole declaration, such as "not guilty" or "non-assumpsit."[69] A special issue is formed when the defendant chooses one single material point which he traverses, and rests his whole case upon its determination.[70] Issues are described as material or immaterial according as they do or do not bring up some material point or question which, when determined by the verdict, will dispose of the whole merits of the case, and leave no uncertainty as to the judgment.[71] A formal issue is one framed in strict accordance with the technical rules of pleading.[72] An informal issue is raised when the material allegations of the declaration are traversed but in an inartificial or untechnical mode.[73] A real issue is one formed in a regular manner in a regular suit for the purpose of determining an actual controversy.[74] A feigned issue is one made up by direction of the court upon a supposed case for the purpose of obtaining the verdict of a jury upon some question of fact materially involved in the cause.[75] An issue of law is an issue upon a matter of law or consisting of matter of law being produced by a demurrer on the one side and a joinder in demurrer on the other.[76] An issue of fact is an issue taken upon or consisting of matter of fact; the fact only and not the law being disputed; and which is to be tried by a jury.[77] Matter of law, however, is sometimes involved in an issue of fact as in what are termed general issues.[78]

E. In Relation to Process. Going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service.[79] A writ or notice is issued when it is put in proper form and placed in an officer's hands for service,[80] at the time it becomes a perfected process.[81] (Issue: Affirmative of Issue — At Trial in Civil Action, see TRIAL; In Criminal Action, see CRIMINAL LAW. Bastard, see BASTARDS. Birth of Issue — As Requisite of Estate by Curtesy, see CURTESY; As Revocation of Will, see WILLS. Conformity of — Judgment to Issue, see JUDGMENTS; Verdict or Findings to Issue, see TRIAL. Conveyance With Limitation to Issue, see DEEDS. Costs of Issues Directed Out of Chancery, see COSTS. Evidence Admissible Under Plea of General Issue, see PLEADING. Facts in Issue Under Pleadings, see PLEADING. Finality of Judgment as to All Issues, see APPEAL AND ERROR. Form of Plea of General Issue, see PLEADING. Identity of Issue — In Abatement of Actions, see ABATEMENT AND REVIVAL; As to Res Judicata, see JUDGMENTS. Illegitimate Issue, see BASTARDS. Issue as Affecting Estates Tail, see ESTATES. Issue of — Commercial Paper, see COMMERCIAL PAPER; Execution, see EXECUTIONS. Issues in — Action of Covenant, see COVENANT, ACTION OF; Civil Actions in General, see EQUITY; PLEADING; TRIAL; Criminal Cases, see INDICTMENTS AND INFORMATIONS; Divorce, see DIVORCE; Dower, see

67. Black L. Dict.

68. Leach *v.* Pierce, 93 Cal. 614, 619, 29 Pac. 235; McDermott *v.* Halleck, 65 Kan. 403, 407, 69 Pac. 335; Columbus, etc., R. Co. *v.* Thurstin, 44 Ohio St. 525, 528, 9 N. E. 232; Hume *v.* Woodruff, 26 Oreg. 373, 376, 38 Pac. 191. See also Beem *v.* Newaygo Cir. Judge, 97 Mich. 491, 492, 56 N. W. 760; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 371, 23 Pac. 743.

69. Black L. Dict.

Common issue is the name given to the issue raised by the plea of *non est factum* in an action for breach of covenant. Black L. Dict.

70. Black L. Dict. See also Kimball *v.* Boston, etc., R. Co., 55 Vt. 95, 97, where it is said that special issue means "directly denying some one material and traversable allegation in the declaration, and concluding to the country."

71. Black L. Dict.

72. Black L. Dict.

73. Black L. Dict.

74. Black L. Dict.

75. Black L. Dict.

76. Burrill L. Dict. See also Hume *v.* Woodruff, 26 Oreg. 373, 376, 38 Pac. 191.

77. Burrill L. Dict.

78. Burrill L. Dict.

79. Webster *v.* Sharpe, 116 N. C. 466, 471, 21 S. E. 912.

80. Oskaloosa Cigar Co. *v.* Iowa Cent. R. Co., (Iowa 1902) 89 N. W. 1065, where it is said: "To say that a notice was 'issued' is not equivalent to a statement that it was served."

An execution is "issued" only when it is properly attested by a clerk, and delivered to the sheriff to be executed by him. Pease *v.* Ritchie, 132 Ill. 638, 645, 24 N. E. 433, 8 L. R. A. 566. *Compare* Mills *v.* Corbett, 8 How. Pr. (N. Y.) 500, 501, where it is said that "issued" as applied to process does not mean the same as "delivered to the sheriff."

81. Blain *v.* Blain, 45 Vt. 538, 543.

DOWER; Ejectment, see EJECTMENT. Issue to the Jury — In Equity, see EQUITY; In General, see TRIAL; On Probate or Contest of Will, see WILLS. Issuing Stock, see CORPORATIONS. Joinder of Issues, see PLEADING. Order of Trial of Different Issues, see TRIAL. Presentation of Issue For Review on Appeal, see APPEAL AND ERROR. Relevancy of Evidence to Issue, see EVIDENCE. Responsiveness of Verdict of Findings to Issue, see TRIAL. Rights of Inheritance, see DESCENT AND DISTRIBUTION. Rights Under Will, see WILLS. Special Issues Tried by Jury, see TRIAL. Variance From Issue, see PLEADING. See also BODILY HEIRS; CHILDREN; DAUGHTER; DESCENDANT; GRANDSON; HEIR; HEIR APPARENT; HEIRESS; HEIR OF THE BODY; HEIR PRESUMPTIVE.)

ISSUE MALE. Issue male so used, like heirs male of the body, defines an estate, which according to the rules of inheritance well settled in England, can descend only to males whose descent from the proposed ancestor has been wholly through males.[82]

IT. A personal pronoun, of the third person and neuter gender, corresponding to the masculine he and the feminine she, and having the same plural forms, they, their, them.[83] (See HE.)

ITA LEX SCRIPTA EST. A maxim meaning "The law is so written."[84]

82. Beckam *v.* De Saussure, 9 Rich. (S. C.) 531, 546. See also Lambert *v.* Peyton, 8 H. L. Cas. 1, 11, 11 Eng. Reprint 325.

83. Century Dict.

"It" used in an arson statute referring to a building see People *v.* Fanshawe, 65 Hun (N. Y.) 77, 89, 19 N. Y. Suppl. 865.

"It" used in a theft statute referring to the stolen property see Goodson *v.* State, 32 Tex. 121, 123.

"It" used in a will referring to both principal and interest in a sum loaned see Willett *v.* Rutter, 84 Ky. 317, 323, 1 S. W. 640. As referring to the contents of a house only and not to the house and its contents see Hart *v.* Stoyer, 164 Pa. St. 523, 528, 30 Atl. 497.

"It" used instead of "them" in an indictment see Hollins *v.* State, (Tex. Cr. App. 1902) 69 S. W. 594.

Used in connection with other words see the following phrases: "It is agreed" (Higginson *v.* Weld, 14 Gray (Mass.) 165, 171; Barton *v.* McLean, 5 Hill (N. Y.) 256, 259; Blood *v.* Crew Levick Co., 171 Pa. St. 328, 334, 33 Atl. 344); "it is considered" (Lovett *v.* State, 29 Fla. 356, 384, 11 So. 172, 16 L. R. A. 313; State *v.* Lake, 34 La. Ann. 1069, 1070; Terrill *v.* Achauer, 14 Ohio St. 80, 85); "it is said" (Mann *v.* Pearson, 2 Johns. (N. Y.) 37, 44); "it shall be no defense" (Whitfield *v.* Ætna L. Ins. Co., 125 Fed. 269, 270); "it shall not be lawful" (Dudley *v.* Collier, 87 Ala. 431, 432, 6 So. 304, 13 Am. St. Rep. 55; Reg. *v.* Nott, 4 Q. B. 768, 773, 45 E. C. L. 768, C. & M. 288, 41 E. C. L. 161, Dav. & M. 1, 7 Jur. 621, 12 L. J. M. C. 143); "it shall or may be lawful" (Central New Jersey Land, etc., Co. *v.* Bayonne, 56 N. J. L. 297, 300, 28 Atl. 713; Hugg *v.* Camden, 39 N. J. L. 620, 622); "it shall suffice" (Ridsdale *v.* Clifton, 2 P. D. 276, 346); "it is not so" (Dedway *v.* Powell, 4 Bush (Ky.) 77, 78, 96 Am. Dec. 283); "its office" (Ware *v.* Bankers' Loan, etc., Co., 95 Va. 680, 683, 29 S. E. 744, 64 Am. St. Rep. 826).

84. Bouvier L. Dict.; Den. *v.* Urison, 2 N. J. L. 212, 227.

Applied or quoted in the following cases:

Alabama.— Barfield *v.* Barfield, 139 Ala. 290, 293, 35 So. 884.

Arkansas.— Trimble *v.* James, 40 Ark. 393, 411; Wilson *v.* Spring, 38 Ark. 181, 191; Thomas *v.* Hinkle, 35 Ark. 450, 456.

Connecticut.— Heath *v.* White, 5 Conn. 228, 236; Townsend *v.* Bush, 1 Conn. 260, 273; Peck *v.* Lockwood, 5 Day 22, 26.

Indiana.— Seiler *v.* State, 160 Ind. 605, 610, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448.

Massachusetts.— Oakes *v.* Hill, 10 Pick. 333, 347.

Mississippi.— Stanford *v.* State, 76 Miss. 257, 258, 24 So. 536.

Missouri.— Chouteau *v.* Rowse, 90 Mo. 191, 195, 2 S. W. 209.

New Jersey.— McCulloch *v.* Hopper, 47 N. J. L. 189, 191, 54 Am. Rep. 146; Minhinnah *v.* Haines, 29 N. J. L. 388, 390; Ayres *v.* Revere, 25 N. J. L. 474, 482; McCormick *v.* Brookfield, 4 N. J. L. 69, 71; Den *v.* Urison, 2 N. J. L. 212, 227.

New York.— Matter of Williams, 31 N. Y. App. Div. 617, 619, 52 N. Y. Suppl. 700; Parish *v.* Rogers, 20 N. Y. App. Div. 279, 281, 46 N. Y. Suppl. 1058; Allen *v.* Cook, 26 Barb. 374, 380; People *v.* Bragle, 10 Abb. N. Cas. 300, 308; Adams *v.* Rockwell, 16 Wend. 285, 319.

Ohio.— Hooker *v.* State, 4 Ohio 348, 350.

Pennsylvania.— Lehigh Valley Ins. Co. *v.* Fuller, 81 Pa. St. 398, 400; Hilbish *v.* Catherman, 60 Pa. St. 444, 445; Watson *v.* Bailey, 1 Binn. 470, 478, 2 Am. Dec. 462; Reesman *v.* Kittaning Ins. Co., 3 Pa. Co. Ct. 1, 5; Kelly *v.* Herb, 29 Wkly. Notes Cas. 526, 528; Armpriester's Estate, 1 Woodw. 342, 343.

South Carolina.— Polite *v.* Bero, 63 S. C. 209, 212, 41 S. E. 305.

Tennessee.— Philips *v.* Robertson, 2 Overt. 399, 416.

Virginia.— White *v.* Owen, 30 Gratt. 43, 54; Perkins *v.* Clements, 1 Patt. & H. 141, 153.

United States.— Hunt *v.* Pooke, 12 Fed. Cas. No. 6,895, 1 Abb. 556; U. S. *v.* The

ITA QUOD. Literally, "so that."[85] A term often used as preceding conditions.[86] (See, generally, COVENANTS; DEEDS.)

ITA SEMPER FIAT RELATIO UT VALEAT DISPOSITIO. A maxim meaning "Let the relation be so made that the disposition may stand."[87]

ITEM.[88] A word of varied meaning; according to the standard lexicographers, it may mean an article;[89] a circumstance, a driblet, a part;[90] a separate particular of an account,[91] the particulars of an account[92] or a single item of an account;[93] anything which can form part of a detail;[94] an ENTRY,[95] *q. v.*; a single entry;[96] or a thing in the aggregate composed of several single things.[97] In written instruments, especially in wills, the word is sometimes used as the proper beginning of a distinct clause[98] or paragraph,[99] and is introductory of a new clause, and divides, so far from connecting it with the precedent;[1] to introduce new and distinct matter,[2] and not to influence other clauses of an instrument;[3] to mark and distinguish the different clauses.[4] (See ITEMIZE; and generally, ACCOUNTS AND ACCOUNTING; WILLS.)

ITEMIZE. To state in items or by particulars.[5] (See ITEM.)

ITEMIZED ACCOUNT. An account which states the items making up the aggregate of the demand.[6] (See ITEM. See also, generally, ACCOUNTS AND ACCOUNTING.)

James Wells, 26 Fed. Cas. No. 15,467, 3 Day 296, 298.

85. Burrill L. Dict. [*citing* Coke Litt. § 329; Sheppard Touchst. 121, 122].

86. "For time out of mind, conditions have usually been preceded by such words as '*proviso*,' '*ita quod*,' and '*sub conditione*,' or their modern equivalents." Graves *v.* Deterling, 120 N. Y. 447, 456, 457, 24 N. E. 655 [*quoted* in Union College *v.* New York, 65 N. Y. App. Div. 553, 555, 73 N. Y. Suppl. 51]; Feltham *v.* Cudworth, 2 Ld. Raym. 760, 766 (where Holt, C. J., said that "*ita quod* is held in Littleton, to make a condition subsequent"); 3 Cyc. 716 note 98. See also Gray *v.* Blanchard, 8 Pick. (Mass.) 284, 291; Wright *v.* Wright, 5 Cow. (N. Y.) 197, 199; Karthaus *v.* Ferrer, 1 Pet. (U. S.) 222, 227, 7 L. ed. 121.

87. Bouvier L. Dict.

Applied in Curson's Case, 6 Coke 75*b*, 76*a*.

88. The word is sometimes used as a verb. Thus "the whole [costs], in this case . . . was . . item'd to counsel." Chambers *v.* Robinson, Bunh. 164.

89. Com. *v.* Barnett, 11 Pa. Dist. 520, 524; U. S. *v.* Young, 128 Fed. 111, 114; Webster Dict. [*quoted* in Baldwin *v.* Morgan, 73 Miss. 276, 278, 18 So. 919].

90. Standard Dict. [*quoted* in Com. *v.* Barnett, 11 Pa. Dist. 520, 524]. See also Com. *v.* Barnett, 199 Pa. St. 161, 173, 48 Atl. 976, 55 L. R. A. 882.

91. Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 196, 42 N. E. 600; Com. *v.* Barnett, 11 Pa. Dist. 520, 524; Webster Dict. [*quoted* in Baldwin *v.* Morgan, 73 Miss. 276, 278, 18 So. 919].

92. U. S. *v.* Young, 128 Fed. 111, 114.

93. Com. *v.* Barnett, 11 Pa. Dist. 520, 524.

"Item in any account for distilled spirituous liquors" see Owens *v.* Porter, 4 C. & P. 367, 19 E. C. L. 557.

94. Com. *v.* Barnett, 11 Pa. Dist. 520, 524; U. S. *v.* Young, 128 Fed. 111, 114, "cash items."

95. U. S. *v.* Young, 128 Fed. 111, 114.

96. Com. *v.* Barnett, 11 Pa. Dist. 520, 524.

97. Com. *v.* Barnett, 11 Pa. Dist. 520, 524.

98. Hoxton *v.* Gardiner, 1 Harr. & M. (Md.) 437, 451, where the term is said to be less favorable than "also." See also Hart *v.* Stoyer, 164 Pa. St. 523, 528, 30 Atl. 497; Hopewell *v.* Ackland, 1 Salk. 239.

Compared with "also" see Evans *v.* Knorr, 4 Rawle (Pa.) 66, 70.

99. Com. *v.* Barnett, 11 Pa. Dist. 520, 524.

1. Castledon *v.* Turner, 3 Atk. 257, 258, 26 Eng. Reprint 950.

The word "item" in a will has never been construed as disjunctive, but is only made use of to distinguish the clauses in the will. Cheeseman *v.* Partridge, 1 Atk. 436, 438, 26 Eng. Reprint 279.

The word "item," or "further," or "moreover," is commonly used in the beginning of a separate devise or bequest in a will, merely for the purpose of indicating that it is the commencement of a new bequest, and not as connecting the preceding with the following bequest. Burr *v.* Sim, 1 Whart. (Pa.) 252, 264, 29 Am. Dec. 48.

2. Hoxton *v.* Gardiner, 1 Harr. & M. (Md.) 437, 451 [*citing* Cole *v.* Rawlinson, 1 Salk. 234, 235]; Horwitz *v.* Norris, 60 Pa. St. 261, 282 [*citing* Evans *v.* Knorr, 4 Rawle (Pa.) 66, 71]; Hart *v.* White, 26 Vt. 260, 268; Hopewell *v.* Ackland, 1 Salk. 239.

The introduction of the word "item" shows that the testator is dealing with a new subject. Doe *v.* Westley, 4 B. & C. 667, 669, 10 E. C. L. 749.

3. Hoxton *v.* Gardiner, 1 Harr. & M. (Md.) 437, 451.

4. Edelen *v.* Smoot, 2 Harr. & G. (Md.) 285, 289.

5. Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600.

Minutely itemizing services see 4 Cyc. 1002 note 7.

6. State *v.* Smith, 89 Mo. 408, 411, 14 S. W. 557.

"Itemized form" see State *v.* Smith, 89 Mo. 408, 411, 14 S. W. 557.

ITER. In England a kind of public way over which the public passed on foot.[7] (See ACTUS; VIA; and, generally, STREETS AND HIGHWAYS.)

ITER EST JUS EUNDI, AMBULANDI HOMINIS; NON ETIAM JUMENTUM AGENDI VEL VEHICULUM. A maxim meaning "A way is the right of going or walking, and does not include the right of driving a beast of burden or a carriage."[8]

ITINERANCY. A practice in the Methodist Episcopal Church which required that no preacher having charge of a congregation should remain at any one place longer than a brief period, ranging at different times from three months to three years.[9] (See, generally, RELIGIOUS SOCIETIES.)

ITINERANT. See, generally, HAWKERS AND PEDDLERS.

J. The initial letter of the words "judge" and "justice," for which it frequently stands as an abbreviation.[10]

JACERE TELUM VOLUNTATIS EST; FERIRE, QUEM NOLUERIS, FORTUNÆ. A maxim meaning "To throw a dart or weapon is a matter of will; but that it strike a person whom you have no wish or intention to strike, is a matter of chance."[11]

JACK.[12] In nomenclature, a word sometimes construed as the equivalent of "John."[13] (See, generally, NAMES.)

JACKASS. A quadruped of the *genus equus* — that is, *equus asinus* — having a peculiar harsh bray, long, stretching ears, and being usually of an ash color, with a black bar across his shoulders.[14] (See HORSE; and, generally, ANIMALS.)

JACK POT. A name which by statute[15] has been applied to a game played with cards.[16] (See, generally, GAMING.)

JACTITATION. A technical word of the medical profession, meaning an involuntary convulsive muscular movement.[17]

JACTITATION PROCEEDING.[18] A proceeding in the nature of a criminal suit; and it has something in common with proceedings for defamation.[19] (See, generally, LIBEL AND SLANDER.)

JACTUS. A thing cast away to save the rest.[20] (See JETTISON.)

JAIL.[21] A house or building used for the purpose of a public prison, or where persons under arrest are kept;[22] any place of confinement used for detaining a prisoner;[23] the dwelling-house of the jailer living with his family in one part of

7. Boyden *v.* Achenbach, 79 N. C. 539, 540 [*citing* State *v.* Johnson, 61 N. C. 140; Coke Litt. 56*a*; Bacon Abr.].

A clear distinction was made between *iter*, *actus*, and *via*, which was adopted by Bracton, and followed by Lord Coke. Burrill L. Dict. [*citing* Bracton fol. 232; Coke Inst. 2. 3. pr.; Coke Litt. 56*a*].

8. Bouvier L. Dict. [*citing* Coke Litt. 56*a*; Inst. 2. 3. pr.; 1 Mackeldey Civ. L. 343, § 314].

9. People *v.* Steele, 2 Barb. (N. Y.) 397, 407.

10. Thus, "J. A.," judge advocate; "J. J.," junior judge; "L. J.," law judge; "P. J.," president judge; "F. J.," first judge; "A. J.," associate judge; "C. J.," chief justice or judge; "J. P.," justice of the peace; "JJ.," judges or justices; "J. C. P.," justice of the common pleas; "J. K. B.," justice of the king's bench; "J. Q. B.," justice of the queen's bench; "J. U. B.," justice of the upper bench. Black L. Dict.

11. Trayner Leg. Max.

12. Distinguished from "horse" in Richardson *v.* Chicago, etc., R. Co., 149 Mo. 311, 323, 324, 50 S. W. 782 [*citing* Richardson *v.* Chicago, etc., R. Co., 62 Mo. App. 1].

13. Walter *v.* State, 105 Ind. 589, 592, 5 N. E. 735 [*citing* 1 Bishop Cr. Proc. § 689; Webster Dict.] (holding that the word "Jack" for "John" as used in an indictment is good).

14. Webster Unabr. Dict. [*quoted* in Robinson *v.* Robertson, 2 Tex. App. Civ. Cas. §§ 253, 254].

15. Tex. Pen. Code, art. 388.

16. Donathan *v.* State, 43 Tex. Cr. 427, 428, 60 S. W. 781.

17. Leman *v.* Manhattan L. Ins. Co., 46 La. Ann. 1189, 1192, 15 So. 388, 49 Am. St. Rep. 348, 24 L. R. A. 589.

18. "A suit of jactitation is a rare proceeding." Thompson *v.* Rourke, [1893] P. 70, 72, 62 L. J. P. 46, 67 L. T. Rep. N. S. 788, 1 Reports 501, per Bowen, L. J.

19. Thompson *v.* Rourke, [1893] P. 70, 72, 62 L. J. P. 46, 67 L. T. Rep. N. S. 788, 1 Reports 501 [*citing* Hawke *v.* Corri, 2 Hagg. Const. 280, 291].

20. Barnard *v.* Adams, 10 How. (U. S.) 270, 303, 13 L. ed. 417.

21. Distinguished from "machine" in Jacobs *v.* Baker, 7 Wall. (U. S.) 295, 297, 19 L. ed. 200.

"Court house and jail" see State *v.* Travis County, 85 Tex. 435, 441, 21 S. W. 1029.

22. State *v.* Bryan, 89 N. C. 531, 534.

23. Tex. Pen. Code (1895), art. 242 [*quoted* in Welch *v.* State, 25 Tex. App. 580, 583, 8 S. W. 657, where defendant was indicted for

it.[24] The word is not unfrequently regarded as identical in meaning with "workhouse."[25] (See, generally, PRISONS.)

JAIL LIBERTIES or LIMITS. The limits within which a prisoner for debt was allowed to go.[26] (See, generally, ESCAPE; EXECUTIONS; PRISONS.)

JAIL YARD. A term sometimes used as synonymous with "debtors' liberties."[27] (See JAIL LIBERTIES.)

JANITOR. A person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and generally to care for them.[28]

JAPANESE. As defined by statute, any native of the Japanese empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not.[29] (Japanese: Naturalization of, see ALIENS.)

JAR. An earthen or glass vessel of simple form, without handle or spout.[30]

JAS. Frequently written as an abbreviation of James.[31] (See, generally, NAMES.)

JEALOUS EYE. A term sometimes used as equivalent to the phrase "careful scrutiny."[32]

JEOFAILS. See, generally, PLEADING.

JEOPARDIZE. Putting in danger.[33]

JEOPARDY. See, generally, CRIMINAL LAW.

JERKING. As applied to a railroad car, a term which means giving it a jerk with the engine and letting it run without the engine being attached to it.[34] (See, generally, RAILROADS.)

JERKY. A concord mail wagon or canvas hack without windows, with canvas cover and sides.[35]

JET. A well-known article, and is defined to be a variety of lignite of a very compact texture, and velvet-black color, susceptible of a good polish, and often wrought into toys, buttons, mourning jewels, and the like.[36]

JETSAM. Goods that, by the act of the owner, have been voluntarily cast overboard to lighten the ship.[37] (See JETTISON.)

JETTISON. In its largest sense, it signifies any throwing overboard; but, in its ordinary sense, it means a throwing overboard for the preservation of the ship

conveying into jail certain saws and a gun with intent to aid the escape etc.].

24. Snyder *v.* People, 26 Mich. 106, 108, 12 Am. Rep. 302 [*citing* People *v.* Van Blarcum, 2 Johns. (N. Y.) 105; Stevens *v.* Com., 4 Leigh (Va.) 683]. See JAILER.

It is held to be an inhabited dwelling-house within the statutes against arson of such houses. Smith *v.* State, 23 Tex. App. 357, 362, 5 S. W. 219, 59 Am. Rep. 773 [*quoting* Bishop St. Cr. (2d ed.) § 207].

25. State *v.* Ellis, 26 N. J. L. 219, 220.

26. English L. Dict.

As defined by statute, it is a space of ground in a square, the center of each of whose sides shall be one mile distant from the jail of each county of the state. Wis. Rev. St. (1898) § 4321. See also Dale *v.* Moulton, 2 Johns. Cas. (N. Y.) 205.

Equivalent expressions are: "prison bounds" and "rules of the prison." Anderson L. Dict.

27. Codman *v.* Lowell, 3 Me. 52, 56.

28. Fagan *v.* New York, 84 N. Y. 348, 352, where the term is said to be distinguished from "attendants."

29. Cunningham *v.* Tomey Homma, [1903] A. C. 151, 152, 72 L. J. P. C. 23, 87 L. T. Rep. N. S. 572; *In re* Provincial Elections Act, 7 Brit. Col. 368, 369, construing Provincial Elections Act (1897), c. 67, § 8.

30. Century Dict.

Bottle-like containers of glass, used in chemical operations, and known as "Koch flasks," and certain so-called "Woulf flasks," shaped like bottles, but having two or three necks apiece, are "bottles or jars," within the tariff act of 1897. Eimer *v.* U. S., 126 Fed. 439, 440.

31. Robbins *v.* Governor, 6 Ala. 839, 841. See also Stephen *v.* State, 11 Ga. 225, 240, 241.

32. Coffman *v.* Hedrick, 32 W. Va. 119, 132, 9 S. E. 65 [*citing* Cheatham *v.* Hatcher, 30 Gratt. (Va.) 56, 32 Am. Rep. 650].

33. U. S. *v.* Mays, 1 Ida. 763, 770.

34. Louisville, etc., R. Co. *v.* Logsdon, 114 Ky. 746, 751, 71 S. W. 905, 24 Ky. L. Rep. 1566.

That jerks and jars of a train constitute an element of negligence see 6 Cyc. 624.

35. Sanderson *v.* Frazier, 8 Colo. 79, 83, 5 Pac. 632, 54 Am. Rep. 544.

36. Webster Dict. [*quoted* in Goldberg *v.* U. S., 61 Fed. 91, 92, 9 C. C. A. 380].

37. Legge *v.* Boyd, 1 C. B. 92, 113, 9 Jur. 307, 14 L. J. C. P. 138, 50 E. C. L. 92.

"Jetsom is when a ship is in danger of being sunk and to lighten the vessel the goods are cast into the sea." Lacaze *v.* State, Add. (Pa.) 59, 64.

and cargo;[38] the throwing overboard of a portion or all of the cargo of the ship for the purpose of lightening it so that it may better endure the stress of weather.[39] (See EQUITABLE JETTISON; FLOTSAM; and, generally, MARINE INSURANCE; SHIPPING.)

JEWEL. A precious stone; a gem;[40] a valuable stone set and prepared for wear;[41] an ornament of dress, usually made of a precious metal, having enamel or precious stones as a part of its design;[42] or an ornament of dress in which the precious stones form a principal part.[43] (See GEM; JEWELRY.)

JEWELRY. Jewels in general,[44] but as commonly understood, ornaments of gold or silver, or precious metals, or precious stones.[45] (Jewelry: Exemption of, see EXEMPTIONS. Liability of — Carrier For, see CARRIERS; Innkeeper, see INNKEEPERS.)

JOB.[46] A particular piece of work; something to be done; any undertaking of a defined or restricted character.[47]

38. Butler *v.* Wildman, 3 B. & A. 398, 401, 22 Rev. Rep. 435, 5 E. C. L. 233.

Defined by statute see Cal. Civ. Code (1903), § 2148; N. D. Rev. Code (1899), § 3856; S. D. Civ. Code (1903), § 1567.

39. Gray *v.* Waln, 2 Serg. & R. (Pa.) 229, 254, 7 Am. Dec. 642. See also Barnard *v.* Adams, 10 How. (U. S.) 270, 303, 13 L. ed. 417; The Enrique, 7 Fed. 490, 5 Hughes 275; The Gas Float Whitton No. 2, [1896] P. 42, 51, 8 Aspin. 110, 65 L. J. Adm. 17, 73 L. T. Rep. N. S. 698, 44 Wkly. Rep. 263.

40. Webster Dict. [*quoted* in Traylor's Estate, Coffey Prob. (Cal.) 284, 287].

41. Cavendish *v.* Cavendish, 1 Bro. Ch. 467, 468, 28 Eng. Reprint 1244, 1 Cox Ch. 77, 29 Eng. Reprint 1070, where the term is distinguished from "gems," which are said to be kept for curiosity only.

42. Rains *v.* Maxwell House Co., 112 Tenn. 219, 224, 79 S. W. 114, 117, 64 L. R. A. 470 [*citing* Webster Dict.].

43. Webster Dict. [*quoted* in Traylor's Estate, Coffey Prob. (Cal.) 284, 287].

Diamonds.— According to the context, and having regard to the circumstances, it has been construed to embrace diamonds, *i. e.* diamond necklace, cross, and rings. Atty.-Gen. *v.* Harley, 7 L. J. Ch. O. S. 31, 5 Russ. 173, 180, 5 Eng. Ch. 173, 38 Eng. Reprint 992.

The term may include masonic orders, and silver filagree ornaments (Brooke *v.* Warwick, 2 De G. & Sm. 425, 436, 64 Eng. Reprint 191, 1 Hall & T. 142, 47 Eng. Reprint 1360, 12 Jur. 912, 18 L. J. Ch. 137, 13 Wkly. Rep. 129), but not a bag of coins (Sudbury *v.* Brown, 4 Wkly. Rep. 736), or a watch (Ramaley *v.* Leland, 43 N. Y. 539, 542, 3 Am. Rep. 728; Becker *v.* Warner, 90 Hun (N. Y.) 187, 212, 35 N. Y. Suppl. 739; Briggs *v.* Todd, 28 Misc. (N. Y.) 208, 212, 59 N. Y. Suppl. 23. But see Rains *v.* Maxwell House Co., 112 Tenn. 219, 224, 79 S. W. 114, 64 L. R. A. 470).

44. Com. *v.* Stephens, 14 Pick. (Mass.) 370, 373.

45. Reg. *v.* Chayter, 11 Ont. 217, 220, where the court said: "Richly cut glass, or highly finished steel may, perhaps, be also held to be jewelry. Jewelry may be made of electro-type ware, but electro-type ware is not jewelry any more than the rude gold or the rough and unpolished precious stone is jewelry."

"The word 'jewelry' is generally used as including articles of personal adornment, and the word further imports that the articles are of value in the community where they are used. A belt of cowry shells, a necklace of bears' claws, a head ornament of sharks' teeth, though possessing no value in themselves, are esteemed valuable in the communities where they are worn; and we, therefore, constantly find them referred to in books written in the English language,— books of travel, standard works, encyclopædias, and scientific dissertations upon sociology — we find those articles described in those books as 'jewelry.' The articles of value used for personal adornment in our civilization are, and for centuries have been, the precious metals,— gold and silver, to which, I think, platina is now generally added,— and what are known as precious stones,— the diamond, sapphire, ruby, etc. Articles manufactured from those for the purpose of personal adornment are known . . . as articles of jewelry." Robbins *v.* Robertson, 33 Fed. 709, 710.

Does not include silk vest chains in which silk is the component of chief value. Zimmern *v.* U. S., 69 Fed. 467, construing the tariff laws.

The word "plate" cannot be deemed to include "jewels." Jewels cannot be deemed plate. Conner *v.* Ogle, 4 Md. Ch. 425, 454.

Women's silver hand bags or purses, used for holding money, articles of wearing, etc., are not "jewelry" within the meaning of the tariff act of 1887. Tiffany *v.* U. S. 131 Fed. 398.

"Jewels and ornaments" see Ramaley *v.* Leland, 43 N. Y. 539, 541, 3 Am. Rep. 728.

"Articles commonly known as jewelry" see Bader *v.* U. S., 116 Fed. 541, 542.

46. "Job carriage"; "job horse" see 16 & 17 Vict. c. 112, § 80.

47. Century Dict. See also Stickney *v.* Cassell, 6 Ill. 418, 421.

It includes drilling or constructing an oil well. Devine *v.* Taylor, 12 Ohio Cir. Ct. 723, 4 Ohio Cir. Dec. 248, 250.

Fire job.— A term sometimes applied to the act of repairing a building after its partial destruction by fire. Monteleone *v.* Royal

JOBBER. A merchant who purchases goods from importers and sells to retailers;[48] a person who sells to any one who comes to him at a fraction above the market price, and buys of any one at a fraction below the market price.[49] (See, generally, FACTORS AND BROKERS; PRINCIPAL AND AGENT.)

JOCK. A word ordinarily only a diminutive name for "John."[50] (See JACK; and, generally, NAMES.)

JOCKEY. A professional rider of horses in races.[51]

JOIN. To unite — that is, act together;[52] to unite or to connect;[53] to join in the execution of an instrument.[54] (See CONNECT.)

JOINDER. A joining of parties as plaintiffs or defendants; a joining of causes of actions or defense, the acceptance of an issue tendered in law or fact.[55] (Joinder: In Demurrer, see PLEADING. In Error, see APPEAL AND ERROR. Of Actions, see JOINDER AND SPLITTING OF ACTIONS. Of Counter-Claims, see PLEADING. Of Counts, see INDICTMENTS AND INFORMATIONS; PLEADING. Of Errors, see APPEAL AND ERROR. Of Husband and Wife in Contracts, see HUSBAND AND WIFE. Of Issue, see PLEADING. Of Parties, see EQUITY; PARTIES.)

Ins. Co., 47 La. Ann. 1563, 1567, 18 So. 472, 56 L. R. A. 784.

As defined by statute, the job is the whole of a thing which is to be done. La. Civ. Code, art. 2727.

48. Webster Dict. [*quoted* in Steward *v.* Winters, 4 Sandf. Ch. (N. Y.) 587, 590], where the term is distinguished from an "auctioneer."

49. Mollett *v.* Robinson, L. R. 7 C. P. 84, 104, 105.

50. Walter *v.* State, 105 Ind. 589, 592, 5 N. E. 735 [*citing* 1 Bishop Cr. Proc. § 689; Webster Dict.].

51. Webster Int. Dict.

"A regular jockey" has been construed to mean one who follows the business of a jockey for a livelihood. Wamsley *v.* Mathews, 3 M. & G. 133, 137, 5 Jur. 508, 3 Scott N. R. 584, 42 E. C. L. 77.

52. Nolan *v.* Moore, 96 Tex. 341, 343, 72 S. W. 583, 97 Am. St. Rep. 911.

"Join and unite" see Illinois Cent. R. Co. *v.* Chicago, etc., R. Co., 122 Ill. 473, 483, 13 N. E. 140.

53. Gallagher *v.* Keating, 27 Misc. (N. Y.) 131, 136, 58 N. Y. Suppl. 366.

54. Collins *v.* Cornwell, 131 Ind. 20, 21, 30 N. E. 796.

"Join him in the deed of conveyance" see Meyer *v.* Gossett, 38 Ark. 377, 380.

55. Webster Int. Dict.

JOINDER AND SPLITTING OF ACTIONS

By James Beck Clark* and Donald J. Kiser†

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* Mr. Clark prior to his death, which occurred in Brooklyn, N. Y., Dec. 15, 1904, had completed a small portion of this article—the balance of the article was written by Mr. Kiser.

† Joint author of "Indictments and Informations," 22 Cyc. 157.

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I. JOINDER.

A. What Constitutes a Joinder — 1. IN GENERAL. A declaration, complaint, or petition, by whichever name the pleading may be designated under the prevailing practice, which seeks to enforce a remedial right arising from an infringement of a single primary right by a single wrong states but one cause of action.[1] This

1. New York *v.* Knickerbocker Trust Co., 104 N. Y. App. Div. 223, 93 N. Y. Suppl. 937; Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 834; Gager *v.* Marsden, 101 Wis. 598, 79 N. W. 922; Occidental Consol. Min. Co. *v.* Comstock Tunnel Co., 111 Fed. 135. See also Reedy *v.* Smith, 42 Cal. 245; Otoe County *v.* Dorman, (Nebr. 1904) 98 N. W. 1064.

Illustrations.— Brown *v.* Master, 104 Ala. 451, 16 So. 443 (action for malicious prosecution and suing out writ of attachment); Applegarth *v.* Dean, 68 Cal. 491, 13 Pac. 587 (recovery of sum paid on deficiency judgment in foreclosure, and of excessive amount for which judgment in foreclosure was rendered); Plano Mfg. Co. *v.* Parmenter, 30 Ill. App. 569 (where same right was conferred by two contracts); Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051 (action by joint owners to recover for fire set by railroad); Anglin *v.* Conley, 114 Ky. 741, 71 S. W. 926, 24 Ky. L. Rep. 1551 (where fraudulent conveyance was alleged to be voluntary and also with fraudulent intent to cheat the grantor's creditors); Palmer *v.* Tyler, 15 Minn. 106 (winding up of partnership and accounting); U. S. *v.* Williams, 6 Mont. 379, 12 Pac. 851 (recovery for cutting of timber, a portion of which it might have been permissible to cut under certain circumstances); Rogers *v.* Wheeler, 89 N. Y. App. Div. 435, 85 N. Y. Suppl. 981 (accounting, although the obligation arises from a representative capacity or individual agreement); Howarth *v.* Howarth, 67 N. Y. App. Div. 354, 73 N. Y. Suppl. 785 (setting aside a deed as a cloud on title, where it was alleged that the deed was forged, was never delivered, and was procured by undue influence); American Trading Co. *v.* Wilson, 37 Misc. (N. Y.) 76, 74 N. Y. Suppl. 718 (actions by shippers of goods against agents of carriers, as well as their undisclosed but subsequently discovered principals for delivery of goods in damaged condition); Porter *v.* International Bridge Co., 60 N. Y. Suppl. 819 (where an action was brought against a railroad company and a bridge company for an encroachment upon land, as to which a license had been granted to a city to use as a public square, alleging that the companies based their right of possession both upon an unwarranted permit from the city and upon title adverse to plaintiffs); Vogler *v.* World Mut. L. Ins. Co., 51 How. Pr. (N. Y.) 301 (action on participating insurance policy in which it was sought to recover a death loss, and the profits accruing to the policy); Peebles *v.* Boone, 116 N. C. 57, 21 S. E. 187 (action by officer against his predecessor to recover funds of the office which belonged to several persons); Ohio Oil Co. *v.* Toledo, etc., R. Co., 4 Ohio Cir. Ct. 210, 2 Ohio Cir. Dec. 505 (trespass on lands held under deeds and under leases); Bowman *v.* Holladay, 3 Oreg. 182 (money earned under contract of employment and damages for breach); Bostick *v.* Barnes, 59 S. C. 22, 37 S. E. 24 (action for assignment of dower against a mortgagee who had foreclosed his mortgage on a portion of the premises, and against the mortgagee's grantee of a portion of the land, and also such grantee's grantee); Wagner *v.* Sanders, 49 S. C. 192, 27 S. E. 68 (settlement of partnership); Sullivan *v.* Sullivan Mfg. Co., 14 S. C. 494 (action against corporation and its directors to enforce a claim against the corporation, for which the directors were liable); Glover *v.* Manila Gold Min., etc., Co., (S. D. 1905) 104 N. W. 261 (action to prevent unlawful acts of corporate directors); Young *v.* Smith, 22 Tex. 345 (personal liability of guardian for goods furnished to wards having separate estates); St. Louis Southwestern R. Co. *v.* Miller, 27 Tex. Civ. App. 344, 66 S. W. 139 (action by owner and by insurer against person causing a fire); Gulf, etc., R. Co. *v.* Jagoe, (Tex. Civ. App. 1895) 32 S. W. 1061 (joint action by lessor and lessee for damages to land by fire, where each had transferred to the other one half of the damages accruing to their respective interests); Somervaill *v.* McDermott, 116 Wis. 504, 93 N. W. 553 (accounting against agent involving several items of property, portions of which came into his possession from plaintiff through fraud, and portions from other persons for her innocently); Collins *v.* Cowan, 52 Wis. 634, 9 N. W. 787 (liens for labor under different employments, where the liens did not arise from contract).

What constitutes a cause of action in general see ACTIONS, 1 Cyc. 641 *et seq.*

Separate assessments for taxation.— But one cause of action arises from the failure of the owner to pay an assessment upon several tracts of land, although they are separately assessed (People *v.* Hagar, 52 Cal. 171 [*distinguishing* Dyer *v.* Barstow, 50 Cal. 652, in

is true, although incidental matters are alleged in connection with the primary right, which render other parties than the main defendant proper or necessary to the litigation,[2] or although facts are stated which, while germane to the primary purpose of the action, might constitute independent grounds of relief.[3] It is not necessary that the wrong shall consist of a single act,[4] or that the resulting injuries consist of but a single element;[5] and the amount sought to be recovered may be

which it was held that several causes of action arose from several separate street assessments made at different times, under distinct contracts and constituting several distinct transactions]); and it has been held proper to join proceedings for the recovery of assessments for public improvements made on the same land at different times (San Joaquin County Swamp, etc., Dist. No. 110 *v.* Feck, 60 Cal. 403, assessments for reclamation purposes in a swamp-land district).

2. See *infra*, I, A, 3, a.

3. See *infra*, I, A, 3.

4. Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Dec. 279; Oliver *v.* Perkins, 92 Mich. 304, 52 N. W. 609 (where a series of wrongful acts all led to a single result and contributed to one injury, the destruction of plaintiff's business); People *v.* Tweed, 5 Hun (N. Y.) 353 (holding that in an action for money fraudulently obtained and unlawfully withheld, the fact that the money had been obtained by divers frauds at different times did not give rise to as many distinct causes of action as there were frauds); Earl *v.* Tupper, 45 Vt. 275 (holding that several assaults and batteries, where connected in one series, might be joined in one count). See also Dickens *v.* New York Cent. R. Co., 13 How. Pr. (N. Y.) 228.

Illustrations.—Hoffman *v.* Tuolumne County Water Co., 10 Cal. 413 (negligence in construction and management); Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762 (where a complaint alleged that plaintiff had been seduced by one defendant, had become pregnant on two occasions, and that her seducer and his co-defendant had conspired to persuade and had persuaded plaintiff to submit to an abortion on each occasion); Cracraft *v.* Cochran, 16 Iowa 301 (entire conversation in which several distinct slanders occurred); Kansas City Hotel Co. *v.* Sigement, 53 Mo. 176 (failure by stock-holder to pay several assessments); Woods *v.* Missouri, etc., R. Co., 51 Mo. App. 500 (killing of stock through failure of a railroad to build and maintain fences and cattle-guards); Warren *v.* Parkhurst, 105 N. Y. App. Div. 239, 93 N. Y. Suppl. 1009 [*affirming* 45 Misc. 466, 92 N. Y. Suppl. 725] (pollution of watercourse by several riparian owners); L. E. Waterman Co. *v.* Waterman, 40 N. Y. App. Div. 530, 58 N. Y. Suppl. 168 (inducing several customers of plaintiff, at different times, to violate their agreement not to sell a manufactured article at less than a stated price); Bliss *v.* Winters, 38 N. Y. App. Div. 174, 56 N. Y. Suppl. 650 (action to set aside a will, a deed, and a bill of sale obtained by fraud at different times); Thomas *v.* Thomas, 9 N. Y. App. Div. 487, 41 N. Y. Suppl. 276 (action to set aside two deeds and the probate of a will, it being alleged that the deeds and will were obtained by undue influence, with the design to secure the property of decedent); Langdon *v.* New York, etc., R. Co., 15 N. Y. Suppl. 255, 27 Abb. N. Cas. 166 (several acts of discrimination by a carrier); Mathers *v.* Cincinnati, 7 Ohio Dec. (Reprint) 496, 3 Cinc. L. Bul. 551 (petition to restrain a city from making a grant of a right to either of two railroads); Baldwin *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 261, 1 Clev. L. Rep. 178 (failure to deliver cattle within a reasonable time and exposing them to contagion); Banks *v.* Crowe, 3 Oreg. 477 (distinct breaches of contract); Smith *v.* Smith, 50 S. C. 54, 27 S. E. 545 (complaint for alimony, alleging desertion and cruelty); Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737 (several breaches of contract); Brown *v.* Leadville Carbonate Bank, 34 Fed. 776 (action to recover notes alleged to have been wrongfully converted by defendant, in which it was charged that a corporate officer wrongfully took the notes from its vault and delivered them to defendant, and also that the corporation in contemplation of insolvency, and with a view to prevent the application of the assets in the manner prescribed by law, transferred them to defendant).

Acts in fraud of creditors.— Skinner *v.* Stuart, 13 Abb. Pr. (N. Y.) 442; Reed *v.* Stryker, 12 Abb. Pr. (N. Y.) 47; Jacot *v.* Boyle, 18 How. Pr. (N. Y.) 106.

By statute it is sometimes provided that where two or more acts of negligence are set forth in the same complaint, as causing the injury, plaintiff shall not be required to elect. Griffin *v.* Southern R. Co., 65 S. C. 122, 43 S. E. 445, so holding where wilful negligence in the operation of a train, and also the dangerous condition of cars, was alleged.

Statutory and common-law negligence.— Senn *v.* Southern R. Co., 135 Mo. 512, 36 S. W. 367; Gebhardt *v.* St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448.

Several infringements of a patent may be joined in one count. Wilder *v.* McCormick, 29 Fed. Cas. No. 17,650, 2 Blatchf. 31.

5. *California.*— Fraler *v.* Sears Union Water Co., 12 Cal. 555, 73 Am. Dec. 562, injuries to mining claim in the washing away of pay dirt, and in obstructing the working of the claim.

Kentucky.— Chesapeake, etc., R. Co. *v.* Hyde, 56 S. W. 423, 21 Ky. L. Rep. 1756 (recovery of damages occasioned by improper construction of bridge and its approaches, and from the use of a street upon which plaintiff's property abutted, as a freight

made up of several items.[6] Under these principles but a single cause of action is stated in a petition seeking the enforcement of a single contract.[7] As the converse of the general rule already stated, it follows that where two or more distinct primary rights are sought to be enforced, or two or more distinct wrongs redressed, there is a joinder of causes of action,[8] although such causes may relate to the same transaction.[9]

yard); Louisville, etc., R. Co. *v.* Neafus, 18 S. W. 1030, 13 Ky. L. Rep. 951 (where a petition based on the breach of a contract by a railroad company to erect a depot on land conveyed to it for that purpose asked damages for the value of the land conveyed and damages for the failure to erect a depot).

New York.— Gilbert *v.* Pritchard, 41 Hun 46, where a complaint in trespass to realty alleged injuries to grass, crops, and plaintiff's person, as matters of aggravation.

South Carolina.— Threatt *v.* Brewer Min. Co., 49 S. C. 95, 26 S. E. 970, injuries to bottom land, to right to water stock, to enjoyment of pure air, fishing privileges, ditches, and neighborhood roads, all occasioned by milling operations.

Washington.— Voss *v.* Bender, 32 Wash. 566, 73 Pac. 697, elements of damage from wrongful attachment.

6. *California.*— McFarland *v.* Holcomb, 123 Cal. 84, 55 Pac. 761.

Missouri.— Wright *v.* Baldwin, 51 Mo. 269.

New York.— Adams *v.* Holley, 12 How. Pr. 326.

Ohio.— Dalton *v.* Barchand, 4 Ohio Dec. (Reprint) 375, 2 Clev. L. Rep. 57.

Wisconsin.— Roehring *v.* Huebschmann, 34 Wis. 185; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

Several gambling transactions.— A complaint stating that defendants ran and played games of poker, and that plaintiff lost to them a certain sum in games played by him between certain dates, states but a single cause of action. Parsons *v.* Wilson, 94 Minn. 416, 103 N. W. 163.

7. Jones *v.* Smith, (Tex. Civ. App. 1905) 87 S. W. 210; Nichol *v.* Alexander, 28 Wis. 118; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

A contract to devise realty and personalty may be specifically enforced in a single action against the administrator and the heirs of a decedent. Hall *v.* Gilman, 77 N. Y. App. Div. 458, 79 N. Y. Suppl. 303.

Several breaches of a bond give rise to a single cause of action. People *v.* Dodge, 11 Colo. App. 177, 52 Pac. 637.

8. See Alabama Great Southern R. Co. *v.* Shahan, 116 Ala. 302, 22 So. 509 (separate overflows of land); Louisville, etc., R. Co. *v.* Cofer, 110 Ala. 491, 18 So. 110; Highland Ave., etc., R. Co. *v.* Dusenberry, 94 Ala. 413, 10 So. 274; Vance *v.* Gaylor, 25 Ark. 32 (contest with regard to elections to separate offices); Swinney *v.* Nave, 22 Ind. 178 (separate slanders); Gore *v.* Condon, 87 Md. 368, 39 Atl. 1042, 67 Am. St. Rep. 352, 40 L. R. A. 382 (interference with plaintiff's property rights and injuries to his reputation); Holloway *v.* Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339 (setting aside a deed procured by fraud, and accounting for the personalty of a partnership); Offield *v.* Wabash, etc., R. Co., 22 Mo. 607 (injury to crops by several annual overflows of water); Fleischmann *v.* Bennett, 87 N. Y. 231 (separate libels); Overbagh *v.* Oathout, 90 Hun (N. Y.) 506, 35 N. Y. Suppl. 962 (recovery of rent due under separate leases); Cohn *v.* Jarecky, 90 Hun (N. Y.) 266, 35 N. Y. Suppl. 935 (negligence of physician and druggist in prescribing, preparing, and compounding a medicine, where the druggist was concerned only in the preparation); Blanchard *v.* Jefferson, 17 N. Y. Suppl. 927, 28 Abb. N. Cas. 236 (recovery of sum due on a deposit and salary); Hall *v.* Cincinnati, etc., R. Co., 1 Disn. (Ohio) 58, 12 Ohio Dec. (Reprint) 485 (distinct injuries to property); Glasier *v.* Nichols, 112 Fed. 877 (where it was sought to recover a sum, appropriated by an agent in the purchase of property, which represented the difference between the actual cost of the property and that represented by the agent to be the cost, and a count for deceit in inducing plaintiff to purchase the property).

Breaches of separate contracts.— Acome *v.* American Mineral Co., 11 How. Pr. (N. Y.) 24; Van Namee *v.* People, 9 How. Pr. (N. Y.) 198; Handy *v.* Chatfield, 23 Wend. (N. Y.) 35; Gardner *v.* Locke, 2 N. Y. Civ. Proc. 252 (express and implied contract); McKemy *v.* Goodall, 1 Ohio Cir. Ct. 23, 1 Ohio Cir. Dec. 14.

Fraud and breach of warranty in a contract of sale have been held to create two causes of action. Byers *v.* Rivers, 3 Ohio Dec. (Reprint) 231, 5 Wkly. L. Gaz. 37.

Breach of warranty and failure to deliver. — It has been held that the failure of a vendor to deliver goods corresponding in quality with the terms of the contract, and his failure to deliver a portion of the goods sold, give rise to separate causes of action. Work *v.* Mitchell, 1 Disn. (Ohio) 506, 12 Ohio Dec. (Reprint) 761.

Recovery of over-payment of insurance assessments and injunction against future excessive assessments, when sought in the same action, embrace legal and equitable causes. Howard *v.* Mutual Reserve Fund Life Assoc., 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853.

9. Holloway *v.* Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; Brown *v.* Chadwick, 32 Mo. App. 615; Dougherty *v.* Wabash, etc., R. Co., 19 Mo. App. 419, holding that an action for damages to a building by the construction of a railroad track could

2. Statement of Single Wrong Infringing Distinct Rights. The statement of distinct rights infringed by the same wrong constitutes a statement of distinct causes of action;[10] as for example, where the same act is averred to have caused an injury to both person and property.[11] But the statement of distinct elements of damages arising from the same wrongful act does not constitute a statement of distinct causes of action.[12]

3. Claims For More Than One Remedy or Relief — a. In General. Since the demand for relief does not constitute a part of the cause of action,[13] as from the same cause of action there often arise several remedial rights,[14] the singleness of a cause of action cannot be determined by an examination of whether different kinds of relief are prayed for or objects sought.[15] For this reason a complaint

not be joined with one for trespass on the land.

Joinder of causes of action arising from same transaction see *infra*, I, B, 2, n.

That there was a common grantor to deeds of different tracts of land to different grantees does not render an action to set aside both deeds and recover the land a single cause of action. Griffith *v.* Griffith, (Kan. 1905) 81 Pac. 178.

10. McHugh *v.* St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853; Reilly *v.* Sicilian Asphalt Paving Co., 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176.

11. *California.*— Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56; McCarty *v.* Fremont, 23 Cal. 196.

Connecticut.— Boerum *v.* Taylor, 19 Conn. 122. *Compare* Seger *v.* Barkhamsted, 22 Conn. 290, in which it was held that the claims might be joined in the same petition in order to avoid multiplicity of suits.

Illinois.— Chicago West Div. R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350, holding, however, that the causes may be joined in the same count.

Maryland.— Baltimore, etc., R. Co. *v.* Ritchie, 31 Md. 191, holding, however, that the causes may be joined in the same count.

New York.—Reilly *v.* Sicilian Asphalt Paving Co., 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176 [*distinguishing* Mulligan *v.* Knickerbocker Ice Co., 109 N. Y. 657, 16 N. E. 684, and *overruling* in effect Chapman *v.* Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; Howe *v.* Peckham, 10 Barb. 656, 6 How. Pr. 229]; McInerney *v.* Main, 82 N. Y. App. Div. 543, 81 N. Y. Suppl. 539; Eagan *v.* New York Transp. Co., 39 Misc. 111, 78 N. Y. Suppl. 209, 11 N. Y. Annot. Cas. 394. *Compare* Lamming *v.* Galusha, 135 N. Y. 239, 31 N. E. 1024; Reilly *v.* Sicilian Asphalt Paving Co., 14 N. Y. App. Div. 242, 43 N. Y. Suppl. 536; Heigle *v.* Willis, 50 Hun 588, 3 N. Y. Suppl. 497; Spencer *v.* Utica, etc., R. Co., 5 Barb. 337; Griffith *v.* Friendly, 30 Misc. 393, 62 N. Y. Suppl. 391; Rosenberg *v.* Staten Island R. Co., 14 N. Y. Suppl. 476, 38 N. Y. St. 106 (holding that conceding that two causes arose they should be consolidated); Grogan *v.* Lindeman, Code Rep. N. S. 287.

Texas.— Watson *v.* Texas, etc., R. Co., 8 Tex. Civ. App. 144, 27 S. W. 924.

England.— Brunsden *v.* Humphrey, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944.

Compare Pittsburg, etc., R. Co. *v.* Carlson, 24 Ind. App. 559, 56 N. E. 251; Owensboro, etc., Gravel Road Co. *v.* Coons, 49 S. W. 966, 20 Ky. L. Rep. 1678.

Contra.— Birmingham Southern R. Co. *v.* Lintner, 141 Ala. 420, 38 So. 363; Braithwaite *v.* Hall, 168 Mass. 38, 46 N. E. 398; Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; Doran *v.* Cohen, 147 Mass. 342, 17 N. E. 647; King *v.* Chicago, etc., R. Co., 80 Minn. 83, 82 N. W. 1113, 81 Am. St. Rep. 238, 50 L. R. A. 161; Lamb *v.* St. Louis, etc., R. Co., 33 Mo. App. 489; Von Fragstein *v.* Windler, 2 Mo. App. 598; Peake *v.* Baltimore, etc., R. Co., 26 Fed. 495, holding, however, that a recovery for the injury to the property did not bar an action for the wrongful death of the person injured.

12. Procter *v.* Southern California R. Co., 130 Cal. 20, 62 Pac. 306; Louisville, etc., Terminal Co. *v.* Lellyett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. 49. See Finken *v.* Elm City Brass Co., 73 Conn. 423, 47 Atl. 670 (holding that a complaint which alleged an injury due to defendant's negligence, and also that defendant first promised to continue to employ plaintiff, but afterward discharged him solely because of his inability in consequence of the injury to do the work, constituted but a single cause of action, and not one based upon tort and the other on contract); Cincinnati, etc., R. Co. *v.* Chester, 57 Ind. 297 (a plaintiff may in the same action seek a recovery for damages for personal injuries, for damages resulting from injuries to his wife, and for expenses and labor in healing and caring for injuries to his child, where all result from the same negligent act); Shoemaker *v.* Atkin, 11 Heisk. (Tenn.) 294 (damages by the same trespass, both to the freehold and to the personal property, may be joined in the same count). See also cases cited as *contra* to the rule in the preceding note.

13. Albert Lea *v.* Knatvold, 89 Minn. 480, 95 N. W. 309; Westlake *v.* Farrow, 34 S. C. 270, 13 S. E. 469; Emory *v.* Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730. See Actions, 1 Cyc. 643 note 6.

14. Emory *v.* Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730.

15. Keems *v.* Gaslin, 24 Nebr. 310, 38 N. W. 797; Adkins *v.* Loucks, 107 Wis. 587, 83

will be regarded as stating but one cause of action, although it may pray for many and various forms of relief, where they are all germane to the vindication of a single primary right,[16] and although the consideration and control of the claims of many different persons, or the exercise of many forms of equitable power, are deemed necessary to accomplish the main purpose, and are invoked.[17]

N. W. 934; Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922. See Tendesen *v.* Marshall, 3 Cal. 440 (sustaining a complaint for trespass which sought to recover the alleged value of the property destroyed and also to recover a sum stated as damages); Moore *v.* Nowell, 94 N. C. 265. See also cases more specifically cited *infra*, I, A, 3, c.

A prayer for alternative relief does not in itself indicate two causes of action. Connor *v.* St. Anthony Bd. of Education, 10 Minn. 439 (where a vendor sought to recover a judgment for purchase-money, and in the alternative, for a cancellation of the contract of sale in case it was found to be invalid); Watkins *v.* Collins, (Tex. Civ. App. 1905) 87 S. W. 368.

Where the facts stated may constitute one of two actions; for example, specific performance, and partition, it is not a case of two actions improperly joined in the complaint, but the court must determine at the trial which of the two actions is supported by the facts. Hall *v.* Hall, 38 How. Pr. (N. Y.) 97.

16. *Idaho.*— Brady *v.* Linehan, 5 Ida. 732, 51 Pac. 761, where a complaint sought a deed to property purchased on execution, and to determine plaintiff's rights to a conveyance as against the sheriff and adverse claimant.

Kansas.— Hopkins *v.* Kuhn, 66 Kan. 619, 72 Pac. 270, enforcement of debt and determination of claim to collateral.

Kentucky.— Caldwell *v.* Hampton, 53 S. W. 14, 21 Ky. L. Rep. 793, where an heir and distributee sought to have her claim against the estate allowed, to have her brother charged with an advancement, to have a partial settlement of the administrator surcharged, and to have the entire estate settled.

Minnesota.— See Anderson *v.* Dyer, 94 Minn. 30, 101 N. W. 1061.

Missouri.— Kelly *v.* Hurt, 61 Mo. 463 (where a bill seeking to set aside a foreclosure sale sought also the recovery of rents and profits and damages by waste); Lincoln *v.* Rowe, 51 Mo. 571 (establishment of debt against wife's separate property may be sought in an action against a husband and wife on their joint note).

New York.— Johnson *v.* Golder, 132 N. Y. 116, 30 N. E. 376 [*reversing* 9 N. Y. Suppl. 739] (where it was claimed that a mortgage was fraudulently foreclosed, and a demand made for redemption, for an accounting, and for the cancellation of a pretended mortgage of the premises given by the purchaser at the foreclosure sale); Hammond *v.* Cockle, 2 Hun 495 (where the setting aside of a deed, partition, and an assignment of dower was sought); Hammond *v.* Hudson River Iron, etc., Co., 20 Barb. 378; Woodard *v.* Holland Medicine Co., 15 N. Y. Suppl. 128 (sequestration of corporate property and enforcement of individual liability of stockholders).

Ohio.— Warner *v.* Callender, 20 Ohio St. 190, payment of unpaid stock subscriptions, and the individual liability of the shareholders may be enforced in one action by a judgment creditor of an insolvent corporation.

South Carolina.— Barrett *v.* Watts, 13 S. C. 441, marshaling assets of the estate of a decedent and bringing in creditors, and providing for the payment of such claims as might be established. See also Ruberg *v.* Brown, 71 S. C. 287, 51 S. E. 96.

Wisconsin.— Herman *v.* Felthousen, 114 Wis. 423, 90 N. W. 432; Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946; Zinc Carbonate Co. *v.* Shullsburg First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922; Gager *v.* Edgerton Bank, 101 Wis. 593, 77 N. W. 920; Damon *v.* Damon, 28 Wis. 510 (prayer for alimony and divorce); Bassett *v.* Warner, 23 Wis. 673.

In the settlement of a partnership everything which arises from the partnership agreement, or which relates thereto may be determined. Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822. So a claim may be joined against a third person who was alleged to have fraudulently obtained portions of the partnership property (Wade *v.* Rusher, 4 Bosw. (N. Y.) 537), or the assignee restrained from appropriating partnership assets to the debts of a portion of the partners (Davis *v.* Grove, 2 Rob. (N. Y.) 134), or a sale of the partnership assets had and contribution between the partners compelled (Goff *v.* Young, 76 S. W. 383, 25 Ky. L. Rep. 786). See also Storrie *v.* Hamilton, (Tex. Civ. App. 1897) 42 S. W. 235, holding that an action will lie by one partner against his copartners and a firm debtor for the dissolution of the firm and to determine the debtor's liability to it. See, generally, PARTNERSHIP.

A receiver and an accounting between the corporation and another may be had in a stock-holder's suit. Miller *v.* Barlow, 78 N. Y. App. Div. 331, 79 N. Y. Suppl. 964; Case *v.* Hudson Co., 41 Misc. (N. Y.) 51, 83 N. Y. Suppl. 577.

Demand for actual and statutory damages for unlawful ejection of tenant. Horton *v.* Equitable L. Assur. Soc., 35 Misc. (N. Y.) 495, 71 N. Y. Suppl. 1060.

17. Beronio *v.* Ventura County Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118 (holding that the fact that a bill in a suit to quiet title asked the annulment of a sheriff's deed executed on a sale of the property under mortgage foreclosure did not render it demurrable as improperly uniting two causes

b. Statutory and Common-Law Relief. Where, from the same state of facts, there is a right to both common-law and statutory remedies, it has been held that two causes of action exist.[18]

c. Legal and Equitable Relief — (I) *GENERAL RULES.* As a result of the blending of the forms of equitable and legal procedure, under the codes of many of the states,[19] but a single cause of action is in many cases held to be stated where a complaint seeks both the legal and the equitable relief to which plaintiff has become entitled by the operation of the same set of facts;[20] but the equitable

of action, since the annulment of the deed was only a remedy incidental to the enforcement of plaintiff's right to the property); Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317 (holding that an action by a judgment creditor to enforce the lien of his judgment, and to test the validity of a conveyance and conflicting liens, states but one cause of action, although the separate interests of several different parties may be affected); Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946 (holding that a claim against a decedent's estate for the value of lands, of which he was grantee under an absolute conveyance accompanied by a separate instrument of defeasance, and which he had sold without the mortgagor's knowledge, constituted a single cause of action, although the construction of the two instruments together as constituting a mortgage was involved as an incidental issue); Frankenburg *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504, 69 L. J. Q. B. 147, 81 L. T. Rep. N. S. 684, 7 Manson 347.

Single object.— A complaint is not to be construed as stating two causes of action for the reason that it seeks to accomplish a single purpose by several operations. Lattin *v.* McCarty, 41 N. Y. 107.

Creditors' suits.— A common form of action in which the question of misjoinder arises is that of creditors' actions in which the object is to set aside fraudulent conveyances made by the debtor, especially where the conveyances are alleged to have been made at various times and to different persons — between whom there is no privity. In cases of this character the whole right of action is deemed to rest on the fraud of the debtor and to constitute but one right of action, although it may affect defendants differently. Anderson *v.* Anderson, 80 Ky. 638; Sheppard *v.* Stephens, 2 S. W. 548, 8 Ky. L. Rep. 603; North *v.* Bradway, 9 Minn. 183; Reed *v.* Stryker, 4 Abb. Dec. (N. Y.) 26, 12 Abb. Pr. 47; Mahler *v.* Schmidt, 43 Hun (N. Y.) 512; Marx *v.* Tailer, 12 N. Y. Civ. Proc. 226; Winslow *v.* Dousman, 18 Wis. 456. See also FRAUDULENT CONVEYANCES, 20 Cyc. 708.

Complaints on foreclosure of attorneys' liens held to state but one cause of action see Elliott *v.* Leopard Min. Co., 52 Cal. 355; Coombe *v.* Knox, 28 Mont. 202, 72 Pac. 641.

In accounting an accounting may be sought against a trustee and those to whom the trust funds have been distributed. Leary *v.* Melcher, 14 N. Y. Suppl. 689.

18. McHugh *v.* St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853; Scott *v.* Robards, 67 Mo. 289, holding that a common-law cause of action against the trustee of a trust deed, for failure to release the deed, must be stated separately from a claim for a penalty provided by statute for the same omission.

19. See *infra*, I, B, 2, p.

20. *California.*— Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544, injunction against waste pending ejectment. See also Hicks *v.* Davis, 4 Cal. 67.

Florida.— Kahn *v.* Kahn, 15 Fla. 400, temporary injunction.

New York.— Hahl *v.* Sugo, 169 N. Y. 109, 62 N. E. 135, 88 Am. St. Rep. 539, 61 L. R. A. 226; Cahoon *v.* Utica Bank, 7 N. Y. 486 [*reversing* 7 How. Pr. 134, 4 How. Pr. 423] (holding that where a mortgage deposited as collateral had been collected, and the proceeds applied to the debt, a single cause of action was stated, although a demand was made for the surplus money and the surrender of the evidence of the debt); Getty *v.* Hudson River R. Co., 6 How. Pr. 269 (in which a complaint was sustained which sought that defendants be enjoined to construct a railroad bridge as required by their charter, and for damages already suffered by the improper construction of the bridge).

North Carolina.— John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22 (injunction against cutting timber in action to recover land); England *v.* Garner, 86 N. C. 366 (recovery of possession of realty, and injunction against waste).

Oklahoma.— Tootle *v.* Kent, 12 Okla. 674, 73 Pac. 310, action for dissolution and accounting of a partnership, together with the appointment of a receiver and the distribution of proceeds, may be joined with an action to recover damages for depreciation of a stock of goods and loss of profits by reason of the closing of plaintiff's business, and for the destruction of his financial standing.

And see Long *v.* Hunter, 58 S. C. 152, 36 S. E. 579; Norwich *v.* Brown, 48 L. T. Rep. N. S. 898 (holding that under the Judicature Act an injunction might be granted in an action in the nature of trespass); Kendrick *v.* Roberts, 46 L. T. Rep. N. S. 59, 30 Wkly. Rep. 365 (holding that a prayer for an injunction can be joined in an action for the recovery of land, without leave of court). See also cases more specifically cited *infra*, I, A, 3, c, (II) *et seq.*

Ancillary equitable relief may be demanded without adding a new cause of action (U. S. Life Ins. Co. *v.* Jordan, 21 Abb. N. Cas. (N. Y.) 330), such as a receivership (Ireland *v.* Nichols, 1 Sweeny (N. Y.) 208; John L.

relief and legal relief must be consistent,[21] and in some cases it has been held that the grounds therefor must be separately stated.[22] The courts, however, frequently ignore the question of whether complaints asserting rights to legal and equitable relief, arising from the same set of facts, state in reality but a single cause of action, and apply to such complaints the principles governing the joinder of legal and equitable causes of action generally.[23] A complaint is not bad, although equitable relief is sought to which plaintiff is not entitled.[24]

(II) *DAMAGES FOR INJURY AND INJUNCTION OR ABATEMENT.* A complaint seeking to recover damages for an injury and an injunction against the continuance of the acts causing it states but a single cause of action.[25] So a complaint may seek to recover damages resulting from a nuisance, and to restrain its continuance,[26] or a judgment abating it.[27]

(III) *REFORMATION AND ENFORCEMENT OF INSTRUMENT.* Under the rule that plaintiff may without stating more than one cause of action seek more than one form of relief, it has been held that but one cause of action is stated by a complaint seeking to reform an instrument and to enforce it as reformed,[28] as where, after reformation of a deed, it is sought to quiet title,[29] or to have partition,[30] or where it is sought to reform the acknowledgment of a mortgage and

Roper Lumber Co. *v.* Wallace, 93 N. C. 22; Tootle *v.* Kent, (Okla. 1903) 73 Pac. 310), in case equitable grounds therefor appear (People *v.* New York, 10 Abb. Pr. (N. Y.) 111 [*reversing* 28 Barb. 240, 8 Abb. Pr. 7, 17 How. Pr. 56]. See also Thompson *v.* Sharrard, 35 Barb. (N. Y.) 593), or an injunction *pendente lite* granted (Turner *v.* Conant, 10 N. Y. Civ. Proc. 192).

21. Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668, 5 How. Pr. 188, 9 N. Y. Leg. Obs. 80 (holding that in the same action a judgment forfeiting a term of years in a lease cannot be sought in connection with an injunction to restrain defendant from making alterations in the demised premises); Ireland *v.* Nichols, 1 Sweeny (N. Y.) 208.

22. Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544; Wa Ching *v.* Constantine, 1 Ida. 266.

Necessity of separate statement generally see PLEADING.

23. See *infra*, I, B, 2, p.

24. Strœbe *v.* Fehl, 22 Wis. 337.

25. Jungerman *v.* Bovee, 19 Cal. 354 (injunction against waste and damages to reversion); Swanson *v.* Kirby, 98 Ga. 586, 26 S. E. 71 (damages for breach of contract and injunction against further breaches); Gillian *v.* Norton, 33 How. Pr. (N. Y.) 373 (so holding where an action was brought by a landlord against the lessees of real property and persons holding as tenants under them, to recover damages for a breach of covenant by the original lessees in permitting the premises to be used for a purpose deemed extrahazardous, and to restrain the continuance of the same); Leidersdorf *v.* Flint, 50 Wis. 400, 7 N. W. 252 (injunction against use of trade-mark, accounting as to profits and recovery of damages).

Award of damages in equity see EQUITY, 16 Cyc. 110 note 79.

Trespass.— Jacob *v.* Lorenz, 98 Cal. 332, 33 Pac. 119; More *v.* Massini, 32 Cal. 590; Gates *v.* Kieff, 7 Cal. 124; Ware *v.* Johnson, 55 Mo. 500, so holding under a statute permitting an injunction for the protection of the subject of litigation pending the suit.

Injuries to water rights.— Watterson *v.* Saldunbehere, 101 Cal. 107, 35 Pac. 482; Weaver *v.* Conger, 10 Cal. 232; Marius *v.* Bicknell, 10 Cal. 217; Akin *v.* Davis, 11 Kan. 580; Cedar Lake Hotel Co. *v.* Cedar Creek Hydraulic Co., 79 Wis. 297, 48 N. W. 371; Stoner *v.* Mau, 11 Wyo. 366, 72 Pac. 193, 73 Pac. 548.

26. Albert Lea *v.* Knatvoid, 89 Minn. 480, 95 N. W. 309; Baker *v.* McDaniel, 178 Mo. 447, 77 S. W. 531; Robinson *v.* Smith, 3 Silv. Sup. (N. Y.) 490, 7 N. Y. Suppl. 38; Emory *v.* Hazard Power Co., 22 S. C. 476, 53 Am. Rep. 730. See also Davis *v.* Lambertson, 56 Barb. (N. Y.) 480; O'Sullivan *v.* New York El. R. Co., 7 N. Y. Suppl. 51.

27. Yolo County *v.* Sacramento, 36 Cal. 193; Lohmiller *v.* Indian Ford Water Power Co., 51 Wis. 683, 8 N. W. 601. See also Bailey *v.* Dale, 71 Cal. 34, 11 Pac. 804, where the joinder of a claim for a statutory penalty for failure to remove an obstruction in a road, with a claim for the abatement of the nuisance, was held unobjectionable.

28. McClurg *v.* Phillips, 49 Mo. 315; Jeroliman *v.* Cohen, 1 Duer (N. Y.) 629; Gooding *v.* McAlister, 9 How. Pr. (N. Y.) 123. And see Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119.

In Indiana, by express statutory provision, the reformation and enforcement of an instrument may be sought in one proceeding (see Monroe *v.* Skelton, 36 Ind. 302); so a mortgage may be reformed and foreclosed (Smith *v.* Kyler, 74 Ind. 575; Miller *v.* Kolb, 47 Ind. 220; Conger *v.* Parker, 29 Ind. 380; Hunter *v.* McCoy, 14 Ind. 528).

29. Louvall *v.* Gridley, 70 Cal. 507, 11 Pac. 777 (where a deed was sought to be declared a mortgage); Walkup *v.* Zehring, 13 Iowa 306.

30. Jenkins *v.* Taylor, 59 S. W. 853, 22 Ky. L. Rep. 1137; Dameron *v.* Jamison, 4 Mo. App. 299.

to foreclose it.[31] But in many cases, without decision as to whether two or more causes of action are stated in such a complaint, the principles governing the joinder of causes of action generally have been applied.[32]

(IV) *CANCELLATION OF DEED AND RECOVERY OF PROPERTY.* As incidental relief, the recovery of property conveyed may be sought in connection with a rescission of a contract,[33] or the possession of property conveyed, in connection with the cancellation of a fraudulent deed.[34]

(V) *FORECLOSURE OF MORTGAGE AND JUDGMENT FOR DEFICIENCY.* Although the cause of action at law to procure a judgment upon the debt secured by mortgage is distinct from the cause of action in equity for the foreclosure of such mortgage,[35] a complaint in foreclosure is not regarded as stating two causes of action, by reason of the fact that it sets out the bond or note secured and seeks a deficiency judgment as a part of the relief.[36]

(VI) *SPECIFIC PERFORMANCE AND MONEY JUDGMENT.* A claim for specific performance and for a money judgment, where arising out of an entire contract, constitutes but one cause of action.[37] Under the rule that incidental relief may be sought without stating a new cause of action, it has been held that a claim for rents and profits may be inserted in a complaint seeking the specific performance of a contract to convey land.[38]

(VII) *ACCOUNTING AND OTHER RELIEF.* As incident to other relief a demand for an accounting is not usually regarded as the statement of a separate cause of action;[39] but such relief must be germane to the principal relief.[40]

d. Effect of Matter Averred as Inducement. Matters stated by way of

31. Hutchinson *v.* Ainsworth, 63 Cal. 286; Vermont L. & T. Co. *v.* McGregor, 5 Ida. 320, 51 Pac. 102.

32. See *infra*, I, B, 2, p, (III).

33. Menz *v.* Beebe, 95 Wis. 383, 70 N. W. 468, 60 Am. St. Rep. 120.

34. Lattin *v.* McCarty, 41 N. Y. 107.

In an action for an accounting, the rescission of certain conveyances of land and the return of the ostensible title to defendant may be demanded as an adjunct to the main purpose of the action. Somervaill *v.* McDermott, 116 Wis. 504, 93 N. W. 553.

35. See *infra*, I, B, 2, p, (V).

36. American Sav., etc., Assoc. *v.* Burghardt, 19 Mont. 323, 48 Pac. 391, 61 Am. St. Rep. 507; Reichert *v.* Stillwell, 172 N. Y. 83, 64 N. E. 790.

By statute it is sometimes provided that there shall be but one action for the recovery of the debt and the enforcement of the right secured by a mortgage. Farwell *v.* Jackson, 28 Cal. 105 (holding that, where a mortgage had been assigned as collateral, the assignee might in one action determine his claim against the mortgagor and mortgagee and persons having liens or encumbrances upon the mortgaged property); Eastman *v.* Turman, 24 Cal. 379 (holding that, where a mortgaged note had been indorsed, plaintiff might ask judgment against the indorser on his liability as such, and also a decree of foreclosure against the mortgagor).

Propriety and rendition of deficiency judgment in foreclosure in general see MORTGAGES.

37. Mann *v.* Higgins, 83 Cal. 66, 23 Pac. 206.

Alternative relief in actions for specific performance generally see SPECIFIC PERFORMANCE.

38. Duval *v.* Tinsley, 54 Mo. 93; Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325.

Joinder of separate causes of action see *infra*, I, B, 2, p, (VI).

39. Washington Nat. Bank *v.* Woodrun, 60 Kan. 34, 55 Pac. 330 (where an accounting, reconveyance of land, cancellation of a judgment against plaintiff rendered in foreclosure, and such other relief as the transactions warranted, was demanded); First Div. St. Paul, etc., R. Co. *v.* Rice, 25 Minn. 278 (sustaining a complaint alleging that defendants dispossessed plaintiff railroad company of certain roads and equipments and money, and praying that defendants be compelled to surrender such realty and personalty, and to account for tolls received by it while operating the roads); Johnson *v.* Golder, 132 N. Y. 116, 30 N. E. 376 (redemption from foreclosure, and accounting as to rents and profits received by the purchaser); Elias *v.* Schweyer, 27 N. Y. App. Div. 69, 50 N. Y. Suppl. 180 (removal of a trustee); Garner *v.* Wright, 28 How. Pr. (N. Y.) 92 (where it was sought to reform a mistake in an assignment for the benefit of creditors, and to compel the assignee to account). See also Chatterton *v.* Chatterton, 32 N. Y. App. Div. 633, 53 N. Y. Suppl. 329; Leary *v.* Melcher, 14 N. Y. Suppl. 689, in which an accounting was sought against a trustee and those to whom trust funds were distributed. See ACCOUNTS AND ACCOUNTING, 1 Cyc. 416.

40. Shanks *v.* Mills, 25 S. C. 358, holding that in an action by remainder-men for partition, a claim for an accounting and distribution of the personal estate of the life-tenant could not be joined.

Accounting as incident to partition in general see PARTITION.

inducement, and not as constituting the gravamen of the complaint, will not cause it to be regarded as stating two causes of action, although such matters of inducement might under certain circumstances constitute a distinct cause of action.[41] Hence a cause of action for which relief is not sought may be stated in the complaint without creating a misjoinder;[42] for example a contract may be set out as showing the duty from which a cause of action in tort arises,[43] or as incident to a cause of action for fraud.[44] An independent cause of action may in some cases be stated as showing the amount of damages to which defendant is entitled, as growing out of the cause of action sued on.[45]

41. *California.*— Lothrop *v.* Golden, (1899) 57 Pac. 394 (matters averred to show right to exemplary damages); Louvall *v.* Bridley, 70 Cal. 507; Reedy *v.* Smith, 42 Cal. 245; Smith *v.* Richmond, 15 Cal. 501.

Connecticut.—Davenport *v.* Lines, 77 Conn. 473, 59 Atl. 603.

Illinois.— Miller *v.* John, 111 Ill. App. 56.

Iowa.— Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289, 70 N. W. 193.

Kansas.— Houston *v.* Delahay, 14 Kan. 125.

Kentucky.— Jones *v.* Louisville, etc., R. Co., 26 Ky. L. Rep. 690, 82 S. W. 416.

Michigan.— Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489. See also Mead *v.* Randall, 111 Mich. 268, 69 N. W. 506.

Minnesota.— See Whiting *v.* Clugston, 73 Minn. 6, 75 N. W. 759.

Missouri.— State *v.* Petticrew, 19 Mo. 373.

Montana.— Custer County *v.* Yellowstone County, 6 Mont. 39, 9 Pac. 586.

Nebraska.— Omaha Gas Co. *v.* Omaha, (1904) 98 N. W. 437; Claire *v.* Claire, 10 Nebr. 54, 4 N. W. 411.

New York.— Zimmerman *v.* Kinkle, 108 N. Y. 282, 15 N. E. 407; Teurs *v.* Teurs, 100 N. Y. 196, 2 N. E. 922; Krower *v.* Reynolds, 99 N. Y. 245, 1 N. E. 775; Gates *v.* Gates, 34 N. Y. App. Div. 608, 54 N. Y. Suppl. 454; Elwell *v.* McDonald, 83 Hun 516, 33 N. Y. Suppl. 459; Lehnan *v.* Purvis, 55 Hun 535, 9 N. Y. Suppl. 910; Welch *v.* Platt, 32 Hun 194, 5 N. Y. Civ. Proc. 433. See also Brewer *v.* Temple, 15 How. Pr. 286.

North Carolina.— Thames *v.* Jones, 97 N. C. 121, 1 S. E. 692.

South Carolina.— Garret *v.* Weinberg, 43 S. C. 36, 20 S. E. 756; Lowry *v.* Jackson, 27 S. C. 318, 3 S. E. 473.

Wisconsin.— Miller *v.* Bayer, 94 Wis. 123, 68 N. W. 869; Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645.

Proceedings for the perfection of a mechanic's lien may be averred without stating a cause of action distinct from that for the enforcement of the lien. Hardy *v.* Miller, 11 Nebr. 395, 9 N. W. 475.

Distinct tax liens alleged as the basis of title in an action to determine adverse claims are not regarded as resulting in the statement of more than one cause of action. Blakemore *v.* Roberts, 12 N. D. 394, 96 N. W. 1029.

An allegation of conspiracy is not rendered double by the fact that acts done in furtherance of the conspiracy embracing different transactions are set out. Green *v.* Davies, 100 N. Y. App. Div. 359, 91 N. Y. Suppl. 470, 34 N. Y. Civ. Proc. 1; Emerick *v.* Sweeney Cattle Co., 17 S. D. 270, 96 N. W. 93.

42. Woodley *v.* Coker, 119 Ga. 226, 46 S. E. 89 (holding a count to state one cause of action for the malicious use of bail process in a trover suit, which resulted in the arrest and imprisonment of defendant, and not to state causes of action for malicious abuse of process, malicious arrest, and false imprisonment); Brewer *v.* Temple, 15 How. Pr. (N. Y.) 286 (where the facts alleged were sufficient to sustain an action for assault and battery and for slander); Zeiser *v.* Cohn, 44 Misc. (N. Y.) 462, 90 N. Y. Suppl. 66 (holding that the only cause of action alleged was one to set aside a fraudulent conveyance, although it was alleged that the grantee had agreed to pay the debts of the judgment debtor to plaintiff, the prayer being that the proceeds of certain real estate which had been conveyed and sold by the grantee be applied to plaintiff's judgment, and for a receiver); Grand Rapids Water-Power Co. *v.* Bensley, 75 Wis. 399, 44 N. W. 640 (allegation in a complaint in an action to enjoin the diversion of water from a river that defendants entered on the lands of one of plaintiffs and dug up and removed the soil).

Showing of equitable title, in an action at common law upon a chose in action, does not indicate a misjoinder. Waters *v.* New York Cent. Trust Co., 99 Fed. 894, where a complaint by a receiver alleged the rendition of a judgment in the form stated, and the appointment of a receiver to collect such judgment and distribute the proceeds, and also alleged the subsequent assignment of the judgment by the owners to plaintiff.

Statement of reasons for making unwilling plaintiff, defendant, is not regarded as stating a cause of action. Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788.

43. Fordyce *v.* Nix, 58 Ark. 136, 23 S. W. 967; Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868.

44. Iowa Economic Heater Co. *v.* American Economic Heater Co., 32 Fed. 735. *Compare* Atwill *v.* Le Roy, 4 Abb. Pr. (N. Y.) 238, 15 How. Pr. 227.

45. Scarratt *v.* F. W. Cook Brewing Co., 117 Ga. 181, 43 S. E. 413, where, in an action against a principal and his surety on a bond conditioned to guarantee the payment of a

e. Effect of Causes Imperfectly Stated. The pleading must contain a complete statement of two or more good causes of action to present a question of joinder.[46] The use of ambiguous expressions which point to a cause of action other than that well stated[47] or which may be rejected as surplusage[48] is not sufficient. Hence, where but one cause of action is alleged against one of defendants, and no cause of action is alleged against the remaining defendants, there is no misjoinder.[49]

f. Effect of Stating Single Cause as Several. A petition will not be regarded as stating more than one cause of action, for the reason that the facts are set out in different ways and terms like separate causes, when it is clear from the facts stated and the judgment demanded that but one cause of action exists.[50]

running account due by the principal, it was alleged that the principal owed an amount in excess of that named in the bond, and a copy of the account was set out. *Compare* Bebinger *v.* Sweet, 1 Abb. N. Cas. (N. Y.) 263, where complaint alleged that defendant led plaintiff into making an unconscionable lease, and then, after plaintiff had sown crops, turned him off and procured his arrest on a malicious charge of embezzlement, and took possession of his goods.

46. *Alabama.*— Bell *v.* Troy, 35 Ala. 184.

California.— Trubody *v.* Trubody, 137 Cal. 172, 69 Pac. 968. *Compare* Jacob *v.* Lorenz, 98 Cal. 332, 33 Pac. 119, where it was held that although separate damages to a particular part of plaintiff's property or cause of depreciation of its value must be specially pleaded, the failure to so plead is not a ground of demurrer for misjoinder.

Colorado.— Flint *v.* Hubbard, 16 Colo. App. 464, 66 Pac. 446.

Maryland.— See Penniman *v.* Winner, 54 Md. 127.

Nebraska.— Lash *v.* Christie, 4 Nebr. 262.

New York.— Tew *v.* Wolfsohn, 174 N. Y. 272, 66 N. E. 934 [*affirming* 77 N. Y. App. Div. 454, 79 N. Y. Suppl. 286]; Mack *v.* Latta, 83 N. Y. App. Div. 242, 82 N. Y. Suppl. 130; Wittingham *v.* Darrin, 45 Misc. 478, 92 N. Y. Suppl. 752; Lord *v.* Vreeland, 15 Abb. Pr. 122. See also Smith *v.* Rathbun, 22 Hun 150, holding that a complaint against the directors of a corporation will not be regarded as wrongfully uniting a cause of action for negligence and for malfeasance in office, where the acts charged are such as to be difficult properly to classify.

South Carolina.— Jenkins *v.* Thomason, 32 S. C. 254, 10 S. E. 961.

South Dakota.— Lyman County *v.* State, 11 S. D. 391, 78 N. W. 17.

Wisconsin.— Whereatt *v.* Ellis, 58 Wis. 625, 17 N. W. 301; Welsh *v.* Chicago, etc., R. Co., 34 Wis. 494; Lee *v.* Simpson, 29 Wis. 333; Truesdall *v.* Rhodes, 26 Wis. 215.

United States.— French *v.* Tunstall, 9 Fed. Cas. No. 5,104*a*, Hempst. 204.

England.— Judin *v.* Samuel, 1 B. & P. N. R. 43.

Where there is a defect of parties as to one cause.— In an action to recover for breaches of covenants contained in a lease and in a renewal thereof if the proper parties on the renewal lease are not before the court, although the pleader has unnecessarily stated covenants in both leases and the breaches thereof, and claims damages by reason of certain covenants in both of the leases, which are alike, the complaint will be considered to set up but a single cause of action on the original lease. Lord *v.* Vreeland, 15 Abb. Pr. (N. Y.) 122.

47. Tew *v.* Wolfsohn, 174 N. Y. 272, 66 N. E. 934; Mack *v.* Latta, 83 N. Y. App. Div. 242, 82 N. Y. Suppl. 130; Kolel America Vatiferes Jerusalem *v.* Eliach, 29 Mich. (N. Y.) 499, 61 N. Y. Suppl. 935.

48. Grandona *v.* Lovdal, 70 Cal. 161, 11 Pac. 623; Whereatt *v.* Ellis, 58 Wis. 625, 17 N. W. 301. See also Pharr *v.* Bachelor, 3 Ala. 237, holding that where the body of a count was in assumpsit, but it concluded in case, such conclusion might be rejected as surplusage, avoiding an objection upon the ground of misjoinder.

49. Good *v.* Daland, 121 N. Y. 1, 24 N. E. 15; New York *v.* Sixth Ave. R. Co., 77 N. Y. App. Div. 367, 79 N. Y. Suppl. 319; Lohmiller *v.* Indian Ford Water-Power Co., 51 Wis. 683, 8 N. W. 601.

50. *Illinois.*—Vermillion County *v.* Knight, 2 Ill. 97, holding that there was no misjoinder in an action against a county on a contract, by reason of the fact that one count charged the contract to have been entered into with the commissioners of the county, and that another count charged it as entered into with the county through its commissioners.

Michigan.— Stubly *v.* Beachboard, 68 Mich. 401, 36 N. W. 192.

Minnesota.— Merrill *v.* Dearing, 22 Minn. 376.

Missouri.— McKee *v.* Calvert, 80 Mo. 348.

New York.— Davis *v.* New York, 75 N. Y. App. Div. 518, 78 N. Y. Suppl. 336, where a complaint in a suit to enforce a mechanic's lien alleged that plaintiff as a trustee in bankruptcy had filed a lien for materials furnished by the bankrupts and that the bankrupts themselves had filed a lien and assigned their claim to plaintiff.

Texas.— See Compton *v.* Ashley, (Civ. App. 1894) 28 S. W. 223.

Wisconsin.— Marston *v.* Dresen, 76 Wis. 418, 45 N. W. 110.

Intent of pleader.— Where it is possible that a pleader may have intended to set forth two causes of action, one for the recovery of

B. Propriety of Joinder — 1. At Common Law — a. Forms of Action Which May Be Joined — (I) *In General.* At common law the form rather than the subject-matter of separate counts determines the propriety of their joinder in many cases,[51] the general rule being that a joinder of counts requiring the same plea and judgment is proper.[52] This rule, however, does not prohibit a joinder in all other cases, and although the pleas are different, counts of the same nature and on which the same judgment may be rendered may in some cases be joined.[53] Nor can counts to which the pleas and judgments are the same be joined in all cases;[54] for example, debt on bond and covenant broken cannot be joined, although general issue to both is *non est factum* and the judgment *misericordia.*[55] So in some states replevin,[56] account,[57] or an action on book-debt[58] cannot be joined with any other cause of action.

(II) *Contract.* Under the general rules already stated,[59] counts in assumpsit and debt cannot be joined;[60] nor can assumpsit be joined with a count in book-debt[61] or in covenant;[62] nor can debt and covenant be joined;[63] nor book-account with account as bailiff or receiver.[64] Debt, however, in apparent contradiction to the general rule, may be joined with detinue, although the judgments are different.[65]

(III) *Tort.* Since actions requiring different judgments cannot as a general rule be joined,[66] it is usually held improper to join trespass and trespass on the

real estate, and the other for partition, yet, if in fact he has set forth but one cause of action, a demurrer for misjoinder cannot be sustained. Westlake *v.* Farrow, 34 S. C. 270, 13 S. E. 469.

Division into paragraphs. — The fact that a petition is divided into paragraphs and the later paragraphs introduced by the phrase "for a further and separate cause of action" will not of itself cause the petition to be construed as stating more than one cause of action. Houston *v.* Delahay, 14 Kan. 125; Welch *v.* Platt, 32 Hun (N. Y.) 194; Hillman *v.* Hillman, 14 How. Pr. (N. Y.) 456 [*approved* in Thompson *v.* Kearney, 14 Daly (N. Y.) 342, 12 N. Y. St. 682].

Stating distinct rights as legal conclusion. — A petition will not be regarded as containing several distinct causes of action, by reason of the fact that it sets out several failures to perform a duty enjoined by law, for which the law permits the recovery of but a single penalty, and as a conclusion of law claims the legal right to recover a penalty for each failure. Loveland *v.* Garner, 71 Cal. 541, 12 Pac. 616, where several failures of the directors of a corporation, with regard to the rendering of statements of accounts and to the making of reports, were alleged in one complaint.

Propriety of stating same cause differently see Pleading.

51. Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439; Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330; Brown *v.* Dixon, 1 T. R. 274.

52. Brady *v.* Spurck, 27 Ill. 478; Smith *v.* Rutherford, 2 Serg. & R. (Pa.) 358; Brown *v.* Dixon, 1 T. R. 274.

Counts averring a waiver of exemptions cannot be joined with counts which contain no such averment. Johnson *v.* Selden, 140 Ala. 418, 37 So. 249, 103 Am. St. Rep. 49; McCrummen *v.* Campbell, 82 Ala. 566, 2 So. 482.

53. Whilden *v.* Merchants', etc., Nat Bank, 64 Ala. 1, 38 Am. Rep. 1; Mutual L. Ins. Co. *v.* Allen, 113 Ill. App. 89 [*affirmed* in 212 Ill. 134, 72 N. E. 200]; 1 Chitty Pl. 222; 2 Saunders 117. e, f.

54. Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330.

55. Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330.

56. Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330.

57. Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330.

58. Whipple *v.* Fuller, 11 Conn. 582, 29 Am. Dec. 330.

59. See *supra*, I, B, 1, a, (I).

60. See Assumpsit, Action of, 4 Cyc. 344; Debt, Action of, 13 Cyc. 416.

61. Phelps *v.* Hurd, 31 Conn. 444.

62. Gaines *v.* Craig, 24 Ark. 477; Gilman *v.* Meredith School Dist., 18 N. H. 215; Pell *v.* Lovett, 19 Wend. (N. Y.) 546 [*reversed* on other grounds in 22 Wend. 369]; Maguire *v.* Rabenau, 16 Wkly. Notes Cas. (Pa.) 479. *Compare* Smaltz *v.* Hancock, 118 Pa. St. 550, 12 Atl. 464, where plaintiff's original declaration was in assumpsit, and subsequently plaintiff filed an additional count in covenant to which defendant did not demur, but went to trial, but on a second trial demurred on the ground of misjoinder and leave to withdraw the count in assumpsit was given.

In New Jersey, under the rules of court, the joinder of covenant with debt, assumpsit, or trespass on the case, or injuries arising from breach of contract, is now permissible. Smith *v.* Miller, 49 N. J. L. 521, 13 Atl. 39.

Joinder of common and special counts in assumpsit see Assumpsit, 4 Cyc. 345.

63. Gaines *v.* Craig, 24 Ark. 477; Brumbaugh *v.* Keith, 31 Pa. St. 327.

64. May *v.* Williams, 3 Vt. 239.

65. See Detinue, 14 Cyc. 268.

66. See *supra*, I, B, 1, a, (I).

case,[67] the judgment in trespass being technically *quod capiatur*, and in case, even though force is inferred, *quod sit in misericordia*.[68] For the same reason the action of trover, being a form of case, cannot be joined with trespass;[69] but trespass and case[70] or trespass and trover[71] may be joined where, under the practice, the same judgment is applicable to both forms of action. So the joinder of trespass and case is proper where the distinction between the actions is removed by statute.[72] Trover and case may be joined,[73] trover being originally an action on the

67. *Alabama.*— Guilford *v.* Kendall, 42 Ala. 651; Bell *v.* Troy, 35 Ala. 184; Sheppard *v.* Shelton, 34 Ala. 652; Sheppard *v.* Furniss, 19 Ala. 760.

Illinois.— Krug *v.* Ward, 77 Ill. 603; Dalson *v.* Bradberry, 50 Ill. 82.

Indiana.— Hines *v.* Kinnison, 8 Blackf. 119.

New Jersey.— Dale Mfg. Co. *v.* Grant, 34 N. J. L. 138; Hull *v.* Phillips, 2 N. J. L. 367; Warren *v.* Fisher, 2 N. J. L. 240.

New York.— Cooper *v.* Bissell, 16 Johns. 146.

Pennsylvania.— Sollenberger *v.* Schnader, 4 Lanc. Bar Dec. 14, 1872; Brant *v.* Lorenze, 34 Leg. Int. 115.

Rhode Island.— Smith *v.* Rhode Island Co., 26 R. I. 24, 57 Atl. 1056.

See 1 Cent. Dig. tit. "Action," § 346.

And *compare* Smith *v.* Goodwin, 4 B. & Ad. 413, 24 E. C. L. 185, 2 L. J. K. B. 192, 2 N. & M. 114, 28 E. C. L. 568 (holding on a motion of arrest of judgment for misjoinder of case and trespass, where six counts were in case, and the seventh charged a vexatious distraint, that, although there was a trespass, plaintiff could bring case for the conversion and that the count in question was an informal count in case and sufficient after verdict); Weeton *v.* Woodcock, 5 M. & W. 587.

False imprisonment and malicious prosecution cannot be joined at common law. Mexican Cent. R. Co. *v.* Gehr, 66 Ill. App. 173.

68. Courtney *v.* Collet, 1 Ld. Raym. 272, 12 Mod. 164.

69. *Alabama.*— Mecklin *v.* Deming, 111 Ala. 159, 20 So. 507.

Georgia.— Crenshaw *v.* Moore, 10 Ga. 384.

Michigan.— Haines *v.* Beach, 90 Mich. 563, 51 N. W. 644.

New York.— Cooper *v.* Bissell, 16 Johns. 146.

Pennsylvania.— Smith *v.* Rutherford, 2 Serg. & R. 358.

See 1 Cent. Dig. tit. "Action," § 347.

But see Goodloe *v.* Potts, Cooke (Tenn.) 399, in which the court intimated, although it did not decide, that such a joinder was proper.

70. Gladfelter *v.* Walker, 40 Md. 1 (sustaining a joinder of counts for entering and breaking plaintiff's close with counts for polluting a stream of water, to the use of which plaintiff was entitled); Gent *v.* Cole, 38 Md. 110 (holding a joinder of counts in case and trespass proper in an action by a negro apprentice for being wrongfully enlisted by his master as a substitute for his son who had been drafted).

71. Williams *v.* Bramble, 2 Md. 313, sustaining a joinder of trover and trespass *vi et armis de bonis asportatis*.

72. *Alabama.*— Taylor *v.* Smith, 104 Ala. 537, 16 So. 629.

Illinois.— Barker *v.* Koozier, 80 Ill. 205; Krug *v.* Ward, 77 Ill. 603; Chicago, etc., R. Co. *v.* Casazza, 83 Ill. App. 421.

Maine.— Moulton *v.* Smith, 32 Me. 406.

Michigan.— Bellant *v.* Brown, 78 Mich. 297.

Ohio.— Henshaw *v.* Noble, 7 Ohio St. 226.

Virginia.— Womack *v.* Circle, 29 Gratt. 192 (holding that a count for malicious arrest and prosecution might be joined with a count for slander); Parsons *v.* Harper, 16 Gratt. 64.

See 1 Cent. Dig. tit. "Actions," § 346.

Such statutes are to be liberally construed. — Bellant *v.* Brown, 78 Mich. 294, 44 N. W. 326.

A statute curing a variance between the writ and declaration, where the writ is in trespass and the declaration describes a cause of action in case and conversely, does not permit the joinder of case and trespass. Hines *v.* Kinnison, 8 Blackf. (Ind.) 119.

False imprisonment and malicious prosecution may be joined. Mexican Cent. R. Co. *v.* Gehr, 66 Ill. App. 173; Haskins *v.* Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376; People *v.* Judge Wayne Cir. Ct., 27 Mich. 164; Nyblach *v.* Haterius, 41 Fed. 120.

73. *Alabama.*—Henry *v.* Allen, 93 Ala. 197, 9 So. 579; Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170; Nabring *v.* Mobile Bank, 58 Ala. 204; Harris *v.* Powers, 57 Ala. 139; Wilkinson *v.* Moseley, 30 Ala. 562; Dixon *v.* Barclay, 22 Ala. 370.

Arkansas.— Ferrier *v.* Wood, 9 Ark. 85.

Delaware.— Tyre *v.* Causey, 4 Harr. 425.

Illinois.— Mutual L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89]; Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303.

Maine.— McConnell *v.* Leighton, 74 Me. 415; Moulton *v.* Witherell, 52 Me. 237, holding that a writ containing a count in trespass *de bonis* and another in case may be amended by adding a more formal count in trover for the same property.

Massachusetts.— Ayer *v.* Bartlett, 9 Pick. 156.

Michigan.— Bearss *v.* Preston, 66 Mich. 11, 32 N. W. 912; Wait *v.* Kellogg, 63 Mich. 138, 30 N. W. 80; Beebe *v.* Knapp, 28 Mich. 53.

Pennsylvania.— Patterson *v.* Anderson, 40 Pa. St. 359, 80 Am. Dec. 579; McCahan *v.*

case.[74] So when an action is originally trover, new counts in case may be added by way of amendment.[75] Under the statutes of some states a plaintiff in replevin may add a count in trover for goods which cannot be found.[76]

(iv) *CONTRACT AND TORT.* It is a well established rule of common-law pleading, that a cause of action arising *ex contractu* cannot be joined with a cause of action arising *ex delicto*.[77] Hence it is improper to join counts in assumpsit with

Hirst, 7 Watts 175 (holding that a count in case for negligence in not properly caring for articles delivered to defendants for safe-keeping may be joined with a count for conversion); Smith *v.* Rutherford, 2 Serg. & R. 358.

Tennessee.— Horsely *v.* Branch, 1 Humphr. 199; Angus *v.* Dickerson, Meigs 458.

West Virginia.— Hood *v.* Maxwell, 1 W. Va. 219.

England.— Smith *v.* Goodwin, 4 B. & Ad. 413, 24 E. C. L. 185, 2 L. J. K. B. 192, 2 N. & M. 114, 28 E. C. L. 568; Samuel *v.* Judin, 6 East 333 (holding a count declaring that plaintiff gave notes to defendant to have them discounted or to account to plaintiff for the money raised thereon, and that defendant intending to defraud had failed to account, although requested, properly joined with a count in trover for the notes); Brown *v.* Dixon, 1 T. R. 274; Mast *v.* Goodson, 3 Wils. C. P. 348. *Contra*, Matthews *v.* Hopkin, 1 Sid. 244. And *compare* Darlston *v.* Hianson, Comb. 333.

See 1 Cent. Dig. tit. "Action," § 351.

A count in case against a common carrier for negligence in the performance of its duty may be joined with a count in trover (Ferrier *v.* Wood, 9 Ark. 85; Southern Express Co. *v.* Palmer, 48 Ga. 85; Dixon *v.* Clifton, 2 Wils. C. P. 319), so plaintiff may declare in case upon the custom of the realm, and also for trover and conversion (Owen *v.* Lewyn, 1 Vent. 223. See also Brown *v.* Dixon, 1 T. R. 274).

Fraud and trover.— It would seem that a count for trover and conversion and a count for fraud in the sale of a horse cannot be joined without an allegation that the contract has been rescinded. Kennet *v.* Robinson, 2 J. J. Marsh. (Ky.) 96.

74. McConnell *v.* Leighton, 74 Me. 415.

75. McConnell *v.* Leighton, 74 Me. 415; Googins *v.* Gilmore, 47 Me. 9, 74 Am. Dec. 427, holding that a writ originally in trover for damages to a reversionary interest in personal property might be amended by the addition of a count in case.

76. Karr *v.* Barstow, 24 Ill. 580.

77. *Alabama.*— Southern R. Co. *v.* Bunnell, 138 Ala. 247, 36 So. 380; Holland *v.* Southern Express Co., 114 Ala. 128, 21 So. 992; Ansley *v.* Piedmont Bank, 113 Ala. 467, 21 So. 59, 59 Am. St. Rep. 122; Baldwin *v.* Kansas City, etc., R. Co., 111 Ala. 515, 20 So. 349; Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170; Chambers *v.* Seay, 73 Ala. 372; Wilson *v.* Stewart, 69 Ala. 302; Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Shotwell *v.* Gilkey, 31 Ala. 724; Copeland *v.* Flowers, 21 Ala. 472.

Connecticut.— Stoyel *v.* Westcott, 2 Day 418, 2 Am. Dec. 109; Clinton *v.* Hopkins, 2 Root 225.

Georgia.— Hitt *v.* Lippitt, Ga. Dec., Pt. II, 89.

Indiana.— Cincinnati, etc., R. Co. *v.* Harris, 61 Ind. 290; Clark *v.* Lineberger, 44 Ind. 223; Powell *v.* Kinney, 6 Blackf. 359; Etchison *v.* Post, 5 Blackf. 140.

Kentucky.— Louisville, etc., Canal Co. *v.* Rowan, 4 Dana 606; Trundle *v.* Arnold, 7 J. J. Marsh. 407; Wickliffe *v.* Davis, 2 J. J. Marsh. 69; Wickliffe *v.* Sanders, 6 T. B. Mon. 296; Carstarphen *v.* Graves, 1 A. K. Marsh. 435; Ryle *v.* Howlet, 3 Bibb 347.

Massachusetts.— Boston Overseers of Poor *v.* Otis, 20 Pick. 38.

Michigan.— People *v.* Judges Washtenaw Cir. Ct., 1 Dougl. 434.

Missouri.— Roberts *v.* Quincy, etc., R. Co., 43 Mo. App. 287; Sumner *v.* Tuck, 10 Mo. App. 269.

New Jersey.— Wilkins *v.* Standard Oil Co., 71 N. J. L. 399, 59 Atl. 14; McDermott *v.* Morris Canal, etc., R. Co., 38 N. J. L. 53; Green *v.* Morris, etc., R. Co., 24 N. J. L. 486; Van Pelt *v.* Van Pelt, 3 N. J. L. 619; Sayres *v.* Scudder, 2 N. J. L. 53.

New York.— Howe *v.* Cook, 21 Wend. 29; Church *v.* Mumford, 11 Johns. 479; Hallock *v.* Powell, 2 Cai. 216.

Pennsylvania.— Erie City Iron-Works *v.* Barber, 118 Pa. St. 6, 12 Atl. 411; McNair *v.* Compton, 35 Pa. St. 23; Finley *v.* Hanhest, 30 Pa. St. 190; Wood *v.* Anderson, 25 Pa. St. 407; Pettit *v.* Sanger, 2 Pearson 84.

Tennessee.— Henderson *v.* Boyd, 85 Tenn. 21, 1 S. W. 498 (such as a count in trespass for personal injuries, and a count for breach of a contract made in settlement of plaintiff's claims for such injuries); Beasley *v.* Bradley, 2 Swan 180.

Virginia.— Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250; Southern Express Co. *v.* McVeigh, 20 Gratt. 264; Creel *v.* Brown, 1 Rob. 265.

England.— Corbett *v.* Packington, 6 B. & C. 268, 13 E. C. L. 131; Bage *v.* Bromnel, 3 Lev. 99; Holms *v.* Taylor, 2 Lev. 101; Dalson *v.* Tyson, 3 Salk. 204; Beningsage *v.* Ralphson, 2 Show. 250; Brown *v.* Dixon, 1 T. R. 274; Taylor *v.* Holmes, T. Raym. 233; Denison *v.* Ralphson, 1 Vent. 365; 1 Chitty Pl. 221; Comyns Dig. "Actions," G.

See 1 Cent. Dig. tit. "Actions," § 348.

Contract and breach of duty imposed by law.— Gurley *v.* McAnally, 109 Ala. 359, 19 So. 518; Rhodes *v.* Otis, 33 Ala. 578, 73 Am. Dec. 439.

Declarations construed to join contract and tort see Western Union Tel. Co. *v.* Waters, 139 Ala. 652, 36 So. 773, failure to deliver telegram.

counts founded on fraud and deceit,[78] with counts in trover[79] or with other counts in case.[80] Nor can assumpsit and trespass be joined,[81] nor book-account and trover.[82] Counts in debt and trespass cannot be joined,[83] nor counts in debt and

Declarations construed not to join contract and tort see Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517 (failure to deliver telegram); Birmingham *v.* Coleman, 111 Ala. 407, 20 So. 383 (injuries caused by defective bridge); Soper *v.* Jones, 56 Md. 503 (where language sounding in tort was rejected as surplusage); Philadelphia, etc., R. Co. *v.* Constable, 39 Md. 149 (negligence in setting fire to fences, and failure to keep fences in repair); Loudon *v.* Carroll, 130 Mich. 79, 89 N. W. 578 (assumpsit containing common counts and counts for deceit); Colonial Woolen Co. *v.* Trenton Water Power Co., 71 N. J. L. 57, 58 Atl. 172 (interference with water rights under lease); Howe *v.* Cook, 21 Wend. (N. Y.) 29 (allegation that defendant fraudulently and deceitfully violated his promise); Royce *v.* Oakes, 20 R. I. 252, 38 Atl. 371 (conversion).

78. *Georgia.*— Hitt *v.* Lippitt, Ga. Dec., Pt. II, 89.

Illinois.— Noetling *v.* Wright, 72 Ill. 390.

Kentucky.— Trundle *v.* Arnold, 7 J. J. Marsh. 407; Carstarphen *v.* Graves, 1 A. K. Marsh. 435.

Massachusetts.— White *v.* Snell, 5 Pick. 425.

Missouri.— Jamison *v.* Copher, 35 Mo. 483.

New Hampshire.— Crooker *v.* Willard, 28 N. H. 134 note.

New York.— Wilson *v.* Marsh, 1 Johns. 503.

North Carolina.— Chamberlain *v.* Robertson, 52 N. C. 12; Toris *v.* Long, 1 N. C. 17.

Pennsylvania.— Noble *v.* Lally, 50 Pa. St. 281; Pennsylvania R. Co. *v.* Zug, 47 Pa. St. 480. But see Jones *v.* Conoway, 4 Yeates 109, holding that a count in the nature of deceit in affirming a negro to be a slave for life, a count for money had and received to plaintiff's use, being the price paid for the slave, and a count for a similar sum paid out and expended, might be joined.

South Carolina.—Tucker *v.* Gordon, 2 Brev. 136.

Vermont.— Dean *v.* Cass, 73 Vt. 314, 50 Atl. 1085.

England.— Orton *v.* Butler, 2 Chit. 343, 18 E. C. L. 668; Beningsage *v.* Ralphson, 2 Show. 250.

See 1 Cent. Dig. tit. "Action," § 348.

79. *Alabama.*— Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 528, 24 So. 885; Mobile L. Ins. Co. *v.* Randall, 74 Ala. 170; Whilden *v.* Gilkey, 64 Ala. 1, 38 Am. Rep. 1; Copeland *v.* Flowers, 21 Ala. 472.

Massachusetts.— Clapp *v.* Campbell, 124 Mass. 50.

New Jersey.— Little *v.* Gibbs, 4 N. J. L. 211; Polhemus *v.* Annin, 1 N. J. L. 176.

New York.— Howe *v.* Cook, 21 Wend. 29.

Rhode Island.— Bull *v.* Matthews, 20 R. I. 100, 37 Atl. 536.

Tennessee.— Beasley *v.* Bradley, 2 Swan 180; Holland *v.* Pack, Peck 151.

Virginia.— Gary *v.* Abingdon Pub. Co., 94 Va. 775, 27 S. E. 595.

Wisconsin.— Hibbard *v.* Bell, 3 Pinn. 190, 3 Chandl. 206.

England.— Corbett *v.* Packington, 6 B. & C. 268, 13 E. C. L. 131; Samuel *v.* Judin, 6 East 333; Govett *v.* Radnidge, 3 East 62; Bage *v.* Bromull, 3 Lev. 99; Dalston *v.* Janson, 5 Mod. 90; Dalson *v.* Tyson, 3 Salk. 204; Matthews *v.* Hopkin, 1 Sid. 244; Brown *v.* Dixon, 1 T. R. 274; Taylor *v.* Holmes, T. Raym. 233; 1 Chitty Pl. 221.

See 1 Cent. Dig. tit. "Action," § 348.

80. *Alabama.*— Evans *v.* Southern R. Co., 133 Ala. 482, 32 So. 138; Baldwin *v.* Kansas City, etc., R. Co., 111 Ala. 515, 20 So. 349, exaction of illegal freight charges. See Tallahassee Falls Mfg. Co. *v.* Western R. Co., 117 Ala. 520, 23 So. 139, 67 Am. St. Rep. 179; Chambers *v.* Seay, 87 Ala. 558, 6 So. 341; Munter *v.* Rogers, 50 Ala. 283.

Connecticut.—Stoyel *v.* Wescott, 2 Day 418, 2 Am. Dec. 109 (aiding escape of prisoner); Clinton *v.* Hopkins, 2 Root 225 (malicious prosecution).

Georgia.— Teem *v.* Ellijay, 89 Ga. 154, 15 S. E. 33, injury to property.

Indiana.— Bodley *v.* Roop, 6 Blackf. 158, negligence.

Kentucky.— Ryle *v.* Howlet, 3 Bibb 347, slander.

Michigan.— Friend *v.* Dunks, 39 Mich. 733, cause of action under civil damage act.

Rhode Island.— Davis *v.* Smith, 26 R. I. 129, 58 Atl. 630, 103 Am. St. Rep. 691, 66 L. R. A. 478.

England.— Willett *v.* Tydy, Carth. 188, official malfeasance.

See 1 Cent. Dig. tit. "Action," § 348.

A count to recover a statutory penalty which, although in form in debt, is founded on a tort, cannot be joined with a count in assumpsit. Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439.

81. *Connecticut.*— McWheeney *v.* Waterbury, 46 Conn. 295, holding that a statute which allows the joining in the same declaration of trespass on the case with trespass and also with assumpsit does not authorize the joining of trespass with assumpsit, or the joining of case, trespass, and assumpsit.

Kentucky.— Ryle *v.* Howlet, 3 Bibb 347.

New Jersey.— Little *v.* Gibbs, 4 N. J. L. 211; Bishop *v.* Jones, 3 N. J. L. 1041; Van Pelt *v.* Van Pelt, 3 N. J. L. 619; Polhemus *v.* Annin, 1 N. J. L. 176.

South Carolina.— Tucker *v.* Gordon, 2 Brev. 136.

Virginia.— Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

82. Broadwell *v.* Congar, 2 N. J. L. 137.

83. Elder *v.* Hilzheim, 35 Miss. 231.

A cause to recover a statutory penalty for cutting trees cannot be joined with a cause for entering upon plaintiff's close (Higdon *v.* Kennemer, 120 Ala. 193, 24 So. 439; Elder *v.*

case,[84] nor trover and detinue.[85] A count upon a contract and a count in tort may sometimes be united, where the former sounds in damages for the malfeasance of defendant in regard to the contract, and where they are so formed that the same plea may be pleaded and the same judgment rendered on both.[86] The joinder of debt and case may be authorized by a statute conferring arbitrary remedies.[87]

(v) *DIFFERENT FORMS FOR SAME CAUSE.* By statute in some states counts for the same cause of action may be joined, although in forms which at common law could not be joined, for example trespass and trespass on the case[88] or

Hilzheim, 35 Miss. 231; Morrison *v.* Bedell, 22 N. H. 234); nor with trespass for taking and carrying away goods (Morrison *v.* Bedell, *supra*; Burr *v.* Sharp, 2 N. J. L. 382).

84. Burr *v.* Sharp, 2 N. J. L. 382, where it was sought to join debt for rent, trespass to land and case for waste.

85. Hood *v.* Hanning, 4 Dana (Ky.) 21; Mockford *v.* Taylor, 19 C. B. N. S. 209, 115 E. C. L. 209; Kettle *v.* Bromsall, Willes 118.

86. *New Hampshire.* — Crawford *v.* Parsons, 63 N. H. 438, covenant and case.

New Jersey. — Little *v.* Gibbs, 4 N. J. L. 211.

New York. — Church *v.* Mumford, 11 Johns. 479 (where in two counts the gravamen set forth was in both a tortious breach of defendant's duty as an attorney, as well as of the implied promise arising from his being employed); Hallock *v.* Powell, 2 Cai. 216 (a count in assumpsit and a count on a warranty on a sale may be joined where the gist of the action in both counts is deceit. If not guilty be pleaded to the other count, and plaintiff take judgment on the assumpsit and enter a *nolle prosequi* on the warranty the misjoinder is not movable in arrest of judgment).

Pennsylvania. — Smith *v.* Rutherford, 2 Serg. & R. 358, holding that a count alleging that defendant did not permit plaintiff to enter certain land, and cut and carry away certain grain sold by defendant to a third party, and by the latter to plaintiff, but prevented plaintiff from so doing, and converted the grain to his own use, consists partly of breach of contract, and partly of misfeasance, and is properly joined with a count in trover, the process, plea, and judgment being the same. *Compare* Pettit *v.* Sanger, 2 Pearson 84, holding that a count setting forth a promise arising out of a sale of property, receipt of proceeds, and failure to pay them over was a count in case *ex delicto* which might be joined with other counts in tort.

England. — Brown *v.* Dixon, 1 T. R. 274. *Compare* Dickon *v.* Clifton, 2 Wils. C. P. 319.

Compare Lane *v.* Hogan, 5 Yerg. (Tenn.) 290, holding that a count charging that defendant agreed to pay a certain sum in good bank-notes, for a horse, with an averment that the notes paid were forged, was in case and might be joined with a count for a deceitful representation that the notes were genuine. But see Humiston *v.* Smith, 22 Conn. 19, holding that while an action upon a warranty is founded on a contract, plaintiff may at his election declare either in assumpsit or in tort; but the two forms of action are so distinct that they cannot both be joined in the same declaration.

Case and a count for breach of trust and fraud arising upon contract, express and implied, may be joined. Clark *v.* Kent County Judge, 125 Mich. 449, 84 N. W. 629, such as a claim for fraudulently procuring money with which to pay a license-fee to conduct a business for plaintiff in another city, and a claim for money which defendant had collected on a note forwarded to him by plaintiff.

87. Smith *v.* Merwin, 15 Wend. (N. Y.) 184, debt for penalty and case for damages from non-attendance of witness.

88. See the statutes of the several states. And see Griffin *v.* Gilbert, 28 Conn. 493 (sustaining a declaration containing two counts in trespass for an entry on land and the digging up of the soil and carting of stones thereon, and a third count in case alleged to be for the same cause of action); Havens *v.* Hartford, etc., R. Co., 26 Conn. 220 (holding that a declaration containing a count in trespass for the forcible ejection of plaintiff by defendants, a railroad company, from their cars, and a count in trespass on the case for the same injury by the negligence of defendants as common carriers in conveying him as a passenger, the latter count also containing an allegation that defendants at the same time assumed to carry safely plaintiff's tool-chest, but damaged it through their negligence, was bad for a misjoinder, although the second count contained an averment that it was for the same cause of action as the first); Boerum *v.* Taylor, 19 Conn. 122 (holding that a count in trespass for placing filthy substances in a quart of rum in a jug, whereby the rum was rendered valueless and spoiled, and another in case for putting such substances into the rum with the intent to cause plaintiff to drink thereof, and that plaintiff drank and was made sick thereby, could not be joined); Black *v.* Howard, 50 Vt. 27 (holding that a count in trespass *quare clausum fregit* might be joined with a count in case for neglect to maintain a division fence); Hagar *v.* Brainerd, 44 Vt. 294 [*distinguishing* Keyes *v.* Prescott, 32 Vt. 86, which held that a count in trover could not be joined with an action of trespass under a statute providing treble damages for cutting trees on the land of another, since the two counts were not for the same cause of action] (sustaining a joinder of trespass on the freehold and trespass on the case); Alger *v.* Curry, 38 Vt. 382.

trover.[89] Other statutes permit the joinder of counts in contract and tort for the same cause,[90] some of such statutes requiring a specific averment that but one cause is stated,[91] although in a proper case such averment may be introduced by amendment.[92] Plaintiff after such an averment cannot introduce evidence of a tort not within the scope of the count on contract.[93] Even in the absence of statute, the joinder of counts for the same cause in different forms has been permitted upon the doctrine of implied amendment.[94]

(VI) *MANDAMUS AND INJUNCTION.* The remedies by injunction and mandamus cannot be had in the same action.[95]

(VII) *LEGAL AND EQUITABLE.* An action at law and an action in equity cannot be joined,[96] hence a joinder of a legal claim against one person with an equitable claim against other persons cannot be permitted.[97]

b. Causes Which May Be Joined — (I) *IN GENERAL.* As a general rule it may be stated that a plaintiff may join all his causes of action in one declaration; if in separate suits he can recover on each in the same form of action,[98] although

An allegation that the counts are for the same cause of action is of no avail, where it is apparent that they are not so. Sellick *v.* Hall, 47 Conn. 260. See also Winnie *v.* Pond, 34 Conn. 391; Havens *v.* Hartford, etc., R. Co., 26 Conn. 220.

89. Templeton *v.* Cloyston, 59 Vt. 628, 10 Atl. 594, in which it is said the court must from the declaration be satisfied that the several counts are for one cause of action.

90. See Louisville, etc., R. Co. *v.* Guthrie, 10 Lea (Tenn.) 432.

91. See Mass. Gen. St. c. 129, § 64; Mass. Pub. St. c. 167, § 4. And see Teague *v.* Irwin, 134 Mass. 303; New Haven, etc., R. Co. *v.* Campbell, 128 Mass. 104, 35 Am. Rep. 360; Mahon *v.* Blake, 125 Mass. 477; Kellogg *v.* Kimball, 122 Mass. 163; Mason *v.* Field, 119 Mass. 585; May *v.* Western Union Tel. Co., 112 Mass. 90; Jenkins *v.* Bacon, 111 Mass. 373, 15 Am. Rep. 33; Morse *v.* Hutchins, 102 Mass. 439; Hulett *v.* Pixley, 97 Mass. 29; Cunningham *v.* Hall, 7 Gray (Mass.) 559.

The federal courts will follow this practice. Central Vermont R. Co. *v.* Soper, 59 Fed. 879, 8 C. C. A. 879.

92. Kellogg *v.* Kimball, 122 Mass. 163.

93. Mason *v.* Field, 119 Mass. 585.

94. Meloon *v.* Read, (N. H. 1905) 59 Atl. 946 (trespass *quare elausum fregit* and *de bonis asportatis* and trover); Broadhurst *v.* Morgan, 66 N. H. 480, 29 Atl. 553; Crawford *v.* Parsons, 63 N. H. 438 (covenant and case); Elsher *v.* Hughes, 60 N. H. 469 (trespass and assumpsit); Rutherford *v.* Whitcher, 60 N. H. 110 (trover and assumpsit); Whitaker *v.* Warren, 60 N. H. 20, 49 Am. Rep. 302 (joinder of a count in debt for double damages given by a statute for injuries caused by a dog, with a count in case for the same injuries). *Compare* Farnum *v.* Concord Land, etc., Co., 69 N. H. 231, 45 Atl. 745, holding that an action for damages for injuries to an animal, occasioned by negligence in keeping in repair a spring, cannot be joined with assumpsit for use of water from the spring, as no evidence competent under one would be competent under the other.

Amendment changing form of action see PLEADING.

95. Whigham *v.* Davis, 92 Ga. 574, 18 S. E. 548.

96. McKinley *v.* Combs, 1 T. B. Mon. (Ky.) 105 (holding that, although a creditor whose claim is purely legal must have judgment and execution before he can maintain a bill to set aside a fraudulent deed, one demand so used to set aside a fraudulent deed cannot have another, purely legal, joined with it, and of which nothing obstructed a recovery at law); Harvey *v.* De Witt, 13 Gray (Mass.) 536; Miner *v.* Nichols, 24 R. I. 199, 52 Atl. 893; Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. ed. 804; Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059; Scott *v.* Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. ed. 358; Thompson *v.* Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765; Bennett *v.* Butterworth, 11 How. (U. S.) 669, 13 L. ed. 859.

Legal relief in action in equity see EQUITY, 16 Cyc. 109 *et seq.*

Joinder of causes in equity see EQUITY, 16 Cyc. 241 *et seq.*

97. Giesy *v.* Gregory, 15 App. Cas. (D. C.) 49.

98. *Illinois.*— Hays *v.* Borders, 6 Ill. 46.

Maryland.— Williams *v.* Bramble, 2 Md. 313.

Michigan.— Randall *v.* Gartner, 96 Mich. 284, 55 N. W. 843; Tregent *v.* Maybee, 54 Mich. 226, 19 N. W. 962.

New Hampshire.— Morrison *v.* Bedell, 22 N. H. 234.

New York.— Hallock *v.* Powell, 2 Cai. 216.

Rhode Island.— Drury *v.* Merrill, 20 R. I. 2, 36 Atl. 835.

Vermont.— Ranney *v.* St. Johnsbury, etc., R. Co., 64 Vt. 277, 24 Atl. 1053.

When two causes of action are of the same nature, where they can be conveniently and fairly tried together, and where a judgment for plaintiff is of the same effect so that defendant cannot be embarrassed on trial, or oppressed by different executions, they may be joined. Morrison *v.* Bedell, 22 N. H. 234.

The true distinction does not rest on the sameness of the process, plea, or judgment, but upon the consideration of whether the action is founded on tort or contract; if the former it may be joined with any tort, and if

the several causes are distinct rights of action so that a judgment for one will not bar a recovery for the other.[99] This rule is, however, subject to the qualification that the causes of action must be in the same right.[1]

(II) *Inconsistent Causes.* A plaintiff cannot recover upon two or more inconsistent counts in his declaration.[2]

(III) *Statutory and Common-Law Causes.* While it has been said that a joinder of a count upon a statute with one based on a common-law right is not permissible,[3] the general rule is that, where the pleas and judgments are the same, the joinder may be permitted,[4] subject also to the further qualification that the

the latter with any contract. Jones *v.* Conoway, 4 Yeates (Pa.) 109.

Similarity of form.— It is not enough that the counts relate to the same subject-matter; the form of action must be the same in all to prevent misjoinder. Howe *v.* Cook, 21 Wend. (N. Y.) 29.

Distinct issues.— Two actions which require several issues cannot be joined. Dalston *v.* Janson, 5 Mod. 90.

99. Chicago West Div. R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350.

1. See *infra*, I, B, 1, b, (VII).

2. Consolidated Coal Co. *v.* Shannon, 34 Md. 144. See also Missouri, etc., R. Co. *v.* Byrne, 100 Fed. 359, 40 C. C. A. 402, holding that a cause of action against a railroad company to recover damages on account of defendant's negligence in the construction and maintenance of cattle-yards at a shipping station, by reason of which certain cattle of plaintiff, placed in the yards while awaiting shipment, escaped, and were lost and injured, may properly be joined with a separate count to recover for the negligent killing of some of the same cattle by an engine on defendant's road.

A declaration by a principal against an agent which charges the agent with the failure to pay over certain moneys and property received by him upon a mortgage belonging to the principal, sufficient in amount to pay the mortgage in full, also counting on a promise made by the agent that if the principal would cause the mortgaged premises to be sold under a decree in foreclosure he, the agent, would pay to the principal any deficiency arising on the sale, contains two inconsistent causes of action. Perkins *v.* Hershey, 77 Mich. 504, 43 N. W. 1021.

Inconsistency and repugnancy between counts see PLEADING.

3. Morrison *v.* Bedell, 22 N. H. 234 (holding that where a forfeiture given by statute is for an act of malicious and criminal character, to establish the right of which a malicious and criminal intent must be proved, an action on such statute cannot be joined with a claim of compensation for a mere civil injury); Smith *v.* Meanor, 16 Serg. & R. (Pa.) 375 (holding that trover cannot be joined with an action on a statute providing double damages for distress and sale, where no rent is in arrear and due); Jenk. 211 (holding that detinue and an action of trespass under a statute cannot be joined); 1 Comyns Dig. tit. "Actions," G. *Compare* Wachusett Nat. Bank *v.* Steel, 135 Mich. 688, 98 N. W. 748 (holding that a creditor of a corporation cannot join with the common counts in assumpsit, and with counts based on fraud, a cause of action based on statute imposing a liability on directors of a corporation in three times the amount paid in on stock held by them, for the violation of certain statutory provisions, as in case of such a joinder the liability of the director would not be precisely ascertained by the verdict); People *v.* Judge Washtenaw Cir. Ct., 1 Dougl. (Mich.) 434.

4. *Alabama.*— Sloss Iron, etc., Co. *v.* Tilson, 141 Ala. 152, 37 So. 427.

Illinois.— Hays *v.* Borders, 6 Ill. 46 (holding proper the joinder of a count for aiding plaintiff's servants to absent themselves from his services, with a count for enticing away a registered servant from such plaintiff); Pisa *v.* Holy, 114 Ill. App. 6; Marquette Third Vein Coal Co. *v.* Dielie, 110 Ill. App. 684.

Massachusetts.— Worster *v.* Canal Bridge, 16 Pick. 541; Heridia *v.* Ayres, 12 Pick. 334; Fairfield *v.* Burt, 11 Pick. 244; Prescott *v.* Tufts, 4 Mass. 146.

Michigan.— See Bottomley *v.* Port Huron, etc., R. Co., 44 Mich. 542, 7 N. W. 214; Swift *v.* Applebone, 23 Mich. 252 (in which it was held that where two of three counts in a declaration to recover damages for injuries received from dogs of defendant were founded on common-law liability and the other upon statute, they were not for the same cause of action, rendering a verdict upon the common-law counts inconsistent with a verdict on the statutory counts); Hogsett *v.* Ellis, 17 Mich. 351.

Mississippi.— Elder *v.* Hilzheim, 35 Miss. 231, debt for a statutory price prescribed as a forfeiture for cutting trees, and debt for the value of the trees carried away.

New Hampshire.— Lamphier *v.* Worcester, etc., R. Co., 33 N. H. 495, common-law count for obstruction of a private way, and statutory remedy against a railroad corporation.

Pennsylvania.— Pennsylvania R. Co. *v.* Bock, 93 Pa. St. 427 (where an action upon a statute for wrongful death was joined with a claim for a horse killed at the same time); Gruber *v.* Clarion First Nat. Bank, 87 Pa. St. 465 (debt to recover a penalty under a statute for the taking of usurious interest, and debt to recover an excess of interest paid). *Compare* Denoon *v.* Binns, 4 Pa. L. J. 183, holding that a count against an alderman to recover a penalty for taking illegal fees, as to which there is no jurisdiction, can-

nature of the actions must be the same, joinder being improper where the nature of the actions is different.[5]

(IV) *CONTRACTS.* The pleader may join as many counts in the declaration as he has causes of action of the same nature in assumpsit,[6] hence it is proper to join counts upon an account annexed with counts for money had and received.[7] Counts in debt on a bond or other specialty may be joined in the same declaration with counts in debt on a judgment or on simple contract,[8] as may counts in debt for several causes of action on statutory penalties of a similar nature.[9] Where the same obligors have executed several bonds to the same obligee, he may sue upon all in the same action;[10] and the obligee of several joint and several bonds

not be joined with another in trespass for maliciously issuing an attachment against plaintiff.

See 1 Cent. Dig. tit. "Action," § 323.

Count for double damages imposed by statute may be joined with a count at common law. Worster *v.* Canal Bridge, 16 Pick. (Mass.) 541; Fairfield *v.* Burt, 11 Pick. (Mass.) 244.

5. McKenzie *v.* Gibson, 73 Ala. 204, holding that since the remedy to enforce a statutory penalty for killing or injuring cattle was in the nature of an action of debt, a count on such statute could not be joined with one in trespass.

6. *Alabama.*— Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517; Howison *v.* Oakley, 118 Ala. 215, 23 So. 810; Treadwell *v.* Tillis, 108 Ala. 262, 18 So. 886; Steiner *v.* Clisby, 103 Ala. 181, 15 So. 612; Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60; Wolffe *v.* State, 79 Ala. 201, 58 Am. Rep. 590.

Illinois.— Bogardus *v.* Trial, 1 Ill. 63.

Indiana.— Powell *v.* Kinney, 6 Blackf. 359.

Kentucky.— Estep *v.* Hammons, 104 Ky. 144, 46 S. W. 715, 20 Ky. L. Rep. 448.

Maryland.— Appleman *v.* Michael, 43 Md. 269.

Massachusetts.—Ames *v.* Stevens, 120 Mass. 218, further holding that a statement in the writ that a count in contract was joined with a count in tort was immaterial where no count in tort was filed in fact.

Michigan.— Berringer *v.* Cobb, 58 Mich. 557, 25 N. W. 491; Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638; Tregent *v.* Maybee, 54 Mich. 226, 19 N. W. 962; Barton *v.* Gray, 48 Mich. 164, 12 N. W. 30; Young *v.* Taylor, 36 Mich. 25; Hall *v.* Woodin, 35 Mich. 67; The Milwaukie *v.* Hale, 1 Dougl. 306.

New Hampshire.— Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

New Jersey.— Bruen *v.* Ogden, 18 N. J. L. 124.

Pennsylvania.— McDowell *v.* Oyer, 21 Pa. St. 417.

Rhode Island.— Drury *v.* Merrill, 20 R. I. 2, 36 Atl. 835, where a count for breach of a promise to marry was joined with a count on a promissory note.

Tennessee.— Kennel *v.* Muncey, Peck 273.

Texas.— Watson *v.* De Witt County, 19 Tex. Civ. App. 150, 46 S. W. 1061.

West Virginia.— Maloney *v.* Barr, 27 W. Va. 381.

Wisconsin.— Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

The holder of several orders payable out of separate specific funds cannot join them in one action of assumpsit because of the impracticability of a judgment which would secure payment of each order of the appropriate fund. Peterson *v.* Manistee, 36 Mich. 8.

Implied and express promise.— Counts *ex contractu* as upon an express agreement may be properly joined with counts for money had and received, also *ex contractu*, as upon an implied promise. Prout *v.* Webb, 87 Ala. 593, 6 So. 190; Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

7. Ames *v.* Stevens, 120 Mass. 218.

8. *Alabama.*— Barclay *v.* Moore, 17 Ala. 634; Spence *v.* Thompson, 11 Ala. 746.

Indiana.— Farnham *v.* Hay, 3 Blackf. 167; Flood *v.* Yandes, 1 Blackf. 102; Tillotson *v.* Stipp, 1 Blackf. 77.

Kentucky.— Patterson *v.* Chalmers, 7 B. Mon. 595; Brown *v.* Warnock, 5 Dana 492.

Maine.— National Exch. Bank *v.* Abell, 63 Me. 346.

Massachusetts.— Van Deusen *v.* Blum, 18 Pick. 229, 29 Am. Dec. 582; Smith *v.* First Cong. Meeting House, 8 Pick. 178.

Mississippi.— Lamkin *v.* Nye, 43 Miss. 241; Mardis *v.* Terrell, Walk. 327.

New Hampshire.— Morrison *v.* Bedell, 22 N. H. 234; Gray *v.* Johnson, 14 N. H. 414.

New York.— Union Cotton Manufactory *v.* Lobdell, 13 Johns. 462.

Virginia.— Eib *v.* Pindall, 5 Leigh 109.

England.— Bedford *v.* Alcock, 1 Wils. C. P. 248.

A count in debt on a judgment may be joined with a count in debt on a note in the same declaration, although the purpose is to make a judgment of sufficient amount to arrest the debtor. De Proux *v.* Sargent, 70 Me. 266.

9. Hoffman *v.* Knight, 127 Ala. 149, 28 So. 593; Bartolett *v.* Achey, 38 Pa. St. 273; Gibson *v.* Gault, 33 Pa. St. 44; Snow *v.* Mast, 65 Fed. 995; Young *v.* Rex, 2 East P. C. 833, 3 T. R. 103, 1 Rev. Rep. 600; Holland *v.* Bothmar, 4 T. R. 228. See also Price *v.* Stone, 49 Ala. 543, holding that in an action on a sheriff's official bond a count alleging the unlawful seizure of a steamboat might be joined with one alleging the destruction of the boat by negligence while in his possession under a writ issued by a state court as a court of admiralty.

10. Gabel *v.* Hammerwell, 44 Ala. 336.

which contain different obligors may sue upon all of the bonds a defendant whose name appears upon each of them.[11]

(v) *TORTS.* Counts upon distinct and independent torts of the same nature and upon which the same judgment may be given may as a general rule be joined.[12] Hence several distinct trespasses may be counted on in the same declaration,[13] such as trespass *quare clausum fregit* and trespass *de bonis asportatis*,[14] or trespass *vi et armis*;[15] so likewise it is proper to join trespass and malicious abuse of process,[16] or false imprisonment,[17] or rescue,[18] or pound breach;[19] or

11. Wood *v.* Hayward, 13 Pick. (Mass.) 269.

12. *Alabama.*— Louisville, etc., R. Co. *v.* Cofer, 110 Ala. 491, 18 So. 110; Henry *v.* Allen, 93 Ala. 197, 9 So. 579, holding that a count for conversion may be joined with a count for deceit in inducing the sale of the converted property.

Georgia.— Oglesby *v.* Stodghill, 23 Ga. 590, holding that, to an action in trespass for entering on plaintiff's land, and taking away his crops, a count may be added for taking and carrying away the profits of the same land for the same time.

Illinois.— Miller *v.* John, 208 Ill. 173, 70 N. E. 27, a count alleging that plaintiff was induced to exchange his land for other land by false and fraudulent statements of defendant was properly joined with a count substantially the same, except that it charged that defendants combining and confederating then and there represented plaintiff and so promised and agreed with him that they would be his agent and trade and exchange for him his farm for other farm lands of greater value, etc.

Maine.— Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696, count in case for obstruction of doors and light so as to reduce the rental value of premises, and count for obstruction of a way.

Michigan.— Bellant *v.* Brown, 78 Mich. 294, 44 N. W. 326, sustaining a declaration uniting counts for obstructing a river with sawlogs so that plaintiff could not make use of it in floating his own logs; for like obstruction of the river at another time and place, delaying plaintiff's drive by which he lost the sale of his logs at a great price; for breaking plaintiff's booms and chains and setting his logs adrift; and for breaking such booms and chains at another time and place, by means of which plaintiff's logs went adrift and became mixed with other logs.

New York.— Lansing *v.* Wiswall, 5 Den. 213, obstruction of private way and obstruction of public highway.

Vermont.— Lee *v.* Springer, 73 Vt. 183, 50 Atl. 809, holding that several distinct assaults may be joined in the same action.

Virginia.— Fisher *v.* Seaboard Air Line R. Co., 102 Va. 363, 46 S. E. 381 (damages for injuries to tenement by reason of the negligence of a railroad company in tearing down an adjoining tenement belonging to it to make room for its tracks, and for injuries by reason of smoke, noise, etc., resulting from the negligent operation of the railroad); Harvey *v.* Skipwith, 16 Gratt. 393.

Breach of warranty and deceit.— Where a party elects to sue in tort instead of in assumpsit, upon a warranty, a count thereon is properly joined with another charging defendant with fraud and deceit in the sale. Humiston *v.* Smith, 22 Conn. 19; Lassiter *v.* Ward, 33 N. C. 443.

13. Rippey *v.* Miller, 46 N. C. 479, 63 Am. Dec. 177 (holding that a count for the wilful destruction of a horse might be joined with a count in trespass for entering on plaintiff's tenement); Smith *v.* Brazelton, 1 Heisk. (Tenn.) 44, 2 Am. Rep. 678; Ditcham *v.* Bond, 2 M. & S. 436 (breaking and entering dwelling-house, assaulting and beating plaintiff, and beating plaintiff's servant *per quod servitium amisit*).

Under a statute rendering damages recoverable for trespasses of various kinds, it is proper to join several of such kinds of trespass in one declaration where only single damages are recoverable for each. Graham *v.* Roark, 23 Ark. 19.

14. *Indiana.*— Heimer *v.* Wilcox, 1 Ind. 29.

Iowa.— Wilson *v.* Johnson, 1 Greene 147.

Massachusetts.— Bishop *v.* Baker, 19 Pick. 517; Parker *v.* Parker, 17 Pick. 236.

Pennsylvania.— Guffey *v.* Free, 19 Pa. St. 384, holding that where a trespass is committed on real estate by non-resident of the county in which the real estate is situated, for the purpose of carrying away plaintiff's personal property, plaintiff may recover in the same action, both for the trespass on the land and the taking away of the personal property.

England.— Kempe *v.* Crews, 1 Ld. Raym. 167.

See 1 Cent. Dig. tit. "Action," § 343.

15. Henry *v.* Carlton, 113 Ala. 636, 21 So. 225; Arnold *v.* Maudlin, 6 Blackf. (Ind.) 187 (assault and battery); Moats *v.* Witmer, 3 Gill & J. (Md.) 118; McClees *v.* Sikes, 46 N. C. 310; Flinn *v.* Anders, 31 N. C. 328 (assault and battery). See also Taylor *v.* Adams, 58 Mich. 187, 24 N. W. 864, holding that counts alleging the occupation of a dwelling-house by plaintiff and her wrongful expulsion by defendant, and a count alleging assault and battery and injury therefrom, were not inconsistent.

16. Winnie *v.* Pond, 34 Conn. 391.

17. Williams *v.* Ivey, 37 Ala. 242; Shepherd *v.* Staten, 5 Heisk. (Tenn.) 79.

18. Allways *v.* Broom, 1 Ld. Raym. 83.

19. Baker *v.* Dumbolton, 10 Johns. (N. Y.) 240.

counts for distinct libels,[20] or malicious prosecutions,[21] or for slander and malicious prosecution[22] or false imprisonment.[23] Counts for injury to the person may be joined with counts for injury to property.[24]

(VI) *REAL ACTIONS.* Where the same land is demanded twice in a writ of right the writ is abatable.[25] So a writ is abatable where the writ in separate counts relies on different seizins.[26]

(VII) *ACTIONS IN DIFFERENT RIGHTS*—(A) *In General.* A further rule governing the joinder of actions is that the counts must be in the same right.[27] So an executor or administrator[28] or guardian[29] cannot sue or be sued in the same action upon an individual and a representative demand. Where, however, an individual cause of action is stated, a misjoinder will not arise from the use of words usually indicating a representative capacity.[30] A statutory action for death

20. Randall *v.* Gartner, 96 Mich. 284, 55 N. W. 843. See, generally, LIBEL AND SLANDER.

21. Pierce *v.* Thompson, 6 Pick. (Mass.) 193, holding that counts for suits brought by defendant in his own name and in the name of third persons may be joined.

22. Bible *v.* Palmer, 95 Tenn. 393, 32 S. W. 249. See also Hall *v.* Hawkins, 5 Humphr. (Tenn.) 357.

Joinder in the same count of such causes of action is apparently permissible. Miles *v.* Oldfield, 4 Yeates (Pa.) 423, 2 Am. Dec. 412; Philips *v.* Fish, 8 Mod. 371; Carter *v.* Fish, 1 Str. 645.

23. Moore *v.* Thompson, 92 Mich. 498, 52 N. W. 1000.

24. Chicago West. Div. R. Co. *v.* Ingraham, 131 Ill. 664, 23 N. E. 350, where negligence of defendant caused a collision between a street-car and a buggy in which plaintiff was riding.

Whether two causes of action arise see *supra*, I, A, 2.

25. Boston *v.* Otis, 20 Pick. (Mass.) 38.

26. Boston *v.* Otis, 20 Pick. (Mass.) 38, where one count alleged the demandant's own seizin, and the other, seizin of his predecessors.

27. Sebring *v.* Keith, 2 Bailey (S. C.) 192. A count by the assignee of a bankrupt for money loaned by him as assignee may be joined with a count for money had and received to his use as such assignee. Richardson *v.* Griffin, 5 M. & S. 294. See cases more specifically cited *infra*, I, B, 1, b, (VII), (B), (C), (D).

Municipal and parochial claims.—The rule requiring causes of action to be in the same right does not prevent the joinder of rights of action accruing to towns in their municipal character with those accruing in their parochial character. Alna *v.* Plummer, 3 Me. 88, holding that a count for money paid for the support of paupers and a count for the price of a pew in a meeting-house belonging to plaintiffs might be joined.

Rights derived from different titles.—In case the same form of action is proper a plaintiff may as a general rule proceed for several distinct injuries, although the several rights affected are derived from different titles. Gabel *v.* Hammerwell, 44 Ala. 336, holding that a plaintiff may proceed in one action for breaches of two or more attachment bonds executed by the same obligors.

Individual and official bond.—It would seem that an action upon a bond single, for payment of money, cannot be joined in an action upon an official bond running to plaintiff and his successors in office. See Foltz *v.* Stevens, 54 Ill. 180 (holding that a count describing a bond as the writing of defendant, whereby he acknowledged himself bound unto the plaintiff "constable" with a condition that defendant should on a certain day deliver to the constable or such other officer as might by law be entitled to receive the same, certain property levied on and placed into the custody of defendant as bailee, was properly joined with a count declaring on an instrument of defendant whereby he acknowledged himself to be bound unto plaintiff in a certain sum of money); Patrick *v.* Rucker, 19 Ill. 428.

28. **Joinder of actions by or against executor or administrator** see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 974.

29. Lee *v.* Chambers, 1 Strobh. (S. C.) 112, a count for money received to the use of a person cannot be joined with a count for money received to the use of such person as guardian.

Actions by or against guardian see GUARDIAN AND WARD, 21 Cyc. 186.

30. Blackstone Nat. Bank *v.* Lane, 80 Me. 165, 13 Atl. 683 (holding that where a note was binding upon a defendant in his private and individual capacity, the fact that defendant was described in the note and not in the writ, as trustee, did not create a misjoinder); Rush *v.* Good, 14 Serg. & R. (Pa.) 226 (holding that in an action by a creditor a count against assignees of a debtor who have sold property and received enough to pay the debts of the assignor, in which defendants are named as trustees, may be joined with a count for money had and received in which defendants are not described as trustees); Wheeler *v.* Wilson, 57 Vt. 157 (holding that where, by statute, a tax-collector is given the right to sue as an individual "in his name" to recover taxes, the fact that in certain counts of a declaration plaintiff declared in his official character, while in others he declared in his individual capacity, did not show a misjoinder). See also Rollins *v.* Marsh, 128 Mass. 116.

cannot be joined with one in the right of the decedent for pain and suffering.[31] Where a plaintiff has different interests in possession and reversion, he may recover in one action for an injury affecting both.[32]

(B) *Upon Joint and Several Liabilities.* A claim upon which defendant is individually liable may be joined with one upon which he is jointly and severally liable,[33] but not with one on which he is jointly liable with his co-defendants.[34] A count in assumpsit on a promise by two defendants may be joined with a count on a promise by them and a third person deceased.[35]

(C) *Upon Partnership and Individual Rights and Liabilities.* Since rights of action vested in a partnership accrue to a surviving partner not in a representative capacity, but in his own right, a count for a debt due the surviving partner in his own right may be joined with a count on a debt due to the firm,[36] as may counts for debts due to him as surviving member of different firms.[37] A count against a partner on an individual demand cannot be joined with a count against him on his liability as a member of a partnership.[38] A surviving partner may, however, be sued on both an individual and a firm debt.[39] The payee of notes made by distinct partnerships of which defendants are the only partners cannot in the same action against such defendants recover on the notes of each partnership.[40]

(D) *Actions By or Against Husband and Wife.* Distinct and separate rights of the husband and wife cannot be enforced in the same action;[41] hence an action which accrues to the husband alone cannot be joined with one which accrues to the husband and wife,[42] nor can a count which will survive to the wife be joined with one which abates at the death of the husband.[43] A count on a

31. Thomas *v.* Star, etc., Milling Co., 104 Ill. App. 110; Merrihew *v.* Chicago City R. Co., 92 Ill. App. 346. *Contra,* Preston *v.* St. Johnsbury, etc., R. Co., 64 Vt. 280, 25 Atl. 486; Ranney *v.* St. Johnsbury, etc., R. Co., 64 Vt. 277, 24 Atl. 1053. See also Callison *v.* Brake, 129 Fed. 196, 63 C. C. A. 354 [*affirming* 122 Fed. 722], in which it was held that where the father of a minor who was killed was also the administrator, he might sue for the death in both capacities, and a count under a statute authorizing an action for wrongful death to be brought by the executor or administrator of the deceased, the measure of damages in such case being the loss to the estate, might be joined with a count under a statute authorizing an action for the wrongful death of a minor child, by the father or mother of such child, in which recovery might be had not only for loss of services, but for the mental pain and suffering of the parent.

32. Irving *v.* Media, 10 Pa. Super. Ct. 132, 7 Del. Co. 378, 44 Wkly. Notes Cas. 131, action for damages resulting from diversion of waters.

33. Bertrand *v.* Byrd, 4 Ark. 187.

34. Safford *v.* Miller, 59 Ill. 205 (in an action by two obligees on a bond for the performance of covenants, where the legal interest of the obligees is joint, there can be no joinder of a count for particular damages resulting to one of plaintiffs individually); Moore *v.* Platte County, 8 Mo. 467.

35. Wheeler *v.* Thom, 2 N. H. 397.

36. Stafford *v.* Gold, 9 Pick. (Mass.) 533; Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376; Davis *v.* Church, 1 Watts & S. (Pa.) 240; Richards *v.* Heather, 1 B. & Ald. 29.

37. Stafford *v.* Gold, 9 Pick. (Mass.) 533; Adams *v.* Hackett, 27 N. H. 289, 59 Am. Dec. 376.

38. Lynch *v.* Thompson, 61 Miss. 354; Miller *v.* Mississippi Northern Bank, 34 Miss. 412; U. S. *v.* McCoy, 54 Fed. 107, trespass.

39. Golding *v.* Vaughan, 2 Chit. 436, 18 E. C. L. 724.

40. Terry *v.* Platt, 1 Pennew. (Del.) 185, 40 Atl. 243.

41. Harvey *v.* Edington, 25 Miss. 22.

42. Hemming *v.* Elliott, 66 Md. 197, 7 Atl. 110; Lewis *v.* Babcock, 18 Johns. (N. Y.) 443, holding, however, that a count by husband and wife for injury to the wife, which was bad as containing also a cause of action for which the husband alone could recover, as for loss of services, etc., was good after verdict, although bad on demurrer. See also Staley *v.* Barhite, 2 Cai. (N. Y.) 221.

In New Jersey, where a statute provides that in any action by a husband and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right arising *ex delicto*, a cause of action by the wife for personal injuries may be joined with one by the husband for injuries to himself and property, resulting from the same act which injured her. Ackerman *v.* North Jersey St. R. Co., 65 N. J. L. 369, 47 Atl. 585.

Under the English Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76, § 40), a count for breaking and entering the premises of the husband may be joined with a count by the husband and wife for assaulting and imprisoning the wife. Morris *v.* Moore, 19 C. B. N. S. 359, 115 E. C. L. 359.

43. Lee *v.* Chambers, 1 Strobh. (S. C.) 112.

promise by the husband and wife cannot be joined with a count on a promise by the wife before marriage;[44] nor can a cause of action against the husband alone.[45] A count for money received to the joint use of husband and wife cannot be joined with a count for money received to the use of the wife while sole,[46] nor can either of these counts be joined to one for money received to the use of the wife while sole, as guardian of her minor children.[47] A joint action will not lie for slander spoken by the husband and wife severally.[48]

(VIII) *AGAINST SEVERAL DEFENDANTS.* In order that causes of action against several defendants be joined, they must each affect all defendants;[49] so distinct causes of action against different defendants cannot be joined, although in favor of the same plaintiff.[50] For example a joint action will not lie against two for their several debts upon separate obligations,[51] or for breach of distinct covenants.[52] Nor can a joint action be maintained against a principal debtor and a guarantor,[53]

44. Edwards *v.* Davis, 16 Johns. (N. Y.) 281; Morris *v.* Norfolk, 1 Taunt. 212.

45. May *v.* Smith, 48 Ala. 483.

46. Lee *v.* Chambers, 1 Strobh. (S. C.) 112.

47. Lee *v.* Chambers, 1 Strobh. (S. C.) 112.

48. Penters *v.* England, 1 McCord (S. C.) 14 (holding that separate actions must be brought, one against the husband for slander spoken by him, and one against the husband and wife for the slander spoken by the wife); Swithin *v.* Vincent, 2 Wils. C. P. 227, 1 Dyer 19*a*.

49. Sleeper *v.* World's Fair Banquet-Hall Co., 166 Ill. 57, 46 N. E. 782; McKee *v.* Kent, 24 Miss. 131; Phenix Iron Foundry *v.* Lockwood, 21 R. I. 556, 45 Atl. 546 (holding that a statute providing that when a plaintiff is in doubt as to the person from whom he is entitled to recover he may join two or more defendants with a view to ascertain which is liable, and that a non-joinder or misjoinder shall not defeat an action, does not authorize the joinder in one declaration of a cause of action against one of two defendants for goods sold, and in the second count thereof a cause of action against the other defendant, on the ground that he had assumed the payment of the debt sued for in the first count); *In re* Cutsworth, Styles 153; Drummond *v.* Dorant, 4 T. R. 360. *Compare* Eskbridge *v.* Ditmars, 51 Ala. 245; Hawkins *v.* Ramsbottom, 6 Taunt. 179, 1 E. C. L. 565, holding that subject only to plea in abatement counts upon a promise by defendant and another since become a bankrupt might be joined in an action against the solvent parties alone, with counts on promises made by defendants solely since the other became a bankrupt.

An action for money had and received against several defendants cannot be maintained unless the money was jointly received by all. Simmons *v.* Spencer, 9 Fed. 581, 3 McCrary 48, holding that where certain deeds were left with a bank, to be delivered on the payment of a specified sum of money which it was instructed to place to plaintiff's credit, and the money paid in was turned over to a third party without credit being given therefor, a joint action could not be maintained against the bank and the third party.

50. *Illinois.*— Sleeper *v.* World's Fair Banquet-Hall Co., 166 Ill. 57, 46 N. E. 782.

Missouri.— Moore *v.* Platte County, 8 Mo. 467, joinder of individual and joint contracts.

New Jersey.— Gilmore *v.* Christ Hospital, 68 N. J. L. 47, 52 Atl. 241; State *v.* Shinn, 42 N. J. L. 138.

North Carolina.— Burns *v.* Williams, 88 N. C. 159.

Rhode Island.— Cole *v.* Lippitt, 25 R. I. 104, 54 Atl. 936.

See 1 Cent. Dig. tit. "Action," § 367 *et seq.*

Where each of defendants took distinct chattels on several claims of title, and has constantly had a separate possession without any control assumed by one over the property held by the other, actions against them in detinue cannot be joined. Slade *v.* Washburn, 24 N. C. 414.

Under a statute making all joint contracts joint and several, the common obligors on several bonds may be sued on each of such bonds, although there are other obligors who have not signed all of the bonds. McMinn Academy *v.* Reneau, 2 Swan (Tenn.) 94.

51. Jackson *v.* Bush, 82 Ala. 396, 1 So. 175; Converse *v.* Ferre, 11 Mass. 325, action against several tenants in common by another tenant in common, to recover a sum paid for repairs on the premises in excess of the share owned by plaintiff, in which the undertaking sued on was a several undertaking by the tenants, each for his own deficiency after the repairs should be completed.

The sureties upon different bonds cannot be sued in one action where there is no joint liability between them. People *v.* Sheehan, 118 Mich. 539, 77 N. W. 88, so holding with regard to sureties on separate bonds for materials for which the seller kept a general account.

52. Childress *v.* McCullough, 5 Port. (Ala.) 54, 30 Am. Dec. 549 (holding that an action cannot be brought against two defendants who were each liable to plaintiff on their several covenants, but by different instruments and not to the same extent); Harris *v.* Campbell, 4 Dana (Ky.) 586 (where one defendant stipulated to deliver to an agent of plaintiff a certain sum in notes, within a certain time, and the other defendant by the same writing stipulated to make up the deficiency in case the first failed to comply).

53. Preston *v.* Davis, 8 Ark. 167. See

or against principals and sureties where they are liable in different amounts.[54] Upon the same principle independent tort-feasors, neither of whom has control over the acts of the others, cannot be sued jointly.[55] When, however, two or more parties are guilty of a joint tort, they may be sued jointly or severally;[56] but a count for a joint cause of action cannot be joined with counts for several causes of action.[57] By statute it is sometimes provided that persons severally liable upon contracts in writing may be joined as defendants in one action,[58] but contracts which are entirely distinct in their nature and terms cannot be joined under such a statute.[59]

(IX) *BY SEVERAL PLAINTIFFS.* Several plaintiffs cannot join separate causes of action against the same defendant.[60] If two persons have an entire joint damage, they may bring a joint action, although their interests are several.[61] Joint owners of personal property may sue jointly to recover damages for its wrongful seizure and detention by another.[62]

2. UNDER THE CODES — a. In General. In certain of the states causes of action

Childress *v.* McCullough, 5 Port. (Ala.) 54, 30 Am. Dec. 549. See also GUARANTY, 20 Cyc. 1484 note 85.

54. Cummings *v.* Little, 45 Me. 183, where two persons signed a note as sureties for a third, and the holder having collateral security from the principal, of less value than the amount of the note, surrendered it to him without the assent of the sureties, one of whom was liable upon another note, the payment of which was the consideration for the giving up of the security.

55. Bonte *v.* Postel, 109 Ky. 64, 58 S. W. 536, 22 Ky. L. Rep. 583, 51 L. R. A. 187; Ferguson *v.* Terry, 1 B. Mon. (Ky.) 96; Sadler *v.* Great Western R. Co., [1895] 2 Q. B. 688 [*affirmed* in [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51]. *Compare* Hawkins *v.* Phythian, 8 B. Mon. (Ky.) 515.

Actions against separate owners of sheep-killing dogs cannot be joined. Russell *v.* Tomlinson, 2 Conn. 206; Van Steenburgh *v.* Tobias, 17 Wend. (N. Y.) 562, 31 Am. Dec. 310; Adams *v.* Hall, 2 Vt. 9, 19 Am. Dec. 690.

A statute which authorizes several verdicts to be found, and several judgments to be rendered, against each of several joint trespassers in a joint action, does not authorize a joint action to be brought for several trespasses. Ferguson *v.* Terry, 1 B. Mon. (Ky.) 96.

56. Henry *v.* Carlton, 113 Ala. 636, 21 So. 225; Smith *v.* Gayle, 58 Ala. 600; Wienskawski *v.* Wisner, 114 Mich. 271, 72 N. W. 177; Laughlin *v.* Atlantic City R. Co., 80 Fed. 702. See also Chamberlin *v.* Shaw, 18 Pick. (Mass.) 278, 29 Am. Dec. 586; Nicoll *v.* Glennie, 1 M. & S. 588.

57. Chicago, etc., R. Co. *v.* Murphy, 198 Ill. 462, 64 N. E. 1011 [*affirming* 99 Ill. App. 126]; McMullin *v.* Church, 82 Va. 501 (holding that in an action against two defendants for maliciously suing out an attachment against plaintiff's property, counts against both defendants jointly cannot be joined in the same declaration with counts against each defendant severally); Sadler *v.* Great Western R. Co., [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51 [*affirming* [1895] 2 Q. B. 688].

58. See Colt *v.* Learned, 118 Mass. 380; Grocers' Bank *v.* Kingman, 16 Gray (Mass.) 473.

The contracts must be separately stated if not the same. Colt *v.* Learned, 118 Mass. 380 [*overruling* so far as in conflict Costigan *v.* Lunt, 104 Mass. 217].

59. Wallis *v.* Carpenter, 13 Allen (Mass.) 19, holding that a joint action against A and B, based on a contract under seal, made to plaintiff by A, to abide by an award, and on a guaranty not under seal, by B, that A should perform the award, was not authorized.

60. Giovanni *v.* First Nat. Bank, 51 Ala. 176 (holding that where firm property was levied on and each party claimed an exemption as to his interest, their joint interest was thereby severed and they could not maintain a joint action against the judgment creditor for selling the property); Ellison *v.* New Bedford Five Cent Sav. Bank, 130 Mass. 48 (holding that where a person made deposits on two separate counts, at a savings bank, in trust for two of his children, their claims against the bank after his death were several and could not be joined); Whiting *v.* Cook, 8 Allen (Mass.) 63.

Separate demands, although arising from an entire or individual contract to different persons or to the same person in different rights, cannot be joined in the same action, without the consent of the parties bound. Weil *v.* Townsend, 25 Pa. Super. Ct. 638.

Parties generally see PARTIES.

Proceedings in the court of claims.— Claimants who have no joint interest cannot present their claims in a single petition. Wilson *v.* U. S., 1 Ct. Cl. 318.

61. Coryton *v.* Lithebye, 2 Saund. 112.

62. Hamilton *v.* Williams, 43 S. W. 430, 19 Ky. L. Rep. 1339, holding that in an action for wrongful seizure and sale of property upon execution, the fact that one joint owner set up that his interest was exempt, while the others merely set up their joint interest, did not cause a misjoinder.

of whatever kind may be joined where each may be prosecuted by the same kind of proceedings,[63] is held by the same party against the same party, in the same right,[64] and has the same venue.[65] The greater number of the codes, however, attempt the division of causes of action into classes which will be considered separately.[66] Where the statutes have abolished the distinction between forms of action at law and in equity, but have made no express provision for the joinder of causes of action, the propriety of such joinder is held to rest largely in the discretion of the trial court, and is liberally permitted for the purpose of avoiding multiplicity of suits and circuity of action.[67] A civil cannot be joined with a

63. See Witt *v.* Day, 112 Iowa 110, 83 N. W. 797 (holding that a petition to set aside a settlement and a release obtained by a guardian might also seek an accounting and a judgment against the guardian's administrator and the sureties on the guardian's bond); Chambers *v.* Oehler, 104 Iowa 278, 73 N. W. 481 (where causes of action for false arrest and malicious prosecution and for a fraudulent conspiracy to cheat and defraud were joined); Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231 (holding that counts for the use of land, for trespass by such use, and for injury to the land by the obstruction of the highway in front of it might properly be joined in the same petition); Foster *v.* Hinson, 76 Iowa 714, 39 N. W. 682 (holding that a cause of action for rent of real estate, under an implied contract, could be joined with a claim for damages for the wrongful occupation of the same real estate for the same time); Buford *v.* Funk, 4 Greene (Iowa) 493 (holding that an action on a contract performed may be united with an action on an account).

In replevin there can be no joinder of causes of action not of the same kind, it being by statute so provided. Wedgewood *v.* Parr, 112 Iowa 514, 84 N. W. 528. See, generally, REPLEVIN.

Equitable causes may be joined. Reed *v.* Howe, 28 Iowa 250 (cause of action to compel an accounting by an administrator and to set aside a fraudulent settlement, and a cause of action to set aside an order of the county court for the sale of real estate of the estate and the fraudulent sale thereof); Byington *v.* Woods, 13 Iowa 17 (holding that where several parcels of land conveyed under a tax-sale by different deeds are the property of several joint owners, they may be joined in one action to foreclose the tax title). Legal and equitable causes see *infra*, I, B, 2, p.

64. See *infra*, I, B, 2, r.

65. See *infra*, I, B, 2, d.

66. See *infra*, I, B, 2, g, *et seq.*

67. Love *v.* Keowne, 58 Tex. 191; Clegg *v.* Varnell, 18 Tex. 294; Dobbin *v.* Bryan, 5 Tex. 276. See also Thomas *v.* Chapman, 62 Tex. 193 (holding that an assignee may bring a single action against a sheriff who has levied three attachments on different portions of the assigned property, for different parties claiming in distinct rights); Watkins *v.* Collins, (Tex. Civ. App. 1905) 87 S. W. 368.

Illustrations.— Cordray *v.* State, 55 Tex. 140 (suit on two official bonds, one payable to the state, and the other to the governor of the state or his successors in office); Bond *v.* Dillard, 50 Tex. 302 (suit by several wards on the bond of their guardian, alleging the conversion by the guardian of personalty belonging to plaintiffs jointly, and personalty belonging to one of plaintiffs individually); Waddell *v.* Williams, 37 Tex. 351 (establishment of debt against estate, and cancellation of fraudulent conveyance made by decedent); Francis *v.* Northcote, 6 Tex. 185 (establishment of devastavit in suit on administrator's bond); Smith *v.* Marston, 5 Tex. 426 (recovery of tax imposed on passengers arriving in a city, and penalty prescribed by the same ordinance upon a captain of a ship, who fails to report a list of his passengers); Carter *v.* Wallace, 2 Tex. 206 (a trespass on premises, and tearing down, removing and converting fences); Jackson *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. 724 (action against railroad for destruction of spring, and for negligent setting of fire); De Garcia *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. 275 (cause of action by widow to set aside a fraudulent judgment in an action for the negligent killing of her husband, and cause of action for such negligent killing); Milam *v.* Hill, 29 Tex. Civ. App. 573, 69 S. W. 447 (action by widow to establish rights in partnership assets as community estate, for a receiver, accounting, and other relief); Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437, 66 S. W. 341 (where a carrier was made a party to an action for the price against the seller of goods damaged in transit before receipt by the purchaser, a controversy being disclosed as to the ownership of the goods while in the hands of the carrier); Johnson *v.* Stratton, 6 Tex. Civ. App. 431, 25 S. W. 683; International, etc., R. Co. *v.* Donaldson, 2 Tex. App. Civ. Cas. § 238 (numerous items as to overcharges of freight, loss of goods shipped, and damages thereto); Houston, etc., R. Co. *v.* Stewart, 1 Tex. App. Civ. Cas. § 1246 (action against a railroad, charging conversion of certain property, damages to other property, overcharges of freight, and discrimination); Cox *v.* Lloyd, 1 Tex. App. Civ. Cas. § 123 (recovery of property wrongfully taken, expenses incurred in search therefor, and exemplary damages).

A cause arising after the institution of the suit, which is not inconsistent with those already stated, may be joined. Smith *v.* Mc-

criminal proceeding.[68] The rules applicable to the joinder of actions in a complaint apply in general to the joinder of causes of action in a counter-claim.[69]

b. Common-Law and Statutory Causes. While the general rule is that common-law and statutory causes of action of the same nature may be joined,[70] the weight of authority seems to be that, where a specific proceeding is prescribed by statute, it may not be joined with an action at common law.[71] A cause of action, under the common law, against one party for compensatory damages cannot be properly joined with an action against another party for punitive damages, the right for which is conferred by statute, although both causes arise out of the same transaction.[72]

c. Inconsistent Causes. Causes of action which are inconsistent with each other cannot as a general rule be joined,[73] although they may have arisen out of the same transaction or transactions connected with the same subject of action;[74]

Gaughey, 13 Tex. 464. Adding new cause by way of amendment see, generally, PLEADING.

Joinder of demands to confer jurisdiction is apparently permissible. Mays *v.* Lewis, 4 Tex. 38; Hamilton *v.* Wilkerson, 1 Tex. App. Civ. Cas. § 556.

Foreclosure of lien and conversion.— Cobb *v.* Barber, 92 Tex. 309, 47 S. W. 963; Cassidy *v.* Willis, 33 Tex. Civ. App. 289, 78 S. W. 40; Jackson *v.* Corley, 30 Tex. Civ. App. 417, 70 S. W. 570; Parlim, etc., Co. *v.* Miller, 25 Tex. Civ. App. 190, 60 S. W. 881.

68. Manville *v.* Felter, 19 Kan. 253, holding that a criminal prosecution and a civil action, prescribed by statute for a trespass, could not be united in one proceeding.

69. Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477. See, generally, RECOUPMENT, SET-OFF AND COUNTER-CLAIM.

70. Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 20 Ky. L. Rep. 87, 44 L. R. A. 474.

Single count.— A common-law cause of action for negligence cannot be joined in the same count with one for statutory negligence. Kendrick *v.* Chicago, etc., R. Co., 81 Mo. 521.

Joinder at common law see *supra*, I, B, 1, b, (III).

71. Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 20 Ky. L. Rep. 87, 44 L. R. A. 474.

For particular proceedings see DIVORCE, 14 Cyc. 662; EMINENT DOMAIN, 15 Cyc. 806, note 89; FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1158; MECHANICS' LIENS.

72. Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 20 Ky. L. Rep. 87, 44 L. R. A. 474.

73. Alexander *v.* Thacker, 30 Nebr. 614, 46 N. W. 825 (holding that a cause of action to foreclose a tax lien could not be joined with one to quiet title, since plaintiff could not foreclose a tax lien on land of which he held the entire fee); Cincinnati, etc., R. Co. *v.* Urbane Third Nat. Bank, 1 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 109; Lee *v.* Fraternal Ins. Co., 1 Handy (Ohio) 217, 12 Ohio Dec. (Reprint) 109.

74. *California.*— Polack *v.* Shafer, 46 Cal. 270, cause of action under the Forcible Entry and Detainer Act and for holding over as a tenant, contrary to a lease.

Georgia.— Golucke *v.* Lowndes County, 123 Ga. 412, 51 S. E. 406, holding that a person cannot in one suit, growing out of a single transaction, sue for breach of a written contract of employment, and also for the value of services regardless of the contract.

Indiana.— Keller *v.* Boatman, 49 Ind. 104, a claim for the delivery of personal property and a claim for moneys paid.

Michigan.— Perkins *v.* Hershey, 77 Mich. 504, 43 N. W. 1021, cause of action in favor of the principal against his agent to pay money and property received by him to his principal, and sufficient to satisfy an obligation, cannot be joined with one based upon the promise of the agent that if the principal would enforce his security the agent would pay any deficiency which might result.

Minnesota.— Vaule *v.* Steenerson, 63 Minn. 110, 65 N. W. 257, holding that a cause of action for a failure of defendant's sheriff to levy an execution could not be joined with a cause of action for a wrongful levy and a conversion.

Missouri.— Boyd *v.* St. Louis Transit Co., 108 Mo. App. 303, 83 S. W. 287, allegations of wilfulness and negligence with regard to a single act are inconsistent.

New York.— Olin *v.* Arendt, 35 N. Y. App. Div. 529, 54 N. Y. Suppl. 820 (causes of action for foreclosure and upon a guaranty of payment of debt secured by a mortgage cannot be joined with a cause to recover from the grantee of the mortgaged premises for a breach of the mortgagor's contract to erect buildings thereon); McClure *v.* Wilson, 13 N. Y. App. Div. 274, 43 N. Y. Suppl. 209 (a cause of action based upon the theory that a contract is valid as between the parties and has been adopted by a corporation, and because of that, money due thereunder belongs to the corporation and should have been paid over to it, cannot be joined with a cause of action upon the theory that the contract is invalid and illegal and that no rights were acquired under it, and which repudiates the contract and seeks to recover for what was done by virtue of it); Scherer *v.* Tyrrell, 40 Hun 637, 23 N. Y. Wkly. Dig. 476 (where one count charged that a husband acted as the agent of his wife, in the purchase of goods, and another charged that the husband paid out money for such goods,

inconsistency, within the meaning of this rule, being such repugnancy that proof of one of the grounds alleged for a recovery necessarily disproves another ground for recovery contained in the same pleading.[75] In a case, however, where particular facts within defendant's knowledge and of which plaintiff is ignorant may, in case their existence or non-existence is established, give rise to different causes of action, plaintiff may set up such causes of action alternatively in separate counts without rendering his pleading bad,[76] although a party cannot set up one

which he obtained from the sale of goods fraudulently procured); Budd *v.* Bingham, 18 Barb. 494 (trespass and ejectment and trespass *quare clausum*); Linden *v.* Hepburn, 3 Sandf. 668, 5 How. Pr. 188 (forfeiture of the term of a lease and an injunction to restrain the lessee from an improper use of the demised premises); Lomb *v.* Richard, 45 Misc. 129, 91 N. Y. Suppl. 881 (cause of action for breach of contract and for its rescission because of fraud); Dodge *v.* Glendenning, 10 N. Y. St. 8 (cause of action for money had and received as proceeds of certain stocks cannot be joined with a cause of action for unlawful conversion thereof); Hoffman *v.* Hoffman, 35 How. Pr. 384 (claims for limited and absolute divorce); Dewey *v.* Ward, 12 How. Pr. 419 (partition and creditors' bill); Lamport *v.* Abbott, 12 How. Pr. 340 (demand for a penalty under a statute, and for an injunction against the offense); Sweet *v.* Ingerson, 12 How. Pr. 331; Waller *v.* Raskan, 12 How. Pr. 28 (deceit in falsely representing a third person as worthy of credit, and an action on a guaranty of the amount of such person's credit); Smith *v.* Hallock, 8 How. Pr. 73 (action for the recovery of real property on the ground of absolute ownership and for damages to a qualified right of enjoyment); Gothard *v.* Lavalle, 4 N. Y. Month. L. Bul. 30 (holding that a cause of action against one to enforce a mechanic's lien cannot be joined with one on contract against his agent, which seeks to hold him as principal).

Ohio.— Owen *v.* Hickman, 2 Disn. 471, forfeiture of a lease for non-payment of rent and recovery of rent due. Countee *v.* Armstrong, 9 Obio Dec. (Reprint) 62, 10 Cinc. L. Bul. 339.

Wisconsin.— McLennan *v.* Prentice, 85 Wis. 427, 55 N. W. 764, holding that an action to rescind a sale of land on the ground of fraud cannot be joined with an action on the covenants of seizin and right to convey contained in the deed.

75. Seiter *v.* Bischoff, 63 Mo. App. 157; Roberts *v.* Quincy, etc., R. Co., 43 Mo. App. 287. See also Brinkman *v.* Hunter, 73 Mo. 172, 39 Am. Rep. 492; Bowen *v.* Mandeville, 29 Hun (N. Y.) 42, holding that where defendant had sold plaintiff a bond and mortgage payable in instalments and guaranteed payment causes of action upon the guaranty, and also for fraud, were not inconsistent. But *compare* Conde *v.* Rogers, 74 N. Y. App. Div. 147, 77 N. Y. Suppl. 518, holding that an action to foreclose a lien on property pledged to plaintiff as security for money loaned by him could not be joined with an action to recover on a claim assigned to plaintiff for services rendered by a third person.

Illustrations of consistent claims.— Common-law and statutory actions based upon the same state of facts, to recover damages sustained through being induced to become a stock-holder in a corporation, by false statements in a report made by defendant, are not inconsistent (Hutchinson *v.* Young, 93 N. Y. App. Div. 407, 87 N. Y. Suppl. 678); nor are causes of action against a sheriff for failure to levy an attachment, and for failure to levy execution after judgment, in the same action (Chittenden *v.* Crosby, 5 Kan. App. 534, 48 Pac. 209); nor are trespass *quare clausum* and *de bonis asportatis* (Carter *v.* Wallace, 2 Tex. 206).

Counts for money had and received and on a note given in settlement of the same claim are consistent. Schultz *v.* Kosbab, 125 Wis. 157, 103 N. W. 237.

Malicious prosecution and false imprisonment are not inconsistent. Marks *v.* Townsend, 97 N. Y. 590; Haight *v.* Webster, 18 N. Y. Wkly. Dig. 108; Castro *v.* De Uriarte, 12 Fed. 250. *Contra*, Nebenzahl *v.* Townsend, 61 How. Pr. (N. Y.) 353.

Breach of warranty and false representations do not give rise to inconsistent causes of action, where affecting the same sale. Spangler *v.* Kite, 47 Mo. App. 230. *Contra*, Springsteed *v.* Lawson, 14 Abb. Pr. (N. Y.) 328; Sweet *v.* Ingerson, 12 How. Pr. (N. Y.) 331. But *compare* Bowen *v.* Mandeville, 29 Hun (N. Y.) 42 [*affirmed* in 95 N. Y. 237]; Robinson *v.* Flint, 16 How. Pr. (N. Y.) 240.

Actions for absolute divorce and for a separation are inconsistent. Zorn *v.* Zorn, 38 Hun (N. Y.) 67.

76. *California.*— Rucker *v.* Hall, 105 Cal. 425, 38 Pac. 962, holding that, in an action to recover commissions under a contract for payment at a certain rate if certain facts were true, and at another rate if other facts were true, and all the facts being peculiarly within the knowledge of defendant, plaintiff might state his cause of action in different counts, accordingly.

Iowa.— Jack *v.* Des Moines, etc., R. Co., 49 Iowa 627; Pearson *v.* Milwaukee, etc., R. Co., 45 Iowa 497; Camp *v.* Wilson, 16 Iowa 225, cause of action on a note and cause of action on the consideration of the note.

Nebraska.— Williams *v.* Lowe, 4 Nebr. 382, holding that a count alleging that certain shares of stock owned by plaintiff were purchased at a judicial sale by defendant, under a parol agreement that the latter should hold the shares in trust and reconvey the same on the payment of a debt due from plaintiff, might be joined with a count alleg-

cause of action and ask that in case it proves unfounded another cause of action be tried.[77] Another apparent exception to the rule requiring consistency has been made in certain cases arising from contract express or implied.[78] A prayer for alternative relief does not in itself render the complaint inconsistent.[79]

d. Causes Having Separate Places of Trial. Causes of action requiring different places of trial cannot be joined.[80]

e. Causes Subject to Different Limitations. It is no objection to a joinder of causes of action that they are subject to different rules of limitation.[81]

f. Causes Belonging to Separate Classes. Where the causes of action which may be joined are classified by the codes, a union of causes of action falling in separate classes is as a general rule prohibited,[82] with the exception of those cases

ing a want of jurisdiction in the court making the judicial sale, but that defendant under color of such aale procured the transfer of the shares on the books of the company and received dividenda thereon in trust for plaintiff.

New York.— Blank *v.* Hartshorn, 37 Hun 101; Longprey *v.* Yates, 31 Hun 432 (holding that in one count an agreed price for certain work might be alleged, and in another count a recovery might be sought, as on a *quantum meruit*); Schuyler *v.* Peck, 8 N. Y. Suppl. 849.

Ohio.— Cincinnati, etc., R. Co. *v.* Urbana Third Nat. Bank, 1 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 109; First Nat. Bank *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 702, 16 Cinc. L. Bul. 399; Citizens' Nat. Bank *v.* Cincinnati, etc., R. Co., 8 Ohio Dec. (Reprint) 788, 9 Cinc. L. Bul. 355.

Wisconsin.— Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

Statements of same cause of action in various ways, in different counts, see PLEADING.

77. Robinson *v.* Rice, 20 Mo. 229; Sandford *v.* New York Fourth Nat. Bank, 60 Hun (N. Y.) 484, 15 N. Y. Suppl. 181; Maxwell *v.* Farnam, 7 How. Pr. (N. Y.) 236 (a claim for the conversion of personalty cannot be joined with one which seeks to recover the property itself); Morel *v.* Westmoreland, [1903] 1 K. B. 64, 72 L. J. K. B. 66, 87 L. T. Rep. N. S. 635, 51 Wkly. Rep. 290; Atty.-Gen. *v.* Durham, 46 L. T. Rep. N. S. 16. But *compare* St. Louis Southwestern R. Co. *v.* Hengst, 36 Tex. Civ. App. 217, 81 S. W. 832, where after the death of a plaintiff pending an action against defendant for personal injuries caused by its negligence, his children filed an amended petition claiming damages for his death, or, in the alternative, in the event his death was not the result of the injuries, for a recovery on the action as originally brought, and it was held that, although the causes of action were in a sense distinct, the children were entitled to join them in one suit.

78. Cowan *v.* Abbott, 92 Cal. 100, 28 Pac. 213; Remy *v.* Olds, 88 Cal. 537, 26 Pac. 355, both holding that a cause of action arising out of an express contract for services may be joined with a cause for services rendered on a *quantum meruit*.

79. Young *v.* Edwards, 11 How. Pr. (N. Y.) 201; Harris *v.* Warlick, (Tex. Civ. App. 1897) 42 S. W. 356; Hunt *v.* Worsfold, [1896] 2 Ch. 224, 65 L. J. Ch. 548, 74 L. T. Rep. N. S. 456, 44 Wkly. Rep. 461; Bagot *v.* Easton, 7 Ch. D. 1, 47 L. J. Ch. 225, 37 L. T. Rep. N. S. 369, 26 Wkly. Rep. 66. See, generally, PLEADING.

80. McDonald *v.* Alford, 32 Tex. 35 (holding that an administrator *de bonis non* cannot unite an action against his predecessor to set aside an order of the county court, with an action of trespass to try title against another party for land situated in a county different from the one in which the suit is brought); Hackett *v.* Carter, 38 Wis. 394 (holding that a cause of action relating to land in the county where the suit was brought could not be joined with a cause of action relating to land in another county).

81. Porter *v.* International Bridge Co., 45 N. Y. App. Div. 416, 60 N. Y. Suppl. 819 [*affirmed* in 163 N. Y. 79, 57 N. E. 174].

82. Cosgrove *v.* Fisk, 90 Cal. 75, 27 Pac. 56 (claims for breach of covenant of warranty of lands for costs expended in another suit between parties, and for fraud, malice, and operation); Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449 (recovery of real property and cause of action against defendant as trustee); Bowles *v.* Sacramento Turnpike, etc., Co., 5 Cal. 224 (claim for possession of real property with damages for its detention, and claim for consequential damages arising from a change of a road by which plaintiff's business was injured); Galusha *v.* Galusha, 138 N. Y. 272, 33 N. E. 1062 (absolute divorce and action to set aside a deed of separation); Thomas *v.* Utica, etc., R. Co., 97 N. Y. 245 (flooding of land and railroad's neglect to maintain a farm crossing as required by statute); Hall *v.* Louis Weber Bldg. Co., 36 Misc. (N. Y.) 551, 73 N. Y. Suppl. 997 (damages to personal property and trespass on realty); People *v.* Wells, 52 N. Y. App. Div. 583, 65 N. Y. Suppl. 319 (action for penalty for cutting trees on a forest reserve and action in favor of the owner of land against one cutting timber thereon without his consent); Helck *v.* Reinheimer, 40 Hun (N. Y.) 637, 23 N. Y. Wkly. Dig. 473 (cause of action to set aside a trust deed under which the mortgagor claims in foreclosure); Teall *v.* Syracuse, 32 Hun (N. Y.) 332 (action for wrongful conversion cannot be joined with

in which they arise from the same transaction within the meaning of a provision common to many of the codes.[83]

g. Contracts Express or Implied. By express provisions of the codes, the joinder of causes of action arising out of contract, express or implied, is usually permissible,[84] subject to the general rule that the causes of action affect all the parties to the action.[85] It has been held that the intent of these provisions is

an action for the proceeds of the same property); Townsend *v.* Coon, 7 N. Y. Civ. Proc. 56; Landau *v.* Levy, 1 Abb. Pr. (N. Y.) 376; Dewey *v.* Ward, 12 How. Pr. (N. Y.) 419; Alger *v.* Scoville, 6 How. Pr. (N. Y.) 131 (causes of action against a trustee, and causes of action upon contract); Durkee *v.* Saratoga, etc., R. Co., 4 How. Pr. (N. Y.) 227; Hodges *v.* Wilmington, etc., R. Co., 105 N. C. 170, 10 S. E. 917 (contract and tort); Sutton *v.* McMillan, 72 N. C. 102; North Carolina Land Co. *v.* Beatty, 69 N. C. 329.

Causes of action for conversion and for an accounting cannot be joined. Thompson *v.* St. Nicholas Nat. Bank, 61 How. Pr. (N. Y.) 163; McDonald *v.* Kountze, 58 How. Pr. (N. Y.) 152.

Causes of action for injury to person and property cannot be joined. Lamb *v.* Harbaugh, 105 Cal. 680, 39 Pac. 56; Thelin *v.* Stewart, 100 Cal. 372, 34 Pac. 861; McCarty *v.* Fremont, 23 Cal. 196; Taylor *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 299. Whether two causes of action arise from same wrongful act see *supra*, I, A, 2.

Slander and false imprisonment.— Tandy *v.* Riley, 80 S. W. 776, 26 Ky. L. Rep. 98, 82 S. W. 1000, 26 Ky. L. Rep. 993; Dragoo *v.* Levi, 2 Duv. (Ky.) 520.

Slander or libel and malicious prosecution.—De Wolfe *v.* Abraham, 151 N. Y. 186, 45 N. E. 455 [*reversing* 6 N. Y. App. Div. 172, 39 N. Y. Suppl. 1029]; Green *v.* Davies, 100 N. Y. App. Div. 359, 91 N. Y. Suppl. 470, 34 N. Y. Civ. Proc. 1; Perrotean *v.* Johnson, 4 Month. L. Bul. (N. Y.) 25.

83. Eagan *v.* New York Transp. Co., 39 Misc. (N. Y.) 111, 78 N. Y. Suppl. 209, 11 N. Y. Annot. Cas. 394 (injury to person and property); Polley *v.* Wilkisson, 5 N. Y. Civ. Proc. 135 (trespass on land and conversion of personalty). See also cases cited *infra*, I, B, 2, n. *Compare* Sullivan *v.* New York, etc., R. Co., 11 Fed. 848, 19 Blatchf. 388, 1 N. Y. Civ. Proc. 285 (holding that a cause of action for a penalty cannot be joined with one for personal injury, although arising from the same transaction). *Contra*, Raynor *v.* Brennan, 40 Hun (N. Y.) 60.

84. See the codes of the several states. And see the following cases:

Georgia.— Aycock *v.* Austin, 87 Ga. 566, 13 S. E. 582, causes of action on two forthcoming bonds, the makers and obligee being the same in each.

Kansas.— Stevens *v.* Able, 15 Kan. 584, plaintiff may join as many causes of action as he may have, whether legal or equitable, or both.

New York.— Parmenter *v.* Baker, 5 Silv. Sup. 167, 8 N. Y. Suppl. 69, 24 Abb. N. Cas. 104 (cause of action against an insane debtor for money loaned, and cause of action against the committee of such debtor, who was alleged to be in possession of moneys on which the debt was an equitable lien); Kent *v.* Crouse, 5 N. Y. St. 141 (cause of action for services rendered by plaintiff, for services rendered by a third person for defendant and assigned to plaintiff, and cause of action for damages for revocation of a submission to arbitration of the first mentioned cause); Palen *v.* Bushnell, 18 Abb. Pr. 301 (claim by receiver of judgment debtor to enforce a claim for usurious premiums, and other claims arising out of contracts under which property was held in fraud of creditors).

Oregon.— The Victorian No. Two, 26 Oreg. 194, 41 Pac. 1103, 46 Am. St. Rep. 616, lien for material furnished on running account, lien for material furnished on special contract, and lien as assignee.

Washington.— Dudley *v.* Duval, 29 Wash. 528, 70 Pac. 68, services rendered on express contract, and contract of guaranty.

Wisconsin.— Badger Tel. Co. *v.* Wolfe River Tel. Co., 120 Wis. 169, 97 N. W. 907.

See 1 Cent. Dig. tit. "Action," § 430 *et seq.*

Causes of action upon a note and upon account may be joined. Thorpe *v.* Dickey, 51 Iowa 676, 2 N. W. 581; Howard *v.* Shirley, 75 Mo. App. 150; Sullivan *v.* Sullivan Mfg. Co., 14 S. C. 494.

Breach of covenants in separate deeds.— Nichol *v.* Alexander, 28 Wis. 118.

Breach of contract and conversion.— A claim for damages for breach of a contract may be joined with a claim for damages for conversion by defendant, of property used by plaintiff in performing his part of the contract. McCorkle *v.* Mallory, 30 Wash. 632, 71 Pac. 186.

Implied promises to repay money.—A cause of action to recover back money paid, on the ground that defendant refused to perform and repudiated the contract under which the money was paid, may be joined with another to recover the money paid, upon the ground that it had been obtained by defendant by fraud. Freer *v.* Denton, 61 N. Y. 492.

Under the Indiana code causes of action arising out of a contract or duty may be united, provided that they affect all the parties to the action. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; State *v.* Peckham, 136 Ind. 198, 36 N. E. 28, both holding that in an action on the guardian's bond, the ward might also seek to set aside an approval of the guardian's account.

85. See *infra*, I, B, 2, r.

restricted to contracts to which the person sued was a party,[86] but a claim upon a contract made with defendant may be joined with claims upon contracts made between defendant and others and assigned to plaintiff.[87] An action on a contract retains its nature as such, although the enforcement of a lien is sought as an ancillary remedy.[88] A cause of action upon an express contract may be joined with one upon an implied contract.[89] Actions for the recovery of statutory penalties are usually regarded as upon contract, and several causes of action therefor against the same defendant may be joined.[90] So likewise actions upon judgments are regarded as upon contract and may be joined,[91] or an action upon a judgment may be joined with one upon an express contract.[92] An action based upon a duty imposed by statute is regarded as upon contract,[93] as is an action for damages for breach of a contract,[94] so as both arising out of contract, it has been held that a count for breach of warranty may be joined with one for false representations by the vendor.[95] Actions for the foreclosure of mortgages upon realty cannot be joined as actions upon contract.[96] Where, by statute, under certain circum-

86. Dyre *v.* Barstow, 50 Cal. 652, holding that causes of action for enforcing liens for two street assessments, made on the same lot at different times, and on different contracts for improving the same street, could not be joined.

87. Fraser *v.* Oakdale Lumber, etc., Co., 73 Cal. 187, 14 Pac. 829. A complaint may contain counts for labor performed for defendant by several persons, the claims for which have been assigned to plaintiff, and also a count for money paid by others for defendant at his request and on his promise to repay, which has also been assigned to plaintiff. Gunderson *v.* Thomas, 87 Wis. 406, 58 N. W. 750.

88. Reindl *v.* Heath, 109 Wis. 570, 85 N. W. 495.

89. Olmstead *v.* Dauphiny, 104 Cal. 635, 38 Pac. 505 (sustaining a joinder of a count for rent under a lease, with one for money paid by mistake); Remy *v.* Olds, 88 Cal. 537, 26 Pac. 355; Keller *v.* Hicks, 22 Cal. 457, 83 Am. Dec. 78 (count charging implied liability to repay purchase-money due on a sale of a county warrant, count charging defendants as indorsers of negotiable paper, and count for money had and received); Hawk *v.* Thorn, 54 Barb. (N. Y.) 164; Kent *v.* Crouse, 5 N. Y. St. 141.

Express contract and quantum meruit.—Cowan *v.* Abbott, 92 Cal. 100, 28 Pac. 213; Remy *v.* Olds, 88 Cal. 537, 26 Pac. 355; Ware *v.* Reese, 59 Ga. 588; Childs *v.* Crithfield, 66 Mo. App. 422; Badger Tel. Co. *v.* Wolfe River Tel. Co., 120 Wis. 169, 97 N. W. 907; Waterman *v.* Waterman, 81 Wis. 17, 50 N. W. 668.

90. Carter *v.* Wilmington, etc., R. Co., 126 N. C. 437, 36 S. E. 14; Burrell *v.* Hughes, 116 N. C. 430, 21 S. E. 971; Maggett *v.* Roberts, 108 N. C. 174, 12 S. E. 890 (for failure to record, and for wrongful issuance of marriage licenses); Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688 (failure of carrier to forward freight); Cincinnati, etc., R. Co. *v.* Cook, 37 Ohio St. 265; State *v.* Allen, 6 Ohio S. & C. Pl. Dec. 43, 3 Ohio N. P. 201. *Compare* Pearkes *v.* Freer, 9 Cal. 642, where it was held that an action against an officer to recover damages accruing from his default might be joined with a cause of action upon a statute imposing a penalty therefor. *Contra*, Brown *v.* Rice, 51 Cal. 489 (demand of excessive toll by toll-gate keeper); Louisville, etc., R. Co. *v.* Com., 102 Ky. 300, 43 S. W. 458, 19 Ky. L. Rep. 1462, 53 L. R. A. 149 (so holding upon the ground that no provision therefor was made in the code).

91. Bank of North America *v.* Suydam, Code Rep. N. S. (N. Y.) 325; Moore *v.* Newell, 94 N. C. 265.

Judgment debtors must be the same and all made defendants.—Barnes *v.* Smith, 1 Rob. (N. Y.) 699.

Judgments against the same firm may be joined, although the firm has been sued under different names in the actions in which the judgments were obtained. Ruth *v.* Lowry, 10 Nebr. 260, 4 N. W. 977.

92. Childs *v.* Harris Mfg. Co., 68 Wis. 231, 32 N. W. 43.

93. Ballou *v.* Willey, 180 Mass. 562, 62 N. E. 1064 (holding that an action against a stock-broker upon account might be joined with one based upon a statute authorizing the recovery of money deposited with the broker for the purchase of stocks upon margin contracts); Thomas *v.* Utica, etc., R. Co., 97 N. Y. 245 (holding that a cause of action against a railroad for failure to maintain a farm crossing could not be joined with one for injury to realty).

94. Waggy *v.* Scott, 29 Oreg. 386, 45 Pac. 774, holding that such a cause of action may be joined with one for goods sold and delivered. See also Kimball, etc., Mfg. Co. *v.* Vroman, 35 Mich. 310, 24 Am. Rep. 558, holding that where a contract of sale conferred the right to return the property in case it did not prove fit for the purpose for which it was sold, a count for breach of warranty might be joined with one averring a return of the property and declaring for money had and received.

95. Patterson *v.* Kirkland, 34 Miss. 423.

96. Selkirk *v.* Wood, 9 N. Y. Civ. Proc. 141; Tobin *v.* Smith, 1 Ohio S. & C. Pl. Dec. 675, 1 Ohio N. P. 75.

stances a suit may be prosecuted upon a demand not due, such a demand cannot be joined with causes of action upon demands which are due.[97]

h. Injuries to Person. As injuries to the person, false imprisonment and malicious prosecution may be joined.[98]

i. Injuries to Character. As injuries to character, actions for slander,[99] or libel [1] may be joined with actions for malicious prosecution. Actions for libel and for slander may be likewise joined,[2] as may several causes of action for slander.[3] But in case the causes of action fall within different divisions of the statutory classification of actions which may be joined,[4] or are regarded as inconsistent,[5] the joinder is not permissible.

j. Injuries to Property. Under the code provisions that causes of action arising out of injuries with or without force to property may be joined,[6] distinct causes of action for injury to realty,[7] or personalty,[8] or realty and personalty,[9] may be stated. Other provisions authorize the joinder of actions for injury to realty.[10] As injuries to property, several causes of action for a penalty prescribed by statute in case of over-charges by carriers of passengers may be joined.[11] Fraudulent representations upon the faith of which one is induced to part with money or property give rise to a cause of action for injury to property.[12] As

97. Wurlitzer *v.* Suppe, 38 Kan. 31, 15 Pac. 863, holding a joinder of an action upon two promissory notes past due, and upon an account not due, to constitute a misjoinder.

98. Chrisman *v.* Carney, 33 Ark. 316; Marks *v.* Townsend, 97 N. Y. 590; Warren *v.* Dennett, 17 Misc. (N. Y.) 86, 39 N. Y. Suppl. 830; Thorpe *v.* Carvalho, 14 Misc. (N. Y.) 554, 36 N. Y. Suppl. 1; Haight *v.* Webster, 18 N. Y. Wkly. Dig. 108.

99. Martin *v.* Mattison, 8 Abb. Pr. (N. Y.) 3; Watson *v.* Hazzard, 3 Code Rep. (N. Y.) 218; Shore *v.* Smith, 15 Ohio St. 173.

Slander and false and malicious charge before grand jury.— Hull *v.* Vreeland, 18 Abb. Pr. (N. Y.) 182.

1. Watts *v.* Hilton, 3 Hun (N. Y.) 606.

2. Martin *v.* Mattison, 8 Abb. Pr. (N. Y.) 3; Noonan *v.* Orton, 32 Wis. 106.

3. Hellstern *v.* Katzer, 103 Wis. 391, 79 N. W. 429.

4. See *supra*, I, B, 2, f.

5. See *supra*, I, B, 2, c.

6. See the codes of the several states. And see Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202, holding that causes of action for all injuries to person or property, whether real or personal, direct or consequential, and whether the damages are given by statute or common law, single or double, may be joined.

7. Astill *v.* South Yuba Water Co., 146 Cal. 55, 79 Pac. 594 (nuisances); Crissey, etc., Lumber Co. *v.* Denver, etc., R. Co., 17 Colo. App. 275, 68 Pac. 670 (a property-owner suing a railroad company for injuries from fire escaping from its premises may allege both statutory and common-law liability); Aldrich *v.* Wetmore, 56 Minn. 20, 57 N. W. 221 (a cause of action for injuries resulting from noxious vapors from a cesspool or stagnant water in an excavation made by defendant on his premises may be united with one for damages from dirt or rubbish removed from such excavation, and deposited in the street in front of the adjoining premises); Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202. See also Chesapeake, etc., R. Co. *v.* Hyde, 56 S. W. 423, 21 Ky. L. Rep. 1756.

Definition.— An actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract, is an injury to property. Benedict *v.* Guardian Trust Co., 58 N. Y. App. Div. 302, 68 N. Y. Suppl. 1082, following code definition.

Consequential damages to person arising from an injury to property may be joined as an injury to property. Grogan *v.* Lindeman, Code Rep. N. S. (N. Y.) 287.

8. Sinclair *v.* Missouri, etc., R. Co., 70 Mo. App. 588; Cleveland *v.* Barrows, 59 Barb. (N. Y.) 364 (false representations inducing purchase and count for conversion); Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447 (causes of action to enjoin a sale for taxes and for damages caused by street improvements for which the tax was laid).

9. Rodgers *v.* Rodgers, 11 Barb. (N. Y.) 595 (cause of action for wrongfully cutting, removing, and converting wood, and cause of action for drawing off the wood which had been cut and converting it); Gilbert *v.* Loberg, 83 Wis. 189, 53 N. W. 500 (waste and deceit).

10. Whatling *v.* Nash, 41 Hun (N. Y.) 579, where it was held that a cause of action for a wrongful entry upon plaintiff's land under water about April or May, 1881, and wrongfully taking away fish therefrom, and a cause for a like entry in 1882, and catching and killing muskrats thereon, might be united in one complaint.

11. Cincinnati, etc., R. Co. *v.* Cook, 37 Ohio St. 265.

12. Wallace *v.* Jones, 182 N. Y. 37, 74 N. E. 576 [*reversing* 83 N. Y. App. Div. 152, 82 N. Y. Suppl. 449] (sustaining a complaint in an action against a board of supervisors to recover the amount of certain items alleged to have been illegally and collusively audited); Benedict *v.* Guardian Trust Co., 58 N. Y. App. Div. 302, 68 N. Y. Suppl. 1082; Cleveland *v.* Barrows, 59 Barb. (N. Y.) 364;

injuries relating to personal property, a cause of action alleging that a bond conditioned for the payment of a sum of money was obtained from plaintiff by false pretensions may be joined with a cause of action for conversion,[13] or a common-law action against a director by a stock-holder who has been induced to become such upon the faith of a false report signed by the director, with an action based upon a statute imposing liability upon the director under such circumstances.[14]

k. Recovery of Real Property With or Without Damages. With some variations in wording, the codes generally provide that claims to recover real property, with or without damages for the withholding thereof, may be joined,[15] the effect being to permit an action in the nature of ejectment to be united with one to recover rents and profits,[16] or damages for the withholding of possession,[17] or both.[18] Several distinct parcels of land, if covered by one title, together with

De Silver *v.* Holden, 50 N. Y. Super. Ct. 236 (a cause for false and fraudulent representation in inducing the execution of a bond and mortgage may be joined with a cause for the conversion of personalty); Gilbert *v.* Loberg, 83 Wis. 189, 53 N. W. 500. *Compare* Campion Card, etc., Co. *v.* Searing, 47 Hun (N. Y.) 237.

13. Silver *v.* Holden, 50 N. Y. Super. Ct. 236.

14. Hutchinson *v.* Young, 93 N. Y. App. Div. 407, 87 N. Y. Suppl. 678.

15. See the various codes. And see cases more specifically cited in the following notes.

Joinder of actions in ejectment generally see EJECTMENT, 15 Cyc. 59.

Under the English Judicature Act no cause of action may be joined in an action to recover land unless by leave of the court or a judge, except in certain cases. See Rules of Court (1875), order 17, rule 2; Read *v.* Wotton, [1893] 2 Ch. 171, 62 L. J. Ch. 481, 62 L. T. Rep. N. S. 209, 3 Reports 374, 41 Wkly. Rep. 556 (holding that a claim for an injunction against a continuing breach of contract might be joined); Clark *v.* Wray, 31 Ch. D. 68, 55 L. J. Ch. 119, 53 L. T. Rep. N. S. 485, 34 Wkly. Rep. 69; Gledhill *v.* Hunter, 14 Ch. D. 492, 49 L. J. Ch. 333, 42 L. T. Rep. N. S. 392, 28 Wkly. Rep. 530 (holding that an action to establish title only, but not seeking possession, is not for the recovery of land); *In re* Pilcher, 11 Ch. D. 905, 48 L. J. Ch. 587, 40 L. T. Rep. N. S. 832, 27 Wkly. Rep. 789; Tawell *v.* Slate Co., 3 Ch. D. 629 (holding a foreclosure action not for the recovery of land); Cook *v.* Enchmarch, 2 Ch. D. 111, 45 L. J. Ch. 504, 24 Wkly. Rep. 293 (holding that leave would be granted where it was sought to recover real and personal estate included in the same instrument); Whetstone *v.* Dewis, 1 Ch. D. 99, 45 L. J. Ch. 49, 33 L. T. Rep. N. S. 501, 24 Wkly. Rep. 93 (holding that a claim to establish title to land amounted to a claim for the recovery of land, and that a claim for personalty included in the same gift could be joined); Rushbrooke *v.* Farley, 54 L. J. Ch. 1079, 52 L. T. Rep. N. S. 572, 33 Wkly. Rep. 557 (holding that leave might be granted after issuance of the writ); Sutcliffe *v.* Wood, 53 L. J. Ch. 970, 50 L. T. Rep. N. S. 705 (holding that leave could not be granted to join a claim for foreclosure against another defendant); Kitching *v.* Kitching, 24 Wkly. Rep. 901 (where leave was given to join a prayer for administration); Allen *v.* Kennet, 24 Wkly. Rep. 845 (where leave was granted to join a claim for a receiver).

16. *Florida.*— Cavedo *v.* Billings, 16 Fla. 261.

Kansas.— Seibert *v.* Baxter, 36 Kan. 189, 12 Pac. 934; Black *v.* Drake, 28 Kan. 482.

Kentucky.— Burr *v.* Woodrow, 1 Bush 602; Walker *v.* Mitchell, 18 B. Mon. 541.

Minnesota.— Armstrong *v.* Hinds, 8 Minn. 254.

Nebraska.— Fletcher *v.* Brown, 35 Nebr. 660, 53 N. W. 577; Harrall *v.* Gray, 12 Nebr. 543, 11 N. W. 851.

New York.— People *v.* New York, 28 Barb. 240, 8 Abb. Pr. 7, 17 How. Pr. 56 [*reversed* on other grounds in 10 Abb. Pr. 111].

See 1 Cent. Dig. tit. "Action," § 405.

17. *Florida.*— Ashmead *v.* Wilson, 22 Fla. 255, holding that the action of ejectment was united with the common-law action of trespass for mesne profits.

Indiana.— Langsdale *v.* Woollen, 120 Ind. 16, 21 N. E. 659; Bottorff *v.* Wise, 53 Ind. 32.

New York.— Vandevoort *v.* Gould, 36 N. Y. 639.

Ohio.— McKinney *v.* McKinney, 8 Ohio St. 423.

Wisconsin.— Welsh *v.* Chicago, etc., R. Co., 34 Wis. 494.

United States.— Pengra *v.* Munz, 29 Fed. 830.

See 1 Cent. Dig. tit. "Action," § 405.

A prayer for damages in the alternative in an action to recover land does not create a misjoinder. Schneider *v.* Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541.

18. Sullivan *v.* Davis, 4 Cal. 291; Walker *v.* Mitchell, 18 B. Mon. (Ky.) 541; Merrill *v.* Dearing, 22 Minn. 376; McKinney *v.* McKinney, 8 Ohio St. 423. And *compare* Whipple *v.* Shewalter, 91 Ind. 114 (holding that, where defendant has failed to demur to a complaint, joining a claim for rent with a claim for possession and damages for unlawful detention, it is not error to instruct the jury as to the amount of the recovery under each of such claims); Spahr *v.* Nicklaus, 51 Ind. 221.

Legal and equitable cause of action see Wilcox *v.* Saunders, 4 Nebr. 569, where it was

rents and profits, or damages for withholding them, may be recovered in the same action,[19] or tax deeds on separate tracts set aside;[20] but the claim for recovery of possession and the claim for damages or rents and profits must not relate to different tracts.[21] Hence ejectment for the possession of a house cannot be joined with trespass on other property where they are distinct transactions.[22] An action for partition may be joined with one for the recovery of rents and profits of the same realty,[23] or to quiet title.[24] An action to recover possession cannot be joined with one for waste,[25] or to foreclose a mortgage,[26] or an action for the unlawful maintenance of a fence constituting a nuisance, with one for the recovery of real estate and to quiet title,[27] nor can a proceeding by an administrator to sell land to pay debts and an action by the heirs for partition be joined as claims to recover real property.[28]

l. Recovery of Chattels With or Without Damages. By the provision of many of the codes, claims for the recovery of specific personal property and damages for the taking or withholding of the same may be united in the same petition.[29]

m. Claims Against Trustee. By the codes it is usually provided that claims against a trustee, by virtue of a contract or by operation of law, may be united.[30] The claims must be against the trustee as such.[31] To arise by operation of law, the liability must arise simply from the position occupied by the trustee.[32]

n. Claims Arising From Same Transaction or Transactions — (i) *GENERAL RULE AND DEFINITIONS OF TERMS.* A provision common to the majority of the codes is that causes of action arising out of the same transaction, or transactions connected with the same subject of action, may be joined.[33] A definition of the

questioned whether in an action for the recovery of the legal title of land from one holding it in trust, a claim for use and occupation, or for damages caused by a tortious injury, could be included in the same petition.

19. Weeks *v.* McPhail, 128 N. C. 134, 38 S. E. 292; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88, construing the California statute.

20. Campbell *v.* Volga Equitable L. & T. Co., 14 S. D. 483, 85 N. W. 1015.

21. Furlong *v.* Cooney, 72 Cal. 322, 14 Pac. 12; Holmes *v.* Williams, 16 Minn. 164.

22. Hulce *v.* Thompson, 9 How. Pr. (N. Y.) 113, holding them not connected with the same subject of action.

23. Edde *v.* Pash-pah-o, 5 Kan. App. 115, 48 Pac. 884.

24. Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540.

25. Bottorff *v.* Wise, 53 Ind. 32.

26. Butler University *v.* Conard, 94 Ind. 353.

27. Giller *v.* West, 162 Ind. 17, 69 N. E. 548, under a statute permitting several causes of action to be joined in the same complaint, where they are for "claims to recover possession of real property, with or without damages, rents, and profits for the withholding thereof, and for waste or damage done to the land, to make partition of and to determine and quiet the title to real property."

28. Garrison *v.* Cox, 99 N. C. 478, 6 S. E. 124.

29. See the codes of the several states. See also Baals *v.* Stewart, 109 Ind. 371, 9 N. E. 403; Pharis *v.* Carver, 13 B. Mon. (Ky.) 236.

30. See the codes of the several states. And see Murphy *v.* Crowley, 140 Cal. 141, 73 Pac. 820, (1902) 70 Pac. 1024, holding that causes of action affecting different tracts of land may be joined.

A claim to enforce an express trust may be joined with a claim to enforce a trust arising by act and operation of law, such as a vendor's lien. Burt *v.* Wilson, 28 Cal. 632, 87 Am. Dec. 142.

31. Jasper *v.* Hazen, 2 N. D. 401, 51 N. W. 583, holding that a count could not be joined with other claims against the trustee, where no trust relation was shown.

32. French *v.* Salter, 17 Hun (N. Y.) 546, holding that the provision did not apply to liabilties created by operation of law and fact; hence a cause of action against the trustee of an insolvent savings bank to recover damages resulting from his wrongful investments could not be joined with an action on a bond given by him to assist in making up a deficiency in the assets of the bank. See also Pettit *v.* King, Seld. (N. Y.) 208, holding that a claim against a trustee could not be joined with one for wrongful conversion.

33. See the codes of the several states.

The meaning of the provision that plaintiff may unite several causes of action, whether legal or equitable, or both, where they all arise out of the same transaction or transactions connected with the same subject of action is, that plaintiff may unite: (1) As many legal causes of action as he pleases, arising out of the same transaction; (2) as many equitable causes of action as he pleases, arising out of the same transaction; (3) as many legal and equitable causes of action as

words employed in this provision is extremely difficult,[34] and while the courts have attempted definitions, the cases themselves appear to have been decided more upon reasons of expediency and with regard to the circumstances of the particular case than upon a settled idea of the meaning of the terms employed in the code.[35] A transaction has been defined to consist of an act or agreement, or several acts or agreements, having some connection with each other, in which more than one person is concerned and by which the legal relations of such persons between themselves are altered.[36] The phrase "subject of action" is generally construed to refer to the property or thing concerning which the proceeding is instituted and carried on, and the changes to be affected by the proceeding.[37] It is regarded as having a meaning distinct from the phrases

he pleases, arising out of the same transaction; (4) as many causes of action as he pleases, arising out of different transactions connected with the same subject of action. Robinson *v.* Flint, 7 Abb. Pr. (N. Y.) 393.

Causes not arising from the same transaction may be joined when connected with the same subject of action. Flint *v.* Dulany, 37 Kan. 332, 15 Pac. 208.

Causes arising from the same transaction may be joined, although not such as could be joined if arising from different transactions. Robinson *v.* Flint, 7 Abb. Pr. (N. Y.) 393.

Necessity that causes of action affect all the parties to the action see *infra*, I, B, 2, r.

Inconsistent causes of action see *supra*, I, B, 2, c.

34. New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 604; Barkley *v.* Williams, 30 Misc. (N. Y.) 687, 64 N. Y. Suppl. 318; Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695.

35. Wiles *v.* Suydam, 64 N. Y. 173; Barkley *v.* Williams, 30 Misc. (N. Y.) 687, 64 N. Y. Suppl. 318; Emerson *v.* Nash, 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326.

The purpose of the provision is to extend the right of plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant, arising out of the same subject of action, so that the court may dispose of the same subject of controversy and its incidents and corollaries in one action. Hamlin *v.* Tucker, 72 N. C. 502.

The provision should be liberally construed. — Emerson *v.* Nash, 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326.

36. Craft Refrigerating Mach. Co. *v.* Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856, further defining the phrase as meaning something which has taken place whereby a cause of action has arisen. Any event in which two or more persons are actors, involving a right which may presently, or by what would proximately occur in respect thereto, be violated, creating an actionable wrong, is a transaction. Emerson *v.* Nash, 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326.

The word "transaction" has been defined to be an infringement upon the primary right of plaintiff (Scarborough *v.* Smith, 18 Kan. 399), as the thing done (Anderson *v.* Hill, 53 Barb. (N. Y.) 238), the doing or performance of any business, the management of any affair (Rogers *v.* Wheeler, 89 N. Y. App. Div. 435, 85 N. Y. Suppl. 981 [*citing* Bouvier L. Dict.]), the act of transacting or conducting any business; negotiation; management; —a proceeding (Rogers *v.* Wheeler, *supra* [*citing* Worcester Dict.]), the management or settlement of an affair, the doing or performing (Rogers *v.* Wheeler, *supra* [*citing* Century Dict.]). With respect to matters of contract the same transaction has been defined to mean the entire proceeding, commencing with the negotiation and ending with the performance of the contract (Robinson *v.* Flint, 7 Abb. Pr. (N. Y.) 393). When a contract between two or more persons on one side, and two or more persons on the other, creates a situation involving presently or proximately separate rights upon one side, each of which with a violation thereof by the other side would constitute a complete ground of complaint for judicial redress, the initial circumstances, that is, the making of the contract, is a "transaction," and such grounds of complaint, should they arise, would be separate "causes of action arising out of the same transaction." Emerson *v.* Nash, 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326.

As distinguished from the primary right. — The primary right, from the violation of which a cause of action arises, must be distinguished from the transaction as referred to in this provision of the codes. The transaction is distinct from the immediate elements of the cause of action, since such elements arise from the transaction. Emerson *v.* Nash, 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326.

37. McKinney *v.* Collins, 88 N. Y. 216; Rogers *v.* Wheeler, 89 N. Y. App. Div. 435, 85 N. Y. Suppl. 981.

Other definitions. — The "subject of action" has in some cases been defined as the primary right. Scarborough *v.* Smith, 18 Kan. 399.

The term "transactions connected with the same subject of action" refers to a different situation than causes of action arising out of the same transaction. The former applies generally, if not exclusively, to matters which might constitute a source of independent causes of action, yet are so germane to the primary matter, the suit being in equity, as

"cause of action," [38] and "object of the action," which are elsewhere considered and defined. [39]

(II) *APPLICATION OF THE RULE*—(A) *In General.* While it is impossible to formulate a general rule which will control the circumstances of all particular cases which may arise,[40] it has been held proper, under the rule that causes of action relating to the same transaction, or transactions connected with the same subject of action, may be joined, to join various causes of action relating to realty,[41] claims arising from the settlement of partnership affairs,[42] or growing out of the administration of decedents' estates,[43] or matters of guardianship,[44] or trust estates,[45] or corporate liabilities and management,[46] as well as many other and miscellaneous

to be regarded really a part thereof. Emerson *v.* Nash, 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326.

38. Scarborough *v.* Smith, 18 Kan. 399. See, generally, ACTIONS, 1 Cyc. 643 note 5.

39. Scarborough *v.* Smith, 18 Kan. 399. See, generally, ACTIONS, 1 Cyc. 643 note 6.

40. Wiles *v.* Suydam, 64 N. Y. 173. See also *supra*, I, B, 2, n, (I), text and note 34.

41. *Kansas.*— Scarborough *v.* Smith, 18 Kan. 399, recovery of real property may be joined with an action for rents and profits and partition.

North Carolina.— Jennings *v.* Reeves, 101 N. C. 447, 7 S. E. 897 (a claim for possession may be joined with one for the execution of a deed); McMillan *v.* Edwards, 75 N. C. 81 (an execution purchaser may compel the execution of a deed to replace a lost sheriff's deed, in an action for the possession of the land).

South Dakota.— Bush *v.* Froelick, 8 S. D. 353, 66 N. W. 939, in foreclosure, a prior foreclosure may be set aside, the issuance of a tax deed restrained, and the equities between the parties determined.

Texas.— Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156 (possession of several tracts of land may be demanded, where plaintiff's right grows from one transaction); Jones *v.* Ford, 60 Tex. 127 (recovery of property from one claiming a lien thereon may be joined with a demand for money paid to third persons which defendant was, under the same contract under which the lien was claimed, bound to repay).

Wisconsin.— Moon *v.* McKnight, 54 Wis. 551, 11 N. W. 800, actions to have a deed declared a mortgage, to have a deed set aside as a forgery, and to foreclose a mortgage may be joined.

See 1 Cent. Dig. tit. "Action," § 498 *et seq.*

As not arising from the same transaction, it is not proper to join an action to restrain the collection of taxes and to recover back taxes paid (Turner *v.* Althaus, 6 Nebr. 55), or a claim for the possession of a tract of land with trespass upon another tract (Hulce *v.* Thompson, 9 How. Pr. (N. Y.) 113), or the foreclosure of mortgages upon distinct portions of land (Tobin *v.* Smith, 1 Ohio S. & C. Pl. Dec. 675, 1 Ohio N. P. 75), or the foreclosure of a mortgage upon the one tract, and an action to recover the possession of another (Edgerton *v.* Powell, 72 N. C. 64).

42. Tootle *v.* Kent, 12 Okla. 674, 73 Pac. 310, holding that a cause of action against a partnership for damages may be joined with one for a dissolution of the partnership and an accounting, and the distribution of partnership property through a receivership. See, generally, PARTNERSHIP.

43. Mayberry *v.* McClurg, 51 Mo. 256 (holding that in proceedings to set aside an allowance against an estate, on the ground of collusion between the claimants and the administrator, the several demands may be regarded as arising from the same transaction); Hay *v.* Hay, 13 Hun (N. Y.) 315 (wrongful conduct inducing the making of a will by plaintiff's ancestor, and false representations inducing consent to proof of the will).

Partition of testator's real estate cannot be joined with a cause of action to establish a debt against the estate (Letson *v.* Evans, 33 Misc. (N. Y.) 437, 68 N. Y. Suppl. 421), or with proceedings by an administrator to sell land to pay debts (Garrison *v.* Cox, 99 N. C. 478, 6 S. E. 124).

44. Holmes *v.* Abbott, 53 Hun (N. Y.) 617, 6 N. Y. Suppl. 943, a plaintiff as guardian may seek to ascertain the extent of his ward's interest in particular property, and the validity and extent of alleged liens thereon.

45. Richtmyer *v.* Richtmyer, 50 Barb. (N. Y.) 55 (accounting as to several trusts created by different instruments); Price *v.* Brown, 10 Abb. N. Cas. (N. Y.) 67 (causes of action against the executor of a deceased co-trustee in favor of a surviving trustee, arising from breach of trust).

46. Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46 (where plaintiff sought a receiver of a corporation for fraud and mismanagement on the part of the officers, and also the enforcement and establishment of a lien growing out of his payment of a sum imposed as a condition in a previous suit brought by him to set aside a fraudulent conveyance of corporate property by the officers, the decree having provided that the corporation should make such payment, and that plaintiff should have the right to do so in case the corporation refused, and have a consequent lien upon the property to indemnify him); Woolf *v.* Barnes, 46 Misc. (N. Y.) 169, 93 N. Y. Suppl. 219; Bonnell *v.* Wheeler, 16 Abb. Pr. N. S. (N. Y.) 81 (cause of action against a corporate director for not making an annual report may be joined with one for making a false report); Glover *v.* Manila

causes of action.[47] A summary proceeding cannot be joined with a claim for damages arising from the same transaction.[48]

(B) *Injuries to Person and Character.* A cause of action for an assault may

Gold Min., etc., Co., (S. D. 1905) 104 N. W. 261.

A cause of action to charge a stock-holder with a corporate debt, because of the failure to make and record a certificate required by statute, cannot be joined with a cause to charge him, as trustee, with the debt, because of the failure to file an annual report, when such causes neither arise out of the same transaction, nor are connected with the same subject of action. Wiles *v.* Suydam, 64 N. Y. 173.

A cause of action against a director to enforce a personal liability for consenting to the creation of an indebtedness in excess of the capital stock of the corporation cannot be joined with a cause for failure to file an annual report as required by statute, because both are penal in their nature and do not arise out of the same transaction. Motley *v.* Pratt, 13 Misc. (N. Y.) 758, 35 N. Y. Suppl. 184.

47. *Colorado.*— Flint *v.* Hubbard, 16 Colo. App. 464, 66 Pac. 446, action by attorneys for fees lost through a fraudulent satisfaction of a judgment by their clients, and one to recover fees included in such judgment which had been assigned to plaintiffs.

New York.— Rogers *v.* Wheeler, 89 N. Y. App. Div. 435, 85 N. Y. Suppl. 981 (action on an accounting under an original contract, in which it was alleged that on the death of the original promisor it was carried out by defendants as his successors); Blanck *v.* Nelson, 39 N. Y. App. Div. 21, 56 N. Y. Suppl. 867 (misconduct of an attorney); Mabey *v.* Adams, 3 Bosw. 346 (frauds practised by a bank director through misrepresentations made to plaintiff, and neglect of duties required by statute).

North Carolina.— Sloan *v.* Carolina Cent. R. Co., 126 N. C. 487, 36 S. E. 21 (action against a carrier for wrongfully permitting an inspection of goods without production of the bill of lading, and for wrongfully withholding a part of the same goods and compelling payment of demurrage); Cook *v.* Smith, 119 N. C. 350, 25 S. E. 958 (action against a sheriff and sureties on his official bond, for an illegal levy and sale, may be joined with one against one who procured such sale to be made and gave an indemnifying bond therefor); Hamlin *v.* Tucker, 72 N. C. 502 (harboring and maintaining plaintiff's wife, conversion of certain personalty to which plaintiff is entitled as husband, inducing the wife, while harbored and maintained, to execute to defendant a deed for land under which he received the rents, and for converting to his own use certain chattels mentioned in a marriage settlement executed by plaintiff and his wife).

South Carolina.— Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695, an action against a building association for wrongful collection of an amount greater than was due on a bond may be joined with an action against a bank for aiding such collection by paying to the association money of plaintiff deposited with it.

Texas.— Sanderson *v.* Railey, (Civ. App. 1898) 47 S. W. 667, action on a note secured by vendor's lien notes, together with an action against the maker of the lien notes to foreclose the lien.

Utah.— Wilson *v.* Sullivan, 17 Utah 341, 53 Pac. 994.

Wisconsin.—Alliance Elevator Co. *v.* Wells, 93 Wis. 5, 66 N. W. 796, action for double rent and for conversion by tenant of personalty.

See 1 Cent. Dig. tit. "Action," § 490 *et seq.*

Joinder of contract and tort see *infra*, I, B, 2, c.

A cause of action against an officer to recover damages incurred through his failure to perform certain duties may be joined with a cause of action to recover a penalty imposed by statute for such default. Pearkes *v.* Freer, 9 Cal. 642.

A cause of action for the annulment of a marriage cannot be joined with one seeking to quiet title of plaintiff in her separate property in which defendant falsely claims an interest. Uhl *v.* Uhl, 52 Cal. 250.

Causes which may not be joined.— Breach of warranty based on the explosion of a gun sold plaintiff, and a cause of action for the wrong in putting a defective weapon on the market (Reed *v.* Livermore, 101 N. Y. App. Div. 254, 91 N. Y. Suppl. 986); alienation of wife's affections and the subsequent conversion of personal property (Crowell *v.* Truesdell, 67 N. Y. App. Div. 502, 73 N. Y. Suppl. 1013); action in contract against attorneys for failure to properly conduct an action, and an action for wilful misconduct in its prosecution (Barkley *v.* Williams, 30 Misc. (N. Y.) 687, 64 N. Y. Suppl. 318); action to annul a contract and cancel a mortgage, and injunction to restrain an action for services rendered, not arising from the contract (Alleghany, etc., R. Co. *v.* Weidenfeld, 5 Misc. (N. Y.) 43, 25 N. Y. Suppl. 71); action by trustee in bankruptcy to recover property adjudged in different suits to belong to certain of defendants, and also property sold in satisfaction of judgments in attachment by other defendants (Davis *v.* Novotney, 15 S. D. 118, 87 N. W. 582).

Where several penalties sought to be recovered grow out of the violation of distinct provisions of law, neither the transaction nor the subject of action are the same or connected with each other. Motley *v.* Pratt, 13 Misc. (N. Y.) 758, 35 N. Y. Suppl. 184.

48. **Joinder of forcible entry and detainer** see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1158.

be joined with other causes of action arising out of the same transaction or transactions.[49] It has been held, however, that a count for assault cannot be joined with a count for slander.[50] When arising out of the same transaction, a cause of action for malicious prosecution may be joined with one for false imprisonment,[51] or for slander.[52] Slander may likewise be joined with false imprisonment.[53]

(c) *Injuries to Person and Property.* A cause of action for damages for injury to the person may be joined with one for injury to property, where both arise from the same transaction;[54] but not where they arise from different transactions, although connected with the same subject of action.[55]

o. Contract and Tort. Under the codes, as at common law, a cause of action in tort cannot as a general rule be joined with a cause of action on contract;[56] hence an action for breach of contract cannot be joined with one for personal

49. O'Horo *v.* Kelsey, 60 N. Y. App. Div. 604, 70 N. Y. Suppl. 14 (attempt to remove goods without legal process, and commencement of civil action for the purpose of intimidation); Doyle *v.* American Wringer Co., 60 N. Y. App. Div. 525, 69 N. Y. Suppl. 952 (forcible entry and taking of goods). See also Brewer *v.* Temple, 15 How. Pr. (N. Y.) 286.

50. Anderson *v.* Hill, 53 Barb. (N. Y.) 238.

51. *Arkansas.*— Chrisman *v.* Carney, 33 Ark. 316.

Kansas.— Wagstaff *v.* Schippel, 27 Kan. 450.

Nebraska.— Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81.

New York.— Marks *v.* Townsend, 97 N. Y. 590; Barr *v.* Shaw, 10 Hun 580; Warren *v.* Dennett, 17 Misc. 86, 39 N. Y. Suppl. 830; Thorp *v.* Carvalho, 14 Misc. 554, 36 N. Y. Suppl. 1; Henderson *v.* Jackson, 40 How. Pr. 168; Haight *v.* Webster, 18 N. Y. Wkly. Dig. 108.

Texas.— San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542.

United States.— Castro *v.* De Uriarte, 12 Fed. 250, applying New York statute.

52. Dinges *v.* Riggs, 43 Nebr. 710, 62 N. W. 74.

53. Harris *v.* Avery, 5 Kan. 146; De Wolfe *v.* Abraham, 6 N. Y. App. Div. 172, 39 N. Y. Suppl. 1029 [*disapproving* Anderson *v.* Hill, 53 Barb. (N. Y.) 238].

54. Lamming *v.* Galusha, 135 N. Y. 239, 31 N. E. 1024 (holding that in an action for maintaining a nuisance in a public highway, an owner of land injuriously affected by the invasion of his property rights may, in addition to obtaining relief by way of an injunction, and for damages sustained by him, recover for a personal injury caused by the nuisance itself); McInerney *v.* Main, 82 N. Y. App. Div. 543, 81 N. Y. Suppl. 539 [*distinguishing* Reilly *v.* Sicilian Asphalt Pav. Co., 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176]; McAndrew *v.* Lake Shore, etc., R. Co., 70 Hun (N. Y.) 46, 23 N. Y. Suppl. 1074; Eagan *v.* New York Transp. Co., 39 Misc. (N. Y.) 111, 78 N. Y. Suppl. 209, 11 N. Y. Annot. Cas. 394; Griffith *v.* Friendly, 30 Misc. (N. Y.) 393, 62 N. Y. Suppl. 391; Rusenberg *v.* Staten Island R. Co., 14 N. Y. Suppl. 476. See also Howe *v.* Peckham, 10 Barb. (N. Y.) 656; Hamlin *v.* Tucker, 72 N. C. 502.

Where separate causes of action arise from the same wrongful act see *supra*, I, A, 2.

Necessity that causes fall within the same subdivision of the statute see *supra*, I, B, 2, f.

55. Campbell *v.* Hallihan, 45 Misc. (N. Y.) 325, 90 N. Y. Suppl. 432.

56. *Arkansas.*— Conant *v.* Storthz, 69 Ark. 209, 62 S. W. 415.

California.— Stark *v.* Wellman, 96 Cal. 400, 31 Pac. 259 (breach of contract to redeliver money intrusted, and conversion); Loup *v.* California Southern R. Co., 63 Cal. 97.

Georgia.— Teem *v.* Ellijay, 89 Ga. 154, 15 S. E. 33; Croghan *v.* New York Underwriters' Agency, 53 Ga. 109.

Indiana.—Cincinnati, etc., R. Co. *v.* Harris, 61 Ind. 290; Clark *v.* Lineberger, 44 Ind. 223 (breach of covenant and false representations); Boyer *v.* Tiedeman, 34 Ind. 72 (fraud and breach of warranty).

Kentucky.— Dierig *v.* South Covington, etc., St. R. Co., 72 S. W. 355, 24 Ky. L. Rep. 1825.

Mississippi.— Hazlehurst *v.* Cumberland Tel., etc., Co., 83 Miss. 303, 35 So. 951.

Missouri.—Southworth Co. *v.* Lamb, 82 Mo. 242; Jamison *v.* Copher, 35 Mo. 483; Roberts *v.* Quincy, etc., R. Co., 43 Mo. App. 287; Sumner *v.* Tuck, 10 Mo. App. 269. See also Sumner *v.* Rogers, 90 Mo. 324, 2 S. W. 476.

Nebraska.— Commercial Union Assur. Co. *v.* Shoemaker, 63 Nebr. 173, 88 N. W. 156. See also Hardy *v.* Miller, 11 Nebr. 395, 9 N. W. 475.

New York.— Nichols *v.* Drew, 94 N. Y. 22; Hubbell *v.* Meigs, 50 N. Y. 480; Conard *v.* Southern Tier Masonic Relief Assoc., 101 N. Y. App. Div. 611, 93 N. Y. Suppl. 626; Compton *v.* Hughes, 38 Hun 377; Booth *v.* Farmers', etc., Bank, 65 Barb. 457; Butt *v.* Cameron, 53 Barb. 642 (enforcement of stock-holder's liability and claim for misfeasance as director); Flynn *v.* Bailey, 50 Barb. 73; Cobb *v.* Dows, 9 Barb. 230; Zrskowski *v.* Mach, 15 Misc. 234, 36 N. Y. Suppl. 421; Hannahs *v.* Hammond, 19 N. Y. Suppl. 883, 28 Abb. N. Cas. 317; Thompson *v.* St. Nicholas Nat. Bank, 61 How. Pr. 163; McDonald *v.* Kountze, 58 How. Pr. 152; Colwell *v.* New York, etc., R. Co., 9 How. Pr.

injuries,[57] or with an action for injuries to personalty [58] or realty.[59] An exception to the general rule exists, however, under the provisions of certain of the codes authorizing the joinder of causes of action of whatever kind, providing that they are between the same parties and in the same right, and have the same venue.[60]

311 (killing of cattle and breach of contract of carriage or other cattle); Burdick *v.* McAmbly, 9 How. Pr. 117; Furniss *v.* Brown, 3 How. Pr. 59 (recovery of specific personalty and damages for breach of contract).

Ohio.— Sturgess *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

Texas.— Frey *v.* Ft. Worth, etc., R. Co., 86 Tex. 465, 25 S. W. 609; Stewart *v.* Gordon, 65 Tex. 344.

Washington.— Clark *v.* Great Northern R. Co., 31 Wash. 658, 72 Pac. 477; Willey *v.* Nichols, 18 Wash. 528, 52 Pac. 237, action on injunction bond and for damages for wilful injunction.

See 1 Cent. Dig. tit. "Action," § 469 *et seq.*

Actions for trespass and use and occupation cannot be joined. McLendon *v.* Atlanta, etc., R. Co., 54 Ga. 293. See also Ramirez *v.* Murray, 5 Cal. 222.

Where defendant waives the tort, the statement of facts showing the commission of a tort does not indicate an improper joinder in an action on contract. De Witt *v.* McDonald, 58 How. Pr. (N. Y.) 441; Campbell *v.* Wright, 21 How. Pr. (N. Y.) 9; Hinds *v.* Tweddle, 7 How. Pr. (N. Y.) 278; Logan *v.* Wallis, 76 N. C. 416. See also Hawk *v.* Thorn, 54 Barb. (N. Y.) 164.

For pleadings construed to state a cause of action in tort as well as in contract see Nimocks *v.* Inks, 17 Ohio 596 (allegations of failure to perform labor, and also performance of labor in a careless, unskilful, undue, and improper manner); Skipworth *v.* Hurt, (Tex. Civ. App. 1900) 58 S. W. 192 (action on a county treasurer's bond, where it was alleged that defendant bank had advanced the amount of the treasurer's shortages to the county, and the sums having been permitted to remain on deposit by the county, the bank wrongfully converted them); Rideout *v.* Milwaukee, etc., R. Co., 81 Wis. 237, 51 N. W. 439 (where in an action for killing a horse, a claim for freight paid on the horse, to defendant, was joined); Lane *v.* Cameron, 38 Wis. 603 (allegations that defendant so improperly and negligently used certain horses which he had borrowed of plaintiff, that they sickened and died, and also that defendant had promised to pay for such horses in case of their death, and had refused to do so on demand).

Pleadings construed as not joining contract and tort see Pavesich *v.* New England L. Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104, 69 L. R. A. 101 (cause of action for libel and cause of action for invasion of plaintiff's right of privacy); Southern R. Co. *v.* Horner, 115 Ga. 381, 41 S. E. 649 (petition setting out a breach of duty by a railroad company as a public carrier, and also asserting a liability under a statutory obligation imposed upon a final connecting carrier); Southwest Missouri Electric R. Co. *v.* Missouri Pac. R. Co., 110 Mo. App. 300, 85 S. W. 966 (action by one railroad company against another, upon an agreement to share damages caused by the sole negligence of either of such companies at a crossing); Jones *v.* St. Louis, etc., R. Co., 89 Mo. App. 653 (action against two carriers for the same negligence); Watt *v.* Talcott, 4 Month. L. Bul. (N. Y.) 25 (where a complaint against a factor for breach of contract sought an accounting and a return of undisposed-of goods).

In partition a demand for rents and profits alleged to have been converted by tenants in common in possession does not show a joinder of tort and contract. Finch *v.* Baskerville, 85 N. C. 205.

57. *Kentucky.*— Dierig *v.* South Covington, etc., St. R. Co., 72 S. W. 355, 24 Ky. L. Rep. 1825, breach of contract of carriage and illegal arrest upon the refusal to pay fare.

New York.— Townsend *v.* Coon, 7 N. Y. Civ. Proc. 56.

Texas.— G. A. Duerler Mfg. Co. *v.* Dullnig, (Civ. App. 1904) 83 S. W. 889 [*affirmed* in (1905) 87 S. W 332], action for personal injuries to an employee, and action on a contract of insurance against accidents.

Utah.— Clinton *v.* Nelson, 2 Utah 284, action upon an official bond of a United States marshal, charging only false imprisonment and malicious cruelty.

Washington.— Sanders *v.* Stimson Mill Co., 34 Wash. 357, 75 Pac. 974 [*reversing* on rehearing 32 Wash. 627, 73 Pac. 688]; Clark *v.* Great Northern R. Co., 31 Wash. 658, 72 Pac. 477, breach of contract of carriage and use of excessive force in ejecting plaintiff from defendant's train.

58. Hoagland *v.* Hannibal, etc., R. Co., 39 Mo. 451; Hall *v.* Fisher, 20 Barb. (N. Y.) 441; Townsend *v.* Coon, 7 N. Y. Civ. Proc. 56.

59. Ederlin *v.* Judge, 36 Mo. 350; Hart *v.* Metropolitan El. R. Co., 15 Daly (N. Y.) 391, 7 N. Y. Suppl. 753 (trespass and tortious invasion of easements by the erection of an elevated railroad in front of plaintiff's premises, and action on a bond conditioned for the payment of the damages for such invasion); Weeks *v.* Keteltas, 13 Daly (N. Y.) 559, 10 N. Y. Civ. Proc. 43 (breach of covenant in a lease and trespass on the leased premises).

Action for penalty.— An action for a penalty given by a statute to any person injured by a breach of its provisions protecting a river from obstruction cannot be joined with an action for damages for such obstruction. Doughty *v.* Atlantic, etc., R. Co., 78 N. C. 22.

60. Devin *v.* Walsh, 108 Iowa 428, 79 N. W. 133 (action for value of coal taken from land, and action for damages to the land); Jack *v.* Des Moines, etc., R. Co., 49 Iowa 627; Turner *v.* Keokuk First Nat. Bank, 26 Iowa 562.

Another general exception results from the provision, in many of the codes, that causes of action arising out of the same transaction or transactions connected with the same subject of action may be joined,[61] and the same exception has been drawn from the general intent of the codes in the absence of such an express provision as just stated.[62] Hence a cause of action for breach of contract may be joined with one for fraud leading to the making of the contract.[63] It has been

61. *Connecticut.*—Craft Refrigerator Mach. Co. *v.* Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856. See also Maisenbacker *v.* Danbury Concordia Soc., 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213.

Kansas.— See Haskell County Bank *v.* Santa Fé Bank, 51 Kan. 39, 32 Pac. 624; Hoye *v.* Raymond, 25 Kan. 665.

Kentucky.— Jones *v.* Johnson, 10 Bush 649, holding that a suit by stock-holders to settle a trust in the hands of the assignee of a corporation may be joined with an action against the officers for negligence and fraudulent management of its affairs.

Minnesota.— Humphrey *v.* Merriam, 37 Minn. 502, 35 N. W. 365; Kraemer *v.* Deustermann, 37 Minn. 469, 35 N. W. 276 (action for money wrongfully withheld, and for money wrongfully exacted and paid); Gertler *v.* Linscott, 26 Minn. 82, 1 N. W. 579.

Mississippi.— Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168, a statutory penalty for failure to maintain cattle-guard may be recovered in connection with an action for actual damages.

Missouri.— Shinn *v.* Guyton, etc., Mule Co., 109 Mo. App. 557, 83 S. W. 1015, action upon a lease for rent, and for damages to the premises by the tenant.

New York.— Woodbury *v.* Deloss, 65 Barb. 501; Adams *v.* Bissell, 28 Barb. 382 (action against a carrier for waste or conversion, and claim to recover back freight paid upon the same goods); Mackenzie *v.* Hatton, 6 Misc. 153, 26 N. Y. Suppl. 873; Grimshaw *v.* Woolfall, 15 N. Y. Suppl. 857; Kent *v.* Crouse, 5 N. Y. St. 141 (claim for services rendered, and damages for revocation of an agreement to submit such claim to arbitration); Badger *v.* Benedict, 4 Abb. Pr. 176 [*affirmed* in 1 Hilt. 414] (breach of agreement to furnish paper, and to print and bind books, and injury to and destruction of plates furnished by plaintiff to print from); Robinson *v.* Flint, 16 How. Pr. 240. See also Corcoran *v.* Mannering, 10 N. Y. App. Div. 516, 41 N. Y. Suppl. 1090 (holding that in an action in equity a claim for injury to property might be united with one for the rent thereof); Rothchild *v.* Grand Trunk R. Co., 10 N. Y. Suppl. 36, 19 N. Y. Civ. Proc. 53. See *contra*, under the code of procedure, Edick *v.* Crim, 10 Barb. 445; Hunter *v.* Powell, 15 How. Pr. 221.

North Carolina.— Cook *v.* Smith, 119 N. C. 350, 25 S. E. 958; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719, both holding that a cause of action against bank directors for the loss of a deposit may be joined with a cause of action for fraud and deceit inducing the deposit.

Ohio.— Pittsburgh, etc., R. Co. *v.* Hedges, 41 Ohio St. 233 (action in contract against a railroad for failure to keep a fence in repair, and for tort in negligently operating a train, resulting in injury to animals); Sturges *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

United States.— Reynolds *v.* Palmer, 21 Fed. 433, applying the code of North Carolina.

See 1 Cent. Dig. tit. "Action," § 471.

But the causes must relate to the same transaction.— Barkley *v.* Williams, 30 Misc. (N. Y.) 687, 64 N. Y. Suppl. 318; Bishop *v.* Chicago, etc., R. Co., 67 Wis. 610, 31 N. W. 219.

As not arising from the same transaction or transactions, it has been held that a cause of action on contract for a breach of quiet enjoyment contained in a lease cannot be joined with one in tort for unlawfully entering the leased apartments and injuring plaintiff's property (Keep *v.* Kaufman, 56 N. Y. 332 [*affirming* 36 N. Y. Super. Ct. 141]); nor can an action upon the breach of a written contract be joined with one for an assault and battery committed on plaintiff in forcibly taking the contract from his possession (Ehle *v.* Huller, 19 N. Y. Super. Ct. 661, 10 Abb. Pr. 287); nor can a count alleging that plaintiff was induced to purchase certain notes through fraudulent representations that the makers were solvent be joined with a count alleging that the makers had given to defendant the amount of the notes for their payment, and that he had failed to pay them (American Nat. Bank *v.* Grace, 64 Hun (N. Y.) 22, 18 N. Y. Suppl. 745).

62. Jones *v.* The Cortes, 17 Cal. 487, 79 Am. Dec. 142.

63. *Connecticut.*— Knapp *v.* Walker, 73 Conn. 459, 47 Atl. 655.

Minnesota.— Humphrey *v.* Merriam, 37 Minn. 502, 35 N. W. 365.

New York.— Robinson *v.* Flint, 16 How. Pr. 240. *Contra*, Seymour *v.* Lorillard, 8 N. Y. Civ. Proc. 90 (holding that a cause of action for falsely representing that a yacht sold did not leak could not be joined with a cause of action for breach of warranty as to the sound condition of the boat, since the two causes of action did not arise out of the same transaction); Springsteed *v.* Lawson, 14 Abb. Pr. 328, 23 How. Pr. 302; Sweet *v.* Ingerson, 12 How. Pr. 331.

Wisconsin.— Koepke *v.* Winterfield, 116 Wis. 44, 92 N. W. 437, an action against a vendor for breach of his covenant of seizin may be joined with an action against him for

held, however, that where actions in tort and actions upon contract are embraced in separate subdivisions of the statute with regard to joinder, they cannot be joined, although arising out of the same transaction, such a joinder being prevented by the rule that the causes of action must fall within one of the specific classes.[64] It must appear clearly from the statement of facts that the causes of action arise from the same transaction; a general averment that they so arise is not sufficient.[65] In all cases where a joinder is permitted, the causes of action must affect all the parties.[66] In determining whether a count is on contract or in tort, the fact that other counts are in contract may be considered as signifying that it was not the intention of the pleader to join inconsistent counts.[67] Where there is an ambiguity as to whether an action is on contract or in tort for conversion, it is to be presumed to be based on contract.[68] The prayer for relief may also be material in the determination of the question.[69] The fact that, as between the tort-feasors, the liability is on contract, will not render an action against them jointly bad as based on a joinder of contract and tort.[70]

p. Legal and Equitable Causes — (1) *IN GENERAL.* The provisions of the codes abolishing the distinction between actions at law and suits in equity,[71] while it does not abrogate the distinction between legal and equitable rights, or legal and equitable remedies,[72] renders it proper in nearly all of the code states to join actions to enforce legal and equitable rights or to obtain legal and equitable relief,[73] provided usually that they arise out of the same transaction or transac-

false representations in the sale of the property.

United States.— Kimber *v.* Young, 137 Fed. 744, applying Colorado statute.

64. Raynor *v.* Brennan, 40 Hun (N. Y.) 60 (holding that a count alleging that plaintiff bet money with defendant on a horse-race, and lost it, could not be joined with a count alleging that plaintiff was induced to make the bet by false representations respecting the horse that won, made by defendant and others with whom defendant conspired to defraud plaintiff); Teall *v.* Syracuse, 32 Hun (N. Y.) 332 (holding that a cause of action for the conversion of personalty cannot be joined with a cause of action to recover the proceeds of the sale of property, as upon an implied promise waiving a tort); North Carolina Land Co. *v.* Beatty, 69 N. C. 329. And *compare* Springsteed *v.* Lawson, 14 Abb. Pr. (N. Y.) 328, 23 How. Pr. 302; Sweet *v.* Ingerson, 12 How. Pr. (N. Y.) 331, both holding that causes of action growing out of a breach of warranty in a sale cannot be joined with a cause of action arising out of fraud in the sale.

65. Flynn *v.* Bailey, 50 Barb. (N. Y.) 73.

66. Haskell County Bank *v.* Santa Fé Bank, 51 Kan. 39, 32 Pac. 624; Hoye *v.* Raymond, 25 Kan. 665; Jones *v.* Procter, 5 Ohio S. & C. Pl. Dec. 416, 5 Ohio N. P. 315. See, generally, *infra*, I, B, 2, r.

67. Roth *v.* Palmer, 27 Barb. (N. Y.) 652.

68. Central Gas, etc., Fixture Co. *v.* Sheridan, 1 Misc. (N. Y.) 386, 22 N. Y. Suppl. 76 [*citing* Goodwin *v.* Griffis, 88 N. Y. 629].

69. Swart *v.* Boughton, 35 Hun (N. Y.) 281; Central Gas, etc., Fixture Co. *v.* Sheridan, 1 Misc. (N. Y.) 386, 22 N. Y. Suppl. 76 [*citing* Goodwin *v.* Griffis, 88 N. Y. 629].

70. Bateman *v.* Forty-Second St., etc., R. Co., 5 N. Y. Suppl. 13, sustaining a complaint against a railroad company and a municipal corporation jointly, for a violation by the railway company of its contract with the municipality to keep certain streets in repair, and for leaving such streets in a dangerous condition whereby plaintiff was injured.

71. See the codes of the several states.

Power of legislature to abolish forms see ACTIONS, 1 Cyc. 705 note 91.

72. See ACTIONS, 1 Cyc. 736.

73. *Arkansas.*— Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100.

California.— More *v.* Massini, 32 Cal. 590; Morenhout *v.* Higuera, 32 Cal. 289; Gray *v.* Dougherty, 25 Cal. 266; Eastman *v.* Turman, 24 Cal. 379.

Florida.— Kahn *v.* Kahn, 15 Fla. 400.

Indiana.— Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Bonnell *v.* Allen, 53 Ind. 130.

Minnesota.— Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086; Holmes *v.* Campbell, 12 Minn. 221; Montgomery *v.* McEwen, 7 Minn. 351.

Missouri.— Callaghan *v.* McMahan, 33 Mo. 111; Rankin *v.* Pharless, 19 Mo. 490, 61 Am. Dec. 574.

Nebraska.— Weinland *v.* Cochran, 9 Nebr. 480, 4 N. W. 67.

New York.— Margraf *v.* Muir, 57 N. Y. 155; Davis *v.* Morris, 36 N. Y. 569; Laub *v.* Buckmiller, 17 N. Y. 620; People *v.* Metropolitan Tel., etc., Co., 31 Hun 596; Peck *v.* Newton, 46 Barb. 173; See *v.* Partridge, 2 Duer 463; Devlin *v.* New York, 4 Misc. 106, 23 N. Y. Suppl. 888; Farmers', etc., Nat. Bank *v.* Rogers, 1 N. Y. Suppl. 757; Arndt *v.* Williams, 16 How. Pr. 244; Getty *v.* Hudson River R. Co., 6 How. Pr. 269.

North Carolina.— State *v.* Smith, 119 N. C. 856, 25 S. E. 871; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725;

tions connected with the same subject of action;[74] and further that the causes affect all the parties to the action[75] and are consistent with each other.[76] In those states, however, in which the distinction between law and equity is retained, although the forms of action are abolished,[77] a legal and equitable cause of action cannot be joined,[78] except perhaps by agreement of the parties.[79] Where the joinder is otherwise proper it is not material that one of the causes of action may be tried by the court while, with regard to the other, there is a constitutional right to trial by a jury.[80] It is not necessary that legal and equitable causes of action be united, even though they arise out of the same transaction or are connected with the same subject of action. Plaintiff has such privilege but its exercise

John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22; Pendleton *v.* Dalton, 92 N. C. 185.

Ohio.— Lamson *v.* Pfaff, 1 Handy 449, 12 Ohio Dec. (Reprint) 231.

Oklahoma.— Tootle *v.* Kent, 12 Okla. 674, 73 Pac. 310.

See 1 Cent. Dig. tit. "Action," § 449.

Where but one cause of action is considered to arise see *supra*, I, A, 3, c.

74. *California.*—Gray *v.* Dougherty, 25 Cal. 266.

Indiana.— State *v.* Parsons, (1897) 47 N. E. 17.

Minnesota.— First Div. St. Paul, etc., R. Co. *v.* Rice, 25 Minn. 278; Montgomery *v.* McEwen, 7 Minn. 351.

Missouri.— Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Henderson *v.* Dickey, 50 Mo. 161; Callaghan *v.* McMahon, 33 Mo. 111.

Nebraska.— Turner *v.* Althaus, 6 Nebr. 54.

New York.— Sternberger *v.* McGovern, 56 N. Y. 12; Lattin *v.* McCarty, 41 N. Y. 107 [*reversing* 8 Abb. Pr. 225, 17 How. Pr. 240]; Bradley *v.* Aldrich, 40 N. Y. 504, 100 Am. Dec. 528; Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191 [*affirming* 39 Barb. 311]; Davis *v.* Morris, 36 N. Y. 569; Van Deventer *v.* Van Deventer, 32 N. Y. App. Div. 578, 53 N. Y. Suppl. 236; People *v.* Metropolitan Tel., etc., Co., 31 Hun 596; Sortore *v.* Scott, 6 Lans. 271; Gridley *v.* Gridley, 33 Barb. 250; Newcombe *v.* Chicago, etc., R. Co., 8 N. Y. Suppl. 366; Scheu *v.* New York, etc., R. Co., 12 N. Y. St. 99; Getty *v.* Hudson River R. Co., 6 How. Pr. 269.

North Carolina.— John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22.

Wisconsin.— Endress *v.* Shove, 110 Wis. 133, 85 N. W. 653; Crites *v.* Fond du Lac County, 67 Wis. 236, 30 N. W. 214; Rippe *v.* Stogdill, 61 Wis. 38, 20 N. W. 645; Leidersdorf *v.* Second Ward Sav. Bank, 50 Wis. 406, 7 N. W. 306.

See 1 Cent. Dig. tit. "Action," § 450.

Definition of same transaction see *supra*, I, B, 2, n, (I).

75. See *infra*, I, B, 2, r.

76. Getty *v.* Hudson River R. Co., 6 How. Pr. (N. Y.) 269. See *supra*, I, B, 2, c.

77. Claussen *v.* Lafranz, 4 Greene (Iowa) 224, holding that, although several causes of action may be united in the same petition, they must be either on the law or chancery side of the court.

In the federal courts, since the distinction between law and equity is preserved (see ACTIONS, 1 Cyc. 736 note 89), causes instituted in a state court, which involve both legal and equitable claims as permitted by the state practice, must be recast on removal to a federal court so as to separate the legal and equitable causes of action. See REMOVAL OF CAUSES.

78. Bowman *v.* Chicago, etc., R. Co., 86 Iowa 490, 53 N. W. 327 (holding that an action to restrain the laying of a railroad track in a street in front of plaintiff's premises could not be joined with one asking damages for a track already laid there, and an injunction to prevent further use of the street until such damages were paid); Faivre *v.* Gillman, 84 Iowa 573, 51 N. W. 46 (holding that actions against a person of unsound mind to recover judgment upon debts due by her, and to have her declared of unsound mind, and a guardian appointed, and to set aside a deed made by her to another defendant, as fraudulent, and subject the land conveyed to the satisfaction of the debts, cannot be joined in the same petition); Stevens *v.* Chance, 47 Iowa 602 (holding that a demand arising on a contract cannot be joined with a prayer to subject to the claim of plaintiff real estate fraudulently conveyed away by defendant).

Retention of suit to award complete relief see EQUITY, 16 Cyc. 106 *et seq.*

79. Hines *v.* Whitebreast Coal, etc., Co., 48 Iowa 296, in which mechanic's lien proceedings were joined with an action upon contract.

80. Phillips *v.* Gorham, 17 N. Y. 270; Porter *v.* International Bridge Co., 45 N. Y. App. Div. 416, 60 N. Y. Suppl. 819 [*affirmed* in 163 N. Y. 79, 57 N. E. 174]. See also Davis *v.* Morris, 36 N. Y. 569; Krakow *v.* Wille, 125 Wis. 284, 103 N. W. 1121, in which it was said the equitable issue might be tried first by the court and the legal issue then tried by a jury. *Compare* Alger *v.* Scoville, 6 How. Pr. (N. Y.) 131, Code Rep. N. S. 303. *Contra,* House *v.* Cooper, 16 How. Pr. (N. Y.) 292, holding that a cause of action against a corporation for equitable relief, which was triable only by a judge at special term, could not be joined with a claim for damages against directors and officers which, in the absence of a waiver by the parties, was triable only by a jury at the circuit.

Right to trial by jury generally see JURIES.

is left to his own election.[81] To authorize both legal and equitable relief in the same action, the complaint must contain allegations which would be sufficient to entitle plaintiff to both kinds of relief if sought in separate actions.[82]

(II) *TORT AND EQUITY.* Ordinarily a demand which is purely of equitable cognizance cannot be joined with a cause of action for damages arising in tort.[83] Such a joinder is, however, permitted by a provision allowing the joinder of causes arising from the same transaction or transactions connected with the same subject of action when the causes so arise,[84] for example, an action to set aside a release may be joined with one seeking to recover upon the right of action released.[85]

(III) *REFORMATION AND ENFORCEMENT OF INSTRUMENT.* A plaintiff may properly seek the reformation of a written instrument and its enforcement as reformed,[86] such a complaint being sometimes held to state but a single cause of action.[87] Under this rule a contract may be reformed and specific performance had,[88] or damages had for its breach,[89] or a judgment recovered on it as reformed.[90] So likewise a deed may be reformed and enforced,[91] as by the recovery of damages for the withholding of the premises,[92] or mesne profits,[93] or damages had for breach of covenants which the deed would contain if reformed.[94] An answer in the nature of a cross bill may seek the reformation of an instrument for mistake and also that it be allowed as a bar to the suit when so reformed.[95]

(IV) *RECOVERY OF PROPERTY AND OTHER RELIEF.* So, applying the same principle, in an action to recover specific real property, equitable relief with regard to the same property may as a general rule be sought,[96] such as the cancellation

81. Bruce *v.* Kelly, 5 Hun (N. Y.) 229; Gregory *v.* Hobbs, 93 N. C. 1.

82. Bockes *v.* Lansing, 74 N. Y. 437.

Granting legal relief where equitable relief is denied see EQUITY, 16 Cyc. 111.

83. Mayo *v.* Madden, 4 Cal. 27; Mares *v.* Wormington, 8 N. D. 329, 79 N. W. 441, where they did not both belong to the same class.

84. Freer *v.* Denton, 61 N. Y. 492 (an action to recover back money paid because defendant refuses to perform and repudiated the contract, and another to recover back the money paid, on the ground that it was obtained from plaintiff by fraud, can be united in the same complaint); Johnson *v.* Hathorn, 2 Abb. Dec. (N. Y.) 465, 2 Keyes 476, 3 Keyes 126 (action for damages for deceit, seeking that the same be declared a lien on a house and lot as a part of the purchase-price, and that the house and lot be sold therefor); Daniels *v.* Baxter, 120 N. C. 14, 26 S. E. 635; Benton *v.* Collins, 118 N. C. 196, 24 S. E. 122 (damages for personal injury, and action to set aside a deed as fraudulent and to have the land sold to pay plaintiff's recovery); Murphy *v.* Cincinnati, 10 Ohio S. & C. Pl. Dec. 541, 8 Ohio N. P. 106, 244 (damages for wrongful appropriation of property by city, for a street, and claim for the recovery of an assessment levied on the property after the making of the street); Krakow *v.* Wille, 125 Wis. 284, 103 N. W. 1121 (holding that causes of action for the reformation of a contract for the sale of real estate and for injury to the freehold after the making of the contract and before execution of the deed might be joined).

85. Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Jackson *v.* Brown, 74 Hun (N. Y.) 25, 26 N. Y. Suppl. 156; Smith *v.* Schulting, 14 Hun (N. Y.) 52; Whetstone *v.* Deloit Straw-Board Co., 76 Wis. 613, 45 N. W. 535.

86. *Indiana.*— Rigsbee *v.* Trees, 21 Ind. 227, statutory.

Missouri.— McHoney *v.* German Ins. Co., 44 Mo. App. 426.

Nebraska.— Stewart *v.* Carter, 4 Nebr. 564.

North Carolina.— Cadell *v.* Allen, 99 N. C. 542, 6 S. E. 399, holding, however, that such relief could not be had as incidental to a purely legal action.

Ohio.— Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119.

See 1 Cent. Dig. tit. "Action," § 459.

87. See *supra*, I, A, 3, c, (III).

Multifariousness of bill in equity see EQUITY, 16 Cyc. 245.

88. Monroe *v.* Skelton, 36 Ind. 302; Ham *v.* Johnson, 51 Minn. 105, 52 N. W. 1080.

89. Rhode *v.* Green, 26 Ind. 83; Caswell *v.* West, 3 Thomps. & C. (N. Y.) 383; Jeroliman *v.* Cohen, 1 Duer (N. Y.) 629; Columbus, etc., R. Co. *v.* Steinfeld, 42 Ohio St. 449.

90. Guernsey *v.* American Ins. Co., 17 Minn. 104; New York Ice Co. *v.* Northwestern Ins. Co., 23 N. Y. 357; Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263.

A promissory note may be corrected and a judgment had for the corrected amount. Rigsbee *v.* Trees, 21 Ind. 227.

91. Laub *v.* Buckmiller, 17 N. Y. 620.

92. Laub *v.* Buckmiller, 17 N. Y. 620.

93. Cake *v.* Peet, 49 Conn. 501.

94. Butler *v.* Barnes, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273.

95. Conger *v.* Parker, 29 Ind. 380.

96. Loomis *v.* Dacker, 4 N. Y. App. Div. 409, 39 N. Y. Suppl. 441 (holding that a

of a deed,[97] or mortgage,[98] or the quieting of title,[99] or, it seems, a partition.[1] It has, however, been held that ejectment cannot be joined with trespass *quare clausum* and a prayer for equitable relief.[2]

(v) *Enforcement of Debt and Foreclosure of Lien.* As a general rule an action for the establishment or enforcement of the debt may be joined with one for the enforcement or foreclosure of a lien securing such debt,[3] the codes sometimes making express provision that, in actions on mortgages or liens, a judgment may be had for the sale of the property and for the amount of the debt against defendants personally ;[4] hence, it is usually regarded as proper to seek in the same action a foreclosure and a judgment upon the debt secured by a mortgage,[5]

demand for relief by injunction might be added, where it was alleged that defendants, some of whom were out of possession, were insolvent; that a conspiracy existed between them to wrongfully hold possession and to obtain and dispose of all the crops growing on the premises); Bucher *v.* Carroll, 19 Hun (N. Y.) 618 (holding that the only consequence of joining equitable causes is that it is necessary that all the causes be tried by a jury).

97. Lattin *v.* McCarty, 41 N. Y. 107 [*reversing* 17 How. Pr. 240, 8 Abb. Pr. 225]; Phillips *v.* Gorham, 17 N. Y. 270; Sheehan *v.* Hamilton, 4 Abb. Dec. (N. Y.) 211, 2 Keyes 304, 3 Abb. Pr. N. S. 197; England *v.* Garner, 86 N. C. 366 (where were joined causes of action to set aside a deed for fraud and imposition, to annul a deed executed by a commissioner to purchasers of land under a decree, to recover possession of the land, and for an account of the rents and profits and for an injunction against waste); Ingram *v.* Abbott, 14 Tex. Civ. App. 583, 38 S. W. 626 (trespass to try title and rescission of conveyance). *Contra*, Gray *v.* Payne, 43 Mo. 203. See also Tompkins *v.* Sprout, 55 Cal. 31, holding that a cause of action to declare null and void certain deeds cannot be joined with a cause of action to quiet title, and one in ejectment.

A purchaser at an execution sale may join a cause of action for the cancellation of a deed of the property purchased to a cause of action for possession of the same property where both causes affect all the parties in the same character and capacity and are strictly connected with the subject-matter of litigation. Pfister *v.* Dascey, 65 Cal. 403, 4 Pac. 363; Stock-Growers' Bank *v.* Newton, 13 Colo. 245, 22 Pac. 444.

98. Hunt *v.* Worsfold, [1896] 2 Ch. 224, 65 L. J. Ch. 548, 74 L. T. Rep. N. S. 456, 44 Wkly. Rep. 461 [not *following* Mulckern *v.* Doerks, 53 L. J. Q. B. 526, 51 L. T. Rep. N. S. 429].

99. Lane *v.* Dowd, 172 Mo. 167, 72 S. W. 632; Bockes *v.* Lansing, 74 N. Y. 437 [*affirming* 13 Hun 38]; Kruczinski *v.* Neuendorf, 99 Wis. 264, 74 N. W. 974. See also Keens *v.* Gaslin, 24 Nebr. 310, 38 N. W. 797.

1. Reams *v.* Spann, 28 S. C. 530, 6 S. E. 325; McGee *v.* Hall, 23 S. C. 388. But see Moreau *v.* Detchemendy, 41 Mo. 431 (holding that the causes cannot be united in the same count); Westlake *v.* Farrow, 34 S. C. 270, 13 S. E. 469 (in which the propriety of joinder was questioned).

2. Bigelow *v.* Gove, 7 Cal. 133, holding that the nature of the relief demanded cannot be determined.

3. Giant Powder Co. *v.* San Diego Flume Co., 78 Cal. 193, 20 Pac. 419 (a claim against the contractor to whom material was furnished may be joined in foreclosure of a materialman's lien against the owner of the premises); Stapleton *v.* King, 40 Iowa 278 (action for a breach of contract and to foreclose a mortgage given to secure the performance of the contract); Farmers', etc., Bank *v.* Rogers, 1 N. Y. Suppl. 757, 15 N. Y. Civ. Proc. 250 (judgment on a note and foreclosure of a lien on certificates of stock given as security); Parmenter *v.* Baker, 5 Silv. Sup. (N. Y.) 167, 8 N. Y. Suppl. 69, 24 Abb. N. Cas. 104 (a cause of action for money loaned may be joined with one to enforce a lien upon the specific avails of real estate mortgaged to secure the loan, and sold by the committee of the mortgagor under an order of court); Moore *v.* Ogden, 35 Ohio St. 430 (action to revive a decree in chancery and a demand for a personal judgment founded on the decree).

Implied prohibition.— A statutory provision authorizing the joinder of several causes of action, whether legal or equitable, but subject to the qualification that the causes of action so united must belong to one of the classes specified and, except in the action for the foreclosure of mortgages, as to which a separate provision is made, must affect all the parties to the action, by implication prohibits the union of a cause of action for the recovery of a debt, except in the case of a mortgage secured by a bond or other obligation of the mortgagor, or of a third person (Burroughs *v.* Tostevan, 75 N. Y. 567); but this rule does not apply under the code of civil procedure, section 484 (Parmenter *v.* Baker, 5 Silv. Sup. (N. Y.) 167, 8 N. Y. Suppl. 69, 24 Abb. N. Cas. 104).

Joinder of actions in mechanic's lien proceedings see, generally, Mechanics' Liens.

4. See the codes of the several states. And see Brugman *v.* McGuire, 32 Ark. 733, where it was held in mechanic's lien proceedings that plaintiffs were not, by a failure to establish their lien, precluded from obtaining a personal judgment against defendants.

5. *California.*— Rollins *v.* Forbes, 10 Cal. 299, so holding where the mortgage was exe-

the complaint seeking such relief being sometimes held to state but a single cause of action.[6] In some code states, however, a cause of action upon the debt and to foreclose the mortgage cannot be joined,[7] although it appears that in such states a deficiency judgment may be rendered in foreclosure as incidental relief.[8] In the absence of a statute modifying the general rule, the same parties must be affected by the claims to establish the debt and to enforce the lien.[9] In the further application of these principles, it has been held that a claim for the possession of land may be united with one to recover upon the debt and for a foreclosure,[10] or that a vendor may have a judgment for purchase-money, and also subject the land sold to the payment thereof,[11] or enforce his vendor's lien.[12] So a mortgage may be foreclosed and a judgment had upon an unsecured debt,[13] or a note containing a mortgage lien on chattels enforced in connection with the foreclosure of another chattel mortgage on the same property, for the same debt.[14] So also an action upon an award as to the amount of damages resulting from a breach of covenant in a deed may be joined with one to foreclose a mortgage indemnifying plaintiff against such breach,[15] or a judgment may be had for money taken fraudulently, and a lien declared upon realty purchased with such money.[16] Where causes of action upon the debt and for foreclosure are held to

cuted by a husband and wife, and the note was made by the husband alone.

Indiana.— Jaseph *v.* Peoples' Sav. Bank, (1889) 22 N. E. 980.

Iowa.— Breckinridge *v.* Brown, 9 Iowa 396 [explaining Sands *v.* Wood, 1 Iowa 263]. And see Kleis *v.* McGrath, 127 Iowa 459, 103 N.W. 371, 69 L. R. A. 260, holding that the holder of a note secured by a mortgage, and of a note for unpaid interest, signed by the same maker, may enforce payment of both notes in one action or proceeding to foreclose the mortgage.

North Carolina.— Martin *v.* McNeely, 101 N. C. 634, 8 S. E. 231.

Ohio.— Burdell *v.* Reeder, 2 Cinc. Super. Ct. 94.

Wisconsin.— Endress *v.* Shove, 110 Wis. 133, 85 N. W. 653, holding that a cause of action to enforce a mortgage and one to recover on the personal liability of the mortgagor grow out of the same transaction and are connected with the same subject thereof, and therefore may be joined, provided no one other than the debtor is made a defendant, and the two causes of action are separately stated.

See 1 Cent. Dig. tit. "Action," § 460.

A judgment for the deficiency is proper where all the parties are affected.— Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109; Faesi *v.* Goetz, 15 Wis. 231; Stilwell *v.* Kellogg, 14 Wis. 461; Jesup *v.* Racine City Bank, 14 Wis. 331; Cary *v.* Wheeler, 14 Wis. 281; Sauer *v.* Steinbauer, 14 Wis. 70. See also Walton *v.* Goodnow, 13 Wis. 661.

By statute it is provided in some cases that a deficiency judgment cannot be had in connection with a decree of foreclosure, but may be rendered only at or after the confirmation of the report of sale. Baird *v.* McConkey, 20 Wis. 297, holding that Laws (1862), c. 243, making such provision, did not apply to an action to foreclose a mortgage given to a corporation for a subscription to its capital stock.

Nature and propriety of deficiency judgment in foreclosure in general see MORTGAGES.

6. See *supra*, I, A, 3, c, (v).

7. McKee *v.* Pope, 18 B. Mon. (Ky.) 548 (on the ground that the causes do not belong to the same class); Dudley *v.* Congregation T. O. St. F., 138 N. Y. 451, 34 N. E. 281 [*affirming* 65 Hun 21, 19 N. Y. Suppl. 605].

8. Dudley *v.* Congregation T. O. St. F., 138 N. Y. 451, 34 N. E. 281 [*affirming* 65 Hun 21, 19 N. Y. Suppl. 605]; Thorne *v.* Newby, 59 How. Pr. (N. Y.) 120. See also *supra*, I, A, 3, c, (v).

9. Plankington *v.* Hildebrand, 89 Wis. 209, 61 N. W. 839, holding that a cause of action for the foreclosure of a pledge of certain stock owned by one defendant could not be united with a demand for a deficiency judgment against two other defendants as maker and indorser of a note, for the security of which the stock was pledged.

Foreclosure of mortgages.— Faesi *v.* Goetz, 15 Wis. 231; Jesup *v.* Racine City Bank, 14 Wis. 331; Cary *v.* Wheeler, 14 Wis. 281; Sauer *v.* Steinbauer, 14 Wis. 70; Borden *v.* Gilbert, 13 Wis. 670. See also Walton *v.* Goodnow, 13 Wis. 661, holding that a demurrer, on the ground that remedies *in rem* and *in personam* were sought in the same suit was not frivolous.

Necessity that causes of action affect all the parties thereto see *infra*, I, B, 2, r.

10. Martin *v.* McNeely, 101 N. C. 634, 8 S. E. 231; Robinson *v.* Willoughby, 67 N. C. 84.

11. Allen *v.* Taylor, 96 N. C. 37, 1 S. E. 462.

12. Walker *v.* Sedgwick, 8 Cal. 398.

13. Witte *v.* Wolfe, 16 S. C. 256.

14. Campbell *v.* Nicholson, (Tex. App. 1892) 18 S. W. 135.

15. McKinnis *v.* Freeman, 38 Iowa 364.

16. File *v.* Springel, 132 Ind. 312, 31 N. E. 1054.

be properly joined, the failure to establish the right to a foreclosure will not prevent a recovery upon the debt.[17]

(VI) *SPECIFIC PERFORMANCE AND DAMAGES FOR NON-PERFORMANCE.* In the same action plaintiff may join a demand for specific performance and a claim for damages for the breach of a contract.[18] In such a case if the equitable relief sought cannot be granted plaintiff may recover such damages as he shows himself entitled to;[19] but he will not be entitled to damages in the absence of allegations showing a right thereto.[20]

(VII) *ESTABLISHMENT OF DEBT AND SETTING ASIDE FRAUDULENT CONVEYANCE.* Under the rule that legal and equitable relief may be sought in the same action, a creditor may in the same proceeding obtain a judgment for his debt and also have the aid of equity to subject property of the debtor to the payment of the debt,[21] such as by the setting aside of a fraudulent conveyance.[22] In many of the code states, however, this rule does not prevail, and a creditor seeking to set aside a fraudulent conveyance must first obtain a judgment on his debt.[23] On the same principle, in an action to set aside a fraudulent conveyance, a money judgment may be awarded where the premises have been conveyed to innocent purchasers, rendering the equitable relief unavailing.[24] An action to set aside a conveyance as fraudulent may be joined with one to declare a transaction, whereby the debtor's statutory homestead had been enlarged, void as to creditors, and to subject the added land to the lien of the judgment.[25] In an action for

17. Jaseph *v.* Peoples' Sav. Bank, (Ind. 1889) 22 N. E. 980; American Sav., etc., Assoc. *v.* Burghardt, 19 Mont. 323, 48 Pac. 391, 61 Am. St. Rep. 507.

Where the causes of action cannot be joined a contrary rule prevails. Dudley *v.* Congregation T. O. St. F., 138 N. Y. 451, 34 N. E. 281 [*affirming* 65 Hun 21, 19 N. Y. Suppl. 605].

18. Margraf *v.* Muir, 57 N. Y. 155; Sternberger *v.* McGovern, 56 N. Y. 12; Van Deventer *v.* Van Deventer, 32 N. Y. App. Div. 578, 53 N. Y. Suppl. 236; Towle *v.* Jones, 1 Rob. (N. Y.) 87; Stanton *v.* Missouri Pac. R. Co., 2 N. Y. Suppl. 298. *Contra*, Ferguson *v.* Burt, 2 Utah 388, holding that a count for the specific performance of a contract to convey real property could not be joined with one to recover money upon an alleged agreement, since the causes belong to different classes.

Alternative relief in action for specific performance see SPECIFIC PERFORMANCE.

19. Margraf *v.* Muir, 57 N. Y. 155; Sternberger *v.* McGovern, 56 N. Y. 12; Barlow *v.* Scott, 24 N. Y. 40. See also Greason *v.* Keteltas, 17 N. Y. 491.

20. Beck *v.* Allison, 56 N. Y. 366, 15 Am. Rep. 430.

21. Vail *v.* Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330; Palen *v.* Bushnell, 46 Barb. (N. Y.) 21 (holding that a receiver in supplementary proceedings may, in an action for restitution of the judgment debtor's property, unite all the claims he has against defendant on this subject of action, and aver the different transactions out of which his right to restitution flows, although in some instances relief must be afforded by setting aside transfers void for usury); Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 88 Tex. 468, 27 S. W. 100 (holding that in an action by corporate creditors to set aside a trust deed to preferred creditors actions might be joined to compel the creditors to pay into court moneys which they had received under the deed).

22. *Georgia.*— Kruger *v.* Walker, 111 Ga. 383, 36 S. E. 794.

Indiana.— File *v.* Springel, 132 Ind. 312, 31 N. E. 1054; Bowen *v.* State, 121 Ind. 235, 23 N. E. 75; Feder *v.* Field, 117 Ind. 386, 20 N. E. 129; Field *v.* Holzman, 93 Ind. 205; Lindley *v.* Cross, 31 Ind. 106, 99 Am. Dec. 610; Frank *v.* Kessler, 30 Ind. 8; Harker *v.* Glidewell, 23 Ind. 219; Love *v.* Mikals, 11 Ind. 227.

North Carolina.— Dawson Bank *v.* Harris, 74 N. C. 206; Glenn *v.* Farmers' Bank, 72 N. C. 626.

Ohio.— Kennedy *v.* Dodge, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360.

Texas.— Shirley *v.* Waco Tap R. Co., 78 Tex. 131, 10 S. W. 543; Cassaday *v.* Anderson, 53 Tex. 527.

See 1 Cent. Dig. tit, "Action," § 458.

The Indiana code provides that when the action arises out of contract plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment. Rev. St. (1881) § 280. Under this provision a cause of action to set aside a fraudulent conveyance may be joined with an action for the enforcement of the debt. Bowen *v.* State, 121 Ind. 235, 23 N. E. 75 (where in a declaration on a bond it was prayed that certain conveyances by the surety be set aside); Hamilton *v.* Barricklow, 96 Ind. 398.

23. See FRAUDULENT CONVEYANCES, 20 Cyc. 683 *et seq.*

24. Valentine *v.* Richardt, 126 N. Y. 272, 27 N. E. 255.

25. Hunt *v.* Dean, 91 Minn. 96, 97 N. W. 574.

divorce in which alimony is sought, a fraudulent conveyance by the husband may be set aside in order that the property conveyed may be reached and subjected to the payment of alimony.[26]

q. Admiralty and Law and Equity. A suit in admiralty cannot be joined with one in law or equity,[27] although by statute one court is given general jurisdiction over such proceedings, and one form of action is provided for the enforcement and protection of private rights and the redress and prevention of private wrongs.[28]

r. Necessity That All Parties Be Affected — (i) *General Rule.* A provision common to all of the codes is that causes of action which may be joined must affect all the parties to the action.[29] This rule does not require that the causes of action affect all the parties equally; it is sufficient that they affect all the parties, although in different degrees.[30] An exception to this rule is made by many of the codes, in the case of actions to enforce mortgages and other liens,[31] for example it may be proper to join a claim for a deficiency judgment against the maker of the mortgage, and also against the principal debtor, in an action for the foreclosure of a mortgage held as collateral.[32]

(ii) *Plaintiffs* — (a) *In General.* It is necessary that the causes of action shall each affect all plaintiffs.[33] Hence a cause of action which shows a joint right of recovery cannot be joined with one which shows a several right,[34]

26. Prouty *v.* Prouty, 4 Wash. 174, 29 Pac. 1049.

27. Bruce *v.* Murray, 123 Fed. 366, 59 C. C. A. 494, holding that a cause of action for foreclosure of a mortgage on a vessel could not be joined with one to enforce liens for wages of seaman against the vessel.

Joinder of causes in admiralty see ADMIRALTY, 1 Cyc. 848.

28. Bruce *v.* Murray, 123 Fed. 366, 59 C. C. A. 494.

29. See the codes of the several states. And see Griffith *v.* Griffith, (Kan. 1905) 81 Pac. 178; Hentig *v.* Southwestern Mut. Ben. Assoc., 45 Kan. 462, 25 Pac. 878; Liney *v.* Martin, 29 Mo. 28; Viall *v.* Mott, 37 Barb. (N. Y.) 208 (where plaintiffs, as heirs of two estates, sought to join their causes of action with regard to both estates, against the executors of one estate and the administrator of the other); Day *v.* State Bank, 52 N. Y. Super. Ct. 363; Taylor *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 299; Higgins *v.* Crichton, 11 Daly (N. Y.) 114; Earle *v.* Scott, 50 How. Pr. (N. Y.) 506; and other cases more specifically cited *infra*, I, B, 2, r, (II), (III).

Under the English Judicature Act, to justify a joinder, there must be an identity either of parties or of subject-matter. Smith *v.* Richardson, 4 C. P. D. 112, 48 L. J. C. P. 140, 40 L. T. Rep. N. S. 256, 27 Wkly. Rep. 230.

Propriety and necessity of joinder of parties as distinguished from causes of action see PARTIES.

30. Richtmyer *v.* Richtmyer, 50 Barb. (N. Y.) 55; Vermeule *v.* Beck, 15 How. Pr. (N. Y.) 333.

Joinder of defendants affected in different degrees see *infra*, I, B, 2, r, (III), (B).

31. See Benson *v.* Battey, 70 Kan. 288, 78 Pac. 844; Harrod *v.* Farrar, 68 Kan. 153, 74 Pac. 624; Nicols *v.* Randall, 5 Minn. 304, holding that a cause of action to have a deed declared to be a mortgage might be joined with causes for the foreclosure thereof, for judgment on a collateral note, for a deficiency, and for the surrender of an instrument given by way of defeasance. See, generally, MORTGAGES.

32. Hastings First Nat. Bank *v.* Lambert, 63 Minn. 263, 65 N. W. 451.

33. *Georgia.*— Miller *v.* Butler, 121 Ga. 758, 49 S. E. 754.

Indiana.— Tate *v.* Ohio, etc., R. Co., 10 Ind. 174, 71 Am. Dec. 309.

Kansas.— Griffith *v.* Griffith, (1905) 81 Pac. 178.

Missouri.— Liney *v.* Martin, 29 Mo. 28.

New York.— Conard *v.* Southern Tier Masonic Relief Assoc., 101 N. Y. App. Div. 611, 93 N. Y. Suppl. 626; Taylor *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 299.

West Virginia.— Yaeger *v.* Fairmont, 43 W. Va. 259, 27 S. E. 234.

England.— Smurthwaite *v.* Hannay, [1894] A. C. 494, 7 Aspin. 485, 63 L. J. Q. B. 737, 71 L. T. Rep. N. S. 157, 6 Reports 299, 43 Wkly. Rep. 113; Stroud *v.* Lawson, [1898] 2 Q. B. 44, 67 L. J. Q. B. 718, 78 L. T. Rep. N. S. 729, 46 Wkly. Rep. 626.

See 1 Cent. Dig. tit. "Action," § 514 *et seq.*

Parties claiming under titles adverse to each other cannot join in ejectment.— Hubbell *v.* Lerch, 58 N. Y. 237.

Actions by owners of distinct parcels of land to restrain tax-sales on illegal assessment cannot be joined. Barnes *v.* Beloit, 19 Wis. 93; Newcomb *v.* Horton, 18 Wis. 566.

34. *California.*— Barham *v.* Hostetter, 67 Cal. 272, 7 Pac. 689, injunction and damages.

Colorado.— Dubois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067, accounting and claim for damages.

Indiana.— Tate *v.* Ohio, etc., R. Co., 10 Ind. 174, 71 Am. Dec. 309.

Iowa.— Grant *v.* McCarty, 38 Iowa 468, re-

although if plaintiffs have a common interest and seek a common relief, the fact that they might also have sued separately does not indicate a misjoinder.[35]

(B) *Contracts.* Several plaintiffs cannot join suits for breach of contracts made with them severally, although by the same defendant and of the same nature;[36] nor can simple contract creditors join to enforce their claims and set aside a fraudulent conveyance.[37] It has, however, been held that actions upon bonds for the same general object may be joined, although the obligees are different.[38]

(C) *Torts.* To authorize a joinder of causes of action in tort, it is necessary that they each affect all the plaintiffs;[39] hence a joint claim cannot be united with a single one,[40] nor when the same tort affects the several rights of different persons can their causes of action be joined.[41]

(D) *Actions by Husband and Wife.* A cause of action in favor of the husband[42] or of the wife[43] alone cannot be joined with one in favor of the husband and wife. Nor can actions by the husband and wife in their separate rights be joined.[44]

(E) *Actions in Different Rights.* A plaintiff cannot in the same action sue in more than one distinct right;[45] hence a plaintiff cannot sue as an individual and

covery of possession of property, and assault and battery.

Kansas.— New *v.* Smith, 68 Kan. 807, 74 Pac. 610.

South Dakota.— Charles City First Nat. Bank *v.* D. S. B. Johnson Land Mortg. Co., 17 S. D. 522, 97 N. W. 748, actions to quiet title and to cancel instruments relating to the title.

See 1 Cent. Dig. tit. "Action," § 514 *et seq.*

35. Whiting *v.* Elmira Industrial Assoc., 45 N. Y. App. Div. 349, 61 N. Y. Suppl. 27; Wall *v.* Fairley, 73 N. C. 464; Gates *v.* Boomer, 17 Wis. 455; Drinqhier *v.* Wood, [1899] 1 Ch. 393, 68 L. J. Ch. 181, 79 L. T. Rep. N. S. 548, 6 Manson 76, 47 Wkly. Rep. 252; Oxford, etc., Universities *v.* Gill, [1899] 1 Ch. 55, 68 L. J. Ch. 34, 79 L. T. Rep. N. S. 338, 47 Wkly. Rep. 248. See also Booth *v.* Mohr, 122 Ga. 333, 50 S. E. 173; Keys *v.* Mathes, 38 Kan. 212, 16 Pac. 436; Ellis *v.* Bedford, [1899] 1 Ch. 494, 68 L. J. Ch. 289, 80 L. T. Rep. N. S. 332, 47 Wkly. Rep. 385.

36. Akins *v.* Hicks, 109 Mo. App. 95, 83 S. W. 75.

37. Wachsmuth *v.* Sims, (Tex. Civ. App. 1895) 32 S. W. 821.

38. Cordray *v.* State, 55 Tex. 140, so holding where an action was brought to enforce bonds given by a sheriff, one of which was payable to the governor of the state or his successors in office, and the other to the state.

39. Grant *v.* McCarty, 38 Iowa 468; Hinkle *v.* Davenport, 38 Iowa 355 (holding that a joint action for the same slanderous words spoken of several cannot be maintained): Gray *v.* Rothschild, 112 N. Y. 668, 19 N. E. 847 (holding that several persons who had sold goods at different times to defendants could not join in a single action, alleging that the goods were obtained by false representations and that defendants conspired to purchase them on credit, and to defraud the sellers of the price); Anderson *v.* Western Union Tel. Co., 84 Tex. 17, 19 S. W. 285 (holding that causes of action in favor of a father and of his son, for failure to deliver telegrams, could not be joined); Stroud *v.* Lawson, [1898] 2 Q. B. 44, 67 L. J. Q. B. 718, 78 L. T. Rep. N. S. 729, 46 Wkly. Rep. 626; Sandes *v.* Wildsmith, [1893] 1 Q. B. 771, 62 L. J. Q. B. 404, 69 L. T. Rep. N. S. 387 (holding that a mother and daughter could not, in an action against a husband and wife, set up several distinct slanders, some of one plaintiff, and some of the other); Peddie *v.* Kyle, [1900] 2 Ir. 265. But see Booth *v.* Briscoe, 2 Q. B. D. 496, 25 Wkly. Rep. 838.

40. Taylor *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 299, injury to leasehold of two owners, and personal injury to one owner.

41. Foreman *v.* Boyle, 88 Cal. 290, 26 Pac. 94 (diversion of water used for irrigation of several tracts); Barham *v.* Hostetter, 67 Cal. 275, 7 Pac. 689 (to the same effect); Hanna *v.* Duxbury, 94 Minn. 8, 101 N. W. 971; Hellams *v.* Switzer, 24 S. C. 39 (where several adjacent landowners were injured by the erection of a dam).

Several persons injured by the same fraud cannot sue together if their interests are distinct (Levering *v.* Schnell, 78 Mo. 167; Woodbury *v.* Deloss, 65 Barb. (N. Y.) 501; Powell *v.* Dayton, etc., R. Co., 13 Oreg. 446, 11 Pac. 222), although they may where their interests are joint (Larsen *v.* Groeschel, 98 Ind. 160, where owners of separate lots were defrauded into exchanging their lots for a farm in which they become jointly interested; Powell *v.* Dayton, etc., R. Co., 13 Oreg. 446, 11 Pac. 222).

42. Lathrope *v.* Flood, 135 Cal. 458, 67 Pac. 683, 57 L. R. A. 215 [*reversing* (1901) 63 Pac. 1007]; Tell *v.* Gibson, 66 Cal. 247, 5 Pac. 223. See also Avogadro *v.* Bull, 4 E. D. Smith (N. Y.) 384.

43. Anderson *v.* Scandia Bank, 53 Minn. 191, 54 N. W. 1062.

44. Stewart *v.* Alvis, 30 Ind. App. 237, 65 N. E. 937; Morton *v.* Western Union Tel. Co., 130 N. C. 299, 41 S. E. 484.

45. Carrier *v.* Bernstein, 104 Iowa 572, 73 N. W. 1076 (holding that an action by a wife to recover statutory damages because of the sale of intoxicating liquors to her husband

as a representative.[46] Under this rule a plaintiff cannot join an individual and a partnership claim;[47] but a surviving partner may sue as such, and also recover as an individual for services under a contract with the partnership, rendered after the death of his copartner.[48] So generally a cause of action for wrongfully causing the death of another cannot be joined with one in the right of the decedent accruing to his estate.[49] A cause of action in favor of devisees of realty cannot be joined with one in favor of the executor in the right of the decedent.[50] A plaintiff having a common interest as executor and devisee may join actions in both rights,[51] and in the same case the executors and devisees may join.[52] So also a person may sue as remainder-man and as heir-at-law of the life-tenant.[53] An action by an assignee to recover personal property cannot be united with an action to settle and distribute the estate of his assignor.[54]

(III) *DEFENDANTS*—(A) *In General.* Where causes of action affecting different parties defendant are joined, it is necessary that each cause of action affect all of the defendants, this necessity resulting from the rule common to all of the codes that causes of action may be joined only when they affect all the parties to the action.[55] It results from this rule that there must be a common or a joint

could not be joined with an action to enforce a penalty which it was provided might be recovered for the benefit of the school fund); Maddox *v.* Williams, 5 Ky. L. Rep. 696; Warwick *v.* New York, 28 Barb. (N. Y.) 210 (holding that a plaintiff cannot join a cause of action in his own right with one for himself and others, as taxpayers, although they relate to the same subject-matter); Johnson *v.* Seattle Electric Co., 39 Wash. 211, 81 Pac. 705 (holding that a husband's cause of action for funeral expenses paid by him on the wrongful death of his wife cannot be joined with a cause of action on behalf of the minor child of the husband and wife for the death of his mother).

46. Cincinnati, etc., R. Co. *v.* Chester, 57 Ind. 297 (holding that a father cannot in the same action recover damages for personal injuries and for the death of a minor child, although they result from the same act of negligence, in case the action for the death is vested, by the statute conferring the right to maintain it, in the next of kin of the child); Moss *v.* Cohen, 15 Misc. (N. Y.) 108, 36 N. Y. Suppl. 265.

Actions by executors or administrators see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 974.

An action by a creditor of a corporation, as an individual, cannot be joined by him with one in behalf of all the creditors of the corporation. Sturtevant-Larrabee Co. *v.* Mast, etc., Co., 66 Minn. 437, 69 N. W. 324.

Stock-holders' actions in behalf of a corporation cannot be joined with actions in favor of the stock-holders individually. Stoddard *v.* Bell, 100 N. Y. App. Div. 389, 91 N. Y. Suppl. 477; Groh *v.* Flammer, 100 N. Y. App. Div. 305, 91 N. Y. Suppl. 423; Pietsch *v.* Krause, 116 Wis. 344, 93 N. W. 9; Whitney *v.* Fairbanks, 54 Fed. 985.

A cause of action on an agreement for the reorganization of a corporation cannot be joined with a cause for the removal of the officers of the reorganized company. Stanton *v.* Missouri Pac. R. Co., 2 N. Y. Suppl. 298.

47. Morgan *v.* Pollard, 75 Ga. 358; Citizens' State Bank *v.* Frazee, 8 Kan. App. 638, 56 Pac. 506; Taylor *v.* Manhattan R. Co., 53 Hun (N. Y.) 305, 6 N. Y. Suppl. 488; Malsby *v.* Lanark Fuel Co., 55 W. Va. 484, 47 S. E. 358.

48. O'Brien *v.* Gilleland, 79 Tex. 602, 15 S. W. 681.

49. *Indiana.*— See Cincinnati, etc., R. Co. *v.* Chester, 57 Ind. 297.

Iowa.— Frink *v.* Taylor, 4 Greene 196.

Kentucky.— Louisville R. Co. *v.* Will, 66 S. W. 628, 23 Ky. L. Rep. 1961; Louisville, etc., R. Co. *v.* Kellem, 13 Ky. L. Rep. 228.

Massachusetts.— Hyde *v.* Booth, 188 Mass. 290, 74 N. E. 337; Brennan *v.* Standard Oil Co., 187 Mass. 376, 73 N. E. 472.

Michigan.— Hurst *v.* Detroit City R. Co., 84 Mich. 539, 48 N. W. 44.

Mississippi.— McVey *v.* Illinois Cent. R. Co., 73 Miss. 487, 19 So. 209.

50. Jacobson *v.* Brooklyn El. R. Co., 22 Misc. (N. Y.) 281, 48 N. Y. Suppl. 1072.

51. Armstrong *v.* Hall, 17 How. Pr. (N. Y.) 76.

52. Richtmyer *v.* Richtmyer, 50 Barb. (N. Y.) 55.

53. People's Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20, action to set aside a transfer of stock and to quiet title.

54. Atchison *v.* Jones, 1 S. W. 406, 8 Ky. L. Rep. 259.

55. *California.*— Ghiradelli *v.* Bourland, 32 Cal. 585; People *v.* Skidmore, 17 Cal. 260, where, in an action against the sureties upon a recognizance, it was held improper to join a third person for the purpose of having property, alleged to have been conveyed to him in order to secure the sureties on the bond, applied to the payment of the bond.

Florida.— Fagan *v.* Barnes, 14 Fla. 53, holding it improper to seek specific performance against one party and ejectment against another.

Georgia.— Ramey *v.* O'Byrne, 121 Ga. 516, 49 S. E. 595; Van Dyke *v.* Van Dyke, 120 Ga. 984, 48 S. E. 380; Willis *v.* Galbreath, 115 Ga. 793, 42 S. E. 81.

Indiana.— Ferguson *v.* Hull, 136 Ind. 339, 36 N. E. 254, holding that a cause of action

liability to warrant the joinder of different causes of action against two or more

against an officer for a wrong in enforcing collection of a judgment cannot be joined in an action to review the judgment.

Iowa.— Prader *v.* National Masonic Acc. Assoc., 107 Iowa 431, 78 N. W. 60 (holding that a cause of action on a bond, for the performance of a decree, could not be joined with a cause of action upon the decree); Thorpe *v.* Dickey, 51 Iowa 676, 2 N. W. 581 (holding that an action upon an account for goods sold and delivered to the indorsers of a note could not be joined with an action on the note against the maker and indorser thereof).

Kansas.— Benson *v.* Battey, 70 Kan. 288, 78 Pac. 844; Harrod *v.* Farrar, 68 Kan. 153, 74 Pac. 624; Atchison, etc., R. Co. *v.* Sumner County, 51 Kan. 617, 33 Pac. 312; Rizer *v.* Davis County, 48 Kan. 389, 29 Pac. 595 (holding it improper to join an action against a board of commissioners for the settlement of an officer's accounts, with an action against the sureties on the bond of such officer, for the wrongful conversion of property deeded in trust to them to protect them as such sureties); Hentig *v.* Southwestern Mut. Ben. Assoc., 45 Kan. 462, 25 Pac. 878 (holding that an action against the president of an insurance association and the holder of an insurance certificate, to enforce a lien for services to the holder of the certificate could not be joined with an action on a bond given under a statute requiring the officers of such association to give a bond for the proper payment and disbursement of all moneys coming into their hands, and for the faithful performance of all contracts made with certificate holders); State *v.* Reno County, 38 Kan. 317, 16 Pac. 337 (where it was held that there was a misjoinder in an alternative writ of mandamus commanding a board of commissioners to canvass the petition of taxpayers of one township, with an order to fix the date of election for several other townships).

Kentucky.— St. Joseph's Orphan Soc. *v.* Wolpert, 80 Ky. 86, distinct claims for support of several infants at an orphan asylum cannot be joined.

Missouri.— Parker *v.* Rodes, 79 Mo. 88, action against the purchaser for purchase-price, and against a third person who converted the goods sold from the purchaser.

New York.— Galusha *v.* Galusha, 138 N. Y. 272, 33 N. E. 1062 (actions for absolute divorce and for an annulment of a separation agreement cannot be joined); Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192 (owner of land cannot in the same action affirm a sale by a broker and hold the vendee as his trustee, and also hold the broker responsible for damages in fraudulently selling the same property); Case *v.* New York Mut. Sav., etc., Assoc., 88 N. Y. App. Div. 538, 85 N. Y. Suppl. 104; Olin *v.* Arendt, 35 N. Y. App. Div. 529, 54 N. Y. Suppl. 820; Goldmark *v.* Magnolia Anti-Friction Metal Co., 30 N. Y. App. Div. 580, 52 N. Y. Suppl. 446 (an express contract cannot be enforced against one defendant and a different and implied contract against another); Arkenburgh *v.* Wiggins, 13 N. Y. App. Div. 96, 43 N. Y. Suppl. 294, 26 N. Y. Civ. Proc. 214; Hunt *v.* American Radiator Co., 2 N. Y. App. Div. 34, 37 N. Y. Suppl. 576; Cummings *v.* American Gear, etc., Co., 87 Hun 598, 34 N. Y. Suppl. 541 (holding a cause of action to enforce the liability of corporate directors for failure to file an annual report properly joined with a cause of action to set aside a conveyance and judgment against the corporation, obtained by collusion with the directors for the purpose of defrauding creditors); Cleghorn *v.* Cleghorn, 79 Hun 609, 29 N. Y. Suppl. 432 (actions for partition, for ejectment, and for an accounting as to rents cannot be joined where defendants are not interested alike); Greene *v.* Martine, 27 Hun 246 (action against executors and devisees); Schnitzer *v.* Cohen, 7 Hun 665; Van Liew *v.* Johnson, 4 Hun 415, 6 Thomps. & C. 648 (action for rescission of contract and for an accounting); Voorhies *v.* Voorhies, 24 Barb. 150; Coster *v.* New York, etc., R. Co., 6 Duer 43, 3 Abb. Pr. 332 [*affirming* 5 Duer 677]; Adams *v.* Stevens, 7 Misc. 468, 27 N. Y. Suppl. 993, 23 N. Y. Civ. Proc. 356; Stanton *v.* Missouri Pac. R. Co., 2 N. Y. Suppl. 298, 15 N. Y. Civ. Proc. 296 (holding that an action upon an agreement, under which a new corporation was to be formed by the stock-holders of an old corporation, on the purchase of property of the old corporation upon foreclosure and sale, could not be joined with an action to remove the officers of the new corporation); Church *v.* Stanton, 9 N. Y. St. 121; Lexington, etc., R. Co. *v.* Goodman, 15 How. Pr. 85 (holding that separate actions should be brought against each transferee of trust property wrongfully conveyed by the trustees in various transactions); Alger *v.* Scoville, 6 How. Pr. 131.

North Carolina.— Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234, a cause of action for wrongful attachment cannot be brought with one against the surety on the attachment bond.

Ohio.— Stone *v.* Becker, 4 Ohio Dec. (Reprint) 541, 2 Clev. L. Rep. 346.

South Carolina.— Suber *v.* Allen, 13 S. C. 317, a creditor's bill against the heirs, the administrator, and the sureties of the administrator cannot be joined with a cause of action to determine the validity of the title of a third person to a portion of the land involved.

South Dakota.— Davis *v.* Novotney, 15 S. D. 118, 87 N. W. 582, where a trustee in bankruptcy sought in one action to recover property adjudged in several different suits to belong to certain of defendants, and also property sold in satisfaction of judgments in attachment by other defendants.

Texas.— Frost *v.* Frost, 45 Tex. 324; Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140; Coutlett *v.* U. S. Mortgage Co., (Civ. App. 1900) 60 S. W. 817; Mc-

persons;[56] hence a cause of action against two defendants cannot be joined with a cause of action against a single defendant.[57] An action in tort against one defendant cannot be joined with an action on contract against another.[58] Causes

Daniel *v.* Chinski, 23 Tex. Civ. App. 504, 57 S. W. 922; Missouri, etc., R. Co. *v.* Starr, 22 Tex. Civ. App. 353, 55 S. W. 393.

Wisconsin.— Hawarden *v.* Youghiogheny, etc., Coal Co., 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828 (in which it was held that causes of action were improperly joined, where one was based on damages arising from a conspiracy, and the other upon the right of plaintiffs, and others similarly situated, to have a perpetual injunction restraining the continuance of such conspiracy); Blakely *v.* Smock, 96 Wis. 611, 71 N. W. 1052 (action to settle the affairs of a partnership cannot be joined with one against the heirs of a deceased partner and the administrator, to declare the amount found due a lien on the realty of the decedent); Hughes *v.* Hunner, 91 Wis. 116, 64 N. W. 887 (an action on a bond given by a domestic insurance company to protect a reinsurance of its risks with a foreign company cannot be brought to enforce claims upon the policies of reinsurance and also upon original policies of the reinsurer); Hoffman *v.* Wheelock, 62 Wis. 434, 22 N. W. 713, 716 (action based upon a fraudulent sale by an administrator, involving third persons, and an action against the administrator individually for waste).

England.— Burstall *v.* Beyfus, 26 Ch. D. 35, 53 L. J. Ch. 565, 50 L. T. Rep. N. S. 542, 32 Wkly. Rep. 418; Smith *v.* Richardson, 4 C. P. D. 112, 48 L. J. C. P. 140, 40 L. T. Rep. N. S. 256, 27 Wkly. Rep. 230.

See 1 Cent. Dig. tit. "Actions," § 524 *et seq.*

Where certain of the parties are unnecessary to the complete determination of a cause of action which is joined with others the complaint is demurrable. Logan *v.* Wallis, 76 N. C. 416.

A complaint in an action in the nature of quo warranto against several officials, alleging that they hold their offices by different tenures, from different sources, and have forfeited them by different acts, misjoins distinct causes of action, in case the action is not directed at the power or authority of the officers as a board, but at the separate right of each to remain a member of the board. State *v.* Parker, 121 N. C. 198, 28 S. E. 297.

An action to wind up a partnership, brought by one partner against another, cannot be joined with an action to set aside an unauthorized sale of firm property by defendant partner. Waite *v.* Vinson, 14 Mont. 405, 36 Pac. 828.

Claims against different partnerships cannot be joined, although certain individuals are each members of all the partnerships. Benton *v.* Winner, 69 Hun (N. Y.) 494, 23 N. Y. Suppl. 413.

Actions against corporate directors who have not all been such at the same time cannot be joined (Warner *v.* James, 88 N. Y. App. Div. 567, 85 N. Y. Suppl. 153; Sayles *v.* White, 18 N. Y. App. Div. 590, 46 N. Y. Suppl. 194; Higgins *v.* Tefft, 4 N. Y. App. Div. 62, 38 N. Y. Suppl. 716); nor can actions for wrongful acts, in each of which all have not participated (Bonnell *v.* Wheeler, 16 Abb. Pr. N. S. (N. Y.) 81, liability for omissions to report, and for the making of false reports).

56. *Kentucky.*— Montgomery *v.* Tabb, 40 S. W. 906, 19 Ky. L. Rep. 468.

Minnesota.— Langevin *v.* St. Paul, 49 Minn. 189, 51 N. W. 817, 15 L. R. A. 766, an action against a city to recover money paid in order to redeem property from an erroneous tax-sale cannot be joined with an action against an owner of a parcel of the property redeemed to recover his proportion of the redemption money.

North Carolina.— State *v.* Parker, 121 N. C. 198, 28 S. E. 297; Mitchell *v.* Mitchell, 96 N. C. 14, 1 S. E. 648, a suit upon a breach of an administrator's bond cannot be joined with one against the judge of the probate court for his act in accepting an insufficient bond.

South Carolina.— Howard *v.* Wofford, 16 S. C. 148.

Washington.— Clark *v.* Great Northern R. Co., 31 Wash. 658, 72 Pac. 477, holding that where a conductor in refusing to permit plaintiff to ride was acting entirely as the agent of the carrier, he was not a proper party to an action for an alleged breach of the carrier's contract.

Wisconsin.— Turner *v.* Duchman, 23 Wis. 500, the holder of three tax deeds upon different tracts cannot quiet title to all, where the former owners were different.

In replevin, where separate articles are in possession of different persons, separate suits must be brought. Woolner *v.* Levy, 48 Mo. App. 469.

In ejectment see EJECTMENT, 15 Cyc. 59.

57. Jamison *v.* Culligan, 151 Mo. 410, 52 S. W. 224; Doan *v.* Holly, 25 Mo. 357; Spencer *v.* Candelaria Waterworks, etc., Co., 118 Fed. 921; Brown *v.* Lee, 19 Fed. 630.

A joint note and an individual note of one of the joint makers which has been transferred to plaintiff as collateral for the joint note cannot both be sued on in the same action. McDaniel *v.* Chinski, 23 Tex. Civ. App. 504, 57 S. W. 922.

58. Hoye *v.* Raymond, 25 Kan. 665 (action for damages against a constable cannot be joined with one on the constable's bond); Wilson *v.* Thompson, 1 Metc. (Ky.) 123; Phillips *v.* Flynn, 71 Mo. 424 (action by a landlord against his tenant for rent, and against another person for conversion of the crops).

Contract of one, and tort of several, cannot be joined (Mendenhall *v.* Wilson, 54 Iowa

of action upon liabilities which are partly joint and partly several cannot be joined.[59]

(B) *Application of Equitable Principles.* The abolition by the codes of the distinction between actions at law and suits in equity,[60] when taken in connection with the provision that causes of action arising out of the same transaction, or transactions connected with the same subject of action, may be united,[61] has caused the principles of equity as to multifariousness[62] to be applied to actions under the codes, in determining the propriety of the joinder of causes of action affecting different parties.[63] It is the object of these provisions to prevent a multiplicity of suits,[64] and their only effect, if any, upon equitable principles of multifariousness has been to enlarge the right of joining different causes in the same action.[65] It may be stated as a general rule that a complaint in an action of an equitable nature does not improperly join several causes of action, if they relate to matters of the same nature, in which all defendants are more or less interested, although the rights of defendants with respect to the general subject of the action may be different, or although some are directly interested in a part only of the general claim.[66] The existence of a connected interest in all the par-

589, 7 N. W. 14; Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142, 65 S. W. 1035; Tompkins *v.* White, 8 How. Pr. (N. Y.) 520; North Carolina Land Co. *v.* Beatty, 69 N. C. 329); nor can a cause of action upon the contract of several be united with the tort of one (State *v.* Kruttschnitt, 4 Nev. 178, such as a cause of action against the obligor and the sureties on an official bond, and a cause of action against the obligee alone, for damages).

59. Lewis *v.* Acker, 11 How. Pr. (N. Y.) 163.

60. See *supra*, I, B, 2, p, (I).

61. See *supra*, I, B, 2, n.

62. See EQUITY, 16 Cyc. 239.

63. First Div. St. Paul, etc., R. Co. *v.* Rice, 25 Minn. 278; New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592; Heggie *v.* Hill, 95 N. C. 303; Young *v.* Young, 81 N. C. 91. See also Douglas County *v.* Walbridge, 38 Wis. 179; Blake *v.* Van Tilborg, 21 Wis. 672.

64. First Div. St. Paul, etc., R. Co. *v.* Rice, 25 Minn. 278; Young *v.* Young, 81 N. C. 91.

65. Heggie *v.* Hill, 95 N. C. 303.

66. *California.*— Wilson *v.* Castro, 31 Cal. 420.

Florida.— Howse *v.* Moody, 14 Fla. 59.

Minnesota.— Foster *v.* Landon, 71 Minn. 494, 74 N. W. 281, where it was said that if the cause is so entire as to be incapable of being prosecuted in several suits, and there may be a necessary party defendant to some portion of the cause, and the judgment cannot be the same as to both parties, the claim will not be deemed multifarious, especially where all the matters grow out of a single transaction and are inseparable and interdependent.

New York.— Zimmerman *v.* Kinkle, 108 N. Y. 282, 15 N. E. 407; New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592 (holding that persons who under different circumstances and rights become holders of false certificates of stock, having a common origin and ground for invalidity, may be joined in an action for the cancellation of the certificates); Gray *v.* Fuller, 17 N. Y. App. Div. 29, 44 N. Y. Suppl. 883; Holmes *v.* Abbott, 53 Hun (N. Y.) 617, 6 N. Y. Suppl. 943 (where it was held that the committee of an incompetent might in the same proceeding seek to ascertain the extent of his ward's interest, and the validity of liens thereon held by various creditors); Wandle *v.* Turney, 5 Duer (N. Y.) 661; Woolf *v.* Barnes, 46 Misc. (N. Y.) 169, 93 N. Y. Suppl. 219; Zoccolo *v.* Stern, 25 Misc. (N. Y.) 246, 55 N. Y. Suppl. 58; Zimmerman *v.* Kunkel, 6 N. Y. St. 768; Henderson *v.* Henderson, 3 N. Y. St. 197 (claim for relief against a deed, by executors, may be joined in an action to set aside a trust created by the will); Morrissey *v.* Leddy, 11 N. Y. Civ. Proc. 438 (holding that mortgages held by the same plaintiff, which are past due and cover the same property, although not given at the same time nor by the same parties, may be foreclosed together and a deficiency judgment rendered); Turner *v.* Conant, 10 N. Y. Civ. Proc. 192. See also Kellogg *v.* Siple, 11 N. Y. App. Div. 458, 42 N. Y. Suppl. 379.

North Carolina.— Heggie *v.* Hill, 95 N. C. 303 (action by purchaser at a sale under foreclosure of a second mortgage, seeking to adjust the rights of judgment creditors, and the first mortgagee, and the purchaser at a sale under the first mortgage); Young *v.* Young, 81 N. C. 91. See also Outland *v.* Outland, 113 N. C. 74, 18 S. E. 72.

Wisconsin.— Carpenter *v.* Christianson, 120 Wis. 558, 98 N. W. 517 (where, in a taxpayer's action to prevent payment, by the county treasurer, of orders and judgments against the county, secured by fraud and collusion, the county, the board of supervisors who were charged with participating in the allowance of the fraudulent claims, the persons holding the orders or judgments, and a former county treasurer whose official account was alleged to have been fraudulently allowed, were made parties defendant); Grady *v.* Maloso, 92 Wis. 666, 66 N. W. 808; Ramash *v.* Scheuer, 81 Wis. 269, 51 N. W. 330 (holding that the vendor in a land contract may bring an action against the vendee and another to vacate a groundless attachment

ties centering in the point in issue in the cause, or in one common point of litigation, has been stated to be the test.[67] The question of damages or relief to be granted will not be deemed important.[68] The declaration is not objectionable if the causes of action arise out of the same transaction or a series of transactions forming one course of dealing and all tending to one end,[69] or if the relation of

levied on the land by such third person through collusion with the vendee, and to enable the vendee to retain possession, and it may be joined with one which seeks also to foreclose the contract and recover the premises free from encumbrances); Bassett *v.* Warner, 23 Wis. 673 (holding that a complaint in equity, by the heirs, for an accounting by one who assumed to act as administrator, is not multifarious for the reason that it seeks the avoidance of a conveyance made by the administrator to one with knowledge of the fraud, and also asks that the heirs of such grantee be compelled to reconvey); Blake *v.* Van Tilborg, 21 Wis. 672.

In Texas the rule is stated to be that all parties need not have an interest in all the matters in controversy, but that it will be sufficient if each party has an interest in some of the matters in the suit, such matters being connected with the others. Sun Ins. Office *v.* Beneke, (Civ. App. 1899) 53 S. W. 98 (holding that the mortgagee may be sued to recover the debt, to foreclose the mortgage, and to recover the proceeds of an insurance policy on the mortgaged premises, to the extent of the mortgaged interest, the mortgagee, his wife, and the insurance company being made parties); Muncy *v.* Mattfield, (Civ. App. 1897) 40 S. W. 345 (where an action to establish boundaries was brought against the separate owners of adjoining tracts); Killfoil *v.* Moore, (Civ. App. 1897) 39 S. W. 646 (holding that an action against the principal on an appeal-bond, for the use and occupation of the premises pending appeal, might be joined with one against the principal and surety on the bond for the same use and occupation); Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261 (holding that the sureties upon sequestration and replevy bonds may be joined in one action upon both bonds, they having been given in trespass to try title, and plaintiff having refused to surrender possession upon discontinuance of his action). See also Craddock *v.* Goodwin, 54 Tex. 578; Ney *v.* Todd, (Civ. App. 1902) 68 S. W. 1014; Cardwell *v.* Masterson, 27 Tex. Civ. App. 591, 66 S. W. 1121; and cases cited *supra*, I, B, 2, a, text and note 67.

67. Bowers *v.* Keesecher, 9 Iowa 422; Whiting *v.* Elmira Industrial Assoc., 45 N. Y. App. Div. 349, 61 N. Y. Suppl. 27; Mahler *v.* Schmidt, 43 Hun (N. Y.) 512, holding that where such is the case, unconnected parties may be joined, even though different relief is sought against them; but that if the action is against different parties concerning things of distinct natures, in which some of the parties have no interest, the joinder is improper. See also Shrigley *v.* Black, 59 Kan. 487, 53 Pac. 477; Hunt *v.* American Radiator Co., 2 N. Y. App. Div. 34, 37 N. Y. Suppl. 576; Douglas County *v.* Walbridge, 38 Wis. 179.

Upon agreements with insurance companies for apportionment of loss.— Where a person is insured in several companies, and each policy limits the amount of his recovery thereunder to the proportion of the loss which the policy should bear to the total insurance, it is proper in an action to recover for the loss to make each company a party defendant, since to that extent the provision in question makes all of the policies one contract. Pretzfelder *v.* Merchants Ins. Co., 116 N. C. 491, 21 S. E. 302. *Compare* Fegelson *v.* Niagara F. Ins. Co., 94 Minn. 486, 103 N. W. 455. *Contra*, Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140.

68. Whiting *v.* Elmira Industrial Assoc., 45 N. Y. App. Div. 349, 61 N. Y. Suppl. 27.

69. *California.*— Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369.

Minnesota.— French *v.* R. R. Smith, etc., Co., 81 Minn. 341, 84 N. W. 44.

New York.— Woodbury *v.* Delap, 1 Thomps. & C. 20; Newcombe *v.* Chicago, etc., R. Co., 8 N. Y. Suppl. 366.

North Carolina.— Fisher *v.* Southern L. & T. Co., 138 N. C. 224, 50 S. E. 659; Heggie *v.* Hill, 95 N. C. 303; King *v.* Farmer, 88 N. C. 22; Young *v.* Young, 81 N. C. 91; Bedsole *v.* Monroe, 40 N. C. 313. And see to the same effect Hamlin *v.* Tucker, 72 N. C. 502.

Wisconsin.— Douglas County *v.* Walbridge, 38 Wis. 179; Blake *v.* Van Tilborg, 21 Wis. 672.

Causes of action arising out of the same transaction or transactions connected with the same subject of action as the phrase is used in the codes may be taken to mean as in substance declaring that when a right, or certain connected rights, between the same parties are brought into legal controversy, all transactions between the parties bearing on the state of these rights may be included within the scope of the action, although such transactions considered as independent transactions would in their nature call for different forms of legal procedure for the purpose of investigation according to the practice that prevailed prior to the adoption of the code. Barrett *v.* Watts, 13 S. C. 441; Sueber *v.* Allen, 13 S. C. 317.

Fraudulent conveyances.— An action to set aside a conveyance of lands by a debtor, which he has not included in an assignment for the benefit of creditors, cannot be joined with a suit for an accounting under the assignment (Hatcher *v.* Winters, 71 Mo. 30); nor can a cause of action to set aside a conveyance, on the ground that it was made with intent to defraud creditors, be joined with a cause of action to set aside a mort-

defendants to the causes of action is such as to require the working out of their various liabilities as between themselves.[70] Hence, where several acts are done in pursuance of a single fraudulent scheme, all persons may be joined who in any manner have participated in such scheme or received anything through it.[71] An action, however, cannot be regarded as equitable, within the meaning of this rule, merely because it is disclosed that it will be difficult to obtain relief against all of the defendants in separate actions.[72]

(c) *Contracts* — (1) IN GENERAL. Causes of action founded upon different contracts cannot be joined, unless all the parties thereto are affected by each.[73] So actions upon joint and upon individual agreements cannot be joined.[74] By analogy, where the causes of action arise from judgments, all the judgment debtors must be the same.[75] Where the action depends upon privity of estate,

gage given by the debtor, on the ground that it was to secure a usurious loan (Marx *v.* Tailer, 12 N. Y. Civ. Proc. 226); nor can a cause of action arising out of a fraudulent assignment and breach of faith in the management of the assets by the assignee be joined with causes to set aside other alleged fraudulent conveyances made by the debtor to various persons, the different transactions being unconnected (Reed *v.* Stryker, 6 Abb. Pr. (N. Y.) 109). See, generally, FRAUDULENT CONVEYANCES, 20 Cyc. 708.

70. Love *v.* Keowne, 58 Tex. 191 (liabilities of sets of sureties upon administration bonds); Commercial Nat. Bank *v.* Cuero First Nat. Bank, (Tex. Civ. App. 1903) 77 S. W. 239 [*reversed* on other grounds in 97 Tex. 536, 80 S. W. 601, 101 Am. St. Rep. 879] (holding that it was proper, where one of the joint makers of a note pleaded that his signature was a forgery, to join as a defendant in the action on the note a third person who undertook to procure the signatures of the makers of the note, and who represented to plaintiff that the makers had signed it); Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; McCormick *v.* Blum, 4 Tex. Civ. App. 9, 22 S. W. 1054, 1120 (where an action was brought to establish several claims against a decedent's estate, and to foreclose a mortgage securing all existing debts and any debt that might thereafter accrue).

71. Dykman *v.* Keeney, 21 N. Y. App. Div. 114, 47 N. Y. Suppl. 352 (continuous mismanagement of the affairs of a bank); Wood *v.* Sydney Sash, etc., Co., 92 Hun (N. Y.) 22, 37 N. Y. Suppl. 885; Zoccolo *v.* Stern, 25 Misc. (N. Y.) 246, 55 N. Y. Suppl. 58; Grady *v.* Maloso, 92 Wis. 666, 66 N. W. 808 (one of several heirs to two tracts of land may maintain an action for partition of the two lots, against his coheirs and persons to whom they have conveyed an interest in one or the other, or both of the lots).

72. Dykman *v.* Keeney, 154 N. Y. 483, 48 N. E. 894 (wrongful acts of various corporate directors); O'Brien *v.* Fitzgerald, 143 N. Y. 377, 38 N. E. 371; O'Brien *v.* Fitzgerald, 6 N. Y. App. Div. 509, 39 N. Y. Suppl. 707 [*affirmed* in 150 N. Y. 572, 44 N. E. 1126].

73. *Arkansas.*— Hurlburt *v.* Wheeler, etc., Mfg. Co., 38 Ark. 594.

Colorado.— Faust *v.* Smith, 3 Colo. App. 505, 34 Pac. 261.

Georgia.— Renfroe *v.* Shuman, 94 Ga. 153, 21 S. E. 373.

Kansas.— Mentzer *v.* Burlingame, (1905) 81 Pac. 196.

Minnesota.— Trowbridge *v.* Forepaugh, 14 Minn. 133.

Mississippi.— Miller *v.* Northern Bank, 34 Miss. 412.

Nebraska.— Barry *v.* Wachosky, 57 Nebr. 534, 77 N. W. 1080; Mowery *v.* Mast, 9 Nebr. 445, 4 N. W. 69.

New York.— Roehr *v.* Liebmann, 9 N. Y. App. Div. 247, 41 N. Y. Suppl. 489, 3 N. Y. Annot. Cas. 297; Nichols *v.* Drew, 19 Hun 490.

Ohio.— Lee *v.* Fraternal Mut. Ins. Co., 1 Handy 217, 12 Ohio Dec. (Reprint) 109, holding that a cause of action on an original policy of insurance cannot be joined with one against another company on a policy of reinsurance.

See 1 Cent. Dig. tit. "Action," § 525.

By same agent.— Contracts between different persons cannot be joined, although they may have been negotiated by or through the same agent. Clegg *v.* Aikens, 5 Abb. N. Cas. (N. Y.) 95.

For same services or goods.— Distinct contracts cannot be joined, although for the same services (Berg *v.* Stanhope, 43 Minn. 176, 45 N. W. 15; Stewart *v.* Rosengren, 66 Nebr. 445, 92 N. W. 586), or for the same goods (Sanders *v.* Clason, 13 Minn. 379).

Joinder of causes of actions against principal and guarantor see GUARANTY, 20 Cyc. 1484.

Against maker and indorser of negotiable instruments see COMMERCIAL PAPER, 8 Cyc. 92.

74. Addicken *v.* Schrubbe, 45 Iowa 315; Doan *v.* Holly, 26 Mo. 186, 25 Mo. 357.

Partnership and individual contracts cannot be joined. Racine Wagon, etc., Co. *v.* Liegeois, 120 Wis. 497, 98 N. W. 218. *Compare* Garr *v.* Redman, 6 Cal. 574, holding that on a bill for the settlement and accounting of the proceeds of a joint adventure, one of defendants might be held to account for his individual promise to return a portion of the outfit.

75. Barnes *v.* Smith, 16 Abb. Pr. (N. Y.) 420.

and not of contract, several defendants may be joined.[76] An action upon a note pledged as collateral to another cannot be joined in an action upon a note which it secures.[77] Claims upon contracts made with different partnerships may be united, where the membership of such partnerships is identical.[78] In some states statutes provide that either one or more of the persons severally liable upon an instrument may be included in the same action.[79]

(2) OFFICIAL AND INDEMNITY BONDS. Actions against separate sureties upon bonds given to secure different duties cannot be joined;[80] but a common surety on different joint and several bonds given by an officer may be joined in an action against him upon all of the bonds;[81] and it has been held in many cases that actions may be brought on distinct indemnity bonds joining different sets of sureties, where the bonds relate to the same matters, and the rights and liabilities of each set of sureties depend upon those of the others.[82] A cause of action against the officer on a breach of his official bond may be joined with a cause of action against the sureties thereon for the same breach.[83]

(D) *Torts.* The rule that the causes of action must affect all the parties is applicable to torts;[84] for example actions for libels published upon different dates

76. Van Rensselaer *v.* Layman, 39 How. Pr. (N. Y.) 9, where an action was brought to recover rent reserved against persons who as assignees of the lessee had become owners in severalty of distinct parcels of the leased tract.

77. Crews *v.* Yowell, 76 S. W. 127, 25 Ky. L. Rep. 598.

78. Pilwisky *v.* Cattaberry, 9 N. Y. Suppl. 636.

79. Burnap *v.* Sylvania Co., 1 Ohio S. & C. Pl. Dec. 107, 7 Ohio N. P. 217, stock subscription contract. See also Bernero *v.* South British, etc., Ins. Co., 65 Cal. 385, 4 Pac. 382.

80. Street *v.* Tuck, 84 N. C. 605.

81. Syme *v.* Bunting, 86 N. C. 175, so holding, although the penalties of the bonds were in different sums. See also State *v.* Schneider, 35 Mo. 533, holding that a declaration founded upon two bonds, one with A as principal and B and others as sureties, and the other with B as principal and A as surety, was not objectionable after verdict.

82. *Kansas.*— Gilbert *v.* Board of Education, 45 Kan. 31, 25 Pac. 226, 23 Am. St. Rep. 700.

Mississippi.— See Adams *v.* Conner, 73 Miss. 425, 19 So. 198, where it could not be determined in which term of an officer who had succeeded himself, a default occurred, and separate bonds had been given for each term.

Nebraska.— Holeran *v.* Adams County School Dist. No. 17, 10 Nebr. 406, 6 N. W. 472.

Ohio.— Siebern *v.* Meyer, 11 Ohio Dec. (Reprint) 344, 26 Cinc. L. Bul. 147.

Texas.— Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974; Dunson *v.* Nacogdoches County, 15 Tex. Civ. App. 9, 37 S. W. 978. See also Coe *v.* Nash, (Civ. App. 1897) 40 S. W. 235.

83. Schilling *v.* Black, 49 Kan. 552, 31 Pac. 143; Moore *v.* Smith, 10 How. Pr. (N. Y.) 361, where in an action against a constable and his sureties plaintiff was permitted to join causes for neglect to make a return after taking sufficient goods to satisfy the execution and for withholding moneys after the return-day. See also Hoye *v.* Raymond, 25 Kan. 665.

84. *California.*— People *v.* Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305 (separate nuisances); Buell *v.* Dodge, 79 Cal. 208, 21 Pac. 735; Johnson *v.* Kirby, 65 Cal. 482, 4 Pac. 458.

Georgia.— Sims *v.* Cordele Ice Co., 119 Ga. 597, 46 S. E. 841.

Iowa.— Cogswell *v.* Murphy, 46 Iowa 44, damages by stock of several owners.

New York.— Hess *v.* Buffalo, etc., R. Co., 29 Barb. 391 (obstruction of easement by one defendant and continuation of obstruction by the other); Rodgers *v.* Rodgers, 11 Barb. 595 (cutting and removing timber and conversion of cut timber).

Oregon.— Dahms *v.* Sears, 13 Oreg. 47, 11 Pac. 891.

Texas.— Brooks *v.* Galveston City R. Co., (Civ. App. 1903) 74 S. W. 330 (action against a street railroad for personal injuries resulting from the negligence of employees, and against the company and its president for libel); White *v.* Preston, (App. 1891) 15 S. W. 712.

Wisconsin.— Greene *v.* Nunnemacher, 36 Wis. 50 (creation and maintenance of nuisance); Lull *v.* Fox, etc., Imp. Co., 19 Wis. 100 (flowage of land).

England.— Sadler *v.* Great Western R. Co., [1896] A. C. 450, 65 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51; Thompson *v.* London County Council, [1899] 1 Q. B. 840, 68 L. J. Q. B. 625, 80 L. T. Rep. N. S. 512, 47 Wkly. Rep. 433 [*explaining* Bennetts *v.* McIlwraith, [1896] 2 Q. B. 464, 8 Aspin. 176, 65 L. J. Q. B. 632, 75 L. T. Rep. N. S. 145, 45 Wkly. Rep. 17]; Pope *v.* Hawtrey, 85 L. T. Rep. N. S. 263.

See 1 Cent. Dig. tit. "Action," § 526.

A municipal corporation and an individual tort-feasor cannot be joined (Zeigler *v.* Ashley, 5 Ohio S. & C. Pl. Dec. 163, 1 Ohio N. P. 62, injury from unguarded excavation in the

by different parties cannot be joined.[85] A joint tort cannot be joined with an individual tort committed by one of the joint tort-feasors.[86] Where two persons, however, have committed a joint tort, actions against them may be joined.[87] So two or more persons whose negligent acts contributed to the infliction of injuries upon another may be sued jointly;[88] it is not necessary that the omission of duty shall be the same or of the same quality, or that the negligent acts shall be the same, or that defendants shall participate in the same negligent acts;[89] it is sufficient that each shall have been guilty of a breach of duty which would render him liable individually for the damages, and that the damages were caused at the same time and by the same instrumentality, or by instrumentalities operating together, or so concurrently in their effect as to render the damages inseparable.[90] An allegation of conspiracy will not render proper the joinder of several tort-feasors, when their separate wrongful acts and not the conspiracy gave rise to the causes of action.[91]

(E) *Actions Against Husband and Wife.* Distinct liabilities of the husband and wife cannot be enforced in the same action,[92] whether arising upon contract[93] or in tort.[94]

(F) *Actions in Different Rights* — (1) IN GENERAL. Actions cannot be brought against defendants in different rights.[95]

(2) INDIVIDUAL AND REPRESENTATIVE CAPACITY. It is improper to join a

street); for example, a cause of action against a city and an abutting owner, for injuries resulting from an excavation in the street (Trowbridge *v.* Forepaugh, 14 Minn. 133), or from an accumulation of ice and snow upon a sidewalk (Kelley *v.* Newman, 62 How. Pr. (N. Y.) 156) cannot be joined, although it has been held that a joint action might be permitted against the city and an abutting owner, for the maintenance of an insecure bridge over an excavation in the street (Van Wagenen *v.* Kemp, 7 Hun (N. Y.) 328).

85. Hays *v.* Perkins, 22 Tex. Civ. App. 199, 54 S. W. 1071. See, generally, LIBEL AND SLANDER.

86. Hines *v.* Jarrett, 26 S. C. 480, 2 S. E. 393; Gower *v.* Couldridge, [1898] 1 Q. B. 348, 67 L. J. Q. B. 251, 77 L. T. Rep. N. S. 707, 46 Wkly. Rep. 214.

87. Farmer *v.* Brokaw, 102 Iowa 246, 71 N. W. 246; Barnes *v.* Ennenga, 53 Iowa 497, 5 N. W. 597; Illinois Cent. R. Co. *v.* Harris, 85 Miss. 15, 38 So. 225 (holding that in an action for injuries to a servant, brought against two defendants, the fact that the relation of master and servant existed between plaintiff and only one of defendants, and that defendants were independent corporations, did not prevent the maintenance of a joint action); Walters *v.* Green, [1899] 2 Ch. 696, 63 J. P. 742, 68 L. J. Ch. 730, 81 L. T. Rep. N. S. 151, 48 Wkly. Rep. 23 [*distinguishing* Sadler *v.* Great Western R. Co., [1896] A. C. 450, 68 L. J. Q. B. 462, 74 L. T. Rep. N. S. 561, 45 Wkly. Rep. 51]; Sewall *v.* B. C. Towing Co., 9 Can. Sup. Ct. 527.

88. Lynch *v.* Elektron Mfg. Co., 94 N. Y. App. Div. 408, 88 N. Y. Suppl. 70.

Corporation and servant. — A complaint may state a cause of action against a corporation and its managing agent, for the same acts of negligence. Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439.

Joint and several liability for negligence see NEGLIGENCE; for tort, generally, see TORTS.

Bill in equity against defendants whose individual acts create a similar injury see EQUITY, 16 Cyc. 254.

Injunction against several wrong-doers see INJUNCTIONS, 22 Cyc. 916.

89. Lynch *v.* Elektron Mfg. Co., 94 N. Y. App. Div. 408, 88 N. Y. Suppl. 70.

90. Colegrove *v.* New York, etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Lynch *v.* Elektron Mfg. Co., 94 N. Y. App. Div. 408, 88 N. Y. Suppl. 70; Barnes *v.* Masterson, 38 N. Y. App. Div. 612, 56 N. Y. Suppl. 939.

91. Warner *v.* James, 88 N. Y. App. Div. 567, 85 N. Y. Suppl. 153, acts of different sets of corporate directors.

92. Palen *v.* Lent, 5 Bosw. (N. Y.) 713.

93. Bryant *v.* Turner, 67 N. Y. App. Div. 625, 73 N. Y. Suppl. 783; Palen *v.* Lent, 5 Bosw. (N. Y.) 713, wife as principal and husband as surety. And see Pittman *v.* Bentley, 102 Ga. 10, 29 S. E. 131, in which it was held that a complaint against husband and wife and a third person, which sought to enforce the lien of a materialman against the wife's property, to charge her for goods sold and delivered to her husband in her behalf, to charge the third person for goods sold and delivered, to hold the husband as guarantor and to recover from the husband and wife for fraud and deceit, and which by other averments varied the alleged liability of all defendants was bad.

94. Malone *v.* Stilwell, 15 Abb. Pr. (N. Y.) 421, separate slanders.

95. See cases cited *infra*, I, B, 2, r, (III), (F), (2), (3), (4).

Causes of action against a city and its officers individually for damages to private property resulting from a public improve-

cause of action against a person in a representative capacity, with one against him in a fiduciary or representative capacity;[96] for example a cause of action against a trustee[97] or a receiver,[98] or an agent,[99] as such, cannot be joined with one upon a demand against him individually.

(3) CORPORATION AND OFFICERS OR STOCK-HOLDERS. A claim against a defendant as an individual cannot be joined with one against him as an officer of a corporation,[1] or as a stock-holder;[2] but a judgment creditor may in the same action enforce the payment of unpaid stock subscriptions and enforce the statutory individual liability of stock-holders.[3] An action to enforce a stock-holder's individual liability cannot, however, be joined with one against him for misfeasance as a director.[4] A cause of action upon contract against a corporation cannot be joined with one against its directors, arising from facts outside of the contract.[5]

(4) PARTNERSHIP AND INDIVIDUAL MEMBERS. It has been held that an action upon a joint contract as a partner may be joined with a cause of action upon the individual contract of the partner;[6] and that a judgment creditor of the firm and of an individual member may bring an action against the firm and the individual partner to set aside a general assignment made by the members of the firm individually and as partners.[7] So also a single action will lie for services rendered to a firm and to a surviving partner;[8] and an action against a surviving partner may be joined with one against the administrator of a deceased partner.[9]

(G) *Joinder of Defendants Who Are Not Liable.* In case the complaint states but a single cause of action the fact that defendants are joined who are not liable will not render it bad as misjoining causes of action.[10]

3. AT CIVIL LAW — a. In General. Under the civil law as codified in Louisiana, separate actions may be cumulated in the same demand except in certain cases

ment cannot be joined. Hancock *v.* Johnson, 1 Metc. (Ky.) 242.

96. Flatonia First Nat. Bank *v.* Valenta, 33 Tex. Civ. App. 108, 75 S. W. 1087.

Actions against executors or administrators see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 975.

97. Warth *v.* Radde, 18 Abb. Pr. (N. Y.) 396, 28 How. Pr. 230; Smith *v.* Geortner, 40 How. Pr. (N. Y.) 185; Alger *v.* Scoville, 6 How. Pr. (N. Y.) 131, Code Rep. N. S. 303, basing the decision on the ground that the causes of action fell in different classes. *Contra*, Fish *v.* Berkey, 10 Minn. 199, holding that the actions may be joined when relating to the same transaction, or transactions connected with the same subject of action.

98. Perkins *v.* Slocum, 82 Hun (N. Y.) 366, 31 N. Y. Suppl. 474; Brandt *v.* Siedler, 10 Misc. (N. Y.) 234, 31 N. Y. Suppl. 112.

99. Jones *v.* Smith, (Tex. Civ. App. 1905) 87 S. W. 210, holding that a cause of action for services rendered to a promoter for the benefit of a corporation, under a contract subsequently ratified by the corporation, cannot be joined with one against the promoter upon services rendered for his individual benefit.

1. Paulsen *v.* Van Steenbergh, 65 How. Pr. (N. Y.) 342.

Misjoinder of causes of action to enforce directors' liability see CORPORATIONS, 10 Cyc. 891.

2. Hawkins *v.* Iron Valley Furnace Co., 40 Ohio St. 507.

3. Warner *v.* Callender, 20 Ohio St. 190.

The same relief may be had on a cross petition.— Peter *v.* Farrell Foundry, etc., Co., 53 Ohio St. 534, 42 N. E. 690.

4. Butt *v.* Cameron, 53 Barb. (N. Y.) 642 (contract and tort); Seaman *v.* Goodnow, 20 Wis. 27 (holding that an action against the directors and officers for failure to file an annual certificate, such failure rendering them liable for the corporate debts, could not be joined with an action to set aside a transfer of corporate property and to enforce payment of delinquent stock subscriptions, although the two latter causes of action might be joined).

5. Lovelace *v.* Doran, etc., Co., 15 N. Y. Suppl. 279, where the complaint alleged that at the time the contract was executed to plaintiffs the corporation was indebted in a sum beyond the amount of its capital stock, and that such indebtedness was created by defendant directors who thereby became personally liable to plaintiffs upon that account. See also House *v.* Cooper, 16 How. Pr. (N. Y.) 292, so holding where the causes demanded different modes of trial.

6. Logan *v.* Wallis, 76 N. C. 416. *Contra*, Kent *v.* West, 33 N. Y. App. Div. 112, 53 N. Y. Suppl. 244.

7. Genesee County Bank *v.* Batavia Bank, 43 Hun (N. Y.) 295.

8. Butler *v.* Kirby, 53 Wis. 188, 10 N. W. 373.

9. Henderson *v.* Kissam, 8 Tex. 46, where the obligation sued on was joint.

10. Pascekwitz *v.* Richards, 37 Misc. (N. Y.) 250, 75 N. Y. Suppl. 291.

which are particularly specified;[11] for example, claims arising from different contracts may be joined when one is not contrary to the other or does not preclude it.[12] In the absence of a provision in the code for joined actions on obligations arising from tort that applying to actions upon contract will be adopted by analogy.[13] A petitory action cannot be joined with a possessory action,[14] although it may be united with one for partition.[15]

b. Inconsistent Demands. A plaintiff cannot be allowed to cumulate several demands in the same action, when one of them is contrary to or precludes another,[16]

11. La. Code Prac. § 148 *et seq.*

Actions which may be cumulated see Hodge *v.* Monroe Mercantile Co., 105 La. 668, 30 So. 142 (demand to be decreed owner of personalty seized for debt of another, and damages for unlawful seizure); Harrison *v.* Soulabere, 52 La. Ann. 707, 27 So. 111 (revocatory action, and action *en declaration de simulation* where the alternative allegations are distinctly made); Sentell *v.* Avoyelles Parish Police Jury, 48 La. Ann. 96, 18 So. 910 (where a petition in an election contest sought to set aside the returns, declare the result a nullity, and to have a correct compilation of the votes made, and an ordinance based on the return declared null); Torian *v.* Weeks, 46 La. Ann. 1502, 16 So. 405 (claim for wages as overseer on defendant's plantation, and for supplies or board of laborers, and a claim for a share of crops raised on shares on another plantation); McNair *v.* Gourrier, 40 La. Ann. 353, 4 So. 310 (claim for definite sum as share in partnership, and claim for indefinite sum as share of profits on final liquidation); Bayly *v.* Becnel, 35 La. Ann. 778 (partition of plantation and settlement of its accounts); Conery *v.* Coone, 33 La. Ann. 372 (action for actual and punitory damages against principal and surety in injunction bond); Maduel *v.* Tuyes, 30 La. Ann. 1404 (revendication of immovable and alternative demand for value in case defendants have encumbered it beyond its value); Mills *v.* Fellows, 30 La. Ann. 824 (action to establish a partnership and for its liquidation when established); Hollingshead *v.* Sturges, 16 La. Ann. 334 (homologation of will and revocation of previous will); Atkinson *v.* Atkinson, 15 La. Ann. 491 (wife's demand for separation of property, and for an injunction against seizure of her separate property on execution by her husband's creditors); Williams *v.* Close, 12 La. Ann. 873 (petitory action for one tract of land, and slander of title of a distinct tract, although such actions cannot be joined for the same tract); Chinn *v.* Blanchard, 6 La. Ann. 66 (damages for tortious possession in possessory action); Lambeth *v.* McMurray, 15 La. 466 (holding that under the civil code plaintiff may join an action to annul a confract with one upon his principal demand); Millaudon *v.* Sylvestre, 8 La. 262 (dissolution of partnership and demand for sum found due); Wrincle *v.* Wrincle, 8 Mart. N. S. (La.) 333 (wherein a wife's action for separation was cumulated with a prayer for injunction to restrain sale under fieri facias against the husband).

Actions which cannot be cumulated see Smith *v.* Braun, 37 La. Ann. 225, breach of promise of marriage and order of filiation or alimony for support of children.

12. Fox *v.* McKee, 31 La. Ann. 67 (action by lessor against his lessee on two separate leases of two pieces of property, and provisional seizure of any effects on the two premises subject to his privilege); Medart *v.* Fasnatch, 15 La. Ann. 621.

13. Loussade *v.* Hartman, 16 La. 117.

14. St. Amand *v.* Long, 25 La. Ann. 164.

15. Durbridge *v.* Crawley, 43 La. Ann. 504, 9 So. 95; Morris *v.* Lalaurie, 34 La. Ann. 204.

16. La. Code Prac. § 149; Tertrou *v.* Durand, 29 La. Ann. 506.

Examples of inconsistent demands see Brown *v.* Brown, 30 La. Ann. 966 (allegations that a transfer is a simulation, and that it is a donation in disguise); Dowling *v.* Gally, 30 La. Ann. 328 (suit for nullity of judicial sale and for proceeds); Theurer *v.* Knorr, 24 La. Ann. 597 (claim for payment of a mortgage from the proceeds of a sale under another mortgage, and attack upon validity of such other mortgage); Provosty *v.* Carmouche, 22 La. Ann. 135 (attack upon validity of sale and demand for payment from proceeds); Ouliber *v.* His Creditors, 16 La. Ann. 287 (claim for payment from proceeds of sale, and seeking the setting aside of the sale and a resale); Louisiana Bank *v.* Delery, 2 La. Ann. 648 (allegation that a judicial sale was null, and demand to be paid by preference from the proceeds); Blake *v.* His Creditors, 6 Rob. (La.) 520 (claim to set aside sales by the syndic of an insolvent, and claims that the syndic be condemned personally to pay the amount shown to be due plaintiffs by the tableau, as creditors); Petitpain *v.* Frey, 15 La. 195 (cause of action on an indorsement and for illegal possession of property for which the note was given).

Examples of consistent demands see Durbridge *v.* Crawley, 43 La. Ann. 504, 9 So. 95 (partition and petitory action and claim for rent); Chaffe *v.* Scheen, 34 La. Ann. 684 (where in an action to annul a *dation en paiement* it was alleged that the act was a simulation, or if not was in fraud of creditors and gave an undue preference); Morris *v.* Lalaurie, 34 La. Ann. 204 (partition and judicial ascertainment of claims of plaintiff and his co-proprietors); Fox *v.* McKee, 31 La. Ann. 67 (action for dissolution of lease and rent until the time of surrender of possession); Johnson *v.* Mayer, 30 La. Ann.

for example a plaintiff cannot demand both a rescission of the sale and a recovery of the price.[17]

c. As Affected by the Parties. Unless plaintiffs have a community interest in the suit, their demands cannot be cumulated without the consent of defendant, notwithstanding a similarity of rights and relief sought;[18] hence separate creditors cannot maintain a joint action against a defendant unless there is a joint interest in the thing demanded, or a privity of contract.[19] It is permissible to join claims against the same person in distinct capacities,[20] but a plaintiff cannot set up a demand involving distinct rights of several individuals.[21] A parent may sue in one action for damages accruing to him personally, and for damages to his minor child, where they grow out of the same tort.[22]

II. SPLITTING.

A. In General — 1. The Rule Against Splitting. It is a well settled principle of law that a judgment concludes the rights of the parties with respect to cause of action stated in the pleading on which it is rendered, whether such action embraces the whole or only part of the demand constituting the cause thereof,[23] and from this it follows that a demand indivisible in its nature cannot be split so

1203 (allegation in an action to annul the sale of realty, that the same was simulated, and if not simulated was fraudulent); Tertrou *v.* Durand, 29 La. Ann. 506 (action to remove an administrator, to enjoin a judgment rendered against plaintiff by such administrator, to compel a delivery to plaintiff of a deed of property at a probate sale, and to declare void a subsequent adjudication of such property to the administrator); Smith *v.* Donnelly, 27 La. Ann. 98 (demand for judgment homologating an award which was alleged to be a final liquidation of a partnership, and for judgment on a note given plaintiff for half of the alleged value of the property put into the partnership); Miller *v.* Rougieux, 20 La. Ann. 577 (action against the curator of an estate demanding that plaintiff be recognized as heir, that the curator be compelled to render an account and to surrender possession of the property in his hands to plaintiff); Nouvet *v.* Bollinger, 15 La. Ann. 293 (demand for recovery of property and in alternative for value); Dubois *v.* Xiques, 14 La. Ann. 427 (demand for dissolution of a lease and demand for rent); Montross *v.* Hillman, 11 Rob. (La.) 87 (cause of action for goods sold and delivered to plaintiff for a third person, and cause of action upon a guaranty of the price of such goods); Winter *v.* Zacharie, 6 Rob. (La.) 466 (action for land and slaves may contain a claim for fruits and damages for tortious possession); Buquet *v.* Watkins, 1 La. 131 (damages for slander and false imprisonment); Cross *v.* Richardson, 2 Mart. N. S. (La.) 323 (action on contracts of warranty for good conduct of an employee, and action for fraudulent and deceitful representations by reason of which such employee was taken into service); Ward *v.* Brandt, 9 Mart. (La.) 625 (prayer for an account and for a sequestration in action for a forced surrender).

17. Parker *v.* Talbot, 37 La. Ann. 22; Copley *v.* Flint, 16 La. 380; De L'Homme *v.* De Kerlegand, 4 La. 353, action to recover specific property and for purchase-price.

18. Favrot *v.* East Baton Rouge Parish, 30 La. Ann. 606, holding that a joint proceeding by judgment creditors for a mandamus to compel parish assessors and police jury to levy a tax to pay their several judgments could not be maintained.

19. Dyas *v.* Dinkgrave, 15 La. Ann. 502, 77 Am. Dec. 196, holding that a firm cannot demand in the same suit payment of two notes dated at the same place and on the same day, and both payable to the firm under its firm-name, in case it is shown that the firm was composed of different persons, when the indebtedness was created which formed the consideration of one note, from those persons who composed the firm when the indebtedness was created which formed the consideration of the other note.

20. Kittredge *v.* Race, 92 U. S. 116, 23 L. ed. 488, holding that under the Louisiana code of practice a suit may be brought and distinct judgments rendered against a defendant as administratrix of her deceased husband, as widow in community and as tutrix of his minor heirs. But see Serret's Succession, 4 La. Ann. 100, holding that proceedings to liquidate and partition the wife's succession cannot be joined with a demand against her surviving husband for the proceeds of her separate property sold by him during marriage.

21. Gerson *v.* Jamar, 30 La. Ann. 1294 (holding that a claim for damages against a sheriff cannot be joined with an interventional demand setting up the intervener's title to personal property attached in his hands); Leverich *v.* Adams, 15 La. Ann. 310.

22. Williams *v.* Pope Mfg. Co., 51 La. Ann. 185, 24 So. 779; Curley *v.* Illinois Cent. R. Co., 40 La. Ann. 810, 6 So. 103; Clairain *v.* Western Union Tel. Co., 40 La. Ann. 178, 3 So. 625.

23. Former adjudication see *post*, JUDGMENTS, XIII; XIV.

as to authorize several actions for the same claim; and if a recovery is had of a part of such a demand, it will be regarded as an election to accept that part for the whole.[24]

24. *Alabama.*— Jasper Mercantile Co. *v.* O'Rear, 112 Ala. 247, 20 So. 583; South, etc., Alabama R. Co. *v.* Henlein, 56 Ala. 368; Campbell *v.* Hatchett, 55 Ala. 548; Robbins *v.* Harrison, 31 Ala. 160; Firemen's Ins. Co. *v.* Cochran, 27 Ala. 228; Oliver *v.* Holt, 11 Ala. 574, 46 Am. Dec. 288.

Arkansas.— Reynolds *v.* Jones, 63 Ark. 259, 38 S. W. 151; Blakeney *v.* Ferguson, 18 Ark. 347.

California.— Agard *v.* Valencia, 39 Cal. 292; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Herriter *v.* Porter, 23 Cal. 385.

Connecticut.— Wildman *v.* Wildman, 70 Conn. 700, 41 Atl. 1; Metropolis Mfg. Co. *v.* Lynch, 68 Conn. 459, 36 Atl. 832; Welles *v.* Rhodes, 59 Conn. 498, 22 Atl. 286; Damon *v.* Denny, 54 Conn. 253, 7 Atl. 409; Burritt *v.* Belfy, 47 Conn. 323, 36 Am. Rep. 79; Marlborough *v.* Sisson, 31 Conn. 332; Pinney *v.* Barnes, 17 Conn. 420; Avery *v.* Fitch, 4 Conn. 362; Lane *v.* Cook, 3 Day 255.

Georgia.— Evans *v.* Collier, 79 Ga. 319, 4 S. E. 266; Cunningham *v.* Morris, 19 Ga. 583, 65 Am. Dec. 611; Planter's, etc., Bank *v.* Chipley, Ga. Dec. 50.

Illinois.— Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; McDole *v.* McDole, 106 Ill. 452; Nickerson *v.* Rockwell, 90 Ill. 460; Rosenmueller *v.* Lampe, 89 Ill. 212, 31 Am. Rep. 74; Clayes *v.* White, 83 Ill. 540; Thompson *v.* Sutton, 51 Ill. 213; Lucas *v.* Le Compte, 42 Ill. 303; Matthias *v.* Cook, 31 Ill. 83; Casselberry *v.* Forquer, 27 Ill. 170; Ross *v.* Weber, 26 Ill. 221; Stone *v.* Pratt, 25 Ill. 25; Camp *v.* Morgan, 21 Ill. 255; Ryan *v.* Waukesha Spring Brewing Co., 63 Ill. App. 334.

Indiana.— Brannenburg *v.* Indianapolis, etc., R. Co., 13 Ind. 103, 74 Am. Dec. 250.

Iowa.— Day *v.* Brenton, 102 Iowa 482, 71 N. W. 538, 63 Am. St. Rep. 460; Cobb *v.* Illinois Cent. R. Co., 38 Iowa 601; Sweeny *v.* Daugherty, 23 Iowa 291; Kennion *v.* Kelsey, 10 Iowa 443; Davis *v.* Milburn, 4 Iowa 246.

Kansas.— Madden *v.* Smith, 28 Kan. 798.

Kentucky.— Davis *v.* Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534, 17 Ky. L. Rep. 1428; Powell *v.* Weiler, 11 B. Mon. 186.

Louisiana.— French *v.* Landis, 12 Rob. 635.

Maryland.— Strike's Case, 1 Bland 57.

Massachusetts.— Stearns *v.* Quincy Mut. F. Ins. Co., 124 Mass. 61, 26 Am. Rep. 647; Bennett *v.* Hood, 1 Allen 47, 79 Am. Dec. 705; Marble *v.* Keyes, 9 Gray 221; Osborne *v.* Atkins, 6 Gray 423; Warren *v.* Comings, 6 Cush. 103; Clark *v.* Baker, 5 Metc. 452; Arnold *v.* Arnold, 17 Pick. 4; Badger *v.* Titcomb, 15 Pick. 409, 26 Am. Dec. 611; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

Michigan.— Milroy *v.* Spurr Mountain Iron Min. Co., 43 Mich. 231, 5 N. W. 287; Hartford F. Ins. Co. *v.* Davenport, 37 Mich. 609.

Minnesota.— O'Brien *v.* Manwaring, 79 Minn. 86, 81 N. W. 746, 79 Am. St. Rep. 426; Pierro *v.* St. Paul, etc., R. Co., 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673; Thompson *v.* Myrick, 24 Minn. 4.

Missouri.— Taylor *v.* Heitz, 87 Mo. 660; Union R., etc., Co. *v.* Traube, 59 Mo. 355; Wagner *v.* Jacoby, 26 Mo. 532; Stewart *v.* Dent, 24 Mo. 111; Gerhart *v.* Fout, 67 Mo. App. 423; Epright *v.* Kaufman, 35 Mo. App. 455.

Nebraska.— Richardson *v.* Opelt, 60 Nebr. 180, 82 N. W. 377; Johnson *v.* Payne, 11 Nebr. 269, 9 N. W. 81; Beck *v.* Devereaux, 9 Nebr. 109, 2 N. W. 365.

New Hampshire.— Kempton *v.* Sullivan Sav. Inst., 53 N. H. 581.

New Jersey.— Leggett *v.* Lippincott, 50 N. J. L. 462, 14 Atl. 577.

New York.— Eddy *v.* Davis, 116 N. Y. 247, 22 N. E. 362; O'Beirne *v.* Lloyd, 43 N. Y. 248 [*reversing* 1 Sweeny 19]; Drayer *v.* Stouvenel, 38 N. Y. 219; Baker *v.* Higgins, 21 N. Y. 397; Secor *v.* Sturgis, 16 N. Y. 548; Hopf *v.* Myers, 42 Barb. 270; Shaffer *v.* Lee, 8 Barb. 412; McKnight *v.* Dunlop, 4 Barb. 36; Bowers *v.* Smith, 5 Silv. Sup. 107, 8 N. Y. Suppl. 226; Coggins *v.* Bulwinkle, 1 E. D. Smith 434; Fern *v.* Vanderbilt, 13 Abb. Pr. 72; Smith *v.* Dittenhoefer, 1 N. Y. City Ct. 143; Masterton *v.* Brooklyn, 7 Hill 61, 42 Am. Dec. 38; Fish *v.* Folley, 6 Hill 54; Bendernagle *v.* Cocks, 19 Wend. 207; Colvin *v.* Corwin, 15 Wend. 557; Sickels *v.* Pattison, 14 Wend. 257, 28 Am. Dec. 527; Guernsey *v.* Carver, 8 Wend. 492, 24 Am. Dec. 60; Miller *v.* Covert, 1 Wend. 487; Phillips *v.* Berick, 16 Johns. 136, 8 Am. Dec. 299.

North Carolina.— McPhail *v.* Johnson, 109 N. C. 571, 13 S. E. 799; Kearns *v.* Heitman, 104 N. C. 332, 10 S. E. 467; Jarrett *v.* Self, 90 N. C. 478; Britton *v.* Thrailkill, 50 N. C. 329; Winslow *v.* Stokes, 48 N. C. 285, 67 Am. Dec. 242; Amis *v.* Amis, 29 N. C. 219.

Ohio.— Ewing *v.* McNairy, 20 Ohio St. 315; Stein *v.* The Prairie Rose, 17 Ohio St. 471, 93 Am. Dec. 631.

Oklahoma.— See Tootle *v.* Kent, 12 Okla. 674, 73 Pac. 310.

Pennsylvania.— Hill *v.* Joy, 149 Pa. St. 243, 24 Atl. 293; Alcott *v.* Hugus, 105 Pa. St. 350; White *v.* Smith, 33 Pa. St. 186, 190, 75 Am. Dec. 589; Corbet *v.* Evans, 25 Pa. St. 310; Simes *v.* Zane, 24 Pa. St. 242; Carvill *v.* Garrigues, 5 Pa. St. 152; Ingraham *v.* Hall, 11 Serg. & R. 78; Eisenhower *v.* Centralia School Dist., 13 Pa. Super. Ct. 51.

South Carolina.— Crips *v.* Talvande, 4 McCord 20.

Tennessee.— Black *v.* Carruthers, 6 Humphr. 87; Perkins *v.* Hadley, 4 Hayw. 148.

Texas.— Ponton *v.* Bellows, 22 Tex. 681; Henderson *v.* Morrill, 12 Tex. 1; Hagerty *v.* Scott, 10 Tex. 525; Francis *v.* Northcote, 6 Tex. 185; International, etc., R. Co. *v.* Donal-

2. Object of the Rule. The object of the rule is to prevent repeated litigation between the same parties in regard to the same subject of controversy; to protect defendant from unnecessary vexation; and to avoid the costs and expenses incident to numerous suits.[25]

3. By Consent. The rule against splitting being for the protection of the debtor, he may waive its benefits by expressly or impliedly consenting to the institution of separate actions upon a single demand.[26]

son, 2 Tex. App. Civ. Cas. § 258; Pitts *v.* Ennis, 1 Tex. 604; Chevalier *v.* Rusk, Dall. 511.

Utah.— Bacon *v.* Raybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

Vermont.— Morey *v.* King, 51 Vt. 383; Whitney *v.* Clarendon, 18 Vt. 252, 46 Am. Dec. 150; Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311.

Wisconsin.— Ranney *v.* Higby, 12 Wis. 61.

United States.— The Haytian Republic, 154 U. S. 118, 14 S. Ct. 992, 38 L. ed. 930; Baird *v.* U. S., 96 U. S. 430, 24 L. ed. 703; Kendall *v.* Stokes, 3 How. 87, 11 L. ed. 506; Claflin *v.* Mather Electric Co., 98 Fed. 699, 39 C. C. A. 241; Hughes *v.* Dundee Mortg., etc., Co., 26 Fed. 831; Hennequin *v.* Barney, 24 Fed. 580; Bartels *v.* Schell, 16 Fed. 341; Chinn *v.* Hamilton, 5 Fed. Cas. No. 2,685, Hempst. 438; Starr *v.* Stark, 22 Fed. Cas. No. 13,316, 1 Sawy. 270.

England.— Brunsden *v.* Humphrey, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944; Gambrell *v.* Falmouth, 4 A. & E. 73, 31 E. C. L. 51; Moses *v.* McFerlan, 2 Burr. 1005, 1 W. Bl. 219; Sparry's Case, 5 Coke 61*a*; Hambleton *v.* Verre, 2 Saund. 169; Hitchin *v.* Campbell, 2 W. Bl. 827.

See 1 Cent. Dig. tit. "Action," § 550.

Under the Louisiana code providing that a litigant who demands less than is due him shall be held to have abandoned the overplus, the litigant is not compelled to include in his suit all the money demands he has against his debtor, under penalty of being held to have abandoned those not included, but only the dividing of one debt for separate suits is forbidden. *In re* Dimmick, 111 La. 655, 35 So. 801.

Necessity of knowledge.— Where an action is brought in unavoidable ignorance of the full extent of the wrongs received or injury done, a subsequent action for further injuries is not precluded. Cunningham *v.* Union Casualty, etc., Co., 82 Mo. App. 607. See also *post*, Judgments, XIII, D, 5, g.

25. *Michigan.*— Dutton *v.* Shaw, 35 Mich. 431.

Missouri.— Moran *v.* Plankinton, 64 Mo. 337.

Pennsylvania.— Logan *v.* Caffrey, 30 Pa. St. 196.

Tennessee.—Sully *v.* Campbell, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161.

United States.— U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Lawrence *v.* U. S., 8 Ct. Cl. 252.

England.— Brunsden *v.* Humphrey, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476; 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944; Ferrer's Case, 6 Coke 7*a*; Sparry's Case, 5 Coke 61*a*.

The reason of the rule is well expressed by the maxims *nemo debet bis vexari pro una et eadem causa* and *interest rei publicæ, ut sit finis litium.* U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93.

The right to invoke this rule is not an original legal right, but is an equitable interposition of courts to prevent a multiplicity of suits upon principles of public policy. Raspberry *v.* Jones, 42 N. C. 146; Lawrence *v.* U. S., 8 Ct. Cl. 252.

26. *Alabama.*— Jasper Mercantile Co. *v.* O'Rear, 112 Ala. 247, 20 So. 583 (holding that the consent of one partner to split a firm debt is insufficient); Herrin *v.* Buckelew, 37 Ala. 585.

Georgia.— McDonald *v.* Tison, 94 Ga. 549, 20 S. E. 427, holding that the debtor's consent will be presumed unless an objection is made in the trial court.

Kentucky.— Louisville Bridge Co. *v.* Louisville, etc., R. Co., 116 Ky. 258, 75 S. W. 285, 25 Ky. L. Rep. 405.

Massachusetts.— Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162; Austin *v.* Walsh, 2 Mass. 401.

Missouri.— St. Louis Fourth Nat. Bank *v.* Noonan, 88 Mo. 372; Morgan *v.* St. Louis, etc., R. Co., 111 Mo. App. 721, 86 S. W. 590; Gerhart *v.* Fout, 67 Mo. App. 423.

New York.— Carrington *v.* Crocker, 37 N. Y. 336, 4 Abb. Pr. N. S. 335; Mills *v.* Garrison, 3 Abb. Dec. 297, 3 Keyes 40 (where the debtor agreed that if the creditor would forbear to sue upon the whole demand, and would bring suit on a part, the debtor would pay the whole claim if there was a recovery). And see Millard *v.* Missouri, etc., R. Co., 20 Hun 191 (where, on defendant's objection as to a part of the claim sued on, plaintiff withdrew that part from the consideration of the jury); Gardner *v.* Patten, 15 N. Y. Suppl. 324 (where the appellate court refused to interfere with a finding that there was but a single cause of action, on the ground that the record failed to show that it contained all the evidence and that consequently there may have been a waiver by defendant).

North Carolina.—Boyle *v.* Robbins, 71 N. C. 130, holding that ratification of an assignment of a part of a debt is evidence of a severance for the purpose of jurisdiction.

Ohio.— Fox *v.* Althorp, 40 Ohio St. 322, where defendant failed to object to the institution of separate actions on an indivisible cause of action.

4. To Confer Jurisdiction. An entire contract cannot be split so as to maintain several suits for the purpose of bringing them within the jurisdiction of a court of limited jurisdiction.[27]

B. Splitting by Plaintiff — 1. In Actions Ex Contractu — a. Divisible and Indivisible Demands — (i) *Distinction Between* — (a) *In General.* The application of the rule against splitting requires a consideration of what constitutes a single and indivisible claim, upon which but a single action can be maintained, and what constitutes distinct causes of action, which may be sued on severally, and, while no rule of general application can be formulated,[28] it may be stated that a single and entire demand or cause of action is one that immediately arises out of one and the same act or contract,[29] and that demands or causes of action which arise out of different acts or contracts,[30] or which arise out of the

Pennsylvania.—Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131.

Tennessee.— Dews *v.* Eastham, 5 Yerg. 297.

United States.— Claflin *v.* Mather Electric Co., 98 Fed. 699, 39 C. C. A. 241.

See 1 Cent. Dig. tit. "Action," § 551.

Although as a rule joint creditors cannot divide their claim so as to give to each the right to a separate action, yet if the debtor procures a release from some of the joint creditors, he cannot object to several suits in equity by the others. Upjohn *v.* Ewing, 2 Ohio St. 13.

27. *Alabama.*— Wharton *v.* King, 69 Ala. 365.

Delaware.— Messick *v.* Dawson, 2 Harr. 50.

Georgia.—Floyd *v.* Cox, 72 Ga. 147; Planters', etc., Bank *v.* Chipley, Ga. Dec. 50; *Ex p.* Gale, R. M. Charlt. 214.

Illinois.— Lucas *v.* Le Compte, 42 Ill. 303.

Kentucky.— Pilcher *v.* Ligon, 91 Ky. 228, 15 S. W. 513, 12 Ky. L. Rep. 860.

Louisiana.— State *v.* Third Justice, 15 La. Ann. 660.

Mississippi.— Ash *v.* Lee, 51 Miss. 101; Morris *v.* Shryock, 50 Miss. 590; Scofield *v.* Pensons, 26 Miss. 402.

Missouri.— Robbins *v.* Conley, 47 Mo. App. 502.

New York.—Stevens *v.* Lockwood, 13 Wend. 644, 28 Am. Dec. 492; Willard *v.* Sperry, 16 Johns. 121.

North Carolina.— Simpson *v.* Elwood, 114 N. C. 528, 19 S. E. 598; McPhail *v.* Johnson, 109 N. C. 571, 13 S. E. 799; Magruder *v.* Randolph, 77 N. C. 79; Boyle *v.* Robbins, 71 N. C. 130; Waldo *v.* Jolly, 49 N. C. 173.

Tennessee.—Carraway *v.* Burton, 4 Humphr. 108; Johnson *v.* Pirtle, 1 Swan 262.

West Virginia.— Hale *v.* Weston, 40 W. Va. 313, 21 S. E. 742.

See 1 Cent. Dig. tit. "Action," § 552.

See also Justices of the Peace.

Prohibition to prevent see Prohibition.

28. See Stickel *v.* Steel, 41 Mich. 350, 352, 1 N. W. 1046; Newberry *v.* Alexander, 44 Ohio St. 346, 7 N. E. 446, an instance of proper joinder originally, an irregular severance and a subsequent consolidation in the appellate court.

Test of one or several acts or agreements. — In the well considered case of Secor *v.* Sturgis, 16 N. Y. 548, it was said that a simple and safe test is to inquire whether the demand rests upon one or several acts or agreements.

Test of entireness of consideration. — It has also been said that the entirety or severableness of the contract may not depend upon the exclusiveness of the subject or the multiplicity of the items composing it, but on the entireness of the consideration or its express or implied apportionment to the several items constituting its subject. If the consideration is exclusive, the contract is entire, whatever the number or variety of items expressed in its subject (Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351; Bigg *v.* Whisking, 14 C. B. 195, 2 C. L. R. 617, 78 E. C. L. 195); but if the consideration is apportioned expressly or impliedly to each of these items, the contract is severable (Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351).

Test of inquiries and findings involved. — Again it has been said that if the investigation involves separate and independent inquiries and findings, breaches, items, or transactions should be held to be independent causes of actions, although they arise out of the same contract. Boyce *v.* Christy, 47 Mo. 70; State *v.* Dulle, 45 Mo. 269; Howard *v.* Clark, 43 Mo. 344.

Identity of evidence. — With regard to the rule which forbids the splitting of a demand arising out of a single transaction, the best test of entirety is whether the same evidence is necessary to support all the branches of the demand. Maine *v.* U. S., 36 Ct. Cl. 531, holding that the element of entirety was wanting where money was borrowed by a state and spent in equipping troops for the United States, while the interest was paid to the bondholders.

29. Secor *v.* Sturgis, 16 N. Y. 548; Bartels *v.* Schell, 16 Fed. 341.

30. Secor *v.* Sturgis, 16 N. Y. 548; Bartels *v.* Schell, 16 Fed. 341.

Rule applied in action for wages retained under an agreement and for special deposit (Byrnes *v.* Byrnes, 102 N. Y. 4, 5 N. E. 776); in action for breach of contract and money loaned (Fort *v.* Penny, 122 N. C. 230, 29 S. E. 362); in action for breaches of several leases of chattels (Peoria, etc., R. Co. *v.* U. S. Rolling Stock Co., 28 Ill. App. 79); in action on contract and fraudulent procurement of credit (Morgan *v.* Skidmore, 3 Abb. N. Cas.

same contract as several or distinct items or transactions,[31] are separable causes upon which distinct actions will lie.[32]

(B) *Particular Cases* — (1) ACCOUNTS — (a) RUNNING ACCOUNTS. While there are many decisions to the effect that each separate item of a running account furnishes a distinct cause of action which at the option of the creditor may be separately sued upon, unless there is an express contract to the contrary, the circumstances show that one entire contract was intended, or from usage or the course of dealing an agreement or understanding to that effect may be inferred,[33] yet, by what appears to be the better doctrine it is held that in the absence of special circumstances an open or continuous running account between the same parties constitutes a single and entire demand which is not susceptible of division, the aggregate of all the items being regarded as the amount due.[34]

(b) MUTUAL ACCOUNTS. In the case of mutual accounts each person does not

(N. Y.) 92, where, after a recovery against a surviving partner for the debt, the creditor was permitted to proceed against the estate of the deceased partner for fraud in procuring the sale); in case of distinct ownership of several at different times (McLellan *v.* Osborne, 51 Me. 118); in foreclosure by pledgee and subsequent foreclosure by mortgagee (O'Dougherty *v.* Remington Paper Co., 81 N. Y. 496); in the restraint of the collection of taxes for different years (Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633); and in action on separate contracts of carriage entered into on different days (Rex *v.* Herefordshire, 1 B. & Ad. 672, 20 E. C. L. 644).

31. Corby *v.* Taylor, 35 Mo. 447; Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; Fox *v.* Phyfe, 36 Misc. (N. Y.) 207, 73 N. Y. Suppl. 149.

32. Rule applied to action for goods sold and for note indorsed in payment therefor (Clark *v.* Young, 1 Cranch (U. S.) 181, 2 L. ed. 74); agreement to pay one person proportionately to the labor performed by him in conjunction with another in an entire piece of work (Sullivan *v.* Grass Valley Quartz Milling, etc., Co., 77 Cal. 418, 19 Pac. 757); attack of preferential assignment and recovery of debt (Paige *v.* Wilson, 8 Bosw. (N. Y.) 294); open account and acceptance of bill of exchange (Ash *v.* Lee, 51 Miss. 101); recovery against railroad company on contract for transportation of baggage and of merchandise (Millard *v.* Missouri, etc., R. Co., 86 N. Y. 441; Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663); recovery of interest from trustee, and negligence respecting the trust fund (Andrew *v.* Schmitt, 64 Wis. 664, 26 N. W. 190); royalties for distinct periods (Miller *v.* Union Switch, etc., Co., 13 N. Y. Suppl. 711); claims upon different provisions of an accident insurance policy (Cunningham *v.* Union Casualty, etc., Co., 82 Mo. App. 607); action upon policy of insurance payable to mortgagee as his interest may appear (Capital City Ins. Co. *v.* Jones, 128 Ala. 361, 30 So. 674, 86 Am. St. Rep. 152). See also Mills *v.* Garrison, 3 Abb. Dec. (N. Y.) 297, 3 Keyes 40, where defendant had agreed to receive four certain bonds held by plaintiff, and pay him a certain sum therefor, and where it was held that plaintiff might tender any one of the bonds, and demand its proportionate share of the money to be paid for the four.

33. *Massachusetts.*— Cummington *v.* Wareham, 9 Cush. 585; Badger *v.* Titcomb, 15 Pick. 409, 26 Am. Dec. 611.

New York. — Secor *v.* Sturgis, 16 N. Y. 548.

North Carolina.— Simpson *v.* Elwood, 114 N. C. 528, 19 S. E. 598; Boyle *v.* Robbins, 71 N. C. 130; Caldwell *v.* Beatty, 69 N. C. 365.

Ohio.— Wren *v.* Winter, 6 Ohio S. & C. Pl. Dec. 176, 5 Ohio N. P. 377.

Tennessee. — Johnson *v.* Pirtle, 1 Swan 262.

See 1 Cent. Dig. tit. "Action," § 604.

By statute in Michigan a general account may be divided and separate actions maintained on the parts thereof, but there may be a recovery of costs in the first action only. Phelps *v.* Abbott, 116 Mich. 624, 74 N. W. 1010.

34. *Alabama.*— Oliver *v.* Holt, 11 Ala. 574, 46 Am. Dec. 288.

Connecticut. — Avery *v.* Fitch, 4 Conn. 362; Bunnel *v.* Pinto, 2 Conn. 431; Lane *v.* Cook, 3 Day 255.

Georgia.— Thompson *v.* McDonald, 84 Ga. 5, 10 S. E. 448; Floyd *v.* Cox, 72 Ga. 147; Macon, etc., R. Co. *v.* Garrard, 54 Ga. 327.

Illinois.— Ryan *v.* Waukesha Spring Brewing Co., 63 Ill. App. 334.

Kansas.— Tootle *v.* Wells, 39 Kan. 452, 18 Pac. 692.

Michigan.—Milroy *v.* Spurr Mountain Iron Mfg. Co., 43 Mich. 231, 5 N. W. 287.

Minnesota.— Memmer *v.* Carey, 30 Minn. 458, 15 N. W. 877.

New York.— O'Beirne *v.* Lloyd, 43 N. Y. 248; Bendernagle *v.* Cocks, 19 Wend. 207; Guernsey *v.* Carver, 8 Wend. 492, 24 Am. Dec. 60.

North Carolina. — Magruder *v.* Randolph, 77 N. C. 79.

Pennsylvania.— Buck *v.* Wilson, 113 Pa. St. 423, 6 Atl. 97.

Rhode Island.— Corey *v.* Miller, 12 R. I. 337.

South Carolina.— Walter *v.* Richardson, 11 Rich. 466.

Wisconsin. — Borngesser *v.* Harrison, 12 Wis. 544, 78 Am. Dec. 757.

See 1 Cent. Dig. tit. "Action," § 604.

have a separate cause of action for each item of his account, but a cause of action exists in favor of him only to whom there is a balance due.[35]

(c) STATED ACCOUNT. If an account of all the items be rendered to the debtor and he agrees that the whole is correct, or that he will pay it, or if he acquiesces in its correctness by silence or delay to dispute it, it may be treated as a stated account constituting but one cause of action.[36]

(d) ITEMS OF ACCOUNT SOLD ON CREDIT. It seems clear, however, that if individual items of an account are sold upon stated periods of credit, each item will constitute a separate cause of action upon which suit may be commenced and maintained as soon as the term of credit expires.[37]

(2) INTEREST — (a) IN GENERAL. Separate actions will lie to recover instalments of interest on an unmatured debt as they become due.[38]

(b) PRINCIPAL DUE. In some cases it has been held that where the principal of a debt is due, separate actions cannot be maintained therefor and for the interest which has accrued thereon, but that the same must be recovered in one action,[39] while in others it is said that promises to pay a debt at one time and interest thereon at another, being separate originally, no subsequent act, except the consent of the parties, can make them entire, and that in consequence the recovery of an instalment or instalments of interest will not defeat a subsequent recovery of the principal, although due when suit for the interest was begun.[40]

(c) PRINCIPAL PAID. Since interest is an incident of the debt, a suit will not lie for its recovery after payment of the principal, unless there is an express agreement with relation thereto.[41]

(3) PROMISSORY NOTES. With respect to promissory notes, it seems that sepa-

35. Waffle *v.* Short, 25 Kan. 503.

36. Bunnel *v.* Pinto, 2 Conn. 431; Simpson *v.* Elwood, 114 N. C. 528, 19 S. E. 598.

37. *Georgia.*— Parks *v.* Oskamp, 97 Ga. 802, 25 S. E. 369; Parris *v.* Hightower, 76 Ga. 631.

Illinois.— Ryan *v.* Waukesha Spring Brewing Co., 63 Ill. App. 334.

Michigan.— Stickel *v.* Steel, 41 Mich. 350, 1 N. W. 1046.

Nebraska.— Beck *v.* Devereaux, 9 Nebr. 109, 2 N. W. 365.

Vermont.— McLaughlin *v.* Hill, 6 Vt. 20.

See 1 Cent. Dig. tit. "Action," § 604.

Rendition of an account of separate sales, and the giving of new notes for the balance due on purchase-money notes, and not corresponding with them in amount, will not affect the right of the creditor to treat the sales as distinct. Campbell Printing Press, etc., Co. *v.* Walker, 9 N. Y. St. 722.

38. Walker *v.* Kimball, 22 Ill. 537; Presstman *v.* Beach, 61 Md. 203; Hastings *v.* Wiswall, 8 Mass. 455; Greenleaf *v.* Kellogg, 2 Mass. 568. And see Wehrly *v.* Morfoot, 103 Ill. 183, holding that the right to recover instalments of interest as they fell due was not affected by a provision that "if the interest is not so paid the entire principal sum shall immediately become due and payable."

Provision for interest and supplementary negotiable paper.— When the provision in an obligation for the payment of interest in instalments is supplemented by promises in the form of negotiable paper, the obligee may dispose of such additional promises, without prejudice to his right to recover on those retained, although others disposed of which matured later have been sued on. Butterfield *v.* Ontario, 44 Fed. 171.

39. *Alabama.*— Ellerbe *v.* Troy, 58 Ala. 143.

Louisiana.— Saul *v.* His Creditors, 7 Mart. N. S. 425; Faurie *v.* Pitot, 2 Mart. 83; Harty *v.* Harty, 2 La. 518.

Maine.— Howe *v.* Bradley, 19 Me. 31.

Missouri.— Wickersham *v.* Whedon, 33 Mo. 561.

New York.— Clement *v.* Grant, 2 N. Y. City Ct. 438.

See 1 Cent. Dig. tit. "Action," § 610.

40. Wehrly *v.* Morfoot, 103 Ill. 183; Dulaney *v.* Payne, 101 Ill. 325, 40 Am. Rep. 205; Andover Sav. Bank *v.* Adams, 1 Allen (Mass.) 28; Sparhawk *v.* Wills, 6 Gray (Mass.) 163.

41. New York Tenth Nat. Bank *v.* New York, 4 Hun (N. Y.) 429 [*affirmed* in 80 N. Y. 660]; Southern Cent. R. Co. *v.* Moravia, 61 Barb. (N. Y.) 180; Fake *v.* Eddy, 15 Wend. (N. Y.) 76; Stevens *v.* Barringer, 13 Wend. (N. Y.) 639; Johnson *v.* Brannan, 5 Johns. (N. Y.) 268; Tillotson *v.* Preston, 3 Johns. (N. Y.) 229; Jacot *v.* Emmett, 11 Paige (N. Y.) 142; Gillespie *v.* New York, 3 Edw. (N. Y.) 512; Riley *v.* Maxwell, 20 Fed. Cas. No. 11,838, 4 Blatchf. 237; Dixon *v.* Parkes, 1 Esp. 110.

Interest accrued prior to parting with principal obligation.— It has been held that in an action to recover stipulated interest, it is a good plea that plaintiff had parted with the original obligation, for the reason that the interest could be claimed only as accessory to the bill. Florence *v.* Drayson, 1 C. B. N. S. 584, 87 E. C. L. 584.

rate actions may be maintained on notes by the same maker to the same payee,[42] maturing at different times,[43] or given in the same transaction,[44] and although all are due.[45]

(4) SALES — (a) AT DIFFERENT TIMES. In the absence of an agreement to the contrary, where sales are made at different times each sale is a separate transaction for which a separate action may be brought,[46] especially when made at different times on different terms of credit.[47]

(b) CONTEMPORANEOUS SALES. The sale of several articles at the same time constitutes, however, one transaction, giving but a single right of action.[48]

(II) *INDIVISIBLE DEMANDS* — (A) *The Rule Stated* — (1) IN GENERAL. There can be but one recovery on an entire and individual contract[49] or for a partial performance thereof.[50] The remedy in such case is to sue for the breach, and to recover all damages present and future.[51]

(2) PARTICULAR CASES — (a) CONTRACT FOR PERSONAL SERVICES. Where a contract for personal service is for a fixed time, it is entire, although compensation to the employee is payable in instalments, and if the latter is wrongfully discharged, and, before the expiration of the time of the contract, sues for and recovers anything under the contract except wages actually due, he is precluded from any further recovery.[52] It has been held, however, that an action on a contract of service is not barred by a former recovery of wages due to the time of

42. Mass *v.* Brown, 7 Mo. 305; Williams *v.* Kitchen, 40 Mo. App. 604; Nathans *v.* Hope, 77 N. Y. 420; Boyle *v.* Grant, 18 Pa. St. 162; Ferguson *v.* Culton, 8 Tex. 283.

43. Starnes *v.* Mutual Loan, etc., Co., 102 Ga. 597, 29 S. E. 452.

44. Williams *v.* Kitchen, 40 Mo. App. 604.

45. Presstman *v.* Beach, 61 Md. 203; Ferguson *v.* Culton, 8 Tex. 283. *Contra*, Scofield *v.* Pensons, 26 Miss. 402.

46. A. K. Young, etc., Mfg. Co. *v.* Wakefield, 121 Mass. 91; American Button-Hole, etc., Co. *v.* Thornton, 28 Minn. 418, 10 N. W. 425; Ruddle *v.* Horine, 34 Mo. App. 616; Stifel *v.* Lynch, 7 Mo. App. 326.

The true question, according to McIntosh *v.* Lown, 49 Barb. (N. Y.) 550, is not whether separate actions on the different items would lead to a multiplicity of suits or be oppressive, but whether the former action was for the identical cause or demand as that for which the subsequent one is brought. And see Carleton *v.* Woods, 28 N. H. 290, holding that where goods are sold at the same time, and a separate value is agreed for each article, the contract is divisible, so that if the sale of some is prohibited by law the illegality will not affect the sale of the other articles.

47. Zimmerman *v.* Ehard, 83 N. Y. 74, 38 Am. Rep. 396; Staples *v.* Goodrich, 21 Barb. (N. Y.) 317. And see Reid *v.* Ferris, 112 Mich. 693, 71 N. W. 484, 67 Am. St. Rep. 437, holding that where sales are separate and distinct and on different terms of credit, there may be an election to rescind some of them or treat them as void and sue in tort for some and on contract for the others.

48. Mansfield *v.* Trigg, 113 Mass. 350; Miner *v.* Bradley, 22 Pick. (Mass.) 457; Colvin *v.* Corwin, 15 Wend. (N. Y.) 557; Smith *v.* Jones, 15 Johns. (N. Y.) 229.

49. *Alabama.*— Danforth *v.* Tennessee, etc., R. Co., 93 Ala. 614, 11 So. 60.

Indiana.— Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91.

Massachusetts.— Davis *v.* Maxwell, 12 Metc. 286; Miner *v.* Bradley, 22 Pick. 457.

Michigan.— Beecher *v.* Pettee, 40 Mich. 181.

Mississippi. — Pittman *v.* Chrisman, 59 Miss. 124.

New York.— King *v.* King, 37 Misc. 63, 74 N. Y. Suppl. 751.

Pennsylvania.— Smedly *v.* Tucker, 3 Phila. 259, holding that the several items of a claim for a mechanic's lien under a single contract cannot be separated.

Texas.— Pitts *v.* Ennis, 1 Tex. 604.

Wisconsin.— Butler *v.* Kirby, 53 Wis. 188, 10 N. W. 373.

See 1 Cent. Dig. tit. "Action," § 593 *et seq.*

Services of standing attorney.— The services of a standing or regularly appointed attorney are usually rendered pursuant to some general contract or understanding, and whatever is due therefor at the end of the service or employment constitutes but one cause of action and cannot be split up into several distinct ones. Hughes *v.* Dundee Mortg., etc., Co., 26 Fed. 831.

Unauthorized change in character of contract.— In Erwin *v.* Lynn, 16 Ohio St. 539, the holder of a note wrote under the indorsements thereon, without authority, a promise to pay part thereof to one person and part to another, and it was held that one recovery thereon would bar another.

50. Dula *v.* Cowles, 47 N. C. 454; White *v.* Brown, 47 N. C. 403.

51. Shaffer *v.* Lee, 8 Barb. (N. Y.) 412.

52. Booge *v.* Pacific R. Co., 33 Mo. 212, 82 Am. Dec. 160; Soursin *v.* Salorgne, 14 Mo. App. 486; Colburn *v.* Woodworth, 31 Barb. (N. Y.) 381; Brodar *v.* Lord, 46 N. Y. Super. Ct. 205; Moody *v.* Leverick, 14 Abb. Pr. N. S. (N. Y.) 145; James *v.* Allen County, 44

discharge,[53] and that the employee may recover each instalment of wages as it becomes due,[54] and that he may not only recover the damages for breach of the contract at the time suit was brought, but also such as may have developed up to the trial.[55]

(b) PROMISSORY NOTE WITH PROVISION FOR ATTORNEY'S FEES. Where promissory notes contain provisions for the payment of attorney's fees in case of non-payment at maturity, such fees together with the specific sum of which payment is promised by the note constitute an entire cause of action, and separate actions for each cannot be maintained.[56]

(B) *Effect of Assignment.* A single cause of action or a cause of action which arises on an entire contract cannot be divided by partial assignment without the consent of the debtor so as to enable each assignee to institute an action for the part of the claim assigned to him, and thus subject the debtor to a number of actions.[57]

(III) *DIVISIBLE DEMANDS* — (A) *Permitting Separate Actions* — (1) IN GENERAL. The rule against splitting is limited to cases where the claim is single and entire;[58] and the fact that two causes of action spring out of the same contract will not *ipso facto* render a judgment on one a bar to a recovery on the other.[59]

(2) DISTINCT BREACHES OF ENTIRE CONTRACT — (a) FORMER RULE. At common law a contract to pay a sum certain in instalments at different times was considered an entire contract upon which no action of debt could be brought until

Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821; Logan *v.* Caffrey, 30 Pa. St. 196.

53. Thompson *v.* Wood, 1 Hilt. (N. Y.) 93.

54. Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Fowler *v.* Armour, 24 Ala. 194.

55. Fowler *v.* Armour, 24 Ala. 194; Davis *v.* Ayres, 9 Ala. 292.

56. Maxwell *v.* Buntin, 31 Ill. App. 278; Brooks *v.* Ancell, 51 Mo. 178; Comstock *v.* Davis, 51 Mo. 569. See also Abbott *v.* Brown, 131 Ill. 108, 22 N. E. 813, holding that where a recovery has been had against the guarantor of a note for the amount of the note only, there can be no subsequent recovery of the attorney's fees.

57. *Alabama.*— Fire Insurance Cos. *v.* Felrath, 77 Ala. 194, 54 Am. Rep. 58.

California.— Thomas *v.* Rock Island Gold, etc., Min. Co., 54 Cal. 578; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Marzion *v.* Pioche, 8 Cal. 522.

District of Columbia.— Sincell *v.* Davis, 24 App. Cas. 218.

Illinois.— Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Chicago, etc., R. Co. *v.* Nichols, 57 Ill. 464.

Kansas.— German F. Ins. Co. *v.* Bullene, 51 Kan. 764, 33 Pac. 467; Whitaker *v.* Hawley, 30 Kan. 317, 1 Pac. 508.

Massachusetts.— Gibson *v.* Cooke, 20 Pick. 15, 32 Am. Dec. 194.

Michigan.— Hartford F. Ins. Co. *v.* Davenport, 37 Mich. 609.

Missouri.— St. Louis Fourth Nat. Bank *v.* Noonan, 88 Mo. 372; Loomis *v.* Robinson, 76 Mo. 488; Beardslee *v.* Morgner, 73 Mo. 22; Burnett *v.* Crandall, 63 Mo. 410; Love *v.* Fairfield, 13 Mo. 300, 53 Am. Dec. 148.

Pennsylvania.— Ingraham *v.* Hall, 11 Serg. & R. 78.

West Virginia.— St. Lawrence Boom, etc., Co. *v.* Price, 49 W. Va. 432, 38 S. E. 526.

Wisconsin.— Walls *v.* Helfenstein, 28 Wis. 632.

United States. — Thatch *v.* Metropole Ins. Co., 11 Fed. 29, 3 McCrary 387; Mandeville *v.* Welch, 5 Wheat. 277, 5 L. ed. 87, a leading case, where it is said that the doctrine that when an order is drawn on a fund it amounts to an assignment thereof does not apply to an order for a part of a fund only, the custodian of which may stand on the singleness of his original contract, and decline to recognize legal or equitable assignments by which it may be broken into fragments.

See 1 Cent. Dig. tit. "Action," § 613.

Effect of partial assignment generally see ASSIGNMENTS, 4 Cyc. 27.

After consent of debtor see ASSIGNMENTS, 4 Cyc. 101.

After settlement by mistake.— Where the beneficiary under an insurance policy settles with the insurer, through mistake, for an amount less than is due, an assignment of the balance of the amount does not constitute a splitting of the demand or division of the cause of action against the insurer. Goodson *v.* National Masonic Acc. Assoc., 91 Mo. App. 339.

58. Phillips *v.* Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299.

59. Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663. And see Doe *v.* Peck, 1 B. & Ad. 428, 9 L. J. K. B. O. S. 60, 20 E. C. L. 546; Doe *v.* Woodbridge, 9 B. & C. 376, 4 M. & R. 302, 17 E. C. L. 173, holding that after the receipt of rent or a distraint therefor, the lessor may forfeit the lease and eject the tenant for the breach of a covenant which had existed at the time of his receipt of the rent and continued thereafter.

all the days of payment had elapsed.[60] After the action of assumpsit was introduced, it was held at first that, although where the contract was to be by instalments, assumpsit would lie on default of the first payment, yet plaintiff was obliged to demand his whole damages, even where only one of the several instalments was payable, on the ground that the contract was entire and that no new action could be maintained.[61] Subsequently, however, it was determined that in assumpsit on such a state of facts an action might be brought for such sum only as was due when the action was brought, and that plaintiffs should recover damages accordingly and have a new action as the other sums became due *toties quoties*.[62]

(b) MODERN RULE. The great weight of modern authority is to the effect, however, that a contract to do several things at several times is divisible in its nature because, although the agreement is in one sense entire, the performance is several, and an action will lie for the breach of any one of the stipulations, each of them being considered in respect to the remedy as a several contract.[63] Thus on an agreement to pay a sum of money by instalments, an action will lie to recover each instalment as it becomes due[64] as rent[65] or compensation for personal

60. Perry *v.* Harrington, 2 Metc. (Mass.) 368, 37 Am. Dec. 98; Badger *v.* Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611; Slade's Case, 4 Coke 91*a*; Beckwith *v.* Nott, Cro. Jac. 504; Siddall *v.* Rawcliffe, 1 Cromp. & M. 487, 2 L. J. Exch. 237, 1 M. & Rob. 263, 2 Tyrw. 441; Pecke *v.* Redman, 1 Dyer 113; Rudder *v.* Price, 1 H. Bl. 547.

A bond payable in equal annual instalments is an entire contract. Each instalment does not constitute a distinct and separate contract. State *v.* Scoggin, 10 Ark. 326.

61. Rudder *v.* Price, 1 H. Bl. 547.

62. Cooke *v.* Whorwood, 2 Saund. 337.

63. *Alabama.*— Robbins *v.* Harrison, 31 Ala. 160.

Illinois.— Joyce *v.* Spafford, 101 Ill. App. 422.

Indiana.— Crouse *v.* Holman, 19 Ind. 30.

Iowa.— Sweeny *v.* Daugherty, 23 Iowa 291.

Kansas.— Whitaker *v.* Hawley, 30 Kan. 317, 1 Pac. 508.

Kentucky.— Breckenridge *v.* Lee, 3 A. K. Marsh. 446.

Maryland.— Orendorff *v.* Utz, 48 Md. 298.

Massachusetts.— Knight *v.* New England Worsted Co., 2 Cush. 271; Perry *v.* Harrington, 2 Metc. 368, 37 Am. Dec. 98; Badger *v.* Titcomb, 15 Pick. 409, 26 Am. Dec. 611.

Missouri.— Union R., etc., Co. *v.* Traube, 59 Mo. 355; Corby *v.* Taylor, 35 Mo. 447; Pettit *v.* American Cent. Ins. Co., 69 Mo. App. 317.

New York.— Secor *v.* Sturgis, 16 N. Y. 548; Millard *v.* Missouri, etc., R. Co., 20 Hun 191; Westfield Reformed Protestant Dutch Church *v.* Brown, 54 Barb. 191; McIntosh *v.* Lown, 49 Barb. 550; Bendernagle *v.* Cocks, 19 Wend. 207, 32 Am. Dec. 448; Rice *v.* King, 7 Johns. 20.

Pennsylvania.— Scott *v.* Kittanning Co., 89 Pa. St. 231, 33 Am. Rep. 753; Merchants' Ins. Co. *v.* Algeo, 31 Pa. St. 446; Jones *v.* Dunn, 3 Watts & S. 109.

United States.—Perkins *v.* Hart, 11 Wheat. 237, 6 L. ed. 463; Lawrence *v.* U. S., 8 Ct. Cl. 252, an assignment by a government contractor of defaulted vouchers under one contract, to various persons, entitling each to sue separately.

England.— Mayor *v.* Pyne, 3 Bing. 285, 11 E. C. L. 104, 2 C. & P. 91, 12 E. C. L. 467, 11 Moore C. P. 2, 28 Rev. Rep. 625; Cooke *v.* Whorwood, 2 Saund. 337.

64. *Alabama.*— Ryall *v.* Prince, 82 Ala. 264, 2 So. 319.

Maryland.— Ahl *v.* Ahl, 60 Md. 207.

Massachusetts.— Badger *v.* Titcomb, 15 Pick. 409, 26 Am. Dec. 611; Heywood *v.* Perrin, 10 Pick. 228, 20 Am. Dec. 518; Tucker *v.* Randall, 2 Mass. 283.

Missouri.— Priest *v.* Deaver, 22 Mo. App. 276.

New York.— Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; Bowen *v.* Mandeville, 29 Hun 42; Smith *v.* Moonelis, 18 N. Y. Suppl. 135; Underhill *v.* Collins, 15 N. Y. Suppl. 495; Coe *v.* Goetschins, 7 Alb. L. J. 413.

Oregon.— Weiler *v.* Henarie, 15 Oreg. 28, 13 Pac. 614.

Pennsylvania.— Sterner *v.* Gower, 3 Watts & S. 136; Kane *v.* Fisher, 2 Watts 246.

Texas.— Racke *v.* Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167, 42 S. W. 774.

Wisconsin.— Bliss *v.* Weil, 14 Wis. 35, 80 Am. Dec. 766.

United States.— Colwell *v.* Fulton, 117 Fed. 931; Peurrung *v.* Carter-Crume Co., 110 Fed. 107; Carter-Crume Co. *v.* Peurrung, 99 Fed. 888, 40 C. C. A. 150 [*affirming* 86 Fed. 439, 30 C. C. A. 174].

England.— Ashford *v.* Hand, Andr. 370.

See 1 Cent. Dig. tit. "Action," § 614.

65. *Illinois.*— Marshall *v.* John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; McDole *v.* McDole, 106 Ill. 452.

Mississippi.— McLendon *v.* Pass, 66 Miss. 110, 5 So. 234, holding that a landlord may sue separately for each year's crops grown on the demised premises, and sold to defendant by the tenant, who holds under a separate contract for each year, and fails to pay the rent.

Missouri.— Kevenaugh *v.* Shaughnessy, 41

services,[66] and it has been held that an indorser who is compelled to make payments on a promissory note may maintain separate actions against a prior indorser to recover each payment made.[67]

(B) *Necessity of Joining.* While there are many decisions to the effect that if an action is not brought until more than one breach of the same contract, or until more than one claim or instalment is due thereunder, all such breaches or claims or instalments constitute but one cause of action and must be included in one action,[68] it has also been held that in such case the right of the party in whose favor the demand exists to proceed upon them separately is unaffected by the fact that they might have been joined.[69] In a proper case, however,

Mo. App. 657. And see Schuricht *v.* Broadwell, 4 Mo. App. 160, holding that the recovery of rent and possession will not bar a recovery for taxes which the lessee covenanted to pay, and for rent which accrued subsequent to the first recovery.

New York.— Underhill *v.* Collins, 60 Hun 585, 15 N. Y. Suppl. 495; Whitman *v.* Louten, 3 N. Y. Suppl. 754; Clark *v.* Jones, 1 Den. 516, 43 Am. Dec. 706.

England.— Gambrell *v.* Falmouth, 4 A. & E. 73, 31 E. C. L. 51; Palmer *v.* Strotwick, 1 Keb. 95, 113, 1 Lev. 43, Sid. 44, T. Raym. 21; Bristowe *v.* Fairclough, 9 L. J. C. P. 245, 1 M. & G. 143, 1 Scott N. R. 161, 39 E. C. L. 687; Welbie *v.* Phillips, 2 Vent. 129.

See 1 Cent. Dig. tit. "Action," § 615.

66. Liddell *v.* Chidester, 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387; Wilkinson *v.* Black, 80 Ala. 329; Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Fowler *v.* Armour, 24 Ala. 194; Davis *v.* Preston, 6 Ala. 83; Armfield *v.* Nash, 31 Miss. 361; Gardner *v.* Patten, 15 N. Y. Suppl. 324; Huntington *v.* Ogdensburgh, etc., R. Co., 7 Am. L. Reg. N. S. 143; Mohrhardt *v.* Southern Pac. R. Co., 2 Tex. App. Civ. Cas. § 322.

Recovery for breach and for services rendered.— On a contract for personal service the employee may, in addition to a recovery for the breach, maintain an action for services actually rendered. Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; Hassell *v.* Nutt, 14 Tex. 260.

67. Wright *v.* Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323 [*affirming* 2 Wend. 369].

68. *Alabama.*— Rake *v.* Pope, 7 Ala. 161.

Arkansas.— State *v.* Scoggin, 10 Ark. 326.

Illinois.— Nickerson *v.* Rockwell, 90 Ill. 460.

Kansas.— Saline County Com'rs *v.* Bondi, 23 Kan. 117.

Louisiana.— Reynolds, etc., Constr. Co. *v.* Monroe, 47 La. Ann. 1289, 17 So. 802.

Missouri.— Union R., etc., Co. *v.* Traube, 59 Mo. 355; State *v.* Davis, 35 Mo. 406; Joyce *v.* Moore, 10 Mo. 271; Pettit *v.* American Cent. Ins. Co., 69 Mo. App. 317.

New York.— Secor *v.* Sturgis, 16 N. Y. 548; Westfield Reformed Protestant Dutch Church *v.* Brown, 54 Barb. 191; Bendernagle *v.* Cocks, 19 Wend. 207, 32 Am. Dec. 448; Colvin *v.* Corwin, 15 Wend. 557.

North Carolina.— McPhail *v.* Johnson, 109 N. C. 571, 13 S. E. 799; Jarrett *v.* Self, 90 N. C. 478.

See 1 Cent. Dig. tit. "Action," § 614.

Instalments of rent.— The rule stated in the text has been applied to actions for instalments of rent arising under the same lease and payable at the time of the commencement of the action. Love *v.* Waltz, 7 Cal. 250; Burritt *v.* Belfy, 47 Conn. 323, 36 Am. Rep. 79; Casselberry *v.* Forguer, 27 Ill. 170; Whitaker *v.* Hawley, 30 Kan. 317, 1 Pac. 508; Warren *v.* Comings, 6 Cush. (Mass.) 103; Jex *v.* Jacob, 19 Hun (N. Y.) 105; Smith *v.* Dittenhoefer, 1 N. Y. City Ct. 143; Fox *v.* Althorp, 40 Ohio St. 322. See 1 Cent. Dig. tit. "Action," § 615.

Personal services.— The text has also been applied to claims for personal service rendered at different times. Green *v.* Von Der Ahe, 36 Mo. App. 394; Hughes *v.* Dundee Mortg., etc., Inv. Co., 26 Fed. 831.

Premissory notes.— It has been held that demands on promissory notes past due must be joined in one action. Scofield *v.* Pensons, 26 Miss. 402. But see *supra*, II, B, 1, a, (I), (B), (3).

69. *Alabama.*— Hill *v.* White, 1 Ala. 576.

Connecticut.— Metropolis Mfg. Co. *v.* Lynch, 68 Conn. 459, 473, 36 Atl. 832.

Georgia.— Parris *v.* Hightower, 76 Ga. 631.

Indiana.— Crouse *v.* Holman, 19 Ind. 30.

Nebraska.— Richardson *v.* Opelt, 60 Nebr. 180, 82 N. W. 377; Beck *v.* Devereaux, 9 Nebr. 109, 2 N. W. 365.

New York.— Secor *v.* Sturgis, 16 N. Y. 548; Bruce *v.* Kelly, 5 Hun 229; Cashman *v.* Bean, 2 Hilt. 340.

Texas.— Ferguson *v.* Culton, 8 Tex. 283; Mohrhardt *v.* Sabine Pass., etc., R. Co., 2 Tex. App. Civ. Cas. § 322.

United States.— The Haytian Republic, 154 U. S. 118, 14 S. Ct. 992, 38 L. ed. 930; Stark *v.* Starr, 94 U. S. 477, 24 L. ed. 276.

England.— Brunsden *v.* Humphrey, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944.

Compare Morehouse *v.* Baker, 48 Mich. 335, 12 N. W. 170, an action on a demand which might have been set off in a prior action between the same parties.

Effect of statute conferring right to unite.— The right to unite claims for the recovery of specific real property and the rents, profits, and damages for withholding the same conferred by Ky. Civ. Code, § 111, may be

to prevent confusion and oppression a consolidation of the actions may be enforced.[70]

(c) *Taint of Illegality Affecting Some.* If an action is brought on several and distinct contracts, the illegality of one or more of them will not preclude a recovery on such of the contracts as are legal;[71] but if a part of the consideration of an entire contract is illegal, no action can be maintained to recover anything thereunder.[72]

b. By and Against Joint and Several Parties — (I) *JOINT AND SEVERAL CREDITORS.* Joint creditors cannot sever their interests so as to entitle some or either of them to sue alone for his or their share or moiety, unless by consent of the debtor;[73] but if the indebtedness to several persons is several and not joint, each may maintain a separate action to recover the proportionate share to which he may show himself entitled.[74]

(II) *SEVERAL CREDITORS OF COMMON FUND.* Under some circumstances, where several are interested in the subject-matter of a contract or in the enforcement of a right, the recovery must be by or on behalf of all as in actions by coparceners against one who has received rent as a trustee;[75] or upon an implied demise or agreement to rent, upon a count for use and occupation;[76] or on a guardian's bond by one of several wards;[77] or by legatees on an executor's bond;[78] or scire facias proceedings on a judgment owned by several having separate interests therein;[79] while it has been held on the other hand that where several persons have distinct interests in an entire fund, each may maintain a separate action to recover the portion thereof to which he may be entitled.[80]

(III) *JOINT AND SEVERAL DEBTORS.* Separate actions against joint and several debtors do not offend the rule against splitting.[81]

2. IN ACTIONS EX DELICTO — a. On One or Several Wrongs — (I) *DAMAGES CAUSED BY ONE WRONG* — (A) *Affecting One Person* — (1) IN GENERAL. By the weight of authority all damages sustained by one person by a single wrong

availed of or not by plaintiff in his discretion. Burr *v.* Woodrow, 1 Bush (Ky.) 602; Gregory *v.* Hobbs, 93 N. C. 1.

70. See CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 589.

71. Goodwin *v.* Clark, 65 Me. 280; Robinson *v.* Green, 3 Metc. (Mass.) 159.

72. Coburn *v.* Odell, 30 N. H. 540. See CONTRACTS, 9 Cyc. 564 *et seq.*

73. *California.*— Nightingale *v.* Scannell, 6 Cal. 506, 65 Am. Dec. 525, holding that when one partner sues for an injury to the partnership property, and makes his copartner a defendant, for want of his consent to join as plaintiff, the recovery must be entire for the whole injury.

Massachusetts.— Baker *v.* Jewell, 6 Mass. 460, 4 Am. Dec. 162; Austin *v.* Walsh, 2 Mass. 401.

Michigan. — Blackburn *v.* Blackburn, 132 Mich. 525, 94 N. W. 24.

Missouri.— Dewey *v.* Carey, 60 Mo. 224.

West Virginia. — Phœnix Assur. Co. *v.* Fristoe, 53 W. Va. 361, 44 S. E. 253.

Compare Angus *v.* Robinson, 59 Vt. 585, 8 Atl. 497, 59 Am. Rep. 758, where it is said that where all the parties to a joint contract agree to a severance of the joint interest, and the obligor promises to pay each his several share, each may sue therefor on the new promise.

74. *Kentucky.*— Hammond *v.* Crawford, 9 Bush 75.

Maryland.— Lahy *v.* Holland, 8 Gill 445, 50 Am. Dec. 705; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681.

Missouri. — State *v.* Leutzinger, 41 Mo. 498; Robbins *v.* Ayres, 10 Mo. 538, 47 Am. Dec. 125; Smith *v.* White, 48 Mo. App. 404.

New York. — Hees *v.* Nellis, 1 Thomps. & C. 118.

Vermont. — Crampton *v.* Ballard, 10 Vt. 251.

75. Decharms *v.* Horwood, 10 Bing. 526, 25 E. C. L. 251.

76. Hoffar *v.* Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628.

77. Moody *v.* State, 84 Ind. 433, holding that the recovery must be for the entire present liability and the money brought into court for distribution.

78. See Arrison *v.* Com., 1 Watts (Pa.) 374, where it was held that one of several legatees might recover on an execution bond, and issue execution for his proportion of the damages, and further that the satisfaction of his claim would not prevent the other legatee from issuing scire facias, and that an action would bar a second like suit by another legatee.

79. Hopkins *v.* Stockdale, 117 Pa. St. 365, 11 Atl. 368; Dietrich's Appeal, 107 Pa. St. 174.

80. Leake *v.* Brown, 43 Ill. 372; Hammond *v.* Crawford, 9 Bush (Ky.) 75; Therason *v.* McSpedon, 2 Hilt. (N. Y.) 1.

81. Sully *v.* Campbell, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161; King *v.* Hoare,

give but one cause of action, and hence where an action is grounded not only on the damage sustained but also on the unlawful act, a new action cannot be brought unless there has been a new unlawful act and fresh damage.[82] Thus but one action will lie for damages resulting from a single trespass to or wrongful act respecting land;[83] for the removal of lateral or subjacent support;[84] for the negligence or wrongful act of a municipality;[85] for setting fires which cause injury;[86] for a single fraud,[87] misrepresentation,[88] malicious prosecution, or false imprisonment;[89] for personal injuries;[90] for enticing away a servant;[91] and generally for all damages resulting from one and the same act;[92] and it is immaterial that the

2 D. & L. 382, 8 Jur. 1127, 14 L. J. Exch. 29, 13 M. & W. 494. And see Johnson *v.* Johnson, 3 B. & P. 162, 6 Rev. Rep. 736, where a purchaser of land from several on eviction therefrom was permitted to recover from one of the vendors for money had and received.

82. Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

83. *California.*— De la Guerra *v.* Newhall, 53 Cal. 141.

Georgia.— Cunningham *v.* Morris, 19 Ga. 583, 65 Am. Dec. 611.

Kansas.— Wichita, etc., R. Co. *v.* Beebe, 39 Kan. 465, 18 Pac. 502.

Minnesota.— Ziebarth *v.* Nye, 42 Minn. 541, 44 N. W. 1027; Pierro *v.* St. Paul, etc., R. Co., 37 Minn. 314, 34 N. W. 38, holding that a recovery for use and occupation in an action to recover the possession of realty is a bar to a subsequent action for injury to the estate during the same period of occupation.

New York.— Hahl *v.* Sugo, 169 N. Y. 109, 62 N. E. 135, 88 Am. St. Rep. 539, 61 L. R. A. 258 [*reversing* 46 N. Y. App. Div. 632, 61 N. Y. Suppl. 770] (holding that where an adjoining owner has unlawfully encroached upon real property, the person injured cannot maintain an action at law to prove his title and right to possession, and then bring a separate suit in equity to remove the encroachment); Porter *v.* Cobb, 22 Hun 278; Van Zandt *v.* New York, 8 Bosw. 375; Johnson *v.* Smith, 8 Johns. 383.

England.— Young *v.* Munby, 4 M. & S. 183.

See 1 Cent. Dig. tit. "Action," § 567.

But see Gens *v.* Hargadine, 56 Mo. App. 245, holding that one who claims damages which, although arising from the same wrongful act, result from injuries to different properties, conceded as to one, and disputed as to the other, can settle the injury not in dispute without barring a recovery for the other.

84. Lamb *v.* Walker, 3 Q. B. D. 389, 47 L. J. Q. B. 451, 38 L. T. Rep. N. S. 643, 26 Wkly. Rep. 775; Bonomi *v.* Backhouse, E. B. & E. 622, 96 E. C. L. 622 (per Coleridge, J.); Bawell *v.* Kensey, 3 Lev. 179.

85. Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; Hempstead *v.* Des Moines, 63 Iowa 36, 18 N. W. 676; Hale *v.* Weston, 40 W. Va. 313, 21 S. E. 742.

86. Knowlton *v.* New York, etc., R. Co., 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625; Trask *v.* Hartford, etc., R. Co., 2 Allen (Mass.) 331.

87. Allison *v.* Connor, 36 Mich. 283.

88. Berringer *v.* Payne, 68 Ala. 154.

89. Foster *v.* Napier, 73 Ala. 595; Thompson *v.* Ellsworth, 39 Mich. 719; Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

After a recovery for a malicious prosecution an action will not lie for the utterance of the words upon which the prosecution was founded (Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514; Rockwell *v.* Brown, 36 N. Y. 207; Sheldon *v.* Carpenter, 4 N. Y. 579, 55 Am. Dec. 301), nor will it lie for like utterances made at a different time but prior to the prosecution (Tidwell *v.* Witherspoon, 21 Fla. 359, 58 Am. Rep. 665), but otherwise if the words were spoken thereafter (Rockwell *v.* Brown, 36 N. Y. 207).

90. Howell *v.* Goodrich, 69 Ill. 556; Filer *v.* New York Cent. R. Co., 49 N. Y. 42; Curtiss *v.* Rochester, etc., R. Co., 20 Barb. (N. Y.) 282; Whitney *v.* Clarendon, 18 Vt. 252, 46 Am. Dec. 150; Hodsoll *v.* Stallebrass, 11 A. & E. 301, 39 E. C. L. 178, 9 C. & P. 63, 38 E. C. L. 49, 8 Dowl. P. C. 482, 9 L. J. Q. B. 132, 3 P. & D. 200; Hudson *v.* Lee, 4 Coke 43*a*; Fetter *v.* Beale, 1 Ld. Raym. 339, 1 Salk. 11.

91. Bird *v.* Randall, 3 Burr. 1345, 1 W. Bl. 373, 387 (where there was a first recovery of a stipulated penalty for breach of the contract of service); Hambleton *v.* Veere, 2 Saund. 169.

92. As the creation of a town charge (Marlborough *v.* Sisson, 31 Conn. 332); false accusations of different offenses in one conversation (Cracraft *v.* Cochran, 16 Iowa 301); the stoppage of a water-supply (Law *v.* McDonald, 62 How. Pr. (N. Y.) 340); the illegal exaction of duties on several items included in one liquidation (Bartels *v.* Schell, 16 Fed. 341); or refusal of a trust company to deliver stock (Bracken *v.* Atlantic Trust Co., 167 N. Y. 510, 60 N. E. 772, 81 Am. St. Rep. 731 [*affirming* 59 N. Y. Suppl. 1099]). And see Continental Ins. Co. *v.* H. M. Loud, etc., Lumber Co., 93 Mich. 139, 53 N. W. 394, 32 Am. St. Rep. 494, where it was held that an insurance company, which became subrogated to a portion of a claim of its insured against one through whose negligence the loss was caused, could not maintain an action against the wrong-doer to recover such portion.

Under a statute limiting the recovery of damages in replevin to those for the illegal detention of the property, the owner of the property may institute a separate action to

damages resulted from negligence combined with a natural cause,[93] or that the injuries produced were distinct.[94] On the other hand it has been held that if distinct injuries result from one and the same wrongful act separate actions will lie to recover for each;[95] and that if the same tort causes injury to different rights of the same party, a recovery for an injury to one right will not preclude a recovery for the injury to the other.[96]

(2) CONVERSION. A party who elects to recover a part of the personalty wrongfully taken or withheld at one time, or to recover damages for such a taking, when he might have sued for or recovered the whole, will be barred by his first recovery,[97] and on the same principle one recovery in replevin will bar a subsequent recovery for chattels not included in the first action or for damages for the wrongful act.[98] Under some circumstances, however, as where the recovery of all the chattels was prevented by the act of defendant in concealing or disposing of them,[99] where the owner was ignorant of the extent of his loss,[1] or because of

recover damages to his business reputation and credit resulting from the malicious taking of the property, since such damages could not be recovered in the action of replevin. Crockett *v.* Miller, 112 Fed. 729, 50 C. C. A. 447.

93. Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792.

94. As injury to person and injury to property (King *v.* Chicago, etc., R. Co., 80 Minn. 83, 82 N. W. 1113, 81 Am. St. Rep. 238, 50 L. R. A. 161; Hazard Powder Co. *v.* Volger, 3 Wyo. 189, 18 Pac. 636); or injuries to different personal property (Dillard *v.* St. Louis, etc., R. Co., 58 Mo. 69). And see New Jersey Cent. R. Co. *v.* Green, 86 Pa. St. 427, 27 Am. Rep. 718, where a recovery of a penalty for the ejection of husband and wife from a railroad train was held to be for one wrongful act giving but one right of recovery.

95. Smith *v.* Warden, 86 Mo. 382 (injury to furniture of married man and injury to his wife by same explosion); Babb *v.* Mackey, 10 Wis. 371 (injury to land and destruction of mill-site by overflow caused by illegal erection of dam); Brunsden *v.* Humphrey, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944 [*reversing* 11 Q. B. D. 712] (personal injuries and injury to property).

96. Bradley *v.* Andrews, 51 Vt. 525, holding that a recovery by a father for the loss of the services of his minor child by reason of bodily injuries will not bar a recovery by him as administrator of such child.

Separate actions for injury to person and property, occasioned by the same act of negligence, may be maintained. Yaple *v.* New York, etc., R. Co., 57 N. Y. App. Div. 265, 68 N. Y. Suppl. 292.

97. *Alabama.*— Wittick *v.* Traun, 27 Ala. 562, 62 Am. Dec. 778; Firemen's Ins. Co. *v.* Cochran, 27 Ala. 228; O'Neal *v.* Brown, 21 Atl. 482. But see Wittick *v.* Traun, 27 Ala. 562, 62 Am. Dec. 778, holding that separate actions of detinue may be brought for the conversion of specific chattels.

California.— Cunningham *v.* Harris, 5 Cal. 81.

Massachusetts.— McCaffrey *v.* Carter, 125 Mass. 330; Folsom *v.* Clemence, 119 Mass. 473; Bennett *v.* Hood, 1 Allen 47, 79 Am. Dec. 705; Marble *v.* Keyes, 9 Gray 221.

Missouri.— Union R., etc., Co. *v.* Traube, 59 Mo. 355.

New York.—Farrington *v.* Payne, 15 Johns. 432.

Pennsylvania.— Simes *v.* Zane, 24 Pa. St. 242.

South Carolina.— Bates *v.* Quattlebom, 2 Nott & M. 205.

Tennessee.— Saddler *v.* Apple, 9 Humphr. 342.

Vermont.— Bullard *v.* Thorpe, 66 Vt. 599, 30 Atl. 36.

Virginia.— Hite *v.* Long, 6 Rand. 457, 18 Am. Dec. 719.

Wisconsin.—Kaehler *v.* Dobberpuhl, 60 Wis. 256, 18 N. W. 841.

England.— Gibbs *v.* Cruikshank, L. R. 8 C. P. 454, 42 L. J. C. P. 273, 28 L. T. Rep. N. S. 735, 21 Wkly. Rep. 734.

See 1 Cent. Dig. tit. "Action," § 570.

98. *Alabama.*— Lenoir *v.* Wilson, 36 Ala. 600.

Illinois.— Karr *v.* Barstow, 24 Ill. 580; Savage *v.* French, 13 Ill. App. 17.

Massachusetts.— Stevens *v.* Tuite, 104 Mass. 328; Bennett *v.* Hood, 1 Allen 47, 79 Am. Dec. 705.

Michigan.— Farwell *v.* Myers, 59 Mich. 179, 26 N. W. 328.

Minnesota.— Hardin *v.* Palmerlee, 28 Minn. 450, 10 N. W. 773.

Missouri.— Moran *v.* Plankington, 65 Mo. 337; Funk *v.* Funk, 35 Mo. App. 246.

Virginia.— Hite *v.* Long, 6 Rand. 457, 18 Am. Dec. 719.

England.— Gibbs *v.* Cruikshanks, L. R. 8 C. P. 454, 42 L. J. C. P. 273, 28 L. T. Rep. N. S. 735, 21 Wkly. Rep. 734; Phillips *v.* Berryman, 3 Dougl. 286, 1 Selw. 679, 26 E. C. L. 193.

See 1 Cent. Dig. tit. "Action," § 578.

99. Bennett *v.* Hood, 1 Allen (Mass.) 47, 79 Am. Dec. 705; Reed *v.* Ferris, 112 Mich. 693, 71 N. W. 484, 67 Am. St. Rep. 437; Farwell *v.* Myers, 64 Mich. 234, 31 N. W. 128.

1. Moran *v.* Plankinton, 64 Mo. 337 (where it was assigned as a reason for this exception

inadvertence on his part on the institution of the first action,[2] a subsequent recovery has been permitted.

(3) KILLING OF ANIMALS. If several animals are killed at the same time and by the same act, there is but a single cause of action which must be recovered for in one suit;[3] but if the killings occur at different times and are the result of different and distinct acts, the causes of action arising therefrom are separate and independent.[4]

(B) *Affecting Two or More Persons.* If two or more persons sustain injuries by the same wrong, a distinct right of action accrues to each, and separate actions may be maintained by them.[5]

(II) *DAMAGES CAUSED BY SEPARATE WRONGS* — (A) *In General.* For more than one tort or wrongful act from which different injuries result, separate actions may be maintained.[6]

(B) *Continuing Trespass.* While it has been held that a continuing trespass may be treated as a single cause of action, although damage results at different times,[7] the rule established by the weight of authority is that for trespasses which are continuous new actions may be brought as often as new torts are repeated and fresh injury results.[8] Thus the creation of a nuisance upon another's land

that the prohibition presupposes knowledge of the constituent elements of the cause of action sought to be unwarrantably divided, and as the law does not require that which is impossible, it necessarily follows that a party should not be precluded in consequence of a former action, which was brought in unavoidable ignorance of the full extent of the wrongs received or the injuries done); Funk *v.* Funk, 35 Mo. App. 246 (which discusses and approves of the principles enunciated in the preceding case); Risley *v.* Squire, 53 Barb. (N. Y.) 280.

2. Yancey *v.* Stone, 9 Rich. Eq. (S. C.) 429, where it was held that the owner of a family of three slaves who had filed a bill to recover two of them was permitted after a bill for the recovery of two, and after decree in his favor, to file a second bill against the same defendant, for the recovery of the other slave, whose name had been omitted from the first bill by the solicitor who drafted it, although the conversion of the whole family was at the same time and by the same act.

3. Brannenburg *v.* Indianapolis, etc., R. Co., 13 Ind. 103, 74 Am. Dec. 250; Binicker *v.* Hannibal, etc., R. Co., 83 Mo. 660; Pucket *v.* St. Louis, etc., R. Co., 25 Mo. App. 650.

4. Louisville, etc., R. Co. *v.* Quade, 101 Ind. 364; Missouri Pac. R. Co. *v.* Scammon, 41 Kan. 521, 21 Pac. 590. And see Toledo, etc., R. Co. *v.* Tilton, 27 Ind. 71; Indianapolis, etc., R. Co. *v.* Kercheval, 24 Ind. 139, both holding that such claims cannot be joined so as to make an aggregate which will give jurisdiction.

5. *California.*— Karr *v.* Parks, 44 Cal. 46.

Massachusetts.— Wilton *v.* Middlesex R. Co., 125 Mass. 130.

Missouri.— Duffy *v.* Gray, 52 Mo. 528.

New York.— Taylor *v.* Manhattan R. Co., 53 Hun 305, 6 N. Y. Suppl. 488; Smith *v.* Meaghan, 28 Hun 423.

Vermont.— Bradley *v.* Andrews, 51 Vt. 525. See also Cade *v.* McFarland, 48 Vt. 47, holding that where two engage in a combat each has a right of action for the injury inflicted on him.

England.— Martin *v.* Kennedy, 2 B. & P. 69.

6. *Arkansas.*— St. Louis, etc., R. Co. *v.* Trimble, 54 Ark. 354, 15 S. W. 899.

California.— Nevada, etc., Canal Co. *v.* Kidd, 43 Cal. 180.

Connecticut.— Doane *v.* Cummins, 11 Conn. 152.

Kentucky.— Burr *v.* Woodrow, 1 Bush 602.

Massachusetts.— Adams *v.* Haffards, 20 Pick. 127; White *v.* Moseley, 8 Pick. 356.

Michigan.— Reid *v.* Ferris, 112 Mich. 693, 71 N. W. 484, 67 Am. St. Rep. 437.

New York.— Woods *v.* Pangburn, 75 N. Y. 495; Lee *v.* Kendall, 56 Hun 610, 11 N. Y. Suppl. 131; Rutherford *v.* Aiken, 2 Thomps. & C. 281; Shook *v.* Lyon, 16 Daly 420, 11 N. Y. Suppl. 720; Betts *v.* Hillman, 15 Abb. Pr. 184; Benson *v.* Matsdorf, 2 Johns. 369; Van Alen *v.* Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 113.

North Carolina.—Johnson *v.* Williams, 115 N. C. 33, 20 S. E. 178; Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633.

Wisconsin.— Kronshag *v.* Chicago, etc., R. Co., 45 Wis. 500.

But see Mobile, etc., R. Co. *v.* State, 51 Miss. 137, holding that all accrued penalties must be sued for in one action.

7. Hueston *v.* Mississippi etc., Boom Co., 76 Minn. 251, 79 N. W. 92.

8. *Illinois.*— Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589; St. Louis, etc., R. Co. *v.* Brown, 34 Ill. App. 552.

Massachusetts.— Warner *v.* Bacon, 8 Gray 397, 69 Am. Dec. 253; Leland *v.* Marsh, 16 Mass. 389.

Michigan.— Wheeler *v.* Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37.

Missouri.— Van Hoozier *v.* Hannibal, etc., R. Co., 70 Mo. 145.

Pennsylvania.— Bare *v.* Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42.

renders it obligatory on the wrong-doer to remove it, and successive actions may be maintained against him until he is compelled to do so.[9] In such cases, however, the recovery in the first action must have been limited to damages sustained at the time of the commencement of the action.[10]

b. Against Joint Wrong-Doers. Where two or more are guilty of a trespass they may be sued jointly or severally in one action;[11] but a judgment against one of two joint tort-feasors will preclude a recovery against the other,[12] although where two not in privity are separately sued for the same wrong, a recovery against one will not bar a subsequent recovery against the other.[13]

C. Splitting of Counter-Claim by Defendant. There is authority to the effect that the rule against splitting an entire cause of action is applicable to a counter-claim, which in some respects is treated as an affirmative action by defendant, so that a recovery in the action will bar the whole claim;[14] but this rule is not applicable to a case where defendant is necessarily restricted to a defeat of plaintiff's claim, and is not permitted to obtain an affirmative judgment.[15] In such a case if the counter-claim or set-off is in excess of plaintiff's demand defendant may recover a judgment for the excess.[16]

JOINT.[1] Combined, united;[2] done by or against, or shared between two or more persons in union;[3] done by, or between two or more unitedly; shared by or between two or more.[4] The term is used to express a common property interest enjoyed or a common liability incurred by two or more persons.[5] As applied to real estate, it involves the idea of survivorship.[6] (Joint: Adventure, see JOINT

England.—Hodsoll *v.* Stallebrass, 11 A. & E. 301, 39 E. C. L. 178, 9 C. & P. 63, 38 E. C. L. 49, 8 Dowl. P. C. 482, 9 L. J. Q. B. 132, 3 P. & D. 200.

9. Cumberland, etc., Canal Corp. *v.* Hitchings, 65 Me. 140; Russell *v.* Brown, 63 Me. 203; Shepherd *v.* Willis, 19 Ohio 142; Smith *v.* Elliott, 9 Pa. St. 345; Kilheffer *v.* Herr, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658; Holmes *v.* Wilson, 10 A. & E. 503, 37 E. C. L. 273; Bowyer *v.* Cook, 4 C. B. 236, 56 E. C. L. 236.

10. *Maine.*— Cumberland, etc., Canal Corp. *v.* Hitchings, 65 Me. 140.

New York.— Blunt *v.* McCormick, 3 Den. 283.

Ohio.— Thayer *v.* Brooks, 17 Ohio 489, 49 Am. Dec. 474.

South Carolina. — Markley *v.* Duncan, 1 Harp. 276.

England.— Battishill *v.* Reed, 18 C. B. 696, 25 L. J. C. P. 290, 4 Wkly. Rep. 603, 86 E. C. L. 696.

11. Henry *v.* Carlton, 113 Ala. 636, 21 So. 225.

12. Thomas *v.* Rumsey, 6 Johns. (N. Y.) 26; King *v.* Hoare, 2 D. & L. 382, 8 Jur. 1127, 14 L. J. Exch. 29, 13 M. & W. 494, opinion of the court by Parke, B.

13. Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Woodbury *v.* Delap, 1 Thomps. & C. (N. Y.) 20.

14. South, etc., Alabama R. Co. *v.* Henlein, 56 Ala. 368; O'Connor *v.* Varney, 10 Gray (Mass.) 231; Burnett *v.* Smith, 4 Gray (Mass.) 50; Inslee *v.* Hampton, 11 Hun (N. Y.) 156; De Wolf *v.* Crandall, 34 N. Y. Super. Ct. 14. In most of these cases, however, defendants might have had complete relief had they sought an affirmative judgment.

Rule not applicable to liquidated demand.— In Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344, it was held that a statutory provision permitting a defendant to set off a part of the amount due from plaintiff, when the whole amount so due exceeded the jurisdiction of the court, and allowing a subsequent recovery of the amount withheld, had reference to liquidated demands, and did not authorize the subdivision of a claim for unliquidated damages arising from a single transaction which might be made the subject of action claimed, but not of set-off.

15. Gordon *v.* Van Cott, 38 N. Y. App. Div. 564, 56 N. Y. Suppl. 554.

16. Gordon *v.* Van Cott, 38 N. Y. App. Div. 564, 56 N. Y. Suppl. 554; Hennell *v.* Fairlamb, 3 Esp. 104. See, generally, RECOUPMENT, SET-OFF AND COUNTER-CLAIM.

1. The words "joint" and "general" import unity, as distinguished from the word "separate," which implies division and distribution. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921, 922.

2. Kansas City *v.* File, 60 Kan. 157, 161, 55 Pac. 877 [*quoting* Abbott L. Dict.; Kinney L. Dict.].

3. Abbott L. Dict. [*quoted* in Kansas City *v.* File, 60 Kan. 157, 161, 55 Pac. 877].

4. Kinney L. Dict. [*quoted* in Kansas City *v.* File, 60 Kan. 157, 161, 55 Pac. 877].

5. Bouvier L. Dict. [*quoted* in State *v.* Maik, 113 Wis. 239, 247, 89 N. W. 183].

6. Bouvier L. Dict. [*quoted* in State *v.* Maik, 113 Wis. 239, 247, 89 N. W. 183].

As used in connection with other words see the following phrases: "At the joint

ADVENTURES. And Several Contract, see COMMERCIAL PAPER; CONTRACTS; HUSBAND AND WIFE; SUBSCRIPTIONS. Debtor Acts, see JUDGMENTS; PROCESS. Debtors — Accord and Satisfaction by One or More, see ACCORD AND SATISFACTION; Attachment Against, see ATTACHMENT; Contribution Between, see CONTRIBUTION; Judgment Against, see JUDGMENTS; Part Payment by One as Affecting Operation of Statute of Limitations, see LIMITATIONS OF ACTIONS; Release of, see PRINCIPAL AND SURETY; RELEASE; Remedy by Action Against, see ABATEMENT AND REVIVAL; PARTIES; Right to Creditor's Suit, see CREDITORS' SUITS; Service of Process Upon, see PROCESS; Subscription by, see SUBSCRIPTIONS. Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. Guardian, see GUARDIAN AND WARD. Indictment, see INDICTMENTS AND INFORMATIONS. Judgment, see JUDGMENTS. Lives, see ESTATES. Negligence, see NEGLIGENCE. Owners, see JOINT TENANCY. Joint Parties, see PARTIES. Resolutions, see STATUTES. Stock Company, see JOINT STOCK COMPANIES. Tenancy, see JOINT TENANCY. Tenant, see JOINT TENANCY. Tort-Feasors — Generally, see TORTS; Accord and Satisfaction by One or More, see ACCORD AND SATISFACTION; Contribution Between, see CONTRIBUTION; Implied Contract of Indemnity Between, see INDEMNITY; Release of, see RELEASE; Remedy by Action, see ABATEMENT AND REVIVAL. Trespass, see TRESPASS. Trustee, see TRUSTS. Will, see WILLS. See also COMBINATION; COMBINE; COMMON; CONNECT; CONNECTED; CROSS.)

JOINT ADMINISTRATOR. See, generally, EXECUTORS AND ADMINISTRATORS.

expense of" (Lapham *v.* Rice, 55 N. Y. 472, 479); "joint assignees" (Ross *v.* Machar, 8 Ont. 417, 431); "joint exception" (State *v.* Gregory, 132 Ind. 387, 389, 31 N. E. 952); "joint petition" (Union School Section *v.* Lockhart, 27 Ont. 345, 346); "joint right" (Butler Hard Rubber Co. *v.* Newark, 61 N. J. L. 32, 47, 40 Atl. 224); "joint stock or mutual plan" (Given *v.* Rettew, 162 Pa. St. 638, 640, 29 Atl. 703); "joint title" (Manufacturer's Bank *v.* Osgood, 12 Me. 117, 121).

"Jointly" see Reclamation Dist. No. 3 *v.* Parvin, 67 Cal. 501, 502, 8 Pac. 43; Kansas City *v.* File, 60 Kan. 157, 161, 55 Pac. 877; Webster *v.* Dwelling House Ins. Co., 53 Ohio St. 558, 42 N. E. 546, 53 Am. St. Rep. 658, 30 L. R. A. 719; State *v.* Maik, 113 Wis. 239, 247, 89 N. W. 183; Gold, etc., Tel. Co. *v.* Commercial Tel. Co., 23 Fed. 340, 342, 23 Blatchf. 199. As creating a joint tenancy see Mustain *v.* Gardner, 203 Ill. 284, 67 N. E. 779; Simons *v.* Bollinger, 154 Ind. 83, 87, 56 N. E. 23, 48 L. R. A. 234; Case *v.* Owen, 139 Ind. 22, 24, 38 N. E. 395, 47 Am. St. Rep. 253; Perkins *v.* Baynton, 1 Bro. Ch. 118, 28 Eng. Reprint 1022. See also JOINTLY, *post*, 464 notes 14, 15.

JOINT ADVENTURES

By P. B. McKenzie

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CROSS-REFERENCES

For Matters Relating to:

Damages For Breach of Contract, see DAMAGES.

General Rules Governing Joint Adventures, see PARTNERSHIP.

Influence of Statute of Frauds on Joint Adventures in Land, see FRAUDS, STATUTE OF.

Pooling Contracts of Carriers, see CARRIERS.

I. DEFINITION.

A joint adventure is an enterprise undertaken by several persons jointly.[1]

1. Cyclopedic L. Dict.

Other definitions are: "A commercial enterprise by several persons jointly." English L. Dict.

"A commercial or maritime enterprise undertaken by several persons jointly." Black L. Dict.

"Grubstake" defined see 20 Cyc. 1390.

II. NATURE, CREATION, AND EXISTENCE OF RELATION.

A. Nature of Relation — Distinguished From Partnership. The subject of joint adventures is of comparatively modern origin. It was unknown at common law, being regarded as within the principles governing partnerships.[2] While some courts hold that a joint adventure is not identical with a partnership,[3] it is regarded as of a similar nature,[4] and governed by the same rules of law.[5] One distinction lies in the fact that while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction,[6] although the latter may comprehend a business to be continued for a period of years.[7] Another distinction is that a corporation incapable of becoming a partner may bind itself by a contract for a joint adventure, the purposes of which are within those of the corporation.[8] The principal distinction, however, is that in most jurisdictions where any is regarded as existing, one party may sue the other at law for a breach of the contract or a share of the profits or losses, or a contribution for advances made in excess of his share; but this right will not preclude a suit in equity for an accounting.[9] The contract need not be express but may be implied from the conduct of the parties.[10]

B. Pooling Contracts. A joint adventure does not exist where property is pooled by the several owners to be sold at a particular price, and each contributor is to receive the proceeds of the property contributed by him;[11] but it is created by a pooling agreement providing for a sale of the property and a ratable distri-

2. The earliest cases in this country in which the subject is mentioned are Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. 212, and Lyles *v.* Styles, 15 Fed. Cas. No. 8,625, 2 Wash. 224, both being reported in 1808. It was in the fifties that the subject first began to assume importance as a distinct title of law.

3. *Illinois.*— Hurley *v.* Walton, 63 Ill. 260.

Louisiana.— Pickerell *v.* Fisk, 11 La. Ann. 277.

Michigan.— Edson *v.* Gates, 44 Mich. 253, 6 N. W. 645.

New York.— Williams *v.* Gillies, 75 N. Y. 197 [*reversing* 13 Hun 422 (*affirming* 53 How. Pr. 429)]; Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435.

Pennsylvania.— Wright *v.* Cumpsty, 41 Pa. St. 102; Galbreath *v.* Moore, 2 Watts 86; Cleveland *v.* Fararr, 4 Brewst. 27. See also Brady *v.* Colhoun, 1 Penr. & W. 140.

4. Slater *v.* Clark, 68 Ill. App. 433; Doane *v.* Adams, 15 La. Ann. 350; Ross *v.* Willett, 76 Hun (N. Y.) 211, 27 N. Y. Suppl. 785; Hubbell *v.* Buhler, 43 Hun (N. Y.) 82.

5. Marston *v.* Gould, 69 N. Y. 220; Chester *v.* Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Spier *v.* Hyde, 92 N. Y. App. Div. 467, 87 N. Y. Suppl. 285; Hollister *v.* Simonson, 18 N. Y. App. Div. 73, 45 N. Y. Suppl. 426; Ross *v.* Willett, 76 Hun (N. Y.) 211, 27 N. Y. Suppl. 785; Hubbell *v.* Buhler, 43 Hun (N. Y.) 82.

In New York a joint adventure is defined as a limited partnership, not limited in a statutory sense as to liability, but as to its scope and duration. Ross *v.* Willett, 76 Hun 211, 27 N. Y. Suppl. 785; Hubbell *v.* Buhler, 43 Hun 82. See also Clark *v.* Rumsey, 52 N. Y. Suppl. 417. The general rule is that a dissolution or an accounting of a joint adventure can be had only in equity (Spier *v.* Hyde, 92 N. Y. App. Div. 467, 87 N. Y. Suppl. 285; Halsted *v.* Schmelzel, 17 Johns. 80), and that no admissions of the answer will deprive equity of jurisdiction (Spier *v.* Hyde, *supra*). But in Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435, it was held that an action at law for a share of the profits was maintainable.

6. *Louisiana.*— Pickerell *v.* Fisk, 11 La. Ann. 277.

Michigan.— McCreery *v.* Green, 38 Mich. 172; Alderton *v.* Williams, (1905) 102 N. W. 753.

Missouri.— Knapp *v.* Hanley, 108 Mo. App. 353, 83 S. W. 1005.

New York.— Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435.

United States.— Camp *v.* U. S., 15 Ct. Cl. 469.

7. As for the purchase and sale of goods for an indefinite time (Derickson *v.* Whitney, 6 Gray (Mass.) 248), or gold mining for two years (Field *v.* Woodmancy, 10 Cush. (Mass.) 427; Goodell *v.* Smith, 9 Cush. (Mass.) 592) or the management, sale, etc., of patents (O'Hara *v.* Harman, 14 N. Y. App. Div. 167, 43 N. Y. Suppl. 556), or the publication of copyrighted books (Bradley *v.* Wolff, 40 Misc. (N. Y.) 592, 83 N. Y. Suppl. 13), or to raising of crops for a period of years (Taylor *v.* Bradley, 39 N. Y. 129, 4 Abb. Dec. 363).

8. Mestier *v.* A. Chevalier Pavement Co., 108 La. 562, 32 So. 520.

9. See *infra*, VI, A.

10. Knapp *v.* Hanley, 108 Mo. App. 353, 83 S. W. 1005.

11. Whaples *v.* Fahys, 87 N. Y. App. Div. 518, 84 N. Y. Suppl. 793.

bution of the profits among the contributors.[12] Such agreement is valid and binding, although the property is not placed in the hands of a trustee, nor any particular person appointed to sell it.[13] Under such circumstances dealings with their property by some of the parties which do not amount to a sale or place it absolutely beyond control will not constitute a breach of the pooling agreement, justifying the others in abandoning it.[14]

C. Consideration For Contract.[15] The mutual promises of the parties are a sufficient consideration to support the contract.[16]

D. Validity of Contract[17] — **1. In General.** The agreement between the parties is not rendered invalid by any uncertainty in the duration of the business or indefiniteness in the minor details of the adventure,[18] or by a defect in the title of property contributed by one of the parties to the enterprise.[19]

2. Parol Agreements. A parol agreement to purchase and sell lands on joint account is valid,[20] and not within the operation of the statute of frauds.[21] If the parol agreement provides that the dealings in real estate shall be conducted in the name of one of the parties, his contracts will not render his associates directly liable to those with whom he deals.[22]

3. Illegality — Against Public Policy. Where the property contributed to the common undertaking by one of the parties is accepted and treated by the others as that of the contributor, they cannot afterward decline to account to him for his share of the profits on the ground that the title of the property was in another.[23] If the contract for the joint adventure is *prima facie* valid it is no defense to an action for an accounting to say that it was for an illegal purpose[24] or was performed in an illegal manner by defendant[25] that he was guilty of illegal acts or fraud in the execution of it,[26] or that the rights acquired thereunder were obtained in an illegal or immoral way.[27] Even if the contract be against public policy, if it is closed, the party receiving the profits must account to his associates therefor.[28]

E. Duration of Contract.[29] If no date is fixed by the contract for the termination of the adventure, or its termination is dependent upon the happening of a contingency, the agreement remains in force until the purpose is accomplished,[30] or the happening of the contingency,[31] and neither party can end it at will by notice or otherwise.[32] Nor will equity dissolve the joint adventure for any cause

12. Green *v.* Higham, 161 Mo. 333, 61 S. W. 798; Spier *v.* Hyde, 92 N. Y. App. Div. 467, 87 N. Y. Suppl. 285.

13. Green *v.* Higham, 161 Mo. 333, 61 S. W. 798.

14. Green *v.* Higham, 161 Mo. 333, 61 S. W. 798.

15. Consideration generally see Contracts, 9 Cyc. 308 *et seq.*

16. Alderton *v.* Williams, (Mich. 1905) 102 N. W. 753; King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332.

17. Validity of contract generally see Contracts.

18. Alderton *v.* Williams, (Mich. 1905) 102 N. W. 753.

19. Alderton *v.* Williams, (Mich. 1905) 102 N. W. 753.

20. King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332; Chester *v.* Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435.

21. King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332; Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435.

An agreement between two or more persons to explore the public domain and discover and locate lodes for the joint benefit of all is not within the statute of frauds, and need not be in writing. Meylette *v.* Brennan, 20 Colo. 242, 38 Pac. 75.

Statute of frauds generally see Frauds, Statute of.

22. Williams *v.* Gillies, 75 N. Y. 197 [*reversing* 13 Hun 422 (*affirming* 53 How. Pr. 429)].

23. Cunningham *v.* Davis, (Tenn. Ch. App. 1898) 47 S. W. 140.

24. Wallis *v.* Wheelock, 26 La. Ann. 246.

25. Jones *v.* Davidson, 2 Sneed (Tenn.) 447.

26. Jones *v.* Davidson, 2 Sneed (Tenn.) 447; Van Tine *v.* Hilands, 131 Fed. 124.

27. McMullen *v.* Hoffman, 75 Fed. 547.

28. Wann *v.* Kelley, 5 Fed. 584, 2 McCrary 628.

29. Duration of contract generally see Contracts.

30. Hubbell *v.* Buhler, 43 Hun (N. Y.) 82.

31. Green *v.* Higham, 161 Mo. 333, 61 S. W. 798.

32. Green *v.* Higham, 161 Mo. 333, 61 S. W. 798; Hubbell *v.* Buhler, 43 Hun (N. Y.) 82.

other than those which justify the dissolution of partnerships.[33] But where the adventure is undertaken on the basis of estimates which contemplate certain expenditures of time and money, and thereafter it develops that without fault of either party so much more time and money will be required than was contemplated, as to render success doubtful, either party may abandon the adventure without becoming liable to the other.[34]

F. Title to Property. Where property is purchased as a joint venture it is not material in whose name the title is taken, as any one holding the title will be regarded as trustee for his associates;[35] and property paid for out of the receipts of the joint adventure becomes the joint property of all the parties.[36]

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTIES.

A. Good Faith Required. Persons united for a common purpose must be loyal to that purpose and each other. None may, without the consent of all the associates, appropriate to his own use the common property, or by any dealing therewith secure an unfair advantage over those interested with him.[37] An advantage or profit secured by one inures to the benefit of all.[38] He must account for a profit made by falsely representing the price of property purchased, or for commissions paid him by his vendor;[39] or profits on a sale negotiated by him before he induces his associates to sell to him at a less price than he obtains.[40] The duty to account for and share the advantage obtained is not affected by the fact that it was received in part as consideration for personal services rendered by the party acquiring it.[41] Those aiding him in procuring an advantage may, in equity, be held equally liable with him for the fraud.[42] The party paying the full contribution toward the adventure is entitled to a conveyance of his interest from the one holding the title,[43] and this right will be enforced against the administrator of the latter, although he died insolvent.[44] A sale of the common property, by one having authority to sell, made in disregard of the terms of the agreement, and at an inadequate price, will be vacated at the instance of the other parties; or if made to a *bona fide* purchaser, the vendor

But see Marston *v.* Gould, 69 N. Y. 220, where it was held that a joint adventure for speculating in stocks was terminable by either party at any time.

33. Hubbell *v.* Buhler, 43 Hun (N. Y.) 82.

34. Hart *v.* McDonald, 52 La. Ann. 1686, 28 So. 169.

35. Freschsel *v.* Bellesheim, 14 N. Y. St. 610.

36. Hayden *v.* Eagleson, 15 N. Y. St. 200.

37. *California.*— Cole *v.* Bacon, 63 Cal. 571.

Maryland.— Hambleton *v.* Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216.

Missouri.— Seehorn *v.* Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562.

New Jersey.— Scudder *v.* Budd, 52 N. J. Eq. 320, 26 Atl. 904.

New York.— Getty *v.* Devlin, 54 N. Y. 403; Spier *v.* Hyde, 92 N. Y. App. Div. 467, 87 N. Y. Suppl. 285; Hollister *v.* Simonson, 18 N. Y. App. Div. 73, 45 N. Y. Suppl. 426; Reilly *v.* Freeman, 1 N. Y. App. Div. 560, 37 N. Y. Suppl. 570.

See 29 Cent. Dig. tit. "Joint Adventures," § 3.

38. *California.*— Cole *v.* Bacon, 63 Cal. 571.

Maryland.— Hambleton *v.* Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216.

Michigan.— Petrie *v.* Torrent, 100 Mich. 117, 58 N. W. 690, 59 N. W. 941.

Missouri.— Seehorn *v.* Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562.

New York.— Getty *v.* Devlin, 54 N. Y. 403; Spier *v.* Hyde, 92 N. Y. App. Div. 467, 87 N. Y. Suppl. 285; Hollister *v.* Simonson, 18 N. Y. App. Div. 73, 45 N. Y. Suppl. 426; Reilly *v.* Freeman, 1 N. Y. App. Div. 560, 37 N. Y. Suppl. 570.

United States.— Delmonico *v.* Roudebush, 5 Fed. 165, 2 McCrary 18.

See 29 Cent. Dig. tit. "Joint Adventures," § 3.

39. Seehorn *v.* Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562; Getty *v.* Devlin, 54 N. Y. 403; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267. But if property is purchased at the price fixed by the party furnishing the capital, the one rendering services need not account for a commission paid him by the vendor. Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435.

40. McCutcheon *v.* Smith, 173 Pa. St. 101, 33 Atl. 881.

41. Delmonico *v.* Roudebush, 5 Fed. 165, 2 McCrary 18.

42. Hambleton *v.* Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216.

43. Putnam *v.* Burrill, 62 Me. 44.

44. Putnam *v.* Burrill, 62 Me. 44.

will be compelled to account and make good the losses of his associates.[45] In the absence of mistake, duress, or fraud, one accepting a consideration in full satisfaction of his interest in the joint adventure and property cannot thereafter claim any right or title therein;[46] but if the property has been used by his coöwner for his individual purposes and in the conduct of his private business, the withdrawing owner is entitled to a fair compensation for such use.[47] Joint property, used by the party to the adventure in whom is vested the title, to secure advances made to him individually, may be redeemed by the other party by payment of such advances.[48] An appropriation of the common property to individual use constitutes conversion,[49] or creates the relation of debtor and creditor between the parties;[50] and if property, other than money, be converted, those guilty thereof are chargeable with its highest value between the date of conversion and the time the complaining party had notice thereof.[51] One having authority to sell the common property, who fails to sell at the time specified in the contract, is answerable for the value of the property at the time the sale should have been made,[52] or its value at the time of refusal to carry out the agreement.[53] And a party having discretion to determine the time of sale of the common property must sell within a reasonable time,[54] and failing to do so he may be sued by the other party for profits that could have been realized;[55] and is chargeable with interest from the date of the suit.[56] The death of one of two persons jointly interested in real estate does not affect the rights or duties of the survivor who holds the title, and if he uses and improves the property as his own the personal representatives of the decedent may recover the latter's share of the net enhanced value of the property as it stood at the time of the improvement.[57] Parties to a joint adventure have the power and interest of a partner, as to the disposition of the property.[58] A majority vested with full power to determine the scheme for the disposition of the common property becomes the agent of and binds all by its acts.[59] A party to a joint adventure may advise, but not order, the party invested with the power to sell the joint property, as to the form in which the consideration shall be paid. The latter may exercise his discretion, and if he, in good faith, although in disregard of the advice of the coöwner, accepts a consideration which becomes worthless, he is not liable for the loss.[60] But the party having the power to sell is under obligation to notify his associate of the contemplated sale, and to use his best endeavors to procure the highest possible price,[61] although he need not declare at the time of the sale that it is made on joint account.[62] If the sale is made in good faith it binds all the parties.[63] The proceeds of the common property in the hands of a trustee appointed by the

45. Hollister *v.* Simonson, 18 N. Y. App. Div. 73, 45 N. Y. Suppl. 426.
46. Oteri *v.* Oteri, 38 La. Ann. 403.
47. Oteri *v.* Oteri, 38 La. Ann. 403.
48. Richardson *v.* McLean, 80 Fed. 854, 26 C. C. A. 190.
49. Morris *v.* Wood, (Tenn. Ch. App. 1896) 35 S. W. 1013.
50. Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. C. C. 212.
51. Morris *v.* Wood, (Tenn. Ch. App. 1896) 35 S. W. 1013.
52. Beckwith *v.* Talbot, 2 Colo. 639.
53. Clarkson *v.* Whitaker, 12 Tex. Civ. App. 483, 33 S. W. 1032.
54. Noyes *v.* Barnard, 63 Fed. 782, 11 C. C. A. 424.
55. Beckwith *v.* Talbot, 2 Colo. 639; Corotinsky *v.* Maimin, 37 Misc. (N. Y.) 777, 76 N. Y. Suppl. 924; Noyes *v.* Barnard, 63 Fed. 782, 11 C. C. A. 424.
56. Beckwith *v.* Talbot, 2 Colo. 639. But in Massachusetts it has been held that if the contract is silent as to the time of sale there is no limit to the delay, and no recovery can be had for a refusal to sell. Dorr *v.* McKinney, 9 Allen (Mass.) 359.
57. Fox *v.* Mahony, 91 N. Y. App. Div. 364, 86 N. Y. Suppl. 679.
58. Lyles *v.* Styles, 15 Fed. Cas. No. 8,625, 2 Wash. 224.
59. Where a number of persons jointly purchase a tract of land to be divided into lots of equal value and distributed among them in accordance with a plan to be determined upon by the majority, the plan of the majority is binding upon all of them. Morey *v.* Clopton, 103 Mo. App. 368, 77 S. W. 467.
60. Lyles *v.* Styles, 15 Fed. Cas. No. 8,625, 2 Wash. 224.
61. Hollister *v.* Simonson, 18 N. Y. App. Div. 73, 45 N. Y. Suppl. 426.
62. Marston *v.* Gould, 69 N. Y. 220.
63. Marston *v.* Gould, 69 N. Y. 220.

parties to receive them must be distributed by him to the several parties according to their contract. He has no authority to apply the shares of any of them to the payment of debts owing by them to others interested in the adventure.[64] If the joint property is not held for sale but for the profits of increase, and any part of it be sold and replaced with that purchased by all the parties, each one is entitled to a share of the proceeds of that sold.[65] If several of the associates in a joint adventure agree to take any unsold shares therein in proportion to the shares subscribed for by them respectively, those not parties to the agreement are not entitled to claim any part of such unsold shares, or the profits accruing thereon.[66] But the parties to such agreement must account for the price of the unsold shares, with interest, out of their individual funds, and cannot apply the undivided profits of the adventure to payment therefor.[67] The courts will not by implication impose upon the parties to the contract any duty or obligation which is not reasonably and naturally inferable from the terms thereof.[68]

B. Rights of Party Contributing Capital. The party furnishing the money to conduct the adventure, who, by the contract is entitled to reimbursement for all expenses, may deduct from the common fund commissions paid to a third party reasonably employed to make the sale;[69] or moneys paid by him in settlement of damages for a trespass committed by his associate in the execution of the common design;[70] or the cost of a part of the property destroyed without fault on his part.[71] But he cannot charge against the fund any part of the expenses of negotiating a loan to be used in the adventure,[72] or interest on such loan,[73] or on advances made by him.[74] If the contract is for the purchase and improvement of lands, he cannot claim out of the common fund the cost of lands unimproved, the title to which is in his name;[75] nor can he claim a higher price for the lands improved than that actually paid.[76] On the purchase of the interest of the other party to the adventure, he who furnishes the capital is entitled to charge the common fund, not only with the moneys advanced, but with any outstanding joint liability in favor of third persons, for which he remains liable after dissolution.[77] A mere provision of the contract for repayment of all advances made by one of the parties will not necessarily bind the others for repayment if the venture fails. Unless there is an express promise by them to repay, the presumption is that he was to be repaid out of the property acquired or its proceeds.[78]

C. Rights of Party Making Advances. Under a contract binding all parties to contribute an equal proportion of the capital and expenses, one advancing more than his share may compel contribution from the others as for money paid for their use,[79] and the refusal of a party to participate in or become a party to a plan for the management of the business of the adventure will not relieve him of the obligation to contribute.[80] The joint property is bound for the repayment of

64. Hirshfeld *v.* Weill, 121 Cal. 13, 53 Pac. 402.
65. Cunningham *v.* Davis, (Tenn. Ch. App. 1898) 47 S. W. 140.
66. Douglas *v.* Merceles, 23 N. J. Eq. 331.
67. Douglas *v.* Merceles, 23 N. J. Eq. 331.
68. Hawkes *v.* Taylor, 175 Ill. 344, 51 N. E. 611.
69. Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.
70. Woodward *v.* Holmes, 67 N. H. 494, 41 Atl. 72.
71. Chilberg *v.* Jones, 3 Wash. 530, 28 Pac. 1104.
72. Petrie *v.* Torrent, 100 Mich. 117, 58 N. W. 690, 59 N. W. 941; Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.
73. Scudder *v.* Budd, 52 N. J. Eq. 320, 26 Atl. 904.
74. Petrie *v.* Torrent, 100 Mich. 117, 58 N. W. 690, 59 N. W. 941.
75. Scudder *v.* Budd, 52 N. J. Eq. 320, 26 Atl. 904.
76. Scudder *v.* Budd, 52 N. J. Eq. 320, 26 Atl. 904.
77. Edson *v.* Gates, 44 Mich. 253, 6 N. W. 645.
78. Bell *v.* McAboy, 3 Brewst. (Pa.) 81.
79. *Illinois.*— Buckmaster *v.* Grundy, 8 Ill. 626.
Louisiana.— Tuyes *v.* Avegno, 23 La. Ann. 177; Doane *v.* Adams, 15 La. Ann. 350.
New Hampshire.— Pillsbury *v.* Pillsbury, 20 N. H. 90.
New York.— Stover *v.* Flack, 30 N. Y. 64.
Pennsylvania.— Finlay *v.* Stewart, 56 Pa. St. 183; Brady *v.* Colhoun, 1 Penr. & W. 140.
See 29 Cent. Dig. tit. "Joint Adventures," § 6.
80. Pillsbury *v.* Pillsbury, 20 N. H. 90.

such advances;[81] and the right to subject it thereto is paramount to the rights of the creditors of the defaulting party,[82] and will be enforced to the extent of requiring the payment of outstanding joint debts created in the purchase of the common property.[83] Where the party making advances takes the title in his individual name he may hold it until repayment;[84] and on repayment the other party is entitled to a conveyance of his interest in the property.[85] If the property becomes valueless before sale, a sale thereof is not a condition precedent to an action to recover advances.[86] One contributing to a pool is entitled to compensation for the property contributed by him, with interest from the date of the contribution.[87] Unless otherwise provided by the contract, reimbursement of advances cannot be insisted upon until the completion of the transaction;[88] but if repayment prior to the consummation of the adventure is provided for, an action at law will lie to recover it.[89] If a stranger to the adventure repays or secures the repayment of advances made by one of the parties, such party may still recover from his associates the advances made, unless a contrary intention is clearly shown.[90] Interest should be allowed on advances from the time of payment,[91] or from the date fixed by the contract;[92] but ordinarily compound interest should not be allowed.[93] The party making advances can fix the terms upon which they will be made and such terms are binding upon those accepting them.[94] Under a contract requiring equal contribution the party furnishing all the capital and having entire control of the adventure may properly charge a reasonable salary for his services.[95] Contribution cannot be demanded where the party claiming it had no authority from the others to incur the expenses,[96] or where the expenses were not incurred for the common object and with a reasonable dependence upon the common fund;[97] and only advances actually made and expenses actually paid are recoverable.[98] A final accounting between the parties, in which all participate or acquiesce, by which the inequalities of their contributions are adjusted and settled, will not be set aside, except for fraud or mistake.[99]

D. Liability of Party Agreeing to Make Advances. Inability to comply

81. Furman *v.* McMillian, 2 Lea (Tenn.) 121; Withers *v.* Pemberton, 3 Coldw. (Tenn.) 56; Gee *v.* Gee, 2 Sneed (Tenn.) 395; Williams *v.* Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191.

One contributing an excessive amount toward the purchase of divers properties cannot claim a lien on all the properties for the aggregate amount of such advances, but the excess paid on each parcel of property acquired must be charged against it and none other. Crenshaw *v.* Crenshaw, 61 S. W. 366, 22 Ky. L. Rep. 1782.

82. Furman *v.* McMillian, 2 Lea (Tenn.) 121; Withers *v.* Pemberton, 3 Coldw. (Tenn.) 56; Williams *v.* Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191.

83. Furman *v.* McMillian, 2 Lea (Tenn.) 121; Rankin *v.* Black, 1 Head (Tenn.) 650.

84. Leamy *v.* Fisler, (N. J. Ch. 1902) 52 Atl. 703; Williams *v.* Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191; Burhans *v.* Jefferson, 76 Fed. 25, 22 C. C. A. 25.

85. Leamy *v.* Fisler, (N. J. Ch. 1902) 52 Atl. 703.

86. Stover *v.* Flack, 30 N. Y. 64.

87. Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.

88. Williams *v.* Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366.

89. Williams *v.* Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366.

90. King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332.

91. Buckmaster *v.* Grundy, 8 Ill. 626; Crenshaw *v.* Crenshaw, 61 S. W. 366, 22 Ky. L. Rep. 1782; Hopkins Mfg. Co. *v.* Ruggles, 51 Mich. 474, 16 N. W. 862.

Delay in furnishing his accounts by the party entitled to interest will not defeat his right thereto. Winsor *v.* Savage, 9 Metc. (Mass.) 346.

92. Scudder *v.* Budd, 52 N. J. Eq. 320, 26 Atl. 904.

93. Winsor *v.* Savage, 9 Metc. (Mass.) 346; Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.

94. Gordon *v.* Boppe, 55 N. Y. 665; Taylor *v.* Noble, 2 Pinn. (Wis.) 415, 2 Chandl. 73.

95. McMullen *v.* Hoffman, 75 Fed. 547.

96. Petrie *v.* Torrent, 100 Mich. 117, 58 N. W. 690, 59 N. W. 941; Norris *v.* Leavitt, 61 N. H. 109. A party who, for the joint benefit of himself and another, undertakes to find a purchaser for land on which they jointly hold an option, cannot, by taking title in his own name, bind the other to pay part of the purchase-price. Parshall *v.* Conklin, 81* Pa. St. 487.

97. Norris *v.* Leavitt, 61 N. H. 109.

98. Clarke *v.* Puig, 18 La. Ann. 342; Kane *v.* Smith, 12 Johns. (N. Y.) 156.

99. Stewart *v.* Milliken, 30 Mich. 503.

with an agreement to furnish the money necessary to carry out the joint adventure will not release the party promising from the obligation;[1] and for such breach of the contract the other party is entitled to recover of him the sum he would have received on the completion of the undertaking, less the expense he would reasonably have incurred in rendering the services necessary thereto,[2] or the expenses incurred by him in good faith in anticipation of performance by the other party.[3]

E. Rights of Party Contributing Services. One who agrees to render services for a share of the profits of an enterprise becomes vested with an interest in the property when acquired and he may recover the value thereof,[4] and may compel an accounting in equity.[5] He cannot be deprived of his share of the profits for accepting a commission from the vendor, when the land was purchased at the price fixed by his associate.[6] And if he is to receive a part of certain property acquired in consideration of his services, the fact that losses were sustained on other property is not material to and cannot defeat his right to such share.[7] If the services are to be performed under certain conditions to be provided by the other parties, he cannot be required to perform them under any other conditions; and where the provisions made by the other parties fail without fault on his part, he may abandon the enterprise.[8] He is entitled to the compensation provided in the contract, and, if in litigation between the parties the court only allows a part thereof, he may collect the balance from the common fund,[9] and if on accounting he claims such balance as the property of himself and another, the other parties cannot object that he does not claim individually.[10] A party required to travel from home is entitled to the expenses of his return.[11] One rendering services cannot recover compensation therefor unless the contract so provides.[12]

IV. INDIVIDUAL LIABILITY.

Each party to the contract must perform the services required of him thereby, and if by his neglect the expense of employing others is incurred he is chargeable therewith.[13] No part of the expenses incurred by one party in the execution of his part of the common enterprise can be charged against the other parties;[14] but should be deducted from his share of the profits.[15]

V. PROFITS AND LOSSES.

A. Right to Share Profits. In the absence of express agreement the law implies an equal division of profits,[16] without regard to any inequality of contribution.[17] And this implication is conclusive where the circumstances warrant it,

1. McCreery *v.* Green, 38 Mich. 172.
2. McCreery *v.* Green, 38 Mich. 172.
3. Alderton *v.* Williams, (Mich. 1905) 102 N. W. 753.
4. Matthews *v.* Kerfoot, 64 Ill. App. 571; Jones *v.* Davis, 48 N. J. Eq. 493, 21 Atl. 1035.
5. Edson *v.* Gates, 44 Mich. 253, 6 N. W. 645.
6. Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435.
7. Altimus *v.* Elliott, 2 Pa. St. 62.
8. Field *v.* Woodmancy, 10 Cush. (Mass.) 427.
9. Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.
10. Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.
11. Scott *v.* Clark, 1 Ohio St. 382.
12. Hopkins Mfg. Co. *v.* Ruggles, 51 Mich. 474, 16 N. W. 862; Stevenson *v.* Maxwell, 2 Sandf. Ch. (N. Y.) 273.
13. Morris *v.* Wood, (Tenn. Ch. App. 1896) 35 S. W. 1013. The parties managing the adventure, who fail to collect from strangers, with whom they litigate the rights of the association, the costs and expenses properly chargeable against them, must bear the loss, and cannot reclaim it from the common fund. Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.
14. Wilson *v.* Anthony, 19 Ark. 16; Lafon *v.* Chinn, 6 B. Mon. (Ky.) 305; Dow *v.* Darragh, 48 N. Y. Super. Ct. 138.
15. Dow *v.* Darragh, 48 N. Y. Super. Ct. 138.
16. Wetmore *v.* Crouch, 150 Mo. 671, 51 S. W. 738; Knapp *v.* Hanley, 108 Mo. App. 353, 83 S. W. 1005; Van Tine *v.* Hilands, 131 Fed. 124.
17. Withers *v.* Pemberton, 3 Coldw. (Tenn.) 56; Rankin *v.* Black, 1 Head (Tenn.) 650; Gee *v.* Gee, 2 Sneed (Tenn.) 395.

and is not affected by a construction of the contract by the parties.[18] But a party who fails or refuses to contribute toward the adventure before any part of the undertaking is accomplished cannot claim any interest in the profits derived therefrom,[19] or in property subsequently acquired by his associate individually, and with his own funds.[20] After dissolution of the joint adventure by mutual consent, if one of the parties pursues the same business on his own account, he will not be required to answer to his former associate for any part of the profits earned by him.[21] Profits in a joint adventure means the net amount after deducting any proper expenses incident to the business;[22] and may consist, not alone of money, but of the unsold portion of the property which was the subject of the adventure;[23] and the presumption is that they are to be determined by the ordinary rules of business.[24] Neither party to a pooling agreement providing for the sharing of profits or earnings of the pooled property can claim a share of the earnings of the property contributed by him. It is out of the earnings of the aggregate property only that he can claim a distributive share.[25]

B. Obligation to Share Losses. The risks attending the proceeds of a joint adventure held by the party into whose hands they come for the joint account of all are shared by all the parties.[26] If the contract for a joint adventure is silent as to sharing the losses, they must be borne by all the parties equally,[27] and without regard to inequality of contribution,[28] and the party paying the losses may recover from the others their *pro-rata* share thereof,[29] with interest from the date of payment,[30] or from the time that the other party receives notice of the losses.[31] A loss not actually incurred or reasonably anticipated cannot be recovered by one party from the other.[32] After a settlement and dissolution of the joint adventure, if the party who took the uncollected assets of the association and paid his associates for their interest therein sustains losses thereon he cannot recover any part thereof from his former associates.[33] An alteration of the place of sale of the property from that specified in the contract, although consented to, may operate to release the party agreeing to render services in connection with the adventure from liability for losses.[34] On the justifiable abandonment of the adventure by one of the parties the losses sustained up to that time must be shared equally by all of them.[35] Under such circumstances neither party can maintain an action against the other for a single item of expense, but the losses must be

18. Wetmore *v.* Crouch, 150 Mo. 671, 51 S. W. 738.

19. Yeager's Appeal, 100 Pa. St. 88. *Compare* Cleveland *v.* Fararr, 4 Brewst. (Pa.) 27, holding that declarations of a part owner that he will not pay his proportion of the expenses do not estop him from recovering his net share of the profits.

20. Miller *v.* Butterfield, 79 Cal. 62, 21 Pac. 543.

21. Goodell *v.* Smith, 9 Cush. (Mass.) 592; Scott *v.* Clark, 1 Ohio St. 382.

22. Doane *v.* Adams, 15 La. Ann. 350; Scott *v.* Clark, 1 Ohio St. 382; Jones *v.* Davidson, 2 Sneed (Tenn.) 447; Chilberg *v.* Jones, 3 Wash. 530, 28 Pac. 1104. In Richardson *v.* Dickinson, 26 N. H. 217, it was held that an agreement to divide the profits accruing from a share in a joint adventure, made with one not a party thereto, included profits derived from a sale of such share, whether or not the undertaking had earned any dividends.

23. Jones *v.* Davis, 48 N. J. Eq. 493, 21 Atl. 1035; Scott *v.* Clark, 1 Ohio St. 382.

24. Chilberg *v.* Jones, 3 Wash. 530, 28 Pac. 1104.

25. Kennebec, etc., R. Co. *v.* White, 38 Me. 63.

26. Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. 212.

27. Claflin *v.* Godfrey, 21 Pick. (Mass.) 1; Lengle *v.* Smith, 48 Mo. 276; Timberlake *v.* Hughes, 65 Mo. App. 640; Floyd *v.* Efron, 66 Tex. 221, 18 S. W. 497.

In Kentucky it has been held that where one party agrees to furnish the capital, and another services, to a joint venture, the latter is not liable for any part of the losses sustained. Rau *v.* Boyle, 5 Bush 253.

28. Withers *v.* Pemberton, 3 Coldw. (Tenn.) 56; Rankin *v.* Black, 1 Head (Tenn.) 650; Gee *v.* Gee, 2 Sneed (Tenn.) 395.

29. Roehl *v.* Porteous, 51 La. Ann. 1746, 26 So. 440.

30. Floyd *v.* Efron, 66 Tex. 221, 18 S. W. 497.

31. Kane *v.* Smith, 12 Johns. (N. Y.) 156.

32. Stoddard *v.* Murdock, 37 Mo. 580.

33. Halstead *v.* Schmelzel, 17 Johns. (N. Y.) 80.

34. Shaw *v.* Gandolfo, 9 La. Ann. 32.

35. Hart *v.* McDonald, 52 La. Ann. 1686, 28 So. 169.

adjusted by an accounting;[36] and the burden of proof is on him claiming a balance due.[37]

VI. ACTIONS OR SUITS BETWEEN PARTIES TO JOINT ADVENTURE.

A. Nature of Remedy — 1. ACTIONS AT LAW. A party to a joint adventure may maintain an action at law to recover a share of the profits of the enterprise,[38] or advances,[39] or to enforce contribution for a proportion of the losses,[40] or for a breach of the contract.[41] An action at law is especially the appropriate remedy where the connection is closed.[42]

2. SUITS IN EQUITY. The remedy at law will not preclude a suit in equity for dissolution of the joint adventure[43] or for an accounting.[44] The party paying the purchase-price of the property acquired under a contract requiring each to contribute equally to the joint adventure may maintain a bill for contribution against the other,[45] before a sale of such property.[46] The failure of the party holding or controlling the legal title to the common property to make an honest sale thereof and account for the proceeds will not warrant a rescission of the contract by the other and a suit to recover his contribution; but his action should be for a sale of the property, division of the net proceeds, and such damages as he has sustained by the misconduct of his associate.[47] On the termination of the contract by one having authority, either party may sue for an accounting.[48]

B. Set-Off. One party may set off against the demands of another for advances payments made by him on behalf of plaintiff in connection with the common venture,[49] and the right to offset such claim is not affected by the fact that plaintiff cannot prove what profits defendant and other parties made in the transaction in which such payments were made on his account.[50] But where one party sues the trustee holding the common fund and some of the parties to the joint adventure, for his share of the fund, a defendant party to the agreement cannot set off against the demand a debt owing to him by plaintiff.[51]

C. Limitations.[52] With respect to the operation of the statute of limitations

38. Hart *v.* McDonald, 52 La. Ann. 1686, 28 So. 169.

37. Hart *v.* McDonald, 52 La. Ann. 1686, 28 So. 169.

38. *Colorado.*— Beckwith *v.* Talbot, 2 Colo. 639.

Illinois.— Hurley *v.* Walton, 63 Ill. 260.

Missouri.— Seehorn *v.* Hall, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562.

New York.— Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435; Peltier *v.* Sewall, 12 Wend. 386.

Pennsylvania.— Finlay *v.* Stewart, 56 Pa. St. 183; Wright *v.* Crumpsty, 41 Pa. St. 102; Gillis *v.* McKinney, 6 Watts & S. 78; Galbreath *v.* Moore, 2 Watts 86; Cleveland *v.* Fararr, 4 Brewst. 27.

Rhode Island.— Fry *v.* Potter, 12 R. I. 542.

United States.— Noyes *v.* Barnard, 63 Fed. 782, 11 C. C. A. 424; Wann *v.* Kelley, 5 Fed. 584, 2 McCrary 628; Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. 212.

See 29 Cent. Dig. tit. "Joint Adventure," § 7.

39. Williams *v.* Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366.

40. Peltier *v.* Sewall, 12 Wend. (N. Y.) 386; Fry *v.* Potter, 12 R. I. 542.

41. Taylor *v.* Bradley, 4 Abb. Dec. (N. Y.) 363; Waring *v.* Cram, 1 Pars. Eq. Cas. (Pa.) 516.

42. Hurley *v.* Walton, 63 Ill. 260; Wann *v.* Kelley, 5 Fed. 584, 2 McCrary 628; Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. 212, holding further that if the connection had not ended a suit in equity for an accounting was the proper remedy.

43. Bradley *v.* Wolff, 40 Misc. (N. Y.) 592, 83 N. Y. Suppl. 13.

44. Petrie *v.* Torrent, 88 Mich. 43, 49 N. W. 1076; Edson *v.* Gates, 44 Mich. 253, 6 N. W. 645; King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332; Bradley *v.* Wolff, 40 Misc. (N. Y.) 592, 83 N. Y. Suppl. 13.

45. Brown *v.* Budd, 2 Ind. 442.

46. Kimball *v.* Williams, 51 N. Y. App. Div. 616, 65 N. Y. Suppl. 69.

47. Hollister *v.* Simonson, 170 N. Y. 357, 63 N. E. 342.

48. Marston *v.* Gould, 69 N. Y. 220.

49. Armstrong *v.* Henderson, 99 Va. 234, 37 S. E. 839. And it is not necessary that other parties who made expenditures on behalf of plaintiff should be a party to the suit in order to permit the allowance of such set-off. Armstrong *v.* Henderson, 99 Va. 234, 37 S. E. 839.

50. Armstrong *v.* Henderson, 99 Va. 234, 37 S. E. 839.

51. Hirshfeld *v.* Weill, 121 Cal. 13, 53 Pac. 402.

52. Statute of limitations generally see LIMITATIONS OF ACTIONS.

upon actions of this character, it has been held that the statute begins to run as to advances from the time of payment.[53]

D. Parties to Actions.[54] All the persons interested in the adventure are not necessary parties to such actions by one party against another;[55] but a corporation organized by the parties to take over the common property is a proper party to a suit to determine the respective interests of the parties in the property and for a distribution of the capital stock of the corporation.[56]

E. Pleadings.[57] A complaint in an action to recover a share of profits which fails to allege that profits have been received by defendant is demurrable;[58] but the pleading of evidence, or matters of inducement, or mere surplusage will not render the complaint subject to demurrer.[59]

F. Evidence.[60] Where the party claiming the existence of a joint adventure is corroborated by the conduct of the parties, it is sufficient to establish the fact against the denial of a single defendant.[61] As a defense against an action based on a contract for a joint adventure defendant may prove its rescission or abandonment.[62] The presumption is that profits are to be determined by the ordinary rules of business, and under a complaint for a division of profits without limitation or explanation, proof that they were to be determined in an extraordinary manner is inadmissible.[63] Admissions of the party under duty to account are admissible against his executor, and are sufficient to sustain a verdict for a less sum than that he admitted to be due.[64] Where the evidence concerning a material issue in an action between the parties is conflicting, the question should be submitted to the jury.[65]

G. Judgment.[66] A judgment in favor of one party against others for his share of the property converted by defendants should be against all defendants participating in the conversion jointly.[67] A decree on accounting limiting the interest on advances does not affect the interest on disbursements.[68]

VII. RIGHTS AND LIABILITIES OF PARTIES AS TO THIRD PERSONS.

Liabilities incurred by one party in the due execution of the joint adventure are binding upon all the parties jointly;[69] and their joint liability is not affected

53. Stover *v.* Flack, 30 N. Y. 64; Brady *v.* Colhoun, 1 Penr. & W. (Pa.) 140.

54. Parties to actions generally see PARTIES.

55. Cole *v.* Bacon, 63 Cal. 571; Beckwith *v.* Talbot, 2 Colo. 639; Burleigh *v.* Bevin, 22 Misc. (N. Y.) 38, 48 N. Y. Suppl. 120.

Non-residents (Angell *v.* Lawton, 76 N. Y. 540) or their personal representatives (Angell *v.* Lawton, *supra*) need not be brought in as parties.

56. King *v.* Barnes, 109 N. Y. 267, 16 N. E. 332.

57. Pleading generally see PLEADING.

58. Dorr *v.* McKinney, 9 Allen (Mass.) 359.

59. Marvin *v.* Yates, 26 Wash. 50, 66 Pac. 131.

60. Evidence generally see EVIDENCE.

61. Mestier *v.* A. Chevalier Pavement Co., 108 La. 562, 32 So. 520.

62. Rescission of the contract may be shown by correspondence between the parties, extending over a period of years, in which it is not mentioned by either party. Brady *v.* Colhoun, 1 Penr. & W. (Pa.) 140.

63. Chilberg *v.* Jones, 3 Wash. 530, 28 Pac. 1104.

64. Marvin *v.* Yates, 26 Wash. 50, 66 Pac. 131.

65. Whether a party sued for negligent management had assumed control, as authorized by the contract, is a question for the jury, where there is some proof of the fact. Sullivan *v.* Ross, 124 Mich. 287, 82 N. W. 1071.

66. Judgments generally see *post*, JUDGMENTS.

67. Reilly *v.* Freeman, 1 N. Y. App. Div. 560, 37 N. Y. Suppl. 570.

68. Stevenson *v.* Maxwell, 2 Sandf. Ch. (N. Y.) 273.

69. *Illinois.*— Slater *v.* Clark, 68 Ill. App. 433.

Massachusetts. — Derickson *v.* Whitney, 6 Gray 248.

New York.—Still *v.* Holbrook, 23 Hun 517; Benners *v.* Harrison, 19 Barb. 53; Clark *v.* Rumsey, 52 N. Y. Suppl. 417.

Tennessee. — Mission Ridge Land Co. *v.* Nixon, (Ch. App. 1897) 48 S. W. 405.

Vermont.— Smith *v.* Burton, 59 Vt. 408, 10 Atl. 536.

See 29 Cent. Dig. tit. "Joint Adventures," § 8.

But see Hartney *v.* Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005, denying the right of a prospector under a "grub stake" contract to bind those interested with him.

by differences in their interests in the property purchased, which are not brought to the notice of the vendor;[70] nor by an agreement between them limiting the liability of some of them to the capital contributed.[71] But if the party creating the liability is authorized to and does deal in his individual name,[72] or if he creates the liability in the performance of obligations imposed upon him individually by the contract,[73] or if the contract is void under the statute of frauds,[74] his associates are not bound therefor.

VIII. ACTIONS BY OR AGAINST THIRD PERSONS.

The party having authority to conduct the business of the joint adventure in his individual name may maintain an action against a stranger who deals with him to recover sums due on account of the joint enterprise.[75] Creditors of the association may maintain suits for the recovery of their debts against the managing associate alone, where he has been credited therewith on his accounts with his associates and assumed the payment thereof.[76] A person will not be held liable as a party to a joint adventure in the absence of convincing proof of the existence of the association and of his membership therein.[77] Non-joinder of parties to an action against joint adventurers must be pleaded to be made available.[78]

JOINT AND SEVERAL CONTRACT. See, generally, BONDS; COMMERCIAL PAPER; CONTRACTS; COVENANTS; DEEDS; GUARANTY; HUSBAND AND WIFE; SUBSCRIPTIONS.

JOINT AND SEVERAL MAKERS. See COMMERCIAL PAPER.

JOINT BALLOT. Jointly by ballot.[1] (See JOINT VOTE.)

JOINT BOND. See, generally, BONDS.

JOINT CAPTORS. A term which denotes those who, not being themselves "actual captors," have nevertheless assisted, or are taken to have assisted, the actual captors, by conveying either encouragement to them or intimidation to their enemy.[2]

JOINT CAUSES OF ACTION. A term which includes causes of action against joint wrongdoers as well as causes of action against joint parties to a contract.[3]

JOINT CONTRACT. See, generally, CONTRACTS.

JOINT COVENANT. See, generally, COVENANTS.

JOINT CREDITORS. Persons jointly entitled to require satisfaction of the same debt or demand.[4] (See JOINT, and Cross-References Thereunder.)

JOINT DEBTOR ACTS. Legislative acts, as a substitute for outlawry, which provide that if process be issued against several joint debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may

70. Mission Ridge Land Co. *v.* Nixon, (Tenn. Ch. App. 1897) 48 S. W. 405.

71. Benners *v.* Harrison, 19 Barb. (N. Y.) 53. *Compare* Cooper *v.* Frierson, 48 Miss. 300, in which it was held that a person dealing with a party to a joint adventure was bound to acquaint himself with the terms of the agreement of association, and the scope of authority to bind each other and the common property.

72. Williams *v.* Gillies, 75 N. Y. 197 [*reversing* 13 Hun 422 (*affirming* 53 How. Pr. 429)].

73. Lafon *v.* Chinn, 6 B. Mon. (Ky.) 305; Cooper *v.* Frierson, 48 Miss. 300.

74. Chamberlain *v.* Dow, 10 Mich. 319.

75. Howe *v.* Savory, 49 Barb. (N. Y.) 403.

76. Secor *v.* Law, 4 Abb. Dec. (N. Y.) 188, 3 Keyes 525, 3 Transcr. App. 328 [*affirming* 9 Bosw. 163].

77. Proof of payments of large sums of money directly to those engaged in an undertaking, and that the party making them was a stock-holder in a corporation interested therein, is insufficient to establish either fact. Poulson *v.* De Navarro, 57 N. Y. App. Div. 623, 68 N. Y. Suppl. 177.

78. Derickson *v.* Whitney, 6 Gray (Mass.) 248.

1. State *v.* Shaw, 9 S. C. 94, 144.

2. *In re* Banda, etc., Booty, L. R. 1 A. & E. 109, 136, 12 Jur. N. S. 819, 35 L. J. Adm. 17, 14 L. T. Rep. N. S. 293.

3. Williamson *v.* Howell, 17 Ala. 830, 831, 832.

4. Black L. Dict.

proceed against those served, and, if successful, have judgment against all.[5] (See, generally, JUDGMENTS; PROCESS.)

JOINT DEBTORS. Persons united in a joint liability or indebtedness.[6] (See JOINT, and Cross-References Thereunder.)

JOINT DECREE. See, generally, EQUITY; JUDGMENTS.

JOINT DISTRICT SEWERS. Sewers constructed or acquired under the authority of an ordinance uniting one or more districts or unorganized territory for the purpose of providing main outlet sewers for the joint benefit of such districts or territory, and paid for by special assessments.[7] (See, generally, DRAINS; WATERS.)

JOINT EMPLOYMENT. A term constantly used to denote a use in the same machine or apparatus; conjoint use.[8]

JOINT EXCEPTION. See, generally, APPEAL AND ERROR.

JOINT EXECUTOR. See, generally, EXECUTORS AND ADMINISTRATORS.

JOINT EXPENSE. A term importing an expense to be equally borne.[9]

JOINT GUARDIAN. See, generally, GUARDIAN AND WARD.

JOINT HEIR. A coheir;[10] as applied to two persons, a term sometimes meaning the heirs of both at the death of the survivor.[11] (See HEIR; and, generally, DESCENT AND DISTRIBUTION; ESTATES; WILLS.)

JOINT INDICTMENT. See, generally, INDICTMENTS AND INFORMATIONS.

JOINT INFORMATION. See, generally, INDICTMENTS AND INFORMATIONS.

JOINT INTEREST. Such interest as is acquired at the same time and by the same title.[12]

JOINT JUDGMENT. See, generally, JUDGMENTS.

JOINT LIVES. A term which applies when a right is granted to two or more persons, to be enjoyed while both live.[13] (See, generally, ESTATES.)

JOINTLY.[14] In a joint manner; unitedly.[15] (See JOINT.)

JOINT MAKER. A term which is used interchangeably with "original promisor" to denote the liability assured by the contract.[16] (See, generally, COMMERCIAL PAPER.)

JOINT MORTGAGE. See, generally, CHATTEL MORTGAGES; MORTGAGES.

JOINT NEGLIGENCE. See, generally, NEGLIGENCE.

JOINT OBLIGATION. An obligation which under the law of Louisiana binds both parties thereto only for their proportion of the debt.[17] (See JOINT AND SEVERAL CONTRACT, and Cross-References Thereunder.)

5. Hall *v.* Lanning, 91 U. S. 160, 168, 23 L. ed. 271.

6. Black L. Dict.

"Other joint debtors" see Walsh *v.* Miller, 51 Ohio St. 462, 487, 38 N. E. 381.

7. Prior *v.* Buehler, etc., Constr. Co., 170 Mo. 439, 443, 71 S. W. 205.

8. Union Switch, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Fed. 833, 834.

9. Lapham *v.* Rice, 55 N. Y. 472, 479.

10. Rapalje & L. L. Dict.

11. Gardiner *v.* Fay, 182 Mass. 492, 493, 65 N. E. 825.

12. Denigan *v.* San Francisco Sav. Union, 127 Cal. 142, 149, 59 Pac. 390, 78 Am. St. Rep. 35.

As defined by statute see Cal. Civ. Code (1903), § 683; Mont. Civ. Code (1895), § 1105; N. D. Rev. Codes (1899), § 3283; S. D. Civ. Code (1903), § 199.

13. Abbott L. Dict.

"During their joint lives" as meaning the time to their coverture see Highley *v.* Allen, 3 Mo. App. 521, 524.

14. "Jointly and severally" see Rice *v.* Gove, 22 Pick. (Mass.) 158, 162, 33 Am. Dec. 724; Mitchell *v.* Darracott, 1 Treadw. (S. C.) 486; Healey *v.* Story, 3 Exch. 2, 3, 18 L. J. Exch. 8; 10 Cyc. 1028; 5 Cyc. 760 note 83.

"Jointly and severally" held equivalent to "jointly and personally" see Healey *v.* Story, 3 Exch. 2, 3, 18 L. J. Exch. 8.

"Jointly or severally" liable see 7 Cyc. 667 note 60.

15. Standard Dict. See also Blankenship *v.* Whaley, 142 Cal. 566, 570, 76 Pac. 235.

"Jointly indebted" see Whitmore *v.* Shiverick, 3 Nev. 288, 310; Richter *v.* Poppenhausen, 42 N. Y. 373, 375.

"H and family, jointly" see Langmaid *v.* Hurd, 64 N. H. 526, 15 Atl. 136.

"Jointly view and assess" see Reclamation Dist. No. 3 *v.* Parvin, 67 Cal. 501, 502, 8 Pac. 43.

"Print jointly or separately" see Gold, etc., Tel. Co. *v.* Commercial Tel. Co., 23 Fed. 340, 342, 23 Blatchf. 199.

16. Wade *v.* Creighton, 25 Oreg. 455, 457, 36 Pac. 289.

17. Groves *v.* Sentell, 153 U. S. 465, 476, 14 S. Ct. 898, 38 L. ed. 785 [*citing* Civ. Code, arts. 2080, 2086], while a solidary obligation,

JOINT OWNER. See, generally, JOINT TENANCY.[18]

JOINT OWNERSHIP. See, generally, JOINT TENANCY.[19]

JOINT PARTY. See, generally, PARTIES.

JOINT PAYEE. See, generally, COMMERCIAL PAPER.

JOINT PROPERTY. A term which may be employed as meaning partnership property.[20] (See, generally, HUSBAND AND WIFE; JOINT TENANCY; PARTNERSHIP; TENANCY IN COMMON.)

JOINT RESOLUTION. See, generally, STATUTES.

JOINT RIGHT. A term which may be employed as importing an equal right.[21]

JOINT SESSION. As used in relation to a legislature, a term which has a well recognized meaning, and implies the meeting together and commingling of the two houses, which, when so met and commingled, act as one body.[22]

on the contrary, binds each of the obligors for the whole debt.

18. See also 10 Cyc. 335; 7 Cyc. 813 note 69; 7 Cyc. 766 note 73; 6 Cyc. 213.

"Joint owners" (see Gorman *v.* Gorman, 87 Md. 338, 348, 39 Atl. 1038); "joint owners of personal property" (see Haven *v.* Haven, 181 Mass. 573, 578, 64 N. E. 410).

19. See also 2 Cyc. 329.

20. Kleinschmidt *v.* Freeman, 4 Mont. 400, 409, 2 Pac. 275.

Joint property of a town and village see State *v.* Maik, 113 Wis. 239, 89 N. W. 183.

21. Butler Hard Rubber Co. *v.* Newark, 61 N. J. L. 32, 47, 40 Atl. 224.

22. Snow *v.* Hudson, 56 Kan. 378, 386, 43 Pac. 260.

JOINT STOCK COMPANIES

By Walter H. Michael*

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CROSS-REFERENCES

For Matters Relating to:
Corporation, see CORPORATIONS; FOREIGN CORPORATIONS.
Insurance Company, see INSURANCE.
Partnership, see PARTNERSHIP.
Unincorporated Society, see ASSOCIATIONS.

I. DEFINITION.

A joint stock company is an association of individuals for purposes of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares of which each member possesses one or more, and which are transferable by the owner.[1]

II. DISTINGUISHED FROM OTHER BUSINESS ORGANIZATIONS.

A. From Corporations — 1. IN GENERAL. Such an association is not technically a corporation; yet it has many of the characteristics of a corporation,[2] and it has been said that it may not be improper to call such an association a quasi-corporation.[3] In many cases almost the full measure of corporate attributes has by legislative enactments been bestowed upon joint stock associations, until the

1. Shelford Joint Stock Co. 1 [*quoted* in Allen *v.* Long, 80 Tex. 261, 266, 16 S. W. 43, 26 Am. St. Rep. 735; Willis *v.* Chapman, 68 Vt. 459, 465, 35 Atl. 459; Bouvier L. Dict.].

Other definitions are given in Kossakowski *v.* People, 177 Ill. 563, 568, 53 N. E. 115; Adams Express Co. *v.* Schofield, 111 Ky. 832, 835, 64 S. W. 903, 23 Ky. L. Rep. 1120; Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531, 540; Lane *v.* Albertson, 78 N. Y. App. Div. 607, 617, 79 N. Y. Suppl. 947; Sandford *v.* New York Suprs., 15 How. Pr. (N. Y.) 172, 175.

Morawetz says: "Joint-stock companies may be cited as quasi corporations of a private character. They are associations having some of the features of an ordinary common law copartnership, and some of the features of a private corporation." 1 Morawetz Corp. § 6.

As defined by an English statute a joint stock company is "a partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be tranferable without the express consent of all the copartners." St. 8 & 9 Vict. c. 110 [*quoted* in Hedge's Appeal, 63 Pa. St. 273, 277; Abbot *v.* Rogers, 16 C. B. 277, 292, 81 E. C. L. 278].

Joint stock companies have been in use in England ever since the famous "South Sea bubble," in the reign of Queen Anne, and in this country since 1811 if not before, organized under legislative acts. 5 Alb. L. J. 19.

2. See, generally, CORPORATIONS.

Its capital is represented by certificates or shares which are transferable without working a dissolution of the concern. Oak Ridge Coal Co. *v.* Rogers, 108 Pa. St. 147; Hedge's Appeal, 63 Pa. St. 273; Hogg *v.* Hoag, 107 Fed. 807; Dixon *v.* Kennaway, [1900] 1 Ch. 833, 69 L. J. Ch. 501, 82 L. T. Rep. N. S. 327, 7 Manson 446.

It is controlled by a board of directors or governors like a corporation, and individual members cannot, as such, make contracts on its behalf. Topeka Bank *v.* Eaton, 107 Fed. 1003, 47 C. C. A. 140; Inman *v.* Ackroyd, [1901] 1 K. B. 613, 70 L. J. K. B. 450, 84 L. T. Rep. N. S. 344, 8 Manson 291, 49 Wkly. Rep. 369.

Suits in name of company.— Like a corporation it can, under modern legislation, sue and be sued in the name of the association. Oak Ridge Coal Co. *v.* Rogers, 108 Pa. St. 147; Ladner *v.* Gibbon, 5 Wkly. Notes Cas. (Pa.) 127), or of an officer designated by statute (Van Aernam *v.* Bleistein, 102 N. Y. 355, 7 N. E. 537; Peckner *v.* Webb, 35 Misc. (N. Y.) 291, 71 N. Y. Suppl. 768). And where the individuals composing it have been sued and served, an amendment striking out their names and leaving that of the association alone may be allowed. McCool *v.* Coal Co., 1 Wilcox (Pa.) 265; Hewitt *v.* Storey, 39 Fed. 719. The statute being in derogation of the common law must be construed strictly. King *v.* Randlett, 33 Cal. 318. It is sufficient to describe such company by the name or title under which its business is transacted. Powhatan Steamboat Co. *v.* Potomac Steamboat Co., 36 Md. 238.

3. Oak Ridge Coal Co. *v.* Rogers, 108 Pa. St. 147. See also 1 Morawetz Corp. § 6.

In Massachusetts there is no intermediate form of organization between a corporation and a partnership, but corporations organized under general statutes, as distinguished from those created by special charters, are known as joint stock companies. Ricker *v.* American L. & T. Co., 140 Mass. 346, 5 N. E. 284; Atty.-Gen. *v.* Mercantile Mar. Ins. Co., 121 Mass. 524.

Under the Pennsylvania statutes such companies are quasi-corporations *de facto* partaking of the nature of limited partnerships. Briar Hill Coal, etc., Co. *v.* Atlas Works, 146 Pa. St. 290, 23 Atl. 326; Eliot *v.* Himrod, 108 Pa. St. 569; Githens *v.* Chester Grocery Co., 2 Del. Co. (Pa.) 452; Lennig *v.* Penn Morocco Co., 16 Wkly. Notes Cas. (Pa.) 114.

difference has become obscure, elusive, and difficult to describe.[4] The fundamental distinction between a corporation and a joint stock company is this: A corporation on the one hand is an artificial entity brought into existence by the sovereign power of the state, and the individual liability of its members is completely eliminated unless some part of that liability is expressly preserved by constitutional or statutory provision;[5] while a joint stock company, on the other hand, is formed by a written agreement of individuals with each other, and its whole force and effect, in constituting and creating the organization, rest upon the common-law right and power of the individuals to contract with each other; the relation they assume is wholly the product of their mutual agreement and depends in no respect upon any grant of authority from the state; and hence the individual personal liability of the members remains intact unless there is express statutory authority for its elimination.[6]

2. Citizenship For Jurisdictional Purposes. It is now[7] settled that joint stock companies, unlike corporations,[8] are not to be considered artificial citizens for jurisdictional purposes.[9]

3. Taxation — a. Capital Stock. Unless the statute expressly includes joint stock associations,[10] they are not taxable upon their capital under a statute subjecting all moneyed or stock corporations deriving an income or profit from their capital or otherwise, to such taxation.[11]

b. Personal Property — Place of Taxation. The personal property held by a joint stock company is properly taxable where its business is carried on and not elsewhere.[12]

c. Shares of Members. The members of a joint stock company are taxable as partners and not as stock-holders of a corporation, and their shares in the company are therefore not subject to taxation under a statute as "stocks in a moneyed corporation."[13]

d. For Doing Business — Foreign Company. It has been held that a foreign joint stock company which possesses all the other attributes and powers of a corporation[14] may be taxed for doing business in a state other than that where it

4. People *v.* Coleman, 133 N. Y. 279, 283, 31 N. E. 96, 16 L. R. A. 183; People *v.* Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303; Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157.

5. People *v.* Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Gifford *v.* Livingston, 2 Den. (N. Y.) 380; Niagara County *v.* People, 7 Hill (N. Y.) 504. See also Corporations, 10 Cyc. 1 *et seq.*

6. Lyon *v.* Denison, 80 Mich. 371, 45 N. W. 358, 8 L. R. A. 358; People *v.* Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

7. It was formerly held in some federal decisions that a joint stock association or a limited partnership having practically all the attributes and powers of a corporation must be considered a citizen of the state where it was organized for the purpose of giving jurisdiction to the courts of the United States without regard to the citizenship of its members. Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293 [*affirming* 79 Fed. 669]; Bushnell *v.* Park, 46 Fed. 209; Baltimore, etc., R. Co. *v.* Adams Express Co., 22 Fed. 404; Fargo *v.* Louisville, etc., R. Co., 6 Fed. 787, 10 Biss. 273; Maltz *v.* American Express Co., 16 Fed. Cas. No. 9,002, 1 Flipp. 611.

8. See Corporations, 10 Cyc. 143 *et seq.* See also Courts, 11 Cyc. 871.

9. Great Southern Fireproof Hotel Co. *v.* Jones, 177 U. S. 449, 20 S. Ct. 690, 44 L. ed. 482; Chapman *v.* Barney, 129 U. S. 677, 9 S. Ct. 426, 32 L. ed. 800; Raphael *v.* Trask, 118 Fed. 777; Carnegie *v.* Hulbert, 53 Fed. 10, 3 C. C. A. 391; Imperial Refining Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503; Dinsmore *v.* Philadelphia, etc., R. Co., 7 Fed. Cas. No. 3,921 11 Phila. (Pa.) 483.

10. People *v.* Wemple, 117 N. Y. 136, 27 N. E. 1046, 6 L. R. A. 303.

11. People *v.* Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

12. Hoadley *v.* Essex County Com'rs, 105 Mass. 519.

13. Hoadley *v.* Essex County Com'rs, 105 Mass. 519, construing Gen. St. c. 11, § 4.

14. The legislature may create a corporation without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes. People *v.* Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; People *v.* Niagara County, 4 Hill (N. Y.) 20; Watertown Bank *v.* Watertown, 25 Wend. (N. Y.) 686; Thomas *v.* Dakin, 22 Wend. (N. Y.) 9. See also, generally, Corporations.

The principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country and is not incompatible with the corporate idea.

was organized, under a law imposing a tax on foreign corporations doing business within the state.[15]

B. Mining Companies. Mining companies and ditch companies in the mining regions, although not strictly joint stock associations, are more like them in their organization and manner of conducting business than ordinary mercantile copartnerships.[16]

C. Ordinary Partnerships. At common law these companies were regarded as commercial partnerships, and, in the absence of express provisions, statutory or otherwise, the rights and liabilities of their members are to be determined by substantially the same rules.[17] The fundamental distinction between ordinary partnerships and joint stock companies is that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence and who therefore are not at liberty, without the consent of all, to retire from the firm and substitute other persons in their places; the decease of a member also works a dissolution of the firm;[18] whereas a joint stock company consists of a large number of individuals not necessarily, or indeed usually, acquainted with each other at all, so that it is a matter of comparative indifference whether changes are made among them or not, and consequently the certificates of shares in such associations may be transferred at will, without the consent of other members, and the decease of a member does not work a dissolution of the association or entitle the personal representative to an accounting. In joint stock companies there is no *delectus personæ*.[19]

III. ARTICLES OF ASSOCIATION.

Articles of association regulating the duties of the officers of the company and the duties, rights, and obligations of the members among themselves should be

Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029 [*affirming* 100 Mass. 531].

15. Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029 [*affirming* 100 Mass. 531, where it was held that an English insurance company, some of whose members are subjects of Great Britain, and the others citizens of another state, and which, although not incorporated, is, by act of parliament, clothed with the rights of acting independently of the rules that govern an ordinary partnership, is liable to the tax imposed by Mass. St. (1862) c. 224, § 2].

16. See, generally, DRAINS; MINES AND MINERALS. As with joint stock associations there is no *delectus personæ*, the stock being bought and sold without consulting coöwners, and their tenure is more in the nature of tenancies in common than of strict commercial partnerships. Taylor *v.* Castle, 42 Cal. 367; Jones *v.* Clark, 42 Cal. 180; McConnell *v.* Denver, 35 Cal. 365, 95 Am. Dec. 107; Settembre *v.* Putnam, 30 Cal. 490; Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116; Duryea *v.* Burt, 28 Cal. 569; Bradley *v.* Harkness, 26 Cal. 69; Skillman *v.* Lachman, 23 Cal. 198, 83 Am. Dec. 96. *Compare* Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231.

17. *Massachusetts.*—Phillips *v.* Blatchford, 137 Mass. 510.

Michigan.— Butterfield *v.* Beardsley, 28 Mich. 412.

New York.— Wells *v.* Gates, 18 Barb. 544.

Ohio.— McFadden *v.* Leeks, 48 Ohio St. 513, 28 N. E. 874.

Pennsylvania.— Hedge's Appeal, 63 Pa. St. 273.

United States.— Claggett *v.* Kilborne, 1 Black 346, 17 L. ed. 213.

England.— Griffith *v.* Paget, 6 Ch. D. 511, 46 L. J. Ch. 493, 37 L. T. Rep. 141, 25 Wkly. Rep. 523.

See 29 Cent. Dig. tit. "Joint Stock Companies," § 1.

A creditor must proceed against the surviving shareholders before an action can be maintained against the representatives of a deceased shareholder. Moore *v.* Brink, 4 Hun (N. Y.) 402, 6 Thomps. & C. 22, Mullin, P. J., delivering the opinion of the court.

18. See, generally, PARTNERSHIP. And see Black L. Dict.

19. Lindley Partn. (7th ed.) p. 22; Black L. Dict. See also Joseph *v.* Davenport, 116 Iowa 268, 89 N. W. 1081; Phillips *v.* Blatchford, 137 Mass. 510; Cincinnati, etc., R. Co. *v.* Citizens' Nat. Bank, 11 Ohio Dec. (Reprint) 50, 24 Cinc. L. Bul. 198; Oak Ridge Coal Co. *v.* Rogers, 108 Pa. St. 147; Hedge's Appeal, 63 Pa. St. 273; Carter *v.* McClure, 98 Tenn. 109, 38 S. W. 585, 60 Am. St. Rep. 842, 36 L. R. A. 282; Industrial Lumber Co. *v.* Texas Pine Land Assoc., 31 Tex. Civ. App. 375, 72 S. W. 875; Willis *v.* Chapman, 68 Vt. 459, 35 Atl. 459; Smith *v.* Anderson, 15 Ch. Div. 247, 50 L. J. Ch. 39, 43 L. T. Rep. N. S. 329, 29 Wkly. Rep. 21. See also 29 Cent. Dig. tit. "Joint Stock Companies," § 1.

executed by all the members and filed with the officer designated by statute,[20] and these cannot be amended without the unanimous consent of the stock-holders.[21] It is analogous to the charter of a corporation on the one hand and to articles of partnership on the other, and the purchaser of stock is bound to know its provisions.[22] Where parties undertake to form a limited partnership the statute must be strictly pursued; otherwise they will be liable as general partners.[23]

IV. POWERS AND DUTIES OF OFFICERS AND MEMBERS.

A. Annual Meetings. It is usually provided by law or by the articles of association that there shall be at least one meeting of the members each year.[24] Timely notice in writing must be given the members of the time and place of the annual meeting.[25] The officers are elected by vote of the stock-holders at the annual meeting regularly called and upon due notice to all the members.[26] A statute securing to minority stock-holders in corporations the power of electing a representative in the board of directors and providing for cumulative voting of stock is not applicable to joint stock associations, unless it is made so in terms.[27]

B. Directors' Meetings. The mere fact that the members of the board of managers were not all present at a special meeting raises no presumption that the meeting was irregular.[28]

C. Power to Make Contracts — 1. In General. Contracts with joint stock associations can be made only with the officers or managers designated by statute or provided for in their articles of association.[29] Directors may bind the company

20. Boston Acid Mfg. Co. *v.* Moring, 15 Gray (Mass.) 211; Haslet *v.* Kent, 160 Pa. St. 85, 28 Atl. 501; Gearing *v.* Carroll, 151 Pa. St. 79, 24 Atl. 1045; Laflin, etc., Powder Co. *v.* Steytler, 146 Pa. St. 434, 23 Atl. 215, 14 L. R. A. 690; Vanhorn *v.* Corcoran, 127 Pa. St. 255, 18 Atl. 16, 4 L. R. A. 386.

21. Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573.

22. Bray *v.* Farwell, 81 N. Y. 600; White *v.* Brownell, 4 Abb. Pr. N. S. (N. Y.) 162; Logan *v.* McNaugher, 88 Pa. St. 103.

23. See *infra*, V, B, 1.

24. Stradley *v.* Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775; Jennings *v.* Beale, 146 Pa. St. 125, 23 Atl. 225.

Particular date.— Where the by-laws of a limited partnership association provide that the annual meeting of the company shall be held on a particular date, the terms of the officers begin from that date, even though they may have been elected on a particular occasion at a later date. Com. *v.* McCarty, 9 Pa. St. 555, 23 Pa. Co. Ct. 145.

25. Stradley *v.* Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775; Irvine *v.* Forbes, 11 Barb. (N. Y.) 587.

Personal notice to all the members, unless some other provision is made in its charter or by-laws, is necessary; and a vote passed at a meeting not so called is not binding. Wiggin *v.* Freewill First Baptist Church, 8 Metc. (Mass.) 301.

26. Boston Acid Mfg. Co. *v.* Moring, 15 Gray (Mass.) 211; Irvine *v.* Forbes, 11 Barb. (N. Y.) 587; Com. *v.* McCarty, 9 Pa. Dist. 555, 23 Pa. Co. Ct. 145.

Appointment of tellers.— Where a by-law of a limited partnership provides that in case the managers fail to appoint tellers for an election of officers the stock-holders in the meeting assembled should elect tellers by vote, an election held by tellers appointed by the chairman of an election meeting against the protest of shareholders is void, and the managers elected will be enjoined from interfering with the business of the association. Tide Water Pipe Co. *v.* Satterfield, 12 Wkly. Notes Cas. (Pa.) 457.

A special agreement by the members that in the management of the company there shall be two votes of equal power, one belonging to one member, and the other belonging to the other two remaining members, applies to the election of liquidating trustees, and when one vote is cast for one set of trustees, and the other vote for another set, there is no election. *In re* Imperial Steel Co., 2 Pa. Dist. 826.

27. Atty.-Gen. *v.* McVichie, (Mich. 1904) 101 N. W. 552.

28. Stradley *v.* Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775.

29. Bernard, etc., Mfg. Co. *v.* Packard, 64 Fed. 309, 12 C. C. A. 123. See also Cook *v.* Gray, 133 Mass. 106.

A member of the association has no general authority by virtue of his membership to bind the company by his contracts. McConnell *v.* Denver, 35 Cal. 365, 95 Am. Dec. 107; Vattier *v.* Roberts, 2 Blackf. (Ind.) 255.

An assignment for creditors, made by the chairman and secretary of a limited partnership association in pursuance of authority conferred by the stock-holders, is valid, without formal authority from the board of managers, although the by-laws provide that such board shall have entire control of the business of the association. Rodgers Printing Co. *v.* Santa Claus Co., 11 Pa. Co. Ct. 529.

for a loan without special authority, as the power to borrow money for the use of the company results necessarily from the power to make contracts.[30]

2. With the Company. A director of a joint stock company may make a valid contract with the company, if in so doing he deals fairly with the stock-holders.[31]

3. Ratification of Unauthorized Contract. Officers who make an unauthorized contract cannot ratify it;[32] but the company may ratify an unauthorized contract by accepting the proceeds of the contract,[33] or by bringing suit thereon.[34]

4. Limitations Imposed by Law. Where the power of the directors to make contracts is limited by statute or the articles of association they render themselves personally liable if they exceed their authority; but, where the other contracting party has notice of the limitation of their authority, the association is not liable unless the act be subsequently ratified by it.[35] Under the Pennsylvania statute relating to the organization of joint stock companies and limited partnerships, no liability for more than five hundred dollars, except against the person incurring it, shall bind such association unless the contract be reduced to writing and signed by at least two of the managers of the association.[36]

V. Rights and Liabilities of the Association and Its Members.

A. Mutual Rights and Remedies — 1. In General. Where the articles of a joint stock association do not regulate the remedies of the parties *inter se*, the general law of partnership applies.[37] The articles of association, however, will

A note whereof a joint stock association was promisor, signed as treasurer, with consent of the directors and in compliance with the by-laws, by a person holding the offices of agent, clerk, and treasurer, and payable to a member of the association for borrowed money, is binding on the members. Walker *v.* Wait, 50 Vt. 668.

Investment in stock of another company.— Where the managers of a limited partnership association for the manufacture of steel springs, to protect the company against a combination of steel makers which operated against them by requiring them to pay more for their steel than their competitors who made their own steel, purchase stock in a certain iron and steel company with the surplus earnings of the spring company, such investment is not *ultra vires*, there being nothing in the spring company's articles which prohibits it from manufacturing its own steel. Layng *v.* A. French Spring Co., 149 Pa. St. 308, 24 Atl. 215.

Performance of ministerial acts.— Where the directors of a joint stock company have borrowed monsy on the credit of the business and property, the affixing of the company's signature to the evidence of indebtedness is a ministerial act, which may be performed by any officer authorized by the directors. Cameron *v.* Decatur First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 178.

30. Wells *v.* Wilson, 3 Ohio 425.

Overdrafts made by the manager of the company are unauthorized where there is a rule of the company that no money should be borrowed except by its board of directors. Cameron *v.* Decatur First Nat. Bank, 4 Tex. Civ. App. 309, 23 S. W. 334.

31. Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 23 L. ed. 328; Barr *v.* Pittsburg Plate-Glass Co., 57 Fed. 86, 6 C. C. A. 260.

32. Hotchin *v.* Kent, 8 Mich. 526.

33. MacGeorge *v.* Harrison Chemical Mfg. Co., 141 Pa. St. 575, 21 Atl. 671.

34. Park *v.* Kelley Axe Mfg. Co., 49 Fed. 618, 1 C. C. A. 395.

35. Hotchin *v.* Kent, 8 Mich. 526; Humphreys *v.* New York, etc., R. Co., 121 N. Y. 435, 24 N. E. 695; Sullivan *v.* Campbell, 2 Hall (N. Y.) 295; Pittsburg Melting Co. *v.* Reese, 118 Pa. St. 355, 12 Atl. 362; Willis *v.* Greiner, (Tex. Civ. App. 1894) 26 S. W. 858.

Right of contribution.— Directors who in violation of the by-laws incur an indebtedness beyond the available capital of the association are not entitled to indemnity or contribution from other stock-holders who did not assent. McFadden *v.* Leeka, 48 Ohio St. 513, 28 N. E. 874.

36. Mercantile Nat. Bank *v.* Lauth, 143 Pa. St. 53, 21 Atl. 1017; Walker *v.* Keystone Brewing Co., 131 Pa. St. 546, 20 Atl. 309; Inter-state Mut. F. Ins. Co. *v.* Brownback, 1 Pa. Super. Ct. 183; McLaughlin *v.* Centre Min. Co., 10 Pa. Co. Ct. 533; Andrews Bros. Co. *v.* Youngstown Coke Co., 39 Fed. 353.

This statute applies both to contracts for sales of goods and contracts of purchase. Pittsburg Melting Co. *v.* Reese, 118 Pa. St. 355, 12 Atl. 362.

This statute does not apply where the act of the company amounts to a conversion of property of greater value than the sum named. Tasker *v.* Brown, 8 Pa. Co. Ct. 390.

37. *California.*—Bullard *v.* Kinney, 10 Cal. 60.

Illinois.— Robbins *v.* Butler, 24 Ill. 387.

Michigan.— Lyon *v.* Denison, 80 Mich. 371, 45 N. W. 358, 8 L. R. A. 358.

New York.— Crater *v.* Binninger, 45 N. Y. 545; Moore *v.* Brink, 4 Hun 402; Bailey *v.* Bancker, 3 Hill 188, 38 Am. Dec. 625.

control their mutual rights and liabilities so far as they are consistent with the law, but they cannot release the members from their liability as partners for the debts of the association.[38] While an action at law cannot be maintained by one member of a joint stock association against other members of the same association in respect to their mutual rights and liabilities as such members,[39] yet he may betake himself to a coördinate forum and file a bill in equity for the adjustment of their rights and have an accounting if justice requires it.[40] A member of a joint stock company, like a member of an ordinary partnership, may recover

Pennsylvania.— Babb *v.* Reed, 5 Rawle 151, 28 Am. Dec. 650; Matter of Fry, 4 Phila. 129.

England.— Holmes *v.* Higgins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. K. B. O. S. 47, 8 E. C. L. 33.

38. *Massachusetts.*— Tyrrell *v.* Washburn, 6 Allen 466; Kingman *v.* Spurr, 7 Pick. 235; Alvord *v.* Smith, 5 Pick. 232.

Michigan.— Lyon *v.* Denison, 80 Mich. 371, 45 N. W. 358, 8 L. R. A. 358.

Mississippi.— Lake *v.* Munford, 4 Sm. & M. 312.

New York.— Cross *v.* Jackson, 5 Hill 478; Marquand *v.* New York Mfg. Co., 17 Johns. 525; Murray *v.* Bogert, 14 Johns. 318, 7 Am. Dec. 466.

Pennsylvania.— Moss' Appeal, 43 Pa. St. 23; Cochran *v.* Perry, 8 Watts & S. 262.

Vermont.— Henry *v.* Jackson, 37 Vt. 431; Stimson *v.* Lewis, 36 Vt. 91.

United States.— Walker *v.* Ogden, 28 Fed. Cas. No. 17,081, 1 Biss. 287.

England.— Fox *v.* Clifton, 9 Bing. 115, 1 L. J. C. P. 180, 2 Moore & S. 146, 23 E. C. L. 509.

39. Whitehouse *v.* Sprague, (Me. 1886) 7 Atl. 17; Phillips *v.* Blatchford, 137 Miss. 510; Myrick *v.* Dame, 9 Cush. (Mass.) 248; Clark *v.* Reed, 11 Pick. (Mass.) 446; Bailey *v.* Bancker, 3 Hill (N. Y.) 188, 38 Am. Dec. 625; Teague *v.* Hubbard, 8 B. & C. 345, 2 M. & R. 369, 15 E. C. L. 174; Milburn *v.* Codd, 7 B. & C. 419, 1 M. & R. 238, 14 E. C. L. 191; Holmes *v.* Higgins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. K. B. O. S. 47, 8 E. C. L. 33; Neale *v.* Turton, 4 Bing. 149, 13 E. C. L. 442; Perring *v.* Hone, 4 Bing. 28, 13 E. C. L. 384, 2 C. & P. 401, 12 E. C. L. 639, 12 Moore C. P. 135; Chadwick *v.* Clarke, 1 C. B. 700, 9 Jur. 539, 14 L. J. C. P. 233, 50 E. C. L. 700; Parkin *v.* Fry, 2 C. & P. 311, 12 E. C. L. 590; Moneypenny *v.* Hartland, 1 C. & P. 352, 12 E. C. L. 211; Wilson *v.* Curzon, 11 Jur. 47, 16 L. J. Exch. 122, 16 M. & W. 532, 5 R. & Can. Cas. 24; Goddard *v.* Hodges, 2 L. J. Exch. 20, 3 Tyrw. 209.

Separate transactions.— There is no rule forbidding one partner to sue another, if the obligation or contract is separate and distinct from all other matters between the partners, and can be determined without going into the partnership accounts. Crater *v.* Bininger, 45 N. Y. 545.

40. *California.*— Smith *v.* Fagan, 17 Cal. 178.

Massachusetts.— Phillips *v.* Blatchford, 137 Mass. 510 (holding that where one partner of a joint stock association pays a debt of the firm he cannot maintain a bill in equity for contribution against the other partners); Whitman *v.* Porter, 107 Mass. 522 (an agreement to purchase and run a ferry-boat, to be owned by the subscribers in proportion to the amounts subscribed by each, the toll to be applied to pay expenses, and the balance, if any, to be divided among them *pro rata*, each subscriber to have the right to sell his stock, the purchaser to have all the rights of an original subscriber, and the association to continue as long as a majority of subscribers shall determine, constitutes the subscribers partners; and one of them can maintain a bill in equity against all the others within the jurisdiction of the court to compel them to contribute to sums paid by him, although not at their request, for the use of the association; and the amount of defendant's liability is to be determined by an appointment among them of the amount paid, without regard to subscribers out of the jurisdiction); Ballou *v.* Wood. 8 Cush. 48.

New Hampshire.— Marston *v.* Durgin, 54 N. H. 347.

New York.— Morrissey *v.* Weed, 12 Hun 491; Warth *v.* Radde, 18 Abb. Pr. 396; Bailey *v.* Bancker, 3 Hill 188, 38 Am. Dec. 625; Cobb *v.* Goodhue, 11 Paige 110.

Ohio.— Rianhard *v.* Hovey, 13 Ohio 300.

Pennsylvania.— Carter *v.* Producers', etc., Oil Co., 164 Pa. St. 463, 30 Atl. 391 (holding that where substantially all the capital of a joint stock association is invested in a pipe line necessary in the transaction of the company's business of transporting and dealing in oil, a sale thereof in exchange for shares in another corporation is *ultra vires*, and may be enjoined at the instance of a single dissenting stock-holder); Fareira's Appeal, 3 Walk. 416 (holding that a court of equity will not interfere between members of companies in matters properly the subject of internal management, unless it is called upon to interfere to give effect to the will of the majority against a factious minority, or unless the majority has been, or is doing, or is about to do, an illegal act); Patterson *v.* Tidewater Pipe Co., 12 Wkly. Notes Cas. 452 (holding that where members of a limited partnership have stood by and allowed the managers of the partnership to follow its business policy for a period of two years or more, such members are estopped by laches from objecting to the acts of the managers); *In re* Henry Disston, etc., File Co., 8 Wkly. Notes Cas. 58.

compensation for services rendered to the company previous to his becoming a member of it.[41] But he cannot claim compensation for services rendered while a member, in the absence of an express agreement to pay him therefor.[42]

2. Dividends. Neither the acquisition of gain nor the provision for the distribution of a dividend among its members is of the essence of a joint stock company.[43] But where an association is organized for gain, the moment a dividend is declared, the company becomes debtor and the shareholder creditor, for the amount payable on demand.[44] Unpaid dividends are assets and are liable for the debts of the company as against the stock-holders.[45] An assignment of stock does not *per se* carry with it dividends previously declared.[46]

3. Transfer of Shares. Where the articles of association are silent on the subject certificates of stock may be transferred at the pleasure of the holder.[47] But where the articles prescribe the manner in which such transfer shall be made there must be compliance before the assignee can become a member of the association,[48] although the transfer may entitle the transferee to such interest in the property as is represented by the certificates transferred.[49]

4. Forfeiture of Stock. The articles of association of an unincorporated company organized under the joint stock plan are the law governing the right of forfeiture of the shares, and all the conditions precedent which are made by them must be strictly complied with or the forfeiture will be void.[50] If the company wrongfully confiscate a member's stock he may sue to be reinstated or to recover the value of his shares.[51]

5. Purchase of Property From Company. A member of a joint stock association has a right to purchase its property sold at public sale,[52] and the fact that it is bid in for less than it is worth is not conclusive evidence of fraud.[53] The fact that one of the managers of the association was also a member of another partnership which received from the first a conveyance authorized by its board of managers in satisfaction of a *bona fide* indebtedness is not sufficient to invalidate

Vermont.— Walker *v.* Wait, 50 Vt. 668.

See 29 Cent. Dig. tit. "Joint Stock Companies," § 14.

41. Lucas *v.* Beach, 4 Jur. 631, 1 M. & G. 417, 1 Scott N. R. 350, 39 E. C. L. 831.

42. Matter of Fry, 4 Phila. (Pa.) 129; Wilson *v.* Curzon, 11 Jur. 47, 16 L. J. Exch. 122, 16 M. & W. 532, 5 R. & Can. Cas. 24.

43. *In re* Russell Literary, etc., Inst., [1898] 2 Ch. 72, 67 L. J. Ch. 411, 78 L. T. Rep. N. S. 588.

44. Keppel *v.* Petersburg R. Co., 14 Fed. Cas. No. 7,722, Chase 167.

45. Curry *v.* Woodward, 44 Ala. 305.

46. Harper *v.* Raymond, 3 Bosw. (N. Y.) 29.

47. Alvord *v.* Smith, 5 Pick. (Mass.) 232; Butterfield *v.* Beardsley, 28 Mich. 412. See also *supra*, II, C.

Purchaser as member.— The demand of one who has purchased shares in a partnership association to be elected a member need not be acted on till the next regular meeting, although it is not to be held for seven months, there being several hundred members scattered over several states. Carter *v.* Producers' Oil Co., 200 Pa. St. 579, 50 Atl. 167.

48. Kingman *v.* Spurr, 7 Pick. (Mass.) 235; Near *v.* Donnelly, 80 Mich. 130, 44 N. W. 1118; Rice *v.* Rockefeller, 134 N. Y. 174, 31 N. E. 907, 30 Am. St. Rep. 658, 17 L. R. A. 237 [*reversing* 56 Hun 516, 9 N. Y. Suppl. 866].

49. Globe Refining Co.'s Estate, 151 Pa. St. 558, 25 Atl. 128.

Although a transfer is not made in the manner prescribed by statute, yet if there is a valuable consideration therefor and it is made by an instrument including an irrevocable power of attorney, it passes title to the assignee as against the assignor and his attaching creditor. Tide Water Pipe Co. *v.* Kitchenman, 108 Pa. St. 630.

50. Morris *v.* Metalline Land Co., 166 Pa. St. 351, 31 Atl. 114, 164 Pa. St. 326, 30 Atl. 240, 44 Am. St. Rep. 614, 27 L. R. A. 305.

51. Lesseps *v.* Architect Co., 13 La. 414; Cox *v.* Bodfish, 35 Me. 302.

Right to redeem after default.— Provisions in articles of agreement of a joint stock company that the shares and interest of a member shall be forfeited on default in the payment of assessments does not authorize the trustee by a naked declaration to make a forfeiture against which a court of equity will not grant relief; and on payment of the amount due, with interest, the stock-holder will be allowed to redeem, and the trustees will be ordered to make and deliver the proper certificates of stock. Walker *v.* Ogden, 29 Fed. Cas. No. 17,081, 1 Biss. 287.

52. Stradley *v.* Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775.

53. Stradley *v.* Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775.

the conveyance in equity inasmuch as the property of the company must be appropriated to the payment of its honest debts.[54]

B. As to the Public — 1. In General. The stock-holders of a joint stock company are personally liable except in so far as such liability may be limited by statute[55] or special agreement[56] for the debts of the company precisely as general partners are liable for the debts of the firm.[57] The association and all its members are responsible for the acts of its officers within the scope of their authority.[58] But while a joint stock company or limited partnership is liable for its tortious acts, its members are not personally liable for such acts unless they participated in them.[59] To entitle members of a limited partnership to protection as such, the statute under which the association is organized and managed must be strictly complied with, otherwise the members are liable as general partners as to the public, although they may be special partners as among themselves.[60] The sub-

54. Stradley *v.* Cargill Elevator Co., 135 Mich. 367, 97 N. W. 775.

55. See *supra*, III; and *infra*, text and note 60.

56. **Agreement to pay out of special fund.** — One who furnishes lumber or other materials to an unincorporated ditch company under an agreement that it is to be paid out of the proceeds of a ditch cannot, after the proceeds have all been faithfully applied in payment, recover the residue as against the members of the company. McConnell *v.* Denver, 35 Cal. 365, 45 Am. Dec. 107.

57. *Illinois.*— Wadsworth *v.* Duncan, 164 Ill. 360, 45 N. E. 132; Robbins *v.* Butler, 24 Ill. 387.

Iowa.— Lewis *v.* Tilton, 64 Iowa 220, 19 N. W. 911, 52 Am. Rep. 436; Pipe *v.* Bateman, 1 Iowa 369.

Kentucky.— Greenup *v.* Barbee, 1 Bibb 320.

Maine— Frost *v.* Walker, 60 Me. 468.

Maryland.— Bodey *v.* Cooper, 82 Md. 625, 34 Atl. 362.

Massachusetts.— Bodwell *v.* Eastman, 106 Mass. 525 (holding that where the agents of an unincorporated stock company, acting within the scope of their employment, hire a mechanic to do work for the company, the members of the company are liable as partners for the work done, even though it was without their knowledge, and under the articles of association no one had authority to incur a debt on behalf of the company); Tyrrell *v.* Washburn, 6 Allen 466; Tappan *v.* Bailey, 4 Metc. 529.

Missouri.— Laney *v.* Fickel, 83 Mo. App. 60 (holding that the members of a joint stock company are liable *in solido* for all of its indebtedness, in the same manner as members of an ordinary partnership); Hunnewell *v.* Willow Springs Canning Co., 53 Mo. App. 245.

New Hampshire.— Farnum *v.* Patch, 60 N. H. 294, 49 Am. Rep. 313.

New York.— Van Aernam *v.* Bleistein, 102 N. Y. 355, 7 N. E. 537; Witherhead *v.* Allen, 4 Abb. Dec. 628, 3 Keyes 562, 8 Abb. Pr. N. S. 164, 33 How. Pr. 620; Kingsland *v.* Braisted, 2 Lans. 17; Irvine *v.* Forbes, 11 Barb. 587; Tradesmen's Bank *v.* Astor, 11 Wend. 87; Livingston *v.* Lynch, 4 Johns. Ch. 573.

North Carolina.— Durham Fertilizer Co. *v.* Clute, 112 N. C. 440, 17 S. E. 419; Bain *v.* Clinton Loan Assoc., 112 N. C. 248, 17 S. E. 154.

Ohio.— Rianhard *v.* Hovey, 13 Ohio 300; Wehrman *v.* McFarlan, 9 Ohio S. & C. Pl. 400, 6 Ohio N. P. 333.

Pennsylvania.— Hill *v.* Stetler, 127 Pa. St. 145, 13 Atl. 306, 17 Atl. 887; Beaver *v.* McGrath, 50 Pa. St. 479; Ridgely *v.* Dobson, 3 Watts & S. 118; Babb *v.* Reed, 5 Rawle 151, 28 Am. Dec. 650; Hess *v.* Werts, 4 Serg. & R. 356.

Tennessee.— Broyles *v.* McCoy, 5 Sneed 602.

Texas.— Cameron *v.* Decatur First Nat. Bank, (Civ. App. 1896) 34 S. W. 178.

Vermont.— Cutler *v.* Thomas, 25 Vt. 73.

United States.— Raymond *v.* Colton, 104 Fed. 219, 43 C. C. A. 501; Riggs *v.* Swann, 20 Fed. Cas. No. 11,831, 3 Cranch C. C. 183.

England.— Cullen *v.* Queensberry, 1 Bro. Ch. 101, 28 Eng. Reprint 1011; Keasley *v.* Codd, 2 C. & P. 408, 12 E. C. L. 643; Matter of Mexican, etc., Co., 4 De G. & J. 544, 5 Jur. N. S. 1191, 28 L. J. Ch. 769, 7 Wkly. Rep. 681, 61 Eng. Ch. 430, 45 Eng. Reprint 211; Atty.-Gen. *v.* Heelis, 2 L. J. Ch. O. S. 189, 2 Sim. & St. 67, 25 Rev. Rep. 153, 1 Eng. Ch. 67, 57 Eng. Reprint 270; Beaumont *v.* Meredith, 3 Ves. & B. 180, 35 Eng. Reprint 447; Carlen *v.* Drury, 1 Ves. & B. 154, 12 Rev. Rep. 203, 35 Eng. Reprint 61; Pearce *v.* Piper, 17 Ves. Jr. 1, 11 Rev. Rep. 1, 34 Eng. Reprint 1; Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005; Lloyd *v.* Loaring, 6 Ves. Jr. 773, 31 Eng. Reprint 1302.

See 29 Cent. Dig. tit. "Joint Stock Companies," §§ 10, 12.

58. Van Aernam *v.* Bleistein, 102 N. Y. 355, 7 N. E. 537. And see *supra*, IV, C.

An action for libel can be maintained against a joint stock association editing a newspaper or other periodical in which the libel is published. Van Aernam *v.* Bleistein, 102 N. Y. 355, 7 N. E. 537 [*affirming* 32 Hun 316].

59. Whitney *v.* Backus, 149 Pa. St. 29, 24 Atl. 51.

60. *Alabama.*— McGehee *v.* Powell, 8 Ala. 827.

Illinois.— Henkel *v.* Heyman, 91 Ill. 96; Pfirmann *v.* Henkel, 1 Ill. App. 145.

scriptions to a limited partnership must be paid in cash or property at a valuation and if this is not done the parties are liable for the debts of the concern as general partners.[61] So also the omission of the word "limited" in the use of the name of

Louisiana.— Lachomette *v.* Thomas, 5 Rob. 172.

Massachusetts.— Lancaster *v.* Choate, 5 Allen 530; Pierce *v.* Bryant, 5 Allen 91.

Missouri.— Smith *v.* Warden, 86 Mo. 382.

New Jersey.— Myers *v.* Edison Gen. Electric Co., 59 N. J. L. 153, 35 Atl. 1069.

New York.— Durant *v.* Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; Van Ingen *v.* Whitman, 62 N. Y. 513; Van Riper *v.* Poppenhausen, 43 N. Y. 68; West Point Foundry Assoc. *v.* Brown, 3 Edw. 284.

Pennsylvania.— Reitzel *v.* Whitaker, 170 Pa. St. 306, 33 Atl. 103; Fourth St. Nat. Bank *v.* Whitaker, 170 Pa. St. 297, 33 Atl. 100; Gearing *v.* Carroll, 151 Pa. St. 79, 24 Atl. 1045; Allegheny Nat. Bank *v.* Bailey, 147 Pa. St. 111, 23 Atl. 439 (holding that one who aids and assists in the organization of a limited partnership cannot thereafter hold the members liable as general partners, upon the ground that such organization was defective); Sheble *v.* Strong, 128 Pa. St. 315, 18 Atl. 397 (holding that it is no defense to an action to charge the members of a limited partnership as general partners, for failure to file a proper statement of the subscription to the capital stock, that the creditor had actual notice of the facts required to be set out in the statement); Vanhorn *v.* Corcoran, 127 Pa. St. 255, 18 Atl. 16, 4 L. R. A. 386; Hite Natural Gas Co.'s Appeal, 118 Pa. St. 436, 12 Atl. 267; Haddock *v.* Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Eliot *v.* Hunrod, 108 Pa. St. 569; Maloney *v.* Bruce, 94 Pa. St. 249; Guillou *v.* Peterson, 89 Pa. St. 163; Vandike *v.* Rosskam, 67 Pa. St. 330; Richardson *v.* Hogg, 38 Pa. St. 153; Pears *v.* Barnes, 1 Pa. Cas. 165, 1 Atl. 658; Reynolds *v.* Creveling, 4 Pa. Dist. 419; Snedden *v.* Wampum Wire Co., 5 Pa. Co. Ct. 418; Bement *v.* Philadelphia Impact Brick Mach. Co., 12 Phila. 494; Frank *v.* Lewis Foundry, etc., Co., 24 Pittsb. Leg. J. 33.

See 29 Cent. Dig. tit. "Joint Stock Companies," § 12.

Sufficient compliance with statute illustrated.— The schedule of personal property subscribed in lieu of cash by members of a partnership association sufficiently complies with the statute if the schedule of the items and values of property contributed is both elaborate and truthful, and the result of an honest purpose to comply with the statutes, and it is such as to enable parties dealing with the association to readily ascertain the kind, amount, and value of property contributed. Robbins Electric Co. *v.* Weber, 172 Pa. St. 635, 34 Atl. 116. So it has been held that members of a limited stock company are not liable as general partners for goods ordered on approval, in the name of the company, but before the articles of association had been recorded, as required by statute, where such articles were recorded before approval. Hinds *v.* Battin, 163 Pa. St. 487, 30 Atl. 164.

Insufficient compliance with statute illustrated.— Where a portion of the capital stock of a limited partnership is contributed in machinery, and the recorded statement does not contain a detailed description and valuation of the same, the defect is fatal, and the members of the association are liable as general partners. Sheble *v.* Patterson, 5 Kulp (Pa.) 153. So where the certificate of organization of a limited partnership association, under the act of June 2, 1874, states that the subscribed stock was "to be paid on the execution hereof," such payment must precede the recording of the certificate, and, where nothing is paid in, the organization is not in compliance with the act, and its members are liable as general partners. Hill *v.* Stetler, 127 Pa. St. 145, 13 Atl. 306, 17 Atl. 887. And where a limited partnership was formed under the laws of the state of Pennsylvania, but failed to file articles of association in the proper recorder's office, as required by the statute, until after the explosion of a steam boiler and after being sued by their employees, the members of the partnership were general partners, and personally liable. Smith *v.* Warden, 86 Mo. 382.

61. See cases cited *infra*, this note.

Contribution in notes of third persons.— Where part of the stock of a limited partnership is subscribed for by paying in the notes of a third person, it is illegally organized, and the members are individually liable. Frank *v.* Lewis Foundry, etc., Co., 24 Pittsb. Leg. J. (Pa.) 33.

Contributions in patent rights.— Under a statute which allows contributions to be made "in real or personal estate, mines or other property, at a valuation to be approved by all the members," such contribution may be made by the transfer of patent rights. Rehfuss *v.* Moore, 134 Pa. St. 462, 19 Atl. 756, 7 L. R. A. 663.

Personalty subject to company's indebtedness.— Under a statute permitting subscriptions to be in "real or personal estate, mines or other property," contributions to the capital cannot be made in personal property of a company, subject to its indebtedness. Haslet *v.* Kent, 160 Pa. St. 85, 28 Atl. 501.

Excessive valuation.— In the absence of fraud, an excessive valuation put upon patent rights contributed to the capital of a limited partnership by the members does not vitiate the partnership. Rehfuss *v.* Moore, 134 Pa. St. 462, 19 Atl. 756, 7 L. R. A. 663 [*affirming* 6 Pa. Co. Ct. 245].

Withdrawal of part of capital.— The fact that part of the required capital of a limited partnership association is withdrawn from the bank where it has been deposited before the organization is completed does not impair the validity of the organization, unless it is also withdrawn from the association. Masters

the partnership association will render each and every person participant in such omission or knowingly acquiescing therein liable for any indebtedness, damage, or liability arising therefrom.[62]

2. Who Are Members. It is sufficient to authorize a finding that a person is a member of such company if his name is signed to the subscription papers for its capital stock, and he has paid, without objection, assessments for the number of shares set against his name.[63] And where it appeared that parties had attended meetings of a joint stock association, and participated therein, and voted to hire money and carry on the business, and had accepted office in such association, they will be held to have been partners in the company.[64] A person who has held himself out to the world as a shareholder, has acted and been treated as such, and has accepted the benefits flowing from the ownership of shares, is liable for the debts of the company, notwithstanding a failure to observe all the formalities required by the articles of association to entitle him to the rights and privileges of a member of the association.[65] Where a member in good faith withdraws from the association he is relieved from liability for debts thereafter contracted.[66] But he cannot escape liability to creditors for debts contracted while he was a member,[67] although in case he is obliged to pay he is entitled to reimbursement from the association or its new members.[68]

VI. Power to Deal in Real Estate.

A joint stock company having no common seal cannot make a deed of any kind.[69] Consequently the power of such association, if it exists, to have, hold,

v. Lauder, 131 Pa. St. 195, 18 Atl. 872; Sheble *v.* Strong, 128 Pa. St. 315, 18 Atl. 397; Eliot *v.* Himrod, 108 Pa. St. 569; Bement *v.* Philadelphia Impact Brick Mach. Co., 12 Phila. (Pa.) 494; Keystone Boot, etc., Co. *v.* Schoellkopf, 11 Wkly. Notes Cas. (Pa.) 132.

62. Sellersville Nat. Bank *v.* Banks, 9 Pa. Co. Ct. 92.

63. Frost *v.* Walker, 60 Me. 468; Holt *v.* Blake, 47 Me. 62; Boston, etc., R. Co. *v.* Pearson, 128 Mass. 445.

64. Machinists' Nat. Bank *v.* Dean, 124 Mass. 81; Taft *v.* Warde, 111 Mass. 518; Tyrrell *v.* Washburn, 6 Allen (Mass.) 466; Hunnewell *v.* Willow Springs Canning Co., 53 Mo. App. 245; Dennis *v.* Kennedy, 19 Barb. (N. Y.) 517; Spear *v.* Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513.

65. Hedge's Appeal, 63 Pa. St. 273; Ralph *v.* Harvey, 1 Q. B. 845, 10 L. J. Q. B. 337, 41 E. C. L. 805; Braithwaite *v.* Skofield, 9 B. & C. 401, 7 L. J. K. B. O. S. 274, 17 E. C. L. 184; Harvey *v.* Kay, 9 B. & C. 356, 17 E. C. L. 163; Holmes *v.* Higgins, 1 B. & C. 74, 2 D. & R. 196, 1 L. J. K. B. O. S. 47, 8 E. C. L. 33; Doubleday *v.* Muskett, 7 Bing. 110, 9 L. J. C. P. O. S. 35, 4 M. & P. 750, 20 E. C. L. 58; Perring *v.* Hone, 4 Bing. 28, 13 E. C. L. 384, 2 C. & P. 401, 12 E. C. L. 639, 12 Moore C. P. 135; Owen *v.* Van Uster, 10 C. B. 318, 20 L. J. C. P. 61, 70 E. C. L. 318; *In re* Vale of Neath, etc., Brewery Co., 3 De G. & Sm. 249, 64 Eng. Reprint 465; Matter of North of England Joint Stock Banking Co., 3 De G. & Sm. 66, 64 Eng. Reprint 383, 3 H. L. Cas. 698, 10 Eng. Reprint 277; Matter of George's Steam-Packet Co., 3 De G. & Sm. 31, 13 Jur. 673, 18 L. J. Ch. 256, 64 Eng. Reprint 367; Harrison *v.* Heathorn, 12 L. J. C. P. 158, 5 M. & G. 322, 6 Scott N. R. 121, 44 E. C. L. 174; Beach *v.* Eyre, 12 L. J. C. P. 140, 5 M. & G. 415, 6 Scott N. R. 327, 44 E. C. L. 222.

Where there is an abortive attempt to subscribe for shares, even with the payment of deposits, and the would-be subscriber never became entitled to share the profits, he is not liable for the debts of the company, unless he has been active in contracting them or has held himself out to the world in the character of an actual partner. West Point Foundry Assoc. *v.* Brown, 3 Edw. (N. Y.) 284; Hedge's Appeal, 63 Pa. St. 273; Fox *v.* Clifton, 6 Bing. 776, 8 L. J. C. P. O. S. 257, 4 M. & P. 676, 31 Rev. Rep. 536, 19 E. C. L. 347.

66. Tyrrell *v.* Washburn, 6 Allen (Mass.) 466.

Assignment of stock.— The stock of a joint stock company may be assigned, so as to discharge the assignor from liability for the debts of the company, although the mode prescribed by the articles be not pursued, if the company recognize the assignee as a partner, and cease to regard the assignor as such. Wells *v.* Wilson, 3 Ohio 425. Irregularities in the assignments of shares in a joint stock company, in violation of the provisions relating thereto, which are openly or tacitly allowed, do not render them invalid. The liability of the assignor relates to debts existing at the time of the assignment, and that of the assignee to those subsequently contracted. Rianhard *v.* Hovey, 13 Ohio 300.

67. Savage *v.* Putnam, 32 N. Y. 501 [*affirming* 32 Barb. 420].

68. Savage *v.* Putnam, 32 N. Y. 501 [*affirming* 32 Barb. 420].

69. Parsons Partn. § 432.

and transfer real estate is a creature of the statute.[70] An unincorporated association cannot as such take and hold real estate unless authorized by statute,[71] although its right to hold real estate can only be questioned by the state.[72] An attempt to convey to an association not authorized to take and hold real estate may properly be construed as a grant to those who are properly described in the deed who thus become tenants in common.[73] And where the land is paid for with the money of the association the outstanding certificates may be regarded as an equitable lien on the property.[74] But although the association cannot as a separate entity take or convey title to land, a joint stock association may be organized for the purpose of buying and selling lands through the instrumentality of trustees who take and hold as joint tenants in trust for the benefit of the persons composing the association.[75]

VII. ACTIONS BY AND AGAINST.[76]

A. Process.[77] A joint stock company having substantially the character and power of a corporation may be served with process in a foreign jurisdiction in the same manner as foreign corporations are served.[78]

B. Parties.[79] In the absence of statutory regulation all the members are proper and necessary parties to an action either by or against a joint stock association.[80] Inasmuch as no one can play the double role of being both plaintiff and

70. See statutes of the several states.

A typical example is the statute of New York which provides that a joint stock association in the name of its president, as such president, may purchase, take, hold, and convey such real property only (1) as may be necessary for its immediate accommodation in the convenient transaction of its business; (2) as may be mortgaged to it in good faith by way of security for loans made by or money due to it; and (3) as it may purchase at sales under judgments, decrees, or mortgages held by it. N. Y. Joint Stock Assoc. L. § 6.

71. Byam *v.* Bickford, 140 Mass. 31, 2 N. E. 687; Bartlet *v.* King, 12 Mass. 537, 7 Am. Dec. 99; Hamblett *v.* Bennett, 6 Allen (Mass.) 140; Tucker *v.* Seaman's Aid Soc., 7 Metc. (Mass.) 188.

72. Howell *v.* Earp, 21 Hun (N. Y.) 393.

73. Byam *v.* Bickford, 140 Mass. 31, 2 N. E. 687; Hunt *v.* Wright, 47 N. H. 396, 93 Am. Dec. 451.

74. Crawford *v.* Gross, 140 Pa. St. 297, 21 Atl. 356. The court may inquire who compose the association and what is the interest of those not named in the deed as well as of those who are named. Pratt *v.* California Min. Co., 24 Fed. 869. See also Near *v.* Donnelly, 80 Mich. 130, 44 N. W. 1118.

75. Barker *v.* White, 58 N. Y. 204; Morris *v.* Metalline Land Co., 166 Pa. St. 351, 31 Atl. 114, 164 Pa. St. 326, 30 Atl. 240, 44 Am. St. Rep. 614, 27 L. R. A. 305; Kramer *v.* Arthurs, 7 Pa. St. 165; Matter of Fry, 4 Phila. (Pa.) 129; Clagett *v.* Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213. See also Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231. A deed to the members of an unincorporated joint stock company and their successors may be void for uncertainty; but, if a trustee be named, it is valid. Natchez *v.* Minor, 9 Sm. & M. (Miss.) 544, 48 Am. Dec. 727. Where certain parties, associated in the formation of a joint stock company for the purpose of holding and improving real estate, fixed a nominal amount as their capital stock and apportioned the same, the certificates issued therefor represent an interest in the real and personal property of the association which a court of equity will protect, and which can be sold or mortgaged by the owners like other species of property. Stringham *v.* Durkee, 8 Wis. 1.

76. Pleading generally see PLEADINGS.
Evidence generally see EVIDENCE.
Executions generally see EXECUTIONS.

77. Process generally see PROCESS.

78. State *v.* Adams Express Co., 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225; Adams Express Co. *v.* State, 55 Ohio St. 69, 44 N. E. 506; State *v.* U. S. Express Co., 2 Ohio S. & C. Pl. Dec. 257, 1 Ohio N. P. 259.

Under Ky. Const. § 208, providing that "the word corporation as used in this Constitution shall embrace joint stock companies and associations," and Ky. St. § 457, providing that "the words 'corporation,' 'company,' may be construed as including any corporation, company, person, persons, partnership, joint stock company or association," an association of three thousand members will be treated as a quasi-corporation for the purpose of service of process. Adams Express Co. *v.* Schofield, 111 Ky. 832, 64 S. W. 903, 23 Ky. L. Rep. 1120.

79. Parties generally see PARTIES.

80. Mattoon *v.* Wentworth, 7 Ohio Dec. (Reprint) 639, 4 Cinc. L. Bul. 513.

Where a person holds stock as trustee, he is a proper party defendant, to the exclusion of his beneficiary, in an action brought by a depositor against the stock-holders to recover the balance due him at the time of the suspension of the bank. Wadsworth *v.* Hocking, 61 Ill. App. 156.

defendant, it is the undeviating rule at law that a copartner cannot sue his firm or be sued by it.[81] Accordingly, in the absence of statutory authority, a member of a joint stock association cannot maintain an action against his company or be sued by it on a contract between him and the company,[82] for the reason that he would thus appear personally on both sides of the record.[83] He may, however, betake himself to a coördinate forum in which such technical incongruity would not be involved in the proper pleadings and procedure.[84] The hardship resulting from this technicality and the great inconvenience of making all the members of large unincorporated companies parties to actions by and against outsiders have been productive of remedial legislation both in this country[85] and in England.[86] In substance these statutes provide that such associations may sue and be sued in the name of a designated officer, as the president or treasurer of the company, who for the purposes of the action is substantially a corporation sole and the representative of the company as distinct from the individuals composing it. Under such legislation there can be no valid objection to litigation between a stock-holder and the appropriate officer as the representative of the whole company.[87] But such an officer must be designated by law; the members themselves cannot nominate an officer to represent the company in such a way as to give him any standing in court in that capacity.[88] Where an action is brought against a company in the name of an officer, or a counter-claim has been made in an action brought by an officer, no action can be brought to enforce the individual liability of the members until after final judgment in the first action and the return of an execution unsatisfied in whole or in part.[89] An action may, how-

81. See PARTNERSHIP.

82. See *supra*, V, A, 1.

83. Walker *v.* Wait, 50 Vt. 668.

84. See *supra*, V, A, 1.

85. People *v.* Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303; Van Aernam *v.* Bleistein, 102 N. Y. 355, 7 N. E. 537; Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Saltsman *v.* Shults, 14 Hun (N. Y.) 256; Bray *v.* Farwell, 3 Lans. (N. Y.) 495; Fargo *v.* McVicker, 55 Barb. (N. Y.) 437; Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157; Tibbetts *v.* Blood, 21 Barb. (N. Y.) 650; Sander *v.* Edling, 13 Daly (N. Y.) 238; McGuffin *v.* Dinsmore, 4 Abb. N. Cas. (N. Y.) 241; DeWitt *v.* Chandler, 11 Abb. Pr. (N. Y.) 459; Olery *v.* Brown, 51 How. Pr. (N. Y.) 92; Bridenbecker *v.* Hoard, 32 How. Pr. (N. Y.) 289; Robbins *v.* Wells, 26 How. Pr. (N. Y.) 15; Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735; McGeorge *v.* Chemical Mfg. Co., 141 Pa. St. 575, 21 Atl. 671.

Under N. Y. St. (1849) c. 258, providing that any joint stock company consisting of seven or more shareholders can sue and be sued in the name of its president or treasurer, in an action brought by an officer of such a company, the allegation that the company is a joint stock company consisting of more than seven shareholders is a material allegation, which may be put in issue by defendant. Tiffany *v.* Williams, 10 Abb. Pr. (N. Y.) 204. See also Schuylerville Nat. Bank *v.* Van Derwerker, 74 N. Y. 234. A joint stock company possessing the right by the law under which it is organized to sue and be sued in the name of its president or treasurer is a citizen of the state of New York, so far as the jurisdiction of the federal courts depends on citizenship. Baltimore, etc., R. Co. *v.* Adams Express Co., 22 Fed. 404; Fargo *v.* Louisville, etc., R. Co., 6 Fed. 787, 10 Biss. 273.

86. Harrison *v.* Brown, 5 De G. & Sm. 728, 64 Eng. Reprint 1318; Wills *v.* Sutherland, 7 D. & L. 89, 4 Exch. 211, 18 L. J. Exch. 450; Skinner *v.* Lambert, 2 Dowl. P. C. N. S. 132, 11 L. J. C. P. 237, 4 M. & G. 477, 5 Scott N. R. 197, 43 E. C. L. 249; Reddish *v.* Pinnock, 10 Exch. 213; Chapman *v.* Milvain, 5 Exch. 61, 14 Jur. 251, 19 L. J. Exch. 228, 1 L. M. & P. 209; Lawrence *v.* Wynn, 8 L. J. Exch. 237, 5 M. & W. 355; *Ex p.* Hall, 1 Mont. & C. 365. See also 7 Geo. IV, c. 46, § 9.

87. See cases cited *supra*, notes 85, 86.

The intent of these statutes was to obviate the inconvenience of joining all the shareholders or associates as parties. They gave officers representing the companies no new right of action. Corning *v.* Greene, 23 Barb. (N. Y.) 33 [*affirmed* in 26 N. Y. 472, 28 How. Pr. 581].

Where a joint stock association owns stock in another association, a stock-holder of the former may maintain a bill to enjoin *ultra vires* acts by the latter. Carter *v.* Producers', etc., Oil Co., 164 Pa. St. 463, 30 Atl. 391.

88. Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Hybart *v.* Parker, 4 C. B. N. S. 209, 4 Jur. N. S. 265, 27 L. J. C. P. 120, 6 Wkly. Rep. 364, 93 E. C. L. 209.

89. Witherhead *v.* Allen, 4 Abb. Dec. (N. Y.) 628, 3 Keyes 562, 8 Abb. Pr. N. S. 164, 33 How. Pr. 620; Flagg *v.* Swift, 25 Hun (N. Y.) 623; Kingsland *v.* Braisted, 2 Lans. (N. Y.) 17; Robbins *v.* Wells, 1 Rob. (N. Y.) 666, 18 Abb. Pr. 191; Green Bay First Nat. Bank *v.* Goff, 31 Wis. 77. See also Gott *v.* Dinsmore, 111 Mass. 45.

ever, be brought by or against all the members in the first instance.[90] Statutes providing that actions shall be prosecuted in the first instance against an officer of the association are local in their application as they affect the remedy only, and in another jurisdiction, where no such legislation exists, the individual liability of members may be enforced by an action against them as partners in the first instance.[91]

C. Judgments.[92] In an action against the company in the name of its president judgment is properly rendered against the president as such, but it does not bind his individual property, and the execution issued must require the sheriff to satisfy it out of the joint property of the association,[93] unless the statute in terms authorizes the issuance of an execution against the individual property of any member of the association for the time being, after a return *nulla bona* against the company, in like manner as if such judgment had been recovered against the members personally.[94]

VIII. DISSOLUTION.

A. How Dissolved — 1. By Consent of Members. Inasmuch as it is a creature of contract and not of the state, a joint stock association may go into voluntary liquidation by mutual consent of all the members and appoint trustees to wind up its affairs;[95] but if formed for a special period it cannot be dissolved within that period without the unanimous consent of the stock-holders,[96] except by the interposition of a court of equity.[97]

2. By Consolidation With Another Company. The directors of a joint stock association have no power to terminate its existence by consolidation with another company, unless such authority is given by the articles of association.[98]

3. By Incorporation. The existence of a joint stock association as such may

90. Schwartz *v.* Wechler, 2 Misc. (N. Y.) 67, 20 N. Y. Suppl. 861, 23 N. Y. Civ. Proc. 21, 29 Abb. N. Cas. 332; N. Y. Joint Stock Assoc. L. § 17.

91. Boston, etc., R. Co. *v.* Pearson, 128 Mass. 445; Gott *v.* Dinsmore, 111 Mass. 45; Bodwell *v.* Eastman, 106 Mass. 525; Taft *v.* Ward, 106 Mass. 518; Tyler *v.* Galloway, 13 Fed. 477, 21 Blackf. 66. In Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940, it was held that the United States Express Company, being a joint stock company or association, formed under the laws of New York authorizing such an association to sue and be sued in the name of its president and treasurer, is not within the act of May 23, 1890 (Pub. Laws, p. 353), supplementing the practice act; and an action may hence be maintained against it in New Jersey in the manner prescribed by the laws of New York.

92. Judgment generally see Judgments.

93. McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204; Schuylerville Nat. Bank *v.* Van Derwerker, 74 N. Y. 234; Burns *v.* Kane, 12 N. Y. Civ. Proc. 86; Robbins *v.* Wells, 26 How. Pr. (N. Y.) 15; Wormwell *v.* Hailstone, 6 Bing. 668, 8 L. J. C. P. O. S. 264, 4 M. & P. 512, 19 E. C. L. 301; Harrison *v.* Pimmins, 7 Dowl. P. C. 28, 8 L. J. Exch. 94, 4 M. & W. 510.

94. Lauder *v.* Tillia, 117 Pa. St. 304, 11 Atl. 86; Sheble *v.* Patterson, 5 Kulp (Pa.) 153; Whitall *v.* Williams, 6 Wkly. Notes Cas. (Pa.) 44; Australasia Bank *v.* Nias, 16 Q. B. 717, 15 Jur. 967, 20 L. J. Q. B. 284, 71 E. C. L. 717; Bartlett *v.* Pentland, 1 B. & Ad. 704, 20 E. C. L. 657; Bradley *v.* Eyre, 1 D. & L. 260, 12 L. J. Exch. 450, 11 M. & W. 432; Nixon *v.* Green, 11 Exch. 550, 25 L. J. Exch. 209. *Compare* Bodey *v.* Cooper, 82 Md. 625, 34 Atl. 362.

95. Morris *v.* Imperial Cap Co., 135 Mich. 476, 98 N. W. 5; Francis *v.* Taylor, 31 Misc. (N. Y.) 187, 65 N. Y. Suppl. 28; Griffith *v.* Paget, 6 Ch. D. 511, 46 L. J. Ch. 493, 37 L. T. Rep. N. S. 141, 25 Wkly. Rep. 523.

Dissolution of corporation by mutual consent of stock-holders see Corporations.

96. Von Schmidt *v.* Huntington, 1 Cal. 55; Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157. See also McVicker *v.* Ross, 55 Barb. (N. Y.) 247; Blatchford *v.* Ross, 54 Barb. (N. Y.) 42, 37 How. Pr. 110, in both of which the attempt was to merge one joint stock association into another.

97. See *infra*, VIII, B.

98. **Unanimous consent** of the stock-holders is ordinarily necessary for this purpose. Blatchford *v.* Ross, 54 Barb. (N. Y.) 42, 37 How. Pr. 110.

Sale of property to satisfy claims of stock-holders.— Shareholders of a joint stock company, objecting to consolidation with another company, have no absolute right to have the property of the company sold to obtain their shares at the commencement of litigation. Their right, if they are entitled to have the property sold, is to have it sold when they have recovered judgment. McVicker *v.* Ross, 55 Barb. (N. Y.) 247, 37 How. Pr. 474.

Consolidation of corporations see Corporations, 10 Cyc. 288 *et seq.*

be terminated by incorporating and the shareholders becoming stock-holders in the new corporations as their respective interests appear.[99]

4. By Insolvency. Proceedings for the dissolution of joint stock associations in cases of insolvency are to be conducted mainly according to the methods employed in cases of insolvent corporations rather than those derived from the law of simple partnership.[1] A receiver may be appointed who may maintain actions against the debtors of the association whether they be stock-holders or not.[2] But no creditor who is a stock-holder can receive any dividend until the other creditors are paid in full.[3]

5. By Sole Ownership of Stock. Where one member becomes the sole owner of all the stock there is nothing for certificates to represent; he simply becomes the owner of the assets and the association is dissolved.[4]

6. In Equity For Cause. Upon adequate cause shown, a court of equity has jurisdiction to decree the dissolution of a joint stock company.[5]

7. Under Articles of Association. The affairs of the company may always be wound up in accordance with the terms of its articles of association.[6]

99. Frank *v.* Drenkhahn, 76 Mo. 508; Durham Fertilizer Co. *v.* Clute, 112 N. C. 440, 17 S. E. 419.

Relief of members from personal liability for debts contracted while they were a joint stock association does not result. Durham Fertilizer Co. *v.* Clute, 112 N. C. 440, 17 S. E. 419. The members of a joint stock company are personally liable for debts contracted by it, although it subsequently becomes incorporated, as they had intended it should when the debts were contracted, and the corporation accepts an assignment of all its assets. Broyles *v.* McCoy, 5 Sneed (Tenn.) 602.

Effect of incorporation generally see Corporations, 10 Cyc. 649 *et seq.*

1. Waterbury *v.* Merchants' Union Express Co., 3 Abb. Pr. N. S. (N. Y.) 163.

Insolvency generally see Insolvency.

Insolvent corporation see Corporations, 10 Cyc. 1236 *et seq.*

2. Lewis *v.* McElvain, 16 Ohio 347; Hillborn *v.* Covenant Pub. Co., 12 Wkly. Notes Cas. (Pa.) 548.

Determination of amount of indebtedness.— The terms of a subscription to a joint stock company prescribed that after twenty per cent had been paid the balance should be "subject to the call of the directors, as they may be instructed by the majority of the stockholders." The company having become insolvent, a receiver was appointed, who instituted an action against a stock-holder for the remaining eighty per cent of his stock subscription. It was held that the receiver had no authority to call upon the stock-holder for payment until the court had determined the amount of indebtedness of the corporation and fixed the liability of each share of the stock, and that these facts thus ascertained should be averred in the petition. Chandler *v.* Keith, 42 Iowa 99.

3. Bain *v.* Clinton Loan Assoc., 112 N. C. 248, 17 S. E. 154.

4. Butterfield *v.* Beardsley, 28 Mich. 412; Farnum *v.* Patch, 60 N. H. 294, 49 Am. Rep. 313.

5. Randolph *v.* Nichol, (Ark. 1905) 84 S. W. 1037; Van Schmidt *v.* Huntington, 1 Cal. 55; Colton *v.* Raymond, 41 Misc. (N. Y.) 580, 85 N. Y. Suppl. 210.

Fraud or conversion of assets.— The court may decree the dissolution of the concern at the suit of one or more of the members upon a showing of such fraud as would defeat the rights of the shareholders in violation of the articles of agreement of the association, or where those in charge are converting the assets or profits of the association to their own use. Colton *v.* Raymond, 41 Misc. (N. Y.) 580, 85 N. Y. Suppl. 210; Werner *v.* Leisen, 31 Wis. 169.

Failure to declare dividends.— The fact that a joint stock company has conducted business for twenty-three years without making dividends for its stock-holders, and has no better prospect for the future, is good ground for its dissolution at the suit of a stock-holder. Willis *v.* Chapman, 68 Vt. 459, 35 Atl. 459.

Insufficient showing.— A bill in equity to place the property of an unincorporated stock company in the hands of a receiver, order the same to be sold, and the proceeds divided among the members, brought by a minority of the stock-holders against a majority, the evidence failing to show that the property is being mismanaged or wasted, will be dismissed; it appearing that the minority can sell their interest if they do not wish to retain it, and realize as much for it in that way as they would be likely to do if the whole property should be put into the hands of a receiver and be by him sold. Hinkley *v.* Blethen, 78 Me. 221, 3 Atl. 655.

Who may institute suit.— One or more of the members may at any time institute proceedings for dissolution. Snyder *v.* Lindsey, 92 Hun (N. Y.) 432, 36 N. Y. Suppl. 1037.

Proper parties.— And in a suit to wind up the affairs of a joint stock association, dispose of its assets, and distribute the proceeds among its stock-holders, every person interested as a stock-holder or creditor is a proper party. Randolph *v.* Nichol, (Ark. 1905) 84 S. W. 1037.

6. Francis *v.* Taylor, 31 Misc. (N. Y.) 187, 65 N. Y. Suppl. 28; Tindel *v.* Park, 154 Pa.

B. Distribution of Proceeds. Upon the dissolution of a joint stock corporation, it is the duty of the trustees to convert the assets into money and distribute the proceeds among the stock-holders.[7]

IX. STATUTORY REGULATION.

While unincorporated joint stock companies with transferable shares are not illegal[8] as common nuisances,[9] at an early date in England they met with legislative opposition;[10] but later the Companies Act, an elaborate system of law, was enacted, under which and its amendments a large part of the business of the country is transacted.[11] And in many of the United States statutes substantially on the lines of the English Companies Act have been enacted.[12]

St. 36, 26 Atl. 300; Lyon *v.* Haynes, 5 M. & G. 504, 44 E. C. L. 268.

Where provision for the winding up at a fixed time is made in the articles of association, it cannot longer be kept on foot as a going concern without the unanimous consent of the shareholders, although it may not be for their mutual benefit to wind it up. Mann *v.* Butler, 2 Barh. Ch. (N. Y.) 362.

7. Frothingham *v.* Barney, 6 Hun (N. Y.) 366, holding that the trustees have no right to exchange the assets of the old association for the stock of a corporation, although one formed to carry on the same business, without the consent of all the stock-holders.

8. *In re* Land Credit Co., L. R. 5 Ch. 363, 39 L. J. Ch. 737, 22 L. T. Rep. N. S. 454, 18 Wkly. Rep. 505; Wormersley *v.* Merritt, L. R. 4 Eq. 695, 37 L. J. Ch. 19, 17 L. T. Rep. N. S. 43, 15 Wkly. Rep. 1165; Barclay's Case, 26 Beav. 177, 4 Jur. N. S. 1042, 27 L. J. Ch. 660, 53 Eng. Reprint 865, 27 Beav. 474, 5 Jur. N. S. 615, 28 L. J. Ch. 631, 7 Wkly. Rep. 509, 54 Eng. Reprint 188.

9. Walburn *v.* Ingilby, Coop. t. Brough. 270, 47 Eng. Reprint 96, 3 L. J. Ch. 21, 1 Myl. & K. 61, 7 Eng. Ch. 61, 39 Eng. Reprint 604; Garrard *v.* Hardey, 1 D. & L. 51, 12 L. J. C. P. 205, 5 M. & G. 471, 6 Scott N. R. 450, 44 E. C. L. 251; Harrison *v.* Heathorn, 12 L. J. C. P. 282, 6 M. & G. 81, 6 Scott N. R. 735, 46 E. C. L. 81.

10. St. 6 Geo. I, c. 18. This act was commonly known as the "Bubble Act" which was designed to suppress them altogether by attaching penalties to membership and making it an offense for stock brokers to deal in their shares. Blackstone says this statute was enacted the year after the infamous south sea project had beggared half the nation. 4 Blackstone Comm. 117. See also Rex *v.* Webh, 14 East 406; Rex *v.* Dodd, 9 East 516. Failing utterly to accomplish the legislative intent the act was repealed in 1825. 5 Geo. IV, c. 114; 6 Geo. IV, c. 91

In the United States the "Buhble Act," although passed long before the American Revolution, did not become a part of the common law of the United States, and joint stock associations have never been considered illegal here. Phillips *v.* Blatchford, 137 Mass. 510, 513, per Holmes J.

11. St. 25 & 26 Vict. c. 89.

This act extends to Scotland and Ireland as well as England. *In re* International Pulp, etc., Co., 3 Ch. D. 594, 45 L. J. Ch. 446, 35 L. T. Rep. N. S. 229, 24 Wkly. Rep. 535.

12. See the statutes of the several states.

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Dower in Joint Tenancy, see Dower.
Equity Jurisdiction Generally, see Equity.
Estate by Entireties, see Husband and Wife.
Estates Generally, see Estates.
Exemption, see Exemptions.
Garnishment of Joint Property, see Garnishment.
Homestead in Joint Tenancy, see Homesteads.
Insurance on Joint Property, see Fire Insurance; Marine Insurance.

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* Author of "Fish and Game," 19 Cyc. 986; "Fires," 19 Cyc. 977; "Improvements," 22 Cyc. 1; and joint author of "Gaming," 20 Cyc. 873, and of "A Treatise on the Law of Agency."

For Matters Relating to — (*continued*)
Joint Tenancy:
By Husband and Wife, see HUSBAND AND WIFE.
In Crops Raised on Leased Lands, see LANDLORD AND TENANT.
Levy on Interest of Joint Tenant:
By Attachment, see ATTACHMENT.
By Execution, see EXECUTIONS.
Partition of Joint Property, see PARTITION.
Property of Joint Tenant Passing:
By Assignment, see ASSIGNMENT FOR BENEFIT OF CREDITORS.
In Bankruptcy Proceedings, see BANKRUPTCY.
In Insolvency Proceedings, see INSOLVENCY.
Redemption of Mortgaged Property by Joint Tenant, see MORTGAGES.
Tenants in Common, see TENANCY IN COMMON.
Voting Stock Held Jointly, see CORPORATIONS.

I. DEFINITION, CREATION, AND EXISTENCE.

A. Definition. A joint tenancy exists where a single estate in property, real or personal, is owned by two or more persons, other than husband and wife, under one instrument or act of the parties.[1]

B. Creation and Existence[2] — **1. IN GENERAL.** A joint tenancy can only be created by purchase or act of the parties and not by descent or act of the law.[3] It may be created by devise,[4] or by any conveyance or act of purchase *inter vivos* which gives an estate to a plurality of persons without adding any restrictive, exclusive, or explanatory words;[5] as where property is conveyed to two or

1. *Massachusetts.*— Stimpson *v.* Batterman, 5 Cush. 153.
North Carolina.— Blair *v.* Osborne, 84 N. C. 417.
South Carolina.— Jenkins *v.* Jenkins, 1 Mill 48.
Tennessee.— Gee *v.* Gee, 2 Sneed 395.
Vermont.— Gilbert *v.* Richards, 7 Vt. 203, holding that a gift of personal property to two or more *prima facie* creates a joint tenancy.
Virginia.— Jones *v.* Jones, 1 Call 458.
England.— Garrick *v.* Taylor, 29 Beav. 79, 7 Jur. N. S. 116, 30 L. J. Ch. 211, 36 L. T. Rep. N. S. 460, 9 Wkly. Rep. 181, 54 Eng Reprint 556 [*affirmed* in 4 De G. F. & J. 159, 7 Jur. N. S. 1174, 31 L. J. Ch. 68, 5 L. T. Rep. N. S. 404, 10 Wkly. Rep. 49, 65 Eng. Ch. 124, 45 Eng. Reprint 1144]; Staples *v.* Maurice, 4 Bro. P. C. 580, 2 Eng. Reprint 395; Berens *v.* Fellowes, 56 L. T. Rep. N. S. 391, 35 Wkly. Rep. 356; *Re* Hughes, 24 L. T. Rep. N. S. 415. See Jackson *v.* Jackson, 7 Ves. Jr. 535, 32 Eng. Reprint 215.
See 29 Cent. Dig. tit. "Joint Tenancy," § 1.
Another definition is: "Joint-tenancy is when two or more persons, not being husband and wife at the date of its acquisition, have any subject of property jointly between them in equal shares by purchase." Freeman Coten. § 10.
Joint tenancy originally applied to land rights only, but now generally extends to personalty as well. Staples *v.* Maurice, 4 Bro. P. C. 580, 2 Eng. Reprint 395.

2. Application of statute of frauds to agreements to buy lands jointly see FRAUDS, STATUTE OF, 20 Cyc. 237.

3. Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93; Simons *v.* McLain, 51 Kan. 153, 32 Pac. 919; Colson *v.* Baker, 42 Misc. (N. Y.) 407, 87 N. Y. Suppl. 238; Lockhart *v.* Vandyke, 97 Va. 356, 33 S. E. 613; 2 Blackstone Comm. 180; 1 Washburne Real Prop. (6th ed.) 529.

4. See, generally, WILLS.

5. Bustard *v.* Saunders, 7 Beav. 92, 7 Jur. 986, 29 Eng. Ch. 92, 49 Eng. Reprint 998; Stratton *v.* Best, 2 Bro. Ch. 233, 29 Eng. Reprint 130; Smith *v.* Oakes, 14 Sim. 122, 37 Eng. Ch. 122, 60 Eng. Reprint 304. And see *infra*, I, B, 6.
A joint purchase by two or more in their joint names creates a joint tenancy. Caines *v.* Grant, 5 Binn. (Pa.) 119; Gee *v.* Gee, 2 Sneed (Tenn.) 395; Crossfield *v.* Such, 1 C. L. R. 668, 8 Exch. 825, 22 L. J. Exch. 325, 1 Wkly. Rep. 470; *Re* Rowe, 58 L. J. Ch. 703, 61 L. T. Rep. N. S. 581; *Re* Hughes, 24 L. T. Rep. N. S. 415, 19 Wkly. Rep. 468. See Petty *v.* Styward, 1 Ch. Rep. 57, 21 Eng. Reprint 506; Harrison *v.* Barton, 1 Johns. & H. 287, 30 L. J. Ch. 213, 7 Jur. N. S. 19, 9 Wkly. Rep. 177; Harris *v.* Fergusson, 16 Sim. 308, 39 Eng. Ch. 308, 60 Eng. Reprint 892; Aveling *v.* Knipe, 19 Ves. Jr. 441, 13 Rev. Rep. 240, 34 Eng. Reprint 580.

more persons as trustees,[6] or where two or more jointly lease a farm.[7] A mortgage to two or more persons as security for a debt due to them jointly creates them joint tenants,[8] until foreclosure;[9] but not where it is given to secure several debts.[10] It has also been held that such an estate may be created by a joint disseizin.[11]

2. DISTINCTION BETWEEN JOINT TENANTS AND TENANTS IN COMMON. The essential difference between joint tenants and tenants in common is that joint tenants hold the property by one joint title and in one right, whereas tenants in common hold by several titles or by one title and several rights.[12] They also differ in that the right of survivorship exists in case of joint tenancy but not in tenancy in common,[13] and in that a joint tenant may convey his interest to his cotenant by a release, which a tenant in common cannot do.[14]

3. WHO MAY BE JOINT TENANTS. As a general rule all natural persons are capable of becoming joint tenants;[15] but bodies politic or corporations cannot be joint tenants either between themselves or with natural persons.[16]

4. ESTATES SUBJECT TO JOINT TENANCY. A joint tenancy may be of an estate in fee, for life, for years, or at will,[17] or of an estate in remainder;[18] and may be of an equitable as well as of a legal estate.[19]

5. ESSENTIALS TO JOINT TENANCY. To create a joint tenancy there must coexist four unities: (1) Unity of interest; (2) unity of title; (3) unity of time; (4) unity of possession;[20] that is, each of the owners must have one and the same interest,[21] conveyed by the same act or instrument,[22] to vest at one and the same time,[23] except in cases of uses and executory devises;[24] and each must have the entire

6. Webster *v.* Vandeventer, 6 Gray (Mass.) 428 (holding that the assignment of a mortgage to two persons as trustees of an unincorporated society vests title in them as joint tenants); Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204. See, generally, TRUSTS.

7. Jeffereys *v.* Small, 1 Vern. Ch. 217, 23 Eng. Reprint 424.

8. Kinsley *v.* Abbott, 19 Me. 430; Appleton *v.* Boyd, 7 Mass. 131. See also MORTGAGES.

9. Kinsley *v.* Abbott, 19 Me. 430.

10. Burnett *v.* Pratt, 22 Pick. (Mass.) 556.

11. Putney *v.* Dresser, 2 Metc. (Mass.) 583; 5 Bacon Abr. 246. *Compare* Fowler *v.* Thayer, 4 Cush. (Mass.) 111.

12. 5 Bacon Abr. 240.

13. Redemptorist Fathers *v.* Lawler, 205 Pa. St. 24, 54 Atl. 487; 5 Bacon Abr. 240. See *infra*, I, B, 9.

14. 5 Bacon Abr. 240.

15. Freeman Coten. 69.

An alien and a subject may be joint tenants. 5 Bacon Abr. 240.

16. Bennet *v.* Holbech, 2 Saund. 317; 5 Bacon Abr. 241; Freeman Coten. 69. See also CORPORATIONS, 10 Cyc. 1132.

17. Thornburg *v.* Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42; 2 Blackstone Comm. 180; Freeman Coten. 70; 1 Washburn Real Prop. (6th ed.) 529.

18. Thornburg *v.* Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42; 1 Washburn Real Prop. (6th ed.) 529.

19. Freeman Coten. 70.

20. Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; Louisville *v.* Coleburne, 108 Ky. 420, 56 S. W. 681, 22 Ky. L. Rep. 64. See Colson *v.* Baker, 42 Misc. (N. Y.) 407, 87 N. Y. Suppl. 238; 2 Blackstone Comm. 180.

21. Case *v.* Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; Craig *v.* Taylor, 6 B. Mon. (Ky.) 457 (holding that a deed to two persons stating the particular interest conveyed to each does not create a joint tenancy); Colson *v.* Baker, 42 Misc. (N. Y.) 407, 87 N. Y. Suppl. 238; 2 Blackstone Comm. 181.

A joint estate may be given to two or more for life with remainder to one of them in fee, or to the heirs of one. Wiscot's Case, 2 Coke 60*b*; 2 Blackstone Comm. 181; Freeman Coten. 65; 1 Tiffany Real Prop. 371.

22. Case *v.* Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; Richardson *v.* Miller, 48 Miss. 311; Colson *v.* Baker, 42 Misc. (N. Y.) 407, 87 N. Y. Suppl. 238; Young *v.* De Bruhl, 11 Rich. (S. C.) 638, 73 Am. Dec. 127; 2 Blackstone Comm. 181.

23. Case *v.* Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; McPherson *v.* Snowden, 19 Md. 197; Colson *v.* Baker, 42 Misc. (N. Y.) 407, 87 N. Y. Suppl. 238; Woodgate *v.* Unwin, 4 Sim. 129, 6 Eng. Ch. 129, 58 Eng. Reprint 50; 2 Blackstone Comm. 181.

24. Powell *v.* Powell, 5 Bush (Ky.) 619, 96 Am. Dec. 372 (holding that a child becomes at its birth joint tenant with the mother of lands which the latter holds in special tail); Sammes' Case, 13 Coke 54; Aylor *v.* Chep. Cro. Jac. 259; McGregor *v.* McGregor, 1 De G. F. & J. 63, 62 Eng. Ch. 49, 45 Eng. Reprint 282; Brent's Case, 1 Dyer 340*a*; Kenworthy *v.* Ward, 1 Eq. Rep. 389, 11 Hare 196, 17 Jur. 1047, 1 Wkly. Rep.

possession of every parcel of the property held in joint tenancy as well as of the whole.[25]

6. Construction of Instrumemts or Acts Creating Joint Tenancies. The ancient English law was apt in its constructions of conveyances to favor joint tenancy rather than tenancy in common; and where an estate was conveyed to two or more persons without any words indicating an intention that it should be divided among them it was construed to be a joint tenancy.[26] Joint tenancies, however, for a long period of time have been and still are regarded with so little favor in England and in this country, both in courts of law and of equity, that whenever the expressions in a conveyance will import an intention in favor of a tenancy in common, such effect will be given to them.[27] But notwithstanding this tendency of the courts, in the absence of statute a conveyance to several persons will still be construed to be a joint tenancy where there is no expression or words in the instrument creating it indicating an intention that the estate shall be divided.[28]

7. Statutory Modifications or Abolition. This leaning of the courts has led in

493, 45 Eng. Ch. 196; Hand *v.* North, 10 Jur. N. S. 7, 33 L. J. Ch. 556, 9 L. T. Rep. N. S. 634, 3 New Rep. 239, 12 Wkly. Rep. 229; Sussex *v.* Temple, 1 Ld. Raym. 310; Oates *v.* Jackson, 2 Str. 1172; 4 Kent Comm. 359; 1 Washburn Real Prop. (6th ed.) 529; Freeman Coten. 65. See also Wills.

25. Case *v.* Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; Colson *v.* Baker, 42 Misc. (N. Y.) 407, 87 N. Y. Suppl. 238; 2 Blackstone Comm. 182.

In the ancient language of the law, joint tenants were said to hold per my et per tout, or in plain words, "by the moiety or half and by all." The true interpretation of this phrase being that these tenants were seized of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation each had only a particular part or interest. Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 55 Am. St. Rep. 162; 4 Kent Comm. 460.

26. Caines *v.* Grant, 5 Binn. (Pa.) 119; Martin *v.* Smith, 5 Binn. (Pa.) 16, 6 Am. Dec. 395; Spencer *v.* Austin, 38 Vt. 258; Fisher *v.* Wigg, 1 Salk. 391; Crooke *v.* De Vandes, 9 Ves. Jr. 197, 32 Eng. Reprint 577; Morley *v.* Bird, 3 Ves. Jr. 628, 4 Rev. Rep. 106, 30 Eng. Reprint 1192; 2 Blackstone Comm. 180. See Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93; Nobel *v.* Teeple, 58 Kan. 398, 49 Pac. 598; Doe *v.* Prestwidge, 4 M. & S. 178, 18 Rev. Rep. 436.

Parol testimony of acts of the parties is admissible to show a joint tenancy, but not of statements of intention. Harrison *v.* Barton, 1 Johns. & H. 287, 7 Jur. N. S. 19, 1 L. J. Ch. 213, 9 Wkly. Rep. 177.

27. *District of Columbia.*— Seitz *v.* Seitz, 11 App. Cas. 358.

Kansas.— Noble *v.* Teeple, 58 Kan. 398, 49 Pac. 598.

Kentucky.— Barclay *v.* Hendricks, 3 Dana 378. See Stewart *v.* Robinson, 74 S. W. 652, 25 Ky. L. Rep. 66.

Maryland.— Gibbons *v.* Riley, 7 Gill 82.

New York.— Westcott *v.* Cady, 5 Johns. Ch. 334, 9 Am. Dec. 306, holding that almost any expression or words denoting a different intention than a joint tenancy will alter the construction.

Pennsylvania.— Sturm *v.* Sawyer, 2 Pa. Super. Ct. 254; McKeever *v.* Patteson, 2 Pa. Co. Ct. 304.

Vermont.— Spencer *v.* Austin, 38 Vt. 258.

England.— Haws *v.* Haws, 3 Atk. 524, 26 Eng. Reprint 1102, 1 Ves. 13, 27 Eng. Reprint 859, 1 Wils. C. P. 165; Owen *v.* Owen, 1 Atk. 494, 26 Eng. Reprint, 313; Campbell *v.* Campbell, 4 Bro. Ch. 15, 29 Eng. Reprint 755; Perkins *v.* Baynton, 1 Bro. Ch. 118, 28 Eng. Reprint 1022; Staples *v.* Maurice, 4 Bro. P. C. 580, 2 Eng. Reprint 395; Lake *v.* Craddock, 3 P. Wms. 158, 24 Eng. Reprint 1011; Rigden *v.* Vallier, 2 Ves. 252, 28 Eng. Reprint 163. See Aveling *v.* Knipe, 19 Ves. Jr. 441, 13 Rev. Rep. 240, 34 Eng. Reprint 580; 4 Kent Comm. 361.

Renting a compartment in a safe deposit vault in the name of M or A does not create a presumption that M and A are joint tenants of the property placed in such compartment. Mercantile Safe Deposit Co. *v.* Huntington, 89 Hun (N. Y.) 465, 35 N. Y. Suppl. 390, 2 N. Y. Annot. Cas. 215.

28. *California.*— Greer *v.* Blanchar, 40 Cal. 194.

District of Columbia.— Seitz *v.* Seitz, 11 App. Cas. 358.

Kansas.—Noble *v.* Teeple, 58 Kan. 398, 49 Pac. 598. See Simons *v.* McLain, 51 Kan. 153, 32 Pac. 919.

Kentucky.— Robinson *v.* Duvall, 79 Ky. 83, 42 Am. Rep. 208; Barclay *v.* Hendricks, 3 Dana 378.

Pennsylvania.— Martin *v.* Smith, 5 Binn. 16, 6 Am. Dec. 395.

South Carolina.— Telfair *v.* Howe, 3 Rich. Eq. 235, 55 Am. Dec. 637.

Vermont.— Decamp *v.* Hall, 42 Vt. 483.

Virginia.— Lockhart *v.* Vandyke, 97 Va. 356, 33 S. E. 613.

Wisconsin.— Farr *v.* Grand Lodge A. O. U. W., 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L. R. A. 249.

United States.— See Apgar *v.* Christophers, 33 Fed. 201.

England.— Jolliffe *v.* East, 3 Bro. Ch. 25, 29 Eng. Reprint 387.

many jurisdictions in this country to statutes under which joint tenancies are wholly or partially abolished, and that made a tenancy in common which before was a joint tenancy,[29] except where the act or instrument creating the estate expressly declares or clearly and manifestly shows an intention to create a joint tenancy.[30] Some of these statutes either expressly except or are held not to apply either to conveyances to several executors or trustees as such,[31] or to

29. Cheney *v.* Teese, 108 Ill. 473; Noble *v.* Teeple, 58 Kan. 398, 49 Pac. 598; Simons *v.* McLain, 51 Kan. 153, 32 Pac. 919; Tabler *v.* Wiseman, 2 Ohio St. 207; Wilson *v.* Fleming, 13 Ohio 68; Miles *v.* Fisher, 10 Ohio 1, 36 Am. Dec. 61; Sergeant *v.* Steinberger, 2 Ohio 305, 15 Am. Dec. 553; Kennedy's Appeal, 60 Pa. St. 511. See Kollock's Estate, 7 Pa. Co. Ct. 348; and cases cited in the following notes.

In **Pennsylvania** the act of March 31, 1812, 5 Sm. L. 395, merely takes away survivorship as an incident of joint tenancy. It makes no change where the estate is created by will or where it is expressly provided for by deed, and whether or not survivorship was intended depends not upon the precise language of the instrument or the form of construction but upon the meaning to be gathered from the will or deed in its entirety. *In re* McCallum, 211 Pa. St. 205, 60 Atl. 903.

In **South Carolina** the acts of 1734 and 1748 relating to joint tenancies, and modifying the title held by joint tenants, operated only in cases where the interest had actually vested, and did not affect the creation of such tenancy. Herbemont *v.* Thomas, Cheves Eq. 21.

30. *Arkansas.*— Cockrill *v.* Armstrong, 31 Ark. 580.

California.— Greer *v.* Blanchar, 40 Cal. 194; Bowen *v.* May, 12 Cal. 348; Dewey *v.* Lambier, 7 Cal. 347.

Delaware.— Davis *v.* Smith, 4 Harr. 68.

Georgia.— Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93; Lowe *v.* Brooks, 23 Ga. 325.

Illinois.— Slater *v.* Gruger, 165 Ill. 329, 46 N. E. 235; Mette *v.* Feltgen, 148 Ill. 357, 36 N. E. 81.

Indiana.— Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; Case *v.* Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; Thornburg *v.* Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42; Nicholson *v.* Caress, 45 Ind. 479; Chandler *v.* Cheney, 37 Ind. 391.

Maryland.— Craft *v.* Wilcox, 4 Gill 504; Purdy *v.* Purdy, 3 Md. Ch. 547.

Massachusetts.— Morris *v.* McCarty, 158 Mass. 11, 32 N. E. 938; Jones *v.* Crane, 16 Gray 308; Burghardt *v.* Turner, 12 Pick. 534; Miller *v.* Miller, 16 Mass. 59; Appleton *v.* Boyd, 7 Mass. 131; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243.

Mississippi.— Day *v.* Davis, 64 Miss. 253, 8 So. 203; McAllister *v.* Plant, 54 Miss. 106.

Missouri.— Johnston *v.* Johnston, 173 Mo. 91, 73 S. W. 202, 96 Am. St. Rep. 486, 61 L. R. A. 166; Lemmons *v.* Reynolds, 170 Mo. 227, 71 S. W. 135; Rodney *v.* Landau, 104 Mo. 251, 15 S. W. 962.

Nevada.— Smith *v.* Shrieves, 13 Nev. 303.

New Jersey.— Berdan *v.* Van Riper, 16 N. J. L. 7; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

New York.— Commercial Bank *v.* Sherwood, 162 N. Y. 310, 56 N. E. 834; *In re* Kimberly, 150 N. Y. 90, 44 N. E. 945; Van Brunt *v.* Van Brunt, 111 N. Y. 178, 19 N. E. 60; Ferrelly *v.* Emigrant Industrial Sav. Bank, 92 N. Y. App. Div. 529, 87 N. Y. Suppl. 54 [*affirmed* in 179 N. Y. 594, 72 N. E. 1141]; Messing *v.* Messing, 64 N. Y. App. Div. 125, 71 N. Y. Suppl. 717; Price *v.* Pestka, 54 N. Y. App. Div. 59, 66 N. Y. Suppl. 297. See De Puy *v.* Stevens, 37 N. Y. App. Div. 289, 55 N. Y. Suppl. 810; Mack *v.* Mechanics', etc., Sav. Bank, 50 Hun 477, 3 N. Y. Suppl. 441; Colson *v.* Baker, 42 Misc. 407, 87 N. Y. Suppl. 238. Such statute applies to personal as well as real estate. Commercial Bank *v.* Sherwood, *supra*; *In re* Kimberly, *supra*; Van Brunt *v.* Van Brunt, *supra*.

Rhode Island.— Franklin Sav. Inst. *v.* People's Sav. Bank, 14 R. I. 632.

Vermont.— Spencer *v.* Austin, 38 Vt. 258.

West Virginia.— Greenbrier Bank *v.* Effingham, 51 W. Va. 267, 41 S. E. 143.

Wisconsin.— Farr *v.* Grand Lodge A. O. U. W., 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L. R. A. 249.

United States.— Randall *v.* Phillips, 20 Fed. Cas. No. 11,555, 3 Mason 378, construing a Rhode Island statute.

Canada.— Adamson *v.* Adamson, 7 Ont. App. 592 [*affirmed* in 12 Can. Sup. Ct. 563].

See 29 Cent. Dig. tit. "Joint Tenancy," § 2.

The intention cannot be gathered from the circumstances surrounding the grantor and attendant upon the execution of the instrument, but must be gathered from the instrument itself. Nicholson *v.* Caress, 45 Ind. 479.

The words "jointly" or "joint tenants" used in respect to the holding of several grantees creates a joint tenancy. Case *v.* Owen, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253; Coudert *v.* Earl, 45 N. J. Eq. 654, 18 Atl. 220.

31. *Arkansas.*— Cockrill *v.* Armstrong, 31 Ark. 580.

California.— Saunders *v.* Schmaelzle, 49 Cal. 59, holding that if the conveyance is silent as to whether the trustees take as joint tenants or tenants in common, courts will hold that they take as joint tenants.

Indiana.— Chandler *v.* Cheney, 37 Ind. 391, holding, however, that in order to create

mortgages,[32] and conveyances to husband and wife.[33] These statutes are in some jurisdictions held to be retroactive in their operation, and to apply to joint estates existing at the time of their enactment as well as to those created afterward,[34] except where the right of survivorship had already accrued.[35]

8. Severance and Termination. A joint tenancy may be terminated or severed, as it is frequently called, by any act that destroys one or more of its unities.[36] But the act of a joint tenant, to amount to a severance, must be such as to preclude him from claiming by survivorship any interest in the subject-matter of the joint tenancy.[37] Thus a joint tenancy may be severed by one or a part of the cotenants conveying or otherwise disposing of their shares, as this destroys the unity of title and creates a severance as to such shares;[38] as where one joint tenant

a joint tenancy in executors or trustees, the deed must describe them as such.

Maryland.— Gray *v.* Lynch, 8 Gill 403.

Mississippi.— Day *v.* Davis, 64 Miss. 253, 8 So. 203; McAllister *v.* Plant, 54 Miss. 106.

Missouri.— Johnston *v.* Johnston, 173 Mo. 91, 73 S. W. 202, 96 Am. St. Rep. 486, 61 L. R. A. 166; Lemmons *v.* Reynolds, 170 Mo. 227, 71 S. W. 135.

Pennsylvania.— Jones *v.* Cable, 114 Pa. St. 586, 7 Atl. 791; Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204; Bambaugh *v.* Bamhaugh, 11 Serg. & R. 191; Hart's Estate, 7 Pa. Co. Ct. 369.

Rhode Island.— Franklin Sav. Inst. *v.* People's Sav. Bank, 14 R. I. 632, holding that courts incline to hold trustees joint tenants rather than tenants in common to avoid inconvenience in administering the trust; and slighter indications will suffice in a trust deed than in other deeds to amount to a "manifest showing."

Vermont.— Spencer *v.* Austin, 38 Vt. 258.

Wisconsin.— Farr *v.* Grand Lodge A. O. U. W., 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L. R. A. 249.

See 29 Cent. Dig. tit. "Joint Tenancy," § 2; and, generally, Trusts.

Compare Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

32. Appleton *v.* Boyd, 7 Mass. 131, holding that a conveyance in mortgage to several persons in fee, to secure the payment of a debt due to the mortgagees jointly, creates a joint tenancy, notwithstanding St. (1785) c. 62, § 4, providing that conveyances to two or more grantees shall create estates in common.

33. Chandler *v.* Cheney, 37 Ind. 391; Johnston *v.* Johnston, 173 Mo. 91, 73 S. W. 202, 96 Am. St. Rep. 486, 61 L. R. A. 166; Lemmons *v.* Reynolds, 170 Mo. 227, 71 S. W. 135; Price *v.* Pestka, 54 N. Y. App. Div. 59, 66 N. Y. Suppl. 297; Farr *v.* Grand Lodge A. O. U. W., 83 Wis. 446, 53 N. W. 738, 35 Am. St. Rep. 73, 18 L. R. A. 249. See, generally, Husband and Wife.

34. Burghardt *v.* Turner, 12 Pick. (Mass.) 534; Annable *v.* Patch, 3 Pick. (Mass.) 360; Miller *v.* Miller, 16 Mass. 59; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243; Miller *v.* Dennett, 6 N. H. 109; Berdan *v.* Van Riper, 16 N. J. L. 7; Bambaugh *v.* Bambaugh, 11 Serg. & R. (Pa.) 191; McKeever *v.* Patteson, 2 Pa. Co. Ct. 304. *Contra*, Greer *v.* Blanchar, 40 Cal. 194; Dewey *v.* Lambier, 7 Cal. 347.

Constitutionality of such statutes see Constitutional Law, 8 Cyc. 899.

35. Miller *v.* Miller, 16 Mass. 59; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243; Annable *v.* Patch, 3 Pick. (Mass.) 360.

36. 2 Blackstone Comm. 185; 1 Tiffany Real Prop. 373. See Doe *v.* McGillivray, 9 U. C. Q. B. 9.

A disclaimer of a joint tenant filed of record is equivalent to a judgment of severance in the suit. Eichelberger *v.* Eichelberger, 4 Pa. L. J. Rep. 73, 6 Pa. L. J. 482.

A joint tenancy in income is severed as to each instalment as it becomes payable without actual payment. Walmsley *v.* Foxhall, 40 L. J. Ch. 28.

Employing part of the property in trade for mutual benefit does not sever a joint tenancy. Hall *v.* Digby, 4 Bro. P. C. 577, 2 Eng. Reprint 393.

The marriage of a female joint tenant will only operate as a severance of her joint tenancy when it would by itself without the necessity of any act of the husband have the effect of divesting the wife's property out of her and vesting it in her husband; consequently it is no severance of her joint tenancy in a freehold or leasehold or in a chose in action. Palmer *v.* Rich, [1897] 1 Ch. 134, 66 L. J. Ch. 69, 75 L. T. Rep. N. S. 484, 45 Wkly. Rep. 205; *In re* Butler, 38 Ch. D. 286, 57 L. J. Ch. 643, 59 L. T. Rep. N. S. 386, 36 Wkly. Rep. 817 [*disapproving* Baillie *v.* Treharne, 17 Ch. D. 388, 50 L. J. Ch. 295, 44 L. T. Rep. N. S. 247, 29 Wkly. Rep. 729]. In North Carolina under the act of 1784 the marriage of a widow, who was joint tenant with her children, was a severance of the joint tenancy. Witherington *v.* Williams, 1 N. C. 83.

37. *In re* Wilks, [1891] 3 Ch. 59, 60 L. J. Ch. 696, 65 L. T. Rep. N. S. 184, 40 Wkly. Rep. 13.

Where one of the joint tenants severs his own interest from the joint property he loses his own right to survivorship, but leaves the right of survivorship in the other shares *inter se* unaffected. Williams *v.* Hensman, 1 Johns. & H. 546, 7 Jur. N. S. 771, 30 L. J. Ch. 878, 5 L. T. Rep. N. S. 203.

38. Robison *v.* Codman, 20 Fed. Cas. No. 11,970, 1 Sumn. 121; *In re* Wilks, [1891] 3 Ch. 59, 60 L. J. Ch. 696, 65 L. T. Rep. N. S.

assigns,[39] mortgages or pledges,[40] or leases[41] his interest. It may be severed by the joint tenants destroying the unity of possession, as by partition;[42] or by the destruction of the unity of interest, as where in the case of a joint tenant for life the inheritance is purchased or descends to one of the cotenants.[43] It may also be terminated altogether by mutual agreement,[44] or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them in common.[45]

9. SURVIVORSHIP. The distinct characteristic of a joint tenancy is that, upon the death of one of the joint tenants, there being no severance, his interest descends to the survivor or survivors, and at length to the last survivor. Where a joint tenancy exists therefore, whether at common law or under the statutes, on the death of one of the joint tenants and in the absence of statute or otherwise, the survivors take the whole estate,[46] free from any charges on the property made

184, 40 Wkly. Rep. 13; Caldwell *v.* Fellowes, L. R. 9 Eq. 410, 39 L. J. Ch. 618, 22 L. T. Rep. N. S. 225, 18 Wkly. Rep. 486; Moody *v.* Moody, Ambl. 649, 27 Eng. Reprint 421; Gale *v.* Gale, 2 Cox Ch. 136, 30 Eng. Reprint 63; Sym's Case, Cro. Eliz. 33; Denne *v.* Judge, 11 East 288; Conolly *v.* Conolly, Ir. R. 1 Eq. 376; Williams *v.* Hensman, 1 Johns. & H. 546, 7 Jur. N. S. 771, 30 L. J. Ch. 878, 5 L. T. Rep. N. S. 203; Clerk *v.* Clerk, 2 Vern. Ch. 323, 23 Eng. Reprint 809; Doe *v.* Montreuil, 6 U. C. Q. B. 515. See Edwards *v.* Champion, 3 De G. M. & G. 202, 23 L. J. Ch. 123, 1 Wkly. Rep. 497, 52 Eng. Ch. 160, 43 Eng. Reprint 80; 2 Blackstone Comm. 185.

A contract or covenant by a joint tenant to convey or dispose of his interest severs the joint tenancy. *In re* Hewett, [1894] 1 Ch. 362, 63 L. J. Ch. 182, 70 L. T. Rep. N. S. 393, 8 Reports 70, 42 Wkly. Rep. 233; Burnaby *v.* Equitable Reversionary Interest Soc., 28 Ch. D. 416, 54 L. J. Ch. 466, 52 L. T. Rep. N. S. 350, 33 Wkly. Rep. 639; *In re* Wilford, 11 Ch. D. 267, 48 L. J. Ch. 243, 27 Wkly. Rep. 455; Kingsford *v.* Ball, 2 Giff. appendix i, 66 Eng. Reprint 294; Gould *v.* Kemp, 2 Myl. & K. 304, 7 Eng. Ch. 304, 39 Eng. Reprint 959. See Brown *v.* Raindle, 3 Ves. Jr. 256, 30 Eng. Reprint 998.

Execution on a judgment against one of the joint tenants severs the joint tenancy. Davidson *v.* Haydom, 2 Yeates (Pa.) 459.

A joint tenancy cannot be severed by will of one of the tenants (Duncan *v.* Forrer, 6 Binn. (Pa.) 193), unless permitted by statute (Jenkins *v.* Jenkins, 1 Mills (S. C.) 48).

39. Davidson *v.* Haydom, 2 Yeates (Pa.) 459.

40. Simpson *v.* Ammons, 1 Binn. (Pa.) 175, 2 Am. Dec. 425; Watkinson *v.* Hudson, 4 L. J. Ch. O. S. 213, 27 Rev. Rep. 263; York *v.* Stone, 1 Salk. 158.

41. Per Lord Ellenborough, C. J., in Doe *v.* Read, 12 East 57.

A demise by the husband of a female joint tenant and her cotenant will not effect a severance. Palmer *v.* Rich, [1897] 1 Ch. 134, 66 L. J. Ch. 69, 75 L. T. Rep. N. S. 484, 45 Wkly. Rep. 205.

42. Haughabaugh *v.* Honald, 3 Brev. (S. C.) 97, 5 Am. Dec. 548 (holding, however, that the mere running of a partition fence through the middle of land held by joint tenants will not operate as a severance, as there must be a separate and distinct possession); Postell *v.* Skirving, 1 Desauss. (S. C.) 158 (holding that joint tenancy is severed by an order of the court for a division); 2 Blackstone Comm. 185; 1 Tiffany Real Prop. 373.

A recovery in trover by one joint tenant against his cotenant effects a severance, since the recovery is founded on partition. Roddy *v.* Cox, 29 Ga. 298, 74 Am. Dec. 64.

A verbal division of land cannot produce a severance of a joint tenancy created by grant, whether made before or after the grant issues. Lacy *v.* Overton, 2 A. K. Marsh. (Ky.) 440.

43. Wiscot's Case, 2 Coke 60*b*; 2 Blackstone Comm. 186; 1 Tiffany Real Prop. 374.

44. *In re* Wilks, [1891] 3 Ch. 59, 60 L. J. Ch. 696, 65 L. T. Rep. N. S. 184, 40 Wkly. Rep. 13; Williams *v.* Hensman, 1 Johns. & H. 546, 7 Jur. N. S. 771, 30 L. J. Ch. 878, 5 L. T. Rep. N. S. 203.

45. Palmer *v.* Rich, [1897] 1 Ch. 134, 66 L. J. Ch. 69, 75 L. T. Rep. N. S. 484, 45 Wkly. Rep. 205; Wilson *v.* Bell, Ir. R. 5 Eq. 501; Williams *v.* Hensman, 1 Johns. & H. 546, 7 Jur. N. S. 771, 30 L. J. Ch. 878, 5 L. T. Rep. N. S. 203; Jackson *v.* Jackson, 9 Ves. Jr. 591, 32 Eng. Reprint 732.

The several receipts of joint tenants of a portion of a trust fund does not destroy the joint tenancy as to the remainder of the fund. Leak *v.* Macdowall, 32 Beav. 28, 55 Eng. Reprint 11.

46. *Indiana.*— Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; Lash *v.* Lash, 58 Ind. 526.

Kansas.— Noble *v.* Teeple, 58 Kan. 398, 49 Pac. 598; Simons *v.* McLain, 51 Kan. 153, 32 Pac. 919.

Kentucky.— Louisville *v.* Coleburne, 108 Ky. 420, 56 S. W. 681, 22 Ky. L. Rep. 64. See Barclay *v.* Hendrick, 3 Dana 378; Overton *v.* Lacy, 6 T. B. Mon. 13, 17 Am. Dec. 111.

Louisiana.— See Pope *v.* Anderson, 13 La. Ann. 538.

Maine.— Kinsley *v.* Abbott, 19 Me. 430.

Maryland.— Hannan *v.* Towers, 3 Harr. & J. 147, 5 Am. Dec. 427. But see Dorsey *v.* Dorsey, 4 Harr. & M. 231, holding that

by the deceased cotenant,[47] and on the death of the last survivor the whole goes to his heirs or personal representatives.[48] In most jurisdictions the common-law right of survivorship as an incident of joint tenancy is now abolished by statute, either expressly or by virtue of the statutes abolishing joint tenancies,[49] except

stock on a farm, held by two persons jointly for mutual advantage, does not go to the survivor in exclusion of the representatives of the deceased tenant.

New York.— Farrelly *v.* Emigrant Industrial Sav. Bank, 92 N. Y. App. Div. 529, 87 N. Y. Suppl. 54 [*affirmed* in 179 N. Y. 594, 72 N. E. 1141]; Messing *v.* Messing, 64 N. Y. App. Div. 125, 71 N. Y. Suppl. 717; Mack *v.* Mechanics', etc., Sav. Bank, 50 Hun 477, 3 N. Y. Suppl. 441; Colson *v.* Baker, 42 Misc. 407, 87 N. Y. Suppl. 238.

Pennsylvania.— Redemptorist Fathers *v.* Lawler, 205 Pa. St. 24, 54 Atl. 487; Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204; Hart's Estate, 7 Pa. Co. Ct. 369.

Rhode Island.— Whitehead *v.* Smith, 19 R. I. 135, 32 Atl. 168.

Vermont.— Decamp *v.* Hall, 42 Vt. 483; Gilbert *v.* Richards, 7 Vt. 203.

West Virginia.— Greenhrier Bank *v.* Effingham, 51 W. Va. 267, 41 S. E. 143.

England.— Garrick *v.* Taylor, 29 Beav. 79, 7 Jur. N. S. 116, 30 L. J. Ch. 211, 36 L. T. Rep. N. S. 460, 9 Wkly. Rep. 181, 54 Eng. Reprint 556 [*affirmed* in 4 De G. F. & J. 159, 31 L. J. Ch. 68, 7 Jur. N. S. 1174, 5 L. T. Rep. N. S. 404, 10 Wkly. Rep. 49, 65 Eng. Ch. 124, 45 Eng. Reprint 1144]; Frewen *v.* Relfe, 2 Bro. Ch. 220, 29 Eng. Reprint 123; Staples *v.* Maurice, 4 Bro. P. C. 580, 2 Eng. Reprint 395; Hall *v.* Digby, 4 Bro. P. C. 577, 2 Eng. Reprint 393; Berens *v.* Fellowes, 56 L. T. Rep. N. S. 391, 35 Wkly. Rep. 356; Harris *v.* Fergusson, 16 Sim. 308, 39 Eng. Ch. 308, 60 Eng. Reprint 892; Jeffereys *v.* Small, 1 Vern. Ch. 217, 23 Eng. Reprint 424; Aveling *v.* Knipe, 19 Ves. Jr. 441, 13 Rev. Rep. 240, 34 Eng. Reprint 580.

Canada.— Haskill *v.* Traser, 12 U. C. C. P. 383.

See 29 Cent. Dig. tit. "Joint Tenancy," § 4; and cases cited *supra*, I, B, 7.

In Connecticut the doctrine of survivorship between joint tenants is not recognized. Phelps *v.* Jepson, 1 Root 48, 1 Am. Dec. 33.

A civil death as well as a physical one gives rise to survivorship. 5 Bacon Abr. 280; Coke Litt. 181*b*; Freeman Coten. 66.

Where all the joint tenants die at the same moment, the estate remains in the same nature to their heirs. Bradshaw *v.* Toulmin, Dick. 633, 21 Eng. Reprint 417.

Where joint tenants lay out money jointly upon the estate in the way of trade, there is no survivorship. Lyster *v.* Dolland, 3 Bro. Ch. 478, 29 Eng. Reprint 653, 1 Ves. Jr. 431, 30 Eng. Reprint 422.

Waiver.— Where one claiming as surviving joint tenant joins the administrator of the deceased tenant in a suit for the recovery, as tenants in common, of part of the property of the tenancy, he thereby waives his right of survivorship, if he had any. Hair *v.* Avery, 28 Ala. 267.

Foreclosure of a mortgage made to secure a note to two jointly may be prosecuted by the survivor. Blake *v.* Sanborn, 8 Gray (Mass.) 154 [*distinguishing* Burnett *v.* Pratt, 22 Pick. (Mass.) 556].

47. 4 Kent Comm. 360. *Compare* Abergavenny's Case, 6 Coke 78*a*.

48. 4 Kent Comm. 360; 1 Tiffany Real Prop. 372.

49. *Alabama.*— Parsons *v.* Boyd, 20 Ala. 112.

Illinois.— Hay *v.* Bennett, 153 Ill. 271, 38 N. E. 645 [*affirming* Bradford *v.* Bennett, 48 Ill. App. 145], holding also that the statute applies as well to personalty as to realty. See Pritchard *v.* Walker, 22 Ill. App. 286 [*affirmed* in 121 Ill. 221, 12 N. E. 336], holding the survivor not entitled to growing crops. *Compare* Mette *v.* Feltgen, 148 Ill. 357, 36 N. E. 81 [*overruling* on rehearing (1891) 27 N. E. 911].

Kansas.— Boyer *v.* Sims, 61 Kan. 593, 60 Pac. 309.

Kentucky.— Truesdell *v.* White, 13 Bush 616; Barclay *v.* Hendrick, 3 Dana 378; Overton *v.* Lacy, 6 T. B. Mon. 13, 17 Am. Dec. 111.

Mississippi.— Day *v.* Davis, 64 Miss. 253, 8 So. 203; Nichols *v.* Denny, 37 Miss. 59.

North Carolina.—Act (1784), Code, § 1326, abolishing survivorship in joint tenancy, does not prohibit contracts making the rights of the parties dependent on survivorship. Taylor *v.* Smith, 116 N. C. 531, 21 S. E. 202. This act also applies only to estates of inheritance and not to joint tenancies for life. As to the latter the common-law rule still prevails. Rowland *v.* Rowland, 93 N. C. 214; Powell *v.* Morisey, 84 N. C. 421; Powell *v.* Allen, 75 N. C. 450.

Pennsylvania.— Redemptorist Fathers *v.* Lawler, 205 Pa. St. 24, 54 Atl. 487. In this state while the language of the act of March 31, 1812, abolishes only survivorship as an incident of joint tenancy, the courts have construed it as abolishing joint tenancy itself except where such an estate is created by express terms or necessary implication. Jones *v.* Cable, 114 Pa. St. 586, 7 Atl. 791; Kennedy's Appeal, 60 Pa. St. 511; Seely *v.* Seely, 44 Pa. St. 434; Arnold *v.* Jack, 24 Pa. St. 57; Kollock's Estate, 7 Pa. Co. Ct. 348; McKeever *v.* Patteson, 2 Pa. Co. Ct. 304; Lentz *v.* Lentz, 2 Phila. 117; McVey *v.* Latta, 4 Wkly. Notes Cas. 524. See Yard's Appeal, 86 Pa. St. 125; Bambaugh *v.* Bambaugh, 11 Serg. & R. 191; Morison's Estate, 5 Montg. Co. Rep. 155; Erwin's Estate, 5 Montg. Co. Rep. 18.

South Carolina.— Telfair *v.* Howe, 3 Rich. Eq. 235, 55 Am. Dec. 637 (holding that survivorship is abolished, but not joint tenancy

where the right is expressly or manifestly created by the grant or devise creating the joint tenancy,[50] and except in the case of a joint tenancy in trust.[51]

II. MUTUAL RIGHTS AND LIABILITIES.

A. Title or Interest of Joint Tenants. The shares or interests of joint tenants are presumed to be equal, but the contrary may be shown by proof.[52] If one has paid more than his proportion in purchasing the property, his cotenant is liable to him for the excess.[53]

B. Possession and Enjoyment of Joint Property. Joint tenants' possession is in common and each has a right to the enjoyment of the whole property to the extent of his interest.[54] If only one of them is in the occupancy of the property, he must be considered as possessing not only for himself, but also for the others;[55] and although it is competent for the joint tenants to make a subdivision of time for the exclusive occupancy of the whole of the joint property,[56] one joint tenant cannot recover the exclusive possession of the premises against his cotenant.[57]

C. Improvements and Repairs. As a general rule one joint tenant cannot compel another to make improvements on the joint property, nor can he maintain an action against him personally to compel contribution to the expense of repairs or improvements made thereon without his consent, express or implied, nor fix it as a lien on his interest in the estate.[58] But where the repairs or improvements

itself); McMeekin *v.* Brummet, 2 Hill Eq. 638. *Compare* Haughabaugh *v.* Honald, 1 Treadw. 90, 3 Brev. 97, 5 Am. Dec. 548; Ball *v.* Deas, 2 Strobh. Eq. 24, 49 Am. Dec. 651.

Virginia.— The Virginia statute abolishing survivorship among joint tenants has no application where the estate in joint tenancy has not vested, and hence upon the death of one of two joint devisees in the lifetime of the testator the whole estate passes to the survivor. Lockhart *v.* Vandyke, 97 Va. 356, 33 S. E. 613.

See 29 Cent. Dig. tit. "Joint Tenancy," § 4; and cases cited *supra*, I, B, 7.

Survivor's right to sue on or assign choses in action held in joint tenancy, it has been held, is not abolished by a statute abolishing survivorship. Sessions *v.* Peay, 19 Ark. 267; Trammell *v.* Harrell, 4 Ark. 602.

50. Redemptorist Fathers *v.* Lawler, 205 Pa. St. 24, 54 Atl. 487; Sturm *v.* Sawyer, 2 Pa. Super. Ct. 254, 38 Wkly. Notes Cas. 536. And see cases in preceding note.

51. Parsons *v.* Boyd, 20 Ala. 112; Boyer *v.* Sims, 61 Kan. 593, 60 Pac. 309. And see *supra*, I, B, 7.

52. Nippel *v.* Hammond, 4 Colo. 211; Shiels *v.* Stark, 14 Ga. 429; 1 Washburn Real Prop. (6th ed.) 428.

Determination of interests.— The interests of joint owners of land, in the absence of some other controlling fact, is to be determined by the proportion which the amount of purchase-money paid by each bears to the entire sum which was the consideration for the deed. Huffman *v.* Mulkey, 78 Tex. 556, 14 S. W. 1029, 22 Am. St. Rep. 71.

53. Stokes *v.* Hodges, 11 Rich. Eq. (S. C.) 135, holding that where two persons purchase a tract of land, as joint tenants, and give a joint bond for the purchase-money, and one of them paid beyond his proportion, he was a surety for the excess so paid and entitled to set up the bond as a specialty debt against the estate of his cotenant. See Parker *v.* Anglesea, 25 L. T. Rep. N. S. 482, 20 Wkly. Rep. 162.

54. Clarke *v.* Slate Valley R. Co., 136 Pa. St. 408, 20 Atl. 562, 10 L. R. A. 238; Volentine *v.* Johnson, 1 Hill Eq. (S. C.) 49.

Equity cannot restrain one joint tenant from entering on the land at the suit of a cotenant. Baldwin *v.* Darst, 3 Gratt. (Va.) 132.

55. Gill *v.* De Witt, 7 Ky. L. Rep. 587; Wiswall *v.* Wilkins, 5 Vt. 87 (holding this to be true, although there appears to be no contract or agreement between them); Roberts *v.* Moore, 20 Fed. Cas. No. 11,905, 3 Wall. Jr. 292.

56. Curtis *v.* Swearingen, 1 Ill. 207.

57. Jamison *v.* Graham, 57 Ill. 94. And see *infra*, II, I.

58. Crest *v.* Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353 (holding that a joint tenant erecting improvements without the consent of the rest cannot hold possession of the property until reimbursed a proportion of the moneys expended); Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449. See Sweet *v.* Stevens, 63 S. W. 41, 23 Ky. L. Rep. 407.

Where a joint tenant having the sole occupancy makes improvements on the joint estate, he is not entitled to be paid therefor unless on the other hand he consents to be charged with occupation rent. Rice *v.* George, 20 Grant Ch. (U. C.) 221.

Necessary repairs.— It has been held, however, that where houses upon land held in joint tenancy are falling to decay, a joint tenant and his creditors, repairing, are entitled to contribution to be enforced by

are made with the express or implied consent of the other cotenants, each of them may be compelled to contribute his proportionate share of the expense,[59] with interest on such proportion.[60]

D. Rents and Profits. One joint tenant may receive the whole rent of the joint property or appoint an agent to collect it;[61] and at common law he was not accountable to his cotenants for receiving more than his share of the rents and profits or for exclusively occupying the common property or more than his share thereof unless he agreed to pay rent or had ousted his cotenant;[62] but under the statute of 4 Anne, c. 16, § 27, and similar statutes adopted in this country a joint tenant is now liable to account for occupying more than his share as well as for receiving more than his portion of the rents and profits,[63] except as to such rents and profits as accrued from improvements made by his own skill, labor, and capital,[64] and except where the property is susceptible of a several occupation, in which event a joint tenant in exclusive possession of a part, without hindering the others from the use of their shares, is not answerable to them for profits realized from the proportion in his exclusive occupancy.[65]

lien; and especially is this the case if the cotenants are unable or refuse to contribute to the cost of repairs. Alexander *v.* Ellison, 79 Ky. 148. Repairs to mill-dam see Clark *v.* Plummer, 31 Wis. 442.

At common law one joint tenant could compel the others to unite in the expense of necessary repairs to a house or mill, by a writ de reparatione facienda, if they after request refused to join in such repairs, but no recovery could be had for repairs already made. Bowles' Case, 11 Coke 79*b*; 4 Kent Comm. 370. See Alexander *v.* Ellison, 79 Ky. 148; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449; Kay *v.* Johnston, 21 Beav. 536, 52 Eng. Reprint 967.

59. Young *v.* Polack, 3 Cal. 208; Sears *v.* Munson, 23 Iowa 380; Houston *v.* McCluney, 8 W. Va. 135, equitable lien by agreement on cotenant's interest, for his proportion of the amount expended.

60. Young *v.* Polack, 3 Cal. 208; Sears *v.* Munson, 23 Iowa 380.

61. Newman *v.* Keffer, 18 Fed. Cas. No. 10,177, 1 Brunn. Col. Cas. 502, 33 Pa. St. 442 note. See Robinson *v.* Hoffman, 4 Bing. 562, 13 E. C. L. 637, 3 C. & P. 234, 14 E. C. L. 544, 6 L. J. C. P. O. S. 113, 1 M. & P. 474, 29 Rev. Rep. 627; Pullen *v.* Palmer, 5 Mod. 72.

62. See Shiels *v.* Stark, 14 Ga. 429; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

63. *California.*— See Conroy *v.* Waters, 133 Cal. 211, 65 Pac. 387.

Georgia.— Shiels *v.* Stark, 14 Ga. 429.

Kentucky.— Nelson *v.* Clay, 7 J. J. Marsh. 138, 23 Am. Dec. 387.

New York.— Messing *v.* Messing, 64 N. Y. App. Div. 125, 71 N. Y. Suppl. 717, holding that a joint tenant may recover his proportion by action, under Code Civ. Proc. § 1666.

South Carolina.— Stokes *v.* Hodges, 11 Rich. Eq. 135.

Vermont.— Wiswall *v.* Wilkins, 5 Vt. 87.

Virginia.— White *v.* Stuart, 76 Va. 546; Newman *v.* Newman, 27 Gratt. 714.

West Virginia.— Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449.

England.—Sturton *v.* Richardson, 2 D. & L. 182, 8 Jur. 476, 13 L. J. Exch. 281, 13 M. & W. 17.

See 29 Cent. Dig. tit. "Joint Tenancy," § 9.

Occupancy by one cotenant with the consent of the other of the joint property does not necessarily relieve him from payment of the rent. Shiels *v.* Stark, 14 Ga. 429.

Nature of liability.— This liability before partition is merely a personal charge against the joint tenant receiving the rents and profit and is not a lien on his share of the property. Burch *v.* Burch, 82 Ky. 622, 6 Ky. L. Rep. 691.

Where one cotenant abandons his possession, the other, remaining in possession, will not be accountable for rents of the entire tract but only for rent of such portion as may have been rendered productive by the labor of the tenant who abandoned it. Volentine *v.* Johnson, 1 Hill Eq. (S. C.) 49.

Where the joint tenant in possession is a creditor of his cotenant, the rents and profits received by him must be applied to the payment of such debt — first, to the interest which has accrued up to the time the rent becomes due and then to the accrued interest, and finally to the principal. Volentine *v.* Johnson, 1 Hill Eq. (S. C.) 49.

Where property consisting of factories, etc., are destroyed during the joint tenant's occupancy, he is not liable for rent after such destruction. White *v.* Stuart, 76 Va. 546.

64. Nelson *v.* Clay, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387 (holding that where one joint tenant enters on land and improves it by his money and labor, he is entitled to the exclusive benefit of the rents and profits accruing therefrom); White *v.* Stuart, 76 Va. 546.

65. Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 62 Am. St. Rep. 911, 29 L. R. A. 449.

E. Conveyances and Contracts Between Joint Tenants.[66] A joint tenant may convey his interest in the joint estate to one of his cotenants, by any means that shows his intention to release such interest,[67] even though, where it is a conveyance of an interest in fee, no words of inheritance are used.[68] If one of two joint tenants conveys his interest to the other, the estate is turned to an estate in severalty; but if one of three or more joint tenants conveys to a cotenant, the purchaser remains as joint tenant with the others as to their original interests, and as tenant in common as to the share purchased by him.[69]

F. Liability For Waste. At common law a joint tenant was not liable to his cotenant for waste,[70] but it is otherwise under the statutes of Westminster II, c. 22, and similar statutes adopted in this country.[71]

G. Purchase of Adverse or Outstanding Title. One joint tenant cannot purchase or otherwise acquire for his own benefit, an adverse or outstanding title or encumbrance against the joint estate; but such a purchase will inure to the joint benefit of him and his cotenants,[72] providing the other joint tenants elect, within a reasonable time, to avail themselves of such adverse title, and contribute their ratable share of the expense of acquiring it.[73] It is not a breach of trust, however, for a joint tenant to take the title in his own name,[74] or to purchase an outstanding title in order to protect his rights.[75] The rule that the purchaser of an adverse claim by one joint tenant shall inure to the benefit of all the cotenants does not apply to a purchase made before the joint tenancy commenced[76] or after it has ceased.[77]

H. Disseizin and Adverse Possession. Since the seizin or possession of one joint tenant is in law the seizin or possession of the others, to constitute a disseizin and adverse possession by one joint tenant there must be an actual ouster

66. **Conveyances by husband to or for wife of property held jointly by them** see HUSBAND AND WIFE.

67. Moser *v.* Dunkle, 1 Woodw. (Pa.) 388 (holding that it is competent for one who is a joint tenant at common law to convey his interest by common-law rules to his cotenant, notwithstanding the statute made them tenants in common); Apgar *v.* Christopher, 33 Fed. 201 (holding that a joint tenant's deed of his share of the estate to his cotenant, in fee simple, reciting an intention to vest the whole of the fee in the grantee, will carry the grantor's title subsequently acquired by survivorship); Eustace *v.* Scawen, Cro. Jac. 696; Chester *v.* Willan, 2 Saund. 96*a*. See Orr *v.* Clark, 62 Vt. 136, 19 Atl. 929.

A release is the proper conveyance from one joint tenant to pass his estate to the other. Chester *v.* Willan, 2 Saund. 96*a*.

68. Moser *v.* Dunkle, 1 Woodw. (Pa.) 388.

69. Coke Litt. 273*b*; 1 Washburn Real Prop. (6th ed.) 533.

70. See Nelson *v.* Clay, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

71. Shiels *v.* Stark, 14 Ga. 429; Nelson *v.* Clay, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

72. *Arkansas.*— Brittin *v.* Handy, 20 Ark. 381, 73 Am. Dec. 497.

Iowa.— Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616, purchase at tax-sale.

Kentucky.— Coleman *v.* Coleman, 3 Dana 398, 28 Am. Dec. 86; Carlyle *v.* Patterson, 3 Bibb 93.

Missouri.— Picot *v.* Page, 26 Mo. 398.

Pennsylvania.— Weaver *v.* Wible, 25 Pa. St. 270, 64 Am. Dec. 696.

United States.— Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

See 29 Cent. Dig. tit. "Joint Tenancy," § 11.

One party to an agreement to purchase land on a joint account, who takes title from a guardian, cannot set up the adverse title of the *cestuis que trustent* to defeat the equitable rights of the other party to the agreement. Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

A release to one of two persons who are in possession of land by an imperfect or tortious title, as by disseizin, will inure to the benefit of both. Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

73. Brittin *v.* Handy, 20 Ark. 381, 73 Am. Dec. 497; Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616; Sneed *v.* Atherton, 6 Dana (Ky.) 276, 32 Am. Dec. 70; Bossier *v.* Herwig, 112 La. 539, 36 So. 557.

74. Carlyle *v.* Patterson, 3 Bibb (Ky.) 93; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

75. Sneed *v.* Atherton, 6 Dana (Ky.) 276, 32 Am. Dec. 70, holding that where an action has been prosecuted against one joint tenant for possession of property, and a decree rendered against him, it is no breach of fidelity or good faith toward his cotenant for him to purchase such outstanding title.

76. Sneed *v.* Atherton, 6 Dana (Ky.) 276, 32 Am. Dec. 70.

77. Coleman *v.* Coleman, 3 Dana (Ky.) 398, 28 Am. Dec. 86.

and adverse holding by him,[78] and notice thereof on the part of his cotenant.[79] But the mere fact of an uninterrupted possession of one tenant which implies no exclusion of the others does not show an adverse possession,[80] nor does a mere failure to account for the proceeds by a joint tenant in possession amount to an ouster.[81]

I. Action Between Joint Tenants. Since the right of possession of the joint property is in all the joint tenants[82] it follows that until there is a severance no joint tenant is entitled to exclusive possession of the property; and therefore cannot sue his cotenant in respect to the possession and enjoyment thereof unless the latter has said or done some act amounting to an ouster.[83] Thus one joint tenant cannot maintain against his cotenant an action of replevin,[84] detinue,[85] trespass,[86] trover,[87] or ejectment,[88] unless such cotenant has said or done something which amounts to an ouster or to a denial of the right of the other tenant. If a joint tenant has been disseized by his cotenant by force he may have a warrant for forcible entry and detainer.[89] A joint tenant of personal property may maintain assumpsit against the other to recover his share of the same or its proceeds.[90]

78. Taylor *v.* Cox, 2 B. Mon. (Ky.) 429; Culver *v.* Culver, 74 S. W. 1074, 25 Ky. L. Rep. 296; Gill *v.* De Witt, 7 Ky. L. Rep. 587; Portis *v.* Hill, 3 Tex. 273. And see ADVERSE POSSESSION, 1 Cyc. 1071 *et seq.*

There need be no actual turning out, but a refusal by a joint tenant to let his cotenant participate in the enjoyment of the common property constitutes an adverse possession. Roberts *v.* Moore, 20 Fed. Cas. No. 11,905, 3 Wall. Jr. 292.

The existence of such acts and circumstances as will amount to disseizin or actual ouster, where a joint tenant asserts in himself an adverse possession, is a question of evidence. Portis *v.* Hill, 3 Tex. 273.

Where there is a severance in fact of a joint tenancy, and possession held for twenty years under it, the title will be a title of severalty to the extent of such separate possession. Drane *v.* Gregory, 3 B. Mon. (Ky.) 619.

79. Roberts *v.* Morgan, 30 Vt. 319.

80. Johnson *v.* Howard, 1 Harr. & M. (Md.) 281 (holding that the uninterrupted possession of one joint tenant for twenty years will not bar the other); Portis *v.* Hill, 3 Tex. 273.

81. Roberts *v.* Moore, 20 Fed. Cas. No. 11,905, 3 Wall. Jr. 292.

82. See *supra*, II, B.

83. Jones *v.* Weathersbee, 4 Strobh. (S. C.) 50, 51 Am. Dec. 653.

In Louisiana the right of a joint owner to maintain a possessory action depends on the nature of his possession. While he continues to possess *nomine communi* the right does not exist; but where he has possessed *nomine proprio* and in good faith for more than a year, it has been held that he is to all legal intents a just possessor, and in case of a disturbance by the other joint tenant the possessory action will lie. Benton *v.* Roberts, 2 La. Ann. 749. Nor will the fact of commencing a suit for partition, after the institution of possessory action, in any manner affect the right to recover in the latter where each party had possessed for more than a year a portion of the land in his own right. Benton *v.* Roberts, *supra*.

84. Ellis *v.* Culver, 2 Harr. (Del.) 129; Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229. See Lisenby *v.* Phelps, 71 Mo. 522; Cross *v.* Hulett, 53 Mo. 397.

85. Chinn *v.* Respass, 1 T. B. Mon. (Ky.) 25.

86. Bishop *v.* Blair, 36 Ala. 80; Bogue *v.* Steel, 1 Phila. (Pa.) 90.

87. Roddy *v.* Cox, 29 Ga. 298, 74 Am. Dec. 64; Lucas *v.* Wasson, 14 N. C. 398, 24 Am. Dec. 266; Campbell *v.* Campbell, 6 N. C. 65; Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565; Shamburg *v.* Moorehead, 4 Brewst. (Pa.) 92.

The measure of recovery in an action of trover by one joint tenant against his cotenant is the value of his interest in the particular property after allowing his cotenant the value of his interest in all other property covered by the same joint title and held by plaintiff adversely to his cotenant. Roddy *v.* Cox, 29 Ga. 298, 74 Am. Dec. 64. See Witherington *v.* Williams, 1 N. C. 83.

88. Lawton *v.* Adams, 29 Ga. 273, 74 Am. Dec. 59; Eads *v.* Rucker, 2 Dana (Ky.) 111; Den *v.* Bordine, 20 N. J. L. 394.

A conveyance by a lessor to one of two joint tenants under a lease reserving rent, of all his title and interest in the premises, does not give the grantee a right to maintain ejectment against his cotenant for nonpayment of the rent accrued to his grantor. Birney *v.* Birney, 15 Vt. 136.

Recovery of mesne profits.— Where a joint tenant recovers in ejectment against his cotenant his damages for mesne profits are restricted to a reasonable time after judgment is recovered. Hare *v.* Fury, 3 Yeates (Pa.) 13, 2 Am. Dec. 358.

89. Eads *v.* Rucker, 2 Dana (Ky.) 111.

Judgment in forcible entry and detainer by one joint tenant against his cotenant must be for plaintiff's undivided interest. Eads *v.* Rucker, 2 Dana (Ky.) 111.

90. Stone *v.* Aldrich, 43 N. H. 52.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

A. In General. As a general rule an act or contract of one joint tenant respecting the joint property without the authority or consent of his cotenants cannot bind or prejudicially affect the latter,[91] except where the act or contract is beneficial to all of them and does not impose any liability upon them.[92]

B. Leases. A lease of the joint property can only be made by all of the cotenants joining therein.[93] One joint tenant may, however, lease his interest in the joint property.[94]

C. Mortgages or Pledges. A mortgage or pledge of joint property is not binding on the cotenants who do not join in its execution,[95] unless by reason of their knowledge and acquiescence, or otherwise, they are estopped to deny it.[96] One joint tenant, however, may mortgage or pledge his interest in the joint property,[97] and to the extent of the mortgage lien the right of the survivors will be destroyed or suspended and the equity of redemption at the death of the mortgagor tenant will be all that will fall to his surviving cotenants.[98]

D. Sales and Conveyances.[99] A sale or conveyance by joint tenants before severance may be made by all of them actually joining therein.[1] But one joint tenant acting alone cannot sell or convey joint property so as to divest his cotenants of their interest therein unless they previously authorized or subsequently ratify the same;[2] although the grantee under such conveyance may acquire title

It is a sufficient description of the property claimed to say "certain choses in action, to wit, demands of S & W against divers persons to the amount of one thousand dollars, conveyed to them by said S & W." Stone *v.* Aldrich, 43 N. H. 52.

91. Tucker *v.* Phillips, 2 Metc. (Ky.) 416 (holding that the fact that one joint tenant abandoned the joint property does not affect his cotenant nor make the latter liable for entering or regaining possession of the land from one who wrongfully went into possession after such abandonment); Rud *v.* Tucker, Cro. Eliz. 802; Clarke *v.* Union F. Ins. Co., 6 Ont. 635; 1 Tiffany Real. Prop. 393.

92. Crary *v.* Campbell, 24 Cal. 634; *In re* O'Hara, 95 N. Y. 403, 47 Am. Rep. 53 (holding that the promise of one of several joint tenants to whom a bequest is made for the benefit of a third party to carry out the purpose of such bequest is binding on all such joint tenants); Rud *v.* Tucker, Cro. Eliz. 802; 1 Tiffany Real Prop. 393. See Mullone *v.* Kline, 55 N. J. L. 479, 27 Atl. 902.

93. Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364; Kingsland *v.* Ryckman, 5 Daly (N. Y.) 13. See Doe *v.* Fenn, 3 Camph. 190, as to ejectment on the several leases of several joint tenants.

94. White *v.* Stuart, 76 Va. 546. See Roper *v.* Lonsdale, 12 East 39; Doe *v.* Read, 12 East 57.

A joint tenant who has leased his interest may maintain ejectment therefor after the expiration of the lease. Roper *v.* Lonsdale, 12 East 39. See Doe *v.* Read, 12 East 57.

95. Frans *v.* Young, 24 Iowa 375; South Carolina State Bank *v.* Campbell, 2 Rich. Eq. (S. C.) 179.

96. South Carolina State Bank *v.* Campbell, 2 Rich. Eq. (S. C.) 179.

97. Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; Frans *v.* Young, 24 Iowa 375; Simpson *v.* Ammons, 1 Binn. (Pa.) 175, 2 Am. Dec. 425; York *v.* Stone, 1 Salk. 158.

98. Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162.

99. Conveyances by joint tenants as bar of dower see DOWER, 14 Cyc. 946.

1. Putnam *v.* Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309.

A deed executed by two joint tenants which recites as to one of them that he merely relinquishes all his right in the land is effectual against both. Lithgow *v.* Kavenagh, 9 Mass. 161.

An advertisement for the sale of a joint estate, although signed by all joint tenants, will not operate to bind one of the joint tenants upon a contract for the sale of the land, if he does not sign the contract also. Hanks *v.* Enloe, 33 Tex. 624.

Sales and conveyances of joint property under order of court by executor or administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 690.

2. *California.*— People *v.* Marshall, 8 Cal. 51.

Iowa.— Whitaker *v.* Hicks, 123 Iowa 733, 99 N. W. 575 (circumstances sufficient to show ratification); Frans *v.* Young, 24 Iowa 375.

Kentucky.— Carlyle *v.* Patterson, 3 Bibb 93; Riddle *v.* McBee, 4 Ky. L. Rep. 898. See Ferguson *v.* Butterfield, 7 Ky. L. Rep. 98.

New York.— Putnam *v.* Wise, 1 Hill 234, 37 Am. Dec. 309.

Pennsylvania.— Browning *v.* Cover, 108 Pa. St. 595.

Texas.— Hanks *v.* Enloe, 33 Tex. 624.

by adverse possession as against the other cotenants.[3] One joint tenant cannot convey a distinct portion of the estate by metes and bounds so as to prejudice his cotenants;[4] but such conveyance operates as an estoppel against the grantor or those claiming under him.[5] It is well settled, however, that a joint tenant may alienate or convey to a stranger his part or interest in the joint property,[6] in which case the grantee becomes tenant in common with the other cotenants, but they as to each other remain joint tenants.[7]

E. Devises. Since a joint tenant's interest is not descendible, but passes immediately upon his death to his survivor,[8] he cannot dispose thereof by devise.[9]

F. Actions By or Against Joint Tenants. As a general rule all the joint tenants should join or be joined in an action respecting joint property. In the absence of a statute authorizing it, an action by or against one or any number less than all of the joint tenants cannot generally be maintained,[10] if objection thereto

See 29 Cent. Dig. tit. "Joint Tenancy," § 18.

3. Larman *v.* Huey, 13 B. Mon. (Ky.) 436; Riddle *v.* McBee, 4 Ky. L. Rep. 898.

4. Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22 (holding also that a person entering under such conveyance cannot be a disseizor of the other joint tenants); Richardson *v.* Miller, 48 Miss. 311; Fitch *v.* Boyer, 51 Tex. 336 (holding that such a deed is not absolutely void but conveys such an interest as will enable the grantee to obtain an action against a trespasser); Trammell *v.* McDade, 29 Tex. 360; Good *v.* Coombs, 28 Tex. 34.

5. Varnum *v.* Abbott, 12 Mass. 474, 7 Am. Dec. 87; Richardson *v.* Miller, 48 Miss. 311; McKay *v.* Welch, 22 Tex. 390.

6. *Indiana.*— Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162.

Iowa.— Frans *v.* Young, 24 Iowa 375.

Kansas.— Neuforth *v.* Hall, 6 Kan. App. 902, 51 Pac. 573.

Kentucky.— Sneed *v.* Waring, 2 B. Mon. 522; Garr *v.* Boswell, 16 Ky. L. Rep. 96, holding, however, that where the parties proposed to sell together and the act of one is dependent upon the act of the others, good conscience requires that one should not undertake to seek to procure for himself more than it is understood and agreed each should have, and if he does so the money thus fraudulently obtained should be divided between the parties as the nominal consideration of the land was divided.

Mississippi.—Richardson *v.* Miller, 48 Miss. 311.

Montana.— Yank *v.* Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522, holding also that a purchaser of a joint tenant's interest need not notify the other cotenants of the sale in order to make it valid as against execution creditors of the seller.

New York.— Messing *v.* Messing, 64 N. Y. App. Div. 125, 71 N. Y. Suppl. 717.

Canada.— See Doe *v.* Montreuil, 6 U. C. Q. B. 515.

See 29 Cent. Dig. tit. "Joint Tenancy," § 18.

Description.— Where a commissioner in deeding undivided interests to joint tenants adopts the description given in the title bond of the original owner, the description is binding on a vendee of one of such joint tenants, although the description of the deed is void as to other tenants. Thomas *v.* Turner, 35 S. W. 1035, 18 Ky. L. Rep. 209.

Where a joint tenant conveys an especial parcel or his interest therein of the general tract, the grantee takes subject to the contingency of loss of the premises, if on partition the parcel in question should not be allotted to the grantor. Stark *v.* Barrett, 15 Cal. 361.

The occupancy of one of two joint tenants of the premises as a homestead does not prevent the other from conveying his interest in the same. Ennis *v.* Loveman, 138 Ala. 465, 35 So. 414.

7. *Kentucky.*— Sneed *v.* Waring, 2 B. Mon. 522.

Mississippi.—Richardson *v.* Miller, 48 Miss. 311.

New York.— Messing *v.* Messing, 64 N. Y. App. Div. 125, 71 N. Y. Suppl. 717.

England.— Denne *v.* Judge, 11 East 288.

Canada.— Doe *v.* Montreuil, 6 U. C. Q. B. 515.

See 29 Cent. Dig. tit. "Joint Tenancy," § 18.

8. See *supra*, I, B, 9.

9. Wilkins *v.* Young, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; Duncan *v.* Forrer, 6 Binn. (Pa.) 193; Swift *v.* Roberts, Ambl. 617, 3 Burr. 1488, 1 W. Bl. 467, 27 Eng. Reprint 400; Coke Litt. 185*b*; 4 Kent Comm. (14th ed.) 358.

10. Briscoe *v.* McGee, 2 J. J. Marsh. (Ky.) 370; Webster *v.* Vandeventer, 6 Gray (Mass.) 428 (writ of entry to foreclose mortgage); Mobley *v.* Bruner, 59 Pa. St. 481, 98 Am. Dec. 360; Milne *v.* Cummings, 4 Yeates (Pa.) 577; Cheyney *v.* Dallet, 1 Del. Co. (Pa.) 225; 5 Bacon Abr. 299.

One joint tenant may sue in the names of all in respect to the joint estate, although the others disclaim. Eichelberger *v.* Eichelberger, 4 Pa. L. J. Rep. 73, holding also that any of the other joint tenants may disclaim and thereby withdraw themselves from all the consequences of the proceedings.

Where plaintiffs in a suit are joint tenants at the commencement thereof it is no defense that they have since by mere operation of law become tenants in common and therefore not

is made in the proper time and manner.[11] Thus in the absence of statute all the joint tenants must be joined as plaintiffs in an action of replevin,[12] detinue,[13] trespass,[14] or in an action of tort in the nature of waste,[15] respecting the joint property. On the other hand it has been held that one joint tenant may maintain unlawful detainer,[16] trespass to try title,[17] or ejectment[18] against a mere trespasser or wrongdoer. An action of trespass or trover by a joint tenant, however, without joining his cotenants is not void, and if objection to the non-joinder is not properly taken by plea in abatement he may maintain the action but can recover merely his proportionate share of the value or damages.[19] One joint tenant may maintain an action in respect to his own share, however, without joining his cotenants,[20] but of course can recover only to the extent of his interest.[21] To avoid the plea of the statute of limitations in an action by joint tenants, it must be shown that all plaintiffs were under disability to sue within the prescribed time.[22]

JOINT THROUGH RATES. Rates which shall be deemed just and reasonable charges for the transportation of goods or commodities over a united route,[1] i. e. over two or more connected lines of railroad over which the goods are hauled

able to sue jointly. Hills *v.* Doe, 6 N. H. 328.

Cal. Code Civ. Proc. § 384, authorizes joint tenants to bring or defend actions separately. Prey *v.* Stanley, 110 Cal. 423, 42 Pac. 908.

Under Mass. Rev. St. c. 101, §§ 10, 11, joint tenants may all or any two or more of them join in a suit to recover their land, or each one may sue alone for his particular share. Webster *v.* Vandeventer, 6 Gray 428; Oxnard *v.* Proprietors Kennebeck Purchase, 10 Mass. 179, holding also that where one of such joint tenants refuses to prosecute with his cotenants they cannot have summons and severance against him; and that where they do unite the disability of one abates the writ as to all.

11. Mode of objecting to non-joinder of joint tenants see PARTIES.

12. Ellis *v.* Culver, 2 Harr. (Del.) 129; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75. See, generally, REPLEVIN.

Where a joint tenant has pledged his interest to a third party he cannot join with his cotenant in an action of replevin against the pledgee for the recovery thereof, since he has disposed of his right to the pledgee. Frans *v.* Young, 24 Iowa 375. And since in such case the pledgee has the same right to possession as against the other owner that his cotenants they cannot have summons and not maintain replevin against the pledgee. Frans *v.* Young, *supra*.

13. Smoot *v.* Wathen, 8 Mo. 522. See also DETINUE, 14 Cyc. 249.

14. Pickering *v.* Pickering, 11 N. H. 141; Milne *v.* Cummings, 4 Yeates (Pa.) 577.

15. Bullock *v.* Hayward, 10 Allen (Mass.) 460; Phillips *v.* Cummings, 11 Cush. (Mass.) 469.

16. Rabe *v.* Fyler, 10 Sm. & M. (Miss.) 440, 48 Am. Dec. 763.

17. Presley *v.* Holmes, 33 Tex. 476.

18. King *v.* Bullock, 9 Dana (Ky.) 41; Presley *v.* Holmes, 33 Tex. 476. See Roper *v.* Lonsdale, 12 East 39. But see Dewey *v.* Lambier, 7 Cal. 347; Milne *v.* Cummings, 4 Yeates (Pa.) 577; 2 Tidd Pr. 1190.

Authority to prosecute such suit is sufficiently shown in answer to a rule to show the same by the exhibition of plaintiff's title as joint tenant to the property involved. King *v.* Bullock, 9 Dana (Ky.) 41.

19. *Georgia.*— Howard *v.* Snelling, 28 Ga. 469, trover.

Kentucky.— Frazier *v.* Spear, 2 Bibb 385.

Pennsylvania.— Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565.

South Carolina.— Boyleston *v.* Cordes, 4 McCord 144; Perry *v.* Middleton, 2 Bay 462; Perry *v.* Walker, 2 Bay 461; McFadden *v.* Haley, 2 Bay 457, 1 Am. Dec. 653.

Texas.— Waggoner *v.* Snody, 98 Tex. 512, 85 S. W. 1134 [*reversing* 36 Tex. Civ. App. 514, 82 S. W. 355], holding also that the burden of proof rests on plaintiff in such case to show the extent of his interest in the property.

See 29 Cent. Dig. tit. "Joint Tenancy," § 19.

20. McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148 (holding that where one of several joint tenants sells his interest, his original cotenants are not necessary parties in an action by him to enforce his vendor's lien); Wells *v.* Francis, 7 Colo. 396, 4 Pac. 49.

By Mass. Rev. St. c. 101, §§ 10, 11, a joint tenant may sue alone for his particular share. Webster *v.* Vandeventer, 6 Gray (Mass.) 428; Oxnard *v.* Proprietors Kennebeck Purchase, 10 Mass. 179.

One joint tenant may maintain trover for his interest against a stranger to whom his cotenant has wrongfully delivered the property for purposes inconsistent with the uses for which it was designed and who denies plaintiff's title and claims that exclusive possession and ownership. Agnew *v.* Johnson, 17 Pa. St. 373, 55 Am. Dec. 565.

21. Witherington *v.* Williams, 1 N. C. 83, after severance.

22. Marstellor *v.* McClean, 7 Cranch (U. S.) 156, 3 L. ed. 300.

1. Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 333, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

without change of cars or unlading the contents. (See generally, CARRIERS; COMMERCE; RAILROADS.)

JOINT TORT-FEASOR. See, generally, TORTS.

JOINT TRESPASS. See, generally, TRESPASS.

JOINT TRUSTEE. See, generally, TRUSTS.

JOINTURE. See, generally, DOWER.[2]

JOINT VOTE. Jointly by *viva voce* vote.[3] (See JOINT BALLOT.)

JOINT WILL. See, generally, WILLS.

JOURNAL. The official record of what is done and passed in the legislative assembly,[4] including each house, the senate as well as the assembly.[5] (Journal: As Evidence, see EVIDENCE. Of Legislature, see CONSTITUTIONAL LAW; STATUTES.)

JOURNEY. In its original signification a day's travel,[6] but in use it has attained a broader though less definite meaning,[7] and it is now applied to a travel by land from place to place without restriction of time.[8] (Journey: Carrying Weapon on, see WEAPONS.)

JOURNEYMAN. A hired workman;[9] one who is employed by the day.[10] (See, generally, MASTER AND SERVANT.)

J. P. An abbreviation of the term,[11] or characters which indicate the office of, justice of the peace.[12] (See, generally, JUSTICES OF THE PEACE.)

JR. An abbreviation of "Junior."[13] (See, JUNIOR; and, generally, NAMES.)

JUDAISM. The religion of those believers in the Old Testament who still

2. See also 14 Cyc. 68 note 36.

3. State *v.* Shaw, 9 S. C. 94, 144.

4. Cushing L. & Pr. Leg. Assembl. § 415 [*quoted* in Montgomery Beer Bottling Works *v.* Gaston, 126 Ala. 425, 444, 28 So. 497, 85 Am. St. Rep. 42, 51 L. R. A. 396].

5. Oakland Pav. Co. *v.* Hilton, 69 Cal. 479, 490, 11 Pac. 3.

Entering the yeas and nays in journal see 8 Cyc. 761 note 22.

6. Gholson *v.* State, 53 Ala. 519, 521, 25 Am. Rep. 652; Hathcote *v.* State, 55 Ark. 181, 183, 17 S. W. 721; Davis *v.* State, 45 Ark. 359, 361; Webster Dict. [*quoted* in Smith *v.* State, 3 Heisk. (Tenn.) 511, 512, 513].

7. Hathcote *v.* State, 55 Ark. 181, 183, 17 S. W. 721.

"'It is impossible to lay down any unbending rule, or determinate distance, which will characterize the act as a journey, or the actor as a traveler. Much must depend on the circumstances of each particular case . . . but one who is merely on the move for a day is not necessarily a traveler, and a journey, in the common acceptation, might be begun and ended in a shorter time." Davis *v.* State, 45 Ark. 359, 361.

As generally understood it signifies travel to a distance from home, and it is not used in reference to travel in one's neighborhood or among one's immediate acquaintances. Hathcote *v.* State, 55 Ark. 181, 183, 17 S. W. 721.

The word suggests the idea of a somewhat prolonged traveling for a specific object, leading a person to pass directly from one point to another (Smith *v.* State, 3 Heisk (Tenn.) 511, 512, or traveling to a distance from home and out of the ordinary line of the person's duties, habits, or pleasure (Eslava *v.* State, 49 Ala. 355, 357 [*quoted* in Gholson *v.* State, 53 Ala. 519, 520, 25 Am. Rep. 652]).

8. Gholson *v.* State, 53 Ala. 519, 521, 25 Am. Rep. 652, where it is said: "But, when thus applied, it is employed to designate a travel which is without the ordinary habits, business, or duties of the person, to a distance from his home, and beyond the circle of his friends or acquaintances."

9. Zell Encycl. [*quoted* in Butler *v.* Clark, 46 Ga. 466, 468].

10. Morgan *v.* London General Omnibus Co., 12 Q. B. D. 201, 206, 50 L. T. Rep. N. S. 687, 32 Wkly. Rep. 416, where Day, J., said: "But that is not the sense in which the term is ordinarily used, for, in most trades where journeymen are employed,—butchers, bakers, and tailors, for instance,—they are hired and paid by the week." See also Hart *v.* Aldridge, Cowp. 54, 56, where it is said: "It makes no difference whether the work is done by the day or by the piece."

That the term does not embrace: A boss or director of an entire department of an extensive factory see Kyle *v.* Montgomery, 73 Ga. 337, 343. A conductor of a passenger or freight train see Miller *v.* Dugas, 77 Ga. 386, 388, 4 Am. St. Rep. 90. An omnibus conductor see Hart *v.* Aldridge, Cowp. 54, 56. A person who merely furnishes the owner with lumber to be used in a building see Stevens *v.* Wells, 4 Sneed (Tenn.) 387, 389.

11. Shattuck *v.* People, 5 Ill. 477, 481.

12. Rowley *v.* Berrian, 12 Ill. 198, 200 [*citing* Livingston *v.* Kettelle, 6 Ill. 116, 41 Am. Dec. 166]. See also Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419; Scudder *v.* Scudder, 10 N. J. L. 340; 2 Cyc. 32 note 80; 1 Cyc. 576 note 72. *Compare* Miller *v.* Miller, 43 S. C. 306, 310, 21 S. E. 254.

13. Century Dict.

The addition, "Jr.," is no part of a name proper. San Francisco *v.* Randall, 54 Cal. 408, 410.

expect and look for a promised Messiah.[14] (See Christianity; and, generally, Religious Societies.)

JUDEX. The judicial power which examines the truth of the fact, the law arising upon it, and, if an injury has been done, applies the remedy.[15] (See, generally, Judges.)

JUDEX ÆQUITATEM SEMPER SPECTARE DEBET. A maxim meaning "A judge ought always to regard equity."[16]

JUDEX ANTE OCULOS ÆQUITATEM SEMPER HABERE DEBET. A maxim meaning "A judge ought always to have equity before his eyes."[17]

JUDEX BONUS NIHIL EX ARBITRIO SUO FACIAT, NEC PROPOSITO DOMESTICÆ VOLUNTATIS, SED JUXTA LEGES ET JURA PRONUNCIET. A maxim meaning "A good judge should do nothing of his own arbitrary will, nor on the dictate of his personal inclination, but should decide according to law and justice."[18]

JUDEX DAMNATUR CUM NOCENS ABSOLVITUR. A maxim meaning "The judge is condemned, when a guilty person escapes punishment."[19]

JUDEX DEBET JUDICARE SECUNDUM ALLEGATA ET PROBATA. A maxim meaning "The judge ought to decide according to the allegations and the proofs."[20]

JUDEX DE PACE CIVIUM CONSTITUITUR. A maxim meaning "A judge is appointed for the peace of the citizens."[21]

JUDEX EST LEX LOQUENS. A maxim meaning "The judge is the speaking law."[22]

JUDEX HABERE DEBET DUOS SALES,—SALEM SAPIENTIAE, NE SIT INSIPIDUS, ET SALEM CONSCIENTIAE, NE SIT DIABOLUS. A maxim meaning "A judge should have two salts,—the salt of wisdom, lest he be insipid; and the salt of conscience, lest he be devilish."[23]

JUDEX NON POTEST ESSE TESTIS IN PROPRIA CAUSA. A maxim meaning "A judge cannot be a witness to his own cause."[24]

JUDEX NON POTEST INJURIAM SIBI DATAM PUNIRE. A maxim meaning "A judge cannot punish an injury done to himself."[25]

JUDEX NON REDDIT PLUS QUAM QUOD PETENS IPSE REQUIVIT. A maxim meaning "A judge cannot give more than the petitioner (or suitor) himself asks."[26]

JUDG. An abbreviation which may stand for other words as well as for the word "judgment."[27] (See, generally, Judgments.)

JUDGE. To compare facts or ideas, so as to form an opinion;[28] to guess.[29]

JUDGE-MADE LAW. A phrase used to indicate judicial decisions which construe away the meaning of statutes, or find meanings in them the legislature never intended. It is also sometimes used as meaning simply, the law established by judicial precedent.[30]

14. Hale *v.* Everett, 53 N. H. 954, 16 Am. Rep. 82.
15. Matter of Miller, 1 Daly (N. Y.) 562, 574 [*citing* 3 Blackstone Comm. 25], where the words "actor" and "*reus*" are also defined. See also 1 Cyc. 715 note 16; 11 Cyc. 652 note 1.
16. Bouvier L. Dict. [*citing* Jenkins Cent. 45].
17. Bouvier L. Dict. [*citing* Jenkins Cent. 58].
18. Burrill L. Dict.
19. Wharton L. Lex.
20. Black L. Dict.
21. Tayler L. Gloss.
22. Bouvier L. Dict.
Applied in Calvin's Case, 7 Coke 1, 5*a*.
23. Cyclopedic L. Dict. [*citing* 3 Inst. 147].
24. Wharton L. Lex. [*citing* 4 Inst. 272].
25. Wharton L. Lex.
26. Trayner Leg. Max.
27. Cassidy *v.* Holbrook, 81 Me. 589, 591, 18 Atl. 290.
28. Kramer *v.* Weinert, 81 Ala. 414, 417, 1 So. 26. See also Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150, 158; 17 Cyc. 27 note 40.
29. Wyman *v.* Herard, 9 Okla. 35, 37, 59 Pac. 1009.
30. Cooley Const. Lim. 70.

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By Henry Long McCune
Judge of Circuit Court of Jackson County, Missouri

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CROSS-REFERENCES

For Matters Relating to:
Absence or Presence of Judge During Trial, see CRIMINAL LAW; TRIAL.
Adjournment of Court, see COURTS.
Amicus Curiæ, see AMICUS CURIÆ.
Appeal or Writ of Error, see APPEAL AND ERROR; CRIMINAL LAW.
Arbitration and Award, see ARBITRATION AND AWARD.
Communications Between Judge and Jury, see CRIMINAL LAW; TRIAL.
Conduct of Judge at Trial, see CRIMINAL LAW; TRIAL.
Constitutional and Legislative Powers Relating to Judges, see CONSTITUTIONAL LAW; COURTS.
Court, see COURTS.
Court Commissioner, see COURT COMMISSIONERS.
Designation, Assignment, and Attendance of Judges, see COURTS.
Federal, Circuit, and District Justices or Judges, see COURTS.
Illness of Judge as Ground For Discharging Jury, see CRIMINAL LAW.
Increasing or Limiting Number of Judges, see COURTS.
Judge:
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As Necessary to Action or Judgment, see ACTIONS.
Of Corporate Elections, see CORPORATIONS.
Of Elections Generally, see ELECTIONS.
Judicial Notice as to Judges and Justices, see EVIDENCE.
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Mandamus to Judge, see MANDAMUS.
Members of Courts-Martial, see ARMY AND NAVY; MILITIA; WAR.
Number of Judges:
Concurring in Opinion, see COURTS.
Necessary to Adjudication, see COURTS.
Organization and Powers of Court, see COURTS.
Power to Enforce Attendance of Judges, see COURTS.
Prohibition Against Judge, see PROHIBITION.
Province of Judge and Jury, see CRIMINAL LAW; TRIAL.
Remarks of Judge at Trial, see CRIMINAL LAW; TRIAL.
Review on Appeal or Writ of Error, see APPEAL AND ERROR; CRIMINAL LAW.
Trial by Court, see TRIAL.
United States Commissioner, see UNITED STATES COMMISSIONERS.

I. TERMINOLOGY.

A. Judge.[1] A judge has been defined as a public officer lawfully appointed to decide litigated questions according to law; an officer, so named in his commission, who presides in some court.[2] Whenever the law vests a person with

1. De facto judge see *infra*, IX.
Special judge see *infra*, VIII.
2. Bouvier L. Dict. [*quoted* in State *v.* O'Gorman, 75 Mo. 370, 375; Foot *v.* Stiles, 57 N. Y. 399, 405; *In re* Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 650].
Other definitions are: "A public officer, who, by virtue of his office, is clothed with judicial authorities." Todd *v.* U. S., 158 U. S. 278, 284, 15 S. Ct. 889, 39 L. ed. 982; U. S. *v.* Clark, 25 Fed. Cas. No. 14,804, 1 Gall. 497, 499.

power to do an act, and constitutes him a judge of the evidence on which the act may be done, and at the same time contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is *quoad hoc* a judge.[3]

B. Judge at Chambers. "A judge at chambers" is simply a judge acting out of court.[4]

"A public officer whose function is to declare the law, to administer justice in a court of law, to conduct the trial of causes between litigants according to legal forms and methods." Anderson L. Dict.

"One invested with authority to determine any cause or question in a court of judicature created by the queen's letters patent. Wharton L. Lex.

In its most extensive sense, the term includes all officers who are appointed to decide such questions, and not only judges properly so called but also justices of the peace and jurors, who are judges of the facts in issue. State *v.* O'Gorman, 75 Mo. 370, 376.

In its more limited sense the term "judge" signifies an officer who is so named in his commission and who presides in some court. State *v.* O'Gorman, 75 Mo. 370, 376.

According to the intent or context the term may include an assistant judge (City Bank *v.* Young, 43 N. H. 457, 460), a commissioner (*In re* Wong Fock, 81 Fed. 558, 560), a county court justice (State *v.* O'Gorman, 75 Mo. 370, 375), a county judge (State *v.* Maloney, 92 Tenn. 62, 68, 20 S. W. 419; Pfister *v.* Smith, 95 Wis. 51, 54, 69 N. W. 984); a court commissioner (Pfister *v.* Smith, *supra*; Woodruff *v.* Depere, 60 Wis. 128, 132, 18 N. W. 761), a judge of the recorder's court (People *v.* Wilson, 15 Ill. 388, 391), a justice of the peace (People *v.* Wilson, *supra*; People *v.* Mann, 97 N. Y. 530, 536, 49 Am. Rep. 556; Center *v.* Hoosick River Pulp Co., 43 Misc. (N. Y.) 247, 249, 88 N. Y. Suppl. 548; Carrington *v.* Andrews, 12 Abb. Pr. (N. Y.) 348, 351), an ordinary (State *v.* Hutson, 1 McCord (S. C.) 240, 241; Hays *v.* Harley, 1 Mill (S. C.) 267, 268), a recorder of a city (State *v.* Grandjean, 51 La. Ann. 1099, 1102, 25 So. 940), a recorder of the mayor's court (Com. *v.* Conyngham, 65 Pa. St. 76, 83), or a register of wills (Mintzer *v.* Baker, 5 Phila. (Pa.) 483). On the other hand it may not include within its meaning a commissioner of appeals (Settle *v* Van Evrea, 49 N. Y. 280, 284), a commissioner of mines (*Re* Malaga Barrens, 21 Nova Scotia 391, 398), a county commissioner (LeCroix *v.* Fairfield County Com'rs, 50 Conn. 321, 322, 47 Am. Rep. 648), a judge of probate (State *v.* French, 2 Pinn. (Wis.) 181, 184, 1 Chandl. 130); People *v.* Mann, 97 N. Y. 530, 536, 49 Am. Rep. 556), a prothonotary (McDougald *v.* Mullins, 30 Nova Scotia 313, 314), a recorder of a city (People *v.* Goodwin, 50 Barb. (N. Y.) 562, 566; Com. *v.* Dallas, 4 Dall. (Pa.) 229, 230, 1 L. ed. 812; Respublica *v.* Dallas, 3 Yeates (Pa.) 300, 305; Egleston *v.* Charleston, 1 Mill (S. C.) 45), a recorder of a municipal court (Morrison *v.* McDonald, 21 Me. 550, 555), or a warden of a municipality (Palgrave Min. Co. *v.* McDonald, 24 Nova Scotia 70, 73).

A judge is an officer of the state charged with the duty of seeing that the law is faithfully administered. Cox *v.* State, 8 Tex. App. 254, 282, 34 Am. Rep. 746.

"Judge" as used in the Bankruptcy Act see BANKRUPTCY, 5 Cyc. 272 note 93.

Mere administrative officers of the government, such as commissioners, committees, auditors, selectmen, and the like, are not included within the meaning of the term. Betts *v.* New Hartford, 25 Conn. 180, 186; Foot *v.* Stiles, 57 N. Y. 399, 405.

Synonymous with "justice" see Low *v.* Cheney, 1 Code Rep. (N. Y.) 29. See also *In re* Wong Fock, 81 Fed. 558, 560.

"United States judge," as including a justice, judge, or commissioner see Chin Bak Kan *v.* U. S., 186 U. S. 193, 22 S. Ct. 891, 894, 46 L. ed. 1121; Fong Mey Yuk *v.* U. S., 113 Fed. 898, 51 C. C. A. 528.

"The terms, 'circuit judge,' and 'judge of the circuit court' are convertible. They mean precisely the same thing, and if there is no circuit court there can be no circuit judge or judge of the circuit court." Crozier *v.* Lyons, 72 Iowa 401, 404, 34 N. W. 186.

Compared with the term "court."—"Judge" and "court" are not, strictly speaking, convertible terms; but they are so in popular sense. U. S. *v.* Gee Lee, 50 Fed. 271, 273, 1 C. C. A. 516. A court is not a judge, nor a judge a court. Todd *v.* U. S., 158 U. S. 278, 284, 15 S. Ct. 889, 39 L. ed. 982; U. S. *v.* Clark, 25 Fed. Cas. No. 14,804, 1 Gall. 497, 499. See also Allen's Appeal, 69 Conn. 702, 707, 38 Atl. 701; Clark *v.* Stanton, 24 Minn. 232, 240. Nevertheless the judge of a court, while presiding over the court, is by common courtesy called the court, and the words "the court" and "the judge (or judges)" are frequently used as synonymous and interchangeable. Pressley *v.* Lamb, 105 Ind. 171, 186, 4 N. E. 682; Michigan Cent. R. Co. *v.* Northern Indiana R. Co., 3 Ind. 239, 245; Levey *v.* Bigelow, 6 Ind. App. 677, 34 N. E. 128, 130; State *v.* Smith, 107 Iowa 480, 486, 78 N. W. 224; Clark *v.* Stanton, 24 Minn. 232, 241; Guild *v.* Meyer, 59 N. J. Eq. 390, 391, 46 Atl. 202; Lowe *v.* Cheney, 1 Code Rep. (N. Y.) 39; United States, Petitioner, 194 U. S. 194, 196, 24 S. Ct. 629, 48 L. ed. 931; Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 535, 19 S. Ct. 513, 43 L. ed. 796. See also COURTS, 11 Cyc. 652 *et seq.*

3. Vanderheyden *v.* Young, 11 Johns. (N. Y.) 150.

4. Whereatt *v.* Ellis, 65 Wis. 639, 644, 27

C. Judge of Court of Record. A judge authorized by law to hold a court which is a court of record[5] is a judge of a court of record.[6]

D. Judge Pro Hac Vice. An attorney at law selected or appointed to act and preside as judge in the trial of a case when the regular judge is disqualified is a judge *pro hac vice*.[7]

E. Judge Pro Tem. A judge elected or appointed to act for and in the absence, sickness, or disqualification of the regular judge is a judge *pro tempore*; he is only a substitute never a duplicate.[8]

II. SCOPE OF TREATISE.

It is proposed in this article to include under the title of judges public officers authorized to preside in courts of justice, whether known as judges, justices, chancellors, surrogates, or by other titles, excluding, however, justices of the peace and members of courts-martial.[9]

III. THE OFFICE OF JUDGE.

A. Whether State or County Office. Whether the judge of a given court is a state or county officer may usually be determined by an examination of the constitutional or statutory provisions creating the office. In some instances, however, these provisions have not been clear, and have received judicial interpretation.[10]

B. Creation and Regulation. The office of judge is created in the United States by the constitution,[11] or by statutory provision, provided the power is delegated to the legislature.[12] Where the office is created by constitution, the power is sometimes delegated to the legislature to exercise control over the office by fixing

N. W. 630, 28 N. W. 333; Anderson L. Dict. [*quoted* in Applehy *v.* South Carolina, etc., R. Co., 58 S. C. 33, 35, 36 S. E. 109]. See also *infra*, VI, C, 2.

"Chambers" defined see 6 Cyc. 845.

5. See, generally, COURTS.

6. People *v.* Kelly, 30 N. Y. Super. Ct. 592, 602, even though the court over which he ordinarily presides is not a court of record.

In the statutory provision providing that on a certain showing any inebriate or habitual or common drunkard shall be brought before the judge of a court of record for trial, the term "judge of a court of record" means any judge of any court of record in the state, even at chambers. State *v.* Ryan, 70 Wis. 676, 36 N. W. 823.

7. See Anderson L. Dict.; 4 Blackstone Comm. 261; Ga. Code, §§ 4178, 4227, 4327. See also Norris *v.* Pollard, 75 Ga. 358; Drawdy *v.* Littlefield, 75 Ga. 215; Castleberry *v.* State, 68 Ga. 49; Reeves *v.* Graffling, 67 Ga. 512; Worsham *v.* Murchison, 66 Ga. 715; Clayton *v.* Wallace, 41 Ga. 268; Henderson *v.* Pope, 39 Ga. 361.

8. See Cox *v.* State, 30 Kan. 202, 204, 2 Pac. 155. *In re* Millington, 24 Kan. 214, 225; Williams *v.* Struss, 4 Okla. 160, 164, 44 Pac. 273; Haverly Invincible Min. Co. *v.* Howcutt, 15 Reporter 746.

9. See JUSTICES OF THE PEACE; COURTS-MARTIAL.

10. For construction of particular statutes see the following cases:

California.— People *v.* Martin, 12 Cal. 409.

Colorado.— *In re* County Judge, 18 Colo. 272, 32 Pac. 549.

Delaware.— State *v.* Churchman, 3 Pennew. 361, 51 Atl. 49 [*overruling* State *v.* Churchman, 3 Pennew. 167, 49 Atl. 381].

Kansas.— McIntyre *v.* Iliff, 64 Kan. 747, 68 Pac. 633.

Michigan.— People *v.* Manistee County, 40 Mich. 585.

Pennsylvania.— Leih *v.* Com., 9 Watts 200.

Tennessee.— Judges' Salary Cases, 110 Tenn. 370, 75 S. W. 1061; State *v.* Glenn, 7 Heisk. 472; Saffrons *v.* Ericson, 3 Coldw. 1; Moore *v.* State, 5 Sneed 510.

Washington.— State *v.* Twichell, 4 Wash. 715, 31 Pac. 19.

See 29 Cent. Dig. tit. "Judges," § 1.

11. *Illinois.*— People *v.* Dubois, 23 Ill. 547, circuit judges.

Indiana.— State *v.* Mount, 151 Ind. 679, 51 N. E. 417.

Mississippi.— Smith *v.* Halfacre, 6 How. 582, circuit judges.

Nebraska.— State *v.* Moores, (1904) 99 N. W. 504, (1903) 96 N. W. 1011; Moores *v.* State, 63 Nebr. 345, 88 N. W. 514; Gordon *v.* Moores, 61 Nebr. 345, 85 N. W. 298; State *v.* Moores, 61 Nebr. 9, 84 N. W. 399, police judges.

New Jersey.— Schalk *v.* Wrightson, 58 N. J. L. 50, 32 Atl. 820, judges of common pleas.

In California.— But there is no such officer in California as a constitutional judge as distinguished from a legislative judge. Both are provided for by the constitution, and in that sense are constitutional officers. Church *v.* Colgan, 117 Cal. 685, 50 Pac. 12.

12. *Alabama.*— Inferior courts of law and equity are created by the legislature. State *v.* Sayre, 118 Ala. 1, 24 So. 89; Thompson

the time and manner of electing judges,[13] by increasing[14] or reducing[15] the number of judges within fixed limits, by designating the judge of one court to be the judge of another court existing in the same district,[16] by altering the territorial limits of his jurisdiction,[17] and by altering or enlarging the powers of the judge.[18]

C. Abolition. When the office of judge is created by the constitution, it cannot be abolished by the legislature;[19] but when created by statute, under

v. Holt, 52 Ala. 491. Also the office of circuit judge. State *v.* Porter, 1 Ala. 688.

California.— People *v.* Waterman, 86 Cal. 27, 24 Pac. 807, judges of superior court.

Colorado.— People *v.* Rucker, 5 Colo. 455, criminal judges.

Indiana.— State *v.* Berghoff, 158 Ind. 349, 63 N. E. 717 (municipal court); Brown *v.* Buzan, 24 Ind. 194 (courts inferior to circuit courts).

Maryland.— Whittington *v.* Polk, 1 Harr. & J. 236, chief justice of county court.

Michigan.— People *v.* Burch, 84 Mich. 408, 47 N. W. 765, additional circuit judges of Kent county.

Minnesota.— Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778, judge and special judge of municipal court of Minneapolis.

Mississippi.— Inferior courts are created by the legislature. O'Leary *v.* Adler, 51 Miss. 28; Houston *v.* Royston, 7 How. 543.

Missouri.— The legislature may establish courts inferior to the supreme court and circuit courts. Harper *v.* Jacobs, 51 Mo. 296; State *v.* Emerson, 39 Mo. 80.

Nebraska.— The legislature has the power not oftener than once in every four years to increase the judicial districts of the state. *In re* Groff, 21 Nebr. 647, 33 N. W. 426, 59 Am. Rep. 859; State *v.* Stevenson, 18 Nebr. 416, 25 N. W. 585.

New York.— People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; Matter of Schultes, 33 N. Y. App. Div. 524, 54 N. Y. Suppl. 34 (municipal court of New York city); People *v.* Hogan, 14 Misc. 48, 35 N. Y. Suppl. 226 (court of special sessions). With the single exception that a justice of the supreme court must be a member of and preside in the court of oyer and terminer, as provided by the constitution, the whole subject of the organization of this court in New York is left to the legislature. The legislature may associate other judicial officers or commissioners with the presiding justice, or permit him to preside without them, making him the sole judge of the court. Smith *v.* People, 47 N. Y. 330.

Ohio.— State *v.* Archibald, 52 Ohio St. 1, 38 N. E. 314, court of insolvency.

Tennessee.— The legislature may establish all courts inferior to the supreme court, and create the judicial offices in connection therewith. State *v.* Maloney, 92 Tenn. 62, 20 S. W. 419; Moore *v.* State, 5 Sneed 510.

Washington.— The number of judges of the supreme court may be increased by the legislature, and decreased again to the minimum of five, whenever, in the judgment of the legislature, necessity or occasion may require, under the clause of the constitution declaring that the supreme court shall consist of five judges, and that the legislature may increase the number of such judges from time to time. State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

United States.— The power is delegated to congress to establish all federal courts inferior to the supreme court of the United States. Const. art. 3, § 1.

See 29 Cent. Dig. tit. "Judges," §§ 2, 4.

13. People *v.* Templeton, 12 Cal. 394; People *v.* Rosborough, 14 Cal. 180; People *v.* Burbank, 12 Cal. 378; People *v.* Wall, 88 Ill. 75; State *v.* Mount, 151 Ind. 679, 51 N. E. 417; Harper *v.* Jacobs, 51 Mo. 296; State *v.* Emerson, 39 Mo. 80.

14. State *v.* Stevenson, 18 Nebr. 416, 25 N. W. 585; *In re* Groff, 21 Nebr. 647, 33 N. W. 426, 59 Am. Rep. 859; State *v.* Brown, 38 Ohio St. 344; State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

15. Schalk *v.* Wrightson, 58 N. J. L. 50, 32 Atl. 820.

16. Although the constitution of Alabama requires the legislature to provide by law for the election of judges of the courts of probate and other inferior courts by the qualified electors of the counties, still the legislature may authorize the judge of the county court elected by the voters of the county to preside in the probate court in the same county, both courts having jurisdiction over the same territory. Randolph *v.* Baldwin, 41 Ala. 305. The supreme court of Pennsylvania has adopted the opposite view in Com. *v.* Conyngham, 65 Pa. St. 76. In the latter case, however, the president judge of the common pleas court was elected by the voters of the whole county, and it was held that he could not be designated by the legislature to preside over the mayor's court of one city in the county as the voters of the city were entitled by the constitution to elect the judge of the mayor's court. See to the same effect Mansfield's Case, 22 Pa. Super. Ct. 224, where the judges of certain existing courts were authorized by statute to preside over a newly established juvenile court.

17. Maroney *v.* State, 45 Tex. Cr. 524, 78 S. W. 696.

18. International Bank *v.* Bradley, 19 N. Y. 245.

A municipal council has no power to change the character or duties of an office prescribed by legislative enactment. Oppenheim *v.* Pittsburgh R. Co., 85 Ind. 471.

19. State *v.* Scott, 9 Ark. 270. Thus the legislature cannot expel a circuit judge from his office by creating a new district and taking from him the territory that constituted his district. People *v.* Dubois, 23 Ill. 547. Nor by abolishing his judicial district before the expiration of his constitutional

authority of the constitution, it may be abolished by statute, and the incumbent deprived of his office.[20] And where the constitution authorizes the legislature to increase the number of judges from time to time, and the legislature exercises the right, it may in turn abolish the number thus increased.[21] The adoption of a new constitution may result in abolishing offices previously existing.[22] Where the constitution establishes the office, but does not fix the number of judges, the legislature may abolish unnecessary judges by abolishing districts, or by providing that successors shall not be appointed for the supernumerary judges.[23] But it cannot terminate the office of a judge elected under a constitutional law for a constitutional term by simply devolving the duties of the office upon another official.[24]

IV. APPOINTMENT OR ELECTION.

A. Introductory Statement. The power can be exercised only by the authority to whom it is so given, and cannot be delegated,[25] and any encroachment thereon is void.[26] The power to select judges, like all other powers, is derived, in the United States, from the people.[27]

B. Method of Selection — How Fixed. Usually the constitution explicitly provides that the superior judges shall either be appointed or elected.[28] In some

term. Com. *v.* Gamble, 62 Pa. St. 343, 1 Am. Rep. 422.

20. People *v.* Lippincott, 67 Ill. 333; Crozier *v.* Lyon, 72 Iowa 401, 34 N. W. 186; Whittington *v.* Polk, 1 Harr. & J. (Md.) 238; Keating *v.* Fitch, 14 Misc. (N. Y.) 128, 35 N. Y. Suppl. 641; People *v.* Hagan, 14 Misc. (N. Y.) 48, 35 N. Y. Suppl. 226.

21. State *v.* McBride, 29 Wash. 335, 70 Pac. 25. And see COURTS, 11 Cyc. 719.

22. State *v.* Duffel, 32 La. Ann. 649; State *v.* Bernoudy, 40 Mo. 192; Cline *v.* Greenwood, 10 Oreg. 230; State *v.* McNally, 13 Utah 25, 43 Pac. 920.

23. Price *v.* Anderson, 65 Miss. 410, 14 So. 96 (holding that the fact that such an act cannot, because of a constitutional obstacle, have the effect of depriving the incumbents of their offices before the expiration of their terms, will not defeat the law, which must await the efflux of time before it can accomplish the legislative purpose); State *v.* King, 104 Tenn. 156, 57 S. W. 150; Judges Cases, 102 Tenn. 509, 53 S. W. 134; State *v.* Gaines, 2 Lea (Tenn.) 316; State *v.* Campbell, 3 Tenn. Cas. 355.

Division of county.— When the legislature of New York divided a county and formed a part thereof into a new county, the judges of the county court appointed prior to the division, and residing in that portion organized into a new county, lost their offices and were no longer competent to act under their commissions. People *v.* Morrell, 21 Wend. (N. Y.) 563.

24. State *v.* Leonard, 86 Tenn. 485, 7 S. W. 453.

25. Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89; People *v.* Dooley, 69 N. Y. App. Div. 512, 75 N. Y. Suppl. 350 [*affirmed* in 171 N. Y. 74, 63 N. E. 815]; People *v.* Guden, 75 N. Y. Suppl. 347.

Where the constitution provides for election by the people no other method can be adopted, and the legislature cannot legislate the judge of an existing court upon the bench of a new court. Com. *v.* Conyngham, 65 Pa. St. 76; Mansfield's Case, 22 Pa. Super. Ct. 224.

Where the existence of a court ceases by limitation at a fixed time and a judge has been elected to preside in said court during the remainder of its existence, the legislature cannot after such election extend the judge's term, the existence of the court having been extended by statute, as this would virtually give the legislature the power of appointment to fill a vacancy which is vested by the constitution in the governor. State *v.* Mount, 151 Ind. 679, 51 N. E. 417, (1898) 52 N. E. 407.

26. People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; State *v.* Moffitt, 5 Ohio 358; Com. *v.* Potts, 79 Pa. St. 164; State *v.* Gardner, 3 S. D. 553, 54 N. W. 606.

27. State *v.* Scott, 9 Ark. 270; State *v.* Bernoudy, 40 Mo. 192; Luther *v.* Borden, 7 How. (U. S.) 1; 2 Wilson Works, Note a appendix; 1 Sharswood Blackstone 49, note 12.

28. See the constitutions of the various states and see the following cases:

Alabama.— State *v.* Sayre, 118 Ala. 1, 24 So. 89.

Connecticut.— Clapp *v.* Hartford, 35 Conn. 220.

Indiana.— State *v.* Mount, 151 Ind. 679, 51 N. E. 417; State *v.* Noble, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101.

Kansas.— Matthews *v.* Shawnee County, 34 Kan. 606, 9 Pac. 765; State *v.* Cobb, 2 Kan. 32.

Kentucky.— Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36.

Maryland.— Magruder *v.* Swann, 25 Md. 173.

Michigan.— People *v.* Burch, 84 Mich. 408, 47 N. W. 765.

New York.— People *v.* Fancher, 50 N. Y. 288; People *v.* Potter, 47 N. Y. 375.

Ohio.— State *v.* Moffitt, 5 Ohio St. 358.

jurisdictions the election is by the people,[29] in others by joint ballot of the two houses of the legislature.[30] The method of selecting judges of inferior courts is commonly left to the legislature for determination.[31]

C. By Whom Appointed. Where the constitution provides for the appointment of judges, the power of appointment is usually vested in the chief executive, with the concurrence of the senate,[32] although some constitutions do not require the concurrence of the senate.[33]

D. Suspension and Exhaustion of Power of Appointment. Where an act of the legislature creating an office and conferring upon the governor the power of appointment provides that the law shall not go into effect until a future day, the power of appointment to fill the office is also suspended until the law takes effect.[34] When a governor has exercised his constitutional power of appointment of a judge and the appointment has been confirmed by the senate, and the appointee duly commissioned, the governor's power is exhausted, and he cannot recall the commission even for the purpose of reappointing the judge for a different term.[35]

E. Delegation of Power to Legislature to Determine by Whom Judges Chosen. Frequently the constitution delegates to the legislature the power to establish courts and to designate by whom the judges thereof shall be chosen.[36] And when the constitution is silent, the legislature may provide that judicial officers shall be elected by the people.[37] Where the constitution provides that certain judicial officers shall be either elected "or" appointed, the legislature

Rhode Island.— *In re* Opinion of Judges, 23 R. I. 635, 51 Atl. 221.

South Carolina.— State *v.* Shaw, 9 S. C. 94.

Virginia.— *In re* Broadus, 32 Gratt. 779.

See 29 Cent. Dig. tit. "Judges," § 6.

Meaning of "elected."—The word "elected" cannot be construed in any other than its accepted popular sense — chosen by the people, and not appointed by the governor. Magruder *v.* Swann, 25 Md. 173.

29. Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36; People *v.* Fancher, 50 N. Y. 288; People *v.* Potter, 47 N. Y. 375.

30. State *v.* Moffitt, 5 Ohio 358; *In re* Opinion of Judges, 23 R. I. 635, 51 Atl. 221; State *v.* Shaw, 9 S. C. 94; *In re* Broadus, 32 Gratt. (Va.) 779.

31. See the following cases:

California.— People *v.* Campbell, 2 Cal. 135.

Kansas.— Mitchell *v.* State, 61 Kan. 779, 60 Pac. 1055.

Michigan.— Renaud *v.* State Ct. of Mediation, etc., 124 Mich. 648, 83 N. W. 620, 83 Am. St. Rep. 346, 51 L. R. A. 458.

New York.— Nelson *v.* People, 23 N. Y. 293.

Oklahoma.— Epley *v.* Moore, 11 Okla. 335, 66 Pac. 337; Roberson *v.* Hubler, 11 Okla. 297, 67 Pac. 477.

32. See, generally, the constitutions of the several states. And see Brady *v.* Howe, 50 Miss. 607; Schalk *v.* Wrightson, 58 N. J. L. 50, 32 Atl. 820; Com. *v.* Collins, 8 Watts (Pa.) 33.

33. The constitution of Delaware of 1897 authorized the governor to appoint, by and with the consent of the senate, such officers "as he is or may be authorized by this constitution or by law to appoint." This provision did not deprive the governor of the right then existing, to appoint without confirmation the judge of a municipal court in existence when the constitution was adopted, and previously established by the general assembly and continued by the constitution. State *v.* Churchman, 3 Pennew. (Del.) 361, 51 Atl. 49 [*overruling* State *v.* Churchman, 3 Pennew. (Del.) 167, 49 Atl. 381]. Nor was it necessary that upon the adoption of the constitution such judge should be reappointed by the governor and confirmed by the senate. Forbes *v.* State, 2 Pennew. (Del.) 197, 43 Atl. 626.

34. *In re* Opinion of Justices, 3 Gray (Mass.) 601; Com. *v.* Fowler, 10 Mass. 290.

35. Strozer *v.* Wright, 54 Ga. 391; State *v.* Draper, 48 Mo. 213.

36. State *v.* Peelle, 121 Ind. 495, 22 N. E. 654; State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; Matthews *v.* Shawnee County, 34 Kan. 606, 9 Pac. 765; St. Paul *v.* Umstetter, 37 Minn. 15, 33 N. W. 115.

Delegation of power to municipalities.—The legislature under the authority to legislate concerning municipal corporations may confer upon them the power of appointing judges with full power to try all cases arising under their own laws. Schroder *v.* Charleston, 2 Treadw. (S. C.) 726, 3 Brev. 533. The chapter of the code of Mississippi on "municipalities" does not state how police justices in cities having four thousand or more inhabitants shall be elected. They may therefore be elected in such mode as the board of mayor and aldermen may choose. Rich *v.* McLaurin, 83 Miss. 95, 35 So. 337.

37. People *v.* Mott, 3 Cal. 502.

may determine whether such officers shall be elected or appointed; but it cannot authorize the employment of both methods in selecting judges of the same grade at the same time.[38]

F. Time and Manner of Selection. The constitution, after designating by whom judicial officers shall be selected, may leave to the legislature the matter of fixing the time and manner of their selection.[39] This power does not include the right to provide that an officer may be elected by the electors of any community smaller than that which the officer is to represent. The "manner of the election" does not go to the question of what body of electors shall elect.[40]

G. Right to Office Derived From Election or Appointment. The right of a judge to his office is determined by his election or appointment and the fact that he has not been commissioned does not render him the less a judge.[41] On the other hand a governor cannot enlarge the official term of a judge by the terms of his commission.[42] And where a judge in office is reappointed as his own successor, he cannot change the term of office prescribed by law by a failure to apply for a second commission and to qualify thereunder.[43] Nevertheless a judge's commission issued by the proper authority is the highest and best evidence of his right to the office until on quo warranto or a proceeding of that nature it is annulled by judicial determination.[44]

V. ELIGIBILITY, QUALIFICATION, AND TENURE.

A. Eligibility. Eligibility to the office of judge in the United States is fixed by law in each state.[45] A certain period of residence within the state, circuit, or county prior to election is commonly required,[46] as is also residence therein at the

38. People *v.* Dooley, 171 N. Y. 74, 63 N. E. 815 [*affirming* 69 N. Y. App. Div. 512, 75 N. Y. Suppl. 350].

39. *California.*— People *v.* Rosborough, 14 Cal. 180; People *v.* Templeton, 12 Cal. 394.

Indiana.— State *v.* Berghoff, 158 Ind. 349, 63 N. E. 717.

New York.— People *v.* Comstock, 78 N. Y. 356; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; Matter of Schultes, 33 N. Y. App. Div. 524, 54 N. Y. Suppl. 34.

Ohio.— State *v.* Moffitt, 5 Ohio 358.

Washington.— State *v.* Rusk, 15 Wash. 403, 46 Pac. 387.

40. People *v.* Dooley, 69 N. Y. App. Div. 512, 75 N. Y. Suppl. 350; People *v.* Guden, 75 N. Y. Suppl. 347. But a statute providing for the election of judicial officers of cities is not rendered unconstitutional by the incorporation of the city into a larger city, if the jurisdiction of the court is confined to the territory in which the officer is voted for. People *v.* Dooley, *supra.*

41. Smith *v.* Askew, 48 Ark. 82, 2 S. W. 349; State *v.* Johnson, 17 Ark. 407; Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36; *In re* Lewis, 29 Pa. St. 518; State *v.* Lyles, 1 McCord (S. C.) 238; Gold *v.* Fite, 2 Baxt. (Tenn.) 237.

From whom authority to act derived.— A judge of the court of common pleas derives his authority to hold the circuit court not from the request of the justice of the supreme court, but from his appointment by the governor as judge of the court of common pleas. Commonwealth Roofing Co. *v.* Palmer Leather Co., 67 N. J. L. 566, 52 Atl. 389.

42. State *v.* Perkins, 139 Mo. 106, 40 S. W. 650; State *v.* Taylor, 15 Ohio St. 137.

43. Anderson *v.* Ryan, 82 Ga. 559, 9 S. E. 331.

44. Thompson *v.* Holt, 52 Ala. 491.

A commission is prima facie evidence of the right to an office (State *v.* Draper, 48 Mo. 213), but it cannot extend the term of an office fixed by law (State *v.* Chapin, 110 Ind. 272, 11 N. E. 317).

45. Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36. And see the constitutions and statutes of the respective states.

Eligibility of infant see INFANT, 22 Cyc. 516.

Corrupt means of obtaining office as disqualification.— The statute of 5 & 6 Edw. VI, c. 16, in so far as it disqualifies a judge from holding an office who has resorted to corrupt means to obtain it, is inconsistent with the act of the legislature of Colorado of 1877, and was therefore not a part of the common law adopted by that state. People *v.* Goddard, 8 Colo. 432, 7 Pac. 301.

Eligibility to particular judgeship.— The provision of the constitution of Louisiana, conferring on the recorder of the city of New Orleans the additional powers and functions of justice of the peace, does not vest the recorder with any other character or title of office than that of recorder. He must therefore be eligible to election as recorder, as his right to act as justice of the peace is consequent and dependent upon being recorder. State *v.* Gastinel, 20 La. Ann. 114.

46. Smith *v.* People, 44 Ill. 16; People *v.* Wilson, 15 Ill. 388; Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36.

time of the election, and continuing during the incumbency of the judge.[47] But residence within the county or circuit is not universally required.[48] Some of the constitutions also provide that the period of service of judges shall terminate after they have attained a certain age.[49] Where the constitution provides that no person shall be eligible to the office of judge unless he is "learned in the law," such person must be an attorney at law admitted to the bar by some court authorized to license persons to practice.[50] And where the constitution provides that a person, in order to be eligible to election as judge, must have practised law in the state for a fixed period next preceding his election, such person must have practised under legal permission obtained by complying with the requirements prescribed by law.[51] The holding of any other office of profit or trust will in some states render a person ineligible to exercise the office of judge.[52]

B. Qualification[53] — **1. Necessity.** While the right to an office is derived by election or appointment, it is competent for the legislature to render the enjoyment of the right dependent upon various conditions such as the issuing of a commission, the qualification of the officer, and in case of an election, the ascertainment of the result. When these conditions are imposed the right to enter upon and hold the office is not complete until they are satisfied.[54] Where the constitution requires a commission to be issued, a person elected as judge cannot

47. People *v.* Owers, 29 Colo. 535, 69 Pac. 515; People *v.* Morrell, 21 Wend. (N. Y.) 563.

Actual residence necessary.— A constitutional provision requiring a district judge to reside in the district for which he was elected means an actual as distinguished from a legal or constructive residence. People *v.* Owers, 29 Colo. 535, 69 Pac. 515.

Residence at time of election.— The constitution of Wisconsin requires a circuit judge to be a resident of the circuit, not only after he has been elected, but also at the time of his election. State *v.* Messmore, 14 Wis. 163.

Residence is lost by a union of intention and acts. The intention may be inferred from surrounding circumstances. Smith *v.* People, 44 Ill. 16. And the naked declaration of intention on the part of a judge to maintain his actual residence within his district is not conclusive of the question. People *v.* Owers, 29 Colo. 535, 69 Pac. 515.

As to the effect of a failure to comply with requirements as to residence see *infra*, V, F, 2.

48. State *v.* Quinn, 96 Me. 496, 52 Atl. 1009; People *v.* Goodwin, 22 Mich. 496.

49. Morrison *v.* McDonald, 21 Me. 550; People *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556.

Construction of particular provisions.— A constitutional provision that the period of service of certain judges shall terminate on the last day of December after they have reached the age of seventy years creates a limitation on the term of office prescribed, applicable where the incumbent attains the age specified before the expiration of a full term. The provision applies to county judges (People *v.* Brundage, 18 Hun (N. Y.) 291 [*affirmed* in 78 N. Y. 403], but does not apply to the office of surrogate (People *v.* Carr, 100 N. Y. 236, 3 N. E. 82, 53 Am. Rep. 161), or to justices of the peace (People *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556). This provision has been construed as not applying to judges elected at the same election at which the constitution was adopted, or to judges then in office. People *v.* Gardner, 59 Barb. (N. Y.) 198 [*affirmed* in 45 N. Y. 812]; People *v.* Norton, 59 Barb. (N. Y.) 169.

50. Jamieson *v.* Wiggin, 12 S. D. 16, 80 N. W. 137, 76 Am. St. Rep. 585, 46 L. R. A. 317.

Lay judges.— The requirement that lay judges "shall be well informed in the law" has been construed as a mere direction to voters conclusively determined by a majority of the ballots. Little *v.* State, 75 Tex. 616, 12 S. W. 965.

51. State *v.* Marks, 30 La. Ann. 97.

52. Biddle *v.* Willard, 10 Ind. 62; Respublica *v.* Dallas, 3 Yeates (Pa.) 300; Com. *v.* Dallas, 4 Dall. (Pa.) 229, 1 L. ed. 812.

A member of a board of education in Missouri is not an officer of a municipal corporation, and is not ineligible on that account to hold the office of justice of the county court. Heller *v.* Stremmel, 52 Mo. 309.

Member of legislature.— The constitution provided that no member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created or the emoluments of which shall have been increased during the term for which he was elected. This provision does not disqualify a member of the legislature from holding the office of county judge, the emoluments of which were increased during his legislative term, but after his appointment as judge. State *v.* Boyd, 21 Wis. 208.

53. **Effect of failure to qualify** see *infra*, V, F, 2.

For matters which disqualify judge from trying cause see *infra*, VII.

54. Brodie *v.* Campbell, 17 Cal. 11.

be legally qualified by taking the required oath until he has received his commission.[55] Generally the law requires the judge elect to take an oath of office;[56] and where a time is prescribed within which the oath must be taken, the performance of the requirement within the time limited is a condition precedent to the right to enter upon the office.[57] Where, however, the time for taking and filing the oath is not expressly made mandatory by statute, the statute will be construed as directory, and the oath may be taken at any time before induction into office.[58] County[59] and probate judges[60] are required in some states to give bond in qualifying.[61]

2. TIME ALLOWED FOR QUALIFYING. A person elected to the office of judge is allowed a reasonable time to qualify,[62] and also a reasonable time to have a judicial determination of his right to the office before qualifying.[63]

C. Proceedings to Test Right to Office.[64] The judiciary are invested with authority to try and determine the right of a judge to office. Such an inquiry is not a political but a judicial question.[65] In the absence of some special statutory provision this right can only be questioned by the state.[66] Quo warranto is

Qualification defined.— The word "qualify" means to take such steps as the law requires before a person elected or appointed to an office is allowed to enter on the discharge of his duties. State *v.* Albert, 55 Kan. 154, 40 Pac. 286.

55. Magruder *v.* Tuck, 25 Md. 217; State *v.* Moffitt, 5 Ohio 358.

Where recommission unnecessary.— Where a judge duly commissioned and qualified becomes *ex officio* vested with authority to preside in another court in addition to his own, he need not be recommissioned as judge of the latter court, unless required by statute. *In re* Judges, 4 Call (Va.) 1. And see Talbot *v.* Simpson, 23 Fed. Cas. No. 13,730, Pet. C. C. 188, holding that where the commission of a justice of the peace appointed him a justice to do all things which any justice of the peace could lawfully do in the court of common pleas, this constituted him a justice of the court of common pleas, and he did not require a separate commission for the latter office.

56. See the statutes of the respective states. And see State *v.* Moffitt, 5 Ohio 358.

For effect of failure to take oath within the time prescribed by law see *infra*, V, F, 2.

On reëlection.— A county judge reëlected to office in Nebraska must qualify by taking a new oath and giving a new bond. State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124.

Where an officer becomes judge of a court by reason of his existing office for which he has qualified by taking the required oath, he need take no further oath on assuming his new duties. Nelson *v.* People, 23 N. Y. 293; Irving *v.* Dunscomb, 2 Wend. (N. Y.) 205.

Indorsement on commission.— Under the law of Ohio the oath must be indorsed on the commission. State *v.* Moffitt, 5 Ohio 358.

57. State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124.

58. Duffy *v.* State, 60 Nebr. 812, 84 N. W. 264.

59. Kimball *v.* Thurman, 12 Ky. L. Rep. 358; Duffy *v.* State, 60 Nebr. 812, 84 N. W. 264; Ganhenour *v.* Anderson, 35 Tex. Civ. App. 569, 81 S. W. 104.

60. Thompson *v.* Holt, 52 Ala. 491.

61. **Time of execution.**— Where a statute requires a judge to execute bond within thirty days after his election and before he enters upon the discharge of his duties, the fact that the bond was executed several days before the day on which the term of office commenced does not render it void. Kimball *v.* Thurman, 12 Ky. L. Rep. 358.

Attestation of bond.— Under a statute requiring the county judge to execute before the clerk of the circuit court a covenant with sufficient surety "to be approved by said clerk," the clerk's attestation of the bond is sufficient evidence of his approval. A formal certificate of approval is not necessary. But even if the statute required such a certificate its omission would not render the bond void. Kimball *v.* Thurman, 12 Ky. L. Rep. 358.

62. Brodie *v.* Campbell, 17 Cal. 11.

63. Rich *v.* McLaurin, 83 Miss. 95, 35 So. 337.

64. See, generally, QUO WARRANTO.

65. State *v.* Porter, 1 Ala. 688 [*overruling* State *v.* Paul, 5 Stew. & P. (Ala.) 40]; State *v.* Lewis, 22 La. Ann. 33.

In Maryland a judge's title to his office may be tried in his own court, before another judge, he being disqualified to sit. Magruder *v.* Swann, 25 Md. 173.

66. Spradling *v.* State, 17 Ala. 440; Curtin *v.* Barton, 139 N. Y. 505, 34 N. E. 1093; Ostrander *v.* People, 29 Hun (N. Y.) 513; Coyle *v.* Com., 104 Pa. St. 117; Campbell *v.* Com., 96 Pa. St. 344; Clark *v.* Com., 29 Pa. St. 129.

Reason for rule.— This principle is founded on considerations of public policy and its maintenance is essential to the preservation of order, the security of private rights, and the due enforcement of the law. Curtin *v.* Barton, 139 N. Y. 505, 34 N. E. 1093.

In Wisconsin where the attorney-general has refused to bring an action of quo warranto to try title to an office, a private person cannot maintain the action on his own complaint, under St. (1898) § 3466, unless

the proper proceeding in which to test a judge's right to his office.[67] The right cannot be tested by mandamus,[68] by a proceeding to enjoin a judge who has been duly commissioned from entering upon the discharge of his duties,[69] by a writ of assize of novel disseizin,[70] by certiorari,[71] or in a habeas corpus proceeding;[72] and in no case can a judge's right to office be tested in a collateral proceeding.[73]

D. Commencement of Term. Usually the time when a judge's term of office begins is fixed definitely either by the constitution,[74] or by statute.[75] But when not otherwise fixed by law his term begins upon his qualification.[76]

E. Duration of Term — 1. In General. The duration of the official terms of judicial officers is usually fixed by the organic or statutory law of the respective

he is entitled to the office, since, under section 3463, the proceeding is a "civil action," and therefore, under section 2605, must be prosecuted in the name of the real party in interest. State *v.* Williams, 114 Wis. 402, 90 N. W. 452.

67. *Alabama.*— Thompson *v.* Holt, 52 Ala. 491; State *v.* Porter, 1 Ala. 688.

California.— People *v.* Campbell, 138 Cal. 11, 70 Pac. 918.

Colorado.— People *v.* Boughton, 5 Colo. 487.

Connecticut.— Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

Louisiana.— State *v.* Gastinel, 20 La. Ann. 114.

Maine.— Woodside *v.* Wagg, 71 Me. 207.

Massachusetts.— Com. *v.* Hawkes, 123 Mass. 525.

Missouri.— State *v.* Draper, 48 Mo. 213; State *v.* Thompson, 36 Mo. 70; State *v.* McBride, 4 Mo. 303, 29 Am. Dec. 636.

Nebraska.— State *v.* Moores, (1904) 99 N. W. 504; Duffy *v.* State, 60 Nebr. 812, 84 N. W. 264.

New York.— Morris *v.* People, 3 Den. 381.

Virginia.— McCraw *v.* Williams, 33 Gratt. 510; Bland, etc., County Judge Case, 33 Gratt. 443.

Wyoming.— *In re* Fourth Judicial Dist., 4 Wyo. 133, 32 Pac. 850.

See 29 Cent. Dig. tit. "Judges," § 13 *et seq.*

Effect of special statutory provisions.— Under the act of June 14, 1836, of the legislature of Pennsylvania, giving the courts of common pleas authority to issue writs of quo warranto to test the right of county officers to hold their office, the writ could not be issued against associate judges of the court of common pleas, they being state and not county officers. Leib *v.* Com., 9 Watts (Pa.) 200.

68. Thompson *v.* Holt, 52 Ala. 491; Henderson *v.* Glynn, 2 Colo. App. 303, 30 Pac. 265.

Mandamus to compel payment of salary.— The right to a judicial office cannot be determined upon an application for a mandamus directed to the auditor for a warrant for the salary. Henderson *v.* Glynn, 2 Colo. App. 303, 30 Pac. 265; State *v.* Draper, 48 Mo. 213; State *v.* Thompson, 36 Mo. 70; Winston *v.* Moseley, 35 Mo. 146; State *v.* Moseley, 34 Mo. 375; State *v.* Moores, (Nebr. 1904) 99 N. W. 504.

69. State *v.* Duffel, 32 La. Ann. 649.

70. Whittington *v.* Polk, 1 Harr. & J. (Md.) 236.

71. Anderson *v.* Morton, 21 App. Cas. (D. C.) 444; People *v.* Gobles, 67 Mich. 475, 35 N. W. 91; Coyle *v.* Sherwood, 1 Hun (N. Y.) 272; People *v.* Sherwood, 4 Thomps. & C. (N. Y.) 34.

72. See Habeas Corpus, 21 Cyc. 301.

73. See *infra*, IX, D.

74. Merced Bank *v.* Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; *Ex p.* Fisher, 33 Gratt. (Va.) 232; *In re* Broadus, 32 Gratt. (Va.) 779; State *v.* Hastings, 10 Wis. 525.

Performing duties of office before commencement of term.— It occasionally happens that a judge is required to discharge the duties of the office to which he has been elected before his term of office begins. Thus in Virginia the constitution provides that the terms of office of certain judges "shall commence on the first day of January next following their appointment; and they shall discharge the duties of their respective offices from their first appointment and qualification under this Constitution until their terms begin." Under this provision it was held by the supreme court of Virginia that a judge of the court, who was elected and qualified in March, 1874, was required to perform the duties of the office from the date of his qualification until the fourteenth day of the following January when his term began, he being the first judge of the hustings court elected under the constitution. *Ex p.* Fisher, 33 Gratt. (Va.) 232.

75. Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36; People *v.* Garlock, 5 Mich. 284; State *v.* Handy, 51 Ohio St. 204, 36 N. E. 1071.

Where the constitution fixes the term, the legislature may prescribe the period of commencement. People *v.* Rosborough, 14 Cal. 180; People *v.* Templeton, 12 Cal. 394; People *v.* Weller, 11 Cal. 77; State *v.* Thoman, 10 Kan. 191; State *v.* Handy, 51 Ohio St. 204, 36 N. E. 1071.

Constitutionality of statute.— Chapter 41 of the Laws of 1854 of Wisconsin, fixing the time when the terms of office of judicial officers shall commence, was constitutional. State *v.* Hastings, 10 Wis. 525.

76. Brodie *v.* Campbell, 17 Cal. 11; People *v.* Templeton, 12 Cal. 394; People *v.* Garlock, 5 Mich. 284; State *v.* Millett, 20 Wash. 221, 54 Pac. 1124.

states and of the federal government. When the constitution of a state ordains that a judge shall hold his office for a fixed term, the constitution governs, and the legislature has no power to alter his tenure.[77] The legislature, however, is sometimes expressly authorized by the constitution to fix the terms of judicial officers.[78] And when the constitution is silent the legislature may fix the term.[79] The terms of office as fixed by the provision vary in extent, judges are chosen for life,[80] during good behavior,[81] for a definite period of time,[82] or until the office is declared vacant by a resolution of the legislature.[83] Occasionally a judge is chosen to preside over a temporary court during the existence of the court,[84] during the military occupation of a state, the appointment being revocable at the pleasure of the military governor,[85] or under a provisional government for an indefinite period.[86]

2. CHANGE OF TERM OF JUDGES IN OFFICE. The tenure of judges in office may be changed by the constitution.[87] But where the office of judge is made elective, the legislature cannot continue the incumbent in office beyond the expiration of the term for which he was elected, either by extending the term,[88] or by postponing the time for the election of his successor,[89] unless there is constitutional authority therefor.[90]

77. *Arkansas.*— State *v.* Askew, 48 Ark. 82, 2 S. W. 349.

California.— People *v.* Campbell, 138 Cal. 11, 70 Pac. 918; People *v.* Rosborough, 14 Cal. 180; People *v.* Templeton, 12 Cal. 394; People *v.* Burbank, 12 Cal. 378; People *v.* Weller, 11 Cal. 77.

Illinois.— People *v.* Knopf, 198 Ill. 340, 64 N. E. 1127.

Kansas.— Peters *v.* Board of State Canvassers, 17 Kan. 365; State *v.* Thoman, 10 Kan. 191.

Michigan.— People *v.* Burch, 84 Mich. 408, 47 N. W. 765.

Ohio.— State *v.* Handy, 51 Ohio St. 204, 36 N. E. 1071.

Pennsylvania.— Com. *v.* Gamble, 62 Pa. St. 343, 1 Am. Rep. 422.

South Carolina.— State *v.* Hutson, 1 McCord 240; State *v.* Lylies, 1 McCord 238; Hays *v.* Harley, 1 Mill 267.

Tennessee.— State *v.* Maloney, 92 Tenn. 62, 20 S. W. 419; Keys *v.* Mason, 3 Sneed 6.

Virginia.— *Ex p.* Meredith, 33 Gratt. 119, 36 Am. Rep. 771.

Washington.— State *v.* Twitchell, 4 Wash. 715, 31 Pac. 19.

See 29 Cent. Dig. tit. "Judges," § 241. And see CONSTITUTIONAL LAW, 8 Cyc. 764, note 40.

Application of rule.— Where the constitution provides that judicial officers shall be elected for some limited term, an act of the legislature authorizing a judge to hold until the next general election, and until his successor is qualified, is void as to that portion which directs that he shall hold over until his successor is qualified. Houston *v.* Royston, 7 How. (Miss.) 543.

The constitution of Washington does not fix the term of an appointive judge, except that it cannot extend beyond general election and the qualification of his successor. State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

78. Matthews *v.* Shawnee County, 34 Kan. 606, 9 Pac. 765; State *v.* Windsor, 45 Mo. 346; State *v.* Hunter, Cheves (S. C.) 288.

79. People *v.* Wall, 88 Ill. 75; People *v.* Carr, 86 N. Y. 512, 62 How. Pr. 51 [*affirming* 25 Hun 325, 62 How. Pr. 19 (*reversing* 62 How. Pr. 5)].

80. U. S. *v.* Causin, 25 Fed. Cas. No. 14,759, 1 Hawy. & H. 37.

81. Com. *v.* Harriman, 134 Mass. 314; Hays *v.* Harley, 1 Mill (S. C.) 267; *In re* Judges Ct. of App., 4 Call (Va.) 135; James *v.* U. S., 38 Ct. Cl. 615.

82. See constitutions and statutes generally and cases cited in note 86.

Where the statute provides that a judge shall hold office "until" a designated date, the word "until" is to be construed as inclusive. People *v.* Fitzgerald, 96 N. Y. App. Div. 242, 89 N. Y. Suppl. 268 [*affirmed* in 180 N. Y. 269, 73 N. E. 55, 34 N. Y. Civ. Proc. 56].

83. *In re* Opinion to Governor, 23 R. I. 635, 51 Atl. 221.

84. Matthews *v.* Shawnee County, 34 Kan. 606, 9 Pac. 765.

85. Louisiana *v.* Wickliffe, 12 Wall. (U. S.) 173, 20 L. ed. 365.

86. Cooper *v.* Moore, 44 Miss. 386; Chambers *v.* Fisk, 22 Tex. 504; Quinn *v.* Com., 20 Gratt. (Va.) 138; Griffin *v.* Cunningham, 20 Gratt. (Va.) 31.

87. State *v.* Frizzell, 31 Minn. 460, 18 N. W. 316; State *v.* McBride, 4 Mo. 303, 29 Am. Dec. 636.

88. State *v.* Mount, 151 Ind. 679, 51 N. E. 417; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302.

89. People *v.* Knopf, 198 Ill. 340, 64 N. E. 842, 1127.

By repealing the law providing for the election of a successor, the legislature cannot keep a judge in office indefinitely. State *v.* Moores, (Nebr. 1903) 96 N. W. 1011, (1904) 99 N. W. 504.

90. Under a constitutional provision giving the legislature power to create, abolish, and control the office, the legislature may extend the term of an elective judge after the date of his election, provided the exten-

3. Right to Full Term as Affected by Time of Commencement of Incumbency. The question occasionally arises whether a judicial officer is entitled to hold his office for the full term fixed by law, irrespective of the time when his incumbency began. It has been held in California,[91] Florida,[92] Maine,[93] South Carolina,[94] and Texas[95] that under the constitutions of those states judges of certain courts are entitled to hold their offices for full terms, although chosen before the expiration of the terms for which their predecessors were commissioned. In New York it has been held that it was intended that one full judicial term should follow another full term with no break in the regular and connected succession;[96] and in Illinois a similar ruling has been made with reference to the offices of judges of the circuit court of Cook county.[97] On the contrary in Louisiana[98] and Nevada[99] it is held that, although the constitution fixed the length of judicial terms, it contemplates that the terms of all judges of a designated grade in the state shall terminate at the same time, and that the legislature in increasing the number of such judges may provide that the terms of the first judges elected shall expire at the next general election. In Tennessee, under the constitution of 1834, a judicial officer was entitled to hold his office for the full constitutional term, without regard to the time of the beginning of his incumbency,[1] but this is changed by the constitution of 1870, which requires uniformity in the time for the commencement and termination of all judicial terms.[2]

4. Right to Hold Over Until Qualification of Successor. As a general rule, when the law creates an office and designates the term, the person chosen to fill the office will hold until his successor is elected and qualified unless there is some express provision of law to the contrary.[3] And this rule obtains whether the want of a successor results from a failure to hold an election, or from the failure of the person elected to qualify, or from the legal change in the time for holding the election.[4] But where the old judicial system ceases to exist at a given time by a constitutional provision,[5] or where the constitution creates the office and limits the term to a fixed period, the incumbent of a judicial office does not hold over until his successor has been elected and has qualified;[6] and where a judge

sion is not so unreasonable as to raise the presumption of a design to deprive the office of its elective character. Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778.

91. People *v.* Burbank, 12 Cal. 378. And see People *v.* Waterman, 86 Cal. 27, 24 Pac. 807.

92. *In re* Circuit Judges, 16 Fla. 841.

93. *In re* Opinion of Justices, 61 Me. 601.

94. Smith *v.* McConnell, 44 S. C. 491, 22 S. E. 721; Whipper *v.* Reed, 9 S. C. 5. These cases construe the provisions of the constitution concerning the election of circuit and probate judges. The rule is different in South Carolina with reference to casual vacancies occurring in the office of justice of the supreme court. Simpson *v.* Willard, 14 S. C. 191.

95. Shelby *v.* Johnson, Dall. (Tex.) 597.

96. People *v.* Townsend, 102 N. Y. 430, 7 N. E. 360; People *v.* Potter, 47 N. Y. 375.

97. People *v.* Knopf, 198 Ill. 340, 64 N. E. 842, 1127.

98. State *v.* Hicks, 36 La. Ann. 836.

99. State *v.* Gorin, 6 Nev. 276.

1. Keys *v.* Mason, 3 Sneed (Tenn.) 6; Brewer *v.* Davis, 9 Humphr. (Tenn.) 208, 49 Am. Dec. 706; Powers *v.* Hurst, 2 Humphr. (Tenn.) 24.

2. State *v.* Maloney, 92 Tenn. 62, 20 S. W. 419.

3. *Indiana.*—Oppenheim *v.* Pittsburgh, etc., R. Co., 85 Ind. 471; Tuley *v.* State, 1 Ind. 500.

Michigan.— People *v.* Burch, 84 Mich. 408, 47 N. W. 765; People *v.* Lord, 9 Mich. 227.

Minnesota.— Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778.

Missouri.— State *v.* Dabbs, 182 Mo. 359, 81 S. W. 1148; State *v.* Perkins, 139 Mo. 106, 40 S. W. 650.

Wisconsin.— State *v.* Washburn, 17 Wis. 658.

See 29 Cent. Dig. tit. "Judges," § 29.

Common-law rule.— At common law, where a statute specifies the duration of a term of office and the officer elected or appointed serves out such term, his authority as such officer thereupon *ipso facto* ceases, unless he be authorized by law to hold over. State *v.* Perkins, 139 Mo. 106, 40 S. W. 650.

4. State *v.* Dabbs, 182 Mo. 359, 81 S. W. 1148; State *v.* Jenkins, 43 Mo. 261; State *v.* Thompson, 38 Mo. 192.

5. State *v.* Duffel, 32 La. Ann. 649.

6. People *v.* Campbell, 138 Cal. 11, 70 Pac. 918; People *v.* Whitman, 10 Cal. 38; Smith *v.* McConnell, 44 S. C. 491, 22 S. E. 721; Cromer *v.* Boinest, 27 S. C. 436, 3 S. E. 849.

In California an appointed judge holds until a successor is elected and qualified; but

has been elected and has qualified, but dies before the end of his predecessor's term of office, the latter is not entitled to hold over.[7]

5. Tenure of Judges Chosen to Fill Newly Created Offices. The creation of a new judgeship sometimes necessitates the appointment of a judge to hold the office until it can be filled in the regular way. As a rule a judge so appointed holds the office only until the next general election at which judges of the same grade are regularly elected.[8] And where the constitution of a state contemplates uniformity in the tenure of the judges throughout the state, the legislature in creating a new circuit may provide that the first judge elected in that circuit shall hold his office until the next general election for judges, although the term for such judge is fixed by the constitution.[9] So also where the constitution fixes the date of the commencement of the full term of a newly created judgeship, the legislature has no power to extend the provisional term of a judge appointed to the position beyond such date.[10]

F. Vacancy in Office — 1. What Constitutes Vacancy. An existing judicial office without an incumbent is vacant.[11] Vacancy applies not to the incumbent, but to the term or to the office.[12] An office is not vacant so long as it is supplied, in the manner provided by the constitution or laws, with an incumbent legally authorized to exercise the power and perform the duties pertaining to it.[13] An office presently filled cannot become or be vacant without a removal either voluntary or involuntary. When voluntary, no judicial determination resulting in vacation is necessary. When involuntary, such determination is essential unless otherwise provided by law.[14]

2. Matters Creating Vacancy. It is well settled that a vacancy may occur by reason of the creation of a new judicial office which has never been filled,[15]

a judge elected holds for a fixed term only. Church *v.* Colgan, 117 Cal. 685, 50 Pac. 12.

7. People *v.* Boughton, 5 Colo. 487; State *v.* Albert, 55 Kan. 154, 40 Pac. 286; State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206. See *infra*, V, F, 2.

8. People *v.* Le Fevre, 21 Colo. 218, 40 Pac. 882; *In re* Election Judges, 11 Colo. 373, 18 Pac. 282; Smith *v.* Halfacre, 6 How. (Miss.) 582.

Filling office for interval between election and qualification.— When a new court is created and the governor has made a temporary appointment of a judge for the office, it is competent for the legislature to provide for filling the office for the interval between the day of the election and the qualification of the succeeding judge by authorizing the appointee to hold during said time. Brodie *v.* Campbell, 17 Cal. 11; People *v.* Burch, 84 Mich. 408, 47 N. W. 765.

9. State *v.* Emerson, 39 Mo. 80.

10. People *v.* Markham, 104 Cal. 232, 37 Pac. 918.

11. *California.*— People *v.* Wells, 2 Cal. 198, 610.

Indiana.— Stocking *v.* State, 7 Ind. 326.

Missouri.— State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415.

Tennessee.— State *v.* Maloney, 92 Tenn. 62, 20 S. W. 419.

Virginia.— *Ex p.* Meredith, 33 Gratt. 119, 36 Am. Rep. 771.

12. People *v.* Le Fevre, 21 Colo. 218, 40 Pac. 882.

13. Johnson *v.* Duden, 18 Cal. 696; Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778; People *v.* Lord, 9 Mich. 227; State *v.* Chase, 7 Ohio St. 372; State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

14. State *v.* McClinton, 5 Nev. 329.

15. *Arkansas.*— State *v.* Askew, 48 Ark. 82, 2 S. W. 349.

Colorado.— People *v.* Rucker, 5 Colo. 455.

Georgia.— Wellborn *v.* Estes, 70 Ga. 390.

Indiana.— See State *v.* Berghoff, 158 Ind. 349, 63 N. E. 717; Stocking *v.* State, 7 Ind. 326.

Iowa.— Allen *v.* Dunham, 1 Greene 89.

Michigan.— People *v.* Burch, 84 Mich. 408, 47 N. W. 765.

Missouri.— State *v.* Burkhead, 187 Mo. 14, 85 S. W. 901.

Oregon.— Cline *v.* Greenwood, 10 Oreg. 230.

Tennessee.— State *v.* Maloney, 92 Tenn. 62, 20 S. W. 419.

Wyoming.— *In re* Fourth Judicial Dist., 4 Wyo. 133, 32 Pac. 850.

See 29 Cent. Dig. tit. "Judges," § 33.

In Missouri it was held in State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415, that where the office of probate judge was created and the election of a judge to fill the office was postponed until the next general election there existed in the meantime a vacancy in the office which the governor could fill by appointment. But in State *v.* Emerson, 39 Mo. 80, the same court held that the creation of a new office did not cause a vacancy happening by "death, resignation, or removal from the circuit" as defined by the constitution.

In Mississippi the creation of a new judicial office does not create a vacancy within the meaning of the provision of the constitution authorizing the governor to fill by ap-

by the death,[16] abandonment of the office,[17] or resignation,[18] of the incumbent, and by the refusal or failure of the person elected to qualify.[19] A vacancy may also be caused by the removal of a judge from the political subdivision of which he was required to be a resident when elected or appointed,[20] or from the state,[21] or by failing to move into his county within a reasonable time where a change in the boundaries of the county has placed a judge's residence without the same,[22] or by accepting or continuing to hold some other office of profit or

pointment an office rendered vacant by the happening of some contingency. O'Leary *v.* Adler, 51 Miss. 28.

In Wisconsin, under the clause of the constitution declaring that "where a vacancy shall happen in the office of the judge of the supreme or circuit court," it shall be filled by appointment "until a successor is elected," it was held that where a new circuit was created, although there was a vacancy in the sense that the office was not occupied, still there was no vacancy within the sense of this clause, but the first judge must be elected, and could not legally be appointed. State *v.* Messmore, 14 Wis. 163.

16. *California.*—Church *v.* Colgin, 117 Cal. 685, 50 Pac. 12.

Colorado.—People *v.* Boughton, 5 Colo. 487.

Kansas.— McIntyre *v.* Iliff, 64 Kan. 747, 68 Pac. 633.

Maryland.— Magruder *v.* Swann, 25 Md. 173.

Michigan.— Kelley *v.* Edwards, 38 Mich. 210.

Missouri.— State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206.

New York.— People *v.* Shea, 7 Hun 303.

South Dakota.— *In re* Supreme Ct. Vacancy, 4 S. D. 532, 57 N. W. 495.

Tennessee.— Gold *v.* Fite, 2 Baxt. 237.

Where the person elected dies before qualifying there is no vacancy in the office, and the incumbent judge will hold over. State *v.* Dabbs, 182 Mo. 359, 81 S. W. 1148. See also People *v.* Lord, 9 Mich. 227.

17. Hampton *v.* Dilley, 3 Ida. 427, 31 Pac. 807.

What constitutes abandonment.— The acceptance by the incumbent of another office or position incompatible with that already held amounts to an abandonment or forfeiture of the first; but abandonment is largely a question of intention. Where the legislature changed Logan county to Lincoln county, and the probate judge of Logan county was appointed by the governor probate judge of Lincoln county and entered upon and accepted the new office, and thereafter the supreme court declared the law changing the counties unconstitutional it was held that said judge had not abandoned his original office, and was entitled thereto. Hampton *v.* Dilley, 3 Ida. 427, 31 Pac. 807. It has been decided in Missouri that a judge does not abandon his office by saying that he has abandoned the same, by neglecting to perform the duties of the office, nor by engaging in the practice of law in violation of a statute forbidding a judge to practice; but such breaches of duty may subject him to indictment and impeachment. State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206.

18. People *v.* Rosborough, 14 Cal. 180.

What constitutes resignation.— Where two officers are incompatible, the acceptance of one while holding the other is in effect a resignation of the first held. Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; Com. *v.* Hawkes, 123 Mass. 525.

Necessity for acceptance.— In California resignation does not depend upon acceptance by the appointing power to be effectual. People *v.* Porter, 6 Cal. 26. But at common law a resignation in order to be effective must be accepted by the proper authority, and the office is not vacant until the successor is appointed. And this is the rule in Kansas. State *v.* Clayton, 27 Kan. 442, 41 Am. Rep. 418. And in Texas an unaccepted resignation afterward withdrawn does not, so far as the rights of third persons are concerned, create a vancancy, although tendered unconditionally. McGbee *v.* Dickey, 4 Tex. Civ. App. 104, 23 S. W. 404 [*overruling* Byers *v.* Crisp, 2 Tex. App. Civ. Cas. § 707].

Withdrawal of resignation.— In Indiana to constitute a complete and operative resignation there must be an intention to relinquish a portion of the term of the office accompanied by the act of relinquishment. A prospective resignation may be withdrawn at any time before acceptance, and it may be withdrawn after acceptance by consent of the accepting authority where no new rights have intervened. Biddle *v.* Willard, 10 Ind. 62.

19. People *v.* Wilson, 72 N. C. 155; Gouhenour *v.* Anderson, 35 Tex. Civ. App. 569, 81 S. W. 104; State *v.* Goetze, 22 Wis. 363; State *v.* Washburn, 17 Wis. 658.

Failure to give bond.— Under the law of Alabama the failure of a judge of probate to give an additional bond when required by a majority of the grand jury of the county worked a forfeiture or vacancy of the office. Thompson *v.* Holt, 52 Ala. 491.

20. People *v.* Goodwin, 22 Mich. 496; Matter of Bolte, 97 N. Y. App. Div. 551, 90 N. Y. Suppl. 499.

21. The removal of a judge from the state with an intention never to return of itself creates a vacancy in the office. Bawden *v.* Stewart, 14 Kan. 355; Curry *v.* Stewart, 8 Bush (Ky.) 560; Prather *v.* Hart, 17 Nebr. 598, 24 N. W. 282.

Temporary absence of a judge from the state does not render the office vacant. People *v.* Welles, 2 Cal. 198, 610; Curry *v.* Stewart, 8 Bush (Ky.) 560.

22. State *v.* Choate, 11 Ohio 511; State *v.* Messmore, 14 Wis. 163.

trust,[23] or some incompatible office.[24] An office may also be vacated by force of a constitutional declaration,[25] or by act of the legislature under constitutional authority.[26] Other matters which will result in creating a vacancy are the removal of the incumbent from office, the decision of a competent tribunal declaring the office vacant, a failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified or other provision relating thereto, a forfeiture of the office as provided by law, and conviction of an infamous crime or of any public offense involving a violation of the oath of office.[27]

3. MATTERS NOT CREATING VACANCY. An office is not rendered vacant by reason of the institution of proceedings to contest the election of the incumbent,[28] or because the judge has been adjudged insane.[29] Nor will a vacancy result from an act of the legislature changing the number designating a judicial circuit without changing the territory comprising the circuit.[30] An act of the legislature fixing the number of judges of an already existing circuit will not be construed as meaning to remove the existing judges;[31] and a constitutional provision that the qualified voters of a state shall elect their own judges will not vacate the offices of judges in office at the date of the adoption of the constitution.[32] So the legislature cannot, by a declaratory enactment, make a vacancy in an office created by the constitution,[33] nor can it authorize the governor to declare such an office vacant.[34] Neither can a governor revoke an appointment of a chancellor, and, treating that revocation as creating a vacancy, fill the office by appointment of another person.[35]

4. FILLING VACANCY — a. Temporary Appointment or Election. Vacancies are

23. State *v.* Cobb, 2 Kan. 32; Hoglan *v.* Carpenter, 4 Bush (Ky.) 89.

Necessity of judicial proceeding to try forfeiture.— Under a constitutional provision that certain judges shall hold no other office of trust or profit under the state, the United States, or any other power, where such a judge entered the military service, and took an office in the armies of the Confederate states, and received the pay thereof, his office of judge was vacated, even without any judicial proceeding to try and determine the fact of forfeiture and vacancy. Chisholm *v.* Coleman, 43 Ala. 204, 94 Am. Dec. 677.

Acceptance of the office of supreme court judge by a member of congress vacates the seat in congress, but does not invalidate his right to the office of judge. Calloway *v.* Sturm, 1 Heisk. (Tenn.) 764.

24. Hampton *v.* Dilley, 3 Ida. 427, 31 Pac. 807; *Ex p.* Call, 2 Tex. App. 497.

What offices incompatible.— The office of special justice of the probate court and of members of the legislature are incompatible. Com. *v.* Hawkes, 123 Mass. 525. So also are the offices of trial justice and deputy sheriff. Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251. And judge of the municipal court and member of the legislature. Woodside *v.* Wagg, 71 Me. 207.

What offices not incompatible.— An attorney at law is not an officer, and his position is not incompatible with a judicial office. McCraw *v.* Williams, 33 Gratt. (Va.) 510; *In re* Bland, etc., County Judge, 33 Gratt. (Va.) 443. The offices of justice of the peace and associate judge of the common pleas are not incompatible. Com. *v.* Northumberland County, 4 Serg. & R. (Pa.) 275.

25. State *v.* McBride, 4 Mo. 303, 29 Am. Dec. 636; State *v.* McNally, 13 Utah 25, 43 Pac. 920.

26. Allen *v.* Dunham, 1 Greene (Iowa) 89.

Where the legislature has power to create a judicial office, it has as an incident thereto the power to abolish it. State *v.* Scott, 9 Ark. 270.

Legislative provisions supplementary to the constitution.— The fact that the constitution of a state provides that the happening of certain things shall create a vacancy does not prohibit the legislature from providing that vacancies may arise from other events. State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124.

27. State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124.

28. Gold *v.* Fite, 2 Baxt. (Tenn.) 237.

29. State *v.* McClinton, 5 Nev. 329.

30. State *v.* Draper, 50 Mo. 353.

31. *In re* Judges Ct. Appeals, 4 Call (Va.) 135.

32. State *v.* Scott, 9 Ark. 270.

33. Stocking *v.* State, 7 Ind. 326; State *v.* Towne, 21 La. Ann. 490. And see Hays *v.* Harley, 1 Mill (S. C.) 267.

The clause of the Wisconsin constitution giving the legislature power to declare cases in which any office shall be declared vacant confers no authority by direct act to declare a particular office of judge vacant. The legislature can only by general laws declare under what existing circumstances offices shall be deemed vacant, and it then becomes a judicial question whether those circumstances exist. State *v.* Messmore, 14 Wis. 163.

34. State *v.* Towne, 21 La. Ann. 490.

35. Brady *v.* Howe, 50 Miss. 607.

usually filled temporarily by appointment made by the governor,[36] unless election or some other mode is plainly indicated.[37] In some states the concurrence of the senate is required.[38] Vacancies in some judgeships in one state are filled by appointment by the county commissioners,[39] and in another by the circuit court commissioners.[40]

b. Vacancy Permanently Filled. In the absence of statutory provision to the contrary, the power to elect includes the lesser and necessary power to fill

36. *Alabama.*— Thompson *v.* Holt, 52 Ala. 491. The constitution of Alabama does not invest the governor with power to fill by appointment vacancies occurring in the office of judge of an inferior court. The authority to determine how such vacancy shall be filled is delegated to the legislature, and the latter has vested the power in the governor. State *v.* Sayre, 118 Ala. 1, 24 So. 89.

California.— People *v.* Rosborough, 14 Cal. 180; People *v.* Martin, 12 Cal. 409; People *v.* Porter, 6 Cal. 26.

Georgia.— Wellborn *v.* Estes, 70 Ga. 390.

Indiana.— State *v.* Berghoff, 158 Ind. 349, 63 N. E. 717; Stocking *v.* State, 7 Ind. 326; Case *v.* State, 5 Ind. 1.

Kansas.— McIntyre *v.* Iliff, 64 Kan. 747, 68 Pac. 633; State *v.* Albert, 55 Kan. 154, 40 Pac. 286.

Louisiana.— State *v.* Grandjean, 51 La Ann. 1099, 25 So. 940.

Minnesota.— Crowell *v.* Lambert, 9 Minn. 283.

Mississippi.— Sam *v.* State, 31 Miss. 480. The constitution of Mississippi gives the governor power to fill vacancies which occur during the last five days of the session of the legislature, but the authority is limited to the filling of vacancies which arise from contingencies, and does not include the appointment of a judge to fill a new office which has never had an incumbent. O'Leary *v.* Adler, 51 Miss. 28.

Missouri.— State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415.

Nebraska.— State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124.

New York.— People *v.* Dooley, 171 N. Y. 74, 63 N. E. 815; People *v.* Cowles, 13 N. Y. 350.

North Carolina.— People *v.* Wilson, 72 N. C. 155.

Oregon.— Cline *v.* Greenwood, 10 Oreg. 230.

Pennsylvania.— Com. *v.* Maxwell, 27 Pa. St. 444.

South Dakota.— *In re* Supreme Ct. Vacancy, 4 S. D. 532, 57 N. W. 495; State *v.* Gardner, 3 S. D. 553, 54 N. W. 606.

Tennessee.— Gold *v.* Fite, 2 Baxt. 237.

Wyoming.— *In re* Johnson County Com'rs, 4 Wyo. 133, 32 Pac. 850.

See 29 Cent. Dig. tit. "Judges," §§ 36, 37.

Under the constitution of Kentucky, if a vacancy occurs in the court of appeals, the governor is required to issue a writ of election to the proper district to fill such vacancy for the residue of the term, provided that if the unexpired term be less than one year the governor shall appoint a judge to fill the vacancy. *In re* Opinion of Judges, 79 Ky. 621.

37. State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415.

In Nebraska, when the unexpired term exceeds one year, the vacancy in all judicial offices except that of judge of the supreme court is filled by election at the next general election. Whether in case of such a vacancy the same can be filled by appointment provisionally is as yet undecided in that state. State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124.

38. State *v.* Claude, 35 La. Ann. 71.

Appointment during vacation of senate.— Judges and chancellors are appointed in Mississippi by the governor with the advice and consent of the senate. When the senate is in session and the term of a chancellor will expire before the next session of the senate the governor should nominate a person to fill the vacancy and send his name to the senate for their concurrence; and if he fails to do so he cannot make a valid appointment to fill such vacancy during the vacation of the senate. Christian *v.* Gibbs, 53 Miss. 314; Brady *v.* Howe, 50 Miss. 607.

In Colorado the legislature established a criminal court and provided that immediately after the act went into effect the judge thereof should be appointed by the governor with the advice and consent of the senate. The governor was unable to make the appointment until after the legislature adjourned. It was held that no vacancy existed in the new office until the governor had lost his right to make the appointment, which occurred when the legislature adjourned; and that thereupon a vacancy existed which under the constitution must be filled by the county commissioners of the county where the vacancy existed. People *v.* Rucker, 5 Colo. 455.

In New York the consent of the senate is required if in session. But if the sittings of the senate are terminated by a long adjournment, it is not in session within the meaning of the constitution, and the governor may make a temporary appointment to fill a vacancy without its advice or consent. People *v.* Fancher, 50 N. Y. 288.

39. People *v.* Rucker, 5 Colo. 455.

40. Under the constitution of Michigan a vacancy in the office of probate judge is filled by appointment by the governor. But it has been held by the supreme court of that state that the constitution thus makes provision for filling the office with some degree of permanency, but does not provide for such temporary emergencies as occur when a judge is

vacancies;[41] and it is customary to provide that upon the expiration of the term of the temporary appointee, the vacancy for the remainder of the unexpired term shall be filled by election by the people.[42] But in Rhode Island, in case of a vacancy in the office of judge of the supreme court, the same is filled by the grand committee consisting of both houses of the general assembly, until the next annual session for the election of officers, at which time the office is filled by election by the general assembly.[43]

c. Filling of Vacancies by Judges in Their Own Court. Judges of the supreme court have no power to appoint a judge to fill a vacancy occasioned by the absence during the term of one of the judges.[44] But where a member of the court is disqualified to hear certain cases, the remaining judges may call in a circuit judge to sit in determining these particular cases.[45]

5. Time of Filling Vacancy. When an official having the right to make an appointment is not by statute required to make it at any definite time, he may make it prior to the expiration of the existing term, provided he would be in office and would have the right to make it when the term actually expired. But when the statute expressly prescribes the time when the appointment shall be made, an appointment prior to that time would be invalid.[46] And a person cannot be elected to a judicial office which does not exist at the time of the election.[47] Nor can an election be held to fill an anticipated vacancy, unless expressly authorized by law.[48] A law which unnecessarily postpones the right to elect a judge would be unconstitutional. But a provision prescribing a reasonable time

sick or absent; nor does it cover the case of an appointment made temporarily upon the death, removal, or resignation of the incumbent. For such emergencies the legislature may make provision by authorizing the circuit court commissioner of the county to serve until an appointment can be made. Kelley *v.* Edwards, 38 Mich. 210. But a temporary vacancy in the office of recorder of the city of Detroit may be filled by the common council which is authorized by the city charter to designate a circuit judge to hold the recorder's court until such vacancy is permanently filled. People *v.* Witherell, 14 Mich. 48.

41. People *v.* Campbell, 2 Cal. 135.

Determining when vacancy exists.— In the absence of statute bestowing the power elsewhere, the power given to an officer to fill a vacancy implies the right to determine when a vacancy exists. State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206.

42. *California.*— People *v.* Rosborough, 14 Cal. 180.

Kansas.— McIntyre *v.* Iliff, 64 Kan. 747, 68 Pac. 633.

Kentucky.— Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36.

Nebraska.— State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124; State *v.* Thayer, 31 Nebr. 82, 47 N. W. 704.

New York.— People *v.* Goodrich, 180 N. Y. 522, 72 N. E. 1140 [*affirming* 92 N. Y. App. Div. 445, 87 N. Y. Suppl. 114]; People *v.* Cowles, 13 N. Y. 350.

Ohio.— State *v.* Barbee, 45 Ohio St. 347, 13 N. E. 731.

Pennsylvania.— Com. *v.* Maxwell, 27 Pa. St. 444.

South Dakota.— State *v.* Gardner, 3 S. D. 553, 54 N. W. 606.

Tennessee.— Calloway *v.* Sturm, 1 Heisk. 764; Barry *v.* Lauck, 5 Coldw. 588.

Washington.— State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

See 29 Cent. Dig. tit. "Judges," § 38.

Under the Kansas constitution where the vacancy occurs more than thirty days before a general election the vacancy is rightfully filled by election. Bawden *v.* Stewart, 14 Kan. 355. And see State *v.* Cobb, 2 Kan. 32.

Computation of time.— The constitution of New York provides that when a vacancy occurs "otherwise than by expiration of term in the office of justice of the supreme court, the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs." Under this provision it has been held that when a vacancy occurred on Aug. 3, 1896, it was proper to fill the same at the election taking place on Nov. 3, 1896, as the time intervening was "not less" than three months. People *v.* Goodrich, 92 N. Y. App. Div. 445, 87 N. Y. Suppl. 114 [*affirmed* in 180 N. Y. 522, 72 N. E. 1148].

43. *In re* Opinion of Governor, 23 R. I. 635, 51 Atl. 221.

44. *In re* Opinion of Chief Justice, 8 Fla. 466.

45. *In re* Circuit Ct. Judges, 4 Fla. 1.

46. People *v.* Fitzgerald, 96 N. Y. App. Div. 242, 89 N. Y. Suppl. 268 [*affirmed* in 180 N. Y. 269, 73 N. E. 55].

47. State *v.* Meares, 116 N. C. 582, 21 S. E. 973.

48. Where a judge gives notice that he will resign at a future day, but in the meantime does not relinquish the office, an election to fill the prospective vacancy is void, as there is no existing vacancy. Biddle *v.* Willard, 10 Ind. 62.

for deliberation in the choice of a successor in case of a vacancy in a judgeship is valid.[49]

6. Term of Appointee to Fill Vancancy. The term of a judge temporarily appointed to fill a vacancy under some provision expires upon the qualification of his successor elected at the next general election at which judges are regularly chosen,[50] under others at the next general election.[51] In one state it has been held that such term expires upon the occurrence of a special election ordered by the governor, and held for the purpose of electing a judge to fill the balance of the unexpired term.[52] And under some provisions the term expires upon the election of a successor at the next meeting of the general assembly.[53] So under some provisions the appointee holds until the end of the unexpired term of his predecessor, and until his successor is elected and has qualified.[54] In no case can the legislature authorize the governor to appoint a judge to fill a vacancy for a longer period than prescribed by the constitution.[55] And on the other hand where the term of the appointee is fixed by law, it is not within the power of the governor to limit the appointment to such time as he shall revoke or determine the commission.[56]

7. Term of Person Elected to Fill Vacancy. Where a vacancy in a judicial term has been filled by an election the incumbent so elected holds as a general rule for the balance of the unexpired term, or until the election and qualification thereafter of his successor.[57] In some states, however, the rule is that certain

49. Com. *v.* Maxwell, 27 Pa. St. 444.

50. *California.*— People *v.* Rosborough, 14 Cal. 180.

Kansas.— State *v.* Cobb, 2 Kan. 32.

Michigan.— People *v.* Palmer, 91 Mich. 283, 51 N. W. 999.

Missouri.— State *v.* Dabbs, 182 Mo. 359, 81 S. W. 1148.

Nebraska.— State *v.* Thayer, 31 Nebr. 82, 47 N. W. 704.

New York.— People *v.* Cowles, 13 N. Y. 350.

Tennessee.— Calloway *v.* Sturm, 1 Heisk. 764.

See 29 Cent. Dig. tit. "Judges," § 39.

"Next general election" construed.— In Kansas where a vacancy exists in the office of probate judge, the governor may fill the same by appointment "until the next regular election after the vacancy occurs, when such vacancy shall be filled by election." The words "next general election" as here used refer to the next general election at which probate judges are regularly chosen. McIntyre *v.* Iliff, 64 Kan. 747, 68 Pac. 633. A provision of the constitution authorizing the governor to fill a vacancy in an elective judicial office until the "next general election" should not be so construed as to permit the appointee to retain the office beyond the term for which his predecessor was elected. State *v.* Gardner, 3 S. D. 553, 54 N. W. 606.

Under the constitution of Washington, the term of an appointive judge is not fixed, except that it cannot extend beyond an election and the qualification of his successor, or to the end of the term. State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

Duration when no provision is made for election of successor.— Where a vacancy in the office of judge has been filled by appointment, and there is no law authorizing the election of a successor, the incumbent will hold the office until the legislature has provided by law for the election of his successor. State *v.* Gardner, 3 S. D. 553, 54 N. W. 606.

51. State *v.* Conrades, 45 Mo. 45; Ritchie *v.* Richards, 14 Utah 345, 47 Pac. 670.

52. Barry *v.* Lauck, 5 Coldw. (Tenn.) 588.

53. Wellborn *v.* Estes, 70 Ga. 390. And see People *v.* Mott, 3 Cal. 502; People *v.* Rucker, 5 Colo. 455.

54. *In re* Supreme Ct. Vacancy, 4 S. D. 532, 57 N. W. 495; State *v.* Washburn, 17 Wis. 658. In no case can the term of such appointee continue beyond the termination of the unexpired term of the former judge. People *v.* Potter, 47 N. Y. 375.

55. Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36.

Appointment under misapprehension as to statute governing.— Where an appointment is made to fill a vacancy and the executive, under a misapprehension as to which of two statutes, one void and the other valid, should be followed in making the appointment, the appointment will be considered as made under the valid statute, although the effect will be to continue the magistrate in office for a longer period than that stated in his commission. People *v.* Dooley, 171 N. Y. 74, 63 N. E. 815.

56. People *v.* Lord, 9 Mich. 227.

In Connecticut it has been held that if the appointing power limits the term to a period less than that prescribed by law, the appointment is void, and he does not become even a *de facto* officer. State *v.* Dow, 78 Conn. 53, 60 Atl. 1063.

57. *Arkansas.*— State *v.* Sorrells, 15 Ark. 664.

Indiana.— State *v.* Chapin, 110 Ind. 272, 11 N. E. 317.

Iowa.— Davis *v.* Best, 2 Iowa 96.

Michigan.— People *v.* Lord, 9 Mich. 227.

New York.— People *v.* Carr, 86 N. Y. 512,

judges so elected hold for the full term fixed by the constitutional or statutory provisions.[58]

8. SUSPENSION OF JUDICIAL ACTION BY VACANCY. Where a vacancy occurs in the office, no other judge can sit in his district, and all judicial action remains in abeyance until the vacancy is filled or another judge designated pursuant to law to exercise the judicial functions temporarily.[59]

G. Removal — 1. WHO ARE SUBJECT TO REMOVAL. Only officers who have been inducted into office are subject to removal. The provisions relating thereto do not refer to persons who have been elected or appointed, but who have not yet qualified.[60]

2. GROUNDS FOR REMOVAL. Usually the causes for which a judge may be removed from office are enumerated in the constitutions of the various states.[61] These provisions are subject to strict construction,[62] and there can be no removal except on the grounds therein enumerated.[63] The grounds usually enumerated are misconduct in office,[64] crimes and misdemeanors,[65] habitual drunkenness,[66] or incompetency.[67] It has been held, however, that a judge cannot be removed solely to

62 How. Pr. 51 [*affirming* 25 Hun 325, 62 How. Pr. 19 (*reversing* 62 How. Pr. 5)], surrogate.

Ohio.— State *v.* Taylor, 15 Ohio St. 137.

Oregon.— State *v.* Ware, 13 Oreg. 380, 10 Pac. 885.

South Carolina.— Simpson *v.* Willard, 14 S. C. 191, supreme court justice.

Texas.— Nicks *v.* Curl, (Civ. App. 1905) 86 S. W. 368.

58. *California.*— People *v.* Burbank, 12 Cal. 378.

Minnesota.— Crowell *v.* Lambert, 9 Minn. 283.

New York.— People *v.* Townsend, 102 N. Y. 430, 7 N. E. 360 [*reversing* 40 Hun 360]; People *v.* Goodrich, 180 N. Y. 522, 72 N. E. 1148 [*affirming* 92 N. Y. App. Div. 445, 87 N. Y. Suppl. 114].

South Carolina.— Smith *v.* McConnell, 44 S. C. 491, 22 S. E. 721; Whipper *v.* Reed, 9 S. C. 5, circuit or probate judges.

Virginia.— Jameson *v.* Hudson, 82 Va. 279 [*overruling* McCraw *v.* Williams, 33 Gratt. 510; *In re* Bland, etc., County Judge, 33 Gratt. 443]; Fitzpatrick *v.* Kirby, 81 Va. 467; Burks *v.* Hinton, 77 Va. 1 [*overruling Ex p.* Meredith, 33 Gratt. 119, 36 Am. Rep. 771]. The decisions of Neal *v.* Allen, 76 Va. 437, and Montague *v.* Massey, 76 Va. 307, which follow the decisions overruled, are overruled by implication, although not mentioned in the overruling decisions.

See 29 Cent. Dig. tit. "Judges," § 39.

59. U. S. *v.* Murphy, 82 Fed. 893, so holding in respect of a vacancy occurring in the office of United States district judge for a district coextensive with the state.

60. Flatan *v.* State, 56 Tex. 93.

61. See the constitutions of the respective states.

62. See McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

63. Falloon *v.* Clark, 61 Kan. 121, 58 Pac. 990; McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567; *In re* Judges Ct. App., 4 Call (Va.) 135.

64. State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361; Brodie *v.* Rutledge, 2 Bay (S. C.) 69.

Wilful neglect if duty while in office is ground for impeachment. State *v.* Tally, 102 Ala. 25, 15 So. 722.

Requiring excessive bail is ground for impeachment. Evans *v.* Foster, 1 N. H. 374.

Non-feasance or malfeasance in office is a ground for removal, although not shown to be corrupt. State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361.

Abandoning of office and practising law in violation of law is ground for removal. State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206.

Extortion or oppression in office is ground for removal. State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361.

Recommitting a person to prison for the same offense for which he had previously been imprisoned and discharged upon habeas corpus is a ground for impeachment. But an intentional violation of the statute forbidding such reimprisonment must be shown, and this can never be imputed to the judicial proceedings of a court. Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290 [*affirming* 5 Johns. 282].

Showing favoritism to one party or his attorney to the prejudice of another is ground for removal. Matter of Bolte, 97 N. Y. App. Div. 551, 90 N. Y. Suppl. 499.

Wilfully making an erroneous ruling or decision is ground for removal. Matter of Bolte, 97 N. Y. App. Div. 551, 90 N. Y. Suppl. 499.

Evidence of misconduct.— That there must be evidence tending to show that the judicial acts complained of were corrupt or inspired by an intention to violate the law or at least that there existed such a persistent and apparently intentional disregard of well known legal rules as to amount to judicial misconduct. Matter of Tighe, 97 N. Y. App. Div. 28, 89 N. Y. Suppl. 719.

65. State *v.* Tally, 102 Ala. 25, 15 So. 722; State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361.

66. State *v.* Robinson, 111 Ala. 482, 20 So. 30; State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361.

67. State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361.

reduce judicial expenses or because of a superfluity of judges,[68] nor for a mere error of judgment in applying legal principles to the cases to be decided.[69]

3. METHODS OF REMOVAL. The methods of removal are prescribed by law and none others than those prescribed are valid.[70] According as the provisions authorize, judges may be removed from office by impeachment,[71] by the courts for cause,[72] by address of the legislature,[73] by joint resolution of both houses of the legislature,[74] or by the governor upon the address of both houses of the legislature.[75] So it has been decided by the supreme court of the United States that the president has the power to remove a judge of the district court of Alaska before the expiration of his term of office, and that such judge was not a judge of a court of the United States within the meaning of that part of section 1768 of the Revised Statutes, now repealed, exempting judges of the courts of the United States from removal by the president.[76]

4. NATURE OF IMPEACHMENT PROCEEDINGS. Impeachment proceedings before courts are criminal in their nature and are governed by the rules of law applicable to criminal causes; and the court must be satisfied of defendant's guilt beyond a reasonable doubt.[77]

H. Forfeiture. Where the statute prescribes that on failing to take oath or file the official bond within the designated time the office shall *ipso facto* become vacant, compliance therewith is a condition precedent to induction into office and non-compliance forfeits all rights thereto.[78] And when a change in the boundaries of a county place the residence of a judge outside thereof, and he does not

68. McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

69. Matter of Bolte, 97 N. Y. App. Div. 551, 90 N. Y. Suppl. 499; Matter of Baker, 94 N. Y. App. Div. 278, 87 N. Y. Suppl. 1022.

70. Falloon *v.* Clark, 61 Kan. 121, 58 Pac. 990; State *v.* Towne, 21 La. Ann. 490 (holding that a judge cannot be removed from office by an act of the legislature); Brady *v.* Howe, 50 Miss. 607.

Applications of rule.— In Michigan, Mississippi, and Missouri a judge who has received his commission and has taken possession of his office cannot be ousted by the governor by the appointment of another person to the same office. People *v.* Lord, 9 Mich. 227; Brady *v.* Howe, 50 Miss. 607; State *v.* Draper, 48 Mo. 213; and in Pennsylvania it is held that where the constitution fixes the term of office of a judge the legislature cannot by a legislative act remove a judge who has been legally elected and commissioned, and appoint another to fill his place; nor can it remove him by abolishing his judicial district. Com. *v.* Gamble, 62 Pa. St. 343, 1 Am. Rep. 422.

71. *Alabama.*— State *v.* Lovejoy, 135 Ala. 64, 35 So. 156; State *v.* Robinson, 111 Ala. 482, 20 So. 30; State *v.* Tally, 102 Ala. 25, 15 So. 722.

Kansas.— Falloon *v.* Clark, 61 Kan. 121, 58 Pac. 990.

Louisiana.— State *v.* Towne, 21 La. Ann. 490.

Massachusetts.— Com. *v.* Harriman, 134 Mass. 314.

New Hampshire.— Evans *v.* Foster, 1 N. H. 374.

New York.— Yates *v.* Lansing, 5 Johns. 282 [*affirmed* in 9 Johns. 395, 6 Am. Dec. 290].

Rhode Island.— *In re* Opinion of Judges, (1902) 51 Atl. 221.

South Carolina.— Brodie *v.* Rutledge, 2 Bay 69.

See 29 Cent. Dig. tit. "Judges," § 44.

For fraud or corruption a justice of the peace can be questioned in New Jersey only by impeachment. Taylor *v.* Doremus, 16 N. J. L. 473.

In New York a judge cannot be challenged or excepted to for corruption, but may be punished by impeachment. McDowell *v.* Van Deusen, 12 Johns. 356.

72. Matter of Bolte, 97 N. Y. App. Div. 551, 90 N. Y. Suppl. 499; Matter of Tighe, 97 N. Y. App. Div. 28, 89 N. Y. Suppl. 719; Matter of Baker, 94 N. Y. App. Div. 278, 87 N. Y. Suppl. 1022; Flatan *v.* State, 56 Tex. 93. And see State *v.* Towne, 21 La. Ann. 490.

73. State *v.* Towne, 21 La. Ann. 490.

74. Fallon *v.* Clark, 61 Kan. 121, 58 Pac. 990; McCully *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

75. Com. *v.* Harriman, 134 Mass. 314, holding that this is the law under the constitution of Massachusetts, notwithstanding the judge is liable to trial by impeachment.

76. Wingard *v.* U. S., 141 U. S. 201, 11 S. Ct. 959, 35 L. ed. 719; McAllister *v.* U. S., 141 U. S. 174, 11 S. Ct. 949, 35 L. ed. 693 [*affirming* 22 Ct. Cl. 318].

77. State *v.* Lovejoy, 135 Ala. 64, 33 So. 1561; State *v.* Robinson, 111 Ala. 482, 20 So. 30; State *v.* Tally, 102 Ala. 25, 15 So. 722.

78. State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124. And see, generally, OFFICERS.

Effect of mistake.— Where a person elected to an office failed to take the constitutional oath of office within the time contemplated

within a reasonable time remove into his county, he thereby forfeits his office.[79] So under some provisions a judicial officer forfeits his office upon conviction of the commission of a felony and the right is not revived by the granting of a pardon.[80] On the other hand the fact that one occupying a position as judge yields to the legislative and executive construction of the constitution, giving his office to another until the question can be settled by the courts does not operate as an abandonment or forfeiture of his office.[81] So it has been held that a probate judge does not forfeit his office by failure to perform duties which are separate and distinct from his judicial duties.[82]

VI. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

A. In General.[83] A justice of the supreme court of the United States is entitled to personal protection while he is in discharge of his official duties.[84] Irrespective of any positive prohibition by statute or otherwise, a judge is exempt from arrest[85] and from the service of civil process[86] while necessarily going to, staying at, and returning from the court.[87] A judge cannot act as attorney or counsel in a case pending before him,[88] or before the court of which he is a member,[89] and in some states, usually by constitutional or statutory provision, further

by the statute because of a mistake on his part as to the proper official oath to be taken, but soon thereafter took and subscribed the proper oath and filed it in the proper office before the office had been declared vacant, or any other right or title had intervened, such failure did not of itself forfeit the office. Duffy *v.* State, 60 Nebr. 812, 84 N. W. 264.

Where a person presents his official bond for approval within the time fixed by law, and because of the failure of the approving body to meet or by reason of no action or any other right or title had accrued he would not thereby forfeit the office as this would not amount to a refusal to take the constitutional oath within the meaning of the word there used. Duffy *v.* State, 60 Nebr. 812, 84 N. W. 264.

79. State *v.* Choate, 11 Ohio 511; State *v.* Messmore, 14 Wis. 163.

Excusable delay under the circumstances mentioned in the text see State *v.* Messmore, 14 Wis. 163.

80. State *v.* Carson, 27 Ark. 469.

81. McCraw *v.* Williams, 33 Gratt. (Va.) 510; *In re* Bland, etc., County Judge, 33 Gratt. (Va.) 443.

82. State *v.* Brown, 35 Kan. 167, 10 Pac. 594.

83. **Judge as witness** see WITNESSES.

Right of judge to apply for writ of certiorari see CERTIORARI, 6 Cyc. 767 note 28, 768 note 29.

84. *In re* Neagle, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55 [*affirming* 39 Fed. 833, 5 L. R. A. 78], holding also that justices are in the discharge of their duties, within the rule of the text, not only while actually holding court, but also while traveling through their circuits for the purpose of holding court at the different places therein.

85. See ARREST, 3 Cyc. 918.

86. Lyell *v.* Goodwin, 14 Fed. Cas. No. 8,616, 4 McLean 29. See, however, *In re* Livingston, 8 Johns. (N. Y.) 351.

87. Lyell *v.* Goodwin, 14 Fed. Cas. No. 8,616, 4 McLean 29.

When at home, however, and not about setting out on his circuit, a judge may be served with summons in a civil action. Lyell *v.* Goodwin, 14 Fed. Cas. No. 8,617, 4 McLean 44.

88. Wright *v.* Boon, 2 Greene (Iowa) 458; Duverney *v.* Vinot, 11 Mart. (La.) 722; Hudson *v.* Grieve, 1 Mart. (La.) 143; Smith *v.* Lovell, 2 Mont. 332.

89. Gallagher *v.* Kern, 31 Mich. 138 (holding that the statute prohibiting any judge from practising or from having a partner who practises in the court of which he is a judge is peremptory, and applies to arbitration proceedings as well as to others); Bashford *v.* People, 24 Mich. 244 (holding that the statute which forbids a judge to appear in a criminal proceeding as the assistant of the district attorney after having called another judge to hold the court and preside at the trial is imperative, and its operation is not affected by the fact that such judge has sent in his resignation, to take effect five days thereafter, and that he intends to act no more officially).

Right to appear as attorney when interested.— Under 3 N. Y. Rev. St. (5th ed.) §§ 4, 9, prohibiting a justice of the supreme court from practising in it, except where he is interested in the subject-matter of the proceeding, a justice who is a judgment creditor of an insolvent corporation for which a receiver has been appointed may act in procuring directions to the receiver in selling the property of the corporation. Libby *v.* Rosekranz, 55 Barb. (N. Y.) 202.

Right to appear as attorney in another county or circuit.— Under Ill. Rev. St. c. 13, § 10, which declares that no judge of any court of record shall be permitted to practise as an attorney in the court in which he presides, a county judge is not necessarily disqualified from practising as an attorney in the county court of another county, even

restrictions are placed upon his right to practise law during his term of office.[90] The constitutions and statutes of the different states frequently provide that no

though he has presided in that court in particular cases at the request of the judge of such other county. O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923. The right of a circuit judge to practise in circuits other than his own was questioned in People *v.* Evans, 72 Mich. 367, 40 N. W. 473, and to settle the question a statute was enacted permitting such judges so to practise. Morton *v.* Detroit, etc., R. Co., 81 Mich. 423, 46 N. W. 111, holding that under Howell Annot. St. Mich. § 7247, as amended by Pub. Acts (1889), p. 210, providing that no judge can practise in the circuit of which he has been elected judge, a judge can practise in other circuits, although he may have presided as judge in the latter.

Right of deputy judge to appear as attorney.— Appearance of a deputy judge of the court as attorney in a case pending in the court, while not professional, is not ground for reversal, since, he being an attorney of the court, it had no power to prevent him from acting as attorney in the case. French *v.* Waterbury, 72 Conn. 435, 44 Atl. 740.

90. In **Arkansas,** Const. art. 7, § 25, prohibiting a judge of the circuit court from appearing as counsel during his term of office, applies to one who, before he was elected judge, accepted a fee in a case and contracted to conduct it. Wood *v.* Keith, 60 Ark. 425, 30 S. W. 756.

In **Florida,** where an attorney becomes a judge of a circuit court, his right to practise in any of the courts of the state, including the supreme court, becomes suspended and continues so while he occupies the official position, except where he is *in propria persona* a party in the cause, and then his appearance should be to represent his individual interest exclusively. Perry *v.* Bush, 46 Fla. 242, 35 So. 225.

In **Georgia,** when a case has been tried before a mayor and appealed to the council, it is improper for the mayor to appear in the attitude of counsel for the municipality. Holliman *v.* Hawkinsville, 109 Ga. 107, 34 S. E. 214. So the ordinary of a county having jurisdiction of an administration is incompetent as an attorney to bring suit on the bond of the administrator (Smith *v.* Andrews, 70 Ga. 708); and since he may be called on to construe wills, an opinion as to one is upon "a matter connected with his court," and the statute prohibits him or his partner from acting as counsel in such a case (Massey *v.* Calhoun, 26 Ga. 127).

In **Illinois,** under Rev. St. c. 13, § 10, which declares that no "judge of any court of record, shall be permitted to practice as an attorney or counsellor at law in the court in which he presides," a probate judge cannot act as counsel in a suit in the circuit court to set aside a will which has been probated before him. Evans *v.* Funk, 151 Ill. 650, 38 N. E. 230 [*affirming* 38 Ill. App. 441]. However, the constitutional provision that "from and after the adoption of this constitution, no judge of the Supreme or circuit court shall receive any other compensation, perquisite or benefit, in any form whatsoever, nor perform any other than judicial duties to which may belong any emoluments" (Const. (1870) art. 6, § 16; 1 Starr & C. Annot. St. p. 133), does not prohibit a judge of the supreme court from rendering services as an attorney in the federal courts under a private contract for compensation. Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435.

In **New York** it was formerly held that a circuit judge could not appear as counsel in the court of errors (Seymour *v.* Ellison, 2 Cow. 13) or the supreme court (Hobby *v.* Smith, 1 Cow. 588); and now, since Const. art. 6, § 20, forbidding a surrogate to practise as an attorney in any court of record, *ipso facto* suspends him from practice on his election, an order of the supreme court suspending him generally from practice is superfluous (Matter of Silkman, 88 N. Y. App. Div. 102, 84 N. Y. Suppl. 1025). However, the fact that plaintiff's former counsel, who had been appointed judge, appeared as a witness in an inquisition and assessment of damages was not ground for setting aside the assessment, since it was not a participation in the trial forbidden by the statutory prohibition against such magistrate's practising law. Beecher *v.* Long Island R. Co., 53 N. Y. App. Div. 324, 65 N. Y. Suppl. 642.

In **Ohio,** Rev. St. § 562, providing that "no person shall practice as an attorney and counselor at law in any court . . . who holds a commission as judge of any court of record," does not apply to one who has received a commission to act as judge for the term for which he was elected but whose term of office has not yet begun. State *v.* Hidy, 61 Ohio St. 549, 56 N. E. 469.

In **Pennsylvania** the word "attorney," as used in Act May 25, 1887 (Pamphl. Laws 271), which requires the declaration or statement of a claim to be filed by plaintiff or his "attorney," means attorney at law and not attorney in fact. But an attorney's right to practise does not cease on his mere appointment to a judicial office, but only when he actually assumes the office and subscribes to the oath, so that he may, before the latter time, properly sign a client's statement of claim under said act, and file the statement thereafter. Kelly *v.* Herb, 147 Pa. St. 563, 23 Atl. 889.

In **Wisconsin,** Rev. St. (1898) § 2582, prohibits a judge of a circuit court from acting as attorney in any matter which he has reason to believe will be brought before any of the courts of the state, but prohibits county judges only from giving advice to litigants in any matter pending before them, or which may be brought before them for decision, etc. Section 2452 declares that county judges shall not be retained as attorney or counsel in any matter which may

judge shall hold any other office during his incumbency;[91] but in the absence of such a prohibition a judge may hold another office.[92] A judge of probate cannot sue for the correction or prevention of public abuse committed or threatened by other officers or individuals;[93] but he may sue on the bond of his predecessor, who has failed to account for moneys in his hands officially.[94]

B. Compensation[95]— **1. In General.** In the United States the right of judges to receive compensation for their services is fixed by constitutional provision of statutory enactment, and the compensation may consist of a salary or the fees or the office.[96] A statute prescribing and regulating the salaries or fees of judges may operate as well on the judges in office at the time of its passage as on those

depend on or relate to any judgment made by them, and shall not act as attorney or counsel for any executor, administrator, etc. It was held that such sections do not prohibit a county judge who was an attorney at law from being appointed to assist the district attorney in the prosecution of a person charged with homicide. Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

91. See the constitutions and statutes of the different states.

Who are "judges" within the prohibition. — N. Y. Const. art. 6, § 21, prohibiting "judicial officers," except justices of the peace, from receiving to their own use any fees or perquisites of office, while it prohibits a judge of the court of appeals from acting as a referee, does not so prohibit a commissioner of appeals, since the latter is not a member of the court of appeals. Settle *v.* Van Evrea, 49 N. Y. 280. A city recorder is not such a judge as is prohibited by the constitution from holding at the same time an office of trust or profit under the United States. Respublica *v.* Dallas, 3 Yeates (Pa.) 300; Com. *v.* Dallas, 4 Dall. (Pa.) 229, 1 L. ed. 812.

What is "another office" within the prohibition.— A judge cannot hold that office and also accept the office of member of the legislature (Com. *v.* Hawkes, 123 Mass. 525; State *v.* Draper, 45 Mo. 355), notary public (Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222), postmaster (Hoglan *v.* Carpenter, 4 Bush (Ky.) 89), recorder (Com. *v.* Conyngham, 65 Pa. St. 76, 3 Brewst. 214), or referee (Countryman *v.* Norton, 21 Hun (N. Y.) 17, holding also that the fact that the trial of an action upon a claim against an estate had been commenced before the person acting as referee was appointed a justice of the supreme court, and that he made no charge for his services did not relieve him from the prohibition). However, the appointment of a judge of the supreme court as a "deputy recruiting commissioner" or his election to the colonelcy of a regiment of volunteers is not within the constitutional inhibition, neither of those offices being known to the law. State *v.* Cobb, 2 Kan. 32. And where a statute provided for the appropriation to purchase certain relics to be paid only upon the certificate of three persons named therein, an appointment upon such committee was not an "office or public trust" within N. Y. Const. art. 6, § 10, providing that a judge of the court of appeals should not hold any other office or public trust. People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734. So the offices of justice of the peace and judge of the common pleas are not incompatible. Com. *v.* Northumberland County, 4 Serg. & R. (Pa.) 275.

Adding to jurisdiction or duties of judges.— Statutes conferring on judges already in office additional jurisdiction or imposing additional duties on them are not in violation of a constitutional provision that they shall hold no other office. Brien *v.* Com., 5 Metc. (Mass.) 508; Matter of Beekman, 11 Abb. Pr. (N. Y.) 164, 19 How. Pr. 518; Daily Register Printing, etc., Co. *v.* New York, 3 N. Y. Suppl. 669 [*affirmed* in 52 Hun 542, 6 N. Y. Suppl. 10]; Striker *v.* Kelly, 2 Den. (N. Y.) 323 [*affirming* 7 Hill 9]; Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; State *v.* Judges First Judicial Dist. Ct. of C. Pl., 21 Ohio St. 1.

If the term of the other office does not begin till after expiration of the office of judge, a judge may, while such, be lawfully elected to the other office. Smith *v.* Moore, 90 Ind. 294.

If a judge accepts another office, he thereby elects, in Missouri, to vacate the office of judge. State *v.* Draper, 45 Mo. 355.

The removal or resignation of a judge from the office does not in Kansas render him eligible to another office. He cannot accept another office till the prescribed term of his judgeship expires. State *v.* Cobb, 2 Kan. 32.

The constitutional prohibition cannot be waived by stipulation of the parties. Countryman *v.* Norton, 21 Hun (N. Y.) 17.

92. *In re* Grand Jury, R. M. Charlt. (Ga.) 149, holding that justices of the inferior court may hold legislative and military offices at the same time; and if the time for performing the duties of the several offices happens at the same time they may elect which to perform.

93. Hays *v.* Ahlrichs, 115 Ala. 239, 22 So. 465.

94. People *v.* Faulkner, 31 Hun (N. Y.) 317.

Suit on administration bond see Executors and Administrators, 18 Cyc. 1278.

95. Interest in compensation or fees as disqualifying judge to hear cause see *infra*, VII, B, 5.

96. See the constitutions and statutes of the several states and the United States, and the following cases:

Alabama.— Benford *v.* Gibson, 15 Ala. 521.

subsequently elected or appointed.[97] If a judge draws his salary while indebted to the county on account of a failure to collect in advance and turn over to the county fees connected with the office as required by statute, an action will lie against him to recover the salary so received.[98]

2. RIGHT AS DEPENDENT ON EXISTENCE OF OFFICE. The right to receive compensation depends primarily upon the existence of the office, and if the court is legally abolished the right to receive compensation as judge thereof thereupon ceases;[99] but if, upon the adoption of a new constitution, a judge is continued in office beyond the expiration of the term for which he was elected pending the

California.— Meyers *v.* Kenfield, 62 Cal. 512.

Idaho.— Hart *v.* Boise County, 2 Ida. (Hasb.) 376, 16 Pac. 552.

Illinois.— Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435; People *v.* Auditor, 64 Ill. 82.

Indiana.— Coburn *v.* Dodd, 14 Ind. 347.

Maryland.— Bradford *v.* Jones, 1 Md. 351.

Michigan.— Chapman *v.* Berrien County, 50 Mich. 311, 15 N. W. 489; People *v.* Manistee County, 40 Mich. 585; People *v.* Auditor-Gen., 5 Mich. 193.

Minnesota.— Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778.

Missouri.— Edwards *v.* Newton County, 73 Mo. 636.

Nebraska.— State *v.* Ream, 16 Nebr. 681, 21 N. W. 398.

Nevada.— State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

New York.—Spring *v.* Wait, 22 Hun 441; Healey *v.* Dudley, 5 Lans. 115; People *v.* Edmonds, 15 Barb. 529.

North Carolina.— Henry *v.* State, 68 N. C. 465.

Ohio.— State *v.* Judges First Judicial Dist. Ct. of C. Pl., 21 Ohio St. 1.

Pennsylvania.— Com. *v.* Mathues, 210 Pa. St. 372, 59 Atl. 961; Com. *v.* Niles, 2 Lanc. L. Rev. 187; *In re* Lancaster Mayor's Ct., 1 Hall Am. L. J. 501.

Tennessee.— Pickard *v.* Henderson, 15 Lea 430.

Texas.— Chambers *v.* Fisk, 22 Tex. 504.

Virginia.— Foster *v.* Jones, 79 Va. 642, 52 Am. Rep. 637; Foster *v.* King County, etc., 79 Va. 633; Sharpe *v.* Robertson, 5 Gratt. 518.

United States.— U. S. *v.* Fisher, 109 U. S. 143, 3 S. Ct. 154, 27 L. ed. 885.

See 29 Cent. Dig. tit. "Judges," §§ 75, 76.

Fees and commissions see *infra*, VI, B, 16.

Statutes held constitutional see Bradford *v.* Jones, 1 Md. 351; State *v.* Ream, 16 Nebr. 681, 21 N. W. 398 (holding that as a statute which regulated the fees of county judges, etc., was not primarily to raise revenue, but to fix a limit to the amount of compensation to be received by such officers, it did not contravene Nebr. Const. art. 9, § 1, requiring that the legislature shall provide revenue by levying a tax by valuation, etc.); State *v.* Atherton, 19 Nev. 332, 10 Pac. 901 (holding that a statute providing that the district judges' salaries should be paid quarterly out of the county treasuries into the state treasury, and by the state treasurer paid to the judges in monthly instalments, did not contravene a constitutional provision (Nev. Const. art. 6, § 15) that district judges should be paid out of the county treasuries of the counties composing their districts); People *v.* Edmonds, 15 Barb. (N. Y.) 529; State *v.* Judges First Judicial Dist. Ct. of C. Pl., 21 Ohio St. 1; Pickard *v.* Henderson, 15 Lea (Tenn.) 430 (holding that a statute providing that when a special judge holds court he shall receive no compensation, unless the regular judge shall order it paid out of his salary, is not unconstitutional as diminishing the salary of the regular judge during his term); Sharpe *v.* Robertson, 5 Gratt. (Va.) 518 (holding that a *per diem* compensation to the judges holding a special court of appeals did not violate the constitutional provision that the judges of the supreme court of appeals and of the superior courts should receive "fixed and adequate salaries").

Statutes held unconstitutional see Lamb *v.* Rawles, 10 Ind. 565; Cowdin *v.* Huff, 10 Ind. 83 (both holding that a statute fixing the salaries of certain judges and basing them partly upon population, partly upon territory, and partly upon population and territory combined, was in violation of a constitutional requirement that the salaries should be uniform throughout the state); People *v.* Auditor-Gen., 5 Mich. 193; Healey *v.* Dudley, 5 Lans. (N. Y.) 115 (holding that a statute conferring on the supervisors of a county power to fix salaries of county judges was in violation of N. Y. Const. art. 6, § 15, which provides that the salaries of county judges shall be established by law, and thereby restricts the power of fixing such salaries to the legislature, and that such power was not that of local legislation, within article 3, section 17, providing that the legislature may confer on the supervisors of the counties of the state such further powers of local legislation as they shall from time to time prescribe).

Statutes repealed see Hart *v.* Boise County, 2 Ida. (Hasb.) 376, 16 Pac. 552; U. S. *v.* Fisher, 109 U. S. 143, 3 S. Ct. 154, 27 L. ed. 885.

97. Benford *v.* Gibson, 15 Ala. 521.

98. Schumacher *v.* Pima County, 7 Ariz. 269, 64 Pac. 490.

99. Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698; State *v.* King, 104 Tenn. 156, 57 S. W. 150; *In re* Judges' Cases, 102 Tenn. 509, 53 S. W. 134; State *v.* Gaines, 2 Lea (Tenn.) 316; State *v.* Campbell, 3 Tenn. Cas. 355.

inauguration of a new judicial system, his salary will continue as formerly during the entire time that he performs the duties of the office.[1]

3. Forfeiture and Waiver.[2] A judge may forfeit his right to salary by neglecting to claim it for an unreasonable length of time after the services are rendered.[3] And if he voluntarily surrenders his office to another claiming title thereto under color of right and suffers such other person to discharge the duties and receive the salary of the office so as to become a judge *de facto*, he thereby forfeits his right to such salary.[4] A judge may also forfeit his salary by accepting another office, if by such acceptance he vacates the office of judge.[5] But a judge does not waive his right to the full amount of the salary to which he is entitled by merely accepting without protest a less amount.[6] It has been held that where a county judge has the right on appeal of probate matters to the district court to the prepayment of his fees, he may waive the right by establishing a regular method of collection in a different manner.[7]

4. When Payable. Ordinarily the salary of a judge is not payable until he has been elected or appointed and received his commission, and has qualified.[8] Sometimes judges are prohibited from drawing their salaries so long as cases that have been submitted to them for decision for ninety days remain undecided.[9]

5. De Facto and De Jure Judges. If the incumbent is in possession of the office under a certificate of election issued by the proper authority he is entitled to receive the compensation incident to the office, although his right to the office is being contested.[10] And the payment of the salary to a *de facto* judge is a defense to an action brought against the state by a judge *de jure* to recover the same salary.[11]

6. Effect of Suspension. When a judge has been lawfully suspended from office he is not entitled to the compensation incident to the office during the period of his suspension.[12]

7. From What Fund Payable. Whether the salary of a judge is payable out of the treasury of the state, the county, or the city depends generally upon whether he is a state, county, or city officer.[13] But sometimes the salaries of

1. Bradford *v.* Jones, 1 Md. 351; Edwards *v.* Newton County, 73 Mo. 636.

2. Right to compensation as dependent on performance of duties see *infra*, VI, B, 10.

3. Cowenhoven *v.* Middlesex County, 43 N. J. L. 117; People *v.* McClellan, 102 N. Y. App. Div. 21, 92 N. Y. Suppl. 105.

4. State *v.* Hastings, 10 Wis. 525.

5. State *v.* Draper, 45 Mo. 355.

6. Butler County *v.* James, 116 Ky. 575, 76 S. W. 402, 25 Ky. L. Rep. 801; Neal *v.* Allen, 76 Va. 437; Montague *v.* Massey, 76 Va. 307. See, however, Thomas *v.* St. Clair, County Sup'rs, 45 Mich. 479, 8 N. W. 45 (holding that where a board of supervisors has fixed the salary of a probate judge and the same has been accepted without protest, such acceptance is an implied assent to the salary as fixed); People *v.* Manistee County, 40 Mich. 585 (holding that where the power of a board of supervisors to fix the salary of a probate judge is questionable, a judge may accept the salary fixed by the board, and having gone into office on such terms and no other compensation having been provided by law, both parties may be deemed to have bound themselves; but that no such inference can arise when a change is made decreasing the salary after a judge has been elected).

7. Drexel *v.* Reed, 65 Nebr. 231, 91 N. W. 254, (1903) 95 N. W. 873.

8. Coburn *v.* Dodd, 14 Ind. 347; Jump *v.* Spence, 28 Md. 1. The constitution of Illinois of 1870 making the salary of certain judges begin at the adjournment of the first session of the legislature after the adoption of the constitution means the final adjournment of the regular session and not of a special or adjourned session. People *v.* Auditor Public Accounts, 64 Ill. 82. A district judge inducted into office with a commission from the governor showing him to be entitled to the office from a certain date is entitled to the salary from that date. Turner *v.* Melony, 13 Cal. 621.

9. Meyers *v.* Kenfield, 62 Cal. 512.

10. Henderson *v.* Glynn, 2 Colo. App. 303, 30 Pac. 265.

11. Henderson *v.* Glynn, 2 Colo. App. 303, 30 Pac. 265.

Constitutionality of statute — An act of the legislature attempting to authorize the city of New York to pay a *de jure* judge for services not performed by him, but which the *de facto* judge performed and received pay for, is unconstitutional and void. Stemmler *v.* New York, 179 N. Y. 473, 72 N. E. 581.

12. Howard *v.* U. S., 22 Ct. Cl. 305.

13. *Indiana.*— Coburn *v.* Dodd, 14 Ind. 347.

Nevada.— State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

certain judges are paid partly out of the state treasury and partly out of the funds of the counties in which they preside.[14] In some states county judges can be paid only out of fees actually collected.[15]

8. Appropriations. Where the salaries of judges are paid by the state, an appropriation by the legislature of the necessary funds is usually required before the salaries can be drawn.[16]

9. Amount. As a rule the authority to fix the amount of compensation to be paid judicial officers is vested by constitution in the legislature,[17] and congress and the legislatures of the different states have enacted laws determining what such compensation shall be.[18] Occasionally the constitution itself fixes the amount,[19] or establishes a limit beyond which compensation cannot be allowed.[20] The authority to fix the compensation of judges who are county or city officers is usually vested in the county or city.[21]

10. Right as Dependent on Performance of Duties. Where the law provides that a judge shall receive a fixed compensation, his right thereto is not dependent upon the manner in which he discharges his official duties; the compensation is an incident to the office and is not measured by the services he performs.[22] In some states, however, the legislature has authorized a deduction from the salary

North Carolina.— Shepherd *v.* Wake, 90 N. C. 115.

Tennessee.— Colbert *v.* Bond, 110 Tenn. 370, 75 S. W. 1061; Shelby County *v.* Six Judges, 3 Tenn. Cas. 508.

Virginia.— Holladay *v.* Auditor, 77 Va. 425.

See 29 Cent. Dig. tit. "Judges," § 75 *et seq.*

14. People *v.* Lippincott, 63 Ill. 504; Hamilton *v.* St. Louis County Ct., 15 Mo. 3.

15. *In re* County Judges, 18 Colo. 272, 32 Pac. 549.

16. Myers *v.* English, 9 Cal. 341; Chancellor's Case, 1 Bland (Md.) 595.

In Montana the constitution makes the appropriation, and this takes precedence over appropriations made by the legislature. State *v.* Hickman, 10 Mont. 497, 26 Pac. 386.

In Nebraska, if an appropriation in gross for a number of judges is deficient in amount, the fund will be divided *pro rata* among such judges. *In re* Groff, 21 Nebr. 647, 38 N. W. 426, 59 Am. Rep. 859.

17. See the constitutions of the different states. And see People *v.* Manistee County, 49 Mich. 585 (holding that a board of supervisors has no power to change the salary of a probate judge until directed to do so by the legislature, he being a state officer); Finley *v.* Territory, 12 Okla. 621, 73 Pac. 273; Com. *v.* Mathues, 210 Pa. St. 372, 59 Atl. 961; Colbert *v.* Bond, 110 Tenn. 370, 75 S. W. 1061; Shelby County *v.* Six Judges, 3 Tenn. Cas. 508.

18. See the statutes of the different states. And see Bradford *v.* Jones, 1 Md. 351; State *v.* St. Louis County Ct., 34 Mo. 530; State *v.* St. Louis County Ct., 20 Mo. 499; State *v.* Rogers, 10 Nev. 319; Lucas County *v.* Millard, 40 Ohio S. & C. Pl. Dec. 419, 4 Ohio N. P. 53; State *v.* State Treasurer, 68 S. C. 411, 47 S. E. 683; Crozier *v.* State, 2 Sneed (Tenn.) 410; State *v.* Cook, 57 Tex. 205 (holding that where a statute provides that a certain judge shall receive the same salary as the judges of another court, a reduction of the salaries of the latter will reduce the salary of the former also); U. S. *v.* Fisher, 109 U. S. 143, 3 S. Ct. 154, 27 L. ed. 885.

Uniformity of salaries.— Salaries of judges of the same court discharging the same duty must be uniform. Com. *v.* Mathues, 210 Pa. St. 372, 59 Atl. 961 [*affirming* 13 Pa. Dist. 231, 29 Pa. Co. Ct. 545]; Bennett *v.* State, 16 S. D. 417, 93 N. W. 643. However, a statute fixing the salaries of judges at one amount generally with a proviso that a larger salary shall be paid in counties having cities of a given population has been upheld, such a statute being of general and uniform operation. State *v.* Reitz, 62 Ind. 159 [*overruling* State *v.* Byrne, 11 Ind. 547; Cowdin *v.* Huff, 10 Ind. 83]; Lamb *v.* Rawles, 10 Ind. 565].

19. Hall *v.* Hamilton, 74 Ill. 437; People *v.* Lippincott, 63 Ill. 504; Adsit *v.* Smith, 129 Mich. 4, 88 N. W. 65; People *v.* Manistee County, 40 Mich. 585; People *v.* Auditor-Gen., 5 Mich. 193; Bennett *v.* State, 16 S. D. 417, 93 N. W. 643.

20. Ada County *v.* Ryals, 4 Ida. 365, 39 Pac. 556.

21. *California.*— People *v.* Johnson, 17 Cal. 305.

Georgia.— Anderson *v.* Pogue, 62 Ga. 176.

Indiana.— Vigo County *v.* Davis, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515.

Kentucky.— Daniel *v.* Bullitt County, 115 Ky. 741, 74 S. W. 1057, 25 Ky. L. Rep. 159; Newport *v.* Berry, 80 Ky. 354, 4 Ky. L. Rep. 185.

New York.— People *v.* McClellan, 102 N. Y. App. Div. 21, 92 N. Y. Suppl. 105; People *v.* Albany County, 12 Wend. 257.

Texas.— Johnson *v.* Hanscom, 90 Tex. 321, 38 S. W. 761.

See 29 Cent. Dig. tit. "Judges," § 80.

See, however, Hamilton *v.* St. Louis County Ct., 15 Mo. 3.

22. Brizzolari *v.* Crawford, 38 Ark. 218 (special judge); Miami County *v.* Collins, 47

of judges during the period for which they are elected for neglecting the duties of their office.[23]

11. EXTRA COMPENSATION. While extra duties may with some exceptions[24] be imposed upon judges by law without providing additional compensation therefor,[25] there is no good reason why in addition to the fixed salary provided by law the legislature may not in its discretion annex a compensation to a special judicial service when from its temporary or occasional nature or other circumstances it would be impolitic to increase the permanent salary.[26] Provisions of this character are found in the acts of congress[27] and in the statutes of many of the states.[28] It has been held that the right of a judge to extra compensation cannot be determined in a proceeding to test his right to the office brought by a claimant who has no interest in the extra compensation.[29]

12. CHANGE IN AMOUNT DURING TERM OF OFFICE. In the absence of a constitu-

Kan. 417, 28 Pac. 175; Goetting *v.* New York, 29 Misc. (N. Y.) 717, 61 N. Y. Suppl. 334.

Right to receive fees where services have not been performed see *infra*, VI, B, 16.

23. White *v.* State, 123 Ala. 577, 26 So. 343 (holding that a neglect of official duty such as will authorize the reduction of a judge's salary must be not only a failure by carelessness or design to perform the required service, but there must be a physical and mental capacity in the judge; that if this capacity is affected by serious illness in the judge's family or other providential conditions over which he has no control, he is not guilty of neglect of duty within the meaning of the constitution); Perkins *v.* Auditor, 79 Ky. 306; Auditor *v.* Cochran, 9 Bush (Ky.) 7; Auditor *v.* Adams, 13 B. Mon. (Ky.) 150. See, however, Garrard *v.* Nuttall, 2 Metc. (Ky.) 106, holding that the state treasurer is not empowered to determine whether there has been a neglect of duty on the part of a judge, and must pay a warrant issued by the auditor on account of such salary.

Effect of statute as diminishing salary see *infra*, VI, B, 12.

24. State *v.* Chase, 5 Harr. & J. (Md.) 297 (holding that if the extra services are not judicial, a judge is under no legal obligation to perform them); *Ex p.* Lancaster Mayor's Ct., 4 Pa. L. J. Rep. 315 (holding that a constitutional provision that adequate compensation shall be provided for all services required of its judges is violated by an act of the legislature abolishing certain courts and adding their business to that of the courts of common pleas without providing any extra compensation to the judges of the latter courts); *In re* Judges Ct. App., 4 Call. (Va.) 135 (holding that the judges of the court of appeals could not be required to act as judges of the district courts, unless the legislature in increasing their duties also increased their compensation).

25. Ada County *v.* Ryals, 4 Ida. 365, 39 Pac. 556 (holding that, although the statutes provide that a probate judge may appoint a clerk of the probate court or may act as his own clerk, and he is also made *ex officio* superintendent of public instruction, yet where the constitution limits the compensation of the probate judge to two thousand dollars per annum, he can retain from fees and commissions only two thousand dollars per annum even when he acts as judge, clerk, and superintendent of instruction); State *v.* Chase, 5 Harr. & J. (Md.) 297; Nuckolls County *v.* Peebler, 65 Nebr. 356, 91 N. W. 289; Pawnee County *v.* Belding, 1 Nebr. (Unoff.) 533, 95 N. W. 776; Sharpe *v.* Robertson, 5 Gratt. (Va.) 518.

26. Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941; Sharpe *v.* Robertson, 5 Gratt. (Va.) 518. See, however, Hall *v.* Hamilton, 74 Ill. 437 (holding that where the constitution fixes the salaries of circuit judges at a definite sum and declares that the same shall not be increased or diminished during their term of office, the legislature cannot allow additional compensation to such judges for holding court outside of their circuits); People *v.* Auditor-Gen. 5 Mich. 193; Newport News *v.* Brown, 102 Va. 107, 45 S. E. 806.

27. Benedict *v.* U. S., 34 Ct. Cl. 388 [*affirmed* in 176 U. S. 357, 20 S. Ct. 458, 44 L. ed. 503].

28. *Illinois.*— People *v.* Lippincott, 67 Ill. 333.

Kansas.— Randall *v.* Butler County, 65 Kan. 20, 68 Pac. 1083; Miami County *v.* Collins, 47 Kan. 417, 28 Pac. 175. *Contra*, Dolman *v.* Shawnee County, 9 Kan. App. 344, 61 Pac. 312.

Michigan.— Adsit *v.* Smith, 129 Mich. 4, 88 N. W. 65.

Montana.— Ming *v.* Truett, 1 Mont. 322.

Nebraska.— Cornell *v.* Irvine, 56 Nebr. 657, 77 N. W. 114.

New Jersey.— See, however, Skinner *v.* Bogart, 42 N. J. L. 407; Anderson *v.* Hill, 42 N. J. L. 351; State *v.* Middlesex County, 41 N. J. L. 232.

North Carolina.— Shepherd *v.* Wake, 90 N. C. 115.

Tennessee.— State *v.* McKee, 8 Lea 24.

Texas.— Farmer *v.* Shaw, (Civ. App. 1900) 54 S. W. 772 [*affirmed* in 93 Tex. 438, 55 S. W. 1115].

See 29 Cent. Dig. tit. "Judges," § 81.

See, however, Garfield County *v.* Beardsley, 18 Colo. App. 55, 70 Pac. 155; Gilmore *v.* Dodge, 58 N. H. 93.

29. State *v.* Maloney, 92 Tenn. 62, 20 S. W. 419.

tional provision to the contrary the legislature may increase or diminish the compensation of a judge during his term of office.[30] In some states, however, the constitution and statutes provide that the compensation of the judges shall not be increased or diminished during their term of office.[31]

30. *Alabama.*— Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698.

Arkansas.— Humphry *v.* Sadler, 40 Ark. 100.

Indiana.— Davidson *v.* Wildman, Wils. 427.

Kentucky.— Stone *v.* Pryor, 103 Ky. 645, 45 S. W. 1053, 1136, 20 Ky. L. Rep. 312.

Michigan.— People *v.* Manistee County, 40 Mich. 585.

Minnesota.— Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778.

Mississippi.— Stone *v.* Wharton, (1889) 5 So. 631, holding that where an act of the legislature changing the judicial districts of the state left certain judges unassigned but permitted them to continue in the discharge of their duties in their old districts until the expiration of their terms, such judges were entitled to receive the increased salaries fixed by such act instead of their former salaries.

Pennsylvania.— Com. *v.* Mathues, 210 Pa. St. 372, 59 Atl. 961. See, however, Com. *v.* Mann, 5 Watts & S. 403.

South Dakota.— Hauser *v.* Seeley, (1904) 100 N. W. 437, where the compensation of a county judge was based upon the population of the county, determined by a method provided for by statute, and a later statute provided a different method of determining such population, and required the county auditor to file immediately after the taking effect of the act a certificate showing the population of the county, computed by the new method, and it was held that the county judge then in office was entitled to the increased compensation thus afforded, his duties having been increased under the new act.

Virginia.— Foster *v.* Jones, 79 Va. 642, 52 Am. Rep. 637; Foster *v.* King County, etc., 79 Va. 633 (where the court upheld the power of the legislature to cut down the territory over which a judge has jurisdiction to the minimum fixed by the constitution, although his compensation is thereby reduced); Com. *v.* Clopton, 9 Leigh 109 (holding that where an additional salary has been allowed a judge because of the mass of business in one court of his circuit, the subsequent severance of this court from his circuit will not affect his right to continue to receive the increased salary during the remainder of his term.

Wisconsin.— State *v.* Kalb, 50 Wis. 178, 6 N. W. 557.

United States.— U. S. *v.* Fisher, 109 U. S. 143, 3 S. Ct. 154, 27 L. ed. 885 (holding that when the legislative body has power to reduce the salary of a judge, an act appropriating a certain sum in full compensation for his services during a given period repeals for the time specified the provisions of an earlier statute fixing a greater sum); Fisher *v.* U. S., 15 Ct. Cl. 323.

See 29 Cent. Dig. tit. "Judges," § 82.

Contractual rights of judge.— The appointment or election to an office created by a state legislature does not create a contract between the incumbent and the state, and the legislature may change the salary without restraint except as directed by its own constitution. Benford *v.* Gibson, 15 Ala. 521. And an act of congress fixing the salaries of the chief justices and associate justices of the territories is not a contract that their salaries will not be reduced during their terms of office. U. S. *v.* Fisher, 109 U. S. 143, 3 S. Ct. 154, 27 L. ed. 885.

Power of supervisors.— A constitution authorizing the boards of supervisors of certain counties to allow the circuit judges of those counties, in addition to the salary fixed by the constitution, such additional salary as might from time to time be determined by the board, gives the board a continuing power and authorizes it after making an order allowing a judge additional compensation to revoke the same during the incumbent's term. Adsit *v.* Smith, 129 Mich. 4, 88 N. W. 65. But where an act provided that boards of supervisors should fix the salaries of probate judges, and in a particular county such salary was fixed, the subsequent reënactment of the statute with an amendment as to another county did not empower the board of the particular county again to fix the judge's salary during his term. Chapman *v.* Berrien County, 50 Mich. 311, 15 N. W. 489.

31. *Alabama.*— White *v.* State, 123 Ala. 577, 26 So. 343.

Arkansas.— *Ex p.* Tully, 4 Ark. 220, 38 Am. Dec. 33.

California.— See People *v.* Duden, 18 Cal. 696, holding that where a judge was elected to fill a supposed vacancy, and the legislature, supposing a term of office to exist in him, reduced the compensation with a proviso that nothing in the act should affect the present incumbent, the latter was entitled to receive the salary as it existed prior to the reduction.

Georgia.— See Anderson *v.* Ryan, 82 Ga. 559, 9 S. E. 331, holding that the statute requires the salary of the county judges to be fixed at the beginning of the judicial term by the grand jury, and that the salary when once fixed cannot be altered during the term.

Illinois.— Foreman *v.* People, 209 Ill. 567, 71 N. E. 35 (holding that a law which increases the salaries of certain judges does not entitle a judge to receive the increased salary if elected after the passage of the law to complete the unexpired term of a judge elected before its passage); Hall *v.* Hamilton, 74 Ill. 437 (holding that a statute providing additional compensation for circuit judges holding courts outside of their circuits violates the constitutional provision that the salary of such judges shall not be increased

13. Compensation of Special Judges. In some states provision is made by statute for the compensation of special judges.[32]

14. On Retirement Because of Age. In some jurisdictions statutes authorizing judges whose terms have not expired to retire on arriving at a definite age provide for their compensation after retirement.[33]

or diminished during the terms for which they are elected).

Kentucky.— Butler County *v.* James, 116 Ky. 575, 76 S. W. 402, 25 Ky. L. Rep. 801; Wadsworth *v.* Maysville, 113 Ky. 455, 68 S. W. 391, 24 Ky. L. Rep. 312; Perkins *v.* Auditor, 79 Ky. 306, 2 Ky. L. Rep. 303; Auditor *v.* Cochran, 9 Bush 7; Auditor *v.* Adams, 13 B. Mon. 150; Thomas *v.* Hager, 86 S. W. 969, 27 Ky. L. Rep. 813. See, however, Marion County Fiscal Ct. *v.* Kelly, 56 S. W. 815, 22 Ky. L. Rep. 174.

Maryland.— Chancellor's Case, 1 Bland 595.

Minnesota.— Steiner *v.* Sullivan, 74 Minn. 498, 77 N. W. 286.

Missouri.— Cunningham *v.* Current River R. Co., 165 Mo. 270, 65 S. W. 556, holding, however, that a statute requiring that where a change of venue is granted by the circuit court ten dollars shall be deposited with the application and shall be paid to the judge who tries the case is not in violation of the constitutional provision that the salary of a judge shall not be increased during his term of office, since such payment is merely compensation for extra work.

Nebraska.— State *v.* Moores, (1903) 96 N. W. 1011, (1904) 99 N. W. 504.

New York.— People *v.* Haws, 32 Barb. 207, 11 Abb. Pr. 261, 20 How. Pr. 29. See, however, People *v.* Fitch, 11 Misc. 257, 32 N. Y. Suppl. 218 [*affirmed* in 145 N. Y. 261, 39 N. E. 972], holding that a sum paid to a justice of the supreme court from a district other than the first as compensation for his expenses and disbursements in the performance of his duties when designated as one of the justices of the general term in the first department is not an increase of salary within the prohibition of the constitution.

North Carolina.— Buxton *v.* Rutherford County Com'rs, 82 N. C. 91, holding that the additional compensation of one hundred dollars allowed a judge of the supreme court for holding a special term is a part of his salary, and an act providing for a reduction thereof violates the constitutional provision against diminishing the salaries of judges while in office.

Tennessee.— Colhert *v.* Bond, 110 Tenn. 370, 75 S. W. 1061; Judges' Cases, 102 Tenn. 509, 53 S. W. 134; State *v.* McKee, 8 Lea 24; Gaines *v.* Horrigan, 4 Lea 608, holding that where a judge is appointed to fill out the unexpired term of a deceased judge, and the salary was diminished during the latter's incumbency, he is entitled only to the compensation fixed by law at the time he assumes the duties of the office, and not to the salary as it was fixed when the deceased judge was elected.

Texas.— See Orr *v.* Davis, 9 Tex. Civ. App. 628, 30 S. W. 249, holding that the statute which provides that the salaries of officers shall not be increased or diminished during their term applies only to officers whose salaries are fixed by law, and not to county judges, who receive such salaries from the county treasury as may be allowed by the commissioner's court.

Virginia.— Neal *v.* Allen, 76 Va. 437; Montague *v.* Massey, 76 Va. 307; Com. *v.* Clopton, 9 Leigh 109.

See 29 Cent. Dig. tit. "Judges," § 82.

Deduction of special judge's compensation. — A constitutional provision forbidding the reduction of a judge's salary during the term is violated by a statute which deducts from his salary the compensation of a special judge who acts in his stead. Auditor *v.* Adams, 13 B. Mon. (Ky.) 150; Holder *v.* Sykes, 77 Miss. 64, 24 So. 261; Burch *v.* Baxter, 12 Heisk. (Tenn.) 601. But a statute which provides that a special judge shall receive no compensation unless the regular judge for whom he acts orders it paid out of his salary is not a reduction of the latter's salary during his term and is constitutional. Pickard *v.* Henderson, 15 Lea (Tenn.) 430.

Taxation of salary.— Where such a provision exists the levying of a tax upon such salary is unconstitutional and void. *In re* Taxation of Salaries, etc., 131 N. C. 692, 42 S. E. 970; Com. *v.* Mann, 5 Watts & S. (Pa.) 403.

32. Norman *v.* Wood, 98 Ky. 640, 33 S. W. 1112, 17 Ky. L. Rep. 1187; Auditor *v.* Adams, 13 B. Mon. (Ky.) 150; People *v.* Oneida County, 82 Hun (N. Y.) 105, 31 N. Y. Suppl. 63, 24 N. Y. Civ. Proc. 152; Matter of Tyler, 60 Hun (N. Y.) 566, 15 N. Y. Suppl. 366 (holding that under the New York code, which provides that an officer acting as special surrogate must be paid for the time during which he so acts a compensation equal *pro rata* to the salary of the surrogate, he is entitled to such salary only while he is actually acting as surrogate); Burch *v.* Baxter, 12 Heisk. (Tenn.) 601.

If a special judge becomes disqualified to try a case a person selected to try it is entitled to the statutory compensation, although the special judge is hearing cases in chambers and is also receiving compensation. Norman *v.* Wood, 98 Ky. 640, 33 S. W. 1112, 17 Ky. L. Rep. 1187.

33. See the statutes of the different states.

In New York the constitution provides for the retirement of judges of the court of appeals and justices of the supreme court upon their arrival at the age of seventy years, and for continuing their compensation thereafter during the remainder of the term for which they were elected if they have served ten

15. Allowance For Clerk Hire, Mileage, and Other Expenses. In some states judges are given allowances for clerk hire, mileage, and other expenses incident to the office.[34]

16. Fees and Commissions.[35] A judge is not entitled to collect fees from the public treasury for services rendered where there is no express statutory allowance therefor;[36] but the compensation of county and probate judges, ordinaries,

years previous to retirement. Const. art. 6, § 13. A judge or justice who has served ten years as such is entitled to the compensation for the remainder of his abridged term whether the ten years' service was rendered during the abridged term or a preceding one. People *v.* Wemple, 125 N. Y. 485, 26 N. E. 921 [*affirming* 58 Hun 275, 12 N. Y. Suppl. 10]. A retiring justice of the supreme court is entitled to receive in addition to the regular salary a gross allowance made by the legislature for expenses of the justices while absent from home, the latter being a part of the compensation of the office (People *v.* Wemple, 115 N. Y. 302, 22 N. E. 272); but he is not entitled to a yearly allowance made by a board of county supervisors for superintending the drawing of jurors (Gilbert *v.* Kings County, 136 N. Y. 180, 32 N. E. 554 [*reversing* 18 N. Y. Suppl. 892]).

U. S. Rev. St. (1878) § 714 [U. S. Comp. St. (1901) p. 578], provides that a federal judge who resigns after reaching the age of seventy and after holding his commission for ten years shall receive during the remainder of his life the salary to which he was entitled at the time of his resignation. A federal judge who so retires is entitled thereafter only to the amount which was payable to him at the date of his resignation, although congress has previously appropriated more than the amount of the salary of the office and subsequently appropriates more for the same fiscal year in which he resigns. James *v.* U. S., 38 Ct. Cl. 615. And he is not entitled after resignation to receive an additional allowance made to him before his resignation for holding terms of court in a district other than his own, although he may for many years have held such term, as this allowance was uncertain and contingent and does not enter into the amount of his retired pay. Benedict *v.* U. S., 34 Ct. Cl. 388 [*affirmed* in 176 U. S. 357, 20 S. Ct. 458, 44 L. ed. 503]. Where the act of congress of 1866 fixed the compensation of chief justice of the supreme court of the District of Columbia at four thousand five hundred dollars and of the associate justices at four thousand dollars each, appropriations made in 1892 and subsequent years by congress for salaries of said judges at the rate of five thousand dollars each were held not to be such a permanent increase of salary as would entitle a judge who retired in 1893 to draw compensation throughout his retirement at the increased rate. James *v.* U. S., 38 Ct. Cl. 615.

34. See the statutes of the different states. See, however, Garfield County *v.* Beardsley, 18 Colo. App. 55, 78 Pac. 155, holding that a county judge in Colorado is not entitled to compensation from the county for time, work, and money expended in defending the jurisdiction of the county court in the district court.

In Idaho the constitution permits the probate judge to appoint a clerk or to act as his own clerk but limits the amount of fees which he may retain for his services; and if he appoints a clerk the aggregate fees and commissions of himself and clerk cannot exceed the amount limited by the constitution. Ada County *v.* Ryals, 4 Ida. 365, 39 Pac. 556.

In Montana whenever a court is appointed by the supreme court to be held in any county the chief justice or associate justice is allowed mileage at the rate of twenty cents per mile in going to and returning from the place where court is held. This allowance is intended to cover not only the expense of traveling, but also of living while holding the court. Power *v.* Choteau County, 7 Mont. 82, 14 Pac. 658.

In Nevada the statute allowing district judges, in addition to their salaries, traveling expenses in going to and returning from the place of holding court does not contravene the constitutional provision prohibiting the judges from receiving "any fees or perquisites of office." State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

In New York justices of the supreme court from districts other than the first are allowed compensation for their expenses and disbursements while holding court in the first department of that district, the compensation being payable by the city of New York. People *v.* Fitch, 11 Misc. 257, 32 N. Y. Suppl. 218 [*affirmed* in 145 N. Y. 261, 39 N. E. 972].

In Pennsylvania a common pleas judge whose district is composed of a single county, and who resides at a place other than the county-seat, is not entitled to mileage in going to and from the county-seat in the discharge of his official duties. *In re* Mileage, etc., 11 Pa. Dist. 385, 26 Pa. Co. Ct. 501.

In South Dakota, where a probate judge is entitled in certain counties to compensation for clerk hire, he is entitled to the compensation whether he employs a clerk or performs the clerk's duties himself. Gordon *v.* Lawrence County, 1 S. D. 31, 44 N. W. 1025.

35. Liability to penalty for taking illegal fees see *infra*, VI, D, 3.

36. *Alabama.*— Rainer *v.* McElroy, 20 Ala. 347.

Kentucky.— Wadsworth *v.* Maysville, 113 Ky. 455, 68 S. W. 391, 24 Ky. L. Rep. 312.

Missouri.— Gammon *v.* Lafayette County, 76 Mo. 675.

New Jersey.— Kenney *v.* O'Neill, 56 N. J. L. 440, 28 Atl. 557.

surrogates, and police magistrates is usually paid in whole or in part in fees collected by them for official duties performed:[37] The right of a judge to receive a statutory fee is not dependent upon the legal sufficiency of an application made to him.[38] In some states the judge is not allowed a fee where the case is dismissed without trial,[39] or where he tries a cause in chambers, even upon stipulation.[40] In some states county judges are allowed certain commissions on the disbursements of school funds,[41] and upon the actual cash receipts of each executor, administrator, and guardian.[42]

C. Powers and Duties[43] **— 1. In General — a. Powers and Functions Generally.** The powers of the judges of the different courts in the United States

New York.— White *v.* Peters, 3 How. Pr. 69.

North Carolina.— Treasurers *v.* Trimmier, 3 Hill 333.

Ohio.— Millard *v.* Conrade, 26 Ohio Cir. Ct. 445.

See 29 Cent. Dig. tit. "Judges," § 88.

Accounting for fees.— The statute which requires the judges of the probate court to make out an account of their fees before they are collectable does not require the keeping of an itemized account of official services. Dean *v.* Witherington, 116 Ala. 573, 22 So. 869. Under the Oklahoma act of 1897 he is required to report all fees and compensation received by virtue of his office, no matter from what source derived. Finley *v.* Territory, 12 Okla. 621, 73 Pac. 273. And see Pitzer *v.* Territory, 4 Okla. 86, 44 Pac. 216. A statute requiring county judges to pay into the county treasury fees received in excess of a certain sum does not contravene a constitutional provision requiring revenue to be provided by a tax according to valuation, the purpose of such a statute being to limit the judge's compensation and not to raise revenue. State *v.* Ream, 16 Nebr. 681, 21 N. W. 398.

37. *Alabama.*— Rainer *v.* McElroy, 20 Ala. 347; Benford *v.* Gibson, 15 Ala. 521.

Georgia.— Lumpkin County *v.* Williams, 89 Ga. 388, 15 S. E. 487, holding, however, that the statute allowing ordinaries fees "for every order passed where no fees are prescribed" are for judicial orders and not for orders drawn on the county treasury for money.

Kansas.— Camphell *v.* Labette Co., 63 Kan. 377, 65 Pac. 679, holding that probate judges are entitled to receive only such fees as the legislature may deem proper compensation for their services, and are not entitled to all fees which the law allows them to collect.

Louisiana.— Bouanchaud *v.* D'Hebert, 21 La. Ann. 138.

Missouri.— Lonergan *v.* Louisiana, 83 Mo. App. 101.

Montana.— Hedges *v.* Lewis, etc., County, 4 Mont. 280, 1 Pac. 748.

New Jersey.— Pomeroy *v.* Mills, 35 N. J. Eq. 442, holding that the fees of a surrogate for auditing and stating the accounts of executors in certain estates is left to the discretion of the orphans' court, and that court should allow a just compensation for the work done.

Ohio.— State *v.* Judges First Judicial Dist. Ct. of C. Pl., 21 Ohio St. 1; Millard *v.* Conrade, 26 Ohio Cir. Ct. 445, holding that where the statute allows fees in criminal cases, the judge is entitled to fees in cases where children are convicted of crime, although instead of ordinary punishment they are sent to industrial schools for enforced education.

Texas.— Johnson *v.* Hanscom, 90 Tex. 321, 38 S. W. 761 [*reversing* (Civ. App. 1896) 37 S. W. 453].

Wisconsin.— Bartlett *v.* Eau Claire County, 112 Wis. 237, 88 N. W. 61.

See 29 Cent. Dig. tit. "Judges," § 88.

38. Sargeant *v.* Sunderland, 21 Vt. 284.

39. Garfield County *v.* Beardsley, 18 Colo. App. 55, 70 Pac. 155 (where a county judge is entitled to a fee for each day actually occupied in the hearing or trial of a misdemeanor case); Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360 (where a county judge is allowed a fee for each criminal case tried and finally disposed of by him).

40. Hills *v.* Passage, 21 Wis. 294.

41. Hayworth *v.* Ragan, 77 Tex. 362, 14 S. W. 70, holding that the amendment of 1887 of the general laws of 1884 making the commissions depend upon the actual disbursement of such funds was declaratory only.

42. Mann *v.* Earnest, 6 Tex. Civ. App. 606, 25 S. W. 1042, but not on the cash receipts of a survivor in community who has duly qualified, from sales made in managing the estate outside the probate court.

43. **Special and substitute judges** see *infra*, VIII, C.

De facto judges see *infra*, IX, C.

Conferring functions on judges instead of the court see CONSTITUTIONAL LAW, 8 Cyc. 813.

Delegation of legislative powers to judges see CONSTITUTIONAL LAW, 8 Cyc. 806 *et seq.*

Functions of judge and jury see CRIMINAL LAW; TRIAL.

Powers of judges with respect to: Admission to bail see BAIL. Allowance to clerks for extra services see CLERKS OF COURTS, 7 Cyc. 208. Appeals or writs of error see APPEAL AND ERROR; CRIMINAL LAW. Appointment of jury commissioners see JURIES. Approval of act of clerk see CLERKS OF COURTS, 7 Cyc. 232 note 87. Approval of appeal-bond or undertaking see APPEAL AND ERROR, 2 Cyc. 843 note 55. Au-

can only be determined by an examination of the constitutions or laws creating the offices.[44] It has been held that a judge has authority to prevent such noise

diting claim against county see COUNTIES, 11 Cyc. 588 note 76. Authenticating affidavit for attachment see ATTACHMENT, 4 Cyc. 516 note 38. Awarding alimony see DIVORCE. Certifying records and proceedings of his court as clerk see CLERKS OF COURTS, 7 Cyc. 223 note 40. Consolidation and severance of actions see CONSOLIDATION AND SEVERANCE OF ACTIONS. Contracts for bridges see BRIDGES, 5 Cyc. 1066 note 64. Costs see COSTS. Criminal prosecutions see CRIMINAL LAW. Drawing or selecting jurors see JURIES. Injunctions see INJUNCTIONS. Instructions to jury see CRIMINAL LAW; TRIAL. Issuance of attachment see ATTACHMENT. Issuance of county order or warrant see COUNTIES, 11 Cyc. 533 note 56. Judgment see JUDGMENTS. Ordering increase of security on appeal see APPEAL AND ERROR, 2 Cyc. 905 note 40. Performing ceremony of adoption see ADOPTION OF CHILDREN, 1 Cyc. 918 note 8. Punishment for contempt see CONTEMPT; INJUNCTIONS. Receiver see RECEIVERS. Settling and signing bills of exceptions see APPEAL AND ERROR; CRIMINAL LAW. Taking acknowledgments see ACKNOWLEDGMENTS. Taking affidavits generally see AFFIDAVITS, 2 Cyc. 9. Taking affidavit for attachment see ATTACHMENT, 4 Cyc. 475 note 3. Taking affidavit for capias see ARREST, 3 Cyc. 928 note 60. Taking a deposition see DEPOSITIONS. Writ of habeas corpus see HABEAS CORPUS.

44. See the constitutions and statutes of the several states and of the United States. And see the following cases:

Alabama.— *Ex p.* Boothe, 64 Ala. 312, holding that a circuit judge had authority to grant writs of prohibition or other remedial writs which could be granted by judges at common law. A judge has no power in this state to grant (Seymour *v.* Farquhar, 95 Ala. 527, 10 So. 650) or dismiss (*Ex p.* Farquhar, 99 Ala. 375, 11 So. 913) a petition for the rehearing of a case as that power resides in the court alone; but if the petition is pending he may grant a supersedeas (*Ex p.* Farquhar, *supra*).

California.— Sanford *v.* Head, 5 Cal. 297, holding that under the former constitution of California clothing the district courts with original jurisdiction in law and equity where over two hundred dollars is involved, the district judge, while sitting in an equity cause, was possessed of all the powers of a court of chancery.

Louisiana.— It has been held in this state that a district judge has no power to employ experts to examine and report on the pleadings and evidence in a case and charge the expense of the examination to an estate under the control of the court, and that such an act amounts to malfeasance on the part of the judge. State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361. A judge of the city court of New Orleans can annul judgments which he has rendered and as well those rendered by the justice of the peace whom he had replaced. State *v.* Voorhies, 34 La. Ann. 99. Recorders may exercise the functions of committing magistrates. State *v.* Moulin, 45 La. Ann. 309, 12 So. 142; State *v.* Cornig, 42 La. Ann. 416, 7 So. 698; State *v.* Judge Fifth Judicial Dist. Ct., 32 La. Ann. 315.

Mississippi.— Buckley *v.* George, 71 Miss. 580, 15 So. 46, holding that a judge of the supreme court may grant a supersedeas on an appeal from an order appointing receivers when the chancellor appointing the receivers has refused to grant it.

Missouri.— Voullaire *v.* Voullaire, 45 Mo. 602, holding that it is the duty of a judge who tries a case to hear the motion for a new trial, and that he cannot refuse to hear the motion or transfer the case and motion to another judge for final disposition.

New York.—Merritt *v.* Slocum, 1 Code Rep. 68, holding that the code conferred no power on a county judge to hear a motion pending in the supreme court. The judges of the court of common pleas of New York were county judges within the meaning of the act of 1860, "to secure creditors a just division of the estate of debtors who conveyed to assignees" and rightfully exercised the jurisdiction conferred by that act and the amendments thereto. *In re* Morgan, 56 N. Y. 629. It was decided in New York in 1827 that a judge of the court of common pleas of that state, although not of the degree of counselor at law, might grant a discharge of an insolvent debtor. Union Cotton Manufactory *v.* Curtis, 7 Cow. 105. But the supreme court of Ohio in 1838 in construing the New York statute adopted the contrary view and held that such a discharge made in New York was invalid. Utica Bank *v.* Card, 8 Ohio 519.

North Carolina.— A superior court judge has no authority to vacate injunctions or set aside attachments except in causes pending in his own district. Bear *v.* Cohen, 65 N. C. 511.

Ohio.— Harris *v.* Gest, 4 Ohio St. 469, holding that the jurisdiction of a judge of the court of common pleas in Ohio is coextensive with the district and not limited to any particular subdivision thereof.

Pennsylvania.— In this state a judge of the supreme court may grant a stay of execution, incidental to a rule to show cause why a *non pros.* should not be taken off. Lebanon Mut. Ins. Co. *v.* Erb, 1 Pa. Cas. 181, 1 Atl. 571. The recorder of the city of Lancaster, under the act of 1818 incorporating the city, had no power except those expressly conferred by that act. He was not a judge in the true sense of the term but an adviser and mouthpiece of the mayor's court. Locher *v.* King, 5 Lanc. Bar, May 2, 1874.

Wisconsin.— A circuit judge may grant leave on an *ex parte* application to bring suit on the official bond of a sheriff. State *v.* Mann, 21 Wis. 684.

See 29 Cent. Dig. tit. "Judges," § 89 *et seq.*

within the precincts of his court as may disturb the administration of justice, and may to this end barricade a street if necessary.[45]

b. When Acting Individually and Not as a Court. It was held in Iowa that the county judge could exercise all the powers of the county court and that the judge and the court were one and the same thing.[46] But in Kentucky it was held that the civil code gave the county judge no powers except while holding a quarterly court.[47] And in Alabama the power to grant or dismiss a petition for a rehearing is in the court and not in the judge individually.[48] The statute of Ohio of 1838 which authorized the supreme court to direct a county attorney to file an information in the nature of a quo warranto did not authorize the judges of that court to make such direction in their individual capacity.[49] In Mississippi where a statute requires a duty to be performed by the judge of a court which is composed of only one judge, it is sufficient that the duty be performed by the court and not by the judge as an individual.[50] In Texas a county judge has authority to approve certain official bonds and the fact that he approves such a bond in open commissioner's court does not make the approval the act of the court instead of the act of the judge.[51]

c. Deciding Case in Limited Time. The constitution of Washington requires a judge of the superior court to decide every case submitted to him within ninety days from the date of its final submission, but his failure to do so does not render a judgment void for want of jurisdiction.[52]

d. Initiating Proceedings. A judge may of his own motion initiate an investigation for the correction of evils in the administration of justice, but he must proceed in an orderly and judicial manner, such as calling the attention of the grand jury to the matter, directing the district attorney to investigate, or, if the latter is interested, appointing a special prosecutor *pro hac vice*, or a commissioner with defined powers of inquiry, or conducting an open investigation himself at the proper time when a particular case is judicially before him.[53]

e. Participating in Decision When Absent During Argument. In Louisiana a judge of the supreme court may participate in a decision, although absent from the bench at the time of the oral argument;[54] and the same is true of a judge of the appellate division of the supreme court of New York, the other supreme court judges only being forbidden so to do by statute.[55]

f. Ex Officio Powers and Duties.[56] The parish judge in Louisiana exercised the powers of two courts, being presiding judge of the parish court and *ex officio* judge of the probate court, and it was therefore necessary when a suit was instituted before him that it should appear in what capacity he acted.[57] In Pennsylvania the judges of the supreme court in 1800 were *ex officio* justices of the peace

45. New Orleans *v.* Bell, 14 La. Ann. 214, where the court sustained a judge on ordering the barricade of a street in order to prevent the passage of horses and vehicles along it.

In Nova Scotia under Judicature Act, § 18, a single judge has the same power to consider and dispose of points of law before trial that he has on trial. Knauth Nachod *v.* Stern, 30 Nova Scotia 251.

46. Lee County *v.* Nelson, 4 Greene (Iowa) 348.

47. Arthur *v.* Green, 3 Metc. (Ky.) 75.

48. *Ex p.* Farquhar, 99 Ala. 375, 11 So. 913; Seymour *v.* Farquhar, 95 Ala. 527, 10 So. 650.

49. Ohio R. Co. *v.* State, 10 Ohio 360.

50. Boon *v.* Bowers, 30 Miss. 246, 64 Am. Dec. 159.

51. Wilson *v.* Wichita County, 67 Tex. 647, 4 S. W. 67.

52. Demaris *v.* Barker, 33 Wash. 200, 74 Pac. 362.

53. *In re* Office Costs, 163 Pa. St. 1, 29 Atl. 912. In this case it was also held that it is improper for him on his own motion and without notice to any of the parties interested in the matter to make an adjudication of the office costs in complaints and indictments filed at a previous session of the court, and file such adjudication subject to exception by the respective officers interested in such costs.

54. *In re* New Orleans Imp., etc., Co., 4 La. Ann. 478.

55. Wittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 543, 62 N. Y. Suppl. 488, 7 N. Y. Annot. Cas. 229.

56. Judge acting as notary ex officio see ACKNOWLEDGMENTS, 1 Cyc. 546 note 87.

Ministerial functions see *infra*, VI, C, 1, k.

57. Segur *v.* Pellerin, 16 La. 63.

and had power to take recognizances for good behavior.[58] The duties of an ordinary in Georgia are of a dual nature, he being both judge and clerk of the court of ordinary.[59]

g. Discretionary Powers. A judge before whom an issue of fact is to be tried has authority to determine which jury shall try the case, to excuse jurors when he thinks proper, to call a juror from one jury to serve on another at his discretion, and to discharge the jury at his pleasure when it cannot agree. These are matters within his discretion and it is doubtful if they can be reviewed on appeal.[60] In New Hampshire a justice presiding at *nisi prius* may in his discretion upon a proper case-made, suspend any of the rules of court and his action will not ordinarily be subject to review at the law term.[61] It was discretionary with a judge of the supreme court of Massachusetts who tried a case in 1830, whether he would report it to the full court, and if he refused to do so the full court could not interfere.[62] In Nevada district judges have the inherent power independent of any statute to adopt such rules and regulations as may be necessary for the proper disposition of the business of their courts.[63] A judge of the supreme court in New York holding a special term and a circuit at the same time may, if he deems it necessary, hear an application to determine the rights of parties aggrieved by a corporate election, although a rule of the supreme court provides that a contested motion shall not be heard at such a term.[64] In South Carolina a judge may in his discretion request a jury to reconsider their verdict, but he is not bound to do so at the request of counsel.[65] A judge has no right to decline to try a cause within his jurisdiction on the ground that it seeks the enforcement of an unjust law.[66]

h. Selecting Presiding Judge, Assigning Judges, and Fixing Terms of Court. In Nevada district judges are authorized by statute to select one of their number as presiding judge.[67] In New York any three justices of the supreme court may designate one of their number to preside in the absence of the presiding judge and the one so designated may, if deemed expedient, preside during the whole term, although the absent justice returns during the term.[68] Under the provisions of the constitution and code of that state the justices of the appellate division of the supreme court in each department may fix the times and places for holding special and trial terms therein and may assign the justices of the department to hold such terms, but they have no power under these provisions to assign justices outside their own department to hold terms therein. If, however, such an assignment is made it is an invitation which may be declined or accepted, and if accepted the designated judge has jurisdiction to hold the term provided he is not a member of an appellate division of another department.[69] In Pennsylvania the courts of common pleas have full control of the assignment of the judge or judges to hold the court of quarter sessions and need not consult the wishes of the public or of suitors. Judges so assigned have full authority to try any case within the

58. Respublica *v.* Cobbet, 3 Yeates (Pa.) 93.

59. State *v.* Henderson, 120 Ga. 780, 48 N. E. 334. See also CLERKS OF COURTS, 7 Cyc. 223 note 40.

60. Ware *v.* Ware, 8 Me. 42.

61. Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

62. Com. *v.* Child, 10 Pick. (Mass.) 252.

63. State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

64. *In re* Argus Co., 138 N. Y. 557, 34 N. E. 388.

65. Bell *v.* Hutchinson, 2 McCord (S. C.) 409.

66. Fournier *v.* De Montigny, 10 Quebec Super. Ct. 292.

67. State *v.* Atherton, 19 Nev. 332, 10 Pac. 901, holding such statute constitutional.

68. People *v.* Hicks, 15 Barb. (N. Y.) 153.

69. People *v.* Herrmann, 149 N. Y. 190, 43 N. E. 546. The constitution of New York authorizes the designation of judges of the superior and common pleas courts to hold circuits and special terms of the supreme court, and a judge so designated is clothed by statute with all the powers of a supreme court justice. It has been held by the court of appeals of that state that if an application has been made to a judge of the superior court sitting as such justice, and after hearing and submission he resigns from the superior court and is appointed a supreme court justice, he loses jurisdiction of the application. *In re* New York, 139 N. Y. 140, 34 N. E. 757 [*affirming* 69 Hun 270, 23 N. Y. Suppl. 532].

jurisdiction of that court.[70] In Virginia the court of appeals had power to transfer a case pending in the district court of appeals to a circuit court, and when a case was so transferred, it was the duty of the judge of the circuit court to hear and determine the case and he could be compelled by mandamus from the supreme court of appeals to do so.[71] In Alabama judges of the circuit court had the power to hold successive courts in any of the counties of their respective circuits and the early statute of that state relative to the alternation of the judges was held to be merely directory.[72]

i. Instructing Jury. A county judge in Nebraska has no right to instruct a jury and it is error for him to do so.[73]

j. Presumption That Judge Acts Within His Powers. It has been decided in New York that where a petition was addressed to a county judge and not to the county court, and an order was signed by the judge, it would be assumed that the judge acted in the capacity in which he was called on to act, although the caption of the order recited that it was in the county court.[74] And in Colorado it was held that when a district judge holds a term of court outside his own district, his authority so to do and to try the causes pending in such court will be presumed unless the contrary appears.[75]

k. Judicial and Ministerial Functions. Judges may be required or authorized by law to discharge ministerial as well as judicial duties,[76] and ministerial acts performed by them do not become judicial because performed by a judicial officer.[77] Such duties, not being inherent, must be performed in strict accordance with the statute.[78] Among the ministerial duties which have been required or authorized by law to be performed by judges are the selection of jurors,[79] custody of records,[80] acting as clerk of his court,[81] administering oaths,[82] and taking affidavits,[83] depositions,[84] or acknowledgments,[85] issuing county orders or warrants,[86] appointment of police commissioners of a city[87] or other officers,[88] entering of public lands

70. *In re* Kensington, etc., Turnpike Road Co., 12 Phila. (Pa.) 611.

71. Cowan *v.* Fulton, 23 Gratt. (Va.) 579.

72. Spradling *v.* State, 17 Ala. 440.

73. Ives *v.* Norris, 13 Nebr. 252, 13 N. W. 276.

74. Albrecht *v.* Canfield, 92 Hun (N. Y.) 240, 36 N. Y. Suppl. 940.

75. Empire Land, etc., Co. *v.* Engley, 14 Colo. 289, 23 Pac. 452.

76. People *v.* Bush, 40 Cal. 344; State *v.* Tolle, 71 Mo. 645; Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343; Beaty *v.* Whitaker, 23 Tex. 526.

Conferring on judges non-judicial or ministerial and administrative powers see CONSTITUTIONAL LAW, 8 Cyc. 844.

Performing ceremony of adoption see ADOPTION OF CHILDREN, 1 Cyc. 918 note 8.

77. People *v.* Bush, 40 Cal. 344.

78. Chadduck *v.* Burke, 103 Va. 694, 49 S. E. 976.

79. See JURIES. The act of a county judge in selecting jurors is not a judicial but a ministerial act. *Ex p.* Virginia, 100 U. S. 339, 25 L. ed. 676. Under the act of congress of June 30, 1879, chapter 52, section 2, a United States district judge may order the names of jurors to be drawn from the boxes used by state authorities in selecting jurors. U. S. *v.* Hanson, 28 Fed. 74.

80. In Alabama when the register in chancery is acting as probate judge by reason of the incompetency of the latter, the record of the register's acts is kept in the probate court, and the judge thereof is the custodian of such records, and is the proper officer to certify to a transcript thereof. Bean *v.* Chapman, 62 Ala. 58.

81. See *supra*, VI, C, 1, f, text and note 59; and CLERKS OF COURTS, 7 Cyc. 223 note 40.

82. Administering oath to clerk.— A judge of a federal district court has authority by virtue of his office to administer to a clerk of his court the oath required to be made to his accounts with, and returns to, the government. U. S. *v.* Ambrose, 2 Fed. 556.

Administering oath to sheriff.— The probate judges of Mississippi, from the year 1833 to the adoption of the revised code of 1857, were vested with authority to administer official oaths to the sheriffs of their respective counties. Alexander *v.* Polk, 39 Miss. 737.

83. See AFFIDAVITS, 2 Cyc. 9; ARREST, 3 Cyc. 928 note 60; ATTACHMENT, 4 Cyc. 475 note 3.

84. See DEPOSITIONS.

85. See ACKNOWLEDGMENTS.

86. See COUNTIES, 11 Cyc. 533 note 56.

87. This power to appoint police commissioners for San Francisco vested by statute in the judges of certain judicial districts not being judicial in character was not continued in force by the new constitution of California. Heinlen *v.* Sullivan, 64 Cal. 378, 1 Pac. 158.

88. Appointment of sheriff.— Under the Louisiana act of 1817, relating to organiza-

for town sites and awarding town lots to citizens,[89] awarding of contracts for the publication of advertisements[90] or the erection of a bridge,[91] the powers of notaries public,[92] and the designation of the number of deputies of certain officers.[93] It was held in New York that an order taken by default is not a judicial decision, such orders being taken as a matter of course.[94] But the refusal to approve a probate judge's bond[95] making orders in proceedings supplementary to executions[96] and taking evidence of the refusal of the Bank of the United States to pay in gold or silver its promissory notes and determine the facts[97] have been declared judicial functions. A judge has the inherent power to administer oaths to witnesses in his court, although the statute does not specifically authorize it.[98]

l. Coördinate Judges — (i) *Coördinate Jurisdiction.* The supreme court of the United States has decided that the acts of congress providing that in each district of the territory of New Mexico court shall be held by "one of the justices of the supreme court," and that each judge shall reside in the district to which he is assigned, do not, in case the judge of a district is disqualified, prevent the discharge of judicial duties for such district by the judge of another district.[99] The additional judge for the Indian Territory appointed under the act of June 7, 1897, is directed by the act to hold court at such places as shall be designated by the appellate court and he is given the same authority, powers, and salary and charged with the same duties as the other judges of the territory. While holding a term of court under an assignment from the appellate court he has the same power to call and hold a special session to dispose of unfinished business after the close of the regular term as the judge of the district would have.[1] The constitution of North Carolina providing that the judges of the supreme court shall preside in the courts of the different districts successively but that no judge shall hold the courts in the same district oftener than once in four years does not forbid legislation authorizing one judge to hold one or more regular terms of the superior

tion of courts, the district judge had power to appoint a sheriff, in default of any officer authorized to serve legal process. Lissac *v.* Klapman, 8 La. Ann. 135.

Appointment of, or acting as, clerk.— In Idaho a probate judge may appoint a clerk of the probate court, or he may act as the clerk of his own court. Ada County *v.* Ryals, 4 Ida. 365, 39 Pac. 556.

Appointment of clerk or master.— A chancellor or special chancellor appointed by the governor *pro tempore* to fill a vacancy in Tennessee was held to have the power to appoint a clerk and master for the constitutional term of the office. Gold *v.* Fite, 2 Baxt. (Tenn.) 237.

Appointment of commissioner in chancery. — An appointment by the chancellor of the Louisville chancery court of a commissioner of the court, when there was no vacancy in the office, was void. Smith *v.* Cochran, 7 Bush (Ky.) 154.

Appointment of detective or special officer. — In Georgia the judge of the superior court has no legal authority to appoint a detective or special officer to hunt up and arrest and bring back to the county an escaped prisoner, and to charge the county with payment for such service. Maxwell *v.* Cumming, 58 Ga. 384.

Appointment of assistant prosecuting attorney by "senior judge."— Under the act of the legislature of Ohio of April 2, 1882, the senior judge of the court of common pleas was authorized to appoint an assistant prosecuting attorney in Lucas county. By "senior judge" was meant the judge who had served the longest under his present commission and not he who had been longest in continuous service. State *v.* Hueston, 44 Ohio St. 1, 4 N. E. 471.

89. Ming *v.* Truett, 1 Mont. 322.

90. The judges of the circuit court of the city of St. Louis have power to award a contract for the publication of legal notices and orders of publication. State *v.* Tolle, 71 Mo. 645.

91. See Bridges, 5 Cyc. 1066 note 64.

92. In 1836 the law of Texas conferred on primary judges the powers of notaries public and authorized them to make record of sales and transfers of title. Beaty *v.* Whitaker, 23 Tex. 526.

Judge acting as notary ex officio see Acknowledgments, 1 Cyc. 546 note 87.

93. Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343.

94. Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 233.

95. Thompson *v.* Holt, 52 Ala. 491.

96. Cashman *v.* Johnson, 4 Abb. Pr. (N. Y.) 256.

97. Kuhn *v.* U. S. Bank, 2 Ashm. (Pa.) 170.

98. Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190.

99. Borrego *v.* Cunningham, 164 U. S. 612, 17 S. Ct. 182, 41 L. ed. 572 [*affirming* 8 N. M. 446, 494, 46 Pac. 349].

1. *In re* Stevenson, 125 Fed. 843.

court by exchange with some other judge with the governor's sanction, or the appointment by the governor of a judge to hold special terms of that court.[2]

(II) *Jurisdiction of One Judge Over Cause Pending Before Another.* As a rule if a judge of a district is presiding over his own court the judge of another district has no jurisdiction to make an order in a matter pending in the former's court.[3] In case of the absence, sickness, or disability of the judge to whom a cause is assigned, any other of the judges of the civil district court of New Orleans, Louisiana, may issue interlocutory orders or conservatory writs in the cause;[4] but only the judge to whom the case is assigned has power to render a judgment on the merits.[5] When a case has been tried before the judge of another district in Nevada the regular district judge may approve an undertaking in an application for a stay of execution on a motion for a new trial unless disqualified.[6] It was held in New York in 1857 that a proceeding commenced in the first judicial district before one of the judges of the district might be continued before any other judge of the same district competent to have commenced it.[7] In a later case in the same state where an interlocutory decree of foreclosure had been made by a court and the judge had ordered a reference without awarding costs, a judgment for costs afterward entered by another judge upon the referee's report was adjudged to be valid.[8] A judge cannot review and modify or reverse the orders of another judge of coördinate jurisdiction.[9]

(III) *Power to Review, Modify, or Rescind Decision of Coördinate Judge.* As a general rule a judge has no power to review on the same facts the decision of a coördinate judge, the remedy being by appeal alone.[10] In some

2. State *v.* Turner, 119 N. C. 841, 25 S. E. 810; State *v.* Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; State *v.* Speaks, 95 N. C. 689; State *v.* Monroe, 80 N. C. 373.

3. People *v.* O'Neil, 47 Cal. 109.

In New York, under Code Civ. Proc. § 342, providing that, if a county judge for any cause is incapable of acting in a special proceeding pending before him, a certificate to that effect may be made, whereupon the special county judge, if any, and if not disqualified, shall act, otherwise the action shall be removed to the supreme court if pending in the county court, and if pending before the county judge it may be continued before any justice of the supreme court within the same judicial district, and sections 52, 53, which contemplate that, in case of the inability of the county judge to act, the proceeding shall be transferred to a like officer in an adjoining county, who shall proceed thereon as though the proceeding were originally brought in his jurisdiction, where a county judge before whom an application for resubmission of local option questions is pending does not sit, he is not authorized to call in the county judge of an adjoining county to pass on such proceeding. Matter of Munson, 95 N. Y. App. Div. 23, 88 N. Y. Suppl. 509.

4. State *v.* Lazarus, 33 La. Ann. 1425.

5. State *v.* Lazarus, 33 La. Ann. 1425, holding, however, that a judgment rendered by another judge of the same court is not a nullity and will be held valid if consented to or if timely objection thereto was not made.

6. Frevert *v.* Swift, 19 Nev. 400, 13 Pac. 6.

7. Dresser *v.* Van Pelt, 15 How. Pr. (N. Y.) 19.

8. Chamberlain *v.* Dempsey, 36 N. Y. 144 [*reversing* 9 Bosw. 540].

9. Ryle *v.* Harrington, 14 How. Pr. (N. Y.) 59; Winship *v.* Pitts, 3 Paige (N. Y.) 259; Astor *v.* Ward, 3 Edw. (N. Y.) 371; Greenwich Bank *v.* Loomis, 2 Sandf. Ch. (N. Y.) 170.

10. *Nebraska.*— Marvin *v.* Weider, 31 Nebr. 774, 48 N. W. 825, holding that if a general demurrer to a petition is overruled by one district judge, it is error for another judge before whom the cause subsequently comes on for trial to sustain an objection to the introduction of evidence on the ground that the petition does not state a cause of action.

New York.— Platt *v.* New York, etc., R. Co., 170 N. Y. 451, 63 N. E. 532 [*reversing* 63 N. Y. App. Div. 401, 71 N. Y. Suppl. 913] (holding that there is nothing in the code of procedure authorizing the practice of applying to one judge at special term to have an order made by another judge at special term declared void); Hallgarten *v.* Eckert, 1 Hun 117, 3 Thomps. & C. 102 (holding that where a resettlement of a case was made by a judge pursuant to a previous order giving leave to apply, made by another judge, and the order resettling the case was appealed from by defendants and affirmed by the general term by default, a motion made before a third justice to have the previous orders vacated will be denied); Swift *v.* Wylie, 5 Rob. 641 (holding that an order by one justice giving time to answer cannot be vacated by another justice *ex parte* and judgment rendered for want of answer); Cazneau *v.* Bryant, 6 Duer 668, 4 Abb. Pr. 402 (holding that a motion denied by one justice cannot be renewed before another on the same facts

cases, however, a judge may modify or rescind the decision of a coördinate judge,[11] as where it is held that a judge may at the trial term pass upon a motion for a new trial of a cause tried before another judge.[12]

(iv) *Mandamus to Coördinate Judge.* It has been decided that when the duty of supervising an election is imposed upon a circuit judge as an officer, another circuit judge has no power to compel him by mandamus to perform the duty.[13]

m. Associate Judges. The powers and duties of associate judges of

except on leave given to review in the order which it is sought to rehear); Chamberlain *v.* Dumville, 21 N. Y. Suppl. 827 (holding that where an application for an order granting a compulsory reference is opposed, and denied by one judge, an order granting the reference, made by another judge, will be reversed, unless leave to renew the motion was first obtained, if practicable, from the judge who denied the application); Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. 233; Harris *v.* Clark, 10 How. Pr. 415 (holding that a stay of proceedings made by one justice of the supreme court at a special term will not be set aside by another justice at a special term on the ground that it was improvidently granted); Follett *v.* Weed, 3 How. Pr. 360 (holding that an order of discovery made by one justice out of court cannot be modified by another justice); Gould *v.* Root, 4 Hill 554 (holding that if an order issued by a judge staying proceedings is afterward revoked by him, another judge should not issue the same order at the same stage of the proceedings).

North Dakota.— Enderlin State Bank *v.* Jennings, 4 N. D. 228, 59 N. W. 1058, 26 L. R. A. 593, holding that the rule stated in the text applies to district judges, although the action has been transferred from the district in which the decision was made.

South Carolina.— State *v.* Price, 35 S. C. 273, 14 S. E. 490; Charles *v.* Jacobs, 18 S. C. 598; Warren *v.* Simon, 16 S. C. 362; Steele *v.* Charlotte, etc., R. Co., 14 S. C. 324.

United States.— Plattner Implement Co. *v.* International Harvester Co., 133 Fed. 376, 66 C. C. A. 438 (*semble*); H. B. Claflin Co. *v.* Furtick, 119 Fed. 429 (holding that a federal judge cannot in a foreclosure suit, on the return of a rule on defendant to show cause why a receiver should not be appointed and an injunction granted, review the action of another judge sitting in the same court in appointing a temporary receiver and entering a restraining order pending the hearing of the rule).

See 29 Cent. Dig. tit. "Judges," § 93.

Powers of coördinate appellate courts see Courts, 11 Cyc. 750 *et seq.*

11. *New York.*— Bourdon *v.* Martin, 74 Hun 246, 26 N. Y. Suppl. 378 [*affirmed* in 142 N. Y. 669, 37 N. E. 571] (holding that where a judge who tried the case refused to entertain a motion made after verdict but before judgment to charge a receiver personally with certain costs, the motion might be made before another judge); Swift *v.* Wylie, 5 Rob. 641 (holding that while one justice has no power to vacate an order made by another, he may open the judgment entered on such order); Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. 233 (holding that an application may properly be made to one judge to set aside an order taken by default before another, as such orders are taken as a matter of course and there is no judicial decision); Selden *v.* Christophers, 1 Abb. Pr. 272 (holding that an order made by one justice at a special term may be modified by another justice at special term when such modification is on a new state of facts and is not in the nature of a review of the first order).

South Carolina.— Perry *v.* Williams, 1 Bailey 10.

Washington.— *In re* Wetmore, 6 Wash. 271, 33 Pac. 615, where an order appointing a guardian was made by one of several judges of a court presiding temporarily over a department usually held by another member of the court, and afterward a petition was filed asking that the order be vacated, and it was held that the member usually holding in that department might entertain jurisdiction of the matter.

United States.— Robinson *v.* Satterlee, 20 Fed. Cas. No. 11,967, 3 Sawy. 134, holding that a judge of the district court of the United States, while sitting as a circuit judge, has jurisdiction to grant leave to renew a motion denied by another judge of the same court.

Canada.— Chambers *v.* Hunter, 2 Nova Scotia Dec. 144, holding that the rule that one judge cannot rescind an order made by another judge does not apply to orders which are made absolute in the first instance.

See 29 Cent. Dig. tit. "Judges," § 93.

12. *Alabama.*— Malone *v.* Eastin, 2 Port. 182,

Illinois.— Chicago, etc., R. Co. *v.* Marseilles, 107 Ill. 313.

South Carolina.—Garvin *v.* Garvin, 13 S. C. 160.

Texas.— Edwards *v.* James, 13 Tex. 52.

United States.—Adams *v.* Spangler, 17 Fed. 133, 5 McCrary 334, holding, however, that a circuit judge will hear a motion for a new trial in a case tried before a district judge at the request of the latter only, and not as a matter of right to the unsuccessful party.

See 29 Cent. Dig. tit. "Judges," § 93.

If, however, the trial judge has refused a motion for a new trial, a new trial cannot be granted by another judge, the remedy being by appeal. Wilsey *v.* Rooney, 16 N. Y. Suppl. 471; Reich *v.* McCrea, 7 N. Y. Suppl. 600.

13. State *v.* Mobile Cir. Judge, 9 Ala. 338.

the same court depend upon the constitution and statutes of the state where they act.[14]

n. Authority of Regular Judge After Appointment of Special or Substitute Judge.[15] Ordinarily upon the appointment or election of a special or substitute judge the powers of the regular judge are suspended so far as concerns the case or term which the former has been chosen to try or hold,[16] unless the special or

14. See the constitutions and statutes of the different states. And see Fuller *v.* State, 1 Blackf. (Ind.) 63 (where each associate circuit judge was held to be bound in certain cases to express an opinion but the determination of the majority was the judgment of the court); Walters *v.* Brooks, 115 Mo. 534, 22 S. W. 514; Walters *v.* Senf, 115 Mo. 524, 22 S. W. 511 (both holding that one member of the county court has no power to release a part of the security given for a loan made by the court, without any action by the court); *In re* White, 33 Nebr. 812, 51 N. W. 287 (holding that a single judge of the supreme court has no power to grant or hear a writ of habeas corpus, as the constitution vests the original jurisdiction of the supreme court in such proceedings in the court alone); Brown *v.* Street Lighting Dist. No. 1, 69 N. J. L. 485, 55 Atl. 1080 (holding that a single justice of the supreme court has power to hear proceedings in certiorari, and his order may be entered as the judgment of the court); Thompson *v.* Smith, 1 How. Pr. (N. Y.) 219 (where, if the first judge of the court of common pleas was a party to a suit, a side judge, if present at the trial, was held to have authority to certify that the case was a proper one to be carried to the supreme court).

In Massachusetts, where there are several judges of a court, a motion for arrest of judgment may be decided by a single judge (Root *v.* Henry, 6 Mass. 504); and a single justice may receive a plea of guilty in a capital case and enter judgment against defendant (Green *v.* Com., 12 Allen 155).

In Pennsylvania associate judges of the court of common pleas, while not authorized to interfere with the presiding judge, may grant a new trial. Reiber *v.* Boos, 110 Pa. St. 594, 1 Atl. 422, holding that the fact that a former law judge sat with them or enunciated an opinion as *amicus curiæ* does not invalidate the order. But they cannot in vacation revoke an order granting a new trial made by a law judge. Glamorgan Iron Co. *v.* Snyder, 84 Pa. St. 397. Nor can they grant a new trial in a case in which the president judge before his appointment was of counsel, such a case being the subject for a special court. Kolb's Case, 4 Watts 154. An assistant law judge vested with the same authority as the president judge has power to issue a mandamus against a city officer to compel the performance of an official duty. Smith *v.* Com., 41 Pa. St. 335. And see Aspden's Appeal, 24 Pa. St. 182.

In Vermont, when the other judges of the county court are disqualified, one judge may try cases and may adjourn the court to a future day and to a different place (Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013); and one judge of the supreme court may empanel and charge a grand jury in the absence of the other members (State *v.* Jenkins, 2 Tyler (Vt.) 384).

The presence of all the judges in court may be required in some cases. Fuller *v.* State, 1 Blackf. (Ind.) 63; Merchant *v.* North, 10 Ohio St. 251. And see Opinion of Justices, 8 Fla. 466, holding that the power to compel the attendance of an associate judge does not pertain to the chief justice but to the judge or judges present at the time fixed for holding court.

15. **Authority, powers, and duties of special and substitute judges** see *infra*, VIII, C.

16. *Arkansas.*— Cowall *v.* Altchul, 40 Ark. 172.

Florida.— Clark *v.* Rugg, 20 Fla. 861, holding, however, that the authority of the regular judge is suspended only as to all cases pending at the term and in the county in which the judge *pro hac vice* was appointed to officiate.

Georgia.— Butler *v.* State, 112 Ga. 76, 37 S. E. 124.

Indiana.— *Ex p.* Skeen, 41 Ind. 418.

Kansas.— List *v.* Jocksheck, 59 Kan. 143, 52 Pac. 420; *In re* Millington, 24 Kan. 214.

Missouri.— State *v.* Ross, 118 Mo. 23, 23 S. W. 196, holding that if a special judge adjourns a regular term of court until the next regular term, the regular judge has no power to reopen the term.

North Carolina.— Bear *v.* Cohen, 65 N. C. 511, holding, however, that where a judge is holding court specially in a county in another district, the jurisdiction of the judge of such district is superseded only in that county.

See 29 Cent. Dig. tit. "Judges," § 98.

A regular judge has no power to sign a bill of exceptions in a case tried before a special judge. Cowall *v.* Altchul, 40 Ark. 172; Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; Lee *v.* Hills, 66 Ind. 474, holding that where certain preliminary proceedings in a case were had before the regular judge, and thereafter, on change of venue, a special judge tried the case, the bill of exceptions must be signed by the special judge.

Exceptions and limitations on rule.— It has been held, however, that where a decree of foreclosure has been granted by a substitute judge, the regular judge being interested, a subsequent application for the appointment of a receiver is in effect a new suit in which the regular judge is authorized to appoint a new judge, although the first appointment has

substitute judge fails to appear,[17] or resigns,[18] or unless his term of office expires.[19] Where a superior court judge undertook to preside in a case pending in the city court, which the judge thereof was qualified to try, the trial was held to be a nullity, although the city court judge was at the time presiding in the superior court in the trial of a case which the superior court judge was disqualified to try.[20]

c. Duty of Judge on Expiration of Term Concerning Property of Office. It is the duty of a judicial officer upon the expiration of his term to surrender to his successor the property of the office which the law commits to his custody. The title to such property is not personal but resides in the public and he is merely its custodian during his continuance in office. The duty is merely ministerial and may be enforced by mandamus,[21] and the person holding the certificate of election being *prima facie* the officer is *prima facie* entitled to the records of the office in advance of the result of an election contest.[22]

2. Powers at Chambers or in Vacation[1] — a. At Common Law and Under Early English Statutes. Where the law authorizes or contemplates the doing of a judicial act, it is understood to mean that the court in term-time may do it and the judge in vacation cannot, without express authority, act therein.[2] While the foregoing is a general rule, it is evident that rules designed for the protection of rights would be of no avail, if judges were deprived of all power at any other time than during court. As a consequence at a very early period judges assumed the right to exercise judicial power at chambers and in vacation, which in their estimation was conducive to the furtherance of the business of the court without special interference with the right of any litigant.[3] At the common law the judges exercised at chambers and in vacation only a limited power, such as ordinarily was conducive to the facilities of business actually pending in court, and this power they exercised independent of any statute.[4] Rules and orders so made by the

not been revoked (Harris *v.* U. S. Savings Fund, etc., Co., 146 Ind. 265, 45 N. E. 328); that if a court record has been lost and a special judge has directed a commissioner to take proof as to its contents, the regular judge may at a subsequent term confirm the commissioner's report and establish the contents of the lost record (Bush *v.* Lisle, 86 Ky. 504, 6 S. W. 330); that where a regular judge has made an order reciting his own disability based on an insufficient affidavit, and has given way to a special judge, this will not prevent him from reassuming jurisdiction before the special judge has acted (Russell *v.* Russell, 12 S. W. 709, 11 Ky. L. Rep. 547); that where a defendant has been indicted and a special judge appointed to try the case, and before trial a new indictment is found, the regular judge has authority to quash the first indictment, and defendant may then be tried by the special judge upon the substitute indictment (*Ex p.* Clay, 98 Mo. 578, 11 S. W. 998); that an order for time to plead made by the recorder of New York in the absence of the circuit judge might be revoked by the latter on his return (Brown *v.* St. John, 19 Wend. (N. Y.) 617); that where a default was taken in a district court before a substitute justice, the regular justice had power thereafter to open and excuse the default (People *v.* Campbell, 18 Abb. Pr. (N. Y.) 1); and that the fact that a substitute judge comes into the district and tries a case under special assignment while the regular judge of the district is holding court in the county at the same time does not oust the latter of jurisdiction (Williams *v.* Struss, 4 Okla. 160, 44 Pac. 273).

17. State *v.* Silva, 130 Mo. 440, 32 S. W. 1007.

18. State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136.

19. Fordyce *v.* State, 115 Wis. 608, 92 N. W. 430.

20. Ivey *v.* State, 112 Ga. 175, 37 S. E. 398.

21. Thompson *v.* Holt, 52 Ala. 491; Crowell *v.* Lambert, 10 Minn. 369; Fowke *v.* Thompson, 5 Rich. Eq. (S. C.) 491.

22. Crowell *v.* Lambert, 10 Minn. 369; Clifford *v.* Hall County, 60 Nebr. 506, 83 N. W. 661, 50 L. R. A. 733, holding further that a county, upon the retirement of a county judge, had no such interest in or right to supreme court reports in his hands as would authorize it to maintain replevin therefor.

1. Form of order entered at chambers see Motions.

Appeal from orders in proceedings at chambers and vacation see Appeal and Error, 2 Cyc. 540, 622.

2. Newman *v.* Hammond, 46 Ind. 119; Ferger *v.* Wesler, 35 Ind. 53; Reyburn *v.* Bassett, McCahon (Kan.) 86; Fisk *v.* Thorp, 51 Nebr. 1, 70 N. W. 498; State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

3. Larco *v.* Casaneuava, 30 Cal. 560; Key *v.* Paul, 61 N. J. L. 133, 38 Atl. 823; Rex *v.* Almon, Wilm. 243; Bagley, Chambers Pr. 47–55; 3 Chitty Gen. Pr. 19 *et seq.*

4. 3 Chitty Gen. Pr. 19.

judge out of term were not effective until they had been made rules of the court in term-time, and until that was done an attachment for the violation thereof could not be issued.[5] Under early English statutes, which became a part of the common law of the United States, judges were enabled to exercise powers which they had not theretofore assumed, such as the ordering of attorneys to pay over moneys received in a pending suit; the production of documents; the compelling of a sheriff to return process; the rule on omissions from process or copy or indorsements thereon; to grant habeas corpus; to bail a person in custody on civil process; to hear justification of bail; to grant or refuse costs;[6] to grant a review by jurors;[7] to compel plaintiff to accept a plea or stay of proceedings in an action of ejectment;[8] to grant a change of venue;[9] to hear motions and petitions and to make rules and orders thereon.[10]

b. Under Constitutional and Modern Statutory Provisions. In the United States the powers of judges at chambers have been enlarged by constitution and statute, and in Canada by statute; and in the determination of the power of a judge at chambers or in vacation it would be well to consult always the local constitution and statutes.[11] In the absence of constitutional inhibition, the legislature may confer upon judges the power to perform judicial acts in vacation or at chambers;[12] but exclusive of those powers which judges exercised at common law at chambers and in vacation, a judge can exercise only such judicial functions as are expressly authorized by constitution or statute,[13] and he must act with due regard for the limits thereof, for if he exceeds them his acts will be void.[14] But the courts will not read into the enabling statute limitations and restrictions not expressed therein,[15] and they are powerless to adopt any rules limiting the exercise of the powers conferred by statute.[16] Where the court is made up of several divisions presided over by separate judges, the legislature may invest each judge with all the powers of the court to be exercised in vacation,[17] and may confer upon inferior judges the vacation powers which superior judges are authorized to exercise.[18] And the judges may exercise such power, notwithstanding the appli-

5. 3 Chitty Gen. Pr. 19.

6. *In re* Kindling, 39 Wis. 35; 3 Chitty Gen. Pr. 20 *et seq.*

7. 2 Tidd Pr. 797.

8. 2 Tidd Pr. 1225.

9. 1 Tidd Pr. 610.

10. 1 Tidd Pr. 510.

11. See the constitutions and statutes of the various states.

12. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Norwalk St. R. Co.'s Appeal, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; Cresap *v.* Gray, 10 Oreg. 345.

13. *California.*— Larco *v.* Casaneuava, 30 Cal. 560.

Idaho.—Delano *v.* Logan County, 4 Ida. 83, 35 Pac. 841.

Illinois.— Conkling *v.* Ridgely, 112 Ill. 36, 1 N. E. 261, 54 Am. Dec. 204; Devine *v.* People, 100 Ill. 290; Blair *v.* Reading, 99 Ill. 600; Keith *v.* Kellogg, 97 Ill. 147; Ling *v.* King, 91 Ill. 571; Watts *v.* McCleave, 16 Ill. App. 272.

Indiana.— In Indiana it was held that when the court has jurisdiction of the subject-matter of the suit and of the parties, the proceedings and orders of the judge in vacation are those of the court, and even if erroneous are not void and cannot be collaterally attacked. Mauch Chunk First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846.

Nebraska.— Johnson *v.* Bouton, 56 Nebr. 626, 77 N. W. 57; Browne *v.* Edwards, etc., Lumber Co., 44 Nebr. 361, 62 N. W. 1070; Ellis *v.* Karl, 7 Nebr. 381.

New York.— Bangs *v.* Selden, 13 How. Pr. 374; Merritt *v.* Slocum, 6 How. Pr. 350. The justices of the supreme court of New York possess the same powers at chambers, in equity cases, as the chancellor formerly had, except so far as restricted by the rules of the court. Garcie *v.* Sheldon, 3 Barb. 232.

Virginia.— Chase *v.* Miller, 88 Va. 791, 14 S. E. 545.

Wisconsin.— Where the statute so provides, judges may decide in vacation a case tried at term-time. Silvernail *v.* Rust, 88 Wis. 458, 60 N. W. 787.

United States.— Hammock *v.* Farmers L. & T. Co., 105 U. S. 77, 26 L. ed. 1111.

See 29 Cent. Dig. tit. "Judges," § 1101.

14. Bangs *v.* Selden, 13 How. Pr. (N. Y.) 374.

15. Delaney *v.* Brett, 51 N. Y. 78 [*affirming* 4 Rob. 712, 1 Abb. Pr. N. S. 421].

16. Lakey *v.* Cogswell, 3 Code Rep. (N. Y.) 116.

17. State *v.* Eggers, (Mo. 1899) 54 S. W. 498.

18. *In re* Gill, 20 Wis. 686; Marvin *v.* Titsworth, 10 Wis. 320; Reg. *v.* Birkett, 21 Ont. 162.

Limitations on exercise of power.— Where

cation might have been made to a superior judge.[19] Where the constitution does not prescribe the contrary, its provisions or those of a statute conferring judicial powers do not abrogate any of the power exercised at chambers by the judges, prior to its adoption, and under the common law.[20] And a statute providing that courts shall always be open for certain purposes does not repeal statutes conferring on judges certain powers to be exercised in vacation or at chambers.[21] Statutes conferring powers to be exercised in vacation do not apply to suits pending at the time of their adoption,[22] nor to cases not expressly mentioned therein.[23] If a statute confers power on a court, as distinct from a judge, to hear proceedings at vacation or at chambers, the judge has no jurisdiction to entertain such matters.[24] A judge sitting in court may treat the court-room as his chambers and dispose of chambers business therein.[25] He cannot compel a party to go out of the county of his residence where the cause is pending to appear before him at chambers in another county.[26]

c. Under Stipulations of Parties.[27] In some jurisdictions it is provided that by stipulation of the parties a judge may exercise at chambers powers conferred on him to be exercised in open court, and the parties will be bound by his acts.[28] While acting under a stipulation authorizing him to perform certain duties in vacation, he must comply strictly with the terms of the stipulation or his acts will be void;[29] and where by stipulation he may alter the time and place for hearing a motion, a special judge, holding court in his stead at the time and place named, has no authority to continue the motion;[30] but an order of continuance by the original trial judge is valid.[31] According to the weight of authority powers conferred on a court cannot be exercised by a judge in vacation even by consent of parties unless a statute so provides,[32] although there are some decisions to the contrary.[33]

a statute confers upon an inferior judge the powers which a superior judge may exercise in vacation, he is not vested thereby with any power which the latter may exercise by reason of any other office than that of judge (Dooley's Case, 8 Abb. Pr. (N. Y.) 188), and is invested only with the powers which the latter exercised at common law (De Myer *v.* McGonegal, 32 Mich. 120; *In re* Kindling, 39 Wis. 35; *In re* Remington, 7 Wis. 643; Conroe *v.* Bull, 7 Wis. 408. See also Carroll *v.* Langan, 63 Hun (N. Y.) 380, 18 N. Y. Suppl. 290; Cashman *v.* Johnson, 4 Abb. Pr. (N. Y.) 256), and he cannot exercise chamber powers subsequently conferred by statute on superior court judges (Brigham *v.* McKenzie, 10 Ont. Pr. 406).

19. Jackson *v.* Jackson, 3 Cow. (N. Y.) 73.

20. Key *v.* Paul, 61 N. J. L. 133, 38 Atl. 823; Kennedy *v.* Simmons, 1 Hun (N. Y.) 603; Wisconsin Industrial School *v.* Clarke County, 103 Wis. 651, 79 N. W. 422; *In re* Kindling, 39 Wis. 35.

21. Black Hills Flume, etc., Co. *v.* Grand Island, etc., R. Co., 2 S. D. 546, 51 N. W. 342.

22. Matter of Hicks, 2 Code Rep. (N. Y.) 128, 4 How. Pr. 316.

23. Matter of Hicks, 2 Code Rep. (N. Y.) 128, 4 How. Pr. 319.

24. Fisk *v.* Thorp, 51 Nebr. 1, 70 N. W. 498.

25. Sarnia Agricultural Implement Mfg. Co. *v.* Perdue, 11 Ont. Pr. 224.

26. Cook *v.* Walker, 15 Ga. 457.

27. See *infra*, VI, C, 2, d, (IX), (XXI).

28. *Alabama.*— Erwin *v.* Reese, 54 Ala. 589.

Iowa.— O'Hagen *v.* O'Hagen, 14 Iowa 264; Hattenback *v.* Hoskins, 12 Iowa 109.

Kansas.— Rogers *v.* Traders' Nat. Bank, (1898) 55 Pac. 463.

Minnesota.— Rogers *v.* Greenwood, 14 Minn. 333.

New York.— *In re* Wadley, 29 Hun 12.

North Carolina.— Benbow *v.* Moore, 114 N. C. 263, 19 S. E. 156; Bynum *v.* Powe, 97 N. C. 374, 2 S. E. 170.

Wisconsin.— Dinsmore *v.* Smith, 17 Wis. 20; Beach *v.* Beckwith, 13 Wis. 21.

Canada.— Ladies' Tailoring Assoc. *v.* Clarkson, 27 U. C. L. J. 501, rendition judgment.

29. Patterson *v.* Hendrix, 72 Ga. 204; Blair *v.* Reading, 96 Ill. 130.

30. Brantley *v.* Hass, 69 Ga. 748.

31. Brantley *v.* Hass, 69 Ga. 748.

32. *California.*— Bates *v.* Gage, 40 Cal. 183; Wicks *v.* Ludwig, 9 Cal. 173. And see Norwood *v.* Kenfield, 34 Cal. 329.

Colorado.— Filley *v.* Cody, 4 Colo. 109; Francis *v.* Wells, 4 Colo. 274; Kirtley *v.* Marshall Silver Min. Co., 4 Colo. 111.

Iowa.— Townsley *v.* Morehead, 9 Iowa 565.

Nebraska.— Conover *v.* Wright, 3 Nebr. (Unoff.) 211, 91 N. W. 545.

New Mexico.— Staab *v.* Atlantic, etc., R. Co., 3 N. M. 349, 9 Pac. 381.

North Carolina.— State *v.* Parsons, 115 N. C. 730, 20 S. E. 511; Gatewood *v.* Leak, 99 N. C. 363, 6 S. E. 706, rendition of judgment.

Canada.— Thompson *v.* Freeman, 4 Ch. Chamb. (U. C.) 1.

33. New Orleans *v.* Gauthreaux, 32 La. Ann. 1126; Dinsmore *v.* Smith, 17 Wis. 20;

d. Powers in Particular Matters[34] — (I) *ADMIRALTY PROCEEDINGS.* A judge at chambers may, when and only when expressly authorized by statute, issue on a lien a warrant for the seizure of a vessel,[35] or make an order for the release of a vessel libeled for the breach of the embargo laws.[36]

(II) *APPEALS.* A judge of a United States circuit court, sitting at chambers, has power to allow a writ of error;[37] but a judge of a state court has no power to grant a writ of error in a criminal case,[38] or an appeal from an interlocutory decree,[39] or to hear an appeal from a justice's court,[40] or extend the time for filing an appeal-bond.[41] And he cannot, under authority to determine an appeal in vacation, decide upon the sufficiency of the appeal-bond.[42] So a clerk of the crown and pleas, acting as judge at chambers, cannot entertain an appeal from the report of a county judge as referee,[43] or hear an application for appeal from a judgment rendered on an affirmed report of a referee.[44] But a judge of the high court can hear at chambers appeals from a master in chambers without regard to whether the case is pending in the common pleas, king's bench, or chancery division.[45]

(III) *ATTACHMENTS.* The writ of attachment was unknown to the common law and no one had power to issue it unless specially authorized.[46] But in several jurisdictions the power has been expressly conferred by statute upon a judge out of court to issue the writ,[47] or to dissolve or vacate an existing one;[48] but in the

Beach *v.* Beckwith, 13 Wis. 21; Doggett *v.* Emerson, 7 Fed. Cas. No. 3,961, 1 Woodb. & M. 1.

34. **Issuance of writ of certiorari at chambers or in vacation** see CERTIORARI, 6 Cyc. 794.

Punishing for contempt for violation of court orders at chambers and in vacation see CONTEMPT, 9 Cyc. 31.

Issuance of writs of habeas corpus by judges at chambers and in vacation see COURTS, 11 Cyc. 811 *et seq.*; HABEAS CORPUS, 21 Cyc. 307 *et seq.*

For judicial powers of clerks of court see CLERKS OF COURT.

35. Delaney *v.* Brett, 51 N. Y. 78; Crawford *v.* Collins, 45 Barb. (N. Y.) 269.

36. U. S. *v.* The Little Charles, 26 Fed. Cas. No. 15,613, 1 Brock. 380.

37. Foote *v.* Silsby, 9 Fed. Cas. No. 4,917, 1 Blatchf. 542.

38. Amis *v.* Koger, 7 Leigh (Va.) 224; Baker *v.* Com., 2 Va. Cas. 353; Jones *v.* Com., 2 Va. Cas. 224.

39. William, etc., College *v.* Lee, 2 Hen. & M. (Va.) 557; Dawney *v.* Wright, 2 Hen. & M. (Va.) 12. The rule is otherwise under the statutes of Mississippi. Nesbit *v.* Rodewald, 43 Miss. 304; Stebbins *v.* Niles, 13 Sm. & M. (Miss.) 307.

40. Jackson County *v.* Addington, 68 N. C. 254.

41. Pardridge *v.* Morgenthau, 157 Ill. 395, 42 N. E. 74; Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676.

42. Chase *v.* Miller, 88 Va. 791, 14 S. E. 545.

43. Prfford *v.* Davis, 7 Ont. Pr. 361.

44. *Re* Dingman, 13 Ont. Pr. 232.

45. Laidlaw Mfg. Co. *v.* Miller, 11 Ont. Pr. 335. See also *Re* Monteith, 11 Ont. Pr. 361.

46. Vann *v.* Adams, 71 Ala. 475.

47. Dutcher *v.* Crowell, 10 Ill. 445; Beecher *v.* James, 3 Ill. 462; Folger *v.* Ross, 40 La. Ann. 602, 4 So. 457; Woodruff *v.* Imperial F. Ins. Co., 90 N. Y. 521; Thompson *v.* Wallace, 6 Can. L. J. 549. See also Reed *v.* Bagley, 24 Nebr. 332, 38 N. W. 827.

48. *Kansas.*— Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. 497; Swearingen *v.* Howser, 37 Kan. 126, 14 Pac. 436; Merchants' Nat. Bank *v.* Danford, 28 Kan. 512; Woods *v.* Danford, 28 Kan. 507; Quinlan *v.* Danford, 28 Kan. 507; Wells *v.* Danford, 28 Kan. 487; Shedd *v.* McConnell, 18 Kan. 594; Gillespie *v.* Lovell, 7 Kan. 419; Moffett *v.* Boydstun, 4 Kan. App. 406, 46 Pac. 24.

Michigan.— Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 438, 17 N. W. 790, 18 N. W. 206; Vinton *v.* Mead, 17 Mich. 388; Albertson *v.* Ebsall, 16 Mich. 203; Edgarton *v.* Hinchman, 7 Mich. 352. See also Hillebrands *v.* Nibbelink, 44 Mich. 413, 6 N. W. 861.

New York.— Ruppert *v.* Haug, 87 N. Y. 141; White *v.* Featherstonhaugh, 7 How. Pr. 357. See also Lansingburgh *v.* McKie, 7 How. Pr. 360; Conklin *v.* Dutcher, 5 How. Pr. 386.

South Carolina.— Bray Clothing Co. *v.* Shealy, 53 S. C. 12, 30 S. E. 620; Segler *v.* Coward, 24 S. C. 119; Cureton *v.* Dargan, 12 S. C. 122; Yancy *v.* Tallman, 1 McCord 474.

Washington.— Suffern *v.* Chisholm, 1 Wash. Terr. 486.

Wisconsin.— Harrison Mach. Works *v.* Hosig, 73 Wis. 184, 41 N. W. 70; Cohen *v.* Burr, 6 Wis. 200.

Wyoming.— Sundance First Nat. Bank *v.* Moorcroft Ranch Co., 5 Wyo. 50, 36 Pac. 821.

Canada.— Thompson *v.* Wallace, 6 Can. L. T. 549; Jackson *v.* Randall, 24 U. C. C. P. 87; Howland *v.* Rowe, 25 U. C. Q. B. 467.

See 29 Cent. Dig. tit. "Judges," § 132.

And see Mason *v.* Lieuallen, 4 Ida. 415, 39 Pac. 1117; Dunlap *v.* Dillard, 77 Va. 847.

Who may move to dissolve.— Under the Michigan statute only parties defendant can

absence of express authority a writ of attachment, or an order vacating or dissolving one,[49] or a final judgment rendered in an attachment proceeding,[50] is erroneous if granted by a judge in vacation or at chambers.

(iv) *Bills of Exceptions and Case.* A judge has no authority to allow and sign a bill of exceptions in vacation,[51] or extend the time for signing it,[52] even after notice;[53] and after the time for sealing a bill of exceptions has expired, a judge cannot be authorized to seal it, even by consent of the parties.[54] A judge cannot in vacation amend a bill of exceptions,[55] or order exceptions to findings, or refusal to find, to be stricken from the judgment-roll or case on appeal,[56] or order a bill of exceptions stricken from the record,[57] or fix a time for the signing of the bill other than that at which he is presiding over his court.[58] But it has been held that a bill of exceptions presented and allowed within the proper time may be signed by the judge in vacation.[59] So too a judge in vacation may enlarge the time for making a case, proposing amendments, and for giving notice of an appearance before the judge, provided the time originally allowed has not expired; and after the expiration of the time he may grant an order staying proceedings until the motion can be made to the court.[60]

move before a judge out of court to dissolve an attachment. Rowe *v.* Kellogg, 54 Mich. 206, 19 N. W. 957.

Waiver of objection to jurisdiction.— A plaintiff who does not question the power of a judge at chambers to dissolve an attachment waives his right to complain that the judge was acting without jurisdiction. Yoakum *v.* Howser, 37 Kan. 130, 14 Pac. 438; Swearingen *v.* Howser, 37 Kan. 126, 14 Pac. 436.

49. Kohn *v.* Justice, 1 Kan. 320; Reyburn *v.* Bassett, McCahon (Kan.) 86; Colter *v.* Marriage, 3 N. M. 351, 9 Pac. 383; Clawson *v.* Sutton Gold Min. Co., 3 S. C. 419.

One of the justices of a United States circuit court will not, against the objection of the adverse party, hear in vacation a motion to discharge the property attached pursuant to the local laws of the state. Claflin *v.* Steinberg, 5 Fed. Cas. No. 2,777, 2 Dill. 324.

A bond to discharge an attachment, given under the Missouri statute and approved by a judge in vacation, instead of by the court, may not be good as a statutory bond, but is valid as a common-law one. Williams *v.* Coleman, 49 Mo. 325.

50. Staab *v.* Atlantic, etc., R. Co., 3 N. M. 349, 9 Pac. 381.

51. *Alabama.*— Powers *v.* Wright, Minor 66.

Colorado.— Jordan *v.* Finley, 4 Colo. 189.

Illinois.— U. S. Life Ins. Co. *v.* Shattuck, 159 Ill. 610, 43 N. E. 389; Marseilles *v.* Howland, 136 Ill. 81, 26 N. E. 495; Hawes *v.* People, 129 Ill. 123, 21 N. E. 777; Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676; Nester *v.* Carney Bros. Co., 98 Ill. App. 630.

Iowa.— Claggett *v.* Gray, 1 Iowa 19.

Kentucky.— Allard *v.* Smith, 2 Metc. 297; Freeman *v.* Brenham, 17 B. Mon. 603; Biggs *v.* McIlvain, 3 A. K. Marsh. 360.

Nebraska.— Mewis *v.* Johnson Harvester Co., 5 Nebr. 217.

See 29 Cent. Dig. tit. "Judges," § 121.

In Mississippi it seems the bill of exceptions may be signed in vacation by the consent of the parties and that consent made a matter of record; otherwise it cannot be signed by the judge in vacation. Williams *v.* Ramsey, 52 Miss. 851. And see Vicksburg, etc., R. Co. *v.* Ragsdale, 51 Miss. 447.

In Florida a bill of exceptions may be settled and signed by the judge, in vacation, where an order fixing the time therefor is made in term-time, and if the trial judge is unable to act at the time appointed, the judge of another circuit or district may settle and sign the bill of exceptions. Bowden *v.* Wilson, 21 Fla. 165.

52. Myrick *v.* Merritt, 21 Fla. 799; Marseilles *v.* Howland, 136 Ill. 81, 26 N. E. 495; Hawes *v.* People, 129 Ill. 123, 21 N. E. 777; Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676; Treishel *v.* McGill, 28 Ill. App. 68. *Contra,* Black *v.* Brown, 9 Johns. (N. Y.) 264.

53. Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. 13.

54. Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676.

55. Terre Haute, etc., R. Co. *v.* Bond, 13 Ill. App. 328; Hall *v.* Mills, 5 Ill. App. 495.

56. Pettit *v.* Pettit, 20 N. Y. Wkly. Dig. 154.

57. Ford *v.* Liner, 24 Tex. Civ. App. 353, 59 S. W. 943.

58. Nester *v.* Carney Bros. Co., 98 Ill. App. 630.

59. Hawes *v.* People, 129 Ill. 123, 21 N. E. 777; Hake *v.* Strubel, 121 Ill. 321, 12 N. E. 676.

60. Hawkins *v.* Dutchess, etc., Steamboat Co., 7 Cow. (N. Y.) 467; Black *v.* Brown, 9 Johns. (N. Y.) 264 [*overruling* Jackson *v.* Hornbeck, 2 Johns. Cas. 115]; Low *v.* Hornbeck, Col. Cas. (N. Y.) 127, Col. C. Cas. 75].

In Wisconsin the rule is that any justice of the supreme court, upon affidavit showing sufficient cause therefor, may grant an order to show cause to the court or any justice thereof, why the time prescribed by rule for service of copies of a printed case should not

(v) *Change of Venue.* Under some statutes a judge at chambers or in vacation may grant a change of venue;[61] but no such power exists independent of statute.[62]

(vi) *Costs and Attorney's Fees.* A judge at chambers cannot hear an application for costs,[63] set aside an allowance of costs,[64] make an extra allowance of costs,[65] materially alter a judgment for costs after action has been taken thereon,[66] decide as to the costs of a demurrer,[67] grant costs of motion,[68] retax costs,[69] or allow attorney's fees against an insolvent estate.[70] It has been held, however, that a judge may order a clerk to refund costs improperly collected.[71]

(vii) *Eminent Domain Proceedings.* In the absence of statutory authority a judge at chambers has no jurisdiction to hear a proceeding for the condemnation of lands,[72] to continue petitioner in possession pending the proceeding of the property sought to be condemned,[73] or to enter final judgment or decree in the proceeding.[74] But if the power to hear condemnation proceedings be expressly conferred by statute on a judge in vacation, such power necessarily includes power to set aside the verdict and order a new trial.[75]

(viii) *Injunctions*—(a) *Allowance.* Judges are generally vested by some constitutional or statutory provision with power to issue an injunction in vacation as well as in term,[76] and at chambers as well as in court.[77] But, in the absence of

be enlarged, or why the appellant should not be permitted to serve the same after the expiration of the day therein prescribed. The order shall specify the time within which a copy thereof, and of the affidavit upon which it was granted, shall be served upon the attorney of the adverse party. Bigelow *v.* West Wisconsin R. Co., 27 Wis. 478.

61. Utsey *v.* Charleston, etc., R. Co., 38 S. C. 399, 17 S. E. 144; Brigham *v.* McKenzie, 10 Ont. Pr. 406. And see Gibson *v.* Abbott, 50 Iowa 155.

62. Powers *v.* Mitchell, 75 Me. 364.

63. Hopkins *v.* Smith, 9 Ont. Pr. 285. But see Cross *v.* Waterhouse, 3 Ont. Pr. 287.

Under a Montana statute, a court hearing applications for condemning rights of way to mining claims has power to adjudge costs at chambers. Granite Mountain Min. Co. *v.* Weinstein, 7 Mont. 440, 17 Pac. 113.

64. Harding *v.* Knust, 15 Ont. Pr. 80. *Contra*, McDougald *v.* Mullins, 30 Nova Scotia 313.

65. Mann *v.* Tyler, 6 How. Pr. (N. Y.) 235, 1 Code Rep. N. S. 382.

66. Noonan *v.* Bank of British North America, 29 N. Brunsw. 119.

67. Jones *v.* Miller, 16 Ont. Pr. 92.

68. Brevoort *v.* Warner, 8 How. Pr. (N. Y.) 321. See also State *v.* Ray, 97 N. C. 510, 1 S. E. 876.

69. Schauble *v.* Tietgen, 31 Wis. 695.

70. Gaffney *v.* Piper, 5 Ida. 490, 51 Pac. 99; Genesee Bank *v.* Denning, 5 Ida. 482, 51 Pac. 406.

71. McIntosh *v.* Pollock, 2 C. L. Chamb. (U. C.) 209.

72. Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 3 Ida. 263, 28 Pac. 394.

73. Loomis *v.* Andrews, 49 Cal. 239.

74. Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 3 Ida. 263, 28 Pac. 394.

75. Centralia, etc., R. Co. *v.* Rixman, 121 Ill. 214, 12 N. E. 685.

76. *Georgia.*— Lowell Mach. Shop *v.* Atlanta Cotton Factory, 60 Ga. 233; Crawford *v.* Rose, 39 Ga. 44.

Indiana.— Merrifield *v.* Weston, 68 Ind. 70; Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435.

Iowa.— Thompson *v.* Benepe, 67 Iowa 79, 24 N. W. 601.

Louisiana.— State *v.* Judges Cir. Dist. Ct., 35 La. Ann. 1075.

New Mexico.— *In re* Sloane, 5 N. M. 590, 25 Pac. 930.

United States.— Gray *v.* Chicago, etc., Co., 10 Fed. Cas. No. 5,713, 1 Woodw. 63.

See 29 Cent. Dig. tit. "Judges," § 125.

Requiring new bond in injunction.— Under the statute of West Virginia a judge of the circuit court has power in vacation to make an order requiring the complainant in injunction to give a new bond with additional security. Hutchinson *v.* Landcraft, 4 W. Va. 312.

77. *California.*— Sullivan *v.* Triunfo Gold, etc., Co., 33 Cal. 385.

Georgia.— Burchard *v.* Boyce, 21 Ga. 6.

Kansas.— State *v.* Cutler, 13 Kan. 131.

Louisiana.— State *v.* Judge, 41 La. Ann. 557, 6 So. 514.

Missouri.— Oliver *v.* Snider, 176 Mo. 63, 75 S. W. 591.

South Carolina.— Salinas *v.* Aultman, 49 S. C. 325, 27 S. E. 385.

Virginia.— Smith *v.* Butcher, 28 Gratt. 144.

See 29 Cent. Dig. tit. "Judges," § 125.

A perpetual injunction against the consent of the party cannot be granted at chambers, or until the issues of the action have been heard and determined. Hornesby *v.* Burdell, 9 S. C. 303.

A temporary injunction granted at chambers on disputed questions of fact is void. Calvert *v.* State, 34 Nebr. 616, 52 N. W. 687.

A mandatory injunction cannot be granted at chambers. Georgia Pac. R. Co. *v.* Douglas-

such statutory or constitutional authority, a judge at chambers[78] or in vacation[79] may not issue an injunction. A judge of one court has no power to grant in vacation or at chambers an injunction in a cause pending in another court,[80] unless he be expressly vested with such power by statute.[81] And when a judge is vested by statute or constitution merely with the power to issue an injunction in an action pending in another court, such judge may grant an injunction in an action pending outside his own judicial district only when the office of judge in such outside district is vacant, or when it is shown that the judge of that district is absent or unable to act.[82]

(B) *Dissolution or Modification.* Where a judge in vacation or at chambers is vested with power to issue an injunction, he is also generally expressly vested with the power to modify or dissolve it.[83] And the rule is that where only the power to grant an injunction is expressly conferred, such power carries with it the power to dissolve and modify it, the latter being incident to the former.[84] Unless express authority be found in the statute, a judge cannot, at chambers, or in vacation, on the dissolution of an injunction, dismiss the bill.[85]

ville, 75 Ga. 828. See also Thomas *v.* Hawkins, 20 Ga. 126.

78. Schlesinger *v.* Allen, 69 Ill. App. 137; Hicks *v.* Derrick, 17 Pa. Co. Ct. 605.

79. State *v.* Michaels, 8 Blackf. (Ind.) 436.

80. Northwestern Mut. L. Ins. Co. *v.* Wilcoxon, 64 Ga. 556; Watts *v.* McCleave, 16 Ill. App. 272; Wallace *v.* Helena Electric R. Co., 10 Mont. 24, 25 Pac. 278; Pittsburg, etc., R. Co. *v.* Hurd, 17 Ohio St. 144, holding that under the Ohio constitution the legislature has no power to confer on a judge of the supreme court jurisdiction to grant an injunction in a cause pending in another court.

Under the constitution of Georgia a judge of the city court may not in vacation grant an injunction in an action pending in the superior court, unless an order has been taken in the latter court in term-time for the determination of the cause in vacation. Northwestern Mut. L. Ins. Co. *v.* Wilcoxon, 64 Ga. 556.

81. Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435; Mauney *v.* Montgomery County, 71 N. C. 486, holding that under the statutes of North Carolina a judge of a district other than that in which the court is pending may issue an injunction.

Under the Missouri statute an injunction in an action pending in the circuit court, issued in vacation by a judge of the common pleas, must be returnable to the circuit court. Oliver *v.* Snider, 176 Mo. 63, 75 S. W. 591.

82. Ellis *v.* Karl, 7 Nebr. 381.

83. *Alabama.*—Griffin *v.* Huntsville Branch Bank, 9 Ala. 201.

Arkansas.— Sanders *v.* Plunkett, 40 Ark. 507.

Georgia.— Crawford *v.* Ross, 39 Ga. 44; Read *v.* Dews, R. M. Charlt. 355.

Illinois.— Watts *v.* McCleave, 16 Ill. App. 272.

Iowa.— See Curtis *v.* Crane, 38 Iowa 459.

Mississippi.— Hiller *v.* Cotten, 54 Miss. 551.

Nebraska.— Browne *v.* Edwards, etc., Lumber Co., 44 Nebr. 361, 62 N. W. 1070.

Nevada.—Champion *v.* Sessions, 1 Nev. 478.

New York.— National Gaslight Co. *v.* O'Brien, 38 How. Pr. 271; Bruce *v.* Delaware, etc., Canal Co., 8 How. Pr. 440.

Ohio.— Chapman *v.* Mad River, etc., R. Co., 1 Ohio Dec. (Reprint) 565, 10 West. L. J. 399; Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 546, 10 West. L. J. 337.

South Carolina.— Bouknight *v.* Davis, 33 S. C. 410, 12 S. E. 96.

Tennessee.— Markham *v.* Townsend, 2 Tenn. Ch. 713.

Texas.— Coleman *v.* Goyne, 37 Tex. 552. And see Price *v.* Bland, 44 Tex. 145.

Virginia.— Muller *v.* Bayly, 21 Gratt. 521.

West Virginia.— Horn *v.* Perry, 11 W. Va. 694; Hayzlett *v.* McMillen, 11 W. Va. 464. See 29 Cent. Dig. tit. "Judges," § 125.

Under the North Carolina statute a judge of one district may not in a cause pending in another district vacate or modify an injunction granted by him. Mauney *v.* Montgomery County, 71 N. C. 486.

Waiver of jurisdiction.— One who is served with notice of an application in vacation time to modify an injunction and appears and resists the application, thereby consents to the authority of the judge to modify the order in vacation. Landt *v.* Remley, 113 Iowa 555, 85 N. W. 783. The Colorado statute, however, expressly forbids the dissolution by a judge in vacation of an injunction granted after notice. Roberts *v.* Arthur, 15 Colo. 456, 24 Pac. 922.

Modification by consent.— A party may consent to authority of a judge to modify an injunction in vacation, and does so by appearing and resisting the motion. Landt *v.* Remley, 113 Iowa 555, 85 N. W. 783.

84. Howard *v.* Lowell Mach. Co., 75 Ga. 325; Semmes *v.* Columbus, 19 Ga. 471; Foote *v.* Forbes, 25 Kan. 359; Henderson *v.* Marcell, 1 Kan. 137; Adams *v.* Douglas County, 1 Fed. Cas. No. 52, McCahon (Kan.) 235. See also Sanders *v.* Plunkett, 40 Ark. 507; Read *v.* Dews, R. M. Charlt. (Ga.) 358.

85. *Illinois.*— Blair *v.* Reading, 99 Ill. 600; Cain *v.* Wyoming, 104 Ill. App. 538.

(IX) *JUDGMENTS.* According to the weight of authority, unless there is special statutory authority therefor a judge has no power to render a judgment or decree at chambers or in vacation,[86] except in pursuance of an order made in term-time.[87] Under the statutes of some jurisdictions a judge may by consent of parties render a decree,[88] or a judgment in vacation.[89] And according to some decisions a judgment or decree may be rendered in vacation on consent or stipulation of the parties in the absence of statutory authority.[90] The weight of authority, however, is to the contrary,[91] the view being taken that the objection to the judgment is jurisdictional and cannot be removed by stipulation.[92] A judge cannot order the clerk to enter *nunc pro tunc* an order alleged to have been made in open court,[93] or materially change a judgment or decree;[94] but, he may correct clerical errors and misprisions in proceedings which are apparent on the record,[95] and may sign in vacation an order announced orally in open court where the delay was due to his act.[96] He has no power to vacate a judgment.[97]

Nebraska.— Johnson *v.* Bouton, 56 Nebr. 626, 77 N. W. 57; Browne *v.* Edwards, etc., Lumber Co., 44 Nebr. 361, 62 N. W. 1070.

North Carolina.— Bynum *v.* Powe, 97 N. C. 374, 2 S. E. 170.

Texas.— Price *v.* Bland, 44 Tex. 145; Coleman *v.* Goyne, 37 Tex. 552; Grant *v.* Chambers, 34 Tex. 573. *Compare* Wagner *v.* Edmiston, 1 Tex. App. Civ. Cas. § 678, where the court, in deciding that the statute does not permit the petition to be dismissed by a judge in vacation or at chambers, strongly intimates that such unauthorized action of the judge may be subsequently confirmed by the court in term-time.

Virginia.— Mount *v.* Radford Trust Co., 93 Va. 427, 25 S. E. 244; Muller *v.* Bayly, 21 Gratt. 521.

See 29 Cent. Dig. tit. "Judges," § 125.

See also Henderson *v.* Marcell, 1 Kan. 137.

86. *Colorado.*— Cooper *v.* American Cent. Ins. Co., 3 Colo. 318; People *v.* Heber, 19 Colo. App. 523, 76 Pac. 550.

Georgia.— Lowell Mach. Shop *v.* Atlanta Cotton Factory Co., 60 Ga. 233.

Kansas.— *In re* Harmer, 47 Kan. 262, 27 Pac. 1004.

Nebraska.— Hodgin *v.* Whitcomb, 51 Nebr. 617, 71 N. W. 314.

Nevada.— Champion *v.* Sessions, 1 Nev. 478.

South Carolina.— Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444.

West Virginia.— Kinports *v.* Rawson, 29 W. Va. 487, 2 S. E. 85; Johnson *v.* Young, 11 W. Va. 673; Monroe *v.* Bartlett, 6 W. Va. 441.

United States.— Campbell Printing-Press, etc., Co. *v.* Manhattan El. R. Co., 48 Fed. 344.

A decree of dissolution of a corporation and an order for the performance of acts incident thereto is unauthorized. State *v.* Woodson, 161 Mo. 444, 61 S. W. 252; Finnell *v.* Burt, 2 Handy (Ohio) 202, 12 Ohio Dec. (Reprint) 403.

Under a New York statute it was held that a judgment by default might be rendered at chambers. Cobb *v.* Lackey, 4 Duer (N. Y.) 673.

87. Laramore *v.* McKinzie, 60 Ga. 532.

88. Erwin *v.* Reese, 54 Ala. 589.

89. Hattenback *v.* Hoskins, 12 Iowa 109; Benbow *v.* Moore, 114 N. C. 263, 19 S. E. 156; Bynum *v.* Powe, 97 N. C. 374, 2 S. E. 170; Ladies' Tailoring Assoc. *v.* Clarkson, 27 U. C. L. J. 501.

90. King *v.* Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 46; Lewis *v.* Lewis, Minor (Ala.) 35; New Orleans *v.* Gauthreaux, 32 La. Ann. 1126; Doggett *v.* Emerson, 7 Fed. Cas. No. 3,961, 1 Woodb. & M. 1.

91. *California.*— Norwood *v.* Kenfield, 34 Cal. 329; Wicks *v.* Ludwig, 19 Cal. 173.

Colorado.— Francis *v.* Wells, 4 Colo. 274; Kirtley *v.* Marshall Silver Min. Co., 4 Colo. 111; Filley *v.* Cody, 4 Colo. 109.

Iowa.— Townsley *v.* Morehead, 9 Iowa 565.

Nebraska.— Conover *v.* Wright, 3 Nebr. (Unoff.) 211, 91 N. W. 545.

New Mexico.— Staab *v.* Atlantic, etc., Co., 3 N. M. 349, 9 Pac. 381.

North Carolina.— Gatewood *v.* Leak, 99 N. C. 363, 6 S. E. 706.

92. Filley *v.* Cody, 4 Colo. 109.

93. Hegeler *v.* Henckell, 27 Cal. 491; Accousi *v* G. A. Stowers Furniture Co., (Tex. Civ. App. 1904) 83 S. W. 1104. But see Frostburg *v.* Tiddy, 63 Md. 514.

94. *In re* Rex, 70 Kan. 221, 78 Pac. 404; Port Elgin Public School Bd. *v.* Eby, 17 Ont. Pr. 58; Lapp *v.* Lapp, 3 Ch. Chamb. (U. C.) 234; Brown *v.* Nelson, 11 Ont. Pr. 121.

95. Hegeler *v.* Henckell, 27 Cal. 491.

96. State *v.* Fullmore, 47 S. C. 34, 24 S. E. 1026.

97. Kime *v.* Fenner, 54 Nebr. 476, 74 N. W. 869; Fisk *v.* Thorp, 51 Nebr. 1, 70 N. W. 498; Turner *v.* Foreman, 47 S. C. 31, 23 S. E. 989; Manning Bank *v.* Mellett, 44 S. C. 383, 22 S. E. 444; Coleman *v.* Keels, 30 S. C. 614, 9 S. E. 270; Charles *v.* Jacobs, 5 S. C. 348; Ingram *v.* Belk, 2 Rich. (S. C.) 111; Bellows *v.* Condee, 4 U. C. Q. B. 346. *Compare* Marty *v.* Ahl, 5 Minn. 27.

Setting aside a default judgment.— According to some of the Canadian decisions a judge or a master in chambers has authority to reconsider a matter which has been brought before him *ex parte*, on the application of the opposing party, and he can open up a default where satisfied that a defense was intended, and injustice has been done. Flett

(x) *Mandamus.* In the absence of special statute conferring authority, a judge has no power in vacation or at chambers to grant writs of mandamus, whether peremptory[98] or alternative.[99] However, judges are generally vested by statute with jurisdiction or authority to issue, or direct the issuance, of alternative writs of mandamus,[1] which may or must, depending upon the statute, be made returnable in vacation,[2] in term-time,[3] or at the next term of court.[4] But if there is no requirement in the statute as to the place of the return of the writ it is discretionary with the judge issuing it when and where it shall be returnable.[5] So too judges out of court are sometimes empowered by statute to grant the peremptory writ.[6]

v. Way, 14 Ont. Pr. 123; Turley *v.* Williamson, 13 U. C. C. P. 581; Kidd *v.* O'Connor, 43 U. C. Q. B. 193; Shaw *v.* Nickerson, 7 U. C. Q. B. 541. But this is denied by others. Hilliard *v.* Arthur, 10 Ont. Pr. 281; Wills *v.* Carroll, 10 Ont. Pr. 142.

98. Payne *v.* Perkerson, 56 Ga. 672; Price *v.* Harned, 1 Iowa 473; People *v.* Donovan, 135 N. Y. 76, 31 N. E. 1009; Matter of Manning, 71 Hun (N. Y.) 236, 24 N. Y. Suppl. 1039. See also Gay *v.* Gilmore, 76 Ga. 725.

99. *Ex p.* Grant, 6 Ala. 91; State *v.* Pierce County, 10 Nebr. 476, 6 N. W. 763; Atty.-Gen. *v.* Lum, 2 Wis. 507; Merrill Mandamus, § 217, where the author assigns as a reason for the decision in *Ex p.* Grant, *supra*, that the jurisdiction or authority to issue the writ is, by the common law, lodged in the court. But see Bean *v.* People, 6 Colo. 98; Johnson *v.* State, 1 Ga. 271, where the court says that it has "no doubt of the power," according to the common law, of a judge to issue the writ, at any time in vacation, but that it must be made returnable in term.

In **Louisiana**, however, it has been held that the practice has always been to issue the alternative writ at chambers, which practice has grown up because the writ is in the nature of an interlocutory order, and not a final judgment. State *v.* Judge, 22 La. Ann. 580. See also State *v.* Judges Cir. Dist. Ct., 35 La. Ann. 1077.

1. *Alabama.*— *Ex p.* Grant, 53 Ala. 16; *Ex p.* Henderson, 43 Ala. 392.

Colorado.— People *v.* Ouray, 4 Colo. 291.

Dakota.— Territory *v.* Shearer, 2 Dak. 332, 8 N. W. 135.

Georgia.— Glover *v.* Morris, 122 Ga. 768, 50 S. E. 956; Hammond *v.* Poole, 58 Ga. 169; Payne *v.* Perkerson, 56 Ga. 672; Wheeler *v.* Walker, 55 Ga. 256. See also Gay *v.* Gilmore, 76 Ga. 725; Johnson *v.* State, 1 Ga. 271.

Missouri.— State *v.* Weeks, 93 Mo. 499, 6 S. W. 266; *Ex p.* Miller, 12 Mo. App. 592. See also State *v.* Rombauer, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502.

Montana.— State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879.

New Mexico.—Territory *v.* Ortiz, 1 N. M. 5.

North Carolina.— Sigman *v.* Southern R. Co., 155 N. C. 181, 47 S. E. 420; Belmont *v.* Reilly, 71 N. C. 260.

Tennessee.— Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245.

Texas.— Jones *v.* McMahan, 30 Tex. 719. See also Meyer *v.* Carolan, 9 Tex. 250.

Utah.— Brown *v.* Atkin, 1 Utah 277.

Wisconsin.— Atty.-Gen. *v.* Lum, 2 Wis. 507.

Wyoming.— State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

See 29 Cent. Dig. tit. "Judges," § 128.

Under the **Colorado** statute, limiting the power of judges in vacation to a hearing in determination of motions and demurrers, and making interlocutory orders preparatory to the trial, it has been held that a judge in vacation has no jurisdiction to render an order denying, on the merits, a petition for the alternative writ. People *v.* Hebel, (App. 1904) 76 Pac. 550.

Under the **Arkansas** statute a judge may in vacation make temporary orders for preventing damages or injury to the applicants for a writ, until the application is decided, but the hearing upon the application must be by the court. Palmer *v.* McChesney, 26 Ark. 452.

2. Territory *v.* Shearer, 2 Dak. 332, 8 N. W. 135; Sigman *v.* Southern R. Co., 135 N. C. 181, 47 S. E. 420; Belmont *v.* Reilly, 71 N. C. 260.

Under the **North Carolina** statute where an application for mandamus is to "enforce a money demand," a judge at chambers has no jurisdiction thereof. Rogers *v.* Jenkins, 98 N. C. 129, 3 S. E. 821. However, it has been held under the same statute that an action in which the only relief demanded was a writ of mandamus to compel the board of dental examiners to issue to plaintiff a certificate of proficiency in dentistry, that an allegation of the board's wrongful refusal to issue the certificate in a given sum does not make it an action for a money demand, so as to take the case out of the jurisdiction of the judge at chambers. Ewhank *v.* Turner, 134 N. C. 77, 46 S. E. 508.

3. Hammond *v.* Poole, 58 Ga. 169; Payne *v.* Perkerson, 56 Ga. 672; Wheeler *v.* Walker, 55 Ga. 256; Whitesides *v.* Stuart, 91 Tenn. 710, 20 S. W. 245; Atty.-Gen. *v.* Lum, 2 Wis. 507. See also Gay *v.* Gilmore, 76 Ga. 725; Johnson *v.* State, 1 Ga. 271.

4. State *v.* Weeks, 92 Mo. App. 359; *Ex p.* Miller, 12 Mo. App. 592.

5. Jones *v.* McMahan, 30 Tex. 719.

6. Territory *v.* Shearer, 2 Dak. 332, 8 N. W. 135; Brown *v.* Atkin, 1 Utah 277; Gloucester County *v.* Middlesex County, 88 Va. 843, 14 S. E. 660; Delgado *v.* Chavez, 140 U. S. 586, 11 S. Ct. 874, 35 L. ed. 578.

(xi) *New Trial.* Unless authorized by statute[7] a judge cannot determine a motion for a new trial in vacation,[8] except by special order made during term-time;[9] and when the term-time order designates a time and place of hearing, the power is restricted thereto, unless the hearing be continued for some good cause then and there shown.[10] So if the motion is not disposed of at the appointed time, or properly continued to a future date, it is continued by operation of law to the next regular term, and the judge has no authority to dismiss it in vacation.[11] Where the motion is continued until the next term, the judge cannot dispose of it in vacation,[12] or transfer it to another judge for hearing.[13] Nor can he hear a motion to set aside an order made in term-time refusing a new trial;[14] or, after verdict on an issue out of chancery, deny a motion for a new trial and order judgment on the verdict;[15] or set aside a verdict and vacate a sentence in a criminal case;[16] or reinstate a case except on notice.[17]

(xii) *Pleadings.* A judge has no authority to pass on a demurrer at chambers or in vacation,[18] except by virtue of an order passed in term-time,[19] or dismiss an action,[20] without giving opportunity for amendment.[21] He cannot grant leave to

Under the Nebraska and Wyoming statutes, however, a judge at chambers is authorized to issue a peremptory writ only when the right to require the performance of the act is clear. Clark *v.* State, 24 Nebr. 263, 38 N. W. 752; State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

Under the Georgia statute a judge at chambers can hear and determine the application for the peremptory writ only when no question of fact is involved. Glover *v.* Morris, 122 Ga. 768, 50 S. E. 956.

7. By statute in Georgia (Civ. Code (1896), §§ 23, 43 *et seq.*) it is now provided that motions for new trials may be heard in vacation on notice. In extraordinary cases by §§ 55, 84 *et seq.*, a motion for a new trial may be made and disposed of in vacation. Spann *v.* Clark, 47 Ga. 369; Candler *v.* Hammond, 23 Ga. 493, which cases were decided under an earlier statute and in effect are overruled by Brinkley *v.* Buchanan, 55 Ga. 542, but are in harmony with the sections cited above.

8. *Georgia.*— Wood *v.* Wiley Mfg. Co., 117 Ga. 517, 43 S. E. 983; Napier *v.* Heilker, 115 Ga. 168, 41 S. E. 689; Dickinson *v.* Mann, 74 Ga. 217; Walker *v.* Banks, 65 Ga. 20; Brinkley *v.* Buchanan, 55 Ga. 342; Johnson *v.* Bemis, 4 Ga. 157; Graddy *v.* Hightower, 1 Ga. 252.

Indiana.— Greenup *v.* Crooks, 50 Ind. 410; Ferger *v.* Wesler, 35 Ind. 53.

Maryland.— Hays *v.* Philadelphia, etc., R. Co., 99 Md. 413, 58 Atl. 439.

Nebraska.— Hodgin *v.* Whitcomb, 51 Nebr. 617, 71 N. W. 314.

South Carolina.— State *v.* Chavis, 34 S. C. 132, 13 S. E. 317; Clawson *v.* Hutchinson, 14 S. C. 517; Charles *v.* Jacobs, 5 S. C. 348.

See 29 Cent. Dig. tit. "Judges," § 116.

In Minnesota a judge can appoint a time and place for hearing an application to set aside a judgment and for leave to answer. Marty *v.* Ahl, 5 Minn. 27.

9. McGee *v.* Anerum, 33 Fla. 499, 15 So. 231; Watson *v.* Jones, 1 Ga. 300. See also cases cited *supra*, this section.

10. Dickinson *v.* Mann, 74 Ga. 217; Walker *v.* Banks, 65 Ga. 20; Tison *v.* Myrick, 60 Ga. 123.

11. Miller *v.* Thigpen, 121 Ga. 475, 49 S. E. 286; Napier *v.* Heilker, 115 Ga. 168, 41 S. E. 689; Atlanta, etc., R. Co. *v.* Strickland, 114 Ga. 998, 41 S. E. 501. See also Shockley *v.* Turnell, 114 Ga. 378, 40 S. E. 279.

12. Wood *v.* Wiley Mfg. Co., 117 Ga. 517, 43 S. E. 983; Johnson *v.* Bemis, 4 Ga. 157.

13. Donly *v.* Fort, 42 S. C. 200, 20 S. E. 51.

14. Mellen *v.* Mellen, 16 N. Y. Suppl. 191, 21 N. Y. Civ. Proc. 301, 27 Abb. N. Cas. 99. See also Charles *v.* Jacobs, 5 S. C. 348.

15. Grierson *v.* Harmon, 16 S. C. 618.

16. Chapman *v.* State, 116 Ga. 598, 42 S. E. 999; Haskens *v.* State, 114 Ga. 837, 40 S. E. 997.

17. Hughes *v.* McCoy, 11 Colo. 591, 19 Pac. 674.

18. Price *v.* Grice, 10 Ida. 443, 79 Pac. 387; Champion *v.* Sessions, 1 Nev. 478. But see Nachod *v.* Stern, 30 Nova Scotia 251.

A statute conferring power to render judgment on a frivolous demurrer at chambers is valid. Clapp *v.* Preston, 15 Wis. 543.

19. Solomon *v.* Peters, 37 Ga. 251, 92 Am. Dec. 69.

In Georgia, by virtue of statute (Act 1869), a demurrer may be passed upon in vacation; but not prior to the return-term. Johnson *v.* Cravey, 120 Ga. 1047, 48 S. E. 424; Stewart *v.* Stewart, 89 Ga. 138, 15 S. E. 23; Murphy *v.* Tallulah Steam Fire Engine Co. No. 3, 72 Ga. 196; Gullatt *v.* Thrasher, 42 Ga. 429.

20. *Illinois.*— Cain *v.* Wyoming, 104 Ill. App. 538.

Minnesota.—Rogers *v.* Greenwood, 14 Minn. 333.

Nebraska.— Johnson *v.* Bouton, 56 Nebr. 626, 77 N. W. 57; Browne *v.* Edwards, etc., Lumber Co., 44 Nebr. 361, 62 N. W. 1070.

Nevada.— Champion *v.* Sessions, 1 Nev. 478.

Texas.— Price *v.* Bland, 44 Tex. 145; Coleman *v.* Goyne, 37 Tex. 552; Aiken *v.* Carroll, 37 Tex. 73; Grant *v.* Chambers, 34 Tex. 573; Wagner *v.* Edmiston, 1 Tex. App. Civ. Cas. § 678.

21. Goodlett *v.* Kelly, 74 Ala. 213; Massey *v.* Modawell, 73 Ala. 421; Yonge *v.* Hooper,

plead double, or to withdraw a plea and plead *de novo*;[22] allow a defendant in an equity action to withdraw his plea and refile it with a jury notice;[23] extend the time to demur;[24] or enter judgment for defendant for failure of plaintiff to reply to an answer;[25] or permit the filing of exceptions *nunc pro tunc*.[26] A judge may at chambers grant leave to amend a complaint,[27] or file a supplemental complaint;[28] but not after the cause is at issue and noticed for trial,[29] unless it is stipulated that a trial shall be had before the judge without a jury.[30] He may grant further time to plead in abatement.[31] But an *ex parte* order extending the time made after the statutory time has expired is a nullity.[32] A motion to strike out an answer, and for judgment for its frivolousness, may be made and decided at chambers;[33] and a conditional judgment thereon may be granted.[34]

(XIII) *PROBATE PROCEEDINGS.* Since the vacation powers of a judge in probate matters are derived solely from statute, he cannot, without express statutory authority, appoint administrators,[35] decree the sale of lands by an administrator,[36] compel an administrator to give additional security on his bond,[37] or render a judgment or decree finally settling the account of an administrator.[38] It has been held, however, that he may grant administration orders in simple cases of account.[39] The power to appoint a guardian is usually lodged by statute expressly in the court, and in such event an appointment made by a judge at chambers is absolutely void.[40] But there are statutes in some states authorizing the provisional appointment of guardians by a judge in vacation, to be acted upon by the court at its next term.[41] So too some statutes confer on a judge in vacation power to finally discharge a guardian,[42] to permit him to sell his ward's realty,[43] or to order him to deposit in the court funds of the minor.[44]

(XIV) *PROHIBITION.* A judge when vested with express statutory authority may in vacation issue a writ of prohibition,[45] but not otherwise.[46] So too a judge

73 Ala. 119; Stoudenmire *v.* De Bardelaben, 72 Ala. 300; Kingsbury *v.* Milner, 69 Ala. 502; Champion *v.* Sessions, 1 Nev. 478.

22. Fraser *v.* McLeod, 1 Brev. (S. C.) 198.

23. Thurlow *v.* Beck, 9 Ont. Pr. 268.

24. Davenport *v.* Sniffen, 1 Barb. (N. Y.) 223; Burrall *v.* Raineteaux, 2 Paige (N. Y.) 331.

25. Aymar *v.* Chase, Code Rep. N. S. (N. Y.) 330.

26. Young *v.* Rann, 111 Iowa 253, 82 N. W. 785; State *v.* Hathaway, 100 Iowa 225, 69 N. W. 449.

27. Ellen *v.* Ellen, 26 S. C. 99, 1 S. E. 413. In Watts *v.* McCleave, 16 Ill. App. 272, it was held that he could not permit the bringing in of new parties.

28. Cook *v.* Walker, 15 Ga. 457; Edwards *v.* Edwards, 14 S. C. 11.

29. Fuller *v.* Roosevelt, 4 Cow. (N. Y.) 144.

30. Clews *v.* Traer, 57 Iowa 459, 10 N. W. 838.

31. Ross *v.* Hammond, 5 N. Brunsw. 631.

32. Fries *v.* Coar, 13 N. Y. Civ. Proc. 152.

33. Witherspoon *v.* Van Dolar, 15 How. Pr. (N. Y.) 266. *Contra*, Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444. See also Larco *v.* Casaneuava, 30 Cal. 560, holding that a judge at chambers has no authority to hear motions to strike out pleadings or parts of pleadings.

34. Witherspoon *v.* Van Dolar, 15 How. Pr. (N. Y.) 266; Fales *v.* Hicks, 12 How. Pr. (N. Y.) 153.

35. Barry *v.* Frayser, 10 Heisk. (Tenn.) 206, holding further that under the Tennessee statute the power of a chancellor at chambers to appoint administrators in vacation is restricted to cases where a bill is filed for that particular purpose.

36. Hunton *v.* Nichols, 55 Tex. 217.

37. Wingate *v.* Wallis, 5 Sm. & M. (Miss.) 249.

38. Bougere's Succession, 29 La. Ann. 378.

39. *In re* Munsie, 10 Ont. Pr. 98.

40. Bell *v.* Love, 72 Ga. 125.

41. Garrison *v.* Lyle, 38 Mo. App. 558.

In New York it has been held under a statute providing that motions may be made in the first judicial district to a justice out of court, except for a new trial on the merits, that a judge at chambers may in such district appoint absolutely, and not provisionally, a guardian *ad litem* in partition. Disbrow *v.* Folger, 5 Abb. Pr. 52.

42. Warder *v.* Elkins, 38 Cal. 439, holding further that the power to finally discharge a guardian necessarily includes the power to perform any act preliminary to this ultimate act.

43. Stewart *v.* Daggy, 13 Nebr. 290, 13 N. W. 399. But this power does not exist in the absence of statute. Mills *v.* Geer, 111 Ga. 275, 36 S. E. 673, 52 L. R. A. 934.

44. Wegmann's Succession, 110 La. 930, 34 So. 878.

45. State *v.* Judges Caddo Parish First Dist. Ct., 35 La. Ann. 1007.

46. People *v.* Arapahoe County Dist. Ct., (Colo. 1901) 69 Pac. 1066.

may, if he possesses express statutory authority,[47] or the powers of a chancellor,[48] or even the powers of a common-law judge,[49] grant in vacation a preliminary rule in prohibition, returnable to and triable by the court in term-time.[50]

(xv) *Quo Warranto.* Without express statutory authority a judge out of court cannot issue a writ of quo warranto,[51] or grant leave to file an information in the nature of quo warranto.[52] But in some jurisdictions the power to issue the writ,[53] or to grant leave to file an information,[54] is expressly conferred by statnte.

(xvi) *Receivers.* By statute judges are generally expressly vested with authority to appoint receivers in vacation or at chambers,[55] to discharge receivers,[56] to authorize the issuance of receivers' certificates,[57] and to enforce the delivery of property of receivers.[58] But the general rule is that, independently of express statutory authority, the judge has no power in vacation or at chambers to appoint

47. State *v.* Dearing, (Mo. 1904) 84 S. W. 21; Lincoln-Lucky, etc., Min. Co. *v.* First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580. See also State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393.

48. State *v.* Dearing, (Mo. 1904) 84 S. W. 21; State *v.* Rombauer, 105 Mo. 103, 16 S. W. 695; State *v.* Rombauer, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502.

49. *Ex p.* Ray, 45 Ala. 15.

50. *Ex p.* Boothe, 64 Ala. 312.

51. State *v.* Conklin, 33 Wis. 685; U. S. *v.* Lockwood, 1 Pinn. (Wis.) 359.

52. McDonald *v.* Alcona County, 91 Mich. 459, 51 N. W. 1114. See also Eslow *v.* Albion Tp., 27 Mich. 4.

53. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237; Bowen *v.* Gilleylen, 58 Miss. 813.

54. People *v.* Moore, 73 Ill. 132.

In Ohio it has been held that a judge of the common pleas, in the exercise of chamber powers, may, as a member of the district court, grant leave to file an information in the nature of a quo warranto in a district court, although the opinion in the case does not disclose whether a statute conferring express authority exists. State *v.* Buckland, 5 Ohio St. 216.

55. *Alabama.*— Moritz *v.* Miller, 87 Ala. 331, 6 So. 269; Harwell *v.* Potts, 80 Ala. 70; Micou *v.* Moses, 72 Ala. 439; *Ex p.* Smith, 23 Ala. 94.

Arkansas.— Franklin *v.* Meyer, 36 Ark. 96.

California.— Quiggle *v.* Trumbo, 56 Cal. 626.

Georgia.— Caswell *v.* Bunch, (1887) 7 S. E. 270. See also Dougherty *v.* Jones, 37 Ga. 348.

Indiana.— Chicago, etc., R. Co. *v.* St. Clair, 144 Ind. 371, 42 N. E. 225. See also Mauch Chunk First Nat. Bank *v.* Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846.

Iowa.— French *v.* Gifford, 30 Iowa 148. See also Clark *v.* Raymond, 84 Iowa 251, 50 N. W. 1068.

Kentucky.— Wilson *v.* Aultman, etc., Co., 91 Ky. 299, 15 S. W. 783, 12 Ky. L. Rep. 881; Hurst *v.* Nicola Bros. Co., 65 S. W. 364, 23 Ky. L. Rep. 1406.

Louisiana.— New Orleans *v.* Gauthreaux, 32 La. Ann. 1126.

Massachusetts.— Wheelock *v.* Hastings, 4 Metc. 504; Kimball *v.* Morris, 2 Metc. 573.

Missouri.— State *v.* Woodson, 161 Mo. 444, 61 S. W. 252; State *v.* Hairzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; St. Louis R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

New York.— Webber *v.* Hobbie, 13 How. Pr. 382.

South Carolina.— Harmon *v.* Wagener, 33 S. C. 487, 12 S. E. 98; Pelzer *v.* Hughes, 27 S. C. 408, 3 S. E. 781; Kilgore *v.* Hair, 19 S. C. 486.

Texas.— Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 88 Tex. 468, 27 S. W. 100; Williams *v.* Odell, (Civ. App. 1898) 47 S. W. 151; New Birmingham Iron, etc., Co. *v.* Blevins, 12 Tex. Civ. App. 410, 34 S. W. 828.

West Virginia.— Kerr *v.* Hill, 27 W. Va. 576, holding that under the statute a judge in vacation may appoint a receiver of the property of any corporation, firm, or person, except the property be real estate, and the rents, issues, and profits thereof.

See 29 Cent. Dig. tit. "Judges," § 126.

And see Rider-Wallis Co. *v.* Fogo, 102 Wis. 536, 78 N. W. 767.

Receiver of lunatic's estate.— Under the North Carolina statute a judge out of court may appoint a receiver of the estate of an insane person during the pendency of an action against his removed guardian. *In re* Hybart, 119 N. C. 359, 25 S. E. 963.

A receiver in insolvent proceedings, as well as in ordinary cases may, under the California statute, be appointed by a judge at chambers. Real Estate Associates *v.* San Francisco, 60 Cal. 223.

The right to require the receiver to qualify by giving a bond is an incident to the right to appoint. State *v.* Woodson, 161 Mo. 444, 61 S. W. 252.

56. Nisbet *v.* Tindall, 115 Ga. 374, 41 S. E. 569; Crawford *v.* Ross, 39 Ga. 44; Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1; Walters *v.* Anglo-American Mortg., etc., Co., 50 Fed. 316.

Power to discharge incident to power to appoint.— It has been held, however, that where the power to appoint a receiver is expressly conferred on a judge in vacation, the power to discharge the receiver is conferred by implication. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1.

57. State *v.* Port Royal, etc., R. Co., 45 S. C. 413, 23 S. E. 363.

58. Cobb *v.* Black, 34 Ga. 162.

a receiver,[59] or entertain a motion to vest the title of an estate in a receiver.[60] However, even in the absence of express statutory authority for the appointment of a receiver by a judge in vacation or at chambers, such appointment will be upheld where defendant voluntarily appears, resists the application, and files his answer,[61] or where the court in term subsequently confirms the appointment.[62]

(XVII) *REFERENCES.* A judge may, at chambers, make an order of reference,[63] order the referee to report his findings and conclusions[64] and confirm such report;[65] and such order may be made in a county other than that in which the cause is pending.[66] He may also grant an allowance in case of a reference.[67]

(XVIII) *SALES.*[68] Under some statutes a judge at chambers or in vacation may confirm a report of a sale under foreclosure decree;[69] pass on objections to the regularity of the sale under foreclosure, including objections to the appraisement;[70] or order partition, provided he sits in the county where the land or a portion thereof lies.[71] He cannot order the resale of property under a decree foreclosing a mortgage, especially where the judge is without the county where the cause is pending, and the proper consent of the parties has not been given.[72] And a statute giving power to a judge in chambers to appoint new trustees and to order the sale of property under certain conditions applies only to cases of trust estates, such estates as should be in the hands of trustees and perhaps to such property or estates as might be within the equitable jurisdiction by reason of some pending litigation in courts of equity. Under a statute of this character no order can be made by a judge in chambers for the sale of an infant's property, unless held for them in trust, or within equity jurisdiction by reason of some pending litigation in a court of equity.[73]

59. *California.*— Ruthrauff *v.* Kresz, 13 Cal. 639.

Indiana.— Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188; Newman *v.* Hammond, 46 Ind. 119.

Kansas.— See Guy *v.* Doak, 47 Kan. 236, 366, 27 Pac. 968.

Mississippi.— See Alexander *v.* Manning, 58 Miss. 634.

Missouri.— St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341.

New York.— See Ireland *v.* Nichols, 7 Rob. 476.

United States.— Hammock *v.* Farmers' L. & T. Co., 105 U. S. 77, 26 L. ed. 1111; Hervey *v.* Illinois Midland R. Co., 28 Fed. 169.

See 29 Cent. Dig. tit. "Judges," § 126.

Compare Ex p. Pincke, 2 Meriv. 452, 35 Eng. Reprint 1013.

As an incident to his statutory power to grant an injunction, however, a judge may in an otherwise proper cause exercise the power in vacation to appoint a receiver. Smith *v.* Butcher, 28 Gratt. (Va.) 144; Penn *v.* Whiteheads, 12 Gratt. (Va.) 74. See Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621. *Contra*, Ruthrauff *v.* Kresz, 13 Cal. 639.

60. Thompson *v.* Freeman, 4 Ch. Chamb. (U. C.) 1.

61. Mauch Chunk First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846; Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682.

Where no process is issued, however, jurisdiction to appoint a receiver is not acquired by a judge at chambers unless the appearance of defendant be in the manner recognized by the law as an appearance. Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188.

62. Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429; Hervey *v.* Illinois Midland R. Co., 28 Fed. 169.

63. Pratt *v.* Timmerman, 69 S. C. 186, 48 S. E. 255; Charlotte First Nat. Bank *v.* Lee, 68 S. C. 116, 46 S. E. 771; Green *v.* McCarter, 64 S. C. 290, 42 S. E. 157; Hampton Bank *v.* Fennell, 55 S. C. 379, 33 S. E. 485; Moore *v.* Bruce, 85 Va. 139, 7 S. E. 195. *Contra*, Scudder *v.* Snow, 29 How. Pr. (N. Y.) 95, holding that an order of reference should be made at special term.

64. Green *v.* McCarter, 64 S. C. 290, 42 S. E. 157.

65. Boegler *v.* Eppley, 40 Hun (N. Y.) 523; Robertson *v.* Robertson, 9 Daly (N. Y.) 44. *Contra*, Shine *v.* Bolling, 82 Ala. 415, 2 So. 533; Coleman *v.* Smith, 55 Ala. 368.

66. Charlotte First Nat. Bank *v.* Lee, 68 S. C. 116, 46 S. E. 771; Hampton Bank *v.* Fennell, 55 S. C. 379, 33 S. E. 485.

67. Main *v.* Pope, 16 How. Pr. (N. Y.) 271.

68. Sale of property in probate proceedings see *supra*, VI, C, 2, d, (XIII).

69. *Ex p.* Branch, 63 Ala. 383.

70. Hartsuff *v.* Huss, 2 Nebr. (Unoff.) 145, 95 N. W. 1070.

71. Woodward *v.* Elliott, 27 S. C. 368, 3 S. E. 477.

72. Kaminisky *v.* Trantham, 45 S. C. 8, 22 S. E. 746.

73. Mitchell *v.* Turner, 117 Ga. 958, 44 S. E. 17; Webb *v.* Hicks, 117 Ga. 335, 43

(XIX) *SUPERSEDEAS.* In the absence of statutory authority a judge cannot in vacation or at chambers issue writs of supersedeas, such as an order staying an execution,[74] staying proceedings on a peremptory mandamus,[75] or staying all actions against one who has taken possession of lands in a condemnation proceeding.[76] But a judge may in vacation, if authorized by statute, issue writs of supersedeas,[77] such as an order staying proceedings under a judgment or an execution,[78] staying proceedings pending an appeal from an order denying a motion to change the venue,[79] or staying proceedings under a previous order appointing a receiver.[80]

(XX) *SUPPLEMENTARY PROCEEDINGS AND EXECUTIONS.* A judge may hear at chambers, and in another county, appeals from orders of the clerk in supplementary proceedings;[81] or an appeal from the clerk's refusal to issue execution.[82] He may pass the final orders in supplementary proceedings, even in a county other than that in which the judgment debtor resides;[83] but he may direct the publication of a notice of sale under execution;[84] and the legislature can authorize him to confirm a sale on execution in vacation,[85] to order execution to issue,[86] to stay or set aside executions,[87] or to rescind an order granting execution after it reaches the

S. E. 738; Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; Fleming *v.* Hughes, 99 Ga. 444, 27 S. E. 791; McDonald *v.* McCall, 91 Ga. 304, 18 S. E. 157; Taylor *v.* Kemp, 86 Ga. 181, 12 S. E. 296; Rogers *v.* Pace, 75 Ga. 436; Pughsley *v.* Pughsley, 75 Ga. 95; Knapp *v.* Harris, 60 Ga. 398; Milledge *v.* Bryan, 49 Ga. 397. But see Sharp *v.* Findley, 71 Ga. 654.

74. Chadwick *v.* Reeder, 19 N. J. L. 156, holding further that the court, when given by statute the power to stay an execution, cannot by a general rule authorize a judge at his chambers to grant such a stay. *Compare* Com. *v.* Magee, 8 Pa. St. 240, 44 Am. Dec. 509.

75. People *v.* Steele, 1 Edm. Sel. Cas. (N. Y.) 568.

76. Loomis *v.* Andrews, 49 Cal. 239.

77. Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 2 Ind. 670; Sales *v.* Woodin, 8 How. Pr. (N. Y.) 349; Waterman *v.* Raymond, 5 Wis. 185.

A supreme court judge has power, in vacation, to make a provisional order for the stay of proceedings in a lower court, to enable a party to renew, if necessary, a similar motion in term. Waterman *v.* Raymond, 5 Wis. 185.

Length of stay.— Under the New York statute any judge may make an order out of court, and without notice, staying the proceeding in an action to enable a party to apply for some ulterior relief, providing the time shall not exceed twenty days. Bangs *v.* Selden, 13 How. Pr. (N. Y.) 374. But *compare* Langdon *v.* Wilkes, Code Rep. N. S. (N. Y.) 10, holding that a judge out of court and without notice may make any number of orders staying proceedings, although collectively they stay the proceedings for more than twenty days. The statute means no single order staying proceedings more than twenty days.

Where application must be made.— Under the New York statute authorizing a defendant to apply "to any judge of the court," for an order of supersedeas, he may apply to a judge in a district in which the action is not triable. Wells *v.* Jones, 2 Abb. Pr. (N. Y.) 20.

78. *Georgia.*— Wheeler *v.* Walker, 55 Ga. 256.

Illinois.— Bonnell *v.* Neely, 43 Ill. 288; Robinson *v.* Chesseldine, 5 Ill. 332; Greenup *v.* Brown, 1 Ill. 252.

Missouri.— Parker *v.* Hannibal, etc., R. Co., 44 Mo. 415.

New York.— Laney *v.* Rochester R. Co., 81 Hun 346, 30 N. Y. Suppl. 893; Ward *v.* Bundy, 43 How. Pr. 330; Otis *v.* Spencer, 8 How. Pr. 171.

Tennessee.— See Marsh *v.* Haywood, 6 Humphr. 210.

Canada.— Lee *v.* Mimico Real Estate Co., 15 Ont. Pr. 288.

See 29 Cent. Dig. tit. "Judges," § 120.

Under the New York statute, as it existed in 1852, the most that a judge out of court could do was to grant an order to show cause before himself, or some other judge, or some court, why proceedings on appeal from a judgment should not be stayed. Steam Nav. Co. *v.* Weed, 8 How. Pr. (N. Y.) 49.

79. Hull *v.* Hart, 27 Hun (N. Y.) 21, holding further that under the New York statute an order staying proceedings in the first judicial district pending appeal from an order denying the motion there made to change the venue may be made by any judge out of court in any part of the state.

80. State *v.* Taylor, 19 Wis. 566.

81. Ledbetter *v.* Pinner, 120 N. C. 455, 27 S. E. 123.

82. McCaskill *v.* McKinnon, 121 N. C. 192, 28 S. E. 265, 61 Am. St. Rep. 659.

83. Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

84. Herriman *v.* Moore, 49 Iowa 171.

85. Beatrice Paper Co. *v.* Beloit Iron Works, 46 Nebr. 900, 65 N. W. 1059; McMurtry *v.* Tuttle, 13 Nebr. 232, 13 N. W. 213.

86. Hamilton *v.* Stewiacke Valley, etc., R. Co., 30 Nova Scotia 10.

87. Robinson *v.* Yon, 8 Fla. 350; Yancy *v.* Tallman, 1 McCord (S. C.) 474.

hands of the sheriff.[88] He may order the sale of trust property,[89] or grant the trustee power to encumber it.[90]

(xxi) *Trial of Actions.* According to the weight of authority a judge has no power to try actions at chambers or in vacation without express constitutional or statutory authority,[91] and in at least one jurisdiction it has been held that a statute conferring on him the right to try issues of fact at chambers is unconstitutional.[92] But under some statutes it is permissible to try an action at chambers or in vacation if the parties consent thereto;[93] and in some jurisdictions independently of any statutory provision consent of the parties authorizes trial or an action at chambers or in vacation,[94] although the weight of authority is to the contrary.[95] Authority is sometimes conferred by express enactment on a judge at chambers or in vacation to try certain classes of actions.[96]

(xxii) *Trusts.* In some jurisdictions a judge may, at chambers, appoint[97] or remove a trustee;[98] and such power may be exercised at any place within the territorial jurisdiction of the judge, without regard to the residence of the parties or the location of the trust property.[99] But he cannot accept the resignation of a trustee and appoint his successor,[1] except by consent of the parties.[2] He may enforce an order granted in vacation, directing a trustee to pay moneys for the support of a beneficiary,[3] and exercise the powers of the chancery court over trust estates when necessary to protect the beneficiary;[4] and in so doing, he acts as a court of equity, which is always open, and a presumption as to jurisdiction applies to orders so made;[5] by consent, he may order a settlement by a resigning trustee,[6] and such order will be valid, although not filed in the proper clerk's office until after the expiration of the judge's term.[7]

(xxiii) *Warrants of Arrest.* A judge in vacation or chambers may, when authorized by statute, issue a warrant for any criminal offense,[8] or grant an order of arrest in a civil cause.[9] In some jurisdictions a judge in vacation or at chambers has statutory authority, where a person is in custody or under arrest for a bailable offense, to let him to bail and take his recognizance.[10] In other jurisdic-

88. Doyle *v.* Henderson, 12 Ont. Pr. 38. *Compare* Bond *v.* Pacheco, 30 Cal. 530, holding that a judge at chambers has no jurisdiction to set aside an execution issued on a judgment and perpetually stay the enforcement thereof.

89. Weems *v.* Harrold, 75 Ga. 866; Saulsbury *v.* Iverson, 73 Ga. 733; Weems *v.* Coker, 70 Ga. 746; Iverson *v.* Saulsbury, 68 Ga. 790; Iverson *v.* Saulsbury, 65 Ga. 724; Askew *v.* Patterson, 53 Ga. 209. *Contra*, Arrington *v.* Cherry, 10 Ga. 429.

90. Weems *v.* Coker, 70 Ga. 746 [*overruling* Iverson *v.* Saulsbury, 68 Ga. 790; Saulsbury *v.* Iverson, 73 Ga. 733; Milledge *v.* Bryan, 49 Ga. 397].

91. *Ex p.* Skeen, 41 Ind. 118; Hornesby *v.* Burdell, 9 S. C. 303; Bank *v.* Harrison, 4 Ont. Pr. 331.

92. Mulhern *v.* Grove, 111 Mich. 528, 70 N. W. 15; Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611.

93. O'Hagan *v.* O'Hagan, 14 Iowa 264.

94. Dinsmore *v.* Smith, 17 Wis. 20; Beach *v.* Beckwith, 13 Wis. 21; Doggett *v.* Emerson, 7 Fed. Cas. No. 3,961, 1 Woodb. & M. 1.

95. Bates *v.* Gage, 40 Cal. 183; Wicks *v.* Ludwig, 9 Cal. 173, Filley *v.* Cody, 4 Colo. 109; Kirtley *v.* Marshall Silver Min. Co., 4 Colo. 111; Staab *v.* Atlantic, etc., R. Co., 3 N. M. 349, 9 Pac. 381. And see Norwood *v.* Kenfield, 34 Cal. 329.

96. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237 (election contests); Aurora F. Ins. Co. *v.* Johnson, 46 Ind. 315 (civil action only); Myers *v.* Warner, 3 Oreg. 212 (election contests); Rodenbough *v.* Wolverton, 2 Lehigh Val. L. Rep. (Pa.) 285 [*affirming* 1 Walk. 48] (election contests).

97. White *v.* McKeon, 92 Ga. 343, 17 S. E. 283; Askew *v.* Patterson, 53 Ga. 209.

98. Heath *v.* Miller, 117 Ga. 854, 44 S. E. 13.

99. Heath *v.* Miller, 117 Ga. 854, 44 S. E. 13.

1. Augusta *v.* Richmond Academy, 77 Ga. 517, 1 S. E. 214.

2. Guthrie *v.* Guthrie, 71 Iowa 744, 30 N. W. 779.

3. Obear *v.* Little, 79 Ga. 384, 43 S. E. 914.

4. Obear *v.* Little, 79 Ga. 384, 4 S. E. 914.

5. Pease *v.* Wagnon, 93 Ga. 361, 20 S. E. 637.

6. Guthrie *v.* Guthrie, 71 Iowa 744, 30 N. W. 779.

7. Guthrie *v.* Guthrie, 71 Iowa 744, 30 N. W. 779.

8. State *v.* Berry, Dudley (S. C.) 215.

9. Lachenmeyer *v.* Lachenmeyer, 26 Hun (N. Y.) 542; Boucicault *v.* Boucicault, 21 Hun (N. Y.) 431; *In re* Kindling, 39 Wis. 35.

10. Crandall *v.* State, 6 Blackf. (Ind.) 284; State *v.* Eyermann, 172 Mo. 294, 72 S. W. 539.

tions the rule obtains that a motion to admit to bail[11] or to mitigate bail[12] has always been chamber business, so that a judge, independent of statute, has the power to grant such motion. In one jurisdiction it has been held that a judge cannot rescind his own order for a writ of capias ad satisfaciendum or discharge one arrested thereon.[13]

(XXIV) *OTHER POWERS.* In addition to the powers previously enumerated it has been held that a judge at chambers or in vacation may hear and determine objections of creditors of an insolvent;[14] order the return of property severed from the realty by a mortgagor while in possession;[15] hear a proceeding on a writ of right;[16] grant writs of assistance,[17] an order to show cause in favor of a stockholder of a corporation aggrieved by a corporate election,[18] an order for the winding-up of a company,[19] or order the payment of alimony and the expenses of litigation to a wife suing for divorce,[20] especially where he is invested with chancery powers,[21] but not prior to service of summons on defendant;[22] restrain the husband from interfering with the wife's personal liberty;[23] reduce an assessment of damages to conform to the amount warranted by the affidavit;[24] order publication as to non-resident parties,[25] except where no pleadings have been filed;[26] order the filing of documents *nunc pro tunc*;[27] order the surrender of the books and documents of a public office after judgment of ouster against the office-holder;[28] settle any difference between the parties as to a feigned issue;[29] recommit or transfer the report of road commissioners;[30] recommit a case for further evidence;[31] appoint jury commissioners;[32] hear a rule against a defaulting tax officer;[33] amend the court records upon notice to the parties in interest;[34] order a special term and revoke such order;[35] order that a judgment of the supreme court affirming a judgment in a criminal case should be made a judgment of the lower court;[36] order the custody of a minor child to be surrendered to its mother by its general guardian;[37] transmit a case from a court of law to one of equity;[38] refuse to adjourn any matter to be heard in court;[39] grant an interpleader order;[40] annul the registry of a mechanic's lien for a sum exceeding two hundred dollars;[41] or grant an application for a writ de lunatico inquirendo.[42] On the other hand it has been held that he cannot make an allowance to a sheriff;[43]

11. State *v.* Wilson, 12 La. Ann. 189; De Myer *v.* McGonegal, 32 Mich. 120; State *v.* Everett, Dudley (S. C.) 295.
12. Smith *v.* Newell, 7 Wend. (N. Y.) 484.
13. McNabb *v.* Oppenheimer, 11 Ont. Pr. 214; Montreal Bank *v.* Campbell, 2 U. C. L. J. 18.
14. Clarke *v.* Ray, 6 Cal. 600.
15. Otis *v.* May, 30 Ill. App. 581.
16. Shaw *v.* Clements, 1 Call (Va.) 429.
17. Kissinger *v.* Whittaker, 82 Ill. 22; Murchison *v.* Miller, 64 S. C. 425, 42 S. E. 177. *Contra*, Chapman *v.* Thornburg, 23 Cal. 48 (since this decision the power has been conferred by statute in California); Hartsuff *v.* Huss, 2 Nebr. (Unoff.) 145, 95 N. W. 1070.
18. *In re* Argus Co., 138 N. Y. 557, 34 N. E. 388.
19. *Re* Toronto Brass Co., 18 Ont. Pr. 248.
20. Smith *v.* Smith, 51 S. C. 379, 29 S. E. 227; *In re* Gill, 20 Wis. 686. *Contra*, Bennett *v.* Southard, 35 Cal. 688.
21. Smith *v.* Smith, 51 S. C. 379, 29 S. E. 227.
22. Coger *v.* Coger, 48 W. Va. 135, 35 S. E. 823.
23. *In re* Gill, 20 Wis. 686.
24. Scoullar *v.* Webb, 3 N. Brunsw. 520.
25. Marvin *v.* Titsworth, 10 Wis. 320.
26. Lochrane *v.* Equitable Loan, etc., Co., 122 Ga. 433, 50 S. E. 372.
27. Palmer *v.* Dinsmore, 15 N. Brunsw. 150.
28. Welch *v.* Cook, 7 How. Pr. (N. Y.) 282.
29. Richards *v.* Brown, 7 Johns. (N. Y.) 320.
30. State *v.* Rye, 35 N. H. 368.
31. Muckenfuss *v.* Fishburne, 65 S. C. 573, 44 S. E. 77.
32. State *v.* Murray, 47 La. Ann. 911, 17 So. 424.
33. State *v.* Buckner, 42 La. Ann. 74, 7 So. 65.
34. Picard *v.* Prival, 35 La. Ann. 370; Falkner *v.* Hunt, 68 N. C. 475.
35. Brown *v.* People, 9 Ill. 439.
36. Wiggins *v.* Tyson, 114 Ga. 64, 39 S. E. 865.
37. Wilcox *v.* Wilcox, 14 N. Y. 575. But see Bennett *v.* Southard, 35 Cal. 688, holding that in a divorce case the custody of a minor child cannot be determined in vacation.
38. McKenzie *v.* Ætna Ins. Co., 14 Nova Scotia 326.
39. Walsh *v.* De Blaquiere, 12 Grant Ch. (U. C.) 107.
40. Haldan *v.* Beatty, 43 U. C. Q. B. 614.
41. *Re* Moorehouse, 13 Ont. 290.
42. *Re* Stuart, 4 Grant Ch. (U. C.) 44.
43. *Ex p.* State Bank, 5 Ark. 463.

adjourn court except on grounds prescribed by statute;[44] continue a cause set down for trial at a future day;[45] order the subpœnaing of witnesses for a defendant under an indictment;[46] hear a petition for the discharge of an imprisoned debtor,[47] or discharge an insolvent[48] or a garnishee;[49] make an order recusing himself;[50] order county commissioners to audit claims against a county;[51] determine a contested right of possession of documents;[52] set aside a stipulation for the dismissal of an action at chambers;[53] order a plaintiff in an action for personal injuries to submit to an examination of the body by a board of physicians;[54] entertain a motion to require an attorney to surrender a county court record to the court of queen's bench;[55] strike out a jury notice on a motion made before trial;[56] entertain a motion for an extension of time in which to move against the judgment of a trial judge;[57] extend the time for making proof in contests of the accounts of an insolvent;[58] order the weekly allowance for prisoners charged in execution on final process;[59] hear a motion transmitted to him by mail by one of the parties thereto;[60] or limit the time for hearing a motion.[61]

3. Powers in Different Courts or Jurisdictions[62] — a. Exercise of Powers in Different Courts. Where authorized by statute, a judge of an inferior court may temporarily preside instead of a superior court judge during the latter's absence or disability;[63] and such legislation is valid.[64] While so presiding, he is vested with all the power and authority of the superior court judge,[65] and may issue orders ordinarily issuable by the latter.[66] But he can exercise such authority only on the occasions and under the conditions prescribed by the statute conferring it.[67] A judge of a superior court may preside over an inferior court,[68] provided such authority is expressly conferred by statute,[69] and then he can preside only in cases

44. Martin *v.* Scott, 118 Ga. 149, 44 S. E. 974.

45. Norwood *v.* Kenfield, 34 Cal. 329.

46. Delano *v.* Logan County, 4 Ida. 83, 35 Pac. 841.

47. Matter of Walker, 2 Duer (N. Y.) 655; Mather's Case, 14 Abb. Pr. (N. Y.) 45.

48. Turner *v.* McIlhany, 6 Cal. 287; People *v.* Wilkinson, 13 Ill. 660; Bennett *v.* Cooper, 57 Barb. (N. Y.) 642.

49. Laughlin *v.* Peckham, 66 Iowa 121, 23 N. W. 294.

50. State *v.* Hengel, 48 La. Ann. 1137, 20 So. 290; State *v.* Hingle, 48 La. Ann. 1074, 20 So. 280.

51. *In re* Conant, 21 S. C. 362.

52. Clark *v.* Pigeon Roost Min. Co., 29 Ga. 29.

53. Rogers *v.* Greenwood, 14 Minn. 333.

54. Ellsworth *v.* Fairbury, 41 Nebr. 881, 60 N. W. 336.

55. Burley *v.* Milne, 7 Ont. Pr. 100.

56. Hawke *v.* O'Neill, 18 Ont. Pr. 164.

57. Imperial Loan Co. *v.* Baby, 13 Ont. Pr. 59.

58. Rose *v.* Desmarteau, 11 Quebec Super. Ct. 22 [*reversing* 8 Quebec Super. Ct. 315].

59. Low *v.* Melvin, 1 C. L. Chamb. (U. C.) 25.

60. *In re* Kinney, 135 Fed. 340, 67 C. C. A. 677.

61. Merritt *v.* Slocum, 6 How. Pr. (N. Y.) 350.

62. Holding court in another circuit see Courts, 11 Cyc. 739.

63. Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370; Jarreau *v.* Choppin, 6 La. 130; Hollister *v.* Judges Lucas County Dist. Ct., 8 Ohio St. 201, 70 Am. Dec. 100; Myers *v.* Com., 79 Pa. St. 308; *In re* President Judges, 64 Pa. St. 33; Foust *v.* Com., 33 Pa. St. 338; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Zephon, 8 Watts & S. (Pa.) 382.

The judges of the common pleas may hold a court of oyer and terminer, although the judges of a supreme court are in session in the same county, provided they are not holding a court of oyer and terminer. Com. *v.* Gross, 1 Ashm. (Pa.) 281. See also Harrison *v.* Hall Safe, etc., Co., 68 Ga. 558.

Evidence to sustain jurisdiction.— Proof, by affidavit, of the absence of the superior judge will sustain the jurisdiction of the inferior judge. Cain *v.* Loeb, 26 La. Ann. 616.

Resignation of office pending hearing.— Where a judge of an inferior court who is vested with authority to preside over a superior court resigns his office pending a hearing before him in the latter court, he loses jurisdiction of the cause, and his subsequent appointment to the office of judge of the superior court will not reinvest him with jurisdiction to determine it. Matter of New York, 69 Hun (N. Y.) 270, 23 N. Y. Suppl. 532.

64. Kilpatrick *v.* Com., 31 Pa. St. 198.

65. Malady *v.* McEnary, 30 Ind. 273; Morriss *v.* Virginia Ins. Co., 85 Va. 588, 8 S. E. 383.

66. Ledoux *v.* Ducote, 24 La. Ann. 181.

67. Foust *v.* Com., 33 Pa. St. 338.

68. McCarron *v.* People, 13 N. Y. 74 [*affirming* 2 Park. Cr. 183]; Com. *v.* Ickhoff, 33 Pa. St. 80; Respublica *v.* Cobbett, 3 Yeates (Pa.) 93; 2 Hale P. C. 4.

69. Rhodes *v.* Sneed, Minor (Ala.) 403.

and under conditions expressed in the statute.[70] In the absence of express constitutional authority, the legislature cannot confer upon supreme and inferior judges the power to preside jointly over an intermediate court.[71] Judges of a coördinate jurisdiction may alternate and make exchanges of their districts[72] and are vested with all the powers of the regular judge of the court over which they preside.[73] A judge of a common-law court cannot appoint a receiver in a cause pending in chancery, where express statutory authority therefor is lacking.[74] Where there is no express prohibition, judges may be invested with other judicial powers than those conferred by constitutional provisions;[75] and the powers of a judge of one court may be conferred upon the judge of another court.[76] A judge authorized to preside over two distinct and separate courts cannot, while sitting in one, legally enter an order in a cause pending in the other.[77] A judge of the supreme court of the United States may issue an injunction at any place out of the circuit in which the suit is instituted, when the circuit and district judges thereof are absent therefrom, or otherwise prevented from taking action.[78]

b. Powers as to Causes Pending Outside of Territorial Jurisdiction[79] — (i) *General Rules.* As a rule a judge cannot make orders in a cause pending in a court outside of the limits of his territorial jurisdiction.[80] It is, however, competent for the legislature to confer upon the judge of one circuit or district the power to make orders in causes pending in another circuit or district when the judge of the latter is for any reason unable or disqualified to act;[81] and this has been done by the legislatures of many states.[82] In the absence of any dis-

Constitutionality of acts.— Such act will not constitute the holding of two offices in violation of a constitutional provision (Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370); but the constitution is violated by a statute conferring upon one judge the authority to regularly hold a supreme and an inferior court (Allen *v.* Dunham, 1 Greene (Iowa) 89).

70. French *v.* Seamans, 27 N. Y. App. Div. 612, 50 N. Y. Suppl. 776 [*reversing* 21 Misc. 722, 48 N. Y. Suppl. 9]; People *v.* Tracy, 9 Wend. (N. Y.) 265.

A supreme court judge may make an order extending the time to answer a complaint filed in a county court. Edwards *v.* Shreve, 83 N. Y. App. Div. 165, 82 N. Y. Suppl. 514.

71. Com. *v.* Flannagan, 7 Watts & S. (Pa.) 68.

72. Harrison *v.* Hall Safe, etc., Co., 64 Ga. 558; West Point First Nat Bank *v.* Block, 82 Miss. 197, 33 So. 849; Stuart *v.* State, 1 Baxt. (Tenn.) 178. See *infra*, VI, C, 3, b, (II).

73. Henry *v.* Hilliard, 120 N. C. 479, 27 S. E. 130; Bear *v.* Cohen, 65 N. C. 511.

74. Alexander *v.* Manning, 58 Miss. 634.

75. Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284; State *v.* Majors, 16 Kan. 440; Young *v.* Ledrick, 14 Kan. 92; *In re* Johnson, 12 Kan. 102.

76. Young *v.* Ledrick, 14 Kan. 92.

77. U. S. Life Ins. Co. *v.* Shattuck, 159 Ill. 610, 43 N. E. 389 [*affirming* 57 Ill. App. 382].

78. Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621.

79. **Power as to causes pending before coördinate judge** see *supra*, VI, C, 1, l, (II).

Power to review cause pending before coördinate judge see *supra*, VI, C, 1, l, (III).

80. Turner *v.* McIlhaney, 6 Cal. 287; State *v.* Parsons, 115 N. C. 730, 20 S. E. 511; Godwin *v.* Monds, 101 N. C. 354, 7 S. E. 793; McNeil *v.* Hodges, 99 N. C. 248, 6 S. E. 127. And see Hains *v.* Vineberg, 15 Quebec Super. Ct. 1, holding that a judge can grant to a curator the right to sue only while he is within the district in which the judicial cession was made. See also cases cited *infra*, note 83.

This rule may be waived by consent of the parties. Bradley Fertilizer Co. *v.* Taylor, 112 N. C. 141, 17 S. E. 69; Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118; Gatewood *v.* Leak, 99 N. C. 363, 6 S. E. 706.

Injunction or restraining order in outside cause.— In some states a judge of a district other than that in which a cause is pending has authority to issue in such cause a restraining order. Hamilton *v.* Icard, 112 N. C. 589, 17 S. E. 519; Mauney *v.* Montgomery County, 71 N. C. 486, holding, however, that he cannot vacate or modify the same. And see Kitchen *v.* Crawford, 13 Tex. 516, holding that a judge of one district can grant an injunction to restrain the execution of process issued from another district to be enforced in his district. In New York, however, it has been held that a statute providing that designated orders may be made by a county judge of the county where the action is triable impliedly prohibits a county judge from making an order staying proceedings in an action pending and triable in another county. Chubbuck *v.* Morrison, 6 How. Pr. (N. Y.) 367; Eddy *v.* Howlett, 2 Code Rep. (N. Y.) 76.

81. Simonton *v.* State, 44 Fla. 289, 31 So. 821; State *v.* Hocker, 35 Fla. 19, 16 So. 614; Swenson *v.* Call, 13 Fla. 337.

82. *Florida.*— Simonton *v.* State, 44 Fla. 289, 31 So. 821 (holding also that he may

qualification or disability on the part of the judge having jurisdiction of a cause, a judge of another district cannot make a valid order therein.[83]

(11) *Substitution or Rotation of Judges.*[84] Judges are generally authorized to exchange districts.[85] But such power exists only by virtue of positive constitutional or statutory provision.[86] Such exchange cannot be made until the judges have first held all the courts in their respective home districts.[87] Where judges exchange districts, the instant one of them enters the district of the other he becomes judge thereof, and the resident judge becomes judge of the district for which he has exchanged,[88] and should so time his journey as to enter it simultaneously with the entry of the non-resident judge into his district.[89] Where judges are required by statute to rotate, they can exercise their general jurisdiction only in the district to which they are assigned at the time, except where they exchange courts or are commissioned to hold a special term of the court.[90] Where a judge is required to hold a term of a court without his district, he retains all the powers vested in him as judge of his own district, and the jurisdiction of the resident judge is superseded by him in the county where the court is held during the specified term, but not otherwise, nor for a longer time;[91] and he is without authority to issue any order in a cause pending in a county of the district where he is temporarily presiding other than that to which he has been called.[92]

c. Powers While Presiding For Another Judge. A judge holding court for

render a final judgment where it is such as may be entered in vacation, but that his jurisdiction extends only to the specific matter submitted to him, and any subsequent matter arising therein may be submitted to another judge); State *v.* Hocker, 35 Fla. 19, 16 So. 614; Bowden *v.* Wilson, 21 Fla. 165 (holding also that he may make such orders while within his own circuit).

Georgia.— Simmons *v.* Cooledge, 95 Ga. 50, 21 S. E. 1001 (holding that when the judge of the superior court is absent from the county in which a levy of an execution or other process issued by the clerk of that court is made on personal property, the ordinary, under code, section 3648, is the only judicial officer authorized to grant an order for the speedy sale of such property, and an order for such sale granted by the judge of the superior court of another circuit is void); Winter *v.* Muscogee R. Co., 11 Ga. 438 (holding that where a superior court judge is disqualified by reason of interest in the subject-matter of a suit pending in his court, a superior court judge from another district may preside at the trial of the cause, although there may be resident inferior court judges competent to sit in the superior court).

Louisiana.— Austin *v.* Scovill, 34 La. Ann. 484; De St. Romes *v.* Levee Steam Cotton Press Co., 31 La. Ann. 224 (both holding that where the district judge who tried a cause is absent, another district judge of the same parish may properly grant an appeal); Klein *v.* Cramer, 30 La. Ann. 372 (holding that where an injunction is asked for in a case that comes within the jurisdiction of the district court, and the district judge is absent and the parish judge is legally recused, the parish judge of an adjoining parish may grant the injunction).

Minnesota.— Mower County *v.* Smith, 22 Minn. 97.

Nebraska.— Ellis *v.* Karl, 7 Nebr. 381.

South Dakota.— Holden *v.* Haserodt, 2 S. D. 220, 49 N. W. 97, 3 S. D. 4, 51 N. W. 340.

See 29 Cent. Dig. tit. "Judges," § 144.

83. *California.*— People *v.* O'Neil, 47 Cal. 109.

Florida.— Swepson *v.* Call, 13 Fla. 337.

Mississippi.— Martin *v.* O'Brien, 34 Miss. 21.

Nebraska.— Ellis *v.* Karl, 7 Nebr. 381.

South Carolina.— State *v.* Black, 34 S. C. 194, 13 S. E. 361.

See 29 Cent. Dig. tit. "Judges," § 144.

84. Powers of substitute judges see *infra*, VIII, C.

85. See the constitutions and statutes of the several states; and the following decisions: Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264; Banks *v.* Oden, 1 A. K. Marsh (Ky.) 546; Howes *v.* Mauney, 66 N. C. 218. See also *supra*, VI, C, 3, a.

Validity of statutes.— A statute requiring judges to exchange districts is not invalid by reason of not applying to all of the judges of the state, especially where the constitution permits judges to exchange *ex mero motu*. Toll *v.* Jerome, 101 Mich. 468, 59 N. W. 816.

86. Blackmore *v.* State Bank, 3 Ark. 309.

87. State *v.* Judge Ninth Judicial Dist., 12 La. Ann. 777.

88. Knox *v.* Beirne, 4 Ark. 460; Howes *v.* Mauney, 66 N. C. 218.

89. Howes *v.* Mauney, 66 N. C. 218.

90. State *v.* Ray, 97 N. C. 510, 1 S. E. 876.

91. Clark *v.* Rugg, 20 Fla. 861; Bear *v.* Cohen, 65 N. C. 511. *Contra*, Wallace *v.* Helena Electric R. Co., 10 Mont. 24, 24 Pac. 626, 25 Pac. 278.

92. Morris *v.* Whitehead, 65 N. C. 637; Myers *v.* Hamilton, 65 N. C. 567; Bear *v.* Cohen, 65 N. C. 511.

another has authority to continue the term, and finish the business at an adjourned term;[93] or to order a special term.[94]

d. Powers as to Holding Court in Another District. A judge of one district may hold court in another, where the statute so authorizes;[95] and the right may be exercised without regard to the ability or disability of the local judge;[96] and he may hold such court while the local judge is sitting in court in another county;[97] and he may hold court at the same time and in the same building with the latter.[98] A judge of the county court, acting under statutory authority, may hold court for the judge of another county,[99] and may preside over a branch of the court, while the local judge holds another branch.[1] Legislation conferring such authority is valid, where not expressly prohibited by the constitution.[2] But in the absence of express statutory authority no such power exists, and the acts of the judge done without his jurisdiction are void.[3] As to the necessity for the record to show the authority of a judge's act in a district other than his own, the authorities are not in harmony. In some jurisdictions the rule is that in the absence of any showing to the contrary it will be presumed that he acted under proper authority.[4] In others it is held that the record must affirmatively show that he acquired jurisdiction in accordance with statutory provisions.[5] Where a statute prescribes that a judge of one county shall perform the duties of a similar judge in an adjoining

93. Williams *v.* Williams, 6 S. D. 284, 61 N. W. 38; Cheesman *v.* Hart, 42 Fed. 98.

94. Elms *v.* State, 10 Humphr. (Tenn.) 128. See also Chafee *v.* Rainey, 21 S. C. 11. But see Woodruff *v.* State, 3 Ark. 285.

95. *Colorado.*— Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417.

Georgia.— Manning *v.* Weyman, 99 Ga. 57, 26 S. E. 58; Daniels *v.* Towers, 79 Ga. 785, 7 S. E. 120; Rutledge *v.* Bullock, 44 Ga. 23.

Illinois.— Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; Jones *v.* Albee, 70 Ill. 34; Salomon *v.* Chicago Title, etc., Co., 115 Ill. App. 194.

Nebraska.— Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933; Drake *v.* State, 14 Nebr. 535, 47 N. W. 117.

Texas.— *In re* Angus, 28 Tex. App. 293, 12 S. W. 1099.

See 29 Cent. Dig. tit. "Judges," § 145.

Request of governor.— Under statute in California the request of the governor to a judge of the superior court of one county to hold a similar court in another county is sufficient authority to entitle him to take jurisdiction of causes pending for trial in the latter county. Pico *v.* Williams, (Cal. 1886) 11 Pac. 600.

Effect of illegality of appointment.—Where a judge who is authorized to hold court in any district acts upon an illegal appointment to hold a court, his general power to hold the court is not affected by the illegality of his appointment, and his acts are valid. People *v.* Herrmann, 149 N. Y. 190, 43 N. E. 546.

96. Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417; Candy *v.* State, 8 Nebr. 482, 1 N. W. 454.

97. Munzesheimer *v.* Fairbanks, 82 Tex. 351, 18 S. W. 697.

98. Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417; Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; State *v.* Emmons, 72 Iowa 265, 33 N. W. 672.

99. Eureka Lake, etc., Canal Co. *v.* Yuba County Super. Ct., 66 Cal. 311, 5 Pac. 490.

1. Beach *v.* People, 157 Ill. 659, 41 N. E. 1117; Wells *v.* People, 156 Ill. 616, 41 N. E. 161; Wisner *v.* People, 156 Ill. 180; 40 N. E. 574; Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567.

2. *California.*— People *v.* McCauley, 1 Cal. 379.

Illinois.— Waller *v.* Tully, 75 Ill. 576.

Indiana.— Beauchamp *v.* State, 6 Blackf. 299.

Michigan.— *In re* Bromley, 113 Mich. 53, 71 N. W. 523.

Pennsylvania.— Com. *v.* Bell, 4 Pa. Super. Ct. 187.

Virginia.— Smith *v.* Com., 75 Va. 904.

See 29 Cent. Dig. tit. "Judges," § 145.

3. Livingston's Appeal, 88 Pa. St. 209.

4. *Arkansas.*— Caldwell *v.* Bell, 3 Ark. 419.

California.— People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

Colorado.— Empire Land, etc., Co. *v.* Engley, 14 Colo. 289, 23 Pac. 452.

Missouri.— Riggs *v.* Owen, 120 Mo. 176, 25 S. W. 356.

Nebraska.— Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933.

South Dakota.— Williams *v.* Williams, 6 S. D. 284, 61 N. W. 38.

Wyoming.— Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

See 29 Cent. Dig. tit. "Judges," § 145.

See also Wyers *v.* State, 21 Tex. App. 448, 2 S. W. 816, holding that it is unnecessary for the record to contain a formal order showing exchange.

5. Sanchez *v.* Sanchez, 21 Fla. 346; Sharman *v.* Thomaston, 67 Ga. 246; State *v.* Ray, 97 N. C. 510, 1 S. E. 876; Bear *v.* Cohen, 65 N. C. 511; *Ex p.* Parker, 6 S. C. 472; Gresham *v.* Ewell, 85 Va. 1, 6 S. E. 700. And see Reed *v.* Warth, 2 Hilt. (N. Y.) 281, holding that the record must show disability of the local judge.

county when the latter is unable from sickness, absence, or other cause to perform such duties, he cannot discharge such duties where there is a vacancy in the office of the latter judge.[6] Where the constitution provides that one district judge may hold court for another, and shall do so when required by law, the legislature cannot confer on the supreme court the power to supplant a district judge by the appointment of another to hold his court.[7] If the constitution is silent on the subject, the legislature may authorize judges to exchange districts.[8] Where the constitution authorizes judges to exchange circuits temporarily, under such regulation as may be prescribed by law, the legislature may imperatively require such exchange;[9] but it cannot require a permanent exchange.[10] Where the right to exchange exists, it is not limited to a time in which courts are being held in both districts.[11] Under constitutional authority to exchange districts judges cannot exchange only parts of districts.[12] But where the governor may require a judge to hold court in any part of the district of another judge, their consent to his requirement that they exchange only parts of their districts will not invalidate the order and render the proceedings before them *coram non judice* and void.[13]

e. Powers While Without Over Business Within His District. Ordinarily the vacation and chambers powers of a judge of general jurisdiction, over cases pending in his district, may be exercised by him while he is outside of such district but within the state;[14] and he may under such circumstances appoint appraisers in a prize suit,[15] dissolve an injunction on the coming in of answer,[16] continue a motion for a new trial,[17] appoint or discharge receivers or act on provisional remedies generally,[18] render a decree,[19] or correct clerical errors in a decree rendered by him.[20] Where he is authorized to receive a plea of guilty at chambers, such plea may be received in a county other than that where the prosecution is pending.[21] But he cannot materially amend or supplement a decree,[22] settle a bill of exceptions,[23] or issue a writ of mandamus returnable by him outside of his district.[24] While holding court outside of his district under the rotation system, a judge is deprived of all jurisdiction over causes pending in the district of his residence,[25] except by consent, which must affirmatively appear in the record.[26] Where the jurisdiction of the judge is limited to his district, he cannot exercise any judicial power while absent from it.[27] But where an order made by him is attacked as invalid by reason of having been made while he was outside of his district, it will be held valid in

6. Grafton Bank *v.* Bickford, 13 Gray (Mass.) 564.

In Montana an act of the legislature providing for the designation of a judge to hold court for another who was disqualified by bias was held unconstitutional. *In re* Weston, 28 Mont. 207, 73 Pac. 512.

7. *In re* Weston, 28 Mont. 207, 72 Pac. 512.

8. State *v.* Stingley, 10 Iowa 488; Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264; Banks *v.* Ogden, 1 A. K. Marsh. (Ky.) 546.

9. Knox *v.* Beirne, 4 Ark. 460.

10. Knox *v.* Beirne, 4 Ark. 460.

11. Gilleland *v.* State, 44 Tex. 356.

12. Myers *v.* Hamilton, 65 N. C. 567. See also State *v.* Watson, 75 N. C. 136.

13. State *v.* Graham, 75 N. C. 256; State *v.* Watson, 75 N. C. 136.

14. Griffin *v.* Huntsville Branch Bank, 9 Ala. 201; Weigel's Succession, 17 La. Ann. 70; Enid *v.* Wigger, 14 Okla. 176, 77 Pac. 190. A court of general jurisdiction may direct a struck jury for the trial of a cause pending before it in a different county from that in which the order is made. Seely *v.* Blair, 6 Ohio 448.

15. The Memphis, 16 Fed. Cas. No. 9,412, Blatchf. Pr. Cas. 202.

16. Griffin *v.* Huntsville Branch Bank, 9 Ala. 201. But see Adams *v.* Kyzer, 61 Miss. 407.

17. Christie *v.* Whitten, 69 Ga. 765; Brantley *v.* Hass, 69 Ga. 748.

18. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio 1.

19. Chafee *v.* Rainey, 21 S. C. 11.

20. Barrett *v.* James, 30 S. C. 329, 9 S. E. 263; Chafee *v.* Rainey, 21 S. C. 11.

21. McCarty *v.* Hopkins, 61 Nebr. 550, 85 N. W. 540.

22. Barrett *v.* James, 30 S. C. 329, 9 S. E. 263.

23. Oliver *v.* Town, 24 Wis. 512.

24. La Motte *v.* Smith, 50 S. C. 558, 27 S. E. 933.

25. Moore *v.* Moore, 131 N. C. 371, 42 S. E. 822; Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118; Godwin *v.* Monds, 101 N. C. 354, 7 S. E. 793; State *v.* Ray, 97 N. C. 510, 1 S. E. 876.

26. Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118; Godwin *v.* Monds, 101 N. C. 354, 7 S. E. 793.

27. Capper *v.* Sibley, 65 Iowa 754, 23 N. W. 153; Dunn *v.* Travis, 45 Kan. 541, 26 Pac. 247; Lee *v.* Wells, 15 Gray (Mass.) 459.

the absence of a positive showing of that fact by the record.[28] And even where the jurisdiction is general, if the statute requires each judge to be assigned to a particular district in which he shall thereafter reside, his assignment will operate to limit his jurisdiction and the exercise of his powers to the district to which he is assigned.[29]

f. Powers as to Causes in Another District After Return to His Own District. A judge who exchanges with another may after departing from the district render his decision in a cause tried before him,[30] certify the evidence therein,[31] or make a settlement of facts for appeal.[32]

g. Powers When Out of State.[33] A judge cannot perform any judicial act when he is beyond the limits of the state;[34] but he may perform mere clerical duties,[35] although he may be superseded within his district, during his absence therefrom, by a substitute judge.[36]

h. Powers of Federal Judges. In the event of the absence of all the judges from a district and circuit, the judge of the United States supreme court may, at any place in the United States, grant an injunction operative in the district.[37] Where a district judge is authorized to act in another district when there is a vacancy in the judgeship therein, he cannot act when the judge of such district is only absent therefrom.[38] A district judge appointed by a circuit to hold court in a foreign district may, by consent of the parties, dispose of a case appealed from the judgment of the resident district judge.[39] A United States district judge, being authorized thereto by statute, may preside over a circuit court of which he is one of the judges, and exercise all of its powers.[40]

4. Powers After Expiration of Term[41] **— a. In General.** A special judge may render a decree in a cause heard by him during term, after the adjournment of the court and the expiration of his commission.[42] Where a judge is elected to hold office for a specified term and until his successor is elected and qualified, his judicial acts performed after the expiration of the specified term and before the qualification of his successor are valid.[43] But his judicial acts done after the qualification of his successor,[44] or after his term of office has expired,[45] are void.

28. State *v.* Satterwhite, 20 S. C. 536.

29. Bedwell *v.* Ross, 12 Okla. 507, 73 Pac. 267; Stanley *v.* U. S., 1 Okla. 336, 33 Pac. 1025. But see Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349.

30. Early *v.* Oliver, 63 Ga. 11; Gould *v.* Duluth, etc., Elevator Co., 3 N. D. 96, 54 N. W. 316.

31. Howe *v.* Jones, 66 Iowa 156, 23 N. W. 376.

32. King County *v.* Hill, 1 Wash. 63, 23 Pac. 926.

33. Absence of judge as ground for appointment of special judge see *infra*, VIII, B, 1.

34. Buchanan *v.* Jones, 12 Ga. 612; Price *v.* Bayless, 131 Ind. 437, 31 N. E. 88. See also Dunn *v.* Travis, 45 Kan. 541, 26 Pac. 247.

35. Lynde *v.* Winnebago County, 16 Wall. (U. S.) 6, 21 L. ed. 272.

36. Lynde *v.* Winnebago County, 16 Wall. (U. S.) 6, 21 L. ed. 272.

37. U. S. *v.* Louisville, etc., Canal Co., 26 Fed. Cas. No. 15,633, 4 Dill. 601, 1 Flipp. 260.

38. American L. & T. Co. *v.* East, etc., R. Co., 40 Fed. 182.

39. Harmon *v.* U. S., 43 Fed. 817.

40. McDowell *v.* Kurtz, 77 Fed. 206, 23 C. C. A. 119; Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 7 C. C. A. 471; Goodyear Dental Vulcanite Co. *v.* Folsom, 3 Fed. 509; Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. No. 3,057, 5 Sawy. 172; *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257; Robinson *v.* Satterlee, 20 Fed. Cas. No. 11,967, 3 Sawy. 134.

41. Power to settle bill of exceptions after expiration of term see APPEAL AND ERROR, 3 Cyc. 32.

Acts of judge after term expires as acts of de facto judge see *infra*, IX, C, 2.

Holding over after expiration of term see *supra*, V, E, 4.

42. Roberts *v.* Wessinger, 69 S. C. 283, 48 S. E. 248.

43. Oppenheim *v.* Pittsburgh, etc., R. Co., 85 Ind. 471; State *v.* Perkins, 139 Mo. 106, 40 S. W. 650.

44. State *v.* Perkins, 139 Mo. 106, 40 S. W. 650. But see Carli *v.* Rhener, 27 Minn. 292, 7 N. W. 139.

45. *California.*— Connolly *v.* Ashworth, 98 Cal. 205, 33 Pac. 60; Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211.

Louisiana.— Bradford *v.* Cook, 4 La. Ann. 229.

Minnesota.— Cain *v.* Libby, 32 Minn. 491, 21 N. W. 739.

Mississippi.— Coopwood *v.* Prewett, 30 Miss. 206.

New York.— Gordon *v.* Trainor, 46 Misc. 439, 92 N. Y. Suppl. 321.

See 29 Cent. Dig. tit. "Judges," § 153.

A judicial officer whose term has expired may make return to a writ of certiorari issued to review a case tried before him,[46] or amend such return.[47]

b. As to Filing Findings. After a judge's term expires, no valid judgment can be entered on his order for judgment made theretofore, where no findings of facts were filed,[48] and according to some decisions he cannot file a finding of facts after his term has expired,[49] although the contrary view is maintained by others.[50] Where the findings of fact and conclusions of law filed during his term are insufficient as a basis for a final judgment, such judgment rendered by him after his term expires is a nullity;[51] and a judgment signed by the judge during his term, but not filed until after the expiration thereof, is void.[52] He cannot render a valid decision after the expiration of his term;[53] and the invalidity of the decision is not affected by the fact that it is ordered filed by his successor and is filed.[54]

c. To Grant New Trial. After his term has expired he cannot grant a new trial in a cause heard before him.[55]

5. Powers of Successor as to Proceedings Before Former Judge[56] — a. In General. Where, pending the trial of a cause, the court is superseded by a new court, to which the business of the old court is transferred, the judge presiding, being elected the judge of the new court, may decide the cause without a resubmission.[57] The fact that a trial was begun before a judge whose term expired prior to its conclusion will not preclude his successor from trying it;[58] but he must try it *de novo*.[59] A judge who did not hear the evidence cannot render a valid judgment in a cause,[60] notwithstanding the testimony may have been written down and preserved.[61] He cannot make any findings of fact in a cause tried before his predecessor.[62] He may, on request of the parties, and on being furnished with an agreed copy of the evidence, rule on a demurrer to the evidence.[63] He may conduct a cause without regard to prior interlocutory orders therein made by another judge.[64] Where the order of a judge has been defeated in its operation by subsequent events, his successor has authority to make such further order

46. People *v.* Peabody, 6 Abb. Pr. (N. Y.) 228; Conover *v.* Devlin, 15 How. Pr. (N. Y.) 470; Harris *v.* Whitney, 6 How. Pr. (N. Y.) 175 [*overruling* Peck *v.* Foote, 4 How. Pr. (N. Y.) 425].

47. Phillips *v.* Atlanta, 87 Ga. 62, 13 S. E. 201.

48. Mace *v.* O'Reilley, 70 Cal. 231, 11 Pac. 721.

49. Ells *v.* Rector, 32 Mich. 379; Watt *v.* O'Brien, 6 Wash. 415, 33 Pac. 969.

50. Manneck Mfg. Co. 4. Smith, etc., Mfg. Co., 2 N. Y. City Ct. 37; Harris *v.* Morange, 1 N. Y. City Ct. 221; Storrie *v.* Shaw, 96 Tex. 618, 75 S. W. 20; Storrie *v.* Shaw, (Civ. App. 1903) 76 S. W. 596.

51. Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211.

52. Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211. But see Babcock *v.* Wolf, 70 Iowa 676, 28 N. W. 490, holding a decree valid which was deposited with an express company for transmission to the clerk before the expiration of the judge's term, although it did not reach the clerk and was not filed until afterward.

53. Connolly *v.* Ashworth, 98 Cal. 205, 33 Pac. 60.

54. Connolly *v.* Ashworth, 98 Cal. 205, 33 Pac. 60.

55. Griffing *v.* Danbury, 41 Conn. 96; Coopwood *v.* Prewett, 30 Miss. 206. *Contra*, Bartolet *v.* Faust, 5 Phila. (Pa.) 316.

56. For power of successor to settle and sign bill of exceptions see Appeal and Error, 3 Cyc. 69.

57. Seale *v.* Ford, 29 Cal. 104.

58. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258; Updike *v.* Armstrong, 4 Ill. 564.

59. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258.

60. *In re* Sullivan, 143 Cal. 462, 77 Pac. 153.

61. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258.

In New York, by reason of statute, a surrogate's successor may complete business pending before him without trial *de novo*. Matter of Carey, 24 N. Y. App. Div. 531, 49 N. Y. Suppl. 32 [*affirming* 14 Misc. 486, 36 N. Y. Suppl. 817]; Matter of Johnson, 27 Misc. 167, 58 N. Y. Suppl. 601; Matter of Winslow, 12 Misc. 254, 34 N. Y. Suppl. 637; *In re* Lawrence, 58 N. Y. Suppl. 597; *In re* Martinhoff, 4 Redf. Surr. 286.

62. Bahnsen *v.* Gilbert, 55 Minn. 334, 56 N. W. 1117.

63. Gertz *v.* Beck, 7 Kan. App. 654, 53 Pac. 884.

64. Niagara F. Ins. Co. *v.* Scammon, 35 Ill. App. 582. Where an inquisition of insanity was ordered by a judge, and at the time fixed for the inquisition another judge appeared to conduct it, the latter was empowered to entertain a motion to dismiss the entire proceeding for insufficiency of the affi-

as may be necessary to effectuate it;[65] and he may refuse his aid in carrying into effect an order made by his predecessor.[66] And where the determination of the cause is left unsettled and open to action in the future, the succeeding judge has all the power to dispose of it possessed by his predecessor.[67] Where one judge has issued a temporary injunction with leave to other persons interested to become parties and move for a dissolution thereof, another judge has jurisdiction to dissolve the injunction upon the motion of such new party.[68] Where the judge in a chancery cause has submitted the issue to the jury, his action cannot be disregarded by a succeeding judge.[69] A succeeding judge cannot correct errors of law committed by his predecessor. The error must be corrected on appeal taken for that purpose.[70]

b. Power to Sign Judgment or Decree. Where the judge directs the drawing of a decree his successor may sign it;[71] and if the signature of a judge is not required, the fact that the succeeding judge signed a judgment rendered by his predecessor will not invalidate it.[72] A succeeding judge may adopt the findings of fact made by his predecessor and render judgment thereon.[73] Where the order of a judge has disposed of all the issues in a cause, his successor may enter final judgment therein,[74] notwithstanding a statute prohibiting a judge from acting in any matter where he was not present and sitting as a member of the court at the hearing thereof.[75] A succeeding judge may render a final decree of divorce and allow alimony to the wife without hearing any evidence, where answers by jury to special interrogatories show the amount of the husband's property.[76]

c. Power to Modify, Vacate, or Review Orders of Predecessor. While in some jurisdictions, however, the office of judge is regarded as a continuing one, and a succeeding judge has the same right to review, modify, or reverse the orders of his predecessor as he has in respect to his own orders,[77] the weight of authority is that as a general rule a succeeding judge cannot review, modify, or reverse the orders of his predecessor;[78] but the rule does not apply to administrative orders, such as the ordering the taking of testimony,[79] a special jury term,[80] to orders made through mistake or fraud perpetrated on the court,[81] to those working extreme hardship,[82] or where there is a change of circumstances.[83]

davit tendered the first judge. Lee *v.* State, 118 Ga. 5, 43 S. E. 994.

65. Board of Public Works *v.* Stark, 2 Nott & M. (S. C.) 337.

66. Bordeaux *v.* Cave, 2 Bailey (S. C.) 6.

67. Robinson *v.* Harford County Com'rs, 12 Md. 132.

68. Bouknight *v.* Davis, 33 S. C. 410, 12 S. E. 96.

69. Asbill *v.* Asbill, 24 S. C. 355.

70. Cowles *v.* Cowles, 121 N. C. 272, 28 S. E. 476.

71. Ruckman *v.* Decker, 27 N. J. Eq. 244.

72. Crim *v.* Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

73. Edmonds *v.* Riley, 15 S. D. 470, 90 N. W. 139.

74. Chamberlain *v.* Dempsey, 36 N. Y. 144 [*reversing* 15 Abb. Pr. 1]; Union Pac. R. Co. *v.* Byrne, 2 Wyo. 109.

75. Rauh *v.* Scholl, 19 Wash. 30, 52 Pac. 332; Hazard *v.* McAndrews, 18 Wash. 392, 51 Pac. 1064.

76. Hedrick *v.* Hedrick, 28 Ind. 291.

77. Shephard *v.* Gove, 26 Wash. 452, 67 Pac. 256. See also Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

78. *Illinois.*— Avery *v.* Swords, 28 Ill. App. 202.

New York.— *In re* Livingston, 34 N. Y. 555; Columbia Mut. Bldg., etc., Assoc. *v.* Mittnacht, 62 N. Y. App. Div. 425, 70 N. Y. Suppl. 1098. But see Belmont *v.* Erie R. Co., 52 Barb. 637; Matter of Smith, 34 N. Y. Suppl. 1057, the latter holding that, by virtue of a statute, a decree of a surrogate can be modified by his successor.

North Carolina.— Twitty *v.* Logan, 86 N. C. 712.

South Carolina.— Crawell *v.* Littlefield, 2 Rich. 17; Bordeaux *v.* Cave, 2 Bailey 6; Bomar *v.* Trail, 1 Bailey 533; Richardson *v.* Whitfield, 2 McCord 148; Macon *v.* Mathis, 1 McCord 172; Durant *v.* Staggers, 2 Nott & M. 488. But in Gibson *v.* Brown, 1 Nott & M. 326, it was held that a judge of probate could revoke the probate of a will made by his predecessor.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

See 29 Cent. Dig. tit. "Judges," § 160.

79. Pratt *v.* Timmerman, 69 S. C. 186, 48 S. E. 255.

80. State *v.* Hingle, 48 La. Ann. 1542, 20 So. 886.

81. Harrington *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

82. Richardson *v.* Whitfield, 2 McCord (S. C.) 148.

83. Crawell *v.* Littlefield, 2 Rich. (S. C.) 17.

d. Power to Grant New Trial. As a general rule a succeeding judge has authority to hear and determine a motion for a new trial in a case heard by his predecessor, where the latter has ceased to preside and departed from the district in which the trial was had,[84] where his term of office has expired,[85] or where he has died.[86] And this power may be exercised by a special judge elected to proceed with the business of the term.[87] A judge under such circumstances must act on the evidence upon which the verdict was founded,[88] which may be ascertained by reference to the notes of the trial judge or by his affidavit, or that of the counsel in the case, by reëxamination of the witnesses, or by any other lawful mode.[89]

e. Power Where District Is Divided. Where a district is divided, the judge elected or appointed to preside in the new district has authority to render a decree in a cause pending therein, which was theretofore submitted for decree in vacation, to the judge formerly having jurisdiction over the district, provided the testimony is preserved in depositions,[90] or where there are special findings of fact,[91] and the new judge may grant a new trial in a case tried before the judge who preceded him in the jurisdiction,[92] but he should not deny a motion for a new trial where the evidence is not preserved.[93]

D. Liability For Official Acts[94]**— 1. Civil Liability For Judicial Acts — a. In General.** As a general rule no person is liable civilly for what he may do

84. *Alabama.*— Malone *v.* Eastin, 2 Port. 182.

Georgia.— Field *v.* Thornton, 1 Ga. 306.

Illinois.— Chicago, etc., R. Co. *v.* Marseilles, 107 Ill. 313.

Michigan.— Manufacturers' Mut. F. Ins. Co. *v.* Daboll, 79 Mich. 241, 44 N. W. 604.

Nebraska.— Lauder *v.* State, 50 Nebr. 140, 69 N. W. 776; State *v.* Gaslin, 32 Nebr. 291, 49 N. W. 353.

West Virginia.— Ott *v.* McHenry, 2 W. Va. 73.

See 29 Cent. Dig. tit. "Judges," § 161.

Contra.— Ohms *v.* State, 49 Wis. 415, 5 N. W. 827.

85. *California.*— Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Macy *v.* Davila, 48 Cal. 646; Altschul *v.* Doyle, 48 Cal. 535.

Kansas.— American Cent. Ins. Co. *v.* Neff, 43 Kan. 457, 23 Pac. 606.

Minnesota.— Hughley *v.* Wabasha, 69 Minn. 245, 72 N. W. 78.

Missouri.— Richardson *v.* Schuyler County Agricultural, etc., Assoc., 156 Mo. 407, 57 S. W. 117; State *v.* Perkins, 139 Mo. 106, 40 S. W. 650; Bailey *v.* Coe, 106 Mo. App. 653, 79 S. W. 1158; Glaves *v.* Wood, 78 Mo. App. 351.

New York.— Gordon *v.* Trainor, 46 Misc. 439, 92 N. Y. Suppl. 321.

See 29 Cent. Dig. tit. "Judges," § 161.

86. *California.*— Jones *v.* Sanders, 103 Cal. 678, 37 Pac. 649.

Illinois.— People *v.* McConnell, 155 Ill. 192, 40 N. E. 608.

Missouri.— Fehlhauer *v.* St. Louis, 178 Mo. 635, 77 S. W. 843.

Nebraska.— Union Pac. R. Co. *v.* Lotway, 2 Nebr. (Unoff.) 348, 96 N. W. 527.

West Virginia.— Franklin *v.* Vandervort, 50 W. Va. 412, 40 S. E. 374.

See 29 Cent. Dig. tit. "Judges," § 161.

Where a nonsuit is granted for the insufficiency of evidence to support a verdict, a new trial will not be granted by a judge who did not hear the trial, and where the evidence was not preserved in the record. Banks *v.* Wilson, 1 Alaska 241.

87. Franklin *v.* Vandervort, 50 W. Va. 412, 40 S. E. 374. But see McCord *v.* Knowlton, 76 Minn. 391, 79 N. W. 397, holding that the application should be made to the trial judge, where convenient.

Disqualification of special judge.— Where the successor of a judge who died is disqualified to hear a motion for a new trial in a case tried before his predecessor, and it is referred to a special judge, and pending decision by him the disqualified judge resigns, and his successor, who is qualified, is appointed, it is proper to vacate the order transferring the case to the special judge, and for the new judge to pass on the motion. Hendrix *v.* Wabash R. Co., 107 Mo. App. 127, 80 S. W. 970.

88. Hughley *v.* Wabasha, 69 Minn. 245, 72 N. W. 78; Ott *v.* McHenry, 2 W. Va. 73.

89. Field *v.* Thornton, 1 Ga. 306; Ott *v.* McHenry, 2 W. Va. 73.

90. Manning *v.* Mathews, 66 Iowa 675, 24 N. W. 271; Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. 940.

91. Crippen *v.* Schnee, 52 Kan. 202, 34 Pac. 793.

In Minnesota, under Gen. St. (1894) § 4846, a judge to whom the cause was submitted has authority to decide it. Darelius *v.* Davis, 74 Minn. 345, 77 N. W. 214.

92. Manufacturers' Mut. F. Ins. Co. *v.* Gratiot County Cir. Judge, 79 Mich. 241, 44 N. W. 604.

93. Bass *v.* Swingley, 42 Kan. 729, 22 Pac. 714.

In Minnesota a judge who tried a case is the proper one to act on a motion for a new trial. McCord *v.* Knowlton, 76 Minn. 391, 79 N. W. 397.

94. Exemption of judge from civil liability for his acts see also Actions, 1 Cyc. 657.

as judge while acting within the limits of his jurisdiction,[95] nor is he liable for neglect or refusal to act.[96] The rule is especially true where the judge is one having general jurisdiction, and in such case there is no liability even though he exceeds his authority.[97] The overwhelming weight of authority is to the effect that where a judge has full jurisdiction of the subject-matter and of the parties, whether his jurisdiction be a general or limited one, he is not liable civilly where he acts erroneously, illegally, or irregularly,[98] and he is not chargeable with costs

Exemption of consul exercising judicial function from liability for his acts see AMBASSADORS AND CONSULS, 2 Cyc. 269.

Exemption from arrest or civil process see *supra*, VI, A.

For criminal responsibility see *infra*, VI, D, 4.

For deductions from salary for neglect of duty see *supra*, VI, B, 10.

For liability on official bond see *infra*, VI, D, 2.

For liability to penalty see *infra*, V, D, 3.

For liability for false imprisonment see FALSE IMPRISONMENT, 19 Cyc. 333 *et seq.*

95. *Alabama.*— Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; Woodruff *v.* Stewart, 63 Ala. 206; Irion *v.* Lewis, 56 Ala. 190; Busteed *v.* Parsons, 54 Ala. 393, 25 Am. Rep. 688; Craig *v.* Burnett, 32 Ala. 728; Hamilton *v.* Williams, 26 Ala. 527; Lester *v.* Governor, 12 Ala. 624.

Arkansas.— Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1.

Connecticut.— Phelps *v.* Sill, 1 Day 315.

Georgia.— Gault *v.* Wallis, 53 Ga. 675; Upshaw *v.* Oliver, Dudley 241.

Iowa.— Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92.

Kansas.— Harrison *v.* Redden, 53 Kan. 265, 36 Pac. 325.

Kentucky.— Pepper *v.* Mayes, 81 Ky. 673; Ayars *v.* Cox, 10 Bush 201; Revill *v.* Pettit, 3 Metc. 314; Morgan *v.* Dudley, 18 B. Mon. 693, 68 Am. Dec. 735; Ely *v.* Thompson, 3 A. K. Marsh. 70; Gregory *v.* Brown, 4 Bibb 28, 7 Am. Dec. 731; Tabb *v.* Mudd, 6 Ky. L. Rep. 220.

Maine.— Morrison *v.* McDonald, 21 Me. 550.

Missouri.— Lenox *v.* Grant, 8 Mo. 254; Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131.

New Hampshire.— Burnham *v.* Stevens, 33 N. H. 247.

New Jersey.— Loftus *v.* Fraz, 43 N. J. L. 667; Taylor *v.* Doremus, 16 N. J. L. 473.

New York.— Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80 [*reversing* 48 How. Pr. 465]; Yates *v.* Lansing, 9 Johns. 395, 6 Am. Dec. 290.

North Carolina.— Cunningham *v.* Dillard, 20 N. C. 485.

Pennsylvania.— Ross *v.* Rittenhouse, 1 Yeates 443, 2 Dall. 160, 1 L. ed. 331.

South Carolina.— Young *v.* Herbert, 2 Nott & M. 172 note; Reid *v.* Hoot, 2 Nott & M. 168, 10 Am. Dec. 582; Brodie *v.* Rutledge, 2 Bay 69.

Tennessee.— Hoggatt *v.* Bigley, 6 Humphr. 236.

United States.— Randall *v.* Brigham, 7 Wall. 523, 19 L. ed. 285.

England.— Scott *v.* Stansfield, L. R. 3 Exch. 220, 37 L. J. Exch. 155, 18 L. T. Rep. N. S. 572, 16 Wkly. Rep. 911; Sutton *v.* Johnstone, 1 Bro. P. C. 76, 1 T. R. 493, 1 Eng. Reprint 427; Fray *v.* Blackburn, 3 B. & S. 576, 113 E. C. L. 576; Kemp *v.* Neville, 10 C. B. N. S. 523, 17 Jur. N. S. 913, 31 L. J. C. P. 158, 4 L. T. Rep. N. S. 640, 10 Wkly. Rep. 6, 100 E. C. L. 523; Floyd *v.* Barker, 12 Coke 23; Marshalsea's Case, 10 Coke 69; Mostyn *v.* Fabrigas, Cowp. 161; Le Caux *v.* Eden, Dougl. 573; Barnardiston *v.* Soame, 6 How. St. Tr. 1063, 1096; Groenvelt *v.* Burwell, 1 Ld. Raym. 454, 12 Mod. 386, 1 Salk. 396; Hamond *v.* Howell, 2 Mod. 218, 1 Mod. 184; Taafe *v.* Downes, 3 Moore P. C. 36 note, 13 Eng. Reprint 15; Calder *v.* Halket, 3 Moore P. C. 28, 13 Eng. Reprint 12; Ackerley *v.* Parkinson, 3 M. & S. 411, 16 Rev. Rep. 317; Aire *v.* Sedgwicke, 2 Rolle 197; Miller *v.* Seare, 2 W. Bl. 1141; 2 Hawkins P. C. c. 13, § 20; 2 Hawkins P. C. c. 1, § 17; 1 Hawkins P. C. c. 72, § 6.

See 29 Cent. Dig. tit. "Judges," § 165.

96. Irion *v.* Lewis, 56 Ala. 190; Lester *v.* Governor, 12 Ala. 624; Phelps *v.* Sill, 1 Day (Conn.) 315.

97. *Arkansas.*— McClure *v.* Hill, 36 Ark. 268.

Colorado.— Hughes *v.* McCoy, 11 Colo. 591, 19 Pac. 674; Terry *v.* Wright, 9 Colo. App. 11, 47 Pac. 905.

Kentucky.— Hollon *v.* Lilly, 100 Ky. 553, 38 S. W. 878, 18 Ky. L. Rep. 968.

Maine.— Williamson *v.* Lacy, 86 Me. 80, 29 Atl. 943, 25 L. R. A. 506.

New York.— Austin *v.* Vrooman, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; Yates *v.* Lansing, 5 Johns. 289.

North Dakota.— Root *v.* Rose, 6 N. D. 575, 72 N. W. 1022.

Ohio.— Nienaber *v.* Tarvin, 9 Ohio S. & C. Pl. Dec. 561, 7 Ohio N. P. 110.

South Carolina.— McCall *v.* Cohen, 16 S. C. 445, 42 Am. Rep. 641.

Tennessee.— Webb *v.* Fisher, 109 Tenn. 701, 72 S. W. 110, 97 Am. St. Rep. 863, 60 L. R. A. 791.

Wisconsin.— Robertson *v.* Parker, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889.

United States.— Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646; Randall *v.* Bingham, 7 Wall. 523, 19 L. ed. 285; U. S. *v.* Bell, 135 Fed. 336, 68 C. C. A. 144 [*affirming* 127 Fed. 1002]; English *v.* Ralston, 112 Fed. 272; Philbrook *v.* Newman, 85 Fed. 139.

See 29 Cent. Dig. tit. "Judges," § 125.

98. *Kentucky.*— Hollon *v.* Lilly, 100 Ky.

resulting from his erroneous rulings,[99] or the cost of a proceeding to prohibit erroneous action on his part;[1] nor is he liable for a failure to exercise due and ordinary care,[2] or where he acts from malicious or corrupt motives.[3] For the corrupt acts of a judge of general jurisdiction the only remedy is by impeachment.[4] While there is some disposition in modern times to make the general rule exempting judges of general jurisdiction from liability for their judicial acts extend to and cover those of inferior jurisdiction,[5] the weight of authority is still to the effect that such inferior judges are liable where they attempt to exercise authority where they have none, or assume jurisdiction without any power;[6] but the burden

553, 38 S. W. 878, 18 Ky. L. Rep. 968; Revill *v.* Pettit, 3 Metc. 314; Morgan *v.* Dudley, 18 B. Mon. 693, 68 Am. Dec. 735; Robinson *v.* Ramey, 8 B. Mon. 214; Gregory *v.* Brown, 4 Bibb 28, 7 Am. Dec. 731; Reed *v.* Taylor, 78 S. W. 892, 25 Ky. L. Rep. 1793.

Maryland.— Roth *v.* Shupp, 94 Md. 55, 50 Atl. 430; Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618.

Nebraska.— Morgan *v.* Larsh, 1 Nebr. 361.

New Jersey.— Taylor *v.* Doremus, 16 N. J. L. 473.

New York.— Willis *v.* Havemeyer, 5 Duer 447.

North Carolina.— Cunningham *v.* Dillard, 20 N. C. 485.

Tennessee.— Cope *v.* Ramsey, 2 Heisk. 197; Hoggatt *v.* Bigley, 6 Humphr. 236.

West Virginia.— Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

England.— Doswell *v.* Impey, 1 B. & C. 163, 8 E. C. L. 70; Lowther *v.* Radnor, 8 East 113; Calder *v.* Halket, 3 Moore P. C. 28, 13 Eng. Reprint 12.

99. State *v.* Whitaker, 45 La. Ann. 1299, 14 So. 66.

1. State *v.* McDuffie, 52 Ala. 4.

2. Ayers *v.* Russell, 50 Hun (N. Y.) 282, 3 N. Y. Suppl. 338.

3. *Alabama.*— Woodruff *v.* Stewart, 63 Ala. 206.

Massachusetts.— Pratt *v.* Gardner, 2 Cush. 63, 48 Am. Dec. 652.

Missouri.— Lenox *v.* Grant, 8 Mo. 254; Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131.

New Hampshire.— Evans *v.* Foster, 1 N. H. 374.

New Jersey.— Taylor *v.* Doremus, 16 N. J. L. 473.

New York.— Cunningham *v.* Bucklin, 8 Cow. 178, 18 Am. Dec. 432.

North Carolina.— Cunningham *v.* Dillard, 20 N. C. 485.

Tennessee.— Webb *v.* Fisher, 109 Tenn. 701, 72 S. W. 110, 97 Am. St. Rep. 863, 60 L. R. A. 791.

Texas.— Taylor *v.* Goodrich, (Civ. App. 1897) 40 S. W. 515.

West Virginia.— Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

United States.—Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646; Philbrook *v.* Newman, 85 Fed. 139. But see Randall *v.* Brigham, 7 Wall. 523, 19 L. ed. 285.

England.— Scott *v.* Stansfield, L. R. 3 Exch. 220, 37 L. J. Exch. 155, 18 L. T. Rep. N. S. 572, 16 Wkly. Rep. 911; Fray *v.* Blackburn, 3 B. & S. 576, 113 E. C. L. 576; Floyd *v.* Barker, 12 Coke 23; Barnardiston *v.* Soame, 6 How. St. Tr. 1063, 1096; Miller *v.* Seare, 2 W. Bl. 1141.

See 29 Cent. Dig. tit. "Judges," § 165.

4. Pratt *v.* Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Taylor *v.* Doremus, 16 N. J. L. 473; Floyd *v.* Barker, 12 Coke 23; Bushell's Case, 1 Mod. 119, Vaugh. 134. See also State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361.

5. *Georgia.*— Calhoun *v.* Little, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630.

Iowa.— Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92. See also Henke *v.* McCord, 55 Iowa 378, 7 N. W. 623.

Michigan.— Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137.

Mississippi.— Bell *v.* McKinney, 63 Miss. 187.

New York.— Austin *v.* Vrooman, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138.

North Carolina.— Scott *v.* Fishblate, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696, holding that he is not liable even where actuated by malice.

Oklahoma.—Comstock *v.* Eagleton, 11 Okla. 487, 69 Pac. 955.

South Carolina.— McCall *v.* Cohen, 16 S. C. 445, 42 Am. Rep. 641.

See 29 Cent. Dig. tit. "Judges," § 165.

6. *Alabama.*— Irion *v.* Lewis, 56 Ala. 190; Craig *v.* Burnett, 32 Ala. 728.

Arkansas.— McClure *v.* Hill, 36 Ark. 268; Vanderpool *v.* State, 34 Ark. 174.

Connecticut.— Tracey *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102.

Kentucky.— Stephens *v.* Wilson, 115 Ky. 27, 72 S. W. 336, 24 Ky. L. Rep. 1832; Blincoe *v.* Head, 103 Ky. 106, 44 S. W. 374, 19 Ky. L. Rep. 1742; Ayars *v.* Cox, 10 Bush 201; Scott *v.* West, 1 Bush 23; Revill *v.* Pettit, 3 Metc. 314; Ely *v.* Thompson, 3 A. K. Marsh. 70.

Maine.— Waterville *v.* Barton, 64 Me. 321.

Massachusetts.— Clarke *v.* May, 2 Gray 410, 61 Am. Dec. 470; Piper *v.* Pearson, 2 Gray 120, 61 Am. Dec. 438.

New Hampshire.— Burnham *v.* Stevens, 33 N. H. 247.

New Jersey.— Taylor *v.* Doremus, 16 N. J. L. 473.

New York.— Evertson *v.* Sutton, 5 Wend. 281, 21 Am. Dec. 217.

Vermont.— Blood *v.* Sayre, 17 Vt. 609.

United States.— Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646.

England.— Doswell *v.* Impey, 1 B. & C.

is upon plaintiff to show that the judge knew or ought to have known that he was acting without jurisdiction.[7] In some courts inferior judges are civilly liable where they act corruptly,[8] or through malice,[9] but the malice must be clearly proved.[10] Where a judge acts wholly without jurisdiction of the parties or the subject-matter, he is subject to civil action for any damage resulting therefrom.[11]

b. For Taking Insufficient Bond. In some jurisdictions the view obtains that the act of a judge in taking a bond or other security is purely ministerial,[12] while in others it is regarded as judicial.[13] In the former class of jurisdictions the rule is that a judge is liable in damages in the matter of taking a bond or other security only when he fails to exercise ordinary care in the performance of his duty.[14] In the latter class the rule of liability is that a judge is not answerable for damages resulting from his failure to take security or sufficient security, as the case may be,[15] except where he acts corruptly,[16] or where the legislature imposes upon him express liability for failure to require security or to exercise certain precautions in taking the same, in which event the rule of liability varies somewhat with the terms of the statute.[17]

163, 8 E. C. L. 70; Marshalsea's Case, 10 Coke 69; Terry *v.* Huntington, Hardres 480; Taaffe *v.* Downes, 3 Moore P. C. 36 note, 13 Eng. Reprint 15; Calder *v.* Halket, 3 Moore P. C. 28, 13 Eng. Reprint 12; Miller *v.* Seare, 2 W. Bl. 1141; Perkin *v.* Proctor, 2 Wils. C. P. 382.

See 29 Cent. Dig. tit. "Judges," § 165.

7. Pike *v.* Carter, 3 Bing. 78, 3 L. J. C. P. O. S. 169, 10 Moore C. P. 376, 11 E. C. L. 47; Gwinne *v.* Poole, Lutw. 1560; Calder *v.* Halket, 3 Moore P. C. 28, 13 Eng. Reprint 12.

8. Gault *v.* Wallis, 53 Ga. 675; Robertson *v.* Parker, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889.

9. Hollon *v.* Lilly, 100 Ky. 553, 38 S. W. 878, 18 Ky. L. Rep. 968; Ayars *v.* Cox, 10 Bush (Ky.) 201; Revill *v.* Pettit, 3 Metc. (Ky.) 314; Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Robinson *v.* Ramey, 8 B. Mon. (Ky.) 214; Gregory *v.* Brown, 4 Bibb (Ky.) 28, 7 Am. Dec. 731; Reed *v.* Taylor, 78 S. W. 892, 25 Ky. L. Rep. 1798; Williamson *v.* Laccy, 86 Me. 80, 29 Atl. 943, 25 L. R. A. 506; Cope *v.* Ramsey, 2 Heisk. (Tenn.) 197; Hoggatt *v.* Bigley, 6 Humphr. (Tenn.) 236.

10. Young *v.* Herbert, 2 Nott & M. (S. C.) 172 note.

11. *Kentucky.*— Stephens *v.* Wilson, 115 Ky. 27, 72 S. W. 336, 24 Ky. L. Rep. 1832.

New Jersey.— Taylor *v.* Doremus, 16 N. J. L. 473.

New York.— Bigelow *v.* Stearns, 19 Johns. 39, 10 Am. Dec. 189; Vosburgh *v.* Welch, 11 Johns. 175.

South Carolina.— McCall *v.* Cohen, 16 S. C. 445, 42 Am. Rep. 641.

United States.—Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646.

England.— Marshalsea's Case, 10 Coke 69; 2 Hawkins P. C. c. 13, § 20.

See 29 Cent. Dig. tit. "Judges," § 165.

Compare Root *v.* Rose, 6 N. D. 575, 72 N. W. 1022, where it was intimated that a judge cannot be liable for his judicial acts, even where his court was without jurisdiction of the subject-matter, unless the assumption of jurisdiction was so extravagant as to preclude any inference of good faith.

12. Williams *v.* Weeks, 70 S. C. 1, 48 S. E. 619; Boggs *v.* Hamilton, 2 Mill (S. C.) 382; McRae *v.* David, 5 Rich. Eq. (S. C.) 475; Spears *v.* Smith, 9 Lea (Tenn.) 483; Boyd *v.* Ferris, 10 Humphr. (Tenn.) 406.

13. Phelps *v.* Sill, 1 Day (Conn.) 315; Com. *v.* Tilton, 111 Ky. 341, 63 S. W. 602, 23 Ky. L. Rep. 753; Austin *v.* Richardson, 1 Gratt. (Va.) 310. See also Kimhall *v.* Thurman, 98 Ky. 578, 33 S. W. 834, 17 Ky. L. Rep. 1222.

14. Cunningham *v.* Dillard, 20 N. C. 485 (holding that the rule of liability is as stated in the text if the act is to be regarded as purely ministerial); Williams *v.* Weeks, 70 S. C. 1, 48 S. E. 619; McRae *v.* David, 5 Rich. Eq. (S. C.) 475.

The rule in Tennessee is that in order to support an action against a justice of the county court for failure to take from a guardian a sufficient bond, it is necessary to show that the act was malicious and wilful. McTeer *v.* Lebow, 85 Tenn. 121, 2 S. W. 18; Spears *v.* Smith, 9 Lea 483.

15. Phelps *v.* Sill, 1 Day (Conn.) 315; Com. *v.* Tilton, 111 Ky. 341, 63 S. W. 602, 23 Ky. L. Rep. 753; Cunningham *v.* Dillard, 20 N. C. 485.

16. Com. *v.* Tilton, 111 Ky. 341, 63 S. W. 602, 23 Ky. L. Rep. 753. See also Phelps *v.* Sill, 1 Day (Conn.) 315.

17. Best *v.* Robinson, 114 Ky. 11, 24 Ky. L. Rep. 767, 69 S. W. 1087; Kimball *v.* Thurman, 98 Ky. 578, 33 S. W. 834, 17 Ky. L. Rep. 1222; Com. *v.* Netherland, 87 Ky. 195, 8 S. W. 272; Burdine *v.* Pettus, 79 Ky. 240; Colter *v.* McIntire, 11 Bush (Ky.) 565; Daniels *v.* Vertrees, 6 Bush (Ky.) 4; Com. *v.* Lewis, 39 S. W. 438, 19 Ky. L. Rep. 170; Austin *v.* Richardson, 1 Gratt. (Va.) 310.

Under the Kentucky statute it has been held that if the judge takes a good bond, and the parties afterward become insolvent, he is not responsible for any damage that may ensue. McIntyre *v.* Gritton, 5 Ky. L. Rep. 686. But if the clerk fails to fill in the printed blanks and form used, the judge is

e. For Ministerial Acts.[18] For the wrongful execution of or refusal to perform a ministerial duty or authority annexed to a judicial office, the officer is answerable to the injured party in an action at law, whether or not he acts in good faith,[19] or personally, or by a clerk whom he has authorized to perform the acts;[20] and his judicial character affords him no protection.[21]

d. Maladministration of Estate. A judge who by virtue of his office comes into possession of the estate of another and undertakes the administration and distribution thereof is civilly liable for any erroneous or corrupt disbursements therefrom;[22] but he cannot be sued for a share or portion of such estate until the amount thereof has been judicially determined in his court.[23]

e. Slanderous Words Spoken in Discharge of Duty. Slanderous words spoken by one who is in the discharge of a judicial duty are not actionable.[24]

f. Acts Not Official. For his acts other than official a judge may be held responsible in the same manner as any private individual.[25]

g. Actions, Who May Sue. Where a statute provides that suit on the bond of a judge shall be brought in the name of the state, an action so brought is not demurrable, although the bond is made payable to the governor.[26] While a right of action against a judge for failure to take a proper bond from a guardian is generally given by statute to the ward alone,[27] who may maintain such action against the administrator of the judge who has brought suit to settle an estate, notwithstanding an injunction restraining creditors of the estate from suing except in that suit,[28] any person injured by such failure may maintain an action at common law, as where a surety seeking release from further liability is defeated therein by the judge's failure to require a new bond.[29] But such action, even by

responsible, since the bond is presumably executed under his sanction and direction. Kinnison *v.* Carpenter, 9 Bush (Ky.) 599. Or if the judge accepts sureties who do not satisfy him of their sufficiency, any subsequent examination into their solvency will not excuse him. McIntyre *v.* Gritton, *supra*. So too a judge who allows a guardian to qualify on signing another's name as surety, representing that he had authority to sign, and it appearing that he had no authority, and that the act was never ratified, is liable. Com. *v.* Netherland, 87 Ky. 195, 8 S. W. 272, 10 Ky. L. Rep. 123.

Only justice presiding liable.— The Tennessee statute providing that the county court shall appoint a guardian and take sufficient security from them and holding the justice making such appointment responsible for having taken insufficient security is held to extend to those only who were presiding when the appointment was made. Strong *v.* Harris, 3 Humphr. (Tenn.) 451.

Bad faith necessary.— Under the North Carolina statute a judge cannot be held liable, where he takes an insufficient bond, for an error of judgment, but only in case he is guilty of bad faith or of that gross neglect which is evidence of it. Governor *v.* McAffee, 13 N. C. 15.

18. **Character of functions as ministerial or judicial** see *supra*, VI, C, 1, k.

19. *Alabama.*— Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

Kentucky.— Kinnison *v.* Carpenter, 9 Bush 599.

Maine.— Stone *v.* Augusta, 46 Me. 127.

Missouri.— Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131.

New Jersey.— Taylor *v.* Doremus, 16 N. J. L. 473.

Virginia.— Austin *v.* Richardson, 1 Gratt. 310.

See 29 Cent. Dig. tit. "Judges," § 167.

But see Cunningham *v.* Dillard, 20 N. C. 485, holding that he was not liable where he acted in good faith. See also Governor *v.* McAffee, 13 N. C. 15.

20. Wood *v.* Farnell, 50 Ala. 546; Kinnison *v.* Carpenter, 9 Bush (Ky.) 599.

21. Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

22. State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361; Wheeler *v.* Barker, 51 Nebr. 846, 71 N. W. 750; Disbrow *v.* Mills, 62 N. Y. 604 [*affirming* 2 Hun 132, 4 Thomps. & C. 682].

23. Spires *v.* Fort, 11 Rich. (S. C.) 578.

24. Scott *v.* Stansfield, L. R. 3 Exch. 220, 37 L. J. Exch. 155, 18 L. T. Rep. N. S. 572, 16 Wkly. Rep. 911; Thomas *v.* Churton, 2 B. & S. 475, 8 Jur. N. S. 795, 31 L. J. Q. B. 139, 6 L. T. Rep. N. S. 320, 110 E. C. L. 475; Rex *v.* Skinner, Lofft. 55. In Miller *v.* Hope, 2 Shaw App. Cas. 125, it was held that a censure of an attorney by a judge, even though done injuriously and from malice, is not actionable.

25. Glavecke *v.* Tijirina, 24 Tex. 663.

26. State *v.* Henderson, 120 Ga. 780, 48 S. E. 334.

27. Kinnison *v.* Carpenter, 9 Bush (Ky.) 599.

28. Com. *v.* Netherland, 87 Ky. 195, 8 S. W. 272, 10 Ky. L. Rep. 123.

29. Kinnison *v.* Carpenter, 9 Bush (Ky.) 599.

the ward, cannot be maintained in equity.[30] Where a statute provides that a judge who fails to require a proper and sufficient bond of his clerk shall be personally bound for any dereliction of duty on the part of the latter, he may be proceeded against summarily under a statute authorizing such proceedings against an officer and his sureties.[31] Where several judges constituting a court are all liable for an act done by them, suit may be brought against any one or more of them.[32]

h. Pleadings. Where the statute imposes liability on a judge for accepting sureties who do not satisfy him of their sufficiency, a complaint in an action to enforce the liability must allege that he knew of the insolvency of the sureties, or acted without taking any proof of the fact, or that the proof taken was insufficient to satisfy one of ordinary judgment that the sureties were sufficient.[33] If the act complained of is a judicial one, and within the jurisdiction of the judge, no allegation of malice, corruption, oppression, tyranny, or want of just or probable cause will operate to make the complaint sufficient in jurisdictions where such facts impose no civil liability.[34] And a complaint alleging that the act was not a judicial one is demurrable where the particular acts set out do not support such general averment.[35] Where liability *vel non* depends upon the date of the act, a complaint which fails to allege the date should not be dismissed on demurrer, for the evidence may show that the act was done at a time when liability attached.[36]

i. Evidence. In actions to enforce civil liability of judges the general rules of evidence in respect of admissibility, burden of proof, and weight and sufficiency govern.[37]

j. Questions For Jury. Whether the excess of his jurisdiction by a judge in making an order is both palpable and malicious or corrupt is a question for the court and not the jury.[38]

k. Amount of Damages. A judge is not liable beyond the actual loss sustained

30. Austin *v.* Richardson, 1 Gratt. (Va.) 310.

31. State Bank *v.* Davenport, 19 N. C. 45.

32. Davis *v.* Lanier, 47 N. C. 307.

33. Burdine *v.* Pettus, 79 Ky. 240.

34. Pratt *v.* Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; Scott *v.* Stansfield, L. R. 3 Exch. 220, 37 L. J. Exch. 155, 18 L. T. Rep. N. S. 572, 16 Wkly. Rep. 911; Fray *v.* Blackburn, 3 B. & S. 576, 113 E. C. L. 576.

35. O'Connell *v.* Mason, 132 Fed. 245, 65 C. C. A. 541.

36. State *v.* Jeter, 59 S. C. 483, 38 S. E. 124.

37. **Admissibility.**— In an action against a judge for improperly issuing a marriage license to a minor he cannot show that plaintiff, the minor's father, had knowledge of the issuance of the license in ample time to have prevented and promised to prevent the marriage. Wood *v.* Farnell, 50 Ala. 546. Where a judge is sued for damages for a judicial act proof that he was drinking at the time of the performance of the act is incompetent. Hollon *v.* Lilly, 100 Ky. 553, 38 S. W. 878, 18 Ky. L. Rep. 968. In an action for accepting a guardian's bond signed under an invalid power of attorney the judge may show ratification on the part of the surety (Best *v.* Robinson, 82 S. W. 302, 26 Ky. L. Rep. 620), but he will not be permitted to prove in such a case that he did not sign the order appointing the guardian and accepting the bond (Com. *v.* Lewis, 39 S. W. 438, 19 Ky. L. Rep. 170). Where a court is composed of several judges, and only those are liable who actually participate in the acts of the court and the judge who signed the minutes, but denies his presence and participation in the act complained of, may properly show the negligence of the clerk in preparing the minutes, and that he called upon any of the judges to authenticate them when recorded. Strong *v.* Harris, 3 Humphr. (Tenn.) 451.

Burden of proof.— In an action against a judge for taking an insufficient bond, the burden of proof is on him to show that he had personal knowledge of the sufficiency of the sureties, or made such inquiry and ascertained such facts as would satisfy a man of ordinary care and prudence of their sufficiency. Lancaster *v.* Turpin, 8 Ky. L. Rep. 430; Williams *v.* Weeks, 70 S. C. 1, 48 S. E. 619.

Weight and sufficiency.— Evidence that a banker, although reputed to be solvent, was in fact insolvent, and engaged in stock speculations, is insufficient to prove a lack of good faith or want of due diligence on the part of a surrogate, who deposited funds of an estate with him, in the absence of proof that he was guilty of want of care and diligence or prudence. People *v.* Faulkner, 8 N. Y. Suppl. 376 [*following* People *v.* Faulkner, 107 N. Y. 477, 14 N. E. 415, and in effect *overruling* People *v.* Faulkner, 31 Hun 317].

38. Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646.

on account of his act or failure or refusal to act.[39] In an action against a judge for taking an insufficient guardian's bond, only nominal damages can be recovered in the absence of proof of actual loss;[40] and there can be no recovery for failure to require a bond, where the loss sustained would not have been covered by the bond if given;[41] but where actual loss is shown the judge is liable for the amount thereof with compound interest to the time the ward attains his majority, after which event no interest will be allowed.[42]

2. LIABILITY ON OFFICIAL BOND[43] — a. In General. Sureties on a judge's bond are liable for moneys received and not properly disbursed by him, only when it is his duty, under the law, to receive such moneys in his official character.[44] A judge and the sureties on his official bond are liable for his conversion of moneys of the state or county which he received by virtue of his office.[45] They are liable for his failure to pay over to his successor or the person entitled thereto moneys deposited with him in condemnation proceedings;[46] for moneys which he has received from an administrator;[47] for his failure to surrender to his successor bonds made payable to him in his official capacity;[48] for his failure to make annual inquiries as to the solvency of the sureties on a guardian's bond, and to require additional security when necessary where the statute imposes such duties;[49] where he accepts a guardian's bond to which the surety's name has been signed by one not authorized thereto;[50] where he fails to require a guardian's bond in the proper amount and with sufficient sureties;[51] where he fails to require, in accordance with the statute, a bond of an executor who purchases at his own sale;[52] where he improperly refuses to grant a retail liquor license;[53] or where he fails to make and deliver a tax-roll to the tax-collector, authorizing the collection of a special tax.[54] And they are liable for interest on moneys converted by him,[55] and demand is not necessary in order to charge them therewith.[56] But there is no liability against his bond for funds of a ward, the charge of which he assumes under agreement with the guardian and the latter's sureties;[57] for

39. Branch *v.* Davis, 29 Fed. 888.

40. Spears *v.* Smith, 9 Lea (Tenn.) 483.

41. Smith *v.* Bland, 7 B. Mon. (Ky.) 21.

42. Davis *v.* Lanier, 47 N. C. 307. See also Com. *v.* Lee, (Ky. 1905) 89 S. W. 731 [*modifying* 86 S. W. 990, 27 Ky. L. Rep. 806].

43. Giving bond see *supra*, V, B, 1.

44. State *v.* Jeter, 59 S. C. 483, 38 S. E. 124.

45. Randolph *v.* Brown, 115 Ala. 677, 22 So. 524. A judge who is also his own clerk and in the latter capacity gives bond for the discharge of the duties of the office is liable thereon for failure to pay over the proceeds of state lands sold by him, especially where the legislature, in imposing the duty, declared the liability on the bond for a failure therein. State *v.* Henderson, 120 Ga. 780, 48 S. E. 334.

A conversion is accomplished where he accepts a check in payment of a license and makes a general deposit of it in his name in a bank which fails. Alston *v.* State, 92 Ala. 124, 9 So. 732, 13 L. R. A. 659.

46. Clelland *v.* McCumber, 15 Colo. 355, 25 Pac. 700; Clark *v.* Douglas, 58 Nebr. 571, 79 N. W. 158; Chicago, etc., R. Co. *v.* Philpott, 56 Nebr. 212, 76 N. W. 550.

47. Bradley *v.* Harden, 73 Ala. 70; Wright *v.* Harris, 31 Iowa 272; Smith *v.* Lovell, 2 Mont. 332; Barker *v.* Wheeler, 60 Nebr. 470, 83 N. W. 678, 83 Am. St. Rep. 541; Wheeler *v.* Barker, 51 Nebr. 846, 71 N. W. 750. But see People *v.* Faulkner, 107 N. Y. 477, 14 N. E. 415 [*reversing* 38 Hun 607], holding that a surrogate is not liable on his official bond for surplus moneys arising from the foreclosure sale of a decedent's land, paid over to him under order of court, and which was lost by the failure of the bank in which he deposited it, pending proceedings to determine its proper disbursement.

48. Whitmire *v.* Langston, 11 S. C. 381.

49. Cosby *v.* Com., 91 Ky. 235, 15 S. W. 514, 12 Ky. L. Rep. 808; Colter *v.* McIntire, 11 Bush (Ky.) 565; Com. *v.* Gowdy, 15 S. W. 516, 12 Ky. L. Rep. 792.

50. Com. *v.* Netherland, 87 Ky. 195, 8 S. W. 272, 10 Ky. L. Rep. 123. But in Com. *v.* Tilton, 111 Ky. 341, 63 S. W. 602, 23 Ky. L. Rep. 753, it was held that in the absence of statutory provision a judge was not liable on his bond for accepting a sheriff's bond signed by one not authorized thereto in writing.

51. Williams *v.* Weeks, 70 S. C. 1, 48 S. E. 619.

52. State *v.* Baskin, 1 Strobh. (S. C.) 35.

53. Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

54. Branch *v.* Davis, 29 Fed. 888.

55. Randolph *v.* Brown, 115 Ala. 677, 22 So. 524; Bradley *v.* Harden, 73 Ala. 70.

56. Bradley *v.* Harden, 73 Ala. 70.

57. Tallman *v.* Drake, 116 Ala. 262, 22 So. 485.

money unlawfully received from an executor and wasted by him;[58] for failing to require a guardian to renew his bond, or to give further security, on account of the insolvency, removal, or death of his original sureties, where the statute does not expressly impose such duty upon him;[59] for a failure to certify the fees of officers to a higher court, where an accused person demands jury trial;[60] for a failure to collect such fees, where his only duty with respect thereto is to issue execution therefor;[61] for the penalty given for the improper issuance of a marriage license to a minor;[62] for failing to award a contract for a public improvement to the lowest bidder;[63] or for the imprisonment of one who refuses to pay a fine justly imposed for contempt.[64] Where a judge is also a clerk of his own court and his only official bond is given in the latter capacity, there is no liability against the bond for his failure to discharge the judicial duty of requiring bond from a county tax-collector.[65]

b. Unlawful and Extra-Official Acts. The sureties on the official bond of a judge are not liable for money which was not received by him within the scope of his official duty.[66]

c. Extent of Liability. As a general rule the extent of the liability of the sureties on an official bond of a judge is measured by the latter's liability, up to the amount of the bond.[67]

3. Penalties. Under a statute giving a penalty for refusal to issue the writ of habeas corpus, a judge in vacation who refuses to allow the writ is liable for the penalty, because his allowance of the writ would be a ministerial act.[68] But judges sitting as a court may in their discretion refuse to allow the writ without incurring the penalty.[69] In several jurisdictions statutes are in force giving a penalty to the party aggrieved whenever a judge exacts illegal fees.[70] The gratuitous preparation of papers to enable a widow in poor circumstances to take out administration does not render the judge liable to a penalty for practising law.[71]

4. Criminal Liability. It is well settled that a judicial officer, when required to exercise his judgment or discretion, is not liable criminally for any error which he commits, provided he acts in good faith.[72] But any judicial officer who acts corruptly is responsible criminally,[73] whether he acts under the law or without

58. State *v.* Baskin, 1 Strobh. (S. C.) 35.
59. Hamilton *v.* Williams, 26 Ala. 527.
60. Burns *v.* Moragne, 128 Ala. 493, 29 So. 460.
61. Burns *v.* Moragne, 128 Ala. 493, 29 So. 460.
62. Jeffreys *v.* Malone, 105 Ala. 489, 17 So. 20.
63. Smith *v.* Stapler, 53 Ga. 300.
64. Van Horn *v.* People, 92 Ill. App. 426.
65. Smith *v.* Taylor, 56 Ga. 292.
66. American Bonding, etc., Co. *v.* Blount, 65 S. W. 806, 23 Ky. L. Rep. 1632; Duncan *v.* Smith, 15 Ky. L. Rep. 58; Hatcher *v.* Pike County, 13 Ky. L. Rep. 494; State *v.* Baskin, 1 Strobh. (S. C.) 35.
67. State *v.* Baskin, 1 Strobh. (S. C.) 35.

The measure of liability of the sureties of a probate judge to a judgment creditor of a county, for his failure to make and deliver the tax roll to the tax collector after a special levy to pay the judgment, is the actual loss or trouble caused to plaintiff by the failure of the proper officer to collect the levy. Branch *v.* Davis, 29 Fed. 888.

The practice in South Carolina, in an action on an official bond of a probate judge, is to enter judgment for the penalty of the bond with a direction to the master to advertise for claims and report them to the court. Williams *v.* Weeks, 70 S. C. 1, 48 S. E. 619.

68. Yates *v.* Lansing, 5 Johns. (N. Y.) 282.
69. Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; Yates *v.* Johnson, 5 Johns. (N. Y.) 282.
70. Wood County *v.* Cate, 75 Tex. 215, 12 S. W. 535.

Agency for plaintiff of person paying fees. — In an action arising under the Alabama statute, it was held that plaintiff, if the fee was paid by another, must prove that such other, in paying it, acted as his agent. Lee *v.* Lide, 111 Ala. 126, 20 So. 410.

What petition must state. — In an action brought under the Texas statute giving a penalty for taking "any other or higher fees than are prescribed in that act for any of the services therein mentioned," the petition must state the services for which the "other or higher" fees were demanded and received. Orton *v.* Engledow, 8 Tex. 206.

71. Allen *v.* Jarvis, 32 U. C. Q. B. 56.
72. Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618; State *v.* Powers, 75 N. C. 281.
73. Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618; State *v.* Powers, 75 N. C. 281.

the law.[74] The rule of the common law exempting a judge from indictment for any act done or omitted to be done when sitting as a judge[75] still prevails, except so far as it has been changed by particular statutes,[76] or by some constitutional provision.[77] Frequently, however, judges are by statute made subject to indictment for wilful neglect of official duty,[78] for corrupt acts done in their official capacity, such as oppression,[79] requiring excessive bail,[80] granting unlawfully a liquor license,[81] extorting illegal fees or compensation,[82] allowing an unjust claim against the county,[83] or failing to vacate his seat.[84]

VII. DISQUALIFICATION TO ACT.[85]

A. In General. Under the civil and canon law a judge was disqualified by interest in a cause,[86] and this rule was recognized as existing under the common law of England by Littleton, Bracton, Fleta, and Bacon,[87] but denied by Coke and Blackstone.[88] There was no other cause for the recusation of a judge at the

74. State *v.* Powers, 75 N. C. 281.

75. Hamilton *v.* Williams, 26 Ala. 527; Yeates *v.* Lansing, 5 Johns. (N. Y.) 282.

Illustrations.— An indictment will not lie against the presiding judge of a court of common pleas for having wilfully prevented an associate from delivering his sentence to the grand jury after the presiding judge has concluded his charge. Com. *v.* Addison, 4 Dall. (U. S.) 225, 1 L. ed. 810. Nor is a county judge who fails to make his semiannual report to the county court indictable. State *v.* Cordell, 11 Lea (Tenn.) 546. Nor will an indictment lie against a judge for scandalous words spoken in office. Rex *v.* Skinner, Lofft. 55.

76. Hamilton *v.* Williams, 26 Ala. 527.

77. Com. *v.* Williams, 79 Ky. 42, 42 Am. Rep. 204, holding that an act providing that it shall be deemed misfeasance in office for the judge of any county court, while engaged in a discharge of his official duties, to be in a state of intoxication, is in violation of the state constitution which provides that judges of the county court shall be subject to indictment for misfeasance in office.

78. Curry *v.* Stewart, 8 Bush (Ky.) 560; State *v.* Hall, 5 S. C. 120, holding that where a probate judge sells realty for distribution among heirs, an indictment against him for wilful neglect in not paying out the money will not be sustained until an order for distribution has been obtained. State *v.* Ferris, 3 Lea (Tenn.) 700.

Defective indictment.— An indictment for neglect of official duty required by law to be performed by the accused as probate judge is fatally defective, if it does not charge a specific duty imposed upon defendant by law and in wilful neglect of duty. State *v.* Hall, 5 S. C. 120. An indictment of a county judge for malfeasance in office, in practising law in the inferior courts, and in actions involving the settlement of estates, as forbidden by Gen. St. c. 28, art. 13, § 16, is demurrable, where the offense is alleged merely in the terms of the statute, without any averment as to the name of the action in which he acted as counsel. Com. *v.* Milby, 24 S. W. 625, 15 Ky. L. Rep. 568.

Evidence.— On indictment of a county judge for demanding illegal fees, the account presented by defendant to the commissioners court was properly deemed in evidence. Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

79. State *v.* Grassle, 74 Mo. App. 313.

80. Evans *v.* Foster, 1 N. H. 374.

81. State *v.* Prescott, 31 Ark. 39, holding that where a judge grants a liquor license, notwithstanding a majority of the electors of a township have voted against the same, a corrupt motive cannot be inferred from error in the official action of the judge, but that the state must show by attendant circumstances that he acted wilfully and from a corrupt motive.

82. State *v.* Perham, 4 Oreg. 188; Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

83. Casey *v.* State, 53 Ark. 334, 14 S. W. 90.

84. Com. *v.* Wammock, 3 Ky. L. Rep. 250.

85. Disqualification as ground for: Appointment of special or substitute judge see *infra*, VIII, B, 1. Arrest of judgment in criminal case see CRIMINAL LAW, 12 Cyc. 757. Certiorari see CERTIORARI, 6 Cyc. 785 note 53. Change of venue see CRIMINAL LAW, 12 Cyc. 245; VENUE. Collateral attack on judgment see JUDGMENTS, *post* p. 1055 *et seq.*

Disqualification of: Judges of appellate court see APPEAL AND ERROR, 2 Cyc. 968 note 91. Justice of the peace see JUSTICES OF THE PEACE.

Raising objection for the first time on appeal or writ of error see CRIMINAL LAW, 12 Cyc. 809.

Showing as to disqualification in record on appeal see APPEAL AND ERROR, 1 Cyc. 156 note 25.

Costs on new trial because of disqualification of judge see COSTS, 11 Cyc. 251 note 53.

86. 3 Blackstone Comm. (Cooley 4th ed.) *361 and notes; Code 3, 1, 16.

87. 2 Bacon Abr. 621; 5 Bracton, t. 5, c. 15; Coke Litt. 141*a*; 6 Fleta, c. 37.

88. 3 Blackstone Comm. (Cooley 4th ed.) *361. In Coke's Commentaries on Littleton, section 212 (141*a*), he quoted with approval

common law.[89] It is now a universally recognized principle that a person cannot be judge of his own cause, and any interest in the subject-matter of a suit will disqualify a judge to preside on the trial thereof.[90] Authority to preside in his own cause cannot be conferred by positive enactment.[91] And however broad the grant of judicial power may be, this rule remains operative, and gives rise to a tacit exception from the general words of the grant.[92] But jurisdiction may be conferred where the interest is not direct, but remote; is not certain and palpable, but contingent and problematical; is not great and important, but minute.[93] Statutes disqualifying judges for designated causes will be liberally construed.[94] But the degree of disqualifying relationship will not be enlarged.[95] Such statutes apply to probate courts.[96]

B. Pecuniary Interest — 1. In General. The interest which disqualifies a judge is a pecuniary interest,[97] or one which involves some individual right or privilege.[98] It must be a direct interest in the subject-matter of the litigation,[99]

the doctrine of the text that "no man can be judge in his own cause;" but in his commentaries on section 514 (294*a*) he announces the doctrine that judges cannot be challenged.

89. 3 Blackstone Comm. (Cooley 4th ed.) *361.

90. *Alabama.*— Medlin *v.* Taylor, 101 Ala. 239, 13 So. 310; State *v.* Castleberry, 23 Ala. 85.

California.— Adams *v.* Minor, 121 Cal. 372, 53 Pac. 815; Meyer *v.* San Diego, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22, 4 L. R. A. 762; Livermore *v.* Brundage, 64 Cal. 299, 30 Pac. 848; North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal. 315.

Connecticut.— Cabot Bank's Appeal, 26 Conn. 7.

Maryland.— Magruder *v.* Swann, 25 Md. 173.

Massachusetts.—Pearce *v.* Atwood, 13 Mass. 324.

New York.— *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88.

Ohio.— Conklin *v.* Squire, 4 Ohio S. & C. Pl. Dec. 493.

Texas.— Chambers *v.* Hodges, 23 Tex. 104; Dicks *v.* Austin College, 1 Tex. App. Civ. Cas. § 1068.

Virginia.— Stuart *v.* Com., 91 Va. 152, 21 S. E. 246.

Washington.—Barnett *v.* Ashmore, 5 Wash. 163, 31 Pac. 466.

England.— Brooks *v.* Rivers, Hardres 503; Dimes *v.* Grand Junction Canal, 3 H. L. Cas. 759, 10 Eng. Reprint 301; Day *v.* Savadge, Hob. 116; London *v.* Wood, 12 Mod. 669; Anonymous, 1 Salk. 396; Smith *v.* Hancock, Style 137; Lincoln *v.* Smith, 1 Vent. 3.

See 29 Cent. Dig. tit. "Judges," § 184.

And see 3 Blackstone Comm. 298 note *a*.

91. Bayard *v.* McLane, 3 Harr. (Del.) 139; Conklin *v.* Squire, 4 Ohio S. & C. Pl. Dec. 493; London *v.* Wood, 12 Mod. 669. See also *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88.

92. Stockwell *v.* White Lake Tp. Bd., 22 Mich. 341; Peninsular R. Co. *v.* Howard, 20 Mich. 18.

93. Heydenfeldt *v.* Towns, 27 Ala. 423; Com. *v.* Ryan, 5 Mass. 90; *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88.

94. North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal. 315; Stockwell *v.* White Lake Tp. Bd., 22 Mich. 341.

95. Waterhouse *v.* Martin, Peck (Tenn.) 374.

96. State *v.* Donlan, 32 Mont. 256, 80 Pac. 244.

97. *Alabama.*— *Ex p.* State Bar Assoc., 92 Ala. 113, 8 So. 768; Ellis *v.* Smith, 42 Ala. 349.

Arkansas.— Foreman *v.* Marianna, 43 Ark. 324.

Connecticut.— Clyma *v.* Kennedy, 64 Conn. 310, 29 Atl. 539, 42 Am. St. Rep. 194.

Florida.— *Ex p.* Harris, 26 Fla. 77, 7 So. 1, 23 Am. St. Rep. 548, 6 L. R. A. 713; Sauls *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190; Ochus *v.* Sheldon, 12 Fla. 138.

Massachusetts.— Northampton *v.* Smith, 11 Metc. 390.

Minnesota.— Sjoberg *v.* Nordin, 26 Minn. 501, 5 N. W. 677.

Mississippi.— Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603; Lemon *v.* Peyton, 64 Miss. 161, 8 So. 235.

Nebraska.— Chicago, etc., R. Co. *v.* Kellogg, 54 Nebr. 138, 74 N. W. 403.

Ohio.— State *v.* Winget, 37 Ohio St. 153; Conklin *v.* Squire, 4 Ohio S. & C. Pl. Dec. 493.

Texas.— Taylor *v.* Williams, 26 Tex. 583; McInnes *v.* Wallace, (Civ. App. 1898) 44 S. W. 537.

Vermont.— State *v.* Sutton, 74 Vt. 12, 52 Atl. 116.

Wisconsin.— Hungerford *v.* Cushing, 2 Wis. 397.

See 29 Cent. Dig. tit. "Judges," § 190 *et seq.*

98. Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603.

99. *Alabama.*— Ellis *v.* Smith, 42 Ala. 349.

California.— Scadden Flat Gold-Min. Co. *v.* Scadden, 121 Cal. 33, 53 Pac. 440.

Florida.— State *v.* Call, 41 Fla. 442, 26 So. 1014, 79 Am. St. Rep. 189; Internal Imp. Fund *v.* Bailey, 10 Fla. 213.

Massachusetts.— Northampton *v.* Smith, 11 Metc. 390.

Montana.— State *v.* Woody, 14 Mont. 455, 36 Pac. 1043.

and it is essential that a liability or pecuniary gain to him must occur on the event of the suit.[1]

2. INTEREST IN SUBJECT-MATTER. A direct, pecuniary, or personal interest in the subject-matter of a suit, however small, will generally disqualify a judge to act therein.[2] For a judge to be disqualified by interest it is not necessary that he be a party to the action. It is sufficient if he is in any wise interested in the subject-matter.[3] And his disqualification is not affected by a failure to serve him with process.[4] It is necessary, however, that he have an interest in the subject-matter and not merely in a legal question involved.[5] He is not necessarily disqualified beyond the point of his interest in a case, and he may properly refer a single question in which he is interested to another tribunal and retain jurisdiction of the main cause.[6]

3. INTEREST AS DIRECTOR OR STOCK-HOLDER OF CORPORATION. A judge who is a stock-holder or director in a corporation is disqualified to act in any proceeding in which such corporation is interested;[7] and the facts that he tried the cause with the consent and at the request of counsel and disposed of his corporate stock before rendering judgment will not operate to qualify him and validate the judgment.[8] But he is not disqualified by reason of having once owned stock in the corporation which was disposed of before the commencement of the proceedings,[9] although he may be liable to be sued for *ultra vires* acts done while a director of the corporation;[10] nor is he disqualified by having been a subscriber for stock in the corporation, where his subscription was canceled before delivery of the certificate;[11] nor by the fact that he and a party to the suit pending before him are

New Jersey.— Peck *v.* Essex County, 20 N. J. L. 457.

New York.— *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055; *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88.

Ohio.— State *v.* Winget, 37 Ohio St. 153.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Texas.— Houston Cemetery Co. *v.* Drew, 13 Tex. Civ. App. 536, 36 S. W. 802; Kemp *v.* Wharton County Bank, 4 Tex. Civ. App. 648, 23 S. W. 916; Grady *v.* Rogan, 2 Tex. App. Civ. Cas. § 259; Dicks *v.* Austin College, 1 Tex. App. Civ. Cas. § 1068; Peters *v.* Duke, 1 Tex. App. Civ. Cas. § 304.

West Virginia.— Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

See 29 Cent. Dig. tit. "Judges," § 190 *et seq.*

1. Foreman *v.* Marianna, 43 Ark. 324; Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603.

2. *California.*—Heilbron *v.* Campbell, (1889) 23 Pac. 122.

Colorado.— MacMillan *v.* Spencer, 28 Colo. 80, 62 Pac. 849; Phillips *v.* Curley, 28 Colo. 34, 62 Pac. 837.

Connecticut.— Cabot Bank's Appeal, 26 Conn. 7.

Louisiana.— State *v.* Lewis, 2 La. 389.

Maryland.— Magruder *v.* Swann, 25 Md. 173.

Missouri.— Jim *v.* State, 3 Mo. 147.

North Carolina.— State *v.* Leigh, 20 N. C. 126.

Oklahoma.— U. S. National Bank *v.* Guthrie Nat. Bank, 6 Okla. 163, 51 Pac. 119.

Texas.— Templeton *v.* Giddings, (1889) 12 S. W. 851; Casey *v.* Kinsey, 5 Tex. Civ. App. 3, 23 S. W. 818; Franco-Texan Land Co. *v.* Howe, 3 Tex. Civ. App. 315, 22 S. W. 766.

West Virginia.— Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

See 29 Cent. Dig. tit. "Judges," §§ 190, 192.

3. State *v.* Castleberry, 23 Ala. 85; Casey *v.* Kinsey, 5 Tex. Civ. App. 3, 23 S. W. 818.

4. Hawpe *v.* Smith, 22 Tex. 410.

5. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

6. Graham *v.* People, 111 Ill. 253; Middletown Nat. Bank *v.* Toledo, etc., R. Co., 105 Fed. 547.

7. *California.*— Adams *v.* Minor, 121 Cal. 372, 53 Pac. 815.

Georgia.— King *v.* Thompson, 59 Ga. 380.

Michigan.— Kittridge *v.* Kinne, 80 Mich. 200, 44 N. W. 1051.

Nevada.— State *v.* Mack, 26 Nev. 430, 69 Pac. 862.

New York.—*In re* Reddish, 2 N. Y. Suppl. 259; Washington Ins. Co. *v.* Price, Hopk. 1.

Ohio.— Gregory *v.* Cleveland, etc., R. Co., 4 Ohio St. 675; Cincinnati, etc., R. Co. *v.* Gill, 1 Ohio Dec. (Reprint) 501, 10 West. L. J. 213.

Texas.— Williams *v.* Quanah City Nat. Bank, (1894) 27 S. W. 147.

Contra.— Bank of North America *v.* Fitzsimons, 2 Binn. (Pa.) 454.

See 29 Cent. Dig. tit. "Judges," § 201.

8. Adams *v.* Minor, 121 Cal. 372, 53 Pac. 815.

9. Scadden Flat Gold-Min. Co. *v.* Scadden, 121 Cal. 33, 53 Pac. 440; Johnson *v.* Marietta, etc., R. Co., 70 Ga. 712; Palmer *v.* Lawrence, 5 N. Y. 389; Nicholson *v.* Showalter, 83 Tex. 99, 18 S. W. 326.

10. Nicholson *v.* Showalter, 83 Tex. 99, 18 S. W. 326.

11. Andes *v.* Ely, 158 U. S. 312, 39 L. ed. 996, 15 S. Ct. 954.

stock-holders in a corporation, the interests of which are in no way involved in the litigation.[12]

4. INTEREST AS CITIZEN OR TAXPAYER. The fact that a penalty or forfeiture inures to the benefit of a municipality or county in which a judge resides and is a taxpayer will not confer upon him a disqualifying interest in an action to recover such penalty or forfeiture;[13] and the legislature may properly confer jurisdiction in disregard of such minute interest.[14] Such provision is valid even in the face of a constitution declaring the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.[15] A judge is not disqualified to hear and determine a cause in which a municipality is interested merely because he is a resident of such municipality,[16] especially where the municipality as a corporation is not directly interested.[17] Nor is he disqualified by being a resident and taxpayer therein.[18] But he is disqualified when the cause involves the levy of a special tax for a period of years,[19] the validity of a tax,[20] the dissolution of the municipal corporation and injunction against the collection of its taxes,[21] or the removal of its officers.[22] Nor is a resident of a county disqualified to try a cause in which the county is interested merely by virtue of such residence,[23] or by being a resident and taxpayer therein.[24]

5. COMPENSATION FEES AND COSTS. The mayor of a city is not disqualified to try offenders against municipal ordinances by the fact that the fines imposed by

12. Hyde Park Lumber Co. *v.* Shepardson, 72 Vt. 188, 47 Atl. 826.

13. *California.*— Matter of Guerrero, 69 Cal. 88, 10 Pac. 261.

Connecticut.— Kilbourn *v.* State, 9 Conn. 560.

Maine.— State *v.* Craig, 80 Me. 85, 13 Atl. 129; State *v.* Intoxicating Liquors, 54 Me. 564; State *v.* Severance, (1886) 4 Atl. 560.

Massachusetts.— Com. *v.* Fletcher, 157 Mass. 14, 31 N. E. 687; Com. *v.* Ryan, 5 Mass. 90; Hanscomb *v.* Russell, 11 Gray 373; Com. *v.* Burding, 12 Cush. 506; Com. *v.* Emery, 11 Cush. 406; Hill *v.* Wells, 6 Pick. 104.

Ohio.— Thomas *v.* Mt. Vernon, 9 Ohio 290.

Vermont.— Colgate *v.* Hill, 20 Vt. 56; State *v.* Batchelder, 6 Vt. 479.

See 29 Cent. Dig. tit. "Judges," § 203.

14. State *v.* Intoxicating Liquors, 54 Me. 564; Com. *v.* Ryan, 5 Mass. 90; Com. *v.* Emery, 11 Cush. (Mass.) 406; Com. *v.* Worcester, 3 Pick. (Mass.) 462; Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581; Wheeling *v.* Black, 25 W. Va. 266.

15. Com. *v.* Worcester, 3 Pick. (Mass.) 462.

16. Foreman *v.* Marianna, 43 Ark. 324; Com. *v.* Worcester, 3 Pick. (Mass.) 462; Thornburgh *v.* Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054. But in Pearce *v.* Atwood, 13 Mass. 324, it was held that such interest would disqualify provided there was another judge who was competent and had jurisdiction.

17. Northampton *v.* Smith, 11 Metc. (Mass.) 390.

18. *California.*— Higgins *v.* San Diego, (1899) 58 Pac. 700; Oakland *v.* Oakland Water Front Co., 118 Cal. 249, 50 Pac. 268.

Connecticut.— Church *v.* Norwich, Kirby 140. But see Hawley *v.* Baldwin, 19 Conn. 584, holding that a judge was disqualified to act in respect to a trust estate against which a town in which he resided and paid taxes held a beneficial claim.

Minnesota.— Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581.

Nevada.— State *v.* Noyes, 25 Nev. 31, 56 Pac. 946.

Texas.— Oak Cliff *v.* State, 97 Tex. 391, 79 S. W. 1068; Dallas *v.* Peacock, 89 Tex. 58, 33 S. W. 220.

See 29 Cent. Dig. tit. "Judges," § 203.

But see State *v.* Call, 41 Fla. 442, 26 So. 1014, 79 Am. St. Rep. 189, holding that a judge who is a taxpayer in a school-district is disqualified to try a cause involving the validity of the levy of a special school-tax therein, notwithstanding a statute declaring that he is not disqualified in a cause in which a county or municipality is interested by reason of being a resident or taxpayer in such county or municipality.

19. Meyer *v.* San Diego, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22.

20. Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960.

21. Wetzel *v.* State, 5 Tex. Civ. App. 17, 23 S. W. 825.

22. State *v.* Cisco, (Tex. Civ. App. 1895) 33 S. W. 244.

23. Province *v.* Paxton, Quincy (Mass.) 548; Burlington County *v.* Fennimore, 1 N. J. L. 293; Clermont County Com'rs *v.* Lytle, 3 Ohio 289; *In re* Huntingdon County Line, 14 Pa. Super. Ct. 571. *Contra*, Jefferson County *v.* Milwaukee County, 20 Wis. 139. And see Lincoln County *v.* Prince, 2 Mass. 544; Peck *v.* Essex County, 21 N. J. L. 656.

24. State *v.* Macdonald, 26 Minn. 445, 4 N. W. 1107; Wade *v.* Travis County, 72 Fed. 985. *Contra*, Peck *v.* Essex County, 21 N. J. L. 656 [*reversing* 20 N. J. L. 457].

him and collected go into the salary fund from which his salary as mayor is paid.[25] And the fact that a judge receives compensation for his services, which is increased with the addition of new duties or the addition of territory to his district, does not give him a disqualifying interest in the causes tried in his court.[26] A court may determine the validity of a statute, although the decision involves the validity of other statutes prescribing the salary, term, and qualifications of the judges composing the court.[27] Interest to the extent of costs accruing in a lower court will not disqualify a judge of a higher court to which an appeal is taken.[28] And the fees given by law for the performance of official duties in relation to civil and criminal proceedings do not constitute an interest in the proceeding which disqualifies a judge,[29] although his sole compensation in certain cases is a fee to be paid by defendant in case of conviction.[30] But where a judge is made a party as such to a suit he is disqualified, although his interest extends only to the costs of making him a party.[31]

6. Merely Nominal Party. A judge is not disqualified by being a merely nominal party to a suit.[32]

7. Remote or Contingent Interests. A remote or contingent interest will not affect the qualification of a judge,[33] nor is it sufficient that he may be bound or obligated in the same manner as a party to the suit,[34] that his title to land may be affected by the suit pending before him,[35] that it is involved in another suit in his court in which the same legal questions may arise,[36] or that he owns land on a stream next below the plaintiff who is suing to enjoin the pollution of the stream.[37] A judge is not disqualified to appoint commissioners of drainage by owning lands to be affected by the drainage;[38] nor will ownership of property in a city disqualify him to hear and determine proceedings by the city to condemn lands for municipal purposes.[39] Signing a petition for liquor license does not disqualify one to act on the petition.[40] Nor will a petition for change of a county site disqualify a judge to entertain proceedings to mandamus the county commis-

25. Matter of Guerrero, 69 Cal. 88, 10 Pac. 261.

26. White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

27. Duncan *v.* McCall, 139 U. S. 449, 11 S. Ct. 573, 35 L. ed. 219.

28. St. Louis, etc., R. Co. *v.* Holden, 3 Tex. App. Civ. Cas. § 323.

29. Com. *v.* Keenan, 97 Mass. 589.

30. Bennett *v.* State, 4 Tex. App. 72.

31. Collingsworth County *v.* Myers, (Tex. Civ. App. 1896) 35 S. W. 414.

32. Philadelphia *v.* Fox, 64 Pa. St. 169; McInnes *v.* Wallace, (Tex. Civ. App. 1898) 44 S. W. 537; Burrell *v.* State, (Tex. Cr. App. 1901) 65 S. W. 914; Grady *v.* Rogan, 2 Tex. App. Civ. Cas. § 259; Peters *v.* Duke, 1 Tex. App. Civ. Cas. § 304. But see Nettleton's Appeal, 28 Conn. 268.

33. *Alabama.*— *Ex p.* State Bar Assoc., 92 Ala. 113, 8 So. 768.

California.— North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal. 315.

Florida.— State *v.* Call, 41 Fla. 442, 26 So. 1014; Internal Imp. Fund *v.* Bailey, 10 Fla. 215.

Georgia.— Augusta Southern R. Co. *v.* McDade, 105 Ga. 134, 31 S. E. 420.

Massachusetts.— Northampton *v.* Smith, 11 Metc. 390. And see Dolliver *v.* St. Joseph F. & M. Ins. Co., 131 Mass. 39.

New Jersey.— Peck *v.* Esesx County, 20 N. J. L. 457.

Rhode Island.— State *v.* Collins, 24 R. I. 242, 52 Atl. 990.

Texas.— Houston Cemetery Co. *v.* Drew, 13 Tex. Civ. App. 536, 36 S. W. 802; Clark *v.* State, 23 Tex. App. 260, 5 S. W. 115.

See 29 Cent. Dig. tit. "Judges," § 190 *et seq.*

But see Reg. *v.* Chapman, 1 Ont. 582; Rex *v.* McIntyre, Taylor (U. C.) 22.

34. Dicks *v.* Austin College, 1 Tex. App. Civ. Cas. § 1068.

35. Heinlen *v.* Heilbron, 97 Cal. 101, 31 Pac. 838.

36. Grigsby *v.* May, 84 Tex. 240, 19 S. W. 343.

37. New Odorless Sewerage Co. *v.* Wisdom, 30 Tex. Civ. App. 224, 70 S. W. 354. But see North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal. 315, in which it was held that where a judge's property was equally subject to injury by acts sought to be enjoined as the property of plaintiff, and the injunction would equally protect him, he was disqualified.

38. *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88.

39. Los Angeles *v.* Pomeroy, 133 Cal. 529, 65 Pac. 1049.

40. Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603; Lemon *v.* Peyton, 64 Miss. 161, 8 So. 235. *Contra*, Powell *v.* Egan, 42 Nebr. 482, 60 N. W. 932; Foster *v.* Frost, 25 Nebr. 731, 41 N. W. 647.

sioners to order an election on the question.[41] And the signing of a petition and voting for the annexation of territory to a city will not disqualify a judge to hear and determine the question of annexation.[42] Being owner of property alleged to have been stolen will not disqualify a judge to try the thief.[43] A judge's interest in a question of law involved in a case before him, due to the fact that its determination will in all probability control rights or remedies which may thereafter accrue to him, is not such an interest as will disqualify him;[44] nor will an interest which he may have in common with the other citizens in a public matter.[45]

8. INTEREST IN ANOTHER ACTION AGAINST ONE OF THE PARTIES. The pendency of an action by the judge against one of the parties to the suit at bar which is entirely independent of and cannot be affected by the latter suit will not constitute a disqualification.[46]

9. MEMBERS OF BAR ASSOCIATION. A judge who is a member of a bar association is not by virtue thereof disqualified to hear and determine a cause in which such association is interested.[47]

10. MATTERS IN PROBATE COURT — a. In General. A probate judge is disqualified to act on the administration of an estate where he has been temporary administrator thereof and has not made final settlement of his accounts as such;[48] where he has acted as attorney and counselor for the executor, whose accounts include payments made to him;[49] where he is assignor of a claim against the estate, which the assignee is attempting to enforce, although it was assigned without recourse;[50] where he appoints a relative as administrator;[51] or where he is the husband of a legatee under a will propounded for probate.[52] But such relationship will not disqualify if the wife is not made a party to the proceedings to probate the will,[53] or where she renounces her legacy by being a witness in such proceeding.[54] Where a probate judge holds another office by virtue of which he is a necessary party to a proceeding in his court he is disqualified to act therein.[55] He is not disqualified by being warden of a church from probating a will giving to the officers of the church a legacy for church purposes;[56] by being custodian of the personalty of the estate pending the contest of a will;[57] by being joint owner of lands with the estate of the decedent;[58] by having been guardian *ad litem* for a minor interested in an estate being administered in his court;[59] or by having been a nominal party to a suit against the decedent in which a judgment was obtained, and which is filed as a claim against the estate.[60] It is improper for him to act as agent or attorney

41. Sauls *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190.

42. Foreman *v.* Marianna, 43 Ark. 324.

43. Davis *v.* State, 44 Tex. 523.

44. North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal. 315; People *v.* Edmonds, 15 Barb. (N. Y.) 529; McFaddin *v.* Preston, 54 Tex. 403; Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238. But see Tex. Rev. St. art. 1040, disqualifying judges of court of appeal and supreme court on account of interest in question to be determined [*cited* in Grigsby *v.* May, 84 Tex. 240, 19 S. W. 343].

45. Foreman *v.* Marianna, 43 Ark. 324; Sauls *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190.

46. Southern California Motor Road Co. *v.* San Bernardino Nat. Bank, 100 Cal. 316, 34 Pac. 711.

47. *Ex p.* Alabama State Bar Assoc., 92 Ala. 113, 8 So. 768, 12 L. R. A. 134; *In re* Bowman, 67 Mo. 146.

48. Burks *v.* Bennett, 55 Tex. 237.

49. Wigand *v.* Dejonge, 8 Abb. N. Cas. (N. Y.) 260.

50. Jan's Succession, 43 La. Ann. 924, 10 So. 6.

51. Plowman *v.* Henderson, 59 Ala. 559. In Hall *v.* Thayer, 105 Mass. 219, 7 Am. Rep. 513, such appointment was declared void.

52. Perkins *v.* George, 45 N. H. 453.

53. *In re* Hopkins, 3 N. Y. Suppl. 661, 6 Dem. Surr. 131; *In re* Hopkins, 2 N. Y. Suppl. 322.

54. *In re* Hopkins, 3 N. Y. Suppl. 661, 6 Dem. Surr. 131; *In re* Hopkins, 2 N. Y. Suppl. 322.

55. Nettleton's Appeal, 28 Conn. 268.

56. *In re* Hopkins, 3 N. Y. Suppl. 661, 6 Dem. Surr. 131; *In re* Hopkins, 2 N. Y. Suppl. 322.

Contra by statute.— State *v.* Young, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636.

57. *In re* Hancock, 91 N. Y. 284 [*reversing* 27 Hun 78].

58. Glavecke *v.* Tijirina, 24 Tex. 663.

59. Richter *v.* Leiby, 107 Wis. 404, 83 N. W. 694.

60. *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055.

for any person interested in the estate, but such relationship will not disqualify him and deprive him of jurisdiction, even where forbidden by statute.[61] But if he is authorized to charge a percentage on sums collected or received by him for a person interested in the estate he thereby becomes interested and disqualified.[62] A probate judge who receives payment of a decree in his court in worthless money is not thereby disqualified to entertain proceedings to compel the proper payment of the decree.[63]

b. Interest as Executor. Where he is executor of a will he is disqualified to act officially in a case involving the interests of his testator's estate.[64] And he is disqualified if he is executor of the will of a legatee under the will propounded for probate.[65]

c. Interest as Creditor of Estate. A probate judge who is a creditor of an estate is disqualified to act judicially thereon,[66] even though the representative's account shows that his claim has been paid.[67] He may, however, qualify himself by relinquishing his claim.[68] But merely determining in his own mind that he will not enforce it will not operate to qualify him.[69] If he is not in fact a creditor, he cannot be disqualified by the allowance of a claim in his favor by the commissioners appointed to investigate claims against the estate.[70]

d. Interest as Debtor of Estate. Where the probate judge is a debtor of an estate he is disqualified to act in respect thereto;[71] and his disqualification is not affected by a *bona fide* transfer of the claim against him made by the executor acting under a void grant of letters testamentary.[72]

e. Interest as Surety on Bond in Litigation. A surety on a bond who subsequently becomes judge of the court in which is pending the proceedings where the bond was given is disqualified to act in such proceedings,[73] or in any matter or proceeding in which liability on such bond may be involved.[74] But the fact of having been surety on the bond of a temporary administrator will not disqualify him to act on the accounts and doings of the same person who became regular administrator.[75]

f. Necessity May Obviate the Rule. The rule as to the disqualification of judges must yield to the demands of necessity. Where disqualification, if permitted to prevail, destroys the only tribunal in which relief may be sought and thus effectually bars the door of justice, the disqualified judge is bound to hear and decide the cause.[76] But to justify a disqualified judge in sitting in a cause in

61. *In re* Cottle, 5 Pick. (Mass.) 483.

62. *In re* White, 37 Cal. 190.

63. Ellis *v.* Smith, 42 Ala. 349.

64. Knight *v.* Hardeman, 17 Ga. 253; Bedell *v.* Bailey, 58 N. H. 62; Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

65. *In re* Bacon, 7 Gray (Mass.) 391.

66. Thornton *v.* Moore, 61 Ala. 347; Payne's Succession, 32 La. Ann. 355; Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; Coffin *v.* Cottle, 9 Pick. (Mass.) 287; *In re* Cottle, 5 Pick. (Mass.) 483; Burks *v.* Bennett, 62 Tex. 277; El Paso *v.* Ft. Dearborn Nat. Bank, (Tex. Civ. App. 1903) 71 S. W. 799 [*affirmed* in 96 Tex. 496, 74 S. W. 21]; Moody *v.* Looscan, (Tex. Civ. App. 1898) 44 S. W. 621. But see State *v.* Woody, 14 Mont. 455, 36 Pac. 1043, holding that a probate judge holding an allowed claim against an estate was not disqualified to hear and determine proceedings for the removal of the administrator.

67. Rhea's Succession, 31 La. Ann. 323.

68. *In re* Cottle, 5 Pick. (Mass.) 483.

69. Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248.

70. Perkins *v.* Shadbolt, 44 Wis. 574.

71. Gay *v.* Minot, 3 Cush. (Mass.) 352.

72. Gay *v.* Minot, 3 Cush (Mass.) 352.

73. Wilson *v.* Wilson, 36 Ala. 655; State *v.* Castleberry, 23 Ala. 85.

74. Wilson *v.* Wilson, 36 Ala. 655.

75. Halbert *v.* Martin, (Tex. Civ. App. 1895) 30 S. W. 388.

76. *Alabama.*— Jeffersonian Pub. Co. *v.* Hilliard, 105 Ala. 576, 17 So. 112; Heydenfeldt *v.* Towns, 27 Ala. 423.

Massachusetts.— Com. *v.* McLane, 4 Gray 427; Hill *v.* Wells, 6 Pick. 104; Pearce *v.* Atwood, 13 Mass. 324; Com. *v.* Ryan, 5 Mass. 90.

New York.— *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88; People *v.* Sherman, 66 N. Y. App. Div. 231, 72 N. Y. Suppl. 718 [*affirmed* in 171 N. Y. 684, 64 N. E. 1124]; People *v.* Magee, 55 N. Y. App. Div. 195, 66 N. Y. Suppl. 849; People *v.* Auburn, 85 Hun 601, 33 N. Y. Suppl. 165; People *v.* New York Police Com'rs, 84 Hun 64, 32 N. Y. Suppl. 18; People *v.* Edmonds, 15 Barb. 529; Matter of Leefe, 2 Barb. Ch. 39; Ten Eick *v.* Simpson, 11 Paige 177. See also Stuart *v.* Me-

which he is directly interested the necessity must be imperative, in the determination of which the greatest care should be exercised.[77]

C. Bias or Prejudice — 1. In General. In the absence of statutory provision, bias or prejudice on the part of a judge does not disqualify him.[78] In many states, however, there now exist statutes which expressly make the bias or prejudice of a judge a ground of disqualification.[79] But disqualifying a judge on the ground of prejudice is so liable to abuse that some states have refused to adopt it,[80] and even where it has been adopted its liability to abuse induces the most rigid construction of its terms.[81] A statute making the alleged prejudice of a judge a ground of disqualification is valid.[82] Even where the disqualification by reason of bias or prejudice is not expressly mentioned, it has been held to be comprehended in such statutory expressions as "otherwise disqualified to sit";[83] "cannot properly preside";[84] "otherwise unable," and "other disability";[85] and "any legal cause."[86] Even where the judge's prejudice does not constitute a ground for disqualification, if the charge is made and the facts alleged indicate the existence of prejudice, the appellate court will carefully scrutinize the record to see that no injustice has been done the complaining party.[87]

2. Character of Disqualifying Prejudice. The disqualifying prejudice of a judge does not necessarily comprehend every bias, partiality, or prejudice which he may entertain with reference to the case.[88] And where, under the law, the

chanics', etc., Bank, 19 Johns. 496; Mooers *v.* White, 6 Johns. Ch. 360.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Wisconsin.— State *v.* Houser, 122 Wis. 534, 100 N. W. 964; Jefferson County *v.* Milwaukee County, 20 Wis. 139.

England.— London *v.* Markwick, 11 Mod. 164; *In re* Great Charte Parish, 2 Str. 1173. See also Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 11 Eng. Reprint 172.

See 29 Cent. Dig. tit. "Judges," § 190 *et seq.*

77. State *v.* Crane, 36 N. J. L. 394; People *v.* Saratoga Springs, 4 N. Y. App. Div. 399, 39 N. Y. Suppl. 607; Washington Ins. Co. *v.* Price, Hopk. (N. Y.) 1; State *v.* Seattle Bd. of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317.

78. *California.*— Bulwer Consol. Min. Co. *v.* Standard Consol. Min. Co., 83 Cal. 613, 23 Pac. 1109; McDowell *v.* Levy, (1885) 8 Pac. 857; People *v.* Shuler, 28 Cal. 490; People *v.* Williams, 24 Cal. 31; People *v.* Mahoney, 18 Cal. 180; McCauley *v.* Weller, 12 Cal. 500. See also *In re* Kasson, 141 Cal. 33, 74 Pac. 436.

Florida.— Bryan *v.* State, 41 Fla. 643, 26 So. 1022.

Minnesota.— Cooper *v.* Brewster, 1 Minn. 94.

Montana.— *In re* Weston, 28 Mont. 207, 72 Pac. 512; *In re* Davis, 11 Mont. 1, 27 Pac. 342.

Nevada.— Allen *v.* Reilly, 15 Nev. 452.

Texas.— Bismark *v.* State, 45 Tex. Cr. 54, 73 S. W. 965; Gaines *v.* State, 38 Tex. Cr. 202, 42 S. W. 385; Johnson *v.* State, 31 Tex. Cr. 456, 20 S. W. 985.

See 29 Cent. Dig. tit. "Judges," § 187.

79. See the statutes of the several states. And see People *v.* Compton, 123 Cal. 403, 56 Pac. 44; State *v.* Donlan, 32 Mont. 256, 80 Pac. 244; State *v.* Clancy, 30 Mont. 529, 77 Pac. 312 (holding a provision of this character constitutional); Butte Min., etc., Co. *v.* Kenyon, 30 Mont. 314, 76 Pac. 696, 77 Pac. 319.

80. Johnson *v.* State, 31 Tex. Cr. 456, 20 S. W. 985.

81. State *v.* Donlan, 32 Mont. 256, 80 Pac. 244.

82. State *v.* Second Judicial Dist. Ct., 30 Mont. 547, 77 Pac. 318; State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

83. Peyton's Appeal, 12 Kan. 398.

84. Turner *v.* Com., 2 Metc. (Ky.) 619.

85. Williams *v.* Robinson, 6 Cush. (Mass.) 333.

86. Gill *v.* State, 61 Ala. 169.

87. State *v.* Bohan, 19 Kan. 28; Bismark *v.* State, 45 Tex. Cr. 54, 73 S. W. 965; Gaines *v.* State, 38 Tex. Cr. 202, 42 S. W. 385; Johnson *v.* State, 31 Tex. Cr. 456, 20 S. W. 985.

88. *Alabama.*— *Ex p.* State Bar Assoc., 92 Ala. 113, 8 So. 768.

California.— Higgins *v.* San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; People *v.* Mahoney, 18 Cal. 180; McCauley *v.* Weller, 12 Cal. 500. In Higgins *v.* San Diego, *supra*, it was held that a long existing controversy between a water company and its patrons, including the judges, which had engendered bad feelings toward the corporation, and a newspaper controversy between it and one of the judges before his election to the bench, resulting in the cutting off of his water-supply, and his threat to forfeit its charter, and the fact that in another litigation the company's attorney incorporated in his brief matter reflecting on one of the judges, which he resented, did not disqualify him from sitting on the trial of a case in which the company was interested. That a party to the cause was a successful candidate for public office against a relative of the judge is insufficient. People *v.* Findley, 132 Cal. 301, 64 Pac. 472.

bias or prejudice of a judge disqualifies him, it must be made to clearly appear, not only that the bias or prejudice exists, but that it is of a character calculated to seriously impair his impartiality and sway his judgment.[89] He is not disqualified by having information or holding an opinion as to the guilt or innocence of a party charged with crime;[90] by having attended a meeting held for the purpose of devising means for suppressing the crime with which the defendant is charged;[91] by a pledge, made while canvassing for his office, to enforce the particular law the defendant is charged with violating, or by having advocated the passage of the law, or counseled with others as to the best means of enforcing it;[92] by having formed an opinion on the legal questions involved in the case;[93] having made a prior decision of law against a party,[94] or by repeated erroneous rulings made on successive trials of the cause;[95] or to try one charged with perjury by having, on request of the prosecuting attorney, ordered him held until the charge could be preferred.[96] A judge who is the subject of a libel is not by reason thereof disqualified to try and punish the person publishing it for a contempt of court.[97] The fact that he tried a case at law will not disqualify him to entertain a suit in equity to set aside the judgment therein.[98] The prejudice of a judge is no ground of disqualification on the trial of a feigned issue sent from an equity to a common-law court for trial by jury.[99] Nor will the prejudice of the regular judge affect the qualification of a special judge called to preside during the enforced absence of the regular judge.[1]

D. Relationship — **1. Relationship to a Party to the Cause.** While under the common law a judge was not disqualified by relationship to a party to a cause, being merely privileged to decline jurisdiction,[2] it is now generally provided by constitution or statute that relationship by consanguinity or affinity between him and a party litigant, within specified degrees, to be variously computed according to the canon, civil, or common law, or statutory rule, will disqualify him.[3] It is

Florida.— Com. *v.* Chadwick, 17 Fla. 428.

Montana.— State *v.* Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219. Under the statute (Code, § 180, as amended by the act of 1903) where a party files an affidavit that he cannot have fair and impartial trial by reason of the bias or prejudice of the judge, the judge is without authority to act. State *v.* Clancy, 30 Mont. 529, 77 Pac. 312. See also Butte Min., etc., Co. *v.* Kenyon, 30 Mont. 314, 76 Pac. 696, 77 Pac. 319.

New Jersey.— Readington Tp. *v.* Dilley, 24 N. J. L. 209.

Texas.— That a judge is one of the contestees in a contest of a local option law does not disqualify him to try one charged with violating the law. Burrell *v.* State, (Cr. App. 1901) 65 S. W. 914; Truesdale *v.* State, 42 Tex. Cr. 544, 61 S. W. 935.

See 29 Cent. Dig. tit. "Judges," § 187 *et seq.*

89. People *v.* Findley, 132 Cal. 301, 64 Pac. 472; Higgins *v.* San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; State *v.* Morrison, 67 Kan. 144, 72 Pac. 554; State *v.* Grinstead, 62 Kan. 593, 64 Pac. 49; State *v.* Bohan, 19 Kan. 28; Emporia *v.* Volmer, 12 Kan. 622; Vance *v.* Field, 89 Ky. 178, 12 S. W. 190, 11 Ky. L. Rep. 388; German Ins. Co. *v.* Landram, 88 Ky. 433, 11 S. W. 367, 592, 10 Ky. L. Rep. 1039.

90. Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; State *v.* Morrison, 67 Kan. 144, 72 Pac. 554. See also Forde *v.* Com., 16 Gratt. (Va.) 547.

91. Dailey *v.* State, (Tex. Cr. App. 1900) 55 S. W. 821. See also Reg. *v.* Brown, 16 Ont. 41; Reg. *v.* Eli, 10 Ont. 727; Reg. *v.* Klemp, 10 Ont. 143.

92. Benson *v.* State, 39 Tex. Cr. 56, 44 S. W. 167, 1091. See also Erwin *v.* Benton, 87 S. W. 291, 27 Ky. L. Rep. 909.

93. Scotland Western Bank *v.* Tallman, 15 Wis. 92.

94. Hays *v.* Morgan, 87 Ind. 231; State *v.* Bohan, 19 Kan. 28; Pearson *v.* Hopkins, 2 N. J. L. 195.

95. Burke *v.* Mayall, 10 Minn. 287.

96. State *v.* Brownfield, 67 Kan. 627, 73 Pac. 925.

97. Myers *v.* State, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

98. Chicago, etc., R. Co. *v.* Kellogg, 54 Nebr. 138, 74 N. W. 403.

99. Walgrove *v.* Walgrove, 3 Edw. (N. Y.) 227.

1. Bash *v.* Evans, 40 Ind. 256.

2. 2 Bacon Abr. (Bouvier ed.) 621.

3. See the following cases in which the judge was held disqualified:

Alabama.— Crook *v.* Newborg, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190; Hooks *v.* Barnett, 38 Ala. 607; Marston *v.* Carr, 16 Ala. 325.

Arkansas.— Kelly *v.* Neely, 12 Ark. 657, 56 Am. Dec. 288.

California.— Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A.

immaterial whether the litigant is suing in his own right or in a representative capacity.[4] And the rule operates to disqualify a judge to try one charged with the murder of a person related to him within the disqualifying degree.[5] The disqualification on account of kinship is not confined to parties of record, but includes all persons representated by such parties,[6] and is not affected by the failure of the related party to appear or make defense[7] or by the fact that such party is indemnified against loss.[8] The relationship must be a subsisting one at the time of the trial to afford grounds for disqualification.[9] And unless it is comprehended within the degree fixed by statute a judge has no authority to recuse himself.[10] A judge is not disqualified by relationship within the prohibited degree to a

773; Howell *v.* Budd, 91 Cal. 342, 27 Pac. 747; People *v.* De la Guerra, 24 Cal. 73; De la Guerra *v.* Burton, 23 Cal. 592.

Connecticut.— Nettleton *v.* Nettleton, 17 Conn. 542; Church *v.* Norwich, Kirby 140. But see Winchester *v.* Hinsdale, 12 Conn. 88.

Delaware.— Bayard *v.* McLane, 3 Harr. 139.

Florida.— State *v.* Wall, 41 Fla. 463, 28 So. 1020, 49 L. R. A. 548, 79 Am. St. Rep. 195.

Georgia.— Bivins *v.* Richland Bank, 109 Ga. 342, 34 S. E. 602; Short *v.* Mathis, 101 Ga. 287, 28 S. E. 918.

Iowa.— Chase *v.* Weston, 75 Iowa 159, 39 N. W. 246.

Louisiana.— State *v.* Foster, 112 La. 533, 36 So. 554; Lacroix's Succession, 30 La. Ann. 924; Hyams' Succession, 30 La. Ann. 460.

Massachusetts.— Taylor *v.* Worcester County Com'rs, 105 Mass. 225; Hall *v.* Thayer, 105 Mass. 219, 7 Am. Rep. 513.

Michigan.— Horton *v.* Howard, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198.

New Hampshire.— Sanborn *v.* Fellows, 22 N. H. 473.

New York.— People *v.* Connor, 142 N. Y. 130, 36 N. E. 807 [*affirming* 65 Hun 392, 20 N. Y. Suppl. 209]; New York, etc., R. Co. *v.* Schuyler, 28 How. Pr. 187.

South Carolina.— *Ex p.* Kreps, 61 S. C. 29, 39 S. E. 181.

Texas.— Schultze *v.* McLeary, 73 Tex. 92, 11 S. W. 924; Jordon *v.* Moore, 65 Tex. 363; Hodde *v.* Susan, 58 Tex. 389; Baker *v.* McRimmon, (Civ. App. 1899) 48 S. W. 742; Gresham *v.* State, 43 Tex. Cr. 466, 66 S. W. 845; January *v.* State, 36 Tex. Cr. 488, 38 S. W. 179.

Canada.—*Ex p.* Jones, 27 N. Brunsw. 552; *Ex p.* Wallace, 27 N. Brunsw. 174; Reg. *v.* Langford, 15 Ont. 52.

See 29 Cent. Dig. tit. "Judges," § 208 *et seq.*

Cases holding that the judge was not disqualified: *Alabama.*— State *v.* Pitts, 139 Ala. 152, 36 So. 20.

Connecticut.— Winchester *v.* Hinsdale, 12 Conn. 88. But see Nettleton *v.* Nettleton, 17 Conn. 542.

Florida.— *Ex p.* Harris, 26 Fla. 77, 7 So. 1, 23 Am. St. Rep. 548, 6 L. R. A. 713.

Georgia.— Fort *v.* West, 53 Ga. 584; Deupree *v.* Deupree, 45 Ga. 414.

Kentucky.— Sparks *v.* Colson, 109 Ky. 711, 60 S. W. 540, 22 Ky. L. Rep. 1369.

Louisiana.— State *v.* Tenth Judicial Dist., 41 La. Ann. 319, 6 So. 22; Poydras *v.* Livingston, 5 Mart. 292.

Maine.— Russell *v.* Belcher, 76 Me. 501.

New York.— Eggleston *v.* Smiley, 17 Johns. 133.

Pennsylvania.— Stearnes Mfg. Co. *v.* Curll, 4 Pa. Co. Ct. 265.

Tennessee.— Hume *v.* Commercial Bank, 10 Lea 1, 43 Am. Rep. 290; Waterhouse *v.* Martin, Peck 374.

Canada.— Clark *v.* Schofield, 28 N. Brunsw. 231; Harris *v.* Fowle, 22 N. Brunsw. 388; Cotton *v.* Stack, 16 N. Brunsw. 424; Reg. *v.* Major, 29 Nova Scotia 373; *In re* Creighton, 13 Nova Scotia 211.

See 29 Cent. Dig. tit. "Judges," § 208 *et seq.*

In Maine disqualification by reason of relationship does not apply to judges of probate appointing executors or administrators. *In re* Marston, 79 Me. 25, 8 Atl. 87; Russell *v.* Belcher, 76 Me. 501.

In Pennsylvania a statute disqualifying a judge whose "near relative" was a party was held not to include relatives by affinity, and the question of who was a "near relative" was for the sound discretion of the judge. Stearnes Mfg. Co. *v.* Curll, 4 Pa. Co. Ct. 265.

4. State *v.* Foster, 112 La. 533, 36 So. 554; Dennard *v.* Jordan, 14 Tex. Civ. App. 398, 37 S. W. 876.

5. Gill *v.* State, 61 Ala. 169.

6. Crook *v.* Newborg, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190; Howell *v.* Budd, 91 Cal. 342, 27 Pac. 747; Roberts *v.* Roberts, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108; Schultze *v.* McLeary, 73 Tex. 92, 11 S. W. 924; Jordon *v.* Moore, 65 Tex. 363; Gains *v.* Barr, 60 Tex. 676; Hodde *v.* Susan, 58 Tex. 389.

But relation to a guardian ad litem will not disqualify. Bryant *v.* Livermore, 20 Minn. 313; Matter of Van Wagonen, 69 Hun (N. Y.) 365, 23 N. Y. Suppl. 636.

7. Bivins *v.* Richland Bank, 109 Ga. 342, 34 S. E. 602; Matthews *v.* Noble, 25 Misc. (N. Y.) 674, 55 N. Y. Suppl. 190.

8. Oakley *v.* Aspinwall, 3 N. Y. 547.

9. Winchester *v.* Hinsdale, 12 Conn. 88; Patterson *v.* Collier, 75 Ga. 419, 58 Am. Rep. 472; Ehrhardt *v.* Breeland, 57 S. C. 142, 35 S. E. 537.

10. State *v.* Judges Tenth Judicial Dist., 41 La. Ann. 319, 6 So. 22.

merely nominal party;[11] to one having no personal interest in the subject-matter of the proceedings;[12] to one who owns an interest in the property which is the subject of the suit, but whose interest is not involved[13] or who is not made a party to the suit;[14] or to a stock-holder of a corporation which is a party to the suit.[15]

2. Relationship to Attorney. In the absence of a statute relationship between a judge and an attorney of record for one of the parties to a suit will not disqualify the judge.[16] But where the attorney's compensation depends on the contingency of recovery, he is, in some jurisdictions, regarded as an interested party, so that relationship to him will disqualify,[17] although the client may have agreed to pay fees commensurate with the services rendered, independently of success.[18] In other states a contrary rule prevails.[19] To disqualify a judge on account of relationship to an attorney, it is not necessary that the attorney's name appear on the record, that there should be any obligation on the part of his client to compensate him, or that his partnership with the attorney of record be continued.[20] But merely appearing as an attorney of record without actively participating in the management of the case will not disqualify.[21]

3. Must Be Against a Party. The only prejudice which will disqualify a judge is a prejudice against a party to the cause.[22] He is not disqualified by prejudice against the attorney of one party[23] or bias in favor of the attorney of the other party to a cause.[24] Prejudice against the cause or defense of a party is not a disqualifying prejudice.[25] It is actual existence of prejudice on the part of a judge, not the mere apprehension of it by a party which disqualifies.[26] But

11. Fowler *v.* Byers, 16 Ark. 196.

12. Underhill *v.* Dennis, 9 Paige (N. Y.) 202; Matter of Hopper, 5 Paige (N. Y.) 489; Patterson *v.* Seeton, 19 Tex. Civ. App. 430, 47 S. W. 732.

13. Patrick *v.* Crowe, 15 Colo. 543, 25 Pac. 985.

14. Williams *v.* Rohles, 22 Fla. 95; *In re* Aldrich, 110 Mass. 189; *In re* Dodge, etc., Mfg. Co., 77 N. Y. 101, 33 Am. Rep. 579; *In re* Hopkins, 3 N. Y. Suppl. 661, 6 Dem. Surr. 12; Hume *v.* Commercial Bank, 10 Lea (Tenn.) 1, 43 Am. Rep. 290; Houston Cemetery Co. *v.* Drew, 13 Tex. Civ. App. 536, 36 S. W. 802.

15. Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773; *In re* Dodge, etc., Mfg. Co., 77 N. Y. 101, 33 Am. Rep. 579 [*reversing* 14 Hun 440]; Lansingburgh Bank *v.* McKie, 7 How. Pr. (N. Y.) 360; Houston Cemetery Co. *v.* Drew, 13 Tex. Civ. App. 536, 36 S. W. 802: Lewis *v.* Hillsboro Roller Mill Co., (Tex. Civ. App. 1893) 23 S. W. 338; *Ex p.* Tinsley, 37 Tex. Cr. 517, 40 S. W. 306, 66 Am. St. Rep. 818; Wise County Coal Co. *v.* Carter, 3 Tex. App. Civ. Cas. § 306; Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315. *Contra*, Rapid City First Nat. Bank *v.* Keenan, 12 S. D. 240, 80 N. W. 1135; Rapid City First Nat. Bank *v.* McGuire, 12 S. D. 226, 80 N. W. 1074, 76 Am. St. Rep. 598, 47 L. R. A. 413, holding that a judge whose wife was a stock-holder in a corporation was disqualified to try a case in which the corporation was interested.

16. Patrick *v.* Crowe, 15 Colo. 543, 25 Pac. 985; People *v.* Whitney, 105 Mich. 622, 63 N. W. 765; Sjoberg *v.* Nordin, 26 Minn. 501, 5 N. W. 677.

17. Howell *v.* Budd, 91 Cal. 342, 27 Pac. 747; Roberts *v.* Roberts, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108; Vine *v.* Jones, 13 S. D. 54, 82 N. W. 82.

18. Roberts *v.* Roberts, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108.

19. Hundley *v.* State, (Fla. 1904) 36 So. 362; Allison *v.* Southern R. Co., 129 N. C. 336, 40 S. E. 91; Winston *v.* Masterson, 87 Tex. 200, 27 S. W. 768; Knapp *v.* Camphell, 14 Tex. Civ. App. 199. The mere naming of attorneys in a complaint for the purpose of showing their employment as foundation for recovery of attorney's fees in the suit does not make them interested parties, and relationship to them will not disqualify the judge (Patton *v.* Collier, 90 Tex. 115, 37 S. W. 413), although plaintiff has agreed that the attorneys shall receive the sum recovered as attorneys' fees (Patton *v.* Collier, (Tex. Civ. App. 1896) 38 S. W. 53).

20. Johnston *v.* Brown, 115 Cal. 694, 47 Pac. 686.

21. Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209.

22. Conn *v.* Chadwick, 17 Fla. 428; Scotland Western Bank *v.* Tallman, 15 Wis. 92.

23. Higgins *v.* San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; State *v.* Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219.

24. State *v.* Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219.

25. People *v.* Findley, 132 Cal. 301, 64 Pac. 472; Bent *v.* Lewis, 15 Mo. App. 40; Readington Tp. *v.* Dilley, 24 N. J. L. 209; Johnson *v.* State, 31 Tex. Cr. 456, 20 S. W. 985.

26. People *v.* Findley, 132 Cal. 301, 64 Pac. 472; Hutchinson *v.* Manchester St. R. Co., 73 N. H. 271, 60 Atl. 1011; Hungerford *v.* Cushing, 2 Wis. 397.

where he manifests a partisan feeling evidencing a pre-judgment of the matter in issue he is disqualified.[27]

E. Expression of Opinion. While a judge should be cautious in declaring his opinions as to causes that are to be tried before him,[28] he is not disqualified to sit in a cause merely by expressing his opinion on a question of law involved in a case in his court,[29] by ruling upon questions arising on the trial thereof,[30] by a declaration of his belief as to the guilt of a person charged with an offense before him,[31] of his freedom from doubt of the sanity of a defendant who relied on insanity as a defense,[32] or an expression of his opinion as to the merits of a cause pending before him.[33] Nor is he disqualified to appoint, in accordance with law, a tribunal to determine questions arising in a matter upon which he has expressed an opinion.[34] Advising the compromise of a suit will not disqualify a judge to try it.[35]

F. Presiding at Trial Involving Same Subject-Matter. A judge is not disqualified by reason of having presided at a previous hearing or trial in which the same subject-matter was involved.[36]

G. Acting as Counsel — 1. In General. In the absence of statute judges are not disqualified by reason of having been counsel in a cause pending before them.[37] But under constitution or statute in most of the states a judge who has

27. Massie *v.* Com., 93 Ky. 588, 20 S. W. 704, 14 Ky. L. Rep. 564; People *v.* Elmendorf, 51 N. Y. App. Div. 173, 64 N. Y. Suppl. 775; State *v.* Board of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A, 317 (distinguishing cases where the judge is trier of law only and where he is trier of facts and law); Barnett *v.* Ashmore, 5 Wash. 163, 31 Pac. 466.

28. Wilson *v.* Hinkley, Kirby (Conn.) 199.

29. Wilson *v.* Hinkley, Kirby (Conn.) 199.

30. Pearson *v.* Hopkins, 2 N. J. L. 195.

31. Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; State *v.* Dick, 4 La. Ann. 182; State *v.* Isaac, 3 La. Ann. 359; Drechsel *v.* State, (Tex. Cr. App. 1897) 39 S. W. 678. *Contra*, Massie *v.* Com., 93 Ky. 588, 20 S. W. 704, 14 Ky. L. Rep. 564.

32. People *v.* Findley, 132 Cal. 301, 64 Pac. 472.

33. Patterson *v.* Police Ct., 123 Cal. 453, 56 Pac. 105; North River Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 713; Hobbs *v.* Campbell, 79 Tex. 360, 15 S. W. 282; Clack *v.* Taylor County, 3 Tex. App. Civ. Cas. § 201. But see Readington Tp. *v.* Dilley, 24 N. J. L. 209, holding that a reviewer of damages on laying out a public road was disqualified by an expression of his opinion as to the amount of damages done one of the landowners.

Circumstances warranting inference of bias. — Where an expression of opinion on the merits of a case is made under circumstances warranting an inference of bias or prejudice it will disqualify. Massie *v.* Com., 93 Ky. 588, 20 S. W. 704, 14 Ky. L. Rep. 564; Chenault *v.* Spencer, 68 S. W. 128, 24 Ky. L. Rep. 141.

34. Readington Tp. *v.* Dilley, 24 N. J. L. 209.

35. *In re* Nevitt, 117 Fed. 448, 54 C. C. A. 622.

36. *Georgia.*— Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147.

Louisiana.—State *v.* Bill, 15 La. Ann. 114; State *v.* Dick, 4 La. Ann. 182; State *v.* Isaac, 3 La. Ann. 359.

New York.— Fry *v.* Bennett, 28 N. Y. 324.

Texas.— Waters-Pierce Oil Co. *v.* Cook, 6 Tex. Civ. App. 573, 26 S. W. 96.

Vermont.— Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333.

See 29 Cent. Dig. tit. "Judges," § 222.

And see Matter of Guerrero, 69 Cal. 88, 10 Pac. 261.

In Connecticut a judge is disqualified from presiding on the second trial of a cause in which a new trial is granted. State *v.* Hartley, 75 Conn. 104, 52 Atl. 615.

Exception to report made by judge as auditor.— A judge of an orphans' court is not disqualified to hear and determine exceptions to his report made as auditor prior to his election as judge. Rufe's Estate, 29 Pa. Co. Ct. 617.

37. *Georgia.*— Lloyd *v.* Smith, T. U. P. Charlt. 143.

Kentucky.— Owings *v.* Gibson, 2 A. K. Marsh 515.

Mississippi.— Thomas *v.* State, 5 How. 20.

New Jersey.— Denn *v.* Talem, 1 N. J. L. 164.

Ohio.— State *v.* Winget, 37 Ohio St. 153.

Pennsylvania.— Bank of North America *v.* Fitzsimons, 2 Binn. 454.

Texas.— Chambers *v.* Hodges, 23 Tex. 104; Burrell *v.* State, (Cr. App. 1901) 65 S. W. 914.

Wisconsin.— Schæffner's Appeal, 41 Wis. 260; Morgan *v.* Hammett, 23 Wis. 30.

Wyoming.— Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

England.— Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 11 Eng. Reprint 172.

See 29 Cent. Dig. tit. "Judges," § 214.

But see Ten Eick *v.* Simpson, 11 Paige (N. Y.) 177; State *v.* Cottrell, 45 W. Va. 837, 32 S. E. 162.

been of counsel in a cause pending before him is disqualified to act therein,[38] although his fee has been paid and his connection with the cause has been severed.[39] Such provisions of law apply to criminal as well as civil cases.[40] A judge who while prosecuting attorney actively participated in the preparation of a criminal case is disqualified to try it.[41] But the mere fact that he was prosecuting attorney at the time of the commission of the offense will not disqualify him.[42] If the judge was a partner in the firm which brought the suit and his name appears as counsel he is disqualified, although he did not actively engage in the management thereof,[43] or receive any compensation.[44] But if his name appears by mistake, and he never was interested in the case and had no connection therewith, he is not disqualified.[45] The disqualifying statute operates as to all cases, whether arising before or after its passage.[46] The disqualification of the judge on account of having been counsel is not limited to the identical case, but extends to another case between the same parties involving substantially the same facts and issues.[47] But he is not disqualified by having merely proposed to assist in the trial

In Florida a contrary rule prevails, and judges are disqualified by reason of having been counsel, although there is no statute on the subject. State *v.* Hocker, 34 Fla. 25, 15 So. 581, 25 L. R. A. 114; Tampa St. R., etc., Co. *v.* Tampa Suburban, etc., R. Co., 30 Fla. 595, 11 So. 562, 17 L. R. A. 681.

38. See the codes of the different states. And see the following cases:

Colorado.— People *v.* Yuma County Dist. Ct., 26 Colo. 226, 56 Pac. 1115; Sterling No. 2 Ditch Co. *v.* Iliff, etc., Valley Ditch Co., 24 Colo. 491, 52 Pac. 669.

Georgia.—East Rome Town Co. *v.* Cothran, 81 Ga. 359, 8 S. E. 737. See also McMillan *v.* Nichols, 62 Ga. 36.

Indiana.— Waterman *v.* Morgan, 114 Ind. 237, 16 N. E. 590; Fechheimer *v.* Washington, 77 Ind. 366.

Kansas.— Tootle *v.* Berkley, 60 Kan. 446, 56 Pac. 755.

Louisiana.— State *v.* Seventh Judicial Dist. Ct., 27 La. Ann. 225; Amacker *v.* Varnado, 19 La. Ann. 381.

Michigan.— Curtis *v.* Wilcox, 74 Mich. 69, 41 N. W. 863; Fraser *v.* Lapeer Cir. Judge, 48 Mich. 176, 12 N. W. 40.

New York.—Darling *v.* Pierce, 15 Hun 542; Wigand *v.* Dejonge, 8 Abb. N. Cas. 260; Van Rensselaer *v.* Douglas, 2 Wend. 290.

Pennsylvania.— Kolb's Case, 4 Watts 154; Voris *v.* Smith, 13 Serg. & R. 334.

Texas.— State *v.* Burks, 82 Tex. 584, 18 S. W. 662; Slaven *v.* Wheeler, 58 Tex. 23; Gaines *v.* Hindman, (Civ. App. 1903) 74 S. W. 583; Graham *v.* State, 43 Tex. Cr. 110, 63 S. W. 558; Wilks *v.* State, 27 Tex. App. 381, 11 S. W. 415; Thompson *v.* State, 9 Tex. App. 649; Cock *v.* State, 8 Tex. App. 659; Baldwin *v.* McMillan, 1 Tex. App. Civ. Cas. § 515. But see Houston, etc., R. Co. *v.* Ryan, 44 Tex. 426, holding that a judge is not disqualified because he had, as counsel, given an opinion on the title to the land in controversy before suit was begun.

Canada.— Harris *v.* Wallace, 12 Nova Scotia 326.

See 29 Cent. Dig. tit. "Judges," § 214.

Under a Connecticut statute of 1855 a judge who had been counsel was permitted to act in the absence of objection by any party interested. Platt *v.* New York, etc., R. Co., 26 Conn. 544.

Probate of will.— A will drawn by a probate judge cannot be probated before him. Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

An affidavit required to be made in order to appeal *in forma pauperis* cannot be made before a judge who had acted as counsel for the pauper defendant. Kalklosh *v.* Bunting, (Tex. Civ. App. 1905) 88 S. W. 389.

Although the judge was counsel in only a part of the matters involved he should surrender jurisdiction of the entire controversy. State *v.* Gray, 100 Mo. App. 98, 72 S. W. 1081.

39. Darling *v.* Pierce, 15 Hun (N. Y.) 542.

40. People *v.* Haas, 105 N. Y. App. Div. 119, 93 N. Y. Suppl. 790.

41. Mathis *v.* State, 3 Heisk. (Tenn.) 127; Terry *v.* State, (Tex. Cr. App. 1893) 24 S. W. 510. *Contra*, Kirby *v.* State, 78 Miss. 175, 28 So. 846, 84 Am. St. Rep. 622.

42. Utzman *v.* State, 32 Tex. Cr. 426, 24 S. W. 412; Wilks *v.* State, 27 Tex. App. 381, 11 S. W. 415.

43. State *v.* Hocker, 34 Fla. 25, 15 So. 581, 25 L. R. A. 114; East Rome Town Co. *v.* Cothran, 81 Ga. 359, 8 S. E. 737. But see Keefe *v.* Syracuse Third Nat. Bank, 177 N. Y. 305, 69 N. E. 593 [*affirming* 79 N. Y. App. Div. 644, 80 N. Y. Suppl. 1138].

44. State *v.* Hocker, 34 Fla. 25, 15 So. 581, 25 L. R. A. 114; East Rome Town Co. *v.* Cothran, 81 Ga. 359, 8 S. E. 737; Slaven *v.* Wheeler, 58 Tex. 23; Woody *v.* State, (Tex. Cr. App. 1902) 69 S. W. 155.

45. Ft. Worth, etc., R. Co. *v.* Mackney, 83 Tex. 410, 18 S. W. 949.

46. People *v.* Saginaw Cir. Ct., 26 Mich. 342.

47. Kabanek *v.* Galveston, etc., R. Co., 72 Tex. 476, 10 S. W. 570; Newcome *v.* Light, 58 Tex. 141, 44 Am. Rep. 604; Barnes *v.* State, (Tex. Cr. App. 1904) 83 S. W. 1124; Woody *v.* State, (Tex. Cr. App. 1902) 69 S. W. 155; Johnson *v.* State, 29 Tex. App. 526, 16 S. W. 418; Freelove *v.* Smith, 9 Vt.

of a cause for a certain fee, which was never agreed to be paid;[48] by having given an opinion as an attorney in favor of one of the parties;[49] by mere casual expressions of opinion concerning a case in which he was never employed;[50] or where his client has been discharged by the appellate court and is no longer a party.[51] So the making of an assignment is not an "action at law" within the prohibition of a statute against county judges giving advice or assistance in such matters, and an assignment is not vitiated by the fact that the county judge drew the assignment papers.[52]

2. Having Been a Counsel in Other Matters. A judge is not disqualified by having been counsel of a person who is interested, or whose estate is involved, where he was never consulted relative to the particular matters which are the subject of the cause or proceeding before him.[53]

3. Causes and Parties Must Be Substantially the Same. If there is a material difference between the two causes in parties or issues he is not disqualified.[54]

H. Review of Own Decision. Where there is no provision to the contrary a judge who presided at the trial of a cause is not thereby disqualified to review the judgment which he rendered therein, and this is so whether such review be sought by appeal to a court of which he has become a judge,[55] by suit to vacate

180; State *v.* Dick, 125 Wis. 51, 103 N. W. 229.

A judge who had acted as attorney or an alleged accomplice of defendant, and as such had consulted with defendant on the indictments pending against him, was thereby disqualified to preside on defendant's trial. People *v.* Haas, 105 N. Y. App. Div. 119, 93 N. Y. Suppl. 790.

48. Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847.

49. Bank of North America *v.* Fitzsimons, 2 Binn. (Pa.) 454.

50. Lee *v.* Heuman, 10 Tex. Civ. App. 666, 32 S. W. 93.

51. Bryan *v.* Austin, 10 La. Ann. 612.

52. Hammel *v.* Schuster, 65 Wis. 669, 27 N. W. 620.

53. Tampa St. R., etc., Co. *v.* Tampa Suburban R. Co., 30 Fla. 595, 11 So. 562, 17 L. R. A. 681; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; People *v.* Weiant, 30 Hun (N. Y.) 475; Kemp *v.* Wharton County Bank, 4 Tex. Civ. App. 648, 23 S. W. 916.

54. *California.*— Cleghorn *v.* Cleghorn, 66 Cal. 309, 5 Pac. 516.

Colorado.— Karcher *v.* Pearce, 14 Colo. 557, 24 Pac. 568.

Georgia.— Conyers *v.* Ford, 111 Ga. 754, 36 S. E. 947; Wolfe *v.* Hines, 93 Ga. 329, 20 S. E. 322.

Idaho.— Stevens *v.* Hall, 8 Ida 549, 69 Pac. 282.

Indiana.— Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332.

Iowa.— *In re* Glass, 127 Iowa 646, 103 N. W. 1013.

Louisiana.— Stewart *v.* Mix, 30 La. Ann. 1036.

Maryland.— Blackburn *v.* Craufurd, 22 Md. 447.

Montana.— State *v.* Woody, 14 Mont. 455, 36 Pac. 1043.

New York.— Keeffe *v.* Syracuse Third Nat. Bank, 177 N. Y. 305, 69 N. E. 593 [*affirming* 79 N. Y. App. Div. 644, 80 N. Y. Suppl. 1138].

Texas.— Blackwell *v.* Farmer's, etc., Nat. Bank, 97 Tex. 445, 79 S. W. 518 [*modifying* (Civ. App. 1903) 76 S. W. 454]; Cullen *v.* Drane, 82 Tex. 484, 18 S. W. 590; Hobbs *v.* Campbell, 79 Tex. 360, 15 S. W. 282; King *v.* Sapp, 66 Tex. 519, 2 S. W. 573; Glasscock *v.* Hughes, 55 Tex. 461; Taylor *v.* Williams, 26 Tex. 583; Meyers *v.* Bloon, 20 Tex. Civ. App. 554, 50 S. W. 217; Locklin *v.* State, (Cr. App. 1903) 75 S. W. 305; Reiffert *v.* State, (Cr. App. 1894) 26 S. W. 839; Koenig *v.* State, 33 Tex. Cr. 367, 26 S. W. 835, 47 Am. St. Rep. 35.

Vermont.— Clemons *v.* Clemons, 69 Vt. 545, 38 Atl. 314.

Wisconsin.— Richter *v.* Leiby, 107 Wis. 404, 83 N. W. 694, 101 Wis. 434, 77 N. W. 745; Hungerford *v.* Cushing, 2 Wis. 397.

United States.— Carr *v.* Fife, 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508 [*affirming* 44 Fed. 713]; *In re* Nevitt, 117 Fed. 448, 54 C. C. A. 622; The Richmond, 9 Fed. 863.

See 29 Cent. Dig. tit. "Judges," § 215.

55. Edwards *v.* His Wife, 9 La. Ann. 321; Babin *v.* Nolan, 2 La. Ann. 346; Galveston, etc., Inv. Co. *v.* Grymes, 94 Tex. 609, 63 S. W. 860, 64 S. W. 778; Beckham *v.* Rice, 1 Tex. Civ. App. 281, 21 S. W. 389. See also Forde *v.* Com., 16 Gratt. (Va.) 547, holding that a justice who acted as coroner at an inquest was not disqualified to sit in the examining court investigating the same homicide.

In New Jersey the disqualification was denied in Peck *v.* Essex County, 20 N. J. L. 457, which was reversed by the court of errors and appeals, on another ground of disqualification, the court declining to decide this particular question. Peck *v.* Essex County, 21 N. J. L. 656. However, the latter court had previously decided that under the constitution judges who concurred in a judgment of the supreme court, although no formal opinion was delivered, were disqualified to sit

it,[56] or by a different character of action, involving substantially the same facts, and issues brought in another court of which he has been elected judge.[57] However, in some jurisdictions a contrary rule prevails, owing to constitutional or statutory provisions.[58] Where the constitution confers upon a judge the right to review his own decisions when he becomes a member of an appellate court, contrary acts of the legislature are inoperative.[59] In some jurisdictions a judge is disqualified to participate in the trial on appeal of any case in which he has as trial judge decided any question involved on the appeal.[60] In others it is held that a judge who only makes preliminary, collateral, or interlocutory orders is not disqualified.[61] The disqualification applies only to the identical case in which the judge acted in the lower court.[62]

I. Judge as Necessary Witness. While a judge is not a competent witness in a cause being tried before him,[63] yet he will not be deprived of his jurisdiction merely on account of being a material and necessary witness, when his failure to testify will not involve a complete denial of justice.[64] Nor is he ousted of jurisdiction by merely being named as a witness in papers filed in the cause.[65] But

on review of the cause in the court of errors and appeals. Gardner *v.* State, 21 N. J. L. 557.

In Ohio prior to the adoption of the statute of April 12, 1858, disqualifying a trial judge to sit as member of an appellate court on the trial of a case tried before him in the lower court, the rule of the text was indorsed. Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 546, 10 West. L. J. 356. After the adoption of the statute, it was held in Burns *v.* State, 2 Ohio Dec. (Reprint) 97, 1 West. L. Month. 355, that the judge was disqualified, and his disqualification applied to criminal as well as civil cases, while in Powers *v.* Seaton, 2 Ohio Dec. (Reprint) 365, 2 West. L. Month. 532, the statute was declared unconstitutional.

56. Chicago, etc., R. Co. *v.* Kellogg, 54 Nebr. 138, 74 N. W. 403.

57. Graham *v.* Selbie, 8 S. D. 604, 67 N. W. 831.

58. Hudson *v.* Wood, (Ind. App. 1899) 52 N. E. 612; Case *v.* Hoffman, (Wis. 1898) 74 N. W. 220; Moran *v.* Dillingham, 174 U. S. 153, 19 S. Ct. 620, 43 L. ed. 930. See also New Jersey and Ohio cases cited in the second preceding note and the statutes of the various states.

In New York an early statute undertook to disqualify a trial justice from presiding in an appellate court on the trial of a case which he had tried below, but it was declared unconstitutional as an attempt to deprive the justices of jurisdiction conferred by the constitution. Pierce *v.* Delamater, 1 N. Y. 17; *In re* Court of Errors, 6 Wend. 158. See also *In re* Lieutenant-Governor, 2 Wend. 213; Yates *v.* People, 6 Johns. 337. Thereafter by constitutional provision the disqualification was made effectual. Van Arsdale *v.* King, 152 N. Y. 69, 46 N. E. 179 [*reversing* 87 Hun 617, 33 N. Y. Suppl. 858]; Duryea *v.* Traphagen, 84 N. Y. 652; Graham *v.* Linden, 50 N. Y. 547; Pistor *v.* Hatfield, 46 N. Y. 249; Real *v.* People, 42 N. Y. 270; Murdock *v.* International Tile, etc., Co., 14 Misc. 225, 35 N. Y. Suppl. 668; Pistor *v.* Brundrett, 42 How. Pr. 5.

59. Pierce *v.* Delamater, 1 N. Y. 17; *In re* Court of Errors, 6 Wend. (N. Y.) 158; Powers *v.* Seaton, 2 Ohio Dec. (Reprint) 365, 2 West. L. Month. 532. But see Burns *v.* State, 2 Ohio Dec. (Reprint) 97, 1 West. L. Month. 355, holding that a judge was disqualified under the statute, the constitutionality thereof not being raised. And a similar statute was declared constitutional in Case *v.* Hoffman, (Wis. 1898) 74 N. W. 220.

60. Pistor *v.* Hatfield, 46 N. Y. 249; Murdock *v.* International Tile, etc., Co., 14 Misc. (N. Y.) 225, 35 N. Y. Suppl. 668; Case *v.* Hoffman, (Wis. 1898) 74 N. W. 220. In Mori *v.* Pearsall, 14 Misc. (N. Y.) 251, 35 N. Y. Suppl. 829, it was held that the mere *pro forma* signing of an order based on the decision of another judge will not disqualify.

61. Engle *v.* Cromlin, 21 N. J. L. 561; Pearson *v.* Hopkins, 2 N. J. L. 195; Smith *v.* Wingard, 3 Wash. Terr. 260, 14 Pac. 596.

62. Philips *v.* Germania Bank, 107 N. Y. 630, 13 N. E. 923.

63. *Alabama.*— Estes *v.* Bridgforth, 114 Ala. 221, 21 So. 512.

Arkansas.— Rogers *v.* State, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, 31 L. R. A. 465.

Georgia.— Shockley *v.* Morgan, 103 Ga. 156, 29 S. E. 694; Baker *v.* Thompson, 89 Ga. 486, 15 S. E. 644.

Kansas.— Gray *v.* Crockett, 35 Kan. 66, 10 Pac. 452.

Louisiana.—Ross *v.* Buhler, 2 Mart. N. S. 312.

New York.—Morss *v.* Morss, 11 Barb. 510.

Ohio.— McMillen *v.* Andrews, 10 Ohio St. 112.

Washington.— Maitland *v.* Zanga, 14 Wash. 92, 44 Pac. 117.

See 29 Cent. Dig. tit. "Judges," § 218.

Contra.— Hopkins *v.* Scott, 38 Nebr. 661, 57 N. W. 391; Fenwick's Trial, 13 How. St. Tr. 538; Cornish's Trial, 11 How. St. Tr. 382.

64. Patten *v.* Tallman, 27 Me. 17; Marry *v.* James, 2 Daly (N. Y.) 437; Reg. *v.* Sproule, 14 Ont. 375.

65. Wills *v.* Whittier, 45 Me. 544.

it has been decided that where he has testified in the case on a former trial he is disqualified.[66]

J. Holding Incompatible Office. A judge cannot be recused because he holds another incompatible office.[67]

K. Illness. A judge may be legally disqualified by reason of sickness, so as to render proper the holding of the court by another judge, and the acts of the latter valid and effectual.[68]

L. Boards and Tribunals Affected by Restrictions. The rule of disqualification on account of interest in the subject-matter or result of litigation extends to every tribunal exercising judicial or quasi-judicial functions.[69] Justices of the peace,[70] jurors,[71] boards of education,[72] the trustees of a village,[73] a town board of supervisors,[74] a board of commissioners of highways,[75] a county auditor, authorized to correct return for taxation, and collect a percentage on the increase in taxes,[76] and stock-holders of a corporation acting as jurors in eminent domain proceedings by the corporation[77] are all included in its operation. On the other hand there are authorities holding that tribunals exercising quasi-judicial powers are not within the influence of the rule disqualifying a judicial officer by reason of interest. Under this contrary rule have been included the common council of a city,[78] and a board of directors of a chamber of commerce.[79]

M. Refusal of Judge to Act — 1. In General. A judge may take judicial notice of matters affecting his qualification and refuse to act if disqualified within his own knowledge and without any extrinsic evidence of such disqualification;[80] and it is not only the right but the duty of a judge to refuse to preside at the trial of a case in which he is disqualified, without regard to the manner of receiving information of his disqualification.[81] But a judge has no right to adjudge

66. Burlington Ins. Co. *v.* McLeod, 40 Kan. 54, 19 Pac. 354.

67. State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390.

68. State *v.* Blair, 53 Vt. 24.

69. Stockwell *v.* White Lake Tp. Bd., 22 Mich. 341.

70. See JUSTICES OF THE PEACE.

71. See JURIES.

72. Stockwell *v.* White Lake Tp. Bd., 22 Mich. 341; State *v.* Seattle Bd. of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317.

73. People *v.* Saratoga Springs, 4 N. Y. App. Div. 399, 618, 39 N. Y. Suppl. 607.

74. State *v.* Bradish, 95 Wis. 205, 70 N. W. 172, 37 L. R. A. 289.

75. State *v.* Crane, 36 N. J. L. 394; Readington Tp. *v.* Dilley, 24 N. J. L. 209. *Contra*, Foot *v.* Stiles, 57 N. Y. 399.

76. Conklin *v.* Squire, 4 Ohio S. & C. Pl. Dec. 493. But see Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116, where it was held that a county trustee invested with similar powers and receiving compensation in like manner was not within the operation of Tenn. Const. art. 6, § 11, prohibiting judges of supreme and inferior courts from presiding in trial of causes in which they were interested.

77. Peninsular R. Co. *v.* Howard, 20 Mich. 18. See also EMINENT DOMAIN, 15 Cyc. 877 note 68.

78. State *v.* Superior, 90 Wis. 612, 64 N. W. 304.

79. Wood *v.* Milwaukee, 119 Wis. 367, 96 N. W. 835.

80. *Alabama.*— Marston *v.* Carr, 16 Ala. 325.

California.— Kern Valley Water Co. *v.* McCord, 70 Cal. 646, 11 Pac. 798; Lux *v.* Haggin, (1887) 13 Pac. 654.

Florida.— Fairchild *v.* Knight, 18 Fla. 770.

Kentucky.— Byram *v.* Holliday, 84 Ky. 18, 7 Ky. L. Rep. 738; Louisville, etc., R. Co. *v.* Shuck, 62 S. W. 259, 23 Ky. L. Rep. 25.

Louisiana.— Lacroix's Succession, 30 La. Ann. 924; Nugent *v.* Stark, 34 La. Ann. 628.

Missouri.— State *v.* Fort, 178 Mo. 518, 77 S. W. 741; State *v.* Gilham, 97 Mo. App. 296, 70 S. W. 943; *In re* Albert, 80 Mo. App. 554.

New Hampshire.— Perkins *v.* George, 45 N. H. 453.

New York.— Paddock *v.* Wells, 2 Barb. Ch. 331.

Canada.— Crowe *v.* McCurdy, 6 Can. L. T. 453; McKenzie *v.* Ætna Ins. Co., 2 Can. L. T. 94, 14 Nova Scotia 326; Belden *v.* Chapman, 21 Nova Scotia 100.

See 29 Cent. Dig. tit. "Judges," § 189.

81. *California.*— *In re* White, 37 Cal. 190; People *v.* De la Guerra, 24 Cal. 73.

Indiana.— Joyce *v.* Whitney, 57 Ind. 550.

Louisiana.— State *v.* Judges Tenth Judicial Dist., 41 La. Ann. 319, 6 So. 22; Nugent *v.* Stark, 34 La. Ann. 628.

Missouri.— State *v.* Gilham, 97 Mo. App. 296, 70 S. W. 943; Jim *v.* State, 3 Mo. 147.

New Hampshire.—Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

New York.— Oakley *v.* Aspinwall, 3 N. Y. 547.

See 29 Cent. Dig. tit. "Judges," § 189.

himself disqualified and refuse to act, when no party to the case could legally recuse him.[82] Where a judge yields jurisdiction to another on account of his disqualification the record should affirmatively show the facts which authorized the act.[83] And it must show the disqualification of the trial judge, not his predecessor.[84] Such adjudication may be made before the papers in the case are actually filed in his court, and while they are in his hands for a preliminary order.[85]

2. CONCLUSIVENESS OF REFUSAL TO ACT. His refusal to act on account of some disqualification existing in his own mind is not conclusive, and his competency may be determined on an application for mandamus to compel him to act,[86] or by appeal.[87] But the judge to whom the case is transferred has no authority to review or annul the order of recusation.[88] If any party is dissatisfied with the action of the judge in deciding himself disqualified, he must make timely objection and resort to his remedy or it will be considered as waived.[89] And the decision of a judge holding himself disqualified will not be reversed unless there is manifest error apparent therein.[90]

N. Right to Object and Proceedings on Objection — 1. IN GENERAL. As a general rule either party may object to a judge on the ground of his disqualification.[91] But where the right is given by statute to a particular party, the other cannot exercise it.[92] Different parties cannot join to disqualify a judge in different actions in which they are not jointly interested.[93] The number of judges which may be disqualified on the ground of prejudice varies in the different jurisdictions.[94]

2. PROCEEDINGS IN WHICH OBJECTIONS CAN BE RAISED. The question of disqualification may be raised on a petition to require the filing of a new assignment, inventory, and appraisement,[95] in a suit for divorce,[96] in proceedings by an administrator for the sale of real estate to pay debts,[97] in proceedings to redeem land from tax-sale,[98] in a preliminary examination before a committing magistrate,[99] in proceedings under a municipal law for the investigation of a town's finances,[1] or in a proceeding in contempt.[2] But not on the probate of a will which is made *ex parte*.[3] A court of chancery will not consider the suggestion of the disqualification of a judge of a circuit court to which it refers a feigned issue.[4]

3. TIME OF MAKING OBJECTION. The time in which objection to the judge

82. State *v.* Voorheis, 41 La. Ann. 567, 6 So. 826; Jones *v.* Judges Tenth Judicial Dist., 41 La. Ann. 319, 6 So. 22; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200.

83. Thornton *v.* Moore, 61 Ala. 347; Hooks *v.* Barnett, 38 Ala. 607; Wilson *v.* Wilson, 36 Ala. 655. But see Bates *v.* Casey, 61 Tex. 592.

84. Poole *v.* Mueller Bros. Furniture, etc., Co., 80 Tex. 189, 15 S. W. 1055.

85. Fairchild *v.* Knight, 18 Fla. 770.

86. Medlin *v.* Taylor, 101 Ala. 239, 13 So. 310; *Ex p.* Alabama State Bar Assoc., 92 Ala. 113, 8 So. 768, 12 L. R. A. 134; State *v.* Voorheis, 41 La. Ann. 567, 6 So. 826.

87. Medlin *v.* Taylor, 101 Ala. 239, 13 So. 310.

88. State *v.* Voorheis, 41 La. Ann. 567, 6 So. 826.

89. State *v.* Voorheis, 41 La. Ann. 567, 6 So. 826.

90. Childress *v.* Grim, 57 Tex. 56.

91. Kelly *v.* Hocket, 10 Ind. 299; Hawpe *v.* Smith, 22 Tex. 410.

A group of defendants, having interests in common in premises sought to be partitioned, although not the sole defendants, is entitled to be regarded as a party in making application for a change of judge on the ground that the judge has been counsel for plaintiff. State *v.* Dick, 125 Wis. 51, 103 N. W. 229.

92. Bonnefoy *v.* Landry, 4 Rob. (La.) 23.

93. State *v.* Wolfe, 11 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 118.

94. See the statutes of the several states. And see Duggins *v.* State, 66 Ind. 350; Line *v.* State, 51 Ind. 172; Jarreau *v.* Choppin, 6 La. 130; State *v.* Gardner, 88 Minn. 130, 92 N. W. 529; State *v.* Greenwade, 72 Mo. 298.

95. Kittridge *v.* Kinne, 80 Mich. 200, 44 N. W. 1051.

96. Kolb's Case, 4 Watts (Pa.) 154.

97. Scherer *v.* Ingerman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

98. Rawson *v.* Boughton, 5 Ohio 328.

99. *Ex p.* Bedard, 106 Mo. 616, 17 S. W. 693.

1. Matter of Hadley, 44 Misc. (N. Y.) 265, 89 N. Y. Suppl. 910.

2. Lamonte *v.* Ward, 36 Wis. 558. *Contra,* Noble Tp. *v.* Aasen, 10 N. D. 264, 86 N. W. 742.

3. *In re* Hunter, 6 Ohio 499.

4. Walgrove *v.* Walgrove, 3 Edw. (N. Y.) 227.

should be made varies in the different jurisdictions, and depends upon arbitrary decision or rule of the court, or statute.[5] Where the party entitled to object is not informed of the disqualifying facts until after the expiration of the time in which objection should be made, his objection, made on discovery of the facts, will be regarded as seasonably made.[6]

4. Mode of Making Objection. In the absence of statute an objection to a judge should be made by petition setting forth the facts relied on to disqualify him, and requesting him not to sit on the trial of the cause.[7] But the proceeding is generally regulated by statutes requiring a verified application for a change of venue, or transfer of the cause to another court, or the calling in of another judge.[8] The statute must be strictly followed.[9]

5. Bringing Suit in Another Court. Where the judge of one court is disqualified, a suit is properly brought in another court having jurisdiction,[10] and a complaint need not set forth the fact of disqualification.[11]

6. Sufficiency of Objection — a. What Affidavit Must Show. The affidavit must set forth some ground of disqualification enumerated in the statute,[12] and

5. *Alabama.*— At the trial. Collins *v.* Hammock, 59 Ala. 448.

Arkansas.— During trial. Shropshire *v.* State, 12 Ark. 190.

California.— On motion for new trial. Finn *v.* Spagnoli, 67 Cal. 330, 7 Pac. 746.

Colorado.— Earliest opportunity. Eberville *v.* Leadville Tunneling, etc., Co., 28 Colo. 241, 64 Pac. 200; Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202.

Georgia.— Before verdict. Berry *v.* State, 117 Ga. 15, 43 S. E. 438.

Indiana.— At least five days before day set for trial. Bernhamer *v.* State, 123 Ind. 577, 24 N. E. 509; Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51. See also Hays *v.* Morgan, 87 Ind. 231. Objection to the qualification of a special judge is waived if not made at the trial. Perry *v.* Pernet, 165 Ind. 67, 74 N. E. 609.

Kentucky.— Before appearing to the merits or submitting preliminary motions. German Ins. Co. *v.* Landram, 88 Ky. 433, 11 S. W. 367, 592, 10 Ky. L. Rep. 1039; Small *v.* Reeves, (1896) 37 S. W. 682; Givens *v.* Crawshaw, 55 S. W. 905, 21 Ky. L. Rep. 1618; Bales *v.* Ferrell, 49 S. W. 759, 20 Ky. L. Rep. 1564; Russell *v.* Russell, 12 S. W. 709, 11 Ky. L. Rep. 547.

Massachusetts.— At the trial. Crosby *v.* Blanchard, 7 Allen 385.

Montana.—Before day fixed for trial. State *v.* Donlan, 32 Mont. 256, 80 Pac. 244; State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

New Hampshire.— At earliest opportunity. Warren *v.* Glynn, 37 N. H. 340.

New Jersey.— Objection to highway commissioner must be made when his appointment is made. Readington Tp. *v.* Dilley, 24 N. J. L. 209.

New York.— Before trial begins. *In re* Hopkins, 2 N. Y. Suppl. 322, 3 N. Y. Suppl. 661, 6 Dem. Surr. 12; Lampier's Case, 5 City Hall Rec. 179.

Tennessee.— Cannot be made for first time on appeal. Nashville *v.* Thompson, 12 Lea 344; Crozier *v.* Goodwin, 1 Lea 125.

Wisconsin.— Before trial begins. Duffy *v.* Hickey, 68 Wis. 380, 32 N. W. 54; Cairns *v.* O'Bleness, 40 Wis. 469; Swineford *v.* Pomeroy, 16 Wis. 553. Objection is in time if made after the case is on the trial calendar and after stipulation to refer. Kollock *v.* Becker, 60 Wis. 53, 18 N. W. 722; Eldred *v.* Becker, 60 Wis. 48, 18 N. W. 720.

Wyoming.— Before cause is set for trial. Dolan *v.* Church, 1 Wyo. 187.

See 29 Cent. Dig. tit. "Judges," § 226.

6. Bernhamer *v.* State, 123 Ind. 577, 24 N. E. 509; Shoemaker *v.* Smith, 74 Ind. 71; Vance *v.* Field, 89 Ky. 178, 12 S. W. 190, 11 Ky. L. Rep. 388.

7. Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114. See Lyon *v.* State Bank, 1 Stew. (Ala.) 442, holding that an objection to a judge cannot be made by challenge or plea.

A judgment cannot be collaterally attacked on account of disqualification of the judge. Gorrill *v.* Whittier, 3 N. H. 265.

Where it is sought to disqualify a judge from hearing a cause on the ground that one of his relatives is interested, which is denied by the opposite party, and is not within the knowledge of the judge, facts to establish such interest, or from which it may be inferred, must be sworn to — a mere statement of belief of his interest is insufficient. Jardine *v.* Vaughan, 26 N. Brunsw. 244.

8. See the statutes of the different states.

9. Kelly *v.* Hocket, 10 Ind. 299; State *v.* Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542.

10. Hooks *v.* Barnett, 38 Ala. 607; Pavy *v.* Ramsey, 14 Ind. 5.

11. Hooks *v.* Barnett, 38 Ala. 607.

12. Jones *v.* State, 61 Ark. 88, 32 S. W. 81; Millison *v.* Holmes, 1 Ind. 45, Smith 55; State *v.* Chantlain, 42 La. Ann. 718, 7 So. 669. An objection that "the presiding judge had heretofore, as counsel, given an opinion in regard to the validity of the title to the land in controversy" is not equivalent to "where he shall have been of counsel in the case." Houston, etc., R. Co. *v.* Ryan, 44 Tex. 426.

must contain a specific statement of the facts on which the disqualification is based,[13] which statement must be positive and not on information or belief.[14] It must be made to clearly appear that the disqualification is a present subsisting one.[15] Where it is sought to disqualify a judge on account of having been counsel in the case, the affidavit need not allege that he was counsel before his election as judge.[16] If the regular judge vacates the bench on an insufficient affidavit, he may properly resume it before the special judge has acted in the case.[17] Where the disqualification can arise only on the filing of an amended petition and the bringing in of new parties, which will produce a misjoinder of causes of action and of parties, the objection is properly disregarded.[18]

b. By Whom Made. The affidavit must be made by the party, and not by his attorney or agent.[19] But the application may be made and the affidavit filed by his attorney in his absence.[20]

c. Where Affidavit Is Conclusive. In some jurisdictions an affidavit which sets forth the facts disqualifying the judge is conclusive, and deprives him of all further jurisdiction in the case,[21] and a statute which makes the affidavit conclusive

13. *Florida.*— Conn *v.* Chadwick, 17 Fla. 428.

Kansas.— Emporia *v.* Volmer, 12 Kan. 622.

Kentucky.— Powers *v.* Reynolds, 89 Ky. 259, 12 S. W. 298, 553, 11 Ky. L. Rep. 460; Vance *v.* Field, 89 Ky. 178, 12 S. W. 190, 11 Ky. L. Rep. 388; German Ins. Co. *v.* Landram, 88 Ky. 433, 11 S. W. 367, 592, 10 Ky. L. Rep. 1039; Erwin *v.* Benton, 87 S. W. 291, 27 Ky. L. Rep. 909; Sparks *v.* Colson, 109 Ky. 711, 60 S. W. 540, 22 Ky. L. Rep. 1369; Schmidt *v.* Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. L. Rep. 763, 72 Am. St. Rep. 427; Small *v.* Reeves, (Ky. 1896) 37 S. W. 682; Russell *v.* Russell, 12 S. W. 709, 11 Ky. L. Rep. 547.

Minnesota.— Burke *v.* Mayall, 10 Minn. 287; *Ex p.* Curtis, 3 Minn. 274.

Ohio.— Wolfe *v.* Marmet, 72 Ohio St. 578, 74 N. E. 1076.

Canada.— Jardine *v.* Vaughan, 26 N. Brunsw. 244.

See 29 Cent. Dig. tit. "Judges," § 227.

In Illinois, Ohio, and South Dakota, by reason of statute, it is sufficient merely to allege bias or prejudice without stating facts. McGoon *v.* Little, 7 Ill. 42; State *v.* Wolfe, 11 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 118; State *v.* Palmer, 4 S. D. 543, 57 N. W. 490 (prior to adoption of the statute the rule in South Dakota followed the text); State *v.* Rodway, 1 S. D. 575, 47 N. W. 1061; State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

14. Davis *v.* Atkinson, (Ark. 1905) 87 S. W. 432; Morehouse *v.* Morehouse, 136 Cal. 332, 68 Pac. 976; People *v.* Findley, 132 Cal. 301, 64 Pac. 472; Higgins *v.* San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; Schmidt *v.* Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. L. Rep. 763, 72 Am. St. Rep. 427; German Ins. Co. *v.* Landram, 88 Ky. 433, 11 S. W. 367, 592, 10 Ky. L. Rep. 1039; Jardine *v.* Vaughan, 26 N. Brunsw. 244. But see Crouch *v.* Dakota, etc., R. Co., (S. D. 1904) 101 N. W. 722; State *v.* Palmer, 4 S. D. 543, 57 N. W. 490.

15. Ehrhardt *v.* Breeland, 57 S. C. 142, 35 S. E. 537.

16. Witter *v.* Taylor, 7 Ind. 110.

17. Russell *v.* Russell, 12 S. W. 709, 11 Ky. L. Rep. 547.

18. Small *v.* Reeves, (Ky. 1896) 37 S. W. 682.

19. Wiltfong *v.* Schafer, 121 Ind. 264, 23 N. E. 91; Heshion *v.* Pressley, 80 Ind. 490; Stevens *v.* Burr, 61 Ind. 464. See also Conn *v.* Chadwick, 17 Fla. 428; Western Bank *v.* Tallman, 15 Wis. 92.

The agent of a corporation may make the affidavit. Jones *v.* Chicago, etc., R. Co., 36 Iowa 68.

20. Wiltfong *v.* Schafer, 121 Ind. 264, 23 N. E. 91; Firestone *v.* Hershberger, 121 Ind. 201, 22 N. E. 985.

21. *Indiana.*— Krutz *v.* Howard, 70 Ind. 174; Krutz *v.* Griffith, 68 Ind. 444; Duggins *v.* State, 66 Ind. 350; Fisk *v.* Patriot, etc., Turnpike Co., 54 Ind. 479; Manly *v.* State, 52 Ind. 215; Marshon *v.* State, 44 Ind. 598; Goldsby *v.* State, 18 Ind. 147; Shattuck *v.* Myers, 13 Ind. 46, 74 Am. Dec. 236.

Kentucky.— Vance *v.* Field, 89 Ky. 178, 12 S. W. 190, 11 Ky. L. Rep. 388; Powers *v.* Com., 70 S. W. 644, 1050, 24 Ky. L. Rep. 1007, 1186; Chenault *v.* Spencer, 68 S. W. 128, 24 Ky. L. Rep. 141; Givens *v.* Crawshaw, 55 S. W. 905, 21 Ky. L. Rep. 1618.

Louisiana.— State *v.* Judge, 39 La. Ann. 994, 3 So. 91; State *v.* Judge, Twenty-First Judicial Dist., 37 La. Ann. 253.

Missouri.— State *v.* Gray, 100 Mo. App. 98, 72 S. W. 1081.

North Dakota.— State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

Ohio.— State *v.* Wolfe, 11 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 118.

Oklahoma.— Lincoln *v.* Territory, 8 Okla. 546, 58 Pac. 730 [*overruling* Cox *v.* U. S., 5 Okla. 701, 50 Pac. 175].

South Dakota.— State *v.* Palmer, 4 S. D. 543, 57 N. W. 490; State *v.* Henning, 3 S. D. 492, 54 N. W. 536.

Wisconsin.— Rines *v.* Boyd, 7 Wis. 155.

United States.— Cox *v.* U. S., 100 Fed. 293, 40 C. C. A. 380, construing a statute of Oklahoma territory.

See 29 Cent. Dig. tit. "Judges," § 224

is valid.[22] But the judge must decide as to the sufficiency of the facts stated to disqualify him.[23] If they are sufficient he must surrender jurisdiction;[24] but if insufficient, his imperative duty is to retain it.[25]

d. Where Affidavit Is Not Conclusive. In other jurisdictions counter-affidavits may be filed, and the truth of the facts made an issue for the determination of the judge,[26] and the burden of proof is on the party alleging the disqualification.[27] In the absence of such counter-affidavits the facts set up in the application must be taken as true,[28] although the judge's personal knowledge may be to the contrary;[29] and his unverified statements in rebuttal are of no weight in determining the question.[30]

e. Affidavit Conforming to Statute Sufficient. An affidavit which substantially conforms to the statute is sufficient,[31] and this is true notwithstanding a rule of court which prescribes additional facts to be stated.[32]

7. Proceeding on Objection. The objection must be made in the court over which the judge presides.[33] When the application conforms to the statute it must be granted; there is no discretion to refuse it;[34] for, although the statute may be in form permissive, it is imperative.[35] It is the duty of the judge to vacate the bench or transfer the cause to another tribunal on the filing of a sufficient affidavit or motion showing his prejudice.[36] No additional motion is neces-

22. State *v.* Second Judicial Dist. Ct., 30 Mont. 547, 77 Pac. 318; State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

23. People *v.* Findley, 132 Cal. 301, 64 Pac. 472; Cass *v.* State, 2 Greene (Iowa) 353; Vance *v.* Field, 89 Ky. 178, 12 S. W. 190, 11 Ky. L. Rep. 388; Byram *v.* Holliday, 84 Ky. 18. See also Conn *v.* Chadwick, 17 Fla. 428.

24. Morehouse *v.* Morehouse, 136 Cal. 332, 68 Pac. 976; Cass *v.* State, 2 Greene (Iowa) 353; Powers *v.* Com., 70 S. W. 644, 1050, 24 Ky. L. Rep. 1007, 1186; Chenault *v.* Spencer, 68 S. W. 128, 24 Ky. L. Rep. 141; Givens *v.* Crawshaw, 55 S. W. 905, 21 Ky. L. Rep. 1618; Western Bank *v.* Tallman, 15 Wis. 92; Rines *v.* Boyd, 7 Wis. 155.

25. Jones *v.* State, 61 Ark. 88, 32 S. W. 81; People *v.* Findley, 132 Cal. 301, 64 Pac. 472; Smith *v.* Com., 108 Ky. 53, 55 S. W. 718, 21 Ky. L. Rep. 1470; Crouch *v.* Dakota, etc., R. Co., (S. D. 1904) 101 N. W. 722.

26. Morehouse *v.* Morehouse, 136 Cal. 332, 68 Pac. 976; People *v.* Compton, 123 Cal. 403, 56 Pac. 44; Bellows *v.* Murray, 66 Me. 199; Lincoln *v.* Territory, 8 Okla. 546, 58 Pac. 730 [*overruling* Cox *v.* U. S., 5 Okla. 701, 50 Pac. 175]; Crouch *v.* Dakota, etc., R. Co., (S. D. 1904) 101 N. W. 722.

27. Heinlen *v.* Heilbron, 97 Cal. 101, 31 Pac. 838; Bellows *v.* Murray, 66 Me. 199; State *v.* De Maio, 70 N. J. L. 220, 58 Atl. 173.

28. Morehouse *v.* Morehouse, 136 Cal. 332, 68 Pac. 976; People *v.* Compton, 123 Cal. 403, 56 Pac. 44.

29. People *v.* Compton, 123 Cal. 403, 56 Pac. 44; Witter *v.* Taylor, 7 Ind. 110; Lincoln *v.* Territory, 8 Okla. 546, 58 Pac. 730 [*overruling* Cox *v.* U. S., 5 Okla. 701, 50 Pac. 175]. In an early case in Wisconsin it was held that the judge must determine the question of his prejudice from his own consciousness, not extrinsic evidence. Hungerford *v.* Cushing, 2 Wis. 397.

30. Morehouse *v.* Morehouse, 136 Cal. 332, 68 Pac. 976; Slaven *v.* Wheeler, 58 Tex. 23.

31. McGoon *v.* Little, 7 Ill. 42; Krutz *v.* Griffith, 68 Ind. 444; Witter *v.* Taylor, 7 Ind. 110; State *v.* Shipman, 93 Mo. 147, 6 S. W. 97; State *v.* Thomas, 32 Mo. App. 159.

32. Krutz *v.* Howard, 70 Ind. 174; Krutz *v.* Griffith, 68 Ind. 444.

33. Ellsworth *v.* Moore, 5 Iowa 486.

34. *Illinois.*— Walsh *v.* Ray, 38 Ill. 30.

Indiana.— Krutz *v.* Howard, 70 Ind. 174; Krutz *v.* Griffith, 68 Ind. 444; Manly *v.* State, 52 Ind. 215; Goldsby *v.* State, 18 Ind. 147; Witter *v.* Taylor, 7 Ind. 110.

Iowa.— Jones *v.* Chicago, etc., R. Co., 36 Iowa 68; Cass *v.* State, 2 Greene 353.

Maryland.— Griffin *v.* Leslie, 20 Md. 15.

Missouri.— State *v.* Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542.

35. Goldsby *v.* State, 18 Ind. 147; Jones *v.* Chicago, etc., R. Co., 36 Iowa 68; State *v.* Palmer, 4 S. D. 543, 57 N. W. 490; State *v.* Henning, 3 S. D. 492, 54 N. W. 536.

36. *Illinois.*— Walsh *v.* Ray, 38 Ill. 30; McGoon *v.* Little, 7 Ill. 42.

Indiana.— Goldsby *v.* State, 18 Ind. 147.

Kansas.— Peyton's Appeal, 12 Kan. 398.

Kentucky.— Massie *v.* Com., 93 Ky. 588, 20 S. W. 704; Turner *v.* Com., 2 Metc. 619; Chenault *v.* Spencer, 68 S. W. 128, 24 Ky. L. Rep. 141.

Ohio.— State *v.* Wolfe, 11 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 118.

Wisconsin.— Western Bank *v.* Tallman, 15 Wis. 92; Runals *v.* Brown, 11 Wis. 185; Foster *v.* Bacon, 9 Wis. 345; Rines *v.* Boyd, 7 Wis. 155.

But under the Iowa statute the rule is otherwise in criminal cases. Turner *v.* Hitchcock, 20 Iowa 310; Cass *v.* State, 2 Greene (Iowa) 353.

sary.[37] But the order recusing himself must be made in open court, not at chambers.[38] Where a judge is made a party to a case he cannot arbitrarily determine that he has no interest therein and strike the complaint from the files.[39] But where the objection is based upon a ground palpably false it may be overruled without hearing proof.[40]

8. CONSTITUTIONAL AND STATUTORY PROVISIONS. A constitutional provision that, where a judge is disqualified, the parties may appoint a proper person to try the case, and that the judges may exchange districts, is not violated by a statute providing for the designation of another judge by the governor, and, if impossible for him to serve, then that the parties may agree on an attorney to try the case.[41] An amendment of the statute regulating the proceedings in case of the disqualification of a judge will not affect cases theretofore transferred, especially where the amended statute so provides.[42] Where the statute authorizes the selection of a special judge by the parties, and the record fails to disclose any act on their part, the calling in of another judge will not constitute reversible error.[43] But a statute specifying the officer who shall cite in another judge is directory only, and conformity to it is not imperative.[44] If a judge who is called in is unable to try the case he may properly call in another.[45] The judge called in must be one authorized by law to preside in lieu of the disqualified judge.[46] The provisions of a territorial statute relative to a change of judges, where an affidavit of prejudice is made, do not apply when the judge is presiding in a federal and not in a territorial court.[47] Where the general provisions of law relative to circuit courts in criminal cases are made applicable to a municipal court, a disqualified judge of the latter court may call in a judge of the former, under a provision authorizing a disqualified circuit judge to call in another circuit judge.[48]

9. PARTIES TO PROCEEDING. All of the judges whose disqualification is alleged should be made parties to the proceedings.[49]

10. RIGHT TO CALL IN OTHER JUDGE OR TRANSFER CAUSE. The law which prescribes the course to be pursued when a judge is disqualified, and directs a change of venue,[50] or the transfer of the case to another court,[51] or that the case be transferred to the nearest judge,[52] or the calling in of another judge,[53] or an attorney,[54] or the election of a special judge by the bar,[55] must be strictly followed. It is proper to refuse a change of venue when the statute directs the calling in of another judge,[56] to refuse to transfer the case to the appellate court of another department, when the

37. State *v.* Second Judicial Dist. Ct., 30 Mont. 547, 77 Pac. 318.

38. Wilkinson *v.* Hengel, 48 La. Ann. 1137, 20 So. 290.

39. Younger *v.* Santa Cruz County Super. Ct., 136 Cal. 682, 69 Pac. 485.

40. Benson *v.* State, 39 Tex. Cr. 56, 44 S. W. 167, 1091.

41. Kruegel *v.* Nash, (Tex. Civ. App. 1903) 72 S. W. 601.

42. Dulaney *v.* Walsh, 90 Tex. 329, 38 S. W. 748 [*affirming* (Civ. App. 1896) 37 S. W. 615]; San Angelo Nat. Bank *v.* Fitzpatrick, 88 Tex. 313, 30 S. W. 1053 [*affirming* (Civ. App. 1895) 29 S. W. 912 (*overruling* San Angelo Nat. Bank *v.* Fitzpatrick, (Civ. App. 1894) 28 S. W. 95)].

43. State *v.* Gillham, 174 Mo. 671, 74 S. W. 859.

44. Gallup *v.* Smith, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353.

45. Daggs *v.* Hoskins, (Ariz. 1898) 52 Pac. 357. *Contra*, State *v.* Gillham, 174 Mo. 671, 74 S. W. 859.

46. Wells *v.* Newton, 101 Ga. 141, 28 S. E. 640.

47. U. S. *v.* Adams, 2 Dak. 305, 9 N. W. 718.

48. Koetting *v.* State, 88 Wis. 502, 60 N. W. 822.

49. State *v.* Fontelieu, 30 La. Ann. 1122.

50. Remy *v.* Olds, (Cal. 1895) 42 Pac. 239 [*overruling* Upton *v.* Upton, 94 Cal. 26, 29 Pac. 411]; Wright *v.* Boon, 2 Greene (Iowa) 458.

51. Graham *v.* People, 111 Ill. 253; Cabrol's Succession, 28 La. Ann. 637; *In re* Rhinebeck, 19 Hun (N. Y.) 346.

52. Com. *v.* White, 161 Pa. St. 576, 29 Atl. 283.

53. State *v.* Judge Ninth Judicial Dist., 21 La. Ann. 51.

54. State *v.* Judges Ninth, etc., Judicial Dists., 29 La. Ann. 785.

55. State *v.* Bacon, 107 Mo. 627, 18 S. W. 19. But when the judge also has authority to call in another judge, he may do so without first ordering an election of a special judge. Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004.

56. State *v.* Parker, 96 Mo. 382, 9 S. W. 728.

statute permits the calling in of judges from such department;[57] or to refuse a transfer to another court in the county, when a change of venue is directed.[58] Where a judge who is called in grants a change of venue to another circuit, and the indictment is there *nol prossed*, on the finding of a new indictment in the county of original jurisdiction the judge therein is not obliged to call in the same judge.[59] The certificate of a judge is competent to prove him interested so as to authorize the calling in of another judge;[60] and he may call in another judge in an action to which he is a party;[61] and when he calls in another judge in a case where he is disqualified the parties are not entitled to a change of venue.[62]

O. Determination of Question — 1. Who Determines the Question Primarily. Where a judge sits alone, the general rule is that he must determine the question of his disqualification.[63] But his decision cannot be influenced by his mere belief.[64] Where other judges preside over the court with him the question must be decided by the court.[65]

2. Determination on Appeal. While the decision of the judge as to his qualification *vel non* may not be conclusive,[66] it will not be disturbed by an appellate court unless clearly erroneous,[67] and he is a competent witness on the question in the appellate court.[68] The jurisdiction of an appellate court cannot be ousted by the disqualification of the judge of the lower court, where such disqualification was not objected to below and does not appear from the record.[69]

P. Waiver of Disqualification — 1. General Rules. If not made before

57. *In re* Broadway Widening, 63 Barb. (N. Y.) 572.

58. State *v.* O'Bryan, 102 Mo. 254, 14 S. W. 933.

59. State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

60. Voris *v.* Smith, 13 Serg. & R. (Pa.) 334.

61. Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004.

62. Upton *v.* Upton, 94 Cal. 26, 29 Pac. 411.

In Louisiana if the judge called in fails to try the case for nine months, it must be transferred to an adjoining district. Wilkinson *v.* Hengel, 48 La. Ann. 1137, 20 So. 290.

63. *California* — Talbot *v.* Pirkey, 139 Cal. 326, 73 Pac. 858.

Colorado.— Patrick *v.* Crowe, 15 Colo. 543, 25 Pac. 985.

New Jersey.— State *v.* De Maio, (1904) 58 Atl. 173.

Pennsylvania.— Philadelphia *v.* Fox, 64 Pa. St. 169.

Texas.— Slaven *v.* Wheeler, 58 Tex. 23.

United States.— Coltrane *v.* Templeton, 106 Fed. 370, 45 C. C. A. 328.

In Louisiana he cannot try the question, but must refer it to another for decision. State *v.* Reid, 114 La. 97, 38 So. 70; State *v.* Foster, 112 La. 533, 36 So. 554; State *v.* Judge Twenty-Second Judicial Dist., 39 La. Ann. 994, 3 So. 91 (also holding that he cannot assume jurisdiction until the question has been decided adversely to the party raising it); State *v.* Judge Third Judicial Dist., 38 La. Ann. 247; State *v.* Judge Twenty-First Judicial Dist., 37 La. Ann. 253; State *v.* Judge Fifteenth Judicial Dist. Ct., 33 La. Ann. 1293 (holding also that it is the duty of such special judge to dispose of the motion as early as practicable, or as the requirements of his district will permit, but that mandamus will not issue to compel action on his part, where the answer shows that the business of his district has prevented action); State *v.* Reid, 115 La. 196, 38 So. 963. But if the judge *ad hoc* be recused he must decide the question of his own qualification *vel non*. State *v.* Foster, 112 La. 533, 36 So. 554.

In Missouri he must refer the question to another court. State *v.* Gray, 100 Mo. App. 98, 72 S. W. 1081.

64. Adams *v.* Minor, 121 Cal. 372, 53 Pac. 815.

65. Internal Imp. Fund Trustees *v.* Bailey, 10 Fla. 213; Waterhouse *v.* Martin, Peck (Tenn.) 374; Slaven *v.* Wheeler, 58 Tex. 23.

66. Medlin *v.* Taylor, 101 Ala. 239, 13 So. 310; *Ex p.* Alabama State Bar Assoc., 92 Ala. 113, 8 So. 768, 12 L. R. A. 134. *Contra*, Hungerford *v.* Cushing, 2 Wis. 397. See also Kahanek *v.* Galveston, etc., R. Co., 72 Tex. 476, 10 S. W. 570.

67. Crook *v.* Newborg, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190; Medlin *v.* Taylor, 101 Ala. 239, 13 So. 310; *Ex p.* Alabama State Bar Assoc., 92 Ala. 113, 8 So. 768, 12 L. R. A. 134; People *v.* Findley, 132 Cal. 301, 64 Pac. 472; Johnston *v.* Brown, 115 Cal. 694, 47 Pac. 686; State *v.* Young, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636; Philadelphia Library Co. *v.* Ingham, 1 Whart. (Pa.) 72; Ellmaker *v.* Buckley, 16 Serg. & R. (Pa.) 72; Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405; Coltrane *v.* Templeton, 106 Fed. 370, 45 C. C. A. 328.

68. Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248.

69. Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960.

proceeding with the trial and action taken by the judge therein, there is a waiver of the right to object to him on account of relationship to a party to the suit,[70] or having been counsel,[71] or having granted a change of venue,[72] or the temporary loss of jurisdiction, which has been restored.[73] The right to object on account of prejudice is waived by making a motion in the cause.[74] The objection must be made in the trial court, and cannot be made for the first time on appeal.[75] The authorities are not in harmony as to the right to waive the disqualification due to interest in the subject-matter of the suit.[76] A disqualification prescribed by a constitution cannot be waived.[77]

2. Waiver by Consent. The right to urge the disqualification of a judge may also be waived by consent,[78] but a judge may decline jurisdiction, although the proper consent is given.[79]

70. *Alabama.*— Hall *v.* Wilson, 14 Ala. 295.

Arkansas.—Pettigrew *v.* Washington County, 43 Ark. 33.

Connecticut.— Church *v.* Norwich, Kirby 140.

Georgia.— Berry *v.* State, 117 Ga. 15, 43 S. E. 438; Buena Vista Loan, etc., Bank *v.* Grier, 114 Ga. 398, 40 S. E. 284; Brown *v.* Holland, 111 Ga. 817, 35 S. E. 643; Shope *v.* State, 106 Ga. 226, 32 S. E. 140; Beall *v.* Sinquefield, 73 Ga. 48.

Iowa.— Stone *v.* Marion County, 78 Iowa 14, 42 N. W. 570.

Kentucky.— Wilson *v.* Smith, 38 S. W. 870, 18 Ky. L. Rep. 927.

Louisiana.— Ricks *v.* Gantt, 35 La. Ann. 920.

New Hampshire.— Crowell *v.* Londonderry, 63 N. H. 42.

South Carolina.— *Ex p.* Hilton, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800.

Tennessee.— Posey *v.* Eaton, 9 Lea 500.

Canada.— Clark *v.* Schofield, 28 N. Brunsw. 231.

See 29 Cent. Dig. tit. "Judges," § 232.

Contra.— Oakley *v.* Aspinwall, 3 N. Y. 547; Schoonmaker *v.* Clearwater, 41 Barb. (N. Y.) 200. But see Hopkins *v.* Lane, 3 N. Y. Suppl. 661, 6 Dem. Surr. 12; Gresham *v.* State, 43 Tex. Cr. 466, 66 S. W. 845.

71. Platt *v.* New York, etc., R. Co., 26 Conn. 544; Groton *v.* Hurlburt, 22 Conn. 178; Jewett *v.* Miller, 12 Iowa 85; Ellsworth *v.* Moore, 5 Iowa 486; Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114; Posey *v.* Eaton, 9 Lea (Tenn.) 500.

72. Du Quoin Water-Works Co. *v.* Parks, 207 Ill. 46, 69 N. E. 587; Sampson *v.* People, 188 Ill. 592, 59 N. E. 427.

73. Kane *v.* Hutkoff, 38 Misc. (N. Y.) 678, 78 N. Y. Suppl. 262.

74. State *v.* Donlan, 32 Mont. 256, 80 Pac. 244; Hutchinson *v.* Manchester St. R. Co., 73 N. H. 271, 60 Atl. 1011.

75. Pettigrew *v.* Washington County, 43 Ark. 33; Sweeptzer *v.* Gaines, 19 Ark. 96. To the same effect see Shropshire *v.* State, 12 Ark. 190.

This rule does not apply where the judgment was rendered by default. Goodrich *v.* Stangland, 155 Ind. 279, 58 N. E. 148; Horton *v.* Howard, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198; Gilbert *v.* Columbia Turnpike Co., 3 Johns. Cas. (N. Y.) 107.

76. Disqualification held to be subject of waiver see Warren *v.* Glynn, 37 N. H. 340; Grundy County *v.* Tennessee Coal, etc., R. Co., 94 Tenn. 295, 29 S. W. 116; Dolan *v.* Church, 1 Wyo. 187; Coltrane *v.* Templeton, 106 Fed. 370, 45 C. C. A. 328. See also Church *v.* Norwich, Kirby (Conn.) 140; Goodrich *v.* Stangland, 155 Ind. 279, 58 N. E. 148.

Disqualification held not to be subject of waiver see Richardson *v.* Welcome, 6 Cush. (Mass.) 331; Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; Peninsular R. Co. *v.* Howard, 20 Mich. 18; Kansas *v.* Knotts, 78 Mo. 356; *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055; Gregory *v.* Cleveland, etc., R. Co., 4 Ohio St. 675; Rapid City First Nat. Bank *v.* McGuire, 12 S. D. 226, 80 N. W. 1074, 76 Am. St. Rep. 598, 47 L. R. A. 413; Dallas *v.* Peacock, 89 Tex. 58, 33 S. W. 220; Chambers *v.* Hodges, 23 Tex. 104; Casey *v.* Kinsey, 5 Tex. Civ. App. 3, 23 S. W. 818; Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238; Dimes *v.* Grand Junction Canal, 3 H. L. Cas. 759, 10 Eng. Reprint 301. But see Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167.

77. Murdock *v.* International Tile, etc., Co., 14 Misc. (N. Y.) 225, 35 N. Y. Suppl. 668.

78. Buena Vista Loan, etc., Bank *v.* Grier, 114 Ga. 398, 40 S. E. 284; Jewett *v.* Miller, 12 Iowa 85; *In re* Hancock, 91 N. Y. 284 [*reversing* 27 Hun 78]; Waterhouse *v.* Martin, Peck (Tenn.) 374, holding, however, that under the constitution in force in 1824 the consent of both parties was necessary. See, however, *infra*, VII, R, 3.

A statute authorizing waiver by consent where the judge is interested does not allow a waiver where be is a party to the suit. Kansas *v.* Knotts, 78 Mo. 356.

Formalities of consent.— The consent must be by writing (State *v.* Hartley, 75 Conn. 104, 52 Atl. 615), or be clearly inferable from the conduct of the parties (Chase *v.* Weston, 75 Iowa 159, 39 N. W. 246).

Where the waiver is limited, any act beyond the limitation is void. Bryan *v.* Welch, 62 Ga. 172.

79. *In re* Eatonton Electric Co., 120 Fed. 1010.

Q. Removal of Disqualification. The disqualification of a judge on account of interest may be removed by relinquishment of his interest,[80] or the transfer thereof.[81] His disqualification on account of relationship to a party may be removed by the renunciation of interest by the related party.[82] If the relationship is by affinity, the death without issue of the blood relative through whom the affinity exists will remove the disqualification,[83] and it has been held that the survival of issue will not operate to continue the disqualification.[84] But a judge who is disqualified by reason of relationship cannot remove the disqualification by dismissing the suit as to his relatives.[85] The jurisdiction of a judge which is lost by his temporary appointment as member of an appellate court is restored on revocation of such appointment.[86]

R. Operation and Effect of Disqualification — 1. In General. Where a judge is disqualified, he can make no order in the cause except to transfer it to the proper court.[87] A suit brought before a disqualified judge should not be dismissed, but transferred to the proper court.[88] The mere disqualification of a judge does not operate to transfer the cause to another court; there must be an order for the transfer.[89] A decree rendered by a disqualified judge cannot be avoided by his successor, if he is likewise disqualified.[90] The disqualification of the regular judge does not affect the qualification of another judge with whom he temporarily exchanges circuits by agreement in accordance with constitutional authority.[91]

2. Effect on Discretionary and Formal Acts. The disqualification of the judge invalidates all acts involving an exercise of discretion by him,[92] but mere

80. Gregg *v.* Pemberton, 53 Cal. 251; *In re* Cottle, 5 Pick. (Mass.) 483; *Re* McLeod, 23 Nova Scotia 154.

What constitutes relinquishment.— Mere determination in his own mind not to enforce a claim against an estate will not remove the disqualification of a probate judge. Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248.

Time of relinquishment.— Where the judge has a disqualifying interest in a claim against an estate, the withdrawal thereof after allowance will not qualify him. Hawley *v.* Baldwin, 19 Conn. 584.

81. Nicholson *v.* Showalter, 83 Tex. 99, 18 S. W. 326; *In re* Sime, 22 Fed. Cas. No. 12,861, 3 Sawy. 305 [*affirming* 22 Fed. Cas. No. 12,860, 2 Sawy. 320], so holding, although the transfer was made for the purpose of removing the disqualification.

Disposing of his interest pending the litigation will not remove his disqualification. Adams *v.* Minor, 121 Cal. 372, 53 Pac. 815.

82. Knickerbocker *v.* Worthing, 138 Mich. 224, 101 N. W. 540; *In re* Hopkins, 3 N. Y. Suppl. 661, 6 Dem. Surr. 12.

83. Yerby *v.* Martin, (Tex. Civ. App. 1897) 38 S. W. 541.

84. Winchester *v.* Hinsdale, 12 Conn. 88.

85. Gains *v.* Barr, 60 Tex. 676.

86. Irving Nat. Bank *v.* Moynihan, 78 N. Y. App. Div. 141, 79 N. Y. Suppl. 528; Kane *v.* Hutkoff, 38 Misc. (N. Y.) 678, 78 N. Y. Suppl. 262.

87. *California.*— Livermore *v.* Brundage, 64 Cal. 299, 30 Pac. 848.

Florida.— Swepson *v.* Call, 13 Fla. 337.

Kentucky.— Turner *v.* Com., 2 Metc. 619.

Louisiana.— Hunter *v.* Blackman, Mann. Unrep. Cas. 427.

Maryland.— See Magruder *v.* Swann, 25 Md. 173.

Montana.— State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

Ohio.— See State *v.* Wolfe, 11 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 118.

See 29 Cent. Dig. tit. "Judges," § 235 *et seq.*

He is bound to transfer the cause.— Livermore *v.* Brundage, 64 Cal. 299, 30 Pac. 848; Hawpe *v.* Smith, 22 Tex. 410; Rines *v.* Boyd, 7 Wis. 155.

88. Rawson *v.* Boughton, 5 Ohio 328; Smith *v.* Hardin, 68 Tex. 120, 3 S. W. 453.

89. Shannon *v.* Smith, 31 Mich. 451; Poole *v.* Mueller Bros. Furniture, etc., Co., 80 Tex. 189, 15 S. W. 1055, holding therefore that where a judgment is reversed because of disqualification of the trial judge and remanded to the same court, the cause is properly triable there by one who has in the meantime succeeded the trial judge in office.

90. *In re* Hancock, 91 N. Y. 284 [*reversing* 27 Hun 78].

91. Evans *v.* State, 58 Ark. 47, 22 S. W. 1026.

92. *Alabama.*— Salm *v.* State, 89 Ala. 56, 8 So. 66.

California.— People *v.* De la Guerra, 24 Cal. 73.

Florida.— State *v.* Hocker, 34 Fla. 25, 15 So. 581, 25 L. R. A. 114.

Idaho.— Gordon *v.* Conor, 5 Ida. 673, 51 Pac. 747.

Michigan.— Shannon *v.* Smith, 31 Mich. 451.

Missouri.— State *v.* Wofford, 111 Mo. 526, 20 S. W. 236.

Nevada.— Frevert *v.* Swift, 19 Nev. 363, 11 Pac. 273.

formal preliminary or ministerial acts which do not require an exercise of discretion are not void by reason of the disqualification.[93]

3. Effect as Rendering Acts Void or Voidable. In the absence of statute positively prohibiting a judge from taking jurisdiction of a cause in which he is disqualified, the general rule is that his acts therein are only voidable, whether his disqualification arises from interest,[94] from relationship,[95] from having been counsel,[96] or from having presided at a former trial.[97] But there are courts which

South Dakota.— State *v.* Finder, 12 S. D. 423, 81 N. W. 959 [*disaffirming* 10 S. D. 103, 72 N. W. 97].

Texas.— State *v.* Burks, 82 Tex. 584, 18 S. W. 662; Reed *v.* State, 11 Tex. App. 587; Fellrath *v.* Gilder, 1 Tex. App. Civ. Cas. § 1060.

See 29 Cent. Dig. tit. "Judges," § 235 *et seq.*

93. *Alabama.*— Plowman *v.* Henderson, 59 Ala. 559; Hayes *v.* Collier, 47 Ala. 726; Heydenfeldt *v.* Towns, 27 Ala. 423. But see Salm *v.* State, 89 Ala. 56, 8 So. 66.

California.— People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933, holding that a disqualified judge may draw a jury for the term of court at which defendant is to be tried.

Georgia.— Brantley *v.* Greer, 71 Ga. 11 (holding that a disqualified judge may allow costs to an auditor serving under his order); Thomas *v.* Jones, 64 Ga. 139; Kean *v.* Lathrop, 58 Ga. 355.

Iowa.— Howe *v.* Jones, 71 Iowa 92, 32 N. W. 187; Ellsworth *v.* Moore, 5 Iowa 486.

Louisiana.— Gibson *v.* Selby, 2 La. Ann. 628.

Maine.— Codman *v.* Lowell, 3 Me. 52.

Maryland.— Buckingham *v.* Davis, 9 Md. 324.

Michigan.— McFarlane *v.* Clark, 39 Mich. 44, 33 Am. Rep. 346.

Mississippi.— Grinstead *v.* Buckley, 32 Miss. 148.

Missouri.— State *v.* Goddard, 162 Mo. 198, 62 S. W. 697; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636; State *v.* Shea, 95 Mo. 85, 8 S. W. 409. But see Dawson *v.* Dawson, 29 Mo. App. 521, holding that a disqualified trial judge could not execute a mandate of the appellate court, strictly following Lacy *v.* Barrett, 75 Mo. 469, which held that when a judge announced his disqualification, he abdicated his office as to that case and could not order an election of a special judge. This latter case, however, was explained and limited in State *v.* Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830, which held that he could order the election of a special judge.

Montana.— Granite Mountain Min. Co. *v.* Durfee, 11 Mont. 222, 27 Pac. 919; Littrell *v.* Wilcox, 11 Mont. 77, 27 Pac. 394.

Nebraska.— State *v.* Gurney, 17 Nebr. 523, 23 N. W. 524.

New York.— Bell *v.* Vernooy, 18 Hun 125; Lansing *v.* Albany Ins. Co., Hopk. 102.

Oklahoma.— Cullins *v.* Overton, 7 Okla. 470, 54 Pac. 702.

Tennessee.— Glasgow *v.* State, 9 Baxt. 485.

Texas.— Cock *v.* State, 8 Tex. App. 659.

West Virginia.— Findley *v.* Smith, 42 W. Va. 299, 26 S. W. 370.

Wisconsin.— State *v.* Collins, 5 Wis. 339.

See 29 Cent. Dig. tit. "Judges," § 236.

Contra.— Harris *v.* Wallace, 12 Nova Scotia 326, holding that a judge who has been counsel for a party is disqualified even to sign *pro forma* orders.

A judge sued in his own court may confess judgment.— Thornton *v.* Lane, 11 Ga. 459.

Duty of disqualified judge to transfer cause see *supra*, VII, R, 1.

94. *Alabama.*— Hayes *v.* Collier, 47 Ala. 726; Hine *v.* Hussey, 45 Ala. 496; Heydenfeldt *v.* Towns, 27 Ala. 423.

Arkansas.— Hanly *v.* Adams, 15 Ark. 232.

Georgia.— Beall *v.* Sinquefield, 73 Ga. 48.

Iowa.— See Foreman *v.* Hunter, 59 Iowa 550, 13 N. W. 659.

Louisiana.— See Gibson *v.* Foster, 2 La. Ann. 503, holding that before the code of practice was adopted the rule of the text obtained.

New Hampshire.— Stearns *v.* Wright, 51 N. H. 600; Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

West Virginia.— Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238; Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370.

See 29 Cent. Dig. tit. "Judges," § 235 *et seq.*

95. *Alabama.*— Salm *v.* State, 89 Ala. 56, 8 So. 66; Trawick *v.* Trawick, 67 Ala. 271; Plowman *v.* Henderson, 59 Ala. 559; Hayes *v.* Collier, 47 Ala. 726; Hine *v.* Hussey, 45 Ala. 496; State *v.* Castleberry, 23 Ala. 85; Hall *v.* Wilson, 14 Ala. 295.

Missouri.— State *v.* Ross, 118 Mo. 23, 23 S. W. 196.

New Hampshire.— Stearns *v.* Wright, 51 N. H. 600; Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

New York.— Paddock *v.* Wells, 2 Barb. Ch. 331.

South Dakota.— *In re* Taber, 13 S. D. 62, 82 N. W. 398.

See 29 Cent. Dig. tit. "Judges," § 235 *et seq.*

96. *Alabama.*— Hayes *v.* Collier, 47 Ala. 726; Hine *v.* Hussey, 45 Ala. 496.

Iowa.— Floyd County *v.* Cheney, 57 Iowa 160, 10 N. W. 324.

Louisiana.— Fly *v.* Noble, 37 La. Ann. 667.

Mississippi.— Thomas *v.* State, 5 How. 20.

New Hampshire.— Stearns *v.* Wright, 51 N. H. 600; Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

Virginia.— Louisville, etc., R. Co. *v.* Taylor, 93 Va. 226, 24 S. E. 1013.

See 29 Cent. Dig. tit. "Judges," § 235 *et seq.*

97. State *v.* Hartley, 75 Conn. 104, 52 Atl. 615.

hold that the acts of a judge disqualified by interest [98] or by having been counsel [99] are void, independent of any statutory provision. Where a judge is by statutory inhibition deprived of authority to act, any proceedings before him are absolutely void,[1] although the parties may agree to waive objections to the jurisdiction and consent that he try the case.[2]

4. EFFECT OF DISQUALIFICATION OF ONE MEMBER OF COURT.[3] It has been held that if a disqualified member of a court composed of several judges participates in the hearing and determination, it invalidates the decision,[4] even though his presence

98. *Kentucky.*— Chism *v.* Evans, 9 Ky. L. Rep. 765.

Massachusetts.—Taylor *v.* Worcester County Com'rs, 105 Mass. 225; Hall *v.* Thayer, 105 Mass. 219, 7 Am. Rep. 513; Sigourney *v.* Sibley, 22 Pick. 507, 33 Am. Dec. 762.

Michigan.— Walton *v.* Torrey, Harr. 259.

Ohio.— Cincinnati, etc., R. Co. *v.* Gill, 1 Ohio Dec. (Reprint) 501, 10 West. L. J. 213.

Tennessee.— Bolling *v.* Anderson, 4 Baxt. 550.

Texas.— Templeton *v.* Giddings, (1889) 12 S. W. 851.

England.— Reg. *v.* Hertfordshire, 6 Q. B. 753, 51 E. C. L. 753; Reg. *v.* Suffolk, 18 Q. B. 416, 83 E. C. L. 416.

See 29 Cent. Dig. tit. "Judges," § 235 *et seq.*

99. Reams *v.* Kearns, 5 Coldw. (Tenn.) 217. *Contra,* Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

1. *Alabama.*— Heydenfeldt *v.* Towns, 27 Ala. 423; State *v.* Castleberry, 23 Ala. 85.

California.— *In re* White, 37 Cal. 190.

Florida.— State *v.* Young, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636.

Indiana.— Fechheimer *v.* Washington, 77 Ind. 366.

Maryland.— Blackburn *v.* Cranfurd, 22 Md. 447.

Michigan.— Horton *v.* Howard, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198; West *v.* Wheeler, 49 Mich. 505, 13 N. W. 836; Stockwell *v.* White Lake Tp. Bd., 22 Mich. 341; Peninsular R. Co. *v.* Howard, 20 Mich. 18.

Missouri.— *Ex p.* Bedard, 106 Mo. 616, 17 S. W. 693.

Nevada.— Frevert *v.* Swift, 19 Nev. 363, 11 Pac. 273.

New Hampshire.— Stearns *v.* Wright, 51 N. H. 600; Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114; Russell *v.* Perry, 14 N. H. 152.

New York.— People *v.* Connor, 142 N. Y. 130, 36 N. E. 807 [*affirming* 65 Hun 392, 20 N. Y. Suppl. 209]; People *v.* Greenburgh, 57 N. Y. 549; Oakley *v.* Aspinwall, 3 N. Y. 547; Chambers *v.* Clearwater, 1 Abb. Dec. 341, 1 Keyes 310 [*affirming* 41 Barb. 200]; Elmira Realty Co. *v.* Gibson, 103 N. Y. App. Div. 140, 92 N. Y. Suppl. 913; *In re* Hancock, 27 Hun 78; Matthews *v.* Noble, 25 Misc. 674, 55 N. Y. Suppl. 190; Wigand *v.* Dejonge, 8 Abb. N. Cas. 260; Jewett *v.* Albany City Bank, Clarke 179. *Contra, In re* Dodge, etc., Mfg. Co., 14 Hun 440 [*reversed* on another ground in 77 N. Y. 101, 33 Am. Rep. 579].

North Dakota.— Orcutt *v.* Conrad, 10 N. D. 431, 87 N. W. 982.

Tennessee.— Pierce *v.* Bowers, 8 Baxt. 353; Reams *v.* Kearns, 5 Coldw. 217.

Texas.— Templeton *v.* Giddings, (1889) 12 S. W. 851; Burks *v.* Bennett, 62 Tex. 277; Newcome *v.* Light, 58 Tex. 141, 44 Am. Rep. 604; Chambers *v.* Hodges, 23 Tex. 104; Garrett *v.* Gaines, 6 Tex. 435; Jouett *v.* Gunn, 13 Tex. Civ. App. 84, 35 S. W. 194; Fieburg *v.* Isbell, (Civ. App. 1894) 25 S. W. 988; Woody *v.* State, (Cr. App. 1902) 69 S. W. 155; Graham *v.* State, 43 Tex. Cr. 110, 63 S. W. 558; January *v.* State, 36 Tex. Cr. 488, 38 S. W. 179; Abrams *v.* State, 31 Tex. Cr. 449, 20 S. W. 987; Fellrath *v.* Gilder, 1 Tex. App. Civ. Cas. § 1060; Baldwin *v.* McMillan, 1 Tex. App. Civ. Cas. § 515.

Vermont.— Hill *v.* Wait, 5 Vt. 124.

Washington.— State *v.* Sachs, 3 Wash. 691, 29 Pac. 446.

United States.— Cox *v.* U. S., 100 Fed. 293, 40 C. C. A. 380.

See 29 Cent. Dig. tit. "Judges," § 235 *et seq.*

2. Oakley *v.* Aspinwall, 3 N. Y. 547; Chambers *v.* Clearwater, 1 Abb. Dec. (N. Y.) 341, 1 Keyes 310; Jouett *v.* Gunn, 13 Tex. Civ. App. 84, 35 S. W. 194; January *v.* State, 36 Tex. Cr. 488, 38 S. W. 179; Abrams *v.* State, 31 Tex. Cr. 449, 20 S. W. 987; Fellrath *v.* Gilder, 1 Tex. App. Civ. Cas. § 1060. *Compare* Walker *v.* Rogan, 1 Wis. 597.

See, however, as to waiver by consent *supra,* VII, P, 2.

3. Effect of disqualification of one member of court on powers of remaining members see COURTS, 11 Cyc. 759.

4. Stockwell *v.* White Lake Tp. Bd., 22 Mich. 341 (holding that a proceeding before the township board to remove an officer of a school-district is in the nature of a judicial investigation; and when one of the board is interested in the subject of the complaint, and his presence is essential to a quorum, the proceedings are void); Case *v.* Hoffman, (Wis. 1898) 74 N. W. 220 (holding that the decision of a case on appeal is void where it was participated in by a judge who was disqualified); State *v.* Bradish, 95 Wis. 205, 70 N. W. 172, 37 L. R. A. 289 (holding that one of three members of a town board of supervisors who hires a minor to purchase liquor so as to obtain evidence against the dealer of selling to minors is incompetent to sit as a member on a hearing to revoke the dealer's license for selling to minors; so that, he sitting, the action of the board revoking his license is void).

was not required to constitute a quorum,[5] and even though the ballot was such that the decision would have been the same had he not voted.[6]

VIII. SPECIAL AND SUBSTITUTE JUDGES.[7]

A. In General. While judicial power cannot be delegated by a judge or granted by consent of parties in the absence of authority conferred by law,[8] provision is made either by constitution or statute in the different states for the selection of a special or substitute judge in the event that the regular judge is disqualified or unable to act.[9] In some states provision is made for the selection of a practising attorney to act as special judge;[10] but in other states neither the court

Sitting with court to make a quorum.— In some cases a disqualified member may sit with the court to make a quorum, and where he does not participate in the decision it is valid. Nephi Irr. Co. *v.* Jenkins, 8 Utah 452, 32 Pac. 699; Walker *v.* Rogan, 1 Wis. 597. *Contra*, Reg. *v.* Suffolk, 18 Q. B. 416, 83 E. C. L. 416.

Illegal constitution of the court as distinguished from mere disqualification of one or more of the judges thereof renders the decision absolutely void. Thus, where the court was required by statute to be held by a justice of the supreme court without an associate, and the court was in fact held by a justice of the supreme court with two justices of the sessions, the decision was void. People *v.* Bork, 96 N. Y. 188.

5. Oakley *v.* Aspinwall, 3 N. Y. 547 (where a disqualified judge of the court of appeals sat on the hearing and voted on the decision, and a reargument was ordered, although he was not required to sit to constitute a quorum); Reg. *v.* Chapman, 1 Ont. 582.

6. Oakley *v.* Aspinwall, 3 N. Y. 547; Reg. *v.* Hertfordshire, 6 Q. B. 753, 51 E. C. L. 753; Reg. *v.* Chapman, 1 Ont. 582. *Contra*, Biggins *v.* Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238.

7. **Authority and powers of special and substitute judges** see *infra*, VIII, C.

Authority and powers of special and substitute judges in chambers or in vacation see *supra*, VI, C, 2.

Authority of regular judge after appointment of special judge see *supra*, VI, C, 1, n.

Showing as to appointment of special judge in transcript for appeal see APPEAL AND ERROR, 3 Cyc. 103 note 70.

Showing as to disqualification of regular judge in record on appeal from special judge see APPEAL AND ERROR, 2 Cyc. 1033 note 19.

8. Davis *v.* Wilson, 65 Ill. 525; Zonker *v.* Cowan, 84 Ind. 395; Shoultz *v.* McPheeters, 79 Ind. 373 (holding that a statute attempting to confer judicial power on a master commissioner in case of the absence of incompetency of the judge is void); Michales *v.* Hine, 3 Greene (Iowa) 470; Wright *v.* Boon, 2 Greene (Iowa) 458. But in a later case the supreme court of Iowa said, "Without saying whether we could fully concur in this latter doctrine, [that the consent of parties will not confer power] it is apparent that such substitution cannot be made against the objection of either party." Smith *v.* Frisbie, 7 Iowa 486, 487.

The parties to a suit cannot by stipulation empower any individual other than a judge of the court to exercise its powers.. Cobb *v.* People, 84 Ill. 511; Bishop *v.* Nelson, 83 Ill. 601; Hoagland *v.* Creed, 81 Ill. 506; Winchester *v.* Ayers, 4 Greene (Iowa) 104. Where, however, a person was "sitting, by consent of counsel," as special judge, in the absence of one of the commissioned judges, four regular judges being present and sitting, the decision is not void on the ground that a judge cannot be created except in the manner prescribed by law, since such person was not a judge, but was merely "acting as judge" by consent of parties and the court. Radford Trust Co. *v.* East Tennessee Lumber Co., 92 Tenn. 126, 21 S. W. 329.

9. See the constitutions and statutes of the different states, and the following decisions: Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; Crawford *v.* Lawrence, 154 Ind. 288, 56 N. E. 673; Burrell *v.* State, 129 Ind. 290, 28 N. E. 699; Fassinow *v.* State, 89 Ind. 235; Bowlus *v.* Brier, 87 Ind. 391; State *v.* Murdock, 86 Ind. 124; Zonker *v.* Cowan, 84 Ind. 395; Feaster *v.* Woodfill, 23 Ind. 493; Lane *v.* Miller, 22 Ind. 104; Starry *v.* Winning, 7 Ind. 311; Case *v.* State, 5 Ind. 1; Burlington University *v.* Stewart, 12 Iowa 442; *In re* Corum, 62 Kan. 271, 62 Pac. 661, 84 Am. St. Rep. 382; Hindman *v.* Toney, 97 Ky. 413, 30 S. W. 1006, 17 Ky. L. Rep. 286; Goldman *v.* Goldman, 47 La. Ann. 1463, 17 So. 881; State *v.* Fontelieu, 30 La. Ann. 1122; State *v.* Judges Ninth, etc., Judicial Dists., 29 La. Ann. 785; State *v.* McCoy, 29 La. Ann. 593; Cabrol's Succession, 28 La. Ann. 637; State *v.* Downs, 164 Mo. 471, 65 S. W. 258; *In re* Hathaway, 9 Hun (N. Y.) 79 [*affirmed* in 71 N. Y. 238]; Aldinger *v.* Pugh, 10 N. Y. Suppl. 684; State *v.* Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 100; Greer *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1075; Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960 [*affirming* (Civ. App. 1893) 21 S. W. 375]; Prendergass *v.* Beale, 59 Tex. 446; Castles *v.* Burney, 34 Tex. 470; Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100; Wynns *v.* Underwood, 1 Tex. 48; Snow *v.* State, 11 Tex. App. 99; Mitchell *v.* Adams, 1 Tex. Unrep. Cas. 117; State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

10. See the constitutions and statutes of the different states. And see Castleberry *v.*

nor the parties to an action can empower an attorney at law to preside as judge at a trial or perform judicial duties.[11] Statutes authorizing the election of an attorney at law as special judge by members of the bar where the regular judge is absent or disqualified are generally held to be constitutional;[12] and the same is true where the statute authorizes the regular judge to appoint,[13] or the parties to agree upon[14] an attorney to hear and determine the case. But statutes authorizing trials before a member of the bar have been declared unconstitutional in several states.[15] Statutes authorizing the substitution of another judge when the regular judge cannot preside have also been upheld by the courts.[16]

B. Selection of Special and Substitute Judges — 1. Grounds For Selection. In those jurisdictions where provision is made for the selection of special or substitute judges, the usual grounds authorizing such selection are the absence,[17] dis-

State, 68 Ga. 49 (holding, however, that the appointment of a member of the bar as judge *pro hac vice* is confined to civil cases); State *v.* Judges First Dist. Ct., 35 La. Ann. 1007; Porter *v.* State, (Tex. Cr. App. 1905) 86 S. W. 767 (holding that the attorney may be elected on the first day of the term if the regular judge is absent, but that he will be ousted by the subsequent appearance of the regular judge).

11. Haverly Invincible Min. Co. *v.* Howcutt, 6 Colo. 574; McGarvey *v.* Hall, 7 Colo. App. 426, 43 Pac. 909; Winchester *v.* Ayers, 4 Greene (Iowa) 104; Andrews *v.* Beck, 23 Tex. 455; Van Slyke *v.* Trempealeau County Farmers' Mut. F. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50.

12. *Kentucky.*— Rudd *v.* Woolfolk, 4 Bush 555; Grayson *v.* Bagby, 74 S. W. 659, 25 Ky. L. Rep. 44.

Mississippi.— Montgomery *v.* Commercial Bank, Sm. & M. Ch. 632.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260; State *v.* Daniels, 66 Mo. 192; State *v.* Able, 65 Mo. 357.

Tennessee.— Harris *v.* State, 100 Tenn. 287, 45 S. W. 438; Halliburton *v.* Brooks, 7 Baxt. 318; Ligan *v.* State, 3 Heisk. 159.

Texas.— Porter *v.* State, (Cr. App. 1905) 86 S. W. 767, so holding, although the statute does not require such special judge to give bond.

West Virginia.— Lynch *v.* Henry, 25 W. Va. 416; Winans *v.* Winans, 22 W. Va. 678; State *v.* Williams, 14 W. Va. 851.

See 29 Cent. Dig. tit. "Judges," § 47.

13. State *v.* Murdock, 86 Ind. 124; Pate *v.* Tait, 72 Ind. 450; State *v.* Dufour, 63 Ind. 567; Brown *v.* Buzan, 24 Ind. 194; Starry *v.* Winning, 7 Ind. 311; Smith *v.* Haworth, 53 Mo. 88; Harper *v.* Jacobs, 51 Mo. 296.

It is no violation of the maxim "that no man should be a judge in his own cause," for the chancellor, under the provision of the statute, to select by lot a member of the bar to try a cause in which he may be interested, and to sign and cause to be entered in the proceedings of his court a decree so rendered. Grinstead *v.* Buckley, 32 Miss. 148.

14. Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83; Henderson *v.* Pope, 39 Ga. 361; Brogan *v.* Savage, 5 Sneed (Tenn.) 689.

A statute attempting to compel a party to a suit to agree to the selection of a special judge is unconstitutional, however. *Ex p.* Amos, 51 Ala. 57.

15. Winchester *v.* Ayers, 4 Greene (Iowa) 104; State *v.* Fritz, 27 La. Ann. 689; State *v.* Phillips, 27 La. Ann. 663; Hayes *v.* Hayes, 10 La. Ann. 642; State *v.* Judge Twelfth Judicial Dist., 9 La. Ann. 64; State *v.* Judge Sixth Judicial Dist., 9 La. Ann. 62; Cohen *v.* Hoff, 2 Treadw. (S. C.) 657, 3 Brev. 500; Van Slyke *v.* Trempealeau County Farmers' Mut. F. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50.

16. *California.*— Gardner *v.* Jones, 126 Cal. 614, 59 Pac. 126; People *v.* Mellon, 40 Cal. 648.

Georgia.— Taylor *v.* Smith, 4 Ga. 133.

Indiana.— Starry *v.* Winning, 7 Ind. 311.

Kentucky.— Royal Ins. Co. *v.* Rufer, 89 Ky. 518, 12 S. W. 1043, 11 Ky. L. Rep. 728; Hughes *v.* Com., 89 Ky. 227, 12 S. W. 269, 11 Ky. L. Rep. 424; Farrell *v.* Com., 7 Ky. L. Rep. 683.

Louisiana.— *In re* Ryan, 10 La. Ann. 540. But see State *v.* Judges Ninth, etc., Judicial Dists., 29 La. Ann. 785.

Michigan.— People *v.* Gallager, 75 Mich. 512, 42 N. W. 1063.

Missouri.— State *v.* Miller, 67 Mo. 604; *Ex p.* Allen, 67 Mo. 534.

Montana.— Farleigh *v.* Kelly, 24 Mont. 369, 62 Pac. 495, 685.

See 29 Cent. Dig. tit. "Judges," § 47.

See, however, Smith *v.* Normant, 5 Yerg. (Tenn.) 271.

17. *Indiana.*— Feigel *v.* State, 85 Ind. 580; Case *v.* State, 5 Ind. 1.

Kansas.— *In re* Corum, 62 Kan. 271, 62 Pac. 661, 84 Am. St. Rep. 382.

Kentucky.— Hindman *v.* Toney, 97 Ky. 413, 30 S. W. 1006, 17 Ky. L. Rep. 286; Taylor *v.* Kohn, 7 Ky. L. Rep. 224. See Royal Ins. Co. *v.* Rufer, 89 Ky. 518, 12 S. W. 1043, 11 Ky. L. Rep. 728.

Michigan.— People *v.* Gallager, 75 Mich. 512, 42 N. W. 1063; People *v.* Witherell, 14 Mich. 48.

Missouri.— State *v.* Miller, 67 Mo. 604; *Ex p.* Allen, 67 Mo. 534.

New York.— People *v.* Oneida County, 82 Hun 105, 24 N. Y. Civ. Proc. 152, 31 N. Y. Suppl. 63. The temporary absence of a sur-

qualification,[18] sickness,[19] or death[20] of the regular judge, or vacancy in the office,[21]

rogate on his vacation leaving instructions with his clerk not to disclose his whereabouts, will authorize the appointment by a justice of the supreme court of a special surrogate to perform the duties of the office, although the regular surrogate is authorized by statute to sign orders during his vacation whenever he may be in the state. *In re* Frye, 20 N. Y. Suppl. 588.

South Carolina.— Flemming *v.* Lyon, 3 McCord 183.

Texas.— Murray *v.* Broughton, 46 Tex. 351; Greer *v.* State, (Cr. App. 1901) 65 S. W. 1075. See Scott *v.* State, (Cr. App. 1902) 68 S. W. 177.

Wisconsin.— Klaise *v.* State, 27 Wis. 462. See 29 Cent. Dig. tit. "Judges," § 49.

In Rhode Island absence means absence from the district, not the town or courthouse where the trial is held. Opie *v.* Clancy, 27 R. I. 42, 60 Atl. 635.

Cause of absence.— When the law authorizes the election of a special judge in the event of the absence of the regular judge, the cause of such absence is immaterial. Merrill *v.* State, (Tex. Cr. App. 1902) 70 S. W. 979.

Absence of special judge.— There may be more than one special judge elected during the same term to hold a court in the absence of the regular judge, if from the absence of the first elected judge there be reason for the election of a second special judge. State *v.* Newman, 49 W. Va. 724, 39 S. E. 655.

18. *Alabama.*— Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83.

Arkansas.— Adams *v.* State, 11 Ark. 466.

Georgia.— Henderson *v.* Pope, 39 Ga. 361; Taylor *v.* Smith, 4 Ga. 133.

Indiana.— Smith *v.* State, 145 Ind. 176, 42 N. E. 1019; Pate *v.* Tait, 72 Ind. 450; State *v.* Dufour, 63 Ind. 567; Kennedy *v.* State, 53 Ind. 542; *Ex p.* Skeen, 41 Ind. 418; Barnes *v.* State, 28 Ind. 82; Murphy *v.* Barlow, 5 Ind. 230.

Kansas.— *In re* Corum, 62 Kan. 271, 62 Pac. 661, 84 Am. St. Rep. 382.

Kentucky.— Smith *v.* Blakeman, 8 Bush 476.

Louisiana.— State *v.* Fontelieu, 30 La. Ann. 1122; State *v.* Judges of Ninth, etc., Judicial Dist., 29 La. Ann. 785; State *v.* McCoy, 29 La. Ann. 593; Cabrol's Succession, 28 La. Ann. 637.

Mississippi.— Kelly *v.* State, 79 Miss. 168, 30 So. 49; Butler *v.* State, 57 Miss. 630; Grinstead *v.* Buckley, 32 Miss. 148; Peter *v.* State, 6 How. 326.

Missouri.— State *v.* Wear, 129 Mo. 619, 31 S. W. 608; State *v.* Downs, (1901) 65 S. W. 258; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636; State *v.* Brownfield, 83 Mo. 448; Lacy *v.* Barrett, 75 Mo. 469; State *v.* Able, 65 Mo. 357; State *v.* Thomas, 32 Mo. App. 159.

Montana.— Farleigh *v.* Kelly, 24 Mont. 369, 62 Pac. 495, 685.

Nebraska.— Seay *v.* Shrader, (1903) 95 N. W. 690.

Nevada.— State *v.* Mack, (1902) 69 Pac. 862.

New York.— Whitney *v.* Post, 8 Paige 36.

Oregon.— Baisley *v.* Baisley, 15 Oreg. 183, 13 Pac. 888.

Pennsylvania.— Com. *v.* Drum, 58 Pa. St. 9; Kolb's Case, 4 Watts 154. However, it has been held that where on the argument of a rule the president judge was disqualified and the two other judges differed, a special judge would not be called in to sit in place of the president judge and hear a reargument. Potter *v.* Hoppin, 1 Wkly. Notes Cas. 301.

South Dakota.— State *v.* Palmer, 4 S. D. 543, 57 N. W. 490.

Texas.— Greer *v.* State, (Cr. App. 1901) 65 S. W. 1075; Austin *v.* Nalle, 85 Tex. 520, 22 S. W. 668, 960 [*affirming* (Civ. App. 1893) 21 S. W. 375]; Prendergass *v.* Beale, 59 Tex. 446; Murray *v.* Broughton, 46 Tex. 351; Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100; Early *v.* State, 9 Tex. App. 476.

Wisconsin.— Haley *v.* Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321, 956.

See 29 Cent. Dig. tit. "Judges," § 50.

What disqualifies.—In Missouri where, upon the death of the judge who has tried a criminal case, one of the attorneys in the case becomes his successor in office, such successor is disqualified to settle a bill of exceptions therein, and a special judge may be elected for that purpose. State *v.* Wofford, 111 Mo. 526, 20 S. W. 236. But the fact that the presiding judge was the person from whom property was alleged to have been stolen is not a good ground for disqualification in Texas, because he is not thereby shown to be "interested" in the case, not being a party thereto or liable to any loss or profit therefrom, otherwise than any other person in the body politic. Davis *v.* State, 44 Tex. 523. And the law does not authorize a district judge presiding over a court having criminal jurisdiction to recuse himself simply because he is connected by blood or marriage with an accused. State *v.* Judges Tenth Judicial Dist., 41 La. Ann. 319, 6 So. 22. And see *supra*, VII.

19. *Alabama.*— Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666; Louisville, etc., R. Co. *v.* Malone, 116 Ala. 600, 22 So. 897.

Arkansas.— Bullock *v.* Neal, 42 Ark. 278.

Kansas.— *In re* Corum, 62 Kan. 271, 62 Pac. 661, 84 Am. St. Rep. 382.

Michigan.— People *v.* Gallagher, 75 Mich. 512, 42 N. W. 1063.

Missouri.— Gale *v.* Michie, 47 Mo. 326.

North Carolina.— State *v.* Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105.

Wisconsin.— Klaise *v.* State, 27 Wis. 462. See 29 Cent. Dig. tit. "Judges," § 48.

20. State *v.* Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105.

21. Burlington University *v.* Stewart, 12 Iowa 442; Gale *v.* Michie, 47 Mo. 326.

or where the regular judge is for any cause unable to hold his court[22] or requests another judge to sit in his stead.[23]

2. MANNER OF SELECTION — a. Special Judges — (I) *BY AGREEMENT.* In some states special judges may be agreed upon by the parties in litigation.[24]

(II) *BY APPOINTMENT.* The power to appoint a special judge is, by statutory provision, conferred upon different officials in the different states.[25] Thus in some jurisdictions special judges may be appointed by the regular judge,[26] In

22. See the statutes of the different states. And see State *v.* Miller, 67 Mo. 604; *Ex p.* Allen, 67 Mo. 534. See, however, Citizens Nat. Bank *v.* Graham, 147 Mo. 250, 48 S. W. 910 [*approved* in Ladd *v.* Forsee, 163 Mo. 506, 63 S. W. 831] (holding that under the constitution the parties to a suit cannot agree upon a special judge and give him jurisdiction to try a case unless the regular judge is sick, absent, or for some cause unable to hold court, and that the mere fact that it will discommode him is not enough); Gale *v.* Michie, 47 Mo. 326 (holding that a statute providing that "if there be a vacancy in the office of judge of any circuit, or if he be sick, absent or from any cause, unable to hold any term of court of any county in his circuit, such term of court may be held by a judge of any other circuit, and at the request of the judge of any circuit, any term of court in his circuit may be held by the judge of any other circuit," does not authorize the judge of a circuit court, in order to prevent a change of venue, to call in a neighboring judge to try a particular case).

Temporary disability.— The statute of Missouri, providing for the appointment of a special judge in the circuit court when the regular judge is under a temporary disability, applies to the circuit court of the city of St. Louis. Bremen Bank *v.* Umrath, 55 Mo. App. 43.

23. Gardner *v.* Jones, 126 Cal. 614, 59 Pac. 126; Farleigh *v.* Kelly, 24 Mont. 369, 62 Pac. 495, 685.

24. *Alabama.*— Donnell *v.* Hamilton, 77 Ala. 610.

Georgia.— Beck *v.* Henderson, 76 Ga. 360.

Kentucky.— Bohannon *v.* Tarbin, 76 S. W. 46, 25 Ky. L. Rep. 515; Louisville, etc., R. Co. *v.* Webb, 11 Ky. L. Rep. 369.

Mississippi.— Peter *v.* State, 6 How. 326, holding, however, that the statute of 1841 authorizing the parties to a suit to select a member of the bar to sit in civil cases when the presiding judge has been interested in the cause does not apply to criminal prosecutions.

Missouri.— State *v.* Wear, 145 Mo. 162, 46 S. W. 1099; State *v.* Bishop, 22 Mo. App. 435; Howard *v.* Lillard, 17 Mo. App. 228.

Tennessee.— Low *v.* State, 111 Tenn. 81, 78 S. W. 110; Neil *v.* State, 2 Lea 674, both holding, however, that the right of the parties to agree upon a special judge is limited to civil cases. The rule of the text applies to a special judge of the supreme court. Radford Trust Co. *v.* East Tennessee Lumber Co., 92 Tenn. 126, 21 S. W. 329.

Texas.— Murray *v.* Broughton, 46 Tex. 351; Wynns *v.* Underwood, 1 Tex. 48. The right to select a special judge in Texas extends to criminal as well as civil cases. Davis *v.* State, 44 Tex. 523; Thompson *v.* State, 9 Tex. App. 649; Early *v.* State, 9 Tex. App. 476. However, under the provision of the constitution directing the transfer of a case from the county court to the district court when the county judge is disqualified, the parties to the action in such a case cannot appoint a special judge by agreement. Whittington *v.* Butler, 2 Tex. App. Civ. Cas. § 790.

Washington.— Nelson *v.* Seattle Traction Co., 25 Wash. 602, 66 Pac. 61.

See 29 Cent. Dig. tit. "Judges," § 54.

This cannot be done in Arkansas as the constitution of that state requires special judges to be elected by the members of the bar. Gaither *v.* Wasson, 42 Ark. 126; Dansby *v.* Beard, 39 Ark. 254.

Selection by one party only.— It has been decided that a judgment rendered by a special judge chosen by only one party to a suit is voidable (Castles *v.* Burney, 34 Tex. 470; Mitchell *v.* Adams, 1 Tex. Unrep. Cas. 117), and that when defendant is in default and the regular judge is disqualified, plaintiff cannot select a special judge to hear proofs on a writ of inquiry (Latimer *v.* Logwood, (Tex. Civ. App. 1893) 27 S. W. 960).

The agreement must be in writing in some states. State *v.* Murdock, 86 Ind. 124; Kennedy *v.* State, 53 Ind. 542; Thompson *v.* State, 9 Tex. App. 649.

25. Beck *v.* Henderson, 76 Ga. 360 (holding that the clerk of the superior court may make the appointment if the judge is disqualified and the parties fail to make a selection): Byars *v.* Crisp, 2 Tex. App. Civ. Cas. § 707 (holding that vacancies in the office of county judge must be filled by the commissioner's court).

26. Gaston *v.* State, 117 Ala. 162, 23 So. 682; Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Smith *v.* State, 145 Ind. 176, 42 N. E. 1019 (holding that only a regular judge can appoint a special judge to act in his place); Walter *v.* Walter, 117 Ind. 247, 20 N. E. 148; Kane *v.* State, 71 Ind. 559; Bash *v.* Evans, 40 Ind. 256; Brown *v.* Buzan, 24 Ind. 194; Feaster *v.* Woodfill, 23 Ind. 493; Shotwell *v.* Taliaferro, 25 Miss. 105; State *v.* Chappell, 26 R. I. 375, 58 Atl. 1009 (holding that every justice of the district court who has no clerk may appoint an assistant justice from among the justices of the peace in his district, with power at any time to revoke the appointment).

Discretion of court as to appointment.— In Indiana if a judge of the circuit court is

others the appointment may be made by the governor upon the certification to him of the necessary facts.[27]

(III) *By Election.* A common method of selecting a special judge is by an election participated in by the members of the bar.[28]

disqualified to act by reason of an application for a change of venue, and if for any reason it is difficult to secure the judge of another circuit to act, he may appoint a competent lawyer of the state of good standing to try the case. The power to decide whether it is difficult to secure another judge is vested in the judge of the court where the case is pending. Walter *v.* Walter, 117 Ind. 247, 20 N. E. 148; Kane *v.* State, 71 Ind. 559. And his decision will not be reviewed by an appellate court, unless it appears that there has been an abuse of discretion. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Kane *v.* State, *supra*. He is not required to consult or conform to the wishes of the parties in making his selection. The suggestion of the names of several competent attorneys to the parties is merely a matter of courtesy, and he is under no obligation to heed their suggestions. Kissel *v.* Lewis, 156 Ind. 283, 59 N. E. 478. The law was formerly otherwise in this state. Barnes *v.* State, 28 Ind. 82 [*approved* in Kennedy *v.* State, 53 Ind. 542].

Formalities of appointment.— In Indiana the appointment of an attorney to act as judge must be in writing, and if not so made any judgment rendered by him will be void (Evans *v.* State, 56 Ind. 459), even if he acts with the consent of the parties (Herhster *v.* State, 80 Ind. 484). But when an appointment is made by an order entered in the order book, and the special judge qualifies, and his oath is also entered on the order book, a written appointment may be made out and filed pending objections to the special judge, and the objections may then be properly overruled. Taylor *v.* Bosworth, 1 Ind. App. 54, 27 N. E. 115. No particular form is necessary for the appointment of an attorney as special judge. State *v.* Murdock, 86 Ind. 124.

27. Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666; Louisville, etc., R. Co. *v.* Malone, 116 Ala. 600, 22 So. 897; Low *v.* State, (Tenn. 1903) 78 S. W. 110; Texas Cent. R. Co. *v.* Rowland, 3 Tex. Civ. App. 158, 22 S. W. 134.

Special supreme court judges.— Under the provisions of the constitution of Tennessee relating to the appointment of special judges of the supreme court, if any of the regular judges are disqualified the governor may appoint a sufficient number of special judges to form a full court. Waterhouse *v.* Martin, Peck (Tenn.) 374.

Fee for commission.— In Arkansas a special judge of the supreme court is entitled to receive his commission without paying the statutory fee required of all state officers. Chism *v.* Martin, 57 Ark. 83, 20 S. W. 809.

28. *Arkansas.*— Hyllis *v.* State, 45 Ark. 478; Gaither *v.* Wasson, 42 Ark. 126; Dansby *v.* Beard, 39 Ark. 254. However, there is no such thing known to the laws of Arkansas as two circuit courts held in the same circuit at the same time, one presided over by a regular judge and the other by a special judge. So while the regular judge is holding court in one county a special judge cannot be elected to hold an adjourned term in another county. State *v.* Williams, 48 Ark. 227, 2 S. W. 843.

Indiana.— Kennedy *v.* State, 53 Ind. 542; Barnes *v.* State, 28 Ind. 82. However, the proper county officers may in certain cases elect a special judge. Geigel *v.* State, 85 Ind. 580.

Kentucky.— Beauchamp *v.* Com., 4 Ky. L. Rep. 27, holding, however, that a special judge can be elected only when there is a regular judge in office.

Missouri.— State *v.* Downs, 164 Mo. 471, 65 S. W. 258 (holding that the statute governing the election of special judges applies to both civil and criminal cases); State *v.* Flournoy, 160 Mo. 324, 60 S. W. 1098 (holding that under Rev. St. § 822, if an application for a change of venue is founded on the interest, prejudice, or other objection to the judge, the case shall be sent to another county, unless the parties either request the election of, or agree upon a special judge, a special judge elected in such a case without a request by the parties has no power to act); State *v.* Punshon, 133 Mo. 44, 34 S. W. 25 (holding that the power of the members of the bar to elect a special judge to hold the term depends only on the failure of the regular judge to procure another judge to do so, and that it is not necessary that he should have made any effort to secure the attendance of another judge); State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218 (holding that the disqualified judge may order the members of the bar to elect a special judge); State *v.* Sanders, 106 Mo. 188, 17 S. W. 223 (holding that in order to disqualify an attorney from voting at an election of a special judge to try a cause upon the ground that he is of counsel in the case, it must be shown that he was counsel at the time the election was held); State *v.* Neiderer, 94 Mo. 79, 6 S. W. 708 (holding that under the statute, when the clerk of the circuit court conducts an election of a special judge and the election results in a tie vote, the clerk shall "give the casting vote").

Tennessee.— Low *v.* State, 111 Tenn. 81, 78 S. W. 110, holding that when a special judge is elected by members of the bar, the election must be held by the clerk of the court and by him alone, and that counsel concerned in the case cannot vote.

Texas.— Merrell *v.* State, (Cr. App. 1902) 70 S. W. 979, holding that if the regular judge is absent, this authorizes the election of a special judge, and that the reason for his absence cannot be raised; and that an

(IV) *Selection by Lot.* In some states when the regular judge is disqualified a member of the bar may be selected by lot to sit as special judge.[29]

b. Substitute Judges. Where a regular judge is disqualified he may in some jurisdictions request another judge to act for him[30] or exchange courts with

attorney receiving a majority of the votes of those participating in the election is elected, although other attorneys who do not vote are present in sufficient number to have changed the result. A special judge may be elected to hold a special term of the district court when the regular judge is absent holding a regular term in another county. Missouri, etc., R. Co. *v.* Stinson, 34 Tex. Civ. App. 285, 78 S. W. 986; St. Louis Southwestern R. Co. *v.* Swinney, 34 Tex. Civ. App. 219, 78 S. W. 547; Missouri, etc., R. Co. *v.* O'Connor, (Civ. App. 1904) 78 S. W. 374; Missouri, etc., R. Co. *v.* Huff, (Civ. App. 1903) 78 S. W. 249; Texas Cent. R. Co. *v.* Bender, 32 Tex. Civ. App. 568, 75 S. W. 561. Although the statute provides for the election of a special judge when the judge is unwilling to hold court, such an election cannot take place when the regular judge has resigned his office, as the constitution requires a vacancy to be filled by the commissioners' court. Byars *v.* Crisp, 2 Tex. App. Civ. Cas. § 707.

West Virginia.— Franklin *v.* Vandervort, 50 W. Va. 412, 40 S. E. 374, holding that when the regular judge of the criminal court is sick on the day fixed for the beginning of the regular term, and the clerk holds an election for a special judge, and several attorneys are placed in nomination, and the clerk, after the ballot, declares that a certain attorney has received a majority of the votes cast by the attorneys present and is duly elected, it is a compliance with the statute.

See 29 Cent. Dig. tit. "Judges," § 53.

Necessity of order for election.— In Missouri if, in a civil action, the disqualification of the regular judge is made apparent, no order for the election of a special judge is necessary, it being the duty of the clerk to proceed to hold an election (Lacy *v.* Barrett, 75 Mo. 469); and where the parties agree upon a special judge to try the case, no order for the election of such special judge is necessary (State *v.* Bishop, 22 Mo. App. 435); but in criminal cases in order to authorize the election of a special judge there must be an order made by the regular judge directing such election (State *v.* Bulling, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830). The statutes of West Virginia forbid the election of a special judge when the regular judge is present holding the court, unless the regular judge enters of record an order for such election; and if this is not done the proceedings had before the special judge are void. State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

Duties of clerk of court.— The power to hold an election of a special judge under Shannon Code Tenn. §§ 5730–5732, declare the result, and administer the oath of office is vested in the clerk, and must be exercised by him alone, whose duty it is also, both under such provisions and under the statute requiring him to keep a record of the proceedings of court, to make a record of the election at the time it is held, and authenticate the same by his official signature. Low *v.* State, 111 Tenn. 81, 78 S. W. 110.

29. Butler *v.* State, 57 Miss. 630, holding, however, that the statute applies to civil cases only and not to criminal prosecutions.

30. *Indiana.*— Hutts *v.* Hutts, 51 Ind. 581; *Ex p.* Wiley, 39 Ind. 546; Kambieskey *v.* State, 26 Ind. 225; Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370.

Indian Territory.— Glenn-Tucker *v.* Clayton, 4 Indian Terr. 511, 70 S. W. 8.

Louisiana.— State *v.* Debaillon, 36 La. Ann. 828.

Maine.— State *v.* Thomas, 56 Me. 490.

Missouri.— State *v.* Fort, 178 Mo. 518, 77 S. W. 741. Where the regular circuit judge is disqualified by an affidavit of prejudice in a criminal case, and the prosecuting attorney and defendant make no selection of an attorney at law to try the case, the judge may call in the judge of another circuit to try the case. State *v.* Hunter, 171 Mo. 435, 71 S. W. 675; State *v.* Wear, 145 Mo. 162, 46 S. W. 1099; State *v.* Gilham, 97 Mo. App. 296, 70 S. W. 943.

Montana.— Farleigh *v.* Kelly, 24 Mont. 569, 62 Pac. 495, 685.

Nevada.— State *v.* Mack, 26 Nev. 430, 69 Pac. 862.

Oregon.— Baisley *v.* Baisley, 15 Oreg. 183, 13 Pac. 888, holding, however, that the circuit judge of Baker county could not, under the act of 1880, authorize another judge to hold court in his county while he himself was holding court therein.

South Dakota.— State *v.* Palmar, 4 S. D. 543, 57 N. W. 490, holding that under the statutes governing changes of venue, it is mandatory on the judge against whom an affidavit of prejudice has been filed to call another judge to preside at the trial.

Wisconsin.— Haley *v.* Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321, 956.

See 29 Cent. Dig. tit. "Judges," § 55.

Formalities of request and appointment.— No formal request in writing is necessary to authorize one district judge to act for another. Means *v.* Stow, 29 Colo. 80, 66 Pac. 881. And see State *v.* Mack, 26 Nev. 430, 69 Pac. 862, holding that no formal application for the calling of a qualified judge is necessary when the record discloses that the acting judge is disqualified. And where a regular judge is disqualified, the appointment of another judge of a court of record need not be in writing. Wood *v.* Franklin, 97 Ind. 117; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E.

him,[31] or the case may be certified to the governor for the appointment of some other judge to preside.[32] A United States circuit judge may appoint a district judge of any district to hold a district or circuit court in any other district whenever in the judgment of such circuit judge the public interest requires.[33] In some states where a vacancy occurs in the office of circuit judge by reason of the death of the incumbent, the governor may designate the judge of another circuit to hold court in the vacant circuit.[34] When a municipal judge is disqualified, absent, or unable to act, power to appoint a substitute is generally conferred by statute upon the mayor or common council.[35]

3. Selection During or After Trial. In some states if the regular judge takes up the trial and becomes unable to continue it a special judge may be selected to do so;[36] and it has been held that a special judge may be selected to dispose of a motion for new trial[37] or to pass on a bill of exceptions.[38]

4. Eligibility to Office of Special Judge. In some states a person must be a qualified elector in order to be qualified to act as a special judge;[39] but in most states a special judge need not be a resident of the judicial district to which he is appointed.[40] And the fact that the appointee already holds some other public office does not necessarily disqualify him as special judge.[41]

1071; State *v.* Newsum, 129 Mo. 154, 31 S. W. 605. So where the judge of a circuit court wrote the clerk of the court to procure the judge of the court of common pleas to preside and charge the grand jury, and the letter was delivered to the latter judge who did as requested and presided until the arrival of the circuit judge, there was a substantial compliance with the statute. Kambieskey *v.* State, 26 Ind. 225. Under Ind. Act (1855), the substitute judge derived his power to act from the statute and not from the notice given him by the disqualified judge, the notice being simply to secure his attendance and no part of the record. Benjamin *v.* Evansville, etc., Straight Line R. Co., 28 Ind. 416.

31. Adams *v.* State, 11 Ark. 466; Walker *v.* Sneed, 7 Ark. 233.

A judge of one circuit cannot be commissioned to try one case in another circuit where the regular judge is incompetent to sit; in such case he must exchange with the judge for the entire circuit. Adams *v.* State, 11 Ark. 466.

32. Walker *v.* Sneed, 7 Ark. 233.

In Kentucky the statute provides that when the regular judge has been sworn off the bench and a judge cannot be procured by election, the clerk shall forthwith certify the facts to the governor, and he shall commission some circuit judge to attend and preside. Under this provision the duty is imposed on the clerk to decide whether a judge can be procured by election, and if he is satisfied that a judge cannot be so procured, he may certify the fact without going through the form of an election. Kennedy *v.* Com., 78 Ky. 447.

33. McDowell *v.* U. S., 159 U. S. 596, 16 S. Ct. 111, 40 L. ed. 271.

34. Howerter *v.* Kelly, 23 Mich. 337.

35. People *v.* Witherell, 14 Mich. 48 (common council); Seay *v.* Shrader, (Nebr. 1903) 95 N. W. 690 (mayor).

36. Bullock *v.* Neal, 42 Ark. 278; Louisville, etc., R. Co. *v.* Webb, 11 Ky. L. Rep. 369; Fuson *v.* Com., 12 S. W. 263, 11 Ky. L. Rep. 412; State *v.* Wofford, 111 Mo. 526, 20 S. W. 236. *Contra*, in criminal cases. Blend *v.* People, 41 N. Y. 604. And see Mason *v.* State, 26 Ohio Cir. Ct. 535, holding that where a judge becomes sick after the evidence is in, and the jury are allowed to disperse, and the court is adjourned from day to day for several weeks, a substitute judge has no authority to continue the trial.

37. Nelson *v.* Seattle Traction Co., 25 Wash. 602, 66 Pac. 61.

38. State *v.* Wofford, 111 Mo. 526, 20 S. W. 236.

39. White *v.* Reagan, 25 Ark. 622, holding, however, that he need not be a registered voter.

40. Taylor *v.* Bosworth, 1 Ind. App. 54, 27 N. E. 115; Breckinridge *v.* Com., 97 Ky. 267, 30 S. W. 634, 17 Ky. L. Rep. 163; Campbell *v.* McFadden, 9 Tex. Civ. App. 379, 31 S. W. 436. And see Kennedy *v.* Com., 78 Ky. 447.

Loss of residence.— A person elected to serve as special judge does not lose his residence by the fact that he "moved" to another state, where he returned after a year's absence, it not appearing that he intended to change his residence. State *v.* Sanders, 106 Mo. 188, 17 S. W. 223.

41. *In re* Judges Cir. Ct., 4 Fla. 4 (holding that a constitutional provision that no justice of the supreme court or judge shall be eligible to any other or different office until one year after he has ceased to be such justice or judge is not violated by a statute authorizing a disqualified justice of the supreme court to notify a judge of the circuit court to sit with the remaining justices of the supreme court for the purpose of determining the cause); State *v.* Chargois, 30 La. Ann. 1102 (holding that a practising attorney is not disqualified from acting as judge *ad hoc* because he holds the office of district attorney); Roundtree *v.* Gilroy, 57 Tex. 176

5. Qualification of Special Judge. The Revised Statutes of the United States, which authorize a United States circuit judge, in case a district judge is disabled from holding court, to appoint the judge of any other district in the circuit to discharge the duties of the disabled judge, require that the "appointment shall be filed in the clerk's office and entered on the minutes of said district court."[42] Special judges are generally required to take an oath of office before entering on the performance of their duties.[43]

6. Successor to Special or Substitute Judge. Provision is usually made by statute for the selection of another special or substitute judge to try the case if the first appointee for any reason does not act.[44]

7. Requisites of Record. Generally speaking the authority of a special or

(holding that a member of the legislature is not disqualified from acting as special judge).

42. U. S. Rev. St. § 591. See, however, National Home for Disabled Volunteer Soldiers *v.* Butler, 33 Fed. 374, holding that the appointment is complete before filing, and that a filing in the office of the clerk of the circuit court instead of the district court will not invalidate the appointment.

43. *Indiana.*— State *v.* Murdock, 86 Ind. 124; Herbster *v.* State, 80 Ind. 484; Kennedy *v.* State, 53 Ind. 542.

Kansas.— Missouri Pac. R. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050, 63 Pac. 444. Where, however, a judge *pro tem* attempted to adjourn court to a future day before taking the oath of office, but shortly afterward on the same day took the oath and adjourned court to the time mentioned in the first order, the court did not lose jurisdiction. State *v.* Earnest, 56 Kan. 31, 42 Pac. 359.

Missouri.— State *v.* Miller, 111 Mo. 542, 20 S. W. 243.

Tennessee.— Low *v.* State, 111 Tenn. 81, 78 S. W. 110.

Texas.— Murray *v.* State, 34 Tex. 331; Thompson *v.* State, 9 Tex. App. 649.

Washington.— State *v.* Sachs, 3 Wash. 691, 29 Pac. 446.

West Virginia.— State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983.

See 29 Cent. Dig. tit. "Judges," § 57.

In Georgia the law does not require an attorney who acts as judge *pro hac vice* to take an oath as judge. Reeves *v.* Graffling, 67 Ga. 512.

Effect of failure to take oath.— The failure of a special judge to take the prescribed oath will not invalidate his acts if he is in possession of and exercises the functions of the office. Powers *v.* State, 83 Miss. 691, 36 So. 6; State *v.* Miller, 111 Mo. 542, 20 S. W. 243. And the judgments rendered by a judge *pro tem* who fails to take the oath of office are voidable only and not subject to collateral attack. *In re* Hewes, 62 Kan. 288, 62 Pac. 673.

Sufficiency of oath.— An oath to the effect that the special judge will "demean himself faithfully in office" is a compliance with a statute requiring him to take an oath to try the cause "without fear, favor, or partiality." State *v.* French, 47 Mo. App. 474; State *v.* Bishop, 22 Mo. App. 435.

Waiver of oath see *infra*, VIII, D.

44. *Arkansas.*— Little Rock, etc., R. Co. *v.* Barker, 39 Ark. 491; Walker *v.* Sneed, 7 Ark. 233.

Indiana.— Smith *v.* State, 145 Ind. 176, 42 N. E. 1019 (holding that when a special judge who has been disqualified refuses to appoint another special judge, the appointment may be made by the regular judge on the ground of public policy); Cargar *v.* Fee, 119 Ind. 536, 21 N. E. 1080 (holding that a judge *pro tem* whose competency is challenged has no power to appoint another person to serve as judge *pro tem*, that power resting solely in the regular judge); Hutts *v.* Hutts, 51 Ind. 581; McCormick *v.* Hyatt, 33 Ind. 546. When a judge of another district has been called in to try a case and fails to appear at the time set for the trial, the case will not be discontinued, but should be passed to the regular docket of cases pending in the court, and a judge thereof may appoint a new judge to try the cause. Glenn *v.* State, 46 Ind. 368. And see Singleton *v.* Pidgeon, 21 Ind. 118.

Kansas.— Davis *v.* Wilson, 11 Kan. 74.

Kentucky.— Terry *v.* Baker, 67 S. W. 258, 23 Ky. L. Rep. 2406, holding that where the statute makes it the duty of the courts to hear and determine contested election cases as speedily as possible, it is the duty of a special judge who has determined not to try such a case to vacate the bench and permit some other person to be chosen to hear it instead of continuing the case.

Louisiana.— State *v.* Judge, 39 La. Ann. 793, 2 So. 595, holding that a district judge who has recused himself and appointed a lawyer or judge *ad hoc* to try the case is the only one having authority to make another appointment in case of the death, removal, or resignation of the appointee.

Missouri.— State *v.* Sanders, 106 Mo. 188, 17 S. W. 223; State *v.* Shipman, 93 Mo. 147, 6 S. W. 97 (both holding that a special judge elected to hold an entire term of court when the judge thereof is unable to do so is a judge of the court, and in case of his disqualification to try any particular criminal case, a special judge may be elected for the purpose of hearing it, either upon application of defendant or upon the order of the court); Barnes *v.* McMullins, 78 Mo. 260; Blanchard *v.* Haseltine, 79 Mo. App. 248. When a disqualified judge calls in the judge of another circuit to try the case, and the latter resigns

substitute judge must appear from the record of the case in which he acts, although the decisions are not entirely harmonious on this question.[45] Thus the record should as a rule show his selection by agreement, appointment, or election;[46]

his office before the final termination of the cause, the disqualified judge is not obliged to call in the successor of the substitute judge or any particular judge. State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136.

West Virginia.— State *v.* Carter, 49 W. Va. 709, 39 S. E. 611.

See 29 Cent. Dig. tit. "Judges," § 51.

45. Cooper *v.* Lingo, 17 Ind. 67; Low *v.* State, 111 Tenn. 81, 78 S. W. 110, holding that the authority of a special judge to preside must appear in all criminal cases, and should not be left to presumption in any case. And see cases cited *infra*, note 46 *et seq.* See, however, Fishback *v.* Weaver, 34 Ark. 569; Thomas *v.* Felt, 21 Ind. App. 265, 52 N. E. 171; Hunter *v.* Ferguson, 13 Kan. 462, holding that where the record of a case tried by a special judge in a court of general jurisdiction is merely silent upon any particular matter, it will be presumed, notwithstanding the silence, that whatever ought to have been done was not only done, but that it was rightly done.

As to substituted judges, however, there are many cases holding that their authority is presumed, in the absence of anything in the record to the contrary. People *v.* Mellon, 40 Cal. 648; Means *v.* Stow, 29 Colo. 80, 66 Pac. 881; Simon *v.* Haifleigh, 21 La. Ann. 607; State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895.

Authority to sit at adjourned term.—Where the judge of another district took an oath to faithfully perform his duties as judge *pro tem* and the case was continued to another term, it will be presumed, nothing appearing to the contrary, that he was qualified to sit at the latter term. Missouri Pac. R. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050, (Kan. 1901) 63 Pac. 444.

Where the record shows that the judge who presided at the trial was specially commissioned for that purpose, and it nowhere contains any statement by which his power or authority can be questioned, the superior court is bound to presume that he had full power and authority to act, and that he acted in obedience to his authority. Caldwell *v.* Bell, 3 Ark. 419, 6 Ark. 227.

Where there are two appointments, one valid and the other invalid, of a special judge, all his acts are presumed to have been done under the valid appointment. Epperson *v.* Rice, 102 Ala. 668, 15 So. 434.

46. *Georgia.*— Worsham *v.* Murchison, 66 Ga. 715.

Indiana.— Negley *v.* Wilson, 14 Ind. 215, holding that where an attorney other than a regular judge signs a bill of exceptions, the record should show his appointment as special judge.

Kentucky.— Slone *v.* Slone, 2 Metc. 339, holding that the selection of a temporary judge in a case should be entered on the order book.

North Carolina.— Bear *v.* Cohen, 65 N. C. 511, holding that whenever a judge exchanges districts with another with the consent of the governor or when required by the governor to hold a specified term of a superior court out of his district, the authority of the governor should be of record in every county in which he holds a term and should be attached to the record of every appeal case.

Texas.— Shultz *v.* Lempert, 55 Tex. 273; Brinkley *v.* Harkins, 48 Tex. 225; Smith *v.* State, 24 Tex. App. 290, 6 S. W. 40; Harris *v.* State, 14 Tex. App. 676; Perry *v.* State, 14 Tex. App. 166; Snow *v.* State, 11 Tex. App. 99; Thompson *v.* State, 9 Tex. App. 649 (holding that an agreement of counsel to appoint a special judge to try a cause should be perpetuated in writing, and such writing filed among the papers and made a part of the record); McMurry *v.* State, 9 Tex. App. 207.

See 29 Cent. Dig. tit. "Judges," § 63.

Contra.— Sweeptzer *v.* Gaines, 19 Ark. 96 (holding that where the law authorizes the selection of a special or substitute judge, it will be presumed, nothing to the contrary appearing, that the selection was regularly made); Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146 (holding that a judge of a superior court of a particular county who holds court in another county must be presumed, in the absence of evidence to the contrary, to be acting upon the request of the governor or of the judge of the court of the latter county); State *v.* Sachs, 3 Wash. 691, 29 Pac. 446 (holding that where the statute requires the stipulation of the parties agreeing upon a special judge to be in writing, it will be presumed that there was a written stipulation, although the journal entries do not expressly so state).

In Indiana and Missouri the rule of the text applies to special judges. State *v.* Murdock, 86 Ind. 124; Kennedy *v.* State, 53 Ind. 542 (both holding that the appointment of an attorney to hold court when for any cause the judge is unable to attend must be in writing and entered on the order book); Smith *v.* Haworth, 53 Mo. 88 (holding that an order appointing a special judge to try a particular case should be entered of record). But it does not apply to substitute judges. Wood *v.* Franklin, 97 Ind. 117; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071; State *v.* Newsum, 129 Mo. 154, 31 S. W. 605.

In Tennessee an order for the election of a special judge under Shannon Code, §§ 5730–5732, to hold court on account of the absence of the regular judge should be entered on the minutes as a part of the caption of the proceedings of the term, and should recite the failure or inability of the regular judge to

it should show the grounds thereof,[47] and, in addition thereto, in some states his

hold court; that an election was held by the clerk, at which the person selected was duly elected by a majority of the attorneys then present and residents of the state; that such person was also in attendance, a resident of the state, and possessed all the qualifications of judge; and that before entering on his duties the oaths of office, that against dueling (section 1073) and those prescribed for special judges (section 5731), which should be copied in full on the record and signed by the special judge, were duly administered to him; but where the election is to try a certain case the entry should be made under the style of the case to be tried, and should show, in addition to the above facts, the disqualification of the regular judge, and that the attorneys therein interested took no part in the election. Low *v.* State, 111 Tenn. 81, 78 S. W. 110.

Judicial notice of commission.— Where a special judge has been appointed and commissioned by the governor, the supreme court will take judicial notice of his authority, and his appointment need not appear in the record of the case. Bell *v.* State, 115 Ala. 25, 22 So. 526. See, however, Bear *v.* Cohen, 65 N. C. 511.

Consent to the appointment of a special judge or chancellor cannot be presumed against parties only constructively before the court, or against minors or married women, or purchasers who are not parties to the original record. Rudd *v.* Woolfolk, 4 Bush (Ky.) 555.

Sufficiency of record.— An order reciting a temporary exchange of districts by two regular judges, the vacation of the bench by one of said judges and the invitation of an attorney by the unanimous voice of the bar to preside is a sufficient entry to authorize said attorney to take the bench. Hughes *v.* Com., 89 Ky. 227, 12 S. W. 269, 11 Ky. L. Rep. 424. And a judgment entered June 12, 1896, which recites that the regular judge was disqualified, and that "on the —— day of ——, 1806," the governor appointed a special judge sufficiently shows that the appointment was made before the case was tried. Temple Compress Co. *v.* De More, (Tex. Civ. App. 1897) 42 S. W. 778. The mere omission in the order of the words "licensed" and "enrolled" as descriptive of the attorneys who participated in the election of a special judge does not render the order a nullity, where it speaks of them as members of the bar, and recites that the clerk, in conducting the election, conformed to the statute, since it will be presumed that the clerk properly performed his duty. State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218. The record of the election and qualification of the special judge should be verified by the official signature of the clerk, and will constitute a part of the record of the case. Low *v.* State, 111 Tenn. 81, 78 S. W. 110.

Time of entry of appointment.— It is sufficient if the record of the appointment and qualification of the special judge is entered before he acts under his commission. Harris *v.* Musgrave, 72 Tex. 18, 9 S. W. 90. In Indiana, where the circuit judge may appoint a judge of the common pleas court to act as circuit judge, the circuit judge may order the letter of appointment to be entered *nunc pro tunc* and the common pleas judge may act as circuit judge after the appointment and before the entry is made. Kamhieskey *v.* State, 26 Ind. 225.

47. *Iowa.*— State *v.* Chicago, etc., R. Co., 50 Iowa 692; Burlington University *v.* Stewart, 12 Iowa 442; Muscatine *v.* Steck, 7 Iowa 505.

Kentucky.— Rudd *v.* Woolfolk, 4 Bush 555; Slone *v.* Slone, 2 Metc. 339, both holding that the reason for the selection of a temporary judge should be entered in the order book.

Massachusetts.— Com. *v.* Fay, 151 Mass. 380, 24 N. E. 201.

Tennessee.— Low *v.* State, 111 Tenn. 81, 78 S. W. 110.

Texas.— Smith *v.* State, 24 Tex. App. 290, 6 S. W. 40, holding that the reason for the selection of a special judge should be entered on the record.

See 29 Cent. Dig. tit. "Judges," § 63.

Contra.— Shircliff *v.* State, 96 Ind. 369 (appointment of second special judge); Hunter *v.* Ferguson, 13 Kan. 462; State *v.* Hunter, 171 Mo. 435, 71 S. W. 675 (holding that where a judge requested the judge of another circuit to try a case pending before the former, it was not necessary that the record should recite that no suitable person could or would be elected as special judge to try the cause, it being presumed in support of the order that the judge exercised his right under the constitution to request another judge to hold a part of his term); State *v.* Newsum, 129 Mo. 154, 31 S. W. 605 (holding that the record need not recite the reasons of the change in calling in the judge of another circuit to try a cause in which the former is disqualified); Com. *v.* Scouton, 20 Pa. Super. Ct. 503; State *v.* Newman, 49 W. Va. 724, 39 S. E. 655 (election of second special judge).

It will be presumed in a collateral proceeding that there were proper reasons for the appointment of a special judge. State *v.* Murdock, 86 Ind. 124. *Contra*, State *v.* Chicago, etc., R. Co., 50 Iowa 692.

Sufficiency of record.— Under a statute authorizing the appointment of a special judge "if it shall be difficult, in the opinion of the court, for any cause" to procure the attendance of a regular judge, a recital by the court that "in the opinion of the court such regular judge cannot be readily obtained" is sufficient to authorize the appointment of an attorney as special judge. Smith *v.* State, 145 Ind. 176, 180, 42 N. E. 1019. And see Chissom *v.* Barbour, 100 Ind. 1. Where, on appeal, the record in relation to a declination of the regular judge to preside and his ap-

eligibility[48] and qualification.[49] The transcript on appeal from the decision of a special judge should contain all facts required to be entered on the record in the court below.[50]

C. Authority, Powers, and Duties[51] — **1. Duration of Authority.** A special judge who has been chosen and has qualified retains exclusive jurisdiction over cases tried before him until they have been finally determined.[52] His authority ceases ordinarily upon entry of a final judgment.[53] It has been held that a special

pointment of another judge showed that such declination and appointment were made without objection "for good and lawful reasons," it was presumed that such declination was made on some of the grounds specified by statute. Leonard *v.* Blair, 59 Ind. 510, 514. An entry stating that the standing justice of the police court had heard the facts of the case as stated by plaintiff and was "somewhat interested in the plaintiff's favor," was sufficient to justify the standing justice to decline proceeding with the case and authorized the special justice to hear it. Williams *v.* Robinson, 6 Cush. 333, 334. Where a special judge is elected by the members of the bar to sit in the trial of a cause, such election is not invalidated by the fact that the record fails to recite the special facts which disqualified the regular judge. State *v.* Hosmer, 85 Mo. 553. A surrogate's certificate of his own disability to act in a case is sufficient proof to enable the district attorney to sit in his place as provided by statute. People *v.* Petty, 32 Hun (N. Y.) 443.

Effect of curative act see *In re* Moulton, 57 Hun (N. Y.) 589, 10 N. Y. Suppl. 717.

48. Horton *v.* Pool, 40 Ala. 629 (holding that the record should show that the person chosen to act as special judge is an attorney of the court); Low *v.* State, 111 Tenn. 81, 78 S. W. 110; Perry *v.* State, 14 Tex. App. 166. *Contra,* State *v.* Gamble, 108 Mo. 500, 18 S. W. 1111.

Sufficiency of record.— The record need not recite the provision of the statute that a person acting as special judge is "a disinterested person, learned in the law." Lawler *v.* Lyness, 112 Ala. 386, 390, 20 So. 574. Where a *pro tem* judge has been elected as provided by law, the presumption will be indulged that he possessed all the qualifications requisite to enable him to hold the court, if it appears that he was an attorney of the court, and was elected to preside, and did preside. Cotton *v.* Wolf, 14 Bush (Ky.) 238.

49. Kennedy *v.* State, 53 Ind. 542 (holding that where an attorney is appointed to try a criminal case on a change of venue thereon because of objection to the regular judge, the record should show that he took the required oath); Rudd *v.* Woodfolk, 4 Bush (Ky.) 555; Slone *v.* Slone, 2 Metc. (Ky.) 339 (both holding that the fact that the requisite oaths have been taken by a temporary judge should be entered in the order book); Low *v.* State, 111 Tenn. 81, 78 S. W. 110; Smith *v.* State, 24 Tex. App. 290, 6 S. W. 40 (holding that the fact that the oath of office was administered to a special judge should be entered on the record). *Contra,* State *v.* Gamble, 108 Mo. 500, 18 S. W. 1111; Green *v.* Walker, 99 Mo. 68, 12 S. W. 353; *In re* Loehr, 11 Mo. App. 53.

Sufficiency of record.— A recital in the record that the special judge "appeared at the bar of the court, and duly qualified to act as judge" in the absence of any recitals to the contrary imports that he was duly sworn. Ford *v.* Cameron First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 684.

50. *Georgia.*— Worsham *v.* Murchison, 66 Ga. 715, holding that it is requisite that the selection and appointment of a judge *pro hac vice* should affirmatively appear in the record, but that the absence of jurisdiction in the presiding judge would operate to reverse his judgment, not to dismiss the appeal.

Indiana.— Kennedy *v.* State, 53 Ind. 542. See, however, Feaster *v.* Woodfill, 23 Ind. 493.

Missouri.— Smith *v.* Haworth, 53 Mo. 88.

North Carolina.— Bear *v.* Cohen, 65 N. C. 511.

Texas.— Smith *v.* State, 24 Tex. App. 290, 6 S. W. 40; Harris *v.* State, 14 Tex. App. 676; Perry *v.* State, 14 Tex. App. 166; Snow *v.* State, 11 Tex. App. 99; McMurry *v.* State, 9 Tex. App. 207.

See 29 Cent. Dig. tit. "Judges," § 63.

51. **Presumptions as to authority** see *supra,* VIII, B, 7.

52. *California.*—Matthews *v.* Marin County Super. Ct., 68 Cal. 638, 10 Pac. 128.

Georgia.— Glover *v.* Morris, 122 Ga. 768, 50 S. E. 956; Landrum *v.* Chamberlin, 73 Ga. 727.

Indiana.— Mayer *v.* Haggerty, 138 Ind. 628, 38 N. E. 42; Perkins *v.* Hayward, 124 Ind. 445, 24 N. E. 1033; Staser *v.* Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Beitman *v.* Hopkins, 109 Ind. 177, 9 N. E. 720; Kissel *v.* Lewis, 27 Ind. App. 302, 61 N. E. 209.

Missouri.— State *v.* Wear, 129 Mo. 619, 31 S. W. 608; State *v.* Moberly, 121 Mo. 604, 26 S. W. 364; State *v.* Wofford, 111 Mo. 526, 20 S. W. 236; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; *Ex p.* Clay, 98 Mo. 578, 11 S. W. 998; Naffzeiger *v.* Reed, 98 Mo. 87, 11 S. W. 315; State *v.* Sneed, 91 Mo. 552, 4 S. W. 411; State *v.* Davidson, 69 Mo. 509; Holliday *v.* Mansker, 44 Mo. App. 465.

Nebraska.— Nebraska Mfg. Co. *v.* Maxon, 23 Nebr. 224, 36 N. W. 492.

Washington.—Fisher *v.* Puget Sound Brick, etc., Co., 34 Wash. 578, 76 Pac. 107; State *v.* Sacks, 3 Wash. 691, 29 Pac. 446.

Canada.— Speers *v.* Speers, 28 Ont. 188.

See 29 Cent Dig. tit. "Judges," § 100.

53. Jones *v.* Peters, 28 Ind. App. 383, 62

judge has no power to act after the expiration of the term for which he was elected.[54] If the regular judge appoints a special judge to hold an adjourned term, however, the latter may continue holding the adjourned term after the commencement of a regular term in another county of the same circuit.[55] Where a district judge recuses himself, and calls in the judge of an adjoining district, the latter may try and determine the cause after nine months have elapsed, although the law accords to either party in interest the right to have the cause transferred to an adjoining district, if it has not been disposed of within nine months from the date of the recusation;[56] and the substituted judge does not lose jurisdiction by reason of inability to try the case on the day on which it had been set for trial by the regular judge, but may hear the case at a later date.[57] A special judge does not lose jurisdiction to complete the trial of a case because the regular judge

N. E. 1019; Kissel *v.* Lewis, 27 Ind. App. 302, 60 N. E. 209; State *v.* Sneed, 91 Mo. 552, 4 S. W. 411.

Appointment of receiver after decree of foreclosure.— A special judge who has rendered a decree of foreclosure, having exercised the jurisdiction he was called upon to entertain, is not entitled to hear a subsequent application for the appointment of a receiver for the subject-matter of the suit, but another special judge may be appointed to hear and determine such application. Harris *v.* U. S. Savings Fund, etc., Co., 146 Ind. 265, 45 N. E. 328.

He cannot try a subsequent suit to set aside or enjoin his judgment.— Norris *v.* Pollard, 75 Ga. 358. *Contra,* Harris *v.* Musgrave, 72 Tex. 18, 9 S. W. 90.

Power to hear motion for accounting after judgment.— Where, in an action to recover real estate, the regular judge being disqualified, trial was had before a judge *pro tem* and judgment was rendered for defendant, the judge *pro tem* had authority to hear and determine a motion by plaintiff for an accounting. Hentig *v.* Thomas, 7 Kan. App. 115, 53 Pac. 80.

Power to punish violation of injunction.— Where a special judge renders a final decree granting a perpetual injunction, a violation of the injunction is an offense against the court and not against the special judge, and he cannot, without further appointment, hear a contempt proceeding for such offense. Kissel *v.* Lewis, 27 Ind. App. 302, 61 N. E. 209. *Contra,* State *v.* Vorhies, 50 La. Ann. 807, 24 So. 276.

Proceedings after verdict.— A district judge called into another district to try a criminal case may after verdict hear and determine any motion or other matter in the case. State *v.* Tomlinson, 7 N. D. 294, 74 N. W. 995.

Powers after judgment see also *infra,* VIII, C, 2.

54. Goodbar Shoe Co. *v.* Stewart, 70 Ark. 407, 68 S. W. 250 (holding that he cannot act at a subsequent term); Crane *v.* Brooke, 109 Ky. 647, 60 S. W. 404, 22 Ky. L. Rep. 1271 (holding that in courts of continuous session the period of sixty days constitutes a term, and a special judge elected to try a particular case has no power to preside after the expiration of sixty days from the date of his election); Small *v.* Reeves, 104 Ky. 289, 46 S. W. 726, 20 Ky. L. Rep. 504; Childers *v.* Little, 96 Ky. 376, 29 S. W. 319, 16 Ky. L. Rep. 521; Low *v.* State, 111 Tenn. 81, 78 S. W. 110; Fordyce *v.* State, 115 Wis. 608, 92 N. W. 430 (holding that where a regular judge was disqualified by an affidavit of prejudice, and called in a judge who heard and overruled a demurrer to the complaint and gave time to answer, and thereupon the parties stipulated that the case should be docketed for trial at the next term, the power of the substitute judge ceased with the expiration of the term at which he was called to preside). *Contra,* Perkins *v.* Hayward, 124 Ind. 445, 24 N. E. 1033; Pennington *v.* State, 13 Tex. App. 44, holding that a special judge has equal authority with the regular judge to enter a judgment *nunc pro tunc* at a succeeding term.

Adjournment of case beyond term.— A special judge lawfully appointed and having jurisdiction of a case does not lose that jurisdiction because of having adjourned the hearing of the case beyond the term at which he was appointed (Wilson *v.* Piper, 77 Ind. 437; Missouri Pac. R. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050, (Kan. 1901) 63 Pac. 444, holding also that he is not divested of authority by a failure to take a new oath at the subsequent term), where the adjournment is taken to a day before the commencement of the next regular term of court (Dillard *v.* State, 65 Ark. 404, 46 S. W. 533). So a substitute judge may adjourn the hearing of a case from time to time, although some of the adjournments may be to a day beyond the regular term of the court. Cincinnati, etc., R. Co. *v.* Rowe, 17 Ind. 568. But if a case is tried and a verdict returned before a special judge, and the term is adjourned without any further action being taken in the case and without any order being made adjourning it to a day in vacation, the authority of the special judge terminates with the adjournment of the term. Greenup *v.* Crooks, 50 Ind. 410.

55. Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975.

56. McKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128.

57. State *v.* Noland, 111 Mo. 473, 19 S. W. 715.

returns during the trial and resumes his duties,[58] unless the special judge was selected to preside only during the regular judge's absence.[59] It has been held that if a disqualified regular judge resigns[60] or if his term expires,[61] the authority of the special judge ceases. The authority of a substituted judge cannot be divested by the election of a special judge after he has responded to the request of the regular judge to act.[62] The appointment of a justice of the peace as an assistant justice of the district court does not terminate on account of his entering on a new term of office as justice of the peace.[63] Where some of the plaintiffs have died, the filing of an amended petition making their heirs parties does not affect the authority of a special judge appointed to try the case.[64]

2. POWERS[65] — a. In General. Special and substitute judges during the period of their incumbency have as a rule all the powers possessed by the regular judge of the court,[66] and their rulings are entitled to the same weight and credit as

58. Bohannon *v.* Tarbin, 76 S. W. 46, 25 Ky. L. Rep. 515 (where the regular judge resumed his duties in another division of the court); State *v.* Moberly, 121 Mo. 604, 26 S. W. 364 (where the regular judge took charge of the trial of the case which the special judge was hearing); Farleigh *v.* Kelly, 24 Mont. 369, 62 Pac. 495, 685 (holding that where a district judge is disqualified from trying a case, and the judge of another district, at his request, holds his court during the trial of such case, the substituted judge may, after his return to his own district, make an order at chambers extending the time within which a statement of the case on motion for new trial may be prepared and served).

59. Hyllis *v.* State, 45 Ark. 478; State *v.* Carter, 49 W. Va. 709, 39 S. E. 611.

60. Caldwell *v.* Bell, 6 Ark. 227. *Contra,* Beauchamp *v.* Com., 4 Ky. L. Rep. 27.

61. Caldwell *v.* Bell, 6 Ark. 227; Coles *v.* Thompson, 7 Tex. Civ. App. 666, 27 S. W. 46. *Contra,* Citizens' Nat. Bank *v.* Graham, 147 Mo. 250, 48 S. W. 910 [*overruling* Naffzieger *v.* Reed, 98 Mo. 87, 11 S. W. 315].

In Louisiana, where a presiding judge who has recused himself appoints another judge to try the case, the order is not vacated by the expiration of the term of the presiding judge and the induction of his successor into office (State *v.* Debaillon, 36 La. Ann. 828), but a member of the bar selected under authority of a provision of the constitution to sit in a case in which the judges of the court of appeals are unable to agree loses jurisdiction if one of the disagreeing judges is succeeded by a new regular judge (State *v.* Judges Fourth Cir. Ct. App., 49 La. Ann. 337, 21 So. 520).

62. State *v.* Wear, 129 Mo. 619, 31 S. W. 608.

63. State *v.* Chappell, 26 R. I. 375, 58 Atl. 1009.

64. Naffzieger *v.* Reed, 98 Mo. 87, 11 S. W. 315.

65. Power of special judge to punish contempt see CONTEMPT, 9 Cyc. 31.

Power of judge pro tem as to extension of time for making and serving a case-made see APPEAL AND ERROR, 3 Cyc. 61 note 85.

66. *Missouri.*— Naffzieger *v.* Reed, 98 Mo. 87, 11 S. W. 315; State *v.* Neiderer, 94 Mo. 79, 6 S. W. 708; State *v.* Sneed, 91 Mo. 552, 4 S. W. 411; State *v.* Davidson, 69 Mo. 509; Holliday *v.* Mansker, 44 Mo. App. 465; Dawson *v.* Dawson, 29 Mo. App. 521. But he has no authority while presiding temporarily to instruct a jury as to the form of its verdict in a case tried before the regular judge, or to receive the verdict or discharge the jury. Allen *v.* Snyder, 82 Mo. 256.

New York.— Aldinger *v.* Pugh, 132 N. Y. 403, 30 N. E. 745 [*affirming* 57 Hun 181, 10 N. Y. Suppl. 684, 19 N. Y. Civ. Proc. 91]; Seymour *v.* Mercer, 13 How. Pr. 564.

North Carolina.— Bear *v.* Cohen, 65 N. C. 511, holding that when judges exchange districts by consent of the governor for a whole riding or series of courts, each takes the place of the other for all purposes during that series of courts; and that when a judge is required to hold a term of court outside his district, his authority becomes that of a special judge, and as such he possesses all the powers of the regular judge for the specified county and for the specified term, and retains those belonging to him as judge of his own district.

North Dakota.— State *v.* Tomlinson, 7 N. D. 294, 74 N. W. 995, holding that a district judge called into another district to try a criminal case may after verdict hear and determine any motion or other matter in the case either in his own district or in the district in which the case was tried.

Rhode Island.— State *v.* Chappell, 26 R. I. 375, 58 Atl. 1009.

South Carolina.— State *v.* Powers, 59 S. C. 200, 37 S. E. 690.

Tennessee.— Low *v.* State, 111 Tenn. 81, 78 S. W. 110; Gold *v.* Fite, 2 Baxt. 237.

Texas.— Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

Washington.— Demaris *v.* Barker, 33 Wash. 200, 74 Pac. 362.

West Virginia.— Carper *v.* Cook, 39 W. Va. 346, 19 S. E. 379.

See 29 Cent. Dig. tit. "Judges," § 99.

However, in Kentucky a special judge has no power to vote for an official indexer under the statute authorizing the judges of the circuit and county courts in certain counties to make the appointment. Roberts *v.* Cain,

those of regular judges.[67] A special judge has power to hold a special term,[68] but not where he is appointed by the governor merely to sit in cases where the regular judge is disqualified.[69] A judge *pro tem* is a substitute and not a duplicate judge and he cannot hold court while the regular judge is also presiding.[70]

b. Determining Motion For New Trial. The power to hear and decide motions for a new trial in cases heard by them is vested in *pro tem* judges in some states.[71]

97 Ky. 722, 31 S. W. 729, 17 Ky. L. Rep. 459. And a special judge commissioned to hear and determine causes pending in a court and undetermined has no authority to preside in an injunction or other cause originating before him. Cruson *v.* Whitley, 19 Ark. 99. And under Miss. Annot. Code (1892), § 922, providing that when a judge of any district is disqualified to act in any matter in vacation such matter shall be brought before the judge of another district, a special judge appointed by the governor has no jurisdiction of a quo warranto proceeding in vacation. Kelly *v.* State, 79 Miss. 168, 30 So. 49.

Change of venue.— A special judge called by the regular judge to try a case may pass upon an application for a change of venue and request another judge to serve if the application is granted (State *v.* Gilman, 97 Mo. App. 296, 70 S. W. 943); and where a substitute judge awards a change of venue to another county on account of the prejudice of the inhabitants, it is his duty to follow the case to the county to which the change of venue has been awarded (State *v.* Anderson, 96 Mo. 241, 9 S. W. 636).

Consolidation of cases.— The appointment of a special judge in a case with which other cases have been consolidated will give him jurisdiction over the consolidated cases (Mills *v.* Paul, (Tex. Civ. App. 1895) 30 S. W. 242), but he has no power to consolidate the case which he is appointed to try with another case (Texas-Mexican R. Co. *v.* Cahill, (Tex. Civ. App. 1893) 23 S. W. 232).

Powers at chambers.— The judge of an adjoining district appointed as substitute judge has no authority to grant an order at chambers within his own judicial district, and in his capacity as judge of the latter, transferring the suit to an adjoining district. Halphen *v.* Guilbeau, 38 La. Ann. 724. Mont. Const. art. 8, § 12, providing that "any judge of the district court may hold court for any other district judge," does not, in the absence of constitutional or statutory provision giving district judges concurrent jurisdiction, empower a judge, acting for another, to exercise out of court the judicial power of the judge whose court he is holding, and an order of injunction issued by such judge in chambers is void. Wallace *v.* Helena Electric R. Co., 10 Mont. 24, 25, 24 Pac. 626, 25 Pac. 278.

Power over records.— An officer upon whom devolves the duties of a probate judge is entitled to access to the probate records, but not to their exclusive possession (Nebraska Mfg. Co. *v.* Maxon, 23 Nebr. 224, 36 N. W. 492), and he must perform such duties in the probate court without removing the papers to his own court, and his acts become matters of record in the probate court (Bean *v.* Chapman, 73 Ala. 140; Bean *v.* Chapman, 62 Ala. 58).

Power to adjourn court.— A special judge has power to adjourn court (Dillard *v.* State, 65 Ark. 404, 46 S. W. 533; State *v.* Ross, 118 Mo. 23, 23 S. W. 196), even in violation of his promise to the regular judge not to do so (State *v.* Ross, *supra*).

67. State *v.* Wear, 145 Mo. 162, 46 S. W. 1099. See, however, Grinstead *v.* Buckley, 32 Miss. 148, holding that the functions of a member of the bar selected to try a case in which a chancellor is interested are ministerial rather than judicial, and that his proceedings must be signed by the chancellor before they have the effect of judicial acts.

68. Missouri, etc., R. Co. *v.* Stinson, 34 Tex. Civ. App. 285, 78 S. W. 986; St. Louis Southwestern R. Co. *v.* Swinney, 34 Tex. Civ. App. 219, 78 S. W. 547; Missouri, etc., R. Co. *v.* Huff, (Tex. Civ. App. 1903) 78 S. W. 249; Winans *v.* Winans, 22 W. Va. 678.

69. Brown *v.* Fleming, 3 Ark. 284.

70. Cox *v.* State, 30 Kan. 202, 2 Pac. 155; *In re* Millington, 24 Kan. 214; Williams *v.* Struss, 4 Okla. 160, 44 Pac. 273; Baisley *v.* Baisley, 15 Oreg. 185, 13 Pac. 888. *Contra*, Paducah Land, etc., Co. *v.* Cochran, 37 S. W. 67, 18 Ky. L. Rep. 465. And see List *v.* Jockheck, 59 Kan. 143, 52 Pac. 420, where it is said that if a judge *pro tem* for a case is lawfully holding court, and the regular judge at the same time holds court in an adjacent room for other cases on the docket, "It would seem that, if the proceedings of either one should be declared void . . . it would be the proceedings before the regular judge," but objection not being made at the time the point is not decided.

71. Clayton *v.* Wallace, 41 Ga. 268; Staser *v.* Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Bremen Bank *v.* Umrath, 55 Mo. App. 43, holding that a special judge appointed by the governor to act as such during the inability of the regular circuit judge has power to act on a motion for a new trial of a cause tried before the regular judge. See, however, Stinson *v.* State, 32 Ind. 124, holding that where an action commenced in the common pleas is set for trial before a judge of the circuit court because of the disqualification of the judge of common pleas, a motion for new trial in such cause must be heard and determined in the court of common pleas, and such substitute judge cannot determine it in his own court.

A judge pro tem may be selected by the parties to dispose of a motion for a new trial and to do whatever remains to be done

c. Signing Bill of Exceptions or Record.[72] As a rule a bill of exceptions should be signed by the judge who tries the case even if he is a special or substitute judge;[73] and he may sign the bill after the adjournment of the term if within the time fixed by law or order of court.[74] The record should be signed by the special judge who presided in the case,[75] and he may sign it at a term subsequent to that at which the final judgment was rendered,[76] if within the time allowed by order of court.[77]

d. Retrying Cause After Reversal. It has been decided in Missouri that if the judgment rendered before a special judge is reversed on appeal, he has authority to retry the case.[78]

in the case. Nelson *v.* Seattle Traction Co., 25 Wash. 602, 66 Pac. 61.

72. See also APPEAL AND ERROR, 3 Cyc. 33, 41 note 92.

73. *Arkansas.*— Cowall *v.* Altchul, 40 Ark. 172; Watkins *v.* State, 37 Ark. 370.

Colorado.— Empire Land, etc., Co. *v.* Engley, 14 Colo. 289, 23 Pac. 452.

Florida.— Bacon *v.* State, 22 Fla. 46.

Indiana.— Lee *v.* Hills, 66 Ind. 474.

Mississippi.—Illinois Cent. R. Co. *v.* Bowles, 71 Miss. 994, 16 So. 235. Formerly it was necessary that a bill of exceptions should be signed by the regular judge, although the case was tried by a special judge. Rankin County Sav. Bank *v.* Johnson, 56 Miss. 125.

See 29 Cent. Dig. tit. "Judges," § 103.

If the bill is signed by the special and also by the regular judge, the signature of the latter will be treated as surplusage. Illinois Cent. R. Co. *v.* Bowles, 71 Miss. 994, 16 So. 235.

If he did not try the case, a special judge has no authority to sign at chambers the bill of exceptions therein. Travellers' Ins. Co. *v.* Leeds, 38 Ind. 444. And see Finch *v.* Travellers Ins. Co., 87 Ind. 302, holding that a bill of exceptions signed by a special judge, the record not showing that he had presided at the trial, cannot be regarded as in the record. In Florida where the trial judge becomes unable from sickness to settle and sign a bill of exceptions in vacation within the time given by order during the term, a judge of another circuit has power under the statute to settle and sign it in vacation within the time limited by the order. Bowden *v.* Wilson, 21 Fla. 165.

Authority of regular judge after appointment of special or substitute judge see *infra*, VI, C, 1, n.

74. *Arkansas.*— Cowall *v.* Altchul, 40 Ark. 172; Watkins *v.* State, 37 Ark. 370.

Florida.— Bacon *v.* State, 22 Fla. 46.

Indiana.— Shugart *v.* Miles, 125 Ind. 445, 25 N. E. 551; Lerch *v.* Emmett, 44 Ind. 331.

Kansas.— Missouri, etc., R. Co. *v.* Ft. Scott, 15 Kan. 435.

Kentucky.— McFarland *v.* Burton, 89 Ky. 294, 12 S. W. 336, 11 Ky. L. Rep. 499; McFarland *v.* Burton, 10 Ky. L. Rep. 873.

Missouri.— Holliday *v.* Mansker, 44 Mo. App. 465.

West Virginia.— Carper *v.* Cook, 39 W. Va. 346, 19 S. E. 379.

See 29 Cent. Dig. tit. "Judges," § 103.

75. Kambieskey *v.* State, 26 Ind. 225, holding, however, that if this is not done and the record is signed by the regular judge, it is a mere irregularity which does not render the proceedings void.

Matters not within special judge's knowledge.— A special judge elected to try a particular case has no power to authenticate a *nunc pro tunc* entry reciting the election at a previous term of another special judge, as he is not presumed to have knowledge of the facts recited in the order; and the fact that a regular judge of a circuit signed the final adjourning order of a term is insufficient to authenticate the *nunc pro tunc* entry. Low *v.* State, 111 Tenn. 81, 78 S. W. 110.

Record of election as special judge.— While the special judge has no control over his election or authority to authenticate the record of the same, it is his duty to see that a proper record is made by the clerk before he signs the decree or judgment made by him. Low *v.* State, 111 Tenn. 81, 78 S. W. 110.

76. Beitman *v.* Hopkins, 109 Ind. 177, 9 N. E. 720.

If a special chancellor neglects to sign his minutes he may subsequently do so by leave of the regular chancellor. Spencer *v.* Armstrong, 12 Heisk. (Tenn.) 707.

77. Missouri Pac. R. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050, 63 Pac. 444; Manufacturing Co. *v.* Stoddard Mfg. Co., 61 Kan. 640, 60 Pac. 320, both holding that where a judge *pro tem*, upon overruling a motion for new trial, renders final judgment and allows a certain time for making and serving a case made for the supreme court, and fixes a time within which amendments may be suggested, his term of office expires after the last day fixed for suggesting amendments, and a case-made signed by him after that time will not be considered an appeal.

78. Naffzieger *v.* Reed, 98 Mo. 87, 11 S. W. 315; State *v.* Sneed, 91 Mo. 552, 4 S. W. 411; State *v.* Hayes, 88 Mo. 344, holding that where a judge is disqualified and calls in the judge of another circuit to try a defendant's application for a change of venue, the judge of such other circuit becomes possessed of jurisdiction of the cause until its final determination, notwithstanding the withdrawal of the application by his consent after the cause has been reversed in the supreme court. But where a special judge was improperly selected and the regular judge had been succeeded in office by another who was not dis-

3. DUTY TO SERVE. Ordinarily an attorney appointed as special judge is not bound to serve as such,[79] and a substitute judge has a right to decline to preside at a trial if he is conscious of the existence of any cause which disqualifies him, and it is his duty in that event to decline to serve.[80]

4. DE FACTO JUDGES.[81] As a general rule a special judge who has been chosen and takes possession of the office becomes a *de facto* judge, provided that the selection of a special judge is authorized by law,[82] and his acts are valid until reversed or set aside by direct proceedings.[83] But where the authority of a *de facto* judge acting under color of a temporary appointment is promptly challenged in a proper method, the question of the validity of his appointment must be decided;[84] and the doctrine of the validity of acts of a *de facto* judge does not apply to the case of a judge *pro tem* appointed by a judge *pro tem*, the latter having no power of appointment.[85]

D. Waiver of Objections. Objections to the authority of a special or substitute judge may be waived by act or omission of the party,[86] and ordinarily such objections are waived where they are not promptly made.[87] The objection

qualified, it was held that upon the case being remanded for retrial the latter should preside. Lacy *v.* Barrett, 75 Mo. 469.

The rule is otherwise in Pennsylvania. Rumsey *v.* Lindsey, 207 Pa. St. 262, 56 Atl. 430.

79. State *v.* Chargois, 30 La. Ann. 1102; State *v.* Brame, 29 La. Ann. 816, both holding that an attorney at law cannot be compelled to accept the appointment of judge *ad hoc*, or to act even after having accepted the appointment and passed on some of the preliminary questions in the case. See, however, Schultze *v.* McLeary, 73 Tex. 92, 11 S. W. 924, holding that a special judge who has been appointed and has qualified to try a case can be compelled to proceed with the trial so long as he holds the appointment.

80. State *v.* Gilham, 97 Mo. App. 296, 70 S. W. 943.

81. De facto judges generally see *infra*, IX.

82. *Indiana.*— State *v.* Murdock, 86 Ind. 124; Jones *v.* State, 11 Ind. 357. Where a special judge acts under authority of an appointment made of record, he is a judge *de facto* and has colorable title to the office, although the appointment was unauthorized. Feaster *v.* Woodfill, 23 Ind. 493; Case *v.* State, 5 Ind. 1.

Kansas.— *In re* Hewes, 62 Kan. 288, 62 Pac. 673.

Kentucky.— Eversole *v.* Steele, 6 Ky. L. Rep. 525.

Louisiana.— Guilbeau *v.* Cormier, 32 La. Ann. 930.

Mississippi.— Powers *v.* State, 83 Miss. 691, 36 So. 6.

Missouri.— State *v.* Miller, 111 Mo. 542, 20 S. W. 243.

Washington.— Smith *v.* Sullivan, 33 Wash. 30, 73 Pac. 793, holding that a special police judge acting under the mayor's appointment is a *de facto* judge.

See 29 Cent. Dig. tit. "Judges," § 11.

Where there is no legal authority for the selection of a member of the bar to act as special judge, a lawyer so attempting to act is without color or right of title and is not a judge *de facto*. State *v.* Fritz, 27 La. Ann. 689; Van Slyke *v.* Trempealeau County Farmers' Mut. F. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50. It has been held, however, that a federal district judge appointed by a circuit judge to officiate in a district where a vacancy exists in the office of district judge is a *de facto* judge, and that his acts are binding on the public and cannot be questioned on the ground that the circuit judge has no power of appointment. McDowell *v.* U. S., 159 U. S. 596, 16 S. Ct. 111, 40 L. ed. 271; Ball *v.* U. S., 140 U. S. 118, 11 S. Ct. 761, 35 L. ed. 377.

83. Drawdy *v.* Littlefield, 75 Ga. 215; Henderson *v.* Pope, 39 Ga. 361.

Collateral attack.—The authority of a judge *pro tem* selected to try cases during a specified term cannot be questioned on proceedings in error brought to reverse the judgment rendered in a case which he has tried. It can be attacked only by a proceeding in behalf of the state. Missouri Pac. R. Co. *v.* Preston, (Kan. 1901) 63 Pac. 444, 63 Kan. 819, 66 Pac. 1050.

84. Cargar *v.* Fee, 119 Ind. 536, 21 N. E. 1080.

85. Cargar *v.* Fee, 119 Ind. 536, 21 N. E. 1080.

86. Radford Trust Co. *v.* East Tennessee Lumber Co., 92 Tenn. 126, 21 S. W. 329, holding that a party to a civil action may waive his right on appeal to have his case heard and decided by duly commissioned judges of the supreme court only.

The taking of an oath by the judge may be waived. Salter *v.* Salter, 6 Bush (Ky.) 624; Trice *v.* Com., 14 Ky. L. Rep. 272 (holding that an agreement by a defendant in a criminal case that a lawyer may act as special judge carries with it a waiver of the requirement that the special judge should be sworn, although defendant is a minor); State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; Carter *v.* Prior, 78 Mo. 222; Grant *v.* Holmes, 75 Mo. 109; Ford *v.* Cameron First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 684.

87. *Arkansas.*— Adams *v.* State, 11 Ark. 466.

should be made at or before the trial,[88] and cannot be made for the first time

Indiana.— Lillie *v.* Trentman, 130 Ind. 16, 29 N. E. 405; Greenwood *v.* State, 116 Ind. 485, 19 N. E. 333 (holding that where the appointment of a special judge is not in writing, and objection is not seasonably made, it will be deemed waived, and his acts upheld as those of a *de facto* judge); Schlungger *v.* State, 113 Ind. 295, 15 N. E. 269; State *v.* Murdock, 86 Ind. 124; Kennedy *v.* State, 53 Ind. 542; Rose *v.* Allison, 41 Ind. 276; Lewis *v.* Albertson, 23 Ind. App. 147, 53 N. E. 1071 (holding that appearing and filing a demurrer or objecting to the jurisdiction solely on the ground that an adjourned term has not been regularly called, or appearing and asking for a continuance, will each amount to a waiver of all objections); Thomas *v.* Felt, 21 Ind. App. 265, 52 N. E. 171 (holding that where a special judge set a case for trial, no objections being made at the time to his acting as judge in said cause, and at the appointed time the regular judge tries the case, there is no error in overruling a motion for new trial on the ground that the special judge had no authority to set the case for trial); Taylor *v.* Bosworth, 1 Ind. App. 54, 27 N. E. 115.

Kentucky.— Small *v.* Reeves, (1896) 37 S. W. 602; Salter *v.* Salter, 6 Bush 624; Slone *v.* Slone, 2 Metc. 339; Moore *v.* Moore, 5 Ky. L. Rep. 777.

Michigan.— Clutton *v.* Clutton, 106 Mich. 690, 64 N. W. 744; Landon *v.* Comet, 62 Mich. 80, 28 N. W. 788.

Missouri.— State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636.

New York.— *In re* Hathaway, 71 N. Y. 238 [*affirming* 9 Hun 79].

Texas.— Davis *v.* Bingham, (Civ. App. 1898) 46 S. W. 840; Campbell *v.* McFadden, 9 Tex. Civ. App. 379, 31 S. W. 436; Hall *v.* Jankofsky, 9 Tex. Civ. App. 504, 29 S. W. 515.

Washington.— State *v.* Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887 (holding that known ineligibility of the judge, not objected to before submission to the jurisdiction, is waived, and as well in criminal as in civil proceedings); State *v.* Sachs, 3 Wash. 691, 29 Pac. 446.

West Virginia.— State *v.* Newman, 49 W. Va. 724, 39 S. E. 655; Jarrell *v.* French, 43 W. Va. 456, 27 S. E. 263; Winans *v.* Winans, 22 W. Va. 678; State *v.* Lowe, 21 W. Va. 783, 45 Am. Rep. 570.

See 29 Cent. Dig. tit. "Judges," § 65.

Mode of objection.— In Arkansas a party to a suit may question the authority of an individual to try his case as special judge, and if the objection is overruled the grounds of the objection and the authority of the judge may be spread upon the record by a bill of exceptions and the authority of the judge to act will then be determined on appeal. White *v.* Reagan, 25 Ark. 622. Where proceedings are had before a special judge duly commissioned, and although before trial the authority of such judge ceases because of the removal of the disqualification of the regular judge by change of incumbent on the bench or otherwise, yet such special judge proceeds to try and determine the case, the proper remedy of the party objecting to his authority is not by quo warranto or by plea to the jurisdiction, but by an objection to the right of the individual to act as judge, and by causing him to place his authority upon record in order that the superior court may determine his right to exercise the powers of special judge. Caldwell *v.* Bell, 6 Ark. 227. In Kentucky an objection to a special judge on the ground that his powers have ceased on account of the termination of the term at which he was elected can be made informally; a mere suggestion on the record is sufficient. Small *v.* Reeves, 104 Ky. 289, 46 S. W. 726, 20 Ky. L. Rep. 504.

88. *Alabama.*—Kimball *v.* Penney, 117 Ala. 245, 22 So. 899.

California.— Oakland *v.* Hart, 129 Cal. 98, 61 Pac. 779, holding that it is too late to make objection to a special judge after he has begun the hearing and has disposed of important matters in the case.

Indiana.— Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; Morgan County *v.* Seaton, 90 Ind. 158; Feaster *v.* Woodfill, 23 Ind. 493; Case *v.* State, 5 Ind. 1. Where a party goes to trial without objection before a judge who assumes to act under color of authority, he cannot, after judgment or conviction, make the objection that the judge acted without competent authority. Crawford *v.* Lawrence, 154 Ind. 288, 56 N. E. 673; Schlungger *v.* State, 113 Ind. 295, 15 N. E. 269; Smurr *v.* State, 105 Ind. 125, 4 N. E. 445.

Kansas.— Missouri Pac. R. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050, 63 Pac. 444; Higby *v.* Ayres, 14 Kan. 331, both holding that where parties consent that a judge *pro tem* may try the case, they thereby waive objection to his power to act. And see List *v.* Jockheck, 59 Kan. 143, 52 Pac. 420, holding that where a case is tried before a judge *pro tem* and at the same time the regular judge also holds court and tries cases, and the defeated party in the case before the judge *pro tem* makes no objection to the division of the court into two tribunals, he will not be heard to complain without showing that he was in fact prejudiced by such irregular proceeding.

Kentucky.— Kentucky Cent. R. Co. *v.* Kenney, 82 Ky. 154.

Missouri.— Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004.

Texas.— Schultze *v.* McLeary, 73 Tex. 92, 11 S. W. 924; Ford *v.* Cameron First Nat. Bank, (Civ. App. 1896) 34 S. W. 684 (holding that it is too late after the trial to raise the question that the regular judge was not disqualified, and a party who tries a case before a special judge will not be heard after the trial to say that he did not agree to the special judge); Texas Cent. R. Co. *v.* Row-

on appeal. Objections raised at that stage of the proceedings are deemed to have been waived.[89]

E. Collateral Attack. The validity of the acts of a special or substitute judge cannot be attacked collaterally on the ground of his want of authority, except for jurisdictional defects.[90]

IX. DE FACTO JUDGES.

A. Who Are De Facto Judges. A judge *de facto* is one who exercises the duties of his office under color of an appointment or election to that office. He differs on the one hand from a mere usurper of an office who undertakes to act without any color of right; and on the other from an officer *de jure* who is in all respects legally appointed and qualified to exercise the office.[91] In order that there may be a *de facto* judge there must be an office which the law recognizes,

land, 3 Tex. Civ. App. 158, 22 S. W. 134 (holding that the trial of a case before a special judge without objection is in effect an agreement to submit the same to him, and no objection to his qualifications can thereafter be made).

See 29 Cent. Dig. tit. "Judges," § 65.

89. *Arkansas.*— Sweeptzer *v.* Gaines, 19 Ark. 96.

Indiana.— Ripley *v.* Mutual Home, etc., Assoc., 154 Ind. 155, 56 N. E. 89; Schlungger *v.* State, 113 Ind. 295, 15 N. E. 269; Kenny *v.* Phillipy, 91 Ind. 511; Winterrowd *v.* Messick, 37 Ind. 122; Hyatt *v.* Hyatt, 33 Ind. 309; Watts *v.* State, 33 Ind. 237; Mitchell *v.* Smith, 24 Ind. 252. And see Feaster *v.* Woodfill, 23 Ind. 493.

Kansas.— Higby *v.* Ayres, 14 Kan. 331.

Kentucky.— Vandever *v.* Vandever, 3 Metc. 137. And see Slone *v.* Slone, 2 Metc. 339.

Missouri.— See Green *v.* Walker, 99 Mo. 68, 73, 12 S. W. 353.

Nebraska.— See Taylor *v.* Tilden, 3 Nebr. 339.

South Carolina.— State *v.* Anone, 2 Nott & M. 27.

Texas.— Shultz *v.* Lempert. 55 Tex. 273; Western Union Tel. Co. *v.* Neel, (Civ. App. 1896) 35 S. W. 29.

Washington.— Snohomish First Nat. Bank *v.* Parker, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828.

See 29 Cent. Dig. tit. "Judges," § 65.

See, however, Klaise *v.* State, 27 Wis. 462, where a justice of the peace attempted to take jurisdiction over a case properly triable before a municipal judge, the latter having refused to try the case, and it was held that an objection to the authority of the justice could be raised for the first time on appeal, as it raised the question of jurisdiction over the subject-matter.

90. *California.*— People *v.* Mellon, 40 Cal. 648.

Indiana.— Crawford *v.* Lawrence, 154 Ind. 288, 56 N. E. 673; Adams *v.* Gowan, 89 Ind. 358; State *v.* Murdock, 86 Ind. 124.

Louisiana.— State *v.* Debaillon, 36 La. Ann. 828; Guilbeau *v.* Cormier, 32 La. Ann. 930.

Missouri.— State *v.* Miller, 111 Mo. 542, 20 S. W. 243.

Texas.— Hall *v.* Jankofsky, 9 Tex. Civ. App. 504, 29 S. W. 515.

Washington.— Smith *v.* Sullivan, 33 Wash. 30, 73 Pac. 793.

United States.— Ball *v.* U. S., 140 U. S. 118, 11 S. Ct. 761, 35 L. ed. 377.

See 29 Cent. Dig. tit. "Judges," § 67.

91. Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574; McCraw *v.* Williams, 33 Gratt. (Va.) 510; Northrup *v.* Gregory, 18 Fed. Cas. No. 10,327, 2 Abb. 503. A person in possession of an office may be an officer *de facto* while some other person is the officer *de jure*; but it is obvious that there cannot be an officer *de facto* and an officer *de jure* both in possession of the office at the same time. Carli *v.* Rhener, 27 Minn. 292, 7 N. W. 139.

Other definitions.— An officer *de facto* is defined to be "one whose acts, although not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised. First, without a known appointment or election, but under such circumstances of reputation or acquiescence, as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give bond, or the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." State *v.* Carroll, 38 Conn. 449, 471, 9 Am. Rep. 409.

Effect of resignation.— Where a judge tenders his resignation unconditionally, but is afterward induced to withdraw the same by the persons vested with the power to fill the vacancy caused by his resignation, he is at least a *de facto* judge thereafter. McGhee *v.* Dickey, 4 Tex. Civ. App. 104, 23 S. W. 404. And where a judge's resignation is condi-

and where a court has no legal existence there can be no judge thereof, either *de jure* or *de facto*.[92]

B. How Color of Title Derived. Color of title necessary to constitute a judge *de facto* may be derived either from election, appointment, or acquiescence by the public for a length of time which would afford strong presumption of colorable right.[93] An unconstitutional statute is sufficient to give color of right or authority to elect or appoint a judicial officer, and a person elected or appointed by authority of such a statute is a *de facto* judge.[94] And in order to constitute a judge *de facto*, it is not necessary that he have color of appointment from a power having "actual" authority to make the appointment, but it is sufficient that he has been appointed by some power having "color" of authority to make it.[95]

C. Powers, Rights, and Liabilities — 1. In General. A *de facto* judge is competent to do whatever may be done by a judge *de jure*,[96] and where he has been commissioned and has qualified and is performing the duties of the office he is entitled in Missouri to draw the salary of the office until ousted by proper proceedings.[97] But it has been held in Connecticut and Mississippi that where a judge sues for fees or sets up a title to property, he must show himself to be an officer *de jure*;[98] and in Connecticut, when sued for acts which he would have authority to do only as a judge, he must, in order to make out a justification, show that he is a judge *de jure*.[99]

2. Validity of Official Acts. In passing upon the validity of official acts, inquiry into the title to the office of the party acting therein may be pursued far

tional in its terms, he continues to be a *de facto* judge at least until the resignation has been accepted. Northrup *v.* Gregory, 18 Fed. Cas. No. 10,327, 2 Abb. 503.

Exercise of power by retiring judge.— Where a judge elect was attorney in a proceeding in the court to which he had been elected and his predecessor assumed jurisdiction of the case, both judges acting in good faith and believing that the retiring judge's term had not yet expired, and where their belief was based upon a reasonable although erroneous construction of the constitution, the judge so acting was a *de facto* judge. Merced Bank *v.* Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732.

92. *In re* Norton, 64 Kan. 842, 68 Pac. 639; Hildreth *v.* McIntire, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61; Frame *v.* Treble, 1 J. J. Marsh. (Ky.) 205; State *v.* O'Brian, 68 Mo. 153; *Ex p.* Snyder, 64 Mo. 58; State *v.* Lake, 8 Nev. 276. And see Alabama Nat. Bank *v.* Williams, (Ala. 1905) 38 So. 240.

Application of rule.— Where the regular judge of a circuit court in Arkansas ordered an adjourned term but was unable to attend because holding a regular term in another county, the adjourned term failed, and there being no court the acts of a special judge appointed by the lawyers present could not be upheld on the ground that he was an officer *de facto*. Caldwell *v.* Barrett, 71 Ark. 310, 74 S. W. 748. There can be no office of judge of a district prior to the date fixed by law for the existence of the district to begin, and a person assuming to act as judge thereof before the office has come into existence is neither a *de facto* nor a *de jure* officer. State *v.* Shuford, 128 N. C. 588, 38 S. E. 808.

93. State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Brady *v.* Howe, 50 Miss. 607; Dredla *v.* Baache, 60 Nebr. 655, 83 N. W. 916. And see *supra*, VIII.

It is only necessary that he have some appearance of right to the office which would lead the public, without inquiry, to suppose him to be the officer he assumes to be. Dredla *v.* Baache, 60 Nebr. 655, 83 N. W. 916.

94. *Alabama.*— State *v.* Judge Eighth Judicial Cir., (1905) 38 So. 835.

Arkansas.— Rives *v.* Pettit, 4 Ark. 582.

Connecticut.— State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

Illinois.— People *v.* Bangs, 24 Ill. 184.

Missouri.— State *v.* Douglass, 50 Mo. 593.

Nevada.— Walcott *v.* Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59.

New York.— People *v.* White, 24 Wend. 520.

Ohio.— *Ex p.* Strang, 21 Ohio St. 610.

Pennsylvania.— Clark *v.* Com., 29 Pa. St. 129.

South Carolina.— Taylor *v.* Skrine, 3 Brev. 516.

Wisconsin.— State *v.* Bloom, 17 Wis. 521.

United States.— *In re* Ah Lee, 5 Fed. 899, 6 Sawy. 410.

See 29 Cent. Dig. tit. "Judges," § 11.

95. Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89. And see Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36.

96. Brady *v.* Howe, 50 Miss. 607.

97. State *v.* Draper, 48 Mo. 213.

98. Plymouth *v.* Painter, 17 Conn. 385, 44 Am. Dec. 574; Christian *v.* Gibbs, 53 Miss. 314.

99. Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

enough to show whether he is a *de facto* officer.[1] But the official acts of a *de facto* judge, before he is ousted from office, are binding on third persons and the public.[2] This rule has been applied in cases where a judge's commission has been illegally issued by the proper authority,[3] where he has taken no oath of office,[4] or took an oath to support a power in insurrectionary hostility to the government,[5] where the election or appointment of a judge was declared void after the judgment in question was rendered;[6] where he has not been eligible to the office;[7] where he has been elected and commissioned and has assumed to act before the commencement of his term believing that his term has begun,[8] where he has acted after the expiration of his term, but while still in possession of the office,[9] where he has accepted an incompatible office but continues to act as judge under his commission and no one is appointed in his stead.[10] Nevertheless the principle that the official acts of *de facto* judges are valid as against third persons cannot be applied to an attempted exercise of judicial power by an officer *de jure* who claims the right to so act by virtue of his office, when in fact no such power is vested therein.[11] And the acts of one assuming to act as judge of a court which never had any legal existence are inoperative because he is neither a *de jure* nor a *de facto* judge.[12]

1. U. S. *v.* Alexander, 46 Fed. 728.

2. *Alabama.*— State *v.* Judge Eighth Judicial Cir., (1905) 38 So. 835.

Arkansas.— Keith *v.* State, 49 Ark. 439, 5 S. W. 880.

California.— People *v.* Rosborough, 14 Cal. 180.

Connecticut.—Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

Kansas.— Missouri Pac. R. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050, (1901) 63 Pac. 444.

Maine.— Woodside *v.* Wagg, 71 Me. 207.

Mississippi.— Cooper *v.* Moore, 44 Miss. 386; Brady *v.* Howe, 50 Miss. 607.

Nevada.— Walcott *v.* Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59.

New York.— Nelson *v.* People, 23 N. Y. 293; Read *v.* Buffalo, 4 Abb. Dec. 22, 3 Keyes 447, 3 Transcr. App. 79; Coyle *v.* Sherwood, 1 Hun 272, 4 Thomps. & C. 34. *Compare* Rodding *v.* Kane, 14 Daly 535, 2 N. Y. Suppl. 56.

North Carolina.— State *v.* Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105.

Pennsylvania.— Campbell *v.* Com., 96 Pa. St. 344.

South Carolina.— Taylor *v.* Skrine, 3 Brev. 516.

Tennessee.— Blackburn *v.* State, 40 Tenn. 690; Nashville *v.* Thompson, 12 Lea 344; Turney *v.* Dibrell, 3 Baxt. 235.

Virginia.— McCraw *v.* Williams, 33 Gratt. 510.

West Virginia.— State *v.* Carter, 49 W. Va. 709, 39 S. E. 611.

Wisconsin.— *In re* Boyle, 9 Wis. 264.

United States.— *In re* Ah Lee, 5 Fed. 899, 6 Sawy. 410.

England.— Dacres' Case, 1 Leon. 288; Knowles *v.* Luce, Moore K. B. 109.

See 29 Cent. Dig. tit. "Judges," § 107.

Reason for rule.— Were it otherwise the public would be subjected to the hazard of having all of the adjudications of a court presided over by an incumbent judge acting by virtue of a commission declared invalid in all cases where, after a course of litigation, the lawful right to his office is declared to be in a contestant. State *v.* Turner, 119 N. C. 841, 25 S. E. 810.

A judge's acts if performed for his own benefit are invalid as he will not be permitted to take advantage of his own wrong. Venable *v.* Curd, 2 Head (Tenn.) 582, *dictum*.

Punishment for usurpation.— For the usurpation or unlawful holding of the office the person assuming to act as judge may be dealt with and punished at the suit of the state. Cooper *v.* Moore, 44 Miss. 386.

3. Calloway *v.* Sturm, 1 Heisk. (Tenn.) 764. And see State *v.* Turner, 119 N. C. 841, 25 S. E. 810.

Irregularity in election.— Where a county judge is exercising the functions assigned to him by law, the courts, in determining the validity of his official acts, will not look into matters of irregularity in his election. Moore *v.* State, 5 Sneed (Tenn.) 510.

4. Pepin *v.* Lachenmyer, 45 N. Y. 27; Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179. But a judgment rendered by an attorney orally appointed judge and acting by consent of parties without having taken the required oath is void for want of jurisdiction. Herbster *v.* State, 80 Ind. 484.

5. Pepin *v.* Lachenmeyer, 45 N. Y. 27.

6. Masterson *v.* Matthews, 60 Ala. 260. See also People *v.* Bangs, 24 Ill. 184.

7. Blackburn *v.* State, 3 Head (Tenn.) 690.

8. McCraw *v.* Williams, 33 Gratt. (Va.) 510.

9. Cary *v.* State, 76 Ala. 78; Carli *v.* Rhener, 27 Minn. 292, 7 N. W. 139; Cromer *v.* Boinest, 27 S. C. 436, 3 S. E. 849. And see Adams *v.* Mississippi State Bank, 75 Miss. 701, 23 So. 395.

10. Woodside *v.* Wagg, 71 Me. 207; Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374.

11. People *v.* White, 24 Wend. 520.

12. Daniels *v.* Hutcheson, 4 Tex. Civ. App. 239, 22 S. W. 278.

D. Collateral Attack on Title to Office and Validity of Official Acts. The right of a *de facto* judge to hold his office is not open to question, nor are his acts subject to attack in a collateral proceeding.[13] These being matters which can only be inquired into in a proceeding to which he is a party.[14] The rule applies although the person acting as judge is incapable of holding the office,[15] and irrespective of the question whether he was properly elected,[16] or whether he is holding two incompatible offices.[17] His right to hold the office will not be inquired into in a habeas corpus proceeding brought to secure the release of a person arrested and held under a writ issued by him. Such right can only be determined in a direct proceeding brought for the purpose.[18] Nor can his title be determined in an action tried before him.[19] Nor in certiorari proceedings to review a conviction had before him.[20] Nor on an appeal taken by a person who has been tried and convicted before him.[21]

JUDGE'S MINUTES or NOTES. Memoranda usually taken by a judge, while a trial is proceeding, of the testimony of witnesses, of documents offered or admitted in evidence, of offers of evidence, and whether it has been received or rejected, and the like matters.[1]

JUDGE'S ORDER. An order made by a judge at chambers, or out of court.[2] (See ORDERS.)

JUDGMENT BOOK. A book required to be kept by the clerk, among the records of the court, for the entry of judgments.[3] (See JUDGMENTS.)

JUDGMENT BY CONFESSION. See JUDGMENTS.

13. *California.*— People *v.* Sassovich, 29 Cal. 480.

Colorado.— Henderson *v.* Glynn, 2 Colo. App. 303, 30 Pac. 265.

Florida.— State *v.* Gleason, 12 Fla. 190.

Indiana.— Littleton *v.* Smith, 119 Ind. 230, 21 N. E. 886; State *v.* Murdock, 86 Ind. 124.

Kansas.— Missouri Pac. R. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050, (1901) 63 Pac. 444; *In re* Corum, 62 Kan. 271, 62 Pac. 661, 84 Am. St. Rep. 382.

Louisiana.— State *v.* Williams, 35 La. Ann. 742; State *v.* Lewis, 22 La. Ann. 33.

Minnesota.— Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289; State *v.* Brown, 12 Minn. 538.

Mississippi.—Cooper *v.* Moore, 44 Miss. 386.

Missouri.— State *v.* Draper, 48 Mo. 56.

Montana.— *Ex p.* Parks, 3 Mont. 426. See also Carland *v.* Custer County, 5 Mont. 579, 6 Pac. 24.

Nebraska.— State *v.* Moores, (1904) 99 N. W. 504.

New York.— Reed *v.* Board, 4 N. Y. 24; Morris *v.* People, 3 Den. 381.

Ohio.— *Ex p.* Strang, 21 Ohio St. 610.

Oregon.— State *v.* Whitney, 7 Oreg. 386.

Pennsylvania.— Clark *v.* Com., 29 Pa. St. 129; Campbell *v.* Com., 29 Pa. St. 125.

Virginia.— McCraw *v.* Williams, 33 Gratt. 510.

United States.— Manning *v.* Weeks, 139 U. S. 504, 11 S. Ct. 624, 35 L. ed. 264.

See 29 Cent. Dig. tit. "Judges," § 14.

Where parties fail to interpose the plea of coram non judice, the decrees of a chancellor *de facto* will be binding on them. Gold *v.* Fite, 2 Baxt. (Tenn.) 237.

14. Keith *v.* State, 49 Ark. 439, 5 S. W. 880; State *v.* Sadler, 51 La. Ann. 1397, 26 So. 390.

15. State *v.* Williams, 61 Kan. 739, 60 Pac. 1050; Hunter *v.* Ferguson, 13 Kan. 462.

16. People *v.* Gobles, 67 Mich. 475, 35 N. W. 91; Coyle *v.* Sherwood, 1 Hun (N. Y.) 272; People *v.* Sherwood, 4 Thomps. & C. (N. Y.) 34; Baker *v.* State, 80 Wis. 416, 50 N. W. 518; *In re* Burke, 76 Wis. 357, 45 N. W. 24; *In re* Boyle, 9 Wis. 264; Manning *v.* Weeks, 139 U. S. 504, 11 S. Ct. 624, 35 L. ed. 264 [*affirming In re* Manning, 76 Wis. 365, 45 N. W. 26].

17. Com. *v.* Taber, 123 Mass. 253.

18. *Iowa.*— *Ex p.* Strahl, 16 Iowa 369.

Kentucky.— Orme *v.* Com., 55 S. W. 195, 21 Ky. L. Rep. 1412.

Massachusetts.— Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374.

Oregon.— State *v.* Whitney, 7 Oreg. 386.

Texas.— *Ex p.* Call, 2 Tex. App. 497.

Wisconsin.— *In re* Manning, 76 Wis. 365, 45 N. W. 26; *In re* Burke, 76 Wis. 357, 45 N. W. 24; *In re* Boyle, 9 Wis. 264.

United States.— Manning *v.* Weeks, 139 U. S. 504, 11 S. Ct. 624, 35 L. ed. 264; Griffin's Case, 11 Fed. Cas. No. 5,815, Chase 364.

See 29 Cent. Dig. tit. "Judges," § 14.

19. State *v.* Brown, 12 Minn. 538.

Regularity of the official bond of the presiding judge cannot be questioned at the trial. People *v.* Dillon, 26 N. Y. Suppl. 778.

20. People *v.* Gobles, 67 Mich. 475, 35 N. W. 91; Coyle *v.* Sherwood, 1 Hun (N. Y.) 272, 4 Thomps. & C. 34.

21. Com. *v.* Taber, 123 Mass. 253; Hamilton *v.* State, 40 Tex. Cr. 464, 51 S. W. 217.

1. Black L. Dict.

2. Black L. Dict.

3. Black L. Dict. [*citing* N. Y. Code, § 279]. See also *In re* Weber, 4 N. D. 119, 123, 59 N. W. 523, 28 L. R. A. 621; Lynch *v.* Burt, 132 Fed. 417, 426.

JUDGMENT BY DEFAULT. See JUDGMENTS.

JUDGMENT CREDITOR. One who is entitled to enforce a judgment by execution; the owner of an unsatisfied judgment.[4] (See CREDITOR; JUDGMENTS.)

JUDGMENT DEBT. A debt, whether on simple contract or by specialty, for the recovery of which judgment has been entered up, either upon a cognovit or upon a warrant of attorney or as the result of a successful action.[5] (See DEBT; JUDGMENTS.)

JUDGMENT DEBTOR. A person against whom judgment has been recovered, and which remains unsatisfied.[6] (See DEBTOR; JUDGMENTS.)

JUDGMENT DOCKET. A list or docket of the judgments entered in a given court, methodically kept by the clerk or other proper officer, open to public inspection, and intended to afford official notice to interested parties of the existence or lien of judgments.[7] (See DOCKET; JUDGMENTS.)

JUDGMENT IN PERSONAM. See JUDGMENTS.

JUDGMENT IN REM. See JUDGMENTS.

JUDGMENT LIEN. See JUDGMENTS.

JUDGMENT NISI. At common law, a judgment entered on the return of the *nisi prius* record, which, according to the terms of the *postea*, was to become absolute unless otherwise ordered by the court within the first four days of the next succeeding term.[8] (See JUDGMENTS.)

JUDGMENT NOTE. A promissory note, embodying an authorization to any attorney, or to a designated attorney, or to the holder, or the clerk of the court, to enter an appearance for the maker and confess a judgment against him for a sum therein named, upon default of payment of the note.[9] (See JUDGMENTS.)

JUDGMENT OF HIS PEERS. Trial by jury.[10] (See, generally, JURIES.)

JUDGMENT OF SALE. Rather an order for the enforcement of a judgment than a judgment itself.[11] (See EXECUTIONS; JUDGMENTS; JUDICIAL SALES.)

JUDGMENT-ROLL. That which is made up of the summons and proof of service, the pleadings, bills of exceptions, all orders relating to the change of parties, together with the copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment.[12]

4. Black L. Dict. See also Baxter *v.* Moses, 77 Me. 465, 477, 1 Atl. 350, 52 Am. Rep. 783; King *v.* Fraser, 23 S. C. 543, 548; *In re* Fryer, 17 Q. B. 718, 724, 55 L. J. Q. B. 478.

5. Black L. Dict. See also Egberts *v.* Pemberton, 7 Johns. Ch. (N. Y.) 208, 210, where it is said that a judgment debt is "a liquidated demand reduced to certainty; and it may, without any very great stretch of presumption, be considered as so much money held in trust."

Judgment debt includes purchase-money and interest and costs under a decree for specific performance. Beaufort *v.* Phillips, 1 De G. & Sm. 321, 325, 63 Eng. Reprint 1087.

6. Black L. Dict. See also Winslow *v.* Central Iowa R. Co., 71 Iowa 197, 200, 32 N. W. 330; Foster *v.* Wood, 1 Abb. Pr. N. S. (N. Y.) 150, 153, where it is said: "The term 'judgment debtor' in this section is one against whom the judgment is conclusive and final."

7. Black L. Dict. See also Hutchinson *v.* Gorham, 37 Oreg. 347, 349, 61 Pac. 431.

8. Black L. Dict. See also Young *v.* McPherson, 3 N. J. L. 895, 897, where it is said: "What is called a judgment *nisi*, is nothing more than a rule to show cause."

9. Black L. Dict.

10. Newland *v.* Marsh, 19 Ill. 376, 382; State *v.* Simons, 61 Kan. 752, 753, 60 Pac. 1052; Wright *v.* Wright, 2 Md. 429, 452, 56 Am. Dec. 723; State *v.* Saunders, 66 N. H. 39, 87, 25 Atl. 588, 18 L. R. A. 646; Knight *v.* Campbell, 62 Barb. (N. Y.) 16, 34; Fetter *v.* Wilt, 46 Pa. St. 457, 460; State *v.* Beswick, 13 R. I. 211, 217, 43 Am. Rep. 26; McCullough *v.* Brown, 41 S. C. 220, 267, 19 S. E. 458, 23 L. R. A. 410; Jelly *v.* Dils, 27 W. Va. 267, 274. See also State *v.* Simons, 2 Speers (S. C.) 761, 768, where it is said: "The 'judgment of his peers' means in general the great unalienable common law mode of trial by twelve good and lawful men of the vicinage, in the presence of the accused, and by the oath of a witness." But see 32 Am. L. Rev. 633, 634.

11. Gage *v.* People, 205 Ill. 547, 551, 69 N. E. 80.

12. Hill Code (Oreg.) §§ 272, 273 [*quoted* in Tatum *v.* Massie, 29 Oreg. 140, 144, 44 Pac. 494]. See also Colton Land, etc., Co. *v.* Swartz, 99 Cal. 278, 282, 33 Pac. 878; Page *v.* Roeding, 96 Cal. 388, 390, 391, 31 Pac. 264; Packard *v.* Bird, 40 Cal. 378, 383.

In proceedings in probate there is, strictly speaking, no judgment-roll. *In re* Kelsey, 12 Utah 393, 43 Pac. 106.

A statement on a motion for new trial is no part of the "judgment roll." Powell *v.* May, 29 Mont. 71, 74 Pac. 80.

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By Henry Campbell Black*

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Of Particular Persons, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; CLERKS OF COURTS; COUNTIES; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; MUNICIPAL CORPORATIONS; OFFICERS; STATES; UNITED STATES.
Claim Against Estate, see EXECUTORS AND ADMINISTRATORS.
Contract, see CONTRACTS; and Special Contract Titles.
Counter-Claim, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.
County Bond or Warrant, see COUNTIES.
Guaranty, see GUARANTY.
Official Bond, see COUNTIES; MUNICIPAL CORPORATIONS; OFFICERS; STATES; UNITED STATES.
Pledge, see PLEDGES.
Policy of Insurance, see ACCIDENT INSURANCE; FIRE INSURANCE, and Other Insurance Titles.
Recognizance, see BAIL; RECOGNIZANCES.
Separation of Community Property, see HUSBAND AND WIFE.
Submission of Controversy, see SUBMISSION OF CONTROVERSY.
Judicial Records as Evidence, see EVIDENCE.
Jurisdiction of Court, see COURTS.
Justice's Judgment, see JUSTICES OF THE PEACE.
Levy on Judgment, see EXECUTIONS.
Opinion of Court, see COURTS.
Order, see ORDERS.
Parol Evidence Affecting Judicial Record, see EVIDENCE.
Presumptions as to Validity:
Jurisdiction, see COURTS.
On Appeal or Writ of Error, see APPEAL AND ERROR.
Review of Judgment, see APPEAL AND ERROR; CERTIORARI; EQUITY.
Supersedeas, see SUPERSEDEAS.
Validity of Judgment as Against Creditors, see FRAUDULENT CONVEYANCES.

I. NATURE AND ESSENTIALS OF JUDGMENTS.

A. In General — 1. DEFINITION OF JUDGMENT. At common law a judgment is the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in or before such court or judge, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist.[1] The corresponding term in equity practice is

1. Black Judgm. § 1 [*quoted* in Gunter *v.* Earnest, 68 Ark. 180, 184, 56 S. W. 876]; Freeman Judgm. § 2.

Other definitions are: "An adjudication of the rights of the parties in respect to the claims involved." McNulty *v.* Hurd, 72 N. Y. 518, 521; Matter of Lyman, 60 Hun (N. Y.) 82, 84, 14 N. Y. Suppl. 198 [*affirmed* in 128 N. Y. 614, 28 N. E. 252]; Leslie *v.* Saratoga Brewing Co., 33 Misc. (N. Y.) 118, 123, 67 N. Y. Suppl. 222.

"The final and solemn adjudication and determination of the rights of the parties in and to the subject-matter litigated." Dunterman *v.* Storey, 40 Nebr. 447, 455, 58 N. W. 949.

"The application of the law to the facts found in the case, and is the legal determination of the rights of the parties before the court." Ball *v.* Trenholm, 45 Fed. 588, 589.

"A conclusion of law" (Virginia *v.* Chillicothe Bank, 16 Ohio 170, 171), "from the facts proved or admitted in the suit, and in money demands must be absolute and in a specified amount" (Swain *v.* Smith, 65 N. C. 211, 212).

"The conclusion of law, upon facts found or admitted by the parties, or upon their default in the course of the suit." 2 Tidd Pr. 930 [*quoted* in Orvis *v.* Elliott, 65 Mo. App. 96, 101; Haeussler *v.* Scheitlin, 9 Mo. App. 303, 308; Plant *v.* Gunn, 19 Fed. Cas. No. 11,205, 2 Woods 372, 378]; Bouvier L. Dict. [*quoted* in Sprick *v.* Washington County, 3 Nebr. 253, 254; Teel *v.* Yost, 56 N. Y. Super. Ct. 456, 465, 5 N. Y. Suppl. 5]. To the same effect see Thompson *v.* People, 23 Wend. (N. Y.) 537, 587; Beard *v.* Hall, 79 N. C. 506, 507; Dibble *v.* Taylor, 2 Speers (S. C.) 308, 311.

"The conclusion that naturally and regularly follows from the premises of law and fact." Clason *v.* Shotwell, 12 Johns. (N. Y.) 31, 34; Jacob L. Dict. [*quoted* in Branch *v.* Branch, 5 Fla. 447, 450].

"The final consideration and determination of a court of competent jurisdiction upon the matters submitted to it." Whitwell *v.* Emory, 3 Mich. 84, 88, 59 Am. Dec. 220; Orvis *v.* Elliott, 65 Mo. App. 96, 101; Freeman Judgm. § 2 [*quoted* in Bell *v.* Otts, 101 Ala. 186, 188, 13 So. 43, 46 Am. St. Rep. 117].

"The decision of the court in a civil or criminal proceeding . . . the determination or sentence of the law." Sprott *v.* Reid, 3 Greene (Iowa) 489, 494, 56 Am. Dec. 549.

"The decision or sentence of the law given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury." Bouvier L. Dict. [*quoted* in Whittem *v.* State, 36 Ind. 196, 204; Teel *v.* Yost, 56 N. Y. Super. Ct. 456, 465, 5 N. Y. Suppl. 5; Mair's Estate, 12 Phila. (Pa.) 2, 3]. To the same effect see Blaikie *v.* Griswold, 10 Wis. 293, 299.

"The decision or sentence of the law, pronounced by a court or other competent tribunal upon the matter contained in the record." Freeman Judgm. (4th ed.) § 2 [*quoted* in State *v.* Fleming, 147 Mo. 1, 10, 44 S. W. 758; Eppright *v.* Kauffman, 90 Mo. 25, 27, 1 S. W. 736]. To the same effect see Davidson *v.* Smith, 7 Fed. Cas. No. 3,608, 1 Biss. 346; 3 Blackstone Comm. 395 [*quoted* in Haeussler *v.* Scheitlin, 9 Mo. App. 303, 308]; Jacob L. Dict. [*quoted* in Deuel *v.* Hawke, 2 Minn. 50, 57].

"The decision or sentence of the law, pronounced or given by a court, upon the effect of proceedings instituted in or before the court." Gamble *v.* Jacksonville, etc., R. Co., 14 Fla. 226, 229.

"The determination of the law as the result of proceedings instituted in a court of justice." Mahoning County Bank's Appeal, 32 Pa. St. 158, 160.

"The determination of some judicial tribunal created by law for the administration of public justice according to law . . . in strictness the determination of the law." Blood *v.* Bates, 31 Vt. 147, 150.

"The determination and sentence of the law." Clason *v.* Shotwell, 12 Johns. (N. Y.) 31, 34.

"A definite sentence upon the matter at issue between the parties." State *v.* Wood, 23 N. J. L. 560, 561.

"Every definite sentence or decision by which the merits of a cause are determined, although it be not technically a judgment, or although the proceedings are not capable of being technically enrolled so as to constitute what is technically called a record." Freeman Judgm. § 16 [*quoted* in Eppright *v.* Kauffman, 90 Mo. 25, 27, 1 S. W. 736].

"The judicial sentences of courts, rendered in causes within their jurisdiction, and coming legally before them." Peirce *v.* Boston, 3 Metc. (Mass.) 520, 521.

A judicial sentence may be designated by a different term than "judgment." Thus, the words "final adjustment," as used in a statute, may be held equivalent in meaning to "final judgment." Cooper *v.* Metzger, 74 Ind. 544.

The use of the word "decree" is very often convenient and proper, as indicating the specific character of a judgment rendered; but it has no place in the statute, and represents nothing but what may with greater propriety

"decree."[2] But under the codes of reformed procedure every final adjudication or determination of the rights of the parties in an action or proceeding is a judgment, whether the proceeding is equitable or legal in its nature.[3]

2. DISTINGUISHED FROM DECREE. The term "judgment" is properly restricted to proceedings at law, while a "decree" is the determination, sentence, or adjudication of a competent court of equity, upon the controversy submitted for its decision.[4]

3. DISTINGUISHED FROM DECISION OR FINDINGS. A finding of facts or conclusions of law by the judge trying a case, or his decision of a controverted point, or

be called a judgment. Gawtry *v.* Adams, 10 Mo. App. 29, 32.

A judgment is sometimes spoken of as "a power by means of which a creditor may enforce his claims by the sale of the debtor's property." Nichols *v.* Dissler, 31 N. J. L. 461, 473, 86 Am. Dec. 219.

Entry of judgment distinguished. — The judgment is a judicial act of the court, the entry is the ministerial act of the clerk. California State Tel. Co. *v.* Patterson, 1 Nev. 150. See also *infra*, VII, A, 1.

2. Decree distinguished see *infra*, I, A, 2.

3. *California.*— Dorland *v.* Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44.

Florida.— Barkley *v.* Russ, 13 Fla. 589, 590.

Indian Territory.—Severs *v.* Northern Trust Co., 1 Indian Terr. 1, 7, 35 S. W. 232.

Iowa.— Walker *v.* Walker, 93 Iowa 643, 61 N. W. 930; Kramer *v.* Rebman, 9 Iowa 114.

Kansas.— State *v.* McArthur, 5 Kan. 280.

Kentucky.— Harrison *v.* Lebanon Water-Works, 91 Ky. 255, 256, 15 S. W. 522, 12 Ky. L. Rep. 822, 34 Am. St. Rep. 180; Hughes *v.* Shreve, 3 Metc. 547; Snyder *v.* Cox, 53 S. W. 263, 266, 21 Ky. L. Rep. 796.

Minnesota.—Sanborn *v.* Rice County Com'rs, 9 Minn. 273; Deuel *v.* Hawke, 2 Minn. 50, 57.

Missouri.— Gawtry *v.* Adams, 10 Mo. App. 29, 32.

Montana.— *In re* McFarland, 10 Mont. 445, 452, 454, 26 Pac. 185 [*quoting* Anderson L. Dict.].

Nebraska.— Horn *v.* Miller, 20 Nebr. 98, 100, 29 N. W. 260; Hastings School-Dist. *v.* Caldwell, 16 Nebr. 68, 72, 19 N. W. 634; State *v.* Dodge County, 10 Nebr. 20, 24, 4 N. W. 370; Hicklin *v.* Nebraska City Nat. Bank, 8 Nebr. 463, 467, 1 N. W. 135.

Nevada.— Lake *v.* Lake, 17 Nev. 230, 235, 30 Pac. 878; Low *v.* Crown Point Min. Co., 2 Nev. 75, 79; California State Tel. Co. *v.* Patterson, 1 Nev. 150.

New York.— Voisin *v.* Commercial Mut. Ins. Co., 123 N. Y. 120, 123, 25 N. E. 325, 9 L. R. A. 612; Springsteene *v.* Gillett, 30 Hun 260, 264; Prentiss *v.* Bowden, 14 Misc. 185, 186, 35 N. Y. Suppl. 653; Donnelly *v.* Brooklyn, 7 N. Y. Suppl. 49, 51, 25 N. Y. Civ. Proc. 144; Phipps *v.* Van Cott, 4 Abb. Pr. 90, 92; Ford *v.* David, 13 How. Pr. 193, 196; Bentley *v.* Jones, 4 How. Pr. 335; Geneva Bank *v.* Hotchkiss, Code Rep. N. S. 153. And see McNulty *v.* Hurd, 72 N. Y. 518, 521; Pearson *v.* Lovejoy, 53 Barb. 407, 408.

North Carolina.— Hutchinson *v.* Smith, 68 N. C. 354, 355.

North Dakota.— Bode *v.* New England Inv. Co., 1 N. D. 121, 126, 45 N. W. 197.

Oregon.— Code, § 240.

South Carolina.— Mason, etc., Vocalion Co. *v.* Killough Music Co., 45 S. C. 11, 14, 22 S. E. 755; Pelzer Mfg. Co. *v.* Cely, 40 S. C. 430, 433, 18 S. E. 790; Cook *v.* Jennings, 40 S. C. 204, 211, 18 S. E. 640; Cromer *v.* Boinest, 27 S. C. 436, 452, 3 S. E. 849; Moore *v.* Holland, 16 S. C. 15, 27.

Tennessee.— The word "judgment" is usually applied to a determination of the rights of the parties in an action at law, and the word "decree" to a similar determination in equity; but the words are declared to be interchangeable as used in the code. Ward *v.* Kenner, (Ch. App. 1896) 37 S. W. 707.

Wisconsin.— Witter *v.* Neeves, 78 Wis. 547, 549, 47 N. W. 938; Garland *v.* McKittrick, 52 Wis. 261, 264, 9 N. W. 160; Blaikie *v.* Griswold, 10 Wis. 293, 299.

Wyoming.— Gramm *v.* Fisher, 3 Wyo. 595, 596, 29 Pac. 377.

"This definition," says Mr. Freeman, in his very excellent work on judgments, "is just broad enough to comprise all final judgments and all final decrees, and narrow enough not to comprise any which is less than final." Perkins *v.* Sierra Nevada Silver Min. Co., 10 Nev. 405, 411 [*quoting* Freeman Judgm. § 14].

4. See 2 Daniell Ch. Pr. 986; Ga. Code, § 4212.

Decree defined see 15 Cyc. 471.

"A decree differs from a judgment both in the process which precedes and determines it and in its contents. . . . While a judgment at law is usually, at least in contested cases, determined by the verdict, the conclusion of law following inevitably as soon as the facts are found, a judge in equity is called upon to decide upon the whole merits of the controversy as it addresses itself to his conscience and sense of fairness, of course within the established rules of equity. Hence while a decree is, equally with a judgment, the deliverance of the law, it is also to a considerable degree the decision of the man who frames it, as the interpreter of that moral standard which equity sets up. Another important particular in which they differ is that a decree is more pliable than a judgment. The latter proceeds upon the determination of a narrow issue, of law or fact, and merely decides upon the existence of an alleged liability as between two contending persons or groups of persons. A decree may be adjusted to meet all the exigencies of the

opinion upon the matters submitted, whether oral or in writing, does not constitute a judgment; it is not such a definitive sentence or adjudication as is contemplated by that term.[5]

4. Distinguished From Rule or Order. An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings.[6] It has not the qualities or consequences of a judgment.[7]

litigation, and to settle all the conflicting rights and claims, however numerous and complicated may be the interests involved. Further, a judgment has in general nothing whatever to do with the means of enforcing the liability which it declares. Certain consequences do indeed flow from it — as the right to issue execution, the attaching of a lien upon land — but these are no part of the judgment, nor is it concerned with directions for making its sanction effective. . . . On the other hand, a decree may, and frequently does, contain more or less minute and specific directions for effectuating its object. Also it may prescribe or forbid a specific act or course of conduct, which a judgment never does. Hence it will be perceived that the orbit of a decree in chancery, so to speak, is much wider than that of a judgment at law." 1 Black Judgm. § 1.

Merger of law and equity. — Under the codes, as stated in the preceding section (see *supra*, I, A, 1), the distinction being no longer maintained between legal and equitable proceedings, the term "judgment" is applicable to any final adjudication of the rights of parties. But besides this, in some of the states, there is a sort of border-land where equitable relief is administered through common-law forms. Thus in Pennsylvania, where an action of ejectment may be brought to enforce the specific performance of a contract for the sale of land, the sentence pronounced is not regarded as an ordinary judgment at law, but as containing the substance of a decree in equity, since it directs the payment of money by one party and the conveyance of the land by the other. Coughanour *v.* Bloodgood, 27 Pa. St. 285.

5. *California.* — Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211.

Connecticut. — Cothren *v.* Olmstead, 57 Conn. 329, 18 Atl. 254.

Florida. — Demens *v.* Poyntz, 25 Fla. 654, 6 So. 261.

Illinois. — Birdsell Mfg. Co. *v.* Independent Fire Sprinkler Co., 87 Ill. App. 443.

Iowa. — Christie *v.* Iowa L. Ins. Co., 111 Iowa 177, 82 N. W. 499.

Louisiana. — Fisk *v.* Parker, 14 La. Ann. 491.

Massachusetts. — New York, etc., R. Co. *v.* Martin, 158 Mass. 313, 33 N. E. 578.

New Jersey. — See Clark *v.* Clark, 2 N. J. L. 112.

New York. — Putnam *v.* Crombie, 34 Barb. 232. *Compare*, however, Heath *v.* Barmour, 35 How. Pr. 1, 5, where it is said: "The word judgment, as here used, means a recovery of damages by the plaintiff, evidenced by the verdict or the finding and decision of the court, entitling the plaintiff to a judgment."

United States. — An orally expressed opinion or finding by a judge in a case not tried by a jury does not, according to the practice of the federal courts, constitute a judgment, and is subject to modification or change until it has become a written order of the court. U. S. *v.* Gomez, 1 Wall. 690, 17 L. ed. 677; Judson *v.* Gage, 98 Fed. 540, 39 C. C. A. 156 [*citing* Anglo-Californian Bank *v.* Mahony Min. Co., 1 Fed. Cas. No. 392, 5 Sawy. 255]. But *compare In re* Barnes, 2 Fed. Cas. No. 1,011, 10 Ben. 79.

Canada. — Fawkes *v.* Swayzie, 31 Ont. 256. *Compare*, however, Rooney *v.* Lyons, 2 Ont. App. 53, 58, where it is said: "The judgment here referred to is either the verdict of the jury or the judgment given at the trial by the Judge if the case is tried without a jury."

The grounds and reasons upon which the court proceeded are no part of its judgment, using that term in its technical sense. Sullivan *v.* Thomas, 3 S. C. 531, 551.

Decision defined generally see 13 Cyc. 427.

Finding defined generally see 19 Cyc. 534.

6. Myers *v.* Myers, 4 Ohio S. & C. Pl. Dec. 217, 3 Ohio N. P. 162; Bankhead *v.* Good, 56 S. C. 392, 34 S. E. 689; Tormey *v.* Gerhart, 41 Wis. 54.

Another definition is: "A decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some point collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment." Loring *v.* Illsley, 1 Cal. 24, 27. And see Gilman *v.* Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290. See also, generally, Orders.

An "intermediate order" defined and distinguished from a judgment see Mercer *v.* Glass, 89 Ky. 199, 202, 12 S. W. 194, 11 Ky. L. Rep. 373; Williams *v.* Glasgow, 1 Nev. 533, 537; People *v.* Priori, 163 N. Y. 99, 106, 57 N. E. 85; Fox *v.* Matthiessen, 155 N. Y. 177, 179, 49 N. E. 673; Taylor *v.* Smith, 24 N. Y. App. Div. 519, 526, 49 N. Y. Suppl. 41; Teaff *v.* Hewitt, 1 Ohio St. 511, 520, 59 Am. Dec. 634; Holden *v.* McMakin, 1 Pars. Eq. Cas. (Pa.) 270, 289; McKinney *v.* Kirk, 9 W. Va. 26, 29.

7. Riley *v.* Christie, 13 La. Ann. 256; State *v.* Klein, 140 Mo. 502, 41 S. W. 895; Finnell *v.* Burt, 2 Handy (Ohio) 202, 12 Ohio Dec. (Reprint) 403.

Where the common-law system of pleading and practice is in force, the term usually employed to designate such an order is "rule." An order or rule is not ordinarily founded upon the whole record in the case, but is granted upon a special application to the court called a "motion."[8]

5. ESSENTIALS OF A JUDGMENT. It is essential to a judgment that it should appear to be the sentence or adjudication of a court or judicial tribunal,[9] and to be the judicial act of the court as such, or of the judge or magistrate who holds or presides in such court.[10] A paper purporting to be a judgment, but not stat-

There is a well known distinction between a "judgment" and an "order." Onslow *v.* Inland Revenue Com'rs, 25 Q. B. D. 465, 466, 59 L. J. Q. B. 556, 63 L. T. Rep. N. S. 513, 38 Wkly. Rep. 728. See also Darrow *v.* Miller, 5 How. Pr. (N. Y.) 247; Fawkes *v.* Swayzie, 31 Ont. 256, 258 [*citing Ex p.* Chinery, 12 Q. B. D. 342, 53 L. J. Ch. 662, 50 L. T. Rep. N. S. 342, 1 Morr. Bankr. Cas. 31, 32 Wkly. Rep. 469]. The distinguishing characteristic of a judgment is that it is final, while that of an order, when it relates to proceedings in an action, is that it is interlocutory. Nolton *v.* Western R. Corp., 10 How. Pr. (N. Y.) 97, 99. By statute every direction of a court or judge, made or entered in writing, and not included in a judgment, has been denominated an order. Bentley *v.* Jones, 4 How. Pr. (N. Y.) 335. A direction or a decision of a court or judge entered upon the order book, or made in writing in an action and not final, is an order. Snyder *v.* Cox, 53 S. W. 262, 21 Ky. L. Rep. 796. *Compare* Onslow *v.* Inland Revenue Com'rs, 25 Q. B. D. 465, 466, 59 L. J. Q. B. 556, 63 L. T. Rep. N. S. 513, 38 Wkly. Rep. 728, where it is said: "A 'judgment,' therefore, is a decision obtained in an action, and every other decision is an order."

Examples.— An order for the sale of land of a deceased person is not a final judgment (Crews *v.* Cleghorn, 13 Ind. 438), nor is an order of a county court allowing a claim against the county and directing that a warrant issue therefor (Sears *v.* Stone County, 105 Mo. 236, 16 S. W. 878, 24 Am. St. Rep. 378), nor a decision of the court upon a matter addressed to its discretionary authority, as, an application to have a case brought forward on the docket, and to vacate a certain judgment rendered therein (Claggett *v.* Simes, 25 N. H. 402). And the refusal of the court to issue a writ of mandamus is neither a judgment nor a decree. Craddock *v.* Croghan, Ky. Dec. 100. On the other hand an order of court made upon motion directing that the surety on a replevin bond recover from his principal the amount which he has been forced to pay is a judgment. State *v.* Vogel, 14 Mo. App. 187. And it has been held that an order granting an application presented by a trustee for leave to sell the trust property has all the sanctity of a formal judgment. Reinhart *v.* Blackshear, 105 Ga. 799, 31 S. E. 748.

Order for judgment.— An order merely directing or authorizing the entry of judgment in the case, although entered in the judgment book, does not constitute a judgment. To have this effect it must be so worded as to express the final sentence of the court on the matters contained in the record and to end the case at once, without contemplating any further judicial action. Morgan *v.* Flexner, 105 Ala. 356, 16 So. 716; Klink *v.* The Cusseta, 30 Ga. 504 [but see Tift *v.* Keaton, 78 Ga. 235, 2 S. E. 690, holding that an order of court allowing plaintiff's attorney to enter up judgment for plaintiff is in itself a sufficient judgment for plaintiff for the amount sued for]; Whitwell *v.* Emory, 3 Mich. 84, 59 Am. Dec. 220; Robinson *v.* Govers, 67 Hun (N. Y.) 317, 22 N. Y. Suppl. 249; Putnam *v.* Crombie, 34 Barb. (N. Y.) 232; Hagler *v.* Kelly, (N. D. 1905) 103 N. W. 629; McTavish *v.* Great Northern R. Co., 8 N. D. 333, 79 N. W. 443; Potter *v.* Eaton, 26 Wis. 382; Lincoln *v.* Cross, 11 Wis. 91.

A special proceeding terminates not in a judgment but in a final order. Fenton *v.* Paillard, 46 Misc. (N. Y.) 151, 93 N. Y. Suppl. 1101, construing Code Civ. Proc. §§ 1301, 3343.

8. Cal. Code Civ. Proc. § 1003; N. Y. Code Civ. Proc. § 767; and, generally, the statutes of the several states.

9. Horn *v.* Miller, 20 Nebr. 98, 100, 29 N. W. 260.

Authority of court or judge see *infra*, I, B.

Quasi-judicial bodies.— It is usual to recognize the determinations of certain bodies invested with minor administrative powers, and acting in a judicial capacity in reference to their exercise, as equivalent to judgments of the courts. Such is the case with reference to road commissioners, in adjudicating upon the necessity of a road and in locating and making assessments for the same. Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525. Also in the case of a town council, in auditing and allowing a claim for a certain and ascertained amount. Kelly *v.* Wimberly, 61 Miss. 548.

An act of the legislature directing the auditor-general to restore certain accounts between the state and certain of its counties to their condition as they were before he made certain charges and gave certain credits is not a judgment, and does not constitute an adjudication as between the counties. Clare County *v.* Auditor-Gen., 41 Mich. 182, 1 N. W. 926.

10. *Georgia.*— Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

Illinois.— Young *v.* People, 171 Ill. 299, 49 N. E. 503.

New York.— Seaman *v.* Ward, 1 Hilt. 52.

ing by what court rendered, or when, or for what cause of action, is a nullity.[11] It is also necessary to a judgment that there should be an existing action, and an issue to be decided, either of law or fact;[12] and except in purely *ex parte* proceedings that it should appear to have been rendered between adverse parties, or between a party plaintiff and some *res* which stands in place of a defendant.[13] But in general the office of a judgment is fully performed when it declares and adjudicates the existence or non-existence of the liability sought to be established; it is not concerned with the means of enforcing the liability declared. Although it adjudges that the one party "have and recover" a certain sum from the other, it is not necessary that it should command the debtor to pay the money, or authorize or direct the issue of an execution,[14] or that it should be served upon any party to the cause after it is entered or filed.[15]

6. Language of a Judgment. The proper formula of a judgment at law is, "It is considered by the court," etc.[16] But the use of these words is not essential to its validity; other terms may be employed if they clearly indicate that the sentence is the judicial act of the court adjudicating the matter in controversy.[17] A

North Carolina. — Mathews *v.* Moore, 6 N. C. 181.

United States. — Goddard *v.* Coffin, 10 Fed. Cas. No. 5,490, 2 Ware 382.

Act of the court. — A memorandum on the minute-book of the judge to the effect that an award of arbitrators in a certain sum is approved and accepted does not constitute a judgment. Gage *v.* Judson, 92 Fed. 545. And so a fee for collection, in order to be recoverable out of the proceeds of a judicial sale, must be made a part of the judgment when entered; and a mere recital in the judgment of what the parties have agreed to do is not sufficient. Anderson *v.* March, 6 Pa. Dist. 49.

Decree drawn by counsel. — A paper drawn up by plaintiff's attorney, not signed and not mentioned in the record nor marked as filed, although found in the official files of the case, purporting to be a decree for the sale of the land in suit, will not as a decree authorize such sale. Raymond *v.* Smith. 1 Metc. (Ky.) 65, 71 Am. Dec. 458. And see Johnson *v.* Ford, 92 Ga. 751, 19 S. E. 712.

11. Bevington *v.* Buck, 18 Ind. 414. *Compare* Horn *v.* Miller, 20 Nebr. 98, 100, 29 N. W. 260.

12. Booth *v.* Kingsland Ave. Bldg. Assoc., 18 N. Y. App. Div. 407, 46 N. Y. Suppl. 457.

13. See Haines *v.* Christie, 27 Colo. 288, 60 Pac. 567; Hall *v.* De Armond, 46 Mo. App. 596.

14. Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717. And see Simmons *v.* Redmond, (Tenn. Ch. App. 1901) 62 S. W. 366. *Compare* Credit Foncier Franco-Canadien *v.* Schultz, 10 Manitoba 417; Frontenac Loan Co. *v.* Morice, 4 Manitoba 442.

15. Western Security Co. *v.* Lafleur, 17 Wash. 406, 49 Pac. 1061.

16. Baker *v.* State, 3 Ark. 491. See also Bell *v.* Otts, 101 Ala. 186, 188, 13 So. 43, 46 Am. St. Rep. 117, where it is said: "The language of a judgment is, 'it is considered by the court, that the plaintiff have and recover,' or 'that the defendant go without day.'" *Compare* Jacob L. Dict. [*quoted* in Deuel *v.* Hawke, 2 Minn. 50, 57], where it is said: "If judgment be for the plaintiff, it is also considered that the defendant be either amerced for his willful delay of justice in not immediately obeying the king's writ, by rendering the plaintiff his due," etc.

Judgment for defendant. — The proper form of final judgment in an action at law, against plaintiff and in favor of defendant, is as follows: "Therefore it is considered that the said (plaintiff) take nothing by his suit and that the said (defendant) do go thereof without day." It is essential that the judgment should include a "*nil capiat*" or an "*eat inde sine die*" or equivalent words. People *v.* Severson, 113 Ill. App. 496. See also Sprick *v.* Washington County, 3 Nebr. 253.

On demurrer. — To constitute a sufficient judgment on a demurrer, there should be a formal entry of the submission on demurrer to a specified pleading, a recital of consideration thereof by the court, and a formal adjudication, such as "It is therefore considered and adjudged by the court that the demurrers be . . . and are hereby overruled" or sustained, as the case may be. Alabama Nat. Bank *v.* Hunt, 125 Ala. 512, 28 So. 488; Jasper Mercantile Co. *v.* O'Rear, 112 Ala. 247, 20 So. 583.

17. *Arkansas.* — The words "ordered, adjudged, and decreed by the court" are of equivalent import to "considered." Ware *v.* Pennington, 15 Ark. 226.

Connecticut. — A judgment may be given in the words "the court are of opinion." Todd *v.* Potter, 1 Day 238.

Georgia. — Thornton *v.* Perry, 101 Ga. 608, 29 S. E. 24.

Illinois. — Johnson *v.* Gillett, 52 Ill. 358; Minkhart *v.* Hankler, 19 Ill. 47; Johnson *v.* Miller, 50 Ill. App. 60; Coats *v.* Barrett, 49 Ill. App. 275. *Compare* Fitzsimmons *v.* Munch, 74 Ill. App. 259; Emig *v.* Medley, 69 Ill. App. 199.

Indiana. — To constitute a valid judgment, the word "recover" should be used, and the amount of the recovery should be stated where a money judgment is rendered. Need-

judgment is properly expressed in the English language, although the previous proceedings have been conducted in French.[18]

7. Formal Requisites — a. In General. According to the modern doctrine a judgment is to be tested by its substance rather than its form, and the form is not very material, provided that in substance it shows directly and not inferentially the judicial character of the act, the nature and scope of the adjudication, and its application to the controversy before the court.[19] Even where the form of a judgment is prescribed by statute, a departure from it is not necessarily fatal to the adjudication.[20] A judgment and the findings may be incorporated in the same instrument without affecting the validity of the judgment.[21]

b. As Determined by Nature of Issues. Where issues of fact have been found by a jury, the proper form of the judgment, if it is for plaintiff, is "*quod recuperet*," that is, that plaintiff "do recover";[22] if for defendant, the judgment should be "*nil capiat per breve*," that is, that plaintiff "take nothing" by his writ or declaration,[23] except where plaintiff took issue upon a plea in abatement, in which case, the plea prevailing, the judgment for defendant is that the action abate, or that the writ or declaration be quashed.[24] Where the issue of law raised by a demurrer to any of the pleadings is found for plaintiff, the judgment is final and definitive and should be "*quod recuperet*,"[25] except where plaintiff has

ham *v.* Gillaspy, 49 Ind. 245. See La Porte *v.* Organ, 5 Ind. App. 369, 32 N. E. 342.

Iowa.— Taylor *v.* Runyan, 3 Iowa 474.

Nebraska. — An entry in the words, "I hereby render judgment against plaintiffs for costs," while informal and incomplete, is not void. Marsh *v.* Synder, 14 Nebr. 237, 15 N. W. 341. And see Black *v.* Cahon, 24 Nebr. 248, 38 N. W. 779.

New Jersey.— See Conover *v.* Conover, 17 N. J. L. 187.

Pennsylvania. — The entry "judgment on verdict" may, in a scire facias upon it, be considered as the judgment which plaintiff was entitled to have. Shirtz *v.* Shirtz, 5 Watts 255.

Wisconsin.— See Vilas *v.* Reynolds, 6 Wis. 214.

United States. — Deadrick *v.* Harrington, 7 Fed. Cas. No. 3,694*b*, Hempst. 50; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

18. Maxent *v.* Maxent, 1 La. 438.

19. *Illinois.* — McLain *v.* People, 85 Ill. 205; Morgan Hastings Co. *v.* Gray Dental Co., 108 Ill. App. 98. But an entry in the court record of "judgment rendered upon the verdict of the jury" is fatally defective, as a judgment, for want of form. Meyer *v.* Teutopolis, 131 Ill. 552, 23 N. E. 651.

Louisiana.— Gibson *v.* Foster, 2 La. Ann. 503. See Duruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555.

Nebraska.— McNamara *v.* Cahon, 21 Nebr. 589, 33 N. W. 259. *Compare* Horn *v.* Miller, 20 Nebr. 98, 100, 29 N. W. 260.

Nevada. — Terry *v.* Berry, 13 Nev. 514; Humboldt Mill, etc., Co. *v.* Terry, 11 Nev. 237.

New York. — A judgment in the words: "Judgment rendered in favor of the defendant and against the plaintiff. Plaintiff is only entitled to $10," determines nothing. Salsberg *v.* Tobias, 84 N. Y. Suppl. 151.

North Dakota.— Cameron *v.* Great Northern R. Co., 8 N. D. 124, 77 N. W. 1016.

Pennsylvania. — Thompson *v.* Musser, 1 Dall. 458, 1 L. ed. 222.

South Carolina.— Ordinary *v.* McClure, 1 Bailey 7, 19 Am. Dec. 648.

South Dakota.— Mattice *v.* Street, 15 S. D. 63, 87 N. W. 522.

Texas.— Hamman *v.* Lewis, 34 Tex. 474; Scott *v.* Burton, 6 Tex. 322, 55 Am. Dec. 782; Roberts *v.* State, 3 Tex. App. 47.

See 30 Cent. Dig. tit. "Judgment," § 12.

20. Lester *v.* Brown, 57 Ga. 79.

21. Hopkins *v.* Warner, 109 Cal. 133, 41 Pac. 868; Beach *v.* Woolford, 7 Ind. 351; Pier *v.* Prouty, 67 Wis. 218, 30 N. W. 232; Morgan *v.* Eggers, 127 U. S. 63, 8 S. Ct. 1041, 32 L. ed. 56.

22. Texas, etc., R. Co. *v.* Saxton, 3 N. M. 282, 6 Pac. 206. And see Needham *v.* Gillaspy, 49 Ind. 245.

Where issue has been joined on a plea in abatement (the only plea in the case) and the issue submitted to a jury, resulting in a verdict for plaintiff, the court should award a peremptory judgment "*quod recuperet*" and not a default for want of a plea. Bishop *v.* Camp, 39 Fla. 517, 22 So. 735.

23. Black L. Dict.; Coke Litt. 363.

24. Where judgment is rendered for defendant in an action, on his plea that the action is barred by the judgment in another suit, the proper order is that the action abate, and not that plaintiff take nothing by his action. Coubrough *v.* Adams, 70 Cal. 374, 11 Pac. 634.

25. Silver *v.* Rhodes, 2 Harr. (Del.) 369; Pettys *v.* Marsh, 24 Fla. 44, 3 So. 577; Hale *v.* Lawrence, 22 N. J. L. 72.

But where defendant demurred for a variance between declaration and writ, and pending the demurrer leave was granted to amend, whereupon the demurrer was overruled, it was held that the judgment should

successfully demurred to a dilatory plea or plea in abatement, in which case the judgment is "*respondeat ouster*," that is, that defendant "do answer over," and requires defendant, beaten on a preliminary point, to present a more substantial defense.[26] When the issue raised by the demurrer is determined in favor of defendant, the judgment in his favor is final and disposes of the case, unless leave be granted to amend the pleading, or withdraw the demurrer, as the case may be.[27] The proper style of the judgment may also depend upon the form of the action, immemorial custom having prescribed the formula of words to be employed in the judgments rendered in certain classes of proceedings.[28]

8. CERTAINTY OF DETERMINATION. It is necessary to the validity of a judgment that it should be certain and definite, or be capable of being made so by proper construction; and to this end it should state clearly the time of its rendition, the parties, the matter in dispute, and particularly the result of the action with the relief granted, so that what the judgment gives, orders, or decides should be clearly apparent.[29]

be "*respondeat ouster*," and not "*quod recuperet*." Walker *v.* Walker, 6 How. (Miss.) 500.

26. Massey *v.* Walker, 8 Ala. 167; Randolph *v.* Singleton, 12 Sm. & M. (Miss.) 439; Heyfron *v.* Mississippi Union Bank, 7 Sm. & M. (Miss.) 434; Trow *v.* Messer, 32 N. H. 361; Cooke *v.* Crawford, 1 Tex. 9, 46 Am. Dec. 93.

27. *Alabama.*— White *v.* Levy, 93 Ala. 484, 9 So. 164.

Illinois.— Weiss *v.* Binnian, 178 Ill. 241, 52 N. E. 969.

Mississippi.— Scharff *v.* Lisse, 63 Miss. 213; Memphis, etc., R. Co. *v.* Orr, 52 Miss. 541; Ross *v.* Sims, 27 Miss. 359.

Missouri.— Comstock *v.* Davis, 51 Mo. 569.

New Jersey.—Hale *v.* Lawrence, 22 N. J. L. 72.

28. Debt or damages.— Where the action is in debt, judgment should not be given for damages; and conversely, in a suit for damages, it is not regular to render judgment for a specified sum under the designation of "debt." Jackson *v.* Haskell, 3 Ill. 565; White *v.* McCall, 1 N. J. L. 93.

Partition.— In the action for partition, the interlocutory judgment whereby it is directed that partition be made, is called judgment "*quod partitio fiat*," while the style of the final judgment in the same action, confirming the partition made, upon the return of the writ, is "*quod partitio facta firma et stabilis in perpetuum*." 5 Bacon Abr. 292. See also Gudgell *v.* Mead, 8 Mo. 53, 54, 55, 40 Am. Dec. 120.

Account.— The interlocutory judgment in an action of account, whereby it is directed that "the defendant do account," is called judgment "*quod computet*." 3 Blackstone Comm. 164.

Judgment nisi.— At common law a judgment *nisi* was one entered on the return of the *nisi prius* record with the *postea* indorsed, which would become absolute according to the terms of the *postea*, unless the court out of which the *nisi prius* record proceeded should, within the first four days, otherwise order. Bouvier L. Dict. It is otherwise defined as "one that is to be valid unless something else should be done within a given time to defeat it." U. S. *v.* Winstead, 12 Fed. 50, 4 Hughes 464. And see Strickland *v.* Cox, 102 N. C. 411, 9 S. E. 414. A rule or order *nisi* is one which is to be confirmed or made absolute, unless cause be shown to the contrary, or something be done which has been required, within a specified time. 1 Black Judgm. § 18.

29. *Alabama.*— Jones *v.* Acre, Minor 5.

California.— Wallace *v.* Farmers' Ditch Co., 130 Cal. 578, 62 Pac. 1078; Gregory *v.* Blanchard, 98 Cal. 311, 33 Pac. 199; Kelley *v.* McGibben, 53 Cal. 13.

Colorado.— Haines *v.* Christie, 27 Colo. 288, 60 Pac. 567.

Georgia.— Inman *v.* Foster, 72 Ga. 79; McWilliams *v.* Walthall, 65 Ga. 109.

Illinois.— Emig *v.* Medley, 69 Ill. App. 199.

Iowa.— Church *v.* Crossman, 41 Iowa 373; Barrett *v.* Garragan, 16 Iowa 47.

Kentucky.— Neff *v.* Covington Stone, etc., Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723, 21 Ky. L. Rep. 1454; Boehme *v.* Droste, 10 Ky. L. Rep. 542.

Louisiana.— Avery *v.* Iberville Police Jury, 15 La. Ann. 223; Clay *v.* Oldham, 3 Mart. N. S. 276; Decker *v.* Bradford, 4 Mart. 311.

New Hampshire.— Wilbur *v.* Abbot, 58 N. H. 272.

New York.— Simmons *v.* Craig, 137 N. Y. 550, 33 N. E. 76; Whiteside *v.* Noyac Cottage Assoc., 68 Hun 565, 568, 23 N. Y. Suppl. 63.

North Carolina.— Carter *v.* Elmore, 119 N. C. 296, 26 S. E. 35; Hinton *v.* Virginia L. Ins. Co., 116 N. C. 22, 21 S. E. 201.

North Dakota.— Cameron *v.* Great Northern R. Co., 8 N. D. 124, 77 N. W. 1016.

Oklahoma.— Custer County *v.* Moon, 8 Okla. 205, 57 Pac. 161.

Oregon.— Dray *v.* Crich, 3 Oreg. 298.

South Carolina.— Ordinary *v.* McClure, 1 Bailey 7, 19 Am. Dec. 648.

Tennessee.— Harman *v.* Childress, 3 Yerg. 327.

Texas.— Sellman *v.* Lee, 55 Tex. 319; Spiva *v.* Williams, 20 Tex. 442; Barrow *v.* Gridley, 25 Tex. Civ. App. 13, 59 S. W.

9. Finality of Determination. Judgments may be either final or interlocutory.[30] A final judgment is one which disposes of the case, either by dismissing it before a hearing is had upon its merits, or after trial, by rendering judgment either in favor of plaintiff or defendant.[31] An interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties.[32] No judgment is final which does not determine the rights of the parties in the cause and preclude further inquiry as

602, 913; Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

United States.— Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

See 30 Cent. Dig. tit. "Judgment," § 7.

30. Elliott *v.* Mayfield, 3 Ala. 223, 226; Sheldon *v.* Mirick, 64 N. Y. St. 67, 69; Valentine *v.* Central Nat. Bank, 10 Abb. N. Cas. (N. Y.) 188, 191; State *v.* Hays, 30 W. Va. 107, 118, 3 S. E. 177; 3 Blackstone Comm. 396, 397 [*quoted* in Lockwood *v.* Jones, 7 Conn. 431, 446]. See also cases cited *infra*, note 33; and XIII, B, 5; XIV, A, 4, g.

The distinction has always been recognized in this court between those orders which are final as to rights and proceedings and those which are not. Demaray *v.* Little, 17 Mich. 386, 388.

31. See cases cited *infra*, this note and note 33. See also Courts, 11 Cyc. 926.

Final judgments are such as at once put an end to the action (Elliott *v.* Mayfield, 3 Ala. 223, 226; Treadway *v.* Coe, 21 Conn. 283; Allen *v.* Adams, 17 Conn. 67, 72; Deuel *v.* Hawke, 2 Minn. 50, 57; Valentine *v.* Central Nat. Bank, 10 Abb. N. Cas. (N. Y.) 188, 191; State *v.* Hays, 30 W. Va. 107, 118, 3 S. E. 177; 3 Blackstone Comm. 398 [*quoted* in Towner *v.* Wells, 8 Ohio 136, 141; Stedman *v.* Poterie, 139 Pa. St. 100, 108, 21 Atl. 219]), by declaring that plaintiff has either entitled himself, or has not, to recover the remedy he sues for (3 Blackstone Comm. 396, 398 [*quoted* in Lockwood *v.* Jones, 7 Conn. 431, 446; Nacoochee Hydraulic Min. Co. *v.* Davis, 40 Ga. 309, 320; Turner *v.* Browder, 18 B. Mon. (Ky.) 825, 827]), or by determining that plaintiff is or is not entitled to recover, and the amount in debt or damages to be recovered (Mahoning County Bank's Appeal, 32 Pa. St. 158). If a judgment so completely fixes the rights of the parties as that the court has nothing further to do in the action, then it is final. Valentine *v.* Central Nat. Bank, 10 Abb. N. Cas. (N. Y.) 188, 191. They are the ultimate and final adjustment of the whole matters in controversy, and put the parties out of court. State *v.* Hays, 30 W. Va. 107, 3 S. E. 177.

"A judgment of nonsuit is a final disposition of the suit in which it is entered, but it does not ordinarily bar a subsequent suit for the same cause of action; it is not a final disposition of the subject matter in litigation. In examining the books, it will be found that the term final judgment is sometimes used to signify a final disposition of the particular suit, and sometimes a final determination of all litigation on the subject matter thereof." Bowne *v.* Johnson, 1 Dougl. (Mich.) 185, 186.

Necessity of entry.— The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute. California State Tel. Co. *v.* Patterson, 1 Nev. 150. See also *infra*, VII.

32. See cases cited *infra*, this note.

An interlocutory judgment is one given in the course of a cause before final judgment (Bouvier L. Dict. [*quoted* in Nacoochee Hydraulic Min. Co. *v.* Davis, 40 Ga. 309, 320]), or such as is given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit (3 Blackstone Comm. 396, 397 [*quoted* in Lockwood *v.* Jones, 7 Conn. 431, 446; Nacoochee Hydraulic Min. Co. *v.* Davis, 40 Ga. 309, 320; Turner *v.* Browder, 18 B. Mon. (Ky.) 825, 827; Holden *v.* McMakin, 1 Pars. Eq. Cas. (Pa.) 270, 288]), but contemplates further proceedings for that purpose (Elliott *v.* Mayfield, 3 Ala. 223, 226 [*quoting* 3 Blackstone Comm. 396; Bingham Judgm. 2, 12, L. lib.; 2 Tomlyn L. Dict. 287]). All judgments that do not fully determine the controversy and put the parties out of court are interlocutory. State *v.* Hays, 30 W. Va 107, 118, 3 S. E. 177. If anything remains to be done by the court before the rights of the parties are fixed, it is interlocutory. Freeman Judgm. § 12 [*cited* in Valentine *v.* Central Nat. Bank, 10 Abb. N. Cas. (N. Y.) 188, 191]. The interlocutory judgments most usually spoken of are those incomplete judgments whereby the right of plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained. 3 Blackstone Comm. 397 [*quoted* in Stedman *v.* Poterie, 139 Pa. St. 100, 108, 21 Atl. 219].

"Interlocutory order" defined see Keifer *v.* Ruchert, 93 Md. 97, 99, 48 Atl. 460; Clagett *v.* Crawford, 12 Gill & J. (Md.) 275, 281; Meyers *v.* Becker, 29 Hun (N. Y.) 567, 573. See also Orders.

The nature of any order, as a decree or final order, or as not final, depends entirely on the effect produced by the adjudication upon the rights and interests of parties. The usual distinction between interlocutory and other orders, depending on the stage of the cause on which they are made, is not the test for appellate purposes. Barry *v.* Briggs, 22 Mich. 201, 204.

Final or interlocutory decree see Equity, 16 Cyc. 471.

to their rights in the premises.[33] But it is not essential, for a judgment to be final, that it should settle all the rights existing between the parties to the suit; all that is required is that it should determine the issues involved in the action; and the judgment is none the less final because some future orders of the court may become necessary to carry it into effect.[34]

10. Judgments as Obligations — a. In General. A judgment is not an assignment, even though entered on confession,[35] nor is it a specialty, within the meaning of a statute providing for the limitation of actions founded upon a specialty.[36] But it is to be regarded as a debt of record,[37] and may constitute a vested right of property in the creditor which cannot lawfully be diminished or destroyed by legislative action.[38]

b. As Contracts. Although numerous cases have ruled that judgments are to be considered and treated in law as contracts,[39] yet this view is opposed by a

33. *Florida.*— Williams *v.* Hutchinson, 26 Fla. 513, 7 So. 852.

Maryland.— Young *v.* Reynolds, 4 Md. 375; Turner *v.* Plowden, 5 Gill & J. 52, 23 Am. Dec. 596.

Mississippi.—Starke *v.* Lewis, 23 Miss. 151.

Nebraska.— Lewis *v.* Watrus, 7 Nebr. 477; Hall *v.* Vanier, 7 Nebr. 397; Banks *v.* Uhl, 6 Nebr. 145.

New York.— Crockett *v.* Smith, 14 Abb. Pr. 62.

South Carolina.— Adickes *v.* Allison, 21 S. C. 245.

Tennessee.— Southern R. Co. *v.* Brigman, 95 Tenn. 624, 32 S. W. 762.

Texas.— Cannon *v.* Hemphill, 7 Tex. 184; Gulf, etc., R. Co. *v.* Stephenson, (Civ. App. 1894) 26 S. W. 236.

Vermont.— White River Bank *v.* Downer, 29 Vt. 332.

United States.— Ingraham *v.* Dawson, 20 How. 486, 15 L. ed. 984.

See 30 Cent. Dig. tit. "Judgment," § 9.

Appeal and error.— The question of the final or interlocutory character of judgments chiefly arises in connection with their appealability. See Appeal and Error, 2 Cyc. 586. And see 1 Black Judgm. §§ 20–49.

Provisional judgment.— A judgment or decision, in its nature judicial, cannot be made provisionally, while the question whether any, or what, judgment should be pronounced is kept open to await argument. American Wood-Paper Co. *v.* Glen's Falls Paper Co., 1 Fed. Cas. No. 321*a*, 8 Blatchf. 513.

34. Perkins *v.* Sierra Nevada Silver Min. Co., 10 Nev. 405; 1 Black Judgm. § 43.

35. Breading *v.* Boggs, 20 Pa. St. 33.

36. Tyler *v.* Winslow, 15 Ohio St. 364.

37. Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Males *v.* Murray, 23 Ohio Cir. Ct. 396; Reeside *v.* U. S., Dev. Ct. Cl. (U. S.) 97; Howland *v.* Codd, 9 Manitoba 435. See also Davidson *v.* Smith, 7 Fed. Cas. No. 3,608, 1 Biss. 346, 351, where it is said: "It is a debt of record; and in many respects, is distinguished from a contract."

Judgment as a "debt" see Corporations, 10 Cyc. 859.

In action of tort.— A judgment is a debt, although it was obtained in an action for a personal injury. Anniston *v.* Hurt, 140 Ala. 394, 37 So. 220, 103 Am. St. Rep. 45.

38. Merchants' Bank *v.* Ballou, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715, 44 L. R. A. 306.

Rate of interest.— But the right to receive interest on the amount of a judgment, at the rate fixed by law at the time the judgment was rendered, is not such a vested right of property as to be beyond the control of the legislature; and consequently a statute reducing the rate of interest on judgments may validly apply to those in force at the date of its enactment, and interest on such existing judgments can be recovered only at the reduced rate from the time of the passage of the statute. Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925. And see Wyoming Nat. Bank *v.* Brown, 9 Wyo. 153, 61 Pac. 465.

Right of appeal.— Although there was no law allowing an appeal from a particular judgment at the time of its rendition it cannot be said that the successful party has any vested right that his judgment shall not be made subject to review by subsequent legislation. Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041.

39. *Alabama.*— Weaver *v.* Lapsley, 43 Ala. 224. But *compare* the Alahama cases cited in the next note.

California.— Reed *v.* Eldredge, 27 Cal. 346; Stuart *v.* Lander, 16 Cal. 372, 76 Am. Dec. 538. And see Scarborough *v.* Dugan, 10 Cal. 305. But *compare* Larrabee *v.* Baldwin, 35 Cal. 155.

Iowa.— Farmers', etc., Bank *v.* Mather, 30 Iowa 283; Johnson *v.* Butler, 2 Iowa 535. But *compare* Sprott *v.* Reid, 3 Greene 489, 56 Am. Dec. 549.

Massachusetts.— Morse *v.* Toppan, 3 Gray 411.

Missouri.— McElroy *v.* Ford, 81 Mo. App. 500.

New York.— Taylor *v.* Root, 4 Abb. Dec. 382, 4 Keyes 335; Humphrey *v.* Persons, 23 Barb. 313; McGuire *v.* Gallagher, 2 Sandf. 402. But *compare* O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64.

Vermont.— Sawyer *v.* Vilas, 19 Vt. 43.

Wisconsin.— Childs *v.* Harris Mfg. Co., 68 Wis. 231, 32 N. W. 43.

Canada.— Martel *v.* Dubord, 3 Manitoba 598.

Broom, in his Commentaries on the Com-

decided preponderance of the authorities.[40] Thus it is held that a judgment is not a contract within the meaning of constitutional provisions respecting laws "impairing the obligation of contracts."[41] But it seems that a judgment may be considered as a contract, within the meaning of a statute providing that several causes of action may be united when they arise out of contract express or implied,[42] or a statute of limitations dividing all classes of actions into actions on contract and actions on tort.[43]

11. WHAT LAW GOVERNS. The validity of a judgment is to be determined by the laws in force at the time of its rendition, and is not affected by subsequent changes therein.[44] And in the case of a foreign judgment or decree, its validity

mon Law, page 262, in his classification of contracts, places in the first rank "contracts of record, such as judgments." Lewis *v.* Armstrong, 8 Abb. N. Cas. (N. Y.) 385, 389.

Distinguished from a bond in Thompson *v.* Grand Gulf R., etc., Co., 3 How. (Miss.) 240, 248, 34 Am. Dec. 81.

40. *Alabama.*— Wolffe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Lovins *v.* Humphries, 67 Ala. 437; Masterson *v.* Gibson, 56 Ala. 56; Smith *v.* Harrison, 33 Ala. 706; Keith *v.* Estill, 9 Port. 669.

California.— Larrabee *v.* Baldwin, 35 Cal. 155.

Illinois.— Rae *v.* Hulbert, 17 Ill. 572; Williams *v.* Waldo, 4 Ill. 264.

Iowa.— Ferry *v.* Campbell, 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92; Sprott *v.* Reid, 3 Greene 489, 56 Am. Dec. 549.

Maine.— Jordan *v.* Robinson, 15 Me. 167.

New York.— O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Wyman *v.* Mitchell, 1 Cow. 316. In Pease *v.* Howard, 14 Johns. 479, the court says that a judgment is not a contract in fact.

North Carolina.— McDonald *v.* Dickson, 87 N. C. 404.

South Carolina.— Napier *v.* Gidiere, Speers Eq. 215, 40 Am. Dec. 613.

Texas.— Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

Wyoming.— Wyoming Nat. Bank *v.* Brown, 7 Wyo. 494, 53 Pac. 291, 75 Am. St. Rep. 935.

United States.— Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925; Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900; Wadsworth *v.* Henderson, 16 Fed. 447; Todd *v.* Crumb, 23 Fed. Cas. No. 14,073, 5 McLean 172.

England.— Bidleson *v.* Whytel, 3 Burr. 1545.

A judgment is a contract in the sense that it may be sued upon in another judicial tribunal, but it is not a contract in that it can only be rendered against a party then capable of contracting a specialty debt (Wadsworth *v.* Henderson, 4 Ky. L. Rep. 1003, 1008); for it is not true that a judgment rests either upon the will or the capacity to contract of the party against whom it is rendered (Freeman Judgm. § 4 [*quoted* in Wadsworth *v.* Henderson, 16 Fed. 447, 451]).

A judgment of this sort involves two ideas — the contract upon which it is rendered and the judgment itself. The one is the act of the parties — the other is the act of the court. They are entirely separate and distinct. Moore *v.* Holland, 16 S. C. 15, 27.

For the purpose of set-off. — Judgments have frequently been held to be contracts, as constituting claims for a set-off, under statutes which provide only for a set-off of claims founded on contract. Sawyer *v.* Vilas, 19 Vt. 43, 47.

Where the cause of action was in tort, there can be no possible ground for holding the judgment to be a contract or in the nature of a contract. Louisiana *v.* New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. ed. 936.

41. *Georgia.*— McAfee *v.* Covington, 71 Ga. 272, 51 Am. Rep. 263.

Iowa.— Ferry *v.* Campbell, 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92; Sprott *v.* Reid, 3 Greene 489, 56 Am. Dec. 549.

Louisiana.— State *v.* New Orleans, 32 La. Ann. 709.

Ohio.— *Ex p.* McKnight, 4 Ohio S. & C. Pl. Dec. 284, 3 Ohio N. P. 255.

Texas.— Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

United States.— Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925; Freeland *v.* Williams, 131 U. S. 405, 9 S. Ct. 763, 33 L. ed. 193; Louisiana *v.* New Orleans, 109 U. S. 285, 3 S. Ct. 211, 27 L. ed. 936; Garrison *v.* New York City, 21 Wall. 196, 22 L. ed. 612; Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900.

Contra.— Weaver *v.* Lapsley, 43 Ala. 224; Scarborough *v.* Dugan, 10 Cal. 305; Maxwell *v.* Devalinger, 2 Pennew. (Del.) 504, 47 Atl. 381; Palmer *v.* Laberee, 23 Wash. 409, 63 Pac. 216; Bettman *v.* Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815.

42. Childs *v.* Harris Mfg. Co., 68 Wis. 231, 32 N. W. 43. And see McGuire *v.* Gallagher, 2 Sandf. (N. Y.) 402; Sawyer *v.* Vilas, 19 Vt. 43.

43. Moore *v.* Nowell, 94 N. C. 265.

44. Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269. And see Wood *v.* Ostram, 29 Ind. 177.

Jurisdiction.— The question of the validity of a judgment, if depending on jurisdiction, must be determined by the jurisdiction of the court at the time when the judgment was rendered. Champlin *v.* Bakewell, 21 La. Ann. 353.

depends, as a general rule, on the law of the state or country in which it was rendered.[45]

B. Authority of Court or Judge[46] — **1. In General.** Where proceedings are had under the authority of a statute, with no objection to the jurisdiction of the court or the validity of the law, the judgment cannot be disturbed, although the statute is afterward adjudged unconstitutional.[47] But where statutory powers are conferred upon a court of inferior jurisdiction, and the mode of executing those powers is prescribed, the course pointed out must be substantially pursued, or the judgments of the court will be void.[48]

2. Constitution of Court. In order that a judgment should be recognized as valid, it is necessary that it should have been rendered by a lawful and duly constituted court.[49] But on principles of public policy and for the security of rights it is held that the regular judgments of a *de facto* court, whose existence has afterward been pronounced unconstitutional and void, are nevertheless valid and conclusive.[50]

3. Time and Place of Rendition — a. Time of Holding Court. A judgment rendered at a term of court held at a different time from that ordained or authorized by the law is void,[51] or at least liable to reversal for irregularity.[52]

b. In Vacation. Unless authorized by statute[53] or by the consent and agree-

45. Lynde *v.* Lynde, 41 N. Y. App. Div. 280, 58 N. Y. Suppl. 567. See *infra*, XXII.

46. Effect of disqualification of judge see Judges, *ante*, p. —— *et seq.*

47. Rives *v.* Pettit, 4 Ark. 582.

48. Mossman *v.* Forrest, 27 Ind. 233. And see Hunt *v.* Hapgood, 4 Mass. 117; Horn *v.* Miller, 20 Nebr. 98, 100, 29 N. W. 260.

49. Rogers *v.* Wood, 2 B. & Ad. 245, 22 E. C. L. 109.

50. *Alabama.*— Masterson *v.* Matthews, 60 Ala. 260; Mayo *v.* Stoneum, 2 Ala. 390; State *v.* Porter, 1 Ala. 688.

Connecticut.— State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

Minnesota.— Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289.

North Carolina.— Gilliam *v.* Reddick, 26 N. C. 368.

Ohio.— State *v.* Alling, 12 Ohio 16.

South Carolina.— State *v.* Anone, 2 Nott & M. 27.

United States.— Keene *v.* McDonough, 8 Pet. 308, 8 L. ed. 955.

Confederate states.— For the validity of judgments rendered by the courts of the states seceding from the Union in 1861 see States.

51. *Alabama.*— Northern Alabama R. Co. *v.* Musgrove, (1905) 38 So. 1037; Kansas City, etc., R. Co. *v.* McLaughlin, (1905) 38 So. 1036; Drennen *v.* Jasper Inv. Co., (1905) 38 So. 1034; Berlin Mach. Works *v.* Marbury Lumber Co., (1905) 38 So. 1033; Kidd *v.* Burke, 142 Ala. 625, 38 So. 241.

Arkansas.— Grimmett *v.* Askew, 48 Ark. 151, 2 S. W. 707.

California.— Wicks *v.* Ludwig, 9 Cal. 173. See Coffinberry *v.* Horrill, 5 Cal. 493.

Colorado.— Cooper *v.* American Cent. Ins. Co., 3 Colo. 318.

Nebraska.— See Horn *v.* Miller, 20 Nebr. 98, 100, 29 N. W. 260.

Nevada.— Dalton *v.* Libby, 9 Nev. 192; State *v.* Roberts, 8 Nev. 239.

Texas.— Hodges *v.* Ward, 1 Tex. 244.

See 30 Cent. Dig. tit. "Judgment," § 14.

52. Smithson *v.* Dillon, 16 Ind. 169. And see Bowden *v.* Hatcher, 83 Ga. 77, 9 S. E. 724.

Where there was reasonable mistake in regard to the time fixed by law for holding the court, and color of authority for the time actually selected, the judgment may be perfectly valid. Venable *v.* Curd, 2 Head (Tenn.) 582.

Term properly commenced.— A judgment is valid when rendered at a term which was commenced at the day fixed by law, although in the middle of the term, and before the judgment, a new statute changes the time for holding the court. Clare *v.* Clare, 4 Greene (Iowa) 411.

Improper adjournment.— Where, in the absence of the judge, the sheriff adjourned the court without authority, the adjournment was held to be a nullity, and a judgment entered by the court two days afterward was held valid. Thomas *v.* Fogarty, 19 Cal. 644.

53. Under statutes authorizing the courts to take cases "under advisement" after trial or hearing at the term, it is held that the judgment may be rendered in vacation. St. Marys Bank *v.* St. John, 25 Ala. 566; *Ex p.* Bennett, 44 Cal. 84; Hutchinson *v.* Bours, 13 Cal. 50; Schenk *v.* Birdseye, 2 Ida. (Hash.) 141, 6 Pac. 128; Hook *v.* Richeson, 115 Ill. 431, 5 N. E. 98 (but the judgment will remain subject to modification, and will not become final, until after the expiration of the succeeding term, and then only as approved at that term); Frostburg *v.* Tiddy, 63 Md. 514; *In re* Korman, 162 Pa. St. 151, 29 Atl. 861. *Compare* Wilson *v.* Rodewald, 61 Miss. 228; Abraham *v.* Levy, 72 Fed. 124, 18 C. C. A. 469.

In Colorado, where a demurrer to a complaint was overruled, and defendant declined to plead over, it was proper to enter a judg-

ment of the parties,[54] a valid judgment cannot be rendered in vacation, this being a judicial act which can be performed only when the court is in session.[55]

c. After End of Term. In accordance with these principles, it is held that a judgment of a court holding regular terms, if rendered after the time fixed by law for its adjournment, is invalid and will be reversed on appeal,[56] unless where

ment against defendant in vacation on the complaint, under Mills Annot. Code, § 74, providing that when a demurrer is decided either in term or vacation the court may proceed to final judgment thereon unless the unsuccessful party plead over as amended. Hereford *v.* Benton, 20 Colo. App. 500, 80 Pac. 499.

54. **Consent.**— In many states it is held that the parties may consent to the rendition of a judgment in vacation, and that when this is done the judgment will be regular and valid, being entered either as of the preceding or the ensuing term, according to the local rules. Wright *v.* Dunklin, 83 Ala. 317, 3 So. 597; Shine *v.* Bolling, 82 Ala. 415, 2 So. 533; Hooper *v.* Strahan, 71 Ala. 75; *Ex p.* Holding, 56 Ala. 458; Erwin *v.* Reese, 54 Ala. 589; King *v.* Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 46; *Ex p.* Bennett, 44 Cal. 84; Patterson *v.* Hendrix, 72 Ga. 204; Walker *v.* Turner, 58 Ga. 114; Western Land Co. *v.* English, 75 Iowa 507, 39 N. W. 719; Babcock *v.* Wolf, 70 Iowa 676, 28 N. W. 490; Myers *v.* Funk, 51 Iowa 92, 50 N. W. 72; O'Hagen *v.* O'Hagen, 14 Iowa 264; Hattenback *v.* Hoskins, 12 Iowa 109; New Orleans *v.* Gautbreaux, 32 La. Ann. 1126; Green *v.* Reagan, 32 La. Ann. 974; Morrison *v.* Citizens' Bank, 27 La. Ann. 401; Hervey *v.* Edmunds, 68 N. C. 243; Morriss *v.* Virginia Ins. Co., 85 Va. 588, 8 S. E. 383; Doggett *v.* Emerson, 7 Fed. Cas. No. 3,961, 1 Woodb. & M. 1.

55. *Alabama.*— Adams *v.* Wright, 129 Ala. 305, 30 So. 574; Rogers *v.* Torbut, 58 Ala. 523.

Arkansas.— Biffle *v.* Jackson, 71 Ark. 226, 72 S. W. 566.

California.— Peabody *v.* Phelps, 7 Cal. 53; Coffinberry *v.* Horrill, 5 Cal. 493. *Compare* *Ex p.* Bennett, 44 Cal. 84.

Colorado.— McGan *v.* O'Neil, 5 Colo. 58; Francis *v.* Wells, 4 Colo. 274; Filley *v.* Cody, 4 Colo. 109.

Illinois.— Bruce *v.* Doolittle, 81 Ill. 103.

Indiana.— Backer *v.* Eble, 144 Ind. 287, 43 N. E. 233.

Iowa.— Laughlin *v.* Peckham, 66 Iowa 121, 23 N. W. 294; Spear *v.* Fitchpatrick, 37 Iowa 127; McClure *v.* Owens, 21 Iowa 133; Townsley *v.* Morehead, 9 Iowa 565; Sheppard *v.* Wilson, Morr. 448.

Kansas.— Earls *v.* Earls, 27 Kan. 538; Dodge *v.* Coffin, 15 Kan. 277.

Louisiana.— State *v.* Judge Fifth Dist. Ct., 26 La. Ann. 119; Hernandez *v.* James, 23 La. Ann. 483; Culver *v.* Leovy, 21 La. Ann. 306.

Massachusetts.— Greenwood *v.* Bradford, 128 Mass. 296.

Michigan.— Steele *v.* Matteson, 50 Mich. 313, 15 N. W. 488.

Mississippi.— Ralph *v.* Prester, 28 Miss. 744.

Nebraska.— Gamble *v.* Buffalo County, 57 Nebr. 163, 77 N. W. 341.

Nevada.— Champion *v.* Sessions, 1 Nev. 478.

Pennsylvania.— Butts *v.* Armor, 164 Pa. St. 73, 30 Atl. 357, 26 L. R. A. 213. *Compare* Beyerle *v.* Hain, 61 Pa. St. 226.

Texas.— Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 88 Tex. 468, 27 S. W. 100; Aiken *v.* Carroll, 37 Tex. 73; Robbin *v.* Lewis, 1 Tex. App. Civ. Cas. § 346.

Utah.— See Russell *v.* Hank, 9 Utah 309, 34 Pac. 245.

Virginia.— Tyson *v.* Glaize, 23 Gratt. 799. *Compare* Harris *v.* Jones, 96 Va. 658, 32 S. E. 455.

West Virginia.— Kinports *v.* Rawson, 29 W. Va. 487, 2 S. E. 85; Rollins *v.* Fisher, 17 W. Va. 578; Johnson *v.* Young, 11 W. Va. 673; Monroe *v.* Bartlett, 6 W. Va. 441.

United States.— Bonnell *v.* Weaver, 3 Fed. Cas. No. 1,630, 5 Biss. 22.

See 30 Cent. Dig. tit. "Judgment," § 13.

But a judgment entered in vacation as of the last day of the previous term has the same effect, when signed by the judge at the next term, as if entered in term-time. Louisville, etc., R. Co. *v.* Elizabethtown Dist. Public Schools, 105 Ky. 358, 49 S. W. 34, 20 Ky. L. Rep. 1228.

Rendition and entry of a judgment are to be distinguished; and if the judgment is duly rendered during term-time, it is then complete, and its validity is in no wise affected by the fact that the clerk does not enter it until the vacation. Sieber *v.* Frink, 7 Colo. 148, 2 Pac. 901; Earls *v.* Earls, 27 Kan. 538; Manitowoc County *v.* Sullivan, 51 Wis. 115, 8 N. W. 12. But see Mitchell *v.* St. John, 98 Ind. 598; McGregor First Nat. Bank *v.* Hostetter, 61 Iowa 395, 16 N. W. 289.

A judgment overruling a demurrer to a petition for injunction and receiver, rendered on an interlocutory hearing in vacation before the appearance term, is a mere nullity. Toomer *v.* Warren, 123 Ga. 477, 51 S. E. 393.

56. *California.*— Smith *v.* Chichester, 1 Cal. 409.

Connecticut.— Although Gen. St. (1902) § 510, provides that a trial shall be ended and judgment rendered before the close of the next term after that at which the trial was commenced, a judgment rendered thereafter, although it may be erroneous, and will be so if rendered against the express objection of one of the parties, is not void for want of jurisdiction. Lawrence *v.* Cannavan, 76 Conn. 303, 56 Atl. 556.

Illinois.— When proceedings for the confirmation of a special tax are begun in the county court at a probate term, the final

this is done by the consent of the parties,[57] or where the decision of the cause is carried over the vacation by a proper entry, such as a *curia advisari vult*.[58]

d. At Chambers. Regularly a judgment should not be made or rendered by the judge at chambers; it is not valid unless passed in open court.[59]

e. Premature Entry of Judgment. Where the statutes direct that judgment shall not be entered until a certain time after the commencement of the action, or the lapse of a term or terms, a judgment prematurely rendered is radically defective, and liable to be reversed or set aside,[60] although probably not absolutely void, the objection not going to the jurisdiction.[61] And the same applies to a judgment rendered before the case is in proper shape for such final action to be taken.[62]

judgment may be rendered at a law term, without any order expressly transferring the cause to the common-law docket, since the county court when holding law terms and when holding probate terms is the same tribunal. Callon *v.* Jacksonville, 147 Ill. 113, 35 N. E. 223.

Indiana.— Passwater *v.* Edwards, 44 Ind. 343. But see Hufford *v.* Lewis, 29 Ind. App. 202, 64 N. E. 99.

Iowa.— Grable *v.* State, 2 Greene 559; Davis *v.* Fish, 1 Greene 406, 48 Am. Dec. 387. But where the trial of a cause is begun in a term, with the *bona fide* expectation and belief that it will be concluded before the day shall arrive when the judge is directed, but not imperatively required, to hold court in another county, he may remain, conclude the trial of that case, receive the verdict, and render judgment, although this may happen to be done on a day, or at a time, when regularly he would be holding court in the other county. State *v.* Knight, 19 Iowa 94.

New York.— Berrian *v.* Olmstead, 4 E. D. Smith 279; Orvis *v.* Curtiss, 8 Misc. 681, 28 N. Y. Suppl. 728.

North Carolina.— Ferrell *v.* Hales, 119 N. C. 199, 25 S. E. 821; Hardin *v.* Ray, 89 N. C. 364.

But if a judgment is ordered and its terms prescribed by the court during a term, it is a judgment rendered in term-time, although the entry thereof be not in fact prepared and transcribed on the journal until after the close of the term. Iliff *v.* Arnot, 31 Kan. 672, 3 Pac. 525.

57. Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380; Morrison *v.* Citizens' Bank, 27 La. Ann. 401; Shackelford *v.* Miller, 91 N. C. 181; Hardin *v.* Ray, 89 N. C. 364.

Evidence of consent.— A party's consent to the rendition of a judgment after the time allowed by statute cannot be implied from his agreement at the first hearing for subsequent written and oral arguments at a date not then set, nor from other acts occurring before the expiration of the statutory time; and although such consent may be implied from his requests to postpone the hearing of the case, made after the time allowed by statute for the rendition of the judgment, he is not estopped from objecting thereafter to its rendition, where the other party is not misled to his prejudice. Lawrence *v.* Cannavan, 76 Conn. 303, 56 Atl. 556.

Implied consent from failure to object in due season see Molyneux *v.* Huey, 81 N. C. 106.

58. *Alabama.*— Charles *v.* State, 3 Port. 440.

Illinois.— Ditch *v.* Shurtleff College, 8 Ill. App. 294.

Kansas.— Tarpenning *v.* Cannon, 28 Kan. 665.

Missouri.— Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206.

New Jersey.— Thorpe *v.* Corwin, 20 N. J. L. 311, but the judgment must be entered and signed as of the succeeding term, not of the former term.

Ohio.— Lyons *v.* Geddes, 8 Ohio Dec. (Reprint) 197, 6 Cinc. L. Bul. 247.

59. Clark *v.* Read, 5 N. J. L. 486; Penn *v.* Meeks, 2 N. J. L. 151; Lyles *v.* Bolles, 8 S. C. 258. *Compare In re* Knickerbocker Bank, 19 Barb. (N. Y.) 602.

Practice in Louisiana see *Ex p.* Gay, 20 La. Ann. 176; Rust *v.* Faust, 15 La. Ann. 477.

60. *Alabama.*— Teat *v.* Cocke, 42 Ala. 336.

Georgia.— State *v.* Gaskill, 68 Ga. 518.

Illinois.— Judgment may be rendered at the same term in which the declaration in the case was amended, when no continuance is asked by defendant. Quartier *v.* St. Mary of the Lakes University, 18 Ill. 300.

Iowa.— Rendition of judgment at the first term after commencement of the action is not error, if no motion for a continuance is made. Holt *v.* Smith, 9 Iowa 373.

Missouri.— Nave *v.* Todd, 83 Mo. 601; Cosgrove *v.* Tebo, etc., R. Co., 50 Mo. 270.

Texas.— Rowan *v.* Shapard, 2 Tex. App. Civ. Cas. § 299.

Antedating order.— An order of court which bears date as of a day not yet arrived is absolutely without any effect, at least until that day shall arrive. Smith *v.* Coe, 7 Rob. (N. Y.) 477.

Extrinsic evidence may be given of the day on which judgment was rendered. Clark *v.* Ely, 2 Root (Conn.) 380.

61. Tobar *v.* Losano, 6 Tex. Civ. App. 698, 25 S. W. 973; Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67; Marshall, etc., Bank *v.* Milwaukee Worsted Mills, 84 Wis. 23, 53 N. W. 1126.

62. People *v.* Judge Kent County Cir. Ct., 34 Mich. 62.

Premature entry of judgment by default see *infra*, IV, C, 4.

Stay of proceedings.— No judgment can

f. Place of Trial or Judgment. It is an irregularity but not a destructive jurisdictional defect to try a case and render judgment at a place other than that fixed by law for the holding of the court,[63] or in a county other than that declared by statute to be the proper county for its trial,[64] or to render judgment in a county other than that in which the venue was laid,[65] or other than that in which the trial was had.[66]

C. Validity as Affected by Status of Parties — 1. In General. Normally all persons, natural or artificial, may be made defendants in a judgment; but special rules determine the validity of judgments for or against persons whose status is abnormal, such as those who are insane or who are under the disability of infancy or coverture,[67] or those whose personality is suspended, for juristic purposes, by civil death.[68]

2. Death of Party Before Judgment[69] — a. In General. A judgment rendered either for or against a party to a suit after his death is held in some states to be absolutely void;[70] but according to the generally accepted doctrine, if the fact of the death does not appear on the record, the judgment may be voidable, but is not void so as to be exposed to collateral impeachment.[71]

b. Judgment Against Deceased Party — (i) *In General.* In several states the doctrine prevails that a judgment rendered against a defendant who is dead at the time is absolutely null and void.[72] But the great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the

validly be entered while an order staying all proceedings in the case remains still in force. Uhe *v.* Chicago, etc., R. Co., 3 S. D. 563, 54 N. W. 601.

63. Herndon *v.* Hawkins, 65 Mo. 265; Le Grange *v.* Ward, 11 Ohio 257; Smith *v.* State, 9 Humphr. (Tenn.) 9. See also Horn *v.* Miller, 20 Nebr. 98, 100, 29 N. W. 260.

64. Gage *v.* Downey, 79 Cal. 140, 21 Pac. 527, 885; Ellis *v.* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287. But *compare* Southern R. Co. *v.* Brock, 115 Ga. 721, 42 S. E. 65.

65. Spiehler *v.* Asiel, 83 Hun (N. Y.) 223, 31 N. Y. Suppl. 584. *Compare* Thaxter *v.* Weston, 2 Mass. 445.

66. Walter *v.* Merced Academy Assoc., 126 Cal. 582, 59 Pac. 136. *Compare* Conover *v.* Wright, 3 Nebr. (Unoff.) 211, 91 N. W. 545.

67. Validity of judgments against: Infant see Infants; lunatic see Insane Persons; married woman see Husband and Wife.

68. Bankrupt. — A judgment obtained against a defendant after his adjudication as a bankrupt will not create a lien upon his estate. McLean *v.* Rockey, 16 Fed. Cas. No. 8,891, 3 McLean 235. And see International Bank *v.* Sherman, 101 U. S. 403, 25 L. ed. 866. See also Bankruptcy; Insolvency.

Incarcerated felon. — In some states a felon confined in the penitentiary is considered as *civiliter mortuus*, and if his conviction takes place and his sentence begins while an action at law is pending against him, a judgment afterward rendered therein is null and void. Rice County *v.* Lawrence, 29 Kan. 158; Neale *v.* Utz, 75 Va. 480. But see Coffee *v.* Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99. See also Convicts.

Slaves. — During the existence of slavery, it was held that a judgment entered against a slave was entirely null and void. Wood *v.* Ward, 30 Fed. Cas. No. 17,966, 2 Flipp. 336.

69. Abatement and revival after death of party see Abatement and Revival, 1 Cyc. 47 *et seq.*

70. Edwards *v.* Whited, 29 La. Ann. 647.

71. *California.* — Todhunter *v.* Klemmer, 134 Cal. 60, 66 Pac. 75.

Florida. — Collins *v.* Mitchell, 5 Fla. 364.

Illinois. — Claflin *v.* Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

Kentucky. — Case *v.* Ribelin, 1 J. J. Marsh. 29.

Minnesota. — Stocking *v.* Hanson, 22 Minn. 542.

Missouri. — Coleman *v.* McAnulty, 16 Mo. 173, 57 Am. Dec. 229. But *compare* Weller Mfg. Co. *v.* Eaton, 81 Mo. App. 657.

New York. — In this state a statute provides that if either party to an action dies after decision, but before final judgment, the court must enter final judgment in the names of the original parties. For the practice under this statute see Clark *v.* Pemberton, 64 N. Y. App. Div. 416, 72 N. Y. Suppl. 232; Scranton *v.* Baxter, 3 Sandf. 660; Peetsch *v.* Quinn, 7 Misc. 6, 27 N. Y. Suppl. 323.

Texas. — Fleming *v.* Seeligson, 57 Tex. 524; Howard *v.* McKenzie, 54 Tex. 171; Fowler *v.* Burdett, 20 Tex. 34; Holman *v.* G. A. Stowers Furniture Co., (Civ. App. 1895) 30 S. W. 1120.

West Virginia. — Watt *v.* Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; King *v.* Burdett, 28 W. Va. 601, 57 Am. Rep. 687.

United States. — New Orleans *v.* Gaines, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102.

See 30 Cent. Dig. tit. "Judgment," § 15.

72. *Alabama.* — Bauer *v.* Word, 135 Ala. 430, 33 So. 538; *Ex p.* Massie, 131 Ala. 62, 31 So. 483, 90 Am. St. Rep. 20, 56 L. R. A. 671; Powe *v.* McLeod, 76 Ala. 418; Meyer *v.* Hearst, 75 Ala. 390. *Compare* Powell *v.* Washington, 15 Ala. 803.

subject-matter and the persons, during the lifetime of a party, a judgment rendered against him after his death, although erroneous and liable to be set aside is not void or open to collateral attack.[73]

Arkansas.— Greenstreet *v.* Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735.

Delaware.— Guyer *v.* Guyer, 6 Houst. 430; Lynch *v.* Tunnell, 4 Harr. 284.

Georgia.— Watson *v.* Adams, 103 Ga. 733, 30 S. E. 577.

Kansas.— Kager *v.* Vickery, 61 Kan. 342, 59 Pac. 628, 78 Am. St. Rep. 318, 49 L. R. A. 153.

Louisiana.— Hoggatt's Succession, 36 La. Ann. 337; Edwards *v.* Whited, 29 La. Ann. 647; Norton *v.* Jamison, 23 La. Ann. 102; New Orleans, etc., R. Co. *v.* Bosworth, 8 La. Ann. 80. *Compare* Stackhouse *v.* Zuntz, 41 La. Ann. 415, 6 So. 666.

Mississippi.— Weis *v.* Aaron, 75 Miss. 138, 21 So. 763, 65 Am. St. Rep. 594; Tarleton *v.* Cox, 45 Miss. 430; Parker *v.* Horne, 38 Miss. 215; Lee *v.* Gardiner, 26 Miss. 521.

South Carolina.— Bragg *v.* Thompson, 19 S. C. 572.

See 30 Cent. Dig. tit. "Judgment," § 16.

73. *California.*— Todhunter *v.* Klemmer, 134 Cal. 60, 66 Pac. 75. *Compare* McCreery *v.* Everding, 44 Cal. 284.

Florida.— Collins *v.* Mitchell, 5 Fla. 364.

Illinois.— Claflin *v.* Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263; Stoetzell *v.* Fullerton, 44 Ill. 108; Pfirshing *v.* Heitner, 91 Ill. App. 407; Davies *v.* Coryell, 37 Ill. App. 505. *Compare* Life Assoc. of America *v.* Fassett, 102 Ill. 315.

Iowa.— Nelson *v.* Gray, 2 Greene 397.

Kentucky.— Spalding *v.* Wathen, 7 Bush 659; Case *v.* Ribelin, 1 J. J. Marsh. 29.

Maine.— West *v.* Jordan, 62 Me. 484.

Massachusetts.—Reid *v.* Holmes, 127 Mass. 326; Loring *v.* Folger, 7 Gray 505.

Michigan.— Webber *v.* Stanton, 1 Mich. N. P. 97.

Minnesota.— Berkey *v.* Judd, 27 Minn. 475, 8 N. W. 383; Stocking *v.* Hanson, 22 Minn. 542; Hayes *v.* Shaw, 20 Minn. 405. *Compare* Lee *v.* O'Shaughnessy, 20 Minn. 173.

Missouri.— Coleman *v.* McAnulty, 16 Mo. 173, 57 Am. Dec. 229; Wittenburgh *v.* Wittenburgh, 1 Mo. 226.

Nebraska.— McCormick *v.* Paddock, 20 Nebr. 486, 30 N. W. 602; Jennings *v.* Simpson, 12 Nebr. 558, 11 N. W. 880.

New York.— Leake *v.* Bundy, 48 Hun 208; Livingston *v.* Rendall, 59 Barb. 493; Borsdorff *v.* Dayton, 17 Abb. Pr. 36; Adams *v.* Nellis, 59 How. Pr. 385; Gerry *v.* Post, 13 How. Pr. 118; Griswold *v.* Stewart, 4 Cow. 457.

North Carolina.— Wood *v.* Watson, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541; Beard *v.* Hall, 79 N. C. 506. *Compare* Burke *v.* Stokely, 65 N. C. 569; Colson *v.* Wade, 5 N. C. 43.

Ohio.— Swasey *v.* Antram, 24 Ohio St. 87.

Oklahoma.— Mosley *v.* Southern Mfg. Co., 4 Okla. 492, 46 Pac. 508.

Oregon.— Mitchell *v.* Schoonover, 16 Oreg. 211, 17 Pac. 867, 8 Am. St. Rep. 282.

Pennsylvania.— Murray *v.* Weigle, 118 Pa. St. 159, 11 Atl. 781; Carr *v.* Townsend, 63 Pa. St. 202; Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Lanning *v.* Pawson, 38 Pa. St. 480; Greenough *v.* Patton, 7 Watts 336. See Webb *v.* Wiltbank, 1 Pa. L. J. Rep. 324. *Compare* Tobias *v.* Dorsey, 2 Wkly. Notes Cas. 15.

Tennessee.— Nolan *v.* Cameron, 9 Lea 234; Buck *v.* Woods, 10 Heisk. 264. *Compare* Morrison *v.* Deaderick, 10 Humphr. 342; Carter *v.* Carriger, 3 Yerg. 411, 24 Am. Dec. 585; Collins *v.* Knight, 3 Tenn. Ch. 183.

Texas.— Fleming *v.* Seeligson, 57 Tex. 524; McClelland *v.* Moore, 48 Tex. 355; Milam County *v.* Robertson, 47 Tex. 222; Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 330; Mills *v.* Alexander, 21 Tex. 154; Wilson *v.* Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086; Ledbetter *v.* Higbee, 13 Tex. Civ. App. 267, 35 S. W. 801. *Compare* Hooper *v.* Caruthers, 78 Tex. 432, 15 S. W. 98.

Utah.— Elliott *v.* Bastian, 11 Utah 452, 40 Pac. 713.

Vermont.— Holt *v.* Thacher, 52 Vt. 592.

Virginia.— Neale *v.* Utz, 75 Va. 480; Evans *v.* Spurgin, 11 Gratt. 615, 6 Gratt. 107, 52 Am. Dec. 105; Hooe *v.* Barber, 4 Hen. & M. 439.

United States.— New Orleans *v.* Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102; Beard *v.* Roth, 35 Fed. 397.

England.— The statute provides that judgment may be entered upon a verdict within two terms after the death of the party against whom the verdict was given. But it is held that a judgment is valid, although not entered within the time, if the verdict was returned during the life of the party, and the delay was occasioned by a motion touching an award. Bridges *v.* Smyth, 8 Bing. 29, 1 Dowl. P. C. 242, 1 L. J. C. P. 33, 1 Moore & S. 93, 21 E. C. L. 431.

See 30 Cent. Dig. tit. "Judgment," § 16.

Doctrine of relation.— On the fiction that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done, a judgment may be held valid which was entered on the same day on which defendant died, although at a later hour of the day. Wright *v.* Mills, 4 H. & N. 488, 5 Jur. N. S. 771, 28 L. J. Exch. 223, 7 Wkly. Rep. 498. And see Hildreth *v.* Thompson, 16 Mass. 191.

Personal representatives joined.— If the personal representatives of a deceased defendant were duly made parties to the proceeding previous to the judgment, it is not enough to vitiate the judgment that it is entered against the dead man by name, instead of against the representatives, for the error is merely clerical. Stackhouse *v.* Zuntz, 41 La. Ann. 415, 6 So. 666.

Where, after an interlocutory judgment, the judgment defendant dies, a motion for judgment against his executrix should be dis-

(II) *Dissolved Corporation.* And on similar principles a judgment rendered against a corporation after its dissolution by an act of the legislature is erroneous but not void.[74]

(III) *Plaintiff's Knowledge of Death.* In some few cases it is held that a judgment so entered is valid if plaintiff was ignorant of the death of defendant, but otherwise if he was informed of the fact.[75]

c. Death of One of Several Defendants. Where the action is against joint defendants, and one dies before judgment, his death not being suggested on the record, and judgment is rendered against all the defendants, it is generally held that the judgment is irregular and voidable, but not void,[76] although some of the decisions hold the judgment in such a case to be a mere nullity.[77] But although the judgment as against the deceased defendant is at best voidable it is valid and binding as against the surviving defendants.[78]

d. Judgment For Deceased Party. A judgment rendered in favor of a party after his death is regarded in some states as null and void,[79] although in a majority it is considered as valid until reversed or vacated.[80] With reference to the stage of the proceedings at which plaintiff's death occurs, it is held that if this happens before the verdict the action should be revived, and if this is omitted the judgment, although not void, may be vacated on a proper application.[81] If plaintiff

missed, and the judgment should be entered as against the original parties under Code Civ. Proc. § 763. Jewett *v.* Schmidt, 45 Misc. (N. Y.) 471, 92 N. Y. Suppl. 737.

Where a defendant dies after damages have been assessed or a verdict rendered against him, a judgment entered on such assessment, or a verdict after his death, and before the end of the vacation next ensuing, is entitled to rank as a judgment in the administration of his assets. Mills *v.* Jones, 2 Rich. (S. C.) 393. See Nichols *v.* Chapman, 9 Wend. (N. Y.) 452; Matter of Dunn, 5 Redf. Surr. (N. Y.) 27.

74. Merrill *v.* Suffolk Bank, 31 Me. 57, 1 Am. Dec. 649.

75. Reid *v.* Holmes, 127 Mass. 326; Grossman's Appeal, 102 Pa. St. 137. See The Clara Davidson, 5 Fed. Cas. No. 2,791, 6 Wkly. Notes Cas. (Pa.) 356.

76. *Illinois.*— Ferguson *v.* Sutphen, 8 Ill. 547.

Indiana.— Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

North Carolina.—Burke *v.* Stokely, 65 N. C. 569.

Pennsylvania.— Lewis *v.* Ash, 2 Miles 110.

Texas.— Holman *v.* G. A. Stowers Furniture Co., (Civ. App. 1895) 30 S. W. 1120.

West Virginia.— King *v.* Burdett, 28 W. Va. 601, 57 Am. Rep. 687.

See 30 Cent. Dig. tit. "Judgment," § 18.

77. Bowen *v.* Troy Portable Mill Co., 31 Iowa 460; McCloskey *v.* Wingfield, 29 La. Ann. 141.

78. *Alabama.*— Fabel *v.* Boykin, 55 Ala. 383.

Georgia.— Lewis *v.* Maulden, 93 Ga. 758, 21 S. E. 147. *Compare* Tedlie *v.* Dill, 3 Ga. 104.

Illinois.— Aldrich *v.* Housh, 71 Ill. App. 607.

Kansas.— McLaughlin *v.* State, 17 Kan. 283.

Kentucky.— Asher *v.* Com., 66 S. W. 759, 23 Ky. L. Rep. 1976.

Mississippi.— Moody *v.* Harper, 38 Miss. 599.

New York.— Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522.

Pennsylvania.— Finney *v.* Cochran, 1 Watts & S. 112, 37 Am. Dec. 450; Hartman *v.* Hesserich, 8 Wkly. Notes Cas. 483. *Compare* Lewis *v.* Ash, 2 Miles 110.

Tennessee.— Collins *v.* Knight, 3 Tenn. Ch. 183.

Texas.— Bennett *v.* Spillars, 9 Tex. 519.

United States.— Downs *v.* Allen, 22 Fed. 805, 23 Blatchf. 54.

See 30 Cent. Dig. tit. "Judgment," § 18.

79. *Alabama.*— Moore *v.* Easley, 18 Ala. 619. *Compare* Kennedy *v.* Pickering, Minor 137.

Arkansas.— Jacobson *v.* Camphell, (1890) 12 S. W. 784.

California.— McCreery *v.* Everding, 44 Cal. 284.

Delaware.— Guyer *v.* Guyer, 6 Houst. 430.

Kentucky.— Amyx *v.* Smith, 1 Metc. 529.

Mississippi.—Richter *v.* Beaumont, 71 Miss. 713, 16 So. 293; Young *v.* Pickens, 45 Miss. 553; Tarleton *v.* Cox, 45 Miss. 430.

See 30 Cent. Dig. tit. "Judgment," § 19.

80. *Iowa.*— Gilman *v.* Donovan, 53 Iowa 362, 5 N. W. 560.

Michigan.— Webber *v.* Stanton, 1 Mich. N. P. 97.

Minnesota.— Hayes *v.* Shaw, 20 Minn. 405.

Missouri.— Coleman *v.* McAnulty, 16 Mo. 173, 57 Am. Dec. 229.

North Carolina.— Wood *v.* Watson, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541.

Pennsylvania.— Walter *v.* Erdman, 4 Pa. Super. Ct. 348. *Compare* Lynch *v.* Kerns, 10 Phila. 335.

Texas.— Best *v.* Nix, 6 Tex. Civ. App. 349, 25 S. W. 130.

81. Wentz *v.* Bealor, 14 Pa. Co. Ct. 337. See Broas *v.* Mersereau, 18 Wend. (N. Y.)

dies after verdict, it is proper to enter judgment *nunc pro tunc* as of the date of the verdict, but if it is entered as of the actual date when rendered, it is not void.[82]

e. Death of One of Joint Plaintiffs. If one of two joint plaintiffs dies before the rendition of judgment in their favor, the judgment may be irregular but is not void.[83]

f. Death of Party Before Suit. Where the death of the party or one of the parties named as plaintiffs, before the commencement of the suit, is not pleaded in abatement, the judgment rendered in the action is not void.[84] But if an action is begun against one who is dead at the time, and prosecuted to judgment, the judgment will be absolutely void for want of jurisdiction.[85]

D. Validity as Dependent on Jurisdiction — 1. In General. — A judgment rendered by a court having no jurisdiction, either of the parties or the subject-matter, is a mere nullity, and will be so held and treated whenever and for whatever purpose it is sought to be used or relied on as a valid judgment.[86] Consent

653. See also Abatement and Revival, 1 Cyc. 47 *et seq.*

82. *Georgia.*— Skidaway Shell-Road Co. *v.* Brooks, 77 Ga. 136.

Iowa.— Gilman *v.* Donovan, 53 Iowa 362, 5 N. W. 560.

Maine.— Goddard *v.* Bolster, 6 Me. 427, 20 Am. Dec. 320. *Compare* West *v.* Jordan, 62 Me. 484.

Massachusetts.— See Stickney *v.* Davis, 17 Pick. 169.

Michigan.— Webber *v.* Stanton, 1 Mich. N. P. 97.

Missouri.— Horner *v.* Nicholson, 56 Mo. 220.

Pennsylvania.— Wood *v.* Boyle, 177 Pa. St. 620, 35 Atl. 853, 55 Am. St. Rep. 747.

See 30 Cent. Dig. tit. "Judgment," § 19.

Amendment.—A judgment may be amended so as to show that, instead of being rendered in favor of a deceased plaintiff, it was really rendered in favor of his personal representatives, and this may be done without notice to defendant. Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Dawson *v.* Hardy, 33 Tex. 198.

Rendition and entry.— If the court rendered judgment during the lifetime of plaintiff, the clerk may perform the ministerial act of entering and recording it after his death. Franklin *v.* Merida, 50 Cal. 289.

83. Fuqua *v.* Mullen, 13 Bush (Ky.) 467; Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1077; Pullen *v.* Baker, 41 Tex. 419; Holt *v.* Thacher, 52 Vt. 592. *Compare* Young *v.* Pickens, 45 Miss. 553.

84. Powell *v.* Washington, 15 Ala. 803; Baragwanath *v.* Wilson, 4 Ill. App. 80; McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; Watt *v.* Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811.

As evidence of fraud.— The death of plaintiff before suit does not necessarily avoid the judgment, but it goes to show such fraud in obtaining the judgment as will vitiate it. Thouvenin *v.* Rodrigues, 24 Tex. 468.

85. *Illinois.*— Claflin *v.* Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

Massachusetts.— Reid *v.* Holmes, 127 Mass. 326; Loring *v.* Folger, 7 Gray 505.

Missouri.— Childers *v.* Schantz, 120 Mo. 305, 25 S. W. 209; Crosley *v.* Hutton, 98 Mo. 196, 11 S. W. 613; Weller Mfg. Co. *v.* Eaton, 81 Mo. App. 657.

New Hampshire.— Winship *v.* Conner, 42 N. H. 341.

New York.— Griswold *v.* Stewart, 4 Cow. 457.

Texas.— Jones Lumber Co. *v.* Rhoades, 17 Tex. Civ. App. 665, 41 S. W. 102.

See 30 Cent. Dig. tit. "Judgment," § 21.

86. *Alabama.*—Wilbourn *v.* Hurt, 139 Ala. 557, 36 So. 768.

California.— Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; Wicks *v.* Ludwig, 9 Cal. 173.

District of Columbia.— Harper *v.* Cunningham, 8 App. Cas. 430.

Georgia.— Georgia Cent. Bank *v.* Gibson, 11 Ga. 453; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Mobley *v.* Mobley, 9 Ga. 247; Towns *v.* Springer, 9 Ga. 130.

Illinois.— Bruschke *v.* Der Nord Chicago Schnetzen Verein, 145 Ill. 433, 34 N. E. 417; St. Louis, etc., Coal Co. *v.* Sandoval Coal, etc., Co., 111 Ill. 32; Botsford *v.* O'Conner, 57 Ill. 72; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Campbell *v.* McCahan, 41 Ill. 45; Johnson *v.* Johnson, 30 Ill. 215; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418.

Indiana.— Mitchell *v.* Gray, 18 Ind. 123; Miller *v.* Snyder, 6 Ind. 1.

Iowa.— Secly *v.* Reid, 3 Greene 374.

Louisiana.— Lemann *v.* Truxillo, 32 La. Ann. 65.

Maine.— Penobscot R. Co. *v.* Weeks, 52 Me. 456.

Maryland.— Clark *v.* Bryan, 16 Md. 171.

Massachusetts.— Sumner *v.* Parker, 7 Mass. 79.

Minnesota.— Ullman *v.* Lion, 8 Minn. 381, 83 Am. Dec. 783.

Mississippi.— Commercial Bank *v.* Martin, 9 Sm. & M. 613.

Missouri.— Holland *v.* Johnson, 80 Me. 34.

Nebraska.— Omaha Nat. Bank *v.* Robinson, (1905) 102 N. W. 613; Murphy *v.* Lyons, 19 Nebr. 689, 28 N. W. 328.

cannot confer jurisdiction; that is, the agreement of the parties cannot give the court the right to adjudicate upon any cause of action or subject-matter which the law has withheld from its cognizance.[87] But where the court has jurisdiction of the parties and the subject-matter, no mere error, irregularity, or informality will vitiate the judgment to such an extent as to render it absolutely void.[88] And the judgment of a court of general jurisdiction is always presumed to have been rightly given, and its jurisdiction to have attached fully, until the contrary is shown.[89] But jurisdiction which has once attached may be lost, and thereby the court may be deprived of the authority to make any further order or judgment; as, when the case has been taken up on appeal or error,[90] or duly removed from a state court to a federal court.[91] So jurisdiction may be lost and the

Nevada.— *Ex p.* Gardner, 22 Nev. 280, 39 Pac. 570.

New York.— *In re* Flatbush Ave., 1 Barb. 286; D'Ivernois *v.* Leavitt, 8 Abb. Pr. 59; Latham *v.* Edgerton, 9 Cow. 227; Savage *v.* Olmstead, 2 Redf. Surr. 478.

Ohio.— Fostoria *v.* Fox, 60 Ohio St. 340, 54 N. E. 370.

Oregon.— Dowell *v.* Applegate, 24 Oreg. 440, 33 Pac. 937.

Pennsylvania.— Torrance *v.* Torrance, 53 Pa. St. 505.

Texas.— Bowers *v.* Chaney, 21 Tex. 363; Mitchell *v.* Runkle, 25 Tex. Suppl. 132.

Vermont.— Barrett *v.* Crane, 16 Vt. 246.

Virginia.— Linn *v.* Carson, 32 Gratt. 170.

United States.— Elliott *v.* Piersol, 1 Pet. 328, 7 L. ed. 164; Fisher *v.* Harnden, 9 Fed. Cas. No. 4,819, 1 Paine 55; Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 4 Sawy. 638.

See 30 Cent. Dig. tit. "Judgment," § 22.

The rule that a court without jurisdiction can make no order except to dismiss the suit does not apply to actions setting aside orders made improperly before the want of jurisdiction was discovered. New Orleans, etc., Mail Co. *v.* Fernandez, 12 Wall. (U. S.) 130, 20 L. ed. 249.

87. *Colorado.*—Peabody *v.* Thatcher, 3 Colo. 275.

Illinois.— Fleischman *v.* Walker, 91 Ill. 318.

Iowa.— Dicks *v.* Hatch, 10 Iowa 380.

Louisiana.— Richardson *v.* Hunter, 23 La. Ann. 255; Mora *v.* Kuzac, 21 La. Ann. 754; State *v.* Fosdick, 21 La. Ann. 256.

Massachusetts.— Santom *v.* Ballard, 133 Mass. 464.

Michigan.— Moore *v.* Ellis, 18 Mich. 77.

New York.— Hobart *v.* Frost, 5 Duer 672.

Wisconsin.— Damp *v.* Dane, 29 Wis. 419.

United States.— New York Home Ins. Co. *v.* Morse, 20 Wall. 445, 22 L. ed. 365.

Jurisdiction of person.—The statement of the text applies to jurisdiction of the subject-matter. Consent may confer jurisdiction of the person. Thus, where a statute provides that a defendant shall not be sued in any other district or place than that where he resides, he may waive this privilege, and by his consent confer jurisdiction upon a court in another district or place to entertain an action against him. Central Trust Co. *v.* McGeorge, 151 U. S. 129, 14 S. Ct. 286, 38 L. ed. 98; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; St. Louis, etc., R. Co. *v.* McBride, 141 U. S. 127, 11 S. Ct. 982, 35 L. ed. 659. But see *contra*, Georgia R., etc., Co. *v.* Harris, 5 Ga. 527. So a decree purporting to be rendered by consent of parties is not void on its face because it declares the title to the premises in controversy to be in a person other than one of the parties to the record, when it appears that such person was a purchaser *pendente lite* from one of the parties. Beardsley *v.* Hilson, 94 Ga. 50, 20 S. E. 272. And it has been held that a judgment in a state court against a consul of a foreign nation taken upon default is valid, on the ground that his not appearing and pleading to the jurisdiction of the court is a waiver of the want of jurisdiction over him. Hall *v.* Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180.

88. *California.*— Grannis *v.* San Francisco Sup. Ct., 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23.

Connecticut.— Perry *v.* Hyde, 10 Conn. 329.

Georgia.— Georgia R., etc., Co. *v.* Pendleton, 87 Ga. 751, 13 S. E. 822.

Illinois.— Buckmaster *v.* Jackson, 4 Ill. 104.

Indiana.— Jackson *v.* Green, 7 Blackf. 391.

Kansas.— Sweet *v.* Ward, 43 Kan. 695, 23 Pac. 941.

New Hampshire.—March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Gorrill *v.* Whittier, 3 N. H. 265.

North Carolina.— Peoples *v.* Norwood, 94 N. C. 167.

Ohio.— Moore *v.* Robison, 6 Ohio St. 302.

Vermont.— Hammond *v.* Wilder, 25 Vt. 342; Egerton *v.* Hart, 8 Vt. 207; *Ex p.* Kellogg, 6 Vt. 509.

Wyoming.— Laramie Nat. Bank *v.* Steinhoff, 11 Wyo. 290, 71 Pac. 992, 73 Pac. 209.

United States.— *Ex p.* Bigelow, 113 U. S. 328, 5 S. Ct. 542, 28 L. ed. 1005.

89. Earle *v.* Earle, 91 Ind. 27; Owen *v.* Shaw, 20 Tex. 81; Alexander *v.* Knox, 1 Fed. Cas. No. 170, 6 Sawy. 54.

Collateral impeachment of judgment see *infra*, XI.

90. Boynton *v.* Foster, 7 Metc. (Mass.) 415. See Lininger *v.* Glenn, 33 Nebr. 187, 49 N. W. 1128.

91. Roberts *v.* Chicago, etc., R. Co., 48 Minn. 521, 51 N. W. 478. And see also REMOVAL OF CAUSES; and Black Dillon Rem. Causes, § 192.

authority of the court terminated by the expiration of the term without judgment rendered and without a proper continuance.[92]

2. OF PERSON. Jurisdiction of the person is essential to the validity of a judgment, and a judgment rendered against one who was not made a party to the action, or not duly cited, or who was no longer before the court, is void.[93] There must also be jurisdiction of the person of plaintiff.[94] Again jurisdiction of the person may depend upon the domicile or residence of a party; and if statutes provide that a defendant shall not be sued in a county or district other than that where he resides, a judgment given against him by a court in another place within the same state will not be valid.[95]

3. OF SUBJECT-MATTER OR CAUSE OF ACTION. Even with full jurisdiction over the parties, no court can render a valid judgment unless it also has jurisdiction over the subject-matter of the litigation or the cause of action.[96] This rule is

92. See *supra*, I, B, 3, c. And see Witt *v.* Henze, 58 Wis. 244, 16 N. W. 609.

93. *Arkansas.*— Cheek *v.* Pugh, 19 Ark. 574.

California.— Ford *v.* Doyle, 37 Cal. 346; McMinn *v.* Whelan, 27 Cal. 300.

Colorado.— Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

District of Columbia.— Harper *v.* Cunningham, 8 App. Cas. 430.

Illinois.— Johnson *v.* Miller, 55 Ill. App. 168. See also Dernburg *v.* Tefft, 63 Ill. App. 33.

Indiana.— McKinney *v.* Frankfort, etc., R. Co., 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; Lee *v.* Back, 30 Ind. 148.

Louisiana.— Bracey *v.* Calderwood, 36 La. Ann. 796. But *compare* Theriot *v.* Bayard, 37 La. Ann. 689.

Mississippi.— McPike *v.* Wells, 54 Miss. 136; Steen *v.* Steen, 25 Miss. 513; Overstreet *v.* Davis, 24 Miss. 393.

Nebraska.— Luse *v.* Rankin, 57 Nebr. 632, 78 N. W. 258; Anheuser-Busch Brewing Assoc. *v.* Hier, 55 Nebr. 557, 75 N. W. 1111.

New Jersey.— Armstrong *v.* Armstrong, 19 N. J. Eq. 357.

New Mexico.— Rice *v.* Schofield, 9 N. M. 314, 51 Pac. 673.

New York.— United Press *v.* A. S. Abell Co., 79 N. Y. App. Div. 550, 80 N. Y. Suppl. 454 [*affirmed* in 178 N. Y. 578, 70 N. E. 1110]; Moulton *v.* De Ma Carty, 6 Rob. 470; Park *v.* Park, 24 Misc. 372, 53 N. Y. Suppl. 677.

North Carolina.— Armstrong *v.* Harshaw, 12 N. C. 187.

Pennsylvania.— English *v.* English, 19 Pa. Super. Ct. 586.

Tennessee.— Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

Texas.— Glass *v.* Smith 66 Tex. 548, 2 S. W. 195; Johnson *v.* Block, (Civ. App. 1898) 46 S. W. 85; Missouri, etc., R. Co. *v.* Fulmore, (Civ. App. 1894) 26 S. W. 238.

Utah.— Houser *v.* Smith, 19 Utah 150, 56 Pac. 683.

Virginia.— Moseley *v.* Cocke, 7 Leigh 224.

Washington.—Weisbach *v.* Arnold, 3 Wash. Terr. 111, 13 Pac. 417.

See 30 Cent. Dig. tit. "Judgment," § 24.

A judgment for defendant in an action in which the court had jurisdiction of the subject-matter but not of the person of defendant is not erroneous, although he made a timely objection, and reserved an exception to the ruling of the court, and might for this reason have caused the judgment to be reversed had it been against him. Fostoria *v.* Fox, 60 Ohio St. 340, 54 N. E. 370.

An apparent exception to this rule is found in the case of a judgment affecting "unknown owners" or "unknown heirs," but the validity of such a judgment depends upon the jurisdiction of the court over the subject-matter in controversy and the persons of the named defendants. See Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Inglee *v.* Welles, 53 Minn. 197, 55 N. W. 117.

94. This is gained by his voluntary institution of the suit, or by his ratification of action in that behalf taken for him by another. Oxtoby *v.* Henley, 112 Iowa 697, 84 N. W. 942.

Judgment on a cross demand may be rendered against a non-resident plaintiff submitting to the jurisdiction of the court by the institution of the suit. Andrews *v.* Whitehead, (Tex. Civ. App. 1901) 60 S. W. 800.

95. Georgia R., etc., Co. *v.* Harris, 5 Ga. 527; Starns *v.* Goodwin, 43 La. Ann. 302, 8 So. 931; Alter *v.* Pickett, 24 La. Ann. 513; Richardson *v.* Hunter, 23 La. Ann. 255; Snyder *v.* Goodrich, 2 E. D. Smith (N. Y.) 84. *Compare* Bartlett *v.* Falk, 110 Iowa 346, 81 N. W. 602; Leach *v.* Kohn, 36 Iowa 144. Consent of defendant conferring jurisdiction see cases cited *supra*, note 87.

Judgment against resident of seceded state see Brooke *v.* Filer, 35 Ind. 402; Foreman *v.* Carter, 9 Kan. 674.

96. *Georgia.*— Ponce *v.* Underwood, 55 Ga. 601.

Illinois.— Johnson *v.* Johnson, 30 Ill. 215.

Indiana.— Webb *v.* Carr, 78 Ind. 455; Bryan *v.* Blythe, 4 Blackf. 249.

Kentucky.—Dorsey *v.* Kendall, 8 Bush 294.

Louisiana.— Wamsley *v.* Robinson, 28 La. Ann. 793.

Maine.— Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

New Hampshire.— Eaton *v.* Badger, 33 N. H. 228; Morse *v.* Presby, 25 N. H. 299;

applied in cases where the subject-matter is expressly withheld from the jurisdiction of the particular court, or placed within the exclusive jurisdiction of another court,[97] where the subject of litigation is real property lying without the territorial jurisdiction of the court,[98] where the court's jurisdiction is limited to a fixed sum, and the amount in controversy exceeds that limit,[99] or where its jurisdiction depends upon a statute which was repealed before suit.[1]

4. Of Question Decided. In addition to jurisdiction of the parties and the subject-matter, it is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant, and should not undertake to pass upon matters outside the issue.[2]

E. Process or Notice to Sustain Judgment — 1. Notice to Defendant — a. In General. A personal judgment rendered against a defendant without service of process upon him, or other sufficient legal notice to him, or an appearance by him, is without jurisdiction and void.[3] Nor, on well-known principles of

Kittredge *v.* Emerson, 15 N. H. 227; Smith *v.* Knowlton, 11 N. H. 191.

New Jersey.— Partridge *v.* Partridge, 46 N. J. Eq. 434, 19 Atl. 662 [*affirmed* in 47 N. J. Eq. 601, 22 Atl. 1075].

New York.— Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Bumstead *v.* Read, 31 Barb. 661; McElroy *v.* Continental R. Co., 3 Silv. Sup. 327, 6 N. Y. Suppl. 306; Bingham *v.* Disbrow, 14 Abb. Pr. 251.

Ohio.— Gilliland *v.* Sellers, 2 Ohio St. 223.

Pennsylvania.— Reel *v.* Elder, 62 Pa. St. 308, 1 Am. Rep. 414.

South Carolina.— Lyles *v.* Bolles, 8 S. C. 258.

Vermont.— Collamer *v.* Page, 35 Vt. 387.

United States.— Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931.

See 30 Cent. Dig. tit. "Judgment," § 24.

Where a complaint alleges two causes of action, the fact that the court had jurisdiction of one of them will not support a judgment upon both, where it had no jurisdiction of the other. Chicago, etc., R. Co. *v.* Spencer, 23 Ind. App. 605, 55 N. E. 882. But *compare* Louisville, etc., R. Co. *v.* Fox, 101 Ind. 416. And see Morris *v.* Steele, 62 Iowa 228, 17 N. W. 490; Stovall *v.* Hibbs, 32 S. W. 1087, 17 Ky. L. Rep. 906; Oger *v.* Daunoy, 7 Mart. N. S. (La.) 656, holding that where judgment is prayed alternatively for a thing of which the court has no jurisdiction and another of which it has, judgment may be given for the latter.

97. *In re* Radde, 9 N. Y. Suppl. 812, 2 Connoly Surr. 293; Vaughan *v.* Cade, 2 Rich. (S. C.) 49.

98. See Watts *v.* White, 13 Cal. 321; Kelly *v.* Tate, 43 Ga. 535; Hickey *v.* Stewart, 3 How. (U. S.) 750, 11 L. ed. 814.

But a court of chancery, after acquiring jurisdiction of a party in a proper case, may decree performance of contracts relating to lands lying in another state, but if the party fails to convey in obedience to the decree, the decree does not affect the legal title to the land. Winn *v.* Strickland, 34 Fla. 610, 16 So. 606; Yost *v.* Devault, 9 Iowa 60.

99. In this case some of the decisions hold that a judgment for a sum in excess of the court's jurisdiction is absolutely void. Street *v.* Stuart, 38 Ark. 159; Jones *v.* Jones, 14 N. C. 360; Moore *v.* Snell, (Tex. Civ. App. 1905) 88 S. W. 270; Western Union Tel. Co. *v.* Campbell, 36 Tex. Civ. App. 276, 81 S. W. 580; Dazey *v.* Pennington, 10 Tex. Civ. App. 326, 31 S. W. 312. But others take the view that it is merely erroneous or voidable. Moore *v.* Martin, 38 Cal. 428; Mathison *v.* Stephens, 9 Ill. App. 435; Hinds *v.* Wallis, 13 Serg. & R. (Pa.) 213; McCormick Harvesting Mach. Co. *v.* Marchant, 11 Utah 68, 39 Pac. 483.

1. Omaha Coal, etc., Co. *v.* Suess, 54 Nebr. 379, 74 N. W. 620.

2. Munday *v.* Vail, 34 N. J. L. 418; Little *v.* Giles, 27 Nebr. 179, 42 N. W. 1044; Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; Standley *v.* Roberts, 59 Fed. 836, 8 C. C. A. 305; Brooks *v.* Conley, 8 Ont. 549; Boucher *v.* Morrison, 13 Quebec Super. Ct. 205. And see *infra*, VI, B.

3. *Arkansas.*— *Ex p.* Woods, 3 Ark. 532; Moore *v.* Watkins, 1 Ark. 268.

California.— People *v.* Harrison, 107 Cal. 541, 40 Pac. 956; Reinhart *v.* Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; Ford *v.* Doyle, 37 Cal. 346; Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; Schloss *v.* White, 16 Cal. 65; Gray *v.* Howes, 8 Cal. 562.

Colorado.— San Juan, etc., Min., etc., Co. *v.* Finch, 6 Colo. 214; Lomax *v.* Besley, 1 Colo. App. 21 27 Pac. 167.

Florida.— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201; Flint River Steam Boat Co. *v.* Roberts, 2 Fla. 102, 48 Am. Dec. 178.

Illinois.— Anderson *v.* Hawhe, 115 Ill. 33, 3 N. E. 566; Goudy *v.* Hall, 30 Ill. 109; Klemm *v.* Dewes, 28 Ill. 317; Bonham *v.* Galloway, 13 Ill. 68; Ditch *v.* People, 31 Ill. App. 368.

Indiana.— Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355; Wort *v.* Finley, 8 Blackf. 335; Smith *v.* Myers, 5 Blackf. 223; Anderson *v.* Miller, 4 Blackf. 417.

Iowa.— Macomber *v.* Peck, 39 Iowa 351; McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421; Temple *v.* Carstens, 1 Greene 492.

constitutional law, would it be competent for the legislature of the state, by statute, to dispense with the necessity of such service or notice, although a contrary opinion has sometimes been expressed.[4] Mere cognizance of the fact that a suit has been brought is not notice in the sense in which the term is here used. To give validity to the judgment, the notice must apprise defendant of what is required of him and of the consequences which may follow if he neglects to defend the action.[5] Hence also he must be accorded an opportunity to present his defense.[6] And if defendant has not been served or notified, no judgment in his favor or against plaintiff can be given.[7] In the case of proceedings *in rem* the judgment may bind the property affected, without personal service on any party, but no personal judgment or decree can be made without such service.[8]

b. Appearance as Waiver of Citation. If a defendant enters a voluntary general appearance in an action, it is a waiver of a want of citation, or of any defects

Kansas.— North *v.* Moore, 8 Kan. 143.

Kentucky.— Garrott *v.* Jaffray, 10 Bush 413; Roberts *v.* Stowers, 7 Bush 295; Long *v.* Montgomery, 6 Bush 394; Peak *v.* Percifull, 3 Bush 218; Pearce *v.* Lancaster, 49 S. W. 12, 20 Ky. L. Rep. 1218.

Louisiana.— Newman *v.* Eldridge, 107 La. 315, 31 So. 688; Hawley *v.* Heyman, 28 La. Ann. 347; Matthews *v.* Crescent City Mut. Ins. Co., 26 La. Ann. 386; Madden *v.* Fielding, 19 La. Ann. 505; McCan *v.* The Golden Age, 17 La. Ann. 91; McCullough *v.* Fanchonette, 1 Mart. 220.

Maine.— Wilton Mfg. Co. *v.* Woodman, 32 Me. 185.

Massachusetts.— Eliot *v.* McCormick, 144 Mass. 10, 10 N. E. 705.

Michigan.— Tyler *v.* Peatt, 30 Mich. 63; Outhwite *v.* Porter, 13 Mich. 533.

Mississippi.— Steen *v.* Steen, 25 Miss. 513; Smith *v.* State, 13 Sm. & M. 140; Enos *v.* Smith, 7 Sm. & M. 85; Prentiss *v.* Mellen, 1 Sm. & M. 521; Torrey *v.* Jordan, 4 How. 401.

Missouri.— Jasper County *v.* Wadlow, 82 Mo. 172; Anderson *v.* Brown, 9 Mo. 646; Bascom *v.* Young, 7 Mo. 1.

Nebraska.— Patrick Land Co. *v.* Leavenworth, 42 Nebr. 715, 60 N. Y. 954.

New Hampshire.— Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

New Jersey.— Cooper *v.* Cape May Point, 67 N. J. L. 437, 51 Atl. 511; Jones *v.* McKelway, 17 N. J. L. 345.

New York.— Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; Oakley *v.* Aspinwall, 4 N. Y. 513; Trebilcox *v.* McAlpine, 46 Hun 469; King *v.* Poole, 36 Barb. 242; Korman *v.* Grand Lodge I. O. F. S. of I., 44 Misc. 564, 90 N. Y. Suppl. 120; Berkowitz *v.* Brown, 3 Misc. 1, 23 N. Y. Suppl. 792; Black's Case, 4 Abb. Pr. 162.

North Carolina.— Condry *v.* Cheshire, 88 N. C. 375; Doyle *v.* Brown, 72 N. C. 393; Stallings *v.* Gully, 48 N. C. 344.

Ohio.— Miami Exporting Co. *v.* Brown, 6 Ohio 535.

Pennsylvania.— Dusenberry *v.* Bradley, 88 Pa. St. 444; Sheetz *v.* Sheetz, 6 Lanc. L. Rev. 97; Lancaster County *v.* Slocum, 4 Leg. Op. 473.

South Carolina.— Jenney *v.* Laurens, 1 Speers 356.

Tennessee.— Gibson *v.* Carroll, 1 Heisk. 23.

Texas.— Bates *v.* Casey, 61 Tex. 592; Johns *v.* Northcutt, 49 Tex. 444; Bynum *v.* Hull, 35 Tex. 27; Wilson *v.* Johnson, 30 Tex. 499; Dashner *v.* Wallace, 29 Tex. Civ. App. 151, 68 S. W. 307; Gunn *v.* Miller, (Civ. App. 1894) 26 S. W. 278; Galveston, etc., R. Co. *v.* McTiegue, 1 Tex. App. Civ. Cas. § 457.

Virginia.— McGavock *v.* Clark, 93 Va. 310, 22 S. E. 864; Staunton Perpetual Bldg., etc., Co. *v.* Haden, 92 Va. 201, 23 S. E. 285; Wrenn *v.* Thompson, 4 Munf. 377.

Washington.— Osborne *v.* Columbia County Farmers' Alliance Corp., 9 Wash. 666, 38 Pac. 160.

West Virginia.— Coger *v.* Coger, 48 W. Va. 135, 35 S. E. 823; Capehart *v.* Cunningham, 12 W. Va. 750; Carlon *v.* Ruffner, 12 W. Va. 297.

United States.— Freeman *v.* Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. ed. 372; St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Windsor *v.* McVeigh, 93 U. S. 274, 23 L. ed. 914; Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. 367, 19 L. ed. 948; Hollingsworth *v.* Barbour, 4 Pet. 466, 7 L. ed. 922; Preston *v.* Walsh, 10 Fed. 315; Farmers' L. & T. Co. *v.* McKinney, 8 Fed. Cas. No. 4,667, 6 McLean 1; Isaacs *v.* Price, 13 Fed. Cas. No. 7,097, 2 Dill. 347; Lincoln *v.* Tower, 15 Fed. Cas. No. 8,355, 2 McLean 473; Mathewson *v.* Sprague, 16 Fed. Cas. No. 9,278, 1 Curt. 457; Thompson *v.* Emmert, 23 Fed. Cas. No. 13,953, 4 McLean 96.

4. Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248. And see Ellsworth *v.* Learned, 21 Vt. 535.

5. Peabody *v.* Phelps, 9 Cal. 213.

6. Ogden *v.* Davidson, 81 Va. 757; Windsor *v.* McVeigh, 93 U. S. 274, 23 L. ed. 914. And see Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Hovey *v.* Elliott, 169 U. S. 409, 17 S. Ct. 841, 42 L. ed. 215.

7. King *v.* Poole, 36 Barb. (N. Y.) 242.

8. See Dernburg *v.* Tefft, 63 Ill. App. 33; Judah *v.* Stephenson, 10 Iowa 493; Thompson *v.* The Julius D. Morton, 2 Ohio St. 26, 59 Am. Dec. 658; Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106.

in the process or its service, and gives the court full jurisdiction over his person;[9] but the case is otherwise where the appearance is special and is entered for the purpose of taking advantage of a failure of notice or defective service.[10]

c. Appearance by Attorney. An appearance for defendant by his authorized attorney is equally efficacious in waiving irregularities and conferring jurisdiction as an appearance in person.[11] And it will be presumed that an appearance so entered by attorney was authorized by defendant.[12] But if the appearance was in fact unauthorized, the judgment will be voidable, or even, according to some of the decisions, wholly void.[13]

d. Constructive Service of Process. It is said that a state has the right to prescribe the mode of serving the process of its own courts upon its own resident citizens, and that a judgment is valid, at least until set aside in a direct proceed-

9. *California.*— Suydam *v.* Pitcher, 4 Cal. 280.

Connecticut.— Payne *v.* Farmers', etc., Bank, 29 Conn. 415.

Georgia.— Reynolds *v.* Lyon, 20 Ga. 225.

Illinois.— Miles *v.* Goodwin, 35 Ill. 53; Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Indiana.— Louisville, etc., R. Co. *v.* Nicholson, 60 Ind. 158; Adams Express Co. *v.* Hill, 43 Ind. 157; Martin *v.* Cole, 38 Ind. 379; Jenners *v.* Spraker, 2 Ind. App. 100, 27 N. E. 117.

Iowa.— Baker *v.* Kerr, 13 Iowa 384.

Kentucky.— Tipton *v.* Wright, 7 Bush 448.

Michigan.— Lane *v.* Leech, 44 Mich. 163, 6 N. W. 228.

Minnesota.— Choteau *v.* Rice, 1 Minn. 192.

Mississippi.— Redus *v.* State, 54 Miss. 712; McPike *v.* Wells, 54 Miss. 136; Harris *v.* Gwin, 18 Miss. 563.

Missouri.— Fulbright *v.* Cannefox, 30 Mo. 425.

New York.— Christal *v.* Kelly, 88 N. Y. 285; Mahaney *v.* Penman, 4 Duer 603.

Pennsylvania.— Fox *v.* Reed, 3 Grant 81.

Texas.— Wilson *v.* Zeigler, 44 Tex. 657.

Wisconsin.— Anderson *v.* Morris, 12 Wis. 689.

United States.— Shields *v.* Thomas, 18 How. 253, 15 L. ed. 368; Toland *v.* Sprague, 12 Pet. 300, 9 L. ed. 1093; Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11.

See 30 Cent. Dig. tit. "Judgment," § 29.

Compare Tilton *v.* McKay, 24 U. C. C. P. 94.

A recital in the record, by the clerk, at the time of rendering judgment, that defendant had appeared at a previous term, is not sufficient evidence of an appearance to warrant a judgment as by default. Kimball *v.* Merrick, 20 Ark. 12. And a general entry that the parties appeared means only that those appeared who were served. Chester *v.* Miller, 13 Cal. 558. And see Barker *v.* Shepard, 42 Miss. 277.

10. *Florida.*— Drew Lumber Co. *v.* Walter, 45 Fla. 252, 34 So. 244; Standley *v.* Arnow, 13 Fla. 361.

Illinois.— Klemm *v.* Dewes, 28 Ill. 317.

Indiana.— Campbell *v.* Swasey, 12 Ind. 70.

Massachusetts.— Nye *v.* Liscombe, 21 Pick. 263; Ames *v.* Winsor, 19 Pick. 247.

Michigan.— Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034.

Nevada.— Cedar Hill Consol. Gold, etc., Min. Co. *v.* Jacob Little Gold, etc., Min. Co., 15 Nev. 302.

Wisconsin.— Allen *v.* Lee, 6 Wis. 478.

Submission of issues.— Where defendant, after appearing specially for the purpose of objecting to the sufficiency of the process or its service, submits the cause for decision, as on a demurrer or otherwise, it constitutes such a voluntary appearance as will give the court jurisdiction. Lente *v.* Clarke, 22 Fla. 515, 1 So. 149. And see Lawrence *v.* Nelson, 143 U. S. 215, 12 S. Ct. 440, 36 L. ed. 130.

11. Stewart *v.* Hibernian Banking Assoc., 78 Ill. 596.

12. Davis *v.* Davis, 96 Ga. 136, 21 S. E. 1002; Leslie *v.* Fischer, 62 Ill. 118; Martin *v.* Judd, 60 Ill. 78; Potter *v.* Parsons, 14 Iowa 286; Gemmell *v.* Rice, 13 Minn. 400.

13. *Colorado.*— Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Illinois.— White *v.* Jones, 38 Ill. 159.

Iowa.— Rice *v.* Griffith, 9 Iowa 539.

Kansas.— Newton First Nat. Bank *v.* Grimes Dry-Goods Co., 45 Kan. 510, 26 Pac. 56; Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

Massachusetts.— Bodurtha *v.* Goodrich, 3 Gray 508.

Nebraska.— Kirschbaum *v.* Scott, 35 Nebr. 199, 52 N. W. 1112.

United States.— Hatfield *v.* King, 184 U. S. 162, 22 S. Ct. 477, 46 L. ed. 481.

See 30 Cent. Dig. tit. "Judgment," § 30.

Contra.— Munnikuyzen *v.* Dorsett, 2 Harr. & G. (Md.) 374; Schirling *v.* Scites, 41 Miss. 644; Brown *v.* Nichols, 42 N. Y. 26; England *v.* Garner, 90 N. C. 197.

Defendant duly served.— The validity of a judgment against a party who was duly served is not affected by the fact that the attorney who appeared for him and made defense was not authorized. Woodward *v.* Willard, 33 Iowa 542.

Parol proof of unauthorized appearance.—A non-resident defendant, who had no notice of an action in which judgment went against him by default, may, in a petition to review the judgment, prove by parol that an appearance entered by an attorney on his behalf was unauthorized, and in that event he is in no

ing for that purpose, when based upon such a form of citation as the law authorizes, although without actual notice to defendant;[14] but the weight of authority is to the effect that no valid personal judgment can be rendered against a defendant upon whom the service of process was merely constructive and who did not appear.[15] And at any rate statutes allowing other than personal service of process must be strictly complied with, in order to give the court jurisdiction, and such compliance must appear affirmatively in the proceedings.[16]

2. CITATION OF NON-RESIDENTS — a. In General. A personal judgment against a non-resident defendant, upon constructive or substituted service only, and without an appearance by or for him, is void, except as a means of reaching property of his within the state, or affecting some interest therein, or as an adjudication upon status.[17] But although defendant be a non-resident, the court will have

way legally affected by it. McNamara *v.* Carr, 84 Me. 299, 24 Atl. 856.

14. *Connecticut.*— Hurlbut *v.* Thomas, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43.

Illinois.— Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689.

Louisiana.—Augusta Ins. Co. *v.* Packwood, 9 La. Ann. 74.

Massachusetts.— Henderson *v.* Staniford, 105 Mass. 504, 7 Am. Rep. 551; Orcutt *v.* Ranney, 10 Cush. 183; McRae *v.* Mattoon, 13 Pick. 53.

New Hampshire.— Rangely *v.* Webster, 11 N. H. 299.

New Jersey.— Gilman *v.* Lewis, 24 N. J. L. 246 note.

Ohio.— Spencer *v.* Brockway, 1 Ohio 259, 13 Am. Dec. 615.

South Carolina.— Hinton *v.* Townes, 1 Hill 439.

Tennessee.— Hunt *v.* Lyle, 8 Yerg. 142.

Texas.— Thouvenin *v.* Rodrigues, 24 Tex. 468.

Vermont.— Price *v.* Hickok, 39 Vt. 292.

England.— Becquet *v.* MacCarthy, 2 B. & Ad. 951, 22 E. C. L. 398; Douglas *v.* Forrest, 4 Bing. 686, 6 L. J. C. P. O. S. 157, 1 M. & P. 663, 29 Rev. Rep. 695, 13 E. C. L. 693.

See 30 Cent. Dig. tit. "Judgment," § 25.

15. *Arkansas.*— Silver *v.* Luck, 42 Ark. 268.

California.— Boring *v.* Penniman, 134 Cal. 514, 66 Pac. 739; De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82.

Indiana.— Mitchell *v.* Gray, 18 Ind. 123. But *compare* Beard *v.* Beard, 21 Ind. 321, personal judgment for alimony.

Kentucky.— Harris *v.* Adams, 2 Duv. 141; Griswold *v.* Popham, 1 Duv. 170.

Michigan.— Innes *v.* Stewart, 36 Mich. 285.

Missouri.— McMahon *v.* Turney, 45 Mo. App. 103. But *compare* Jones *v.* Driskill, 94 Mo. 190, 7 S. W. 111, judgment in a back-tax suit case.

New York.— Warren *v.* Tiffany, 9 Abb. Pr. 66, 17 How. Pr. 106.

United States.— Remer *v.* McKay, 54 Fed. 432.

See 30 Cent. Dig. tit. "Judgment," § 25.

16. Fortman *v.* Ruggles, 58 Ill. 207; Zecharie *v.* Bowers, 1 Sm. & M. (Miss.) 584, 40 Am. Dec. 111.

17. *Alabama.*— Louisville, etc., R. Co. *v.* Nash, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331.

California.— Belcher *v.* Chambers, 53 Cal. 635.

Connecticut.— Munger *v.* Doolan, 75 Conn. 656, 55 Atl. 169; Easterly *v.* Goodwin, 35 Conn. 273; Aldrich *v.* Kinney, 4 Conn. 380, 10 Am. Dec. 151.

Idaho.— Kerns *v.* McAulay, 8 Ida. 558, 69 Pac. 539.

Illinois.— Zepp *v.* Hager, 70 Ill. 223.

Indiana.— Cavanaugh *v.* Smith, 84 Ind. 380.

Kentucky.— Randall *v.* Shropshire, 4 Metc. 327; Harris *v.* John, 6 J. J. Marsh. 257; Young *v.* Bullen, 43 S. W. 687, 19 Ky. L. Rep. 1561; Christie *v.* Garrity, 22 S. W. 158, 14 Ky. L. Rep. 910.

Louisiana.— Pagett *v.* Curtis, 15 La. Ann. 451; Marshall *v.* Walrigant, 13 La. Ann. 619.

Maryland.— Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 66 Md. 511, 8 Atl. 265.

Massachusetts.— Belcher *v.* Sheehan, 171 Mass. 513, 51 N. E. 19, 68 Am. St. Rep. 445; Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6, 26 Am. St. Rep. 210, 12 L. R. A. 574; Carleton *v.* Bickford, 13 Gray 591, 74 Am. Dec. 652; Phelps *v.* Brewer, 9 Cush. 390, 57 Am. Dec. 56.

Nebraska.— Fowler *v.* Brown, 51 Nebr. 414, 71 N. W. 54.

New Hampshire.— Eaton *v.* Badger, 33 N. H. 228.

New Jersey.— Miller *v.* Dungan, 36 N. J. L. 21.

New York.— Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Park *v.* Park, 24 Misc. 372, 53 N. Y. Suppl. 677.

Pennsylvania.— Reber *v.* Wright, 68 Pa. St. 471.

Texas.— Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Kilmer *v.* Brown, (Civ. App. 1902) 67 S. W. 1090; Wilson Hardware Co. *v.* Anderson Knife, etc., Co., 22 Tex. Civ. App. 229, 54 S. W. 928; Bradley *v.* Burnett, (Civ. App. 1897) 40 S. W. 170; Tempel *v.* Dodge, 11 Tex. Civ. App. 42, 31 S. W. 686; Freeman *v.* Preston, (Civ. App. 1895) 29 S. W. 495; Ward *v.* Green, (Civ. App. 1894) 28 S. W. 574; Spence *v.* Morris, (Civ. App. 1894) 28 S. W. 405.

jurisdiction if he is personally served with process within the state,[18] or if he appears in the action personally or by a duly authorized attorney.[19]

b. Extraterritorial Service of Process. Process issuing from the courts of one state or country cannot run into another, and although a non-resident defendant may have been personally served with such process in the state or country of his domicile, it will not give such jurisdiction as to authorize a personal judgment against him.[20]

c. Service by Publication. Some decisions hold that constructive service by publication will give the court such jurisdiction over a non-resident that its judgment, although not enforceable beyond the state, may be satisfied out of any property of defendant found within the state;[21] but the accepted rule is that a personal judgment rendered on this species of citation only, without attachment of property

Vermont.— Woodruff *v.* Taylor, 20 Vt. 65; Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340.

United States.— Dewey *v.* Des Moines, 173 U. S. 193, 19 S. Ct. 379, 43 L. ed. 665; Freeman *v.* Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. ed. 372; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. 58, 22 L. ed. 70; Thompson *v.* Whitman, 18 Wall. 457, 21 L. ed. 897; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Bischoff *v.* Wethered, 9 Wall. 812, 19 L. ed. 829; Burt *v.* Delano, 4 Fed. Cas. No. 2,211, 4 Cliff. 611; Galpin *v.* Page, 9 Fed. Cas. No. 5,206, 3 Sawy. 93.

England.— Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. Rep. N. S. 93, 19 Wkly. Rep. 587; Buchanan *v.* Rucker, 9 East 192, 1 Campb. 63, 9 Rev. Rep. 531.

See 30 Cent. Dig. tit. "Judgment," § 26.

18. Murphy *v.* Winter, 18 Ga. 690; Thompson *v.* Cowell, 148 Mass. 552, 20 N. E. 170; Mowry *v.* Chase, 100 Mass. 79; Downer *v.* Shaw, 22 N. H. 277.

Service on resident agent.— A non-resident may be bound by a judgment against him, if it is founded on personal service effected within the state on his duly authorized agent; but this does not apply where the cashier of a local bank is put into the ostensible position of an agent for a non-resident corporation, by receiving money due to it, by means of a trick on the part of the resident plaintiff, arranged for the mere purpose of bringing defendant within the jurisdiction of the state. Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259.

19. Davis *v.* Davis, 96 Ga. 136, 21 S. E. 1002; Holt *v.* Alloway, 2 Blackf. (Ind.) 108; Walker *v.* Lathrop, 6 Iowa 516; March *v.* Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

Error in rendering a personal judgment on default against a non-resident defendant, who had notice only by publication, is not available on behalf of a co-defendant who appeared. Pattison *v.* Smith, 93 Ind. 447.

20. *California.*— Riverside First Nat. Bank *v.* Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95.

Indiana.— Allen *v.* Cox, 11 Ind. 383.

Iowa.— Lutz *v.* Kelly, 47 Iowa 307; Weil *v.* Lowenthal, 10 Iowa 575. *Compare* McBride *v.* Harn, 52 Iowa 79, 2 N. W. 962.

Massachusetts.— Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356.

Michigan.— McEwan *v.* Zimmer, 38 Mich. 765, 31 Am. Rep. 332. But jurisdiction over a non-resident defendant is conferred by his acceptance of "due personal service" of the writ. Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475.

Mississippi.— Cudabac *v.* Strong, 67 Miss. 705, 7 So. 543.

Missouri.— Higgins *v.* Beckwith, 102 Mo. 456, 14 S. W. 931; Daniels *v.* Atchison, etc., R. Co., 58 Mo. App. 202. And see Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495.

New Hampshire.— Bryant *v.* Ela, Smith 396.

New York.— China, etc., Bank *v.* Morse, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139; Matter of James, 78 Hun 121, 28 N. Y. Suppl. 992; Holmes *v.* Holmes, 4 Lans. 388; Dunn *v.* Dunn, 4 Paige 425.

North Carolina.— Hinton *v.* Penn Mut. L. Ins. Co., 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636; Irby *v.* Wilson, 21 N. C. 568.

Ohio.— Cross *v.* Armstrong, 44 Ohio St. 613, 10 N. E. 160.

Pennsylvania.— Steel *v.* Smith, 7 Watts & S. 447. *Compare* Moore *v.* Fields, 42 Pa. St. 467.

Texas.— Wilson *v.* Cleburne Nat. Bank, 27 Tex. Civ. App. 54, 63 S. W. 1067; Andrews *v.* Union Cent. L. Ins. Co., (Civ. App. 1898) 44 S. W. 610; Perry *v.* Bassett, 16 Tex. Civ. App. 288, 41 S. W. 523.

Vermont.— Price *v.* Hickok, 39 Vt. 292.

Wisconsin.— Smith *v.* Grady, 68 Wis. 215, 31 N. W. 477.

United States.— Sutherland-Innes Co. *v.* American Wired Hoop Co., 113 Fed. 183, 51 C. C. A. 145; Ætna L. Ins. Co. *v.* Lyon County, 95 Fed. 325; Wilson *v.* Graham, 4 Wash. 53, 30 Fed. Cas. No. 17,804.

21. Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104; Minot *v.* Tilton, 64 N. H. 371, 10 Atl. 682, 64 N. H. 618, 15 Atl. 127; Jarvis *v.* Barrett, 14 Wis. 591.

Practice in Kentucky.— On the statute authorizing constructive service on a non-resident defendant by the making of a warning

and without appearance by defendant, except in an action for divorce, which is governed by special rules, is void for all purposes.[22]

3. Attachment of Property — a. In General. Where jurisdiction of an action is acquired by attachment of defendant's property, but without personal service of process upon him, no personal judgment can be rendered against him, although the court may have power to adjudicate upon and dispose of the property attached.[23]

b. Non-Resident Defendant. In an action in a state court against a non-resident defendant, begun by attachment of his property within the jurisdiction of the court, there is no authority to render a judgment enforceable against him personally, unless there was also personal service of process upon him; and in the absence of such service, a judgment expressed in general terms will be effective only against the property so attached.[24] The judgment will not even be enforceable against other property of defendant found within the court's jurisdiction,

order and the appointment of an attorney to defend see Carr *v.* Carr, 92 Ky. 552, 18 S. W. 453, 13 Ky. L. Rep. 756, 36 Am. St. Rep. 614; Payne *v.* Hardesty, 14 S. W. 348, 12 Ky. L. Rep. 336.

22. *California.* — Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626.

Illinois.— Chicago Star Brewery *v.* Otto, 63 Ill. App. 40.

Indiana.— Mitchell *v.* Gray, 18 Ind. 123.

Minnesota.— Plummer *v.* Hatton, 51 Minn. 181, 53 N. W. 460.

Missouri.— Smith *v.* McCutchen, 38 Mo. 415; McMahon *v.* Turney, 45 Mo. App. 103.

Montana.— Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940.

New Mexico.— Smith *v.* Montoya, 3 N. M. 39, 1 Pac. 175.

New York.— New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; Stow *v.* Chapin, 4 N. Y. Suppl. 496.

North Carolina.— Goodwin *v.* Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209.

Oregon.— Willamette Real Estate Co. *v.* Hendrix, 28 Oreg. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

Texas.— Evans *v.* Breneman, (Civ. App. 1898) 46 S. W. 80; Bumpass *v.* Anderson, (Civ. App. 1899) 51 S. W. 1103; Southern Bldg., etc., Assoc. *v.* Brackett, (Civ. App. 1897) 39 S. W. 619; Ward *v.* Green, (Civ. App. 1894) 28 S. W. 574; Spence *v.* Morris, (Civ. App. 1894) 28 S. W. 405; Heady *v.* Bexar Bldg., etc., Assoc., (Civ. App. 1894) 26 S. W. 468.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Du Pont *v.* Abel, 81 Fed. 534; Remer *v.* McKay, 54 Fed. 432.

Parol evidence tending to show defendant's knowledge of the suit will not render valid a judgment which must rest on proof of a strict compliance with the statute in regard to service by publication. Roberts *v.* Roberts, 3 Colo. App. 6, 31 Pac. 941.

23. *Alabama.*—Kennedy *v.* Millsap, 25 Ala. 560; Campbell *v.* Doss, 17 Ala. 401.

Illinois.— Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Firebaugh *v.* Hall, 63 Ill. 81.

Indiana.— Ireland *v.* Webber, 27 Ind. 256; The Tom Bowling *v.* Hough, 5 Blackf. 188.

Iowa.— Johnson *v.* Dodge, 19 Iowa 106; Doolittle *v.* Shelton, 1 Greene 272; Wilkie *v.* Jones, Morr. 97.

Louisiana.— Durand's Succession, 24 La. Ann. 352.

Maine.— Penobscot R. Co. *v.* Weeks, 52 Me. 456.

Nebraska.— A judgment rendered without substituted service on a non-resident defendant in attachment, whose property has been seized, is merely erroneous, but not void. Jones *v.* Danforth, (1904) 99 N. W. 495.

New Hampshire.— Gay *v.* Smith, 38 N. H. 171; Burt *v.* Stevens, 22 N. H. 229.

New Jersey.— Bright *v.* Hand, 16 N. J. L. 273.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

West Virginia.—Hall *v.* Lowther, 22 W. Va. 570.

United States.— Lincoln *v.* Tower, 15 Fed. Cas. No. 8,355, 2 McLean 473; Wyman *v.* Russell, 30 Fed. Cas. No. 18,115, 4 Biss. 307.

See 30 Cent. Dig. tit. "Judgment," § 33.

24. *Alabama.*— Exchange Nat. Bank *v.* Clement, 109 Ala. 270, 19 So. 814. See Meyer *v.* Keith, 99 Ala. 519, 13 So. 500; Brinsfield *v.* Austin, 39 Ala. 227.

California.— Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

Colorado.— Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221.

Georgia.— Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662.

Illinois.— Jacobus *v.* Smith, 14 Ill. 359.

Indiana.— King *v.* Vance, 46 Ind. 246; Henrie *v.* Sweasey, 5 Blackf. 335.

Iowa.— Johnson *v.* Dodge, 19 Iowa 106.

Kansas.— See Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260.

Kentucky.— Payne *v.* Witherspoon, 14 B. Mon. 270; Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179.

Maine.— Lovejoy *v.* Albee, 33 Me. 414, 54 Am. Dec. 630; McVicker *v.* Beedy, 31 Me. 314, 1 Am. Dec. 666.

Massachusetts.— McDermott *v.* Clary, 107 Mass. 501; Packard *v.* Matthews, 9 Gray 311; Morrison *v.* Underwood, 5 Cush. 52.

but only against that actually attached on mesne process in the action.[25] But a judgment enforceable personally against defendant may be given if, in addition to the attachment, he was personally served with process in the action,[26] if he appears and pleads,[27] or if he acknowledges service of the writ and waives the benefit of the statutes respecting absent defendants.[28]

4. Joint Defendants — a. Service on Part Only. Unless a statute provides otherwise it is a general rule that, where a suit is instituted against several defendants jointly, and one is not served with process, and the court assumes jurisdiction and proceeds to render judgment against them all, the judgment is erroneous and voidable, or in some states absolutely void, at least as against defendant not served.[29] But the judgment is probably not void as an entirety, many cases holding that it is valid and enforceable against defendant who was served, and that he

Minnesota.— Whitney *v.* Sherin, 74 Minn. 4, 76 N. W. 787; Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104.

Mississippi.— Cason *v.* Cason, 31 Miss. 578.

New Hampshire.— Downer *v.* Shaw, 22 N. H. 277.

New York.— Pawling *v.* Willson, 13 Johns. 192.

Ohio.— Arndt *v.* Arndt, 15 Ohio 33.

Oregon.— Willamette Real Estate Co. *v.* Hendrix, 28 Oreg. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

South Carolina.— Young *v.* Green, 10 Rich. Eq. 19.

Texas.— Barelli *v.* Wagner, 5 Tex. Civ. App. 445, 27 S. W. 17.

Vermont.— Stevens *v.* Fisher, 30 Vt. 200; Woodruff *v.* Taylor, 20 Vt. 65; *Ex p.* Kellogg, 6 Vt. 509.

Virginia.— McAllister *v.* Guggenheimer, 91 Va. 317, 21 S. E. 475.

Wisconsin.— Renier *v.* Hurlbut, 81 Wis. 24, 50 N. W. 783, 29 Am. St. Rep. 850, 14 L. R. A. 562.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Phelps *v.* Holker, 1 Dall. 261, 1 L. ed. 128; Du Pont *v.* Abel, 81 Fed. 534; Mickey *v.* Stratton, 17 Fed. Cas. No. 9,530, 5 Sawy. 475.

See 30 Cent. Dig. tit. "Judgment," § 33.

Effect of judgment.— A judgment founded on this kind of jurisdiction cannot be made the basis of an action of debt against defendant. Eastman *v.* Wadleigh, 65 Me. 251, 20 Am. Rep. 695. And see Easterly *v.* Goodwin, 35 Conn. 279, 95 Am. Dec. 237; Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675. Nor can proceedings be taken against him to compel him to submit to an examination concerning his property, nor can plaintiff have a warrant for his arrest, as prescribed by the code, on account of his refusal to apply property in satisfaction of such judgment. Bartlett *v.* McNeil, 60 N. Y. 53.

In a mortgage foreclosure suit, where defendant is a non-resident, and has not been served with process or appeared in the action, the court cannot enter a personal judgment against him for a deficiency; plaintiff's remedy is limited to the foreclosure and sale of the equity of redemption. Schwinger *v.* Hickok, 53 N. Y. 280; Ward *v.* Green, (Tex. Civ. App. 1894) 28 S. W. 574; Heady *v.* Bexar Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 468.

Amended petition.— Where, after attachment of property and publication of a citation, plaintiff filed an amended petition, setting up an entirely new cause of action, on which judgment by default was rendered without any further citation being published or service had, it was held that the court acquired no jurisdiction and the judgment was void. Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295.

25. *Idaho.*— Kerns *v.* McAulay, 8 Ida. 558, 69 Pac. 539.

Maine.— Eastman *v.* Wadleigh, 65 Me. 251, 20 Am. Rep. 695.

Mississippi.— Tabler *v.* Mitchell, 62 Miss. 437.

Missouri.— Johnson *v.* Holley, 27 Mo. 594.

Pennsylvania.— Coleman's Appeal, 75 Pa. St. 441.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Graham *v.* Spencer, 14 Fed. 603.

See 30 Cent. Dig. tit. "Judgment," § 33.

Contra.— Fiske *v.* Anderson, 33 Barb. (N. Y.) 71; Stevens *v.* Fisher, 30 Vt. 200.

26. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Darrah *v.* Watson, 36 Iowa 116.

27. Kerr *v.* Swallow, 33 Ill. 379.

28. Richardson *v.* Smith, 11 Allen (Mass.) 134.

29. *Alabama.*— Parker *v.* Parker, 39 Ala. 347; Faver *v.* Briggs, 18 Ala. 478; Rivers *v.* Loving, 1 Stew. 395; Kennedy *v.* Russell, Minor 77.

Arkansas.— Hickey *v.* Smith, 6 Ark. 456; Palmer *v.* Edwards, 4 Ark. 431.

California.— Junkans *v.* Bergin, 64 Cal. 203, 30 Pac. 627; Inos *v.* Winspear, 18 Cal. 397; Treat *v.* McCall, 10 Cal. 511; Estell *v.* Chenery, 3 Cal. 467; Ingraham *v.* Gildemeester, 2 Cal. 88.

Illinois.— Evans *v.* Gill, 25 Ill. 116; Hurd *v.* Burr, 22 Ill. 29; Swift *v.* Green, 20 Ill. 173; Brockman *v.* McDonald, 16 Ill. 112; Rider *v.* Alleyne, 3 Ill. 474; Ogden *v.* Bowen, 3 Ill. 33; Ward *v.* Stanley, 41 Ill. App. 417. Judgment rendered against all the defendants, where all have not been served or appeared, is erroneous and must be reversed,

can take no advantage of the failure to serve the others.[30] And in a number of the states, according to the statutes or the practice prevailing in the courts, and in derogation of the common law, if two or more persons are sued in a joint action, plaintiff may proceed against any one or more of them upon service of process on them, notwithstanding there may be others not served; and if his contention is successful, he may have judgment against those served, excluding the others,[31]

both as to those served and those not served. Williams *v.* Chalfant, 82 Ill. 218.

Indiana.— Lewis *v.* Bortsfield, 75 Ind. 390; Cahill *v.* Vanlaningham, 7 Ind. 540; Allen *v.* Chadsey, 1 Ind. 399; Dunn *v.* Hall, 8 Blackf. 32.

Iowa.— Gerrish *v.* Seaton, 73 Iowa 15, 34 N. W. 485.

Kentucky.— Johnson *v.* Vaughan, 9 B. Mon. 217; Stivers *v.* Prentice, 3 B. Mon. 461; Heathman *v.* Hulin, 3 J. J. Marsh. 432; Moores *v.* Parker, 3 Litt. 268; White *v.* Avery, 9 S. W. 296, 10 Ky. L. Rep. 388.

Louisiana.— Loussade *v.* Hartman, 16 La. 117.

Maine.— Winslow *v.* Lambard, 57 Me. 356.

Massachusetts.— Odom *v.* Denny, 16 Gray 114; Tappan *v.* Bruen, 5 Mass. 193.

Michigan.— Proctor *v.* Lewis, 50 Mich. 329, 15 N. W. 495.

Mississippi.— Moody *v.* Lyles, 44 Miss. 121; Martin *v.* Williams, 42 Miss. 210, 97 Am. Dec. 456; Petit *v.* McCombs, 41 Miss. 628; Ayer *v.* Bailey, 5 How. 688.

Missouri.— Boyd *v.* Ellis, 107 Mo. 394, 18 S. W. 29.

Nebraska.— Forbes *v.* Bringe, 32 Nebr. 757, 49 N. W. 720; Mercer *v.* James, 6 Nebr. 406.

New Hampshire.— Wilbur *v.* Abbot, 60 N. H. 40.

New Jersey.—Smith *v.* McDonald, 4 N. J. L. 103; Ford *v.* Munson, 4 N. J. L. 93. *Compare* Schuyler *v.* McCrea, 16 N. J. L. 248.

New York.— McDoel *v.* Cook, 2 N. Y. 110; Farrell *v.* Calkins, 10 Barb. 348; Jackson *v.* Hoag, 6 Johns. 59; Jones *v.* Reed, 1 Johns. Cas. 20.

North Carolina.— Pender *v.* Griffin, 72 N. C. 270; Dick *v.* McLaurin, 63 N. C. 185.

Ohio.— A judgment against all of several defendants, where only a part are served with process, is erroneous, but not void. Douglass *v.* Massie, 16 Ohio 271, 47 Am. Dec. 375.

Pennsylvania.— Murdy *v.* McCutcheon, 95 Pa. St. 435; Boaz *v.* Heister, 6 Serg. & R. 18; Herschberger *v.* Brown, 2 Woodw. 101.

Tennessee.— Winchester *v.* Beardin, 10 Humphr. 247, 51 Am. Dec. 702.

Texas.— Rogers *v.* Harrison, 44 Tex. 169; Rhone *v.* Ellis, 30 Tex. 30; Bayless *v.* Daniels, 8 Tex. 140; Houston *v.* Ward, 8 Tex. 124; Hulme *v.* Janes, 6 Tex. 242, 55 Am. Dec. 774; Tilman *v.* Johnson, (Civ. App. 1890) 16 S. W. 788. And see Chicago, etc., R. Co. *v.* Halsell, 35 Tex. Civ. App. 126, 80 S. W. 140 [*affirmed* in 98 Tex. 244, 83 S. W. 15].

Utah.—Blyth, etc., Co. *v.* Swenson, 15 Utah 345, 49 Pac. 1027.

Virginia.— Blanton *v.* Carroll, 86 Va. 539, 10 S. E. 329; Graham *v.* Graham, 4 Munf. 205.

West Virginia.— Ferguson *v.* Millender, 32 W. Va. 30, 9 S. E. 38; Vandiver *v.* Roberts, 4 W. Va. 493.

England.— At common law, where process was issued against two, on a joint cause of action, and only one appeared, the other must be outlawed before there could be any further proceedings. Edwards *v.* Carter, 1 Str. 473.

See 30 Cent. Dig. tit. "Judgment," § 27.

30. *Georgia.*—Kitchens *v.* Hutchins, 44 Ga. 620.

Illinois.— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60.

Mississippi.— Wise *v.* Hyatt, 68 Miss. 714, 10 So. 37.

Ohio.— Ash *v.* McCabe, 21 Ohio St. 181.

Tennessee.— Davis *v.* Reaves, 7 Lea 585.

Virginia.— Gray *v.* Stuart, 33 Gratt. 351.

See 30 Cent. Dig. tit. "Judgment," § 27.

31. *Arkansas.*— Neal *v.* Singleton, 26 Ark. 491.

California.— Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218; Kelly *v.* Bandini, 50 Cal. 530; Hirschfield *v.* Franklin, 6 Cal. 607; Ingraham *v.* Gildemeester, 2 Cal. 88.

Delaware.— Cunningham *v.* Dixon, 1 Marv. 163, 41 Atl. 519.

Florida.— Bacon *v.* Green, 36 Fla. 325, 18 So. 870.

Georgia.— Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660; Tedlie *v.* Dill, 2 Ga. 128.

Illinois.— Waidner *v.* Pauly, 141 Ill. 442, 30 N. E. 1025; Fender *v.* Stiles, 31 Ill. 460; Johnson *v.* Buell, 26 Ill. 66; Stephens *v.* Sweeney, 7 Ill. 375; Rehm *v.* Halverson, 94 Ill. App. 627; Green *v.* Shaw, 66 Ill. App. 74. But *compare* Briggs *v.* Adams, 31 Ill. 486, holding that in actions not sounding in tort, where two or more are sued, judgment must be rendered against all who are served, or, if that cannot be, then against none, unless some defendants have personal defenses.

Kentucky.— Moore *v.* Estes, 79 Ky. 282; Chinn *v.* Com., 5 J. J. Marsh. 29.

Maryland.— Loney *v.* Bailey, 43 Md. 10.

Minnesota.— Dillon *v.* Porter, 36 Minn. 341, 31 N. W. 56.

Mississippi.— Hunt *v.* Anderson, 33 Miss. 559.

Nebraska.— Bennett *v.* Townsend, 1 Nebr. 460.

New Jersey.— Flemming *v.* Freese, 26 N. J. L. 263; Harker *v.* Brink, 24 N. J. L. 333.

New York.— Billhofer *v.* Heubach, 15 Abb. Pr. 143; Stannard *v.* Mattice, 7 How. Pr. 4.

Ohio.— Bazell *v.* Belcher, 31 Ohio St. 572.

Oregon.— Simpson *v.* Prather, 5 Oreg. 86.

Pennsylvania.— Jamieson *v.* Pomeroy, 9 Pa. St. 230; Moore *v.* Henburn, 5 Pa. St. 399; Donough *v.* Boger, 10 Phila. 616.

South Carolina.— Caldwell *v.* Harp, 2 McCord 275.

provided it is shown that defendants not brought in cannot be found or that it is impossible to serve process on them,[32] and that there is a joint liability or joint cause of action against all.[33] But a voluntary appearance for defendants not served will cure the error and permit a judgment against all.[34]

b. Statutory Provisions. In several states statutes have been enacted which provide that where an action is instituted against two or more defendants upon an alleged joint liability, and some of them are served with process, but not the others, plaintiff may proceed to trial against those who are before the court, and, if he recovers, may have judgment against all the defendants whom he shows to be jointly liable, but it must be so entered as to be enforceable only against the joint property of all and the separate property of those served.[35] The provisions of such a statute must be strictly followed to give validity to the judgment.[36]

Vermont.— Hodges *v.* Eastman, 12 Vt. 358.

Virginia.— Dillard *v.* Turner, 87 Va. 669, 14 S. E. 123; Norfolk, etc., R. Co. *v.* Shippers' Compress Co., 83 Va. 272, 2 S. E. 139.

West Virginia.— Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

United States.— Cooper *v.* Gordon, 6 Fed. Cas. No. 3,195, 4 McLean 6. *Compare* Allen *v.* Clayton, 11 Fed. 73.

See 30 Cent. Dig. tit. "Judgment," § 27.

In some states the rendition of a judgment against a defendant who was not served, and who did not appear, is considered to be a mere clerical mistake, which may be amended on motion in the trial court. Savage *v.* Walshe, 26 Ala. 619; Bergen *v.* Bolton, 10 Mo. 658.

32. Hunt *v.* Adamson, 4 Ind. 108; Heaston *v.* Fulghum, 7 Blackf. (Ind.) 101; Bell *v.* State, 7 Blackf. (Ind.) 33; Depew *v.* Wheelan, 6 Blackf. (Ind.) 485; Lowe *v.* Blair, 6 Blackf. (Ind.) 282; Gibbons *v.* Surber, 4 Blackf. (Ind.) 155; Sherrod *v.* Davis, 2 N. C. 282; Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

33. Carter *v.* Berkshire, 8 Blackf. (Ind.) 193; Taylor *v.* Claypool, 5 Blackf. (Ind.) 557; Schoneman *v.* Fegley, 7 Pa. St. 433.

34. Eaton *v.* Harris, 42 Ala. 491; Sharp *v.* Brunnings, 35 Cal. 528; Heaton *v.* Collins, 7 Blackf. (Ind.) 414; Mosher *v.* Small, 5 Pa. St. 221; Hall *v.* Law, 2 Watts & S. (Pa.) 121.

Appearance for one defendant.— Where an attorney appears specially for one defendant in an action against two, and afterward, as attorney for defendant, acknowledges judgment in favor of plaintiff, it is good only as to defendant for whom he appeared, and a joint execution is erroneous. Kimmel *v.* Kimmel, 5 Serg. & R. (Pa.) 294.

Unauthorized appearance.—A judgment entered against one who has not been served, on an appearance by an unauthorized attorney, which has not been ratified or confirmed, is absolutely void as against such defendant. Newton First Nat. Bank *v.* Wm. B. Grimes Dry-Goods Co., 45 Kan. 510, 26 Pac. 56. Where two defendants were summoned in a case, but no return was made as to one, and afterward an attorney confessed judgment for defendants, on a scire facias issued seventeen years afterward to revive the judgment against the executors of defendant, served alone, it is competent to prove that the plural entry was made without authority, and that the judgment was not joint. Wright *v.* Harris, 24 Ga. 415.

Construction of judgment.— Where process is served only on a part of defendants, and judgment is taken against "defendants" without naming them, and without any appearance of those not served, the judgment will be understood to be only against those who were duly served. Neal *v.* Singleton, 26 Ark. 491; Clark *v.* Finnell, 16 B. Mon. (Ky.) 329; Morgan *v.* Morgan, 2 Bibb (Ky.) 388; Winchester *v.* Beardin, 10 Humphr. (Tenn.) 247, 51 Am. Dec. 702; Boyd *v.* Baynham, 5 Humphr. (Tenn.) 386, 42 Am. Dec. 438. *Contra*, Langley *v.* Grill, 1 Colo. 71.

35. *California.*— Kelly *v.* Van Austin, 17 Cal. 564.

Illinois.— Neal *v.* Pennington, 65 Ill. App. 68.

Minnesota.— Ingwaldson *v.* Olson, 79 Minn. 252, 82 N. W. 579; Johnson *v.* Lough, 22 Minn. 203.

New York.— Magovern *v.* Robertson, 129 N. Y. 636, 29 N. E. 1031; Priessenger *v.* Sharp, 59 N. Y. Super. Ct. 315, 14 N. Y. Suppl. 372; Northern Bank *v.* Wright, 5 Rob. 604; Power Publishing Co. *v.* Hall, 69 N. Y. Suppl. 533; Leahey *v.* Kingon, 22 How. Pr. 209; Mason *v.* Denison, 11 Wend. 612; Pardee *v.* Haynes, 10 Wend. 630.

South Carolina.— Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913.

Wisconsin.— Brawley *v.* Mitchell, 92 Wis. 671, 66 N. W. 799; Blackburn *v.* Sweet, 38 Wis. 578.

See 30 Cent. Dig. tit. "Judgment," § 27.

36. The judgment must be in form against both or all the defendants; and a judgment against the one served alone is erroneous in substance. Kelly *v.* Van Austin, 17 Cal. 564; Stehr *v.* Ollbermann, 49 N. J. L. 633, 10 Atl. 547; Nelson *v.* Bostwick, 5 Hill (N. Y.) 37, 40 Am. Dec. 310. And if it should appear upon the trial that the contract in suit was not joint, but was made with one of defendants alone, then the statute does not apply, and plaintiff cannot recover under it. Fleming *v.* Freese, 26 N. J. L. 263; Harker *v.* Brink, 24 N. J. L. 333. And if defendant who was served and brought before the court succeeds in establishing a personal defense to the action, plaintiff cannot recover against the other defendants, although his cause of

c. Partners. At common law, in an action against a firm, each partner must be duly served with process, and if some are not served, a judgment rendered against them all will be voidable, at least so far as concerns those not cited.[37] But in those states where the joint debtor acts are in force a judgment may be rendered against the firm, to be enforced against the partnership property and the individual property of the partners served.[38]

d. Non-Residents. Similar rules apply where one of defendants is served within the jurisdiction, but the other, being a non-resident, is not cited. At common law, in this case, a joint judgment cannot be rendered nor any form of judgment which will bind a defendant not brought into court.[39] But in several states, either by force of statutes or the settled practice of the courts, a judgment, either joint or several, may be entered, which will be effective against defendant who was served.[40]

5. Defective Process. A summons or other writ which is radically defective will not support a judgment; but if the writ, although imperfect in some particulars, is sufficiently complete to constitute a legal notice to defendant, and to inform him of the essential facts he is entitled to know, the consequent judgment is not void, although it may be liable to be reversed or vacated if defendant takes advantage of the defect promptly.[41] Particularly with regard to misnomer, it is

action was fully proved. Leggett *v.* Boyd, 6 Wend. (N. Y.) 500.

37. *Alabama.*— Faver *v.* Briggs, 18 Ala. 478.

California.— Davidson *v.* Knox, 67 Cal. 143, 7 Pac. 413; Inos *v.* Winspear, 18 Cal. 397; Schloss *v.* White, 16 Cal. 65; Ingraham *v.* Gildemeester, 2 Cal. 88.

Colorado.— San Juan, etc., Min., etc., Co. *v.* Finch, 6 Colo. 214; Dessauer *v.* Koppin, 3 Colo. App. 115, 32 Pac. 182.

Iowa.— Harford *v.* Street, 46 Iowa 594.

Kansas.— Dresser *v.* Wood, 15 Kan. 344.

Louisiana.— Anderson *v.* Arnette, 27 La. Ann. 237; Gaienne *v.* Akin, 17 La. 42, 36 Am. Dec. 604.

Mississippi.— Mitchell *v.* Greenwald, 43 Miss. 167; Smith *v.* Tupper, 4 Sm. & M. 261, 43 Am. Dec. 483.

New York.— St. John *v.* Holmes, 20 Wend. 609, 32 Am. Dec. 603.

Virginia.— Bowler *v.* Huston, 30 Gratt. 266, 32 Am. Rep. 673.

United States.— Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271.

38. Newlon *v.* Heaton, 42 Iowa 593; Scott *v.* Bogart, 14 La. Ann. 261; Patten *v.* Cunningham, 63 Tex. 666; Alexander *v.* Stern, 41 Tex. 193; Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271.

39. Hill *v.* Bates, (Ark. 1890) 12 S. W. 874; Buffum *v.* Ramsdell, 55 Me. 252, 92 Am. Dec. 589; Wright *v.* Andrews, 130 Mass. 149; Leonard *v.* Bryant, 11 Metc. (Mass.) 370. *Compare* Dennett *v.* Chick, 2 Me. 191, 11 Am. Dec. 59; Gay *v.* Richardson, 18 Pick. (Mass.) 417; Call *v.* Hagger, 8 Mass. 423.

40. *Connecticut.*—Bishop *v.* Vose, 27 Conn. 1. *Compare* Stoyel *v.* Westcott, 3 Day 349.

Kentucky.— Moore *v.* Estes, 79 Ky. 282; Sneed *v.* Wiester, 2 A. K. Marsh. 277.

Michigan.— Ludington First Nat. Bank *v.* Dwight, 85 Mich. 509, 48 N. W. 696; Church *v.* Edson, 39 Mich. 113; Gunzberg *v.* Miller, 39 Mich. 80; Denison *v.* Smith, 33 Mich. 155.

New Hampshire.— Olcott *v.* Little, 9 N. H. 259, 32 Am. Dec. 357.

New York.— Daniels *v.* Patterson, 3 N. Y. 47.

See 30 Cent. Dig. tit. "Judgment," § 28.

41. *Alabama.*— *Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

California.— Peabody *v.* Phelps, 9 Cal. 213; State *v.* Woodlief, 2 Cal. 241.

Indiana.— Louisville, etc., R. Co. *v.* Thompson, 62 Ind. 87.

Iowa.— Dougherty *v.* McManus, 36 Iowa 657; De Tar *v.* Boone County, 34 Iowa 488; Shawhan *v.* Loffer, 24 Iowa 217.

Nebraska.—If service of summons has actually been made on defendant, and the time given him to answer has elapsed before judgment, the fact that an error was made in the return-day of the summons is an irregularity which does not render the judgment void. Jones *v.* Danforth, (1904) 99 N. W. 495.

South Dakota.— Wiley *v.* Carson, 15 S. D. 298, 89 N. W. 475.

Texas.— Bell *v.* Vanzandt, 54 Tex. 150.

See 30 Cent. Dig. tit. "Judgment," § 31.

Date of writ.— A mistake in the date of the writ, or the fact that the date is left blank, must be taken advantage of before judgment. Wood *v.* State Bank, 1 Fla. 378; Ambler *v.* Leach, 15 W. Va. 677.

Notice of time and place for appearance.— If the notice does not state the time or place at which defendant is required to appear, it lacks the essentials of legal process, and no valid judgment can be rendered upon it. Kitsmiller *v.* Kitchen, 24 Iowa 163; Falkner *v.* Guild, 10 Wis. 563.

Writ not signed or sealed.— If the writ lacks the signature of the clerk or other officer having authority to issue it, or if it is not under seal, it will not support a judgment. Costley *v.* Driver, 45 Ala. 230. But *compare* Doe *v.* Pendleton, 15 Ohio 735; Ambler *v.* Leach, 15 W. Va. 677, holding that

held that if process is really served upon the person intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or omits to plead the misnomer in abatement, he is bound by the judgment rendered against him.[42] And a similar rule applies in the case of a misnomer of plaintiff.[43]

6. DEFECTIVE SERVICE OF PROCESS. Although the service of process may have been defective or irregular, the judgment will not necessarily be void. Advantage of such a matter should be taken by a proper motion or proceeding in the action. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction.[44] But statutes authorizing constructive service of process are to be strictly construed; and in the case of a

these defects must be taken advantage of by motion or by writ of error.

Indorsement.— A judgment is not invalidated by the fact of an unnecessary indorsement of the amount upon the summons. Larimer *v.* Clemmer, 31 Ohio St. 499. So of the omission of such an indorsement when it is required by the statute. Lawton *v.* Nicholas, 12 Okla. 550, 73 Pac. 262.

Return.— The fact that the officer's return upon mesne process is not signed will not invalidate the judgment. McElrath *v.* Butler, 29 N. C. 398.

Naming defendant.— A summons which does not name defendant, otherwise than by describing him as the "heir of T.," will give the court no jurisdiction to render a judgment against him. Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

Returnable too soon.— If the writ is made returnable too soon, or does not give defendant the required number of days' notice, the judgment will be erroneous but not void. Ballinger *v.* Tarbell, 16 Iowa 491, 85 Am. Dec. 527; Clapp *v.* Graves, 26 N. Y. 418. See also West *v.* Williamson, 1 Swan (Tenn.) 277; Glover *v.* Holman, 3 Heisk. (Tenn.) 519. *Compare* Johnson *v.* Baker, 38 Ill. 98, 87 Am. Dec. 293; Sanders *v.* Rains, 10 Mo. 770.

42. *California.*— Welsh *v.* Kirkpatrick, 30 Cal. 202, 89 Am. Dec. 85; Sutter *v.* Cox, 6 Cal. 415. But a judgment against defendant served by a fictitious name, who appears and answers in his real name, cannot be supported unless the complaint is amended by inserting the true name, as required by the code. Alameda County *v.* Crocker, 125 Cal. 101, 57 Pac. 766; San Francisco *v.* Burr, (Cal. 1894) 36 Pac. 771; McKinley *v.* Tuttle, 42 Cal. 570. And see Ford *v.* Doyle, 37 Cal. 346.

Illinois.— Guinard *v.* Heysinger, 15 Ill. 288.

Indiana.— Kingen *v.* Stroh, 136 Ind. 610, 36 N. E. 519; Bloomfield R. Co. *v.* Burress, 82 Ind. 83.

Iowa.— Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573.

Kansas.— Hoffield *v.* Board of Education, 33 Kan. 644, 7 Pac. 216.

Kentucky.— Patton *v.* Campbell, 74 S. W. 1092, 25 Ky. L. Rep. 275.

Maryland.— Baltimore First Nat. Bank *v.* Jaggers, 31 Md. 38, 100 Am. Dec. 53.

Massachusetts.— Fitzgerald *v.* Salentine, 10 Metc. 436; Smith *v.* Bowker, 1 Mass. 76.

Missouri.— Parry *v.* Woodson, 33 Mo. 347, 84 Am. Dec. 51.

Pennsylvania.— Althouse *v.* Hunsberger, 6 Pa. Super. Ct. 160.

South Carolina.— Waldrop *v.* Leonard, 22 S. C. 118.

United States.— Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. ed. 451.

England.— Oakley *v.* Giles, 3 East 168.

See 30 Cent. Dig. tit. "Judgment," § 31.

43. McGaughey *v.* Woods, 106 Ind. 380, 7 N. E. 7; U. S. National Bank *v.* Venner, 172 Mass. 449, 52 N. E. 543; Kronski *v.* Missouri Pac. R. Co., 77 Mo. 362; Terry *v.* French, 5 Tex. Civ. App. 120, 23 S. W. 911; Green *v.* Brown, (Tex. App. 1890) 15 S. W. 37. *Compare Ex p.* Cheatham, 6 Ark. 531, 44 Am. Dec. 525.

44. *Arkansas.*— Webb *v.* Hanger, 2 Ark. 124.

California.— Rowley *v.* Howard, 23 Cal. 401.

Georgia.— Weslow *v.* Peavy, 51 Ga. 210.

Illinois.— Douglas *v.* Whiting, 28 Ill. 362.

Kansas.— Stewart *v.* Bodley, 46 Kan. 397, 26 Pac. 719, 26 Am. St. Rep. 105; Simcock *v.* Emporia First Nat. Bank, 14 Kan. 529.

Louisiana.— Dupuy *v.* Arceneaux, 21 La. Ann. 629.

Maine.— Dow *v.* March, 80 Me. 408, 15 Atl. 26; Cole *v.* Butler, 43 Me. 401.

Massachusetts.— Hendrick *v.* Whittemore, 105 Mass. 23; Hart *v.* Huckins, 6 Mass. 399.

Michigan.— People's Mut. Ben. Soc. *v.* Fraser, 97 Mich. 627, 56 N. W. 944; South Bend Chilled Plow Co. *v.* Manahan, 62 Mich. 143, 28 N. W. 768; Ellis *v.* Fletcher, 40 Mich. 321.

Minnesota.— W. W. Kimball Co. *v.* Brown, 73 Minn. 167, 75 N. W. 1043; Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342.

Mississippi.— Christian *v.* O'Neal, 46 Miss. 669; Campbell *v.* Hays, 41 Miss. 561.

Nebraska.— Baldwin *v.* Burt, 2 Nebr. (Unoff.) 377, 96 N. W. 401, holding that where the attempted service fails to reach the party to be served in any way, a judgment founded thereon is absolutely void.

New York.— Pixley *v.* Winchell, 7 Cow. 366, 17 Am. Dec. 525.

Ohio.— Marienthal *v.* Amburgh, 2 Disn. 586; Sleeper *v.* Sleeper, 1 Handy 530, 12 Ohio Dec. (Reprint) 273; McGill *v.* Smith, 2 Cinc. Super. Ct. 215.

Pennsylvania.— Morrison *v.* Wetherill, 8

citation by publication, or other form of constructive notification, strict compliance with the provisions of the statute is necessary to give the court jurisdiction.[45] It is also held that no valid judgment by default can be taken when there is no return by the officer serving the writ,[46] or when the return is so faulty or defective as not to show a service of the writ,[47] although minor irregularities or ambiguities in the return will not vitiate the judgment.[48]

F. Pleadings to Sustain Judgment — 1. Necessity For Pleadings. No valid judgment can be entered in an action without the filing of a declaration or complaint or some written statement of plaintiff's cause of action and demands,[49] unless this is waived by the agreement of the parties or defendant's confession, or ratified by subsequent consent.[50] And it is a general rule that if an action proceeds to trial and verdict without the filing of any plea on the part of defendant, or without the formation of an issue for the determination of the court, a judgment rendered therein is erroneous and voidable if not absolutely void.[51]

Serg. & R. 502; Com. *v.* Banks, 22 Pa. Super. Ct. 403; McEwen *v.* Horton, 1 Pa. Co. Ct. 498.

Texas.— Hale *v.* McComas, 59 Tex. 484.

Virginia.— Brown *v.* Chapman, 90 Va. 174, 17 S. E. 855.

West Virginia.— Laidley *v.* Bright, 17 W. Va. 779.

United States.— Ford *v.* Delta, etc., Land Co., 43 Fed. 181; Isaacs *v.* Price, 13 Fed. Cas. No. 7,097, 2 Dill. 347.

See 30 Cent. Dig. tit. "Judgment," § 31.

Service of process on Sunday is a mere irregularity, which may be pleaded in abatement, or set aside on motion; but it does not invalidate the judgment. Comer *v.* Jackson. 50 Ala. 384.

But service on a stranger, who is not authorized to accept service for defendant, is no service at all, and cannot support a judgment. Waddill *v.* Payne, 23 La. Ann. 773; Wheeler *v.* Moore, 10 Wash. 309, 38 Pac. 1053.

Service by plaintiff.— It is said that where the sheriff who serves the writ is himself plaintiff, the judgment in the suit so begun is a nullity. Knott *v.* Jarboe, 1 Metc. (Ky.) 504.

45. *California.*— People *v.* Mullan, 65 Cal. 396, 4 Pac. 348; Braly *v.* Seaman, 30 Cal. 610; People *v.* Huber, 20 Cal. 81.

Colorado.— Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438; Roberts *v.* Roberts, 3 Colo. App. 6, 31 Pac. 941.

Illinois.— Campbell *v.* McCahan, 41 Ill. 45; Chickering *v.* Failes, 26 Ill. 507.

Indiana.— Johnson *v.* Patterson, 12 Ind. 471.

Iowa.— Fanning *v.* Kraptfl, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293; Hodson *v.* Tibbetts, 16 Iowa 97; Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117; Hodges *v.* Brett, 4 Greene 345; Pinkney *v.* Pinkney, 4 Greene 324.

Kansas.— Williams *v.* Moorehead, 33 Kan. 609, 7 Pac. 226; Entrekin *v.* Chambers, 11 Kan. 368.

Maryland.— White *v.* McClellan, 62 Md. 347.

Michigan.— Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520; Hebel *v.* Amazon Ins. Co., 33 Mich. 400.

Minnesota.— Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4.

Missouri.— Chamberlain *v.* Blodgett, 96 Mo. 482, 10 S. W. 44; Pomeroy *v.* Betts, 31 Mo. 419; Hirsh *v.* Weisberger, 44 Mo. App. 506.

Tennessee.— Byram *v.* McDowell, 15 Lea 581.

Texas.— Edrington *v.* Allsbrooks, 21 Tex. 186; Leavitt *v.* Brazelton, 28 Tex. Civ. App. 3, 66 S. W. 465.

United States.— Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116; Boswell *v.* Otis, 9 How. 336, 13 L. ed. 164; Meyer *v.* Kuhn, 65 Fed. 705, 13 C. C. A. 298; Detroit *v.* Detroit City R. Co., 54 Fed. 1.

See, generally, Process.

46. Wilmington *v.* Kearns, 1 Houst. (Del.) 362; January *v.* Henry, 3 T. B. Mon. (Ky.) 8; Hibbard *v.* Pettibone, 8 Wis. 270. *Compare* Hudson *v.* Messick, 1 Houst. (Del.) 275; Lawrence *v.* Howell, 52 Iowa 62, 2 N. W. 617.

47. Divilbiss *v.* Whitmire, 20 Ill. 425; Feurt *v.* Caster, 174 Mo. 289, 73 S. W. 576; Roberts *v.* Stockslager, 4 Tex. 307.

48. Halstead *v.* Mustion, 166 Mo. 488, 66 S. W. 258; Texas F. Ins. Co. *v.* Berry, (Tex. Civ. App. 1902) 67 S. W. 790.

49. Beckett *v.* Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399; Humphries *v.* Bartee, 10 Sm. & M. (Miss.) 282; Dunlap *v.* Southerlin, 63 Tex. 38.

Joint defendants.— Where original process issues against two, which is served on one only, and plaintiff declares against him only, although an appearance is entered as to both, a judgment given against both will be reversed, and rendered against that defendant only who was declared against. Lucy *v.* Beck, 5 Port. (Ala.) 166.

50. McLeod *v.* Graham, 132 N. C. 473, 43 S. E. 935; McLean *v.* Breece, 113 N. C. 390, 18 S. E. 694; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106; Peoples *v.* Norwood, 94 N. C. 167; Leach *v.* Western North Carolina R. Co., 65 N. C. 486. And see Mengis *v.* Fifth Ave. R. Co., 81 Hun (N. Y.) 480, 30 N. Y. Suppl. 999.

51. *Iowa.*— Sturman *v.* Sturman, 118 Iowa 620, 92 N. W. 886.

2. DEFECTS IN PLEADINGS. Where plaintiff's declaration or complaint is defective in substance, to the extent of failing to make out a cause of action, it cannot support a judgment in his favor, but such judgment will be erroneous and reversible.[52]

3. SEVERAL COUNTS. Although one or more of the counts in a declaration may be defective or insufficient, yet if it contains a good count it will support a general verdict for plaintiff, and a judgment entered thereon will not be reversible.[53]

Louisiana.— Brannsdorff *v.* Fay, 18 La. Ann. 187.

Mississippi.— Porterfield *v.* Butler, 47 Miss. 165, 12 Am. Rep. 329; Armstrong *v.* Barton, 42 Miss. 506; Steele *v.* Palmer, 41 Miss. 88.

Tennessee.— Trabue *v.* Higden, 4 Coldw. 620; Doyle *v.* Smith, 1 Coldw. 15; Hopson *v.* Fountain, 4 Humphr. 243.

Virginia.— Johnson *v.* Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

West Virginia.— Baltimore, etc., R. Co. *v.* Faulkner, 4 W. Va. 180.

Wisconsin.— Du Bay *v.* Uline, 6 Wis. 588.

See 30 Cent. Dig. tit. "Judgment," § 34.

Pleadings lost.— It appeared that, subsequent to trial and while the case was under advisement by the court, all the pleadings were lost. It was held, on objection by defendant, that judgment could not be entered without substituted copies. Grimison *v.* Russell, 11 Nebr. 469, 9 N. W. 647.

Evidence to support.— A judgment or decree based upon incompetent evidence is never for that reason alone void. Mann *v.* Martin, 14 Bush (Ky.) 763.

52. *Connecticut.*— Camp *v.* Scott, 47 Conn. 366.

Georgia.— Where the parties are not set out with sufficient certainty to ascertain who are defendants to the suit, no valid judgment can be rendered against any one. Varnell *v.* Speer, 55 Ga. 132. But *compare* Manry *v.* Shepperd, 57 Ga. 68.

Indiana.— McCormick *v.* Webster, 89 Ind. 105; Friddle *v.* Crane, 68 Ind. 583.

Iowa.— A mistake in the name of plaintiff, as stated in the petition, does not vitiate the judgment, where the name appears correctly in the process in the case and in the judgment. Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573.

Kentucky.— Paul *v.* Smith, 82 Ky. 451. A petition which contains no prayer for relief is insufficient to confer jurisdiction on the court to render any judgment in favor of plaintiff. Bowman *v.* Ray, 80 S. W. 516, 25 Ky. L. Rep. 2131.

Minnesota.— Knudson *v.* Curley, 30 Minn. 433, 15 N. W. 873. But the failure of the complaint to state facts constituting a cause of action does not render the judgment absolutely void or a mere nullity; it will be valid unless reversed or set aside in some appropriate proceeding for that purpose. Kubesh *v.* Hanson, 93 Minn. 259, 101 N. W. 73.

Missouri.— Walker *v.* Deaver, 79 Mo. 664.

Nebraska.— A demurrable petition may confer jurisdiction, and a decree, valid unless appealed from, may sometimes be rendered upon it. Selby *v.* Pneppka, (1905) 102 N. W. 263.

Pennsylvania.— Sullivan County *v.* Middendorf, 7 Pa. Super. Ct. 71; Susquehanna F. Ins. Co. *v.* Leih, 8 Del. Co. 103.

Wisconsin.— Harris *v.* Harris, 10 Wis. 467.

United States.— U. S. *v.* Arredondo, 6 Pet. 691, 8 L. ed. 547.

See 30 Cent. Dig. tit. "Judgment," § 36.

Wrong form of action.— The fact that defendant at the trial makes no objection to the form of action, as, that one joint action is improperly brought instead of two several suits, cannot enable the court to enter a judgment which the law does not warrant. Ellison *v.* New Bedford Five Cents Sav. Bank, 130 Mass. 48; Leonard *v.* Robbins, 13 Allen (Mass.) 217.

Showing jurisdiction.— When an action is brought in any court of inferior and limited jurisdiction, the declaration must expressly aver that the cause of action arose within the jurisdiction of the court; failing this, the judgment is erroneous. Wooster *v.* Parsons, Kirby (Conn.) 27.

But a judgment is not void or erroneous because the name of plaintiff's attorney attached to the complaint is printed, instead of being written. Hancock *v.* Bowman, 49 Cal. 413.

53. *California.*— If any material issue is raised by the pleadings, a verdict in favor of a party supports a judgment in his favor. Orton *v.* Brown, 117 Cal. 501, 49 Pac. 583.

Florida.— Gregory *v.* McNealy, 12 Fla. 578.

Illinois.— District No. 2 Drainage Com'rs *v.* Union Dist. No. 3 Drainage Com'rs. 113 Ill. App. 114 [*affirmed* in 211 Ill. 328, 71 N. E. 1007]; Minkhart *v.* Hankler, 19 Ill. 47.

Maryland.— Gordon *v.* Downey, 1 Gill 41.

Massachusetts.— Worster *v.* Canal Bridge, 16 Pick. 541.

New Hampshire.— Rochester *v.* Roberts, 29 N. H. 360.

Pennsylvania.— McCredy *v.* James, 6 Whart. 547. *Compare* Coleman *v.* Grubb, 23 Pa. St. 393.

West Virginia.— Stolle *v.* Ætna F. & M. Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593.

See 30 Cent. Dig. tit. "Judgment," § 37.

Contra.— Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112. And see Gage *v.* Allen, 84 Wis. 323, 54 N. W. 627, holding that a judgment which is based on only one of two issues raised by the pleadings, and which leaves the other undisposed of, is erroneous. And if there is no count in the declaration on the cause of action shown by the evidence, there

G. Effect of Invalidity — 1. IN GENERAL. A judgment which is void, as distinguished from one which is merely voidable, or liable to be vacated or set aside, for irregularity or other cause, or reversed for error, is a mere nullity. It is not binding on any one; it raises no lien or estoppel; it does not impair or affect the rights of any one,[54] unless by the agreement of the parties concerned;[55] it confers no rights upon the party in whose favor it is given, and affords no protection to persons acting under it;[56] it does not even operate as a discontinuance of the action.[57] Such a judgment may be vacated or set aside, even on motion of the party in whose favor it is given, if it is not such a judgment as he sought;[58] but it is not necessary to take any steps to vacate or avoid it until an effort is made to enforce it.[59] Finally a void judgment is open to collateral impeachment, and may be declared a nullity in any court where it is material to the interests of the parties to consider it.[60]

2. PARTIAL INVALIDITY. It has been said that a judgment must be either valid or void as a whole,[61] and if it is a nullity as to some of the parties affected, it cannot be held good as to any others.[62] But this principle is not universally admitted,[63] and, as to jurisdiction of the subject-matter, it seems that, although the judgment may go beyond the issues and grant relief not asked for, or not

can be no recovery. Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366.

54. Ludwig *v.* Murphy, 143 Cal. 473, 77 Pac. 150; Hart *v.* Manson, 119 Ga. 865, 47 S. E. 345; Horton *v.* Cutler, 28 La. Ann. 331; Gottlieb *v.* Middleberg, 23 Pa. Super. Ct. 525.

Judgments may be void, irregular, or erroneous.— Carter *v.* Rountree, 109 N. C. 29, 32, 13 S. E. 716.

An irregular judgment is one entered contrary to the course of the court — contrary to the method of procedure and practice under it allowed by law in some material respect; as if the court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury trial and did not waive his right to the same (Carter *v.* Rountree, 109 N. C. 29, 32, 13 S. E. 716), or as a judgment without service of process (Koonce *v.* Butler, 84 N. C. 221, 223 [*citing* Wolfe *v.* Davis, 74 N. C. 597]).

An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law. Carter *v.* Rountree, 109 N. C. 29, 32, 13 S. E. 716; Koonce *v.* Butler, 84 N. C. 221, 223.

A void judgment is one that has merely semblance, without some essential element or elements, as where the court purporting to render it has not jurisdiction. Carter *v.* Rountree, 109 N. C. 29, 32, 13 S. E. 716.

Evidence of invalidity.— A judgment will not be held void on its face unless the record thereof affirmatively shows that the court was without jurisdiction to render it. People *v.* Davis, 143 Cal. 673, 77 Pac. 651; Canadian, etc., Mortg., etc., Co. *v.* Clarita Land, etc., Co., 140 Cal. 672, 74 Pac. 301.

55. A decree rendered in accordance with a consent verdict, although it may not be valid as a judgment of the court, will, in the absence of fraud, accident, or mistake, be operative as an agreement binding on all the parties thereto. Driver *v.* Wood, 114 Ga. 296, 40 S. E. 257 [*citing* Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430].

56. Andrus *v.* Blazzard, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354.

Erroneous judgments distinguished.— While, as stated in the text, a void judgment will not protect a person acting under it, and while it is also held that a judgment which is voidable for irregularity will not, after being set aside, justify the acts of a party done under it before it was vacated, yet this principle is not applied to a judgment which is merely erroneous and which is reversed for error by a court of review. Simpson *v.* Hornbeck, 3 Lans. (N. Y.) 53. And see Wolfe *v.* Davis, 74 N. C. 599; Boggess *v.* Howard, 40 Tex. 153; Gray *v.* Stuart, 33 Gratt. (Va.) 351; *Ex p.* Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872.

57. Moore *v.* Hoskins, 66 Miss. 496, 6 So. 500.

58. May *v.* Ball, 12 La. Ann. 416.

Vacating and setting aside see *infra*, IX, B, 2.

59. Rice *v.* Allen, (Nebr. 1903) 95 N. W. 704.

The court may subsequently enter a valid judgment, although the void judgment remains unchallenged. Morrison *v.* Berlin, 37 Wash. 600, 79 Pac. 1114.

60. Hart *v.* Manson, 119 Ga. 865, 47 S. E. 345; Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

61. Hutchins *v.* Lockett, 39 Tex. 165.

62. Jackson *v.* Hulse, 6 Mackey (D. C.) 548; West Chicago St. R. Co. *v.* Annis, 62 Ill. App. 180; Grace *v.* Casey-Grimshaw Marble Co., 62 Ill. App. 149; Comenitz *v.* Bank of Commerce, 85 Miss. 662, 38 So. 35; Blanchard *v.* Gregory, 14 Ohio 413; Meyer *v.* Kuhn, 65 Fed. 705, 13 C. C. A. 298.

63. Pardon *v.* Dwire, 23 Ill. 572; Joyes *v.* Hamilton, 10 Bush (Ky.) 544; Hollis *v.* Dashiell, 52 Tex. 187; Butler *v.* Holmes, 29 Tex. Civ. App. 48, 68 S. W. 52; Keith *v.*

within the competence of the court, yet it may be good for so much as the court had power and authority to include in it.[64]

3. VALIDATING VOID JUDGMENT. A void judgment cannot be made valid and operative by its subsequent approval by the judge,[65] by his approval of a sale on execution held under it,[66] by afterward supplying the elements which were lacking to its validity,[67] by a subsequent proceeding instituted for that purpose in a court of equity,[68] by citing the party against whom it was entered to show cause why it should not be declared valid,[69] by a revival of the judgment,[70] or by the taking of an appeal from it, or even by an affirmance on appeal, if the affirmance is on grounds not affecting the question of validity.[71] But these principles do not apply to such errors as are cured by the statute of jeofails.[72] It should be added that it is not competent for the legislature to validate a judgment void for want of jurisdiction, and a statute purporting to have that effect would be unconstitutional.[73]

4. RATIFICATION AND ESTOPPEL. There are some cases holding that a void judgment cannot be made valid by ratification, waiver, or estoppel;[74] but the generally accepted doctrine is that the party who would have a right to avoid the judgment may give it validity by his acceptance and ratification of it, or be estopped by his conduct to impeach its validity.[75] And this he does by accepting or sharing in the fruits or benefits of the judgment,[76] by attempting to use the judgment as a bar or a defense to a subsequent action,[77] or by an unconditional offer of a certain sum in compromise and satisfaction of his liability under the judgment.[78] Also a party who successfully opposes an objection made by the adverse party that the court has no jurisdiction cannot question the jurisdiction after an adverse decision on appeal.[79] But mere acquiescence in a judgment does

Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

64. State *v.* Evans, 176 Mo. 310, 75 S. W. 914; Pacific Express Co. *v.* Emerson, 101 Mo. App. 62, 74 S. W. 132.

65. Townsley *v.* Morehead, 9 Iowa 565.

66. Willamette Real Estate Co. *v.* Hendrix, 28 Oreg. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

67. Hodson *v.* Tibbetts, 16 Iowa 97.

68. Ray *v.* Ray, 1 Ida. 566.

69. Jewett *v.* Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555.

70. *Ex p.* Pile, 9 Ark. 336; Evans *v.* Payne, 30 La. Ann. 498; Woods *v.* Bryan, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688.

71. Wilson *v.* Montgomery, 14 Sm. & M. (Miss.) 205; Jones *v.* Pharis, 59 Mo. App. 254; Chambers *v.* Hodges, 23 Tex. 104. But *compare* Ferguson *v.* Millender, 32 W. Va. 30, 9 S. E. 38.

72. See Churchill *v.* Rogers, Hard. (Ky.) 182; Ferton *v.* Feller, 33 Mich. 199; Gibson *v.* Governor, 11 Leigh (Va.) 600.

73. *California.*— Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656.

Colorado.— Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438.

Illinois.— McDaniel *v.* Correll, 19 Ill. 226, 68 Am. Dec. 587.

Indiana.— Wells County *v.* Fahlor, 132 Ind. 426, 31 N. E. 1112.

Massachusetts.— Denny *v.* Mattoon, 2 Allen 361, 79 Am. Dec. 784.

New Jersey.— State *v.* Union, 33 N. J. L. 350.

Pennsylvania.— Lane *v.* Nelson, 79 Pa. St. 407; Richards *v.* Rote, 68 Pa. St. 248.

Utah.— *In re* Christensen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504.

Virginia.— Griffin *v.* Cunningham, 20 Gratt. 31.

See 30 Cent. Dig. tit. "Judgment," § 40.

74. Camp *v.* Wood, 10 Watts (Pa.) 118; Laughton *v.* Nadeau, 75 Fed. 789.

75. *Illinois.*— Wood *v.* Rawlings, 76 Ill. 206.

Iowa.— Ryan *v.* Doyle, 31 Iowa 53.

Ohio.— Blanchard *v.* Gregory, 14 Ohio 413.

Pennsylvania.— Ramsey *v.* Linn, 2 Rawle 229.

Tennessee.— Haynes *v.* Powell, 1 Lea 347.

See 30 Cent. Dig. tit. "Judgment," § 41.

76. Boulder, etc., County Ditch Co. *v.* Lower Boulder Ditch Co., 22 Colo. 115, 43 Pac. 540; Arthur *v.* Israel, 15 Colo. 147, 25 Pac. 81, 22 Am. St. Rep. 381, 10 L. R. A. 693; Denver City Irr., etc., Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; Ashley *v.* Riser, 26 La. Ann. 711; Dreyer *v.* Bigney, 8 Ohio Dec. (Reprint) 562, 9 Cinc. L. Bul. 15; McDaniel *v.* Anderson, 19 S. C. 211.

77. Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Simpson *v.* Lewis, 19 La. Ann. 453; Kennedy *v.* Bamhrick, 20 Mo. App. 630.

78. Standifer *v.* McWhorter, 1 Stew. (Ala.) 532; Handley *v.* Jackson, 31 Oreg. 552, 50 Pac. 915, 65 Am. St. Rep. 839.

79. Griggs *v.* Brooks, 79 Hun (N. Y.) 394, 29 N. Y. Suppl. 794.

not necessarily constitute a ratification of it,[80] and still less can this result follow where the party affected moves to set it aside or for a new trial.[81]

II. JUDGMENTS BY CONFESSION.[82]

A. In General — 1. Nature and Requisites. A judgment may be rendered upon the confession of defendant, either in an action regularly commenced against him by the issuance and service of process, in which case the confession may be made by his attorney of record, or, without the institution of a suit, upon a confession by defendant in person or by his attorney in fact.[83] It implies something more than a mere admission of a debt to plaintiff; in addition, it is defendant's consent that a judgment shall be entered against him therefor.[84] But it may be made conditional, and in that case it can be enforced only upon compliance with the conditions or in accordance therewith.[85] A power of attorney to confess judgment may be incorporated in, or attached to, a promissory note, the condition being the non-payment of the note at maturity; the instrument being then commonly called a "judgment note."[86]

2. Statutory Provisions. Statutes regulating the confession of judgments without action, or otherwise than according to the course of the common law, are strictly construed, and a strict compliance with their provisions must be shown in order to sustain the validity of the judgment.[87] And this applies also to statutory restrictions upon the right to confess judgment,[88] as that authority to confess

80. Sneed *v.* Townsend, 2 Tex. Unrep. Cas. 350.

81. Roberts *v.* Chicago, etc., R. Co., 48 Minn. 521, 51 N. W. 478; Martin *v.* Cobb, 77 Tex. 544, 14 S. W. 162.

82. Definition see Confession of Judgment.

Res judicata see *infra*, XIII, C, 3; XIV, A, 4, b.

83. See Montgomery *v.* Murphy, 19 Md. 576, 81 Am. Dec. 652; Mikeska *v.* Blum, 63 Tex. 44; Thurston *v.* Hughes, 16 Quebec Super. Ct. 472.

No particular form is necessary to a confession of judgment; any admission of the claim that leaves no issue to be tried is a confession of judgment. Skinner *v.* Dameron, 5 Rob. (La.) 447.

Not an assignment.— A confession of judgment by a debtor to a trustee for his creditors is not an assignment so as to require recording. Guy *v.* McIlree, 26 Pa. St. 92.

84. Thus a garnishee's admission in answer to interrogatories that he holds property of the debtor is not a confession of judgment. Hanna *v.* His Creditors, 12 Mart. (La.) 32. And collusion between a mortgagor and mortgagee in a foreclosure suit, intended by them to be fictitious, does not have the effect of a confession of judgment. Connoly *v.* Cunningham, 2 Wash. Terr. 242, 5 Pac. 473.

85. Manadue *v.* Franklin, 1 Rob. (La.) 122; Wood *v.* Bagley, 34 N. C. 83; Triveley *v.* Krouse, 2 C. Pl. (Pa.) 254; Burns *v.* Beck, 1 Leg. Rec. (Pa.) 81. *Compare* State *v.* Judge Fourth Dist. Ct., McGloin (La.) 11.

86. Spruance *v.* Weldon, 5 Harr. (Del.) 175; Packer *v.* Roberts, 140 Ill. 9, 29 N. E. 668; Vietor *v.* Johnson, 148 Pa. St. 583, 24 Atl. 173; Burgunder *v.* Lederer, 12 Pa. Co. Ct. 222.

Disputing validity of note.— On a rule to show cause why judgment should not be entered on a note, if defendant testifies that the note is not genuine, and that he never executed or signed the same, the rule must be discharged, since such issues must be determined by a jury. Handrick *v.* Billings, 24 Pa. Co. Ct. 64.

87. *California.*— Chapin *v.* Thompson, 20 Cal. 681.

District of Columbia.— Harper *v.* Cunningham, 5 App. Cas. 203.

Illinois.— Desnoyers Shoe Co. *v.* Litchfield First Nat. Bank, 188 Ill. 312, 58 N. E. 994.

Indiana.— Maulsby *v.* Wolf, 14 Ind. 457.

Iowa.— Edgar *v.* Greer, 7 Iowa 136.

Kansas.— McCrairy *v.* Ware, 6 Kan. App. 155, 51 Pac. 293.

Missouri.— Burr *v.* Mathers, 51 Mo. App. 470.

New York.— Allen *v.* Smillie, 1 Abb. Pr. 354.

Utah.— Utah Nat. Bank *v.* Sears, 13 Utah 172, 44 Pac. 832.

See 30 Cent. Dig. tit. "Judgment," § 43.

Declaratory of common law.— Where the statute providing for judgments by confession is merely declaratory of the common law, only a substantial compliance therewith is required. Saunders *v.* Lipscomb, 90 Va. 647, 19 S. E. 450. And see Stewart *v.* Walters, 38 N. J. L. 274.

Signing confession.— A statutory provision that the confession of judgment must be signed by the party and by witnesses must be strictly followed. Beach *v.* Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 145.

Appearance in person.— A statutory requirement that the debtor shall appear in person and confess the judgment is imperative and cannot be evaded. Rosebrough *v.* Ansley, 35 Ohio St. 107. And see Reed *v.* Hamet, 4 Watts (Pa.) 441.

88. Goodwill *v.* Elkins, 51 La. Ann. 521,

judgment shall not be given in the same instrument which contains the promise or obligation to pay the debt,[89] or that such confession shall not be authorized by any instrument executed prior to suit brought.[90]

3. Confession Without Action. In the case of a judgment confessed without the bringing of an action, it is not necessary that a declaration or complaint should be filed, the statement required by the statute being a sufficient setting forth of plaintiff's claim.[91] Nor is it necessary that any process should be issued or served on defendant, or any appearance entered by or for him other than the appearance for the purpose of confessing the judgment.[92]

4. Debts For Which Judgment May Be Confessed — a. In General. The statutes generally allow the confession of judgment for any debt "justly due and owing" or "justly due or to become due." Such a judgment therefore cannot be sustained if the claim on which it was based was fictitious or fraudulent as to creditors,[93] if it was extorted by duress,[94] or founded upon an immoral or illegal consideration.[95] It is, however, no objection to a confessed judgment that the claim for which it is given would be barred by the statute of limitations[96] or by the debtor's discharge in bankruptcy,[97] that several different debts to the same creditor are included in the one judgment,[98] or that it is given to one person as trustee for

25 So. 317. And see Kiernan *v.* Jackson, 111 La. 645, 35 So. 798.

89. Trombly *v.* Parsons, 10 Mich. 272.

90. O'Neal *v.* Clymer, 21 Tex. Civ. App. 386, 52 S. W. 619.

91. *Alabama.*— Gayle *v.* Foster, Minor 125.

Arkansas.— Choat *v.* Bennett, 11 Ark. 313; Thompson *v.* Foster, 6 Ark. 208; Johnston *v.* Glasgow, 5 Ark. 311.

Indiana.— See Gambia *v.* Howe, 8 Blackf. 133, holding that in case of a judgment confessed by virtue of a warrant of attorney, the cause of action must be described either in a declaration or in the warrant of attorney.

Iowa.— Ober *v.* Shepherd, 1 Greene 430.

Ohio.— Matthews *v.* Thompson, 3 Ohio 272.

Pennsylvania.— Montelius *v.* Montelius, Brightly 79, 5 Pa. L. J. 88.

See 30 Cent. Dig. tit. "Judgment," § 90.

But see Wilhelm *v.* Locklar, 46 Fla. 575, 35 So. 6; People *v.* Whitehead, 90 Ill. App. 614; Stein *v.* Good, 16 Ill. App. 516 [*affirmed* in 115 Ill. 93, 3 N. E. 735]; Dorsey *v.* Stevenson, 4 Harr. & M. (Md.) 351; Bowie *v.* State, 3 Harr. & M. (Md.) 408; Hardy *v.* Moore, 3 Harr. & M. (Md.) 389.

92. *Illinois.*— Whitton *v.* Whitton, 64 Ill. App. 53.

Louisiana.— Stein *v.* Brunner, 42 La. Ann. 772, 7 So. 718; Marbury *v.* Pace, 29 La. Ann. 557.

New Jersey.—Elsasser *v.* Haines, 52 N. J. L. 10, 18 Atl. 1095. But *compare* Stretch *v.* Hancock, 2 N. J. L. 207; Wilkins *v.* Croft, 2 N. J. L. 91; Hinchman *v.* Glover, 2 N. J. L. 90.

Ohio.— Rosebrough *v.* Ansley, 35 Ohio St. 107; Sidney First Nat. Bank *v.* Reed, 31 Ohio St. 435; Douglass *v.* McCoy, 5 Ohio 522; Matthews *v.* Thompson, 3 Ohio 272.

Tennessee.— Roberts *v.* Rose, 2 Humphr. 145; Hays *v.* State Bank, Mart. & Y. 179.

Texas.— A judgment confessed without service of process is valid if the justness of the debt was sworn to by plaintiff, as required by the statute. Flanagan *v.* Bruner, 10 Tex. 257.

Virginia.— Saunders *v.* Lipscomb, 90 Va. 647, 19 S. E. 450.

See 30 Cent. Dig. tit. "Judgment," § 90.

But see Wilhelm *v.* Locklar, 46 Fla. 575, 35 So. 6.

93. Nusbaum *v.* Louchheim, 1 Pa. Cas. 106, 1 Atl. 391.

Confession of judgment for an excessive amount, or without proof of non-payment of the claim, as evidence of a fraudulent intent see Crofut *v.* Aldrich, 54 Ill. App. 541; Page *v.* Simpson, 188 Pa. St. 393, 41 Atl. 638.

Preëxisting debt.— A judgment note may be legally given as security for a preëxisting debt, and when so given it is not open to the objection of a want of consideration. Union Nat. Bank *v.* Lane, 177 Ill. 171, 52 N. E. 361, 69 Am. St. Rep. 216; Lane *v.* Union Nat. Bank, 75 Ill. App. 299.

Preferring creditors by confession of judgment see Assignments For Benefit of Creditors, 4 Cyc. 170.

94. See Richmond *v.* Roberts, 7 Johns. (N. Y.) 319.

95. Bredin's Appeal, 92 Pa. St. 241, 37 Am. Rep. 677. But see Shufelt *v.* Shufelt, 9 Paige (N. Y.) 137, 37 Am. Dec. 381.

96. Wassell *v.* Reardon, 11 Ark. 705, 44 Am. Dec. 245; Cross *v.* Moffat, 11 Colo. 210, 17 Pac. 771; Wright *v.* Wright, 103 Fed. 580. See, however, Matzenbaugh *v.* Doyle, 156 Ill. 331, 40 N. E. 935; Kahn *v.* Lesser, 97 Wis. 217, 72 N. W. 739.

In Pennsylvania the court may in its discretion open a judgment where it appears on the face of the obligation upon which judgment was entered that the statute of limitations had run against the debt at the time the judgment was entered. Bates *v.* Cullum, 163 Pa. St. 234, 29 Atl. 870; Ellinger's Appeal, 114 Pa. St. 505, 7 Atl. 180; Bennett *v.* Allen, 10 Pa. Co. Ct. 256; Sickler *v.* Sickler, 2 Pa. Co. Ct. 313. *Compare* Smith *v.* Nichols, 2 Pa. Co. Ct. 372; Spang *v.* Deibler, 2 Dauph. Co. Rep. (Pa.) 406.

97. Dewey *v.* Moyer, 72 N. Y. 70.

98. Fortune *v.* Bartolomei, 164 Ill. 51, 45

numerous small creditors, all the debts being justly due.[99] But the judgment must be for a certain and specific sum; it cannot be made to cover an indefinite amount or an unliquidated claim,[1] nor can a judgment be confessed for a claim arising out of a tort.[2] If the statute permits the confession of judgment for a debt "due or to become due," this may include a claim founded upon an obligation presently existing but not yet payable or not yet matured.[3] And under the same circumstances a judgment may be confessed to secure a liability which is at the time contingent or conditional, as on a contract of indemnity, indorsement, or suretyship.[4]

b. Future Advances. A judgment by confession may be taken to secure not only a present indebtedness but also future advances agreed to be made to the debtor.[5]

5. Who May Confess Judgment[6] — a. In General. As a general rule a confession of judgment can be made only by defendant himself, or by some person

N. E. 274; Genestelle *v.* Waugh, 11 Mo. 367. And see Odell *v.* Reynolds, 70 Fed. 656, 17 C. C. A. 317.

99. Breading *v.* Boggs, 20 Pa. St. 33.

1. Curtice *v.* Scovel, 1 Root (Conn.) 327; Little *v.* Dyer, 138 Ill. 272, 27 N. E. 905, 32 Am. St. Rep. 140; Nichols *v.* Hewit, 4 Johns. (N. Y.) 423. And see Patterson *v.* Indiana, 2 Greene (Iowa) 492. *Compare* Scott *v.* Mantonya, 164 Ill. 473, 45 N. E. 977; Fortune *v.* Bartolomei, 164 Ill. 51, 45 N. E. 274. But see Holden *v.* Bull, 1 Penr. & W. (Pa.) 460.

2. Boutel *v.* Owens, 2 Sandf. (N. Y.) 655; Burkham *v.* Van Saun, 14 Abb. Pr. N. S. (N. Y.) 163; Boutette *v.* Owen, 2 Code Rep. (N. Y.) 40.

3. *California.*— Pond *v.* Davenport, 45 Cal. 225.

Illinois.— Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265; Shepherd *v.* Wood, 73 Ill. App. 486; Blanck *v.* Medley, 63 Ill. App. 211; Farmers', etc., Bank *v.* Spear, 49 Ill. App. 509. *Compare* Baldwin *v.* Freydendall, 10 Ill. App. 106.

Indiana.— Calloway *v.* Byram, 95 Ind. 423.

Iowa.— McClish *v.* Manning, 3 Greene 223.

Louisiana.— Pickersgill *v.* Brown, 7 La. Ann. 297.

Mississippi.— Black *v.* Pattison, 61 Miss. 599.

Missouri.— Mechanics' Bank *v.* Mayer, 93 Mo. 417, 6 S. W. 237; Stern *v.* Mayer, 19 Mo. App. 511.

New Jersey.— Strong *v.* Gaskill, (1891) 59 Atl. 339. But see Sterling *v.* Flemming, (1890) 19 Atl. 182.

New York.— St. John Woodworking Co. *v.* Smith, 82 N. Y. App. Div. 348, 82 N. Y. Suppl. 1025 [*affirmed* in 178 N. Y. 629, 71 N. E. 1139]; Forrester *v.* Strauss, 21 N. Y. Civ. Proc. 166, 18 N. Y. Suppl. 41.

Pennsylvania.— German-American Title, etc., Co. *v.* Campbell, 184 Pa. St. 541, 39 Atl. 291.

Wisconsin.— Port Huron Engine, etc., Co. *v.* Clements, 113 Wis. 249, 89 N. W. 160.

Explicit authority required.— To sustain a confession of judgment for a debt not yet due, authority therefor must be given in the warrant of attorney in clear and precise terms. Farwell *v.* Huston, 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237; Blanck *v.* Medley, 63 Ill. App. 211; Cohen *v.* Burgess, 44 Ill. App. 206; German-American Title, etc., Co. *v.* Campbell, 184 Pa. St. 541, 39 Atl. 291; Title Ins., etc., Co. *v.* Rau, 153 Pa. St. 488, 26 Atl. 220; Smith *v.* Pringle, 100 Pa. St. 275; Reid *v.* Southworth, 71 Wis. 288, 36 N. W. 866.

Conditional authority.— Where a warrant of attorney confers authority, in a certain contingency, to confess judgment on a note before it is due, the record must show that the specified contingency had happened, otherwise the judgment is unwarranted. Roundy *v.* Hunt, 24 Ill. 598.

4. Allen *v.* Norton, 6 Oreg. 344; Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Ford *v.* Elkin, 2 Speers (S. C.) 146; Keep *v.* Leckie, 8 Rich (S. C.) 164. But see Sprague *v.* Noble, 3 Ill. App. 521; Marks *v.* Reynolds, 12 Abb. Pr. (N. Y.) 403 [*reversing* 20 How. Pr. 338].

In New Jersey a judgment can be confessed only for a debt actually existing as a present liability at the time of its entry, not including a contingent liability as indorser or surety. Hildreth *v.* Harwood, 24 N. J. L. 51; Sayre *v.* Hewes, 32 N. J. Eq. 652; Clapp *v.* Ely, 10 N. J. Eq. 178. *Compare* Ely *v.* Parkhurst, 25 N. J. L. 188.

5. Cook *v.* Whipple, 55 N. Y. 150, 14 Am. Rep. 202; Truscott *v.* King, 6 Barb. (N. Y.) 346; Averill *v.* Loucks, 6 Barb. (N. Y.) 19; Livingston *v.* McInlay, 16 Johns. (N. Y.) 165; Lansing *v.* Woodworth, 1 Sandf. Ch. (N. Y.) 43; Shenk's Appeal, 33 Pa. St. 371; Ter-Hoven *v.* Kerns, 2 Pa. St. 96.

Effect of subsequent judgment.— It seems that advances made or responsibilities incurred, after a subsequent judgment has intervened, will not be covered by the confessed judgment. Brinkerhoff *v.* Marvin, 5 Johns. Ch. (N. Y.) 320.

6. **Confession of judgment by:** Attorney see Attorney and Client. Corporations see Corporations. Executor see Executors. Guardian see Guardian and Ward. Infant see Infants. Lunatic or other persons *non compotes mentis* see Insane Persons. Married woman see Husband and Wife. Partner see Partnership.

duly authorized to act for him in that behalf.[7] The authority of an attorney at law appearing in open court will be presumed until the contrary is shown,[8] but this is not so in the case of an attorney in fact.[9] An agent acting within the scope of his authority and to the extent of it may confess judgment against his principal;[10] but an officer of a municipal corporation without special authority cannot confess judgment.[11] A trustee, although described as such, cannot confess an ordinary judgment so as to bind the trust estate.[12] It is immaterial to the validity of the judgment that defendant confessing it is an officer of the court in which it is entered; a judgment against himself may be confessed by the clerk,[13] or by the judge of the court.[14]

b. Joint Defendants. In a pending action against two or more defendants, one of them cannot confess judgment against them all, and a joint judgment rendered on the confession of one only will be set aside.[15] But it appears that one defendant may confess judgment to affect himself only, although it will remain interlocutory until the trial and determination of the issues as to the other defendant.[16] In the case of a confession without action, it is held that one joint debtor cannot bind the others by a confession of judgment; such a judgment will not be authorized unless all join in the confession or in executing the warrant of attorney.[17] And conversely, under a joint warrant of attorney authorizing the confession of a judgment for a joint debt, a judgment cannot be entered against one of the debtors alone.[18] Where a warrant of attorney or a statement of indebtedness is signed by only a part of defendants against whom it directs

7. Gasquet *v.* Johnston, 8 Mart. N. S. (La.) 544; Hoppock *v.* Cray, (N. J. Ch. 1891) 21 Atl. 624; Stediford *v.* Ferris, 4 N. J. L. 108; Payne *v.* Robinson, 11 Pa. Co. Ct. 544.

8. Harper *v.* Cunningham, 5 App. Cas. (D. C.) 203. But in vacation his authority to confess judgment must affirmatively appear and no presumption will be indulged in favor of it. Martin *v.* Judd, 60 Ill. 78. And see Jarrett *v.* Andrews, 19 Ind. 403.

Written authority.— In Pennsylvania the authority of an attorney to confess judgment need not be in writing. Flanigen *v.* Philadelphia, 51 Pa. St. 491. But in Texas the rule appears to be otherwise. See Gruhba *v.* Blum, 62 Tex. 426.

Liability of attorney for confessing without authority see ATTORNEY AND CLIENT, 4 Cyc. 968.

9. Virginia Valley Ins. Co. *v.* Barley, 16 Gratt. (Va.) 363.

10. *Georgia.*— Howell *v.* Gordon, 40 Ga. 202, holding that a judgment confessed by the agent of a non-resident, who has not been served with process within the state, is void for want of jurisdiction.

Illinois.— Chicago Tip, etc., Co. *v.* Chicago Nat. Bank, 74 Ill. App. 439.

Louisiana.— Conery *v.* Rotchford, 34 La. Ann. 520.

Pennsylvania.— Davenport *v.* Wright, 51 Pa. St. 292.

Texas.— Parker *v.* Poole, 12 Tex. 86.

Master of vessel.— A judgment against a steamboat, as a substantive party, and her owners, entered on confession of the master of the boat, is erroneous. Wassell *v.* English, 17 Ark. 480.

11. Custer County *v.* Chicago, etc., R. Co., 62 Nebr. 657, 87 N. W. 341; Moore *v.* Oklahoma County School Dist. No. 71, 11 Okla. 332, 66 Pac. 279. *Compare* Gere *v.* Cayuga County, 7 How. Pr. (N. Y.) 255; Maneval *v.* Jackson Tp., 9 Pa. Co. Ct. 28.

12. Mallory *v.* Clark, 20 How. Pr. (N. Y.) 418.

13. Smith *v.* Mayo, 83 Va. 910, 5 S. E. 276.

14. Thornton *v.* Lane, 11 Ga. 459.

15. *Alabama.*— Armstrong *v.* Holley, 29 Ala. 305.

California.— Chapin *v.* Thompson, 20 Cal. 681.

District of Columbia.— Hutchinson *v.* Brown, 19 D. C. 136.

Indiana.— Allen *v.* Chadsey, 1 Ind. 399.

New Jersey.— Bilderback *v.* Hinchman, 14 N. J. L. 570; Ballinger *v.* Sherron, 14 N. J. L. 144; Wiggins *v.* Klienhans, 9 N. J. L. 249.

New York.— Griswold *v.* Griswold, 14 How. Pr. 446; Stoutenburgh *v.* Vandenburgh, 7 How. Pr. 229.

Pennsylvania.— Calhoun *v.* Logan, 22 Pa. St. 46.

England.— Rees *v.* Richmond, 62 L. T. Rep. N. S. 427.

See 30 Cent. Dig. tit. "Judgment," § 51.

16. Strause *v.* Braunreuter, 21 Pa. Co. Ct. 228; Virginia, etc., Coal, etc., Co. *v.* Fields, 94 Va. 102, 26 S. E. 426; Taylor *v.* Beck, 3 Rand. (Va.) 316. And see Harbeck *v.* Pupin, 123 N. Y. 115, 25 N. E. 311.

17. Weintraute *v.* Solomon, 2 Marv. (Del.) 371, 43 Atl. 257; Davenport Mills Co. *v.* Chambers, 146 Ind. 156, 44 N. E. 1109; Tripp *v.* Saunders, 59 How. Pr. (N. Y.) 379; Lambert *v.* Converse, 22 How. Pr. (N. Y.) 265; Liberty Grotto No. 1, S. & D. of A. A. *v.* Meade, 11 Pa. Co. Ct. 340. *Compare* Miller *v.* Roval Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350.

18. Weintraute *v.* Solomon, 2 Marv. (Del.)

judgment to be entered, a judgment entered thereunder will bind those who subscribed the warrant or statement, although nugatory as to the others.[19]

6. To Whom Judgment May Be Confessed. A judgment may be confessed to any creditor being the legal owner of the debt in question,[20] or to an assignee or trustee for the benefit of various creditors.[21]

7. Consent or Ratification of Creditor. A judgment based upon a confession made without the request, knowledge, or consent of the creditor, and entered at the instance of the debtor alone, will have no validity unless the creditor ratifies or accepts it.[22] And the validity of the judgment dates only from such acceptance, and therefore it will not affect the priority of other creditors who came in between the entry of the judgment and its ratification.[23] The creditor's assent to or ratification of the judgment, if not express, may be implied from the circumstances of his dealing with it.[24]

B. Warrant or Power of Attorney[25] — 1. Validity and Necessity. A judgment by confession may be entered upon a written authority, called a warrant or letter of attorney, by which the debtor empowers an attorney to enter an appearance for him, waive process, and confess judgment against him for a designated sum,[26] except where this method of proceeding is prohibited by statute.[27] The warrant, as the basis of the judgment, is generally required to be placed on file in the clerk's office, and no judgment can be so entered until it is so filed.[28] And in

371, 43 Atl. 257; Mayer *v.* Pick. 192 Ill. 561, 61 N. E. 416, 85 Am. St. Rep. 352; Bernstein *v.* Curran, 99 Ill. App. 179; Frank *v.* Thomas, 35 Ill. App. 547; Hunt *v.* Chamberlin, 8 N. J. L. 336, 14 Am. Dec. 427; Croasdell *v.* Tallant, 83 Pa. St. 193; Kahn *v.* Lesser, 97 Wis. 217, 72 N. W. 739.

19. Knox *v.* Winstead Sav. Bank, 57 Ill. 330; North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441; Mercer *v.* James, 6 Nebr. 406; York Bank's Appeal, 36 Pa. St. 458. But see Chapin *v.* Thompson, 20 Cal. 681.

20. Shepherd *v.* Wood, 73 Ill. App. 486, legal holder of a note at time of entry.

Administrators.— A warrant of attorney in a note to confess judgment in favor of the payee is available to his administrator. Drake *v.* Simpson, 11 Ohio Dec. (Reprint) 854, 30 Cinc. L. Bul. 236. But see Finney *v.* Ferguson, 3 Watts & S. (Pa.) 413; Wentz *v.* Bealor, 14 Pa. Co. Ct. 337.

State as creditor.— A person may confess judgment for money due to the state as well as to an individual. State *v.* Love, 23 N. C. 264.

Confession of judgment to attorney by client see Attorney and Client, 4 Cyc. 961 note 84.

21. Breading *v.* Boggs, 20 Pa. St. 33. And see Paton *v.* Westervelt, 2 Duer (N. Y.) 362.

22. *California.*— Wilcoxson *v.* Burton, 27 Cal. 228, 87 Am. Dec. 66.

Indiana.— Chapin *v.* McLaren, 105 Ind. 563, 5 N. E. 688; Haggerty *v.* Juday, 58 Ind. 154.

Iowa.— Farmers', etc., Bank *v.* Mather, 30 Iowa 283.

New York.— Martin *v.* Freed, 21 N. Y. Suppl. 302.

Pennsylvania. — Ingersoll *v.* Dyott, 1 Miles 245.

23. Lowenstein *v.* Caruth, 59 Ark. 588, 28 S. W. 421; Wilcoxson *v.* Burton, 27 Cal. 228, 87 Am. Dec. 66; Buchanan *v.* Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899.

24. Barker *v.* Ayers, 5 Md. 202 (execution of a release of the judgment shows ratification); Flanagan *v.* Continental Ins. Co., 22 Nebr. 235, 34 N. W. 367.

Creditor's benefit.— In Pennsylvania it appears to be the doctrine that the creditor's acceptance of the judgment may be presumed from the mere fact that it operates to his benefit. Clawson *v.* Eichbaum, 2 Grant (Pa.) 130; McCalmont *v.* Peters, 13 Serg. & R. (Pa.) 196. But elsewhere it is said that his mere silence or failure to object upon being informed of the judgment does not amount to a ratification of it, although it is admissible as evidence tending to prove his acceptance. Haggerty *v.* Juday, 58 Ind. 154.

Enforcement of judgment.— Acceptance or ratification may also be inferred from the fact that the creditor attempts to enforce the judgment. Tootle *v.* Otis, 1 Nebr. (Unoff.) 360, 95 N. W. 681; Johnston *v.* McAusland, 9 Abb. Pr. (N. Y.) 214.

Knowledge and consent of creditor's attorney.— It is sufficient if the confession is made with the knowledge and consent of the creditor's attorney, in whose hands he has placed the matter. Chapin *v.* McLaren, 105 Ind. 563, 5 N. E. 688.

25. See, generally, Principal and Agent.

26. Bernstein *v.* Curran, 99 Ill. App. 179; Whitton *v.* Whitton, 64 Ill. App. 53; Toledano *v.* Relf, 7 La. Ann. 60. And see Strong *v.* Gaskill, (N. J. 1891) 59 Atl. 339.

27. Aultman, etc., Co. *v.* Mead, 109 Ky. 583, 60 S. W. 294, 22 Ky. L. Rep. 1189; Hudson *v.* McMahon, (Ky. 1899) 50 S. W. 259; Ball *v.* Poor, 4 Ky. L. Rep. 746.

28. Chambers *v.* Denie, 2 Pa. St. 421. But see Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Lost warrant.— A judgment may be en-

some states the law requires proof of the execution of the warrant before the entry of a judgment, although, if the confession is in open court, the evidence of execution need not be preserved in the record.[29]

2. REQUISITES AND SUFFICIENCY — a. In General. A warrant or power of attorney to confess judgment should be in writing[30] and should conform to the requirements of the statute in force at the time of its execution,[31] although in the absence of specific statutory directions it is sufficient, without much regard to its form, if it contains the essentials of a good power and clearly states its purpose.[32] It must be signed by the person against whom the judgment is to be entered,[33] and also sealed by him if the statute so directs,[34] and attested by witnesses if that is expressly required,[35] and, unless accompanied by a declaration or sworn statement, it should set forth or describe the cause of action or nature of the liability,[36] specifying the exact amount of the judgment to be entered.[37] The statutes sometimes provide that the warrant or power of attorney must be a "separate instrument" from that which evidences the debt;[38] but in the absence of such a restriction it may well be attached to, or incorporated in, the note, bond, or other obligation.[39]

b. Effect of Blanks. Unfilled blanks in a warrant or power of attorney do not destroy its validity if enough remains to make it effective as a power, and if they do not render the instrument so ambiguous that its meaning cannot be determined.[40]

tered on a note on a warrant of attorney duly executed but lost or stolen. Bauer *v.* Ribs, 4 Pa. Dist. 583.

29. Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514; Desnoyers Shoe Co. *v.* Litchfield First Nat. Bank, 89 Ill. App. 579 [*affirmed* in 188 Ill. 312, 58 N. E. 994]; Anderson *v.* Field, 6 Ill. App. 307; Gambia *v.* Howe, 8 Blackf. (Ind.) 133.

30. An oral statement by defendant in a suit that plaintiff need not serve any papers, as he can take judgment at any time, does not constitute a power of attorney to confess judgment. Siskiyou County Bank *v.* Hoyt, 132 Cal. 81, 64 Pac. 118.

31. McPheeters *v.* Campbell, 5 Ind. 107; Edgar *v.* Greer, 10 Iowa 279; Bonnell *v.* Weaver, 3 Fed. Cas. No. 1,630, 5 Biss. 22.

Execution in presence of attorney for debtor see Westfall *v.* Donoven, 2 N. J. L. 68; Manhattan Co. *v.* Brower, 1 Cai. (N. Y.) 511.

32. Mason *v.* Smith, 8 Ind. 73.

Writings held insufficient see Giddens *v.* Crenshaw, 74 Ala. 471; Rabe *v.* Heslip, 4 Pa. St. 139.

Effect of erasures see Scudder *v.* Scudder, 10 N. J. L. 340.

Defects in warrant do not necessarily avoid a judgment confessed under it, especially after revival of the judgment without objection taken on account of the invalidity of the warrant. Wood *v.* Ellis, 10 Mo. 382.

33. Consolidated Ice Mfg. Co. *v.* Blomer, 18 Pa. Super. Ct. 451. And see Beach *v.* Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 145.

Affidavit to genuineness of signature see Blake *v.* State Bank, 178 Ill. 182, 52 N. E. 957; Gardner *v.* Bunn, (Ill. 1888) 21 N. E. 614.

34. See the statutes of the different states.

In Pennsylvania a warrant of attorney to confess judgment need not be under seal Kneedler's Appeal, 92 Pa. St. 428; Hazelton Nat. Bank *v.* Kintz, 24 Pa. Super. Ct. 456.

Corporate seal see Chicago Tip, etc., Co. *v.* Chicago Nat. Bank, 74 Ill. App. 439; St. Bartholomew's Church *v.* Wood, 61 Pa. St. 96.

35. McCalmont *v.* Peters, 13 Serg. & R. (Pa.) 196. And see Beach *v.* Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 145.

36. Veach *v.* Pierce, 6 Ind. 48; Gambia *v.* Howe, 8 Blackf. (Ind.) 133; Eldridge *v.* Folwell, 3 Blackf. (Ind.) 207.

37. Connay *v.* Halstead, 73 Pa. St. 354.

38. See the statutes of the different states. And see Trombly *v.* Parsons, 10 Mich. 272; Shelmerdine *v.* Lippincott, 69 N. J. L. 82, 54 Atl. 237; Hendrickson *v.* Fries, 45 N. J. L. 555; Scudder *v.* Scudder, 10 N. J. L. 340.

39. Scott *v.* Mantonya, 164 Ill. 473, 45 N. E. 977; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

40. Packer *v.* Roberts, 140 Ill. 9, 29 N. E. 668; Browne *v.* Cassem, 74 Ill. App. 305; Links *v.* Mayer, 22 Ill. App. 489; Findlay First Nat. Bank *v.* Trout, 58 Ohio St. 347, 51 N. E. 27; Leish *v.* Cromwell, 4 Ohio Dec. (Reprint) 32, Clev. L. Rec. 38; Sweesey *v.* Kitchen, 80 Pa. St. 160; Richards *v.* Globe Bank, 12 Wis. 692.

Designation of parties.— Where a note and power of attorney are included in the same instrument, the power will not be invalidated by the fact that the blank space in which the person giving the power should be named is left unfilled, as it will be presumed that the power was given by the maker of the note. Packer *v.* Roberts, 140 Ill. 9, 29 N. E. 668. But where the note is signed by several persons, and the power of attorney does not designate the person or persons against whom the judgment is to be entered, it has been

3. Construction and Operation. The authority given by a warrant of attorney must be strictly pursued,[41] and the warrant, in respect to its operation and effect, is to be construed strictly against the party in whose favor it is given.[42] Generally by its own terms it includes, or operates as, a waiver of process,[43] and release of errors,[44] and dispenses with proof of plaintiff's cause of action; but there are cases in which the creditor must prove some essential element of his right to recover, before he is entitled to use a power of attorney.[45]

4. Time of Execution. It is not necessary that the warrant of attorney should be given at the same time with the note, bond, or other evidence of debt,[46] or that an action for the recovery of the debt should have been begun before the confession of judgment,[47] unless this is expressly required by statute.[48]

5. For and Against Whom Judgment May Be Entered. The warrant should name or describe with reasonable certainty the person in whose favor the judgment is to be entered.[49] But he may be designated as the "holder" of the note secured, in which case judgment may be entered in favor of the person who at the time is the legal holder of the security.[50] And if the creditor is named, it seems that the power of attorney will be available to one to whom he has assigned the debt,[51] or to his executor or administrator.[52] In case of joint debtors, who jointly execute the power of attorney, a judgment may be confessed thereon against both or all.[53] But the power of attorney is not available against one

held that the power is so incomplete that no judgment can be rendered upon it. Morris *v.* Bank of Commerce, 67 Tex. 602, 4 S. W. 246.

41. Weber *v.* Powers, 213 Ill. 370, 72 N. E. 1070, 68 L. R. A. 610; Baldwin *v.* Freydendall, 10 Ill. App. 106; Eddy *v.* Smiley, 26 Pa. Super. Ct. 318.

Where a warrant of attorney has special conditions attached to it, as that execution shall be levied only on certain premises, it is not competent for the creditor to make use of the warrant while repudiating the conditions. Sneveley *v.* Tarr, 1 Phila. (Pa.) 220.

42. Fitzgerald *v.* Wiggins, 6 Ohio Dec. (Reprint) 1201, 12 Am. L. Rec. 476, 11 Cinc. L. Bul. 51.

43. Varnum *v.* Runion, 28 Fed. Cas. No. 16,892, 1 McLean 413.

44. Boyles *v.* Chytraus, 175 Ill. 370, 51 N. E. 563; Lyons *v.* Kelly, 40 La. Ann. 498, 4 So. 480; Sidney First Nat. Bank *v.* Reed, 31 Ohio St. 435.

45. See Fitzgerald *v.* Wiggins, 6 Ohio Dec. (Reprint) 1201, 12 Am. L. Rec. 476; Strasburger *v.* Heidenheimer, 63 Tex. 5.

46. Burroughs *v.* Condit, 6 N. J. L. 300. And see Trombly *v.* Parsons, 10 Mich. 272.

47. Hodges *v.* Ashurst, 2 Ala. 301; Keep *v.* Leckie, 8 Rich. (S. C.) 164; Brockenbrough *v.* Brockenbrough, 31 Gratt. (Va.) 580; Virginia Ins. Co. *v.* Barley, 16 Gratt. (Va.) 363. *Compare* Rankin *v.* Lawrence, 4 Rich. (S. C.) 267.

48. O'Hara *v.* Lannier, 1 B. Mon. (Ky.) 100. And see O'Neal *v.* Clymer, 21 Tex. Civ. App. 386, 52 S. W. 619.

49. Packer *v.* Roberts, 140 Ill. 9, 29 N. E. 668; Holmes *v.* Parker, 125 Ill. 478, 17 N. E. 759 [*affirming* 25 Ill. App. 232]; Holmes *v.* Bemis, 124 Ill. 453, 17 N. E. 42; Mahaffey *v.* Rogers, 10 Ohio Cir. Ct. 24, 6 Ohio Cir. Dec. 88; McClure *v.* Bowles, 5 Ohio S. & C. Pl. Dec. 288, 5 Ohio N. P. 327. And see Eddy *v.* Smiley, 26 Pa. Super. Ct. 318.

Uncertainty as to creditor.— Where a note and warrant of attorney are written together over one signature, the warrant, although it does not state in whose favor judgment may be confessed, is not void for uncertainty, but the instrument as a whole will be construed to authorize confession of judgment in favor of the payee of the note. Drake *v.* Simpson, 11 Ohio Dec. (Reprint) 854, 30 Cinc. L. Bul. 236.

50. Shepherd *v.* Wood, 73 Ill. App. 486; Richards *v.* Barlow, 140 Mass. 218, 6 N. E. 68; National Exch. Bank *v.* Wiley, 3 Nebr. (Unoff.) 716, 92 N. W. 582; Marsden *v.* Soper, 11 Ohio St. 503.

Holder of note indorsed in blank.— A power in a note to confess judgment in favor of "the payee above named or assigns" gives no power to confess judgment in favor of a holder of the note indorsed in blank, whose name nowhere appears thereon, either as indorser or otherwise. McClure *v.* Bowles, 5 Ohio S. & C. Pl. Dec. 288, 5 Ohio N. P. 327.

51. Reed *v.* Bainbridge, 4 N. J. L. 351. But *compare* Spence *v.* Emerine, 46 Ohio St. 433, 21 N. E. 866, 15 Am. St. Rep. 634; Jenks *v.* Hendley, 6 Phila. (Pa.) 518.

52. Drake *v.* Simpson, 11 Ohio Dec. (Reprint) 854, 30 Cinc. L. Bul. 236. And see Martin *v.* Belmont Bank, 13 Ohio 250. But *compare* Paterson *v.* Pyle, (Pa. 1889) 17 Atl. 6. And see *supra*, II, A, 6.

53. Frank *v.* Thomas, 35 Ill. App. 547. And see *supra*, II, A, 5, b.

Death of one debtor.— Under a joint warrant of attorney, a judgment can only be confessed against all of the makers; and in case of the death of one of them no judgment can be confessed against the survivors. Kloeckner *v.* Schafer, 110 Ill. App. 391.

who signs it, or the obligation secured, only in the character of a surety,[54] nor against the heirs or personal representatives of the deceased obligor.[55]

6. Time of Entering Judgment. The warrant of attorney should state the time when the judgment is to be entered, although this may be done by authorizing a confession "at any term" of court or "at any time hereafter," or upon the happening of a future event, uncertain as to time.[56] And where the warrant authorizes confession of judgment upon a note "at any time," the judgment may be entered up at any time after the delivery of the note, even before its maturity.[57] If the warrant is for the confession of judgment "as of any term," it does not authorize judgment to be entered up in vacation.[58] But if it is indefinite as to the time, or does not refer to the terms of the court, the judgment may be confessed in vacation as well as in term-time.[59] It was the settled practice under the common law, still operative in this country except where changed by statute or a rule of court, that a judgment could not be confessed on a warrant of attorney executed more than a year and a day before, unless an affidavit was filed showing that the maker was alive and that some portion of the debt was still due, and a rule of court, or order of a judge in vacation, must be obtained granting leave to enter judgment.[60]

7. Who May Execute Power. A warrant of this kind should regularly designate the person who is authorized to enter the confession of judgment, either by

54. Jarosh *v.* Easton, 57 Iowa 569, 10 N. W. 893.

55. See *In re* Claghorn, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. Rep. 680.

56. See Gorman *v.* Richardson, 6 Serg. & R. (Pa.) 163; Montelius *v.* Montelius, Brightly (Pa.) 79.

In Pennsylvania judgment on a warrant of attorney cannot be entered before the warrant is actually filed in the prothonotary's office. Chambers *v.* Denie, 2 Pa. St. 421. But a judgment on a warrant of attorney received by the prothonotary at his residence, after office hours, may be docketed the next day as of the day when received. Polhemus' Appeal, 32 Pa. St. 328.

"Any time hereafter."—Under a power of attorney to confess judgment "at any time hereafter," judgment may be entered on the same day that the power is given. Thomas *v.* Mueller, 106 Ill. 36; Cummins *v.* Holmes, 11 Ill. App. 158. *Compare* Waterman *v.* Jones, 28 Ill. 54.

57. Farwell *v.* Huston, 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237; McDonald *v.* Chisholm, 131 Ill. 273, 23 N. E. 596; Sherman *v.* Baddely, 11 Ill. 622; Elkins *v.* Wolfe, 44 Ill. App. 376; Cohen *v.* Burgess, 44 Ill. App. 206; Alldritt *v.* Morrison First Nat. Bank, 22 Ill. App. 192; Integrity Title Ins., etc., Co. *v.* Rau, 153 Pa. St. 488, 26 Atl. 220; Volkenand *v.* Drum, 143 Pa. St. 525, 22 Atl. 881, even where the note is post-dated. *Contra*, see Reid *v.* Southworth, 71 Wis. 288, 36 N. W. 866; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

"On default of payment."—Judgment cannot be so entered if the power authorizes it only "on default of payment" of the note, or otherwise expresses the intention that it shall not be exercised until after such default. Bannon *v.* People, 1 Ill. App. 496; Spier *v.* Corll, 33 Ohio St. 236; Lewis *v.* Moon, 1 Ohio Cir. Ct. 211, 1 Ohio Cir. Dec. 116.

58. Whitney *v.* Bohlen, 157 Ill. 571, 42 N. E. 162; Graves *v.* Whitney, 49 Ill. App. 435.

A warrant to enter judgment as of the last, next, or any subsequent term authorizes the entry of a judgment in the present term. Montelius *v.* Montelius, Brightly (Pa.) 79.

Confession on first day of term before court opens.—A judgment confessed in the clerk's office on the morning of the first day of the term of court, before the court was opened, is a valid judgment. Brown *v.* Hume, 16 Gratt. (Va.) 456.

59. Pickett *v.* Thruston, 7 Ark. 397; Keith *v.* Kellogg, 97 Ill. 147; Browne *v.* Cassem, 74 Ill. App. 305; Baldwin *v.* Freydendall, 10 Ill. App. 106; Towle *v.* Gonter, 5 Ill. App. 409; Kellogg *v.* Keith, 4 Ill. App. 386. *Compare* Pond *v.* Simons, 17 Ind. App. 84, 45 N. E. 48, 46 N. E. 153. And see *infra*, II, E, 5, d, (II).

60. Hinds *v.* Hopkins, 28 Ill. 344; Alldritt *v.* Morrison First Nat. Bank, 22 Ill. App. 24; Stein *v.* Good, 16 Ill. App. 516; Wight *v.* Alden, 3 How. Pr. (N. Y.) 213; Manufacturers', etc., Bank *v.* St. John, 5 Hill (N. Y.) 497. And see Clark *v.* Hopkins, 7 Johns. (N. Y.) 556.

In Pennsylvania a rule of court provides that "if a warrant of attorney to enter judgment be above ten years and under twenty, the court, or a judge thereof in vacation, must be moved for leave to enter judgment, which motion must be grounded on an affidavit that the warrant was duly executed, and that the money is unpaid and the party living. When the warrant is above twenty years old, there must be a rule to show cause served on defendant, if he can be found within the county." But the court may in a proper case after the entry of judgment

name or description,[61] although the courts recognize the validity of a warrant running to "any attorney" of a particular court or to "any attorney of any court of record."[62] Where the power is thus expressed, it may be executed by two persons, acting jointly or as partners, both being attorneys of the court,[63] or by the payee of the note, being an attorney, in favor of the holder to whom he has transferred it.[64]

8. NATURE AND AMOUNT OF JUDGMENT — a. In General. A warrant of attorney to confess judgment will not authorize the entry of a judgment for any greater amount than that specified in the warrant or in the note or other obligation which it secures, whatever may be the state of accounts between the parties,[65] or for any other debt, liability, or claim than the one specifically set forth or described in the papers,[66] although when the obligation secured is a bond, it seems that judgment may be confessed for the full amount of the penalty.[67] Where the warrant authorizes the confession of judgment for "such amount as may be found due" on the obligation secured, it is sufficient, and judgment may be entered for the amount actually due.[68] And the judgment may include interest if the warrant authorizes it.[69]

b. Second Judgment. A power of attorney to confess judgment is exhausted by one such confession, and no second judgment can be entered by virtue of the power,[70] except where the first judgment has been vacated or reversed before the entry of the second.[71]

9. REVOCATION AND DEFEASANCE. A warrant of attorney to confess judgment is not revocable at the will of the grantor;[72] but it is revoked or defeated by the death of the grantor before entry of judgment,[73] or by payment of the debt

grant leave to file the required affidavit *nunc pro tunc*. Woods *v.* Woods, 126 Pa. St. 396, 17 Atl. 662.

61. Rabe *v.* Heslip, 4 Pa. St. 139. See Grubbs *v.* Blum, 62 Tex. 426.

62. Burroughs *v.* Condit, 6 N. J. L. 300; McClure *v.* Bowles, 5 Ohio S. & C. Pl. Dec. 288, 5 Ohio N. P. 327. But see Carlin *v.* Taylor, 7 Lea (Tenn.) 666.

63. Kuehne *v.* Goit, 54 Ill. App. 596; Patton *v.* Stewart, 19 Ind. 233. And see Hall *v.* Jones, 32 Ill. 38; Blanck *v.* Medley, 63 Ill. App. 211.

64. Parker *v.* Poole, 12 Tex. 86.

65. Tucker *v.* Gill, 61 Ill. 236; Mutual Guarantee Bldg., etc., Assoc. *v.* Fallen, 21 Pa. Co. Ct. 617; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

66. See Fortune *v.* Bartolomei, 164 Ill. 51, 45 N. E. 274; Frye *v.* Jones, 78 Ill. 627; Chapin *v.* Clemitson, 1 Barb. (N. Y.) 311; Page *v.* Simpson, 188 Pa. St. 393, 41 Atl. 638; Bennett *v.* Haley, 142 Pa. St. 253, 21 Atl. 814; Smith *v.* Pringle, 100 Pa. St. 275; Ellis *v.* Ambler, 11 Pa. Super. Ct. 406; Cobb *v.* Yetter, 4 Pa. Co. Ct. 293.

67. Den *v.* Zellers, 7 N. J. L. 153.

68. Allen *v.* Parker, 11 Ind. 504; Patterson *v.* Indiana, 2 Greene (Iowa) 492; Whitney *v.* Hopkins, 135 Pa. St. 246, 19 Atl. 1075; Kahn *v.* Lesser, 97 Wis. 217, 72 N. W. 739; Dilley *v.* Van Wie, 6 Wis. 209.

69. See Allen *v.* Parker, 11 Ind. 504; Rigby *v.* Taylor, 1 Ohio Dec. (Reprint) 405, 9 West. L. J. 43; Cordray *v.* Galveston, (Tex. Civ. App. 1894) 26 S. W. 245.

70. Philadelphia *v.* Johnson, 208 Pa. St. 645, 57 Atl. 1114 [*affirming* 23 Pa. Super. Ct. 591]; Ely *v.* Karmany, 23 Pa. St. 314; Livezely *v.* Pennock, 2 Browne (Pa.) 321; Fairchild *v.* Camac, 8 Fed. Cas. No. 4,610, 3 Wash. 558.

Second judgment not absolutely void.— Where a judgment by confession is entered on a warrant of attorney in one county, and afterward, such judgment remaining in force and unpaid, a second judgment upon the same warrant is entered in another county, it is held that the second judgment is not absolutely void, for a sale under it would vest a good title in the sheriff's vendee, but in that case the attorney who entered the judgment, or the obligee of the bond, if it was entered by him, would be answerable for the consequences. Neff *v.* Barr, 14 Serg. & R. (Pa.) 166; Martin *v.* Rex, 6 Serg. & R. (Pa.) 296.

71. Huner *v.* Doolittle, 3 Greene (Iowa) 76, 54 Am. Dec. 489; Banning *v.* Taylor, 24 Pa. St. 297; Beck *v.* Taylor, 1 Chest. Co. Rep. (Pa.) 454, 14 Lanc. Bar 67; Fairchild *v.* Camac, 8 Fed. Cas. No. 4,610, 3 Wash. 558.

72. Rapley *v.* Price, 11 Ark. 713; Wassell *v.* Reardon, 11 Ark. 705, 44 Am. Dec. 245; Odes *v.* Woodward, 2 Ld. Raym. 849. *Compare* Evans *v.* Fearne, 16 Ala. 689, 50 Am. Dec. 197; Gale *v.* Chase, 3 Johns. (N. Y.) 147.

73. Milnor *v.* Milnor, 9 N. J. L. 93; Wood *v.* Hopkins, 3 N. J. L. 263; Maddock *v.* Stevens, 15 N. Y. Civ. Proc. 248, 3 N. Y. Suppl. 528; Bennet *v.* Davis, 3 Cow. (N. Y.) 68; Lanning *v.* Pawson, 38 Pa. St. 480; Sauerfield *v.* McNierney, 30 Pittsb. Leg. J. N. S. (Pa.) 283; Tobias *v.* Dorsey, 2 Wkly. Notes Cas. (Pa.) 15; Enston *v.* Mixer, 15

intended to be secured,[74] although not by the running of the statute of limitations against the debt,[75] or by the supervening insanity of the grantor, this disability not operating to revoke any power which he could not have revoked if he had remained sane.[76]

C. Statement of Indebtedness — 1. Nature and Necessity. Statutes in many of the states require a person confessing a judgment to file a written statement, signed and verified, designating the amount for which the judgment is to be entered, and stating concisely the facts out of which the indebtedness arose. This requirement is imperative.[77] But it applies only to confessions of judgment without action. Where a suit has been begun, process served, and a declaration filed, and defendant then confesses judgment, the case is not within the statute.[78]

2. Requisites and Sufficiency. It is essential to the sufficiency of such a statement that it should set forth explicitly the amount of the debt, or of the judgment to be entered, so that this particular may not be left uncertain or conjectural.[79] It has been held that the statement should be so precise that any one can calculate from it the amount due with the interest if any.[80] But technical accuracy in the description of the liability or cause of action is not requisite.[81] Nor is it necessary to comply strictly with a direction of the statute that the statement shall "authorize the entry of judgment," a substantial manifestation of the debtor's intention in that regard being sufficient.[82] A motion by plaintiff to amend the statement is addressed to the discretion of the court, and may be granted on such terms as shall appear just,[83] as against subsequent judgment creditors who have not sought to vacate the judgment,[84] but not against a creditor who has taken steps to have it set aside.[85]

Rich. (S. C.) 193. *Compare* Gilbert *v.* Corbin, 18 Wend. (N. Y.) 600; Keep *v.* Leckie, 8 Rich. (S. C.) 164.

74. Rea *v.* Forrest, 88 Ill. 275; Danville First Nat. Bank *v.* Cunningham, 48 Fed. 510.

75. Wassell *v.* Reardon, 11 Ark. 705, 44 Am. Dec. 245; Cross *v.* Moffat, 11 Colo. 210, 17 Pac. 771. *Compare* Bennett *v.* Allen, 10 Pa. Co. Ct. 256. But see Kahn *v.* Lesser, 97 Wis. 217, 72 N. W. 739; Brown *v.* Parker, 28 Wis. 21.

76. Spencer *v.* Reynolds, 9 Pa. Co. Ct. 249.

77. See the statutes of the different states. And see the following cases:

California.— Cordier *v.* Schloss, 18 Cal. 576.

Iowa.— Trenery *v.* Swan, 93 Iowa 619, 61 N. W. 947.

Missouri.— Gilbert *v.* Gilbert, 33 Mo. App. 259.

New York.— Lanning *v.* Carpenter, 20 N. Y. 447; Citizens' Nat. Bank *v.* Shaw, 46 Hun 589; Winnebrenner *v.* Edgerton, 30 Barb. 185.

North Carolina.—Smith *v.* Smith, 117 N. C. 348, 23 S. E. 270.

Pennsylvania.—Carter *v.* Shoener, 5 Pa. Co. Ct. 186. But a warrant of attorney, reciting a bond which is on the same sheet of paper, may be detached from the bond, and entered up without any statement of a confession of judgment. United Security L. Ins., etc., Co. *v.* Vaughn, 22 Pa. Co. Ct. 167.

South Carolina.— Woods *v.* Bryan, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688; Kohn *v.* Meyer, 19 S. C. 190.

Tennessee.— In this state the requirement of a written statement of the cause of indebtedness is considered merely directory; and a judgment by confession is not invalidated by the want of such statement. Hughes *v.* Helms, (Ch. App. 1898) 52 S. W. 460.

Washington.— Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

See 30 Cent. Dig. tit. "Judgment," § 73.

78. Hoguet *v.* Wallace, 28 N. J. L. 523; Elliot *v.* Woodhull, 12 N. J. L. 126; Gottry *v.* Ruckman, 3 N. J. L. 427; Miller *v.* British Columbia Bank, 2 Oreg. 291; Gerald *v.* Burthee, 29 Tex. 202.

79. Hard *v.* Foster, 98 Mo. 297, 11 S. W. 760; Clements *v.* Gerow, 1 Abb. Dec. (N. Y.) 370, 1 Keyes 297; Claflin *v.* Sanger, 9 Abb. Pr. (N. Y.) 214; Nichols *v.* Hewit, 4 Johns. (N. Y.) 423; Uzzle *v.* Vinson, 111 N. C. 138, 16 S. E. 6; Sharp *v.* Danville, etc., R. Co., 106 N. C. 308, 11 S. E. 530, 19 Am. St. Rep. 533.

Statement as to interest.— A statement that no part of the note or interest has been paid, and that the full amount thereof, and interest since the date of the note, are due and owing thereon, is sufficient to include interest in a judgment by confession. Rothchild *v.* Mannesovitch, 29 N. Y. App. Div. 580, 51 N. Y. Suppl. 253. And see Tilles *v.* Albright, 18 N. Y. Suppl. 493.

80. Mather *v.* Mather, 25 Misc. (N. Y.) 51, 53 N. Y. Suppl. 999.

81. *Ex p.* Hays, 6 Ark. 419.

82. Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

83. Symson *v.* Selheimer, 105 N. Y. 660, 12 N. E. 31.

84. Bradley *v.* Glass, 20 N. Y. App. Div. 200, 46 N. Y. Suppl. 790.

85. Blackmer *v.* Greene, 47 N. Y. Suppl. 113, 4 N. Y. Annot. Cas. 395.

3. Creation and Character of Debt — a. In General. In describing the nature of the debt and the facts out of which it arose, the statement should be definite enough to prevent the parties from shifting the consideration, and to furnish creditors and others with a basis for inquiry if they desire to investigate the *bona fides* of the judgment.[86] But if otherwise sufficiently specific, it is not invalid merely because indefinite as to time.[87] And it may refer for particulars to a schedule annexed, but in that case the schedule must contain all the necessary facts.[88] And where there have been numerous dealings between the parties, the statement will be sufficient if it sets forth an adjustment of accounts, with exact particulars of the balance found due and defendant's agreement or liability to pay it.[89]

b. Goods Sold and Delivered. A confession of judgment for a certain sum for "goods, wares, and merchandise" of a specified value is held by some of the authorities to be too indefinite; it should state the nature and quantities of the goods sold, the time of sale, and the aggregate price, or even the price of the several items.[90] But other cases hold the statement to be sufficient if the indebtedness is declared to be for goods, wares, and merchandise sold and delivered, with a merely approximate description of the period at or within which the sale took place.[91]

c. Bills and Notes. A statement is not sufficient which sets forth, as the basis of the judgment to be entered, a promissory note executed by defendant to plaintiff; for the consideration of the note should be described, or the facts creating the indebtedness for which the note was given.[92] And the statement will be held insufficient if it is substantially incorrect in describing the consideration of

86. *Connecticut.*— Wight *v.* Mott, Kirby 152.

Iowa.— Briggs *v.* Yetzer, 103 Iowa 342, 72 N. W. 647.

Minnesota.— Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741.

Missouri.— Teasdale Commission Co. *v.* Van Hardenberg, 53 Mo. App. 326; Stern *v.* Mayer, 19 Mo. App. 511.

New York.— McDowell *v.* Daniels, 38 Barb. 143. And see Gandall *v.* Finn, 2 Abb. Dec. 232, 1 Keyes 217, 33 How. Pr. 444; Acker *v.* Acker, 1 Abb. Dec. 1, 1 Keyes 291; Stebbins *v.* East Soc., 12 How. Pr. 410; Lawless *v.* Hackett, 16 Johns. 149.

South Carolina.— Weinges *v.* Cash, 15 S. C. 44.

Wisconsin.— Thompson *v.* Hintgen, 11 Wis. 112; Nichols *v.* Kribs, 10 Wis. 76, 78 Am. Dec. 294.

See 30 Cent. Dig. tit. "Judgment," § 75.

Debt on bond.— Where the indebtedness for which the judgment is confessed is evidenced by a bond given by defendant to plaintiff, or consists in a contingent liability on plaintiff's part as indorser or surety on a bond, it is necessary to state such particulars of the instrument and of the transaction out of which it arose as will show that the liability was incurred in good faith and that the debt is justly due. Kern *v.* Chalfant, 7 Minn. 487; Beekman *v.* Kirk, 15 How. Pr. (N. Y.) 228; Smith *v.* Smith, 117 N. C. 348, 23 S. E. 270.

87. Harrison *v.* Gibbons, 71 N. Y. 58.

88. Hamann *v.* Keinhart, 11 Abb. Pr. (N. Y.) 132.

89. Hard *v.* Foster, 98 Mo. 297, 11 S. W. 760; Critten *v.* Vredenburgh, 151 N. Y. 536, 45 N. E. 952; Davenport *v.* Leary, 95 N. C. 203; Hall *v.* Moorman, 4 McCord (S. C.) 283.

90. Bryan *v.* Miller, 28 Mo. 32, 75 Am. Dec. 107; Nichols *v.* Kribs, 10 Wis. 76, 78 Am. Dec. 294.

91. Daniels *v.* Claflin, 15 Iowa 152; *Ex p.* Graham, 54 S. C. 163, 32 S. E. 67

In New York while there are a number of cases supporting this rule (Read *v.* French, 28 N. Y. 285; Thompson *v.* Van Vechten, 27 N. Y. 568; Neusbaum *v.* Keim, 24 N. Y. 325; Gandall *v.* Finn, 2 Abb. Dec. 232, 1 Keyes 217, 33 How. Pr. 444; Weil *v.* Hill, 71 Hun 133, 24 N. Y. Suppl. 521; Delaware *v.* Ensign, 21 Barb. 85; Curtis *v.* Corbitt, 25 How. Pr. 58; Mott *v.* Davis, 15 How. Pr. 67; Healy *v.* Preston, 14 How. Pr. 20; Schoolcraft *v.* Thompson, 9 How. Pr. 61; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475); the latest decisions show a tendency to adhere to the stricter rule, and to require considerable particularity in setting forth the details of the alleged sales (Blackmer *v.* Greene, 20 N. Y. App. Div. 532, 47 N. Y. Suppl. 113; Bradley *v.* Glass, 20 N. Y. App. Div. 200, 46 N. Y. Suppl. 790). And among the earlier cases there are many which held the statement to be insufficient if it merely alleged a sum due for "goods, wares, and merchandise sold and delivered." Ingram *v.* Robbins, 33 N. Y. 409, 88 Am. Dec. 393; Moody *v.* Townsend, 3 Abb. Pr. 375; Hoppock *v.* Donaldson, 12 How. Pr. 141; Boyden *v.* Johnson, 11 How. Pr. 503; Purdy *v.* Upton, 10 How. Pr. 494; Lawless *v.* Hackett, 16 Johns. 149.

92. *California.*— Pond *v.* Davenport, 44 Cal. 481.

the note,[93] or if it fails to specify the amount of the note.[94] In regard to the degree of particularity with which the consideration of the note must be described, it has been held that a statement that it was given for "goods sold and delivered," or for "goods, wares, and merchandise," is not sufficient without details as to the date, amount, and subject of the sale or sales.[95] But it is enough to state that the note was given for "money loaned" to defendant, or "money borrowed" by him, if the amount and time of the loan are given, and the sum is alleged to be justly due.[96] It is also sufficient to set forth that the judgment is confessed to secure plaintiff for a debt due or to become due upon his indorsement, as the surety of defendant and for his benefit, of a certain note or notes fully described in all essential particulars.[97]

d. Loans and Advances. A recital in the statement that the indebtedness accrued for "borrowed money," or for "money loaned" or "advanced" to the debtor, sufficiently states the facts out of which the indebtedness arose,[98] provided

Iowa.— Edgar *v.* Greer, 7 Iowa 136.

Minnesota.— Hackney *v.* Wollaston, 73 Minn. 114, 75 N. W. 1037; Wells *v.* Gieseke, 27 Minn. 478, 8 N. W. 380.

Missouri.— McHenry *v.* Shephard, 2 Mo. App. 378. *Compare* Mechanics' Bank *v.* Mayer, 93 Mo. 417, 6 S. W. 237.

New York.— Freligh *v.* Brink, 22 N. Y. 418; Chappel *v.* Chappel, 12 N. Y. 215, 64 Am. Dec. 496; Norris *v.* Denton, 30 Barb. 117; Kendall *v.* Hodgins, 1 Bosw. 659; Butts *v.* Schieffelin, 5 N. Y. Civ. Proc. 415; Rae *v.* Lawser, 9 Abb. Pr. 380 note; Von Beck *v.* Shuman, 13 How. Pr. 472; Johnston *v.* Fellerman, 13 How. Pr. 21; Case *v.* Redfield, 7 Wend. 398. *Compare* Murray *v.* Judson, 9 N. Y. 73, 59 Am. Dec. 516; Von Keller *v.* Muller, 3 Abb. Pr. 375 note, holding that a statement for judgment by confession, which sets out a note as the indebtedness, is sufficient as against the debtor, although it may not be as against creditors.

North Carolina.— Davidson *v.* Alexander, 84 N. C. 621.

South Carolina.— Woods *v.* Bryan, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688; *Ex p.* Carroll, 17 S. C. 446.

See 30 Cent. Dig. tit. "Judgment," § 76.

93. White *v.* Williams, 1 Paige (N. Y.) 502.

94. Norris *v.* Denton, 30 Barb. (N. Y.) 117. But see Little *v.* Crittenden, 10 Tex. 192.

95. *California.*— Cordier *v.* Schloss, 18 Cal. 576.

Iowa.— Where the statement sets out that the promissory note annexed was given "for value received in one Sweepstakes separator," the judgment is not invalid for want of a showing as to how the indebtedness arose. Brown *v.* Barngrover, 82 Iowa 204, 47 N. W. 1082.

Missouri.— Bryan *v.* Miller, 28 Mo. 32, 75 Am. Dec. 107.

New York.— Claflin *v.* Sanger, 31 Barb. 36; McKee *v.* Tyson, 10 Abb. Pr. 392; Moody *v.* Townsend, 3 Abb. Pr. 375. *Compare* Post *v.* Coleman, 9 How. Pr. 64.

North Carolina.— Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

See 30 Cent. Dig. tit. "Judgment," § 76.

But see Cleveland Co-operative Stove Co. *v.* Douglas, 27 Minn. 177, 6 N. W. 628.

96. *California.*— Pond *v.* Davenport, 44 Cal. 481.

Iowa.— Marvin *v.* Tarbell, 12 Iowa 93. *Compare* Bernard *v.* Douglas, 10 Iowa 370; Kennedy *v.* Lowe, 9 Iowa 580.

Missouri.— Claflin *v.* Dodson, 111 Mo. 195, 19 S. W. 711; Stern *v.* Mayer, 19 Mo. App. 511.

New York.— Ely *v.* Cooke, 28 N. Y. 365; Freligh *v.* Brink, 22 N. Y. 418; Mather *v.* Mather, 38 N. Y. App. Div. 32, 55 N. Y. Suppl. 973. *Compare* Dunham *v.* Waterman, 17 N. Y. 9, 72 Am. Dec. 406 [*reversing* 3 Duer 166].

North Carolina.— Uzzle *v.* Vinson, 111 N. C. 138, 16 S. E. 6.

See 30 Cent. Dig. tit. "Judgment," § 76.

But see Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

Assumption of debt.— It is sufficient to state that the note was given in consideration of plaintiff's assumption of a debt for which he was liable as defendant's surety. Dullard *v.* Phelan, 83 Iowa 471, 50 N. W. 204.

Note given for purchase of debt due plaintiff see Kirby *v.* Fitzgerald, 31 N. Y. 417.

Note for salary due plaintiff see Kellogg *v.* Cowing, 33 N. Y. 408.

97. Ingram *v.* Robbins, 33 N. Y. 409, 88 Am. Dec. 393; Hopkins *v.* Nelson, 24 N. Y. 518; Dow *v.* Platner, 16 N. Y. 562; McDowell *v.* Daniels, 38 Barb. (N. Y.) 143. And see Camden First Nat. Bank *v.* Carleton, 43 N. Y. App. Div. 6, 59 N. Y. Suppl. 635.

98. *Colorado.*— Brown *v.* Miller, 11 Colo. 431, 18 Pac. 617.

Iowa.— Kendig *v.* Marble, 58 Iowa 529, 12 N. W. 584; Miller *v.* Clarke, 37 Iowa 325; Vanfleet *v.* Phillips, 11 Iowa 558.

Minnesota.— Kern *v.* Chalfant, 7 Minn. 487.

Missouri.— Hard *v.* Foster, 98 Mo. 297, 11 S. W. 760.

New York.— Rothchild *v.* Mannesovitch, 29 N. Y. App. Div. 580, 51 N. Y. Suppl. 253; Wild *v.* Porter, 22 N. Y. App. Div. 179, 47 N. Y. Suppl. 1036; Terrett *v.* Brooklyn Imp. Co., 18 Hun 6; McDowell *v.* Daniels, 38 Barb. 143; Tilles *v.* Albright, 18 N. Y. Suppl. 493; Marsh *v.* Lawrence, 4 Cow. 461.

there is no uncertainty as to the amount due.[99] As to stating the time of the loan or advance there are decisions from which it appears to be sufficient to allege that the money was loaned to defendant within a certain year or years, or at divers times after a specified day,[1] or on or about a day named.[2]

4. Signature and Verification. The statement of indebtedness and confession of judgment must be signed by the debtor in person; a signature by his attorney is not sufficient.[3] But signing the affidavit verifying the statement is a sufficient signing of the statement itself, especially if they are on the same page or sheet.[4] The statement must also be verified by the oath of the debtor himself.[5] And he must swear to the truth of the statement, not merely to his belief in its truth.[6] This affidavit may be made before any duly qualified officer,[7] and it is susceptible of amendment if faulty but not wholly void.[8]

D. Confession After Action Brought — 1. In General. Confessions of judgment in a suit regularly instituted are of two sorts; first, judgment by *cognovit actionem*, and second, by confession *relicta verificatione*. In the former case defendant, after service, instead of entering a plea, acknowledges and confesses that plaintiff's cause of action is just and rightful.[9] In the latter case, after

See 30 Cent. Dig. tit. "Judgment," § 78.

99. Flour City Nat. Bank *v.* Doty, 41 Hun (N. Y.) 76.

1. Frost *v.* Koon, 30 N. Y. 428; Miller *v.* Kosch, 74 Hun (N. Y.) 50, 26 N. Y. Suppl. 183; Broisted *v.* Breslin, 5 N. Y. St. 67; Lyon *v.* Sherman, 14 Abb. Pr. (N. Y.) 393. But *compare* Wood *v.* Mitchell, 117 N. Y. 439, 22 N. E. 1125; McDowell *v.* Daniels, 38 Barb. (N. Y.) 143; Davis *v.* Morris, 21 Barb. (N. Y.) 152; Daly *v.* Matthews, 12 Abb. Pr. (N. Y.) 403.

2. Johnston *v.* McAusland, 9 Abb. Pr. (N. Y.) 214.

3. Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; French *v.* Edwards, 9 Fed. Cas. No. 5,098, 5 Sawy. 266.

4. Kern *v.* Chalfant, 7 Minn. 487; Mosher *v.* Heydrick, 45 Barb. (N. Y.) 549, 30 How. Pr. 161; Purdy *v.* Upton, 10 How. Pr. (N. Y.) 494; Post *v.* Coleman, 9 How. Pr. (N. Y.) 64.

5. Bryant *v.* Harding, 29 Mo. 347. *Compare* Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

6. Ingram *v.* Robbins, 33 N. Y. 409, 88 Am. Dec. 393. And see Mosher *v.* Heydrick, 45 Barb. (N. Y.) 549, 30 How. Pr. 161; Schoolcraft *v.* Thompson, 9 How. Pr. (N. Y.) 61, both holding that an affidavit that "the facts stated in the above confession" are true is a sufficient declaration that the statement is true.

7. See Mosher *v.* Heydrick, 45 Barb. (N. Y.) 549, 30 How. Pr. 161.

Affidavit taken in another state see Frisbee *v.* Seaman, 49 Iowa 95; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

Plaintiff's attorney as officer.— The mere fact that the notary public before whom the statement for confession of judgment was sworn to was at that time retained as the attorney for plaintiff is not of itself sufficient to invalidate the judgment confessed thereon. Vanfleet *v.* Phillips, 11 Iowa 558; Post *v.* Coleman, 9 How. Pr. (N. Y.) 64.

The jurat of the officer taking the affidavit should be in due form; but a formal defect will not so far invalidate the judgment as to lay it open to collateral attack. Grattan *v.* Matteson, 54 Iowa 229, 6 N. W. 298. And see Briggs *v.* Yetzer, 103 Iowa 342, 72 N. W. 647.

Seal of notary.— As between the parties, a confession of judgment is not avoided by the want of a seal to the notary's certificate to the affidavit. Thorp *v.* Platt, 34 Iowa 314.

8. Cook *v.* Whipple, 55 N. Y. 150, 14 Am. Rep. 202.

9. Pond *v.* Davenport, 44 Cal. 481; Lewis *v.* Barber, 21 Ill. App. 638; Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

A cognovit is a specific confession of the justice of plaintiff's claim and that the amount claimed is due to him, and expresses or implies defendant's consent to the entry of judgment therefor. If he files a formal answer, although it admits the allegations of the petition, a judgment rendered in accordance with the legal conclusions of the petition is not one by consent or confession. Aull *v.* Day, 133 Mo. 337, 34 S. W. 578; Adler *v.* Anderson, 42 Mo. App. 189.

Time of preparing cognovit.— A judgment by confession is not affected by the fact that the cognovit was prepared before the cause of action accrued, where the judgment was not entered until after accrual. Blake *v.* State Bank, 178 Ill. 182, 52 N. E. 957.

The caption of the cognovit upon which a judgment is confessed in vacation is not an essential part of the instrument, and if defective may be treated as surplusage. Browne *v.* Cassem, 74 Ill. App. 305.

Effect of a cognovit as an admission in pais and as a release of errors and irregularities see Hirschfield *v.* Franklin, 6 Cal. 607; Little *v.* Dyer, 35 Ill. App. 85; McClish *v.* Manning, 3 Greene (Iowa) 223.

In Canada.— Time for filing or entering judgment see McLean *v.* Stuart, 2 Ont. Pr. 367; Armour *v.* Carruthers, 2 Ont. Pr. 217; Commercial Bank *v.* Fletcher, 8 U. C. C. P. 181; Oliphant *v.* McGinn, 4 U. C. Q. B. 170. Place of entry of judgment see Laverty *v.*

pleading and before trial, defendant both confesses plaintiff's cause of action and withdraws or abandons his plea or other allegations, whereupon judgment is entered against him without proceeding to trial.[10] In either case the judgment must be tested by rules and principles known to the common law, and is not governed by the statutes authorizing the confession of judgments without action, so that if good at common law it is not impeachable for the lack of an affidavit, statement of the origin of the indebtedness, or other supports required by those statutes.[11] A judgment by cognovit, after process has been served, may be entered in vacation;[12] but not pending a stay of proceedings,[13] or after the death of plaintiff,[14] nor in any case where a statute prescribes a different and exclusive form of proceeding on the particular obligation in suit.[15] And it has been decided that, where a party confesses judgment against himself under a mistake of fact as to what the pleadings contain, he may upon discovering his error retract the confession, provided it has not been recorded.[16]

2. PROCESS, APPEARANCE, AND PLEADING. It is essential to the validity of a confession of judgment in a pending action that process should have been regularly served upon defendant, or service accepted by him, or that an appearance should have been entered by him in person or by a duly authorized attorney for him;[17]

Patterson, 5 U. C. Q. B. 641; Commercial Bank *v.* Brondgeest, 5 U. C. Q. B. 325. Judgment when cognovit executed by only some of several defendants see Roach *v.* Potash, Trin. T. 2 & 3 Vict., 2 Ont. Case L. Dig. 2941. Necessity for process see Walton *v.* Hayward, 2 U. C. Jur. O. S. 502. Cognovit as additional security for a debt see Parker *v.* Roberts, 3 U. C. Q. B. 114. Witnesses to cognovit see King *v.* Robins, Taylor (U. C.) 299; Cleal *v.* Latham, 1 U. C. Q. B. 412; Grant *v.* McIntosh, 4 U. C. Q. B. O. S. 184. Irregularities in cognovit or judgment see Potter *v.* Pickle, 2 Ont. Pr. 391; Folger *v.* McCallum, 1 Ont. Pr. 352; Paterson *v.* Squires, 1 C. L. Chamb. (U. C.) 234; Kerr *v.* Shoff, 9 U. C. Q. B. 180; Parker *v.* Roberts, 3 U. C. Q. B. 114; Goslin *v.* Tune, 1 U. C. Q. B. 277. Stay of proceedings upon cognovit see Roberts *v.* Hasleton, Taylor (U. C.) 32; Crooks *v.* Wilson, 8 U. C. Q. B. 114. Setting aside judgment see Mowat *v.* Switzer, Mich. T. 3 Vict., 2 Ont. Case L. Dig. 2941; Alexander *v.* Hervey, Trin. T. 7 Wm. IV., 2 Ont. Case L. Dig. 2941; Irvin *v.* Ham, 9 Can. L. J. 80; Armour *v.* Carruthers, 2 Ont. Pr. 217; Douglass *v.* Mayer, 5 U. C. C. P. 377; Gorrie *v.* Beard, 5 U. C. Q. B. 626; Fisher *v.* Edgar, 5 U. C. Q. B. O. S. 141. Costs see Hasleton *v.* Brundige, Taylor (U. C.) 84. Interest see Ramsay *v.* Carruthers, 23 U. C. Q. B. 21. Discharge of bail see Carter *v.* Sullivan, 4 U. C. C. P. 298. Cognovit as defense to indorser of a note see Montreal Bank *v.* Douglas, 17 U. C. Q. B. 208.

10. *Florida.*— Gregory *v.* McNealy, 12 Fla. 578.

Georgia.— Hicks *v.* Ayer, 5 Ga. 298.

Pennsylvania.— Cooper *v.* Borrall, 10 Pa. St. 491.

Texas.— Burton *v.* Lawrence, 4 Tex. 373.

Virginia.— Richardson *v.* Jones, 12 Gratt. 53.

Judgment on proof of case.— A judgment which recites that the parties appeared, that defendants withdrew their plea, and that, plaintiffs having proved their cause, a judgment was rendered in their favor, is a judgment rendered on proof of the cause of action made to the court, and not a judgment upon confession. Holliday *v.* Myers, 11 W. Va. 276.

11. *Louisiana.*— Goodwill *v.* Elkins, 51 La. Ann. 521, 25 So. 317.

Michigan.— Crouse *v.* Derhyshire, 10 Mich. 479, 82 Am. Dec. 51.

Missouri.— Chamberlin *v.* Mammoth Min. Co., 20 Mo. 96.

Oregon.— Miller *v.* Oregon City Paper Mfg. Co., 3 Oreg. 24.

Pennsylvania.— Welsh *v.* Buckner, 2 Miles 96.

Texas.— Schroeder *v.* Fromme, 31 Tex. 602; Gerald *v.* Burthee, 29 Tex. 202; Smith *v.* Ridley, 30 Tex. Civ. App. 158, 70 S. W. 235; Lauderdale *v.* Ennis Stationery Co., (Civ. App. 1894) 24 S. W. 834; Rankin *v.* Filburn, 1 Tex. App. Civ. Cas. § 797.

12. Stewart *v.* Walters, 38 N. J. L. 274.

13. Sacket's Harbor Bank *v.* Martin, 2 How. Pr. (N. Y.) 11.

14. Lewis *v.* Rapelyea, 1 Barh. (N. Y.) 29.

15. French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 717; Burns *v.* Nash, 23 Ill. App. 552, both holding that in Illinois the statute of forcible entry and detainer prescribing the mode of procedure to obtain the remedy excludes all other modes, and a judgment entered without the service of process on the tenant, but on a cognovit filed under a warrant of attorney contained in the lease, is void.

16. Smith *v.* Simms, 9 Ga. 418. But see Little *v.* Dyer, 35 Ill. App. 85; New England Mortg. Security Co. *v.* Tarver, 60 Fed. 660, 9 C. C. A. 190.

17. *Georgia.*— McBride *v.* Bryan, 67 Ga. 584.

Indiana.— Comparet *v.* Hanna, 34 Ind. 74; Coonley *v.* Tracy, 4 Ind. 137; Craig *v.* Glass, 1 Ind. 89; Ferraud *v.* McClease, 1 Ind. 87.

that there should be an appearance by plaintiff, or at least his consent to the entry of judgment;[18] and that a declaration or some statement of plaintiff's claim should have been filed,[19] although the confession of judgment operates as a waiver or release of any defects or omissions in the declaration.[20]

E. Proceedings to Obtain Judgment — 1. Necessity in General. As a general rule judgment may be entered up on defendant's confession as a matter of office business and without invoking the judicial functions of the court.[21] But where the statute requires an office confession of judgment to be confirmed by the court, its incidents as a judgment do not attach until the date of such confirmation.[22] The intervention of a jury is necessary where the right to enter the confession depends upon the happening of a contingency which must be ascertained as a matter of fact,[23] but not where the confession of judgment is unconditional and the amount certain.[24]

2. Jurisdiction and Venue. It is essential to the validity of a judgment by confession that the court should have such jurisdiction of the action that it might lawfully have rendered the same judgment in a contested action.[25] Thus a judgment of this character is subject to a statutory limitation that actions may be brought and judgments rendered only in courts having jurisdiction of the county or district where defendant resides.[26] And a warrant of attorney to confess a judgment, executed in one state and by its terms to be enforced there, will not

Kentucky.— Hudson *v.* McMahon, (1899) 50 S. W. 259.

Mississippi.— Hemphill *v.* Hemphill, 34 Miss. 68.

Ohio.— Hart *v.* Sarvis, 3 Ohio S. & C. Pl. Dec. 708, 3 Ohio N. P. 316.

Texas.— Gerald *v.* Burthee, 29 Tex. 202; Burton *v.* Varnell, 5 Tex. 139; O'Neal *v.* Clymer, 21 Tex. Civ. App. 386, 52 S. W. 619.

See 30 Cent. Dig. tit. "Judgment," § 81.

Compare Shadrack *v.* Woolfolk, 32 Gratt. (Va.) 707.

18. Thayer *v.* Finley, 36 Ill. 262.

19. Montgomery *v.* Barnett, 8 Tex. 143; Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21. *Compare* Ober *v.* Shepherd, 1 Greene (Iowa) 430; Byers *v.* Brannon, (Tex. 1892) 19 S. W. 1091; McNeil *v.* Cannon, 16 Fed. Cas. No. 8,913, 1 Cranch C. C. 127.

20. Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514; Hall *v.* Jones, 32 Ill. 38; Hoeing *v.* Adams Express Co., 8 Ky. L. Rep. 154; Parker *v.* Simpson, 1 Mo. 539.

21. See Vietor *v.* Johnson, 148 Pa. St. 583, 24 Atl. 173; Weikel *v.* Long, 55 Pa. St. 238. Where a warrant to confess judgment authorizes any attorney to appear and confess judgment for an amount named, defendant has no standing to be first heard before entry of judgment. Mulhearn *v.* Roach, 24 Pa. Super. Ct. 483.

22. Bass *v.* Estill, 50 Miss. 300.

23. Fitzgerald *v.* Wiggins, 6 Ohio Dec. (Reprint) 1201, 12 Am. L. Rec. 476.

24. Allen *v.* White, Minor (Ala.) 365; Cochlin *v.* Com., 11 Wkly. Notes Cas. (Pa.) 460.

25. *Arkansas.*— Rapley *v.* Price, 9 Ark. 428.

Michigan.— Athens First Nat. Bank *v.* Garland, 109 Mich. 515, 67 N. W. 559, 63 Am. St. Rep. 597, 33 L. R. A. 83.

New Jersey.— Vanderveere *v.* Gaston, 24 N. J. L. 818.

New York.— Lanning *v.* Carpenter, 23 Barb. 402.

Pennsylvania.— Sanderson *v.* Phinney, 2 Walk. 526.

See 30 Cent. Dig. tit. "Judgment," § 86.

Constitution of court.— A court is a court, although the jury be dismissed, and therefore may then render judgment upon a confession. Melins *v.* Horne, 29 Ga. 536.

Presumption of jurisdiction see Bush *v.* Hanson, 70 Ill. 480.

Courts of limited jurisdiction. — Where judgment is confessed in a court whose jurisdiction is limited in respect to the entry of judgments of this kind, or in respect to the amount involved in suits before it, or otherwise, its jurisdiction must clearly appear upon the face of the proceedings, and the record must show that all statutory requirements were complied with. Spear *v.* Carter, 1 Mich. 19, 48 Am. Dec. 688; Judges Lewis Ct. C. Pl. *v.* People, 15 Wend. (N. Y.) 110; Tenny *v.* Filer, 8 Wend. (N. Y.) 569; Camp *v.* Woods, 10 Watts (Pa.) 118.

Concurrent jurisdiction.— A judgment entered in the district court, by virtue of a warrant of attorney authorizing the entry of such judgment in the court of common pleas, those courts having concurrent jurisdiction, will not be set aside as erroneous at the instance of a subsequent judgment creditor. Hauer's Appeal, 5 Watts & S. (Pa.) 473.

Waiver of exceptions.— After a confession of judgment without exception to the jurisdiction of the particular court the subject-matter being within its general competence, the judgment rendered is valid. Kelly *v.* Lyons, 40 La. Ann. 498, 4 So. 480.

26. McClure *v.* Bowles, 5 Ohio S. & C. Pl. Dec. 288, 5 Ohio N. P. 327; Oil City *v.* McAboy, 74 Pa. St. 249; *Ex p.* Ware Furniture Co., 49 S. C. 20, 27 S. E. 9. *Compare* Martin *v.* Bowie, 3 Hill (S. C.) 225. But see Kitchen

support a judgment entered in another state.[27] But a warrant of attorney may be so drawn as to authorize the confession of judgment in a foreign state, as where the authority is to confess judgment "in any court of record."[28]

3. AUTHORITY OF CLERK OF COURT. The statutes generally authorize the prothonotary or clerk of the court to enter a judgment by confession, on the filing in his office of the necessary papers, without action by the judge. His act in entering the judgment being merely ministerial and not judicial, this method of proceeding is perfectly valid.[29] But any directions of the statute as to the conditions on which the clerk may thus enter judgment as a requirement that there must be proof of the execution of the confession of judgment must be strictly observed.[30] And if the papers submitted are defective or insufficient, defendant should make his objection to the court, not to the clerk.[31]

4. PROOF OF CAUSE OF ACTION — a. In General. As a general rule a confession of judgment dispenses with the necessity of proving plaintiff's cause of action,[32] except where the right to enter judgment depends upon a condition or contingency the occurrence of which is not disclosed by the papers.[33] But it is commonly required that plaintiff shall prove the due execution of the warrant or power of attorney.[34]

v. Bellefontaine Nat. Bank, 53 Kan. 242, 36 Pac. 344, 42 Am. St. Rep. 282; Kelly *v.* Lyons, 40 La. Ann. 498, 4 So. 480.

27. Hamilton *v.* Schoenberger, 47 Iowa 385; Manufacturers', etc., Bank *v.* Boyd, 3 Den. (N. Y.) 257; Lewis *v.* Moon, 1 Ohio Cir. Ct. 211, 1 Ohio Cir. Dec. 116; Krantz *v.* Kazenstein, 22 Pa. Super. Ct. 275.

28. *Massachusetts.*— Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840.

Michigan.— See Athens First Nat. Bank *v.* Garland, 109 Mich. 515, 67 N. W. 559, 63 Am. St. Rep. 597, 33 L. R. A. 83.

Missouri.— Crim *v.* Crim, 162 Mo. 544, 63 S. W. 489, 85 Am. St. Rep. 521, 54 L. R. A. 502.

New Jersey.— Shelmerdine *v.* Lippincott, 69 N. J. L. 82, 54 Atl. 237.

Ohio.— Youngstown First Nat. Bank *v.* McKinney, 16 Ohio Cir. Ct. 80, 9 Ohio Cir. Dec. 1. *Compare* Davis *v.* Packer, 8 Ohio Cir. Ct. 107, 4 Ohio Cir. Dec. 437.

Wisconsin.— Pirie *v.* Stern, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103.

Compare Manufacturers', etc., Bank *v.* St. John, 5 Hill (N. Y.) 497.

29. *Arkansas.*— Pickett *v.* Thurston, 7 Ark. 397.

Illinois.— Conkling *v.* Ridgely, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204.

Iowa.— Grattan *v.* Matteson, 54 Iowa 229, 6 N. W. 298.

Maryland.— Tyrrell *v.* Hilton, 92 Md. 176, 48 Atl. 55.

Missouri.— Finley *v.* Caldwell, 1 Mo. 512.

Pennsylvania.— Reed *v.* Hamet, 4 Watts 441; Ingersoll *v.* Dyott, 1 Miles 245. But the prothonotary can enter judgment only when the amount due appears on the face of the instrument, not when it depends on a condition, the happening of which cannot be ascertained from the instrument. See Richards *v.* Richards, 135 Pa. St. 239, 19 Atl. 1077.

South Carolina.— A judgment upon confession, taken and entered by the clerk, is valid, in the absence of fraud, although it be in his own favor. Moore *v.* Trimmier, 32 S. C. 511, 11 S. E. 548, 552; Trimmier *v.* Winsmith, 23 S. C. 449.

Virginia.— The clerk, acting as a ministerial officer, may enter a judgment by confession against himself. Smith *v.* Mayo, 83 Va. 910, 5 S. E. 276.

See 30 Cent. Dig. tit. "Judgment," § 87. And see CLERKS OF COURT, 7 Cyc. 228 note 54.

Territorial restriction.— A judgment by confession may be entered by any county clerk, and not merely by the clerk employed where the statement authorizing it was filed. Mosher *v.* Heydrick, 30 How. Pr. (N. Y.) 161. But not in a county where the particular court had no jurisdiction. Kirkbride *v.* Durden, 1 Dall. (U. S.) 288, 1 L. ed. 141.

30. Epstein *v.* Ferst, 35 Fla. 498, 17 So. 414.

31. Roundy *v.* Hunt, 24 Ill. 598.

32. Baldwin *v.* Brown, 3 N. J. L. 533. See Edwards *v.* Pitzer, 12 Iowa 607.

33. Crofut *v.* Aldrich, 54 Ill. App. 541.

34. *Alabama.*— Brown *v.* Little, 9 Ala. 416.

Illinois.— Desnoyers Shoe Co. *v.* Litchfield First Nat. Bank, 188 Ill. 312, 58 N. E. 994; Ball *v.* Miller, 38 Ill. 110; Joliet Electric Light, etc., Co. *v.* Ingalls, 23 Ill. App. 45; Anderson *v.* Field, 6 Ill. App. 307; Follansbee *v.* Scottish American Mortg. Co., 5 Ill. App. 17. But a statutory requirement that plaintiff shall prove orally in court that the person granting the power to confess knew that its meaning was to authorize judgment before the note should become due by its terms is not jurisdictional. Bush *v.* Hanson, 70 Ill. 480.

Louisiana.— Lewis *v.* Andrews, 1 Mart. 196.

Michigan.— Elliott *v.* Ives, 44 Mich. 190, 6 N. W. 237.

New Jersey.— Wilkins *v.* Croft, 2 N. J. L. 91.

Pennsylvania.— Maloney *v.* White, 24 Pa. Co. Ct. 23.

See 30 Cent. Dig. tit. "Judgment," § 91.

b. Affidavit Accompanying Warrant or Statement. To evidence the good faith of the transaction and prevent fraud, it is commonly required that the warrant or statement shall be accompanied by an affidavit that the debt is "justly due and owing" or "justly due or to become due." In respect to the form of this affidavit, a substantial compliance with the statute is sufficient, the precise form of words not being essential.[35] And the affidavit is not necessary where defendant files an answer admitting the debt and consenting to the judgment.[36] It is sometimes required that the affidavit shall set forth the true consideration of the bond or other obligation on which the judgment is confessed.[37] But this is not generally necessary where a complaint is filed fully describing the cause of action.[38] This affidavit must be made by plaintiff in person,[39] unless the statute allows it to be made "by some one in his behalf," in which case it may be made by his attorney, provided the affidavit discloses the sources of the attorney's information and gives a reason why it was not made by plaintiff himself.[40]

c. Necessity For Affidavit or Verification. A judgment by confession entered without the filing of the required affidavit to the justness of the debt secured, although erroneous and liable to be set aside, is not absolutely void.[41]

5. Judgment — a. Final or Interlocutory. A judgment entered upon the confession of defendant is in general final and not interlocutory,[42] unless the right to enter the judgment or to issue execution upon it depends upon the happening of a contingency, in which case it is necessary that the court should determine the matter by a final judgment.[43]

35. Edgar *v.* Greer, 7 Iowa 136; Kinyon *v.* Fowler, 10 Mich. 16; Mulford *v.* Stratton, 41 N. J. L. 466; Reading *v.* Reading, 24 N. J. L. 358; Hoyt *v.* Hoyt, 16 N. J. L. 138; Lanning *v.* Carpenter, 20 N. Y. 447.

A statement which does not allege the fact of indebtedness from defendant to plaintiff, either directly or by necessary implication, will not support a judgment by confession. Citizens' Nat. Bank *v.* Allison, 37 Hun (N. Y.) 135.

Negativing payment.— As the affidavit need not go beyond the requirements of the statute, it is not necessary to deny in specific terms that the debt has been paid, released, barred, or discharged. Lanning *v.* Carpenter, 20 N. Y. 447. And see Oppenheimer *v.* Giershofer, 54 Ill. App. 38.

Accommodation indorsement. — The requirement of an affidavit that the debt is "justly due and owing" will prevent an accommodation indorser of notes, secured by bond and warrant of attorney, from entering up judgment before he has paid the notes, although he has assumed their payment, when the payee has not released the maker. Sterling *v.* Fleming, 53 N. J. L. 652, 24 Atl. 1001.

36. Lanier *v.* Blount, (Tex. Civ. App. 1898) 45 S. W. 202.

37. Strong *v.* Gaskill, (N. J. 1891) 59 Atl. 339; Keyes *v.* Smith, 67 N. J. L. 190, 51 Atl. 122; Reading *v.* Reading, 24 N. J. L. 358; Latham *v.* Lawrence, 11 N. J. L. 322; Scudder *v.* Scudder, 10 N. J. L. 340; Sheppard *v.* Sheppard, 10 N. J. L. 250; Burroughs *v.* Condit, 6 N. J. L. 300; Woodward *v.* Cook, 6 N. J. L. 160; Blackwell *v.* Rankin, 7 N. J. Eq. 152.

38. Clouser *v.* March, 15 Ind. 82.

39. Montgomery *v.* Barnett, 8 Tex. 143.

40. Rogers *v.* Cherrier, 75 Wis. 54, 43 N. W. 828; Jewett *v.* Fink, 47 Wis. 446, 2 N. W. 1124.

41. *Indiana.*— Bible *v.* Voris, 141 Ind. 569, 40 N. E. 670; Aldrich *v.* Minard, 12 Ind. 551; McPheeters *v.* Campbell, 5 Ind. 107.

New Jersey.— Vanderveere *v.* Gaston, 24 N. J. L. 818; Wright *v.* Wood, 20 N. J. L. 308; Den *v.* Zellers, 7 N. J. L. 153. *Compare* Clapp *v.* Ely, 27 N. J. L. 555.

Pennsylvania.— Where a judgment has been entered on a warrant of attorney without affidavit or application to the court as required by a rule of court, and execution issued thereon, the court may permit the judgment to stand under a *nunc pro tunc* order granting leave to file an affidavit and make the motion required, and at the same time set aside the execution for the protection of intervening rights. Woods *v.* Woods, 126 Pa. St. 396, 17 Atl. 662.

Texas.— Hopkins *v.* Howard, 12 Tex. 7. *Compare* Flanagan *v.* Bruner, 10 Tex. 257.

Wisconsin.— Reiley *v.* Johnston, 22 Wis. 279.

See 30 Cent. Dig. tit. "Judgment," § 93.

Contra.— Bunn *v.* Gardner, 18 Ill. App. 94 [*affirmed* in 132 Ill. 403, 23 N. E. 1072, 7 L. R. A. 729]; Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

A judgment confessed in open court by warrant of attorney, where the record shows that the court found that the warrant of attorney was proved, is not erroneous, although no affidavit appears to prove the execution of such a warrant. Iglehart *v.* Church, 35 Ill. 255.

42. Johnson *v.* Estabrook, 84 Ill. 75; Huston *v.* Ditto, 20 Md. 305.

43. Bonta *v.* Clay, 1 Litt. (Ky.) 27.

b. Form and Requisites. A judgment rendered upon the confession of defendant should follow closely the cognovit or warrant of attorney,[44] particularly in regard to the parties defendant,[45] and the precise debt or obligation intended to be secured,[46] including any special conditions or stipulations in the warrant of attorney,[47] although it is not considered necessary to recite the warrant at length in the judgment.[48] The judgment must be signed by a judge or court commissioner, if it is so required by the statute,[49] and must otherwise comply, in respect to its form and contents, with the rules governing ordinary judgments.[50]

c. Rendition and Entry. According to the usual practice a judgment upon confession is to be entered by the prothonotary or clerk of the court,[51] who may be constrained to perform his duty in this respect by a rule or motion.[52] Irregularities in the entry of the judgment may be corrected by an entry made *nunc pro tunc*,[53] provided, however, that they are not jurisdictional, for in the latter case the judgment cannot be sustained, even though it should appear that the amount of the judgment was justly due.[54]

d. Time of Entering Judgment[55] — (i) *In General.* Judgment by confession in an action already pending cannot properly be entered before the return-term of the writ,[56] or before the filing of the agreement or warrant to confess judgment.[57] In respect to the day of the term on which the confession may be entered the case is governed by local laws and practice.[58] On a warrant or power

44. Stevens *v.* Dubarry, Minor (Ala.) 379.

45. Dickerson *v.* Kelley, 3 Pennew. (Del.) 69, 50 Atl. 512.

Judgment against administrator see Little *v.* Brannin, 4 N. J. L. 288.

Judgment after death of one defendant see Richardson *v.* Jones, 12 Gratt. (Va.) 53.

Judgment against partnership.— Where a judgment-note has been signed with a firm-name, and does not disclose the names of the individual partners, plaintiff may file a formal declaration against the partnership by its title, naming the individual members, and judgment may thus be confessed and entered by the prothonotary in this form. Myers *v.* Sprenkle, 14 York Leg. Rec. (Pa.) 124.

46. A judgment by confession should express the particular debt for which it is given, so that it may be pleadable in bar of a future demand for the same claim. Wight *v.* Mott, Kirby (Conn.) 152.

Consolidation of claims.— Where several obligations or instalments, all between the same parties and all due, are covered by separate warrants of attorney, or by one warrant authorizing confession of judgment "from time to time," a single judgment may be entered by confession for the gross amount then due. Fortune *v.* Bartolomei, 164 Ill. 51, 45 N. E. 274; Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514; Genestelle *v.* Waugh, 11 Mo. 367; Odell *v.* Reynolds, 70 Fed. 656, 17 C. C. A. 317. But see Adams *v.* Bush, 5 Watts (Pa.) 289.

47. See Flach *v.* Temple, 2 Pennew. (Del.) 129, 45 Atl. 539; Hope *v.* Everhart, 70 Pa. St. 231; Strode *v.* Head, 2 Wash. (Va.) 149.

48. Brown *v.* Little, 9 Ala. 416; Rankin *v.* Filburn, 1 Tex. App. Civ. Cas. § 797.

49. Wadsworth *v.* Willard, 22 Wis. 238; Remington *v.* Cummings, 5 Wis. 138. *Compare* Dullard *v.* Phelan, 83 Iowa 471, 50 N. W. 204, holding that a statutory provision that judgments by confession shall be signed by the judge is merely directory.

50. See Swink *v.* Norwood, 9 Port. (Ala.) 287; Hill *v.* Fiernan, 4 Mo. 316; Humboldt Mill, etc., Co. *v.* Terry, 11 Nev. 237.

51. Johns *v.* Fritchey, 39 Md. 258; Helvete *v.* Rapp, 7 Serg. & R. (Pa.) 306. See also Williams *v.* Atwood, 52 Ga. 585. And see *supra*, II, E, 3.

52. Hall *v.* Moreman, 3 McCord (S. C.) 477.

53. Risser *v.* Martin, 86 Iowa 392, 53 N. W. 270; Wells *v.* Gieseke, 27 Minn. 478, 8 N. W. 380; Wight *v.* Alden, 3 How. Pr. (N. Y.) 213.

54. Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

55. See *supra*, II, B, 6.

56. Haden *v.* Perry, 11 Fed. Cas. No. 5,893, 1 Cranch C. C. 285; Askew *v.* Smith, 2 Fed. Cas. No. 588, 1 Cranch C. C. 159. But *compare* Cruger *v.* Sullivan, 11 Tex. Civ. App. 377, 32 S. W. 448.

Relation back to first day of term.— The rule that judgments of a court of record all relate back to the first day of the term in which they were rendered applies to judgments by confession. Farley *v.* Lea, 20 N. C. 307, 32 Am. Dec. 680.

Not necessary for judge to be in court.— A judgment by confession will not be set aside on the ground that it was in fact entered before the judge took his seat, on the day of its entry, when the record shows that the term had commenced several days prior thereto, and does not show that there was any adjournment. Jasper *v.* Schlesinger, 22 Ill. App. 637 [*affirmed* in 125 Ill. 230, 17 N. E. 718].

57. Snowden *v.* Preston, 73 Md. 261, 20 Atl. 910; Chambers *v.* Denie, 2 Pa. St. 421.

58. See Clouser *v.* March, 15 Ind. 82; Union Bank *v.* Magrath, 2 Speers (S. C.) 302.

of attorney, the judgment may be entered up on the same day on which the confession is given, if permitted by its terms;[59] and on the other hand the warrant does not lose its efficacy because remaining unexecuted for nearly a year,[60] and the statute of limitations does not run against it.[61]

(II) *In Vacation.* By force of statutes existing in most of the states, judgments upon the confession of defendant may be entered in vacation by the clerk of the court without an order or other direction from the judge.[62]

e. Form and Contents of Record. The warrant or power of attorney authorizing a confession of judgment should be filed as a part of the record,[63] but not the note, bond, or other evidence of the debt.[64] In some states it is held that, upon the confession of a judgment in vacation in the clerk's office, the formal writing up of the judgment in the court records is essential, so that execution cannot be issued until this is done.[65] But elsewhere it is considered that the statutory requirements as to the recording of such judgments are merely directory, the statement, affidavit, and other papers accompanying the confession constituting the judgment-roll and serving as the basis for an execution.[66] Where the statute

59. Emly *v.* Eagle, 17 N. J. L. 348; Osborn *v.* Rogers, 112 N. Y. 573, 20 N. E. 365.

60. Curtis *v.* Corbitt, 25 How. Pr. (N. Y.) 58.

61. Spang *v.* Deibler, 2 Dauph. Co. Rep. (Pa.) 406; Morris *v.* Hannick, 31 Leg. Int. (Pa.) 230.

62. *Arkansas.* — Pickett *v.* Thruston, 7 Ark. 397.

Colorado.—A clerk of court has no authority, unless conferred by statute, to enter a judgment in vacation by confession in any cause against a county. Abbott *v.* Yuma County, 18 Colo. 6, 30 Pac. 1031.

Illinois.— Ling *v.* King, 91 Ill. 571; Durham *v.* Brown, 24 Ill. 93; Ottawa First Nat. Bank *v.* Daly, 34 Ill. App. 173; Anderson *v.* Field, 6 Ill. App. 307. During the vacation judgments by confession can be entered only by the clerk. No order or direction from the judge is required; and in fact the judge has no power during the vacation to order the entry of judgments by confession. But during the term such judgments can be entered only in open court. Conkling *v.* Ridgely, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204. And see Pond *v.* Simons, 17 Ind. App. 84, 45 N. E. 48, 46 N. E. 153, construing Illinois statute on this subject.

Iowa.— Kendig *v.* Marble, 58 Iowa 529, 12 N. W. 584. *Compare* Edgar *v.* Greer, 7 Iowa 136.

New Jersey.— Stewart *v.* Walters, 38 N. J. L. 274.

New York.— Arden *v.* Rice, 1 Cai. 498.

North Carolina.— Sharp *v.* Danville, etc., R. Co., 106 N. C. 308, 11 S. E. 530, 19 Am. St. Rep. 533. *Compare* Slocumb *v.* Anderson, 4 N. C. 77.

South Carolina.— Weinges *v.* Cash, 15 S. C. 44.

Wisconsin.— Blaikie *v.* Griswold, 10 Wis. 293.

See 30 Cent. Dig. tit. "Judgment," § 101.

But see Bonnell *v.* Weaver, 3 Fed. Cas. No. 1,639, 5 Biss. 22. And *compare* Miflin *v.* Stalker, 4 Kan. 283; Parker *v.* Lewis, 18 Fed. Cas. No. 10,741*a*, Hempst. 72.

63. *Arkansas.*— Thompson *v.* Foster, 6 Ark. 208.

Illinois.— Roundy *v.* Hunt, 24 Ill. 598; Durham *v.* Brown, 24 Ill. 93.

Ohio.— Knox County Bank *v.* Doty, 9 Ohio St. 505, 75 Am. Dec. 479.

Pennsylvania.— Lytle *v.* Colts, 27 Pa. St. 193.

Texas.— Grubbs *v.* Blum, 62 Tex. 426.

See 30 Cent. Dig. tit. "Judgment," § 102.

Compare Burroughs *v.* Condit, 6 N. J. L. 300.

64. Stern *v.* Mayer, 19 Mo. App. 511; Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

In Pennsylvania it is the rule that the note on which a judgment by confession has been entered by the prothonotary should not be redelivered to plaintiff, but should remain on file as evidence for the authority for the judgment. Fraley's Appeal, 76 Pa. St. 42.

In Tennessee the code requires that the written evidence of the debt shall be filed; but this is held to be merely directory, so that its omission from the record does not invalidate the judgment. Arnold *v.* McCorkle, 6 Baxt. 301.

65. Knights *v.* Martin, 155 Ill. 486, 40 N. E. 358.

66. See *Ex p.* Graham, 54 S. C. 163, 32 S. E. 67; Manning *v.* Dove, 10 Rich. (S. C.) 395; Saunders *v.* Lipscomb, 90 Va. 647, 19 S. E. 450.

Recording in separate book.— Although a judgment by confession is not entered in the records of the ordinary proceedings of the court, but in a separate book called a "record of judgments by confession," it is not for that reason invalid. Brown *v.* Barngrover, 82 Iowa 204, 47 N. W. 1082.

Entry on leave of court.— A judgment on a bond and warrant of attorney can only be entered in the mode directed by the act for that purpose, although ten years have elapsed, and it has become necessary to obtain leave of the court on an affidavit, as required by the Practice Act. Eakin *v.* Smith, 21 N. J. L. 97.

requires plaintiff to file a sworn statement and directs the clerk to indorse the judgment upon the statement and to enter it in the judgment book, the two entries are deemed to have the force of duplicate originals, and the omission of one, the other being duly made, is an irregularity which will not avoid the judgment.[67] The record of a confessed judgment should show that the execution of the warrant or power of attorney was duly proved,[68] but need not include matters of evidence or other details not affecting the jurisdiction of the court.[69]

6. AMOUNT OF RECOVERY — a. In General. The judgment, in order that it may be valid, must be for such an amount as is authorized by the warrant of attorney upon which it is based.[70] But upon confession of judgment in a pending action, if plaintiff's demand is in the nature of a debt the amount of which may be ascertained by calculation, it is sufficient to enter judgment generally, the judgment in such case being supposed to be for the amount of damages laid in the declaration.[71] If the judgment entered on a warrant of attorney includes a greater sum than was actually confessed, it is held to be void only as to the excess, not *in toto*, unless the excess was fraudulently included.[72] The judgment

67. Wells *v.* Gieseke, 27 Minn. 478, 8 N. W. 380; King *v.* Higgins, 3 Oreg. 406.

68. Rapley *v.* Price, 9 Ark. 428; Gambia *v.* Howe, 8 Blackf. (Ind.) 133; Montelius *v.* Montelius, Brightly (Pa.) 79.

Where a judgment is confessed in open court, the evidence of the execution of the warrant of attorney before the confession of the judgment need not appear on the record. Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514.

69. Osgood *v.* Blackmore, 59 Ill. 261 (evidence need not be preserved in record); Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514 (where the warrant authorizes any attorney at law to confess a judgment, it is not necessary for the record to show that judgment was confessed by an attorney at law).

Trust for creditors.— Where the judgment is confessed for the benefit of plaintiff, and also for the benefit of certain other creditors of defendant, it is no objection to its validity, at the suit of other creditors who may be affected by it, that the trust does not appear upon the record. Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

Contingency authorizing entry. — Where the warrant of attorney for the confession of judgment was to be executed only upon a certain contingency, it must appear from the record that the event contemplated has occurred. Roundy *v.* Hunt, 24 Ill. 598.

70. Cobb *v.* Yetter, 4 Pa. Co. Ct. 293. And see Connay *v.* Halstead, 73 Pa. St. 354.

Rent.— Where the warrant authorizes a confession of judgment for any rent due by the terms of a lease which fixes the amount of rent, a judgment in accordance with such power may properly be entered, although the lease also binds the lessee to pay damages for waste of water and other items, thereby rendering the amount due, aside from the rent, uncertain. Scott *v.* Mantonya, 60 Ill. App. 481.

Future advances.— A confession of judgment to cover future advances is valid; but if the creditor gives a statement of the amount then due, to enable defendant to borrow from another, he is estopped from claiming beyond that amount. Ter-Hoven *v.* Kerns, 2 Pa. St. 96.

Penalty of bond.— Where a bond, with warrant of attorney, is made in a certain penal sum, to be void on payment of half that amount under certain circumstances, judgment may be entered for the penalty of the bond, it being for the obligor to show any payment that may have been made, and have the judgment corrected accordingly. Latrobe Bldg., etc., Assoc. *v.* Fritz, 152 Pa. St. 224, 25 Atl. 558. So a judgment entered for the amount of the penalty, in pursuance of the express direction of the warrant, is not illegal, although a part of the real debt had already been collected by foreclosure of a mortgage given for the same debt. Earl *v.* Jenkins, 71 N. J. L. 416, 58 Atl. 1086.

Partial confession.— A defendant who has filed a partial confession of judgment may be compelled to furnish particulars of the items of plaintiff's account which are covered by such confession. Lafortune *v.* Joliette, 2 Quebec Pr. 24.

71. Latrobe Bldg., etc., Assoc. *v.* Fritz, 152 Pa. St. 224, 25 Atl. 558. And see McMechen *v.* Baltimore, 2 Harr. & J. (Md.) 41. But *compare* Vanderveer *v.* Ingleton, 7 N. J. L. 140.

72. Gayle *v.* Foster, Minor (Ala.) 125; McElrath *v.* Dupuy, 2 La. Ann. 520; Davenport *v.* Wright, 51 Pa. St. 292. *Compare* Tucker *v.* Gill, 61 Ill. 236.

Fraud.— A judgment confessed on a note given as security for indorsements is not fraudulent because confessed for more than the amount of the notes indorsed, the party not having at hand at the time the means of determining their amount, and nothing more than was due ever having been claimed or received on the judgment. Page *v.* Simpson, 188 Pa. St. 393, 41 Atl. 638.

Amount indorsed on process. — Judgment by confession may be for a larger sum than is indorsed on the process. Hunt *v.* Shivers, 4 N. J. L. 89. And see Lewis *v.* Smith, 2 Serg. & R. (Pa.) 142.

may also include interest on plaintiff's demand, if that is warranted by the terms of the confession.[73]

b. Liquidation by Court or Clerk. Where the confession of judgment does not determine the extent of the recovery, and it is not ascertainable by mere calculation, it must be liquidated by the court,[74] but if it is simply a matter of calculation, this may be done by the clerk.[75]

c. Costs and Attorney's Fees. A judgment by confession may ordinarily include plaintiff's costs,[76] and also a fee for his attorney, if that is authorized by the terms of the warrant or confession.[77] A stipulation in the warrant for such a fee rests upon a valid consideration and is not fraudulent as to other creditors,[78] unless the amount specified is grossly excessive, in which case the judgment is voidable as against other creditors, at least to the extent of such fee.[79] If the amount is not fixed, but the stipulation is for a "reasonable attorney's fee," it is for the court, not for the attorney himself, to determine what is a reasonable fee, and this contemplates a judicial proceeding by the court to determine the amount to be allowed. Hence if the attorney fixes the amount of his fee and confesses judgment for the whole amount, without the intervention of the court, the judgment is void.[80]

F. Construction and Operation of Judgment — 1. In General. A judgment upon confession, whether entered upon a warrant of attorney, or in open court upon a cognovit, is the act of the court, and until it is reversed or set aside, it has all the qualities and effects of a judgment on a verdict.[81] At the same time it is the act of the parties also, and binding upon them as their voluntary settle-

73. See Cordray *v.* Galveston, (Tex. Civ. App. 1894) 26 S. W. 245; Chouinard *v.* Bernier, 11 Quebec Super. Ct. 121.

Excessive or unclaimed interest.— Judgment on a note is not vitiated because confessed for a greater rate of interest than the note bears (Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765), nor because the prothonotary made an entry for interest from the date of the note no claim for interest having been made by plaintiff, and none ever received by him on the judgment (Page *v.* Simpson, 188 Pa. St. 393, 41 Atl. 638).

74. Bonta *v.* Clay, 1 Litt. (Ky.) 27; Lewis *v.* Bonnert, 2 Pa. Dist. 698, 12 Pa. Co. Ct. 366; Church *v.* Given, 39 Leg. Int. (Pa.) 168; Dunbar *v.* Lindenberger, 3 Munf. (Va.) 169.

75. Connay *v.* Halstead, 73 Pa. St. 354; Hope *v.* Everhart, 70 Pa. St. 231; Yanyo *v.* Leizerowitz, 8 Del. Co. (Pa.) 107, 18 Lanc. L. Rev. 1.

Delay in liquidation.— This duty must be performed by the clerk without unnecessary delay. Where a judgment was confessed "amount to be ascertained by the prothonotary," and no amount was ascertained for fourteen years, and plaintiff and principal defendant were dead, the court refused to make an order for ascertaining the amount against the surety. Cook *v.* Cooper, 4 Harr. (Del.) 189.

76. See Yeldell *v.* State, 100 Ala. 26, 14 So. 570, 46 Am. St. Rep. 20; Johnson *v.* Sutliff, 17 Nebr. 423, 23 N. W. 9; Eakin *v.* Smith, 21 N. J. L. 97; Second Ward Sav. Bank *v.* Schranck, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569. And see Costs, 11 Cyc. 71.

Tender.— Where defendant brings into court the amount due for debt and costs, before the expiration of the time to answer, but without having answered, costs will be taxed as in case of a bill taken as confessed. Anonymous, Clarke (N. Y.) 531.

Effect on costs of confession for sum below jurisdiction of court see Stranghellan *v.* Ward, 16 Phila. (Pa.) 134.

77. Ball *v.* Miller, 38 Ill. 110; Kellogg *v.* Keith, 4 Ill. App. 386; Sweeney *v.* Stroud, 55 N. J. L. 97, 25 Atl. 273; Schmidt's Appeal, 82 Pa. St. 524; Clarkson *v.* States, 13 Pa. Co. Ct. 56; Lemon *v.* Longabaugh, 4 Pa. Co. Ct. 546; Focht *v.* Longabaugh, 5 Lanc. L. Rev. (Pa.) 41; *In re* Quickel, 11 York Leg. Rec. (Pa.) 150. But see Martin *v.* Belmont Bank, 13 Ohio 250.

Insolvency as defense.— The maker of a note authorizing judgment by confession and the payment of attorney's fees cannot question the attorney's fees on the ground that he was insolvent when he made the note. Blanck *v.* Medley, 63 Ill. App. 211.

Fees not earned. — The attorney's fees authorized in a judgment note cannot be collected as part of the debt due, when the debtor was ready to pay at the maturity of the note and did not dispute the claim. Moore's Appeal, 110 Pa. St. 433, 1 Atl. 593.

78. Weigley *v.* Matson, 24 Ill. App. 178 [*affirmed* in 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335].

79. Hulse *v.* Mershon, 125 Ill. 52, 17 N. E. 50. And see Sweeney *v.* Stroud, 55 N. J. L. 97, 25 Atl. 273.

80. Campbell *v.* Goddard, 117 Ill. 251, 7 N. E. 640, 123 Ill. 220, 14 N. E. 261.

81. St. Bartholomew's Church *v.* Wood, 61

ment.[82] And if the judgment is confessed upon terms duly entered, it is in effect a conditional judgment, and the court will take notice of the terms and enforce them,[83] and also in a proper case restrict the security of the judgment to the debt or claim actually intended to be secured.[84] The judgment will also operate as a release or waiver of errors not going to the jurisdiction;[85] but it will not preclude the creditor from pursuing other remedies for the collection of the same debt,[86] or discharge sureties or indorsers who are not parties thereto.[87] If the confession of judgment is void, it is not sufficient consideration to support a mortgage made to secure its payment.[88]

2. CONCLUSIVENESS. A judgment upon confession is as conclusive, between the parties and their privies, of the facts and points involved in and determined by it, and as final a bar to the maintenance by the creditor of another suit for the same demand as any other judgment.[89]

3. PRESUMPTIONS SUPPORTING JUDGMENT. A judgment upon confession, entered in a court having jurisdiction, is supported by the same presumptions in respect to the regularity of the proceedings, the sufficiency of the pleadings and evidence, and other matters essential to its validity, as a judgment in a contested action.[90]

4. VALIDITY — a. In General. A judgment entered upon the confession of defendant may be impeached for fraud by other creditors whose rights or remedies are affected by it,[91] although, if no fraud or deception was practised on the debtor, it is binding as between the original parties.[92] As to the proceedings in entering or confessing the judgment, although there are some decisions to the effect that a judgment which does not conform to the requirements of the statute is absolutely void,[93] the better rule appears to be that if there has been an attempt to comply in all respects with the law, the judgment is at most only voidable at the instance of creditors, although the execution of such attempt be informal or defective; but the total omission of any of the steps prescribed by the statute will

Pa. St. 96; Braddee *v.* Brownfield, 4 Watts (Pa.) 474.

Time of entry.— When a judgment by confession purports to have been entered in open court in term-time, it cannot, in the absence of fraud, be shown that the contrary is the fact. Weigley *v.* Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335.

82. Payne *v.* Furlow, 29 La. Ann. 160.

Confession of judgment as a voluntary transfer see ATTACHMENT, 4 Cyc. 417 note 19.

83. See Huston *v.* Ditto, 20 Md. 305; Wood *v.* Bagley, 34 N. C. 83; Damon *v.* Bache, 55 Pa. St. 67, 93 Am. Dec. 730.

84. See Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158; Lloyd *v.* Whitley, 59 N. C. 316; *In re* Legare, 2 Hill (S. C.) 600; Moore *v.* Union Mut. L. Ins. Co., 17 Fed. Cas. No. 9,777.

85. Battelle *v.* Bridgman, Morr. (Iowa) 363; Triplett *v.* Waring, 5 Dana (Ky.) 448.

86. Clawson *v.* Eichbaum, 2 Grant (Pa.) 130.

87. Washington First Nat. Bank *v.* Eureka Lumber Co., 123 N. C. 24, 31 S. E. 348.

88. Austin *v.* Grant, 1 Mich. 490.

89. McDowall *v.* Branham, 2 Nott & M. (S. C.) 572; 2 Black Judgm. § 508. And see *infra*, XIV, A, 4, b.

Strangers to a judgment by confession are not concluded by its date nor by its recitals. Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505.

Other creditors secured.— Where a judgment has been confessed in favor of one creditor, intended also to secure the claims of certain other creditors, it operates as a merger of the debt due the former; but with regard to the others, it is a mere collateral security, and leaves them at liberty to prosecute any remedy which they might have sought previous to the judgment. Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

90. Johnson *v.* Berizheimer, 84 Ill. 54, 25 Am. Rep. 427; Bush *v.* Hanson, 70 Ill. 480; Hall *v.* Jones, 32 Ill. 38; Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790; Hays *v.* Com., 14 Pa. St. 39; Miller *v.* Alexander, 8 Tex. 36. And see Roundy *v.* Hunt, 24 Ill. 598, holding that where a judgment by confession is entered in open court it is presumed to be the judgment of the court, but when it is entered by the clerk in vacation, the presumption does not apply. But *compare* Patterson *v.* Pyle, (Pa. 1889) 17 Atl. 6.

91. Hanchett *v.* Kimbark, 118 Ill. 121, 7 N. E. 491; Karnes *v.* Lloyd, 52 Ill. 113; Sponsler's Appeal, 127 Pa. St. 410, 17 Atl. 1097.

92. Crim *v.* Crim, 162 Mo. 544, 63 S. W. 489, 85 Am. St. Rep. 521, 54 L. R. A. 502; Pottinger *v.* Hecksher, 2 Grant (Pa.) 309; Stone *v.* Duncan, 1 Head (Tenn.) 103.

93. Edgar *v.* Greer, 10 Iowa 279; Utah Nat. Bank *v.* Sears, 13 Utah 172, 44 Pac. 832. And see Ainsworth *v.* Mobile Fruit, etc., Co., 102 Ga. 123, 29 S. E. 142.

render the judgment entirely inoperative and void.[94] Where the statute provides that there shall be filed with a confession of judgment a statement of the facts out of which the indebtedness arose,[95] it has been held that the filing of a defective or insufficient statement will not render the judgment void as between the parties; as against other creditors it raises a presumption of fraud, and they may attack it on this ground;[96] but plaintiff may sustain his judgment by proving that it is fair, and not fraudulent or collusive, and warranted by the facts actually existing, although such facts were not included in the statement.[97]

b. Estoppel to Deny Validity. A defendant confessing judgment is estopped to question its validity on account of irregularities to which he did not object, or to dispute any facts set forth in the confession or the accompanying statement,[98] or to set up any claims or defenses which might have been presented in opposition to plaintiff's action,[99] and if, after the entry of the judgment, he ratifies or accepts it, or acquiesces in it, he is estopped to deny the authority on which it was confessed or otherwise to impeach its validity.[1]

G. Opening or Vacating Judgment — 1. Jurisdiction and Authority of Court. While a judgment by confession operates as a release of errors, and therefore cannot ordinarily be carried up by appeal or certiorari,[2] yet courts of law exercise an equitable jurisdiction over judgments entered in this way, and

94. Oppenheimer *v.* Giershofer, 54 Ill. App. 38; Sheldon *v.* Stryker, 34 Barb. (N. Y.) 116; Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765; Bacon *v.* Reybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

Want of affidavit.— The omission to make and file the affidavit required by the statute that the debt is justly due and owing does not invalidate the judgment as between the parties, although it is cause for other creditors to impeach its validity. Gardner *v.* Bunn, (Ill. 1888) 21 N. E. 614; Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790; Chapin *v.* McLaren, 105 Ind. 563, 5 N. E. 688; Mavity *v.* Eastridge, 67 Ind. 211; Dean *v.* Thacher, 32 N. J. L. 470; Stone *v.* Williams, 40 Barb. (N. Y.) 322.

95. See *supra*, II, C, 1.

96. *California.*— Pond *v.* Davenport, 44 Cal. 481; Lee *v.* Figg, 37 Cal. 328, 99 Am. Dec. 271; Richards *v.* McMillan, 6 Cal. 419, 65 Am. Dec. 521.

Illinois.— Boyles *v.* Chytraus, 175 Ill. 370. 51 N. E. 563; Krickow *v.* Pennsylvania Tar Mfg. Co., 87 Ill. App. 653.

Iowa.— Plummer *v.* Douglas, 14 Iowa 69, 81 Am. Dec. 456.

Minnesota.— Coolbaugh *v.* Roemer, 30 Minn. 424, 15 N. W. 869.

Missouri.— Hard *v.* Foster, 98 Mo. 297, 11 S. W. 760; How *v.* Dorscheimer, 31 Mo. 349; Bryan *v.* Miller, 28 Mo. 32, 75 Am. Dec. 107.

New York.— Kirby *v.* Fitzgerald, 31 N. Y. 417; Ely *v.* Cooke, 28 N. Y. 365; Read *v.* French, 28 N. Y. 285; Neushaum *v.* Keim, 24 N. Y. 325; Miller *v.* Earle, 24 N. Y. 110; Bradley *v.* Glass, 20 N. Y. App. Div. 200, 46 N. Y. Suppl. 790; Crouse *v.* Johnson, 65 Hun 337. 20 N. Y. Suppl. 177; Winnebrenner *v.* Edgerton, 30 Barb. (N. Y.) 185; James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475.

South Carolina.— Woods *v.* Bryan, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688.

Utah.— Bacon *v.* Raybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

Virginia.— Shadrack *v.* Woolfolk, 32 Gratt. 707.

United States.— *In re* Fuller, 9 Fed. Cas. No. 5,148, 1 Sawy. 243. *Compare* French *v.* Edwards, 9 Fed. Cas. No. 5,098, 5 Sawy. 266.

See 30 Cent. Dig. tit. "Judgment," § 107.

97. Cordier *v.* Schloss, 18 Cal. 576; Richards *v.* McMillan, 6 Cal. 419, 65 Am. Dec. 521; Bacon *v.* Raybould, 4 Utah 357, 10 Pac. 481, 11 Pac. 510.

98. Burchett *v.* Casady, 18 Iowa 342; Plummer *v.* Douglas, 14 Iowa 69, 81 Am. Dec. 456; Peace *v.* Mangum, 28 N. C. 369; Trimmier *v.* Winsmith, 23 S. C. 449; Martin *v.* Powie, Riley (S. C.) 236. *Compare* Niven's Case, 5 City Hall Rec. (N. Y.) 79.

99. Troxel *v.* Clark, 9 Iowa 201. *Compare* Coffin *v.* Stonebrenner, 1 Lehigh Val. L. Rep. (Pa.) 93, holding that this rule does not apply as against a set-off to the whole or a part of plaintiff's claim.

1. Giddens *v.* Crenshaw County, 74 Ala. 471; Saffold *v.* Foster, 74 Ga. 751; Maraist *v.* Caillier, 30 La. Ann. 1087; Mattes *v.* Mock, 2 Leg. Rec. (Pa.) 141; Lebo *v.* Oxenrider, 1 Woodw. (Pa.) 432.

2. See Wilson *v.* Collins, 9 Ala. 127; Krickow *v.* Pennsylvania Tar Mfg. Co., 87 Ill. App. 653; Garner *v.* Burleson, 26 Tex. 348; Mandeville *v.* Holcy, 1 Pet. (U. S.) 136, 7 L. ed. 85.

Errors of substance.— A confession of judgment, although a waiver of formal errors, does not prevent defendant from procuring the reversal of the judgment for errors of substance. Kennedy *v.* Lowe, 9 Iowa 580; Battelle *v.* Bridgman, Morr. (Iowa) 363; Parker *v.* Griggs, 4 N. J. L. 161; Portage Canal, etc., Co. *v.* Crittenden, 17 Ohio 436;

have power, in the exercise of a sound discretion, to open, vacate, or set aside such a judgment for good cause shown.[3]

2. TIME FOR APPLICATION. A judgment by confession may be opened or vacated on motion during the term at which it was entered,[4] or after the end of the term, unless this is expressly forbidden by the statute.[5] Generally there is no limitation of time for exercising the equitable power of the court to open or set aside a confessed judgment;[6] but such applications, when made after such an unreasonable delay on defendant's part as to make him chargeable with laches, are viewed with great disfavor, and will not be granted except on very strong grounds.[7]

3. WHO MAY APPLY. An application to vacate or set aside a judgment by confession may be made by defendant himself,[8] or by a junior judgment

Hopkins *v.* Howard, 12 Tex. 7; Montgomery *v.* Barnett, 8 Tex. 143.

3. *Illinois.*— Baragwanath *v.* Lasher, 203 Ill. 247, 67 N. E. 781; Earll *v.* Chicago, 136 Ill. 277, 26 N. E. 370; Norton *v.* Allen, 69 Ill. 306; Lake *v.* Cook, 15 Ill. 353; Parker *v.* Crilly, 113 Ill. App. 309; Kloeckner *v.* Schafer, 110 Ill. App. 391; Coergen *v.* Schmidt, 69 Ill. App. 538; Jordan *v.* Huntington, 58 Ill. App. 646; Seaver *v.* Siegel, 54 Ill. App. 632; Uhlendorf *v.* Kaufman, 41 Ill. App. 373; Campbell *v.* Goddard, 17 Ill. App. 382; Walker *v.* Ensign, 1 Ill. App. 113.

Ohio.— Knox County Bank *v.* Doty, 9 Ohio St. 505, 75 Am. Dec. 479.

Oregon.— Miller *v.* British Columbia Bank, 2 Oreg. 291.

Pennsylvania.— Cruzan *v.* Hutchison, 210 Pa. St. 88, 59 Atl. 485; Howie *v.* Lewis, 196 Pa. St. 558, 46 Atl. 850; Wilson *v.* Cox, 170 Pa. St. 331, 33 Atl. 79; Duane *v.* Addicks, 155 Pa. St. 124, 25 Atl. 895; Philadelphia *v.* Weaver, 155 Pa. St. 74, 25 Atl. 876; Earnest *v.* Hoskins, 100 Pa. St. 551; Earley's Appeal, 90 Pa. St. 321; McAllister's Appeal, 59 Pa. St. 204; Flanigen *v.* Philadelphia, 51 Pa. St. 491; Hutchinson *v.* Ledlie, 36 Pa. St. 112; Bunce *v.* Wightman, 29 Pa. St. 335; Kellogg *v.* Krauser, 14 Serg. & R. 137, 16 Am. Dec. 480; Roenigk's Appeal, 1 Pa. Cas. 284, 3 Atl. 99; Keeler *v.* De Witt, 24 Pa. Super. Ct. 463; Fryberger *v.* Motter, 24 Pa. Super. Ct. 317; Wilkinson *v.* Becker, 12 Montg. Co. Rep. (Pa.) 29; Malone *v.* Philadelphia, etc., R. Co., 2 Pa. L. J. 385. But a judgment entered on a judgment note cannot be stricken off on motion, where it was regular in every respect, was intended to be entered of record, and there was no breach of faith or contract on the part of plaintiff in so doing. Heist *v.* Tobias, 182 Pa. St. 442, 38 Atl. 579.

Wisconsin.—Milwaukee Second Ward Sav. Bank *v.* Schrank, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569; McCabe *v.* Sumner, 40 Wis. 386; Brown *v.* Parker, 28 Wis. 21.

See 30 Cent. Dig. tit. "Judgment," §§ 109, 110.

Relief granted by court where judgment confessed.— Judgment upon a warrant of attorney having been obtained in a municipal court, and docketed in the circuit court, the latter has no jurisdiction to set aside the judgment, the former being a court of record with full power to grant relief. Coon *v.* Seymour, 71 Wis. 340, 37 N. W. 243.

Joint defendants.— Whether a judgment against two persons, entered on a warrant of attorney, may be set aside as to one of them and stand good as to the other, is an unsettled point. It depends upon whether, in the particular state, a joint judgment is considered as an entirety or as severable. See Chapin *v.* Thompson, 20 Cal. 681; North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441; Reynolds *v.* Silvers, 17 N. J. L. 275; Darragh *v.* Bigger, 172 Pa. St. 89, 33 Atl. 273; York Bank's Appeal, 36 Pa. St. 458.

4. Bolton *v.* McKinley, 22 Ill. 203.

5. *Illinois.*— Burwell *v.* Orr, 84 Ill. 465; Wyman *v.* Yeomans, 84 Ill. 403; Austin *v.* Lott, 28 Ill. 519; Kingman *v.* Reinemer, 58 Ill. App. 173; Heeney *v.* Alcock, 9 Ill. App. 431.

Ohio.— Fox *v.* Lima Nat. Bank, 11 Ohio Dec. (Reprint) 127, 15 Cinc. L. Bul. 28; Wheeler *v.* White, 2 Ohio Dec. (Reprint) 584, 4 West. L. Month. 110.

Pennsylvania.— Silberman *v.* Shulausky, 16 Pa. Co. Ct. 131.

South Carolina.— *Ex p.* Carroll, 17 S. C. 446.

Virginia.— Virginia Valley Ins. Co. *v.* Barley, 16 Gratt. 363.

See 30 Cent. Dig. tit. "Judgment," § 111.

6. King *v.* Brooks, 72 Pa. St. 363. And see Manufacturers', etc., Bank *v.* Boyd, 3 Den. (N. Y.) 257.

7. Parish *v.* McLeod, 73 Ga. 123; Hall *v.* Jones, 32 Ill. 38; Applebee's Appeal, 126 Pa. St. 385, 17 Atl. 672.

Delay by advice of counsel.— Where a defendant in a confessed judgment alleges that his name was forged to the judgment note, his delay for one year after judgment before taking steps to open it may be explained by defendant as the result of his obedience to the advice of counsel. Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

8. Reading *v.* Reading, 24 N. J. L. 358; Taliaferro *v.* Herring, 10 Humphr. (Tenn.) 272; Montgomery *v.* Barnett, 8 Tex. 143.

Joint defendants.— The court may open the judgment on the application of any defendant having a meritorious defense to the cause of action on which it was rendered, whether his co-defendants do or do not join him in such application. Custer *v.* Harmon,

creditor,[9] or a creditor who has levied an attachment,[10] or according to the doctrine in some states by any general creditor of the judgment defendant,[11] or by a person who claims property levied on under execution issued on such judgment;[12] but not, it appears, by one who merely claims an interest, by purchase or otherwise, in land which is subject to the lien of the judgment.[13]

4. Form and Requisites of Application. An application to open or set aside a judgment by confession should be made by motion, and if on behalf of defendant should recite that the claim was unjust and that the judgment ought not to have been confessed, or otherwise show a meritorious defense to the action,[14] as well as the specific ground on which the application is based;[15] and if on behalf of creditors it should allege fraud or collusion between the parties and consequent injury to the applicants' rights.[16]

5. Grounds For Opening or Vacating — a. In General. Where a judgment by confession is entirely void for want of jurisdiction, the court may vacate it without regard to the question whether defendant has a good defense to the claim on which it was based.[17] But otherwise an application of this kind being addressed to the equitable power of the court, it will not be granted unless defendant shows that he has a meritorious defense to the cause of action, or has suffered injustice by the entry of the judgment, or in any case where the court believes that, in an action on the debt or claim judgment ought to go against him; and hence it will not be sufficient for him to point out mere technical errors or irregularities.[18] But it is held to be good ground for opening or vacat-

105 Ill. App. 76. And see Knox County Bank *v.* Doty, 9 Ohio St. 505, 75 Am. Dec. 479.

9. *Iowa.*— Bernard *v.* Douglas, 10 Iowa 370.

Missouri.— How *v.* Dorscheimer, 31 Mo. 349; Bryant *v.* Harding, 29 Mo. 347. But a judgment confessed by several defendants will not be set aside on the motion of a creditor who has recovered judgment against some of defendants only. Powell *v.* January, 35 Mo. 134.

New York.— Utter *v.* McLean, 53 Hun 568, 6 N. Y. Suppl. 281; Butler *v.* Lewis Ct. C. Pl., 10 Wend. 541; Frasier *v.* Frasier, 9 Johns. 80. But a judgment by confession, although entered on a defective statement, will not be set aside on the motion of a creditor whose judgment is also entered on a defective statement. Rae *v.* Lawser, 9 Abb. Pr. 380 note.

South Carolina.— *Ex p.* Carroll, 17 S. C. 446; Townsend *v.* Meetze, 4 Rich. 510.

Wisconsin.— Thompson *v.* Hintgen, 11 Wis. 112.

See 30 Cent. Dig. tit. "Judgment," § 115.

Contra.— Arrington *v.* Sherry, 5 Cal. 513.

10. Scales *v.* Scott, 13 Cal. 76. See Burtis *v.* Dickinson, 81 Hun (N. Y.) 343, 30 N. Y. Suppl. 886.

11. Norris *v.* Denton, 30 Barb. (N. Y.) 117; Bach *v.* Morley, 1 Lehigh Val. L. Rep. (Pa.) 58. But *compare* Wintringham *v.* Wintringham, 20 Johns (N. Y.) 296; Williams *v.* Robertson, 3 Pittsb. (Pa.) 32.

12. Howell *v.* Gordon, 40 Ga. 302.

13. McLaughlin *v.* Zeidler, 13 Pa. Co. Ct. 47; Packard *v.* Smith, 9 Wis. 184.

14. Arrington *v.* Sherry, 5 Cal. 513.

15. Anderson *v.* Best, 176 Pa. St. 498, 35 Atl. 194.

16. Grazebrook *v.* McCreedie, 9 Wend. (N. Y.) 437; Winnebrenner *v.* Edgerton, 30 Barb. (N. Y.) 185.

17. Desnoyers Shoe Co. *v.* Litchfield First Nat. Bank, 188 Ill. 312, 58 N. E. 994. See Kelly *v.* Lyons, 40 La. Ann. 498, 4 So. 480; Lytle *v.* Colts, 27 Pa. St. 193; *Ex p.* Ware Furniture Co., 49 S. C. 20, 27 S. E. 9.

18. *Illinois.*— Whalen *v.* Billings, 104 Ill. App. 281; Pearce *v.* Miller, 99 Ill. App. 424.

Iowa.— Edgard *v.* Greer, 7 Iowa 136.

Maryland.— Tyrrell *v.* Hilton, 92 Md. 176, 48 Atl. 55.

New Jersey.— Gottry *v.* Ruckman, 3 N. J. L. 427.

New York.— Sebring *v.* Rathbun, 1 Johns. Cas. 331.

Ohio.— Pomeroy *v.* Drake, 2 Ohio Dec. (Reprint) 67, 1 West. L. Month. 282.

Pennsylvania.— Division No. 168 A. A. of S. R. E. of A. *v.* Keller, 23 Pa. Super. Ct. 135.

Wisconsin.— Van Steenwyck *v.* Sackett, 17 Wis. 645.

United States.— Hyer *v.* Hyatt, 12 Fed. Cas. No. 6,976, 2 Cranch C. C. 633; McCandless *v.* McCord, 15 Fed. Cas. No. 8,678, 4 Cranch C. C. 533.

See 30 Cent. Dig. tit. "Judgment," § 116.

Applications of text.— Where county officers are sued upon a warrant drawn by them on account of a just debt, and confess judgment therefor, such judgment will not be stricken off at the suit of a taxpayer on the mere technicality that the action should have been brought on the original debt. Maneval *v.* Jackson Tp., 141 Pa. St. 426, 21 Atl. 672. So where the indorsee of a negotiable note described himself as the payee's assignee, it was held, on a motion to set aside a judgment by confession, that this was a mere *descriptio personæ*, and therefore did not in-

ing the judgment that defendant's signature to the confession or warrant of attorney was forged,[19] that his name was never signed by him or by any one authorized to sign it for him,[20] or that the attorney who assumed to appear for him and confess the judgment had no authority to do so.[21] And a material alteration in the judgment note may also be ground for opening the judgment.[22] The judgment may be opened on showing a want of consideration for the note, bond, or other obligation on which it was entered,[23] or a failure of such consideration,[24] or that the consideration was illegal or immoral,[25] or where it appears that the debt had already been paid or otherwise released or discharged,[26] or was subject to credits or counter-claims for which no allowance was made,[27] or to the defense of usury,[28] or that plaintiff has broken an agreement with defendant as to entering up or enforcing the judgment.[29] Ground for vacating the judgment may also be found in the death of defendant before entry of the judgment,[30] or his personal

validate the judgment. Blaikie *v.* Griswold, 10 Wis. 293. Nor will a judgment on a judgment note be stricken off because the note lacked an agreement stamp, if it was otherwise duly stamped as an instrument for the payment of money. Williams *v.* Robertson, 3 Pittsb. (Pa.) 32. On the other hand where a judgment by confession is taken without filing the original warrant or a copy thereof, as provided by the statute, the judgment may be set aside on motion. Knox County Bank *v.* Doty, 9 Ohio St. 505, 75 Am. Dec. 479.

19. Schomaker *v.* Dean, 201 Pa. St. 439, 50 Atl. 923; Darragh *v.* Bigger, 172 Pa. St. 89, 33 Atl. 273; Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Humphreys *v.* Rawn, 8 Watts (Pa.) 78.

20. Charles D. Kaier Co. *v.* O'Brien, 202 Pa. St. 153, 51 Atl. 760.

21. Dobbins *v.* Dupree, 36 Ga. 108; Foley *v.* Gatliff, 43 S. W. 190, 19 Ky. L. Rep. 1103; Cyphert *v.* McClune, 22 Pa. St. 195; Sherman *v.* Brenner, 1 Wkly. Notes Cas. (Pa.) 193. *Compare* Hansen *v.* Schlesinger, 125 Ill. 230, 17 N. E. 718 (holding that the mere fact that the attorney, otherwise duly empowered, waived defendant's right of appeal, which the warrant gave him no authority to do, is not ground for setting aside the judgment); Purcell *v.* Kleaver, 98 Wis. 102, 73 N. W. 322 (holding that a judgment which is admitted to be just will not be set aside in equity for the mere reason that the attorney confessing it under a warrant was not formally admitted to practice in the court where the judgment was taken).

22. Saunders *v.* Baldwin, 23 Pa. Co. Ct. 10.

23. Woodward *v.* Carson, 208 Pa. St. 144, 57 Atl. 342; Duquesne Brewing Co. *v.* Thomas, 207 Pa. St. 202, 56 Atl. 421; McMahon *v.* McMahon, 203 Pa. St. 16, 52 Atl. 17; Herman *v.* Potamkin, 24 Pa. Super. Ct. 11; Cooke *v.* Edwards, 9 Pa. Dist. 182; Grayhill *v.* Neiman, 13 York Leg. Rec. (Pa.) 77. But see Weigley *v.* Conrade, 132 Pa. St. 147, 19 Atl. 58; Woodring *v.* Woodring, 11 Pa. Co. Ct. 603.

24. Anderson *v.* Best, 176 Pa. St. 498, 35 Atl. 194; Wilson's Appeal, 109 Pa. St. 606, 7 Atl. 88; Dodds *v.* Dodds, 9 Pa. St. 315; Bunnell *v.* Bacon, 6 Lanc. L. Rev. (Pa.) 33; Staub *v.* Weaver, 30 Pittsb. Leg. J. (Pa.) 315. And see Dutton *v.* Suplee, 8 Pa. Co. Ct. 92.

Breach of warranty.— Where the purchaser of a chattel gives his judgment-note for the price, on which a judgment is entered up, he may have it opened on showing a breach of the warranty given by the seller as to the quality or utility of the chattel. Keist *v.* Kingman, 36 Ill. App. 489; McCormick Harvesting Mach. Co. *v.* Smith, 9 Kulp (Pa.) 448.

Judgment for price of land.— A dispute as to the title of land is not cause for opening a judgment given for purchase-money, unless there has been an eviction by paramount title. The remedy of defendant is an action on the agreement. Bartolette *v.* Schauble, 2 Leg. Rec. (Pa.) 268.

25. Fields *v.* Brown, 188 Ill. 111, 58 N. E. 977; Watkins *v.* State, 7 Mo. 334.

Note made on Sunday.— A judgment entered upon a judgment note given in part payment on an exchange of horses will not be opened merely because the note was made on a Sunday. Thomas *v.* Van Dyke, 23 Pa. Co. Ct. 385.

26. Reist *v.* Reist, 200 Pa. St. 317, 49 Atl. 951; Walker *v.* Sallada, 17 Pa. Co. Ct. 371.

27. Evans *v.* Barclay, 38 Ill. App. 496; Audendried *v.* Woodward, 28 N. J. L. 265; Provident Bldg., etc., Assoc. *v.* Cresswell, 204 Pa. St. 105, 53 Atl. 647; Walter *v.* Fees, 155 Pa. St. 55, 25 Atl. 829; Yanyo *v.* Leizerowitz, 8 Del. Co. (Pa.) 107.

28. McGuire *v.* Campbell, 58 Ill. App. 188; Marr *v.* Marr, 110 Pa. St. 60, 20 Atl. 592.

29. Filson *v.* Greenspan, 194 Pa. St. 546, 45 Atl. 330; Wilson *v.* Cox, 170 Pa. St. 331, 33 Atl. 79; Hale *v.* Gilman, 3 Walk. (Pa.) 192; Burns *v.* Beck, 1 Leg. Rec. (Pa.) 81; Kelly *v.* Taliaferro, 82 Va. 801, 5 S. E. 85; Jones *v.* Keyes, 16 Wis. 562. And see Heckscher *v.* Middleton, 54 N. J. L. 312, 23 Atl. 943; Molyneux *v.* Huey, 81 N. C. 106; Davis *v.* Barr, 9 Serg. & R. (Pa.) 137; Mechanics', etc., Bldg., etc., Assoc. *v.* Boll, 11 York Leg. Rec. (Pa.) 24.

30. Hukill *v.* Fennemore, 4 Houst. (Del.) 581. And see Lanning *v.* Pawson, 38 Pa. St. 480.

disability.[31] A judgment entered upon a warrant of attorney to confess judgment upon a breach of any of the conditions of a lease will be stricken off where defendant has had no opportunity to be heard on the question of breach of condition.[32] But a judgment entered under a warrant of attorney contained in a lease of a chattel, which on its face is a bailment and not a conditional sale, will not be opened when neither fraud, accident, nor mistake is shown as a basis for relief.[33] An indorser of a note, confessing judgment in ignorance of the fact that no demand has been made on the maker, is entitled to have the judgment set aside, and set up such fact as a defense.[34] A judgment taken by plaintiff on a cognovit entered by an attorney will not be set aside on the ground that it was in violation of an injunction issuing from another court.[35] A judgment against a surety on a bond, entered on a warrant of attorney, will not be set aside on the ground that the principal debtor lives in another state, and is there the administrator of the obligee, and alleges that nothing is due on the bond.[36]

b. Time of Entering Judgment. A judgment by confession will not be opened or vacated on the mere ground that it was taken prematurely, as, before the maturity of the note secured, without showing a meritorious defense.[37]

c. Objections to Affidavit or Statement. Mere defects or irregularities in the affidavit or statement of the indebtedness, required by the statute,[38] constitute no ground for vacating or setting aside the judgment.[39] This relief may be granted where the affidavit or statement is wholly lacking or entirely insufficient,[40] although even in this case some of the decisions hold that the judgment should not be set aside where no fraud or injustice is shown, and the debt is admitted to be due, there being in that event no equitable ground for the court's interposition.[41]

d. Defects in Pleading or Evidence. A judgment by confession cannot be set aside on account of immaterial defects in the pleadings or evidence in the case, or because of variances not going to the root of the action,[42] although it seems that it may be vacated for want of proof of the execution of the power of attorney by defendant,[43] or where the petition for judgment does not state facts necessary to give jurisdiction.[44]

e. Fraud, Imposition, or Duress. A confessed judgment may be vacated on a sufficient showing that it was obtained by means of fraud, deception, or imposition practised upon defendant.[45] Or it may be vacated by showing

31. Crosby *v.* Washburn, 66 N. J. L. 494, 49 Atl. 455.

32. Patterson *v.* Pyle, (Pa. 1889) 17 Atl. 6; Secor *v.* Shippey, 7 Pa. Co. Ct. 555. See Ellis *v.* Rice, 195 Pa. St. 42, 45 Atl. 655; Groll *v.* Gegenheimer, 147 Pa. St. 162, 23 Atl. 440.

33. Sheasley *v.* Condrin, 10 Pa. Dist. 56.

34. Richter *v.* Selin, 8 Serg. & R. (Pa.) 425.

35. Grazebrook *v.* McCreedie, 9 Wend. (N. Y.) 437.

36. Fries *v.* Woodworth, 31 N. J. L. 273.

37. Black *v.* Pattison, 61 Miss. 599; King *v.* Shaw, 3 Johns. (N. Y.) 142. *Compare* Smith *v.* Hartwell, 22 Fed. Cas. No. 13,054, 4 McLean 206. But see Reid *v.* Southworth, 71 Wis. 288, 36 N. W. 866, holding that a judgment entered by confession on two notes before their maturity, under a warrant of attorney authorizing such confession only after maturity, will be vacated on motion, even after one of the notes has matured, without any showing of special injury.

38. See *supra*, II, C, 1.

39. Pirie *v.* Hughes, 43 Wis. 531.

40. Clafin *v.* Sanger, 9 Abb. Pr. (N. Y.) 214 note; Boyden *v.* Johnson, 11 How. Pr. (N. Y.) 503; McCabe *v.* Sumner, 40 Wis. 386. And see Kleeman *v.* J. & P. Baltz Brewing Co., 70 N. J. L. 202, 60 Atl. 408.

41. *Illinois.*— Alldritt *v.* Morrison First Nat. Bank, 22 Ill. App. 24.

Iowa.— Churchill *v.* Lyon, 13 Iowa 431.

New Jersey.— Ely *v.* Parkhurst, 25 N. J. L. 188.

Pennsylvania.— Emery *v.* Smith, 12 Pa. Co. Ct. 281.

Texas.— Chestnutt *v.* Pollard, 77 Tex. 86, 13 S. W. 852.

See 30 Cent. Dig. tit. "Judgment," § 118.

42. Adam *v.* Arnold, 86 Ill. 185; Hempstead *v.* Humphrey, 38 Ill. 90; Hall *v.* Jones, 32 Ill. 38.

43. Stein *v.* Good, 115 Ill. 93, 3 N. E. 735.

44. Hower *v.* Jones, 4 Ohio Dec. (Reprint) 302, 1 Clev. L. Rep. 257.

45. *Alabama.*— Noble *v.* Moses, 74 Ala. 604.

Illinois.— Anderson *v.* Field, 6 Ill. App. 307. And see Funk *v.* Hossack, 115 Ill. App. 340.

New York.— Kirby *v.* Fitzgerald, 31 N. Y. 417.

duress.[46] And fraud or collusion between the original parties to the judgment will be cause for setting it aside at the instance of other creditors.[47]

f. Objection to Amount of Judgment. A judgment by confession may be opened or set aside where, in consequence of mistake or of fraud or extortion practised upon defendant, the amount of it is excessive, and it would be unconscionable to enforce it as it stands.[48] But the mere fact that the judgment was confessed for less than the amount apparently due is no ground for setting it aside on the motion of defendant.[49]

6. Evidence. The party who moves to have a judgment by confession opened or vacated must assume the burden of proving the facts on which he relies as the ground of his application,[50] and the motion will not be granted except upon clear, positive, and satisfactory evidence.[51]

7. Affidavits. The affidavits filed in support of a motion to open a confessed judgment, and let defendant in to a defense, must show that he has a good defense

Ohio.— Wheeler *v.* White, 2 Ohio Dec. (Reprint) 584, 4 West. L. Month. 110.

Oklahoma.— Moore *v.* Oklahoma County School Dist. No. 71, 11 Okla. 332, 66 Pac. 279.

Pennsylvania.— Jones *v.* Scott, 209 Pa. St. 177, 58 Atl. 281; Burlington School Dist. *v.* Alexander, 6 Pa. Co. Ct. 413. But see Division No. 168 A. A. of S. R. E. of A. *v.* Keller, 23 Pa. Super. Ct. 135.

Texas.— Buchanan *v.* Bilger, 64 Tex. 589. See 30 Cent. Dig. tit. "Judgment," § 120.

Compare Smith *v.* Nichol, 23 Nova Scotia 382. See, however, Osborn *v.* Gehr, 29 Nebr. 661, 46 N. W. 84, holding that a confessed judgment, alleged to have been obtained fraudulently and without notice to defendant, will not be vacated, where the evidence in support of the petition to vacate shows that defendant had no defense to the action.

Absence of fraud or undue influence.— A confession of judgment will be supported where it was voluntarily made in consideration of further time being granted, although by one of weak understanding, in the habit of making improvident bargains, subject to intoxication, and in embarrassed circumstances, there being no evidence of fraud in obtaining it or of undue influence. Mason *v.* Williams, 3 Munf. (Va.) 126, 5 Am. Dec. 505. In the absence of fraud judgments by confession will not be set aside simply because they were given by defendant after obtaining from plaintiff an extension of time to answer in an action then pending. Wood *v.* Mitchell, 17 N. Y. Suppl. 782.

46. See Baldwin *v.* Murphy, 82 Ill. 485; Boutel *v.* Owens, 2 Sandf. (N. Y.) 655; Storm *v.* Smith, 1 Wend. (N. Y.) 37; Hayes *v.* Holfast, 23 Pa. Co. Ct. 574.

Where judgment is confessed in the presence of the court there can be no duress. Hamilton *v.* Clarke, 1 Bibb (Ky.) 251.

47. Crescent Canal Co. *v.* Montgomery, 124 Cal. 134, 56 Pac. 797; Illinois Watch Co. *v.* Payne, 39 N. Y. App. Div. 521, 57 N. Y. Suppl. 308; Filson *v.* Greenspan, 194 Pa. St. 546, 45 Atl. 330; Pirie *v.* Hughes, 43 Wis. 531; Thompson *v.* Hintgen, 11 Wis. 112. And see, generally, Fraudulent Conveyances.

48. *Illinois.*— Chicago Bldg. Soc. *v.* Haas, 111 Ill. 176. But where a note on which judgment has been confessed was given to secure future advances, such judgment will not be set aside because it exceeds the advances made, when it appears that the judgment creditor has incurred indebtedness, for which further advances must be made, to a greater amount than such excess. McDonald *v.* Chisholm, 131 Ill. 273, 23 N. E. 596.

New York.— Wilder *v.* Baumstauck, 3 How. Pr. 81.

Ohio.— Wheeler *v.* White, 2 Ohio Dec. (Reprint) 584, 4 West. L. Month. 110.

Pennsylvania.— Beaver *v.* Slear, 168 Pa. St. 466, 31 Atl. 1094; Saunders *v.* Mather, 3 Pa. Cas. 346, 6 Atl. 712; Tinckum's Appeal, 3 Walk. 38; Coffin *v.* Stonebrenner, 1 Lehigh Val. L. Rep. 93.

Texas.— Frazier *v.* Woodward, 61 Tex. 449. See 30 Cent. Dig. tit. "Judgment," § 121.

49. Blaikie *v.* Griswold, 10 Wis. 293.

50. Williams *v.* Hernon, 4 Abb. Dec. (N. Y.) 611, 3 Keyes 99, 33 How. Pr. 241; Herfurth *v.* Biederstaedt, 43 Wis. 633. *Compare* Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

51. Dockerty *v.* Ege, 40 N. J. L. 99; Howie *v.* Lewis, 196 Pa. St. 558, 46 Atl. 850; Champlin *v.* Smith, 164 Pa. St. 481, 30 Atl. 447; Tidioute, etc., Oil Co. *v.* Shear, 161 Pa. St. 508, 29 Atl. 107; Christie *v.* Steelsmith, 158 Pa. St. 117, 27 Atl. 879; Fisher *v.* King, 153 Pa. St. 3, 25 Atl. 1029; Lomison *v.* Faust, 145 Pa. St. 8, 23 Atl. 377; Yost *v.* Mensch, 141 Pa. St. 73, 21 Atl. 507; Scott's Appeal, 123 Pa. St. 155, 16 Atl. 430; English's Appeal, 119 Pa. St. 533, 13 Atl. 479, 4 Am. St. Rep. 656; Hickernell's Appeal, 90 Pa. St. 328; Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Mangan *v.* McHale, 2 Pa. Dist. 73; Beck *v.* Taylor, 1 Chest. Co. Rep. (Pa.) 454; Sigle *v.* Seigley, 9 Kulp (Pa.) 471; Bausman *v.* Kreider, 18 Lanc. L. Rev. (Pa.) 103, 14 York Leg. Rec. 146; Habecker *v.* Smith, 3 Lanc. L. Rev. (Pa.) 337; Philbin *v.* Davinger, 29 Leg. Int. (Pa.) 325; Yeakle *v.* Kriebel, 16 Montg. Co. Rep. (Pa.) 45; Robinson *v.* Stewart, 1 Rich. (S. C.) 3; Port Huron Engine, etc., Co. *v.* Clements, 113 Wis. 249, 89 N. W. 160.

on the merits,[52] and must state positively, and not by way of inference or belief, the facts on which he relies.[53] Such affidavits are to be construed most strongly against the party making the motion.[54] Counter affidavits may be received and considered,[55] and in this case the moving party must establish his contention by a fair preponderance of evidence, the court refusing to disturb the judgment if the counter affidavits are as strong and convincing as his own.[56]

8. Submission of Issue to Jury. Where an application to open a confessed judgment is based on grounds going to the merits, and is contested, the issues raised should ordinarily be tried by a jury.[57]

9. Relief Awarded — a. In General. On a proper application and good cause shown, the court may vacate a judgment by confession,[58] or simply open it for the purpose of letting defendant in to make his defense,[59] or to make a conditional order to plead and for the examination of witnesses, leaving the judgment standing to await the finding on the issues formed.[60] If the judgment includes several claims or items, some of which are due and others not, or some of which are sufficiently described in the statement and others not, it may be vacated or set aside as to those demands which cannot be supported and left standing as to the others,[61] or it may be reduced to the amount which the court finds to be justly due.[62]

b. Imposition of Terms. Terms may be imposed upon defendant, on granting his application to open the judgment;[63] but it is not proper to require that the money supposed to be due shall be brought into court, although the judgment may be allowed to stand as security to abide the result.[64]

10. Proceedings After Opening Judgment. When a judgment entered by confession is opened generally, and without terms, plaintiff is put to the proof of his cause of action precisely as if no judgment had been entered.[65] And it follows from this that the defendant may set up on the trial any defense which would have been available to him if an action had been brought, instead of a judgment being entered, on the debt or instrument in suit.[66] And the defendant may

52. Holmes *v.* Parker, 125 Ill. 478, 17 N. E. 759; Pitts *v.* Magie, 24 Ill. 610; Joliet Electric Light, etc., Co. *v.* Ingalls, 23 Ill. App. 45; Anders *v.* Devries, 26 Md. 222; Hammond *v.* Harris, 2 How. Pr. (N. Y.) 115.

53. Melville *v.* Brown, 16 N. J. L. 363.

54. Chicago Fire Proofing Co. *v.* Park Nat. Bank, 145 Ill. 481, 32 N. E. 534.

55. Truby *v.* Case, 41 Ill. App. 153. *Compare* Dionne *v.* Matzenbaugh, 49 Ill. App. 527. And see Hoyt *v.* Hoyt, 16 N. J. L. 138.

56. Anderson *v.* Studebaker, 37 Ill. App. 532; Sundberg *v.* Temple, 33 Ill. App. 633.

57. Barrow *v.* Bispham, 11 N. J. L. 110; Scudder *v.* Scudder, 10 N. J. L. 340; Remington *v.* Wright, 4 N. J. L. J. 250; Hewett *v.* Fitch, 3 Johns. (N. Y.) 250; King *v.* Shaw, 3 Johns. (N. Y.) 142.

In Pennsylvania it has been held that, although there is a conflict of testimony, the court may judge of the weight of the evidence and the credibility of the witnesses, and is not required in every case to send the issue to a jury. Blauvelt *v.* Kemon, 196 Pa. St. 128, 46 Atl. 416; Earley's Appeal, 90 Pa. St. 321; Duffy *v.* Kaufman, 18 Pa. Super. Ct. 362. See, however, Cruzan *v.* Hutchison, 210 Pa. St. 88, 59 Atl. 485; Steiner *v.* Scholl, 163 Pa. St. 465, 30 Atl. 159; Greenbaum *v.* Komorovski, 5 Pa. Dist. 284; Hughes *v.* Moody, 10 Pa. Co. Ct. 305.

58. Everitt *v.* Knapp, 6 Johns. (N. Y.) 331.

59. Lanyon *v.* Lanz, 43 Ill. App. 654; Walker *v.* Ensign, 1 Ill. App. 113; Jones *v.* Keyes, 16 Wis. 562.

60. Condon *v.* Besse, 86 Ill. 159. *Compare* Independent Brewing Assoc. *v.* Klett, 114 Ill. App. 1.

61. Wells *v.* Gieseke, 27 Minn. 478, 8 N. W. 380; Kern *v.* Chalfant, 7 Minn. 487; Clapp *v.* Ely, 27 N. J. L. 555.

62. Reynolds *v.* Paver, 22 Ill. 660; Fleming *v.* Jencks, 22 Ill. 475; McGuire *v.* Campbell, 58 Ill. App. 188; Fries *v.* Woodward, 31 N. J. L. 273; Seligman *v.* Franco-American Trading Co., 2 Silv. Sup. 349, 5 N. Y. Suppl. 681, 17 N. Y. Civ. Proc. 342.

63. Tyrrell *v.* Hilton, 92 Md. 176, 48 Atl. 55; Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

64. Page *v.* Wallace, 87 Ill. 84; Lake *v.* Cook, 15 Ill. 353; McGuire *v.* Campbell, 58 Ill. App. 188. And see Riddle *v.* Canby, 2 Ohio Dec. (Reprint) 586, 4 West. L. Month. 124. But *compare* Heaps *v.* Hoopes, 68 Md. 383, 12 Atl. 882.

65. Sossong *v.* Rosar, 112 Pa. St. 197, 3 Atl. 768; West *v.* Irwin, 74 Pa. St. 258; Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

66. Borchsenius *v.* Canutson, 100 Ill. 82 (a set-off or counter-claim may be pleaded); Sossong *v.* Rosar, 112 Pa. St. 197, 3 Atl. 768 (the statute of limitations may be pleaded, although that was not one of the grounds on

offer any evidence, as of payment, for instance, that is admissible under the general issue.[67]

III. JUDGMENTS ON CONSENT, OFFER, OR ADMISSION.[68]

A. On Consent of Parties — 1. Nature and Requisites. The parties to a suit can adjust the matters in controversy and their rights between themselves, and have a judgment or decree entered by consent of all parties, without regard to the state of the pleadings or evidence in the case.[69] A judgment of this kind is to be distinguished from one entered upon confession, as also from a judgment by default, its special characteristic being the settlement between the parties of the terms, amount, or conditions of the judgment to be rendered.[70] A consent judgment may be entered in open court by the judge on the consent of the parties or their attorneys, orally expressed, or may be entered on the record without the express sanction of the court from a written agreement between counsel, duly filed, in which latter case the court's assent is presumed.[71] A judgment entered

which the judgment was opened). But see Roby *v.* Updyke, 61 Ill. App. 328.

Matter of defense arising subsequent to the judgment cannot be set up by defendant. Curtis *v.* Slosson, 6 Pa. St. 265.

Fraud, when set up as a defense to a judgment by confession, opened by order of the court, must be affirmatively and positively proved. Hipps *v.* Wardle, 1 Pa. Cas. 147, 1 Atl. 727.

67. Teuber *v.* Schumacher, 44 Ill. App. 577.

68. Authority of attorney to consent to judgment see Attorney and Client, 4 Cyc. 936.

Res judicata see *infra*, XIII, C, 4; XIV, A, 4, b.

69. Seiler *v.* Union Mfg. Co., 50 W. Va. 208, 40 S. E. 547. And see Huntington *v.* Newport News, etc., Co., 78 Conn. 35, 61 Atl. 59.

Record evidence of consent.— A judgment entry that the parties came by their attorneys, and by consent of defendants the judgment was rendered against them, shows that defendants, and not their attorneys, consented. McNeil *v.* State, 71 Ala. 71. And so, where the record shows that, issues of fact having been formed and the evidence heard, the "court by consent" found for plaintiff, and rendered judgment accordingly, this shows a judgment by agreement of the parties. Hudson *v.* Allison, 54 Ind. 215. But a decree reciting that the cause came on to be heard before a special judge, "presiding by consent of parties," does not show consent to the contents of the decree. Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507.

Time of entering.— In Georgia it has been held that a judgment obtained with the consent of defendant at the term during which the writ was filed, while good *inter partes*, cannot affect the rights of third persons. Ainsworth *v.* Mobile Fruit, etc., Co., 102 Ga. 123, 29 S. E. 142. And in California stipulations by defendants for the taking of judgments against them are of no avail where they are entered after the expiration of three years. Grant *v.* McArthur, 137 Cal. 270, 70 Pac. 88.

Amount of recovery.— Where the declaration in the case asks judgment on a note for a precise amount, the consent of defendant cannot authorize a judgment for a larger sum. Lester *v.* Cloud, 67 Ga. 770.

Verification of claim.— A statute requiring, in the absence of process, verification of the justness of the debt alleged and confessed, applies to judgments entered by agreement of the parties. Lauderdale *v.* Ennis Stationery Co., (Tex. Civ. App. 1894) 24 S. W. 834.

Authority of an administrator to consent to a judgment against him see Merrill *v.* Bachelder, 123 Cal. 674, 56 Pac. 618.

Waiver of irregularities.— The validity of a judgment for plaintiffs in an action at law, entered by consent of defendant's attorney given in open court, and on admissions of fact made by him, is not affected by the fact that a jury trial was not formally waived, nor because no findings were made by the court, the consent to the judgment having rendered them unnecessary. Harniska *v.* Dolph, 133 Fed. 158, 66 C. C. A. 224.

70. See Houpt *v.* Bohl, 71 Ark. 330, 75 S. W. 470; Penn *v.* Fogler, 77 Ill. App. 365; Massey *v.* Barbee, 138 N. C. 84, 50 S. E. 567; Burton *v.* Varnell, 1 Tex. 635.

71. Beliveau *v.* Amoskeag Mfg. Co., 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L. R. A. 167. And see Dawson *v.* Babin, 9 La. Ann. 357; Morrison *v.* Underwood, 5 Cush. (Mass.) 52.

Indorsement by attorney.— Where a decree drawn up by counsel for one of the parties is submitted to the attorney of record for the other, and the latter indorses on it the letters "O. K." with his signature, and it is placed in the hands of the court and ordered to be recorded, it makes a binding and effective decree by consent. Indianapolis, etc., R. Co. *v.* Sands, 133 Ind. 433, 32 N. E. 722. *Compare* Davis Paint Mfg. Co. *v.* Metzger Linseed Oil Co., 188 Ill. 295, 58 N. E. 940; McMaster *v.* Radford, 16 Ont. Pr. 20.

Statement of cause of action.— A judgment entered by agreement, without a specific statement of the cause of action, signed by the parties or their attorneys, as required by

on a stipulation of the parties is in fact a judgment by consent.[72] The fact that a defendant causes a decree to be entered up shows his consent to it,[73] but his mere request that it may be modified in a certain detail does not;[74] nor does a mere statement of counsel that he has no objection to the entry of the judgment.[75] And it is within the jurisdiction of the court to determine the fact and the sufficiency of the consent of the parties.[76]

2. Operation and Effect — a. In General. A judgment by consent of the parties is more than a mere contract *in pais*;[77] having the sanction of the court, and entered as its determination of the controversy, it has all the force and effect of any other judgment,[78] being conclusive as an estoppel upon the parties and their privies,[79] and not invalidated by subsequent failure to perform a condition on which the consent was based,[80] although it may be inquired into for fraud practised upon one of the parties,[81] or as against other creditors of defendant.[82] After a defendant has consented that a judgment may be rendered against him, he is not entitled to a jury trial to fix the amount of damages.[83] Where several defendants are brought into court, a judgment by agreement as to one only is a dismissal as to the others.[84]

b. As Waiver of Defects or Irregularities. A judgment by consent operates as a waiver of any defects in the process or pleadings, or irregularities in the previous proceedings, or grounds of objection which would have constituted errors in the judgment if rendered upon trial, provided they do not go to the jurisdiction.[85]

B. Offer of Judgment — 1. In General. Where a judgment is entered upon defendant's offer to suffer judgment for a certain amount, and plaintiff's acceptance of it, it is as valid and binding as any other judgment.[86] Such an offer may be made where the only matter in dispute is the amount of the recovery to which plaintiff is entitled,[87] as where the claim is for unliquidated

a rule of court, is a nullity. Baider *v.* Murray, 1 Phila. (Pa.) 273.

72. Corby *v.* Abbott, 28 Mont. 523, 73 Pac. 120.

Stipulation to abide result of another suit. — The parties may stipulate that the determination of a question in another suit pending between them shall be authority for the entry of judgment in the suit at bar; but a judgment cannot be entered on such a stipulation unless it is shown that a judgment has been rendered in the other suit. Magnolia Metal Co. *v.* Sugden, 57 N. Y. App. Div. 575, 68 N. Y. Suppl. 563. And see Western Land Co. *v.* English, 75 Iowa 507, 39 N. W. 719; Churchill *v.* Crane, 22 Me. 22.

73. Young *v.* Young, 17 N. J. Eq. 161.

74. Sweeney *v.* Sweeney, 16 Ont. 92.

75. Goodrich *v.* Alfred, 72 Conn. 257, 43 Atl. 1041.

76. Merrill *v.* Bachelder, 123 Cal. 674, 56 Pac. 618.

77. Telford *v.* Barney, 1 Greene (Iowa) 575.

78. Turner *v.* Gates, 90 Ga. 731, 16 S. E. 971; Lundon *v.* Waddiek, 98 Iowa 478, 67 N. W. 388; Casler *v.* Chase, 160 Mo. 418, 60 S. W. 1040; Richmond, etc., R. Co. *v.* Shippen, 2 Patt. & H. (Va.) 327.

79. Harding *v.* Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. ed. 1066 [*reversing* 140 Cal. 690, 74 Pac. 284]; New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96. And see *infra*, XIV, A, 4, b.

80. Railsback *v.* Wiggins, 20 Ind. 485.

81. Washington *v.* Louisville, etc., R. Co., 34 Ill. App. 658. See Benningfield *v.* Reed, 8 B. Mon. (Ky.) 102.

82. Edison General Electric Co. *v.* Westminster & V. Tramway Co., [1897] A. C. 193. And see Greensboro Nat. Bank *v.* Gilmer, 118 N. C. 668, 24 S. E. 423.

83. Bradstreet *v.* Erskine, 50 Me. 407.

84. Henry *v.* Gibson, 55 Mo. 570.

85. *Kentucky.*— King *v.* Ohio Valley R. Co., 10 S. W. 631, 10 Ky. L. Rep. 748.

Maine.— Heath *v.* Whidden, 29 Me. 108.

Nebraska.— Clark *v.* Charles, 55 Nebr. 202, 75 N. W. 563.

South Carolina.— Jones *v.* Webb, 8 S. C. 202.

South Dakota.— Carr *v.* Gilbert, 11 S. D. 445, 78 N. W. 1002.

Tennessee.— Tellico Mfg. Co. *v.* Williams, (Ch. App. 1900) 59 S. W. 1075.

Texas.— Lessing *v.* Cunningham, 55 Tex. 231; Lanier *v.* Blount, (Civ. App. 1898) 45 S. W. 202.

See 30 Cent. Dig. tit. "Judgment," § 147.

86. Trier *v.* Herman, 115 N. Y. 163, 21 N. E. 1034; Bush *v.* O'Brien, 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685; Collins *v.* Harris, 5 N. Y. St. 162; Green *v.* Green, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525.

87. Maxwell *v.* Dudley, 13 Bush (Ky.) 403. And see Ross *v.* Bridge, 24 How. Pr. (N. Y.) 163.

Extent of admission.— An offer to be defaulted for a certain sum is not an admission of a good cause of action. Avery *v.* Straw, 30 Me. 458.

damages,[88] or where defendant admits his liability to a certain extent, but disputes plaintiff's demand beyond that sum.[89] It is not a pleading, amendable by the party at his own pleasure, but a proceeding amendable only by direction of the court,[90] and it must be unconditional and unqualified,[91] and precludes defendant from proceeding with the case until plaintiff's right to elect has been exercised or has expired.[92] The offer may be made at any time after service of process,[93] and by one of several joint debtors who has been served.[94] Its effect, where plaintiff proceeds to trial and recovers no more than the amount offered, is to give defendant his costs.[95]

2. Mode of Making Offer. A defendant making an offer of judgment must comply strictly with any directions of the statute, as to its being in writing,[96] and verified,[97] and as to its service on plaintiff,[98] or its being made in open court, according to the terms of the statute;[99] but the phraseology is not an essential matter, provided the intention is made clear.[1]

3. Acceptance or Rejection. To have the benefit of an offer of judgment, plaintiff must definitely and positively accept it.[2] If he rejects it or fails to accept it he cannot have any advantage of it in the subsequent proceedings, or secure a judgment for the amount offered, except on due proof and recovery in the ordinary way.[3] Nor will he be allowed to play fast and loose with the offer; having once refused it, he cannot change his mind and accept it.[4] By going to trial he waives the right to accept a previous offer of judgment,[5] and the same result may follow where he amends his complaint in matters of substance.[6] As to the time within which plaintiff must exercise his option to accept or refuse, if it is fixed by the terms of the offer, the court has no authority to extend the time after its expiration,[7] and if fixed by statute plaintiff must have the full number of days allowed,[8] and defendant cannot withdraw his offer, although yet unaccepted,

88. Maxwell *v.* Missouri, etc., R. Co., 91 Mo. App. 582.

89. Boynton *v.* Frye, 33 Me. 216; Harris *v.* Equitable L. Assur. Soc., 64 N. Y. 196; Bettis *v.* Goodwill, 32 How. Pr. (N. Y.) 137.

90. Vellerman *v.* King, 2 Edm. Sel. Cas. (N. Y.) 371.

91. Pinckney *v.* Childs, 7 Bosw. (N. Y.) 660.

92. Walker *v.* Johnson, 8 How. Pr. (N. Y.) 240.

A counter-claim filed after an offer of judgment, and before plaintiff's acceptance of it, cannot be adjudicated in the action, where plaintiff in due season accepts the offer. U. S. Mortgage, etc., Co. *v.* Hodgson, 30 Misc. (N. Y.) 84, 61 N. Y. Suppl. 868.

93. Fowler *v.* Haynes, 91 N. Y. 346.

94. Emery *v.* Emery, 9 How. Pr. (N. Y.) 130.

95. See Southard *v.* Becker, 15 Misc. (N. Y.) 436, 37 N. Y. Suppl. 927; Lew *v.* Lucas, 37 Oreg. 208, 61 Pac. 344; Berry *v.* Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748; Spaulding *v.* Warner, 57 Vt. 654.

96. Hunt *v.* Elliott, 20 Me. 312; R. E. Dietz Co. *v.* Miller, etc., Co., 88 N. Y. Suppl. 322.

97. McFarren *v.* St. John, 14 Hun (N. Y.) 387.

98. Maxwell *v.* Missouri, etc., R. Co., 91 Mo. App. 582. And see Maxwell *v.* Dudley, 13 Bush (Ky.) 403.

99. Armstrong *v.* Spears, 18 Ohio St. 373; Fike *v.* France, 12 Ohio St. 624.

1. An offer to confess judgment for a specific sum is a sufficient compliance with a statute providing for offers to allow judgment. Adams *v.* Phifer, 25 Ohio St. 301. And see Rose *v.* Grinstead, 53 Ind. 202. And so an offer which is definite and specific and otherwise follows the statute is not invalidated by the fact that it is headed "Offer of compromise." Benson *v.* Chicago, etc., R. Co., 113 Iowa 179, 84 N. W. 1028.

2. Becker *v.* Breen, (Nebr. 1903) 94 N. W. 614.

3. *Georgia.*— Barefield *v.* Bryan, 8 Ga. 463.
Iowa.— Benson *v.* Chicago, etc., R. Co., 113 Iowa 179, 84 N. W. 1028.
Kentucky.— Tyler *v.* Hamilton, 108 Ky. 120, 55 S. W. 920, 21 Ky. L. Rep. 1516.
New York.— Harris *v.* Equitable L. Assur. Soc., 64 N. Y. 196; Mazanec *v.* Manhattan Inv., etc., Co., 2 N. Y. App. Div. 489, 38 N. Y. Suppl. 20.
Pennsylvania.— Laughner *v.* Jennings, 1 Pa. Dist. 669.
See 30 Cent. Dig. tit. "Judgment," § 135.

4. Orth *v.* Zion's Co-operative Mercantile Inst., 5 Utah 419, 16 Pac. 590.

5. Browne *v.* Vredenburgh, 43 N. Y. 195; Corning *v.* Radley, 25 Misc. (N. Y.) 318, 54 N. Y. Suppl. 565; Cox *v.* Henry, 36 Pa. St. 445.

6. Woelfle *v.* Schmenger, 12 N. Y. Civ. Proc. 312.

7. Gaines *v.* Heaton, 100 Ill. App. 26 [*affirmed* in 198 Ill. 479, 64 N. E. 1081].

8. Mansfield *v.* Fleck, 23 Minn. 61; Becker *v.* Breen, (Nebr. 1903) 94 N. W. 614.

within the time limited,[9] nor take any other effective step in the proceedings, such as filing an answer, since the acceptance will relate back to the filing of the offer.[10]

C. Judgment on Admissions — 1. Admission in Pleadings in General. If defendant in his pleadings admits plaintiff's cause of action against him, or his liability to plaintiff to a specific limited amount, the latter will be entitled to take judgment for that amount.[11] But the admission must be distinct and unequivocal and not conditional,[12] and it is conclusive of nothing but defendant's liability.[13] It admits only the traversable allegations of the declaration, and the amount of the debt or damages confessed, and no greater sum can be recovered without further proof.[14]

2. Admission of Part of Demand. If defendant's answer admits the justice of a portion of plaintiff's demand, the latter is entitled to take judgment for the amount so admitted to be due.[15] As to his right to take a judgment for what defendant is willing to concede, and then proceed to trial for the remainder of his claim, with the possible result of securing a second judgment in the same action, it appears that this could not be done at common law,[16] but it is permitted by statute in many of the states.[17] But the admission must be uncon-

9. McVicar *v.* Keating, 19 N. Y. App. Div. 581, 46 N. Y. Suppl. 298; Hackett *v.* Edwards, 22 Misc. (N. Y.) 659, 49 N. Y. Suppl. 609, 27 N. Y. Civ. Proc. 99.

10. U. S. Mortgage, etc., Co. *v.* Hodgson, 28 Misc. (N. Y.) 447, 58 N. Y. Suppl. 1132.

11. *Iowa.*— Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa 286, 66 N. W. 176, 35 L. R. A. 63.

Louisiana.— Averments in an exception taken as an answer, admitting defendant's liability, but alleging an extension of the terms of payment of the notes sued on, are judicial admissions binding the party making them, and judgment may be rendered on them on motion, without a trial on the merits. Frank *v.* Hardee, 22 La. Ann. 184. But of two plaintiffs he alone to whom the answer admits an indebtedness can have judgment on the admission. Parsons *v.* Suares, 9 La. 411.

Missouri.— North *v.* Nelson, 21 Mo. 360.

New York.— Cohn *v.* Burtnett, 1 N. Y. Civ. Proc. 211.

Pennsylvania.— Goucher *v.* Providence Washington Ins. Co., 3 Pa. Super. Ct. 230.

See 30 Cent. Dig. tit. "Judgment," § 137.

12. Ganor *v.* Hinrichs, 2 Pa. Super. Ct. 522. And see Cooper *v.* Kanter, 24 Misc. (N. Y.) 203, 52 N. Y. Suppl. 625.

13. A judgment declaring a statute invalid cannot be rendered on an admission in the pleadings of facts rendering it invalid. State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393.

As estoppel.— In an action for a trespass to personalty, a tender, in the answer, of a judgment for nominal damages and costs and a release of the property, having been refused, defendant is not estopped on the trial to deny plaintiff's title. Auley *v.* Osterman, 65 Wis. 118, 25 N. W. 657, 26 N. W. 568.

14. Kelley *v.* Dover, 18 N. H. 566.

15. Monroe *v.* Chaldeck, 78 Ill. 429; Williams *v.* Harris, 2 How. (Miss.) 627; Ferree *v.* Ellsworth, 1 Misc. (N. Y.) 93, 19 N. Y. Suppl. 659; Griffith *v.* Maxwell, 25 Wash. 658, 66 Pac. 106; Mace *v.* Gaddis, 3 Wash. Terr. 125, 13 Pac. 545. And see Sellers *v.* Union Lumbering Co., 36 Wis. 398.

In New York an early statutory provision fixed the rights of a plaintiff, where a part of his claim is admitted by the answer, as follows: "When the answer of the defendant . . . admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy." Code Proc. § 244. See Roosevelt *v.* New York, etc., R. Co., 45 Barb. 554; Wireman *v.* Remington Sewing Mach. Co., 39 N. Y. Super. Ct. 314; Coursen *v.* Hamlin, 2 Duer 513; Smith *v.* Olyssen, 4 Sandf. 711; Burhans *v.* Casey, 4 Sandf. 706; Dolan *v.* Petty, 4 Sandf. 673; Baker *v.* Nussbaum, 1 Hilt. 549; Quintard *v.* Secor, 3 E. D. Smith 614, 1 Abb. Pr. 393; St. John *v.* Thorne, 2 Abb. Pr. 166; Dusenberry *v.* Woodward, 1 Abb. Pr. 443; Merritt *v.* Thompson, 1 Abb. Pr. 223; Meyers *v.* Trimble, 1 Abb. Pr. 220; Fosdick *v.* Groff, 22 How. Pr. 158; Guiet *v.* Murphy, 18 How. Pr. 411; Russell *v.* Meacham, 16 How. Pr. 193; Bender *v.* Sherwood, 15 How. Pr. 258; Slawson *v.* Conkey, 10 How. Pr. 57; Clarkson *v.* De Peyster, Hopk. 274.

16. Weaver *v.* Carnahan, 37 Ohio St. 363; De Hart *v.* Schaeffer, 1 Woodw. (Pa.) 365; Bradford *v.* Bradford, 1 Pa. L. J. Rep. 388. *Compare* Ross-Lewin *v.* Redfield, 68 N. Y. 627.

17. See the following cases:

Alabama.— Henderson *v.* Henry, 6 Ala. 361.

Louisiana.— Frey *v.* Fitzpatrick-Cromwell Co., 108 La. 125, 32 So. 437; Skinner *v.* Dameron, 5 Rob. 447; State *v.* Judge New Orleans Prob. Ct., 4 Rob. 44; Parsons *v.* Suares, 9 La. 411.

New York.— Meise *v.* Doscher, 68 Hun 557, 23 N. Y. Suppl. 49; Shaw *v.* Coleman,

ditional,[18] although it need not specify the particular items of plaintiff's claim or account to which it applies.[19]

3. PLEA OF SET-OFF OR COUNTER-CLAIM. Where defendant pleads a set-off or counter-claim, but no other answer or defense, it is an admission of his liability for so much of plaintiff's demand as is in excess of the alleged recoupment, and for that excess plaintiff is entitled to take judgment.[20]

D. Submission of Agreed Case. An agreed case is a formal written enumeration of the facts in a case, assented to by both parties as correct and complete, and submitted to the court by their agreement, in order that a decision may be rendered without a trial, upon the court's conclusions of law upon the facts as stated.[21]

E. Rendition and Entry of Judgment — 1. IN GENERAL. The entry of a judgment upon an agreement of the parties, or upon an offer and acceptance, is in general a mere ministerial act, which may be performed by the clerk of the court,[22] upon notice to the adverse party in cases where he has the right to be heard as to the nature or terms of the judgment to be entered.[23] The judgment must conform to the terms of the agreement of the parties,[24] and the court has no power to add to it conditions which the parties have not agreed on.[25]

54 N. Y. Super. Ct. 3; Dusenberry *v.* Woodward, 1 Abb. Pr. 443; Tracy *v.* Humphrey, 5 How. Pr. 155.

Ohio.— Weaver *v.* Carnahan, 37 Ohio St. 363.

Pennsylvania.— Roberts *v.* Sharp, 161 Pa. St. 185, 28 Atl. 1023; Russell *v.* Archer, 76 Pa. St. 473; Coleman *v.* Nantz, 63 Pa. St. 178; Calkins *v.* Keely, 3 Pa. Dist. 339; Myers *v.* Cochran, 3 Pa. Dist. 135; Coburn *v.* Reynolds, 14 Pa. Co. Ct. 157; Drake *v.* Irvine, 22 Pittsb. Leg. J. N. S. 100; Maylin *v.* Root, 33 Wkly. Notes Cas. 76.

Wisconsin.— Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241; Buffalo Barb Wire Co. *v.* Phillips, 64 Wis. 338, 25 N. W. 208.

See 30 Cent. Dig. tit. "Judgment," § 138.

18. Foster *v.* Devlin, 57 N. Y. Super. Ct. 120, 6 N. Y. Suppl. 505.

19. Richey *v.* Cooper, 45 N. H. 414. But see Philadelphia *v.* Second, etc., St. Pass. R. Co., 2 Pa. Dist. 705, 13 Pa. Co. Ct. 580.

20. Willis *v.* Taggard, 6 How. Pr. (N. Y.) 433; Benson *v.* Stein, 34 Ohio St. 294; Moore *v.* Woodside, 26 Ohio St. 537; Jordan *v.* Kleinsmith, 5 Pa. Dist. 674; Burges *v.* Pollitzer, 19 S. C. 451. *Compare* Cronin *v.* Tebo, 63 Hun (N. Y.) 190, 17 N. Y. Suppl. 650.

21. Black L. Dict.

Availability of defenses.— In a case presented upon a statement of facts, without any stipulation that the decision should be influenced by the pleadings, defendant is entitled to judgment when the facts will verify any plea which is a bar to the action. Machias Hotel Co. *v.* Fisher, 56 Me. 321. So, where there is a declaration and no plea, and a case agreed is submitted to the court for its decision, plaintiff's cause of action, as set forth in the declaration, is submitted to the court without reference to any particular form of defense, and defendant is entitled to judgment if the facts stated afford him a defense of which he might have availed himself under any form of pleading. Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445. So it has been held that a judgment for the amount stipulated in an agreed statement of facts, as owing by one party to the other, was properly refused where it was determined that the party to whom payment was due was liable in damages for negligence to the party owing. Western Union Cold Storage Co. *v.* Winona Produce Co., 197 Ill. 457, 64 N. E. 496.

Affidavit of good faith.— Under a statutory requirement that the parties, on submission of a controversy, shall file an affidavit that the controversy is real and the submission made in good faith, an affidavit made by the attorney in fact of one of the parties that the submission is in good faith and that the controversy is real to the best of his knowledge, information, and belief is not sufficient. Bloomfield *v.* Ketcham, 95 N. Y. 657.

22. Edwards *v.* Turner, (Tenn. Ch. App. 1897) 47 S. W. 144. And see Lindsley *v.* Van Cortlandt, 67 Hun (N. Y.) 145, 22 N. Y. Suppl. 222; Hill *v.* Northrop, 9 How. Pr. (N. Y.) 525; Day *v.* Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426.

In California the clerk may enter judgment upon defendant's order to suffer judgment for a specified sum only when such offer is made after action brought, and while the action is pending; a judgment entered otherwise is void. Crane *v.* Hirshfelder, 17 Cal. 582. And see Helena Second Nat. Bank *v.* Kleinschmidt, 7 Mont. 146, 14 Pac. 667.

23. See Robbins *v.* Watson, 22 How. Pr. (N. Y.) 293.

An agreement that a case shall abide the decision in another case does not entitle the party, in whose favor the decision in such other case is claimed to be, to a judgment, without notice to his opponent. Schaeffer *v.* Siegel, 7 Mo. App. 542.

24. Sprowl *v.* Stewart, 19 La. Ann. 433.

25. Johnson *v.* Carver, 175 Pa. St. 200, 34 Atl. 627.

2. TIME OF ENTRY. Defendant's offer of a judgment, or his consent to the entry of a judgment against him, will generally entitle plaintiff to take judgment at once, without reference to the stage of the proceedings at which it is made.[26] Thus the judgment may be entered before the return-day of the writ,[27] or before the expiration of defendant's time for pleading,[28] and in vacation [29] in those jurisdictions where the consent of parties will authorize the entry of judgments out of term.[30]

F. Opening or Vacating Judgment — 1. IN GENERAL. A court has power to open or vacate a judgment entered by consent or agreement of parties, on adequate grounds, but it cannot alter or correct it, except with the consent of all the parties affected by the judgment;[31] nor can it set aside such a judgment after the expiration of the time allowed by statute for instituting proceedings for that purpose.[32]

2. GROUNDS FOR OPENING OR VACATING. A judgment by consent or agreement may be opened or set aside for want of compliance with statutory directions as to such judgments,[33] or where it was entered by the consent or direction of an unauthorized attorney,[34] or for an excessive amount or otherwise in violation of the agreement of the parties,[35] or for fraud,[36] or collusion,[37] or where defendant was tricked or misled by false representations,[38] or on account of a mistake or misapprehension of the party or his counsel,[39] and also to allow defendant to set

26. Cook *v.* Lines, 7 Kulp (Pa.) 503. And see Stedeker *v.* Bernard, 102 N. Y. 327, 6 N. E. 791. See, however, De Morat *v.* Entrekin, 33 Wkly. Notes Cas. (Pa.) 160, holding that judgment cannot be taken after the cause is one at issue.

On decision of another suit.— A judgment by agreement for entry of final judgment in one action, on the rendition of final judgment in another action, cannot be entered pending a motion for new trial in such other action. Gillmore *v.* American Cent. Ins. Co., 65 Cal. 63, 2 Pac. 882.

27. Byrne *v.* Jeffries, 38 Miss. 533; Boyd *v.* J. M. Ward Furniture, etc., Co., 38 Mo. App. 210. *Contra*, Boyle *v.* Horner, 104 Pa. St. 379.

28. Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168; Hoguet *v.* Wallace, 28 N. J. L. 523. *Compare* Bridenbecker *v.* Mason, 16 How. Pr. (N. Y.) 203.

29. See Cowley *v.* McLaughlin, 137 Mass. 221. *Compare* Gamble *v.* Buffalo County, 57 Nebr. 163, 77 N. W. 341. But see Boynton *v.* Ashabranner, (Ark. 1905) 88 S. W. 566.

30. See *supra*, I, B, 3, b.

31. *Illinois.*— Atchison, etc., R. Co. *v.* Elder, 149 Ill. 173, 36 N. E. 565.

Iowa.— Mains *v.* Des Moines Nat. Bank, 113 Iowa 395, 85 N. W. 758.

Maine.— Berry *v.* Somerset R. Co., 89 Me. 552, 36 Atl. 904.

New York.— Spiehler *v.* Asiel, 83 Hun 223, 31 N. Y. Suppl. 584; Stilwell *v.* Stilwell, 81 Hun 392, 30 N. Y. Suppl. 961.

North Carolina.— Deaver *v.* Jones, 114 N. C. 649, 19 S. E. 637; Kerchner *v.* McEachern, 93 N. C. 447; Stump *v.* Long, 84 N. C. 616. And see Massey *v.* Barbee, 138 N. C. 84, 50 S. E. 567.

Ohio.— Jordan *v.* Russell, 8 Ohio Dec. (Reprint) 467, 8 Cinc. L. Bul. 91.

Oklahoma.— Outcalt *v.* Collier, 8 Okla. 473, 58 Pac. 642.

Oregon.— Stites *v.* McGee, 37 Oreg. 574, 61 Pac. 1129.

Pennsylvania.— Colwell *v.* Wehrly, 150 Pa. St. 523, 24 Atl. 737; Sheetz *v.* Huber, 1 Wkly. Notes Cas. 351.

Texas.— Cetti *v.* Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787.

West Virginia.— Stewart *v.* Stewart, 40 W. Va. 65, 20 S. E. 862; Morris *v.* Peyton, 29 W. Va. 201, 11 S. E. 954; Estill *v.* McClintic, 11 W. Va. 399.

England.— Ainsworth *v.* Wilding, [1896] 1 Ch. 673, 65 L. J. Ch. 432, 74 L. T. Rep. N. S. 193, 44 Wkly. Rep. 540.

Canada.— Roberts *v.* Donovan, 16 Ont. Pr. 456.

See 30 Cent. Dig. tit. "Judgment," §§ 148, 149.

32. Dyerville Mfg. Co. *v.* Heller, 102 Cal. 615, 36 Pac. 928; Yerkes *v.* McHenry, 6 Dak. 5, 50 N. W. 485.

33. Baider *v.* Murray, 1 Phila. (Pa.) 273; Wadsworth *v.* Willard, 22 Wis. 238. *Compare* Trier *v.* Hermann, 44 Hun (N. Y.) 489 [*affirmed* in 115 N. Y. 163, 21 N. E. 1034].

34. Foley *v.* Gatliff, 43 S. W. 190, 19 Ky. L. Rep. 1103. See Jackson *v.* Brown, 82 Cal. 275, 23 Pac. 142.

35. See Ukiah Bank *v.* Reed, (Cal. 1900) 63 Pac. 68; Barnes *v.* Smith, 34 Ind. 516; McManus *v.* Ennis, 1 N. Y. App. Div. 30, 36 N. Y. Suppl. 1049.

36. Crescent Canal Co. *v.* Montgomery, 124 Cal. 134, 56 Pac. 797.

37. Ross *v.* Bridge, 24 How. Pr. (N. Y.) 163.

38. Oetjen *v.* Fayen, 7 Misc. (N. Y.) 496, 27 N. Y. Suppl. 978; Wolf *v.* Butler, 81 Tex. 86, 16 S. W. 794; Cetti *v.* Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787. See New England Mortg. Security Co. *v.* Tarver, 60 Fed. 660, 9 C. C. A. 190.

39. Saleski *v.* Boyd, 32 Ark. 74; Underwood *v.* Underwood, 87 Cal. 523, 25 Pac.

up the defense of usury;[40] and, it seems, where the rights of an infant are concerned, and there is reason to think they may not have been adequately protected by the judgment.[41] If a corporation enters into a transaction which is *ultra vires*, and litigation ensues, in the course of which a judgment is entered by consent, such judgment is as binding on the parties as one obtained after a contest, and will not be set aside because the transaction was beyond the powers of the corporation.[42]

IV. JUDGMENTS BY DEFAULT.[43]

A. Nature and Requisites — 1. What Constitutes Judgment by Default — a. On Default Proper. Properly speaking, a judgment by default is one taken against a defendant when, having been duly summoned or cited in an action, he fails to enter an appearance.[44] The term is not properly applied to a judgment rendered when a defendant, after appearance and plea, withdraws his plea and abandons the defense,[45] or where he fails to plead within the time limited after the overruling of his demurrer.[46] But the term is frequently, and indeed commonly, used in a much wider sense, in which it includes judgments given against defendant for want of a plea, answer, affidavit of defense, etc., as well as for want of an appearance.[47]

b. Judgment of Nil Dicit. This is the form of judgment to be entered when defendant, having appeared, fails to put in any plea or answer, or having pleaded, withdraws the plea and makes no defense,[48] or where he elects to stand upon a plea to which a demurrer has been sustained.[49] But the distinction between this form of judgment and the other varieties of judgment against defendant for failure to take some required step in the action is no longer strictly observed; and the entry of a judgment by *nil dicit*, when it should have been by default, is a mere informality and not reversible error.[50] There is also a form called judgment by "*non sum informatus*," which is rendered where, instead of pleading,

1065. *Compare* Anderson *v.* Carr, 4 Silv. Sup. (N. Y.) 250, 7 N. Y. Suppl. 281; Stump *v.* Long, 84 N. C. 616; Murphy *v.* Merritt, 63 N. C. 502.

40. Marr *v.* Marr, 110 Pa. St. 60, 20 Atl. 592.

41. Atchison, etc., R. Co. *v.* Elder, 149 Ill. 173, 36 N. E. 565.

42. Charlebois *v.* Delap, 26 Can. Sup. Ct. 221.

43. Default judgments in actions of ejectment see EJECTMENT, 15 Cyc. 179.

Res judicata see *infra*, XIII, C, 5; XIV, A, 4, c.

44. State *v.* Baten, 48 La. Ann. 1538, 21 So. 119; Brown *v.* Chapman, 90 Va. 174, 17 S. E. 855; Goolsby *v.* Strother, 21 Gratt. (Va.) 107; Adamson *v.* Peerce, 20 W. Va. 59.

Appearance by attorney.— A justice's judgment when defendant is present by attorney, although the attorney takes no part in the trial, is not a judgment by default. Borgwald *v.* Fleming, 69 Mo. 212.

45. Stone *v.* Minor, 6 Rob. (La.) 29; Holliday *v.* Myers, 11 W. Va. 276; Eldred *v.* Michigan Ins. Bank, 17 Wall. (U. S.) 545, 21 L. ed. 685.

46. Smith *v.* Barnum, 3 N. Y. Suppl. 476.

47. Black Judgm. § 80. And see Debs *v.* Dalton, 7 Ind. App. 84, 34 N. E. 236.

Failure to appear and oppose a demurrer constitutes a default within N. Y. Code Civ. Proc. § 1294. Forgotson *v.* Becker, 81 N. Y. Suppl. 321.

48. Hutchison *v.* Powell, 92 Ala. 619, 9 So. 170; Stewart *v.* Goode, 29 Ala. 476; Summerlin *v.* Dowdle, 24 Ala. 428; Dart *v.* Hercules, 34 Ill. 395; Foster *v.* Filley, 2 Ill. 256; Greenough *v.* Sheldon, 9 Iowa 503; Gilder *v.* McIntyre, 29 Tex. 89. And see Bennett *v.* Couchman, 48 Barb. (N. Y.) 73.

Partial defense.— Where defendant's plea or answer sets up a defense only to a part of plaintiff's declaration or complaint, the latter may take judgment by *nil dicit* for that portion which is unanswered. Deshler *v.* Hodges, 3 Ala. 509; Safford *v.* Vail, 22 Ill. 327; Warren *v.* Nexsen, 4 Ill. 38; Cross *v.* Watson, 6 Blackf. (Ind.) 129. Thus, in an action on two notes, each set up as a distinct cause of action, where defendant answers only as to one of the notes, judgment should be given, on motion, on the other note. Curran *v.* Kerchner, 117 N. C. 264, 23 S. E. 177.

Failure to appear at trial.— If defendant has put in his plea, and issue has been joined, and he then fails to appear when the case is called for trial, the judgment to be entered against him cannot properly be in the form of a judgment *nil dicit*, for he is not in default for want of an answer. Taylor *v.* McLaughlin, 2 Colo. 375.

49. Chicago, etc., R. Co. *v.* Bozarth, 91 Ill. App. 68.

50. Elyton Land Co. *v.* Morgan, 88 Ala. 434, 7 So. 249; Atlantic Glass Co. *v.* Paulk, 83 Ala. 404, 3 So. 800; Shields *v.* Barden, 6 Ark. 459.

defendant's attorney declares that he "is not informed" of any answer or defense to be made.[51]

c. Want of Affidavit of Defense or Merits. Where the statutes require a defendant, if he means to contest plaintiff's claim, to file an affidavit setting forth the facts on which he means to rely as a defense, or an affidavit that he has a meritorious defense to the action, his failure to comply with this provision will entitle plaintiff to a judgment,[52] which is not technically a judgment by default,[53] although practically it has the same consequences and effects.[54]

d. Non Prosequitur. Judgment of *non prosequitur* or *non pros* is given against plaintiff for his default or neglect to take any of those steps in the proceedings which he is required to take in due time, as a failure to file a declaration or reply, to amend a pleading after demurrer, or to appear when the case is called for trial. In states where this term is no longer employed, its equivalent is a judgment of "dismissal for want of prosecution."[55] The judgment of *non pros.* is said to be in effect a judgment by default for laches.[56] It is sometimes provided by statute that a defendant may proceed with the case upon the failure of plaintiff to appear, and judgment may be rendered on the merits.[57]

The proceeding to ascertain the amount due is the same on a judgment by *nil dicit* as upon a default. Storey *v.* Nichols, 22 Tex. 87.

In Texas it has been held that a judgment by *nil dicit* is entitled to a more liberal construction than if it had been rendered in the absence of defendant; and that it is to be regarded as partaking of the nature and conclusiveness of a judgment by confession. Storey *v.* Nichols, 22 Tex. 87; Wheeler *v.* Pope, 5 Tex. 262.

51. Black L. Dict.; 3 Blackstone Comm. 397.

52. Sheldon *v.* Martin, 1 Code Rep. (N. Y.) 81; Tobyhanna, etc., Lumber Co. *v.* Home Ins. Co., 167 Pa. St. 231, 31 Atl. 564; Bright *v.* Oakdale Coal, etc., Co., 10 Phila. (Pa.) 609. And see Hurd *v.* Barr, 22 Ill. 29.

Constitutionality of statutes.— Statutes requiring defendant to file an affidavit of defense, or affidavit of merits, are constitutional and valid. Honore *v.* Home Nat. Bank, 80 Ill. 489; Wilder *v.* Arwedson, 80 Ill. 435; Hunt *v.* Lucas, 99 Mass. 404.

Insufficient affidavit of defense.— If an affidavit of defense is filed, but plaintiff deems it inadequate in law to constitute a defense to the action, he may have a rule on defendant to show cause why judgment should not be entered against him for want of a sufficient affidavit of defense. But it is error to give judgment on account of the insufficiency of an affidavit of defense filed, where the case is not one in which such an affidavit can legally be required. Bartoe *v.* Guckert, 158 Pa. St. 124, 27 Atl. 845. A motion for judgment on this ground, being in the nature of a demurrer, admits the facts averred in the affidavit, and denies their sufficiency as an answer to the claim. Hicks *v.* Northern Liberties Nat. Bank, 168 Pa. St. 638, 32 Atl. 63. And if the court decides that the allegations of the affidavit are not adequate to constitute a defense to the action, judgment will be given for plaintiff, unless, for special reasons, leave should be granted to file a new or supplemental affidavit. Laird *v.* Campbell, 92 Pa. St. 470; Callan *v.* Lukens, 89 Pa. St. 134; Sykes *v.* Anderson, 14 Pa. Co. Ct. 329. Where such leave has been given, the affidavit must be filed within a reasonable time, or else the court may enter judgment without a new rule or further notice to defendant. Close *v.* Hancock, 3 Pa. Super. Ct. 207. On motion for judgment for want of a sufficient affidavit of defense, the correctness of an averment in the affidavit as to the law of another state cannot be tested by reference to the statutes of that state. Wood Co. *v.* Berry Co., 4 Pa. Dist. 141.

53. Abeles *v.* Powell, 6 Pa. Super. Ct. 123. *Compare* McClung *v.* Murphy, 2 Miles (Pa.) 177.

54. See North *v.* Yorke, 174 Pa. St. 349, 34 Atl. 620.

55. *Alabama.*—Blankenship *v.* Owens, (1900) 27 So. 974; White *v.* Levy, 93 Ala. 484, 9 So. 164.

California.— Swain *v.* Burnette, 76 Cal. 299, 18 Pac. 394; Thompson *v.* Spray, (Cal. 1884) 4 Pac. 418.

Illinois.— Hunter *v.* Bilyeu, 39 Ill. 367; People *v.* Reuter, 88 Ill. App. 586.

Iowa.— Sully *v.* Wilson, 44 Iowa 394.

Maryland.— Henderson *v.* Maryland Home F. Ins. Co., 90 Md. 47, 44 Atl. 1020.

New Mexico.— Lasswell *v.* Kitt, 11 N. M. 459, 70 Pac. 561.

New York.— Bonnell *v.* Rome, etc., R. Co., 12 Hun 218; Gurnee *v.* Hoxie, 29 Barb. 547; Brady *v.* Martin, 11 N. Y. Suppl. 424, 19 N. Y. Civ. Proc. 134; Comstock *v.* Hallock, 2 Edm. Sel. Cas. 69.

Utah.— Dunham *v.* Travis, 25 Utah 65, 69 Pac. 468.

West Virginia.— Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 12 S. E. 817.

Canada.— Calder *v.* Dancy, 4 Manitoba 25.

56. People *v.* Reuter, 88 Ill. App. 586; Walton *v.* Lefever, 17 Lanc. L. Rev. (Pa.) 203.

57. Clune *v.* Quitzow, 125 Cal. 213, 57 Pac. 886.

2. ACTIONS IN WHICH DEFAULT MAY BE TAKEN. In some states the right to take judgment by default, or for want of an affidavit of defense, is restricted to actions of contract, or arising *ex contractu*.[58] This excludes actions for damages founded on a tort,[59] and actions for an injunction.[60] In some states also this procedure is not applicable in actions of replevin.[61]

3. AGAINST WHOM DEFAULT MAY BE TAKEN — a. Defendants Generally. As a general rule a default may be taken against any natural person or corporation[62] against whom the same judgment might have been obtained as the result of contested proceedings,[63] including not only principal defendants but also garnishees.[64]

b. Joint Defendants. At common law, where several persons are summoned as defendants, and one of them suffers a default, while the others plead, final judgment cannot be entered upon the default until the issue as to the other defendants is disposed of, and not even then unless plaintiff had a verdict on the issue or defendants' pleading set up a merely personal defense.[65] Nor can plaintiff discontinue or dismiss his action as to one defendant and take judgment against the other,[66] unless in a case where the cause of action is joint and several.[67]

58. This will include an action to recover the value of services rendered (Whereatt *v.* Ellis, 68 Wis. 61, 30 N. W. 520, 41 N. W. 762); an action against principal and surety on a bond to insure the faithful performance of a contract (Fidelity, etc., Co. *v.* U. S., 187 U. S. 315, 23 S. Ct. 120, 47 L. ed. 194); an action for the foreclosure of a mortgage (Chamberlain *v.* Armstrong, 9 Ont. Pr. 212); an action to enforce a statutory liability of stock-holders of banking corporations, to depositors and creditors, for double the par value of their stock (Coulbourn *v.* Boulton, 100 Md. 350, 59 Atl. 711), and an action upon a foreign judgment (Martel *v.* Dubord, 3 Manitoba 598).

Claim barred by limitations.— A part of plaintiff's claim being more than six years old does not render a judgment on default for the whole illegal. Wilson *v.* Hayes, 18 Pa. St. 354.

After a plea of the general issue, in an action on a promissory note, there can be no judgment by default. McKaughan *v.* Harrison, 25 Tex. Suppl. 461; Bedwell *v.* Thompson, 25 Tex. Suppl. 245.

59. Mississippi Cent. R. Co. *v.* Fort, 44 Miss. 423; Stanley *v.* Litt, 19 Ont. Pr. 101.

60. McCallum *v.* McCallum, 11 Ont. Pr. 16.

61. Ogilbe *v.* Bennett, 1 Pa. Co. Ct. 575; Crofut *v.* Chichester, 3 Phila. (Pa.) 457.

62. To support a judgment by default against a corporation, it must appear of record that the person who, as shown by the return of the officer, was served with process, has such a relation to the corporation that service on him was equivalent to service on the corporation. Cloud *v.* Pierce City, 86 Mo. 357.

63. Lamping *v.* Hyatt, 27 Cal. 99, holding that judgment by default cannot be taken against persons not named or described in the complaint, although they were served with process.

Defendant not appearing.— Where a counter-claim was filed in an action on contract, to which plaintiff replied, and the court had jurisdiction both of the parties and the subject-matter, the fact that defendant did not appear at the trial did not deprive the court of jurisdiction to render judgment dismissing the counter-claim. Groton Bridge, etc., Co. *v.* Clark Pressed Brick Co., 126 Fed. 552.

64. *Indiana.*— Debs *v.* Dalton, 7 Ind. App. 84, 34 N. E. 236.

Iowa.— Scamahorn *v.* Scott, 42 Iowa 529.

Maryland.— Abell *v.* Simon, 49 Md. 318.

Missouri.— Laughlin *v.* January, 59 Mo. 383.

Pennsylvania.— Jones *v.* Tracy, 75 Pa. St. 417.

South Carolina.— Gracy *v.* Coates, 2 McCord 224.

Contra.— Hibernia Sav., etc., Soc. *v.* Inyo County Sup. Ct., 56 Cal. 265.

65. *Alabama.*— Brooks *v.* Maltbie, 4 Stew. & P. 96.

Arkansas.— State *v.* Gibson, 21 Ark. 140; Hutchings *v.* Real Estate Bank, 4 Ark. 517.

California.— See Curry *v.* Roundtree, 51 Cal. 184.

Illinois.— Russell *v.* Hogan, 2 Ill. 552. See Freeland *v.* Jasper County, 27 Ill. 303.

Indiana.— Stapp *v.* Davis, 78 Ind. 128; Lodge *v.* State Bank, 6 Blackf. 557.

Iowa.— Curtis *v.* Smith, 42 Iowa 665; Greenough *v.* Shelden, 9 Iowa 503.

Massachusetts.— Woodward *v.* Newhall, 1 Pick. 500.

Michigan.— See Penfold *v.* Slyfield, 110 Mich. 343, 68 N. W. 226.

New Hampshire.— Bowman *v.* Noyes, 12 N. H. 302.

New York.— Catlin *v.* Latson, 4 Abb. Pr. 248; Jackson *v.* Reon, 60 How. Pr. 103.

Oregon.— Wilson *v.* Blakeslee, 16 Oreg. 43, 16 Pac. 872.

Virginia.— Taylor *v.* Beck, 3 Rand. 316.

Wisconsin.— Pett *v.* Clark, 5 Wis. 198.

See 30 Cent. Dig. tit. "Judgment," § 156.

66. Pullen *v.* Whitfield, 55 Ga. 174; Britton *v.* Wheeler, 8 Blackf. (Ind.) 31; Winslow *v.* Herrick, 9 Mich. 380; Hall *v.* Rochester, 3 Cow. (N. Y.) 374.

67. Stainbrook *v.* Duncan, 45 Ill. App. 344; Conner *v.* Cockerill, 6 Fed. Cas. No. 3,112, 4 Cranch C. C. 3.

In several states, however, the joint debtor acts provide that in actions regularly commenced against several joint defendants the court may, whenever a several judgment would be proper, render judgment against one or more of them, leaving the action to proceed against the others; and this permits the entry of a judgment by default against a defendant not appearing or not pleading, where the cause of action is joint and several,[68] although, if the claim is upon a joint liability, no final judgment can be entered until the issues raised are finally disposed of, for in that case defendants must stand or fall together.[69] And such statutes do not authorize the entry of a judgment against one only of several defendants who are all equally in default.[70] It has been held that where process is served on only one of two defendants, judgment by default cannot be rendered against both or against the one served,[71] unless by the aid of statutes such as those above mentioned.[72] One who is originally a defendant, but afterward, by leave of court, becomes a plaintiff and files a cross bill, is not entitled to a default judgment against his co-defendants, if they had no notice of his cross bill or that he had changed his status in the case.[73]

4. Jurisdiction of Defendant. A judgment entered by default against a party who has not been served with process and who has not appeared in the action is irregular and void.[74] And due and proper service must appear on the record, or

68. *California.*— Bailey Loan Co. *v.* Hall, 110 Cal. 490, 42 Pac. 962.

Indiana.— Key *v.* Robinson, 8 Ind. 368.

Mississippi.— Moore *v.* Ayres, 5 Sm. & M. 310.

Missouri.— Lyon *v.* Page, 21 Mo. 104; Beshears *v.* Vandalia Banking Assoc., 73 Mo. App. 293.

Nebraska.— German-American Bank *v.* Stickle, 59 Nebr. 321, 80 N. W. 910.

New York.— Genesee Bank *v.* Field, 19 Wend. 643.

Texas.— Johnson *v.* Davis, 7 Tex. 173.

69. Pennsylvania Finance Co. *v.* Hanlon, 75 Ill. App. 188; Rich *v.* Husson, 4 Sandf. (N. Y.) 115; Kinney *v.* Belcher, 1 N. Y. City Ct. 49; Osbun *v.* Bartram, 15 Ohio Cir. Ct. 224. And see Bausman *v.* Eads, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201

70. Long *v.* Serrano, 55 Cal. 20; Murtland *v.* Floyd, 153 Pa. St. 99, 25 Atl. 1038; Stewart *v.* Glenn, 5 Wis. 14.

71. *California.*— Kelly *v.* Van Austin, 17 Cal. 564.

Illinois.— Anderson *v.* Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; Rider *v.* Alleyne, 3 Ill. 474.

Iowa.— Kellogg *v.* Window, 100 Iowa 552, 69 N. W. 875.

Kentucky.— Randall *v.* Shropshire, 4 Metc. 327; Butler *v.* Stump, 4 Bibb 387.

Maine.— Winslow *v.* Lambard, 57 Me. 356.

Maryland.— Hanley *v.* Donoghue, 59 Md. 239, 43 Am. Rep. 554.

New Hampshire.— Burt *v.* Stevens, 22 N. H. 229. *Compare* Merrill *v.* Coggill, 12 N. H. 97.

New Jersey.— Jones *v.* McKelway, 17 N. J. L. 345; Gulick *v.* Thompson, 4 N. J. L. 292.

Texas.— Rogers *v.* Harrison, 44 Tex. 169; Tilman *v.* Johnson, (App. 1890) 16 S. W. 788.

See 30 Cent. Dig. tit. "Judgment." § 157.

72. Kelly *v.* Van Austin, 17 Cal. 564; Dillon *v.* Porter, 36 Minn. 341, 31 N. W. 56.

73. Cole *v.* Grigsby, (Tex. Civ. App. 1894) 35 S. W. 680.

74. *Arkansas.*— Moore *v.* Watkins, 1 Ark. 268.

California.— Johnston *v.* Callahan, 146 Cal. 212, 79 Pac. 870.

Georgia.— Martin *v.* Scott, 118 Ga. 149, 44 S. E. 974.

Illinois.— Townsand *v.* Townsand, 21 Ill. 540; Cooke *v.* Haungs, 113 Ill. App. 501; Ditch *v.* People, 31 Ill. App. 368.

Indiana.— Shepherd *v.* Marvel, 16 Ind. App. 417, 45 N. E. 526.

Iowa.— Hoitt *v.* Skinner, 99 Iowa 360, 68 N. W. 788; Muscatine Turn Verein *v.* Funck, 18 Iowa 469.

Kansas.— York Draper Mercantile Co. *v.* Hutchinson, 2 Kan. App. 47, 43 Pac. 315.

Kentucky.— Randall *v.* Shropshire, 4 Metc. 327; Foster *v.* Wade, 4 Metc. 252.

Louisiana.— State *v.* Billings, 23 La. Ann. 798; Madden *v.* Fielding, 19 La. Ann. 505.

Michigan.— Johnson *v.* Delbridge, 35 Mich. 436.

Mississippi.— Duncan *v.* Gerdine, 59 Miss. 550; Prentiss *v.* Mellen, 1 Sm. & M. 521.

Missouri.— Bascom *v.* Young, 7 Mo. 1; Patterson *v.* Yancey, 97 Mo. App. 681, 71 S. W. 845.

New York.— Durkin *v.* Paten, 97 N. Y. App. Div. 139, 89 N. Y. Suppl. 622; J. H. Mohlman Co. *v.* Landwehr, 87 N. Y. App. Div. 83, 83 N. Y. Suppl. 1073.

North Carolina.— Swift *v.* Dixon, 131 N. C. 42, 42 S. E. 458; Stallings *v.* Gully, 48 N. C. 344; Winslow *v.* Anderson, 20 N. C. 1, 32 Am. Dec. 651.

Oklahoma.— Foster *v.* Cimarron Valley Bank, 14 Okla. 24, 76 Pac. 145.

Pennsylvania.— Ault *v.* Cowan, 20 Pa. Super. Ct. 628.

Texas.— Rogers *v.* Harrison, 1 Tex. App. Civ. Cas. § 494. And see Field *v.* O'Connor, (Civ. App. 1904) 80 S. W. 872.

Virginia.— Staunton Perpetual Bldg., etc.,

by the officer's return or proof of service, before the court is authorized to render a judgment by default.[75] If the summons, citation, or other process served on defendant was defective or irregular, but not to the extent of being substantially worthless, a judgment entered thereon by default will be irregular and liable to be corrected, reversed, or set aside, but not absolutely void.[76] Further process, sufficient in itself, must be duly served upon the party or upon some person authorized to receive or accept service in his stead.[77] But when jurisdiction is

Co. *v.* Haden, 92 Va. 201, 23 S. E. 285; Graham *v.* Graham, 4 Munf. 205.

Washington.— Osborne *v.* Columbia County Farmers' Alliance Corp., 9 Wash. 666, 38 Pac. 160.

West Virginia.— Rorer *v.* People's Bldg., etc., Assoc., 47 W. Va. 1, 34 S. E. 758.

Wisconsin.— Zimmerman *v.* Gerdes, 106 Wis. 608, 82 N. W. 532.

United States.— Warren Mfg. Co. *v.* Etna Ins. Co., 29 Fed. Cas. No. 17,206, 2 Paine 501.

See 30 Cent. Dig. tit. "Judgment," § 25.

Effect of appearance to set aside for want of jurisdiction see APPEARANCES, 3 Cyc. 528.

Where no summons was served on defendant in attachment, a personal judgment against him was not authorized. Stone *v.* Cassidy, (Ark. 1905) 87 S. W. 621.

75. *California.*—Elder *v.* Grunsky, 127 Cal. 67, 59 Pac. 300.

Georgia.— Pennsylvania Casualty Co. *v.* Thompson, 123 Ga. 240, 51 S. E. 314; News Printing Co. *v.* Brunswick Pub. Co., 113 Ga. 160, 38 S. E. 333. Although there has been valid service, yet if there is no return, or a void return, no default judgment should be entered. Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

Indiana.— Leach *v.* Adams, 21 Ind. App. 547, 52 N. E. 813.

Kentucky.— Herman *v.* Martin, 107 Ky. 642, 55 S. W. 429, 21 Ky. L. Rep. 1396.

Michigan.— Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514; People's Mut. Ben. Soc. *v.* Frazer, 97 Mich. 627, 56 N. W. 944.

New York.— Loeb *v.* Smith, 24 Misc. 200, 52 N. Y. Suppl. 677.

Texas.— Robinson *v.* Horton, 36 Tex. Civ. App. 333, 81 S. W. 1044; Owen *v.* Kuhn, (Civ. App. 1903) 72 S. W. 432; Russell *v.* Butler, (Civ. App. 1902) 71 S. W. 395; Harbolt *v.* State, 37 Tex. Cr. 639, 40 S. W. 998.

Wisconsin.— Zimmerman *v.* Gerdes, 106 Wis. 608, 82 N. W. 532; Wilkinson *v.* Bayley, 71 Wis. 131, 36 N. W. 836.

Record supplying proof of service.— A default judgment will not be disturbed because the officer's affidavit of service was not entered on the back of the writ, it being sufficient if the record states that the service was verified according to law. Brown *v.* Butterworth, (Del. 1904) 58 Atl. 1041.

76. *Iowa.*— Heins *v.* Wicke, 102 Iowa 396, 71 N. W. 345; Church *v.* Lacy, 102 Iowa 235, 71 N. W. 338; Hoitt *v.* Skinner, 99 Iowa 360, 68 N. W. 788; De Tar *v.* Boone County, 34 Iowa 488; Kitsmiller *v.* Kitchen, 24 Iowa 163.

Massachusetts.— Bishop *v.* Donnell, 171 Mass. 563, 51 N. E. 170.

Mississippi.— Betts *v.* Baxter, 58 Miss. 334; Christian *v.* O'Neal, 46 Miss. 669; Campbell *v.* Hays, 41 Miss. 561.

Nebraska.— Ley *v.* Pilger, 59 Nebr. 561, 81 N. W. 507.

New York.— Crouse *v.* Reichert, 61 Hun 46, 15 N. Y. Suppl. 369. The summons cannot be changed after defendant's default by bringing in a new plaintiff and giving him a judgment. Korman *v.* Grand Lodge I. O. F. S. of I., 44 Misc. 564, 90 N. Y. Suppl. 120.

Ohio.— Gillett *v.* Miller, 12 Ohio Cir. Ct. 209, 5 Ohio Cir. Dec. 588.

Texas.— McCullar *v.* Murchison, (Civ. App. 1897) 40 S. W. 545; Line *v.* Cranfill, (Civ. App. 1896) 37 S. W. 184; Dunn *v.* Hughes, (Civ. App. 1896) 36 S. W. 1084; Harbolt *v.* State, 37 Tex. Cr. 639, 40 S. W. 998. And see Shook *v.* Laufer, (Civ. App. 1904) 84 S. W. 277; Robinson *v.* Horton, 36 Tex. Civ. App. 333, 81 S. W. 1044; Delaware Western Constr. Co. *v.* Farmers', etc., Nat. Bank, 33 Tex. Civ. App. 658, 77 S. W. 628.

Wisconsin.— Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037.

United States.— Isaacs *v.* Price, 13 Fed. Cas. No. 7,097, 2 Dill. 347.

Defects in process as affecting the jurisdiction of the court generally see *supra*, I, E, 5.

Misnomer of parties as affecting sufficiency of process see Ueland *v.* Johnson, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698; Bradley *v.* Sandilands, 66 Minn. 40, 68 N. W. 321, 61 Am. St. Rep. 386; Gillian *v.* McDowall, 66 Nebr. 814, 92 N. W. 991.

77. *Iowa.*— Hoitt *v.* Skinner, 99 Iowa 360, 68 N. W. 788.

New York.— Goldberg *v.* Fowler, 29 Misc. 328, 60 N. Y. Suppl. 475. See O'Connell *v.* Gallagher, 104 N. Y. App. Div. 492, 93 N. Y. Suppl. 643; Seifert *v.* Caverly, 63 Hun 604, 18 N. Y. Suppl. 327.

Pennsylvania.— Scranton *v.* Manley, 13 Pa. Super. Ct. 439.

United States.— King *v.* Davis, 137 Fed. 198; Isaacs *v.* Price, 13 Fed. Cas. No. 7,097, 2 Dill. 347.

Canada.— Holmes *v.* Stewiacke R. Co., 32 Nova Scotia 395.

A voluntary appearance by defendant will confer jurisdiction and amount to a waiver of defects in the process or its service; but the entry of an order that the cause "is hereby continued by consent" does not show such an appearance and waiver of service as will support a judgment by default. Flowers *v.* Jackson, 66 Ark. 458, 51 S. W. 462.

thus acquired, it is not divested by subsequent errors or irregularities in the proceedings.[78] In the case of constructive service of process, by publication or otherwise, jurisdiction to render a judgment by default will depend upon a strict compliance with the requirements of the statutes in that behalf.[79]

5. WAIVER OF DEFAULT. A plaintiff who means to take advantage of defendant's default must insist upon his right to do so; he waives the default if he voluntarily extends the time for defendant to take the required step, accepts a pleading filed too late, consents to a reference of the case, and allows the introduction of evidence, or goes to trial without objection.[80]

6. DISCRETION OF COURT. Upon an application for judgment by default, defendant being technically in default, it is in the sound discretion of the court to grant the motion or take off the default, according to the justice of the particular case and the relative diligence or laches of the parties, or, on granting defendant leave to plead, to restrict the time within which he may do so, or otherwise impose reasonable terms on him.[81]

7. EFFECT OF DEATH OF DEFENDANT. As the mere entry of a default does not involve or amount to a final judgment and does not determine either the kind or

Effect of acknowledgment or acceptance of service see Johnson *v.* Delbridge, 35 Mich. 436; Winston *v.* Miller, 12 Sm. & M. (Miss.) 550; Davis *v.* Jordan, 5 How. (Miss.) 295; Read *v.* French, 28 N. Y. 285.

Amended or substituted petition.— Judgment by default cannot be rendered on an amended or substituted petition, without the issuance and service of process thereon. Cope *v.* Slayden, 72 S. W. 284, 24 Ky. L. Rep. 1734; Watson *v.* Miller Bros., 69 Tex. 175, 5 S. W. 680; Franklin *v.* Houston, 22 Tex. Civ. App. 459, 54 S. W. 913. But a judgment by default is not void where it appears that a summons upon the petition as amended was duly served on defendant. Little *v.* Ferguson, 55 S. W. 554, 21 Ky. L. Rep. 1398.

One becoming defendant on own motion.— To warrant entering a judgment against one who has been made a defendant on his own motion, there must be notice and proof of no answer, the same as in the ordinary case of a defendant who has been served and has appeared. Fagan *v.* Barnes, 14 Fla. 53.

78. Deutsch Roemisch Katholischer Central Verein *v.* Lartz, 94 Ill. App. 255.

79. *Delaware.*—Taylor *v.* Rossiter, 6 Houst. 485.

Iowa.— Gary *v.* Northwestern Masonic Aid Assoc., (1891) 50 N. W. 27.

Massachusetts.— Porter *v.* Prince, 188 Mass. 80, 74 N. E. 256.

Missouri.— State *v.* White, 75 Mo. App. 257.

New York.— Bowler *v.* Ennis, 46 N. Y. App. Div. 309, 61 N. Y. Suppl. 686; Diller *v.* Willis, 34 Misc. 197, 68 N. Y. Suppl. 829.

Oklahoma.— Hockaday *v.* Jones, 8 Okla. 156, 56 Pac. 1054.

Texas.— Wilson *v.* Cleburne Nat. Bank, 27 Tex. Civ. App. 54, 63 S. W. 1067.

Washington.— Bailey *v.* Hood, 38 Wash. 700, 80 Pac. 559.

Where a court has jurisdiction to make a valid order for publication of summons, a judgment by default predicated thereon is valid. People *v.* Wrin, 143 Cal. 11, 76 Pac. 646.

80. *California.*— Sawtelle *v.* Muncy, 116 Cal. 435, 48 Pac. 387; Hestres *v.* Clements, 21 Cal. 425. But see Pennie *v.* Visher, 94 Cal. 323, 29 Pac. 711.

Illinois.— National Union Bldg. Assoc. *v.* Brewer, 41 Ill. App. 223.

Indiana.— Aston *v.* Wallace, 43 Ind. 468.

Iowa.— Jones *v.* Jones, 13 Iowa 276.

Kansas.— Luke *v.* Johnnycake, 9 Kan. 511.

Maryland.— King *v.* Hicks, 32 Md. 460.

Mississippi.— Covel *v.* Smith, 68 Miss. 296, 8 So. 850.

New York.— Knickerbacker *v.* Loucks, 3 How. Pr. 64.

North Carolina.— Faucette *v.* Ludden, 117 N. C. 170, 23 S. E. 173.

Pennsylvania.— Muir *v.* Preferred Acc. Ins. Co., 203 Pa. St. 338, 53 Atl. 158.

Texas.— Looney *v.* Linney, (Civ. App. 1892) 21 S. W. 409.

Washington.—Cornell University *v.* Denney Hotel Co., 15 Wash. 433, 46 Pac. 654.

See 30 Cent. Dig. tit. "Judgment," § 164.

81. *Alabama.*— Hudson *v.* Wood, 102 Ala. 631, 15 So. 356.

Georgia.— Chambless *v.* Livingston, 123 Ga. 257, 51 S. E. 314.

Iowa.— Rhutasel *v.* Rule, 97 Iowa 20, 65 N. W. 1013.

Louisiana.— Seddan *v.* Templeton, 7 La. Ann. 126.

Massachusetts.— Willey *v.* Durgin, 118 Mass. 64; Crippen *v.* Byron, 4 Gray 314.

Nebraska.— Lichtenberger *v.* Worm, 41 Nebr. 856, 60 N. W. 93.

Ohio.— Striker *v.* Beattie, 7 Ohio Dec. (Reprint) 683, 4 Cinc. L. Bul. 956; Mehmert *v.* Tynes, 3 Ohio S. & C. Pl. Dec. 57, 1 Ohio N. P. 393.

Texas.— Crigsby *v.* May, 84 Tex. 240, 19 S. W. 343.

Washington.— Haynes *v.* B. F. Schwartz Co., 5 Wash. 433, 32 Pac. 220.

See 30 Cent. Dig. tit. "Judgment," § 160.

amount of such judgment, but leaves the matter open for further proceedings if defendant dies before such proceedings a final judgment against him is, erroneous and void.[82]

B. Pleadings to Sustain Judgment — 1. Requisites of Declaration or Complaint. A default admits only what is well pleaded; and consequently a judgment by default cannot be sustained if plaintiff's declaration or complaint does not state a good cause of action or lacks those averments which are necessary to show his right to recover.[83] The test proposed by some of the decisions is that the declaration or complaint must be sufficient to withstand a general demurrer.[84]

82. Colson *v.* Wade, 5 N. C. 43; Carter *v.* Carriger, 3 Yerg. (Tenn.) 411, 24 Am. Dec. 585; Sheldon *v.* Sheldon, 37 Vt. 152. See also Smith *v.* Lynch, 12 N. Y. Civ. Proc. 348. *Compare* Matter of Clark, 5 Dem. Surr. (N. Y.) 377, under Code Civ. Proc. § 763.

Effect of death on judgments generally see *supra*, I, C, 2.

83. *Alabama.*— Haygood *v.* Tait, 126 Ala. 264, 27 So. 842; Amason *v.* Nash, 19 Ala. 104; Walker *v.* Massey, 10 Ala. 30; Wellhorn *v.* Sheppard, 5 Ala. 674.

California.— Penrose *v.* Winter, 135 Cal. 289, 67 Pac. 772; McDonald *v.* Placerville, (1898) 55 Pac. 600; Hibernia Sav., etc., Soc. *v.* Matthai, 116 Cal. 424, 48 Pac. 370; Hallock *v.* Jaudin, 34 Cal. 167; Barron *v.* Frink, 30 Cal. 486; Abbe *v.* Marr, 14 Cal. 210.

Colorado.— Pickett *v.* Handy, 9 Colo. App. 357, 48 Pac. 820.

Delaware.— Reybold *v.* Denny, 3 Pennew. 589, 53 Atl. 55.

Florida.— Wilson *v.* Fridenberg, 22 Fla. 114.

Illinois.— Schueler *v.* Mueller, 193 Ill. 402, 61 N. E. 1044; Schultz *v.* Meiselbar, 144 Ill. 26, 32 N. E. 550; Chicago, etc., R. Co. *v.* Coss, 73 Ill. 394; Wright *v.* Bennett, 4 Ill. 258; Woodruff *v.* Matheney, 55 Ill. App. 350; Press *v.* Ridgeway Refrigerator Mfg. Co., 37 Ill. App. 269.

Indian Territory.— Merrill *v.* Martin, 3 Indian Terr. 571, 64 S. W. 539.

Iowa.— Warthen *v.* Himstreet, 112 Iowa 605, 84 N. W. 702; Bosch *v.* Kassing, 64 Iowa 312, 20 N. W. 454.

Maine.— Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

Minnesota.— Doud *v.* Duluth Mill. Co., 55 Minn. 53, 56 N. W. 463.

Mississippi.— Merritt *v.* White, 37 Miss. 438. And see Smith *v.* Frank Gardner Hardware Co., 83 Miss. 654, 36 So. 9.

Nebraska.— Koehler *v.* Reed, 1 Nebr. (Unoff.) 836, 96 N. W. 380; Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

New Mexico.— Dame *v.* Cochiti Reduction, etc., Co., (1905) 79 Pac. 296.

North Carolina.— Cowles *v.* Cowles, 121 N. C. 272, 28 S. E. 476.

Ohio.— Smitheron *v.* Owens, Wright 574.

Oregon.— Bailey *v.* Malheur, etc., Irr. Co., 36 Oreg. 54, 57 Pac. 910; Askren *v.* Squire, 29 Oreg. 228, 45 Pac. 779.

Pennsylvania.— Ide *v.* Booth, 8 Pa. Co. Ct. 499; Brennan *v.* Franey, 5 Pa. Co. Ct. 212; Morris *v.* Creswell, 2 Pearson 197; Swenk *v.* Erwin, 8 Del. Co. 122; First Nat. Bank *v.* Day, 13 York Leg. Rec. 187.

Texas.— Andrews *v.* Union Cent. L. Ins. Co., 92 Tex. 584, 50 S. W. 572; Glenn *v.* Shelburne, 29 Tex. 125; Thigpen *v.* Mundine, 24 Tex. 282; Hall *v.* Jackson, 3 Tex. 305; McCullar *v.* Murchison, (Civ. App. 1897) 40 S. W. 545; Johnson *v.* Dowling, 1 Tex. App. Civ. Cas. § 1090. And see El Paso, etc., R. Co. *v.* Kelly, (Civ. App. 1904) 83 S. W. 855 [*reversed* in (1905) 87 S. W. 660]; Tyler *v.* Blanton, 34 Tex. Civ. App. 393, 78 S. W. 564.

Wisconsin.— Crist *v.* Davidson, (1903) 93 N. W. 532; Stahl *v.* Chicago, etc., R. Co., 94 Wis. 315, 68 N. W. 954. *Compare* Frankfurth *v.* Anderson, 61 Wis. 107, 20 N. W. 662.

United States.— U. S. *v.* Bell, 135 Fed. 336, 68 C. C. A. 144 [*affirming* 127 Fed. 1002]. But see Dorr *v.* Birge, 8 Barb. (N. Y.) 351; Reeder *v.* Lockwood, 30 Misc. (N. Y.) 531, 62 N. Y. Suppl. 713; Pope *v.* Dinsmore, 8 Abb. Pr. (N. Y.) 429; Adams *v.* Oaks, 20 Johns. (N. Y.) 282.

Applications of text.—A petition which does not allege an assignment of the claim sued on, when it is not in plaintiff's name and no assignment is proved, will not sustain a judgment by default. Thompson *v.* Stetson, 15 Nebr. 112, 17 N. W. 368. So a judgment by default for fraudulent representations cannot stand unless the intent to defraud was alleged in the complaint. Shields *v.* Clement, 12 Misc. (N. Y.) 506, 33 N. Y. Suppl. 676. But such a judgment is not void merely because the complaint fails to show whether plaintiff described as a "company," is a corporation or a partnership. Moore *v.* Martin, etc., Co., 124 Ala. 291, 27 So. 252.

Effect of misnomer of defendant see Kingen *v.* Stroh, 136 Ind. 610, 36 N. E. 519; Booth *v.* Holmer, 2 Tex. Unrep. Cas. 232.

Failure to lay venue.— Where a judgment has been entered by default for want of a plea, defendant cannot, on a rule to strike off the judgment, allege that the statement of claim was insufficient, because it did not lay a venue; in such a case the omission is cured by the default. American Mfg. Co. *v.* S. Morgan Smith Co., 25 Pa. Super. Ct. 176.

84. Globe Acc. Ins. Co. *v.* Reid, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291; Sloan *v.* Faurot, 11 Ind. App. 689, 39 N. E. 539; Ishmel *v.* Potts, (Tex. Civ. App. 1898) 44

In addition to this, it is necessary to sustain the judgment, if so provided by statute, that the complaint should be verified,[85] and accompanied by plaintiff's affidavit;[86] nor will the judgment be valid if it grants relief different from that prayed in the complaint or in excess of plaintiff's demands.[87] But if the declaration contains several counts, one of which is good, the judgment will be sustained, although the other counts are not sufficient.[88]

2. Filing and Serving Declaration or Complaint. Unless a plaintiff has filed his declaration or complaint at or within the prescribed time, and served the same on defendant, if that is required by the statute, he will not be entitled to a judgment by default on defendant's failure to appear or plead, and a judgment so entered will be irregular and voidable.[89]

3. Effect of Amendment. It is a general rule that an amendment of the declaration or complaint, after default, if it introduces a new cause of action, or if it otherwise goes to the substance of the pleading, opens the default and admits the defendant to all the rights which he would have had on the filing or service of the original declaration or complaint,[90] although it is otherwise if the amendment is immaterial or merely formal.[91] And if the amendment brings in a new defendant, he cannot be defaulted until he has had due time to appear and plead.[92] But judgment rendered on the amended declaration or complaint

S. W. 615. And see Loeber *v.* Delahaye, 7 Iowa 478.

85. Witt *v.* Long, 93 N. C. 388.

86. De Atley *v.* Senior, 55 Md. 479; Strock *v.* Com., 90 Pa. St. 272. *Compare* St. Louis, etc., R. Co. *v.* Yocum, 34 Ark. 493.

87. Northern Trust Co. *v.* Albert Lea College, 68 Minn. 112, 71 N. W. 9; McKibben *v.* Harris, 54 Nebr. 520, 74 N. W. 952; Parszyk *v.* Mach, 10 S. D. 555, 74 N. W. 1027. And see *infra*, IV, E, 6, b.

88. Hunt *v.* San Francisco, 11 Cal. 250; Swearingen *v.* Mt. Pleasant Bank, 13 Ohio 200. But *compare* Dryden *v.* Dryden, 9 Pick. (Mass.) 546; Hemmenway *v.* Hickes, 4 Pick. (Mass.) 497.

89. *Alabama.*— Amason *v.* Nash, 19 Ala. 104; Wellborn *v.* Sheppard, 5 Ala. 674; Ware *v.* Todd, 1 Ala. 199; Price *v.* Chevers, 9 Port. 511; Napper *v.* Noland, 9 Port. 218; Masterton *v.* Beasley, 1 Stew. & P. 247; McElroy *v.* Dwight, 1 Stew. 149. And the want of a declaration is not cured by filing one after judgment on default. Rankin *v.* Crowill, Minor 125.

Delaware.— Hibbert *v.* Guardian Sav., etc., Assoc., 3 Pennew. 591, 53 Atl. 54.

District of Columbia.— Fidelity, etc., Co. *v.* U. S., 187 U. S. 315, 23 S. Ct. 120, 47 L. ed. 194 [*affirming* 20 App. Cas. 376].

Illinois.— Moody *v.* Thomas, 79 Ill. 274; Woodruff *v.* Matheney, 55 Ill. App. 350; Smith *v.* Little, 53 Ill. App. 157; Maple *v.* Havenhill, 37 Ill. App. 311; Press *v.* Ridgway Refrigerator Mfg. Co., 37 Ill. App. 269; Wakefield *v.* Pennington, 9 Ill. App. 374.

Iowa.— Jones *v.* Merrill, 73 Iowa 234, 34 N. W. 829. See Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Carver *v.* Seevers, 126 Iowa 669, 102 N. W. 518.

Michigan.— Marshall *v.* Calkins, 114 Mich. 697, 72 N. W. 992; Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514.

Mississippi.— Merritt *v.* White, 37 Miss. 438.

New York.— Crouse *v.* Reichert, 61 Hun 46, 15 N. Y. Suppl. 369.

Pennsylvania.— Vanormer *v.* Ford, 98 Pa. St. 177; Kohler *v.* Luckenbaugh, 84 Pa. St. 258; Black *v.* Johns, 68 Pa. St. 83; Foreman *v.* Schricon, 8 Watts & S. 43; Graham *v.* Blank, 6 Pa. Dist. 133; Thompson *v.* Owen, 8 Kulp 36; Cleary *v.* Association, 1 Leg. Rec. 360; Hiester *v.* Muhlenberg, 2 Woodw. 1. *Compare* Morrison *v.* Wetherill, 8 Serg. & R. 502.

Texas.— Kennedy *v.* McCoy, 46 Tex. 220; Glenn *v.* Shelburne, 29 Tex. 125; Dunn *v.* Hughes, (Civ. App. 1896) 36 S. W. 1084.

Virginia.— Waugh *v.* Carter, 2 Munf. 333.

Washington.— Spokane Falls *v.* Curry, 2 Wash. 541, 27 Pac. 477.

See 30 Cent. Dig. tit. "Judgment," § 169.

But see Hibernia Sav., etc., Soc. *v.* Matthai, 116 Cal. 424, 48 Pac. 370; Young *v.* Young, 18 Minn. 90; Roberts *v.* Allman, 106 N. C. 391, 11 S. E. 424; Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037.

90. *California.*— Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40; Witter *v.* Bachman, 117 Cal. 318, 49 Pac. 202.

Connecticut.— La Barre *v.* Waterbury, 69 Conn. 554, 37 Atl. 1068.

Indian Territory.— Brooks *v.* Collier, 3 Indian Terr. 468, 58 S. W. 559.

Kentucky.— Mullins *v.* Johnson, 52 S. W. 843, 21 Ky. L. Rep. 633.

Montana.— Barber *v.* Briscoe, 8 Mont. 214, 19 Pac. 589.

Canada.— Guess *v.* Perry, 12 Ont. Pr. 460.

91. Boisse *v.* Langham, 1 Mo. 572; King *v.* Goodson, 42 Tex. 81; Ellis *v.* Mabry, 25 Tex. Civ. App. 164, 60 S. W. 571. And see Southern Bell Tel., etc., Co. *v.* Parker, 119 Ga. 721, 47 S. E. 194.

92. Mears *v.* James, 2 Nev. 342; Snow *v.* Morehouse, 37 Tex. 514.

will cure defects or insufficiency of the original declaration or complaint on which the default was taken.[93]

4. Service or Notice of Amended Pleading. Where the declaration or complaint is amended in matters of substance, or withdrawn and a new one filed in its place, the amended or substituted pleading must be served on defendant, or he must be otherwise notified of it, according to the requirements of the statute, before he can be defaulted.[94] It has been held that defendant should be admitted to a defense only as to the new matters set up in the amended petition, not as to matters pleaded in the original petition, which he failed to answer in due season.[95]

C. Grounds For Judgment by Default[96] — 1. What Constitutes Default in General. Although a default properly means defendant's failure to appear at the return-day,[97] the term is also used where he fails to demur or plead.[98] But the mere failure of defendant to obey an order of court made incidentally in the progress of the cause does not usually entitle plaintiff to take judgment as by default.[99] It is also erroneous to enter a judgment by default, where a judgment of nonsuit appears on the record as still subsisting.[1] Where defendant pleads in abatement, and no replication is filed, his failure to move for a judgment of *non pros.* does not authorize the entry of a judgment against him.[2]

2. Default of Appearance — a. In General. Defendant's failure to enter his appearance, or cause an appearance to be entered for him, is a default which will entitle plaintiff to take judgment.[3] Defendant's rights will be saved in this respect not only by a formal entry of appearance,[4] but by his taking any step in

93. Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51; Schirmeier *v.* Baecker, 20 Ill. App. 373.

94. Brown *v.* Tuttle, 27 Ill. App. 389; Littlefield *v.* Schmoldt, 24 Ill. App. 624; Cross *v.* Stevens, 45 Kan. 443, 25 Pac. 880; People *v.* Woods, 2 Sandf. (N. Y.) 652; Watson *v.* Miller, 69 Tex. 175, 5 S. W. 680; Texas, etc., R. Co. *v.* White, 55 Tex. 251; McRee *v.* Brown, 45 Tex. 503; McNeil *v.* Childress, 34 Tex. 370; Furlow *v.* Miller, 30 Tex. 28; Weatherford *v.* Van Alstyne, 22 Tex. 22; Morrison *v.* Walker, 22 Tex. 18; Hutchinson *v.* Owen, 20 Tex. 287. *Compare* Spencer *v.* McCarty, 46 Tex. 213; Perryman *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 349.

Service of answer after complaint amended. — Where, after answer served, the complaint is formally amended, it is not necessary to serve another answer, and defendant is not in default for failure to do so. Martinson *v.* Marzolf, (N. D. 1905) 103 N. W. 937.

95. Bennett *v.* Carey, 72 Iowa 476, 34 N. W. 291.

96. In Connecticut under a statute providing that, in cases where an attorney appears for defendant, plaintiff may require him to state to the court whether he believes a *bona fide* defense exists to the action, whether such defense will be made, and whether there will be a trial, and that if the attorney refuses to disclose as required, or fails to satisfy the court that such defense will be made or such trial had, the court may order judgment for plaintiff, it has been held that where the rule is complied with, the court has no authority to pass on the legal sufficiency of the defense, and render judgment because it deems such defense insufficient. Jennings *v.* Parsons, 71 Conn. 413, 42 Atl. 76.

In North Carolina under a statute (Clark Code Civ. Proc. § 237), providing that in actions for the recovery of real estate defendant, before he is permitted to plead, shall file an undertaking with good and sufficient surety, but containing no requirement that the bond shall be justified in the first instance, the mere entry on the back of the undertaking of plaintiff's exception to the filing thereof, without any action of the court thereon, is insufficient to entitle plaintiff to judgment by default final on the failure of defendant to have the undertaking justified. Becton *v.* Dunn, 137 N. C. 559, 50 S. E. 289.

97. Kessler *v.* Vera, 25 Misc. (N. Y.) 763, 54 N. Y. Suppl. 142.

98. Moses *v.* Kittle, 103 Ga. 806, 30 S. E. 687.

99. Order to testify or attend for examination see Snyder *v.* Raab, 40 Mo. 166; Cheever *v.* Scott, 38 N. H. 32; Anderson *v.* Johnson, 1 Sandf. (N. Y.) 713.

Order to produce papers see Sutherlin *v.* Underwriters' Agency, 53 Ga. 442.

Order to pay motion costs see Canavello *v.* Michael, 31 Misc. (N. Y.) 170, 63 N. Y. Suppl. 967.

Order to pay motion costs see Canavello *v.* more, etc., R. Co. *v.* Ritchie, 31 Md. 191.

1. Kelley *v.* Hogan, 16 Mo. 215. *Compare* Jones *v.* Merrill, 1 Ala. 217.

2. Gaston *v.* Parsons, 8 Port. (Ala.) 469.

3. Chicago, etc., R. Co. *v.* Bozarth, 91 Ill. App. 68; Carter *v.* Daizy, 42 Miss. 501; Dubois *v.* Glaub, 52 Pa. St. 238; Saupp *v.* Flanigan, 7 Pa. Dist. 604; Humphrey *v.* Smith, 5 Lanc. L. Rev. (Pa.) 1. *Compare* Henry *v.* Carson, 96 Ind. 412.

4. Sheepshanks *v.* Boyer, 21 Fed. Cas. No. 12,741, Baldw. 462, holding that an application to the clerk and his promise to enter an appearance are equivalent to an appear-

the proceedings which unequivocally shows that he submits himself generally to the jurisdiction of the court.[5] But this effect is not produced by a special appearance entered for the purpose of objecting to the jurisdiction,[6] or by a motion to dissolve an attachment,[7] or for a continuance.[8] If the appearance is entered by an attorney for defendant, it should be done by a formal entry of record, or formal notice of his appearance, or by the filing of a pleading.[9] A default obtained without proper service and on an unauthorized appearance by an attorney is void.[10]

b. Withdrawal of Appearance. If the attorney who has entered an appearance for defendant withdraws his appearance, although without leave of court, before further proceedings are had, judgment by default for want of an appearance may then be taken.[11] And so if defendant, after pleading, withdraws his own appearance, his plea goes with him, and judgment may be rendered against him as on default.[12] But the withdrawal of the attorney's appearance after the filing of a plea does not withdraw the plea so as to justify a judgment by default.[13]

c. Absence at Trial or Other Proceeding. In most states it is held that the mere failure of defendant to appear when the case is called for trial, his plea or answer being on file, will not entitle plaintiff to take judgment as by default, but the trial must proceed and plaintiff must present evidence in support of his demands.[14] In a few, however, judgment by default is allowed in such cases.[15]

ance, and a default cannot be taken on his omission.

5. Ridgway *v.* Horner, 55 N. J. L. 84, 25 Atl. 386.

Giving bail.— A default judgment against one who has been arrested and has given bail to the sheriff, but not entered special bail, is invalid. Foreman *v.* McFerrin, 13 Serg. & R. (Pa.) 290.

Filing affidavit of defense.— Judgment for want of an appearance cannot be taken against a defendant who, although he enters no formal appearance, nevertheless files an affidavit of defense. Philadelphia *v.* Hopple, 2 Pa. Co. Ct. 543.

6. See *supra*, I, E, 1, b. And see Mantle *v.* Casey, 31 Mont. 408, 78 Pac. 591. *Compare* London Assur. Corp. *v.* Lee, 66 Tex. 247, 18 S. W. 508.

7. Glidden *v.* Packard, 28 Cal. 649; Warren Sav. Bank *v.* Silverstein, 15 Pa. Co. Ct. 584. *Compare* Myler *v.* Wittish, 204 Pa. St. 180, 53 Atl. 758.

8. Flowers *v.* Jackson, 66 Ark. 458, 51 S. W. 462; Hoyt *v.* Macon, 2 Colo. 113.

9. Couch *v.* Mulhane, 63 How. Pr. (N. Y.) 79.

Service of notice of retainer see Bronk *v.* Conklin, 2 How. Pr. (N. Y.) 7; Pierson *v.* Miles, 12 Wend. (N. Y.) 221; Lynes *v.* Schooley, 7 Cow. (N. Y.) 516.

10. Dillon *v.* Rand, 15 Colo. 372, 25 Pac. 185; Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Fleming *v.* Boulevard Highlands Imp. Co., 12 Colo. App. 187, 54 Pac. 859; Howell *v.* Campbell, 53 Kan. 742, 37 Pac. 120. But if defendant was personally served, it is immaterial, as affecting a judgment by default against him, whether or not an attorney who appeared for him was authorized so to do, since in either event the judgment is proper. Hunter *v.* Bryant, 98 Cal. 252, 33 Pac. 55.

11. Summerlin *v.* Dowdle, 24 Ala. 428; Henck *v.* Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300; Hutchinson *v.* Manchester St. R. Co., 73 N. H. 271, 60 Atl. 1011; Rio Grande Irr., etc., Co. *v.* Gildersleeve, 174 U. S. 603, 19 S. Ct. 761, 43 L. ed. 1103 [*affirming* 9 N. M. 12, 48 Pac. 309].

12. Carver *v.* Williams, 10 Ind. 267; Coffin *v.* Evansville, etc., R. Co., 7 Ind. 413; Cox *v.* Graham, 3 Iowa 347.

13. Mason *v.* Abbott, 83 Ill. 445; Muenster *v.* Tremont Nat. Bank, 92 Tex. 422, 49 S. W. 362; Field *v.* Fowler, 62 Tex. 65.

14. *Illinois.*— Covell *v.* Marks, 2 Ill. 391; Manlove *v.* Gallipot, 2 Ill. 390.

Indiana.— Firestone *v.* Firestone, 78 Ind. 534; Maddox *v.* Pulliam, 5 Blackf. 205. *Compare* Langdon *v.* Bullock, 8 Ind. 341.

Iowa.— Arbuckle *v.* Bowman, 6 Iowa 70; Brown *v.* Hollenbeck, 2 Greene 318. But where defendant files a counter-claim, and plaintiff does not appear, defendant is entitled to proceed with the trial of the counter-claim. Stewart *v.* Gorham, (1904) 98 N. W. 512.

Louisiana.— Fonda *v.* Denton, 13 La. Ann. 343.

Maine.— Frothingham *v.* Dutton, 2 Me. 255.

Minnesota.— Strong *v.* Comer, 48 Minn. 66, 50 N. W. 936.

Missouri.— Nordmanser *v.* Hitchcock, 40 Mo. 178.

New York.— Patten *v.* Hazewell, 34 Barb. 421; Murling *v.* Grote, 1 Hilt. 116; Alburtis *v.* McCready, 2 E. D. Smith 39; Pultz *v.* Diossy, 53 How. Pr. 270; Ward *v.* Dewey, 12 How. Pr. 193. But *compare* Moon *v.* Thompson, 2 Daly 180; Brooks *v.* Delaware, etc., R. Co., 88 N. Y. Suppl. 961; Burroughs *v.* Garrison, 15 Abb. Pr. 144.

See 30 Cent. Dig. tit. "Judgment," § 179.

15. Stapp *v.* Thomason, 2 Litt. (Ky.) 214; Schooler *v.* Asherst, 1 Litt. (Ky.) 216, 13

If, however, the case is set or called for trial without giving defendant the notice required by a statute, rule of court, or previous agreement of the parties, a judgment taken by default will be set aside.[16]

3. DEFAULT IN PLEADING — a. Failure to Plead in General. Process having been duly served upon defendant, and plaintiff having filed a good declaration or complaint, judgment as by default may be entered against defendant if he fails to plead or answer in due season;[17] and he will not be saved from this consequence by having entered an appearance in the action; that will prevent the taking of a judgment for want of an appearance, but not a judgment for want of a plea.[18] The plea or answer must be in writing,[19] filed in the particular action,[20] and not withdrawn,[21] and responsive to any and all pleadings in the action which defendant is bound to answer.[22] But if a new party is brought in as defendant, the complaint must be amended, or a new complaint filed against him, or he can-

Am. Dec. 232; Milner *v.* Miller, 4 Bibb (Ky.) 341; Eaton *v.* Morgan, Tapp. (Ohio) 45; McKellar *v.* Lamkin, 22 Tex. 244; Lytle *v.* Custead, 4 Tex. Civ. App. 490, 23 S. W. 451.

16. Simpson *v.* Bryan, (Ky. 1895) 32 S. W. 412; Smith *v.* Moreton Truck, etc., Co., 19 Ohio Cir. Ct. 628, 10 Ohio Cir. Dec. 532; Byrne *v.* Wood, 8 Ohio Dec. (Reprint) 760, 9 Cinc. L. Bul. 308. See, however, People *v.* Denver Dist. Ct., 33 Colo. 405, 80 Pac. 1065.

17. *Arkansas.*— Gatton *v.* Walker, 9 Ark. 199.

California.— Hancock *v.* Pico, 40 Cal. 153; Providence Tool Co. *v.* Prader, 32 Cal. 634, 91 Am. Dec. 598.

Iowa.— See Lyon *v.* Byington, 7 Iowa 422.

New York.— Hays *v.* Berryman, 6 Bosw. 679; Hoffnung *v.* Grove, 18 Abb. Pr. 142; Didier *v.* Warner, 1 Code Rep. 42. And see Tautphoeus *v.* Harbor, etc., Bldg., etc., Assoc., 96 N. Y. App. Div. 23, 88 N. Y. Suppl. 709.

North Carolina.— Hartman *v.* Farrior, 95 N. C. 177; Rogers *v.* Moore, 86 N. C. 85.

Pennsylvania.— See Rankin *v.* Du Puy, 31 Pittsb. Leg. J. N. S. 335.

Washington.— The denial of a motion for default for want of an answer is largely a matter of discretion with the trial court. Woodham *v.* Anderson, 32 Wash. 500, 73 Pac. 536.

See 30 Cent. Dig. tit. "Judgment," § 180.

Time of filing.— Where the parties agree that an answer shall be considered filed as of the date when delivered to plaintiff's attorney, there is no default, although the clerk's file-mark is not put on the answer till the day of the trial. McAnally *v.* Vickry, (Tex. Civ. App. 1904) 79 S. W. 857.

Time for amended plea.— Where the court, on motion to strike a plea and enter default, orders the plea amended by a certain time, the clerk cannot, without further orders, enter default as for want of a plea after such time. Knight *v.* Dunn, 47 Fla. 175, 36 So. 62.

18. Russ *v.* Gilbert, 19 Fla. 54; Brown *v.* Niagara Mach. Co., 7 N. Y. Suppl. 514; North *v.* Yorke, 174 Pa. St. 349, 34 Atl. 620.

In Georgia the mere marking of the name of defendant's counsel on the docket, where no other pleading or defense is filed, is not sufficient to prevent the taking of a judgment by default. Simmons *v.* Auten, (Ga. 1894) 22 S. E. 149; Simmons *v.* Southern Banking, etc., Co., 94 Ga. 795, 21 S. E. 1005. *Compare* Fleming *v.* Shepherd, 83 Ga. 338, 9 S. E. 789.

19. State *v.* Patterson, (Tex. Civ. App. 1897) 40 S. W. 224, holding that to prevent the entry of a judgment by default for want of an answer, it is not sufficient for defendant to present himself on the appearance day and make an oral request for the dismissal of the action on the ground that he is sued in the wrong county. *Compare* Crapp *v.* Dodd, 92 Ga. 405, 17 S. E. 66.

Verifying plea.— Where a plea, required to be verified, is sworn to by only one of two defendants, the other must be defaulted. Riley *v.* Southern Female College, 118 Ga. 849, 45 S. E. 672. So a default must be entered for defendant's failure to comply with a statute requiring him to file, with his plea, an affidavit that there is not any sum due to plaintiff. Hurlburt *v.* Straub, 54 W. Va. 303, 46 S. E. 163.

20. Dowell *v.* Winters, 20 Tex. 793, holding that judgment by default cannot be prevented by the fact that defendant had commenced a separate suit in the same court, in which he denied the claim set up in plaintiff's action and sought an injunction against the prosecution of that action.

21. Campbell *v.* Scott, 3 Indian Terr. 462, 58 S. W. 719.

22. See Helena First Nat. Bank *v.* Neill, 13 Mont. 377, 34 Pac. 180.

Where, in an action upon a demand due, aided by a writ of attachment, defendant appears and traverses the allegations of the affidavit for the attachment, but does not plead to the declaration, judgment by default should be entered. Ripley *v.* Astec Min. Co., 6 N. M. 415, 28 Pac. 773.

Petition and cross petition.— In an action to enforce a lien, where creditors who are made defendants both to the original petition and to a cross petition, answer the petition only, but not the cross petition, they will be barred from setting up any other claim or lien than that asserted in their answer to the petition. Delker *v.* Evans, 67 S. W. 837, 23 Ky. L. Rep. 2451.

not be defaulted for want of an answer.[23] Nor can a default be entered pending a call on plaintiff for a bill of particulars.[24]

b. Rule or Notice to Plead. Where the rules of practice or something exceptional in the case, such as an amendment of the complaint, the striking out of the plea or answer with leave to plead anew, or an arrangement of the parties, requires defendant to be ruled to plead, he cannot be put in default without the taking of such a rule[25] and its proper service upon him or due notice to him.[26] But if he then fails to plead or answer within the appointed time, judgment may be taken against him as for want of a plea.[27] It has been held, however, that a plea filed after the day fixed by the rule will not be too late, if before a default is asked for and ordered.[28]

c. Time For Answering. A judgment rendered by default against a defendant before the expiration of the time allowed to him for filing a plea or answer is irregular and voidable at his instance.[29] But on the other hand he cannot escape the consequences of his neglect by filing a plea after the expiration of the time,[30] unless it be done by consent of plaintiff or leave of the court,[31] or, in some jurisdictions, before plaintiff has claimed the entry of a default,[32] or unless the delay

23. Vass *v.* People's Bldg., etc., Assoc., 91 N. C. 55.

24. Payne *v.* Smith, 19 Wend. (N. Y.) 122.

25. *Colorado.*— Mullen *v.* Wine, 9 Colo. 167, 11 Pac. 54.

Illinois.— Daniels *v.* Chicago Fifth Nat. Bank, 65 Ill. 409; Pratt *v.* Grimes, 35 Ill. 164; Ridgely Nat. Bank *v.* Fairbank, 54 Ill. App. 296.

Iowa.— Rollins *v.* Coggshall, 29 Iowa 510.

Kentucky.— Clark *v.* Davis, Hard. 410; Welch *v.* Davis, Ky. Dec. 48.

New York.— Whitman, etc., Mfg. Co. *v.* Hamilton, 27 Misc. 198, 57 N. Y. Suppl. 760; Burr *v.* Kernan, 6 Hill 263.

Ohio.— Hearn *v.* State, 1 Ohio Dec. (Reprint) 262, 6 West. L. J. 511.

Pennsylvania.— Green *v.* Hallowell, 9 Pa. St. 53; Bisbing *v.* Albertson, 6 Watts & S. 450; Foreman *v.* McFerrin, 13 Serg. & R. 290.

South Carolina.— See Law *v.* Duncan, 2 Brev. 263; Perkins *v.* Burtin, 2 Brev. 97.

Virginia.— Smithson *v.* Briggs, 33 Gratt. 180. The necessity of a rule to plead before entry of a default judgment in ejectment, where there has been no appearance, is dispensed with by Va. Code (1904), pp. 1406, 1728. King *v.* Davis, 137 Fed. 198.

Wisconsin.— Elkhorn First Nat. Bank *v.* Prescott, 27 Wis. 616.

See 30 Cent. Dig. tit. "Judgment," § 181.

26. Miller *v.* Halsey, 16 N. J. L. 63; Hunter *v.* Budd, 5 N. J. L. 718; Dizen *v.* Bates, 7 Johns. (N. Y.) 537. See Griffin *v.* McGavin, 117 Mich. 372, 75 N. W. 1061, 72 Am. St. Rep. 564.

27. *Illinois.*— Haggard *v.* Smith, 71 Ill. 226.

Indiana.— Risher *v.* Morgan, 56 Ind. 172; Blair *v.* Davis, 9 Ind. 236.

New York.— Sharp *v.* Dorr, 15 Johns. 531.

Pennsylvania.— Marks *v.* Russell, 40 Pa. St. 372; Shaffer *v.* Bropst, 9 Serg. & R. 85; Vanatta *v.* Anderson, 3 Binn. 417; Reeves *v.* Edsell, 1 Lack. Jur. 96.

Virginia.— Smith *v.* Lloyd, 16 Gratt. 295.

United States.— Fowle *v.* Bowie, 9 Fed. Cas. No. 4,994, 3 Cranch C. C. 291.

See 30 Cent. Dig. tit. "Judgment," § 181.

28. Castle *v.* Judson, 17 Ill. 381; Lambert *v.* Hyers, 27 Ill. App. 400. And see Redfield *v.* Miller, 59 Iowa 393, 13 N. W. 334; Havens *v.* Dibble, 18 Wend. (N. Y.) 655.

29. Gillette-Herzog Mfg. Co. *v.* Ashton, 55 Minn. 75, 56 N. W. 576; Forbes *v.* Muxlow, 13 N. Y. Suppl. 797, 18 N. Y. Civ. Proc. 239; Parker *v.* Linden, 13 N. Y. Suppl. 787; Lash *v.* Warren, (Tex. 1890) 14 S. W. 694; Hole *v.* Page, 20 Wash. 208, 54 Pac. 1123. And see *infra*, IV, E, 2, b.

Premature default in justice's court see Yentzer *v.* Thayer, 10 Colo. 63, 14 Pac. 53, 3 Am. St. Rep. 563; Dow *v.* March, 80 Me. 408, 15 Atl. 26.

30. *California.*— Irvine *v.* Davy, 88 Cal. 495, 26 Pac. 506.

Georgia.— Camp *v.* Phillips, 88 Ga. 415, 14 S. E. 580.

Iowa.— Harrison *v.* Kramer, 3 Iowa 543.

Kansas.— Luke *v.* Johnnycake, 9 Kan. 511.

Maryland.— Gemmell *v.* Davis, 71 Md. 458, 18 Atl. 955.

See 30 Cent. Dig. tit. "Judgment," § 182.

Oversight of counsel.— The court may refuse to grant a judgment for want of an affidavit of defense, where defendant's depositions show that the failure to file the affidavit was due to an oversight of counsel, and set forth a good defense. Hinton *v.* Hart, 1 Woodw. (Pa.) 97.

31. Rhodes *v.* McFarland, 43 Ala. 95; Ellett *v.* Britton, 6 Tex. 229.

Discretion of court in granting leave to answer after time see Crane *v.* Crane, 121 Cal. 99, 53 Pac. 433; Lichtenberger *v.* Worm, 41 Nebr. 856, 60 N. W. 93.

32. *Alabama.*— Woosley *v.* Memphis, etc., R. Co., 28 Ala. 536; Ellis *v.* Hickman, Minor 394.

California.— Stevens *v.* Ross, 1 Cal. 94.

Illinois.— Cook *v.* Forest, 18 Ill. 581.

Texas.— Jefferson *v.* Jones, 74 Tex. 635, 12 S. W. 749; Hurlock *v.* Reinhardt, 41 Tex. 580.

was due to the action of the court,[33] or is attributable to plaintiff's own fault or irregular action in the case,[34] or a delay in the mails,[35] or the grant of further time in which to plead.[36] Defendant has the whole of the last day in which to plead, and cannot be said to be in default until that day has fully expired,[37] and if the last day falls on a Sunday or holiday, he is entitled to the whole of the next succeeding day.[38] But a judgment thus prematurely entered is not absolutely void; if defendant takes no steps to vacate or reverse the judgment, or otherwise to correct the error, he is presumed to have waived it.[39] In case of default judgment may be entered before the case is reached in its regular order on the docket.[40]

d. Answering Amended Pleadings. Leave granted to plaintiff to amend his declaration or complaint, and to defendant for time to plead, is an abandonment of all existing issues, and if plaintiff amends, and no plea is filed by defendant to the amended declaration or complaint, plaintiff is entitled to a judgment by default, notwithstanding there was a plea to the original declaration or complaint,[41]

Wisconsin.— Pett *v.* Clark, 5 Wis. 198.

See 30 Cent. Dig. tit. "Judgment," § 182.

33. White *v.* Lokey, 131 N. C. 72, 42 S. E. 445 (continuing all cases on the docket); Muir *v.* Preferred Acc. Ins. Co., 203 Pa. St. 338, 53 Atl. 158 (making an order for the removal of the case to the federal court and afterward rescinding it).

34. White *v.* Cummings, 3 Sandf. (N. Y.) 716 (retaining a pleading nineteen days and then returning it as defective); Sweeney *v.* O'Dwyer, 45 Misc. (N. Y.) 43, 90 N. Y. Suppl. 806 (plaintiff's failure to return an unverified answer within twenty-four hours as required by rule of court); Royce *v.* Mott, 1 How. Pr. (N. Y.) 50 (returning a plea with an objection on a wrong ground). And see Little *v.* Carlisle, 3 Ill. 375; Philips *v.* Prescott, 9 How. Pr. (N. Y.) 430.

35. Yates *v.* Guthrie, 119 N. Y. 420, 23 N. E. 741; Radcliff *v.* Van Benthuysen, 3 How. Pr. (N. Y.) 67; Lawler *v.* Saratoga County Mut. F. Ins. Co., 2 Code Rep. (N. Y.) 114.

36. See Owens *v.* Tinsley, 21 Mo. 423; Wrigley *v.* Jolley, 36 N. J. Eq. 168; James *v.* Signell, 60 N. Y. App. Div. 295, 69 N. Y. Suppl. 1106. *Compare* Emery *v.* Downing, 13 N. J. Eq. 59.

37. *Iowa.*— Brandt *v.* Wilson, 58 Iowa 485, 12 N. W. 535.

Louisiana.— Fowler *v.* Smith, 1 Rob. 448.

Minnesota.— Barker *v.* Keith, 11 Minn. 65.

New Mexico.— Lohman *v.* Cox, 9 N. M. 503, 56 Pac. 286.

Pennsylvania.— Porter *v.* Hower, 9 Pa. Co. Ct. 283; Guernsey *v.* Hunt, 4 Pa. Co. Ct. 480. And see Rank *v.* Hauer, 2 Pa. Co. Ct. 385.

Texas.— Ryburn *v.* Nail, 4 Tex. 305.

See 30 Cent. Dig. tit. "Judgment," § 182.

Rule to plead "by" a day certain.— Where a rule is granted to plead "by" a day named, the time expires on the opening of the court on that day, so far as to justify a default on that day. Belleville Sav. Bank *v.* Reis, 29 Ill. App. 622; Sharpless *v.* Schnebly, 6 Pa. L. J. 284.

Judgment and plea entered the same day.— Where defendant's plea is filed on the same day on which a judgment by default is taken, it will be presumed that the plea was first on file, and the judgment will be reversed or vacated. Lyon *v.* Barney, 2 Ill. 387. See Purvis *v.* Forbes, 5 How. (Miss.) 518. *Compare* Brainard *v.* Hanford, 6 Hill (N. Y.) 368; Rogers *v.* Beach, 18 Wend. (N. Y.) 533; Wooldridge *v.* Brown, 1 Tex. 478.

38. Rothchild *v.* Mannesovitch, 29 N. Y. App. Div. 580, 51 N. Y. Suppl. 253. But where the time to plead is limited to a certain number of days, Sundays and holidays are to be counted, except where the last day is *dies non.* Bailey *v.* Edmundson, 168 Mass. 297, 46 N. E. 1064.

39. *California.*— Burt *v.* Scrantom, 1 Cal. 416.

Georgia.— McDonald *v.* Tutty, 99 Ga. 184, 27 S. E. 157; Wiggins *v.* Mayer, 91 Ga. 778, 18 S. E. 430.

Kansas.— Mitchell *v.* Aten, 37 Kan. 33, 14 Pac. 497, 1 Am. St. Rep. 231.

Louisiana. — Anheuser-Busch Brewing Assoc. *v.* McGowan, 49 La. Ann. 630, 21 So. 766.

New Jersey.— Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168; Hoguet *v.* Wallace, 28 N. J. L. 523.

Pennsylvania.— Harper *v.* Biles, 115 Pa. St. 594, 8 Atl. 446.

Tennessee.— West *v.* Williamson, 1 Swan 277; Glover *v.* Holman, 3 Heisk. 519.

United States.— White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113.

40. Brenner *v.* Gundershiemer, 14 Iowa 82. And see Leonard *v.* Hargis, 58 Kan. 40, 48 Pac. 586; Kessler *v.* Vera, 25 Misc. (N. Y.) 763, 54 N. Y. Suppl. 142.

41. *Alabama.*— Sartin *v.* Weir, 3 Stew. & P. 421.

Connecticut.— La Barre *v.* Waterbury, 69 Conn. 554, 37 Atl. 1068.

Illinois.— Hurd *v.* Burr, 22 Ill. 29.

Iowa. — Brenner *v.* Bundershiemer, 14 Iowa 82.

Montana.— Gettings *v.* Buchanan, 17 Mont. 581, 44 Pac. 77.

New York.— Thum *v.* Isermann, 32 Misc. 708, 65 N. Y. Suppl. 1147.

Tennessee.— Robinson *v.* Keys, 9 Humphr. 144.

unless the amendment was merely formal,[42] or the original plea or answer set forth a sufficient defense to the declaration or complaint as amended.[43] But the amended declaration or complaint must be served on defendant, or otherwise notified to him,[44] and he cannot be defaulted when no time for filing the new answer is fixed either by statute or rule or order of court.[45]

e. Answer to Part of Cause of Action. If defendant's plea or answer sets up a denial or defense to only a part of plaintiff's cause of action, severable from the rest, plaintiff may take judgment by default, or more properly by *nil dicit*, for the portion unanswered, and proceed to trial for the rest.[46] Or if plaintiff is willing to concede the validity of the defense, as to that portion of his demand which it undertakes to answer, he may have judgment by default for the remainder.[47]

f. Necessity For Filing Plea. To prevent a default defendant's plea or answer must be actually and duly filed in the clerk's office.[48]

g. Necessity For Affidavit of Defense. In some states the statutes or rules of court require defendant to file an affidavit of defense, on penalty of having judgment taken against him, where plaintiff's claim is upon an instrument for the

United States.— Seawell *v.* Crawford, 55 Fed. 729.

See 30 Cent. Dig. tit. "Judgment," § 184.

Compare Niagara F. Ins. Co. *v.* Thron, 4 Pa. Co. Ct. 308; Fahlnecker *v.* Harrington, 21 Wkly. Notes Cas. (Pa.) 541.

42. McQuade *v.* Chicago, etc., R. Co., 73 Iowa 688, 42 N. W. 520, 43 N. W. 615; Cavenaugh *v.* Fuller, 9 Kan. 233; Stevens *v.* Thompson, 5 Kan. 305.

43. Pease *v.* Bartlett, 97 Ill. App. 492; Ridgely Nat. Bank *v.* Fairbank, 54 Ill. App. 296; First Nat. Bank *v.* Prescott, 27 Wis. 616.

Joint defendants.— Where one of several defendants answers, he is not in default for failure to answer an amended petition which does not change the effect of the original as to him. Bremen Bank *v.* Umrath, 55 Mo. App. 43.

44. Southern Ins. Co. *v.* Smith-Tyler, 43 Fla. 297, 31 So. 247; Brown *v.* King, 39 Mo. 380; Merrill *v.* Thompson, 80 N. Y. App. Div. 503, 81 N. Y. Suppl. 122; Tolmie *v.* Otchin, 1 Oreg. 95.

Judgment irregular only.— A judgment by default without notice, in an action for equitable relief, after defendants had appeared, for default in pleading to amended complaint filed after answer, is irregular, but not void. Martinson *v.* Marzolf, (N. D. 1905) 103 N. W. 937.

45. Walker *v.* Freelove, 79 Iowa 752, 45 N. W. 303; Wright *v.* Howell, 24 Iowa 150; Elmore *v.* Vallette, 16 Abb. Pr. (N. Y.) 249; Bell *v.* Thomas, 7 S. D. 202, 63 N. W. 907. And see Keokuk *v.* Wright, 22 Kan. 464. But see Naracong *v.* Graves, 8 Nebr. 443, 1 N. W. 127, holding that on sustaining a demurrer to a petition the court may at its discretion allow the petition to be amended instanter, and on the same day default defendant for want of an answer.

46. *Alabama.*— Deshler *v.* Hodges, 3 Ala. 509.

Arkansas.— Desha *v.* Robinson, 17 Ark. 228. But a plea professing to answer the whole declaration, but in fact answering a part only, is demurrable; and in such case plaintiff cannot waive the objection and take judgment for the part of the declaration which is not answered. Jones *v.* Cecil, 10 Ark. 592.

Illinois.— Allen *v.* Watt, 69 Ill. 655.

Indiana.— Fitch *v.* Polke, 5 Blackf. 86.

Massachusetts.— Dwight *v.* Holbrook, 1 Allen 560. *Compare* Rundlett *v.* Weeber, 3 Gray 263.

Mississippi.— Williams *v.* Harris, 2 How. 627.

Pennsylvania.— McKinney *v.* Mitchell, 4 Watts & S. 25; Bradford *v.* Bradford, 2 Pa. L. J. 406.

Tennessee.— See Young *v.* Fentress, 10 Humphr. 151.

Virginia.— Southall *v.* State Exch. Bank, 12 Gratt. 312.

Canada.— Mackenzie *v.* Ross, 14 Ont. Pr. 299.

See 30 Cent. Dig. tit. "Judgment," § 185.

Judgment on admission in pleadings see *supra*, III, C, 2.

Distinct causes of action.— In an action on two notes, where each note is set out as a distinct cause of action, and defendant answers only as to one of them, plaintiff should be allowed on motion to take judgment on the other. Curran *v.* Kerchner, 117 N. C. 264, 23 S. E. 177.

47. Henry *v.* Meriam, etc., Paraffine Co., 83 Ill. 461.

48. Scammon *v.* McKey, 21 Ill. 554. And see Wall *v.* Galvin, 80 Ind. 447. *Compare* Smith *v.* Wells, 6 Johns. (N. Y.) 286.

In Pennsylvania judgment for want of an affidavit of defense may be taken, although there is an entry on the docket of the filing of an affidavit, where no affidavit or receipt for one can be found among the papers. Woodside *v.* Stevenson, 5 Wkly. Notes Cas. 235.

In Wisconsin a judgment by default is proper where the plea, although deposited with the clerk, was not marked "Filed" as required by the rules of practice. Keep *v.* Enos, 3 Pinn. 234, 3 Chandl. 261.

Amended declaration.— If pleas to a declaration are applicable to the declaration as

payment of money, a book-account, or the like.[49] But this requirement has no

amended, it is error to render judgment by default because the pleas are not filed afresh. Northrop *v.* Flaig, 57 Miss. 754.

49. See the statutes of the different states. And see Tweed *v.* Dayett, 5 Houst. (Del.) 526; Frank *v.* Maguire, 42 Pa. St. 77; Hottenstein *v.* Kohler, 3 Walk. (Pa.) 202; Wachter's Case, 1 Walk. (Pa.) 267; Schoonover *v.* Philipsburg Banking Co., 1 Pa. Dist. 733, 11 Pa. Co. Ct. 61; Hansell *v.* Nelson, 1 Miles (Pa.) 340; Bayard *v.* Gillasspy, 1 Miles (Pa.) 256; Lane *v.* Nelson, 6 Kulp (Pa.) 502; Bradford *v.* Bradford, 1 Pa. L. J. Rep. 209, 2 Pa. L. J. 79; Renkauff *v.* Aronson, 13 Phila. (Pa.) 87; Gilmer *v.* Philadelphia, etc., R. Co., 7 Wkly. Notes Cas. (Pa.) 15; Elkington *v.* Farmers' Bone Co., 1 Wkly. Notes Cas. (Pa.) 636; Reynell *v.* Askin, 1 Wkly. Notes Cas. (Pa.) 213; Dewart *v.* Masser, 40 Pa. St. 302; Hoffman *v.* Locke, 19 Pa. St. 57; Smucker *v.* Grinberg, 27 Pa. Super. Ct. 531; Lehman *v.* Winters, 10 Pa. Dist. 147; Praun *v.* Miller, 3 Pa. Dist. 536; Medlar *v.* Wadlinger, 2 Pa. Dist. 687; Kearney *v.* Colins, 2 Miles (Pa.) 13; Barbe *v.* Davis, 1 Miles (Pa.) 118; Hubbard *v.* Dorman, 7 Pa. Co. Ct. 384; Lynch *v.* Kerns, 10 Phila. (Pa.) 335; Newlin *v.* Milton Bldg., etc., Assoc., 9 Wkly. Notes Cas. (Pa.) 220; Van Dyke *v.* Ward, 8 Wkly. Notes Cas. (Pa.) 418; McCarrol *v.* Western M. E. Church, 5 Wkly. Notes Cas. (Pa.) 210; Hopper *v.* Hemphill, 3 Wkly. Notes Cas. (Pa.) 474; Barr *v.* Ambler, 2 Wkly. Notes Cas. (Pa.) 262; Hennesey *v.* Muller, 1 Wkly. Notes Cas. (Pa.) 106; Craig *v.* Rushton, 1 Wkly. Notes Cas. (Pa.) 82; Weidner *v.* Kreider, 1 Woodw. (Pa.) 321.

Actions on contracts see Schabinger *v.* Warren, 4 Houst. (Del.) 544; Singerly *v.* Caldwell, 88 Pa. St. 312; Barr *v.* Duncan, 76 Pa. St. 395; Eshelman *v.* Thompson, 62 Pa. St. 495; Sylva *v.* Bond, 2 Miles (Pa.) 421; Dugan *v.* Loyd, 2 Miles (Pa.) 259; Montgomery *v.* Johnston, 1 Miles (Pa.) 324; Herring *v.* Hodges, 3 Pa. Co. Ct. 175; Barrie *v.* Adams, 1 Pa. Co. Ct. 525; Shoff *v.* Stiles, 13 Lanc. Bar (Pa.) 99; Reed *v.* Keech, 1 Phila. (Pa.) 146; Rile *v.* Worl, 1 Phila. (Pa.) 45; Journal of Commerce Co. *v.* Reeves, 17 Wkly. Notes Cas. (Pa.) 222; Coleman *v.* Clark, 14 Wkly. Notes Cas. (Pa.) 76; King *v.* Permanent Exhibition Co., 10 Wkly. Notes Cas. (Pa.) 190; Brez *v.* Stellwagon, 6 Wkly. Notes Cas. (Pa.) 540; Gercke *v.* Montgomery, 6 Wkly. Notes Cas. (Pa.) 238; Fox *v.* Mausman, 5 Wkly. Notes Cas. (Pa.) 511; Coe *v.* Schenkmeyer, 5 Wkly. Notes Cas. (Pa.) 252; Fertig *v.* Maley, 5 Wkly. Notes Cas. (Pa.) 133; Titus *v.* Bell, 4 Wkly. Notes Cas. (Pa.) 380; McNarr *v.* Winpenny, 1 Wkly. Notes Cas. (Pa.) 29; Guldin *v.* Butz, 2 Woodw. (Pa.) 74.

Actions against guarantor or surety see Vulcanite Pav. Co. *v.* Philadelphia Traction Co., 115 Pa. St. 280, 8 Atl. 777; Hossler *v.* Hartman, 82 Pa. St. 53; Korn *v.* Hohl, 80 Pa. St. 333; Jones *v.* Patterson, 5 Pa. Cas. 19, 8 Atl. 62; Blackburne *v.* Boker, 1 Pa. L. J. 30; Girard L. Ins. Co. *v.* Finley, 1 Phila. (Pa.) 70; Continental Brewing Co. *v.* Bonner, 14 Wkly. Notes Cas. (Pa.) 437; Sitgreaves *v.* Griffith, 2 Wkly. Notes Cas. (Pa.) 705; Montayne *v.* Carey, 1 Wkly. Notes Cas. (Pa.) 311; Hiester *v.* Schwenck, 1 Woodw. (Pa.) 287.

Actions on bonds and recognizances see Byrne *v.* Hayden, 124 Pa. St. 170, 16 Atl. 750; Calhoun *v.* Monongahela Bldg., etc., Assoc., 104 Pa. St. 392; Com. *v.* Hoffman, 74 Pa. St. 105 [*affirming* 2 Pearson 147]; Harres *v.* Com., 35 Pa. St. 416; Boas *v.* Nagle, 3 Serg. & R. (Pa.) 250; Com. *v.* Steelman, 2 Miles (Pa.) 405; Com. *v.* Miller, 14 Lanc. Bar (Pa.) 47; Knecht *v.* Mortimore, 1 Leg. Rec. (Pa.) 159; McFate *v.* Shallcross, 1 Phila. (Pa.) 40; Com. *v.* Colgan, 19 Wkly. Notes Cas. (Pa.) 131; Com. *v.* Kessler, 17 Wkly. Notes Cas. (Pa.) 176; Pennypacker *v.* Camden, etc., R. Co., 14 Wkly. Notes Cas. (Pa.) 158; Beck *v.* Courtney, 13 Wkly. Notes Cas. (Pa.) 302; Com. *v.* Meyerhaven, 12 Wkly. Notes Cas. (Pa.) 548; Rusk *v.* Clifford, 10 Wkly. Notes Cas. (Pa.) 238; Elliott *v.* Kunszig, 9 Wkly. Notes Cas. (Pa.) 542; Com. *v.* Pelletier, 8 Wkly. Notes Cas. (Pa.) 516; Com. *v.* Myers, 7 Wkly. Notes Cas. (Pa.) 487; Com. *v.* Laws, 7 Wkly. Notes Cas. (Pa.) 80; Koelle *v.* Engbert, 4 Wkly. Notes Cas. (Pa.) 202; Sands *v.* Fritz, 3 Wkly. Notes Cas. (Pa.) 531; Griffith *v.* Salter, 3 Wkly. Notes Cas. (Pa.) 433; Berustine *v.* Gavaghan, 1 Wkly. Notes Cas. (Pa.) 506; Crine *v.* Wallace, 1 Wkly. Notes Cas. (Pa.) 293; Artisan's Loan Assoc. *v.* Noris, 1 Wkly. Notes Cas. (Pa.) 110; Gerhart *v.* Kaufman, 1 Woodw. (Pa.) 367; Com. *v.* Becker, 1 Woodw. (Pa.) 297; Linderman *v.* Linderman, 1 Woodw. (Pa.) 56; Montgomery Lodge No. 59 *v.* Waid, 1 Woodw. (Pa.) 39.

Actions on notes and drafts see Miner's Bank *v.* Blackiston, 2 Miles (Pa.) 358; Horter *v.* Wilson, 17 Wkly. Notes Cas. (Pa.) 562; Dundore *v.* Dobson, 6 Wkly. Notes Cas. (Pa.) 299; Freedley *v.* Watts, 6 Wkly. Notes Cas. (Pa.) 269; De Castro *v.* Costas, 1 Wkly. Notes Cas. (Pa.) 156; Miners' Trust Co. Bank *v.* Keim, 1 Wkly. Notes Cas. (Pa.) 50.

Actions on judgments see Mink *v.* Shaffer, 124 Pa. St. 280, 16 Atl. 805; Palmer *v.* March, 64 Pa. St. 239; Luckenbach *v.* Anderson, 47 Pa. St. 123; Moore *v.* Fields, 42 Pa. St. 467; McCleary *v.* Faber, 6 Pa. St. 476; Billington *v.* Gautier Steel Co., 7 Pa. Cas. 574, 9 Atl. 35; Barnitz *v.* Bair, 2 Chest. Co. Rep. (Pa.) 480; Winner *v.* Carter, 16 Leg. Int. (Pa.) 20; Walker *v.* Delaware Mut. Safety Ins. Co., 1 Phila. (Pa.) 192; Reed *v.* Keech, 1 Phila. (Pa.) 147; Reed *v.* Keech, 1 Phila. (Pa.) 146; Hinman *v.* Hare, 13 Wkly. Notes Cas. (Pa.) 251; Freeman *v.* Huntzinger, 11 Wkly. Notes Cas. (Pa.) 191; Bodkin *v.* McDonald, 2 Wkly. Notes Cas. (Pa.) 586.

Actions on book-accounts see Fenn *v.* Early, 113 Pa. St. 264, 6 Atl. 58; Post *v.* Wallace, 110 Pa. St. 121, 20 Atl. 409; Harbison *v.*

application to claims arising out of torts,[50] or where defendant is sued in a representative capacity,[51] or where there has been an award of arbitrators finding that the plaintiff has no cause of action.[52] If the defense alleged in the affidavit is good as to a part of the claim, but insufficient as to the balance, the court may direct judgment for the part insufficiently denied, and allow plaintiff to try the case as to the remainder.[53] In Pennsylvania it is also provided by statute that such an affidavit shall be filed in actions of scire facias on mortgages, judgments, and mechanics' liens.[54]

h. Failure to Plead Over or Rejoin. Judgment by default is properly entered where a party fails to plead in due season after the overruling of his demurrer, with leave given him to plead or a preliminary judgment of *respondeat ouster*,[55] or where a plea to the jurisdiction is found against him,[56] or his motion to quash the summons is overruled.[57] And the rule is the same where plaintiff demurs to the plea or answer, and the demurrer is sustained, and defendant neglects to avail himself of leave given to file a new plea,[58] or where, on a plea of former recovery, and a replication of *nul tiel record*, defendant fails to rejoin.[59]

i. Striking Out Pleading. Judgment as by default or *nil dicit* may be entered against a defendant where his plea or answer is stricken out, as sham, frivolous, irrelevant, or filed without authority, and he does not ask or obtain leave to file a new plea;[60] or where, having obtained such leave, he fails to file an

Hawkins, 6 Leg. Gaz. (Pa.) 157; Hirst *v.* Clark, 3 Pa. L. J. 33; Second Nat. Bank *v.* Baker, 14 Wkly. Notes Cas. (Pa.) 89; Hadley *v.* Fitler, 12 Wkly. Notes Cas. (Pa.) 461; Love *v.* Building, etc., Assoc., 11 Wkly. Notes Cas. (Pa.) 303; Sylvester *v.* Thompson, 11 Wkly. Notes Cas. (Pa.) 203; Hopple *v.* Weber, 10 Wkly. Notes Cas. (Pa.) 435; Birch *v.* Gregory, 7 Wkly. Notes Cas. (Pa.) 147; Thomas *v.* Askin, 6 Wkly. Notes Cas. (Pa.) 501; Ferris *v.* Philadelphia, etc., Mach. Co., 4 Wkly. Notes Cas. (Pa.) 441; Meany *v.* Kleine, 3 Wkly. Notes Cas. (Pa.) 474; Lennig *v.* Quaker City Steamboat Co., 3 Wkly. Notes Cas. (Pa.) 434; Binswanger *v.* Fisher, 3 Wkly. Notes Cas. (Pa.) 340; Cooper *v.* Ranakin, 2 Wkly. Notes Cas. (Pa.) 428; Lloyd *v.* Thayer, 2 Wkly. Notes Cas. (Pa.) 291; Hoe *v.* Seitz, 1 Wkly. Notes Cas. (Pa.) 429; Atwood *v.* Caverley, 1 Wkly. Notes Cas. (Pa.) 82.

50. Osborn *v.* Athens First Nat. Bank, 154 Pa. St. 134, 26 Atl. 289; Read *v.* Bush, 5 Binn. (Pa.) 455. *Compare* Allen *v.* St. Clair, 3 Pa. Co. Ct. 463.

51. Lewis *v.* Quigney, 1 Lehigh Val. Rep. (Pa.) 188.

52. Gregg *v.* Meeker, 4 Binn. (Pa.) 428.

53. Roberts *v.* Sharp, 14 Pa. Co. Ct. 186 [*affirmed* in 161 Pa. St. 185, 28 Atl. 1023]; Drake *v.* Irvine, 10 Pa. Co. Ct. 486. But this does not apply to a case where the affidavit applies to the whole of plaintiff's claim, although it may be insufficient in law as to a part of it. Reilly *v.* Daly, 159 Pa. St. 605, 28 Atl. 493; Myers *v.* Cochran, 3 Pa. Dist. 135.

54. See Bradbury *v.* Wagenhorst, 54 Pa. St. 180; Union Trust Co. *v.* City Trust, etc., Co., 4 Pa. Dist. 381; Marsh *v.* Smith, 3 Pa. L. J. 489.

55. *California.*— Stark *v.* Raney, 18 Cal. 622.

Connecticut.—See Hourigan *v.* Norwich, 77 Conn. 358, 59 Atl. 487.

Florida.— Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. 73.

Illinois.— People *v.* Weber, 92 Ill. 288; Bates *v.* Williams, 43 Ill. 494; Haldeman *v.* Starrett, 23 Ill. 393.

Iowa.— Musser *v.* Hobart, 14 Iowa 248.

Louisiana.— Story *v.* Jones, 14 La. Ann. 73.

Missouri.— Lane *v.* Dowd, 172 Mo. 167, 72 S. W. 632. See Rickaly *v.* John O'Brien Boiler Works Co., 108 Mo. App. 130, 82 S. W. 963.

Pennsylvania.— Close *v.* Hancock, 3 Pa. Super. Ct. 207.

Wisconsin.— Keep *v.* Enos, 3 Pinn. 234, 3 Chandl. 261.

See 30 Cent. Dig. tit. "Judgment," § 195.

56. Jordan *v.* Carter, 60 Ga. 443.

57. McPherson *v.* Beatrice First Nat. Bank, 12 Nebr. 202, 10 N. W. 707. And see London Assur. Corp. *v.* Lee, 66 Tex. 247, 18 S. W. 508; McKellar *v.* Lamkin, 22 Tex. 244.

58. Hecla Consol. Gold Min. Co. *v.* O'Neill, 22 N. Y. Suppl. 130 [*affirmed* in 148 N. Y. 724, 42 N. E. 723]; Gockel *v.* Averment, 7 Ohio Dec. (Reprint) 554, 3 Cinc. L. Bul. 894.

59. Burckhart *v.* Watkins, 4 Mo. 72.

60. *Georgia.*— Parkman *v.* Dent, 101 Ga. 280, 28 S. E. 833.

Illinois.— Pierson *v.* Hendrix, 88 Ill. 34; Fanning *v.* Russell, 81 Ill. 398; Deam *v.* Lowy, 44 Ill. App. 302. *Compare* Cooper *v.* Buckingham, 4 Ill. 546.

Mississippi.— State *v.* Brown, 34 Miss. 688.

Missouri.—Taff *v.* Westerman, 39 Mo. 413; Robinson *v.* Lawson, 26 Mo. 69; Taylor *v.* Pearson, 1 Mo. App. 39.

New York.— Aymar *v.* Chase, Code Rep. N. S. 141.

See 30 Cent. Dig. tit. "Judgment," § 197.

Compare Abbott *v.* Douglass, 28 Cal. 295.

amended pleading.[61] Thus the default admits that defendant occupies the position or status or fills the relation to others which is alleged in the declaration.[62]

4. When Entry of Default Improper — a. Plea Filed and Not Disposed of. When an answer or other pleading of a defendant, raising an issue of law or fact, is properly on file in the case, no judgment by default can be entered against him; to authorize a default, the answer or other pleading must be disposed of by motion, demurrer, or in some other manner.[63] Even though the plea filed by defendant is bad in form or substance, yet, if it does not admit plaintiff's case, the latter cannot have judgment for want of a plea,[64] unless the plea is such that it

61. McMurran *v.* Meek, 47 Minn. 245, 49 N. W. 983.

Amended complaint.—Where defendant files no plea and makes no appearance, and, when the case is called for trial, plaintiff amends by making allegations which are necessary to support the prayers of his original petition, these allegations will not be taken as true, because not answered, but must be supported by proof. Miller *v.* Georgia R. Bank, 120 Ga. 17, 47 S. E. 525.

62. Hentsch *v.* Porter, 10 Cal. 555, default suffered by one sued in the character of an administrator is an admission that he is such administrator.

63. *Alabama.*—Clements *v.* Mayfield Woolen Mills, 128 Ala. 332, 29 So. 10; Green *v.* Jones, 102 Ala. 303, 14 So. 630; McCoy *v.* Harrell, 40 Ala. 232; Crow *v.* Decatur Bank, 5 Ala. 249; Malone *v.* Stud, Minor 360; Tubb *v.* Madding, Minor 129; Collier *v.* Crawford, Minor 100. *Compare* Bryant *v.* Simpson, 3 Stew. 339. And see Ledbetter, etc., Land, etc., Assoc. *v.* Vinton, 108 Ala. 644, 18 So. 692.

Arizona.— Porter *v.* Bichard, 1 Ariz. 87, 25 Pac. 530.

Arkansas.— White *v.* Reagan, 25 Ark. 622; Alexander *v.* Stewart, 23 Ark. 18; Phillips *v.* Reardon, 7 Ark. 256; Boyer *v.* Robinson, 6 Ark. 552; Hicks *v.* Vann, 4 Ark. 526.

Illinois.— Mason *v.* Abbott, 83 Ill. 445; Van Dusen *v.* Pomeroy, 24 Ill. 289; McAllister *v.* Ball, 24 Ill. 149; Sammis *v.* Clark, 17 Ill. 398; Lyon *v.* Barney, 2 Ill. 387; Semple *v.* Locke, 1 Ill. 389; White *v.* Thompson, 1 Ill. 72; Knopf *v.* Corcoran, 112 Ill. App. 320; Dorn *v.* Briggs, 106 Ill. App. 79; Pease *v.* Bartlett, 97 Ill. App. 492; Salomon *v.* McCormick, 95 Ill. App. 332; Keck *v.* McEldowney, 73 Ill. App. 159; Wells *v.* Mathews, 70 Ill. App. 504; Race *v.* Irving Park Hall Assoc., 50 Ill. App. 131; Pana *v.* Humphreys, 39 Ill. App. 641; Faurot *v.* Park Nat. Bank, 37 Ill. App. 322; Parrott *v.* Goss, 17 Ill. App. 110; Leach *v.* Elwood, 3 Ill. App. 453. Where a demurrer to a declaration is filed after a plea, it is error to enter judgment by default on overruling the demurrer, as the demurrer does not waive the plea. Marshall *v.* Duke, 4 Ill. 67.

Indiana.— Wall *v.* Galvin, 80 Ind. 447; Terrell *v.* State, 68 Ind. 155; Young *v.* State Bank, 4 Ind. 301, 58 Am. Dec. 630; Ellison *v.* Cain, 2 Ind. 236; Ellison *v.* Nickols, 1 Ind. 477; Tipton *v.* Cummins, 5 Blackf. 571; Harris *v.* Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372. And see State Bank *v.* Brooks, 4 Blackf. 485; Runnion *v.* Crane, 4 Blackf. 466.

Iowa.— Levi *v.* Monroe, 11 Iowa 453; Conrad *v.* Baldwin, 3 Iowa 207; Markey *v.* Mettler, 1 Iowa 528; Baldwin *v.* Winn, 3 Greene 180; Miller *v.* Hardacre, 1 Greene 154.

Massachusetts.— See Fels *v.* Raymond, 139 Mass. 98, 28 N. E. 691.

Michigan.— Bosman *v.* Akeley, 39 Mich. 710, 33 Am. Rep. 447.

Minnesota.— Strong *v.* Comer, 48 Minn. 66, 50 N. W. 936.

Mississippi.— Biloxi Lumber, etc., Co. *v.* New Orleans R., etc., Co., (1900) 28 So. 21; Hambrick *v.* Dent, 70 Miss. 59, 11 So. 608; Beard *v.* Orr, etc., Shoe Co., (1891) 8 So. 512; Taylor *v.* McNairy, 42 Miss. 276; Kidd *v.* Harris, 30 Miss. 396; McEwin *v.* State, 3 Sm. & M. 120. See Soria *v.* Planters' Bank, 3 How. 46.

Missouri.— Louthan *v.* Caldwell, 52 Mo. 121; Norman *v.* Hooker, 35 Mo. 366; Ruch *v.* Jones, 33 Mo. 393; Elliott *v.* Leak, 4 Mo. 540

Nebraska.— McMurtry *v.* State, 19 Nebr. 147, 26 N. W. 915.

Nevada.— Maples *v.* Geller, 1 Nev. 233.

New Mexico.— Knaebel *v.* Slaughter, 7 N. M. 221, 34 Pac. 198.

New York.— Phonoharp Co. *v.* Stobbe, 20 Misc. 698, 46 N. Y. Suppl. 678; Chadwick *v.* Snediker, 26 How. Pr. 60; Perine *v.* Blackford, 2 How. Pr. 131.

North Carolina.— Carolina Inv. Co. *v.* Kelly, 123 N. C. 388, 31 S. E. 671.

Pennsylvania.—Com. *v.* Krause, 23 Pa. Co. Ct. 511.

Tennessee.— See Union Bank *v.* Hicks, 4 Humphr. 327.

Texas.— Able *v.* Chandler, 12 Tex. 88, 62 Am. Dec. 518; Bedwell *v.* Thompson, 25 Tex. Suppl. 245; Hepburn *v.* Danville Nat Bank, (Civ. App. 1896) 34 S. W. 988; Sevier *v.* Turner, (Civ. App. 1895) 33 S. W. 294; Roseboro *v.* Thompson, 1 Tex. App. Civ. Cas. 18.

See 30 Cent. Dig. tit. "Judgment," § 198; and Commercial Paper, 8 Cyc. 296.

64. *Florida.*— Porter *v.* Parslow, 39 Fla. 50, 21 So. 574.

Illinois.— Keeler *v.* Campbell, 24 Ill. 287.

Iowa.— Canal Bank *v.* Newberry, 7 Iowa 4.

Missouri.— After replying to a plea filed in proper time, plaintiff cannot take judgment by *nil dicit*; if the plea is bad, he

may be treated as a mere nullity,[65] or where it has been expressly or tacitly withdrawn.[66]

b. Pending Decision on Demurrer. On similar principles it is erroneous to render a judgment by default against a defendant who has filed a demurrer to the declaration or complaint, when the same remains unanswered and not disposed of in any way, and he has not waived or withdrawn the demurrer.[67] It makes no difference that the demurrer would not be sustainable; still it must be disposed of in some proper manner,[68] although of course if it has been stricken out plaintiff may then take a judgment.[69]

c. Exceptions Not Disposed of. A judgment by default, entered while exceptions are pending and undetermined, is erroneous and irregular.[70]

d. Pendency of Motion. Generally it is erroneous and irregular to enter a judgment by default while a motion remains pending and not disposed of.[71]

D. Operation and Effect of Default — 1. In General. A default cannot be taken to cure or waive radical defects, going to the authority of the court to enter

should withdraw his replication and demur. Cox *v.* Capron, 10 Mo. 691.

New Hampshire.— Briggs *v.* Sholes, 14 N. H. 262.

New York.— Hyde *v.* Watson, 1 Den. 670.

Texas.— Middleton *v.* McCamant, 39 Tex. 146.

Wisconsin.— Maxwell *v.* Jarvis, 14 Wis. 506.

See 30 Cent. Dig. tit. "Judgment," § 198.

65. Thus, where a plea in abatement alleges matter which cannot be so pleaded, plaintiff may treat it as a nullity and take judgment by default. Stapp *v.* Thomason, 2 Litt. (Ky.) 214. And so where defendant files pleas setting up matters immaterial to the case as made in the declaration, and tendering no material issue, and traversing nothing essential to plaintiff's right to recover. Glens Falls Ins. Co. *v.* Porter, 44 Fla. 568, 33 So. 473. Or where the plea was not filed until after the expiration of the time allowed in a rule on defendant to plead. Daniels *v.* Sanderson, 22 Pa. St. 443.

66. Miller *v.* Hardacre, 1 Greene (Iowa) 154, holding that the withdrawal of a plea will be presumed if it appears of record that defendant's counsel was present in court at the time a judgment by default was rendered against his client, and made no objection.

67. *Alabama.*— White *v.* Whatley, 128 Ala. 524, 30 So. 738; Louisville, etc., R. Co. *v.* Walker, 128 Ala. 368, 30 So. 738.

Arkansas.— Taylor *v.* Coolidge, 17 Ark. 454.

California.— Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501; Oliphant *v.* Whitney, 34 Cal. 25; Hestres *v.* Clements, 21 Cal. 425.

Colorado.— Gibson *v.* Smith, 1 Colo. 7.

Illinois.— Sammis *v.* Clark, 17 Ill. 398; Clark *v.* People, 15 Ill. 213; Steelman *v.* Watson, 10 Ill. 249; Bradshaw *v.* McKinney, 5 Ill. 54; McKinney *v.* May, 2 Ill. 534; Race *v.* Irving Park Hall Assoc., 50 Ill. App. 131; Fish *v.* Wheeler, 31 Ill. App. 596.

Indiana.— Hirsh *v.* Clawson, 106 Ind. 329, 6 N. E. 919; Kellenberger *v.* Perrin, 46 Ind. 282; Kegg *v.* Welden, 10 Ind. 550.

Iowa.— Key *v.* Hayden, 13 Iowa 602.

Kentucky.— Warford *v.* Temple, 73 S. W. 1023, 24 Ky. L. Rep. 2268.

Mississippi.— Mayfield *v.* Barnard, 43 Miss. 270; Rowley *v.* Cummings, 1 Sm. & M. 340.

New York.— Kelly *v.* Downing, 42 N. Y. 71; De Witt *v.* Swift, 3 How. Pr. 280; Anonymous, 4 Hill 56; Coster *v.* Waring, 19 Wend. 97; Anonymous, 17 Wend. 445. And see Swift *v.* De Witt, 1 Code Rep. 25.

Oregon.— Willamette Falls Transp., etc., Co. *v.* Smith, 1 Oreg. 181.

Pennsylvania.— Sinclair *v.* Evans, 5 Pa. Dist. 384.

See 30 Cent. Dig. tit. "Judgment," § 199.

68. Flournoy *v.* Childress, Minor (Ala.) 93. But see Clayton *v.* Jones, 68 N. C. 497.

69. George *v.* Hatton, 2 Kan. 333.

70. State *v.* Vallette, 26 La. Ann. 730; Francis *v.* Steamer Black Hawk, 18 La. Ann. 629; Rawle *v.* Skipwith, 8 Mart. N. S. (La.) 118. And see State *v.* Gittings, 35 Md. 169.

71. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; Ridgway *v.* Horner, 55 N. J. L. 84, 25 Atl. 386. But see Dudley *v.* White, 44 Fla. 264, 31 So. 830, holding that where defendant's motion to dismiss is of such a character that plaintiff is justified in treating it as a nullity he may cause the clerk to enter a default.

This rule applies to a motion to quash the return or the summons (Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212; Farris *v.* Walter, 2 Colo. App. 450, 31 Pac. 231; Story *v.* Ware, 35 Miss. 399, 72 Am. Dec. 125; Blythe *v.* Hinckley, 84 Fed. 228. *Compare* Phillips *v.* Kerr, 26 Ill. 213; Higley *v.* Pollock, 21 Nev. 198, 27 Pac. 895), to vacate an unauthorized appearance (Dillon *v.* Rand, 15 Colo. 372, 25 Pac. 185), to require plaintiff to furnish security for costs or to dismiss for want of such security (McDermett *v.* Rosenhaum, 13 Colo. App. 444, 58 Pac. 880; The Osprey *v* Jenkins, 9 Mo. 643), to substitute new parties as defendants (Woods *v.* Woods, 16 Minn. 81), and to motions for a continuance (Hosmer *v.* Hoitt, 161 Mass. 173, 36 N. E. 835; Ackerman *v.* Horicon Iron Mfg. Co., 16 Wis. 155. *Compare* Dunbar *v.* Baker, 104 Mass. 211), for

the judgment or to the foundation of plaintiff's cause of action,[72] and it does not generally forfeit or affect the rights of a co-defendant[73] or intervening claimant,[74] or of defendant himself except as to the matters necessarily admitted by the default.[75] Where judgment by default is entered against a defendant, a final judgment cannot afterward be rendered in his favor without first setting aside the default.[76]

2. DEFAULT AS AN ADMISSION — a. Matters Admitted in General. A default is an admission of every material and traversable allegation of the declaration or complaint necessary to plaintiff's cause of action,[77] that defendant is the person named in the writ and intended to be sued,[78] and that the court has acquired jurisdiction of his person and has jurisdiction of the cause of action.[79] Also it admits the due execution of a note, contract, or other instrument sued on, and, where defendant is a corporation, its capacity to make the contract in suit.[80] But a default does not admit allegations of facts extrinsic to plaintiff's cause of action or unnecessary to its establishment,[81] or facts alleged by a co-defendant,[82] or according to some of the authorities, the legal effect of plaintiff's facts; that is, while the

a change of venue (see Pennie *v.* Visher, 94 Cal. 323, 29 Pac. 711; Beasley *v.* Cooper, 42 Iowa 542; Anderson *v.* Perkins, 52 Mo. App. 527; Starr *v.* Francis, 22 Wend. (N. Y.) 633), for the removal of the cause to a United States court (Mattoon *v.* Hinkley, 33 Ill. 208; Cooper *v.* Condon, 15 Kan. 572), or to strike out a pleading (Mitchell *v.* Campbell, 14 Oreg. 454, 13 Pac. 190. *Compare* Kellogg *v.* Churchill, 2 Ohio Dec. (Reprint) 4, 1 West. L. Month. 45. But see Webb *v.* Stevens, 14 Mo. 480).

72. See Teat *v.* Cocke, 42 Ala. 336; Winston *v.* Miller, 12 Sm. & M. (Miss.) 550.

Effect of judgment by default as to demand or notice to indorser see COMMERCIAL PAPER, 7 Cyc. 1130.

73. Lomer *v.* Meeker, 25 N. Y. 361.

74. Cunnington *v.* Scott, 4 Utah 446, 11 Pac. 578; Sheldon *v.* Sheldon, 37 Vt. 152.

75. See Goodwater Warehouse Co. *v.* Street, 137 Ala. 621, 34 So. 903; Manwaring *v.* Lippincott, 52 N. Y. App. Div. 526, 65 N. Y. Suppl. 428. See, however, Lenney *v.* Finley, 118 Ga. 427, 45 S. E. 317, holding that where a judgment by default is rendered in a case in which the damages are not liquidated, defendant is concluded as to all material allegations save the amount of damages.

76. Bateman *v.* Pool, 84 Tex. 405, 19 S. W. 552.

77. *California.*— Hunt *v.* San Francisco, 11 Cal. 250; McGregor *v.* Shaw, 11 Cal. 47; Rowe *v.* Table Mountain Water Co., 10 Cal. 441; Harlan *v.* Smith, 6 Cal. 173. And see Hibernia Sav., etc., Soc. *v.* Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73.

Illinois.— Schueler *v.* Mueller, 193 Ill. 402, 61 N. E. 1044; Garrison *v.* People, 21 Ill. 535; Cook *v.* Skelton, 20 Ill. 107, 71 Am. Dec. 250; Phœnix Ins. Co. *v.* Hedrick, 73 Ill. App. 601. *Compare* Madison County *v.* Smith, 95 Ill. 328.

Indiana.— Smith *v.* Carley, 8 Ind. 451.

Iowa.— Pfantz *v.* Culver, 13 Iowa 312.

Michigan.— Grinnell *v.* Bebb, 126 Mich. 157, 85 N. W. 467.

Missouri.— McCutchin *v.* Batterton, 1 Mo. 342.

Nebraska.— See Hary *v.* Miller, 11 Nebr. 395, 9 N. W. 475.

New York.— Bullard *v.* Sherwood, 85 N. Y. 253; McMullin *v.* Mackey, 6 N. Y. Suppl. 885.

North Carolina.— McLeod *v.* Nimocks, 122 N. C. 437, 29 S. E. 577.

Texas.— Belcher *v.* Ross, 33 Tex. 12; Long *v.* Wortham, 4 Tex. 381; Moore *v.* Johnson, 12 Tex. Civ. App. 694, 34 S. W. 771 (in an action against two persons as husband and wife, a default admits that they sustain that relation); Welch *v.* Holmes, 2 Tex. Unrep. Cas. 342; Mason *v.* Slevin, 1 Tex. App. Civ. Cas. § 11.

United States.— McCallon *v.* Waterman, 15 Fed. Cas. No. 8,675, 1 Flipp. 651.

See 30 Cent. Dig. tit. "Judgment," § 203.

Partners.— The existence of a partnership between two or more defendants sued as such is admitted by a default. Ellis *v.* Jameson, 17 Me. 235; Millard *v.* Adams, 1 Misc. (N. Y.) 431, 21 N. Y. Suppl. 424. But see Baker *v.* Baer, 59 Ark. 503, 28 S. W. 28.

Stock-holder.— Judgment by default in an action to enforce a stock-holder's liability is conclusive that a defendant, duly summoned and failing to answer, was a stock-holder. Ueland *v.* Johnson, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698.

Joint obligors.— A defendant charged as a joint obligor does not admit liability in any other capacity by suffering a default. Munn *v.* Haynes, 46 Mich. 140, 9 N. W. 136.

78. Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632.

79. Teat *v.* Cocke, 42 Ala. 336; Goldie *v.* McDonald, 78 Ill. 605; Applegate *v.* Ruble, 2 A. K. Marsh. (Ky.) 128; Heffner *v.* Lynch, 21 Md. 552.

80. Starr Cash, etc., Car Co. *v.* Starr, 69 Conn. 440, 37 Atl. 1057.

81. Dunlap *v.* Glidden, 34 Me. 517; Stelle *v.* Palmer, 11 Abb. Pr. (N. Y.) 62.

82. Woodworth *v.* Bellows, 1 Code Rep. (N. Y.) 129.

default admits that the facts are as plaintiff has alleged them, it does not admit that those facts constitute a good cause of action or entitle plaintiff to recover.[83]

b. Facts Properly Pleaded. Defendant's default operates as an admission only of those facts which are well and properly pleaded in plaintiff's declaration or complaint.[84]

c. Where Service Is Constructive. When the service of process upon defendant was constructive only, as, by publication, his default has much less force as an admission; and it is necessary for plaintiff, in order to obtain judgment, to show affirmatively a full compliance with the statute in regard to the mode of issuing and serving the process,[85] and also the facts which give the court jurisdiction over the property attached, or the *res* upon which alone its judgment can operate,[86] and, according to some of the decisions, the facts which entitle plaintiff to the relief demanded.[87]

d. Amount of Claim or Damages. If the action is in tort, or upon an unliquidated claim or demand, a default admits plaintiff's right to recover but not the amount to which he is entitled, and therefore further proceedings will be necessary to determine the amount of the judgment.[88] But if the cause of action is such that plaintiff is entitled to recover a fixed sum or nothing at all, or if the amount of his damages is ascertainable by mere calculation, the default admits his right to recover the sum demanded in the declaration or complaint, and judgment may be entered therefor.[89]

83. Chaffin *v.* McFadden, 41 Ark. 42; Johnson *v.* Pierce, 12 Ark. 599; Hayden *v.* Johnson, 59 Ga. 104; Madison County *v.* Smith, 95 Ill. 328. But *compare* Parker *v.* House, 66 N. C. 374.

84. *Illinois.*— Thompson *v.* Dearborn, 107 Ill. 87; Cutright *v.* Stanford, 81 Ill. 240; Peck *v.* Wilson, 22 Ill. 205.

Iowa.— Johnson *v.* Mantz, 69 Iowa 710, 27 N. W. 467.

Minnesota.— Doud *v.* Duluth Milling Co., 55 Minn. 53, 56 N. W. 463.

Missouri.—Robinson *v.* Missouri R. Constr. Co., 53 Mo. 435.

Nebraska.— Carnahan *v.* Brewster, 2 Nebr. (Unoff.) 366, 96 N. W. 590.

New Hampshire.— *In re* Toppan, 24 N. H. 43.

Texas.— Hawkins *v.* Haney, 1 Tex. App. Civ. Cas. § 723.

See 30 Cent. Dig. tit. "Judgment," § 204.

85. Wheeler *v.* Edinger, 11 Iowa 409; Carr *v.* Kopp, 3 Iowa 80; Byington *v.* Crosthwait, 1 Iowa 148; Pinkney *v.* Pinkney, 4 Greene (Iowa) 324; Broghill *v.* Lash, 3 Greene (Iowa) 357; Howell *v.* Campbell, 53 Kan. 742, 37 Pac. 120.

86. Jackson *v.* McElroy, 2 Bush (Ky.) 132; Harris *v.* Adams, 2 Duv. (Ky.) 141.

87. Jones *v.* Adams, 46 Ga. 605; Doty *v.* Moore, 16 Tex. 591; Beach *v.* Mosgrove, 16 Fed. 305, 4 McCrary 50.

88. Whittey *v.* Douge, 9 Iowa 597; Osborn *v.* Leach, 133 N. C. 427, 45 S. E. 783. And see *infra*, IV, E, 4; IV, E, 7, a.

Trover.— On default in an action for the conversion of personal property, it is not error for the court, before entering judgment, to require proof of the value of the property. Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

Trespass.— In trespass against several defendants, where some plead to issue and others suffer default, the latter are not bound by the assessment of damages on the issue tried between plaintiff and those defendants who pleaded. Cridland *v.* Floyd, 6 Serg. & R. (Pa.) 412.

89. Hershy *v.* MacGreevy, 46 Ark. 498; Fitz *v.* Cauchoix, 2 Mart. N. S. (La.) 265; Milne *v.* Labo, 2 Mart. N. S. (La.) 83; Cobb *v.* Dunkin, 19 How. Pr. (N. Y.) 164.

In an action on a promissory note, if defendant suffers a default, plaintiff is entitled to judgment for the amount claimed, without any evidence on the question of damages. Cooper *v.* Brinkman, 38 Kan. 442, 17 Pac. 157; Kiersted *v.* Rogers, 6 Harr. & J. (Md.) 282.

An action on an insurance policy is "for the recovery of money only," although the damages demanded are unliquidated, within the meaning of a statute providing for the entry of judgment, on default, in such cases, without proof. Schobacher *v.* Germantown Farmers' Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969.

Goods sold.— A judgment by default for want of a plea, in an action of assumpsit, where an account was filed in the declaration, was held an admission of indebtedness for the articles charged, but the value of the articles and the amount of the items were required to be proved. Patrick *v.* Ridgaway, 4 Harr. & J. (Md.) 312.

Breach of promise of marriage.— Under a statute providing that a default shall be taken as an admission of the amount of damages claimed "in actions on contract for the recovery of money only," it has been held that an action for a breach of a promise of marriage is of this character, and judgment may be rendered for the amount claimed without proof, although plaintiff also al-

3. Right to Participate in Further Proceedings. After making default a defendant is not entitled to notice of further proceedings in the case, or to participate in them, where they are not of such a character as to open the default or affect the question of his ultimate liability;[90] but where further proceedings are taken for the assessment of the damages or the taxation of costs, he is entitled to take part, and to offer proper evidence and cross-examine witnesses.[91]

E. Rendition and Entry of Judgment — 1. Preliminary Entry of Default. In some states a final judgment cannot be rendered against defendant without a preliminary entry of the default,[92] in others this action is not at all necessary,[93] and in others, while it is the regular and proper practice, and the omission to enter the default may be reversible error, it does not avoid the judgment.[94] This preliminary entry is to be made by the clerk of the court,[95] on application of plaintiff, or on an order of the court granted on plaintiff's motion,[96] and the entry should show the default affirmatively, not merely that plaintiff claimed it or moved for the entry.[97]

2. Time For Taking or Entering Judgment — a. In General. A judgment by default is not valid if taken before the expiration of any and all delays accorded to defendant by statute or rule of practice.[98] But judgment by default may be

leges, for the purpose of enhancing her damages, seduction under such promise. Cole *v.* Hoeburg, 36 Kan. 263, 13 Pac. 275.

90. Kittle *v.* Bellegarde, 86 Cal. 556, 25 Pac. 55. See Callahan *v.* Hickey, 63 Cal. 437.

91. Davis *v.* Wimberly, 86 Ga. 46, 12 S. E. 208; Fenton *v.* Garlick, 6 Johns. (N. Y.) 287; Millikan *v.* Booth, 4 Okla. 713, 46 Pac. 489. And see *infra*, IV, E, 4, a; IV, E, 5, d.

92. *Arkansas.*— Hyde *v.* Pinkard, 25 Ark. 163.

Florida.— Blount *v.* Gallaher, 22 Fla. 92.

Louisiana.— Henshaw *v.* Flannery, 27 La. Ann. 671; Riggin *v.* Merchants' Bank, 19 La. Ann. 373; Washington *v.* Hackett, 19 La. Ann. 146; Whitten's Succession, 9 La. Ann. 417; New Orleans, etc., R. Co. *v.* Patton, 2 La. Ann. 352; Caldwell *v.* Glenn, 6 Rob. 9. But in proceedings before the city courts, no default preliminary to judgment against defendant is required. State *v.* Judge First City Ct., 46 La. Ann. 365, 14 So. 906.

Missouri.— Lombard *v.* Clark, 33 Mo. 308; McElhany *v.* McHenry, 26 Mo. 174. But a defendant who has filed no answer cannot object that no interlocutory judgment was entered, when he voluntarily proceeds with an inquiry of damages. McClurg *v.* Hurst, 37 Mo. 144.

Vermont.— See Sheldon *v.* Sheldon, 37 Vt. 152. And see Leonard *v.* Sibley, 76 Vt. 254, 56 Atl. 1015.

West Virginia.— Marstiller *v.* Ward, 52 W. Va. 74, 43 S. E. 178.

93. See Watson *v.* Brigham, 3 How. Pr. (N. Y.) 290; McClung *v.* Murphy, 2 Miles (Pa.) 177.

On failure of a defendant properly served to appear within the time allowed, the court may enter judgment against him without a prior formal entry of default by the clerk. Hibernia Sav., etc., Soc. *v.* Matthai, 116 Cal. 424, 48 Pac. 370.

94. *Indiana.*— Gillespie *v.* Splahn, Wils. 228.

Iowa.— Culbertson *v.* Salinger, 122 Iowa 12, 97 N. W. 99.

Kentucky.— Gano *v.* Hart, Hard. 297; Hubble *v.* Mullanphy, Hard. 294.

Mississippi.— Rappleye *v.* Hill, 4 How. 295.

Nebraska.— Alter *v.* State, 62 Nebr. 239, 86 N. W. 1080; Likes *v.* Wildish, 27 Nebr. 151, 42 N. W. 900; Jones *v.* Null, 9 Nebr. 57, 1 N. W. 867.

Washington.— Proulx *v.* Stetson, etc., Mill Co., 6 Wash. 478, 33 Pac. 1067.

Wisconsin.— Fisher *v.* Chase, 2 Chandl. 3. *Compare* Holmes *v.* Lewis, 2 Wis. 83.

95. Bashford-Burmister Co. *v.* Agua Fria Copper Co., (Ariz. 1894) 35 Pac. 983.

Judge disqualified.— The entry of a default in a case authorized by law is a ministerial action to be performed by the clerk, and the fact that the judge would be disqualified to try the case does not disqualify the clerk for the performance of this duty. People *v.* De Carrillo, 35 Cal. 37; Dudley *v.* White, 44 Fla. 264, 31 So. 830.

Office judgment.— The office judgment, on default in ejectment, cannot in any case become final without the intervention of the court or jury. King *v.* Davis, 137 Fed. 198. Under W. Va. Code (1899), c. 125, § 46, an office judgment in an action on contract, where there is no order for inquiry of damages, becomes final, so as to bar a defense, on the last day of the next term of the circuit court after the entry of such judgment. Bradley *v.* Long, 57 W. Va. 599, 50 S. E. 746.

96. Greenough *v.* Shelden, 9 Iowa 503.

97. Goodwater Warehouse Co. *v.* Street, 137 Ala. 621, 34 So. 903; Woosley *v.* Memphis, etc., R. Co., 28 Ala. 536.

98. Woolford *v.* Harrington, 2 Ark. 85; Bailey *v.* Edmundson, 168 Mass. 297, 46 N. E. 1064; Rankans *v.* Ottawa Cir. Judge, 97 Mich. 623, 55 N. W. 566.

Application of rule.—This is the case where the judgment is entered before the execution

taken before the day set for the trial of the case,[99] and on the other hand where defendant fails to plead, plaintiff is not deprived of his right to claim a default because he does not demand it until the time of trial.[1] A default judgment prematurely entered is not validated by its subsequent confirmation or the entry of a final judgment upon it.[2]

b. Time Allowed For Appearance or Pleading. A judgment by default for want of an appearance, entered before the expiration of the time allowed by law for defendant to enter his appearance, or taken for want of a plea, before the expiration of the time granted by statute, rule, or order of court, or stipulation for the filing of a plea, is premature, and although not absolutely void, is reversible for error or voidable for irregularity.[3]

and return of the writ (Crews *v.* Garland, 2 Munf. (Va.) 491), where the writ is made returnable too soon (Robinson *v.* State Bank, 11 Ark. 301. And see Lacher *v.* Will, 6 Wis. 282), where the declaration has not been filed or served on defendant the requisite number of days (Gore *v.* Smith, 1 Ill. 267; Holland *v.* Hunton, 15 Mo. 475), where a rule to plead has not been taken as required by law, or has not expired (see Tillepaugh *v.* Braithwaite, 6 Wend. (N. Y.) 560; Leispenard *v.* Baker, 6 Johns. (N. Y.) 323; Howell *v.* Denniston, 3 Cai. (N. Y.) 96), or where the judgment is irregularly entered with reference to the day of the term or the days for hearing motions (see Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365; Junge *v.* MacKnight, 135 N. C. 105, 47 S. E. 452; Pennsylvania Ins. Co. *v.* Passmore, 4 Serg. & R. (Pa.) 507; Russell *v.* Assignees, 1 Leg. Rec. (Pa.) 97), or pending a stay of proceedings (Forbes *v.* Muxlow, 13 N. Y. Suppl. 797, 18 N. Y. Civ. Proc. 239), or pending the time allowed by law to defendant to move to set aside the default (Green *v.* Skipwith, 1 Rand. (Va.) 460), or contrary to the stipulation or agreement of the parties (see Osborn *v.* Rogers, 112 N. Y. 573, 20 N. E. 365; Turner *v.* Burrows, 1 Hill (N. Y.) 627).

99. Blair *v.* Manson, 9 Ind. 357; Brenner *v.* Gundershiemer, 14 Iowa 82. And see Race *v.* Malony, 21 Kan. 31. *Compare* Norris *v.* Dodge, 23 Ind. 190. *Contra*, Robien *v.* Kooie, 107 Ill. App. 219.

1. Manville *v.* Parks, 7 Colo. 128, 2 Pac. 212.

Effect of laches.— Where plaintiff neglected to enter a default judgment for eight years after service of summons on defendant, an entry at such time was erroneous, because of plaintiff's laches. Coleman *v.* Akers, 87 Minn. 492, 92 N. W. 408.

2. Hart *v.* Nixon, 25 La. Ann. 136; Washington *v.* Comeau, McGloin (La.) 234.

3. *Alabama.*— Pruit *v.* Clack, 9 Port. 286; Gwynn *v.* Weaver, 1 Stew. 219; Rather *v.* Owen, 1 Stew. 38.

California.— Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402; Remnant *v.* Hoffman, (1886) 11 Pac. 319; Willson *v.* Cleaveland, 30 Cal. 192; Burt *v.* Scranton, 1 Cal. 416.

Colorado.— Gwillim *v.* Colorado Springs First Nat. Bank, 13 Colo. 278, 22 Pac. 458; O'Rear *v.* Lazarus, 8 Colo. 608, 9 Pac. 621. But see Farris *v.* Walter, 2 Colo. App. 450, 31 Pac. 231.

Connecticut.— Cook *v.* Mix, 10 Conn. 565; Way *v.* Clark, 1 Root 439; Austin *v.* Nichols, 1 Root 199.

Illinois.— Pattison *v.* Hood, 4 Ill. 152; A. W. Stevens Co. *v.* Kehr, 93 Ill. App. 510.

Indiana.— Jones *v.* Roland, 8 Blackf. 272.

Iowa.— McGrew *v.* Downs, 67 Iowa 687, 25 N. W. 880; Knetzer *v.* Bradstreet, 3 Greene 487.

Kansas.—Mitchell *v.* Aten, 37 Kan. 33, 14 Pac. 497, 1 Am. St. Rep. 231.

Louisiana.— Brooks *v.* Cavanaugh, 11 La. Ann. 183; Williams *v.* Dunn, 2 La. Ann. 806; Arthur *v.* Cochran, 12 Rob. 41; Bryan *v.* Spruell, 16 La. 313; Carmena *v.* Mix, 15 La. 165; Maurin *v.* Dashiell, 14 La. 471. An acceptance of service and waiver of citation will not authorize judgment by default before the expiration of the ten days from the service of citation. Anheuser-Busch Brewing Assoc. *v.* McGowan, 49 La. Ann. 630, 21 So. 766.

Massachusetts.— Smith *v.* Rice, 11 Mass. 507.

Michigan.— Drew *v.* Claypool, 61 Mich. 233, 28 N. W. 78.

Mississippi.— Burns *v.* Loeb, 59 Miss. 167. *Compare* Winston *v.* Miller, 12 Sm. & M. 550.

Missouri.— Howard *v.* Clark, 43 Mo. 344; Smith *v.* Best, 42 Mo. 185; Branstetter *v.* Rives, 34 Mo. 318.

Nevada.— Kidd *v.* Four-Twenty Min. Co., 3 Nev. 381.

New Jersey.— Laufman *v.* Hope Mfg. Co., 54 N. J. L. 70, 23 Atl. 305; Cooper *v.* Hughes, 39 N. J. L. 445.

New York.—Corning *v.* Roosevelt, 10 N. Y. Suppl. 937, 18 N. Y. Civ. Proc. 193; Schuhardt *v.* Roth, 10 Abb. Pr. 203; Van Pelt *v.* Boyer, 7 How. Pr. 325. And see Littauer *v.* Stern, 177 N. Y. 233, 69 N. E. 538 [*affirming* 88 N. Y. App. Div. 274, 85 N. Y. Suppl. 71]; Hatfield *v.* Atwood, 3 N. Y. Suppl. 258, 15 N. Y. Civ. Proc. 330. Where defendant obtains an order extending the time to plead, and the order is revoked after the original time has expired, he must then be allowed a reasonable time in which to plead. Knap *v.* Smith, 7 Wend. 534. *Compare* Anonymous, 3 Hill 448. But an extension of time to plead, fraudulently obtained or collusively granted, will be disregarded and judgment may be entered notwithstanding it. Have-

c. On Service by Publication. Statutes authorizing the service of process on non-resident defendants by publication commonly provide that a party so served shall have a certain number of days after the completion of the publication in which to answer; and no judgment by default can be taken until this period has fully expired.[4]

d. In Case of Joint Defendants. Where the action is against several defendants, judgment by default cannot properly be entered against any, unless by the help of a statute, until all have been served;[5] and all must have the full time allowed for answering;[6] and if one appears and pleads, and the others do not, the rule at common law is that no judgment can be entered on the default until the issue as to the other defendants is disposed of.[7]

e. After Entry of Default. When a preliminary entry of default is made, the final judgment is usually deferred until the assessment of the damages; but when there is no such reason for delay, there is no impropriety in rendering final judgment at once, or as of the day of the default,[8] unless it is provided by statute that a default shall not be made final until after the lapse of a certain number of days.[9] On the other hand, when the default has been entered, no rights of plaintiff are forfeited by delay in taking the final judgment.[10]

f. Term of Court. In many states the laws provide that judgment shall not be entered against a defendant at the return-term or appearance term, but only at a subsequent term, where certain conditions exist, as, where he is absent from the state, or where the writ has not been served or the declaration filed a certain number of days before the beginning of the term, or in any actions except such as are specified in the statute. Where this is the case, a default judgment entered at the return or appearance term is premature and liable to be reversed or set aside.[11]

meyer *v.* Brooklyn Sugar Refining Co., 15 N. Y. Suppl. 157.

Ohio.— Kimmel *v.* Pratt, 40 Ohio St. 344; Williamson *v.* Nicklin, 34 Ohio St. 123.

Pennsylvania.— Tobyhanna, etc., Lumber Co. *v.* Home Ins. Co., 167 Pa. St. 231, 31 Atl. 564; Fitzsimons *v.* Salomon, 2 Binn. 436; Sheppard *v.* Bobem, 1 Pa. Super. Ct. 164; Bloomsburg Banking Co. *v.* Mourey, 4 Pa. Co. Ct. 247; Myers *v.* Smith, 2 C. Pl. 185; Association *v.* Gardiner, 10 Phila. 361; Foster *v.* Reynolds, 1 Phila. 241. Where the copy of the summons left with defendant fixed the day for appearance two days later than that in the summons itself, a judgment by default entered on the earlier date is invalid. Hoary *v.* McHale, 2 Pa. Dist. 686.

Texas.— Lash *v.* Warren, (1890) 14 S. W. 694; Oden *v.* Vaughn Grocery Co., 34 Tex. Civ. App. 115, 77 S. W. 967; Trevino *v.* Garza, 1 Tex. App. Civ. Cas. § 821.

Virginia.— Turnbull *v.* Thompson, 27 Gratt. 306.

Wisconsin.— Schobacher *v.* Germantown Farmers' Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969; Salter *v.* Hilgen, 40 Wis. 363; Sawyer *v.* Farmers', etc., Bank, 7 Wis. 386.

See 30 Cent. Dig. tit. "Judgment," § 212.

4. Seeley *v.* Taylor, 17 Colo. 70, 28 Pac. 461, 723; Morton *v.* Morton, 16 Colo. 358, 27 Pac. 718; Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221; Sylph Min., etc., Co. *v.* Williams, 4 Colo. App. 345, 36 Pac. 80; Stockwell *v.* McCracken, 109 Mass. 84; Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84; Downer *v.* Mellen, 50 Barb. (N. Y.) 232; Smith *v.* Fogarty, 6 N. Y. Civ. Proc. 366; Brod *v.* Heymann, 3 Abb. Pr. N. S. (N. Y.) 396; Higginbotham *v.* Haselden, 3 W. Va. 266. And see Morrison *v.* Beckham, 96 Ky. 72, 27 S. W. 868, 16 Ky. L. Rep. 294, warning order against non-resident defendant. See ATTACHMENT, 4 Cyc. 828.

5. Evans *v.* Gill, 25 Ill. 116; Bushee *v.* Wright, 1 Pinn. (Wis.) 276. And see Bennet *v.* Reed, 10 Watts (Pa.) 396.

6. Stehr *v.* Ollbermann, 49 N. J. L. 633, 10 Atl. 547; Doughten *v.* McMurtrie, 24 N. J. L. 252; Jacques *v.* Greenwood, 1 Abb. Pr. (N. Y.) 230; Harriott *v.* Van Cott, 5 Hill (N. Y.) 285.

7. *Illinois.*— Wight *v.* Meredith, 5 Ill. 360; Teal *v.* Russell, 3 Ill. 319; Russell *v.* Hogan, 2 Ill. 552.

Iowa.— Campbell *v.* McHarg, 9 Iowa 354; Morrison *v.* Stoner, 7 Iowa 493.

Michigan.— Penfold *v.* Slyfield, 110 Mich. 343, 68 N. W. 226.

Texas.— Boles *v.* Linthicum, 48 Tex. 220.

Vermont.— Fletcher *v.* Blair, 20 Vt. 124.

See 30 Cent. Dig. tit. "Judgment," § 214. And see *supra*, IV, A, 3, b.

8. Coolidge *v.* Cary, 14 Mass. 115.

9. Taney *v.* Meilleur, 35 La. Ann. 117; Ward *v.* Graves, 11 La. Ann. 116; Fowler *v.* Smith, 1 Rob. (La.) 448; Johns *v.* Boyle, 14 La. 268; Hall *v.* Mulholland, 3 La. 113; Gorham *v.* De Armas, 7 Mart. (La.) 359; Wheat *v.* Davidson, 2 Tex. 196.

10. Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218, judgment entered eight years after default.

11. *Alabama.*— Falk *v.* Reese, 19 Ala. 240; Griffin *v.* Wilson, 19 Ala. 27; Dupree *v.*

g. Day of the Term. A judgment by default cannot be sustained unless it is entered in accordance with statutes or rules of court relating to the day of the term on which judgments may be taken.[12] Where it is the custom to enter judgments as of the last day of the term, a judgment by default may be so entered, although the record shows that the default occurred on a previous day.[13]

h. Hour of the Day. Where a defendant is cited to appear at a certain hour on a day named, judgment cannot be taken against him at an earlier hour on the same day.[14] And when he is required to plead within a certain number of days, he has the whole of the last day in which to plead and cannot be defaulted until that day has fully expired.[15]

i. In Vacation. Statutes sometimes provide for the entry of judgments by default by the clerks of court in vacation, under certain circumstances;[16] but

Smith, 3 Ala. 736; O'Neal *v.* Garrett, 3 Ala. 276; Wiggins *v.* Perryman, 4 Stew. & P. 94. But see National Fertilizer Co. *v.* Hinson, 103 Ala. 532, 15 So. 844.

Delaware.— Gale *v.* Myers, 4 Houst. 546.

Georgia.— Welch *v.* Singleton, 95 Ga. 519, 20 S. E. 496; Bowden *v.* Hatcher, 83 Ga. 77, 9 S. E. 724. Where, after service on a garnishee to answer at a certain term of court, the term is abolished, and it is provided that cases then pending shall be triable at another term then created, on failure of the garnishee to answer at the latter term, a judgment by default is properly rendered. Mutual L. Ins. Co. *v.* Moss, 93 Ga. 272, 20 S. E. 308.

Illinois.— Culver *v.* Phelps, 130 Ill. 217, 22 N. E. 809; McAllister *v.* Ball, 28 Ill. 210; Collins *v.* Tuttle, 24 Ill. 623; Leopold *v.* Steel, 41 Ill. App. 17.

Iowa.— Walters *v.* Blake, 100 Iowa 521, 69 N. W. 879; Langford *v.* Ottumwa Water Power Co., 53 Iowa 415, 5 N. W. 574.

Kentucky.— Anderson *v.* Ramsay, 2 A. K. Marsh. 23.

Maryland.— Darnall *v.* Harrison, 1 Harr. & J. 137.

Massachusetts.— Thayer *v.* Tyler, 10 Gray 164; Blanchard *v.* Wild, 1 Mass. 342.

Missouri.— Morris *v.* Horrell, 35 Mo. 467; Hopkins *v.* McGee, 33 Mo. 312; Morp *v.* Burris. 31 Mo. 308; Doan *v.* Holly, 26 Mo. 186; Matthews *v.* Boas, 6 Mo. 597.

New Jersey.— Miller *v.* Halsey, 16 N. J. L. 63.

North Carolina.— A statute providing that defendant shall not be compelled to plead for twelve months from the return-term excuses him from pleading, but not from appearing at the return-term and asking time to plead; and a judgment taken on default of such appearance should not be set aside. Crawford *v.* Wilmington Bank, 61 N. C. 136.

Ohio.— Boyles *v.* Hoyt, 2 Ohio Dec. (Reprint) 376, 2 West. L. Month. 548; Mather *v.* Gallia Furnace Co., 2 Ohio Dec. (Reprint) 94, 1 West. L. Month. 351.

Tennessee.— Ross *v.* Meek, 93 Tenn. 666, 28 S. W. 20; Brient *v.* Waterfield, 5 Sneed 537.

Texas.— Bagley *v.* Spruill, 1 Tex. Unrep. Cas. 277; Wallace *v.* Crow, 1 Tex. App. Civ. Cas. § 41.

Vermont.— Rider *v.* Alexander, 1 D. Chipm. 267.

United States.— O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840; Linthicum *v.* Remington, 15 Fed. Cas. No. 8,377, 5 Cranch C. C. 546.

See 30 Cent. Dig. tit. "Judgment," § 216.

12. As to the proper day for entering default judgments see the following cases:

Alabama.— Hollis *v.* Herzberg, 128 Ala. 474, 29 So. 582; Letondal *v.* Huguenin, 26 Ala. 552.

Indiana.— Reed *v.* Spayde, 56 Ind. 394; Kaufman *v.* Sampson, 9 Ind. 520; Baltimore, etc., R. Co. *v.* Flynn, 2 Ind. App. 55, 28 N. E. 201. See Archibald *v.* Lamb, 9 Ind. 544.

Indian Territory.— Martin *v.* Berry, 1 Indian Terr. 399, 37 S. W. 835.

Iowa.— Huebner *v.* Farmers' Ins. Co., 71 Iowa 30, 32 N. W. 13; Burr *v.* Wilcox, 19 Iowa 31.

Kansas.— Leonard *v.* Hargis, 58 Kan. 40, 48 Pac. 586.

Maryland.— Mailhouse *v.* Inloes, 18 Md. 328.

Missouri.—Matthews *v.* Cook, 35 Mo. 286.

Pennsylvania.— Black *v.* Johns, 68 Pa. St. 83.

South Carolina.— *Compare* McComb *v.* Woodbury, 13 S. C. 479.

Tennessee.— Byrd *v.* State Bank, 2 Swan 43.

Texas.—Martin *v.* Harnett, 86 Tex. 517, 25 S. W. 1115; East Line, etc., R. Co. *v.* Scott, 66 Tex. 565, 1 S. W. 663; Cockrell *v.* State, 22 Tex. Civ. App. 568, 55 S. W. 579; Graham *v.* Miller, (Civ. App. 1894) 24 S. W. 1107; McConnell *v.* Foscue, (Civ. App. 1894) 24 S. W. 964; McKay *v.* Barlow, (App. 1892) 18 S. W. 650.

13. Herring *v.* Polley, 8 Mass. 113.

14. Parker *v.* Shephard, 1 Cal. 131; Smith *v.* Fetherston, 10 Phila. (Pa.) 306. And see Yentzer *v.* Thayer, 10 Colo. 63, 14 Pac. 53, 3 Am. St. Rep. 563.

15. See *supra*, IV, C, 3, c.

16. See the statutes of the different states. And see Oswego River Pulp Co. *v.* Delaware Water Gap Pulp Co., 10 Pa. Co. Ct. 312; McConkey *v.* McCraney, 71 Wis. 576, 37 N. W. 822; Wells *v.* Morton, 10 Wis. 468; Holmes *v.* Lewis, 2 Wis. 83.

where the rendition of a final judgment of this character is to be performed as a judicial act by the court, or involves an application to the court, it can be done as a general rule only in term-time.[17]

j. Presumption as to Time of Entering Judgment. Where the record does not show on what day a judgment by default was rendered, it will be presumed to have been rendered on the proper day.[18] And if the record recites that the time for answering had expired, it will be presumed that the court satisfied itself that such was really the case.[19]

3. Application For Judgment — a. Necessity For Application to Court. Where defendant makes default, and the nature of the action and of plaintiff's demand is such that there is no necessity for judicial action in determining the relief to be granted or the amount of the recovery, the statutes generally provide that a judgment may be entered by the clerk of the court, without application to the judge,[20] although otherwise it is necessary to move or apply to the court for the judgment.[21]

17. *Florida.*— Marshall *v.* Ravisies, 22 Fla. 583.

Illinois.—Cook *v.* Forest, 18 Ill. 581.

Louisiana.— Laurent *v.* Beelman, 30 La. Ann. 363, holding that a judgment by default must be read and signed in open court, and that if it is only signed by the judge at chambers it is void. And see State *v.* Billings, 23 La. Ann. 798.

New York.—Aymar *v.* Chace, 12 Barb. 301.

North Carolina.— One is not bound to take notice of an order made by the judge after the latter has left the court-room for the term, and a default and judgment based on such order are properly set aside. Branch *v.* Walker, 92 N. C. 87.

Pennsylvania.— Sauer *v.* Martin, 9 Kulp 483.

See 30 Cent. Dig. tit. "Judgment," § 219.

In Washington under a statute authorizing judges at chambers in vacation to hear all matters whatever not requiring the intervention of a jury, a judgment by default may be entered at chambers. Murne *v.* Schwabacher, 2 Wash. Terr. 130, 3 Pac. 899.

18. Look *v.* Henderson, 4 Tex. 303; Bunker *v.* Rand, 19 Wis. 253, 88 Am. Dec. 684.

19. Catanich *v.* Hayes, 52 Cal. 338. But *compare* Palmer *v.* McMaster, 8 Mont. 186, 19 Pac. 585.

20. Kittle *v.* Bellegarde, 86 Cal. 556, 25 Pac. 55; Wall *v.* Heald, 95 Cal. 364, 30 Pac. 551; Bailey *v.* Sloan, 65 Cal. 387, 4 Pac. 349; People *v.* Weil, 53 Cal. 253; Heinrich *v.* Englund, 34 Minn. 395, 26 N. W. 122; Skillman *v.* Greenwood, 15 Minn. 102; Kipp *v.* Fullerton, 4 Minn. 473; Bullard *v.* Sherwood, 85 N. Y. 253; Augner *v.* New York, 14 N. Y. App. Div. 461, 43 N. Y. Suppl. 803; Kerr *v.* Dildine, 14 N. Y. Civ. Proc. 176; Flynn *v.* Hudson River R. Co., 6 How. Pr. (N. Y.) 308; Livingston *v.* Conner, 7 Wend. (N. Y.) 521; Hunter *v.* Snyder, 11 W. Va. 198; Farmers' Bank *v.* Montgomery, 11 W. Va. 169.

Constitutionality.— The functions of the clerk in thus entering judgment being ministerial, and in no sense judicial, the statutes authorizing this method of procedure are not unconstitutional.

Florida.— Gamble *v.* Jacksonville, etc., R. Co., 14 Fla. 226.

Minnesota.— Skillman *v.* Greenwood, 15 Minn. 102.

Montana.— Sperling *v.* Calfee, 7 Mont. 514, 19 Pac. 204.

Oregon.— Graydon *v.* Thomas, 3 Oreg. 250.

Wisconsin.— Lathrop *v.* Snyder, 17 Wis. 110.

Construction.— This proceeding being summary and out of the ordinary course of the common law, the statute must be strictly construed and the clerk must closely follow its provisions. Files *v.* Robinson, 30 Ark. 487; Curry *v.* Roundtree, 51 Cal. 184; Providence Tool Co. *v.* Prader, 32 Cal. 634, 91 Am. Dec. 598; Kelly *v.* Van Austin, 17 Cal. 564; Taylor *v.* Smith, (Tenn. Ch. App. 1896) 36 S. W. 970. Under a statute providing that the clerk may in vacation enter a judgment by default upon proof of personal service of process on defendant, a judgment entered out of term by the clerk, without such proof, is void. McConkey *v.* McCraney, 71 Wis. 576, 37 N. W. 822. And see Elder *v.* Grunsky, 127 Cal. 67, 59 Pac. 300.

Effect of mistakes.—Mistakes or irregularities committed by the clerk in entering judgment, not going to the jurisdiction, do not make the judgment void; but the error may be cured by motion in the court below or corrected on appeal. This is the case where the clerk by mistake enters judgment for too great a sum. Lenoir *v.* Broadhead, 50 Ala. 58; Bond *v.* Pacheco, 30 Cal. 530.

21. *Connecticut.*— New York, etc., R. Co. *v.* Hungerford, 75 Conn. 76, 52 Atl. 487.

Georgia.— Tippin *v.* Whitehead, 66 Ga. 688. And see O'Connell *v.* Friedman, 118 Ga. 831, 45 S. E. 668.

Kentucky.— A judgment by default at the rules in the clerk's office must be confirmed in court; otherwise the judgment is not final, and cannot be pleaded as a judgment or warrant an execution. Nicholas *v.* Caldwell, 2 Bibb 545.

New York.— Mathot *v.* Triebel, 102 N. Y. App. Div. 426, 92 N. Y. Suppl. 512.

Pennsylvania.— Doud *v.* Citizens' Ins. Co., 6 Pa. Co. Ct. 329; Blair *v.* Warden, 4 Pa.

b. Notice of Application. Except where the statutes or rules of practice expressly require such notice,[22] a defendant who is once in court whether by legal process or by appearance is not as a general rule entitled to notice of an application for or entry of a judgment by default against him,[23] especially where the judgment is one which will be entered as a matter of course, as in an action for the payment of money only.[24]

c. Proceedings on Application. On application for judgment by default, the

Co. Ct. 464; Rankin *v.* Du Puy, 31 Pittsb. Leg. J. N. S. 335.

South Carolina.— Adams *v.* Agnew, 15 S. C. 36; Wolf *v.* Hamberg, 6 S. C. 448; Martin *v.* Malony, 1 Rich. 272.

Wisconsin.— Morrison *v.* Austin, 14 Wis. 601; Holmes *v.* Lewis, 2 Wis. 83.

See 30 Cent. Dig. tit. "Judgment," § 222.

Actions of tort.— Judgment by default cannot be entered by the clerk without application to the court where the action is in tort. Shay *v.* Chicago Clock Co., 111 Cal. 549, 44 Pac. 237; Reynolds *v.* La Crosse, etc., Packet Co., 10 Minn. 178.

Fraud.— Where an action is predicated on certain acts of defendant, alleged to have been done with a fraudulent intent, judgment by default cannot be entered by the clerk without the intervention of the court. Fayerweather *v.* Tucker, 11 N. Y. Suppl. 39, 25 Abb. N. Cas. (N. Y.) 395, 18 N. Y. Civ. Proc. 276.

Execution against the person.— The fact that matters alleged in a complaint, demanding judgment for a sum of money only, would entitle plaintiff to an execution against the person, to enforce the judgment, does not deprive him of the right to enter judgment on default without application to the court. Steamship Richmond Hill Co. *v.* Seager, 33 N. Y. App. Div. 640, 54 N. Y. Suppl. 1116.

Conversion.— Judgment by default in an action for conversion can be entered only on application to the court. Horton *v.* La Duc, 59 How. Pr. (N. Y.) 454.

Actions affecting real property.— In proceedings to compel the determination of claims to real property, plaintiff must move the court for judgment on default. Rosevelt *v.* Giles, 7 Hill (N. Y.) 166. And see Lucy *v.* Dowling, 114 Mass. 92; Brundred *v.* Egbert, 164 Pa. St. 615, 30 Atl. 503.

22. *Arkansas.*—Notice must be given where defendant has been constructively summoned and has not appeared. Benjamin *v.* Birmingham, 50 Ark. 433, 8 S. W. 183.

Mississippi.— By statute five days' notice before the commencement of the term is required to authorize plaintiff to demand a judgment by default. Rainey *v.* Planters' Bank, 26 Miss. 177.

New Jersey.— Slack *v.* Reeder, 30 N. J. L. 348, holding that under section 90 of rules of court, if plaintiff omits to enter such judgment at the term at which the default is made, he cannot have judgment until he has given the required notice to defendant.

New York.— Union Trust Co. *v.* Driggs, 62 N. Y. App. Div. 213, 70 N. Y. Suppl. 947; Citizens' Sav. Bank *v.* Bauer, 49 Hun 238, 1 N. Y. Suppl. 450 (construing Code Civ. Proc. §§ 780, 1219); De Forest *v.* Baker, Abb. Pr. N. S. 34.

Ohio.— Fliedner *v.* Rockefeller, 9 Ohio Dec. (Reprint) 266, 12 Cinc. L. Bul. 20.

Pennsylvania.— Marlin *v.* Waters, 127 Pa. St. 177, 17 Atl. 890; Thomas *v.* Weiand, 16 Phila. 77.

Washington.— The statute (Ballinger Code, § 4886) provides that, after appearance, defendant is entitled to notice of all subsequent proceedings, and this includes the entry of a judgment by default. Ashcraft *v.* Powers, 22 Wash. 440, 61 Pac. 161. But the statute applies only to defendants still in the case, and does not entitle a defendant to notice of entry of judgment when he, on notice and hearing, has been declared in default for failing to amend his answer. Norris *v.* Campbell, 27 Wash. 654, 68 Pac. 339.

Wisconsin.— Brockway *v.* Newton, 49 Wis. 406, 5 N. W. 781 [*distinguishing* Allen *v.* Beekman, 42 Wis. 185; Platt *v.* Robinson, 10 Wis. 128]; Northrup *v.* Shephard, 26 Wis. 220.

See 30 Cent. Dig. tit. "Judgment," § 207.

23. *Alabama.*— Knope *v.* Reeves, (1900) 28 So. 666.

Nebraska.— McBrien *v.* Riley, 38 Nebr. 561, 57 N. W. 385.

New York.— Kimball *v.* Knights, 18 Wend. 657.

Pennsylvania.— Seidel *v.* Hurley, 1 Woodw. 352, holding that where defendant, after taking an appeal, removes beyond the court's jurisdiction, a rule for judgment for want of a plea may be made absolute, although not served on him.

South Dakota.— Searles *v.* Lawrence, 8 S. D. 11, 65 N. W. 34.

Texas.— Eakins *v.* Groesbeck, 24 Tex. 179.

See 30 Cent Dig. tit. "Judgment," § 207.

A defendant who has withdrawn his appearance is not entitled to notice of application for judgment by default. Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037.

Upon affirmance of an order requiring defendant to do certain acts or have his answer stricken out, and judgment rendered against him by default, no stay being granted by the appellate court until after the time limited in the order has expired, plaintiff is entitled to judgment by default, without notice to defendant, immediately upon the record being returned to the trial court. Whereatt *v.* Ellis, 68 Wis. 61, 30 N. W. 520, 31 N. W. 762.

24. Heinrich *v.* Englund, 34 Minn. 395, 26 N. W. 122; Burges *v* Pollitzer, 19 S. C. 451; Searles *v.* Lawrence, 8 S. D. 11, 65 N. W. 34;

court may hear evidence as to the right to take such a judgment, although it will not under ordinary circumstances receive evidence upon the merits of the case.[25] It may disregard objections which are not jurisdictional but amount to no more than mere irregularities,[26] and, as the facts of the case justify, may either render a judgment by default or confirm the entry thereof and assess plaintiff's damages,[27] or deny the application,[28] or it may set aside a preliminary entry of the default.[29] A rule requiring the court sitting as a jury to find separately facts and conclusions of law does not apply in rendering a judgment by default against one of several defendants.[30]

d. Bond or Recognizance on Taking Judgment. Under a statute providing that, before the rendering of a judgment against a defendant who was constructively summoned, and did not appear, a bond or recognizance shall be executed conditioned to save him harmless if he procures a vacation or modification thereof, a judgment rendered without the required security is erroneous.[31]

4. Assessment of Damages — a. Notice of Assessment.[32] Where defendant has appeared but not answered, in an action for the recovery of money only, and the complaint is duly verified, he is not entitled to notice of assessment;[33] but it is otherwise where the amount sought to be recovered is unliquidated or uncertain, and defendant will have the right to be heard on the question of the amount of the judgment.[34]

b. Method of Assessment. The rules governing the assessment of damages, where a judgment by default is entered by the court or by a jury, clerk of court or referee upon a writ of inquiry or other proceeding are fully discussed elsewhere in this work.[35]

5. Evidence — a. Proof of Jurisdictional Facts. To sustain a judgment by default there must be proof of the service of process on defendant. This is furnished by the officer's return, which imports verity,[36] although in some states an affidavit of the person serving the writ is required, which must be made in due form in order to support the judgment.[37] In case of service by publication upon

Pormann *v.* Frede, 72 Wis. 226, 39 N. W. 385; Egan *v.* Sengpiel, 46 Wis. 703, 1 N. W. 467.

25. Woods *v.* Brzezinski, 57 Conn. 471, 18 Atl. 252.

Where the proceedings are continued as an inquest after the default, defendant cannot, on such an application, introduce evidence in regard to contesting the merits of the controversy beyond such as is incident to an inquest of damages. Kerker *v.* Carter, 1 Hill (N. Y.) 101.

Where one or more of several defendants come in and defend while the others make default, evidence against those in default may be taken at the same time; whether such evidence shall then be taken, or at a separate time, being a matter of practice to be regulated by the court having original jurisdiction. Lyon *v.* Yates, 61 N. Y. 661.

That plaintiff has chosen a wrong form of action cannot be shown after default, on the trial to assess damages. Iasigi *v.* Shea, 148 Mass. 538, 20 N. E. 110.

26. Spackman *v.* McCormick, 3 Walk. (Pa.) 468; Heffner *v.* Confair, 1 Del. Co. (Pa.) 440; Genobles *v.* West, 23 S. C. 154; Anderson *v.* Doolittle, 38 W. Va. 629, 18 S. E. 724.

27. New York, etc., R. Co. *v.* Hungerford, 75 Conn. 76, 52 Atl. 487; Brown *v.* Rhinehart, 112 N. C. 772, 16 S. E. 840; Mississippi Mills *v.* Bauman, 12 Tex. Civ. App. 312, 34 S. W. 681.

Where no request to have the jury assess damages is made plaintiff is not entitled to a judgment against him. Mississippi Mills *v.* Bauman, 12 Tex. Civ. App. 312, 34 S. E. 681.

28. McDermett *v.* Rosenbaum, 13 Colo. App. 444, 58 Pac 880; Medley *v.* Wetzlar, 5 La. Ann. 217, for defective proceedings.

29. Wilcox *v.* Huie, 18 La. 426.

30. Brown *v.* Brown, 3 Cal. 111.

31. Morrison *v.* Beckham, 96 Ky. 72, 27 S. W. 868, 16 Ky. L. Rep. 294; Gill *v.* Johnson, 1 Metc. (Ky.) 649; Webber *v.* Tanner, 65 S. W. 848, 23 Ky. L Rep. 1694; White *v.* Moyers, 31 S. W. 280, 17 Ky. L. Rep. 402. *Compare* Stearns *v.* Wrisley, 30 Vt. 661.

32. See Damages, 13 Cyc. 226.

33. Dix *v.* Palmer, 5 How. Pr. (N. Y.) 233; Trumbull *v.* Peck, 17 Wis. 265. And see Christian, etc., Grocery Co. *v.* Coleman, 125 Ala. 158, 27 So. 786.

34. Quin *v.* Tilton, 2 Duer (N. Y.) 648; Cook *v.* Pomeroy, 10 How. Pr. (N. Y.) 103.

35. See Damages, 13 Cyc. 220 *et seq.* Right to a trial by jury see Juries.

36. Gatlin *v.* Dibrell, 74 Tex. 36, 11 S. W. 908.

37. Spaulding *v.* Lyon, 2 Abb. N. Cas. (N. Y.) 203; Camp *v.* Welles, 11 Pa. St. 206.

an absent or non-resident defendant, a strict compliance with all the requirements of the statute must be shown.[38] A written acknowledgment of service of process, indorsed on the writ, and purporting to be signed by defendant, will not be sufficient to support a judgment by default, without proof of the authenticity of the indorsement and signature.[39]

b. Proof of Default. Where judgment is taken for want of an appearance by defendant, no proof of the fact is required, as the court can determine judicially from an inspection of the record whether or not an appearance has been entered.[40] And the rule is the same where the default consists in the failure to obey a rule to plead,[41] or to plead over after the overruling of a demurrer.[42] But in the ordinary case of defendant's omission to plead or answer within the time limited by law, plaintiff is required in some states to make and file an affidavit that no plea or answer has been received or filed within the time allowed.[43]

c. Proof of Cause of Action — (1) *Necessity For Proof.* As a general rule a default admits the cause of action and the material and traversable allegations of the declaration, although not the amount of damages, and hence the amount to be recovered is all plaintiff is required to prove or defendant permitted to controvert.[44] There are, however, numerous decisions disapproving of the entry of

38. *California.*— People *v.* Greene, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448.

Iowa.— McCraney *v.* Childs, 11 Iowa 54.

Missouri.— Childers *v.* Schantz, 120 Mo. 305, 25 S. W. 209.

New York.— Capital City Bank *v.* Parent, 134 N. Y. 527, 31 N. E. 976, 18 L. R. A. 240.

South Carolina.— Clyburn *v.* Reynolds, 31 S. C. 91, 9 S. E. 973.

See 30 Cent. Dig. tit. "Judgment," § 226.

39. *Ex p.* Gibson, 10 Ark. 572; Johnson *v.* Delbridge, 35 Mich. 436; Bozman *v.* Brower, 6 How. (Miss.) 43; Davis *v* Jordon, 5 How. (Miss.) 295; Harvie *v.* Bostic, 1 How. (Miss.) 106; Read *v.* French, 28 N. Y. 285. *Compare* Andrews *v.* Townshend, 56 N. Y. Super. Ct. 140, 1 N. Y. Suppl. 421.

40. Edson *v.* La Londe, 88 Mich. 162, 50 N. W. 112.

41. Edson *v.* La Londe, 88 Mich. 162, 50 N. W. 112; Elliott *v.* Farwell, 44 Mich. 186, 6 N. W. 234.

42. Cahoon *v.* Wisconsin Cent. R. Co., 10 Wis. 290.

43. *Florida.*— Fagan *v.* Barnes, 14 Fla. 53.

Georgia.— See Hamby Mountain Gold Mines *v.* Findley, 85 Ga. 431, 11 S. E. 775.

Michigan.— Failure to file affidavit for default cannot be taken advantage of on error. Steers *v.* Holmes, 79 Mich. 430, 44 N. W. 922.

Minnesota.— Dunwell *v.* Warden, 6 Minn. 287.

New York.— Brien *v.* Casey, 2 Abb. Pr. 416; Philips *v.* Prescott, 9 How. Pr. 430.

Texas.— Hopkins *v.* Donaho, 4 Tex. 336.

Wisconsin.— Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326; Downer *v.* McVickar, 15 Wis. 168; Smith *v.* Hoyt, 14 Wis. 252.

See 30 Cent. Dig. tit. "Judgment," § 227.

Sufficiency of affidavit.— A paper in the form of an affidavit, with an erroneous venue in the caption, may nevertheless be sufficient proof as an oath. Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

By whom made. — The affidavit that no answer has been received should be made by the attorney or his managing clerk, or by some person shown in the affidavit to have the charge of the suit, or otherwise to be in a situation to have knowledge of the matter. Imlay *v.* New York, etc., R. Co., 1 Sandf. (N. Y.) 732, 1 Code Rep. 94.

44. *Alabama.*— Maund *v.* Loeb, 87 Ala. 374, 6 So. 376.

California.— Tuolumne Redemption Co. *v.* Patterson, 18 Cal. 415.

Colorado.— Downing North Denver Land Co. *v.* Burns, 30 Colo. 283, 70 Pac. 413; Godding *v.* Rossiter, 20 Colo. App. 245, 77 Pac. 1094, action on foreign judgment, authenticated copy thereof being on file.

Connecticut.— Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239.

Florida.— Russ *v.* Gilbert, 19 Fla. 54.

Georgia.— See Mitchell *v.* Allen, 110 Ga. 282, 34 S. E. 851. But *compare* Kaiser *v.* Brown, 98 Ga. 19, 25 S. E. 925; Durden *v.* Carhart, 41 Ga. 76. Where defendant in a suit on an account is in default, under Civ. Code (1895), § 5078, plaintiff is permitted to take a verdict as if each item were proved by testimony. Norman *v.* Great Western Tailoring Co., 121 Ga. 813, 49 S. E. 782. And see Fryer *v.* Cole, 70 Ga. 687.

Illinois.— Chicago *v.* English, 198 Ill. 211, 64 N. E. 976.

Iowa.— Eaton *v.* Peavy, 75 Iowa 740, 38 N. W. 423.

Louisiana.— Davis *v.* Davis, 8 La. Ann. 91. But see Bryan *v.* Spruell, 16 La. 313.

Minnesota.— Exley *v.* Berryhill, 37 Minn. 182, 33 N. W. 567.

Nebraska.— Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

New Hampshire.— Willson *v.* Willson, 25 N. H. 229, 57 Am. Dec. 320.

New York.— Sayres *v.* Miller, 10 N. Y. Civ. Proc. 69. The provision of the code that, if a complaint alleges that money sought to be recovered was received by defendant in a fiduciary capacity, there can be no recovery

such a judgment without proof of the facts essential to plaintiff's recovery, chiefly, however, in cases where the action is for unliquidated damages or based upon a condition or contingency.[45] The filing of a copy of the instrument sued on,[46] of an affidavit of the amount due to plaintiff,[47] is sometimes required. Where one of two joint defendants answers, controverting the material allegations of the declaration, the fact that the other defendant suffers default does not dispense with the necessity of proof as to the answering defendant.[48]

(II) *Admissibility, Weight, and Sufficiency.* The ordinary rules concerning the admissibility of evidence are applicable.[49] If the nature of the evidence to be required on an application for judgment by default or an assessment of damages is not prescribed by statute, the judgment may be founded on any evidence sufficient to satisfy the court;[50] but it must be legal evidence, tending to establish plaintiff's claim or to fix the amount of his recovery.[51] The

unless the allegation is proved, does not apply where defendant is in default. Steamship Richmond Hill Co. *v.* Seager, 33 N. Y. App. Div. 640, 54 N. Y. Suppl. 1116; Reeder *v.* Lockwood, 30 Misc. 531, 62 N. Y. Suppl. 713. But see Humphrey *v.* Persons, 23 Barb. 313, construing a statute which provides that if a defendant does not appear and answer in an action in a justice's court, plaintiff cannot recover without proving his case.

North Carolina.— Junge *v.* MacKnight, 137 N. C. 285, 49 S. E. 474.

Pennsylvania.— Lancaster Bank *v.* McCall, 2 Pa. L. J. Rep. 498; Alexander *v.* Morgan, 7 Pittsb. Leg. J. 188.

Texas.— Union Cent. L. Ins. Co. *v.* Lipscomb, (Civ. App. 1894) 27 S. W. 307.

See *supra*, IV, D, 2, a.

The burden of fixing the amount of his claim is upon plaintiff. Ruth *v.* Smith, 29 Colo. 154, 68 Pac. 278; Smith *v.* Marietta First Nat. Bank, 115 Ga. 608, 41 S. E. 983; Durden *v.* Carhart, 41 Ga. 76; Patrick *v.* Ridgaway, 4 Harr. & J. (Md.) 312; Pollock *v.* Pollock, 2 Ohio Cir. Ct. 143, 1 Ohio Cir. Dec. 410.

45. *Florida.*— It is error to render a final judgment after a default entered in a suit on a bond without production of the bond or proper evidence of it. West *v.* Fleming, 36 Fla. 298, 18 So. 587.

Georgia.— Sanner *v.* Sayne, 78 Ga. 467, 3 S. E. 651, action on a note not yet due.

Indiana.— Dean *v.* Richards, 16 Ind. 114.

Kansas.— Garner *v.* State, 28 Kan. 790.

Minnesota.— Fowler *v.* Jenks, 90 Minn. 70, 95 N. W. 887, 96 N. W. 914.

New Jersey.— Torrence *v.* Van Emburgh, 2 N. J. L. 106.

New York.— Oulman *v.* Schmidt, 35 Hun 345; Carter *v.* Dallimore, 2 Sandf. 222; Whitman, etc., Mfg. Co. *v.* Hamilton, 27 Misc. 198, 57 N. Y. Suppl. 760; Vorzimer *v.* Shapiro, 6 Misc. 143, 26 N. Y. Suppl. 53 (action for deceit); Lazzarone *v.* Oishei, 2 Misc. 200, 21 N. Y. Suppl. 267.

Oklahoma.— Guthrie *v.* T. W. Harvey Lumber Co., 5 Okla. 774, 50 Pac. 84.

Pennsylvania.— Spangler *v.* Rush, 6 Pa. Dist. 28; Sipple *v.* Guldin, 3 Lack. Jur. 128.

Texas.— The facts upon which a claim against the estate of a decedent is based must be proved, although the executor defaults. Hendrix *v.* Hendrix, 46 Tex. 6.

Wisconsin.— Sibley *v.* Weinberg, 116 Wis. 1, 92 N. W. 427. In this case it was held that in replevin defendant having failed to answer, it was not an abuse of discretion to require plaintiff, on his application for judgment on his verified complaint, to prove the unlawful taking or withholding of the property by defendant; and generally that the court is not required to give judgment on a verified complaint, without proof of the cause of action, when proof is deemed wise or necessary.

In South Carolina under Code Civ. Proc. § 267, in a suit in equity plaintiff was not entitled to judgment by default of answer, but was bound to establish her right to the relief sought to the satisfaction of the chancellor. Cannady *v.* Martin, 72 S. C. 131, 51 S. E. 549.

46. Salter *v.* Griffith, 89 Pa. St. 200; Lawrance *v.* Fussell, 77 Pa. St. 460; Zimerman *v.* Kuebler, 4 Pa. Co. Ct. 607.

47. Marstiller *v.* Ward, 52 W. Va. 74, 43 S. E. 178.

48. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390. And see Lyon *v.* Yates, 61 N. Y. 661.

49. See, generally, Evidence. And see Louisiana State Bank *v.* Senecal, 9 La. 225 (in confirming a default, no evidence can be given of a fact not alleged); Frazier *v.* Frazier, 2 Leigh (Va.) 642 (although defendant is in default, yet the proceedings in another suit between different parties are not competent evidence against him).

50. Stow *v.* Stacy, 14 N. Y. Civ. Proc. 45. And see Stephens *v.* Gate City Gas-Light Co., 81 Ga. 150, 6 S. E. 838; Frank *v.* Maguire, 42 Pa. St. 77.

51. Kentgen *v.* Jordan, 15 La. Ann. 219, holding that the evidence of one witness, who simply declares that an account sued on is correct, without giving his reasons for this assertion, is not sufficient to authorize the confirmation of a default.

An unsworn statement of an attorney as to the contents of papers which are not introduced in evidence or submitted to the

accompanying affidavit of plaintiff may be sufficient by itself to support the judgment, if in proper form and containing the allegations needed to fix liability on defendant;[52] but it is in the discretion of the court to require other or further proof.[53] Where plaintiff's claim is required by statute to be verified, by affidavit or otherwise, it is *prima facie* evidence of the amount for which judgment should be rendered on an assessment of damages on defendant's default.[54]

d. Evidence For Defendant. On an inquest of damages defendant has the right to cross-examine plaintiff's witnesses,[55] although he cannot object to the introduction of testimony or demur to the evidence.[56] He may also offer any evidence which goes in mitigation or reduction of damages;[57] but he cannot introduce evidence controverting plaintiff's entire cause of action, or tending to avoid it or to show that no right of action existed.[58]

e. Presumptions as to Proof. Where a judgment is entered by default, it will be presumed that whatever proofs were necessary to support it were duly presented and taken.[59]

6. Relief Awarded — a. In General. Although defendant, by a default, admits the truth of the allegations in the complaint,[60] the judgment rendered thereon must pronounce the true sentence of the law, and if it does not it is erroneous.[61] If plaintiff's pleading states a cause of action, and defendant fails to

court is not sufficient to sustain an assessment of damages on default. Wells *v.* Tedrick, 69 Ill. App. 203.

Pleadings as evidence.— An averment, filed with the copy of the instrument sued on, cannot be used to enlarge or complete plaintiff's claim on such instrument, so as to authorize judgment for want of a sufficient affidavit of defense. Vulcanite Paving Co. *v.* Philadelphia Traction Co., 2 Pa. Co. Ct. 375.

52. See Hellen *v.* Steinwender, 28 Fla. 191, 10 So. 207; Vulcanite Paving Co. *v.* Philadelphia Traction Co., 2 Pa. Co. Ct. 375.

53. Didier *v.* Warner, 2 Edm. Sel. Cas. (N. Y.) 41.

54. Central Illinois Coal Co. *v.* Field, 17 Ill. App. 260; Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673.

55. Davis *v.* Wimberly, 86 Ga. 46, 12 S. E. 208; Binz *v.* Tyler, 79 Ill. 248; Lyman *v.* Bechtell, 58 Iowa 755, 12 N. W. 273; Lceber *v.* Delahaye, 7 Iowa 478; St. Louis Southwestern R. Co. *v.* Denson, (Tex. Civ. App. 1894) 26 S. W. 265. *Compare* Petty *v.* Frick Co., 86 Va. 501, 10 S. E. 886.

56. Morton *v.* Bailey, 2 Ill. 213, 27 Am. Dec. 767; Lyman *v.* Bechtell, 58 Iowa 755, 12 N. W. 273; Petty *v.* Frick Co., 86 Va. 501, 10 S. E. 886. *Compare* St. Louis Southwestern R. Co. *v.* Denson, (Tex. Civ. App. 1894) 26 S. W. 265.

57. Randolph *v.* Sharpe, 42 Ala. 265; Regan *v.* New York, etc., R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306.

58. *Alabama.*— Washington County *v.* Porter, 128 Ala. 278, 29 So. 185.

Connecticut.— Lambert *v.* Sanford, 55 Conn. 437, 12 Atl. 519.

Illinois.— Binz *v.* Tyler, 79 Ill. 248.

Missouri.— Phillips *v.* Bachelder, 47 Mo. App. 52.

New York.— Foster *v.* Smith, 10 Wend. 377.

North Carolina.— Lee *v.* Knapp, 90 N. C. 171; Garrard *v.* Dollar, 49 N. C. 175, 67 Am. Dec. 271; Templeton *v.* Pearse, 3 N. C. 339. And see Williams *v.* Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800. But see Dewey *v.* Sloan, 9 Ohio Dec. (Reprint) 151, 11 Cinc. L. Bul. 102; Marstiller *v.* Ward, 52 W. Va. 74, 43 S. E. 178.

In Connecticut a statute permits defendant to notify plaintiff of any special defense to be set up on a hearing in damages on default. This allows the presentation of such defenses, but casts the burden of proving them on defendant. Nelson *v.* Branford Lighting, etc., Co., 75 Conn. 548, 54 Atl. 303; Bernhard *v.* Curtis, 75 Conn. 476, 54 Atl. 213; Upton *v.* Windham, 75 Conn. 288, 53 Atl. 660, 96 Am. St. Rep. 197; Ockershausen *v.* New York, etc., R. Co., 71 Conn. 617, 42 Atl. 650; Brennan *v.* Berlin Iron Bridge Co., 71 Conn. 479, 42 Atl. 625; Gardner *v.* New London, 63 Conn. 267, 28 Atl. 42.

59. Evans *v.* Young, 10 Colo. 316, 15 Pac. 424, 3 Am. St. Rep. 583; Hubbell *v.* Clannon, 13 La. 494; Hotchkiss *v.* Cutting, 14 Minn. 537; Bunker *v.* Rand, 19 Wis. 253, 88 Am. Dec. 684.

60. See *supra*, IV, D, 2, a.

61. New York, etc., R. Co. *v.* Hungerford, 75 Conn. 76, 52 Atl. 487.

Allowance of credits.— A judgment by default on a note, on which there is an indorsement of a credit by plaintiff, ought to be entered subject to such credit. Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755.

Joint defendants.— In an action against joint defendants, where one suffers default, but the other proceeds to trial and secures a general verdict against plaintiff, this is equivalent to a finding that nothing is due from the defaulted defendant, and no judgment can be entered against him. Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595.

answer, it is error to give judgment for defendant.[62] And if defendant is a non-resident and is served by publication only, it is error to render a personal judgment against him on his default; the only proper judgment is one *in rem*.[63] But aside from such limitations, the court has jurisdiction to render any judgment to which plaintiff is entitled under the relief demanded in his complaint.[64]

b. Conformity to Pleadings. A judgment by default for a sum greater than that prayed for in the declaration or complaint, or justified by its allegations, is irregular and erroneous.[65] Where the complaint is for so much money, without specifying the kind, or does not show that the contract sued on was made payable in any particular kind of money, it is error to enter a judgment on default for a sum payable in gold coin.[66] When the prayer of the complaint is for specific relief, plaintiff is confined to a recovery in strict accordance with what he has asked for.[67]

62. Bouscaren *v.* Brown, 40 Nebr. 722, 59 N. W. 385.

63. *Iowa.*— Smith *v.* Griffin, 59 Iowa 409, 13 N. W. 423.

Kentucky.— Selden *v.* Preston, 11 Bush 191; Payne *v.* Witherspoon, 14 B. Mon. 270.

Mississippi.— Bias *v.* Vance, 32 Miss. 198.

New Hampshire.— Eastman *v.* Dearborn, 63 N. H. 364.

Texas.— Barelli *v.* Wagner, 5 Tex. Civ. App. 445, 27 S. W. 17.

See 30 Cent. Dig. tit. "Judgment," § 232. And see *infra*, XVI, B.

64. McMahon *v.* Pugh, 62 S. C. 506, 40 S. E. 961. And see Adamson *v.* Bergen, 15 Colo. App. 396, 62 Pac. 629; Morrison *v.* Van Bibber, 25 Tex. Suppl. 153.

65. *Arkansas.*— Snow *v.* Grace, 25 Ark. 570; Jones *v.* Robinson, 8 Ark. 484.

California.— Arata *v.* Tellurium Gold, etc., Min. Co., 65 Cal. 340, 4 Pac. 195; Savings, etc., Soc. *v.* Horton, 63 Cal. 105; Bond *v.* Pacheco, 30 Cal. 530; Lamping *v.* Hyatt, 27 Cal. 99; Lattimer *v.* Ryan, 20 Cal. 628; Gage *v.* Rogers, 20 Cal. 91.

Colorado.— Ruth *v.* Smith, 29 Colo. 154, 68 Pac. 278; Russell *v.* Shurtleff, 28 Colo. 414, 65 Pac. 27, 89 Am. St. Rep. 216.

Connecticut.— Seltzer *v.* W. H. Davenport Fire Arms Co., 74 Conn. 46, 49 Atl. 852.

Idaho.— Lowe *v.* Turner, 1 Ida. 107.

Illinois.— Thompson *v.* Turner, 22 Ill. 389. And see Dorn *v.* Briggs, 106 Ill. App. 79.

Iowa.— Johnson *v.* Mantz, 69 Iowa 710, 27 N. W. 467.

Kentucky.— Young *v.* Lancaster, 5 T. B. Mon. 381. *Compare* Taylor *v.* Cline, 35 S. W. 109, 18 Ky. L. Rep. 9.

Michigan.— Rose *v.* Palmer, 74 Mich. 332, 41 N. W. 1080.

Minnesota.— Northern Trust Co. *v.* Albert Lea College, 68 Minn. 112, 71 N. W. 9; Farrington *v.* Wright, 1 Minn. 241.

Nevada.— Burling *v.* Goodman, 1 Nev. 314.

New Hampshire.— Chase *v.* Brown, 32 N. H. 130.

New York.— Andrews *v.* Monilaws, 8 Hun 65; Reidy *v.* Bleistift, 31 Misc. 181, 63 N. Y. Suppl. 974; Partridge *v.* Gould, 1 Code Rep. 85; Hart *v.* Seixas, 21 Wend. 40.

North Carolina.— White *v.* Snow, 71 N. C. 232.

Ohio.— Williams *v.* Hamlin, 1 Handy 95, 12 Ohio Dec. (Reprint) 46; Thatcher *v.* Dickinson, 3 Ohio Cir. Ct. 144, 2 Ohio Cir. Dec. 82.

Pennsylvania.— Edison Gen. Electric Co. *v.* Thackara Mfg. Co., 167 Pa. St. 530, 31 Atl. 856; Dennison *v.* Leech, 9 Pa. St. 164; Boaz *v.* Heister, 6 Serg. & R. 18; Dickson *v.* Tunstall, 3 C. Pl. 128.

Tennessee.— Fowlkes *v.* Webber, 8 Humphr. 530.

Texas.— Thomas *v.* Walsh, 44 Tex. 160; Hillebrant *v.* Barton, 39 Tex. 599. See Trueheart *v.* Simpson, (Civ. App. 1894) 24 S. W. 842.

Washington.— Bast *v.* Hysom, 6 Wash. 170, 32 Pac. 997.

Wisconsin.— Viles *v.* Green, 91 Wis. 217, 64 N. W. 856; Zwickey *v.* Haney, 63 Wis. 464, 23 N. W. 577.

See 30 Cent. Dig. tit. "Judgment," § 233.

Interest.—Where plaintiff, in his complaint, does not demand interest on the claim or account sued on, a judgment by default, adding interest to the claim, is erroneous. Pickett *v.* Handy, 9 Colo. App. 357, 48 Pac. 820; Hubbard *v.* Blow, 1 Wash. (Va.) 70. And the fact that a defendant is defaulted does not warrant the allowance of more than the legal rate of interest on the judgment. Dysart *v.* Logan, 2 J. J. Marsh. (Ky.) 428.

66. Wallace *v.* Eldredge, 27 Cal. 495; Lamping *v.* Hyatt, 27 Cal. 99. See Johnson *v.* Stallcup, 41 Tex. 529.

67. *California.*— Staacke *v.* Bell, 125 Cal. 309, 57 Pac. 1012; Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

Colorado.— Russell *v.* Shurtleff, 28 Colo. 414, 65 Pac. 27, 89 Am. St. Rep. 216.

Iowa.— Heins *v.* Wicke, 102 Iowa 396, 71 N. W. 345.

Kansas.— Miner *v.* Pearson, 16 Kan. 27; Weaver *v.* Gardner, 14 Kan. 347.

Minnesota.— Northern Trust Co. *v.* Albert Lea College, 68 Minn. 112, 71 N. W. 9; Exley *v.* Berryhill, 37 Minn. 182, 33 N. W. 567.

Mississippi.— Reid *v.* Gregory, 78 Miss. 247, 28 So. 835.

Nebraska.— Vorce *v.* Page, 28 Nebr. 294, 44 N. W. 452.

c. Costs and Attorney's Fees. A judgment for plaintiff by default will ordinarily entitle him to recover the costs of the action as in other cases.[68] And where the suit is on a written instrument containing a stipulation for the payment of an attorney's fee, the judgment rendered on defendant's default may include the amount of such fee as well as the principal sum of plaintiff's demand.[69]

7. Form and Effect of Judgment — a. Final or Interlocutory. In some states, as already stated, a final judgment cannot be entered immediately upon a default; there must first be a preliminary entry of the default.[70] And generally a final judgment cannot be entered where the damages are unliquidated or the amount of plaintiff's claim uncertain or indeterminate;[71] there must first be an interlocutory judgment by default, and the final judgment is entered after the damages have been assessed on a writ of inquiry or otherwise determined according to law.[72] If a part of the declaration or complaint is unanswered, plaintiff may have an interlocutory judgment as to such part, but final judgment cannot be entered until the issues are tried and determined.[73] Where one of two joint defendants suffers a default, but the other answers and proceeds to trial, there may be an interlocutory judgment against defendant in default, but there can be no final judgment in the action until the termination of the case against the other.[74] In some states a judgment entered upon default must be confirmed by the court, before it can have the effect of a final judgment;[75] in others, it is proper for the court, on entering an interlocutory judgment, to direct what final judgment shall be entered, or to direct that the final judgment shall be settled by a judge or

New York.— Mathot *v.* Triebel, 102 N. Y. App. Div. 426, 92 N. Y. Suppl. 512; Hasbrouck *v.* New Platz, etc., Traction Co., 98 N. Y. App. Div. 563, 90 N. Y. Suppl. 977; Olcott *v.* Kohlsaat, 8 N. Y. Suppl. 116, 117; Simonson *v.* Blake, 20 How. Pr. 484.

South Dakota.— Parszyk *v.* Mach, 10 S. D. 555, 74 N. W. 1027.

Texas.— Storey *v.* Nichols, 22 Tex. 87; Tempel *v.* Dodge, 11 Tex. Civ. App. 42, 31 S. W. 686.

See 30 Cent. Dig. tit. "Judgment," § 233.

But see Burton *v.* Louisville, 85 S. W. 727, 27 Ky. L. Rep. 514.

68. See Galligan *v.* Clark, 119 Mass. 83; Hunt *v.* O'Neill, 44 N. J. L. 564; King *v.* Poole, 36 Barb. (N. Y.) 242; Banta *v.* Marcellus, 2 Barb. (N. Y.) 373; Voght *v.* Shave, 1 Code Rep. (N. Y.) 38; Merritt *v.* Gosman, 2 Den. (N. Y.) 186; Hinsdale *v.* Howland, 25 Wend. (N. Y.) 677; State Bank *v.* Wood, 10 Wend. (N. Y.) 626; Freeman *v.* Preston, (Tex. Civ. App. 1895) 29 S. W. 495; Pool *v.* Lamon, (Tex. Civ. App. 1894) 28 S. W. 363.

Necessity for notice of taxation of costs see Dix *v.* Palmer, 5 How. Pr. (N. Y.) 233; Rickards *v.* Swetzer, 3 How. Pr. (N. Y.) 413.

Necessity for notice o ftaxation of costs are taxed against a defendant in default, in a case where he is not liable for them, the error may be corrected or amended on writ of error. Sims *v.* Thompson, 30 Ala. 158.

Joint defendants.— A judgment for costs in favor of one of several defendants who has not appeared, but was defaulted, will not be set aside when it appears affirmatively that there was no cause of action against him, and judgment was rendered in favor of the other defendants. Lash *v.* Perry, 24 Ind. 126.

69. Wood *v.* Winship Mach. Co., 83 Ala. 424, 3 So. 757, 3 Am. St. Rep. 754; Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24. And see Philadelphia Trust, etc., Co. *v.* McDaniel, 2 Pa. Co. Ct. 102.

70. See *supra*, IV, E, 1.

71. See *supra*, IV, E, 4, a.

72. Williams *v.* Rockwell, 64 N. C. 325; Phillips *v.* Hellings, 5 Watts & S. (Pa.) 44; Whitaker *v.* Bramson, 30 Fed. Cas. No. 17,526, 2 Paine 209.

When plaintiff's claim is liquidated or certain in amount, so that he is entitled to recover that amount if anything at all, there is no need of an assessment of damages, and therefore final judgment may be at once entered on default. Combs *v.* Breathitt County, 38 S. W. 138, 39 S. W. 33, 18 Ky. L. Rep. 809; Reed *v.* Nicholson, 158 Mo. 624, 59 S. W. 977; Scott *v.* Mutual Reserve Fund L. Assoc., 137 N. C. 515, 50 S. E. 221; Craig *v.* Alston, 1 Mill (S. C.) 123.

73. Lucas *v.* Farrington, 21 Ill. 31; Bradshaw *v.* McKinney, 5 Ill. 54; Brewer *v.* Christian, 9 Ill. App. 57. And see Stewart *v.* Bryan, 121 N. C. 46, 28 S. E. 18.

74. *Illinois.*— O'Conner *v.* Mullen, 11 Ill. 116.

Michigan.— People *v.* Marquette Cir. Judge, 41 Mich. 222, 49 N. W. 925.

Pennsylvania.— Watsontown Nat. Bank *v.* Messinger, 6 Pa. Co. Ct. 609.

Texas.— Kingsland, etc., Mfg. Co. *v.* Mitchell, (Civ. App. 1896) 36 S. W. 757. *Compare* Peters *v.* Crittenden, 8 Tex. 131.

West Virginia.— State *v.* Corvin, 51 W. Va. 19, 41 S. E. 211.

See 30 Cent. Dig. tit. "Judgment," §§ 237, 238. And see *supra*, IV, A, 3, b.

75. Ballard *v.* Lee, 14 La. 211; French *v.* Putnam, 14 La. 97; Fleming *v.* Conrad, 11 Mart. (La.) 301. And see Knight *v.* Knight, 12 La. Ann. 59.

referee.[76] But when a judgment by default is properly entered by the clerk or a commissioner, in final form, it becomes the judgment of the court, and stands until reversed or set aside.[77]

b. Form and Requisites.[78] A judgment by default should possess the formal requisites of a judgment,[79] and should be certain and definite in respect to the amount of the recovery.[80] The names of the parties appearing in the judgment should correspond with those in the declaration and the writ, the ordinary rules as to variance in this respect being applicable.[81] Where a judgment by default is given against a defendant absent from the state, it should direct plaintiff to comply with the statutory provisions which in such a case are necessary to entitle him to execution.[82]

c. Recitals of Judgment — (I) *In General.* A judgment by default should recite facts sufficient to show that defendant was in default, and for what reason, whether for want of an appearance, for want of a plea, or otherwise.[83] And, if the statute requires plaintiff to produce or file proof of his cause of action, before the judgment can be entered, it is necessary that the judgment shall show a compliance with this requirement.[84] And if there was an inquiry

76. U. S. Life Ins. Co. *v.* Jordan, 46 Hun (N. Y.) 201; Kerr *v.* Dildine, 14 N. Y. Civ. Proc. 176.

77. Peterson *v.* Dillon, 27 Wash. 78, 67 Pac. 397; Patons *v.* Lee, 18 Fed. Cas. No. 10,800, 2 Cranch C. C. 646. And see Hoey *v.* Aspell, 62 N. J. L. 200, 40 Atl. 776.

78. In Arizona a default judgment is not void because of failure to comply with Rev. St. (1901) par. 1435, providing that a statement of the evidence shall be filed as part of the record of the case; paragraph 1443, by enumerating the papers which constitute the judgment-roll in cases of judgment by default, and which do not include such statement, indicating that it is not a jurisdictional requisite to entry of a valid judgment. Steinfield *v.* Montijo, (1905) 80 Pac. 325.

79. Hoehne *v.* Trugillo, 1 Colo. 161, 91 Am. Dec. 703; Torrent *v.* Sulter, 67 Ga. 32; Groover *v.* Inman, 60 Ga. 406.

An order of court allowing plaintiff's attorney to enter up judgment for plaintiff is in itself a sufficient judgment for plaintiff for the amount sued for. Tift *v.* Keaton, 78 Ga. 235, 2 S. E. 690.

Mutilated entry.— Where an entry was made by the judge on the docket of "in default," and on the same day the judge passed his pen through the entry, in the absence of proof to the contrary, such mutilated entry will be treated as a correction of an inadvertence, and not as a default judgment. Albany Pine Products Co. *v.* Hercules Mfg. Co., 123 Ga. 270, 51 S. E. 297.

In Louisiana a default, which became under the old practice final by operation of law, does not require the signature of the judge to perfect it. Babin *v.* Winchester, 7 La. 460.

80. See Drane *v.* King, 21 Ala. 556; Claughton *v.* Black, 24 Miss. 185; Neal *v.* Hussey, 48 N. C. 70; Boaz *v.* Heister, 6 Serg. & R. (Pa.) 18.

81. *Alabama.*— Elliott *v.* Smith, 1 Ala. 74.

Arkansas.— *Ex p.* Cheatham, 6 Ark. 531, 44 Am. Dec. 525.

Iowa.— Peterson *v.* Little, 74 Iowa 223, 37 N. W. 169.

Kansas.— Rowe *v.* Palmer, 29 Kan. 337.

New York.— Farmers' Nat. Bank *v.* Williams, 9 N. Y. Civ. Proc. 212.

Texas.— Faver *v.* Robinson, 46 Tex. 204.

Wisconsin.— Zwickey *v.* Haney, 63 Wis. 464, 23 N. W. 577.

See 30 Cent. Dig. tit. "Judgment," § 240.

Names of partners.— A judgment by default in favor of a firm is erroneous where the names of the persons composing such firm do not appear. Simmons *v.* Titche, 102 Ala. 317, 14 So. 786.

82. Strong *v.* Meacham, 1 Root (Conn.) 391.

83. *Alabama.*— Thomas *v.* Brown, 1 Stew. 412.

California.— Kittle *v.* Bellegarde, 86 Cal. 556, 25 Pac. 55.

Georgia.— Wiggins *v.* Mayer, 91 Ga. 778, 18 S. E. 430.

Iowa.— Cook *v.* Walters, 4 Iowa 72.

Louisiana.— Deblanc *v.* Leblanc, 15 La. Ann. 224. But a judgment by default need assign no reasons for its rendition; the absence of any exception or answer is itself sufficient reason. Hemken *v.* Farmer, 3 Rob. 155; Babin *v.* Winchester, 7 La. 460; Dehart *v.* Berthoud, 7 Mart. 440; Allard *v.* Ganushau, 4 Mart. 662. *Compare* Montserrat *v.* Godet, 5 Mart. 522.

Maryland.— Griffith *v.* Adams, 95 Md. 170, 52 Atl. 66.

Missouri.— Kansas City First Nat. Bank *v.* Landis, 34 Mo. App. 433.

Nebraska.— Hardy *v.* Miller, 11 Nebr. 395, 9 N. W. 475.

New Mexico.— Rio Grande Irr., etc., Co. *v.* Gildersleeve, 9 N. M. 12, 48 Pac. 309.

New York.— Catlin *v.* Latson, 4 Abb. Pr. 248.

See 30 Cent. Dig. tit. "Judgment," § 241.

84. *Florida.*— Ropes *v.* Snyder-Harris Bassett Co., 37 Fla. 529, 20 So. 535; Einstein *v.* Davidson, 35 Fla. 342, 17 So. 563; Blount *v.* Gallaher, 22 Fla. 92.

of damages, the judgment should recite the manner in which the assessment was made.[85]

(II) *Recital of Jurisdictional Facts.* A judgment by default must recite and the records show that process was duly served on defendant, and must disclose the existence of every material fact to give the court jurisdiction.[86]

d. Operation and Effect. A judgment of default or *nil dicit* is as conclusive as any other.[87] It determines finally plaintiff's right to recover, and defendant's liability for the debt sued for or the damages to be assessed,[88] precludes defendant from setting up any matters which might have been urged in defense to the action,[89] and operates as a waiver or release of any mere formal errors or irregu-

Louisiana.— See Canal Bank *v.* McGloin, 10 La. Ann. 240; Bridge *v.* Bellow, 14 La. 435; Hubbell *v.* Clannon, 13 La. 494; Shuff *v.* Palfrey, 2 Mart. N. S. 50.

Pennsylvania.— Saxman *v.* Perkins, 19 Pa. Co. Ct. 43.

Texas.— See Hepburn *v.* Danville Nat. Bank, (Civ. App. 1896) 34 S. W. 988.

West Virginia.— See Anderson *v.* Doolittle, 38 W. Va. 629, 18 S. E. 724.

See 30 Cent. Dig. tit. "Judgment," § 241.

But *compare* Jessop *v.* Sharp, 2 N. J. L. 324.

85. Daniel *v.* Judy, 14 B. Mon. (Ky.) 393. And see Radcliff *v.* Erwin, Minor (Ala.) 88; Jarvis *v.* Blanchard, 6 Mass. 4.

Showing assessment of damages by court see Howard *v.* Tomlinson, 27 Mich. 168.

86. *Alabama.*— Finney *v.* Gilder, 73 Ala. 196; Shapard *v.* Lewis, 59 Ala. 606; Graham *v.* Reynolds, 45 Ala. 578; Connoly *v.* Alabama, etc., R. Co., 29 Ala. 373; Smith *v.* Mobile Branch Bank, 5 Ala. 26.

Arkansas.— Kimball *v.* Merrick, 20 Ark. 12; Hudson *v.* Breeding, 7 Ark. 445.

California.— McCoy *v.* Morrison, 61 Cal. 363; Schloss *v.* White, 16 Cal. 65.

Delaware.— Elligood *v.* Cannon, 4 Harr. 176.

Illinois.— Reed *v.* Curry, 35 Ill. 536; Stein *v.* Stein, 44 Ill. App. 107.

Indiana.— Eltzroth *v.* Voris, 74 Ind. 459; Young *v.* Dickey, 63 Ind. 31; Cochnower *v.* Cochnower, 27 Ind. 253; Miller *v.* Bottorff, 6 Blackf. 30; Klinger *v.* Brownell, 5 Blackf. 332; Bliss *v.* Wilson, 4 Blackf. 169; Rany *v.* Governor, 4 Blackf. 2; Debs *v.* Dalton, 7 Ind. App. 84, 34 N. E. 236.

Kentucky.— Hermann *v.* Martin, 107 Ky. 642, 55 S. W. 429, 21 Ky. L. Rep. 1396; Peers *v.* Carter, 4 Litt. 268.

Mississippi.— Winston *v.* Miller, 12 Sm. & M. 550.

New York.— Maples *v.* Mackey, 89 N. Y. 146.

Pennsylvania.— Adler *v.* Patrick, 1 Chest. Co. Rep. 465; Deerback *v.* Hildebrand, 10 Lanc. Bar 152.

South Dakota.— Weber *v.* Tschetter, 1 S. D. 205, 46 N. W. 201.

Texas.— Pipkin *v.* Kaufman, 62 Tex. 545; Greenway *v.* De Young, 34 Tex. Civ. App. 583, 79 S. W. 603.

Washington.— See Proulx *v.* Stetson, etc., Mill Co., 6 Wash. 478, 33 Pac. 1067.

Wisconsin.— Grantier *v.* Rosecrance, 27 Wis. 488.

See 30 Cent. Dig. tit. "Judgment," § 242.

Where the service of process was constructive only, as by publication, it is necessary that the judgment itself or the record should affirmatively show a full compliance with the provisions of the statutes authorizing such service. Cochnower *v.* Cochnower, 27 Ind. 253; McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421; Childers *v.* Schantz, 120 Mo. 305, 25 S. W. 209; Stillwell *v.* Tomlinson, 36 N. J. L. 359; Taliafero *v.* Carter, 74 Tex. 637, 12 S. W. 750; Byrnes *v.* Sampson, 74 Tex. 79, 11 S. W. 1073; Davis *v.* Davis, 24 Tex. 187; Hill *v.* Baylor, 23 Tex. 261; McFadden *v.* Lockhart, 7 Tex. 573; Chaffee *v.* Bryan, 1 Tex. App. Civ. Cas. § 770; Jordan *v.* Batey, 1 Tex. App. Civ. Cas. § 420. See 30 Cent. Dig. tit. "Judgment," § 242.

87. Bradford *v.* Bradford, 5 Conn. 127; Fowler *v.* Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172; St. Louis *v.* Lang, 131 Mo. 412, 33 S. W. 54. See Custer *v.* Greenpoint Ferry Co., 98 N. Y. 660; Gelston *v.* Hoyt, 13 Johns. (N. Y.) 561. And see *infra*, XIV, A, 4, c.

Right to retrial.— Under a statute which provides that when a judgment has been rendered against a defendant who did not appear, and who was served by publication only, he may appear within two years after judgment, and move to have the action retried, and that "the action shall be retried as to such defendant as if there had been no judgment . . . and upon a new trial the court may confirm the former judgment, or may modify or set it aside," the judgment remains in full force until the retrial is had. Stanbrough *v.* Cook, 83 Iowa 705, 49 N. W. 1010.

Terms imposed.— Where a court in its discretion subjects a party to certain conditions, which he must comply with in order to be allowed to appear and defend, the judgment rendered against him on his failure to comply is not a sentence without judicial determination which will not be entitled to respect. Carolan *v.* Carolan, 47 Ark. 511, 2 S. W. 105.

Effect on co-defendant see Hempy *v.* Ransom, 33 Ohio St. 312.

88. Heffner *v.* Lynch, 21 Md. 552; Mailhouse *v.* Inloes, 18 Md. 328; Green *v.* Hamilton, 16 Md. 317, 77 Am. Dec. 295; Clark *v.* Compton, 15 Tex. 32.

89. Stuart *v.* Peay, 21 Ark. 117; Cochrane *v.* Miller, 10 La. Ann. 140; McKnight *v.* Wilkins, 1 Mo. 308.

larities.[90] The review of a judgment by default on error or appeal,[91] and opening or vacating such a judgment,[92] are discussed elsewhere. On a proceeding to open or vacate, defendant may present objections going to the power and authority of the court to render the judgment, such as a want of jurisdiction,[93] the failure of plaintiff to present proof of his cause of action, as required by the statute,[94] that the declaration or complaint does not set forth a good cause of action,[95] or that there was fraud in the procurement of the judgment.[96] If the action was against a non-resident defendant, who did not appear and was served only constructively, the suit being begun by an attachment of his property within the jurisdiction, the judgment binds only the property so attached and does not affect defendant personally.[97]

V. JUDGMENTS ON MOTION OR SUMMARY PROCEEDINGS.[98]

A. When Authorized — 1. In General. As a general rule a judgment cannot be awarded upon a mere motion, but only upon the trial of the action, according to the parties a full opportunity to assert and litigate their rights.[99] But a judgment on motion may be granted where it is merely to complete a judgment already entered between the parties or to make effective provisions already incorporated in it,[1] or to authorize the recovery of money illegally obtained under an existing judgment.[2] There are also statutes in some of the states allowing a judgment to be entered on motion when plaintiff sues for a fixed sum or for liquidated damages, and files an affidavit in support of his claim, and defendant fails to file an answering affidavit.[3] The entry of judgment in summary proceedings, that is, on motion heard by the court without a jury, has been authorized, either by statute or the settled practice of the courts, in actions against receivers of the public revenues,[4] and contractors undertaking work for the government,[5] as well as against certain

90. A judgment by default is a waiver of an imperfection in the declaration. Irwin *v.* Williams, Walk. (Miss.) 314. It also waives any objection to a misjoinder of causes of action. Bratton *v.* Smith, 2 Ohio Dec. (Reprint) 360, 2 West. L. Month. 497.

91. Stevens *v.* Ross, 1 Cal. 94. See Appeal and Error, 2 Cyc. 617 *et seq.* And see Gerhart *v.* Fout, 72 Mo. App. 138.

In New York the statute restricts the right of appeal to parties not in default; and consequently the remedy of one aggrieved by an invalid judgment by default is by motion to have it corrected. Park *v.* Park, 24 Misc. 372, 53 N. Y. Suppl. 677, construing Code Civ. Proc. § 1294.

92. See *infra*, IX.

93. Gilbreath *v.* Kuykendall, 1 Ark. 50.

94. Durden *v.* Carhart, 41 Ga. 76; Peck *v.* Overton, 7 La. Ann. 70.

95. See *supra*, IV, B, 1. And see Meguiar *v.* Rudy, 7 Bush (Ky.) 432; Neidenberger *v.* Campbell, 11 Mo. 359, holding that where there are several counts in a declaration, and one is defective in substance, such defect is not cured by a judgment by default, and the statute of jeofails does not reach such a judgment.

96. People *v.* New York, 19 How. Pr. (N. Y.) 289. *Compare* Roberts *v.* Miles, 12 Mich. 297.

97. Soulard *v.* Vacuum Oil Co., 109 Ala. 387, 19 So. 414; Johnson *v.* Holley, 27 Mo. 594. And see *supra*, I, E, 3, b.

98. Res judicata see *infra*, XIII, B, 2, d, e; XIV, A, 3, d.

99. See Meacham *v.* Bear Valley Irr. Co., 145 Cal. 606, 79 Pac. 281, 68 L. R. A. 600; Jackson *v.* Motley, Ky. Dec. 133; Szerlip *v.* Baier, 21 Misc. (N. Y.) 331, 47 N. Y. Suppl. 133; Simpson *v.* Legg, 22 Fed. Cas. No. 12,883, 2 Cranch C. C. 132. *Compare* Hemphill *v.* Sappington, 11 Ark. 731.

1. Currituck County *v.* Dare County, 129 N. C. 12, 39 S. E. 578.

2. Thus, where a judgment creditor receives a partial payment on the judgment, but omits to credit it on the judgment, and then revives the judgment for the full amount by scire facias, and attempts to enforce payment in full, defendant may recover the partial payment by summary proceedings. Anderson *v.* Gage, Dudley (S. C.) 319. But *compare* Field *v.* Maghee, 5 Paige (N. Y.) 539.

3. Swayne *v.* Remley, 1 Pennew. (Del.) 1, 39 Atl. 453; Newman *v.* Goddard, 12 App. Cas. (D. C.) 404; Boogher *v.* Byers, 10 App. Cas. (D. C.) 419; Lawrence *v.* Middle States Loan, etc., Co., 7 App. Cas. (D. C.) 161; Gleason *v.* Hoeke, 5 App. Cas. (D. C.) 1; Deane *v.* Echols, 2 App. Cas. (D. C.) 522; Williams *v.* Bradley, 2 App. Cas. (D. C.) 346; Laubheimer *v.* Naill, 88 Md. 174, 40 Atl. 888; Wilson *v.* Dawson, 96 Va. 687, 32 S. E. 461.

4. See Murray *v.* Hoboken Land, etc., Co., 18 How. (U. S.) 272, 15 L. ed. 372; U. S. *v.* Blacklock, 24 Fed. Cas. No. 14,604, 2 Cranch C. C. 166; U. S. *v.* Lyon, 26 Fed. Cas. No. 15,651, 2 McLean 249.

5. See Ewing *v.* Penitentiary Directors, Hard. (Ky.) 5.

public officers, such as sheriffs, and the sureties on bonds given in the course of judicial proceedings.[6] So, where funds in the custody of a court are loaned out by order of the court, the borrower is a party to the cause to which the funds belong; and his obedience to an order requiring the return of the money may be enforced by a judgment entered against him on mere motion.[7]

2. JUDGMENT ON PLEADINGS. This is a form of judgment not infrequently used in practice under the reformed codes of procedure. It is rendered on motion of plaintiff, when the answer admits or leaves undenied all the material facts stated in the complaint.[8] But such a judgment cannot be given where the pleadings of defendant set up a substantial and issuable defense,[9] or where the suit is for unliquidated damages and the answer states matters in mitigation.[10]

B. Application For Judgment. A defendant is entitled to notice of a motion for judgment against him; and even if the statute authorizing such a proceeding is silent as to notice, still he is entitled to a reasonable notice.[11] If judgment is entered on the motion before the time notified to defendant, it is erroneous, but not void.[12] But on the other hand, if the motion is not taken up on the day specified, it operates as a discontinuance, and the case cannot be taken up subsequently, on the same motion, and judgment entered,[13] unless defendant waives the objection by appearing personally, failing to object at the proper time, or himself calling up the motion.[14] In case of joint defendants, plaintiff, if otherwise entitled to a judgment of this sort, may proceed against those served with the notice.[15] A motion for judgment as in case of nonsuit is a special motion, and must be founded on an affidavit showing the facts necessary to entitle the party to his

6. Hall *v.* Com., 8 Bush (Ky.) 378.

Sureties on bonds.— Dow Wire Works Co. *v.* Engelhardt, 136 Ala. 608, 33 So. 817; Council *v.* Averett, 90 N. C. 168; Newberry *v.* Sheffey, 89 Va. 286, 15 S. E. 548. *Compare* Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

Summary judgment against stipulators see ADMIRALTY.

7. *Ex p.* Craighead, 12 Heisk. (Tenn.) 640; Vaughn *v.* Tealey, (Tenn. Ch. App. 1896) 39 S. W. 868. And see Puckett *v.* Jenkins, 2 Baxt. (Tenn.) 484.

8. *Arizona.*— Finley *v.* Tucson, (1900) 60 Pac. 872.

California.— Botto *v.* Vandament, 67 Cal. 332, 7 Pac. 753; Amador County *v.* Butterfield, 51 Cal. 526; Felch *v.* Beaudry, 40 Cal. 439.

Colorado.— Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

New York.— Lee *v.* Jacob, 38 N. Y. App. Div. 531, 56 N. Y. Suppl. 645.

United States.— See Shattuc *v.* McArthur, 25 Fed. 133.

9. *California.*— Prost *v.* Moore, 40 Cal. 347.

Idaho.— Alspaugh *v.* Reid, 6 Ida. 223, 55 Pac. 300.

Iowa.— Parker *v.* Des Moines Life Assoc., 108 Iowa 117, 78 N. W. 826.

North Carolina.— Lewis *v.* Foard, 112 N. C. 402, 17 S. E. 9.

Pennsylvania.—Pennsylvania R. Co. *v.* Midvale Steel Co., 9 Pa. Dist. 181.

Canada.— Spears *v.* Fleming, 19 Ont. Pr. 127.

10. Shattuc *v.* McArthur, 25 Fed. 133.

11. Brown *v.* Wheeler, 3 Ala. 287.

Sufficiency of notice.—A notice which states that judgment will be moved for at a specified term of the court is sufficient, although it does not designate the day on which the motion will be made. State *v.* Allison, 8 Heisk. (Tenn.) 1.

An objection to a notice of motion for judgment, on the ground that it does not appear therefrom at what time the court is to be holden, must be taken by plea in abatement. Griffin *v.* State Bank, 6 Ala. 908.

In Virginia under Code (1887), § 3211, the notice takes the place of both writ and declaration, and should summon the party upon whom it is served to a fixed and certain day, not less than fifteen days after such service. See Swift *v.* Wood, 103 Va. 494, 49 S. E. 643; Tench *v.* Gray, 102 Va. 215, 46 S. E. 287; Schofield *v.* Palmer, 134 Fed. 753.

Service of notice.— Where defendant is a non-resident, but has an attorney of record, service of notice of judgment on the latter is sufficient. Opothlarholer *v.* Gardiner, 15 La. 512.

12. Bustard *v.* Gates, 4 Dana (Ky.) 429.

13. Barclay *v.* Barclay, 42 Ala. 345; Parsons *v.* Lee, 8 Port. (Ala.) 125; Webb *v.* Brown, 3 Ark. 488; Phillips *v.* Chaney, 7 How. (Miss.) 250.

14. Evans *v.* State Bank, 13 Ala. 787; Gary *v.* State Bank, 11 Ala. 771; Phillips *v.* Chaney, 7 How. (Miss.) 250.

15. Caldwell *v.* Harp, 2 McCord (S. C.) 275. But see Stewart *v.* Richard, 3 Manitoba 610.

A dismissal of one of the parties to a motion for judgment is not a discontinuance of the entire motion, although the party dismissed was notified and has appeared and pleaded. Beard *v.* Mobile Branch Bank, 8 Ala. 344.

judgment.[16] In respect to the forms of pleadings to be employed on an application of this kind, and the evidence to be admitted, the provisions of the statute must be closely followed.[17]

C. Form and Requisites of Judgment. The rendition of judgment on motion or in summary proceedings being in derogation of the common law, the statute authorizing it must be strictly pursued, and the judgment must show on its face all facts necessary to give jurisdiction and to support the judgment.[18] The entry of a decree on the minutes of the court in a summary proceeding is the judgment; and where, after such entry, defendant died, the fact that it is signed during the term thereafter does not make it irregular.[19]

D. Relief Awarded. As the duty of judges is to administer justice according to law, if counsel should inadvertently omit to ask what his client is entitled to demand in a summary proceeding, the court would unquestionably be bound to award it to him, notwithstanding the omission.[20]

VI. JUDGMENT ON TRIAL OF ISSUES.[21]

A. Rendition, Form, and Requisites in General[22] — 1. Power and Duty of Court[23] — a. In General. It is the duty of the court, when necessary facts have been lawfully determined by regular proceedings, to render the proper judgment in the case.[24] The performance of this duty by the court may be enforced by mandamus, where the applicant's right to a judgment is clear and no constraint

16. Storey *v.* Child, 2 Mich. 107.

17. Borches *v.* Bellis, 110 Ky. 620, 62 S. W. 486, 23 Ky. L. Rep. 37 (holding that under a statute providing that, in cases where judgment may be obtained on motion, "the motion may be heard and determined upon or without written pleadings," the question whether the pleadings shall be in writing or not is addressed to the discretion of the court); Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271 (admissibility of evidence).

18. Arthur *v.* State, 22 Ala. 61; Floyd *v.* Black, Litt. Sel. Cas. (Ky.) 11; Rucker *v.* Moore, 1 Heisk. (Tenn.) 726; Crockett *v.* Parkison, 3 Coldw. (Tenn.) 219; Haynes *v.* Gates, 2 Head (Tenn.) 598; Cannon *v.* Wood, 2 Sneed (Tenn.) 177; Barry *v.* Patterson, 3 Humphr. (Tenn.) 313; Jones *v.* Read, 1 Humphr. (Tenn.) 335; Garner *v.* Carroll, 7 Yerg. (Tenn.) 365; Hamilton *v.* Burum, 3 Yerg. (Tenn.) 355.

If the allegations in the notice are sufficient to give summary jurisdiction, a judgment upon a verdict need not repeat the same averments. May *v.* Long, 6 Ala. 107.

19. Dibble *v.* Taylor, 2 Speers (S. C.) 308, 42 Am. Dec. 368. And see Foster *v.* Chapman, 4 McCord (S. C.) 291.

20. Roth *v.* Steffe, 9 Lanc. Bar (Pa.) 77.

21. For judgments against absentee see ABSENTEES.

For judgment in action for accounting see ACCOUNTING, 1 Cyc. 413 *et seq.*

For judgment in attachment suit see ATTACHMENT, 4 Cyc. 753 *et seq.*

For judgment on bond see BONDS, 5 Cyc. 855 *et seq.*

For judgment in action by or against infant see INFANTS, 22 Cyc. 693 *et seq.*

For judgments of justices see, generally, JUSTICES OF THE PEACE.

22. Form and requisites of judgment in bastardy proceedings see BASTARDS, 5 Cyc. 688.

Form and requisites of judgment in ejectment see EJECTMENT, 15 Cyc. 174 *et seq.*

Form and requisites of judgment in action by or against executor or administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1040 *et seq.*

23. Power of referee to render final judgment see, generally, REFERENCE.

Entry of judgment on report of referee see *infra*, VI, A, 4, c.

24. Isler *v.* Brown, 67 N. C. 175.

The fact that there may be no way in which a judgment can be satisfied is no valid reason for withholding it, if one shows himself entitled thereto. Shurtleff *v.* Wiscasset, 74 Me. 130.

Directing verdict.— Where the state of the case is such that it is proper for the court to direct a verdict one way or the other, this should be done, and the court has no right simply to refuse to proceed with the case. Hatch *v.* Frazer, (Mich. 1904) 101 N. W. 228.

It is error for the court to refuse to sign a judgment, and to order a continuance, in order that plaintiff may move to have a judgment of another court affecting the land set aside, where the cause has been heard and the case is ripe for judgment. Burgess *v.* Kirby, 94 N. C. 575.

Failure to enter judgment for plaintiff for an amount admitted to be due and tendered in court is error for which the judgment will be reversed. Mace *v.* Gaddis, 3 Wash. Terr. 125, 13 Pac. 545.

Failure to comply with terms.— In a case where plaintiff obtained leave to amend his writ, on terms which he failed to comply with, but the case was given to the jury as

upon the judicial discretion of the court is attempted.[25] But the authority of a court to render a judgment does not always depend upon the fact that regular proceedings have taken place and culminated in a verdict; it may in some cases rest upon the consent or agreement of the parties.[26] Where issues are sent from one court to another to be tried, it belongs to the court in which the main litigation is pending to enter any judgment that may be necessary in the case.[27]

b. Necessity of Issues. As a general rule there can be no final judgment rendered in an action before the cause is expressly or tacitly at issue.[28] Hence it is error to proceed to trial and judgment while a good and valid plea, or one of several pleas, remains unanswered and not in any way disposed of.[29]

c. Determination of All Issues. A judgment must determine all the issues properly raised in the case, and hence it is error to render a final judgment while an issue remains undisposed of.[30] Thus, where there is an issue of law and also one of fact, plaintiff cannot have final judgment until both issues are found in

amended without objection, and upon the return of a verdict for plaintiff the court ordered that plaintiff should comply with the terms before the judgment was entered, it was held that defendant had no ground of objection. Cannon *v.* Leonard, 10 Allen (Mass.) 247.

A judgment prematurely entered by the court of its own motion, after issue joined, and without any hearing, trial, or opportunity to be heard on the issues, is irregular and will be reversed. Hennessy *v.* Tacoma Smelting, etc., Co., 33 Wash. 423, 74 Pac. 584.

25. State *v.* Edwards, 11 Mo. App. 152. And see, generally, MANDAMUS.

26. See *supra*, III, A, 1.

Hearing at chambers.— It is competent for the parties to agree that a case shall be heard before a judge at chambers in the same manner and with the same effect as though it were tried by him in court without a jury. Beach *v.* Beckwith, 13 Wis. 21.

Finding of arbitrator.— So they may agree to refer a pending suit to an arbitrator, and that a judgment in the cause shall be entered according to his decision. Monroe Bank *v.* Widner, 11 Paige (N. Y.) 529, 43 Am. Dec. 768.

Decree drawn by counsel.— It is no ground for the reversal of a judgment that the decree was prepared by the attorney of the successful party, where the decision as prepared is adopted by the trial judge. Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

27. Levy *v.* Levy, 28 Md. 25; Browne *v.* Browne, 22 Md. 103. And see East River Sav. Inst. *v.* Bucki, 77 Hun (N. Y.) 329, 28 N. Y. Suppl. 325; Borden *v.* Smith, 20 N. C. 27.

28. Braunsdorff *v.* Fay, 18 La. Ann. 187; Slark *v.* Broom, 10 La. Ann. 21; Porterfield *v.* Butler, 47 Miss. 165, 12 Am. Rep. 329; Armstrong *v.* Barton, 42 Miss. 506; Steele *v.* Palmer, 41 Miss. 88; Baltimore, etc., R. Co. *v.* Faulkner, 4 W. Va. 180. And see *supra*, I, F, 1. *Compare* Hall *v.* Law, 2 Watts & S. (Pa.) 121.

Immaterial issue.— In Barber *v.* Gordon, 2 Root (Conn.) 95, it is said that, where the issue joined is immaterial, the court should give judgment according to the right of the cause upon the whole record.

29. Hollis *v.* Moore, 25 Ark. 105; Fesmire *v.* Brock, 25 Ark. 20; Burton *v.* Johnson, 2 Ind. 339; Roller *v.* Custer, 6 Blackf. (Ind.) 433; McGuffin *v.* Helm, 5 Litt. (Ky.) 47; Herbert *v.* Wich, 45 Md. 474.

30. *Arkansas.*— Williams *v.* Perkins, 21 Ark. 18; Mandel *v.* Peet, 18 Ark. 236; Reed *v.* State Bank, 5 Ark. 193.

California.— See Greer *v.* Greer, 135 Cal. 121, 67 Pac. 20.

Illinois.— Dow *v.* Rattle, 12 Ill. 373.

Indiana.— Barret *v.* Thompson, 5 Ind. 457; Richardson *v.* Adkins, 6 Blackf. 141; Buford *v.* Ganson, 5 Blackf. 585; Rubottom *v.* McClure, 4 Blackf. 505; Barker *v.* McClure, 2 Blackf. 14.

Kentucky.— Gray *v.* Gorin, 3 A. K. Marsh. 556.

Maryland.— Souder *v.* Home Friendly Soc., 72 Md. 511, 20 Atl. 137.

Minnesota.— Cobb *v.* Cole, 51 Minn. 48, 52 N. W. 985. And see Armstrong *v.* Hinds, 9 Minn. 356, holding that where several distinct issues were joined by the pleadings, and the jury found a special verdict which did not include all the issues, but found no general verdict, a judgment rendered thereon should be set aside.

Missouri.— Boothe *v.* Loy, 83 Mo. App. 601.

Virginia.—See McClung *v.* Beirne, 10 Leigh 394, 34 Am. Dec. 739.

Wisconsin.— Gage *v.* Allen, 84 Wis. 323, 54 N. W. 627.

See 30 Cent. Dig. tit. "Judgment," § 355.

Applications of rule.— Where defendant, in an action on a judgment, pleads *nul tiel record*, and also sets up a defense on the merits, such as payment or the statute of limitations, and the latter plea is found against him, this is not sufficient to warrant judgment for plaintiff; it is error to render judgment without also disposing of the first plea. Gatewood *v.* Palmer, 10 Humphr. (Tenn.) 466; Gee *v.* Hamilton, 6 Munf. (Va.) 32. But a judgment which determines the amount due upon the contract sued on is in legal effect a determination against defendant of all matters pleaded by him to re-

his favor.[31] And the rule is the same where defendant pleads matters triable by a jury and also sets up equitable defenses.[32] But if defendant proves any one of several pleas in bar, he is entitled to judgment, whatever disposition may be made of the others.[33]

d. Judgments in Causes Tried Together. Where several causes are tried and submitted together, it is not proper to render a general judgment, but separate judgments should be entered in the separate cases.[34] And so in a penal action to recover on several distinct offenses judgment must be rendered separately on each specific offense.[35]

e. More Than One Judgment in Same Case. There can be only one final judgment in any action; and therefore, when such a judgment has once been entered, no second or different judgment can be rendered between the same parties and in the same suit, until the first shall have been vacated and set aside or reversed on appeal or error.[36] On this principle different judgments are not allowed in one action upon independent contracts which by common-law rules could not be joined in the same suit; and so, where several contracts sued on in

duce plaintiff's demand, and therefore it will not be reversed on the ground that it does not determine all the issues raised by the pleadings. Williams *v.* National Bldg., etc., Assoc., 59 S. W. 321, 22 Ky. L. Rep. 962.

Special statutory provisions.— Rev. St. (1895) art. 1331, authorizing the court to enter judgment in the absence of a finding by the jury on special issues, is constitutional. Featherstone *v.* Brown, (Tex. Civ. App. 1905) 88 S. W. 470.

31. Beard *v.* Adams, 8 Blackf. (Ind.) 469; Stewart *v.* Cantrall, 6 Blackf. (Ind.) 74; Fischli *v.* Cowan, 1 Blackf. (Ind.) 350; Ellis *v.* Loumier, 1 Mo. 260.

32. Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424, 63 S. W. 85; Buckner *v.* Mear, 26 Ohio St. 514.

33. Leiter *v.* Day, 35 Ill. App. 248; Pejepscot Proprietors *v.* Nichols, 10 Me. 256.

34. Kitter *v.* People, 25 Ill. 42; New York Security, etc., Co. *v.* Saratoga Gas, etc., Light Co., 157 N. Y. 689, 51 N. E. 1092 [*affirming* 88 Hun 569, 34 N. Y. Suppl. 890]; Bogan *v.* Sprott, 37 S. C. 605, 16 S. E. 35; Keep *v.* Indianapolis, etc., R. Co., 10 Fed. 454, 3 McCrary 302.

35. Bloodgood *v.* Vandeveer, 3 N. J. L. 928.

36. *Colorado.*—Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193.

Florida.— State *v.* Jacksonville, etc., R. Co., 16 Fla. 708.

Illinois.— Morrison *v.* Chicago, 142 Ill. 660, 32 N. E. 172; Brewer *v.* Christian, 9 Ill. App. 57.

Kansas.— West *v.* Ela, 42 Kan. 334, 21 Pac. 1043.

Kentucky.— Bethel *v.* Bethel, 6 Bush 65, 99 Am. Dec. 655; Shepherd *v.* Harvey, 43 S. W. 456, 19 Ky. L. Rep. 1478; Brown *v.* Vancleave, 13 Ky. L. Rep. 462.

Missouri.— McAdams *v.* McHenry, 22 Mo. 413; Seay *v.* Sanders, 88 Mo. App. 478; Murphy *v.* De France, 23 Mo. App. 337.

New York.— Crichton *v.* Columbia Ins. Co., 81 N. Y. App. Div. 614, 81 N. Y. Suppl. 363; Mott *v.* Union Bank, 8 Bosw. 591.

Pennsylvania.— O'Neal *v.* O'Neal, 4 Watts & S. 130.

Texas.— Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

Washington.— Buffalo Pitts Co. *v.* Dearing, 37 Wash. 591, 79 Pac. 1104.

West Virginia.— Enos *v.* Stansbury, 18 W. Va. 477.

Wisconsin.— Garvin *v.* Martin, (1903) 93 N. W. 470.

See 30 Cent. Dig. tit. "Judgment," § 361. And see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 608.

Compare Plummer *v.* Park, 62 Nebr. 665, 87 N. W. 534, holding that the rendition of two decrees in a case at the same term, but not on the same day, is not reversible error, if the rights of the litigants have been correctly determined.

An original and cross suit are but one cause, and when they have been tried together, but one judgment should be rendered in both, which should embody all the points adjudicated in both actions. Simpson *v.* McKay, 3 Thomps. & C. (N. Y.) 65.

Inconsistent judgments.— Where a record showed two inconsistent verdicts and judgments in the same case, a new trial having been had without setting aside the first verdict and judgment, it was held that the proceedings subsequent to the entry thereof should be reversed on error. Conrad *v.* Commercial Mut. Ins. Co., 81* Pa. St. 66.

Legal and equitable relief demanded.— Where, in an action for trespass, both damages and an injunction are sought, only one judgment should be entered, although the equity issues are referred to the court for trial, even if its findings are not conclusive as against a subsequent hearing on the question of damages. Cox *v.* McClure, 73 Conn. 486, 47 Atl. 757.

For joint defendants.— Where the maker and indorser of a note are sued together, and a verdict is given in favor of both defendants, without any severance in pleading, only one judgment can be perfected against plaintiff. Aeby *v.* Rapelyea, 1 Hill (N. Y.) 371.

the same action are proved to be entirely distinct in their nature, plaintiff must elect which count he will retain and obtain judgment on that count.[37]

2. As Depending on Nature of Issues — a. Issues of Fact in General. An issue of fact is raised by the plea or answer, or by the subsequent pleadings, and it is generally necessary to the rendition of a judgment in the case that such issue should be tried in some regular mode and determined in favor of one party or the other.[38]

b. Issues on Plea in Abatement. Where issue has been joined upon a plea in abatement, there being no other pleas in the case, and the issue submitted to a jury, resulting in a verdict for plaintiff, the court should award a peremptory judgment *quod recuperet*, and it is error to give judgment of *respondeat ouster* or a default for want of a plea.[39] On the other hand, if such an issue is found in favor of defendant, the judgment is that the suit abate or that plaintiff's writ be quashed.[40]

c. Issues on Demurrer. The judgment on sustaining or overruling a demurrer may be either final or interlocutory, allowing further pleadings, according to the nature of the pleading which it attacks.[41] But where issues of fact have also been joined and are not disposed of it is error to render final judgment on a demurrer.[42]

d. Demurrer to Evidence. On a demurrer to evidence,[43] where it is manifest that the merits of the cause have not been tried, the court is not compelled to render a final judgment, but may remand the cause for a new trial.[44] But when such a demurrer is overruled, the other party is entitled to judgment.[45]

3. Nonsuit or Dismissal of Action.[46] Where plaintiff fails to prove his case, or

37. Leonard *v.* Robbins, 13 Allen (Mass.) 217.

38. See Smith *v.* Smith, 101 Ga. 296, 28 S. E. 665; McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Small *v.* Lutz, 34 Oreg. 131, 55 Pac. 529, 58 Pac. 79.

39. *Arkansas.*— Wade *v.* Bridges, 24 Ark. 569.

Connecticut.— Alling *v.* Shelton, 16 Conn. 436.

Florida.— Bishop *v.* Camp, 39 Fla. 517, 22 So. 735.

Indiana.— Atkinson *v.* State Bank, 5 Blackf. 84.

Maine.— Frye *v.* Hinkley, 18 Me. 320.

Massachusetts.— Boston Glass Manufactory *v.* Langdon, 24 Pick. 49, 35 Am. Dec. 292.

New Hampshire.— Chase *v.* Deming, 42 N. H. 274.

New Mexico.— Texas, etc., R. Co. *v.* Saxton, 3 N. M. 282, 6 Pac. 206.

New York.— Haight *v.* Holley, 3 Wend. 258. *Compare* Marston *v.* Lawrance, 1 Johns. Cas. 397.

Ohio.— Myers *v.* Erwin, 20 Ohio 381. *Compare* Johnston *v.* Hubbell, Wright 69.

Pennsylvania.— Mehaffy *v.* Share, 2 Penr. & W. 361.

United States.— Renner *v.* Marshall, 1 Wheat. 215, 4 L. ed. 74.

See 30 Cent. Dig. tit. "Judgment," § 358.

Contra.— Cunningham *v.* Campbell, 3 Tenn. Ch. 488; Searight *v.* Payne, 1 Tenn. Ch. 186.

40. McCutchen *v.* McCutchen, 8 Port. (Ala.) 151; Clark *v.* Latham, 25 Ark. 16; Larco *v.* Clements, 36 Cal. 132; Eddy *v.* Brady, 16 Ill. 306; McKinstry *v.* Pennover, 2 Ill. 319.

A general judgment for defendant, which does not clearly show that it rests solely on a plea that the action was prematurely brought, cannot be sustained by the sufficiency of that plea and of the proof under it, where the plea in abatement is joined with pleas in bar in the same action. Speer *v.* Kearney County, 88 Fed. 749, 32 C. C. A. 101.

41. See *supra*, I, A, 7, b. And see Weiss *v.* Binnian, 178 Ill. 241, 52 N. E. 969; Texas Land, etc., Co. *v.* Winter, 93 Tex. 560, 57 S. W. 39.

Form and sufficiency of judgment on demurrer see Alabama Nat. Bank *v.* Hunt, 125 Ala. 512, 28 So. 488; Tallassee Falls Mfg. Co. *v.* Alabama Western R. Co., 128 Ala. 167, 29 So. 203.

42. Benson *v.* Arnold, 75 Ill. App. 610; Burnett *v.* Burnett, 86 N. Y. App. Div. 386; 83 N. Y. Suppl. 760; Seeley *v.* Amsterdam, 54 N. Y. App. Div. 9, 66 N. Y. Suppl. 221; Ferris *v.* Ferris, 34 N. Y. App. Div. 144, 54 N. Y. Suppl. 523; Houghton *v.* Tolman, 74 Vt. 467, 52 Atl. 1032.

43. This proceeding, now practically obsolete, was analogous to a demurrer to a pleading. It was an objection or exception by one of the parties in an action at law to the effect that the evidence which his adversary had produced was insufficient in point of law, whether true or not, to make out his case or sustain the issue. Upon joinder in demurrer the jury was discharged, and the case was argued to the court in banc, who gave judgment upon the facts as shown in evidence. Black L. Dict.

44. Gazzam *v.* Mobile Bank, 1 Ala. 268.

45. Golden *v.* Knowles, 120 Mass. 336.

46. Conclusiveness see *infra*, XIV, A, 4, d.

in other words, where the court decides that he has given no evidence on which the jury could find a verdict in his favor, the proper judgment to be entered is one of nonsuit.[47] But this is not the proper judgment when defendant successfully controverts plaintiff's evidence, or proves that no such facts exist as are alleged by plaintiff; in that case there should be a general judgment for defendant.[48] The corresponding judgment under the code practice is one of dismissal. But when this judgment is granted for failure of plaintiff's evidence it is not a judgment on the merits, and should not be so denominated; and if the judgment recites that the complaint was dismissed "on the merits," it is reversible error.[49] An analogous form of judgment against plaintiff is that of *nolle prosequi*, which is entered where, after appearance, he declares that he "will not further prosecute his suit." It is used as a means of abandoning one or more counts of a declaration or parts of a cause of action, or releasing one or more of the joint defendants,

Merger and bar see *infra*, XIII, C, 6.

47. Watson *v.* Higgins, 7 Ark. 475; McClendon *v.* Bennett, 18 La. Ann. 49; Doyle *v.* Estornet, 13 La. Ann. 318; Bishop *v.* Empire Transp. Co., 37 N. Y. Super. Ct. 12; Egyptian Flag Cigarette Co. *v.* Comisky, 40 Misc. (N. Y.) 236, 81 N. Y. Suppl. 673; Wilson *v.* Breyfogle, 63 Fed. 379, 11 C. C. A. 248.

Peremptory nonsuit.— "Notwithstanding some difference of opinion, it is now generally agreed that the right of trial by jury does not include the right to have the jury render a verdict in cases where the law is clearly against the plaintiff. The jury are to try and determine the facts, but it is the court which must declare the law applicable to the facts. Consequently, when the judge, at the close of the plaintiff's evidence, orders a peremptory nonsuit, on the ground that, conceding all the facts which the jury could find from the evidence, those facts are not sufficient to establish a liability against the defendant, such action is no violation of the plaintiff's constitutional rights." Black Const. L. (2d ed.) 518; Scruggs *v.* Brackin, 4 Yerg. (Tenn.) 528; Baylis *v.* Travelers' Ins. Co., 113 U. S. 316, 5 S. Ct. 494, 28 L. ed. 989.

Directing judgment.— Under a statute authorizing the court in a proper case to take the testimony from the jury and direct a judgment for defendant, a judgment so directed has not the effect of a nonsuit at common law, but is a decision of the action on the merits. Stockstill *v.* Dayton, etc., R. Co., 24 Ohio St. 83.

Insufficient pleadings.— Where the court holds that plaintiff cannot recover on his pleadings, and renders "judgment upon the pleadings," the remedy to declare it a judgment of nonsuit is by motion in the trial court. Murray *v.* Southerland, 125 N. C. 175, 34 S. E. 270.

48. State *v.* North Louisiana, etc., R. Co., 25 La. Ann. 65. And see Hardin *v.* Dickey, 123 Cal. 513, 56 Pac. 258.

49. McCune *v.* Eaton, 77 Minn. 404, 80 N. W. 355; Deelev *v.* Heintz, 169 N. Y. 129, 62 N. E. 158; Martin *v.* Cook, 142 N. Y. 654, 37 N. E. 569; Weeks *v.* Van Ness, 104 N. Y. App. Div. 7, 93 N. Y. Suppl. 337; Peggo *v.* Dinan, 72 N. Y. App. Div. 434, 76 N. Y. Suppl. 565; Hicks *v.* Shives, 65 N. Y. App. Div. 447, 72 N. Y. Suppl. 867; Thiry *v.* Taylor Brewing, etc., Co., 37 N. Y. App. Div. 391, 56 N. Y. Suppl. 85; Terry *v.* Horne, 59 Hun (N. Y.) 492, 13 N. Y. Suppl. 353; Knight *v.* Sackett, etc., Light Co., 61 N. Y. Super. Ct. 219, 19 N. Y. Suppl. 712 [*affirmed* in 141 N. Y. 404, 36 N. E. 392]; Hedenberg *v.* Manhattan R. Co., 91 N. Y. Suppl. 68; Steele *v.* Wells, 20 N. Y. Suppl. 736; Blake *v.* Barnes, 18 N. Y. Suppl. 471, 28 Abb. N. Cas. 401; Mannion *v.* Broadway, etc., R. Co., 13 N. Y. Suppl. 759, 18 N. Y. Civ. Proc. 40; McCullough *v.* Vibbard, 1 N. Y. Suppl. 610.

Plaintiff trying merits.— When the court, upon a trial at special term, has granted a motion, at the close of plaintiff's evidence, to dismiss the complaint, but plaintiff, instead of resting upon this decision as a nonsuit, afterward requests the court to find upon all the issues of fact in the case, and the court accordingly does make findings of fact and conclusions of law, and directs a judgment dismissing the complaint upon the merits, plaintiff cannot assert, merely because defendant did not formally rest his case, that the decision so made is in effect a mere nonsuit, and not a determination upon the merits. Bliven *v.* Robinson, 152 N. Y. 333, 46 N. E. 615. And see Houtz *v.* Uinta County, 11 Wyo. 152, 70 Pac. 840.

Dismissal for want of jurisdiction.— Where plaintiff's demand exceeds the jurisdiction of an inferior court, it should dismiss the cause from the docket and transfer it to a court of competent jurisdiction, and an order quashing the proceedings is void. Dazey *v.* Pennington, 10 Tex. Civ. App. 326, 31 S. W. 312.

Dismissal for want of prosecution.— Where there is no plea of set-off, and plaintiff fails either to reply or to appear, the proper judgment to be entered is one dismissing the case for want of prosecution. Caldwell *v.* McKay, 65 Ill. App. 405. And see *supra*, IV, A, 1, d.

The proper form of a judgment dismissing an action, with costs to defendant, is as follows: "It is therefore considered and adjudged by the court that this cause be dismissed, and that the defendant recover from the plaintiff all costs herein expended."

while holding to the rest.[50] A judgment of *retraxit* is given against plaintiff when, after appearance, he voluntarily goes into court and enters upon the record a statement that he "withdraws his suit." It differs from a nonsuit in being an open and voluntary renunciation of his claim, while a nonsuit is the consequence of his neglect or default or the failure of his evidence.[51]

4. As Depending on Form of Trial — a. Judgment on Verdict of Jury[52]— (i) *In General.* The party in whose favor a verdict is found will ordinarily be entitled to the rendition of a judgment upon it, after the time allowed to move in arrest or for a new trial,[53] unless exceptions or points of law have been reserved for the decision of the court.[54] But the verdict, to sustain a judgment, must have been given in a case which was at the time ripe for trial,[55] and must be in itself valid and sufficient in form,[56] responsive to the issues submitted to the jury,[57] and not released, stricken off, or set aside.[58] But a verdict is not affected by subsequent matters, such as may furnish ground of objection to the form or contents of the judgment.[59] And although the law permits or directs a case of the particular kind to be tried by the court without a jury, the judgment is not necessarily void because a jury was called and rendered a verdict; for the court may adopt the verdict as its own judicial act.[60] But in any case the judgment should show distinctly that it is founded upon the verdict and entered in accordance with it.[61]

Casto *v.* Eigeman, 162 Ind. 506, 70 N. E. 807.

50. See Livingston *v.* Livingston, 3 Johns. (N. Y.) 189; Black Judgm. § 15.

51. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Cunningham *v.* Schley, 68 Ga. 105; 1 Black Judgm. § 15; 3 Blackstone Comm. 296.

52. **Sufficiency of verdict to sustain judgment** see, generally, Trial.

53. Goddard *v.* Coffin, 10 Fed. Cas. No. 5,490, 2 Ware 382.

54. See Forsyth *v.* Hooper, 11 Allen (Mass.) 419; Purchase *v.* New York Exch. Bank, 10 Bosw. (N. Y.) 564; Horbach *v.* Reeside, 5 Whart. (Pa.) 223.

Where the verdict is for plaintiff, subject to a question of law reserved, a subsequent judgment for plaintiff should be entered, not on the point reserved, but on the verdict. Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. Rep. 628.

Pending demurrer to evidence.— The rendition of a verdict unconditional on its face, where there is a demurrer to the evidence, is not error, if such demurrer be afterward passed upon and determined by the court; but it cannot render judgment upon such verdict, without determining the demurrer. Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685.

55. A verdict rendered without issue having been joined will not support a judgment. Brown *v.* Cunningham, 23 W. Va. 109; Gallatin *v.* Haywood, 4 W. Va. 1.

Agreement as to amount.— Where counsel for the two parties, after the introduction of testimony, agree in open court upon the amount for which a verdict ought to be returned, a verdict rendered in pursuance of such agreement is equivalent to a confession, and will support a judgment entered up in the usual form, although no issuable defense had been filed in the case. McNulty *v.* Marcus, 57 Ga. 507.

56. See Tourtelotte *v.* Brown, 1 Colo. App. 408, 29 Pac. 130; Hepburn *v.* Hoag, 4 Cow. (N. Y.) 57. But a judgment apparently founded on a void verdict may be good if it is in a case where the law requires no verdict. Lockett *v.* Usry, 28 Ga. 345.

57. Ramer *v.* Fletcher, 29 Ala. 470; Rosenkranz *v.* Wagner, 62 Cal. 151; Maxwell *v.* Wright, 160 Ind. 515, 67 N. E. 267.

58. Barnard *v.* Young, 5 Humphr. (Tenn.) 100. But where the judge of the particular court has no legal authority to set aside verdicts, he may enter a judgment on a verdict which he had previously assumed to set aside. Hecht *v.* Mothner, 4 Misc. (N. Y.) 536, 24 N. Y. Suppl. 826.

Two verdicts in same case.— Where a trial resulted in a verdict for plaintiff, and a motion for a new trial was granted, but by inadvertence the verdict was not set aside, and the case then proceeded to a default and another verdict for plaintiff, and to judgment, the fact that such judgment is supported by two verdicts does not vitiate it. Walsh *v.* Walsh, 114 Ill. 655, 3 N. E. 437.

Practice on second verdict.— Where a case has been tried, and a verdict returned for plaintiff, which has not been set aside, and then there has been another trial and a verdict for defendant, the court will not set aside the second verdict and render judgment on the first if the motion for judgment is not made until after the second verdict is returned. Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163.

59. Muse *v.* Curtis, 9 Mart. (La.) 82.

60. Koch *v.* Brockhan, 111 Ga. 334, 36 S. E. 695; Hooker *v.* Rochester, 126 N. Y. 635, 26 N. E. 1043.

61. Faulk *v.* Kellums, 54 Ill. 188. See Armstrong *v.* Colby, 47 Vt. 359.

(II) *Special Verdict.* In cases where the statutes provide for the returning of special verdicts and enact that if a general and a special verdict are inconsistent, judgment shall be rendered pursuant to the latter, it is held that the judgment should be rendered on the general verdict in all cases where the facts constituting the special finding are not inconsistent with the general verdict.[62] A special verdict or finding, to sustain a judgment, should be definite and certain,[63] and responsive to the issues submitted,[64] and should find the facts essential to support a judgment.[65]

b. Decision on Trial by Court.[66] Where the court tries the case without a jury and finds facts entitling one of the parties to a judgment, he has the right to have such a judgment entered and it is error to refuse it.[67] When the trial is thus held, it is essential to follow closely the directions of the statute, as for instance that the decision shall be given in writing and filed with the clerk,[68] and that it shall contain a finding of the facts or statement of the grounds of decision,[69] although it seems that a direction that the decision shall be filed within a limited number of days after the submission of the case is only directory.[70] If the finding is contrary to the weight of the evidence, it will not support the judgment.[71]

c. Judgment on Report of Referee[72] — (I) *In General.* An order of reference is intended for the finding of the issues in the case, and a submission of such findings to the court, subject to exception and review, and such reference stands

62. Murray *v.* Phillips, 59 Ind. 56; Quaid *v.* Cornwall, 13 Bush (Ky.) 601; Schlageck *v.* Widhalm, 59 Nebr. 541, 81 N. W. 448. And see Carter *v.* Missouri Min., etc., Co., (Okla. 1895) 41 Pac. 356; Menominee River Sash, etc., Co. *v.* Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176. And see *infra*, VI, D, 2, b.

63. Helphrey *v.* Chicago, etc., R. Co., 29 Iowa 480.

Determination as to which defendant judgment should be rendered against.— In a suit against two railroad companies jointly for personal injuries, when the jury renders a special verdict, and names the amount which will compensate plaintiff for his injuries, without assessing damages against either defendant, the question against which of the defendants judgment is to be entered is one of law for the court. Louisville, etc., R. Co. *v.* Treadway, 142 Ind. 475, 40 N. E. 807, 41 N. E. 794.

64. Hallowell *v.* Smith, 2 Kan. App. 473, 43 Pac. 89.

65. See Munkwitz *v.* Uhlig, 64 Wis. 380, 25 N. W. 424.

The evidence cannot be considered in determining what judgment shall be entered on a special verdict. Seabright *v.* New Jersey Cent. R. Co., 72 N. J. L. 8, 60 Atl. 64.

66. **Necessity and sufficiency of findings by court** see Trial.

67. Outwater *v.* Moore, 124 N. Y. 66, 26 N. E. 329.

Where by agreement of parties a case is to be heard before a judge at chambers in the same manner and with the same effect as though it were tried by him in court without a jury, a judgment so rendered by him will be of the same effect and validity as though entered on trial in open court. Beach *v.* Beckwith, 13 Wis. 21.

68. Garr *v.* Spaulding, 2 N. D. 414, 51 N. W. 867; Gull River Lumber Co. *v.* Barnes County School Dist. No. 39, 1 N. D. 500, 48 N. W. 427; Bush *v.* Geisy, 16 Oreg. 355, 19 Pac. 123.

Necessity of decision.— Under N. Y. Code Civ. Proc. § 1228, providing that judgment on the decision of a court upon the trial of the whole issue of fact without a jury may be entered on filing the decision, a decision is essential to support a judgment dismissing a complaint after trial by the court. Lentschner *v.* Lentschner, 80 N. Y. App. Div. 43, 80 N. Y. Suppl. 146.

Want of decision.— A judgment entered in favor of a defendant without any decision as to plaintiff's rights is without authority. Sommer *v.* Sommer, 87 N. Y. App. Div. 434, 84 N. Y. Suppl. 444.

Sufficiency of decision.— A minute entry by the court, directing that findings and decree be drawn in favor of defendant, does not constitute the decision of the court, or prevent it from subsequently rendering a decision for plaintiff on default. Canadian, etc., Mortg., etc., Co. *v.* Clarita Land, etc., Co., 140 Cal. 672, 74 Pac. 301.

69. Sturdevant *v.* Stanton, 47 Conn. 579; French *v.* Higgins, 66 N. J. L. 128, 48 Atl. 1007; Newman *v.* Mayer, 52 N. Y. App. Div. 209, 65 N. Y. Suppl. 294, 7 N. Y. Annot. Cas. 497. *Compare* Cizek *v.* Cizek, (Nebr. 1904) 99 N. W. 28.

Entry of findings nunc pro tunc.— Rendition of a judgment without findings, although it is an irregularity, does not render the judgment void, but in such case the irregularity may be cured by entry *nunc pro tunc* of the findings. Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

70. Smith *v.* Uhler, 99 Ind. 140; Edmonds *v.* Riley, 15 S. D. 470, 90 N. W. 139.

71. Grier *v.* McCormick, 32 Wis. 422.

72. **In actions for accounting** see Accounts and Accounting, 1 Cyc. 413.

as a verdict of a jury if the referee is to report the facts, or as the decision of the court if the reference is as to all the issues, and judgment entered on the report of the referee has all the force and effect of a judgment on verdict.[73] The party in whose favor the referee finds is entitled to have judgment entered on the report,[74] unless exceptions are filed and successfully maintained.[75] The court may order judgment on the report, or confirm it and adopt it as its own decision.[76] But to sustain a judgment the report must be in proper form [77] and responsive to the issues submitted,[78] and a judgment in favor of a defendant who did not answer or appear before the referee and as to whose interest the referee made no finding cannot be sustained.[79] An objection that the referee erred in the legal principles adopted by him is not available against a motion for judgment, but should be presented by exceptions to the report or motion to set it aside.[80]

(II) *Necessity of Application to Court.* In several of the states it is the rule that judgment may be entered by the clerk, without application to the court, upon the report of a referee to whom the whole issue was submitted for decision.[81] But this cannot be done where the reference is a special proceeding and not the whole issue in the case,[82] or where the report reserves questions for the decision

73. *Kansas.*— Savage *v.* Challiss, 4 Kan. 319.

Maine.— Pease *v.* Whitten, 31 Me. 117.

Missouri.— State *v.* Burckhartt, 83 Mo. 430; Turley *v.* Barnes, 67 Mo. App. 237.

New York.— Union Bag, etc., Co. *v.* Allen Bros. Co., 94 N. Y. App. Div. 595, 88 N. Y. Suppl. 368 (where the referee has made and delivered his decision or report, the duty of settling a decree devolves on the court, and not on the referee); Currie *v.* Cowles, 7 Rob. 3; Yale *v.* Coddington, 21 Wend. 175.

Pennsylvania.— Sutton *v.* Horn, 7 Serg. & R. 228; Barde *v.* Wilson, 3 Yeates 149.

See 30 Cent. Dig. tit. "Judgment," § 365.

Compare Eldridge *v.* Woolsey, 4 Ohio Dec. (Reprint) 45, Clev. L. Rec. 59.

Where exceptions are filed to an auditor's finding, a judgment overruling the exceptions and making the finding the judgment of the court is valid and final, if unexcepted to. Hogan *v.* Walsh, 122 Ga. 283, 50 S. E. 84.

74. Holt *v.* Kirby, 39 Me. 164; Anonymous, 2 Hill (N. Y.) 382.

A motion for judgment on the report of the referee should be sustained where the report is regular in all respects, and no reason is assigned in the notice of motion of either party why it should not be accepted. Neeley *v.* Roberts, 17 S. D. 161, 95 N. W. 921.

75. McGlue *v.* Philadelphia, 105 Pa. St. 236; Scranton *v.* Davis, 5 Luz. Leg. Reg. (Pa.) 65.

76. Trummer *v.* Konrad, 32 Oreg. 54, 51 Pac. 447; White *v.* Eddy, 19 R. I. 108, 31 Atl. 823; Wood *v.* Babb, 16 S. C. 427; Edward P. Allis Co. *v.* Madison Electric Light, etc., Co., 9 S. D. 459, 70 N. W. 650.

If the report is set aside it is error to render judgment on it. Burchett *v.* Hamil, 5 Okla. 300, 47 Pac. 1053.

If the report is lost, judgment may be rendered on a copy of it. Little *v.* Gardner, 5 N. H. 415, 22 Am. Dec. 468.

Form of judgment.— When a referee reports that nothing is due to plaintiff, and it appears by his report that the case had not been heard, but that his report is founded on the default of plaintiff to appear before him, the proper judgment to be entered is a dismissal of the complaint, not an absolute judgment as upon a verdict. Salter *v.* Malcolm, 1 Duer (N. Y.) 596.

77. A report by a referee that "defendant should be ordered and adjudged to account," etc., is a sufficient order of judgment. Hathaway *v.* Russell, 46 N. Y. Super. Ct. 103.

78. Cochrane *v.* Halsey, 25 Minn. 52.

79. McWhirter *v.* Bowen, 103 N. Y. App. Div. 447, 92 N. Y. Suppl. 1039.

80. Clayton *v.* Levy, 49 N. J. L. 577, 9 Atl. 755.

81. Terpening *v.* Holton, 9 Colo. 306, 12 Pac. 189; Piper *v.* Johnston, 12 Minn. 60; Austin *v.* Rawdon, 42 N. Y. 155; McCready *v.* Woodhull, 34 Barb. (N. Y.) 80; Crook *v.* Crook, 14 Daly (N. Y.) 298, 20 Abb. N. Cas. 249; Bouton *v.* Bouton, 42 How. Pr. 11. *Contra*, Blackburn *v.* Markle, 12 Serg. & R. (Pa.) 143.

Effect of stipulation.— Where a stipulation for reference was, that the cause be referred to the judge "as sole referee to hear and determine," and that on filing his report judgment might be entered "with the same force and effect as upon the verdict of a jury," it was held that judgment might be entered upon the referee's report as upon a plea of confession; and such report would not be subject to review by the court. Walworth County Bank *v.* Farmers' L. & T. Co., 22 Wis. 231.

Federal courts will follow the practice of the state courts, and allow the entry of judgment on a referee's report without application to the court, where that is the local rule. Hooker *v.* Fowler, 2 Wall. (U. S.) 123, 17 L. ed. 759; Chicago Fourth Nat. Bank *v.* Neyhardt, 9 Fed. Cas. No. 4,991, 13 Blatchf. 393.

82. Potter *v.* Durfee, 44 Hun (N. Y.) 197; Niebuhr *v.* Schreyer, 15 Daly (N. Y.) 35, 2 N. Y. Suppl. 413.

of the court,[83] or is subject to exceptions filed,[84] or does not settle the form of the judgment to be entered.[85]

5. Judgment Notwithstanding the Verdict[86]— **a. In General.** At common law a judgment *non obstante veredicto* is one which may be entered by order of the court for plaintiff in an action at law, notwithstanding the jury have found a verdict for defendant, where it is apparent from defendant's plea that he can have no merits.[87] The granting of such a judgment rests very much in the discretion of the court,[88] but such a judgment is always upon the merits, and should never be granted but in a very clear case,[89] and this procedure should never be used as a means of reviewing and reversing the decision of the jury on questions of fact which are properly within their exclusive province.[90] But in some states, where the special findings of the jury are in direct conflict with the general verdict, it is the practice to grant a judgment notwithstanding the verdict.[91] But this can be done only where the special findings are so irreconcilably in conflict with the general verdict that both cannot stand.[92] And the motion for the judgment can be made only by the party against whom the verdict goes; hence, if the general verdict is

83. Bon *v.* Sanford, 23 Hun (N. Y.) 520.

84. Fairbank *v.* Newton, 46 Wis. 644, 1 N. W. 335.

85. Matter of Baldwin, 87 Hun (N. Y.) 372, 34 N. Y. Suppl. 435; Maicas *v.* Leony, 50 Hun (N. Y.) 178, 2 N. Y. Suppl. 831.

86. Judgment non obstante veredicto in audita querela proceedings see Audita Querela, 4 Cyc. 1072 note 5.

Judgment on special interrogatories and findings notwithstanding verdict see Trial.

87. Williams *v.* Anderson, 9 Minn. 50.

88. Frick *v.* Joseph, 2 N. M. 138.

Judgment non obstante or motion for new trial.— Where it is apparent that a decision on a motion for judgment *non obstante* will be likely to work material injustice to the party against whom it may be rendered, the court, to avoid such palpable wrong, will convert it into a rule for a new trial and proceed to decide that. Gring *v.* Burkholder, 2 Woodw. (Pa.) 82.

Action by court on its own motion.— The negligence of counsel in failing to object at the proper time to the reception of incompetent evidence will not preclude the judge from giving judgment of his own motion, notwithstanding the verdict. Murray *v.* Blackledge, 71 N. C. 492.

89. Lough *v.* Thornton, 17 Minn. 253. Where it is clear, from the ruling of the court upon a motion for a new trial, that the claimant can in no event be entitled to damages for the cause for which he claims them, the court will order judgment notwithstanding the verdict to be entered up for the respondents. Ballou *v.* Harris, 5 R. I. 419.

Joint defendants.— A motion for judgment for plaintiff notwithstanding the verdict, when made with reference to all defendants, is properly denied, where it appears that it might have been granted as to some of defendants only. Glencoe Bank *v.* Cain, 89 Minn. 473, 95 N. W. 308.

90. Slivitski *v.* Wein, 93 Wis. 460, 67 N. W. 730.

Wrong or mistaken verdict.— When there is a verdict for substantial damages, in a case where no more than nominal damages should be recovered, the remedy is by motion for a new trial, not by the entry of a judgment *non obstante veredicto*. Carl *v.* Granger Coal Co., 69 Iowa 519, 29 N. W. 437. And the same rule applies where some of the documentary evidence shows that the verdict finds inconsistent facts. Chapman *v.* Holding, 60 Ala. 522.

91. *California.*— McAulay *v.* Moody, 128 Cal. 202, 60 Pac. 778.

Indiana.— Louisville, etc., R. Co. *v.* Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Citizens' St. R. Co. *v.* Damm, 25 Ind. App. 511, 58 N. E. 564; Toledo, etc., R. Co. *v.* Trimble, 8 Ind. App. 333, 35 N. E. 716. And where the special findings are so ambiguous as to justify a *venire de novo* on motion of one party, a judgment on the verdict for the other is properly refused. Bockman *v.* Ritter, 21 Ind. App. 250, 52 N. E. 100.

Iowa.— Felton *v.* Chicago, etc., R. Co., 69 Iowa 577, 29 N. W. 618.

Kansas.— Lyon County School Dist. No. 46 *v.* Lund, 51 Kan. 731, 33 Pac. 595.

Michigan.— Judgment *non obstante veredicto* cannot be entered where there is merely a general verdict for the opposite party, and no special verdict inconsistent therewith. Central Sav. Bank *v.* O'Connor, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433.

Virginia.— If a special verdict is not uncertain, but plaintiff's case, as thereby shown, is a defective case or a defective title, there should not be a *venire de novo*, but judgment should be given for defendant. Brown *v.* Ferguson, 4 Leigh 37, 24 Am. Dec. 707.

United States.— Fairbank *v.* Cincinnati, etc., R. Co., 66 Fed. 471.

See 30 Cent. Dig. tit. "Judgment," § 367.

92. Stein *v.* Chicago, etc., R. Co., 41 Ill. App. 38; Todd *v.* Badger, 134 Ind. 204, 33 N. E. 963; Porter *v.* Waltz, 108 Ind. 40, 8 N. E. 705; Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5; Baltimore, etc., R. Co. *v.* Rowan, 104 Ind. 88, 3 N. E. 627; Pennsylvania Co. *v.* Smith, 98 Ind. 42; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146; McNabb *v.* Clipp,

in his favor, but the special findings do not correspond with it, a motion in that behalf will not avail him.[93] A judgment notwithstanding the verdict will not be upheld for a variance where it does not appear that no amendment of the complaint can be properly made.[94]

b. Verdict Not Sustained by Evidence. A judgment *non obstante veredicto* should not be granted because the verdict may be contrary to the weight of the evidence, or where there is evidence to sustain the verdict, although it may be uncertain or unconvincing, or where the evidence is conflicting and therefore properly to be weighed by the jury.[95] But such a judgment may be given if there is an entire failure of evidence, or if the evidence shows as a matter of law that the verdict should have been directed, and it is not probable that a different result would have been reached on another trial.[96] But even so it should be refused if it appears that on a new trial the party will be able to supply the defects in the evidence and make a showing which would sustain the verdict.[97]

c. Judgment on Pleadings.[98] Where defendant's plea or answer alleges matter which does not constitute a defense to the action, or confesses a cause of action in plaintiff and sets up matter in avoidance, and such matter, although found true by the verdict of the jury, is insufficient in law to constitute a bar or defense to the action, the court will enter a judgment for plaintiff notwithstanding the verdict.[99]

5 Ind. App. 204, 31 N. E. 858; Vance *v.* Franklin, 4 Ind. App. 515, 30 N. E. 149.

93. Brown *v.* Searle, 104 Ind. 218, 3 N. E. 871. And see Scott *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1902) 66 S. W. 485.

94. Welch *v.* Northern Pac. R. Co., (N. D. 1904) 103 N. W. 396.

95. *Arkansas.*— Trippe *v.* Du Val, 33 Ark. 811.

Michigan.— Plunkett *v.* Detroit Electric R. Co., (1905) 103 N. W. 620.

Minnesota.— Olson *v.* Minnesota, etc., R. Co., 89 Minn. 280, 94 N. W. 871; Kreuzer *v.* Great Northern R. Co., 87 Minn. 33, 91 N. W. 27; Marengo *v.* Great Northern R. Co., 84 Minn. 397, 87 N. W. 1117, 87 Am. St. Rep. 369; Levine *v.* Barrett, 83 Minn. 145, 85 N. W. 942, 87 N. W. 847; Bragg *v.* Chicago, etc., R. Co., 81 Minn. 130, 83 N. W. 511; Jones *v.* Chicago, etc., R. Co., 80 Minn. 488, 83 N. W. 446, 49 L. R. A. 640; Kreatz *v.* St. Cloud School Dist., 79 Minn. 14, 81 N. W. 533; Marquardt *v.* Hubner, 77 Minn. 442, 80 N. W. 617.

Nebraska.— Manning *v.* Orleans, 42 Nebr. 712, 60 N. W. 953.

North Carolina.— Christian *v.* Yarborough, 124 N. C. 72, 32 S. E. 383.

Pennsylvania.— North American Oil Co. *v.* Forsyth, 48 Pa. St. 291. And see Confer *v.* Pennsylvania R. Co., 209 Pa. St. 425, 58 Atl. 811.

Texas.— Templeman *v.* Gibbs, (Civ. App. 1894) 25 S. W. 736.

See 30 Cent. Dig. tit. "Judgment," § 367.

96. Merritt *v.* Great Northern R. Co., 81 Minn. 496, 84 N. W. 321; Glennon *v.* Erie R. Co., 86 N. Y. App. Div. 397, 83 N. Y. Suppl. 875 [*affirmed* in 180 N. Y. 562, 73 N. E. 1124]; Mechan *v.* Great Northern R. Co., (N. D. 1904) 101 N. W. 183; Richmire *v.* Andrews, etc., Elevator Co., 11 N. D. 453, 92 N. W. 819; Casety *v.* Jamison, 35 Wash. 478, 77 Pac. 800.

97. Merritt *v.* Great Northern R. Co., 81 Minn. 496, 84 N. W. 321; Marquardt *v.* Hubner, 77 Minn. 442, 80 N. W. 617; Cruikshank *v.* St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W. 958; Welch *v.* Northern Pac. R. Co., (N. D. 1904) 103 N. W. 396; Meehan *v.* Great Northern R. Co., (N. D. 1904) 101 N. W. 183; Nelson *v.* Grondahl, 12 N. D. 130, 96 N. W. 299; Richmire *v.* Anderson, etc., Elevator Co., 11 N. D. 453, 92 N. W. 819. See also Pine Tree Lumber Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357.

Where evidence is not so strong as on previous trial.— Where there was a verdict for plaintiff, and on appeal a new trial was ordered on the ground that the verdict was manifestly against the evidence, and on the second trial the evidence in plaintiff's favor was not so strong as previously, it was proper for the court on motion to order judgment notwithstanding the verdict for plaintiff rather than grant another new trial. Baxter *v.* Covenant Mut. Life Assoc., 81 Minn. 1, 83 N. W. 459.

98. Judgment on pleadings in general see PLEADINGS.

99. *Arkansas.*— Rhodes *v.* Andrews, (1890) 13 S. W. 422; Dickerson *v.* Morrison, 6 Ark. 264.

Connecticut.— Bliss *v.* Bange, 6 Conn. 78; Fitch *v.* Scot, 1 Root 351.

Indiana.— Musselman *v.* Wise, 84 Ind. 248; Pomeroy *v.* Burnett, 8 Blackf. 142; Berry *v.* Borden, 7 Blackf. 384.

Iowa.— Jones *v.* Fennimore, 1 Greene 134.

Kentucky.— Evans *v.* Stone, 80 Ky. 78; O'Neal *v.* M. Rumley Co., 53 S. W. 521, 21 Ky. L. Rep. 936.

Massachusetts.— Dewey *v.* Humphrey, 5 Pick. 187.

Minnesota.— Plano Mfg. Co. *v.* Richards, 86 Minn. 94, 90 N. W. 120; Lough *v.* Bragg, 18 Minn. 121.

Mississippi.—Garrett *v.* Beaumont, 24 Miss. 377; State *v.* Commercial Bank, 6 Sm. & M. 218, 45 Am. Dec. 280.

And similar action may be taken where issue has been joined upon a point which is wholly immaterial.[1] But if the plea or answer tenders a real and substantial issue, plaintiff cannot have this judgment,[2] however defective technically or faulty in point of form the plea may be,[3] the proper judgment in a case of the latter kind being one of repleader.[4] Defendant is entitled to judgment notwithstanding the verdict where plaintiff's pleadings are not sufficient to support a judgment in his favor and it appears on the record that the verdict cannot be supported as a matter of law.[5]

d. Verdict Subject to Question Reserved. If a point of law is ruled provisionally at the trial, but reserved for the further consideration of the court, and if its ultimate decision shows that the party in whose favor the verdict goes is not entitled to judgment, the court may enter judgment notwithstanding the verdict, the record showing the point of law reserved and the specific facts on which it arose.[6] In Pennsylvania the court may reserve the question whether there is any

Nebraska. — Connor *v.* Becker, 62 Nebr. 856, 87 N. W. 1065; Gibbon *v.* American Bldg., etc., Assoc., 43 Nebr. 132, 61 N. W. 126; Oades *v.* Oades, 6 Nebr. 304.

New Hampshire. — Roberts *v.* Dame, 11 N. H. 226.

New York. — Mallory *v.* Lamphear, 8 How. Pr. 491; Pentz *v.* Sackett, Lalor 113; Bellows *v.* Shannon, 2 Hill 86; Gould *v.* Ray, 13 Wend. 633; Burdick *v.* Green, 18 Johns. 14.

North Carolina. — Western Carolina Bank *v.* Moore, 138 N. C. 529, 51 S. E. 79; Corporation Commission *v.* Southern R. Co., 135 N. C. 81, 47 S. E. 229; Hauser *v.* Harding, 126 N. C. 295, 35 S. E. 586; Ward *v.* Phillips, 89 N. C. 215; Tankard *v.* Tankard, 84 N. C. 286; Moye *v.* Petway, 76 N. C. 327.

Ohio. — Tootle *v.* Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Sullenberger *v.* Gest, 14 Ohio 204.

Oregon. — Friendly *v.* Lee, 20 Oreg. 202, 25 Pac. 396.

Rhode Island. — Collier *v.* Jenks, 19 R. I. 493, 34 Atl. 998.

Virginia. — Frank *v.* Gump, (1905) 51 S. E. 358.

West Virginia. — Mason *v.* Harper's Ferry Bridge Co., 28 W. Va. 639.

United States. — Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678.

England. — Pim *v.* Grazebrook, 2 C. B. 429, 52 E. C. L. 429; Benson *v.* Duncan, 3 Exch. 644, 14 Jur. 218, 18 L. J. Exch. 169; Atkinson *v.* Davies, 11 M. & W. 236.

See 30 Cent. Dig. tit. "Judgment," § 368.

Matters of law cannot be pleaded; and if issue is joined on a plea setting up matter of law, it is immaterial, and if found for defendant, the court will give judgment for plaintiff. Tatum *v.* Tatum, 19 Ark. 194.

Defective declaration. — Under the common-law practice, if the verdict is for defendant upon issue joined upon the traverse of insufficient pleas in bar, *non constat* that plaintiff would have judgment on motion *non obstante veredicto*. The court on such motion would look into the whole record, and if the declaration had defects which would be reached by general demurrer, the verdict would be followed by judgment for defendant. Batchelder *v.* Kinney, 44 Vt. 150.

1. Woods *v.* Hynes, 2 Ill. 103; Shreve *v.* Whittlesey, 7 Mo. 473; Menard *v.* Wilkinson, 3 Mo. 255.

2. Louisville, etc., R. Co. *v.* Coyne, 30 S. W. 970, 17 Ky. L. Rep. 285; Lough *v.* Thornton, 17 Minn. 253; Williams *v.* Anderson, 9 Minn. 50; Virgin Cotton Mills *v.* Abernathy, 115 N. C. 402, 20 S. E. 522; Lewis *v.* Foard, 112 N. C. 402, 17 S. E. 9; Nelson *v.* Grondahl, 12 N. D. 130, 96 N. W. 299.

3. Lough *v.* Thornton, 17 Minn. 253.

Waiver of objections. — Where a plaintiff, to a plea of set-off, replied in a single replication *non-assumpsit, nil debet,* matter by way of traverse, and new affirmative matter, without having obtained leave to reply double, and the parties went to trial on the issue so made, a motion for judgment *non obstante* will be denied. Price *v.* Art Printing Co., 112 Ill. App. 1.

4. Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678, 2 Tidd Pr. 922.

5. Plunkett *v.* Detroit Electric R. Co., (Mich. 1905) 103 N. W. 620.

6. Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52; Fayette City Borough *v.* Huggins, 112 Pa. St. 1, 4 Atl. 927; Buckley *v.* Duff, 111 Pa. St. 223, 3 Atl. 823; Keifer *v.* Eldred Tp., 110 Pa. St. 1, 20 Atl. 592; Wilde *v.* Trainor, 59 Pa. St. 439; Witman *v.* Smeltzer, 16 Pa. Super. Ct. 285; Lippincott *v.* Mine Hill, etc., R. Co., 2 Leg. Chron. (Pa.) 337; Buehler *v.* Rapp, 2 Woodw. (Pa.) 443; Casey *v.* Pennsylvania Asphalt Pav. Co., 109 Fed. 744. See also Edwards *v.* Woodruff, 25 Pa. Super. Ct. 575.

In Pennsylvania a judgment *non obstante veredicto* cannot be entered where no question of law has been reserved. Inquirer Printing, etc., Co. *v.* Rice, 106 Pa. St. 623; Mechanics' Sav. Fund *v.* Murphy, 1 Walk. 31. *Compare* Gedusky *v.* Rubinsky, 8 Pa. Dist. 10, holding that on a verdict in trespass awarding plaintiff a specified amount of damages as compensation and a specified amount as punitive damages, the court on appeal may enter judgment for the amount of the compensatory damages, and a judgment *non obstante* for defendant as to the punitive

evidence in the case entitling plaintiff to recover; and if it decides this point in the negative it may give judgment for defendant, notwithstanding a verdict for plaintiff.[7]

e. Motion For Judgment. A motion for judgment notwithstanding the verdict must be made in the trial court,[8] before judgment has been entered upon the verdict,[9] and must contain a specific request for a judgment notwithstanding the verdict, a mere motion for a new trial not being sufficient;[10] although a party may make his motion in the alternative, for judgment notwithstanding the verdict or, in case that is denied, for a new trial.[11] It is also a prerequisite to such a judgment, under some statutes, that the moving party has moved to direct a verdict in his favor at the close of the testimony.[12] Such a motion is founded on the record alone, and its determination cannot be influenced by affidavits or extrinsic evidence.[13] It cannot be heard in vacation, in the absence of an agreement of the parties to that effect.[14]

f. Party Entitled to Judgment. At common law, and according to the rule still in force in many of the states, a defendant is not entitled in any circumstances to move for judgment *non obstante veredicto*, the right to make this motion being confined to plaintiff, and the proper motion for defendant, when the verdict is

damages, although no point was reserved on the record. But where, after reserving a point on certain facts, the court submits other evidence to the jury, a judgment *non obstante* cannot be entered if it is uncertain whether the jury found on the facts on which the reservation was made or on the other evidence. Keifer *v.* Eldred Tp., 110 Pa. St. 1, 20 Atl. 592.

7. Fisher *v.* Scharadin, 186 Pa. St. 565, 40 Atl. 1091. *Compare* Yerkes *v.* Richards, 170 Pa. St. 346, 32 Atl. 1089; Butts *v.* Armor, 164 Pa. St. 73, 30 Atl. 357, 26 L. R. A. 213; Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52.

8. Coonrod *v.* Benson, 2 Greene (Iowa) 179.

9. Schieble *v.* Hart, 12 S. W. 628, 11 Ky. L. Rep. 607; State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218, 45 Am. Dec. 280. And where the court has already made an order setting the verdict aside, it cannot revoke the order and enter a judgment against the verdict. Hemstad *v.* Hall, 64 Minn. 136, 66 N. W. 366.

The filing of a petition for judgment non obstante seventeen days after the verdict is returned is too late to entitle it to consideration. Marshalltown Stone Co. *v.* Des Moines Brick Mfg. Co., (Iowa 1905) 101 N. W. 1124.

The court may enter judgment on the verdict without passing on the motion for a judgment *non obstante*; as such motion is disposed of by the entry of the judgment. Hard *v.* Harris, 24 Ohio Cir. Ct. 714.

10. Netzer *v.* Crookston, 66 Minn. 355, 68 N. W. 1099; Crane *v.* Knauf, 65 Minn. 447, 68 N. W. 79.

As to motion for judgment notwithstanding special findings or answers to interrogatories inconsistent with the general verdict see Louisville, etc., R. Co. *v.* Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Storrs, etc., Co. *v.* Fusselman, 23 Ind. App. 293, 55 N. E. 245; Marion St. R. Co. *v.* Carr, 10 Ind. App. 200, 37 N. E. 952.

11. Netzer *v.* Crookston, 66 Minn. 355, 68 N. W. 1099; Kernan *v.* St. Paul City R. Co., 64 Minn. 312, 67 N. W. 71; Harker *v.* Smith, 7 Ohio Dec. (Reprint) 435, 3 Cinc. L. Bul. 54. See Leach *v.* Ansbacher, 28 Leg. Int. (Pa.) 277. And see *infra*, VI, A, 6, e.

12. Sayer *v.* Harris Produce Co., 84 Minn. 216, 87 N. W. 617; Netzer *v.* Crookston, 66 Minn. 355, 68 N. W. 1099; Hemstad *v.* Hall, 64 Minn. 136, 66 N. W. 366; Johns *v.* Ruff, 12 N. D. 74, 95 N. W. 440.

In New Jersey the practice is to direct the verdict for one party, and to grant a rule to show cause why the judgment should not be entered for the other party, and judgment may be so entered on the return of the rule. Hoyt *v.* Kearney Land Co., 7 N. J. L. J. 121.

13. *Alabama.*— Adams *v.* Munter, 74 Ala. 338, holding also that the record must contain all the evidence.

Indiana.— Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033.

New York.— Smith *v.* Smith, 2 Wend. 624.

Ohio.— Under Rev. St. § 5328, which confines the court to a consideration of the statements in the pleadings in disposing of a motion for judgment notwithstanding the verdict, the record, outside of the pleadings, should not be considered in disposing of the motion. McCoy *v.* Jones, 61 Ohio St. 119, 55 N. E. 219; Beetz *v.* Strobel, 6 Ohio S. & C. Pl. Dec. 143, 4 Ohio N. P. 166.

Pennsylvania.— Lichtheim *v.* North-Western Nat. Ins. Co., 9 Pa. Dist. 540, 23 Pa. Co. Ct. 471.

Vermont.— Stearn *v.* Clifford, 62 Vt. 92, 18 Atl. 1045; Snow *v.* Conant, 8 Vt. 301.

United States.— U. S. *v.* Gardner, 133 Fed. 285, 66 C. C. A. 663.

See 30 Cent. Dig. tit. "Judgment," § 373.

14. Scribner *v.* Rutherford, 65 Iowa 551, 22 N. W. 670.

A judge other than the one who presided at the trial cannot hear such motion. Aultman, etc., Co. *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603.

against him, being a motion in arrest of judgment.[15] But in several states this rule has been relaxed, either by statute or judicial decisions, so as to permit the entry of judgment notwithstanding the verdict in proper cases on motion of defendant,[16] especially where plaintiff's pleadings do not state a cause of action,[17] or where plaintiff has failed to reply to an answer, or paragraph in the answer, setting up a good defense,[18] as where, in an action for negligence, a plea of contributory negligence is not controverted.[19]

6. Time For Rendition[20] — a. In General. The premature entry of a judgment does not make it entirely void, since it does not prejudice the right of parties to move in arrest or for a new trial.[21] But on the other hand, where the law requires

15. *Colorado.*— Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462; Floyd *v.* Colorado Fuel, etc., Co., 10 Colo. App. 54, 50 Pac. 864.

Illinois.— Chicago City R. Co. *v.* White, 110 Ill. App. 23. A motion for judgment contrary to the general verdict and in conformity with special findings, if made by defendant, must be in the form of a motion for judgment on such findings, and not in the form of a motion for judgment notwithstanding the verdict. Teehan *v.* Union Bridge Co., 84 Ill. App. 532.

Iowa.— Bradshaw *v.* Hedge, 10 Iowa 402.

Nevada.— Brown *v.* Lillie, 6 Nev. 177.

New Hampshire.— Smith *v.* Powers, 15 N. H. 546.

New York.— Phœnix *v.* Stagg, 1 Hall 698; Bell *v.* Hazard, 1 N. Y. City Ct. 108; Bellows *v.* Shannon, 2 Hill 86; Schermerhorn *v.* Schermerhorn, 5 Wend. 513; Smith *v.* Smith, 4 Wend. 468.

North Carolina.— Christian *v.* Yarborough, 124 N. C. 72, 32 S. E. 383.

Ohio.— Buckingham *v.* McCracken, 2 Ohio St. 287.

Rhode Island.— Burnham *v.* New York, etc., R. Co., 17 R. I. 544, 23 Atl. 638; Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345.

South Carolina.— Barnes *v.* Rodgers, 54 S. C. 115, 31 S. E. 885; Bowdre *v.* Hampton, 6 Rich. 208.

Texas.— Judgment *non obstante veredicto* will not be entered in favor of plaintiff against a defendant, who has obtained a favorable verdict, on a verdict rendered against his co-defendant. Davis *v.* Pullman Co., 34 Tex. Civ. App. 621, 79 S. W. 635.

Vermont.— Stoddard *v.* Cambridge Mut. F. Ins. Co., 75 Vt. 253, 54 Atl. 284; Davis *v.* Streeter, 75 Vt. 214, 54 Atl. 185; Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652; Bradley Fertilizer Co. *v.* Caswell, 65 Vt. 231, 26 Atl. 956; Stoughton *v.* Mott, 15 Vt. 162.

Wisconsin.— Sheehy *v.* Duffy, 89 Wis. 6, 61 N. W. 295.

United States.— Friedly *v.* Giddings, 119 Fed. 438; German Ins. Co. *v.* Frederick, 58 Fed. 144, 7 C. C. A. 122; Brown *v.* Hartford F. Ins. Co., 4 Fed. Cas. No. 2,009, Brunn. Col. Cas. 663.

See 30 Cent. Dig. tit. "Judgment," § 372.

16. *Indiana.*— Brown *v.* Searle, 104 Ind. 218, 3 N. E. 871; Martindale *v.* Price, 14 Ind. 115; Indianapolis, etc., R. Co. *v.* Davis, 10 Ind. 398.

Iowa.— Carl *v.* Granger Coal Co., 69 Iowa 519, 29 N. W. 437.

Maine.— Porter *v.* Titcomb, 7 Me. 302.

Minnesota.— Bragg *v.* Chicago, etc., R. Co., 81 Minn. 130, 83 N. W. 511; Kreatz *v.* St. Cloud School Dist., 79 Minn. 14, 81 N. W. 533; Marquardt *v.* Hubner, 77 Minn. 442, 80 N. W. 617; Cruikshank *v.* St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W. 958. *Compare* Baxter *v.* Covenant Mut. Life Assoc., 81 Minn. 1, 83 N. W. 459.

Nebraska.— Stewart *v.* American Exch. Nat. Bank, 54 Nebr. 461, 74 N. W. 865; Gibbon *v.* American Bldg., etc., Assoc., 43 Nebr. 132, 61 N. W. 126; Manning *v.* Orleans, 42 Nebr. 712, 60 N. W. 953.

Oregon.— Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676.

Pennsylvania.— Where plaintiff's evidence is so weak as to amount but to a scintilla, judgment will be rendered for defendant *non obstante veredicto.* Holland *v.* Kindregan, 155 Pa. St. 156, 25 Atl. 1077.

See 30 Cent. Dig. tit. "Judgment," § 372.

17. Beavers *v.* Bowen, 70 S. W. 195, 24 Ky. L. Rep. 882; Cruikshank *v.* St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W. 958; Harker *v.* Smith, 7 Ohio Dec. (Reprint) 435, 3 Cinc. L. Bul. 54; Benicia Agricultural Works *v.* Creighton, 21 Oreg. 495, 28 Pac. 775, 30 Pac. 676.

18. Martindale *v.* Price, 14 Ind. 115; Evans *v.* Stone, 80 Ky. 78.

19. Louisville, etc., R. Co. *v.* Mayfield, 35 S. W. 924, 18 Ky. L. Rep. 224; Gore *v.* Illinois Cent. R. Co., 32 S. W. 754, 17 Ky. L. Rep. 799.

20. Entry nunc pro tunc see *infra*, VII, D.
Time for entry see *infra*, VII, C.
Time for rendition against garnishee see GARNISHMENT.
Time of rendering judgment on negotiable instruments see COMMERCIAL PAPER.

21. Hartridge *v.* Wesson, 4 Ga. 101. And see Rulo *v.* Murphy, 51 S. W. 312, 21 Ky. L. Rep. 295; Burnham *v.* Denike, 54 N. Y. App. Div. 132, 66 N. Y. Suppl. 396.
Where defendant is arrested in a civil action, it is not reversible error to render judgment for plaintiff before defendant's motion to vacate the order of arrest has been heard. Allison *v.* Maddrey, 114 N. C. 421, 19 S. E. 646.
Where defendant is allowed additional time to file a supplemental affidavit of defense,

the rendition of the judgment within a certain limited time, it is generally held that the court loses authority over the case at the expiration of that time, so that a judgment thereafter rendered cannot be sustained,[22] as where the judge is directed by statute to render his decision within a certain number of days after the case is submitted to him.[23] But in the absence of such statutory directions the court has authority to take a case under advisement for a reasonable length of time before rendering its decision.[24]

b. On Verdict. In the absence of statutory provisions to the contrary, a party is ordinarily entitled to have judgment rendered immediately upon the return of a verdict in his favor.[25] But in some states it is provided that there shall be a delay of a certain number of days to allow time for motions in arrest or for a new trial. Nevertheless a judgment entered at once upon the verdict is not entirely void, although the disregard of such a provision may make it irregular.[26] So a statutory provision that judgment shall be entered forthwith upon the verdict, or within a limited time after its return, is directory only, and failure to obey it does not avoid the judgment.[27] Even where the statute requires the judgment to be entered at the same term at which the verdict was returned, it may be competent

and the time expires without his filing it, and judgment is then entered, he cannot complain that the judgment was premature merely because members of the bar had been notified that "undisposed of cases upon prior current motion lists" would not be called for argument until a still later day. McFetridge *v.* Megargee, 26 Pa. Super. Ct. 501.

At first term.— Where there is a doubt, the court will not permit judgment to be taken at the first term on affidavit of demand. A. H. Davenport Co. *v.* Addicks, (Del. 1904) 57 Atl. 532.

22. Tomlinson *v.* Litze, 82 Iowa 32, 47 N. W. 1015, 31 Am. St. Rep. 458; Orvis *v.* Curtiss, 8 Misc. (N. Y.) 681, 28 N. Y. Suppl. 728. *Compare* Brown *v.* Porter, 7 Wash. 327, 34 Pac. 1105.

Interlocutory judgment.— A judgment in an action of trespass to try title, which does not dispose of all the defendants, nor of all the subject-matter of the controversy, is merely interlocutory, and the court has jurisdiction to render the final judgment at the succeeding term. Reed *v.* Liston, 8 Tex. Civ. App. 118, 27 S. W. 913.

Joint defendants.— In an action against joint defendants, plaintiff is not compelled to take a several judgment against one of them, although he may be entitled to do so, before the rights of all are tried. Kirtz *v.* Spaugh, Wils. (Ind.) 267.

23. Wiseman *v.* Panama R. Co., 1 Hilt. (N. Y.) 300; Van Valis *v.* Charcona, 40 Misc. (N. Y.) 226, 81 N. Y. Suppl. 630; Wallace *v.* Harris, 40 Misc. (N. Y.) 216, 81 N. Y. Suppl. 652; Frost *v.* Kopp, 13 N. Y. Civ. Proc. 377. *Contra*, see Landry *v.* Bertrand, 48 La. Ann. 48, 19 So. 126; Demaris *v.* Barker, 33 Wash. 200, 74 Pac. 362. And *compare* Keating *v.* Serrell, 5 Daly (N. Y.) 278, holding that a provision of this kind is for the benefit of the parties and may be waived by them.

24. See McInerney *v.* Tarvin, 72 S. W. 1107, 24 Ky. L. Rep. 2005; Krebs *v.* Senig, 132 Mich. 346, 93 N. W. 875; Bush *v.* Bank of Commerce, 38 Nebr. 403, 56 N. W. 989; Sharp *v.* Brown, 34 Nebr. 406, 51 N. W. 1030; Prudential Ins. Co. *v.* Taylor, 59 N. J. L. 352, 35 Atl. 798.

25. Hutchinson *v.* Bours, 13 Cal. 50; Van Riper *v.* Van Riper, 4 N. J. L. 156, 7 Am. Dec. 576.

Where there are issues to two pleas on record, and verdict upon one only against defendant, final judgment cannot be given until the other issue is determined. Hammond *v.* Freeman, 9 Ark. 62.

Conditional verdict.— Where a verdict is conditional on plaintiff's tendering defendant a certain sum, judgment may be entered thereon before tendered, although execution could not issue without leave of court or compliance with the condition. Mawhinney *v.* Shallcross, 2 Pa. Co. Ct. 164.

Verdict set aside.— Where a verdict entered subject to the opinion of the court is set aside, the court cannot at a subsequent term make a new judgment in bar of defendant, but must proceed to try the cause. Robinson *v.* Scott, 5 T. B. Mon. (Ky.) 278.

26. Hutchinson *v.* Brown, 8 App. Cas. (D. C.) 157; Stansbury *v.* Keady, 29 Md. 361; Walrod *v.* Shuler, 2 N. Y. 134; Droz *v.* Lakey, 2 Sandf. (N. Y.) 681; Young *v.* Shallenberger, 53 Ohio St. 291, 41 N. E. 518. *Compare* Marvin *v.* Marvin, 75 N. Y. 240.

27. Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218; Heinlen *v.* Phillips, 88 Cal. 557, 26 Pac. 366; Oakland First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551, 748; Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668; Waters *v.* Dumas, 75 Cal. 563, 17 Pac. 685; Gay *v.* Ardry, 14 La. 288.

A verdict not stayed or set aside is evidence of plaintiff's claim, although judgment was not rendered on it; and he can have judgment at any time before the right would be barred by the statute of limitations. Person *v.* Barlow, 35 Miss. 174, 72 Am. Dec. 21. And see Jerrett *v.* Mahan, 20 Nev. 89, 17 Pac. 12.

for the court to enter the judgment at a subsequent term, the parties appearing and being heard.[28]

c. On Report of Referee.[29] On the report of a referee, as on a verdict, the successful party is entitled to judgment at once, in the absence of statutory provisions to the contrary.[30] But if the statute provides that judgment shall not be entered on the report until after a certain number of days, a judgment entered within that time is irregular, although not void.[31]

d. Date of the Judgment. By the common law, followed in some of the states, all judgments rendered at a given term of court are presumed to have been rendered on the first day of that term,[32] and at the earliest possible moment of that day.[33] In other states a judgment is regarded as rendered on the last day of the term unless the contrary is shown.[34] But in a majority of states a judgment takes effect from the day it is actually rendered or entered.[35] And the date of the judgment may be fixed by reference to the record of the proceedings in the case.[36] The fact that a judgment is not dated does not render it void.[37]

e. Motion For New Trial or to Set Aside Verdict. In some jurisdictions it is held that a judgment cannot properly be entered pending a motion for a new trial.[38] But in others it is thought that the entry of judgment at such time is at most a mere irregularity.[39] But the judgment may be entered up immediately on disposing of the motion,[40] although the court, having granted a new trial, can-

28. Shephard *v.* Brenton, 20 Iowa 41. And see Murdock *v.* Ganahl, 47 Mo. 135; Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

29. Entry of judgment on report of referee see *infra*, VII, E, 3.

30. Reed *v.* Farmer, 69 N. C. 539; Wheatley *v.* Martin, 6 Leigh (Va.) 62; Halcomb *v.* Flournoy, 2 Call (Va.) 433. And see Annis *v.* Gleason, 56 N. H. 16; Smith *v.* Joyce, 14 Daly (N. Y.) 73.

31. Hill *v.* Watson, 2 How. Pr. (N. Y.) 153; Pittsburg, etc., R. Co. *v.* Shaw, (Pa. 1888) 14 Atl. 323.

32. See Norwood *v.* Thorp, 64 N. C. 682; Coe *v.* Erb, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764; Coutts *v.* Walker, 2 Leigh (Va.) 268. *Compare* Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769.

If the case was not ready for trial, so that no judgment could have been given on the first day of the term, the judgment does not relate back to that day. Yates *v.* Robertson, 80 Va. 475; Withers *v.* Carter, 4 Gratt. (Va.) 407, 50 Am. Dec. 78; Dunn *v.* Rennick, 40 W. Va. 349, 22 S. E. 66. And the doctrine of relation will not be applied in such a manner as to cut out intervening rights acquired in good faith. Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; Campbell *v.* Williams, 39 Iowa 646.

33. Wright *v.* Mills, 4 H. & N. 488, 5 Jur. N. S. 771, 28 L. J. Exch. 223, 7 Wkly. Rep. 498. And see Peetsch *v.* Quinn, 6 Misc. (N. Y.) 50, 26 N. Y. Suppl. 728. *Compare* Neale *v.* Utz, 75 Va. 480.

34. Chase *v.* Gilman, 15 Me. 64; Herring *v.* Polley, 8 Mass. 113; Goodall *v.* Harris, 20 N. H. 363; Bradish *v.* State, 35 Vt. 452; Rider *v.* Alexander, 1 D. Chipm. (Vt.) 267.

35. *Alabama.*— Powe *v.* McLeod, 76 Ala. 418; Lanier *v.* Russell, 74 Ala. 364; Lanier *v.* Richardson, 72 Ala. 134; *Ex p.* Dillard, 68 Ala. 594; Alabama Coal, etc., Co. *v.* State, 54 Ala. 36; Quinn *v.* Wiswall, 7 Ala. 645; Pope *v.* Brandon, 2 Stew. 401, 20 Am. Dec. 49.

Connecticut.— Main *v.* Main, 48 Conn. 301.

Louisiana.— Hubbell *v.* Clannon, 13 La. 494; Marigny *v.* Stanley, 2 La. 322.

Maryland.— Dyson *v.* Simmons, 48 Md. 207.

Oregon.— Stannis *v.* Nicholson, 2 Oreg. 332.

Vermont.— Huntington *v.* Charlotte, 15 Vt. 46.

See 30 Cent. Dig. tit. "Judgment," § 385.

36. Cooper *v.* Cooper, 14 La. Ann. 665. And see Clayton *v.* Fulp, 52 N. C. 444.

Presumptions in support.— In the absence of contrary evidence in the record, it will be presumed in support of a judgment that the day of its date occurred during a regular term of court (Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565), and that it was rendered before the expiration of the term of office of the judge (Babcock *v.* Wolf, 70 Iowa 676, 28 N. W. 490).

Sunday.— The mere recitation in the clerk's journal entry is not sufficient to establish the fact that the verdict and judgment were rendered on Sunday and thus to vitiate them. Knight *v.* Kelley, 10 Iowa 104.

37. Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

38. Louisville *v.* Muldoon, 43 S. W. 867, 19 Ky. L. Rep. 1386; Goodwin *v.* Small, 92 Me. 588, 43 Atl. 507; Van Vliet *v.* Conrad, 95 Pa. St. 494; Schmidt *v.* Terry, 111 Fed. 290.

39. Hasted *v.* Dodge, (Iowa 1887) 35 N. W. 462; Young *v.* State, 6 Ohio 435; Wheeler *v.* Russell, 93 Wis. 135, 67 N. W. 43; Arnold *v.* Jones, 1 Fed. Cas. No. 559, Bee 104.

40. Stevenson *v.* Sherwood, 22 Ill. 238, 74 Am. Dec. 140; People *v.* Ten Eyck, 18 Wend. (N. Y.) 553.

not rescind the order and render judgment on the verdict at a subsequent term.[41] As for a motion to set aside the verdict, it is said that the entry of a judgment on the verdict itself disposes of the motion, so that no formal dismissal of the motion is necessary.[42]

f. Stay of Proceedings. It is irregular to render a judgment while an order staying proceedings in the case remains unrevoked and unexpired, but the judgment is not for that reason void.[43]

7. Proceedings to Obtain Judgment — a. Application For Judgment. Where judgment follows as the result of contested proceedings and the finding of a verdict, it is usually not necessary for the successful party, in modern practice, to take active measures to secure the rendition of judgment,[44] unless required by statute.[45] While it is usually required, when an application for judgment is necessary, that notice of the motion therefor shall be given to the opposite party,[46] yet the failure or insufficiency of the notice will not vitiate a judgment otherwise regular and to which the moving party was clearly entitled.[47]

b. Order For Judgment. The application for judgment, if successful, should

41. Brooks *v.* Hanauer, 22 Ark. 174; Wells *v.* Melville, 25 Tex. 337.

42. Home Flax Co. *v.* Beebe, 48 Ill. 138. *Compare* Davison *v.* Brown, 93 Wis. 85, 67 N. W. 42.

43. *Michigan.*— Harvey *v.* McAdams, 32 Mich. 472.

Minnesota.— Danner *v.* Capehart, 41 Minn. 294, 42 N. W. 1062.

South Carolina.— Cosgrove *v.* Butler, 1 S. C. 241.

South Dakota.— Uhe *v.* Chicago, etc., R. Co., 4 S. D. 505, 57 N. W. 484, 3 S. D. 563, 54 N. W. 601.

Wisconsin.— Bacon *v.* Bicknell, 17 Wis. 523.

See 30 Cent. Dig. tit. "Judgment," § 388.

44. Where there are several pleas in bar, each going to the whole action, and judgment is for defendant on any one of them, he may perfect judgment without motion, although the others be against him. Bellows *v.* Shannon, 2 Hill (N. Y.) 86. But where nominal damages are recovered, and plaintiff does not enter judgment, defendant's proper course is to move for leave to enter judgment for his costs. Runnell *v.* Griffin, 8 Abb. Pr. (N. Y.) 39.

The allegations in a postea are conclusive on a motion for judgment. Carpenter *v.* Dickson, 60 N. J. L. 375, 41 Atl. 21.

To change form of judgment.— A motion to declare a "judgment upon the pleadings" a judgment of nonsuit can be filed in the cause after appeal and affirmance of the judgment. Murray *v.* Southerland, 125 N. C. 175, 34 S. E. 270.

On special verdict.— A formal motion for judgment on a special verdict is not necessary. Egmann *v.* East St. Louis Connecting R. Co., 65 Ill. App. 345; Voris *v.* Star City Bldg., etc., Assoc., 20 Ind. App. 630, 50 N. E. 779; Carthage Turnpike Co. *v.* Overman, 19 Ind. App. 309, 48 N. E. 874. *Compare* Merwan *v.* Ingersol, 3 Cow. (N. Y.) 367.

Form of motion.— A motion for judgment on the findings of fact as an entirety, or on the findings of fact and conclusions of law taken together, is properly denied as too general. Royse *v.* Bourne, 149 Ind. 187, 47 N. E. 827.

45. In California a statute provides that an action may be dismissed, or judgment of nonsuit entered, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months. Cal. Code Civ. Proc. § 581. But this does not cause the party to lose his judgment when the lapse of time mentioned was caused by the delay of the court or negligence of the clerk. San Jose Ranch Co. *v.* San Jose Land, etc., Co., 126 Cal. 322, 58 Pac. 824; Jones *v.* Chalfant, (Cal. 1892) 31 Pac. 257.

46. See the statutes of various states. And see White *v.* Sydenstricker, 6 W. Va. 46; Headly *v.* Miller, 63 Wis. 173, 23 N. W. 428. But in some states it is held that no such notice is necessary, the opposite party being bound to take notice of the filing of the motion. Wagner *v.* Tice, 36 Iowa 599; Gould *v.* Duluth, etc., Elevator Co., 3 N. D. 96, 54 N. W. 316. And see John Meunier Gun Co. *v.* Lehigh Valley Transp. Co., 123 Wis. 143, 101 N. W. 386, holding that a defendant who has not appeared is not entitled to notice of application for judgment.

On overruling demurrer.— A statute requiring eight days' notice of an application for judgment does not apply where a defendant's demurrer has been overruled and he has declined to plead over. Halley *v.* Ingersoll, 14 S. D. 7, 84 N. W. 201.

On conditional verdict or finding.— Where a party is held entitled to a certain judgment on condition of doing a certain act within a specified time, the proper practice is, on the expiration thereof, and on due notice to the other party, to make proof of performance, or of failure to perform, and apply for a judgment. Massing *v.* Ames, 36 Wis. 409.

For form of notice of judgment see White *v.* Sydenstricker, 6 W. Va. 46.

47. Pormann *v.* Frede, 72 Wis. 226, 39 N. W. 385.

be followed by an order of court directing the clerk to enter a judgment in the form and terms specified;[48] and a mere expression of the court's opinion that a designated party is entitled to recover is not sufficient.[49]

c. Mode of Rendition. The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict, and must be done by the judge — or a majority of the judges composing the court[50] — with a due regard to any statutory provisions regulating the manner of its performance.[51]

8. Interlocutory and Final Judgments. Although there cannot be two final judgments in the same case,[52] it is sometimes proper to enter an interlocutory judgment before the final disposition of the case.[53] Generally speaking the judgment is final if it at once disposes of the entire controversy, settling the rights of the parties, and leaving nothing for further consideration;[54] but interlocutory if it merely settles some preliminary point or matter, or reserves for future determination some detail essential to the complete adjustment of the subject of litigation.[55]

48. Hall *v.* Beston, 13 N. Y. App. Div. 116, 43 N. Y. Suppl. 304 (construing Code Civ. Proc. § 1022); Vance *v.* Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461. But it seems that a general order that judgment be entered in all cases then ready for judgment will be sufficient. Somerville *v.* Fiske, 137 Mass. 91. And where the purport and intention of the order are plain, it is not vitiated by the omission to employ the technical language of a judgment. Henlein *v.* Graham, 32 S. C. 303, 10 S. E. 1012.

Ambiguous order.— A judgment ordered for "plaintiff," after overruling a motion for new trial, without specifying which plaintiff, the action being brought by two plaintiffs jointly, and the verdict rendered for "plaintiffs," is fatally defective. Aultman *v.* Wirth, 45 Ill. App. 614.

Authority of clerk.— The order for judgment is the clerk's authority for entering the same, by which alone he must be guided. Hence a judgment entered in pursuance of an express order of the court will not be void, although it may be voidable, when the court, by a subsequent order not noticed by the clerk, has directed the case to be continued. Claggett *v.* Simes, 31 N. H. 56.

49. Hall *v.* Beston, 13 N. Y. App. Div. 116, 43 N. Y. Suppl. 304; Reynolds *v.* Ætna L. Ins. Co., 6 N. Y. App. Div. 254, 39 N. Y. Suppl. 885 (holding "judgment for defendants, with costs" insufficient); Vance *v.* Ravenswood, etc., Co., 53 W. Va. 338, 44 S. E. 461.

50. *In re* Kings County El. R. Co., 78 N. Y. 383.

51. Signing judgment.— It is not error for the court to sign a judgment on the same day it renders its opinion, without giving notice to plaintiff. White Crest Canning Co. *v.* Sims, 30 Wash. 374, 70 Pac. 1003. And see Fisher *v.* Puget Sound Brick Co., 34 Wash. 578, 76 Pac. 107.

Reading judgment in open court.— In Louisiana a statute requires judgments to be read in open court; and it is held that this requirement is jurisdictional, and that a judgment not so read, or which is signed in chambers, is invalid. Richardson *v.* Turner, 52 La. Ann. 1613, 28 So. 158; Woodlief *v.* Logan, 50 La. Ann. 438, 23 So. 716; State *v.* Judges Fourth Cir. Ct. of Appeals, 48 La. Ann. 905, 19 So. 932.

In case of remittitur the judgment previously entered should first be set aside, and a remittitur entered, and this should then be followed by judgment for the reduced amount. Bartling *v.* Thielman, 183 Ill. 88, 55 N. E. 677.

52. See *supra*, VI, A, 1, e. And see Shepherd *v.* Harvey, 43 S. W. 456, 19 Ky. L. Rep. 1478; Ellis *v.* Harris, 56 Nebr. 398, 76 N. W. 898.

53. Boothe *v.* Loy, 83 Mo. App. 601; Cornell *v.* Cornell, 96 N. Y. 108.

Pending a motion for a new trial a judgment is not of final effect. Rice Fisheries Co. *v.* Pacific Realty Co., 35 Wash. 535, 77 Pac. 839.

Under a statute abolishing special pleading the final judgment depends upon what the law as applied to the case may require after the facts in controversy have been settled. Potter *v.* Titcomb, 16 Me. 423.

Effect of interlocutory judgment.— Where a statute provides that in an action tried by the court an interlocutory judgment "may" state the substance of the final judgment, but does not require that it shall state it, the court, in directing final judgment, is not confined to the interlocutory decree or foreclosed by it. Hebblethwaite *v.* Flint, 83 N. Y. App. Div. 163, 82 N. Y. Suppl. 471.

Costs.— An interlocutory judgment properly provides for execution for the collection of costs. Maeder *v.* Wexler, 43 Misc. (N. Y.) 19, 87 N. Y. Suppl. 402.

54. See Gleason *v.* Chester, 1 Day (Conn.) 152; New Orleans, etc., R. Co. *v.* Chaney, 3 La. Ann. 262; Valentine *v.* Central Nat. Bank, 10 Abb. N. Cas. (N. Y.) 188; Harris *v.* Sanders, (Tex. Civ. App. 1898) 45 S. W. 29. And see *supra*, I, A, 9. As to finality of judgments and decrees for purposes of appeal and error see, generally, Appeal and Error.

55. See Stephens *v.* Blackburn, 46 S. W. 680, 20 Ky. L. Rep. 436; Delano *v.* Rice, 26 Misc. (N. Y.) 502, 57 N. Y. Suppl. 678.

The judgment is ordinarily final when rendered in pursuance of a general verdict,[56] or on submission of the entire case to the court,[57] or on a submission for decision on the pleadings.[58] But an interlocutory judgment may be entered where it is necessary to frame an issue on which the parties may properly go to trial,[59] or on overruling a demurrer, where leave is given to amend the pleading or to plead over,[60] or where the court has not before it all the papers necessary to settle the form of the final judgment,[61] or reserves the decision of some point affecting the amount recoverable or the right to modify the judgment,[62] or finds it necessary to appoint a master or referee to find issues in the case, unless where the action to be taken on the coming in of his report is definitely prescribed.[63] So also a judgment is generally interlocutory if it embodies a condition, the performance of which is necessary to make it effective, or a condition on the performance of which it may be released.[64] And in the action of account, it is usual and proper to render a preliminary judgment that "the parties do account."[65]

9. **Form and Contents of Judgment**[66] — **a. In General.**[67] No particular form of words is usually considered necessary to show the rendition of a judgment. It is sufficient if it shows distinctly that the matter has been determined in favor of one of the litigants, or that the rights in litigation have been adjudicated, with a statement of the time, place, parties, matter in dispute, and the result, with the relief granted.[68] But a statutory provision that judgments must be in writing is imperative, and a decision of the court, not reduced to writing or entered on the minutes, is not effective as a judgment.[69] It should be noted that a much less

Although a judgment may be interlocutory in form or in the manner of its expression, yet it is final if it really decides completely the contestation between the parties. Singster *v.* Lacroix, 14 Quebec Super. Ct. 89.

Dismissing separate defense.— Where plaintiff replies to a separate defense, and a demurrer to the reply is overruled and such defense dismissed, with a provision that plaintiff recover a certain sum as costs and disbursements on the trial of the demurrer, and have execution therefor, the judgment so ordering is interlocutory. Maeder *v.* Wexler, 43 Misc. (N. Y.) 19, 87 N. Y. Suppl. 402.

56. *In re* Fulton, 51 Pa. St. 204.

57. Pease *v.* Roberts, 9 Ill. App. 132; Teaz *v.* Chrystie, 2 Abb. Pr. (N. Y.) 109.

58. Sanderson *v.* Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141.

59. Sullenberger *v.* Gest, 14 Ohio 204; Trott *v.* West, Meigs (Tenn.) 163.

60. See Williamson *v.* Joyce, 137 Cal. 151, 69 Pac. 980; Williams *v.* Watters, 97 Md. 113, 54 Atl. 767; Swan *v.* Mutual Reserve Fund Life Assoc., 22 Misc. (N. Y.) 256, 50 N. Y. Suppl. 46; Fales *v.* Lawson, 4 N. Y. Suppl. 284; Texas Land, etc., Co. *v.* Winter, 93 Tex. 560, 57 S. W. 39.

61. Dial *v.* Gary, 24 S. C. 572.

62. Young *v.* Young, 165 Mo. 624, 65 S. W. 1016, 88 Am. St. Rep. 440; Graham *v.* Coolidge, 30 Tex. Civ. App. 273, 70 S. W. 231.

63. Bentley *v.* Gardner, 27 Misc. (N. Y.) 674, 58 N. Y. Suppl. 824.

64. Water Supply, etc., Co. *v.* Tenney, 24 Colo. 344, 51 Pac. 505; Jacobs *v.* Jacobs, 62 S. W. 263, 23 Ky. L. Rep. 186; McAnally *v.* Haynie, 17 Tex. Civ. App. 521, 42 S. W. 1049. *Compare* Young *v.* Mackall, 3 Md. Ch. 398.

65. Spalding *v.* Day, 37 Conn. 427; Zapp *v.* Miller, 109 N. Y. 51, 15 N. E. 889; Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934.

66. **For form and contents of judgment in suit involving disputed boundaries** see BOUNDARIES, 5 Cyc. 572.

67. **Amendment of formal requisites** see *infra*, VIII.

Signature see *infra*, VII, H, 7.

68. See *supra*, VI, A, 1, 6. And as to the necessary substance of a judgment and the effect of informalities or defects see the following cases:

California.— People *v.* Norris, 144 Cal. 422, 77 Pac. 998, the validity of a judgment is not otherwise affected by the erroneous inclusion of a personal judgment for costs.

Illinois.— Faulk *v.* Kellums, 54 Ill. 188; Birdsell Mfg. Co. *v.* Independent Fire Sprinkler Co., 87 Ill. App. 443; Fitzsimmons *v.* Munch, 74 Ill. App. 259.

Indiana.— Hord *v.* Bradbury, 156 Ind. 30, 59 N. E. 31.

Nebraska.— Sullivan's Sav. Inst. *v.* Clark, 12 Nebr. 578, 12 N. W. 103; Miller *v.* Burlington, etc., R. Co., 7 Nebr. 227.

Ohio.— Waggoner *v.* Dubois, 19 Ohio 67.

Texas.— Cook *v.* Hancock, 20 Tex. 2; Wilson *v.* Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086; Roberts *v.* State, 3 Tex. App. 47.

A memorandum on the margin of a judgment which does not contradict or unsettle its terms, probably made by the clerk for his own convenience, will not affect it. Iglehart *v.* Hobart, 19 Ill. 637. And so a memorandum filed by the trial judge stating the grounds of his decision is no part of the judgment. Forgotson *v.* Raubitschek, 87 N. Y. Suppl. 503.

69. Young *v.* Young, 165 Mo. 624, 65 S. W. 1016, 88 Am. St. Rep. 440; Willy *v.* Lewis,

degree of technicality and formality is required in judgments of justices of the peace and other inferior courts than is exacted in respect to the judgments of courts of record.[70]

b. Recitals — (i) *In General.* A judgment should recite facts sufficient to identify the parties, subject-matter, and amount or character of the relief granted,[71] but it is not ordinarily required to set out the facts on which it is founded, it being sufficient if they are stated in the pleadings and ascertained by the judgment.[72] But where, as in Louisiana, the constitution or a statute expressly requires the court to assign a reason for its judgment, a judgment not stating the reasons on which it is founded is void, although it need not refer to the particular law on which it is based;[73] and it is sufficient if it gives as the only reason why it is rendered that "the jury have found a verdict in favor of the plaintiff."[74]

(ii) *As to Jurisdictional Facts.* Where service of process upon defendant was constructive only, the judgment should recite facts sufficient to show compliance with the statute.[75] But otherwise in the case of judgments of courts of record, there is a presumption of jurisdiction which will aid defects or omissions in the record and protect the judgment against collateral impeachment on the ground of want of jurisdiction.[76]

(iii) *As to Verdict or Findings.* Where the case is tried by a jury it is

6 Ohio S. & C. Pl. Dec. 242, 4 Ohio N. P. 212. See Melchers *v.* Moore, 62 S. C. 386, 40 S. E. 773.

70. Lynch *v.* Kelly, 41 Cal. 232; Gaines *v.* Beets, 2 Dougl. (Mich.) 98; Felter *v.* Mulliner, 2 Johns. (N. Y.) 181; Elliott *v.* Jordan, 7 Baxt. (Tenn.) 376.

71. Brown *v.* State, 8 Heisk. (Tenn.) 871; Blane *v.* Sansum, 2 Call (Va.) 495. And see Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285; The Mollie Hamilton *v.* Paschal, 9 Heisk. (Tenn.) 203; Boyken *v.* State, 3 Yerg. (Tenn.) 426, the last two cases holding that a judgment must contain sufficient facts to enable the clerk to issue an execution thereon, by an inspection of its entry, without reference to other entries. See also Appeal and Error, 2 Cyc. 614.

Applications of rule.— A judgment for plaintiff in an action in which a set-off was pleaded need not specifically show what disposition was made of the set-off. Coats *v.* Barrett, 49 Ill. App. 275. And in a suit to subject a contract for the sale and purchase of land held as collateral security for the payment of promissory notes, the judgment need not find the value of the land, or ascertain what proportion of the purchase-money has been paid, or the extent of the purchaser's equitable interest in the land. Vaughn *v.* Cushing, 23 Ind. 184. On the other hand a judgment recognizing a lessor's privilege on property is defective if it does not show at what date the privilege attached. Gleason *v.* Sheriff, 20 La. Ann. 266.

72. Stebbens *v.* Cubberly, 10 Ind. 301; Judge *v.* Booge, 47 Mo. 544; White *v.* Walker, 22 Mo. 433; Cook *v.* Hancock, 20 Tex. 2; Hamilton *v.* Ward, 4 Tex. 356; Sears *v.* Green, 1 Tex. Unrep. Cas. 727. *Compare* May field *v.* State, 40 Tex. 289. *Contra,* see Walker *v.* Carey, 53 Ill. 470; Newman *v.* Mayer, 65 N. Y. Suppl. 294, 7 N. Y. Annot. Cas. 497; Barret *v.* Tazewell, 1 Call (Va.) 215; Wiscart *v.* Dauchy, 3 Dall. (U. S.) 321, 1 L. ed. 619.

A judgment following a trial by the court should merely state that the court has made its findings of fact and conclusions of law, and then decree the relief to which the party is entitled, without again reciting the facts found. Beebe *v.* Mead, 101 N. Y. App. Div. 500, 92 N. Y. Suppl. 51.

An erroneous recital of fact in a particular not affecting the relative rights of the parties or the final result of the controversy will not vitiate the decree. Woods *v.* Allen, 122 Iowa 695, 98 N. W. 499.

73. Dorr *v.* Jouet, 20 La. Ann. 27; Selby *v.* Levee Com'rs, 14 La. Ann. 434; Jacobs *v.* Levy, 12 La. Ann. 410; West Baton Rouge *v.* Bozman, 11 La. Ann. 94; Fleury *v.* Murphy, 2 La. Ann. 59; Slidell *v.* Locke, 18 La. 461; Henderson *v.* Bowles, 3 Mart. N. S. (La.) 152; Millon *v.* Delisle, 2 Mart. N. S. (La.) 239; Seghers *v.* His Creditors, 10 Mart. (La.) 54; Muse *v.* Curtis, 5 Mart. (La.) 686; Montserrat *v.* Godet, 5 Mart. (La.) 522; Urquhart *v.* Taylor, 5 Mart. (La.) 200; Sierra *v.* Slort, 4 Mart. (La.) 587; Gray *v.* Laverty, 4 Mart. (La.) 463. *Compare* Palmer *v.* Yarrington, 1 Ohio St. 253.

74. McDonough *v.* Thompson, 11 La. 566.

75. See Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Campbell *v.* McCahan, 41 Ill. 45; Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401.

76. *Arkansas.*— Huggins *v.* Dabbs, 57 Ark. 628, 22 S. W. 563.

California.— Green *v.* Swift, 50 Cal. 454.

Georgia.— Buice *v.* Lowman Gold, etc., Min. Co., 64 Ga. 769.

Illinois.— Berkson *v.* People, 154 Ill. 81, 39 N. E. 1079.

Tennessee.— Barry *v.* Patterson, 3 Humphr. 313.

Texas.— Caldwell *v.* Brown, 43 Tex. 216.

See 30 Cent. Dig. tit. "Judgment," § 398.

not necessary to incorporate the verdict in the judgment;[77] nor, when tried by the court, the special findings on which the decision is based.[78]

c. Designation of Amount of Recovery[79] — (i) *In General.* It is essential to the validity of a judgment that the amount of the recovery which it awards should be stated in it with precision and certainty.[80] But if the judgment entry itself, without naming the amount of the recovery, contains data which permit its calculation, as by referring to the verdict or the pleadings, where the amount is precisely stated, a sufficient degree of certainty is attained.[81] If there is a blank in the judgment, where the statement of its amount should be, this will deprive it of all force and efficacy as a judgment, at least until the blank is filled.[82] Whether the statement of the amount of the judgment only in figures instead of the sum being written out will impair its validity is an unsettled question. Some of the authorities refuse to give effect to a judgment thus expressed,[83] while others do not admit the irregularity to be fatal.[84] But if the amount of the judgment is

77. McKinnon *v.* Reliance Lumber Co., 63 Tex. 30; Missouri, etc., R. Co. *v.* Walden, (Tex. Civ. App. 1898) 46 S. W. 87.

78. Springfield F. & M. Ins. Co. *v.* Hamby, 65 Ark. 14, 45 S. W. 472; Gallinger *v.* Vale, 6 Iowa 387; Bunten *v.* Orient Mut. Ins. Co., 8 Bosw. (N. Y.) 448.

79. **Conformity to verdict and findings** see *infra*, VI, D, 2.

80. *Alabama.*— Jones *v.* Acre, Minor 5.

Delaware.— Etheridge *v.* Middleton, 1 Marv. 139, 40 Atl. 714.

Illinois.— People *v.* Pirfenbrink, 96 Ill. 68; Guild *v.* Hall, 91 Ill. 223; Dickinson *v.* Rahn, 98 Ill. App. 245.

Indiana.— Needham *v.* Gillaspy, 49 Ind. 245.

Iowa.— Battell *v.* Lowery, 46 Iowa 49.

Kentucky.— Deering *v.* Halbert, 2 Litt. 290.

Maine.— Bickford *v.* Flannery, 70 Me. 106.

Mississippi.— Warbington *v.* Norris, 3 How. 227; Berry *v.* Anderson, 2 How. 649; Douglass *v.* Hendricks, Walk. 230.

New York.— O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816.

North Carolina.— Lyman *v.* Ramseur, 113 N. C. 503, 18 S. E. 690; Dunns *v.* Batchelor, 20 N. C. 46.

Oklahoma.— Custer County *v.* Moon, 8 Okla. 205, 57 Pac. 161.

Texas.— Brown *v.* Horless, 22 Tex. 645; Barnett *v.* Caruth, 22 Tex. 173, 73 Am. Dec. 255; Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

Virginia.— Early *v.* Moore, 4 Munf. 262.

See 30 Cent. Dig. tit. "Judgment," § 400.

On the trial of a feigned issue to determine the ownership of a fund paid into court, the verdict and judgment, if for plaintiff, should be general, and it is error to render judgment against defendant for a stated sum. Julius King Optical Co. *v.* Royal Ins. Co., 24 Pa. Super. Ct. 527.

81. *Alabama.*— Rose *v.* Pearson, 41 Ala. 687; Ellis *v.* Dunn, 3 Ala. 632; Dinsmore *v.* Austill, Minor 89.

Louisiana.— Melancon *v.* Duhamel, 3 Mart. N. S. 7.

Mississippi.— Ladnier *v.* Ladnier, 64 Miss. 368, 1 So. 492.

Pennsylvania.— Lewis *v.* Smith, 2 Serg. & R. 142.

Virginia.— Barrett *v.* Wills, 4 Leigh 114, 26 Am. Dec. 315.

See 30 Cent. Dig. tit. "Judgment," § 400.

Contra.— Dickinson *v.* Rahn, 98 Ill. App. 245, holding that a judgment must be for a definite amount and that amount must be ascertainable from the judgment alone. And see Boyken *v.* State, 3 Yerg. (Tenn.) 426.

Verdict indefinite.— It is error to render a judgment on a verdict for plaintiff which fails to state how much he should recover, when all debt is denied by defendant. In such a case the jury should be directed to retire and find how much plaintiff ought to recover. Bartle *v.* Plane, 68 Iowa 227, 26 N. W. 88.

82. Lea *v.* Yates, 40 Ga. 56; Nichols *v.* Stewart, 21 Ill. 106; School Directors *v.* Newman, 47 Ill. App. 364; Case *v.* Plato, 54 Iowa 64, 6 N. W. 128; Rigglesworth *v.* Reed, Morr. (Iowa) 19; Noyes *v.* Newmarch, 1 Allen (Mass.) 51.

But in Pennsylvania it appears to be the rule that a judgment entered for an unliquidated sum will sustain an execution and a sheriff's sale thereon, if the actual amount of the judgment debt is indorsed on the execution. See Ulshafer *v.* Stewart, 71 Pa. St. 170; Gray *v.* Coulter, 4 Pa. St. 188.

Filling in blanks.— Where the court orders a judgment, the amount of which the clerk is directed to assess, and he makes a judgment entry, leaving a blank for the amount, which he subsequently fills in in vacation, this is at most an irregularity and it may be filled in in compliance with an order made by the court in term-time. Lind *v.* Adams, 10 Iowa 398, 77 Am. Dec. 123.

83. Linder *v.* Monroe, 33 Ill. 388; Lloyd *v.* Hance, 16 N. J. L. 127; Smith *v.* Miller, 8 N. J. L. 175, 14 Am. Dec. 418; Cole *v.* Petty, 2 N. J. L. 60.

84. Davis *v.* McCary, 100 Ala. 545, 13 So. 665; Tankersley *v.* Silburn, Minor (Ala.) 185; Kopperl *v.* Nagy, 37 Ill. App. 23; Fullerton *v.* Kelliher, 48 Mo. 542.

Figures controlling writing.— If the amount of recovery stated in figures in a judgment differs from that stated in writing, but the

written out, the designation "dollars" (or "cents," or both, as the case may be) must be appended to it;[85] and if it is expressed in figures only, the dollar-mark ($), or some other appropriate sign, must be used to show the sum intended.[86] But an entry of judgment for the right sum, although it is inaccurately named "damages" instead of "debt," or so much debt and so much damages, is not reversible error.[87] So where the record does not show of what the judgment was made up it is competent to show that fact by extraneous evidence.[88] And where judgment is recovered for compensatory and punitive damages, the court is not required to specify how much is for the one and how much for the other.[89]

(II) *As to Interest.*[90] Judgment may be rendered in the aggregate for the debt and interest due at the time,[91] unless where a statute requires the debt and interest to be separately specified in the judgment.[92] Where interest enters into a judgment as a separate part of it, the amount must be stated with precision,[93] or sufficient data given for its calculation with certainty, as by stating the rate of interest[94] and the date from which it begins to run.[95]

recitals in the judgment itself show the former to be the true amount, the error is not sufficient cause for the reversal of the judgment. Cave *v.* Houston, 65 Tex. 619.

85. Carpenter *v.* Sherfy, 71 Ill. 427. But *compare* Carr *v.* Anderson, 24 Miss. 188; Hopkins *v.* Orr, 124 U. S. 510, 8 S. Ct. 590, 31 L. ed. 523.

86. Peter *v.* Hill, 13 Ill. App. 36. Thus a judgment for taxes is fatally defective if it does not show the amount of the tax for which it was rendered; and the use of numerals simply, without any words, marks, or signs to indicate that they stand for money, and for what denominations of money, is not sufficient. 1 Black Judgm. § 118; Black Tax Tit. (2d ed.) § 180. See, generally, TAXATION.

87. Briggs *v.* Greenlee, Minor (Ala.) 123; Carver *v.* Adams, 40 Vt. 552.

88. Gilbert *v.* Earl, 47 Vt. 9. And see Shean *v.* Cunningham, 6 Bush (Ky.) 123.

89. Hambly *v.* Hayden, 20 R. I. 558, 40 Atl. 417.

90. Conformity to verdict and findings see *infra*, VI, D, 2.

Amendment of judgment as to costs see *infra*, VIII.

91. Dickinson *v.* Mobile Branch Bank, 12 Ala. 54; Bondurant *v.* Woods, 1 Ala. 543; Palmer *v.* Murray, 8 Mont. 312, 21 Pac. 126; Frazier *v.* Campbell, 5 Tex. 275.

92. Maguire *v.* Xenia, 54 Ill. 299; March *v.* Wright, 14 Ill. 248; Mager *v.* Hutchinson, 7 Ill. 266; Williams *v.* Illinois Bank, 6 Ill. 667; Prince *v.* Lamb, 1 Ill. 378; Spooner *v.* Warner, 2 Ill. App. 240; Brandon *v.* Diggs, 1 Heisk. (Tenn.) 472.

Interest on verdict.— Although a statute provides that when judgment is rendered on a verdict interest shall be computed from the date of the verdict to the time of rendering the judgment on the same and made a part of the judgment, yet a judgment is not void for uncertainty because of the fact that the interest is not so computed. Blumke *v.* Dailey, 67 Ill. App. 381. See Southern Kansas R. Co. *v.* Showalter, 57 Kan. 681, 47 Pac. 831.

93. Tankersley *v.* Silhurn, Minor (Ala.) 185; Wooster *v.* Clarke, 2 Ark. 101.

Rate of interest.— Under the law of Virginia, where an obligation bears interest at a specified rate, a judgment thereon should be for the principal and interest thereon at the agreed rate until payment. Where no rate is specified, the judgment should be for interest at the legal rate in the state where the obligation is to be performed, which in the absence of proof is presumed to be the same as in the state where the action is brought. Schofield *v.* Palmer, 134 Fed. 753.

94. Smith *v.* Tatman, 71 Ind. 171; Hardin *v.* Major, 4 Bibb (Ky.) 104; Harper *v.* Bell, 2 Bibb (Ky.) 221; Cotton *v.* Reavill, 2 Bibb (Ky.) 99; Troxwell *v.* Fugate, Hard. (Ky.) 2; Catron *v.* Lafayette County, 125 Mo. 67, 28 S. W. 331; Ramsey *v.* Jones, 5 Lea (Tenn.) 500.

Interest on interest.— A stipulation in a judgment that the interest on it shall bear interest if not paid annually is void and does not make such judgment usurious. *In re* Fuller, 9 Fed. Cas. No. 5,148, 1 Sawy. 243. Where plaintiff exhibits a claim for principal, and with interest added, up to a given day, it is error in the county court to enter up a condemnation for the gross sum as bearing interest from the day on which the attachment issued. The charge of interest upon the interest was not warranted under such circumstances. Boarman *v.* Patterson, 1 Gill (Md.) 372.

95. Dinsmore *v.* Austill, Minor (Ala.) 89; Hill *v.* Lyles, (Tex. Civ. App. 1904) 81 S. W. 559; Johnson *v.* McLain, 13 Fed. Cas. No. 7,395*a*, Hempst. 59; Archer *v.* Morehouse, 30 Fed. Cas. No. 18,225, Hempst. 184.

Wrong date.— It is immaterial that a judgment recites that the money recoverable bears interest from an erroneous date, where it appears that the amount, with interest, for which judgment is rendered does not exceed the amount for which the party complaining is legally liable. Dean *v.* Blount, 71 Tex. 270, 9 S. W. 168. And see Washington Park Club *v.* Baldwin, 59 Ill. App. 61.

(III) *As to Costs and Fees.* A judgment for a specified amount and costs is not void as to the costs because the amount thereof is left blank, since it may be afterward inserted by the clerk.[96] But where the judgment is for costs only, it is erroneous if the amount thereof is left blank.[97] An attorney's fee or commission, stipulated for in the contract or obligation in suit, may be incorporated in the judgment as a part of it.[98]

(IV) *Designating Medium of Payment.*[99] As a general rule a judgment has nothing to do with the means or the medium of satisfying the debt which it establishes; and hence it is ordinarily beyond the power of the court to prescribe the kind of money in which the judgment shall be paid;[1] and this rule has been adhered to even though the judgment is rendered on a contract specifying the medium of payment.[2] But this rule has been very generally changed by statute. By reason of the legal tender act and of the statutes in various states, the general rule now is that if an action is brought on a note, bond, or other contract expressly made payable in a specific medium of payment, a judgment thereon in favor of plaintiff should also be expressed to be payable in that medium,[3] as in gold

96. *Connecticut.*— Calhoun *v.* Porter, 21 Conn. 526.

Kansas.— Linton *v.* Housh, 4 Kan. 535.

Louisiana.— Brown *v.* Brown, 9 La. Ann. 310.

Massachusetts.— As a matter of form the amount of the costs should be stated in a decree. East Tennessee Land Co. *v.* Leeson, 185 Mass. 4, 69 N. E. 351.

Michigan.— Schroeder *v.* Boyce, 127 Mich. 33, 86 N. W. 387.

Minnesota.— See Richardson *v.* Rogers, 37 Minn. 461, 35 N. W. 270; Leyde *v.* Martin, 16 Minn. 38.

North Carolina.— Young *v.* Connelly, 112 N. C. 646, 17 S. E. 424.

Utah.— Smith *v.* Nelson, 23 Utah 512, 65 Pac. 485.

Wyoming.— Big Goose, etc., Co. *v.* Morrow. 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955.

United States.— Flynn *v.* Edwards, 36 Fed. 873.

See 30 Cent. Dig. tit. "Judgment," § 404.

Costs as separate item.— That costs were included in a judgment in a separate item was not erroneous, on the ground that defendant was thereby deprived of his right to move to retax the costs. Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76.

Costs after tender.— Under a statutory provision that on plaintiff's failure to recover a more favorable judgment than defendant has offered the latter shall be entitled to costs accruing after the offer, a single judgment should be entered for plaintiff for the amount recovered less defendant's costs. Coatsworth *v.* Ray, 28 N. Y. Civ. Proc. 6, 52 N. Y. Suppl. 498.

Error cured.— Any defect in a judgment because of uncertainty in the amount required thereby to be paid to a receiver as a reasonable fee is eliminated by his remitter of all fees. Watson *v.* Williamson, (Tex. Civ. App. 1903) 76 S. W. 793.

97. Mosher *v.* Uinta County, 2 Wyo. 462. *Compare* Edwards *v.* Farmers', etc., State Bank, 67 Kan. 67, 72 Pac. 534; Garner *v.* Hays, 3 Mo. 436.

Authority of clerk to insert amount of costs.— Since the amendment of the Practice Act in 1861, the clerk may insert the amount of the costs within two days after they shall have been taxed or retained in a blank left for that purpose. Antonia Co. *v.* Ridge Co., 23 Cal. 219.

98. See George P. Steel Iron Co. *v.* Jacobs, 9 Pa. Super. Ct. 122; Clarkson *v.* States, 4 Pa. Dist. 428.

99. **Designation of medium of payment in judgment against tax-collector** see Taxation.

1. Belford *v.* Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593; Duerson *v.* Bellows, 1 Blackf. (Ind.) 217; Marshall *v.* Grand Gulf R., etc., Co., 5 La. Ann. 360; Swain *v.* Smith, 65 N. C. 211.

2. Munter *v.* Rogers, 50 Ala. 283; Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272; Smith *v.* Dilland, 2 Duv. (Ky.) 152; Hord *v.* Miller, 2 Duv. (Ky.) 103; Johnson *v.* Vickers, 1 Duv. (Ky.) 266; Buchegger *v.* Schultz, 13 Mich. 420; Davis *v.* Field, 43 Vt. 221.

3. Chesapeake Bank *v.* Swain, 29 Md. 483; Quinn *v.* Lloyd, 1 Sweeny (N. Y.) 253. And see cases cited *infra*, this note.

Bank-notes.— In Kentucky under the act of Jan. 5, 1824, a judgment on any suit depending on a contract for the payment of notes of the bank of Kentucky or bank of the commonwealth, or for the payment of current paper of the state, shall be given for the amount of such debt to be discharged by paper of the same kind, provided that plaintiff makes a written statement on the declaration or warrant that he is willing to take such paper and discharge the debt, but this statute does not extend to a contract payable in part in bank-notes and in part in money (Kincaid *v.* Carpenter, 6 J. J. Marsh. (Ky.) 10; Stockton *v.* Scobie, 1 J. J. Marsh. (Ky.) 6; Dougherty *v.* Holloway, 5 T. B. Mon. (Ky.) 314); nor does it apply to actions on covenants made before the act was passed in which cases judgment is recoverable in money (Letcher *v.* Kennedy, 3 J. J. Marsh. (Ky.) 701; Gatewood *v.* Gatewood, 3 J. J.

coin,[4] or in current money,[5] except that where the contract contemplates payment in the currency of a foreign country, or in the notes of a particular bank, or anything else except current money of the United States, the value of the foreign money should be fixed by evidence, the exchange calculated, and the judgment given in American dollars and cents.[6] But in any case it is only in

Marsh. (Ky.) 117; Davis *v.* Phelps, 7 T. B. Mon. (Ky.) 632; Owens *v.* Holliday, 7 T. B. Mon. (Ky.) 296; Hardin *v.* Barbour, 6 T. B. Mon. (Ky.) 395; Duckham *v.* Smith, 5 T. B. Mon. (Ky.) 372; Feemster *v.* Ringo, 5 T. B. Mon. (Ky.) 336).

4. *California.*— At common law, a court has no power to order that a judgment shall be paid in gold or silver coin. Reed *v.* Eldredge, 27 Cal. 346. But in this state a statute provides that judgments in suits on contracts or obligations in writing for the direct payment of money may be made payable in the kind of money specified therein. Cal. Code Civ. Proc. § 667. And under this statute a judgment expressed to be payable in "gold coin" or "United States gold coin" is correct if the obligation in suit is so worded. Sheehy *v.* Chalmers, (1894) 36 Pac. 514; Chamberlin *v.* Vance, 51 Cal. 75; Winans *v.* Hassey, 48 Cal. 634; Belloc *v.* Davis, 38 Cal. 242; Gay *v.* Hamilton, 33 Cal. 686; Burnett *v.* Stearns, 33 Cal. 468; Reese *v.* Stearns, 29 Cal. 273; Lane *v.* Gluckauf, 28 Cal. 288, 87 Am. Dec. 121; McComb *v.* Reed, 28 Cal. 281, 87 Am. Dec. 115; Harding *v.* Cowing, 28 Cal. 212; Carpentier *v.* Atherton, 25 Cal. 564.

Colorado.— Hittson *v.* Davenport, 4 Colo. 169.

Illinois.— McGoon *v.* Shirk, 54 Ill. 408, 5 Am. Rep. 122. *Compare* Whetstone *v.* Colley, 36 Ill. 328.

Louisiana.— Lafitte *v.* Rivera, 23 La. Ann. 32. *Compare* Olanyer *v.* Blanchard, 18 La. Ann. 616.

Maryland.— Chesapeake Bank *v.* Swain, 29 Md. 483.

Massachusetts.— Paddock *v.* Commercial Ins. Co., 104 Mass. 521; Warren *v.* Franklin Ins. Co., 104 Mass. 518; Independent Ins. Co. *v.* Thomas, 104 Mass. 192. *Compare* Tufts *v.* Plymouth Gold Min. Co., 14 Allen 407; Wood *v.* Bullens, 6 Allen 516.

Missouri.— Foster *v.* Atlantic, etc., R. Co., 1 Mo. App. 390.

Montana.— Knox *v.* Gerhauser, 3 Mont. 267.

Nevada.— Linn *v.* Minor, 4 Nev. 462; Milliken *v.* Sloat, 1 Nev. 573. *Compare* Miller *v.* Cherry, 2 Nev. 165; Clark *v.* Burning Moscow Co., 2 Nev. 97; Hastings *v.* Burning Moscow Co., 2 Nev. 93; Burling *v.* Goodman, 1 Nev. 314; Maynard *v.* Newman, 1 Nev. 271.

New York.— Wild *v.* New York, etc., Silver Min. Co., 59 N. Y. 644; Kellogg *v.* Swecney, 46 N. Y. 291, 7 Am. Rep. 333; Chrysler *v.* Renois, 43 N. Y. 209; Ransford *v.* Marvin, 8 Abb. Pr. N. S. 432.

Ohio.— Phillips *v.* Dugan, 21 Ohio St. 466, 8 Am. Rep. 66.

Pennsylvania.— McCalla *v.* Ely, 64 Pa. St. 254; Benners *v.* Clemens, 58 Pa. St. 24.

Texas.— Bridges *v.* Reynolds, 40 Tex. 204; Smith *v.* Wood, 37 Tex. 616. *Compare* Central R. Co. *v.* George, 32 Tex. 568; Killough *v.* Alford, 32 Tex. 457, 5 Am. Rep. 249; Flournoy *v.* Healy, 31 Tex. 590; Windisch *v.* Gussett, 30 Tex. 744.

United States.— Trebilcock *v.* Wilson, 12 Wall. 687, 20 L. ed. 460; Dewing *v.* Sears, 11 Wall. 379, 20 L. ed. 189; Butler *v.* Horwitz, 7 Wall. 258, 19 L. ed. 149; Bronson *v.* Rodes, 7 Wall. 229, 19 L. ed. 141; Cheang-Kee *v.* U. S., 3 Wall. 320, 18 L. ed. 72; Edmondson *v.* Hyde, 8 Fed. Cas. No. 4,285, 2 Sawy. 205.

See 30 Cent. Dig. tit. "Judgment," § 405. And see BONDS, 5 Cyc. 855 *et seq.*

Market value of gold.— It is also held that where the contract was only solvable in coin, it would be improper to render judgment for the market value of that amount of coin calculated in terms of legal tender notes; the judgment must simply be for so much gold or silver. Foster *v.* Atlantic, etc., R. Co., 1 Mo. App. 390; Phillips *v.* Dugan, 21 Ohio St. 466, 8 Am. Rep. 66; Davis *v.* Mason, 3 Oreg. 154; Dewing *v.* Sears, 11 Wall. (U. S.) 379, 20 L. ed. 189. And see Henderson *v.* McPike, 35 Mo. 255.

If the contract is expressly solvable in gold coin of the United States it would be erroneous to give judgment simply for so many dollars. Winans *v.* Hassey, 48 Cal. 634; Meyer *v.* Kohn 29 Cal. 278; Emery *v.* Langley, 1 Ida. 694; Gregory *v.* Morris, 96 U. S. 619, 24 L. ed. 740; The Edith, 8 Fed. Cas. No. 4,281, 5 Ben. 144. *Compare* Prince Edward's Island Bank *v.* Trumbull, 53 Barb. (N. Y.) 459; Davis *v.* Mason, 3 Oreg. 154.

5. Cocke *v.* Kendall, 5 Fed. Cas. No. 2,929*b*, Hempst. 236.

Judgment on a contract payable in good and lawful money of the state should be expressed payable in the current money of the state (Moore *v.* Republic, 1 Tex. 563), or in federal money as that is lawful money of any state (Cocke *v.* Kendall, 5 Fed. Cas. No. 2,929*b*, Hempst. 236).

Where a promissory note is payable "in the currency of the country, but not in Confederate notes," recovery should be for such notes as are actually in circulation at the maturity of the note, although greatly depreciated in value. Coffin *v.* Hill, 1 Heisk. (Tenn.) 385.

6. *Kentucky.*— Griffith *v.* Miller, 6 J. J. Marsh. 329.

Louisiana.— Erlanger *v.* Avegno, 24 La. Ann. 77; Wilson *v.* Lambeth, 4 La. Ann. 351. *Compare* Roberts *v.* Wilkinson, 5 La. Ann. 369; Roberts *v.* Stark, 3 La. Ann. 71.

Mississippi.— Cowan *v.* McCutchen, 43 Miss. 207.

Virginia.— Scott *v.* Call, 1 Wash. 115.

respect of contracts expressly stipulating for payment in coin that judgments for coin can be entered.[7] Such a judgment is not permissible in an action for unliquidated damages,[8] or in an action of tort.[9] And although interest on a debt expressed to be payable in coin can be paid only in coined money,[10] yet the costs of the action may be paid in legal tender notes.[11]

d. Designation of Property.[12] When a judgment has to do with specific property, it is essential that the property be designated in the judgment with such a degree of certainty that it can be identified without reasonable opportunity for mistake.[13] But in this particular the judgment may be aided by intendments and additional data drawn from the pleadings and other parts of the record, or even extrinsic documentary evidence.[14]

Wisconsin.— Hawes *v.* Woolcock, 26 Wis. 629.

United States.— Patten *v.* U. S., 15 Ct. Cl. 288.

See 30 Cent. Dig. tit. "Judgment," § 438.

Contra.— See Lodge *v.* Spooner, 8 Gray (Mass.) 166.

Judgment on a contract payable in pounds sterling may formerly have been expressed in pounds sterling (Purviance *v.* Neave, 4 Harr. & M. (Md.) 199; Scott *v.* Call, 1 Wash. (Va.) 115); but now it should be reduced into currency, at the time of entering judgment on the contract, according to the rate of exchange then existing (Scott *v.* Hornsby, 1 Call (Va.) 41; Murphy *v.* Camac, 17 Fed. Cas. No. 9,948, 4 Wash. 307).

A judgment upon a contract payable in Confederate treasury notes should be for a sum equal to the value of those notes, in the legal tender currency of the United States at the time and place they were payable. Bissell *v.* Heyward, 96 U. S. 580, 24 L. ed. 678. See Ayres *v.* Daly, 56 Ga. 119. But see Martin *v.* Bartow Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320.

7. Noonan *v.* Hood, 49 Cal. 293.

Deposit in bank.— A person who deposited gold with a banker is only entitled to recover the amount in dollars and cents in the circulating medium of the country. Gumbel *v.* Abrams, 20 La. Ann. 568, 96 Am. Dec. 426 And where a special deposit of gold coin is turned into an open account, or an account stated, a judgment payable in gold coin cannot be recovered, unless there is a written contract to pay the balance in coin. Howard *v.* Roeben, 33 Cal. 399.

Coin "or its equivalent."— Where a note or other obligation is expressed to be payable in gold coin or its equivalent in United States legal tender notes, the judgment should follow the contract, fixing the amount to be paid if paid in gold, and the amount to be paid if paid in legal tender notes. Wells *v.* Van Sickle, 6 Nev. 45; Dunn *v.* Barnes, 73 N. C. 273; Mitchell *v.* Henderson, 63 N. C. 643. See Reese *v.* Stearns, 29 Cal. 273.

A condition in a note expressed to be payable in gold coin, that if it is paid at maturity or before suit brought it shall be payable in lawful money, does not impair the right, in case suit has to be brought, to recover judgment in gold coin. Churchman *v.* Martin, 54 Ind. 380.

Verdict for coined money.— Where there is no allegation in the complaint that there was an agreement to pay in gold coin, the court cannot render a judgment payable in gold, even if the verdict of the jury is for gold coin; for the verdict cannot go beyond the issues. Watson *v.* San Francisco, etc., R. Co., 50 Cal. 523.

8. Calhoun *v.* Pace, 37 Tex. 454.

9. Livingston *v.* Morgan, 53 Cal. 23; Patochi *v.* Central Pac. R. Co., 52 Cal. 90; Chamberlin *v.* Vance, 51 Cal. 75.

10. Chesapeake Bank *v.* Swain, 29 Md. 483; Chrysler *v.* Renois, 43 N. Y. 209.

11. Chrysler *v.* Renois, 43 N. Y. 209; Phillips *v.* Dugan, 21 Ohio St. 466, 8 Am. Rep. 66.

12. **Description of property in foreclosure decree** see MORTGAGES.

13. *Arkansas.*— Jones *v.* Minogue, 29 Ark. 637.

California.— Chapman *v.* Polack, (1884) 5 Pac. 232.

Kentucky.— Neff *v.* Covington Stone, etc., Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723, 21 Ky. L. Rep. 1454; McCue *v.* Sharp, 45 S. W. 770, 20 Ky. L. Rep. 216; Harrison *v.* Taylor, 43 S. W. 723, 19 Ky. L. Rep. 1191; McGuire *v.* Kirk, 26 S. W. 585, 16 Ky. L. Rep. 87.

Massachusetts.— Chamberlain *v.* Bradley, 101 Mass. 188, 3 Am. Rep. 331.

Texas.— Devine *v.* Keller, 73 Tex. 364, 11 S. W. 379; Hearne *v.* Erhard, 33 Tex. 60; Wingo *v.* Jones, (Civ. App. 1900) 59 S. W. 916; Birdseye *v.* Rogers, (Civ. App. 1894) 26 S. W. 841.

See 30 Cent. Dig. tit. "Judgment," § 406.

Property ordered to be sold.—Because there is a want of certainty in the description of land ordered to be sold to satisfy a judgment, it does not follow that the judgment is otherwise bad. Although such want of certainty renders void what it refers to, unless plaintiff in the execution be dissatisfied, no other person can complain. Gear *v.* Hart, 31 Tex. 135.

Personalty.— A judgment affecting numerous articles of personal property is not invalid because they are not separately assessed or valued. Brumby *v.* Langdon, 10 Ala. 747; Wright *v.* Henderson, 12 Tex. 43.

14. *Indiana.*— Threlkeld *v.* Allen, 133 Ind. 429, 32 N. E. 576.

Iowa.— Foster *v.* Bowman, 55 Iowa 237, 7

e. Conditions and Alternative Provisions. In an ordinary action at law the court cannot render a conditional judgment.[15] But in many states, and especially where the courts are invested with more or less of the authority of courts of equity, it is held permissible and proper to insert in a judgment such conditions or alternative provisions as are necessary to work out all the equities of the parties or make the judgment conform to their contract or undertaking.[16] And in suits for the recovery of personal property, the court may make a judgment ordering the restoration of the property or the payment of its value in default thereof.[17]

f. Provisions as to Payment and Enforcement. As a general rule a judgment has nothing to do with the means of its enforcement. It merely pronounces the sentence of the law, without directing how it shall be satisfied.[18] But a judgment may order payment to be made out of a particular fund, when the contract of the parties contemplates the payment out of such fund,[19] or may be adapted to the proportionate liabilities of the several defendants in the action,[20] or, in the case of a debt payable by instalments, the judgment may be so framed as to provide for its payment at successive periods, as the instalments fall due, or may order the payment of the amount presently due, with leave to plaintiff to take out execu-

N. W. 513. And see Coleman *v.* Reel, 75 Iowa 304, 39 N. W. 510, 9 Am. St. Rep. 484, holding that a judgment that plaintiff recover "the property in controversy," or in default thereof a sum fixed as its value, will not be reversed for uncertainty in the recovery, where, although the petition claims several articles, the record shows that the controversy was reduced to two of them.

Kentucky.— Four-Mile Land, etc., Co. *v.* Slusher, 107 Ky. 664, 55 S. W. 555, 21 Ky. L. Rep. 1427; Posey *v.* Green, 78 Ky. 162. *Compare* Neff *v.* Covington Stone, etc., Co., 108 Ky. 457, 55 S. W. 697, 56 S. W. 723, 21 Ky. L. Rep. 1454.

Maryland.— Jones *v.* Belt, 2 Gill 106.

Texas.— Sanger *v.* Roberts, 92 Tex. 312, 48 S. W. 1; Leavell *v.* Seale, (Civ. App. 1898) 45 S. W. 171; Spaulding *v.* Anders, (Civ. App. 1896) 35 S. W. 407; Martin *v.* Teal, (Civ. App. 1895) 29 S. W. 691.

See 30 Cent. Dig. tit. "Judgment," § 406.

15. Consolidated Min., etc., Co. *v.* Huff, 62 Kan. 405, 63 Pac. 442; Cox *v.* Bright, 65 Mo. App. 417; Hopkins *v.* Bowers, 111 N. C. 175, 16 S. E. 1; Strickland *v.* Cox, 102 N. C. 411, 9 S. E. 414; Johnson *v.* Carver, 175 Pa. St. 200, 34 Atl. 627. *Compare* Nimocks *v.* Pope, 117 N. C. 315, 23 S. E. 269.

16. *California.*— Leese *v.* Sherwood, 21 Cal. 151.

Indiana.— A judgment may in some cases be rendered in favor of a party on condition that he pay the costs. Chandler *v.* Chandler, 13 Ind. 492.

Iowa.— Hahn *v.* Cummings, 3 Iowa 583.

Louisiana.— In giving judgment such conditions may be annexed as may be equitable and necessary to protect the party cast against other prosecutions. So, where a judgment is in course of execution or a party garnished in another state, no judgment can be had on the same claim in this state, unless subject to the condition that no execution issue until the result of the proceedings in the other state be ascertained. West *v.* McConnell, 5 La. 424, 25 Am. Dec. 191; Robeson *v.* Carpenter, 7 Mart. N. S. 30; Bryans *v.* Dunseth, 1 Mart. N. S. 412; Carrol *v.* McDonogh, 10 Mart. 609.

Massachusetts.—Com. *v.* Pejepscut, 7 Mass. 399.

Minnesota.— Carlton *v.* Carey, 61 Minn. 318, 63 N. W. 611.

New Jersey.— Johnston *v.* Bowers, 69 N. J. L. 544, 55 Atl. 230.

Pennsylvania.— Harmar *v.* Holton, 25 Pa. St. 245. A party accepting a decree of a court in his favor cannot reject the conditions on which it is made. Ewing *v.* Filley, 43 Pa. St. 384.

See 30 Cent. Dig. tit. "Judgment," §§ 408, 409.

17. Mills *v.* Kansas Lumber Co., 26 Kan. 574; Bateman *v.* Dazy, 11 Rob. (La.) 484; Nicholls *v.* Hanse, 5 La. 475; Davis *v.* Calhoun, 41 Tex. 554; Cheatham *v.* Riddle, 8 Tex. 162; Wolf *v.* Lachman, (Tex. Civ. App. 1892) 20 S. W. 867.

18. It is no objection to the validity of a judgment that it does not declare that execution may issue. Bradley *v.* Clark, 3 Day (Conn.) 502.

Lien on realty.— A judgment on an ordinary promissory note, although given for the purchase-money of real estate, should not contain provisions declaring it a lien on such real estate and ordering that the same be sold to satisfy it; it should be an ordinary personal judgment against defendant, authorizing an ordinary execution to be issued against the property in general of the debtor. Greeno *v.* Barnard, 18 Kan. 518.

In an action begun by the arrest of defendant the judgment must be against defendant and not against his goods. It should be against defendant to be made of his goods only. Miller *v.* Tuttle, 5 N. J. L. 810.

Designation of payee.— A decree ordering the payment of money to the guardian of a minor includes a duty and obligation to pay it to the minor himself, where no guardian has been appointed for him. Johnson *v.* Bobbitt, 81 Miss. 339, 33 So. 73.

19. Cicero *v.* People, 105 Ill. App. 406.

20. Douglass *v.* Howland, 11 Ind. 554.

tions for the succeeding instalments.[21] So if the action is upon a written obligation which waives the benefit of exemption or stay laws or appraisement laws, the judgment may contain provisions giving effect to the waiver.[22] But a judgment entered for a certain amount, to be discharged on the payment of a less sum, is erroneous.[23]

g. Surplusage. A judgment is not vitiated by the addition to it of merely superfluous provisions or directions, or of matters which follow as the legal consequences of the judgment whether or not they are incorporated in it.[24]

B. Nature and Extent of Relief Awarded[25] — **1. In General.** Judgments are presumed to follow the obligations they enforce, unless in cases where the declaration or complaint does not follow the obligation.[26] But in general a judgment cannot be given for any matter which will or may happen posterior to its rendition,[27] or for claims which were not due at the time of the commencement of the action, although they may fall due *pendente lite*.[28]

2. As Measured by Plaintiff's Claims — a. Amount Indorsed on Summons. In some states plaintiff is required to indorse on the summons the amount for which judgment will be taken if defendant fails to appear, and the amount so indorsed is conclusive on plaintiff, so that it is error to render judgment for a larger sum,[29] unless where the excess is for interest accrued since the commencement of the suit,[30] or where defendant appears and answers to the merits.[31] But in other states plaintiff's recovery is not limited to the sum named in or indorsed upon the writ.[32]

b. Amount Demanded in Declaration or Complaint. It is a general rule that a judgment cannot properly be rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration

21. Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004; Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202; Thatcher *v.* Taylor, 3 Munf. (Va.) 249. Where a judgment orders the first instalment of a debt to be paid at a future day, and in a subsequent clause execution is awarded "forthwith" to collect such instalment, the last clause must be reversed for inconsistency, but it does not invalidate the whole judgment. Neff *v.* State, 3 Ind. 564.

22. See Smith *v.* Tatman, 71 Ind. 171; Pratt *v.* Wallbridge, 16 Ind. 147; Shaw *v.* Tatham, 15 Ind. 377; Davis *v.* Bond, 14 Ind. 7; Morton *v.* White, 5 Ind. 338; McLane *v.* Elmer, 4 Ind. 239; Little *v.* White, 3 Ind. 544; Develin *v.* Wood, 2 Ind. 102; Hageman *v.* Salisberry, 74 Pa. St. 280.

23. Steinback *v.* Lisa, 1 Mo. 228; Ross *v.* Gill, 1 Wash. (Va.) 87.

24. *California.*— Burke *v.* Carruthers, 31 Cal. 467.

Illinois.— Washington Park Club *v.* Baldwin, 59 Ill. App. 61; Board of Education *v.* Hoag, 25 Ill. App. 558.

Indiana.— Thorn *v.* Tyler, 3 Blackf. 504.

Kentucky.— Cleveland Orphan Inst. *v.* Helm, 74 S. W. 274, 24 Ky. L. Rep. 2485.

Maine.— Lancaster *v.* Richmond, 83 Me. 534, 22 Atl. 393.

Michigan.— Conlin *v.* Lamont Iron Co., 116 Mich. 626, 74 N. W. 1004.

New York.— Simmons *v.* Craig, 137 N. Y. 550, 33 N. E. 76.

Texas.— French *v.* Olive, 67 Tex. 400, 3 S. W. 568.

Virginia.—McMichen *v.* Amos, 4 Rand. 134.

Washington.— Barthrop *v.* Tucker, 29 Wash. 666, 70 Pac. 120.

See 30 Cent. Dig. tit. "Judgment," § 410.

25. Construction and operation of judgments see *infra*, XII.

26. U. S. *v.* Hawkins, 4 Mart. N. S. (La.) 317, joint or several liability of sureties on bail-bond.

It is error to give a double judgment for a single debt. Ashley *v.* Maddox, 30 Fed. Cas. No. 18,227, Hempst. 217.

27. Tourne *v.* Tourne, 9 La. 452; Elliott *v.* La Barre, 5 La. 223.

28. Taylor *v.* Richman, 87 Ill. App. 419; Dant *v.* Head, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369; Christen *v.* Rhulman, 24 La. Ann. 50; Osborne *v.* Powell, 17 La. Ann. 169. *Contra*, as to claims falling due *pendente lite* see Southern Pac. R. Co. *v.* Allen, (Cal. 1905) 40 Pac. 752; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 73 N. Y. 82.

Future instalments of same debt see *supra*, VI, A, 9, f.

29. Messervey *v.* Beckwith, 41 Ill. 452; Brown *v.* Phillips, 6 Ill. App. 250; Basset *v.* Mitchell, (Kan. 1888) 19 Pac. 671; Robinett *v.* Morris, Hard. (Ky.) 93; Cleveland Co-operative Stove Co. *v.* Grimes, 9 Nebr. 123, 2 N. W. 345; Watson *v.* McCartney, 1 Nebr. 131.

30. Elliott *v.* Knight, 64 Ill. App. 87; Graff *v.* Graybill, 1 Watts (Pa.) 428.

31. Erck *v.* Omaha Nat. Bank, 43 Nebr. 613, 62 N. W. 67.

32. Smith *v.* Keen, 26 Me. 411; Lynch *v.* Sinking Fund Com'rs, 4 How. (Miss.) 377;

or complaint.[33] And it is immaterial that the evidence may prove a greater debt

Smock *v.* Warford, 4 N. J. L. 306; Hopper *v.* Steelman, 3 N. J. L. 907.

33. *Alabama.*— Derrick *v.* Jones, 1 Stew. 18; Flournoy *v.* Childress, Minor 93; Dinsmore *v.* Austill, Minor 89.

Arkansas.— White *v.* Cannada, 25 Ark. 41; Hudspeth *v.* Gray, 5 Ark. 157.

California.— Kerry *v.* Pacific Mar. Co., 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65; Foley *v.* Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; Bond *v.* Pacheco, 30 Cal. 530; Lamping *v.* Hyatt, 27 Cal. 99.

Colorado.— Smith *v.* Morrison, 19 Colo. App. 154, 74 Pac. 535; Wheeler *v.* Mayher, 15 Colo. App. 179, 61 Pac. 623. *Compare* Ohio Creek Anthracite Coal Co. *v.* Hinds, 15 Colo. 173, 25 Pac. 502.

Connecticut.— Davenport *v.* Bradley, 14 Conn. 309; Smith *v.* Allen, 5 Day 337.

District of Columbia.— Denison *v.* Lewis, 5 App. Cas. 308.

Florida.— Stockton *v.* Jacksonville, etc., R. Co., 44 Fla. 728, 33 So. 401; Southern Bell Tel., etc., Co. *v.* D'Alemberte, 39 Fla. 25, 21 So. 570.

Georgia.— Lester *v.* Cloud, 67 Ga. 770.

Illinois.— Sawyer *v.* Daniels, 48 Ill. 269; Pierson *v.* Finney, 37 Ill. 29; Altes *v.* Hinckler, 36 Ill. 275, 85 Am. Dec. 407; Brown *v.* Smith, 24 Ill. 196; Thompson *v.* Turner, 22 Ill. 389; Oakes *v.* Ward, 19 Ill. 46; Stephens *v.* Sweeney, 7 Ill. 375; Taylor *v.* Richman, 87 Ill. App. 419.

Indiana.— Helms *v.* Kearns, 40 Ind. 124; Gaff *v.* Hutchinson, 38 Ind. 341; Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137; May *v.* State Bank, 9 Ind. 233; Hay *v.* McCoy, 6 Blackf. 69. But *compare* Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042, holding that, where the complaint demands a money judgment in a specified sum, and defendant answers, judgment may be rendered for a greater sum than that demanded should the case justify it.

Iowa.— Mann *v.* Howe, 9 Iowa 546; Haven *v.* Baldwin, 5 Iowa 503; Stiles *v.* Brown, 3 Greene 589. *Contra*, see Johnson *v.* Rider, 84 Iowa 50, 50 N. W. 36.

Kansas.— St. Louis, etc., R. Co. *v.* Armstrong, 25 Kan. 561.

Kentucky.— Rowan *v.* Lee, 3 J. J. Marsh. 97; Feemster *v.* Johnson, 1 J. J. Marsh. 68; Edwards *v.* Wiester, 2 A. K. Marsh. 382; Robinett *v.* Morris, Hard. 93; Reccius *v.* Louisville, 66 S. W. 410, 23 Ky. L. Rep. 1832; Chaney *v.* Ramey, 43 S. W. 235, 19 Ky. L. Rep. 1258. See Russellville Bank *v.* Coke, 45 S. W. 867, 20 Ky. L. Rep. 291.

Louisiana.— Carre *v.* Massie, 113 La. 608, 37 So. 530; Claverie's Succession, 34 La. Ann. 1122; Mackey *v.* Thompson, 17 La. Ann. 65; Sainet *v.* Sainet, 8 Mart. N. S. 468; Barckley *v.* Evans, 2 Mart. N. S. 241; Church Wardens *v.* Peytavin, 1 Mart. N. S. 400.

Massachusetts.— Hemmenway *v.* Hickes, 4 Pick. 497; Grosvenor *v.* Danforth, 16 Mass. 74.

Michigan.— Bennett *v.* Smith, 40 Mich. 211.

Minnesota.— Nichols, etc., Co. *v.* Wiedemann, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41.

Mississippi.— See Montgomery *v.* Hanover Nat. Bank, 79 Miss. 443, 30 So. 635.

Missouri.— State *v.* Davidson, 87 Mo. 683; Pope *v.* Salsman, 35 Mo. 362; Beckwith *v.* Boyce, 12 Mo. 440; Hayton *v.* Hope, 3 Mo. 53; Powell *v.* Horrell, 92 Mo. App. 406; Cauthorn *v.* Berry, 69 Mo. App. 404; Girvin *v.* St. Louis Refrigerator, etc., Co., 66 Mo. App. 315; Poulson *v.* Collier, 18 Mo. App. 583. See Dickey *v.* Covenant Mut. Life Assoc., 82 Mo. App. 372. *Compare* Kansas *v.* Johnson, 78 Mo. 661. And see Impkamp *v.* St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119; Hyatt *v.* Loyal Protective Assoc., 106 Mo. App. 610, 81 S. W. 470.

Nebraska.— Davis *v.* Hall, (1904) 97 N. W. 1023; Van Etten *v.* Kosters, 48 Nebr. 152, 66 N. W. 1106.

New Jersey.— Lake *v.* Merrill, 10 N. J. L. 288; Hawk *v.* Anderson, 9 N. J. L. 319; Darnel *v.* Park, 3 N. J. L. 1004; Still *v.* Earle, 3 N. J. L. 868; Johnson *v.* Van Doren, 2 N. J. L. 374; Cortleyou *v.* Cortleyou, 2 N. J. L. 318.

New York.— Cohen *v.* Wittemann, 100 N. Y. App. Div. 338, 91 N. Y. Suppl. 493; Lifschitz *v.* McConnell, 80 N. Y. App. Div. 289, 80 N. Y. Suppl. 253; Morrison *v.* L'Hommedieu, 15 N. Y. App. Div. 623, 44 N. Y. Suppl. 79; Green *v.* Easton, 74 Hun 329, 26 N. Y. Suppl. 553; Wall *v.* Emigrant Industrial Sav. Bank, 64 Hun 249, 19 N. Y. Suppl. 194; Andrews *v.* Monilaws, 8 Hun 65; Robinson *v.* Ficken, 10 Misc. 758, 32 N. Y. Suppl. 118; Shapiro *v.* McLaughlin, 6 Misc. 146, 25 N. Y. Suppl. 1117; Droege *v.* Interurban St. R. Co., 91 N. Y. Suppl. 71; Muller *v.* Barker, 90 N Y. Suppl. 388.

Pennsylvania.— Dennison *v.* Leech, 9 Pa. St. 164.

South Carolina.— Straub *v.* Screven, 19 S. C. 445.

Texas.— Janson *v.* Bank of Republic, 48 Tex. 599; Hillebrant *v.* Barton, 39 Tex. 599; Houston, etc., R. Co. *v.* McMillan, (Civ. App. 1904) 84 S. W. 296; White *v.* Simonton, 34 Tex. Civ. App. 464, 79 S. W. 621; Missouri, etc., R. Co. *v.* Reasor, 28 Tex. Civ. App. 302, 68 S. W. 332; Cook *v.* Arnold, (Civ. App. 1896) 36 S. W. 343; Warren *v.* Prewett, (Civ. App. 1894) 25 S. W. 647; Wilkins *v.* Burns, (Civ. App. 1893) 25 S. W. 431.

Vermont.— Chaffee *v.* Hooper, 54 Vt. 513; Anonymous, Brayt. 72.

Virginia.— Gibson *v.* Governor, 11 Leigh 600; Tennant *v.* Gray, 5 Munf. 494; Cloud *v.* Campbell, 4 Munf. 214.

Wisconsin.— Beranek *v.* Beranek, 113 Wis. 272, 89 N. W. 146.

United States.— Gentry *v.* U. S., 101 Fed. 51, 41 C. C. A. 185; Hogan *v.* Taylor, 12 Fed. Cas. No. 6,584*a*, Hempst. 20. And see Brought

or a greater amount of damage than was alleged by plaintiff.[34] A judgment for a greater sum than that laid in the complaint or declaration cannot stand even though defendant confesses judgment for the larger amount[35] or withdraws his pleas.[36] But the rule does not prohibit the addition of costs to the amount of the recovery, although this may swell the total beyond the sum claimed in the declaration;[37] nor will it prevent the addition of interest lawfully accruing on plaintiff's claim,[38] although it bars the addition of an attorney's fee if the result would be to make the recovery exceed plaintiff's demand.[39] But a judgment rendered for an excessive amount is not absolutely void. It is erroneous and liable to reversal, and may be voidable *in toto* or as to the excess; but it is a valid adjudication until the proper steps are taken against it.[40] The judgment may be rectified by reducing the amount of the recovery, or it may be ordered reversed unless plaintiff will remit the excess.[41] It is also held that a judgment for less than the amount claimed in the complaint is erroneous, as not according to the allegations and proof, where there is no evidence on which a reduction of the claim could be based.[42]

c. Prayer For Relief. On a bill in equity, or a complaint under the reformed codes of procedure, where the complainant has asked for specific relief in the premises, or relief as to a specific subject-matter, no more extensive relief can properly be accorded to him.[43] But where a prayer for general relief is added to

v. Cherokee Nation, 129 Fed. 192, 63 C. C. A. 350.

See 30 Cent. Dig. tit. "Judgment," §§ 443, 444.

34. Lister *v.* Vowell, 122 Ala. 264, 25 So. 564; Denison *v.* Lewis, 5 App. Cas. (D. C.) 328; Cauthorn *v.* Berry, 69 Mo. App. 404.

Contra, in Montana, the amount of damages claimed in a complaint is not a material averment, but plaintiff may recover the damages he proves. Loeb *v.* Kamak, 1 Mont. 152. And see Becker *v.* Yellowstone County, 10 Mont. 87, 24 Pac. 700.

Amended petition.— If plaintiff amends his petition and issue is joined thereon, his recovery will not be limited to the amount claimed in the original petition. Kohn *v.* Johnson, (Iowa 1899) 80 N. W. 543. Or, in proper cases, the complaint will be deemed to have been amended so as to demand judgment for the amount actually recovered. Carpenter *v.* Sheldon, 22 Ind. 259.

Account render.— In an early case in Pennsylvania, it was said that in an action of account render plaintiff might have judgment to a greater amount than the damages laid in the declaration. Gratz *v.* Phillips, 5 Binn. (Pa.) 564.

Arbitration and award.— It appears that judgment may be rendered for an amount exceeding the *ad damnum* in the writ, after the action, together with other claims of plaintiff against defendant, has been referred to arbitrators under a rule of court. Day *v.* Berkshire Woollen Co., 1 Gray (Mass.) 420.

35. Lester *v.* Cloud, 67 Ga. 770.

36. Janson *v.* Bank of Republic, 48 Tex. 599.

37. Reed *v.* Corrigan, 114 Iowa 638, 87 N. W. 676; French *v.* Goodnow, 175 Mass. 451, 56 N. E. 719. *Compare* Hight *v.* White, 1 Morr. (Iowa) 45.

38. Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366. And see Manogue *v.* Kearney, 19 App. Cas. (D. C.) 448.

39. Skym *v.* Weske Consol. Co., (Cal. 1896) 47 Pac 116.

40. Bond *v.* Pacheco, 30 Cal. 530; Gum-Elastic Roofing Co. *v.* Mexico Pub. Co., 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700; Lawton *v* Nicholas, 12 Okla. 550, 73 Pac. 262; Chaffee *v.* Hooper, 54 Vt. 513.

41. *Alabama.*— Lister *v.* Vowell, 122 Ala. 264, 25 So. 564.

Illinois.— Bartling *v.* Thielman, 183 Ill. 88, 55 N. E. 677.

North Carolina.— Anthony *v.* Estes, 101 N. C. 541, 8 S. E. 347.

Texas.— Peet *v.* Hereford, 1 Tex. App. Civ. Cas. § 869.

Washington.—Belle City Mfg. Co. *v.* Kemp, 27 Wash. 111, 67 Pac. 580.

Canada.— Halifax *v.* Bent, 33 Nova Scotia 546.

See 30 Cent. Dig. tit. "Judgment," § 443.

42. Owens *v.* Flynn, 7 Misc. (N. Y.) 171, 27 N. Y. Suppl. 336.

43. *Connecticut.*— Jenner *v.* Brooks, 77 Conn. 384, 59 Atl. 508.

Illinois.— Dodge *v.* Wright, 48 Ill. 382. A decree cannot give relief which facts disclosed by the evidence would warrant, unless there are averments in the bill to which the evidence can be applied. Wheeler *v.* Foster, 82 Ill. App. 153.

Iowa.— Brown *v.* Iowa L. of H., 107 Iowa 439, 78 N. W. 73; Lafever *v.* Stone, 55 Iowa 49, 7 N. W. 400.

Kentucky.— Miller *v.* Allen, 104 Ky. 114. 46 S. W. 523, 20 Ky. L. Rep. 463.

Louisiana.— Sprigg *v.* Beaman, 6 La. 59; Lynch *v.* Postlethwaite, 7 Mart. 293. *Compare* Carson *v.* Dwight, 5 Rob. 484; Gottschalk *v.* De la Rosa, 6 La. 219.

Missouri.— Johns *v.* Riley, 65 Mo. App. 356.

the demand of specific relief, the court is not limited to the specific demand, but may grant such other appropriate relief as may be consistent with the allegations and proofs and necessary to adjust fully the equities of the case.[44] Nevertheless even under a prayer for general relief, the court cannot go outside the issues and decree in favor of plaintiff on grounds not alleged, although they may appear in evidence, or grant relief inconsistent with that which is prayed or entirely different from it.[45] Under the code practice it is generally provided that if there be no answer the relief granted cannot exceed that which plaintiff shall have demanded in his complaint.[46] But if defendant answers, the court may grant

New York.— Where only equitable relief is asked in an action on a contract, and the court finds that plaintiff is not entitled to equitable relief, it cannot retain the action as one at law, and assess damages on facts not alleged, but must dismiss the complaint. Gall *v.* Gall, 17 N. Y. App. Div. 312, 45 N. Y. Suppl. 248. But where plaintiff alleges facts entitling him to both legal and equitable relief, and demands both, the court may award either that is appropriate to the case made by the proof. Johnson *v.* Hathorn, 2 Abb. Dec. 465.

Pennsylvania.— Johnson's Appeal, 9 Pa. St. 416.

South Carolina.— Cauthen *v.* Cauthen, 70 S. C. 167, 49 S. E. 321.

Texas.— Oustott *v.* Oustott, 27 Tex. 643; Moore *v.* Guest, 8 Tex. 117; Johnson *v.* Brown, (Civ. App. 1901) 65 S. W. 485; Smith *v.* So Rill, (Civ. App. 1899) 54 S. W. 38; Holland *v.* Preston, (Civ. App. 1897) 41 S. W. 374; Lee *v.* British, etc., Mortg. Co., 16 Tex. Civ. App. 671, 40 S. W. 1041; Allen *v.* Waddill, (Civ. App. 1894) 26 S. W. 273; Peet *v.* Hereford, 1 Tex. App. Civ. Cas. § 869; Blum *v.* Ferguson, 1 Tex. App. Civ. Cas. § 581; Osborne *v.* Barnett, 1 Tex. App. Civ. Cas. § 125.

United States.— Eddy, etc., Live-Stock Co. *v.* Blackburn, 70 Fed. 949, 17 C. C. A. 532.

See 30 Cent. Dig. tit. "Judgment," §§ 441, 442.

Variance between judgment and petition.— A cause will not be reversed for variance between the judgment and the prayer of the petition, where the judgment substantially follows the prayer and the variance is so slight that plaintiff would be allowed to amend at any time without costs (Mitchell *v.* Milhoan, 11 Kan. 617); a material variance, however, will be fatal to the validity of the judgment (Condit *v.* Stevenson, 13 Ill. App. 417).

After verdict for defendant on the cause of action set out in the petition, plaintiff cannot have judgment *non obstante veredicto* on a new and different cause of action disclosed in the answer. Beetz *v.* Strobel, 6 Ohio S. & C. Pl. Dec. 143, 4 Ohio N. P. 166.

Relief less extensive than prayer.— The fact that more extensive relief of the same general nature is prayed in the bill than is warranted by the proofs does not preclude giving so much as the evidence will sustain. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

44. *Alabama.*— Kelly *v.* Payne, 18 Ala. 371.

Arkansas.— Rogers *v.* Brooks, 30 Ark. 612.

Iowa.— Laverty *v.* Sexton, 41 Iowa 435.

Kentucky.— Allen *v.* Coffman, 1 Bibb 469.

Louisiana.— Bradford *v.* Clark, 7 La. 147; Smith *v.* Corcoran, 7 La. 46; Gottschalk *v.* De la Rosa, 6 La. 219; Dubourg *v.* Anderson, 7 Mart. 268.

Michigan.— Van Voorhis *v.* Bond, 110 Mich. 3, 67 N. W. 974.

New Hampshire.— Stone *v.* Anderson, 26 N. H. 506.

New York.— Colton *v.* Ross, 2 Paige 396, 22 Am. Dec. 648; Wilkin *v.* Wilkin, 1 Johns. Ch. 111.

South Carolina.— Barr *v.* Haseldon, 10 Rich. Eq. 53.

Tennessee.— Galloway *v.* Galloway, 2 Baxt. 328.

Texas.— McLane *v.* Mackey, (Civ. App. 1900) 59 S. W. 944. And see Ellis *v.* National Exch. Bank, (Civ. App. 1905) 86 S. W. 776.

West Virginia.— Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

United States.— Jonathan Mills Mfg. Co. *v.* Whitehurst, 72 Fed. 496, 19 C. C. A. 130.

See 30 Cent. Dig. tit. "Judgment," § 441.

45. *Arkansas.*— Rogers *v.* Brooks, 30 Ark. 612.

California.— Carpentier *v.* Brenham, 50 Cal. 549.

Kentucky.— Miller *v.* Allen, 104 Ky. 114, 46 S. W. 523, 20 Ky. L. Rep. 463; Sinking Fund Com'rs *v.* Mason, etc., Co., 41 S. W. 548, 19 Ky. L. Rep. 771; McIlvain *v.* Porter, 7 S. W. 309, 8 S. W. 705, 9 Ky. L. Rep. 899.

Michigan.— Coulin *v.* Lamont Iron Co., 116 Mich. 626, 74 N. W. 1004.

New York.— Rome Exch. Bank *v.* Eames, 4 Abb. Dec. 83.

Texas.— Behrens Drug Co. *v.* Hamilton, (Civ. App. 1898) 45 S. W. 622.

United States.— Wilson *v.* Graham, 30 Fed. Cas. No. 17,804, 4 Wash. C. C. 53.

See 30 Cent. Dig. tit. "Judgment," §§ 441, 442.

46. Prince *v.* Farrell, 32 Minn. 293, 20 N. W. 234; Minnesota Linseed Oil Co. *v.* Maginnis, 32 Minn. 193, 20 N. W. 85.

Measure of relief.— In some states, under a provision of this kind, it is held that it is improper to grant plaintiff any other relief than that prayed for. Foley *v.* Foley, 120

any relief which is consistent with the case made by the pleadings.[47] And indeed in many of the cases we find a much broader rule stated, viz., that the prayer for relief in a complaint is not conclusive as to the relief to which plaintiff is entitled, but the court may give such relief as he is entitled to on the facts stated and proved or admitted.[48]

3. INTEREST. If plaintiff is entitled to interest on his claim or demand, it should be found by the jury and included in their verdict,[49] and the verdict is sufficient in this respect if, without specifying the amount of the interest allowed, it contains data from which it can be calculated with certainty and precision.[50]

Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; Halvorsen *v.* Orinoco Min. Co., 89 Minn. 470, 95 N. W. 320. Under this clause, where the complaint contains no prayer for damages, a judgment on default awarding damages is erroneous, although the complaint states facts sufficient to sustain such a judgment. Pittsburgh Coal Min. Co. *v.* Greenwood, 39 Cal. 71. And see Miner *v.* Pearson, 16 Kan. 27; Olcott *v.* Kohlsaat, 8 N. Y. Suppl. 116, 117.

In New York it is ruled that he may have any relief to which the facts entitle him, consistent with that demanded in the complaint. Hale *v.* Omaha Nat. Bank, 49 N. Y. 626; Hagar *v.* Townsend, 67 Fed. 433. *Compare* Gall *v.* Gall, 17 N. Y. App. Div. 312, 45 N. Y. Suppl. 248.

What constitutes defense.— The filing of a demurrer is not the making of a defense within the meaning of these statutes. Sinking Fund Com'rs *v.* Mason, etc., Co., 41 S. W. 548, 19 Ky. L. Rep. 771.

47. *California.*— Ellis *v.* Rademacher, 125 Cal. 556, 58 Pac. 178; Poledori *v.* Newman, 116 Cal. 375, 48 Pac. 325; Chase *v.* Christianson, 41 Cal. 253.

Indiana.— Evans *v.* Schafer, 119 Ind. 49, 21 N. E. 448; Humphrey *v.* Thorn, 63 Ind. 296; Resor *v.* Resor, 9 Ind. 347; Mandlove *v.* Lewis, 9 Ind. 194; Colson *v.* Smith, 9 Ind. 8.

Iowa.— Marder *v.* Wright, 70 Iowa 42, 29 N. W. 799.

Kentucky.— Russellville Bank *v.* Coke, 45 S. W. 867, 20 Ky. L. Rep. 291.

Missouri.— State *v.* Adler, 97 Mo. 413, 10 S. W. 824; Ashby *v.* Winston, 26 Mo. 210.

Nebraska.— Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150.

New York.— Rider *v.* Foggan, 133 N. Y. 620, 30 N. E. 1150; Redpath *v.* Redpath, 75 N. Y. App. Div. 95, 77 N. Y. Suppl. 668; Eldridge *v.* Adams, 54 Barb. 417; Saltus *v.* Genin, 3 Bosw. 250.

South Carolina.— Hamilton *v.* McAlister, 49 S. C. 230, 27 S. E. 63.

See 30 Cent. Dig. tit. "Judgment," §§ 441, 442.

Changing form of action.— Under Iowa Code, § 2514, which provides for a change into the proper proceedings in case a wrong proceeding is adopted, a proper judgment at law for the amount of the claim will be given, although the proceeding was erroneously commenced in equity to establish a mechanic's lien. Swift *v.* Calnan, 102 Iowa 206, 71 N. W. 233, 63 Am. St. Rep. 443, 37 L. R. A. 462.

48. *Colorado.*— Ross *v.* Purse, 17 Colo. 24, 28 Pac. 473.

Indiana.— McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Huston *v.* Whitsell, 48 Ind. 129.

Kansas.— Atchison First Nat. Bank *v.* Wattles, 8 Kan. App. 136, 54 Pac. 1103.

Missouri.— McGrew *v.* Missouri Pac. R. Co., 87 Mo. App. 250; Gunnell *v.* Emerson, 80 Mo. App. 322.

Nebraska.— Solt *v.* Anderson, 63 Nebr. 734, 89 N. W. 306; Toy *v.* McHugh, 62 Nebr. 820, 87 N. W. 1059.

New Hampshire.— Kittredge *v.* Emerson, 15 N. H. 227.

New York.— Bergmann *v.* Salmon, 79 Hun 456, 29 N. Y. Suppl. 968; Eldredge *v.* Adams, 54 Barb. 417; Muehlberger *v.* Schilling, 3 N. Y. Suppl. 705.

North Carolina.— Hendon *v.* North Carolina R. Co., 127 N. C. 110, 37 S. E. 155; Reade *v.* Street, 122 N. C. 301, 30 S. E. 124; Patrick *v.* Richmond, etc., R. Co., 93 N. C. 422; Dempsey *v.* Rhodes, 93 N. C. 120.

See 30 Cent. Dig. tit. "Judgment," §§ 441, 442.

The contrary view.— In several states it is held that this equitable power of the courts will not justify them in awarding to plaintiff, upon a replication, an entirely different judgment from that prayed for in his petition. Hibernia Sav., etc., Soc. *v.* Thornton, 123 Cal. 62, 55 Pac. 702; Eastlick *v.* Wright, 121 Cal. 309, 53 Pac. 654; Marder *v.* Wright, 70 Iowa 42, 29 N. W. 799; Lazarus *v.* Barrett, 5 Tex. Civ. App. 5, 23 S. W. 822.

49. A verdict assessing the damages at a certain sum with interest is sufficient to sustain judgment for the amount stated without the interest. Wiseman *v.* Ziegler, 41 Nebr. 886, 60 N. W. 320.

Remittitur.— A judgment cannot include interest, although given by the verdict, when a remittitur for it is entered. Flower *v.* Williams, 1 La. 22.

Excessive interest.— Interest cannot be allowed to an amount in excess of that demanded, or from a time prior to that from which interest is asked. Carter Brick Co. *v.* Clement, (Tex. Civ. App. 1904) 84 S. W. 434; Missouri, etc., R. Co. *v.* Dawson, (Tex. Civ. App. 1904) 84 S. W. 298.

50. *Kansas.*— Mills *v.* Mills, 39 Kan. 455, 18 Pac. 521; Citizens' Bank *v.* Bowen, 25 Kan. 117.

But if the jury does not allow interest in its verdict, the court cannot allow it, and it is error to give judgment for interest in addition to the amount of the verdict.[51] But interest may be allowed on the verdict, from the time of its return to the entry of judgment, if the delay in entering judgment was caused by defendant's unsuccessful motion for a new trial.[52] Similar rules obtain in cases tried without a jury. Interest may be included in the recovery, in proper cases, but the finding in regard to it must be certain and definite as to amount.[53] By statute in most of the states interest is allowed upon judgments; and it may be proper to insert in the judgment a direction as to the rate of interest it shall bear, particularly where such rate corresponds with that fixed in the contract in suit and is different from the ordinary legal rate of interest;[54] but generally such a direction forms no proper part of the judgment, the interest recoverable upon it being dependent entirely upon the statute, and not being a matter of judicial determination.[55]

4. Personal Judgment in Proceedings In Rem.[56] Although a judgment in proceedings *in rem* is properly against the *res* only,[57] yet if defendant appears and defends the action on the merits a personal judgment against him may be rendered, if the facts will justify and sustain it.[58]

5. Statutory Penalty or Damages. Where a statute imposes a penalty for the commission or omission of a certain act, the judgment, if for plaintiff, must be for the full amount of the penalty, and the courts have no power to mitigate it.[59] And where the statute gives double or treble damages, the jury, if they find for

Nevada.— Allen *v.* Reilly, 15 Nev. 452.

New Jersey.— Carpenter *v.* Dickson, 60 N. J. L. 375, 41 Atl. 21.

South Carolina.— State Bank *v.* Bowie, 1 McMull. 429.

United States.— American Nat. Bank *v.* National Wall-Paper Co., 77 Fed. 85, 23 C. C. A. 33.

See 30 Cent. Dig. tit. "Judgment," § 453.

51. *Iowa.*— Flanagan *v.* McWilliams, 52 Iowa 148, 2 N. W. 1062.

Kansas.— Southern Kansas R. Co. *v.* Showalter, 57 Kan. 681, 47 Pac. 831; Carter *v.* Christie, 1 Kan. App. 604, 42 Pac. 256.

Kentucky.— Martin *v.* Com., 6 J. J. Marsh. 549; Russell *v.* Shepherd, Hard. 44.

Louisiana.— Wichtrecht *v.* Fasnacht, 17 La. Ann. 166; Cochrane *v.* Murphy, 4 La. Ann. 6; Chain *v.* Kelso, 7 Mart. N. S. 263; Dale *v.* Downs, 7 Mart. N. S. 224; Commandeur *v.* Russell, 5 Mart. N. S. 456; Bedford *v.* Jacobs, 5 Mart. N. S. 448; Decuir *v.* Packwood, 5 Mart. 300. *Compare* McMicken *v.* Millaudon, 2 La. 180.

Montana.— Gillett *v.* Clark, 6 Mont. 190, 9 Pac. 823.

Texas.— Akiu *v.* Jefferson, 65 Tex. 137; Shearer *v.* Smith, 35 Tex. 427; Goggan *v.* Evans, 12 Tex. Civ. App. 256, 33 S. W. 891; Smith *v.* Smith, 10 Tex. Civ. App. 485, 32 S. W. 28; Freiberg *v.* Brunswick-Balke-Collender Co., (App. 1890) 16 S. W. 784.

Virginia.— See Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

Wisconsin.— See Diedrich *v.* Northwestern Union R. Co., 47 Wis. 662. 3 N. W. 749.

See 30 Cent. Dig. tit. "Judgment," § 453.

Compare Louisville, etc., R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

52. Gibson *v.* Cincinnati Enquirer, 10 Fed. Cas. No. 5,391, 2 Flipp. 88.

53. Bell *v.* Ardis, 38 Mich. 609.

Excessive interest.— Where too much interest is calculated and included in the judgment, the error may be corrected on motion or amended in the appellate court. Spence *v.* Rutledge, 11 Ala. 590. But see Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184, holding that the objection that too large an amount of interest has been included in a judgment cannot be raised for the first time in the appellate court. And see Wright *v.* Seeley, 96 Mich. 491, 56 N. W. 86.

Compound interest.— Where, on a bill to foreclose a mortgage, defendant entered his consent to the allowance of compound interest, the court would not afterward permit him to withdraw it. Booker *v.* Gregory, 7 B. Mon. (Ky.) 439.

54. See Campbell *v.* Mesier, 6 Johns. Ch. (N. Y.) 21; Smith *v.* Martin, 7 Coldw. (Tenn.) 272; Cruger *v.* Sullivan, 11 Tex. Civ. App. 377, 32 S. W. 448; Campbell *v.* State Cent. Bank, 1 Tex. App. Civ. Cas. § 378.

55. See Kofoed *v.* Coshy, 122 Cal. 314, 54 Pac. 1115; Pearsons *v.* Hamilton, 2 Ill. 415; Simmons *v.* Garrett, McCahon (Kan.) 511; Byrd *v.* Gasquet, 4 Fed. Cas. No. 2,268*a*, Hempst. 261.

56. **Personal judgment for deficiency on foreclosure of mortgage** see, generally, Mortgages.

Personal judgment for deficiency on partition suits see, generally, Partition.

57. Wintz *v.* Webb, 14 N. C. 27.

58. Miller *v.* Whitehead, 66 Ga. 283; Frink *v.* King, 4 Ill. 144; Huxley *v.* Harrold, 62 Mo. 516.

59. Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780; Powell *v.* Redfield, 19 Fed. Cas. No. 11,359, 4 Blatchf. 45;

plaintiff, should assess his damages and increase them by the statutory multiple; but if the verdict finds only single damages, the court may perform the multiplication and order the entry of judgment for the larger amount.[60]

6. CONFORMITY TO VERDICT. In respect to the amount of the recovery, as in other particulars, the judgment must conform to the verdict, the successful party being entitled to a judgment for just what the jury have allowed him,[61] unless the verdict is erroneous through a mere miscalculation, which can be corrected by a proper computation;[62] and it is equally erroneous to render a judgment for an amount less than the verdict,[63] except where a remittitur is entered,[64] or for an amount greater than that found by the jury,[65] although it has been held in the

U. S. *v.* Montell, 26 Fed. Cas. No. 15,798, Taney 47.

60. *California.*— Chipman *v.* Emeric, 5 Cal. 239.

Maine.— Palmer *v.* York Bank, 18 Me. 166, 36 Am. Dec. 710.

Michigan.— Osborn *v.* Lovell, 36 Mich. 246.

Missouri.— Shrewsbury *v.* Bawtlitz, 57 Mo. 414.

Pennsylvania.— Royse *v.* May, 93 Pa. St. 454.

Applying verdict.—Under a declaration containing a count for a common-law trespass and a count for a statutory trespass, where a general verdict of guilty is returned, it is not competent for the court to apply the verdict to the count under the statute and proceed to render judgment for treble the damages returned. Osborn *v.* Lovell, 36 Mich. 246. And see Brown *v.* Penobscot Bank, 8 Mass. 445.

61. See Dyer *v.* Hatch, 1 Ark. 339; Ward *v.* Thompson, 48 Iowa 588; John A. Tolman Co. *v.* Savage, 5 S. D. 496, 59 N. W. 882; Tripis *v.* Rosborough, (Tex. Civ. App. 1893) 23 S. W. 231.

General finding.— If the jury find for plaintiff in general terms, he will be entitled to judgment for the whole amount of his demand, if it is a liquidated sum. Medler *v.* Hiatt, 14 Ind. 405. And see Haffield *v.* Pain, 17 Ind. App. 347, 46 N. E. 653. But see Hirth *v.* Lynch, 96 Ill. 409, where a verdict was returned as follows: "We, the jury in the above case, find for plaintiff," and to these words the clerk, in making up his record, added, "and assess his damages at" a certain sum, and it was held that the judgment for this sum should be set aside.

Indefinite verdict.— When the jury returns a verdict for a specific sum "subject to a set-off of a certain number of dollars, if such set-off has not been already paid," judgment should be rendered for the sum specified, and the rest of the verdict should be rejected as surplusage. Hawkins *v.* House, 65 N. C. 614.

Segregation of items.— A judgment in trover for the assessed aggregate value of the chattels sued for, in case of non-delivery, does not conform to a verdict finding the value of each separately. Blankenship *v.* Berry, 28 Tex. 448.

Giving part of verdict to attorney.— Where the jury gives plaintiff a verdict for a definite sum, it is error for the court in entering judgment to allot half of that sum to plaintiff and the other half to his attorney, the latter not being named in the verdict or connected with the cause by pleadings or evidence, and the reasonableness of his fee not having been judicially passed on. Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032.

62. Dawson *v.* Shirk, 102 Ind. 184, 1 N. E. 292; Houston *v.* Newsome, 82 Tex. 75, 17 S. W. 603.

63. Heidenheimer *v.* Schlett, 63 Tex. 394; Goggan *v.* Evans, 12 Tex. Civ. App. 256, 33 S. W. 891; March *v.* Williams, 3 Tex. App. Civ. Cas. § 377; Blackwell *v.* Landreth, 90 Va. 748, 19 S. E. 791; Robostelli *v.* New York, etc., R. Co., 34 Fed. 507. But see Colorado Cent. Consol. Min. Co. *v.* Turck, 50 Fed. 888, 2 C. C. A. 67, holding that the fact that the court, in entering final judgment in ejectment, did not award to plaintiff all the premises to which he was entitled under the verdict affords no ground of complaint to defendant.

Verdict excessive.— Where the verdict is excessive, being for a greater amount of damages than are laid in the declaration, judgment may be given only for the amount so laid. Bush *v.* Dyke, 6 T. B. Mon. (Ky.) 142; Baltzell *v.* Hickman, 4 Litt. (Ky.) 265. And see Gould *v.* Bridgers, 3 Mart. N. S. (La.) 692.

64. Walker *v.* Fuller, 29 Ark. 448; Durrell *v.* Boyd, 2 Disn. (Ohio) 463; Underwood *v.* Parrott, 2 Tex. 168. But the court cannot on its own motion remit a part of the verdict returned by the jury, and enter without the consent of plaintiff a judgment for a less sum than that found by such verdict. Dickinson *v.* Rahn, 98 Ill. App. 245.

65. *Alabama.*— Reid *v.* Dunklin, 5 Ala. 205. See Malone *v.* Donnally, Minor 12.

California.— Alpers *v.* Schammel, 75 Cal. 590, 17 Pac. 708. See Harvey *v.* Hadley, 87 Cal. 557, 26 Pac. 792.

Illinois.— A court cannot enter a judgment upon a verdict for a greater sum than the verdict, except for interest accrued in the interval between the two. Hallberg *v.* Brosseau, 64 Ill. App. 520.

Indiana.— Mitchell *v.* Geisendorff, 44 Ind. 358; Helms *v.* Kearns, 40 Ind. 124.

Iowa.— Haldane *v.* Arcadia, 70 Iowa 462, 30 N. W. 802.

Louisiana.— Bulloc *v.* Parthet, 8 Mart. N. S. 123.

latter case that the validity of the judgment is not affected where the excess is so trifling as to be a negligible quantity.[66]

7. Tender, Counter-Claim, and Offer of Compromise. Payments made on plaintiff's account, before or pending the suit, should be deducted before judgment,[67] and if he recovers a verdict for less than the amount tendered in court, the verdict should be set aside and judgment entered for the amount tendered.[68] If defendant succeeds in establishing a counter-claim, judgment should be in his favor if it exceeds the claims proved by plaintiff,[69] or if it is less than that amount then judgment should be rendered for plaintiff for the difference only.[70] An offer of settlement made by plaintiff before suit will not preclude him from recovering a larger sum than that contemplated by his offer.[71] But an agreement between the parties as to the amount of the recovery will support a judgment for such amount, although the pleadings were not amended to correspond with the agreement.[72]

8. Affirmative Relief to Defendant. A judgment for affirmative relief may be rendered in favor of a defendant where he establishes a counter-claim exceeding plaintiff's demand,[73] or where he otherwise shows himself to be entitled to

Mississippi.— Buck *v.* Little, 24 Miss. 463.

Missouri.— Hayton *v.* Hope, 3 Mo. 53.

Nebraska.— Volker *v.* Tecumseh First Nat. Bank, 26 Nebr. 602, 42 N. W. 732.

South Dakota.— John A. Tollman Co. *v.* Savage, 5 S. D. 496, 59 N. W. 882.

Texas.— Stevens *v.* Lee, 70 Tex. 279, 8 S. W. 40; Clark *v.* Gallaher, 3 Tex. Civ. App. 541, 22 S. W. 1047.

See 30 Cent. Dig. tit. "Judgment," § 452.

66. Brown *v.* Montgomery, (Tex. Civ. App. 1895) 31 S. W. 1079, ten cents excess.

67. *Connecticut.*— Hathaway *v.* Hemingway, 20 Conn. 191.

Louisiana.— McClellan Dry-Dock Co. *v.* Farmers' Alliance Steam-Boat Line, 43 La. Ann. 258, 9 So. 630.

Minnesota.— Wolford *v.* Bowen, 57 Minn. 267, 59 N. W. 195.

Pennsylvania.— George P. Steel Iron Co. *v.* Jacobs, 9 Pa. Super. Ct. 122.

Vermont.— Joy *v.* Hull, 4 Vt. 455, 24 Am. Dec. 625.

Virginia.— Gray *v.* Hines, 4 Munf. 437.

68. Coffman *v.* Brown, 7 Colo. 147, 2 Pac. 905; Sweetland *v.* Tuthill, 54 Ill. 215.

If plaintiff recovers a verdict for an amount greater than the sum tendered and paid into court, it will be proper to render judgment for the amount of the verdict and credit the money already paid in. Barnes *v.* Bates, 28 Ind. 15.

It is erroneous to render judgment for plaintiff upon the pleadings without evidence for a larger sum than the answer admits to be due to him. Van Etten *v.* Kosters, 48 Nebr. 152, 66 N. W. 1106.

69. See *infra*, VI, B, 8.

70. *Illinois.*— Coats *v.* Barrett, 49 Ill. App. 275.

Missouri.— Hackworth *v.* Zeitinger, 48 Mo. App. 32.

Nebraska.— Ashland Land, etc., Co. *v.* Woodford, 50 Nebr. 118, 69 N. W. 769.

New York.— Clarkson *v.* Manson, 60 How. Pr. 45.

Ohio.— Moore *v.* Woodside, 26 Ohio St. 537.

Vermont.— Cross *v.* Haskins, 13 Vt. 536.

71. Brush *v.* S. A. & D. R. Co., 43 Iowa 554.

72. Wilson *v.* Panne, 1 Kan. App. 721, 41 Pac. 984.

73. *Indiana.*— Gaff *v.* Hutchinson, 38 Ind. 341.

Iowa.— Callender *v.* Drabelle, 73 Iowa 317, 35 N. W. 240.

Louisiana.—Smith *v.* Amacker, 15 La. Ann. 299; Orleans Nav. Co. *v.* Bingey, 6 Mart. N. S. 688; Gilly *v.* Logan, 2 Mart. N. S. 196.

Minnesota.— Nichols, etc., Co. *v.* Wiedmann, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41.

Missouri.— Hackworth *v.* Zeitinger, 48 Mo. App. 32.

New York.— Skinner *v.* White, 69 Hun 82, 23 N. Y. Suppl. 383; Roosevelt *v.* New York, etc., R. Co., 45 Barb. 554; Mackinstry *v.* Smith, 16 Misc. 351, 38 N. Y. Suppl. 93; Clarkson *v.* Manson, 60 How. Pr. 45, 48.

South Carolina.— Plyer *v.* Parker, 10 S. C. 464.

Tennessee.— Paragon Refining Co. *v.* Lee, 98 Tenn. 643, 41 S. W. 362.

See 30 Cent. Dig. tit. "Judgment," § 380.

A judgment without citation against a plaintiff who merely sues for another and has no interest in the litigation on a plea in reconvention by defendant is void. McFadin *v.* McGreal, 25 Tex. 73.

A separate judgment in favor of one of several defendants may be rendered on a counter-claim showing a separate cause of action in favor of such defendant. Plyer *v.* Parker, 10 S. C. 464.

Where the counter-claim is for damages on a bond, and the damages equal or exceed the amount of the bond, judgment for defendant should be for the amount of the bond less plaintiff's established demands. Union Mercantile Co. *v.* Chandler, 90 Iowa 650, 57 N. W. 595.

such relief,[74] provided the facts constituting the foundation of such relief are stated in the pleading,[75] or such relief is asked for therein.[76]

9. Relief as Between Co-Defendants. At common law one defendant to a suit cannot recover a judgment against a co-defendant, at least without a cross pleading and service of process or an appearance to the cross pleading by defendant thereto.[77] But in equity a decree between co-defendants, grounded on the pleadings and proofs between plaintiff and defendants, is regular, and indeed the court is bound to make such a decree in order to avoid a multiplicity of suits.[78] And in several states, by force of statutes or the adoption of equitable procedure, it is proper to grant affirmative relief as between co-defendants,[79] when they have been given a full opportunity to litigate their claims as against each other.[80]

C. Parties[81] — 1. Necessity For Determination as to All Parties. Under the rule that there can be but one final judgment in any case, and except where authorized by statute, it is reversible error to render final judgment against a part of defendants without disposing of the case as to the others,[82] unless where one

74. Buckers Irr., etc., Co. *v.* Platte Valley Irr. Co., 28 Colo. 187, 63 Pac. 305; Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186; Reeves *v.* Roberts, 62 Tex. 550; James *v.* Daniels, (Tex. Civ. App. 1897) 43 S. W. 26; National Foundry, etc., Works *v.* Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125.

A decree may be rendered in favor of a defendant where he proves to be the creditor and plaintiff the debtor. Kraker *v.* Shields, 20 Gratt. (Va.) 377. And see Walker *v.* Aht, 83 Ill. 226.

A general judgment may grant relief to some of several defendants in response to their answers, without giving the same relief to the other defendants. Reeves *v.* Roberts, 62 Tex. 550.

75. Gilreath *v.* Gilliland, 95 Tenn. 383, 32 S. W. 250; National Foundry, etc., Works *v.* Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125 (although there be no prayer for affirmative relief in the answer); Benedict *v.* Horner, 13 Wis. 256.

76. Coupry *v.* Dufau, 1 Mart. N. S. (La.) 90; Wright *v.* Delafield, 25 N. Y. 266; Hager *v.* Reed, 11 Ohio St. 626; Gilreath *v.* Gilliland, 95 Tenn. 383, 32 S. W. 250.

Recoupment.— A plea of recoupment cannot authorize a judgment for damages in defendant's favor, it being a purely defensive plea, and never carrying with it any affirmative relief. Fowler *v.* Payne, 52 Miss. 210.

77. Cavin *v.* Williams, 8 Bush (Ky.) 343; Horine *v.* Moore, 14 B. Mon. (Ky.) 311.

78. Chamley *v.* Dunsany, 2 Sch. & Lef. 690, 718. And see Symmes *v.* Strong, 28 N. J. Eq. 131; Jones *v.* Sander, 2 Wash. 329, 26 Pac. 224.

79. *Maine.*— Little *v.* Merrill, 62 Me. 328.

Minnesota.— Crich *v.* Williamsburg City F. Ins. Co., 45 Minn. 441, 48 N. W. 198; Goldschmidt *v.* Nobles County, 37 Minn. 49, 33 N. W. 544.

New York.— Derham *v.* Lee, 87 N. Y. 599 [*affirming* 60 How. Pr. 334]; Van Allen *v.* Rogers, 5 Misc. 420, 26 N. Y. Suppl. 708; Wells *v.* Smith, 7 Abb. Pr. 261; Mechanics', etc., Sav. Inst. *v.* Roberts, 1 Abb. Pr. 381; Bogardus *v.* Parker, 7 How. Pr. 305.

South Carolina.— Beattie *v.* Latimer, 42 S. C. 313, 20 S. E. 53.

Texas.— Gulf, etc., R. Co. *v.* Hathaway, 75 Tex. 557, 12 S. W. 999.

See 30 Cent. Dig. tit. "Judgment," § 381.

80. See Norbury *v.* Seeley, 4 How. Pr. (N. Y.) 73; Woodworth *v.* Bellows, 4 How. Pr. (N. Y.) 24; Rice *v.* Cutler, 17 Wis. 351, 84 Am. Dec. 747.

Demand for relief and service of copy of answer on co-defendant as requisite to granting relief to defendant see Masons' Supplies Co. *v.* Jones, 172 N. Y. 598, 64 N. E. 1123.

If plaintiff is not entitled to any relief, not being the real party in interest, defendants cannot litigate their rights between themselves. Dusenbury *v.* Fisher, 47 N. Y. Super. Ct. 482. And the statute does not authorize the granting of relief to one defendant against his co-defendant on issues not arising between plaintiff and either defendant. Joyce *v.* Growney, 154 Mo. 253, 55 S. W. 466.

81. Amendment of judgment as to parties see *infra*, VIII, B, 6.

Conformity to verdict or findings as to parties see *infra*, VI, D, 2, d.

Designation of parties in entry of judgment see *infra*, VII, J, 2.

82. *California.*—Schultz *v.* McLean, 76 Cal. 608, 18 Pac. 775.

Colorado.— Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832; Bissell *v.* Cushman, 5 Colo. 76.

Illinois.— Barbour *v.* White, 37 Ill. 164; Dow *v.* Rattle, 12 Ill. 373; Davidson *v.* Bond, 12 Ill. 84; Ward *v.* Stanley, 41 Ill. App. 417.

Kentucky.— Johnson *v.* Vaughan, 9 B. Mon. 217; Warren *v.* Lewis, 1 B. Mon. 119; O'Hara *v.* Lannier, 1 B. Mon. 100; Buford *v.* McDaniel, 1 A. K. Marsh. 426; Long *v.* Carlyle, 1 A. K. Marsh. 401.

Louisiana.— Reynolds *v.* Feliciana Steam Boat Co., 17 La. 397. But where two parties are sued, one for the payment of a note as maker, and the other for illegally retaining it, the causes of action being distinct, judgment may well be had against one and the case continued as to the other. Regillo *v.* Lorente, 7 La. 140.

of defendants is dismissed from the case on a plea personal to himself, such as his discharge in bankruptcy.[83]

2. JOINT PLAINTIFFS. Where several plaintiffs join in the action, it is the rule at common law that all must recover or none, and if only part of plaintiffs have a right of action, the suit must fail as to all.[84] But this rule does not apply where the claims of the several plaintiffs are distinct, although united for a common interest;[85] and it has been changed by statute in several of the states so as to permit the recovery of a judgment by any plaintiff who shows himself entitled, although the others may fail.[86]

3. JOINT DEFENDANTS[87]— a. In Actions of Contract. At common law if several defendants are joined in an action *ex contractu*, and all are brought before the

Massachusetts.— Gerrish *v.* Cummings, 4 Cush. 391; Woodward *v.* Newhall, 1 Pick. 500.

Mississippi.— Prewett *v.* Caruthers, 7 How. 304.

Missouri.— Spalding *v.* Citizens' Bank, 78 Mo. App. 374.

New York.— Jewett *v.* Schmidt, 45 Misc. 34, 90 N. Y. Suppl. 848.

Tennessee.— Hutchins *v.* Sims, 7 Humphr. 236.

Texas.— Wootters *v.* Kauffman, 67 Tex. 488, 3 S. W. 465; Rodrigues *v.* Trevino, 54 Tex. 198.

Virginia.— Rohr *v.* Davis, 9 Leigh 30; Taylor *v.* Beck, 3 Rand. 316.

West Virginia.— Creigh *v.* Hedrick, 5 W. Va. 140.

See 30 Cent. Dig. tit. "Judgment," § 412.

Contra.— See Bank of Commerce *v.* Smith, 57 Minn. 374, 59 N. W. 311.

Joint plaintiffs.— A judgment is not defective because of the omission to dispose of the rights of a party plaintiff whose pleadings showed that he had no valid claim as against the other plaintiffs. Miller *v.* Rogers, 49 Tex. 398.

83. Robinson *v.* Brown, 82 Ill. 279.

84. *Alabama.*— Prestwood *v.* McGowin, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136; McLeod *v.* McLeod, 73 Ala. 42.

Georgia.— Walker *v.* Pope, 101 Ga. 665, 29 S. E. 8.

Kansas.— Dempster Mill Mfg. Co. *v.* Fitzwater, 6 Kan. App. 24, 49 Pac. 624.

Missouri.— McLaran *v.* Wilhelm, 50 Mo. App. 658.

New York.—Sheldon *v.* Van Slyke, 16 Barb. 26.

Texas.— Wells *v.* Moore, 15 Tex. 521.

Wisconsin.— Egaard *v.* Dahlke, 109 Wis. 366, 85 N. W. 369.

See 30 Cent. Dig. tit. "Judgment," § 414.

85. Steam Laundry Co. *v.* Thompson, 91 Ga. 47, 16 S. E. 198; Hamilton-Brown Shoe Co. *v.* Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520.

Creditors' suit.— The rule that no plaintiff can recover unless all are entitled to a judgment does not apply to an action in which a number of creditors unite to set aside a fraudulent attachment of their debtor's property. Henderson *v.* J. B. Brown Co., 125 Ala. 566, 28 So. 79.

Rules as to joinder of plaintiffs.— Several persons having distinct claims against the same defendant may unite in an action against him for the protection or enforcement of their common rights or interests. But their recovery will be limited to what concerns them jointly, and they cannot make one suit the vehicle for carrying all their claims into judgment. Grant *v.* Schmidt, 22 Minn. 1. And see Helmuth *v.* Bell, 150 Ill. 263, 37 N. E. 230. And conversely one of a class of plaintiffs cannot, in suing alone, procure an adjudication which will be binding upon all, unless the others come in as joint plaintiffs or otherwise connect themselves with the action. Williams *v.* Williams, 74 N. C. 1.

Concurrent actions.—Where proceedings are taken concurrently by several persons against the same fund, it seems they stand on an equal footing. Thus, where two trustee processes were served at the same time, and judgment was recovered in each for an amount greater than the sum held by the garnishee, it was considered that each of the creditors was entitled to one half of the fund, although their claims were unequal. Davis *v.* Davis, 2 Cush. (Mass.) 111.

86. *California.*— Johnson *v.* Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719.

Indiana.— Mississinewa Min. Co. *v.* Andrews, 22 Ind. App. 523, 54 N. E. 146; Louisville, etc., R. Co. *v.* Lange, 13 Ind. App. 337, 41 N. E. 609.

New York.—Chamhovet *v.* Cagney, 35 N. Y. Super. Ct. 474.

Pennsylvania.— Frisbie *v.* McFarlane, 196 Pa. St. 110, 46 Atl. 359; Hinckle *v.* Riffert, 6 Pa. St. 196.

South Carolina.— Where an action is not authorized by one of the parties plaintiff, no relief should be granted as to him. Toole *v.* Johnson, 61 S. C. 34, 39 S. E. 254.

Texas.— Ward *v.* Gibbs, 10 Tex. Civ. App. 287, 30 S. W. 1125.

United States.— Meldrim *v.* U. S., 7 Ct. Cl. 595.

See 30 Cent. Dig. tit. "Judgment," § 414.

87. Conformity to pleadings and proof see *supra*, VI, D, 1, e.

Judgment against one or more co-parties in actions of debt see DEBT.

Judgment against one defendant in civil action of conspiracy see CONSPIRACY.

Judgment against one or more partners see, generally, PARTNERSHIP.

court by service or appearance, it is essential to plaintiff's recovery that he should establish a joint liability; in other words he must recover against all or none, and it is not competent to enter a judgment in favor of one defendant and against another.[88] But this rule does not apply where one of the defendants pleads and proves matter which goes to his personal discharge,[89] such as a discharge in bank-

Judgment against principal and surety see, generally, PRINCIPAL AND SURETY.

Recovery against defendants where action against co-defendants is barred by limitations see, generally, LIMITATIONS.

88. *Alabama.*— Park *v.* Edge, 42 Ala. 631.

Florida.— Somers *v.* Florida Pebble Phosphate Co., (1905) 39 So. 61; Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Hale *v.* Crowell, 2 Fla. 534, 50 Am. Dec. 301.

Georgia.— Austell *v.* McLarin, 51 Ga. 467. But where two are sued as partners, and it appears that there is no partnership, and that one alone is liable, the suit will not abate, but may proceed against the one liable. Francis *v.* Dickel, 68 Ga. 255. And see Millhiser *v.* McAllister, 103 Ga. 798, 30 S. E. 661. Where the surety on an appeal-bond is dead, judgment in an action on the bond is not void because it is entered against the principal alone. Lewis *v.* Maulden, 93 Ga. 758, 21 S. E. 147.

Illinois.— Kingsland *v.* Koeppe, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; Cairo, etc., R. Co. *v.* Easterly, 89 Ill. 156; Jansen *v.* Varnum, 89 Ill. 100; Felsenthal *v.* Durand, 86 Ill. 230; Bœhm *v.* Bœhm, 61 Ill. 140; Thomas *v.* Lowy, 60 Ill. 512; Flake *v.* Carson, 33 Ill. 518; Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186; People *v.* Organ, 27 Ill. 27, 79 Am. Dec. 391; Howell *v.* Barrett, 8 Ill. 433; Wight *v.* Meredith, 5 Ill. 360; Kimmel *v.* Shultz, 1 Ill. 169; Beidler *v.* Richardson, 107 Ill. App. 536; Connelly *v.* Cover, 102 Ill. App. 426; Kosciuszko Bldg., etc., Assoc. *v.* Dudek, 101 Ill. App. 353; Joyce *v.* Spafford, 94 Ill. App. 554; Smith *v.* Condon, 90 Ill. App. 314; Bedwell *v.* Ashton, 87 Ill. App. 272; Schmelzer *v.* Chicago Ave. Sash, etc., Mfg. Co., 85 Ill. App. 596; Stitt *v.* Kurtenbach, 85 Ill. App. 38; Pennsylvania Finance Co. *v.* Hanlon, 75 Ill. App. 188; Vanston *v.* Boughton, 71 Ill. App. 627; Brady *v.* Madden, 67 Ill. App. 637; Green *v.* Shaw, 66 Ill. App. 74; Indiana Millers' Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355; Cooper *v.* McNeil, 43 Ill. App. 350; Davis *v.* Johnson, 41 Ill. App. 22; Enterprise Distilling Co. *v.* Bradley, 17 Ill. App. 509; Goodale *v.* Cooper, 6 Ill. App. 81; Rosenberg *v.* Barrett, 2 Ill. App. 386.

Indiana.— Helm *v.* Van Vleet, 1 Blackf. 342, 12 Am. Dec. 248; Valentine *v.* Duff, (1893) 33 N. E. 529.

Kansas.— Syracuse *v.* Reed, 5 Kan. App. 806, 49 Pac. 259.

Kentucky.— Duckworth *v.* Lee, 10 Bush 51; Fernold *v.* Speer, 3 Metc. 459; Brown *v.* McKee, 1 J. J. Marsh. 475; Erwin *v.* Devine, 2 T. B. Mon. 124. Although one of two defendants sued as individuals on a note to which their names were signed as such did not in fact sign the note, judgment should go against both on proof of their liability as partners. Johnson *v.* Bonfield, 40 S. W. 697, 19 Ky. L. Rep. 300.

Louisiana.— Francis *v.* Martin, 28 La. Ann. 403.

Maryland.— Barker *v.* Ayers, 5 Md. 202.

Minnesota.— Johnson *v.* Lough, 22 Minn. 203; Carlton *v.* Chouteau, 1 Minn. 102.

Mississippi.— Jones *v.* McGahey, 1 How. 128.

Missouri.— Miller *v.* Bryden, 34 Mo. App. 602. *Compare* McCoy *v.* Green, 83 Mo. 626. And see Henry *v.* Gibson, 55 Mo. 570, holding that where all defendants are brought into court, a judgment rendered by agreement against one is tantamount to a dismissal as to the others.

New Jersey.— Stehr *v.* Ollbermann, 49 N. J. L. 633, 10 Atl. 547; Wills *v.* Shinn, 42 N. J. L. 138; Patterson *v.* Loughridge, 42 N. J. L. 21.

New Mexico.— Rupe *v.* New Mexico Lumber Assoc., 3 N. M. 261, 5 Pac. 730.

New York.— Williams *v.* Horgan, 6 Duer 658, 13 How. Pr. 138; Birkbeck *v.* Tucker, 2 Hall 121; Sager *v.* Nichols, 1 Daly 1; Britton's Estate, 15 N. Y. St. 445; Platner *v.* Johnson, 3 Hill 476. *Compare* Stimson *v.* Van Pelt, 66 Barb. 151; Hopkins *v.* Lane, 4 Thomps. & C. 311.

Pennsylvania.— Cook *v.* Mackrell, 70 Pa. St. 12; Rowan *v.* Rowan, 29 Pa. St. 181; Mosher *v.* Small, 5 Pa. St. 221.

South Carolina.— Lucas *v.* Sanders, 1 McMull. 311.

South Dakota.— Anderson *v.* Chilson, 8 S. D. 64, 65 N. W. 435. But see Ross *v.* Wait, 4 S. D. 584, 57 N. W. 497.

Vermont.— Metropolitan Washing Mach. Co. *v.* Morris, 39 Vt. 393.

Virginia.— Rohr *v.* Davis, 9 Leigh 30; Jenkins *v.* Hurt, 2 Rand. 446.

United States.— Mack *v.* Sloteman, 21 Fed. 109; Milne *v.* Huber, 17 Fed. Cas. No. 9,617, 3 McLean 212. And see Schofield *v.* Palmer, 134 Fed. 753.

See 30 Cent. Dig. tit. "Judgment," §§ 415, 416.

Contra.— See Brugman *v.* McGuire, 32 Ark. 733.

Agreement of parties.— Where, in an action against several, the parties make an agreement by which the interests of all the defendants but one are adjusted, a judgment against that one will be good, although no formal dismissal as to the others is entered. Bailey *v.* McWilliams, 111 Mo. App. 35, 85 S. W. 618.

89. *Illinois.*— Seymour *v.* O. S. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716; Frink *v.* Jones, 5 Ill. 170; Aten *v.* Brown,

ruptcy,[90] or to his personal disability to contract, such as infancy or coverture,[91] or sets up matter which is a bar to the action as against himself only, and of which the others could not take advantage.[92] And it appears that the rule has no proper application to an action against administrators as such,[93] nor where some of defendants are not served with process and do not appear.[94]

b. In Actions of Tort. In a suit founded upon tort against several defendants, plaintiff may recover against as many and only such defendants as he proves to be guilty, and any defendant as against whom the proof fails is entitled to a verdict.[95]

14 Ill. App. 451; Goodale *v.* Cooper, 6 Ill. App. 81.

Kentucky.— Brown *v.* Warner, 2 J. J. Marsh. 37; Barlow *v.* Wiley, 3 A. K. Marsh. 457.

Massachusetts.— Tuttle *v.* Cooper, 10 Pick. 281.

New Hampshire.—Peebles *v.* Rand, 43 N. H. 337.

New York.— Sperry *v.* Miller, 2 Barb. Ch. 632.

Ohio.— Sprague *v.* Childs, 16 Ohio St. 107.

United States.— Sweeney *v.* Hanley, 126 Fed. 97, 61 C. C. A. 153.

See 30 Cent. Dig. tit. "Judgment," § 416.

90. Hathaway *v.* Crocker, 7 Metc. (Mass.) 262.

91. Coe *v.* Hamilton, Morr. (Iowa) 319; McGuire *v.* Johnson, 2 Lans. (N. Y.) 305.

92. Snyder *v.* Snyder, 9 W. Va. 415. And see Robinson *v.* Brown, 82 Ill. 279.

Release of surety.— Judgment may be given in favor of a defendant who shows that he signed the note in suit only as a surety for the other defendant, and that the payee extended the time of payment without his knowledge or consent, this being a personal defense. Ritchie *v.* Gibbs, 7 Ill. App. 149.

Defendant improperly joined.—The rule requiring a recovery against all the defendants or none does not apply where one was joined as a defendant who was an unnecessary or improper party. A. W. Stevens Co. *v.* Kehr, 93 Ill. App. 510.

93. Gray *v.* White, 5 Ala. 490.

94. Mitchell *v.* Brewster, 28 Ill. 163; Bell *v.* State, 7 Blackf. (Ind.) 33.

95. *Alabama.*— Cooper *v.* Turrentine, 17 Ala. 13; Blackburn *v.* Baker, 7 Port. 284; Sprowl *v.* Kellar, 4 Stew. & P. 382.

Arkansas.— Criner *v.* Brewer, 13 Ark. 225; Harris *v.* Preston, 10 Ark. 201.

Colorado.— Dewoody *v.* Guertin, 13 Colo. App. 517, 58 Pac. 794.

Georgia.— Howard *v.* Dayton Coal, etc., Co., 94 Ga. 416, 20 S. E. 336.

Illinois.— Jansen *v.* Varnum, 89 Ill. 100; Winslow *v.* Newlan, 45 Ill. 145; Baker *v.* Michigan, etc., R. Co., 42 Ill. 73; Davis *v.* Taylor, 41 Ill. 405; Illinois Cent. R. Co. *v.* Foulks, 92 Ill. App. 391; Vieths *v.* Skinner, 47 Ill. App. 325.

Indiana.— Louisville, etc., R. Co. *v.* Duvall, 40 Ind. 246; Chicago, etc., R. Co. *v.* Martin, 31 Ind. App. 308, 65 N. E. 591; Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

Kentucky.— Shelton *v.* Harlow, 15 B. Mon. 547; Pfaffinger *v.* Gilman, 38 S. W. 1088, 18 Ky. L. Rep. 1071. *Compare* Prince *v.* Flynn, 2 Litt. 240.

Maine.— Gillerson *v.* Small, 45 Me. 17; Thacher *v.* Jones, 31 Me. 528.

Maryland.— Hambleton *v.* McGee, 19 Md. 43.

Mississippi.— Hardy *v.* Thomas, 23 Miss. 544, 57 Am. Dec. 152.

Nebraska.— Hayden *v.* Woods, 16 Nebr. 306, 20 N. W. 345.

New York.— Layton *v.* McConnell, 61 N. Y. App. Div. 447, 70 N. Y. Suppl. 679; Turner *v.* McCarthy, 4 E. D. Smith 247; Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539; Lansing *v.* Montgomery, 2 Johns. 382.

Oregon.— Cauthorn *v.* King, 8 Oreg. 138.

Pennsylvania.— Magee *v.* Pennsylvania Schuylkill Valley R. Co., 13 Pa. Super. Ct. 187; McCall *v.* Forsyth, 4 Watts & S. 179. But see Wiest *v.* Electric Traction Co., 200 Pa. St. 148, 49 Atl. 891, 58 L. R. A. 666, where plaintiff sued in trespass to recover damages for negligence and declared for a joint tort, but the evidence showed no joint action on the part of defendants, and it was held that a judgment against one defendant for a separate tort could not be permitted.

South Carolina.— Chanet *v.* Parker, 1 Mill 333.

Tennessee.—McCully *v.* Malcom, 9 Humphr. 187.

Texas.— Kinkler *v.* Junica, 84 Tex. 116, 19 S. W. 359; Gulf, etc., R. Co. *v.* Lee, (Civ. App. 1901) 65 S. W. 54; Williams *v.* Goff, (Civ. App. 1899) 54 S. W. 428; Emerson *v.* Skidmore, 7 Tex. Civ. App. 641, 25 S. W. 671.

Vermont.— Wright *v.* Cooper, 1 Tyler 425.

United States.— Albright *v.* McTighe, 49 Fed. 817; Milne *v.* Huber, 17 Fed. Cas. No. 9,617, 3 McLean 212.

See 30 Cent. Dig. tit. "Judgment," § 417.

Successful defense by one defendant.— In an action for negligence, where the relation of the co-defendants is such that if the one was not negligent the other is not liable, if the one succeeds in establishing his defense, and judgment is given in his favor, no judgment can be entered against the other, even upon a verdict of guilty. Doremus *v.* Root, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649.

Where an adult and a minor are joined as defendants and joint tort-feasors in an action of trespass *quare clausum fregit*, and it is not discovered until after the verdict that one of the parties is a minor, the court may enter a *nolle prosequi* as to the minor, and

c. Under Joint Liability Acts.[96] In many states statutes provide that judgment may be given "for or against one or more of several defendants," and usually provide further that, in an action against several defendants, "the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper." Under these statutes, if a plaintiff sues two or more defendants on a joint obligation, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be liable, when the others are not liable.[97] And where the law of the state contains a provision of

permit the verdict and judgment to stand against the other defendant. Crane *v.* Lynch, 27 Pa. Super. Ct. 565.

96. Application of statutory provisions to actions by or against partners see, generally, PARTNERSHIP.

97. *Alabama.*— Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332; Longstreet *v.* Rea, 52 Ala. 195.

Arkansas.— Parke *v.* Meyer, 28 Ark. 281, 27 Ark. 551. See Stiewel *v.* Borman, 63 Ark. 30, 37 S. W. 404.

California.— Dobbs *v.* Purington, 136 Cal. 70, 68 Pac. 323; Mock *v.* Santa Rosa, 126 Cal. 330, 58 Pac. 826; Leadbetter *v.* Lake, 118 Cal. 515, 50 Pac. 686; Morgan *v.* Righetti, (1896) 45 Pac. 260; Lewis *v.* Clarkin, 18 Cal. 399; Stoddart *v.* Van Dyke, 12 Cal. 437; Rowe *v.* Chandler, 1 Cal. 167. See Gruhn *v.* Stanley, 92 Cal. 86, 28 Pac. 56. Where an order of nonsuit as to certain defendants is granted, leaving others still before the court, the court may in its final judgment include a judgment of nonsuit as to such defendants. Hanna *v.* De Garmo, 140 Cal. 172, 73 Pac. 830.

Colorado.— Shafer *v.* Hewitt, 6 Colo. App. 374, 41 Pac. 509.

Connecticut.— Salomon *v.* Hopkins, 61 Conn. 47, 23 Atl. 716; Dean *v.* Savage, 23 Conn. 359.

Delaware.— Cunningham *v.* Dixon, 1 Marv. 163, 41 Atl. 519.

District of Columbia.—Presbrey *v.* Thomas, 1 App. Cas. 171.

Illinois.— See Neal *v.* Pennington, 65 Ill. App. 68.

Indiana.— Richardson *v.* Jones, 58 Ind. 240; Stafford *v.* Nutt, 51 Ind. 535; Murray *v.* Ebright, 50 Ind. 362; Rose *v.* Comstock, 17 Ind. 1; Hubbell *v.* Woolf, 15 Ind. 204; Hunt *v.* Standart, 15 Ind. 33, 77 Am. Dec. 79. But where plaintiff insists that he is entitled to judgment against all the defendants or none, and he is not in fact entitled to judgment against some of them, he waives his right to the determination of the question as to whether he is entitled to judgment against any. Valentine *v.* Duff, (App. 1893) 33 N. E. 529.

Iowa.— Poole *v.* Hintrager, 60 Iowa 180, 14 N. W. 223; Eyre *v.* Cook, 10 Iowa 586. 9 Iowa 185; Smith *v.* Coopers, 9 Iowa 376.

Kansas.— Smith *v.* Straub, 41 Kan. 7, 20 Pac. 516.

Kentucky.— Patton *v.* Shanklin, 14 B. Mon. 15.

Louisiana.— Hornor *v.* McDonald, 52 La. Ann. 396, 27 So. 91; Minor *v.* Hart, 52 La. Ann. 395, 27 So. 99; Roder *v.* Hart, 52 La. Ann. 215, 27 So. 238. See Smith *v.* New Orleans, etc., R. Co., 109 La. 782, 33 So. 769.

Maine.— Gleason *v.* Sanitary Milk-Supply Co., 93 Me. 544, 45 Atl. 825, 74 Am. St. Rep. 370.

Maryland.— Westheimer *v.* Craig, 76 Md. 399, 25 Atl. 419.

Michigan.— See Beekman *v.* Sylvester, 109 Mich. 183, 66 N. W. 1093.

Minnesota.— Wabash First Nat. Bank *v.* Burkhardt, 71 Minn. 185, 73 N. W. 858; Yellow Medicine County Bank *v.* Wiger, 59 Minn. 384, 61 N. W. 452; Miles *v.* Wann, 27 Minn. 56, 6 N. W. 417; Reed *v.* Pixley, 22 Minn. 540.

Mississippi.— Under Code, §§ 2237–2241, the right in suits upon joint and several contracts to render a judgment against one or more defendants and grant a new trial as to others applies only to suits on promissory notes and bills of exchange; in all other suits upon joint and several contracts a judgment erroneous as to one is erroneous as to all. Mhoon *v.* Colment, 51 Miss. 60.

Missouri.— Crews *v.* Lackland, 67 Mo. 619.

Montana.— Knatz *v.* Wise, 16 Mont. 555, 41 Pac. 710.

Nebraska.— School Dist. No. 34 *v.* Kountze, (1902) 92 N. W. 597; Roggenkamp *v.* Hargreaves, 39 Nebr. 540, 58 N. W. 162; Long *v.* Clapp, 15 Nebr. 417, 19 N. W. 467.

Nevada.— See Mayenbaum *v.* Murphy, 5 Nev. 383.

New Jersey.— Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

New York.—Barker *v.* Cocks, 50 N. Y. 689; McIntosh *v.* Ensign, 28 N. Y. 169; Brumskill *v.* James, 11 N. Y. 294; Fielden *v.* Lahens, 2 Abb. Dec. 111, 3 Transcr. App. 218, 6 Abb. Pr. N. S. 341; McGuire *v.* Johnson, 2 Lans. 305; Stimson *v.* Van Pelt, 66 Barb. 151; Dillaye *v.* Wilson, 43 Barb. 261; Brown *v.* Richardson, 4 Rob. 603; Moss *v.* Jerome, 10 Bosw. 220; Claflin *r.* Butterly, 5 Duer 327; Galligan *v.* De Lorenzo, 92 N. Y. Suppl. 268; Owen *v.* Conner, 11 N. Y. Suppl. 352; Barth *v.* Amberg, 9 N. Y. St. 522; People *v.* Cram, 8 How. Pr. 151; Fullerton *r.* Taylor, 6 How. Pr. 259.

Ohio.— Lampkin *v.* Chisom, 10 Ohio St. 450; Lennig *v.* Burgoyne, 1 Handy 77, 12 Ohio Dec. (Reprint) 36.

Oregon.— Hayden *v.* Pearce, 33 Oreg. 89,

this sort, the same practice will be adopted by the federal courts sitting within that state.[98] But these statutes do not permit the rendition of a several judgment on a joint cause of action. That can be done only where a several judgment would be proper. That is to say, if plaintiff sues on a joint contract or obligation, which is not also several, he must recover against all or none, as at common law, the test being whether a separate action against the particular defendant could have been maintained.[99]

d. One Defendant Suffering Default. Where one defendant suffers a default, while the other pleads and goes to trial and defends successfully on a ground not personal to himself, his success will inure to the benefit of the defaulting defendant, and judgment must be rendered for both.[1] On the other hand if plaintiff

52 Pac. 1049; Hamm *v.* Basche, 22 Oreg. 513, 30 Pac. 501; Ah Lep *v.* Gong Choy, 13 Oreg. 205, 9 Pac. 483; Sears *v.* McGraw, 10 Oreg. 48.

Pennsylvania.— Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033; Van Zandt *v.* Winters, 22 Pa. Super. Ct. 181.

South Carolina.— Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913; Freeman *v.* Clark, 3 Strobh. 281. Where plaintiff sued a railroad company and the engineer of its train for injuries received, and verdict is returned against the company but in favor of the engineer, it will not be set aside on the complaint of the company, on the ground that as it absolved the servant from negligence the master was not liable. Bedenbaugh *v.* Southern R. Co., 69 S. C. 1, 48 S. E. 53.

South Dakota.— Merchants' Nat. Bank *v.* Stebbins, 15 S. D. 280, 89 N. W. 674; Ross *v.* Wait, 4 S. D. 584, 57 N. W. 497.

Tennessee.— Carpenter *v.* Lee, 5 Yerg. 265; Darwin *v.* Cox, 5 Yerg. 257.

Texas.— Coleman *v.* Colgate, 69 Tex. 88, 6 S. W. 553; Stevens *v.* Gainesville Nat. Bank, 62 Tex. 499; Congdon *v.* Monroe, 51 Tex. 109; Willis *v.* Morrison, 44 Tex. 27; Kuykendall *v.* Coulter, 7 Tex. Civ. App. 399, 26 S. W. 748.

Utah.— Blyth, etc., Co. *v.* Swenson, 15 Utah 345, 49 Pac. 1027.

Vermont.— Reynolds *v.* Field, 41 Vt. 225; Hurlburt *v.* Hendy, 27 Vt. 245.

Virginia.—Muse *v.* Farmers' Bank, 27 Gratt. 252; Moffett *v.* Bickle, 21 Gratt. 280; Steptoe *v.* Read, 19 Gratt. 1.

West Virginia.— Hoffman *v.* Bircher, 22 W. Va. 537.

Wisconsin.— Bacon *v.* Bicknell, 17 Wis. 523.

United States.— Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819.

See 30 Cent. Dig. tit. "Judgment," § 412 *et seq.*

Attachment.— These statutes are as applicable to suits by attachment as to suits in any other form; and where an attachment is sued out against two persons jointly it may be sustained as against the separate property of one alone. Allen *v.* Clayton, 11 Fed. 73, 3 McCrary 517.

Garnishment.— A judgment against a garnishee, when there has been no judgment against defendant in the suit to which the garnishment is ancillary, is not valid. Shoemaker *v.* Pace, (Tex. Civ. App. 1897) 41 S. W. 498.

Improper joinder of defendants.— The fact that persons have been improperly joined as parties defendant does not warrant the entry of a judgment in their favor, but the action should be dismissed as to them. Gillum *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716.

Apportionment of damages.— In Indiana it is held that a plaintiff, suing upon a joint cause of action against two defendants, may recover a separate judgment against each for one half of the claim. Hassler *v.* Hefele, 151 Ind. 391, 50 N. E. 361. And in New Hampshire damages may be apportioned among several defendants by separate judgments, if justice will be promoted by such a course. City Sav. Bank *v.* Whittle, 63 N. H. 587, 3 Atl. 645.

Affirmative relief to defendant.—Under the "joint debtor" acts, where the statute also permits the court to grant affirmative relief to defendant, it may give judgment for one of defendants as against another, if that can be done without injury to plaintiff. Beattie *v.* Latimer, 42 S. C. 313, 20 S. E. 53.

98. Sawin *v.* Kenny, 93 U. S. 289, 23 L. ed. 926; Witters *v.* Sowles, 34 Fed. 119.

99. Parke *v.* Meyer, 28 Ark. 281; Fetz *v.* Clark, 7 Minn. 217; Niles *v.* Battershall, 2 Rob. (N. Y.) 146; Fullerton *v.* Taylor, 6 How. Pr. (N. Y.) 259; Van Ness *v.* Corkins, 12 Wis. 186.

Joint plea of general issue.—In some states it is considered that these statutes do not apply where defendants join in pleading the general issue, and there is nothing to show that a defense is to be taken by one on grounds personal to himself. Anderson *v.* White, 39 Mich. 130; Gibson *v.* Beveridge, 90 Va. 696, 19 S. E. 785.

Under the New Jersey statutes, where, in an action on a bond, one of two defendant joint debtors is properly in court, plaintiff is entitled to judgment against both such joint debtors. Sayre, etc., Co. *v.* Griefen, (Sup. 1905) 60 Atl. 513.

1. *Arkansas.*— State *v.* Gibson, 21 Ark. 140; State *v.* Williams, 17 Ark. 371.

Illinois.— Faulk *v.* Kellums, 54 Ill. 188.

Iowa.— Campbell *v.* McHarg, 9 Iowa 354. *Compare* Storm Lake *v.* Iowa Falls, etc., R. Co., 62 Iowa 218, 17 N. W. 489.

Missouri.— Adderton *v.* Collier, 32 Mo. 507.

obtains a verdict against defendant who answers, he is then entitled to a joint judgment against all the defendants.[2] And it would be erroneous and improper to render judgment against that defendant alone who answered; both must be joined in the judgment as in the action,[3] although it is proper and usual to enter an interlocutory judgment against defendant who defaults, to await the trial of the issue as to the other.[4]

e. Discontinuance or Dismissal as to One Defendant. Although it is a general rule as above stated that plaintiff must recover against all the defendants or none, yet it is held permissible for him to enter a dismissal, discontinuance, or *nolle prosequi* against one or more of the defendants, and proceed to trial and judgment against the rest;[5] and this course is proper where its object is to cure a misjoinder,[6] or where there is a failure of jurisdiction over one of the defendants because of his non-residence,[7] or because of a failure to secure service of process upon him,[8] in which case it is not only proper but necessary to dispose of the proceeding as to him by a dismissal or *nolle prosequi*, the court having no author-

New Hampshire.— Bowman *v.* Noyes, 12 N. H. 302.

New York.— Rich *v.* Husson, 4 Sandf. 115.

Ohio.— Miller *v.* Longacre, 26 Ohio St. 291.

United States.— Champlin *v.* Tilley, 5 Fed. Cas. No. 2,586, 1 Brunn. Col. Cas. 71, 3 Day (Conn.) 303.

See 30 Cent. Dig. tit. "Judgment," § 419.

Effect of "joint debtor" acts.— The rule stated in the text is modified by the so-called joint debtor acts, permitting the rendition of judgment for or against one or more of the several defendants, so that a judgment may be taken against defendant who defaults, although it is given in favor of the answering defendant (Bailey Loan Co. *v.* Hall, 110 Cal. 490, 42 Pac. 962; Kingsland, etc., Mfg. Co. *v.* Mitchell, (Tex. Civ. App. 1896) 36 S. W. 757), or so as to permit a verdict and judgment for or against the party answering, without regard to the proceedings against his co-defendant (Black Hills Nat. Bank *v.* Kellogg, 4 S. D. 312, 56 N. W. 1071). And in Illinois it is said that where, in an action against two defendants, of whom only one has heen served, judgment is entered by default against defendant served and the action continued as to the other, such judgment, although erroneous, is not void. Anderson *v.* Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696.

2. Fletcher *v.* Blair, 20 Vt. 124.

3. *Illinois.*— Wells *v.* Reynolds, 4 Ill. 191.

Indiana.— Heaton *v.* Collins, 7 Blackf. 414; Davis *v.* Graniss, 5 Blackf. 79; Helm *v.* Van Vleet, 1 Blackf. 342, 12 Am. Dec. 248.

Kentucky.— Dinwiddie *v.* Marshall, 2 A. K. Marsh. 342.

Mississippi.— Falconer *v.* Frazier, 7 Sm. & M. 235; Henry *v.* Halsey, 5 Sm. & M. 573.

Pennsylvania.— Murtland *v.* Floyd, 153 Pa. St. 99, 25 Atl. 1038; Robinson *v.* Floyd, 153 Pa. St. 98, 25 Atl. 1040; Donnelly *v.* Graham, 77 Pa. St. 274.

See 30 Cent. Dig. tit. "Judgment," § 419.

Compare Downer *v.* Dana, 22 Vt. 22; Hood *v.* Maxwell, 1 W. Va. 219.

4. Greer *v.* Miller, 2 Overt. (Tenn.) 187. See Peters *v.* Crittenden, 8 Tex. 131; Burton *v.* Varnell, 5 Tex. 139. And see *supra*, IV, A, 3, b; IV, E, 2, d.

5. *Alabama.*— Hallett *v.* Allaire, Minor 360.

Illinois.— Cairo, etc., R. Co. *v.* Easterly, 89 Ill. 156.

Iowa.— Young *v.* Brown, 10 Iowa 537.

Michigan.— Root, etc., Co. *v.* Walton Salt Assoc., (1905) 103 N. W. 844.

Mississippi.— Harrison *v.* Agricultural Bank, 2 Sm. & M. 307; Nevitt *v.* Natchez Steam Packet Co., 5 How. 196; Peyton *v.* Scott, 2 How. 870. But under the statute requiring that the makers and indorsers of negotiable paper shall be sued jointly, plaintiff, after service of process, cannot discontinue as to the makers and take judgment against the indorsers. Brunson *v.* Lea, 5 Sm. & M. 149; Boush *v.* Smith, 2 Sm. & M. 512; Wilkinson *v.* Tiffany, 5 How. 411.

Missouri.— Jackson *v.* Bowles, 67 Mo. 609.

New Hampshire.—Flanders *v.* White Mountains Bank, 43 N. H. 383.

Pennsylvania.— Weist *v.* Jacoby, 62 Pa. St. 110; Chambers *v.* Lapsley, 7 Pa. St. 24; Com. *v.* Nesbitt, 2 Pa. St. 16; Ward *v.* Taylor, 1 Pa. St. 238.

Rhode Island.— Granite Bldg. Corp. *v.* Greene, 25 R. I. 586, 57 Atl. 649.

South Carolina.— Where a cause of action is several as well as joint plaintiff may discontinue as to the rest and take judgment against one, by leave of court, but not otherwise. Fitch *v.* Heise, Cheves 185.

Washington.— Cushing *v.* Williamsburg City F. Ins. Co., 4 Wash. 538, 30 Pac. 736.

Wisconsin.— Hibbard *v.* Bell, 3 Pinn. 190, 3 Chandl. 206.

See 30 Cent. Dig. tit. "Judgment," § 421.

Contra.— See Hall *v.* Rochester, 3 Cow. (N. Y.) 374.

6. Thompson *v.* Reinhard, 11 Wis. 293.

7. Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Duckworth *v.* Lee, 10 Bush (Ky.) 51; Applegate *v.* Jacoby, 9 Dana (Ky.) 206; Sebree *v.* Clay, 3 A. K. Marsh. (Ky.) 552; January *v.* Rice, 33 Mo. 409.

8. Smith *v.* Robinson, 11 Ala. 270; Combs *v.* Warner, 8 Dana (Ky.) 87; Bates *v.* Rey-

ity to render judgment against defendant served without some action putting the other out of the case.[9] And where judgment is rendered against all the defendants, after a discontinuance as to one, it will be reversed as to all.[10] But it is ruled that this action can be taken only where the action might properly have been brought in the first instance against those defendants who are retained in the case; it cannot be used to transform a purely joint obligation into a several one.[11] Nor can plaintiff in any case dismiss one or more of defendants arbitrarily and without cause.[12]

f. Joint or Several Judgment[13] — (i) *In General.* In general, where an action is brought upon a joint contract or obligation against several defendants who plead and defend jointly, the judgment against them must be joint and not several.[14] On the other hand, where the action is upon a joint and several obligation, or upon a cause of action where each of defendants is liable only for his own acts or for his proportionate share of the total damage, or in any case where several actions might properly have been maintained, several judgments against them will be proper.[15] And so where the items of damages are distinct a joint judgment cannot be entered unless each defendant is liable to the full extent of plain-

nolds, 7 Bosw. (N. Y.) 685. *Compare* Wolley *v.* Bowie, 41 Miss. 553.

9. Alston *v.* State Bank, 9 Ark. 455; Bowmans *v.* Mize, 3 B. Mon. (Ky.) 320; Violet *v.* Waters, 1 J. J. Marsh. (Ky.) 303; Hughes *v.* Evans, 4 Sm. & M. (Miss.) 737; Dennison *v.* Lewis, 6 How. (Miss.) 517. *Compare* Oliver *v.* Hutto, 5 Ala. 211; Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Hunt *v.* Anderson, 33 Miss. 559.

10. Inglish *v.* Watkins, 4 Ark. 199.

11. Anderson *v.* Robinson, 38 Mich. 407.

12. Trigg *v.* Christmill, 4 Bibb (Ky.) 455. And see Ferguson *v.* State Bank, 11 Ark. 512.

13. Conformity to report of referee see *infra*, VI, D, 2, e.

Conformity to verdict see *infra*, VI, D, 2, d.

Joint judgment against owners in severalty for public improvements see MUNICIPAL CORPORATIONS.

14. *California.*— Hulsman *v.* Todd, 96 Cal. 228, 31 Pac. 39.

Colorado.— Shafer *v.* Hewitt, 6 Colo. App. 374, 41 Pac. 509.

Illinois.— Howell *v.* Barrett, 8 Ill. 433. A judgment that plaintiff have and recover from defendants, naming them, his said damages, etc., is an entire judgment and a unit against all the defendants. Seymour *v.* O. S. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716.

Indiana.— Starry *v.* Johnson, 32 Ind. 438.

Iowa.— McArthur *v.* Linderman, 62 Iowa 307, 17 N. W. 531.

Kentucky.— Holmes *v.* Gay, 6 Bush 47; Elledge *v.* Bowman, 5 J. J. Marsh. 593; Rochester *v.* Anderson, 1 Bibb 439.

Louisiana.— Wartelle *v.* Hudson, 8 La. Ann. 486; Van Wyck *v.* Hills, 4 Rob. 140; Comstock *v.* Paie, 3 Rob. 440; Drew *v.* Atchison, 3 Rob. 140; Thompson *v.* Chretien, 3 Rob. 26.

Minnesota.— Hanlon *v.* Hennessy, 87 Minn. 353, 92 N. W. 1.

Nebraska.— A judgment otherwise joint in form is not rendered several by a finding as to which of defendants is the principal debtor and which the surety. Farney *v.* Hamilton County, 54 Nebr. 797, 75 N. W. 44.

New York.— See Moss *v.* Jerome, 10 Bosw. 220.

Ohio.— Dunphy *v.* Gilliam Mfg. Co., 21 Ohio Cir. Ct. 696, 11 Ohio Cir. Dec. 822; Wilson *v.* Rose Clare Lead, etc., Co., 7 Ohio Dec. (Reprint) 223 1 Cinc. L. Bul. 314.

Tennessee.— Worley *v.* Waldran, 3 Sneed 548.

Texas.— Murphy *v.* Gage, (Civ. App. 1893) 21 S. W. 396.

Washington.— Gove *v.* Moses, 1 Wash. Terr. 7.

West Virginia.— Hoffman *v.* Bircher, 22 W. Va. 537.

See 30 Cent. Dig. tit. "Judgment," § 423.

Service on separate writs.— Where a writ was against two on a joint cause of action, and service was made on one only, and afterward a writ was issued and served on the other, for the same cause of action, it was held that a joint judgment against both defendants was erroneous. Godfrey *v.* McCulloch, 5 Blackf. (Ind.) 178.

A joint judgment against three defendants while a former judgment against one of them in the same action remains unreversed is erroneous. Fletcher *v.* Andrews, 1 A. K. Marsh. (Ky.) 52.

15. *California.*— Page *v.* Fowler, 39 Cal. 412, 2 Am. Rep. 462. See Stearns *v.* Aguirre, 6 Cal. 176.

Colorado.— Ding *v.* Kennedy, 7 Colo. App. 72, 41 Pac. 1112.

Indiana.— Murray *v.* Ebright, 50 Ind. 362. In an action against two defendants to recover the mesne profits of separate pieces of land, it is error to render a joint judgment in the absence of a joint possession. Kennedy *v.* Christian, 2 Ind. 503.

Louisiana.— Kuhn *v.* Embry, 35 La. Ann. 488; Turnage *v.* Wells, 19 La. Ann. 135; Bell *v.* Massey, 14 La. Ann. 831.

Minnesota.— See Wabasha First Nat. Bank *v.* Burkhardt, 71 Minn. 185, 73 N. W. 858.

tiff's demand or recovery.[16] But the form of the judgment may be determined by the verdict, which it should follow and to which it should conform.[17] And it should be observed that, although a judgment be rendered against two or more parties jointly, the judgment itself is a joint and several obligation.[18] Similar rules obtain in the case of joint plaintiffs; their recovery should be joint if their cause of action is joint, but otherwise several.[19]

(II) *In Actions of Tort.* At common law, in an action of tort against several defendants, plaintiff is not entitled to any judgment unless he shows a joint tort,[20] although this has been changed in some states by the joint debtor acts,[21] and if defendants plead jointly, and a joint verdict is given against them, the judgment must be joint and not several,[22] the general rule forbidding the jury

New York.— Parker *v.* Jackson, 16 Barb. 33; Harrington *v.* Higham, 15 Barb. 524; Fullerton *v.* Taylor, 6 How. Pr. 259.

Oregon.— Sears *v.* McGrew, 10 Oreg. 48.

Pennsylvania.—See Croasdell *v.* Tallant, 83 Pa. St. 193.

Tennessee.— Crenshaw *v.* Smith, 10 Heisk. 1.

Texas.— Kuykendall *v.* Coulter, 7 Tex. Civ. App. 399, 26 S. W. 748; Missouri Pac. R. Co. *v.* Groesbeck, (Civ. App. 1894) 24 S. W. 702.

Wisconsin.— Phillips *v.* Bridges, 3 Wis. 270.

See 30 Cent. Dig. tit. "Judgment," § 423.

Executors and administrators.— A joint judgment or decree may be rendered against joint executors, administrators, or guardians, when they are jointly liable for the acts of each other. Williams *v.* Harrison, 19 Ala. 277. But where one of two defendants is liable individually, and the other in his representative capacity, the judgment against them should be several. Nelson *v.* Humes, 12 Ill. App. 52; Gray *v.* McDowell, 5 T. B. Mon. (Ky.) 501. *Compare* Bennett *v.* Spillars, 7 Tex. 600.

Surviving defendant.— Under the joint debtor acts, where an action is brought jointly against two defendants, one of whom dies, a several judgment may be entered against the surviving defendant. Shain *v.* Forbes, 82 Cal. 577, 23 Pac. 198.

Maker and indorser.— In a suit against several makers of a note and the indorsers thereon, a several judgment against the makers may be entered. Van Ness *v.* Corkins, 12 Wis. 186.

Partnerships.— Where the action is against partners on a partnership obligation, a joint judgment should be entered against defendants, although it seems that the entry of separate judgments is merely an irregularity, which may be corrected on motion. Judd Linseed Sperm Oil Co. *v.* Hubbell, 76 N. Y. 543. But judgment may be entered against defendants individually who are named and described in the complaint as a certain company, although they are not members of it, if the jury find that they are liable individually. Comanche Min. Co. *v.* Rumley, 1 Mont. 201.

Conflict of laws.— It is error for a court of one state to enter a joint decree against heirs or legatees whose liabilities are controlled by the laws of another state and are determined by that law to be several. De Ende *v.* Wilkinson, 2 Patt. & H. (Va.) 663.

Costs.— A joint judgment in favor of defendants for costs is proper where they are sued jointly, although they answered separately. Leadbetter *v.* Lake, 118 Cal. 515, 50 Pac. 686; Cook *v.* Dickerson, 1 Duer (N. Y.) 679. And conversely judgment may be entered for different sums against several defendants, where plaintiff is entitled to recover more costs as against some of them than against the others. Fox *v.* Muller, 31 Misc. (N. Y.) 470, 64 N. Y. Suppl. 388.

16. *Missouri.*— Smith *v.* Sims, 77 Mo. 269.

New York.— Van Rensselaer *v.* Layman, 39 How. Pr. 9.

Vermont.— Murray *v.* Mattison, 67 Vt. 553, 32 Atl. 479.

Wisconsin.— Payne *v.* Jelleff, 67 Wis. 246, 30 N. W. 526.

United States.— Germania F. Ins. Co. *v.* Boykin, 12 Wall. 433, 20 L. ed. 442; Chambers *v.* Upton, 34 Fed. 473.

See 30 Cent. Dig. tit. "Judgment," § 423.

Several heirs.— In an action to subject assets descended to several heirs to a debt of their ancestor, the judgment, if for plaintiff, should be several against each of the heirs for the amount received by him from the ancestor, not to exceed, however, the sum to which plaintiff is entitled. Ransdell *v.* Threlkeld, 4 Bush (Ky.) 347.

17. Richards *v.* Scott, 7 Ida. 726, 65 Pac. 433; Eames *v.* Stevens, 26 N. H. 117. *Compare* Dougherty *v.* Dorsey, 4 Bibb (Ky.) 207.

18. Read *v.* Jeffries, 16 Kan. 534. And see Stout *v.* Baker, 32 Kan. 113, 4 Pac. 141.

19. See Wheeler *v.* Hawkins, 116 Ind. 515, 19 N. E. 470; Alford *v.* Dewin, 1 Nev. 207; Akinson *v.* Ward, 2 Tex. Unrep. Cas. 236; School-Dists. *v.* Edwards, 46 Wis. 150, 49 N. W. 968.

20. Little Rock, etc., R. Co. *v.* Stevenson, 62 Ark. 354, 35 S. W. 787; Barnes *v.* Ennenga, 53 Iowa 497, 5 N. W. 597.

21. Lower *v.* Franks, 115 Ind. 334, 17 N. E. 630; Dunn *v.* Newberry, (Tex. Civ. App. 1905) 86 S. W. 626. *Compare* Nashville, etc., R. Co. *v.* Jones, 100 Tenn. 512, 45 S. W. 681.

22. Pickle *v.* Byers, 16 Ind. 383; Cunningham *v.* Dyer, 2 T. B. Mon. (Ky.) 50; Rochester *v.* Anderson, 1 Bibb (Ky.) 439; Hardy *v.* Thomas, 23 Miss. 544, 57 Am. Dec. 152; Keegan *v.* Hayden, 14 R. I. 175.

to divide or apportion the damages among defendants and requiring, in case they do, the entry of a joint judgment against both or all defendants for the larger amount.[23]

g. Joint Judgment as Entirety. By some of the authorities a judgment against two or more defendants jointly is regarded as an entirety, so that if it is irregular, erroneous, or void as to one of the defendants, it is equally so to all;[24] but other decisions are disposed to hold that a judgment may be valid and enforceable as to one or some of defendants, although voidable or void as to others.[25]

4. Separate Judgments Against Different Parties. The rule of the common law is that only one final judgment can be entered in any action, and separate judgments against the several defendants are improper.[26] But this rule has been changed by statute in several states;[27] and there are authorities supporting the rendition of separate judgments against defendants where their liabilities are not only several but, by the terms of the contract, differ in extent,[28] or where one of defendants, after a joint judgment against them, obtains a new trial.[29]

5. Judgment For or Against One Not a Party.[30] No valid judgment can be rendered for or against one who was not a party to the action; and a judgment so given will be void as far as concerns the person improperly included in it,[31]

23. *Kentucky.*— Sodousky *v.* McGee, 4 J. J. Marsh. 267; Cox *v.* Cooke, 1 J. J. Marsh. 360; Rochester *v.* Anderson, 1 Bibb 439. *Compare* Henry *v.* Sennett, 3 B. Mon. 311.

Massachusetts.— Halsey *v.* Woodruff, 9 Pick. 555.

New York.— Beal *v.* Finch, 11 N. Y. 128; Post *v.* Stockwell, 34 Hun 373; Hoffman *v.* Schwartz, 11 N. Y. Civ. Proc. 200; Livingston *v.* Bishop, 1 Johns. 290, 3 Am. Dec. 330.

Tennessee.— Nashville, etc., R. Co. *v.* Jones, 100 Tenn. 512, 45 S. W. 681.

Texas.— Ft. Worth, etc., R. Co. *v.* Enos, 15 Tex. Civ. App. 673, 39 S. W. 1095.

See 30 Cent. Dig. tit. "Judgment," § 424.

Contra.— Stewart *v.* Pruett, 6 La. Ann. 727. And see Dunn *v.* Hall, 8 Blackf. (Ind.) 32, holding that where one of two defendants in a suit for libel pleads the general issue, and the other, on whom process is not served, does not appear, or does appear, but there is no issue or default as to him, a joint judgment cannot be rendered against defendants.

Where several defendants are sued jointly for negligence, causing personal injury to plaintiff, to warrant a joint judgment against defendants, the evidence must satisfactorily show that the acts of negligence coöperated concurrently or in continuous successive order, producing the common result. Waters-Pierce Oil Co. *v.* Van Elderen, 137 Fed. 557.

24. Cummings *v.* Smith, 114 Ill. App. 35; Larsen *v.* Ditto, 90 Ill. App. 384; Rangely *v.* Webster, 11 N. H. 299; Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913; Williams *v.* Duffy, 7 Humphr. (Tenn.) 255; Trousdale *v.* Donnell, 4 Humphr. (Tenn.) 273.

Want of jurisdiction.— As to the effect of a judgment against joint defendants, one of whom was not served with process, see *supra*, I, E, 4, a. And see 1 Black Judgm. § 211.

25. Wabaunsee County School-Dist. No. 63 *v.* Chicago Lumber Co., 41 Kan. 618, 21 Pac. 599; Engstrand *v.* Kleffman, 86 Minn. 403, 90 N. W. 1054, 91 Am. St. Rep. 359; Council Bluffs Sav. Bank *v.* Griswold, 50 Nebr. 753, 70 N. W. 376; Reynolds *v.* Adams, 3 Tex. 167.

26. *Illinois.*— Gould *v.* Sternburg, 69 Ill. 531.

Kentucky.— Elledge *v.* Bowman, 5 J. J. Marsh. 593; True *v.* Clark, 3 Bibb 295.

New York.— La Forge *v.* Chilson, 3 Sandf. 752.

West Virginia.— Snyder *v.* Snyder, 9 W. Va. 415.

Wisconsin.— Hundhausen *v.* Bond, 36 Wis. 29.

See 30 Cent. Dig. tit. "Judgment," § 426.

27. Pollock *v.* Glazier, 20 Ind. 262; Corneille *v.* Pfeiffer, 26 Ind. App. 62, 59 N. E. 188; Hempy *v.* Ransom, 33 Ohio St. 312; Cloon *v.* City Ins. Co., 1 Handy (Ohio) 32, 12 Ohio Dec. (Reprint) 12; Knapp *v.* Mills, 20 Tex. 123; Bennett *v.* Spillars, 7 Tex. 600; Van Ness *v.* Corkins, 12 Wis. 186.

28. Irwine *v.* Wood, 7 Colo. 477, 4 Pac. 783; Costigan *v.* Lunt, 104 Mass. 217; Den *v.* Snowhill, 13 N. J. L. 23, 22 Am. Dec. 496.

In New Hampshire it is said that damages may be apportioned among the several defendants, if justice will be done by such a procedure. City Sav. Bank *v.* Whittle, 63 N. H. 587, 3 Atl. 645.

Executor of deceased joint debtor.— Where the action is against a surviving obligor and the executor of a deceased obligor, and the verdict is a general one for so much money, separate judgments may be entered against defendants. Arthur *v.* Griswold, 60 N. Y. 143; Trimmier *v.* Thomson, 10 S. C. 164.

29. Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31.

30. Constitutional guaranty against deprivation of property as applied to statutes making judgment effective against person not party see Constitutional Law.

31. *Alabama.*—Del Barco *v.* Mobile Branch Bank, 12 Ala. 238.

and according to some of the authorities a mere nullity as to all the parties to it.[32]

6. Judgment For or Against Nominal Party. Judgment must be entered in the name of plaintiff, although for the use and benefit of another.[33] But a defendant who is only a nominal and unnecessary party should not be included in the judgment, although it seems that a judgment against "the defendants" generally will not be reversed for that reason alone.[34]

7. Designation of Parties[35] — a. In General. It is essential to the validity of a judgment that it should designate clearly the parties for and against whom it is given.[36] This may be done either by naming them correctly or by describing

Arkansas.— Sisk *v.* Almon, 34 Ark. 391; Holland *v.* Burris, 28 Ark. 171; Cheek *v.* Pugh, 19 Ark. 574.

California.— Sullivan *v.* Mier, 67 Cal. 264, 7 Pac. 691; Bachman *v.* Sepulveda, 39 Cal. 688; Ford *v.* Doyle, 37 Cal. 346.

Illinois.— Virden *v.* Needles, 98 Ill. 366; Pratt *v.* Pratt, 96 Ill. 184; Prieto *v.* Duncan, 22 Ill. 26; Smith *v.* Byrd, 7 Ill. 412; Rice, etc., Co. *v.* Goldberg, 26 Ill. App. 603. But see Farwell *v.* Sturges, 58 Ill. App. 462, holding that moneys found to be equitably due from one to another of the parties to the proceeding may be ordered, in a suit in equity, to be paid to one who is not a party to the suit, but who, as between himself and the party to whom the money is found to be due, is equitably entitled to it.

Indiana.— McKinney *v.* Frankfort, etc., R. Co., 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; Shaw *v.* Hoadley, 8 Blackf. 165.

Iowa.— McClure *v.* Owens, 21 Iowa 133.

Kentucky.— Day *v.* Burnham, 89 Ky. 75, 11 S. W. 807, 11 Ky. L. Rep. 292; Williams *v.* Hamilton, 29 S. W. 873, 16 Ky. L. Rep. 794.

Louisiana.— Anderson *v.* Arnette, 27 La. Ann. 237; Leverich *v.* Toby, 7 La. Ann. 445.

Mississippi.— Overstreet *v.* Davis, 24 Miss. 393; Clement *v.* Hawkins, 8 Sm. & M. 339.

Missouri.— Barton *v.* Walker, 165 Mo. 25, 65 S. W. 293; Pacific Exp. Co. *v.* Emerson, 101 Mo. App. 62, 74 S. W. 132.

Nebraska.— McCord-Brady Co. *v.* Krause, 36 Nebr. 764, 55 N. W. 215.

New Jersey.— Wright *v.* Ramsay, 3 N. J. L. 409.

North Carolina.— State *v.* Simmons, 118 N. C. 9, 23 S. E. 923; Armstrong *v.* Harshaw, 12 N. C. 187.

Pennsylvania.— Danville, etc., R. Co.'s Appeal, 81* Pa. St. 326; Moser *v.* Hoch, 3 Pa. St. 230.

South Carolina.— Richey *v.* Du Pre, 20 S. C. 6.

Tennessee.— Deming *v.* Merchants' Cotton-Press., etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

Texas.— Dunlap *v.* Southerlin, 63 Tex. 38; Johnson *v.* Block, (Civ. App. 1898) 46 S. W. 85; Missouri, etc., R. Co. *v.* Fulmore, (Civ. App. 1894) 26 S. W. 238.

Utah.— Houser *v.* Smith, 19 Utah 150, 56 Pac. 683.

Virginia.— Moseley *v.* Cocke, 7 Leigh 224.

West Virginia.— Smith *v.* Lowther, 35 W. Va. 300, 13 S. E. 999.

United States.— Litchfield *v.* Richards, 9 Wall. 575, 19 L. ed. 681.

See 30 Cent. Dig. tit. "Judgment," § 428.

Purchaser pendente lite.— A decree purporting to be rendered by consent of parties is not void on its face because it declares the title to the premises in controversy to be in a person other than one of the parties to the record, where it appears that such person was a purchaser *pendente lite* from one of the parties. Hilson *v.* Beardsley, 97 Ga. 399, 24 S. E. 134; Beardsley *v.* Hilson, 94 Ga. 50, 20 S. E. 272.

Receiver.— The court can order a judgment to be docketed in favor of a receiver, not a party to the action, and can enforce it by execution. Goodenough *v.* Davids, 4 Month. L. Bul. (N. Y.) 35.

32. Smith *v.* Byrd, 7 Ill. 412; Overstreet *v.* Davis, 24 Miss. 393; Armstrong *v.* Harshaw, 12 N. C. 187.

33. Snowder *v.* Stout, 3 N. J. L. 413; March *v.* Verble, 79 N. C. 19. But see Jones *v.* Hoss, 29 La. Ann. 564, holding that it is error to render judgment in the name and in favor of a party, where the record shows that he has previously subrogated another to all his rights in the action, and given such other full power to control and manage the suit.

34. Cincinnati, etc., R. Co. *v.* Spratt, 2 Duv. (Ky.) 4. And see Harris *v.* Musgrove, 59 Tex. 401, where it is said that judgment may be rendered against one who, although only a formal party, is incidentally interested in the subject-matter of the suit, and received the benefit of a credit on the note sued on.

35. **Judgment in firm's name** see, generally, Partnership.

Judgment in name of treasurer of township see, generally, Towns.

36. Spence *v.* Simmons, 16 Ala. 828; Fuller Watchman's Electrical Detector Co. *v.* Louis. 50 Ill. App. 428; Sutton *v.* Louisville, 5 Dana (Ky.) 28; Goldberg *v.* Markowitz, 94 N. Y. App. Div. 237, 87 N. Y. Suppl. 1045.

A misrecital in a decree to the effect that an intervener who resisted plaintiff's claim was a defendant is not fatal. Newman *v.* Bullock, 23 Colo. 217, 47 Pac. 379.

The title of a case is matter of form only, and a clerical error therein will not vitiate

them in such terms as will identify them with certainty.[37] Thus a judgment expressed to be merely for or against "plaintiff" or "defendant" will be sufficient, if the names of the parties thus designated can be ascertained without ambiguity from the record.[38] And a judgment for "plaintiff," when there are several plaintiffs in the case, or against "defendant," when there are several, or one which erroneously describes the parties as "plaintiffs" or "defendants," when there is only one party on each side, will not be void, if the record as a whole shows clearly, and without any doubt, for and against whom the judgment is intended to be given.[39] It has also been held that a judgment which describes the parties plaintiff or defendant as the "heirs" or "descendants" of a person named is not void for uncertainty, although they are not named individually, if the papers in the case show who are meant.[40] And the fact that a descriptive

the judgment. Ewing *v.* Hatfield, 17 Ind. 513.

Designating principal and sureties. — In Ohio it is required by statute that the judgment shall certify which of defendants is principal and which surety; but it is held that this applies only where they are sued jointly, and if judgment is recovered in an action against the surety alone, it is not necessary to its validity that it should specify the fact of his suretyship. Wilkins *v.* Ohio Nat. Bank, 31 Ohio St. 565.

Assignee of claim.— Under a statute providing that a transfer of interest during the pendency of an action does not abate the action, which may be thereafter prosecuted to judgment in the name of the original plaintiff, it is not error for the court to enter up judgment in favor of plaintiff, notwithstanding an assignment of his claim to his attorney, as security for fees, pending the trial. Mayo *v.* Halley, 124 Iowa 675, 100 N. W. 529.

37. Little *v.* Birdwell, 27 Tex. 688.

38. *Alabama.*— Bolling *v.* Speller, 96 Ala. 269, 11 So. 300; Collins *v.* Hyslop, 11 Ala. 508.

Connecticut.— Cole *v.* Jerman, 77 Conn. 374, 59 Atl. 425.

Indiana.— Hendry *v.* Crandall, 131 Ind. 42, 30 N. E. 789.

Kentucky.— Johnston *v.* Churchills, Litt. Sel. Cas. 177.

Michigan.— Aldrich *v.* Maitland, 4 Mich. 205.

Tennessee.— Wilson *v.* Nance, 11 Humphr. 189.

Texas.— Smith *v.* Chenault, 48 Tex. 455; Little *v.* Birdwell, 27 Tex. 688.

See 30 Cent. Dig. tit. "Judgment," § 430.

Joint parties.— Where there are two plaintiffs in the action or two defendants, and judgment is intended to be given for one of plaintiffs only, or against one of defendants only, it must specify which one is meant, and failure to do so will invalidate it. Holt *v.* Gridley, 7 Ida. 416, 63 Pac. 188; Aultman *v.* Wirth, 45 Ill. App. 614.

39. *Alabama.*— Ellis *v.* Dunn, 3 Ala. 632.

California.— Haynes *v.* Backman, (1892) 31 Pac. 746.

Illinois.— Hofferbert *v.* Klinkhardt, 58 Ill. 450.

Indiana.— Taylor *v.* Taylor, 64 Ind. 356; Sturgis *v.* Rogers, 26 Ind. 1.

Iowa.— Finnagan *v.* Manchester, 12 Iowa 521.

Kentucky.— Prents *v.* Barnett, 4 Bibb 251.

Michigan.— Holcomb *v.* Tift, 54 Mich. 647, 20 N. W. 627.

New Mexico.— New Mexico, etc., R. Co. *v.* Madden, 7 N. M. 215, 34 Pac. 50.

Rhode Island.— McMahon *v.* Perkins, 22 R. I. 116, 46 Atl. 405.

Texas.— Missouri Pac. R. Co. *v.* Smith, (1891) 16 S. W. 803; Turner *v.* Houston, (Civ. App. 1897) 43 S. W. 69.

Virginia.— Roach *v.* Blakey, 89 Va. 767, 17 S. E. 228.

See 30 Cent. Dig. tit. "Judgment," § 430.

"For" and "against."— A judgment for a definite amount should not be set aside because it fails to state that it is "for" plaintiff, and "against" defendant, when the declaration sets forth a cause of action and the parties thereto. Adams *v.* Walker, 59 Ga. 506.

40. Low *v.* Graff, 80 Ill. 360; Stevenson *v.* Flournoy, 89 Ky. 561, 13 S. W. 210, 11 Ky. L. Rep. 745; Parsons *v.* Spencer, 83 Ky. 305; Schackleford *v.* Fountain, 1 T. B. Mon. (Ky.) 252, 15 Am. Dec. 115. And see Dietrich *v.* Dietrich, 154 Pa. St. 92, 25 Atl. 1080. But a decree entered in favor of "the legatees of Phillip Joseph," without stating who they are, cannot sustain an execution nor a writ of error. Joseph *v.* Joseph, 5 Ala. 280. So if the judgment awards a portion of the damages against persons who are described in it only as "sureties." McKnew *v.* Duvall, 45 Md. 501. And it has been held that a judgment against "the captain and master of the steamboat Mollie Hamilton," where there is nothing in the record to disclose the name of the captain or master of the vessel, is void. The Mollie Hamilton *v.* Paschal, 9 Heisk. (Tenn.) 203.

Judgment in the alternative.— A judgment against certain parties named "or their representatives or assigns" has been held void for uncertainty. Miller *v.* Peters, 25 Ohio St. 270. But see Downs *v.* Allen, 22 Fed. 805, 23 Blatchf. 54, holding that a judgment against the parties named therein,

word or phrase is added to a party's name in a judgment neither affects the validity of the judgment nor changes the legal rights and relations which it engenders.[41]

b. Names and Misnomer. A judgment will be vitiated by a misnomer of the parties therein or a material variance between the declaration and the judgment,[42] unless the error is a mere clerical misprision not calculated to mislead,[43] or the right and wrong names are *idem sonantes*,[44] or unless the record contains data by which the judgment can be amended, or the record and judgment together point out the persons to be bound by the judgment, with unmistakable certainty.[45] Properly each party should be designated by his true name, both christian name and surname in full,[46] and in the case of a partnership, the names of the individual

"or such of them as are now surviving," is a valid judgment against the survivors.

41. Descriptio personæ.— On the effect of the addition of a descriptive word to the name of a party in a judgment, such as "executor," "trustee," "treasurer," "tax-collector," and the like, see the following cases:

California.— Rutan *v.* Wolters, 116 Cal. 403, 48 Pac. 385; O'Brien *v.* Ballou, 116 Cal. 318, 48 Pac. 130.

Georgia.— Stewart *v.* Atlanta Beef Co., 93 Ga. 12, 18 S. E. 981, 44 Am. St. Rep. 119; Tinsley *v.* Lee, 51 Ga. 482.

Iowa.— Dougherty *v.* McManus, 36 Iowa 657.

North Carolina.— Hall *v.* Craige, 68 N. C. 305.

Pennsylvania.— Rockwell *v.* Tupper, 7 Pa. Super. Ct. 174; Stone *v.* Wimmill, 6 Phila. 311.

Texas.— Sass *v.* Hirschfeld, 23 Tex. Civ. App. 396, 56 S. W. 941; Croom *v.* Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072.

Virginia.— Fulkerson *v.* Taylor, 100 Va. 426, 41 S. E. 863.

See 30 Cent. Dig. tit. "Judgment," § 430.

Agent.— In an action against one as agent for an estate, on a bill accepted by him as such agent, a judgment against him as agent is proper, as execution thereon will not go against his individual property, but be levied on assets in his hands as agent. Rudd *v.* Owensboro Deposit Bank, 105 Ky. 443, 49 S. W. 207, 971, 20 Ky. L. Rep. 1276, 1497.

42. *California.*— Ford *v.* Doyle, 37 Cal. 346.

Maryland.— McKnew *v.* Duvall, 45 Md. 501.

Missouri.— Sweazy *v.* Nettles, 2 Mo. 6.

New York.— Wilber *v.* Widner, 1 Wend. 55.

Texas.— Terry *v.* French, 5 Tex. Civ. App. 120, 23 S. W. 911.

Wisconsin.— Reeve *v.* Lee, 6 Wis. 80.

See 30 Cent. Dig. tit. "Judgment," § 430.

Waiver of defect.— After the entry of a default, which is permitted by defendant to stand without motion to set it aside, a lack of entire identity between the name of plaintiff, as contained in the process and judgment, and as contained in the declaration, will be cured. Edwards *v.* Warner, 111 Ill. App. 32.

43. Webster *v.* State Bank, 4 Ark. 423.

44. Kuhn *v.* Kilmer, 16 Nebr. 699, 21 N. W. 443; Robertson *v.* Winchester, 85 Tenn. 171, 1 S. W. 781; Salinas *v.* State, 39 Tex. Cr. 319, 45 S. W. 900.

45. *Alabama.*— *Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

California.— Chicago Clock Co. *v.* Tobin, 123 Cal. 377, 55 Pac. 1007; Sutter *v.* Cox, 6 Cal. 415.

Louisiana.— Frey *v.* Fitzpatrick-Cromwell Co., 108 La. 125, 32 So. 437.

Missouri.— Ellis *v.* Jones, 51 Mo. 180.

Pennsylvania.— Sheridan's Estate, 10 Kulp 225.

Texas.— Hopson *v.* Schoelkopf, (Civ. App. 1894) 27 S. W. 283.

46. Omission of christian name will not necessarily vitiate the judgment, if such name is disclosed by other parts of the record, or if the party can be connected with the judgment by proper evidence. Root *v.* Fellowes, 6 Cush. (Mass.) 29; Goodgion *v.* Gilreath, 32 S. C. 388, 11 S. E. 207; Hays *v.* Yarborough, 21 Tex. 487; Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340. And see Preston *v.* Wright, 60 Iowa 351, 14 N. W. 352. But in Vincent *v.* Means, 184 Mo. 327, 82 S. W. 96, it is held that where there is no proof that a person has ever received or executed conveyances of land by using the initial letter or letters of his name, a judgment rendered in a suit against him to quiet title to land, in which he is sued by his initials and surname, and which does not disclose his christian name, is void.

Error in christian name.— The fact that the judgment in a case is entered in favor of the true plaintiff by a christian name other than his own is immaterial, and will not work a reversal. Cleveland, etc., R. Co. *v.* Surrells, 115 Ill. App. 615.

Initials.— Defendant may be designated by the initial letter of his christian name, with the surname, if he habitually signs his name in that style, so as to make it his business name, or if it appears that there is no other person having the same initial and last name. Oakley *v.* Pegler, 30 Nebr. 628, 46 N. W. 920; *In re* Jones, 27 Pa. St. 336.

Middle name.— The middle name of a party is of no consequence, as the law recognizes but one christian name; and hence the omission of such middle name from the judgment or a mistake in it will not be regarded. Hicks *v.* Riley, 83 Ga. 332, 9 S. E. 771; Clute

partners should be set out.[47] But a defendant may be sued by a fictitious name, and if the complaint is amended by inserting his true name when discovered, the judgment following it will be valid.[48] And a defendant who is sued by a wrong name, but with due service of process upon him, who fails to plead the misnomer and suffers a judgment to be taken against him in such name, may be connected with the judgment by proper averments and will be bound by it.[49]

D. Conformity to Pleadings and Verdict[50] **— 1. Conformity to Pleadings — a. In General.** A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered; if it is not supported by the pleadings it is fatally defective.[51]

v. Emmerich, 26 Hun (N. Y.) 10; Crawford *v.* Wilcox, 68 Tex. 109, 3 S. W. 695.

47. Simmons *v.* Titche, 102 Ala. 317, 14 So. 786; Hitch *v.* Gray, 1 Marv. (Del.) 400, 41 Atl. 91; Ellis *v.* Jones, 51 Mo. 180; Bailey *v.* Crittenden, (Tex. Civ. App. 1897) 44 S. W. 404. *Compare* Collins *v.* Hyslop, 11 Ala. 508.

48. Alameda County *v.* Crocker, 125 Cal. 101, 57 Pac. 766; San Francisco *v.* Burr, (Cal. 1894) 36 Pac. 771; McKinley *v.* Tuttle, 42 Cal. 570; Enders *v.* The Henry Clay, 8 Rob. (La.) 30; Fischer *v.* Hetherington, 11 Misc. (N. Y.) 575, 32 N. Y. Suppl. 795.

Assumed name.— A person has a right to be known by any name he chooses, and a suit and judgment against a person by an assumed name is not erroneous. Clark *v.* Clark, 19 Kan. 522.

Where a debtor is equally well known by two names, a judgment against him in either name is good as against him. Isaacs *v.* Mintz, 11 N. Y. Suppl. 423.

49. McCreery *v.* Everding, 54 Cal. 168; Pond *v.* Ennis, 69 Ill. 341; Davis *v.* Taylor, 41 Ill. 405; Louisville, etc., R. Co. *v.* Hall, 12 Bush (Ky.) 131; Althouse *v.* Hunsperger, 6 Pa. Super. Ct. 160.

50. Conformity to pleadings and process in actions by or against executors or administrators see Executors and Administrators.

Conformity to pleadings and process in forcible entry and detainer see Forcible Entry and Detainer.

Conformity of final judgment or decree for injunctions to pleadings and findings see Injunctions.

Conformity to pleadings in actions to avoid fraudulent conveyances see Fraudulent Conveyances.

Conformity to verdict or findings in actions on insurance policies see Fire Insurance; Life Insurance.

Necessity of amending pleadings to support verdict see, generally, Pleadings.

51. *California.*— Balfour-Guthrie Inv. Co. *v.* Sawday, 133 Cal. 228, 65 Pac. 400; Orton *v.* Brown, 117 Cal. 501, 49 Pac. 583; McDougald *v.* Argonaut Land, etc., Co., 117 Cal. 87, 48 Pac. 1021; Bachman *v.* Sepulveda, 39 Cal. 688.

Illinois.— Wheeler *v.* Foster, 82 Ill. App. 153.

Kentucky.— Frankfort *v.* Deposit Bank, 111 Ky. 950, 65 S. W. 10, 23 Ky. L. Rep. 1285, 98 Am. St. Rep. 444; Johnson *v.* Johnson, 45 S. W. 879, 20 Ky. L. Rep. 271.

Louisiana.— Independent Ice, etc., Co. *v.* Anderson, 106 La. 55, 30 So. 270; Brigot *v.* Brigot, 49 La. Ann. 1428, 22 So. 641.

Michigan.— Clark's Appeal, 100 Mich. 448, 59 N. W. 150.

Montana.— Campbell *v.* Flannery, 32 Mont. 119, 79 Pac. 702, 80 Pac. 240.

Nebraska.— Solt *v.* Anderson, 67 Nebr. 103, 93 N. W. 205; Clemons *v.* Heelan, 52 Nebr. 287, 72 N. W. 270.

Nevada.— Frevert *v.* Henry, 14 Nev. 191; Perkins *v.* Sierra Nevada Silver Min. Co., 10 Nev. 405.

New Jersey.— Marshman *v.* Conklin, 21 N. J. Eq. 546.

New York.— Schlimbach *v.* McLean, 178 N. Y. 600, 70 N. E. 1108; Cohen *v.* Wittemann, 100 N. Y. App. Div. 338, 91 N. Y. Suppl. 493; Davis *v.* Broadalbin Knitting Co., 90 N. Y. App. Div. 567, 86 N. Y. Suppl. 127.

North Carolina.— Nash *v.* Sutton, 119 N. C. 298, 25 S. E. 959; Parsley *v.* Nicholson, 65 N. C. 207.

North Dakota.— Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518.

Pennsylvania.— Longest *v.* Sohey, 1 Wkly. Notes Cas. 402.

South Dakota.— Seiberling *v.* Mortinson, 10 S. D. 644, 75 N. E. 202; Novotny *v.* Danforth, 9 S. D. 301, 68 N. W. 749.

Tennessee.— Perkins Oil Co. *v.* Eberhart, 107 Tenn. 409, 64 S. W. 760; Teasdale *v.* Manchester Produce Co., 104 Tenn. 267, 56 S. W. 853; Mosley *v.* Matthews, Meigs 578.

Texas.— Roche *v.* Lovell, 74 Tex. 191, 11 S. W. 1079; Clark *v.* Clark, 21 Tex. Civ. App. 371, 51 S. W. 337; Lee *v.* British, etc., Mortg. Co., 16 Tex. Civ. App. 671, 40 S. W. 1041; Thomas Mfg. Co. *v.* Griffin, 16 Tex. Civ. App. 188, 40 S. W. 755; Hoefling *v.* Dobbin, (Civ. App. 1897) 40 S. W. 58; Childress *v.* Smith, (Civ. App. 1896) 37 S. W. 1076; Robinson *v.* Moore, 1 Tex. Civ. App. 93, 20 S. W. 994. And see Gulf, etc., R. Co. *v.* Fenn, 33 Tex. Civ. App. 352, 76 S. W. 597.

Utah.— Sowles *v.* Clawson, 28 Utah 74, 76 Pac. 1067.

West Virginia.— Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

Wisconsin.— Spaulding *v.* Stubbings, 86

b. Nature and Form of Remedy. At common law if plaintiff has mistaken the nature of his remedy, or chosen a wrong form of action, he cannot have any relief which he has not asked for, or which is not consistent with the theory of his action, although the evidence may show him entitled to it.[52] But in some states the common-law forms of pleading having been abolished, it is made the duty of the courts to give such judgments as the evidence warrants, without regard to the form or name of the action.[53]

c. Grounds of Action or Defense. It is also a rule, without special regard to the form of the action, that a judgment cannot be rendered for a cause of action not stated in the declaration or complaint,[54] or upon a view of the facts which is contrary to the theory on which plaintiff's action proceeded.[55] Thus if he alleges

Wis. 255, 56 N. W. 469, 39 Am. St. Rep. 888.

See 30 Cent. Dig. tit. "Judgment," § 434 *et seq.* And see DESCENT AND DISTRIBUTION, 14 Cyc. 162; EMINENT DOMAIN, 15 Cyc. 1013.

Description of land in the judgment must follow and accord with that in the declaration or complaint. Quinlan *v.* Smye, 21 Tex. Civ. App. 156, 50 S. W. 1068; Leavell *v.* Seale, (Tex. Civ. App. 1898) 45 S. W. 171.

Where the petition contains allegations unnecessary to the cause of action, the court may disregard these and render judgment in the case on the strength of the essential allegations. Connell *v.* Brumback, 18 Ohio Cir. Ct. 502, 10 Ohio Cir. Dec. 149.

Allegations of answer.— Defendant cannot complain of a judgment based on a contract, as it is alleged in his answer, although it differs from that alleged by plaintiff. Ach *v.* Carter, 21 Wash. 140, 57 Pac. 344.

Judgment on reversal and remand.— Where a judgment for plaintiff was reversed on appeal, with directions to render judgment for defendant as prayed in the answer, which was that the prayer of the complaint be denied, and that plaintiff take nothing by the action, and that defendant have judgment against plaintiff for costs, a judgment rendered that the prayer of plaintiff be denied, that plaintiff take nothing by the action, and that defendant have judgment against plaintiff for costs, and is entitled to "appropriate process" to enforce the judgment, and every part thereof, was not objectionable, as granting more relief than demanded, in so far as it awarded process to enforce the judgment. White *v.* Wise, (Cal. 1905) 81 Pac. 664.

52. Applications of rule.— A plea of set-off for money had and received does not permit a recovery of damages for breach of an express contract. Smith *v.* Weed Sewing Mach. Co., 26 Ohio St. 562. So in an action to restrain a mortgagee from foreclosing plaintiff is not entitled to an accounting. Davis *v.* Hinchcliffe, 7 Wash. 199, 34 Pac. 915. But *compare* Chaurant *v.* Maillard, 56 N. Y. App. Div. 11, 67 N. Y. Suppl. 345. And where an action is brought to foreclose a mechanic's lien, and the lien is shown to have been discharged by the giving of a bond, the court has no power to render a personal judgment against defendant. Mertz *v.* Mapes-Reeve Constr. Co., 30 Misc. (N. Y.) 343, 63 N. Y. Suppl. 455. See Fein *v.* Davis, 2 Wyo. 118.

Failure to object to complaint.— Objection cannot be made to the form of a judgment which follows the complaint to which no objection was made. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 41 Pac. 308.

53. Wright *v.* Hooker, 10 N. Y. 51; Brennan *v.* Gale, 56 N. Y. App. Div. 4, 67 N. Y. Suppl. 382; Wilder *v.* Boynton, 63 Barb. (N. Y.) 547; Eldridge *v.* Adams, 54 Barb. (N. Y.) 417; Doughty *v.* Crozier, 9 Abb. Pr. (N. Y.) 411; Atlanta Nat. Bank *v.* Southern R. Co., 106 Fed. 623.

Merger of law and equity.— Although under the modern systems courts of law may enforce equitable rights the proof must agree with the pleadings and the relief granted must be within the prayer for relief and the grounds relied on. Eddy, etc., Live-Stock Co. *v.* Blackburn, 70 Fed. 949, 17 C. C. A. 532.

54. Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332; National Commercial Bank *v.* Lackawanna Transp. Co., 172 N. Y. 596, 64 N. E. 1123; Adams *v.* McCann, 59 N. Y. Super. Ct. 59, 13 N. Y. Suppl. 424; McVity *v.* Stanton, 10 Misc. (N. Y.) 105, 30 N. Y. Suppl. 934. *Contra,* Hairy *v.* Dennistoun, 5 Rob. (La.) 130; Russell *v.* Cash, 2 La. 185. And see Kansas Refrigerator Co. *v.* Pert, 3 Kan. App. 364, 42 Pac. 943.

Ground of relief not pleaded but admitted. — Complainant brought suit to restrain the sale of certain land on a judgment against her former husband. A purchaser of the judgment intervened and on the trial admitted that it had been paid in full before his intervention. It was held that complainant was entitled to judgment on such admission, although she had not pleaded payment of the judgment as a ground of relief. Abee *v.* San Antonio Brewing Assoc., (Tex. Civ. App. 1904) 78 S. W. 973.

55. *Arkansas.*— Stitt *v.* Rector, 70 Ark. 613, 69 S. W. 552.

California.— Dobbs *v.* Purington, (1901) 65 Pac. 1091.

New York.— Arnold *v.* Angell, 62 N. Y. 508; Graham *v.* Read, 57 N. Y. 681; Broads *v.* Livingston, 21 Misc. 783, 47 N. Y. Suppl. 143; Felter *v.* Maddock, 11 Misc. 297, 32 N. Y. Suppl. 292.

facts showing a cause of action in tort he cannot have a judgment on proving a cause of action in contract;[56] and a count for goods sold and delivered will not sustain a recovery for money advanced or services rendered for defendant;[57] so in an action for money obtained from plaintiff by fraud, it is error, on finding no fraud shown, to give judgment as for money loaned.[58] And where the theory of the complaint and of the trial, as well as of the entire evidence, was that a deed was not intended as a mortgage, but as a conveyance, a judgment based on the theory that the deed was a mortgage cannot be upheld.[59]

d. Issues Raised by Pleadings. To render a valid judgment the court must have jurisdiction not only of the parties and the general subject-matter, but also of the particular question which it assumes to decide, or of the particular remedy or relief which it assumes to grant; and a judgment of a court upon a subject which may be within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is void.[60] An exception to the rule is recognized in some

Tennessee.— Osborne v. Boswell, (Ch. App. 1900) 61 S. W. 96.

Texas.— Texas, etc., R. Co. v. Logan, 3 Tex. App. Civ. Cas. § 186.

See 30 Cent. Dig. tit. "Judgment," § 436.

56. Degraw v. Elmore, 50 N. Y. 1; National Commercial Bank v. Lackawanna Transp. Co., 59 N. Y. App. Div. 270, 69 N. Y. Suppl. 396; Noble v. Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483; Behrens Drug Co. v. Hamilton, (Tex. Civ. App. 1898) 45 S. W. 622.

57. Rand v. Hornbarger, 82 Ill. App. 341. *Compare* Peterson v. Short, 15 La. 159.

58. Kress v. Woehrle, 23 Misc. (N. Y.) 472, 52 N. Y. Suppl. 628.

In a suit by a contractor for work on a public building to recover for "work and labor," a judgment rendered for "labor and material" cannot be sustained. Fidelity, etc., Co. v. Parkinson, (Nebr. 1903) 94 N. W. 120.

59. Bullenkamp v. Bullenkamp, 43 N. Y. App. Div. 510, 60 N. Y. Suppl. 84.

60. *Arkansas.*— Hoover v. Binkley, (1899) 51 S. W. 73; State Bank v. Sherrill, 12 Ark. 183.

California.— Stearns Ranchos Co. v. McDowell, 134 Cal. 562, 66 Pac. 724; Wallace v. Farmers' Ditch Co., 130 Cal. 578, 62 Pac. 1078; Eastlick v. Wright, 121 Cal. 309, 53 Pac. 654; Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Demick v. Cuddihy, 72 Cal. 110, 12 Pac. 287, 13 Pac. 166; Lake v. Tebbits, 56 Cal. 481; Bachman v. Sepulveda, 39 Cal. 688; Putnam v. Lamphier, 36 Cal. 151.

Colorado.— Breckinridge Mercantile Co. v. Bailif, 16 Colo. App. 554, 66 Pac. 1079; Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

Connecticut.— Burns, etc., Lumber Co. v. Doyle, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235.

Georgia.— Jackson v. Miles, 94 Ga. 484, 19 S. E. 708.

Indiana.— American Furniture Co. v. Batesville, (1893) 35 N. E. 682; Boardman v. Griffin, 52 Ind. 101; Bartmess v. Holliday, 27 Ind. App. 544, 61 N. E. 750; Oolitic Stone Co. v. Crofton, 4 Ind. App. 571, 31 N. E. 375. See State v. Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

Kansas.— W. W. Kendall Boot, etc., Co. v. Davenport, (1901) 65 Pac. 688.

Louisiana.— State v. St. Paul, 52 La. Ann. 1039, 27 So. 571; Kuhnholz v. New Orleans, 45 La. Ann. 1398, 14 So. 219; Hennen v. Wood, 16 La. Ann. 263; Castile v. Chacere, 13 La. Ann. 561; Fisk v. Mead, 18 La. 332; Milne v. Girodeau, 12 La. 324.

Missouri.—McGregor v. J. C. Ware Constr. Co., 188 Mo. 611, 87 S. W. 981; McLaughlin v. McLaughlin, 16 Mo. 242; Kyle v. Hoyle, 6 Mo. 526; Smith v. St. Louis Transfer R. Co., 92 Mo. App. 41.

Nebraska.— State v. Haverly, 62 Nebr. 767, 87 N. W. 959; Carter v. Gibson, 47 Nebr. 655, 66 N. W. 631; Rockford Watch Co. v. Manifold, 36 Nebr. 801, 55 N. W. 236; Lincoln Nat. Bank v. Virgin, 36 Nebr. 735, 55 N. W. 218, 38 Am. St. Rep. 747.

New Jersey.— Munday v. Vail, 34 N. J. L. 418; Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305.

New Mexico.— Badaracco v. Badaracco, 10 N. M. 761, 65 Pac. 153.

New York.— Husted v. Van Ness, 158 N. Y. 104, 52 N. E. 645; Banta v. Banta, 103 N. Y. App. Div. 172, 93 N. Y. Suppl. 393; Schlimbach v. McLean, 83 N. Y. App. Div. 157, 82 N. Y. Suppl. 516; Bolivar v. Bolivar Water Co., 62 N. Y. App. Div. 484, 70 N. Y. Suppl. 750; Bryant v. Allen, 54 N. Y. App. Div. 500, 67 N. Y. Suppl. 89; Clapp v. McCabe, 84 Hun 379, 32 N. Y. Suppl. 425; William Anson Wood Mower, etc., Co. v. Thayer, 50 Hun 516, 3 N. Y. Suppl. 465; Vandenburgh v. New York, 57 N. Y. Super. Ct. 285, 5 N. Y. Suppl. 664. See Kittel v. Schmieder, 89 N. Y. App. Div. 615, 85 N. Y. Suppl. 977.

North Carolina.— Wilson v. Taylor, 98 N. C. 275, 3 S. E. 492.

South Dakota.— Seiberling v. Mortinson, 10 S. D. 644, 75 N. W. 202; Wyman v. Hallock, 4 S. D. 469, 57 N. W. 197.

Tennessee.— Thompson v. Keck Mfg. Co., 107 Tenn. 451, 64 S. W. 709; Wright v. Durrett, (Ch. App. 1899) 52 S. W. 710.

Texas.— Paris First Baptist Church v.

jurisdictions where it is held that parties may if they so elect depart from the issues made by the pleadings, and try other questions relating to the merits of the controversy by consent or acquiescence.[61]

e. Parties to Judgment. The judgment must correspond with the pleadings in respect to the parties for and against whom it goes; and it is erroneous for example to include in it a defendant as to whom there has been a discontinuance.[62] So a judgment for plaintiff alone cannot be sustained where the complaint shows that he is not the sole owner of the claim sued on, but that others named in the pleadings are joint owners of it.[63] Similarly, where the complaint asks different relief as against the different defendants, or alleges only a partial liability on the part of each of them, there cannot be a general judgment against one or all of them for the entire claim or demand.[64] But a complaint alleging performance of services for defendant and others at their request, and an agreement of defendant to pay therefor, supports a judgment against him alone.[65] And a judgment against a principal only for exemplary damages is not erroneous because the petition asked such damages against principal and agents, and the verdict was general.[66]

f. Personal or Representative Capacity. Generally the judgment should be for and against the parties in the capacity in which they sue and are sued. But it is held that if plaintiff sues as executor or administrator, and the evidence shows that the right of recovery is in him as an individual, the judgment may follow the evidence.[67] But on the other hand a personal judgment against an

Fort, 93 Tex. 215, 54 S. W. 892, 49 L. R. A. 517; Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567; Throckmorton v. Davenport, 55 Tex. 236; Long v. Long, 29 Tex. Civ. App. 536, 69 S. W. 428; McLane v. Mackey, (Civ. App. 1900) 59 S. W. 944; Lazarus v. Barrett, 5 Tex. Civ. App. 5, 23 S. W. 822.

Virginia.— Seamster v. Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262.

Wisconsin.— Magnuson v. Clithero, 101 Wis. 551, 77 N. W. 882.

United States.— Reynolds v. Stockton, 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464; Barnes v. Chicago, etc., R. Co., 122 U. S. 1, 7 S. Ct. 1043, 30 L. ed. 1128; Graham v. La Crosse, etc., R. Co., 3 Wall. 704, 18 L. ed. 247; Hooven, etc., Co. v. Featherstone, 111 Fed. 81, 49 C. C. A. 229; Brown v. U. S., 1 Ct. Cl. 377.

See 30 Cent. Dig. tit. "Judgment," § 437.

Illustrations of rule.— Where the complaint alleges a cause of action on a note only, the court cannot decree the foreclosure of a mortgage which was given to secure the note. Hibernia Sav., etc., Soc. v. Thornton, 123 Cal. 62, 55 Pac. 702. And so a judgment foreclosing a trust deed on church property cannot be entered in a suit between different factions of the church for the possession of the property, where neither party sought a foreclosure of the deed nor a sale of the property. Paris First Baptist Church v. Fort, 93 Tex. 215, 54 S. W. 892, 49 L. R. A. 617. And a decree in an action between a mortgagor and certain mortgagees of chattels, whereby a mortgage not attacked by the pleadings and whose holder is not a party to the action, is declared void, cannot be sustained. Rockford Watch Co. v. Manifold, 36 Nebr. 801, 55 N. W. 236. But in South Carolina it is said that where, in practice under the code, an instrument comes in question in an issue, and is relied on as an estoppel, the court, on deciding that the instrument is void, may order the same to be canceled, although there is no prayer in the complaint for such relief. McKenzie v. Sifford, 45 S. C. 496, 23 S. E. 622.

61. Newman v. Bullock, 23 Colo. 217, 47 Pac. 379; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Schoepflin v. Coffey, 162 N. Y. 12, 56 N. E. 502; Farmers L. & T. Co. v. Housatonic R. Co., 152 N. Y. 251, 40 N. E. 504; Knickerbocker v. Robinson, 83 N. Y. App. Div. 614, 82 N. Y. Suppl. 314; Wright v. Durrett, (Tenn. Ch. App. 1899) 52 S. W. 710.

62. Browner v. Davis, 15 Cal. 9.

63. Laredo Electric Light, etc., Co. v. United States Electric Lighting Co., (Tex. Civ. App. 1894) 26 S. W. 310. See Akinson v. Ward, 2 Tex. Unrep. Cas. 236.

64. Feder v. Field, 117 Ind. 386, 20 N. E. 129; Thompson v. School Dist. No. 4, 71 Mo. 495.

65. Delafield v. San Francisco, etc., R. Co., (Cal. 1895) 40 Pac. 958.

66. Emerson v. Skidmore, 7 Tex. Civ. App. 641, 25 S. W. 671.

67. Childress v. Davis, 15 La. 492; Butler v. Kenner, 2 Mart. N. S. (La.) 274; McGrew v. Browder, 2 Mart. N. S. (La.) 17; Hunter v. Postlethwaite, 10 Mart. (La.) 456, 12 Am. Dec. 334; Bingham v. Marine Nat. Bank, 18 Abb. N. Cas. (N. Y.) 135.

Descriptio personæ.— Where a note in suit was given to plaintiff as "guardian" of certain minor heirs, and he is so described in the petition and citation, but the judgment is rendered in favor of plaintiff as "administrator," it may be sustained, the words

administrator or executor who is sued in his representative character is fatally defective.[68]

g. Facts and Evidence. Where all the material facts are conclusively established, the court should apply the law to such facts, and render the judgment which it requires.[69] But the judgment must correspond with the *allegata* and *probata*. Facts proved at the trial, but not set up in the pleadings, cannot sustain a judgment;[70] and conversely the judgment must be supported by the evidence, and cannot be based on facts of which there is no proof or admission, although they may have been pleaded. In the latter case the judgment will be erroneous, although not void.[71]

2. Conformity to Verdict and Findings[72] — a. In General. The judgment must follow and conform to the verdict, not only as to the amount of the recovery, but also as to the nature and measure of relief and as to the parties, and it cannot go beyond the verdict in settling the rights of the parties, or admeasuring the recovery, or declaring or foreclosing liens,[73] except that in cases where the evidence

"administrator" and "guardian" being both rejected as surplusage. Morrison *v.* Hodges, 25 Tex. Suppl. 176. And see Connellee *v.* Hopkins, (Tex. Civ. App. 1895) 31 S. W. 315.

68. Foley *v.* Scharmann, 58 N. Y. App. Div. 250, 68 N. Y. Suppl. 771; Humphrey *v.* West, 3 Rand (Va.) 516.

69. Reiff *v.* Mullholland, 65 Ohio St. 178, 62 N. E. 124.

70. *Connecticut.*— Stein *v.* Coleman, 73 Conn. 524, 48 Atl. 206; Burns, etc., Lumber Co. *v.* Doyle, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235.

Missouri.— Kiskaddon *v.* Jones, 63 Mo. 190.

New York.— Springer *v.* Westcott, 87 Hun 190, 33 N. Y. Suppl. 805; Mueller *v.* Schmenger, 28 Misc. 445, 59 N. Y. Suppl. 189.

North Carolina.— Parsley *v.* Nicholson, 65 N. C. 207.

Tennessee.— Simpson *v.* Markwood, 6 Baxt. 340.

Texas.— Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567; Wallace *v.* Bogel, 62 Tex. 636.

West Virginia.— Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366.

71. *Illinois.*— Clement *v.* Brown, 30 Ill. 43; Manken *v.* Wilson, 8 Ill. App. 303.

Indiana.— Whitman Agricultural Co. *v.* Hornbrook, 24 Ind. App. 255, 55 N. E. 502.

Louisiana.— A judgment may be based on facts, of which some are found by the jury and others submitted to the court. Morris *v.* Hatch, 2 Mart. N. S. 491.

Missouri.— Coleman *v.* Hicks, 158 Mo. 367, 59 S. W. 70; Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93.

Nebraska.— Lubker *v.* Grand Detour Plow Co., 53 Nebr. 111, 73 N. W. 457.

New York.— Reilly *v.* Freeman, 1 N. Y. App. Div. 560, 37 N. Y. Suppl. 570.

Texas.— Pyron *v.* Grinder, 25 Tex. Suppl. 159.

Utah.— Darke *v.* Ireland, 4 Utah 192, 7 Pac. 714.

See 30 Cent. Dig. tit. "Judgment," § 445.

Good and bad counts.— Where there are several counts, all of which are good, it is not error to enter judgment generally, although the evidence may have been applicable only to some of them. Kissecker *v.* Monn, 36 Pa. St. 313, 78 Am. Dec. 379. But if there was a good and a bad count, and it appears that the evidence was applied solely to the bad count, the judgment must be reversed. Scull *v.* Roane, 21 Fed. Cas. No. 12,570c, Hempst. 103. And although plaintiff should fail in proving a special count in his declaration, he may nevertheless prevail on some of the general counts, so as to sustain a verdict and judgment. Houston *v.* Gilbert, 3 Brev. (S. C.) 63, 5 Am. Dec. 542.

72. Conformity to verdict of judgment on foreclosure of mortgage see, generally, MORTGAGES.

73. *Alabama.*— Bell *v.* Otts, 101 Ala. 186, 13 So. 43, 46 Am. St. Rep. 117.

California.— Butler *v.* Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040; Ross *v.* Austill, 2 Cal. 183.

Georgia.— Parker *v.* Salmons, 113 Ga. 1167, 39 S. E. 475; Darien Bank *v.* J. K. Clarke Lumber Co., 112 Ga. 947, 38 S. E. 363; Howard *v.* Johnson, 91 Ga. 319, 18 S. E. 132. But a decree will not be reversed for failure to follow the verdict, where, had it been rendered in accordance therewith, it would have been contrary to law. Southwestern Georgia Bank *v.* McGarrah, 120 Ga. 944, 48 S. E. 393.

Illinois.— Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14; Hellman *v.* Schwartz, 44 Ill. App. 84; Boyd *v.* Ernst, 36 Ill. App. 583.

Indiana.— Jarboe *v.* Brown, 39 Ind. 549.

Kansas.— O'Keef *v.* Seip, 17 Kan. 131.

Kentucky.— Marmaduke *v.* Tennant, 4 B. Mon. 210; Bourlier Cornice, etc., Co. *v.* Loemker, 67 S. W. 10, 23 Ky. L. Rep. 2346; Bogard *v.* Turner, 63 S. W. 607, 23 Ky. L. Rep. 630; Jackson *v.* Hill, 58 S. W. 434, 22 Ky. L. Rep. 563; Metropolitan L. Ins. Co. *v.* Sehlhorst, 53 S. W. 524, 21 Ky. L. Rep. 912.

Louisiana.— Solomon *v.* Gardiner, 50 La. Ann. 1293, 23 So. 896; Walker *v.* Acklen, 19 La. Ann. 186; De Young *v.* De Young, 9 La. Ann. 545; Black *v.* Catlett, 1 Rob. 540.

would have authorized the court to direct a verdict, it may in rendering judgment go further than the verdict in adjusting the equities of the parties.[74] But if the judgment is sustained by the verdict, it is not invalidated by the fact that a mistake is made in the judgment in its description of the verdict.[75] Judgment should not be rendered upon a verdict which finds upon a part only of the issues.[76] Where there is a general verdict on several counts, the court cannot enter judgment specially on one count, leaving the other count without a judgment.[77]

b. Special Verdict and Findings.[78] Where the statutes require a finding of facts to serve as the basis of the judgment, the omission of this requisite will

Massachusetts.— Brown *v.* Chase, 4 Mass. 436.

Minnesota.— Ramaley *v.* Ramaley, 69 Minn. 491, 72 N. W. 694.

Montana.— Duane *v.* Molinak, 31 Mont. 343, 78 Pac. 588; Conley *v.* Dunn, 28 Mont. 295, 72 Pac. 654.

Nebraska.— Foster, etc., Lumber Co. *v.* Leisure, 3 Nebr. (Unoff.) 237, 91 N. W. 556; Morsch *v.* Besack, 52 Nebr. 502, 72 N. W. 953.

Pennsylvania.— Wolf *v.* Jacobs, 10 Pa. Super. Ct. 54; Kalbach *v.* Ontelaunce Tp., 16 Pa. Co. Ct. 590. But see Maus *v.* Mahoning Tp., 24 Pa. Super. Ct. 624, where, on a verdict finding "said defendant township not guilty," the judgment was entered "in favor of the defendant."

South Carolina.— Eason *v.* Miller, 15 S. C. 194.

Texas.— Ablowich *v.* Greenville Nat. Bank, 95 Tex. 429, 67 S. W. 79, 881; Traylor *v.* Townsend, 61 Tex. 144; Johnson *v.* Newman, 35 Tex. 166; Union Carpet Lining Co. *v.* Miller, (Civ. App. 1905) 86 S. W. 651; Eastham *v.* Patty, (Civ. App. 1904) 83 S. W. 885; May *v.* Martin, 32 Tex. Civ. App. 132, 73 S. W. 840; Dysart *v.* Terrell, (Civ. App. 1902) 70 S. W. 986; San Antonio, etc., R. Co. *v.* Addison, (Civ. App. 1902) 70 S. W. 200; Weinert *v.* Simang, 29 Tex. Civ. App. 435, 68 S. W. 1011; Butler *v.* Holmes, 29 Tex. Civ. App. 48, 68 S. W. 52; Hillen *v.* Williams, 25 Tex. Civ. App. 268, 60 S. W. 997; Kingsbury *v.* Price, (Civ. App. 1900) 59 S. W. 52; Galveston, etc., R. Co., *v.* Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622; Carothers *v.* Lange, (Civ. App. 1900) 55 S. W. 580; Smith *v.* Smith, 23 Tex. Civ. App. 304, 55 S. W. 541; Clark *v.* Clark, 21 Tex. Civ. App. 371, 51 S. W. 337; Williams *v.* Cleveland, 18 Tex. Civ. App. 133, 44 S. W. 689; Carter *v.* Bolin, (Civ. App. 1895) 30 S. W. 1084; Morgan *v.* Richardson, (Civ. App. 1894) 25 S. W. 171; McCurdy *v.* Bullock, 2 Tex. Civ. App. 223, 20 S. W. 1110; Freiberg *v.* Brunswick-Balke-Collender Co., (App. 1890) 16 S. W. 784.

Washington.— Swenson *v.* Stoltz, 36 Wash. 318, 78 Pac. 999.

United States.— Bennett *v.* Butterworth, 11 How. 669, 13 L. ed. 859; Smith *v.* Delaware Ins. Co., 7 Cranch 434, 3 L. ed. 396.

See 30 Cent. Dig. tit. "Judgment," § 446. And see ACCOUNTS AND ACCOUNTING, 1 Cyc. 492.

Judgment held to conform to verdict.— Where a verdict provided that the land in controversy be divided into two parts of equal value, the division to be made in the manner specified in the verdict, and that the land be held as provided by the will, where the finding generally was for plaintiff, a decree based on this verdict, appointing commissioners to make the partition, instead of having it done by the executors, was not illegal as failing to follow the verdict. Atkins *v.* Winter, 122 Ga. 644, 50 S. E. 487.

74. Smith *v.* Smith, 23 Tex. Civ. App. 304, 55 S. W. 541.

75. Texas, etc., R. Co. *v.* Padgett, (Tex. Civ. App. 1896) 36 S. W. 300.

76. Hackett *v.* Jones, 34 Ill. App. 562; Texas Brewing Co. *v.* Meyer, (Tex. Civ. App. 1896) 38 S. W. 263; Mason First Nat. Bank *v.* Vander Stucken, (Tex. Civ. App. 1896) 37 S. W. 170.

Verdict not stating amount.— Where plaintiff in his complaint demanded judgment for four hundred dollars, and the only issue was that of fraud in the execution of the note, and the jury returned a verdict, "We find in favor of the plaintiff," it was held that the court might enter a judgment for four hundred dollars, the amount of the note. Betts *v.* Butler, 1 Ida. 185.

Verdict aided by evidence.— In an action for land it is error to render judgment for land situate in a certain manner to a certain described line, not described by the verdict, instructions, or pleadings, as the verdict cannot be thus aided by the evidence. Brient *v.* Bruce, 5 Tex. Civ. App. 580, 24 S. W. 35. But the court in its judgment is authorized in assuming the existence of a fact admitted in the pleadings, although the jury makes no finding in regard to it. Blakeley *v.* El Paso Bldg., etc., Assoc., (Tex. Civ. App. 1894) 26 S. W. 292.

Under a federal statute (Act Sept. 24, 1789, § 32; U. S. Rev. St. (1878) § 954 [U. S. Comp. St. (1901) p. 696]), it is proper to give judgment according as the right of the cause in law appears, without regarding any imperfection or defect or want of form in the verdict, and to amend any such imperfection, defect, or want of form. U. S. *v.* Quantity of Manufactured Tobacco, 27 Fed. Cas. No. 716,106*a*, 5 Ben. 457. And see Parks *v.* Turner, 12 How. (U. S.) 319, 13 L. ed. 883; Roach *v.* Hulings, 16 Pet. (U. S.) 319, 10 L. ed. 979.

77. Paul *v.* Harden, 9 Serg. & R. (Pa.) 23.

78. Judgment on special finding notwithstanding verdict see, generally, TRIAL.

render the judgment erroneous and liable to reversal, although not absolutely void.[79] And whenever the judgment is based upon a special verdict or findings they must be sufficiently comprehensive, certain, and consistent to sustain the judgment and justify it as a matter of law,[80] and cannot be aided by the evidence.[81] But if the special verdict or findings are sufficient, the judgment must follow and accord with them,[82] and cannot go beyond them in awarding relief or settling the

79. *Arkansas.*— Springfield F. & M. Ins. Co. *v.* Hamby, 65 Ark. 14, 45 S. W. 472.

California.—Williams *v.* Williams, 104 Cal. 85, 37 Pac. 784.

Iowa.— National Horse Importing Co. *v.* Novak, 95 Iowa 596, 64 N. W. 616.

Kansas.— Garner *v.* State, 28 Kan. 790.

Minnesota.— Swanstrom *v.* Marvin, 38 Minn. 359, 37 N. W. 455.

Nebraska.— Lubker *v.* Grand Detour Plow Co., 53 Nebr. 111, 73 N. W. 457; Connelly *v.* Edgerton, 22 Nebr. 82, 34 N. W. 76.

Texas.— McCreary *v.* Robinson, (Civ. App. 1900) 57 S. W. 682. And see Texas Brewing Co. *v.* Meyer, (Civ. App. 1896) 38 S. W. 263. But under the statute relating to special verdicts, a finding is not essential in matters not submitted. San Antonio *v.* Marshall, (Civ. App. 1905) 85 S. W. 315.

Utah.— Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 14 Utah 458, 47 Pac. 1030.

Wisconsin.— Disch *v.* Timm, 101 Wis. 179, 77 N. W. 196.

But in Michigan it is held that a judgment rendered without a finding of facts to support it has no greater validity than a judgment rendered upon a jury trial without a verdict. Stansell *v.* Corning, 21 Mich. 242. And see People *v.* Judge Kent County Cir. Ct., 34 Mich. 62.

General finding insufficient.— If the findings are required to be specific, a general finding for plaintiff will not support a judgment in his favor. Ladd *v.* Tully, 51 Cal. 277.

80. *California.*— Blankenship *v.* Whaley, 124 Cal. 300, 57 Pac. 79.

Illinois.— Northwestern Brewing Co. *v.* Manion, 145 Ill. 182, 34 N. E. 50; West *v.* Carter, 129 Ill. 249, 21 N. E. 782.

Indiana.— Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868. Where there are issues in abatement and also issues in bar in the same action, and both issues are found for the defendant, judgment should be entered exclusively on the issues in abatement, and not on those in bar. Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4.

Kansas.— Case *v.* Jacobitz, 9 Kan. App. 842, 62 Pac. 115; Boynton *v.* Hardin, 9 Kan. App. 166, 58 Pac. 1007.

Kentucky.— Monroe *v.* Wilson, 6 T. B. Mon. 122.

Michigan.— Burdick *v.* Chamberlain, 38 Mich. 610.

New York.— McConnell *v.* Playa de Oro Min. Co., 43 N. Y. App. Div. 616, 59 N. Y. Suppl. 368; Reynolds *v.* Ætna L. Ins. Co., 6 N. Y. App. Div. 254, 39 N. Y. Suppl. 885.

North Carolina.— Strauss *v.* Wilmington, 129 N. C. 99, 39 S. E. 772.

Oregon.— Noland *v.* Bull, 24 Oreg. 479, 33 Pac. 983.

Utah.— Karren *v.* Karren, 25 Utah 87, 69 Pac. 465, 95 Am. St. Rep. 815, 60 L. R. A. 294; Maynard *v.* Locomotive Engineers' Mut. L., etc., Ins. Assoc., 14 Utah 458, 47 Pac. 1030.

Vermont.— Foster *v.* King, 73 Vt. 278, 50 Atl. 1061.

Wisconsin.— Wanzer *v.* Chippewa Valley Electric R. Co., 108 Wis. 319, 84 N. W. 423; Hart *v.* West Side R. Co., 86 Wis. 483, 57 N. W. 91.

See 30 Cent. Dig. tit. "Judgment," § 447.

81. Frankel *v.* Michigan Mut. L. Ins. Co., 158 Ind. 304, 62 N. E. 703; Wabash R. Co. *v.* Ray, 152 Ind. 392, 51 N. E. 920; Kuhlman *v.* Medlinka, 29 Tex. 385; Texas Loan Agency *v.* Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399; Maxwell *v.* Cisco First Nat. Bank, (Tex. Civ. App. 1893) 23 S. W. 342. *Compare* Scott *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1902) 66 S. W. 485. And see Desdunes *v.* Miller, 2 Mart. N. S. (La.) 53, holding that the court in giving judgment on a special verdict may to a certain extent supply its defects from the evidence.

Facts not pleaded.— A fact found by a special verdict which would be a bar to a recovery or defeat a defense if properly pleaded will not be regarded by the court in rendering judgment, for it can only look at such facts as properly arise under the issues joined. McCarty *v.* Hudsons, 24 Wend. (N. Y.) 291.

Admitted facts.— Where certain facts involved as issues in a case are undisputed, and are incorporated without objection in the court's instructions, they thereby become matters of record on which the court may properly base its judgment, although they are not found by the jury. McCreary *v.* Robinson, (Tex. Civ. App. 1900) 57 S. W. 682.

82. *California.*— Robinson *v.* Crescent City Mill, etc., Co., 93 Cal. 316, 28 Pac. 950.

Indiana.— Caress *v.* Foster, 62 Ind. 145; Bowles *v.* Stout, 60 Ind. 267; Rau *v.* Ball Bros. Glass Mfg. Co., 21 Ind. App. 147, 51 N. E. 945. And see Kepler *v.* Wright, 31 Ind. App. 512, 68 N. E. 618.

Kentucky.— Casey *v.* Louisville, etc., R. Co., 84 Ky. 79.

Nebraska.— Gaffey *v.* Northwestern Mut. L. Ins. Co., (1904) 98 N. W. 826; Lewis *v.* Scotia Bldg., etc., Assoc., 42 Nebr. 439, 60 N. W. 881.

Texas.— Scott *v.* Farmers', etc., Nat. Bank, (Civ. App. 1902) 66 S. W. 485; Clendenning *v.* Mathews, 1 Tex. App. Civ. Cas. § 904.

See 30 Cent. Dig. tit. "Judgment," § 447.

rights of the parties.[83] In some states the statutes provide that if a general and a special verdict are inconsistent, judgment shall be rendered pursuant to the latter. But it is held that the judgment should be rendered on the general verdict, not only in the case provided, but in all cases where the facts constituting the special finding are not inconsistent with the general verdict.[84]

c. Modification of Verdict. The court may of its own motion eliminate surplusage from a verdict and render judgment on the verdict as corrected.[85] Or the parties may agree to a modification of the verdict.[86] But when the court has permitted the jury to amend their verdict, it is error for it to reject the amended verdict, and enter judgment on the original verdict.[87]

d. Parties to Judgment. In respect to the parties for and against whom it is given, as in other particulars, a judgment must follow and conform to the verdict.[88] Thus a several judgment cannot be entered on a joint verdict,[89] unless plaintiff remits the damages as to one of defendants,[90] or the court grants him a new trial.[91] In designating the parties the use of the singular for the plural or

A judgment inconsistent with the facts specially found by the court will be reversed and made to conform to the findings. Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505. But where a part of the conclusions of law based on a special finding of facts by the court are erroneous, but the judgment apparently ignores such erroneous conclusions, and is proper under the conclusions which are correct, it will not be disturbed. Hill *v.* Hazen, 93 Ind. 109.

Disregarding findings.— The court will not be justified in disregarding the special verdict or findings and rendering judgment in accordance with the evidence (Waller *v.* Liles, (Tex. 1902) 70 S. W. 17), unless where the allegations of the pleadings are so defective or vague as not to support the findings (Kullmann *v.* Greenebaum, 84 Cal. 98, 24 Pac. 49).

Ambiguous finding.— A judicial finding, the meaning of which is doubtful, should be so read, if the words will fairly justify it, as to make it harmonize with the judgment. Finken *v.* Elm City Brass Co., 73 Conn. 423, 47 Atl. 670. And see Ashville Nat. Bank *v.* New York Fidelity, etc., Co., 89 Fed. 819, 32 C. C. A. 355.

83. *Colorado.*— Croke *v.* American Nat. Bank, 18 Colo. App. 3, 70 Pac. 229.

Illinois.— Boyd *v.* Ernst, 36 Ill. App. 583.

Indiana.— Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103.

New York.— De Laney *v.* Blizzard, 7 Hun 66; Loeschigk *v.* Addison, 19 Abb. Pr. 169.

Ohio.— Miller *v.* Southworth, 10 Ohio Cir. Ct. 572, 5 Ohio Cir. Dec. 101.

See 30 Cent. Dig. tit. "Judgment," § 447.

84. *Indiana.*— Murray *v.* Phillips, 59 Ind. 56.

Kansas.— Citizens' Nat. Bank *v.* Larahee, 64 Kan. 158, 67 Pac. 546; Shattuck *v.* Harvey County, 63 Kan. 849, 66 Pac. 1057.

Kentucky.— Quaid *v.* Cornwall, 13 Bush 601.

Nebraska.—Schlageck *v.* Widhalm, 59 Nebr. 541, 81 N. W. 448.

New York.— Eisemann *v.* Swan, 6 Bosw. 668.

Ohio.— Clark *v.* Bradshaw, 2 Ohio Cir. Ct. 56, 1 Ohio Cir. Dec. 359.

Texas.— Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 20 Tex. Civ. App. 338, 48 S. W. 559.

85. Chambers *v.* Walker, 42 Ala. 445; O'Brien *v.* Palmer, 49 Ill. 72; Kearney *v.* Wurdeman, 33 Mo. App. 447.

86. Den *v.* Hammel, 18 N. J. L. 73.

87. George *v.* Belk, 101 Tenn. 625, 49 S. W. 748.

88. Morsch *v.* Besack, 52 Nebr. 502, 72 N. W. 953; Smith *v.* Silvis, 8 Nebr. 164; Galveston, etc., R. Co. *v.* Hubbard, (Tex. Civ. App. 1902) 70 S. W. 112.

89. Boys *v.* Shawhan, 88 Cal. 111, 25 Pac. 1063; Brooks *v.* Collier, 3 Indian Terr. 468, 58 S. W. 559; Kellogg *v.* Gilman, 3 N. D. 538, 58 N. W. 339; Frisbie *v.* McFarlane, 196 Pa. St. 110, 46 Atl. 359.

In actions of tort.— Where plaintiff sues several defendants as joint tort-feasors, and asks for judgment against them jointly, it is no ground of complaint that judgments are rendered separately against them for separate and different amounts. Rowan *v.* Daniel, 20 Tex. Civ. App. 321, 49 S. W. 686. And see Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167. And although the verdict finds a joint liability against both defendants, the judgment may properly decree a joint and several liability. Southern Kansas R. Co. *v.* Crump, 32 Tex. Civ. App. 222, 74 S. W. 335.

Effect of statutes.— A statutory provision that judgment may be rendered against some and for other defendants in the same action applies only where there are findings for some and against others, and not where the verdict or finding is against all. Graham *v.* Henderson, 35 Ind. 195. And see Rankin *v.* Collins, 50 Ind. 158.

Verdict against one only.— Where the action is against joint defendants, and the verdict finds against one only, a judgment may be entered against him thereon, and it will have the effect of discharging the other. Howard *v.* Johnson, 91 Ga. 319, 18 S. E. 132; Lenoir *v.* Moore, 61 Miss. 400; Kinkler *v.* Junica, 84 Tex. 116, 19 S. W. 359; Blue *v.* McCabe, 5 Wash. 125, 31 Pac. 431.

90. Golding *v.* Hall, 9 Port. (Ala.) 169.

91. See Terpenning *v.* Gallup, 8 Iowa 74; Buckles *v.* Lambert, 4 Metc. (Ky.) 330; U. S.

vice versa will not amount to a variance between the verdict and judgment, where it is evidently a mistake and does not cast obscurity upon the decision.[92]

e. Conformity to Report of Referee. If the report of a referee or master is accepted by the court or sustained against exceptions the judgment must conform to its findings and conclusions; to depart from it in any essential matter will be reversible error.[93]

f. Objections on Ground of Variance. The objection that a judgment does not conform to the verdict may be taken by motion in arrest,[94] or application to the court rendering the judgment to correct or reform it,[95] or by appeal or error.[96]

E. Arrest of Judgment[97] **— 1. Grounds in General — a. General Rules.** At common law the arrest of judgment is a withholding or staying of judgment, notwithstanding a verdict has been given, on the ground that there is some error appearing on the face of the record which vitiates the proceedings.[98] As a general rule judgment cannot be arrested if it appears on the whole record for which party judgment ought to be given.[99] The power to arrest judgment is inherent in courts of general common-law jurisdiction,[1] but in several of the states is regulated or restricted by statute.[2]

v. Chaffee, 25 Fed. Cas. No. 14,773, 2 Bond 147.

92. See Grayham *v.* Roberds, 7 Ala. 719; Butler *v.* Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040; Lamar *v.* Williams, 39 Miss. 342.

93. *Indiana.*— Smith *v.* Harris, 135 Ind. 621, 35 N. E. 984; Lee *v.* State, 88 Ind. 256.

Maine.— Anonymous, 31 Me. 590.

Massachusetts.—Com. *v.* Pejepscut, 7 Mass. 399; Nelson *v.* Andrews, 2 Mass. 164.

New Hampshire.— Brown *v.* Cochran, 11 N. H. 199.

New York.— Union Bag, etc., Co. *v.* Allen Bros. Co., 94 N. Y. App. Div. 595, 88 N. Y. Suppl. 368; Hyman *v.* Friedman, 138 N. Y. 639, 34 N. E. 512; Robbins *v.* Mount, 55 Hun 80, 8 N. Y. Suppl. 388; O'Shea *v.* Kirker, 4 Bosw. 120.

North Carolina.— Allen *v.* McMinn, 76 N. C. 395.

Pennsylvania.— Moon *v.* Long, 12 Pa. St. 207.

See 30 Cent. Dig. tit. "Judgment," § 455.

A report of a referee stating that he had been unable to reach a decision which he was satisfied was correct, but had found for defendant on the ground that the burden of proof was on plaintiff, justifies the court in ordering a judgment for defendant. Cummings *v.* Remick, 63 N. H. 429.

Reducing amount of recovery.— Where the referee finds for plaintiff, for a sum in excess of that claimed in the petition, it is proper for the court on sustaining the report to reduce the sum awarded to the proper amount and enter judgment therefor. Kettler *v.* Kettler, 28 Nebr. 403, 44 N. W. 465.

94. Lee *v.* Wilkins, 79 Mo. App. 159. But *compare* Potter *v.* McCormack, 127 Ind. 439, 26 N. E. 883; State *v.* Snow, 74 Me. 354.

95. State *v.* Currie, 72 Minn. 403, 75 N. W. 742.

96. See Layman *v.* Hendrix, 1 Ala. 212; Wilkerson *v.* Rust, 57 Ind. 172; Mengis *v.* Fifth Ave. R. Co., 81 Hun (N. Y.) 480, 30 N. Y. Suppl. 999.

97. Injunctions against enforcement see *infra*, X.

Stay of suspension see *infra*, XX.

Arrest of judgment in action for causing death see Death.

Arrest of judgment in actions on negotiable instruments see Commercial Paper.

Arrest of judgment in bastardy proceedings see Bastardy.

Arrest of judgment in criminal prosecutions see Criminal Law.

Arrest of judgment in ejectment see Ejectment.

98. Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Roscorla *v.* Thomas, 3 Q. B. 234, 2 G. & D. 508, 6 Jur. 929, 11 L. J. Q. B. 214, 43 E. C. L. 713; 3 Blackstone Comm. 393; Bouvier L. Dict. tit. "Arrest of Judgment;" Burrill L. Dict. tit. "Arrest of Judgment;" Stephen Pl. 106. And see Hansher *v.* Hanshew, 94 Ind. 208.

99. Cranston Prob. Ct. *v.* Sprague, 3 R. I. 205, in which it is further said that if on the other hand, taking all the facts admitted by the pleadings and such as are established by the verdict, the court cannot determine which party should have judgment, it is proper to arrest the judgment.

1. Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97; Catherwood *v.* Konn, 2 Pa. St. 341.

2. *Illinois.*— The statute provides that judgments shall not be arrested because of any mispleading, discontinuance, or misjoining of the issue, or any default or negligence by which neither party has been prejudiced. Rev. St. c. 7, § 6. See Mayer *v.* Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196.

Maine.— It is provided by law that no motion in arrest of judgment in any civil action shall be sustained in the courts of the state. Rev. St. c. 82, § 31. See Stetson *v.* Corinna, 44 Me. 29.

Massachusetts.— The statute provides that judgment shall not be arrested for a cause existing before verdict, unless such cause

b. Matters Appearing of Record. As a general rule judgment can be arrested only for error apparent on the face of the record itself.[3] And for the purpose of a motion in arrest the record does not include the evidence taken at the trial.[4]

c. Process and Matters Preliminary to Trial. A fatal defect in the writ or process by which the suit is begun may be taken advantage of by motion in arrest,[5] but not a mere irregularity or clerical mistake in the process,[6] or such a defect as may be waived by the party's submitting to trial,[7] or such as will be cured by the verdict.[8] Failure to serve defendant with process may furnish ground for a motion of this kind,[9] but not the omission of other steps proper or necessary to be taken before the trial, but not affecting the jurisdiction of the court.[10]

affects the jurisdiction of the court. Lane *v.* Holcomb, 182 Mass. 360, 65 N. E. 794.

Tennessee.— A statute directs that the supreme court shall not arrest judgment for any defect or imperfection in matters of form. See Corn *v.* Brazelton, 2 Swan 273.

3. *Colorado.*— Floyd *v.* Colorado Fuel, etc., Co., 10 Colo. App. 54, 50 Pac. 864.

Connecticut.— Hamilton *v.* Pease, 38 Conn. 115.

Florida.— Jordan *v.* State, 22 Fla. 528.

Georgia.— Leffler *v.* Union Compress Co., 121 Ga. 40, 48 S. E. 710; Sanner *v.* Sayne, 78 Ga. 467, 3 S. E. 651; Rountree *v.* Lathrop, 69 Ga. 539; Loudon *v.* Coleman, 62 Ga. 146; Garner *v.* State, 42 Ga. 203; Hammond *v.* Candler, 22 Ga. 281; Collins *v.* Hutchins, 21 Ga. 270; Brown *v.* Lee, 21 Ga. 159.

Illinois.— Evans *v.* Lohr, 3 Ill. 511; McGill *v.* Rothgeb, 45 Ill. App. 511.

Indiana.— Balliett *v.* Humphreys, 78 Ind. 388; Case *v.* State, 5 Ind. 1.

Louisiana.— State *v.* Green, 43 La. Ann. 402, 9 So. 42; State *v.* Addison, 15 La. Ann. 185; State *v.* Turner, 6 La. Ann. 309.

Maryland.—Bowland *v.* Wilson, 71 Md. 307, 18 Atl. 536.

Massachusetts.— Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711.

Mississippi.— Frank *v.* State, 39 Miss. 705.

Missouri.— McGannon *v.* Millers' Nat. Ins. Co., 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778; McCarty *v.* O'Bryan, 137 Mo. 584, 38 S. W. 456; Elsenrath *v.* Kallmeyer, 61 Mo. App. 430; White *v.* Caldwell, 17 Mo. App. 691.

New Hampshire.— Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171.

North Carolina.— State *v.* Douglass, 63 N. C. 500; State *v.* George, 30 N. C. 324, 49 Am. Dec. 392.

Pennsylvania.— Com. *v.* Duff, 7 Pa. Super. Ct. 415; Ward *v.* Lakeside R. Co., 20 Pa. Co. Ct. 494.

Rhode Island.— Bull *v.* Mathews, 20 R. I. 100, 37 Atl. 536.

South Carolina.— Burnett *v.* Ballund, 2 Nott & M. 435; State *v.* Heyward, 2 Nott & M. 312, 10 Am. Dec. 604.

Texas.— Sanger *v.* Ker, 1 Tex. App. Civ. Cas. § 1081.

Vermont.— Montpelier, etc., R. Co. *v.* Macchi, 74 Vt. 403, 52 Atl. 960; Noyes *v.* Parker, 64 Vt. 379, 24 Atl. 12.

Virginia.— Com. *v.* Stephen, 4 Leigh 679; Com. *v.* Watts, 4 Leigh 672.

West Virginia.— Swindell *v.* Harper, 51 W. Va. 381, 41 S. E. 117; Gerling *v.* Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691.

United States.— Davenport *v.* Paris, 136 U. S. 580, 10 S. Ct. 1064, 34 L. ed. 548; Bond *v.* Dustin, 112 U. S. 604, 5 S. Ct. 296, 28 L. ed. 835; Burrows *v.* Niblack, 84 Fed. 111, 28 C. C. A. 130.

See 30 Cent. Dig. tit. "Judgment," § 467.

Extrinsic evidence.— In passing upon a motion in arrest it is not allowable for the judge to invoke his recollection as to what occurred at the trial. Washington *v.* Calhoun, 103 Ga. 675, 30 S. E. 434.

Statements of counsel.— Nor can a motion in arrest be aided by statements of the adverse party's counsel. Taylor *v.* Corley, 113 Ala. 580, 21 So. 404.

In garnishment proceedings a motion in arrest of judgment cannot be based on the alleged invalidity of the judgment against the principal defendant. Leffler *v.* Union Compress Co., 121 Ga. 40, 48 S. E. 710.

4. Ward *v.* Lakeside R. Co., 20 Pa. Co. Ct. 494; Montpelier, etc., R. Co. *v.* Macchi, 74 Vt. 403, 52 Atl. 960; Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652; Davenport *v.* Paris, 136 U. S. 580, 10 S. Ct. 1064, 34 L. ed. 548; Clary *v.* Hardeeville Brick Co., 100 Fed. 915; Burrows *v.* Niblack, 84 Fed. 111, 28 C. C. A. 130.

5. Neal *v.* Gordon, 60 Ga. 112; Hartridge *v.* McDaniel, 20 Ga. 398. See Paul *v.* Ward, 21 Ind. 211.

6. McGee *v.* Barber, 14 Pick. (Mass.) 212; Gilbert *v.* Nantucket Bank, 5 Mass. 97.

7. Brannon *v.* Central Bank, 18 Ga. 361; Foot *v.* Knowles, 4 Metc. (Mass.) 386.

8. Dudley *v.* Carmolt, 5 N. C. 339.

9. Shields *v.* Oney, 5 Munf. (Va.) 550. But see Hendrix *v.* Cawthorn, 71 Ga. 742; Rowen *v.* Taylor, 1 Pinn. (Wis.) 235.

Failure to serve defendant with a copy of the declaration as required by the rules and practice of the court is no ground for arresting the judgment. Loney *v.* Bailey, 43 Md. 10.

10. *Illinois.*— Failure to file the declaration in due season. Chicago City R. Co. *v.* Roach, 180 Ill. 174, 54 N. E. 212.

Indiana.—Insufficient replevin bond. Bugle *v.* Myers, 59 Ind. 73.

Iowa.— Failure to present claim to board

d. Matters Pleadable in Bar or Abatement. Generally speaking a judgment will not be arrested on account of any matter which defendant might have pleaded and relied on as a defense to the action, whether by plea in bar[11] or in abatement.[12] But an objection to the jurisdiction of the court is never waived, and hence may be presented on a motion in arrest.[13]

e. Matters of Evidence. It is no ground for arresting a judgment that there was error in the admission of evidence at the trial,[14] or that the evidence was insufficient to sustain the verdict.[15]

f. Conduct of Trial. A motion in arrest of judgment cannot ordinarily be based on any matters which took place at the trial of the cause, or on irregularities or failure to follow the rules of procedure in the conduct of such trial.[16]

of municipal officers before bringing suit is held sufficient ground for motion in arrest of judgment. Pierson *v.* Hawarden Independent School Dist., 106 Iowa 695, 77 N. W. 494.

Missouri.— Error in transmission of record on change of venue. Gilstrap *v.* Felts, 50 Mo. 428.

Virginia.— Requiring defendants to file particulars of defense. Virginia, etc., Coal, etc., Co. *v.* Fields, 94 Va. 102, 26 S. E. 426.

See 30 Cent. Dig. tit. "Judgment," § 465.

11. *Arkansas.*— A previous adjudication of the matter in controversy is no ground for arresting the judgment. Bozeman *v.* Shaw, 37 Ark. 160.

California.— Barnhart *v.* Edwards, (1899) 57 Pac. 1004.

Delaware.— Where the record shows a defendant to be a joint owner of property, for which replevin was brought, and judgment for plaintiff, it may be taken advantage of on motion in arrest. Ellis *v.* Culver, 2 Harr. 129.

Georgia.— Slaughter *v.* Thompkins, Dudley 117.

Iowa.— Gordon *v.* Pitt, 3 Iowa 385.

Maryland.— Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833.

Massachusetts.— Hill *v.* Dunham, 7 Gray 543 (contract made on Sunday); Root *v.* Henry, 6 Mass. 504.

Missouri.— Unconstitutionality of statute. McCarty *v.* O'Bryan, 137 Mo. 584, 38 S. W. 456.

South Carolina.— See Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702; State *v.* James, 2 Bay 215.

Texas.— Moore *v.* Cross, 87 Tex. 557, 29 S. W. 1051.

United States.— An objection that a cause of action stated in a declaration at law is cognizable only in equity cannot be considered when first taken on a motion in arrest of judgment. Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407. See Lindo *v.* Gardner, 1 Cranch 343, 2 L. ed. 130.

See 30 Cent. Dig. tit. "Judgment," § 457.

12. Belden *v.* Curtis, 48 Conn. 32; Hawkins *v.* Hughes, 87 N. C. 115.

Where a party pleads to the merits, after his plea in abatement has been overruled, he cannot insist on the same matter in arrest of judgment. Davis *v.* Dickson, 2 Stew. (Ala.) 370.

The premature commencement of the action, however, is an objection which may be taken advantage of on a motion in arrest of judgment, according to several decisions. Sanner *v.* Sayne, 78 Ga. 467, 3 S. E. 651; Cheetham *v.* Lewis, 3 Johns. (N. Y.) 42; Bell *v.* Bullion, 2 Yerg. (Tenn.) 479. And so if the declaration is on a cause of action accruing subsequent to the date of the writ judgment may be arrested, that being a defect not cured by verdict. Chapline *v.* Tope, Tapp. (Ohio) 282.

13. Strong *v.* Avery, 1 Root (Conn.) 259; Moultrop *v.* Bennet, Kirby (Conn.) 351; Robinson *v.* Mead, 7 Mass. 353; McLaughlin *v.* Stelle, 16 Fed. Cas. No. 8,873, 1 Cranch C. C. 483. *Contra*, State *v.* Scott, 1 Bailey (S. C.) 270; Martin *v.* Carter, 1 Yerg. (Tenn.) 489; Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122.

14. Clary *v.* Hardeeville Brick Co., 100 Fed. 915.

15. *Connecticut.*— Carpenter *v.* Child, 1 Root 220; Mott *v.* Meach, 1 Root 186.

Indiana.— Bright *v.* State, 90 Ind. 343.

Maryland.— Baden *v.* State, 1 Gill 165.

New Hampshire.— Lovell *v.* Sabin, 15 N. H. 29.

New Jersey.— Powe *v.* State, 48 N. J. L. 34, 2 Atl. 662.

Pennsylvania.— Com. *v.* Wickett, 20 Pa. Super. Ct. 350.

Vermont.— Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

See 30 Cent. Dig. tit. "Judgment," § 466.

Contra.— See Sanner *v.* Sayne, 78 Ga. 467, 3 S. E. 651.

16. *Connecticut.*— Dutton *v.* Tracy, 4 Conn. 79; Swan *v.* Butler, Kirby 276. *Compare* Scott *v.* Turner, 1 Root 163.

Indiana.— Groves *v.* Ruby, 24 Ind. 418.

Maryland.— Spencer *v.* Trafford, 42 Md. 1.

Ohio.— Challen *v.* Cincinnati, 40 Ohio St. 113.

Vermont.— Walker *v.* Sargeant, 11 Vt. 327.

See 30 Cent. Dig. tit. "Judgment," § 457.

A defect in the form of the judgment cannot be reached by a motion in arrest, for the reason that the motion must precede the rendition of the judgment. Smith *v.* Dodds, 35 Ind. 452.

Any error of law of the trial court based on interpretation of the record proper which includes the summons and return may be cor-

2. Defect, Misjoinder, or Non-Joinder of Parties — a. In General. The objection that there is a defect of parties is waived by going to trial without objection, and cannot therefore be raised by motion in arrest of judgment.[17] In most jurisdictions it is likewise no ground for arresting judgment that there is an alleged misjoinder of plaintiffs or defendants;[18] or that there is a non-joinder of such parties,[19] except where the record shows that a joint owner or joint obligor has not been joined.[20]

b. Death of Party. The death of one of several plaintiffs or defendants before judgment, being matter *dehors* the record, is not properly matter to be moved in arrest of judgment.[21]

3. Defects in Pleading — a. Insufficiency in General. If the declaration or complaint entirely omits the allegation of facts essential to plaintiff's right of recovery, or plaintiff's title or cause of action appears from the declaration itself to be defective and bad in law, so that his pleadings could not support a judgment in his favor, the judgment may be arrested on motion of defendant,[22] if such

rected by motion in arrest. Reed *v.* Nicholson, 93 Mo. App. 29.

Failure to submit issues to jury may be taken advantage of by motion in arrest of judgment. Dilly *v.* Omaha, etc., R. Co., 55 Mo. App. 123.

17. Yonley *v.* Thompson, 30 Ark. 399; Chandler, etc., Co. *v.* Norwood, 14 App. Cas. (D. C.) 357; Rengger *v.* Lindenberger, 53 Mo. 364; De Prez *v.* Everett, 73 Tex. 431, 11 S. W. 388; Veal *v.* Fortson, 57 Tex. 482; Thompson *v.* Kimbrough, 23 Tex. Civ. App. 350, 57 S. W. 328; Hab *v.* Johnston, 1 Tex. App. Civ. Cas. § 624. *Compare* Hutchings *v.* Weems, 35 Mo. 285.

That the suit has been prosecuted to final judgment in the name of a firm is no ground for arresting the judgment. Crouch *v.* Hance, 62 Mo. App. 25.

18. Little Rock, etc., R. Co. *v.* Dyer, 35 Ark. 360; Miller *v.* Blake, 6 Colo. 118; Miller *v.* Keokuk, etc., R. Co., 63 Iowa 680, 16 N. W. 567; Demeritt *v.* Mills, 59 N. H. 18 (under Gen. St. c. 207, §§ 8, 9, allowing amendment). *Contra*, McDonald *v.* Algeo, 96 Ill. App. 79; Johnson *v.* Cunningham, 56 Ill. App. 593; Cruikshank *v.* Gardner, 2 Hill (N. Y.) 333.

19. Douglas *v.* Chapin, 26 Conn. 76; Scanlon *v.* People, 95 Ill. App. 348; Garvin *v.* Paul, 47 N. H. 158 (in action *ex delicto*); Nealley *v.* Moulton, 12 N. H. 485; McGregor *v.* Balch, 17 Vt. 562.

20. *Delaware.*— Ellis *v.* Culver, 2 Harr. 129, holding that in trespass by a part owner defendant must plead non-joinder in abatement; but in replevin it may be taken advantage of by a motion in arrest of judgment.

Illinois.— Scanlon *v.* People, 95 Ill. App. 348.

Indiana.— Bragg *v.* Wetzel, 5 Blackf. 95.

New Hampshire.— Nealley *v.* Moulton, 12 N. H. 485.

North Carolina.— Cain *v.* Wright, 50 N. C. 282, 72 Am. Dec. 551, holding that the non-joinder of several tenants in common in an action of detinue by one of them may be taken advantage of by motion in arrest of judgment.

Vermont.— McGregor *v.* Balch, 17 Vt. 562.

United States.— Farni *v.* Tesson, 1 Black 309, 17 L. ed. 67.

See 30 Cent. Dig. tit. "Judgment," § 462.

21. Crow *v.* State, 23 Ark. 684; Rountree *v.* Lathrop, 69 Ga. 539; Emery *v.* Osgood, 1 Allen (Mass.) 244. But see Mann *v.* Glover, 14 N. J. L. 195.

22. *Alabama.*— Taylor *v.* Jones, 52 Ala. 78.

Arizona.— Consolidated Canal Co. *v.* Peters, 5 Ariz. 80, 46 Pac. 74.

Colorado.— Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314.

Georgia.— Kelly *v.* Strause, 116 Ga. 872, 43 S. E. 280.

Illinois.— Hartrich *v.* Hawes, 202 Ill. 334, 67 N. E. 13; Himrod Coal Co. *v.* Clark, 197 Ill. 514, 64 N. E. 282; Kipp *v.* Lichtenstein, 79 Ill. 358; Cooke *v.* Orne, 37 Ill. 186; Schofield *v.* Settley, 31 Ill. 515; Smith *v.* Curry, 16 Ill. 147; Illinois Live Stock Ins. Co. *v.* Kirkpatrick, 61 Ill. App. 74; Santa Fé Drainage District Com'rs *v.* Waeltz, 41 Ill. App. 575; Seelye *v.* People, 40 Ill. App. 449.

Indiana.— Reed *v.* Browning, 130 Ind. 575, 30 N. E. 704; Stewart *v.* Terre Haute, etc., R. Co., 103 Ind. 44, 2 N. E. 208; Heddens *v.* Younglove, 46 Ind. 212; Chicago, etc., R. Co. *v.* Wheeler, 14 Ind. App. 62, 42 N. E. 489; Lockhart *v.* Schlotterback, 12 Ind. App. 683, 40 N. E. 1109; Louisville, etc., R. Co. *v.* Johnson, 11 Ind. App. 328, 36 N. E. 766.

Iowa.— Lacey *v.* Davis, 126 Iowa 675, 102 N. W. 535; Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508; Pierson *v.* Harwarden Independent School Dist., 106 Iowa 695, 77 N. W. 494; Johnson *v.* Miller, 82 Iowa 693, 47 N. W. 903, 48 N. W. 1081, 31 Am. St. Rep. 514; Smith *v.* Burlington, etc., R. Co., 59 Iowa 73, 12 N. W. 763. *Compare* Anderson *v.* Leverich, 70 Iowa 741, 30 N. W. 39.

Kentucky.— Fible *v.* Caplinger, 13 B. Mon. 464.

Maryland.— Stirling *v.* Garritee, 18 Md. 468.

Missouri.— Jaccard *v.* Anderson, 32 Mo. 188. *Compare* Saulsbury *v.* Alexander, 50 Mo. 142.

pleadings are not cured by the answer.[23] But if the defect is merely formal and therefore amendable, or such as may be waived by going to trial without objection, or consists only in a faulty or inartificial manner of setting out a title or cause of action which appears to be good in law, then it cannot be reached by motion in arrest.[24] And the courts will go a long way in sustaining a declaration

New Hampshire.— Bedell *v.* Stevens, 28 N. H. 118; Gould *v.* Kelley, 16 N. H. 551.

South Carolina.— Philson *v.* Bampfield, 1 Brev. 202.

Tennessee.— Southern R. Co. *v.* Maxwell, 113 Tenn. 464, 82 S. W. 1137.

Vermont.— Baker *v.* Sherman, 73 Vt. 26, 50 Atl. 633; Merritt *v.* Dearth, 48 Vt. 65.

United States.— U. S. *v.* Batchelder, 24 Fed. Cas. No. 14,540.

See 30 Cent. Dig. tit. "Judgment," §§ 468, 471.

Where the declaration fails to state a cause of action, the sufficiency of the evidence to support the judgment may be questioned by motion in arrest, or upon error, although all the facts alleged therein are proved. Illinois Live Stock Ins. Co. *v.* Kirkpatrick, 61 Ill. App. 74.

Two cross complaints.— A motion as an entirety in arrest of a judgment rendered on two separate cross complaints cannot be sustained if sufficient facts are stated in either. Jones *v.* Pothast, 72 Ind. 158.

23. See cases cited in preceding note.

24. *Alabama.*— Parker *v.* Abrams, 50 Ala. 35.

Connecticut.—Robbins *v.* Wolcott, 19 Conn. 356.

Georgia.— Lester *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 475.

Illinois.— Mayer *v.* Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196. A motion in arrest is properly denied where the declaration is merely a defective statement of a good cause of action, and is sufficient to inform defendant of plaintiff's claim. Garibaldi *v.* O'Connor, 112 Ill. App. 53 [*affirmed* in 210 Ill. 284, 71 N. E. 379, 66 L. R. A. 73].

Indiana.— Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740; Johnson *v.* Ahrens, 117 Ind. 600, 19 N. E. 335; Jones *v.* Ahrens, 116 Ind. 490, 19 N. E. 334; Kious *v.* Day, 94 Ind. 500; Griesel *v.* Schmal, 55 Ind. 475; Spahr *v.* Nicklaus, 51 Ind. 221; Reagan *v.* Fox, 45 Ind. 8; Bequette *v.* Laselle, 5 Blackf. 443.

Iowa.— Smith *v.* Milburn, 17 Iowa 30. It is no ground for arresting judgment that the petition pleads evidence of facts, rather than the facts themselves. Williams *v.* Ballinger, 125 Iowa 410, 101 N. W. 139.

Maryland.— Charles County Com'rs *v.* Mandanyohl, 93 Md. 150, 48 Atl. 1058; Riddell *v.* Douglas, 60 Md. 337; Baden *v.* Clarke, 1 Gill 165.

Massachusetts.— Dean *v.* Ross, 178 Mass. 397, 60 N. E. 119; Moor *v.* Boswell, 5 Mass. 306.

Missouri.— Pickering *v.* Mississippi Valley Nat. Tel. Co., 47 Mo. 457.

New Hampshire.— Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177; Walpole *v.* Marlow, 2 N. H. 385.

New York.— Meyer *v.* McClean, 2 Johns. 183.

Ohio.— Porter *v.* Kepler, 14 Ohio 127; Howe *v.* Dawson, Tapp. 169.

Pennsylvania.—Borbridge *v.* Herst, 6 Phila. 391.

Rhode Island.— Judgment will not be arrested for lack of an essential averment in the declaration which is contained by implication in averments used. Bowen *v.* White, 26 R. I. 68, 58 Atl. 252.

Texas.— Halsell *v.* Belcher, 6 Tex. Civ. App. 322, 25 S. W. 156.

Vermont.— Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695; Prouty *v.* Mather, 49 Vt. 415; Newton *v.* Brown, 49 Vt. 16; Merritt *v.* Dearth, 48 Vt. 65; McKoy *v.* Brown, 13 Vt. 593.

Virginia.— Greenlee *v.* Bailey, 9 Leigh 526; Terrell *v.* Atkinson, 2 Wash. 143.

West Virginia.— Hughes *v.* Frum, 41 W. Va. 445, 23 S. E. 604.

United States.—Peden *v.* American Bridge Co., 120 Fed. 523, 56 C. C. A. 646; Louisville, etc., R. Co. *v.* Ward, 61 Fed. 927, 10 C. C. A. 166. And see Elliott *v.* Canadian Pac. R. Co., 129 Fed. 163.

See 30 Cent. Dig. tit. "Judgment," §§ 468, 469.

The rule has been applied in the case of omission of a *similiter* (Babcock *v.* Huntington, 2 Day (Conn.) 392; Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Huling *v.* Florida Sav. Bank, 19 Fla. 695) or of the formal concluding words (District of Columbia *v.* Eaton, 13 App. Cas. (D. C.) 182; Bowen *v.* White, 26 R. I. 68, 58 Atl. 252; Stearns *v.* Stearns, 32 Vt. 678); or any omission not affecting plaintiff's cause of action, especially where it can be supplied from other papers in the case (Huling *v.* Florida Sav. Bank, 19 Fla. 695, omission of the signature of plaintiff's attorney to an amended declaration); Proctor *v.* Crozier, 6 B. Mon. (Ky.) 268, omission to lay damages in the declaration, where the blank may be filled by reference to the writ; Com. *v.* Eagan, 103 Mass. 71; Dollman *v.* Munson, 90 Mo. 85, 2 S. W. 134); and it has also been applied in case of mere clerical mistake (Newcomer *v.* Kean, 57 Md. 121), such as of an ordinary misspelling of a party's name (Toledo, etc., R. Co. *v.* Ingraham, 77 Ill. 309).

Variance as to form of action.— Whether a judgment should be arrested for a variance between the declaration and the writ, in naming the form of action, as where one of them is in trespass and the other in case, is

as against a motion of this kind,[25] giving it the benefit of a liberal construction to cure any ambiguity or looseness of description,[26] aiding the pleader by every reasonable implication and intendment,[27] and overlooking any defects which are cured by the verdict or the omission to allege any facts which must have been found by the jury.[28] Nor will the judgment be arrested because the complaint fails to anticipate and negative defenses.[29] Nor can the question of the propriety of allowing an amendment to be made in the pleadings be reached on motion in arrest.[30]

b. Misjoinder of Causes of Action. A misjoinder of counts or causes of action, apparent upon the declaration, with damages assessed entire, is ground for arresting the judgment,[31] unless one of the counts or causes so joined is stricken out or withdrawn from the jury,[32] or is fatally defective,[33] or unless the damages have been separately assessed upon the several counts.[34]

c. Joinder of Good and Bad Counts. In several states, following the English rule,[35] it is held that if a general verdict for plaintiff is taken upon several counts in the declaration, and one of the counts is fatally defective, the judgment will be arrested on motion, although other counts not liable to objection were covered by the verdict.[36] But the general rule is that the judgment will not be

an unsettled point. It is answered affirmatively in Niles *v.* Brown, 25 R. I. 537, 56 Atl. 1030, but negatively in Homan *v.* Fleming, 51 Ill. App. 572.

25. Mace *v.* Vendig, 23 Mo. App. 253; Jordan *v.* Boone, 5 Rich. (S. C.) 528.

26. Lester *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 475; State *v.* Greenwell, 4 Gill & J. (Md.) 407; Mitchell *v.* Starbuck, 10 Mass. 5.

27. Bedell *v.* Stevens, 28 N. H. 118; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 457, 56 Am. Rep. 561; Curtis *v.* Burdick, 48 Vt. 166; Morey *v.* Homan, 10 Vt. 565.

Waiver of defect.— On a motion in arrest, the whole record is before the court, and where a defect in the petition is waived of record by defendant, the motion will not be granted on account of such defect. Auld *v.* Butcher, 2 Kan. 135.

Where the plea states the fact omitted from the declaration a motion in arrest will not be sustained. McFeely *v.* Vantyle, 2 Ohio 197.

28. See *infra*, VI, E, 3, e.

29. Allen *v.* Word, 6 Humphr. (Tenn.) 284; Louisville, etc., R. Co. *v.* Ward, 61 Fed. 927, 10 C. C. A. 166.

Contributory negligence.—In Indiana, in an action for negligence, the complaint must negative contributory negligence, and if it fails to do so this will be ground for arresting the judgment. Eberhart *v.* Reister, 96 Ind. 478; Ohio, etc., R. Co. *v.* Smith, 5 Ind. App. 560, 32 N. E. 809.

30. Le Strange *v.* State, 58 Md. 26. And see Hatfield *v.* Cummings, 152 Ind. 537, 53 N. E. 761.

31. *Arkansas.*— Governor *v.* Evans, 1 Ark. 349.

Indiana.— Bodley *v.* Roop, 6 Blackf. 158.

Missouri.— Pitts *v.* Fugate, 41 Mo. 405; Meyers *v.* Field, 37 Mo. 434. But see Welsh *v.* Stewart, 31 Mo. App. 376, holding that where two causes of action are stated in a single count, defendant must object by motion to compel an election, and cannot move in arrest after verdict.

New Hampshire.—Morse *v.* Eaton, 23 N. H. 415.

New Jersey.— Potts *v.* Clarke, 20 N. J. L. 536.

Rhode Island.— Bull *v.* Mathews, 20 R. I. 100, 37 Atl. 536.

Tennessee.— Rodgers *v.* Ellison, Meigs 88.

Vermont.— Haskell *v.* Bowen, 44 Vt. 579; Joy *v.* Hill, 36 Vt. 333. But see Dean *v.* Cass, 73 Vt. 314, 50 Atl. 1085, holding that, where the counts of a declaration are of different natures and improperly joined, the judgment will not be arrested, but plaintiff having requested it a venire de novo will be awarded.

See 30 Cent. Dig. tit. "Judgment," § 461.

Matter of inducement.— Where the gist of an action is tort, and a contract is disclosed in the declaration merely by way of inducement, the declaration is sufficient, and judgment will not be arrested for such joinder. Stoyel *v.* Westcott, 2 Day (Conn.) 418, 2 Am. Dec. 109.

In Ohio it is held that where, in an action brought to recover for an injury to personal property, a count in trespass *quare clausum fregit* is joined in the declaration with several counts in case, for negligence, the court, looking to the provisions of the act of March 12, 1844, "to regulate the practice of the judicial courts," will not arrest the judgment on account of an alleged misjoinder of causes of action. Henshaw *v.* Noble, 7 Ohio St. 226.

32. Prescott *v.* Tufts, 4 Mass. 146; Barber *v.* Erie City Iron Works, 2 Pa. Co. Ct. 162.

Where the verdict rests wholly on one of the counts, the judgment will not be arrested for misjoinder of counts. Sellick *v.* Hall, 47 Conn. 260.

33. Penniman *v.* Winner, 54 Md. 127.

34. Louisville, etc., Canal Co. *v.* Rowan, 4 Dana (Ky.) 606.

35. Kitchenman *v.* Skeel, 3 Exch. 49.

36. Camp *v.* Barker, 21 Vt. 469; Sylvester *v.* Downer, 18 Vt. 32; Needham *v.* McAuley, 13 Vt. 68; Walker *v.* Sargeant, 11 Vt. 327; Haselton *v.* Weare, 8 Vt. 480; Terrell *v.*

arrested if there be one good count to which the verdict can be applied; that is, a motion in arrest will not prevail unless all the counts are so defective as not to have been cured by the verdict.[37]

d. Defects Available on Demurrer — (I) *In General.* Judgment will not be arrested for any defect in the pleadings which would not have been fatal on general demurrer.[38] And it is not every such defect that will warrant arresting the judgment; for greater strictness is shown on a motion of this kind than upon a demurrer,[39] the motion being denied if the issue joined be such that the court can presume that the defects or omissions were supplied by proof at the trial.[40] And in several states it is the rule that judgment will not be arrested for any defect which might and should have been objected to by demurrer, if enough appears to show for whom the judgment should be rendered.[41]

(II) *After Decision on Demurrer.* A motion in arrest of judgment should not be entertained after the overruling of a demurrer to the declaration, at least where the motion is based on any exceptions which might have been considered

Page, 3 Hen. & M. (Va.) 118; Fenwick *v.* Grimes, 8 Fed. Cas. No. 4,733, 5 Cranch C. C. 439; Mandeville *v.* Cookenderfer, 16 Fed. Cas. No. 9,009, 3 Cranch C. C. 257. But see Whitcomb *v.* Wolcott, 21 Vt. 368.

37. *Alabama.*— Hayes *v.* Solomon, 90 Ala. 520, 7 So. 921.

Connecticut.— Hoag *v.* Hatch, 23 Conn. 585; Lewis *v.* Niles, 1 Root 433.

Illinois.— Chicago, etc., Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38; Illinois Cent. R. Co. *v.* Scheffner, 209 Ill. 1, 70 N. E. 619 [*affirming* 106 Ill. App. 344]; Chicago, etc., R. Co. *v.* Murphy, 198 Ill. 462, 64 N. E. 1011; Baltimore, etc., R. Co. *v.* Alsop, 176 Ill. 471, 52 N. E. 253, 732; Swift *v.* Fue, 167 Ill. 443, 47 N. E. 761; Bradshaw *v.* Hubbard, 6 Ill. 390; Garibaldi *v.* O'Connor, 112 Ill. App. 53 [*affirmed* in 210 Ill. 284, 71 N. E. 379, 66 L. R. A. 73]; Chicago, etc., R. Co. *v.* Gore, 105 Ill. App. 16.

Indiana.— Sims *v.* Dame, 113 Ind. 127, 15 N. E. 217; Louisville, etc., R. Co. *v.* Fox, 101 Ind. 416; Baddeley *v.* Patterson, 78 Ind. 157; Spahr *v.* Nicklaus, 51 Ind. 221; Kelsey *v.* Henry, 48 Ind. 37; Newell *v.* Downs, 8 Blackf. 523; Gilmore *v.* Ward, 22 Ind. App. 106, 52 N. E. 810; Price *v.* Boyce, 10 Ind. App. 145, 36 N. E. 766.

Kentucky.— Frankfort Bridge Co. *v.* Williams, 9 Dana 403, 35 Am. Dec. 155. *Compare* Carlisle Bank *v.* Hopkins, 1 T. B. Mon. 245, 15 Am. Dec. 113.

Maine.— Bishop *v.* Williamson, 11 Me. 495. Earlier decisions in this state, such as Clough *v.* Tenney, 5 Me. 446, were overruled by the passage of the act of March, 1830, c. 463.

Maryland.— Terry *v.* Bright, 4 Md. 430; Gordon *v.* Downey, 1 Gill 41.

Massachusetts.— Smith *v.* Cleveland, 6 Metc. 332. Early decisions in this state inconsistent with the case above cited are no longer in force. Barnes *v.* Hurd, 11 Mass. 59; Stevenson *v.* Hayden, 2 Mass. 406; Benson *v.* Swift, 2 Mass. 50.

Missouri.— Carpenter *v.* Hamilton, 185 Mo. 603, 84 S. W. 863; Zellers *v.* Missouri Water, etc., Co., 92 Mo. App. 107.

New Hampshire.— Conway *v.* Jefferson, 46 N. H. 521. *Compare* Blanchard *v.* Fisk, 2 N. H. 398.

New York.— Edwards *v.* Reynolds, Lalor 53.

South Carolina.— Ryan *v.* Copes, 11 Rich. 217, 73 Am. Dec. 106; Spann *v.* Perry, 3 Strobh. 339; Pratt *v.* Thomas, 2 Hill 654; Nelson *v.* Emerson, 1 Brev. 48, 2 Am. Dec. 646.

United States.— Burrows *v.* Niblack, 84 Fed. 111, 28 C. C. A. 130.

See 30 Cent. Dig. tit. "Judgment," § 473.

38. *Delaware.*— Higgins *v.* Bogan, 4 Harr. 330.

Florida.— Hyer *v.* Vaughn, 18 Fla. 647; Sedgwick *v.* Dawkins, 18 Fla. 335.

Maryland.— Washington, etc., Turnpike Road *v.* State, 19 Md. 239.

South Carolina.— State *v.* James, 2 Bay 215.

Texas.— Machon *v.* Randle, 66 Tex. 282, 17 S. W. 477; Hurley *v.* Birdsell, 1 Tex. App. Civ. Cas. § 1183.

See 30 Cent. Dig. tit. "Judgment," § 470.

39. Champion *v.* Mumford, Kirby (Conn.) 170; Henry *v.* Sowles, 28 Fed. 521. And see N. K. Fairbank Co. *v.* Bahre, 213 Ill. 636, 73 N. E. 322.

Illustrations.— Thus it is not a ground for arrest of judgment that the count on which the verdict is rendered is repugnant to another count in the declaration. White *v.* Smell, 9 Pick. (Mass.) 16. And in the absence of a demurrer to a complaint, the fact that it contains statements of conclusions is not ground for a motion in arrest. Stockwell *v.* State, 101 Ind. 1.

40. Higgins *v.* Bogan, 4 Harr. (Del.) 330; Smith *v.* Eastern R. Co., 35 N. H. 356; Johnson *v.* Dowling, 1 Tex. App. Civ. Cas. § 1090.

41. *Missouri.*— Woods *v.* State, 10 Mo. 698.

Ohio.— Jordan *v.* James, 5 Ohio 88.

South Carolina.— Tappan *v.* Harwood, 2 Speers 536.

Tennessee.— Memphis, etc., R. Co. *v.* Stockard, 11 Heisk. 568.

Texas.— Wooters *v.* International, etc., R. Co., 54 Tex. 294.

See 30 Cent. Dig. tit. "Judgment," § 470.

on the demurrer,[42] and *a fortiori* matter which was objected to by demurrer and decided upon cannot afterward be urged in arrest of judgment.[43]

e. Defects Amended, Waived, or Cured. A motion in arrest of judgment will not be granted on account of any failure or defect in the pleadings which could have been amended, the amendment being considered as made for the purposes of the motion,[44] or for any defect or omission which may be considered as having been waived by defendant,[45] or cured by the verdict or finding,[46] the rule in regard to omissions being that, although the petition may be defective, yet if it appears that the verdict could not have been given or judgment rendered without proof of the matter omitted to be stated, the defect will be cured and the judgment will not be arrested.[47] Nevertheless if a fact essential to plaintiff's right of action is neither expressly stated nor necessarily implied from the facts which are stated, a verdict will not cure the defect, and judgment will be arrested.[48]

f. Variance. As a general rule a motion in arrest of judgment cannot be based on the ground of an alleged variance.[49] This applies where the variance is between the writ or præcipe and the declaration or complaint.[50] It also applies

Contra.— See Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97.

42. Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626; Chicago, etc., R. Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Independent O. of M. A. *v.* Paine, 122 Ill. 625, 14 N. E. 42; American Express Co. *v.* Pinckney, 29 Ill. 392; Rouse *v.* Peoria County, 7 Ill. 99; Story, etc., Organ Co. *v.* Rendleman, 63 Ill. App. 123; Mayer *v.* Lawrence, 58 Ill. App. 194; Crown Coal, etc., Co. *v.* Yoch Coal Min. Co., 57 Ill. App. 666; School Directors *v.* Kimmel, 31 Ill. App. 537; Indiana, etc., R. Co. *v.* Sampson, 31 Ill. App. 513; Brooks *v.* People, 11 Ill. App. 422.

Contrary view.— This rule is not universally accepted. In one state it is said that there can be no error in declaring a fatally defective complaint bad on motion in arrest, although a demurrer thereto may have been previously overruled; for it is the duty of the court not to permit a judgment to be entered upon a complaint which is so clearly insufficient as to afford the judgment no foundation. Newman *v.* Perrill, 73 Ind. 153. And see Hydes Ferry Turnpike Co. *v.* Yates, 108 Tenn. 428, 67 S. W. 69. And in Texas it is said that where no action is shown to have been taken before trial on a general demurrer filed in the case, it may be availed of on motion in arrest of judgment. McCall *v.* Sullivan, 1 Tex. App. Civ. Cas. § 1.

43. Chicago, etc., R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680; Price *v.* Art Printing Co., 112 Ill. App. 1; Leathe *v.* Thomas, 109 Ill. App. 434; Chicago *v.* Smith, 95 Ill. App. 335; Miller *v.* McCormick Harvesting Mach. Co., 84 Ill. App. 571; Chicago, etc., R. Co. *v.* Pearson, 82 Ill. App. 605; Cleveland, etc., R. Co. *v.* Jenkins, 70 Ill. App. 415; Davis *v.* Carroll, 71 Md. 568, 18 Atl. 965; Freeman *v.* Camden, 7 Mo. 298; Ross *v.* Burlington Bank, 1 Aik. (Vt.) 43, 15 Am. Dec. 664. *Contra*, Decatur *v.* Simpson, 115 Iowa 348, 88 N. W. 839. And see Stewart *v.* Terre Haute, etc., R. Co., 103 Ind. 44, 2 N. E. 208, holding that if the court has erroneously overruled a demurrer to the complaint it is not thereby precluded from granting a motion in arrest of judgment, although the motion is based on the same defect that was attacked by the demurrer.

44. Parker *v.* Abrams, 50 Ala. 35; Eagle Mfg. Co. *v.* Wise, 40 Ga. 127; Barber *v.* Erie City Iron Works, 2 Pa. Co. Ct. 162; Brickman *v.* South Carolina R. Co., 8 S. C. 173.

45. Auld *v.* Butcher, 2 Kan. 135; Barney *v.* Bliss, 2 Aik. (Vt.) 60.

Demurring to plaintiff's evidence does not waive defendant's right to test the sufficiency of the complaint by motion in arrest. Bish *v.* Van Cannon, 94 Ind. 263.

46. *Illinois.*—Western Stone Co. *v.* Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244.

Indiana.— Powell *v.* Bennett, 131 Ind. 465, 30 N. E. 518; Sims *v.* Dame, 113 Ind. 127, 15 N. E. 217; James *v.* Fowler, 90 Ind. 563; Parker *v.* Clayton, 72 Ind. 307; McCormick *v.* Mitchell, 57 Ind. 248; Bayless *v.* Jones, 10 Ind. App. 102, 37 N. E. 421.

Maine.— Barrett *v.* Black, 56 Me. 498, 96 Am. Dec. 497.

Massachusetts.— Wilson *v.* Coffin, 2 Cush. 316.

Missouri.— Saulsbury *v.* Alexander, 50 Mo. 142.

New Hampshire.— Bedell *v.* Stevens, 28 N. H. 118; Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171.

Vermont.— Curtis *v.* Burdick, 48 Vt. 166; Lincoln *v.* Blanchard, 17 Vt. 464; Morey *v.* Homan, 10 Vt. 565.

West Virginia.— Hughes *v.* Frum, 41 W. Va. 445, 23 S. E. 604.

See 30 Cent. Dig. tit. "Judgment," §§ 468, 476.

47. Jones *v.* Louderman, 39 Mo. 287. And see Stanley *v.* Missouri Pac. R. Co., 84 Mo. 625.

48. Frazer *v.* Roberts, 32 Mo. 457; Welch *v.* Bryan, 28 Mo. 30; Sawyer *v.* Whittier, 2 N. H. 315. And see *supra*, VI, E, 3, a.

49. Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407.

50. *Florida.*— Cooper *v.* Livingston, 19 Fla. 684.

where the motion is based on the ground that there is a variance between the declaration or complaint and the proof.[51]

4. Objections to Jury. An objection to the mode of drawing and impaneling the jury will not be ground for a motion in arrest of judgment,[52] or an objection to the competence or qualification of an individual juror.[53] And because a judgment can be arrested only for matter of record, it is held that misconduct of the jury or improper influence brought to bear upon them after the trial is no ground for arresting the judgment.[54]

5. Objections to Verdict — a. In General. A motion in arrest of judgment will not reach a mere formal or inconsequential defect or irregularity in the verdict;[55] but it will reach a verdict which appears from the record to be materi-

Illinois.— Toledo, etc., R. Co. *v.* McLaughlin, 63 Ill. 389; Homan *v.* Fleming, 51 Ill. App. 572.

South Carolina.— Haney *v.* Townsend, 1 McCord 206; Bradley *v.* Jenkins, 3 Brev. 42.

Tennessee.— Johnson *v.* Planters' Bank, 1 Humphr. 77.

United States.— Wilson *v.* Berry, 30 Fed. Cas. No. 17,791, 2 Cranch C. C. 707.

See 30 Cent. Dig. tit. "Judgment," § 478.

51. Williamson *v.* Rexroat, 55 Ill. App. 116; Coulter *v.* Western Theological Seminary, 29 Md. 69; Adams *v.* Shirk, 104 Fed. 54, 43 C. C. A. 407. *Compare* Allen *v.* Word, 6 Humphr. (Tenn.) 284.

52. State *v.* Swift, 14 La. Ann. 827; State *v.* Hill, 19 S. C. 435. But *compare* Livingston *v.* Rogers, 1 Cai. (N. Y.) 583.

Objection to number of jurors.— If the case is tried in a court of record before a less number of jurors than the party is entitled to, and his consent does not expressly appear of record, he may take advantage of the objection by motion in arrest. Cox *v.* Moss, 53 Mo. 432; Brown *v.* Hannibal, etc., R. Co., 37 Mo. 298; Vaughn *v.* Scade, 30 Mo. 600; Naylor *v.* Chinn, 82 Mo. App. 160.

Waiver of jury.— Where a cause involving an issue of fact is tried before the court, and neither the judgment entry nor the minutes of the court show that a jury was waived, a motion in arrest of judgment on that ground should be granted. Brown *v.* St. Louis, etc., R. Co., 69 Mo. App. 418.

53. *California.*— People *v.* Samsels, 66 Cal. 99, 4 Pac. 1061.

Connecticut.— Brown *v.* Breed, 2 Root 523; Chapman *v.* Welles, Kirby 133. But see State *v.* Babcock, 1 Conn. 401; Smith *v.* Ward, 2 Root 302. The modern rule in this state appears to be that the disqualification or incompetence of a juror, if known to the party at the time of impaneling the jury, and not then objected to, must be considered as waived; but if not then known, it may be made the ground of a motion in arrest after verdict. Bailey *v.* Trumbull, 31 Conn. 581; Quinebaug Bank *v.* Leavens, 20 Conn. 87, 50 Am. Dec. 272; Selleck *v.* Sugar Hollow Turnpike Co., 13 Conn. 453; Parmele *v.* Guthery, 2 Root 185, 1 Am. Dec. 65; Tweedy *v.* Brush, Kirby 13.

Louisiana.— State *v.* Chevis, 48 La. Ann. 575, 19 So. 557; State *v.* Williams, 38 La. Ann. 361.

New Mexico.— Territory *v.* Armijo, 7 N. M. 571, 37 Pac. 1117.

Vermont.— Atkinson *v.* Allen, 12 Vt. 619, 36 Am. Dec. 361.

Virginia.— Gray *v.* Com., 92 Va. 772, 22 S. E. 858.

See 30 Cent. Dig. tit. "Judgment," § 481.

54. Brister *v.* State, 26 Ala. 107; McCann *v.* State, 9 Sm. & M. (Miss.) 465.

Rule in Connecticut.— If the objecting party was ignorant of the alleged misconduct of the jury until after the verdict was returned, he may move in arrest of judgment. Hickox *v.* Parmelee, 21 Conn. 86; Woodruff *v.* Richardson, 20 Conn. 238; Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337. And the earlier cases justify the arrest of judgment for improper conduct on the part of a juror, as in conversing with one not a member of the jury upon the merits of the case, without reference to the knowledge or ignorance of the party making the objection. Bennett *v.* Howard, 3 Day 219; Nichols *v.* Bronson, 2 Day 211; Bullock *v.* Hosford, 2 Root 349; Talmadge *v.* Northrop, 1 Root 522; Bow *v.* Parsons, 1 Root 429; Dana *v.* Roberts, 1 Root 134, 1 Am. Dec. 36. And see Howard *v.* Cobb, 12 Fed. Cas. No. 6,755, Brunn. Col. Cas. 75, 3 Day (Conn.) 309.

55. *California.*— Millard *v.* Hathaway, 27 Cal. 119.

Connecticut.— Thomson *v.* Church, Kirby 212 (that the jury misapprehended the legal consequences of their verdict); Church *v.* Norwich, Kirby 140.

District of Columbia.— Hartman *v.* Ruby, 16 App. Cas. 45; Chandler, etc., Co. *v.* Norwood, 14 App. Cas. 357.

Georgia.— Patterson *v.* Murphy, 63 Ga. 281, holding that a judgment will not be arrested because the verdict was not signed by any of the jurors where their names appear in the record.

Indiana.— Potter *v.* McCormack, 127 Ind. 439, 26 N. E. 883.

Iowa.— Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162, holding that inconsistency between a special finding and a general verdict cannot be taken advantage of by a motion in arrest.

Massachusetts.— Fuller *v.* Chamberlain, 11 Metc. 503.

Pennsylvania.— Brown *v.* Young, 1 Phila. 75.

United States.— Huff *v.* Hutchinson, 14

ally defective.[56] And it has been held that it will reach a verdict which was arrived at by referring the assessment of damages to chance.[57]

b. Verdict on Immaterial Issues. It will be ground for a motion in arrest of judgment if the verdict is rendered upon an immaterial issue, not decisive of the merits of the cause.[58]

c. Conformity to Pleadings or Issues. A motion in arrest may be based on the ground that the verdict is not responsive to the issues, or that it differs in a material respect from the pleadings and the issues formed thereon,[59] except where the part of the issue not found is immaterial or bad.[60] A general verdict on several counts or pleas properly joined, although erroneous in not specifying on which plea it is based, or in not stating that it is based on all the pleas, is not, in the absence of instructions to make separate findings, ground for arresting judgment.[61]

6. Motions in Arrest[62] — a. Time For Moving. A motion in arrest must be made before the rendition and entry of a final judgment in the cause.[63] In some

How. 586, 14 L. ed. 553; Hartshorn *v.* Wright, 11 Fed. Cas. No. 6,169, Pet. C. C. 64.

See 30 Cent. Dig. tit. "Judgment," § 484.

A verdict in the alternative in an action of trespass is no ground for arrest of judgment. Johnson *v.* Packer, 1 Nott & M. (S. C.) 1.

In Rhode Island where the verdict is a nullity, but the declaration states a good cause of action, the present practice, instead of arresting judgment as at common law, is to grant a new trial. Bowen *v.* White, 26 R. I. 68, 58 Atl. 252.

56. Westfield Gas, etc., Co. *v.* Abernathy, 8 Ind. App. 73, 35 N. E. 399; Finney *v.* State, 9 Mo. 632; Erdbruegger *v.* Meier, 14 Mo. App. 258; Chaffin *v.* Williams, 4 Humphr. (Tenn.) 231.

Where an action has abated as against one of two defendants, and the verdict is returned against both jointly, judgment thereon should be arrested. Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

A conditional verdict in an action of *indebitatus assumpsit* for money had and received is bad, and ground for arresting a judgment. Butcher *v.* Metts, 1 Miles (Pa.) 153.

57. Warner *v.* Robinson, 1 Root (Conn.) 194, 1 Am. Dec. 38.

58. Basset *v.* Davis, 2 Root (Conn.) 204; Henshaw *v.* Clark, 2 Root (Conn.) 4; Palmer *v.* Seymour, Kirby (Conn.) 139; Cranston Prob. Ct. *v.* Sprague, 3 R. I. 205. But see Robbins *v.* Wolcott, 19 Conn. 356, holding that it is no ground for a motion in arrest that issue was taken on matter of inducement included in a pleading.

59. Smith *v.* Raymond, 1 Day (Conn.) 189; Pettibone *v.* Gozzard, 2 Root (Conn.) 254; Russel *v.* Cornwell, 2 Root (Conn.) 68; Kegwin *v.* Campbell, 1 Root (Conn.) 268; Smith *v.* Bellamy, 1 Root (Conn.) 200; Miller *v.* Gable, 30 Ill. App. 578; Young *v.* Wickliffe, 7 Dana (Ky.) 447; Keirle *v.* Shriver, 11 Gill & J. (Md.) 405.

Verdict for excessive amount.— In Grist *v.* Hodges, 14 N. C. 198, it was held that if the verdict exceeds the amount of damages laid in the writ or declaration, it is fatal in arrest of judgment, unless plaintiff remits the excess. *Compare* Duffy *v.* Averitt, 27 N. C. 455, holding otherwise where the trial is on a warrant. But other decisions do not recognize this as a sufficient ground for arresting the judgment. Hutchins *v.* Adams, 3 Me. 174; Huff *v.* Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553.

Finding damages in pounds when the declaration lays them in dollars is no ground for arresting judgment. Butts *v.* Shreve, 4 Fed. Cas. No. 2,258, 1 Cranch C. C. 40.

Joint defendants.— Where, in an action against several defendants, damages were assessed against some of them and not against the others, the latter may move in arrest of judgment, on the ground that there is no verdict against them. Westfield Gas, etc., Co. *v.* Abernathy, 8 Ind. App. 73, 35 N. E. 399. See Greer *v.* Miller, 2 Overt. (Tenn.) 187.

60. Pettis *v.* Warren, Kirby (Conn.) 426; Moffett *v.* Turner, 23 Mo. App. 194; Wenberg *v.* Homer, 6 Binn. (Pa.) 307.

61. Ball *v.* Powers, 62 Ga. 757; Richmond *v.* Whittlesey, 2 Allen (Mass.) 230.

Where different and distinct causes of action are united in one suit a failure to make separate findings on each cause of action is ground for arresting judgment. Pitts *v.* Fugate, 41 Mo. 405; Grimes *v.* Sprague, 86 Mo. App. 245. But see Richmond *v.* Whittlesey, 2 Allen (Mass.) 230.

62. Allowance of costs on arrest of judgment see Costs.

63. *California.* — Barnhart *v.* Edwards, (1899) 57 Pac. 1004.

Indiana.— Smith *v.* State, 140 Ind. 343, 39 N. E. 1060; Potter *v.* McCormack, 127 Ind. 439, 26 N. E. 883; Clochen *v.* Ninde, 120 Ind. 88, 22 N. E. 94; Hansher *v.* Hanshew, 94 Ind. 208; Brownlee *v.* Hare, 64 Ind. 311; Hilligoss *v.* Pittsburgh, etc., R. Co., 40 Ind. 112; Bayless *v.* Jones, 10 Ind. App. 102, 37 N. E. 421. *Compare* Wheeler *v.* Rohrer, 21 Ind. App. 477, 52 N. E. 780.

Maryland.— Keller *v.* Stevens, 66 Md. 132, 6 Atl. 533.

Missouri.— Parker *v.* Simpson, 1 Mo. 539,

jurisdictions the time allowed for making such a motion is limited by statute,[64] and in others it is held that it cannot be made after the end of the term of court at which the verdict was returned,[65] or at any rate after the lapse of such a time as shows laches.[66] But a motion of this kind may be made and heard after the decision on a motion for a new trial.[67]

b. Requisites of Application. A motion in arrest of judgment should be presented to the court in some mode recognized as sufficient by the local statute,[68] and should point out the specific errors on which it is based.[69] It is subject to amendment, but not so as to change it into a motion for a new trial,[70] and since it must be tried by the record it cannot be aided by affidavits.[71]

c. Hearing and Determination. A motion in arrest of judgment serves in some measure the office of a demurrer and it should be governed by the principles of a demurrer.[72] It must be tried by the record and cannot be aided by extraneous evidence or by the judge's recollection of the course of the trial.[73] The judgment of the court should be decisive and responsive to the motion,[74] and should, if justice requires it, dismiss plaintiff's case altogether,[75] or award a new

Vermont.— State *v.* Kibling, 63 Vt. 636, 22 Atl. 613.

United States.— Dove *v.* Blair, 30 Fed. Cas. No. 18,292, 2 Hayw. & H. 200.

See 30 Cent. Dig. tit. "Judgment," § 490.

Contra.— See Sullivan *v.* New Bedford Sav. Inst., 140 Mass. 260, 6 N. E. 83.

In Georgia a motion in arrest of judgment may be made at any time before the adjournment of the court at which the cause is finally disposed of; and defendant's right to make such motion will not be defeated by entering up a judgment by plaintiff on the record before the adjournment of the court at which the cause is finally determined. Hartridge *v.* Wesson, 4 Ga. 101.

64. See Sheldon *v.* Woodbridge, 2 Root (Conn.) 473; Beach *v.* Hall, Kirby (Conn.) 235; State *v.* Leathers, 61 Mo. 381.

65. See Donley *v.* Dougherty, 97 Ill. App. 544; Danforth *v.* Lowe, 53 Mo. 217; Griffin *v.* Wabash R. Co., 110 Mo. App. 221, 85 S. W. 111. *Compare* Bayard *v.* Malcolm, 1 Johns. (N. Y.) 310.

66. Raney *v.* McRae, 14 Ga. 589, 40 Am. Dec. 660.

After pleading to the merits it is too late to move in arrest of judgment for the omission to file a bill of particulars required by a rule of the court. Long *v.* Kinard, Harp. (S. C.) 47.

67. *Arkansas.*— Pope *v.* Latham, 1 Ark. 66.

Indiana.— A motion in arrest of judgment cuts off a previous motion for a new trial. Daily *v.* Nuttman, 14 Ind. 339.

Kansas.— State *v.* Webb, 53 Kan. 464, 36 Pac. 1117.

Massachusetts.— Jones *v.* Fales, 4 Mass. 245.

Ohio.— Wilkinson *v.* Daniel, Wright 368.

See 30 Cent. Dig. tit. "Judgment," § 491.

68. In Indiana it is said that a motion in arrest of judgment need not be in writing, nor point out the grounds therefor, nor need it be brought into the record by bill of exceptions. Chicago, etc., R. Co. *v.* Wheeler, 14 Ind. App. 62, 42 N. E. 489. And in Connecticut an answer to a motion in arrest of judgment need not be in writing. Lewis *v.* Hawley, 2 Day (Conn.) 495, 2 Am. Dec. 121.

69. State *v.* Bouline, 107 La. 454, 31 So. 885; State *v.* Wing, 32 Me. 581; Persinger *v.* Wabash, etc., R. Co., 82 Mo. 196. *Compare* State *v.* Greenwell, 4 Gill & J. (Md.) 407.

Erroneous statement of grounds.—Where a party made a motion which he called a motion "for an arrest of judgment," but assigned only causes proper in support of a motion for a new trial, which in substance and effect it was, it was held that the motion would be considered as for the latter purpose. Salinas *v.* Wright, 11 Tex. 572.

70. Sedgwick *v.* Dawkins, 16 Fla. 198.

A statute requiring all grounds of motion in arrest to be insisted on at once does not interfere with the right of the movant to amend at any time prior to final decision. Union Compress Co. *v.* Leffler, 122 Ga. 640, 50 S. E. 483.

Where the motion is granted, and the judgment thereon is set aside, the motion is still pending, with a right of the movant to amend. Union Compress Co. *v.* Leffler, 122 Ga. 640, 50 S. E. 483.

71. Greene *v.* Oliphant, 64 Ga. 565; State *v.* Malone, 37 La. Ann. 266; Harvey *v.* Wood, 5 Wend. (N. Y.) 221.

72. Washington, etc., Turnpike Road *v.* State, 19 Md. 239; State *v.* Greenwell, 4 Gill & J. (Md.) 407.

A rule for a new trial and a motion in arrest of judgment may both be entertained, where the reasons filed in support of both motions were contemporaneous. Ransing *v.* Bender, 3 Lanc. L. Rev. (Pa.) 193.

73. Woodruff *v.* Whittlesey, Kirby (Conn.) 60; Washington *v.* Calhoun, 103 Ga. 675, 30 S. E. 434; Rawles *v.* State, 56 Ind. 433.

74. Bird *v.* Bird, 2 Root (Conn.) 411; Worthington *v.* Dewit, 1 Root (Conn.) 182. See Raymond *v.* Bell, 18 Conn. 81.

75. See Keirle *v.* Shriver, 11 Gill & J. (Md.) 405. And see Sanner *v.* Sayne, 78 Ga. 467, 3 S. E. 651. But *compare* Kauff-

trial.[76] If several defendants join in the motion, it must be sustained or overruled as to all.[77]

d. Presumptions in Aid of Verdict. On a motion in arrest of judgment, after trial, every reasonable intendment will be made in favor of the pleadings,[78] and it will be presumed after verdict that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial,[79] although it cannot be presumed that a cause of action was proved where none was stated, and where a material fact is omitted, which cannot be implied in or inferred from the finding of those which are stated, the verdict will not cover the defect.[80]

e. Operation and Effect of Arrest. The granting of a motion in arrest of judgment prevents the entry of a final judgment in the cause, unless it is made conditional upon an amendment or such other action as will remove the cause of arrest.[81] And if it does not award a venire facias de novo, it operates as a discontinuance and dismisses defendant without day.[82]

VII. ENTRY, RECORD, AND DOCKETING.[83]

A. Rendition and Entry Distinguished.[84] The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the

man *v.* Kauffman, 2 Whart. (Pa.) 139, holding that a judgment for defendant cannot be entered on a motion in arrest of judgment, since it would deprive plaintiff of his right to another action.

76. Postley *v.* Mott, 3 Den. (N. Y.) 353; Pratt *v.* Thomas, 2 Hill (S. C.) 654.

77. Van Gundy *v.* Carrigan, 4 Ind. App. 333, 30 N. E. 933; Rush *v.* Rush, 19 Mo. 441. But see U. S. *v.* O'Fallon, 27 Fed. Cas. No. 15,911, 15 Blatchf. 298.

78. Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171; Owen *v.* Schmidt, 14 Phila. (Pa.) 184; Teague *v.* Griffin, 2 Nott & M. (S. C.) 93.

Damages claimed.—Where both general and special damages were alleged, but by reason of defective pleading recovery cannot be had for the special damages, it will be presumed, upon a motion in arrest of judgment, that the verdict was for the general damages only. Packard *v.* Slack, 32 Vt. 9. And so where, in addition to a good cause of action, matters are alleged in the declaration which do not form a proper ground for damages in that action, and a verdict was rendered for plaintiff on a plea of general denial, it will be presumed that the proof was confined to the legitimate ground for damages. Hamm *v.* Romine, 98 Ind. 77.

79. *Colorado.*— Daniels *v.* Denver, 2 Colo. 669.

Illinois.— Herman Berghoff Brewing Co. *v.* Przbylski, 82 Ill. App. 361.

New Hampshire.— Bedell *v.* Stevens, 28 N. H. 118.

New York.— Addington *v.* Allen, 11 Wend. 374; Beecker *v.* Beecker, 7 Johns. 99, 5 Am. Dec. 246.

South Carolina.— Cooper *v.* Halbert, 2 McMull. 419.

Virginia.— Murdock *v.* Herndon, 4 Hen. & M. 200.

United States.— Scull *v.* Higgins, 21 Fed. Cas. No. 12,570*a*, Hempst. 90.

See 30 Cent. Dig. tit. "Judgment," § 496.

80. Bedell *v.* Stevens, 28 N. H. 118; Addington *v.* Allen, 11 Wend. (N. Y.) 374; Cooper *v.* Halbert, 2 McMull. (S. C.) 419.

81. Johnson *v.* Johnson, 30 Colo. 402, 70 Pac. 692.

82. Butcher *v.* Metts, 1 Miles (Pa.) 233. See Hackley *v.* Hastie, 3 Johns. (N. Y.) 253.

83. Entry of judgment upon petition for naturalization see ALIENS, 2 Cyc. 114.

Entry of appellate judgment see APPEAL AND ERROR, 3 Cyc. 471.

Entry of judgment on award see ARBITRATION AND AWARD, 3 Cyc. 797.

Entry of judgment of forfeiture of bail see BAIL, 5 Cyc. 130.

Fees for entering judgment see COSTS, 11 Cyc. 112.

84. See the following cases:

California.— McLaughlin *v.* Doherty, 54 Cal. 519, 520.

Colorado.— Schuster *v.* Rader, 13 Colo. 329, 334, 22 Pac. 505.

Indiana.— Vigo County *v.* Terre Haute, 147 Ind. 134, 136, 46 N. E. 350; Martin *v.* Pifer, 96 Ind. 245, 248.

Montana.— Parrott *v.* Kane, 14 Mont. 23, 27, 35 Pac. 243.

Nevada.— California State Tel. Co. *v.* Patterson, 1 Nev. 150.

New York.— Livingston *v.* Hammer, 7 Bosw. 670, 676.

Ohio.— Coe *v.* Erb, 59 Ohio St. 259, 262, 52 N. E. 640, 69 Am. St. Rep. 764.

Texas.— Winstead *v.* Evans, (Civ. App. 1896) 33 S. W. 580.

Washington.— Barthrop *v.* Tucker, 29 Wash. 666, 669, 70 Pac. 120 [*quoted* in State *v.* Brown, 31 Wash. 397, 401, 72 Pac. 86, 62 L. R. A. 974].

West Virginia.— McClain *v.* Davis, 37 W. Va. 330, 333, 16 S. E. 629, 18 L. R. A. 634.

facts in controversy as ascertained by the pleadings and verdict.[85] The entry of a judgment is a ministerial act which consists in spreading it upon the record or writing it at large in a docket or other official book.[86]

B. Necessity For Entry — 1. In General. As between the parties a judgment duly rendered is valid and effective, although not entered; that is, the neglect or failure of the clerk to make a proper entry of the judgment, or his defective or inaccurate entry of it, will not deprive it of the force of a judicial decision.[87] Still a judgment is not complete and perfect for all purposes until it has been duly entered.[88] Thus until entered it cannot create a lien upon the land

85. Goddard *v.* Coffin, 10 Fed. Cas. No. 5,490, 2 Ware 382. And see Matthews *v.* Houghton, 11 Me. 377.

86. Blatchford *v.* Newberry, 100 Ill. 484; Dalton *v.* Loughlin, 4 Abb. N. Cas. (N. Y.) 187; Miller *v.* Albright, 12 Ohio Cir. Ct. 533, 5 Ohio Cir. Dec. 585. See also Jasper *v.* Schlesinger, 22 Ill. App. 637.

Another definition is: "A ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action." 1 Black Judgm. § 106; Burns *v.* Skelton, 29 Tex. Civ. App. 453, 68 S. W. 527. See also Columbus Water-Works *v.* Columbus, 46 Kan. 666, 675, 26 Pac. 1046.

"To take an order or a judgment is not to enter it. Either may be taken, and never entered." Uhe *v.* Chicago, etc., R. Co., 4 S. D. 505, 517, 57 N. W. 484 [*citing* Blatchford *v.* Newberry, 100 Ill. 484].

"Entry of judgments," used in reference to a bond or stipulation filed with the clerk for the appraised or agreed value of any property liable in the district court, and to the adjustment of the clerk's fees in the matter, means entry of the judgment or decree on the stipulation and not the entry of the main decree in the cause. The Belle, 3 Fed. Cas. No. 1,270, 5 Ben. 57.

87. *California.* — Holt *v.* Holt, 107 Cal. 258, 40 Pac. 390 [*distinguishing* Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211].

Georgia.— Webster *v.* Dundee Mortg., etc., Co., 93 Ga. 278, 20 S. E. 310; Powell *v.* Perry, 63 Ga. 417; Bridges *v.* Thomas, 50 Ga. 378.

Iowa.— Craig *v.* Alcorn, 46 Iowa 560.

Louisiana.— Elliot *v.* Cox, 5 Mart. N. S. 285.

New York.— Butler *v.* Lee, 1 Abb. Dec. 279, 3 Keyes 70, 33 How. Pr. 251; New York City Baptist Mission Soc. *v.* Tabernacle Baptist Church, 10 N. Y. App. Div. 288, 41 N. Y. Suppl. 976; Carpenter *v.* Simmons, 1 Rob. 360, 28 How. Pr. 12; Risk *v.* Uffelman, 7 Misc. 133, 27 N. Y. Suppl. 392.

Ohio.— Newnam *v.* Cincinnati, 18 Ohio 323.

Pennsylvania.— Helvete *v.* Rapp, 7 Serg. & R. 306.

United States.— Bird *v.* McClelland, etc., Brick Mfg. Co., 45 Fed. 458. Omission properly to record the verdict is a mere irregularity which does not destroy the validity of the judgment, at least until it be set aside. Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304.

Canada.— Kelly *v.* Wade, 14 Ont. Pr. 66. See 30 Cent. Dig. tit. "Judgment," § 501.

Execution may issue on a judgment duly rendered, although it has not been entered, and a sale thereunder will pass good title. Los Angeles County Bank *v.* Raynor, 61 Cal. 145; Weigley *v.* Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335.

Attachment of judgment debt.— A judgment ordered by the judge to be entered for a certain amount, although not yet entered or signed, is a debt to the judgment creditor capable of being attached. Holtby *v.* Hodgson, 24 Q. B. D. 103, 59 L. J. Q. B. 46, 62 L. T. Rep. N. S. 145, 38 Wkly. Rep. 68.

In California it is provided by statute that an action may be dismissed if, after verdict or final submission, the party entitled to judgment neglects to have it entered for more than six months. Cal. Code Civ. Proc. § 581, subd. 6. But this action will not be taken where the party entitled to judgment orally requested the clerk to enter it and paid him the proper fee, whereupon the clerk promised to enter the judgment (Gardner *v.* Tatum, 77 Cal. 458, 19 Pac. 879); nor in a case where the court, after submission, held the case under advisement for more than six months before rendering a decision (San Jose Ranch Co. *v.* San Jose Land, etc., Co., 126 Cal. 322, 58 Pac. 824).

88. *Illinois.*— Edwards *v.* Evans, 61 Ill. 492.

Iowa.— King *v.* Dickson, 114 Iowa 160, 86 N. W. 263.

Louisiana.— Dorsey *v.* Hills, 4 La. Ann. 106.

Minnesota.— Maurin *v.* Carnes, 71 Minn. 308, 74 N. W. 139.

New York.— Lentilhon *v.* New York, 3 Sandf. 721.

South Dakota.— Locke *v.* Hubbard, 9 S. D. 364, 69 N. W. 588.

Texas.— Green *v.* White, 18 Tex. Civ. App. 509, 45 S. W. 389.

United States.— Mahoney Min. Co. *v.* Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707.

See 30 Cent. Dig. tit. "Judgment," § 501.

Right of appeal.— The entry of a judgment is necessary to put in motion the right of appeal from the judgment, or to limit the time within which that right may be exercised. Los Angeles County Bank *v.* Raynor,

of the debtor such as to affect third parties,[89] or support a claim of *res judicata* or former adjudication.[90]

2. Presumption as to Entry. As it is the duty of clerks of courts to enter the judgments of the courts, it will be presumed, in aid of a judgment, that this duty was performed, when the dockets or records have been lost or destroyed, especially after the lapse of a considerable period of time.[91]

C. Authority and Duty to Enter — 1. In General. Authority for the entry of a judgment must be found in the actual rendition of such a judgment, and an order of court for its entry, unless the entry follows as of course, according to the local practice, without such an order.[92]

2. Authority and Duty of Clerk.[93] When a judgment has been rendered in a cause, it becomes the duty of the clerk, according to the usual practice, to make a record entry of it.[94] And whether he does so in pursuance of an order of the court,[95] or without such an order,[96] his authority extends only to the entering of the judgment exactly as it was rendered by the court, without addition, diminution, or change of any kind;[97] and a judgment entered by a clerk who had no authority to enter it at all, or in the form in which it is entered, is void.[98] The

61 Cal. 145. See Marshall *v.* Taylor, 97 Cal. 422, 32 Pac. 515. And see Appeal and Error, 2 Cyc. 625.

89. Los Angeles County Bank *v.* Raynor, 61 Cal. 145; Coe *v.* Erb, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764.

90. Young *v.* People, 171 Ill. 299, 49 N. E. 503; Dunning *v.* Seward, 90 Ind. 63; Ferguson *v.* Staver, 40 Pa. St. 213. *Compare* Bates *v.* Delavan, 5 Paige (N. Y.) 299.

91. *Georgia.*— American Mortg. Co. *v.* Hill, 92 Ga. 297, 18 S. E. 425.

Illinois.— Ward *v.* White, 66 Ill. App. 155.

Indiana.— Jenkins *v.* Parkhill, 25 Ind. 473.

Louisiana.— Hubbell *v.* Clannon, 13 La. 494.

Texas.— Gunter *v.* Buckler, (Civ. App. 1895) 32 S. W. 229.

United States.— Slicer *v.* Pittsburg Bank, 16 How. 571, 14 L. ed. 1063; Cromwell *v.* Pittsburg Bank, 6 Fed. Cas. No. 3,409, 2 Wall. Jr. 569.

See 30 Cent. Dig. tit. "Judgment," § 503.

92. Martin *v.* Barnhardt, 39 Ill. 9. And see Carolina Grocery Co. *v.* Moore, 63 S. C. 184, 41 S. E. 88; Hills *v.* Passage, 21 Wis. 294.

Authority of judge to order entry of a judgment rendered by his predecessor see Weyman *v.* National Broadway Bank, 59 How. Pr. (N. Y.) 331; Johnson *v.* Young, 11 W. Va. 673.

Effect of appeal.— Where findings and an order for judgment are filed, but the judgment is not formally entered, an affirmance on appeal does not divest the trial court of jurisdiction to enter the judgment afterward. Brady *v.* Burke, 90 Cal. 1, 27 Pac. 52.

93. See Clerks of Courts, 7 Cyc. 219 *et seq.*

94. Selders *v.* Boyle, 5 Kan. App. 451, 49 Pac. 320; Ferrell *v.* Hales, 119 N. C. 199, 25 S. E. 821; Boynton *v.* Crockett, 12 Okla. 57, 69 Pac. 869; Hall *v.* Moreman, 3 McCord (S. C.) 477.

95. Decker *v.* St. Louis, etc., R. Co., 92 Mo. App. 50.

Sufficiency of general order see Rothschild *v.* Knight, 176 Mass. 48, 57 N. E. 337.

Revocation of order.— A judgment entered by the clerk in pursuance of an express order of the court will not be void, or a mere nullity, although the court, by a subsequent order not noticed by the clerk, has directed the case to be continued; but it would be irregular and voidable and liable to be set aside upon seasonable application to the court. Claggett *v.* Simes, 31 N. H. 56.

Entry in open court.— An order of court in a controverted matter should not be entered by the clerk in the absence of the court, although upon a written order from the judge; all such proceedings should be in open court. Aspden's Appeal, 24 Pa. St. 182.

96. Hanna *v.* Dexter, 15 Abb. Pr. (N. Y.) 135, holding that the clerk has power, under the practice in New York, to enter judgment upon a conditional order of the court, on proof of non-compliance with the condition.

In case of default the clerk is generally authorized to enter the proper judgment without application to the court. Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529. And see *supra*, IV, E, 3, a. But not where plaintiff's claim is for unliquidated damages (*In re* Scharmann, 49 N. Y. App. Div. 278, 63 N. Y. Suppl. 267), or where the proceeding is to bring in additional defendants and have them show cause why they should not be bound by the judgment originally entered (Ingwaldson *v.* Olson, 79 Minn. 252, 82 N. W. 579).

97. Ramaley *v.* Ramaley, 69 Minn. 491, 72 N. W. 694; Claughton *v.* Black, 24 Miss. 185; Card *v.* Meincke, 70 Hun (N. Y.) 382, 24 N. Y. Suppl. 375; Paine *v.* Aldrich, 59 Hun (N. Y.) 623, 13 N. Y. Suppl. 455; Robostelli *v.* New York, etc., R. Co., 34 Fed. 507.

98. Lacoste *v.* Eastland, 117 Cal. 673, 49 Pac. 1046; Stearns *v.* Aguirre, 7 Cal. 443; Nau *v.* Suelflohn, 45 Wis. 438. *Compare* Dillon *v.* Porter, 36 Minn. 341, 31 N. W. 56.

fact that a judgment is entered up by a deputy clerk, and not by the clerk in person, does not affect its validity.[99]

D. Parties Entitled to Enter. Where the successful party neglects to enter judgment, the court has power to compel him to do so, or to direct that the defeated party may cause it to be entered, if the other does not do so within a specified time.[1] Under a statute providing that when a verdict shall be rendered the party in whose favor it is may enter judgment at any time within four days after adjournment of court, the attorney of a plaintiff who has procured a verdict in an action *ex delicto* may enter judgment within such time, although plaintiff has died since the verdict.[2]

E. Time For Entry — 1. In General. In the absence of a statute or rule of court, judgment upon a verdict may be entered at any time after the return of the verdict, either immediately or after a delay which is not unreasonably great.[3] But it is sometimes the practice to enter all judgments on the last day of the term.[4]

2. When Entry Must Be Delayed. At common law, and by statute in some of the states, judgment cannot be entered on a verdict until the lapse of four days from its rendition, to allow of motions in arrest or for a new trial.[5] But in other states this rule is not in force,[6] and it does not apply where the case was tried by the court without a jury.[7] It is irregular to enter judgment in an action before it is ripe for such proceeding, as where an accounting must be taken,[8] where damages are yet to be assessed,[9] where other ancillary or subsidiary matters remain to be determined before the judgment can be put in its final shape,[10] where a motion for a new trial is pending, although this does not render the judgment void, but only irregular,[11] or where the verdict has been taken subject to the opinion of the court[12] or the court has ordered a stay of proceedings after the verdict.[13] Still the premature entry of a judgment is not a jurisdictional

Order signed in blank.— It seems that orders entered by the clerk over a blank signature of the judge are not valid orders of the court. Marshall County *v.* Bennett, 15 Ind. 181.

Numbering folios.— A rule of court forbidding the clerk to file a paper in which the folios are not numbered does not invalidate the entry of a judgment the folios of which are not numbered, a statute providing that no judgment shall be impaired or affected by an informality in entering it. New York City Baptist Mission Soc. *v.* Tabernacle Baptist Church, 10 N. Y. App. Div. 288, 41 N. Y. Suppl. 976.

99. State *v.* Hoeflinger, 35 Wis. 393. *Compare* Lee *v.* Carrollton Sav., etc., Soc., 58 Md. 301.

Deputy not duly appointed.— The fact that a judgment was enrolled and tested by one as deputy clerk who had never been regularly appointed deputy, but who sometimes acted as deputy in the absence of the clerk and the duly appointed deputy, does not make the judgment void. King *v.* Belcher, 30 S. C. 381, 9 S. E. 359.

1. Wilson *v.* Simpson, 84 N. Y. 674. See Townsend *v.* Meader, 58 Me. 288.

2. Skidaway Shell-Road Co. *v.* Brooks, 77 Ga. 136.

3. See the following cases:

Michigan.— Harvey *v.* McAdams, 32 Mich. 472.

New York.— Heinemann *v.* Waterbury, 5 Bosw. 686; Rose *v.* Rock, 6 Johns. 330.

North Carolina.— Jacobs *v.* Burgwyn, 63 N. C. 193.

Ohio.— Dellenbarger *v.* Hunger, 24 Ohio Cir. Ct. 722.

Washington.— Harris *v.* Fidalgo Mill Co., 38 Wash. 169, 80 Pac. 289.

Entry on the day after findings of fact are filed is not erroneous where no motion for a new trial is pending. Lewis *v.* Portland First Nat. Bank, (Oreg. 1904) 78 Pac. 990.

4. Haynes *v.* Thom, 28 N. H. 386; Lovell *v.* Sabin, 15 N. H. 29.

5. Marvin *v.* Marvin, 75 N. Y. 240; Droz *v.* Lakey, 2 Sandf. (N. Y.) 681; Britton *v.* Stanley, 1 Whart. (Pa.) 267.

6. See Erie R. Co. *v.* Ackerson, 33 N. J. L. 33; Young *v.* Shallenberger, 53 Ohio St. 291, 41 N. E. 518.

7. Lynde *v.* Cowenhoven, 4 How. Pr. (N. Y.) 327.

8. McMahon *v.* Allen, 27 Barb. (N. Y.) 335.

9. Stone *v.* Foley, 15 N. Y. St. 398.

10. Cummings *v.* Ross, 90 Cal. 68, 27 Pac. 62; Paducah Land, etc., Co. *v.* Cochran, 37 S. W. 67, 18 Ky. L. Rep. 465; Bode *v.* New England Inv. Co., 1 N. D. 121, 45 N. W. 197.

11. Habersham *v.* Wetter, 59 Ga. 11; Ferris *v.* Commercial Nat. Bank, 158 Ill. 237, 41 N. E. 1118; Hasted *v.* Dodge, (Iowa 1887) 35 N. W. 462.

12. Jackson *v.* Fitzsimmons, 6 Wend. (N. Y.) 546.

13. Murphy *v.* Pacific Bank, 130 Cal. 542, 62 Pac. 1059; Harvey *v.* McAdams, 32 Mich.

defect, and therefore does not avoid the judgment, but at most makes it irregular and voidable.[14]

3. Time Within Which Entry Must Be Made — a. In General. Statutes requiring that judgment shall be entered within a limited time after the rendition of a verdict or other determination of the cause are generally directory only, so that the validity of the judgment is not affected by failure to comply with them.[15]

b. Entry After Term. Although regularly the judgment should be entered at the same term at which the verdict is returned or the final decision of the case made, yet it is generally held to be competent for the court to order its entry at a subsequent term, if no rights of third persons will be prejudiced.[16]

c. After Expiration of Judge's Term. If a judgment or decree was actually rendered or settled before the expiration of the term of office of the judge trying the case, it is generally held to be immaterial that it was not filed or entered of record until afterward, the judicial act being the rendition of the judgment, and its entry being merely ministerial.[17]

4. Entry in Vacation. The entry or recording of a judgment being a ministerial act, as distinguished from the rendition of it, it has been held that if a judgment is duly rendered during term-time, it is then complete, and its validity is in no wise affected by the fact that the clerk does not enter it until vacation.[18]

472; Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522; Alfaro *v.* Davidson, 39 N. Y. Super. Ct. 408; Chauncey *v.* Baldwin, 2 How. Pr. (N. Y.) 205; Lillienthal *v.* Wallach, 36 Fed. 255.

14. Haley *v.* Amestoy, 44 Cal. 132; Tobar *v.* Losano, 6 Tex. Civ. App. 698, 25 S. W. 973; Horning *v.* E. Griesbach Brewing Co., 84 Wis. 71, 54 N. W. 105; Marshall, etc., Bank *v.* Milwaukee Worsted Mills, 84 Wis. 23, 53 N. W. 1126.

15. *California.*— Churchill *v.* Louie, 135 Cal. 608, 67 Pac. 1052; Neihaus *v.* Morgan, (1896) 45 Pac. 255; Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218; Marshall *v.* Taylor, 97 Cal. 422, 32 Pac. 515; Jones *v.* Chalfant, (1892) 31 Pac. 257; Rosenthal *v.* McMann, 93 Cal. 505, 29 Pac. 121; Heinlen *v.* Phillips, 88 Cal. 557, 26 Pac. 366; Oakland First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551, 748; Gardner *v.* Tatum, 77 Cal. 458, 19 Pac. 879; Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668; Waters *v.* Dumas, 75 Cal. 563, 17 Pac. 685.

Illinois.— Iglehart *v.* Chicago M. & F. Ins. Co., 35 Ill. 514.

Iowa.— Bevering *v.* Smith, 121 Iowa 607, 96 N. W. 1110. But see Tomlinson *v.* Litze, 82 Iowa 32, 47 N. W. 1015, 31 Am. St. Rep. 458.

Kentucky.— See Raymond *v.* Smith, 1 Metc. 65, 71 Am. Dec. 458.

Minnesota.— Denel *v.* Hawke, 2 Minn. 50.

New York.— Smith *v.* Coe, 7 Rob. 477; Lyons *v.* Gavin, 43 Misc. 659, 88 N. Y. Suppl. 252; Cohn *v.* Coit, 3 Code Rep. 23.

Washington.— Brown *v.* Porter, 7 Wash. 327, 34 Pac. 1105; Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931. See Quareles *v.* Seattle, 26 Wash. 226, 66 Pac. 389.

See 30 Cent. Dig. tit. "Judgment," § 518.

16. *Iowa.*— Farley *v.* O'Malley, 77 Iowa 531, 42 N. W. 435; Shephard *v.* Brenton, 20 Iowa 41.

Massachusetts.— Taber *v.* Wilcox, 136 Mass. 56; Marshall *v.* Merritt, 103 Mass. 45.

Missouri.— Pelz *v.* Bollinger, 180 Mo. 252, 79 S. W. 146. And see Murdock *v.* Ganahl, 47 Mo. 135.

New Hampshire.— Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 67 N. H. 326, 36 Atl. 254.

North Carolina.— Ferrell *v.* Hales, 119 N. C. 199, 25 S. E. 821.

Pennsylvania.— Murray *v.* Cooper, 6 Serg. & R. 126.

South Carolina.— Koon *v.* Munro, 11 S. C. 139; Lynch *v.* Inglis, 1 Bay 449.

See 30 Cent. Dig. tit. "Judgment," § 519.

But see Packard *v.* Packard, 34 Kan. 53, 7 Pac. 628; McDonald *v.* Bunn, 3 Den. (N. Y.) 45; Lake *v.* Hood, 35 Tex. Civ. App. 32, 79 S. W. 323.

17. Hamill *v.* Gibson, 61 Ala. 261; Shenandoah Nat. Bank *v.* Read, 86 Iowa 136, 53 N. W. 96; Babcock *v.* Wolf, 70 Iowa 676, 28 N. W. 490; Tracy *v.* Beeson, 47 Iowa 155; Roberts *v.* White, 39 N. Y. Super. Ct. 272; McDowell *v.* McDowell, 92 N. C. 227. *Contra,* Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211; Mace *v.* O'Reilley, 70 Cal. 231, 11 Pac. 721; Russell *v.* Sargent, 7 Ill. App. 98; Wilson *v.* Rodewald, 61 Miss. 228.

18. *Arizona.*— Woffenden *v.* Charouleau, 2 Ariz. 89, 11 Pac. 61.

California.— People *v.* Jones, 20 Cal. 50; Marysville *v.* Buchanan, 3 Cal. 212. *Compare* Wicks *v.* Ludwig, 9 Cal. 173. But see Coffinberry *v.* Horrill, 5 Cal. 493; Peabody *v.* Phelps, 7 Cal. 53.

Colorado.— Sieber *v.* Frink, 7 Colo. 148, 2 Pac. 901; Phelan *v.* Ganebin, 5 Colo. 14. *Compare* Francis *v.* Wells, 4 Colo. 274.

Florida.— McGee *v.* Ancrum, 33 Fla. 499, 15 So. 231.

Kansas.— Earls *v.* Earls, 27 Kan. 538.

Kentucky.—Louisville, etc., R. Co. *v.* Eliza-

But in several states the statutes or the settled practice of the courts forbid the entry of judgments in vacation.[19]

5. Presumption as to Time of Entry. It will be presumed in the absence of direct evidence that a judgment was entered at such a time as would make it valid, rather than at a time when it would be illegal or irregular to enter it.[20] In some states there is a presumption that all judgments are entered on the first[21] or last day of the term.[22]

F. Entry Nunc Pro Tunc — 1. Power and Authority of Courts. There is an inherent, common-law power in the courts to cause the entry of judgments *nunc pro tunc* in proper cases and in furtherance of justice.[23] This power belongs to all courts of record, and may be exercised by an appellate court as well as by the trial court,[24] but does not appertain to the clerk of a court.[25] It can be exercised, however, only in cases where the cause was ripe for judgment, that is, where the case was in such a condition at the date to which the judgment is to relate back that a final judgment could then have been entered immediately.[26]

bethtown Dist. Public Schools, 105 Ky. 358, 49 S. W. 34, 20 Ky. L. Rep. 1228.

Massachusetts.— Thompson *v.* Goulding, 5 Allen 81.

Nevada.— Schultz *v.* Winter, 7 Nev. 130.

New York.— McDonald *v.* Bunn, 3 Den. 45. *Compare* Hogeboom *v.* Genet, 6 Johns. 325.

Utah.— Russell *v.* Hank, 9 Utah 309, 34 Pac. 245.

Wisconsin.— Manitowoc County *v.* Sullivan, 51 Wis. 115, 8 N. W. 12.

United States.—Green *v.* Watkins, 6 Wheat. 260, 5 L. ed. 256; Hatch *v.* Eustis, 11 Fed. Cas. No. 6,207, 1 Gall. 160.

See 30 Cent. Dig. tit. "Judgment," § 522.

19. *Arkansas.*— Smith *v.* Egner, 28 Ark. 475.

Georgia.—Thomas County *v.* Hopkins, 119 Ga. 909, 47 S. E. 319.

Indiana.— Passwater *v.* Edwards, 44 Ind. 343. And see Mitchell *v.* St. John, 98 Ind. 598.

Iowa.— See Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810; McGregor First Nat. Bank *v.* Hostetter, 61 Iowa 395, 16 N. W. 289; Hattenback *v.* Hoskins, 12 Iowa 109; Townsley *v.* Morehead, 9 Iowa 565; Sheppard *v.* Wilson, Morr. 448.

Ohio.— Coe *v.* Erb, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764.

See 30 Cent. Dig. tit. "Judgment," § 522.

20. Eagle Gold Min. Co. *v.* Bryarly, 28 Colo. 262, 65 Pac. 52; Peetsch *v.* Quinn, 6 Misc. (N. Y.) 50, 26 N. Y. Suppl. 728; Woody *v.* Dean, 24 S. C. 499.

21. Norwood *v.* Thorp, 64 N. C. 682.

22. Pierce *v.* Lamper, 141 Mass. 20, 6 N. E. 223; Goodall *v.* Harris, 20 N. H. 363; Baker *v.* Merrifield, 13 N. H. 357.

23. *California.*— Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227; Swain *v.* Naglee, 19 Cal. 127.

Illinois.— Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414.

Indiana.— Chissom *v.* Barbour, 100 Ind. 1.

Iowa.— Shephard *v.* Brenton, 20 Iowa 41.

Kansas.— Aydelotte *v.* Brittain, 29 Kan. 98.

Maine.— Billings *v.* Berry, 50 Me. 31.

Maryland.— Stern *v.* Bennington, 100 Md. 344, 60 Atl. 17.

Missouri.— Mead *v.* Brown, 65 Mo. 552; Dawson *v.* Waldheim, 89 Mo. App. 245.

Montana.— Work *v.* Northern Pac. R. Co., 13 Mont. 438, 34 Pac. 726.

Nebraska.— Fisk *v.* Osgood, 2 Nebr. (Unoff.) 100, 96 N. W. 237.

New Jersey.— Hess *v.* Cole, 23 N. J. L. 116.

New York.— Jewett *v.* Schmidt, 45 Misc. 471, 92 N. Y. Suppl. 737; Wood *v.* Keyes, 6 Paige 478.

North Carolina.— Ferrell *v.* Hales, 119 N. C. 199, 25 S. E. 821; Shackelford *v.* Miller, 91 N. C. 181; Long *v.* Long, 85 N. C. 415.

Ohio.— Dial *v.* Holter, 6 Ohio St. 228.

South Carolina.— State Bank *v.* Kennerly, 3 Rich. 195.

United States.— Mitchell *v.* Overman, 103 U. S. 62, 26 L. ed. 369.

England.— Evans *v.* Rees, 12 A. & E. 167, 9 L. J. Q. B. 317, 4 P. & D. 36, 40 E. C. L. 91; Norwich *v.* Berry, 4 Burr. 2277; Hodges *v.* Templer, 6 Mod. 191; Mohun's Case, 6 Mod. 59.

See 30 Cent. Dig. tit. "Judgment," § 525.

Statutory provisions requiring a proceeding to vacate or modify a judgment to be brought within a certain time after the judgment is pronounced do not apply to a motion for an entry of judgment *nunc pro tunc.* Hyde *v.* Michelson, 52 Nebr. 680, 72 N. W. 1035, 66 Am. St. Rep. 533. And see Risser *v.* Martin, 86 Iowa 392, 53 N. W. 270.

24. Steers *v.* Holmes, 79 Mich. 430, 44 N. W. 922.

25. Rockwood *v.* Davenport, 37 Minn. 533, 35 N. W. 377, 5 Am. St. Rep. 872.

26. *Arkansas.*— Jennings *v.* Ashley, 5 Ark. 128.

Illinois.— Robb *v.* Bostwick, 5 Ill. 115; Birdsell Mfg. Co. *v.* Independent Fire Sprinkler Co., 87 Ill. App. 443. On an application to make a new party to a judgment, the party, on coming into court, should be ruled to plead, and thus have an

And this relief will not be granted where the failure to enter the judgment at the proper time was due to the party's own carelessness or negligence,[27] or to enable him to gain an advantage over the other party to which he would not have been entitled at the proper time for entering the judgment,[28] or generally unless it is shown that some injury or injustice would result from the refusal to take the action demanded,[29] a motion for such an entry being addressed very largely to the discretion of the court.[30]

2. Grounds For Entry — a. Death of Party. If judgment upon a verdict is delayed by a motion for a new trial or other proceeding, or if a case tried by the court is held under advisement or delayed by exceptions, and meanwhile one of the parties dies, the court will not allow the action to abate, but will enter judgment *nunc pro tunc* as of a time when the party was still alive.[31] And the same

opportunity of making a defense on the merits; and in such case judgment should not be rendered *nunc pro tunc*. Loomis *v.* Francis, 17 Ill. 206.

Kansas.— See Bridges *v.* Sargent, 1 Kan. Francis, 17 Ill. 206.

Mississippi.— If there is no verdict in the record, the court cannot at a subsequent term order a verdict and judgment to be entered *nunc pro tunc*. Gray *v.* Thomas, 12 Sm. & M. 111.

Missouri.— Young *v.* Young, 165 Mo. 624, 65 S. W. 1016, 88 Am. St. Rep. 440.

New York.— Kissam *v.* Hamilton, 20 How. Pr. 369; North *v.* Pepper, 20 Wend. 677.

Rhode Island.— Hazard *v.* Durant, 14 R. I. 25.

Texas.— Perkins *v.* Dunlavy, 61 Tex. 241.

Washington.— Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 75.

Wisconsin.— Hocks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113.

27. Dawson *v.* Waldheim, 89 Mo. App. 245; Stapler *v.* Hoffman, 1 Dem. Surr. (N. Y.) 63; London Fishmongers *v.* Robertson, 3 C. B. 970, 4 D. & L. 656, 16 L. J. C. P. 118, 54 E. C. L. 970; Wilkes *v.* Perks, 7 Jur. 68, 12 L. J. C. P. 145, 5 M. & G. 376, 6 Scott N. R. 42, 44 E. C. L. 202.

28. Hall *v.* Brown, 59 N. H. 198; Moore *v.* Westervelt, 14 How. Pr. (N. Y.) 279; Allston *v.* Sing, Riley (S. C.) 199.

29. Sherman *v.* Western Inv. Banking Co., 6 Ariz. 33, 52 Pac. 1126; Aurora F. & M. Ins. Co. *v.* Texas Bldg. Assoc. No. 2, 7 Ohio Dec. (Reprint) 469, 3 Cinc. L. Bul. 429; U. S. *v.* Gomez, 3 Wall. (U. S.) 752, 18 L. ed. 212.

30. Rockwood *v.* Davenport, 37 Minn. 533, 35 N. W. 377, 5 Am. St. Rep. 872; Powers *v.* Carter Coal, etc., Co., 100 Va. 450, 41 S. E. 867.

31. *Alabama.*— Powe *v.* McLeod, 76 Ala. 418.

Arkansas.— Pool *v.* Loomis, 5 Ark. 110.

California.— *In re* Page, 50 Cal. 40. See Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 475, 41 Pac. 328; Franklin *v.* Merida, 50 Cal. 289.

Connecticut.— Brown *v.* Wheeler, 18 Conn. 199; Collins *v.* Prentice, 15 Conn. 423.

Georgia.— Spencer *v.* Peake, 73 Ga. 803.

Maine.— Lewis *v.* Soper, 44 Me. 72; Goddard *v.* Bolster, 6 Me. 427, 20 Am. Dec. 320.

Massachusetts.— Wilkins *v.* Wainwright, 173 Mass. 212, 53 N. E. 397; Tapley *v.* Goodsell, 122 Mass. 176; Tapley *v.* Martin, 116 Mass. 275; Patterson *v.* Buckminster, 14 Mass. 144; Perry *v.* Wilson, 7 Mass. 393.

Michigan.— Webber *v.* Stanton, 1 Mich. N. P. 97.

New Hampshire.— Blaisdell *v.* Harris, 52 N. H. 191; Hall *v.* Harvey, 3 N. H. 61.

New Jersey.— Hess *v.* Cole, 23 N. J. L. 116; Burnham *v.* Dalling, 16 N. J. Eq. 310.

New York.— Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522; Arthur *v.* Schriever, 60 N. Y. Super. Ct. 59, 16 N. Y. Suppl. 610; Fulton *v.* Fulton, 8 Abb. N. Cas. 210; De Agreda *v.* Mantel, 1 Abb. Pr. 130; Kissam *v.* Hamilton, 20 How. Pr. 369; Diefendorf *v.* House, 9 How. Pr. 243; Holmes *v.* Honie, 8 How. Pr. 383; Ehle *v.* Moyer, 8 How. Pr. 244; Gurney *v.* Parks, 1 How. Pr. 140; Spalding *v.* Congdon, 18 Wend. 543; Ryghtmyre *v.* Durham, 12 Wend. 245; Springsted *v.* Jayne, 4 Cow. 423; Wood *v.* Keyes, 6 Paige 478; Campbell *v.* Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570. See Tuomy *v.* Dunn, 77 N. Y. 515. And *compare* Bennet *v.* Davis, 3 Cow. 68.

North Carolina.— Beard *v.* Hall, 79 N. C. 506; Isler *v.* Brown, 66 N. C. 556; Wilson *v.* Myers, 11 N. C. 73, 15 Am. Dec. 510.

Ohio.— *In re* Jarrett, 42 Ohio St. 199; Dial *v.* Holter, 6 Ohio St. 228.

Oregon.— Mitchell *v.* Schoonover, 16 Oreg. 211, 17 Pac. 867, 8 Am. St. Rep. 282.

Pennsylvania.— Griffith *v.* Ogle, 1 Binn. 172; Rothstein *v.* Brooks, 6 Pa. Co. Ct. 411; *In re* Lindsay, 25 Pittsb. Leg. J. N. S. 406.

South Carolina.— Allston *v.* Sing, Riley 199; Napier *v.* Carpenter, 2 Brev. 407.

Tennessee.— McLean *v.* State, 8 Heisk. 22.

Wisconsin.— Hocks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113.

United States.— New Orleans *v.* Warner, 176 U. S. 92, 20 S. Ct. 280, 44 L. ed. 385; Mitchell *v.* Overman, 103 U. S. 62, 26 L. ed. 369; Green *v.* Watkins, 6 Wheat. 260, 5 L. ed. 256; Citizens' Bank *v.* Brooks, 23 Fed. 21, 23 Blatchf. 137; Hatch *v.* Eustis, 11 Fed. Cas. No. 6,207, 1 Gall. 160; Griswold *v.* Hill, 11 Fed. Cas. No. 5,834, 1 Paine 483.

England.— Evans *v.* Rees, 12 A. & E. 167, 9 L. J. Q. B. 317, 4 P. & D. 36, 40 E. C. L. 91; Blewett *v.* Tregonning, 4 A. & E. 1002,

rule applies where defendant is a corporation and is dissolved, or its charter expires, after the action has been tried and the case taken under advisement by the court.[32] Where the entry of judgment on a verdict is delayed by a motion in arrest or for a new trial, pending which one of the parties dies, judgment may be entered *nunc pro tunc*, on the decision of the motion, as of the time when the verdict was returned.[33] And so where an appeal has been taken and one of the parties dies before hearing in the appellate court the proper practice is to affirm or reverse the judgment below *nunc pro tunc*.[34]

b. Delay by Act of Court. Whenever delay in entering a judgment is caused by the action of the court, as in holding the case under advisement, judgment *nunc pro tunc* will be allowed as of the time when the party would otherwise have been entitled to it, if justice requires it.[35]

c. Failure to Enter Judgment on Rendition. In any case where a judgment was actually rendered, order made, or decree signed, but the same has not been entered on the record, in consequence of any accident or mistake, or the neglect or omission of the clerk, the court has power to order that the judgment be entered up *nunc pro tunc*, the fact of its rendition being satisfactorily established and no intervening rights being prejudiced.[36]

31 E. C. L. 435; Bridges *v.* Smyth, 8 Bing. 29, 1 Dowl. P. C. 242, 1 L. J. C. P. 33, 1 Moore & S. 93, 21 E. C. L. 431; Norwich *v.* Berry, 4 Burr. 2277; Moor *v.* Roberts, 3 C. B. N. S. 830, 4 Jur. N. S. 241, 27 L. J. C. P. 161, 6 Wkly. Rep. 297, 91 E. C. L. 830; Harrison *v.* Heathorn, 1 D. & L. 529, 6 Scott N. R. 794; Seymour *v.* Greenwood, 6 H. & N. 359, 30 L. J. Exch. 189, 9 Wkly. Rep. 518; Abington *v.* Lipscomb, 11 L. J. Q. B. 15; Key *v.* Goodwin, 1 Moore & S. 620; Green *v.* Cohden, 4 Scott 486, 36 E. C. L. 598; Toulmin *v.* Anderson, 1 Taunt. 385; Davies *v.* Davies, 9 Ves. Jr. 461, 32 Eng. Reprint 681.

Canada.— Neil *v.* McMillan, 27 U. C. Q. B. 257.

See 30 Cent. Dig. tit. "Judgment," § 529.

Actions of tort.— The power to enter judgment *nunc pro tunc* does not extend to the entering of judgment in favor of a deceased plaintiff in an action of tort. Ireland *v.* Champneys, 4 Taunt. 884. But see Brown *v.* Wheeler, 18 Conn. 199.

32. State *v.* Waldo Bank, 20 Me. 470; Shakman *v.* U. S. Credit System Co., 92 Wis. 366, 66 N. W. 528, 53 Am. St. Rep. 920, 32 L. R. A. 383.

33. *Connecticut.*— Brown *v.* Wheeler, 18 Conn. 199; Collins *v.* Prentice, 15 Conn. 423.

Georgia.— Watson *v.* Jones, 1 Ga. 300.

Massachusetts.— Terry *v.* Briggs, 12 Cush. 319.

Missouri.— Witten *v.* Robison, 31 Mo. App. 525.

New Jersey.—McNamara *v.* New York, etc., R. Co., 56 N. J. L. 56, 28 Atl. 313; Den *v.* Tomlin, 18 N. J. L. 14, 35 Am. Dec. 525.

New York.— Spalding *v.* Congdon, 18 Wend. 543.

Ohio.— Dial *v.* Holter, 6 Ohio St. 228.

Pennsylvania.— Fitzgerald *v.* Stewart, 53 Pa. St. 343; Griffith *v.* Ogle, 1 Binn. 172.

South Carolina.— Denoon *v.* O'Hara, 1 Brev. 500.

34. *Georgia.*— Perdue *v.* Bradshaw, 18 Ga. 287; Hardee *v.* Stovall, 1 Ga. 92; Kane *v.* Hills, R. M. Charlt. 103.

New Hampshire.— Blaisdell *v.* Harris, 52 N. H. 191.

Texas.— *Ex p.* Beard, 41 Tex. 234.

Vermont.— Snow *v.* Carpenter, 54 Vt. 17.

Virginia.— Van Gunden *v.* Kane, 88 Va. 591, 14 S. E. 334.

United States.— Richardson *v.* Green, 130 U. S. 104, 9 S. Ct. 443, 32 L. ed. 872; Borer *v.* Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 L. ed. 532.

See 30 Cent. Dig. tit. "Judgment," §§ 530, 531, 532.

35. *Illinois.*— Seymour *v.* O. S. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716. *Compare* Littlejohn *v.* Arbogast, 86 Ill. App. 505.

Massachusetts.— Perry *v.* Wilson, 7 Mass. 393.

New Jersey.— McNamara *v.* New York etc., R. Co., 56 N. J. L. 56, 28 Atl. 313; Hess *v.* Cole, 23 N. J. L. 116; Thorpe *v.* Corwin, 20 N. J. L. 311.

New York.— Clapp *v.* Graves, 2 Hilt. 317.

Ohio.— Mannix *v.* Elder, 1 Ohio Cir. Ct. 59, 1 Ohio Cir. Dec. 36.

South Carolina.— Allston *v.* Sing, Riley 199.

South Dakota.— Todd *v.* Todd, 7 S. D. 174, 63 N. W. 777.

Compare McClain *v.* Davis, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634.

Repeal of statute.— Where the action was upon a statute which was afterward repealed, but before the repealing statute went into operation the action was tried and verdict rendered for plaintiff, and questions of law were reserved, which, after the repeal took effect, were decided in his favor, the court ordered judgment to be entered on the verdict as of a day previous to the going into operation of the repealing act. Springfield *v.* Worcester, 2 Cush. (Mass.) 52.

36. *Alabama.*— Whorley *v.* Memphis, etc., R. Co., 72 Ala. 20; Wilkerson *v.* Goldthwaite, 1 Stew. & P. 159.

d. Correction of Clerical Errors. If a judgment has been irregularly entered, or fails to contain all that is essential to it or to express the true sentence of the court, in consequence of clerical errors or omissions, it may be completed by an order *nunc pro tunc*, or may be set aside and the true and correct judgment entered *nunc pro tunc*.[37]

e. Changing or Revising Judgment. The power to order the entry of judgments *nunc pro tunc* cannot be used for the purpose of correcting errors or

Arkansas.— St. Louis, etc., R. Co. *v.* Winfrey, (1891) 16 S. W. 572.

California.— Marshall *v.* Taylor, 97 Cal. 422, 32 Pac. 515; Dreyfuss *v.* Tompkins, 67 Cal. 339, 7 Pac. 732; Swain *v.* Naglee, 19 Cal. 127.

Florida.— Hagler *v.* Mercer, 6 Fla. 721.

Georgia.— Kelsoe *v.* Hill, 58 Ga. 364; Johnson *v.* Wright, 27 Ga. 555; Foster *v.* Cherokee County Justices Inferior Ct., 9 Ga. 185.

Illinois.— Metzger *v.* Morley, 197 Ill. 208, 64 N. E. 280, 90 Am. St. Rep. 158; Howell *v.* Morlan, 78 Ill. 162; Fitzsimmons *v.* Munch, 79 Ill. App. 538; Ives *v.* Hulce, 17 Ill. App. 30.

Iowa.— Day *v.* Goodwin, 104 Iowa 374, 73 N. W. 864, 65 Am. St. Rep. 465; Shephard *v.* Brenton, 20 Iowa 41.

Kansas.— Iliff *v.* Arnott, 31 Kan. 672, 3 Pac. 525.

Kentucky.—Monarch *v.* Brey, 106 Ky. 688, 51 S. W. 191, 21 Ky. L. Rep. 279. *Compare* Boyd County *v.* Ross, 95 Ky. 167, 25 S. W. 8, 44 Am. St. Rep. 210, 15 Ky. L. Rep. 520.

Louisiana.— Hardy *v.* Stevenson, 26 La. Ann. 236; State *v.* Smith, 12 La. Ann. 349.

Maryland.— Stern *v.* Bennington, 100 Md. 344, 60 Atl. 17.

Michigan.— *In re* Shepard, 109 Mich. 631, 67 N. W. 971.

Mississippi.— Forbes *v.* Navra, 63 Miss. 1; Cotten *v.* McGehee, 54 Miss. 621.

Missouri.— Smith *v.* Steel, 81 Mo. 455; Belkin *v.* Rhodes, 76 Mo. 643; State *v.* Jeffors, 64 Mo. 376; Priest *v.* McMaster, 52 Mo. 60; Turner *v.* Christy, 50 Mo. 145; Groner *v.* Smith, 49 Mo. 318; Gibson *v.* Chouteau, 45 Mo. 171, 100 Am. Dec. 366; Hyde *v.* Curling, 10 Mo. 359.

Montana.— Parrott *v.* McDevitt, 14 Mont. 203, 36 Pac. 193; Harvey *v.* Whitlatch, 1 Mont. 713.

Nebraska.— Morrill *v.* McNeill, (1901) 91 N. W. 601; Gund *v.* Horrigan, 53 Nebr. 794, 74 N. W. 257; Hyde *v.* Michelsen, 52 Nebr. 680, 72 N. W. 1035, 66 Am. St. Rep. 533; Hamer *v.* McKinley-Lanning L. & T. Co., 51 Nebr. 496, 71 N. W. 51; Van Etten *v.* Test, 49 Nebr. 725, 68 N. W. 1023.

New York.— People *v.* Central City Bank, 35 How. Pr. 428; Chichester *v.* Cande, 3 Cow. 39, 15 Am. Dec. 238.

North Carolina.— McDowell *v.* McDowell, 92 N. C. 227; Gregory *v.* Haughton, 12 N. C. 442.

Ohio.— Huber Mfg. Co. *v.* Sweny, 57 Ohio St. 169, 48 N. E. 879; Miller *v.* Albright, 12 Ohio Cir. Ct. 533, 5 Ohio Cir. Dec. 585; Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 11 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375; Hamner *v.* McConnel, 2 Ohio 31.

Oregon.— Douglas County Road Co. *v.* Douglas County, 5 Oreg. 406.

Pennsylvania.— Irvin *v.* Hazleton, 37 Pa. St. 465; Herring *v.* Philadelphia, 1 Walk. 4; Murray *v.* Cooper, 6 Serg. & R. 126.

South Carolina.— State *v.* Fullmore, 47 S. C. 34, 24 S. E. 1026.

Texas.— Texas Land, etc., Co. *v.* Winter, 93 Tex. 560, 57 S. W. 39; Whittaker *v.* Gee, 63 Tex. 435; Burnett *v.* State, 14 Tex. 455, 65 Am. Dec. 131; Ward *v.* Ringo, 2 Tex. 420, 47 Am. Dec. 654; Orr *v.* Wright, (Civ. App. 1898) 45 S. W. 629.

Wisconsin.— Williams *v.* Ely, 13 Wis. 1.

United States.— Baldwin *v.* Lamar, 2 Fed. Cas. No. 800, Chase 432.

See 30 Cent. Dig. tit. "Judgment," § 526.

The rule stated in the text is applicable not only to judgments upon a verdict in contested cases, but also to judgments by confession (Mountain *v.* Rowland, 30 Ga. 929; Davis *v.* Barker, 1 Ga. 559; Doughty *v.* Meek, 105 Iowa 16, 74 N. W. 744, 67 Am. St. Rep. 282), and by default (Lanyon *v.* Michigan Buggy Co., 94 Ill. App. 243; Monarch *v.* Brey, 106 Ky. 688, 51 S. W. 191, 21 Ky. L. Rep. 279). It may also be invoked in proceedings in a probate court (Brooks *v.* Brooks, 52 Kan. 562, 35 Pac. 215), and in actions for divorce as well as in other cases (Rush *v.* Rush, 97 Tenn. 279, 37 S. W. 13). And its application is not confined to final judgments, but extends also to the orders of the court. See Ferguson *v.* Millaudon, 12 La. Ann. 348; Huber Mfg. Co. *v.* Sweny, 57 Ohio St. 169, 48 N. E. 879; Texas Land, etc., Co. *v.* Winter, 93 Tex. 560, 57 S. W. 39; Burnett *v.* State, 14 Tex. 455, 65 Am. Dec. 131.

37. *Alabama.*— Seymour *v.* Thomas Harrow Co., 81 Ala. 250, 1 So. 45.

Arkansas.—See Freeman *v.* Mears, 35 Ark. 278.

Colorado.— People *v.* Thirteenth Judicial Dist. Ct., 33 Colo. 77, 79 Pac. 1014.

Georgia.— Pollard *v.* King, 62 Ga. 103. *Compare* Emory *v.* Smith, 51 Ga. 455.

Minnesota.— Stai *v.* Selden, 87 Minn. 271, 92 N. W. 6.

Missouri.— Belkin *v.* Rhodes, 76 Mo. 643; State *v.* Jeffors, 64 Mo. 376; Allen *v.* Sayles, 56 Mo. 28; Priest *v.* McMaster, 52 Mo. 60; Turner *v.* Christy, 50 Mo. 145; Hyde *v.* Curling, 10 Mo. 359.

New York.— Jones *v.* Merchants' Nat. Bank, 1 N. Y. Suppl. 578; Sing *v.* Annin, 10 Johns. 302.

omissions of the court. This procedure cannot be employed to enter a judgment where the court wholly failed to render any judgment at the proper time,[38] or to change the judgment actually rendered to one which it neither rendered nor intended to render,[39] or where the fault in the original judgment is that it is wrong as a matter of law,[40] or to allow the court to review and reverse its action in respect to what it formerly refused to do or assent to.[41]

3. Time of Entry. The right to enter judgment *nunc pro tunc* is not defeated by a delay of several terms, or even several years, which is explained or justified, where justice to the parties requires it and no intervening rights are affected.[42]

4. Proceedings For Entry Nunc Pro Tunc — a. In General. An application for the entry of a judgment *nunc pro tunc* should be made by motion, to which only the parties to the original proceeding are proper parties.[43] The party opposing the motion may present any reasons in opposition to it which are available at such a stage of the cause;[44] but the proceeding is summary, and no inquiry will be permitted into the merits of the original action or the facts already established by the judgment.[45]

b. Notice of Application. In some jurisdictions no notice of an application for the entry of a judgment *nunc pro tunc* is necessary, where the motion is based on matters of record, such as could not be disputed by the opposite party even if he were heard;[46] but in other jurisdictions the proper practice is to give notice of all such applications.[47]

United States.— Sheppard *v.* Wilson, 6 How. 260, 12 L. ed. 430; Murphy *v.* Stewart, 2 How. 263, 11 L. ed. 261.

See 30 Cent. Dig. tit. "Judgment," § 527.

38. *Florida.*— Adams *v.* Higgins, 23 Fla. 13, 1 So. 321.

Indiana.— Wilson *v.* Vance, 55 Ind. 394.

Missouri.— Young *v.* Young, 165 Mo. 624, 65 S. W. 1016, 88 Am. St. Rep. 440; Briant *v.* Jackson, 80 Mo. 318; Hansbrough *v.* Fudge, 80 Mo. 307; State *v.* Jeffors, 64 Mo. 376; Priest *v.* McMaster, 52 Mo. 60; Turner *v.* Christy, 50 Mo. 145; Hyde *v.* Curling, 10 Mo. 359; Page *v.* Chapin, 80 Mo. App. 159.

Nebraska.— Garrison *v.* People, 6 Nebr. 274.

Texas.— Wheeler *v.* Duke, 29 Tex. Civ. App. 20, 67 S. W. 909.

See 30 Cent. Dig. tit. "Judgment," § 528.

39. Printup *v.* Mitchell, 19 Ga. 586; Ross *v.* Ross, 83 Mo. 100; Page *v.* Chapin, 80 Mo. App. 159; Cleveland Leader Printing Co. *v.* Green, 52 Ohio St. 487, 40 N. E. 201, 49 Am. St. Rep. 725. And see Phelps *v.* Wolff, (Nebr. 1905) 103 N. W. 1062.

40. *Maine.*— *In re* Limerick, 18 Me. 183.

Michigan.— Whitwell *v.* Emory, 3 Mich. 84, 59 Am. Dec. 220.

Missouri.— Woolridge *v.* Quinn, 70 Mo. 376; Gibson *v.* Chouteau, 45 Mo. 171, 100 Am. Dec. 366; Hyde *v.* Curling, 10 Mo. 359; Evans *v.* Fisher, 26 Mo. App. 541.

Nebraska.— Nuckolls *v.* Irwin, 2 Nebr. 60.

Pennsylvania.— Smith *v.* Hood, 25 Pa. St. 218, 64 Am. Dec. 692.

Texas.— Perkins *v.* Dunlavy, 61 Tex. 241.

United States.— Brignardello *v.* Gray, 1 Wall. 627, 17 L. ed. 692.

41. Moore *v.* State, 63 Ga. 165.

42. *Alabama.* — Mays *v.* Hassell, 4 Stew. & P. 222, 24 Am. Dec. 750.

Nebraska.— Hyde *v.* Michelsen, 52 Nebr. 680, 72 N. W. 1035, 66 Am. St. Rep. 533. And see Phelps *v.* Wolff, (1905) 103 N. W. 1062.

New York.— Diefendorf *v.* House, 9 How. Pr. 243.

South Carolina.— Galpin *v.* Fishburne, 3 McCord 22, 15 Am. Dec. 614.

Virginia.— Van Gunden *v.* Kane, 88 Va. 591, 14 S. E. 334.

See 30 Cent. Dig. tit. "Judgment," § 535.

But see Willis *v.* Bivins, 76 Ga. 745; McClain *v.* Davis, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634.

43. Hillens *v.* Brinsfield, 113 Ala. 304, 21 So. 208; Urbanski *v.* Manns, 87 Ind. 585.

44. Montgomery County *v.* Auchley, 103 Mo. 492, 15 S. W. 626.

45. Hebel *v.* Scott, 36 Ind. 226; Uland *v.* Carter, 34 Ind. 344.

46. Nabers *v.* Meredith, 67 Ala. 333; Glass *v.* Glass, 24 Ala. 468; Bentley *v.* Wright, 3 Ala. 607; Allen *v.* Bradford, 3 Ala. 281, 37 Am. Dec. 689; Mays *v.* Hassell, 4 Stew. & P. 222, 24 Am. Dec. 750; Davis *v.* Barker, 1 Ga. 559; Stokes *v.* Shannon, 55 Miss. 583; Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522. *Compare* Womack *v.* Sanford, 37 Ala. 445; Clemens *v.* Judson, Minor (Ala.) 395.

Where it becomes necessary to go beyond the records in the case, in order to alter or amend it, notice of the application must be given to the opposite party. Wimberly *v.* Mansfield, 70 Ga. 783.

47. *Connecticut.*— Weed *v.* Weed, 25 Conn. 337.

Massachusetts.— King *v.* Burnham, 129 Mass. 598.

Minnesota.— Berthold *v.* Fox, 21 Minn. 51.

Texas.— Cowart *v.* Oram, 1 Tex. App. Civ. Cas. § 183.

c. Evidence. According to the generally accepted rule, the evidence to justify the entry of a judgment *nunc pro tunc* must be record evidence, that is, some entry, note, or memorandum from the records or quasi-records of the court, which shows in itself, without the aid of parol evidence, that the alleged judgment was rendered, and what were its character and terms.[48] But according to some authorities an entry *nunc pro tunc* may be ordered on any evidence that is sufficient and satisfactory, whether it be parol or otherwise.[49] And when the fact that a judg-

Wisconsin.— Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70.

See 30 Cent. Dig. tit. "Judgment," § 540.

48. *Alabama.*— Ware *v.* Kent, 123 Ala. 427, 26 So. 208, 82 Am. St. Rep. 132; Kemp *v.* Lyon, 76 Ala. 212; Herring *v.* Cherry, 75 Ala. 376; Lily *v.* Larkin, 66 Ala. 122; *Ex p.* Gilmer, 64 Ala. 234; *Ex p.* Jones, 61 Ala. 399; Dabney *v.* Mitchell, 54 Ala. 198; Price *v.* Gillespie, 28 Ala. 279; Perkins *v.* Perkins, 27 Ala. 479; Dickens *v.* Bush, 23 Ala. 849; Yonge *v.* Broxson, 23 Ala. 684; Hudson *v.* Hudson, 20 Ala. 364, 56 Am. Dec. 200; Metcalf *v.* Metcalf, 19 Ala. 319, 54 Am. Dec. 188; Benford *v.* Daniels, 13 Ala. 667; Rains *v.* Ware, 10 Ala. 623; Andrews *v.* Mobile Branch Bank, 10 Ala. 375; Thompson *v.* Miller, 2 Stew. 470; Draughan *v.* Tombeckbee Bank, 1 Stew. 66, 18 Am. Dec. 38.

California.— Hegeler *v.* Henckell, 27 Cal. 491; Swain *v.* Naglee, 19 Cal. 127.

Florida.— Adams *v.* Re Qua, 22 Fla. 250, 1 Am. St. Rep. 191.

Georgia.— Attaway *v.* Carswell, 89 Ga. 343, 15 S. E. 472; Robertson *v.* Pharr, 56 Ga. 245.

Illinois.— Tynan *v.* Weinhard, 153 Ill. 598, 38 N. E. 1014; Cairo, etc., R. Co. *v.* Holbrook, 72 Ill. 419; Coughran *v.* Gutcheus, 18 Ill. 390.

Indiana.— Boyd *v.* Schott, (1898) 50 N. E. 379; Uland *v.* Carter, 34 Ind. 344; Crystal Ice, etc., Co. *v.* Marion Gas Co., (App. 1905) 74 N. E. 15.

Kentucky.— Raymond *v.* Smith, 1 Metc. 65, 71 Am. Dec. 458; Wade *v.* Bryant, 7 S. W. 397, 9 Ky. L. Rep. 875.

Mississippi.— Shackelford *v.* Levy, 63 Miss. 125.

Missouri.— Young *v.* Young, 165 Mo. 624, 65 S. W. 1016, 88 Am. St. Rep. 440; Montgomery County *v.* Auchley, 103 Mo. 492, 15 S. W. 626; Atkinson *v.* Atchison, etc., R. Co., 81 Mo. 50; State *v.* Jeffors, 64 Mo. 376; Fletcher *v.* Coombs, 58 Mo. 430; Gibson *v.* Chouteau, 45 Mo. 171, 100 Am. Dec. 366; Hyde *v.* Curling, 10 Mo. 359; Blize *v.* Castlio, 8 Mo. App. 290. And see Sperling *v.* Stubblefield, 105 Mo. App. 489, 79 S. W. 1172.

Ohio.— Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609.

Texas.— Camoron *v.* Thurmond, 56 Tex. 22; Calloway *v.* Nichols, 47 Tex. 327; Wheeler *v.* Duke, 29 Tex. Civ. App. 20, 67 S. W. 909.

See 30 Cent. Dig. tit. "Judgment," § 541.

Memoranda or minutes.— Entries on the judge's docket or memoranda upon his minutes constitute sufficient evidence on which to enter a judgment *nunc pro tunc.* Harris *v.* Bradford, 4 Ala. 214; Metzger *v.* Morley, 197 Ill. 208, 64 N. E. 280, 90 Am. St. Rep. 158; Schockey *v.* Akey, 6 Kan. App. 920, 49 Pac. 694; Monarch *v.* Brey, 106 Ky. 688, 51 S. W. 191, 21 Ky. L. Rep. 279; Graham *v.* Lynn, 4 B. Mon. (Ky.) 17, 39 Am. Dec. 493; Blum *v.* Neilson, 59 Tex. 378. See 30 Cent. Dig. tit. "Judgment," § 541. But see Boon *v.* Boon, 8 Sm. & M. (Miss.) 318; Rhodes *v.* Sherrod, 8 Sm. & M. (Miss.) 97.

Entries on docket.— Entries on the court and bar docket, which are quasi-records, are admissible evidence. Farmer *v.* Wilson, 34 Ala. 75.

Motion docket.— Where the law requires the clerk to keep a motion docket, and the entries made in it show the orders taken by the court, they are sufficient evidence to authorize a *nunc pro tunc* entry. Yonge *v.* Broxson, 23 Ala. 684.

Judge's recollection.— An entry of judgment *nunc pro tunc* cannot be made simply on the judge's recollection of having rendered such a judgment, or of its terms or amount. Short *v.* Kellogg, 10 Ga. 180; Chicago, etc., R. Co. *v.* Wingler, 165 Ill. 634, 46 N. E. 712; Belkin *v.* Rhodes, 76 Mo. 643; Shea *v.* Mabry, 1 Lea (Tenn.) 319.

An oral announcement of the court's decision is not a sufficient basis for the entry of a judgment *nunc pro tunc.* Boyd *v.* Schott, 152 Ind. 161, 52 N. E. 752; Young *v.* Young, 165 Mo. 624, 65 S. W. 1016, 88 Am. St. Rep. 440.

Statement of counsel.— A *nunc pro tunc* entry should not be ordered by a judge other than the one who made the original order, upon the mere statement of counsel, excepted to by the opposing counsel, that such an order was made. Carter *v.* McBroom, 85 Tenn. 377, 2 S. W. 803. And see Robertson *v.* Pharr, 56 Ga. 245; Cadwell *v.* Dullaghan, 74 Iowa 239, 37 N. W. 178.

A written opinion filed in the case will be sufficient evidence to justify the entry. State *v.* Mobile, 24 Ala. 701. And see Mead *v.* Brown, 65 Mo. 552.

Conflict of evidence.— The presumption of the verity of the record will control where the evidence afforded by the papers and files in the case is in conflict with that furnished by the minute book and the judge's docket. Missouri, etc., R. Co. *v.* Holschlag, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417.

49. *Arkansas.*— Bobo *v.* State, 40 Ark. 224.

Connecticut.— Weed *v.* Weed, 25 Conn. 337.

Kansas.— Aydelotte *v.* Brittain, 29 Kan. 98.

Maryland.— Where a court has given an oral direction to the clerk to enter a judg-

ment was formerly rendered is established by record evidence, it is proper to admit parol proof for the purpose of showing its date, character, and terms, and the relief granted.[50]

5. Effect of Entry Nunc Pro Tunc. A judgment entered *nunc pro tunc* relates back to the time of the original entry and cures defects and irregularities.[51] But the effects of such an entry by relation will be confined to the rights and interests of the original parties, and it will not be allowed to prejudice the intervening rights of third persons without notice.[52] A *nunc pro tunc* entry of record is competent evidence of the facts which it recites,[53] and cannot be impeached collaterally.[54] Entering a decree *nunc pro tunc*, and thereby restricting the time for appeal, is not prejudicial error, where the defeated party succeeds in perfecting his appeal.[55]

G. Proceedings For Entry — 1. Necessity For Order. When a judgment has been rendered in the ordinary course of judicial proceedings, it is the duty of the clerk to enter it of record, and for this no special order of the court is required in ordinary cases.[56]

2. Application or Motion and Notice. If the party entitled to judgment neglects to have it entered, the opposite party, if it is important to his interests, may move the court to compel the entry to be made, and the court upon a proper showing will order it to be done.[57] In cases where a motion or application to the court for the entry of a judgment is necessary, it should generally be on notice to the adverse party.[58]

ment, and the clerk fails to make the entry, parol evidence is admissible to show that the judgment was in fact ordered to be entered. Stern *v.* Bennington, 100 Md. 344, 60 Atl. 17.

Massachusetts.— Rugg *v.* Parker, 7 Gray 172.

New Hampshire.— Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172.

North Carolina.— Jacobs *v.* Burgwyn, 63 N. C. 193.

50. *Connecticut.*— Weed *v.* Weed, 25 Conn. 337.

Georgia.— Johnson *v.* Wright, 27 Ga. 555.

Massachusetts.— Rugg *v.* Parker, 7 Gray 172; Clark *v.* Lamb, 8 Pick. 415, 19 Am. Dec. 332.

New Hampshire.— Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172.

North Carolina.— Davis *v.* Shaver, 61 N. C. 18, 91 Am. Dec. 92.

Texas.— Camoron *v.* Thurmond, 56 Tex. 22; Burnett *v.* State, 14 Tex. 455, 65 Am. Dec. 131.

51. Jordan *v.* Petty, 5 Fla. 326; Bush *v.* Bush, 46 Ind. 70; Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609; Rollins *v.* Kahn, 66 Wis. 658, 29 N. W. 640.

Want of jurisdiction.—A judgment or order which was void for want of jurisdiction cannot be validated by a *nunc pro tunc* entry. Eslow *v.* Albion Tp., 32 Mich. 193; Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609.

52. *Alabama.*— Acklen *v.* Acklen, 45 Ala. 609. On motion to enter *nunc pro tunc* a judgment already rendered, a stranger cannot intervene and question the judgment. Hillens *v.* Brinsfield, 113 Ala. 304, 21 So. 208.

Illinois.— McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Shirley *v.* Phillips, 17 Ill. 471.

Indiana.— Leonard *v.* Broughton, 120 Ind. 536, 22 N. E. 731, 16 Am. St. Rep. 347.

Kansas.— Small *v.* Douthitt, 1 Kan. 335.

Kentucky.— Graham *v.* Lynn, 4 B. Mon. 17, 39 Am. Dec. 493.

Missouri.— Koch *v.* Atlantic, etc., R. Co., 77 Mo. 354.

Nebraska.— Hyde *v.* Michelson, 52 Nebr. 680, 72 N. W. 1035, 66 Am. St. Rep. 533.

New York.— Newburgh Bank *v.* Seymour, 14 Johns. 219; Vroom *v.* Ditmas, 5 Paige 528.

Ohio.— Mather *v.* Cincinnati R. Tunnel Co., 3 Ohio Cir. Ct. 284, 2 Ohio Cir. Dec. 161.

Pennsylvania.— Smith *v.* Hood, 25 Pa. St. 218, 64 Am. Dec. 692.

South Carolina.— Galpin *v.* Fishburne, 3 McCord 22, 15 Am. Dec. 614.

Washington.— Hays *v.* Miller, 1 Wash. Terr. 143.

Lien.— A judgment entered *nunc pro tunc* will not be operative as a lien on land which in the meantime has passed into the hands of an innocent purchaser without notice. Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889. And see *infra*, XV, C, 4.

53. Cogswell *v.* State, 65 Ind. 1.

54. Ware *v.* Kent, 123 Ala. 427, 26 So. 208, 82 Am. St. Rep. 132.

55. Monson *v.* Kill, 144 Ill. 248, 33 N. E. 43.

56. See Smith *v.* Coe, 7 Rob. (N. Y.) 477; Hallett *v.* Righters, 13 How. Pr. (N. Y.) 43. And see *supra*, VII, C, 2.

57. Sherrerd *v.* Frazer, 6 Minn. 572; Furlong *v.* Griffin, 3 Minn. 207; Lentilhon *v.* New York, 3 Sandf. (N. Y.) 721; Jackson *v.* Parker, 2 Cai. (N. Y.) 385.

58. Warwick *v.* Cox, 36 N. J. L. 392; Parker *v.* Linden, 59 Hun (N. Y.) 359, 13

3. Judgment on Report of Referee. Where an order of reference directs the entry of judgment upon the filing of the referee's report, the clerk may enter the judgment without any further order and without notice.[59]

4. Notice of Entry. By force of statutes in some of the states it is necessary for the party causing the entry of a judgment to serve the opposite party with notice of such entry.[60]

H. Judgment-Roll or Record — 1. Nature and Requisites in General. At common law the judgment-roll was a roll of parchment upon which all the proceedings in the cause, up to the issue and the award of venire inclusive, together with the judgment which the court awarded in the case, were entered; it included as well the pleadings and process as the signing of judgment.[61] In some states it is still required that a judgment-roll shall be made up.[62] And generally either as a substitute for the judgment-roll or in addition to it, the clerk is required to make a record of the case. This is a history of all the proceedings in the action from its inception to final judgment, including all the papers filed in the case and upon which the court acted at any stage of the proceedings.[63] To sustain the

N. Y. Suppl. 95; Goddard *v.* Coffin, 10 Fed. Cas. No. 5,490, 2 Ware 382. *Compare* Mace *v.* O'Reilley, 70 Cal. 231, 11 Pac. 721. But see Whitaker *v.* McClung, 14 Minn. 170; Gould *v.* Duluth, etc., Elevator Co., 3 N. D. 96, 54 N. W. 316; Egan *v.* Sengpiel, 46 Wis. 703, 1 N. W. 467.

59. Bowie *v.* Borland, 68 Cal. 233, 9 Pac. 79; Leyde *v.* Martin, 16 Minn. 38; Piper *v.* Johnston, 12 Minn. 60; Kilmer *v.* Hathorn, 78 N. Y. 228; Renouil *v.* Harris, 2 Sandf. (N. Y.) 641; Crook *v.* Crook, 14 Daly (N. Y.) 298, 12 N. Y. St. 663. And see Paget *v.* Melcher, 26 N. Y. App. Div. 12, 49 N. Y. Suppl. 922; Bentley *v.* Gardner, 27 Misc. (N. Y.) 674, 58 N. Y. Suppl. 824.

Where the effect of a decision is to set aside the report of a referee, but to leave the cause pending, no judgment being directed or authorized, an entry of judgment by the prothonotary without an order, and at variance with the decision, is irregular and should be stricken from the record. McGlue *v.* Philadelphia, 105 Pa. St. 236.

60. Brown *v.* Trent, 12 La. 600; Gravier *v.* Carraby, 12 La. 127; Patterson *v.* McCunn, 38 Hun (N. Y.) 531; Harnett *v.* Westcott, 56 N. Y. Super. Ct. 129, 2 N. Y. Suppl. 10; Crook *v.* Crook, 14 Daly (N. Y.) 298, 20 Abb. N. Cas. 249; People *v.* Albany, etc., R. Co., 39 How. Pr. (N. Y.) 49; Ladd *v.* Ingham, 3 How. Pr. (N. Y.) 90.

61. Vail *v.* Iglehart, 69 Ill. 332; Brown L. Dict.

62. See the statutes of the different states.

Docketing judgment before filing judgment-roll.— In some states it is required by law that before a docket entry is made of a judgment there shall be filed a judgment-roll containing all the papers necessary to be attached according to the provisions of the statute; and it seems that unless this provision is complied with the docketing of the judgment is an unauthorized and illegal act. See Whitney *v.* Townsend, 67 N. Y. 40; Townshend *v.* Wesson, 4 Duer (N. Y.) 342. But *compare* Ward *v.* White, 66 Ill. App. 155; Hardin *v.* Melton, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423.

63. See the following cases:

Alabama.— Ansley *v.* Carlos, 9 Ala. 973.

Illinois.— Stevison *v.* Earnest, 80 Ill. 513; Vail *v.* Iglehart, 69 Ill. 332.

Michigan.— Crane *v.* Hardy, 1 Mich. 56.

Minnesota.— Boe *v.* Irish, 69 Minn. 493, 72 N. W. 842.

Nebraska.— Burge *v.* Gandy, 41 Nebr. 149, 59 N. W. 359.

New York.— American Exch. Bank *v.* Smith, 6 Abb. Pr. 1.

United States.— Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

See 30 Cent. Dig. tit. "Judgment," § 547.

Contents of record.— The clerk should record the full judgment as well as the decision of the court. Thomas *v.* Thomas, 98 Me. 184, 56 Atl. 651.

A lien docket is not a record of judgments, but only their essential index. Ferguson *v.* Staver, 40 Pa. St. 213.

A judge's calendar is not a part of the court records, and an entry therein is not a judgment. Traer *v.* Waitman, 56 Iowa 443, 9 N. W. 339.

The clerk's docket is the record of the court, until the record is fully extended. Read *v.* Sutton, 2 Cush. (Mass.) 115.

Destruction of record.— As the judgment record is merely evidence of the judgment, its accidental destruction does not destroy the judgment. Ames *v.* Hoy, 12 Cal. 11.

File-marks on papers.— If the law does not require the clerk to indorse papers with the date of their filing, such an indorsement is not a part of the record and is not evidence of the date. Clow *v.* Winfield, 15 Tex. 449.

Docketing judgment before entry in judgment book.— In some states to constitute a judgment for the purpose of docketing it must first be entered in the judgment book. And a docketing without such entry is of no avail, even though a judgment-roll be filed with what purports to be a copy of the judgment in it. Maurin *v.* Carnes, 71 Minn. 308, 74 N. W. 139; Rockwood *v.* Davenport, 37 Minn. 533, 35 N. W. 377, 5 Am. St. Rep. 872. See Locke *v.* Hubbard, 9 S. D. 364, 69 N. W. 588.

judgment, it is essential that the roll or record should show the actual rendition of a judgment, and describe it with sufficient particularity to leave none of its provisions in substantial doubt.[64]

2. MATTERS TO BE SHOWN.[65] A judgment-roll or record of a judgment is sufficient if the time,[66] place,[67] parties,[68] matter in dispute,[69] method of trial,[70] and the result[71] are clearly stated.[72] Although the entry of judgment recites the hearing of certain named witnesses for plaintiff, it is not objectionable because it fails to state that they were sworn.[73] Where the record shows the filing of a demurrer to the answer, it must also show what disposition was made of the demurrer, or circumstances implying its abandonment.[74]

3. RECITAL OF JURISDICTIONAL FACTS. It is essential to the validity of a judgment of an inferior court, or of any court proceeding on constructive service of process, that the facts necessary to show its jurisdiction should be recited in the record. But in the case of a court of general or superior jurisdiction, proceeding in the ordinary way, the want or insufficiency of such recitals will be aided by presumptions in favor of the court's jurisdiction.[75]

4. PAPERS TO BE INCLUDED. The judgment-roll or record in a case should include the writ or original process, with the necessary indorsements thereon, and any other papers on which the jurisdiction of the court is founded.[76] It should also include

One record.— Where defendant offers to allow judgment as to a part of the claim, and, on a litigation subsequent to the acceptance of such offer, plaintiff recovers a verdict as to the residue of such claim, there should be but one record or judgment-roll. Hoe *v.* Sanborn, 24 How. Pr. (N. Y.) 26.

64. *Georgia.*— Velvin *v.* Hall, 78 Ga. 136. *Illinois.*— Rothgerber *v.* Wonderly, 66 Ill. 390; Johnson *v.* Miller, 50 Ill. App. 60. *Iowa.*— Thompson *v.* Cook, 21 Iowa 472. *Louisiana.*— Pate's Succession, 6 La. Ann. 241; Bonnafe *v.* Lane, 5 La. Ann. 225. *Maine.*— Stetson *v.* Corinna, 44 Me. 29. *Minnesota.*— Brown *v.* Hathaway, 10 Minn. 303. *Mississippi.*— Josselyn *v.* Stone, 28 Miss. 753. *New York.*— Geery *v.* Geery, 79 N. Y. 565. *North Carolina.*— Davis *v.* Shaver, 61 N. C. 18, 91 Am. Dec. 92. *South Carolina.*— Evans *v.* Hinds, 1 McMull. 490. *Texas.*— West *v.* Keeton, 17 Tex. Civ. App. 139, 42 S. W. 1034. *Washington.*— Huntington *v.* Blakeney, 1 Wash. Terr. 111.

See 30 Cent. Dig. tit. "Judgment," § 547.

65. **Reciting compliance with statute in preliminary matters** see Shaubhut *v.* Hilton, 7 Minn. 506; Stewart *v.* Miller, Meigs (Tenn.) 574.

66. Marentille *v.* Oliver, 2 N. J. L. 358.

67. Parish *v.* Pearsons, 27 Vt. 621.

68. American Express Co. *v.* Haggard, 37 Ill. 465, 87 Am. Dec. 257; *In re* Jones, 27 Pa. St. 336; Wilson *v.* Nance, 11 Humphr. (Tenn.) 189.

Necessity of showing which of the defendants is principal and which sureties see Rose *v.* Madden, 1 Kan. 445; Flannagan *v.* Cleveland, 44 Nebr. 58, 62 N. W. 297.

69. See Gage *v.* Eddy, 186 Ill. 432, 57 N. E. 1030.

70. Rutherford *v.* Crawford, 53 Ga. 138; Buck *v.* Mosley, 24 Miss. 170 (both holding that if the judgment purports to be upon a verdict, the entry is insufficient if it does not show the swearing and impaneling of a jury and the submission of an issue to them); Bruner *v.* Marcum, 50 Mo. 405 (holding that an entry of judgment which shows that the parties "appeared and submitted the case for trial to the court" sufficiently indicates that trial by jury was waived).

71. Montelius *v.* Montelius, 5 Pa. L. J. 88.

Impossible award.— Where a record consisted of a placita and an order, entitled "People *v.* J. B.," committing said B to jail for refusing to pay "arrears of alimony due in this cause," it was held that the record did not sustain the order, as alimony could not be due to the people of the state. Barclay *v.* People, 69 Ill. App. 517.

72. Barrett *v.* Garrigan, 16 Iowa 47; Wright *v.* Fletcher, 12 Vt. 431.

73. Roushey *v.* Feist, 10 Kulp (Pa.) 79.

74. Huse *v.* Moore, 20 Cal. 115.

75. See *infra*, XI, E, 2, h.

A recital in a judgment that defendant has been regularly served with process as required by law is not rebutted, where the judgment-roll merely contains the original summons, with a return of the sheriff that he was unable to find defendant, and the affidavit of publication, which does not show that an alias was not issued prior to the publication. People *v.* Davis, 143 Cal. 673, 77 Pac. 651.

The force of jurisdictional recitals is such that the question whether or not the judgment is void on its face must be determined solely by an inspection of the judgment-roll. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

76. Nadenbush *v.* Lane, 4 Rand. (Va.) 413.

Affidavit and order of publication see People *v.* Temple, 103 Cal. 447, 37 Pac. 414; People *v.* Thomas, 101 Cal. 571, 36 Pac. 9; Weeks *v.* Garibaldi South Gold Min. Co., 73

the pleadings,[77] the verdict, decision, or report on which the judgment is founded,[78] the judgment itself,[79] and generally any matters involving the merits of the action and necessarily affecting the judgment,[80] but not interlocutory rulings or the proceedings on collateral or incidental issues in the case.[81]

5. MAKING AND FILING. In most of the states it is made the duty of the clerk on the rendition of a judgment to make up the record or to make and file the judgment-roll.[82] The making of a record may, however, be waived by the agreement of both parties.[83]

6. DATE. The entry or record of a judgment is not void merely because it is

Cal. 599, 15 Pac. 302; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. (U. S.) 274.

A written entry of appearance for defendant, filed in an attachment suit, is a part of the record. Baldwin *v.* McClelland, 152 Ill. 42, 38 N. E. 143. But *compare* Rowland *v.* Slate, 58 Pa. St. 196.

77. Braden *v.* U. S., 10 Ct. Cl. 412.

Where an amended answer has been substituted for the original answer, neither the order directing the substitution nor the original answer is properly a part of the judgment-roll. Dexter *v.* Dustin, 70 Hun (N. Y.) 515, 24 N. Y. Suppl. 129.

Where plaintiff puts in two replications to a plea, either of which is a good answer to it, and defendant demurs to one and rejoins to the other, and the demurrer is overruled and the issue joined on the other replication is found for plaintiff, the record need not include the replication demurred to and the proceedings thereon. Graham *v.* Schmidt, 1 Sandf. (N. Y.) 74.

78. Overton *v.* Auburn Nat. Bank, 3 N. Y. St. 169; Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426. *Compare* Cook *v.* Dickerson, 1 Duer (N. Y.) 679, all holding that a copy of the verdict must he included.

Decision of the court in cases tried without a jury see Lewis *v.* Jones, 13 Abb. Pr. (N. Y.) 427; Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426.

Report of referee see Renouil *v.* Harris, 2 Sandf. (N. Y.) 641; Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426.

Assessment of damages, by the clerk of the court, on a judgment hy default, should be included in the judgment-roll. Squire *v.* Elsworth, 4 How. Pr. (N. Y.) 77.

A restatement of a guardian's account, filed in the case and marked as approved by the judge, on which an order was entered finding due the balance shown by such restatement, is essentially a record of the court. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458.

79. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418, holding that where a map or other paper is referred to in a judgment as a material part of it, it should be identified by the judgment and made a part of it, and not referred to as a paper recorded elsewhere. And see Cicero *v.* People, 105 Ill. App. 406.

80. See the statutes of the different states. And see Haupt *v.* Simington, 27 Mont. 480, 71 Pac. 672, 94 Am. St. Rep. 839.

An award of execution is no necessary or proper part of the judgment-roll in the ordinary case of judgment entered on failure of defendant to answer. Cooney *v.* Van Rensselaer, 1 Code Rep. (N. Y.) 38.

Interpolations of clerk see Ferrier *v.* Deutchman, 51 Ind. 21.

81. See Murphy *v.* Shea, 143 N. Y. 78, 37 N. E. 675. *Compare* Grand Rapids First Nat. Bank *v.* McGuire, 12 S. D. 226, 80 N. W. 1074, 76 Am. St. Rep. 598, 47 L. R. A. 413.

Judgment on demurrer see Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32. *Compare* Cal. Code Civ. Proc. § 670.

82. See Williams *v.* McGrade, 13 Minn. 46; Van Orman *v.* Phelps, 9 Barb. (N. Y.) 500; Osborne *v.* Toomer, 51 N. C. 440.

Duty of prevailing party to furnish judgment-roll see Heinemann *v.* Waterbury, 5 Bosw. (N. Y.) 686.

The omission of the clerk to file the judgment-roll of a judgment will not render void his subsequent proceedings. Williams *v.* McGrade, 13 Minn. 46.

Limits of clerk's authority.— In making up the judgment-roll, the clerk has no authority to determine whether the cause of action is such as to authorize an execution against the person, but the attorney for plaintiff must take the responsibility of determining that question from the record. Bacon *v.* Grossmann, 90 N. Y. App. Div. 204, 86 N. Y. Suppl. 66.

Fastening papers together.— If all the papers constituting the judgment-roll are on file, it is not a fatal objection that they are not sewed together as required by the statute. Earle *v.* Barnard, 22 How. Pr. (N. Y.) 437. And this is so where all the papers are placed together in an envelope properly indorsed. Melchers *v.* Moore, 62 S. C. 386, 40 S. E. 773.

Recording judgment.— A statute which requires decrees of the chancery court vesting title to property in either of the parties to a suit to be recorded in the office of the clerk of the county court of the county in which the real property is situated does not make the vesting of title dependent upon the recording of the decree; but the decree is affected by a failure to have it so recorded, just as a deed would be under the registration laws. Witter *v.* Dudley, 42 Ala. 616.

In Michigan there is no provision made by statute for a judgment record, unless one of the parties requires it. Emery *v.* Whitwell, 6 Mich. 474; Lothrop *v.* Southworth, 5 Mich. 436; Norvell *v.* McHenry, 1 Mich. 227.

83. Colonial, etc., Mortg. Co. *v.* Foutch, 31 Nebr. 282, 47 N. W. 929.

not dated.[84] It may be dated back to the time when the court directed judgment to be entered,[85] but is not valid if post-dated, at least until the arrival of the day named.[86]

7. SIGNATURE — a. Necessity. It is sometimes necessary to the validity of a judgment or decree that it shall be signed by the judge.[87] According to some authorities, however, statutes requiring the judge to sign all judgments rendered in his court are held to be merely directory, so that his omission to sign a judgment or any irregularity in doing so will not invalidate the judgment, although it may cast doubt upon its authenticity.[88] But in perhaps a majority of the states it is entirely unnecessary to the validity of a judgment that it should be signed by the judge, the presumption being that if it is entered by the clerk it was so directed and authorized by the court.[89]

84. Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380; Burwell, etc., Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222; Hardin *v.* Melton, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423.

Showing hour of rendition.— A judgment entry is sufficient if it specifies the day, although it does not show that the judgment was rendered at any particular hour. Wilson *v.* Greenwood, 5 Houst. (Del.) 519. And see Cooke *v.* Shoemaker, 17 Pa. Co. Ct. 641.

85. Clark *v.* Clark, 138 N. Y. 653, 34 N. E. 513; Starbird *v.* Moore, 21 Vt. 529.

86. Smith *v.* Coe, 7 Rob. (N. Y.) 477.

87. *Connecticut.* — Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672.

Georgia.— Jones *v.* Word, 61 Ga. 26; Odom *v.* Causey, 59 Ga. 607; Sloan *v.* Cooper, 54 Ga. 486. And see Arrowood *v.* McKee, 119 Ga. 623, 46 S. E. 871. But a judgment will be upheld if found entered on the minutes of the day's proceedings, such minutes being regularly signed by the judge, although the judgment itself bears only the signature of counsel. Such a judgment, although irregular, is not void, and can be amended. Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76, 100 Am. St. Rep. 159; Huckaby *v.* Sasser, 69 Ga. 603; Tharpe *v.* Crumpler, 63 Ga. 273; Jones *v.* Word, 61 Ga. 26.

Indiana.— Galbraith *v.* Sidener, 28 Ind. 142.

Kentucky.— Raymond *v.* Smith, 1 Metc. 65, 71 Am. Dec. 458.

Louisiana.— State *v.* Jumel, 30 La. Ann. 421; Saloy *v.* Collins, 30 La. Ann. 63; Broussard *v.* Dupre, 29 La. Ann. 518; Haggerty's Succession, 27 La. Ann. 667; Marchal *v.* Hooker, 27 La. Ann. 454; Scott *v.* Goodrich, 24 La. Ann. 259; Bynum *v.* Gordon, 24 La. Ann. 160; Planters Consol. Assoc. *v.* Mason, 23 La. Ann. 618; Hatch *v.* Arnault, 3 La. Ann. 482; Gates *v.* Bell, 3 La. Ann. 62; Johnson *v.* Hamilton, 2 La. Ann. 206; Fox *v.* Tio, 1 La. Ann. 334; Asbridge's Succession, 1 La. Ann. 206; Mechanics', etc., Bank *v.* Walton, 7 Rob. 451; *Ex p.* Nicholls, 4 Rob. 52; Gallier *v.* Garcia, 2 Rob. 319; State *v.* McDonald, 17 La. 485; Williams *v.* Holloway, 11 La. 515; Collerton *v.* McCleary, 3 La. 429; Smith *v.* Harrathy, 5 Mart. N. S. 519; Sprigg *v.* Wells, 5 Mart. N. S. 104; Brand *v.* Livaudais, 3 Mart. 389.

Canada.— Guerin *v.* Fox, 15 Quebec Super. Ct. 199.

See 30 Cent. Dig. tit. "Judgment," § 554.

In Louisiana the statute requiring judgments to be signed applies only to final judgments, not to interlocutory or incidental orders made in the progress of a cause. Wickman *v.* Nalty, 41 La. Ann. 284, 6 So. 123; Sachse *v.* Citizens' Bank, 37 La. Ann. 364; Cohn *v.* Canal Bank, 37 La. Ann. 202; State *v.* Judge Fifth Dist. Ct., 12 La. Ann. 455; Kræutler *v.* U. S. Bank, 11 Rob. 160; Van Winckle *v.* Flecheaux, 12 La. 148.

88. *Alabama.*— Bartlett *v.* Lang, 2 Ala. 161.

Arkansas.— *Ex p.* Slocomb, 9 Ark. 375.

Iowa.— Childs *v.* McChesney, 20 Iowa 431, 89 Am. Dec. 545.

New Jersey.— Hillyer *v.* Schenck, 15 N. J. Eq. 398.

North Carolina.— Keener *v.* Goodson, 89 N. C. 273; Rollins *v.* Henry, 78 N. C. 342.

Ohio.— Simmons *v.* Brown, 4 Ohio Dec. (Reprint) 29, Clev. L. Rec. 33.

Texas.— Norwood *v.* Snell, 95 Tex. 582, 68 S. W. 773; Cannon *v.* Hemphill, 7 Tex. 184.

See 30 Cent. Dig. tit. "Judgment," § 554.

Signing in wrong place.— If the signature of the judge is placed in the body of the decree instead of at the end of it it is an irregularity, but not material. Hurley *v.* Hewett, 89 Me. 100, 35 Atl. 1026.

Where a court is composed of several judges, its orders and decrees are sufficiently authenticated by the signature of either. Stone *v.* State, 20 N. J. L. 404; *In re* Millcreek Road, 9 Pa. Co. Ct. 592.

89. *California.*— Crim *v.* Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123; Los Angeles County Bank *v.* Raynor, 61 Cal. 145.

Colorado.— Eberville *v.* Leadville Tunneling, etc., Co., 28 Colo. 241, 64 Pac. 200.

Kansas.— Gordon *v.* Bodwell, 55 Kan. 131, 39 Pac. 1044; French *v.* Pease, 10 Kan. 51.

Minnesota.— Leyde *v.* Martin, 16 Minn. 38; Cathcart *v.* Peck, 11 Minn. 45.

Missouri.— Fontaine *v.* Hudson, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515; Platte County *v.* Marshall, 10 Mo. 345.

b. Time and Place. If the signing of judgment is required to be suspended for a certain number of days to allow of motions for a new trial or the like, the premature signing of it is irregular, but not a fatal defect.[90] On the other hand delay in signing the judgment does not invalidate it, if it is signed before proceedings are taken on it or before it is pleaded or relied on.[91] The signing of judgment should be done in open court,[92] and in term-time,[93] and regularly it should be done within the territorial jurisdiction of the court.[94]

c. Signature of Clerk. Although the clerk of the court should attest the judgment-roll or entry by his signature, his failure to do so is at most an irregularity, and does not affect the validity of the judgment.[95]

8. Supplying Lost Records — a. In General. Independent of statutes, courts of general jurisdiction have power and authority to supply new records when the originals have been lost or destroyed.[96] But a court possesses this power only over

Nebraska.— Scott *v.* Rohman, 43 Nebr. 618, 62 N. W. 46, 47 Am. St. Rep. 767; Gallentine *v.* Cummings, 4 Nebr. (Unoff.) 690, 96 N. W. 178; Colony *v.* Billingsley, 2 Nebr. (Unoff.) 670, 89 N. W. 744.

New York.— Clapp *v.* Hawley, 97 N. Y. 610; De Laney *v.* Blizzard, 7 Hun 66; Van Orman *v.* Phelps, 9 Barb. 500; Munro's Estate, 15 Abb. Pr. 363.

Oklahoma.— Boynton *v.* Crockett, 12 Okla. 57, 69 Pac. 869.

Wisconsin.— Egaard *v.* Dahlke, 109 Wis. 366, 85 N. W. 369; Fulton *v.* State, 103 Wis. 238, 79 N. W. 234.

See 30 Cent. Dig. tit. "Judgment," § 554.

90. See State *v.* Judge Twenty-Second Dist., 35 La. Ann. 1104; Converse *v.* Bloom, 20 La. Ann. 555; Gilmore's Succession, 12 La. Ann. 562; Opothlarholer *v.* Gardiner, 15 La. 512; Dicks *v.* Barton, 5 Mart. N. S. (La.) 657; Thompson *v.* Chretien, 12 Mart. (La.) 250; Snyder *v.* Jenkins, 6 Wend. (N. Y.) 533; Orange Bank *v.* Brown, 1 Wend. (N. Y.) 31.

91. Den *v.* Downam, 13 N. J. L. 135; Van Orman *v.* Phelps, 9 Barb. (N. Y.) 500; Lockhart *v.* State, 32 Tex. Cr. 149, 22 S. W. 413; Landon *v.* Burke, 33 Wis. 452.

92. State *v.* Judges Fourth Cir. Ct. of App., 48 La. Ann. 905, 19 So. 932; Cooper *v.* Cooper, 14 La. Ann. 665.

93. Culver *v.* Leovy, 21 La. Ann. 306.

Consent to signature in vacation.— The signature of the judgment by the judge in vacation is valid, if done with the consent of the parties. Rust *v.* Faust, 15 La. Ann. 477; Hervey *v.* Edmunds, 68 N. C. 243.

Signing vacation entries.— A statute in Iowa requires the court in term-time to have the entries of the preceding vacation read and signed at the following term; but it is held to be merely directory so that the failure to observe it does not vitiate a judgment so entered. Vanfleet *v.* Phillips, 11 Iowa 558.

94. Greensboro Nat. Bank *v.* Gilmer, 118 N. C. 668, 24 S. E. 423, holding that the signing of a judgment by the judge while in another county is not invalid, when done by consent. And see Ottillie *v.* Wæchter, 33 Wis. 252.

95. *Minnesota.*— Hotchkiss *v.* Cutting, 14 Minn. 537; Jorgensen *v.* Griffin, 14 Minn. 464.

New Hampshire.— Folsom *v.* Blood, 58 N. H. 11.

New York.— Lythgoe *v.* Lythgoe, 145 N. Y. 641, 41 N. E. 89; Goelet *v.* Spofford, 55 N. Y. 647; Artisan's Bank *v.* Treadwell, 34 Barb. 553; Seaman *v.* Drake, 1 Cai. 9. *Compare* Manning *v.* Guyon, 2 Edm. Sel. Cas. 39.

South Carolina.— Clark *v.* Melton, 19 S. C. 498.

Wisconsin.— Sexton *v.* Rhames, 13 Wis. 99.

See 30 Cent. Dig. tit. "Judgment," § 556.

96. *Alabama.*— Ward *v.* State, 78 Ala. 455; Doswell *v.* Stewart, 11 Ala. 629; McLendon *v.* Jones, 8 Ala. 298, 42 Am. Dec. 640; Dozier *v.* Joyce, 8 Port. 303. A probate court has power to substitute any part of its records which may have been lost or destroyed. Lilly *v.* Larkin, 66 Ala. 110.

Arkansas.— Garibaldi *v.* Carroll, 33 Ark. 568. *Compare* Webb *v.* Hanger, 2 Ark. 124; Smith *v.* Dudley, 2 Ark. 60.

Florida.— Pearce *v.* Thackeray, 13 Fla. 574; Keen *v.* Jordan, 13 Fla. 327.

Iowa.— Emmet County *v.* Peterson, 48 Iowa 695; Gammon *v.* Knudson, 46 Iowa 455.

Kentucky.— Deshong *v.* Cain, 1 Duv. 309.

Louisiana.— Garland *v.* Roy, 18 La. 605.

Missouri.— Julian *v.* Ward, 69 Mo. 153; George *v.* Middough, 62 Mo. 549.

North Carolina.— Moye *v.* Petway, 75 N. C. 165.

South Carolina.— Dubois *v.* Thomas, 14 S. C. 30.

Texas.— Hayden *v.* Dunaway, 9 Tex. Civ. App. 315, 29 S. W. 529.

See 30 Cent. Dig. tit. "Judgment," § 557.

Judgment never entered.— A statutory application to supply a lost record cannot be made the means of getting on the record a judgment or decree which never was entered there, or of completing a record imperfectly entered. Box *v.* Delk, 47 Ala. 729.

Whole record to be restored.— It is not sufficient to restore a part only of the lost record — such as the final judgment — but the restoration must be of the whole record, including the summons, pleadings, etc., as the court can determine the legal effect of

its own records. A bill in equity will not lie to supply or restore a record in a court of law.[97] And the restoration cures no defects or objections. A substituted record possesses only the same validity as the original.[98]

b. Procedure. An application for the restoration of a lost or destroyed record should be made by motion,[99] showing the interest of the moving party and his right to apply for the restoration,[1] and containing at least the substance of that which he will ask the court to enroll in place of the original record.[2] The opposite party must have notice of the motion,[3] and be permitted to contest the application.[4] The motion may be supported by affidavits, and sustained by any evidence which satisfies the court of the existence and loss of the original record and the correctness of the proposed substitute,[5] and when so satisfied it will order the substitute to stand enrolled as and for the original.[6]

a judgment only from an inspection of the whole record. Vail *v.* Iglehart, 69 Ill. 332.

Voidable and void judgments.—If it clearly appears that the original judgment was void on its face, a motion to restore it should be refused. Being a nullity, it was of no advantage to the creditor, and he is not injured by the refusal to restore it. But the restoration should not be denied if it appears that the original judgment was merely voidable. Vail *v.* Iglehart, 69 Ill. 332.

97. Davies *v.* Pettit, 11 Ark. 349; Keen *v.* Jordan, 13 Fla. 327; Fisher *v.* Sievres, 65 Ill. 99; Welch *v.* Smith, 65 Miss. 394, 4 So. 340.

98. Lilly *v.* Larkin, 66 Ala. 110.

99. Peddy *v.* Street, 87 Ala. 299, 6 So. 3.

In Missouri the proper proceeding to reinstate a judgment, the record of which has been lost or destroyed, is not by motion, but upon petition and answer as in ordinary cases at law. Besshears *v.* Rowe, 46 Mo. 501.

1. Russell *v.* Lillja, 90 Ill. 327.

Parties.— In a proceeding to substitute a decree under a special statute, the original records of the court having been destroyed, the proper practice is to make the motion in the name of all the parties in whose favor the decree is rendered. Gilbert *v.* Beck, 42 Ala. 504. And see McDonald *v.* Des Moines Valley R. Co., 61 Iowa 192, 16 N. W. 89.

2. Russell *v.* Lillja, 90 Ill. 327; Vail *v.* Iglehart, 69 Ill. 332; Spears *v.* Work, 29 Ind. 502; Hayden *v.* Dunaway, 9 Tex. Civ. App. 315, 29 S. W. 529.

3. Weaver *v.* Bryan, 2 Blackf. (Ind.) 172; Haney *v.* McClure, 88 Ky. 146, 10 S. W. 427, 10 Ky. L. Rep. 711.

Want of notice.— Although a judgment of which the record has been destroyed is wrongfully restored by the court without notice to the debtor, yet when the judgment is revived by scire facias, with notice to the debtor, he should make his objection by plea of *nul tiel record.* George *v.* Middough, 62 Mo. 549. And see Gibson *v.* Vaughan, 61 Mo. 418.

Sufficiency of notice.— The notice must be sufficiently explicit to advise the opposite party of what is intended, as well as to enable him to controvert the affidavits submitted. McLendon *v.* Jones, 8 Ala. 298, 42 Am. Dec. 640. But if the notice is explicit in describing a judgment and papers alleged to be lost or destroyed, it is sufficient, although it does not conform to a statute providing for such a proceeding. Doswell *v.* Stewart, 11 Ala. 629.

Service of notice may be made by a private person, if the statute regulating the proceeding does not direct how it shall be made. Jones *v.* Lewis, 37 Miss. 434.

4. The judgment debtor should not be permitted to contest the application on grounds which go to the merits of the original judgment. Vail *v.* Iglehart, 69 Ill. 332. Nor can he contest the truth of the recitals of the proposed record, although he may show that the lost record contained no such recitals. Peddy *v.* Street, 87 Ala. 299, 6 So. 3.

In Arkansas it has been held that the debtor may show that he had a good defense to the original action, which he was deprived of the opportunity of asserting, without fault on his part, by fraud and collusion. Guess *v.* Amis, 54 Ark. 1, 14 S. W. 900.

In Kansas the statute permits the judgment debtor to set forth any new matters arising subsequent to the judgment which operated in whole or in part to extinguish or set it aside. See Davidson *v.* Beers, 45 Kan. 365, 25 Pac. 859.

In Kentucky the judgment debtor may show that a motion for a new trial had been regularly made and was pending when the judgment was destroyed. Green *v.* Stevens, 2 Duv. 420.

5. McBryde *v.* Rhodes, 69 Ala. 133; Dabney *v.* Mitchell, 66 Ala. 495; Lilly *v.* Larkin, 66 Ala. 110; Curyea *v.* Berry, 84 Ill. 600; Green *v.* Stevens, 2 Duv. (Ky.) 420; Park *v.* Park, 6 Baxt. (Tenn.) 404.

Statutory or common-law proof.—Although the statute provides a method for proceeding to prove the contents of a lost record, the party may proceed according to the common law, without resorting to the statutory method. Parry *v.* Walser, 57 Mo. 169; Johnson *v.* Skipworth, 59 Tex. 473.

Docket entries as evidence see Boothe *v.* Dorsey, 11 Gill & J. (Md.) 247; Reynolds *v.* Rees, 23 S. C. 438.

6. Adkinson *v.* Keel, 25 Ala. 551.

I. Judgment Book or Docket and Index — 1. Docket and Entries Therein. In some states it is the statutory duty of clerks of courts[7] to keep a "judgment book" or "docket,"[8] in which they are to enter the final judgments of their courts;[9] and in some the judgment is first to be entered in a judgment book and a judgment-roll filed, and then the judgment is to be docketed.[10] But the failure of the clerk to docket the judgment does not destroy it, or deprive it of the usual consequences of a judgment,[11] and his erroneous or false entries do not conclude the parties, or impair the validity of the judgment.[12] In determining the sufficiency of a docket entry, the whole entry must be considered, and if from the whole, the amount and date of the judgment, the parties to it, and the court in which it was rendered, appear, the entry will be held sufficient.[13]

2. Separate Books. Where the clerk is directed by law to keep certain books for the entry of judgments, or to record judgments in a book specially designated by statute for that purpose, or to enter different kinds of judgments or decrees in different books, and deviates from the course prescribed, the validity of the judgment is not thereby impaired as between the parties,[14] although it may be otherwise as to third persons who are misled, or who fail to receive the notice which a proper entry would have afforded them.[15]

3. Indexing Record. Where the statute requires the entries in the judgment docket to be arranged alphabetically, or to be so indexed, this is an essential part of the docketing of the judgment, and at least a substantial compliance is necessary to the validity of the judgment, at any rate as against third parties.[16]

7. See Clerks of Courts, 7 Cyc. 222.

8. See the statutes of the different states. And see Johnson *v.* Day, 2 N. D. 295, 50 N. W. 701.

What constitutes judgment book see Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305.

9. See the following cases:

California.— Blythe *v.* Ayres, 110 Cal. 226, 42 Pac. 641.

Louisiana.— Amet *v.* Boyer, 42 La. Ann. 831, 8 So. 588.

Missouri.— Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186.

New York.— Harris *v.* Elliott, 163 N. Y. 269, 57 N. E. 406; Bernstein *v.* Schoenfeld, 37 Misc. 610, 76 N. Y. Suppl. 140.

North Carolina.— Young *v.* Connelly, 112 N. C. 646, 17 S. E. 424.

See 30 Cent. Dig. tit. "Judgment," § 559.

Time and place of docketing.— The fact that a judgment is entered on his docket by the clerk at night, in the office of counsel for defendant, which was situated near the clerk's office, does not make the judgment invalid. Sharp *v.* Danville, etc., R. Co., 106 N. C. 308, 11 S. E. 530, 19 Am. St. Rep. 533.

Docket as record.— In some states docket entries stand in the place of the record, or constitute the only record, and receive all the consideration that is accorded to the formal record in other states. Washington, etc., Steam Packet Co. *v.* Sickles, 24 How. (U. S.) 333, 16 L. ed. 650.

10. Maurin *v.* Carnes, 71 Minn. 308, 74 N. W. 139; Rockwood *v.* Davenport, 37 Minn. 533, 35 N. W. 377, 5 Am. St. Rep. 872; Townshend *v.* Wesson, 4 Duer (N. Y.) 342; Schenectady, etc., Plank Road Co. *v.* Thatcher, 6 How. Pr. (N. Y.) 226.

11. Day *v.* Graham, 6 Ill. 435; Risk *v.* Uffelman, 7 Misc. (N. Y.) 133, 27 N. Y. Suppl. 392; Johnson *v.* Fitzhugh, 3 Barb. Ch. (N. Y.) 360; Girard L. Ins., etc., Co. *v.* Farmers', etc., Nat. Bank, 57 Pa. St. 388.

12. Booth *v.* Farmers', etc., Nat. Bank, 4 Lans. (N. Y.) 301.

Lien.— If the mistakes or defects in docketing the judgment do not impair the substantial accuracy and fulness of the record required, as notice to persons interested, they will not prevent the judgment from attaching as a lien. Hesse *v.* Mann, 40 Wis. 560.

13. *In re* Boyd, 3 Fed. Cas. No. 1,746, 4 Sawy. 262. And see Holford *v.* James, 136 Fed. 553, 69 C. C. A. 263 [*affirming* (Indian Terr. 1903) 76 S. W. 261].

14. *Iowa.*— Carr *v.* Bosworth, 72 Iowa 530, 34 N. W. 317.

Louisiana.— Gillespie *v.* Cammack, 3 La. Ann. 248.

Maryland.— Bond *v.* Citizens' Nat. Bank, 65 Md. 498, 4 Atl. 893.

Minnesota.— Thompson *v.* Bickford, 19 Minn. 17; Jorgensen *v.* Griffin, 14 Minn. 464. *Compare* Brown *v.* Hathaway, 10 Minn. 303.

Montana.— Wolf *v.* Great Falls Water Power, etc., Co., 15 Mont. 49, 38 Pac. 115; Work *v.* Northern Pac. R. Co., 11 Mont. 513, 29 Pac. 280.

New York.—Whitney *v.* Townsend, 67 N. Y. 40; Lentilhon *v.* New York, 3 Sandf. 721.

South Carolina.— *Ex p.* Graham, 54 S. C. 163, 32 S. E. 67.

Texas.— West *v.* Keeton, 17 Tex. Civ. App. 139, 42 S. W. 1034.

See 30 Cent. Dig. tit. "Judgment," § 560.

15. See Hesse *v.* Mann, 40 Wis. 560.

16. *Iowa.*— Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 381, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122; Sterling Mfg. Co. *v.* Early, 69 Iowa 94, 28 N. W. 458.

J. Irregularities and Defects — 1. In General. In the entry or record of a judgment, a clerical error, misdescription, irregularity, or other defect not going to the jurisdiction of the court will not vitiate the judgment nor give it an effect which it would not have had if correctly entered,[17] provided there is enough in the entry or record to constitute a judgment.[18] And the same rule applies to alterations or interlineations, if explained by other parts of the record, or authorized by the court.[19]

2. Designation of Parties. The question who are parties to a suit is to be determined by all the pleadings, process, and proceedings in the case; and a judgment is operative for or against all who are real parties, although their names be incorrectly given in the judgment entry, or wholly omitted from it.[20] Hence the omission from the entry of judgment of the names of some of the defendants does not work a dismissal or discontinuance as to them,[21] and conversely the erroneous inclusion of persons as defendants does not bring them into the case,[22] and as between the parties themselves the validity and effect of the judgment are not impaired by a misnomer or misdescription of a party.[23] These and other like errors are regarded as immaterial where other parts of the record afford the means of correcting them.[24]

3. Designation of Amount. A judgment is not invalidated by a clerical error in the entry of it in respect to the amount of the recovery,[25] or where a blank space is left in the entry for the amount of the damages[26] or costs,[27] as this may

Nebraska.— Hastings School Dist. *v.* Caldwell, 16 Nebr. 68, 19 N. W. 634; Metz *v.* State Bank, 7 Nebr. 165.

New York.— Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305.

North Carolina.— Hahn *v.* Mosely, 119 N. C. 73, 25 S. E. 713.

Texas.—New England L. & T. Co. *v.* Avery, (Civ. App. 1897) 41 S. W. 673; Central Coal, etc., Co. *v.* Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383. And see Glasscock *v.* Stringer, (Civ. App. 1895) 32 S. W. 920.

Virginia.— Fulkerson *v.* Taylor, 100 Va. 426, 41 S. E. 863. *Compare* Old Dominion Granite Co. *v.* Clarke, 28 Gratt. 617.

See 30 Cent. Dig. tit. "Judgment," § 561. And see *infra*, XV, A, 6.

17. *California.*— Will *v.* Sinkwitz, 41 Cal. 588.

Illinois.— Bunker *v.* Green, 48 Ill. 243.

Louisiana.— Lindquist *v.* Maurepas Land, etc., Co., 112 La. 1030, 36 So. 843.

Massachusetts.— Fay *v.* Wenzell, 8 Cush. 315.

Minnesota.— Shaubhut *v.* Hilton, 7 Minn. 506.

Missouri.— Campbell *v.* Wolf, 33 Mo. 459.

New Jersey.— Griggs *v.* Drake, 21 N. J. L. 169; Stokes *v.* Coonis, 4 N. J. L. 159.

New York.— Renouil *v.* Harris, 2 Sandf. 641.

Pennsylvania.— Montelius *v.* Montelius, 5 Pa. L. J. 88.

South Carolina.— Longstreet *v.* Lafitte, 2 Speers 664.

Texas.— Marlin *v.* Stockbridge, 14 Tex. 165; Cook *v.* Crawford, 10 Tex. 71.

Wisconsin.— State *v.* Richter, 37 Wis. 275.

See 30 Cent. Dig. tit. "Judgment," § 562.

18. Carter *v.* Elmore, 119 N. C. 296, 26 S. E. 35.

19. Walker *v.* Armour, 22 Ill. 658; Lutz *v.* Kelly, 47 Iowa 307; Ferguson *v.* Kumler, 25 Minn. 183; Allen *v.* Sales, 56 Mo. 28.

20. McCartey *v.* Kittrell, 55 Miss. 253.

21. Russell *v.* Erwin, 41 Ala. 292; Hendry *v.* Crandall, 131 Ind. 42, 30 N. E. 789; Robertson *v.* Winchester, 85 Tenn. 171, 1 S. W. 781; Roach *v.* Blakey, 89 Va. 767, 17 S. E. 228.

22. Laflin *v.* White, 38 Ill. 340; Waidner *v.* Pauly, 37 Ill. App. 278.

23. *Iowa.*—Preston *v.* Wright, 60 Iowa 351, 14 N. W. 352. *Compare* Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 381, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122, effect of a misnomer of defendant on the rights of third persons.

Michigan.— Field *v.* Plummer, 75 Mich. 437, 42 N. W. 849.

Nevada.— Burbank *v.* Rivers, 20 Nev. 159, 18 Pac. 753.

New York.— Sanders *v.* Rhewbottom, 7 N. Y. St. 167.

Texas.— Crawford *v.* Wilcox, 68 Tex. 109, 3 S. W. 695; Robinson *v.* Moore, 1 Tex. Civ. App. 93, 20 S. W. 994; Bradford *v.* Rogers, 2 Tex. Unrep. Cas. 57.

See 30 Cent. Dig. tit. "Judgment," § 563.

24. Vangeazel *v.* Hillyard, 1 Houst. (Del.) 515; Toliver *v.* Morgan, 75 Iowa 619, 34 N. W. 858; Athens First Nat. Bank *v.* Garland, 109 Mich. 515, 67 N. W. 559, 63 Am. St. Rep. 597, 33 L. R. A. 83; Davis *v.* Hoopes, 33 Miss. 173; Grimball *v.* Mississippi etc., R. Co., 3 Sm. & M. (Miss.) 38.

25. Janes *v.* Bullard, 107 Cal. 130, 40 Pac. 108.

26. Hagler *v.* Mercer, 6 Fla. 721; Lind *v.* Adams, 10 Iowa 398, 77 Am. Dec. 123; Frost *v.* Flint, 2 How. Pr. (N. Y.) 125. *Compare* Hann *v.* Gosling, 9 N. J. L. 248.

27. Calhoun *v.* Porter, 21 Conn. 526; Frankel *v.* Chicago, etc., R. Co., 70 Iowa 424,

be afterward filled in, or where the amount of the judgment is written in figures without words or a dollar mark, but in columns indicating the usual division into dollars and cents.[28]

K. Effect of Entry and Record — **1. Conclusiveness of Record.** No one, whether or not a party, may impeach the record of a judgment considered as a record.[29] And a record of a court imports absolute verity, and is conclusive evidence of the facts which it recites[30] as between the parties to the judgment and those in privity with them,[31] and cannot be contradicted or varied by evidence *aliunde*.[32] This rule, however, is subject to the qualification that one portion of a record may be limited, explained, or qualified by another portion thereof,[33] and

30 N. W. 679; Richardson *v.* Rogers, 37 Minn. 461, 35 N. W. 270; Cotes *v.* Smith, 29 How. Pr. (N. Y.) 326.

28. Therme *v.* Berthenoid, 106 Iowa 697, 77 N. W. 497; New England L. & T. Co. *v.* Avery, (Tex. Civ. App. 1897) 41 S. W. 673.

29. *Alabama.* — Simmons *v.* Shelton, 112 Ala. 284, 21 So. 309, 57 Am. St. Rep. 39.

California.— Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647.

Illinois.— Ambler *v.* Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202.

Iowa.— Goodhue *v.* Daniels, 54 Iowa 19, 6 N. W. 129.

New York.— Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216; Raymond *v.* Richmond, 78 N. Y. 351.

Ohio.— Barkaloo *v.* Emerick, 18 Ohio 268.

Vermont.— Spence *v.* Dearth, 43 Vt. 98.

30. *Alabama.*—Waller *v.* Campbell, 25 Ala. 544; Eslava *v.* Elliott, 5 Ala. 264, 39 Am. Dec. 326.

California.— Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742. Where a judgment-roll offered in evidence contains two judgments, the last in point of time will be treated as the true and final judgment, and the other disregarded. Colton Land, etc., Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878.

Illinois.—Consolidated Coal Co. *v.* Schaefer 135 Ill. 210, 25 N. E. 788; Allen *v.* Henn, 97 Ill. App. 378. Orders of court, when entered of record, are conclusive, and affidavits to the contrary are inadmissible. Kemper *v.* Waverly, 81 Ill. 278.

Iowa.— Mornver *v.* Cooper, 35 Iowa 257.

Maine.— Willard *v.* Whitney, 49 Me. 235.

Maryland.— Montgomery *v.* Murphy, 19 Md. 576, 81 Am. Dec. 652.

Minnesota.— Kurtz *v.* St. Paul, etc., R. Co., 61 Minn. 18, 63 N. W. 1; *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287; Ferguson *v.* Kumler, 25 Minn. 183.

Missouri.— Shoults *v.* Baker, 7 Mo. 350; Freedman *v.* Holberg, 89 Mo. App. 340.

Nebraska.— State *v.* Hopewell, 35 Nebr. 822, 53 N. W. 990; Fisk *v.* Osgood, 2 Nebr. (Unoff.) 100, 96 N. W. 237.

New Jersey.— *In re* Coursen, 4 N. J. Eq. 408.

New York.— Pendleton *v.* Weed, 17 N. Y. 72; McCarthy *v.* Marsh, 5 N. Y. 263; Towle *v.* De Witt, 7 Hun 93.

North Carolina.— Galloway *v.* McKeithen, 27 N. C. 12, 42 Am. Dec. 153.

Oklahoma.— Boynton *v.* Crockett, 12 Okla. 57, 69 Pac. 869.

Pennsylvania.— Kostenbader *v.* Kuebler, 199 Pa. St. 246, 48 Atl. 972, 85 Am. St. Rep. 783; Waters *v.* Bates, 44 Pa. St. 473; Adams *v.* Betz, 1 Watts 425, 26 Am. Dec. 79; Kennedy *v.* Wachsmuth, 12 Serg. & R. 171, 14 Am. Dec. 676; Selin *v.* Snyder, 7 Serg. & R. 166.

South Carolina.— Trimmier *v.* Thomson, 19 S. C. 247.

Wisconsin.— Atchinson *v.* Rosalip, 4 Chandl. 12.

See 30 Cent. Dig. tit. "Judgment," § 567.

31. Blann *v.* Chambliss, 9 Port. (Ala.) 412.

As against strangers the record of a judgment is always evidence of the fact that such a judgment was rendered at such a time between such parties. Havis *v.* Taylor, 13 Ala. 324. See also Key *v.* Dent, 14 Md. 86, holding that the record of a suit between other parties is proof that the suit was brought and recovery had as therein set forth; but the consequences to others, resulting from those facts apparent from the face of the record, are to be established by appropriate evidence of such other facts as may be necessary to sustain the action or defense. And see *infra*, XIV.

32. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Springer *v.* Wood, 3 Pa. Cas. 391, 6 Atl. 330. And see cases cited in notes 30, 31. See also Evidence, 17 Cyc. 571 *et seq.*, and cases there cited.

Conflicting evidence.— Evidence which, although it would not directly contradict any fact certified by the record of a judgment, would conflict with its legal effect, or with judicial deductions from its tenor, should not be admitted, after acquiescence in the judgment and rights derived under it for a long term of years. Bustard *v.* Gates, 4 Dana (Ky.) 429.

Evidence as to ground of decision.— Where the record does not show on what ground the judgment was rendered, parol evidence may be admitted to identify the ground of the decision. Evans *v.* Billingsley, 32 Ala. 395; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

33. Leese *v.* Clark, 28 Cal. 26; Barnett *v.* Wolf, 70 Ill. 76; Halstead *v.* Mustion, 166 Mo. 488, 66 S. W. 258.

that extraneous evidence is admissible to point out and correct a clerical mistake in the record.[34]

2. Recital of Jurisdictional Facts. A recital in a judgment record of the facts on which the jurisdiction of the court is based, when those facts are sufficient in law to confer jurisdiction, is at least *prima facie* evidence that the court duly acquired jurisdiction, and, according to the doctrine prevailing in many states, is conclusive evidence on that point.[35]

3. Record as Notice. The record of a judgment is notice of what it contains or recites [36] as against parties properly before the court [37] and those whose situation requires them to inform themselves of the judgment,[38] provided the judgment is properly entered and clearly recites or describes the fact in question,[39] or shows enough to induce a cautious man to make an investigation.[40]

4. Conflict in Record. In case of conflict or inconsistency between statements in different parts of a judgment record, that one will be presumed true which will sustain the validity and correctness of the judgment, if it is possible to regard the other as a mistake.[41]

L. Filing Transcript of Judgment — 1. Transfer From One County to Another. In several states the statutes authorize the transfer from one county to another, by the filing of a transcript, of final judgments of the court,[42] where they have been docketed or recorded in the county where rendered.[43] And this may be done, not only by the judgment creditor, but after his death by his heir, administrator, or creditor.[44] The transcript will not be vitiated by mere clerical

34. Ecker *v.* New Windsor First Nat. Bank, 64 Md. 292, 1 Atl. 849; Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613. But see *infra*, VIII, C, 2, g.

35. See *infra*, XI, E, 2, i.

36. Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304.

37. Bond *v.* Citizens' Nat. Bank, 65 Md. 498, 4 Atl. 893; Sluder *v.* Graham, 118 N. C. 835, 23 S. E. 924; Taylor *v.* Charter Oak L. Ins. Co., 17 Fed. 566, 3 McCrary 487. But *compare* Helms *v.* Chadbourne, 45 Wis. 60.

38. See Albert *v.* Baltimore, 2 Md. 159; Bartz *v.* Paff, 95 Wis. 95, 69 N. W. 297, 37 L. R. A. 848.

39. Cummings *v.* Long, 16 Iowa 41, 85 Am. Dec. 502; Taylor *v.* Hotchkiss, 2 La. Ann. 917; Jartroux *v.* Dupeire, 2 La. Ann. 608; Holmes *v.* Campbell, 13 Minn. 66.

40. Muller *v.* Flavin, 13 S. D. 595, 83 N. W. 687.

41. *Alabama.*— King *v.* Martin, 67 Ala. 177; Falkner *v.* Christian, 51 Ala. 495.

Arkansas.— Thorn *v.* Delany, 6 Ark. 219.

California.— Davis *v.* Lezinsky, 93 Cal. 126, 28 Pac. 811.

Illinois.— Kerr *v.* Swallow, 33 Ill. 379.

Iowa.— Conrad *v.* Baldwin, 3 Iowa 207.

Missouri.— Missouri, etc., R. Co. *v.* Holschlag, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417.

Nevada.— Blasdel *v.* Kean, 8 Nev. 305.

New York.— Levey *v.* Allien, 72 Hun 321, 25 N. Y. Suppl. 352.

Texas.— See Hodges *v.* Robbins, 23 Tex. Civ. App. 57, 56 S. W. 565.

Utah.— Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121.

See 30 Cent. Dig. tit. "Judgment," § 570.

In case of irreconcilable contradiction declarations incorporated in the judgment will prevail over the file-mark on papers in the case (Western Union Tel. Co. *v.* Jackson, 19 Tex. Civ. App. 273, 46 S. W. 279), the judgment over the original petition (Doe *v.* Smith, 1 Ind. 451. But see Montgomery *v.* Barnett, 8 Tex. 143), the judgment record over an entry in the docket (Case *v.* Plato, 54 Iowa 64, 6 N. W. 128), the judgment docket over the index of liens (Mather *v.* Jenswold, 72 Iowa 550, 32 N. W. 512, 34 N. W. 327), and, in Pennsylvania, the appearance docket over the judgment index or lien docket (Hance's Appeal, 1 Pa. St. 408; Nicholson's Appeal, 8 Pa. Cas. 396, 11 Atl. 562. *Compare* Mehaffy's Appeal, 7 Watts & S. (Pa.) 200).

42. See the statutes of the different states. And see Hastings School Dist. *v.* Coldwell, 16 Nebr. 68, 19 N. W. 634; Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278.

Judgments, etc., which cannot be transferred.— A judgment by default, which still requires the assessment of damages by a jury is not capable of being transferred (Connell *v.* Miller, 1 C. Pl. (Pa.) 67), nor an award, until the time allowed for appeal has elapsed (Hallman's Appeal, 18 Pa. St. 310), nor a verdict, without the rendition of a judgment upon it (Bailey *v.* Eder, 90 Pa. St. 446); and the same is true of a decree of a court of equity, although it be for the payment of a definite sum of money (Brooke *v.* Phillips, 83 Pa. St. 183).

Agreement by the judgment creditor not to transfer see Fullerton's Appeal, 46 Pa. St. 144.

43. McAden *v.* Banister, 63 N. C. 478. And see Callahan *v.* Hendrix, 79 Tex. 494, 15 S. W. 593; Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296.

44. Walt *v.* Swinehart, 8 Pa. St. 97.

errors,[45] but it must be sufficiently full to give reasonably certain and definite information to subsequent purchasers or lienors.[46] A transcript thus entered in another county does not become a judgment of the court to which transferred, but a quasi-judgment for certain limited purposes, such as lien, execution, and revival.[47] And hence, if it is desired to enter the judgment in a third county, it must be done by transcript from the original judgment, not from the transcript entered in the second county.[48] And further, the merits of a judgment thus transferred cannot be inquired into by the court to which it is taken; it is there only for purposes of enforcement and satisfaction.[49]

2. TRANSFER FROM INFERIOR TO SUPERIOR COURT — a. In General. For the purpose of enforcing the judgments of justices or other inferior courts against real property of the debtor,[50] statutes in several states[51] allow the creditor[52] to take a transcript of such a judgment[53] and file it in the office of the clerk of a superior court, whereupon, being there duly docketed,[54] it acquires the same force as a lien which it would have had if originally rendered by the superior court.[55] If the statute contemplates the filing of a complete transcript of the justice's record, it is not satisfied by a mere abstract of the judgment;[56] but otherwise the transcript is sufficient if it shows all the essential elements of a judgment,[57] and particularly

45. Thompson *v.* Bickford, 19 Minn. 17; Lamprey *v.* Pike, 28 Fed. 30.

46. Jones *v.* Luck, 7 Mo. 551; Wilson *v.* Patton, 87 N. C. 318; Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278; Gullett Gin Co. *v.* Oliver, 78 Tex. 182, 14 S. W. 451; Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247; Willis *v.* Sommerville, 3 Tex. Civ. App. 509, 22 S. W. 781; Decatur First Nat. Bank *v.* Cloud, 2 Tex. Civ. App. 627, 21 S. W. 770.

Copy of the entire record required.—Chester County Bank *v.* Olwine, 3 Pa. L. J. Rep. 507; Updegraff *v.* Perry, 1 Pa. L. J. Rep. 365.

Certification by the clerk.— Updegraff *v.* Perry, 4 Pa. St. 291; Miller *v.* Constein, 1 Leg. Rec. (Pa.) 146; Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278.

47. Beck *v.* Church, 113 Pa. St. 200, 6 Atl. 57; Mellon *v.* Guthrie, 51 Pa. St. 116; Brandt's Appeal, 16 Pa. St. 343.

48. Nelson *v.* Guffey, 131 Pa. St. 273, 18 Atl. 1073; Mellon *v.* Guthrie, 51 Pa. St. 116; Loomis *v.* Griffin, 1 C. Pl. (Pa.) 109.

49. King *v.* Nimick, 34 Pa. St. 297.

50. See Austin *v.* Payne, 7 Bush (Ky.) 480.

51. See the statutes of the different states.

52. Cunningham *v.* Eiseman, 4 N. Y. Civ. Proc. 220, holding that the judgment debtor has no right to take and file a transcript of the judgment against himself.

53. Bodkin *v.* McDonald, 11 Phila. (Pa.) 342, holding that under a statute authorizing transcripts of judgments of justices of the peace to be docketed in the court of common pleas, a transcript of a judgment obtained before magistrates and a sheriff's jury, in a statutory proceeding to obtain possession of premises purchased at a sheriff's sale, cannot be so docketed.

A judgment of a justice of the peace imposing a fine is not one which can be removed by transcript to a superior court. Cox *v.* Spurgin, 210 Ill. 398, 71 N. E. 456.

54. Fish *v.* Emerson, 44 N. Y. 376; Blossom *v.* Barry, 1 Lans. (N. Y.) 190; Lewis *v.* Ryder, 13 Abb. Pr. (N. Y.) 1; Lee *v.* Bishop, 89 N. C. 256.

Where filed.— The transcript must be filed in the proper court of the county where the judgment was recovered, and cannot in the first instance be filed in the court of another county. Pemberton *v.* Pollard, 18 Nebr. 435, 25 N. W. 582; Bowman *v.* Silvus, 6 Kulp (Pa.) 496; Sheridan *v.* Coleman, Wilcox (Pa.) 114.

Filing and recording transcript.— Where the transcript is filed in the circuit court, it need not be recorded in that court before process is issued on it. Hamilton *v.* Matlock, 5 Blackf. (Ind.) 421.

Issuance of execution.— As to the necessity of having an execution issued by the justice and returned *nulla bona* before filing the transcript see Poineer *v.* Bagnall, 49 N. J. L. 226, 7 Atl. 858; Matthews *v.* Miller, 47 N. J. L. 414, 1 Atl. 464; Nimmo *v.* Howard, 42 N. J. Eq. 487, 10 Atl. 712; Hawkins *v.* Wills, 49 Fed. 506, 1 C. C. A. 339.

55. See *infra*, VII, L, 2, e.

56. White *v.* Espey, 21 Oreg. 328, 28 Pac. 71; Sterringer *v.* Mackie, 57 W. Va. 63, 49 S. E. 942. *Compare* Treptow *v.* Buse, 10 Kan. 170.

In Minnesota where the judgment was rendered by a justice of the peace the statute intends that the transcript shall be a literal copy of the judgment of the justice, and not a mere abstract of the same. Boe *v.* Irish, 69 Minn. 493, 72 N. W. 842. But a transcript from a municipal court is sufficient if it contains the docket entries only and need not be as full and complete as the transcript from a justice's court. Schmahl *v.* Thompson, 82 Minn. 78, 84 N. W. 649. And see Funk *v.* Lamb, 87 Minn. 348, 92 N. W. 8.

57. Chicago, etc., R. Co. *v.* Summers, 113 Ind. 10, 14 N. E. 733, 3 Am. St. Rep. 616; Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230; Coulter *v.* Slaughter, 2 Chest. Co. Rep. (Pa.) 55; Elliott *v.* Jordan, 7 Baxt. (Tenn.) 376.

the jurisdiction of the inferior court,[58] the date of the judgment,[59] the names of the parties, and the amount of the recovery.[60]

b. Certificate and Authentication. It is necessary that the transcript should be certified as correct by the justice or other court from which it is taken, and authenticated in accordance with the directions of the statute.[61]

c. Time For Filing. If there is no explicit restriction of the time within which a transcript of a justice's judgment may be taken, it may be done at any time during the life of the judgment.[62] But generally it is necessary that there should be a judgment actually rendered and still in force,[63] which has not become dormant,[64] or barred by the statute of limitations,[65] and is not so old as to be invalidated by the presumption of payment after twenty years.[66] The transcript may be filed before the time to appeal from the judgment has expired,[67] but not after an appeal has been taken.[68]

d. Affidavit of Creditor. In some states statutes[69] require the judgment creditor, on filing a transcript from a justice or other inferior court, to make and file an affidavit of the amount remaining due and unpaid on the judgment, or that the judgment is due and unpaid, and that it cannot be satisfied from the goods and chattels of the debtor. This requirement is jurisdictional and the affidavit is indispensable.[70]

Defective language.— A transcript of a justice's judgment, although expressed in bad English, will be held good if intelligible in its essential parts. Jackson *v.* Browner, 7 Wend. (N. Y.) 388.

58. Wedel *v.* Green, 70 Mich. 642, 38 N. W. 638; Coulter *v.* Slaughter, 2 Chest. Co. Rep. (Pa.) 55. *Compare* Matter of Thompson, 29 N. Y. App. Div. 83, 51 N. Y. Suppl. 384.

59. Anderson *v.* Kimbrough, 5 Coldw. (Tenn.) 260.

60. Dickens *v.* Crane, 33 Kan. 344, 6 Pac. 630; Schmahl *v.* Thompson, 82 Minn. 78, 84 N. W. 649; Coulter *v.* Slaughter, 2 Chest. Co. Rep. (Pa.) 55.

61. *Michigan.*— Jewett *v.* Bennett, 3 Mich. 198.

Missouri.— Franse *v.* Owens, 25 Mo. 329.

New Jersey.— Barr *v.* Fleming, 61 N. J. L. 431, 39 Atl. 915.

New York.— People *v.* Keenan, 31 Hun 625; Dickinson *v.* Smith, 25 Barb. 102.

Texas.— Atteridge *v.* Maxey, 18 Tex. Civ. App. 550, 45 S. W. 606.

See 30 Cent. Dig. tit. "Judgment," § 573.

Who must certify.— The transcript should be certified by the justice who rendered the judgment. But the certificate of one justice to the transcript of a judgment by another, with the certificate of the clerk of a court of record to the official character of such justice, may perhaps, in the absence of a statutory requirement, be sufficient to authenticate the judgment. Draggoo *v.* Graham, 9 Ind. 212. A justice cannot certify a transcript after his term of office has expired. Singley *v.* Fisher, 2 Leg. Rec. (Pa.) 168. And where a justice certifies that the judgment was rendered by him, but it is shown that it was rendered by his predecessor, the record of the transfer will be vacated, and the issuance of process on the judgment as transferred will be enjoined. Hamilton *v.* Thomson, 3 Kan. App. 8, 44 Pac. 437. But in Pennsylvania, by force of a statute applicable in certain special cases, if the judgment was rendered by a justice since deceased, the transcript may be given by the person who is in possession of his docket. Sloan *v.* McKinstry, 18 Pa. St. 120.

Signature.— If the transcript contains the essential particulars and is authenticated by the certificate of the justice it need not necessarily be signed. Surratt *v.* Crawford, 87 N. C. 372.

Several judgments may be embraced in one transcript, and it is not necessary to certify each judgment separately. Jeffries *v.* Wright, 51 Mo. 215. And see Williams *v.* McCandless, 14 Pa. St. 185.

62. Rhoad *v.* Patrick, 37 S. C. 517, 16 S. E. 536. And see Sanders *v.* Mase, 4 Pa. Co. Ct. 134.

63. See Stephens *v.* Santee, 51 Barb. (N. Y.) 532. *Compare* Clark *v.* Butts, 73 Minn. 361, 76 N. W. 199.

64. Woodard *v.* Paxton, 101 N. C. 26, 7 S. E. 496; Kopf *v.* Denning, 5 Ohio S. & C. Pl. Dec. 154, 7 Ohio N. P. 385; Pitzer *v.* Russel, 4 Oreg. 124. *Compare* Sanders *v.* Mase, 4 Pa. Co. Ct. 134.

65. See Rose *v.* Henry, 37 Hun (N. Y.) 397; Slocum *v.* Stoddard, 7 N. Y. Civ. Proc. 240.

66. Light *v.* Steckbeck, 19 Pa. Co. Ct. 654.

67. Dawson *v.* Cunning, 50 Ill. App. 286.

68. Ruhinsky *v.* Patrick, 13 Pa. Co. Ct. 262.

69. See the statutes of the different states.

70. Frohlich *v.* Mitchell, 132 Mich. 432, 93 N. W. 1087; Berkery *v.* Reilly, 82 Mich. 160, 46 N. W. 436; Smith *v.* St. Joseph Cir. Judge, 46 Mich. 338, 9 N. W. 440; Peck *v.* Cavell, 16 Mich. 9; Curtis *v.* Stout, 69 N. J. L. 124, 54 Atl. 252; Grimshaw *v.* Carroll, 62 N. J. L. 730, 42 Atl. 733; Barr *v.* Fleming, 62 N. J. L. 449, 45 Atl. 1090; Brink *v.* Blazer, 62 N. J. L. 175, 40 Atl. 623; Bulat

e. Operation and Effect of Transfer. The effect of transferring a judgment by transcript from an inferior court to a superior court is to divest the former of all jurisdiction over the case and the judgment,[71] and to make it in most of the states to all intents and purposes a judgment of the latter court,[72] which may thereafter issue process on it,[73] modify it or grant other relief against it,[74] or vacate it or strike it off the docket for cause shown.[75]

VIII. AMENDMENT AND CORRECTION.[76]

A. Jurisdiction and Power to Amend — 1. Power and Authority of Courts[77] — a. In General. As a general rule all courts whose proceedings are preserved in any species of record or memorial have the power and authority to make such corrections therein as truth and justice require and the rules of law permit.[78]

v. Londrigan, 63 N. J. Eq. 22, 50 Atl. 909 [*affirmed* in 65 N. J. Eq. 718, 60 Atl. 1133].

71. Oyster *v.* Bank, 107 Iowa 39, 77 N. W. 523; Hitchcock *v.* Hosmer, 96 Mich. 297, 55 N. W. 841.

Issuance of process.— A justice of the peace, who has rendered judgment in an action before him, has no authority to issue process on the judgment after it has been transferred to the district court and docketed there. Rahm *v.* Soper, 28 Kan. 529. *Compare* Drum *v.* Snyder, 1 Binn. (Pa.) 381.

72. *Iowa.*— Stover *v.* Elliott, 80 Iowa 329, 45 N. W. 901. But *compare* Klepfer *v.* Keokuk, 125 Iowa 592, 102 N. W. 515, holding that the filing of a transcript of a judgment of a city superior court in the district court renders that judgment a judgment of the district court only for the purposes of enforcement, and does not deprive the superior court of the power given it by statute to set it aside.

Massachusetts.— Upham *v.* Damon, 12 Allen 98.

New York.— Agar *v.* Tibbets, 46 Hun 52; Bergman *v.* Noble, 45 Hun 133; Spencer *v.* Wait, 9 N. Y. Civ. Proc. 93.

North Carolina.— Bates *v.* Fayetteville Bank, 65 N. C. 81.

Pennsylvania.— Smith *v.* Wehrly, 157 Pa. St. 407, 27 Atl. 700; Smith *v.* Gosline, 2 Pa. Co. Ct. 15; Swartz *v.* Fell, 1 Pa. Co. Ct. 571; Hamilton *v.* Dawson, 4 Pa. L. J. 140.

South Dakota.— Williams *v.* Rice, 6 S. D. 9, 60 N. W. 153.

See 30 Cent. Dig. tit. "Judgment," § 581.

But see Farmers' State Bank *v.* Bales, 64 Nebr. 870, 90 N. W. 945; Moores *v.* Peycke, 44 Nebr. 405, 62 N. W. 1072.

In Florida it has been held that a statute providing that a judgment of a justice's court, when docketed in the circuit court, shall become a judgment of the circuit court, was void for conflict with the clause of the constitution limiting the jurisdiction of the circuit courts; but this does not invalidate the other provisions of the statute relating to the enforcement of judgments so transferred. Bucky *v.* Willard, 16 Fla. 330.

73. Miller *v.* Fees, 3 Pa. L. J. 243.

74. Babb *v.* Bruere, 23 Mo. App. 604; Johnson *v.* Manning, 75 N. Y. App. Div. 285, 78 N. Y. Suppl. 96. *Compare* Fitch *v.* Byall, 149 Ind. 554, 49 N. E. 455.

75. McLaughlin *v.* Cross, 68 N. J. L. 599, 53 Atl. 703; Dailey *v.* Gifford, 12 Serg. & R. (Pa.) 72; Gearhart *v.* Flegal, 3 Pa. Co. Ct. 399; Noerdlinger *v.* Huff, 31 Wash. 360, 72 Pac. 73. But see *infra*, IX, A, 3, c.

Striking off.— A judgment of a justice of the peace entered in the court of common pleas for the purposes of lien and execution cannot be stricken off by the court because it appears by evidence outside the record that another judgment had been previously recovered against defendant on the same cause of action. Heaney *v.* Faust, 19 Pa. Co. Ct. 495.

76. **Amending judgment in action on bail-bond** see BAIL, 5 Cyc. 61.

77. **Power of appellate court to amend** see APPEAL AND ERROR, 3 Cyc. 473.

78. *Georgia.*— Wright *v.* Boyd, 96 Ga. 745, 22 S. E. 379.

Iowa.— Shepherd *v.* Brenton, 15 Iowa 84.

Maryland.— After a decree has been enrolled the court will not entertain any application to vary it, except upon consent of all parties, or in respect to matters which are of course. Lovejoy *v.* Irelan, 19 Md. 56.

New York.— McCall *v.* McCall, 54 N. Y. 541; Morehouse *v.* Yeager, 41 N. Y. Super. Ct. 306; Tower *v.* Wilson, 3 Cai. 151.

North Carolina.— Bagley *v.* Wood, 34 N. C. 90; Jones *v.* Lewis, 30 N. C. 70, 47 Am. Dec. 338; State *v.* King, 27 N. C. 203.

See 30 Cent. Dig. tit. "Judgment," § 581.

Probate courts possess the power of amending their judgments and orders. Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289; Matter of Robertson, 51 N. Y. App. Div. 117, 64 N. Y. Suppl. 385; Kennedy *v.* Wachsmuth, 12 Serg. & R. (Pa.) 171, 14 Am. Dec. 676. And see COURTS, 11 Cyc. 799.

An arbitrator, after the delivery of his award, may correct a mere clerical error in it not affecting the merits. Goodell *v.* Raymond, 27 Vt. 241.

Judgment entered in vacation.— A judgment entered in vacation is under the control of the court and subject to modification or correction until finally approved. McConnell *v.* Avey, 117 Iowa 282, 90 N. W. 604; Porter *v.* McBride, 44 Iowa 479.

Expiration of judge's term.— The author-

This power is inherent and independent of statutes.[79] But in several states statutes have been enacted[80] either defining the authority of the courts in this regard and regulating its exercise,[81] or limiting the cases in which amendments may be made,[82] or the time within which such relief may be granted.[83] Statutes of this character should not be construed retrospectively.[84] It is not only the right, but also the duty, of a court to amend or correct its judgment when substantial grounds for such action are shown[85] by a party entitled to make the application;[86] and it appears that the amendment asked for will accomplish the purpose and give him the relief to which he is entitled,[87] and this without regard to the possible or probable effect of the amendment on the interests of other parties.[88]

b. During the Term. A court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them, for cause shown, or may, to promote justice, revise, supersede, revoke, or vacate them, as may in its discretion seem necessary.[89]

ity of a judge to amend a judgment rendered by him is not affected by the fact that after the decision his term expired and some days elapsed before he was reëlected to the office. Deutermann *v.* Pollock, 30 N. Y. App. Div. 378, 51 N. Y. Suppl. 928.

Judge leaving circuit.— After a judge has filed his decree with the clerk for record, and has finished his judicial labors on a circuit of which he is neither the presiding nor resident judge, he has no right to modify his decree. Hughes *v.* Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2.

79. Cooper *v.* Cooper, 51 N. Y. App. Div. 595, 64 N. Y. Suppl. 901. And see Williams *v.* Wheeler, 1 Barb. (N. Y.) 48.

80. See the statutes of the different states.

81. See Shaeffer *v.* Lacy, 121 Cal. 574, 54 Pac. 72; McConnell *v.* Avey, 117 Iowa 282, 90 N. W. 604.

82. See Flint *v.* Cuny, 6 La. 67; Meyer *v.* Haven, 70 N. Y. App. Div. 529, 75 N. Y. Suppl. 261.

83. See *In re* Henderson, 157 N. Y. 423, 52 N. E. 183.

84. State *v.* Cross, 6 Ind. 387; Pendleton *v.* Prestridge, 12 Sm. & M. (Miss.) 302; Hooker *v.* Hooker, 10 Sm. & M. (Miss.) 599; Stewart *v.* Davidson, 10 Sm. & M. (Miss.) 351; Lee *v.* Cook, 1 Wyo. 413. And see Rowell *v.* Boston, etc., R. Co., 59 N. H. 35.

85. Baynes *v.* Billups, 48 Ga. 347; Gove *v.* Lyford, 44 N. H. 525. And see Wight *v.* Alden, 3 How. Pr. (N. Y.) 213.

86. Hawks *v.* Votaw, 1 Wash. 70, 23 Pac. 442.

The party in whose favor the judgment has been given may have relief against it within the time limited, as well as the party against whom it is rendered. Montgomery *v.* Ellis, 6 How. Pr. (N. Y.) 326. And see Smith *v.* Mullins, 3 Metc. (Ky.) 182.

87. See Hurley *v.* Robinson, 85 Me. 400, 27 Atl. 270; Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 217, 32 N. E. 851; Meldon *v.* Devlin, 39 N. Y. App. Div. 581, 57 N. Y. Suppl. 670. But see Perry *v.* Adams, 83 N. C. 266.

88. See Colby *v.* Moody, 19 Me. 111; Gasz *v.* Strick, 3 N. Y. Suppl. 830; Foster *v.* Woodfin, 65 N. C. 29. But see Wendell *v.* Mugridge, 19 N. H. 109, holding that the amendment of a judgment is in the discretion of the court and will not be allowed where injustice would thereby be done to any one.

89. *Alabama.*— Acre *v.* Ross, 3 Stew. 288; Neale *v.* Caldwell, 3 Stew. 134.

California.— De Castro *v.* Richardson, 25 Cal. 49.

Georgia.— Perkins *v.* Castleberry, 119 Ga. 702, 46 S. E. 825.

Illinois.— Becker *v.* Sauter, 89 Ill. 596; Stahl *v.* Webster, 11 Ill. 511; Stitt *v.* Kurtenbach, 85 Ill. App. 38.

Indiana.— Richardson *v.* Howk, 45 Ind. 451; Obenchain *v.* Comegys, 15 Ind. 496.

Iowa.— Hull *v.* Eby, 123 Iowa 257, 98 N. W. 774; Streeter *v.* Gleason, 120 Iowa 703, 95 N. W. 242; Dawson *v.* Wisner, 11 Iowa 6; Chapman *v.* Allen, Morr. 23.

Kentucky.— Worthington *v.* Camphell, 1 S. W. 714, 8 Ky. L. Rep. 416.

Maryland.— Robinson *v.* Harford County Com'rs, 12 Md. 132; Burch *v.* Scott, 1 Bland 112.

Mississippi.— McRaven *v.* McGuire, 9 Sm. & M. 34.

Missouri.— Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289; Eddie *v.* Eddie, 138 Mo. 599, 39 S. W. 451; McGurry *v.* Wall, 122 Mo. 614, 27 S. W. 327.

Nebraska.— Harris *v.* State, 24 Nebr. 803, 40 N. W. 317; Coxe *v.* Omaha Coal, etc., Co., 4 Nebr. (Unoff.) 412, 94 N. W. 519; Colby *v.* Maw, 1 Nebr. (Unoff.) 478, 95 N. W. 677.

Nevada.— Marshall *v.* Golden Fleece Gold, etc., Min. Co., 16 Nev. 156.

New York.— Cooper *v.* Cooper, 51 N. Y. App. Div. 595, 64 N. Y. Suppl. 901; Gough *v.* McFall, 31 N. Y. App. Div. 578, 52 N. Y. Suppl. 221; Conklin *v.* New York El. R. Co., 18 N. Y. Civ. Proc. 366, 13 N. Y. Suppl. 782.

North Carolina.— Culbreth *v.* Smith, 124 N. C. 289, 32 S. E. 714.

Pennsylvania.— Larkin *v.* Glover Steam, etc., Fitting Co., 2 Del. Co. 453.

South Carolina.— Lemacks *v.* Glover, 1 Rich. Eq. 141.

Tennessee.— Ocoee Bank *v.* Hughes, 2 Coldw. 52; State *v.* Disney, 5 Sneed 598.

Texas.— Sugg *v.* Thornton, 73 Tex. 666, 9 S. W. 145; McPherson *v.* Johnson, 69 Tex.

c. After the Term. After the expiration of the term at which a judgment or decree was rendered, it is out of the power of the court, except as allowed by statutes, to amend or correct it in any matter of substance or in any matter affecting the merits, although mere clerical mistakes may be corrected, especially if apparent on the face of the record.[90] But the rule against amendment after

484, 6 S. W. 798; Lane *v.* Ellinger, 32 Tex. 369; Carothers *v.* Lange, (Civ. App. 1900) 55 S. W. 580; Studebaker Bros. Mfg. Co. *v.* Hunt, (Civ. App. 1896) 38 S. W. 1134; Texas Sav. Loan Assoc. *v.* Smith, (Civ. App. 1895) 32 S. W. 380; Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210; Hinzie *v.* Ward, 1 Tex. App. Civ. Cas. § 1314.

United States.— Barrell *v.* Tilton, 119 U. S. 637, 7 S. Ct. 332, 30 L. ed. 511 [*affirming* 17 Fed. 59, 9 Sawy. 84]; Alabama Gold L. Ins. Co. *v.* Nichols, 109 U. S. 232, 3 S. Ct. 120, 27 L. ed. 915; Memphis *v.* Brown, 94 U. S. 715, 24 L. ed. 244; Mahler *v.* Animarium Co., 129 Fed. 897, 64 C. C. A. 329; Judson *v.* Gage, 98 Fed. 540, 39 C. C. A. 156.

Canada.— Canadian Land, etc., Co. *v.* Dysart, 9 Ont. 495.

See 30 Cent. Dig. tit. "Judgment," § 582.

Negligence of party.— The power of the court to amend its judgments during the term will not be employed to enable a party to take advantage of his own negligence or misconduct, to the injury of other parties. Cornell University *v.* Parkinson, 59 Kan. 365, 53 Pac. 138.

90. *Alabama.*— Ivey *v.* Gilder, 119 Ala. 495, 24 So. 715; Van Dyke *v.* State, 22 Ala. 57.

Alaska.— Banks *v.* Wilson, 1 Alaska 241. *Compare Ex p.* Marks, 136 Fed. 168, 69 C. C. A. 80.

Arkansas.— McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597; Malpas *v.* Lowenstine, 46 Ark. 552; Graham *v.* Parham, 32 Ark. 676.

California.— A court has no power to amend a judgment or order made at a previous term, unless a motion was made or some proceedings instituted at such term to procure the amendment to be made, and the motion or proceeding was continued, or unless the record discloses that the judgment or order as entered was not the one made by the court. See O'Brien *v.* O'Brien, 124 Cal. 422, 57 Pac. 225; De Castro *v.* Richardson, 25 Cal. 49.

Colorado.— Exchange Bank *v.* Ford, 7 Colo. 314, 3 Pac. 449.

Connecticut.— Goldreyer *v.* Cronan, 76 Conn. 113, 55 Atl. 594. See Waldo *v.* Spencer, 4 Conn. 71.

Illinois.— Culver *v.* Cougle, 165 Ill. 417, 46 N. E. 242; Goucher *v.* Patterson, 94 Ill. 525; Becker *v.* Sauter, 89 Ill. 596; Dunham *v.* South Park Com'rs, 87 Ill. 185; Humphreyville *v.* Culver, 73 Ill. 485; Lill *v.* Stookey, 72 Ill. 495; Cairo, etc., R. Co. *v.* Holbrook, 72 Ill. 419; Cook *v.* Wood, 24 Ill. 295; Coughran *v.* Gutcheus, 18 Ill. 390; Finch *v.* Finch, 111 Ill. App. 481; Fitzgerald *v.* Gore, 105 Ill. App. 242; Page *v.* Shields, 102 Ill. App. 575; Denhard *v.* Dunbar, 98 Ill. App. 266; Peterson *v.* Metropolitan Nat. Bank, 88 Ill. App. 190; Schmidt *v.* Rehwinkel, 86 Ill. App. 267; Schmelzer *v.* Chicago Ave. Sash, etc., Mfg. Co., 85 Ill. App. 596; Gould *v.* Watson, 80 Ill. App. 242; Howe *v.* Warren, 46 Ill. App. 325; Horner *v.* Horner, 37 Ill. App. 199. A judgment may be amended in mere matters of form, or so amended, by the correction of mistakes, as to make it conform to the judgment which the court actually rendered, even after the term. McDonald *v.* Patterson, 190 Ill. 121, 60 N. E. 106; Mains *v.* Cosner, 67 Ill. 536; Smith *v.* Wilson, 26 Ill. 186; Harris *v.* Schilling, 108 Ill. App. 116; Denhard *v.* Dunbar, 98 Ill. App. 266. But in order to do this there must be some record, minute, or memorial paper, or stenographic notes, or some other written source from which to determine what was the exact nature of the judgment or order to be amended; the amendment canot be based on oral evidence merely or on the judge's recollection. Denhard *v.* Dunbar, *supra*; Stitt *v.* Kurtenbach, 85 Ill. App. 38.

Indiana.— Hamilton *v.* Burch, 28 Ind. 233; Nixon *v.* Nichols, 10 Ind. App. 1, 37 N. E. 421. The source of the authority of the courts to amend a judicial record after the end of the term is found in the English statutes relative to amendments, which have been adopted as the law of this state. Makepeace *v.* Lukens, 27 Ind. 435, 92 Am. Dec. 263.

Kansas.— Barker *v.* Mecartney, 10 Kan. App. 130, 62 Pac. 439.

Kentucky.— Daviess County Ct. *v.* Howard, 13 Bush 101; Com. *v.* Shanks, 10 B. Mon. 304; Bramblett *v.* Pickett, 2 A. K. Marsh. 10, 12 Am. Dec. 350; Ward *v.* Lee, 1 Bibb 18; Com. *v.* Ratcliff, 84 S. W. 1147, 27 Ky. L. Rep. 297. *Compare* Gay *v.* Caldwell, Hard. 63, holding that a record may be amended after the case is out of court, if there is anything in it to amend by.

Louisiana.— Balio *v.* Wilson, 12 Mart. 358, 13 Am. Dec. 376.

Michigan.— Whitwell *v.* Emory, 3 Mich. 84, 59 Am. Dec. 220.

Minnesota.— Where the facts are undisputed, the court has power to amend the record at a subsequent term. Bilansky *v.* State, 3 Minn. 427.

Mississippi.— Sagory *v.* Bayless, 13 Sm. & M. 153. Amendments may be made after the term in cases where infants are defendants and the right is expressly reserved in the final decree of time to come in and contest the decree, and in cases of defendants who are non-residents. Cole *v.* Miller, 32 Miss. 89. But the court cannot after the term enlarge its judgment so as to include a recovery against bondsmen not originally included therein. Barber *v.* Biloxi, 76 Miss. 578, 25 So. 298.

the term does not apply to interlocutory judgments or such as remain *in fieri*,[91] or to action in that behalf taken with the consent of the parties concerned or at their request,[92] or where the judgment is carried over the term by a motion to amend or correct it or a petition for a rehearing.[93]

d. In Vacation. By statute in some of the states an amendment or correction of a judgment may be made in vacation, especially if there is matter of record by which to amend,[94] but in others this can only be done in term-time.[95]

e. After Appeal. Where the court would otherwise have the authority to amend the judgment, it may be done after an appeal has been taken;[96] but not

Missouri.— Harrison *v.* State, 10 Mo. 686; State *v.* Harper, 56 Mo. App. 611. But a judgment irregular for error of fact may be attacked at a subsequent term. Bishop *v.* Seal, 92 Mo. App. 167. And a judgment may be amended at any time as to mere matters of form. Hickman *v.* Barnes, 1 Mo. 156. But a judgment cannot be expunged at a term subsequent to that of its rendition, on the ground that neither the judge's docket nor the clerk's minutes show the rendition thereof. Jones *v.* Hart, 60 Mo. 351.

Nebraska.— Ackerman *v.* Ackerman, 61 Nebr. 72, 84 N. W. 598; Anderson *v.* McCloud-Love Live-Stock Commission Co., 58 Nebr. 670, 79 N. W. 613; Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873.

New York.— Foley *v.* Foley, 15 N. Y. App. Div. 276, 44 N. Y. Suppl. 588; McLean *v.* Stewart, 14 Hun 472; Killpatrick *v.* Rose, 9 Johns. 78.

North Carolina.— Moore *v.* Hinnant, 90 N. C. 163.

Ohio.— Botkin *v.* Pickaway County Com'rs, 1 Ohio 375, 13 Am. Dec. 630.

Oregon.— Hoover *v.* Hoover, 39 Oreg. 456, 65 Pac. 796.

Pennsylvania.— Com. *v.* Krause, 198 Pa. St. 391, 48 Atl. 256; Gannon *v.* Riel, 3 Lack. Leg. N. 68.

Tennessee.— Ocoee Bank *v.* Hughes, 2 Coldw. 52; State *v.* Disney, 5 Sneed 598; Clark *v.* Lary, 3 Sneed 77. See Elliot *v.* Cochran, 1 Coldw. 389.

Texas.— Hartwell *v.* Jackson, 7 Tex. 576; Smallwood *v.* Love, (Civ. App. 1904) 78 S. W. 400; Segal *v.* Armistead, 25 Tex. Civ. App. 562, 62 S. W. 1073; Abbott *v.* Foster, (Civ. App. 1901) 62 S. W. 121; Sass *v.* Hirschfeld, 23 Tex. Civ. App. 1, 56 S. W. 602; Hedgecoxe *v.* Conner, (Civ. App. 1897) 43 S. W. 322.

Utah.— Lees *v.* Freeman, 19 Utah 481, 57 Pac. 411.

West Virginia.— Morgantown Second Nat. Bank *v.* Ralphsnyder, 54 W. Va. 231, 46 S. E. 206; Stewart *v.* Stewart, 40 W. Va. 65, 20 S. E. 862.

Wisconsin.— Pringle *v.* Dunn, 39 Wis. 435; Van Dresar *v.* Coyle, 38 Wis. 672; Smith *v.* Armstrong, 25 Wis. 517. See Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70; Chouteau *v.* Hooe, 1 Pinn. 663; Gardner *v.* Grant County, 1 Pinn. 210.

United States.— Manning *v.* German Ins. Co., 107 Fed. 52, 46 C. C. A. 144; Lynah *v.* U. S., 106 Fed. 121; Hook *v.* Mercantile Trust Co., 89 Fed. 410, 32 C. C. A. 238; Albers *v.* Whitney, 1 Fed. Cas. No. 137, 1 Story 310.

See 30 Cent. Dig. tit. "Judgment," § 583.

Failure to enter in full.— Where the clerk of a court of record fails to enter up the judgment in full, in fact ordered by the court, at the proper time, the judgment may be amended at a subsequent term, so as to express the order formerly made. Groton Bridge, etc., Co. *v.* Clark Pressed Brick Co., 136 Fed. 27, 68 C. C. A. 577 [*affirming* 126 Fed. 552].

91. Hastings *v.* Cunningham, 35 Cal. 549; Tanton *v.* Keller, 78 Ill. App. 31; Salyer *v.* Arnett, 62 S. W. 1031, 23 Ky. L. Rep. 321; Aull *v.* Day, 133 Mo. 337, 34 S. W. 578.

Where a formal written judgment is not made and signed until the term succeeding the one at which the matter was orally determined, the judgment comes into existence only at the latter term, and remains subject to the control of the court until the close of such term. Judson *v.* Gage, 98 Fed. 540, 39 C. C. A. 156.

92. Sheridan *v.* Chicago, 175 Ill. 421, 51 N. E. 898; Hewetson *v.* Chicago, 172 Ill. 112, 49 N. E. 992.

93 *Illinois.*— Watson *v.* Le Grand Roller Skating Rink Co., 177 Ill. 203, 52 N. E. 317.

Missouri.— Brnner *v.* Marcum, 50 Mo. 405; Houston *v.* Thompson, 87 Mo. App. 63.

Ohio.— Niles *v.* Parks, 49 Ohio St. 370, 34 N. E. 735.

West Virginia.— Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685.

Wyoming.— O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

United States.— New Orleans *v.* Fisher, 91 Fed. 574, 34 C. C. A. 15.

See 30 Cent. Dig. tit. "Judgment," § 583.

94. Shirley *v.* Conway, 44 Miss. 434; Graves *v.* Fulton, 7 How. (Miss.) 592; Geller *v.* Hoyt, 7 How. Pr. (N. Y.) 265; Missouri Pac. R. Co. *v.* Haynes, 82 Tex. 448, 18 S. W. 605; Swift *v.* Faris, 11 Tex. 18; Morris *v.* Coleman County, (Tex. Civ. App. 1896) 35 S. W. 29.

95. Hinton *v.* Virginia L. Ins. Co., 116 N. C. 22, 21 S. E. 201; Hale *v.* Finch, 1 Wash. Terr. 517.

96. *Alabama.*— *Ex p.* Henderson, 84 Ala. 36, 4 So. 284; Dow *v.* Whitman, 36 Ala. 604.

Arkansas.— Freel *v.* State, 21 Ark. 212.

Missouri.— Exchange Nat. Bank *v.* Allen, 68 Mo. 474; De Kalb County *v.* Hixon, 44 Mo. 341.

after the adjudication of the appeal in the court above,[97] except perhaps as to matters not considered on the appeal.[98]

2. Authority of Clerk. The clerk of the court has no authority on his own responsibility and without an order or direction of the court to amend, change, or correct a judgment.[99]

3. Judgments Which May Be Amended or Corrected — a. In General. The power of amendment extends to interlocutory as well as final judgments,[1] and to orders;[2] and its exercise is not impeded by the fact that the judgment may have become dormant,[3] or may be irregular or even wholly invalid;[4] but an amendment should not be made after the issue of an execution on the judgment,[5] and still less after it has been paid or otherwise satisfied.[6] A memorandum made by the clerk at the foot of the judgment is not a part of the judgment, and if erroneous may be rectified on motion.[7]

b. Judgments by Confession. Courts have power to amend a judgment by confession, as well as any other, by rectifying mistakes, correcting the form of the judgment, or supplying omissions.[8]

Nevada.— Sparrow *v.* Strong, 2 Nev. 362.

Pennsylvania.— Crutcher *v.* Com., 6 Whart. 340; Berryhill *v.* Wells, 5 Binn. 56.

Texas.— Wood *v.* Wheeler, 7 Tex. 13; Texas, etc., R. Co. *v.* Walker, (Civ. App. 1905) 87 S. W. 194.

England.— Richardson *v.* Mellish, 3 Bing. 334, 4 L. J. C. P. O. S. 68, 11 Moore C. P. 104, 11 E. C. L. 167.

See 30 Cent. Dig. tit. "Judgment," § 585.

But see Haydel *v.* Roussel, 1 La. Ann. 35; Swan *v.* Mutual Reserve Fund Life Assoc., 22 Misc. (N. Y.) 256, 50 N. Y. Suppl. 46.

97. *Alabama.*— Werborn *v.* Pinney, 76 Ala. 291.

Illinois.— Mains *v.* Cosner, 67 Ill. 536.

Iowa.— Edgar *v.* Greer, 10 Iowa 279.

Kentucky.— Bleight *v.* McIlvoy, 4 T. B. Mon. 142.

New York.— Meldon *v.* Devlin, 39 N. Y. App. Div. 581, 57 N. Y. Suppl. 670.

North Carolina.— Harrison *v.* Harrison, 114 N. C. 219, 19 S. E. 232.

See 30 Cent. Dig. tit. "Judgment," § 585.

But see Dreyfuss *v.* Tompkins, 67 Cal. 339, 7 Pac. 732; Rousset *v.* Boyle, 45 Cal. 64.

98. West Chester, etc., Plank Road Co. *v.* Chester County, 21 Pa. Co. Ct. 86.

99. *California.*— Chapin *v.* Broder, 16 Cal. 403.

Iowa.— Grattan *v.* Matteson, 54 Iowa 229, 6 N. W. 298.

Maine.— Rockland Water Co. *v.* Pillsbury, 60 Me. 425.

Ohio.— Hollister *v.* Judges Lucas County Dist. Ct., 8 Ohio St. 201, 70 Am. Dec. 100. But *compare* Woods *v.* Green, Wright 503.

Pennsylvania.— Prowattain *v.* McTier, 1 Phila. 105.

South Carolina.— Chafee *v.* Rainey, 21 S. C. 11.

United States.— Barnes *v.* Lee, 2 Fed. Cas. No. 1,017, 1 Cranch C. C. 430.

See 30 Cent. Dig. tit. "Judgment," § 586.

But *compare* Smith *v.* Coe, 7 Rob. (N. Y.) 477.

1. *Alabama.*— Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540; State *v.* Craig, 12 Ala. 363.

Illinois.— Campbell *v.* Powers, 139 Ill. 128, 28 N. E. 1062.

Kentucky.— Royse *v.* Royse, 34 S. W. 1068, 17 Ky. L. Rep. 1403.

North Carolina.—Coates *v.* Wilkes, 94 N. C. 174.

Texas.— Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100.

Canada.— Budden *v.* Rochon, 13 Quebec Super. Ct. 322.

See 30 Cent. Dig. tit. "Judgment," § 588.

2. Holmes *v.* McDowell, 15 Hun (N. Y.) 585; U. S. Life Ins. Co. *v.* Jordan, 15 N. Y. St. 292; Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535. *Compare* Fossat *v.* U. S., 2 Wall. (U. S.) 649, 17 L. ed. 739.

3. Allen *v.* Bradford, 3 Ala. 281, 37 Am. Dec. 689; Williams *v.* Merritt, 109 Ga. 217, 34 S. E. 1012.

4. Higgins *v.* Driggs, 21 Fla. 103; Thompson *v.* Kimbrel, 46 Ga. 529; Olcott *v.* Kohlsaat, 8 N. Y. Suppl. 117.

5. D'Apremont *v.* Peytavin, 5 Mart. (La.) 641; State Bank *v.* Hampton, 4 Mart. (La.) 94; Spring *v.* Tidwell, 31 Miss. 63.

6. *Indiana.*— Gray *v.* Robinson, 90 Ind. 527.

Mississippi.— Burns *v.* Stanton, 2 Sm. & M. 457.

Pennsylvania.— Hassler's Appeal, 5 Watts 176.

Texas.— Gaines *v.* Mensing, 64 Tex. 325.

United States.— Russell *v.* U. S., 15 Ct. Cl. 168. But *compare* Crookes *v.* Maxwell, 6 Fed. Cas. No. 3,415, 6 Blatchf. 468.

See 30 Cent. Dig. tit. "Judgment," § 593.

But see Dennis *v.* Colley, 112 Ga. 114, 37 S. E. 119; Goldsmith *v.* Clausen, 14 Iowa 278; Brooks *v.* Brooks, 52 Kan. 562, 35 Pac. 215; Mechanics' Bank *v.* Minthorne, 19 Johns. (N. Y.) 244.

7. Fugate *v.* Glasscock, 7 Mo. 577.

8. *Georgia.*— Gaines *v.* Wedgeworth, 19 Ga. 31.

Indiana.— Kindig *v.* March, 15 Ind. 248.

Iowa.— Thorp *v.* Platt, 34 Iowa 314.

c. Judgments by Consent. A judgment entered by consent cannot be altered or corrected except with the consent of all the parties affected by it.[9]

d. Judgments by Default. A judgment by default may be amended or corrected in a proper case, at the instance of plaintiff,[10] or on motion of defendant.[11]

e. Judgment Entered on Transcript From Another Court. Where a judgment of a justice of the peace or other inferior court is filed in a court of record, the latter court has power to amend and correct it.[12] But where a transcript of a judgment is taken from one court to another court of coördinate jurisdiction, for purposes of lien, it can be amended only in the court which rendered it.[13]

B. Nature of Errors and Corrections — 1. Clerical Errors. A mere clerical error arising from inadvertence or the formal misprision of clerks or other officers may always be corrected by the court, so as to make the judgment speak the truth, even after the term.[14] The term "clerical error" as here used must not be taken in too narrow a sense. It includes not only errors made by

Michigan.— Grand Rapids Sav. Bank *v.* Widdicomb, 114 Mich. 639, 72 N. W. 615.

Missouri.— Hull *v.* Dowdall, 20 Mo. 359.

New York.— Mann *v.* Brooks, 7 How. Pr. 449.

North Carolina.— Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Pennsylvania.— Jenkins *v.* Davis, 141 Pa. St. 266, 21 Atl. 592; Hutchinson *v.* Ledlie, 36 Pa. St. 112. But see Emerald Benev. Assoc. *v.* Burke, 9 Kulp 177, holding that the court has no power without plaintiff's consent to reduce the amount of a judgment confessed and regularly entered.

West Virginia.— Stringer *v.* Anderson, 23 W. Va. 482.

See 30 Cent. Dig. tit. "Judgment," § 589.

Compare Ex p. Carroll, 17 S. C. 446; Southern Porcelain Mfg. Co. *v.* Thew, 5 S. C. 5; Richardson *v.* Jones, 12 Gratt. (Va.) 53, holding that the court has no authority at a subsequent term to substitute a judgment upon *nil dicit* for a judgment by confession, on the ground that the latter was entered by mistake of the clerk.

Amending statement of indebtedness on which judgment founded.— Cook *v.* Whipple, 55 N. Y. 150, 14 Am. Rep. 202; Union Bank *v.* Bush, 36 N. Y. 631; Ingram *v.* Robbins, 33 N. Y. 409, 88 Am. Dec. 393; Mitchell *v.* Van Buren, 27 N. Y. 300; National Park Bank *v.* Salomon, 1 Silv. Sup. (N. Y.) 494, 5 N. Y. Suppl. 632, 17 N. Y. Civ. Proc. 8; Davis *v.* Morris, 21 Barb. (N. Y.) 152; McKee *v.* Tyson, 10 Abb. Pr. (N. Y.) 392; Johnston *v.* Fellerman, 13 How. Pr. (N. Y.) 21; Neele *v.* Berryhill, 4 How. Pr. (N. Y.) 16; Lawless *v.* Hackett, 16 Johns. (N. Y.) 149.

9. Milford Independent School Dist. *v.* Ross, 95 Iowa 69, 63 N. W. 576; Knox *v.* Moser, 72 Iowa 154, 33 N. W. 617; Aronson *v.* Sire, 85 N. Y. App. Div. 607, 83 N. Y. Suppl. 362 [but see Eagan *v.* Moore, 11 Daly (N. Y.) 199]; McEachern *v.* Kerchner, 90 N. C. 177; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,269, 1 Woodb. & M. 61. *Compare* People *v.* Quick, 92 Ill. 580. And see *supra*, III, F, 1.

10. *Indiana.*— Torr *v.* Torr, 20 Ind. 118.

New York.— Williams *v.* Wheeler, 1 Barb. 48. *Compare* Bullard *v.* Sherwood, 85 N. Y. 253.

North Carolina.— Churchill *v.* Brooklyn L. Ins. Co., 88 N. C. 205; Griffin *v.* Hinson, 51 N. C. 154; Powell *v.* Jopling, 47 N. C. 400.

Ohio.— Haswell *v.* Henley, 7 Ohio Dec. (Reprint) 453, 7 Cinc. L. Bul. 325.

Vermont.— Mosseaux *v.* Brigham, 19 Vt. 457.

Virginia.— Dillard *v.* Thornton, 29 Gratt. 392; Wainwright *v.* Harper, 3 Leigh 270; Hatcher *v.* Lewis, 4 Rand. 152.

See 30 Cent. Dig. tit. "Judgment," § 591.

11. See Cairo, etc., R. Co. *v.* Holbrook, 72 Ill. 419. *Compare* Sundback *v.* Griffith, 7 S. D. 109, 63 N. W. 544.

12. *Arkansas.*— Crane *v.* Crane, 51 Ark. 287, 11 S. W. 1.

Indiana.— Wiley *v.* Forsee, 6 Blackf. 246.

Missouri.— Babb *v.* Bruere, 23 Mo. App. 604.

New York.— Hilton *v.* Sinsheimer, 5 N. Y. Civ. Proc. 355.

Pennsylvania.— Maidencreek Tp. *v.* Berks County, 1 Woodw. 48.

See 30 Cent. Dig. tit. "Judgment," § 592. And see *supra*, VII, L, 2, e.

13. Morris *v.* Bunyan, 58 Kan. 210, 48 Pac. 864; Maltby-Henley Co. *v.* Deane, 57 N. Y. Suppl. 457, 28 N. Y. Civ. Proc. 338; King *v.* Nimick, 34 Pa. St. 297; Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278.

14. *Alabama.*— Myers *v.* Conway, 90 Ala. 109, 7 So. 639; Taylor *v.* Harwell, 65 Ala. 1; Randolph *v.* Little, 62 Ala. 396; Russell *v.* Erwin, 41 Ala. 292; Lee *v.* Houston, 20 Ala. 301; Dobson *v.* Dickson, 8 Ala. 252; Jordan *v.* Huntsville Branch Bank, 5 Ala. 284; Smith *v.* Mobile Branch Bank, 5 Ala. 26; Dearing *v.* Smith, 4 Ala. 432; Smyth *v.* Strader, 9 Port. 446; Moody *v.* Keener, 9 Port. 252; Evans *v.* St. John, 9 Port. 186; Scales *v.* Swan, 9 Port. 163.

Arkansas.— Portis *v.* Talbot, 33 Ark. 218.

California.— *In re* Willard, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554; Galvin *v.* Palmer, 134 Cal. 426, 66 Pac. 572; O'Brien *v.* O'Brien, 124 Cal. 422, 57 Pac. 225; Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am.

the clerk in entering the judgment, but also those mistakes apparent on the record, whether made by the court or counsel during the progress of the case, which cannot reasonably be attributed to the exercise of judicial consideration or discretion.[15]

St. Rep. 321; Dreyfuss *v.* Tompkins, 67 Cal. 339, 7 Pac. 732; Will *v.* Sinkwitz, 41 Cal. 588; Swain *v.* Naglee, 19 Cal. 127.

Colorado.— Gaynor *v.* Clements, 16 Colo. 209, 26 Pac. 324; Knox *v.* McFerran, 4 Colo. 348; Wolfley *v.* Lebanon Min. Co., 3 Colo. 296; People *v.* Arapahoe County Ct., 9 Colo. App. 41, 47 Pac. 469; Breene *v.* Booth, 6 Colo. App. 140, 40 Pac. 193.

Illinois.— St. Louis Consol. Coal Co. *v.* Oeltjen, 189 Ill. 85, 59 N. E. 600; Newman *v.* Chicago, 153 Ill. 469, 38 N. E. 1053; Smith *v.* Wilson, 26 Ill. 186; Denhard *v.* Dunbar, 93 Ill. App. 266; Heintz *v.* Pratt, 54 Ill. App. 616; Littlefield *v.* Schmoldt, 24 Ill. App. 624; Ives *v.* Hulce, 17 Ill. App. 39.

Indiana.— Sherman *v.* Nixon, 37 Ind. 153; Jenkins *v.* Long, 23 Ind. 460; Silner *v.* Butterfield, 2 Ind. 24; Brittenham *v.* Robinson, 22 Ind. App. 536, 54 N. E. 133; Stratton *v.* Lockhart, 1 Ind. App. 380, 27 N. E. 715.

Kansas.— Birmingham *v.* Leonhardt, 2 Kan. App. 513, 43 Pac. 996.

Kentucky.— Johnson *v.* Commonwealth Bank, 2 Duv. 521; Smith *v.* Mullins, 3 Metc. 182; Scroggin *v.* Scroggin, 1 J. J. Marsh. 362; Speed *v.* Hann, 1 T. B. Mon. 16, 15 Am. Dec. 78; Sharpe *v.* Fowler, Litt. Sel. Cas. 446.

Maine.— Bean *v.* Ayers, 70 Me. 421; Hall *v.* Williams, 10 Me. 278.

Maryland.— Ecker *v.* New Windsor First Nat. Bank, 64 Md. 292, 1 Atl. 849; Parkhurst *v.* Citizens' Nat. Bank, 61 Md. 254.

Massachusetts.— Fay *v.* Wenzell, 8 Cush. 315; Balch *v.* Shaw, 7 Cush. 282.

Michigan.— Kunze *v.* Tawas State Sav. Bank, 130 Mich. 688, 90 N. W. 668.

Minnesota.— Northwestern Life, etc., Co. *v.* Gippe, 92 Minn. 36, 99 N. W. 364; McClure *v.* Bruck, 43 Minn. 395, 45 N. W. 438.

Missouri.— Stevenson *v.* Black, 168 Mo. 549, 68 S. W. 909; Wand *v.* Ryan, 166 Mo. 646, 65 S. W. 1025; State *v.* Primm, 61 Mo. 166; Robertson *v.* Neal, 60 Mo. 579; Hickman *v.* Barnes, 1 Mo. 156; Cauthorn *v.* Berry, 69 Mo. App. 404; Farley *v.* Cammann, 43 Mo. App. 168; Eau Claire Lumber Co. *v.* Anderson, 13 Mo. App. 429.

Nebraska.—Brownlee *v.* Davidson, 28 Nebr. 785, 45 N. W. 51.

New Hampshire.— State *v.* Dowd, 43 N. H. 454.

New York.— Bohlen *v.* Metropolitan El. R. Co., 121 N. Y. 546, 24 N. E. 932; Morrison *v.* Metropolitan El. R. Co., 60 N. Y. App. Div. 180, 70 N. Y. Suppl. 65; Adams *v.* Ash, 46 Hun 105; Granite State Provident Assoc. *v.* McHugh, 34 N. Y. Suppl. 341; Alvord *v.* Beach, 5 Abb. Pr. 451.

North Carolina.— Beam *v.* Bridgers, 111 N. C. 269, 16 S. E. 391; Brady *v.* Beason, 28 N. C. 425; Wilson *v.* Myers, 11 N. C. 73, 15 Am. Dec. 510.

Ohio.— State *v.* Beam, 3 Ohio St. 508; Hammer *v.* McConnel, 2 Ohio 31.

Pennsylvania.—Com. *v.* Chauncey, 2 Ashm. 90; Heermans *v.* Powell, 2 L. T. N. S. 73.

South Carolina.— Knox *v.* Moore, 41 S. C. 355, 19 S. E. 683; Henlein *v.* Graham, 32 S. C. 303, 10 S. E. 1012; Carroll *v.* Tompkins, 14 S. C. 223.

Texas.— Chambers *v.* Hodges, 3 Tex. 517.

Virginia.— Saunders *v.* Lipscomb, 90 Va. 647, 19 S. E. 450; Digges *v.* Dunn, 1 Munf. 56.

Wisconsin.— Bostwick *v.* Van Vleck, 100 Wis. 387, 82 N. W. 302; State *v.* Delafield, 69 Wis. 264, 34 N. W. 123; Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70.

United States.— Hicklin *v.* Marco, 64 Fed. 609; Albers *v.* Whitney, 1 Fed. Cas. No. 137, 1 Story 310; Northern Bank *v.* Labitut, 2 Fed. Cas. No. 842, 1 Woods 11; Barnes *v.* Lee, 2 Fed. Cas. No. 1,018, 1 Cranch C. C. 471; Pierce *v.* Turner, 19 Fed. Cas. No. 11,148, 1 Cranch C. C. 433.

England.— Hatton *v.* Harris, [1892] A. C. 547, 62 L. J. C. P. 24, 67 L. T. Rep. N. S. 722, 1 Reports 1.

Canada.— McMaster *v.* Radford, 16 Ont. Pr. 20.

See 30 Cent. Dig. tit. "Judgment," § 598.

15. Ford *v.* Tinchant, 49 Ala. 567.

Rule in Illinois.— As the writ of error coram nobis was employed only to correct mistakes of fact in a decree or judgment, not put in issue or passed upon by the court, and is abolished by Ill. Rev. St. c. 110, § 67, providing that such mistakes may be corrected on motion, such motion can only reach such mistakes of fact as might have been corrected by the writ of error coram nobis before it was abolished. McPherson *v.* Wood, 52 Ill. App. 170. A mistake in entering the judgment, so that it reads for plaintiff instead of for defendant, or *vice versa*, or so that it gives the right of execution to the defeated party instead of to the other, may be corrected on motion. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; Morrison *v.* Stewart, 21 Ill. App. 113. A misnomer of the term of court in the entry of the judgment is a clerical error and amendable. Burnham *v.* Chicago, 24 Ill. 496.

Wrong date.— A clerical error in the date at which the judgment was rendered may be corrected. Girardey *v.* Bessman, 62 Ga. 654; Woodward *v.* People, 56 Ill. App. 45; Johnson *v.* Commonwealth Bank, 2 Duv. (Ky.) 521; Ecker *v.* New Windsor First Nat. Bank, 64 Md. 292, 1 Atl. 849; Grimes *v.* Grosjean, 24 Nebr. 700, 40 N. W. 137; Carlton *v.* Patterson, 29 N. H. 580; Day *v.* Argus Printing

2. Judicial Errors. A decision which is wrong in law cannot be corrected on motion, and the allowance of an amendment should never be used as a means of reviewing the judgment on the merits or rectifying judicial errors or mistakes.[16] Thus the judgment cannot be modified or amended because as it stands it is not supported by the evidence,[17] or because the conclusions of law on which it is founded are alleged to be erroneous,[18] or to make it conform to what ought to have been done but was not in fact done.[19] And when a statute authorizes the correction of judgments on the ground of "mistake," it means mistake of fact, and not of law.[20]

3. Reforming and Perfecting the Judgment. An amendment or correction may

Co., 47 N. J. Eq. 594, 22 Atl. 1056; Clark *v.* Clark, 138 N. Y. 653, 34 N. E. 513; Rogers *v.* Edmonds, 7 N. Y. Suppl. 881; Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 84 Fed. 752.

Misdescription of property.— A clerical error in the description of the property involved in the judgment is amendable. Taylor *v.* Harwell, 65 Ala. 1; Wilcox *v.* Wells, 5 Ida. 786, 51 Pac. 985; Treasy *v.* Moore, 36 S. W. 1132, 18 Ky. L. Rep. 421; Elliott *v.* Buffington, 149 Mo. 663, 51 S. W. 408; Harlan *v.* Moore, 132 Mo. 483, 34 S. W. 70; Bishop *v.* Seal, 92 Mo. App. 167; Mansel *v.* Castles, 93 Tex. 414, 55 S. W. 559.

16. *Alabama.*— Wilmerding *v.* Corbin Banking Co., 126 Ala. 268, 28 So. 640; Browder *v.* Faulkner, 82 Ala. 257, 3 So. 30; Emerson *v.* Head, 81 Ala. 443, 1 So. 197; Stoutz *v.* Rouse, 75 Ala. 431; Whorley *v.* Memphis, etc., R. Co., 72 Ala. 20.

Arkansas.— McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597.

California.— Willard *v.* Duncan, 139 Cal. 501, 73 Pac. 240.

Illinois.— Horner *v.* Horner, 37 Ill. App. 199.

Indiana.— Stone *v.* Stone, 158 Ind. 628, 64 N. E. 86; Johnson *v.* Foreman, 24 Ind. App. 93, 56 N. E. 254.

Iowa.— Perry *v.* Kaspar, 113 Iowa 268, 85 N. W. 22.

Kentucky.— Ballard *v.* Davis, 3 J. J. Marsh. 656.

Maine.— Hall *v.* Williams, 10 Me. 278.

Maryland.— Rice *v.* Donald, 97 Md. 396, 55 Atl. 620.

Missouri.— Fetters *v.* Baird, 72 Mo. 389; Turner *v.* Christy, 50 Mo. 145. *Compare* State *v.* Luce, 50 Mo. 361; Harbor *v.* Pacific R. Co., 32 Mo. 423; Burns *v.* Sullivan, 90 Mo. App. 1; Webb *v.* Elliott, 75 Mo. App. 557; Bohm *v.* Stivers, 75 Mo. App. 291.

Nebraska.— Dillon *v.* Chicago, etc., R. Co., 58 Nebr. 472, 78 N. W. 927.

New York.— Carpentier *v.* Willet, 31 N. Y. 90, 1 Abb. Dec. 312, 1 Keyes 510, 28 How. Pr. 225; Muller *v.* Naumann, 85 N. Y. App. Div. 337, 83 N. Y. Suppl. 488; Ray *v.* New York Bay Extension R. Co., 34 N. Y. App. Div. 3, 53 N. Y. Suppl. 1052; Sabater *v.* Sabater, 7 N. Y. App. Div. 70, 39 N. Y. Suppl. 958; Matter of Silliman, 38 Misc. 226, 77 N. Y. Suppl. 267; Heert *v.* Cruger, 14 Misc. 508, 35 N. Y. Suppl. 1063; Hotaling *v.* Marsh, 14 Abb. Pr. 161.

North Carolina.— Simmons *v.* Dowd, 77 N. C. 155.

Pennsylvania.— Duffey *v.* Houtz, 105 Pa. St. 96; Gannon *v.* Riel, 3 Lack. Leg. N. 68. *Compare In re* Pocono Tp., 22 Pa. Co. Ct. 105.

Texas.— Missouri Pac. R. Co. *v.* Haynes, 82 Tex. 448, 18 S. W. 605; Perkins *v.* Dunlavy, 61 Tex. 241; Milam County *v.* Robertson, 47 Tex. 222.

Vermont.— Davis *v.* Nelson, 73 Vt. 328, 50 Atl. 1094.

Virginia.— Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458; Com. *v.* Cawood, 2 Va. Cas. 527.

Wisconsin.— Pinger *v.* Vanclick, 36 Wis. 141; Durning *v.* Burckhardt, 34 Wis. 585.

United States.— Elder *v.* Richmond Gold, etc., Min. Co., 58 Fed. 536, 7 C. C. A. 354; Northern Bank *v.* Labitut, 2 Fed. Cas. No. 842, 1 Woods 11; Espinosa *v.* U. S., 8 Fed. Cas. No. 4,529.

See 30 Cent. Dig. tit. "Judgment," § 595.

Following supreme court decision.— In Parsons Water Co. *v.* Knapp, 33 Kan. 752, 7 Pac. 568, it is held that a judgment may be corrected so as to make it correspond with a previous decision of the supreme court.

Correction during term.— During the term the court may change or correct a judgment not only in respect to clerical errors or mistakes, but also to correct a judicial error, that is, a mistake or erroneous decision, injuriously affecting a party, caused by the court's mistake as to the law, or misinformation as to essential facts. Ryon *v.* Thomas, 104 Ind. 59, 3 N. E. 653; Flickinger *v.* Omaha Bridge, etc., Co., 98 Iowa 358, 67 N. W. 372; State *v.* Daugherty, 70 Iowa 439, 30 N. W. 685; Wolmerstadt *v.* Jacobs, 61 Iowa 372, 16 N. W. 217; Bishop *v.* Aborn, 16 R. I. 568, 18 Atl. 203; Carothers *v.* Lange, (Tex. Civ. App. 1900) 55 S. W. 580.

17. Strange *v.* Tyler, 95 Ind. 396; Dorsey *v.* Dorsey, 29 Ind. App. 248, 64 N. E. 475; Boos *v.* State, 11 Ind. App. 257, 39 N. E. 197.

18. Chicago, etc., R. Co. *v.* State, 159 Ind. 237, 64 N. E. 860; Rader *v.* Sheets, 26 Ind. App. 479, 59 N. E. 1090.

19. Wolfe *v.* Davis, 74 N. C. 597; Cleveland Leader Printing Co. *v.* Green, 52 Ohio St. 487, 40 N. E. 201, 49 Am. St. Rep. 725.

20. Manning *v.* Nelson, 107 Iowa 34, 77 N. W. 503; Knox *v.* Moser, 72 Iowa 154, 33 N. W. 617.

be allowed at any time, where the judgment as entered does not correspond with the judgment as actually rendered, or with the intention and understanding of the court in regard to its form or terms.[21] The power of amendment may be employed to strike out surplusage or matter improperly included in the judgment,[22] to correct wrong recitals,[23] to change the form of the judgment to make it correspond with the facts of its rendition;[24] and it may be employed to relieve the

21. *Alabama.*— Governor *v.* Knight, 8 Ala. 297. But see Teat *v.* Cocke, 42 Ala. 336.

Arkansas.— Hershy *v.* Baer, 45 Ark. 240; Portis *v.* Talbot, 33 Ark. 218; King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739.

California.— Canadian, etc., Mortg., etc., Co. *v.* Clarita Land, etc., Co., 140 Cal. 672, 74 Pac. 301; Homescekers' Loan Assoc. *v.* Gleason, 133 Cal. 312, 65 Pac. 617; San Joaquin Land, etc., Co. *v.* West, 99 Cal. 345, 33 Pac. 928; Dreyfuss *v.* Tompkins, 67 Cal. 339, 7 Pac. 732; Rousset *v.* Boyle, 45 Cal. 64.

Connecticut.— Weed *v.* Weed, 25 Conn. 337. See Taylor *v.* Starr, 2 Root 293.

Georgia.— Wallace *v.* Cason, 42 Ga. 435; Oliver *v.* Ross, 27 Ga. 363.

Illinois.— Gillett *v.* Booth, 95 Ill. 183.

Indiana.— Stuart *v.* Logansport, 87 Ind. 584.

Kentucky.— Sharpe *v.* Fowler, Litt. Sel. Cas. 446.

Louisiana.— State *v.* Major, 38 La. Ann. 642. But see State *v.* Judge Civ. Dist. Ct., 43 La. Ann. 1169, 10 So. 294, holding that a judge, after having by mistake signed a judgment in favor of defendant, cannot of his own accord substitute therefor a judgment for plaintiff, although the latter was the judgment orally given by him.

Maine.— *In re* Limerick, 18 Me. 183.

Massachusetts.— Savage *v.* Blanchard, 148 Mass. 348, 19 N. E. 396; Capen *v.* Stoughton, 16 Gray 364.

Minnesota.— Hall *v.* Merrill, 47 Minn. 260, 49 N. W. 980; Nell *v.* Dayton, 47 Minn. 257, 49 N. W. 981.

Missouri.— Webb *v.* Elliott, 75 Mo. App. 557; State *v.* White, 75 Mo. App. 257; Farley *v.* Cammann, 43 Mo. App. 168; Stacker *v.* Cooper Cir. Ct., 25 Mo. 401; Blumenthal *v.* Kurth, 22 Mo. 173.

Montana.— Quigley *v.* Birdseye, 11 Mont. 439. 28 Pac. 741.

Nebraska.— Hoagland *v.* Way, 35 Nebr. 387, 53 N. W. 207; Brownlee *v.* Davidson, 28 Nebr. 785, 45 N. W. 51; Grimes *v.* Grosjean, 24 Nebr. 700, 40 N. W. 137.

New Hampshire.— Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172.

New York.— Kenney *v.* Apgar, 93 N. Y. 539; Salmon *v.* Gedney, 75 N. Y. 479; Baker *v.* Home L. Ins. Co., 63 N. Y. 630; Strauss *v.* Bendheim, 32 Misc. 179, 66 N. Y. Suppl. 247; Robertson *v.* Hay, 12 Misc. 7, 33 N. Y. Suppl. 31; Sexton *v.* Bennett, 17 N. Y. Suppl. 437; U. S. Life Ins. Co. *v.* Jordan, 21 Abb. N. Cas. 330.

North Carolina.— Beam *v.* Bridgers, 111 N. C. 269, 16 S. E. 391; Strickland *v.* Strickland, 95 N. C. 471; Parsons *v.* McBride, 49 N. C. 99. But after an order entered as dictated by the judge has been construed and affirmed by the supreme court an amendment cannot be allowed on the ground that the construction placed on it was not what the judge intended. Harrison *v.* Harrison, 114 N. C. 219, 19 S. E. 232.

Ohio.— Elliott *v.* Plattor, 43 Ohio St. 198, 1 N. E. 222; Nye *v.* Stillwell, 12 Ohio Cir. Ct. 40, 5 Ohio Cir. Dec. 335; Murray *v.* Murray, 5 Ohio Dec. (Reprint) 382, 5 Am. L. Rec. 266.

Pennsylvania.— Law *v.* Kennedy, 2 Walk. 497.

South Carolina.— Huggins *v.* Oliver, 21 S. C. 147.

Tennessee.— Crutchfield *v.* Stewart, 1 Humphr. 380.

Texas.— Converse *v.* Langshaw, 81 Tex. 275, 16 S. W. 1031; Texas Pac. R. Co. *v.* Connor, 13 Tex. Civ. App. 423, 35 S. W. 330.

Wisconsin.— Bostwick *v.* Van Vleck, 106 Wis. 387, 82 N. W. 302; Williams *v.* Hayes, 68 Wis. 248, 32 N. W. 44; Cole's Will, 52 Wis. 591, 9 N. W. 664; Durning *v.* Burkhardt, 34 Wis. 585; Wyman *v.* Buckstaff, 24 Wis. 477.

United States.— Gilmer *v.* Grand Rapids, 16 Fed. 708; Bradley *v.* Eliot, 3 Fed. Cas. No. 1,778, 5 Cranch C. C. 293; Figh *v.* U. S., 3 Ct. Cl. 97. *Compare* Doe *v.* Waterloo Min. Co., 60 Fed. 643.

England.—Tucker *v.* New Brunswick Trading Co., 44 Ch. D. 249, 59 L. J. Ch. 551, 63 L. T. Rep. N. S. 69, 38 Wkly. Rep. 741.

Canada.— Balfour *v.* Drummond, 4 Manitoba 467.

See 30 Cent. Dig. tit. "Judgment," §§ 594, 596.

22. Evans *v.* Schafer, 86 Ind. 135; Brusie *v.* Peck, 62 Hun (N. Y.) 248, 16 N. Y. Suppl. 645; Boyd *v.* Campbell, 12 Misc. (N. Y.) 351, 33 N. Y. Suppl. 557; Hartley *v.* White, 94 Pa. St. 31.

23. Jones *v.* Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (where an order of the probate court really directed a sale of land for the purpose of an equitable division among the heirs, a recital that the sale was ordered "to pay debts" may be corrected); Jenkins *v.* Davis, 141 Pa. St. 266, 21 Atl. 592; Odell *v.* Reynolds, 70 Fed. 656, 17 C. C. A. 317.

24. Marine Bank Co. *v.* Mallers, 58 Ill. App. 232, holding that an amendment may be made where a judgment of dismissal failed to include a judgment for costs properly chargeable to plaintiff.

Wrong entry of default.— Where a judgment appears of record as entered by default, but in fact two pleas were filed and appear of record, the court will presume that the judgment was entered through inadvertence

judgment of ambiguity,[25] or to make it conform to the verdict, where by mistake it has been entered in terms differing therefrom.[26] And so the court may amend its record by transferring the proceedings to the proper suit when by mistake they have been filed in a suit to which they do not belong.[27]

4. SUBSTANTIAL CHANGE OR MODIFICATION OF JUDGMENT. The power of a court to amend its own record is limited to such changes or corrections as are in affirmance of the judgment originally rendered; and where the judgment expresses the entire judicial action taken at the time of its rendition, the court has no authority to enlarge or diminish it, to make a change or modification in matter of substance, or, under the guise of amendment, to review the case and render a different judgment.[28] A judgment therefore cannot be amended so as to vary the rights of the parties as fixed by the original decision;[29] and it is error to amend a judgment by reducing its amount, where the reason for the alteration is that the court has

and correct the mistake. Miller *v.* Hoc, 1 Fla. 189. And so where a judgment is confessed in open court and the clerk improperly enters it as a judgment by default the mistake will be corrected. Grand Rapids Sav. Bank *v.* Widdicomb, 114 Mich. 639, 72 N. W. 615.

Dismissal "on the merits." — Where an action is dismissed on technical grounds, or for want of prosecution, an erroneous recital in the judgment that it was dismissed "on the merits" will be stricken out on motion. Petrie *v.* Hamilton College, 92 Hun (N. Y.) 81, 36 N. Y. Suppl. 636; Mannion *v.* Broadway, etc., R. Co., 13 N. Y. Suppl. 759, 18 N. Y. Civ. Proc. 40; Riggs *v.* Chapin, 7 N. Y. Suppl. 765; Williams *v.* Hayes, 68 Wis. 248, 32 N. W. 44. And where an action is dismissed "on the merits" a judgment which does not so state may be amended to do so. Ruegamer *v.* Cieslinskie, 104 N. Y. App. Div. 135, 93 N. Y. Suppl. 599.

25. Keene *v.* Welsh, 8 Mont. 305, 21 Pac. 25.

26. *Georgia.* — Sanders *v.* Williams, 75 Ga. 283; Moses *v.* Eagle, etc., Mfg. Co., 68 Ga. 241; Saffold *v.* Wade, 56 Ga. 174; Mahone *v.* Perkinson, 35 Ga. 207.

Illinois. — Seely *v.* Pelton, 63 Ill. 101; Werner *v.* Evans, 94 Ill. App. 328.

Minnesota. — Eaton *v.* Caldwell, 3 Minn. 134.

New York. — Corn Exch. Bank *v.* Blye, 119 N. Y. 414, 23 N. E. 805.

Tennessee. — Tunstall *v.* Schoenpflug, 4 Baxt. 43.

Texas. — Stevens *v.* Lee, 70 Tex. 279, 8 S. W. 40.

Washington. — Seattle, etc., R. Co. *v.* Johnson, 7 Wash. 97, 34 Pac. 567.

Wisconsin. — Thrasher *v.* Tyack, 15 Wis. 256.

See 30 Cent. Dig. tit. "Judgment," § 597.

But see Freeland *v.* Field, 6 Call (Va.) 12.

27. Sweeny *v.* Delany, 1 Pa. St. 320, 44 Am. Dec. 136.

28. *Alabama.* — Browder *v.* Faulkner, 82 Ala. 257, 3 So. 30; Gibson *v.* Wilson, 18 Ala. 63.

California. — De Castro *v.* Richardson, 25 Cal. 49; Morrison *v.* Dapman, 3 Cal. 255. And see *In re* Potter, 141 Cal. 424, 75 Pac. 850.

Illinois. — Robinson *v.* Brown, 82 Ill. 279; Little *v.* Stookey, 72 Ill. 495; Buckles *v.* Northern Bank, 63 Ill. 268; Peterson *v.* Metropolitan Nat. Bank, 88 Ill. App. 190; Gould *v.* Watson, 80 Ill. App. 242; Horner *v.* Horner, 37 Ill. App. 199.

Kentucky. — Bethel *v.* Bethel, 6 Bush 65, 99 Am. Dec. 655; Penn *v.* Emerson, Ky. Dec. 292.

Louisiana. — Factors', etc., Ins. Co. *v.* New Harbor Protection Co., 39 La. Ann. 583, 2 So. 407.

Minnesota. — Day *v.* Mountin, 89 Minn. 297, 94 N. W. 887.

New Hampshire. — Gove *v.* Lyford, 44 N. H. 525.

New York. — Audubon *v.* Excelsior Ins. Co., 27 N. Y. 216; Aronson *v.* Sire, 85 N. Y. App. Div. 607, 83 N. Y. Suppl. 362; Hirshbach *v.* Ketchum, 79 N. Y. App. Div. 561, 80 N. Y. Suppl. 143; Heath *v.* New York Bldg. Loan Banking Co., 84 Hun 302, 32 N. Y. Suppl. 454; Rockwell *v.* Carpenter, 25 Hun 529; Dunscomb *v.* Poole, 41 Misc. 335, 84 N. Y. Suppl. 749; Jones *v.* Newton, 19 N. Y. Suppl. 786. But nevertheless it is within the discretion of the court, by resettling a judgment, to correct errors therein caused by inadvertence. Granite State Provident Assoc. *v.* McHugh, 88 Hun 617, 34 N. Y. Suppl. 341.

Ohio. — Greene *v.* Dodge, 3 Ohio 486.

Pennsylvania. — Paul *v.* Harden, 9 Serg. & R. 23.

Texas. — Chambers *v.* Hodges, 3 Tex. 517; Rogers *v.* East Line Lumber Co., 11 Tex. Civ. App. 108, 33 S. W. 312; Byars *v.* Justin, 2 Tex. App. Civ. Cas. § 686.

Virginia. — Cralle *v.* Cralle, 84 Va. 198, 6 S. E. 12.

Wisconsin. — Williams *v.* Hayes, 68 Wis. 248, 32 N. W. 44.

United States. — Elder *v.* Richmond Gold, etc., Min. Co., 58 Fed. 536, 7 C. C. A. 354; Morgan's Louisiana, etc., Steam-Ship Co. *v.* Texas Cent. R. Co., 32 Fed. 525.

Canada. — Port Elgin Public School Bd. *v.* Eby, 17 Ont. Pr. 58.

29. Heath *v.* New York Bldg. Loan Banking Co., 146 N. Y. 260, 40 N. E. 770; Smith *v.* Smith, 40 N. Y. App. Div. 251, 57 N. Y. Suppl. 1122; Stilwell *v.* Stilwell, 81 Hun (N. Y.) 392, 30 N. Y. Suppl. 961; Duryea

changed its mind,[30] or by decreeing additional relief to the successful party,[31] or releasing from the operation of the judgment persons or property originally affected by it,[32] or reviewing and readjudging the question of costs,[33] or adjudicating a matter which might have been, but was not, considered and determined on the trial.[34]

5. SUPPLYING OMISSIONS. If anything has been omitted from the judgment which is necessarily or properly a part of it, and which was intended and understood to be a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk, the omission may be supplied by an amendment after the term.[35] But on the other hand, if the proposed addition is a mere afterthought, and formed no part of the judgment as originally intedend

v. Fuechsel, 76 Hun (N. Y.) 404, 27 N. Y. Suppl. 1037.

Changing relief granted.—Where judgment has been rendered for the surrender to a party of certain securities, he cannot have it changed into a judgment for money damages. Dunscomb *v.* Poole, 41 Misc. (N. Y.) 335, 84 N. Y. Suppl. 749.

30. Pursley *v.* Wickle, 4 Ind. App. 382, 30 N. E. 1115; Griffith *v.* Maxwell, 19 Wash. 614, 54 Pac. 35. *Compare* Cooper *v.* Cooper, 51 N. Y. App. Div. 595, 64 N. Y. Suppl. 901.

During the term the court may reduce the amount of a judgment if satisfied that it is too large. Flickinger *v.* Omaha Bridge, etc., R. Co., 98 Iowa 358, 67 N. W. 372.

31. O'Brien *v.* O'Brien, 124 Cal. 422, 57 Pac. 225; Byrne *v.* Hoag, 116 Cal. 1, 47 Pac. 775; Fresno First Nat. Bank *v.* Dusy, 110 Cal. 69, 42 Pac. 476. And see Thompson *v.* Thompson, 73 Wis. 84, 40 N. W. 671.

Personal judgment in foreclosure suit.—It is error to amend a judgment by giving a personal judgment in addition to the decree of foreclosure originally pronounced. Kenyon *v.* Baker, 82 Iowa 724, 47 N. W. 977; Barnes *v.* Hale, 44 Nebr. 355, 62 N. W. 1063; Smith *v.* Fox, (Tex. 1890) 15 S. W. 196.

32. Johnson *v.* Foreman, 24 Ind. App. 93, 56 N. E. 254. But see Chase *v.* Whitten, 62 Minn. 498, 65 N. W. 84.

33. Manning *v.* Nelson, 107 Iowa 34, 77 N. W. 503; Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 217, 32 N. E. 851; People *v.* Buffalo, 9 Misc. (N. Y.) 403, 29 N. Y. Suppl. 1071; Hedgecoxe *v.* Conner, (Tex. Civ. App. 1897) 43 S. W. 322.

34. Parker *v.* Linden, 59 Hun (N. Y.) 359, 13 N. Y. Suppl. 95.

35. *Alabama.*— Gatchell *v.* Foster, 94 Ala. 622, 10 So. 434; Memphis, etc., R. Co. *v.* Whorley, 74 Ala. 264, failure of the clerk, in the entry of a final judgment against a garnishee, to recite the fact and amount of the original judgment against the debtor.

Arkansas.— A judgment in favor of A, administrator, may be amended so as to show that it was recovered by A as administrator of B, deceased. Crane *v.* Crane, 51 Ark. 287, 11 S. W. 1.

Colorado.— Hittson *v.* Davenport, 4 Colo. 169.

Georgia.— Woolfolk *v.* Gunn, 45 Ga. 117; Gaines *v.* Wedgeworth, 19 Ga. 31. And see Johnson *v.* Wright, 27 Ga. 555, as to supplying omission of a recital that a guardian *ad litem* was appointed at the proper term. A judgment is not rendered void by an omission to sign it, but the signature may be supplied by amendment. Pollard *v.* King, 62 Ga. 103.

Illinois.— Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414; Atkins *v.* Hinman, 7 Ill. 437.

Indiana.— Brittenham *v.* Robinson, 22 Ind. App. 536, 54 N. E. 133.

Iowa.— Thorp *v.* Platt, 34 Iowa 314; Buckwalter *v.* Craig, 24 Iowa 215; Lind *v.* Adams, 10 Iowa 398, 77 Am. Dec. 123, filling up blank left in the judgment record for the insertion of the amount of the judgment.

Kansas.— First State Bank *v.* Stevenson, 65 Kan. 816, 70 Pac. 875; Sumner *v.* Cook, 12 Kan. 162.

Kentucky.— Blair *v.* Russell, 14 Bush 412.

Maine.— Lewis *v.* Ross, 37 Me. 230, 59 Am. Dec. 49.

Massachusetts.— Balch *v.* Shaw, 7 Cush. 282.

Michigan.— Salter *v.* Sutherland, (1901) 85 N. W. 112; Hiawatha Tp. *v.* Schoolcraft County Cir. Judge, 90 Mich. 270, 51 N. W. 282 (omission of recital that the dismissal of a bill was "without prejudice"); Souvais *v.* Leavitt, 53 Mich. 577, 19 N. W. 261.

Missouri.— Evans *v.* Fisher, 26 Mo. App. 541.

Montana.— Kendall *v.* O'Neal, 16 Mont. 303, 40 Pac. 599.

Nebraska.— State *v.* Moran, 24 Nebr. 103, 38 N. W. 29.

New York.— Galligan *v.* Galligan, 73 N. Y. App. Div. 71, 76 N. Y. Suppl. 786; Matter of Kling, 60 N. Y. App. Div. 512, 69 N. Y. Suppl. 962; Guilfoyle *v.* Pierce, 9 N. Y. App. Div. 1, 40 N. Y. Suppl. 993; Beitz *v.* Fuller, 92 Hun 457, 36 N. Y. Suppl. 950; Martin *v.* Bronsveld, 9 Misc. 701, 29 N. Y. Suppl. 1119; Nealon *v.* Frisbie, 9 Misc. 660, 30 N. Y. Suppl. 551; Mooney *v.* Ryerson, 8 N. Y. Civ. Proc. 435; Fry *v.* Bennett, 9 Abb. Pr. 45; Daly *v.* Mathews, 20 How. Pr. 267; Newburgh Bank *v.* Seymour, 14 Johns. 219; Rogers *v.* Rogers, 1 Paige 188; Ray *v.* Connor, 3 Edw. 478; Gardner *v.* Dering, 2 Edw. 131; Farrington *v.* King, 1 Bradf. Surr. 182. The omission of the clerk's signature to a judgment filed and docketed may be supplied by amendment. Seaman *v.* Drake, 1 Cai. 9. Where the judgment fails to state, as intended by the court, that the dismissal of the

and pronounced, it cannot be brought in by way of amendment.[36] Where the clerk has made no entry of a judgment on the minutes of the court, a motion to amend by entering judgment *nunc pro tunc* cannot be granted because there is no judgment to amend.[37]

6. As to Parties — a. In General. A misnomer or false description of a party or wrong spelling of his name in the judgment may be amended so as to make the judgment correspond with the other parts of the record.[38] And the rule is the same where the entry in this respect is not sufficiently definite or precise.[39] It may even be permissible, where necessary to carry out the purpose of the judgment, to substitute one party for another as plaintiff or defendant.[40]

b. Adding or Striking Out Names. Where a judgment entry fails to cor-

complaint was without prejudice this statement may be supplied. Electrical Equipment Co. *v.* Feuerlicht, 90 N. Y. Suppl. 467. Where, in drawing up a decree for the appraisement and sale of trust property, the christian name of one of the appraisers was omitted, it may be supplied *nunc pro tunc*. De Caters *v.* Le Ray de Chaumont, 3 Paige 178. And an omission which occurred through the inadvertence of plaintiff's attorney may be supplied in this manner. Close *v.* Gillespey, 3 Johns. 526.

North Carolina.— Alexander *v.* Robinson, 85 N. C. 275; Freshwater *v.* Baker, 52 N. C. 404; Kirkland *v.* Mangum, 50 N. C. 313; Galloway *v.* McKeithen, 27 N. C. 12, 42 Am. Dec. 153.

Ohio.— Nye *v.* Stillwell, etc., Co., 12 Ohio Cir. Ct. 40, 5 Ohio Cir. Dec. 335.

Pennsylvania.— *In re* North Franklin Tp. Road, 8 Pa. Super. Ct. 358; Kittanning Ins. Co. *v.* Adams, 8 Pa. Cas. 337, 10 Atl. 895; Scranton *v.* Hull, 3 Lack. Leg. N. 99.

Texas.— Trammell *v.* Trammell, 25 Tex. Suppl. 261; Burnett *v.* State, 14 Tex. 455, 65 Am. Dec. 131; Doty *v.* Caldwell, (Civ. App. 1897) 38 S. W. 1025.

Washington.— Sivyer *v.* Lawyer, 25 Wash. 360, 65 Pac. 529; Cunningham *v.* Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

See 30 Cent. Dig. tit. "Judgment," § 599.

Where a foreclosure decree omits a fractional part of the land described in the mortgage and the findings, it may be supplied by amendment. Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321. *Compare* Young *v.* Sadler, 24 S. W. 877, 15 Ky. L. Rep. 531. But see on this point Ruff *v.* Elkin, 40 S. C. 69, 18 S. E. 220.

Day of sale.— A decree may be amended by supplying an omission to fix a day of sale. Gregory *v.* Perry, 71 S. C. 246, 50 S. E. 787.

36. *Alabama.*—Robertson *v.* King, 120 Ala. 459, 24 So. 929.

Georgia.— Branch *v.* Carswell, 66 Ga. 254.

Illinois.— Forquer *v.* Forquer, 19 Ill. 68.

Maine.— *In re* Limerick, 18 Me. 183.

Maryland.— Montgomery *v.* Murphy, 19 Md. 576, 81 Am. Dec. 652.

See 30 Cent. Dig. tit. "Judgment," § 599.

37. Brown *v.* Coward, 3 Hill (S. C.) 4.

38. *Alabama.*— Burdeshaw *v.* Comer, 108 Ala. 617, 18 So. 556; Brown *v.* Barnes, 93 Ala. 58, 9 So. 455; Smith *v.* Redus, 9 Ala. 99, 44 Am. Dec. 429; Snelgrove *v.* Mobile Branch Bank, 5 Ala. 295.

California.— Fay *v.* Stubenrauch, 141 Cal. 573, 75 Pac. 174; San Monica First Nat. Bank *v.* Kowalsky, (1893) 31 Pac. 1133.

Georgia.— Hicks *v.* Riley, 83 Ga. 332, 9 S. E. 771; Wright *v.* McBride, 42 Ga. 234.

Illinois.— Davenport *v.* Kirkland, 156 Ill. 169, 40 N. E. 304; Metz *v.* McAvoy Brewing Co., 98 Ill. App. 584.

Kansas.— Southern Kansas R. Co. *v.* Brown, 44 Kan. 681, 24 Pac. 1100.

Louisiana.— Shelly *v.* Dobbins, 31 La. Ann. 530.

Michigan.— Merrick *v.* Mayhue, 40 Mich. 196.

Montana.— Barber *v.* Briscoe, 9 Mont. 341, 23 Pac. 726.

New York.— Ganson *v.* Buffalo, 2 Abb. Dec. 236, 1 Keyes 454; People *v.* Tarbell, 17 How. Pr. 120; Marsh *v.* Berry, 7 Cow. 344.

North Carolina.— Patterson *v.* Walton, 119 N. C. 500, 26 S. E. 43.

Pennsylvania.— Prowattain *v.* McTier, 1 Phila. 105.

Texas.— Sugg *v.* Thornton, 73 Tex. 666, 9 S. W. 145.

United States.— U. S. Bank *v.* McKenney, 2 Fed. Cas. No. 926, 3 Cranch C. C. 173.

See 30 Cent. Dig. tit. "Judgment," § 601.

A judgment against a party sued by a wrong name and not appearing in the action is a nullity and incapable of amendment. Schoellkopf *v.* Ohmeis, 11 Misc. (N. Y.) 253, 32 N. Y. Suppl. 726; Albers *v.* Whitney, 1 Fed. Cas. No. 137, 1 Story 310.

39. Smith *v.* Redus, 9 Ala. 99, 44 Am. Dec. 429; Doty *v.* Rigour, 9 Ohio St. 519. And see Leviston *v.* Swan, 33 Cal. 480. *Compare* Levi *v.* Drudge, 139 Ind. 458, 39 N. E. 45.

40. Gay *v.* Cheney, 58 Ga. 304, holding that where by mistake judgment has been entered in favor of a former administratrix whose letters had abated by marriage, it is proper for the court to correct the mistake and amend the judgment, so as to make it read in favor of the administrator *de bonis non*, if he had been duly made a party and was the real plaintiff when the judgment was entered. Kees *v.* Maxim, 99 Mich. 493, 58 N. W. 473. But see Boland *v.* Benson, 54 Wis. 387, 11 N. W. 911.

Where judgment has been entered for the use of a third person, who disclaims the assignment to him, defendant may move the

respond with the record in consequence of a clerical error or inadvertence, which makes it include more or fewer parties than it should, it may be amended by striking out the names of those erroneously added[41] or inserting the names of those improperly omitted.[42] But this power of amendment cannot be employed to bring within the judgment new parties, who were not previously before the court,[43] or, by changing the parties, to change the substance and effect of the judgment.[44]

c. Personal or Representative Capacity. A judgment entered against a party in a representative capacity, when it should have been against him individually, or *vice versa*, or a personal judgment against an executor or administrator which should have been against the goods of the estate, may be amended by other parts of the record, when the mistake was clerical and not judicial.[45]

court to strike out the use. Baldwin *v.* Wright, 3 Gill (Md.) 241. And see *In re* New York, 90 N. Y. 390.

It is not permissible to amend a judgment against an executor, in favor of the guardian of four minor heirs, for an aggregate sum, by changing it into a separate judgment in favor of each heir for one fourth of the amount of the original judgment. Browder *v.* Faulkner, 82 Ala. 257, 3 So. 30.

A judgment entered against a firm cannot be amended so as to show that it was rendered not only against the firm, but also against a particular defendant as a member of the firm, where it does not appear in any way that the court ever intended to render judgment against defendant individually. Graham Paper Co. *v.* Wohlwend, 116 Iowa 358, 89 N. W. 1068.

41. *Alabama.*— Savage *v.* Walshe, 26 Ala. 619; English *v.* Brown, 9 Ala. 504; Hood *v.* Mobile Branch Bank, 9 Ala. 335.

California.— Alpers *v.* Schammel, 75 Cal. 590, 17 Pac. 708; Lewis *v.* Rigney, 21 Cal. 268; Mulliken *v.* Hull, 5 Cal. 245.

Georgia.— Bryan *v.* Averett, 21 Ga. 401, 68 Am. Dec. 464.

Idaho.— Gaffney *v.* Hoyt, 2 Ida. 199, 10 Pac. 34.

Illinois.— Heintz *v.* Pratt, 54 Ill. App. 616. But *compare* Baragwanath *v.* Wilson, 4 Ill. App. 80.

Indiana.— Lemen *v.* Young, 14 Ind. 3; McManus *v.* Richardson, 8 Blackf. 100.

Iowa.— Shelley *v.* Smith, 50 Iowa 543.

Kentucky.— Oldham *v.* Brannon, 2 Metc. 302.

Maryland.— Billingslea *v.* Smith, 77 Md. 504, 26 Atl. 1077.

Missouri.— Powell *v.* Banks, 146 Mo. 620, 48 S. W. 664; Neenan *v.* St. Joseph, 126 Mo. 89, 28 S. W. 963; State *v.* Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664; Weil *v.* Simmons, 66 Mo. 617; Turner *v.* Christy, 50 Mo. 145; Bergen *v.* Bolton, 10 Mo. 658; Hanly *v.* Dewes, 1 Mo. 16; California *v.* Harlan, 75 Mo. App. 506; L. H. Rumsey Mfg. Co. *v.* Baker, 35 Mo. App. 217.

New York.— Mingay *v.* Lackey, 142 N. Y. 449, 37 N. E. 471; Sherman *v.* Fream, 8 Abb. Pr. 33.

North Carolina.— People's Nat. Bank *v.* McArthur, 82 N. C. 107; Ashe *v.* Streator, 53 N. C. 256.

Ohio.— Hammer *v.* McConnel, 2 Ohio 31.

Texas.— Henderson *v.* Banks, 70 Tex. 398, 7 S. W. 815; Robinson *v.* Moore, 1 Tex. Civ. App. 93, 20 S. W. 994.

See 30 Cent. Dig. tit. "Judgment," § 602.

42. *Alabama.*— Russell *v.* Erwin, 41 Ala. 292; Parks *v.* Stonum, 8 Ala. 752.

Arkansas.— Shaul *v.* Duprey, 48 Ark. 331, 3 S. W. 366.

Colorado.— Breene *v.* Booth, 6 Colo. App. 140, 40 Pac. 193.

Florida.— Brett *v.* Ming, 1 Fla. 447.

Indiana.— Bales *v.* Brown, 57 Ind. 282; State *v.* Hood, 3 Blackf. 351. And see Brownlee *v.* Grant County, 101 Ind. 401.

Mississippi.— Forbes *v.* Navra, 63 Miss. 1.

New York.— Produce Bank *v.* Morton, 67 N. Y. 199; Jackson *v.* Young, 1 Cow. 131; Newburgh Bank *v.* Seymour, 14 Johns. 219.

Texas.— Whittaker *v.* Gee, 63 Tex. 435; Trammell *v.* Trammell, 25 Tex. Suppl. 261; Doty *v.* Caldwell, (Civ. App. 1897) 38 S. W. 1025.

See 30 Cent. Dig. tit. "Judgment," § 602.

43. *Alabama.*— Robertson *v.* King, 120 Ala. 459, 24 So. 929.

Delaware.— Brown *v.* Smyth, 4 Harr. 204.

Georgia.— Thompson *v.* American Mortg. Co., 122 Ga. 39, 49 S. E. 751; Bond *v.* Burns, 113 Ga. 82, 38 S. E. 405.

New York.— See Sprague *v.* Jones, 9 Paige 395.

Pennsylvania.— Young *v.* Young, 88 Pa. St. 422; Carskadden *v.* McGhee, 7 Watts & S. 140. And see Doerr *v.* Graybill, 24 Pa. Super. Ct. 321.

Texas.— Eck *v.* Warner, 25 Tex. Civ. App. 338, 60 S. W. 799.

44. Smith *v.* Fox, (Tex. App. 1890) 15 S. W. 196.

45. *Alabama.*— Garner *v.* Garner, 107 Ala. 242, 18 So. 169; Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Sellers *v.* Smith, 11 Ala. 264; Yarborough *v.* Scott, 5 Ala. 221.

California.— Bemmerly *v.* Woodward, 124 Cal. 568, 57 Pac. 561. But *compare* Leonis *v.* Leffingwell, 126 Cal. 369, 58 Pac. 940.

Florida.— Adams *v.* Re Qua, 22 Fla. 250, 1 Am. St. Rep. 191.

Georgia.— Leonard *v.* Collier, 53 Ga. 387. But see Lovelace *v.* Smith, 39 Ga. 130.

Kentucky.— Speed *v.* Hann, 1 T. B. Mon. 16, 15 Am. Dec. 78.

Maine.— West *v.* Jordan, 62 Me. 484.

7. PROCESS, SERVICE, AND APPEARANCE — a. In General. An erroneous recital of the judgment or of another part of the record in regard to the issuance or service of process may be amended to make it conform to the actual facts, or to make it more explicit.[46] But when the fault is not in the statements or recitals of the record, but in the writ or process itself, this cannot be amended, being a jurisdictional defect.[47]

b. Return or Proof of Service. When the court actually acquired jurisdiction of defendant, but the return of the officer or other proof of service fails to show that fact, or is otherwise irregular or defective, it may be amended after judgment.[48] But the officer's return cannot be so amended as to render the judgment erroneous or cause its reversal.[49]

Massachusetts.— Atkins *v.* Sawyer, 1 Pick. 351, 11 Am. Dec. 188.

Pennsylvania.— Aycinena *v.* Peries, 2 Pa. St. 286.

Tennessee.— Conn *v.* Scruggs, 5 Baxt. 567.

Texas.— Gilbert *v.* Hancock, 2 Tex. App. Civ. Cas. § 379. But *compare* Sass *v.* Hirschfeld, 23 Tex. Civ. App. 1, 56 S. W. 602.

Virginia.— Snead *v.* Coleman, 7 Gratt. 300, 56 Am. Dec. 112.

Wisconsin.— Wyman *v.* Buckstaff, 24 Wis. 477.

Canada.— Mack *v.* Mack, 27 Nova Scotia 458.

See 30 Cent. Dig. tit. "Judgment," § 603.

46. *Alabama.*— Seymour *v.* Thomas Harrow Co., 81 Ala. 250, 1 So. 45.

Illinois.— Lyon *v.* Boilvin, 7 Ill. 629.

Maine.— Smith *v.* Wood, 48 Me. 252.

Massachusetts.— Merrill *v.* Kaulback, 158 Mass. 328, 33 N. E. 515.

North Dakota.— Mills *v.* Howland, 2 N. D. 30, 49 N. W. 413.

See 30 Cent. Dig. tit. "Judgment," § 604.

Amendment of the entry of appearances see Tilden *v.* Johnson, 6 Cush. (Mass.) 354; Smith *v.* Minor, 1 N. J. L. 416.

Amendment of affidavits as to publication of notice see Doe *v.* Scoggin, 2 Ind. 208; Long *v.* Fife, 45 Kan. 271, 25 Pac. 594, 23 Am. St. Rep. 724; Harrison *v.* Beard, 30 Kan. 532, 2 Pac. 632; Foreman *v.* Carter, 9 Kan. 674; Voelz *v.* Voelz, 80 Wis. 504, 50 N. W. 398.

47. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; Bell *v.* Good, 19 N. Y. Suppl. 693, 22 N. Y. Civ. Proc. 317; James *v.* Kirkpatrick, 5 How. Pr. (N. Y.) 241.

Names of parties omitted from summons.— In a partition suit, where the names of certain defendants were inadvertently omitted from the copy summons filed, it was held not conclusive that they had not been made parties, and as it appeared that they had actually been parties, it was considered that the summons might be amended after judgment and sale. Van Wyck *v.* Hardy, 11 Abb. Pr. (N. Y.) 473.

Blank summons.— Where the summons as originally issued contained blanks, but defendant accepted service on it and suffered judgment by default, it was held that plaintiff might have leave to fill up the blanks *nunc pro tunc*. Wicker *v.* Pope, 6 Rich. (S. C.) 366.

Service by publication.— In an action commenced by service by publication, the steps prescribed up to the point where the service is complete by publication and mailing are jurisdictional facts. After service is complete the court can amend whatever is irregular; but the proceedings tending to confer jurisdiction cannot be amended. Hallett *v.* Righters, 13 How. Pr. (N. Y.) 43.

48. *Alabama.*— Moore *v.* Horn, 5 Ala. 234; Hefflin *v.* McMinn, 2 Stew. 492, 20 Am. Dec. 58.

Arkansas.— Ross *v.* Ford, 2 Ark. 26.

California.— Hibernia Sav., etc., Soc. *v.* Matthai, 116 Cal. 424, 48 Pac. 370; Herman *v.* Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145; Allison *v.* Thomas, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89.

Colorado.— Seeley *v.* Taylor, 17 Colo. 70, 28 Pac. 461, 723.

Delaware.—Wilmington *v.* Kearns, 1 Houst. 362.

Illinois.— National Ins. Co. *v.* Chamber of Commerce, 69 Ill. 22; Smith *v.* Clinton Bridge Co., 13 Ill. App. 572.

Indiana.— De Armond *v.* Adams, 25 Ind. 455.

Kansas.— Hackett *v.* Lathrop, 36 Kan. 661, 14 Pac. 220; Foreman *v.* Carter, 9 Kan. 674.

Kentucky.— Irvine *v.* Scobee, 5 Litt. 70.

Missouri.— Wellshear *v.* Kelley, 69 Mo. 343; Stewart *v.* Stringer, 45 Mo. 113.

New York.— Fawcett *v.* Vary, 59 N. Y. 597; Jones *v.* U. S. Slate Co., 16 How. Pr. 129.

Virginia.— Stotz *v.* Collins, 83 Va. 423, 2 S. E. 737.

Washington.— Cunningham *v.* Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

West Virginia.— Anderson *v.* Doolittle, 38 W. Va. 633, 18 S. E. 726.

Wisconsin.— Wait *v.* Sherman, 61 Wis. 119, 20 N. W. 653; Moyer *v.* Cook, 12 Wis. 335. But see Rehmstedt, *v.* Bricoe, 55 Wis. 616, 13 N. W. 687; Hall *v.* Graham, 49 Wis. 553, 5 N. W. 943.

See 30 Cent. Dig. tit. "Judgment," § 605.

But see Rochelle *v.* Cox, 5 La. 283; Hughes *v.* Lapice, 5 Sm. & M. (Miss.) 451; Dorsey *v.* Peirce, 5 How. (Miss.) 173.

49. Chicago Planing Mill Co. *v.* Merchants' Nat. Bank, 97 Ill. 294; White River Bank *v.* Downer, 29 Vt. 332.

8. Pleadings and Other Proceedings. It is permissible by amendment after judgment to cure a merely formal defect in the pleadings,[50] or other proceedings in the action,[51] but not a defect of substance or one affecting the jurisdiction.[52]

9. Amount and Character of Relief — a. In General. In respect to the extent and character of the relief granted, as in other matters, if the entry of judgment does not correspond with the judgment actually intended and pronounced by the court, it may be amended by correcting any clerical mistake, or supplying matters inadvertently omitted, or striking out clauses erroneously inserted,[53] or by making such changes as are necessary to make it conform to the pleadings[54] or the verdict.[55] But there is no power to amend by correcting a judicial mistake or error of law,[56] or by giving relief which was not within the contemplation of the parties or the court at the time the judgment was rendered.[57] An amendment in the provision of a judgment designating the medium of payment may be allowed in

50. *Alabama.*— Price *v.* Thomason, 11 Ala. 875.

Iowa.— O'Connell *v.* Cotter, 44 Iowa 48.

Kansas.— Sanford *v.* Willetts, 29 Kan. 647.

Missouri.— Lamb *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 489.

New York.— Martin *v.* Lott, 4 Abb. Pr. 365.

Pennsylvania.— Wampler *v.* Shissler, 1 Watts & S. 365.

Texas.— San Antonio Nat. Bank *v.* McLane, 96 Tex. 48, 70 S. W. 210.

Wisconsin.— Flanders *v.* Cottrell, 36 Wis. 564; Hodge *v.* Sawyer, 34 Wis. 397; Kenosha City Bank *v.* McClellan, 21 Wis. 112.

See 30 Cent. Dig. tit. "Judgment," § 606.

Form of action.— If plaintiff sues in trover when he might have brought assumpsit, he may amend after judgment and even after appeal. Peaslee *v.* Dudley, 63 N. H. 220.

A statutory proceeding to bind a partner by a judgment against his copartner is in the nature of an action on a judgment, and neither the pleadings nor the judgment in the original action can be amended. Waterman *v.* Lipman, 67 Cal. 26, 6 Pac. 875.

51. Dunwell *v.* Warden, 6 Minn. 287 (defective affidavit of no answer); Brandt *v.* Albers, 6 Nebr. 504 (change in title of case on substitution of plaintiffs); Riggs *v.* Waydell, 17 Hun (N. Y.) 515 (amendment in offer of judgment); Lewis *v.* Jones, 13 Abb. Pr. (N. Y.) 427 (error of entering a judgment in an action tried by the court, without the filing of a decision in writing, may be cured by allowing one to be made and filed *nunc pro tunc*); Wright *v.* Williams, 2 Wend. (N. Y.) 632 (failure to award writ of inquiry); Seeber *v.* Yates, 6 Cow. (N. Y.) 40 (omission to enter *nolle prosequi* as to counts abandoned).

52. See Varnum *v.* Bissell. 14 Pick. (Mass.) 191; Sydnor *v.* Burke, 4 Rand. (Va.) 161; Anderson *v.* Doolittle, 38 W. Va. 629, 18 S. E. 724; Smith *v.* Jackson, 22 Fed. Cas. No. 13,065, 1 Paine 486.

53. *Alabama.*— *Ex p.* Schmidt, 62 Ala. 252; Wainwright *v.* Sanders, 20 Ala. 602.

Connecticut.— Bradley *v.* Baldwin, 5 Conn. 288.

Iowa.— Hartley *v.* Bartruff, 112 Iowa 592, 84 N. W. 704; Porter *v.* McBride, 44 Iowa 479.

Kentucky.— Young *v.* Sadler, 24 S. W. 877, 15 Ky. L. Rep. 531; Brown *v.* U. S. Home, etc., Assoc., 13 S. W. 1085, 12 Ky. L. Rep. 283.

Minnesota.— Chase *v.* Whitten, 62 Minn. 498, 65 N. W. 84.

Nebraska.— Wise *v.* Frey, 9 Nebr. 217, 2 N. W. 375.

New York.— *In re* Robertson, 165 N. Y. 675, 59 N. E. 1129; New York Ice Co. *v.* Northwestern Ins. Co., 23 N. Y. 357; Swift *v.* Swift, 88 Hun 551, 34 N. Y. Suppl. 852; Loeschigk *v.* Addison, 7 Rob. 506; New York *v.* Lyons, 1 Daly 296; Lee *v.* Curtiss, 17 Johns. 86.

North Dakota.— Tyler *v.* Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660.

See 30 Cent. Dig. tit. "Judgment," § 607.

54. Baker *v.* Allen, 92 Ind. 101; Hurley *v.* Dubuque Gaslight, etc., Co., 8 Iowa 274; Binion *v.* Woolery, 78 S. W. 898, 25 Ky. L. Rep. 1802; Vandenburgh *v.* New York, 57 N. Y. Super. Ct. 285, 7 N. Y. Suppl. 675.

55. Taylor *v.* Taylor, 7 N. Y. Suppl. 880.

56. Fresno First Nat. Bank *v.* Dusy, 110 Cal. 69, 42 Pac. 476; Egan *v.* Egan, 90 Cal. 15, 27 Pac. 22; Troutman *v.* Hills, 5 Ill. App. 396; Conway *v.* Winter, 9 La. 271; Nihan *v.* Knight, 56 N. H. 167.

57. *Georgia.*— McDaniel *v.* Mitchell, 95 Ga. 40, 21 S. E. 993.

Indiana.— State *v.* Pierce, 22 Ind. 110; Nixon *v.* Nichols, 10 Ind. App. 1, 37 N. E. 421.

Iowa.— Kenyon *v.* Baker, 82 Iowa 724, 47 N. W. 977.

Montana.— Finlen *v.* Heinze, 28 Mont. 548, 73 Pac. 123.

Nebraska.— Barnes *v.* Hale, 44 Nebr. 355, 62 N. W. 1063.

New York.— Wingrove *v.* German Sav. Bank, 2 N. Y. App. Div. 479, 37 N. Y. Suppl. 1092; Prentiss *v.* Machado, 2 Rob. 660.

Texas.— Holland *v.* Preston, 12 Tex. Civ. App. 585, 34 S. W. 975; Adams *v.* Duggan, 1 Tex. App. Civ. Cas. § 1268.

United States.— Davis *v.* Duncan, 19 Fed. 477; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,269, 1 Woodb. & M. 61.

See 30 Cent. Dig. tit. "Judgment," § 607.

a proper case.[58] It is within the power of a court within the term at which a judgment is entered against an administrator to strike therefrom an award of execution.[59]

b. Amount of Recovery. If, in consequence of a clerical error or miscalculation on the part of the clerk or the court, the amount of the recovery in a judgment is stated at a wrong sum, the entry may be amended to conform to the truth.[60] So an amendment may be made where the amount of the judgment is in excess of that claimed by plaintiff in his pleadings,[61] or greater than the sum found by the verdict or ordered by the court,[62] or larger than the amount which limits the jurisdiction of the court,[63] or excessive in consequence of the failure to allow proper credits,[64] although not where the excess of the judgment is due to an error of law, as where it is greater than the evidence will support,[65] unless in that

58. Betts *v.* Butler, 1 Ida. 185; Miller *v.* Tyler, 58 N. Y. 477; Cheang-Kee *v.* U. S., 3 Wall. (U. S.) 320, 18 L. ed. 72.

59. McLaughlin *v.* Chicago, etc., R. Co., 115 Ill. App. 262.

60. *Alabama.*— Sherry *v.* Priest, 57 Ala. 410; Modawell *v.* Hudson, 57 Ala. 75; Drane *v.* King, 21 Ala. 556; Burt *v.* Hughes, 11 Ala. 571; Smith *v.* Robinson, 11 Ala. 270.

Arkansas.— Arrington *v.* Conrey, 17 Ark. 100.

Delaware.— State *v.* Walker, 3 Harr. 502.

Indiana.— Daniels *v.* McGinnis, 97 Ind. 549; Mitchell *v.* Lincoln, 78 Ind. 531; Miller *v.* Royce, 60 Ind. 189; Latta *v.* Griffith, 57 Ind. 329; Sherman *v.* Nixon, 37 Ind. 153.

Kansas.— Redinger *v.* Jones, 68 Kan. 627, 75 Pac. 997.

Kentucky.— Emison *v.* Walker, 31 S. W. 461, 17 Ky. L. Rep. 238.

Louisiana.— Goldman *v.* Goldman, 47 La. Ann. 1463, 17 So. 881; Hale *v.* New Orleans, 18 La. Ann. 353.

Maine.— White *v.* Blake, 74 Me. 489.

Massachusetts.— Bacon *v.* Lincoln, 2 Cush. 124.

Michigan.— Lyman *v.* Becannon, 29 Mich. 466; Emery *v.* Whitwell, 6 Mich. 474.

Minnesota.— Clements *v.* Utley, 91 Minn. 352, 98 N. W. 188; Knappen *v.* Freeman, 47 Minn. 491, 50 N. W. 533.

New York.— Robert *v.* Buckley, 145 N. Y. 215, 39 N. E. 966; Greer *v.* New York, 4 Rob. 675; Hunt *v.* Grant, 19 Wend. 90.

North Carolina.— Wall *v.* Covington, 83 N. C. 144.

Ohio.— Kellogg *v.* Churchill, 2 Ohio Dec. (Reprint) 4, 1 West. L. Month. 45.

Pennsylvania.— Smith *v.* Hood, 25 Pa. St. 218, 64 Am. Dec. 692.

Rhode Island.— Trott *v.* Wheaton, 5 R. I. 353. But see Richardson *v.* Hunt, 7 R. I. 543.

South Carolina.— Patton *v.* Massey, 2 Hill 475.

Texas.— De Hymel *v.* Scottish-American Mortg. Co., 80 Tex. 493, 16 S. W. 311.

West Virginia.— Triplett *v.* Lake, 43 W. Va. 428, 27 S. E. 363.

United States.— U. S. *v.* Fearson, 25 Fed. Cas. No. 15,081, 5 Cranch C. C. 95.

See 30 Cent. Dig. tit. "Judgment," § 610.

Judicial errors as to the amount of recovery cannot be amended. Pursley *v.* Wickle, 4 Ind. App. 382, 30 N. E. 1115; Missouri Pac. R. Co. *v.* Haynes, 82 Tex. 448, 18 S. W. 605. And see Evans *v.* Fisher, 26 Mo. App. 541; Williams *v.* Tenpenny, 11 Humphr. (Tenn.) 176.

Mistake of parties in calculating amount.— When the error complained of in a consent decree is the insertion of a particular amount as the result of a calculation by one of the parties upon a basis which other parties regard as not in accord with the understanding of the parties, such error is not a clerical error, but a mistake of parties, and can be corrected only by original bill. Morris *v.* Peyton, 29 W. Va. 201, 11 S. E. 954.

61. *Alabama.*— Smith *v.* Robinson, 11 Ala. 270; Dunn *v.* Tillotson, 9 Port. 272.

Illinois.— Elston *v.* Dewes, 28 Ill. 436.

Indiana.— Nelson *v.* Cottingham, 152 Ind. 135, 52 N. E. 702.

Kansas.— Clevenger *v.* Hansen, 44 Kan. 182, 24 Pac. 61.

Kentucky.— Holeman *v.* Coleman, 1 A. K. Marsh. 296.

Louisiana.— McClellan Dry-Dock Co. *v.* Farmers' Alliance Steam-Boat Line, 43 La. Ann. 258, 9 So. 630.

Missouri.— Elliott *v.* Buffington, 149 Mo. 663, 51 S. W. 408.

New Hampshire.— Leighton *v.* Lord, 29 N. H. 237.

Texas.— Wheeler *v.* Roberts, 2 Tex. App. Civ. Cas. § 127.

See 30 Cent. Dig. tit. "Judgment," § 610.

A judgment against a garnishee may be amended where by mistake it is given for a greater sum than that due plaintiff. Alleman *v.* Kight, 19 W. Va. 201.

62. Alpers *v.* Schammel, 75 Cal. 590, 17 Pac. 708; Kindel *v.* Beck, etc., Lith. Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Quigley *v.* Birdseye, 11 Mont. 439, 28 Pac. 741; Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. 966.

63. Stinerville, etc., Stone Co. *v.* White, 25 Misc. (N. Y.) 314, 54 N. Y. Suppl. 577.

64. Goldstein *v.* Stern, 9 N. Y. Suppl. 274. But *compare* Moss *v.* Rowland, 1 Duv. (Ky.) 321; Gunn *v.* Turner, 21 Gratt. (Va.) 382.

65. Boos *v.* State, 11 Ind. App. 257, 39

case plaintiff remits the excess.[66] A similar rule applies where through inadvertence or mistake the judgment is entered for too small an amount,[67] as where it is for less than appears on the face of the obligation in suit,[68] or less than the amount admitted to be due by defendant's pleadings.[69] And an amendment is proper where the clerk in entering the judgment has omitted to insert the sum recovered.[70]

c. Error as to Interest. A clerical error in the calculation of interest or in fixing the date from which interest shall run may be corrected by an amendment.[71]

d. Provisions as to Costs. A clerical error or omission in regard to the costs to be allowed in an action or included in the judgment may be corrected on motion.[72] But it is not permissible, by an amendment after the term, to add to the judgment costs not originally allowed nor within the purview of the original judgment,[73] nor to reconsider the allowance of costs and shift them from one party to the other.[74]

N. E. 197; McConkey *v.* Lamb, 71 Iowa 636, 33 N. W. 146. But see Doty *v.* Rigour, 9 Ohio St. 519.

66. Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112; Homans *v.* Tyng, 56 N. Y. App. Div. 383, 67 N. Y. Suppl. 792; Pennsylvania F. Ins. Co. *v.* Wagley, (Tex. Civ. App. 1896) 36 S. W. 997. And see Hardy *v.* Cathcart, 1 Marsh. 180.

67. O'Conner *v.* Mullen, 11 Ill. 57; Sherman *v.* Nixon, 37 Ind. 153; Smith *v.* Myers, 5 Blackf. (Ind.) 223; Mechanics' Bank *v.* Minthorne, 19 Johns. (N. Y.) 244; Lowry *v.* Catlin, 2 Vt. 365.

Amendment increasing demand.— Where judgment by default has been properly entered, the court cannot on mere motion vacate the judgment at a subsequent term, allow an amendment increasing the *ad damnum*, and enter a new judgment for the larger sum. Radclyffe *v.* Barton, 154 Mass. 157, 28 N. E. 148.

68. Overend *v.* Robinson, 10 La. Ann. 728; Brumfield *v.* Mortee, 15 La. 116; Smith *v.* Hood, 25 Pa. St. 218, 64 Am. Dec. 692.

69. Brown *v.* Lawler, 21 Minn. 327; Hodgins *v.* Heaney, 15 Minn. 185.

70. Wilkerson *v.* Goldthwaite, 1 Stew. & P. (Ala.) 159; Miller *v.* Royce, 60 Ind. 189; Farris *v.* Kilpatrick, 1 Humphr. (Tenn.) 379; Moseley *v.* Brigham, 12 Tex. 104.

71. *Alabama.*— Hastings *v.* Alabama State Land Co., 124 Ala. 608, 26 So. 881; Spence *v.* Rutledge, 11 Ala. 590.

Indiana.— Conway *v.* Day, 79 Ind. 318; Hughes *v.* Hinds, 69 Ind. 93.

Kentucky.— Dils *v.* Hatcher, 76 S. W. 514, 25 Ky. L. Rep. 891.

Louisiana.— Mullan *v.* Creditors, 39 La. Ann. 397, 2 So. 45.

North Carolina.— Griffin *v.* Hinson, 51 N. C. 154. But *compare* Garrett *v.* Love, 90 N. C. 368; Baker *v.* Moore, 4 N. C. 441.

Pennsylvania.— West Chester, etc., Plank Road Co. *v.* Chester County, 21 Pa. Co. Ct. 86.

South Carolina.— Patton *v.* Massey, 2 Hill 475.

Texas.— McCorkle *v.* Earle, 20 Tex. 231; Morris *v.* Coleman County, (Civ. App. 1896) 35 S. W. 29.

Virginia.— Com. *v.* Winston, 5 Rand. 546. *Compare* Brewer *v.* Hastie, 3 Call 22; Deans *v.* Scriba, 2 Call 415.

West Virginia.—Triplett *v.* Lake, 43 W. Va. 428, 27 S. E. 363.

United States.— Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 84 Fed. 744.

See 30 Cent. Dig. tit. "Judgment," § 611.

But see Wilson *v.* Boughton, 50 Mo. 17; Bullard *v.* Sherwood, 85 N. Y. 253.

72. *Arkansas.*— England *v.* Files, 45 Ark. 530.

California.— Janes *v.* Bullard, 107 Cal. 130, 40 Pac. 108.

Georgia.— McLendon *v.* Frost, 59 Ga. 350.

Maine.— Thomas *v.* Thomas, 98 Me. 184, 56 Atl. 651.

New Jersey.— Blackwell *v.* Leslie, 4 N. J. L. 112.

New York.— Martine *v.* Huylar, 12 N. Y. Suppl. 66.

Rhode Island.— Bishop *v.* Aborn, 16 R. I. 568, 18 Atl. 203.

South Carolina.— O'Driscoll *v.* McBurney, 2 Nott & M. 58.

See 30 Cent. Dig. tit. "Judgment," § 612.

73. *Mississippi.*— Shackelford *v.* Levy, 63 Miss. 125.

Missouri.— Jackson *v.* St. Louis, etc., R. Co., 89 Mo. 104, 1 S. W. 224.

New Jersey.— Brookfield *v.* Morse, 12 N. J. L. 331.

New York.— Hotaling *v.* Marsh, 14 Abb. Pr. 161; Shepard *v.* Hoit, 6 Hill 395. But see Gasz *v.* Strick, 3 N. Y. Suppl. 830, holding that where a party is entitled to costs as of course a correction allowing costs may be made, although the judgment has been vacated and a new trial awarded.

Pennsylvania.— Barker *v.* Johnson, 2 Pa. Co. Ct. 414. But *compare* Simpson's Appeal, 1 Mona. 202.

Washington.— State *v.* Langhorne, 12 Wash. 588, 41 Pac. 917.

See 30 Cent. Dig. tit. "Judgment," § 612.

But see Lampton *v.* Nichols, 1 Cinc. Super. Ct. (Ohio) 166.

74. *Alabama.*— Harris *v.* Billingsley, 18 Ala. 438.

California.— Wickersham *v.* Crittenden, 103 Cal. 582, 37 Pac. 513.

C. Proceedings and Relief — 1. Amendment on Court's Own Motion. The court which rendered a judgment may, on its own motion and without application by a party, amend it by the correction of a clerical error or mistake, more especially during the same term;[75] but it cannot do so where the proposed amendment involves a review of the judgment or a substantial modification of it.[76] The court has power, after announcing a judgment, to amend the order before it is signed to conform to the facts.[77]

2. Application to Court — a. Nature and Form of Proceeding. A judgment once entered must be corrected, if irregular or erroneous, by some proper proceeding for that purpose; it cannot be merely disregarded and the proper judgment entered anew.[78] During the term at which the judgment was rendered, the correction may be made by an order of the court upon a mere suggestion of the error.[79] But after the term the amendment can only be made upon the presentation of a formal petition or motion,[80] entitled and filed in the same action or proceeding,[81] and not by an independent suit for that purpose,[82] or by a pleading in the nature of a complaint.[83]

b. Form and Requisites of Application. A motion for the amendment of a judgment should set forth clearly and specifically the nature of the errors or

Indiana.—Spence *v.* Owen County, 117 Ind. 573, 18 N. E. 513.

Michigan.— Beem *v.* Newaygo Cir. Judge, 97 Mich. 491, 56 N. W. 760; Kraft *v.* Raths, 45 Mich. 20, 7 N. W. 232.

Montana.— State *v.* Case, 14 Mont. 520, 37 Pac. 95.

Wisconsin.— Williams *v.* Williams, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708; Boland *v.* Benson, 54 Wis. 387, 11 N. W. 911.

See 30 Cent. Dig. tit. "Judgment," § 612.

75. Ryon *v.* Thomas, 104 Ind. 59, 3 N. E. 653; McConnell *v.* Avey, 117 Iowa 282, 90 N. W. 604; Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622; Aycock *v.* Kimbrough, 71 Tex. 330, 12 S. W. 71, 10 Am. St. Rep. 745; Hooker *v.* Williamson, 60 Tex. 524; Barton *v.* American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210. But see Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70.

76. State *v.* Judge Civ. Dist. Ct., 43 La. Ann. 1169, 10 So. 294; Miller *v.* Chandler, 29 La. Ann. 88; Ross *v.* Ross, 83 Mo. 100.

77. Harmon *v.* Thompson, 84 S. W. 569, 27 Ky. L. Rep. 181.

78. Nuckolls *v.* Irwin, 2 Nebr. 60.

79. Weed *v.* Weed, 25 Conn. 337.

80. *Arkansas.*— Arrington *v.* Conrey, 17 Ark. 100.

Connecticut.— Weed *v.* Weed, 25 Conn. 337.

Georgia.— Fischesser *v.* Thompson, 45 Ga. 459.

Illinois.— Forquer *v.* Forquer, 19 Ill. 68. But a decree of a former term cannot be reviewed and set aside on a mere motion. Jacquemart *v.* Erb, 53 Ill. 291.

Indiana.— Nelson *v.* Cottingham, 152 Ind. 135, 52 N. E. 702; Baum *v.* Thoms, 150 Ind. 378, 50 N. E. 357, 65 Am. St. Rep. 368; Morrow *v.* Geeting, 23 Ind. App. 494, 55 N. E. 787.

Iowa.— Stockdale *v.* Johnson, 14 Iowa 178.

Kansas.— Small *v.* Douthitt, 1 Kan. 335.

Maine.— *In re* Limerick, 18 Me. 183.

Massachusetts.— Rugg *v.* Parker, 7 Gray 172.

North Carolina.— State *v.* King, 27 N. C. 203.

Contra.— See Southall *v.* Exchange Bank, 12 Gratt. (Va.) 312.

See 30 Cent. Dig. tit. "Judgment," § 614.

Motion to strike out.— The proper remedy to correct a judgment which contains an unauthorized provision is a motion to strike out. Sabater *v.* Sabater, 7 N. Y. App. Div. 70, 39 N. Y. Suppl. 958.

Appeal.— If the judgment is objectionable in form, the remedy is by motion to correct it in the court below, and an appeal may be taken from a denial of the motion; but an appeal without making such motion is not proper. Simmons *v.* Craig, 137 N. Y. 550, 33 N. E. 76.

Waiver of right to apply.— A defendant in a foreclosure proceeding who desires the correction of a mistake in the record entry of the decree does not waive his right to apply therefor by applying for a stay of the order of sale. Hoagland *v.* Way, 35 Nebr. 387, 53 N. W. 207.

81. Clark *v.* Digges, 5 Gill (Md.) 109; Burdell *v.* Reeder, 2 Cinc. Super. Ct. (Ohio) 94, both holding that a motion to amend a judgment cannot be allowed in an action of scire facias or other proceeding to revive the judgment, but must be made in the original cause.

Time for filing.— A motion to correct a judgment by a *nunc pro tunc* entry need not be filed before the notice of the motion is served on the adverse party, or at any specified time preceding the date named in the notice for making the motion. Indianapolis, etc., Rapid Transit Co. *v.* Andis, 33 Ind. App. 625, 72 N. E. 145.

82. Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202; Colburn *v.* Woodworth, 31 Barb. (N. Y.) 381.

83. Urbanski *v.* Manus, 87 Ind. 585; Cravens *v.* Chambers, 69 Ind. 84; Latta *v.*

omissions complained of, the terms of the correction desired, and the reasons for invoking the court's action.[84]

c. Jurisdiction. A motion to amend a judgment cannot be entertained by another court or another judge than the one rendering the judgment.[85] But the jurisdiction of the proper court to amend the judgment is not affected by defendant's absence from the state, jurisdiction of his person having attached in the action,[86] or by the fact that similar relief has already been granted to a joint party.[87]

d. Time For Application. An application for the amendment of a judgment must be made within a reasonable time; if unduly delayed, it will be denied on the ground of laches, especially where rights have vested under the judgment which would be disturbed by its alteration.[88] At the same time the inherent power of a court to correct or amend its own records in the interests of justice is not lost by the mere lapse of time,[89] except where the matter is regulated by stat-

Griffith, 57 Ind. 329; Blizzard *v.* Blizzard, 40 Ind. 344; Dunham *v.* Tappan, 31 Ind. 173; Goodwine *v.* Hendrick, 29 Ind. 383. *Compare* Gray *v.* Robinson, 90 Ind. 527.

84. Dunham *v.* Roberts, 28 Ala. 286; Scotton *v.* Mann, 89 Ind. 404; Bole *v.* Newberger, 81 Ind. 274; Berror *v.* Carrier, 34 Ind. App. 353, 73 N. E. 123; Morrow *v.* Geeting, 23 Ind. App. 494, 55 N. E. 787; Slingluff *v.* Gainer, 49 W. Va. 7, 37 S. E. 771.

85. *Kansas.*—Holdredge *v.* McCombs, (1901) 66 Pac. 1048.

New York.— Wells *v.* Vanderwerker, 45 N. Y. App. Div. 155, 60 N. Y. Suppl. 1089; Oakley *v.* Cokalete, 6 N. Y. App. Div. 229, 39 N. Y. Suppl. 1001; New York Security, etc., Co. *v.* Lipman, 83 Hun 569, 32 N. Y. Suppl. 65.

North Carolina.— Johnson *v.* Marcom, 121 N. C. 83, 28 S. E. 58; Adams *v.* Reeves, 76 N. C. 412.

South Carolina.— Hughes *v.* Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2.

United States.— King *v.* French, 14 Fed. Cas. No. 7,793, 2 Sawy. 441.

See 30 Cent. Dig. tit. "Judgment," § 618.

In Alabama under the act establishing courts of probate, the circuit court has power to make amendments *nunc pro tunc* in the judgments of the county court, in causes transferred to the former court under that act. Glass *v.* Glass, 24 Ala. 468.

Successive judges.— Where two judges preside successively at the same term, the latter may amend or modify an order of his predecessor. State *v.* Womack, 17 Tex. 237.

General and special term.— Concerning the power of amendment as between the general and special term of the supreme court in New York see McLean *v.* Stewart, 14 Hun (N. Y.) 472; Sheldon *v.* Williams, 52 Barb. (N. Y.) 183; Davis *v.* Duffie, 8 Bosw. (N. Y.) 691; De Agreda *v.* Mantel, 1 Abb. Pr. (N. Y.) 130; Butler *v.* Niles, 28 How. Pr. (N. Y.) 181; Geller *v.* Hoyt, 7 How. Pr. (N. Y.) 265.

86. Hall *v.* Williams, 10 Me. 278.

87. Healy *v.* Just, 53 Miss. 547.

88. *Illinois.*— Elston *v.* Dewes, 28 Ill. 436.

Indiana.— Brittenham *v.* Robinson, 22 Ind. App. 536, 54 N. E. 133, holding that plaintiff's delay for two years to apply for the correction of a clerical omission in a judgment is no ground for denying the application, where it was made upon the discovery of the omission.

Kentucky.— Bonar *v.* Gosney, 30 S. W. 602, 17 Ky. L. Rep. 90.

Massachusetts.— Snell *v.* Dwight, 121 Mass. 348.

Minnesota.— Nell *v.* Dayton, 47 Minn. 257, 49 N. W. 981.

New York.— Hirshbach *v.* Ketchum, 79 N. Y. App. Div. 561, 80 N. Y. Suppl. 143; Gall *v.* Gall, 58 N. Y. App. Div. 97, 68 N. Y. Suppl. 649; Grant *v.* Griswold, 21 Hun 509; Rogers *v.* Rogers, 1 Paige 188.

Ohio.— Fowble *v.* Rayberg, 4 Ohio 45.

Pennsylvania.— Ullery *v.* Clark, 18 Pa. St. 148.

Texas.— Williamson *v.* Wright, 1 Tex. Unrep. Cas. 711.

Wisconsin.— McKinney *v.* Jones, 57 Wis. 301, 15 N. W. 160.

United States.— Coleman *v.* Neill, 11 Fed. 461.

Canada.— Lightbound *v.* Hill, 9 Ont. Pr. 295.

See 30 Cent. Dig. tit. "Judgment," § 619.

89. *Alabama.*— Nabers *v.* Meredith, 67 Ala. 333.

Colorado.— Breene *v.* Booth, 6 Colo. App. 140, 40 Pac. 193.

Georgia.— A judgment which, although dormant, still survives as a debt of record, enforceable by suit, may be amended so as to cure a mere irregularity. Williams *v.* Merritt, 109 Ga. 217, 34 S. E. 1012.

Indiana.— Sidener *v.* Coons, 83 Ind. 183; Jenkins *v.* Long, 23 Ind. 460.

Kentucky.— Smith *v.* Mullins, 3 Metc. 182.

Maine.— Lewis *v.* Ross, 37 Me. 230, 59 Am. Dec. 49.

Massachusetts.— Parker *v.* Rugg, 9 Gray 209.

Mississippi.— Healy *v.* Just, 53 Miss. 547; Graves *v.* Fulton, 7 How. 592.

New Hampshire.— Chamberlain *v.* Crane, 4 N. H. 115.

New Jersey.— Probasco *v.* Probasco, 3 N. J. L. 1012.

New York.— New York Ice Co. *v.* Northwestern Ins. Co., 23 N. Y. 357; Vandenburgh

ute, in which case, as to proposed amendments coming within the terms of the statute, the limitation which it imposes is imperative.[90] Generally an application to amend a judgment is too late after the amount of it has been paid, especially if the amendment would make a party liable to pay it a second time.[91]

e. Parties. All the parties to the judgment whose rights or interests may be affected by the proposed amendment should be made parties to the application therefor,[92] but it is not generally necessary to join other creditors or persons subsequently acquiring interests in the property affected.[93]

f. Notice of Application. As a general rule a judgment cannot be amended in a material particular unless due and proper notice of the application therefor has been given to the opposite party, so that he may have an opportunity to appear and show cause against the proposed correction.[94] It has been held, how-

v. New York, 57 N. Y. Super. Ct. 285, 7 N. Y. Suppl. 675.

North Carolina.— Walton *v.* Pearson, 85 N. C. 34.

Pennsylvania.— Beek's Appeal, 15 Pa. St. 406.

Tennessee.— Rickman *v.* Rickman, 6 Lea 483.

Texas.— Hamilton-Brown Shoe Co. *v.* Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520.

United States.— Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 71 Fed. 826; Coelle *v.* Loekhead, 5 Fed. Cas. No. 2,943*a*, Hempst. 194.

See 30 Cent. Dig. tit. "Judgment," § 619.

90. *Alabama.*— Sartor *v.* Montgomery Branch Bank, 29 Ala. 353.

California.— Scamman *v.* Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Dyerville Mfg. Co. *v.* Heller, 102 Cal. 615, 36 Pac. 928.

Colorado.— Pleyte *v.* Pleyte, 15 Colo. 44, 24 Pac. 579; Child *v.* Whitman, 7 Colo. App. 117, 42 Pac. 601.

Indiana.— Douglass *v.* Keehn, 78 Ind. 199.

Iowa.— Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380; Wetmore *v.* Harper, 70 Iowa 346, 30 N. W. 611; Fuller *v.* Stebbins, 49 Iowa 376.

Kansas.— First State Bank *v.* Stevenson, 65 Kan. 816, 70 Pac. 875.

Kentucky.— Boro *v.* Holtzhauer, 67 S. W. 30, 23 Ky. L. Rep. 2317.

Minnesota.— Gallagher *v.* Irish-American Bank, 79 Minn. 226, 81 N. W. 1057; McClure *v.* Bruck, 43 Minn. 305, 45 N. W. 438.

New York.— Deagan *v.* King, 83 N. Y. App. Div. 428, 82 N. Y. Suppl. 422; Oliver *v.* French, 9 N. Y. App. Div. 623, 41 N. Y. Suppl. 106.

Ohio.— Corry *v.* Camphell, 34 Ohio St. 204.

Rhode Island.— Fitch *v.* Richard, 18 R. I. 617, 29 Atl. 689.

South Carolina.— Robbins *v.* Slattery, 30 S. C. 328, 9 S. E. 510.

Tennessee.—Carney *v.* McDonald, 10 Heisk. 232.

Wisconsin.— Williams *v.* Hayes, 68 Wis. 248, 32 N. W. 44.

See 30 Cent. Dig. tit. "Judgment," § 619.

91. Hassler's Appeal, 5 Watts (Pa.) 176. But see Mechanics' Bank *v.* Minthorne, 19 Johns. (N. Y.) 244.

92. Oldham *v.* Brannon, 2 Metc. (Ky.) 302. But if the object of the amendment is merely to work out rights as between parties on the same side of the action, without affecting those on the other side, the latter need not be joined. Thus if the application is to amend a judgment entered in favor of two persons as joint plaintiffs so as to make it stand in favor of one alone, defendant is not a necessary party to the proceeding. Turner *v.* Christy, 50 Mo. 145. And see Carlon *v.* Ruffner, 12 W. Va. 297.

93. Adam *v.* Arnold, 86 Ill. 185; Mann *v.* Brooks, 7 How. Pr. (N. Y.) 449. And see Heidbreder *v.* Superior Ice, etc., Co., 184 Mo. 456, 83 S. W. 469. *Compare* Auerbach *v.* Gieseke, 40 Minn. 258, 41 N. W. 946; O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

94. *Alabama.*— Murray *v.* Tardy, 19 Ala. 710.

Arkansas.— Alexander *v.* Stewart, 23 Ark. 18; Martin *v.* State Bank, 20 Ark. 636.

California.— Chester *v.* Miller, 13 Cal. 558; McNally *v.* Mott, 3 Cal. 235.

Connecticut.— Wooster *v.* Glover, 37 Conn. 315; Weed *v.* Weed, 25 Conn. 337.

Georgia.— Fischesser *v.* Thompson, 45 Ga. 459.

Illinois.— Michael *v.* Mattoon, 172 Ill. 394, 50 N. E. 155; Thrifts *v.* Fritz, 101 Ill. 457; Means *v.* Means, 42 Ill. 50; Cook *v.* Wood, 24 Ill. 295; O'Conner *v.* Mullen, 11 Ill. 116; Rauh *v.* Ritchie, 1 Ill. App. 188.

Indiana.— Perkins *v.* Hayward, 132 Ind. 95, 31 N. E. 670; Corwin *v.* Thomas, 83 Ind. 110; Kyle *v.* Hayward, 14 Ind. 367; Randal *v.* State, Smith 266. See Indianapolis, etc., Rapid Transit Co. *v.* Andis, (App. 1904) 72 N. E. 145.

Iowa.— Browne *v.* Kiel, 117 Iowa 316, 90 N. W. 624; McGlaughlin *v.* O'Rourke, 12 Iowa 459.

Kansas.— Byington *v.* Call, 36 Kan. 455, 13 Pac. 738; Hammerslough *v.* Hackett, 30 Kan. 57, 1 Pac. 41.

Kentucky.— Seiler *v.* Northern Bank, 86 Ky. 128, 5 S. W. 536, 9 Ky. L. Rep. 497.

Maine.— Rockland Water Co. *v.* Pillsbury, 60 Me. 425. *Compare* Hall *v.* Williams, 10 Me, 278.

Michigan.—People *v.* McCutcheon, 40 Mich. 244; Whitwell *v.* Emory, 3 Mich. 84, 59 Am. Dec. 220.

Minnesota.— Berthold *v.* Fox, 21 Minn. 51.

Mississippi.— Poole *v.* McLeod, 1 Sm. & M. 391; Dorsey *v.* Peirce, 5 How. 173.

ever, that an amendment may be made without notice during the same term at which the judgment was rendered,[95] or in any case where the amendment is merely formal, or designed to make the entry of the judgment conform to the judgment as actually rendered, so that the opposite party, if present, could not successfully resist it.[96] The notice, if required, must be sufficient in form and substance to inform the party of the time and purpose of the proceeding,[97] and be served on him or his attorney of record.[98] But if the party appears and defends it is a waiver of notice.[99]

g. Evidence. According to the weight of authority the rule is that a judgment or decree can be amended or corrected only where there is sufficient record evidence, or evidence quasi of record, to sustain the amendment, and that extraneous evidence cannot be received for this purpose.[1] In this connection it is generally considered that the notes and minutes made by the judge upon his

Nebraska.— Anderson *v.* McCloud-Love Live-Stock Commission Co., 58 Nebr. 670, 79 N. W. 613; Homan *v.* Hellman, 35 Nebr. 414, 53 N. W. 369.

New Hampshire.— Remick *v.* Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

New Jersey.— Murphy *v.* Farr, 11 N. J. L. 186.

New York.— Case *v.* Mannis, 57 Hun 594, 11 N. Y. Suppl. 243 [*affirmed* in 123 N. Y. 661, 26 N. E. 749]; Day *v.* Wilber, 2 Cai. 258.

North Carolina.— Hinton *v.* Virginia L. Ins. Co., 116 N. C. 22, 21 S. E. 201; Cobb *v.* Wood, 8 N. C. 95.

Ohio.— Warrington *v.* Upham Mfg. Co., 18 Ohio Cir. Ct. 311, 10 Ohio Cir. Dec. 180; Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468, 3 West. L. Month. 195.

Texas.— Coffee *v.* Black, 50 Tex. 117; Wheeler *v.* Goffe, 24 Tex. 660; Thomason *v.* Bishop, 24 Tex. 302; McNairy *v.* Castleberry, 6 Tex. 286; Byars *v.* Justin, 2 Tex. App. Civ. Cas. § 686.

Washington.— Griffith *v.* Maxwell, 19 Wash. 614, 54 Pac. 35.

Wisconsin.— Schmidt *v.* Gilson, 14 Wis. 514; Hill *v.* Hoover, 5 Wis. 386, 68 Am. Dec. 70.

England.— Wallis *v.* Thomas, 7 Ves. Jr. 292, 32 Eng. Reprint 119.

See 30 Cent. Dig. tit. "Judgment," § 622.

95. O'Conner *v.* Mullen, 11 Ill. 57; Richardson *v.* Howk, 45 Ind. 451.

96. *Alabama.*— Ware *v.* Kent, 123 Ala. 427, 26 So. 208, 82 Am. St. Rep. 132; Nabers *v.* Meredith, 67 Ala. 333.

Arkansas.— Rogers *v.* Brooks, 31 Ark. 194.

California.— Dickey *v.* Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321.

Illinois.— Dunn *v.* Rodgers, 43 Ill. 260.

Massachusetts.— Balch *v.* Shaw, 7 Cush. 282.

Michigan.— Emery *v.* Whitwell, 6 Mich. 474.

Missouri.— Nave *v.* Todd, 83 Mo. 601.

South Carolina.— Ashmore *v.* Charles, 14 Rich. 63.

United States.— Odell *v.* Reynolds, 70 Fed. 656, 17 C. C. A. 317.

See 30 Cent. Dig. tit. "Judgment," § 622.

97. See Swift *v.* Allen, 55 Ill. 303; Nye *v.* Stillwell, 12 Ohio Cir. Ct. 40, 5 Ohio Cir. Dec. 335.

In Virginia it seems that the notice need not be in writing. Dillard *v.* Thornton, 29 Gratt. 392.

98. McNairy *v.* Castleberry, 6 Tex. 286. But see Berthold *v.* Fox, 21 Minn. 51.

99. National Ins. Co. *v.* Chamber of Commerce, 69 Ill. 22; McConnell *v.* Avey, 117 Iowa 282, 90 N. W. 604; Elliott *v.* Plattor, 43 Ohio St. 198, 1 N. E. 222.

1. *Alabama.*—Leinkauff *v.* Tuskaloosa Sale, etc., Co., 105 Ala. 328, 16 So. 891; Lilly *v.* Larkin, 66 Ala. 122; Horton *v.* Beadle, 62 Ala. 32; Pettus *v.* McClannahan, 52 Ala. 55; Dunlap *v.* Horton, 49 Ala. 412; Bruce *v.* Strickland, 47 Ala. 192; Summersett *v.* Summersett, 40 Ala. 596, 91 Am. Dec. 494; Harris *v.* Martin, 39 Ala. 556; Courson *v.* Herrin, 33 Ala. 553; West *v.* Galloway, 33 Ala. 306; Dunham *v.* Roberts, 28 Ala. 286; Hudson *v.* Hudson, 20 Ala. 364, 56 Am. Dec. 200; Saltmarsh *v.* Bird, 19 Ala. 665; Kidd *v.* Montague, 19 Ala. 619; Metcalf *v.* Metcalf, 19 Ala. 319, 54 Am. Dec. 188; Bondurant *v.* Thompson, 15 Ala. 202; Rains *v.* Ware, 10 Ala. 623; Armstrong *v.* Robertson, 2 Ala. 164; Brown *v.* Martlett, 2 Ala. 29; Tombeckbee Bank *v.* Strong, 1 Stew. & P. 187, 21 Am. Dec. 657. But *compare* Tanner *v.* Hayes, 47 Ala. 722.

California.— Menzies *v.* Watson, 105 Cal. 109, 38 Pac. 641; De Castro *v.* Richardson, 25 Cal. 49; Swain *v.* Naglee, 19 Cal. 127; Branger *v.* Chevalier, 9 Cal. 351; Morrison *v.* Dapman, 3 Cal. 255. But see Kaufman *v.* Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139, holding that it is within the discretion of the trial court, on satisfactory evidence outside the record, that the record minutes incorrectly set forth its orders, to direct an amendment thereof at any time after judgment. But when the record of a judgment itself affords satisfactory evidence, not only of a mistake therein, but also of what the order of judgment really was, it may be corrected without any further extraneous proof. People *v.* Ward, 141 Cal. 628, 75 Pac. 306.

Georgia.— Dixon *v.* Mason, 68 Ga. 478; Gay *v.* Cheney, 58 Ga. 304; Woolfolk *v.*

docket are record evidence;[2] but the amendment cannot be based on the judge's knowledge or recollection of the facts,[3] or his affidavit in regard to the error to be corrected,[4] and still less upon the testimony of witnesses speaking from their

Gunn, 45 Ga. 117; Pitman *v.* Lowe, 24 Ga. 429.

Illinois.— In this state the rule appears to be that the court, upon notice to the parties in interest, may amend its record at a subsequent term, if evidence to support the amendment can be drawn from the record, or from some minute or memorial paper, or notes taken by a stenographer, or other document in the nature of a record, made in connection with the case or upon the trial or hearing; but that an amendment cannot be based on oral evidence alone. See Sullivan *v.* Eddy, 154 Ill. 199, 40 N. E. 482; Frew *v.* Danforth, 126 Ill. 242, 19 N. E. 293; Hansen *v.* Schlesinger, 125 Ill. 230, 17 N. E. 718; Gillett *v.* Booth, 95 Ill. 183; Goucher *v.* Patterson, 94 Ill. 525; Forquer *v.* Forquer, 19 Ill. 68; Coughran *v.* Gutcheus, 18 Ill. 390; Page *v.* Shields, 102 Ill. App. 575; Desnoyers Shoe Co. *v.* Litchfield First Nat. Bank, 89 Ill. App. 579; Stitt *v.* Kurtenbach, 85 Ill. App. 38; Chicago Title, etc., Co. *v.* Chicago, etc., R. Co., 58 Ill. App. 388; Stony Island Hotel Co. *v.* Johnson, 57 Ill. App. 608; Horner *v.* Horner, 37 Ill. App. 199.

Kansas.— Cushenberry *v.* McMurray, 27 Kan. 328.

Kentucky.— Bennett *v.* Tiernay, 78 Ky. 580; Finnell *v.* Jones, 7 Bush 359; Stephens *v.* Wilson, 14 B. Mon. 88; Norton *v.* Sanders, 7 J. J. Marsh. 12; Hendrix *v.* Clay, 2 A. K. Marsh. 462; Crenshaw *v.* Crenshaw, 69 S. W. 711, 24 Ky. L. Rep. 600.

Maine.— Fairfield *v.* Paine, 23 Me. 498. *Compare* Willard *v.* Whitney, 49 Me. 235.

Mississippi.— Shackelford *v.* Levy, 63 Miss. 125; Moody *v.* Grant, 41 Miss. 565; Russell *v.* McDougall, 3 Sm. & M. 234; Guise *v.* Middleton, Sm. & M. Ch. 89.

Missouri.— Burnside *v.* Wand, 170 Mo. 531, 71 S. W. 337, 62 L. R. A. 429; Gibson *v.* Chouteau, 45 Mo. 171, 100 Am. Dec. 366; Saxton *v.* Smith, 50 Mo. 490; State *v.* Clark, 18 Mo. 432; Bishop *v.* Seal, 92 Mo. App. 167; Bohm *v.* Stivers, 75 Mo. App. 291; State *v.* White, 75 Mo. App. 257; McGonigle *v.* Bresnen, 44 Mo. App. 423.

Nevada.— Solomon *v.* Fuller, 14 Nev. 63.

New Mexico.— Secou *v.* Leroux, 1 N. M. 388; Waldo *v.* Beckwith, 1 N. M. 97.

Oklahoma.— Colcord *v.* Conger, 10 Ala. 458, 62 Pac. 276.

Oregon.— Nicklin *v.* Robertson, 28 Oreg. 278, 42 Pac. 993, 52 Am. St. Rep. 790.

Tennessee.— Provident Sav. L. Assur. Soc. *v.* Edmonds, 95 Tenn. 53, 31 S. W. 168; Carney *v.* McDonald, 10 Heisk. 232; Ridgeway *v.* Ward, 4 Humphr. 430; Nashville, etc., R. Co. *v.* Central Land Co., (Ch. App. 1897) 48 S. W. 110.

Texas.— Missouri Pac. R. Co. *v.* Haynes, 82 Tex. 448, 18 S. W. 605; Messner *v.* Hutchins, 17 Tex. 597; Meyer Bros. Drug Co. *v.* Coulter, 18 Tex. Civ. App. 685, 46 S. W. 648.

Vermont.— See Mosseaux *v.* Brigham, 19 Vt. 457.

Virginia.— Barnes *v.* Com., 92 Va. 794, 23 S. E. 784.

See 30 Cent. Dig. tit. "Judgment," § 623.

2. *Alabama.*— Farmer *v.* Wilson, 34 Ala. 75; West *v.* Galloway, 33 Ala. 306.

Illinois.— Gillett *v.* Booth, 95 Ill. 183.

Iowa.— Jones *v.* Field, 80 Iowa 281, 45 N. W. 753.

Missouri.— State *v.* Primm, 61 Mo. 166; Robertson *v.* Neal, 60 Mo. 579; Burns *v.* Sullivan, 90 Mo. App. 1. But *compare* Henley *v.* Kinley, 16 Mo. App. 176.

Nebraska.— Morrill *v.* McNeill, (1901) 91 N. W. 601. Since such memoranda are not a part of the record proper, and therefore not of controlling authority, it will be possible that they may be overborne by other evidence; and the court cannot be compelled to correct its journal from such minutes. Sullivan's Sav. Inst. *v.* Clark, 12 Nebr. 578, 12 N. W. 103.

Oregon.— Nicklin *v.* Robertson, 28 Oreg. 278, 42 Pac. 993, 52 Am. St. Rep. 790.

See 30 Cent. Dig. tit. "Judgment," § 624.

But see Shackelford *v.* Levy, 63 Miss. 125; Boon *v.* Boon, 8 Sm. & M. (Miss.) 318; Dickson *v.* Hoff, 3 How. (Miss.) 165.

Stenographer's notes taken at the trial of the cause are held sufficient evidence by which to amend the judgment. Sullivan *v.* Eddy, 154 Ill. 199, 40 N. E. 482. *Compare* Becher *v.* Deuser, 169 Mo. 159, 69 S. W. 363.

A paper drawn up and filed by the judge may be sufficient for this purpose (Johnson *v.* Moore, 112 Ind. 91, 13 N. E. 106), but not a memorandum for a judgment drawn by an attorney to be copied by the clerk (Becher *v.* Deuser, 169 Mo. 159, 69 S. W. 363).

3. *Illinois.*— Stony Island Hotel Co. *v.* Johnson, 57 Ill. App. 608; Horner *v.* Horner, 37 Ill. App. 199; *In re* Barnes, 27 Ill. App. 151.

Mississippi.— Boon *v.* Boon, 8 Sm. & M. 318.

Missouri.— Saxton *v.* Smith, 50 Mo. 490; Blize *v.* Castlio, 8 Mo. App. 290. But during the term the court may amend its record by an entry *nunc pro tuno* based on the judge's own recollection. Williams *v.* Silvey, 84 Mo. App. 433.

South Carolina.— State *v.* Smith, 1 Nott & M. 13.

Tennessee.— State *v.* Fields, Peck 140.

Virginia.— Barnes *v.* Com., 92 Va. 794, 23 S. E. 784.

See 30 Cent. Dig. tit. "Judgment," § 623.

4. Smith *v.* Brannan, 13 Cal. 107.

recollection of what took place;[5] and it has been held that where the judgment is sought to be amended for clerical errors or formal defects, it is necessary that the fault should be apparent on the record; it cannot be pointed out by affidavit.[6] According to some decisions, however, an amendment of a judgment may be based on any evidence, whether parol or otherwise, which is satisfactory in its weight and character.[7]

h. Hearing and Order.[8] The questions presented by a motion for the amendment of a judgment, whether of law or fact, are for the determination of the court to which it is addressed,[9] although it seems that an inquiry may be ordered to ascertain facts which were left undecided and omitted from the original decision.[10] No questions will be examined other than those necessary to determine the necessity or propriety of the amendment,[11] and the opening of the judgment for the purpose of amending it should not be made the occasion for granting relief other than that asked in the motion,[12] although it is proper to impose reasonable and just conditions upon granting the amendment,[13] and the costs of the motion may be taxed against the party unsuccessfully resisting it.[14] The order should recite the necessary jurisdictional facts.[15] If the motion is denied, the remedy of the party is not by renewing it or asking for a rehearing of it, but by appeal.[16]

5. Coughran *v.* Gutcheus, 18 Ill. 390; Becher *v.* Deuser, 169 Mo. 159, 69 S. W. 363; Williams *v.* Silvey, 84 Mo. App. 433.

6. Portis *v.* Talbot, 33 Ark. 218; Bramblet *v.* Pickett, 2 A. K. Marsh. (Ky.) 10, 12 Am. Dec. 350; State *v.* Primm, 61 Mo. 166; Solomon *v.* Fuller, 14 Nev. 63.

7. *Arkansas.*—Arrington *v.* Conrey, 17 Ark. 100.

Colorado.— Doane *v.* Glenn, 1 Colo. 454; People *v.* Arapahoe County Ct., 9 Colo. App. 41, 47 Pac. 469; Breene *v.* Booth, 6 Colo. App. 140, 40 Pac. 193.

Connecticut.—Weed *v.* Weed, 25 Conn. 337.

Indiana.—Mitchell *v.* Lincoln, 78 Ind. 531; Hebel *v.* Scott, 36 Ind. 226; Jenkins *v.* Long, 23 Ind. 460; Brownlee *v.* Grant County, 101 Ind. 401. But see Williams *v.* Freshour, 136 Ind. 361, 36 N. E. 280; Conway *v.* Day, 92 Ind. 422; Williams *v.* Henderson, 90 Ind. 577; Shaw *v.* Newsom, 78 Ind. 335; Makepeace *v.* Lukens, 27 Ind. 435. 92 Am. Dec. 263; Boyd *v.* Blaisdell, 15 Ind. 73.

Iowa.— McConnell *v.* Avey, 117 Iowa 282, 90 N. W. 604; Stockdale *v.* Johnson, 14 Iowa 178; Eno *v.* Hunt, 8 Iowa 436. *Compare* Giddings *v.* Giddings, 70 Iowa 486, 30 N. W. 869.

Maryland.— Parkhurst *v.* Citizens' Nat. Bank, 61 Md. 254.

Massachusetts.— Rugg *v.* Parker, 7 Gray 172; Clark *v.* Lamb, 8 Pick. 415, 19 Am. Dec. 332.

Nebraska.— Harris *v.* Jennings, 64 Nebr. 80, 89 N. W. 625, 97 Am. St. Rep. 635; Harlan County School Dist. No. 1 *v.* Bishop, 46 Nebr. 850, 65 N. W. 902. *Compare* Hogue *v.* Ogle, 51 Nebr. 223, 70 N. W. 940.

New Hampshire.— Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; Wendell *v.* Mugridge, 19 N. H. 109.

North Carolina.— State *v.* Swepson, 83 N. C. 584; Mayo *v.* Whitson, 47 N. C. 231.

Ohio.— Hollister *v.* Judges Lucas County Dist. Ct., 8 Ohio St. 201, 70 Am. Dec. 100; Huntington *v.* Zeigler, 2 Ohio St. 10.

Pennsylvania.— Larkin *v.* Glover Steam, etc., Fitting Co., 2 Del. Co. 453; Hallman *v.* Gottshall, 13 Montg. Co. Rep. 161.

United States.— Carr *v.* Fife, 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508; Wight *v.* Nicholson, 134 U. S. 136, 10 S. Ct. 487, 33 L. ed. 865; Murphy *v.* Stewart, 2 How. 263, 11 L. ed. 261. *Compare* Tilghman *v.* Werk, 39 Fed. 680.

See 30 Cent. Dig. tit. "Judgment," § 623.

8. Vacating or setting aside order allowing amendment see Graves *v.* Fulton, 7 How. (Miss.) 592; Stewart *v.* Stringer, 45 Mo. 113; Reichenbach *v.* Fisher, 32 Wis. 133.

9. Woolfolk *v.* Gunn, 45 Ga. 117; Brown *v.* West, 65 N. H. 187, 18 Atl. 233.

10. Freshwater *v.* Baker, 52 N. C. 404.

11. Pryor *v.* Leonard, 57 Ga. 136. See Effray *v.* Masson, 18 N. Y. Suppl. 353, 28 Abb. N. Cas. 207.

12. See Woolfolk *v.* Gunn, 45 Ga. 117; Siegrist *v.* Holloway, 7 N. Y. Civ. Proc. 58; German Mut. Farmer F. Ins. Co. *v.* Decker, 74 Wis. 556, 43 N. W. 500.

Amendment as to one party.— A judgment is not such an entirety as not to be amenable or subject to correction as to one of the parties alone, unless the substantial rights of the others would be injuriously affected thereby. Neenan *v.* St. Joseph, 126 Mo. 89, 28 S. W. 963.

13. Weed *v.* Weed, 25 Conn. 337; Salter *v.* Sutherland, 125 Mich. 662, 85 N. W. 112.

14. Westall *v.* Marshall, 16 Tex. 182; Morris *v.* Coleman County, (Tex. Civ. App. 1896) 35 S. W. 29.

15. Carney *v.* McDonald, 10 Heisk. (Tenn.) 232.

16. Morrow *v.* Geeting, 23 Ind. App. 494, 55 N. E. 787; Bonar *v.* Gosney, 30 S. W. 602, 17 Ky. L. Rep. 92; Johnson *v.* Atlantic, etc., R. Co., 43 N. H. 410; Aronson *v.* Sire, 85 N. Y. App. Div. 607, 83 N. Y. Suppl. 362.

Presumptions on appeal see Brownlee *v.* Davidson, 28 Nebr. 785, 45 N. W. 51.

Parties who consent to the amendment of a judgment are estopped from afterward objecting to it.[17]

i. Discretion of Court. An application to amend or correct a judgment is addressed to the discretion of the court, and its action will not be interfered with by an appellate court, unless where an abuse of discretion is manifest, or controlled by mandamus.[18] Further the regularity of an amendment made by a court of competent jurisdiction cannot be inquired into collaterally.[19]

3. Mode of Making Amendment. An amendment of a judgment may practically be accomplished by entering the order therefor or the making of an order which effects the same result,[20] in which case the amendment may actually be made at any time thereafter,[21] or by the entry of a release or remittitur, where that will make the necessary correction;[22] but good practice requires not only that the amendment should be ordered, but that the clerk should actually make it as directed.[23] The courts tolerate but do not favor the making of such corrections by erasure and interlineation on the original record,[24] the better method being to annul or vacate the defective entry and replace it by a new entry ordered to be made *nunc pro tunc*.[25] Where a decree already made in a cause is tacitly revoked during the same term, and a second decree is made on the same subject-matter, it would be more orderly and convenient, in making the second decree, to refer to the first one and state in what particular it is intended to modify, supplement, or supersede it; but this is not essential if a comparison of the two decrees discloses the changes or modifications made.[26]

4. Allowing Amendment Nunc Pro Tunc. The court may not only order the amendment or correction of a judgment, but may order it to be done *nunc pro tunc*.[27] But this cannot be done where the original judgment was a nullity, or where the effect would be to enter a judgment entirely different from that originally rendered.[28]

17. Steckmesser *v.* Graham, 10 Wis. 37.

18. *Alabama.*— *Ex p.* Woodruff, 123 Ala. 99, 26 So. 509; Leinkauff *v.* Tuskaloosa Sale, etc., Co., 105 Ala. 328, 16 So. 891.

Connecticut.— Wooster *v.* Glover, 37 Conn. 315; Waldo *v.* Spencer, 4 Conn. 71.

Georgia.— Saffold *v.* Keenan, 2 Ga. 341.

Illinois.— Desnoyers Shoe Co. *v.* Litchfield First Nat. Bank, 89 Ill. App. 579 [*affirmed* in 188 Ill. 312, 58 N. E. 994].

Massachusetts.— Gibson *v.* Crehore, 5 Pick. 146.

New York.— Smith *v.* Smith, 40 N. Y. App. Div. 251, 57 N. Y. Suppl. 1122; Brown *v.* McCune, 5 Sandf. 224; Smith *v.* Grant, 11 N. Y. Civ. Proc. 354.

North Carolina.— Brooks *v.* Stephens, 100 N. C. 297, 6 S. E. 81.

Pennsylvania.— Com. *v.* Hultz, 6 Pa. St. 469.

Texas.— Austin *v.* Jordan, 5 Tex. 130.

United States.— *Ex p.* Morgan, 114 U. S. 174, 5 S. Ct. 825, 29 L. ed. 135; Slicer *v.* Pittsburg Bank, 16 How. 571, 14 L. ed. 1063.

See 30 Cent. Dig. tit. "Judgment," § 620.

19. Hamilton *v.* Seitz, 25 Pa. St. 226, 64 Am. Dec. 694. And see Cromwell *v.* Pittsburg Bank, 6 Fed. Cas. No. 3,409, 2 Wall. Jr. 569.

20. Weed *v.* Weed, 25 Conn. 494; Hord *v.* Bradbury, 156 Ind. 20, 59 N. E. 27; Guay *v.* Andrews, 8 La. Ann. 141.

21. Marshall *v.* Fisher, 46 N. C. 111.

22. Buckles *v.* Northern Bank, 63 Ill. 268; Pennsylvania F. Ins. Co. *v.* Wagley, (Tex. Civ. App. 1896) 36 S. W. 997; Lowdon *v.* Fisk, (Tex. Civ. App. 1894) 27 S. W. 180; Ambler *v.* McMechen, 1 Fed. Cas. No. 273, 1 Cranch C. C. 320.

23. McDowell *v.* McDowell, 92 N. C. 227; Jones *v.* Lewis, 30 N. C. 70, 47 Am. Dec. 338.

24. State *v.* Craig, 12 Ala. 363; King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739; Allen *v.* Sales, 56 Mo. 28.

25. King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739; Mansel *v.* Castles, 93 Tex. 414, 55 S. W. 559.

26. Eddie *v.* Eddie, 138 Mo. 599, 39 S. W. 451; Barrell *v.* Tilton, 119 U. S. 637, 7 S. Ct. 332, 30 L. ed. 511.

27. *Georgia.*— Shaw *v.* Watson, 52 Ga. 201.

Missouri.— Bishop *v.* Seal, 92 Mo. App. 167; Williams *v.* Silvey, 84 Mo. App. 432; Evans *v.* Fisher, 26 Mo. App. 541.

Montana.— Barber *v.* Briscoe, 9 Mont. 341, 23 Pac. 726.

New York.— Eagan *v.* Moore, 2 N. Y. Civ. Proc. 300; Close *v.* Gillespey, 3 Johns. 526. And see De Lancey *v.* Piepgras, 73 Hun 607, 26 N. Y. Suppl. 806.

Ohio.— Elliott *v.* Plattor, 43 Ohio St. 198, 1 N. E. 222; Green *v.* Raitz, 18 Ohio Cir. Ct. 364, 9 Ohio Cir. Dec. 688.

Texas.— Tillman *v.* Peoples, 28 Tex. Civ. App. 233, 67 S. W. 201.

See 30 Cent. Dig. tit. "Judgment," § 628.

28. See Ford *v.* Tinchant, 49 Ala. 567; Grant *v.* Griswold, 21 Hun (N. Y.) 509; Fairchild *v.* Dean, 15 Wis. 206.

5. Operation and Effect of Amendment — a. As Between the Parties. The amendment or correction of a judgment relates back to the original judgment and becomes a part of it, and makes the judgment of the same effect as if the defects or mistakes on account of which it was amended had never existed.[29] But it does not make a new judgment or confer any new or additional rights.[30] Where a party applies for and obtains an amendment of the judgment, he thereby waives all erroneous rulings of the court preceding the judgment.[31]

b. As Against Third Persons. An amendment of a judgment will not be allowed to prejudice the rights of third persons, such as subsequent judgment creditors, purchasers, or mortgagees, who have acquired interests for value,[32] unless where they have taken with notice,[33] or where the amendment is made at the same term at which the judgment was rendered.[34] The order allowing an amendment should contain a saving of the intervening rights of third persons, but the law will make this reservation whether it is expressed or not.[35]

D. Writ of Error Coram Nobis — 1. Nature and Existence of Remedy. This is a writ which lies in the same court which rendered a judgment, and brings its

29. *Alabama.*— Hood *v.* Mobile Branch Bank, 9 Ala. 335.

California.— Crim *v.* Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; Leese *v.* Clark, 28 Cal. 26.

Florida.— Adams *v.* Higgins, 23 Fla. 13, 1 So. 321.

Illinois.— Vail *v.* Arkell, 146 Ill. 363, 34 N. E. 937.

Kansas.— Small *v.* Douthitt, 1 Kan. 335.

Maryland.— Zantzinger *v.* Ribble, 36 Md. 32.

Michigan.—Reynolds *v.* Reynolds, 115 Mich. 378, 73 N. W. 425.

New York.— *In re* New York, 90 N. Y. 390; Bartlett *v.* McNeil, 60 N. Y. 53.

North Carolina.— Galloway *v.* McKeithen, 27 N. C. 12, 42 Am. Dec. 153.

Ohio.— Riblet *v.* Davis, 24 Ohio St. 114.

Texas.— Burnett *v.* State, 14 Tex. 455, 65 Am. Dec. 131.

Wisconsin.— Magnuson *v.* Clithero, 101 Wis. 551, 77 N. W. 882.

See 30 Cent. Dig. tit. "Judgment," § 632.

Validating intervening acts.— The amendment of the judgment will make valid acts done by officers or others under it which, although sustainable under the judgment as amended, would lack legal support under the judgment as originally entered. Adams *v.* Higgins, 23 Fla. 13, 1 So. 321; Williams *v.* Wheeler, 1 Barb. (N. Y.) 48. But *compare* Farnham *v.* Hildreth, 32 Barb. (N. Y.) 277, where it is held that an amendment of the record of a judgment and execution, by substituting defendant's true name for the one erroneously inserted, made by an *ex parte* order, after sale of the property levied on, will not validate the sale or divest defendant's title to the property.

Effect on pending appeal.— Where a judgment is amended pending an appeal, and the amendment properly certified to the appellate court, the amendment is before such court for consideration; and it will relate back and sustain the judgment as against defects or errors made the subject of the appeal but cured by the amendment. Seymour *v.* Thomas Harrow Co., 81 Ala. 250, 1 So. 45. And see Orleans, etc., R. Co. *v.* International Constr. Co., 113 La. 49, 37 So. 10. But *compare* McClellan Dry-Dock Co. *v.* Farmers' Alliance Steam-Boat Line, 43 La. Ann. 258, 9 So. 630.

30. Hershy *v.* Baer, 45 Ark. 240; L. H. Rumsey Mfg. Co. *v.* Baker, 35 Mo. App. 217; Bostwick *v.* Van Vleck, 106 Wis. 387, 82 N. W. 302. But *compare* Specht *v.* Barber Asphalt Pav. Co., 80 S. W. 1106, 26 Ky. L. Rep. 193.

A dormant judgment is not revived by an amendment *nunc pro tunc.* Allen *v.* Bradford, 3 Ala. 281, 37 Am. Dec. 689.

31. Pittsburg, etc., R. Co. *v.* Beck, (Ind. 1898) 52 N. E. 399.

32. *Georgia.*— Thompson *v.* Kimbrel, 46 Ga. 529; Perdue *v.* Bradshaw, 18 Ga. 287; Ligon *v.* Rogers, 12 Ga. 281.

Illinois.— Calef *v.* Parsons, 48 Ill. App. 253.

Indiana.— Indiana, etc., R. Co. *v.* Bird, 116 Ind. 217, 18 N. E. 837, 9 Am. St. Rep. 842.

Kansas.— Pritchard *v.* Madren, 31 Kan. 38, 2 Pac. 691.

Minnesota.— Nell *v.* Dayton, 47 Minn. 257, 49 N. W. 981; Berthold *v.* Fox, 21 Minn. 51.

Nebraska.— Homan *v.* Hellman, 35 Nebr. 414, 53 N. W. 369.

New Hampshire.— Remick *v.* Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

Pennsylvania.— Crutcher *v.* Com., 6 Whart. 340.

See 30 Cent. Dig. tit. "Judgment," § 633.

Contra.— Walton *v.* Pearson, 85 N. C. 34, holding it to be the duty of every court to correct its records, when erroneously made up, so as to make them speak the truth, regardless of the consequences to parties or third persons.

33. Colman *v.* Watson, 54 Ind. 65.

34. Studebaker Bros. Mfg. Co. *v.* Hunt, (Tex. Civ. App. 1896) 38 S. W. 1134; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. ed. 332.

35. McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

own judgment before it for review and reversal or modification, on account of some error of fact, not of law, affecting the validity and regularity of the proceedings, and which was not brought into the issue.[36] It is not a writ of right. It can be granted only on a showing of cause, and then it is in the discretion of the court whether, on the affidavits presented, to allow the writ or not, and its decision will not be reviewed by an appellate court.[37] In most of the states, if not abolished by statute, it has become obsolete, being superseded by the more speedy and efficacious remedy by motion in the same court.[38]

2. GROUNDS FOR APPLICATION. Error coram nobis does not lie to correct any error of law, its office being confined strictly to errors of fact.[39] Only such errors can be assigned as are consistent with the record before the court,[40] and the court will not look into the cause of action on which the judgment was rendered,[41] or consider any facts which might have been presented to the court on the trial of the cause,[42] and still less any facts which were put in issue and adjudicated upon the trial.[43] But the writ may issue where there is a vital jurisdictional defect not apparent on the face of the record,[44] or on account of the death of a party before judgment, or the infancy, insanity, or coverture of defendant, such disability not

36. Ledgerwood *v.* Pickett, 15 Fed. Cas. No. 8,175, 1 McLean 143; Phillips *v.* Russell, 19 Fed. Cas. No. 11,105*a*, Hempst. 62; Castledine *v.* Mundy, 4 B. & Ad. 90, 2 L. J. K. B. 154, 1 N. & M. 635, 24 E. C. L. 49; Beven *v.* Cheshire, 3 Dowl. P. C. 70; King *v.* Jones, 2 Ld. Raym. 1525; Evans *v.* Chester, 2 M. & W. 847.

To what court addressed.— A writ of error coram nobis must be addressed to the court which rendered the judgment. Land *v.* Williams, 12 Sm. & M. (Miss.) 362, 51 Am. Dec. 117. It cannot be employed to reverse the judgment of another court, and especially a higher one (Latham *v.* Hodges, 35 N. C. 267); nor will the writ issue from a superior to an inferior court (Roughton *v.* Brown, 53 N. C. 393).

After appeal.— This writ will not lie after affirmance of the judgment in an appellate court, nor after the decision on any proceeding to reverse, vacate, or set aside the judgment. Latham *v.* Hodges, 35 N. C. 267; Hillman *v.* Chester, 12 Heisk. (Tenn.) 34; Welsh *v.* Harman, 8 Yerg. (Tenn.) 103; Lambell *v.* Pretty John, 1 Str. 690.

37. Higbie *v.* Comstock, 1 Den. (N. Y.) 652; Tyler *v.* Morris, 20 N. C. 625, 34 Am. Dec. 395.

38. See Billups *v.* Freeman, (Ariz. 1898) 52 Pac. 367; Life Assoc. of America *v.* Fassett, 102 Ill. 315; McKindley *v.* Buck, 43 Ill. 488; Beaubien *v.* Hamilton, 4 Ill. 213; Sloo *v.* State Bank, 2 Ill. 428; McPherson *v.* Wood, 52 Ill. App. 170; Smith *v.* Kingsley, 19 Wend. (N. Y.) 620; People *v.* Oneida C. Pl., 20 Johns. (N. Y.) 22; Pickett *v.* Ledgerwood, 7 Pet. (U. S.) 144, 8 L. ed. 638.

39. *Georgia.*— Beall *v.* Powell, 4 Ga. 525.

Illinois.— Holden *v.* Dunn, 144 Ill. 413, 33 N. E. 413, 19 L. R. A. 481; Brady *v.* Washington Ins. Co., 82 Ill. App. 380; Maple *v.* Havenhill, 37 Ill. App. 311.

Iowa.— McKinney *v.* Western Stage Co., 4 Iowa 420.

Maryland.— Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681; Bridendolph *v.* Zeller, 3 Md. 325; Hawkins *v.* Bowie, 9 Gill & J. 428.

Mississippi.— Mississippi, etc., R. Co. *v.* Wynne, 42 Miss. 315; Fellows *v.* Griffin, 9 Sm. & M. 362.

Missouri.— State *v.* Heinrich, 14 Mo. App. 146.

Pennsylvania.— Hurst *v.* Fisher, 1 Watts & S. 438; Day *v.* Hamhurgh, 1 Browne 75.

Tennessee.— McLemore *v.* Durivage, 92 Tenn. 482, 22 S. W. 207; Lamb *v.* Sneed, 4 Baxt. 349; Upton *v.* Philips, 11 Heisk. 215; Patterson *v.* Arnold, 4 Coldw. 364.

Texas.— Milam County *v.* Robertson, 47 Tex. 222.

See 30 Cent. Dig. tit. "Judgment," § 639.

40. Williams *v.* Edwards, 34 N. C. 118.

41. Higbie *v.* Comstock, 1 Den. (N. Y.) 652. But see Merritt *v.* Parks, 6 Humphr. (Tenn.) 332.

42. Dobbs *v.* State, 63 Kan. 321, 65 Pac. 658; Hadley *v.* Bernero, 103 Mo. App. 549, 78 S. W. 64.

43. *Alabama.*— Holford *v.* Alexander, 12 Ala. 280, 46 Am. Dec. 253.

Illinois.— Gould *v.* Watson, 80 Ill. App. 242.

Kentucky.— Lightfoot *v.* Commonwealth Bank, 4 Dana 492.

Tennessee.— Memphis German Sav. Inst. *v.* Hargan, 9 Heisk. 496.

Virginia.— Richardson *v.* Jones, 12 Gratt. 53.

See 30 Cent. Dig. tit. "Judgment," § 639.

Newly discovered evidence cannot be made the basis for a writ of error coram nobis. Dobbs *v.* State, 63 Kan. 321, 65 Pac. 658.

44. State *v.* Clarkson, 88 Mo. App. 553; State *v.* White, 75 Mo. App. 257.

Defects in process or service see Marble *v.* Vanhorn, 53 Mo. App. 361; Phillips *v.* Russell, 25 Fed. Cas. No. 11,105*a*, Hempst. 62.

Impeaching return.— It is not ground for a writ of error coram nobis that the sheriff's return of the service of a writ or notice is false. Shoffet *v.* Menifee, 4 Dana (Ky.) 150; Bolling *v.* Anderson, 1 Tenn. Ch. 127.

Unauthorized appearance of attorney see Miller *v.* Ewing, 8 Sm. & M. (Miss.) 421; Abernathy *v.* Latimore, 19 Ohio 286.

having been brought to the notice of the court before judgment,[45] or where a default has been irregularly entered against a party not legally in default, or has been taken against him by fraud, accident, or mistake, without fault on his part.[46]

3. PROCEEDINGS. There is no limitation of the time within which a writ of error coram nobis may be brought,[47] unless fixed by statute.[48] The writ can be prosecuted only by one who was a party or privy to the record, or injured by the judgment,[49] and it issues upon a motion or petition addressed to the court and supported by affidavits[50] setting forth with certainty and particularity the errors or defects complained of.[51] Notice of the application must be given to the opposing party,[52] and the writ issues upon an order of the court allowing it.[53]

4. HEARING AND JUDGMENT. Issues must be made up, under a writ of error coram nobis, and these must be tried if necessary by a jury;[54] but the writ does not open up the whole case for a new trial, but only those points and questions raised by the application for it.[55] The judgment, if against the party applying,

45. *Illinois.*— St. Louis Consol. Coal Co. *v.* Oeltjen, 189 Ill. 85, 59 N. E. 600.

Maryland.— Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681.

Mississippi.— Neilson *v.* Holmes, Walk. 261.

Missouri.— Dugan *v.* Scott, 37 Mo. App. 663; Latshaw *v.* McNees, 50 Mo. 381.

Ohio.— Dows *v.* Harper, 6 Ohio 518, 27 Am. Dec. 270.

See 30 Cent. Dig. tit. "Judgment," § 639.

Contra.— Withrow *v.* Smithson, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762.

46. Dinsmore *v.* Boyd, 6 Lea (Tenn.) 689; Tucker *v.* James, 12 Heisk. (Tenn.) 333; Jones *v.* Pearce, 12 Heisk. (Tenn.) 281; Crouch *v.* Mullinix, 1 Heisk. (Tenn.) 478; Crawford *v.* Williams, 1 Swan (Tenn.) 341.

Irregularities not sufficient to sustain the writ see Jackson *v.* Milsom, 6 Lea (Tenn.) 514; Mahalovitch *v.* Vaughn, 1 Baxt. (Tenn.) 325; Brandon *v.* Diggs, 1 Heisk. (Tenn.) 472.

Erroneous entry.— That an order of default was entered without first passing on a demurrer on file was an error of law, and therefore cannot be questioned on a writ of error coram nobis. Utley *v.* Cameron, 87 Ill. App. 71.

47. Powell *v.* Gott, 13 Mo. 458, 53 Am. Dec. 153.

The ordinary statute of limitations in regard to writs of error does not apply to writs of error coram nobis. Eubank *v.* Rall, 4 Leigh (Va.) 308; Strode *v.* Stafford Justices, 23 Fed. Cas. No. 13,537, 1 Brock. 162.

48. See Breckinridge *v.* Coleman, 7 B. Mon. (Ky.) 331; Whaley *v.* Stout, 2 J. J. Marsh. (Ky.) 147; Case *v.* Ribelin, 1 J. J. Marsh. (Ky.) 29; Elliott *v.* McNairy, 1 Baxt. (Tenn.) 342.

49. Holford *v.* Alexander, 12 Ala. 280, 46 Am. Dec. 253.

Administrator.— On a suggestion that defendant died before judgment entered, a writ of error coram nobis may be allowed to be brought in the name of his administrator. Devereux *v.* Roper, 1 Phila. (Pa.) 182.

Joint parties.—All the defendants to a joint judgment must be parties to a writ of error. Cook *v.* Conway, 3 Dana (Ky.) 454. But see Roughton *v.* Brown, 53 N. C. 393, holding that only those parties as to whom there was error of fact need be joined in the writ.

50. Ferris *v.* Douglass, 20 Wend. (N. Y.) 626.

An agent's affidavit to a petition for a writ of error coram nobis is a nullity, unless the affidavit or petition shows good cause why the principal did not make it. Reid *v.* Hoffman, 6 Heisk. (Tenn.) 440.

The petition for the writ may be amended on good cause shown if sustained by affidavits of proper strength. Baxter *v.* Grandstaff, 3 Tenn. Ch. 244.

Pleadings in writing.— In writs of error coram nobis, the pleadings should be in writing. Handley *v.* Fitzhugh, 3 A. K. Marsh. (Ky.) 561. But *compare* Lansdale *v.* Findley, Hard. (Ky.) 151.

Evidence.— On an application for a writ of error coram nobis the court will not weigh conflicting evidence. Dobbs *v.* State, 63 Kan. 321, 65 Pac. 658.

51. Dunnivant *v.* Miller, 1 Baxt. (Tenn.) 227; Thruston *v.* Belote, 12 Heisk. (Tenn.) 249; Hicks *v.* Haywood, 4 Heisk. (Tenn.) 598; Bolling *v.* Anderson, 1 Tenn. Ch. 127.

Requisites of application.— The application for the writ must show that, if the facts on which the error is predicated had been presented to the trial court, the judgment complained of could not have been entered. Dobbs *v.* State, 63 Kan. 321, 65 Pac. 658.

52. Mears *v.* Garretson, 2 Greene (Iowa) 316; Combs *v.* Carter, 1 Dana (Ky.) 178; Woodrough *v.* Perkins, 1 Bibb (Ky.) 288; Ferris *v.* Douglass, 20 Wend. (N. Y.) 626. But *compare* Duff *v.* Combs, 8 B. Mon. (Ky.) 386.

53. Comstock *v.* Van Schoonhoven, 3 How. Pr. (N. Y.) 258; Maher *v.* Comstock, 1 How. Pr. (N. Y.) 175; Ferris *v.* Douglass, 20 Wend. (N. Y.) 626.

Entitling.— A writ of error coram nobis to vacate a judgment need not be entitled in the action in which the judgment was entered. Swain *v.* Heartt, 2 How. Pr. (N. Y.) 90.

54. Cook *v.* Conway, 3 Dana (Ky.) 454; Fellows *v.* Griffin, 9 Sm. & M. (Miss.) 362.

55. Breckinridge *v.* Coleman, 7 B. Mon. (Ky.) 331. *Compare* Connelly *v.* Magowan, 3 T. B. Mon. (Ky.) 152.

is that the judgment complained of be affirmed; if in his favor, that the judgment be revoked and recalled, and the latter judgment puts the suit in the same situation as when the judgment was rendered.[56]

E. Action to Review Judgment — 1. Jurisdiction and Authority. In some states the statutes authorize the review and modification or reversal of a judgment upon an independent action brought for that purpose[57] in the same court which rendered the judgment, no other having jurisdiction,[58] after the party has unsuccessfully moved for a modification of the judgment, or for a new trial, in the original action, and duly reserved exceptions to the court's refusal to grant him such relief, or to its rulings and decisions made at the trial.[59]

2. Grounds For Review. A proceeding of this kind for the review of a judgment may be maintained for want of jurisdiction,[60] for the insufficiency of the complaint to show any right of action,[61] for error of law committed by the trial court,[62] for material new matter discovered since the rendition of the judgment,[63] for fraud

56. Holford *v.* Alexander, 12 Ala. 280, 46 Am. Dec. 253; Fellows *v.* Griffin, 9 Sm. & M. (Miss.) 362.

Joint defendants.— The judgment may be vacated as to one defendant who shows himself entitled to relief and retained as to the others. Miller *v.* Ewing, 8 Sm. & M. (Miss.) 421.

Plaintiff consenting to vacation.—If, on application by a judgment defendant for a writ of error coram nobis, the plaintiff elects to vacate the judgment, he will be permitted to do so, and the application will then be denied. Higbie *v.* Comstock, 1 Den. (N. Y.) 652.

57. See the statutes of the different states. And see Bullard *v.* Brown, 74 Vt. 120, 52 Atl. 422, holding that a judgment cannot be reformed in a suit brought solely to perfect the judgment lien.

58. Johnson *v.* Ahrens, 117 Ind. 600, 19 N. E. 335; Jones *v.* Ahrens, 116 Ind. 490, 19 N. E. 334; Arnold *v.* Styles, 2 Blackf. (Ind.) 391; Fenske *v.* Kluender, 61 Wis. 602, 21 N. W. 796.

59. Graves *v.* State, 136 Ind. 406, 36 N. E. 275; Bement *v.* May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; Gates *v.* Scott, 123 Ind. 459, 24 N. E. 257; Baker *v.* Ludlam, 118 Ind. 87, 20 N. E. 648; American Ins. Co. *v.* Gibson, 104 Ind. 336, 3 N. E. 892; Slussman *v.* Kensler, 88 Ind. 190; Williams *v.* Manley, 33 Ind. App. 270, 69 N. E. 469.

When exceptions unnecessary.— But where the court had no jurisdiction of the person of defendant, a proceeding to review a personal judgment rendered against him will lie, without his having taken any exceptions to the rulings in the original action. McCormack *v.* Greensburgh First Nat. Bank, 53 Ind. 466. And the rule appears to be the same where a judgment by default has been rendered on an insufficient complaint. Berkshire *v.* Young, 45 Ind. 461.

60. See McArthur *v.* Leffler, 110 Ind. 526, 10 N. E. 81; State Bldg., etc., Assoc. *v.* Brackin, 27 Ind. App. 677, 62 N. E. 91; Campbell *v.* Garton, 29 Mo. 343.

Unauthorized appearance.—When an attorney appears for a party without authority and confesses judgment, relief cannot be obtained in a proceeding to review the judgment. Floyd County Agricultural, etc., Assoc. *v.* Tompkins, 23 Ind. 348.

61. Harlen *v.* Watson, 63 Ind. 143. *Compare* Searle *v.* Whipperman, 79 Ind. 424.

Excessive relief.— A suit to review a judgment cannot be maintained on the ground that the relief granted by the judgment was beyond the relief asked by the complaint filed in the original action. Freeman *v.* Paul, 105 Ind. 451, 5 N. E. 754.

62. A proceeding to review a judgment for error of law appearing in the proceedings and judgment is in the nature of an appeal, and is to be tried by the record alone; hence only such errors can be considered as would be available on a direct appeal, and the suit cannot be sustained unless the errors relied on are such as would have justified a reversal of the judgment if it had been appealed directly. Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Tachau *v.* Fiedeldey, 81 Ind. 54; Rice *v.* Turner, 72 Ind. 559; Richardson *v.* Howk, 45 Ind. 451; Williams *v.* Manley, 33 Ind. App. 270, 69 N. E. 469; State Bldg., etc., Assoc. *v.* Brackin, 27 Ind. App. 677, 62 N. E. 91; Kiley *v.* Murphy, 7 Ind. App. 239, 34 N. E. 112, 650.

Assessment of damages.— Mistake or misapprehension of the court, in the assessment of damages, resulting in the assessment of too great a sum, cannot be reviewed. Burton *v.* Harris, 76 Ind. 429.

63. What is here meant is an entirely different thing from new evidence. The term means facts constituting the whole or part of a ground of action or defense. Dippel *v.* Schicketanz, 100 Ind. 376; Peyton *v.* Kruger, 77 Ind. 486; Fleming *v.* Stout, 19 Ind. 328; Nelson *v.* Johnson, 18 Ind. 329; Hall *v.* Palmer, 18 Ind. 5; Springfield Engine, etc., Co. *v.* Michener, 23 Ind. App. 130, 55 N. E. 32. It does not include newly discovered evidence in support of claims or contentions set up and litigated in the original action. Peyton *v.* Kruger, *supra*; Barnes *v.* Dewey, 58 Ind. 418; Layton *v.* Weaver, 51 Ind. 110; Roush *v.* Layton, 51 Ind. 106; Walker's Estate, 19 Pa. Co. Ct. 189. And further, it must be new matter of fact, and not matter

practised in obtaining the judgment,[64] or where the judgment was taken against the party in consequence of surprise, mistake, inadvertence, or his excusable neglect,[65] or to correct a mistake in the form of the judgment;[66] but not on account of matters which might have been pleaded in defense to the original action,[67] nor merely on account of a conflict in the evidence.[68]

3. Time For Proceedings. The right to bring an action for the review of a judgment is not lost by delay, not amounting to laches,[69] unless the time is limited by statute, in which case it must be exercised within the statutory time,[70] except in the case of persons under a legal disability at the time of the rendition of judgment, whose rights in this behalf are generally saved by the statute, for an equal length of time after the removal of the disability.[71] A complaint to review a judgment cannot be prosecuted while an appeal from the judgment is pending, or after the affirmance of the judgment on appeal,[72] except where it is founded on the discovery of material new matter, in which case it may be prosecuted after the judgment has been affirmed on an appeal involving only alleged errors of law in the proceedings below.[73]

4. Parties. In a proceeding to review a judgment, the same parties, and all of them, as those in the original proceeding sought to be reviewed, should be before the court.[74]

5. Complaint — a. Requisites in General. A complaint for review of a judgment should show that exceptions to the errors alleged were duly taken,[75] and that one of the statutory grounds for review of the judgment exists, setting forth the facts and circumstances relied on with at least so much certainty and particularity as will sustain it against a demurrer.[76] In particular, if the complaint is

of law, such as a subsequently enacted curative statute. Worley *v.* Ellettsville, 60 Ind. 7.

64. See State *v.* Holmes, 69 Ind. 577; Bryant *v.* Hoskins, 53 Ind. 218.

Fraud or irregularity practised by the clerk and sheriff, after rendition of judgment, in altering the entry thereof, or in connection with issuing the execution or making the levy, cannot be reviewed. Ferguson *v.* Hull, 136 Ind. 339, 36 N. E. 254.

65. Snipes *v.* Jones, 59 Ind. 251.

66. Ryon *v.* Thomas, 104 Ind. 59, 3 N. E. 653. But *compare* Slussman *v.* Kensler, 88 Ind. 190.

67. Jones *v.* Tipton, 142 Ind. 643, 42 N. E. 221; Epstein *v.* Greer, 93 Ind. 140; Mitchell *v.* Boyer, 58 Ind. 19.

68. Terry *v.* Bronnenberg, 87 Ind. 95.

69. Claghorn's Estate, 10 Pa. Dist. 91.

70. Rupert *v.* Martz, 116 Ind. 72, 18 N. E. 381; Webster *v.* Maiden, 41 Ind. 124; Indianapolis First Nat. Bank *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054.

Delay within the statutory time.— The party seeking to review the judgment should act with reasonable promptness, and his application will not be regarded with favor if he has delayed a long time in making it, although it is presented within the time limited by the statute. Alexander *v.* Daugherty, 69 Ind. 388; Simpkins *v.* Wilson, 11 Ind. 541.

71. See the statutes of the different states.

Coverture is not a legal disability within the meaning of such a statute. Rosa *v.* Prather, 103 Ind. 191, 2 N. E. 575. *Compare* Harlen *v.* Watson, 63 Ind. 143.

Non-residents.— If the statute makes no reservation in favor of non-residents, none can be implied. Rosa *v.* Prather, 103 Ind. 191, 2 N. E. 575.

72. Buscher *v.* Knapp, 107 Ind. 340, 8 N. E. 263; Hill *v.* Roach, 72 Ind. 57. But where defendant, having prayed an appeal, takes no further steps, jurisdiction of the trial court is not divested, and it may entertain a suit to review the judgment. State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566.

73. Hill *v.* Roach, 72 Ind. 57.

74. Douglay *v.* Davis, 45 Ind. 493. And see Tereba *v.* Standard Cabinet Mfg. Co., 32 Ind. App. 9, 68 N. E. 1033.

A surety against whom a judgment has been obtained may review the same without disturbing the separate judgments in the same action in favor of his principals. Michener *v.* Springfield Engine, etc., Co., 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59.

Joint judgment defendants, sureties on a bond, may join in such a complaint, making the principal a party defendant, although he has no interest in the matters on which errors are based. Burns *v.* Singer Mfg. Co., 87 Ind. 541.

Heirs.— Where an administrator sues for and obtains an order to sell lands to satisfy a judgment, it cannot be reviewed on the petition of the heirs, as they are not parties to the proceeding. Cassel *v.* Case, 14 Ind. 393.

75. Goar *v.* Cravens, 57 Ind. 365; Kitch *v.* State, 53 Ind. 59; Train *v.* Gridley, 36 Ind. 241.

76. Lightcap *v.* Konovosky, 161 Ind. 609,

founded on the discovery of material new matter, it must set forth plaintiff's ignorance of it at the time of the trial, the fact that it could not have been discovered in due season by the exercise of proper diligence, and the circumstances of its discovery.[77] But a complaint stating a cause of action in general terms will be good, after verdict, as against a motion in arrest of judgment.[78] And a complaint is not bad on demurrer for want of facts, if otherwise sufficient, merely because it fails to show that the suit was commenced within the time limited by the statute.[79]

b. Transcript of Record. In order to review a judgment the complaint therefor should contain a true and complete transcript of so much of the record of the proceedings as would be necessary on a direct appeal, or so much as is necessary fully to present the questions on which error is predicated.[80]

6. Defenses, Answer, Etc. In an action for the review of a judgment, only such defenses are proper as are available on an appeal from the judgment.[81] Defendant may demur to the complaint, and thereby admits the truth of its statements of fact.[82] He is not entitled to amend his pleadings in the original case.[83]

7. Evidence. Plaintiff must prove all the facts necessary to entitle him to the relief asked,[84] and may according to the circumstances of the case present the testimony of witnesses, affidavits, or other exhibits;[85] but the recitals of the record, unless controverted by evidence, will control the allegations of the complaint.[86]

8. Hearing and Determination. Where the court finds in favor of plaintiff, whether on a hearing or on overruling a demurrer, a final judgment will be entered reversing the original judgment,[87] unless it is found to be merely exces-

69 N. E. 396; Hague *v.* Huntington First Nat. Bank, 159 Ind. 636, 65 N. E. 907; Wabash R. Co. *v.* Young, 154 Ind. 24, 55 N. E. 853; Jones *v.* Tipton, 142 Ind. 643, 42 N. E. 221; Rosa *v.* Prather, 103 Ind. 191, 2 N. E. 575; Shoaf *v.* Joray, 86 Ind. 70; Williams *v.* Manley, 33 Ind. App. 270, 69 N. E. 469; Smith *v.* Harris, 43 Mo. 557.

Where the record of the proceedings in the original action is made a part of the complaint, the exhibit thus presented will govern, on the question whether the court had jurisdiction, rather than the general allegations in the complaint. Hall *v.* Palmer, 18 Ind. 5.

77. Osgood *v.* Smock, 144 Ind. 387, 40 N. E. 37; Majors *v.* Craig, 144 Ind. 39, 43 N. E. 3; Debolt *v.* Debolt, 86 Ind. 521; State *v.* Holmes, 69 Ind. 577; Alexander *v.* Daugherty, 69 Ind. 388; Whitehall *v.* Crawford, 67 Ind. 84; Gregg *v.* Louden, 51 Ind. 585.

Affidavit.— In an action to review a judgment because of new matter, an affidavit made by the witness by whom it is claimed such new matter can be proved, and filed with the complaint, will be deemed a mere exhibit, and not a part of the complaint; and in determining the materiality of the newly discovered evidence, the court can consider only the allegations of the body of the complaint itself. Hill *v.* Roach, 72 Ind. 57.

78. Johnson *v.* Ahrens, 117 Ind. 600, 19 N. E. 335; Jones *v.* Ahrens, 116 Ind. 490, 19 N. E. 334.

79. Boyd *v.* Fitch, 71 Ind. 306; Whitehall *v.* Crawford, 67 Ind. 84.

80. Bradford *v.* Marion School Town, 107 Ind. 280, 7 N. E. 256; Funk *v.* Davis, 103 Ind. 281, 2 N. E. 739; Leech *v.* Perry, 77 Ind. 422; Stevens *v.* Logansport, 76 Ind. 498; Davis *v.* Binford, 70 Ind. 44; Whitehall *v.* Crawford, 67 Ind. 84; Worley *v.* Ellettsville, 60 Ind. 7; Comer *v.* Himes, 58 Ind. 573; Mitchell *v.* Boyer, 58 Ind. 19; Goar *v.* Cravens, 57 Ind. 365; Hardy *v.* Chipman, 54 Ind. 591; Weathers *v.* Doerr, 53 Ind. 104; Kitch *v.* State, 53 Ind. 59; Davidson *v.* King, 49 Ind. 338; Owen *v.* Cooper, 46 Ind. 524; McDade *v.* McDade, 29 Ind. 340; Brown *v.* Lucas, 18 Ind. 286; Bartmess *v.* Holliday, 27 Ind. App. 544, 61 N. E. 750; Kiley *v.* Murphy, 7 Ind. App. 239, 34 N. E. 112, 650.

Certification of record.— In an action to review a judgment, it is not necessary that the copy of the record contained in the complaint should be a certified copy. Hoppes *v.* Hoppes, 123 Ind. 397, 24 N. E. 139.

81. Kiley *v.* Murphy, 7 Ind. App. 239, 24 N. E. 112, 650.

82. Bartmess *v.* Holliday, 27 Ind. App. 544, 61 N. E. 750.

General demurrer. — If defendant demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action, this is equivalent to a submission of the case to the court for a hearing on the facts set out in the complaint. Nord *v.* Marty, 56 Ind. 531.

83. Leech *v.* Perry, 77 Ind. 422.

84. Alsop *v.* Wiley, 17 Ind. 452.

85. See Slagle *v.* Bodmer, 75 Ind. 330.

86. State *v.* Holmes, 69 Ind. 577.

87. Knox County *v.* Montgomery, 109 Ind. 69, 9 N. E. 590; Leech *v.* Perry, 77 Ind. 422; Monticello *v.* Kennard, 7 Ind. App. 135, 34 N. E. 454. *Compare* Barron *v.* Jackson, 42 N. H. 419.

sive in amount, in which case it may be modified without being reversed.[88] On the other hand if the finding is for defendant, the judgment will be one of affirmance of the original judgment; and this will bar a second complaint to review the same judgment.[89]

IX. OPENING OR VACATING.[90]

A. Jurisdiction and Authority in General — 1. Nature and Scope of Remedy — a. In General. The power to vacate, open, or set aside a judgment is a common-law power inherent in courts of general jurisdiction, and may be exercised without the grant of special statutory authority.[91] An application for this purpose is not in the nature of an appeal from the judgment;[92] but is addressed to the equitable powers of the court,[93] and is to be based upon a showing of good and sufficient grounds for the relief asked,[94] and granted only upon hearing the parties, and not in an *ex parte* or summary manner.[95]

b. Constitutional and Statutory Provisions. It is not in the power of the people of a state, by the adoption of a constitutional provision, or of the legislature, by the enactment of a statute, to annul an existing final judgment or class of judgments, or order the same to be set aside and a new trial granted.[96] But the legislature may give to the courts authority to open or set aside judgments, in addition to that common-law power which they already possess,[97] and some statutes of this character have been sustained, although retroactive in their operation.[98] A statute of this kind is not exclusive. That is, if it enumerates certain grounds for which judgments may be vacated, the party applying for relief under the statute must bring himself within its terms. But the statute will not prevent the courts from acting on other grounds or causes which would be good and suffi-

88. Francis *v.* Davis, 69 Ind. 452.

89. Coen *v.* Funk, 26 Ind. 289. *Compare* Hayes *v.* Collins, 114 Mass. 54.

90. Vacating judgment after appeal see Appeal and Error, 2 Cyc. 975.

Vacating judgment by consent of counsel see Attorney and Client, 4 Cyc. 942.

91. Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681; Bradley *v.* Slater, 55 Nebr. 334, 75 N. W. 826, 58 Nebr. 554, 78 N. W. 1069; Evans *v.* Adams, 15 N. J. L. 373; Donnelly *v.* McArdle, 14 N. Y. App. Div. 217, 43 N. Y. Suppl. 560; Kiefer *v.* Grand Trunk R. Co., 5 Silv. Sup. (N. Y.) 285, 8 N. Y. Suppl. 230; Prior *v.* Hall, 13 N. Y. Civ. Proc. 83; Allen *v.* Ackley, 4 How. Pr. (N. Y.) 5.

In Pennsylvania the courts, for cause shown, open, without vacating, a judgment by default, for the purpose of letting defendant in to a defense. Although this practice is unknown to the common law, it is an appeal to the equitable powers of the court to allow a hearing on the merits, from which defendant, by adherence to the strict forms of law, would otherwise be precluded. McAnulty *v.* National Life Assoc., 6 Lack. Leg. N. 128.

A court is governed by the same rules in relieving against defaults in real as in personal actions. Burtch *v.* Hoag, 6 Cow. (N. Y.) 398.

Other relief.— As to the authority of the court to treat a motion for the vacation of a judgment as an application for relief which is more appropriate or more suitable for it to grant, or, on such an application, to grant relief other than that prayed, see Smith *v.* Gouraud, 76 Hun (N. Y.) 343, 27 N. Y. Suppl. 717; Milleman *v.* New York, 18 How. Pr. (N. Y.) 542; Kellett *v.* Freeman, 19 Pa. Super. Ct. 155.

An auditor, appointed to make distribution of a fund, has no power or authority to set aside a judgment or declare it void. Edwards' Appeal, 66 Pa. St. 89; Leeds *v.* Bender, 6 Watts & S. (Pa.) 315.

92. Keeler *v.* Dennis, 5 N. Y. St. 479.

93. Brown *v.* Easton, 30 N. J. Eq. 725; Wintringham *v.* Wintringham, 20 Johns. (N. Y.) 296; McAnulty *v.* National Life Assoc., 6 Lack. Leg. N. (Pa.) 128.

94. Dean *v.* Leonard, 3 Brev. (S. C.) 398.

95. Reynolds *v.* Barnes, 76 Pa. St. 427; Horner *v.* Hower, 39 Pa. St. 126; Whitney *v.* Chandler, 2 Leg. Rec. (Pa.) 270. *Compare* *In re* Geise, 4 Leg. Gaz. (Pa.) 233.

96. 1 Black Judgm. § 298. See Constitutional Law, 8 Cyc. 824. And see Connell *v.* Vaughn, 40 Ga. 154; State *v.* Flint, 61 Minn. 539, 63 N. W. 1113; De Chastellux *v.* Fairchild, 15 Pa. St. 18, 53 Am. Dec. 570.

97. White *v.* Herndon, 40 Ga. 493.

98. See Newland *v.* Gentry, 18 B. Mon. (Ky.) 666; Walker *v.* Hasser, 41 Miss. 90; Marston *v.* Humes, 3 Wash. 267, 28 Pac. 520. *Compare* Wieland *v.* Shillock, 24 Minn. 345; Lee *v.* Cook, 1 Wyo. 413.

Retroactive construction.— A statute providing that the courts shall not render or enforce judgments founded on certain demands will not authorize a court to vacate a judgment already rendered on such a demand. Ransone *v.* Grist, 40 Ga. 241; Williams *v.* Freeland, 19 W. Va. 599.

cient at common law, and an application based on such a ground is not governed by the statute.[99] Such a law is remedial in its character, and should be liberally construed,[1] although it cannot be extended beyond its legitimate purport. Thus if it speaks only of "defaults" it cannot be applied to final judgments otherwise rendered.[2]

c. Other Remedies Available. A motion to vacate or set aside a judgment will not be entertained when the proper remedy of the party aggrieved is by appeal, error, or certiorari;[3] by a motion for a new trial in the court rendering the judgment;[4] by mandamus requiring the court to take some action which would give the party what he seeks;[5] by an independent action for damages;[6] or by a bill in equity for injunction or other relief.[7]

2. Authority of Courts — a. In General. The authority to vacate or set aside

99. Bond *v.* Epley, 48 Iowa 600; Ladd *v.* Stevenson, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; Kiefer *v.* Grand Trunk R. Co., 5 Silv. Sup. (N. Y.) 285, 8 N. Y. Suppl. 230; Cowles *v.* Hayes, 69 N. C. 406. *Compare* People *v.* O'Connell, 23 Cal. 281; Myres *v.* Myres, 6 Ohio St. 221; Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512.

1. People *v.* Campbell, 18 Abb. Pr. (N. Y.) 1; Turner *v.* Coughran, 8 S. D. 419, 66 N. W. 810. See Carr *v.* Watkins, 9 S. W. 218, 10 Ky. L. Rep. 342.

2. O'Connell *v.* Friedman, 118 Ga. 831, 45 S. E. 668; Mathews *v.* Bishop, 106 Ga. 564, 32 S. E. 631; Zimmermann *v.* Bloch, 12 Misc. (N. Y.) 158, 32 N. Y. Suppl. 1073; Brown *v.* Chapman, 90 Va. 174, 17 S. E. 855.

3. *Delaware.*—Wood *v.* Dickerson, 3 Pennew. 23, 50 Atl. 215.

Louisiana.— Landry *v.* Bertrand, 48 La. Ann. 48, 19 So. 126.

Maryland.— Chappell *v.* Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982.

Minnesota.— Grant *v.* Schmidt, 22 Minn. 1.

Nebraska.— Kellogg *v.* Spargur, 3 Nebr. (Unoff.) 595, 100 N. W. 1025.

New York.— Clinton *v.* Eddy, 54 Barb. 54. But see Szerlip *v.* Baier, 21 Misc. 331, 47 N. Y. Suppl. 133, holding that the remedies by motion and by appeal are cumulative. Under N. Y. Code Civ. Proc. § 1294, restricting the right of appeal to parties not in default, the remedy of one aggrieved by an invalid default judgment is by motion to have it corrected. Park *v.* Park, 24 Misc. 372, 53 N. Y. Suppl. 677. And see Matter of Armstrong, 72 N. Y. App. Div. 286, 76 N. Y. Suppl. 37.

Pennsylvania. — Philadelphia, etc., Co. *v.* Snowdon, 161 Pa. St. 201, 28 Atl. 1067.

South Carolina.— McMahon *v.* Pugh, 62 S. C. 506, 40 S. E. 961; Bryson *v.* Whilden, 55 S. C. 465, 33 S. E. 558.

Texas.— Johnston *v.* Sharpe, (Civ. App. 1896) 34 S. W. 1006.

Wisconsin.—Edwards *v.* Janesville, 14 Wis. 26.

United States.— Thomassen *v.* Whitwell, 23 Fed. Cas. No. 13,930, 9 Ben. 458.

Striking off judgment.— Where defendant moves promptly, the court will strike off a judgment by default, entered on an insufficient statement of claim, instead of compelling him to resort to a writ of error. Ide *v.* Booth, 8 Pa. Co. Ct. 499. *Compare* North *v.* Yorke, 174 Pa. St. 349, 34 Atl. 620, holding that a default judgment which is not only regular on its face, but also regular and valid in fact, cannot be stricken from the record; but the remedy in such a case is by a motion to open the judgment and let the defendant in to a defense.

4. Mize *v.* Americus Mfg., etc., Co., 109 Ga. 359, 34 S. E. 583; Clark's Cove Guano Co. *v.* Steed, 92 Ga. 440, 17 S. E. 967; Louisville, etc., R. Co. *v.* Rountree, 90 Ind. 329; Dean *v.* Munhall, 20 Pa. Co. Ct. 533; Folsom *v.* Ballard, 70 Fed. 12, 16 C. C. A. 593.

Where in attachment judgment is taken by default both against the principal debtor and a garnishee, their remedy is by motion to set aside the default, and not by motion for a new trial. Debs *v.* Dalton, 7 Ind. App. 84, 34 N. E. 236.

Where judgment is rendered for defendant on the pleadings, for want of a replication, a motion to set aside the judgment is the proper remedy, and no motion for a new trial is necessary. Iba *v.* Wyoming Cent. Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

5. Chappell *v.* Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982.

6. Chappell *v.* Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982. But see Deane *v.* Loucks, 58 Hun (N. Y.) 555, 12 N. Y. Suppl. 903.

7. Woodward *v.* Arlington Mills Mfg. Co., 2 Pennew. (Del.) 188, 44 Atl. 620; State *v.* Pierce County Super. Ct., (Wash. 1898) 52 Pac. 1013.

Pending a suit in equity to restrain proceedings on a judgment and have it declared void, the court in which it was rendered has no jurisdiction of a proceeding to set it aside. Wilmington First Nat. Bank *v.* Lieberman, 1 Marv. (Del.) 367, 41 Atl. 90. And see Hay *v.* Cole, 90 Hun (N. Y.) 258, 35 N. Y. Suppl. 950.

In Pennsylvania where a rule to open judgment has been held under advisement, and defendant thereafter sues in equity for cancellation of the judgment, and his bill is dismissed, he cannot ask for a decision in the law side of the court on the rule to open the judgment. Mellerio *v.* Freeman, 211 Pa. St. 202, 60 Atl. 735.

judgments is incident to all courts of record, or of general jurisdiction,[8] including not only the *nisi prius* courts, but also courts of equity,[9] and appellate courts,[10] and probate or surrogates' courts.[11] The power to vacate a judgment must be exercised by the court which rendered the judgment, and no other court can take cognizance of such an application.[12] As between courts of coördinate jurisdiction, such as two county courts or circuit courts of the same state, the rule is that neither has power to vacate a judgment rendered by the other which is not void upon its face.[13]

8. *Illinois.*— Briggs *v.* Dunne, 163 Ill. 36, 46 N. E. 628.

Indiana.— Gingrich *v.* Gingrich, 146 Ind. 227, 45 N. E. 101.

Iowa.— Martin *v.* Van Bergen, 1 Greene 314.

Maryland.— Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681.

Michigan.— Grand Rapids Fifth Nat. Bank *v.* Clinton Cir. Judge, 100 Mich. 67, 58 N. W. 648.

Missouri.— Hulbert *v.* Tredway, 159 Mo. 665, 60 S. W. 1035.

New York.— Matter of Broadway Ins. Co., 23 N. Y. App. Div. 282, 48 N. Y. Suppl. 299; Donnelly *v.* McArdle, 14 N. Y. App. Div. 217, 43 N. Y. Suppl. 560; Coffin *v.* Lesster, 36 Hun 347; Morgan *v.* Holladay, 38 N. Y. Super. Ct. 117; Jellinghaus *v.* New York Ins. Co., 5 Bosw. 678; Riley *v.* Ryan, 45 Misc. 151, 91 N. Y. Suppl. 952; People *v.* Dunn, 54 N. Y. Suppl. 194; Bigelow *v.* Heaton, 2 How. Pr. 207.

Ohio.— Manguno, etc., Co. *v.* Clymonts, 19 Ohio Cir. Ct. 237, 10 Ohio Cir. Dec. 427.

Vermont.— Scott *v.* Stewart, 5 Vt. 57.

Virginia.— Ballard *v.* Whitlock, 18 Gratt. 235.

See 30 Cent. Dig. tit. "Judgment," § 666.

United States courts.— The power to vacate judgments belongs inherently to the courts of the United States as well as to those of the states. Fisher *v.* Simon, 67 Fed. 387, 14 C. C. A. 443; U. S. *v.* Williams, 67 Fed. 384, 14 C. C. A. 440; U. S. *v.* Wallace, 46 Fed. 569.

A change in the constitution of the court does not preclude a consideration of the question whether a judgment entered by the court before the change should be vacated. State *v.* Snohomish Super. Ct., 18 Wash. 277, 51 Pac. 365.

9. Small *v.* Reeves, 104 Ky. 289, 46 S. W. 726, 20 Ky. L. Rep. 504; Ætna L. Ins. Co. *v.* McCormick, 20 Wis. 265.

10. Turner *v.* Davis, 132 N. C. 187, 43 S. E. 637; Cruger *v.* McCracken, 87 Tex. 584, 30 S. W. 537. *Compare* Veeder *v.* Baker, 83 N. Y. 163; Pringle *v.* Dunn, 39 Wis. 435.

11. *Georgia.*— Whitaker *v.* Smith, 33 Ga. 237.

Minnesota.— *In re* Gragg, 32 Minn. 142, 19 N. W. 651.

Mississippi.— Smith *v.* Denson, 2 Sm. & M. 326 (*quære*); Hamberlin *v.* Terry, Sm. & M. Ch. 589.

Missouri.— *In re* Marquis, 85 Mo. 615.

New York.— Matter of Armstrong, 72 N. Y. App. Div. 286, 76 N. Y. Suppl. 37; Matter of Lyons, 73 Hun 433, 26 N. Y. Suppl. 469; *In re* Dey Ermand, 24 Hun 1; Matter of Coogan, 27 Misc. 563, 59 N. Y. Suppl. 111.

Texas.— Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63; Hirshfeld *v.* Brown, (Civ. App. 1895) 30 S. W. 962. And see Ruenbuhl *v.* Heffron, (Civ. App. 1897) 38 S. W. 1028.

See 30 Cent. Dig. tit. "Judgment," § 666.

12. *California.*— *In re* Hickey, 129 Cal. 14, 61 Pac. 475; Hitchcock *v.* San Francisco Super. Ct., 73 Cal. 295, 14 Pac. 872.

Iowa.— Grattan *v.* Matteson, 51 Iowa 622, 2 N. W. 432.

New York.— Thompson *v.* Thompson, 52 Hun 117, 4 N. Y. Suppl. 842; Fitch *v.* Hall, 18 How. Pr. 314; Ayres *v.* Covill, 9 How. Pr. 573.

Ohio.— Carey *v.* Kemper, 45 Ohio St. 93, 11 N. E. 130.

South Carolina.— Thew *v.* Southern Porcelain Mfg. Co., 8 S. C. 286.

Compare State *v.* Richardson, 1 Marv. (Del.) 372, 41 Atl. 75, holding that the superior court has jurisdiction to vacate its judgment against a surety whose name is alleged to have been forged, although the chancery court has jurisdiction where the signature is admitted, but is claimed to have been obtained by fraud.

13. *Georgia.*— Dixon *v.* Baxter, 106 Ga. 180, 32 S. E. 24, superior courts of different counties.

Indiana.— Black *v.* Plunkett, 132 Ind. 599, 31 N. E. 567.

Nebraska.— Smithson *v.* Smithson, 37 Nebr. 535, 56 N. W. 300, 40 Am. St. Rep. 504.

New York.— Wilsey *v.* Rooney, 16 N. Y. Suppl. 471. *Compare* Carroll *v.* Goslin, 2 E. D. Smith 376. But see Cruikshank *v.* Cruikshank, 30 N. Y. App. Div. 381, 51 N. Y. Suppl. 926, where it is said that a court exercising jurisdiction concurrent with that of another, by which an order has been made, is not without power to modify it or set it aside on new papers, or relieve from an order which has proved oppressive, where leave has been given to renew; the question is not one of power, but of practice and orderly procedure.

North Carolina.— Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118; Taylor *v.* Pope, 101 N. C. 368, 7 S. E. 795; Godwin *v.* Monds, 101 N. C. 354, 7 S. E. 793.

South Carolina.— Odom *v.* Burch, 52 S. C. 305, 29 S. E. 726.

Tennessee.— Smith *v.* Johnson, 2 Heisk. 225.

Wisconsin.—Cardinal *v.* Eau Claire Lumber Co., 75 Wis. 404, 44 N. W. 761.

b. As Between Federal and State Courts. A federal court has no jurisdiction of an action or other proceeding to vacate or set aside a judgment rendered by a state court,[14] except where the ground of objection is that the judgment was obtained by fraud, in which case the federal court, if otherwise it has jurisdiction of the action, may entertain a suit and make a decree which as between the parties shall have the effect of vacating the judgment and any proceedings taken or rights acquired thereunder.[15] And so in a state court a judgment rendered by a federal court may be attacked as fraudulent, but cannot be reviewed as to any alleged errors or irregularities, or annulled for an alleged want of jurisdiction.[16]

3. What Judgments May Be Vacated — a. In General. The power of courts to grant relief by opening or vacating judgments is not generally limited either by the nature and form of the action,[17] or by the amount in controversy.[18] It extends to judgments rendered upon default,[19] by confession,[20] and upon trial and verdict;[21]

14. Blythe *v.* Hinckley, 84 Fed. 246; Little Rock Junction R. Co. *v.* Burke, 66 Fed. 83, 13 C. C. A. 341; Elder *v.* Richmond Gold, etc., Min. Co., 58 Fed. 536, 7 C. C. A. 354; Smith *v.* Schwed, 9 Fed. 483.

After removal of cause.— Where, at the time a cause was removed to the federal court, a judgment had been rendered against defendant, but the state court had power under the statute to vacate the same, the federal court is vested on the removal with the same power. Cady *v.* Associated Colonies, 119 Fed. 420.

15. Bertha Zinc, etc., Co. *v.* Vaughan, 88 Fed. 566; Davenport *v.* Moore, 74 Fed. 945; Little Rock Junction R. Co. *v.* Burke, 66 Fed. 83, 13 C. C. A. 341; Hatch *v.* Ferguson, 52 Fed. 833; Young *v.* Sigler, 48 Fed. 182; De Forest *v.* Thompson, 40 Fed. 375; Hunt *v.* Fisher, 29 Fed. 801.

Remedy in state court.— The federal court should not act in such cases where the injured party has or had an opportunity to apply for relief to the state courts. Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 6 S. Ct. 1009, 30 L. ed. 196; Nougue *v.* Clapp, 101 U. S. 551, 25 L. ed. 1026; Randall *v.* Howard, 2 Black (U. S.) 585, 17 L. ed. 269.

16. Kurtz *v.* Philadelphia, etc., R. Co., 187 Pa. St. 59, 40 Atl. 988.

17. See Wakefield *v.* Moore, 65 Ga. 268 (holding that a rule absolute against a sheriff may be vacated on motion at the same or a subsequent term); Reed *v.* Loucks, 61 How. Pr. (N. Y.) 434 (holding that a default judgment in ejectment may be set aside for cause).

An inquest of damages may be set aside on motion. Leighton *v.* Wood, 17 Abb. Pr. (N. Y.) 177. *Compare* Saunderson *v.* Lace, 2 Pinn. (Wis.) 257, 1 Chandl. 231.

Forfeited recognizance.— A judgment entered with the county clerk on a forfeited recognizance becomes subject to the jurisdiction and control of the court of common pleas to the same extent as if it had been docketed in it. People *v.* Petry, 2 Hilt. (N. Y.) 523.

Mandamus.— A judgment making a writ of mandamus peremptory is a final judgment which cannot be vacated or set aside by the judge on a rule taken by defendant in mandamus. State *v.* Conway, 24 La. Ann. 132.

Vacating judgments in summary proceedings see Cochran *v.* Reich, 20 Misc. (N. Y.) 593, 46 N. Y. Suppl. 441; Smith *v.* Knight, 14 W. Va. 749.

Vacating judgments in actions in rem see McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597; Platt *v.* Torrey, 18 Wend. (N. Y.) 572; *In re* Schuylkill River Road, 14 Montg. Co. Rep. (Pa.) 46.

18. McCormick Harvesting Mach. Co. *v.* Schneider, 36 Nebr. 206, 54 N. W. 257. *Compare* Brooks *v.* Collins, 1 N. C. 103.

A judgment for costs may be opened for sufficient cause shown like any other judgment. Hughes *v.* Miller, 2 Greene (Iowa) 9; Skillings *v.* Massachusetts Ben. Assoc., 151 Mass. 321, 23 N. E. 1136.

19. Szerlip *v.* Baier, 21 Misc. (N. Y.) 331, 47 N. Y. Suppl. 133; Brown *v.* Niagara Mach. Co., 7 N. Y. Suppl. 514; Van Namee *v.* Jones, 1 How. Pr. (N. Y.) 55; O'Connell *v.* E. C. King, 26 R. I. 544, 59 Atl. 926; National Exch. Bank *v.* McElfish Clay Mfg. Co., 48 W. Va. 406, 37 S. E. 541. But see West *v.* Carter, 25 Ill. App. 245.

Default without judgment.— A mere naked default, on which no judgment has ever been entered, may be set aside at any time on proper grounds. Ordway *v.* Suchard, 31 Iowa 481; Simmons *v.* Church, 31 Iowa 284; Harper *v.* Drake, 14 Iowa 533. And see Sargent *v.* Wilson, 2 McCord (S. C.) 512; Hane *v.* Goodwyn, 2 Bay (S. C.) 521.

In California a motion to vacate a default entered by the clerk may be made at any time before final judgment is entered, although the court may have adjourned for the term at which the default was entered before the motion is made. Willson *v.* Cleaveland, 30 Cal. 192.

20. See *supra*, II, G.

Office judgments.— In some states it is held that mere office judgments are under the control of the court in succeeding terms and can be modified or set aside for cause shown. Wilson *v.* Torbert, 3 Stew. (Ala.) 296, 21 Am. Dec. 632; Powell *v.* Jopling, 47 N. C. 400; Bougher *v.* Bougher, Tapp. (Ohio) 158; James *v.* Gott, 55 W. Va. 229, 47 S. E. 649. See Enders *v.* Burch, 15 Gratt. (Va.) 64.

21. The verdict must be set aside as well as the judgment. A judgment regularly entered upon a verdict cannot be stricken off so long as the verdict is permitted to stand, for if this were done the relief awarded would be

and may be applied as well to interlocutory as to final judgments,[22] and to orders as well as final decisions,[23] and even to such judgments as are utterly void and mere nullities.[24] The final settlements of executors and trustees may be opened or vacated.[25] In Pennsylvania it has been held that there is no authority for a rule to open a judgment of nonsuit, such a judgment not being within the meaning of the statutes on the subject; but the proper and only practice is to apply to the court to take off the nonsuit.[26]

b. Executed or Satisfied Judgments. It has been held that a judgment may be opened or vacated for good cause, such as fraud or mistake, even after the amount of it has been collected by payment or by levy and sale on execution;[27] but the weight of authority seems otherwise.[28]

c. Judgments on Transcripts. Where a judgment rendered by an inferior court, such as that of a justice of the peace, is transferred to a superior court, by taking and filing a transcript, for the purposes of lien and execution,[29] the latter court cannot open or vacate the judgment so transferred.[30]

nugatory, the verdict remaining. Brown *v.* Rhinehart, 112 N. C. 772, 16 S. E. 840; Flowers *v.* Alvord, 111 N. C. 248, 16 S. E. 319; Conrad *v.* Commercial Mut. Ins. Co., 29 Leg. Int. (Pa.) 172.

22. Fliedner *v.* Rockefeller, 9 Ohio Dec. (Reprint) 266, 12 Cinc. L. Bul. 20; Kitchen *v.* Strawbridge, 14 Fed. Cas. No. 7,854, 4 Wash. 84. *Compare* Offinger *v.* De Wolf, 40 N. Y. Super. Ct. 446; Starke *v.* Woodward, 1 Nott & M. (S. C.) 259; Vaccaro *v.* Cicalla, 89 Tenn. 63, 14 S. W. 43.

Judgments on demurrers are not final until the end of the term, until which time, on proper showing, they may be set aside. Shields *v.* Taylor, 13 Sm. & M. (Miss.) 127.

23. Matter of Brake, 59 How. Pr. (N. Y.) 329; Potter *v.* Jennman, 4 Ohio S. & C. Pl. Dec. 444, 4 N. P. 78.

24. *Georgia.*— Crane *v.* Barry, 47 Ga. 476.

Illinois.— Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

Kansas.— Foreman *v.* Carter, 9 Kan. 674.

North Carolina.— Hervey *v.* Edmunds, 68 N. C. 243.

Oklahoma.— Phœnix Bridge Co. *v.* Street, 9 Okla. 422, 60 Pac. 221.

South Carolina.— Mills *v.* Dickson, 6 Rich. 487.

But see Kaufmann *v.* Drexel, 56 Nebr. 229, 76 N. W. 559.

25. Anderson *v.* Anderson, 178 Ill. 160, 52 N. E. 1038; Sheetz *v.* Kirtley, 62 Mo. 417.

26. Harvey *v.* Pollock, 148 Pa. St. 534, 23 Atl. 1127.

27. *Indiana.*— Shepherd *v.* Marvel, 16 Ind. App. 417, 45 N. E. 526.

New York.— Hatch *v.* Central Nat. Bank, 78 N. Y. 487.

Pennsylvania.— Guthrie *v.* Reid, 107 Pa. St. 251. But see Reap *v.* Battle, 6 Kulp 423.

West Virginia.— A joint judgment against several defendants, one of whom was not served with process and did not appear, may be reversed on his motion, although it has been satisfied by another defendant. Ferguson *v.* Millender, 32 W. Va. 30, 9 S. E. 38.

United States.— Osborn *v.* Michigan Air-Line R. Co., 18 Fed. Cas. No. 10,594, 2 Flipp. 503.

See 30 Cent. Dig. tit. "Judgment," § 675.

28. *Georgia.*— Penfold *v.* Singleton, 36 Ga. 556.

Massachusetts.— Skillings *v.* Massachusetts Ben. Assoc., 151 Mass. 321, 23 N. E. 1136.

Missouri.— Davis *v.* Blair, 88 Mo. App. 372.

Montana.— Foster *v.* Hauswirth, 5 Mont. 566, 6 Pac. 19.

New Jersey.— Galbraith *v.* Cooper, 24 N. J. L. 219.

Rhode Island.— Alverson *v.* Alverson, 2 R. I. 27.

Virginia.— Enders *v.* Burch, 15 Gratt. 64.

See 30 Cent. Dig. tit. "Judgment," § 675.

29. See *supra*, VII, L, 2.

30. *New York.*— McCunn *v.* Barnett, 2 E. D. Smith 521; Brown *v.* Niagara Mach. Co., 7 N. Y. Suppl. 514; Hoffman *v.* Fish, 18 Abb. Pr. 76; Martin *v.* New York, 20 How. Pr. 86. The superior court may set aside the judgment as to a defendant who was not served with process. Daniels *v.* Southard, 36 N. Y. App. Div. 540, 55 N. Y. Suppl. 692.

North Carolina.—Whitehurst *v.* Merchants', etc., Transp. Co., 109 N. C. 342, 13 S. E. 937; Morton *v.* Rippy, 84 N. C. 611.

Pennsylvania.— Littster *v.* Littster, 151 Pa. St. 474, 25 Atl. 117; Boyd *v.* Miller, 52 Pa. St. 431; Lacock *v.* White, 19 Pa. St. 495; Brendle *v.* Gorley, 14 Pa. Co. Ct. 113; Bradley *v.* Stephenson, 3 Pa. Co. Ct. 397; Singer *v.* Singer Mfg. Co., 2 Pa. Co. Ct. 578; Rice *v.* Kitzelman, 1 Chest. Co. Rep. 173; Brown *v.* Long, 8 Kulp 429; Deebeck *v.* Hildebrand, 10 Lanc. Bar 152; Campbell *v.* Penn Dist., 10 Leg. Int. 46; Peters *v.* Coby, 24 Pittsb. Leg. J. 99. If a judgment of a justice of the peace, thus transferred to the common pleas, is void, and so appears on the face of the transcript, the common pleas may order it stricken from the records. Brown's Appeal, 130 Pa. St. 365, 18 Atl. 642; Pantall *v.* Dickey, 123 Pa. St. 431, 16 Atl. 789; Knoblauch *v.* Hefron, 3 Pa. Dist. 765; Weldy *v.* Young, 21 Pa. Co. Ct. 15; Merold *v.* Rush Tp., 18 Pa. Co. Ct. 389; Couch *v.* Heffron, 15 Pa. Co. Ct. 636; Klinger *v.* Koons, 13 Pa. Co. Ct. 641; Gearhart *v.* Flegal, 3 Pa. Co. Ct. 399; Campbell *v.* Evler,

4. RIGHT TO RELIEF — a. In General. A motion to vacate or open a judgment should not be granted unless it is shown that the judgment is unjust, as to the moving party, as it stands, or that he is actually or prospectively injured or prejudiced by it,[31] that he will be benefited by the granting of the relief asked,[32] and that the motion can be granted without material injustice or injury to the opposing party[33] or prejudice to the intervening rights of third persons.[34] Further, to entitle himself to this relief, the moving party must show a sufficient reason why he did not assert and enforce his rights at the proper time and in the regular manner,[35] and that his own conduct throughout has been free from fraud or any turpitude,[36] and he must free himself from all imputation of negligence or laches, for the judgment will not be disturbed if it appears to have been entered as a result of his own heedlessness, sloth, or lack of diligence in protecting his own interests.[37]

1 Pa. Co. Ct. 394; Ward *v.* Fannon, 7 Kulp 488.

South Dakota. — Garlock *v.* Calkins, 14 S. D. 90, 84 N. W. 393.

Wisconsin.— Wait *v.* Sherman, 61 Wis. 119, 20 N. W. 653; Mabbett *v.* Vick, 53 Wis. 158, 10 N. W. 84. But the validity of the judgment may be attacked by motion in the circuit court on the ground that the justice had no jurisdiction. Townsend *v.* Seelig, 113 Wis. 31, 88 N. W. 908.

See 30 Cent. Dig. tit. "Judgment," § 676.

In Minnesota the municipal court of St. Paul may upon a proper showing vacate and set aside its judgments after transcripts thereof have been filed in and executions issued out of the district court. Buffham *v.* Perkins, 43 Minn. 158, 44 N. W. 1150; Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71.

31. *Georgia.*— O'Connor *v.* Brucker, 117 Ga. 451, 43 S. E. 731.

Illinois.— Souerbry *v.* Fisher, 62 Ill. 135.

Kentucky.— Taylor *v.* Young, 2 Bush 428.

New York.— Kidd *v.* Phillips, 45 N. Y. Super. Ct. 633; Fowler *v.* Colyer, 2 E. D. Smith 125; Forster *v.* Capewell, 1 Hilt. 47; Bascom *v.* Feazler, 2 How. Pr. 16.

North Carolina.— Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106; Hinton *v.* Roach, 95 N. C. 106; Stancill *v.* Gay, 92 N. C. 455.

Ohio.— Bartges *v.* O'Neill, 13 Ohio St. 72.

South Dakota.— St. Paul Harvester Co. *v.* Forbreg, 2 S. D. 357, 50 N. W. 628.

Texas.— King *v.* Goodson, 42 Tex. 81; Chambers *v.* Fisk, 15 Tex. 335.

Wisconsin.— Stilson *v.* Rankin, 40 Wis. 527.

See 30 Cent. Dig. tit. "Judgment," § 672.

Want of jurisdiction.— Where the judgment is absolutely void for want of jurisdiction, it seems that it may be set aside without a showing of injury or prejudice to the moving party. Mackubin *v.* Smith, 5 Minn. 367; Lambert *v.* Converse, 22 How. Pr. (N. Y.) 265.

Misnomer of defendant.— Where judgment by default is taken against defendant by a wrong name, it will not be opened where it does not appear that any effort has been made to enforce it against him in his right name. Meurer *v.* Berlin, 80 N. Y. App. Div. 294, 80 N. Y. Suppl. 240.

New facts.— A judgment should not be vacated because matters have arisen since its rendition which would render its enforcement inequitable, unless the vacation thereof should be necessary for the protection of the adverse party. Laramie Nat. Bank *v.* Steinhoff, 11 Wyo. 290, 71 Pac. 992, 73 Pac. 209.

32. Oakes *v.* Ziemer, 61 Nebr. 6, 84 N. W. 409.

Insufficient defense.— A motion to open the judgment will be denied where the defense proposed to be set up is one which could not be admitted or which plainly would not prevail. Storey *v.* Weaver, 66 Ga. 296. And see Biebinger *v.* Taylor, 64 Mo. 63.

33. Smith *v.* Weston, 81 Hun (N. Y.) 87, 30 N. Y. Suppl. 649.

The mere pendency of garnishment proceedings on a judgment by default will not affect the power of the court to vacate it. London Guarantee, etc., Co. *v.* Mosness, 98 Ill. App. 651.

34. Coon *v.* Welborn, 83 Ind. 230.

35. Greenberg *v.* Angerman, 84 N. Y. Suppl. 244.

36. Thus the law will not lend its aid to relieve a person from a judgment confessed by him for the purpose of defrauding his creditors (Blystone *v.* Blystone, 51 Pa. St. 373), or where he has been guilty of fraud in attempting to elude execution by setting up a claim under a fictitious name to the goods sought to be levied on (Rohrbacker *v.* Schultz, 10 Pa. Co. Ct. 282), or where the note in suit was given for a small sum on a promise to give in return a very much larger sum (Kunkle's Appeal, 107 Pa. St. 368), or where he has filed a frivolous demurrer apparently to delay the proceedings (Bruen *v.* Adams, 3 Cai. (N. Y.) 97), or violated an injunction issued in the case (Daly *v.* Gardner, 1 Alaska 357), or where his allegations of the grounds on which his motion is based are untrue in fact (McLaren *v.* Kehlor, 22 Wis. 297).

37. *Alabama.*— *Ex p.* O'Neal, 72 Ala. 560.

California.— Coleman *v.* Rankin, 37 Cal. 247.

Illinois.— Gage *v.* Chicago, 211 Ill. 109, 71 N. E. 877, 103 Am. St. Rep. 191; Treutler *v.* Halligan, 86 Ill. 39; Pitzele *v.* Lutkins, 85 Ill. App. 662.

Iowa.— Heathcote *v.* Haskins, 74 Iowa

b. Discretion of Court. A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case.[38] And consequently its determination will not be disturbed on

566, 38 N. W. 417; Kreisinger *v.* Icarian Community, 16 Iowa 586; Thatcher *v.* Haun, 12 Iowa 303; Harrison *v.* Kramer, 3 Iowa 543.

Kansas.— McMillan *v.* Baker, 20 Kan. 50.

Louisiana.— Lindquist *v.* Maurepas Land, etc., Co., 112 La. 1030, 36 So. 843; Niblett *v.* Scott, 4 La. Ann. 246; Grabfelder *v.* Navra, McGloin 63.

Minnesota.— Frear *v.* Heichert, 34 Minn. 96, 24 N. W. 319. And see Walsh *v.* Boyle, 94 Minn. 437, 103 N. W. 506; Moran *v.* Mackey, 32 Minn. 266, 20 N. W. 159.

Missouri.— Castlio *v.* Bishop, 51 Mo. 162; Weimar *v.* Morris, 7 Mo. 6.

Montana.— Blaine *v.* Briscoe, 16 Mont. 582, 41 Pac. 1002.

Nebraska.— Dixon County *v.* Gantt, 30 Nebr. 885, 47 N. W. 419; Bell *v.* White Lake Lumber Co., 21 Nebr. 525, 32 N. W. 561.

Nevada.— Howe *v.* Coldren, 4 Nev. 171.

New Mexico.— Metzger *v.* Waddell, 1 N. M. 400.

New York.— Dunham *v.* Ringrose, 72 Hun 300, 25 N. Y. Suppl. 454; Mason *v.* Mason, 19 N. Y. Suppl. 955; Ferris *v.* Fisher, 19 N. Y. Suppl. 139; Sprague *v.* Mumford, 1 How. Pr. 68; Post *v.* Wright, 1 Cai. 111. And see O'Connell *v.* Gallagher, 104 N. Y. App. Div. 492, 93 N. Y. Suppl. 643; Brown *v.* Huber, 103 N. Y. App. Div. 134, 92 N. Y. Suppl. 940.

North Carolina.— Mutual Reserve Fund Life Assoc. *v.* Scott, 136 N. C. 157, 48 S. E. 581; Roberts *v.* Allman, 106 N. C. 391, 11 S. E. 424; Sluder *v.* Rollins, 76 N. C. 271.

Pennsylvania.— Fisher *v.* O'Donnell, 153 Pa. St. 619, 26 Atl. 293; Hoar *v.* Weaver, 12 Lanc. Bar 144; Sharff *v.* Stump, 2 Woodw. 441.

Rhode Island.— Miller *v.* McCormick, (1904) 60 Atl. 48.

Wisconsin.— Insurance Co. of North America *v.* Swineford, 28 Wis. 257.

United States.— Arcularius *v.* Staples, 1 Fed. Cas. No. 509*b*; McClellan *v.* Fosbender, 15 Fed. Cas. No. 8,695.

See 30 Cent. Dig. tit. "Judgment," § 250.

38. *Alabama.*— Bagby *v.* Chandler, 8 Ala. 230.

California.— Merchants' Ad-Sign Co. *v.* Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277; Clarke *v.* Witram, 99 Cal. 50, 33 Pac. 798; Williamson *v.* Cummings Rock Drill Co., 95 Cal. 652, 30 Pac. 762; Poirier *v.* Gravel, 88 Cal. 79, 25 Pac. 962; Garner *v.* Erlanger, 86 Cal. 60, 24 Pac. 805; Dougherty *v.* Nevada Bank, 68 Cal. 275, 9 Pac. 112.

Colorado.— Robert E. Lee Silver Min. Co. *v.* Engelbrach, 18 Colo. 106, 31 Pac. 771; Morrell Hardware Co. *v.* Princess Gold Min. Co., 16 Colo. App. 54, 63 Pac. 807; Donald *v.* Bradt, 15 Colo. App. 414, 62 Pac. 580.

District of Columbia.— St. Clair *v.* Conlon, 12 App. Cas. 161.

Florida.— Loring *v.* Wittich, 16 Fla. 617.

Georgia.— Roberts *v.* Kuhrt, 119 Ga. 704, 46 S. E. 856; Bowen *v.* Wyeth, 119 Ga. 687, 46 S. E. 823; Deering Harvester Co. *v.* Thompson, 116 Ga. 418, 42 S. E. 772; Tower *v.* Ellsworth, 112 Ga. 460, 37 S. E. 736; Mitchell *v.* Williams, 110 Ga. 280, 34 S. E. 848; Bridges *v.* Blakeman, 108 Ga. 801, 34 S. E. 122; Herren *v.* Harralson, 97 Ga. 374, 24 S. E. 457; Storey *v.* Weaver, 66 Ga. 296.

Illinois.— Culver *v.* Brinkerhoff, 180 Ill. 548, 54 N. E. 585; Barrett *v.* Queen City Cycle Co., 179 Ill. 68, 53 N. E. 550; Fergus *v.* Garden City Planing Mill, etc., Co., 71 Ill. 51; Mason *v.* McNamara, 57 Ill. 274; Norton *v.* Hixon, 25 Ill. 439, 79 Am. Dec. 338; Germania F. Ins. Co. *v.* Muller, 110 Ill. App. 190; Considine *v.* Lee, 105 Ill. App. 246; Brunswick-Balke-Collender Co. *v.* O'Donnell, 101 Ill. App. 533; Hartford L., etc., Ins. Co. *v.* Rossiter, 98 Ill. App. 11; Burke *v.* Ward, 50 Ill. App. 283; Board of Education *v.* Hoag, 21 Ill. App. 588; Dunlap *v.* Gregory, 14 Ill. App. 601.

Indiana.— Cavanaugh *v.* Toledo, etc., R. Co., 49 Ind. 149; Carlisle *v.* Wilkinson, 12 Ind. 91; Masten *v.* Indiana Car, etc., Co., 25 Ind. App. 175, 57 N. E. 148; Hoag *v.* Old People's Mut. Ben. Soc., 1 Ind. App. 28, 27 N. E. 438.

Iowa.— Klepfer *v.* Keokuk, 126 Iowa 592, 102 N. W. 515; McQuade *v.* Chicago, etc., R. Co., 78 Iowa 688, 42 N. W. 520, 43 N. W. 615.

Kansas.— Hopkins *v.* Hopkins, 47 Kan. 103, 27 Pac. 822.

Kentucky.— Elliston *v.* Commonwealth Bank, 3 Dana 99; Pennsylvania F. Ins. Co. *v.* Young, 78 S. W. 127, 25 Ky. L. Rep. 1350; Jett *v.* Farmers' Bank, 76 S. W. 385, 25 Ky. L. Rep. 817.

Michigan.— Alspaugh *v.* Ionia Cir. Judge, 126 Mich. 67, 85 N. W. 244; Low *v.* Mills, 61 Mich. 35, 27 N. W. 877; Detroit *v.* Jackson, 1 Dougl. 106.

Minnesota.— White *v.* Gurney, 92 Minn. 271, 99 N. W. 889; McMurran *v.* Bourne, 81 Minn. 515, 84 N. W. 338; Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127; Hull *v.* Chapel, 77 Minn. 159, 79 N. W. 669, 77 Am. St. Rep. 666; Milwaukee Harvester Co. *v.* Schroeder, 72 Minn. 393, 75 N. W. 606; St. Mary's Hospital *v.* National Ben. Co., 60 Minn. 61, 61 N. W. 824; Pine Mountain Iron, etc., Co. *v.* Tabour, 55 Minn. 287, 56 N. W. 895; Granse *v.* Frings, 46 Minn. 352, 49 N. W. 60; Lord *v.* Hawkins, 39 Minn. 73, 38 N. W. 689; Sheldon *v.* Risedorph, 23 Minn. 518; Merritt *v.* Putnam, 7 Minn. 493. And see Walsh *v.* Boyle, 94 Minn. 437, 103 N. W. 506, holding that the court, on motion to open a default judgment, should exercise such discretion as will tend in a reasonable degree to secure a determination of the rights of the parties on a trial.

Missouri.— Welch *v.* Mastin, 98 Mo. App. 273, 71 S. W. 1090; Cabanne *v.* Macadaras,

appeal unless it is plain that its discretion has been abused.[39] At the same time the court should act upon a sound legal and impartial discretion, not arbitrarily nor from mere caprice,[40] and while the court should be inclined to grant the relief asked rather than to deny it, and doubts should be resolved in favor of the application,[41] still it is an abuse of discretion, and therefore reversible error, to open or vacate a judgment where the moving party shows absolutely no legal ground therefor, or offers no excuse for his own negligence or default;[42] and on

91 Mo. App. 70; Sinclair *v.* Narragansett Lead, etc., Co., 87 Mo. App. 268; Carr *v.* Belton School Dist., 42 Mo. App. 154; Hunt *v.* Jenney, 2 Mo. App. Rep. 1249.

Montana.— Eakins *v.* Kemper, 21 Mont. 160, 53 Pac. 310; Whiteside *v.* Logan, 7 Mont. 373, 17 Pac. 34.

Nebraska.— Lichtenberger *v.* Worm, 41 Nebr. 856, 60 N. W. 93; Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255; Sang *v.* Lee, 20 Nebr. 667, 31 N. W. 85; Vindquest *v.* Perky, 16 Nebr. 284, 20 N. W. 301.

New Jersey.— Smith *v.* Livesey, 67 N. J. L. 269, 51 Atl. 453.

New Mexico.— Territory *v.* Las Vegas Grant, 6 N. M. 87, 27 Pac. 414.

New York.— New York *v.* Smith, 138 N. Y. 676, 34 N. E. 400; Dudley *v.* Broadway Ins. Co., 42 N. Y. App. Div. 555, 59 N. Y. Suppl. 668; McCredy *v.* Woodcock, 41 N. Y. App. Div. 526, 58 N. Y. Suppl. 656; Graef *v.* Bernard, 7 Misc. 246, 27 N. Y. Suppl. 263; Lewy *v.* Fox, 54 N. Y. Super. Ct. 397; Audit Co. *v.* McNaught, 87 N. Y. Suppl. 542; O'Meara *v.* Interurban St. R. Co., 87 N. Y. Suppl. 405; Spektorsky *v.* American New System Carbonating, etc., Apparatus Co., 39 N. Y. Suppl. 73; Seiffert *v.* Caverley, 19 N. Y. Suppl. 520; Cunningham *v.* Hatch, 18 N. Y. Suppl. 458; Leighton *v.* Wood, 17 Abh. Pr. 177; Outwater *v.* New York, 18 How. Pr. 572; Spencer *v.* Webb, 1 Cai. 118.

North Carolina.— Wyche *v.* Ross, 119 N. C. 174, 25 S. E. 878; Kerchner *v.* Baker, 82 N. C. 169; Hudgins *v.* White, 65 N. C. 393.

North Dakota.— Fargo *v.* Keeney, 11 N. D. 484, 92 N. W. 836.

Oklahoma.— Hagar *v.* Wikoff, 2 Okla. 580, 39 Pac. 281.

Oregon.— Schneider *v.* Hutchinson, 35 Oreg. 253, 57 Pac. 324, 76 Am. St. Rep. 474; Coos Bay Nav. Co. *v.* Endicott, 34 Oreg. 573, 57 Pac. 61; Askren *v.* Squire, 29 Oreg. 228, 45 Pac. 779; Lovejoy *v.* Willamette Transp., etc., Co., 24 Oreg. 569, 34 Pac. 660; White *v.* Northwest Stage Co., 5 Oreg. 99.

Pennsylvania.— Com. *v.* Mellet, 196 Pa. St. 243, 46 Atl. 434; Wernet's Appeal, 91 Pa. St. 319; Earley's Appeal, 90 Pa. St. 321; Lamb's Appeal, 89 Pa. St. 407; Sweesey *v.* Kitchen, 80 Pa. St. 160; McClelland *v.* Pomeroy, 75 Pa. St. 410; Gilliland *v.* Bredin, 63 Pa. St. 393; Eldred *v.* Hazlett, 38 Pa. St. 16; Skidmore *v.* Bradford, 4 Pa. St. 296; Zartman *v.* Spangler, 21 Pa. Super. Ct. 647; Fidelity Ins. Trust, etc., Co. *v.* Second Phœnix Bldg., etc., Assoc., 17 Pa. Super. Ct. 270; O'Brien *v.* Sylvester, 12 Pa. Super. Ct. 408; Leader *v.* Dunlap, 6 Pa. Super. Ct. 243; Crawford *v.* Rath, 4 Pa. Super. Ct. 612. And see Bradshaw Electro Sanitary Odor Co. *v.* Bradshaw, 27 Pa. Super. Ct. 196.

South Carolina.— Cannady *v.* Martin, 72 S. C. 131, 51 S. E. 549; *In re* Bugg, 71 S. C. 439, 51 S. E. 263; Le Conte *v.* Irwin, 19 S. C. 554.

South Dakota.— Evans *v.* Fall River County, 4 S. D. 119, 55 N. W. 862.

Tennessee.— Tennessee Bank *v.* Skillern, 2 Sneed 698.

Vermont.— Johnson *v.* Shumway, 65 Vt. 389, 26 Atl. 590.

Washington.— Walton *v.* Hartman, 38 Wash. 34, 80 Pac. 196; Dougall *v.* Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849; Livesley *v.* O'Brien, 6 Wash. 553, 34 Pac. 134; Haynes *v.* B. F. Schwartz Co., 5 Wash. 433, 32 Pac. 220; Spokane Falls *v.* Curry, 2 Wash. 541, 27 Pac. 477.

Wisconsin.— Stoll *v.* Pearl, 122 Wis. 619, 99 N. W. 906, 100 N. W. 1054; Wheeler, etc., Mfg. Co. *v.* Monahan, 63 Wis. 194, 23 N. W. 109; Ray *v.* Northrup, 55 Wis. 396, 13 N. W. 239; Seymour *v.* Chippewa County, 40 Wis. 62; Bertline *v.* Bauer, 25 Wis. 486.

United States.—Resler *v.* Shehee, 1 Cranch 110, 2 L. ed. 51; Silver Peak Gold Min. Co. *v.* Harris, 116 Fed. 439. And see Bryce *v.* Southern R. Co., 129 Fed. 966.

See 30 Cent. Dig. tit. "Judgment," §§ 265, 673.

Where the situation of the judgment creditor has undergone a material change, as by the incurring of expense in issuing and levying execution, and the loss of a material witness, there is no abuse of discretion in refusing to open the judgment. Jefferson County Bank *v.* Robbins, 67 Wis. 68, 29 N. W. 209, 893.

39. See APPEAL AND ERROR, 3 Cyc. 341.

40. Bailey *v.* Taaffe, 29 Cal. 422; Rieker *v.* Doerr, 16 Lanc. L. Rev. (Pa.) 59.

41. Vermont Marble Co. *v.* Black, (Cal. 1894) 38 Pac. 512; Watson *v.* San Francisco, etc., R. Co., 41 Cal. 17; Westphal *v.* Clark, 46 Iowa 262.

42. *Georgia.*— Brucker *v.* O'Connor, 115 Ga. 95, 41 S. E. 245; Griffin *v.* Brewer, 96 Ga. 758, 22 S. E. 284.

Michigan.— People *v.* Judge Branch Cir. Ct., 26 Mich. 370.

Missouri.— Arnold *v.* Palmer, 23 Mo. 411.

New York.— Ellery *v.* Bendet, 31 Misc. 771, 64 N. Y. Suppl. 346; Gibbins *v.* Campbell, 21 N. Y. Suppl. 283.

Wisconsin.— Milwaukee Mut. Loan, etc.,

the other hand, if he shows himself plainly and justly entitled to the relief demanded, the court must grant the application and has no discretion to refuse it.[43] When a party moving to vacate or open a judgment brings his case within the statute, if the application is based on a statute, and shows himself to be free from any negligence or wrong conduct, and it appears that he has acted in due season and is clearly and plainly entitled to the relief asked, the application must be granted as a matter of right, and the court has no discretion to refuse it.[44] Under no circumstances will the court be justified in refusing to receive and hear a motion to vacate the judgment; its discretion is to be exercised on the facts as developed on a hearing, not in advance of it.[45]

c. Waiver and Estoppel. A person who would ordinarily be entitled to apply for the vacation of a judgment may waive the right to such relief, or be estopped by his conduct to ask for it.[46] This is the case where he acquiesces in the rendition of the judgment[47] or in the effect of the judgment as rendered,[48] or expressly acknowledges its binding force,[49] or receives and retains benefits accruing to him under it,[50] or voluntarily pays the amount of it,[51] or suffers his property to be sold

Soc. *v.* Jagodzinski, 84 Wis. 35, 54 N. W. 102.

See 30 Cent. Dig. tit. "Judgment," §§ 265, 673.

43. Hull *v.* Vining, 17 Wash. 352, 49 Pac. 537.

Mandamus will lie to compel the court to act, if the judgment or decree cannot be taken up on appeal. Bridgeport Electric, etc., Co. *v.* Bridgeport Land, etc., Co., 104 Ala. 276, 16 So. 93; Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514.

44. *Arizona.*— Lawler *v.* Bashford-Burmister Co., 5 Ariz. 94, 46 Pac. 72.

Illinois.— Lyon *v.* Robbins, 46 Ill. 276.

Indiana.— Cavanaugh *v.* Toledo, etc., R. Co., 49 Ind. 149; Phelps *v.* Osgood, 34 Ind. 150; Smith *v.* Noe, 30 Ind. 117.

Kansas.— Albright *v.* Warkentin, 31 Kan. 442, 2 Pac. 614; Board of Education *v.* National Bank of Commerce, 4 Kan. App. 438, 46 Pac. 36.

Michigan.— Arno *v.* Wayne Cir. Judge, 42 Mich. 362, 4 N. W. 147.

Minnesota.— Fifield *v.* Norton, 79 Minn. 264, 82 N. W. 581; Gillette-Herzog Mfg. Co. *v.* Ashton, 55 Minn. 75, 56 N. W. 576; Boeing *v.* McKinley, 44 Minn. 392, 46 N. W. 766; Nye *v.* Swan, 42 Minn. 243, 44 N. W. 9; Swift *v.* Fletcher, 6 Minn. 550.

Nebraska.— Brown *v.* Conger, 10 Nebr. 236, 4 N. W. 1009.

New York.— Seifert *v.* Caverly, 63 Hun 604, 18 N. Y. Suppl. 327; New York Excise Com'rs *v.* Hollister, 2 Hilt. 588; Reidy *v.* Bleistift, 31 Misc. 181, 63 N. Y. Suppl. 974.

Oregon.— Hanthorn *v.* Oliver, 32 Oreg. 57, 51 Pac. 440, 67 Am. St. Rep. 518.

Pennsylvania.— Cloud *v.* Markle, 186 Pa. St. 614, 40 Atl. 811.

Washington.— Titus *v.* Larsen, 18 Wash. 145, 51 Pac. 351; Hull *v.* Vining, 17 Wash. 352, 49 Pac. 537.

Wisconsin.— Pier *v.* Millerd, 63 Wis. 33, 22 N. W. 759.

See 30 Cent. Dig. tit. "Judgment," § 251.

45. Franciscus *v.* Martin, 9 Mo. 197; Hudgins *v.* White, 65 N. C. 393.

46. Martinson *v.* Marzolf, (N. D. 1905) 103 N. W. 937.

47. McCormick *v.* Hogan, 48 Md. 404.

A stipulation between the parties, in consideration of an extension of the time to answer, that plaintiff should have judgment for the amount claimed if a third person failed to appear and ask for leave to defend within such time, does not waive defendant's right to apply for the vacation of a judgment against him by default, on the ground of its having been taken against him through his mistake or excusable neglect. Barker *v.* Keith, 11 Minn. 65.

Failure to defend at plaintiff's request.— Where defendant refrains from setting up usury as a defense, at the request of plaintiff, and because the latter desires to obtain a speedy decision of another question in the case, defendant will not be estopped from moving to open the judgment. Reap *v.* Battle, 6 Kulp (Pa.) 423.

48. Berkeley *v.* Kennedy, 65 N. Y. App. Div. 613, 72 N. Y. Suppl. 734; Harper *v.* Biles, 115 Pa. St. 594, 8 Atl. 446.

Failure to redeem.— Where a judgment by default, barring redemption, has been rendered against a junior encumbrancer through his excusable neglect, and he learns of the judgment while the period of redemption is running, but fails to redeem, he cannot have the judgment vacated. Becker *v.* Tell City Bank, 142 Ind. 99, 41 N. E. 323.

49. Roberts *v.* Price, 2 Ohio Dec. (Reprint) 681, 4 West. L. Month. 581. But *compare* Williams *v.* Neth, 4 Dak. 360, 31 N. W. 630.

50. McDaniel *v.* Stum, 65 S. W. 800, 23 Ky. L. Rep. 1935; Freiberg *v.* La Clair, 78 Wis. 164, 47 N. W. 178.

Accepting costs.— Plaintiff's right to a reargument and resettlement of an order opening a default will not be lost by accepting costs ordered to be paid by defendant, receiving his answer, and excepting to the sufficiency of sureties. Lanahan *v.* Drew, 17 N. Y. Suppl. 840.

51. Read's Appeal, 126 Pa. St. 415, 17 Atl. 621; Drummond's Appeal, 10 Pa. Cas. 627,

on execution without objection,[52] or where the party against whom a default or other interlocutory judgment is taken submits to and ratifies it by participating in the further proceedings in the action.[53] It is also generally held that a party waives his right to apply for the vacation of a judgment by taking an appeal from it,[54] or by instituting an independent action for substantially the same relief.[55] Where two entries of a judgment for the same debt are made by mistake, and the debtor contrives to procure an entry of satisfaction of the first, he is estopped to have the second vacated for irregularity.[56]

B. Persons Entitled to Relief — 1. In General. A judgment will not be vacated or set aside on the motion of a third person, who was not a party or privy to the action,[57] unless it appears that the moving party was the real party in inter-

12 Atl. 658; Murphy v. Cawley, 7 Kulp (Pa.) 128.

Payment of the amount admitted to be due, although voluntary, does not deprive defendant of the right to have the judgment opened. Roberts v. Price, 2 Ohio Dec. (Reprint) 681, 4 West. L. Month. 581.

Payment not voluntary.— Payment made to prevent the sheriff from seizing property on which he is about to levy is not voluntary, and will not prevent the party from having the judgment set aside for irregularity. Knox County Bank v. Doty, 9 Ohio St. 505, 75 Am. Dec. 479.

Offer to pay before suit.— Defendant is estopped to apply for the opening of a judgment where he made a declaration of no defense to the note on which the judgment was entered and offered to pay it to the present holder before or about the time of its maturity. Humphrey v. Tozier, 154 Pa. St. 410, 26 Atl. 542.

52. McCleary v. Faber, 6 Pa. St. 476; Fritz v. Roney, 9 Pa. Dist. 27; Hill v. Woodward, 78 Va. 765.

Some one misled.— Satisfaction of a judgment by sale of defendant's property does not deprive him of the right to relief, unless it is shown that someone was misled by his failure to prevent the sale. Shepherd v. Marvel, 16 Ind. App. 417, 45 N. E. 526. *Compare* Coffey v. Carter, 47 Kan. 22, 27 Pac. 128.

53. Greenway v. James, 34 Mo. 326; Hawley v. Brunner, 1 Nebr. (Unoff.) 571, 95 N. W. 678. And see Harres v. Com., 35 Pa. St. 416.

Applications of text.— Submitting to a reference, or permitting the report to be confirmed without objection, waives the right to apply for the vacation of the judgment. Koehler v. Brady, 82 N. Y. App. Div. 279, 81 N. Y. Suppl. 695; Davis v. Garr, 7 How. Pr. (N. Y.) 311. So an objection that a default was improperly taken is not available to one who afterward pleaded without objection upon the setting aside of the default. Cupp v. Ayers, 89 Ind. 60. But filing a demurrer in the mistaken belief that a default had not yet been entered is no waiver of the right to object to the judgment by default as void for want of jurisdiction. State Ins. Co. v. Waterhouse, 78 Iowa 674, 43 N. W. 611. Taking part in the inquisition of damages, after a default, waives the right to open or vacate the default. Burke v. Stokely, 65 N. C. 569. But *compare* Baltimore, etc., R. Co. v. Ritchie, 31 Md. 191. On the assessment of damages, if defendant is present and cross-examines the witnesses without objecting to the default, he cannot afterward move to set it aside. Sneaghan v. Briggs, Wils. (Ind.) 75; Mason v. Bidleman, 1 How. Pr. (N. Y.) 62. But where judgment is rendered in trespass to try title, and proceedings are begun to restrain interference with the property, a motion to dissolve the injunction does not waive the right to have the judgment opened. Dallas Oil, etc., Co. v. Portwood, (Tex. Civ. App. 1902) 68 S. W. 1017.

54. Clumpha v. Whiting, 10 Abb. Pr. (N. Y.) 448; People v. Albany, etc., R. Co., 39 How. Pr. (N. Y.) 49; Bassett v. Hughes, 48 Wis. 23, 3 N. W. 770. But *compare* Patterson v. Hochster, 21 N. Y. App. Div. 432, 47 N. Y. Suppl. 553.

55. Hay v. Cole, 90 Hun (N. Y.) 258, 35 N. Y. Suppl. 950; Norwood v. King, 86 N. C. 80. *Compare* Cetti v. Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787.

56. Weed v. Pendleton, 1 Abb. Pr. (N. Y.) 51.

57. *Alabama.*— Boykin v. Kernochan, 24 Ala. 697.

Georgia.— Jones v. Smith, 120 Ga. 642, 48 S. E. 134.

Illinois.— *Ex p.* Burdick, 162 Ill. 48, 44 N. E. 413.

Indiana.— Indianapolis, etc., R. Co. v. Crockett, 2 Ind. App. 136, 28 N. E. 222.

Minnesota.— Kern v. Chalfant, 7 Minn. 487.

Missouri.— Peake v. Laughlin, 49 Mo. 162.

Nebraska.— Pinkham v. Pinkham, 61 Nebr. 336, 85 N. W. 285.

New Jersey.— Leonard v. New York Bay Co., 28 N. J. Eq. 192.

New York.— *In re* Rochester, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161.

North Carolina.— Uzzle v. Vinson, 111 N. C. 138, 16 S. E. 6; Hinsdale v. Hawley, 89 N. C. 87; Walton v. Walton, 80 N. C. 26; Smith v. Newbern, 73 N. C. 303; Jacobs v. Burgwyn, 63 N. C. 196.

Pennsylvania.—Drexel's Appeal, 6 Pa. St. 272; Williams v. Robertson, 3 Pittsb. 32; Gaehring v. Haedrich, 8 Pa. Super. Ct. 507; *In re* Rowland, 7 Pa. L. J. 312.

Texas.— McGhee v. Romatka, 18 Tex. Civ. App. 436, 44 S. W. 700.

est, although the judgment proceeded for or against a nominal party,[58] or was a surety for the principal debtor[59] or a garnishee,[60] or unless the judgment was obtained by fraud or collusion and he bears such a relation thereto that his rights may be affected.[61] A subrogee has the necessary interest to procure the revocation of an order irregularly rescinding the decree by which he was subrogated.[62] A judgment confessed in the name of the firm by one claiming to be a partner may be opened in favor of another alleged partner, who denies the partnership and claims the property levied on.[63]

2. SUCCESSFUL PARTY. The courts have power in a proper case to open or set aside a judgment at the instance of the party in whose favor it was rendered.[64]

Vermont.— Robinson *v.* Stevens, 63 Vt. 555, 22 Atl. 80.

Wisconsin.— Pier *v.* Oneida County, 124 Wis. 398, 102 N. W. 912; Packard *v.* Smith, 9 Wis. 184.

United States.— Cosgrove *v.* U. S., 33 Ct. Cl. 167.

See 30 Cent. Dig. tit. "Judgment," § 722.

Purchaser from defendant.— A motion to open a judgment may be made by one to whom the judgment defendant has conveyed his interest in the subject-matter of the action. Brown *v.* Massey, 13 Okla. 670, 76 Pac. 226.

A judgment against a municipal corporation, obtained by the fraud or collusion of one of its officers, may be set aside on the motion of another officer (Sturm *v.* Brown County School Dist. No. 70, 45 Minn. 88, 47 N. W. 462; Lowber *v.* New York, 26 Barb. (N. Y.) 262) or on the motion of taxpayers of the municipality (Kane *v.* Independent School Dist., 82 Iowa 5, 47 N. W. 1076).

Stock-holders.— A judgment against a corporation, alleged to be fraudulent or collusive or void for want of jurisdiction, may be vacated at the instance of stock-holders. Crossman *v.* Vivienda Water Co., 136 Cal. 571, 69 Pac. 220; People *v.* Hektograph Co., 10 Abb. N. Cas. (N. Y.) 358.

Bondholders, secured by a railroad mortgage, who were not made parties to an action for foreclosure by other bondholders, may have the decree vacated for fraud. Stevens *v.* Boston Cent. Nat. Bank, 144 N. Y. 50, 39 N. E. 68.

The trustees of a railroad mortgage have, it seems, no standing to move for the vacation of a judgment against the corporation to which they were not parties. Indianapolis, etc., R. Co. *v.* Crockett, 2 Ind. App. 130, 28 N. E. 222.

Person injured by execution.— Where the property of a person who was not a party to the action is wrongfully taken and sold on execution, he has his remedy, but not by a motion to vacate the judgment. Barney *v.* Vigoureaux, 75 Cal. 376, 17 Pac. 433.

Heirs.—Judgment against an administrator may be opened at the instance of the heirs, where its rendition was due to defendant's negligence, and there is a good defense which he did not present. McWillie *v.* Martin, 25 Ark. 556; Nicholes *v.* Chicago, 184 Ill. 43, 56 N. E. 351. And see Pierce *v.* East Greenwich Prob. Ct., 19 R. I. 472, 34 Atl. 992. But *compare* Cosgrove *v.* U. S., 33 Ct. Cl. 167.

Unknown defendants.— Persons joined as "unknown" defendants, by virtue of a statute, and as such concluded by the judgment, have a standing to move the opening of the judgment. Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

58. Clarke *v.* Baird, 98 Cal. 642, 33 Pac. 756; Brettell *v.* Deffebach, 6 S. D. 21, 60 N. W. 167; Ætna Ins. Co. *v.* Aldrich, 38 Wis. 107.

A landlord cannot be dispossessed of his property by judgment rendered in an action to try title brought against his tenant, to which he was no party and of which he had no notice; and he may have it set aside. Moser *v.* Hussey, 67 Tex. 456, 3 S. W. 688; King *v.* Davis, 137 Fed. 198.

59. Jewett *v.* Crane, 35 Barb. (N. Y.) 208, 13 Abb. Pr. 97; Krall *v.* Campbell Printing Press, etc., Co., 79 Tex. 556, 15 S. W. 565; Ault *v.* Elliot, 2 Fed. Cas. No. 655, 2 Cranch C. C. 372.

Indemnitor.— Where a sheriff, indemnified as to property levied on, makes wilful default in replevin, so that judgment is taken against him, the default may be set aside on motion of the indemnitor. Jakobi *v.* Gorman, 2 Misc. (N. Y.) 190, 21 N. Y. Suppl. 762.

60. Sprague *v.* Auffmordt, 183 Mass. 7, 66 N. E. 416. But *compare* Camberford *v.* Hall, 3 McCord (S. C.) 345.

61. Covey *v.* Wheeler, 23 Pa. Co. Ct. 467.

Wife of judgment debtor.— Where a husband gives a mortgage, and suffers a judgment on it, purposely, to defeat his wife of her dower, the mortgagee having constructive notice of her rights, she may have the judgment opened and be let in to a defense to the extent of her dower. McClurg *v.* Schwartz, 87 Pa. St. 521.

62. Buck *v.* Blair, 34 La. Ann. 767.

63. Lehman Mach. Co. *v.* Rood, 8 Kulp (Pa.) 264.

64. *California.*— Thompson *v.* Alford, 135 Cal. 52, 66 Pac. 983. And see Palace Hardware Co. *v.* Smith, 134 Cal. 381, 66 Pac. 474.

Connecticut.— Porter *v.* Orient Ins. Co., 72 Conn. 519, 45 Atl. 7.

Louisiana.— A judgment apparently in his favor, but really prejudicial to a person, may be annulled where the proceedings have been taken without his authority or knowledge in the exercise of his rights; but otherwise where his name merely has been used

3. JOINT DEFENDANTS. A judgment against several defendants jointly, which is void or irregular as to one of them, may be vacated on the application of that defendant.[65] In such a case it is not necessary that the judgment should be vacated as to all the defendants if their liability is several as well as joint,[66] unless they are inseparably connected in interest,[67] except in those jurisdictions where a joint judgment is regarded as an entirety for all purposes.[68]

4. LEGAL REPRESENTATIVES. Statutes regulating the opening or vacating of judgments sometimes provide that an application for such relief may be made by the "legal representatives of the defendant" or by "any person legally representing him"; and it has been held that these phrases include not only the executor or administrator of a deceased defendant[69] or his widow and heirs,[70] but also one who by deed or other grant has acquired his entire interest in the subject-matter of the action.[71] Persons applying in this character for the vacation of the judgment must show a state of facts which would have supported the application if made by the original party.[72]

5. CREDITORS, LIENORS, AND PURCHASERS. An application to vacate or set aside a judgment may be made by another judgment creditor[73] who has been defrauded or injured by the judgment,[74] or by a person holding a lien or encumbrance

to enforce the rights of others. Blood *v.* Vollers, 6 La. Ann. 784.

Missouri.— Downing *v.* Still, 43 Mo. 309.

New York.— McCredy *v.* Woodcock, 41 N. Y. App. Div. 526, 58 N. Y. Suppl. 656; Graef *v.* Bernard, 7 Misc. 246, 27 N. Y. Suppl. 263. But *compare* Havemeyer *v.* Brooklyn Sugar Refining Co., 13 N. Y. Suppl. 873, 26 Abb. N. Cas. 157.

Pennsylvania.— Herdic *v.* Woodward, 75 Pa. St. 479.

Texas.— Richardson *v.* Ellett, 10 Tex. 190.

Washington.— Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446.

But *compare* Smith *v.* Hoyt, 14 Wis. 252, holding that a party cannot object to a part of a judgment which is in his favor, although it be unauthorized.

65. *California.*— Reinhart *v.* Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52.

Indiana.— Huntington First Nat. Bank *v.* Williams, 126 Ind. 423, 26 N. E. 75; Fall *v.* Evans, 20 Ind. 210.

Iowa.— Broghill *v.* Lash, 3 Greene 357.

Montana.— Morse *v.* Callantine, 19 Mont. 87, 47 Pac. 635.

New York.— Weston *v.* Citizens' Nat. Bank, 88 N. Y. App. Div. 330, 84 N. Y. Suppl. 743; Droham *v.* Norton, 1 Misc. 486, 21 N. Y. Suppl. 579; Parker *v.* Linden, 13 N. Y. Suppl. 787; St. John *v.* Holmes, 20 Wend. 609, 32 Am. Dec. 603.

North Carolina.— Sikes *v.* Weatherly, 110 N. C. 131, 14 S. E. 511.

North Dakota.— Stewart *v.* Parsons, 5 N. D. 273, 65 N. W. 672.

Vermont.— Franks *v.* Lockey, 45 Vt. 395.

West Virginia.— Ferguson *v.* Millender, 32 W. Va. 30, 9 S. E. 38.

Judgment against partners.— Where an attorney confesses judgment against several partners, under an authority derived from only one, the others may have the judgment opened. Cyphert *v.* McClune, 22 Pa. St. 195.

After a discontinuance as to one defendant in an ejectment suit before service or appearance, the judgment taken against the other defendant does not bind the former, and therefore he cannot object to it. Hathaway *v.* Fullerton, 11 Wis. 287.

Errors affecting only co-defendant.— A party primarily liable, as the maker of the note in suit, and against whom a judgment is regular, cannot complain of errors affecting his co-defendant only. Ward *v.* Tinnen, 10 Tex. 187.

66. Patterson *v.* Yancey, 97 Mo. App. 681, 71 S. W. 845.

67. Boyd *v.* Munson, 56 Nebr. 269, 76 N. W. 552; Jordan *v.* Russell, 8 Ohio Dec. (Reprint) 467, 8 Cinc. L. Bul. 91.

68. Steuhenville Nat. Exch. Bank *v.* McElfish Clay Mfg. Co., 48 W. Va. 406, 37 S. E. 541. And see *supra*, VI, C, 3, g.

69. Hartigan *v.* Nagle, 11 Misc. (N. Y.) 449, 32 N. Y. Suppl. 220; Dick *v.* Mahoney, 21 Pa. Co. Ct. 241. *Compare* Walton *v.* McKesson, 101 N. C. 428, 7 S. E. 566.

70. Williamson *v.* Wachenheim, 62 Iowa 196, 17 N. W. 486. And see Riley *v.* Ryan, 45 Misc. (N. Y.) 151, 91 N. Y. Suppl. 952, 93 N. Y. Suppl. 386. But *compare* McLeod *v.* Graham, 132 N. C. 473, 43 S. E. 935.

71. Malone *v.* Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063; Plummer *v.* Brown, 64 Cal. 429, 1 Pac. 703; Boeing *v.* McKinley, 44 Minn. 392, 46 N. W. 766. But see Whitney *v.* Kelley, 94 Cal. 146, 29 Pac. 624, 28 Am. St. Rep. 106, 15 L. R. A. 813; Parsons *v.* Johnson, 66 Iowa 455, 23 N. W. 921.

72. Corwin *v.* Bensley, 43 Cal. 253.

73. Melville *v.* Brown, 16 N. J. L. 363, holding that none but a judgment creditor, or one whose claim has been judicially established, is entitled to question the fairness of a judgment between other parties, and he must first have exhausted all other remedies.

74. *Iowa.*— Bernard *v.* Douglas, 10 Iowa 370.

New York.— Beards *v.* Wheeler, 76 N. Y. 213.

Pennsylvania.— Moore *v.* Dunn, 147 Pa. St. 359, 23 Atl. 596; Geist *v.* Geist, 2 Pa.

which is injuriously affected by the judgment,[75] or by a *bona fide* purchaser of the property affected,[76] except where such person loses his right by passing on his interest to another or it is lost by foreclosure or otherwise,[77] and except where he is seeking or has already sought a remedy by a separate and independent action.[78]

C. Persons as Against Whom Judgment May Be Vacated. The assignee of a judgment cannot set up his rights to prevent its being opened or vacated, as he stands in no better position than his assignor,[79] nor can one of several defendants prevent such action being taken, although the judgment is beneficial to him, and he was no party to the fraud perpetrated by the other defendants on which the motion is based.[80] But the statutes are generally so framed as to save and protect, when the judgment is opened or vacated, the rights and titles of purchasers in good faith under the judgment.[81]

D. Time of Application — 1. During the Term. During the whole of the term at which a judgment or order is rendered, it remains subject to the plenary control of the court, and may be vacated, set aside, modified, or annulled,[82] and

St. 441; Reigel's Appeal, 1 Walk. 72; Entenman *v.* Keebler, 13 Phila. 56.

South Carolina.— Posey *v.* Underwood, 1 Hill 262.

United States.— Smith *v.* Schwed, 9 Fed. 483.

See 30 Cent. Dig. tit. "Judgment," § 723.

In the absence of fraud, where there is no lack of jurisdiction, a subsequent execution creditor has no standing to move to vacate a judgment and execution against his debtor. Roof *v.* Meyer, 8 N. Y. Civ. Proc. 60.

Judge as creditor.— The judge of a court who has rendered a judgment which is null and void cannot as a creditor of one of the parties avail himself of the nullity. Osborn *v.* Segras, 29 La. Ann. 291.

75. Bean *v.* Fisher, 14 Wis. 57, holding, however, that this does not apply to a senior mortgagee, who was not made a party to the junior mortgagee's action for foreclosure in which the judgment was recovered, as his rights are not concluded by the judgment.

76. *California.*— People *v.* Mullan, 65 Cal. 396, 4 Pac. 348. But see Abadie *v.* Lobero, 36 Cal. 390.

New Jersey.—Reed *v.* Bainbridge, 4 N. J. L. 351.

New York.— Kendall *v.* Hodgins, 1 Bosw. 659.

Texas.— Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63, holding the rule to be otherwise, however, where the judgment was entered by agreement of the parties.

Utah.— Thomas *v.* Morris, 8 Utah 284, 31 Pac. 446.

See 30 Cent. Dig. tit. "Judgment," § 723.

But see People *v.* Calhoun Cir. Ct., 1 Dougl. (Mich.) 417; Jacobs *v.* Burgwyn, 63 N. C. 196; Powell *v.* McDowell, 16 Nebr. 424, 20 N. W. 271 (under statute); Milleisen *v.* Senseman, 4 Pa. Super. Ct. 455; Philadelphia *v.* Fraley, 2 Pa. Co. Ct. 439; Stark *v.* Overfield, 1 C. Pl. (Pa.) 36.

After execution of the judgment a purchaser cannot claim the right to have it set aside. Jackson *v.* Stiles, 10 Johns. (N. Y.) 67.

Voluntary obligee.— A voluntary bond is a gift of the money, and a judgment thereon cannot be impeached by a legatee who is only a volunteer on the ground of want of consideration. *In re* Rowland, 7 Pa. L. J. 312.

77. Ward *v.* Montclair R. Co., 26 N. J. Eq. 260.

78. Mueller *v.* Reimer, 46 Minn. 314, 48 N. W. 1120; Scheidt *v.* Sturgis, 10 Bosw. (N. Y.) 606.

79. Northam *v.* Gordon, 23 Cal. 255; Haley *v.* Eureka County Bank, 20 Nev. 410, 22 Pac. 1098.

80. Furman *v.* Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629.

81. See the statutes of the different states. And see Craig *v.* Major, 139 Ind. 624, 35 N. E. 1098; Randall *v.* Barker, 67 Kan. 774, 74 Pac. 240; Citizens' State Bank *v.* Haymes, 56 Nebr. 394, 76 N. W. 867; Watson *v.* Ulbrich, 18 Nebr. 186, 24 N. W. 732; Miller *v.* Erdhouse, 7 Ohio Dec. (Reprint) 294, 2 Cinc. L. Bul. 84; Roberts *v.* Price, 2 Ohio Dec. (Reprint) 681, 4 West. L. Month. 581.

82. *Alabama.*— Johnson *v.* Lattimore, 7 Ala. 200.

Arkansas.— Underwood *v.* Sledge, 27 Ark. 295; McKnight *v.* Strong, 25 Ark. 212; Ashley *v.* May, 5 Ark. 408; Ashley *v.* Hyde, 6 Ark. 92, 42 Am. Dec. 685.

Colorado.— Martin *v.* Skehan, 2 Colo. 614.

Georgia.— Bowen *v.* Wyeth, 119 Ga. 687, 46 S. E. 823; Cooley *v.* Tybee Beach Co., 99 Ga. 290, 25 S. E. 691; Jordan *v.* Tarver, 92 Ga. 379, 17 S. E. 351.

Idaho.— Moore *v.* Taylor, 1 Ida. 630.

Illinois.— Edwards *v.* Irons, 73 Ill. 583; Coughran *v.* Gutcheus, 18 Ill. 390; Kloeckner *v.* Schafer, 110 Ill. App. 391; Mellon *v.* People, 59 Ill. App. 467.

Indiana.— Gingrich *v.* Gingrich, 146 Ind. 227, 45 N. E. 101; Burnside *v.* Ennis, 43 Ind. 411; Ralston *v.* Lothain, 18 Ind. 303; Layman *v.* Braybill, 14 Ind. 166.

Iowa.— Kirby *v.* Gates, 71 Iowa 100, 32 N. W. 191; Harper *v.* Drake, 14 Iowa 533; Taylor *v.* Lusk, 9 Iowa 444.

Kansas.— State *v.* Sowders, 42 Kan. 312, 22 Pac. 425.

Kentucky.— Kyle *v.* Conn, Ky. Dec. 186.

Maryland.— Townshend *v.* Chew, 31 Md.

for this purpose an adjourned term is considered but a continuation of the regular term.[83] This is a power inherent in all courts of general jurisdiction, and is not dependent upon, nor derived from, the statutes,[84] and statutes requiring applications for a new trial to be made within a limited number of days after a verdict or decision have no application to a motion to set aside a judgment made at the same term.[85]

2. After the Term — a. General Rule. As a general rule, in the absence of statutory provisions to the contrary, no court possesses authority to vacate or set aside its final judgment after the expiration of the term.[86] And a similar rule

247; Rotherford *v.* Pope, 15 Md. 579; Robinson *v.* Harford County Com'rs, 12 Md. 132.

Mississippi.—Pattison *v.* Josselyn, 43 Miss. 373; Barker *v.* Justice, 41 Miss. 240; Sagory *v.* Bayless, 13 Sm. & M. 153.

Missouri.— Smith *v.* Perkins, 124 Mo. 50, 27 S. W. 574; Rottmann *v.* Schmucker, 94 Mo. 139, 7 S. W. 117; Randolph *v.* Sloan, 58 Mo. 155; Ennis *v.* Hogan, 47 Mo. 513; State *v.* Callaway County Treasurer, 43 Mo. 228; Hesse *v.* Seyp, 88 Mo. App. 66; Woodward *v.* Woodward, 84 Mo. App. 328; Nelson *v.* Ghiselin, 17 Mo. App. 663; Rankin *v.* Lawton, 17 Mo. App. 574.

Nebraska.— Bradley *v.* Slater, 58 Nebr. 554, 78 N. W. 1069, 55 Nebr. 334, 75 N. W. 826; Taylor *v.* Trumbull, 32 Nebr. 508, 49 N. W. 375; Harris *v.* State, 24 Nebr. 803, 40 N. W. 317; Volland *v.* Wilcox, 17 Nebr. 46, 22 N. W. 71.

Nevada.— Ballard *v.* Purcell, 1 Nev. 342.

New Jersey.— Fraley *v.* Feather, 46 N. J. L. 429; Kelly *v.* Bell, 17 N. J. L. 270.

New York.— Bradford *v.* Greenwich Ins. Co., 8 Abb. Pr. 261.

North Carolina.— Gwinn *v.* Parker, 119 N. C. 19, 25 S. E. 705; Halyburton *v.* Carson, 80 N. C. 16; Scaff *v.* Bufkin, 53 N. C. 161.

Ohio.— Manguno, etc., Co. *v.* Clymonts, 19 Ohio Cir. Ct. 237, 10 Ohio Cir. Dec. 427; Parker *v.* Robinson, 5 Ohio Dec. (Reprint) 367, 5 Am. L. Rec. 189.

Texas.— Blackburn *v.* Knight, 81 Tex. 326, 16 S. W. 1075; Foster *v.* Martin, 20 Tex. 118; Taylor *v.* Gribble, (Civ. App. 1896) 33 S. W. 765; Texas Sav. Loan Assoc. *v.* Smith, (Civ. App. 1895) 32 S. W. 380.

West Virginia.— Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804; Kelty *v.* High, 29 W. Va. 381, 1 S. E. 561; Parkersburg Nat. Bank *v.* Neal, 28 W. Va. 744; Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685.

United States.— Memphis *v.* Brown, 94 U. S. 715, 24 L. ed. 244; *Ex p.* Lange, 18 Wall. 163, 21 L. ed. 872; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 101 Fed. 146; Wyler *v.* Union Pac. R. Co., 89 Fed. 41; Ætna L. Ins. Co. *v.* Hamilton County, 79 Fed. 575, 25 C. C. A. 94; *Ex p.* Casey, 18 Fed. 86; Hand *v.* Yahoola Min. Co., 11 Fed. Cas. No. 6,016, 2 Woods (U. S.) 407; Union Trust Co. *v.* Rockford, etc., R. Co., 24 Fed. Cas. No. 14,401, 6 Biss. 197.

See 30 Cent. Dig. tit. "Judgment," §§ 263, 667.

83. Van Dyke *v.* State, 22 Ala. 57. But *compare* McManama *v.* Garnett, 3 Metc. (Ky.) 517; Childers *v.* Loudin, 51 W. Va. 559, 42 S. E. 637.

84. Bradley *v.* Slater, 58 Nebr. 554, 78 N. W. 1069; Manguno, etc., Co. *v.* Clymonts, 19 Ohio Cir. Ct. 237, 10 Ohio Cir. Dec. 427.

85. *Kentucky.*— Williams *v.* Williams, 107 Ky. 496, 54 S. W. 716, 21 Ky. L. Rep. 1208; Riglesberger *v.* Bailey, 102 Ky. 608, 44 S. W. 118, 19 Ky. L. Rep. 1660; Pennsylvania F. Ins. Co. *v.* Young, 78 S. W. 127, 25 Ky. L. Rep. 1350.

Missouri.— St. Louis *v.* Meyer, 13 Mo. App. 367 [*affirmed* in 87 Mo. 276]. And see Harkness *v.* Jarvis, 182 Mo. 231, 81 S. W. 446.

Nebraska.— Bradley *v.* Slater, 58 Nebr. 554, 78 N. W. 1069.

New York.— Traver *v.* Silvernail, 2 Code Rep. 96.

Ohio.— Jordan *v.* Russell, 8 Ohio Dec. (Reprint) 467, 8 Cinc. L. Bul. 91; Parker *v.* Robinson, 5 Ohio Dec. (Reprint) 367, 5 Am. L. Rec. 189.

Texas.— Ishmel *v.* Potts, (Civ. App. 1898) 44 S. W. 615. And see El Paso, etc., R. Co. *v.* Kelley, (1905) 87 S. W. 660.

Vermont.— Arlington Mfg. Co. *v.* Mears, 65 Vt. 414, 26 Atl. 587.

United States.— Hall *v.* Houghton, etc., Mercantile Co., 60 Fed. 350, 8 C. C. A. 661.

A statute limiting the time within which a motion to set aside may be made restricts the power of the court, so that a judgment cannot be vacated, after the expiration of such time, even during the same term. Ellis *v.* Ellis, 92 Tenn. 471, 22 S. W. 1.

86. *Alabama.*— Soulard *v.* Vacuum Oil Co., 109 Ala. 387, 19 So. 414; Donnell *v.* Hamilton, 77 Ala. 610; Buchanan *v.* Thomason, 70 Ala. 401; *Ex p.* Sims, 44 Ala. 248; Bryant *v.* Horn, 42 Ala. 496; Alexander *v.* Nelson, 42 Ala. 462; Griffin *v.* Griffin, 40 Ala. 296; Noland *v.* Locke, 16 Ala. 52; Crothers *v.* Ross. 15 Ala. 800.

Arizona.— National Metal Co. *v.* Greene Consol. Copper Co., (1905) 80 Pac. 397; *In re* Zeckendorf, (1901) 64 Pac. 492.

Arkansas.— Williams *v.* Reutzel, 60 Ark. 155, 29 S. W. 374; McKnight *v.* Strong, 25 Ark. 212; Brandenburg *v.* State, 24 Ark. 50; Rawdon *v.* Rapley, 14 Ark. 203, 58 Am. Dec. 370; Ashley *v.* Hyde, 6 Ark. 92, 42 Am. Dec. 685; Smith *v.* Stinnett, 1 Ark. 497.

California.— After the adjournment of the term the court loses all control over its decisions, unless its jurisdiction is saved by some motion or proceeding at the time, except when the summons has not been served,

applies to decrees in equity; courts of chancery cannot open a final decree after the end of the term, unless upon a bill of review, or bill or petition impeaching

in which case a party may within six months move to set the judgment aside. Lattimer *v.* Ryan, 20 Cal. 628; Bell *v.* Thompson, 19 Cal. 706; Shaw *v.* McGregor, 8 Cal. 521; Robb *v.* Robb, 6 Cal. 21; Carpentier *v.* Hart, 5 Cal. 406; Suydam *v.* Pitcher, 4 Cal. 280; Baldwin *v.* Kramer, 2 Cal. 582.

Colorado.— People *v.* Denver County Dist. Ct., 33 Colo. 405, 80 Pac. 1065; Smith *v.* Mock, 33 Colo. 154, 79 Pac. 1011; Exchange Bank *v.* Ford, 7 Colo. 314, 3 Pac. 449.

Connecticut.— Hall *v.* Paine, 47 Conn. 429.

District of Columbia.— Tubman *v.* Baltimore, etc., R. Co., 20 App. Cas. 541 [*affirmed* in 190 U. S. 38, 23 S. Ct. 777, 47 L. ed. 946].

Florida.— Forcheimer *v.* Tarble, 23 Fla. 99, 1 So. 695; Internal Imp. Fund *v.* Bailey, 10 Fla. 238.

Georgia.— Cauley *v.* Wadley Lumber Co., 119 Ga. 648, 46 S. E. 852; Baker *v.* Baker, 113 Ga. 378, 38 S. E. 818; Camp *v.* Phillips, 88 Ga. 415, 14 S. E. 580. But the court may renew and annul its order absolute against a sheriff, at the same or a subsequent term, on motion, when it is made to appear that he was not in contempt. Wakefield *v.* Moore, 65 Ga. 268.

Illinois.— Doremus *v.* Chicago, 212 Ill. 513, 72 N. E. 403; Pisa *v.* Rezek, 206 Ill. 344, 69 N. E. 67; Chicago *v.* Nicholes, 192 Ill. 489, 61 N. E. 434; Rich *v.* Chicago, 187 Ill. 396, 58 N. E. 306; McChesney *v.* Chicago, 161 Ill. 110, 43 N. E. 702; Baldwin *v.* McClelland, 152 Ill. 42, 38 N. E. 143; Becker *v.* Sauter, 89 Ill. 596; Coursen *v.* Hixon, 78 Ill. 339; Fix *v.* Quinn, 75 Ill. 232; McKindley *v.* Buck, 43 Ill. 488; Messervey *v.* Beckwith, 41 Ill. 452; Cox *v.* Brackett, 41 Ill. 222; Smith *v.* Wilson, 26 Ill. 186; Cook *v.* Wood, 24 Ill. 295; Lampsett *v.* Whitney, 4 Ill. 170; Ryder *v.* Twiss, 4 Ill. 4; Garner *v.* Crenshaw, 2 Ill. 143; Leavitt *v.* Bolton, 102 Ill. App. 582; Utley *v.* Cameron, 87 Ill. App. 71; Stitt *v.* Kurtenbach, 25 Ill. App. 38; Fish Furniture Co. *v.* Jenkins, 82 Ill. App. 551; Arnold *v.* Kilchmann, 80 Ill. App. 229; Bristol *v.* Ross, 79 Ill. App. 261; Kelley *v.* Heath, etc., Mfg. Co., 66 Ill. App. 528; Stettauer *v.* Chicago Title, etc., Co., 62 Ill. App. 31; Chambers *v.* Kirschoff, 57 Ill. App. 615; Davies *v.* Coryell, 37 Ill. App. 505; Maple *v.* Havenhill, 37 Ill. App. 311; Schmidt *v.* Thomas, 33 Ill. App. 109; Baragwanath *v.* Wilson, 4 Ill. App. 80. *Compare* Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850.

Indiana.— Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440; Bland *v.* State, 2 Ind. 608; Brackenridge *v.* McCulloch, 7 Blackf. 334; Blair *v.* Russell, Smith 287.

Iowa.— McName *v.* Malvin, 56 Iowa 362, 9 N. W. 297; Emerson *v.* Tomlinson, 4 Greene 398.

Kansas.— Johnson *v.* Jones, 58 Kan. 745, 51 Pac. 224.

Kentucky.— Lovelace *v.* Lovell, 107 Ky. 676, 55 S. W. 549, 21 Ky. L. Rep. 1433; McManama *v.* Garnett, 3 Metc. 517; Hocker *v.* Gentry, 3 Metc. 463; Anderson *v.* Anderson, 18 B. Mon. 95; Lexington, etc., Turnpike Road Co. *v.* McMurtry, 6 B. Mon. 214; Kelly *v.* Keiser, 3 A. K. Marsh. 268; Reed *v.* Hatcher, 1 Bibb 346; Ayres *v.* Fuqua, (1897) 41 S. W. 15; McDaniel *v.* Stum, 65 S. W. 800, 23 Ky. L. Rep. 1935; Bevins *v.* Ryland, 64 S. W. 752, 23 Ky. L. Rep. 1061; Herald *v.* Hargis, 54 S. W. 958, 21 Ky. L. Rep. 1287. And see Griffin *v.* Gingell, 25 Ky. L. Rep. 2031, 79 S. W. 284. A court of continuous session has, for the period of sixty days after their rendition, the same control over its judgments as circuit courts have during the term of the rendition of judgments. Henry Vogt Mach. Co. *v.* Pennsylvania Iron Works Co., 66 S. W. 734, 23 Ky. L. Rep. 2163, construing St. § 988.

Maryland.— McCormick *v.* Hogan, 48 Md. 404; Loney *v.* Bailey, 43 Md. 10; Dorsey *v.* Gary, 37 Md. 64, 11 Am. Rep. 528; Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681.

Massachusetts.— Radclyffe *v.* Barton, 154 Mass. 157, 28 N. E. 148; Pierce *v.* Lamper, 141 Mass. 20, 6 N. E. 223; Wood *v.* Payea, 138 Mass. 61; Blanchard *v.* Ferdinand, 132 Mass. 389; Mason *v.* Pearson, 118 Mass. 61, holding that the rule applies to a court which holds weekly terms.

Mississippi.— Adams *v.* Evans, (1896) 19 So. 834; Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 255, 13 So. 844, 30 Am. St. Rep. 541; Cotten *v.* McGehee, 54 Miss. 621; Ledyard *v.* Henderson, 46 Miss. 260. But see Burns *v.* Loeb, 59 Miss. 167, holding that the fact that one against whom a judgment by default has been prematurely entered takes no action at the same term is not a waiver of his right to have the judgment reversed.

Missouri.— State *v.* Sullivan County Ct., 51 Mo. 522; Brewer *v.* Dinwiddie, 25 Mo. 351; Ashby *v.* Glasgow, 7 Mo. 320; Orvis *v.* Elliott, 65 Mo. App. 96. See Dougherty *v.* St. Vincent's College, 53 Mo. 579.

Nebraska.— Sherman County *v.* Nichols, 65 Nebr. 250, 91 N. W. 198; Schuyler Bldg., etc., Assoc. *v.* Fulmer, 61 Nebr. 68, 84 N. W. 609; Fisk *v.* Thorp, 51 Nebr. 1, 70 N. W. 498; Ganzer *v.* Schiffbauer, 40 Nebr. 633, 59 N. W. 98; McBrien *v.* Riley, 38 Nebr. 561, 57 N. W. 385.

New Jersey.— Galbraith *v.* Cooper, 24 N. J. L. 219.

North Carolina.— Turner *v.* Davis, 132 N. C. 187, 43 S. E. 637; Moore *v.* Hinnant, 90 N. C. 163; State *v.* Auman, 35 N. C. 241; Ramsour *v.* Raper, 29 N. C. 346; Dobbin *v.* Gaster, 26 N. C. 71; Alston *v.* Parish, 1 N. C. 221.

Ohio.— Huntington *v.* Finch, 3 Ohio St. 445; Wohlgemuth *v.* Taylor, 25 Ohio Cir. Ct. 271; Exposition Bldg., etc., Co. *v.* Spiegel, 12 Ohio Cir. Ct. 761, 4 Ohio Cir. Dec. 474; Potter *v.* Jennman, 4 Ohio S. & C. Pl. Dec.

the decree for fraud.[87] In a few states the courts open or vacate judgments in proper cases without any limitation as to time.[88]

b. Motion Continued to Next Term. A motion to vacate or open a judgment, made at the same term at which the judgment was rendered, and continued to a subsequent term, may be allowed at such subsequent term.[89] Where a motion for

444, 4 Ohio N. P. 78. But see Huber Mfg. Co. *v.* Sweney, 11 Ohio Cir. Ct. 190, 5 Ohio Cir. Dec. 329.

Oregon.— Brand *v.* Baker, 42 Oreg. 426, 71 Pac. 320; Alexander *v.* Ling, 31 Oreg. 222, 50 Pac. 915; Deering *v.* Creighton, 26 Oreg. 556, 38 Pac. 710.

Pennsylvania.— In this state the courts have discretionary power to open a default, to let defendant in to a defense, at any time, during or after the term, but not to vacate or set aside a judgment rendered on the trial of the case, after the end of the term except for fraud. Sullivan *v.* Sweeney, 189 Pa. St. 474, 42 Atl. 45; Fisher *v.* Hestonville, etc., Pass. R. Co., 185 Pa. St. 602, 40 Atl. 97; North *v.* Yorke, 174 Pa. St. 349, 34 Atl. 620; Bradley *v.* Towanda Tp., 133 Pa. St. 371, 20 Atl. 1060; King *v.* Brooks, 72 Pa. St. 363; Dean *v.* Munhall, 11 Pa. Super. Ct. 69; Hill *v.* Egan, 2 Pa. Super. Ct. 596; Couch *v.* Heffron, 15 Pa. Co. Ct. 636; Ware *v.* Baldwin, 7 Kulp 278. And see Philadelphia *v.* Coulston, 118 Pa. St. 541, 12 Atl. 604. As to a judgment obtained by fraud or misrepresentation, it may be opened for this cause, notwithstanding it may have been several times revived by scire facias. Citizens' Trust, etc., Co. *v.* Goodchild, 195 Pa. St. 80, 45 Atl. 662; Monroe *v.* Monroe, 93 Pa. St. 520.

South Carolina.— Mitchell *v.* Humphries, Harp. 479; Schroder *v.* Eason, 2 Nott & M. 291.

Tennessee.— Vaughn *v.* Tealey, (Ch. App. 1899) 58 S. W. 487.

Texas.— Ragsdale *v.* Green, 36 Tex. 193; Metzger *v.* Wendler, 35 Tex. 378; Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100; Merle *v.* Andrews, 4 Tex. 200; Wilson *v.* Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086; Hirshfeld *v.* Brown, (Civ. App. 1895) 30 S. W. 962; Imlay *v.* Brewster, 3 Tex. Civ. App. 103, 22 S. W. 226; Thomas *v.* Neel, (App. 1892) 18 S. W. 138.

Utah.— Benson *v.* Anderson, 14 Utah 334, 47 Pac. 142; Jones *v.* New York L. Ins. Co., 14 Utah 215, 47 Pac. 74.

Virginia.— A judgment by default will not be stricken out after the expiration of the term at which it was entered, unless shown to have been obtained by fraud, surprise, or mistake, or that there is some statutory authority for so doing. Turnbull *v.* Thompson, 27 Gratt. 306; Halley *v.* Baird, 1 Hen. & M. 25.

Washington.— *In re* Barker, 33 Wash. 79, 73 Pac. 796; Hancock *v.* Stewart, 1 Wash. Terr. 323.

West Virginia.— State *v.* Boner, 57 W. Va. 81, 49 S. E. 944; Seiler *v.* Union Mfg. Co., 50 W. Va. 208, 40 S. E. 547; Barbour County Ct. *v.* O'Neal, 42 W. Va. 295, 26 S. E. 182; Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685.

Wisconsin.— Dufur *v.* Home Inv. Co., 122 Wis. 470, 100 N. W. 831; State *v.* Waukesha County Cir. Ct., 108 Wis. 77, 83 N. W. 1115; Pormann *v.* Frede, 72 Wis. 226, 39 N. W. 385; Frankfurth *v.* Anderson, 61 Wis. 107, 20 N. W. 662; Schobacher *v.* Germantown Farmers' Ins. Co., 59 Wis. 86, 17 N. W. 969; Breed *v.* Ketchum, 51 Wis. 164, 7 N. W. 550; Egan *v.* Sengpiel, 46 Wis. 703, 1 N. W. 467; Salter *v.* Hilgen, 40 Wis. 363; Gray *v.* Gates, 37 Wis. 614; Scheer *v.* Keown, 34 Wis. 349; Spafford *v.* Janesville, 15 Wis. 474.

United States.— Phillips *v.* Negley, 117 U. S. 665, 6 S. Ct. 901, 29 L. ed. 1013; Bronson *v.* Schulten, 104 U. S. 410, 26 L. ed. 997; Cameron *v.* McRoberts, 3 Wheat. 591, 4 L. ed. 467; King *v.* Davis, 137 Fed. 222; Brown *v.* Arnold, 127 Fed. 387; Green *v.* Fitchburg R. Co., 116 Fed. 928; A. B. Dick Co. *v.* Wichelman, 108 Fed. 961, 48 C. C. A. 164; U. S. *v.* 1,621 Pounds of Fur Clippings, 106 Fed. 161, 45 C. C. A. 263; Klever *v.* Seawall, 65 Fed. 373, 12 C. C. A. 653; Austin *v.* Riley, 55 Fed. 833; Grames *v.* Hawley, 50 Fed. 319; Baptist *v.* Farwell Transp. Co., 29 Fed. 180; Allen *v.* Wilson, 21 Fed. 881; Northern Bank *v.* Labitut, 2 Fed. Cas. No. 842, 1 Woods 11; Brush *v.* Robbins, 4 Fed. Cas. No. 2,059; 3 McLean 486; McClellan *v.* Fosbender, 15 Fed. Cas. No. 8,695; Popino *v.* McAllister, 19 Fed. Cas. No. 11,277, 4 Wash. 393; U. S. *v.* Six Lots of Ground, 27 Fed. Cas. No. 16,299, 1 Woods 234. If the state courts permit the vacating of judgments after the term, the federal courts are not bound to follow their rule. Austin *v.* Riley, 55 Fed. 833; Wood *v.* Luse, 30 Fed. Cas. No. 17,950, 4 McLean 254.

See 30 Cent. Dig. tit. "Judgment," §§ 264, 668.

87. Brooks *v.* Love, 3 Dana (Ky.) 7; Bobb *v.* Bobb, 2 A. K. Marsh. (Ky.) 240; McMicken *v.* Perin, 18 How. (U. S.) 507, 15 L. ed. 504.

88. Campau *v.* Coates, 17 Mich. 235; Vandenburgh *v.* New York, 57 N. Y. Super. Ct. 285, 7 N. Y. Suppl. 675; Schweizer *v.* Raymond, 6 Abb. N. Cas. (N. Y.) 378; Hinde *v.* Tubbs, 10 Johns. (N. Y.) 486.

In New Hampshire where a judgment has been rendered at a trial term of the supreme judicial court, it is within the power of that court to vacate the judgment at a subsequent term for sufficient cause shown. Probate Judge *v.* Webster, 46 N. H. 518.

89. *Illinois.*— Donaldson *v.* Copeland, 201 Ill. 540, 66 N. E. 844 [*affirming* 101 Ill. App. 252]; People *v.* Springer, 106 Ill. 542; Hibbard *v.* Mueller, 86 Ill. 256; Windett *v.* Hamilton, 52 Ill. 180. The mere making of

a new trial is made and continued over the term, it suspends the finality of the judgment so that the court may set it aside at the subsequent term.[90]

c. Consent of Parties. The court may vacate or open a judgment after the end of the term, if the parties consent or agree thereto.[91]

d. Interlocutory Judgments. An interlocutory judgment or order is always under the control of the court until the final decision of the suit, and it may be modified or rescinded, on sufficient grounds shown, even after the term at which it was made, so it be before the entry of final judgment.[92]

e. Void Judgments. Where a judgment is entirely void for want of jurisdiction the power to vacate it or set it aside is not limited to the term at which it was rendered, but may be exercised at a succeeding term.[93] And this applies as

the motion is sufficient to preserve the jurisdiction of the court over the judgment, although the motion is oral and not accompanied by any statement of the grounds thereof. Hartman *v.* Viera, 113 Ill. App. 216.

Kansas.— Babcock Hardware Co. *v.* Farmers', etc., Bank, 50 Kan. 648, 32 Pac. 377.

Missouri.— Childs *v.* Kansas City, etc., R. Co., 117 Mo. 414, 23 S. W. 373. It is not essential to the retention of power by the court to dispose of the motion at a succeeding term that the motion should have been submitted and taken under advisement. Harkness *v.* Jarvis, 182 Mo. 231, 81 S. W. 446.

Ohio.— Niles *v.* Parks, 49 Ohio St. 370, 34 N. E. 735.

South Carolina.— Ward *v.* Western Union Tel. Co., 62 S. C. 274, 40 S. E. 670.

Washington.— State *v.* Brown, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974.

West Virginia.— Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685.

Wisconsin.— Baker *v.* Baker, 51 Wis. 538, 8 N. W. 289. *Compare* Gans *v.* Harmison, 44 Wis. 323.

See 30 Cent. Dig. tit. "Judgment," § 669.

But see Ashley *v.* Hyde, 6 Ark. 92, 42 Am. Dec. 685.

Leave to move at next term.— It is held that leave granted at the term at which judgment is entered to move the next term to set it aside is irregular and void. Hill *v.* St. Louis, 20 Mo. 584.

Motion not submitted to court.— Suspension of the judgment, so as to enable the court to vacate it at a succeeding term, is not effected by the mere entry on the docket of notice of a motion to vacate it, which is neither acted upon nor called to the attention of the court. Gunnells *v.* State Bank, 18 Ala. 676.

In Kentucky a court of continuous session has power to set aside an order after the expiration of sixty days from the date of its entry, where a motion for that purpose was made before the expiration of the sixty days. Forest Hill Bldg., etc., Assoc. *v.* McEvoy, 66 S. W. 1031, 24 Ky. L. Rep. 161. But see Williams *v.* Williams, 104 Ky. 496, 54 S. W. 716, 21 Ky. L. Rep. 1208.

90. Suddarth *v.* Empire Lime Co., 79 Mo. App. 585. But *compare* Siloam Springs *v.* McPhitridge, 53 Ark. 21, 13 S. W. 137.

91. *Alabama.*— Kidd *v.* McMillan, 21 Ala. 325; Hair *v.* Moody, 9 Ala. 399.

Illinois.— Gage *v.* Chicago, 141 Ill. 642, 31 N. E. 163.

Nebraska.— Royal Trust Co. *v.* Exchange Bank, 55 Nebr. 663, 76 N. W. 425.

Ohio.— Disabled Volunteer Soldiers' Nat. Home *v.* Overholser, 64 Ohio St. 517, 60 N. E. 628.

Texas.— McCord-Collins Commerce Co. *v.* Stern, (Civ. App. 1901) 61 S. W. 341.

United States.— Newman *v.* Newton, 14 Fed. 634, 4 McCrary 293.

See 30 Cent. Dig. tit. "Judgment," § 671.

Contra.— Little Rock *v.* Bullock, 6 Ark. 282; Anderson *v.* Thompson, 7 Lea (Tenn.) 259.

92. *Alabama.*— State *v.* Gardner, 45 Ala. 46.

California.— Hastings *v.* Cunningham, 35 Cal. 549.

Illinois.— Mowatt *v.* Cole, 59 Ill. App. 345.

Iowa.— Sioux City First Nat. Bank *v.* Flynn, 117 Iowa 493, 91 N. W. 784.

Louisiana.— State *v.* King, 46 La. Ann. 163, 15 So. 283.

Mississippi.— Davis *v.* Roberts, Sm. & M. Ch. 543.

Missouri.— Matthews *v.* Cook, 35 Mo. 286; Burnes *v.* Burnes, 61 Mo. App. 612. Under a statute allowing an appeal from interlocutory judgments in partition, if exceptions are not made in due time, the judgment will be conclusive, and cannot thereafter be set aside. Windes *v.* Earp, 150 Mo. 600, 51 S. W. 1044.

New Mexico.— Bent *v.* Miranda, 8 N. M. 78, 42 Pac. 91.

New York.— *In re* Buffalo, 78 N. Y. 362; Patterson *v.* Hare, 74 Hun 269, 26 N. Y. Suppl. 626.

North Carolina.— Miller *v.* Justice, 86 N. C. 26.

Virginia.— Baker *v.* Swineford, 97 Va. 112, 33 S. E. 542.

Washington.— Balfour-Guthrie Inv. Co. *v.* Geiger, 20 Wash. 579, 56 Pac. 370.

West Virginia.— Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696; Rheims *v.* Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. 670.

United States.— Blythe *v.* Hinckley, 84 Fed. 228.

See 30 Cent. Dig. tit. "Judgment," § 674.

93. *Alabama.*— Chamblee *v.* Cole, 128 Ala. 649, 30 So. 630; Baker *v.* Barclift, 76 Ala. 414; Seawall *v.* Buckley, 54 Ala. 592.

well to a want of jurisdiction of the subject-matter as to a lack of jurisdiction over the parties.[94] But this rule cannot be extended so as to apply to mere errors and irregularities,[95] and defects or irregularities in regard to the jurisdiction, such as make the judgment voidable at most, are not ground for vacating it after the term, especially where acquiesced in by the parties for a considerable length of time.[96]

f. Irregularities. A judgment will not be vacated after the end of the term for any mere irregularity not affecting the jurisdiction, and therefore not rendering the judgment void, unless the statute grants an extended time for moving to vacate it on this ground, and in that case the application is too late if not made within the statutory time.[97]

California.— If want of jurisdiction appears on the face of the record, the judgment may be vacated at any time. Crossman *v.* Vivienda Water Co., 136 Cal. 571, 69 Pac. 220; Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Hanson *v.* Hanson, (Cal. 1889) 20 Pac. 736; People *v.* Green, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448; Whartou *v.* Harlan, 68 Cal. 422, 9 Pac. 727; Lewis *v.* Rigney, 21 Cal. 268. And see People *v.* Davis, 143 Cal. 673, 77 Pac. 651. But if the defect or failure of jurisdiction is not thus apparent, a motion to vacate the judgment must be made within the time limited by statute for so moving for other causes. People *v.* Dodge, 104 Cal. 487, 38 Pac. 203; People *v.* Harrison, 84 Cal. 607, 24 Pac. 311; People *v.* Goodhue, 80 Cal. 199, 22 Pac. 66.

Colorado.— People *v.* Denver Dist. Ct., 33 Colo. 405, 80 Pac. 1065.

Florida.— Mickler *v.* Reddick, 38 Fla. 341, 21 So. 286.

Illinois.— Chicago *v.* Nodeck, 202 Ill. 257, 67 N. E. 39; Lyon *v.* Robbins, 46 Ill. 276; McIntyer *v.* Houseman, 108 Ill. App. 276; Parker *v.* Macoy, 91 Ill. App. 313.

Iowa.— Sioux City First Nat. Bank *v.* Flynn, 117 Iowa 493, 91 N. W. 784; Smith *v.* Griffin, 59 Iowa 409, 13 N. W. 423.

Kansas.— Foreman *v.* Carter, 9 Kan. 674; York Draper Mercantile Co. *v.* Hutchinson, 2 Kan. App. 47, 43 Pac. 315.

Minnesota.— Waite *v.* Coaracy, 45 Minn. 159, 47 N. W. 537; Feikert *v.* Wilson, 38 Minn. 341, 37 N. W. 585.

Mississippi.— Meyer *v.* Whitehead, 62 Miss. 387.

Nebraska.— Kaufmann *v.* Drexel, 56 Nebr. 229, 76 N. W. 559. But *compare* McCormick Harvesting Mach. Co. *v.* Stires, (1903) 94 N. W. 629.

New York.— *In re* Buffalo, 78 N. Y. 362; Winnebrenner *v.* Edgerton, 30 Barb. 185; Weeks *v.* Merritt, 5 Rob. 610; *In re* Coogan, 27 Misc. 563, 59 N. Y. Suppl. 111; Matter of Underhill, 9 N. Y. Suppl. 457, 1 Connoly Surr. 313; Prior *v.* Hall, 13 N. Y. Civ. Proc. 83; Bonnell *v.* Henry, 13 How. Pr. 142; Harris *v.* Warren, 1 How. Pr. 139. See Hilton *v.* Thurston, 1 Abb. Pr. 318.

North Carolina.— Monroe *v.* Whitted, 79 N. C. 508.

North Dakota.— Freeman *v.* Wood, 11 N. D. 1, 88 N. W. 721.

Oregon.— Ladd *v.* Mason, 10 Oreg. 308.

Pennsylvania.— Couch *v.* Heffron, 15 Pa. Co. Ct. 636.

Rhode Island.—Spooner *v.* Leland, 5 R. I. 348.

South Carolina.— Barns *v.* Branch, 3 McCord 19.

Texas.— Hough *v.* Hammond, 36 Tex. 657; Burr *v.* Lewis, 6 Tex. 76; Ruenbuhl *v.* Heffron, (Civ. App. 1897) 38 S. W. 1028.

Utah.— Park *v.* Higbee, 6 Utah 414, 24 Pac. 524.

Virginia.— McPherson *v.* Nesmith, 3 Gratt. 237.

United States.— U. S. *v.* Wallace, 46 Fed. 569.

See 30 Cent. Dig. tit. "Judgment," § 739. And see *infra*, IX, D, 2.

But see Vaughn *v.* Tealey, (Tenn. Ch. App. 1899) 58 S. W. 487.

94. Gille *v.* Emmons, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609.

In Wisconsin a final judgment in the court of last resort cannot be vacated after a year from its rendition on the ground that the court had no jurisdiction of the subject-matter. State *v.* Waupaca County Bank, 20 Wis. 640.

95. Einstein *v.* Davidson, 35 Fla. 342, 17 So. 563; Maple *v.* Havenhill, 37 Ill. App. 311; Corning *v.* Shepard, 3 How. Pr. (N. Y.) 16.

96. Thornton *v.* American Writing Mach. Co., 83 Ga. 288, 9 S. E. 679, 20 Am. St. Rep. 320; Bostwick *v.* Perkins, 4 Ga. 47; Weaver *v.* Jones, 82 N. C. 440; Hanks *v.* Ingram, 2 Bailey (S. C.) 440.

97. *California.*— Kittle *v.* Bellegarde, 86 Cal. 556, 25 Pac. 55; Mace *v.* O'Reilley, 70 Cal. 231, 11 Pac. 721.

Georgia.— Fleetwood *v.* Equitable Mortg. Co., 108 Ga. 811, 33 S. E. 1014; Crow *v.* American Mortg. Co., 92 Ga. 815, 19 S. E. 31; Gunn *v.* Howell, 22 Ga. 377.

Iowa.— Gilman *v.* Donovan, 53 Iowa 362, 5 N. W. 560. And see Cooper *v.* Dishrow, 106 Iowa 550, 76 N. W. 1013.

Kansas.— Wauhansee County School Dist. No. 63 *v.* Chicago Lumber Co., 41 Kan. 618, 21 Pac. 599; George *v.* Hatton, 2 Kan. 333; Leavenworth *v.* Hicks, McCahon 160.

Kentucky.— Delker *v.* Evans, 67 S. W. 837, 23 Ky. L. Rep. 2451.

Michigan.— People *v.* Judge Calhoun Cir. Ct., 1 Dougl. 417.

Minnesota.— Jorgensen *v.* Griffin, 14 Minn. 464.

Missouri.— The statute provides that judgments may he set aside for irregularity on motion made within three years after the term at which they were rendered. State *v.*

g. Judgments Obtained by Fraud. The inherent power of the courts to set aside a judgment obtained through fraud, deception, or collusion may be exercised after the expiration of the term,[98] and the statutes limiting the time within which applications to vacate judgments must be made do not cover the case of a fraudulent judgment, unless expressly made applicable thereto.[99] But if the statute applies, a motion made after the statutory time has run comes too late, and only a court of equity can then afford the requisite relief.[1]

3. Under Statutes. Where statutes authorize the courts to vacate or set aside judgments, on certain enumerated grounds, within a prescribed time from the rendition of the judgment, the power of the court over the judgment absolutely ceases upon the expiration of such time, and thereafter it has no discretion, or even jurisdiction, to grant relief by vacating or modifying the judgment.[2] Such

Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664; Craig *v.* Smith, 65 Mo. 536; Phillips *v.* Evans, 64 Mo. 17; Harbor *v.* Pacific R. Co., 32 Mo. 423; Reed *v.* Nicholson, 93 Mo. App. 29. *Compare* Orvis *v.* Elliott, 65 Mo. App. 96, holding that, to constitute such irregularity in the judgment as will authorize the court to set it aside after the expiration of the term at which it is rendered, it must have been rendered contrary to the course of law and practice.

New Hampshire.— Claggett *v.* Simes, 31 N. H. 56.

New York.— Corn Exch. Bank *v.* Blye, 119 N. Y. 414, 23 N. E. 805; Judd Linseed Oil Co. *v.* Hubbell, 76 N. Y. 543; Strong *v.* Strong, 4 Rob. 621; Matter of Hesdra, 4 Misc. 37, 23 N. Y. Suppl. 846; Prior *v.* Hall, 13 N. Y. Civ. Proc. 83; Martin *v.* Lott, 4 Abb. Pr. 365; Stebbins *v.* East Soc., 12 How. Pr. 410; Whitehead *v.* Pecare, 9 How. Pr. 35; Bliss *v.* Treadway, 1 How. Pr. 245; Cagger *v.* Gardner, 1 How. Pr. 142; Soulden *v.* Cook, 4 Wend. 217; Thompson *v.* Skinner, 7 Johns. 556.

South Carolina.— After the lapse of several years the court will not entertain a motion to set aside a judgment for such irregularities or defects in the form or matter of proceedings as may be supplied by reasonable intendments, or may be presumed to have happened through inattention or by clerical negligence, and do not appear to have been made fraudulently or injuriously, or to have a tendency to produce an illegal and injurious effect. Porter *v.* Brisbane, 1 Brev. 381.

Wisconsin.— Davidson *v.* Hackett, 45 Wis. 208; Challoner *v.* Howard, 41 Wis. 355.

United States.— Lyles *v.* The Santiago de Cuba, 2 Fed. 271. But *compare* Union Bank *v.* Crittenden, 24 Fed. Cas. No. 14,354, 2 Cranch C. C. 238.

See 30 Cent. Dig. tit. "Judgment," § 741.

But see Harrell *v.* Peebles, 79 N. C. 26; Cowles *v.* Hayes, 69 N. C. 406; Follett *v.* Alexander, 58 Ohio St. 202, 50 N. E. 720; Shelton *v.* Welsh, 7 Leigh (Va.) 175.

98. *Illinois.*— Chicago *v.* Nodeck, 202 Ill. 257, 67 N. E. 39.

Iowa.— Beck *v.* Juckett, 111 Iowa 339, 82 N. W. 762; Melick *v.* Tama City First Nat. Bank, 52 Iowa 94, 2 N. W. 1021. And see Independent School Dist. *v.* Schreiner, 46 Iowa 172.

Maryland.— Munnikhuysen *v.* Magraw, 57 Md. 172; Taylor *v.* Sindall, 34 Md. 38.

Mississippi.— Harper *v.* Barnett, (1895) 16 So. 533.

Missouri.— Mayberry *v.* McClurg, 51 Mo. 256.

Nebraska.— A judgment may be vacated after the term for fraud, but only upon a showing of some substantial injury. Van Every *v.* Sanders, (1903) 95 N. W. 870.

Pennsylvania.— Humphreys *v.* Rawn, 8 Watts 78; Peterson *v.* Peterson, 13 Phila. 82.

South Carolina.— Farrow *v.* Dial, 1 McMull. 292, 36 Am. Dec. 267.

Tennessee.— Conn *v.* Whiteside, 6 Humphr. 47.

Wisconsin.— *In re* Fisher, 15 Wis. 511.

But *compare* King *v.* Davis, 137 Fed. 198, holding that federal courts of equity having jurisdiction to vacate judgments at law procured by fraud, under U. S. Rev. St. § 723, forbidding suits in equity where there is an adequate remedy at law, fraud is no ground for vacation of a default judgment in ejectment, recovered in a federal law court at a former term, in such court.

99. *Kansas.*— Sanford *v.* Weeks, 50 Kan. 339, 31 Pac. 1088.

Missouri.— Hyatt *v.* Wolfe, 22 Mo. App. 191.

New York.— Hurlbut *v.* Coman, 43 Hun 586; Mattern *v.* Sage, 15 Daly 38, 3 N. Y. Suppl. 120; McCloud *v.* Meehan, 30 Misc. 67, 62 N. Y. Suppl. 852.

South Dakota.— Whittaker *v.* Warren, 14 S. D. 611, 86 N. W. 638.

Texas.— Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99.

See 30 Cent. Dig. tit. "Judgment," § 743.

1. *In re* Hudson, 63 Cal. 454.

2. *Alabama.*— *Ex p.* Payne, (1901) 29 So. 622; Schwarz *v.* Oppenheimer, 90 Ala. 462, 8 So. 36; Lawson *v.* Moore, 45 Ala. 519; State *v.* Gardner, 45 Ala. 46.

California.— Canadian, etc., Mortg., etc., Co. *v.* Clarita Land, etc., Co., 140 Cal. 672, 74 Pac. 301; Butler *v.* Soule, 124 Cal. 69, 56 Pac. 601; Brackett *v.* Banegas, 99 Cal. 623, 34 Pac. 344; Moore *v.* Yolo County Super. Ct., 86 Cal. 495, 25 Pac. 22; Hartman *v.* Olvera, 49 Cal. 101. And see People *v.* Davis, 143 Cal. 673, 77 Pac. 651.

Colorado.— People *v.* Denver Dist. Ct., 33 Colo. 405, 80 Pac. 1065.

a statute commonly begins to run from the rendition of the judgment,[8] and a

Delaware.— Woolley *v.* Corbit, 3 Pennew. 501, 51 Atl. 601; Thomas *v.* Adams Express Co., 1 Pennew. 142, 39 Atl. 1014.

Florida.— Dudley *v.* White, 44 Fla. 264, 31 So. 830.

Georgia.— O'Connell *v.* Friedman, 118 Ga. 831, 45 S. E. 668; Ingalls *v.* Lamar, 115 Ga. 296, 41 S. E. 573; Beardsley *v.* Hilson, 94 Ga. 50, 20 S. E. 272; *In re* Bradley, 64 Ga. 535. But see Stewart *v.* Golden, 98 Ga. 479, 25 S. E. 528. It has been held that the limitation referred to in Code, § 3530, providing that a motion to set aside a judgment "may be made at any time within the statute of limitations," is the time within which the cause of action upon which the judgment is founded would be barred. Kelly *v.* Brooks, 50 Ga. 582; Tison *v.* McAfee, 50 Ga. 279; Prescott *v.* Bennett, 50 Ga. 266.

Idaho.— Kerns *v.* McAulay, 8 Ida. 558, 69 Pac. 539; Bunnell, etc., Inv. Co. *v.* Curtis, 5 Ida. 652, 51 Pac. 767.

Illinois.— The statutory provision that a motion to vacate a judgment entered in vacation shall be made at the next term is mandatory, and the motion cannot be made in vacation. Dowden *v.* Wilson, 108 Ill. 257.

Indiana.— Hunter *v.* Francis, 56 Ind. 460.

Iowa.— Manning *v.* Nelson, 107 Iowa 34, 77 N. W. 503; Priestman *v.* Priestman, 103 Iowa 320, 72 N. W. 535; Worth *v.* Wetmore, 87 Iowa 62, 54 N. W. 56; Walker *v.* Freelove, 79 Iowa 752, 45 N. W. 303; Hunt *v.* Stevens, 26 Iowa 399.

Kansas.— Leavenworth *v.* Hicks, McCahon 160. Although the statute permits the vacating of a judgment, after the term, for certain causes, it is also required that defendant should present to the court a complete and valid answer to the action on which the judgment was rendered. Schuler *v.* Fowler, 63 Kan. 98, 64 Pac. 1035.

Kentucky.— Wingfield *v.* Cotton, (1889) 56 S. W. 813; Bitzer *v.* O'Bryan, 54 S. W. 951, 21 Ky. L. Rep. 1307; Schleutker *v.* Glade, 45 S. W. 521, 20 Ky. L. Rep. 205. And see Snowden *v.* Darnaby, 15 Ky. L. Rep. 332.

Maine.— McNamara *v.* Carr, 84 Me. 299, 24 Atl. 856.

Massachusetts.— James *v.* Townsend, 104 Mass. 367.

Michigan.— Carpenter *v.* Judge Grand Rapids Super. Ct., 126 Mich. 8, 85 N. W. 265; Petley *v.* Carpenter, 124 Mich. 14, 82 N. W. 666.

Minnesota.— McCluer *v.* Crotty, 69 Minn. 426, 72 N. W. 701; Stocking *v.* Hanson, 22 Minn. 542. The time for moving to vacate an order on the statutory grounds cannot be extended beyond one year by the fact that subsequent proceedings have been had based on such order. Griffin *v.* Jorgenson, 22 Minn. 92.

Missouri.— Maryland Fidelity, etc., Co. *v.* Schuchman, 189 Mo. 468, 88 S. W. 626; McGrew *v.* Foster, 66 Mo. 30; Swan *v.* Chicago, etc., R. Co., 38 Mo. App. 588.

Montana.— Whitbeck *v.* Montana Cent. R. Co., 21 Mont. 102, 52 Pac. 1098.

Nevada.— Lang Syne Gold Min. Co. *v.* Ross, 20 Nev. 127, 18 Pac. 348, 19 Am. St. Rep. 337.

New Mexico.— Rio Grande Irr., etc., Co. *v.* Gildersleeve, 9 N. M. 12, 48 Pac. 309.

New York.— Cooper *v.* Cooper, 107 N. Y. App. Div. 118, 94 N. Y. Suppl. 814; Atkinson *v.* Abraham, 78 N. Y. App. Div. 498, 79 N. Y. Suppl. 680; Bolles *v.* Duff, 56 Barb. 567; Sacia *v.* O'Connor, 47 N. Y. Super. Ct. 53; Jex *v.* Jacob, 9 Daly 293; Feist *v.* Third Ave. R. Co., 13 Misc. 240, 34 N. Y. Suppl. 57; New York Health Dept. *v.* Babcock, 84 N. Y. Suppl. 604; De Dewandelaer *v.* Hager, 1 How. Pr. 63. The statutory limitation of two years for motions to set aside judgments does not apply to surrogates' courts. Matter of Henderson, 33 N. Y. App. Div. 545, 53 N. Y. Suppl. 957; Matter of Mather, 41 Misc. 414, 84 N. Y. Suppl. 1105.

North Carolina.— McLean *v.* McLean, 84 N. C. 366.

Rhode Island.— Johnson *v.* Hoxsie, 19 R. I. 703, 36 Atl. 720.

South Carolina.— Turner *v.* Foreman, 47 S. C. 31, 24 S. E. 989. A court may in its discretion permit defendant's attorney to enter an appearance and move to set aside a judgment taken by default, after the time limited therefor by its own rule. Sargent *v.* Wilson, 2 McCord 512.

Tennessee.— Ellis *v.* Ellis, 92 Tenn. 471, 22 S. W. 1; Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

Texas.— El Paso, etc., R. Co. *v.* Kelley, (1905) 87 S. W. 660 [*reversing* (Civ. App. 1904, 83 S. W. 855]; Kenedy *v.* Jarvis, (1886) 1 S. W. 191; Bean *v.* Dove, 33 Tex. Civ. App. 377, 77 S. W. 242; Thomas *v.* Neel, (App. 1892) 18 S. W. 138. A suit to set aside a judgment must be brought within two years from its rendition, or two years after the removal of a disability then existing. The constitutional provision that persons under disabilities shall not be barred of their rights of property in less than seven years after the removal of the disability does not apply. Fleming *v.* Seeligson, 57 Tex. 524.

Utah.— Elliott *v.* Bastian, 11 Utah 452, 40 Pac. 713.

Washington.— Twigg *v.* James, 37 Wash. 434, 79 Pac. 959.

Wisconsin.— Buchan *v.* Nelson, 114 Wis. 234, 90 N. W. 114.

United States.— Elder *v.* Richmond Gold, etc., Min. Co., 58 Fed. 536, 7 C. C. A. 354.

See 30 Cent. Dig. tit. "Judgment," § 735.

Last day Sunday.— Where the time is limited to a certain number of days, and the last day is Sunday, the party must present his application on the day previous. *Ex p.* James, 125 Ala. 119, 28 So. 69.

3. Walker *v.* Cameron, 78 Iowa 315, 43 N. W. 199. And see Schobacher *v.* Germantown Farmers' Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969, holding that the mere fact that

statute extending the time limit is not retroactive.[4] The limitation is usually one of time only, and has no reference to the amount in controversy.[5] Such a statute does not, in respect to the causes enumerated, limit the power of the courts to set aside their own judgments at the same term;[6] but after the close of the term, the party's remedy must be sought under the statute, and is confined to the grounds therein mentioned,[7] although, if the application is based on a ground not named in the statute, but otherwise recognized as sufficient, it need not be made within the statutory time.[8] Even if the application is made within the statutory time, it will be regarded with disfavor, and may be refused, if there is unexplained delay in presenting it, or such unreasonable dilatoriness as amounts to laches.[9] Where the statutory time begins to run from "notice" of the judgment, this means actual knowledge of the judgment, however acquired, whether by written notice or otherwise;[10] and under a provision of this kind the judgment may be vacated if moved against within the time limited after notice of it, although more than that time has passed since the judgment was rendered.[11]

4. LACHES OF PARTY. A party who has knowledge of the judgment against him is required to exercise reasonable diligence in seeking to have it set aside, and his unexcused delay in making the application, amounting to laches, will justify the court in refusing the relief asked,[12] especially where the vacating of

the costs are not taxed, and are finally waived by plaintiff, will not prevent the running of the year within which application to set aside the judgment by default must be made.

4. New York Health Dept. *v.* Babcock, 84 N. Y. Suppl. 604.

5. Royal Trust Co. *v.* Cortland Exch. Bank, 55 Nebr. 663, 76 N. W. 425.

6. Arlington Mfg. Co. *v.* Mears, 65 Vt. 414, 26 Atl. 587; and see *supra*, IX, D, 1.

7. *California.*— Shaw *v.* McGregor, 8 Cal. 521. See People *v.* Lafarge, 3 Cal. 130.

Dakota.— Yerkes *v.* McHenry, 6 Dak. 5, 50 N. W. 485.

Michigan.— Turner *v.* Ottawa Cir. Judge, 123 Mich. 617, 82 N. W. 247.

Missouri.— State *v.* Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664.

Nebraska.— Hampton Lumber Co. *v.* Van Ness, 54 Nebr. 185, 74 N. W. 587.

Wisconsin.— Milwaukee Mut. Loan, etc., Soc. *v.* Jagodzinski, 84 Wis. 35, 54 N. W. 102.

8. McCloud *v.* Meehan, 30 Misc. (N. Y.) 67, 62 N. Y. Suppl. 852; Becton *v.* Dunn, 137 N. C. 559, 50 S. E. 289; Cowles *v.* Hayes, 69 N. C. 406; Martinson *v.* Marzolf, (N. D. 1905) 103 N. W. 937.

9. *Colorado.*— Clark *v.* Perry, 17 Colo. 56, 28 Pac. 329.

Indiana.— Birch *v.* Frantz, 77 Ind. 199.

Minnesota.— Cutler *v.* Button, 51 Minn. 550, 53 N. W. 872; Gerish *v.* Johnson, 5 Minn. 23.

New York.— Kahn *v.* Casper, 51 N. Y. App. Div. 540, 64 N. Y. Suppl. 838.

Washington.— Kuhn *v.* Mason, 24 Wash. 94, 64 Pac. 182; Bozzio *v.* Vaglio, 10 Wash. 270, 38 Pac. 1042.

And see *infra*, IX, D, 4.

Contra.— Wolff *v.* Canadian Pac. R. Co., 89 Cal. 332, 26 Pac. 825; Independent School Dist. *v.* Schreiner, 46 Iowa 172; Albright *v.* Warkentin, 31 Kan. 442, 2 Pac. 614.

10. Minnesota Thresher Mfg. Co. *v.* Holz, 10 N. D. 16, 84 N. W. 581; Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640; Dallas Oil, etc., Co. *v.* Portwood, (Tex. Civ. App. 1902) 68 S. W. 1017; Turner *v.* Leathem, 84 Wis. 633, 54 N. W. 1001; Schobacher *v.* Germantown Farmers' Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969; Gray *v.* Gates, 37 Wis. 614; Butler *v.* Mitchell, 17 Wis. 52.

Notice to defendant's attorney of the entry of judgment against such defendant is notice to defendant himself, within the meaning of the statute. Sargent *v.* Kindred, 5 N. D. 472, 67 N. W. 826.

Service or appearance as notice.—A defendant cannot be charged with notice of the entry of judgment against him merely from the service of process upon him. Wieland *v.* Shillock, 23 Minn. 227; Minnesota Thresher Mfg. Co. *v.* Holz, 10 N. D. 16, 84 N. W. 581. See Smith *v.* Brown, 136 Mass. 416; Matthewson *v.* Moulton, 135 Mass. 122. But if he has appeared in the action he is deemed to have notice of the judgment therein from the time it is entered and perfected. Holmes *v.* Campbell, 13 Minn. 66. And see Sluder *v.* Graham, 118 N. C. 835, 23 S. E. 924.

Serving transcript of judgment.— Service by plaintiff's attorney upon defendant's of a transcript of the judgment is as effectual as a notice in the customary form; and after one year therefrom the judgment cannot be set aside on the statutory grounds. Jex *v.* Jacob, 7 Abb. N. Cas. (N. Y.) 452.

11. James *v.* Townsend, 104 Mass. 367; Coleman *v.* Akers, 87 Minn. 492, 92 N. W. 408; Bloor *v.* Smith, 112 Wis. 340, 87 N. W. 870; Turner *v.* Leathem, 84 Wis. 633, 54 N. W. 1001.

12. *California.*— People *v.* Wrin, 143 Cal. 11, 76 Pac. 646; Nicoll *v.* Weldon, 130 Cal. 666, 63 Pac. 63; Wolff *v.* Canadian Pac. R. Co., 123 Cal. 535, 56 Pac. 453; Garrison *v.* McGowan, 48 Cal. 592; Reese *v.* Mahoney, 21 Cal. 305.

the judgment would work unusual hardship to the opposing party,[13] or where rights of innocent third persons have intervened.[14] But however great the lapse of time laches is not imputable to a party who had no knowledge of the judgment against him; it is only required of him to be diligent in seeking relief after he has notice of it.[15] And lapse of time will not affect the right to vacate a judgment on the ground that the court never had jurisdiction to render it.[16] While it is impossible to lay down a precise rule as to what will constitute reasonable diligence, or what amounts to laches, it may be stated as the general result of the authorities that a delay of more than a very few months will be fatal to the application.[17] Where a judgment is irregularly entered against a person under a legal

Colorado.— Clark *v.* Perry, 17 Colo. 56, 28 Pac. 329.

Georgia.— Camp *v.* Phillips, 88 Ga. 415, 14 S. E. 580; Miller *v.* Mitchel, 38 Ga. 312. And see Southern Bell Tel., etc., Co. *v.* Parker, 119 Ga. 721, 47 S. E. 194.

Illinois.— Barrett *v.* Queen City Cycle Co., 179 Ill. 68, 53 N. E. 550; Fischer *v.* Stiefel, 179 Ill. 59, 53 N. E. 407; Ryder *v.* Twiss, 4 Ill. 4.

Indiana.—Ammerman *v.* State, 98 Ind. 165.

Kansas.—Knauber *v.* Watson, 50 Kan. 702, 32 Pac. 349.

Kentucky.— Johnson *v.* Bush, 64 S. W. 628, 65 S. W. 158, 23 Ky. L. Rep. 1399.

Maryland.— McCormick *v.* Hogan, 48 Md. 404; Montgomery *v.* Murphy, 19 Md. 576, 81 Am. Dec. 652; Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681.

Michigan.— Walsh *v.* Wayne Cir. Judge, 76 Mich. 470, 43 N. W. 573.

Minnesota.— McClymond *v.* Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354; Seibert *v.* Minneapolis, etc., R. Co., 58 Minn. 72, 59 N. W. 828; Nauer *v.* Benham, 45 Minn. 252, 47 N. W. 796; Altmann *v.* Gabriel, 28 Minn. 132, 9 N. W. 633; Groh *v.* Bassett, 7 Minn. 325.

New York.— Arents *v.* Long Island R. Co., 36 N. Y. App. Div. 379, 55 N. Y. Suppl. 401; Marvin *v.* Brandy, 56 Hun 242, 9 N. Y. Suppl. 593; James *v.* McCreery, 3 Silv. Sup. 571, 7 N. Y. Suppl. 494; Bogardus *v.* Livingston, 2 Hilt. 236; Lucas *v.* Geneva 2d Baptist Church, 4 How. Pr. 353; Bliss *v.* Treadway, 1 How. Pr. 245; Cagger *v.* Gardner, 1 How. Pr. 142; De Dewandelaer *v.* Hager, 1 How. Pr. 63; Nichols *v.* Nichols, 10 Wend. 560.

North Carolina.— Le Duc *v.* Slocomb, 124 N. C. 347, 32 S. E. 726.

Oregon.— Coast Land Co. *v.* Oregon Colonization Co., 44 Oreg. 483, 75 Pac. 884.

Pennsylvania.— Garman *v.* Charlier, 10 Pa. Dist. 38; Alexander *v.* Jones, 13 Lanc. Bar 43; Christian *v.* Coal Co., 2 Leg. Rec. 269; McQuillan *v.* Hunter, 1 Phila. 49; Piersol *v.* Pittsburg, etc., R. Co., 31 Pittsb. Leg. J. N. S. 127. And see Howe Sewing Mach. Co. *v.* Larimer, 5 Pa. Co. Ct. 660.

Tennessee.— Jones *v.* Williamson, 5 Coldw. 371; Fanning *v.* Fly, 2 Coldw. 486.

Texas.— Milam *v.* Gordon, 29 Tex. Civ. App. 415, 68 S. W. 1003; Dick *v.* Collins, 29 Tex. Civ. App. 12, 68 S. W. 1015.

Washington.— Scott *v.* Hanford, 37 Wash. 5, 79 Pac. 481; Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446.

Wisconsin.— Wheeler, etc., Mfg. Co. *v.* Monahan, 63 Wis. 194, 23 N. W. 109; Landon *v.* Burke, 33 Wis. 452; Ætna L. Ins. Co. *v.* McCormick, 20 Wis. 265; Welch *v.* May, 14 Wis. 200; Sanderson *v.* Dox, 6 Wis. 164.

United States.— Aldrich *v.* Crump, 128 Fed. 984.

See 30 Cent. Dig. tit. "Judgment," § 736.

13. Levy *v.* Joyce, 1 Bosw. (N. Y.) 622. And see Smith *v.* Morrill, 12 Colo. App. 233, 55 Pac. 824.

14. Le Duc *v.* Slocomb, 124 N. C. 347, 32 S. E. 726. But *compare* Vilas *v.* Plattsburgh, etc., R. Co., 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844.

15. *California.*— Stoutenborough *v.* San Francisco Bd. of Education, 104 Cal. 664, 38 Pac. 449.

Colorado.—Du Bois *v.* Clark, 12 Colo. App. 220, 55 Pac. 750.

Minnesota.— Stocking *v.* Hanson, 35 Minn. 207, 28 N. W. 507.

Pennsylvania.— Sperry *v.* Styer, 23 Pa. Super. Ct. 607; Scranton *v.* Manley, 13 Pa. Super. Ct. 439.

United States.— Maury *v.* Fitzwater, 88 Fed. 768.

16. Feikert *v.* Wilson, 38 Minn. 341, 37 N. W. 585; Bailey *v.* Hood, 38 Wash. 700, 80 Pac. 559; Maury *v.* Fitzwater, 88 Fed. 768.

17. The following periods of delay in moving to set aside or vacate the judgment have been held so great as to justify the court in refusing the application on account of laches, where it was not shown that the party was ignorant of the fact that a judgment had been given against him, and where he made no sufficient explanation or excuse for his dilatoriness: Thirty years (Francis *v.* Wood, 81 Ky. 16), twenty-one years (Bradley *v.* Towanda Tp., 133 Pa. St. 371, 20 Atl. 1060), twenty years (Thompson *v.* Skinner, 7 Johns. (N. Y.) 556; Hitchcock *v.* Washburn, 9 Pa. Dist. 272), seventeen years (Meyer *v.* Mallon, 85 Hun (N. Y.) 450, 32 N. Y. Suppl. 889), sixteen years (People *v.* Blake, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313), fifteen years (Curran's Estate, 9 Pa. Co. Ct. 514), fourteen years (Sheehan *v.* Osborn, 138 Cal. 512, 71 Pac. 622; Wade *v.* De Leyer, 40 N. Y. Super. Ct. 541; Rehm *v.* Frank, 16 Pa. Super. Ct. 175), thirteen years (Richards' Appeal, 127 Pa. St. 63, 17

disability, he must exercise reasonable diligence in moving to vacate it, after the removal of the disability.[18]

5. Commencement of Proceedings. Where the statute limits the time for

Atl. 756), twelve years (People *v.* Thomas, 101 Cal. 571, 36 Pac. 9; Brailsford *v.* Surtell, 2 Bay (S. C.) 333; McArthur *v.* Southard, 10 S. D. 566, 74 N. W. 1031), eleven years (Lytle *v.* Forrest, 175 Pa. St. 408, 34 Atl. 734), ten years (Weeks *v.* Merritt, 5 Rob. (N. Y.) 610; Lytle *v.* Forest, 16 Pa. Co. Ct. 239; Howe Sewing-Mach. Co. *v.* Larimer, 5 Pa. Co. Ct. 660; Turnbull *v.* Thompson, 27 Gratt. (Va.) 306), nine years (O'Flanagan *v.* Case, 41 Kan. 183, 21 Pac. 96), eight years and a half (Hooper *v.* Smith, 74 Wis. 530, 43 N. W. 556), seven years (Reese *v.* Mahoney, 21 Cal. 305; Cauthorn *v.* Harkness, 60 Ga. 299; Becker *v.* Bochus, 5 Redf. Surr. (N. Y.) 488; Eaton *v.* Youngs, 36 Wis. 171), six years (Tooker *v.* Booth, 7 Misc. (N. Y.) 421, 27 N. Y. Suppl. 974; Biles *v.* Harper, 1 Pa. Co. Ct. 666; De Camp *v.* Bates, (Tex. Civ. App. 1896) 37 S. W. 644), five years (Bostwick *v.* Perkins, 4 Ga. 47; Brame *v.* Towne, 66 Minn. 133, 68 N. W. 846; Van Arsdale *v.* King, 33 N. Y. Suppl. 858; Drummond *v.* Matthews, 17 N. Y. Suppl. 726; Adams *v.* Barheydt, 1 Wend. (N. Y.) 101; McLean *v.* McLean, 84 N. C. 366; *In re* Markle, 187 Pa. St. 639, 41 Atl. 304; Wrenn *v.* Thompson, 4 Munf. (Va.) 377), four years (Case *v.* Case, 137 Ind. 526, 37 N. E. 337; Nicholson *v.* Nicholson, 113 Ind. 131, 15 N. E. 223; Clark *v.* Southern Porcelain Mfg. Co., 8 S. C. 22; Bowling *v.* Blum, (Tex. Civ. App. 1899) 52 S. W. 97), three years (Walker *v.* Equitable Mortg. Co., 114 Ga. 862, 40 S. E. 1010; Chidsey *v.* Wayne Cir. Judge, 131 Mich. 5, 90 N. W. 691; Northern Trust Co. *v.* Crystal Lake Cemetery Assoc., 67 Minn. 131, 69 N. W. 708; Jorgensen *v.* Griffith, 14 Minn. 464. But *compare* Zebley *v.* Storey, 8 Wkly. Notes Cas. (Pa.) 212), two years (Cassel *v.* Cassel, 26 Ind. 90; People *v.* Judges Calhoun Cir. Ct., 1 Dougl. (Mich.) 417; MacNabb *v.* Porter Air-Lighter Co., 44 N. Y. App. Div. 102, 60 N. Y. Suppl. 694; Hendricks *v.* Carpenter, 2 Rob. (N. Y.) 625; *In re* Gilman, 17 N. Y. Suppl. 494; Societe Fonciere *v.* Milliken, 135 U. S. 304, 10 S. Ct. 823, 34 L. ed. 208. But see Alexander *v.* Haden, 2 Mo. 228), several years (Manley *v.* Chandler, (Kan. App. 1901) 63 Pac. 298; Humphrey *v.* Havens, 13 Minn. 150; Citizens' Trust, etc., Co. *v.* Goodchild, 195 Pa. St. 80, 45 Atl. 662; West Philadelphia Title, etc., Co. *v.* Olympia, 19 Wash. 150, 52 Pac. 1015), twenty months (New Castle Wire Nail Co.'s Case, 18 Pa. Super. Ct. 257), eighteen months (Wygant *v.* Brown, 3 Silv. Sup. (N. Y.) 551, 7 N. Y. Suppl. 490; Judd *v.* Patton, 13 S. D. 648, 84 N. W. 199), seventeen months (Ammerman *v.* State, 98 Ind. 165), sixteen months (Welch *v.* May, 14 Wis. 200), fifteen months (Duluth *v.* Dibblee, 62 Minn. 18, 63 N. W. 1117; Denton *v.* Merchants' Nat. Bank, 18 Wash. 387, 51 Pac. 473), fourteen months (Jones *v.* Jones, 71 Hun (N. Y.) 519, 24 N. Y. Suppl. 1031), one year (Gibson *v.* Manly, 15 Ill. 140; Sherwood *v.* Mohler, 14 Md. 564; Low *v.* Mills, 61 Mich. 35, 27 N. W. 877; Walker *v.* Anderson, 18 N. J. L. 217; *In re* Woolsey, 95 N. Y. 135; Conant *v.* American Rubber Tire Co., 37 Misc. (N. Y.) 129, 74 N. Y. Suppl. 409; Albany *v.* Dorr, 1 Den. (N. Y.) 268; *In re* Mutual Ben. Co., 190 Pa. St. 355, 42 Atl. 706; Sullivan *v.* Sweeney, 189 Pa. St. 474, 42 Atl. 45; Draper *v.* Bishop, 4 R. I. 489; Sanderson *v.* Dox, 6 Wis. 164. But see Droham *v.* Norton, 1 Misc. (N. Y.) 486, 21 N. Y. Suppl. 579; Heinemann *v.* Pier, 110 Wis. 185, 85 N. W. 646), eleven months (Altmann *v.* Gabriel, 28 Minn. 132, 9 N. W. 633), ten months (Hugenin *v.* Granger, 1 How. Pr. (N. Y.) 120), eight months (Jones *v.* U. S. Slate Co., 16 How. Pr. (N. Y.) 129), seven months (Bickel *v.* Kraus, 100 Ky. 728, 39 S. W. 414, 18 Ky. L. Rep. 1054. But see McCord-Collins Commerce Co. *v.* Stern, (Tex. Civ. App. 1901) 61 S. W. 341), six months (Hill *v.* Beatty, 61 Cal. 292; Hirschlan *v.* Krechman, 20 Pa. Super. Ct. 227. But see Stanton-Thompson Co. *v.* Crane, 24 Nev. 171, 51 Pac. 116), five months (St. Paul Land Co. *v.* Dayton, 39 Minn. 315, 40 N. W. 66; Groh *v.* Bassett, 7 Minn. 325), four months (Watsontown Nat. Bank *v.* Messinger, 6 Pa. Co. Ct. 609), two months (McMurran *v.* Meek, 47 Minn. 245, 49 N. W. 983. But see Lorzing *v.* Eisenberg, 5 Misc. (N. Y.) 358, 25 N. Y. Suppl. 750), fifty-six days (Carr *v.* Dawes, 46 Mo. App. 351), and nineteen days (Ellis *v.* Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687). On the other hand the following periods of delay have been held not so great as to preclude the moving party from relief, on the ground of negligence or laches: Ten days (Norton *v.* Atchison, etc., R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; Langan's Estate, 74 Cal. 353, 16 Pac. 188), one month (Horton *v.* New Pass Gold, etc., Min. Co., 21 Nev. 184, 27 Pac. 376, 1018), and thirteen months (Lyons *v.* Green, 68 Ark. 205, 56 S. W. 1075).

18. Six years after the removal of the disability is too long a time to wait. Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681; Becker *v.* Bochus, 5 Redf. Surr. (N. Y.) 488. Two years is a sufficiently liberal time to allow to a party in this situation. Barnes *v.* Gill, 13 Abb. Pr. N. S. (N. Y.) 169. But it is immaterial how long after the rendition of the judgment the motion may be made, if it is presented with reasonable promptness after the disability is removed. Thus a petition to vacate a probate decree was entertained twenty-two years after its entry, where the moving party had been during the whole of that time under the disability of coverture. Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100.

applying for the vacation of a judgment, the moving party, to bring himself within its terms, must not only file his motion or petition within the prescribed time, but also issue or serve such process or notice as may be necessary to bring the opposite party into court,[19] and present his case in a condition to be heard within the limited time.[20] But when this has been done in due season, the petition may be amended, or a new one substituted, after the expiration of the time,[21] or new parties added,[22] or the application continued for further hearing.[23] And if the motion was made within the limited time, it is competent for the court to act on it and grant the relief demanded, although the time has expired before the decision.[24]

E. Grounds For Opening or Vacating — 1. In General. A motion to open or vacate a judgment is addressed to the equitable powers of the court,[25] and should be granted only upon a showing of one of the statutory grounds for such action,[26] or else that the enforcement of the judgment would be unjust, oppressive, or inequitable,[27] and not for the mere convenience of the moving party or to restore to him some right or advantage which he has forfeited,[28] nor in any case where the relief to which he is entitled can more appropriately be awarded in some other action or proceeding,[29] and never where it appears that on a new trial or hearing the same judgment would be rendered.[30]

19. Temple *v.* Irvin, 34 Ind. 412; Satterlee *v.* Grubb, 38 Kan. 234, 16 Pac. 475. *Compare* Babcock Hardware Co. *v.* Farmers, etc., Bank, 50 Kan. 648, 32 Pac. 377.

20. Underwood *v.* Dollins, 47 Mo. 259.

21. Bush *v.* Bush, 46 Ind. 70.

22. Bever *v.* Beardmore, 40 Ohio St. 70.

23. Nornborg *v.* Larson, 69 Minn. 344, 72 N. W. 564.

24. *Indiana.*— Bush *v.* Bush, 46 Ind. 70.

Kentucky.— Trapp *v.* Aldrich, 67 S. W. 834, 23 Ky. L. Rep. 2430.

Maryland.—Preston *v.* McCann, 77 Md. 30, 25 Atl. 687.

Minnesota.— Washburn *v.* Sharpe, 15 Minn. 63.

Nebraska.— Savage *v.* Aiken, 14 Nebr. 315, 15 N. W. 693.

Contra.— Sargent *v.* Kindred, 5 N. D. 472, 67 N. W. 826; Nicklin *v.* Robertson, 28 Oreg. 278, 42 Pac. 993, 52 Am. St. Rep. 790; McKnight *v.* Livingston, 46 Wis. 356, 1 N. W. 14; Whitney *v.* Karner, 44 Wis. 563; Knox *v.* Clifford, 41 Wis. 458.

25. Goergen *v.* Schmidt, 69 Ill. App. 538; McMillan *v.* Baker, 20 Kan. 50; Smith *v.* Nichols, 2 Pa. Co. Ct. 372.

26. Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440. And see Brown *v.* Niagara Mach. Co., 7 N. Y. Suppl. 514.

27. Bond *v.* Citizens' Nat. Bank, 65 Md. 498, 4 Atl. 893; Ladd *v.* Stevenson, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; Dean *v.* Leonard, 1 Treadw. (S. C.) 462. And see Beall *v.* Coats, 45 Ga. 512 (holding that an application to open a judgment against defendant for the price of property purchased by him from plaintiff, on the sole ground that he is willing to return the property to plaintiff, should be denied); Ladenberg *v.* Old Dominion Copper Co., 6 N. Y. St. 649.

Misconduct of judge.— A judgment may be vacated where entered by the judge corruptly; but mere harshness to the one party and an appearance of favoring the other, where no actual injustice is done, is no such misconduct as would justify setting aside the judgment. Newton *v.* Joslin, 30 Fed. 891.

28. A judgment should not be set aside merely to allow a change of venue (Elliston *v.* Commonwealth Bank, 3 Dana (Ky.) 99); or to allow an appeal, the right of appeal from the judgment as originally rendered being barred by lapse of time (Memphis, etc., R. Co. *v.* Johnson, 16 Lea (Tenn.) 387); or to allow a trial on the merits, judgment having been taken by default, when the conduct of plaintiff has been fair, and the proceedings regular, and no circumstances of hardship or injustice prevented the making of a defense (Murat *v.* Boulton, 13 N. J. L. 304).

29. Wade *v.* De Leyer, 40 N. Y. Super. Ct. 541, holding that a judgment will not be opened where another suit is pending between the same parties, in which the court can grant to defendant all the relief or protection which the equities of the case call for. And see *supra*, IX, A, 1, c. *Compare* Loughlin *v.* Conn, 191 Pa. St. 150, 43 Atl. 127.

Review of judgment.— A motion to vacate a judgment cannot be made to perform the functions of a writ of error, so as to review the legal basis of the judgment. Spafford *v.* Janesville, 15 Wis. 474.

30. Richardson Drug Co. *v.* Dunagan, 8 Colo. App. 308, 46 Pac. 227; Tucker *v.* Black, 1 How. Pr. (N. Y.) 249; Caperton *v.* Wanslow, 18 Tex. 125.

Alleged disagreeemnt of judges.— A judgment rendered in open court, without any expression of dissent from any of the judges, will not be set aside on a motion based on the allegation that there was an equal division of opinion among the members of the bench at their consultations. In such case it is not competent to inquire what

2. Invalidity of Judgment. A judgment which appears on the face of the record to be absolutely void, and therefore a mere nullity, may be vacated on motion by the court which rendered it at any time.[31] This action may be taken not only where there was a want of jurisdiction of the person of defendant, but also where the judgment is outside of the issues and on a matter not submitted for decision,[32] and where the judgment is vitiated by the fact that the trial judge was disqualified to act, in consequence of his consanguinity with one of the parties.[33]

3. Jurisdictional Defects — a. Want of, or Irregularity in, Process, Service, or Notice. It is good ground for vacating or opening a judgment that defendant had no notice of the action, either because of a failure to serve him with process, or because the process or service was fatally irregular or defective.[34] And this

opinions were expressed in conference. Mason *v.* Jones, 3 N. Y. 375.

31. *Alabama.*— Frazier *v.* McWhirter, 121 Ala. 308, 25 So. 804; Buchanan *v.* Thomason, 70 Ala. 401; Bland *v.* Bowie, 53 Ala. 152; Bruce *v.* Strickland, 47 Ala. 192; Johnson *v.* Johnson, 40 Ala. 247. If the judgment is valid on its face, the court has no power at a subsequent term, in the absence of a statute, to vacate it on the ground that it had no jurisdiction of the person of defendant. Kohn *v.* Haas, 95 Ala. 478, 12 So. 577; Pettus *v.* McClannahan, 52 Ala. 55; *Ex p.* Morris, 44 Ala. 361.

California.— People *v.* Temple, 103 Cal. 447, 37 Pac. 414. If an inspection of the record does not disclose a want of jurisdiction, the judgment cannot be vacated on that ground, after the term at which it was rendered, unless a motion is made at that term and carried over. Bell *v.* Thompson, 19 Cal. 706.

Georgia.— Regopoulas *v.* State, 116 Ga. 596, 42 S. E. 1014; Jones *v.* Killebrew, 55 Ga. 153. *Compare* Parker *v.* Belcher, 87 Ga. 110, 13 S. E. 314. The defect of jurisdiction must appear on the face of the record. Drake *v.* Brown Mfg. Co., 121 Ga. 550, 49 S. E. 590.

Illinois.— Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530.

Iowa.— Wright, etc., Oil, etc., Mfg. Co. *v.* Kleigel, 70 Iowa 578, 31 N. W. 878.

Kansas.— Newton First Nat. Bank *v.* Grimes Dry-Goods Co., 45 Kan. 510, 26 Pac. 56. A false return by a sheriff of a notice of sale under execution is not ground for setting aside the judgment on which the execution issued. Tutt *v.* Ferguson, 13 Kan. 45.

Minnesota.— Stai *v.* Selden, 87 Minn. 271, 92 N. W. 6.

Mississippi.— Lane *v.* Wheless, 46 Miss. 666.

New York.— Matter of Broadway Ins. Co., 23 N. Y. App. Div. 282, 48 N. Y. Suppl. 299. A judgment is not void, and subject to a motion to vacate, because the judgment-roll as made up did not contain all the proper papers, the remedy being by motion to have such papers inserted. Breckenridge Co. *v.* Perkins, 14 N. Y. App. Div. 629, 43 N. Y. Suppl. 800.

North Carolina.— Anonymous, 1 N. C. 91.

Oklahoma.— Foster *v.* Cimarron Valley Bank, 14 Okla. 24, 76 Pac. 145; Phœnix Bridge Co. *v.* Street, 9 Okla. 422, 60 Pac. 221.

Rhode Island.— *In re* College St., 11 R. I. 472.

Texas.— Dazey *v.* Pennington, 10 Tex. Civ. App. 326, 31 S. W. 312; Fendrick *v.* Shea, 1 Tex. App. Civ. Cas. § 912.

Virginia.— Powers *v.* Carter Coal, etc., Co., 100 Va. 450, 41 S. E. 867.

Washington.— Nolan *v.* Arnot, 36 Wash. 101, 78 Pac. 463.

West Virginia.— Rorer *v.* People's Bldg., etc., Assoc., 47 W. Va. 1, 34 S. E. 758.

United States.—Thomas *v.* American Freehold Land, etc., Co., 47 Fed. 550, 12 L. R. A. 681; Shuford *v.* Cain, 22 Fed. Cas. No. 12,823, 1 Abb. 302. *Compare* U. S. Bank *v.* Moss, 6 How. 31, 12 L. ed. 331.

See 30 Cent. Dig. tit. "Judgment," § 678. And see *supra*, IX, D, 2, e.

In Nebraska it has been held that the statutory provisions authorizing the district courts to vacate or modify judgments, after the expiration of the term, under certain circumstances, apply only to voidable judgments, which are proof against collateral attack, and not to such as are absolutely void. Gutterson *v.* Meyer, 68 Nebr. 767, 94 N. W. 969; Baldwin *v.* Burt, 2 Nebr. (Unoff.) 377, 383, 96 N. W. 401.

32. Gille *v.* Emmons, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609.

33. Elmira Realty Co. *v.* Gibson, 103 N. Y. App. Div. 140, 92 N. Y. Suppl. 913; Matthews *v.* Noble, 25 Misc. (N. Y.) 674, 55 N. Y. Suppl. 190.

34. *Arkansas.*— Hunton *v.* Euper, 63 Ark. 323, 38 S. W. 517.

California.— People *v.* Temple, 103 Cal. 447, 37 Pac. 414; Norton *v.* Atchison, etc., R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; Dunlap *v.* Steere, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143, 16 L. R. A. 361; People *v.* Applegarth, 64 Cal. 229, 30 Pac. 805; Pico *v.* Carillo, 7 Cal. 30.

Colorado.— Lomax *v.* Besley, 1 Colo. App. 21, 27 Pac. 167.

Dakota.— Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701.

Delaware.— *In re* Warthman, 4 Pennew. 319, 55 Atl. 6.

rule includes cases where the summons was missent by mail,[35] or left at defendant's residence, while he was absent or sick, so that he knew nothing of it,[36] or served on only one of two joint defendants, while the verdict and judgment are against both,[37] or, defendant being a corporation, was served on one who was not an officer of the corporation and not authorized to receive service.[38] But judgment will not be set aside for mere clerical errors, omissions, or irregularities in the process, not affecting the jurisdiction,[39] especially where defendant had actual

Georgia.— Jeffers *v.* Ware, 72 Ga. 135; Ross *v.* Jones, 52 Ga. 22. And see Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

Illinois.— Brady *v.* Washington Ins. Co., 67 Ill. App. 159.

Indiana.— Coleman *v.* Floyd, 131 Ind. 330, 31 N. E. 75; Smith *v.* Noe, 30 Ind. 117; Shepherd *v.* Marvel, 16 Ind. App. 417, 45 N. E. 526.

Iowa.— *In re* Behrens, 104 Iowa 29, 73 N. W. 351; Hoitt *v.* Skinner, 99 Iowa 360, 68 N. W. 788; Jamison *v.* Weaver, 84 Iowa 611, 51 N. W. 65; Allen *v.* Rogers, 27 Iowa 106; Davis *v.* Burt, 7 Iowa 56.

Kansas.— Osborne *v.* Schlichenmeier, 68 Kan. 421, 75 Pac. 474; Quinton *v.* Durein, 59 Kan. 772, 51 Pac. 898; Hanson *v.* Wolcott, 19 Kan. 207; Simcock *v.* Emporia First Nat. Bank, 14 Kan. 529; Parker *v.* Elder, 8 Kan. 460.

Louisiana.— Florsheim Bros. Dry Goods Co. *v.* Williams, 45 La. Ann. 1196, 14 So. 120.

Maryland.— Pattison *v.* Hughes, 80 Md. 559, 31 Atl. 320.

Michigan.—People *v.* Bacon, 18 Mich. 247; Hurlburt *v.* Reed, 5 Mich. 30.

Minnesota.— Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342; Covert *v.* Clark, 23 Minn. 539.

Missouri.— Smith *v.* Rollins, 25 Mo. 408; Hirsh *v.* Weisberger, 44 Mo. App. 506. *Compare* Lindell *v.* State Bank, 4 Mo. 228.

Nebraska.— Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867; Wilkins *v.* Wilkins, 26 Nebr. 235, 41 N. W. 1101.

New York.— Edwards *v.* Woodruff, 90 N. Y. 396; Szerlip *v.* Baier, 21 Misc. 331, 47 N. Y. Suppl. 133; People *v.* Dunn, 54 N. Y. Suppl. 194; James *v.* Kirkpatrick, 5 How. Pr. 241; Dix *v.* Palmer, 5 How. Pr. 233; Coon *v.* Noble, 2 How. Pr. 97.

North Carolina.— Yeargin *v.* Wood, 84 N. C. 326; Blue *v.* Blue, 79 N. C. 69. And see Koonce *v.* Butter, 84 N. C. 221.

Pennsylvania.— Kunes *v.* McCloskey, 10 Pa. Co. Ct. 542; Geise's Estate, 1 Leg. Chron. 282; Pershing *v.* Iron City, etc., Imp. Co., 29 Pittsb. Leg. J. N. S. 167.

Rhode Island.— Duhaime *v.* Monast, 20 R. I. 524, 40 Atl. 377.

South Carolina.— Wyman *v.* Hoover, 10 S. C. 135.

Tennessee.— Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

Utah.— Blyth, etc., Co. *v.* Swenson, 15 Utah 345, 49 Pac. 1027.

Vermont.— Kimball *v.* Kelton, 54 Vt. 177.

West Virginia.— Midkiff *v.* Lusher, 27 W. Va. 439.

Wisconsin.— Sayles *v.* Davis, 20 Wis. 302; Carr *v.* Commercial Bank, 16 Wis. 50.

United States.— Harris *v.* Hardeman, 14 How. 334, 14 L. ed. 444; Blythe *v.* Hinckley, 84 Fed. 228; Shuford *v.* Cain, 22 Fed. Cas. No. 12,823, 1 Abb. 302. And see *In re* Dunn, 53 Fed. 341.

See 30 Cent. Dig. tit. "Judgment," § 686.

Actual resident served by publication.— Where a defendant who is really resident within the jurisdiction is served by publication, on a false return of the sheriff that he could not be found, he may have the judgment vacated as rendered on an error of fact. State *v.* Heinrich, 14 Mo. App. 146.

A non-resident trustee served by publication only is not entitled to appear and defend after judgment rendered against him, when the *cestui que trust* was a resident, was served with process, and appeared and defended the action. Croft *v.* Mead, 13 Wis. 528.

Unknown parties.— Persons joined as defendants under the description of "unknown heirs" or the like, and notified only by publication, are entitled to have the judgment set aside. Boeing *v.* McKinley, 44 Minn. 392, 46 N. W. 766; Buskirk *v.* Ferrell, 51 W. Va. 198, 41 S. E. 123.

35. Malone *v.* Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063; Seifert *v.* Caverly, 63 Hun (N. Y.) 604, 18 N. Y. Suppl. 327.

36. *Indiana.*— Kolb *v.* Raisor, 17 Ind. App. 551, 47 N. E. 177.

Minnesota.— Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127.

Missouri.— Southern Express Co. *v.* Hunt, 54 Miss. 664.

New York.— Burkhard *v.* Smith, 19 Misc. 31, 42 N. Y. Suppl. 638.

Pennsylvania.— Wismer *v.* Rimby, 12 Montg. Co. Rep. 166.

But see Morse *v.* Engle, 28 Nebr. 534, 44 N. W. 859.

37. Harralson *v.* McArthur, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689; Graham *v.* Ringo, 67 Mo. 324; Otey *v.* Rogers, 26 N. C. 534; Carter *v.* Kaiser, (Tenn. Ch. App. 1898) 48 S. W. 265.

38. Board of Education *v.* National Bank of Commerce, 4 Kan. App. 438, 46 Pac. 36; Glaeser *v.* St. Paul, 67 Minn. 368, 69 N. W. 1101; Bray *v.* St. Brandon Church, 39 Minn. 390, 40 N. W. 518; Wheeler *v.* Moore, 10 Wash. 309, 38 Pac. 1053.

39. *California.*— Central Pac. R. Co. *v.* Creed, 70 Cal. 497, 11 Pac. 772.

Iowa.— Durand *v.* Northwestern Life, etc., Co., 112 Iowa 296, 83 N. W. 972.

notice of the commencement of the action[40] and refrained from appearing and defending in the expectation that he could overturn the judgment in consequence of such error or defect,[41] or where his objections to the process or service are waived by his appearance.[42] On a motion for this purpose the recitals of the record in regard to questions of jurisdiction are presumptively correct, but not conclusive, and they may be impeached and contradicted,[43] and although an officer's return of service is usually conclusive between the parties, this is not so on a motion to open or vacate the judgment; it may be traversed and the judgment set aside if the return is shown to have been false.[44] But when a party has once been properly served with proper process, he is in court for every purpose connected with the action, and is bound at his peril to inform himself of the various successive steps in the proceedings, and cannot have the judgment vacated for the failure to notify him of some intermediate action in the case.[45]

b. Judgment on Constructive Service. Statutes in several states provide that a non-resident defendant who has been constructively served by publication of summons, and against whom a judgment is given, may appear and have the judgment vacated and be admitted to defend the action, within a limited time after the rendition of the judgment or after receiving notice of it.[46] But it is generally held that a defendant cannot avail himself of these statutes, although construct-

South Carolina.— Clark *v.* Southern Porcelain Mfg. Co., 8 S. C. 22.

Washington.— State *v.* Pierce County Super. Ct., 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724.

Wisconsin.— Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037.

See 30 Cent. Dig. tit. "Judgment," § 686.

40. Turner *v.* J. I. Case Threshing Mach. Co., 133 N. C. 381, 45 S. E. 781.

41. Irions *v.* Keystone Mfg. Co., 61 Iowa 406, 16 N. W. 349; Hull *v.* Canandaigua Electric Light, etc., Co., 55 N. Y. App. Div. 419, 66 N. Y. Suppl. 865.

42. *California.*— Lyons *v.* Roach, 84 Cal. 27, 23 Pac. 1026.

Georgia.— Blalock *v.* Tidwell, 56 Ga. 517.

Iowa.— Corn Exch. Bank *v.* Applegate, 97 Iowa 67, 65 N. W. 1007.

Kentucky.— Triplett *v.* Gillen, 6 J. J. Marsh. 564.

Missouri.— Reilly *v.* Russell, 39 Mo. 152, 90 Am. Dec. 457.

Nebraska.— Raymond *v.* Strine, 14 Nebr. 236, 15 N. W. 350.

Wisconsin.— Gray *v.* Gates, 37 Wis. 614.

43. Farnsley *v.* Stillwell, 107 Iowa 631, 78 N. W. 678; Priestman *v.* Priestman, 103 Iowa 320, 72 N. W. 535; Newcomb *v.* Dewey, 27 Iowa 381; Sankey's Appeal, 55 Pa. St. 491; Blythe *v.* Hickley, 84 Fed. 228. *Compare* Canadian, etc., Mortg., etc., Co. *v.* Clarita Land, etc., Co., 140 Cal. 672, 74 Pac. 301; Mikeska *v.* Blum, 63 Tex. 44.

44. *Colorado.*— Du Bois *v.* Clark, 12 Colo. App. 220, 55 Pac. 750.

Illinois.— Scrafield *v.* Sheeler, 18 Ill. App. 507.

Minnesota.— Burton *v.* Schenck, 40 Minn. 52, 41 N. W. 244; Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71.

New York.— Daniels *v.* Southard, 51 N. Y. Suppl. 1136; Williams *v.* Van Valkenburg, 16 How. Pr. 144. But see Tracy *v.* Shannon, 3 N. Y. Suppl. 245, 22 Abb. N. Cas. 136.

Rhode Island.— Locke *v.* Locke, 18 R. I. 716, 30 Atl. 422.

Wisconsin.— Carr *v.* Commercial Bank, 16 Wis. 50.

See 30 Cent. Dig. tit. "Judgment," § 687.

But see Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653, 11 Ky. L. Rep. 103, 21 Am. St. Rep. 356; Fowler *v.* Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172.

45. *California.*— Jacks *v.* Baldez, 97 Cal. 91, 31 Pac. 899; Dusy *v.* Prudom, 95 Cal. 646, 30 Pac. 798. *Compare* Bailey *v.* Sloan, 65 Cal. 387, 4 Pac. 349.

Illinois.— Culver *v.* Brinkerhoff, 180 Ill. 548, 54 N. E. 585.

Kansas.— Curry *v.* Janicke, 48 Kan. 168, 29 Pac. 319.

Kentucky.— Kamman *v.* Otto, 34 S. W. 1070, 17 Ky. L. Rep. 1367.

Montana.— Blaine *v.* Briscoe, 16 Mont. 582, 41 Pac. 1002.

New York.— Eyring *v.* Hercules Land Co., 9 N. Y. App. Div. 306, 41 N. Y. Suppl. 191.

46. See the statutes of the different states. And see the following cases:

Arkansas.—Waldo *v.* Thweatt, 64 Ark. 126, 40 S. W. 782.

California.— Norton *v.* Atchison, etc., R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; Guy *v.* Ide, 6 Cal. 99, 65 Am. Dec. 490.

Delaware.— Taylor *v.* Rossiter, 6 Houst. 485.

Kansas.— McKee *v.* Covalt, (1905) 81 Pac. 475; Albright *v.* Warkentin, 31 Kan. 442, 2 Pac. 614.

Kentucky.— Kinney *v.* O'Bannon, 6 Bush 692; Beazley *v.* Maret, 1 Bush 466; Dunlap *v.* McIlvoy, 3 Litt. 269.

Mississippi.— Jacks *v.* Bridewell, 51 Miss. 881.

Missouri.— Blanchard *v.* Hatch, 32 Mo. 261; Hirsh *v.* Weisberger, 44 Mo. App. 506.

Ohio.— Roberts *v.* Price, 2 Ohio Dec. (Reprint) 681, 4 West. L. Month. 581.

ively summoned, if he had actual knowledge or notice of the action in time to make his defense.[47] If, however, he shows good cause for opening the judgment,[48] and gives a satisfactory excuse for any delay in making his application,[49] he is entitled to the statutory relief as a matter of right, and the court has no discretion to refuse it.[50] The right to proceed under laws of this kind is usually confined to the non-resident defendant, and the intervening rights of third persons acquired in good faith will be saved, either by the statute itself or by the order of the court.[51]

c. Unauthorized Appearance. A judgment obtained against a party upon whom no process was served, and for whom an attorney entered an appearance without authority, may be set aside by the court which rendered it,[52] provided defendant did not accept or ratify the unauthorized act of the attorney, as by

Texas.— Davis v. Davis, 24 Tex. 187; Snow v. Hawpe, 22 Tex. 168; Miles v. Dana, 13 Tex. Civ. App. 240, 36 S. W. 848.

Utah.— Blyth, etc., Co. v. Swenson, 15 Utah 345, 49 Pac. 1027.

Washington.— Jordan v. Hutchinson, 39 Wash. 373, 81 Pac. 867.

Unauthorized appearance of attorney.—The right of a non-resident defendant, served by publication, to have the judgment opened and be admitted to defend is not taken away by the fact that an attorney appeared for him in the action, but at the instance of a person who had no authority to retain counsel for him. Kepley v. Irwin, 14 Nebr. 300, 15 N. W. 719.

Person without interest in property involved.— A defendant, served by publication only, who has parted with his interest in the property involved in the action, is not entitled to have the judgment set aside. Browne v. Palmer, 66 Nebr. 287, 92 N. W. 315.

47. *Georgia.*— Steers v. Morgan, 66 Ga. 552.

Kansas.— Satterlee v. Grubb, 38 Kan. 234, 16 Pac. 475.

Minnesota.— Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748. *Compare* Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459.

Nebraska.—Stover v. Hough, 47 Nebr. 789, 66 N. W. 825; Reed v. Thompson, 19 Nebr. 397, 27 N. W. 391.

Pennsylvania.— Kauffman v. Bitting, 2 Woodw. 39.

Texas.— Roller v. Ried, (Civ. App. 1894) 24 S. W. 655.

Personal service outside the state imparts actual notice of the action, and a defendant so served cannot take advantage of the statute authorizing the judgment to be vacated where defendant has been served "by publication only." Clark v. Tull, 113 Iowa 143, 84 N. W. 1030; McBride v. Harn, 52 Iowa 79, 2 N. W. 962.

48. Orr v. Howard, 5 Ill. 559; Smith v. Foster, 3 Coldw. (Tenn.) 139.

49. State Bank v. McElroy, 106 Iowa 258, 76 N. W. 715; Mueller v. McCulloch, 59 Minn. 409, 61 N. W. 455; Cutler v. Button, 51 Minn. 550, 53 N. W. 872; Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537; Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689.

50. *Illinois.*— Lyon v. Robbins, 46 Ill. 276.

Kansas.— Albright v. Warkentin, 31 Kan. 442, 2 Pac. 614.

Minnesota.— Fifield v. Norton, 79 Minn. 264, 82 N. W. 581; Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766; Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508.

Nebraska.— Brown v. Conger, 10 Nebr. 236, 4 N. W. 1009.

Ohio.— Roberts v. Price, 2 Ohio Dec. Reprint 681, 4 West. L. Month. 581.

51. Rhodes v. Rhodes, 125 N. C. 191, 34 S. E. 271.

52. *California.*— McKinley v. Tuttle, 34 Cal. 235. Where defendant was served with summons, a judgment by default will not be set aside because an attorney who appeared for him was not authorized to do so, since, if he was not authorized, the judgment by default was proper. Hunter v. Bryant, 98 Cal. 252, 33 Pac. 55.

District of Columbia.— Woods v. Dickinson, 7 Mackey 301.

Georgia.— Longman v. Bradford, 108 Ga. 572, 33 S. E. 916.

Illinois.— Leslie v. Fischer, 62 Ill. 118; Lyon v. Boilvin, 7 Ill. 629.

Iowa.— Russell v. Pottawottamie County, 29 Iowa 256; Rice v. Griffith, 9 Iowa 539.

Kansas.—Mendenhall v. Robinson, 56 Kan. 633, 44 Pac. 610.

Louisiana.— Ridge v. Alter, 14 La. Ann. 866; Marvel v. Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424.

Maryland.— Heaps v. Hoopes, 68 Md. 383, 12 Atl. 882.

Missouri.— Bradley v. Welch, 100 Mo. 258, 12 S. W. 911; Craig v. Smith, 65 Mo. 536.

Nebraska.— Hurste v. Hotaling, 20 Nebr. 178, 29 N. W. 299.

Nevada.— Stanton-Thompson Co. v. Crane, 24 Nev. 171, 51 Pac. 116.

New York.— The modern doctrine in this state is that relief against a judgment rendered against one not served with process, on the unauthorized appearance of an attorney in his name, may be sought and obtained by motion in the case in which such appearance was entered; that if, at the time of such motion, the attorney who entered the appearance is insolvent, it is no reason for denying the motion that at the time the judgment was given the attorney was able to respond in damages; that it rests in the discretion of the court, according to the cir-

acquiescing in it or failing to object, with full knowledge.[53] And one of two joint defendants under similar circumstances may have the judgment vacated in so far as it relates to or affects him.[54] But the party moving for such relief must assume the burden of proving that the attorney had no authority to act for him,[55] and establish the fact by evidence which fully negatives any such authority,[56] especially where innocent third persons have acquired rights under the judgment or decree sought to be set aside.[57]

4. FRAUD AND COLLUSION — a. In General. A judgment obtained by fraud or collusion may be vacated or set aside,[58] courts of record possessing an inherent

cumstances of the particular case, either to vacate the judgment entirely or to allow it to stand as security, with leave to defendant to come in and defend; but that, if defendant was a non-resident and was not served, he is entitled to have the judgment set aside absolutely. Vilas *v.* Plattsburgh, etc., R. Co., 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844; Post *v.* Charlesworth, 66 Hun (N. Y.) 256, 21 N. Y. Suppl. 168; Ellsworth *v.* Campbell, 31 Barb. (N. Y.) 134; New York *v.* Smith, 61 N. Y. Super. Ct. 374, 20 N. Y. Suppl. 666; Yates *v.* Horanson, 7 Rob. (N. Y.) 12; American Aquol, etc., Paint Co. *v.* Smith, 35 N. Y. Suppl. 723. *Compare* Abbett *v.* Blohm, 54 N. Y. App. Div. 422, 66 N. Y. Suppl. 838. Earlier decisions, following the English rule (see Bayley *v.* Buckland, 1 Exch. 1), held that if the attorney who appeared for the party was solvent and able to respond in damages, relief must be sought in an action against him for his unauthorized act; that the judgment would be vacated only in case the recovery of damages against the attorney was not possible (Powers *v.* Trenor, 3 Hun (N. Y.) 3; Allen *v.* Stone, 10 Barb. (N. Y.) 547; Williams *v.* Van Valkenburg, 16 How. Pr. (N. Y.) 144; Grazebrook *v.* McCreedie, 9 Wend. (N. Y.) 437; Denton *v.* Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237).

Ohio.— Critchfield *v.* Porter, 3 Ohio 518.

Pennsylvania.— Bryn Mawr Nat. Bank *v.* James, 152 Pa. St. 364, 25 Atl. 823. If it is not admitted that the attorney's appearance for defendant was unauthorized, then the judgment cannot be stricken off, but can only be opened, and the disputed facts sent to a jury. Swartz *v.* Morgan, 163 Pa. St. 195, 29 Atl. 974, 975, 43 Am. St. Rep. 786. Defendant must act promptly; if he was aware that an attorney, although unauthorized, had appeared for him, a default judgment will not be vacated after the lapse of ten years. Lytle *v.* Forest, 16 Pa. Co. Ct. 239.

Washington.— McEachern *v.* Brackett, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922.

Wisconsin.— Cleveland *v.* Hopkins, 55 Wis. 387, 13 N. W. 225.

See 30 Cent. Dig. tit. "Judgment," § 689.

Solvency of attorney.— In several states the courts are disposed to make the grant of relief depend on the insolvency of the attorney who entered the unauthorized appearance, holding that if he is able to respond in damages the injured party must seek redress by suing him. See Smith *v.* Bowditch, 7 Pick. (Mass.) 137; Schirling *v.* Scites, 41 Miss. 644; Chadbourn *v.* Johnston, 119 N. C. 282, 25 S. E. 705; North Carolina *v.* Lassiter, 83 N. C. 38.

53. Seale *v.* McLaughlin, 28 Cal. 668; Mason *v.* Stewart, 6 La. Ann. 736; Moss *v.* Raynor, 1 How. Pr. (N. Y.) 110.

54. Longman *v.* Bradford, 108 Ga. 572, 33 S. E. 916; J. B. Sheriff Mfg. Co. *v.* Pritsch Coal Co., 27 Pittsb. Leg. J. N. S. (Pa.) 218. *Compare* Hatch *v.* Stitt, 66 Pa. St. 264. But see Keyes *v.* Moultrie, 1 Bosw. (N. Y.) 629; Leahey *v.* Kingon, 22 How. Pr. (N. Y.) 209.

55. Connell *v.* Galligher, 36 Nebr. 749, 55 N. W. 229.

56. Heath *v.* Miller, 117 Ga. 854, 44 S. E. 13; Russell *v.* Pottawottamie County, 29 Iowa 256.

Record as evidence.— When the record shows that a defendant appeared by his attorney, it is conclusive of the fact of appearance, but only *prima facie* evidence of the authority of the attorney to act, which may be denied and rebutted by proof. Blyth, etc., Co. *v.* Swenson, 15 Utah 345, 49 Pac. 1027.

Question already decided.— A party cannot re-try the question of the authority of an attorney to represent him, on a petition to vacate the judgment, when such question was adjudicated in the original action on a motion to dismiss. Roberts *v.* Shelton, etc., R. Co., 21 Wash. 427, 58 Pac. 576.

57. Kenyon *v.* Shreck, 52 Ill. 382.

58. *Georgia.*— Mobley *v.* Mobley, 9 Ga. 247.

Illinois.— Illinois Steel Co. *v.* Szutenbach, 67 Ill. App. 280.

Louisiana.— Prats *v.* His Creditors, 5 Rob. 288.

Mississippi.— Harper *v.* Barnett, (1895) 16 So. 533.

Missouri.— Mayberry *v.* McClurg, 51 Mo. 256; Harris *v.* Sanders, 38 Mo. 421.

New York.— Ludwin *v.* Siano, 36 Misc. 537, 73 N. Y. Suppl. 940.

Pennsylvania.— Cochran *v.* Eldridge, 49 Pa. St. 365; Peterson *v.* Peterson, 13 Phila. 82.

Texas.— Hirshfeld *v.* Brown, (Civ. App. 1895) 30 S. W. 962; Williams *v.* Lumpkin, (Civ. App. 1894) 26 S. W. 103.

Wisconsin.— O'Neill's Estate, 90 Wis. 480, 63 N. W. 1042.

Canada.— Reynolds *v.* Gallihar Gold Min. Co., 19 Nova Scotia 466.

See 30 Cent. Dig. tit. "Judgment," § 712.

common-law power in this behalf, which is not dependent upon legislation,[59] although in some states its exercise is specifically regulated by statute.[60] Relief in cases of this kind is generally granted on motion of the party defrauded;[61] but in certain states after the end of the term he must proceed by bill in equity or by an independent action at law.[62] Some of the decisions limit the authority to set aside judgments for this cause to cases where the fraud complained of was practised in the very act of obtaining the judgment;[63] but more generally it is held that a judgment should be vacated for fraud or deceit practised by one party upon the other, in regard to the cause of action,[64] or for misrepresentations or

Plaintiff having no right to sue.— Where A sues for the foreclosure of a mortgage which he had already assigned to B, the judgment may be set aside for fraud. Marshall *v.* McGee, 33 Hun (N. Y.) 354.

Violation of agreement as to costs.— A party is not entitled to the vacation of a judgment for costs entered on motion, at the hearing of which he did not appear, merely because the judgment fails to conform to an agreed division of costs, in the absence of actual fraud. Manning *v.* Nelson, 107 Iowa 34, 77 N. W. 503.

Preferring creditors.— There is no such fraud in a judgment as to authorize its annulment merely because defendant favored other creditors, whereby it proved worthless. Gray *v.* Richmond Bicycle Co., 26 Misc. (N. Y.) 165, 55 N. Y. Suppl. 787.

Mere failure of a party voluntarily to disclose evidence which would tend to defeat his defense does not constitute such fraud as would authorize the vacation of a judgment. McDougall *v.* Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849.

59. *Iowa.*— Melick *v.* Tama City First Nat. Bank, 52 Iowa 94, 2 N. W. 1021.

Maryland.— Taylor *v.* Sindall, 34 Md. 38.

Missouri.— Mayherry *v.* McClurg, 51 Mo. 256.

New York.— Furman *v.* Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629.

Pennsylvania.— Humphreys *v.* Rawn, 8 Watts 78.

South Carolina.— Farrow *v.* Dial, 1 McMull. 292, 36 Am. Dec. 267.

Tennessee.— Conn *v.* Whiteside, 6 Humphr. 47.

Vermont.— Scoville *v.* Brock, 76 Vt. 385, 57 Atl. 967.

Wisconsin.— *In re* Fisher, 15 Wis. 511.

60. See the statutes of the different states. And see Manning *v.* Nelson, 107 Iowa 34, 77 N. W. 503; McDougall *v.* Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849.

61. Gillespie *v.* Rout, 39 Ill. 247. And see cases cited *supra*, note 59.

62. *California.*— Young *v.* Fink, 119 Cal. 107, 50 Pac. 1060; Robb *v.* Robb, 6 Cal. 21.

Georgia.— Dugan *v.* McGlann, 60 Ga. 353.

North Carolina.— Uzzle *v.* Vinson, 111 N. C. 138, 16 S. E. 6; Sharp *v.* Danville, etc., R. Co., 106 N. C. 308, 11 S. E. 530, 19 Am. St. Rep. 533; Syme *v.* Trice, 96 N. C. 243, 1 S. E. 480; Fowler *v.* Poor, 93 N. C. 466.

South Carolina.— Brown *v.* Buttz, 15 S. C. 488.

United States.— Grames *v.* Hawley, 50 Fed. 319.

See 30 Cent. Dig. tit. "Judgment," § 712.

63. Zellerbach *v.* Allenberg, 67 Cal. 296, 7 Pac. 908; Pelz *v.* Bollinger, 180 Mo. 252, 79 S. W. 146; Fears *v.* Riley, 148 Mo. 49, 49 S. W. 836; Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407, the fraud must have been in the procurement of the judgment, and not merely in the cause of action on which the judgment was founded, and which could have been interposed as a defense, unless such interposition was prevented by the fraud of the adverse party. See also Schweinfurter *v.* Schmahl, 69 Minn. 418, 72 N. W. 702.

64. Furman *v.* Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; Smallwood *v.* Trenwith, 110 N. C. 91, 14 S. E. 505; Kemmerer's Appeal, 125 Pa. St. 283, 17 Atl. 420, 802; Guild *v.* Phillips, 44 Fed. 461.

Suit on satisfied claim.— A judgment should be vacated if it is shown that the instrument or claim on which it is founded had been paid or satisfied before suit and the fact concealed. Halladay *v.* Underwood, 75 Ill. App. 96; Oliver *v.* Riley, 92 Iowa 23, 60 N. W. 180; Noyes *v.* Loeb, 24 La. Ann. 48. See Mitchell *v.* Kinnaird, 52 S. W. 830, 21 Ky. L. Rep. 640.

Forged note.— Where judgment is recovered upon an instrument to which defendant's name was forged, it will be set aside, provided he was not chargeable with lack of diligence in failing to allege the forgery in defense to the action. State *v.* Richardson, 1 Marv. (Del.) 372, 41 Atl. 75; Fox *v.* Lima Nat. Bank, 11 Ohio Dec. (Reprint) 127, 25 Cinc. L. Bul. 28; Gillespie *v.* Rogers, 184 Pa. St. 488, 39 Atl. 290; Gottlieb *v.* Middleberg, 23 Pa. Super. Ct. 525; Reeser *v.* Breneman, 4 Pa. Dist. 143; Lindsley *v.* Sparks, 20 Tex. Civ. App. 56, 48 S. W. 204.

Note obtained by fraud.— A judgment may be vacated where defendant was tricked into signing a judgment note, supposing it to be a simple promissory note, or was secretly made to assume obligations toward third persons which he had no intention of incurring. Anderson *v.* Field, 6 Ill. App. 307; United Security L. Ins., etc., Co. *v.* Ott, (N. J. Ch. 1893) 26 Atl. 923. But defendant's unsupported testimony that the note was procured from him by fraud will not justify its vacation, in the face of his previous written admission of its validity and the fact that the person who obtained it vouches for its validity. Deering Har-

tricks practised upon defendant to keep him away from the trial or to prevent him from claiming his rights in the premises or setting up an available defense.[65] Fraud practised upon the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair.[66] A judgment may also be set aside for misconduct of an attorney or other officer, amounting to constructive

vester Co. *v.* Streeper, 16 Montg. Co. Rep. (Pa.) 41.

Alteration of instrument.— An affidavit that the instrument in suit had been materially altered, without showing in what the alteration consists, would furnish but feeble ground upon which to base a motion to vacate the judgment. Taylor *v.* Randall, 5 Cal. 79.

Where a partner wrongfully gives a firm-note for a private debt a judgment based on such note will be set aside. Adams *v.* James L. Leeds Co., 189 Pa. St. 544, 42 Atl. 195.

Mistake.— A mistake of an administrator in supposing his decedent to have been a surety on a bond, and so suffering a judgment on the bond, whereas he was only a witness, is no ground for vacating the judgment, where there was no fraud practised, and the mistake arose from the administrator's ignorance of the foreign language in which the bond was written. Fackler *v.* Bavarian Relief Soc., 8 Ohio Dec. (Reprint) 56, 5 Cinc. L. Bul. 353.

Usury.— The mere fact that there was usury in the original mortgage debt, on which the judgment is founded, is not alone sufficient to establish fraud, such as to give another creditor the right to have the judgment set aside. Mahan *v.* Cavender, 77 Ga. 118.

65. *California.*— Riddle *v.* Baker, 13 Cal. 295. See, however, Young *v.* Fink, 119 Cal. 107, 50 Pac. 1060.

Indiana.— Cotterell *v.* Koon, 151 Ind. 182, 51 N. E. 235; Douthit *v.* Douthit, 133 Ind. 26, 32 N. E. 715; Duringer *v.* Moschino, 93 Ind. 495.

Iowa.— Larson *v.* Williams, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544; Rivers *v.* Olmsted, 66 Iowa 186, 23 N. W. 392. That defendant was advised by plaintiff's attorney that he had no defense to the action, when in fact he had, and that he was thereby dissuaded from entering an appearance, may be ground for opening a default. Simmons *v.* Church, 31 Iowa 284. But a mortgagor who consents to a decree of foreclosure on the mortgagee's promise to make an accounting thereafter cannot have the decree set aside because the mortgagee does not keep his promise. Mains *v.* Des Moines Nat. Bank, 113 Iowa 395, 85 N. W. 758.

Maryland.— Pattison *v.* Hughes, 80 Md. 559, 31 Atl. 320.

Missouri.— Hulbert *v.* Tredway, 159 Mo. 665, 60 S. W. 1035.

Nebraska.— Gutterson *v.* Meyer, (1903) 94 N. W. 969.

New Jersey.— Magowan *v.* Magowan, 57 N. J. Eq. 195, 39 Atl. 364; Stillwell *v.* Stillwell, 47 N. J. Eq. 275, 20 Atl. 960, 24 Am. St. Rep. 408.

New York.— Smith *v.* Weston, 81 Hun 87, 30 N. Y. Suppl. 649; McCloud *v.* Meehan, 30 Misc. 67, 62 N. Y. Suppl. 852.

Pennsylvania.— Miller *v.* Neidzielska, 176 Pa. St. 409, 35 Atl. 225; Coulson *v.* Conn, 13 Pa. Co. Ct. 40.

South Dakota.— Whittaker *v.* Warren, 14 S. D. 611, 86 N. W. 638.

Tennessee.— See Smith *v.* Miller, (Ch. App. 1897) 42 S. W. 182.

Texas.— Wolf *v.* Butler, 81 Tex. 86, 16 S. W. 794; Rodriguez *v.* Espinosa, (Civ. App. 1894) 25 S. W. 669.

Misrepresentations in pleadings.— A judgment will not be set aside on account of misrepresentations or false statements in the pleadings, which the opposite party could and should have discovered in time to controvert them at the trial. Gazzam *v.* Reading, 202 Pa. St. 231, 51 Atl. 1000; Watts *v.* Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258.

66. *Georgia.*— Rivers *v.* West, 103 Ga. 582, 30 S. E. 555.

Minnesota.— Rustad *v.* Bishop, 80 Minn. 497, 83 N. W. 449, 81 Am. St. Rep. 282, 50 L. R. A. 168.

Missouri.— Fears *v.* Riley, 148 Mo. 49, 49 S. W. 836.

New York.— Where a judgment has been entered by plaintiff as upon default, notwithstanding the service of an answer which he was bound to accept, it should be vacated without terms. Phonoharp Co. *v.* Stobbe, 20 Misc. 698, 46 N. Y. Suppl. 678.

Ohio.— Pollock *v.* Pollock, 2 Ohio Cir. Ct. 143, 1 Ohio Cir. Dec. 410.

Tennessee.— Pyett *v.* Hatfield, 15 Lea 473.

Texas.— Schneider *v.* Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541.

United States.— Rhine *v.* U. S., 33 Ct. Cl. 481. It is no ground for setting aside a judgment that the cause of action was transferred to plaintiff, a non-resident, to enable him to bring suit in a federal court, which otherwise would not have had jurisdiction. Andes *v.* Millard, 70 Fed. 515.

Canada.— Taylor *v.* Sharp, 8 Manitoba 163.

But see National Fertilizer Co. *v.* Hinson, 103 Ala. 532, 15 So. 844, holding that it is no ground for vacating a judgment that plaintiff falsely informed the court that defendant had agreed to let judgment be taken by default, at least where it does not appear that judgment would not have been given but for such statement.

fraud, although there was no actual intention to cheat or mislead,[67] or for fraudulent collusion between some of the parties to the action, or between the counsel in the case, working injury to the just rights of the others.[68] But a judgment or decree will not be vacated on a mere suspicion or presumption of fraud; there must be clear and strong evidence.[69] The right to have a judgment opened on this ground may be waived by the party injured, or he may be estopped by his subsequent conduct to apply for such relief.[70]

b. Taking Judgment Contrary to Agreement. Where there was an agreement between the parties that the case should be continued, or that defendant's time to answer should be extended, or that the action should be dismissed as the result of a compromise or settlement, or a promise of plaintiff that he would not press the case to judgment, in violation of which plaintiff, without notice to defendant, enters a default, or secures a judgment against the latter in his absence, it is good ground for vacating the judgment.[71] But the agreement or

67. Martin *v.* Spurlock, 68 S. W. 396, 24 Ky. L. Rep. 212; Pryor *v.* Lloyd, 4 Lack. Leg. N. (Pa.) 328. *Compare* Adams *v.* Beaumont First Nat. Bank, (Tex. Civ. App. 1899) 52 S. W. 642.

68. *California.*— Barrett *v.* Graham, 19 Cal. 632.

Indiana.— Crescent Brewing Co. *v.* Cullins, 125 Ind. 110, 25 N. E. 159. A municipal corporation cannot have a judgment opened which was taken against it by default through the fraudulent connivance of the officer who was served with the summons, where plaintiff was innocent of all fraud and not aware of such connivance. Adams School Tp. *v.* Irwin, 150 Ind. 12, 49 N. E. 806.

Kansas.— Haverty *v.* Haverty, 35 Kan. 438, 11 Pac. 364.

Montana.— Largey *v.* Bartlett, 18 Mont. 265, 44 Pac. 962.

New York.— Cleveland *v.* Porter, 10 Abb. Pr. 407; People *v.* New York, 19 How. Pr. 155. *Compare* Markell *v.* Hill, 64 N. Y. App. Div. 191, 69 N. Y. Suppl. 537, 71 N. Y. Suppl. 924.

Oregon.— Nelson *v.* Blaisdell, 23 Oreg. 507, 32 Pac. 391.

South Dakota.— Farrar *v.* Consolidated Apex Min. Co., 12 S. D. 237, 80 N. W. 1079; Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 63 N. W. 546.

Tennessee.— Collins *v.* Legg, 1 Lea 120; Smith *v.* Miller, (Ch. App. 1897) 42 S. W. 182.

69. *Missouri.*— Obermeyer *v.* Einstein, 62 Mo. 341.

New Jersey.— Caldwell *v.* Fifield, 24 N. J. L. 150.

Pennsylvania.— Oberly *v.* Oberly, 190 Pa. St. 341, 42 Atl. 1105; National Mut. Bldg., etc., Assoc. *v.* Kondrak, 9 Kulp 14; Grove *v.* Hake, 14 York Leg. Rec. 45.

Washington.— Tacoma Lumber, etc., Co. *v.* Wolff, 7 Wash. 478, 35 Pac. 115, 755.

United States.— Jones *v.* Brittan, 13 Fed. Cas. No. 7,455, 1 Woods 667.

70. Schenck's Appeal, 94 Pa. St. 37.

71. *Arkansas.*—Browning *v.* Roane, 9 Ark. 354, 50 Am. Dec. 218.

California.— Merchants' Ad-Sign Co. *v.* Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277; McGowan *v.* Kreling, 117 Cal. 31, 48 Pac. 980; Craig *v.* San Bernardino Inv. Co., 101 Cal. 122, 35 Pac. 558; Blackwood *v.* Cutting Packing Co., 71 Cal. 461, 12 Pac. 493. A mere agreement between the parties for a settlement is no ground for setting aside the judgment, when plaintiff made no promise to discontinue the suit or to delay its progress. Sweet *v.* Burdett, 40 Cal. 97.

Colorado.— State Bd. of Agriculture *v.* Meyers, 13 Colo. App. 500, 58 Pac. 879.

Florida.— Purviance *v.* Edwards, 17 Fla. 140.

Illinois.— Harbers *v.* Tribby, 5 Ill. App. 411.

Indiana.— Douthit *v.* Douthit, 133 Ind. 26, 32 N. E. 715; McGaughey *v.* Woods, 92 Ind. 296; Nealis *v.* Dicks, 72 Ind. 374; Hoag *v.* Old People's Mut. Ben. Soc., 1 Ind. App. 28, 27 N. E. 438. The pendency of a proposition for a compromise of the claim in suit is not of itself a sufficient excuse for a failure to appear to the action. Goldsberry *v.* Carter, 28 Ind. 59.

Iowa.— Council Bluffs L. & T. Co. *v.* Jennings, 81 Iowa 470, 46 N. W. 1006. See Humphrey *v.* Darlington, 15 Iowa 207.

Kansas.— McIntosh *v.* Crawford County Com'rs, 13 Kan. 171.

Kentucky.— Perry *v.* Fisher, 44 S. W. 378, 19 Ky. L. Rep. 1733.

Minnesota.— Milwaukee Harvester Co. *v.* Schroeder, 72 Minn. 393, 75 N. W. 606; Martin *v.* Curley, 70 Minn. 489, 73 N. W. 405; Barker *v.* Keith, 11 Minn. 65.

Montana.— Where the parties agreed to compromise a pending suit on certain conditions, but defendant did not comply with those conditions, he cannot have a judgment taken against him by default set aside on the ground of surprise. Donnelly *v.* Clark, 6 Mont. 135, 9 Pac. 887.

Nebraska.— Cadwallader *v.* McClay, 37 Nebr. 359, 55 N. W. 1054, 40 Am. St. Rep. 496.

New Jersey.— Binsse *v.* Barker, 13 N. J. L. 263, 23 Am. Dec. 720. A judgment entered upon a cognovit will not be opened because of a verbal promise, alleged to have been made at the time of giving the cognovit, that the judgment would never be enforced.

promise must have been explicit, and of such a character that defendant could rely upon it and remain inactive without being thereby chargeable with negligence or lack of due diligence in guarding his own interests.[72] And where a statute or rule of court requires agreements to extend the time for pleading, or for the trial, to be reduced to writing and filed, or communicated to the court, a mere oral agreement of the parties, not brought to the notice of the court, will not be sufficient to authorize the vacation of a judgment taken in violation of its terms.[73]

c. False Testimony. A judgment may be set aside on the ground of fraud in procuring it, where it was obtained by means of the perjured testimony of the successful party,[74] or of witnesses suborned by him to give false evidence,[75] unless the other party was warned in advance that such evidence would be resorted to or knew that he might expect to meet it.[76]

5. Irregularities — a. In General. A judgment may be vacated or set aside on proof of a material irregularity affecting its validity or showing that it was not entered according to the due course of proceedings.[77] But this rule

Heckscher *v.* Middleton, 54 N. J. L. 312, 23 Atl. 943.

New York.— Spiehler *v.* Asiel, 83 Hun 223, 31 N. Y. Suppl. 584; Mutual L. Ins. Co. *v.* Kroehle, 29 Misc. 481, 61 N. Y. Suppl. 944; Campbell *v.* Lumley, 24 Misc. 196, 52 N. Y. Suppl. 684; McKechnie *v.* Spike, 5 N. Y. St. 150; Ward *v.* Sands, 10 Abb. N. Cas. 60; Mann *v.* Provost, 3 Abb. Pr. 446; Varnum *v.* Wheeler, 1 How. Pr. 11. But see Sayer *v.* Finck, 2 Cai. 336.

North Carolina.— Ellington *v.* Wicker, 87 N. C. 14.

North Dakota.— Minnesota Thresher Mfg. Co. *v.* Holz, 10 N. D. 16, 84 N. W. 581.

Ohio.— Mitchell *v.* Knight, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729.

Oregon.— See Thompson *v.* Connell, 31 Oreg. 231, 48 Pac. 467, 65 Am. St. Rep. 818.

Pennsylvania.— Schweyer *v.* Walbert, 190 Pa. St. 334, 42 Atl. 694; Weixel *v.* Lennox, 179 Pa. St. 459, 36 Atl. 248; Batzle *v.* Trumbower, 22 Pa. Super. Ct. 487.

South Dakota.— Griswold Linseed Oil Co. *v.* Lee, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

Texas.— Field *v.* Fowler, 62 Tex. 65; Rodriguez *v.* Espinosa, (Civ. App. 1894) 25 S. W. 669.

Washington.— McBride *v.* McGinley, 31 Wash. 573, 72 Pac. 105; Bast *v.* Hysom, 6 Wash. 170, 32 Pac. 997.

Wisconsin.— Boutin *v.* Catlin, 101 Wis. 545, 77 N. W. 910; Heinemann *v.* Le Clair, 82 Wis. 135, 51 N. W. 1101; Stafford *v.* McMillan, 25 Wis. 566. But see Falkenberg *v.* Gorman, 71 Wis. 8, 36 N. W. 599.

See 30 Cent. Dig. tit. "Judgment," § 290.

72. *California.*—Jenkins *v.* Gamewell Fire Alarm Tel. Co., (1892) 31 Pac. 570.

Idaho.— Holland Bank *v.* Lieuallen, 6 Ida. 127, 53 Pac. 398.

Illinois.— Hartford L., etc., Ins. Co. *v.* Rossiter, 196 Ill. 277, 63 N. E. 680.

Missouri.— Robyn *v.* Chronicle Pub. Co., 127 Mo. 385, 30 S. W. 130.

Nebraska.— Funk *v.* Kansas Mfg. Co., 53 Nebr. 450, 73 N. W. 931.

Nevada.— Haley *v.* Eureka County Bank, 20 Nev. 410, 22 Pac. 1098.

73. *Alabama.*— Norman *v.* Burns, 67 Ala. 248.

Georgia.— Matthews *v.* Bishop, 106 Ga. 564, 32 S. E. 631; Camp *v.* Morgan, 81 Ga. 740, 8 S. E. 422; Exchange Bank *v.* Elkan, 72 Ga. 197.

Iowa.— Dixon *v.* Brophey, 29 Iowa 460.

Missouri.— Schroeder *v.* Miller, 35 Mo. App. 227.

North Carolina.— Le Duc *v.* Slocomb, 124 N. C. 347, 32 S. E. 726.

South Carolina.— Malcomson *v.* James, Harp. 7.

See 30 Cent. Dig. tit. "Judgment," § 290.

But see Johnson *v.* Sweeney, 95 Cal. 304, 30 Pac. 540; Jay *v.* De Groot, 28 How. Pr. (N. Y.) 107; Oliver *v.* Metropolitan Nat. Bank, 3 Pennyp. (Pa.) 74.

74. *Iowa.*— Klaes *v.* Klaes, 103 Iowa 689, 72 N. W. 777.

Kansas.—Laithe *v.* McDonald, 12 Kan. 340.

Louisiana.— Rowe *v.* Chicago Lumber, etc., Co., 50 La. Ann. 1258, 24 So. 235.

Nebraska.— Munro *v.* Callahan, 55 Nebr. 75, 75 N. W. 151, 70 Am. St. Rep. 366.

Pennsylvania.— Humphreys *v.* Rawn, 8 Watts 78. And see White *v.* Sperling, 24 Pa. Super. Ct. 120.

Contra.— U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; U. S. *v.* Gleeson, 90 Fed. 778, 33 C. C. A. 272; Baker *v.* Wadsworth, 67 L. J. Q. B. 301.

75. Miller *v.* Miller, (Nebr. 1903) 95 N. W. 1010; Nugent *v.* Metropolitan St. R. Co., 46 N. Y. App. Div. 105, 61 N. Y. Suppl. 476. *Contra*, Pico *v.* Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336; Maryland Steel Co. *v.* Marney, 91 Md. 360, 46 Atl. 1077.

76. Heathcote *v.* Haskins, 74 Iowa 566, 38 N. W. 417; McDougall *v.* Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849.

77. *California.*— Block *v.* Kearney, (1901) 64 Pac. 267; Butler *v.* Soule, 124 Cal. 69, 56 Pac. 601; Kaufman *v.* Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; Will *v.* Lytle Creek Water Co., 100 Cal. 344, 34 Pac. 830.

Delaware.— Garden *v.* Derickson, 3 Houst. 342.

does not apply where the alleged error constituted only an unimportant omis-

Iowa.— Sitzer *v.* Fenzloff, 112 Iowa 491, 84 N. W. 514; *In re* Behren, 104 Iowa 29, 73 N. W. 351; Keeney *v.* Lyon, 10 Iowa 546.

Kansas.— Foreman *v.* Carter, 9 Kan. 674.

Kentucky.— Stuart *v.* Beckner, 32 S. W. 140, 17 Ky. L. Rep. 549.

Maryland.— Siewerd *v.* Farnen, 71 Md. 627, 18 Atl. 968; Craig *v.* Wroth, 47 Md. 281; Graff *v.* Merchants', etc., Transp. Co., 18 Md. 364.

Michigan.— Turner *v.* Ottawa Cir. Judge, 123 Mich. 617, 82 N. W. 247.

Minnesota.— Rhodes *v.* Walsh, 58 Minn. 196, 59 N. W. 1000.

Missouri.— Downing *v.* Still, 43 Mo. 309; Branstetter *v.* Rives, 34 Mo. 318; Doan *v.* Holly, 27 Mo. 256; Bowers *v.* McIntire, 45 Mo. App. 331.

New Hampshire.— Claggett *v.* Simes, 31 N. H. 56.

New Jersey.— Midler *v.* Lazadder, 14 N. J. L. 34; Reed *v.* Bainbridge, 4 N. J. L. 351.

New York.— Pitt *v.* Davison, 37 N. Y. 235; Johnson *v.* Carnley, 10 N. Y. 570, 61 Am. Dec. 762; Bennett *v.* Couchman, 48 Barb. 73; Dart *v.* McAdam, 27 Barb. 187; Matter of Foulk, 10 N. Y. Suppl. 515, 18 N. Y. Civ. Proc. 175 Dickinson *v.* Kimball, 1 Code Rep. 83; Clark *v.* McFarland, 10 Wend. 634; Vredenburgh *v.* Calf, 9 Paige 128.

North Carolina.— Scott *v.* Mutual Reserve Fund Life Assoc., 137 N. C. 515, 50 S. E. 221; Syme *v.* Trice, 96 N. C. 243, 1 S. E. 480; Neville *v.* Pope, 95 N. C. 346; Mabry *v.* Erwin, 78 N. C. 45; Wolfe *v.* Davis, 74 N. C. 597; Cowles *v.* Hayes, 69 N. C. 406; Hervey *v.* Edmunds, 68 N. C. 243; Dick *v.* McLaurin, 63 N. C. 185; Moore *v.* Mitchell, 61 N. C. 304; Keaton *v.* Banks, 32 N. C. 381, 51 Am. Dec. 393; Winslow *v.* Anderson, 20 N. C. 1, 32 Am. Dec. 651.

Ohio.— Huntington *v.* Finch, 3 Ohio St. 445; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Hunt *v.* Yeatman, 3 Ohio 15; Eaton *v.* Morgan, Tapp. 45; Pollock *v.* Pollock, 2 Ohio Cir. Ct. 143, 1 Ohio Cir. Dec. 410; Glass-Edsall Paper Co. *v.* Telegram Pub. Co., 11 Ohio Dec. (Reprint) 899, 30 Cinc. L. Bul. 369.

Pennsylvania.— Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818; O'Hara *v.* Baum, 82 Pa. St. 416; Murdock *v.* Steiner, 45 Pa. St. 349; Wilson *v.* Hayes, 18 Pa. St. 354; McMichael *v.* McFalls, 17 Lanc. L. Rev. 279; Blair *v.* Warden, 5 Lanc. L. Rev. 113.

South Carolina.— Mills *v.* Dickson, 6 Rich. 487.

Texas.— Roller *v.* Reid, (1894) 25 S. W. 624; Wood *v.* Smith, 11 Tex. 367.

Washington.— State *v.* Huston, 32 Wash. 154, 72 Pac. 1015.

West Virginia.— Smith *v.* Knight, 14 W. Va. 749.

Wisconsin.— *In re* Fisher, 15 Wis. 511.

United States.— Jones *v.* Kemper, 13 Fed. Cas. No. 7,472, 2 Cranch C. C. 535; Union Bank *v.* Crittenden, 24 Fed. Cas. No. 14,354, 2 Cranch C. C. 238.

See 30 Cent. Dig. tit. "Judgment," §§ 255, 697.

Irregularities before trial.— A judgment by default, taken at the return-term, when the declaration has not been filed at the issuance of the writ, will be set aside. Nelson *v.* Rogers, 41 Miss. 635. And where plaintiff's attorney served a declaration without indorsing his place of residence thereon, as required by a rule of court, a judgment was set aside. Watkins *v.* Stevens, 3 How. Pr. (N. Y.) 28. But this action will not be taken because of the failure of plaintiff to furnish security for costs (Lytle *v.* Fenn, 15 Fed. Cas. No. 8,651, 3 McLean 411), or to pay the jury fee before entering up judgment (Heisterhagen *v.* Garland, 10 Mo. 66). Nor will a judgment be set aside, in a case where no affidavit of defense was filed, because the instrument in suit, a copy of which was filed, was not such as entitled the party to judgment (Philadelphia Sav. Inst. *v.* Smith, 10 Pa. St. 13), or because defendant was proceeded against as a non-resident, although his absence from the state was merely temporary (Smothers *v.* Meridian Fertilizer Factory, 137 Ala. 166, 33 So. 898).

Irregularities at trial.— A judgment may be vacated where it is clear that the issues submitted to the jury were not the issues made by the pleadings (Yannes *v.* Brandtmaier, 7 Kulp (Pa.) 517), or where it was rendered on issue joined without any notice of trial or appearance at the trial (People *v.* Bacon, 18 Mich. 247; Ashcraft *v.* Powers, 22 Wash. 440, 61 Pac. 161); but not on the mere ground that a deposition was used without proper notice of its taking (Hill *v.* Bowyer, 18 Gratt. (Va.) 364), or because defendant, who had moved to strike out the verdict, was not given an opportunity to amend the motion and make it a motion for a new trial (Chappell *v.* Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982), or because the judge was absent from the bench while part of the testimony was being taken, there being no dispute as to what the testimony was (Crook *v.* Hamlin, 140 N. Y. 297, 35 N. E. 499), or because the case was tried by the judge instead of by a jury, without the consent of parties thereto (Henry *v.* Hill, 84 Ga. 283, 10 S. E. 742; White *v.* Morris, 107 N. C. 92, 12 S. E. 80. But *compare* Benton *v.* Lindell, 10 Mo. 557; Cowles *v.* Hayes, 69 N. C. 406).

Irregularities in taking judgment.— A judgment entered on a declaration reciting a bond and warrant of attorney to confess judgment, but without any appearance for defendant or formal confession of judgment, will be set aside. Lytle *v.* Colts, 27 Pa. St. 193. And see Knox County Bank *v.* Doty, 9 Ohio St. 505, 75 Am. Dec. 479. This will be done where a default was entered without applying to the court (Rosevelt *v.* Giles, 7 Hill (N. Y.) 166), or where a rule for judgment for want of a sufficient affidavit of defense

sion,[78] or amounts to no more than a mere lack of strict technical form,[79] or is of such a character as to be curable by amendment,[80] or where it may be deemed cured or waived by failure to object in due season,[81] or where the fault complained of is not shown to be prejudicial or dangerous to any substantial right or interest of the party.[82] And in some states it is held that a judgment cannot be vacated for this cause unless the irregularity appears on the face of the record,[83] at least

was made absolute through the failure of the court to notice the filing of a supplemental affidavit which had been allowed (Com. *v.* Krause, 23 Pa. Co. Ct. 511). But where, in an action for conversion, judgment on default was entered for damages by the clerk, it will not be set aside merely because there was no proper assessment of the damages, where the amount so entered by the clerk was right. Hersey *v.* Walsh, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 689.

Want of findings or decision.— It is proper to vacate a judgment entered where no findings of fact or law were made or filed by the court, as required by law, and findings were not waived (Southern Pac. R. Co. *v.* Crampton, 63 Cal. 537; Hunt *v.* Patterson, 38 Mich. 95; Prondzinski *v.* Garbutt, 9 N. D. 239, 83 N. W. 23), or where special findings require the entry of a judgment thereon notwithstanding the general verdict, but judgment is wrongly entered on the general verdict (Seeds *v.* American Bridge Co., 68 Kan. 522, 75 Pac. 480), or where there is an inconsistency between the findings of fact and the conclusions of law (Moore *v.* Richardson, 5 S. C. 142). But in Minnesota it is held that the omission to file findings may be supplied by a *nunc pro tunc* order, and is not cause for vacating the judgment. Swanstrom *v.* Marvin, 38 Minn. 359, 37 N. W. 455. And in New York the remedy of a party complaining of such omission is by appeal, not by motion to set aside the judgment. People *v.* Church, 2 Lans. (N. Y.) 459; People *v.* Albany, etc., R. Co., 57 Barb. (N. Y.) 204. A judgment may be vacated where the judge neglects to make and file a formal written decision of the cause, as required by the statute. Thomas *v.* Tanner, 14 How. Pr. (N. Y.) 426; Garr *v.* Spaulding, 2 N. D. 414. 51 N. W. 867. *Compare* Hupfel *v.* Schœmig, 34 N. Y. Super. Ct. 476; Bullard *v.* Harris, 21 N. Y. Suppl. 9.

Irregularities in form of judgment.— Mere informality or irregularity in the entry of the judgment, not constituting error of law, or a defect necessarily fatal to its validity, will not be ground for setting it aside. Jones *v.* Hart, 60 Mo. 351; Bulkley *v.* Smith, 1 Duer (N. Y.) 643; Ramsburg *v.* Kline, 96 Va. 465, 31 S. E. 608.

Allowing answer after default.— Where the court, after a default judgment, erroneously allows defendant to file an answer at the second term, all subsequent proceedings are nugatory, and a judgment of nonsuit rendered against plaintiff should therefore be vacated. Cauley *v.* Wadley Lumber Co., 119 Ga. 648, 46 S. E. 852.

If any portion of a judgment is regular and valid, it will not be set aside as irregular on a motion to set aside the entire judgment. Challiss *v.* Headley, 9 Kan. 684. And see Mailhouse *v.* Inloes, 18 Md. 328.

78. Acklen *v.* Fink, 95 Md. 655, 53 Atl. 423; Dufur *v.* Ashland County, 88 Wis. 574, 60 N. W. 829.

Illustrations.— A judgment will not be vacated because no judgment-roll had been made up or filed before the issuance of execution (Lathrop *v.* Snyder, 17 Wis. 110), or because the judgment-roll omits recitals which may be supplied by intendment from the judgment itself (Whitney *v.* Daggett, 108 Cal. 232, 41 Pac. 471), or because it does not contain all the proper papers (Breckinridge Co. *v.* Perkins, 14 N. Y. App. Div. 629, 43 N. Y. Suppl. 800).

79. East Tennessee Land Co. *v.* Leeson, 185 Mass. 4, 69 N. E. 351; People *v.* Albany, etc., R. Co., 57 Barb. (N. Y.) 204; Davis *v.* Shaver, 61 N. C. 18, 91 Am. Dec. 92; Guernsey County Com'rs *v.* Cambridge, 7 Ohio Cir. Ct. 72, 3 Ohio Cir. Dec. 669. See Lathrop *v.* Snyder, 17 Wis. 110.

Designating party entitled to recover.— A judgment for a sum of money should not be set aside by reason of its omitting to state that it is for plaintiff and against defendant, where the declaration duly states the cause of action and the parties. Adams *v.* Walker, 59 Ga. 506.

80. Artope *v.* Barker, 74 Ga. 462; Steers *v.* Morgan, 66 Ga. 552; Acklen *v.* Fink, 95 Md. 655, 53 Atl. 423; Mansel *v.* Castles, 93 Tex. 414, 55 S. W. 559; Pennsylvania F. Ins. Co. *v.* Wagley, (Tex. Civ. App. 1896) 36 S. W. 997. *Compare* Welsbach Commercial Co. *v.* Popper, 59 N. Y. Suppl. 1016.

81. Crow *v.* American Mortg. Co., 92 Ga. 815, 19 S. E. 31. And see Baums Castorine Co. *v.* Kimpel, (Del. 1904) 58 Atl. 1035; Slater *v.* Skirving, 45 Nebr. 594, 63 N. W. 848; Cosgrove *v.* Butler, 1 S. C. 241.

82. *California.*— Block *v.* Kearney, (1901) 64 Pac. 267.

Minnesota.— Ætna Ins. Co. *v.* Swift, 12 Minn. 437.

Nebraska.— Shelby *v.* St. James Orphan Asylum, 66 Nebr. 40, 92 N. W. 155.

New York.— Cramer *v.* Fitzsimmons, 12 Wend. 251; Runnell *v.* Griffin, 8 Abb. Pr. 39. And see Crook *v.* Hamlin, 140 N. Y. 297, 35 N. E. 499.

North Carolina.— Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106; Stancill *v.* Gay, 92 N. C. 455; Williamson *v.* Hartman, 92 N. C. 236.

83. Tuffree *v.* Stearns Ranchos Co., (Cal. 1898) 54 Pac. 826; Sweat *v.* Latimer, 119 Ga. 615, 46 S. E. 835; Tietjen *v.* Merchants' Nat. Bank, 117 Ga. 501, 43 S. E. 730. See, however, Union Compress Co. *v.* Leffler, 122

where the application is made after the end of the term at which judgment was rendered.[84]

b. Unauthorized or Premature Entry. A judgment may be set aside where it is shown to have been entered by the clerk without any authority therefor, whether his entry thereof was the result of mistake, inadvertence, or wrongful intent;[85] and the same is true where the entry was ordered by the court improvidently or under a mistake.[86] A similar rule obtains where the entry of judgment was premature, either because made before the return-day or the day fixed by law for entering judgments,[87] or before the time for answering had expired,[88] or while there was an answer or demurrer on file and not disposed of,[89] or because,

Ga. 640, 50 S. E. 483, holding that in proceeding by petition, with rule *nisi* or process and service on necessary parties, the courts of the state may exercise the jurisdiction which obtained at common law to set aside judgments for irregularities not appearing on the face of the record.

84. *Alabama.*— Curtis *v.* Gaines, 46 Ala. 455.

Illinois.— Kuehne *v.* Goit, 54 Ill. App. 596.

Indiana.— Busching *v.* Sunman, 19 Ind. App. 683, 49 N. E. 1091.

Missouri.— Phillips *v.* Evans, 64 Mo. 17.

Pennsylvania.— Hall *v.* West Chester Pub. Co., 180 Pa. St. 561, 37 Atl. 106.

Wisconsin.— Milwaukee Mut. Loan, etc., Soc. *v.* Jagodzinski, 84 Wis. 35, 54 N. W. 102; Egan *v.* Sengpeil, 46 Wis. 703, 1 N. W. 467.

85. *California.*— Wharton *v.* Harlan, 68 Cal. 422, 9 Pac. 727. And see Kaufman *v.* Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139.

Florida.— Sedgwick *v.* Dawkins, 16 Fla. 198.

Indiana.— Coleman *v.* Floyd, 131 Ind. 330, 31 N. E. 75.

Iowa.— Wolf *v.* Shenandoah Nat. Bank, 84 Iowa 138, 50 N. W. 561.

Maryland.— Merrick *v.* Baltimore, 43 Md. 219.

New York.— Caro *v.* Metropolitan El. R. Co., 48 N. Y. Super. Ct. 545.

Pennsylvania.— Vanderpool *v.* Vanderpool, 162 Pa. St. 394, 29 Atl. 910.

South Carolina.— Cooper *v.* Smith, 16 S. C. 331.

United States.— Medford *v.* Dorsey, 16 Fed. Cas. No. 9,389, 2 Wash. 433; U. S. *v.* McKnight, 26 Fed. Cas. No. 15,695, 1 Cranch C. C. 84.

See 30 Cent. Dig. tit. "Judgment," § 698.

Unauthorized judgment supported by just debt.— Where a judgment is entered for a *bona fide* debt, past due, it will not be set aside at a subsequent term, although entered without authority. Reynertson *v.* Central Lumber Co., 69 Ill. App. 131.

Record as conclusive evidence.— It has been held that a judgment cannot be expunged at a term subsequent to that of its rendition, on the ground that neither the judge's docket nor the clerk's minutes show the rendition of such a judgment. The record of the judgment imports absolutely verity, and cannot be assailed for the lack of such vouchers. Jones *v.* Hart, 60 Mo. 351.

A judgment which is not in conformity to the verdict may be set aside. Eason *v.* Miller, 15 S. C. 194.

86. Murray *v.* Derrick, 101 Ga. 113, 28 S. E. 616; Fraley *v.* Feather, 46 N. J. L. 429; Matter of Underhill, 2 Silv. Sup. (N. Y.) 541, 6 N. Y Suppl. 133 [*affirmed* in 117 N. Y. 471, 22 N. E. 1120]. *Compare* State *v.* Lockhart, 18 Wash. 531, 52 Pac. 315.

87. Clegg *v.* Fithian, 32 Ind. 90; Brackett *v.* Brackett, 61 Mo. 221; Bloomsburg Banking Co. *v.* Mourey, 4 Pa. Co. Ct. 247. But *compare* Pier *v.* Amory, 40 Wis. 571.

88. *Arkansas.*— Browning *v.* Roane, 9 Ark. 354, 50 Am. Dec. 218.

California.— Winchester *v.* Black, 134 Cal. 125, 66 Pac. 197; Crane *v.* Crane, 121 Cal. 99, 53 Pac. 433; Remnant *v.* Hoffman, (1886) 11 Pac. 319.

Iowa.— Cooper *v.* Disbrow, 106 Iowa 550, 76 N. W. 1013.

Maryland.— Mailhouse *v.* Inloes, 18 Md. 328.

Mississippi.— Kelly *v.* Brooks, 57 Miss. 225.

Utah.— Western Loan, etc., Co. *v.* Berg, 24 Utah 278, 67 Pac. 669.

Washington.— Hole *v.* Page, 20 Wash. 208, 54 Pac. 1123.

Compare Williamson *v.* Nicklin, 34 Ohio St. 123.

The entry of a judgment on the last of the days allowed for an answer, although an irregularity, is not ground for setting the judgment aside at the suit of a subsequent creditor, in the absence of fraud. Rothchild *v.* Mannesovitch, 29 N. Y. App. Div. 580, 51 N. Y. Suppl. 253.

Where an amendment was allowed which introduced an entirely new cause of action, and defendant was defaulted without having had a proper opportunity to defend, the judgment should be set aside. Weatherford *v.* Van Alstyne, 22 Tex. 22.

89. *California.*— Oliphant *v.* Whitney, 34 Cal. 25.

Indiana.— Lawler *v.* Couch, 80 Ind. 369.

Minnesota.— Swift *v.* Fletcher, 6 Minn. 550.

Missouri.— Norman *v.* Hooker, 35 Mo. 366.

New York.— Riley *v.* Van Amrange, 1 How. Pr. 43.

Ohio.— Follett *v.* Alexander, 58 Ohio St. 202, 50 N. E. 720; Keszler *v.* Cincinnati, 3 Ohio Cir. Ct. 223, 2 Ohio Cir. Dec. 127.

for any other reason, it was made before the case was ripe for trial or regularly came up for hearing.[90]

6. ERROR IN JUDGMENT — a. In General. After the term at which a judgment was rendered, it cannot be vacated or set aside because erroneous in matter of law.[91] Thus a motion for this purpose cannot be based on the reception of incompetent evidence or the alleged insufficiency of the evidence to support the judgment.[92] But mistake of fact or misinformation as to the status of the case or the facts in controversy, inducing the court to render a judgment which it would not have given if fully and correctly informed, will be ground for setting the judgment aside.[93]

90. *California.*— A judgment in a suit in equity, entered through inadvertence by the clerk on a special advisory verdict, while other issues of fact remain to be determined by the court, may be set aside. Cummings *v.* Ross, 90 Cal. 68, 27 Pac. 62.

Georgia.— See Rooney *v.* Richers, 103 Ga. 576, 30 S. E. 262.

Iowa.— Drake *v.* Smythe, 44 Iowa 410. See Stewart *v.* Gorham, 122 Iowa 669, 98 N. W. 512.

New York.— Beach *v.* McCann, 1 Hilt. 256; Swan *v.* Mutual Reserve Fund Life Assoc., 22 Misc. 256, 50 N. Y. Suppl. 46.

Tennessee.— Findley *v.* Johnson, 1 Overt. 344.

Virginia.— A judgment for plaintiff in assumpsit, after trial, should be set aside and a new trial granted, if there was no plea by defendant. Johnson *v.* Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

91. *Alabama.*— Wiggins *v.* Steiner, 103 Ala. 655, 16 So. 8.

California.— Grannis *v.* San Francisco Super. Ct., 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23.

Kansas.— Sexton *v.* Rock Island Lumber, etc., Co., 49 Kan. 153, 30 Pac. 164; Pierson *v.* Benedict, 5 Kan. App. 790, 48 Pac. 996.

Kentucky.— Kimbrough *v.* Harbett, 110 Ky. 94, 60 S. W. 836, 22 Ky. L. Rep. 1578; Coffey *v.* Proctor Coal Co., 20 S. W. 286, 14 Ky. L. Rep. 415.

Louisiana.— Taliaferro *v.* Steele, 14 La. Ann. 656. *Compare* Shaw *v.* Thompson, 3 Mart. N. S. 392.

Massachusetts.— Brown *v.* Bull, 3 Mass. 211.

Minnesota.— Carlson *v.* Phinney, 56 Minn. 476, 58 N. W. 38; Grant *v.* Schmidt, 22 Minn. 1.

Mississippi.— Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 255, 13 So. 844, 30 Am. St. Rep. 541.

Missouri.— Peake *v.* Redd, 14 Mo. 79.

New York.— Hauscheld *v.* Hauscheld, 33 N. Y. App. Div. 296, 53 N. Y. Suppl. 831; Roche *v.* Ward, 7 How. Pr. 416. And see Union Bag, etc., Co. *v.* Allen Bros. Co., 94 N. Y. App. Div. 595, 88 N. Y. Suppl. 368.

North Carolina.— McLeod *v.* Graham, 132 N. C. 473, 43 S. E. 935; May *v.* Stimson Lumber Co., 119 N. C. 96, 25 S. E. 721; State *v.* Horton, 89 N. C. 581; Anonymous, 1 N. C. 91.

North Dakota.— State *v.* Donovan, 10 N. D. 203, 86 N. W. 709.

Vermont.— Harriman *v.* Swift, 31 Vt. 385.

Washington.— Davis *v.* Fields, 9 Wash. 78, 37 Pac. 281.

Wisconsin.— Gilbert-Arnold Land Co. *v.* O'Hare, 93 Wis. 194, 67 N. W. 38; Fornette *v.* Carmichael, 38 Wis. 236; Loomis *v.* Rice, 37 Wis. 262; Landon *v.* Burke, 33 Wis. 452; Spafford *v.* Janesville, 15 Wis. 474.

United States.— Bronson *v.* Schulten, 104 U. S. 410, 26 L. ed. 997; U. S. Bank *v.* Moss, 6 How. 31, 12 L. ed. 331; Klever *v.* Seawall, 65 Fed. 373, 12 C. C. A. 653. *Compare* King *v.* Davis, 137 Fed. 198.

See 30 Cent. Dig. tit. "Judgment," § 692.

During the term it is within the power of the court to recall or set aside a judgment, not only where it was inadvertently or improvidently entered, but also in cases where the court is satisfied that its rulings or decisions on which the judgment rested were erroneous as a matter of law. Smith *v.* Milwaukee Electric R., etc., Co., 119 Wis. 336, 96 N. W. 823. And see *supra*, IX, D, 1.

Conforming to direction of appellate court. — A trial court, being satisfied that its order for the distribution of a fund is not in accordance with the direction of the supreme court relative thereto, may vacate the order, to the end that the direction may be carried out. Grand Rapids Fifth Nat. Bank *v.* Clinton Cir. Judge, 100 Mich. 67, 58 N. W. 648.

Under statutes.— Statutes authorizing the vacation of judgments for "mistake," "irregularity," or other similar causes do not apply to a case of mistake of law or misconstruction of the law by the trial court. Russell *v.* Colyar, 4 Heisk. (Tenn.) 154; Kuhn *v.* Mason, 24 Wash. 94, 64 Pac. 182; Loomis *v.* Rice, 37 Wis. 262. Under a statute authorizing "erroneous" judgments to be set aside on motion, a judgment cannot be vacated for error of law in the judgment itself, unless apparent on its face, but only for error of fact, to be shown by satisfactory evidence. Hill *v.* Watson, 10 S. C. 268.

92. Fort *v.* Strohecker, 58 Ga. 262; Hurtert *v.* Weines, 27 Iowa 134; Elder *v.* New Orleans, 31 La. Ann. 500; Chambers *v.* Carthel, 35 Mo. 374.

93. *Maine.*— Woodcock *v.* Parker, 35 Me. 138.

Maryland.— Straus *v.* Rost, 67 Md. 465, 10 Atl. 74.

Massachusetts.— Keith *v.* McCaffrey, 145 Mass. 18, 12 N. E. 419.

New York.— Kelly *v.* Brower, 1 Hilt. 514.

b. Error in Amount of Judgment. A judgment may be vacated when rendered for an amount in excess of that claimed in the writ or declaration,[94] or where it includes an unauthorized allowance of damages in addition to the amount fixed by the jury,[95] unless the fault can be cured by reducing or remitting the excess,[96] or unless the excess is very trifling.[97] But this cannot generally be done on account of an erroneous computation of the amount of damages or interest,[98] or on an allegation that the amount of the judgment is greater than the facts of the case will warrant.[99]

c. Erroneous Taxation of Costs. A judgment should not be set aside for irregularity in the taxing of costs, or error in the amount as taxed, the remedy being by motion to correct the judgment by reducing or otherwise changing the taxed costs.[1]

7. Defects and Objections as to Parties — a. In General. A judgment may be vacated for non-joinder of a necessary party,[2] or where it was rendered on a joint contract against only a part of defendants,[3] or where it includes defendants who were never made parties to the suit,[4] or where it appears that the real party in interest has not been joined.[5] But a judgment will not be set aside on account of the misnomer of a party, at least where it did not mislead, and is not calculated to work substantial injury.[6] Nor will a judgment be set aside because of a

Ohio.— State *v.* Moore, 1 Ohio Dec. (Reprint) 506, 10 West. L. J. 219.

See 30 Cent. Dig. tit. "Judgment," § 693.

See, however, Wittemore *v.* Malcomson, 9 N. J. L. J. 338.

94. Andrews *v.* Monilaws, 8 Hun (N. Y.) 65; Barns *v.* Branch, 3 McCord (S. C.) 19.

When the proper remedy is by appeal see Palmer *v.* Zumbrota Bank, 65 Minn. 90, 67 N. W. 893.

95. See Corn Exch. Bank *v.* Blye, 119 N. Y. 414, 23 N. E. 805.

96. F. A. Poth Brewing Co. *v.* Bernd, (N. J. Sup. 1896) 36 Atl. 664.

97. Ziel *v.* Dukes, 12 Cal. 479; Lathrop *v.* Snyder, 17 Wis. 110.

Illustration.— Adjudging interest on a note from the date of its maturity, instead of the last day of grace, where the amount is small, is not such error as warrants setting aside the judgment. Ramsburg *v.* Kline, 96 Va. 465, 31 S. E. 608.

98. Browder *v.* Browder, 13 La. 156; Brackett *v.* Brackett, 61 Mo. 221; Van Dolsen *v.* Abendroth, 53 N. Y. Super. Ct. 35.

Error in verdict.— The fact that the jury, on an inquisition in an action of tort, assessed more damages than the evidence would warrant is ground for a new trial, but not for vacating the judgment. Green *v.* Hamilton, 16 Md. 317, 77 Am. Dec. 295. But see Greer *v.* New York, 1 Abb. Pr. N. S. (N. Y.) 206.

Indefiniteness as to amount is no cause for vacating the judgment in an action for foreclosure, where no deficiency judgment was asked and there is no claim that any payments have been made. Bryson *v.* Whilden, 55 S. C. 465, 33 S. E. 558.

99. Provins *v.* Lovi, 6 Okla. 94, 50 Pac. 81.

1. *Arkansas.*— Derton *v.* Boyd, 21 Ark. 264.

Georgia.— Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541.

New York.— Stimson *v.* Huggins, 16 Barb. 658; Agricultural Ins. Co. *v.* Bean, 45 How. Pr. 444; Toll *v.* Thomas, 15 How. Pr. 315; Potter *v.* Smith, 9 How. Pr. 262. *Compare* Massilon Bank *v.* Dwight, 2 Code Rep. 49.

Washington.— Dickson *v.* Matheson, 12 Wash. 196, 40 Pac. 725.

Wisconsin.— Field *v.* Heckman, 118 Wis. 461, 95 N. W. 377; Loomis *v.* Rice, 37 Wis. 262.

See 30 Cent. Dig. tit. "Judgment," § 704.

But see McDonald *v.* Burke, 3 Ida. 266, 28 Pac. 440, 35 Am. St. Rep. 276.

2. Spring *v.* Montague, 9 B. Mon. (Ky.) 39. But *compare* Benedict *v.* Mortimer, (N. J. Ch. 1889) 18 Atl. 246.

Non-joinder of lessor or grantor.— Where in ejectment a judgment by default was rendered against a tenant, without the knowledge of his landlord, a motion to vacate is proper. Mowry *v.* Nunez, (Cal. 1893) 33 Pac. 1122. But it is no ground for striking out a judgment against a defendant in ejectment that his grantor was not made a party. Chappell *v.* Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982.

3. Mullendore *v.* Silvers, 34 Ind. 98; Dougherty *v.* Walters, 1 Ohio St. 201.

4. Downing *v.* Still, 43 Mo. 309.

5. Ebell *v.* Bursinger, 70 Tex. 120, 8 S. W. 77. *Compare* Grinnell *v.* Schmidt, 2 Sandf. (N. Y.) 706. But see Smead *v.* Fay, 1 Disn. (Ohio) 531, 12 Ohio Dec. (Reprint) 777.

6. Jones *v.* San Francisco Sulphur Co., 14 Nev. 172; National Condensed Milk Co. *v.* Brandenburgh, 40 N. J. L. 111; Covey *v.* Wheeler, 23 Pa. Co. Ct. 467. But *compare* Will *v.* Lytle Creek Water Co., 100 Cal. 344, 34 Pac. 830.

Indefinite description.—A judgment in favor of a nominal plaintiff, "for the use of the estate of" a deceased person, will not be set aside on the ground that it does not show for whom it was rendered. Dowell *v.* Mills, 32 Tex. 440.

technical objection, not appearing on the face of the record, to plaintiff's capacity to sue.[7]

b. Persons Under Disabilities. Coverture,[8] infancy,[9] and insanity[10] have been held sufficient grounds for setting aside a judgment improperly rendered. A judgment entered on a judgment-note will not be opened on a petition by defendant alleging that if he signed the note it was when he was drunk, the indebtedness not being denied.[11] The entry of a judgment against a person under legal disability is not an "irregularity," within the meaning of a statute authorizing judgments to be vacated for that cause, but an error of fact, and therefore the statute does not affect the power of the court to set aside such a judgment on motion.[12]

c. Death of Party. It is competent and proper for the court to set aside a judgment which was rendered after the death of a party.[13]

8. Matters Available in Defense — a. In General. A proceeding to vacate or set aside a judgment cannot be sustained on any grounds which might have been pleaded in defense to the action, and could have been so pleaded with proper care and diligence.[14] This includes the defense of a counter-claim or set-off

7. Abram French Co. *v.* Marx, 10 Misc. (N. Y.) 384, 31 N. Y. Suppl. 122.

8. See Richardson *v.* Matthews, 58 Ark. 484, 25 S. W. 502 (by statute); Adams *v.* Grey, 154 Pa. St. 258, 26 Atl. 423 (it should appear on the face of the record that defendant was a married woman); Littster *v.* Littster, 151 Pa. St. 474, 25 Atl. 117 (right lost by laches).

Validity of judgments against married women see Husband and Wife, 21 Cyc. 1580.

9. See Bloor *v.* Smith, 112 Wis. 340, 87 N. W. 870. And see Infants.

10. St. Louis Consol. Coal Co. *v.* Oeltjen, 189 Ill. 85, 59 N. E. 600; Judd *v.* Gray, 156 Ind. 278, 59 N. E. 849; State *v.* Jehlik, 66 Kan. 301, 71 Pac. 572, 61 L. R. A. 265. And see Small *v.* Reves, 104 Ky. 289, 46 S. W. 726, 20 Ky. L. Rep. 504, holding that mental unsoundness is a "misfortune" within the meaning of a statute authorizing the vacation of judgments taken against a party through his "unavoidable casualty or misfortune." But see Van Walters *v.* Marion County, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431.

11. Ford *v.* Tigue, 8 Kulp (Pa.) 428.

12. *Colorado.*— Rogers *v.* McMillen, 6 Colo. App. 14, 39 Pac. 891.

Missouri.— State *v.* Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664; Powell *v.* Gott, 13 Mo. 458, 53 Am. Dec. 153.

North Carolina.— Keaton *v.* Banks, 32 N. C. 381, 51 Am. Dec. 393.

South Carolina.— Levy *v.* Williams, 4 S. C. 515.

Wisconsin.— Bond *v.* Neuschwander, 86 Wis. 391, 57 N. W. 54.

13. *Alabama.*— Moore *v.* Easley, 18 Ala. 619.

Illinois.— Claflin *v.* Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

Iowa.— Bowen *v.* Troy Portable Mill Co., 31 Iowa 460.

Massachusetts.— Stickney *v.* Davis, 17 Pick. 169.

Missouri.— A motion to vacate a judgment on the ground that defendant, or one of several joint defendants, was dead at the time the suit was begun, must be made at the same term; after the term it is too late. State *v.* Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664; Phillips *v.* Evans, 64 Mo. 17.

New York.— Borsdorff *v.* Dayton, 17 Abb. Pr. 36 note; Holmes *v.* Honie, 8 How. Pr. 383.

North Carolina.— Burke *v.* Stokely, 65 N. C. 569. But *compare* Wood *v.* Watson, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541.

Oregon.— To defeat the judgment of a court of general jurisdiction, the legal representatives of a deceased party cannot allege that he died on the same day the judgment was rendered, but an hour before. Mitchell *v.* Schoonover, 16 Oreg. 211, 17 Pac. 867, 8 Am. St. Rep. 282.

Pennsylvania.— Stevenson *v.* Virtue, 21 Pa. Co. Ct. 229. *Compare In re* Hoopes, 185 Pa. St. 167, 39 Atl. 840.

See 30 Cent. Dig. tit. "Judgment," § 695.

Effect of death of party on validity of judgment generally see *supra*, I, C, 2.

14. *Alabama.*— Powell *v.* Washington, 15 Ala. 803.

California.— Weisenborn *v.* Neumann, 60 Cal. 376.

Delaware.— McDaniel *v.* Townsend, 4 Pennew. 359, 55 Atl. 6.

Georgia.— Sisson *v.* Pittman, 113 Ga. 166, 38 S. E. 315; Purity Ice Works *v.* Rountree, 104 Ga. 676, 30 S. E. 885; Cauthen *v.* Barnesville Sav. Bank, 68 Ga. 287; Thomason *v.* Fannin, 54 Ga. 361; Easley *v.* Camp, 40 Ga. 698; Field *v.* Sisson, 40 Ga. 67; Barksdale *v.* Greene, 29 Ga. 418.

Illinois.— Fischer *v.* Stiefel, 179 Ill. 59, 53 N. E. 407.

Iowa.— Merrill *v.* Bowe, 67 Iowa 636, 25 N. W. 840; Brett *v.* Myers, 65 Iowa 274, 21 N. W. 604.

Kansas.— Elder *v.* Lawrence Nat. Bank, 12 Kan. 242.

Kentucky.— Roseberry *v.* Wilson, 68 S. W. 417, 24 Ky. L. Rep. 285; Farris *v.* Hoskins, 63 S. W. 577, 23 Ky. L. Rep. 596.

Louisiana.— Robichaud *v.* Nelson, 28 La.

which might have been pleaded in the original action, and may still form the basis of a separate suit,[15] and the defense of payment of the obligation on which the judgment rests;[16] but it appears that a judgment by confession or default may be opened to let in the defense that defendant was entitled to certain credits on the debt which plaintiff failed to allow.[17]

b. Illegality of Cause of Action. A judgment will not be opened or vacated because founded on an illegal or fraudulent consideration, if the party knew of this objection and might have set it up in defense to the action.[18] If the parties

Ann. 578; Kirkland *v.* His Creditors, 2 La. 205.

Minnesota.— Deering Harvester Co. *v.* Donovan, 82 Minn. 162, 84 N. W. 745, 83 Am. St. Rep. 417; Carlson *v.* Phinney, 56 Minn. 476, 58 N. W. 38.

New York.— Weed *v.* Whitehead, 1 N. Y. App. Div. 192, 37 N. Y. Suppl. 178; Rondout First Nat. Bank *v.* Hamilton, 50 How. Pr. 116; Janssen *v.* Wemple, 3 Redf. Surr. 229.

North Carolina.— McLeod *v.* Graham, 132 N. C. 473, 43 S. E. 935.

Ohio.— Fowble *v.* Walker, 4 Ohio 64.

Pennsylvania.— Lauer Brewing Co. *v.* Chmielewski, 206 Pa. St. 90, 55 Atl. 841; Gillespie *v.* Rogers, 184 Pa. St. 488, 39 Atl. 290; Smith *v.* Wachob, 179 Pa. St. 260, 36 Atl. 221; Baker *v.* Lukens, 35 Pa. St. 146.

South Carolina.— Higgins *v.* Wait, 28 S. C. 606, 5 S. E. 363.

Texas.— Bankers' Union *v.* Nabors, 36 Tex. Civ. App. 38, 81 S. W. 91.

Utah.— Peterson *v.* Crosier, 29 Utah 235, 81 Pac. 860.

Virginia.— Marshall *v.* Cheatham, 88 Va. 31, 13 S. E. 308.

Washington.— Friedman *v.* Manley, 21 Wash. 675, 59 Pac. 490; Roberts *v.* Shelton Southwestern R. Co., 21 Wash. 427, 58 Pac. 576.

Wisconsin.— Kirschbon *v.* Bonzel, 67 Wis. 178, 29 N. W. 907; Saunderson *v.* Lace, 2 Pinn. 257, 1 Chandl. 231.

Wyoming.— Bonnifield *v.* Price, 1 Wyo. 245.

United States.— Jaeger *v.* U. S., 33 Ct. Cl. 214. And see Mack Mfg. Co. *v.* Van Duerson, 138 Fed. 953.

See 30 Cent. Dig. tit. "Judgment," § 679.

15. *Illinois.*— Boas *v.* Heffron, 40 Ill. App. 652.

Indiana.— Cresswell *v.* White, 3 Ind. App. 306, 29 N. E. 612.

Kentucky.— Maddox *v.* Williams, 87 Ky. 147, 7 S. W. 907, 9 Ky. L. Rep. 975.

New York.— Leahey *v.* Kingon, 22 How. Pr. 209.

Pennsylvania.— Croop *v.* Dodson, 7 Kulp 13.

United States.— Avery *v.* U. S., 12 Wall. 304, 20 L. ed. 405.

See 30 Cent. Dig. tit. "Judgment," § 682.

16. Council *v.* Willis, 66 N. C. 359. *Compare* Walker *v.* Sallada, 17 Pa. Co. Ct. 371. But see Derrickson *v.* Derrickson, 2 Marv. (Del.) 281, 43 Atl. 170, holding that where a judgment against a husband and wife on a judgment note for his debt was paid by his administrator, who took an assignment of it, the wife is entitled to have the judgment opened, and an entry made that such payment was made and that nothing is due.

17. Bright *v.* Diamond, 189 Pa. St. 476, 42 Atl. 45; Heimgartner *v.* Stewart, 180 Pa. St. 500, 37 Atl. 93; Lee *v.* Colvin, 4 Lack. Leg. N. (Pa.) 168. And see Schweyer *v.* Walbert, 190 Pa. St. 334, 42 Atl. 694.

18. Bell *v.* Hanks, 55 Ga. 274; Inman *v.* Jones, 44 Ga. 44; Ransone *v.* Grist, 40 Ga. 241; Lauer's Appeal, 12 Wkly. Notes Cas. (Pa.) 165; Thomas *v.* Thomas, 88 Wis. 88, 59 N. W. 504.

Usury.— In Pennsylvania a judgment may be opened to let defendant in to defend on the ground of usury in the contract on which it was founded (Walter *v.* Breisch, 86 Pa. St. 457; Anderson's Appeal, 1 Pa. Cas. 45, 1 Atl. 329; Whyte *v.* Cramer, 4 Pa. Super. Ct. 436; Veal *v.* Washburn, Lack. Leg. Rec. (Pa.) 378), or the judgment creditor will be required to release or remit the excess of interest (Scovel *v.* Hunter, 12 Phila. (Pa.) 531), or if usurious interest has been paid on a judgment note after the entry of a judgment upon it, the payment will be considered as an equitable payment on the judgment itself, and proper relief can be given to the debtor without opening the judgment (Shafer's Appeal, 99 Pa. St. 246). It seems that a similar rule obtains in Illinois. Fleming *v.* Jencks, 22 Ill. 475. But *compare* Lucas *v.* Spencer, 27 Ill. 15. But in other states a judgment will not be set aside on the ground of usury, where there is no showing that defendant was prevented from setting up the usury in the original action. Bearce *v.* Barstow, 9 Mass. 45, 6 Am. Dec. 25; Corning *v.* Ludlum, 28 N. J. Eq. 398.

In Illinois it is provided by statute that all judgments, mortgages, bonds, etc., given or executed for money won at gaming shall be void and may be vacated or set aside. Rev. St. c. 38, § 135. This makes it immaterial that the defense of illegality of the consideration might have been pleaded in the original action; and the statute applies not only to judgments entered on confession, but also to those rendered in a contested suit. West *v.* Carter, 129 Ill. 249, 21 N. E. 782; Lucas *v.* Nichols, 66 Ill. 41; Mallett *v.* Butcher, 41 Ill. 382; Boddie *v.* Brewer, etc., Brewing Co., 107 Ill. App. 357 [*affirmed* in 204 Ill. 352, 68 N. E. 394]; Harris *v.* McDonald, 79 Ill. App. 638. But it seems that the statute does not apply to a judgment by default recovered on a gambling contract. Grubey *v.* White, 23 Ill. App. 600.

were equally guilty in participating in an immoral or unlawful contract, the courts will give no relief after the recovery of a judgment thereon, but will leave them where they stand.[19]

c. Want or Failure of Consideration. The failure, want, or inadequacy of the consideration for the contract or undertaking on which a judgment is founded is not a ground for vacating a judgment,[20] unless there are circumstances of fraud or great oppression in the case,[21] or where the judgment attacked was rendered on an earlier judgment, recovered in another court or another jurisdiction, which earlier judgment has since been reversed or vacated.[22]

9. Defects and Objections as to Pleadings. A judgment will not be set aside on account of defects or insufficiency in the pleadings,[23] especially where the alleged fault was amendable[24] or has been waived by joining issue and going to trial,[25] although it seems a judgment may be vacated if the declaration or complaint states no cause of action, or contains no averments showing liability on the part of defendant.[26]

10. Newly Discovered Evidence. A judgment may be vacated or set aside where new evidence is discovered or new facts occur, after the judgment, or too late to have been presented on the trial, which show that a different judgment should have been rendered, or that the judgment as it stands should not be enforced,[27] provided the party also shows that he was ignorant of such evidence

19. Fields *v.* Brown, 89 Ill. App. 287; Woelfel *v.* Hammer, 159 Pa. St. 446, 28 Atl. 146; Shumaker *v.* Reed, 13 Pa. Co. Ct. 547.

20. Townsend *v.* Townsend, 5 Harr. (Del.) 20; Powell *v.* Boring, 44 Ga. 169; Blake *v.* State Bank, 178 Ill. 182, 52 N. E. 957; Pennock *v.* Claypole, 1 Phila. (Pa.) 27; Seltzer *v.* Moser, 1 Woodw. (Pa.) 475. But see Stegner *v.* Stegner, 8 Kulp (Pa.) 332; Couch *v.* Dayton, 5 L. T. N. S. (Pa.) 167.

21. Greer *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 427.

22. Banning *v.* Taylor, 24 Pa. St. 297; Ætna Ins. Co. *v.* Aldrich, 38 Wis. 107; Heckling *v.* Allen, 15 Fed. 196, 4 McCrary 303.

23. *District of Columbia.*— Harris *v.* Leonhardt, 2 App. Cas. 318.

Georgia.—Tietjen *v.* Merchants' Nat. Bank, 117 Ga. 501, 43 S. E. 730; Branch *v.* Carswell, 66 Ga. 254; Brown *v.* Bennett, 55 Ga. 189.

Illinois.— McKenzie *v.* Penfield, 87 Ill. 38; Sevier *v.* Magguire, 49 Ill. 66; Pioneer Furniture Co. *v.* Langworthy, 84 Ill. App. 594.

Iowa.— Fairbairn *v.* Dana, 68 Iowa 231, 26 N. W. 90.

Louisiana.— Paschal *v.* Union Bank, 9 La. Ann. 483.

Maryland.— Jones *v.* Freeman, 29 Md. 273.

Missouri.— Hall *v.* Lane, 123 Mo. 633, 27 S. W. 546.

Nebraska.— Oakes *v.* Zimer, 62 Nebr. 603, 87 N. W. 350.

New York.— Grant *v.* Birdsall, 48 N. Y. Super. Ct. 427.

Pennsylvania.— Colwell *v.* Wehrly, 150 Pa. St. 523, 24 Atl. 737.

South Carolina.— Dinkins *v.* Vaughan, Harp. 26.

Wisconsin.— Ford *v.* Baird, 2 Pinn. 242, 1 Chandl. 212.

United States.— Hartshorne *v.* Ingle, 11 Fed. Cas. No. 6,170, 1 Cranch C. C. 91.

See 30 Cent. Dig. tit. "Judgment," § 696.

24. Wicker *v.* Schofield, 61 Ga. 135.

25. Fannin *v.* Durdin, 54 Ga. 476; Huntington *v.* Emery, 74 Md. 67, 21 Atl. 495; Burling *v.* Freeman, 2 Hun (N. Y.) 661.

26. *Georgia.*— Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280.

Kansas.— Mason *v.* Kansas City Circular R. Co., 58 Kan. 817, 51 Pac. 284.

Texas.— Johnson *v.* Dowling, 1 Tex. App. Civ. Cas. § 1090.

Wisconsin.— Stahl *v.* Chicago, etc., R. Co., 94 Wis. 315, 68 N. W. 954.

United States.— Ringgold *v.* Elliot, 20 Fed. Cas. No. 11,844, 2 Cranch C. C. 462.

But *compare* Anderson *v.* Anderson, 18 B. Mon. (Ky.) 95.

Judgment on amended complaint.— Where an amended complaint, on which judgment is rendered, is unobjectionable, the judgment will not be set aside because of the fact that the original complaint did not state a cause of action. Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51.

27. *Iowa.*— Heathcote *v.* Haskins, 74 Iowa 570, 38 N. W. 419.

Minnesota.— Sheffield *v.* Mullin, 28 Minn. 251, 9 N. W. 756.

Nebraska.— Munro *v.* Callahan, 55 Nebr. 75, 75 N. W. 151, 70 Am. St. Rep. 366.

New Jersey.— Kelly *v.* Bell, 17 N. J. L. 270.

North Carolina.— The action of the trial court in setting aside a judgment for newly discovered evidence is discretionary and not subject to review. But this action should be taken only in cases of manifest injustice and where there is no other relief obtainable, and not where the new evidence is merely impeaching or cumulative. Turner *v.* Davis, 132 N. C. 187, 43 S. E. 637.

Oregon.— Wells *v.* Wall, 1 Oreg. 295.

Texas.— Krall *v.* Campbell Printing-Press, etc., Co., 79 Tex. 556, 15 S. W. 565; Fitz-

and could not have discovered it in time to adduce it at the trial, by the exercise of due diligence,[28] and that it is material and such as to affect the decision of the issue[29] and not merely cumulative or additional to that which was introduced at the trial.[30]

11. DISOBEDIENCE OF ORDER OF COURT. Where plaintiff enters judgment in disobedience to an injunction forbidding the further prosecution of the action, or in disregard of a pending order for a new trial, the judgment will be set aside.[31]

12. STATUTORY GROUNDS FOR VACATING — a. Necessity For Excusing Default. A defendant seeking to be relieved against a judgment taken against him through his "mistake, inadvertence, surprise, or excusable neglect," or "unavoidable casualty or misfortune," or other statutory grounds, must show a good excuse for failing to defend himself at the proper time; it is not enough that he has a meritorious defense to the action; he must give a sufficient reason for the omission to plead it in due season.[32]

b. Mistake — (i) *IN GENERAL.* Statutes generally authorize the opening or

gerald *v.* Compton, 28 Tex. Civ. App. 202, 67 S. W. 131.

Wisconsin.— Cooley *v.* Gregory, 16 Wis. 303.

United States.— Heckling *v.* Allen, 15 Fed. 196, 4 McCrary 303.

Canada.— Brousseau *v.* Déchêne, 3 Quebec Pr. 397.

See 30 Cent. Dig. tit. "Judgment," § 716.

Compare Ex p. Davidge, 72 S. C. 16, 51 S. E. 269.

In Alabama it is provided by statute (Ala. Code, § 2407) that a judgment may be opened on the discovery of a written release of the claim sued on; but this does not apply where after judgment on a promissory note a paper is found showing that the consideration on which the note was supposed to be given had no existence at the time of its execution on account of previous payments. Davis *v.* McCampbell, 37 Ala. 609.

Impeachment of evidence already used.— Where plaintiff in a suit relied on an existing judgment, which was received in evidence without objection from defendant, and recovered a judgment, it cannot be set aside on the ground that the judgment so relied on was afterward set aside as fraudulent. Peeples *v.* Ulmer, 64 S. C. 496, 42 S. E. 429.

Evidence used on motion for new trial.— Where a motion for a new trial has been overruled on the ground that newly discovered evidence on which such motion was based was not of sufficient importance for that purpose, the same evidence cannot be made the basis of a proceeding to set the judgment aside. New York *v.* Brady, 115 N. Y. 599, 22 N. E. 237.

Evidence to make new parties.— A judgment will not be vacated because plaintiff thinks he has discovered a partner of defendant, in order that he may join such supposed partner in a new action. Wilkins *v.* Budd, 6 N. J. L. 153.

28. *Alabama.*— Bruce *v.* Williamson, 50 Ala. 313.

Arkansas.— Robinson *v.* Davis, 66 Ark. 429, 51 S. W. 66.

Georgia.— Gladden *v.* Cobb, 80 Ga. 11, 6 S. E. 163.

Iowa.— Heathcote *v.* Haskins, 74 Iowa 566, 38 N. W. 417.

Kentucky.— Moore *v.* Rogers, 86 S. W. 977, 27 Ky. L. Rep. 827.

Missouri.— Stephens *v.* Gallagher, 42 Mo. App. 245.

New York.— Merrifield *v.* Bell, 14 N. Y. Suppl. 322.

North Carolina.— Williamson *v.* Boykin, 104 N. C. 100, 10 S. E. 87.

Pennsylvania.— Irwin's Appeal, 9 Pa. Cas. 479, 12 Atl. 840.

United States.— U. S. *v.* Millinger, 7 Fed. 187, 19 Blatchf. 202.

See 30 Cent. Dig. tit. "Judgment," §§ 715, 716.

29. Mueller *v.* Marsh, 116 Mich. 375, 74 N. W. 513; Boswell *v.* Coaks, 6 Reports 167.

30. Lashley *v.* King, 20 Ind. 232; Turner *v.* Davis, 132 N. C. 187, 43 S. E. 637; Briggs *v.* U. S., 29 Ct. Cl. 178. But see Levy *v.* Joyce, 1 Bosw. (N. Y.) 622.

31. Lobdell *v.* Livingston, 1 Sandf. (N. Y.) 661; Bennett *v.* Le Roy, 5 Abb. Pr. (N. Y.) 55; Rothenhausler *v.* Rothenhausler, 6 Wkly. Notes Cas. (Pa.) 560.

32. *California.*— Reilly *v.* Ruddock, 41 Cal. 312; People *v.* O'Connell, 23 Cal. 281; Harlan *v.* Smith, 6 Cal. 173.

Georgia.— Mitchell *v.* Allen, 110 Ga. 282, 34 S. E. 851; Fleetwood *v.* Equitable Mortg. Co., 108 Ga. 811, 33 S. E. 1014.

Illinois.— Utley *v.* Cameron, 87 Ill. App. 71.

Indiana.— Bass *v.* Smith, 60 Ind. 40; Jelley *v.* Gaff, 56 Ind. 331; Berry *v.* Seitz, 15 Ind. 69; American Brewing Co. *v.* Jergens, 21 Ind. App. 595, 52 N. E. 820.

Iowa.— Walker *v.* Clark, 8 Iowa 474.

Minnesota.— Moran *v.* Mackey, 32 Minn. 266, 20 N. W. 159.

Missouri.— Edwards *v.* Watkins, 17 Mo. 273.

Nebraska.— Burke *v.* Pepper, 29 Nebr. 320, 45 N. W. 466; Spencer *v.* Thistle, 13 Nebr. 227, 13 N. W. 214.

New York.— Cowton *v.* Anderson, 1 How. Pr. 145; Johnson *v.* Clark, 6 Wend. 517; Post *v.* Wright, 1 Cai. 111; McKinstry *v.* Edwards, 2 Johns. Cas. 113.

vacation of a judgment taken against a defendant by mistake,[33] provided he excuses the mistake and explains what it was and how it occurred.[34] But this applies only to mistakes of fact, not to mistakes of law.[35] And if the statute gives the right to open or vacate a judgment taken against a party through "his" mistake, no mistake made by any other person will justify this action,[36] although in the absence of such a restriction the mistake may be one made by plaintiff, whereby he fails to secure all he is entitled to,[37] or a mutual mistake or misunderstanding of the parties,[38] or a mistake of the court arising from misinformation or misunderstanding as to matters of fact,[39] or even the mistake of an entire stranger,

North Carolina.— Clement *v.* Ireland, 129 N. C. 220, 39 S. E. 838.

Pennsylvania.— Letchworth *v.* Bunting, 12 Pa. Co. Ct. 587; Martin *v.* Hall, 1 Phila. 233; Emerson *v.* Knight, 1 Phila. 121. And see E. T. Burrowes Co. *v.* Cambridge Springs Co., 26 Pa. Super. Ct. 315.

Texas.— Foster *v.* Martin, 20 Tex. 118.

Wisconsin.— Milwaukee Mut. Loan, etc., Soc. *v.* Jagodzinski, 84 Wis. 35, 54 N. W. 102; Edwards *v.* Janesville, 14 Wis. 26.

33. See the statutes of the different states. And see Baxter *v.* Carrol, (N. J. Ch. 1898) 41 Atl. 407; Pew *v.* Hastings, 1 Barb. Ch. (N. Y.) 452; Mead *v.* Morris, 21 Wis. 310. But *compare* Lawton *v.* Branch, 62 Ga. 350.

In North Dakota it has been held that to warrant the setting aside of a judgment by default on the ground of mistake under a statute in that state, the mistake must consist in something done in the case, either by the court or a party, which was not intended to be done. Sargent *v.* Kindred, 5 N. D. 8, 63 N. W. 151.

Mistake in the instrument sued on may furnish cause for setting the judgment aside; as where by mistake judgment was entered on a note never executed by the party charged. Reid *v.* Case, 14 Wis. 429. But this is not so where the party's mistake was as to the contents of the instrument; as where he supposed that a bill of sale which he had given contained a warranty of title only, whereas it warranted both title and soundness. Stewart *v.* Williams, 33 Ala. 492.

Mistake as to pleading.— The court may vacate a judgment against a sheriff, entered for want of answer to the complaint, where he shows that his answer to an order to show cause was intended as an answer to the complaint. Whitney *v.* Sherin, 74 Minn. 4, 76 N. W. 787. And a judgment was vacated where defendant suffered a default in consequence of a mistake as to the best form of presenting his defense. Arnold *v.* Norfolk, etc., Hosiery Co., 19 N. Y. Suppl. 957.

A mistake in the execution issued on a judgment, although it results in plaintiff's obtaining less than he is entitled to, is not cause for vacating the judgment. Amazon Ins. Co. *v.* Partridge, 49 Vt. 121; Smith *v.* Howard, 41 Vt. 74.

34. Douglass *v.* Brooks, 38 Cal. 670.

Inexcusable mistake.— Where defendant, on the strength of an allegation in the complaint, admitted that plaintiff was the administrator of a deceased party, whereas the probate records would show that such was not the fact, the mistake is not one entitling him to be relieved of a judgment taken against him. Martin *v.* Fowler, 51 S. C. 164, 28 S. E. 312.

35. *Connecticut.*— Jartman *v.* Pacific F. Ins. Co., 69 Conn. 355, 37 Atl. 970.

Indiana.— Thompson *v.* Harlow, 150 Ind. 450, 50 N. E. 474; Thacker *v.* Thacker, 125 Ind. 489, 25 N. E. 595.

Iowa.— Stryker *v.* Rivers, 47 Iowa 108.

Kentucky.— Chaffin *v.* Fulkerson, 95 Ky. 277, 24 S. W. 1066, 15 Ky. L. Rep. 635.

New York.— Jellinghaus *v.* New York Ins. Co., 5 Bosw. 678; *In re* Carr, 19 N. Y. Suppl. 647.

North Carolina.— Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118.

Pennsylvania.— Clarion, etc., R. Co. *v.* Hamilton, 127 Pa. St. 1, 17 Atl. 752.

South Dakota.— That defendant was erroneously advised and honestly believed that the payment of certain delinquent taxes and of certain costs was essential to his right to make a defense or file an answer in a suit concerning land is no **ground for** setting aside a judgment by **default against him**, the mistake being one of law. **Keenan** *v.* Daniells, 1904) 99 N. W. 853.

Compare Walton *v.* Jones, 53 Ga. 91, holding that where an administrator, sued on a debt of his intestate, fails to plead *plene administravit*, under the belief that the default judgment taken against him will only bind property of the estate subsequently coming to his hands, the court in its discretion may open the judgment and permit him to plead as he should have done.

In California by statute the "mistake" which will authorize the courts to relieve a party against a judgment may be either a mistake of fact or of law. Cal. Civ. Code, § 1576; Douglass *v.* Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247.

36. Center Tp. *v.* Marion County Com'rs, 110 Ind. 579, 10 N. E. 291; Boyden *v.* Williams, 80 N. C. 95.

37. Newton *v.* Weaver, 18 Fed. Cas. No. 10,193, 2 Cranch C. C. 685.

38. Benge *v.* Potter, 55 S. W. 431, 21 Ky. L. Rep. 1389. But see Stites *v.* McGee, 37 Oreg. 574, 61 Pac. 1129, refusing to open a consent decree on the ground of mutual mistake in the stipulation on which it was founded.

39. Cooper *v.* Duncan, 20 Mo. App. 355; Patterson *v.* Hochster, 21 N. Y. App. Div.

which affects the progress of the cause or the entry of judgment.[40] But a motion for relief on this ground will not be granted where the defense set up in the moving papers is entirely new, and not disclosed by the original pleadings,[41] and the motion has been denied where the judgment was rendered after a trial at which the moving party was present.[42]

(II) *As to Cause of Action.* A judgment will not generally be set aside on account of a mistake as to the identity of the suit or the cause of action, as where the party erroneously supposes the action is brought upon one claim or obligation, although it is really upon another,[43] unless there are strong circumstances to show that the mistake was natural and excusable and productive of decided injustice.[44] But a mistake as to the capacity in which the party is sued, as where he supposes the action to be against him in an official capacity, when he is really sued as an individual or *vice versa* may be ground for vacating the judgment,[45] and this is true of a mistake as to plaintiff's capacity or title to sue.[46]

(III) *As to Time For Pleading or Trial* — (A) *In General.* A party who makes an honest and excusable mistake as to the time when he is required to plead or answer, or as to the time of the trial, whereby he is prevented from making his defense in due season, may have judgment opened or set aside;[47] but

432, 47 N. Y. Suppl. 553; Warren *v.* Harvey, 92 N. C. 137; Hughes *v.* Miller, 192 Pa. St. 365, 43 Atl. 976.

A mistake of a referee may also be ground for vacating the judgment. Fortunato *v.* New York, 2 Misc. (N. Y.) 406, 21 N. Y. Suppl. 963.

Judgment not intended but correct on the facts.— Where the judgment entered on the journal is different from what was intended by the court, but is shown to be such as ought to have been rendered, it will not be vacated or modified as entered by mistake. Murphy *v.* Swadner, 34 Ohio St. 672.

40. A mistake in the transmission of a telegram, whereby a party is misled as to the time or manner in which certain steps in the cause must be taken by him, will be ground for opening the judgment. Thum *v.* Pyke, 6 Ida. 359, 55 Pac. 864; Volland *v.* Wilcox, 17 Nebr. 46, 22 N. W. 71.

41. Kehler *v.* New Orleans Ins. Co., 23 Fed. 709.

42. Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53.

43. *Alabama.*— Dial *v.* Gambrel, 126 Ala. 151, 28 So. 1.

Indiana.— Williams *v.* Grooms, 122 Ind. 391, 24 N. E. 158; Lake *v.* Jones, 49 Ind. 297.

Kentucky.— Coburn *v.* Currens, 1 Bush 242.

Nebraska.— Cleland *v.* Hamilton L. & T. Co., 55 Nebr. 13, 75 N. W. 239.

New York.— Devlin *v.* Boyd, 69 Hun 328, 23 N. Y. Suppl. 523.

North Carolina.— Reed *v.* Farmer, 69 N. C. 539.

44. Balfour-Guthrie Inv. Co. *v.* Sawday, 133 Cal. 228, 65 Pac. 400; Sewall *v.* Weeman, 31 Me. 539; Martin *v.* Curley, 70 Minn. 489, 73 N. W. 405; Bertline *v.* Bauer, 25 Wis. 486.

Failure to credit payments.— Where there was an agreement to credit the amount paid on a note, and the debtor has no reason to doubt that this has been done, and fails to defend on the faith thereof, not knowing that plaintiff claims an unjust amount, he may be relieved against the judgment to the extent of payments not credited. Doyle *v.* Reilly, 18 Iowa 108, 85 Am. Dec. 582.

45. Capital Sav. Bank, etc., Co. *v.* Swan, 100 Iowa 718, 69 N. W. 1065. *Compare* Williamson *v.* Cocke, 124 N. C. 585, 32 S. E. 963, holding that one who is sued both as administrator and individually, who, when the summons is shown to him, says he knows all about it, and walks away from the officer before it is read to him, and, supposing he is sued only as administrator, makes no defense, cannot have a default judgment set aside.

46. Western Nat. Bank *v.* Paul, (N. J. Sup. 1901) 49 Atl. 830.

47. *California.*— Miller *v.* Carr, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180; Buell *v.* Emerich, 85 Cal. 116, 24 Pac. 644; Cottrell *v.* Cottrell, 83 Cal. 457, 23 Pac. 531; Reidy *v.* Scott, 53 Cal. 69; Heinlen *v.* Centerville, etc., Irr. Ditch Co., (1884) 4 Pac. 417.

Montana.— Jensen *v.* Barbour, 12 Mont. 566, 31 Pac. 592.

New York.— Manwaring *v.* Lippincott, 52 N. Y. App. Div. 526, 65 N. Y. Suppl. 428; Dunham *v.* Clark, 2 How. Pr. 163; Jackson *v.* Stiles, 3 Cai. 133.

North Dakota.— Braseth *v.* Bottineau County, (1904) 100 N. W. 1082.

Oregon.— Coos Bay Nav. Co. *v.* Endicott, 34 Oreg. 573, 57 Pac. 61; Hanthorn *v.* Oliver, 32 Oreg. 57, 51 Pac. 440, 67 Am. St. Rep. 518.

Washington.— Dalgardno *v.* Trumbull, 25 Wash. 362, 65 Pac. 528; Titus *v.* Larsen, 18 Wash. 145, 51 Pac. 351.

Wisconsin.— Johnson *v.* Eldred, 13 Wis. 482.

United States.— Clark *v.* Sohier, 5 Fed. Cas. No. 2,835, 1 Woodb. & M. 368.

See 30 Cent. Dig. tit. "Judgment," § 274.

not where the mistake was the result of his own heedlessness or lack of due attention.[48]

(B) *Misinformation as to Time of Trial.* A default judgment should be set aside where the absence of defendant and his counsel was caused by their reliance on a statement made officially by the judge of the court that the case could not be reached or would not be tried before a certain date, or that nothing further would be done without notifying counsel, notwithstanding which a default was taken,[49] or where they were similarly misinformed and misled by the clerk of the court,[50] or by the calendar or official list of cases set for trial,[51] or by counsel for plaintiff.[52] But some cases hold that even such official assurances will not relieve litigants or their counsel from the duty of exercising the utmost vigilance in watching the progress of their cases.[53]

(IV) *As to Process.* A person served with a summons must make sure that he understands what it is, by reading it or having it read to him; he cannot have a default set aside on the ground that he mistook it for a subpœna or for a notice in another suit,[54] unless he failed to receive a copy of the writ and was misled by

48. O'Connor *v.* Ellmaker, 83 Cal. 452, 23 Pac. 531; Elliott *v.* Shaw, 16 Cal. 377; Grosvenor *v.* Doyle, 50 Ill. App. 47; Bishop *v.* Donnell, 171 Mass. 563, 51 N. E. 170 (where the summons was erroneously dated six years before the real time of its issuance, but defendant was not misled by the mistake); Churchill *v.* Brooklyn L. Ins. Co., 88 N. C. 205.

Adjournment of court.— Where a defendant was duly summoned to appear at a day in a regular term, a judgment entered on his default will not be set aside merely because the court adjourned before that day arrived. Miller *v.* Burton, 121 Ind. 224, 23 N. E. 84.

Mistake as to court.— A judgment will not be set aside because the party defaulted mistook the court in which his case was pending. Robertson *v.* Bergen, 10 Ind. 402.

Misunderstanding counsel.— It is not sufficient ground for vacating a judgment that the party misunderstood his attorney's statement as to when the court met. Ross *v.* Louisville, etc., R. Co., 92 Ky. 583, 18 S. W. 456, 13 Ky. L. Rep. 801.

49. *Alabama.*— *Ex p.* Heflin, 54 Ala. 95. *Compare* National Fertilizer Co. *v.* Hinson, 103 Ala. 532, 15 So. 844.

California.— Melde *v.* Reynolds, 129 Cal. 308, 61 Pac. 932.

Georgia.— Fleetwood *v.* Equitable Mortg. Co., 108 Ga. 811, 33 S. E. 1014; Harralson *v.* McArthur, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689. *Compare* Deering Harvester Co. *v.* Thompson, 116 Ga. 418, 42 S. E. 772; Farmer *v.* Perry, 46 Ga. 543.

Indiana.— Cruse *v.* Cunningham, 79 Ind. 402; Ratliff *v.* Baldwin, 29 Ind. 16, 92 Am. Dec. 330. *Compare* Cresswell *v.* White, 3 Ind. App. 306, 29 N. E. 612; Western Union Tel. Co. *v.* Griffin, 1 Ind. App. 46, 27 N. E. 113.

Iowa.— Jean *v.* Hennessy, 74 Iowa 348, 37 N. W. 771, 7 Am. St. Rep. 486; Buena Vista County *v.* I. F. & S. C. R. Co., 49 Iowa 657.

Kansas.— Sanders *v.* Hall, 37 Kan. 271, 15 Pac. 197. But a default cannot be excused by reliance on a statement made by the judge out of court that the case would not be tried, such statement not being a judicial determination. Missouri, etc., R. Co. *v.* Crowe, 9 Kan. 496.

Louisiana.— A default will not be excused by the fact that counsel misunderstood remarks of the court, and erroneously supposed that no business would be transacted at a particular time. Mann *v.* Mann, 33 La. Ann. 351.

New York.— Tyler *v.* Olney, 12 Johns. 378.

North Carolina.— Pickens *v.* Fox, 90 N. C. 369.

Virginia.— Fairfax *v.* Alexandria, 28 Gratt. 16.

See 30 Cent. Dig. tit. "Judgment," § 291.

50. *Kansas.*— Nash *v.* Denton, (1898) 51 Pac. 896.

Montana.— Anaconda Min. Co. *v.* Saile, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472.

Nebraska.— Thompson *v.* Sharp, 17 Nebr. 69, 22 N. W. 78.

New York.— Hewitt *v.* Hazard, 33 N. Y. App. Div. 630, 53 N. Y. Suppl. 340.

Wisconsin.— Black *v.* Hurlbut, 73 Wis. 126, 40 N. W. 673.

51. Silverman *v.* Childs, 107 Ill. App. 522; Carpenter *v.* Tuffs, 2 How. Pr. (N. Y.) 166. *Compare* Stewart *v.* Gorham, 122 Iowa 669, 98 N. W. 512.

Unofficial publications, such as newspapers, should not be relied on for information as to the time when cases will be reached or tried. If this is done, it will not excuse a default. Kellam *v.* Todd, 114 Ga. 981, 41 S. E. 39. But *compare* Watson *v.* San Francisco, etc., R. Co., 41 Cal. 17.

52. Rodgers *v.* Furse, 83 Ga. 115, 9 S. E. 669; Rabinowitz *v.* Haimowitz, 91 N. Y. Suppl. 11.

53. Elton *v.* Brettschneider, 33 Ill. App. 355; Stewart *v.* Cannon, 66 Minn. 64, 68 N. W. 604; Deering *v.* Creighton, 26 Oreg. 556, 38 Pac. 710; Wilson *v.* Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086.

54. *Indiana.*— Lowe *v.* Hamilton, 132 Ind. 406, 31 N. E. 1117.

Iowa.— Teabout *v.* Roper, 62 Iowa 603, 17 N. W. 906.

the officer as to its purport,[55] or where the copy was so illegible that it could not be ascertained upon whom a notice of appearance should be served.[56]

(v) *As to Employment of Counsel.* A defendant cannot ordinarily procure the setting aside of a judgment against him, on the ground of his mistaken belief that he had retained an attorney to protect his interests; he must see to it that the attorney understands and accepts the retainer; otherwise his failure to pay personal attention to the case is inexcusable negligence.[57] But where the mistake was as to the employment of counsel by a person whom defendant justifiably relied on to attend to that matter as a co-defendant, or a business agent, it may furnish cause for vacating the judgment.[58]

(vi) *As to Validity of Proceedings.* A mistake as to the regularity of the proceedings is one of law, not of fact; and therefore a defendant cannot have a judgment set aside because he erroneously believed that the service of process upon him was illegal,[59] or that the proceedings were otherwise irregular or invalid.[60]

(vii) *Resulting From Ignorance.* The illiteracy of a defendant, or ignorance of the English language, of the course of judicial procedure, or of his rights and duties, will furnish no excuse for failing to defend the action, nor justify the vacation of the judgment, where he at least knew that he had been sued, and neglected to ask information or advice from others,[61] although it may be otherwise where such ignorance prevented him from discovering that legal proceedings had been taken against him until after the rendition of the judgment,[62] or where plaintiff has taken a fraudulent or deceitful advantage of his ignorance.[63]

Kentucky.— Dean *v.* Noel, 70 S. W. 406, 24 Ky. L. Rep. 969.

Missouri.— State *v.* O'Neill, 4 Mo. App. 221.

New York.— Ball *v.* Mander, 19 How. Pr. 468; Yates *v.* Woodruff, 4 Edw. Ch. 700.

North Carolina.— White *v.* Snow, 71 N. C. 232.

See 30 Cent. Dig. tit. "Judgment," § 275.

55. Hite *v.* Fisher, 76 Ind. 231.

56. Wheeler *v.* Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

57. *Georgia.*— Howell *v.* Glover, 65 Ga. 466.

New York.— Rogers *v.* Latson, 2 How. Pr. 277.

North Carolina.— Finlayson *v.* American Acc. Co., 109 N. C. 196, 13 S. E. 739; Hyman *v.* Capehart, 79 N. C. 511; Burke *v.* Stokely, 65 N. C. 569.

Texas.— Davis *v.* Darling, 20 Tex. 803; Ames Iron Works *v.* Chinn, 20 Tex. Civ. App. 382, 49 S. W. 665.

Washington.— Northern Pac., etc., R. Co. *v.* Black, 3 Wash. 327, 28 Pac. 538.

West Virginia.— Post *v.* Carr, 42 W. Va. 72, 24 S. E. 583.

United States.— School Dist. No. 13 *v.* Lovejoy, 16 Fed. 323, 3 McCrary 558.

See 30 Cent. Dig. tit. "Judgment," § 276.

But see Panesi *v.* Boswell, 12 Heisk. (Tenn.) 323, holding that a misunderstanding between defendant and his attorney, as to whether the latter had been employed, is ground for setting aside a judgment by default.

58. *Arkansas.*— Kupferle *v.* Merchants' Nat. Bank, 32 Ark. 717.

Indiana.— Alvord *v.* Gere, 10 Ind. 385.

Iowa.— Barto *v.* Sioux City Electric Co., 119 Iowa 179, 93 N. W. 268; Bennett *v.* Carey, 72 Iowa 476, 34 N. W. 291.

Minnesota.— Glaeser *v.* St. Paul, 67 Minn. 368, 69 N. W. 1101.

Montana.— Morse *v.* Callantine, 19 Mont. 87, 47 Pac. 635.

New Jersey.— Abrams *v.* Wood, 4 N. J. L. 30.

North Carolina.— Nicholson *v.* Cox, 83 N. C. 44, 35 Am. Rep. 556.

See 30 Cent. Dig. tit. "Judgment," § 276.

59. Sergeant Ct. of App. *v.* George, 5 Litt. (Ky.) 198; Plano Mfg. Co. *v.* Murphy, 16 S. D. 380, 92 N. W. 1072, 102 Am. St. Rep. 692.

60. Jartman *v.* Pacific F. Ins. Co., 69 Conn. 355, 37 Atl. 970 (mistake in believing that the writ was fatally defective); Bliss *v.* Treadway, 1 How. Pr. (N. Y.) 245 (where defendant neglected to plead because he supposed that a misstatement of his christian name in the complaint vitiated the proceedings); Jackson *v.* Johnson, 1 Wend. (N. Y.) 284.

61. *California.*— Chase *v.* Swain, 9 Cal. 130.

Georgia.— Sutton *v.* Gunn, 86 Ga. 652, 12 S. E. 979.

Kentucky.— Chaffin *v.* Fulkerson, 95 Ky. 277, 24 S. W. 1066, 15 Ky. L. Rep. 635.

Missouri.— Heisterhagen *v.* Garland, 10 Mo. 66.

New York.— New York *v.* Green, 1 Hilt. 393; Beckman *v.* Franker, 3 Cai. 95.

North Carolina.— Abrams *v.* Virginia F. Ins. Co., 93 N. C. 60.

Texas.— Pierce *v.* Cole, 17 Tex. 259.

See 30 Cent. Dig. tit. "Judgment," § 289.

62. Nash *v.* Cars, 92 Ind. 216; Wood *v.* Schoenauer, 85 Minn. 138, 88 N. W. 411; Lawrence *v.* Price, 24 Pa. Co. Ct. 524.

63. Adams *v.* Citizens' State Bank, 70 Ind. 89.

c. Surprise. A judgment by default, obtained in such a manner as to constitute a legal surprise to defendant, may be set aside.[64] But this does not include surprise occasioned by a ruling or decision of the court,[65] the unexpected introduction or rejection of evidence at the trial,[66] or the calling of the case for trial before defendant thought it could possibly be reached.[67] The unanticipated transfer of the case to another court may constitute legal surprise,[68] and so may the taking of judgment contrary to an agreement to postpone the time for answering or for the trial,[69] or a mistake as to the employment of counsel,[70] or a misunderstanding among several counsel for defense as to who was charged with the duty of filing the answer.[71] There is no legal "surprise" where the judgment was given by consent of the party's attorney, and the contention is merely that he exceeded his authority.[72]

d. Excusable Neglect — (i) *In General.* Under the statutes in many states a party may be relieved against a judgment taken against him through his "excusable neglect," which means a lack of attention to the progress of his cause, or failure to attend the trial, which is excused or justified by the peculiar circumstances of the case.[73] Such negligence may be excusable where it is caused by his

64. Bidleman *v.* Kewen, 2 Cal. 248; Dupries *v.* Milwaukee, etc., R. Co., 20 Minn. 156; Binsse *v.* Barker, 13 N. J. L. 263, 23 Am. Dec. 720; Delancey *v.* Brownell, 4 Johns. (N. Y.) 136; New York *v.* Sands, 2 Cai. (N. Y.) 378.

Representation by counsel.— A judgment may be vacated for surprise or excusable neglect, although defendant was represented by counsel. *Ex p.* Roundtree, 51 S. C. 405, 29 S. E. 66.

Necessity of diligence.— Surprise is not ground for setting aside a judgment, if the party affected could have guarded against it by proper care and diligence. Washer *v.* White, 16 Ind. 136; Chapman *v.* Clevinger, 10 Ind. 23.

65. Carlisle *v.* Barnes, 45 Misc. (N. Y.) 6, 90 N. Y. Suppl. 810 (allowance of an amendment to conform to the proof); Ean *v.* Chicago, etc., R. Co., 101 Wis. 166, 76 N. W. 329 (decision holding a complaint bad on other grounds than those urged); Breed *v.* Ketchum, 51 Wis. 164, 7 N. W. 550 (refusal of the court to continue the cause). But see Empire Min. Co. *v.* Propeller Towboat Co., 60 S. C. 457, 38 S. E. 602 (approving the vacating of a default because defendant's attorney was surprised by the court's decision that it had jurisdiction of the case); Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

On overruling demurrer.— Where defendant filed a demurrer and an answer, and the demurrer was overruled, and judgment given against him on the insufficiency of his answer, and he alleged surprise, because, in the absence of a motion for judgment on the pleadings, he had no expectation that the answer would be passed on, it was held that the judgment should be vacated. Heilbron *v.* Campbell, (Cal. 1890) 23 Pac. 1032. And see City St. Imp. Co. *v.* Emmons, (Cal. 1903) 71 Pac. 332.

Mistake as to intention of court.— Where a party or his counsel is taken by surprise, on account of a misapprehension as to the intention of the court, it is ground for setting aside the judgment. Winter *v.* State, 18 Ga. 275.

66. Robinson *v.* Davis, 66 Ark. 429, 51 S. W. 66; Hobbs *v.* Tipton County, 122 Ind. 180, 23 N. E. 714; Illinois Bank *v.* Hicks, 4 J. J. Marsh. (Ky.) 128. But *compare* Carlisle *v.* Barnes, 45 Misc. (N. Y.) 6, 90 N. Y. Suppl. 810.

67. Andres *v.* Kridler, 49 Nebr. 535, 68 N. W. 938.

68. Bennett *v.* Jackson, 34 W. Va. 62, 11 S. E. 734. *Compare* Phillip *v.* Davis, (Iowa 1899) 78 N. W. 810.

69. Chicago, etc., R. Co. *v.* Gillett, 38 Iowa 434; Durham *v.* Commercial Nat. Bank, 45 Oreg. 385, 77 Pac. 902; Dunlop *v.* Schubert, 97 Wis. 135, 72 N. W. 350. *Compare* Huntington *v.* Emery, 74 Md. 67, 21 Atl. 495. And see *supra*, IX, E, 4, b.

70. Loree *v.* Reeves, 2 Mich. 133; *Ex p.* Rountree, 51 S. C. 405, 29 S. E. 66.

71. Bradley *v.* McPherson, (N. J. Ch. 1903) 56 Atl. 303.

72. Hairston *v.* Garwood, 123 N. C. 345, 31 S. E. 653.

73. See the statutes of the different states. And see the following cases:

California.— Grady *v.* Donahoo, 108 Cal. 211, 41 Pac. 41; Burns *v.* Scooffy, 98 Cal. 271, 33 Pac. 86; Dow *v.* Ross, 90 Cal. 562, 27 Pac. 409.

Georgia.— Brucker *v.* O'Connor, 115 Ga. 95, 41 S. E. 245.

Indiana.— Kreite *v.* Kreite, 93 Ind. 583; Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1.

Kansas.— Johnson *v.* Ware, 64 Kan. 840, 73 Pac. 99.

Massachusetts.— Keith *v.* McCaffrey, 145 Mass. 18, 12 N. E. 419.

Nevada.— Haley *v.* Eureka County Bank, 20 Nev. 410, 22 Pac. 1098; State *v.* Consolidated Virginia Min. Co., 13 Nev. 194; Evans *v.* Cook, 11 Nev. 69; Harper *v.* Malloy, 4 Nev. 447.

New York.— Born *v.* Schrenkeisen, 52 N. Y. Super. Ct. 219; Filon *v.* Durkin, 16 N. Y. Suppl. 217; Egan *v.* Rooney, 38 How. Pr.

failure to receive notice of the action or the trial,[74] by an accident or chain of accidents which he could not have avoided or controlled,[75] by a genuine and excusable mistake or miscalculation,[76] by his reliance upon assurances given him by those upon whom he had a right to depend, as the adverse party or counsel retained in the case, or a competent business adviser, that it would not be necessary for him to take an active part in the case, or that the suit would not be prosecuted,[77] by his relying on another person to attend to the case for him, when

121; Chauncey *v.* Baldwin, 2 How. Pr. 205. And see Carlisle *v.* Barnes, 92 N. Y. Suppl. 924, 102 N. Y. App. Div. 582 [*affirming* 45 Misc. 6, 90 N. Y. Suppl. 810].

North Carolina.— Marsh *v.* Griffin, 123 N. C. 660, 31 S. E. 840; Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118; Taylor *v.* Pope, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530; Francks *v.* Sutton, 86 N. C. 78; Bradford *v.* Coit, 77 N. C. 72; Griel *v.* Vernon, 65 N. C. 76.

Oregon.— Nye *v.* Bill Nye Gold Min., etc., Co., (1905) 80 Pac. 94; Thompson *v.* Connell, 31 Oreg. 231, 48 Pac. 467, 65 Am. St. Rep. 818; Weiss *v.* Meyer, 24 Oreg. 108, 32 Pac. 1025; Hicklin *v.* McClear, 19 Oreg. 508, 24 Pac. 992.

Pennsylvania.— Guernsey *v.* Hunt, 5 Lanc. L. Rev. 133.

Utah.— Peterson *v.* Crosier, 29 Utah 235, 81 Pac. 860.

Wisconsin.— Behl *v.* Schuette, 95 Wis. 441, 70 N. W. 559; Superior Consol. Land Co. *v.* Dunphy, 93 Wis. 188, 67 N. W. 428; Commercial Bank *v.* McAuliffe, 92 Wis. 242, 66 N. W. 110; Turner *v.* Leathem, 84 Wis. 633, 54 N. W. 100; Milwaukee Mut. Loan, etc., Soc. *v.* Jagodzinski, 84 Wis. 35, 39, 64 N. W. 102; Heinemann *v.* Le Clair, 82 Wis. 135, 57 N. W. 1101; Freiberg *v.* Le Clair, 78 Wis. 163, 47 N. W. 178; Black *v.* Hurlbut, 73 Wis. 126, 40 N. W. 673; Wheeler, etc., Mfg. Co. *v.* Monahan, 63 Wis. 194, 23 N. W. 109; Pier *v.* Millerd, 63 Wis. 33, 22 N. W. 759; Cleveland *v.* Burnham, 55 Wis. 598, 13 N. W. 677, 680; Whitney *v.* Karner, 44 Wis. 563; Pringle *v.* Dunn, 39 Wis. 435; Quaw *v.* Lameraux, 36 Wis. 626; Landon *v.* Burke, 33 Wis. 452; Stoppelfeldt *v.* Milwaukee, etc., R. Co., 29 Wis. 688; Stafford *v.* McMillan, 25 Wis. 566; Ætna L. Ins. Co. *v.* McCormick, 20 Wis. 265; Flanders *v.* Sherman, 18 Wis. 575; Butler *v.* Mitchell, 17 Wis. 52; Johnson *v.* Eldred, 13 Wis. 482.

See 30 Cent. Dig. tit. "Judgment," § 709.

Negligence of agent.— Generally the negligence of an agent is imputable to the principal, and the latter cannot excuse his default by his reliance on the agent, unless the agent's negligence was also excusable. Morris *v.* Liverpool, etc., Ins. Co., 131 N. C. 212, 42 S. E. 577; Texas F. Ins. Co. *v.* Berry, 34 Tex. Civ. App. 228, 76 S. W. 219.

Negligence of officer of municipal corporation.— That a default judgment was rendered against a municipal corporation through the negligence of one of its officers, who had knowledge of the action, is no ground for opening the judgment. Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1. And see Carondelet *v.* Allen, 13 Mo. 556.

74. *California.*— Clark *v.* Oyharzabal, 129 Cal. 328, 61 Pac. 1119.

Indiana.— Knowlton *v.* Smith, 163 Ind. 294, 71 N. E. 895.

Kansas.— Board of Education *v.* National Bank of Commerce, 4 Kan. App. 438, 46 Pac. 36.

Minnesota.— Queal *v.* Bulen, 89 Minn. 477, 95 N. W. 310.

Montana.— Greene *v.* Montana Brewing Co., 32 Mont. 102, 79 Pac. 693.

South Dakota.— Farrar *v.* Consolidated Apex Min. Co., 12 S. D. 237, 80 N. W. 1079.

75. *Illinois.*— Blain *v.* Shaffner, 37 Ill. App. 394.

Minnesota.— Fitzpatrick *v.* Campbell, 58 Minn. 20, 59 N. W. 629.

North Carolina.— Williams *v.* Richmond, etc., R. Co., 110 N. C. 466, 15 S. E. 97. But see Vick *v.* Baker, 122 N. C. 98, 29 S. E. 64.

Ohio.— Selberg *v.* Davidson, 4 Ohio Dec. (Reprint) 270, 1 Clev. L. Rep. 195.

Oregon.— Mitchell, etc., Co. *v.* Downing, 23 Oreg. 448, 32 Pac. 394.

76. *In re* Davis, 15 Mont. 347, 30 Pac. 292; Jensen *v.* Barbour, 12 Mont. 566, 31 Pac. 592.

77. *California.*— Craig *v.* San Bernardino Inv. Co., 101 Cal. 122, 35 Pac. 558.

Colorado.— City Block Directory Co. *v.* App, 4 Colo. App. 350, 35 Pac. 985.

Indiana.— Birch *v.* Frantz, 77 Ind. 199. *Compare* Craig *v.* Major, 139 Ind. 624, 35 N. E. 1098.

Minnesota.— Henderson *v.* Lange, 71 Minn. 468, 74 N. W. 173.

North Carolina.— Francks *v.* Sutton, 86 N. C. 78.

Tennessee.— Rowland *v.* Jones, 2 Heisk. 321.

Washington.— Hull *v.* Vining, 17 Wash. 352, 49 Pac. 537.

Wisconsin.— Wicke *v.* Lake, 21 Wis. 410, 94 Am. Dec. 552.

But see Swift *v.* Berry, 9 Iowa 43.

Unauthorized assurances.— A default is not excused when such assurances were made by an official or private person who had no authority to make them, so that defendant was not justified in relying on them. Harding *v.* R. S. Peale Co., 44 Ill. App. 344; Bowen *v.* Bragunier, 88 Ind. 471.

Indefinite statements.— Defendant cannot excuse a default by showing that he relied on statements in regard to the dismissal of the case, or the probable time of the trial, when they appear to have been vague, indefinite, or lacking in positiveness. Chambers

such other person promised to do so or was chargeable with that duty,[78] or by a well founded belief that the case would not be reached for trial as quickly as it was in fact reached.[79]

(II) *Diligence Required of Suitors.* A party seeking relief against a judgment on the ground of his excusable negligence must clear himself of the imputation of want of due diligence; he cannot have relief if the taking of the judgment appears to have been due to his own carelessness, slothfulness, or indifference to his own rights.[80] Thus to put himself in a position where he can claim relief against an adverse judgment, he must, unless he means to try his own case, retain an attorney practising in the particular court,[81] and see that the attorney understands and accepts the retainer,[82] and in case his counsel dies, or withdraws or is discharged from the case, he must promptly engage another.[83] Further it is his duty to inform his counsel fully of the facts constituting his cause of action or defense,[84] and to be personally active in procuring witnesses, collecting evidence,

v. Butte, 16 Mont. 90, 40 Pac. 71; State *v.* Casey, 9 S. D. 436, 69 N. W. 585; Ray *v.* Northrup, 55 Wis. 396, 13 N. W. 239.

78. *Connecticut.*— Schoonmaker *v.* Albertson, etc., Mach. Co., 51 Conn. 387.

Massachusetts.— Soper *v.* Manning, 158 Mass. 381, 33 N. E. 516.

Missouri.— Wells *v.* Andrews, 133 Mo. 663, 34 S. W. 865.

Montana.— Heardt *v.* McAllister, 9 Mont. 405, 24 Pac. 263.

New Jersey.— Barlow *v.* Burns, 70 N. J. L. 631, 57 Atl. 262.

Washington.— Williams *v.* Breen, 25 Wash. 666, 66 Pac. 103.

79. Cameron *v.* Carroll, 67 Cal. 500, 8 Pac. 45; *In re* Davis, 15 Mont. 347, 39 Pac. 292. But see White *v.* Ryan, 31 Ala. 400; Foote *v.* Branch, 42 Minn. 62, 43 N. W. 782; Desnoyer *v.* McDonald, 4 Minn. 515.

80. *Alabama.*— Elyton Land Co. *v.* Morgan, 88 Ala. 434, 7 So. 249.

California.— Shay *v.* Chicago Clock Co., 111 Cal. 549, 44 Pac. 237.

Georgia.— Athens Leather Mfg. Co. *v.* Myers, 98 Ga. 396, 25 S. E. 503; Griffin *v.* Brewer, 96 Ga. 758, 22 S. E. 284.

Illinois.— Harms *v.* Jacobs, 160 Ill. 589, 43 N. E. 745; Gilchrist Transp. Co. *v.* Northern Grain Co., 107 Ill. App. 531 [*affirmed* in 204 Ill. 510, 68 N. E. 558].

Kansas.— Knauber *v.* Watson, 50 Kan. 702, 32 Pac. 349.

Louisiana.— Brand *v.* Stafford, 28 La. Ann. 51.

Minnesota.— Stickney *v.* Jordain, 50 Minn. 258, 52 N. W. 861; Nauer *v.* Benham, 45 Minn. 252, 47 N. W. 796. And see McClure *v.* Clark, 94 Minn. 37, 101 N. W. 951.

Nevada.— Haley *v.* Eureka County Bank, 20 Nev. 410, 22 Pac. 1098.

New York.— Cohen *v.* Levy, 49 N. Y. App. Div. 638, 62 N. Y. Suppl. 1060; Mullane *v.* Roberge, 21 Misc. 342, 47 N. Y. Suppl. 155.

Pennsylvania.— Fritz *v.* Roney, 9 Pa. Dist. 27.

Rhode Island.— Pierce *v.* East Greenwich Prob. Ct., 19 R. I. 472, 34 Atl. 992.

Texas.— Padgitt *v.* Evans, (Civ. App. 1899) 51 S. W. 513.

Washington.— Moody *v.* Reichow, 38 Wash. 303, 80 Pac. 461; Myers *v.* Landrum, 4 Wash. 762, 31 Pac. 33.

Wisconsin.— Grootemaat *v.* Tebel, 39 Wis. 576.

81. Jett *v.* Herald, 62 S. W. 264, 23 Ky. L. Rep. 9; Union Cent. L. Ins. Co. *v.* Lipscomb, (Tex. Civ. App. 1894) 27 S. W. 307.

Non-resident attorney.— If the attorney retained is not a resident of the jurisdiction, and does not regularly practise there, his failure to attend to the case will not excuse the client's neglect to give it his own attention, his duty being, in such a case, to retain a local attorney also. Manning *v.* Roanoke, etc., R. Co., 122 N. C. 428, 28 S. E. 963.

82. Church *v.* Lacy, 102 Iowa 235, 71 N. W. 338. And see *supra*, IX, E, 12, b, (v).

83. *Maryland.*— Huntington *v.* Emery, 74 Md. 67, 21 Atl. 495.

Missouri.— Judah *v.* Hogan, 67 Mo. 252.

Montana.— Briscoe *v.* McCaffery, 8 Mont. 336, 20 Pac. 691.

North Carolina.— Pepper *v.* Clegg, 132 N. C. 312, 43 S. E. 906; Simpson *v.* Brown, 117 N. C. 482, 23 S. E. 441; Kivett *v.* Wynne, 89 N. C. 39.

South Dakota.— Minnehaha Nat. Bank *v.* Hurley, 13 S. D. 18, 82 N. W. 87.

Texas.— Missouri, etc., R. Co. *v.* Davidson, 25 Tex. Civ. App. 134, 60 S. W. 278.

Circumstances excusing neglect.— If the party is ignorant of the fact that his attorney is dead, or has left the state, or withdrawn from the case, until after judgment taken against him, or until it is too late to retain other counsel or prepare the case, he may have the judgment set aside, provided he acts promptly upon discovering the facts. Boyle *v.* Solstien, (Cal. 1888) 16 Pac. 898; Crescent Brewing Co. *v.* Cullins, 125 Ind. 110, 25 N. E. 159; Comstock *v.* Whitworth, 75 Ind. 129; Ennis *v.* Fourth St. Bldg. Assoc., 102 Iowa 520, 71 N. W. 426; Atkinson *v.* Abraham, 78 N. Y. App. Div. 498, 79 N. Y. Suppl. 680; Herbert *v.* Lawrence, 21 N. Y. Civ. Proc. 336, 18 N. Y. Suppl. 95; Utah Commercial, etc., Bank *v.* Trumbo, 17 Utah 198, 53 Pac. 1033.

84. Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218; Russ *v.* Gilbert, 19 Fla. 54; Cowles

and otherwise preparing for trial, the mere employment of counsel not being sufficient to excuse the party from giving the case his personal attention.[85] Also he must keep himself informed of the progress of the case, not relying upon such news as he can obtain from persons not bound to keep him advised,[86] and particularly, he must find out when his case is set down for trial or when it is likely to be reached in its order on the calendar,[87] and must be in attendance while the court is in session and there is a prospect of his case being called.[88]

e. Mistake, Negligence, or Misconduct of Counsel — (I) *Mistake in General.* A mistake of the party's counsel, as well as a mistake of his own, may be pleaded as excuse for a default and as a reason for opening the judgment, provided it was genuine and reasonable, and a mistake of fact rather than of law,[89] such as counsel's mistaking the case in which he was retained or becoming confused between several similar cases,[90] or his misunderstanding of the real facts of the case or the circumstances of the transaction out of which the suit arose,[91] or his erroneous impression that the action had been discontinued.[92]

(II) *Mistake as to Time For Appearance or Trial.* A judgment may be vacated or opened when it is shown that the failure to defend was due to a mistake or miscalculation of the party's attorney as to the time allowed him for pleading or taking some other step in the action,[93] as to the term of court at

v. Cowles, 121 N. C. 272, 28 S. E. 476; Pfister *v.* Smith, 95 Wis. 51, 69 N. W. 984.

85. *Delaware.*— Home Loan Assoc. *v.* Foard, 3 Pennew. 165, 50 Atl. 537.

Illinois.— Hahn *v.* Gates, 169 Ill. 299, 48 N. E. 398; Schroer *v.* Wessell, 89 Ill. 113; Simon *v.* Hengels, 107 Ill. App. 174.

Indiana.— Kreite *v.* Kreite, 93 Ind. 583.

Minnesota.— John T. Noye Mfg. Co. *v.* Wheaton Roller-Mill Co., 60 Minn. 117, 61 N. W. 910.

New York.— Lang *v.* Wiesner, 40 N. Y. Suppl. 1118.

North Carolina.— Pepper *v.* Clegg, 132 N. C. 312, 43 S. E. 906; Norton *v.* McLaurin, 125 N. C. 185, 34 S. E. 269.

South Carolina.— Sullivan *v.* Shell, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894.

United States.— Silver Peak Gold Min. Co. *v.* Harris, 116 Fed. 439.

86. Osborn *v.* Leach, 133 N. C. 427, 45 S. E. 783; Roberts *v.* Allman, 106 N. C. 391, 11 S. E. 424; Governor *v.* Lassiter, 83 N. C. 38; Kerchner *v.* Baker, 82 N. C. 169.

87. Bosbyshell *v.* Summers, 40 Mo. 172; Cobb *v.* O'Hagan, 81 N. C. 293.

Relying on attorney for notice.— It is not a sufficient excuse for a default that defendant's counsel did not notify him of the time of the trial, if the counsel had not engaged or promised to do so (Cobb *v.* O'Hagan, 81 N. C. 293), or if the party himself had actual notice that the case would probably be tried at a given term, at which it actually was tried (Leader *v.* Dunlap, 6 Pa. Super. Ct. 243).

88. Parker *v.* Belcher, 87 Ga. 110, 13 S. E. 314; Henry *v.* Clayton, 85 N. C. 371; Waddell *v.* Wood, 64 N. C. 624. But *compare* Long *v.* Cole, 74 N. C. 267, holding that an order for judgment, made at midnight, when the adverse party was absent and had no notice that the court was in session, may be opened, as taken by surprise or excusable neglect.

89. Shurtleff *v.* Thompson, 63 Me. 118; Lutz *v.* Alkazin, (N. J. Ch. 1903) 55 Atl. 1041; Barnes *v.* Harris, 2 How. Pr. (N. Y.) 32; Allan *v.* Smith, 20 Johns. (N. Y.) 477; Wray *v.* Winner, 1 Phila. (Pa.) 336. But *compare* Wilson *v.* Smith 17 Tex. Civ. App. 188, 43 S. W. 1086.

Case docketed in wrong name.— That an attorney, retained to defend the case, failed to find the case because it was entered on the docket in a wrong name, and therefore made no defense, is sufficient to warrant the setting aside of a default. Clifford *v.* Gruelle, 32 S. W. 937, 17 Ky. L. Rep. 842. *Compare* Webster *v.* McMahan, 13 Mo. 582.

90. Frazier *v.* Williams, 18 Ind. 416; May *v.* Wolvington, 69 Md. 117, 14 Atl. 706; Mantle *v.* Largey, 17 Mont. 479, 43 Pac. 633; State *v.* Consolidated Virginia Min. Co., 13 Nev. 194. *Compare* Norwood *v.* King, 86 N. C. 80, where mistake as to the case was mixed with great negligence of party and counsel, and a motion to vacate the judgment was refused on the ground that the neglect was inexcusable.

91. Underwood *v.* Underwood, 87 Cal. 523, 25 Pac. 1065; McCredy *v.* Woodcock, 41 N. Y. App. Div. 526, 58 N. Y. Suppl. 656.

92. Searles *v.* Christensen, 5 S. D. 650, 60 N. W. 29. But see Lytle *v.* Fenn, 15 Fed. Cas. No. 8,651, 3 McLean 411.

93. *California.*— Melde *v.* Reynolds, 129 Cal. 308, 61 Pac. 932. But *compare* Pennie *v.* Visher, 94 Cal. 323, 29 Pac. 711; People *v.* Rains, 23 Cal. 127.

Minnesota.— Lathrop *v.* O'Brien, 47 Minn. 428, 50 N. W. 530.

Missouri.— Scott *v.* Smith, 133 Mo. 618, 34 S. W. 864.

Montana.— Collier *v.* Fitzpatrick, 22 Mont. 553, 57 Pac. 181. But the fact that defendant's attorney was not advised when his demurrer to the complaint would be submitted is not ground for setting aside a default judgment ordered on the demurrer

which the case would be tried[94] or the day of the term or hour of the day,[95] as to its being on the calendar for trial,[96] or as to the time when it would probably be reached for trial in its order.[97]

(III) *Mistake or Ignorance of Law.* A party cannot be relieved from a judgment taken against him in consequence of the legal ignorance or mistake of his counsel, whether it concerns the rights or duties of the client, the legal effect of the facts in the case, or the rules of procedure.[98]

(IV) *Erroneous Advice.* It is generally held not to be good ground for setting aside a judgment that it was suffered by the party in consequence of receiving erroneous advice from his attorney as to the necessity of making a defense or as to the validity of his defense.[99]

(V) *Negligence of Counsel.* It is a general rule that the negligence of an

being overruled. Helena *v.* Brule, 15 Mont. 429, 39 Pac. 456, 852.

Nevada.— Horton *v.* New Pass Gold, etc., Min. Co., 21 Nev. 184, 27 Pac. 376, 1018.

New York.— Dunham *v.* Van Arnum, 1 How. Pr. 225.

North Carolina.— Koch *v.* Porter, 129 N. C. 132, 39 S. E. 777; English *v.* English, 87 N. C. 497.

Texas.— Springer *v.* Gillespie, (Civ. App. 1900) 56 S. W. 369.

United States.— Brown *v.* Philadelphia, etc., R. Co., 9 Fed. 183.

94. Barrett *v.* Queen City Cycle Co., 179 Ill. 68, 53 N. E. 550, holding that the mistake of an attorney's clerk in placing the cause on the office diary for the January term instead of the preceding December term will not warrant the opening of a default when the attorney knew when the action was commenced that it would be called at the December term. And see Walsh *v.* Walsh, 114 Ill. 655, 3 N. E. 437.

95. Dodge *v.* Ridenour, 62 Cal. 263; Hermance *v.* Cunningham, 49 Nebr. 897, 69 N. W. 311; Seymour *v.* Elmer, 1 Abb. Pr. (N. Y.) 412; Harker *v.* McBride, 1 How. Pr. (N. Y.) 41; Van Elten *v.* Hurst, 1 How. Pr. (N. Y.) 26; Farmers' Mut. F. Ins. Co. *v.* Reynolds, 52 Vt. 405.

It is no sufficient excuse that the attorney forgot on what day the term began, when the summons, which he duly received, showed the date (Baltimore, etc., R. Co. *v.* Flinn, 2 Ind. App. 55, 28 N. E. 201), nor that it was the usual, but not invariable, custom for the court not to try cases on the first day of the term, the particular case having been set for trial on that day (Wilson *v.* Scott, 50 Mo. App. 329), nor that the attorney erroneously supposed that the court met at half-past nine in the morning, whereas it convened at nine (Savage *v.* Dinkler, 12 Okla. 463, 72 Pac. 366).

96. Allen *v.* Hoffman, 12 Ill. App. 573; Smith *v.* Reid, 1 How. Pr. (N. Y.) 23; Taylor *v.* Pope, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530. But see Kamman *v.* Otto, 34 S. W. 1070, 17 Ky. L. Rep. 1367; Miller *v.* Fitzgerald Dry-Goods Co., 62 Nebr. 270, 86 N. W. 1078.

97. Pearson *v.* Drobaz Fishing Co., 99 Cal. 425, 34 Pac. 76; Slack *v.* Casey, 22 Ill. App. 412; Morrell *v.* Gibson, 1 How. Pr. (N. Y.) 208; Bosher *v.* Harris, 1 How. Pr. (N. Y.) 206.

98. *California.*— Brooks *v.* Johnson, 122 Cal. 569, 55 Pac. 423; Harbaugh *v.* Honey Lake Valley Land, etc., Co., 109 Cal. 70, 41 Pac. 792; Shearman *v.* Jorgensen, 106 Cal. 483, 39 Pac. 863. But a mistake arising out of the misconstruction of a pleading may be so far excusable that the court will not wholly abuse its discretion in setting aside a default. Langford *v.* Langford, 136 Cal. 507, 69 Pac. 235.

Illinois.— Allen *v.* Continental Ins. Co., 97 Ill. App. 164.

Montana.— Mantle *v.* Casey, 31 Mont. 408, 78 Pac. 591.

North Carolina.— Phifer *v.* Travelers' Ins. Co., 123 N. C. 405, 31 S. E. 715.

Oregon.— Hicklin *v.* McClear, 19 Oreg. 508, 24 Pac. 992.

Pennsylvania.— *In re* Hoopes, 185 Pa. St. 167, 39 Atl. 840.

But see Eagle Bank *v.* Holley, 7 Cow. (N. Y.) 514; Russel *v.* Ball, 3 Johns. Cas. (N. Y.) 91; Dowell *v.* Winters, 20 Tex. 793.

99. *Alabama.*— Brock *v.* South, etc., Alabama R. Co., 65 Ala. 79.

Kentucky.— Mouser *v.* Harmon, 96 Ky. 591, 29 S. W. 448, 16 Ky. L. Rep. 651; Cox *v.* Armstrong, 43 S. W. 189, 19 Ky. L. Rep. 1081.

Missouri.— Vastine *v.* Bast, 41 Mo. 493, where defendant, a non-resident, was enticed within the state by false representations and there served with process, and his attorney erroneously advised him that he need pay no attention to the writ.

New Jersey.— Barlow *v.* Burns, 70 N. J. L. 631, 57 Atl. 262.

North Carolina.— Hodgin *v.* Matthews, 81 N. C. 289, where defendant relied on his attorney's opinion that the recovery against him would be inconsiderable, and was surprised to be charged by the judgment with a large sum.

Wisconsin.— Milwaukee Mut. Loan, etc., Soc. *v.* Jagodzinski, 84 Wis. 35, 54 N. W. 102, where an attorney advised defendant that he could not successfully defend the action. But see Crebler *v.* Eidelbush, 24 Wis. 162 (where it was held not an abuse of discretion to set aside a default suffered by defendant because an attorney erroneously advised him that the service on him was

attorney is imputable to his client, and that the latter cannot be relieved from a judgment taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of the former.[1] And this rule applies not only where the

void); Wicke *v.* Lake, 21 Wis. 410, 94 Am. Dec. 552 (where one claiming paramount title to mortgaged land neglected to answer a bill for foreclosure, because assured by counsel that the mortgagor's answer presented a complete defense, it was held proper to set aside his default and let in his answer).

Contra.— Douglass *v.* Todd, 96 Cal. 655, 31 Pac. 623, 31 Am St. Rep. 247; Baxter *v.* Chute, 50 Minn. 164, 52 N. W. 379, 36 Am. St. Rep. 633.

1. *Alabama.*—Blood *v.* Beadle, 65 Ala. 103; *Ex p.* Walker, 54 Ala. 577.

Alaska.— Daly *v.* Gardner, 1 Alaska 357.

California.— Alferitz *v.* Cahen, 145 Cal. 397, 78 Pac. 878; Yancey *v.* National Benev. Assoc., 122 Cal. 676, 55 Pac. 604; Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766; Fincher *v.* Malcolmson, 96 Cal. 38, 30 Pac. 835; Cox *v.* O'Neil, (1884) 4 Pac. 456; Smith *v.* Tunstead, 56 Cal. 175; Ekel *v.* Swift, 47 Cal. 619; People *v.* Rains, 23 Cal. 127; Mulholland *v.* Heyneman, 19 Cal. 605. *Compare* Ashton *v.* Dashaway Assoc., (1893) 33 Pac. 446.

Florida.— Waterson *v.* Seat, 10 Fla. 326.

Georgia.— Morris *v.* Wofford, 114 Ga. 935, 41 S. E. 56; Silver *v.* Hull, 97 Ga. 234, 22 S. E. 578; Phillips *v.* Collier, 87 Ga. 66, 13 S. E. 260; McDaniel *v.* McLendon, 85 Ga. 614, 11 S. E. 869.

Illinois.— Eggleston *v.* Royal Trust Co., 205 Ill. 170, 68 N. E. 709; Schultz *v.* Meiselbar, 144 Ill. 26, 32 N. E. 550; Foster *v.* Weber, 110 Ill. App. 5; West Chicago St. R. Co. *v.* Stoltzenfeldt, 100 Ill. App. 142; Rawley *v.* Murray, 69 Ill. App. 428; Metropolitan L. Ins. Co. *v.* Bergen, 64 Ill. App. 685; Stenzel *v.* Sims, 25 Ill. App. 538.

Indiana.— Noblesville *v.* Noblesville Gas, etc., Co., 157 Ind. 162, 60 N. E. 1032; Moore *v.* Horner, 146 Ind. 287, 45 N. E. 341; Sharp *v.* Moffitt, 94 Ind. 240; Kreite *v.* Kreite, 93 Ind. 583; Brumbaugh *v.* Stockman, 83 Ind. 583; Bash *v.* Van Osdol, 75 Ind. 186; Spaulding *v.* Thompson, 12 Ind. 477, 74 Am. Dec. 221; Carlisle *v.* Wilkinson, 12 Ind. 91; Carr *v.* Jeffersonville First Nat. Bank, (App. 1905) 73 N. E. 947; American Brewing Co. *v.* Jergens, 21 Ind. App. 595, 52 N. E. 820; Parker *v.* Indianapolis Nat. Bank, 1 Ind. App. 462, 27 N. E. 650.

Iowa.— Church *v.* Lacy, 102 Iowa 235, 71 N. W. 338; Jackson *v.* Gould, 96 Iowa 488, 65 N. W. 406; Williams *v.* Westcott, 77 Iowa 332, 42 N. W. 314, 14 Am. St. Rep. 287; Reiher *v.* Webb, 73 Iowa 559, 35 N. W. 631; Niagara Ins. Co. *v.* Rodecker, 47 Iowa 162; Jones *v.* Leech, 46 Iowa 186; Ordway *v.* Suchard, 31 Iowa 481; Humphrey *v.* Darlington, 15 Iowa 207; State *v.* Elgin, 11 Iowa 216.

Kansas.— Welch *v.* Challen, 31 Kan. 696, 3 Pac. 314.

Kentucky.— Anderson *v.* Green, 55 S. W. 420, 21 Ky. L. Rep. 1439.

Minnesota.— Van Aernam *v.* Winslow, 37 Minn. 514, 35 N. W. 381; Merritt *v.* Putnam, 7 Minn. 493.

Missouri.— Matthis *v.* Cameron, 62 Mo. 504; Gehrke *v.* Jod, 59 Mo. 522; Boshyshell *v.* Summers, 40 Mo. 172; Austin *v.* Nelson, 11 Mo. 192; Kerby *v.* Chadwell, 10 Mo. 392; Field *v.* Matson, 8 Mo. 686; Patterson *v.* Yancey, 97 Mo. App. 681, 71 S. W. 845; Anderson *v.* Perkins, 52 Mo. App. 527.

Montana.— Thomas *v.* Chambers, 14 Mont. 423, 36 Pac. 814; Haggin *v.* Lorentz, 13 Mont. 406, 34 Pac. 607.

Nevada.— Harper *v.* Mallory, 4 Nev. 447.

New Hampshire.— Butler *v.* Morse, 66 N. H. 429, 23 Atl. 90; Bergeron *v.* Dartmouth Sav. Bank, 62 N. H. 655.

North Carolina.— Norton *v.* McLaurin, 125 N. C. 185, 34 S. E. 269; Whitson *v.* Western North Carolina R. Co., 95 N. C. 385; Twitty *v.* Logan, 86 N. C. 712; Burke *v.* Stokely, 65 N. C. 569; House *v.* Bryant, 3 N. C. 374. But *compare* Gwathney *v.* Savage, 101 N. C. 103, 7 S. E. 661; Geer *v.* Reams, 88 N. C. 197; Bradford *v.* Coit, 77 N. C. 72 (which decisions favor the rule that the neglect of the attorney may be sufficient excuse for a default, if no laches or negligence is imputable personally to the client); Griel *v.* Vernon, 65 N. C. 76 (holding that a judgment taken by default for want of a plea is, within the meaning of the statute, a "surprise" on defendant, when he employed an attorney to file a plea and the latter neglected to do so).

Ohio.— Williams *v.* Heisley, 4 Ohio Dec. (Reprint) 273, 1 Clev. L. Rep. 196.

Oklahoma.— Wynn *v.* Frost, 6 Okla 89, 50 Pac. 184.

Oregon.— Hicklin *v.* McClear, 19 Oreg. 508, 24 Pac. 992.

South Carolina.— Irby *v.* Henry, 16 S. C. 617; Wilkie *v.* Walton, 2 Spears 473; Foster *v.* Jones, 1 McCord 116; Schroder *v.* Eason, 2 Nott & M. 291.

Texas.— Merrill *v.* Roberts, 78 Tex. 28, 14 S. W. 254; Scrivner *v.* Malone, 30 Tex. 773; Tarrant County *v.* Lively, 25 Tex. Suppl. 399; Foster *v.* Martin, 20 Tex. 118; Woolley *v.* Sullivan, (Civ. App. 1897) 43 S. W. 919. But *compare* New York Fidelity, etc., Co. *v.* Lopatka, 24 Tex. Civ. App. 536, 60 S. W. 268.

Utah.— Peterson *v.* Crosier, 29 Utah 235, 81 Pac. 860.

Vermont.—Davison *v.* Heffron, 31 Vt. 687; Babcock *v.* Brown, 25 Vt. 550, 60 Am. Dec. 290.

Washington.— Sanborn *v.* Centralia Furniture Mfg. Co., 5 Wash. 150, 31 Pac. 466.

Wisconsin.— Falkenberg *v.* Gorman, 71 Wis. 8, 36 N. W. 599. *Compare* Hanson *v.* Michelson, 19 Wis. 498; Huebschman *v.*

negligence of the attorney consisted in his failure to file a plea or answer in due season,[2] but also where he failed to pursue and follow up the case with due care and watchfulness.[3] In a few states, however, the courts are indulgent in opening or setting aside judgments taken against a party in consequence of the negligence or inattention of his attorney, provided the party himself was not directly in fault.[4] Such relief has been granted on a showing that the attorney is insolvent and therefore unable to make good his fault by paying damages.[5] The negligence of an attorney may be excusable, when attributable to an honest mistake, an accident, or any cause which is not incompatible with proper diligence on his part, and in these circumstances it will be proper to set aside or open the judgment taken in consequence thereof.[6] But in any case the client himself must be free from fault; negligence of his counsel is not excusable negligence, for which a judgment will be set aside, if the client wholly neglected the case and took no interest in its issue.[7] And if he would excuse himself on this ground, he must also show that he employed counsel practising habitually in the particular court, or who specially agreed to attend to the case.[8] When an attorney is

Baker, 7 Wis. 542; Babcock *v.* Perry, 4 Wis. 31.

United States.— U. S. *v.* Wallace, 46 Fed. 569.

See 30 Cent. Dig. tit. "Judgment," §§ 281, 710.

2. Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218; Bentley *v.* Finch, 86 Ga. 809, 13 S. E. 155. And see cases cited *supra*, IX, E, 12, e, (II), note 93.

3. Pearson *v.* Drobaz Fishing Co., 99 Cal. 425, 34 Pac. 76; Liverpool, etc., Ins. Co. *v.* Perrin, 10 N. M. 90, 61 Pac. 124; Padgitt *v.* Evans, (Tex. Civ. App. 1899) 51 S. W. 513. And see cases cited *supra*, IX, E, 12, d, (II), note 80.

4. Lenz *v.* Rowe, 66 N. J. L. 131, 48 Atl. 525; Hewitt *v.* Hazard, 33 N. Y. App. Div. 630, 53 N. Y. Suppl. 340; Nash *v.* Whetmore, 33 Barb. (N. Y.) 155; Sharp *v.* New York, 31 Barb. (N. Y.) 578; Elston *v.* Schilling, 7 Rob. (N. Y.) 74; Clark *v.* Lyon, 2 Hilt. (N. Y.) 91; De Marco *v.* Mass. 31 Misc. (N. Y.) 827, 64 N. Y. Suppl. 768; Gideon *v.* Dwyer, 17 Misc. (N. Y.) 233, 40 N. Y. Suppl. 1053; Steer *v.* Head, 1 How. Pr. (N. Y.) 15; Meacham *v.* Dudley, 6 Wend. (N. Y. 514; Fenton *v.* Garlick, 6 Johns. (N. Y.) 287; Philips *v.* Hawley, 6 Johns. (N. Y.) 129; Tripp *v.* Vincent, 8 Paige (N. Y.) 176; Millspaugh *v.* McBride, 7 Paige (N. Y.)) 509, 34 Am. Dec. 360; Curtis *v.* Ballagh, 4 Edw. (N. Y.) 635; Van Cott *v.* Webb-Miller, 25 Pa. Super. Ct. 51; Weir *v.* Craige, 13 Pa. Co. Ct. 46; Bright *v.* McLaughlin, 1 Pa. Co. Ct. 296; Knittle *v.* Compton, 4 C. Pl. (Pa.) 117; Scranton Supply Co. *v.* Cooper, 4 C. Pl. (Pa.) 103; Com. *v.* Schooley, 5 Kulp (Pa.) 53; North *v.* Yorke, 12 Montg. Co. Rep. (Pa.) 168; Brandle *v.* Jones, 2 Woodw. (Pa.) 7; Hinton *v.* Hart, 1 Woodw. (Pa.) 97; Densereau *v.* Saillant, 22 R. I. 500, 48 Atl. 668. But see Early *v.* Bard, 93 N. Y. App. Div. 476, 87 N. Y. Suppl. 650.

5. Sampson *v.* Ohleyer, 22 Cal. 200; Gordon *v.* Cowle, 4 Ohio Dec. (Reprint) 92, 1 Clev. L. Rep. 18. *Contra*, Phillips *v.* Collier, 87 Ga. 66, 13 S. E. 260; Phillips *v.* Taber, 83 Ga. 565, 10 S. E. 270.

6. *California.*— O'Brien *v.* Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; Fulweiler *v.* Hog's Back Consol. Min. Co., 83 Cal. 126, 23 Pac. 65.

Illinois.— Allen *v.* Hoffman, 12 Ill. App. 573, where the attorney overlooked the case on the trial calendar by reason of its being placed under a title calculated to mislead. But see East St. Louis *v.* Thomas, 102 Ill. 453, holding that it is not a sufficient excuse for failing to file a replication that the attorney could not find the papers in the case, if he did not apply to the clerk for them.

Indiana.— Spaulding *v.* Thompson, 12 Ind. 477, 74 Am. Dec. 221.

Iowa.— Ordway *v.* Suchard, 31 Iowa 481.

Kentucky.— Clifford *v.* Gruelle, 32 S. W. 937, 17 Ky. L. Rep. 842, where the attorney could not find the case because it was docketed in a wrong name.

Louisiana.— Lockett *v.* Toby, 10 La. Ann. 713; Riley *v.* Louisville, 2 La. Ann. 965, 46 Am. Dec. 560.

Minnesota.— Crane, etc., Co. *v.* Sauntry, 90 Minn. 301, 96 N. W. 794.

Mississippi.— See Benwood Iron-Works Co. *v.* Tappan, 56 Miss. 659.

Missouri.— Cabanne *v.* Macadaras, 91 Mo. App. 70.

Montana.— Collier *v.* Fitzpatrick, 22 Mont. 553, 57 Pac. 181; Loeh *v.* Schmith, 1 Mont. 87.

New York.— Lawson *v.* Hilton, 89 N. Y. App. Div. 303, 85 N. Y. Suppl. 863.

North Carolina.— A judgment will not be set aside on the ground of excusable neglect, where an answer was not filed in apt time, because a custom had grown up among the bar to disregard the rule. Brown *v.* Hale, 93 N. C. 188.

Oregon.— Mitchell, etc., Co. *v.* Downing, 23 Oreg. 448, 32 Pac. 394.

Pennsylvania.— Boyer *v.* Jones, 1 Woodw. 498.

See 30 Cent. Dig. tit. "Judgment," §§ 7 710.

7. Norton *v.* McLaurin, 125 N. C. 185, 34 S. E. 269.

8. Manning *v.* Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963.

employed simply to retain counsel to appear at another place, he is a mere agent, and his negligence is imputable to his client,[9] and likewise the negligence of any person who is delegated or employed by the attorney to attend to the case is imputable to the attorney himself, and will not be excusable in the one unless it would have been in the other.[10]

(VI) *Misconduct of Attorney.* A judgment will be set aside where it was obtained through the fraudulent or dishonest conduct of defendant's attorney, as where he deceives and misleads his client,[11] enters into a collusive arrangement with the opposing counsel,[12] corruptly sells out his client's interests,[13] or even for such constructive fraud as is implied in his attempting to act for both parties,[14] or secretly withdrawing from the case and leaving it undefended, from hostility to his client.[15] But where a party is actually represented by counsel in court, fully prepared to try the cause, and such counsel refuses to proceed for the sole reason that he thinks the justice presiding may decide against him, the judgment thus rendered cannot be vacated as though taken by default, and no reason can be suggested for disturbing it which could not be urged with equal force to vacate a judgment alleged to have resulted from the incompetence of the attorney conducting the trial.[16]

(VII) *Misunderstanding of Counsel.* Where a defense is not interposed, and judgment is consequently suffered, through a genuine and accidental misunderstanding between the party and his counsel, the judgment may be set aside;[17] but not where either is chargeable with negligence or carelessness, without which the misunderstanding would not have arisen.[18] The rule is similar where the misunderstanding was between different counsel retained on the same side or between the attorneys for the opposing parties, the courts holding this sufficient ground for vacating the judgment.[19] In such case, however, in order that the

9. Finlayson *v.* American Acc. Co., 109 N. C. 196, 13 S. E. 739.

10. Webster *v.* McMahan, 13 Mo. 582; Davison *v.* Heffron, 31 Vt. 687.

11. Hilderbrandt *v.* Rohbecke, 20 Minn. 100; Barton *v.* Harker, 69 N. J. L. 603, 55 Atl. 105; Gillespie *v.* Weiss, 22 Pa. Co. Ct. 177.

12. Smith *v.* Miller, (Tenn. Ch. App. 1897) 42 S. W. 182.

13. Haverty *v.* Haverty, 35 Kan. 438, 11 Pac. 364; Anthony *v.* Karbach, 64 Nebr. 509, 90 N. W. 243, 97 Am. St. Rep. 662; Beck *v.* Bellamy, 93 N. C. 129; *Ex p.* Roundtree, 51 S. C. 405, 29 S. E. 66.

In Iowa a judgment cannot be vacated for fraud and negligence of attorneys in not interposing a valid defense, under the statute authorizing the vacation of a judgment for fraud in obtaining it. McCormick *v.* McCormick, 109 Iowa 700, 81 N. W. 172.

14. Arrington *v.* Arrington, 116 N. C. 170, 21 S. E. 181.

15. Herbert *v.* Lawrence, 18 N. Y. Suppl. 95, 21 N. Y. Civ. Proc. 336; Nichells *v.* Nichells, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515.

The unauthorized withdrawal of an attorney has been held to be sufficient ground for vacating the resulting judgment, merely if the client did not know of it or consent to it, without any circumstances of fraud or dishonesty. Utah Commercial, etc., Bank *v.* Trumbo, 17 Utah 198, 53 Pac. 1033. But if the client consents to the withdrawal of his attorney's appearance, he precludes himself from moving for the vacation of the judgment. Fincher *v.* Malcolmson, 96 Cal. 38, 30 Pac. 835; Dudley *v.* Broadway Ins. Co., 42 N. Y. App. Div. 555, 59 N. Y. Suppl. 668.

16. Sutter *v.* New York, 106 N. Y. App. Div. 129, 94 N. Y. Suppl. 515.

17. Kupferle *v.* Merchants' Nat. Bank, 32 Ark. 717; Dixon *v.* Lyne, 10 S. W. 469, 10 Ky. L. Rep. 769; Pike *v.* Henderson, (N. J. Ch. 1901) 48 Atl. 551; Panesi *v.* Boswell, 12 Heisk. (Tenn.) 323. *Compare* McRae *v.* Adams, 85 Ill. App. 528, holding it no ground for setting aside a default that defendant's counsel, through a misunderstanding, failed to appear at the trial, where defendant's only complaint is that the judgment is larger than he thinks it ought to be. But see Ingalls *v.* Lamar, 115 Ga. 296, 41 S. E. 573; Moore *v.* Kelly, etc., Co., 109 Ga. 798, 35 S. E. 168.

18. Baltimore, etc., R. Co. *v.* Ryan, 31 Ind. App. 597, 68 N. E. 923; Welch *v.* Mastin, 98 Mo. App. 273, 71 S. W. 1090.

19. *California.*— Santa Rosa Sav. Bank *v.* Schell, 142 Cal. 505, 76 Pac. 250.

Indiana.— Beatty *v.* O'Connor, 106 Ind. 81, 5 N. E. 880.

Iowa.— See Tschohl *v.* Machinery Mut. Ins. Assoc., 126 Iowa 211, 101 N. W. 740.

Montana.— Whiteside *v.* Logan, 7 Mont. 373, 17 Pac. 34.

United States.— Campbell *v.* Barclay, 4 Fed. Cas. No. 2,352, 4 Biss. 517.

Canada.— Fabien *v.* Gougeon, 18 Quebec Super. Ct. 242.

judgment may be set aside, it is necessary that, the facts shall be fully explained and that the mistake shall be shown to be excusable.[20]

f. Casualty or Misfortune — (I) *In General.* Where statutes authorize the vacation of judgments on account of "unavoidable casualty or misfortune,"[21] they mean an accident or mishap arising from causes beyond the party's control, and which he could not have guarded against in the exercise of due foresight and diligence.[22]

(II) *Absence of Party From State.* Absence of defendant from the state or beyond seas at the time of the trial will be cause for setting aside the judgment if it is shown that he could not have been present and that his absence operated to his prejudice,[23] provided he is not chargeable with negligence or lack of proper attention to his case.[24]

(III) *Absence of Party From Trial.* The mere fact that a judgment was rendered in the absence of defendant is no cause for setting it aside, where his absence is not excused or shown to have been unavoidable.[25] But it is a good

20. Bernstein *v.* Brown, 23 Nebr. 64, 36 N. W. 359.

21. See the statutes of the different states.

22. Ennis *v.* Fourth St. Bldg. Assoc., 102 Iowa 520, 71 N. W. 426, holding that where, shortly before the trial, defendant's attorney absconded, without the knowledge of his client, it was sufficient reason for vacating the judgment. *Compare* Dwight *v.* Webster, 32 Barb. (N. Y.) 47, holding that where suit was brought to foreclose a mortgage for non-payment of interest, and defendant suffered a default because he could not find the holder of the mortgage in time to pay the interest, it was held that, although this was a misfortune to defendant, it was not of a nature to enable the court to relieve him.

Failure to receive notice.— A judgment should be vacated on this ground where it appears that the summons was left at defendant's residence while he and all his family were absent on a vacation, and he had no knowledge of the suit until after judgment (Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496. But *compare* Howard *v.* Abbey, 2 Ohio Dec. (Reprint) 64, 2 West. L. Month. 278), or where by accident he failed to receive notices sent to him by his attorney regarding the progress of the cause and the time of the trial (Syfers *v.* Keiser, 31 Ind. App. 6, 66 N. E. 1021. But *compare* Bates *v.* Bates, 66 Minn. 131, 68 N. W. 845).

Misunderstanding as to time of court.— It is no cause for setting aside the judgment that defendant misunderstood his attorney's statement as to when the court met. Ross *v.* Louisville, etc., R. Co., 92 Ky. 583, 18 S. W. 456, 13 Ky. L. Rep. 801.

Loss of papers.— The accidental misplacement and loss of papers essential to inform the party of his rights or enable him to prepare his defense is a "casualty or misfortune." Northern Dispensary Trustees *v.* Merriam, 59 How. Pr. (N. Y.) 226. *Contra,* Miller *v.* Albaugh, 24 Iowa 128.

Miscarriage of mails.—If pleadings or other papers essential to the case are intrusted to the mails, in due season and under proper precautions, and are lost or miscarry, it will be ground for vacating the judgment under this head. Boyd *v.* Williams, 70 N. J. L. 185, 56 Atl. 135; Corning *v.* Tripp, 1 How. Pr. (N. Y.) 14; Williams *v.* Richmond, etc., R. Co., 110 N. C. 466, 15 S. E. 97.

Insanity is such a "misfortune" within the meaning of the statutes as will authorize the courts to vacate or modify a judgment. Small *v.* Reeves, 104 Ky. 289, 46 S. W. 726, 20 Ky. L. Rep. 504; Bean *v.* Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138, 8 Ky. L. Rep. 739.

Imprisonment.— If a party is deprived of the opportunity to interpose a meritorious defense by being detained as a convict in the penitentiary, the court may, on a proper application after his release, open the default. Bonnell *v.* Rome, etc., R. Co., 12 Hun (N. Y.) 218.

Oversight of counsel in accidentally omitting certain allegations of errors from a motion for a new trial is not an "unavoidable casualty or misfortune." Reed *v.* Wilson, 13 Kan. 153.

Ineffectual attempt to retain counsel.—The mere fact that the party wrote to an attorney to appear for him, although without disclosing his defense, and did not know until after judgment that his letter was never delivered is not a sufficient excuse. School Dist. No. 13 *v.* Lovejoy, 16 Fed. 323, 3 McCrary 558. And see Ganzer *v.* Schiffbauer, 40 Nebr. 633, 59 N. W. 98.

Absence of a material witness at the trial is not sufficient cause for setting aside the judgment. Erichson *v.* Sidlo, 76 N. Y. App. Div. 347, 78 N. Y. Suppl. 487; Ward *v.* Ruckman, 23 How. Pr. (N. Y.) 330.

23. Honore *v.* Murray, 3 Dana (Ky.) 31; Philips *v.* Blagge, 3 Johns. (N. Y.) 141.

24. Pardridge *v.* Wing, 75 Ill. 236; Superior Consol. Land Co. *v.* Dunphy, 93 Wis. 188, 67 N. W. 428.

25. *California.*— McGuire *v.* Drew, 83 Cal. 225, 23 Pac. 312.

Georgia.— Kellam *v.* Todd, 114 Ga. 981, 41 S. E. 39.

Illinois.— Ettinghausen *v.* Marx, 86 Ill. 475.

Indiana.— Turpie *v.* Knowles, 78 Ind. 221.

excuse if he shows that he was compelled to absent himself from the trial by a constraint which he was bound to obey or a cause which he could not control,[26] or that he was prevented from reaching the place of trial in due season by a railroad accident, the impassable condition of the roads, storms, or other insuperable obstacles.[27]

(iv) *Absence of Counsel.* The mere absence of one's attorney at the time of the trial is no cause for setting aside a judgment,[28] unless it is shown that he could have gone to trial, if present, or presented good grounds for a continuance,[29] and that injustice and injury have resulted to the client in consequence,[30] or that the attorney's absence was excusable or unavoidable, it being considered a sufficient excuse that he was engaged at the time in trying a case in another court,[31] or was in attendance upon another court as a witness,[32] or was suddenly called

Kentucky.— Brashears *v.* Dickinson, 66 S. W. 816, 23 Ky. L. Rep. 2183.

Nebraska.— Sullivan *v.* Benedict, 36 Nebr. 409, 54 N. W. 676; Western Mut. Ben. Assoc. *v.* Pace, 23 Nebr. 494, 36 N. W. 816; Crippen *v.* Church, 17 Nebr. 304, 22 N. W. 567; Strine *v.* Kaufman, 12 Nebr. 423, 11 N. W. 867.

New York.— Mullane *v.* Roberge, 21 Misc. 342, 47 N. Y. Suppl. 155; Root *v.* Goodspeed, 2 N. Y. City Ct. 173.

North Carolina.— Deal *v.* Palmer, 68 N. C. 215.

Texas.— Helm *v.* Weaver, 69 Tex. 143, 6 S. W. 420.

See 30 Cent. Dig. tit. "Judgment," § 707.

26. Waterson *v.* Seat, 10 Fla. 326; Wray *v.* People, 70 Ill. 664; Keith *v.* McCaffrey, 145 Mass. 18, 12 N. E. 419; Matter of New York, etc., R. Co., 40 How. Pr. (N. Y.) 335.

Illustrations.— It is a sufficient excuse for his absence that defendant was compelled to attend before a grand jury and could not be released until after his own case was disposed of (Frazier *v.* Bishop, 29 Mo. 447), that he was in compulsory attendance before another court (Tullis *v.* Scott, 38 Tex. 537. *Compare* Kitson *v.* Blake, 14 N. Y. Suppl. 446), or that he was absent in the actual military service of the United States (Piper *v.* Aldrich, 41 Mo. 421), or that he was imprisoned by the sentence of another court committing him for contempt (Truax *v.* Roberts, 4 N. J. L. 288. And see Bonnell *v.* Rome, etc., R. Co., 12 Hun (N. Y.) 218).

It is not a sufficient excuse for his absence from the trial that defendant was a milkman, delivering milk every day in a city, and had no one to attend to his duties in his absence (Landa *v.* McGehee, (Tex. 1892) 19 S. W. 516), or that he was a candidate for office and was busy on the day of the trial in looking after the returns (McGuire *v.* Drew, 83 Cal. 225, 23 Pac. 312).

27. Monroe *v.* Paddock, 75 Ind. 422; Decker *v.* Graves, 10 Ind. App. 25, 37 N. E. 550; Janes *v.* Langham, 33 Tex. 604; Omro *v.* Ward, 19 Wis. 232.

Diligence and foresight required.— An excuse of this kind will not be accepted as sufficient if it appears that the party failed to exercise a reasonable degree of prudence in guarding against the obstacles which might delay him, or of effort to overcome them. Thus he will not be relieved from the judgment where he simply failed to leave home in time to reach the court before the trial (Bradford *v.* Coit, 77 N. C. 72), where he made a mistake as to the distance he would have to travel (Almy *v.* Hess, 2 Utah 223), where he knew that the roads were in bad condition, but did not allow for the probable delay arising therefrom (Mehnert *v.* Thieme, 15 Kan. 368), where a storm kept him at home for one day, but there were three other days during which he could have gone to the court (Malek *v.* Kodad, 92 Iowa 763, 60 N. W. 491), or where a railroad accident delayed him, but there was still time for him to have reached the court if he had not stopped to get a witness and bring him to the trial (Williams *v.* Kessler, 82 Ind. 183).

28. Cogdell *v.* Barfield, 9 N. C. 332; Stilson *v.* Rankin, 40 Wis. 527.

29. Hurck *v.* St. Louis Exposition, etc., Assoc., 28 Mo. App. 629.

30. Anderson *v.* Scotland, 17 Fed. 667, 5 McCrary 414.

31. *Georgia.*— Beall *v.* Marietta Paper-Mill Co., 45 Ga. 28.

Missouri.— Stout *v.* Lewis, 11 Mo. 438. *Compare* Boernstein *v.* Heinrichs, 24 Mo. 26.

New York.— Tiedemann *v.* Dry Dock, etc., R. Co., 62 N. Y. App. Div. 611, 70 N. Y. Suppl. 819; *In re* Harris, 1 N. Y. Civ. Proc. 162; Fowler *v.* Hay, 1 How. Pr. 40. *Compare* Cohen *v.* Meryash, 93 N. Y. Suppl. 529; Kitson *v.* Blake, 14 N. Y. Suppl. 446, holding that the excuse that the attorney was trying a case in another court is not sufficient when that case was closed in ample time for him to have reached the court before the calling of the other case.

Ohio.— Smith *v.* Moreton Truck, etc., Co., 19 Ohio Cir. Ct. 628, 10 Ohio Cir. Dec. 532; Cunningham *v.* Mathivet, 4 Ohio Dec. (Reprint) 344, 1 Clev. L. Rep. 341.

Utah.— Thomas *v.* Morris, 8 Utah 284, 31 Pac. 446.

Wisconsin.— McArthur *v.* Slauson, 60 Wis. 293, 19 N. W. 45.

32. Wynne *v.* Prairie, 86 N. C. 73. *Compare* Gray *v.* Sabin, 87 Cal. 211, 25 Pac. 422, it seems that it is otherwise if his attend-

away by the illness or death of a near relative,[33] or, being out of town, was unexpectedly detained,[34] or even that the mere multiplicity and pressure of his professional engagements prevented him from giving attention to the case.[35] But some cases take a stricter view of the attorney's obligations, and hold that if he has cases coming on in different courts he must obtain leave of absence from one court or the other, and arrange that neither case shall be proceeded with in his absence,[36] that if he is likely to be detained elsewhere he must apply for a continuance or extension of time,[37] that if he is detained on his way to the place of trial he should telegraph to the judge and ask to have the case held,[38] and that it is no excuse for his voluntary absence that he believed the case would not be reached before his return.[39] And a majority of the decisions, particularly the more recent ones, do not favor accepting the excuse that the attorney was detained elsewhere by important business, even when it was of a public character, such as his attendance upon the legislature, of which he was a member.[40]

(v) *Sickness of Party or Relative.* If a party is prevented by sickness from preparing his case or attending the trial, and the circumstances are such that his personal attention and presence are necessary to the due protection of his rights, the judgment against him may be set aside on the ground of "casualty or misfortune" or of "excusable neglect."[41] But the illness of a member of his

ance there was voluntary and without a subpœna.

33. Burns *v.* Scooffy, 98 Cal. 271, 33 Pac. 86; Green *v.* Stobo, 118 Ind. 332, 20 N. E. 850; Martin *v.* St Charles Tobacco Co., 53 Mo. App. 655. But see Powell *v.* Washington, 15 Ala. 803; Cresswell *v.* White, 3 Ind. App. 306, 29 N. E. 612.

34. Dougherty *v.* Nevada Bank, 68 Cal. 275, 9 Pac. 112; Ellis *v.* Butler, 78 Iowa 632, 43 N. W. 459; Chesapeake, etc., R. Co. *v.* Hickey, (Ky. 1893) 22 S. W. 441; Cooley *v.* Barbourville Land, etc., Co., 43 S. W. 464, 19 Ky. L. Rep. 1454.

35. Chamberlin *v.* Del Norte County, 77 Cal. 150, 19 Pac. 271; Lee *v.* Kress, 3 Lanc. L. Rev. (Pa.) 313. But see Simon *v.* Hengels, 107 Ill. App. 174; Dick *v.* Williams, 87 Wis. 651, 58 N. W. 1029.

36. Western, etc., R. Co. *v.* Pitts, 79 Ga. 532, 4 S. E. 921.

37. Grove *v.* Bush, 86 Iowa 94, 53 N. W. 88; Beckham *v.* Morrison, 20 S. W. 197, 14 Ky. L. Rep. 241; Lowell *v.* Ames, 6 Mont. 187, 9 Pac. 826; Ross *v.* Belden, 72 N. Y. App. Div. 628, 76 N. Y. Suppl. 88.

38. Caughey *v.* Northern Pac. Elevator Co., 51 Minn. 324, 53 N. W. 545.

39. Gray *v.* Sabin, 87 Cal. 211, 25 Pac. 422; Pitzele *v.* Lutkins, 85 Ill. App. 662; Huntington *v.* Emery, 74 Md. 67, 21 Atl. 495.

40. *Alabama.*— Shields *v.* Burns, 31 Ala. 535.

Georgia.— Bentley *v.* Finch, 86 Ga. 809, 13 S. E. 155.

Indiana.— Phelps *v.* Osgood, 34 Ind. 150; Harlow *v.* Seymour First Nat. Bank, 30 Ind. App. 160, 65 N. E. 603.

Kentucky.— Marcum *v.* Powers, 9 S. W. 255, 10 Ky. L. Rep. 380.

Missouri.— Wilson *v.* Scott, 50 Mo. App. 329; Carr *v.* Dawes, 46 Mo. App. 351.

Montana.—Butte Butchering Co. *v.* Clarke, 19 Mont. 306, 48 Pac. 303.

Ohio.— French Wax Figure Co. *v.* Jupp Baxter Co., 21 Ohio Cir. Ct. 764, 12 Ohio Cir. Dec. 76.

South Carolina.— Claussen *v.* Johnson, 32 S. C. 86, 11 S. E. 209.

Wisconsin.— Dick *v.* Williams, 87 Wis. 651, 58 N. W. 1029.

See 30 Cent. Dig. tit. "Judgment," § 287.

Contra.— People *v.* Brett, 79 N. Y. App. Div. 631, 79 N. Y. Suppl. 709.

41. *Georgia.*— A judgment will not be set aside on the ground that defendant was sick when it was rendered and could not put in his plea, if no reason is shown why the plea was not filed before the trial term. Cannon *v.* Harrold, 61 Ga. 158. And see McCall *v.* Miller, 120 Ga. 262, 47 S. E. 920.

Illinois.— Sickness of defendant may be ground for vacating the judgment, but it must be clearly shown that the case could not be properly prepared or sucessfully tried without his personal presence or attention, the excuse not being sufficient if it appears that the whole proceeding might have been carried through by his attorney. Edwards *v.* McKay, 73 Ill. 570; Shaffer *v.* Sutton, 49 Ill. 506; Stetham *v.* Shoultz, 17 Ill. 99; Franz *v.* Winne, 6 Ill. App. 82.

Indiana.— Jonsson *v.* Lindstrom, 114 Ind. 152, 16 N. E. 400 (judgment will not be set aside because defendant was too sick to attend the trial, where he might have appeared by attorney); Flanagan *v.* Patterson, 78 Ind. 514; Monroe *v.* Paddock, 75 Ind. 422; Harvey *v.* Wilson, 44 Ind. 231 (judgment set aside where both defendant and his attorney were too ill to attend to the case); Sage *v.* Matheny, 14 Ind. 369 (judgment opened where service was constructive only and defendant did not know of the suit, and was sick during its pendency and until after judgment).

Iowa.— Liggett *v.* Worrall, 98 Iowa 529, 67 N. W. 406; Brewer *v.* Holborn, 34 Iowa 473; Luscomb *v.* Maloy, 26 Iowa 444. But

family, while it may be ground for a continuance, is no cause for setting aside the judgment.[42]

(VI) *Sickness of Counsel or Relative.* The illness of defendant's counsel, so severe as to prevent him from appearing and trying the case, is good ground for vacating the judgment, provided defendant did not know of it in time to retain other counsel or was otherwise prevented from doing so.[43] And the same rule applies in case of the illness of a member of the attorney's family, withdrawing his attention from all professional business, and leaving the client without legal aid and without the opportunity to retain other counsel.[44]

F. Proceedings For Relief — 1. Nature and Form of Proceedings. The form of proceeding for relief against a judgment by having it opened, vacated, or set aside varies in the different states. In some the writ of audita querela is still in use for this purpose,[45] in others such relief may be granted on writ of error coram nobis,[46] and in others a bill of review is an appropriate remedy.[47] But in a

it is not sufficient ground for setting aside a default that defendant "had a lame back" on the day of the trial. Reiher *v.* Webb, 73 Iowa 559, 35 N. W. 631.

Kansas.— Gheer *v.* Huber, 32 Kan. 319, 4 Pac. 290.

Kentucky.— French *v.* Eversole, 32 S. W. 211, 17 Ky. L. Rep. 617.

Montana.— Benedict *v.* Spendiff, 9 Mont. 85, 22 Pac. 500.

Nebraska.— The character and duration of the alleged illness must be shown, and it must appear that defendant was really prevented thereby from defending the action. Scott *v.* Wright, 50 Nebr. 849, 70 N. W. 396.

New York.— Carey *v.* Browne, 67 Hun 516, 22 N. Y. Suppl. 521; Matter of Traver, 9 Misc. 621, 30 N. Y. Suppl. 851. But see Ransdell *v.* National Rivet, etc., Co., 20 N. Y. App. Div. 388, 46 N. Y. Suppl. 819.

Pennsylvania.— Lockard *v.* Keyser, 18 Pa. Super. Ct. 172.

South Carolina.— Farmers', etc., Mercantile, etc., Co. *v.* Smith, 70 S. C. 160, 49 S. E. 226.

Texas.— Goodhue *v.* Meyers, 58 Tex. 405; Holliman *v.* Pearlstone, (Civ. App. 1895) 29 S. W. 542; Truehart *v.* Simpson, (Civ. App. 1894) 24 S. W. 842.

West Virginia.— Princeton Bank *v.* Johnston, 41 W. Va. 550, 23 S. E. 517.

See 30 Cent. Dig. tit. "Judgment," § 288.

But see Gardenhire *v.* Vinson, 39 Ark. 270; Depriest *v.* Patterson, 85 N. C. 376.

42. Glover *v.* Dimmock, 119 Ga. 696, 46 S. E. 824; Seiberling *v.* Schuster, 83 Iowa 747, 49 N. W. 844; Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135; Skinner *v.* Bryce, 75 N. C. 287. *Compare* Hill *v.* Crump, 24 Ind. 291, where a judgment by default was set aside on a showing that both defendant and his counsel were prevented from attending court, the former by the dangerous illness of his wife, and the latter by his necessary attention to his duties as a public officer. But see Thornall *v.* Turner, 23 Misc. (N. Y.) 363, 51 N. Y. Suppl. 214; Clewis *v.* Snell, (Tex. Civ. App. 1900) 59 S. W. 910.

43. *Georgia.*— Harralson *v.* McArthur, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689.

Illinois.— Defendant is not entitled to relief if he knew his attorney was sick and neglected to retain other counsel having opportunity to do so (Clark *v.* Ewing, 93 Ill. 572), or where the case had been once continued on account of the illness of his counsel, and on an agreement that it should be tried on the day set, other counsel being employed if necessary (Hittle *v.* Zeimer, 164 Ill. 64, 45 N. E. 419).

Indiana.— Bristor *v.* Galvin, 62 Ind. 352. Relief will be denied where defendant's attorney was one of a firm, the appearance of the firm being entered for him, and no cause shown why the other partner did not attend to the case. Heaton *v.* Peterson, 6 Ind. App. 1, 31 N. E. 1133.

Iowa.— Callanan *v.* Ætna Nat. Bank, 84 Iowa 8, 50 N. W. 69; Wishard *v.* McNeil, 78 Iowa 40, 42 N. W. 578; Montgomery County *v.* American Emigrant Co., 47 Iowa 91.

Kentucky.— Snelling *v.* Lewis, 78 S. W. 1124, 25 Ky. L. Rep. 1856; Reinicke *v.* Morse, 10 S. W. 468, 10 Ky. L. Rep. 767.

Minnesota.— Nye *v.* Swan, 42 Minn. 243, 44 N. W. 9.

New York.— Wilmarth *v.* Gatfield, 1 How. Pr. 52. *Compare* Sheridan *v.* Kelly, 2 How. Pr. 28.

Oregon.— Weiss *v.* Meyer, 24 Oreg. 108, 32 Pac. 1025.

Texas.— Goodhue *v.* Meyers, 58 Tex. 405; Southwestern Tel., etc., Co. *v.* Jennings, (Civ. App. 1899) 51 S. W. 288.

United States.— Cook *v.* Beall, 6 Fed. Cas. No. 3,153, 2 Cranch C. C. 264.

See 30 Cent. Dig. tit. "Judgment," § 288.

But see McFarland *v.* White, 13 La. Ann. 394.

44. Tidwell *v.* Witherspoon, 18 Fla. 282; Scott *v.* Smith, 133 Mo. 618, 34 S. W. 864; Stout *v.* Lewis, 11 Mo. 438; Martin *v.* St. Charles Tobacco Co., 53 Mo. App. 655. But see Powell *v.* Washington, 15 Ala. 803; Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135.

45. See Audita Querela, 4 Cyc. 1065. And see 1 Black Judgm. § 299.

46. See *supra*, VIII, D.

47. *Arkansas.*— Kizer Lumber Co. *v.* Mosely, 56 Ark. 544, 20 S. W. 409.

majority the proper method of seeking such relief is either by a petition or complaint inaugurating a distinct and independent action,[48] by a rule on the adverse party to show cause why the judgment should not be opened or vacated,[49] or by an application to the court which rendered the judgment, in the form of a motion, with notice to the adverse party.[50] But in any case there must be a

District of Columbia.— Fries *v.* Fries, 1 MacArthur 291.

Georgia.—Durant *v.* Duchesse D'Auxy, 107 Ga. 456, 33 S. E. 478.

New York.— Watson *v.* Watson, 47 How. Pr. 240.

Texas.— Merle *v.* Andrews, 4 Tex. 200.

See 30 Cent. Dig. tit. "Judgment," § 724. And see EQUITY, 16 Cyc. 517 *et seq.*

When bill of review not necessary.— The general rule that a decree once enrolled cannot be opened except by a bill of review is subject to exceptions arising in cases not heard upon the merits and in which it is alleged that the decree was entered by mistake or surprise, or under such circumstances as shall satisfy the court that it ought to be set aside. Herbert *v.* Rowles, 30 Md. 271; Cawley *v.* Leonard, 28 N. J. Eq. 467; Smith *v.* Alton, 22 N. J. Eq. 572; Millspaugh *v.* McBride, 7 Paige (N. Y.) 509, 34 Am. Dec. 360; Beekman *v.* Peck, 3 Johns. Ch. (N. Y.) 415; Bennett *v.* Winter, 2 Johns. Ch. (N. Y.) 205; Erwin *v.* Vint, 6 Munf. (Va.) 267.

Parties.—To a bill to vacate a decree, plaintiff in such decree is a necessary party defendant; to omit him is a fatal defect. Harwood *v.* Cincinnati, etc., Airline R. Co., 17 Wall. (U. S.) 78, 21 L. ed. 558.

In **South Carolina** the method of obtaining relief against a judgment under Code, § 195, is an exclusive remedy, which takes the place of a petition for rehearing or a bill of review. *Ex p.* Carolina Nat. Bank, 56 S. C. 12, 33 S. E. 781.

48. *California.*— People *v.* Temple, 103 Cal. 447, 37 Pac. 414.

Georgia.— Dugan *v.* McGlann, 60 Ga. 353.

Indiana.— Scudder *v.* Jones, 134 Ind. 547, 32 N. E. 221. See Frazier *v.* Williams, 18 Ind. 416.

Iowa.— Callanan *v.* Ætna Nat. Bank, 84 Iowa 8, 50 N. W. 69; Dullard *v.* Phelan, 83 Iowa 471, 50 N. W. 204; Council Bluffs L. & T. Co. *v.* Jennings, 81 Iowa 470, 46 N. W. 1006.

Kentucky.— Snelling *v.* Lewis, 78 S. W. 1124, 25 Ky. L. Rep. 1856; Henry Vogt Mach. Co. *v.* Pennsylvania Iron Works Co., 66 S. W. 734, 23 Ky. L. Rep. 2163.

Nebraska.— Delaney *v.* Updike Grain Co., 5 Nebr. (Unoff.) 579, 99 N. W. 660.

Texas.— Brown *v.* Dutton, (Civ. App. 1905) 85 S. W. 454.

Wisconsin.— Zinc Carbonate Co. *v.* Shullsburg First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

See 30 Cent. Dig. tit. "Judgment," § 724. And see *infra*, X.

49. *In re* Levy, 3 Pennew. (Del.) 5, 50 Atl. 540; Grier *v.* Jones, 54 Ga. 154; Job *v.* Walker, 3 Md. 129; Fisher *v.* Hestonville, etc., Pass. R. Co., 185 Pa. St. 602, 40 Atl. 97; Silberman *v.* Shuklansky, 172 Pa. St. 77, 33 Atl. 272; Anderson *v.* Woodworth, 1 Lack. Leg. N. (Pa.) 264; Whitney *v.* Chandler, 2 Leg. Rec. (Pa.) 270. And see Knarr *v.* Elgren, 7 Pa. Cas. 172, 9 Atl. 875; Com. *v.* Masonic Home, 7 Pa. Dist. 103.

The judgment may be stricken off if absolutely void; but if it is merely irregular, it will be opened and defendant let in to a defense. Dikeman *v.* Butterfield, 135 Pa. St. 236, 19 Atl. 938.

Authority of attorney.— Where an application for an order to show cause why a judgment should not be set aside is presented by an attorney who appears from the moving papers to be associated with, and not substituted for, the attorney who defended the action originally, it is error to refuse the order on the mere ground that no authorized attorney had appeared. Olmstead *v.* Firth, 60 Minn. 126, 61 N. W. 1017.

50. *Georgia.*— Under Civ. Code (1895), § 5362, judgments can be arrested or set aside on motion only for defects appearing on the face of the record. Union Compress Co. *v.* Leffler, 122 Ga. 640, 50 S. E. 483.

Iowa.— Manning *v.* Ferguson, 103 Iowa 561, 72 N. W. 762.

Massachusetts.— Davis *v.* National L. Ins. Co., 187 Mass. 468, 73 N. E. 658.

Minnesota.— Phelps *v.* Western Realty Co., 89 Minn. 319, 94 N. W. 1085.

Mississippi.— Benwood Iron-Works Co. *v.* Tappan, 56 Miss. 659.

Nebraska.— Pollock *v.* Boyd, 36 Nebr. 369, 54 N. W. 560.

New York.— Flake *v.* Van Wagenen, 54 N. Y. 25.

North Carolina.— Everett *v.* Reynolds, 114 N. C. 366, 19 S. E. 233; Grant *v.* Harrell, 109 N. C. 78, 13 S. E. 718; Carter *v.* Rountree, 109 N. C. 29, 13 S. E. 716; Foard *v.* Alexander, 64 N. C. 69. But see Uzzle *v.* Vinson, 111 N. C. 138, 16 S. E. 6, holding that a judgment sought to be vacated on the ground of fraud cannot be attacked by motion in the cause, but only by an independent action.

North Dakota.—Garr *v.* Spaulding, 2 N. D. 414, 51 N. W. 867.

Ohio.— Fox *v.* Lima Nat. Bank, 11 Ohio Dec. (Reprint) 127, 25 Cinc. L. Bul. 28. *Compare* Ralston *v.* Wells, 49 Ohio St. 298, 30 N. E. 784.

South Carolina.— Drake *v.* Steadman, 46 S. C. 474, 24 S. E. 458.

Washington.— Under the statutes in this state, a proceeding to open or set aside a judgment may in certain cases be by motion in the cause, but in others must be by peti-

direct proceeding for the purpose, not a mere incident to the progress of the cause or to the execution of the judgment, and one which is appropriate to the relief sought.[51] A statutory form of proceeding for this purpose is not the exclusive remedy, unless clearly so intended, but is cumulative to the common-law right to move in proper time and form for the setting aside of the judgment.[52] But if it is attempted to adopt and follow the statutory method, the provisions of the statute must be complied with, in order to authorize the court to act.[53]

2. Vacation of Judgment on Court's Own Motion. During the term at which a judgment was rendered, the court has power on its own motion to vacate the same for irregularity or because it was improvidently or inadvertently entered,[54] and this may be done even after the term if the judgment was void on its face.[55]

3. Indirect Vacation of Judgment. A judgment may be practically vacated, although not in terms set aside, by the taking of subsequent proceedings in the same action which are inconsistent with the judgment continuing in force,[56] as by

tion. Ballinger Annot. Codes & St. §§ 5153–5161; Williams *v.* Breen, 25 Wash. 666, 66 Pac. 103; Griffith *v.* Maxwell, 25 Wash. 658, 66 Pac. 106; Spokane, etc., Lumber Co. *v.* Stanley, 25 Wash. 653, 66 Pac. 92; Sturgiss *v.* Dart, 23 Wash. 244, 62 Pac. 858; Roberts *v.* Shelton Southwestern R. Co., 21 Wash. 427, 58 Pac. 576; State *v.* Pierce County Super. Ct., 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724; Whidby Land, etc., Co. *v.* Nye, 5 Wash. 301, 31 Pac. 752.

Wyoming.— Iba *v.* Wyoming Cent. Assoc., 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

See 30 Cent. Dig. tit. "Judgment," § 724.

Permission to renew motion.— After denying a motion to open or vacate a judgment, the court may grant permission to renew the motion, and thereupon may impose terms if it seems just and proper. Liquari *v.* Abramson, 91 N. Y. Suppl. 768.

51. It is not appropriate or permissible to open or vacate a judgment when the application takes the form of a motion for a new trial. Ervin School Tp. *v.* Tapp, 121 Ind. 463, 23 N. E. 505; Thomas *v.* Morris, 8 Utah 284, 31 Pac. 446; Whitney *v.* Karner, 44 Wis. 563. But a motion for a new trial may be treated as a proper application to open the judgment, where filed after the time in which a new trial could be moved for. Bradley *v.* Slater, 58 Nebr. 554, 78 N. W. 1069. Nor can such relief properly be granted on the bringing of another action of the same kind for the same purpose as the first (Sanders *v.* Price, 56 S. C. 1, 33 S. E. 731), nor where the grounds for such action are presented by way of objection to the confirmation of a report of sale (Johnson *v.* Campbell, 52 Ark. 316, 12 S. W. 578), or in an answer to proceedings supplementary to execution (Saunders *v.* Hall, 2 Abb. Pr. (N. Y.) 418), or on a motion to quash (Bridewell *v.* Mooney, 25 Ark. 524), or a motion for a *nunc pro tunc* amendment of the summons (State *v.* Davis, 73 Ind. 359), or a special demurrer (Whetcroft *v.* Dunlop, 29 Fed. Cas. No. 17,506, 1 Cranch C. C. 5).

52. Wheeler *v.* White, 2 Ohio Dec. (Reprint) 584, 4 West. L. Month. 110.

53. State *v.* Fourth Dist. Ct., 16 Nev. 371.

54. *California.*— Hall *v.* Polack, 42 Cal. 218.

Georgia.— Jordan *v.* Tarver, 92 Ga. 379, 17 S. E. 351.

Indiana.— Ray *v.* Moore, 19 Ind. App. 690, 49 N. E. 1083.

Iowa.— Wolmerstadt *v.* Jacobs, 61 Iowa 372, 16 N. W. 217.

Missouri.— Smith *v.* Perkins, 124 Mo. 50, 27 S. W. 574.

United States.— Wyler *v.* Union Pac. R. Co., 89 Fed. 41; Ætna L. Ins. Co. *v.* Hamilton County, 79 Fed. 575, 25 C. C. A. 94.

See 30 Cent. Dig. tit. "Judgment," § 725.

But see Whitbeck *v.* Montana Cent. R. Co., 21 Mont. 102, 52 Pac. 1098; Long *v.* Kingfisher County, 5 Okla. 128, 47 Pac. 1063.

Grounds.— This does not mean that the court may of its own accord revoke or cancel any judgment it may have rendered, even during the same term; there must be some error, irregularity, or want of jurisdiction to justify such action. Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cir. Ct. 783, 6 Ohio Cir. Dec. 670.

55. Winrod *v.* Wolters, 141 Cal. 399, 74 Pac. 1037; White *v.* Ladd, 41 Oreg. 324, 68 Pac. 739, 93 Am. St. Rep. 732; Smaltz *v.* Hancock, 118 Pa. St. 550, 12 Atl. 464.

56. Thomas *v.* McGuinness, 94 Ill. App. 248 (holding that where plaintiff, after defaulting one defendant and after a successful demurrer by the other, amends his declaration and takes a rule on both defendants to plead to the amended declaration the judgment is vacated); Alliance Milling Co. *v.* Eaton, (Tex. Civ. App. 1896) 33 S. W. 588 (holding that where an interlocutory judgment by default is granted subject to the right of defendant to file an answer, the filing of an answer will vacate the judgment in so far as the defenses pleaded show that plaintiff ought not to recover). And see Watson *v.* Harris, 65 Tex. 61.

Motion for review.— A judgment is not set aside by grant of leave to file a motion for reconsideration, a written argument at the next term, and a continuance of the cause.

the entry of a second judgment in the case, different from the first,[57] or by an order granting a new trial,[58] or by the reversal of the judgment on appeal.[59]

4. APPLICATION FOR VACATION — a. Form and Requisites. An application to vacate or open a judgment, whether in the form of a petition or motion, must be in writing;[60] but it is not required to be in any particular form unless one is prescribed by statute,[61] and even in that case the motion may be entertained, although it is not strictly in conformity with the statute, trifling irregularities not being sufficient to oust the jurisdiction of the court.[62] But the application should show compliance with any preliminary requisites,[63] describe the judgment or portion of it sought to be vacated,[64] and contain an appropriate demand of relief.[65] In some jurisdictions leave of court to file the motion must be obtained.[66]

b. Sufficiency of Allegations. A motion or petition to vacate a judgment must state the nature of the suit in which it was entered,[67] and show that the petitioner has such an interest in the judgment as entitles him to apply for its vacation.[68] Further the application must show the existence of one of the statutory causes for setting aside a judgment, or facts sufficient to warrant the court in taking such action in the exercise of its general jurisdiction,[69] and it is not

Rawdon v. Rapley, 14 Ark. 203, 58 Am. Dec. 370.

Rescinding order appointing commissioners. — Where the court orders the appointment of commissioners and renders judgment on their report, and afterward passes an order setting aside the order of appointment, this does not vacate the judgment. Lowry v. Jenkins, 3 Bibb (Ky.) 314.

Dismissal after judgment nisi on a forfeited bail-bond, and after scire facias to the sureties and the filing of their answer, expressed to be "without prejudice, with the consent of defendant's attorney," does not vacate the judgment, without an order setting it aside. Burris v. State, 34 Tex. Cr. 551, 31 S. W. 395.

Pleading after default.— The mere filing of a plea, after a default, without an order setting aside the default, does not vacate the judgment. Camp v. Phillips, 88 Ga. 415, 14 S. E. 580; Wall v. Atwell, 21 Gratt. (Va.) 401. And see Loeber v. Moore, 20 D. C. 1.

57. Winer v. Mast, 146 Ind. 177, 45 N. E. 66; Mornyer v. Cooper, 35 Iowa 257. *Compare* Dyer v. Wilbur, 48 Me. 287, holding that a judgment is not necessarily vacated or annulled by the granting of a review of it and the rendering of judgment in the action of review. But see Nuckolls v. Irwin, 2 Nebr. 60; Mason v. McLean, 6 Wash. 31, 32 Pac. 1006.

58. Steeple v. Downing, 60 Ind. 478; Maxwell v. Campbell, 45 Ind. 360; Rickets v. Hitchens, 34 Ind. 348; Lane v. Kingsberry, 11 Mo. 402; Patterson v. Loughridge, 46 N. J. L. 138. *Compare* Reed v. Spayde, 56 Ind. 394; Laclede Nat. Bank v. Betterton, 5 Tex. Civ. App. 355, 24 S. W. 326. But see Stanbrough v. Cook, 86 Iowa 740, 53 N. W. 131.

59. Where an interlocutory judgment by default is entered against a sole defendant, or against one of two defendants, and plaintiff recovers a judgment on the trial, which is reversed on appeal, it has been held that this will vacate the default. Reinhart v. Luzo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; Downer v. Dana, 22 Vt. 22. *Contra*, Hogan v. Alston, 9 Ala. 627; Griswold v. Stoughton, 1 Cai. (N. Y.) 6.

60. Ohio Falls Car Co. v. Sweet, etc., Co., 7 Ind. App. 163, 34 N. E. 533; Indianapolis, etc., R. Co. v. Crockett, 2 Ind. App. 136, 28 N. E. 222.

61. People v. Lafarge, 3 Cal. 130; Barbee v. Fox, 79 Ky. 588.

Joining with motion for new trial.— On a proceeding to set aside a default judgment and obtain a new trial, the petition for a new trial is not objectionable because it refers to the motion to set aside the default, and the affidavit supporting it, and makes them a part thereof. Wishard v. McNeil, 78 Iowa 40, 42 N. W. 578.

62. Boston L. & T. Co. v. Organ, 53 Kan. 386, 36 Pac. 733; Wilson, etc., Inv. Co. v. Hillyer, 50 Kan. 446, 31 Pac. 1064.

A trifling misnomer, not calculated to mislead or confuse any one, does not make the motion papers fatally defective. Porter v. Bichard, 1 Ariz. 87, 25 Pac. 530.

Error in entitling.— If, in docketing a motion to set aside a judgment, the cause is entitled as in the original papers, without reversing the order of the parties, the error is harmless. Hoag v. Old People's Mut. Ben. Soc., 1 Ind. App. 28, 27 N. E. 438.

Amendment.— Where a motion to set aside a default has been made and overruled, without a continuance, it is error to allow an amendment of the application at a subsequent term. Albany Land Co. v. McElwaine-Richards Co., 11 Ind. App. 477, 39 N. E. 297.

63. Brown v. Niagara Mach. Co., 7 N. Y. Suppl. 514.

64. State v. Huston, 32 Wash. 154, 72 Pac. 1015.

65. Beatty v. O'Connor, 106 Ind. 81, 5 N. E. 880.

66. Blair v. Thomas, Dudley (S. C.) 288.

67. Thompson v. Harlow, 150 Ind. 450, 50 N. E. 474.

68. Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182. And see King v. Davis, 137 Fed. 222.

69. Kirkham v. Gibson, 52 Nebr. 23, 71

enough to allege "mistake," "surprise," "fraud," "unavoidable casualty or misfortune," or the like, in general terms, but the very facts which led up to the taking of the judgment or which prevented the party from defending the suit must be stated explicitly.[70] He must also show, not generally or inferentially, but by specific averments, that he has not been in fault, or has exercised due diligence and vigilance,[71] or if he has been negligent he must show in like manner that his neg-

N. W. 960; Spencer *v.* Thistle, 13 Nebr. 227, 13 N. W. 214; Roberts *v.* Shelton Southwestern R. Co., 21 Wash. 427, 58 Pac. 576. *Compare* British-American Ins. Co. *v.* Wilson, 77 Conn. 559, 60 Atl. 293, motion to set aside a judgment of nonsuit under Conn. Gen. St. (1902) § 762.

Statement of grounds. — That the facts stated in a motion to vacate or modify a judgment do not justify the granting of the relief prayed is an objection which goes to the merits, and affords no ground for the refusal of the court to consider and act on the motion. Cahill *v.* San Francisco Super. Ct., 145 Cal. 42, 78 Pac. 467.

In Georgia a motion to set aside a judgment based on the verdict of a jury cannot properly be predicated upon any fact not appearing of record. Ayer *v.* James, 120 Ga. 578, 48 S. E. 154.

In Texas an application to set aside a judgment by default should bring the case substantially within the rules relating to new trials. Foster *v.* Martin, 20 Tex. 118.

70. *Arkansas.*— Waldo *v.* Thweatt, 64 Ark. 126, 40 S. W. 782.

California.— Shearman *v.* Jorgensen, 106 Cal. 483, 39 Pac. 863.

Colorado.— Barra *v.* People, 18 Colo. App. 16, 69 Pac. 1074.

Georgia.— Peek *v.* Bowden, 52 Ga. 344.

Indiana.— Thompson *v.* Harlow, 150 Ind. 450, 50 N. E. 474; Van Walters *v.* Marion County Children's Guardians, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431; Hall *v.* Durham, 116 Ind. 198, 18 N. E. 181; Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163; Clandy *v.* Caldwell, 106 Ind. 256, 6 N. E. 360; Bristor *v.* Galvin, 62 Ind. 352; Frost *v.* Dodge, 15 Ind. 139; American Brewing Co. *v.* Jergens, 21 Ind. App. 595, 52 N. E. 820. An allegation that the court was not legally in session when the judgment was rendered, and had no authority to hold a term at that time, is merely a conclusion of law and unavailing. Long *v.* Ruch, 148 Ind. 74, 47 N. E. 156.

Iowa.— A petition which sets out the facts showing the alleged fraud is sufficient without a specific allegation of fraud. Oliver *v.* Riley, 92 Iowa 23, 60 N. W. 180; Lafever *v.* Stone, 55 Iowa 49, 7 N. W. 400.

Kansas.— Hill *v.* Williams, 6 Kan. 17; George *v.* Hatton, 2 Kan. 333.

Kentucky.— Dixon *v.* Wood, 64 S. W. 724, 23 Ky. L. Rep. 1004; Grundy *v.* Kelley, 41 S. W. 20, 19 Ky. L. Rep. 476; Combs *v.* Bentley, 41 S. W. 8, 19 Ky. L. Rep. 505. And see Logan *v.* Steel, 7 J. J. Marsh. 41.

Louisiana.— Landry *v.* Dickson, 7 La. Ann. 238.

Nebraska.— Roh *v.* Vitera, 38 Nebr. 333, 56 N. W. 977.

Nevada.— Brown *v.* Warren, 17 Nev. 417, 30 Pac. 1078.

New Mexico.— Lasswell *v.* Kitt, 11 N. M. 459, 70 Pac. 561.

New York.— Deane *v.* Loucks, 58 Hun 555, 12 N. Y. Suppl. 903.

Ohio.— Wellman *v.* Wellman, 9 Ohio Cir. Ct. 72, 6 Ohio Cir. Dec. 61; Hildebrand *v.* Windisch, 4 Cinc. L. Bul. 289, 6 Ohio Dec. (Reprint) 784, 8 Am. L. Rec. 103.

Pennsylvania.— Gazzam *v.* Reading, 202 Pa. St. 231, 51 Atl. 1000; Fisher *v.* Hestonville, etc., R. Co., 185 Pa. St. 602, 40 Atl. 97; Wyman's Appeal, 3 Walk. 410.

South Carolina.— Blair *v.* Thomas, Dudley 288.

Texas.— Contreras *v.* Haynes, 61 Tex. 103; Grogan *v.* Smith, (Civ. App. 1895) 33 S. W. 276. Where judgment by default is taken against a defendant served only by publication, his petition to set aside the default need only allege that he had no actual notice and that he has a good defense. Snow *v.* Hawpe, 22 Tex. 168.

Vermont.— Hunt *v.* Burbank, 73 Vt. 273, 50 Atl. 1058.

Wisconsin.— O'Neill's Estate, 90 Wis. 480, 63 N. W. 1042.

Canada.—Rutherford *v.* Bready, 9 Manitoba 29.

See 30 Cent. Dig. tit. "Judgment," § 727.

71. *Alabama.*— Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788; Waddill *v.* Weaver, 53 Ala. 58.

Alaska.— Marx *v.* Valentine, 1 Alaska 28.

Iowa.— Miller *v.* Albaugh, 24 Iowa 128.

Minnesota.— Schweinfurter *v.* Schmahl, 69 Minn. 418, 72 N. W. 702.

Ohio.— Brownsberger *v.* Cincinnati, etc., R. Co., 25 Ohio Cir. Ct. 765.

Texas.— See Kitchen *v.* Crawford, 13 Tex. 516.

See 30 Cent. Dig. tit. "Judgment," § 727.

Failure to move for new trial.— A motion to set aside a judgment should show why the party did not seasonably move for a new trial, if the same matters would have been available. Blood *v.* Beadle, 65 Ala. 103; Heine *v.* Treadwell, 72 Cal. 217, 13 Pac. 503.

Failure to move at same term.— Where the motion is made at a term subsequent to that at which the judgment was rendered, it must be shown that there was a good reason or excuse for not moving at the same term. Lindsley *v.* Sparks, 20 Tex. Civ. App. 56, 48 S. W. 204; Rodriguez *v.* Espinosa, (Tex. Civ. App. 1894) 25 S. W. 669.

New evidence.— An application to set aside a judgment for newly discovered evidence

ligence was excusable.[72] And the motion must show that he has a good and meritorious defense to the action, not merely by so alleging, but by setting forth fully the facts which constitute the proposed defense,[73] except in cases where the judgment is absolutely void, when no defense need be shown.[74]

5. Answer and Other Pleadings. Where a proceeding to vacate a judgment is begun by petition or complaint, it is the right of the judgment creditor to controvert its allegations by an answer, and the court cannot refuse to permit a proper answer to be filed.[75] The answer must raise an issue by direct and positive averments; if it fails to do so, the petition may be taken as confessed and the judgment set aside.[76] On the other hand the petition may be dismissed for failure to file a replication, if one would be required by the ordinary rules of pleading.[77]

6. Parties on Application. As a general rule all the parties to a judgment should be made parties to a proceeding to vacate or open it,[78] as well as those

must state the means used to secure the evidence; it is not sufficient to state that every means had been used to find the witness. Turner *v.* Davis, 132 N. C. 187, 43 S. E. 637.

72. Blake *v.* Stewart, 29 Ind. 318.

73. *Alabama.*— Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788.

Illinois.— Roberts *v.* Corby, 86 Ill. 182; Rich *v.* Hathaway, 18 Ill. 548; Columbus Mut. Life Assoc. *v.* Plummer, 86 Ill. App. 446; Brewer, etc., Brewing Co. *v.* Lonergan, 63 Ill. App. 28.

Indiana.— Jones *v.* Crowell, 143 Ind. 218, 42 N. E. 612; Rupert *v.* Martz, 116 Ind. 72, 18 N. E. 381; Kreite *v.* Kreite, 93 Ind. 583; Williams *v.* Kessler, 82 Ind. 183; Slagle *v.* Bodmer, 75 Ind. 330; Bristor *v.* Galvin, 62 Ind. 352; Toledo, etc., R. Co. *v.* Gates, 32 Ind. 238; Frost *v.* Dodge, 15 Ind. 139; David *v.* Kessler, Wils. 519.

Iowa.— Johnson *v.* Nash-Wright Co., 121 Iowa 173, 96 N. W. 760; Palmer *v.* Rogers, 70 Iowa 381, 30 N. W. 645; King *v.* Stewart, 48 Iowa 334; Jaeger *v.* Evans, 46 Iowa 188; Brewer *v.* Holborn, 34 Iowa 473; Piggott *v.* Addicks, 3 Greene 427, 56 Am. Dec. 547.

Kansas.— Sanford *v.* Weeks, 50 Kan. 339, 31 Pac. 1088.

Louisiana.—Raoul *v.* Danbois, 2 Mart. 150.

Minnesota.— Forin *v.* Duluth, 66 Minn. 54, 68 N. W. 515.

Missouri.— Florez *v.* Uhrig, 35 Mo. 517; Palmer *v.* Russell, 34 Mo. 476; Barry *v.* Johnson, 3 Mo. 372. But see Scott *v.* Smith, 133 Mo. 618, 34 S. W. 864.

Nebraska.— Hughes *v.* Housel, 33 Nebr. 703, 50 N. W. 1127.

New York.— McGaffigan *v.* Jenkins, 1 Barb. 31; Young *v.* Conklin, 3 Misc. 122, 23 N. Y. Suppl. 993; Brewster *v.* Boyle, 19 N. Y. Suppl. 146; Ellis *v.* Jones, 6 How. Pr. 296; Dix *v.* Palmer, 5 How. Pr. 233; Jackson *v.* Stiles, 3 Cai. 93; Cogswell *v.* Vanderbergh, 1 Cai. 155. *Compare* Briggs *v.* Briggs, 3 Johns. 449.

North Carolina.— Mauney *v.* Gidney, 88 N. C. 200.

North Dakota.— Minnesota Thresher Mfg. Co. *v.* Holz, 10 N. D. 16, 84 N. W. 581.

Oklahoma.— Provins *v.* Lovi, 6 Okla. 94, 50 Pac. 81.

Oregon.— Mayer *v.* Mayer, 27 Oreg. 133, 39 Pac. 1002.

Pennsylvania.— Shenk *v.* Hacker, 3 Pa. Super. Ct. 439.

Texas.— Foster *v.* Martin, 20 Tex. 118; Keator *v.* Case, (Civ. App. 1895) 31 S. W. 1099; Ellis *v.* Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687.

Washington.— State *v.* Lockhart, 18 Wash. 531, 52 Pac. 315.

West Virginia.— Robinson *v.* Braiden, 44 W. Va. 183, 28 S. E. 798.

See 30 Cent. Dig. tit. "Judgment," § 727.

74. Symes *v.* Charpiot, 17 Colo. App. 463, 69 Pac. 311; Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913.

75. Dobbins *v.* McNamara, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; Thompson *v.* Sharp, 17 Nebr. 69, 22 N. W. 78.

In Ohio no demurrer or answer to the petition is authorized by the statute, although such pleadings may be required by rule of court or filed on special leave. Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468, 3 West. L. Month. 195.

In Tennessee where a petition is filed to open a decree which was rendered without personal service on defendant, the proper practice is to move to dismiss the petition, instead of answering it. Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

76. Lansing *v.* McKillup, 1 Cow. (N. Y.) 35; Hunter *v.* Mahoney, 148 Pa. St. 232, 23 Atl. 1004.

77. Russell's Appeal, 93 Pa. St. 384.

78. Day *v.* Goodwin, 104 Iowa 374, 73 N. W. 864, 65 Am. St. Rep. 465; Ferguson *v.* Smith, 10 Kan. 394; Willis *v.* Peet, 26 La. Ann. 156; Weidersum *v.* Naumann, 62 How. Pr. (N. Y.) 369.

Joint defendants.— Where a judgment is invalid as against one defendant for lack of jurisdiction, and he moves to have it set aside as to him, the other defendant, who was properly served or appeared in the action, is not a necessary party. Durre *v.* Brown, 7 Ind. App. 127, 34 N. E. 577; Carlon *v.* Ruffner, 12 W. Va. 297. Although all defendants join in the petition to set the judgment aside, that is no reason for denying the motion *in toto*; it may be permitted to stand as to those served. Stewart *v.* Parsons, 5 N. D. 273, 65 N. W. 672. A defendant who has not answered, and who has not appeared on the argument of a motion to vacate the judg-

who may have acquired interests in the judgment, or under it, and therefore have an interest in maintaining it.[79] Where defendant in a pending case seeks to avoid an existing judgment on the ground that he was not duly served, and there is an entry of service purporting to have been made by a sheriff, he must traverse the return and make the officer a party to the proceeding.[80]

7. Notice of Application — a. In General. During the term at which a judgment was rendered, it may be set aside for sufficient cause without notice to the party affected.[81] But after the term this action cannot be taken except upon notice to the party or parties interested in maintaining the judgment,[82] which

ment, will not be permitted to join in the motion after its submission for decision. Havemeyer *v.* Brooklyn Sugar Refining Co., 13 N. Y. Suppl. 873, 26 Abb. N. Cas. 157.

Misnomer.— One petitioning for the vacation of a judgment must appear to be the same person against whom it was rendered; a motion by "Samuel" to vacate a judgment against "Simon" will not be granted, although the summons was served on "Samuel." Upham *v.* Cohn, 14 N. Y. Civ. Proc. 27.

A merely nominal party need not be joined. Fitzgerald *v.* Cross, 30 Ohio St. 444.

A defendant mortgagor need not be served with notice of a motion by his co-defendant, a prior mortgagee, to set aside a default judgment in the foreclosure proceedings under which the property was sold to plaintiff. Schart *v.* Schart, 116 Cal. 91, 47 Pac. 927.

79. Walker *v.* Equitable Mortg. Co., 114 Ga. 862, 40 S. E. 1010.

Assignee of judgment.— On a proceeding to vacate a judgment, the assignee of the judgment is a necessary party and entitled to notice. Robinson *v.* American Chemical Co., 9 N. Y. Civ. Proc. 78. *Compare* Malone *v.* Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063.

A purchaser of property on execution under the judgment is a necessary party to a proceeding to vacate the judgment. Molloy *v.* Batchelder, 69 Mo. 503; Howe Sewing-Mach. Co. *v.* Larimer, 5 Pa. Co. Ct. 660.

The legal representative is a necessary party to a proceeding to set aside a judgment in favor of the deceased. Grier *v.* Jones, 54 Ga. 154.

80. Green *v.* Grant, 108 Ga. 751, 32 S. E. 846.

81. Rich *v.* Thornton, 69 Ala. 473; Desribes *v.* Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Smith *v.* Robinson, 11 Ala. 270; Lake *v.* Jones, 49 Ind. 297; Burnside *v.* Ennis, 43 Ind. 411; Yancey *v.* Teeter, 39 Ind. 305; Allison *v.* Whittier, 101 N. C. 490, 8 S. E. 338; Morrison *v.* Berlin, 37 Wash. 600, 79 Pac. 1114, holding that a void judgment may be set aside, without notice, either on motion of a party, or by the court upon its own motion, and a valid judgment may be entered in its place, so long as it does not exceed the relief warranted by the complaint.

Motion filed during trial term.— Where a motion to vacate a judgment is filed during the trial term, but no notice thereof is given to the adverse party until after the beginning of a subsequent term, it will be considered as made during the subsequent term. Morrell Hardware Co. *v.* Princess Gold Min. Co., 16 Colo. App. 54, 63 Pac. 807. See Major *v.* Rand, 72 Ill. App. 279.

In Iowa if an application to vacate a judgment is made more than three days after its entry, although at the same term of court, it must be on notice to the adverse party. Ellis *v.* Remley, 115 Iowa 381, 88 N. W. 819. A judgment irregularly entered in vacation may be stricken off by the judge at the opening of the next term without notice. Carpenter *v.* Zuver, 56 Iowa 390, 9 N. W. 304.

82. *California.*— Vallejo *v.* Green, 16 Cal. 160.

Connecticut.— Porter *v.* Orient Ins. Co., 72 Conn. 519, 45 Atl. 7.

Georgia.— Exchange Bank *v.* Elkan, 72 Ga. 197.

Illinois.— Bruen *v.* Bruen, 43 Ill. 408; Hall *v.* O'Brien, 5 Ill. 405; Brady *v.* Washington Ins. Co., 67 Ill. App. 159. See People *v.* Miller, 195 Ill. 621, 63 N. E. 504; Stanton *v.* Kinsey, 151 Ill. 301, 37 N. E. 871.

Indiana.— Lake *v.* Jones, 49 Ind. 297; Burnside *v.* Ennis, 43 Ind. 411; Yancy *v.* Teter, 39 Ind. 305; Frazier *v.* Williams, 18 Ind. 416; Martindale *v.* Brown, 18 Ind. 284; Smith *v.* Chandler, 13 Ind. 513.

Iowa.— Pollock *v.* Simpson, 67 Iowa 519, 25 N. W. 758; Hawkeye Ins. Co. *v.* Duffie, 67 Iowa 175, 25 N. W. 117. *Compare* Rivers *v.* Olmsted, 66 Iowa 186, 23 N. W. 392; Stivers *v.* Thompson, 15 Iowa 1.

Kansas.— Alliance Trust Co. *v.* Barrett, 6 Kan. App. 689, 50 Pac. 465.

Louisiana.— Florsheim Bros. Dry Goods Co. *v.* Williams, 45 La. Ann. 1196, 14 So. 120; Bajourin *v.* Ramelli, 34 La. Ann. 554.

Maryland.— Regester *v.* Woodward Iron Co., 82 Md. 645, 33 Atl. 320.

Michigan.— Vincent *v.* Benzie Cir. Judge, (1905) 102 N. W. 369.

Mississippi.— Lane *v.* Wheless, 46 Miss. 666.

Missouri.— Coleman *v.* McAnulty, 16 Mo. 173, 57 Am. Dec. 229.

Nebraska.— Fisk *v.* Thorp, 51 Nebr. 1, 70 N. W. 498; Tootle *v.* Jones, 19 Nebr. 588, 27 N. W. 635; Nuckolls *v.* Irwin, 2 Nebr. 60.

New York.— Wheeler *v.* Emmeluth, 7 N. Y. Suppl. 807; Cayuga County Bank *v.* Warfield, 13 How. Pr. 439; Barheydt *v.* Adams, 1 Wend. 101.

North Carolina.— Lyon *v.* McMillan, 72 N. C. 392; Sutton *v.* McMillan, 72 N. C. 102.

notice must be in writing,[83] sufficiently full and explicit to advise the party of the nature of the proceeding, the judgment to be affected, and the grounds on which the motion will be based,[84] and duly and regularly served,[85] unless service is waived by appearance or otherwise.[86]

b. Service on Party's Attorney. Where an attorney has appeared for a party in an action and has prosecuted it to judgment, he remains attorney for that party until he has secured a judgment not liable to vacation for any cause provided by statute or established practice, and hence a motion to vacate the judgment may properly be served on the attorney of record for plaintiff.[87]

8. Affidavits and Evidence — a. Affidavits in Support of Motion — (i) *In General.* A petition or motion to vacate a judgment should be verified or supported by an affidavit as to the facts set forth,[88] which should regularly be made

Ohio.— Hettrick *v.* Wilson, 12 Ohio St. 136, 80 Am. Dec. 337; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459.

Rhode Island.— Chapdelaine *v.* Handy, 18 R. I. 706, 30 Atl. 342.

South Carolina.— State *v.* Parker, 7 S. C. 235; Ingram *v.* Belk, 2 Rich. 111; McDonald *v.* Ivy, Rice 95.

Tennessee.— Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640; Warren *v.* Farquaharson, 4 Baxt. 484.

Texas.— Texas Land, etc., Co. *v.* Winter, 93 Tex. 560, 57 S. W. 39.

Washington.— Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446; Spokane, etc., Lumber Co. *v.* Stanley, 25 Wash. 653, 66 Pac. 92.

Canada.— McKay *v.* Rumble, 8 Manitoba 86.

See 30 Cent. Dig. tit. "Judgment," § 747.

Leave to withdraw a motion to set aside a judgment may be granted without previous notice to the adverse party. Jensen *v.* Barbour, 12 Mont. 566, 31 Pac. 592.

Motion to revoke.— Where a judgment which had been standing for several years, and on which execution had been issued and defendant's land sold, had been set aside on motion of defendant, it was held that no notice of a motion on the part of plaintiff to revoke the order setting the judgment aside, and to reinstate the same and the execution on the docket, was necessary. Perry *v.* Pearce, 68 N. C. 367.

83. Harper *v.* Sugg, 111 N. C. 324, 16 S. E. 173.

84. O'Brien *v.* Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; Sweeney *v.* Stanford, 60 Cal. 362; Eastman *v.* Moore, 14 Iowa 586; Decker *v.* Kitchen, 21 Hun (N. Y.) 332; Sniffen *v.* Peck, 6 N. Y. Civ. Proc. 188; Lewis *v.* Graham, 16 Abb. Pr. (N. Y.) 126; Ellis *v.* Jones, 6 How. Pr. (N. Y.) 296; Coit *v.* Lambeer, 2 Code Rep. (N. Y.) 79; Cummings *v.* Tabor, 61 Wis. 185, 21 N. W. 72.

85. Grier *v.* Jones, 54 Ga. 154, holding that if the adverse party is dead, the notice of the motion should be served on his personal representative, who should be made a party.

No notice need be served when the party is present by his counsel at the time when the motion is made. Hill *v.* Crump, 24 Ind. 291; Jensen *v.* Barbour, 12 Mont. 566, 31 Pac. 592. *Compare* Shotwell *v.* Rowell, 30 Ga. 557.

Notice by publication.— A motion for relief from a judgment is not a proceeding in which notice to the opposite party can be given by publication. Beck *v.* Koester, 79 Ind. 135. *Contra,* Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468, 3 West. L. Month. 195.

86. Jennings *v.* Pearce, 101 Ala. 538, 14 So. 319; Moore *v.* Easley, 18 Ala. 619; Toy *v.* Haskell, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70; Acock *v.* Halsey, 90 Cal. 215, 27 Pac. 193; Taylor *v.* Taylor, 52 Ill. App. 527; Worth *v.* Wetmore, 87 Iowa 62, 54 N. W. 56.

87. *Dakota.*— Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701.

Georgia.— Jordan *v.* Tarver, 92 Ga. 379, 17 S. E. 351.

Illinois.— Pick *v.* Glickman, 54 Ill. App. 646.

Kansas.— Newton First Nat. Bank *v.* Grimes Dry-Goods Co., 45 Kan. 510, 26 Pac. 56, by statute.

Minnesota.— Phelps *v.* Heaton, 79 Minn. 476, 82 N. W. 990.

Nebraska.— Merriam *v.* Gordon, 17 Nebr. 325, 22 N. W. 563.

North Carolina.— Branch *v.* Walker, 92 N. C. 87.

North Dakota.— Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095.

Washington.— Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446; Sturgiss *v.* Dart, 23 Wash. 244, 62 Pac. 858.

See 30 Cent. Dig. tit. "Judgment," § 749.

Notice by summons.— Where the statute provides that on petition to vacate a judgment a summons shall issue and be served as in the commencement of an action, it cannot be served on the attorney of record in the judgment. Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468, 3 West. L. Month. 195.

88. *California.*— *In re* Van Loan, 142 Cal. 423, 76 Pac. 37.

Georgia.— Dugan *v.* McGlann, 64 Ga. 446.

Illinois.— Gage *v.* Chicago, 211 Ill. 109, 71 N. E. 877.

Indiana.— Frazier *v.* Williams, 18 Ind. 416.

Washington.— Twigg *v.* James, 37 Wash. 434, 79 Pac. 959.

Verification on information and belief is in some states not a sufficient compliance with the statute, at least where the verifica-

by the party himself, but may be made by his attorney, if the latter speaks from personal knowledge and shows a sufficient reason why he makes the affidavit instead of his client.[89] A copy of the affidavit should be served on the opposite party or his counsel.[90]

(II) *Requisites and Sufficiency.* An affidavit in support of a motion to vacate a judgment should state facts positively and directly; it is not sufficient to allege them on information and belief.[91] It should show the existence and nature of the judgment sought to be set aside,[92] and state the grounds on which relief is asked, not inferentially but directly, and not generally but specifically and in detail,[93] and show that the applicant has not been negligent or failed in the exercise of due diligence,[94] and if it is necessary to excuse his default or show why the action was not defended, this must be done by a particular and detailed statement of the facts constituting his excuse,[95] the rule being that in all the particulars

tion is made by the applicant's attorney. Caperton *v.* Wanslow, 18 Tex. 125; Woodworth *v.* Coleman, 57 Vt. 368. But in Nebraska the petition need not be verified positively, but is sufficiently verified on belief. Anthony *v.* Karbach, 64 Nebr. 509, 90 N. W. 243, 97 Am. St. Rep. 662.

Adding verification by amendment.—Where the statute requires a petition verified by affidavit, the court is not deprived of jurisdiction by the fact that the petition is not so verified, but an amendment may be allowed, so as to supply the omission. Rush *v.* Rush, 46 Iowa 648, 26 Am. Rep. 179.

An affidavit used on a motion for a change of venue cannot be used as the foundation of a motion to set aside a judgment by default. Cutler *v.* Biggs, 2 Hill (N. Y.) 409.

Filing.— This affidavit is not required to be filed before the hearing on the motion is entered on. Jones *v.* Swepson, 94 N. C. 700. And see Whidby Land, etc., Co. *v.* Nye, 5 Wash. 301, 31 Pac. 752.

In Indiana the complaint or motion need not itself be verified, but it must be supported by an affidavit showing the facts. Newcome *v.* Wiggins, 78 Ind. 306; Hunter *v.* Francis, 56 Ind. 460.

In New York the statute does not require the city controller, on an application to open a judgment against the city obtained by fraud or collusion, to show by affidavit the ground of his belief of the existence of fraud. Sharp *v.* New York, 31 Barb. 572.

In Pennsylvania it has been held that an affidavit is not required to support a rule to strike off a judgment which appears on the face of the record to have been unlawfully and improvidently entered. Allen *v.* Krips, 119 Pa. St. 1, 12 Atl. 759.

In South Carolina a suggestion to set aside a judgment need not be verified by affidavit. Bona *v.* Smith, Dudley 114.

89. *California.*— Melde *v.* Reynolds, 129 Cal. 308, 61 Pac. 932.

Kansas.— Baker *v.* Knickerbocker, 25 Kan. 288.

Nebraska.— Reed *v.* Thompson, 19 Nebr. 397, 27 N. W. 391.

New York.— Davis *v.* Solomon, 25 Misc. 695, 56 N. Y. Suppl. 80.

North Dakota.— Kirschner *v.* Kirschner, 7 N. D. 291, 75 N. W. 252.

Pennsylvania.— James *v.* Young, 1 Dall. 248, 1 L. ed. 93.

See 30 Cent. Dig. tit. "Judgment," § 312.

Compare Sturges *v.* Rogers, 16 Ind. 18.

90. Scales *v.* Labar, 51 Ill. 232; Hall *v.* O'Brien, 5 Ill. 405; Fink *v.* Bryden, 3 Johns. (N. Y.) 245.

91. Lycoming F. Ins. Co. *v.* Newcomb, 1 Leg. Chron. (Pa.) 9; Sulphur Springs First Nat. Bank *v.* Willis, (Tex. 1891) 18 S. W. 205.

92. Pike *v.* Power, 1 How. Pr. (N. Y.) 54; Fink *v.* Bryden, 3 Johns. (N. Y.) 245.

93. *California.*— Bradford *v.* McAvoy, 99 Cal. 324, 33 Pac. 1091.

Indiana.— Hazelrigg *v.* Wainwright, 17 Ind. 215.

Maryland.— German *v.* Slade, 42 Md. 510.

Minnesota.— Weymouth *v.* Gregg, 40 Minn. 45, 41 N. W. 243.

New York.— Butterick Pub. Co. *v.* King, 15 N. Y. App. Div. 403, 44 N. Y. Suppl. 60; Jennings *v.* Asten, 5 Duer 695; New York *v.* Green, 1 Hilt. 393; Stone *v.* Smith, 31 Misc. 740, 64 N. Y. Suppl. 139; Graham *v.* Powers, 3 N. Y. Suppl. 899. And see Guase *v.* Sterling Piano Co., 95 N. Y. App. Div. 115, 88 N. Y. Suppl. 532.

Ohio.— Ryan *v.* Roth, 20 Ohio Cir. Ct. 472, 11 Ohio Cir. Dec. 297.

Washington.— Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446.

See 30 Cent. Dig. tit. "Judgment," § 312.

New evidence.— A motion to set aside a judgment for newly discovered evidence must be supported by affidavits showing that the witness will give the new evidence, that it is probably true, that it is material, and that due diligence was used to secure it. Turner *v.* Davis, 132 N. C. 187, 43 S. E. 637.

94. Masten *v.* Indiana Car, etc., Co., 25 Ind. App. 175, 57 N. E. 148; Green *v.* Goodloe, 7 Mo. 25.

95. *California.*— Jenkins *v.* Gamewell Fire Alarm Tel. Co., (1892) 31 Pac. 570; Bailey *v.* Taaffe, 29 Cal. 422.

Illinois.— An affidavit that defendant was sick and confined to his house, from service until after default, is not sufficient without showing what was the nature of his sickness or that it prevented him from communicating with his counsel. Edwards *v.* McKay, 73 Ill. 570.

above mentioned the affidavit is to be construed most strongly against the party making it.[96]

b. Affidavit of Merits. An application to open or set aside a judgment must be supported by an affidavit showing that defendant has a good defense to the action on the merits, called an affidavit of merits,[97] except in cases where the grant

Indiana.— Hazelrigg *v.* Wainwright, 17 Ind. 215; Frost *v.* Dodge, 15 Ind. 139.

Iowa.— An affidavit is not sufficient which states that defendant's failure to enter his appearance was caused by "some accident or oversight" on the part of his attorney; it must show what caused the alleged accident or oversight, and what care was taken to avoid such a result. Martin *v.* Reese, 105 Iowa 694, 75 N. W. 496.

Nevada.— Brown *v.* Warren, 17 Nev. 417, 30 Pac. 1078.

New York.— It is not sufficient to state in the affidavit that defendant's counsel was detained in another court, without showing in what court and what action he was detained. Rosenthal *v.* Payne, 2 N. Y. Suppl. 717.

Texas.— Woods *v.* Lang, (1889) 11 S. W. 917.

See 30 Cent. Dig. tit. "Judgment," § 312.

96. Crossman *v.* Wohlleben, 90 Ill. 537; Pitzele *v.* Lutkins, 85 Ill. App. 662.

97. *Alabama.*— *Ex p.* Payne, 130 Ala. 189, 29 So. 622.

California.— Block *v.* Kearney, (1901) 64 Pac. 267; Parrott *v.* Den, 34 Cal. 79; Bailey *v.* Taaffe, 29 Cal. 422; People *v.* Rains, 23 Cal. 127; Reese *v.* Mahoney, 21 Cal. 305.

Georgia.—Beall *v.* Marietta Paper Mill Co., 45 Ga. 28.

Illinois.— Little *v.* Allington, 93 Ill. 253; Norton *v.* Hixon, 25 Ill. 439, 79 Am. Dec. 338; Moir *v.* Hopkins, 21 Ill. 557; Grubb *v.* Crane, 5 Ill. 153; Gilmore *v.* German Sav. Bank, 89 Ill. App. 442.

Indiana.— Lake *v.* Jones, 49 Ind. 297; Nutting *v.* Losance, 27 Ind. 37; Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440; Dale *v.* Bugh, 16 Ind. 233; Frost *v.* Dodge, 15 Ind. 139; Shoaff *v.* Jones, 1 Ind. 564.

Iowa.— Brunson *v.* Nichols, 72 Iowa 763, 34 N. W. 289; McGrew *v.* Downs, 67 Iowa 687, 25 N. W. 880; Smith *v.* Watson, 28 Iowa 218; Lucas *v.* Waller, Morr. 303.

Kentucky.— Richardson *v.* Finney, 6 Dana 319; Grundy *v.* Kelly, 41 S. W. 20, 19 Ky. L. Rep. 476.

Minnesota.— Under Gen. St. (1894) § 5267, the formal affidavit of merits provided for in the rules of the district court is not indispensable, if the court does not require it as a prerequisite to the grant of relief, and if facts authorizing the exercise of the court's discretion are made to appear by the affidavit of the moving party. McMurran *v.* Bourne, 81 Minn. 515, 84 N. W. 338.

Mississippi.— Porter *v.* Johnson, 2 How. 736.

Missouri.— Adams *v.* Hickman, 43 Mo. 168; Lamb *v.* Nelson, 34 Mo. 501; Palmer *v.* Russell, 34 Mo. 476.

New Jersey.— Condit *v.* Crane, 16 N. J. L. 349; Miller *v.* Alexander, 1 N. J. L. 400.

New York.— Barrow *v.* Sabbaton, 2 Hall 348; Allen *v.* Thompson, 1 Hall 54; Leffler *v.* Beck, 32 Misc. 776, 66 N. Y. Suppl. 479; Godson *v.* Taussig, 32 Misc. 712, 65 N. Y. Suppl. 716; Cahill *v.* Lilienthal, 30 Misc. 429, 62 N. Y. Suppl. 524; Cross *v.* Birch, 27 Misc. 295, 58 N. Y. Suppl. 438; Gold *v.* Hutchinson, 26 Misc. 1, 55 N. Y. Suppl. 575; Davis *v.* Solomon, 25 Misc. 695, 56 N. Y. Suppl. 80; Goldfeder *v.* Lincoln, 23 Misc. 760, 51 N. Y. Suppl. 215; Thornall *v.* Turner, 23 Misc. 363, 51 N. Y. Suppl. 214; Fassett *v.* Tallmadge, 15 Abb. Pr. 205; Van Horne *v.* Montgomery, 5 How. Pr. 238; Dix *v.* Palmer, 5 How. Pr. 233; Colegate *v.* Marsh, 2 How. Pr. 137; Bogardus *v.* Doty, 2 How. Pr. 75; Stewart *v.* McMartin, 2 How. Pr. 38; Alberti *v.* Peck, 1 How. Pr. 230; Popham *v.* Baker, 1 How. Pr. 166; Robinson *v.* Sinclair, 1 How. Pr. 106; Sheldon *v.* Camphell, 5 Hill 508; Havens *v.* Dibble, 18 Wend. 655; Tallmadge *v.* Stockholm, 14 Johns. 342; Bailey *v.* Caldwell, 3 Johns. 451; Fink *v.* Bryden, 3 Johns. 245; Roosevelt *v.* Kemper, 2 Cai. 30; Hunt *v.* Wallis, 6 Paige 371.

North Dakota.— Braseth *v.* Bottineau County, (1904) 100 N. W. 1082; Sargent *v.* Kindred, 5 N. D. 8, 63 N. W. 151; Gauthier *v.* Rusicka, 3 N. D. 1, 53 N. W. 80.

Rhode Island.— Draper *v.* Bishop, 4 R. I. 489.

South Dakota.— Judd *v.* Patton, 13 S. D. 648, 84 N. W. 199.

Texas.— Foster *v.* Martin, 20 Tex. 118; Cook *v.* Phillips, 18 Tex. 31; Watson *v.* Newsham, 17 Tex. 437.

Wisconsin.— Loucheine *v.* Strouse, 49 Wis. 623, 6 N. W. 360; Butler *v.* Mitchell, 15 Wis. 355.

United States.— Popino *v.* McAllister, 19 Fed. Cas. No. 11,277, 4 Wash. 393; Republic Ins. Co. *v.* Williams, 20 Fed. Cas. No. 11,707, 3 Biss. 370.

Canada.— Moore *v.* Kennedy, 12 Manitoba 173.

See 30 Cent. Dig. tit. "Judgment," §§ 311, 752.

In Colorado an affidavit of merits is not necessary to the setting aside of a judgment by default, although it is said that good practice requires it. State Bd. of Agriculture *v.* Meyers, 13 Colo. App. 500, 58 Pac. 879.

In Washington no affidavit of merits is required of a defendant petitioning for the vacation of a judgment by default, since his petition must state the facts and be made under oath. Wheeler *v.* Moore, 10 Wash. 309, 38 Pac. 1053. And see Walla Walla Printing, etc., Co. *v.* Budd, 2 Wash. Terr. 336, 5 Pac. 602.

of the motion is not discretionary with the court, but is demandable of right, as where there was no jurisdiction over defendant,[98] where a judgment was taken by default before defendant's time to answer had expired or after the case was at issue,[99] where the judgment was entered without authority, by mistake, or improvidently,[1] or where it was obtained by fraud.[2] Where such affidavit is necessary, its lack cannot generally be supplied by a pleading or any other paper.[3] As to the contents of the affidavit, it should set forth fully the facts constituting the proposed defense, a mere allegation that defendant has a meritorious defense not being sufficient,[4] and the facts must be stated positively and affirmatively, and not merely upon information and belief.[5] It has been held, however, that it is sufficient to set forth in the affidavit that defendant has fully and fairly stated the case to his counsel, and is advised by him, and believes that he has a full and meritorious defense to the action.[6] The affidavit should be made by the applicant

98. Norton *v.* Atchison, etc., R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; Rice *v.* Griffith, 9 Iowa 539; Braunstetter *v.* Rives, 34 Mo. 318. *Compare* Kramer *v.* Gerlach, 28 Misc. (N. Y.) 525, 59 N. Y. Suppl. 855.

99. *Ex p.* Haynes, 140 Ala. 196, 37 So. 286; Foster *v.* Vehmeyer, 133 Cal. 459, 65 Pac. 974; American Audit Co. *v.* Industrial Federation, 84 N. Y. App. Div. 304, 82 N. Y. Suppl. 642; Findley *v.* Johnson, 1 Overt. (Tenn.) 344; Knowles *v.* Fritz, 58 Wis. 216, 16 N. W. 621.

1. Browning *v.* Roane, 9 Ark. 354, 50 Am. Dec. 218; Toy *v.* Haskell, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70; Willson *v.* Cleaveland, 30 Cal. 192; Messenger *v.* Marsh, 6 Iowa 491.

No cause of action stated.— An affidavit of merita is not indispensable under the statute to warrant the trial court in setting aside a default judgment entered by the clerk, where it is apparent that the complaint does not state a cause of action. Pease *v.* Kootenai County, 7 Ida. 731, 65 Pac. 432.

2. Crescent Canal Co. *v.* Montgomery, 124 Cal. 134, 56 Pac. 797; Morris *v.* Kahn, 31 Misc. (N. Y.) 25, 62 N. Y. Suppl. 1040.

3. Parrott *v.* Den, 34 Cal. 79; Jones *v.* Russell, 3 How. Pr. (N. Y.) 324; Gauthier *v.* Rusicka, 3 N. D. 1, 53 N. W. 80; Mowry *v.* Hill, 11 Wis. 146. *Compare* Omro *v.* Ward, 19 Wis. 232.

Accepting answer as equivalent.— It has been held, however, that it is in the discretion of the court to accept a verified answer, or other such paper, as equivalent to an affidavit of merits. Crescent Canal Co. *v.* Montgomery, 124 Cal. 134, 56 Pac. 797; Huehner *v.* Farmers' Ins. Co., 71 Iowa 30, 32 N. W. 13; Crane, etc., Co. *v.* Sauntry, 90 Minn. 301, 96 N. W. 794.

4. *Arizona.*— Copper King of Arizona *v.* Johnson, (1904) 76 Pac. 594 [*affirmed* in 195 U. S. 627, 25 S. Ct. 793, 49 L. ed. 351].

Illinois.— Roberts *v.* Corby, 86 Ill. 182; Bamberger *v.* Golden, 93 Ill. App. 452.

Indiana.— Toledo, etc., R. Co. *v.* Gates, 32 Ind. 238; Goldsberry *v.* Carter, 28 Ind. 59; Frost *v.* Dodge, 15 Ind. 139.

Iowa.— Polk County Sav. Bank *v.* Geneser, 101 Iowa 210, 70 N. W. 89; Palmer *v.* Rogers, 70 Iowa 381, 30 N. W. 645.

Missouri.— Castlio *v.* Bishop, 51 Mo. 162; Lamb *v.* Nelson. 34 Mo. 501.

Texas.— Foster *v.* Martin, 20 Tex. 118.

Effect of insufficiency of affidavit.— An order opening a default will not be reversed solely because of the insufficiency of the affidavit of merits or of the answer, unless the answer is such that it could be stricken out on motion. Forin *v.* Duluth, 66 Minn. 54, 68 N. W. 515.

Surplusage in the affidavit of merits, consisting of mattera improper to be raised on such a motion, or of doubtful propriety, will not warrant a reversal of the action of the trial court in granting the motion, if the affidavit otherwise contains a sufficient showing of a meritorious defense. Hitchcock *v.* McElrath, 69 Cal. 634, 11 Pac. 487.

Truth of affidavit not in issue.— If the affidavit of merits contains a sufficient showing of a good defense, it must, for the purpose of the motion, be accepted as correct; its truth remains to be determined on the trial of the action. Joerns *v.* La Nicca, 75 Iowa 705, 38 N. W. 129.

5. *California.*— Jenkins *v.* Gamewell Fire Alarm Tel. Co., (1892) 31 Pac. 570.

Illinois.— Columbus Mut. Life Assoc. *v.* Plummer, 86 Ill. App. 446.

Texas.— See El Paso, etc., R. Co. *v.* Kelley, (1905) 87 S. W. 660.

Wisconsin.— Superior Consol. Land Co. *v.* Dunphy, 93 Wis. 188, 67 N. W. 428; Union Lumbering Co. *v.* Chippewa County, 47 Wis. 245, 2 N. W. 281.

United States.— Silver Peak Gold Min. Co. *v.* Harris, 116 Fed. 439.

Compare Klepfer *v.* Keokuk, 126 Iowa 592, 102 N. W. 515.

6. Reidy *v.* Scott, 53 Cal. 69; Francis *v.* Cox, 33 Cal. 323; Woodward *v.* Backus, 20 Cal. 137; Manley *v.* Kalamazoo Cir. Judge, 114 Mich. 525, 72 N. W. 348; Kirschner *v.* Kirschner, 7 N. D. 291, 75 N. W. 252; Bloor *v.* Smith, 112 Wis. 340, 87 N. W. 870; Burnham *v.* Smith, 11 Wis. 258.

Requisites of affidavit in this form.— The affidavit must allege that the party has stated the "case" or the "facts of the case" to his counsel; it is not sufficient if it merely shows that he has stated the "facts of his defense" to counsel. Morgan *v.* McDonald, 70 Cal. 32, 11 Pac. 350; Burnham

himself, unless good reasons exist for having it made by another person.[7] But it may be made by his attorney, on showing a sufficient reason why the party himself does not make it.[8] In that case, however, the affidavit must show that the attorney has personal knowledge of the facts of the case, and its averments must be based on such knowledge and not on information or belief.[9]

c. Proposed Answer — (I) *Necessity of Filing.* A statutory provision that the applicant for the vacation of a judgment shall file with his moving papers a copy of the answer which he proposes to put in when the judgment is opened is mandatory, and the motion cannot be granted unless this is done.[10]

(II) *Requisites and Sufficiency.* The answer filed with the motion must present an issuable plea,[11] meeting fully the matters contained in the declaration

v. Smith, 11 Wis. 258. And an affidavit that deponent is advised by his counsel that he has a good and sufficient defense, but without stating that he has fully and fairly stated the case to his counsel, is insufficient. Gold *v.* Hutchinson, 26 Misc. (N. Y.) 1, 55 N. Y. Suppl. 575. And see Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037.

In chancery this form of affidavit is not sufficient to authorize a court of equity to set aside a regular default or decree; the affidavit must state the defense in such detail that the court may judge whether it is meritorious. McGaffigan *v.* Jenkins, 1 Barb. (N. Y.) 31; Goodhue *v.* Churchman, 1 Barb. Ch. (N. Y.) 596; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173.

7. Bailey *v.* Taaffe, 29 Cal. 422. And see El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in (1905) 87 S. W. 660].

8. People's Ice Co. *v.* Schlenker, 50 Minn. 1, 52 N. W. 219; Davis *v.* Solomon, 56 N. Y. Suppl. 80, 28 N. Y. Civ. Proc. 420.

9. *California.*— Will *v.* Lytle Creek Water Co., 100 Cal. 344, 34 Pac. 830; Bailey *v.* Taaffe, 29 Cal. 422.

Illinois.—Hitchcock *v.* Herzer, 90 Ill. 543; A. W. Stevens Co. *v.* Kehr, 93 Ill. App. 510.

Minnesota.— Frankoviz *v.* Smith, 35 Minn. 278, 28 N. W. 508.

Nevada.— Horton *v.* New Pass Gold, etc., Min. Co., 21 Nev. 184, 27 Pac. 376, 1018.

South Dakota.— Pettigrew *v.* Sioux Falls, 5 S. D. 646, 60 N. W. 27.

Wisconsin.— Stilson *v.* Rankin, 40 Wis. 527.

10. *Arizona.*— Lawler *v.* Bashford-Burmister Co., 5 Ariz. 94, 46 Pac. 72.

California.— Bagley *v.* Cohen, 121 Cal. 604, 53 Pac. 1117.

Iowa.— Worth *v.* Wetmore, 87 Iowa 62, 54 N. W. 56; Brunson *v.* Nichols, 72 Iowa 763, 34 N. W. 289; Thacher *v.* Haun, 12 Iowa 303. And see Carver *v.* Seevers, 126 Iowa 669, 102 N. W. 518.

Nebraska.— McBrien *v.* Riley, 38 Nebr. 561, 57 N. W. 385; Fritz *v.* Grosnicklaus, 20 Nebr. 413, 30 N. W. 411; Spencer *v.* Thistle, 13 Nebr. 227, 13 N. W. 214; Childs *v.* Ferguson, 4 Nebr. (Unoff.) 65, 93 N. W. 409. But if the proposed answer was actually tendered and was before the court in such a way that the court could pass on its sufficiency, it is immaterial that it was not formally filed. Anthony *v.* Karbach, 64 Nebr. 509, 90 N. W. 243, 97 Am. St. Rep. 662. And where the proceeding is to vacate a judgment for irregularity, in which case the court must first decide on the grounds offered for the vacation, before trying the validity of the defense, the answer need not be tendered with the motion. Fisk *v.* Thorp, 60 Nebr. 713, 84 N. W. 79.

New York.— Schumpp *v.* Interurban St. R. Co., 81 N. Y. App. Div. 576, 81 N. Y. Suppl. 366; Meyer *v.* New York, 80 N. Y. App. Div. 584, 80 N. Y. Suppl. 774; Sutherland *v.* Mead, 80 N. Y. App. Div. 103, 80 N. Y. Suppl. 504; Allen *v.* Fowler, etc., Co., 45 N. Y. App. Div. 506, 61 N. Y. Suppl. 325; Richardson *v.* Sun Printing, etc., Assoc., 20 N. Y. App. Div. 329, 46 N. Y. Suppl. 814; Reynolds *v.* Palen, 20 Abb. N. Cas. 11. *Compare* Carey *v.* Browne, 67 Hun 516, 22 N. Y. Suppl. 521.

North Dakota.— Sargent *v.* Kindred, 5 N. D. 8, 63 N. W. 151. But see Wheeler *v.* Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746, holding that if the affidavit on a motion to vacate a default sets out a valid defense on the merits it is discretionary with the court to accept such affidavit in lieu of a verified answer.

Wisconsin.— Superior Consol. Land Co. *v.* Dunphy, 93 Wis. 188, 67 N. W. 428; Howey *v.* Clifford, 42 Wis. 561; Republic Ins. Co. *v.* Williams, 20 Fed. Cas. No. 11,707, 3 Biss. 370, construing law of Wisconsin on this point.

See 30 Cent. Dig. tit. "Judgment," § 317.

In Indiana the requirement is that the answer shall be filed before the judgment shall be opened, and this is complied with by filing the answer at the time of the entry of the order opening the judgment. Bryant *v.* Richardson, 126 Ind. 145, 25 N. E. 807.

In Washington defendant need not tender his answer until after the determination of the merits of his motion to vacate the judgment. Wheeler *v.* Moore, 10 Wash. 309, 38 Pac. 1053.

11. Reeve *v.* Thorburn, 2 How. Pr. (N. Y.) 29. And see Vowell *v.* Lyles, 28 Fed. Cas. No. 17,020, 1 Cranch C. C. 329.

A plea in abatement is not an issuable plea, and not such as can be accepted on a motion to set aside a judgment by default, unless based on matters occurring after the entry of judgment. Bradley *v.* Welch, 1

or complaint.[12] If the judgment is against two as joint defendants, the answer must be verified by both.[13]

d. Counter-Affidavits. The party seeking to sustain a judgment, as against a motion to set it aside, may present for the consideration of the court affidavits in opposition to those of the moving party, in regard to the alleged grounds for vacating the judgment or the matters set up in excuse of defendant's failure to make his defense in due time,[14] provided such counter-affidavits set forth facts, and not merely matters of inference, conjecture, or belief;[15] but the affidavit of merits cannot be thus controverted. As it is only required to show a *prima facie* defense, and the court is not to inquire into its truth, counter-affidavits as to the facts of the defense are not admissible.[16]

e. Presumptions and Burden of Proof. The party who seeks to have a judgment opened or set aside must assume the burden of proving the facts essential to entitle him to the relief asked.[17] His unsupported affidavit, being clear and

Munf. (Va.) 284; Hunt *v.* Wilkinson, 2 Call (Va.) 49, 1 Am. Dec. 534; Hinton *v.* Ballard, 3 W. Va. 582.

A general demurrer to the declaration is not such a plea as plaintiff is bound to accept, where the parties have agreed that a default may be set aside on condition that defendant plead to the merits. Doty *v.* Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773.

12. *Georgia.*— Oliver *v.* Shipley, 43 Ga. 376. And see Berendt *v.* Ripps, 120 Ga. 228, 47 S. E. 595.

Kansas.— Hale *v.* Hoagland, (App. 1900) 61 Pac. 314.

Virginia.— Wyche *v.* Macklin, 2 Rand. 426.

Wisconsin.— Milwaukee Mut. L., etc., Soc. *v.* Jagodzinski, 84 Wis. 35, 54 N. W. 102; Cleveland *v.* Burnham, 55 Wis. 598, 13 N. W. 677, 680.

United States.— Jenks *v.* Garretson, 13 Fed. Cas. No. 7,278, 4 McLean 258.

See 30 Cent. Dig. tit. "Judgment," § 318.

13. Dunlap *v.* McIlvoy, 3 Litt. (Ky.) 269.

14. *California.*— *In re* Van Loan, 143 Cal. 423, 76 Pac. 37; Security L. & T. Co. *v.* Estudillo, 134 Cal. 166, 66 Pac. 257; Douglass *v.* Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247.

Illinois.— Gilchrist Transp. Co. *v.* Northern Grain Co., 204 Ill. 510, 68 N. E. 558; Hefling *v.* Van Zandt, 162 Ill. 162, 44 N. E. 424; Matzenbaugh *v.* Doyle, 156 Ill. 331, 40 N. E. 935; Reed *v.* Curry, 35 Ill. 536; Swigart *v.* Holmes, 96 Ill. App. 43; A. W. Stevens Co. *v.* Kehr, 93 Ill. App. 510; Truby *v.* Case, 41 Ill. App. 153; Anderson *v.* Studebaker, 37 Ill. App. 532; Sundberg *v.* Temple, 33 Ill. App. 633.

Indiana.— Rogers *v.* Overton, 87 Ind. 410.

Minnesota.— Bausman *v.* Tilley, 46 Minn. 66, 48 N. W. 459.

Montana.— Butte Butchering Co. *v.* Clarke, 19 Mont. 306, 48 Pac. 303.

Nebraska.— Stover *v.* Hough, 47 Nebr. 789, 66 N. W. 825.

New York.— Provost *v.* Provost, 18 N. Y. Suppl. 896.

See 30 Cent. Dig. tit. "Judgment," §§ 319, 753.

15. Powell *v.* Kane, 5 Paige (N. Y.) 265.

16. *Alabama.*— Pratt *v.* Keils, 28 Ala. 390.

California.— Douglass *v.* Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; Gracier *v.* Weir, 45 Cal. 53; Francis *v.* Cox, 33 Cal. 323.

Illinois.— Gilchrist Transp. Co. *v.* Northern Grain Co., 204 Ill. 510, 68 N. E. 558; Mendell *v.* Kimball, 85 Ill. 582; Kalkaska Mfg. Co. *v.* Thomas, 17 Ill. App. 235; Spillman *v.* People, 16 Ill. App. 224. And see Rust *v.* Baird, 109 Ill. App. 41.

Indiana.— Bristor *v.* Galvin, 62 Ind. 352; Lake *v.* Jones, 49 Ind. 297; Buck *v.* Havens, 40 Ind. 221; Hill *v.* Crump, 24 Ind. 291; Masten *v.* Indiana Car, etc., Co., 25 Ind. App. 175, 57 N. E. 148.

Iowa.— Worth *v.* Wetmore, 87 Iowa 62, 54 N. W. 56.

New York.— Benedict *v.* Arnoux, 85 Hun 283, 32 N. Y. Suppl. 905; Hanford *v.* McNair, 2 Wend. 286; Anonymous, 1 Johns. 313. But the rule that opposing affidavits are not admissible to disprove an affidavit of merits is confined to the point of controverting the merits. Where the affidavit of merits is made by an attorney or agent, with an excuse for that fact, plaintiff may show by counter-affidavits that the excuse is false or frivolous. Johnson *v.* Lynch, 15 How. Pr. 199. And while it is not proper to try the truth or validity of the proposed defense, yet if it clearly appears that the defense suggested has no foundation in fact, that may be taken into consideration in disposing of the application. Catlin *v.* Latson, 4 Abb. Pr. 248.

North Dakota.— Minnesota Thresher Mfg. Co. *v.* Holz, 10 N. D. 16, 84 N. W. 581.

South Dakota.— Congdon Hardware Co. *v.* Consolidated Apex Min. Co., 11 S. D. 376, 77 N. W. 1022; Griswold Linseed Oil Co. *v.* Lee, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

See 30 Cent. Dig. tit. "Judgment," §§ 319, 753.

But see McIntire *v.* Bimber, 9 Pa. Co. Ct. 463; Krebs *v.* Clark, 9 Pa. Co. Ct. 420; Fitzgerald *v.* Compton, (Tex. Civ. App. 1902) 67 S. W. 131.

17. *Indiana.*— Smith *v.* McClure, 146 Ind. 123, 44 N. E. 1004.

Iowa.— Johnson *v.* Nash-Wright Co., 121

positive, may be sufficient for this purpose, if there is no opposing evidence;[18] but if he is contradicted or opposed, he will be required to establish his contentions by a fair preponderance of the evidence.[19] On an inquiry of this kind presumptions will be indulged requiring evidence to overcome them, of the regularity and validity of proceedings in the case anterior to judgment,[20] and of the correctness of recitals in the record,[21] as also presumptions of fact founded on the well-known working of public agencies, such as the post-office.[22]

f. Evidence — (i) *Admissibility.* On motions to vacate or open judgments, the rules of evidence are not so strictly adhered to as on the trial of an issue before a jury, and the court can generally hear any evidence which is calculated to aid it in reaching a conclusion;[23] but the evidence should be confined to the

Iowa 173, 96 N. W. 760; Farnsley *v.* Stillwell, 107 Iowa 631, 78 N. W. 678.

Maryland.— Smith *v.* Black, 51 Md. 247.

Missouri.— Acock *v.* Acock, 57 Mo. 154.

New York.— Deane *v.* Loucks, 58 Hun 555, 12 N. Y. Suppl. 903; Seymour *v.* Elmer, 4 E. D. Smith 199.

North Dakota.— Wheeler *v.* Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

Pennsylvania.— Dennison *v.* Leech, 9 Pa. St. 164; Huber *v.* Brown, 2 L. T. N. S. 104; Walsh *v.* Watrous, 2 L. T. N. S. 7. See, however, Miller *v.* Miller, 209 Pa. St. 511, 58 Atl. 885.

Washington.— Washington Mill Co. *v.* Marks, 27 Wash. 170, 67 Pac. 565.

In trespass to try title where judgment was rendered on service by publication, to entitle defendant to a new trial, the burden is not thrown on him to prove a good title in himself, but it is sufficient if he can show that plaintiff was not entitled to recover. Miles *v.* Dana, 13 Tex. Civ. App. 240, 36 S. W. 848.

Judgment on constructive service.— Under a statute permitting a defendant served wit process outside the state to come in and defend, within a limited time, it is not incumbent on him to show irregularity in the proceedings or any defect in the judgment. Marvin *v.* Brandy, 56 Hun (N. Y.) 242, 9 N. Y. Suppl. 593.

18. Yost *v.* Mensch, 141 Pa. St. 73, 21 Atl. 507; Lee *v.* Sallada, 7 Pa. Super. Ct. 98. *Compare* Regester *v.* Woodward Iron Co., 82 Md. 645, 33 Atl. 320 (holding that it is error to strike out a final judgment merely on an *ex parte* affidavit of fraud); Davis *v.* Reyner, 12 Montg. Co. Rep. (Pa.) 52.

19. *California.*— Poirier *v.* Gravel, 88 Cal. 79, 25 Pac. 962.

Colorado.— Rogers *v.* McMillen, 6 Colo. App. 14, 39 Pac. 891.

Indiana.— Quick *v.* Lawrence Nat. Bank, 10 Ind. App. 523, 38 N. E. 73.

Iowa.— Brown *v.* Stegemann, (1900) 81 N. W. 450; Mogelberg *v.* Clevinger, 93 Iowa 736, 61 N. W. 1092.

Kentucky.— Layton *v.* Prewitt, 25 S. W. 882, 15 Ky. L. Rep. 827.

Maryland.— Geesey *v.* Stouch, 94 Md. 75, 50 Atl. 422; Huntington *v.* Emery, 74 Md. 67, 21 Atl. 495.

Minnesota.— Swanstrom *v.* Marvin, 38 Minn. 359, 37 N. W. 455.

Missouri.— Missouri Bank *v.* Bray, 37 Mo. 194.

Nebraska.— Stover *v.* Hough, 47 Nebr. 789, 66 N. W. 825.

New York.— Forster *v.* Capewell, 1 Hilt. 47; Lewis *v.* Jones, 13 Abb. Pr. 427; Lansing *v.* Horner, 3 Cai. 95.

Pennsylvania.— Oberly *v.* Oberly, 190 Pa. St. 341, 42 Atl. 1105; Tidioute, etc., Oil Co. *v.* Shear, 161 Pa. St. 508, 29 Atl. 107; Lomison *v.* Faust, 145 Pa. St. 8, 23 Atl. 377; Woods *v.* Irwin, 141 Pa. St. 278, 21 Atl. 603, 23 Am. St. Rep. 282. *Compare* Gillespie *v.* Weiss, 22 Pa. Co. Ct. 177.

20. Barra *v.* People, 18 Colo. App. 16, 69 Pac. 1074; Busching *v.* Sunman, 19 Ind. App. 683, 49 N. E. 1091; McElroy *v.* Continental R. Co., 3 Silv. Sup. (N. Y.) 327, 6 N. Y. Suppl. 306; Herschberger *v.* Brown, 2 Woodw. (Pa.) 101. But see Blythe *v.* Hinckley, 84 Fed. 228, holding that the rule as to the presumptions in favor of the validity and regularity of proceedings had before judgment is applicable only in cases of collateral attack, and cannot be invoked to cure defects in the service of process, upon an application in the same suit to set aside a default judgment, in order to permit a defense on the merits.

21. Whitney *v.* Daggett, 108 Cal. 232, 41 Pac. 471; Whitfield *v.* Howard, 12 S. D. 355, 81 N. W. 727.

22. Vernon *v.* Gillen Printing Co., 16 Misc. (N. Y.) 507, 39 N. Y. Suppl. 172, holding that on showing that an answer, served by mail, was deposited in a letter-box at half-past seven, it will be presumed that it was taken to the post-office before twelve o'clock, so as to prevent a default.

23. *Alabama.*— State *v.* Gardner, 45 Ala. 46.

Louisiana.— Gernon *v.* Handlin, 19 La. Ann. 25.

North Carolina.— Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106; Stancill *v.* Gay, 92 N. C. 455.

Pennsylvania.— Harper *v.* Kean, 11 Serg. & R. 280.

Texas.— El Paso, etc., R. Co. *v.* Kelly (Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in (1905) 87 S. W. 660].

See 30 Cent. Dig. tit. "Judgment," § 750.

Personal knowledge of judge.— A trial court, in setting aside a default judgment, may rest its action upon matters within its

matters stated in the applicant's moving papers.[24] Although some cases show a reluctance to permit contradiction of the record,[25] it is generally held that the recitals of the record are only presumptively correct, and may be contradicted and overthrown by evidence of sufficient weight and clearness.[26]

(II) *Weight and Sufficiency.* According to the rule generally favored, the party seeking to have a judgment vacated or opened must establish the facts on which he relies by clear, strong, and satisfactory proof.[27] His own testimony alone

own knowledge. Foley *v.* Leisy Brewing Co., 116 Iowa 176, 89 N. W. 230.

Oral evidence against affidavit.—Where the person on whom the writ was served, as managing officer of the corporation defendant, files an affidavit that he was not such officer, oral evidence is not admissible on the hearing to rebut the affidavit. Carr *v.* Commercial Bank, 18 Wis. 255.

Agreement to dismiss.— Where defendant's excuse for his default is that he relied on plaintiff's agreement or promise to settle or dismiss the action, evidence of what passed between their attorneys in this regard is admissible. Moon *v.* Jennings, 119 Ind. 130, 20 N. E. 748, 21 N. E. 471, 12 Am. St. Rep. 383. But not where a rule of court invalidates all agreements or stipulations between parties or their counsel unless reduced to writing and entered on the minutes. Haley *v.* Eureka County Bank, 20 Nev. 410, 22 Pac. 1098.

Satisfaction or release.— Matters going in satisfaction or release of the judgment may be shown on the motion to open it. Renwick *v.* Richardson, 5 Pa. Super. Ct. 202; Rauh *v.* Pearson, 3 Lack. Leg. N. (Pa.) 327.

Record evidence required.— In some states, to authorize the setting aside of a judgment after the term, there must be some defect or invalidity apparent on the face of the record. Buchanan *v.* Thomason, 70 Ala. 401; Pettus *v.* McClannahan, 52 Ala. 55; Clark Cove Guano Co. *v.* Steed, 92 Ga. 440, 17 S. E. 967; Pulliam *v.* Dillard, 71 Ga. 598.

Void judgment.— Where the allegation is that the judgment is void on its face, this question must be determined from an inspection of the record alone. Canadian, etc., Mortg., etc., Co. *v.* Clarita Land, etc., Co., 140 Cal. 672, 74 Pac. 301. And see People *v.* Norris, 144 Cal. 422, 77 Pac. 998; Hall *v.* West Chester Pub. Co., 180 Pa. St. 561, 37 Atl. 106.

Proof of service.— On a motion to set aside a judgment for want of service of process, the testimony of plaintiff's attorney that the summons itself cannot be found among the papers and records of the case is sufficient to justify the introduction of the rule docket as secondary evidence of the return. Doty *v.* Deposit Bldg., etc., Assoc., 103 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. L. Rep. 625, 43 L. R. A. 551, 554.

24. Zeltner *v.* Henry Zeltner Brewing Co., 85 N. Y. App. Div. 387, 83 N. Y. Suppl. 366; Fyan *v.* Cessna, 7 Pa. Cas. 42, 10 Atl. 29; Ives *v.* Snyder, 7 Kulp (Pa.) 393; Linderman *v.* Linderman, 1 Woodw. (Pa.) 69.

25. Pulliam *v.* Dillard, 71 Ga. 598; Arnold *v.* Kilchmann, 80 Ill. App. 229; Stony Island Hotel Co. *v.* Johnson, 57 Ill. App. 608.

26. *California.*— Whitney *v.* Daggett, 108 Cal. 232, 41 Pac. 471; Norton *v.* Atchison, etc., R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; McKinley *v.* Tuttle, 34 Cal. 235.

Indiana.— Smith *v.* Noe, 30 Ind. 117; Kolb *v.* Raisor, 17 Ind. App. 551, 47 N. E. 177.

Iowa.— Farnsley *v.* Stillwell, 107 Iowa 631, 78 N. W. 678; Jamison *v.* Weaver, 84 Iowa 611, 51 N. W. 65; Wolf *v.* Shenandoah Nat. Bank, 84 Iowa 138, 50 N. W. 561.

Kansas.— Atchison Sav. Bank *v.* Means, 61 Kan. 857, 58 Pac. 989.

New York.— Howe Mach. Co. *v.* Pettibone, 12 Hun 657.

North Carolina.— Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106.

Pennsylvania.— Shortz *v.* Quigley, 1 Binn. 222; Guernsey *v.* Froude, 13 Pa. Super. Ct. 405.

South Dakota.— Whitfield *v.* Howard, 12 S. D. 355, 81 N. W. 727.

See 30 Cent. Dig. tit. "Judgment," §§ 321, 750.

27. *California.*— Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51; Garrison *v.* McGowan, 48 Cal. 592.

District of Columbia.— Spalding *v.* Crawford, 3 App. Cas. 361.

Indiana.— Devenbaugh *v.* Nifer, 3 Ind. App. 379, 29 N. E. 923.

Iowa.— Johnson *v.* Nash-Wright Co., 121 Iowa 173, 96 N. W. 760; Coleman *v.* Case, 66 Iowa 534, 24 N. W. 31.

Maryland.— Smith *v.* Black, 51 Md. 247.

Michigan.— Crawford *v.* Hoeft, 58 Mich. 1, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870.

Nebraska.— Winters *v.* Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. Rep. 489.

New Jersey.— Caldwell *v.* Fifield, 24 N. J. L. 150.

New York.— Yates *v.* Guthrie, 119 N. Y. 420, 23 N. E. 741; Green *v.* Warren, 14 Hun 434; Donadi *v.* New York State Mut. Ins. Co., 2 E. D. Smith 519; Wygant *v.* Brown, 9 N. Y. Suppl. 372; Southwell *v.* Marryatt, 1 Abb. Pr. 218; Hill *v.* Northrop, 9 How. Pr. 525.

Pennsylvania.— Guernsey *v.* Froude, 13 Pa. Super. Ct. 405; National Mut. Bldg., etc., Assoc. *v.* Kondrak, 9 Kulp 14; Peters *v.* McDonald, 7 Kulp 308; Eshleman *v.* Bowers, 1 Lanc. Bar, Feb. 19, 1870; Building Assoc. *v.* Bank, 2 L. T. N. S. 79; Walsh *v.* Watrous, 2 L. T. N. S. 7.

may answer this requirement, if not contradicted or impeached;[28] but the motion must fail if the affidavit of the applicant is squarely contradicted by that of the opposing party, and there is nothing else in evidence, so that the testimony is in equipoise.[29] If in addition to opposing affidavits one party or the other is corroborated by circumstances, admissions, or evidence drawn from the record, the decision will be in his favor.[30] In case of a decided and irreconcilable conflict in the evidence for and against the motion, the general rule is that the court must decide according to the fair preponderance of the evidence,[31] although

South Carolina.— Hill *v.* Watson, 10 S. C. 268.

Tennessee.— Jones *v.* Williamson, 5 Coldw. 371; Smith *v.* Miller, (Ch. App. 1897) 42 S. W. 182.

Wyoming.— Brophy *v.* Brunswick, 2 Wyo. 86.

See 30 Cent. Dig. tit. "Judgment," §§ 322, 754.

28. Daly *v.* Thompson, 5 Pa. Dist. 749.

Deponent unreliable.— Where the court is unable to believe the applicant's affidavit, his assertions being open to suspicion on account of his previous criminal record, it may dismiss the motion. Schoenhut's Appeal, 1 Pa. Cas. 530, 5 Atl. 619.

29. Stocking *v.* Hanson, 35 Minn. 207, 28 N. W. 507; Van Ness *v.* Nichols, 1 How. Pr. (N. Y.) 119; Gillespie *v.* Webster, 180 Pa. St. 405, 36 Atl. 928; Rbine *v.* Swartley, (Pa. 1889) 16 Atl. 846; Vogeley's Appeal, (Pa. 1888) 15 Atl. 878; Barton's Appeal, 4 Pa. Cas. 136, 7 Atl. 168; Fishblate *v.* McCullough, 7 Pa. Dist. 364; Reichenbach *v.* Hartlep, 15 Pa. Super. Ct. 23; McNeal *v.* Banks, 6 Kulp (Pa.) 371; Salsberg *v.* Mack, 6 Kulp (Pa.) 337; Hildreth *v.* Davis, 6 Kulp (Pa.) 336; Wells *v.* Wayman, 1 Lack. Leg. Rec. (Pa.) 485; Rieker *v.* Doerr, 16 Lanc. L. Rev. (Pa.) 59.

Opposing affidavits of unequal weight.— It is not considered that the opposing affidavits counterbalance each other where the one is direct and positive, while the other merely states the affiant's belief, opinion, or recollection, or charges matters by way of inference or implication. Haggin *v.* Lorentz, 13 Mont. 406, 34 Pac. 607; Gaslin *v.* Ritzel, 33 Nebr. 739, 50 N. W. 1123; Walton *v.* McKesson, 101 N. C. 428, 7 S. E. 566; Hunt *v.* Childress, 5 Lea (Tenn.) 247. Nor are the affidavits of equal weight, where the one is explicit and detailed, while the other merely contradicts it in general terms. Brown *v.* Stegemann, (Iowa 1900) 81 N. W. 450. Thus a motion to set aside a judgment should prevail when supported by an affidavit of an agreement to compromise the suit, which is opposed by an affidavit denying such agreement, but not denying defendant's belief in its existence. Sedberry *v.* Jones, 42 Tex. 10. So a default will be set aside on the ground that the summons was not served, when defendant so states in his affidavit, and the counter affidavit of the party claiming to have made the service does not state where or under what circumstances he made it. Allen *v.* McIntyre, 56 Minn. 351, 57 N. W. 1060.

30. Whitton *v.* Whitton, 64 Ill. App. 53; Lee *v.* Macfee, 45 Minn. 33, 47 N. W. 309; Dillon *v.* Porter, 36 Minn. 341, 31 N. W. 56; O'Connell *v.* Gallagher, 104 N. Y. App. Div. 492, 93 N. Y. Suppl. 643; Vanderpool *v.* Vanderpool, 162 Pa. St. 394, 29 Atl. 910; Stockwell *v.* Webster, 160 Pa. St. 473, 28 Atl. 837; Irwin's Appeal, 9 Pa. Cas. 479, 12 Atl. 840; Gardner's Appeal, 4 Pa. Cas. 251, 8 Atl. 176; George P. Steel Iron Co. *v.* Jacobs, 9 Pa. Super. Ct. 122; Heilner *v.* Falls Coal Co., 9 Pa. Super. Ct. 78; Howe Sewing-Mach. Co. *v.* Larimer, 5 Pa. Co. Ct. 660; Markle *v.* Fichter, 7 Kulp (Pa.) 549; Ward *v.* Ward, 4 Lanc. L. Rev. (Pa.) 306; Todd *v.* Hoff, 13 Montg. Co. L. Rep. (Pa.) 207.

Contradicting return.— The affidavit of defendant, stating positively that he never was served with process, will be sufficient to overcome the officer's return of service, unless the latter is corroborated by evidence. Gray *v.* Hays, 41 Minn. 12, 42 N. W. 594; Drohan *v.* Norton, 1 Misc. (N. Y.) 486, 21 N. Y. Suppl. 579; Parker *v.* Van Dorn Iron Works, 23 Ohio Cir. Ct. 444. But see Tatum *v.* Curtis, 9 Baxt. (Tenn.) 360. But defendant's affidavit merely stating that he has no recollection of being served with process is not sufficient as against the sheriff's return of personal service, especially when the record also recites the court's finding that he was served. People *v.* Dodge, 104 Cal. 487, 38 Pac. 203. On the other hand, where the summons in an action against a partnership shows clearly that it was not served on one of defendants, and there is no other summons or entry on the record, it is proper to find that defendant was not served. Ricaud *v.* Alderman, 132 N. C. 62, 43 S. E. 543.

31. *Indiana.*— Grayson *v.* Patterson, 7 Ind. 238.

Kansas.— Atchison Sav. Bank *v.* Means, 61 Kan. 857, 58 Pac. 989.

Maryland.— Coulbourn *v.* Fleming, 78 Md. 210, 27 Atl. 1041.

Minnesota.— Weymouth *v.* Gregg, 40 Minn. 45, 41 N. W. 243.

Montana.— Martin *v.* De Loge, 15 Mont. 343, 39 Pac. 312.

New York.— Julian *v.* Woolsey, 147 N. Y. 722, 42 N. E. 723; Kinne *v.* Meyer, 10 N. Y. Suppl. 448; Frink *v.* Morrison, 13 Abb. Pr. 80.

South Dakota.— Parszyk *v.* Mach, 10 S. D. 555, 74 N. W. 1027.

Washington.— Tacoma Lumber, etc., Co. *v.* Wolff, 7 Wash. 478, 35 Pac. 115, 755.

See 30 Cent. Dig. tit. "Judgment," §§ 322, 754.

In Illinois it has been held that where the

in some states it is thought that in these circumstances the motion should be denied.[32] If the relief asked is accorded, it will be presumed, on review in an appellate court, that there was sufficient evidence to justify the order.[33]

9. Showing Meritorious Defense — a. Necessity. To obtain an order opening or vacating a judgment, the party applying therefor must allege and show to the court that he has a good and meritorious defense to the cause of action.[34] And in

evidence on a motion to vacate a judgment by confession is conflicting, and the contested matter in doubt, the motion should be allowed. Brown *v.* Huber, 79 Ill. App. 109.

In Pennsylvania it has been held that a petition to open a judgment should not be granted unless there is more than oath against oath; but when there is more than this, and it comes to a question of the weight of the evidence, it is for the trial court, in the exercise of a sound discretion, to decide to which side the scales incline, and if it is in doubt on this question, or as to the credibility of the witnesses, it is always proper to open the judgment and let the issue be decided by a jury. Burley *v.* Filby, 193 Pa. St. 374, 44 Atl. 453; Steiner *v.* Scholl, 163 Pa. St. 465, 30 Atl. 159; Philadelphia *v.* Weaver, 155 Pa. St. 74, 25 Atl. 876; Klopfer *v.* Ekis, 155 Pa. St. 41, 25 Atl. 785; Woods *v.* Irwin, 141 Pa. St. 278, 21 Atl. 603, 23 Am. St. Rep. 282; Essick's Appeal, 1 Mona. 588; Knarr *v.* Elgren, 7 Pa. Cas. 172, 9 Atl. 875; Snively *v.* Fisher, 21 Pa. Super. Ct. 56; Lee *v.* Sallada, 7 Pa. Super. Ct. 98; Krebs *v.* Clark, 9 Pa. Co. Ct. 420; Herr *v.* Strauss, 16 Lanc. L. Rev. 68; Ward *v.* Ward, 4 Lanc. L. Rev. 306; Massey *v.* Buck, 1 Phila. 215.

32. Mogelberg *v.* Clevinger, 93 Iowa 736, 61 N. W. 1092; Hoffman *v.* Loudon, 96 Mo. App. 184, 70 S. W. 162.

33. Willett *v.* Millman, 61 Iowa 123, 15 N. W. 866.

34. *Alabama.*— *Ex p.* Carroll, 50 Ala. 9.

Arkansas.— Nelson *v.* Hubbard, 13 Ark. 253.

California.— Merchants' Ad-Sign Co. *v.* Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277; Garrison *v.* McGowan, 48 Cal. 592; People *v.* Rains, 23 Cal. 127; Reese *v.* Mahoney, 21 Cal. 305.

Colorado.— Barra *v.* People, 18 Colo. App. 16, 69 Pac. 1074.

Georgia.— Jewell *v.* Martin, 121 Ga. 325, 48 S. E. 929; Reab *v.* Sherman, 93 Ga. 792, 20 S. E. 642.

Illinois.— Eggleston *v.* Royal Trust Co., 205 Ill. 170, 68 N. E. 709; Gilchrist Transp. Co. *v.* Northern Grain Co., 204 Ill. 510, 68 N. E. 558; Hitchcock *v.* Herzer, 90 Ill. 543; Constantine *v.* Wells, 83 Ill. 192; Foster *v.* Weber, 110 Ill. App. 5; Rust *v.* Baird, 109 Ill. App. 41; Pitzele *v.* Lutkins, 85 Ill. App. 662; Peters *v.* Fisher, 78 Ill. App. 435; Culver *v.* Brinkerhoff, 76 Ill. App. 679; Mann *v.* Warde, 64 Ill. App. 108; Burke *v.* Ward, 50 Ill. App. 283.

Indiana.— Becker *v.* Tell City Bank, 142 Ind. 99, 41 N. E. 323; West *v.* Miller, 125 Ind. 70, 25 N. E. 143; Lee *v.* Basey, 85 Ind. 543; Dale *v.* Bugh, 16 Ind. 233; Stevens *v.* Helm, 15 Ind. 183; Frost *v.* Dodge, 15 Ind. 139; Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1.

Iowa.— Tullis *v.* McClary, (1905) 104 N. W. 505; Tschohl *v.* Machinery Mut. Ins. Assoc., 126 Iowa 211, 101 N. W. 740; Culbertson *v.* Salinger, 122 Iowa 12, 97 N. W. 99; Hawley *v.* Griffin, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86; Wright, etc., Oil, etc., Mfg. Co. *v.* Kleigel, 70 Iowa 578, 31 N. W. 878; Gilman *v.* Donovan, 53 Iowa 362, 5 N. W. 560; Dryden *v.* Wyllis, 51 Iowa 534, 1 N. W. 703; Thompson *v.* Savage, 43 Iowa 398; McDonald *v.* Donaghue, 30 Iowa 568.

Kansas.— Durham *v.* Moore, 48 Kan. 135, 29 Pac. 472; Coffey *v.* Carter, 47 Kan. 22, 27 Pac. 128.

Kentucky.— Carr *v.* Carr, 92 Ky. 552, 18 S. W. 453, 13 Ky. L. Rep. 756, 36 Am. St. Rep. 614; Williams *v.* Taylor, 11 Bush 375; Wireman *v.* Wireman, 87 S. W. 319, 27 Ky. L. Rep. 961 (construing Code Civ. Proc. § 521); Anderson *v.* Greene, 55 S. W. 420, 21 Ky. L. Rep. 1439.

Mississippi.— Fore *v.* Folsom, 4 How. 282.

Missouri.— Castlio *v.* Bishop, 51 Mo. 162; Adams *v.* Hickman, 43 Mo. 168; Campbell *v.* Garton, 29 Mo. 343.

Montana.— Lamb *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 64.

Nebraska.— Gavin *v.* Reed, (1905) 102 N. W. 455; Oakes *v.* Ziemer, 61 Nebr. 6, 84 N. W. 409; Clark *v.* Charles, 55 Nebr. 202, 75 N. W. 563; Kime *v.* Fenner, 54 Nebr. 476, 74 N. W. 869; Gilbert *v.* Marrow, 54 Nebr. 77, 74 N. W. 420; Gilcrest *v.* Nantker, 47 Nebr. 58, 66 N. W. 16; Bond *v.* Wycoff, 42 Nebr. 214, 60 N. W. 564; McBrien *v.* Riley, 38 Nebr. 561, 57 N. W. 385; Delaney *v.* Updike Grain Co., 5 Nebr. (Unoff.) 579, 99 N. W. 660; Waters *v.* Raker, 1 Nebr. (Unoff.) 830, 96 N. W. 78.

New Jersey.— Shawger *v.* Granard, 64 N. J. L. 219, 45 Atl. 979; Riker *v.* Ball, 3 N. J. L. 974.

New York.— Gilman *v.* Tucker, 57 N. Y. Super. Ct. 324, 7 N. Y. Suppl. 682; Jellinghaus *v.* New York Ins. Co., 5 Bosw. 678; Quinn *v.* Case, 2 Hilt. 467; Mix *v.* White, 1 E. D. Smith 614; Kramer *v.* Gerlach, 28 Misc. 525, 59 N. Y. Suppl. 855; Cross *v.* Birch, 27 Misc. 295, 58 N. Y. Suppl. 438; Gold *v.* Hutchinson, 26 Misc. 1, 55 N. Y. Suppl. 575; Davis *v.* Solomon, 25 Misc. 695, 56 N. Y. Suppl. 80; Jospe *v.* Lighte, 22 Misc. 146, 48 N. Y. Suppl. 645; Timolat *v.* S. J. Held Co., 15 Misc. 630, 37 N. Y. Suppl. 221; Phillips *v.* Equitable L. Assur. Soc., 26 N. Y. Suppl. 522; Brewster *v.* Boyle, 19 N. Y. Suppl. 146; Mather *v.* Carrol, 14 N. Y. St. 469; Macomber *v.* New York, 17 Abb. Pr. 35; McGuin *v.* Cace, 9 Abb. Pr. 160; Powers *v.*

some states, by force of statute, it is erroneous for the court to set aside a judgment, until it has first found and adjudged that there is a valid defense to the action.[35] There is, however, an exception to this rule in cases where the judgment attacked is void for want of jurisdiction,[36] and in certain other cases, as where judgment was obtained by fraud,[37] or where a judgment by default was rendered before defendant's time to plead had expired,[38] or was taken against a lunatic.[39] It is not necessary that the defense should go to the entire action; it is sufficient if it purports to defeat any substantial part of plaintiff's claim.[40] The court is

Trenor, 48 How. Pr. 500; Davenport *v.* Ferris, 6 Johns. 131; Thompson *v.* Payne, 3 Cai. 88.

North Carolina.— Osborn *v.* Leach, 133 N. C. 427, 45 S. E. 783; Le Duc *v.* Slocomb, 124 N. C. 347, 32 S. E. 726; Jeffries *v.* Aaron, 120 N. C. 167, 26 S. E. 696; Andrews *v.* Devane, 3 N. C. 373.

Ohio.— Murphy *v.* Swadner, 34 Ohio St. 672; Fliedner *v.* Rockefeller, 9 Ohio Dec. (Reprint) 266, 12 Cinc. L. Bul. 20; Howard *v.* Abbey, 2 Ohio Dec. (Reprint) 64, 1 West. L. Month. 278.

Oregon.— Egan *v.* North American Loan Co., 45 Oreg. 131, 76 Pac. 774, 77 Pac. 392.

Pennsylvania.— Welton *v.* Littlejohn, 163 Pa. St. 205, 29 Atl. 871; Daly *v.* Thompson, 5 Pa. Dist. 749; Swallow *v.* Ives, 4 Lanc. L. Rev. 300.

South Dakota.— Pettigrew *v.* Sioux Falls, 5 S. D. 646, 60 N. W. 27.

Tennessee.— Jones *v.* Williamson, 5 Coldw. 371.

Texas.— Pacific Mut. L. Ins. Co. *v.* Williams, 79 Tex. 633, 15 S. W. 478; Aldridge *v.* Mardoff, 32 Tex. 204; Cook *v.* Phillips, 18 Tex. 31; Watson *v.* Newsham, 17 Tex. 437; Calvert, etc., R. Co. *v.* Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997; Chambers *v.* Gallup, 30 Tex. Civ. App. 424, 70 S. W. 1009. And see El Paso, etc., R. Co. *v.* Kelley, (1905) 87 S. W. 660.

Washington.— Williams *v.* Breen, 25 Wash. 666, 66 Pac. 103; Western Security Co. *v.* Lafleur, 17 Wash. 406, 49 Pac. 1061; Tacoma Lumber, etc., Co. *v.* Wolff, 7 Wash. 478, 35 Pac. 115, 755.

Wisconsin.— Boutin *v.* Catlin, 101 Wis. 545, 77 N. W. 910; Bonnell *v.* Gray, 36 Wis. 574; Sayles *v.* Davis, 22 Wis. 225; Holden *v.* Kirby, 21 Wis. 149. Where a judgment is attacked on the ground of irregularity, creditors are in no better position for assailing it than the judgment debtor, and neither can avoid it unless it is shown to be unjust or inequitable. Horning *v.* E. Griesbach Brewing Co., 84 Wis. 71, 54 N. W. 105; Marshall, etc., Bank *v.* Milwaukee Worsted Mills, 84 Wis. 23, 53 N. W. 1126.

Wyoming.— White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

United States.— Kimberly *v.* Arms, 40 Fed. 548; Dawson *v.* Daniel, 7 Fed. Cas. No. 3,668, 2 Flipp. 301.

See 30 Cent. Dig. tit. "Judgment," §§ 293, 717.

Demurrer to answer.— Where the complaint, in an action to set aside a judgment, does not attempt to show that plaintiff therein had or has any valid defense to the original action, a demurrer to the answer, whether good or bad, is properly overruled, for a bad answer is sufficient for a bad complaint. Rupert *v.* Martz, 116 Ind. 72, 18 N. E. 381.

35. See the statutes of the different states. And see Western Assur. Co. *v.* Klein, 48 Nebr. 904, 67 N. W. 873; Bond *v.* Wycoff, 42 Nebr. 214, 60 N. W. 564; State *v.* Duncan, 37 Nebr. 631, 56 N. W. 214; Follett *v.* Alexander, 58 Ohio St. 202, 50 N. E. 720.

36. *Illinois.*— Taylor *v.* Coughlan, 73 Ill. App. 378.

Indiana.— Dobbins *v.* McNamara, 113 Ind. 64, 14 N. E. 887, 3 Am. St. Rep. 626.

Iowa.— Rice *v.* Griffith, 9 Iowa 539.

Kansas.— Hanson *v.* Wolcott, 19 Kan. 207.

Minnesota.— St. Paul Sav. Bank *v.* Arthur, 62 Minn. 98, 53 N. W. 812, 18 L. R. A. 498; Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342; Mackubin *v.* Smith, 5 Minn. 367. In proceedings to vacate a judgment entered against personal representatives, where there has been no order for continuance of the original action against them, as required by statute, they are not bound to show a meritorious defense. Lee *v.* O'Shaughnessy, 20 Minn. 173.

Nebraska.— Baldwin *v.* Burt, 2 Nebr. (Unoff.) 377, 383, 96 N. W. 401.

South Carolina.— Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913.

See 30 Cent. Dig. tit. "Judgment," § 293.

37. Crescent Canal Co. *v.* Montgomery, 124 Cal. 134, 56 Pac. 797; Morris *v.* Kahn, 31 Misc. (N. Y.) 25, 62 N. Y. Suppl. 1040. But *compare* Maryland Steel Co. *v.* Marney, 91 Md. 360, 46 Atl. 1077, requiring a showing of a meritorious defense where it was alleged that the judgment was procured by means of a conspiracy between plaintiff and certain others to establish his case by false testimony.

Taking judgment contrary to an agreement between the parties to continue the case, or to extend the time for pleading, is so far a fraud on defendant's rights as to justify the setting aside of the judgment without a showing of a defense on the merits. Browning *v.* Roane, 9 Ark. 354, 50 Am. Dec. 218; Stevens *v.* Thompson, 1 How. Pr. (N. Y.) 136.

38. Hole *v.* Page, 20 Wash. 208, 54 Pac. 1123.

39. Kent *v.* West, 22 Misc. (N. Y.) 403, 50 N. Y. Suppl. 339.

40. Kime *v.* Fenner, 54 Nebr. 476, 74 N. W. 869; Taylor *v.* Trumbull, 32 Nebr. 508, 49 N. W. 375; Congdon Hardware Co. *v.* Consolidated Apex Min. Co., 11 S. D. 376, 77 N. W. 1022.

not to try and decide upon the facts set up by way of defense, or to determine whether the defense will ultimately prevail;[41] but is only to inquire whether it is meritorious, interposed in good faith, and *prima facie* sufficient to defeat the action or some part thereof.[42] But the motion is properly denied if the court finds that the proposed answer is clearly frivolous,[43] or is so inadequate and immaterial that the result of a new trial would be nothing but the entry of the same judgment,[44] or is plainly untenable.[45] And it is not sufficient to allege in general terms that defendant has a good or meritorious defense to the action; the facts constituting the proposed defense must be set forth in detail, so that the court may judge whether or not it is meritorious and sufficient.[46]

b. Sufficiency of Defense. A judgment will not be opened or vacated if the defense set up by defendant, and which he proposes to plead, is not meritorious or is purely technical in its character or is dishonest or unconscionable.[47] Of such

41. Calvert *v.* Williams, 10 Md. 478; Congdon Hardware Co. *v.* Consolidated Apex Min. Co., 11 S. D. 376, 77 N. W. 1022; Fairfield *v.* King, 41 Vt. 611.

42. Western Assur. Co. *v.* Klein, 48 Nebr. 904, 67 N. W. 873. And see Culbertson *v.* Salinger, 122 Iowa 12, 97 N. W. 99, holding that the requirement of showing a meritorious defense is met by showing such a state of facts as will be "likely" to defeat plaintiff's claim.

In New Jersey it has been held that it is not necessary for defendant, seeking the opening of a judgment, to show that he is unquestionably entitled to a judgment in his own favor, but it is enough if he shows that he has a defense which is of such merit that the court may properly be asked to pass upon it. Bradley *v.* McPherson, (Ch. 1903) 56 Atl. 303; Pike *v.* Henderson, (Ch. 1901) 48 Atl. 551.

Striking out defenses.— Where the petition for the vacation of a judgment presents several defenses to plaintiff's cause of action, the court cannot strike out the answer in which such defenses are set up, on the ground that all the defenses pleaded are not available, and then dismiss the proceeding because the petition does not exhibit a defense to the action. Kime *v.* Fenner, 54 Nebr. 476, 74 N. W. 869.

43. Benedict *v.* Arnoux, 85 Hun (N. Y.) 283, 32 N. Y. Suppl. 905; Excise Com'rs *v.* Hollister, 2 Hilt. (N. Y.) 588.

44. *California.*— Brooks *v.* Johnson, 122 Cal. 569, 55 Pac. 423.

Colorado.— Richardson Drug Co. *v.* Dunagan, 8 Colo. App. 308, 46 Pac. 227.

New Jersey.— Allaire *v.* Day, 30 N. J. Eq. 231.

New York.—Schrenkeisen *v.* Kroll, 85 N. Y. Suppl. 1072.

Texas.— Tinsley *v.* Corbett, 27 Tex. Civ. App. 633, 66 S. W. 910; Keator *v.* Case, (Civ. App. 1895) 31 S. W. 1099.

Matters already adjudicated.— A motion to open the judgment should be denied where it appears that substantially the same matters proposed to be pleaded had been determined against defendant in a former litigation. Storey *v.* Weaver, 66 Ga. 296.

45. Miracle *v.* Lancaster, 46 Iowa 179; Ives *v.* Snyder, 7 Kulp (Pa.) 393.

46. See *supra*, IX, F, 4, b.

47. *Alabama.*— Waddill *v.* Weaver, 53 Ala. 58.

Arkansas.— Pennington *v.* Gibson, 6 Ark. 447.

California.— Parrott *v.* Den, 34 Cal. 79; People *v.* Rains, 23 Cal. 127.

Indiana.—Hazelrigg *v.* Wainwright, 17 Ind. 215.

Iowa.— Niagara Ins. Co. *v.* Rodecker, 47 Iowa 162; Thatcher *v.* Haun, 12 Iowa 303; Andrus *v.* Clark, 8 Iowa 475.

Kansas.— Anderson *v.* Beebe, 22 Kan. 768.

Kentucky.— Herald *v.* Hargis, 54 S. W. 958, 21 Ky. L. Rep. 1287.

Minnesota.— St. Paul, etc., R. Co. *v.* Blackmar, 44 Minn. 514, 47 N. W. 172; Jorgensen *v.* Griffin, 14 Minn. 464.

Nebraska.— Oakes *v.* Ziemer, 62 Nebr. 603, 87 N. W. 350; Mulhollan *v.* Scoggin, 8 Nebr. 202.

New Jersey.— Marsh *v.* Lasher, 13 N. J. Eq. 253.

New York.— Audubon *v.* Excelsior Ins. Co., 10 Abb. Pr. 64; Valleau *v.* Cahill, 1 N. Y. City Ct. 47; Gourlay *v.* Hutton, 10 Wend. 595; Bard *v.* Fort, 3 Barb. Ch. 632; Gay *v.* Gay, 10 Paige 369. But *compare* Benedict *v.* Arnoux, 85 Hun 283, 32 N. Y. Suppl. 905, holding that an application to open a default should not be denied on the ground that the proposed defense is unconscionable.

North Carolina.— Wyche *v.* Ross, 119 N. C. 174, 25 S. E. 878; Statesville Bank *v.* Foote, 77 N. C. 131.

Pennsylvania.— Hunter *v.* Forsyth, 205 Pa. St. 466, 55 Atl. 26; Caldwell *v.* Carter, 153 Pa. St. 310, 25 Atl. 831; Buechly *v.* Association, 1 Leg. Rec. 73. A judgment entered on a note for want of affidavit of defense will not be opened nearly two years afterward on affidavits merely denying the indebtedness. Ware *v.* Baldwin, 7 Kulp 278. Where municipal officers are sued on a warrant drawn by them, a judgment by confession will not be stricken off at the suit of a taxpayer on the mere ground that the action should have been on the original debt, instead of on the warrant, where it is not denied that the debt was just. Maneval *v.* Jackson Tp., 141 Pa. St. 426, 21 Atl. 672.

Wisconsin.—Neenah Nat. Bank *v.* Ketchum, 48 Wis. 640, 4 N. W. 801.

a character are the defense of usury,[48] the coverture of defendant,[49] plaintiff's want of capacity to sue,[50] a plea of *ultra vires*,[51] the statute of frauds,[52] a set-off or counter-claim,[53] a failure to allow proper credits,[54] a forfeiture or breach of condition,[55] or any fraudulent conduct in which defendant participated,[56] or which he could have discovered and pleaded by using due diligence.[57] On the other hand it is considered that a plea of the statute of limitations is a meritorious defense and not unconscionable.[58] And the same is true of a plea of discharge in bankruptcy or insolvency,[59] or of the invalidity of the statute or ordinance on which the action is founded,[60] or a plea of payment or tender,[61] or that the amount of the judgment is greatly in excess of what plaintiff is entitled to recover,[62] or failure of consideration for the note in suit,[63] or the plea of *non est factum*,[64] or

United States.— See Porter *v.* Marsteller, 19 Fed. Cas. No. 11,287, 1 Cranch C. C. 129.

See 30 Cent. Dig. tit. "Judgment," § 295.

48. Biebinger *v.* Taylor, 64 Mo. 63; Vanderveer *v.* Holcomb, 22 N. J. Eq. 555; Marsh *v.* Lasher, 13 N. J. Eq. 253; Farish *v.* Corlies, 1 Daly (N. Y.) 274; Morris *v.* Slatery, 6 Abb. Pr. (N. Y.) 74; Lovett *v.* Cowman, 6 Hill (N. Y.) 223; Quincy *v.* Foot, 1 Barb. Ch. (N. Y.) 496; Candler *v.* Pettit, 1 Paige (N. Y.) 427. But *compare* Wagner *v.* Blanchet, 27 N. J. Eq. 356.

49. Marion *v.* Regenstein, 98 Ala. 475, 13 So. 384; Genet *v.* Dusenbury, 2 Duer (N. Y.) 679. But see Miller *v.* Weber, 11 York. Leg. Rec. (Pa.) 64, holding that a judgment may be opened when the case involves a question whether defendant's coverture is a defense to the debt sued on.

50. Abram French Co. *v.* Marx, 8 Misc. (N. Y.) 490, 28 N. Y. Suppl. 749; Jay *v.* De Groot, 17 Abb. Pr. (N. Y.) 36 note; Watts *v.* Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258.

51. King *v.* Merchants' Exch. Co., 2 Sandf. (N. Y.) 693.

52. McCulloch *v.* Tapp, 2 Ohio Dec. (Reprint) 678, 4 West. L. Month. 575.

53. *Illinois.*— Boas *v.* Heffron, 40 Ill. App. 652.

Indiana.— Wills *v.* Browning, 96 Ind. 149; Cresswell *v.* White, 3 Ind. App. 306, 29 N. E. 612.

Iowa.— Johnson *v.* Nash-Wright Co., 121 Iowa 173, 96 N. W. 760; Williams *v.* Westcott, 77 Iowa 332, 42 N. W. 314, 14 Am. St. Rep. 287.

New York.— Leahey *v.* Kingon, 22 How. Pr. 209.

Pennsylvania.— Walter *v.* Fees, 155 Pa. St. 55, 25 Atl. 829; Croop *v.* Dodson, 7 Kulp 13.

See 30 Cent. Dig. tit. "Judgment," § 295.

54. McRae *v.* Purvis, 12 La. Ann. 85; White *v.* Featherstonhaugh, 7 How. Pr. (N. Y.) 357; Cooke *v.* Edwards, 15 Pa. Super. Ct. 412.

55. Union Cent. L. Ins. Co. *v.* Lipscomb, (Tex. Civ. App. 1894) 27 S. W. 307. But *compare* Hickerson *v.* Raiguel, 2 Heisk. (Tenn.) 329; Scottish Union Ins. Co. *v.* Tomkies, 28 Tex. Civ. App. 157, 66 S. W. 1109.

56. Parker *v.* Grant, 1 Johns. Ch. (N. Y.) 630. And see Johnson *v.* Richardson, 67 Kan. 521, 73 Pac. 113.

57. Overstreet *v.* Brown, 62 S. W. 885, 23 Ky. L. Rep. 317.

58. *Mississippi.*— Sanders *v.* Robertson, 23 Miss. 389.

New York.— Gourlay *v.* Hutton, 10 Wend. 595. *Contra*, Hawes *v.* Hoyt, 11 How. Pr. 454; Douglas *v.* Douglas, 3 Edw. 390.

North Dakota.—Wheeler *v.* Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

Oregon.— Mitchell *v.* Campbell, 14 Oreg. 454, 13 Pac. 190.

Pennsylvania.— Ellinger's Appeal, 114 Pa. St. 505, 7 Atl. 180; Comp *v.* Messimer, 5 Pa. Dist. 566; Chandler *v.* Bennett, 3 Pa. Co. Ct. 155. *Contra*, Brown *v.* Sutter, 1 Dall. 239, 1 L. ed. 118; Spang *v.* Deibler, 1 Pa. Co. Ct. 670; Smith *v.* Nicholas, 3 C. Pl. 191.

South Carolina.—Hane *v.* Goodwyn, 1 Brev. 461.

South Dakota.— Garvie *v.* Greene, 9 S. D. 608, 70 N. W. 847.

Contra.— Pennington *v.* Gibson, 6 Ark. 447; Carr *v.* Dawes, 46 Mo. App. 351; Newsom *v.* Ran, 18 Ohio 240; Sheets *v.* Baldwin, 12 Ohio 120; Meiners *v.* Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586.

59. Tuttle *v.* Scott, 119 Cal. 586, 51 Pac. 849; New Hampshire Sav. Bank *v.* Webster, 48 N. H. 21; Kahn *v.* Casper, 51 N. Y. App. Div. 540, 64 N. Y. Suppl. 838; Comer *v.* Wrisley, 14 Daly (N. Y.) 14, 1 N. Y. St. 778; Adam's Appeal, 101 Pa. St. 471; Wise's Appeal, 99 Pa. St. 193; Com. *v.* Huber, 5 Pa. L. J. 331.

60. Welch *v.* Mastin, 98 Mo. App. 273, 71 S. W. 1090.

61. Levy *v.* Metropolis Mfg. Co., 73 Conn. 559, 48 Atl. 429; Halladay *v.* Underwood, 75 Ill. App. 96; Ellis *v.* Butler, 78 Iowa 632, 43 N. W. 459; United Wine, etc., Co. *v.* Platz, 86 N. Y. Suppl. 260. But *compare* Tallman *v.* Sprague, 60 N. Y. Super. Ct. 425, 18 N. Y. Suppl. 207, holding that an affidavit that defendant had partly paid the note in suit by giving another note for a part thereof does not show a sufficient defense to entitle him to have a judgment on the note opened.

62. Joerns *v.* La Nicca, 75 Iowa 705, 38 N. W. 129; Southern Express Co. *v.* Hunt, 54 Miss. 664; Kubie *v.* Miller, 31 Misc. (N. Y.) 460, 64 N. Y. Suppl. 448.

63. Burnham *v.* Brewster, 1 Vt. 87.

64. Marvin *v.* Brandy, 56 Hun (N. Y.) 242, 9 N. Y. Suppl. 593; Collins *v.* Freas, 77 Pa. St. 493; West *v.* Irwin, 74 Pa. St. 258; Wheeler *v.* Moore, 10 Wash. 309, 38

want of title in plaintiff to the property in suit,[65] or want of authority in an agent or trustee to make the contract or conveyance in suit,[66] or contributory negligence,[67] or a plea of *res judicata*.[68] A judgment will not be opened on the ground that defendant was incapacitated by habitual drunkenness to make the contract sued on, where no fraud or imposition is charged, and the evidence does not show that he was entirely incapable of making a contract.[69] Before a court will set aside a judgment rendered on an earlier judgment for a sum of money, it must be shown that the petitioner was not indebted to the judgment plaintiff; and the defense of *nul tiel record* is not sufficient.[70] A judgment entered upon a bond given to secure any indebtedness that might be found against the obligor by award of arbitrators will not be opened on the ground that it was given to compound a felony, where the evidence shows that there was no actual agreement not to prosecute, and that the obligor, although charged with a felony, did not actually commit it.[71]

10. Effect of Application on Status of Judgment. The filing of a motion or petition to vacate a judgment does not suspend its operation, or prevent the issue and execution of final process upon it.[72] On the contrary some cases hold that such action admits the regularity of the judgment and waives any objections to it on that score.[73]

G. Trial and Determination of Application — 1. Hearing and Decision. On a contested application to open or vacate a judgment, the court should hear both parties and examine thoroughly into all pertinent facts and circumstances,[74] and it is error to grant or dismiss the motion summarily or on an *ex parte* hearing,[75] unless the question at issue is one which can be determined from an inspection of the record or unless the facts are such as do not admit of dispute.[76] A motion of this kind is triable by the court,[77] although it is within the power of the court in a proper case to award an issue to be tried by a jury,[78] or to order a

Pac. 1053. But see Davis *v.* Jenkins, 93 Ky. 353, 20 S. W. 283, 14 Ky. L. Rep. 342, 40 Am. St. Rep. 197.

Denying partnership.— Akin to this plea is the defense that defendant who moves to open the judgment was never a member of the partnership which executed the note on which the judgment was rendered. This is a good and meritorious defense. Bristor *v.* Galvin, 62 Ind. 352.

65. Willett *v.* Millman, 61 Iowa 123, 15 N. W. 866; Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368.

66. Wishard *v.* McNeil, 78 Iowa 40, 42 N. W. 578; Bloor *v.* Smith, 112 Wis. 340, 87 N. W. 870.

67. Barto *v.* Sioux City Electric Co., 119 Iowa 179, 93 N. W. 268.

68. Audubon *v.* Excelsior F. Ins. Co., 10 Abb. Pr. (N. Y.) 64.

69. Spetz *v.* Howard, 23 Pa. Super. Ct. 420.

70. Stratton Bank *v.* Dixon, 105 Iowa 148, 74 N. W. 919.

71. Woelfel *v.* Hammer, 159 Pa. St. 446, 28 Atl. 146.

72. Wiley *v.* Woodman, 19 La. Ann. 210; Spang *v.* Com., 12 Pa. St. 358; Savage *v.* Kelly, 11 Phila. (Pa.) 525; Davis *v.* Com., 16 Gratt. (Va.) 134; Freeman *v.* Dawson, 110 U. S. 264, 4 S. Ct. 94, 28 L. ed. 141.

73. Tootle *v.* Jones, 19 Nebr. 588, 27 N. W. 635; Hays *v.* Com., 14 Pa. St. 39.

74. Craig *v.* Wroth, 47 Md. 281; Souder *v.* Lippincott, 48 N. J. L. 437, 8 Atl. 729; Anderson *v.* Horn, 10 N. Y. Suppl. 8, 23 Abb. N. Cas. 475; Hunter *v.* Forsyth, 205 Pa. St. 466, 55 Atl. 26.

Examining parties.— A motion to vacate a judgment, made by one of three defendants therein, on the ground that the appearance of the attorney was unauthorized, is properly denied, after the death of the attorney and of the co-defendant who retained him, where the moving party refuses to submit himself generally to the jurisdiction of the court, so that it is impossible to cross-examine him as to his knowledge and the authority from him to the attorney. Vilas *v.* Butler, 9 N. Y. Suppl. 82.

In Pennsylvania it is said that the same strictness of practice is not adhered to in opening a judgment by default as in the case of a judgment by confession. Scranton Supply Co. *v.* Cooper, 4 C. Pl. 103.

75. Reilly *v.* Ruddock, 41 Cal. 312; Ratliff *v.* Baldwin, 29 Ind. 16, 92 Am. Dec. 330.

Continuance for plaintiff's absence.— On hearing of defendant's application to open a default and for new trial it is not an abuse of discretion to refuse a continuance for the absence of plaintiff. Wilson *v.* Pfaffe, (Iowa 1905) 103 N. W. 992.

76. Bonner *v.* Martin, 51 Ga. 195; Ratliff *v.* Baldwin, 29 Ind. 16, 92 Am. Dec. 330.

77. Kolkhoff *v.* Busse, 29 Cinc. L. Bul. (Ohio) 341, 6 Ohio S. & C. Pl. Dec. 28.

78. Rasmussen *v.* Smith, 82 Ill. App. 334; Meyer *v.* Whitehead, 62 Miss. 387; Martin *v.* Kline, 157 Pa. St. 473, 27 Atl. 753; Mc-

reference,[79] or to itself proceed to take an accounting.[80] The inquiry will be limited to the grounds set up in support of the motion and in opposition to it, including questions of due diligence and the like, but not extending to a consideration of the merits of the original action.[81] The motion may be dismissed for want of jurisdiction if it appears that notice of it was not served on the party opposing,[82] or it may be withdrawn by the party presenting it.[83]

2. Relief Awarded — a. In General. On granting an application to set aside a judgment, it is not proper to enjoin its enforcement.[84] If taken by default it should be opened, and thereupon defendant should be allowed or required to plead within a reasonable time;[85] otherwise the cause should be set down for hearing or a new trial should be ordered, according to the situation,[86] unless justice can be done between the parties by amending or correcting the judgment, or reducing its amount, in which case the court will be warranted in entering a new judgment in the proper form.[87] Opening a judgment, it will be observed, is a different thing from vacating it; the former action merely lets in a defense to the suit, while the latter annuls the judgment;[88] and generally a judgment cannot be stricken off unless it is entirely null and void.[89] But either on opening or vacating the judgment, the relief granted may also include the setting aside of an execution or a sale thereunder.[90]

b. Partial Vacation of Judgment. A court having power to vacate a judgment entirely may grant less relief by vacating it in part only, where justice so

Cutcheon *v.* Allen, 96 Pa. St. 319; Whiting *v.* Johnson, 11 Serg. & R. (Pa.) 328, 14 Am. Dec. 633; *In re* Rowland, 7 Pa. L. J. 312; Linderman *v.* Linderman, 1 Woodw. (Pa.) 60.

79. Dovale *v.* Ackerman, 5 Silv. Sup. (N. Y.) 264, 7 N. Y. Suppl. 833.

80. Ross *v.* Noble, 6 Kan. App. 361, 51 Pac. 792.

81. Reinicke *v.* Morse, 10 S. W. 468, 10 Ky. L. Rep. 767; National Condensed Milk Co. *v.* Brandenburgh, 40 N. J. L. 111; Bradley *v.* McPherson, (N. J. Ch. 1903) 56 Atl. 303; Traitteur *v.* Livingston, 59 N. Y. Super. Ct. 140, 13 N. Y. Suppl. 603; Dinsmore *v.* Adams, 49 How. Pr. (N. Y.) 238; Kissinger *v.* Bitting, 2 Woodw. (Pa.) 39. And see Vanderventer *v.* Phillips, 7 Hill (N. Y.) 143.

What matters considered.— On a motion to strike out a judgment for irregularity in the proceedings, the whole question of jurisdiction, and whether the proper steps were taken to justify the entry of judgment, are open for review. Mueller *v.* Michaels, 101 Md. 188, 60 Atl. 485.

82. Aiken *v.* Wolfe, 76 Ga. 816.

83. Cherry *v.* Home Bldg., etc., Assoc., 55 Ga. 19.

84. Hunton *v.* Euper, 63 Ark. 323, 38 S. W. 517.

85. *Illinois.*—Purcell *v.* Henry, 67 Ill. App. 256.

Kentucky.— Carr *v.* Watkins, 9 S. W. 218, 9 Ky. L. Rep. 342.

Minnesota.— Jones *v.* Swain, 57 Minn. 251, 59 N. W. 297.

New York.—Headdings *v.* Gavette, 86 N. Y. App. Div. 592, 83 N. Y. Suppl. 1017; Gormully, etc., Mfg. Co. *v.* Catharine, 25 Misc. 338, 55 N. Y. Suppl. 475.

Ohio.— Kolkhoff *v.* Busse, 6 Ohio S. & C. Pl. Dec. 28.

Pennsylvania.— Keyes *v.* Moorhead, 11 Pa. Co. Ct. 43; Bloomsburg Banking Co. *v.* Mourey, 4 Pa. Co. Ct. 247.

Texas.— Fowler *v.* Morrill, 8 Tex. 153; Belknap *v.* Groover, (Civ. App. 1900) 56 S. W. 249.

See 30 Cent. Dig. tit. "Judgment," § 324.

Where a judgment is set aside because void for want of jurisdiction over defendant, he should not be ordered to answer the complaint. Merced Co. *v.* Hicks, (Cal. 1885) 7 Pac. 181.

86. Beck *v.* Juckett, 111 Iowa 339, 82 N. W. 762; Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468, 3 West. L. Month. 195.

87. *Georgia.*— Triest *v.* Watts, 62 Ga. 671.

Indiana.— Marion Mfg. Co. *v.* Harding, 155 Ind. 648, 58 N. E. 194; Slagle *v.* Bodmer, 75 Ind. 330.

Kentucky.— Benge *v.* Potter, 55 S. W. 431, 21 Ky. L. Rep. 1389.

Michigan.— Lorman *v.* Benson, 9 Mich. 237.

United States.— Bonnell *v.* Weaver, 3 Fed. Cas. No. 1,630, 5 Biss. 22.

See 30 Cent. Dig. tit. "Judgment," § 756.

Compare Watson *v.* Paine, 25 Ohio St. 340.

88. Hall *v.* Jones, 32 Ill. 38; Gloninger *v.* Hazard, 4 Phila. (Pa.) 354.

89. Mutual L. Ins. Co. *v.* Tenan, 204 Pa. St. 332, 54 Atl. 172; Davidson *v.* Miller, 204 Pa. St. 223, 53 Atl. 773; Swartz *v.* Morgan, 163 Pa. St. 195, 29 Atl. 974, 975, 43 Am. St. Rep. 786; *In re* County Auditors, 8 Kulp (Pa.) 415; Sweigart *v.* Conrad, 16 Lanc. L. Rev. (Pa.) 340.

90. Stephens *v.* Stephens, 1 Phila. (Pa.) 108. But see Adams *v.* James L. Leeds Co., 189 Pa. St. 544, 42 Atl. 195, holding that on opening a judgment by confession, in order to determine its validity, where an execution thereon has been levied on personalty, it is error to set aside the execution and the

requires;[91] and this may be done in respect to the amount of the judgment,[92] or as to the recovery on one or more separate counts or causes of action united in the same suit,[93] or as to one of several defendants, where their interests are severable and the judgment is not an entirety,[94] although generally a joint judgment against several defendants, if opened or vacated as to one, must be opened or vacated as to all.[95]

3. ORDER AND FINDINGS. An order for the opening or vacation of a judgment should show clearly what disposition was made of the judgment and that the action purporting to have been taken was by the authority of the court.[96] In addition to this it is sometimes also required that the court should find the order and state the facts on which it is based,[97] or recite the grounds for granting the

levy, in the absence of other equivalent security substituted therefor.

91. Geer *v.* Reams, 88 N. C. 197. *Compare* Ross *v.* Ross, 21 Oreg. 9, 26 Pac. 1007. But see Miller *v.* Mowrer, 4 Lanc. Bar (Pa.) 727, where it is said that a court will not exercise the power to strike out a part of a judgment.

92. Weaver *v.* Painter, 2 Pa. Cas. 395, 3 Atl. 839. And see Dulle *v.* Lally, 167 Ill. 485, 47 N. E. 753.

93. Weaver *v.* Leach, 26 Kan. 179; Cochrane *v.* Halsey, 25 Minn. 52; Jaffray *v.* Wolf, 1 Okla. 312, 33 Pac. 945. And see Wise *v.* Schloesser, 111 Iowa 16, 82 N. W. 439.

Recovery not apportionable.— Where a verdict is for general damages, and the court cannot say what part of it was for the claims or demands properly allowable, and what part for demands on which a recovery should not have been allowed, the whole verdict and judgment must be set aside. Irwin *v.* Knox, 10 Johns. (N. Y.) 365.

94. Powell *v.* Perry, 63 Ga. 417; Wright *v.* Churchman, 135 Ind. 683, 35 N. E. 835; Pattison *v.* Norris, 29 Ind. 165; Neenan *v.* St. Joseph, 126 Mo. 89, 28 S. W. 963; Creigh *v.* Hedrick, 5 W. Va. 140.

95. *Illinois.*— Claflin *v.* Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263; Gould *v.* Sternburg, 69 Ill. 531; Reynolds *v.* Barnard, 36 Ill. App. 218.

Iowa.— Storm Lake *v.* Iowa Falls, etc., R. Co., 62 Iowa 218, 17 N. W. 489.

Kentucky.— Bitzer *v.* O'Bryan, 107 Ky. 590, 54 S. W. 951, 21 Ky. L. Rep. 1307.

Michigan.— Van Renselaer *v.* Whiting, 12 Mich. 449. See McArthur *v.* Oliver, 53 Mich. 299, 305, 19 N. W. 5, 8.

Missouri.— Smith *v.* Rollins, 25 Mo. 408.

Nebraska.— Lamb *v.* Gregory, 12 Nebr. 506, 11 N. W. 755.

Nevada.— Stevenson *v.* Mann, 13 Nev. 268.

Ohio.—Frazier *v.* Williams, 24 Ohio St. 625.

Tennessee.— Saunders *v.* Harris, 5 Humphr. 72.

Texas.— Levy *v.* Gill, (Civ. App. 1898) 46 S. W. 84. *Compare* Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531.

Vermont.— Starbird *v.* Moore, 21 Vt. 529.

West Virginia.— Calvert *v.* Ash, 47 W. Va. 480, 35 S. E. 887; Midkiff *v.* Lusher, 27 W. Va. 439; Carlon *v.* Ruffner, 12 W. Va. 297.

See 30 Cent. Dig. tit. "Judgment," § 756. And see *supra*, VI, C, 3, g.

96. Barton *v.* Bryant, 2 Ind. 189 (holding that a memorandum appended to a decree setting forth that such decree is set aside and discharged is inoperative, in the absence of anything to show that it was entered by the court or otherwise authorized); McKenzie *v.* Bismarck Water Co., 6 N. D. 361, 71 N. W. 608 (holding that a judgment of the district court is not vacated by an order sustaining a motion for a new trial which has no basis on statutory grounds, such order being absolutely void).

In Pennsylvania it has been held that where a judgment is set aside after the term at which it was entered, it is better that the formal entry should be, "Judgment vacated, verdict set aside, and new trial granted," instead of merely, "Rule absolute for new trial," which does not at once show all that has been done. Fisher *v.* Hestonville, etc., Pass. R. Co., 185 Pa. St. 602, 40 Atl. 97. And where a judgment is opened to let defendant in to a defense, and on the trial he gets a verdict, it is proper thereupon to enter an order formally vacating the original judgment. McAnulty *v.* National Life Assoc., 6 Lack. Leg. N. 128.

97. Turner *v.* J. I. Case Threshing Mach. Co., 133 N. C. 381, 45 S. E. 781; Bacon *v.* Johnson, 110 N. C. 114, 14 S. E. 508; Winborne *v.* Johnson, 95 N. C. 46; Smith *v.* Hahn, 80 N. C. 240; Jones *v.* Swepson, 79 N. C. 510; Utley *v.* Peters, 72 N. C. 525; Powell *v.* Weith, 66 N. C. 423. *Compare* Allison *v.* Whittier, 101 N. C. 490, 8 S. E. 338, holding that setting aside a judgment by default at the same term at which it was rendered is a matter of discretion, and it is not necessary for the judge in this case to find the facts on which he bases his rulings.

In California an order upon a motion to set aside a default should not be accompanied by findings of fact, unless the motion involves the trial of a question of fact by the court. Waller *v.* Weston, 125 Cal. 201, 57 Pac. 892. And see Wolff *v.* Canadian Pac. R. Co., 123 Cal. 535, 56 Pac. 453.

In Nebraska, in the absence of a request for special findings, a general finding in a proceeding to vacate a judgment by default is sufficient to support an order of vacation. Anthony *v.* Karbach, 64 Nebr. 509, 90 N. W. 243, 97 Am. St. Rep. 662.

motion,[98] or make a finding and adjudication that there is a valid defense to the action.[99] If the order sets the case down for trial, notice of the time and place must be given to the adverse party,[1] and in any case the order must be duly entered of record.[2] The order may be reviewed on appeal,[3] or recalled or rescinded on motion for that purpose.[4] The motion should not be denied upon the particular grounds assigned thereby, and the mover left to make another motion for the same purpose, simply assigning in its support a ground not before specified, but which plainly appears in the record.[5]

4. Objections and Exceptions. Defects or irregularities in the proceedings to vacate a judgment, or in the action of the court thereon, are waived if the party fails to object in due season, or shows his acquiescence by participating in the further proceedings in the action.[6]

H. Conditions on Grant of Relief — 1. Imposition of Terms in General. Where the opening or vacating of a judgment is asked as a matter of favor or indulgence, it is within the sound discretion of the court to impose, as a condition to granting the application, such terms as may be just and reasonable.[7] But the

98. Johnson *v.* Manning, 80 N. Y. App. Div. 368, 80 N. Y. Suppl. 738; Strassner *v.* Thompson, 40 N. Y. App. Div. 28, 57 N. Y. Suppl. 546; Lerner *v.* Wagner, 36 Misc. (N. Y.) 833, 74 N. Y. Suppl. 851; Spina *v.* Maroselli, 34 Misc. (N. Y.) 204, 68 N. Y. Suppl. 862; Gold *v.* Hutchinson, 26 Misc. (N. Y.) 1, 55 N. Y. Suppl. 575; Gormully, etc., Mfg. Co. *v.* Catharine, 25 Misc. (N. Y.) 338, 55 N. Y. Suppl. 475; Thornall *v.* Turner, 23 Misc. (N. Y.) 363, 51 N. Y. Suppl. 214; Colwell *v.* Devlin, 20 Misc. (N. Y.) 355, 45 N. Y. Suppl. 850.

99. State *v.* Duncan, 37 Nebr. 631, 56 N. W. 214; Newman *v.* Desnoyers, 64 Ohio St. 447, 60 N. E. 572; Braden *v.* Hoffman, 46 Ohio St. 639, 22 N. E. 930, all holding that a want of such a finding makes the order erroneous and irregular, but not entirely void.

1. Royal Trust Co. *v.* Cortland Exch. Bank, 55 Nebr. 663, 76 N. W. 425.

2. McKnight *v.* Dunlop, 5 N. Y. 537, 55 Am. Dec. 370. And see Greenberg *v.* Laeov, 84 N. Y. Suppl. 930; Losee *v.* Dolan, 74 N. Y. Suppl. 685.

3. Scott's Appeal, 123 Pa. St. 155, 16 Atl. 430.

4. Smith *v.* Wachob, 179 Pa. St. 260, 36 Atl. 221.

5. Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118.

6. *Alabama.*— Coltart *v.* Moore, 79 Ala. 361; Hair *v.* Moody, 9 Ala. 399.

Illinois.— Donaldson *v.* Copeland, 101 Ill. App. 252.

Iowa.— Worth *v.* Wetmore, 87 Iowa 62, 54 N. W. 56.

Kansas.— Boston Loan, etc., Co. *v.* Organ, 53 Kan. 386, 36 Pac. 733.

Louisiana.— May *v.* Ball, 12 La. Ann. 416.

Minnesota.— Marty *v.* Ahl, 5 Minn. 27.

New York.— Weston *v.* Citizens' Nat. Bank, 88 N. Y. App. Div. 330, 84 N. Y. Suppl. 743.

North Carolina.— Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118.

Wisconsin.— Ætna Ins. Co. *v.* Aldrich, 38 Wis. 107.

See 30 Cent. Dig. tit. "Judgment," § 763.

7. *Illinois.*— Chicago *v.* English, 198 Ill. 211, 64 N. E. 976 [*affirming* 97 Ill. App. 594); Burhans *v.* Norwood Park, 138 Ill. 147, 27 N. E. 1088; Freibroth *v.* Mann, 70 Ill. 523; Mason *v.* McNamara, 57 Ill. 274; Hovey *v.* Middleton, 56 Ill. 468; Hersey *v.* Westover, 7 Ill. App. 629.

Kansas.— Missouri Pac. R. Co. *v.* Linson, 39 Kan. 416, 18 Pac. 498; Ames *v.* Brinsden, 25 Kan. 746; Spratly *v.* Putnam F. Ins. Co., 5 Kan. 155.

Minnesota.— Exley *v.* Berryhill, 36 Minn. 117, 30 N. W. 436.

Missouri.— Young *v.* Bircher, 31 Mo. 136, 77 Am. Dec. 638.

Nevada.— Howe *v.* Coldren, 4 Nev. 171, imposing terms as to trial.

New York.— Ridley *v.* Manhattan R. Co., 72 Hun 164, 25 N. Y. Suppl. 380; Jacobs *v.* Marshall, 6 Duer 689; Gale *v.* Vernon, 4 Sandf. 709; Ironwood *v.* Coffin, 38 Misc. 339, 77 N. Y. Suppl. 907; Sweet *v.* Metropolitan St. R. Co., 18 Misc. 355, 41 N. Y. Suppl. 549; Parmele *v.* Rosenthal, 10 Misc. 433, 31 N. Y. Suppl. 872; Hornthal *v.* Finelite, 9 Misc. 724, 29 N. Y. Suppl. 686; Chamberlain *v.* Fitch, 2 Cow. 243; Livingston *v.* Livingston, 3 Johns. 254.

Ohio.— Fowble *v.* Walker, 4 Ohio 64.

Pennsylvania.— Huston Tp. Cooperative Mut. F. Ins. Co. *v.* Beale, 110 Pa. St. 321, 1 Atl. 926; McMurray *v.* Erie, 59 Pa. St. 223; Ensly *v.* Wright, 3 Pa. St. 501; Kunes *v.* McCloskey, 10 Pa. Co. Ct. 542.

Tennessee.— Smith *v.* Foster, 3 Coldw. 139.

Vermont.— Hale *v.* Griswold, 1 D. Chipm. 107.

Wisconsin.— Whereatt *v.* Ellis, 70 Wis. 207, 35 N. W. 314, 5 Am. St. Rep. 164; Magoon *v.* Callahan, 39 Wis. 141.

See 30 Cent. Dig. tit. "Judgment," § 326.

Speedy trial.— As a condition on opening a default, it is entirely competent and proper to require that defendant shall agree to an immediate or speedy trial, without asking a postponement for any cause. Chicago *v.* English, 198 Ill. 211, 64 N. E. 976; Muller

imposition of terms is not a necessary condition on opening the judgment; and the judgment creditor cannot complain that terms were not imposed, unless he can also show that the action of the court was arbitrary and unjust.[8] Where the opening or setting aside of the judgment is demandable as of right, it is not proper to impose any terms;[9] as in the case where the judgment was void for want of jurisdiction,[10] or was taken without notice to defendant,[11] or was entered prematurely or improvidently,[12] or procured by fraud and collusion.[13]

2. LIMITING DEFENSE. It is in the discretion of the court on opening a judgment to require as a condition that defendant shall plead issuably or to the merits,[14] or it may in its discretion make it a condition that he shall forbear to set up some particular defense which is considered unconscionable or purely technical.[15] In

v. Rost, 11 N. Y. Suppl. 615; Delany *v.* Delany, 2 Thomps. & C. (N. Y.) 530.

Denying a change of venue is a proper condition on opening a judgment. Dennison *v.* Chapman, 102 Cal. 618, 36 Pac. 943.

Appointment of receiver.— Requiring defendant to consent to the appointment of a receiver of the property in controversy pending the trial on his answer is a proper condition. Exley *v.* Berryhill, 36 Minn. 117, 30 N. W. 436.

Restitution of property.— A judgment entered on the note of a married woman for the purchase-money of real estate will not be stricken off, unless she rescinds the contract and reconveys the land. Dotro *v.* Dotro, 2 Pittsb. Leg. J. (Pa.) 261.

Denying appeal.— Requiring defendant to consent that the verdict on the trial shall be final and that no appeal shall be taken affects his substantial rights and is not a proper condition. Fuchs, etc., Mfg. Co. *v.* Springer, etc., Co., 15 Misc. (N. Y.) 443, 37 N. Y. Suppl. 24.

Requiring answer.— On opening a default, a requirement that defendant shall answer by a certain time is erroneous, since it deprives him of the right to demur. Berg *v.* Pohl, 24 Misc. (N. Y.) 740, 53 N. Y. Suppl. 799. But see Perkins *v.* Davis, 3 Greene (Iowa) 235.

8. Warder *v.* Patterson, 6 Dak. 83, 50 N. W. 484; Johnson *v.* McCurry, 102 Ga. 471, 31 S. E. 88; Kelber *v.* Pittsburgh Nat. Plow Co., 146 Pa. St. 485, 23 Atl. 335; Boutin *v.* Catlin, 101 Wis. 545, 77 N. W. 910, especially where a judgment by default is opened at the same term at which it was entered.

9. Cohen *v.* Meryash, 93 N. Y. Suppl. 529, holding that an order opening a default without condition will be considered as made on the theory that the party was entitled to it as matter of right.

10. Spencer *v.* Berns, 114 Iowa 126, 86 N. W. 209; Smith *v.* Nicholson, 5 N. D. 426, 67 N. W. 296; Kelber *v.* Pittsburgh Nat. Plow Co., 146 Pa. St. 485, 23 Atl. 335; Wren *v.* Johnson, 62 S. C. 533, 40 S. E. 937.

11. Rauer's Law, etc., Co. *v.* Gilleran, 138 Cal. 352, 71 Pac. 445; Rosenberg *v.* Hassett, 86 N. Y. Suppl. 865.

12. Taylor *v.* Coghlan, 73 Ill. App. 378; James *v.* Signell, 60 N. Y. App. Div. 295, 69 N. Y. Suppl. 1106.

13. Nagle *v.* Groff, 2 Pa. L. J. 363.

14. Coffee *v.* Lawrence, 2 Den. (N. Y.) 195; Alston *v.* Parish, 1 N. C. 221; Hughes *v.* Phelps, 1 Brev. (S. C.) 81; Kemball *v.* Stewart, 14 Fed. Cas. No. 7,682, 1 McLean 332. But *compare* Horn *v.* Brennan, 46 How. Pr. (N. Y.) 479, holding that a judge at special term has no power to make a waiver of a material issue in the pleadings a condition of opening a default and inquest taken at the trial term, his power being limited to costs and proceedings in the case.

15. Dennison *v.* Chapman, 102 Cal. 618, 36 Pac. 943; Thompson *v.* Dickinson, 159 Mass. 210, 34 N. E. 262; Pape *v.* Schofield, 77 Hun (N. Y.) 236, 28 N. Y. Suppl. 340; Ridley *v.* Manhattan R. Co., 72 Hun (N. Y.) 164, 25 N. Y. Suppl. 380; Bailey *v.* Clayton, 20 Pa. St. 295.

Meritorious defense.— It is an abuse of discretion for the trial court to refuse to set aside a default unless defendant will agree to waive a meritorious defense. Mitchell *v.* Campbell, 14 Oreg. 454, 13 Pac. 190. And see Detroit *v.* Donovan, 112 Mich. 317, 70 N. W. 894.

Statute of limitations.— Most of the decisions hold that the statute of limitations is a defense which defendant may be required to waive or abandon, as a condition to opening the judgment. Sawyer *v.* Patterson, 12 Ala. 295; Anaconda Min. Co. *v.* Saile, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472; Audubon *v.* Excelsior F. Ins. Co., 10 Abb. Pr. (N. Y.) 64; Fox *v.* Baker, 2 Wend. (N. Y.) 244; Meiners *v.* Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586. *Compare* Allen *v.* Mapes, 20 Wend. (N. Y.) 633. But others regard it as a meritorious defense which should not be thus excluded. Mitchell *v.* Campbell, 14 Oreg. 454, 13 Pac. 190. And see Dutilh *v.* Miller, 2 Browne (Pa.) 311.

Usury is a defense which defendant may be forbidden to set up, as a condition upon opening a default. Audubon *v.* Excelsior F. Ins. Co., 10 Abb. Pr. (N. Y.) 64; Lord *v.* Vandenburgh, 15 How. Pr. (N. Y.) 363. But see Kinderhook Bank *v.* Gifford, 40 Barb. (N. Y.) 659; Grant *v.* McCaughin, 4 How. Pr. (N. Y.) 216.

A plea of res judicata is neither dishonest nor unconscionable, and it would not be proper to require defendant to waive or abandon such plea, on opening a default

like manner, it may, if it deems proper, restrict him to the defenses set up in his petition or moving papers.[16]

3. PAYMENT OF COSTS AND EXPENSES. It is proper for the court to impose as a condition on opening a judgment that defendant shall pay the accrued costs in the action,[17] and also in a proper case and where justice requires it the disbursements of the opposite party,[18] his reasonable personal expenses incurred in connection with the suit,[19] a proper fee to his attorneys,[20] and the costs of the motion itself.[21] But it is not the imperative duty of the court, unless made so by statute, to impose costs, and it is in its discretion to omit this requirement,[22] particularly if it is not insisted on by plaintiff,[23] or if defendant is not chargeable with any negli-

against him. Audubon *v.* Excelsior F. Ins. Co., 10 Abb. Pr. (N. Y.) 64.

Want of jurisdiction.— Where the court has jurisdiction of the class of cases to which the one at bar belongs, but for some reason failed to acquire jurisdiction in the particular case, it has power, on opening a default at defendant's request, to impose the condition that he shall waive the want of jurisdiction. Putney *v.* Collins, 3 Grant (Pa.) 72.

16. Pike *v.* Henderson, (N. J. Ch. 1901) 48 Atl. 551; Marsh *v.* Nordyke, etc., Co., (Pa. 1888) 15 Atl. 875; Gilkyson *v.* Larue, 6 Watts & S. (Pa.) 213.

17. *California.*— Heermanr *v.* Sawyer, 48 Cal. 562; Leet *v.* Grants, 36 Cal. 288; Bailey *v.* Taaffe, 29 Cal. 422; Howe *v.* Independence Consol. Gold, etc., Min. Co., 29 Cal. 72; People *v.* O'Connell, 23 Cal. 281; Roland *v.* Kreyenhagen, 18 Cal. 455.

Georgia.— Johnson *v.* Durham, 31 Ga. 335; Williams *v.* Dawson, 13 Ga. 44.

Illinois.— Yost *v.* Minneapolis Harvester Works, 41 Ill. App. 556.

Indiana.— Norris *v.* Dodge, 23 Ind. 190.

Kansas.— Stewart *v.* Scully, 46 Kan. 491, 26 Pac. 957.

Michigan.— People *v.* Wayne Cir. Judge, 39 Mich. 375.

Minnesota.— Ueland *v.* Johnson, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698.

Nebraska.— Leake *v.* Gallogly, 34 Nebr. 857, 52 N. W. 824; Haggerty *v.* Walker, 21 Nebr. 596, 33 N. W. 244; Kepley *v.* Irwin, 14 Nebr. 300, 15 N. W. 719.

New Jersey.— Denn *v.* Evaul, 1 N. J. L. 233.

New York.— Marcus *v.* Pomeranz, 98 N. Y. App. Div. 619, 90 N. Y. Suppl. 139; Goodness *v.* Metropolitan St. R. Co., 49 N. Y. App. Div. 76, 63 N. Y. Suppl. 476; Hyman *v.* London Assur. Corp., 43 N. Y. App. Div. 622, 60 N. Y. Suppl. 355; De Marco *v.* Mass, 31 Misc. 827, 64 N. Y. Suppl. 768; Stransky *v.* Weichman, 24 Misc. 767, 53 N. Y. Suppl. 549; Schwartz *v.* Schendel, 24 Misc. 701, 53 N. Y. Suppl. 773; Szerlip *v.* Baier, 22 Misc. 351, 49 N. Y. Suppl. 300; Meislahn *v.* Hanken, 18 N. Y. Suppl. 361; Leighton *v.* Wood, 17 Abb. Pr. 177; Morrell *v.* Gibson, 1 How. Pr. 208; Burnham *v.* Smith, 1 How. Pr. 46; Bennet *v.* Fuller, 4 Johns. 486; Russel *v.* Ball, 3 Johns. Cas. 91.

Ohio.— Messick *v.* Roxbury, 1 Handy 190, 12 Ohio Dec. (Reprint) 95.

Pennsylvania.— Cooper *v.* Kingston, 6 Kulp 344.

South Dakota.— Ormsby *v.* Conrad, 4 S. D. 599, 57 N. W. 778.

Wisconsin.— Dole *v.* Northrop, 19 Wis. 249. To impose costs on plaintiff, when a judgment is opened on the petition of defendant, is erroneous. Port Huron Engine, etc., Co. *v.* Clements, 113 Wis. 249, 89 N. W. 160.

United States.— Sharpless *v.* Robinson, 21 Fed. Cas. No. 12,713, 1 Cranch C. C. 147.

Canada.— Piper *v.* Kings Dyspepsia Cure Co., 33 Nova Scotia 278.

See 30 Cent. Dig. tit. "Judgment," § 328.

Leave to sue in forma pauperis does not deprive the court of the power to impose costs against such person as a condition on which a judgment by default will be opened. Elwin *v.* Routh, 1 N. Y. Civ. Proc. 131.

18. Traitteur *v.* Levingston, 59 N. Y. Super. Ct. 140, 13 N. Y. Suppl. 603; Siegel *v.* Frankel, 93 N. Y. Suppl. 533; Ketcham *v.* Elliott, 20 N. Y. Suppl. 745; Muller *v.* Rost, 11 N. Y. Suppl. 615; Meiners *v.* Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586.

19. McCarty *v.* Altonwood Stock Farm, 68 Hun (N. Y.) 551, 22 N. Y. Suppl. 1091; Bloor *v.* Smith, 112 Wis. 340, 87 N. W. 870; Behl *v.* Schuette, 95 Wis. 441, 70 N. W. 559.

20. Hopkins *v.* Meyer, 76 N. Y. App. Div. 365, 78 N. Y. Suppl. 459; McCarty *v.* Altonwood Stock Farm, 68 Hun (N. Y.) 551, 22 N. Y. Suppl. 1091; Hinz *v.* Starin, 2 Silv. Sup. (N. Y.) 505, 6 N. Y. Suppl. 165; Elwin *v.* Routh, 1 N. Y. Civ. Proc. 131; Ormsby *v.* Conrad, 4 S. D. 599, 57 N. W. 778; Freiberg *v.* Le Clair, 78 Wis. 164, 47 N. W. 178.

21. Randall *v.* Shields, 80 N. Y. App. Div. 625, 80 N. Y. Suppl. 474; Richardson *v.* Sun Printing, etc., Assoc., 20 N. Y. App. Div. 329, 46 N. Y. Suppl. 814; Morrell *v.* Gibson, 1 How. Pr. (N. Y.) 208; Anonymous, 6 Cow. (N. Y.) 390. But see Martin *v.* Hodges, 45 Hun (N. Y.) 38; Gaul *v.* Miller, 3 Paige (N. Y.) 192.

22. Robinson *v.* Merrill, 80 Cal. 415, 22 Pac. 260; Ryan *v.* Mooney, 49 Cal. 33; Johnson *v.* McCurry, 102 Ga. 471, 31 S. E. 88; Boutin *v.* Catlin, 101 Wis. 545, 77 N. W. 910.

23. Robinson *v.* Merrill, 80 Cal. 415, 22 Pac. 260; Butler *v.* Richmond, etc., R. Co., 88 Ga. 594, 15 S. E. 668.

gence or fault in suffering the judgment.[24] If costs are left to abide the event, the court may impose the condition that defendant shall furnish security for them.[25]

4. Securing Payment of Judgment. It is within the authority of the court, on opening a judgment, to impose the condition that defendant shall give a bond or undertaking to pay any judgment plaintiff may eventually recover.[26] But this is regarded as a severe condition, and will be held an abuse of discretion unless the facts of the case and the situation of the parties fully justify it.[27] It is also competent for the court in proper cases to require defendant to give an undertaking that he will not sell or encumber any of his property to hinder plaintiff in the collection of his claim,[28] or even to require him to deposit with the clerk of the court a sum sufficient to secure plaintiff's claim.[29]

5. Judgment to Stand as Security. If it appears that defendant, moving to set aside a judgment, is in failing circumstances or of doubtful solvency, it is proper to impose the condition that the judgment already entered shall stand as security for the amount ultimately recovered.[30]

6. Payment of Amount Admitted as Due. It is a proper condition upon opening a default to require defendant to pay so much of plaintiff's claim as he admits to be due, to enable him to dispute the rest.[31]

7. Performance of Conditions. Compliance with the terms imposed on the

24. Where the court had no jurisdiction over the person of defendant, he is entitled to have the judgment set aside without being required to pay costs. Waller *v.* Weston, 125 Cal. 201, 57 Pac. 892; Stanton-Thompson Co. *v.* Crane, 24 Nev. 171, 51 Pac. 116; Oram *v.* Dennison, 13 N. J. Eq. 438. And this is so where he was not actually in default when the judgment was entered (Gillespie *v.* Satterlee, 18 Misc. (N. Y.) 606, 42 N. Y. Suppl. 463), or where a default was taken in violation of an agreement not to do so, or in consequence of a misunderstanding between counsel (O'Brien *v.* Long, 49 Hun (N. Y.) 80, 1 N. Y. Suppl. 695; Traitteur *v.* Levingston, 59 N. Y. Super. Ct. 140, 13 N. Y. Suppl. 603; Brady *v.* Martin, 11 N. Y. Suppl. 424, 19 N. Y. Civ. Proc. 134; Kane *v.* Demarest, 13 How. Pr. (N. Y.) 465).

25. Williams *v.* Taylor, 11 Bush (Ky.) 375; Thayer *v.* Mead, 2 Code Rep. (N. Y.) 18; Hartwell *v.* White, 9 Paige (N. Y.) 368.

26. Caponigri *v.* Cooper, 70 N. Y. App. Div. 124, 74 N. Y. Suppl. 1116; Jellinghaus *v.* New York Ins. Co., 5 Bosw. (N. Y.) 678; Hornthal *v.* Finelite, 9 Misc. (N. Y.) 724, 29 N. Y. Suppl. 686; Halter *v.* Spokane Soap Works Co., 12 Wash. 662, 42 Pac. 126. Whereatt *v.* Ellis, 68 Wis. 61, 30 N. W. 520, 31 N. W. 762.

27. Brown *v.* Brown, 37 Minn. 128, 33 N. W. 546; Glickman *v.* Loew, 29 N. Y. App. Div. 479, 51 N. Y. Suppl. 1078; Brickel *v.* Train, 86 N. Y. Suppl. 292; Union Nat. Bank *v.* Benjamin, 61 Wis. 512, 21 N. W. 523.

28. Schwartz *v.* Schendel, 24 Misc. (N. Y.) 701, 53 N. Y. Suppl. 773.

29. Fuchs, etc., Mfg. Co. *v.* Springer, etc., Co., 15 Misc. (N. Y.) 443, 37 N. Y. Suppl. 24. Under N. Y. Laws (1896), c. 748, the municipal court of New York city cannot require the deposit in court of the amount of the judgment rendered, as a condition upon opening a default. Stivers *v.* Ritt, 29 Misc. (N. Y.) 341, 60 N. Y. Suppl. 507.

30. *Indiana.*—Pierson *v.* Holman, 5 Blackf. 482.

New Jersey.— McTague *v.* Pennsylvania, etc., R. Co., 44 N. J. L. 62.

New York.— Flagg *v.* Cooper, 54 N. Y. Super. Ct. 50, 11 N. Y. Civ. Proc. 421; Schumann *v.* Orchard, 9 Daly 245; Long Branch Pier Co. *v.* Crossley, 40 Misc. 249, 81 N. Y. Suppl. 905; Dudley *v.* Brinck, 8 Misc. 76, 28 N. Y. Suppl. 527; Hart *v.* Washburn, 17 N. Y. Suppl. 85; Pomares *v.* Duncan, 11 N. Y. Suppl. 380, 25 Abb. N. Cas. 58; Selover *v.* Forbes, 22 How. Pr. 477; Blodget *v.* Conklin, 9 How. Pr. 442; Corning *v.* Tripp, 1 How. Pr. 14; Hitchcock *v.* Barlow, 2 Wend. 629; Anonymous, 6 Cow. 390; Denton *v.* Noyes, 6 Johns. 296, 5 Am. Dec. 237; Fenton *v.* Garlick, 6 Johns. 287. *Compare* Dovale *v.* Ackermann, 5 Silv. Sup. 269, 7 N. Y. Suppl. 833. But see Yates *v.* Guthrie, 119 N. Y. 420, 23 N. E. 741, holding that the right to have a judgment set aside cannot be limited by the condition that it shall stand as security, where the answer sets up a meritorious defense. And see Dovale *v.* Ackermann, 5 Silv. Sup. 269, 7 N. Y. Suppl. 833.

Pennsylvania.— Ash *v.* Conyers, 2 Miles 94. And see Van Cott *v.* Webb-Miller, 25 Pa. Super. Ct. 51.

Wisconsin.— Ordinarily on setting aside a default the judgment should be allowed to stand as security; but this is not necessary where defendant has landed property which he cannot sell without an order of court, being insane, since no injury can result to plaintiff from vacating the judgment without terms. Bond *v.* Neuschwander, 86 Wis. 391, 57 N. W. 54.

See 30 Cent. Dig. tit. "Judgment," § 331.

31. Youngman *v.* Tonner, 82 Cal. 611, 23 Pac. 120; Pier *v.* Amory, 42 Wis. 474; Magoon *v.* Callahan, 39 Wis. 141.

opening of a judgment is a condition precedent to the relief granted; unless they are complied with the judgment will remain in full force and effect.[32] But performance of the conditions may be waived by the party for whose benefit they were prescribed,[33] and where a judgment which should never have been entered is stricken off on terms, an order reinstating it for non-compliance with the terms will be reversed.[34]

I. Operation and Effect of Vacating or Opening — 1. In General. Where a judgment is vacated or set aside, it is entirely destroyed and the rights of the parties are left as if no such judgment had ever been entered,[35] and it affords no justification for acts done before the order of vacation,[36] although generally the rights of third persons, such as purchasers in good faith who have relied on the judgment, will be saved.[37] But merely opening a judgment, or setting aside a final judgment by default, does not necessarily vacate prior interlocutory judg-

Pleading usury.— A court may refuse to set aside a judgment by default and let defendant in to plead usury, except on payment by him of the principal and legal interest. Weber *v.* Zeimet, 27 Wis. 685; Jones *v.* Walker, 22 Wis. 220; Dole *v.* Northrop, 19 Wis. 249.

32. *Alabama.*— Willis *v.* Planters', etc., Bank, 19 Ala. 141.

California.— Wolff *v.* Canadian Pac. R. Co., 89 Cal. 332, 26 Pac. 825; Hartman *v.* Olvera, 49 Cal. 101; Gregory *v.* Haynes, 21 Cal. 443.

Florida.— Waterson *v.* Seat, 10 Fla. 326.

Maryland.— Walters *v.* Munroe, 17 Md. 501.

New York.—Furman *v.* Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; Van Ingen *v.* Hilton, 91 Hun 373, 36 N. Y. Suppl. 752; Mitchell *v.* Menkle, 1 Hilt. 142; Delehanty *v.* Hoffman, 1 How. Pr. 9; Sabin *v.* Johnson, 7 Cow. 421.

South Carolina.—Brown *v.* Brown, 27 S. C. 153, 3 S. E. 69.

United States.— Howe *v.* McDermott, 12 Fed. Cas. No. 6,768, 4 Cranch C. C. 711.

But see Dana *v.* Gill, 5 J. J. Marsh. (Ky.) 242, 20 Am. Dec. 255.

See 30 Cent. Dig. tit. "Judgment," § 336.

33. Walker *v.* Cameron, 78 Iowa 315, 43 N. W. 199; Keifer *v.* Grand Trunk R. Co., 13 N. Y. Suppl. 860; Ransom *v.* New York, 20 Fed. Cas. No. 11,572, 4 Blatchf. 157 [*affirmed* in 20 How. 581, 15 L. ed. 1000].

34. Wolfe *v.* Murray, 96 Md. 727, 54 Atl. 876.

35. *California.*— Mulford *v.* Estudillo, 32 Cal. 131.

Georgia.— Kahn *v.* Southern Bldg., etc., Assoc., 115 Ga. 459, 41 S. E. 648.

Iowa.— Yetzer *v.* Martin, 58 Iowa 612, 12 N. W. 630.

Kansas.— Olson *v.* Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296.

Louisiana.— Magee *v.* Dunbar, 10 La. 546.

Michigan.— Walsh *v.* Varney, 38 Mich. 73.

North Carolina.— Williams *v.* Floyd, 27 N. C. 649.

Pennsylvania.— Montgomery *v.* Waynesburg Exch. Bank, 3 Pa. Cas. 461, 6 Atl. 133; Carson *v.* Coulter, 2 Grant 121.

South Dakota.— Mach *v.* Blanchard, 15 S. D. 432, 90 N. W. 1042, 91 Am. St. Rep. 698, 58 L. R. A. 811; Todd *v.* Todd, 7 S. D. 174, 63 N. W. 777.

United States.— Ætna L. Ins. Co. *v.* Hamilton County, 79 Fed. 575, 25 C. C. A. 94.

See 30 Cent. Dig. tit. "Judgment," § 759.

Enforcement.— When a default judgment has been set aside, no steps can legally be taken to enforce it as if still existing. McKechnie *v.* Spike, 5 N. Y. St. 150.

If a judgment is set aside its lien ceases, and there is no power to keep the lien alive to the end that it may attach to such judgment as shall ultimately be rendered in the case. Farmers' L. & T. Co. *v.* Killinger, 46 Nebr. 677, 65 N. W. 790, 41 L. R. A. 222. But in Pennsylvania, where the practice is merely to open the judgment for the purpose of letting in a defense, the order opening the judgment merely suspends it and does not destroy the lien attaching at the date of its original entry. Steinbridge's Appeal, 1 Penr. & W. (Pa.) 481.

Judgment of vacation void.— If a second judgment, which in terms sets aside a prior valid judgment, is itself void, the first remains in full force and effect. Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013.

Judgment against joint tort-feasors.— Where, in an action against joint tort-feasors, judgment was rendered against both of them, the setting aside of the judgment as against one did not impair the judgment against the other as it then stood. Weathers *v.* Kansas City Southern R. Co., 111 Mo. App. 315, 86 S. W. 908.

36. Simpson *v.* Hornbeck, 3 Lans. (N. Y.) 53; Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 735. But see Anderson *v.* Schmidt, 96 Ill. App. 125.

37. *Kansas.*— Howard *v.* Entreken, 24 Kan. 428. Where a judgment is vacated because absolutely void, an intervening purchaser of the property affected loses his rights, because a sale under a void judgment passes no title. North *v.* Moore, 8 Kan. 143.

Minnesota.— Gowen *v.* Conlow, 51 Minn. 213, 53 N. W. 365; Drew *v.* St. Paul, 44 Minn. 501, 47 N. W. 158.

Missouri.— Coleman *v.* McAnulty, 16 Mo. 173, 57 Am. Dec. 229.

ments in the case.[38] It leaves the action still pending and undetermined and justifies further proceedings therein.[39] And where the judgment is left to stand as security, it does not determine any rights of the parties in the action, but subsists only for the purpose of security.[40] If the party who obtains the opening of a judgment is afterward defeated in the action, the effect is to restore the original judgment to full force and finally conclude his rights in the premises.[41] An order denying a motion to set aside a judgment does not give jurisdiction where none before existed or confer on the judgment any validity it did not originally possess.[42]

2. CONCLUSIVENESS OF DECISION. An order granting or denying a motion to open or vacate a judgment is binding and conclusive on all parties to the application and on those in privity with them.[43]

3. AS BAR TO SUBSEQUENT PROCEEDINGS. The remedy of a party aggrieved by the denial of a motion to open or vacate a judgment is by appeal;[44] he cannot resort to independent proceedings to obtain the same relief,[45] or renew his motion on the same grounds[46] unless the court grants him leave to do so,[47] or unless the

Nebraska.— Security Abstract of Title Co. *v.* Longacre, 56 Nebr. 469, 76 N. W. 1073.

See 30 Cent. Dig. tit. "Judgment," §§ 337, 759.

Compare Benedict *v.* Auditor-Gen., 104 Mich. 269, 62 N. W. 364.

A mortgagee's interest in the mortgaged land may be defeated by the subsequent vacation of a judgment which vested title in the mortgagor, and the mortgagee is not protected by the registry acts as an innocent purchaser. White *v.* Gurney, 92 Minn. 271, 99 N. W. 889.

38. Fisk *v.* Baker, 47 Ind. 534; McLaran *v.* Wilhelm, 50 Mo. App. 658; Logan *v.* Wilkins, 72 N. C. 49. *Compare* Adams *v.* Bradshaw, Hard. (Ky.) 555.

39. Martin *v.* Baugh, 1 Ind. App. 20, 27 N. E. 110; Kelly *v.* Harrison, 69 Miss. 856, 12 So. 261; McCarty *v.* Altonwood Stock Farm, 68 Hun (N. Y.) 551, 22 N. Y. Suppl. 1091; Union Bank *v.* Mott, 16 How. Pr. (N. Y.) 525; Prondzinski *v.* Garbutt, 9 N. D. 239, 83 N. W. 23.

40. Mott *v.* Union Bank, 8 Bosw. (N. Y.) 591.

41. Buell *v.* Burlingame, 11 Colo. 164, 17 Pac. 509; Law *v.* O'Regan, 179 Mass. 107, 60 N. E. 397; Huston Tp. Co-operative Mut. F. Ins. Co. *v.* Beale, 110 Pa. St. 321, 1 Atl. 926.

42. Cloud *v.* Pierce City, 86 Mo. 357. And see Smith *v.* Los Angeles, etc., R. Co., (Cal. 1893) 34 Pac. 242.

43. Butler *v.* Soule, 124 Cal. 69, 56 Pac. 601; Benson *v.* Simmers, 53 S. W. 1035, 21 Ky. L. Rep. 1060; Johnson *v.* Hesser, 61 Nebr. 631, 85 N. W. 894.

A taxpayer in a city against which a judgment has been rendered is bound by an order denying a motion to vacate the judgment, in the same way and to the same extent as the city. Bush *v.* O'Brien, 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685.

44. Ward *v.* Derrick, 57 Ark. 500, 22 S. W. 93; Holman *v.* G. A. Stowers Furniture Co., (Tex. Civ. App. 1895) 30 S. W. 1120; McCord *v.* McCord, 24 Wash. 529, 64 Pac. 748.

45. The denial of a motion to open a judgment is a bar to a bill in equity based on the same grounds for the same relief. Ward *v.* Derrick, 57 Ark. 500, 22 S. W. 93; Trescott *v.* Lewis, 12 La. Ann. 197; Wilson *v.* Buchanan, 170 Pa. St. 14, 32 Atl. 620; McCord *v.* McCord, 24 Wash. 529, 64 Pac. 748. But see Hill *v.* Bowyer, 18 Gratt. (Va.) 364.

The writ of error coram nobis cannot be resorted to for the purpose of reversing a judgment, when a motion to the same effect has been tried and denied. Second Ward Bank *v.* Upman, 14 Wis. 596.

An order refusing to set aside a default and permit an answer cannot be set up as a bar to an action to set aside the final judgment. States *v.* Cromwell, (N. Y. 1887) 14 N. E. 448.

The denial of a motion to open a default taken against plaintiff does not prevent him from bringing a suit subsequently. Cohen *v.* Levy, 49 N. Y. App. Div. 638, 62 N. Y. Suppl. 1060.

46. Weller *v.* Hammer, 43 Minn. 195, 45 N. W. 427; Swanstrom *v.* Marvin, 38 Minn. 359, 37 N. W. 455; McCord *v.* McCord, 24 Wash. 529, 64 Pac. 748; Dwight *v.* St. John, 25 N. Y. 203; Smith *v.* Van Patten, 2 How. Pr. (N. Y.) 235; De Dewandelaer *v.* Hager, 1 How. Pr. (N. Y.) 63.

47. *California.*— Mace *v.* O'Reilley, 70 Cal. 231, 11 Pac. 721.

Minnesota.— Carlson *v.* Carlson, 49 Minn. 555, 52 N. W. 214.

Montana.— Jensen *v.* Barbour, 12 Mont. 566, 31 Pac. 592.

New York.— Bush *v.* O'Brien, 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685, upon additional facts.

Pennsylvania.— Silberman *v.* Shuklansky, 172 Pa. St. 77, 33 Atl. 272.

Washington.— Clein *v.* Wandschneider, 14 Wash. 257, 44 Pac. 272.

Wisconsin.— Webster *v.* Oconto County, 47 Wis. 225, 2 N. W. 335; Kabe *v.* The Eagle, 25 Wis. 108; Butler *v.* Mitchell, 17 Wis. 52.

See 30 Cent. Dig. tit. "Judgment," § 760.

order dismissing the motion is without prejudice to a renewal,[48] or is made in a manner too defective or imperfect to prevent a renewal.[49] A new motion should always be entertained when based on new grounds, not covered by the former motion and not then known or available to the party.[50]

4. Restitution. Where a final judgment is absolutely vacated, after it has been paid, or satisfied by execution or by possession of the property in controversy, the party benefiting by it should be ordered to make restitution;[51] but not where the judgment is merely opened to permit a defense; in that case there should be no order of restitution until after trial and final judgment.[52]

5. Defenses Available After Opening Default. If the order opening a default and permitting a plea limits the defenses which may be interposed, defendant will not be allowed to set up matters outside the specifications of the order;[53] but otherwise he may avail himself of any meritorious defense,[54] although not of merely formal and technical objections.[55]

6. Proceedings After Opening Default. Upon the entry of an order opening a judgment by default, defendant should file his plea or answer, in pursuance of

48. Wolff *v.* Canadian Pac. R. Co., 89 Cal. 332, 26 Pac. 825; Kabe *v.* The Eagle, 25 Wis. 108.

49. Webb *v.* McNeil, 3 Munf. (Va.) 184.

50. Macomber *v.* New York, 17 Abb. Pr. (N. Y.) 35; Apsley *v.* Wood, 67 How. Pr. (N. Y.) 406; De Peyster *v.* Hildreth, 2 Barb. Ch. (N. Y.) 109; Robbins *v.* Kountz, 44 Wis. 558.

Grounds which might have been presented. — A second application to vacate a judgment, founded on facts which were known to the party when making the first, should not be considered. Weller *v.* Hammer, 43 Minn. 195, 45 N. W. 427; Swanstrom *v.* Marvin, 38 Minn. 359, 37 N. W. 455. *Contra*, Overton *v.* Rogers, 99 Ind. 595.

Other grounds appearing on record.—Where the particular grounds assigned on a motion to vacate a judgment are held insufficient, but other grounds appear on the face of the record which are not specified, they should also be considered, and the motion granted, if they are accounted sufficient; it is error to deny the motion on the grounds specified, leaving the party to renew it on the other grounds. Skinner *v.* Terry, 107 N. C. 103, 12 S. E. 118.

51. *Iowa.*— Chambliss *v.* Hass, 125 Iowa 484, 101 N. W. 153, 68 L. R. A. 126.

New Hampshire.— Pittsfield *v.* Barnstead, 38 N. H. 115.

New York.— Kidd *v.* Curry, 29 Hun 215; Parker *v.* Lythgoe, 14 N. Y. Suppl. 528.

Pennsylvania.— Elliott's Estate, 5 Pa. Dist. 349; Stephens *v.* Stephens, 1 Phila. 109.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

See 30 Cent. Dig. tit. "Judgment," § 761.

52. Ketcham *v.* Elliott, 20 N. Y. Suppl. 745.

53. *Missouri.*— Hoffman *v.* Loudon, 96 Mo. App. 184, 70 S. W. 162.

New York.— West *v.* West Bradley, etc., Mfg. Co., 7 N. Y. St. 386.

North Carolina.— Williams *v.* Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800.

Pennsylvania. — Marsh *v.* Nordyke, etc., Co., (1888) 15 Atl. 875; McMurray *v.* Erie, 59 Pa. St. 223; Bradley *v.* Com., 31 Pa. St. 522.

Texas.— Erwin *v.* Archenhold Co., 34 Tex. Civ. App. 55, 77 S. W. 823.

See 30 Cent. Dig. tit. "Judgment," § 338.

54. Holmes *v.* Campbell, 13 Minn. 66.

Defense subsequently arising.— Defendant can urge defenses existing at the time of the rendition of the judgment, but not those accruing subsequently. Curtis *v.* Slosson, 6 Pa. St. 265.

Limitations.— The statute of limitations may be pleaded when the judgment is opened without restrictions. Hane *v.* Goodwyn, 1 Brev. (S. C.) 461; Garvie *v.* Greene, 9 S. D. 608, 70 N. W. 847.

Discharge in bankruptcy is a meritorious defense, but may be rejected when defendant waits more than five years after obtaining leave to answer, before presenting it. Barstow *v.* Hansen, 4 Thomps. & C. (N. Y.) 569.

Set-off.— When a judgment is opened, it does not thereby become subject to a plea of set-off generally. Beaty *v.* Bordwell, 91 Pa. St. 438.

Res judicata.— Matters which ordinarily would be concluded by a judgment by default cease to be *res judicata* when the default is set aside, and therefore cannot be pleaded in defense as settled by the default. People *v.* Miller, 195 Ill. 621, 63 N. E. 504.

55. Ekel *v.* Snevily, 3 Watts & S. (Pa.) 272, 38 Am. Dec. 758, holding that where a judgment is opened on an affidavit of merits, defendant will not be allowed upon the trial to take advantage of a technical objection to the form of action. But *compare* Farrar *v.* Baber, Ga. Dec. Pt. II, 125, holding that after opening a judgment by default defendant may avail himself of any radical defect in plaintiff's declaration.

A plea in abatement on the setting aside of a default is improper, where the matter in abatement existed at the time of the institution of the suit. Bradley *v.* Welch, 1 Munf. (Va.) 284.

leave granted in the order, or on being ruled so to do [56] the case should be placed on the calendar or set for trial,[57] and should thereupon be proceeded with as if no default had been entered.[58] Plaintiff is not bound to serve the declaration on a party who is let in to defend after a default.[59] Although the judgment may have been left to stand as security, it does not retain its vitality for any other purpose, and therefore does not determine any rights of the parties nor stand in the way of an entirely new trial of the controversy.[60] But if plaintiff for the second time recovers a judgment, it should stand as of the date of the original judgment;[61] and in any case the new judgment is conclusive upon all other matters going to the right of recovery.[62]

7. Vacation of Order. An order of court vacating or opening a judgment may be reversed, vacated, or recalled, when given without jurisdiction,[63] or obtained irregularly or fraudulently,[64] or because erroneous,[65] or on defendant's failure to comply with the conditions imposed on him.[66] The effect of vacating such an order is to restore the original judgment,[67] but when this is done, provision should be made for saving the intervening rights of third persons.[68]

X. EQUITABLE RELIEF AGAINST JUDGMENTS.

A. Jurisdiction and Authority of Courts of Equity — 1. Nature and Scope of Remedy. Courts of equity claim no supervisory jurisdiction over courts

56. Merchants' Ad-Sign Co. *v.* Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277; Hoey *v.* Aspell, 62 N. J. L. 200, 40 Atl. 776; Belknap *v.* Groover, (Tex. Civ. App. 1900) 56 S. W. 249.

Form of plea.— Where defendant, on moving to have a default set aside, files what he calls a "peremptory exception," it is not irregular for plaintiff to treat the plea as standing as a defense, and bring the case to trial in the ordinary manner as in case of an answer. Citizens' Bank *v.* Beard, 5 La. Ann. 41.

Demurrer.—On setting aside a judgment by default, defendant cannot file a special demurrer. Violett *v.* Dale, 1 Bibb (Ky.) 144. But it seems that a general demurrer may be filed where the order simply required defendant to plead at once. Chicago *v.* English, 198 Ill. 211, 64 N. E. 976.

Oral plea.— Where there is a proper showing for the opening of a default, it is error to direct a trial on the oral statement by defendant's counsel of what he would plead. Moses *v.* Kittle, 103 Ga. 806, 30 S. E. 687.

57. Chicago *v.* English, 198 Ill. 211, 64 N. E. 976; Martin *v.* Universal Trust Co., 76 N. Y. App. Div. 320, 78 N. Y. Suppl. 465.

58. Meixell *v.* Kirkpatrick, 25 Kan. 13; Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

Burden of proof.— Where a default is opened generally, the burden is on plaintiff to prove his case *de novo*. Chicago Electric Light Renting Co. *v.* Hutchinson, 25 Ill. App. 476. But *compare* O'Neill *v.* Brown, 61 Tex. 34.

Non prosequitur.— A motion by defendant's counsel for judgment *non prosequitur*, made on setting aside an order for judgment by default and before defendant has entered his appearance, is properly refused. Rodericks *v.* Payne, 1 McCord (S. C.) 408.

Where defendant again fails to appear or plead, a new judgment will be given for plaintiff. Greenberg *v.* Laeov, 84 N. Y. Suppl. 930. But see Barkin *v.* Rosenbach, 25 Misc. (N. Y.) 780, 55 N. Y. Suppl. 628, holding that fresh proofs should be taken before the entry of a second judgment by default.

59. Hitchcock *v.* Barlow, 2 Wend. (N. Y.) 629.

60. Holmes *v.* Rogers, 2 N. Y. Suppl. 501.

61. Dulle *v.* Lally, 167 Ill. 485, 47 N. E. 753; McAnulty *v.* National Life Assoc., 6 Lack. Leg. N. (Pa.) 128.

62. Kolb *v.* Raisor, 17 Ind. App. 551, 47 N. E. 177.

63. Prescott *v.* Bennett, 50 Ga. 266; State *v.* Parker, 7 S. C. 235.

64. Foster *v.* Potter, 24 Ind. 363; Keating *v.* Hayes, 78 Hun (N. Y.) 599, 29 N. Y. Suppl. 475.

65. Reed *v.* Nicholson, 93 Mo. App. 29. But see Hanson *v.* Hanson, (Cal. 1889) 20 Pac. 736.

66. Gregory *v.* Haynes, 21 Cal. 443. See Wolff *v.* Canadian Pac. R. Co., 89 Cal. 332, 26 Pac. 825.

The withdrawal of counsel of record, after they have filed an answer, does not withdraw the answer and restore the default set aside by the answer. Washington *v.* Comeau, McGloin (La.) 234.

Gross laches in failing to notify the adverse party of an order setting aside a default will justify the vacation of the order. Waterman *v.* Jones, 1 How. Pr. (N. Y.) 12.

67. Kirby *v.* Gates, 71 Iowa 100, 32 N. W. 191; Gloninger *v.* Hazard, 4 Phila. (Pa.) 354. But see Owen *v.* Going, 7 Colo. 85, 1 Pac. 229.

68. Keogh *v.* Delany, 40 N. J. L. 97.

of law or their proceedings, and a suit in equity for relief against a judgment at law cannot be made to serve the purpose of an appeal, so as to review the judgment with reference to alleged errors;[69] nor will a court of equity undertake to revise, correct, or reform a judgment at law, unless there be some special grounds for equitable interference,[70] or to vacate or annul it or set it aside.[71] Neither will equity under any ordinary circumstances order a new trial of an action already determined at law,[72] although this may be done where the right to move for a new trial at law was lost, or the application refused, in consequence

69. *Indiana.*—Willman *v.* Willman, 57 Ind. 500.

Iowa.— Hendron *v.* Kinner, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783.

New Jersey.— Tomkins *v.* Tomkins, 11 N. J. Eq. 512; Clapp *v.* Ely, 10 N. J. Eq. 178.

New York.— Hyatt *v.* Bates, 35 Barb. 308.

Tennessee.— McClanahan *v.* Stovall, 6 Lea 505; Whiteside *v.* Latham, 2 Coldw. 91. But a court of equity may in a separate suit review a judgment at law, so far as to adjust the order of liability between defendants. Winham *v.* Crutcher, 3 Tenn. Ch. 666.

See 30 Cent. Dig. tit. "Judgment," § 764. And see *infra*, X, B, 7, a, b.

No relief at law.— In Nebraska it is said that a judgment in probate proceedings procured by fraud, or some order which by reason of the lapse of the term cannot be set aside by the ordinary powers of the court, can be reviewed in equity. *In re* James, (Nebr. 1903) 97 N. W. 22.

70. *Alabama.*—Lockard *v.* Lockard, 16 Ala. 423. Equity cannot substitute one person as defendant in place of another in a judgment at law. McBroom *v.* Sommerville, 2 Stew. 515.

California.— Dutil *v.* Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

Kentucky.— Cameron *v.* Bell, 2 Dana 328.

Maryland.— Contee *v.* Cooke, 2 Harr. & J. 179; Ellicott *v.* Welch, 2 Bland 242.

Missouri.— Sumner *v.* Whitley, 1 Mo. 708.

New Jersey.— Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York.— Hyatt *v.* Bates, 35 Barb. 308.

Rhode Island.— Furbush *v.* Collingwood, 13 R. I. 720.

Tennessee.— White *v.* Cahal, 2 Swan 550; State Bank *v.* Patterson, 8 Humphr. 363, 47 Am. Dec. 618.

See 30 Cent. Dig. tit. "Judgment," § 764.

Amendment and correction in trial court see *supra*, VIII.

Amendment not affecting merits.— A court of equity, in furtherance of justice, may modify a judgment in a particular not affecting the merits of the case, but merely relating to the mode of execution. Tyler *v.* Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660.

Supplying omissions.— Equity may reform a judgment at law by the addition of something omitted through mistake, when due cause therefor is shown. Hamburg-Bremen F. Ins. Co. *v.* Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283.

71. Ellis *v.* Gosney, 1 J. J. Marsh. (Ky.) 346; Ayres *v.* Lawrence, 63 Barb. (N. Y.) 454; Weyand *v.* Weller, 39 Pa. St. 443.

Grounds already adjudicated.— Equity will not set aside a judgment at law on grounds which were presented to the trial court in a motion for a new trial and held insufficient. Telford *v.* Brinkerhoff, 163 Ill. 439, 45 N. E. 156; Hendrickson *v.* Bradley, 85 Fed. 508, 29 C. C. A. 303.

An action to set aside a judgment annulling a marriage, on the ground that such judgment was obtained by the fraudulent representations of plaintiff, is not simply an action to open a default in a former suit, where the complainant seeks not only to have such judgment set aside, but also asks that the validity of the marriage which had been annulled by such judgment be determined. Everett *v.* Everett, 180 N. Y. 452, 73 N. E. 231.

Opening and vacating in trial court see *supra*, IX.

72. Pharr *v.* Reynolds, 3 Ala. 521; McGrew *v.* Tombeckbee Bank, 5 Port. (Ala.) 547; Peace *v.* Nailing, 16 N. C. 289; Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132.

Decisions justifying grant of new trial.— In several states it is held that chancery has jurisdiction to relieve against a judgment at law by ordering a new trial in the action, especially when the judgment was obtained by fraud, accident, or mistake. West Chicago St. R. Co. *v.* Stoltzenfeldt, 100 Ill. App. 142; Prussian Nat. Ins. Co. *v.* Chichocky, 94 Ill. App. 168; Booth *v.* Stamper, 6 Ga. 172; Benton *v.* Crowder, 7 Sm. & M. (Miss.) 185; Trefz *v.* Knickerbocker L. Ins. Co., 8 Fed. 177.

Forum for new trial.— In cases where it would be proper for equity to order a new trial, the parties will be sent back to the law court for this purpose if the grounds of action or defense are purely legal; but if they are suitable for the cognizance of equity, the chancellor will generally close the controversy by a final decree. Cummins *v.* Kennedy, 4 J. J. Marsh. (Ky.) 642. And so if the only question is as to allowing credit for certain payments, and the amounts can be ascertained in the proceeding in equity, a new trial will not be granted, but the rights of the parties settled in the one proceeding. Chase *v.* Manhardt, 1 Bland (Md.) 333. It is also held permissible for the court of equity on granting a new trial at law to direct that the verdict be certified to it, and thereupon to proceed to make a final decree. Wilson *v.* Rucker, 1 Call (Va.) 500.

of fraud, accident, mistake, or some other circumstance peculiarly within the cognizance of equity,[73] when the usual and proper course is not to award a new trial in express terms, but to decree that unless the party consents to have the judgment set aside and a new trial had, he shall be perpetually enjoined from collecting his judgment.[74] It is indeed within the authority of a court of equity to enjoin the enforcement of a judgment at law, whenever sufficient equitable grounds are shown,[75] and this is the proper method of granting relief; but in so doing the equity court does not undertake to interfere with the judgment itself, but lays its prohibition upon the party otherwise entitled to enforce it.[76]

2. STATUTORY PROVISIONS. The statutes existing in many of the states which authorize courts of law to open, vacate, modify, or set aside their own judgments, for causes specified,[77] do not exclude the power of courts of equity to relieve against judgments on sufficient grounds, but furnish a cumulative or additional remedy,[78] except in cases where a motion or other proceeding under the statute

73. *Connecticut.*— Carrington *v.* Holabird, 17 Conn. 530.

Florida.— Carter *v.* Bennett, 6 Fla. 214.

Illinois.— How *v.* Mortell, 28 Ill. 478.

Indiana.— Deputy *v.* Tobias, 1 Blackf. 311, 12 Am. Dec. 243.

Iowa.— Hoskins *v.* Hattenback, 14 Iowa 314.

Kentucky.— Cummins *v.* Kennedy, 4 J. J. Marsh. 642.

Mississippi.— Land *v.* Elliot, 1 Sm. & M. 608.

Nebraska.— Horn *v.* Queen, 4 Nebr. 108. In an action in equity to obtain a new trial after judgment at law, on the ground that the party was deprived of his right to review, it must appear that there was a genuine controversy, that matters were determined adversely to the party complaining to the prejudice of his interests, and that he was deprived of his right to be heard on appeal by fraud or accident without fault on his own part. Zweibel *v.* Caldwell, (1905) 102 N. W. 84.

Virginia.— Knifong *v.* Hendricks, 2 Gratt. 212, 44 Am. Dec. 385.

Power and duty of court.—A court of equity not only has power, but it is its duty, to set aside a judgment obtained through fraud, accident, or mistake, and to award a new trial, where the defeated party has no remedy at law. Sanford *v.* White, 132 Fed. 531.

74. Pelham *v.* Moreland, 11 Ark. 442; Gainty *v.* Russell, 40 Conn. 450; Banks *v.* Shain, Litt. Sel. Cas. (Ky.) 451; Yancey *v.* Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35; Waggoner *v.* McKinney, 1 A. K. Marsh. (Ky.) 479; Lawless *v.* Reese, 3 Bibb (Ky.) 486; Cairo, etc., R. Co. *v.* Titus, 35 N. J. Eq. 384.

In Maine it is said that the supreme court, sitting as a court of equity, cannot compel a party to consent to a new trial of an action decided in the same court at law. Cowan *v.* Wheeler, 25 Me. 267, 43 Am. Dec. 283.

75. *Connecticut.*— Gainty *v.* Russell, 40 Conn. 450.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

Massachusetts.— Brooks *v.* Twitchell, 182 Mass. 443, 65 N. E. 843, 94 Am. St. Rep. 662.

New Jersey.— Power *v.* Butler, 4 N. J. Eq. 465.

Ohio.— Curtis *v.* Cisna, 1 Ohio 429.

United States.— Phillips *v.* Negley, 117 U. S. 665, 6 S. Ct. 901, 29 L. ed. 1013; Sahlgard *v.* Kennedy, 2 Fed. 295, 1 McCrary 291.

England.— Humphreys *v.* Humphreys, 3 P. Wms. 395, 24 Eng. Reprint 1116; Gainesborough *v.* Gifford, 2 P. Wms. 424, 24 Eng. Reprint 797; Barnesly *v.* Powel, 1 Ves. 119, 27 Eng. Reprint 930.

Litigation unsettled.— Where a judgment rendered by the supreme court is absolute as to the matters which it professes to decide, its execution cannot be enjoined by a party while litigating other matters in controversy which the judgment had reserved. Henderson *v.* Wilcox, 9 La. Ann. 347, 2 La. Ann. 502.

Amount in controversy.— A court of chancery will under no circumstances allow a judgment at law to be stayed for very paltry sums, unless in cases of the grossest fraud. Yantis *v.* Burdett, 3 Mo. 457.

Circumspection in exercise of equitable powers.— The power of courts of equity to enjoin the enforcement of judgments being liable to abuse, and the abuse of it being extremely mischievous, as tending to conflicts of jurisdiction, its exercise will be closely and carefully scrutinized, and confined to clear cases and well-recognized grounds of equitable interference. Kersey *v.* Rash, 3 Del. Ch. 321; Johnson *v.* Templeton, 60 Tex. 238.

76. *Kentucky.*— Farmers' Bank *v.* Collins, 13 Bush 138; Blight *v.* Tobin, 7 T. B. Mon. 612, 18 Am. Dec. 219; Yancey *v.* Downer, 5 Litt. 8, 15 Am. Dec. 35.

Maryland.— Richardson *v.* Baltimore, 8 Gill 433; Contee *v.* Cooke, 2 Harr. & J. 179.

New York.— Harding *v.* Fiske, 12 N. Y. Suppl. 139, 25 Abb. N. Cas. 348.

North Carolina.— Justice *v.* Scott, 39 N. C. 108.

Virginia.— Wynne *v.* Newman, 75 Va. 811.

77. See *supra*, IX, A, 1, b; IX, E, 12.

78. *Alabama.*— Brewer *v.* Montgomery Branch Bank, 24 Ala. 439.

Colorado.— Smith *v.* Morrill, 12 Colo. App. 233, 55 Pac. 824.

would furnish an adequate and complete remedy, resort to equity being cut off where the grounds of the application and the relief to which the party is entitled are equally within the cognizance of the law court under the statute.[79]

3. RIGHT TO RELIEF — a. In General. To entitle a party to relief in equity against a judgment at law, he must show that he did not procure or consent to the judgment attacked, or acquiesce in it, or waive the errors complained of;[80] that his situation is not due to his own neglect or carelessness;[81] that there is an attempt or threat to enforce the judgment against him;[82] that he is injured by the judgment as it stands or will be injured by such enforcement;[83] and that he comes into equity with clean hands and is entitled to the favorable consideration of the court.[84] He must also show that he has no other available or adequate

Connecticut.— Carrington *v.* Holabird, 19 Conn. 84.

Illinois.— Harper *v.* Mangel, 98 Ill. App. 526.

Indiana.— McOuat *v.* Cathcart, 84 Ind. 567.

Iowa.— Iowa Sav., etc., Assoc. *v.* Chase, 118 Iowa 51, 91 N. W. 807.

Nebraska.— MacCall *v.* Looney, (1903) 96 N. W. 238; Meyers *v.* Smith, 59 Nebr. 30, 80 N. W. 273.

Ohio.— Darst *v.* Phillips, 41 Ohio St. 514; Norwich Union F. Ins. Soc. *v.* Stang, 18 Ohio Cir. Ct. 464, 9 Ohio Cir. Dec. 576.

Texas.— McLane *v.* San Antonio Nat. Bank, (Civ. App. 1902) 68 S. W. 63.

Statutes limiting the time within which judgments may be set aside on motion or petition, for mistake, surprise, excusable neglect, etc., have no application to a suit in equity to enjoin or annul a judgment on the ground of fraud. Ex-Mission Land, etc., Co. *v.* Flash, 97 Cal. 610, 32 Pac. 600; Irvine *v.* Leyh, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10; McNeil *v.* McNeil, 78 Fed. 834.

79. *Indiana.*— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

Minnesota.— Wieland *v.* Shillock, 24 Minn. 345. See Geisberg *v.* O'Laughlin, 88 Minn. 431, 93 N. W. 310.

North Carolina.— Knott *v.* Taylor, 99 N. C. 511, 6 S. E. 788, 6 Am. St. Rep. 547.

North Dakota.— Kitzman *v.* Minnesota Thresher Mfg. Co., 10 N. D. 26, 84 N. W. 585.

Oklahoma.— Racey *v.* Racey, 12 Okla. 650, 73 Pac. 305; Hockaday *v.* Jones, 8 Okla. 156, 56 Pac. 1054.

Pennsylvania.— Riley *v.* Ellmaker, 6 Whart. 545; Gilder *v.* Merwin, 6 Whart. 522; Henrie *v.* Orangeville Loan Assoc., 1 C. Pl. 43.

Virginia.— Brown *v.* Chapman, 90 Va. 174, 17 S. E. 855.

West Virginia.— Vance *v.* Snyder, 6 W. Va. 24.

United States.— Travelers' Protective Assoc. of America *v.* Gilbert, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538.

80. *California.*— Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12.

Iowa.— Chas. C. Taft Co. *v.* Bounani, 110 Iowa 739, 81 N. W. 469.

Kentucky.— Crutchers *v.* Wolf, 1 T. B. Mon. 88.

Louisiana.— Capdevielle *v.* Erwin, 13 La. Ann. 286.

Virginia.— Chisholm *v.* Anthony, 2 Hen. & M. 13.

See 30 Cent. Dig. tit. "Judgment," § 766.

Compare Cassidy *v.* Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116; McTeer *v.* Briscoe, (Tenn. Ch. App. 1899) 61 S. W. 564.

A motion for a new trial does not waive the right to an injunction. Wright *v.* Hake, 38 Mich. 525.

81. Koehler *v.* Reed, 1 Nebr. (Unoff.) 836, 96 N. W. 380; Wells *v.* Wall, 1 Oreg. 295; Nevins *v.* McKee, 61 Tex. 412. *Compare* Roberts *v.* Jordan, 3 Munf. (Va.) 488. See *infra*, X, A, 3, b.

Excusing failure to defend at law see *infra*, X, B, 9.

82. King *v.* Bill, 28 Conn. 593; Chambers *v.* Robbins, 28 Conn. 552; Richardson *v.* Lumsden, 83 Ga. 391, 9 S. E. 1109; McGill *v.* Bone, 26 Miss. 446; White *v.* Schurer, 4 Baxt. (Tenn.) 23.

83. *California.*— Painter *v.* J. B. Painter Co., 133 Cal. 129, 65 Pac. 311.

Illinois.— Titsworth *v.* Cook, 49 Ill. App. 307.

Indiana.— Wilson Sewing Mach. Co. *v.* Curry, 126 Ind. 161, 25 N. E. 896.

Iowa.— Crenshaw *v.* Wickersham, 15 Iowa 154.

Kentucky.— Kelly *v.* Kelly, 2 Duv. 363; Taylor *v.* Reed, 5 T. B. Mon. 36; Caldwell *v.* Cook, 5 Litt. 180.

Maryland.— Wilson *v.* Miller, 30 Md. 82, 96 Am. Dec. 568.

Missouri.— Dobbs *v.* St. Joseph F. & M. Ins. Co., 72 Mo. 189.

Texas.— Williams *v.* Nolan, 58 Tex. 708; McLane *v.* San Antonio Nat. Bank, (Civ. App. 1902) 68 S. W. 63.

See 30 Cent. Dig. tit. "Judgment," § 766.

Persons entitled to relief see *infra*, X, A, 6.

84. Donaldson *v.* Roberts, 109 Ga. 832, 35 S. E. 277; McElroy *v.* Chancellor, 8 Tex. 270; Thompson *v.* Merchants', etc., Bank, 3 W. Va. 651.

But it is no objection to relief in equity against a judgment, obtained by mistake for twice as much as it ought to have been, that the complainant's land, which was taken and sold on execution to satisfy the judgment, was previously conveyed by the complainant to his own children with a

remedy;[85] that there is in the case a recognized ground such as fraud or the like for equitable interference;[86] and if a new trial is asked that such trial will probably result in a different judgment.[87]

b. Lost by Negligence. Equity will refuse to relieve a party against a judgment which results from his own negligence or carelessness in failing to plead or defend the original action, or otherwise to watch over, protect, and assert his rights in that proceeding,[88] or where he has negligently omitted, having full

fraudulent intention to evade the payment of the judgment. Williamson *v.* Johnson, 5 N. J. Eq. 537.

Favoring administrators.— The strictness with which courts of equity look on a bill to enjoin a judgment will be relaxed, where an administrator is defending who has no personal knowledge of the matter in litigation. Polarek *v.* Gordon, 102 Ill. App. 356.

85. Lincoln *v.* Bell, 65 Nebr. 351, 91 N. W. 287; Kaufmann *v.* Drexel, 56 Nebr. 229, 76 N. W. 559; Hess *v.* Lell, 4 Nebr. (Unoff.) 476, 94 N. W. 975. And see *infra*, X, A, 4, a.

86. Decker *v.* Decker, 193 Ill. 285, 61 N. E. 1108, 86 Am. St. Rep. 325, 55 L. R. A. 697; Polarek *v.* Gordon, 102 Ill. App. 356; George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1.

Fraud is not the only ground for enjoining the enforcement of a judgment; other circumstances may make it so inequitable as to justify the interference of a court of chancery. Dashner *v.* Wallace, 29 Tex. Civ. App. 151, 68 S. W. 307. But in any case it must be shown that it would be unjust and against conscience to enforce the judgment. Fowler *v.* Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172.

Discretion of court.— Whether a court of equity will interfere to relieve a party from the consequences of his own default is a matter not determined by any precise rules, but rests in the discretion of the court upon all the circumstances. Rogan *v.* Walker, 1 Wis. 631.

87. Painter *v.* J. B. Painter Co., 133 Cal. 129, 65 Pac. 311; Taggart *v.* Wood, 20 Iowa 236; Bland *v.* Pope, 4 J. J. Marsh. (Ky.) 595; Sauer *v.* Kansas, 69 Mo. 46.

Necessity of meritorious defense see *infra*, X, B, 14.

88. *Alabama.*— Foshee *v.* McCreary, 123 Ala. 493, 26 So. 309; Sanders *v.* Fisher, 11 Ala. 812; Naylor *v.* Phillips, 2 Stew. & P. 58.

Arkansas.— Hanna *v.* Morrow, 43 Ark. 107.

California.— Borland *v.* Thornton, 12 Cal. 440.

District of Columbia.— Mason *v.* Jones, 7 D. C. 247.

Florida.— Dibble *v.* Trulnck, 12 Fla. 185.

Georgia.— Berry *v.* Burghard, 111 Ga. 117, 36 S. E. 459; Platt *v.* Sheffield, 63 Ga. 627; Mullins *v.* Christopher, 36 Ga. 584; York *v.* Clopton, 32 Ga. 362; Rogers *v.* Kingsbury, 22 Ga. 60; Tarver *v.* McKay, 15 Ga. 550; Bellamy *v.* Woodson, 4 Ga. 175, 48 Am. Dec. 221; Stroup *v.* Sullivan, 2 Ga. 275, 46 Am. Dec. 389.

Illinois.— Blackburn *v.* Bell, 91 Ill. 434; Packwood *v.* Gridley, 39 Ill. 388.

Indiana.— Hollinger *v.* Reeme, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L. R. A. 46; Bryant *v.* Hoskins, 53 Ind. 218.

Iowa.— Tredway *v.* Sioux City, etc., R. Co., 39 Iowa 663; Leach *v.* Kohn, 36 Iowa 144.

Kansas.— Ohio, etc., Mortg., etc., Co. *v.* Carter, 9 Kan. App. 621, 58 Pac. 1040.

Kentucky.— Harris *v.* Kidwell, 7 J. J. Marsh. 382; Oldham *v.* Woods, 3 T. B. Mon. 47; Yancey *v.* Downer, 5 Litt. 8, 15 Am. Dec. 35.

Louisiana.—Brand *v.* Stafford, 28 La. Ann. 51; Willis *v.* Wansley, 25 La. Ann. 588; Lanfear *v.* Mestier, 18 La. Ann. 497, 89 Am. Dec. 658.

Maryland.— Belt *v.* Blackburn, 28 Md. 227.

Massachusetts.— McBride *v.* Little, 115 Mass. 308.

Michigan.— Gray *v.* Barton, 62 Mich. 186, 28 N. W. 813; McVickar *v.* Filer, 31 Mich. 304.

Mississippi.— Roots *v.* Cohen, (1893) 12 So. 593; Hiller *v.* Cotton, 48 Miss. 593; Hamilton *v.* Moore, 32 Miss. 625; Bruner *v.* Planters' Bank, 23 Miss. 406.

Missouri.— Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481; Reed *v.* Wangler, 46 Mo. 508.

Nebraska.— Zweibel *v.* Caldwell, (1905) 102 N. W. 84; Barr *v.* Post, 59 Nebr. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; Proctor *v.* Pettitt, 25 Nebr. 96, 41 N. W. 131; Pope *v.* Hooper, 6 Nebr. 178. And see Parker *v.* Parker, (1905) 102 N. W. 85.

New Jersey.— Cairo, etc., R. Co. *v.* Titus, 27 N. J. Eq. 102.

New York.— Gardiner *v.* Van Alstyne, 22 N. Y. App. Div. 579, 48 N. Y. Suppl. 114.

Ohio.— Green *v.* Dodge, 6 Ohio 80. 25 Am. Dec. 736; Dorflinger *v.* Coil, 2 Ohio 311.

Oregon.— Wells *v.* Wall, 1 Oreg. 295.

Rhode Island.— Briggs *v.* Smith, 5 R. I. 213.

South Carolina.— Dyson *v.* Leek, 2 Strobh. Eq. 239; Patton *v.* Davis, Rich. Eq. Cas. 46.

Tennessee.— Jones *v.* Williamson, 5 Coldw. 371; Seay *v.* Hughes, 5 Sneed 155; Rice *v.* Railroad Bank, 7 Humphr. 39.

Texas.— Clegg *v.* Darragh, 63 Tex. 357; Goss *v.* McClaren, 17 Tex. 107, 67 Am. Dec. 646; White *v.* Powell, (Civ. App. 1905) 84 S. W. 836; McLane *v.* San Antonio Nat. Bank, (Civ. App. 1902) 68 S. W. 63; Ivey *v.* McConnell, (Civ. App. 1892) 21 S. W. 403.

Vermont.— St. Johnsbury *v.* Bagley, 48 Vt. 75; Warner *v.* Conant, 24 Vt. 351, 58 Am. Dec. 178.

Virginia.— Hill *v.* Bowyer, 18 Gratt. 364; Donally *v.* Ginatt, 5 Leigh 359; Stanard *v.*

knowledge of the facts, to apply in due season for such remedies as were open to him by appeal or writ of error,[89] by motion for a new trial,[90] or by proceedings to vacate the judgment.[91]

4. Concurrent Remedies — a. In General. To be entitled to equitable relief against the enforcement of a judgment, the party must have exhausted his resources at law, for equity will not grant relief where he has an adequate remedy at law by any form of motion, petition, or proceeding in the original action.[92]

Rogers, 4 Hen. & M. 438; Hoomes *v.* Kuhn, 4 Call 274.

West Virginia.—Evans *v.* Taylor, 28 W.Va. 184.

Wisconsin.— Rogan *v.* Walker, 1 Wis. 631.

United States.— Railroad Co. *v.* Neal, 20 Fed. Cas. No. 11,534, 1 Woods 353.

See 30 Cent. Dig. tit. "Judgment," § 767.

Excusable neglect.— A distinction must be taken between such neglect as is attributable solely to the party himself and such as is brought about by the improper or deceitful conduct of the other side; the former is not excusable, the latter sometimes is. Rowland *v.* Jones, 2 Heisk. (Tenn.) 321.

No notice of action.— Where service is by publication, and defendant has no notice of the action until after the rendition of judgment, he is not chargeable with laches if he acts promptly after discovering the existence of the judgment against him. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

89. *Alabama.*— Jones *v.* Watkins, 1 Stew. 81.

Kentucky.— See Landrum *v.* Farmer, 7 Bush 46.

Mississippi.— Fleming *v.* Nunn, 61 Miss. 603.

Missouri.— Perkins *v.* St. Louis, etc., R. Co., 143 Mo. 513, 45 S. W. 260; Renfroe *v.* Renfroe, 54 Mo. App. 429.

Texas.— Bergstrom *v.* Kiel, 28 Tex. Civ. App. 532, 67 S. W. 781.

Virginia.— Brown *v.* Street, 6 Rand. 1.

See 30 Cent. Dig. tit. "Judgment," § 767.

90. *California.*— Boston *v.* Haynes, 33 Cal. 31; Mastick *v.* Thorp, 29 Cal. 444.

Connecticut.— Belding *v.* Silliman, 2 Root 75.

Kentucky.— Gales *v.* Shipp, 2 Bibb 241; Edwards *v.* Handley, Hard. 602, 3 Am. Dec. 745.

Minnesota.— Hulett *v.* Hamilton, 60 Minn. 21, 61 N. W. 672.

South Carolina.— Foltz *v.* Pourie, 2 Desauss. 40.

West Virginia.— Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

United States.— Hendrickson *v.* Hinkley, 11 Fed. Cas. No. 6,357, 5 McLean 211.

See 30 Cent. Dig. tit. "Judgment," § 767.

91. Heller *v.* Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016; Borland *v.* Thornton, 12 Cal. 440; Bergstrom *v.* Kiel, 28 Tex. Civ. App. 532, 67 S. W. 781; Long *v.* Eisenbeis, 18 Wash. 423, 51 Pac. 1061. See *supra*, IX.

92. *Arkansas.*— Wingfield *v.* McLure, 48 Ark. 510, 3 S. W. 439.

California.— Baker *v.* O'Riordan, 65 Cal. 368, 4 Pac. 232; Ede *v.* Hazen, 61 Cal. 360; Bibend *v.* Kreutz, 20 Cal. 109; Chipman *v.* Bowman, 14 Cal. 157.

District of Columbia.— Bohrer *v.* Fay, 3 MacArthur 145.

Georgia.— Johnson *v.* Driver, 108 Ga. 595, 34 S. E. 158; Hart *v.* Lazaron, 46 Ga. 396; Nisbett *v.* Cantrell, 32 Ga. 294; Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682.

Illinois.— Burch *v.* West, 134 Ill. 258, 25 N. E. 658.

Iowa.— Bellows *v.* Tod, 52 Iowa 359, 3 N. W. 102. Courts, in the exercise of their general equity powers, cannot grant relief by giving a new trial on account of lost evidence, when the law affords a plain and direct remedy by permitting the substitution of evidence. Loomis *v.* McKenzie, 48 Iowa 416.

Kansas.— Supreme Lodge O. of S. F. *v.* Carey, 57 Kan. 655, 47 Pac. 621.

Kentucky.— Bush *v.* Craig, 4 Bibb 168; Robinson *v.* Morgan, Litt. Sel. Cas. 56. But see Logan *v.* McMillan, 5 Dana 484.

Louisiana.— Dufossat *v.* Berens, 18 La. Ann. 339.

Missouri.— Missouri, etc., R. Co. *v.* Hoereth, 144 Mo. 136, 45 S. W. 1085.

Nebraska.— Bankers' L. Ins. Co. *v.* Robbins, 53 Nebr. 44, 73 N. W. 269; Cadwallader *v.* McClay, 37 Nebr. 359, 55 N. W. 1054, 40 Am. St. Rep. 496; Proctor *v.* Pettit, 25 Nebr. 96, 41 N. W. 131.

New York.—Clute *v.* Potter, 37 Barb. 199; Grant *v.* Quick, 5 Sandf. 612; Lane *v.* Moss, 18 N. Y. Suppl. 605.

North Carolina.— Parker *v.* Bledsoe, 87 N. C. 221.

Oregon.— Snyder *v.* Vannoy, 1 Oreg. 344.

Pennsylvania.— Albert *v.* March, 7 Pa. Co. Ct. 502.

Rhode Island.— Opie *v.* Clancy, 27 R. I. 42, 60 Atl. 635; Spooner *v.* Leland, 5 R. I. 348.

South Carolina.—The mere fact that judgment was recovered on the equity side of the court will not authorize the maintenance of a separate equitable action to set the judgment aside, where a motion would otherwise be the proper remedy. Crocker *v.* Allen, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831.

Tennessee.— Graham *v.* Roberts, 1 Head 56.

Texas.— Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991.

Virginia.— Christian *v.* Christian, 6 Munf. 534; Noland *v.* Cromwell, 4 Munf. 155.

Wisconsin.— Wilkinson *v.* Rewey, 59 Wis. 554, 18 N. W. 513; Crandall *v.* Bacon, 20 Wis. 639, 91 Am. Dec. 451.

b. Motion to Review, Vacate, or Correct. Equitable relief against a judgment will generally be refused if the party can be equally well relieved on a motion in the trial court to open, modify, or vacate the judgment,[93] or to stay or quash execution.[94] In a few cases, however, it has been held that an injunction might be granted, although the judgment might be vacated or set aside on motion and the time for such a motion had not yet expired.[95]

c. Motion For New Trial. Injunction will not be granted to restrain the enforcement of a judgment or to order a new trial, where the party still has an opportunity to move the trial court for a new trial, or had such opportunity and negligently omitted to avail himself of it.[96]

United States.— Ewing *v.* St. Louis, 5 Wall. 413, 18 L. ed. 657; Furnald *v.* Glenn, 64 Fed. 49, 12 C. C. A. 27.

See 30 Cent. Dig. tit. "Judgment," § 768.

Statutory remedy not exclusive.—A statute giving to courts of record power to relieve a party of a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, does not exclude his right to seek relief in equity against a decree obtained by fraud, where he has not invoked the statutory proceeding. Froebrich *v.* Lane, 45 Oreg. 13, 76 Pac. 351, 106 Am. St. Rep. 634.

Exception as to fraud.— In Georgia it is said that where a judgment is obtained by fraud, the party aggrieved may go into either a court of equity or a court of law for relief, and having applied to the former, he cannot be sent back to a court of law, although his remedy there might be equally adequate. Griffin *v.* Sketoe, 30 Ga. 300. And see Alspaugh *v.* Adams, 80 Ga. 345, 5 S. E. 496.

Payment before execution.— Injunction may be granted to restrain further proceedings on an execution, where the judgment debtor has paid the amount thereof to the real plaintiff in interest, although he would also have a remedy at law by motion to quash the writ. Crawford *v.* Thurmond, 3 Leigh (Va.) 85.

Refusal of leave to petition.— Since a petition to reopen a decree, rendered without an appearance by the petitioner, may be commenced without previous leave of court, a refusal to grant such leave is nugatory, and no bar to a bill seeking relief on the same grounds relied on in the petition. Hill *v.* Bowyer, 18 Gratt. (Va.) 364.

Injunction restraining the right to plead a judgment in bar may be granted, where such use of it would give an unfair advantage in an action at law, notwithstanding that the trial court might give substantially the same relief on the trial or on motion. Brennau *v.* Berlin Iron Bridge Co., 73 Conn. 412, 47 Atl. 668.

93. *Alabama.*— J. A. Roebling Sons Co. *v.* Stevens Electric Co., 93 Ala. 39, 9 So. 369.

California.— Wickersham *v.* Comerford, 96 Cal. 433, 31 Pac. 358; Bibend *v.* Kreutz, 20 Cal. 109; Imlay *v.* Carpentier, 14 Cal. 173.

Dakota.— Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701.

Illinois.— Hofmann *v.* Burris, 210 Ill. 587, 71 N. E. 584; Pyle *v.* Crebs, 112 Ill. App. 480.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

Iowa.— Johnson *v.* Nash-Wright Co., 121 Iowa 173, 96 N. W. 760; Hintrager *v.* Sumbargo, 54 Iowa 604, 7 N. W. 92. *Compare* Connell *v.* Stelson, 33 Iowa 147.

New Hampshire.— Reed *v.* Prescott, 70 N. H. 88, 46 Atl. 457.

New York.— Jacobs *v.* Morange, 47 N. Y. 57; Leet *v.* Leet, 12 N. Y. App. Div. 11, 42 N. Y. Suppl. 174; Harris *v.* True, 14 Misc. 172, 35 N. Y. Suppl. 379.

North Carolina.— Mutual Reserve Fund Life Assoc. *v.* Scott, 136 N. C. 157, 48 S. E. 581; Henderson *v.* Moore, 125 N. C. 383, 34 S. E. 446.

North Dakota.— Freeman *v.* Wood, (1905) 103 N. W. 392.

Oklahoma.— Hockaday *v.* Jones, 8 Okla. 156, 56 Pac. 1054.

Pennsylvania.— Smith *v.* Kammerer, 152 Pa. St. 98, 25 Atl. 165.

South Carolina.— Crocker *v.* Allen, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831.

Texas.— Sherman Steam-Laundry Co. *v.* Carter, (Civ. App. 1900) 60 S. W. 328; Rowlett *v.* Williamson, 18 Tex. Civ. App. 28, 44 S. W. 624.

Utah.— Baer *v.* Higson, 26 Utah 78, 72 Pac. 180.

Virginia.— Brown *v.* Chapman, 90 Va. 174, 17 S. E. 855.

United States.— Furnald *v.* Glenn, 56 Fed. 372; Cowley *v.* Northern Pac. R. Co., 46 Fed. 325.

See 30 Cent. Dig. tit. "Judgment," §§ 768, 769. And see *supra*, X, A, 2.

94. Logan *v.* Hillegass, 16 Cal. 200; Imlay *v.* Carpentier, 14 Cal. 173; Goolsby *v.* St. John, 25 Gratt. (Va.) 146; Morrison *v.* Speer, 10 Gratt. (Va.) 228; Howell *v.* Thomason, 34 W. Va. 794, 12 S. E. 1088.

95. Hernandez *v.* James, 23 La. Ann. 483 (under code of practice, art. 303); Meyers *v.* Smith, 59 Nebr. 30, 80 N. W. 273; Norwich Union F. Ins. Soc. *v.* Stang, 18 Ohio Cir. Ct. 464, 9 Ohio Cir. Dec. 576; Williams *v.* Pile, 104 Tenn. 273, 56 S. W. 833; Caruthers *v.* Hartsfield, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580; McTeer *v.* Briscoe, (Tenn. Ch. App. 1899) 61 S. W. 564. *Compare* Gunn *v.* Neal, 2 Heisk. (Tenn.) 318.

96. *Alabama.*— Pickens *v.* Yarborough, 30 Ala. 408; Hill *v.* McNeill, 8 Port. 432.

d. Appeal or Certiorari. Relief will not be granted in equity against a judgment at law where the party has an adequate remedy as to the matters complained of by appeal or error, and makes no effort to avail himself of it, or has lost such remedy by failing to take proper steps to secure or to perfect his appeal or writ of error.[97] And although the case is not appealable, or he may have lost the right to appeal without fault on his own part, equity will not interfere if there is still

Kentucky.— Harrison *v.* Harrison, 1 Litt. 137; Barrett *v.* Belshe, 4 Bibb 348.

Missouri.— Laffoon *v.* Fretwell, 24 Mo. App. 258.

Nebraska.— Woodward *v.* Pike, 43 Nebr. 777, 62 N. W. 230.

New Hampshire.— Thompson *v.* Ela, 58 N. H. 490.

New Jersey.— Hayes *v.* U. S. Phonograph Co., 65 N. J. Eq. 5, 55 Atl. 84; Wolcott *v.* Jackson, 52 N. J. Eq. 387, 28 Atl. 1045.

Texas.— Hamblin *v.* Knight, 81 Tex. 351, 16 S. W. 1082, 26 Am. St. Rep. 818; Metzger *v.* Wendler, 35 Tex. 378.

West Virginia.— Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

See 30 Cent. Dig. tit. "Judgment," § 770.

An action founded upon a gaming promise has been held an exception to the rule stated in the text, and where defendant was surprised at the trial and there was a verdict and judgment against him, he may have an injunction, although he made no effort to obtain a new trial in the law court. White *v.* Washington, 5 Gratt. (Va.) 645.

Necessity of asserting newly discovered evidence by motion for new trial see *infra*, X, B, 13, a.

97. *Arkansas.*— Ward *v.* Derrick, 57 Ark. 500, 22 S. W. 93.

California.— Hollenbeak *v.* McCoy, 127 Cal. 21, 59 Pac. 201; Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12; Daly *v.* Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61.

Florida.— Kahn *v.* Kahn, 15 Fla. 400; Dibble *v.* Truluck, 12 Fla. 185.

Georgia.— Augusta Mut. Loan Assoc. *v.* McAndrew, 63 Ga. 490.

Illinois.— Henion *v.* Pohl, 113 Ill. App. 100; Ingwersen *v.* Buchholz, 88 Ill. App. 73; Alabama Ins. Co. *v.* Kingman, 21 Ill. App. 493.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Parsons *v.* Pierson, 128 Ind. 479, 28 N. E. 97.

Indian Territory.— Stewart *v.* Snow, 5 Indian Terr. 126, 82 S. W. 696.

Iowa.— Schricker *v.* Field, 9 Iowa 366.

Kansas.— Edwards *v.* Cary, 20 Kan. 414.

Kentucky.— James *v.* Neal, 3 T. B. Mon. 369; Todd *v.* Jackson, 61 S. W. 1, 22 Ky. L. Rep. 1697.

Maryland.— Miller *v.* Duvall, 26 Md. 47; Chappell *v.* Cox, 18 Md. 513; Brumbaugh *v.* Schnebly, 2 Md. 320.

Mississippi.— Flanneken *v.* Wright, 64 Miss. 217, 1 So. 157. *Compare* Wilson *v.* Montgomery, 14 Sm. & M. 205.

Missouri.— Perkins *v.* St. Louis, etc., R. Co., 143 Mo. 513, 45 S. W. 260; Patterson *v.* Yancey, 97 Mo. App. 681, 71 S. W. 845; Renfroe *v.* Renfroe, 54 Mo. App. 429; Wyman *v.* Hardwick, 52 Mo. App. 621.

Montana.— Shilling *v.* Reagan, 19 Mont. 508, 48 Pac. 1109.

Nebraska.— Nebraska L. & T. Co. *v.* Crook, (1905) 103 N. W. 57; Mayer *v.* Nelson, 54 Nebr. 434, 74 N. W. 841; Langan *v.* Parkhurst, 2 Nebr. (Unoff.) 804, 96 N. W. 63.

New York.— Leet *v.* Leet, 12 N. Y. App. Div. 11, 42 N. Y. Suppl. 174; Ludwig *v.* Lazarus, 10 N. Y. App. Div. 62, 41 N. Y. Suppl. 773.

North Carolina.— Henderson *v.* Moore, 125 N. C. 383, 34 S. E. 446.

Oregon.— Hoover *v.* Bartlett, 42 Oreg. 145, 70 Pac. 378; Scoggin *v.* Hall, 12 Oreg. 372, 7 Pac. 355; Winkle *v.* Winkle, 8 Oreg. 193.

Pennsylvania.— Wolf *v.* Schleiffer, 2 Brewst. 563.

Rhode Island.— Rafferty *v.* Potter, 21 R. I. 517, 45 Atl. 152.

Tennessee.— Palmer *v.* Malone, 1 Heisk. 549; Evans *v.* International Trust Co., (Ch. App. 1900) 59 S. W. 373.

Texas.— Bills *v.* Scott, 49 Tex. 430; Rountree *v.* Walker, 46 Tex. 200; Long *v.* Smith, 39 Tex. 160; Windisch *v.* Gussett, 30 Tex. 744; Graham *v.* Coolidge, 30 Tex. Civ. App. 273, 70 S. W. 231; San Antonio, etc., R. Co. *v.* Glass, (Civ. App. 1897) 40 S. W. 339; Dunson *v.* Spradley, (Civ. App. 1897) 40 S. W. 327; McHugh *v.* Sparks, 15 Tex. Civ. App. 57, 38 S. W. 537; Holman *v.* G. A. Stowers Furniture Co., (Civ. App. 1895) 30 S. W. 1120; Texas-Mexican R. Co. *v.* Wright, (Civ. App. 1895) 29 S. W. 1154. *Compare* Smith *v.* Carroll, 28 Tex. Civ. App. 330, 66 S. W. 863.

Virginia.— Williamson *v.* Appleberry, 1 Hen. & M. 206.

Washington.— Eidemiller *v.* Elder, 32 Wash. 605, 73 Pac. 687; Bowman *v.* McGregor, 6 Wash. 118, 32 Pac. 1059.

See 30 Cent. Dig. tit. "Judgment," § 771.

In Louisiana the remedy by action for nullity of judgment, as provided by Code Pr. art. 607, is independent of the remedy by appeal, but is not a substitute therefor, nor a means of affording another day in court to a litigant who has neglected his opportunity. The case taken up by an appeal is the case heard and decided in the court of first instance and which is contained in the record, while the case presented in an action for the nullity of the judgment appealed from is one which has not been heard and which is *dehors* the record in the appellate court. Hence the action of nullity and the appeal may be maintained at the same time without conflict. State *v.* Sommerville, 112 La. 1091, 36 So. 864.

an adequate remedy by certiorari.[98] But some decisions make an exception in cases where fraud is alleged against the judgment,[99] where the matters alleged against it lie outside the record and therefore are not cognizable on writ of error,[1] or where the amount in controversy was so small that no appeal could be taken.[2]

e. Independent Action at Law. Equity will refuse to enjoin a judgment where the party would have an available and adequate remedy for any damage he may suffer from its enforcement, by means of a cross action or an action against some person responsible for such injury.[3]

f. Loss of Legal Remedy. Where the party had a remedy at law by appeal or motion to vacate or for a new trial, and has lost it, without fault on his own part, by causes which he could not control, preventing him from applying for it in due season, equity will not refuse to enjoin the judgment merely because the remedy at law, if it had been available, would have been appropriate and adequate.[4]

98. Chapman *v.* Kane, 97 Ill. App. 567; Reid *v.* Stock Yards Lumber, etc., Co., 88 Ill. App. 32; Booth *v.* Koehler, 51 Ill. App. 370; San Antonio, etc., R. Co. *v.* Glass, (Civ. App. 1897) 40 S. W. 339. *Compare* Nelson *v.* Rockwell, 14 Ill. 375.

99. Baldwin *v.* Davidson, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460; Lang Syne Gold Min. Co. *v.* Ross, 20 Nev. 127, 18 Pac. 358, 19 Am. St. Rep. 337.

1. Cassidy *v.* Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116.

2. Gulf, etc., R. Co. *v.* Henderson, 83 Tex. 70, 18 S. W. 432; Gulf, etc., R. Co. *v.* King, 80 Tex. 681, 16 S. W. 641.

3. Murphy *v.* Cuddihy, 111 Iowa 645, 82 N. W. 999; Robinson *v.* McDowell, 125 N. C. 337, 34 S. E. 550.

Action for breach of warranty. — Where judgment has been recovered for the price of property sold, equity will not enjoin the judgment where the purchaser may sue for breach of warranty of the property. Ponder *v.* Cox, 26 Ga. 485; Gorman *v.* Young, 18 S. W. 369, 13 Ky. L. Rep. 785; Henry *v.* Elliott, 59 N. C. 175.

Counter-claim. — Although defendant in a suit was prevented from setting up offsets or counter-claims, he is not entitled to have the judgment enjoined, but must pursue his remedy at law, by an independent action (Hudson *v.* Kline, 9 Gratt. (Va.) 379), even where the other party is a non-resident and keeps beyond the jurisdiction (Beall *v.* Brown, 7 Md. 393). But see Norton *v.* Wochler, (Tex. Civ. App. 1903) 72 S. W. 1025, holding that if the judgment creditor is insolvent, this will entitle defendant to enjoin the collection of the judgment so far as to establish a counter-claim against it.

Third person responsible. — Equity will not enjoin a judgment where the debtor is in such a position that he may make himself whole immediately upon paying the judgment, by a suit at law against a person who is responsible over to him for the loss or damage he may suffer. Drake *v.* Lyons, 9 Gratt. (Va.) 54.

Suit against officer. — Neither will equity give relief where the appropriate remedy of the party aggrieved by the execution of the judgment is by action of replevin or trespass against the officer. Tevis *v.* Ellis, 25 Cal. 515; Straub *v.* Simpson, 74 Mo. App. 230; Gutierres *v.* Pino, 1 N. M. 392; Geers *v.* Scott, (Tex. Civ. App. 1895) 33 S. W. 587. But *compare* Dowell *v.* Goodwin, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873, holding that such an action against the officer is not an adequate remedy.

Unlawful arrest. — The remedy of a party who has been unlawfully arrested, and against whom a judgment has been rendered on such arrest, is in an action at law for the arrest, and not by a bill in equity to enjoin the collection of the judgment. Baldwin *v.* Murphy, 82 Ill. 485.

4. *Arkansas.* — Kansas, etc., R. Co. *v.* Fitzhugh, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211; Harkey *v.* Tillman, 40 Ark. 551.

California. — Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; People *v.* Temple, 103 Cal. 447, 37 Pac. 414; Thompson *v.* Laughlin, 91 Cal. 313, 27 Pac. 752; Baker *v.* O'Riordan, 65 Cal. 368, 4 Pac. 232; Bibend *v.* Kreutz, 20 Cal. 109.

Iowa. — Larson *v.* Williams, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544; Newton Dist. Tp. *v.* White, 42 Iowa 608.

Nebraska. — Radzuweit *v.* Watkins, 53 Nebr. 412, 73 N. W. 679.

Ohio. — Oliver *v.* Pray, 4 Ohio 175, 19 Am. Dec. 595.

Rhode Island. — Spooner *v.* Leland, 5 R. I. 348.

South Dakota. — Whitney *v.* Hazzard, (1904) 101 N. W. 346.

Texas. — De Garcia *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 77 S. W. 275.

Utah. — Bailey *v.* Stevens, 11 Utah 175, 39 Pac. 828.

United States. — Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 62 Fed. 1; Tice *v.* School Dist. No. 18, 17 Fed. 283, 5 McCrary 360; Graham *v.* Boston, etc., R. Co., 14 Fed. 753.

Fraud of adverse party. — If complainant was deprived of his opportunity to appeal, or to move against the judgment in the law court, by the fraud or deceit of his adversary, or by a trick played upon him, this will furnish ground for equity to interfere, if he also shows that the judgment is wrong or

But the mere loss of a legal remedy is no ground for equity to interfere, unless it is also shown that there is equitable ground of objection to the judgment as it stands;[5] and relief will in no case be granted where the loss of the remedy at law was due to the party's own negligence or fault or that of his counsel.[6] And it

against conscience. Johnson *v.* Unversaw, 30 Ind. 435; Paddock *v.* Palmer, 19 Vt. 581. But the conduct of the adverse party must have been actually fraudulent and such as to leave the complainant without adequate remedy at law. Thus the mere fact that the judgment creditor did not notify the debtor of the entry of judgment, and let a year go by without suing out execution, with the intention that the latter should not petition for a writ of review, is not such fraud as will justify the interference of equity. Amherst College *v.* Allen, 165 Mass. 178, 42 N. E. 570. So also, where complainant abandoned his proceedings instituted for a new trial, on the promise of the other party to "make a fair offer of compromise." Dalhoff *v.* Keenan, 66 Iowa 679, 24 N. W. 273. So where the judgment creditor wrongfully obtained possession of a case made for appeal, and withheld it until the time for appeal had passed, it was considered no ground to enjoin the judgment, there being a remedy by petition in error in the appellate court. Muse *v.* Wafer, 29 Kan. 279.

Death or disability of judge.— Where the right of appeal is cut off by the sickness, death, or resignation of the judge before signing the bill of exceptions, equity may relieve against the judgment, if it is shown to be unjust or oppressive and the complainant has not been negligent. Little Rock, etc., R. Co. *v.* Wells, 61 Ark. 354, 33 S. W. 208, 54 Am. St. Rep. 216, 30 L. R. A. 560; Kansas, etc., R. Co. *v.* Fitzhugh, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211; Leigh *v.* Armor, 35 Ark. 123; Galbraith *v.* Barnard, 21 Oreg. 67, 26 Pac. 1110; Grafton, etc., R. Co. *v.* Davisson, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

Refusal to allow appeal.— In Picket *v.* Morris, 2 Wash. (Va.) 255, it was held that equity will relieve against a judgment at law, where the law judge wrongfully refuses to allow an appeal or sign a bill of exceptions. But the weight of authority is against this position, it being considered that the remedy by mandamus is adequate to meet such a case, and therefore equity should not interfere. Boyd *v.* Weaver, 134 Ind. 266, 33 N. E. 1027; Houston, etc., R. Co. *v.* Ellisor, 14 Tex. Civ. App. 706, 37 S. W. 972.

Mistake of judge.— If a meritorious bill of exceptions is dismissed because of a mistake of the certifying judge, without the fault of counsel, the judgment may be enjoined until the matters set up in the bill of exceptions can be heard. Kohn *v.* Lovett, 43 Ga. 179.

Destruction of records.— Equity may act where the attempt to appeal was frustrated by the destruction of the records by fire, provided the complainant has been in no fault. Bailey *v.* Stevens, 11 Utah 175, 39 Pac. 828.

Unexpected adjournment.— Where the complainant was deprived of the opportunity to move for a new trial, or to press his motion to a hearing, because of the sudden and unexpected adjournment of the term, equity may relieve him, if the case be otherwise proper. Johnson *v.* Branch, 48 Ark. 535, 3 S. W. 819; Tarver *v.* McKay, 15 Ga. 550; Knifong *v.* Hendricks, 2 Gratt. (Va.) 212, 44 Am. Dec. 385.

Inability to furnish bond.— It has been thought a proper ground for equity to interfere that complainant could not secure an appeal from the judgment on account of his inability to get sureties on his appeal-bond. Roberts *v.* Cantrell, 3 Hayw. (Tenn.) 219. But see *contra*, Dupre *v.* Anderson, 45 La. Ann. 1154, 13 So. 743.

Amount too small.— If no appeal could be taken because the amount in controversy was too small to allow it, equity may enjoin the judgment if sufficient ground is shown Gulf, etc., R. Co. *v.* Henderson, 83 Tex. 70, 18 S. W. 432; Gulf, etc., R. Co. *v.* King, 80 Tex. 681, 16 S. W. 641; Galveston, etc., R. Co. *v.* Ware, 74 Tex. 47, 11 S. W. 918.

Accident in general.— In Illinois the doctrine is that a court of equity will not disturb the judgment of a court of law because mere accident prevented a party from perfecting an appeal. Ballance *v.* Loomiss, 22 Ill. 82; Chicago Waifs Mission, etc., School *v.* Excelsior Electric Co., 44 Ill. App. 425.

New grounds.— Equity may properly interfere where the grounds on which it is asked to act were not discovered, or did not arise, until after the time when they could have been made available in the law court on a motion for a new trial or to vacate the judgment. Larson *v.* Williams, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544; Hoskins *v.* Hattenback, 14 Iowa 314; Colyer *v.* Langford, 1 A. K. Marsh. (Ky.) 237.

5. Church *v.* Gallie, (Ark. 1905) 88 S. W. 307; Johnson *v.* Branch, 48 Ark. 535, 3 S. W. 819; Gulf, etc., R. Co. *v.* Henderson, 83 Tex. 70, 18 S. W. 432; Burton *v.* Wiley, 26 Vt. 430.

Change in construction of statute.— Where a judgment was rendered according to a particular construction of a statute, and after a writ of error thereon was barred by the statute of limitations, the supreme court gave a different construction to the statute in another case, it was held that equity would not interfere to open the judgment. Jones *v.* Watkins, 1 Stew. (Ala.) 81.

6. *Arkansas.*— Waldo *v.* Thweatt, 64 Ark. 126, 40 S. W. 782.

California.— Hollenbeak *v.* McCoy, 127 Cal. 21, 59 Pac. 201; Quinn *v.* Wetherbee, 41 Cal. 247; Phelps *v.* Peabody, 7 Cal. 50.

has also been held that relief will not be granted where the loss of the remedy at law was due to a mistaken mode of proceeding.[7]

5. WHAT COURTS EXERCISE THE POWER. In some states it is the rule that any court of equitable powers, having jurisdiction of the parties and the subject-matter, may enjoin the enforcement of a judgment, although it was rendered by a court of concurrent or equal jurisdiction.[8] But in others, either by statute or settled practice, a suit to enjoin a judgment must be brought in the same court which rendered it, and will not be entertained by another court of coördinate jurisdiction.[9] Where the former rule prevails, a court of chancery jurisdiction

Georgia.— Donaldson *v.* Roberts, 109 Ga. 832, 35 S. E. 277; Brown *v.* Brown, 99 Ga. 312, 25 S. E. 649.

Maryland.— Ruppertsberger *v.* Clark, 53 Md. 402.

Missouri.— Wyman *v.* Hardwick, 52 Mo. App. 621.

Montana.— Vantilburg *v.* Black, 3 Mont. 459.

Nebraska.— Woodward *v.* Pike, 43 Nebr. 777, 62 N. W. 230.

New York.— Dodge *v.* Strong, 2 Johns. Ch. 228.

Ohio.— White *v.* U. S. Bank, 6 Ohio 528.

Tennessee.— Ballard *v.* Nashville, etc., R. Co., 94 Tenn. 205, 28 S. W. 1088.

Texas.— Alexander *v.* San Antonio Lumber Co., (1890) 13 S. W. 1025; Rowlett *v.* Williamson, 18 Tex. Civ. App. 28, 44 S. W. 624.

Washington.— Long *v.* Eisenbeis, 18 Wash. 423, 51 Pac. 1061.

7. Yancey *v.* Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35; Long *v.* Smith, 39 Tex. 160.

8. *Indiana.*—Ashcraft *v.* Knoblock, 146 Ind. 169, 45 N. E. 69; Leary *v.* Dyson, 98 Ind. 317. *Compare* Plunkett *v.* Black, 117 Ind. 14, 19 N. E. 537.

Kansas.— Holderman *v.* Tedford, 7 Kan. App. 657, 53 Pac. 887.

Louisiana.— Hibernia Nat. Bank *v.* Standard Guano Chemical, etc., Co., 51 La. Ann. 1321, 26 So. 274; Sheriff *v.* Judge Twenty-First Judicial Dist. Ct., 46 La. Ann. 29, 14 So. 427; Trichel *v.* Bordelon, 9 Rob. 191; Clark *v.* Christine, 12 La. 394; Fennessy *v.* Gonsoulin, 11 La. 419, 30 Am. Dec. 720.

Mississippi.— Griffith *v.* Vertner, 5 How. 736.

Nebraska.— Cobbey *v.* Wright, 29 Nebr. 274, 45 N. W. 460.

New York.— Moser *v.* Polhamus, 4 Abb. Pr. N. S. 442. *Compare* Corbin *v.* Casina Land Co., 26 N. Y. App. Div. 408, 49 N. Y. Suppl. 929. But see Grazebrook *v.* McCreedie, 9 Wend. 437, holding that where a judgment was confessed in violation of an injunction of the chancery court, the supreme court will not set it aside on that ground, but will leave it to the chancery court to vindicate its own authority.

Ohio.— Manahan *v.* Hart, 24 Ohio Cir. Ct. 527; Howenstine *v.* Sweet, 13 Ohio Cir. Ct. 239, 7 Obio Cir. Dec. 498.

Pennsylvania.— Koch *v.* Biesecker, 7 Pa. Super. Ct. 37.

Virginia.— Randolph *v.* Tucker, 10 Leigh 655; Ambler *v.* Wyld, 2 Wash. 36.

United States.— Sayers *v.* Burkhardt, 85 Fed. 246, 29 C. C. A. 137.

See 30 Cent. Dig. tit. "Judgment," § 860.

Pendency of writ of error is not ground for the refusal of an injunction staying proceedings at law upon the judgment, where the suit in chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them, but sets up an equity independent of the judgment, which admits the validity thereof, but suggests reasons why the party who has obtained it ought not to avail himself of it. Parker *v.* Judges Maryland Cir. Ct., 12 Wheat. (U. S.) 561, 6 L. ed. 729. It does not affect the jurisdiction of a court of equity over a bill to enjoin a judgment that the judgment is pending on error, and under a supersedeas, in the supreme court. Platt *v.* Threadgill, 80 Fed. 192.

Federal jurisdiction.— A bill to enjoin a judgment will lie in the federal circuit court where the judgment was rendered, although the original plaintiff resides in and is a citizen of another state. Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349.

The amount in controversy must be within the limits of the court's jurisdiction. Breuning *v.* Weigel, 22 La. Ann. 593; Walker *v.* McMaster, 48 Tex. 213. A court has power, however, to enjoin the collection of a judgment which it had power to render, although, by reason of the accrued interest and costs, the amount exceeds the limit of original jurisdiction. Davis *v.* Davis, 10 Bush (Ky.) 274.

9. *California.*— Uhlfelder *v.* Levy, 9 Cal. 607; Gorham *v.* Toomey, 9 Cal. 77.

Connecticut.— Smith *v.* Hall, 71 Conn. 427, 42 Atl. 86.

Georgia.— Reynolds *v.* Dunlap, 94 Ga. 727, 19 S. E. 906.

Iowa.— Oberholtzer *v.* Hazen, 101 Iowa 340, 70 N. W. 207; Phelan *v.* Johnson, 80 Iowa 727, 46 N. W. 68; Grattan *v.* Matteson, 51 Iowa 622, 2 N. W. 432.

Kentucky.— Mallory *v.* Dauber, 83 Ky. 239; Mason *v.* Chambers, 4 J. J. Marsh. 401; Nairin *v.* Kentucky Heating Co., 86 S. W. 676, 27 Ky. L. Rep. 551; Waring *v.* Bertram, 75 S. W. 222, 25 Ky. L. Rep. 307; Shackleford *v.* Patterson, 62 S. W. 1040, 23 Ky. L. Rep. 316; Jacobson *v.* Wernert, 41 S. W. 281, 19 Ky. L. Rep. 662.

Montana.— Beck *v.* Fransham, 21 Mont. 117, 53 Pac. 96.

Texas.— Van Ratcliff *v.* Call, 72 Tex. 491, 10 S. W. 578; Cook *v.* Baldridge, 39 Tex.

may enjoin a judgment obtained in another chancery court,[10] or in the supreme court of the state,[11] or even in a court in another state,[12] and may take jurisdiction of a bill to impeach its own former decree.[13] The federal courts are prohibited by statute from granting injunctions to stay proceedings in the state courts, and this prevents them from enjoining the enforcement of judgments recovered in state courts.[14] But a federal court, having otherwise jurisdiction of the action, may make a decree which, as between the parties, shall set aside and vacate a judgment of a state court, and the proceedings taken and rights acquired thereunder, on the ground that it was procured by fraud or was void for want of jurisdiction.[15] Conversely state courts have no power or jurisdiction to enjoin the enforcement of a judgment rendered by a court of the United States.[16]

6. Persons Entitled to Relief — a. In General. As a rule relief in equity against a judgment at law is given only to the parties to the action,[17] or those in privity of interest or estate with them.[18] A stranger to the proceedings can have

250; Ellis *v.* Harrison, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984.

Utah.— Mosby *v.* Gisborn, 17 Utah 257, 54 Pac. 121.

Wisconsin.— Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891.

United States.— Oglesby *v.* Attrill, 12 Fed. 227; Sahlgard *v.* Kennedy, 2 Fed. 295, 1 McCrary 291; Osborn *v.* Michigan Air-Line R. Co., 18 Fed. Cas. No. 10,594, 2 Flipp. 503.

See 30 Cent. Dig. tit. "Judgment," § 860.

10. Douglass *v.* Joyner, 1 Baxt. (Tenn.) 32.

11. Massie *v.* Mann, 17 Iowa 131; Hibernia Nat. Bank *v.* Standard Guano Chemical, etc., Co., 51 La. Ann. 1321, 26 So. 274; De la Croix *v.* Gaines, 13 La. Ann. 177; Brown *v.* Walker, 84 Fed. 532. *Contra,* Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968.

12. Davis *v.* Cornue, 151 N. Y. 172, 45 N. E. 449; Remer *v.* Mackay, 35 Fed. 86. But see Bicknell *v.* Field, 8 Paige (N. Y.) 440, holding that jurisdiction of the parties to a judgment rendered in another state will not confer jurisdiction to enjoin proceedings, to be taken in such other state, for the enforcement of the judgment.

13. Lacassagne *v.* Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. ed. 368.

14. U. S. Rev. St. (1878) § 720 [U. S. Comp. St. (1901) p. 581]; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 82 Fed. 943; Louisville Trust Co. *v.* Cincinnati, 73 Fed. 716; Foote *v.* Glenn, 52 Fed. 529.

15. Howard *v.* De Cordova, 177 U. S. 609, 20 S. Ct. 817, 44 L. ed. 908; Northern Pac. R. Co. *v.* Kurtzman, 82 Fed. 241; McNeil *v.* McNeil, 78 Fed. 834; Davenport *v.* Moore, 74 Fed. 945; Young *v.* Sigler, 48 Fed. 182. See also Courts, 11 Cyc. 1014.

16. *Georgia.*— Strozier *v.* Howes, 30 Ga. 578.

Nebraska.— Prugh *v.* Portsmouth Sav. Bank, 48 Nebr. 414, 67 N. W. 309.

New York.— Coster *v.* Griswold, 4 Edw. 364.

South Carolina.— English *v.* Miller, 2 Rich. Eq. 320.

United States.— Central Nat. Bank *v.* Stevens, 169 U. S. 432, 18 S. Ct. 403, 42 L. ed. 807; U. S. *v.* Keokuk, 6 Wall. 514, 18 L. ed. 933; U. S. *v.* Johnson County, 6 Wall. 166, 18 L. ed. 768.

See also Courts, 11 Cyc. 1014.

17. Marriner *v.* Smith, 27 Cal. 649; Mulford *v.* Cohn, 18 Cal. 42; Terhune *v.* Colton, 10 N. J. Eq. 21; Mayes *v.* Woodall, 35 Tex. 687.

Real party in interest.— Any person who took a substantial interest under a judgment rendered by consent, which does not speak the true intention of the parties, may bring a bill to review and reform it, although he may not have been an actual, technical party thereto. Lester *v.* Mathews, 58 Ga. 403.

A release by defendant in ejectment of the right to the land in controversy to a third person will not prevent his maintaining a bill to enjoin the judgment, where his equity is a mere possibility or constructive equitable trust, created by the decree of a court of equity. Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349.

18. Bullock *v.* Winter, 10 Ga. 214.

An assignee of the right of action may sue. Clevenger *v.* Mayfield, (Tex. Civ. App. 1905) 86 S. W. 1062.

An executor cannot enjoin the sale on execution of real property, under a judgment obtained against the testator in his lifetime, to which a claim has been filed by a purchaser from the testator. Redd *v.* Blandford, 54 Ga. 123.

A garnishee may maintain a petition to vacate a judgment rendered against him in that character, on the ground that the principal debtor was never notified of the garnishment proceedings. Searle *v.* Fairbanks, 80 Iowa 307, 45 N. W. 571.

Beneficiaries of a trust estate may maintain a bill to enjoin a fraudulent judgment against their trustee, to which they were not parties. Snelling *v.* American Freehold Land Mortg. Co., 107 Ga. 852, 33 S. E. 634, 73 Am. St. Rep. 160.

Guarantors and sureties.— A guarantor or surety may sue to enjoin the collection of a judgment against his principal. Michener *v.* Springfield Engine, etc., Co., 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59; Bradshaw *v.* Miners' Bank, 81 Fed. 902, 26 C. C. A. 673. *Compare* Walker *v.* Gilbert, 7 Sm. & M. (Miss.) 456.

no claim to enjoin the enforcement of the judgment, not being bound by it,[19] unless he can show that it was taken for the purpose of defrauding him, or that he is directly injured or jeopardized by the judgment as it stands,[20] as where he claims to be the true owner of the property in controversy or sets up a paramount title to it.[21]

b. Purchasers, Encumbrancers, and Creditors. A purchaser of property subject to the lien of a judgment to which his grantor makes no objection cannot maintain a suit to enjoin its enforcement, unless he can show that it was fraudulent or expressly designed to injure him;[22] and a similar rule obtains in the case of encumbrancers by mortgage or otherwise,[23] and other creditors of the common debtor.[24]

A surety upon a replevin bond may, where there has been a trial and judgment in replevin, after the death of plaintiff and without reviver or suggestion of death upon the record, have the error corrected by direct proceedings to enjoin the judgment. McBrayer *v.* Jordan, (Nebr. 1905) 103 N. W. 50.

A stock-holder of a corporation, who is subject to a limited liability for its debts, may maintain a suit for an injunction to restrain the enforcement of a judgment against the corporation. Musson *v.* Richardson, 11 Rob. (La.) 43; Sumner *v.* Marcy, 23 Fed. Cas. No. 13,609, 3 Woodb. & M. 105.

A receiver of a national bank, although not a party to a suit against the bank in a state court, may appear there and contest the validity of the judgment. Denton *v.* Baker, 93 Fed. 46, 35 C. C. A. 187.

19. *Alabama.*— Barnard *v.* Davis, 54 Ala. 565.

Colorado.— Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464.

Louisiana.— Miller *v.* Miller, 4 La. Ann. 354.

Nebraska.— Douglas County *v.* Connell, 15 Nebr. 617, 19 N. W. 591.

Texas.— Mayes *v.* Woodall, 35 Tex. 687.

United States.— Stone *v.* Towne, 91 U. S. 341, 23 L. ed. 412; Union Waxed, etc., Paper Co. *v.* Sevigne Bread Wrapper Co., 138 Fed. 415.

See 30 Cent. Dig. tit. "Judgment," § 856.

20. *Colorado.*— Crippen *v.* X. Y. Irr. Ditch Co., 32 Colo. 447, 76 Pac. 794; Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505.

Kansas.—Busenbark *v.* Busenbark, 33 Kan. 572, 7 Pac. 245.

Maryland.— Taylor *v.* Mallory, 76 Md. 1, 23 Atl. 1098.

Mississippi.— Humphries *v.* Bartee, 10 Sm. & M. 282.

Nebraska.— Stull *v.* Masilonka, (1905) 104 N. W. 188.

Virginia.— Jordan *v.* Williams, 3 Rand. 501.

United States.— Bradshaw *v.* Miners' Bank, 81 Fed. 902, 26 C. C. A. 673.

See 30 Cent. Dig. tit. "Judgment," § 856.

Under a statute allowing the party aggrieved to prosecute an action to set aside a judgment obtained by the fraud of the prevailing party, one not a party cannot maintain such an action, although he was directly interested in the result. Stewart *v.* Duncan, 40 Minn. 410, 42 N. W. 89.

Failure to intervene has been held to prevent the maintenance of an equitable suit to restrain the enforcement of a judgment, by one who had full knowledge of the pendency of an action in which he had a pecuniary interest. Fitzgerald *v.* Bowen, 114 Ga. 691, 40 S. E. 735.

Adequate remedy at law.—Where a stranger to an execution, whose goods have been levied on under it, has a good remedy at law, he cannot enjoin the judgment on the ground that it was erroneous. Markley *v.* Rand, 12 Cal. 275.

21. Sims *v.* Goodwyn, 31 Ga. 267; Goodnough *v.* Sheppard, 28 Ill. 81; Alexander *v.* Scotland Mortg. Co., 47 Fed. 131. *Compare* Scott *v.* Whitlow, 20 Ill. 310; Harper *v.* Hill, 35 Miss. 63; Whitman *v.* Willis, 51 Tex. 429.

22. *California.*— Whitney *v.* Kelley, 94 Cal. 146, 29 Pac. 624, 28 Am. St. Rep. 106, 15 L. R. A. 813; Marriner *v.* Smith, 27 Cal. 649.

Louisiana.— Landry *v.* Connely, 4 Rob. 127; Flucker *v.* Lacy, 2 La. 265.

Maryland.— Barnes *v.* Dodge, 7 Gill 109.

Missouri.— Charter Oak L. Ins. Co. *v.* Cummings, 90 Mo. 267, 2 S. W. 397; Hohenthal *v.* Watson, 34 Mo. 183.

New York.— Harris *v.* Graham, 90 Hun 198, 35 N. Y. Suppl. 732; Monroe *v.* Delavan, 26 Barb. 16; Barnes *v.* Mott, 16 Abb. Pr. N. S. 57; Shufelt *v.* Shufelt, 9 Paige 137, 37 Am. Dec. 381; French *v.* Shotwell, 6 Johns. Ch. 235.

Virginia.— Neale *v.* Utz, 75 Va. 480.

West Virginia.— McFarland *v.* Dilly, 5 W. Va. 135.

See 30 Cent. Dig. tit. "Judgment," § 857.

But see Hurd *v.* Eaton, 28 Ill. 122, holding that where a judgment creditor may collect from property that his debtor has not conveyed, but refuses or fails to do so, he may be enjoined from proceeding against the debtor's grantee.

Purchasers pendente lite are bound by the judgment, and cannot have equitable relief against it on any ground which might have been interposed as a defense to the action. Tredway *v.* McDonald, 51 Iowa 663, 2 N. W. 567; Blanchard *v.* Ware, 37 Iowa 305; Patterson *v.* Brown, 32 N. Y. 81.

23. Hughes *v.* Winship Mach. Co., 78 Ga. 793, 4 S. E. 6; Terhune *v.* Colton, 10 N. J. Eq. 21; Young *v.* Schenck, 22 Wis. 556.

24. *Georgia.*— Phillips *v.* Walker, 48 Ga. 55; Robinson *v.* Thompson, 30 Ga. 933; Hammock *v.* McBride, 6 Ga. 178.

7. Persons Against Whom Relief May Be Granted. An action to enjoin a void, fraudulent, or unconscionable judgment may generally be maintained against any person who attempts to enforce it,[25] including the heirs at law of the judgment creditor,[26] although a reservation must generally be made in favor of purchasers of the property affected, who take the same in good faith and without notice of the circumstances affecting the validity of the judgment.[27]

8. What Judgments May Be Enjoined — a. In General. A court of equity may, upon sufficient cause being shown, grant relief against a judgment, decree, or order of any judicial tribunal,[28] and the form or nature of the judgment is not generally material in this respect,[29] although it is not usual or proper to enjoin a

Indiana.— Adkins *v.* Nicholson, 39 Ind. 535; Dougherty *v.* Richardson, 20 Ind. 412.

Louisiana.— Vienne *v.* Boissier, 10 Mart. 359.

Michigan.— Edson *v.* Cumings, 52 Mich. 52, 17 N. W. 693.

New Jersey.— Robinson *v.* Davis, 11 N. J. Eq. 302, 69 Am. Dec. 591.

New York.— Shaw *v.* Dwight, 27 N. Y. 244, 84 Am. Dec. 275; McParland *v.* Bain, 26 Hun 38.

Texas.— Rotzein *v.* Cox, 22 Tex. 62.

See 30 Cent. Dig. tit. "Judgment," § 857.

25. Chambers *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 270.

United States as party.— Since the sovereign is beyond the reach of any prohibitory process, an injunction cannot be issued to restrain the United States from collecting a judgment in its favor. Hill *v.* U. S., 9 How. 386, 13 L. ed. 185.

26. Evans *v.* Spurgin, 11 Gratt. (Va.) 615.

27. Hayden *v.* Hayden, 46 Cal. 332; Calef *v.* Parsons, 48 Ill. App. 253.

28. Jewett *v.* Dringer, 31 N. J. Eq. 586.

Sentences of ecclesiastical courts.— Vaubrough *v.* Cock, 1 Ch. Cas. 200, 22 Eng. Reprint 761; Bissell *v.* Axtell, 2 Vern. Ch. 47, 23 Eng. Reprint 641.

Probate decrees and orders.— Boulton *v.* Scott, 3 N. J. Eq. 231. *Compare* State *v.* McGlynn, 20 Cal. 233, 81 Am. Dec. 118.

Awards.— Milnor *v.* Georgia R., etc., Co., 4 Ga. 385; Lonsdale *v.* Littledale, 2 Ves. Jr. 451, 30 Eng. Reprint 720. But a bill will not lie to vacate an award on the ground of mistake on the part of the arbitrators or failure to determine all the matters submitted; for these matters may be pleaded in defense to an action at law upon the award. Mickles *v.* Thayer, 14 Allen (Mass.) 114. See Arbitration and Award, 3 Cyc. 753 *et seq.*

Verdicts.— Williams *v.* Lee, 3 Atk. 223, 26 Eng. Reprint 930; Bateman *v.* Willoe, 1 Sch. & Lef. 201.

Decrees in chancery. — *Idaho.*— Oro Fino, etc., Min. Co. *v.* Cullen, 1 Ida. 113.

North Carolina.— Batts *v.* Winstead, 77 N. C. 238. *Compare* Greenlee *v.* McDowell, 39 N. C. 481.

Pennsylvania.— Cochran *v.* Eldridge, 49 Pa. St. 365.

Tennessee.— Montgomery *v.* Whitworth, 1 Tenn. Ch. 174. *Compare* Allen *v.* Barksdale, 1 Head 238, as to when a bill of review is the only proper means of seeking relief.

England.— Bradish *v.* Gee, Ambl. 229, 1 Ld. Ken. 73, 27 Eng. Reprint 152; Galley *v.* Baker, Cas. t. Talb. 199, 25 Eng. Reprint 736; Loyd *v.* Mansell, 2 P. Wms. 73, 24 Eng. Reprint 645.

See Equity, 16 Cyc. 501 *et seq.*

Judgments of justices of the peace see Justices of the Peace.

Judgment against insane person see Insane Persons, 22 Cyc. 1243.

Judgments for or against executor or administrator see Executors and Administrators, 18 Cyc. 1052.

Setting aside execution sale by bill in equity see Executions, 17 Cyc. 1282.

Order of adoption see Adoption of Children, 1 Cyc. 928.

Foreclosure of mortgage see Mortgages.

Special tribunals.— It is said that injunction does not lie to restrain the execution of a judgment of a special tribunal created by statute, certiorari being the proper remedy. Hornesby *v.* Burdell, 9 S. C. 303. But see Walt *v.* Thomasson, 10 Heisk. (Tenn.) 151, where a default judgment of a military commission, organized by a district commander, without the consent of the war department, to try civil cases between citizens, was perpetually enjoined.

29. Nunn *v.* Matlock, 17 Ark. 512.

Default.— A judgment by default may be enjoined, but not where defendant after due service neglected to make a defense. McHale *v.* Metz, (Nebr. 1903) 96 N. W. 1004.

Scire facias.— A judgment upon scire facias is of the same force as any other, and may be enjoined in a proper case. Thompson *v.* Hammond, 1 Edw. (N. Y.) 497.

Statutory forfeiture.— Equity may relieve against a statutory judgment arising from the forfeiture of a forthcoming bond. Nenn *v.* Matlock, 17 Ark. 512.

Settlement of guardian's accounts.— A bill of review lies to reverse the decision of the county court in passing on the final account and settlement of the guardian of a deceased ward. Young *v.* Gray, 60 Tex. 541.

Collusive action.— In the case of a judgment on a note which was given solely for the purpose of testing, by a collusive action, whether the maker had any title in property held in trust for his wife, the chancery court refused to interfere, because the whole proceeding was "an abuse of legal process and a fraud on the law." Wells *v.* Smith, 13 Gray (Mass.) 207, 74 Am. Dec. 631.

merely interlocutory order in a cause still pending in another court,[30] nor a final judgment which has been affirmed on appeal.[31] Although some of the decisions deny the right of equitable relief where the judgment is merely erroneous or void, on the ground that in the former case it may be revised on appeal, and in the latter may be disregarded or set aside on motion,[32] yet others hold that injunction is a proper remedy against a void judgment,[33] and this is clearly the case where the judgment has been vacated or set aside by the court which rendered it,[34] or enjoined in the state where it was procured,[35] or paid or otherwise satisfied,[36] or where the record has been destroyed and there has been no renewal by substitution.[37]

b. Judgments by Confession or Consent. A judgment entered upon the confession of defendant may be enjoined in equity for fraud or other adequate cause;[38] but not for mere defects or irregularities in the instrument of confession,[39] or on account of matters which should have been presented to the law court in opposition to the judgment,[40] or where defendant has been negligent or improvident.[41] And although equity is little disposed to overhaul judgments settled by consent or compromise, yet such a judgment may be enjoined if fraud or mistake in its procurement is clearly established.[42]

30. Farwell *v.* Great Western Tel. Co., 47 Ill. App. 579; Smith *v.* Barkemeyer, McGloin (La.) 139; Furnald *v.* Glenn, 64 Fed. 49, 12 C. C. A. 27.

Where a decree is entered in vacation, a complainant threatening to proceed thereon before it has been made final will be restrained until defendant can be heard on his objections. Hook *v.* Richeson, 106 Ill. 392.

31. *Georgia.* — Russel *v.* Slaton, 38 Ga. 195.

Missouri. — Philippi *v.* American Brass, etc., Co., 103 Mo. App. 723, 78 S. W. 77.

Texas. — Sweetman *v.* Stratton, 74 Tex. 76, 11 S. W. 1055.

West Virginia. — Armstrong *v.* Poole, 30 W. Va. 666, 5 S. E. 257.

United States. — Central Trust Co. *v.* Evans, 73 Fed. 562, 19 C. C. A. 563. But *compare* Humphreys *v.* Leggett, 9 How. 297, 13 L. ed. 145; Nelson *v.* Killingley First Nat. Bank, 70 Fed. 526.

32. *Alabama.* — Murphree *v.* Bishop, 79 Ala. 404.

Arkansas. — Fuller *v.* Townsley-Myrick Dry Goods Co., 58 Ark. 314, 24 S. W. 635.

California. — Sanchez *v.* Carriaga, 31 Cal. 170.

Georgia. — Lockridge *v.* Lyon, 68 Ga. 137.

Missouri. — St. Louis, etc., R. Co. *v.* Reynolds, 89 Mo. 146, 1 S. W. 208.

33. See *infra*, X, B, 2, a.

34. Rickets *v.* Hitchens, 34 Ind. 348.

35. Brien *v.* Loftus, 3 Rob. (La.) 163.

36. Johnson *v.* Huber, 106 Wis. 282, 82 N. W. 137.

Reimbursement.—On enjoining a judgment which has been paid, equity will decree the reimbursement of the judgment debtor, or require the judgment creditor to account to him in the character of a trustee. Tomkins *v.* Tomkins, 11 N. J. Eq. 512; Taylor *v.* Wood, 3 N. C. 332. *Contra*, Hunt *v.* Boyier, 1 J. J. Marsh. (Ky.) 484, 19 Am. Dec. 116.

37. Cyrus *v.* Hicks, 20 Tex. 483.

38. *Georgia.* — Gravely *v.* Southerland, 29 Ga. 335.

Illinois. — Cooper *v.* Tyler, 46 Ill. 462, 95 Am. Dec. 442; Hall *v.* Jones, 32 Ill. 38; Truett *v.* Wainwright, 9 Ill. 418.

Indiana. — Cummins *v.* White, 4 Blackf. 356.

Iowa. — Meleck *v.* Tama City First Nat. Bank, 52 Iowa 94, 2 N. W. 1021; Powell *v.* Spaulding, 3 Greene 443.

Kentucky. — Moseby *v.* Lewis, 4 Litt. 159.

Maryland. — Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600; West *v.* Beanes, 3 Harr. & J. 568; Hitch *v.* Fenby, 4 Md. Ch. 190.

Mississippi. — Newman *v.* Morris, 52 Miss. 402.

Nebraska. — Shufeldt *v.* Gandy, 25 Nebr. 602, 41 N. W. 553.

New York. — Chapin *v.* Clemitson, 1 Barb. 311; Frasier *v.* Frasier, 9 Johns. 80; Matter of McLaughlin, 1 Clarke 113. See Farrington *v.* Freeman, 2 Edw. 572.

North Carolina. — Heath *v.* Cobb, 17 N. C. 187, confession extorted by duress.

Texas. — Johnston *v.* Loop, 2 Tex. 331.

Wisconsin. — McCabe *v.* Sumner, 40 Wis. 386.

United States. — Boyce *v.* Grundy, 3 Pet. 210, 7 L. ed. 655; Thomas *v.* Watson, 23 Fed. Cas. No. 13,913, Taney 297.

See 30 Cent. Dig. tit. "Judgment," § 776.

Confession of judgment by one partner against the firm without the consent of the others may be enjoined. Christy *v.* Sherman, 10 Iowa 535.

39. Burch *v.* West, 134 Ill. 258, 25 N. E. 658; Ross *v.* Cox, 69 Ill. App. 430.

40. Moore *v.* Barclay, 23 Ala. 739; Wood *v.* Ellis, 10 Mo. 382 (judgment confessed on void letter of attorney, but afterward revived on scire facias without opposition); Shelton *v.* Gill, 11 Ohio 417 (illegal stipulation for collection fees included in warrant of attorney to confess judgment).

41. Kearney *v.* Sasser. 37 Md. 264; Goodwin *v.* Cartwright, 10 Fed. Cas. No. 5,551, 2 Hask. 340; Mason *v.* Jones, 16 Fed. Cas. No. 9,240, 1 Hayw. & H. 329.

42. *District of Columbia.* — U. S. Electric Lighting Co. *v.* Leiter, 19 D. C. 575.

9. Conditions Precedent. A party coming into equity to obtain relief against a judgment at law must on his part do whatever equity requires.[43] In particular, if the complainant does not dispute the validity of the judgment with respect to the entire amount of it, he must first pay or offer to pay whatever amount he admits to be due.[44] But it is not usual or necessary, before filing a bill for this purpose, to obtain leave of the court whose judgment is to be impeached or of that in which the bill is filed.[45]

B. Grounds For Relief in Equity — 1. General Rules. As a general rule any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself there, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to enjoin the adverse party from enforcing such judgment.[46] It must therefore be made to appear that it would be unjust and uncon-

Iowa.— Steiner *v.* Lenz, 110 Iowa 49, 81 N. W. 190.

Kansas.— Edwards *v.* Cary, 20 Kan. 414; Elder *v.* Lawrence Nat. Bank, 12 Kan. 242.

Kentucky.— Hahn *v.* Hart, 12 B. Mon. 426.

Louisiana.— King *v.* Watts, 23 La. Ann. 363.

New York.— Levy *v.* Passavant, 19 N. Y. App. Div. 71, 45 N. Y. Suppl. 986.

North Carolina.— Council *v.* Averett, 90 N. C. 168.

Tennessee.— Swanson *v.* Jordan, (Ch. App. 1898) 52 S. W. 1102.

Texas.— Goliad *v.* Weisiger, 4 Tex. Civ. App. 653, 23 S. W. 694.

Virginia.— Anderson *v.* Woodford, 8 Leigh 316.

See 30 Cent. Dig. tit. "Judgment," § 776.

43. Lipscomb *v.* Winston, 1 Hen. & M. (Va.) 453; Payne *v.* Dudley, 1 Wash. (Va.) 196.

44. *Alabama.*— Yonge *v.* Shepperd, 44 Ala. 315; Tucker *v.* Holley, 20 Ala. 426. The amount admitted to be due must be paid into court; a simple offer to pay is not sufficient. J. A. Roebling Sons Co. *v.* Stevens Electric Light Co., 93 Ala. 39, 9 So. 369.

Colorado.— Brewer *v.* Mock, 14 Colo. App. 454, 60 Pac. 578.

Georgia.— Hill *v.* Harris, 42 Ga. 412.

Illinois.— Tompkins *v.* Lang, 74 Ill. App. 500.

Indiana.— Keifer *v.* Summers, 137 Ind. 106, 35 N. E. 1103, 36 N. E. 894; Crawford *v.* Harvey, 1 Blackf. 382. Payment of the amount conceded to be due is not an indispensable condition to obtaining relief in equity, where the excess in the judgment occurred through mistake, and the debtor was fraudulently dissuaded from seeking to have it corrected in the original action. Blizzard *v.* Bross, 56 Ind. 74.

Iowa.— Byers *v.* Odell, 56 Iowa 618, 10 N. W. 102.

Kentucky.— Thomas *v.* Bush, 1 Bibb 506.

Maryland.— Neurath *v.* Hecht, 62 Md. 221. To obtain an injunction against a judgment on the ground that the complainant cannot safely pay it, there being several claimants, he should file a bill of interpleader and pay the debt into court for the party showing himself entitled thereto. Fowler *v.* Lee, 10 Gill & J. 358, 32 Am. Dec. 172.

Missouri.— Herweck *v.* Koken Barber Supply Co., 61 Mo. App. 454.

New York.— Ingalls *v.* Merchants' Nat. Bank, 51 N. Y. App. Div. 305, 64 N. Y. Suppl. 911; Williams *v.* Lockwood, Clarke 172. Deposit of the amount of the judgment is not required in the case of other judgment creditors attacking it on the ground that it has been paid and satisfied. Packer *v.* Nevin, 67 N. Y. 550.

Ohio.— Shelton *v.* Gill, 11 Ohio 417; Liniman *v.* Dunniek, 1 Ohio Cir. Ct. 563, 1 Ohio Cir. Dec. 314. Tender of the amount actually due is not required where the judgment creditor fraudulently prevented the debtor from defending the action, and obtained a judgment for an excessive amount. Lockwood *v.* Mitchell, 19 Ohio 448, 53 Am. Dec. 438.

Texas.— Smith *v.* Smith, 75 Tex. 410, 12 S. W. 678; Jordan *v.* Chester, (Civ. App. 1897) 43 S. W. 904. If the amount admitted to be due is sufficiently tendered, and the bill offers to pay it, it is not necessary that the sum should be actually deposited in court. Hamburger *v.* Kosminsky, (Civ. App. 1901) 61 S. W. 958. On setting aside a judgment against plaintiff for delinquent taxes, and the sale of the land thereunder, it was proper to require him to pay his proportion of the taxes and of the costs. State *v.* Dashiell, 32 Tex. Civ. App. 454, 74 S. W. 779.

Wisconsin.— Stokes *v.* Knarr, 11 Wis. 389.

See 30 Cent. Dig. tit. "Judgment," § 853.

Amount received under inadequate judgment.— Where the United States files a bill to set aside a judgment in its favor as being for too small a sum, tender of the amount received under the judgment is not necessary, since, if it should be found that a larger sum was due, the amount paid can be credited on the new judgment; and if nothing was due, judgment can be entered against the United States for the sum paid. U. S. *v.* Beebe, 180 U. S. 343, 21 S. Ct. 371, 45 L. ed. 563.

45. McDonald *v.* Pearson, 114 Ala. 630, 21 So. 534; Kincaid *v.* Conly, 62 N. C. 270; Keran *v.* Trice, 75 Va. 690; Brown *v.* Walker, 84 Fed. 532.

46. *Alabama.*— Foshee *v.* McCreary, 123 Ala. 493, 26 So. 309; Watts *v.* Gale, 20 Ala.

scientious to enforce the judgment,[47] and equity will not interfere merely on account of hardship,[48] or where it appears that there is no valid defense to the action.[49] But on the other hand, where a proper case for equitable relief is made out, the fact that the judgment creditor is of undoubted solvency and able to refund the money which may be collected on an execution, will not prevent the interposition of equity.[50]

2. INVALIDITY OF JUDGMENT — a. In General. It is generally held that equity may properly enjoin the enforcement of a judgment which is absolutely and entirely void,[51] especially if the judgment is regular on its face and does not dis-

817; Stinnett *v.* Mobile Branch State Bank, 9 Ala. 120.

Arkansas.— Gaines *v.* Hale, 26 Ark. 168; McWillie *v.* Martin, 25 Ark. 556.

California.— Mastick *v.* Thorp, 29 Cal. 444.

Georgia.— Block *v.* Tinsley, 95 Ga. 436, 22 S. E. 672; Keaton *v.* Baggs, 53 Ga. 226; Southwestern R. Co. *v.* Chapman, 46 Ga. 557; Rhodes *v.* Gauladett, 40 Ga. 212.

Illinois.— Telford *v.* Brinkerhoff, 163 Ill. 439, 45 N. E. 156.

Indiana.— Wilson Sewing Mach. Co. *v.* Curry, 126 Ind. 161, 25 N. E. 896; Lindley *v.* Cravens, 2 Blackf. 426.

Kansas.— Tutt *v.* Ferguson, 13 Kan. 45.

Kentucky.— Yelton *v.* Hawkins, 2 J. J. Marsh. 1.

Louisiana.— Leblanc *v.* Walsh, 8 La. Ann. 67; Lafon *v.* Desessart, 1 Mart. N. S. 71. *Compare* Derbigny *v.* Peirce, 18 La. 551.

Maryland.— Windwart *v.* Allen, 13 Md. 196; Kent *v.* Ricards, 3 Md. Ch. 392.

Michigan.— Kelleher *v.* Boden, 55 Mich. 295, 21 N. W. 346; Miller *v.* Morse, 23 Mich. 365.

Missouri.— Clark *v.* Condit, 13 Mo. 222; Mott *v.* Bernard, 97 Mo. App. 265, 70 S. W. 1093.

Nebraska.— McBride *v.* Wakefield, 58 Nebr. 442, 78 N. W. 713; Losey *v.* Neidig, 52 Nebr. 167, 71 N. W. 1067; Proctor *v.* Pettitt, 25 Nebr. 96, 41 N. W. 131.

New York.—New York, etc., R. Co. *v.* Haws, 56 N. Y. 175; Vilas *v.* Jones, 1 N. Y. 274; Davoue *v.* Fanning, 4 Johns. Ch. 199.

North Carolina.— Allen *v.* Pearce, 59 N. C. 309; Stewart *v.* Mizell, 43 N. C. 242; Gatlin *v.* Kilpatrick, 4 N. C. 147, 6 Am. Dec. 557.

Pennsylvania.— Philadelphia *v.* Dobson, 10 Pa. Co. Ct. 34.

South Carolina.— Bush *v.* Bush, 3 Strobh. Eq. 131, 51 Am. Dec. 675.

Tennessee.— Porter *v.* Burton, 10 Heisk. 415; Isler *v.* Outlaw, 4 Humphr. 118; West *v.* Magness, (Ch. App. 1898) 46 S. W. 469.

Texas.— Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991.

Virginia.— Booth *v.* Kesler, 6 Gratt. 350; Stafford *v.* Carter, 4 Gratt. 63; Lewis *v.* Wyatt, 2 Rand. 114.

West Virginia.—Alford *v.* Moore, 15 W. Va. 597. But equity will not grant a new trial of an action at law merely because of prejudice in the community. Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

Wisconsin.— Sylvester *v.* Guernsey, 22 Wis. 569.

United States.— Truly *v.* Wanzer, 5 How. 141, 12 L. ed. 88; Alexandria Mar. Ins. Co. *v.* Hodgson, 7 Cranch 332, 3 L. ed. 362; Skirving *v.* National L. Ins. Co., 59 Fed. 742, 8 C. C. A. 241; Prout *v.* Gibson, 20 Fed. Cas. No. 11,445, 1 Cranch C. C. 389; Railroad Co. *v.* Neal, 20 Fed. Cas. No. 11,534, 1 Woods 353.

See 30 Cent. Dig. tit. "Judgment," § 780 *et seq.*

47. *Maine.*— Bachelder *v.* Bean, 76 Me. 370.

Maryland.— Fowler *v.* Lee, 10 Gill & J. 358, 32 Am. Dec. 172; Little *v.* Price, 1 Md. Ch. 182.

Oregon.— Handley *v.* Jackson, 31 Oreg. 552, 50 Pac. 915, 65 Am. St. Rep. 839.

Rhode Island.— Opie *v.* Clancy, 27 R. I. 42, 60 Atl. 635.

South Carolina.— Crocker *v.* Allen, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831.

Texas.— Mason *v.* House, 20 Tex. Civ. App. 500, 49 S. W. 911.

United States.— Perry *v.* Johnston, 95 Fed. 322.

See 30 Cent. Dig. tit. "Judgment," § 780.

48. Hamilton *v.* Adams, 15 Ala. 596, 50 Am. Dec. 150; Hill *v.* Rogers, Rice Eq. (S. C.) 7; Pettes *v.* Whitehall Bank, 17 Vt. 435.

49. Stetson *v.* Goldsmith, 31 Ala. 649; Calhoun *v.* Tullass, 35 Ga. 119; Hendrickson *v.* Hinckley, 17 How. (U. S.) 443, 15 L. ed. 123; Sohier *v.* Merril, 22 Fed. Cas. No. 13,158, 3 Woodb. & M. 179. See *infra*, X, B 14.

50. Carrington *v.* Holabird, 19 Conn. 84.

51. *Alabama.*— Martin *v.* Atkinson, 108 Ala. 314, 18 So. 888.

California.— Chester *v.* Miller, 13 Cal. 558.

Colorado.— Smith *v.* Morrill, 12 Colo. App. 233, 55 Pac. 824.

Georgia.— Austell *v.* McLarin, 51 Ga. 467; Crane *v.* Barry, 47 Ga. 476.

Indiana.— Rickets *v.* Hitchens, 34 Ind. 348. *Compare* Joseph *v.* Burk, 46 Ind. 59.

Iowa.— Iowa Sav., etc., Assoc. *v.* Chase, 118 Iowa 51, 91 N. W. 807; Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522; Leonard *v.* Capital Ins. Co., 101 Iowa 482, 70 N. W. 629; Tomlinson *v.* Litze, 82 Iowa 32, 47 N. W. 1015, 31 Am. St. Rep. 458. *Compare* Ruppin *v.* McLachlan, 122 Iowa 343, 98 N. W. 153.

Kentucky.— Combs *v.* Sewell, 59 S. W. 526, 22 Ky. L. Rep. 1026.

Louisiana.— Hernandez *v.* James, 23 La. Ann. 483; Musson *v.* Richardson, 11 Rob. 43.

close the grounds of its invalidity.[52] But to obtain relief on this ground it is necessary for the complainant to show that he has no adequate remedy at law,[53] or that he has exhausted his legal remedies by motion to vacate or strike out the judgment,[54] or by certiorari to review it.[55]

b. Disability of Parties. It has been held that the personal disability of defendant in a judgment, such as coverture, infancy, or insanity, is not a ground for equitable interference with the judgment, the defect not being jurisdictional, and the remedy being at law.[56] But other decisions regarding a judgment against such a person as void hold it proper for chancery to restrain its enforcement.[57] Execution on a judgment against a person deceased, it has been held, will not be enjoined, the remedy being at law.[58]

c. Suit or Judgment Unauthorized or Forbidden.[59] A judgment obtained by an attorney who had no authority from plaintiff to bring the suit may be enjoined;[60] and so where the complainant was joined as a plaintiff in the suit without his consent,[61] or where the suit was brought by a nominal plaintiff who had no authority from the real party in interest.[62]

3. Want of Jurisdiction — a. In General. A judgment void for want of jurisdiction over the person of defendant may be enjoined in equity.[63] And the

Mississippi.— Humphries *v.* Bartee, 10 Sm. & M. 282.

Nebraska.— Rice *v.* Allen, (1903) 95 N. W. 704. But the enforcement of a judgment will not be enjoined on a mere showing of a nominal violation of complainant's rights. Van Every *v.* Sanders, (1903) 95 N. W. 870.

Nevada.— Dalton *v.* Libby, 9 Nev. 192.

Tennessee.— McNairy *v.* Eastland, 10 Yerg. 310; Caruthers *v.* Hartsfield, 3 Yerg. 366, 24 Am. Dec. 580. But see Evans *v.* International Trust Co., (Ch. App. 1900) 59 S. W. 373.

Texas.— Glass *v.* Smith, 66 Tex. 548, 2 S. W. 195; Smith *v.* Deweese, 41 Tex. 594; Cooke *v.* Burnham, 32 Tex. 129; Chambers *v.* Hodges, 23 Tex. 104.

Wisconsin.— Lamb *v.* Anderson, 2 Pinn. 251, 1 Chandl. 224.

See 30 Cent. Dig. tit. "Judgment," § 782.

Contra.— Given's Appeal, 121 Pa. St. 260, 15 Atl. 468, 6 Am. St. Rep. 795; Gillam *v.* Arnold, 32 S. C. 503, 10 S. E. 331.

See also *supra*, X, A, 8, a, text and note 32.

52. Chambers *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 270; Gazollo *v.* McCann, 63 Mo. App. 414. *Compare* Bell *v.* Francke, 23 La. Ann. 599.

53. Fuller *v.* Townsley-Myrick Dry-Goods Co., 58 Ark. 314, 24 S. W. 635; Bagwell *v.* Head, 40 Ga. 145. See *supra*, X, A, 4, e.

54. Murphree *v.* Bishop, 79 Ala. 404; Sanchez *v.* Carriago, 31 Cal. 170; Logan *v.* Hillegass, 16 Cal. 200; Chipman *v.* Bowman, 14 Cal. 157; Given *v.* Kern, 4 Pa. Co. Ct. 389; McIndoe *v.* Hazelton, 19 Wis. 567, 88 Am. Dec. 701. See *supra*, X, A, 4, b.

55. Texas-Mexican R. Co. *v.* Wright, 88 Tex. 346, 31 S. W. 613, 31 L. R. A. 200. See *supra*, X, A, 4, d.

An alleged disqualification of the trial judge can be reviewed by appeal, and is no ground for enjoining proceedings on the judgment. Dunson *v.* Spradley, (Tex. Civ. App. 1897) 40 S. W. 327.

56. Levystein *v.* O'Brien, 106 Ala. 352, 17 So. 550, 54 Am. St. Rep. 56, 30 L. R. A. 707; Evans *v.* Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606; Robb *v.* Halsey, 11 Sm. & M. (Miss.) 140; Wyman *v.* Hardwick, 52 Mo. App. 621. See also Church *v.* Gallic, (Ark. 1905) 88 S. W. 307; Hart *v.* Manahan, 70 Ohio St. 189, 71 N. E. 696.

Privilege of defendant.— Service of process on a privileged person, as a member of the legislature, is not void, and his remedy is by motion or plea, and not by injunction to restrain a judgment given against him by default on such service. Peters *v.* League, 13 Md. 58, 71 Am. Dec. 622.

57. *Louisiana.*— Médart *v.* Fasnatch, 15 La. Ann. 621.

Maryland.— Griffith *v.* Clarke, 18 Md. 457.

Virginia.— Horner *v.* Marshall, 5 Munf. 466.

West Virginia.— Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223.

United States.— Tabb *v.* Gist, 23 Fed. Cas. No. 13,719, 1 Brock. 33, 6 Call 279.

58. Williamson *v.* Applcberry, 1 Hen. & M. (Va.) 206; Wynn *v.* Wilson, 30 Fed. Cas. No. 18,116, Hempst. 698.

59. Judgment obtained in violation of injunction see Injunctions, 22 Cyc. 787.

60. Smyth *v.* Balch, 40 N. H. 363; Latimer *v.* Latimer, 22 S. C. 257.

61. Lillibridge *v.* Ross, 59 Mo. 217.

62. Marchman *v.* Sewell, 93 Ga. 653, 21 S. E. 172; Abbott *v.* Hughes, 3 Ohio 278.

63. *Alabama.*— Dunklin *v.* Wilson, 64 Ala. 162; Robinson *v.* Reid, 50 Ala. 69; Crafts *v.* Dexter, 8 Ala. 767, 42 Am. Dec. 666; Secor *v.* Woodward, 8 Ala. 500; Brooks *v.* Harrison, 2 Ala. 209.

Colorado.— San Juan, etc., Min., etc., Co. *v.* Finch, 6 Colo. 214.

Connecticut.— Jeffery *v.* Fitch, 46 Conn. 601.

Georgia.— Hart *v.* Lazaron, 46 Ga. 396. But where a decree is rendered in a suit against a citizen of the state and a citizen of a foreign state, it will not be enjoined on behalf of such foreign citizen merely on ac-

same remedy may be sought where the failure of jurisdiction was in respect to the subject-matter of the action.[64] But the complainant has the burden of proving affirmatively the facts constituting want of jurisdiction,[65] and that he has not been negligent in failing to seek his remedy at law,[66] and also according to numerous decisions that the judgment, in addition to being void for want of jurisdiction, is groundless, excessive, or unjust.[67]

b. Want or Defect of Process or Service. If no process or legal notice of the action was served on defendant, so that jurisdiction over him was not acquired, equity may on a proper showing enjoin the judgment creditor from proceeding to enforce the judgment.[68] So also defects in the process so radical that it does

count of the fact of his non-residence and because he is therefore not bound by it. Dearing *v.* Charleston Bank, 5 Ga. 497, 48 Am. Dec. 300. And *compare* Morris *v.* Morris, 76 Ga. 733, in which an injunction was refused because of an adequate remedy by affidavit of illegality.

Illinois.—Montague *v.* Mitchell, 28 Ill. 481; Follansbee *v.* Scottish-American Mortg. Co., 7 Ill. App. 486.

Indian Territory.— Robberson *v.* Crow, 3 Indian Terr. 174, 53 S. W. 534.

Iowa.— Iowa Union Tel. Co. *v.* Boylan, 86 Iowa 90, 52 N. W. 1122; Jamison *v.* Weaver, 84 Iowa 611, 51 N. W. 65; Coon *v.* Jones, 10 Iowa 131.

Missouri.— Smoot *v.* Judd, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738; Campbell *v.* Edwards, 1 Mo. 324.

Nebraska.— Cobbey *v.* Wright, 34 Nebr. 771, 52 N. W. 713.

New York.— Wilmore *v.* Flack, 96 N. Y. 512; Corwithe *v.* Griffing, 21 Barb. 9. But *compare* Fullan *v.* Hooper, 66 How. Pr. 75.

North Carolina.—Myers *v.* Daniels, 59 N. C. 1. But *compare* Partin *v.* Luterloh, 59 N. C. 341.

Oregon.— White *v.* Espey, 21 Oreg. 328, 28 Pac. 71 [*distinguishing* Galbraith *v.* Barnard, 21 Oreg. 67, 26 Pac. 1110].

Tennessee.— Ridgeway *v.* State Bank, 11 Humphr. 523; Ingle *v.* McCurry, 1 Heisk. 26; Walker *v.* Wynne, 3 Yerg. 62.

Texas.— McFaddin *v.* Spencer, 18 Tex. 440; Dashner *v.* Wallace, (Civ. App. 1902) 68 S. W. 307; Tucker *v.* Williams, (Civ. App. 1900) 56 S. W. 585; Jennings *v.* Shiner, (Civ. App. 1897) 43 S. W. 276; Wofford *v.* Booker, 10 Tex. Civ. App. 171, 30 S. W. 67.

See 30 Cent. Dig. tit. "Judgment," § 793.

Contra.— Drake *v.* Steadman, 46 S. C. 474, 24 S. E. 458; Thomas *v.* West, 59 Wis. 103, 17 N. W. 684.

Adjudication as to jurisdiction.— The fact that the law court, in rendering judgment, passed on the sufficiency of an alleged service of the writ in the case is not a bar to a readjudication of the question in an action to restrain execution of the judgment. State Ins. Co. *v.* Waterhouse, 78 Iowa 674, 43 N. W. 611. But see Meyer *v.* Meyer, 6 Ohio Dec. (Reprint) 847, 8 Am. L. Rec. 426, holding that, where a case has been tried twice, and judgment rendered on the theory that the court had jurisdiction, the judgment cannot be enjoined on the ground of want of jurisdiction.

Scope of injunction. — The fact that a judgment was rendered without jurisdiction by an inferior court does not justify a perpetual injunction against the prosecution of any suit on the same cause of action. Paul *v.* Davidson, 43 Nebr. 505, 61 N. W. 736.

Jurisdiction of federal courts.— Where a suit between citizens of the same state has been brought in a federal court, by collusion or otherwise, on the ground of defendant's alienage, and a default judgment entered, the proceedings are wholly without jurisdiction, and an injunction may be granted to restrain execution of the judgment. Broadis *v.* Broadis, 86 Fed. 951.

64. Cunningham *v.* Taylor, 20 Tex. 126; Hill *v.* Gordon, 45 Fed. 276. But see Newlon *v.* Wade, 43 W. Va. 283, 27 S. E. 244, holding that a judgment of a justice of the peace, founded on a sufficient summons, cannot be attacked in equity on the sole ground that the cause of action arose in another county, the place of defendant's residence.

Amount in controversy.— That the amount in controversy in the suit in which the judgment was rendered was less than the sum required to give jurisdiction to the court is not sufficient ground for a bill in equity to declare the judgment void, the remedy being by writ of error. Donham *v.* Springfield Hardware Co., 62 Fed. 110, 10 C. C. A. 294.

65. Eichhoff *v.* Eichhoff, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110; Westbrook *v.* Thompson, 104 Tenn. 363, 58 S. W. 223.

66. Hamblin *v.* Knight, 81 Tex. 351, 16 S. W. 1082, 26 Am. St. Rep. 818.

67. *Illinois.*— Off *v.* Title Guarantee, etc., Co., 87 Ill. App. 472; Combs *v.* Hamlin Wizard Oil Co., 58 Ill. App. 123.

Iowa.— Gerrish *v.* Hunt, 66 Iowa 682, 24 N. W. 274.

Mississippi.— Newman *v.* Taylor, 69 Miss. 670, 13 So. 831.

Nebraska.— Fickes *v.* Vick, 50 Nebr. 401, 69 N. W. 951.

Wisconsin.— Stokes *v.* Knarr, 11 Wis. 389.

68. *Alabama.*— Robinson *v.* Reid, 50 Ala. 69; Stubbs *v.* Leavitt, 30 Ala. 352.

Arizona.— San Pedro Cattle Co. *v.* Williams, (1894) 36 Pac. 34.

Arkansas.— Mullins *v.* Central Coal, etc., Co., 73 Ark. 333, 84 S. W. 477; Ryan *v.* Boyd, 33 Ark. 778.

California.— Parsons *v.* Weis, 144 Cal. 410,

not serve its purpose of notifying defendant of the suit and the time for proceeding in it will be ground for an injunction against the judgment;[69] but not where the process is sufficient to put him on inquiry as to the action, which inquiry he

77 Pac. 1007; Martin *v.* Parsons, 49 Cal. 94.

Colorado.— Wilson *v.* Hawthorne, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290.

District of Columbia.— Brown *v.* Wygant, 6 Mackey 447.

Illinois.— Kochman *v.* O'Neill, 202 Ill. 110, 66 N. E. 1047; Jones *v.* Neely, 82 Ill. 71; Weaver *v.* Poyer, 70 Ill. 567; Wilday *v.* McConnel, 63 Ill. 278. But unless a judgment is unjust equity will not set it aside on account of irregularities as to the service of the summons. Garden City Wire, etc., Co. *v.* Kause, 67 Ill. App. 108.

Iowa.— Miller *v.* Minneapolis, etc., R. Co., (1903) 93 N. W. 76; State Ins. Co. *v.* Waterhouse, 78 Iowa 674, 43 N. W. 611; Gerrish *v.* Hunt, 66 Iowa 682, 24 N. W. 274; Givens *v.* Campbell, 20 Iowa 79.

Kansas.— Steele *v.* Duncan, 47 Kan. 511, 28 Pac. 206.

Louisiana.— Keith *v.* Renard, 18 La. Ann. 734. And see Leblanc *v.* Perroux, 21 La. Ann. 26.

Mississippi.— Duncan *v.* Gerdine, 59 Miss. 550; Southern Express Co. *v.* Craft, 43 Miss. 508.

Nebraska.— Bankers' L. Ins. Co. *v.* Robbins, 53 Nebr. 44, 73 N. W. 269.

New Jersey.— Truitt *v.* Darnell, 65 N. J. Eq. 221, 55 Atl. 692; Herbert *v.* Herbert, 50 N. J. Eq. 467, 25 Atl. 401; Vansyckle *v.* Rorback, 6 N. J. Eq. 234.

South Carolina.— Equity will not restrain the enforcement of a judgment on the ground that defendant was never served with process, where the record shows no flaw or defect in the service, unless he shows some ground of equitable cognizance, such as fraud, accident, or mistake; for otherwise he has an adequate remedy by motion to vacate the judgment in the court where it was rendered. Gillam *v.* Arnold, (1892) 14 S. E. 938; Crocker *v.* Allen, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831.

Texas.— August Kern Barber Supply Co. *v.* Freeze, 96 Tex. 513, 74 S. W. 303.

Virginia.— Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777.

United States.— Kibbe *v.* Benson, 17 Wall. 624, 21 L. ed. 741; New River Mineral Co. *v.* Seeley, 120 Fed. 193, 56 C. C. A. 505.

See 30 Cent. Dig. tit. "Judgment," § 794.

Contra.— Moore *v.* Carpenter, 63 N. H. 65; Fullan *v.* Hooper, 66 How. Pr. (N. Y.) 75; Grant *v.* Harrell, 109 N. C. 78, 13 S. E. 718; Mason *v.* Miles, 63 N. C. 564; Partin *v.* Luterloh, 59 N. C. 341; Armworthy *v.* Cheshire, 17 N. C. 234, 34 Am. Dec. 273; Graham *v.* Roberts, 1 Head (Tenn.) 56. *Compare* Smith *v.* Van Bebber, 1 Swan (Tenn.) 110.

Joint defendants.— Where judgment was rendered against two defendants, although process was served on only one of them, defendant not served may have relief in equity against the judgment. Morgan *v.* Scott, Minor (Ala.) 81, 12 Am. Dec. 35; Gerrish *v.* Seaton, 73 Iowa 15, 34 N. W. 485. But see Mason *v.* Miles, 63 N. C. 564, holding that where a judgment has been obtained against a principal and surety it is no ground for an injunction in favor of the surety that the principal was not served with process and had no opportunity to defend.

Judgment fraudulently altered.— Equity has jurisdiction to vacate a judgment which has been fraudulently altered so as to include a defendant who was not served and not originally included in the judgment. Chester *v.* Miller, 13 Cal. 558.

Service by publication.— Equity will set aside a judgment rendered on constructive service of process, where defendant had no actual knowledge of the action, and the affidavit filed by the plaintiff, and on which the service by publication was ordered, was false. Dunlap *v.* Steere, 92 Cal. 344, 28 Pac. 563, 27 Am. St. Rep. 143, 16 L. R. A. 361.

Waiver of want of notice.— Equity will not interfere where the want of notice was cured by an agreement of the party affected, by which the rendition of the judgment was suspended by consent until the opinion of the supreme court in another case between the same parties could be had. Stein *v.* Burden, 30 Ala. 270.

Mistake of defendant.— It is no ground for relief that defendant forgot that the writ had been served upon him, and thereby was prevented from appearing and defending. Cullum *v.* Casey, 1 Ala. 351; Dewees *v.* Richardson, 1 A. K. Marsh. (Ky.) 312. Nor that he erroneously supposed that the suit was intended to be against another person. Higgins *v.* Bullock, 73 Ill. 205.

69. Roberts *v.* Henry, 2 Stew. (Ala.) 42; Bird *v.* Cain, 6 La. Ann. 248.

Failure to object.— Defects in the process or service of which defendant had full knowledge will not be ground for enjoining the judgment, where he fails to object in due time or to take advantage of such defects, or to make any sufficient excuse for his failure to do so. Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Wilsey *v.* Maynard, 21 Iowa 107; Graham *v.* Roberts, 1 Head (Tenn.) 56.

Want of seal.— Equity will not interfere because the summons was defective for want of a seal, for this does not invalidate the judgment (Krug *v.* Davis, 85 Ind. 309), and the proper remedy of the party is by motion to quash the execution (Logan *v.* Hillegass, 16 Cal. 200).

Language of writ.— The fact that the petition and process were not expressed in the French language, the maternal tongue of defendant, affords no ground for enjoining the judgment. Ortes *v.* Lallande, 4 La. Ann. 188.

negligently fails to pursue.[70] And ground for the interposition of equity may be laid by showing a fatal defect in the manner of serving the process.[71] But a defective return or proof of process duly served is not sufficient ground for equity to interfere.[72]

c. False Return of Service. Equity may vacate or enjoin a judgment in an action of which defendant had no legal notice, the trial court assuming jurisdiction on the strength of a false return of service of process by the sheriff or other officer.[73] Earlier decisions holding that the party's only remedy was by an action against the officer [74] are inconsistent with the modern rules. But in several states it is held that relief cannot be granted on this ground unless it is shown that the false return was induced or procured by plaintiff or that he was connected

70. Woods *v.* Brzezinski, 57 Conn. 471, 18 Atl. 252; Gallup *v.* Manning, 48 Conn. 25.

71. Owens *v.* Ranstead, 22 Ill. 161; Lapiece *v.* Hughes, 24 Miss. 69; Jones *v.* Commercial Bank, 5 How. (Miss.) 43, 35 Am. Dec. 419; Walker *v.* Gilbert, Freem. (Miss.) 85; Strowbridge *v.* Miller, (Nebr. 1903) 94 N. W. 825.

Service on wrong person is ground for injunction. Magin *v.* Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216. *Compare* School Directors *v.* National School Furnishing Co., 53 Ill. App. 254; Alabama Ins. Co. *v.* Kingman, 21 Ill. App. 493; Uehlein *v.* Burk, 119 Iowa 742, 94 N. W. 243.

Decoying defendant into jurisdiction.— In Vastine *v.* Bast, 41 Mo. 493, a court of equity refused to interfere in a case where defendant, not denying that he had been duly served, alleged that he was not a citizen or resident of the state and that he had been fraudulently decoyed within the jurisdiction in order to secure service on him; for the objection should have been taken by appearing in the original suit and moving to set aside the service. But *compare* Grass *v.* Hess, 37 Ind. 193.

Plaintiff serving writ.— Where the sheriff who serves the writ is himself plaintiff, the judgment in the suit so begun is a nullity and may be enjoined. Knott *v.* Jarboe, 1 Metc. (Ky.) 504.

72. Pico *v.* Sunol, 6 Cal. 294; Peoria, etc., R. Co. *v.* Duggan, 32 Ill. App. 351; McFaddin *v.* Garrett, 49 La. Ann. 1319, 22 So. 358; Northwestern, etc., Hypotheek Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

73. *Alabama.*— Martin *v.* Barney, 20 Ala. 369; Crafts *v.* Dexter, 8 Ala. 767, 42 Am. Dec. 666; Brooks *v.* Harrison, 2 Ala. 209.

Arkansas.— Ryan *v.* Boyd, 33 Ark. 778.

California.— Lapham *v.* Campbell, 61 Cal. 296; Martin *v.* Parsons, 49 Cal. 94.

Colorado.— Du Bois *v.* Clark, 12 Colo. App. 220, 55 Pac. 750.

Illinois.—Cassidy *v.* Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116; Jones *v.* Neely, 82 Ill. 71; Owens *v.* Ranstead, 22 Ill. 161. But where the sheriff's return shows due service of the summons, equity will require something more than the oath of defendant to contradict it and set aside the judgment. Allen *v.* Hickey, 53 Ill. App. 437.

Iowa.— Wolf *v.* Shenandoah Nat. Bank, 84 Iowa 138, 50 N. W. 561; Connell *v.* Stelson, 33 Iowa 147; Stone *v.* Skerry, 31 Iowa 582; Newcomb *v.* Dewey, 27 Iowa 381; Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520.

Kansas.— McNeill *v.* Edie, 24 Kan. 108.

Kentucky.— The officer's return may be counteracted by proof of fraud on the part of the person benefited, or mistake on the part of the officer; and when this is shown, the enforcement of the judgment may be enjoined. Bramlett *v.* McVey, 91 Ky. 151, 15 S. W. 49, 12 Ky. L. Rep. 760; Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653, 11 Ky. L. Rep. 103, 21 Am. St. Rep. 356; Landrum *v.* Farmer, 7 Bush 46.

Louisiana.— Hernandez *v.* James, 23 La. Ann. 483; Sloan *v.* Menard, 5 La. Ann. 218.

Mississippi.— Jones *v.* Commercial Bank, 5 How. 43, 35 Am. Dec. 419; Walker *v.* Gilbert, Freem. 85.

Montana.— Hauswirth *v.* Sullivan, 6 Mont. 203, 9 Pac. 798.

New York.— Mather *v.* Parsons, 32 Hun 338.

Oregon.— Huntington *v.* Crouter, 33 Oreg. 408, 54 Pac. 208, 72 Am. St. Rep. 726; Heatherly *v.* Hadley, 4 Oreg. 1.

Pennsylvania.— Miller *v.* Gorman, 38 Pa. St. 309.

Rhode Island.— Dowell *v.* Goodwin, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873.

South Carolina.— Ruff *v.* Elkin, 40 S. C. 69, 18 S. E. 220.

Tennessee.— Ingle *v.* McCurry, 1 Heisk. 26; Bell *v.* Williams, 1 Head 229; Ridgeway *v.* State Bank, 11 Humphr. 523; McNairy *v.* Eastland, 10 Yerg. 310; Estis *v.* Patton, 3 Yerg. 382; Caruthers *v.* Hartsfield, 3 Yerg. 366, 24 Am. Dec. 580.

Texas.— Hamblen *v.* Knight, 60 Tex. 36; State *v.* Dashiell, 32 Tex. Civ. App. 454, 74 S. W. 779.

Vermont.—Equity will not impeach a judgment at law for a mere irregularity, as where complainant seeks to try the truth of an officer's return upon parol testimony. Wardsboro *v.* Whitingham, 45 Vt. 450.

Washington.— Johnson *v.* Gregory, 4 Wash. 109, 29 Pac. 831, 31 Am. St. Rep. 907.

Wisconsin.— Johnson *v.* Coleman, 23 Wis. 452, 99 Am. Dec. 193.

See 30 Cent. Dig. tit. "Judgment," § 795.

74. Stites *v.* Knapp, Ga. Dec. Pt. II, 36; Taylor *v.* Lewis, 2 J. J. Marsh. (Ky.) 400,

in some fraudulent way with the deception.[75] And numerous cases rule that equity should not interfere if there is still an adequate remedy in the original action or proceeding,[76] and that the complainant must show a meritorious defense or some equitable ground other than the want of due notice.[77]

d. Unauthorized Appearance. It is generally held that equity may enjoin the enforcement of a judgment taken against a defendant on an unauthorized appearance of an attorney for him,[78] although some of the cases still adhere to the early English rule that he must first exhaust his remedy by suit against the attorney, if the latter is solvent and able to respond in damages.[79] At any rate the party

19 Am. Dec. 135; Walker *v.* Robbins, 14 How. (U. S.) 584, 14 L. ed. 552.

75. *California.*— Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639. And see Martin *v.* Parsons, 49 Cal. 94.

Indiana.— In a suit to vacate a judgment on the ground that there was no service of the summons, and that the return thereon was false, the return, being regular on its face, is conclusive in the absence of any allegation of fraud. Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687; Cully *v.* Shirk, 131 Ind. 76, 30 N. E. 882, 31 Am. St. Rep. 414; Nietert *v.* Trentman, 104 Ind. 390, 4 N. E. 306; Krug *v.* Davis, 85 Ind. 309.

Kentucky.— Taylor *v.* Lewis, 2 J. J. Marsh. 400, 19 Am. Dec. 135. And see Chambers *v.* Handley, 4 Bibb 284.

Maryland.— Gardner *v.* Jenkins, 14 Md. 58.

Missouri.— A sheriff's return of service of summons is conclusive, except in an action against the sheriff for a false return; and a bill in equity will not lie to set aside a default judgment based on the false return, showing proper service, unless plaintiff in the action was a party to the false return, or knew of it, and took advantage of it with such knowledge, and was guilty of fraud in the very act of procuring the judgment; and it is not sufficient to implicate plaintiff in this way merely to show that he became the purchaser at the execution sale under the judgment, if it is not shown that he was cognizant of the falsity of the return, and it does not appear that he was guilty of any fraud. Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481.

Nebraska.— Johnson *v.* Jones, 2 Nebr. 126.

Virginia.— Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777.

United States.— Walker *v.* Robbins, 14 How. 584, 14 L. ed. 552; King *v.* Davis, 137 Fed. 222.

See 30 Cent. Dig. tit. "Judgment," § 795.

76. Sanchez *v.* Carriaga, 31 Cal. 170; Bibend *v.* Kreutz, 20 Cal. 109; Comstock *v.* Clemens, 19 Cal. 77; Chambers *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 270; Crandall *v.* Bacon, 20 Wis. 639, 91 Am. Dec. 451.

77. *Alabama.*— Secor *v.* Woodward, 8 Ala. 500.

California.— Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639.

Iowa.— Coon *v.* Jones, 10 Iowa 131.

Maryland.— Gardner *v.* Jenkins, 14 Md. 58; Fowler *v.* Lee, 10 Gill & J. 358, 32 Am. Dec. 172.

Mississippi.— Harris *v.* Gwin, 10 Sm. & M. 563.

78. *Illinois.*— Cassidy *v.* Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116; Truett *v.* Wainwright, 9 Ill. 418.

Indiana.— Wiley *v.* Pratt, 23 Ind. 628. And see Hollinger *v.* Reeme, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L. R. A. 46.

Iowa.— Newcomb *v.* Dewey, 27 Iowa 381; Bryant *v.* Williams, 21 Iowa 329; Harshay *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; De Louis *v.* Meek, 2 Greene 55, 50 Am. Dec. 491.

Louisiana.— Marvel *v.* Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424; Wood *v.* Henderson, 2 La. Ann. 220.

Missouri.— Campbell *v.* Edwards, 1 Mo. 324.

Nebraska.— Kaufmann *v.* Drexel, 56 Nebr. 229, 76 N. W. 559.

New Jersey.— Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York.— Ormsby *v.* Jacques, 12 Hun 443; Allen *v.* Stone, 10 Barb. 547; Gilman *v.* Prentice, 11 N. Y. Civ. Proc. 310. *Compare* Gilman *v.* Tucker, 57 N. Y. Super. Ct. 324, 7 N. Y. Suppl. 682.

Ohio.— Critchfield *v.* Porter, 3 Ohio 518.

Oregon.— Handley *v.* Jackson, 31 Oreg. 552, 50 Pac. 915, 65 Am. St. Rep. 839.

Tennessee.— Boro *v.* Harris, 13 Lea 36; Jones *v.* Williamson, 5 Coldw. 371.

Washington.— Turner *v.* Turner, 33 Wash. 118, 74 Pac. 55.

West Virginia.— Smith *v.* Johnson, 44 W. Va. 278, 29 S. E. 509.

United States.— U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Shelton *v.* Tiffin, 6 How. 163, 12 L. ed. 387.

See 30 Cent. Dig. tit. "Judgment," § 796.

Remedy in case of unauthorized appearance generally see APPEARANCE, 3 Cyc. 533.

79. Everett *v.* Warner Bank, 58 N. H. 340; Smyth *v.* Balch, 40 N. H. 363; Bunton *v.* Lyford, 37 N. H. 512, 75 Am. Dec. 144; Hoffmire *v.* Hoffmire, 3 Edw. (N. Y.) 173; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

In England this rule has now been abandoned. Hubbart *v.* Phillips, 2 D. & L. 707, 14 L. J. Exch. 103, 13 M. & W. 702; Bayley *v.* Buckland, 1 Exch. 1; Robson *v.* Eaton, 1 T. R. 62.

seeking such relief must also show that the judgment is unjust or inequitable, or that the result would be different on a full and fair trial of the merits.[80]

4. INSUFFICIENT OR ILLEGAL CAUSE OF ACTION. That the cause of action stated by plaintiff is not sufficient to support the judgment or does not entitle him to the relief awarded is a defense which must be interposed at law, and equity will not enjoin the judgment on this ground,[81] unless it appears that there was some good reason why defendant did not or could not plead it.[82] That the contract or cause of action was illegal, immoral, or contrary to public policy is good ground for enjoining the enforcement of the judgment;[83] but according to many of the cases only when the defense could not have been made at law or was prevented,[84] and

80. Budd *v.* Gamble, 13 Fla. 265; Fowler *v.* Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172; Harris *v.* Gwin, 10 Sm. & M. (Miss.) 563. *Compare* Mills *v.* Scott, 43 Fed. 452.

81. *Alabama.*— Hamilton *v.* Adams, 15 Ala. 596, 50 Am. Dec. 150; Chandler *v.* Crawford, 7 Ala. 506; Long *v.* Brown, 4 Ala. 662; McGowen *v.* Young, 2 Stew. & P. 160.

Arkansas.— Hall *v.* Melvin, 62 Ark. 439, 35 S. W. 1109, 54 Am. St. Rep. 301.

Georgia.— Gibson *v.* Cohen, 85 Ga. 850, 11 S. E. 141.

Indiana.— De Haven *v.* Covalt, 83 Ind. 344.

Kentucky.— Carpenter *v.* Hackley, 1 A. K. Marsh. 155.

Louisiana.— Haynes *v.* O'Neil, 30 La. Ann. 1238; Maraist *v.* Caillier, 30 La. Ann. 1087; Sartorius *v.* Dawson, 13 La. Ann. 111.

New York.— Stilwell *v.* Carpenter, 59 N. Y. 414.

North Carolina.— Peace *v.* Nailing, 16 N. C. 289.

Virginia.— Turner *v.* Davis, 7 Leigh 227, 30 Am. Dec. 502.

United States.— Griswold *v.* Hazard, 28 Fed. 578.

See 30 Cent. Dig. tit. "Judgment," § 784.

In Tennessee a more liberal rule prevails, and it appears that relief may be granted in equity on the ground stated in the text, where there are circumstances impeaching the justice or the validity of the judgment. Scurlock *v.* Scurlock, 92 Tenn. 629, 22 S. W. 858; Breeden *v.* Grigg, 8 Baxt. 163; Isler *v.* Turner, 7 Humphr. 116.

Ultra vires is a defense which must be interposed at law, and is not ground for enjoining the judgment. Atwater *v.* American Exch. Nat. Bank, 40 Ill. App. 501.

Fraud in cause of action see *infra*, X, B, 12, b.

82. Owsley *v.* Thurman, 5 J. J. Marsh. (Ky.) 127; Cummins *v.* Latham, 4 T. B. Mon. (Ky.) 97; Skinner *v.* White, 17 Johns. (N. Y.) 357.

83. Miller *v.* Gaskins, Sm. & M. Ch. (Miss.) 524.

Usury.— Isaacke *v.* Ficklin, 5 B. Mon. (Ky.) 18; Fisher *v.* Carroll, 41 N. C. 485; Frierson *v.* Moody, 3 Humphr. (Tenn.) 561; Greer *v.* Hale, 95 Va. 533, 28 S. E. 873, 64 Am. St. Rep. 814. *Compare* Thompson *v.* Ware, 8 B. Mon. (Ky.) 26; Parkam *v.* Pulliam, 5 Coldw. (Tenn.) 497; Hale *v.* Hale, 1 Coldw. (Tenn.) 233, 78 Am. Dec. 490. *Contra*, Robb *v.* Halsey, 11 Sm. & M. (Miss.) 140.

Gambling debts.— Wooldridge *v.* Cates, 2 J. J. Marsh. (Ky.) 221; Gill *v.* Webb, 4 T. B. Mon. (Ky.) 299; Martin *v.* Terrell, 12 Sm. & M. (Miss.) 571; Collins *v.* Lee, 2 Mo. 16; Woodson *v.* Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612. *Compare* Hoomes *v.* Smock, 1 Wash. (Va.) 389. And see *contra*, Dunn *v.* Holloway, 16 N. C. 322.

Agreement to stifle prosecution.— Given's Appeal, 121 Pa. St. 260, 15 Atl. 468, 6 Am. St. Rep. 795. And see Heath *v.* Cobb, 17 N. C. 187.

Slave property.— Lindstrum *v.* Ewing, 25 La. Ann. 520; Planters Consol. Assoc. *v.* Blanc, 25 La. Ann. 226. *Compare* Hardeman *v.* Harris, 7 How. (U. S.) 726, 12 L. ed. 889.

84. Hobby *v.* Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301; Thomas *v.* Phillips, 4 Sm. & M. (Miss.) 358; Green *v.* Robinson, 5 How. (Miss.) 80; Sample *v.* Barnes, 14 How. (U. S.) 70, 14 L. ed. 330.

Usury.— The general doctrine is that usury is no ground for enjoining the judgment if defendant neglected or failed to avail himself of this defense in the action at law, having an opportunity to do so.

Alabama.— Royster *v.* Watkins, 3 Port. 436; Moore *v.* Dial, 3 Stew. 155; Teague *v.* Russell, 2 Stew. 420. But *compare* McCollum *v.* Prewitt, 37 Ala. 573.

Georgia.— Owen *v.* Gibson, 74 Ga. 465.

Illinois.— Lucas *v.* Spencer, 27 Ill. 15.

Kentucky.— Chinn *v.* Mitchell, 2 Metc. 92. But *compare* Pearce *v.* Hedrick, 3 Litt. 109.

Michigan.— Barrows *v.* Doty, Harr. 1.

Mississippi.— Smith *v.* Walker, 8 Sm. & M. 131; Yeizer *v.* Burke, 3 Sm. & M. 439.

New York.— Berry *v.* Thompson, 17 Johns. 436; Paterson *v.* Bangs, 9 Paige 627; Bartholomew *v.* Yaw, 9 Paige 165; Lansing *v.* Eddy, 1 Johns. Ch. 49; Peirson *v.* Smith, Clarke 228.

North Carolina.— Branton *v.* Dixon, 5 N. C. 225.

Ohio.— Rains *v.* Scott, 13 Ohio 107.

Tennessee.— McKoin *v.* Cooley, 3 Humphr. 559; Nance *v.* Gregory, 1 Tenn. Ch. 636.

Virginia.— Brown *v.* Toell, 5 Rand. 543, 16 Am. Dec. 759.

See 30 Cent. Dig. tit. "Judgment," § 810.

Gambling contracts.— The statutes being generally so framed as to make all gambling contracts absolutely void, and sometimes also attaching the same invalidity to judgments recovered upon them, it is generally held that equity may enjoin a judgment recovered on such a contract, without reference to the

never, it has been held, where the party seeking relief is *in pari delicto* with the other.[85]

5. WANT OR FAILURE OF CONSIDERATION. Although certain decisions favor the right of equity to enjoin the enforcement of a judgment, on account of the want or failure of consideration for the contract on which it is founded, on the broad ground that it would be against conscience to permit the collection of the judgment under such circumstances,[86] yet the general doctrine is that this is a defense which should be interposed in the action at law, and will furnish no ground for relief in equity if the party pleaded it at law, or might have done so.[87] However, equity may relieve him against the judgment where the defense could not have been set up at law,[88] where there are circumstances in the case amounting to fraud or deceit,[89] or where the failure of consideration occurs or is discovered after the rendition of the judgment,[90] always provided he has then no adequate remedy at

question whether the defense could have been interposed at law. Harris *v.* McDonald, 194 Ill. 75, 62 N. E. 310; West *v.* Carter, 129 Ill. 249, 21 N. E. 782; Lucas *v.* Nichols, 66 Ill. 41; Mallett *v.* Butcher, 41 Ill. 382; Clay *v.* Fry, 3 Bibb (Ky.) 248, 6 Am. Dec. 654; Gough *v.* Pratt, 9 Md. 526; Lucas *v.* Waul, 12 Sm. & M. (Miss.) 157; Skipwith *v.* Strother, 3 Rand. (Va.) 214; Woodson *v.* Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612. See 30 Cent. Dig. tit. "Judgment," § 810. But in several states it is the rule that relief in equity cannot be granted on this ground if the defense could have been made effectual at law. Owens *v.* Van Winkle Gin, etc., Co., 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767; Wilkerson *v.* Whitney, 7 Mo. 295; Jones *v.* Jones, 4 N. C. 547. And where a party has unsuccessfully attempted to resist the payment of a debt for which he is sued at law, on the ground of its being based on a gaming transaction, he cannot afterward have relief in equity. Moffett *v.* White, 1 Litt. (Ky.) 324.

85. Young *v.* Beardsley, 11 Paige (N. Y.) 93; McDonald *v.* Campbell, 3 Pittsb. (Pa.) 554; Barnett *v.* Barnett, 83 Va. 504, 2 S. E. 733; Sample *v.* Barnes, 14 How. (U. S.) 70, 14 L. ed. 330; Creath *v.* Sims, 5 How. (U. S.) 192, 12 L. ed. 110.

Lottery transaction.— A default judgment against a person engaged in conducting a lottery will not be enjoined at the suit of defendant upon the ground that his business is illegal. Pacific Debenture Co. *v.* Caldwell, 147 Cal. 106, 81 Pac. 314.

86. *Georgia.*— Wright *v.* McDonald, 44 Ga. 452.

Illinois.— Weaver *v.* Poyer, 70 Ill. 567.

Kansas.— Scott *v.* Paulen, 15 Kan. 162.

Kentucky.— Schooling *v.* McGee, 1 T. B. Mon. 232; Harper *v.* Coleman, 4 Litt. 156; Booth *v.* Booth, 3 Litt. 57.

Louisiana.— Davidson *v.* New Orleans, 34 La. Ann. 170.

Missouri.— Bassett *v.* Henry, 34 Mo. App. 548.

North Carolina.— Cox *v.* Jerman, 41 N. C. 526; Singleton *v.* Ogden, 5 N. C. 157.

South Carolina.— Hunter *v.* Boykin, 1 Desauss. Eq. 108.

Tennessee.— Irwin *v.* Burnett, 6 Humphr. 342.

West Virginia.— Jarrett *v.* Goodnow, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927.

United States.— Skillern *v.* May, 4 Cranch 137, 2 L. ed. 574.

See 30 Cent. Dig. tit. "Judgment," § 786.

87. *Alabama.*— Howell *v.* Motes, 54 Ala. 1; White *v.* Ross, 5 Stew. & P. 123; Isbell *v.* Morris, 1 Stew. & P. 41; McMillion *v.* Pigg, 3 Stew. 165.

Arkansas.— Dickson *v.* Richardson, 16 Ark. 114; Dugan *v.* Cureton, 1 Ark. 31, 31 Am. Dec. 727.

California.— Jackson *v.* Norton, 6 Cal. 187.

Delaware.— Whitaker *v.* Wickersham, 5 Del. Ch. 187.

Georgia.— Allen *v.* Thornton, 51 Ga. 594.

Indiana.— Garrison *v.* Cobb, 106 Ind. 245, 6 N. E. 332; Smith *v.* Tyler, 51 Ind. 512; Ricker *v.* Pratt, 48 Ind. 73; Hardy *v.* Stone, 23 Ind. 597; Pichon *v.* McHenry, 6 Blackf. 517; Raburn *v.* Shortridge, 2 Blackf. 480.

Kentucky.— Booker *v.* Meriwether, 4 Litt. 212; Allen *v.* Philips, 2 Litt. 1; French *v.* Orear, 4 Bibb 249; Gorman *v.* Young, 18 S. W. 369, 13 Ky. L. Rep. 785.

Louisiana.— Butman *v.* Forshay, 21 La. Ann. 165.

Mississippi.— McLaurin *v.* Parker, 24 Miss. 509.

Missouri.— Bartlett *v.* Pettus, 3 Mo. 345.

New York.— Tiffany *v.* Norris, 18 N. Y. Suppl. 428.

North Carolina.— Waldrop *v.* Green, 63 N. C. 344.

Wisconsin.— Marsh *v.* Edgerton, 1 Chandl. 198.

See 30 Cent. Dig. tit. "Judgment," § 786.

88. Greenlee *v.* Gaines, 13 Ala. 198, 48 Am. Dec. 49.

89. Pelham *v.* Floyd, 9 Ark. 530; Poe *v.* Decker, 5 Ind. 150; Hoggins *v.* Becraft, 1 Dana (Ky.) 28; Sturgus *v.* Simpson, 2 J. J. Marsh. (Ky.) 502; Jackson *v.* Tong, 1 A. K. Marsh. (Ky.) 81.

90. *Alabama.*— Wray *v.* Furniss, 27 Ala. 471.

Georgia.— Odell *v.* Reed, 54 Ga. 142.

Illinois.— McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449, holding that a bill may be filed to enjoin proceedings on a judgment of

law,[91] which is the case for instance where his remedy would be by an action against the other party and the latter is insolvent,[92] and provided the complainant himself is free from all fraud or dishonesty and is injured by the judgment as it stands.[93]

6. PAYMENT — a. Payment or Settlement of Claim in Suit. Payment, settlement, or discharge of the claim in suit must generally be set up as a defense before judgment, and it will furnish no ground for a court of equity to enjoin the judgment, unless the party was prevented from making his defense at law by fraud, circumvention, or deceit, or by an accident.[94] But it is otherwise where the circumstances of the case were such that this plea could not have been received in the action at law.[95] So also, where the payment or settlement was made after

one of the courts of the state, recovered upon a judgment in the courts of another state, if the party applying has not been guilty of laches in the assertion of his rights, and the judgment of the foreign court has been reversed.

Kentucky.— Waters *v.* Mattingly, 1 Bibb 244, 4 Am. Dec. 631.

Montana.— O'Rourke *v.* Schultz, 23 Mont. 285, 58 Pac. 712.

See 30 Cent. Dig. tit. "Judgment," § 786.

But *compare* Morrison *v.* Crooks, 3 Rob. (La.) 273; Wright *v.* Smith, 13 N. Y. App. Div. 536, 43 N. Y. Suppl. 728.

91. Hardwick *v.* Forbes, 1 Bibb (Ky.) 212; Hulett *v.* Hamilton, 60 Minn. 21, 61 N. W. 672.

92. Ponder *v.* Cox, 28 Ga. 305; Gillett *v.* Sullivan, 127 Ind. 327, 26 N. E. 827; Luckett *v.* Triplett, 2 B. Mon. (Ky.) 39; Dudley *v.* Bryan, 6 J. J. Marsh. (Ky.) 231; Dorsey *v.* Shepherd, 9 W. Va. 57.

Non-residence of judgment creditor.— The fact that the vendor of a chattel resides in another state and has brought suit for the price in the courts of this state is no ground for a court of equity to enjoin his judgment at law for the price, on account of a breach of warranty in the sale. Shenault *v.* Eaton, 4 Yerg. (Tenn.) 98.

93. Cheney *v.* Hovey, 56 Kan. 637, 44 Pac. 605; Brown *v.* Poindexter, 10 Sm. & M. (Miss.) 596; Rollins *v.* National Casket Co., 40 W. Va. 590, 21 S. E. 722.

Want of title to land sold.— A vendee who enters under a title bond and holds the land under that title until the statute of limitations bars a recovery against him by an adverse title cannot set up defect of title in his vendor, existing at the date of the sale to him, as ground for enjoining a judgment for the purchase-money. Amick *v.* Bowyer, 3 W. Va. 7. And see Yancey *v.* Lewis, 4 Hen. & M. (Va.) 390, holding that a purchaser of land in possession cannot be relieved against a judgment for the purchase-money on the ground of defect in the title of the vendor; but there must be an actual eviction.

94. *Alabama.*— Sanders *v.* Fisher, 11 Ala. 812; Moore *v.* Dial, 3 Stew. 155.

Connecticut.— Gates *v.* Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268.

District of Columbia.— Rider *v.* Morsell, 3 MacArthur 186.

Illinois.— Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Gold *v.* Bailey, 44 Ill. 491, 92 Am. Dec. 190; Finley *v.* Thayer, 42 Ill. 350; Fillmore *v.* Hodgman, 71 Ill. App. 554.

Kentucky.— Walker *v.* Thomas, 88 Ky. 486, 11 S. W. 434, 11 Ky. L. Rep. 20; Craig *v.* Whips, 1 Dana 375; Hall *v.* Burton, 3 J. J. Marsh. 567; Reeder *v.* Duncan, 1 Bibb 368.

Louisiana.— Garlick *v.* Reece, 8 La. 101.

Maine.— Devoll *v.* Scales, 49 Me. 320.

Maryland.— Hall *v.* McCann, 51 Md. 345; Webster *v.* Hardisty, 28 Md. 592; Tabler *v.* Castle, 12 Md. 144; Worthington *v.* Bicknell, 2 Harr. & J. 58; Chase *v.* Manhardt, 1 Bland 333.

Missouri.— Reese *v.* Smith, 12 Mo. 344; Yantis *v.* Burdett, 4 Mo. 4; Strong *v.* Hopkins, 1 Mo. 530.

New Jersey.— Moore *v.* Gamble, 9 N. J. Eq. 246.

New York.— Gardner *v.* Oliver Lee & Co.'s Bank, 11 Barb. 558; Foster *v.* Wood, 6 Johns. Ch. 87; Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513.

North Carolina.— Jones *v.* Cameron, 81 N. C. 154; Deaver *v.* Erwin, 42 N. C. 250.

South Carolina.— Sullivan *v.* Shell, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894.

Tennessee.— Palmer *v.* Malone, 1 Heisk. 549.

Texas.— Dickenson *v.* McDermott, 13 Tex. 248; Bates *v.* Wills Point Bank, 11 Tex. Civ. App. 73, 32 S. W. 339. The fact that a party is seeking to enforce a judgment without giving proper credits does not entitle the judgment debtor to enjoin the collection of the whole judgment. Alexander *v.* Baylor, 20 Tex. 560.

Virginia.— Sitlington *v.* Kinney, 29 Gratt. 91; Harnsbarger *v.* Kinney, 13 Gratt. 511; Cabell *v.* Roberts, 6 Rand. 580; Foster *v.* Clarke, 5 Munf. 430; Branch *v.* Burnley, 1 Call 147.

United States.— Gear *v.* Parish, 5 How. 168, 12 L. ed. 100.

See 30 Cent. Dig. tit. "Judgment," § 788.

Fraud.— A judgment recovered for an unjust amount, after an executed agreement of settlement, relied on by defendant, but invalid as an agreement because made on Sunday, will be enjoined in equity. Blakesley *v.* Johnson, 13 Wis. 530.

95. Hawkins *v.* Harding, 37 Ill. App. 564; Barnes *v.* Lloyd, 1 How. (Miss.) 584.

the institution of the suit, and was not then pleadable, a court of equity will grant relief against the judgment.[96]

b. Payment or Satisfaction of Judgment. It is generally held that equity may enjoin a judgment creditor from proceeding to collect a judgment which has been in fact paid, discharged, or satisfied,[97] although some authorities hold otherwise, considering the remedy at law to be adequate;[98] and it is clear that one who might have set up the fact of payment or discharge of a judgment, by way of defense to an action at law upon it, or in a proceeding to revive it, cannot claim equitable relief against its enforcement.[99]

c. Relief to Sureties and Indorsers. Although there is nothing in the mere character of a surety entitling him to the special consideration of equity,[1] yet there may be circumstances giving him a right to relief against the judgment which would not be available to the principal, such as an extension of the time of

96. Florat *v.* Handy, 35 La. Ann. 816; Humphreys *v.* Leggett, 9 How. (U. S.) 297, 13 L. ed. 145.

97. *California.*— Thompson *v.* Laughlin, 91 Cal. 313, 27 Pac. 752.

Illinois.— Edwards *v.* McCurdy, 13 Ill. 496. *Compare* Mason *v.* Richards, 8 Ill. 25.

Indiana.— Johnson *v.* Kitch, 100 Ind. 30; Marsh *v.* Prosser, 64 Ind. 293; Bowen *v.* Clark, 46 Ind. 405. *Compare* Rich *v.* Dessar, 50 Ind. 309.

Iowa.— Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522; Harphan *v.* Worthington, 100 Iowa 313, 69 N. W. 535; Matter of Phillips, 52 Iowa 232, 3 N. W. 49.

Louisiana.— Denis *v.* Gayle, 40 La. Ann. 286, 4 So. 3; Woolfolk *v.* Degelos, 24 La. Ann. 199; Todd *v.* Paton, 12 La. Ann. 88.

Massachusetts.— Tompson *v.* Redemption Nat. Bank, 106 Mass. 128.

Michigan.— Kallander *v.* Neidhold, 98 Mich. 517, 57 N. W. 571.

Mississippi.— Moore *v.* Red, (1898) 22 So. 948.

Missouri.— Smith *v.* Taylor, 78 Mo. App. 630; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173.

Nebraska.— Phillips *v.* Kuhn, 35 Nebr. 187, 52 N. W. 881; Frey *v.* Drahos, 10 Nebr. 594, 7 N. W. 319.

New York.— Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Mallory *v.* Norton, 21 Barb. 424; Shaw *v.* Dwight, 16 Barb. 536; Deen *v.* Milne, 13 N. Y. St. 464. *Compare* Roach *v.* Duckworth, 95 N. Y. 391; Lansing *v.* Eddy, 1 Johns. Ch. 49.

Oregon.— Marks *v.* Willis, 36 Oreg. 1, 58 Pac. 526, 78 Am. St. Rep. 752.

Tennessee.— Moore *v.* Harryman, 1 Overt. 259.

Texas.— Heath *v.* Garrett, 50 Tex. 264; Texas Land, etc., Co. *v.* Worsham, 5 Tex. Civ. App. 245, 23 S. W. 938.

Wisconsin.— Johnson *v.* Huber, 106 Wis. 282, 82 N. W. 137.

See 30 Cent. Dig. tit. "Judgment," § 789.

Remission of fine.— An injunction is the proper remedy to restrain a county attorney from issuing an execution on a judgment for a fine, where the fine has been remitted by the governor. Smith *v.* State, 26 Tex. App. 49, 9 S. W. 274.

Discharge in bankruptcy.— Equity will enjoin the collection of a judgment which has been discharged by proceedings in bankruptcy. Peatross *v.* McLaughlin, 6 Gratt. (Va.) 64.

Joint debtors.— Where a separate judgment has been rendered against each of two joint tort-feasors, one judgment cannot be perpetually enjoined, while both remain in force and unsatisfied, although the other judgment has been assigned to a third person. Meixell *v.* Kirkpatrick, 25 Kan. 19.

98. *Alabama.*— Larkin *v.* Mason, 71 Ala. 227; Perrine *v.* Carlisle, 19 Ala. 686.

Arkansas.— Anthony *v.* Shannon, 8 Ark. 52.

Kentucky.— Oldham *v.* Woods, 3 T. B. Mon. 47.

Maryland.— Gorsuch *v.* Thomas, 57 Md. 334.

North Carolina.— Robinson *v.* McDowell, 125 N. C. 337, 34 S. E. 550; McRae *v.* Davis, 58 N. C. 140.

Virginia.— Coleman *v.* Anderson, 29 Gratt. 425.

West Virginia.— Rollins *v.* National Casket Co., 40 W. Va. 590, 21 S. E. 722.

See 30 Cent. Dig. tit. "Judgment," § 789.

99. *Illinois.*— Grindol *v.* Ruby, 14 Ill. App. 439.

Indiana.— Hunt *v.* Lane, 9 Ind. 248.

Mississippi.— Nevit *v.* Hamer, 5 Sm. & M. 145; Sinking Fund Com'rs *v.* Patrick, Sm. & M. Ch. 110.

Missouri.— Yantis *v.* Burdett, 3 Mo. 457.

North Carolina.— Armsworthy *v.* Cheshire, 17 N. C. 234, 34 Am. Dec. 273.

South Carolina.— Sullivan *v.* Shell, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894.

Virginia.— Barnett *v.* Barnett, 83 Va. 504, 2 S. E. 733; Harnsbarger *v.* Kinney, 13 Gratt. 511.

Contra.— Hayden *v.* Sheriff, 43 La. Ann. 385, 8 So. 919.

1. Trimble *v.* Clark, 4 Bibb (Ky.) 325; Taylor *v.* Mallory, 76 Md. 1, 23 Atl. 1098; Williams *v.* Whitworth, 1 Tenn. Ch. 215; Hardeman *v.* Harris, 7 How. (U. S.) 726, 12 L. ed. 889.

Establishing character as surety.— Where judgment is erroneously or wrongfully taken against one as principal, when he is only

payment of the debt, without his knowledge or consent,[2] a release of the principal or of cosureties,[3] a promise to the surety not to hold him liable or enforce the debt against him,[4] fraud, accident, or mistake preventing him from defending the action at law,[5] or payment or release of the debt or judgment.[6] But he cannot have relief in equity if he has been negligent in failing to defend himself before judgment,[7] or on any ground which might have been pleaded in defense in the action at law.[8]

7. Errors and Irregularities — a. In General. Equity will not set aside or enjoin a judgment recovered at law, against a party who had a full opportunity to defend himself, in a case of which the court had jurisdiction, simply on the ground that the judgment is irregular or erroneous, or because the court of chancery would in deciding the same case have come to a different conclusion.[9]

liable as surety or indorser, equity may relieve him against the judgment, on evidence showing the true character of his liability. Baubien *v.* Stoney, Speers Eq. (S. C.) 508; Creed *v.* Scruggs, 1 Heisk. (Tenn.) 590; Cahal *v.* Frierson, 3 Humphr. (Tenn.) 411. *Contra*, see Heath *v.* Derry Bank, 44 N. H. 174.

2. *Illinois.*— Kennedy *v.* Evans, 31 Ill. 258.

Michigan.— Mack *v.* Doty, Harr. 366.

Vermont.— Dunham *v.* Downer, 31 Vt. 249.

Virginia.— Dey *v.* Martin, 78 Va. 1; Armistead *v.* Ward, 2 Patt. & H. 504.

West Virginia.— Shields *v.* Reynolds, 9 W. Va. 483.

See 30 Cent. Dig. tit. "Judgment," § 791.

But see Maxwell *v.* Connor, 1 Hill Eq. (S. C.) 14, holding that an administrator of a deceased surety cannot, after judgment against the surety in a suit at law, maintain a bill to discharge the surety on the ground of an unauthorized extension of time to the principal debtor.

3. Johnson *v.* Givens, 3 Metc. (Ky.) 91.

Judgments differing in amount.— Where separate actions are brought against the principal and the surety, and judgments recovered, that against the principal being less in amount than that against the surety, it would seem to be ground for relieving the surety to the extent of the excess. But in such a case, if the court is satisfied, from facts which were not brought out at the trial, that the judgment against the surety is for the correct amount, and that against the principal too small, an injunction will not be granted. Whetcroft *v.* Christie, 4 Harr. & M. (Md.) 385.

Failure to obtain satisfaction of the judgment out of available assets of the principal debtor will not generally afford the surety ground for an injunction to restrain the enforcement of the judgment as against him. Pike *v.* State, 14 Ark. 403; Martin *v.* Orr, 96 Ind. 27; Thornton *v.* Thornton, 63 N. C. 211; Windham *v.* Crutcher, 2 Tenn. Ch. 535. But if the conduct of the judgment creditor in this respect is such as to amount to a deliberate fraud upon the rights of the surety, the latter may be entitled to relief by injunction. McMullen *v.* Hinkle, 39 Miss. 142; Wall *v.* Gressom, 4 Munf. (Va.) 110.

Defective proceedings against principal.— Where judgment has been rendered against principal and surety, it is no ground for relief in equity in favor of the surety that the principal was not duly served with process and had no opportunity to defend. Mason *v.* Miles, 63 N. C. 564; Lacy *v.* Garrard, 2 Ohio 7.

4. Roberts *v.* Miles, 12 Mich. 297; Cage *v.* Cassidy, 23 How. (U. S.) 109, 16 L. ed. 430; Union Bank *v.* Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60.

5. Costley *v.* Allen, 56 Ala. 198; Norris *v.* Pollard, 75 Ga. 358; Dew *v.* Hamilton, 23 Ga. 414; Evans *v.* Cook, 11 Nev. 69. *Compare* Hamer *v.* Sears, 81 Ga. 288, 6 S. E. 810.

6. Merrill *v.* San Diego First Nat. Bank, 94 Cal. 59, 29 Pac. 242; Kallander *v.* Neidhold, 98 Mich. 517, 57 N. W. 571.

Payment of the debt before suit, not taken advantage of in the original action, cannot be alleged by the surety as a ground for relief against the judgment. Foster *v.* Wood, 6 Johns. Ch. (N. Y.) 87.

7. McGrew *v.* Tombeckbee Bank, 5 Port. (Ala.) 547; Smith *v.* Powell, 50 Ill. 21; Ebersole *v.* Lattimer, 65 Iowa 164, 21 N. W. 500; Smith *v.* McLain, 11 W. Va. 654.

8. Baine *v.* Williams, 10 Sm. & M. (Miss.) 113; Vilas *v.* Jones, 1 N. Y. 274; Loud *v.* Sergeant, 1 Edw. (N. Y.) 164; Smyth *v.* Barbee, 9 Lea (Tenn.) 173.

Matters not pleadable.— Where, in an action on a bond, the surety is not permitted to allege facts sufficient for his defense by a plea of new matters arising after issue joined, he is entitled to relief in equity from the judgment rendered against him. Leggett *v.* Humphreys, 21 How. (U. S.) 66, 16 L. ed. 50.

Matters adjudicated and determined in the original action cannot be made the basis for an application by the surety for relief in equity. Will *v.* Dunn, 5 Gratt. (Va.) 384.

9. *Alabama.*— Saunders *v.* Albritton, 37 Ala. 716; McCollum *v.* Prewitt, 37 Ala. 573; Coffin *v.* McCullough, 30 Ala. 107; Lucas *v.* Darien Bank, 2 Stew. 280; Jones *v.* Watkins, 1 Stew. 81.

California.— Hull *v.* Calkins, 137 Cal. 84, 69 Pac. 838.

Colorado.— Hall *v.* Lincoln, 10 Colo. App. 360, 50 Pac. 1047.

Georgia.— Durant *v.* D'Auxy, 107 Ga. 456,

b. Errors of Law. A court of equity will not interfere with a judgment recovered at law on the ground that it is erroneous as a matter of law, or on account of errors alleged to have been committed by the court on the trial of the case.[10]

33 S. E. 478; Robuck *v.* Harkins, 38 Ga. 174; Logan *v.* Gigley, 11 Ga. 243.

Illinois.— Clark *v.* Shawen, 190 Ill. 47, 60 N. E. 116; Klinesmith *v.* Van Bramer, 104 Ill. App. 384; Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365.

Indiana.— Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 336; Fitch *v.* Byall, 149 Ind. 554, 49 N. E. 455; Davis *v.* Clements, 148 Ind. 605, 47 N. E. 1056, 62 Am. St. Rep. 539; Cicero *v.* Williamson, 91 Ind. 541; Krug *v.* Davis, 85 Ind. 309; De Haven *v.* Covalt, 83 Ind. 344; Macy *v.* Lloyd, 23 Ind. 60; Dunn *v.* Fish, 8 Blackf. 407.

Iowa.— Hendron *v.* Kinner, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783; Drake *v.* Hanshaw, 47 Iowa 291.

Kansas.— Missouri Pac. R. Co. *v.* Reid, 34 Kan. 410, 8 Pac. 846; Burke *v.* Wheat, 22 Kan. 722.

Kentucky.— Biggs *v.* Garrard, 6 B. Mon. 484, 44 Am. Dec. 778.

Louisiana.— Chiasson *v.* Duplantier, 10 La. 570.

Maryland.— Chappell Chemical, etc., Co. *v.* Virginia Sulphur Mines Co., (1897) 36 Atl. 260; East Baltimore Station Methodist Protestant Church *v.* Baltimore, 6 Gill 391, 48 Am. Dec. 540.

Michigan.— Tromble *v.* Hoffman, 130 Mich. 676, 90 N. W. 694.

Mississippi.— Parker *v.* Horne, 38 Miss. 215; Ammons *v.* Whitehead, 31 Miss. 99; Thomas *v.* Tappan, Freem. 472.

Missouri.— Hazeltine *v.* Reusch, 51 Mo. 50; Missouri, etc., R. Co. *v.* Warden, 73 Mo. App. 117.

New Jersey.— Stout *v.* Slocum, 52 N. J. Eq. 88, 28 Atl. 7; Phillips *v.* Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Dringer *v.* Erie R. Co., 42 N. J. Eq. 573, 8 Atl. 811.

New York.— Mulligan *v.* Brophy, 8 How. Pr. 135; Donovan *v.* Finn, Hopk. 59, 14 Am. Dec. 531; Holmes *v.* Remsen, 7 Johns. Ch. 286; De Riemer *v.* Cantillon, 4 Johns. Ch. 85; Shottenkirk *v.* Wheeler, 3 Johns. Ch. 275.

North Carolina.— Grantham *v.* Kennedy, 91 N. C. 148; Martin *v.* Deep River Copper Min. Co., 64 N. C. 653; Williams *v.* Rockwell, 64 N. C. 325; Foard *v.* Alexander, 64 N. C. 69.

Pennsylvania.— Eyster's Appeal, 65 Pa. St. 473; Biles' Estate, 2 Brewst. 609; Vanarsdalen *v.* Whitaker, 10 Phila. 153.

South Carolina.— McDowall *v.* McDowall, Bailey Eq. 324; Cohen *v.* Dubose, Harp. Eq. 102, 14 Am. Dec. 709.

Texas.— Pryor *v.* Emerson, 22 Tex. 162; Fitzhugh *v.* Orton, 12 Tex. 4. While an action to set aside a judgment, and sheriff's sale of land thereunder, for errors apparent on the face of the record, will not lie, yet if the errors are such as render the judgment void against collateral attack, the action may be maintained as a suit to recover the property. Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838. And see Gulf, etc., R. Co. *v.* Stephenson, (Civ. App. 1894) 26 S. W. 236.

Vermont.— Paddock *v.* Palmer, 19 Vt. 581; Fletcher *v.* Warren, 18 Vt. 45.

Virginia.— Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; Roseberger *v.* Bowen, 84 Va. 660, 5 S. E. 697; Slack *v.* Wood, 9 Gratt. 40; Turpin *v.* Thomas, 2 Hen. & M. 139, 3 Am. Dec. 615.

West Virginia.— Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

Wisconsin.— Ford *v.* Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902; Jilsun *v.* Stebbins, 41 Wis. 235; Ableman *v.* Roth, 12 Wis. 81; Merritt *v.* Baldwin, 6 Wis. 439.

United States.— Ludlow *v.* Ramsey, 11 Wall. 581, 20 L. ed. 216; Tarver *v.* Tarver, 9 Pet. 174, 9 L. ed. 91; Smith *v.* Schwed, 9 Fed. 483.

England.— Baker *v.* Morgans, 2 Dow. 526, 3 Eng. Reprint 954.

See 30 Cent. Dig. tit. "Judgment," § 797 *et seq.*

10. *Alabama.*— Murphree *v.* Bishop, 79 Ala. 404; Baker *v.* Pool, 56 Ala. 14; Jones *v.* Watkins, 1 Stew. 81.

Arkansas.— Johnson *v.* Branch, 48 Ark. 535, 3 S. W. 819; *Ex p.* Christian, 23 Ark. 641.

California.— Daly *v.* Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61.

Georgia.— Irvin *v.* Sanders, 52 Ga. 350.

Illinois.— Gibbons *v.* Bressler, 61 Ill. 110; Chicago Waifs Mission, etc., School *v.* Excelsior Electric Co., 44 Ill. App. 425; Taylor *v.* Weagley, 17 Ill. App. 485.

Indiana.— Earl *v.* Matheney, 60 Ind. 202; Cassel *v.* Scott, 17 Ind. 514; Dunn *v.* Fish, 8 Blackf. 407; Pichon *v.* McHenry, 6 Blackf. 517.

Iowa.— Ashlock *v.* Ashlock, 52 Iowa 319, 1 N. W. 594, 3 N. W. 131; York *v.* Boardman, 40 Iowa 57.

Kentucky.— Reynolds *v.* Horine, 13 B. Mon. 234; Bradley *v.* Morgan, 2 A. K. Marsh. 369; Boone County *v.* Dils, 5 Ky. L. Rep. 686.

Mississippi.— A. B. Smith Co. *v.* Holmes County Bank, (1895) 18 So. 847; McKinney *v.* Willis, 64 Miss. 82, 1 So. 3; Robb *v.* Halsey, 11 Sm. & M. 140.

Missouri.— McGindley *v.* Newton, 75 Mo. 115; Risher *v.* Roush, 2 Mo. 95, 22 Am. Dec. 442; Cooper *v.* Duncan, 58 Mo. App. 5; Corley *v.* McKeag, 57 Mo. App. 415.

Nebraska.— Fox *v.* McClay, 48 Nebr. 820, 67 N. W. 888; Haynes *v.* Aultman, 36 Nebr. 257, 54 N. W. 511.

New Jersey.— Dringer *v.* Erie R. Co., 42 N. J. Eq. 573, 8 Atl. 811; Holmes *v.* Steele, 28 N. J. Eq. 173; Vaughn *v.* Johnson, 9 N. J. Eq. 173. It is not enough that the

c. Objections as to Evidence. Equity will not enjoin the enforcement of a judgment at law either on the ground of the insufficiency of the evidence to support it,[11] or the lack of evidence of essential facts,[12] or because of erroneous action of the court in admitting or excluding particular evidence.[13]

d. Defects in Pleadings. The trial court having had jurisdiction of the parties and the subject-matter, its judgment will not be set aside or enjoined in equity on an allegation that it is not sustained by the pleadings in the case, or on account of any mistake, defect, or insufficiency in the pleadings.[14]

trial court may have erred in judgment as to a subject-matter properly before it, but it must have been led into error by some fraudulent and unconscientious act or omission of the party to be benefited by its judgment, or the court of chancery cannot take cognizance of it. Boulton *v.* Scott, 3 N. J. Eq. 231.

New York.— Stilwell *v.* Carpenter, 59 N. Y. 414; Mason *v.* Jones, 3 N. Y. 375; Jessurun *v.* Mackie, 24 Hun 624, 61 How. Pr. 261; Ayres *v.* Lawrence, 63 Barb. 454; Anderson *v.* Roberts, 18 Johns. 515, 9 Am. Dec. 235.

North Carolina.— Chambers *v.* Penland, 78 N. C. 53; Stockton *v.* Briggs, 58 N. C. 309; Glasgow *v.* Flowers, 2 N. C. 233.

Ohio.— Spencer *v.* King, 5 Ohio 182; Lieby *v.* Ludlow, 4 Ohio 469.

Oregon.— Putnam *v.* Webb, 15 Oreg. 440, 15 Pac. 711; Nicklin *v.* Hobin, 13 Oreg. 406, 10 Pac. 835.

Pennsylvania.— Lebanon Mut. Ins. Co. *v.* Erb, 2 Chest. Co. Rep. 537 [*affirmed* in 2 Chest. Co. Rep. 570].

Rhode Island.— Barr *v.* Carpenter, 16 R. I. 724, 19 Atl. 392.

Tennessee.— Pardue *v.* West, 1 Lea 729; Thompson *v.* Meek, 3 Sneed 271; Nicholson *v.* Patterson, 6 Humphr. 394; Chester *v.* Scott, 4 Hayw. 14; Moore *v.* McGaha, 3 Tenn. Ch. 415.

Texas.— Weaver *v.* Vandervanter, 84 Tex. 691, 19 S. W. 889; Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991.

Vermont.— Pettes *v.* Whitehall Bank, 17 Vt. 435.

Virginia.— Worsham *v.* Hardaway, 5 Gratt. 60.

Washington.— Davis *v.* Fields, 9 Wash. 78, 37 Pac. 281; Bowman *v.* McGregor, 6 Wash. 118, 32 Pac. 1059.

United States.— Leslie *v.* Urbana, 56 Fed. 762, 6 C. C. A. 111; Suydam *v.* Beals, 23 Fed. Cas. No. 13,653, 4 McLean 12.

See 30 Cent. Dig. tit. "Judgment," § 799.

11. *Iowa.*— Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111.

Kentucky.— Nashville, etc., R. Co. *v.* Mattingly, 101 Ky. 219, 40 S. W. 673, 19 Ky. L. Rep. 373.

Louisiana.— Landry *v.* Bertrand, 48 La. Ann. 48, 19 So. 126; Howell *v.* New Orleans, 28 La. Ann. 681; Naughton *v.* Dinkgrave, 25 La. Ann. 538; Taliaferro *v.* Steele, 14 La. Ann. 656.

Tennessee.— Martin *v.* Porter, 4 Heisk. 407; Hembree *v.* White, 2 Overt. 202.

Texas.— Robinson *v.* Sanders, 33 Tex. 774.

See 30 Cent. Dig. tit. "Judgment," § 801.

12. Pico *v.* Sunol, 6 Cal. 294; Hammer *v.* Rochester, 2 J. J. Marsh. (Ky.) 144; Maskell *v.* Horner, 10 La. Ann. 641.

13. *Indiana.*— Edgerton *v.* Comstock, 3 Ind. 383.

New Jersey.— Vaughn *v.* Johnson, 9 N. J. Eq. 173.

North Carolina.— Stockton *v.* Briggs, 58 N. C. 309.

South Carolina.— Hunt *v.* Coachman, 6 Rich. Eq. 286.

Wisconsin.— Merritt *v.* Baldwin, 6 Wis. 439.

See 30 Cent. Dig. tit. "Judgment," § 801.

Contra.— See Ambler *v.* Wyld, 2 Wash. (Va.) 36, where it was held proper to grant a new trial in chancery, on the ground that admissible evidence was improperly rejected on the trial at law.

Evidence not available at law.— A judgment in a suit by an administrator cannot be enjoined merely because, under the statute, defendant was not competent to testify in the suit, and there was no other evidence to sustain his defense. Williams *v.* Carr, 4 Colo. App. 368, 36 Pac. 646.

That the jury made erroneous deductions from the evidence, whereby an excessive verdict was rendered, is no ground for relief in equity. Pogue *v.* Shotwell, 2 Dana (Ky.) 281.

14. *Alabama.*— Meyer *v.* Calera Land Co., 133 Ala. 554, 31 So. 938.

California.— Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12. Equity will not set aside a judgment solely because the complaint was filed on a legal holiday. Peterson *v.* Weissbein, 65 Cal. 42, 2 Pac. 730.

Indiana.— Schwab *v.* Madison, 49 Ind. 329.

Iowa.— Chas. C. Taft Co. *v.* Bounani, 110 Iowa 739, 81 N. W. 469, defendant corporation erroneously designated in the petition as a partnership.

Missouri.— Hunter *v.* Kansas City Safe-Deposit, etc., Bank, 158 Mo. 262, 58 S. W. 1053.

Nebraska.— Johnson *v.* Jones, 2 Nebr. 126, petition not verified.

New Jersey.— Jackson *v.* Darcy, 1 N. J. Eq. 194.

Tennessee.— Robertson *v.* Winchester, 85 Tenn. 171, 1 S. W. 781, misnomer of defendant.

Texas.— Moore *v.* Britton, 15 Tex. Civ. App. 237, 38 S. W. 528 (petition containing no prayer for relief); Reast *v.* Hughes, (Civ. App. 1896) 33 S. W. 1003.

Virginia.— Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777;

e. Irregularities in Proceedings. Irregularities or errors in the proceedings leading up to a judgment furnish no ground for equitable interference,[15] unless brought about by fraud or collusion,[16] or of such a nature as to deprive the party of all opportunity of making his defense in the action at law.[17]

f. Error in Amount of Judgment or Relief Granted. Where through fraud, accident, mistake, or miscalculation a judgment is entered for an amount or in terms not intended or inconsistent with the pleadings, equity may give relief on clear and satisfying proof.[18] But this action will not be taken where the party has

Grigg *v.* Dalsheimer, 88 Va. 508, 13 S. E. 993; Perkins *v.* Clements, 1 Patt. & H. 141.

Wisconsin.— John V.. Farwell Co. *v.* Hilbert, 91 Wis. 437, 65 N. W. 172, 30 L. R. A. 235.

United States.— Allen *v.* Allen, 97 Fed. 525, 38 C. C. A. 336.

See 30 Cent. Dig. tit. "Judgment," § 803.

15. *Alabama.*— McCullum *v.* Prewitt, 37 Ala. 573; Lucas *v.* Darien Bank, 2 Stew. 280. An injunction will not issue to restrain the enforcement of a judgment against an infant merely because no guardian *ad litem* was appointed to defend for him. Levystein *v.* O'Brien, 106 Ala. 352, 17 So. 550, 54 Am. St. Rep. 56, 30 L. R. A. 707.

Arkansas.— Clopton *v.* Carloss, 42 Ark. 560.

Georgia.— Wimpy *v.* Gaskill, 79 Ga. 620, 7 S. E. 156.

Illinois.— Howe *v.* South Park Com'rs, 119 Ill. 101, 7 N. E. 333; Bell *v.* Gardner, 77 Ill. 319; Parker *v.* Singer Mfg. Co., 9 Ill. App. 383.

Indiana.— Rhodes Burford Furniture Co. *v.* Mattox, 135 Ind. 372, 34 N. E. 326, 35 N. E. 11; Wilhite *v.* Wilhite, 124 Ind. 226, 24 N. E. 1039; Nelson *v.* Johnson, 18 Ind. 329.

Iowa.— Phelan *v.* Johnson, 80 Iowa 727, 46 N. W. 68.

Kansas.— Evangelical Assoc. Pub. House *v.* Heyl, 61 Kan. 634, 60 Pac. 317; Burke *v.* Wheat, 22 Kan. 722.

Kentucky.— Moore *v.* Lockitt, 2 A. K. Marsh. 526.

Louisiana.— McKnight *v.* Connell, 14 La. Ann. 396; Gilmore *v.* Gilmore, 9 La. Ann. 197; Seymour *v.* Cooley, 9 La. 72.

Maryland.— Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646.

New York.— Bush *v.* O'Brien, 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685; Sandford *v.* Sinclair, 8 Paige 373.

Ohio.— Reynolds *v.* Reynolds, 3 Ohio 268.

South Carolina.— Henderson *v.* Mitchell, Bailey Eq. 113, 21 Am. Dec. 526; McGuire *v.* McGowan, 4 Desauss. Eq. 486.

Texas.— Roller *v.* Wooldridge, 46 Tex. 485.

See 30 Cent. Dig. tit. "Judgment," § 804.

Misconduct of jury, or of persons influencing the jury, or bringing pressure to bear upon the jury to hasten their verdict, will not be ground for relief in equity. Crafts *v.* Hall, 4 Ill. 131; Cressap *v.* Winchester, 6 Rob. (La.) 458. *Compare* Lawless *v.* Reese, 3 Bibb (Ky.) 486.

Trial without jury, where a jury was necessary or the party was entitled to it, is not ground for equity to interfere, there being a remedy at law. Blanck *v.* Speckman, 23 La. Ann. 146.

Mistake of jurors.— In certain early cases in Virginia, it was held that equity might properly intervene and order a new trial, where it was shown that the verdict was founded on a mistake made by the jury, or by some of their number, concerning the facts of the case or their duty in the premises. Cochran *v.* Street, 1 Wash. (Va.) 79; Woods *v.* Macrae, Wythe (Va.) 253.

16. Byars *v.* Justin, 2 Tex. App. Civ. Cas. § 686. See also *infra*, X, B, 12, d.

17. Carrington *v.* Holabird, 19 Conn. 84; Kincaid *v.* Conly, 62 N. C. 270.

18. *Alabama.*— Norris *v.* Cottrell, 20 Ala. 304.

Connecticut.— Wells *v.* Bridgeport Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250.

Illinois.— Dooley *v.* Stipp, 26 Ill. 86.

Indiana.— Davidson *v.* King, 49 Ind. 338.

Iowa.— Reno *v.* Teagarden, 24 Iowa 144. See also Partridge *v.* Harrow, 27 Iowa 96, 99 Am. Dec. 643.

Maine.— Cunningham *v.* Gusbee, 73 Me. 417.

Maryland.— Katz *v.* Moore, 13 Md. 566.

Mississippi.— Baggett *v.* Watson, 70 Miss. 64, 11 So. 679.

Missouri.— Case *v.* Cunningham, 61 Mo. 434; Wilson *v.* Boughton, 50 Mo. 17. *Compare* Davis *v.* Wade, 58 Mo. App. 641.

Ohio.— Gill *v.* Pelkey, 54 Ohio St. 348, 43 N. E. 991.

Oregon.— Smith *v.* Butler, 11 Oreg. 46, 4 Pac. 517. *Compare* George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1.

South Carolina.— Coben *v.* Dubose, Harp. Eq. 102, 14 Am. Dec. 709.

Tennessee.— Murphy *v.* Johnson, 107 Tenn. 552, 64 S. W. 894; Gwinn *v.* Newton, 8 Humphr. 710.

Texas.— Wills Point Bank *v.* Bates, 76 Tex. 329, 13 S. W. 309. *Compare* Reast *v.* Hughes, (Civ. App. 1896) 33 S. W. 1003.

Virginia.— Rust *v.* Ware, 6 Gratt. 50, 52 Am. Dec. 100.

United States.— Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 71 Fed. 826. And see L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 128 Fed. 343, 63 C. C. A. 73.

See 30 Cent. Dig. tit. "Judgment," § 806.

Judicial error.— If the error in the amount of the judgment is judicial instead of merely clerical, arising from the application of the mind of the court or jury to the facts in the case, and resulting in the award of a sum greater than it should justly be, equity has

an adequate remedy by appeal, motion, or other proceeding in the law court,[19] or where he is chargeable with negligence in permitting the mistake to occur or in failing to seek his remedy in due time.[20]

g. Irregular Rendition or Entry. Irregularities or errors in the time, form, or manner of the rendition or entry of a judgment furnish no ground for equity to reform it or enjoin its collection,[21] unless in cases where there is no other way of obtaining relief,[22] or where the party has been prevented from obtaining relief at law by fraud, accident, or the act of the opposite party, without fault or neglect on his own part.[23]

8. Defenses Not Interposed at Law — a. Legal Defenses in General. A defendant in an action at law who has a defense to the suit of which he is fully aware, which is cognizable in a court of law and within its jurisdiction, and which he has an opportunity to interpose, is chargeable with negligence if he fails to set up such defense and insist upon it, not being prevented from doing so by any fraud, accident, or surprise; and he cannot have relief in equity against the judgment in that action, on the same grounds which constituted such defense, however unjust or inequitable the judgment may appear to be.[24] This rule applies to all defenses

generally no power to interfere, the remedy being by appeal or other appropriate proceeding at law. Reed *v.* Clarke, 4 T. B. Mon. (Ky.) 18; Smith *v.* Butler, 11 Oreg. 46, 4 Pac. 517.

Costs.— Mere error in the taxation of costs is no cause for enjoining a judgment. Stiver *v.* Stiver, 3 Ohio 19; Harriman *v.* Swift, 31 Vt. 385.

19. *California.*— Holmes *v.* Rogers, 13 Cal. 191.

Louisiana.— Walker *v.* Villavaso, 26 La. Ann. 42.

New York.— New York *v.* Cornell, 9 Hun 215.

Tennessee.— King *v.* Vaughan, 8 Yerg. 59, 29 Am. Dec. 104.

West Virginia.— Alleman *v.* Kight, 19 W. Va. 201.

United States.— Furnald *v.* Glenn, 56 Fed. 372.

See 30 Cent. Dig. tit. "Judgment," § 806. And see *supra*, X, A, 4.

20. Freeman *v.* Hart, 61 Iowa 525, 16 N. W. 597; Muscatine *v.* Mississippi, etc., R. Co., 17 Fed. Cas. No. 9,971, 1 Dill. 536. And see *supra*, X, A, 3, b.

21. *California.*— Hunter *v.* Hoole, 17 Cal. 418; Logan *v.* Hillegass, 16 Cal. 200.

Indiana.— Pittsburgh, etc., R. Co. *v.* Elwood, 79 Ind. 306; Cooper *v.* Butterfield, 4 Ind. 423; State Bank *v.* Young, 2 Ind. 171, 52 Am. Dec. 501.

Louisiana.— Levi *v.* Converae, 20 La. Ann. 558.

Maryland.— Smith *v.* Bowes, 38 Md. 463.

Mississippi.— McRaney *v.* Coulter, 39 Miss. 390.

New Jersey.— Cutter *v.* Kline, 35 N. J. Eq. 534.

New York.— Whittemore *v.* Judd Linseed, etc., Oil Co., 16 Daly 290, 10 N. Y. Suppl. 737.

Washington.— Long *v.* Eisenbeis, 18 Wash. 423, 51 Pac. 1061.

United States.— Skirving *v.* National L. Ins. Co., 59 Fed. 742, 8 C. C. A. 241.

See 30 Cent. Dig. tit. "Judgment," § 807.

No finding of facts.— A judgment is not void for want of a finding of facts to support it, but is merely erroneous, and the lack of such finding is no cause for enjoining the judgment. Petalka *v.* Fitle, 33 Nebr. 756, 51 N. W. 131.

Mistakes of clerk.— Some cases hold it proper for equity to grant relief where the clerk of the law court has made mistakes or erroneous entries in the record of the judgment. Prussian Nat. Ins. Co. *v.* Chichocky, 94 Ill. App. 168; Mayo *v.* Bentley, 4 Call (Va.) 528; Smith *v.* Wallace, 1 Wash. (Va.) 254.

22. Partridge *v.* Harrow, 27 Iowa 96, 99 Am. Dec. 643.

23. Weaver *v.* State, 39 Ala. 535.

24. *Alabama.* — Dampskibsaktieaelskabet Habil *v.* U. S. Fidelity, etc., Co., (1905) 39 So. 54; Kirby *v.* Kirby, 70 Ala. 370; Bibb *v.* Hitchcock, 49 Ala. 468, 20 Am. Rep. 288; Garrett *v.* Lynch, 44 Ala. 683; McCollum *v.* Prewitt, 37 Ala. 573; Watt *v.* Cobb, 32 Ala. 530; Hair *v.* Lowe, 19 Ala. 224; Foster *v.* State Bank, 17 Ala. 672; Mock *v.* Cundiff, 6 Port. 24; McGrew *v.* Tombeckbee Bank, 5 Port. 547; Thomas *v.* Hearn, 2 Port. 262; Moore *v.* Dial, 3 Stew. 155; Lucas *v.* Darien Bank, 2 Stew. 280.

Arkansas.— Lester *v.* Hoskins, 26 Ark. 63; Conway *v.* Ellison, 14 Ark. 360; Menifee *v.* Ball, 7 Ark. 520; Hempstead *v.* Watkins, 6 Ark. 317, 46 Am. Dec. 696; Bently *v.* Dillard, 6 Ark. 79; Andrews *v.* Fenter, 1 Ark. 186.

California.— Ede *v.* Hazen, 61 Cal. 360; Agard *v.* Valencia, 39 Cal. 292; Mastick *v.* Thorp, 29 Cal. 444; Phelps *v.* Peabody, 7 Cal. 50.

Connecticut.— Tyler *v.* Hamersley, 44 Conn. 419, 26 Am. Rep. 479; Day *v.* Welles, 31 Conn. 344.

Florida.— Michel *v.* Sammis, 15 Fla. 308.

Georgia.— Reynolds, etc., Estate Mortg. Co. *v.* Martin, 116 Ga. 495, 42 S. E. 796; Berry *v.* Burghard, 111 Ga. 117, 36 S. E.

which are purely legal in their nature. It includes the defense that there had

459; Griffin *v.* Smyly, 105 Ga. 475, 30 S. E. 416; Starnes *v.* Mutual Loan, etc., Co., 97 Ga. 400, 24 S. E. 138; Bailey *v.* State Sav. Bank, 97 Ga. 398, 24 S. E. 40; Neal *v.* Henderson, 72 Ga. 209; Smith *v.* Phinizy, 71 Ga. 641; Brinson *v.* Wessolowsky, 58 Ga. 293; Brown *v.* Wilson, 56 Ga. 534; Castellaw *v.* Guilmartin, 54 Ga. 299; Fricks *v.* Miller, 41 Ga. 274; Robuck *v.* Harkins, 38 Ga. 174; Cleckley *v.* Beall, 37 Ga. 583; Nisbett *v.* Cantrell, 32 Ga. 294; Vaughn *v.* Fuller, 23 Ga. 366; Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682; Robbins *v.* Mount, 3 Ga. 74.

Illinois.— Hofmann *v.* Burris, 210 Ill. 587, 71 N. E. 584; Carney *v.* Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328; Cairo, etc., R. Co. *v.* Holbrook, 92 Ill. 297; Higgins *v.* Bullock, 73 Ill. 205; Smith *v.* Allen, 63 Ill. 474; Franklin Mill Co. *v.* Schmidt, 50 Ill. 208; Smith *v.* Powell, 50 Ill. 21; Walker *v.* Kretsinger, 48 Ill. 502; Scott *v.* Whitlow, 20 Ill. 310; Greenup *v.* Woodworth, 1 Ill. 254; Greenup *v.* Brown, 1 Ill. 252; Beaugenon *v.* Turcotte, 1 Ill. 167; More *v.* Bagley, 1 Ill. 94, 12 Am. Dec. 144; Spraker *v.* Bartlett, 73 Ill. App. 522; Lewis *v.* Firemen's Ins. Co., 67 Ill. App. 195; Newman *v.* Schueck, 58 Ill. App. 328; Lavender *v.* Boaz, 17 Ill. App. 421.

Indiana.— Center Tp. *v.* Marion County, 110 Ind. 579, 10 N. E. 291; Skinner *v.* Deming, 2 Ind. 558, 54 Am. Dec. 463; Raburn *v.* Shortridge, 2 Blackf. 480; Brown *v.* Wyncoop, 2 Blackf. 230.

Iowa.— Fulliam *v.* Drake, 105 Iowa 615, 75 N. W. 479; Johnson *v.* Lyon, 14 Iowa 431; Shricker *v.* Field, 9 Iowa 366; Kriechbaum *v.* Bridges, 1 Iowa 14; Miller *v.* McGuire, Morr. 150; Faulkner *v.* Campbell, Morr. 148.

Kansas.— Myers *v.* Jones, 61 Kan. 191, 59 Pac. 275; Howard *v.* Eddy, 56 Kan. 498, 43 Pac. 1133; Ohio, etc., Mortg., etc., Co. *v.* Carter, 9 Kan. App. 621, 58 Pac. 1040.

Kentucky.— McCown *v.* Macklin, 7 Bush 308; Casey *v.* Gregory, 13 B. Mon. 505, 56 Am. Dec. 581; Moran *v.* Woodyard, 8 B. Mon. 537; Paynter *v.* Evans, 7 B. Mon. 420; Beauchamp *v.* Handley, 1 B. Mon. 135; Helm *v.* Smith, 4 J. J. Marsh. 288; Bain *v.* Harrison, 1 J. J. Marsh. 595; Perryville *v.* Letcher, 1 J. J. Marsh. 384; Hampton *v.* Dudley, 1 J. J. Marsh. 272; Shrowyer *v.* Cates, 4 T. B. Mon. 300; Sneed *v.* Coyle, 4 Litt. 163; Moore *v.* Lockitt, 2 A. K. Marsh. 526; Carpenter *v.* Hackley, 1 A. K. Marsh. 155; Cowan *v.* Price, 1 Bibb 173, 4 Am. Dec. 627; Smith *v.* Durrett, Ky. Dec. 236, 2 Am. Dec. 714; Jacobs *v.* Jacobs, 62 S. W. 263, 23 Ky. L. Rep. 186.

Louisiana.— O'Connor *v.* Sheriff, 30 La. Ann. 441; Robichaud *v.* Nelson, 28 La. Ann. 578; Mahan *v.* Accommodation Bank, 26 La. Ann. 34; Greene *v.* Johnson, 21 La. Ann. 464; Lee *v.* Hubbell, 20 La. Ann. 551; Todd *v.* Fisk, 14 La. Ann. 13; Donnell *v.* Parrott, 13 La. Ann. 251; McRae *v.* Purvis, 12 La. Ann. 85; Swain *v.* Sampson, 6 La. Ann. 799; Minor *v.* Stone, 1 La. Ann. 283; Kennard *v.* Henderson, 9 Rob. 165; De Lizardi *v.* Hardaway, 8 Rob. 22; Dayton *v.* Commercial Bank, 6 Rob. 17; Benton *v.* Roberts, 3 Rob. 224; Peytavin *v.* Winter, 8 La. 271; Garlick *v.* Reece, 8 La. 101; Gravier *v.* Roche, 5 La. 441; McMicken *v.* Millaudon, 2 La. 180; Monroe *v.* McMicken, 8 Mart. N. S. 510; Lafon *v.* Desessart, 1 Mart. N. S. 71. *Compare* Eastin *v.* Dugat, 4 La. 397.

Maine.— Bachelder *v.* Bean, 76 Me. 370; Russ *v.* Wilson, 22 Me. 207; Titcomb *v.* Potter, 11 Me. 218.

Maryland.— Ahearn *v.* Fink, 64 Md. 161, 3 Atl. 32; Ewing *v.* Nickle, 45 Md. 413; Huston *v.* Ditto, 20 Md. 305; Lyday *v.* Douple, 17 Md. 188; Katz *v.* Moore, 13 Md. 566; Little *v.* Price, 1 Md. Ch. 182.

Massachusetts.— Barton *v.* Radclyffe, 149 Mass. 275, 21 N. E. 374; Barker *v.* Walsh, 14 Allen 172.

Michigan.— Farmers' F. Ins. Co. *v.* Johnston, 113 Mich. 426, 71 N. W. 1074; Kelleher *v.* Boden, 55 Mich. 295, 21 N. W. 346; Miller *v.* Morse, 23 Mich. 365; Morris *v.* Hadley, 9 Mich. 278; Wright *v.* King, Harr. 12.

Minnesota.— Clark *v.* Lee, 58 Minn. 410, 59 N. W. 970; Sargeant *v.* Bigelow, 24 Minn. 370.

Mississippi.— Gaines *v.* Kennedy, 53 Miss. 103; Jordan *v.* Thomas, 34 Miss. 72, 69 Am. Dec. 387; Shipp *v.* Wheless, 33 Miss. 646; Scroggins *v.* Howorth, 23 Miss. 514; Love *v.* Pass, 14 Sm. & M. 158; Selser *v.* Ferriday, 13 Sm. & M. 698; Meek *v.* Howard, 10 Sm. & M. 502; Williams *v.* Jones, 10 Sm. & M. 108; Semple *v.* McGatagan, 10 Sm. & M. 98; Fanning *v.* Farmers', etc., Bank, 8 Sm. & M. 139; Smith *v.* Walker, 8 Sm. & M. 131; Benton *v.* Crowder, 7 Sm. & M. 185; Thomas *v.* Phillips, 4 Sm. & M. 358; Miller *v.* Doxey, Walk. 329.

Missouri.— Hamilton *v.* McLean, 169 Mo. 51, 68 S. W. 930; Kelly *v.* Hurt, 74 Mo. 561; Collier *v.* Easton, 2 Mo. 145.

Montana.— O'Rourke *v.* Schultz, 23 Mont. 285, 58 Pac. 712.

Nebraska.— Broken Bow *v.* Broken Bow Waterworks Co., 57 Nebr. 548, 77 N. W. 1078; Ashton *v.* Jones, 14 Nebr. 426, 16 N. W. 434.

New Jersey.— Phillips *v.* Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Mettler *v.* Easton, etc., R. Co., 26 N. J. Eq. 65; Kinney *v.* Ogden, 3 N. J. Eq. 168.

New York.— Gardiner *v.* Van Alstyne, 163 N. Y. 573, 57 N. E. 1110; Stilwell *v.* Carpenter, 59 N. Y. 414; Schroeppell *v.* Shaw, 3 N. Y. 446; Vilas *v.* Jones, 1 N. Y. 274; Ingalls *v.* Merchants' Nat. Bank, 51 N. Y. App. Div. 305, 64 N. Y. Suppl. 911; Mills *v.* Van Voorhis, 10 Abb. Pr. 152; Hamel *v.* Grimm, 10 Abb. Pr. 150; Norton *v.* Woods, 22 Wend. 520; Anderson *v.* Roberts, 18 Johns. 515, 9 Am. Dec. 235; Le Guen *v.* Gouverneur,

been a discharge of the defendant in bankruptcy proceedings[25] and the defense of the statute of limitations.[26]

b. Equitable Defenses. If a party's defense to an action at law was not within the cognizance of a court of law, being purely equitable in its nature, he is of course not chargeable with negligence in failing to make it effectual at law; and he may have relief in equity against the judgment, if it is unjust and inequitable, on the grounds constituting such defense.[27] And this rule is not altered by the

1 Johns. Cas. 436, 1 Am. Dec. 121; Southgate *v.* Montgomery, 1 Paige 41; Foster *v.* Wood, 6 Johns. Ch. 87; Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513; Dodge *v.* Strong, 2 Johns. Ch. 228; Lansing *v.* Eddy, 1 Johns. Ch. 49.

North Carolina.— Champion *v.* Miller, 55 N. C. 194; Peace *v.* Nailing, 16 N. C. 289; Gatlin *v.* Kilpatrick, 4 N. C. 147, 6 Am. Dec. 557.

Ohio.— Wood *v.* Archer, 2 Ohio 22; McCarty *v.* Burrows, 2 Ohio 20; Voight *v.* Voight, 6 Ohio Dec. (Reprint) 1127, 10 Am. L. Rec. 564; Brennen *v.* Cist, 9 Ohio S. & C. Pl. Dec. 18, 6 Ohio N. P. 1.

Oklahoma.— Herbein *v.* Moore, 10 Okla. 317, 61 Pac. 1060.

Oregon.— Oregon R., etc., Co. *v.* Gates, 10 Oreg. 514; Snyder *v.* Vannoy, 1 Oreg. 344.

Pennsylvania.— Gilder *v.* Merwin, 6 Whart. 522; Maher's Appeal, 2 Pa. Cas. 261, 4 Atl. 184; Lebanon Mut. Ins. Co.'s Appeal, 1 Pa. Cas. 187, 1 Atl. 559; Hetzell *v.* Bentz, 8 Phila. 261.

South Carolina.— Jackson *v.* Patrick, 10 S. C. 197; Kibler *v.* Cureton, Rich. Eq. Cas. 143; O'Keefe *v.* Rice, 1 Bailey Eq. 179.

Tennessee.— Brandon *v.* Green, 7 Humphr. 130; Galbraith *v.* Martin, 5 Humphr. 50; Giddens *v.* Lea, 3 Humphr. 133; Hunt *v.* Lyle, 8 Yerg. 142; Evans *v.* International Trust Co., (Ch. App. 1900) 59 S. W. 373; Huff *v.* Miller, (Ch. App. 1900) 58 S. W. 876.

Texas.— Clegg *v.* Darragh, 63 Tex. 357; Nichols *v.* Dibrell, 61 Tex. 539; Nevins *v.* McKee, 61 Tex. 412; Coffee *v.* Ball, 49 Tex. 16; Jordan *v.* Corley, 42 Tex. 284; Cook *v.* Baldridge, 39 Tex. 250; Gibson *v.* Moore, 22 Tex. 611; Doss *v.* Miller, 6 Tex. 338; Prewitt *v.* Perry, 6 Tex. 260; Mason *v.* House, 20 Tex. Civ. App. 500, 49 S. W. 911; Ayres *v.* Parrish, 15 Tex. Civ. App. 541, 40 S. W. 435.

Vermont.— Day *v.* Cummins, 19 Vt. 496; Briggs *v.* Shaw, 15 Vt. 78; Emerson *v.* Udall, 13 Vt. 477, 37 Am. Dec. 604.

Virginia.— Hoge *v.* Fidelity L. & T. Co., 103 Va. 1, 48 S. E. 494; Mackey *v.* Mackey, 29 Gratt. 158; Richmond Enquirer Co. *v.* Robinson, 24 Gratt. 548; Harnsbarger *v.* Kinney, 13 Gratt. 511; Morgan *v.* Carson, 7 Leigh 238; Collins *v.* Jones, 6 Leigh 530, 29 Am. Dec. 216; Bierne *v.* Mann, 5 Leigh 364; Farmers' Bank *v.* Vanmeter, 4 Rand. 553; Vanlew *v.* Bohannan, 4 Rand. 537; Chapman *v.* Harrison, 4 Rand. 336; Noland *v.* Cromwell, 4 Munf. 155; Turpin *v.* Thomas, 2 Hen. & M. 139, 3 Am. Dec. 615.

Washington.— Spokane Co-operative Min. Co. *v.* Pearson, 28 Wash. 118, 68 Pac. 165.

West Virginia.— Alleman *v.* Kight, 19 W. Va. 201; Braden *v.* Reitzenberger, 18 W. Va. 286; Harner *v.* Price, 17 W. Va. 523; Alford *v.* Moore, 15 W. Va. 597; Black *v.* Smith, 13 W. Va. 780; Smith *v.* McLain, 11 W. Va. 654; Shields *v.* McClung, 6 W. Va. 79.

Wisconsin.— Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891; Marsh *v.* Edgerton, 1 Chandl. 198.

United States.— New York L. Ins. Co. *v.* Bangs, 103 U. S. 780, 26 L. ed. 608; Hungerford *v.* Sigerson, 20 How. 156, 15 L. ed. 869; Sample *v.* Barnes, 14 How. 70, 14 L. ed. 330; Tompkins *v.* Drennen, 56 Fed. 694, 6 C. C. A. 83; Brooks *v.* Moorhouse, 4 Fed. Cas. No. 1,956, 3 Ban. & A. 229; New Orleans *v.* Morris, 18 Fed. Cas. No. 10,182, 3 Woods 103; Wynn *v.* Wilson, 30 Fed. Cas. No. 18,116, Hempst. 698.

See 30 Cent. Dig. tit. "Judgment," § 808.

Duress or threats.— Although the extortion of a note, bond, or confession of judgment by means of compulsion or intimidation is a defense which may and should be pleaded at law (Hendricks *v.* Compton, 2 Rob. (Va.) 192), yet it has been held that equity may enjoin the judgment on this ground (Heath *v.* Cobb, 17 N. C. 187).

Forgery.— It is no ground for equitable relief that the instrument sued on at law was forged, this being a defense which must be set up in the action at law. Watkins *v.* Landon, 67 Minn. 136, 69 N. W. 711; Hamilton *v.* McLean, 139 Mo. 678, 41 S. W. 224. But *compare* Reynolds *v.* Dothard, 7 Ala. 664, holding that, where a statute judgment is rendered against a surety in an appeal-bond, without notice to him, he may go into equity for relief against the judgment on the ground that the signature of his name to the bond is a forgery. And see Barnett *v.* Lynch, 1 Marv. (Del.) 114, 40 Atl. 666, where it is said that a joint judgment on a note which had been decreed void for forgery as to one of defendants will be set aside as to the other.

25. Bellamy *v.* Woodson, 4 Ga. 175, 48 Am. Dec. 221; Burke *v.* Pinnell, 93 Ind. 540; Marsh *v.* Mandeville, 28 Miss. 122; Miller *v.* Clements, 54 Tex. 351; Coffee *v.* Ball, 49 Tex. 16; White *v.* Powell, (Tex. Civ. App. 1905) 84 S. W. 836.

26. Estis *v.* Patton, 3 Yerg. (Tenn.) 382.

27. *Alabama.*— Humphries *v.* Adkins, (1905) 38 So. 840; Stevens *v.* Hertzler, 114 Ala. 563, 22 So. 121; Calloway *v.* McElroy, 3 Ala. 406.

Arkansas.— Newton *v.* Field, 16 Ark. 216.

California.— Kelley *v.* Kriess, 68 Cal. 210, 9 Pac. 129.

fact that there may have been an ineffectual attempt to set up the defense in the suit at law.[28] But under the codes of practice, which blend legal and equitable powers, or confer extensive equitable powers upon the courts of common law, it is held that a defense, if available under the code, must be set up in the original action, and cannot be made the basis of a subsequent application to equity, although it is inherently equitable in its nature.[29]

c. **Defenses Available Either at Law or in Equity.** Where a party's defense to an action is cognizable either at law or in equity, it is generally held that he may choose in which forum he will make his defense, and if he omits to do so at law he may then have recourse to equity for relief against the judgment.[30] But if in any such case the party makes his defense in the trial at law, he will be

Colorado.— Fisher *v.* Greene, 5 Colo. 541.
Delaware.— Kersey *v.* Rash, 3 Del. Ch. 321.
Georgia.— Fannin *v.* Thomasson, 45 Ga. 533; Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Clifton *v.* Livor, 24 Ga. 91. *Compare* Gentle *v.* Atlas Sav., etc., Assoc., 105 Ga. 406, 31 S. E. 544, denying relief against a judgment suffered by default, although the party alleged that his defense was equitable.
Illinois.— Weaver *v.* Poyer, 79 Ill. 417; Ames *v.* Snider, 55 Ill. 498; Vennum *v.* Davis, 35 Ill. 568; Hawkins *v.* Harding, 37 Ill. App. 564.
Indiana.— Gillett *v.* Sullivan, 127 Ind. 327, 26 N. E. 827.
Maryland.— Harwood *v.* Jones, 10 Gill & J. 404, 32 Am. Dec. 180; Estep *v.* Watkins, 1 Bland 486. A party may go into equity for relief against a judgment at law, where his title to relief rests upon an agreement embraced by the statute of frauds, and therefore void at law, but attended by circumstances which take it out of the operation of the statute in equity. Harwood *v.* Jones, *supra*.
Michigan.— Wales *v.* Michigan Bank, Harr. 308.
Mississippi.— Ferriday *v.* Selcer, Freem. 258.
New Jersey.— Borcherling *v.* Ruckelshaus, 49 N. J. Eq. 340, 24 Atl. 547; Sanders *v.* Wagner, 32 N. J. Eq. 506.
New York.— Clute *v.* Potter, 37 Barb. 199; King *v.* Baldwin, 17 Johns. 384, 8 Am. Dec. 415.
Tennessee.— Walker *v.* Day, 8 Baxt. 77; Mewborn *v.* Glass, 5 Humphr. 520; Galbrath *v.* Martin, 5 Humphr. 50; Hill *v.* Crosby, 2 Humphr. 545; Cornelius *v.* Thomas, 1 Tenn. Ch. 283.
Vermont.— Dunham *v.* Downer, 31 Vt. 249; West *v.* Rutland Bank, 19 Vt. 403.
West Virginia.— Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927.
Wisconsin.— Barber *v.* Rukeyser, 39 Wis. 590; Lamb *v.* Anderson, 2 Pinn. 251, 1 Chandl. 224.
United States.— Johnson *v.* Christian, 128 U. S. 374, 9 S. Ct. 87, 32 L. ed. 412; Crim *v.* Handley, 94 U. S. 652, 24 L. ed. 216; Hendrickson *v.* Hinckley, 17 How. 443, 15 L. ed. 123; Scott *v.* Shreeve, 12 Wheat. 605, 6 L. ed. 744; Hawkins *v.* Wills, 49 Fed. 506, 1 C. C. A. 339.
See 30 Cent. Dig. tit. "Judgment," § 809.

Difficulty of establishing defense at law.— Equity will not relieve, after a judgment at law, on the mere ground of the difficulty of the defense in a court of law, even in cases where courts of equity and of law have concurrent jurisdiction, as in matters of account. To authorize relief it must be a case where it is impossible for the party to make an effectual defense at law. Dilly *v.* Barnard, 8 Gill & J. (Md.) 170.

28. Calloway *v.* McElroy, 3 Ala. 406; Ferriday *v.* Selcer, Freem. (Miss.) 258; Hughes *v.* Nelson, 29 N. J. Eq. 547. *Contra*, see Donaldson *v.* Kendall, Ga. Dec. Pt. II, 227; Morgan's Appeal, 43 Leg. Int. (Pa.) 282.

Defenses both legal and equitable.— If defendant has both a legal defense and an equitable defense, the latter not cognizable at law, a failure to use diligence in making his legal defense will not prevent a court of equity from granting an injunction on proof of the equitable defense. Winchester *v.* Gleaves, 3 Hayw. (Tenn.) 213; Cornelius *v.* Thomas, 1 Tenn. Ch. 283.

29. Kelly *v.* Hurt, 74 Mo. 561; Savage *v.* Allen, 54 N. Y. 458; Winfield *v.* Bacon, 24 Barb. (N. Y.) 154. And see Reeve *v.* Jackson, 46 Ark. 272. But *compare* Dorsey *v.* Reese, 14 B. Mon. (Ky.) 157, holding that the code of practice permits, but does not require, an equitable defense to be set up in an action on a legal demand, and therefore, if defendant fails to avail himself of this privilege, and permits a judgment to go against him, he may bring an equitable action to obtain relief against the judgment.

30. Hempstead *v.* Watkins, 6 Ark. 317, 42 Am. Dec. 696; Bently *v.* Dillard, 6 Ark. 79; Dorsey *v.* Reese, 14 B. Mon. (Ky.) 157; Harlan *v.* Wingate, 2 J. J. Marsh. (Ky.) 138; Morrison *v.* Hart, 2 Bibb (Ky.) 4, 4 Am. Dec. 663; Rathbone *v.* Warren, 10 Johns. (N. Y.) 587; Rice *v.* Railroad Bank, 7 Humphr. (Tenn.) 39; Stothart *v.* Burnet, Cooke (Tenn.) 417. But *compare* Merriman *v.* Cannovan, 7 Coldw. (Tenn.) 571; Galbrath *v.* Martin, 5 Humphr. (Tenn.) 50. *Contra*, see Fowler *v.* Atkinson, 6 Minn. 503 (under a statute requiring defendant in an action to interpose all defenses which he may have, whether legal or equitable); Vaughn *v.* Johnson, 9 N. J. Eq. 173.

Gaming contracts.— In several states courts of law and of equity have concurrent jurisdiction of the defense that the debt sued

regarded as having made his election, and if he fails he will have no ground for a bill in equity for relief against the judgment, unless his defeat occurred through fraud or accident.[31]

9. Excuses For Not Defending at Law — a. General Rules. Equity may grant relief against a judgment at law, which is unjust and inequitable, where the party had a good defense to the action, but had no opportunity to avail himself of it in the legal action;[32] or where the loss of his defense was occasioned by the fraud or fault of the adverse party, by surprise or accident, or by his own mistake or ignorance of his defense, provided there has been no negligence or fault on the part of the complainant or his counsel or agents.[33] Equity will not enjoin a judgment where the only reason alleged for the failure of defendant to avail himself of a legal defense is an erroneous ruling of the trial court excluding such defense, for this is to be remedied by appeal.[34] To establish the state of facts constituting the excuse for failing to defend at law, no such certainty of proof is required as to prove the defense itself;[35] yet if the excuse is not proved it avails nothing to prove the defense.[36]

b. Ignorance of Facts or Law — (i) *In General.* Equity may grant relief against a judgment at law, where there was a good and valid defense to the action, of which defendant was ignorant at the time of the trial, and which

on was for money lost at play; and defendant may suffer a judgment to be taken against him by default at law, and then obtain relief against the judgment in equity. Harris *v.* McDonald, 194 Ill. 75, 62 N. E. 310; Lucas *v.* Nichols, 66 Ill. 41; Boddie *v.* Brewer, etc., Brewing Co., 107 Ill. App. 357 [*affirmed* in 204 Ill. 352, 68 N. E. 394]; Clay *v.* Fry, 3 Bibb (Ky.) 248, 6 Am. Dec. 654; Gough *v.* Pratt, 9 Md. 526; Collins *v.* Lee, 2 Mo. 16. And see *supra*, X, B, 4.

31. *Alabama.*— Haughy *v.* Strang, 2 Port. 177, 27 Am. Dec. 648.

Arkansas.— Dickson *v.* Richardson, 16 Ark. 114; Burton *v.* Hynson, 14 Ark. 32.

California.— Dutil *v.* Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

Kentucky.— Morrison *v.* Hart, 2 Bibb 4, 4 Am. Dec. 663.

Michigan.— Farmers' F. Ins. Co. *v.* Johnston, 113 Mich. 426, 71 N. W. 1074.

Vermont.— Dunham *v.* Downer, 31 Vt. 249.

Virginia.— Penn *v.* Reynolds, 23 Gratt. 518.

West Virginia.— Bias *v.* Vickers, 27 W. Va. 456.

See 30 Cent. Dig. tit. "Judgment," § 842. And see *infra*, X, B, 10, a.

Form of defense immaterial.— Defendant's election to rely upon his defense at law is manifested by offering any defense whatever, whether by demurrer to the declaration, or by plea in abatement or in bar. Le Guen *v.* Gouverneur, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121.

Cases of doubtful jurisdiction.— If there is a doubt whether a defense is available at law, while there is an undoubted jurisdiction in equity, and defendant omits to make his defense in the action at law, or if he makes it and it is overruled on the ground that it cannot be considered at law, equity may afford relief, notwithstanding a trial at law. King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415.

32. Carrington *v.* Holabird, 17 Conn. 530; Benton *v.* Crowder, 7 Sm. & M. (Miss.) 185; Blount *v.* Garen, 3 Hayw. (Tenn.) 88; Spotswood *v.* Higgenbotham, 6 Munf. (Va.) 313.

33. *Florida.*— Hoey *v.* Jackson, 31 Fla. 541, 13 So. 459.

Illinois.— Telford *v.* Brinkerhoff, 163 Ill. 439, 45 N. E. 156.

Kentucky.— Saunders *v.* Jennings, 2 J. J. Marsh. 513.

Mississippi.— Lott *v.* Michel, (1895) 16 So. 794; Ross *v.* Holloway, 60 Miss. 553; Herring *v.* Winans, Sm. & M. Ch. 466.

Texas.— Taylor *v.* Fore, 42 Tex. 256.

Virginia.— Barret *v.* Floyd, 3 Call 531.

West Virginia.— Farmers', etc., Leaf Tobacco Warehouse Co. *v.* Pridemore, 55 W. Va. 451, 47 S. E. 258.

Wisconsin.— Marsh *v.* Edgerton, 2 Pinn. 230, 1 Chandl. 198.

See 30 Cent. Dig. tit. "Judgment," § 816 *et seq.*

Compare Weakley *v.* Gurley, 60 Ala. 399.

If the party voluntarily deprives himself of the means of making his defense at law, equity will not interfere in his behalf; as where a party, having a good defense to a note, voluntarily executes a deed of trust to secure its payment. Fanning *v.* Farmers', etc., Bank, 8 Sm. & M. (Miss.) 139.

34. Hart *v.* Life Assoc. of South, 54 Ala. 495; Moore *v.* Dial, 3 Stew. (Ala.) 155; Commercial Union Assur. Co. *v.* Scammon, 133 Ill. 627, 23 N. E. 406; Ingwersen *v.* Buchholz, 88 Ill. App. 73; Maxwell *v.* Connor, 1 Hill Eq. (S. C.) 14; Griswold *v.* Hazard, 141 U. S. 260, 11 S. Ct. 972, 999, 35 L. ed. 678; Edmanson *v.* Best, 57 Fed. 531, 6 C. C. A. 471. *Contra*, see King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415.

35. Rice *v.* Railroad Bank, 7 Humphr. (Tenn.) 39.

36. Turner *v.* Davis, 7 Leigh (Va.) 227, 30 Am. Dec. 502.

he could not have discovered, by the exercise of reasonable and proper diligence, in time to set it up at law.[37] But he must show the exercise of due diligence to discover his defense, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his own part; otherwise equity will do nothing for him.[38] And

37. *Alabama.*— Garrett *v.* Lynch, 45 Ala. 204; Bynum *v.* Sledge, 1 Stew. & P. 135.

Arkansas.— Reed *v.* Harvey, 23 Ark. 44.

Florida.— Baltzell *v.* Randolph, 9 Fla. 366.

Georgia.— Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682; Pearce *v.* Chastain, 3 Ga. 226, 46 Am. Dec. 423; Stroup *v.* Sullivan, 2 Ga. 275, 46 Am. Dec. 389.

Illinois.— Chicago, etc., R. Co. *v.* Hay, 119 Ill. 493, 10 N. E. 29; Hyatt *v.* Brown, 82 Ill. 28; Brown *v.* Luehrs, 79 Ill. 575; Shinkle *v.* Letcher, 47 Ill. 216; Vennum *v.* Davis, 35 Ill. 568; Hubbard *v.* Hobson, 1 Ill. 190; Chapman *v.* Salfisberg, 111 Ill. App. 102; Polarek *v.* Gordon, 102 Ill. App. 356.

Maryland.— Gardiner *v.* Hardey, 12 Gill & J. 365; Iglehart *v.* Lee, 4 Md. Ch. 514.

Michigan.—Wales *v.* Michigan Bank, Harr. 308.

Mississippi.— Meek *v.* Howard, 10 Sm. & M. 502; Goad *v.* Hart, 8 Sm. & M. 787.

New Jersey.— Power *v.* Butler, 4 N. J. Eq. 465.

Oregon.— Wells *v.* Wall, 1 Oreg. 295.

South Carolina.— Jones *v.* Kilgore, 2 Rich. Eq. 63.

Tennessee.— Brandon *v.* Green, 7 Humphr. 130.

Virginia.— Meem *v.* Rucker, 10 Gratt. 506; Rust *v.* Ware, 6 Gratt. 50, 52 Am. Dec. 100; Armistead *v.* Ward, 2 Patt. & H. 504.

West Virginia.— Ludington *v.* Handley, 7 W. Va. 269; Ferrell *v.* Allen, 5 W. Va. 43.

Wisconsin.— Barber *v.* Rukeyser, 39 Wis. 590.

United States.— Davis *v.* Tileston, 6 How. 114, 12 L. ed. 366; Swan *v.* U. S. Bank, 23 Fed. Cas. No. 13,668, 2 Brock. 293.

See 30 Cent. Dig. tit. "Judgment," § 817.

Illustrations.— A judgment for a part of the purchase-money of real estate was enjoined, on the ground that the vendee had been deceived by the vendor as to the title, and had remained ignorant of the defect therein until after the rendition of the judgment. Fitch *v.* Polke, 7 Blackf. (Ind.) 564. So where an administrator has recovered judgment for the price of property of his intestate sold by him, it is a sufficient excuse to the vendee for not defending at law that he did not know until after the judgment that the administrator had no authority to sell. Crisman *v.* Beasley, Sm. & M. Ch. (Miss.) 561.

An alteration in an instrument sued on at law may be taken advantage of at law, and the failure of defendant to discover the alteration until after judgment is no ground for relief in equity. Shelmire *v.* Thompson, 2 Blackf. (Ind.) 270.

A mistake in an account, on which a judgment at law was recovered, which was not discovered until after the trial, is not sufficient to authorize an injunction against the judgment. Falls *v.* Robinson, 5 Md. 365.

38. *Alabama.*— Garrett *v.* Lynch, 45 Ala. 204; McCollum *v.* Prewitt, 37 Ala. 573; Taliaferro *v.* Montgomery Branch Bank, 23 Ala. 755; Stinnett *v.* Mobile Branch Bank, 9 Ala. 120; Lee *v.* Insurance Bank, 2 Ala. 21.

Arkansas.— Carnall *v.* Looper, 35 Ark. 107.

Georgia.— Hill *v.* Harris, 51 Ga. 628; Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682.

Indiana.— Skinner *v.* Deming, 2 Ind. 558, 54 Am. Dec. 463.

Kansas.— Tutt *v.* Ferguson, 13 Kan. 45.

Kentucky.— McCown *v.* Macklin, 7 Bush 308.

Michigan.— Wixom *v.* Davis, Walk. 15.

Mississippi.— Buckingham *v.* Wesson, 54 Miss. 526; Leggett *v.* Morris, 6 Sm. & M. 723; Miller *v.* Gaskins, Sm. & M. Ch. 524.

Missouri.— Carolus *v.* Koch, 72 Mo. 645.

New York.— Metropolitan El. R. Co. *v.* Johnston, 158 N. Y. 739, 53 N. E. 1128; Devlin *v.* Boyd, 16 N. Y. Suppl. 37; Thompson *v.* Berry, 3 Johns. Ch. 395.

North Carolina.— Grantham *v.* Kennedy, 91 N. C. 148.

Tennessee.— Hubbard *v.* Ewing, 4 Baxt. 404; Bailey *v.* Anderson, 6 Humphr. 149.

Texas.— Burnley *v.* Rice, 21 Tex. 171; Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991.

Virginia.— Slack *v.* Wood, 9 Gratt. 40.

United States.— U. S. *v.* Ames, 99 U. S. 35, 25 L. ed. 295; Avery *v.* U. S., 12 Wall. 304, 20 L. ed. 405; Brown *v.* Swann, 10 Pet. 497, 9 L. ed. 508; Marine Ins. Co. *v.* Hodgson, 7 Cranch 333, 3 L. ed. 362.

See 30 Cent. Dig. tit. "Judgment," § 817.

Public records.— The fact that a party is ignorant of a recorded judgment is due to his own negligence, and equity cannot relieve him from the consequences. Bunn *v.* Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48.

Diligence at trial.— If defendant in an action at law denies the genuineness of the deed under which plaintiff claims, it is his duty to attack the authenticity of such deed on the trial at law, and, having failed to do so, he cannot have relief in equity on the ground that he has since discovered it to be a forgery. Hamilton *v.* McLean, 169 Mo. 51, 68 S. W. 930. But a party having no knowledge or information of a fact material to his defense, and which was exclusively within the knowledge of the adverse party, is not guilty of such laches or want of diligence as will deprive him of the right to equitable relief against the judgment merely because he failed to bring out such fact on cross-examination. Cairo, etc., R. Co. *v.* Titus, 28 N. J. Eq. 269.

ignorance of the law, of the nature or consequences of the action, or of the party's legal rights and duties, will generally afford no ground for equitable interference.[39]

(II) *Necessity of Seeking Discovery.* If defendant in an action at law could obtain information concerning the facts which constitute his defense, and which are necessary to make his defense effectual, by the aid of a bill in equity for a discovery from the adverse party, his failure to avail himself of this means of information will preclude him from afterward obtaining an injunction against the judgment.[40]

c. Evidence Not Available at Law. Where defendant cannot make good his defense, because the only evidence to sustain it is not admissible or cannot be produced in a court of law, but can be supplied in equity, he may be relieved against the judgment;[41] but not where the same grounds of objection to the proposed evidence are equally prohibitive in equity as at law.[42]

d. Mistake. A mistake of fact, provided it be honest and genuine, and such as a man might reasonably make, will be a sufficient excuse for not defending an action at law, and will warrant a court of equity, if the judgment be against conscience, in enjoining its enforcement.[43] But it is no ground for relief in equity

Suspicion not equivalent to knowledge.— Although a party may have suspected the existence of a fact which would have given him a good defense to the action at law, this will not preclude him from relief in equity, if his suspicions did not amount to legal or moral certainty, and if he is not chargeable with laches in failing to make efforts to discover the truth. West *v.* Logwood, 6 Munf. (Va.) 491.

Special favor to administrators.— Some courts are disposed to show special indulgence in this particular to administrators, on the ground that they are obliged, from the nature of their office, to rely upon the information which they may derive from others. Hewlett *v.* Hewlett, 4 Edw. (N. Y.) 7.

39. State Bank *v.* Stanton, 7 Ill. 352; English *v.* Aldrich, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; McKean *v.* Read, Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318; Fox *v.* Mt. Sterling Nat. Bank, 10 S. W. 368, 10 Ky. L. Rep. 688; *In re* Dey Ermand, 24 Hun (N. Y.) 1.

40. *Alabama.*— Hill *v.* McNeill, 8 Port. 432.

Georgia.— Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Albritton *v.* Bird, R. M. Charlt. 93.

Kentucky.— Harrison *v.* Harrison, 1 Litt. 137; Lemon *v.* Cherry, 1 Bibb 253.

Maryland.— Dilly *v.* Barnard, 8 Gill & J. 170.

Michigan.— Wright *v.* King, Harr. 12.

New York.— Bartholomew *v.* Yaw, 9 Paige 165; Norton *v.* Woods, 5 Paige 249; Barker *v.* Elkins, 1 Johns. Ch. 465. *Compare* Cudney *v.* Early, 4 Paige 209.

Virginia.— Green *v.* Massie, 21 Gratt. 356; Norris *v.* Hume, 2 Leigh 334, 21 Am. Dec. 631.

United States.— Brown *v.* Swann, 10 Pet. 497, 9 L. ed. 508.

See 30 Cent. Dig. tit. "Judgment," § 820.

Contra.— Deputy *v.* Tobias, 1 Blackf. (Ind.) 311, 12 Am. Dec. 243.

In what cases discovery may be had see DISCOVERY, 14 Cyc. 306.

41. *Alabama.*— Jordan *v.* Loftin, 13 Ala. 547.

Kentucky.— Wilson *v.* Davis, 1 A. K. Marsh. 219.

New York.— Norton *v.* Woods, 5 Paige 249.

Ohio.— Smith *v.* Simmons, Tapp. 265.

Tennessee.— Lewis *v.* Brooks, 6 Yerg. 167; Winchester *v.* Jackson, 3 Hayw. 305.

Vermont.— Dana *v.* Nelson, 1 Aik. 252.

Virginia.— Vathir *v.* Zane, 6 Gratt. 246; Spencer *v.* Wilson, 4 Munf. 130.

See 30 Cent. Dig. tit. "Judgment," § 819.

42. Reed *v.* Clarke, 4 T. B. Mon. (Ky.) 18; Robinson *v.* Wheeler, 51 N. H. 384; Hendrickson *v.* Hinchley, 17 How. (U. S.) 443, 15 L. ed. 123.

43. *California.*— Bibend *v.* Kreutz, 20 Cal. 109.

Georgia.— Brewer *v.* Jones, 44 Ga. 71; Kohn *v.* Lovett, 43 Ga. 179.

Iowa.— Partridge *v.* Harrow, 27 Iowa 96, 99 Am. Dec. 643.

Kentucky.— Lyle *v.* Williamson, 6 T. B. Mon. 142; Trimble *v.* Scott, 38 S. W. 697, 18 Ky. L. Rep. 963.

Maryland.— Miller *v.* State, 12 Md. 207; Chase *v.* Manhardt, 1 Bland 333.

Mississippi.— Ford *v.* Ford, Walk. 505, 12 Am. Dec. 587. See Hamilton *v.* Moore, 32 Miss. 625.

Missouri.— Wilson *v.* Boughton, 50 Mo. 17.

Nebraska.— MacCall *v.* Looney, 4 Nebr. (Unoff.) 715, 96 N. W. 238.

New York.— Marvin *v.* Marvin, 1 Abb. N. Cas. 372, 52 How. Pr. 97.

North Carolina.— Wade *v.* Newbern, 73 N. C. 318; Bird *v.* Chaffin, 21 N. C. 55.

Ohio.— Rammelsberg *v.* Mitchell, 29 Ohio St. 22.

Tennessee.— Drew *v.* Clarke, Cooke 374, 5 Am. Dec. 698.

Texas.— Lumpkin *v.* Williams, 1 Tex. Civ. App. 214, 21 S. W. 967.

Virginia.— Mason *v.* Nelson, 11 Leigh 227;

that the party was prevented from making his defense at law by a mistake of law,[44] or by reason of mistaking or misunderstanding his rights in the premises.[45] Nor will relief be granted in any case where the applicant does not show due diligence and freedom from all negligence on his own part.[46]

e. Surprise — (i) *In General.* Equity may relieve a party from a judgment obtained against him by surprise.[47] But it will not do so where the surprise relied upon was such as might reasonably have been guarded against,[48] where the party has a remedy in the trial court,[49] or where the surprise was occasioned by his own negligence or lack of care or attention.[50]

(ii) *Surprise Caused by Evidence or Witnesses.* Surprise caused by the

Price *v.* Fuqua, 4 Munf. 68; Halcomb *v.* Innis, 4 Call 364.

West Virginia.—Clark *v.* Sayers, 48 W. Va. 33, 35 S. E. 882.

Wisconsin.— Hall *v.* Hall, 98 Wis. 193, 73 N. W. 1000.

United States.— Perry *v.* Johnston, 95 Fed. 322; Hamburg-Bremen F. Ins. Co. *v.* Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283; Bell *v.* Cunningham, 3 Fed. Cas. No. 1,246, 1 Sumn. 89.

See 30 Cent. Dig. tit. "Judgment," § 821.

44. *Missouri.*— Risher *v.* Roush, 2 Mo. 95, 22 Am. Dec. 442.

Nebraska.— Broken Bow *v.* Broken Bow Waterworks Co., 57 Nebr. 548, 77 N. W. 1078.

New York.— Crosier *v.* Acer, 7 Paige 137.

North Carolina.— Smith *v.* Auldridge, 3 N. C. 382.

Ohio.— Green *v.* Dodge, 6 Ohio 80, 25 Am. Dec. 736; Abbott *v.* Hughes, 3 Ohio 278; Duckwall *v.* Zimmerman, 2 Ohio 23.

Tennessee.— Hubbard *v.* Martin, 8 Yerg. 498.

Virginia.— Meem *v.* Rucker, 10 Gratt. 506; Richmond, etc., R. Co. *v.* Shippen, 2 Patt. & H. 327.

See 30 Cent. Dig. tit. "Judgment," § 821.

Contra.— Lowndes *v.* Chisholm, 2 McCord Eq. (S. C.) 455, 16 Am. Dec. 667.

45. *Colorado.*— Snider *v.* Rinehart, 20 Colo. 448, 39 Pac. 408.

Indiana.— Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373.

New Jersey.— Hill *v.* Hill, 62 N. J. L. 442, 41 Atl. 943.

New York.— Shotwell *v.* Murray, 1 Johns. Ch. 512.

Tennessee.—Schwab *v.* Mount, 4 Coldw. 60; Graham *v.* Roberts, 1 Head 56.

See 30 Cent. Dig. tit. "Judgment," § 821.

46. Slappey *v.* Hodge, 99 Ala. 300, 13 So. 256; Simmons *v.* Martin, 53 Ga. 620; Mellendy *v.* Austin, 69 Ill. 15; Hilton *v.* Tyrrell, 93 Md. 657, 49 Atl. 926.

47. *Arkansas.*— Sneed *v.* Town, 9 Ark. 535.

California.— Bibend *v.* Kreutz, 20 Cal. 109; Carpentier *v.* Hart, 5 Cal. 406.

New York.— Forrestier *v.* Wilson, 1 Duer 624.

South Carolina.— Barnes *v.* Milne, Rich. Eq. Cas. 459, 24 Am. Dec. 422.

Virginia.—Anderson *v.* Woodford, 8 Leigh 316; Callaway *v.* Alexander, 8 Leigh 114, 31 Am. Dec. 640.

United States.— Bell *v.* Cunningham 3 Fed. Cas. No. 1,246, 1 Sumn. 89.

See 30 Cent. Dig. tit. "Judgment," § 821.

Contra.— Honey *v.* Honey, 18 Mo. 466.

Unexpected call for trial.— Where a party for good and sufficient reasons, and without any negligence or inattention, believes that his case will not be reached for trial during the current term or within a certain time, but nevertheless it is called and he is defaulted, this constitutes such surprise as will justify a court of equity in giving him relief, if he cannot obtain it by application to the trial court. Prussian Nat. Ins. Co. *v.* Chichocky, 94 Ill. App. 168; Moore *v.* Cohen, 70 Ill. App. 160; Beveridge *v.* Hewitt, 8 Ill. App. 467; Joslin *v.* Coffin, 5 How. (Miss.) 539; Jones *v.* Kincaid, 5 Lea (Tenn.) 677; Weed *v.* Hunt, 76 Vt. 212, 56 Atl. 980.

Change of venue.— The fact that defendant in an action at law did not know of the removal of a cause by change of venue to another circuit is no ground for a court of equity to grant a new trial, where the writ was executed before the order was granted. Logan *v.* Outen, 4 Bibb (Ky.) 399. *Compare* Philip *v.* Davis, (Iowa 1899) 78 N. W. 810; Bennett *v.* Jackson, 34 W. Va. 62, 11 S. E. 734.

48. Shannon *v.* Reese, 38 Ala. 586; Fowler *v.* Roe, 11 N. J. Eq. 367.

Examples.— Where the party's attorney was present during the entire term of court, it cannot be said that he was surprised by the entry of a judgment against him. Finch *v.* Hollinger, 47 Iowa 173. The fact that the supreme court refused to review the judgment of the circuit judge cannot be an occasion of legal "surprise," where the parties had made a stipulation which in effect made the decision of the circuit judge final. Farmers' L. & T. Co. *v.* Walworth, County Bank, 23 Wis. 249. Where process of attachment was in fact served, the execution will not be enjoined on the ground of surprise in obtaining the judgment of condemnation. Peters *v.* League, 13 Md. 58, 71 Am. Dec. 622.

49. Wieland *v.* Shillock, 23 Minn. 227 (motion to vacate or open the judgment under a statute); Crim *v.* Handley, 94 U. S. 652, 24 L. ed. 216 (where the party might have obtained a continuance in the action at law, but did not ask for it).

50. Lawson *v.* Bettison, 12 Ark. 401.

absence of a witness from the trial,[51] by the unexpected character of the testimony given by a witness,[52] by the introduction of unanticipated evidence,[53] or by a discovery that a witness who was relied on to testify is incompetent or privileged[54] is not in general ground for relief in equity against the resulting judgment, at least where the party could have guarded himself against such a surprise by the exercise of proper care and vigilance.[55]

f. Accident or Misfortune — (I) *In General.* Unavoidable accident or misfortune, preventing the party from making his defense at law, is sufficient ground for the interference of equity in an otherwise meritorious case.[56] But relief will not be granted on this ground where no counsel was employed, or witnesses summoned, or any other steps taken to defend the action.[57]

(II) *Absence of Counsel.* The unavoidable absence of the party's attorney from the court at the time of the trial may in some circumstances entitle the party to relief in equity,[58] although the courts are not very much disposed to

51. Chapman *v.* Scott, 5 Fed. Cas. No. 2,609, 1 Cranch C. C. 302. See Armstrong *v.* Thompson, 3 Hayw. (Tenn.) 127.

52. Drew *v.* Hayne, 8 Ala. 438; Bell *v.* Gardner, 77 Ill. 319; Stone *v.* Moody, 6 Yerg. (Tenn.) 31; Oswald *v.* Tyler, 4 Rand. (Va.) 19.

53. Hall *v.* Griggin, 119 Ala. 214, 24 So. 27; Hendrickson *v.* Hinckley, 17 How. (U. S.) 443, 15 L. ed. 123. See Gibson *v.* Watts, 1 McCord Eq. (S. C.) 490.

54. Abrams *v.* Camp, 4 Ill. 290.

55. Powell *v.* Stewart, 17 Ala. 719; Williams *v.* Lockwood, Clarke (N. Y.) 172 (denying relief where defendant was surprised by the unexpected character of the testimony given by a witness on whom he relied, but it appeared that he had never questioned the witness as to the facts within his knowledge); Wilder *v.* Lee, 64 N. C. 50; Hendrickson *v.* Hinckley, 17 How. (U. S.) 443, 15 L. ed. 123. But see Post *v.* Boardman, 10 Paige (N. Y.) 580, holding where the holders of a usurious note transferred it colorably to one of their number, who could not prove the usury, and a suit at law upon the note was thereupon brought in his name, and defendant, supposing the transfer real, was surprised at the trial by the fact that the note did not belong to the nominal plaintiff alone, that a court of equity would relieve him against the judgment.

56. *Delaware.*— Kersey *v.* Rash, 3 Del. Ch. 321.

Illinois.— Ames *v.* Snider, 55 Ill. 498; Hall *v.* Jones, 32 Ill. 38; How *v.* Mortell, 28 Ill. 478; Hinrichsen *v.* Van Winkle, 27 Ill. 334.

Kentucky.— Yowell *v.* Gaines, 2 Bush 211.

Mississippi.— Ford *v.* Ford, 1 Miss. 505, 12 Am. Dec. 587.

Nebraska.—Radzuweit *v.* Watkins, 53 Nebr. 412, 73 N. W. 679.

New Hampshire.— Wingate *v.* Haywood, 40 N. H. 437.

New Jersey.— Horner *v.* Conover, 26 N. J. L. 138; Herbert *v.* Herbert, 49 N. J. Eq. 70, 22 Atl. 789.

Oregon.— Handley *v.* Jackson, 31 Oreg. 552, 50 Pac. 915, 65 Am. St. Rep. 839.

Rhode Island.— Opie *v.* Clancy, 27 R. I. 42, 60 Atl. 635.

Virginia.— Morris *v.* Ross, 2 Hen. & M. 408; Degraffenreid *v.* Donald, 2 Hen. & M. 10. See 30 Cent. Dig. tit. "Judgment," § 821.

Floods which prevented the party from reaching the place of trial will be a sufficient excuse, if it is clearly made out that the obstacle was insuperable, that it existed at the very time of the trial, and that the case could not be defended in his absence. English *v.* Savage, 14 Ala. 342; Brooks *v.* Whitson, 7 Sm. & M. (Miss.) 513.

Loss of papers.— Equity may give relief on account of the loss of documents essential to the defense of the action at law (Vathir *v.* Zane, 6 Gratt. (Va.) 246), but will not do so unless fully satisfied that the loss of the papers would interfere fatally with the complainant's success in the trial court (Rogers *v.* Cross, 3 Pinn. (Wis.) 36, 3 Chandl. 34), and will refuse its aid if the loss was attributable in any degree to the negligence of the party himself or his counsel (Marshall *v.* Marshall, 7 Okla. 240, 54 Pac. 461).

Loss of witness.— Where parties were prevented from making their defense at law by the acts of plaintiff, until the only witness by whom the defense could be proved was dead, it was held that they were entitled to relief in equity. Mack *v.* Doty, Harr. (Mich.) 366.

Disturbed local conditions.— Equity refused to enjoin a judgment on the ground that defendant was prevented by intense excitement prevailing in the country from attending court, that it was dangerous to travel from home, that it was generally understood there would be no court, and that the judge of the court said he would hold no session for the trial of cases. George *v.* Tutt, 36 Mo. 141. And see Nye *v.* Sochor, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896.

57. McCollum *v.* Prewitt, 37 Ala. 573; Cole *v.* Hundley, 8 Sm. & M. (Miss.) 473; Essex County *v.* Berry, 2 Vt. 161.

58. See McBroom *v.* Sommerville, 2 Stew. (Ala.) 515; Sasser *v.* Olliff, 91 Ga. 84, 16 S. E. 312.

interfere on this account,[59] and will not do so where it appears that defendant could have saved himself by the timely employment of other counsel,[60] or where he had another attorney of record in the case.[61]

(III) *Sickness of Party or Relative.* The severe illness of defendant, or of a near relative, preventing him from attending the trial, may be ground for relief in equity against the judgment.[62] But it must first appear that his personal presence was necessary to the successful defense of the action.[63] And further, a party in this situation must use diligence in endeavoring to prepare for the trial, employing counsel, summoning witnesses, asking for a continuance or for a new trial, or otherwise making suitable efforts to save himself; and if he fails in this, equity will not relieve him.[64]

g. Excusable Neglect. Equity may relieve a party from a judgment taken against him through his excusable neglect.[65] But if he has carelessly or foolishly omitted to attend to his case, to retain and instruct counsel, to gather his witnesses, or otherwise to prepare for the trial, he is in no position to invoke the aid of equity, and it will be refused.[66]

h. Reliance on Advice or Statements of Others. It is not a sufficient excuse

59. *Alabama.*— Powell *v.* Stewart, 17 Ala. 719.

Arkansas.— Izard County *v.* Huddleston, 39 Ark. 107.

Georgia.— Morris *v.* Morris, 76 Ga. 733.

Louisiana.— Esterbrook *v.* Gauche, 27 La. Ann. 36.

Tennessee.— Kearney *v.* Smith, 3 Yerg. 127, 24 Am. Dec. 550.

See 30 Cent. Dig. tit. "Judgment," § 828.

60. French *v.* Garner, 7 Port. (Ala.) 549; Mock *v.* Cundiff, 6 Port. (Ala.) 24; Crim *v.* Handley, 94 U. S. 652, 24 L. ed. 216.

61. Yeizer *v.* Burke, 3 Sm. & M. (Miss.) 439.

62. Owen *v.* Gerson, 119 Ala. 217, 24 So. 413; Clifton *v.* Livor, 24 Ga. 91; Flanagan *v.* Patterson, 78 Ind. 514; Taylor *v.* Watkins, 62 Ind. 511; Hord *v.* Dishman, 5 Call (Va.) 279.

63. Jamison *v.* May, 13 Ark. 600; McDonald *v.* Myles, 12 Sm. & M. (Miss.) 279.

64. *Alabama.*— Campbell *v.* White, 77 Ala. 397; Pharr *v.* Reynolds, 3 Ala. 521.

Delaware.— Kersey *v.* Rash, 3 Del. Ch. 321.

Illinois.— Shaffer *v.* Sutton, 49 Ill. 506; Hopper *v.* Davies, 70 Ill. App. 682.

Michigan.— Kelleher *v.* Boden, 55 Mich. 295, 21 N. W. 346.

Mississippi.— Robb *v.* Halsey, 11 Sm. & M. 140; Cole *v.* Hundley, 8 Sm. & M. 473.

Texas.— Roller *v.* Ried, (Civ. App. 1894) 24 S. W. 655; Wood *v.* Lenox, 5 Tex. Civ. App. 318, 23 S. W. 812.

See 30 Cent. Dig. tit. "Judgment," § 829.

65. Commonwealth Bank *v.* Hancock, 6 Dana (Ky.) 284, 32 Am. Dec. 76; Klabunde *v.* Byron-Reed Co., (Nebr. 1904) 98 N. W. 182; Young *v.* Morgan, 9 Nebr. 169, 2 N. W. 237; Harris *v.* Musgrave, 72 Tex. 18, 9 S. W. 90.

Reliance on evidence.— If a party goes to trial relying on the opposite party to prove his action when called as a witness, he has a right to act on the presumption that such party, when sworn, will not swear falsely, and therefore he cannot be held to be negligent in going to trial relying on such evidence. Stowell *v.* Eldred, 26 Wis. 504.

66. *Alabama.*— Kanape *v.* Reeves, 127 Ala. 216, 28 So. 666; Waldrom *v.* Waldrom, 76 Ala. 285; McCollum *v.* Prewitt, 37 Ala. 573.

Georgia.—Redwine *v.* McAfee, 101 Ga. 701, 29 S. E. 428; Frazer *v.* Sibley, 50 Ga. 96.

Illinois.— Gaynor *v.* Crandall, 44 Ill. App. 511.

Indiana.—Sheffermeyer *v.* Columbia City German Bldg., etc., Assoc., 58 Ind. 191.

Kentucky.— McConnel *v.* Ficklin, 4 Bibb 413.

Maryland.— Norris *v.* Campbell, 27 Md. 688.

Mississippi.— Davis *v.* Presler, 5 Sm. & M. 459.

Missouri.— Head *v.* Pitzer, 1 Mo. 548.

Nebraska.— Dorwart *v.* Troyer, 2 Nebr. (Unoff.) 22, 96 N. W. 116.

Oklahoma.— Crist *v.* Cosby, 11 Okla. 635, 69 Pac. 885.

South Carolina.— Sullivan *v.* Shell, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894.

Tennessee.— Rodgers *v.* Dibrell, 6 Lea 69.

Texas.— Aultman *v.* Higbee, 32 Tex. Civ. App. 502, 74 S. W. 955; McLane *v.* San Antonio Nat. Bank, (Civ. App. 1902) 68 S. W. 63; Wood *v.* Lenox, 5 Tex. Civ. App. 318, 23 S. W. 812.

Virginia.— Richmond Enquirer Co. *v.* Robinson, 24 Gratt. 548; Stanard *v.* Rogers, 4 Hen. & M. 438.

United States.— Travelers' Protective Assoc. *v.* Gilbert, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538. See National Surety Co. *v.* State Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394.

See 30 Cent. Dig. tit. "Judgment," § 823.

Forgetfulness.— It is not a sufficient excuse for failing to defend the action at law that the party forgot all about the suit, or about the time of trial, no matter what causes may have engrossed his attention. Cullum *v.* Casey, 1 Ala. 351; War-

for failing to defend an action at law that the party relied on others, who were not officially bound to give him correct information or any information at all, to advise him concerning the character or purpose of the suit, the necessity of defending it, the progress of the cause, or its probable time of trial.[67]

i. Negligence or Misconduct of Counsel. It is no sufficient ground for relief in equity that a judgment was obtained against a party in consequence of the neglect, inattention, mistake, or incompetence of his attorney.[68] Nor will equity

ner *v.* Conant, 24 Vt. 351, 58 Am. Dec. 178; Nye *v.* Sochor, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896.

Expectation as to amount of recovery.— Nor is the excuse sufficient where defendant neglected to prepare for the defense of the action because confident that plaintiff could not recover more than a certain amount. Embry *v.* Palmer, 107 U. S. 3, 2 S. Ct. 25, 27 L. ed. 346.

Public business.— An injunction will not be granted to stay proceedings at law on a judgment on the ground that defendant was prevented by public business from making preparations for the trial. Smith *v.* Lowry, 1 Johns. Ch. (N. Y.) 320.

Miscalculation as to time of trial.— It is not a case of excusable neglect where defendant omitted to prepare his case or attend court because he supposed his case would not be reached as soon as it was in fact reached. Yelton *v.* Hawkins, 2 J. J. Marsh. (Ky.) 1; Yancey *v.* Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35.

Fear of personal violence.— That a defendant was kept away from the court where his case was pending by fear of personal violence arising from threats against him or other grounds for apprehending such danger will not be cause for enjoining the judgment rendered against him, where it does not appear that such fear was well grounded, that the adverse party had anything to do with the alleged threats, or that defendant did what he could to secure an attorney to represent him. Holt *v.* Graham, 2 Bibb (Ky.) 192; Duncan *v.* Gibson, 45 Mo. 352; Prater *v.* Robinson, 11 Heisk. (Tenn.) 391; Powell *v.* Cyfers, 1 Heisk. (Tenn.) 526. But *compare* Harvey *v.* Seashol, 4 W. Va. 115.

67. *Arkansas.*— Jackson *v.* Woodruff, 57 Ark. 599, 22 S. W. 566; Hanna *v.* Morrow, 43 Ark. 107.

Georgia.— Dozier *v.* Wilkerson, 76 Ga. 835; Cardin *v.* Jones, 23 Ga. 175.

Illinois.— Walker *v.* Shreve, 87 Ill. 474; Higgins *v.* Bullock, 73 Ill. 205; Calman *v.* Stuckart, 70 Ill. App. 310.

Indiana.— English *v.* Aldrich, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; Birch *v.* Frantz, 77 Ind. 199.

Iowa.— Sedden *v.* State, 100 Iowa 378, 69 N. W. 671.

Kentucky.— Hayden *v.* Moore, 4 Bush 107; Harrison *v.* Lee, 7 J. J. Marsh. 171. But see Mitchell *v.* Kerby, 38 S. W. 507, 18 Ky. L. Rep. 961, where a judgment was set aside on a showing that defendant had been prevented from defending the action by being told by plaintiff that nothing would be done at that term of court, and that the matter would be settled.

Missouri.— Dunn *v.* Hansard, 37 Mo. 199.

Nebraska.— Young *v.* Morgan, 13 Nebr. 48, 13 N. W. 1.

New Jersey.— Amey *v.* Calkins, (Ch. 1890) 19 Atl. 388.

Tennessee.— Collins *v.* Knight, 3 Tenn. Ch. 183. But see Rowland *v.* Jones, 2 Heisk. 321, where defendant, whose name had been forged to the note in suit, was held justified in relying on the assurances of the other makers, his co-defendants, that they would pay it, or that he need not trouble himself about it.

Texas.— Cannon *v.* Hemphill, 7 Tex. 184.

Virginia.— Lee *v.* Baird, 4 Hen. & M. 453, holding that where a former member of a firm is joined in a suit against the new partnership, and omits to make defense, on an assurance by another of defendants that the matter shall be adjusted, he may be relieved in equity.

See 30 Cent. Dig. tit. "Judgment," § 824.

68. *Alabama.*— Broda *v.* Greenwald, 66 Ala. 538; Watts *v.* Gayle, 20 Ala. 817; Powell *v.* Stewart, 17 Ala. 719; McBroom *v.* Sommerville, 2 Stew. 515.

Arkansas.— Scroggin *v.* Hammett Grocer Co., 66 Ark. 183, 49 S. W. 820; Burton *v.* Hynson, 14 Ark. 32. A party cannot obtain a new trial in equity on the ground that his counsel mistook the facts of his defense, if he was present at the trial at law. Jamison *v.* May, 13 Ark. 600.

California.— Davis *v.* Chalfant, 81 Cal. 627, 22 Pac. 972; Quinn *v.* Wetherbee, 41 Cal. 247; Boston *v.* Haynes, 33 Cal. 31; Barnett *v.* Kilhourne, 3 Cal. 327.

Florida.— Dibble *v.* Trulnck, 12 Fla. 185.

Georgia.— Sasser *v.* Olliff, 91 Ga. 84, 16 S. E. 312; Albritton *v.* Bird, R. M. Charlt. 93.

Illinois.—Bardonski *v.* Bardonski, 144 Ill. 284, 33 N. E. 39; Dinet *v.* Eigenmann, 96 Ill. 39; Kern *v.* Strausberger, 71 Ill. 413; Fuller *v.* Little, 69 Ill. 229; Ames *v.* Snider, 55 Ill. 498; Winchester *v.* Grosvenor, 48 Ill. 517; Albro *v.* Dayton, 28 Ill. 325; Henry *v.* Seager, 80 Ill. App. 172.

Indiana.— Sharp *v.* Moffitt, 94 Ind. 240; Parker *v.* Indianapolis Nat. Bank, 1 Ind. App. 462, 27 N. E. 650.

Iowa.— Jones *v.* Leech, 46 Iowa 186; Shricker *v.* Field, 9 Iowa 366. But an attorney's failure to make defense, arising from misinformation given by attorneys of the district as to the time of the term, and not from neglect, is ground for relief against the judgment. Buena Vista County *v.* Iowa

relieve a party who had a valid defense to the action, but was erroneously advised by his counsel that it was not necessary to bring it forward.[69] But the case is otherwise where the party has been deceived or betrayed by his attorney,[70] and the courts have thought proper to grant relief in some cases of misunderstanding or misapprehension on the part of the attorney.[71]

10. Matters Determined in Original Action — a. In General. Equity will not entertain a bill for relief against a judgment, founded on any matters which were tried and determined in the action at law, or which were there so put in issue that they might have been adjudicated, however unjust the judgment may appear to be.[72]

b. Motion For New Trial or to Vacate. Equity will refuse to interfere by

Falls, etc., R. Co., 49 Iowa 657. And see Barthell *v.* Roderick, 34 Iowa 517, holding that, where the judgment in an action on a promissory note has been rendered for too small an amount, by reason of a mistake of plaintiff's attorney in calculating the sum due and claimed in the petition, the mistake may be corrected upon petition in equity.

Kentucky.— Payton *v.* McQuown, 97 Ky. 757, 31 S. W. 874, 17 Ky. L. Rep. 518, 53 Am. St. Rep. 437, 31 L. R. A. 33; Barrow *v.* Jones, 1 J. J. Marsh. 470; Patterson *v.* Matthews, 3 Bibb 80.

Maryland.— Darling *v.* Baltimore, 51 Md. 1.

Massachusetts.— Amherst College *v.* Allen, 165 Mass. 178, 42 N. E. 570.

Mississippi.— Roots *v.* Cohen, (1893) 12 So. 593; McLaughlin *v.* Clark, Freem. 385.

Missouri.— Fears *v.* Riley, 148 Mo. 49, 49 S. W. 836; Matthis *v.* Cameron, 62 Mo. 504; Miller *v.* Bernecker, 46 Mo. 194; Bowman *v.* Field, 9 Mo. App. 576.

Nebraska.— Funk *v.* Kansas Mfg. Co., 53 Nebr. 450, 73 N. W. 931.

New York.— Reich *v.* Cochran, 105 N. Y. App. Div. 542, 94 N. Y. Suppl. 404 [*reversing* 41 Misc. 621, 85 N. Y. Suppl. 247].

Ohio.— White *v.* U. S. Bank, 6 Ohio 528.

Pennsylvania.— Waldo *v.* Denton, 135 Pa. St. 181, 19 Atl. 1078. *Compare* Lebanon Mut. Ins. Co. *v.* Erb, 2 Chest. Co. Rep. 537; Bleiler *v.* George, 2 Woodw. 401.

South Carolina.— Vaughan *v.* Hewitt, 17 S. C. 442; O'Keefe *v.* Rice, Bailey Eq. 179.

Tennessee.— Chester *v.* Apperson, 4 Heisk. 639; Graham *v.* Roberts, 1 Head 56; Morton *v.* Nunnelly, 3 Hayw. 210. *Compare* Click *v.* Gillespie, 4 Hayw. 4.

Vermont.— Burton *v.* Wiley, 26 Vt. 430; Warner *v.* Conant, 24 Vt. 351, 58 Am. Dec. 178.

Virginia.— Ayres *v.* Morehead, 77 Va. 586.

Wisconsin.— Hiles *v.* Mosher, 44 Wis. 601; Farmers' L. & T. Co. *v.* Walworth County Bank, 23 Wis. 249; Huebschman *v.* Baker, 7 Wis. 542.

United States.— Crim *v.* Handley, 94 U. S. 652, 24 L. ed. 216; Celina *v.* Eastport Sav. Bank, 68 Fed. 401, 15 C. C. A. 495; Cowley *v.* Northern Pac. R. Co., 46 Fed. 325; Barhorst *v.* Armstrong, 42 Fed. 2; Rogers *v.* Parker, 20 Fed. Cas. No. 12,018, 1 Hughes 148; Wynn *v.* Wilson, 30 Fed. Cas. No. 18,116, Hempst. 698.

See 30 Cent. Dig. tit. "Judgment," § 827.

Contra.— See Whittlesey *v.* Delaney, 73 N. Y. 571; Sharp *v.* New York, 31 Barb. (N. Y.) 578.

69. *Alabama.*— Duckworth *v.* Duckworth, 35 Ala. 70.

Georgia.— Brown *v.* Wilson, 56 Ga. 534.

Iowa.— Shricker *v.* Field, 9 Iowa 366.

Kentucky.— Mouser *v.* Harmon, 96 Ky. 591, 29 S. W. 448, 16 Ky. L. Rep. 651.

North Carolina.— Fentriss *v.* Robins, 4 N. C. 610, 7 Am. Dec. 704.

See 30 Cent. Dig. tit. "Judgment," § 827.

70. Smith *v.* Quarles, (Tenn. Ch. App. 1897) 46 S. W. 1035; Pacific R. Co. *v.* Missouri Pac. R. Co., 111 U. S. 505, 4 S. Ct. 583, 28 L. ed. 498. *Contra*, Ketchum *v.* Harlowe, 84 Mo. 225. And see Watts *v.* Gayle, 20 Ala. 817, holding that a party against whom a judgment at law is rendered by default cannot obtain relief against it in equity, on the ground that the attorney whom he had retained to appear and defend the suit for him failed to do so, and appeared for the opposite party, when the proof shows that he had only requested the attorney to attend to any and all business for him, and had not mentioned any particular case.

71. Day *v.* Welles, 31 Conn. 344; Webster *v.* Skipworth, 26 Miss. 341.

72. *Alabama.*— Foster *v.* State Bank, 17 Ala. 672.

Arkansas.— Garvin *v.* Squires, 9 Ark. 533, 50 Am. Dec. 224.

California.— Le Mesnager *v.* Variel, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91; Agard *v.* Valencia, 39 Cal. 292; Barnett *v.* Kilbourne, 3 Cal. 327.

Colorado.— Haley *v.* Breeze, 13 Colo. App. 432, 59 Pac. 226.

Florida.— Michel *v.* Sammis, 15 Fla. 308.

Georgia.— Robinson *v.* Veal, 78 Ga. 301; Brown *v.* Wilson, 56 Ga. 534; Van Dyke *v.* Martin, 52 Ga. 56; Parker *v.* King, 43 Ga. 299.

Illinois.— Buckmaster *v.* Grundy, 8 Ill. 626; More *v.* Bagley, 1 Ill. 94, 12 Am. Dec. 144; Klinesmith *v.* Van Bramer, 104 Ill. App. 384.

Iowa.— Fulliam *v.* Drake, 105 Iowa 615, 75 N. W. 479; Lowery *v.* Greene County, 75 Iowa 338, 39 N. W. 523; Finch *v.* Hollinger, 47 Iowa 173.

Kansas.— Myers *v.* Jones, 61 Kan. 191, 59 Pac. 275.

Kentucky.— Triplett *v.* Gill, 7 J. J. Marsh.

injunction, when the grounds presented for its action have been already considered and held insufficient on a motion made in the trial court to open or vacate the judgment or for a new trial.[73]

c. Refusal to Continue. A bill for an injunction cannot be maintained on grounds which were presented and overruled on a motion for a continuance, or on the ground that the refusal to continue forced the party to trial at a disadvantage.[74]

432; James *v.* Neal, 3 T. B. Mon. 369; Stark *v.* Thompson, 3 T. B. Mon. 296; Lamme *v.* Saunders, 1 T. B. Mon. 263; Robinson *v.* Gilbreth, 4 Bibb 183; Davidson *v.* Givins, 2 Bibb 200, 4 Am. Dec. 695; Morrison *v.* Hart, 2 Bibb 4, 4 Am. Dec. 663. But see Meriwether *v.* Booker, 5 Litt. 254, where the complainant had attempted to set up his defense at law, but the court of law held that it was not there available, but that his remedy was in equity, and he thereupon filed his bill for an injunction against the judgment, and the court of chancery, being of the opinion that the defense ought to have prevailed at law, decreed a perpetual injunction.

Louisiana.— Hooper *v.* Rhodes, 7 La. Ann. 137.

Maryland.— Briesch *v.* McCauley, 7 Gill 189.

Mississippi.— Johnson *v.* Smokey, (1888) 4 So. 788; Yongue *v.* Billups, 23 Miss. 407.

Missouri.— Price *v.* Johnson County, 15 Mo. 433; Matson *v.* Field, 10 Mo. 100; Sumner *v.* Whitley, 1 Mo. 708.

New Jersey.— Isham *v.* Cooper, 56 N. J. Eq. 398, 37 Atl. 462, 39 Atl. 760; Amey *v.* Calkins, (Ch. 1890) 19 Atl. 388; Vaughn *v.* Johnson, 9 N. J. Eq. 173; Powers *v.* Butler, 4 N. J. Eq. 465; Kinney *v.* Ogden, 3 N. J. Eq. 168. But see Smalley *v.* Line, 28 N. J. Eq. 348, where the court of chancery gave effect to a compromise between the parties, the debtor having paid the consideration, by enjoining the execution of a judgment rendered in an action against him in which he had vainly pleaded and attempted to enforce the compromise.

New York.— Herring *v.* New York, etc., R. Co., 63 How. Pr. 497; Pacific Mail Steamship Co. *v.* New York, 57 How. Pr. 511; Simpson *v.* Hart, 1 Johns. Ch. 97.

North Carolina.— Peace *v.* Nailing, 16 N. C. 289; Brickell *v.* Jones, 3 N. C. 357.

Ohio.— Lieby *v.* Ludlow, 4 Ohio 469.

Oregon.— Snyder *v.* Vannoy, 1 Oreg. 344.

Pennsylvania.— Dunning *v.* Krotzer, 2 L. T. N. S. 183.

South Carolina.— Forsythe *v.* McCreight, 10 Rich. Eq. 308; Hill *v.* Rogers, Rice Eq. 7.

Tennessee.— White *v.* Cahal, 2 Swan 550; Williams *v.* Wright, 9 Humphr. 493; Cox *v.* Hartsville Bank, (Ch. App. 1900) 63 S. W. 237; Evans *v.* International Trust Co., (Ch. App. 1900) 59 S. W. 373.

Texas.— Luther *v.* Western Union Tel. Co., 25 Tex. Civ. App. 31, 60 S. W. 1026.

Utah.— Mosby *v.* Gisborn, 17 Utah 257, 54 Pac. 121.

Vermont.— Continental L. Ins. Co. *v.* Currier, 58 Vt. 229, 4 Atl. 866; Fletcher *v.* Warren, 18 Vt. 45; Emerson *v.* Udall, 13 Vt. 477, 37 Am. Dec. 604; Dana *v.* Nelson, 1 Aik. 252.

Virginia.— Tapp *v.* Rankin, 9 Leigh 478; Faulkner *v.* Harwood, 6 Rand. 125. *Compare* Braxton *v.* Willing, 4 Call 288.

Washington.— Wingard *v.* Jameson, 2 Wash. Terr. 402, 7 Pac. 863.

United States.— U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Hendrickson *v.* Hinckley, 17 How. 443, 15 L. ed. 123; Truly *v.* Wanzer, 5 How. 141, 12 L. ed. 88; Marine Ins. Co. *v.* Hodgson, 7 Cranch 332, 3 L. ed. 362; Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 71 Fed. 826; Tompkins *v.* Drennen, 56 Fed. 694, 6 C. C. A. 83; Breckenridge *v.* Peter, 4 Fed. Cas. No. 1,825, 4 Cranch C. C. 15; U. S. *v.* Flint, 25 Fed. Cas. No. 15,121, 4 Sawy. 42.

England.— Bateman *v.* Willoe, 1 Sch. & Lef. 204.

See 30 Cent. Dig. tit. "Judgment," § 841.

Adjudication on jurisdiction.— A decision in a suit that the court had jurisdiction is conclusive of that question in a direct proceeding by the same parties to have the decree set aside. Hall *v.* Lowther, 22 W. Va. 570.

73. *Alabama.*— Haughy *v.* Strang, 2 Port. 177, 27 Am. Dec. 648.

California.— Collins *v.* Butler, 14 Cal. 223.

Illinois.— Telford *v.* Brinkerhoff, 163 Ill. 439, 45 N. E. 156.

Indiana.— Davis *v.* Bass, 4 Ind. 313.

Iowa.— Dalhoff *v.* Keenan, 66 Iowa 679, 24 N. W. 273.

Michigan.— Codd *v.* Mahiat, 109 Mich. 186, 66 N. W. 1093; Gray *v.* Barton, 62 Mich. 186, 28 N. W. 813.

Missouri.— Wabash R. Co. *v.* Mirrielees, 182 Mo. 126, 81 S. W. 437; Matson *v.* Field, 10 Mo. 100. But *compare* Sherer *v.* Akers, 74 Mo. App. 217, holding that an adverse ruling on a motion to set aside a judgment entered by default will not bar an action in equity to enjoin the execution of the judgment.

Ohio.— Critchfield *v.* Porter, 3 Ohio 518.

Pennsylvania.— Wilson *v.* Buchanan, 170 Pa. St. 14, 32 Atl. 620.

Virginia.— Meredith *v.* Johns, 1 Hen. & M. 585.

United States.— Hendrickson *v.* Bradley, 85 Fed. 508, 29 C. C. A. 303; Folsom *v.* Ballard, 70 Fed. 12, 16 C. C. A. 593; Railroad Co. *v.* Neal, 20 Fed. Cas. No. 11,534, 1 Woods 353.

See 30 Cent. Dig. tit. "Judgment," § 843.

Contra.— Simson *v.* Hart, 14 Johns. (N. Y.) 63.

74. Andrews *v.* Fenter, 1 Ark. 186; West-

11. Compelling Set-Off or Reduction of Damages — a. In General. As equity may order one judgment to be set off against another, so it has power to restrain the execution of a judgment when it is made to appear that the judgment defendant has a debt against plaintiff exceeding the judgment in amount, and which he cannot otherwise collect.[75] But such action will not be taken where the judgment debtor has an adequate remedy at law,[76] or unless it appears that the judgment creditor is insolvent or in some way unable to respond to the claim against him, so that the complainant is in danger of losing it.[77]

b. Subject-Matter of Set-Off. Where equitable grounds are shown, injunction

ern *v.* Woods, 1 Tex. 1; Syme *v.* Montague, 4 Hen. & M. (Va.) 180.

75. *Alabama.*— Dunham Lumber Co. *v.* Holt, 124 Ala. 181, 27 So. 556; Dunham Lumber Co. *v.* Holt, 123 Ala. 336, 26 So. 663; O'Neill *v.* Perryman, 102 Ala. 522, 14 So. 898; Goldsmith *v.* Stetson, 39 Ala. 183; Pharr *v.* Reynolds, 3 Ala. 521. But see Powell *v.* Stewart, 17 Ala. 719, holding that mutual accounts between the parties, if they are not complicated, do not furnish a sufficient ground for overhauling a judgment at law, especially when they have been submitted to and passed upon by the law court.

Arkansas.— Bettison *v.* Jennings, 8 Ark. 287.

California.— Russell *v.* Conway, 11 Cal. 93.

Colorado.— Whitehead *v.* Jessup, 7 Colo. App. 460, 43 Pac. 1042.

Connecticut.— Kelly *v.* Wiard, 49 Conn. 443.

Delaware.— Webster *v.* McDaniel, 2 Del. Ch. 297.

Georgia.— Tommey *v.* Ellis, 41 Ga. 260.

Illinois.— Hinrichsen *v.* Reinback, 27 Ill. 295; Buckmaster *v.* Grundy, 8 Ill. 626; Matson *v.* Oberne, 25 Ill. App. 213.

Kentucky.— Hahn *v.* Hart, 12 B. Mon. 426; Bishop *v.* Duncan, 3 Dana 15; Mitchell *v.* Stewart, 4 J. J. Marsh. 551; Payne *v.* Loudon, 1 Bibb 518.

Louisiana.— Muse *v.* Rogers, 12 Mart. 370.

Michigan.— Wells *v.* Elsam, 40 Mich. 218.

Mississippi.— Posey *v.* Maddox, 65 Miss. 193, 3 So. 460.

Missouri.— Sumner *v.* Whitley, 1 Mo. 708.

Nebraska.— Commercial State Bank *v.* Ketchum, 1 Nebr. (Unoff.) 454, 96 N. W. 614.

New York.— Ladew *v.* Hart, 8 N. Y. App. Div. 150, 40 N. Y. Suppl. 509; Lane *v.* Moss, 18 N. Y. Suppl. 605.

North Carolina.— Capehart *v.* Etheridge, 63 N. C. 353.

Oregon.— McDonald *v.* Mackenzie, 24 Oreg. 573, 14 Pac. 866.

Tennessee.— Clift *v.* Martin, 4 Baxt. 387; Brazelton *v.* Brooks, 2 Head 194.

Texas.— Hanchett *v.* Gray, 7 Tex. 549.

Virginia.— Shipman *v.* Fletcher, 95 Va. 585, 29 S. E. 325; McClellan *v.* Kinnaird, 6 Gratt. 352.

West Virginia.— Jarrett *v.* Goodnow, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; Black *v.* Smith, 13 W. Va. 780.

Wisconsin.— Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232.

United States.— L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 116 Fed. 1, 53 C. C. A. 513.

See 30 Cent. Dig. tit. "Judgment," § 830.

Contra.— Rives *v.* Rives, 7 Rich. Eq. (S. C.) 353.

Set-off of payments of usury.— In a suit to restrain the levy of an execution, on the ground that the contract was usurious, an injunction may be granted where it appears that the payments made by the debtor exceed the debt and legal interest. Ennis *v.* Ginn, 5 Del. Ch. 180; Hill *v.* Reifsnider, 46 Md. 555; Bond *v.* Jones, 8 Sm. & M. (Miss.) 368. *Compare* Day *v.* Cummings, 19 Vt. 496.

Set-off previously refused.— A party who has refused a set-off when it was offered in a suit at law, and who refuses to adjust the matter on equitable principles, cannot come into chancery to enforce the set-off. Love *v.* Freer, Wright (Ohio) 412.

Set-off less than judgment.— An injunction granted to restrain the collection of a judgment on the ground that the debtor therein is entitled to a credit for a sum less than the whole amount of the judgment should provide that the judgment creditor may proceed by execution to collect the undisputed balance of the judgment. Levy *v.* Steinbach, 43 Md. 212.

76. Aholtz *v.* Goltra, 114 Ill. 241, 1 N. E. 911; Thompson *v.* Sansberry, 2 J. J. Marsh. (Ky.) 362; Scotts *v.* Hume, Litt. Sel. Cas. (Ky.) 378; Brown *v.* Scott, 2 Bibb (Ky.) 635.

77. Wellborn *v.* Bonner, 9 Ga. 82; Markham *v.* Todd, 2 J. J. Marsh. (Ky.) 364; Clute *v.* Ewing, 21 Tex. 677; Montgomery Water Power Co. *v.* Chapman, 128 Fed. 197 (where complainant had a valid attachment lien on land of defendant, as well as a bond with good surety); Boone *v.* Small, 3 Fed. Cas. No. 1,644, 3 Cranch C. C. 628.

Non-residence of judgment creditor.— In some states it is ruled that if the judgment creditor is a non-resident of the state, so that the debtor, having a cross claim against him, cannot get personal service on him, and particularly if he has no property within the state, this will be sufficient ground for the interference of equity to decree a set-off. Livingston *v.* Marshall, 82 Ga. 281, 11 S. E. 542; Moss *v.* Rowland, 1 Duv. (Ky.) 321. But in some other jurisdictions this is denied. Walker *v.* Thomas, 88 Ky. 486, 11 S. W. 434, 11 Ky. L. Rep. 20; Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49; Beall *v.* Brown, 7 Md. 393.

may be used as a means of setting off one judgment against another;[78] but it is by no means necessary that the claim to be set off should have been reduced to judgment,[79] or even that it should be a demand enforceable at law, equity possessing the power to set off an equitable debt against a legal one, where there are special circumstances of which only a court of chancery can take notice.[80] And although the claims may not appear on their face to be mutual, a court of equity will look beyond the nominal parties to the real parties in interest and adjudge accordingly;[81] and a set-off may be decreed as against an assignee of the judgment if he took it with notice of the equities, or if the assignment was fraudulently intended to prevent a set-off.[82] So also a judgment debtor may in this way set off an amount which he has paid in the character of a surety for the judgment creditor.[83] But generally a party going into equity to enjoin a judgment on the ground of a set-off must show as strong a claim to be paid the amount of his demand as if he were suing on the same at law or in equity,[84] and equity will not ordinarily grant this relief where the claim set up is contingent, uncertain, or unliquidated,[85] or where it accrued, or was acquired by the complainant, after the recovery of the judgment at law.[86]

78. Hobbs *v.* Duff, 23 Cal. 596; Iredell *v.* Langston, 16 N. C. 392; Barbour *v.* National Exch. Bank, 50 Ohio St. 90, 33 N. E. 542, 20 L. R. A. 192.

However in Kentucky it is said that the chancellor cannot set off one judgment against another, unless there is a connection between the transactions on which the judgments were rendered, or unless the judgment prayed to be set off cannot be enforced by legal means. Allnut *v.* Winn, 3 J. J. Marsh. (Ky.) 304.

79. Ellis *v.* Kerr, (Tex. Civ. App. 1893) 23 S. W. 1050.

80. Chandler *v.* Lyon, 8 Ala. 35; Chandler *v.* Crawford, 7 Ala. 506; Small *v.* Collins, 6 Houst. (Del.) 273; Brazelton *v.* Brooks, 2 Head (Tenn.) 194. *Compare* Hudson *v.* Kline, 9 Gratt. (Va.) 379.

81. Hobbs *v.* Duff, 23 Cal. 596; Sellers *v.* Bryan, 17 N. C. 358. *Compare* Cummins *v.* Bradford, 29 S. W. 747, 16 Ky. L. Rep. 753.

Several debt against joint.— Where a complainant in equity holds a claim against one of two parties who have jointly recovered a judgment against him, and such individual debtor is insolvent, the claim may be set off against that debtor's share or interest in the judgment and *vice versa*. Fulkerson *v.* Davenport, 70 Mo. 541; Baker *v.* Kinsey, 41 Ohio St. 403. So one member of a firm may set off his separate judgment against the insolvent debtor who seeks to enforce a judgment against the firm. Jeffries *v.* Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158.

82. *Alabama.*— Henderson *v.* McVay, 32 Ala. 471.

Iowa.— Hurst *v.* Sheets, 14 Iowa 322.

Kentucky.— Merrill *v.* Souther, 6 Dana 305.

New York.— Davidson *v.* Alfaro, 16 Hun 353; Weston *v.* Turner, 3 Silv. Sup. 70, 22 N. Y. Suppl. 141.

Tennessee.— A debt due from the assignor of a judgment to defendant therein cannot be set off by bill in equity against a *bona fide* holder of the judgment without notice. Catron *v.* Cross, 3 Heisk. 584.

See 30 Cent. Dig. tit. "Judgment," § 830½.

83. Wood *v.* Steele, 65 Ala. 436; Tuscumbia, etc., R. Co. *v.* Rhodes, 8 Ala. 206; Williams *v.* Helme, 16 N. C. 151, 18 Am. Dec. 580; Mattingly *v.* Sutton, 19 W. Va. 19.

84. Walker *v.* Ayres, 1 Iowa 449.

85. *Illinois.*— Hinrichsen *v.* Reinback, 27 Ill. 295.

Iowa.— Baker *v.* Ryan, 67 Iowa 708, 25 N. W. 890.

Kentucky.— Bradley *v.* Morgan, 2 A. K. Marsh. 369. *Compare* Brown *v.* Starke, 3 Dana 316.

New Jersey.— Jackson *v.* Bell, 31 N. J. Eq. 554.

New York.— Bradley *v.* Angel, 3 N. Y. 475.

Virginia.— Randolph *v.* Randolph, 1 Hen. & M. 181.

See 30 Cent. Dig. tit. "Judgment," § 830½.

But see Guttendag *v.* Lehigh Valley Iron Co., 14 Phila. (Pa.) 639 (where an injunction was granted to restrain the enforcement of a judgment where defendant therein showed that he had recovered a judgment for a larger amount against the creditor, before a justice of the peace, and that such creditor was insolvent and did not deny the validity of the justice's judgment, notwithstanding that an appeal from the latter judgment was still pending); Memphis, etc., R. Co. *v.* Greer, 87 Tenn. 698, 11 S. W. 931, 4 L. R. A. 858 (where it was held that a bill to enjoin the collection of a judgment may be sustained on the ground of an equitable set-off, although the claim is not determined and fixed, but is being contested); Edminson *v.* Baxter, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751 (allowing a person against whom a judgment had been recovered for freight to set off, by bill in equity, the damages which he had sustained in respect to the goods carried, through the misconduct of the carriers).

A claim for services rendered may in equity be set off against a judgment at law, the reasonable value of the services being first ascertained and determined. Baylor *v.* Morrison, 2 Bibb (Ky.) 103; Ashton *v.* McKim, 2 Fed. Cas. No. 584, 4 Cranch C. C. 19.

86. Bemis *v.* Simpson, Ga. Dec. Pt. II,

c. To Relieve Vendee on Failure of Title. Where a vendor of property has recovered judgment for the purchase-money and become insolvent, and the vendee is damnified by a failure of title or possession, or by having to pay off an encumbrance, equity may enjoin the judgment to the extent of the loss which the vendee has suffered;[87] but not where he has a plain and adequate remedy at law by action for breach of the covenant of warranty or against encumbrances,[88] or where he has neglected an opportunity to set off his damages when sued for the purchase-price.[89]

d. Failure to Plead Set-Off at Law. Equity will not enjoin a judgment on account of matters which might have been pleaded by way of set-off in the action in which the judgment was recovered, where the party neglected his opportunity in that respect,[90] unless he shows a good and sufficient excuse for his neglect,[91] and still less on account of any set-off or counter-claim which was set up in the action at law and rejected or decided adversely to him.[92]

224; Desearn *v.* Babers, 62 Miss. 421; Condon *v.* Shehan, 46 Miss. 710.

But it may be otherwise if the claim was acquired before the rendition of the judgment at law, but too late to plead it by way of set-off in that action. Ellis *v.* Kerr, (Tex. Civ. App. 1893) 23 S. W. 1050.

Under the Spanish law previously in force in Louisiana a defendant might purchase a note of plaintiff after judgment and execution, and suspend execution by injunction, until his claim to set off the amount could be determined. Caldwell *v.* Davis, 2 Mart. N. S. (La.) 135.

87. *Indiana.* — Shelby *v.* Marshall, 1 Blackf. 384.

Kentucky. — Collins *v.* Fitzpatrick, 6 J. J. Marsh. 67.

Maryland. — Hilleary *v.* Crow, 1 Harr. & J. 542.

Tennessee. — Hamlin *v.* Berry, 1 Overt. 39.

Virginia. — Jaynes *v.* Brock, 10 Gratt. 211; Shores *v.* Ware, 1 Rob. 1.

See 30 Cent. Dig. tit. "Judgment," § 831.

88. *Georgia.* — Ponder *v.* Cox, 26 Ga. 485.

Kentucky. — Haggin *v.* Oliver, 5 J. J. Marsh. 237; Watts *v.* Hunn, 4 Litt. 267; Gorman *v.* Young, 18 S. W. 369, 13 Ky. L. Rep. 785.

New Jersey. — Hopper *v.* Lutkins, 4 N. J. Eq. 149.

North Carolina. — Henry *v.* Elliott, 59 N. C. 175; Merritt *v.* Hunt, 39 N. C. 406.

Tennessee. — Smith *v.* Ross, 3 Humphr. 220.

See 30 Cent. Dig. tit. "Judgment," § 832.

89. Hambrick *v.* Dickey, 48 Ga. 578; Hall *v.* Clark, 21 Mo. 415.

90. *Alabama.* — Moore *v.* Faggard, 51 Ala. 525; Hill *v.* McNeill, 8 Port. 432. But see French *v.* Garner, 7 Port. 549, holding that, where it is doubtful whether a matter of set-off could have been established at law by defendant in a judgment, there is good ground for the interposition of equity after judgment.

Arkansas. — Garvin *v.* Squires, 9 Ark. 533, 50 Am. Dec. 224; Menifee *v.* Ball, 7 Ark. 520; Cummins *v.* Bentley, 5 Ark. 9.

Kentucky. — Lamme *v.* Saunders, 1 T. B. Mon. 263; Hughes *v.* McCoun, 3 Bibb 254.

Maryland. — Twigg *v.* Hopkins, 85 Md. 301, 37 Atl. 24; Cook *v.* Murphy, 7 Gill & J. 282.

Massachusetts. — Wolcott *v.* Jones, 4 Allen 367.

Michigan. — McGraw *v.* Pettibone, 10 Mich. 530.

North Carolina. — Love *v.* Love, 41 N. C. 325.

Pennsylvania. — McLean *v.* Bindley, 114 Pa. St. 559, 8 Atl. 1.

South Carolina. — Tollison *v.* West, Harp. Eq. 93.

Virginia. — George *v.* Strange, 10 Gratt. 499; Lipscomb *v.* Winston, 1 Hen. & M. 453; Perkins *v.* Clements, 1 Pat. & H. 141.

West Virginia. — Zinn *v.* Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772; Sayre *v.* Harpold, 33 W. Va. 553, 11 S. E. 16.

United States. — Hendrickson *v.* Hinchley, 17 How. 443, 15 L. ed. 123.

See 30 Cent. Dig. tit. "Judgment," § 834.

Contra. — Ellis *v.* Fisher, 10 La. Ann. 479; De Lizardi *v.* Hardaway, 8 Rob. (La.) 22. *Compare* Crow *v.* Watkins, 12 La. Ann. 845.

91. *Alabama.* — Duckworth *v.* Duckworth, 35 Ala. 70; Pearce *v.* Winter Iron-Works, 32 Ala. 68; Mock *v.* Cundiff, 6 Port. 24.

Georgia. — Hines *v.* Beers, 76 Ga. 9; Harris *v.* Western, etc., R. Co., 59 Ga. 830.

Iowa. — Shricker *v.* Field, 9 Iowa 366.

Mississippi. — Stovall *v.* Northern Bank, 5 Sm. & M. 17.

Missouri. — Payne *v.* O'Shea, 84 Mo. 129.

Ohio. — Allen *v.* Medill, 14 Ohio 445.

Tennessee. — Reeves *v.* Hogan, Cooke 175, 5 Am. Dec. 684.

Virginia. — Griffith *v.* Thompson, 4 Gratt. 147.

See 30 Cent. Dig. tit. "Judgment," § 835.

92. Carlyle *v.* Long, 5 Litt. (Ky.) 167. But *compare* Ward *v.* Chiles, 3 J. J. Marsh. (Ky.) 486 (holding that a complainant showing himself entitled to any credit which a jury did not allow him on a trial at law will be entitled to relief in equity to that extent); Hackett *v.* Connett, 2 Edw. (N. Y.) 73 (holding that a decision of a court of law refusing to allow a set-off is not a bar to a suit in equity to obtain a set-off).

12. FRAUD AND COLLUSION — a. Fraud in General. A court of equity upon a proper application will relieve against or enjoin a party from enforcing a judgment which he has obtained by means of fraud.[93] The term "fraud" as here used is to be taken in its common and direct sense, and means the perpetration of an intentional wrong[94] or the breach of a duty growing out of a fiduciary relation.[95] To obtain relief on this ground it is necessary that the fraud charged

93. *Alabama.*— Dunklin *v.* Harvey, 50 Ala. 177; Eslava *v.* Eslava, 50 Ala. 32; Hair *v.* Lowe, 19 Ala. 224.

California.— Baker *v.* O'Riordan, 65 Cal. 368, 4 Pac. 232; Hayden *v.* Hayden, 46 Cal. 332; Carpentier *v.* Hart, 5 Cal. 406; Sanford *v.* Head, 5 Cal. 297.

Connecticut.— Stanton *v.* Embry, 46 Conn. 65; Pearce *v.* Olney, 20 Conn. 544; Carrington *v.* Holabird, 17 Conn. 530.

Georgia.— Dugan *v.* McGlann, 60 Ga. 353; Brown *v.* Thornton, 47 Ga. 474; Griffin *v.* Sketoe, 30 Ga. 300; Mobley *v.* Mobley, 9 Ga. 247.

Illinois.— Fellers *v.* Rainey, 82 Ill. 114; Wilday *v.* McConnel, 63 Ill. 278; Ogden *v.* Larrabee, 57 Ill. 389; How *v.* Mortell, 28 Ill. 478; Hinrichsen *v.* Van Winkle, 27 Ill. 334.

Indiana.— Asbury *v.* Frisz, 148 Ind. 513, 47 N. E. 328; Hogg *v.* Link, 90 Ind. 346.

Iowa.— Larson *v.* Williams, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544; Oliver *v.* Riley, 92 Iowa 23, 60 N. W. 180; Young *v.* Tucker, 39 Iowa 596; Cowin *v.* Toole, 31 Iowa 513; De Louis *v.* Meek, 2 Greene 55, 50 Am. Dec. 491; Porter *v.* Moffett, Morr. 108.

Kansas.— Adams *v.* Secor, 6 Kan. 542.

Kentucky.— Hahn *v.* Hart, 12 B. Mon. 426; Williams *v.* Fowler, 2 J. J. Marsh. 405; Carneal *v.* Wilson, 3 Litt. 80.

Louisiana.— Blodget *v.* Hogan, 10 La. Ann. 18; Fox *v.* Bonner, 12 La. 406; Paxton *v.* Cobb, 2 La. 137.

Maryland.— Dilly *v.* Barnard, 8 Gill & J. 170; Kent *v.* Ricards, 3 Md. Ch. 392; Burch *v.* Scott, 1 Bland 112.

Michigan.— Edson *v.* Cumings, 52 Mich. 52, 17 N. W. 693; Burpee *v.* Smith, Walk. 327.

Mississippi.— Land *v.* Elliott, 1 Sm. & M. 608.

Missouri.— Payne *v.* O'Shea, 84 Mo. 129; Bresnehan *v.* Price, 57 Mo. 422; Perry *v.* Siter, 37 Mo. 273; Miles *v.* Jones, 28 Mo. 87; Collier *v.* Easton, 2 Mo. 145; Lee *v.* Harmon, 84 Mo. App. 157; Smith *v.* Taylor, 78 Mo. App. 630.

Nebraska.— Klabunde *v.* Byron-Reed Co., (1904) 98 N. W. 182.

New Hampshire.— Wingate *v.* Haywood, 40 N. H. 437.

New Jersey.— Binsse *v.* Barker, 13 N. J. L. 263, 23 Am. Dec. 720; United Security L. Ins., etc., Co. *v.* Ott, (Ch. 1893) 26 Atl. 923; Dringer *v.* Erie R. Co., 42 N. J. Eq. 573, 8 Atl. 811; Tomkins *v.* Tomkins, 11 N. J. Eq. 512; Moore *v.* Gamble, 9 N. J. Eq. 246; Boulton *v.* Scott, 3 N. J. Eq. 231.

New York.— Whittlesey *v.* Delaney, 73 N. Y. 571; Corwithe *v.* Griffing, 21 Barb. 9; Munn *v.* Worrall, 16 Barb. 221; Reigal *v.* Wood, 1 Johns. Ch. 402.

North Carolina.— Smith *v.* Hays, 54 N. C. 321.

Oklahoma.— Estes *v.* Timmons, 12 Okla. 539, 73 Pac. 303.

Rhode Island.— Greene *v.* Haskell, 5 R. I. 447.

Tennessee.— Crank *v.* Flowers, 4 Heisk. 629; Jones *v.* Williamson, 5 Coldw. 371; Smith *v.* Quarles, (Ch. App. 1897) 46 S. W. 1035.

Texas.— Park *v.* Casey, 35 Tex. 536; Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117.

Utah.— Benson *v.* Anderson, 10 Utah 135, 37 Pac. 256.

Virginia.— Poindexter *v.* Waddy, 6 Munf. 418, 8 Am. Dec. 749.

West Virginia.— Franks *v.* Morris, 9 W. Va. 664.

Wisconsin.— Balch *v.* Beach, 119 Wis. 77, 95 N. W. 132. And see *In re* O'Neill, 90 Wis. 480, 63 N. W. 1042.

United States.— White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113; Hunt *v.* Fisher, 29 Fed. 801; Sahlgard *v.* Kennedy, 2 Fed. 295, 1 McCrary 291; Sawyer *v.* Gill, 21 Fed. Cas. No. 12,399, 3 Woodb. & M. 97; Surget *v.* Byers, 23 Fed. Cas. No. 13,629, Hempst. 715.

See 30 Cent. Dig. tit. "Judgment," § 836.

Fraudulent alteration.— It is good ground for the intervention of equity that a judgment fairly and regularly obtained has afterward been fraudulently altered so as to increase the amount for which it stands (Babcock *v.* McCamant, 53 Ill. 214), or so as to include a person not originally named in it or made a party to the action (Chester *v.* Miller, 13 Cal. 558).

Amending pleadings.— There can be no fraud in filing an amended declaration and an amended account on leave granted by the court, and a new trial will not be granted for that cause. Davis *v.* Presler, 5 Sm. & M. (Miss.) 459.

94. Ohio, etc., Mortg., etc., Co. *v.* Carter, 9 Kan. App. 621, 58 Pac. 1040.

Lack of proof.— In a suit against a married woman in which she was personally served the fact that a judgment was rendered against her without any proof that the cause of action was one for which her estate was properly chargeable is not such a fraud on her rights as will justify an injunction against the judgment. Cayce *v.* Powell, 20 Tex. 767, 73 Am. Dec. 211.

95. See McDonald *v.* Pearson, 114 Ala. 630, 21 So. 534; Ruppin *v.* McLachlan, 122 Iowa 343, 98 N. W. 153.

should be clearly stated and proved,[96] and it must appear that the fraud was practised or participated in by the judgment creditor,[97] that it was actually effective in bringing about the judgment which was rendered,[98] that the complainant in equity has a good defense to the action on the merits,[99] and has no other adequate means of obtaining relief against the judgment or avoiding its consequences,[1] and that his situation is in no way due to his own negligence or lack of proper diligence.[2]

b. Fraud in Cause of Action. Although some of the earlier cases support the right of equity to enjoin a judgment on the ground of fraud in the instrument or transaction on which it is founded,[3] for example, that equity may relieve

96. Jones *v.* South, 3 A. K. Marsh. (Ky.) 352; Rooks *v.* Williams, 13 La. Ann. 374; F. G. Oxley Stave Co. *v.* Butler County, 121 Mo. 614, 26 S. W. 367; Holton *v.* Davis, 108 Fed. 138, 47 C. C. A. 246.

97. Ruppin *v.* McLachlan, 122 Iowa 343, 98 N. W. 153.

Fraud of agent.— Although the fraud which brought about the rendition of a judgment was practised by an agent without the knowledge or consent of his principal, still the latter cannot avail himself of the fruits thereof. Webster *v.* Diamond, 36 Ark. 532.

Fraud of judge.— Where fraud and collusion are charged against a judge in entering an order or judgment a court of general equity jurisdiction can review the same and annul it, if the facts justify such action. Sanford *v.* Head, 5 Cal. 297.

Disqualification of judge.— A bill attacking a judgment as fraudulent by reason of the judge's having been counsel before the trial should state on whose behalf he so acted, and that the complainant objected to his sitting as judge, or failed to object by reason of ignorance of such disqualification. Griffith *v.* Griffith, (Tenn. Ch. App. 1898) 46 S. W. 340. Mar. 620

Fraud of officer.— Equity may enjoin the enforcement of a judgment obtained by the fraud of the officer charged with the service of the writ. Dowell *v.* Goodwin, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873. *Compare* Graham *v.* Loh, 32 Ind. App. 183, 69 N. E. 474. See *supra*, X, B, 3, c.

98. A judgment cannot be impeached in equity on the ground of fraud practised by the successful party where it appears that the fraud, if attempted, was unsuccessful. Allen *v.* Allen, 97 Fed. 525, 38 C. C. A. 336; Amory *v.* Amory, 1 Fed. Cas. No. 335, 6 Biss. 174. Or as otherwise stated it must be made to appear that the judgment has no other foundation than the fraud charged, and that if there had been no fraud there would have been no judgment. Dringer *v.* Erie R. Co., 42 N. J. Eq. 573, 8 Atl. 811; Holton *v.* Davis, 108 Fed. 138, 47 C. C. A. 246.

99. *Alabama.*— Hair *v.* Lowe, 19 Ala. 224.

Connecticut.— Pearce *v.* Olney, 20 Conn. 544.

Georgia.— Roberts *v.* Moore, 113 Ga. 170, 38 S. E. 402.

Illinois.— Henkleman *v.* Peterson, 40 Ill. App. 540; Atwater *v.* American Exch. Nat. Bank, 40 Ill. App. 501.

Iowa.— Way *v.* Lamb, 15 Iowa 79.

Missouri.— Hasler *v.* Schopp, 70 Mo. App. 469.

Wisconsin.— Ableman *v.* Roth, 12 Wis. 81.

United States.— White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113.

See 30 Cent. Dig. tit. "Judgment," § 849.

As to necessity of showing meritorious defense in general see *infra*, X, B, 14, a.

Reduction of damages.— Equity will not generally relieve against a judgment alleged to have been obtained by fraud, where the relief asked for is merely a reduction of the damages. Murdock *v.* De Vries, 37 Cal. 527; Essex County *v.* Berry, 2 Vt. 161.

1. Chalmers *v.* Hack, 19 Me. 124; Sylvester *v.* Boyd, 166 Mass. 445, 44 N. E. 343; Lyme *v.* Allen, 51 N. H. 242. *Contra*, see Nelson *v.* Rockwell, 14 Ill. 375.

Statutory remedy cumulative.— A statute which authorizes a petition to set aside a judgment for fraud practised by the successful party does not impair the right to file a bill in equity to impeach the judgment for fraud, but furnishes a cumulative statutory substitute therefor. Wheeler *v.* White, 2 Ohio Dec. (Reprint) 584, 4 West. L. Month. 110.

Solvency of creditor immaterial.— The fact that one is solvent is no ground for refusing to enjoin proceedings on a judgment which he has obtained by fraud. Sanderson *v.* Voelcker, 51 Mo. App. 328.

2. Weeks *v.* Holmes, 101 Ill. App. 435; Ratliff *v.* Stretch, 130 Ind. 282, 30 N. E. 30; Fackler *v.* Bavarian Relief Soc., 8 Ohio Dec. (Reprint) 56, 5 Cinc. L. Bul. 353.

3. *Alabama.*— Chandler *v.* Lyon, 8 Ala. 35.

Kentucky.— Robinson *v.* Gilbreth, 4 Bibb 183.

Tennessee.— Cox *v.* Hartsville Bank, (Ch. App. 1900) 63 S. W. 237, a case of mutilation of receipts by a party after their introduction in evidence by the adverse party, in which the court held it sufficient to justify the intervention of equity, on the ground that it was a fraudulent presentation of an issue, and not fraud in support of an issue.

Virginia.— Dandridge *v.* Harris, 1 Wash. 326, 1 Am. Dec. 465; Overstreet *v.* Randolph, Wythe 47.

United States.— Trefz *v.* Knickerbocker L. Ins. Co., 8 Fed. 177.

See 30 Cent. Dig. tit. "Judgment," § 785.

Fraud in procuring instrument.— Some decisions sustain the right of equity to grant relief against a judgment, where the instrument in suit, whether a note, bond, warrant

against a judgment for the price of property sold, where the sale was induced by false representations or concealment of the truth, in regard to quantity, character, or title,[4] it is now generally held that the fraud which will justify such action must be extrinsic or collateral to the matters involved in the issues or the trial at law,[5] and that fraud in the cause of action or instrument in suit must be set up in the trial at law, and furnishes no ground for relief in equity, unless the party aggrieved shows a good and sufficient reason why he did not avail himself of this defense at law.[6]

c. Fraud in Preventing Defense. Where a defendant in an action at law has a good defense, but is prevented from setting it up by the fraud, artifice, deceit, or misrepresentation of plaintiff, without negligence or fault on his own part, and a judgment is thereby obtained against him, it is a proper case for equitable relief.[7]

of attorney to confess judgment, or other cause of action, was procured by fraud, false representations, or deceit. Norwood *v.* Richardson, (Del. Ch. 1903) 57 Atl. 244; Bird *v.* Chaffin, 21 N. C. 55; Crawford *v.* Crawford, 4 Desauss. Eq. (S. C.) 176. But *compare* Peyton *v.* Rawlens, 4 Hayw. (Tenn.) 77, where relief in equity was refused, although the note on which the judgment was founded was obtained by false representations, was without consideration, and was signed while the maker was in a state of delirium from sickness.

4. *Alabama.*— Wray *v.* Furniss, 27 Ala. 471; Walton *v.* Bonham, 24 Ala. 513; Graham *v.* Tankersley, 15 Ala. 634.

Indiana.— Poe *v.* Decker, 5 Ind. 150.

Kentucky.— Prewitt *v.* Singleton, 3 J. J. Marsh. 707. See also McCoun *v.* Delany, 2 Bibb 440.

Louisiana.— Davis *v.* Millaudon, 14 La. Ann. 868.

North Carolina.— Cox *v.* Jerman, 41 N. C. 526; Hauser *v.* Mann, 5 N. C. 410.

Virginia.— Jaynes *v.* Brock, 10 Gratt. 211).

Contra.— See Iverson *v.* Wilburn, 65 Ga. 103; Amick *v.* Bowyer, 3 W. Va. 7.

5. Irvine *v.* Leyh, 124 Mo. 361, 27 S. W. 512; Keith *v.* Alger, 114 Tenn. 1, 85 S. W. 71; U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50; Coe *v.* Aiken, 61 Fed. 24.

6. *Alabama.*— Adler *v.* Van Kirk Land, etc., Co., 114 Ala. 551, 21 So. 490, 62 Am. St. Rep. 133; Watts *v.* Frazer, 80 Ala. 186; Wellborn *v.* Tiller, 10 Ala. 305; Hudson *v.* Crutchfield, 12 Ala. 433.

District of Columbia.— Mason *v.* Jones, 7 D. C. 247.

Illinois.— Crumpton *v.* Baldwin, 42 Ill. 165.

Indiana.— State *v.* Holmes, 69 Ind. 577; Lake *v.* Jones, 49 Ind. 297; Tereba *v.* Standard Cabinet Mfg. Co., 32 Ind. App. 9, 68 N. E. 1033.

Iowa.— Loughren *v.* Bonniwell, 125 Iowa 518, 101 N. W. 287, 106 Am. St. Rep. 319; Brownell *v.* Storm Lake Bank, 63 Iowa 754, 19 N. W. 788.

Minnesota.— Moudry *v.* Witzka, 89 Minn. 300, 94 N. W. 885; O'Brien *v.* Larson, 71 Minn. 371, 74 N. W. 148.

Mississippi.— Allen *v.* Hopson, Freem. 276.

Missouri.— Covington *v.* Chamblin, 156 Mo. 574, 57 S. W. 728; Irvine *v.* Leyh, 124 Mo. 361, 27 S. W. 512; Irvine *v.* Leyh, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10; Link *v.* Link, 48 Mo. App. 345.

Nebraska.— Secord *v.* Powers, 61 Nebr. 615, 85 N. W. 846, 87 Am. St. Rep. 474; Norwegian Plow Co. *v.* Bollman, 47 Nebr. 186, 66 N. W. 292, 31 L. R. A. 747; Shufeldt *v.* Gandy, 34 Nebr. 32, 51 N. W. 302.

New York.— Gardiner *v.* Van Alstyne, 22 N. Y. App. Div. 579, 48 N. Y. Suppl. 114 [*affirmed* in 163 N. Y. 573, 57 N. E. 1110]; White *v.* Boyce, 6 N. Y. St. 19; Le Guen *v.* Gouverneur, 1 Johns. Cas. 436, 1 Am. Dec. 121.

North Carolina.— Partin *v.* Luterloh, 59 N. C. 341.

Pennsylvania.— Kountz's Appeal, 36 Leg. Int. 186.

Tennessee.— Keith *v.* Alger, (1905) 85 S. W. 71; Noll *v.* Chattanooga Co., (Ch. App. 1896) 38 S. W. 287. *Compare* Gray *v.* Ward, (Ch. App. 1898) 52 S. W. 1028.

Texas.— Hatch *v.* Garza, 22 Tex. 176.

United States.— U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Marine Ins. Co. *v.* Hodgson, 7 Cranch 332, 3 L. ed. 362; Pacific R. Co. *v.* Missouri Pac. R. Co., 12 Fed. 641, 2 McCrary 227; Muscatine *v.* Mississippi, etc., R. Co., 17 Fed. Cas. No. 9,971, 1 Dill. 536.

See 30 Cent. Dig. tit. "Judgment," § 785.

Exceptions to this rule have been made in cases where the judgment was based on service by publication and defendant had no actual knowledge of the suit (Irvine *v.* Leyh, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10), where the court in which the action was brought and the trial had was without jurisdiction to pass on the question of fraud (Sanders *v.* Soutter, 126 N. Y. 193, 27 N. E. 263), and in the case of an audit obtained by fraud in the city of New York (Brennan *v.* New York, 8 Daly (N. Y.) 426).

7. *California.*— Kelley *v.* Kriess, 68 Cal. 210, 9 Pac. 129; Spencer *v.* Vigneaux, 20 Cal. 442.

Colorado.— Fisher *v.* Greene, 5 Colo. 541.

Georgia.— Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; Dodge *v.* Williams, 107 Ga. 410, 33 S. E. 468; Farmers', etc., Bank *v.* Ruse, 27 Ga. 391; Stroup *v.* Sullivan, 2 Ga. 275, 46 Am. Dec. 389.

But he must show that he is free from the charge of negligence or lack of due attention to his case.[8]

d. Fraud in Procuring Judgment. Fraud practised in the very matter of obtaining the judgment is regarded as perpetrated upon the court, as well as upon the injured party, and will warrant a court of equity in enjoining the judgment.[9] This may for example consist in deceit and imposition practised upon the court as a means of obtaining a judgment which otherwise would not be rendered,[10] or

Illinois.— Ames *v.* Snider, 55 Ill. 498; Hall *v.* Jones, 32 Ill. 38.

Indiana.— Johnson *v.* Unversaw, 30 Ind. 435; Cummins *v.* White, 4 Blackf. 356.

Iowa.— De Louis *v.* Meek, 2 Greene 55, 50 Am. Dec. 491.

Kentucky.— Ellis *v.* Kelly, 8 Bush 621; Mitchell *v.* Kerby, 38 S. W. 507, 18 Ky. L. Rep. 961.

Louisiana.— Lazarus *v.* McGuirk, 42 La. Ann. 194, 8 So. 253; Noyes *v.* Loeb, 23 La. Ann. 13.

Michigan.— Mack *v.* Doty, Harr. 366.

Missouri.— Tapana *v.* Shaffray, 97 Mo. App. 337, 71 S. W. 119. See Ritter *v.* Democratic Press Co., 68 Mo. 458.

Nebraska.— Buchanan *v.* Griggs, 20 Nebr. 165, 29 N. W. 297.

New York.— Everett *v.* Everett, 89 N. Y. App. Div. 619, 85 N. Y. Suppl. 922; Huggins *v.* King, 3 Barb. 616.

Ohio.— Lockwood *v.* Mitchell, 19 Ohio 448, 53 Am. Dec. 438.

Virginia.— Poindexter *v.* Waddy, 6 Munf. 418, 8 Am. Dec. 749.

Wisconsin.— Barber *v.* Rukeyser, 39 Wis. 590.

See 30 Cent. Dig. tit. "Judgment," § 838.

Contra.— See Grover *v.* Wycoff, 27 N. J. Eq. 75, where the fraud consisted in joining as a defendant a person who had no interest in the suit, but who was the only witness by whom the real defendant could prove his case, thus depriving him of essential testimony, but relief in equity was denied.

Fictitious plaintiff.— Equity may grant relief where the suit at law was instituted in the name of a person not interested, whose name was used only for the purpose of preventing a defense which defendant had against the real plaintiff in interest. Greenleaf *v.* Maher, 10 Fed. Cas. No. 5,780, 2 Wash. 393.

Taking advantage of defendant's absence. — Equity will relieve where, in *ex parte* proceedings in foreign attachment, advantage, after being waited for, has been deliberately taken of complainant's absence to obtain, without his knowledge, a judgment upon a claim to which he has a sufficient defense. Herbert *v.* Herbert, 47 N. J. Eq. 11, 20 Atl. 290.

8. Collins *v.* Scott, 100 Cal. 446, 34 Pac. 1085; Hoey *v.* Jackson, 31 Fla. 541, 13 So. 459; German F. Ins. Co. *v.* Perry, 45 Ill. App. 197.

9. *Alabama.*— Seals *v.* Weldon, 121 Ala. 319, 25 So. 1021; Watts *v.* Frazer, 80 Ala. 186.

California.— Herd *v.* Tuohy, 133 Cal. 55, 65 Pac. 139; California Beet Sugar Co. *v.* Porter, 68 Cal. 369, 9 Pac. 313; Zellerbach *v.* Allenberg, 67 Cal. 296, 7 Pac. 908. And see Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

Connecticut.— Pearce *v.* Olney, 20 Conn. 544.

Illinois.— Renner *v.* Kannally, 193 Ill. 212, 61 N. E. 1026; Schroer *v.* Pettibone, 163 Ill. 42, 45 N. E. 207.

Indiana.— Asbury *v.* Frisz, 148 Ind. 513, 47 N. E. 328; Burnett *v.* Milnes, 148 Ind. 230, 46 N. E. 464; Hogg *v.* Link, 90 Ind. 346.

Iowa.— Larson *v.* Williams, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544.

Kentucky.— Turner *v.* Colson, 55 S. W. 551, 21 Ky. L. Rep. 1390.

Louisiana.— Yeatman *v.* Louisiana State Bank, 25 La. Ann. 461.

Missouri.— Lee *v.* Harmon, 84 Mo. App. 157.

New Jersey.— Tomkins *v.* Tomkins, 11 N. J. Eq. 512; Boulton *v.* Scott, 3 N. J. Eq. 231.

New York.— Stilwell *v.* Carpenter, 2 Abb. N. Cas. 238.

North Carolina.— Mutual Reserve Fund Life Assoc. *v.* Scott, 136 N. C. 157, 48 S. E. 581.

Rhode Island.— Spooner *v.* Leland, 5 R. I. 348.

Tennessee.— McTeer *v.* Briscoe, (Ch. App. 1899) 61 S. W. 564.

United States.— New River Mineral Co. *v.* Seeley, 120 Fed. 193, 56 C. C. A. 505; Muscatine *v.* Mississippi, etc., R. Co., 17 Fed. Cas. No. 9,971, 1 Dill. 536.

See 30 Cent. Dig. tit. "Judgment," § 836.

10. Sohler *v.* Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Wickersham *v.* Comerford, 96 Cal. 433, 31 Pac. 358; Larson *v.* Williams, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544; McConnell *v.* Hicks, 64 Kan. 828, 68 Pac. 651; Benson *v.* Anderson, 10 Utah 135, 37 Pac. 256. *Compare* Heller *v.* Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016.

But equity will not set aside a decree allotting a homestead to the widow of a decedent, on the ground that she misrepresented to the court the facts concerning the property. Hanley *v.* Hanley, 114 Cal. 690, 46 Pac. 736. Nor is it sufficient ground to enjoin the judgment that defendants made false statements to the court as to their financial condition, whereby the court was induced to render a judgment for a less sum than would otherwise have been awarded. U. S. *v.* Beebe, 92 Fed. 244, 34 C. C. A. 321. Or that evi-

in the act of the successful party in illegally tampering with the jury,[11] or in wrongfully obtaining a judgment by the surreptitious use of legal process and proceedings.[12] But relief will not be granted where the injured party is chargeable with such timely knowledge of the facts alleged as would have enabled him to prevent the entry of the judgment, if he had used proper diligence,[13] or where his own conduct has been improper or fraudulent.[14]

e. Deceit and Concealment. An unjust judgment obtained by means of deceit, artifice, or concealment may be enjoined in equity, there being no adequate remedy against it at law.[15] On the other hand no party is bound to furnish weapons to his adversary or plead himself out of court; and the mere fact that he keeps silence and does not communicate to the court or to the adverse party facts which would defeat his recovery is not such fraud as will justify a court of equity in enjoining the resulting judgment.[16]

dence was collusively withheld from the court, unless it also appears that the judgment was in fact unjust. Hoboken First Baptist Church *v.* Syms, 51 N. J. Eq. 363, 28 Atl. 461. And where one party misrepresents to the court the contents of a bill of exceptions it is no ground for equitable relief if the other party or his counsel was negligent in failing to scrutinize the paper. Bigby *v.* Powell, 25 Ga. 244, 71 Am. Dec. 168. And in a case in Texas, where the drawing up of a decree was left to the attorney of the successful party, who fraudulently framed it not in accordance with the judgment of the court, and caused it to be entered on the minutes, it was held that as it was the duty of the judge to see and approve such minutes the decree as entered must be regarded as the deliberate act of the court, and not to be interfered with in equity. Weaver *v.* Vandervanter, 84 Tex. 691, 19 S. W. 889.

11. Platt *v.* Threadgill, 80 Fed. 192.

12. Respass *v.* Zorn, 42 Ga. 389; Herbert *v.* Herbert, 49 N. J. Eq. 565, 25 Atl. 366. *Compare* Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

13. Bellamy *v.* Woodson, 4 Ga. 175, 48 Am. Dec. 221; Amherst College *v.* Allen, 165 Mass. 178, 42 N. E. 570; Cayce *v.* Powell, 20 Tex. 767, 73 Am. Dec. 211.

14. Barnett *v.* Barnett, 83 Va. 504, 2 S. E. 733.

15. *Arkansas.*— Brittin *v.* Crabtree, 20 Ark. 309. *Compare* Ramseur *v.* Brownell, (1889) 12 S. W. 200.

California.— Spencer *v.* Vigneaux, 20 Cal. 442.

Illinois.— Vennum *v.* Davis, 35 Ill. 568.

Kentucky.— Kruson *v.* Kruson, 1 Bibb 183.

Louisiana.— Noyes *v.* Loeb, 24 La. Ann. 48.

Massachusetts.— Currier *v.* Esty, 110 Mass. 536.

Missouri.— West *v.* Wayne, 3 Mo. 16.

New Jersey.— Herbert *v.* Herbert, 49 N. J. Eq. 70, 22 Atl. 789; Tomkins *v.* Tomkins, 11 N. J. Eq. 512.

North Carolina.— Fish *v.* Lane, 3 N. C. 342.

Virginia.— Griffith *v.* Reynolds, 4 Gratt. 46.

Utah.— Mosby *v.* Gisborn, 17 Utah 257, 54 Pac. 121.

United States.— Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95. But *compare* Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50, holding that a default judgment, recovered by means of false statements in respect to a fact essential to the right of recovery, which deceived both defendant and the court, cannot be set aside by a suit in equity, as this is not a collateral or extrinsic fraud.

See 30 Cent. Dig. tit. "Judgment," § 840.

Compromise judgment induced by deceit.— A bill in equity for relief against a compromise judgment should be sustained where it alleges that complainant's consent thereto was obtained by a fraudulent withholding by defendant of material facts, well known to him, and unknown to complainant, which facts which probably have controlled the case in complainant's favor, the facts being fully stated. Guild *v.* Phillips, 44 Fed. 461. But such a judgment will not be set aside on account of false representations by defendants that they were without property and that nothing could be realized by execution against them, when no representations were made with respect to the merits of the cause of action. U. S. *v.* Beebe, 180 U. S. 343, 21 S. Ct. 371, 45 L. ed. 563. And see Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208.

Forged agreement.— Equity will relieve against a judgment entered on an agreement to which one defendant's name was forged, although the co-defendant who forged it was the only culpable party. Lindsley *v.* Sparks, 20 Tex. Civ. App. 66, 48 S. W. 204.

Character of concealment, how far material.— Equity will refuse to interfere on the ground that the attorney of the opposite party had fraudulently concealed a written agreement, where there was no concealment of the character of the demand thereon. Cairo, etc., R. Co. *v.* Titus, 30 N. J. Eq. 502.

False conclusion of law.— In a suit to quiet title an allegation of ownership of the property, constituting a false deduction from the facts pleaded, is not such a false statement as will constitute fraud or imposition on the court justifying the interference of equity. Ruppin *v.* McLachlan, 122 Iowa 343, 98 N. W. 153.

16. *Illinois.*— Field *v.* Flanders, 40 Ill. 470; Durham *v.* Field, 30 Ill. App. 121.

f. Collusion. Equity will restrain the enforcement of a judgment which was unjustly obtained by means of a conspiracy or fraudulent collusion.[17] This rule is applied where the collusive agreement was between plaintiff and the judge,[18] between plaintiff or his attorney and defendant's attorney,[19] between plaintiff and one of defendants, to the prejudice of another,[20] between plaintiff and the officers of a defendant corporation, who are bound to protect its interests,[21] between the parties to the action, to the injury of a third person having an interest in the property in suit,[22] or between plaintiff and an executor or administrator, being defendant, resulting in the establishment of an invalid claim against the estate.[23] But fraud of this kind is no ground for relief in equity if it could have been pleaded in defense to the original action,[24] and in any case the collusion or connivance alleged must be clearly and fully made out.[25]

g. Perjury and Subornation of Perjury. Although some few cases sustain the doctrine that equity may grant relief against a judgment obtained by means of false testimony,[26] and especially where it was procured, concocted, and inten-

Kentucky.— Taylor *v.* Bradshaw, 6 T. B. Mon. 145, 17 Am. Dec. 132. *Compare* Basye *v.* Beard, 12 B. Mon. 581.

Michigan.— See Finn *v.* Adams, (1904) 101 N. W. 533.

New York.— Stilwell *v.* Carpenter, 2 Abb. N. Cas. 238.

Tennessee.— Long *v.* Gilbert, (Ch. App. 1900) 59 S. W. 414.

Wisconsin.— Nye *v.* Sochor, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896.

United States.— Travelers' Protective Assoc. *v.* Gilbert, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538.

See 30 Cent. Dig. tit. "Judgment," § 840.

17. Whiting *v.* Taylor, 8 Dana (Ky.) 403; Roach *v.* Duckworth, 61 How. Pr. (N. Y.) 128; Wright *v.* Miller, 8 N. Y. 9, 59 Am. Dec. 438. And see Sanford *v.* White, 132 Fed. 531. *Contra*, see Phelan *v.* Johnson, 80 Iowa 727, 46 N. W. 68, where it is said that, although a judgment is fraudulent and collusive, it is not void, but only voidable, and execution thereon cannot be enjoined.

A ward suing to impeach a decree made in a former action between the then guardian and a former guardian of such ward need not show actual fraud or collusion between the parties. Batts *v.* Winstead, 77 N. C. 238.

18. Kimble *v.* Short, 2 Kan. App. 130, 43 Pac. 317; Mason *v.* Quinn, 9 Kulp. (Pa.) 543; Stokes *v.* Knarr, 11 Wis. 389.

19. Smith *v.* Quarles, (Tenn. Ch. App. 1897) 46 S. W. 1035; Watson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 830; Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

20. Spencer *v.* Vigneaux, 20 Cal. 442; Garlick *v.* McArthur, 6 Wis. 450; Young *v.* Sigler, 48 Fed. 182. See Walker *v.* Doane, 131 Ill. 27, 22 N. E. 1006.

Collusion between co-defendants.— Fraud, in order to justify the setting aside of a judgment obtained by means of it, must have been practised upon the opposite party; fraud between co-defendants, however gross it may be, will not affect plaintiff. State *v.* Holmes, 69 Ind. 577.

21. Babcock Hardware Co. *v.* Farmers', etc., Bank, 54 Kan. 273, 38 Pac. 256; Balch *v.* Balch, 119 Wis. 77, 95 N. W. 132; School District Tp. *v.* Lombard, 21 Fed. Cas. No. 12,478, 2 Dill. 493. See CORPORATIONS, 10 Cyc. 963.

22. Decatur First Nat. Bank *v.* Pullen, 129 Ala. 638, 29 So. 685; Gregory *v.* Perkins, 40 Iowa 82; Largey *v.* Bartlett, 18 Mont. 265, 44 Pac. 962.

23. Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368, 50 N. E. 1095; Ramsey *v.* Hicks, 53 Mo. App. 190; Hoboken First Baptist Church *v.* Syms, 52 N. J. Eq. 545, 31 Atl. 717.

24. Murphy *v.* De France, 101 Mo. 151, 13 S. W. 756.

25. *Indiana.*— Cicero Tp. *v.* Picken, 122 Ind. 260, 23 N. E. 763.

Iowa.— Rock Rapids Independent Dist. *v.* Miller, 92 Iowa 676, 61 N. W. 376.

New York.— Davis *v.* Cornue, 151 N. Y. 172, 45 N. E. 449.

Oregon.— Nelson *v.* Blaisdell, 23 Oreg. 507, 32 Pac. 391.

United States.— Holton *v.* Davis, 108 Fed. 138, 47 C. C. A. 246; Foote *v.* Glenn, 52 Fed. 529.

See 30 Cent. Dig. tit. "Judgment," § 837.

26. *Kansas.*— Adams *v.* Secor, 6 Kan. 542.

North Carolina.— Burgess *v.* Lovengood, 55 N. C. 457; Peagram *v.* King, 9 N. C. 605.

Texas.— Avocato *v.* Dell' Ara, (Civ. App. 1904) 84 S. W. 443.

Wisconsin.— Stowell *v.* Eldred, 26 Wis. 504.

England.— Tovey *v.* Young, Finch Prec. Ch. 193, 24 Eng. Reprint 93, 2 Vern. Ch. 437, 23 Eng. Reprint 880; Coddrington *v.* Webb, 2 Vern. Ch. 240, 23 Eng. Reprint 755.

See 30 Cent. Dig. tit. "Judgment," § 839.

Rule in Louisiana.— An action of nullity lies against a judgment obtained on false documents, although not forged, and although the party using them was innocent of any evil intention. Beauchamp *v.* McMicken, 7 Mart. N. S. 605. But not where the existence of such documents was known to defendant before trial, or where the judgment was predicated on the false testimony of a witness, whom defendant made no effort

tionally produced by the successful party,[27] yet the weight of authority is to the effect that there is no ground for equitable interference with a judgment in the fact that perjury was committed by such party or his witnesses at the trial,[28] or that he suborned the witnesses and conspired with them to secure a judgment in his favor.[29]

h. Taking Judgment Contrary to Agreement — (1) *In General.* If defendant in an action at law, having a good defense, is induced to refrain from setting it up, in consequence of the promises or representations of plaintiff, upon which he honestly relies, and the latter, fraudulently and in violation of the agreement, proceeds to take a judgment, equity will grant relief by injunction.[30]

to discredit or contradict. Perry *v.* Rue, 31 La. Ann. 287.

In Minnesota a statute authorizes an action to set aside a judgment obtained by means of the "perjury, subornation of perjury, or any fraudulent act, practice or representation of the prevailing party." Minn. Gen. St. (1894) § 5434. And see Watkins *v.* Landon, 67 Minn. 136, 69 N. W. 711. Under such a statute it is held that such an action cannot be maintained upon the bare allegation that upon an issue of fact squarely made so that each party knows what the other will attempt to prove, and where neither has the right or is under any necessity to depend on the other to prove the fact to be as he himself claims it, there was false or perjured testimony by the successful party or his witnesses. Wilkins *v.* Sherwood, 55 Minn. 154, 56 N. W. 591; Hass *v.* Billings, 42 Minn. 63, 43 N. W. 797.

27. Secord *v.* Powers, 61 Nebr. 615, 85 N. W. 846, 87 Am. St. Rep. 474; Barr *v.* Post, 59 Nebr. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; Meyers *v.* Smith, 59 Nebr. 30, 80 N. W. 273; Camp *v.* Ward, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929.

28. *Alabama.*— Peterson *v.* Blanton, 76 Ala. 264; Governor *v.* Barrow, 13 Ala. 540.

California.— Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Steen *v.* March, 132 Cal. 616, 64 Pac. 994.

Illinois.— Evans *v.* Woodsworth, 213 Ill. 404, 72 N. E. 1082; Guthrie *v.* Doud, 33 Ill. App. 68.

Maryland.— Gott *v.* Carr, 6 Gill & J. 309.

Michigan.— Gray *v.* Barton, 62 Mich. 186, 28 N. W. 813; Miller *v.* Morse, 23 Mich. 365.

Mississippi.— Smedes *v.* Ilsley, 68 Miss. 590, 10 So. 75.

Missouri.— Wabash R. Co. *v.* Mirrielees, 182 Mo. 126, 81 S. W. 437.

New Hampshire.—Metcalf *v.* Gilmore, 59 N. H. 417, 47 Am. Rep. 217; Demerit *v.* Lyford, 27 N. H. 541.

New Jersey.— Vaughn *v.* Johnson, 9 N. J. Eq. 173.

New York.— Woodruff *v.* Johnston, 61 N. Y. Super. Ct. 348, 19 N. Y. Suppl. 861; Ross *v.* Wood, 8 Hun 185, 51 How. Pr. 196; Smith *v.* Lowry, 1 Johns. Ch. 320.

Oregon.— Friese *v.* Hummel, 26 Oreg. 145, 37 Pac. 458, 46 Am. St. Rep. 610.

Pennsylvania.— Kountz's Appeal, 36 Leg. Int. 186; Latimer *v.* Dean, 31 Pittsb. Leg. J. N. S. 192.

Rhode Island.— Furbush *v.* Collingwood, 13 R. I. 720.

Vermont.— Camp *v.* Ward, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929.

West Virginia.— Farmer's, etc., Leaf Tobacco Warehouse Co. *v.* Pridemore, 55 W. Va. 451, 47 S. E. 258.

United States.— Holton *v.* Davis, 108 Fed. 138, 47 C. C. A. 246; Wood *v.* Davis, 108 Fed. 130; Cotzhausen *v.* Kerting, 29 Fed. 821. But *compare* Marshall *v.* Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870 (holding that a court of equity may enjoin the enforcement of a judgment at law when the bill alleges that the judgment was obtained by the use of a forged letter as evidence, the complainant being ignorant of the existence of such evidence before the trial, and not discovering its falsity until too late to move for a new trial, and not being guilty of any laches in the matter); Graver *v.* Faurot, 76 Fed. 257, 22 C. C. A. 156.

See 30 Cent. Dig. tit. "Judgment," § 839.

Perjury as ground for opening or vacating a judgment on motion or by petition see *supra*, IX, E, 4, c.

29. Pico *v.* Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 25 Am. St. Rep. 159, 13 L. R. A. 336; Maryland Steel Co. *v.* Marney, 91 Md. 360, 46 Atl. 1077; Ross *v.* Wood, 70 N. Y. 8; Noll *v.* Chattanooga Co., (Tenn. Ch. App. 1896) 38 S. W. 287.

30. *Arkansas.*— Pelham *v.* Moreland, 11 Ark. 442.

California.— Heim *v.* Butin, (1895) 40 Pac. 39; California Beet Sugar Co. *v.* Porter, 68 Cal. 369, 9 Pac. 313; McLeran *v.* McNamara, 55 Cal. 508.

Connecticut.— Stanton *v.* Embry, 46 Conn. 595; Chambers *v.* Robbins, 28 Conn. 552; Pearce *v.* Olney, 20 Conn. 544.

Florida.— Purviance *v.* Edwards, 17 Fla. 140.

Georgia.— Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303. Equity will relieve against a judgment obtained by inducing defendants to withdraw an equitable plea filed in the case by a promise of plaintiff that if such plea were withdrawn he would do the equity set up in the plea, which he failed to do. Markham *v.* Angier, 57 Ga. 43. *Compare* Mays *v.* Taylor, 7 Ga. 238.

Illinois.— Cassidy *v.* Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116; Foote *v.* Despain, 87 Ill. 28; How *v.* Mortell, 28 Ill. 478; Wierich *v.* De Zoya, 7 Ill. 385;

But in some states such an agreement in regard to the suit will furnish no ground for equitable interference unless in writing,[31] and in others it is ruled that a consideration for the agreement must be shown, and also that the applicant for relief was injured by his reliance upon it.[32]

(II) *Compromise or Settlement.* Where a judgment is fraudulently taken by default in violation of an agreement for a compromise or settlement, the interposition of a defense being thus prevented, its enforcement will be restrained,[33] if

Beams *v.* Denham, 3 Ill. 58. But where a default was taken in violation of an agreement for a continuance, but defendant was present in court when the default was taken, it was held that his failure to make the agreement known to the court at the time, or to apply to set aside the default, was such negligence as barred his right to equitable relief. Saltsman *v.* Bissell, 75 Ill. 67. And see German F. Ins. Co. *v.* Perry, 45 Ill. App. 197.

Indiana.— Nord *v.* Marty, 56 Ind. 531; Johnson *v.* Unversaw, 30 Ind. 435; Stone *v.* Lewman, 28 Ind. 97. *Compare* Mitchell *v.* Boyer, 58 Ind. 19; Reed *v.* Bansemer, 28 Ind. 470.

Iowa.—Searle *v.* Fairbanks, 80 Iowa 307, 45 N. W. 571; Bennett *v.* Carey, 72 Iowa 476, 34 N. W. 291; Baker *v.* Redd, 44 Iowa 179; Rogers *v.* Gwinn, 21 Iowa 58; Humphrey *v.* Darlington, 15 Iowa 207; De Louis *v.* Meek, 2 Greene 55, 50 Am. Dec. 491. But *compare* Lumpkin *v.* Snook, 63 Iowa 515, 19 N. W. 333, holding that one is not entitled to have a judgment vacated for fraud because his failure to make a defense was caused, not by any fraudulent misrepresentations, but by a promise of the adverse party, when the promise is one which may be enforced notwithstanding the judgment.

Kentucky.— Broaddus *v.* Broaddus, 3 Dana 536; Gill *v.* Carter, 6 J. J. Marsh. 484; Edmondson *v.* Moseby, 4 J. J. Marsh. 497; Williams *v.* Fowler, 2 J. J. Marsh. 405.

Louisiana.— Lazarus *v.* McGuirk, 42 La. Ann. 194, 8 So. 253; Jouet *v.* Mortimer, 29 La. Ann. 206; Lacoste *v.* Robert, 11 La. Ann. 33.

Maryland.— Dilly *v.* Barnard, 8 Gill & J. 170; Kent *v.* Ricards, 3 Md. Ch. 392; Chase *v.* Manhardt, 1 Bland 333.

Massachusetts.— Brooks *v.* Twitchell, 182 Mass. 443, 65 N. E. 843, 94 Am. St. Rep. 662.

Michigan.— Scriven *v.* Hursh, 39 Mich. 98; Roberts *v.* Miles, 12 Mich. 297.

Minnesota.— Hamilton *v.* Wood, 55 Minn. 482, 57 N. W. 208.

Mississippi.— Anderson *v.* Cameron, 63 Miss. 114; Brooks *v.* Whitson, 7 Sm. & M. 513; Newman *v.* Meek, Sm. & M. Ch. 331.

Missouri.— Murphy *v.* Smith, 86 Mo. 333; Perry *v.* Siter, 37 Mo. 273; Sanderson *v.* Voelcker, 51 Mo. App. 328.

Nebraska.— Cadwallader *v.* McClay, 37 Nebr. 359, 55 N. W. 1054, 40 Am. St. Rep. 496; Keeler *v.* Elston, 22 Nebr. 310, 34 N. W. 891; Buchanan *v.* Griggs, 18 Nebr. 121, 24 N. W. 452.

New Jersey.— Miller *v.* Harrison, 32 N. J. Eq. 76; Moore *v.* Gamble, 9 N. J. Eq. 246.

New York.— Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Hinckley *v.* Miles, 15 Hun 170.

North Carolina.— Jarman *v.* Saunders, 64 N. C. 367.

South Dakota.— Griswold Linseed Oil Co. *v.* Lee, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

Tennessee.— Brandon *v.* Green, 7 Humphr. 130; Newnan *v.* Stuart, 5 Hayw. 78. *Compare* Edwards *v.* Turner, (Ch. App. 1897) 47 S. W. 144.

Texas.— Burnley *v.* Rice, 21 Tex. 171.

Vermont.— Delaney *v.* Brown, 72 Vt. 344, 47 Atl. 1067.

Virginia.— Moore *v.* Lipscombe, 82 Va. 546; Holland *v.* Trotter, 22 Gratt. 136.

United States.— Cage *v.* Cassidy, 23 How. 109, 16 L. ed. 430; Whitcomb *v.* Gandy, 37 Fed. 735.

See 30 Cent. Dig. tit. "Judgment," § 825.

Contingent agreement.— Where defendant suffers judgment to be taken against him in consideration of an agreement on plaintiff's part that no money need be paid on it except upon the happening of a certain event, plaintiff will not be permitted to exact payment in violation of the agreement. Moore *v.* Barclay, 16 Ala. 158.

Unfounded expectation of forbearance.— It is no ground for equitable relief to a judgment defendant, who has a good defense to a large part of plaintiff's demand, but who did not set it up in the action, that he believed the creditor would give him the benefit of it after judgment, which he now refuses to do. Coleman *v.* Goyne, 37 Tex. 552.

Changing defenses.— Where there was an unsettled account between the parties, and defendant led plaintiff to believe that a note which he held would be set up in part payment of the account, but on the trial he took the position that the note, being of later date than the account, was evidence of a settlement in full, and plaintiff was unprepared to meet this contention by evidence, having relied on defendant's pursuing the course he had indicated, and judgment went against plaintiff, it was held that defendant's conduct was not so far fraudulent as to justify an injunction against the judgment. Shannon *v.* Reese, 38 Ala. 586.

31. Norman *v.* Burns, 67 Ala. 248; Collier *v.* Falk, 66 Ala. 223.

32. Heim *v.* Butin, 109 Cal. 500, 42 Pac. 138, 50 Am. St. Rep. 54.

33. *California.*— Thompson *v.* Laughlin, 91 Cal. 313, 27 Pac. 752; McGregor *v.* Shaw, 11 Cal. 47.

Connecticut.— Gates *v.* Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268; Bridge-

defendant is not chargeable with negligence in failing to prevent the entry of judgment when he could have done so,[34] and provided there is no longer an adequate remedy at law against the judgment.[35]

13. Newly Discovered Evidence — a. In General. Where a defendant was prevented from making good his defense by the lack of evidence to support it, being ignorant of the existence of such evidence and unable to discover it by the exercise of due diligence, equity will relieve him against the judgment, upon the subsequent discovery and production of such evidence.[36] Statutes authorizing the courts of law to grant new trials on the ground of newly discovered evidence do not divest the courts of equity of the power to grant a new trial in cases where the facts will justify it.[37]

b. Diligence in Former Proceedings. Equity will not grant relief against a judgment on the ground of newly discovered evidence, if the evidence could have been discovered before trial by the exercise of care and diligence in searching for it or in interrogating persons cognizant of the facts.[38]

port Sav. Bank *v.* Eldredge, 28 Conn. 556, 73 Am. Dec. 688.

Georgia. — Dunnahoo *v.* Holland, 51 Ga. 147.

Illinois.— Brall *v.* Agnew, 15 Ill. App. 122.

Indiana.— Brake *v.* Payne, 137 Ind. 479, 37 N. E. 140; Nealis *v.* Dicks, 72 Ind. 374; Dallin *v.* McIvor, 12 Ind. App. 150, 39 N. E. 765.

Iowa.— Rogers *v.* Gwinn, 21 Iowa 58.

Kansas.— Hentig *v.* Sweet, 27 Kan. 172.

Maryland.— Kent *v.* Ricards, 3 Md. Ch. 392.

Missouri.— Murphy *v.* Smith, 86 Mo. 333.

New Hampshire.— Hibbard *v.* Eastman, 47 N. H. 507, 93 Am. Dec. 467.

Tennessee.— Turney *v.* Young, 2 Overt. 266.

See 30 Cent. Dig. tit. "Judgment," § 826.

34. Lowry *v.* Sloan, 51 Ga. 633; Bigelow *v.* Church, 48 Iowa 175; Watrous *v.* Rodgers, 16 Tex. 410. See *supra*, X, A, 3, b.

35. J. A. Roebling Sons Co. *v.* Stevens Electric Light Co., 93 Ala. 39, 9 So. 369.

36. *Alabama.*— Wilson *v.* Wilson, 113 Ala. 670, 21 So. 67; Cox *v.* Mobile, etc., R. Co., 44 Ala. 611; Waters *v.* Creagh, 4 Stew. & P. 410.

Connecticut.— Wolcott *v.* Day, 2 Root 62.

Georgia.— Taylor *v.* Sutton, 15 Ga. 103, 60 Am. Dec. 682; Pearce *v.* Chastain, 3 Ga. 226, 46 Am. Dec. 423.

Illinois.— McGehee *v.* Gold, 68 Ill. 215. A court of chancery will reject an application for a new trial on the ground of newly discovered evidence, for the same reasons which would control a court of law. Yates *v.* Monroe, 13 Ill. 212.

Indiana.— Webster *v.* Maiden, 41 Ind. 124; Kiser *v.* Winans, 20 Ind. 428.

Iowa.— Brakke *v.* Hoskins, 98 Iowa 233, 67 N. W. 235; Melick *v.* Tama City First Nat. Bank, 52 Iowa 94, 2 N. W. 1021.

Maryland.— Ahl *v.* Ahl, 71 Md. 555, 18 Atl. 959; Iglehart *v.* Lee, 4 Md. Ch. 514.

Nebraska.— Van Antwerp *v.* Lathrop, (1904) 98 N. W. 35.

New Jersey.— Maxwell *v.* Hannon, 29 N. J. Eq. 525.

New York.— Mills *v.* Van Voorhis, 10 Abb. Pr. 152; Floyd *v.* Jayne, 6 Johns. Ch. 479.

South Carolina.— Cantey *v.* Blair, 1 Rich. Eq. 41; Winthrop *v.* Lane, 3 Desauss. Eq. 310.

Tennessee.—Levan *v.* Patton, 2 Heisk. 108.

Virginia.— Rust *v.* Ware, 6 Gratt. 50, 52 Am. Dec. 100.

United States.— Guild *v.* Phillips, 44 Fed. 461; Foote *v.* Silsby, 9 Fed. Cas. No. 4,918, 1 Blatchf. 545.

See 30 Cent. Dig. tit. "Judgment," § 845.

Contra.— Gusman *v.* De Poret, 33 La. Anu. 333; Campbell *v.* Briggs, 3 Rob. (La.) 110; Buckingham *v.* Wesson, 54 Miss. 526.

Additional equitable grounds required.— In some cases it is held that equity will not relieve against a judgment on the ground of newly discovered evidence, unless there are also circumstances of fraud, accident, or mistake preventing a defense. Powell *v.* Watson, 41 N. C. 94; Alley *v.* Ledbetter, 16 N. C. 449; Norris *v.* Hume, 2 Leigh (Va.) 334, 21 Am. Dec. 631.

Failure to take nonsuit.— In an action concerning realty, plaintiff, being unable to find a certain deed which constituted a link in his chain of title, relied upon a certified copy of its record, which was excluded by the court, and judgment rendered for defendant. Afterward the deed was found and plaintiff brought suit to set aside the judgment. But it was held that he was not entitled to such relief, since he might have averted the judgment by taking a nonsuit. Brownson *v.* Reynolds, 77 Tex. 254, 13 S. W. 986.

Statute making witnesses competent.— It is not a ground for relief in equity that parties who were not examinable as witnesses at the time of the trial have since been made competent by statute. Brown *v.* Hurd, 56 Ill. 317; Kendall *v.* Winsor, 6 R. I. 453.

37. Baltzell *v.* Randolph, 9 Fla. 366; Colyer *v.* Langford, 1 A. K. Marsh. (Ky.) 237; Horn *v.* Queen, 4 Nebr. 108; Duncan *v.* Lyon, 3 Johns. Ch. (N. Y.) 352, 8 Am. Dec. 513.

Concurrent remedies in general see *supra*, X, A, 4.

38. *Colorado.*—Snider *v.* Rinehart, 20 Colo. 448, 39 Pac. 408.

c. Character and Effect of Evidence. To justify a court of equity in enjoining a judgment on the ground of newly discovered evidence, it must appear that such evidence is material,[39] and is of such a character and strength that it is reasonably certain that it would have produced an opposite result if produced at the trial,[40] some cases even going so far as to hold that the new evidence must be incontrovertible and conclusive.[41] Further it will not be sufficient for this purpose if it appears to be merely cumulative or corroborative,[42] or merely intended to impeach some of the witnesses at the former trial.[43]

14. Meritorious Defense — a. Necessity in General. A court of equity will not interfere with the enforcement of a judgment recovered at law, unless it is unjust and unconscionable; and therefore such relief will not be granted unless the complainant shows that he has a good and meritorious defense to the original action.[44] The only exception to this rule is in the case of a judgment which is

Delaware.— Kersey *v.* Rash, 3 Del. Ch. 321.

Georgia.— McCaulis *v.* Duval, 69 Ga. 744.

Illinois.— Brown *v.* Luehrs, 95 Ill. 195; Tallman *v.* Becker, 85 Ill. 183; Holmes *v.* Strateler, 57 Ill. 209.

Indiana.— Mason *v.* Palmerton, 2 Ind. 117.

Kentucky.— Barrow *v.* Jones, 1 J. J. Marsh. 470; Taylor *v.* Bradshaw, 6 T. B. Mon. 145, 17 Am. Dec. 132.

Maryland.— Kirby *v.* Pascault, 53 Md. 531; Gott *v.* Carr, 6 Gill & J. 309.

Mississippi.— Porter *v.* Kilpatrick, 24 Miss. 414; Lee *v.* Hooker, 7 Sm. & M. 601.

Nebraska.— Barr *v.* Post, 59 Nebr. 361, 80 N. W. 1041, 80 Am. St. Rep. 680.

New Jersey.— Cairo, etc., R. Co. *v.* Titus, 27 N. J. Eq. 102; Glover *v.* Hedges, 1 N. J. Eq. 113.

New York.— Merrifield *v.* Bell, 14 N. Y. Suppl. 322; Floyd *v.* Jayne, 6 Johns. Ch. 479.

North Dakota.— Freeman *v.* Wood, (1905) 103 N. W. 392.

South Carolina.— Henderson *v.* Mitchell, Bailey Eq. 113, 21 Am. Dec. 526.

Tennessee.— Graham *v.* Roberts, 1 Head 56.

Texas.— Burnley *v.* Rice, 21 Tex. 171.

Virginia.— De Lima *v.* Glassell, 4 Hen. & M. 369.

West Virginia.— Farmers', etc., Leaf Tobacco Warehouse Co. *v.* Pridemore, 55 W. Va. 451, 47 S. E. 258; Bloss *v.* Hull, 27 W. Va. 503; Hevener *v.* McClung, 22 W. Va. 81; Ludington *v.* Handley, 7 W. Va. 269.

Wisconsin.— Marsh *v.* Edgerton, 2 Pinn. 230, 1 Chandl. 198.

See 30 Cent. Dig. tit. "Judgment," § 846.

Evidence obtainable on cross-examination. — Equity will not relieve against a judgment at law when the facts relied on as a ground for relief, although discovered since the trial, might have been established at such trial on cross-examination. Cairo, etc., R. Co. *v.* Titus, 27 N. J. Eq. 102.

But the fact that defendant might have obtained evidence by a bill of discovery or otherwise will not affect his right to relief if he had no reason to suspect the existence of such evidence. Winthrop *v.* Lane, 3 Desauss. Eq. (S. C.) 310.

39. Cairo, etc., R. Co. *v.* Titus, 28 N. J. Eq. 269. But there is no rule requiring newly discovered evidence relied on as a basis for equitable relief against a judgment to be in writing. Cantey *v.* Blair, 1 Rich. Eq. (S. C.) 41.

40. *Alabama.*— Beadle *v.* Graham, 66 Ala. 102.

Colorado.— Snider *v.* Rinehart, 20 Colo. 448, 39 Pac. 408.

Illinois.— Brown *v.* Luehrs, 95 Ill. 195; Holmes *v.* Stateler, 57 Ill. 209; Willems *v.* Willems, 72 Ill. App. 200.

Indiana.— Mason *v.* Palmerton, 2 Ind. 117.

Mississippi.— Roots *v.* Cohen, (1893) 12 So. 593.

Pennsylvania.— Lebanon Mut. Ins. Co.'s Appeal, 2 Chest. Co. Rep. 570.

Virginia.— Wynne *v.* Newman, 75 Va. 811.

United States.— Ocean Ins. Co. *v.* Fields, 18 Fed. Cas. No. 10,406, 2 Story 59.

See 30 Cent. Dig. tit. "Judgment," § 847.

41. Buckelew *v.* Chipman, 5 Cal. 399; Bloss *v.* Hull, 27 W. Va. 503.

42. *Georgia.*— Scudder *v.* Puckett, 12 Ga. 337.

Kentucky.— Daniel *v.* Daniel, 2 J. J. Marsh. 52.

Maryland.— Briesch *v.* McCauley, 7 Gill 189.

Nebraska.— Meyers *v.* Smith, 59 Nebr. 30, 80 N. W. 273.

North Carolina.— Pemberton *v.* Kirk, 39 N. C. 178.

West Virginia.— Farmers', etc., Leaf Tobacco Warehouse Co. *v.* Pridemore, 55 W. Va. 451, 47 S. E. 258.

See 30 Cent. Dig. tit. "Judgment," § 848.

43. Woodside *v.* Morgan, 92 Ill. 273; Dixon *v.* Graham, 16 Iowa 310; Morris *v.* Hadley, 9 Mich. 278; Houston *v.* Smith, 41 N. C. 264.

Perjury.— Where the newly discovered evidence goes to show that the verdict was obtained by perjury, equity may grant relief, this being an exception to the rule that such relief will not be granted on the ground of newly discovered evidence which merely goes to impeach witnesses. Peagram *v.* King, 9 N. C. 605. See *supra*, X, B, 12, g.

44. *Alabama.*— Saunders *v.* Albritton, 37 Ala. 716; Secor *v.* Woodward, 8 Ala. 500.

absolutely void, not merely irregular or voidable, where, according to the doctrine generally accepted, it is not necessary to show a defense on the merits.[45] However,

Arkansas.— Chambliss *v.* Reppy, 54 Ark. 539, 16 S. W. 571; Rotan *v.* Springer, 52 Ark. 80, 12 S. W. 156; State *v.* Hill, 50 Ark. 458, 8 S. W. 401; Gibson *v.* Armstrong, 32 Ark. 438; Lawson *v.* Bettison, 12 Ark. 401. And see Little Rock, etc., R. Co. *v.* Newman, 73 Ark. 555, 84 S. W. 727.

California.— Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Preston *v.* Hill, 38 Cal. 686.

Georgia.— Woodward *v.* Dromgoole, 71 Ga. 523; Cardin *v.* Jones, 23 Ga. 175.

Illinois.— Kochman *v.* O'Neill, 202 Ill. 110, 66 N. E. 1047; Colson *v.* Leitch, 110 Ill. 504; Brown *v.* Luehrs, 95 Ill. 195; Frink *v.* McClung, 9 Ill. 569; Pierson *v.* Linn, 101 Ill. App. 624; Tompkins *v.* Lang, 74 Ill. App. 500; Combs *v.* Hamlin Wizard Oil Co., 58 Ill. App. 123; Kaufman *v.* Schneider, 35 Ill. App. 256; Virginia *v.* Dunaway, 17 Ill. App. 68.

Iowa.— Taggart *v.* Wood, 20 Iowa 236; Way *v.* Lamb, 15 Iowa 79.

Kansas.— Tootle *v.* Ellis, 63 Kan. 422, 65 Pac. 675, 88 Am. St. Rep. 246; Muse *v.* Wafer, 29 Kan. 279.

Mississippi.— Newman *v.* Taylor, 69 Miss. 670, 13 So. 831; Stewart *v.* Brooks, 62 Miss. 492; Lindsey *v.* Sellers, 26 Miss. 169.

Missouri.— Wabash R. Co. *v.* Mirrielees, 182 Mo. 126, 81 S. W. 437; Sauer *v.* Kansas, 69 Mo. 46.

Nebraska.— Dorwart *v.* Troyer, (1901) 96 N. W. 116; McBride *v.* Wakefield, 58 Nebr. 442, 78 N. W. 713; Fickes *v.* Vick, 50 Nebr. 401, 69 N. W. 951; Campbell Printing Press, etc., Co. *v.* Marder, 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573; Wilson *v.* Shipman, 34 Nebr. 573, 52 N. W. 576, 33 Am. St. Rep. 660; Petalka *v.* Fitle, 33 Nebr. 756, 51 N. W. 131; Proctor *v.* Pettitt, 25 Nebr. 96, 41 N. W. 131; Gould *v.* Loughran, 19 Nebr. 392, 27 N. W. 397. See Ritchey *v.* Seeley, (1905) 102 N. W. 256, holding that, in an action to obtain a new trial because of unavoidable casualty depriving complainant of his right of review, it is not necessary to show conclusively that he has a sufficient cause of action or defense, but it is sufficient to show good faith and tender a seriously litigable issue.

New Jersey.— Stout *v.* Slocum, 52 N. J. Eq. 88, 28 Atl. 7; Dringer *v.* Erie R. Co., 42 N. J. Eq. 573, 8 Atl. 811; Davis *v.* Delaware Tp., 40 N. J. Eq. 156; Vanderbeck *v.* Perry, 30 N. J. Eq. 78; Boynton *v.* Sandford, 28 N. J. Eq. 184.

North Carolina.— Dudley *v.* Cole, 21 N. C. 429.

Ohio.— Gifford *v.* Morrison, 37 Ohio St. 502, 41 Am. Rep. 537; Hildebrand *v.* Windisch, 6 Ohio Dec. (Reprint) 784, 8 Am. L. Rec. 103.

Oregon.— Handley *v.* Jackson, 31 Oreg. 552, 50 Pac. 915, 65 Am. St. Rep. 839; Heatherly *v.* Hadley, 2 Oreg. 269.

Rhode Island.— Spooner *v.* Leland, 5 R. I. 348.

Tennessee.— Kirkpatrick *v.* Utley, 14 Lea 96; Seay *v.* Hughes, 5 Sneed 155.

Texas.— Anderson *v.* Oldham, 82 Tex. 228, 18 S. W. 557; Ratto *v.* Levy, 63 Tex. 278; Sharp *v.* Schmidt, 62 Tex. 263; Schleicher *v.* Markward, 61 Tex. 99; Freeman *v.* Miller, 53 Tex. 372; Overton *v.* Blum, 50 Tex. 417; Dashner *v.* Wallace, (Civ. App. 1902) 68 S. W. 307; Rumfield *v.* Neal, (Civ. App. 1898) 46 S. W. 262; Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991.

Vermont.— Nason *v.* Smalley, 8 Vt. 118.

Wisconsin.— Wilkinson *v.* Rewey, 59 Wis. 554, 18 N. W. 513; Ableman *v.* Roth, 12 Wis. 81; Stokes *v.* Knarr, 11 Wis. 389; Wright *v.* Eaton, 7 Wis. 595; Huebschman *v.* Baker, 7 Wis. 542.

United States.— White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113; Massachusetts Ben. Life Assoc. *v.* Lohmiller, 74 Fed. 23, 20 C. C. A. 274; Bradley *v.* Richardson, 3 Fed. Cas. No. 1,786, 2 Blatchf. 343, 23 Vt. 720; Kidwell *v.* Masterson, 14 Fed. Cas. No. 7,758, 3 Cranch C. C. 52.

See 30 Cent. Dig. tit. "Judgment," § 849.

Tender in full payment of a judgment does away with the requirement that a defense must be shown before the judgment will be opened. Hauswirth *v.* Sullivan, 6 Mont. 203, 9 Pac. 798.

When a garnishee comes into a court of chancery to be relieved against a judgment at law, which has been rendered against him by default, he should show by his bill, not only that he is not indebted to the principal defendant, but also that he has no effects in his hands belonging to such defendant. Hair *v.* Lowe, 19 Ala. 224.

45. *Arkansas.*— Ryan *v.* Boyd, 33 Ark. 778.

California.— People *v.* Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381, holding that in an action to vacate a judgment obtained by fraud it is not necessary to show that the defense to the action in which the judgment was rendered is not barred by the statute of limitations.

Colorado.— Crippen *v.* X. Y. Irr. Ditch Co., 32 Colo. 447, 76 Pac. 794; Keely *v.* East Side Imp. Co., 16 Colo. App. 365, 65 Pac. 456.

Connecticut.— Blakeslee *v.* Murphy, 44 Conn. 188.

Iowa.— Mosher *v.* McDonald, (1905) 102 N. W. 837; Arnold *v.* Hawley, 67 Iowa 313, 25 N. W. 259. But the collection of a judgment rendered on a claim admitted to be due and just will not be enjoined on the sole ground of want of jurisdiction over defendant to render such judgment, and that the costs were excessive. Parsons *v.* Nutting, 45 Iowa 404.

Minnesota.— Magin *v.* Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216.

even this is not universally admitted, but some courts require a meritorious defense to be shown even where the judgment is void.[46]

b. Nature of Defense. Within the meaning of the rule just stated, equity will not relieve against a judgment on the showing of a merely technical defense,[47] or one which would be considered unconscionable.[48] But immorality tainting the consideration of the transaction on which the judgment was founded is regarded as a meritorious defense,[49] and so also, it seems, is the statute of limitations.[50]

C. Procedure and Practice — 1. Form of Proceeding. Where application is to be made to a court possessing equitable jurisdiction, for relief against a judgment, it should be in the form of a separate and independent proceeding commenced by bill,[51] or, under the code practice, by complaint,[52] or, where the adjudication to be impeached is a decree in equity, either by petition in the original action or by original bill in the nature of a bill of review, according to the circumstances,[53] praying for an injunction to restrain the enforcement of the judgment or other appropriate relief.[54] But in those jurisdictions where legal and equitable powers are vested in the same courts, it is permissible for the judgment debtor, when suit is brought on the judgment, to set up in his answer the grounds on which he claims that it should be vacated or enjoined, and demand appropriate relief, whereupon the answer will be treated as equivalent to a bill in equity.[55]

Tennessee.— Bell *v.* Williams, 1 Head 229.

Texas.— Harrison *v.* Lokey, 26 Tex. Civ. App. 404, 63 S. W. 1030; Fox *v.* Robbins, (Civ. App. 1901) 62 S. W. 815.

United States.— Mills *v.* Scott, 43 Fed. 452.

See 30 Cent. Dig. tit. "Judgment," § 849.

46. Colson *v.* Leitch, 110 Ill. 504; Rogan *v.* Eads, 101 Ill. App. 509; Pilger *v.* Torrence, 42 Nebr. 903, 61 N. W. 99 (holding that even a void judgment will not be set aside in equity where no meritorious defense to the action is shown, if the invalidity is not apparent on its face): Janes *v.* Howell, 37 Nebr. 320, 55 N. W. 965, 40 Am. St. Rep. 494; Hockaday *v.* Jones, 8 Okla. 156, 56 Pac. 1054.

47. Sprague *v.* Lux, 12 Ill. App. 271; Ballow *v.* Wichita County, 74 Tex. 339, 12 S. W. 48; Skirving *v.* National L. Ins. Co., 59 Fed. 742, 8 C. C. A. 241.

What constitutes a meritorious defense such as will justify the opening or vacating of a judgment on motion in the court which rendered it see *supra*, IX, F, 9, b.

48. McClelland *v.* Chambers, 1 Bibb (Ky.) 366; Ashton *v.* Parkinson, 8 Phila. (Pa.) 338.

49. Given's Appeal, 121 Pa. St. 260, 15 Atl. 468, 6 Am. St. Rep. 795.

50. Jamison *v.* Weaver, 84 Iowa 611, 51 N. W. 65; Gerrish *v.* Seaton, 73 Iowa 15, 34 N. W. 485; Strowbridge *v.* Miller, 4 Nebr. (Unoff.) 449, 94 N. W. 825. *Contra*, Budd *v.* Gamble, 13 Fla. 265; Estis *v.* Patton, 3 Yerg. (Tenn.) 382.

51. Bost *v.* Lassiter, 105 N. C. 490, 11 S. E. 329. And see Reich *v.* Cochran, 41 Misc. (N. Y.) 621, 85 N. Y. Suppl. 247.

The writ of supersedeas is not the proper remedy by which to vacate a judgment for usury. White *v.* Harris, 5 Humphr. (Tenn.) 421.

A bill or action to vacate or enjoin a judgment cannot be treated as a motion in the original cause or a petition for a new trial, where it is not framed on that theory and the only relief asked is a perpetual injunction. Foard *v.* Alexander, 64 N. C. 69; Edmanson *v.* Best, 57 Fed. 531, 6 C. C. A. 471.

Action of nullity in Louisiana.— If it is claimed that an adjudication is absolutely void, for illegality or other cause, resort should be had to an action of nullity, and not an injunction. Cook *v.* State, 16 La. 288. And see Woolfolk *v.* Woolfolk, 30 La. Ann. 139. But the action of a creditor to have a judgment recognizing a homestead in favor of his judgment debtor declared inoperative and void, because the conditions which were the motive of the judgment have ceased to exist, rests on the principle that when anything happens to destroy the force of a judgment it ceases to have effect, and must not be confounded with action for the nullity of the judgment, as provided in La. Code Pr. c. 6, § 3. Denis *v.* Gayle, 40 La. Ann. 286, 4 So. 3.

Election of remedies.— Where a complainant filed his bill in a court of chancery for relief against a judgment at law, and subsequently sued out a writ of error from the supreme court on the judgment, an order was granted compelling him to elect in which court he would proceed. Webb *v.* Williams, Walk. (Mich.) 452.

52. People *v.* Judges C. Pl., 3 Abb. Pr. (N. Y.) 181.

53. McGlathery *v.* Richardson, 129 Ala. 653, 29 So. 665; *Ex p.* Smith, 34 Ala. 455.

Bill of review see Equity, 16 Cyc. 517.

54. Marks *v.* Willis, 36 Oreg. 1, 58 Pac. 526, 78 Am. St. Rep. 752. And see *infra*, X, C, 8, a, (VII).

A bill to vacate a decree cannot be sustained as a bill of review for error apparent on the record. George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1.

55. Cundiff *v.* Teague, 46 Tex. 475; Brown *v.* Parker, 28 Wis. 21; Stowell *v.* Eldred,

2. Jurisdiction. The question of what courts may entertain a bill for equitable relief against a judgment, and the question of their jurisdiction, have already been considered.[56]

3. Venue. A bill in equity for relief against a judgment should as a general rule be brought in the county or other judicial district in which the judgment was rendered,[57] unless an objection on this ground is waived,[58] or a change of venue is granted for due cause.[59] But in some cases the proper venue of the action has been held to be the place where defendant resides, although it be other than the place of the rendition of the judgment,[60] and in others that when the judgment is sought to be enforced against specific property, an action to restrain such enforcement may be maintained at the place where the property is situated.[61]

4. Parties — a. In General. To a bill in equity to enjoin the enforcement of a judgment recovered at law, all the parties to the original action should be made parties,[62] and also any other persons whose rights would or might be affected by the grant of the relief asked.[63]

26 Wis. 504. And see Gray *v.* Ward, (Tenn. Ch. App. 1898) 52 S. W. 1028.

56. See *supra*, X, A, 5.

57. *Connecticut.*— Smith *v.* Hall, 71 Conn. 427, 42 Atl. 86.

Georgia.— Lester *v.* Mathews, 58 Ga. 403.

Indian Territory.— Stewart *v.* Snow, 5 Indian Terr. 126, 82 S. W. 696.

Iowa.— Brunk *v.* Moulton Bank, 121 Iowa 14, 95 N. W. 238.

Louisiana.— State *v.* King, 43 La. Ann. 826, 9 So. 640. See Langridge *v.* Judge Twenty-First Judicial Dist. Ct., 46 La. Ann. 29, 14 So. 427.

Missouri.— State *v.* Price, 38 Mo. 382.

Nebraska.— Smithson *v.* Smithson, 37 Nebr. 535, 56 N. W. 300, 40 Am. St. Rep. 504.

Tennessee.— Newnan *v.* Stuart, Cooke 339.

Texas.— Eatwell *v.* Roessler, (Civ. App. 1904) 82 S. W. 796; Ross *v.* Drouilhet, (Civ. App. 1904) 80 S. W. 241.

Utah.— Mosby *v.* Gisborn, 17 Utah 257, 54 Pac. 121.

Virginia.— Cocke *v.* Pollok, 1 Hen. & M. 499.

See 30 Cent. Dig. tit. "Judgment," § 860.

Filing a transcript of a judgment in another county, in order that it may become a lien on real estate situated there, does not make it a judgment of such other county, within the meaning of this rule. Brunk *v.* Moulton Bank, 121 Iowa 14, 95 N. W. 238.

58. Shrader *v.* Walker, 8 Ala. 244; Smith *v.* Morrill, 12 Colo. App. 233, 55 Pac. 824.

59. State *v.* Price, 38 Mo. 382.

60. Butler *v.* Butler, 11 Ala. 668; Baker *v.* Ryan, 67 Iowa 708, 25 N. W. 890; State *v.* Chippewa County Dist. Ct., 85 Minn. 283, 88 N. W. 755; Bell *v.* Fludd, 28 S. C. 313, 5 S. E. 810.

61. Busenbark *v.* Busenbark, 33 Kan. 572, 7 Pac. 245; Chambers *v.* King Wrought Iron Bridge Manufactory, 16 Kan. 270; Boswell *v.* Wheat, 37 Miss. 610; Keyte *v.* Plemmons, 28 Mo. 104. See Sweetser *v.* Smith, 51 Hun (N. Y.) 642, 5 N. Y. Suppl. 951 [*reversing* 5 N. Y. Suppl. 378].

62. *Alabama.*— McGlathery *v.* Richardson, 129 Ala. 653, 29 So. 665.

California.— East Riverside Irr. Dist. *v.* Holcomb, 126 Cal. 315, 58 Pac. 817.

Georgia.— Lester *v.* Mathews, 58 Ga. 403.

Kentucky.— Hendrick *v.* Robinson, 7 Dana 165.

Louisiana.— Gremaud *v.* Gremaud, 115 La. 79, 38 So. 901; Morris *v.* Bienvenu, 30 La. Ann. 878; Haggerty *v.* Phillips, 21 La. Ann. 729; Winn *v.* Dickson, 15 La. Ann. 273.

New York.— Bowers *v.* Tallmadge, 16 How. Pr. 325; Boughton *v.* Allen, 11 Paige 321.

Tennessee.— Paul *v.* Wiles, 1 Tenn. Ch. 519.

Texas.— York *v.* Cartwright, 42 Tex. 136; Clevenger *v.* Mayfield, (Civ. App. 1905) 86 S. W. 1062, holding that in a proceeding to set aside a decree, on the ground of fraud perpetrated in its rendition, by a plaintiff in the suit on his co-plaintiffs, instituted by a purchaser of the interests of some of the co-plaintiffs, the other co-plaintiffs should be made parties.

Canada.— Comtois *v.* Dumontier, 8 Quebec Q. B. 293.

See 30 Cent. Dig. tit. "Judgment," § 867.

63. *Alabama.*— Brandon *v.* Cabiness, 19 Ala. 155, assignee in bankruptcy of complainant.

Florida.— Scarlett *v.* Hicks, 13 Fla. 314, legal representative of a decedent's estate.

Georgia.— Barksdale *v.* Brown, 16 Ga. 95.

New York.— Graham *v.* Luddington, 19 Hun 246.

Tennessee.— Wessell *v.* Sharp, (Ch. App. 1897) 39 S. W. 543, holding that the clerk of the court is not a necessary party to an action to enjoin the enforcement of a judgment, if the parties beneficially interested are joined, and no question of jurisdiction is raised.

Texas.— De Garcia *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 77 S. W. 275.

Virginia.— Harrison *v.* Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703. And see Jameson *v.* Deshields, 3 Gratt. 4.

United States.— Atkins *v.* Dick, 14 Pet. 114, 10 L. ed. 378. In a suit to set aside

b. Joinder of Plaintiffs. Where a judgment is recovered against two or more as joint defendants, all should join as plaintiffs in an action to enjoin its enforcement or be made parties.[64] And the rule is the same where the judgment was recovered jointly against a principal and surety.[65] So also tenants in common may sue jointly to enjoin the enforcement of a judgment in ejectment, although they were not all made defendants in the ejectment.[66]

c. Defendants. A bill in equity for relief against a judgment should join as defendants all persons really and beneficially interested in the judgment, or whose rights are liable to be affected by the injunction,[67] including plaintiff or joint plaintiffs in whose name the judgment stands,[68] the party for whose use the action was really brought, although he is not the nominal plaintiff,[69] the assignee as well as the assignor of the judgment,[70] persons claiming or acquiring interests in the property specifically affected by the judgment,[71] and any persons who participated

a judgment, where it is necessary, to protect an attorney's lien, that he should be made a party thereto, the court will allow him to intervene. Patrick *v.* Leach, 17 Fed. 476, 3 McCrary 555.

See 30 Cent. Dig. tit. "Judgment," § 867.

Persons against whom relief may be had see *supra*, X, A, 7.

64. Gates *v.* Lane, 44 Cal. 392; Macey *v.* Brooks, 4 Bibb (Ky.) 238; Crawford *v.* McDaniel, 1 Rob. (Va.) 448. But see Merriman *v.* Walton, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 786, holding that, where one of several joint judgment debtors sues to restrain the enforcement of the judgment against himself alone, he need not join the others as plaintiffs. And although the obligation in suit was a joint and several note, if one of the makers is sued alone, and judgment recovered against him, and he brings a suit in equity to enjoin it, he need not join his co-maker as a party. Burpee *v.* Smith, Walk. (Mich.) 327.

Persons entitled to sue in general see *supra*, X, A, 6.

65. Love *v.* Cofer, 1 J. J. Marsh. (Ky.) 327; Lewis *v.* Hayden, 4 Litt. (Ky.) 281. *Compare* Bently *v.* Gregory, 7 T. B. Mon. (Ky.) 368.

Set-off in favor of surety.— The principal in a note has no such interest in the subject-matter of an equitable set-off which his surety has against the payee as to entitle him to join such surety in a suit to restrain execution of a judgment which the payee who is insolvent has obtained against both principal and surety in an action on the note. Moore *v.* Moore, 17 Ala. 631.

66. Russell *v.* Defrance, 39 Mo. 506.

67. *Georgia.*— Read *v.* Dews, R. M. Charlt. 358.

Illinois.— Elston *v.* Blanchard, 3 Ill. 420, holding that to a bill for relief against a judgment at law on a promissory note, obtained in an action against the maker, in favor of an assignee of the note, the payee is a necessary party.

Indiana.— Lindley *v.* Cravens, 2 Blackf. 426.

Iowa.— Stringfield *v.* Graff, 22 Iowa 438, holding that an attorney, having in his hands money which he agreed to apply, and which should be applied, upon a judgment, but which he claims the right to retain, is a proper party defendant to a bill seeking cancellation of the judgment.

Kansas.— Le Roy Coal, etc., Co. *v.* Crowl, 3 Kan. App. 288, 45 Pac. 132.

Maryland.— Hodges *v.* Planters' Bank, 7 Gill & J. 306.

New York.— Gibson *v.* Blakley, 85 Hun 305, 32 N. Y. Suppl. 1005; Van Cleef *v.* Sickles, 5 Paige 505.

See 30 Cent. Dig. tit. "Judgment," § 869.

68. *Alabama.*— Eldridge *v.* Turner, 11 Ala. 1049.

Delaware.— Davidson *v.* Wilson, 3 Del. Ch. 307.

Georgia.— White *v.* Bleckley, 105 Ga. 173, 31 S. E. 147.

Indiana.— See Cox *v.* Bird, 88 Ind. 142, holding, however, that plaintiff in a judgment for the enforcement of a ditch assessment is not a necessary party to an action to set aside a sale under the judgment, the party in interest being the purchaser at the sale.

Kentucky.— Daniel *v.* Hannagan, 5 J. J. Marsh. 48.

Louisiana.— Everett *v.* McKinney, 7 La. 375; Kenner *v.* Duncan, 3 Mart. N. S. 563. *Compare* Pironi *v.* Riley, 39 La. Ann. 302, 1 So. 675.

Missouri.— Fulkerson *v.* Davenport, 70 Mo. 541.

Wisconsin.— Newcomb *v.* Horton, 18 Wis. 566.

See 30 Cent. Dig. tit. "Judgment," § 869.

69. Triplett *v.* Vandegrift, 8 B. Mon. (Ky.) 420; Turner *v.* Cox, 5 Litt. (Ky.) 175.

70. Pemberton *v.* Riddle, 5 T. B. Mon. (Ky.) 401; Mumford *v.* Sprague, 11 Paige (N. Y.) 438; Liniman *v.* Donnick, 1 Ohio Cir. Ct. 563, 1 Ohio Cir. Dec. 314; Duncan *v.* Bullock, 18 Tex. 541; Ellis *v.* Kerr, (Tex. Civ. App. 1893) 23 S. W. 1050.

But the assignor of a cause of action which is afterward merged in a judgment is not a necessary party to an action to enjoin the enforcement of the judgment by the assignee. Taylor *v.* Bush, 5 T. B. Mon. (Ky.) 84; Drake *v.* Lyons, 9 Gratt. (Va.) 54.

71. *Georgia.*— Tarver *v.* New England Mortg. Security Co., 96 Ga. 536, 23 S. E. 507.

in an alleged fraud, charged as the means whereby the judgment was obtained, although they were not parties to the original action.[72] If the action is brought against the sheriff or other officer holding process under the judgment to restrain him from proceeding for its collection the judgment plaintiff should be joined as a defendant;[73] but where the suit is against the judgment creditor, it is not necessary to make the sheriff a party, unless it be under special statutory provisions.[74]

5. Process and Service. In a suit in equity to enjoin a judgment, the respondent must be brought before the court by a proper service of process; service by publication, he being a non-resident, will not in the absence of a statute so providing give jurisdiction.[75] But service of the subpœna may well be made on the attorney of record for plaintiff in the original action.[76]

6. Release of Errors. By statute in some states the complainant in a bill in equity for relief against a judgment at law is required to file or indorse on his bill a release of errors, and if this is not done no injunction will be granted.[77] In other states a release is necessary only when required by the court.[78] These requirements have, however, been held inapplicable to proceedings in chancery, or those in their nature equitable,[79] or in a case where the judgment is not merely erroneous but is void.[80] The omission of such a release is not in any case ground for dismissing the bill.[81] A release when so given applies only to errors in the legal proceedings which might be taken advantage of in the appellate court, and does not affect the remedy of the party in equity.[82]

7. Preliminary or Temporary Injunction — a. Right to Injunction. In a suit in equity for relief against a judgment at law, a preliminary or temporary

Illinois.— Kannally *v.* Renner, 84 Ill. App. 51.

Indiana.— Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687.

Kentucky.— Cummins *v.* Latham, 4 T. B. Mon. 97; King *v.* Harper, 4 Bibb 570.

Maryland.— Buchanan *v.* Torrance, 11 Gill & J. 342.

United States.— Johnson *v.* Christian, 128 U. S. 374, 9 S. Ct. 87, 32 L. ed. 412.

See 30 Cent. Dig. tit. "Judgment," § 869.

72. Hill *v.* Reifsnider, 39 Md. 429; Huggins *v.* King, 3 Barb. (N. Y.) 616. But an action to vacate and set aside a judgment as fraudulent cannot be maintained against one who is innocent of the fraud, is not a party to the judgment, and claims nothing under it. McNair *v.* Toler, 21 Minn. 175.

73. East Riverside Irr. Dist. *v.* Holcomb, 126 Cal. 315, 58 Pac. 817.

74. Collier *v.* Falk, 61 Ala. 105; Howard *v.* Levering, 8 Ohio Cir. Ct. 614, 4 Ohio Cir. Dec. 236; Adams *v.* Boynton, 4 Ohio Dec. (Reprint) 348, 1 Clev. L. Rep. 352; Ashton *v.* Parkinson, 1 Leg. Gaz. (Pa.) 99; Gulf, etc., R. Co. *v.* Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331.

Sheriff as nominal plaintiff.— In a suit to set aside a judgment standing in the name of a sheriff upon a replevin bond, he should be made a party, although he has no personal interest in the suit. Campbell *v.* Western, 3 Paige (N. Y.) 124.

The clerk of the court who is entitled to costs on a judgment sought to be enjoined is not a proper party to the bill, and service on him does not give the court jurisdiction to proceed against the others and decree against him for the costs of the suit in equity. McGavock *v.* Elliott, 3 Yerg. (Tenn.) 373.

75. Fisher *v.* Evans, 25 Mo. App. 582. *Compare* Moore *v.* Wright, 4 Stew. & P. (Ala.) 84; Everett *v.* Everett, 22 N. Y. App. Div. 473, 47 N. Y. Suppl. 994, in which a decree of divorce was annulled.

Injunctions against non-residents generally see Injunctions, 22 Cyc. 906.

Service of process by publication see, generally, Process.

76. Oglesby *v.* Attrill, 12 Fed. 227; Doe *v.* Johnston, 7 Fed. Cas. No. 3,958, 2 McLean 323. *Contra*, Death *v.* Pittsburg Bank, 1 Iowa 382. See *supra*, IX, F, 7, b.

77. See the statutes of the various states. And see Paulding *v.* Watson, 21 Ala. 279; Bates *v.* Planters', etc., Bank, 9 Port. (Ala.) 376 (holding, however, that such a release was not necessary where the injunction merely prevented the disposition of a particular fund, and did not stay or render inoperative the execution); San Juan, etc., Min., etc., Co. *v.* Finch, 6 Colo. 214; McConnel *v.* Ayres, 4 Ill. 210; Bradley *v.* Lamb, Hard. (Ky.) 527.

78. Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373. But see Addleman *v.* Mormon, 7 Blackf. (Ind.) 31, holding that under the statute then existing a release was in all cases necessary.

79. San Juan, etc., Min., etc., Co. *v.* Finch, 6 Colo. 214; McConnel *v.* Ayres, 4 Ill. 210.

80. McConnel *v.* Ayres, 4 Ill. 210.

81. Paulding *v.* Watson, 21 Ala. 279; Vance *v.* Cummins, Ky. Dec. 247.

82. Bass *v.* Nelms, 56 Miss. 502; Patterson *v.* Gordon, 3 Tenn. Ch. 18.

injunction may be granted where the judgment appears to have been obtained by fraud, mistake, or surprise,[83] or to await the determination of issues upon which the rights of the parties depend.[84] But this action will not ordinarily be taken unless plaintiff's equity is clear, or at least supported by a strong *prima facie* case,[85] and not where the judgment appears to rest upon a good and valuable consideration,[86] where the judgment has already been enforced by execution before the filing of the bill,[87] or where it is not shown that the refusal of the injunction will cause serious injury to the complainant.[88]

b. Proceedings to Obtain. Where a temporary injunction against a judgment is asked, notice of the application must be served on defendant.[89] And further, the complainant must furnish security.[90] But in most states the ordinary injunction bond is considered sufficient for this purpose, and he is not required to bring into court the amount of the judgment, unless under extraordinary circumstances.[91] Elsewhere, however, it is necessary for him to deposit in court the amount of the judgment, unless the court will accept a sufficient bond conditioned to pay the judgment, in place of the actual deposit.[92]

83. Kohn *v.* Lovett, 43 Ga. 179; Turner *v.* McCarter, 42 Ga. 491; Roach *v.* Hulings, 20 Fed. Cas. No. 11,874, 5 Cranch C. C. 637.

Injunctions against judicial proceedings in general see INJUNCTIONS, 22 Cyc. 786.

84. Truesdale *v.* Morrison, 84 Ill. 420; Huntington *v.* Metzger, 58 Ill. App. 372; Gillett *v.* Booth, 6 Ill. App. 423. But an injunction will not be awarded against a judgment to enable a defendant to procure a settlement of partnership affairs, in order that he may offset a balance due him on such settlement, when it is not made to appear that any balance will in fact be due. Robinson *v.* Wheeler, 51 N. H. 384.

Pending appeal.— Ordinarily an injunction will not be granted to restrain the enforcement of a judgment from which an appeal is pending. Andrews *v.* Rumsey, 75 Ill. 598; Carroll *v.* Chaffe, 35 La. Ann. 83; Emmons *v.* Campbell, 22 Hun (N. Y.) 582; Coster *v.* Van Schaick, 64 How. Pr. (N. Y.) 100. But proceedings on a default judgment, entered in an action on a judgment on which a writ of error is being prosecuted, will be stayed until the determination of such writ, since the second judgment, depending entirely on the first, would fall with a reversal thereof. Pentz *v.* Willoughby, 1 How. Pr. (N. Y.) 27.

85. *Georgia.*— Yarborough *v.* Miller, 84 Ga. 546, 11 S. E. 450; Lewis *v.* Armstrong, 47 Ga. 289.

Indiana.— Montgomery *v.* Weir, 1 Blackf. 226.

Kansas.— Akin *v.* Davis, 14 Kan. 143.

North Carolina.— Moye *v.* Albritton, 42 N. C. 62.

United States.— Foley *v.* Guarantee Trust Co., 74 Fed. 759, 21 C. C. A. 78; Nelson *v.* Killingley First Nat. Bank, 70 Fed. 526. Where the original judgment has stood for eight years, and the debtor admits its justice and merely seeks to change the method of collecting it, its collection will not be restrained pending an appeal from the dismissal of his bill asking for such modification. U. S. *v.* Knox County Ct., 39 Fed. 757.

See 30 Cent. Dig. tit. "Judgment," § 872.

86. Sohier *v.* Merril, 22 Fed. Cas. No. 13,158, 3 Woodb. & M. 179.

87. Kamm *v.* Stark, 14 Fed. Cas. No. 7,604, 1 Sawy. 547.

88. Ingalls *v.* Merchants' Nat. Bank, 51 N. Y. App. Div. 305, 64 N. Y. Suppl. 911.

89. Burlington *v.* Cox, 55 Iowa 752, 8 N. W. 360; Christie *v.* Bogardus, 1 Barb. Ch. (N. Y.) 167.

Effect of notice.— Notice of application for a provisional injunction in a suit in equity to restrain the enforcement of a judgment at law does not operate as a stay. Kamm *v.* Stark, 14 Fed. Cas. No. 7,604, 1 Sawy. 547.

Notice of application in general see INJUNCTIONS, 22 Cyc. 918.

90. See, generally, INJUNCTIONS, 22 Cyc. 920 *et seq.*

91. Fellows *v.* Day, 5 Bush (Ky.) 666; Chester *v.* Apperson, 4 Heisk. (Tenn.) 639; Edrington *v.* Allsbrooks, 21 Tex. 186.

Condition of bond.— Where an injunction against a judgment is asked on the ground that complainant had a good defense to the action, but was induced by the false and fraudulent representations of the opposing attorney to believe that the action had been dismissed, the bond need not contain an undertaking to pay any judgment ultimately to be recovered. Way *v.* Lamb, 15 Iowa 79.

Bond as supersedeas.— A bond given to obtain an injunction will not operate as a supersedeas, if it describes a different judgment from that sought to be enjoined. Wiswell *v.* Munroe, 4 Ala. 9.

92. Phillips *v.* Pullen, 45 N. J. Eq. 157, 16 Atl. 915; Cairo, etc., R. Co. *v.* Titus, 26 N. J. Eq. 94; Marlatt *v.* Perrine, 17 N. J. Eq. 49; Kinney *v.* Ogden, 3 N. J. Eq. 168; Morris Canal, etc., Co. *v.* Bartlett, 3 N. J. Eq. 9; Christie *v.* Bogardus, 1 Barb. Ch. (N. Y.) 167; Cooper *v.* Tappan, 4 Wis. 362. But *compare* Rodgers *v.* Rodgers, 1 Paige (N. Y.) 426.

Authority to take bond.— In an action to enjoin the execution of a judgment, the master should ascertain and direct the amount to be deposited in court, but only the court can take a bond and security in lieu of the actual

c. Continuance or Dissolution — (i) *In General.* If the rights of the parties depend on unsettled issues of fact, the preliminary injunction will ordinarily be continued until the hearing and determination.[93] But it may be dissolved if the court becomes satisfied that it ought never to have been granted,[94] or for want of a release of errors,[95] or for want of prosecution on the part of the complainant,[96] or where the amount proposed to be set off against the judgment, for which purpose the injunction was sued out, bears an insignificant proportion to the amount of the judgment,[97] or where the judgment was recovered by a vendor of land for the purchase-money, and was enjoined on the ground of a defect or failure of title, it should be dissolved on his exhibiting a good title or tendering a good and sufficient deed, as the case may be.[98] But the injunction should not be dissolved for a mere defect of parties.[99]

(ii) *On Answer.* When the respondent's answer denies the equity of the complainant's bill, and fully and explicitly negatives all its essential allegations, the preliminary injunction should in general be dissolved.[1] But this will not be

deposit of the money. Jenkins *v.* Wilde, 2 Paige (N. Y.) 394.

93. *Maryland.*— Barnes *v.* Dodge, 7 Gill 109.

New Jersey.— Johnston *v.* Corey, 25 N. J. Eq. 311.

North Carolina.— Dalrymple *v.* Sheppard, 38 N. C. 74.

Virginia.— Nelson *v.* Armstrong, 5 Gratt. 354.

United States.— Mason *v.* Jones, 16 Fed. Cas. No. 9,240, 1 Hayw. & H. 329.

See 30 Cent. Dig. tit. "Judgment," § 876.

94. Atchison *v.* Parks, 2 La. Ann. 306; Akers *v.* Akers, 83 Va. 633, 8 S. E. 260; Vass *v.* Magee, 1 Hen. & M. (Va.) 2.

False allegations.— Where complainant has an equity to enjoin the enforcement of part of a judgment, but, for the purpose of obtaining an injunction as to the whole, alleges a ground of relief which is false in fact, and relies upon it alone, the court may dissolve the injunction as to the whole of the judgment. Ward *v.* Smith, 58 N. C. 204.

As to costs.— Where an injunction against a judgment at law is dissolved, it should also be dissolved as to costs. Burrows *v.* Miller, 3 Bibb (Ky.) 77.

95. Bradley *v.* Lamh, Hard. (Ky.) 527.

Necessity of release of errors see *supra*, X, C, 6.

96. Stephens *v.* Hornbrook, 2 Ind. 666; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809; Zoll *v.* Campbell, 3 W. Va. 226.

Failure to prosecute appeal.— An injunction to restrain the enforcement of a judgment pending a writ of error is rightly dissolved where the writ is not sued out within the time required by law. Galveston City R. Co. *v.* D. A. Tompkins Co., (Tex. Civ. App. 1894) 26 S. W. 774.

97. Barrow *v.* Robichaux, 15 La. Ann. 70.

Modification.— Where a preliminary injunction was granted restraining the enforcement of a judgment to allow the complainant to set off another judgment against it, and it appears that the complainant's judgment is less in amount than the judgment enjoined, the injunction should be modified so as to permit the respondent to proceed to collect the excess of his judgment over the amount of complainant's judgment. Steiner *v.* Scholze, 105 Ala. 607, 18 So. 79.

98. Moore *v.* Cook, 4 Hayw. (Tenn.) 84; Young *v.* McClung, 9 Gratt. (Va.) 336; Grantland *v.* Wight, 2 Munf. (Va.) 179.

But a vendor, seeking the dissolution of an injunction against his judgment for the purchase-money, and having gone to trial willingly, will not be allowed time by the court for procuring a title. Hays *v.* Tribble, 3 B. Mon. (Ky.) 106.

Passing on sufficiency of title.— In some cases it is held, in a case such as that stated in the text, that the injunction should be continued until the master shall report, upon a reference to him as to the sufficiency of the title tendered. Kilpatrick *v.* Harris, 62 N. C. 222. But in others it is held correct practice to dissolve the injunction upon defendant's tendering a deed to plaintiff, or filing it in the case, without requiring it to be approved by the court before the injunction is dissolved. McMahon *v.* Spangler, 4 Rand. (Va.) 51.

99. Scarlett *v.* Hicks, 13 Fla. 314; Irick *v.* Black, 17 N. J. Eq. 189; McKay *v.* Hite, 2 Leigh (Va.) 145; Jackson *v.* Aruold, 4 Rand. (Va.) 195.

1. *Alabama.*— Rice *v.* Tobias, 83 Ala. 348, 3 So. 670; Weems *v.* Weems, 73 Ala. 462; Rogers *v.* Bradford, 29 Ala. 474; McClure *v.* Colclough, 6 Ala. 492.

Arkansas.— Bettison *v.* Jennings, 8 Ark. 287.

Delaware.— Maclary *v.* Reznor, 3 Del. Ch. 445.

Georgia.— Ford *v.* Tison, 8 Ga. 466.

Illinois.— Parkinson *v.* Trousdale, 4 Ill. 367.

Indiana.— Thompson *v.* Adams, 2 Ind. 151.

Maryland.— Doub *v.* Barnes, 4 Gill 1.

Mississippi.— Pass *v.* Dykes, 2 Sm. & M. 92.

North Carolina.— Walker *v.* Gurley, 83 N. C. 429; Woodfin *v.* Johnson, 54 N. C. 317; Capehart *v.* Mhoon, 45 N. C. 30; Martin *v.* Spier, 2 N. C. 369.

Ohio.— Smith *v.* Simmons, Tapp. 311.

done where the denials of the answer are vague, general, or lacking in particularity,[2] or where the answer admits the substantial rights of complainant[3] in whole or in part.[4]

(III) *Refunding Bond.* When the preliminary injunction is dissolved on the answer, it is proper to require of the respondent a bond conditioned to refund the amount he may collect on the judgment, in case the equity proceedings should finally be determined against him.[5]

8. Pleading — a. Bill or Complaint — (I) *Certainty of Allegations.* In a bill in equity, or complaint, to obtain an injunction against a judgment at law, the allegations must be positive, explicit, and certain.[6]

(II) *Averment of Meritorious Defense.* The bill must also allege and show that the complainant has a good and meritorious defense to the action at law, and it must allege and show this, not merely in general terms, but by stating the facts constituting the proposed defense.[7] It is not enough for complainant

South Carolina.— McClure *v.* Miller, 1 Bailey Eq. 107, 21 Am. Dec. 522.

Texas.— Wills Point Bank *v.* Bates, 76 Tex. 329, 13 S. W. 309; Howard *v.* Randolph, 73 Tex. 454, 11 S. W. 495; Wheeler *v.* Gray, 5 Tex. Civ. App. 12, 23 S. W. 821.

Virginia.— Wise *v.* Lamb, 9 Gratt. 294.

See 30 Cent. Dig. tit. "Judgment," § 877.

2. *Alabama.*— Moore *v.* Barclay, 16 Ala. 158.

Iowa.— Gates *v.* Ballou, 54 Iowa 485, 6 N. W. 701.

Maryland.— Doub *v.* Barnes, 4 Gill 1.

New York.— Skinner *v.* White, 17 Johns. 357.

North Carolina.— Tooley *v.* Jasper, 3 N. C. 383.

Virginia.— Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595.

See 30 Cent. Dig. tit. "Judgment," § 877.

3. Myers *v.* Daniels, 59 N. C. 1. And see Lynch *v.* Colegate, 2 Harr. & J. (Md.) 34, ruling that, when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is always continued until final hearing or further order.

4. Maulden *v.* Armistead, 18 Ala. 500, stating the rule as follows: When the injunction of an entire judgment at law has in the first instance been properly granted, and the answer shows that the complainant is entitled to some relief, although not to the extent claimed by the bill, the injunction may be dissolved in part, or continued on such terms as will insure ultimate justice between the parties; but to authorize such dissolution, or a requirement that the complainant pay a portion of the judgment into court, as a condition to the continuance, the answer should show explicitly the amount which plaintiff at law is in equity entitled to receive; and if this is not done, and there is no danger of the debt being lost by continuing the injunction, it should be retained until the final hearing. And see Skipwith *v.* Strother, 3 Rand. (Va.) 214; Heatherly *v.* Farmers' Bank, 31 W. Va. 70, 5 S. E. 754.

5. Jackson *v.* Elliott, 100 Ala. 669, 13 So. 690; Dexter *v.* Ohlander, 95 Ala. 467, 10 So. 527; Robertson *v.* Walker, 51 Ala. 484; McLaughlin *v.* McLaughlin, 36 Ala. 145; Clarke *v.* Wells, 6 N. C. 3.

6. *Alabama.*— Long *v.* Brown, 4 Ala. 622.

Georgia.— Benedict *v.* Gammon Theological Seminary, 122 Ga. 412, 50 S. E. 162.

Kentucky.— Dewees *v.* Richardson, 1 A. K. Marsh. 312; Louisville Tobacco Warehouse Co. *v.* Wood, 82 S. W. 456, 26 Ky. L. Rep. 769; Benedict *v.* Wilhoite, 80 S. W. 1155, 26 Ky. L. Rep. 178.

Nebraska.— Parker *v.* Parker, (1905) 102 N. W. 85; Zweibel *v.* Caldwell, (1905) 102 N. W. 84.

South Dakota.— Ft. Pierre *v.* Hall, (1905) 104 N. W. 470; Phillips *v.* Norton, (1904) 101 N. W. 727, holding that an allegation that plaintiff is informed and believes that defendant claims to own the judgment is *prima facie* sufficient as an allegation of such ownership, in the absence of a motion to make more certain.

Tennessee.— Winham *v.* Crutcher, 2 Tenn. Ch. 535.

United States.—McKee *v.* Travelers' Ins. Co., 41 Fed. 117; Brooks *v.* O'Hara, 8 Fed. 529, 2 McCrary 644.

See 30 Cent. Dig. tit. "Judgment," § 880.

Identifying judgment.— A bill seeking to enjoin a judgment and execution, which does not so identify them as to make it appear what judgment and execution are meant, and which does not limit the prayer for injunction to any particular judgment and execution, is demurrable. Adams *v.* White, 23 Fla. 352, 2 So. 774.

Allegations on information and belief.— Chancery will not restrain the collection of a judgment at law upon a bill in which all the material facts are charged on information and belief only, without any allegation as to whence the information was derived or any affidavit connected with the bill. Williams *v.* Lockwood, Clarke (N. Y.) 172. But *compare* Phillips *v.* Norton, (S. D. 1904) 101 N. W. 727.

7. *Alabama.*— National Fertilizer Co. *v.* Hinson, 103 Ala. 532, 15 So. 844; Yonge *v.* Hooper, 73 Ala. 119; Beadle *v.* Graham, 66 Ala. 102; Dunklin *v.* Wilson, 64 Ala. 162.

Arkansas.— Rotan *v.* Springer, 52 Ark. 80, 12 S. W. 156.

to aver that he has stated the facts to his attorney and that he is advised by him that he has a good defense.[8]

(III) *Averring Injury or Injustice to Complainant.* The bill must likewise allege and show that it would be against conscience to allow the enforcement of the judgment, or that it would work injury or injustice to the complainant in some specific manner.[9]

(IV) *Alleging Specific Grounds For Equitable Relief*—(A) *In General.* Whatever be the specific ground on which equity is asked to interfere—whether fraud, accident, mistake, want of jurisdiction, or excusable neglect—the bill or complaint must show the existence of such ground by specific averments, setting forth in detail the particular facts constituting the fraud or other basis for equitable relief.[10]

California.—Harnish *v.* Bramer, 71 Cal. 155, 11 Pac. 888.

Connecticut.—Jeffery *v.* Fitch, 46 Conn. 601.

District of Columbia.—Bohrer *v.* Fay, 3 MacArthur 145.

Georgia.—Hill *v.* Harris, 42 Ga. 412.

Illinois.—Buntain *v.* Blackburn, 27 Ill. 406; Tompkins *v.* Lang, 74 Ill. App. 500; Combs *v.* Hamlin Wizard Oil Co., 58 Ill. App. 123; Lemon *v.* Sweeney, 6 Ill. App. 507.

Indiana.—Warne *v.* Irwin, 153 Ind. 20, 53 N. E. 926; Becker *v.* Tell City Bank, 142 Ind. 99, 41 N. E. 323; Nichols *v.* Nichols, 96 Ind. 433; Williams *v.* Hitzie, 83 Ind. 303; Wiley *v.* Pratt, 23 Ind. 628; Durre *v.* Brown, 7 Ind. App. 127, 34 N. E. 577.

Kansas.—Mulvaney *v.* Lovejoy, 37 Kan. 305, 15 Pac. 181.

Louisiana.—Chinn *v.* New Orleans First Municipality, 1 Rob. 523.

Maryland.—Home L. Ins. Co. *v.* Caulk, 86 Md. 385, 38 Atl. 901.

Mississippi.—Roots *v.* Cohen, (1893) 12 So. 593.

Nebraska.—Janes *v.* Howell, 37 Nebr. 320, 55 N. W. 965, 40 Am. St. Rep. 494; Petalka *v.* Fitle, 33 Nebr. 756, 51 N. W. 131; Hartford F. Ins. Co. *v.* Meyer, 30 Nebr. 135, 46 N. W. 292, 27 Am. St. Rep. 384; Winters *v.* Means, 25 Nebr. 241, 41 N. W. 157, 13 Am. St. Rep. 489; Chicago, etc., R. Co. *v.* Manning, 23 Nebr. 552, 37 N. W. 462.

Rhode Island.—Opie *v.* Clancy, 27 R. I. 42, 60 Atl. 635.

Texas.—Anderson *v.* Oldham, 82 Tex. 228, 18 S. W. 557; Sowell *v.* Jones, (1887) 4 S. W. 620.

West Virginia.—Longdale Iron Co. *v.* Queenberry, 50 W. Va. 451, 40 S. E. 487.

Wisconsin.—Ableman *v.* Roth, 12 Wis. 81.

United States.—White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113; Massachusetts Mut. Ben. Life Assoc. *v.* Lohmiller, 74 Fed. 23, 20 C. C. A. 274.

See 30 Cent. Dig. tit. "Judgment," § 885.

Necessity of good and meritorious defense see *supra*, X, B, 14.

8. Eldred *v.* White, 102 Cal. 600, 36 Pac. 944.

9. Lemon *v.* Sweeney, 6 Ill. App. 507; New York Home L. Ins. Co. *v.* Caulk, 86 Md. 385, 38 Atl. 901; Van Every *v.* Sanders, (Nebr. 1903) 95 N. W. 870; Lininger *v.* Glenn, 33 Nebr. 187, 49 N. W. 1128; Scofield *v.* State Nat. Bank, 9 Nebr. 316, 2 N. W. 888, 31 Am. Rep. 412; Sharp *v.* Schmidt, 62 Tex. 263.

Necessity of injury to afford right to relief see *supra*, X, A, 6, a.

A general allegation of injury is not sufficient to entitle the party to equitable relief from a judgment. Lawson *v.* Bettison, 12 Ark. 401.

Fraudulent judgment.—A party may enjoin the enforcement of a judgment obtained by fraud, without alleging that irreparable injury would ensue unless such relief was granted. Byars *v.* Justin, 2 Tex. App. Civ. Cas. § 686. And see Brown *v.* Byam, 59 Iowa 52, 12 N. W. 770, holding that, on petition to vacate a judgment on the ground of fraud, where fraud has been clearly shown, a presumption of prejudice should follow, unless the court is able to say from the record that the prejudice is not material. But on the other hand, in McNair *v.* Toler, 21 Minn. 175, it is held that the complaint must show, not only the commission of the fraud, but also damages resulting therefrom to plaintiff.

10. *Alabama.*—Crafts *v.* Dexter, 8 Ala. 767, 42 Am. Dec. 666.

Arkansas.—Whitehill *v.* Butler, 51 Ark. 341, 11 S. W. 477.

California.—Douglass *v.* Brooks, 38 Cal. 670; Crane *v.* Hirshfelder, 17 Cal. 467.

Florida.—Gamble *v.* Campbell, 6 Fla. 347.

Georgia.—Scruggs *v.* Burke, 82 Ga. 166, 8 S. E. 209.

Illinois.—Hickey *v.* Stone, 60 Ill. 458; Willems *v.* Willems, 72 Ill. App. 200.

Indiana.—Warne *v.* Irwin, 153 Ind. 20, 53 N. E. 926; Davis *v.* Clements, 148 Ind. 605, 47 N. E. 1056, 62 Am. St. Rep. 539; Graham *v.* Loh, 32 Ind. App. 183, 69 N. E. 474; State *v.* Wills, 26 Ind. App. 329, 59 N. E. 868; Durre *v.* Brown, 7 Ind. App. 127, 34 N. E. 577.

Iowa.—Byers *v.* O'Dell, 56 Iowa 618, 10 N. W. 102; Finch *v.* Hollinger, 47 Iowa 173.

Kansas.—Wheatley *v.* Tutt, 4 Kan. 240.

Kentucky.—Shipp *v.* Haskins, 4 Dana 614.

Maryland.—Neurath *v.* Hecht, 62 Md. 221.

Mississippi.—Tatum *v.* Tate, 77 Miss. 684, 27 So. 647.

Missouri.—Mullins *v.* Rieger, 169 Mo. 521, 70 S. W. 4, 92 Am. St. Rep. 651; Reed *v.* Vaughan, 15 Mo. 137, 55 Am. Dec. 133.

(B) *Newly Discovered Evidence.* A bill for relief in equity against a judgment at law on the ground of newly discovered evidence must set forth such evidence in detail, so that the court may judge of its nature, materiality, and weight;[11] and it must also aver that the complainant was ignorant of it at the time of the trial at law,[12] and show, not merely that he was diligent in seeking to discover it before the trial, but what efforts he made for that purpose and what degree of diligence he employed.[13]

(C) *Fraud.* If fraud is the ground on which the aid of equity in relieving against a judgment is asked, it is not sufficient to incorporate in the bill a general allegation of fraud, deceit, or misconduct, but the specific facts constituting the alleged fraud must be set forth particularly.[14] On the other hand if the facts

Nebraska.— Meyers *v.* Smith, 59 Nebr. 36, 80 N. W. 275.

New York.—Smith *v.* Nelson, 62 N. Y. 286; New York, etc., Transp. Co. *v.* Tyroler, 25 N. Y. App. Div. 161, 48 N. Y. Suppl. 1095; Christie *v.* Bogardus, 1 Barb. Ch. 167; Bebee *v.* State Bank, 1 Johns. 529, 3 Am. Dec. 353.

Ohio.— McCurdy *v.* Baughman, 43 Ohio St. 78, 1 N. E. 93.

Oklahoma.— Tibbits *v.* Miller, 9 Okla. 677, 60 Pac. 95; Mosley *v.* Southern Mfg. Co., 4 Okla. 492, 46 Pac. 508.

Oregon.— Handley *v.* Jackson, 31 Oreg. 552, 50 Pac. 915, 65 Am. St. Rep. 839.

Pennsylvania.— Kountz's Appeal, 36 Leg. Int. 186.

Tennessee.— McTeer *v.* Briscoe, (Ch. App. 1899) 61 S. W. 564.

Texas.— Janson *v.* Jacobs, 44 Tex. 573; Henderson *v.* Morrill, 12 Tex. 1; De Garcia *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 77 S. W. 275.

Vermont.— Camp *v.* Ward, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929.

Wisconsin.— Gaynor *v.* Blewett, 85 Wis. 155, 55 N. W. 169.

United States.— Atkins *v.* Dick, 14 Pet. 114, 10 L. ed. 378; Travelers' Protective Assoc. of America *v.* Gilbert, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538; Crapo *v.* Hazelgreen, 93 Fed. 316, 35 C. C. A. 314; Young *v.* Sigler, 48 Fed. 182.

See 30 Cent. Dig. tit. "Judgment," § 879.

Want of jurisdiction.— A petition which alleges that there was no service of process on the judgment defendant, that he did not employ counsel or authorize any one to employ counsel to represent him in the suit, and that he knew nothing about the suit until after the rendition of judgment therein, sufficiently shows a lack of jurisdiction as a basis for equitable relief. Graham *v.* East Texas Land, etc., Co., (Tex. Civ. App. 1899) 50 S. W. 579.

11. *Alabama.*— Waters *v.* Creagh, 4 Stew. & P. 410.

Georgia.— Nisbett *v.* Cantrell, 32 Ga. 294.

Illinois.— Toledo, etc., R. Co. *v.* Ingram, 85 Ill. 172; Willems *v.* Willems, 72 Ill. App. 200.

Iowa.— Miller *v.* McGuire, Morr. 150.

Kentucky.— Brashears *v.* Dickinson, 66 S. W. 816, 23 Ky. L. Rep. 2183.

New Hampshire.— Robinson *v.* Wheeler, 51 N. H. 384.

New Jersey.— Hannon *v.* Maxwell, 31 N. J. Eq. 318.

New York.— New York *v.* Brady, 115 N. Y. 599, 22 N. E. 237; Paterson *v.* Banks, 9 Paige 627.

North Dakota.— Freeman *v.* Wood, (1905) 103 N. W. 392.

Texas.— Burnley *v.* Rice, 21 Tex. 171.

See 30 Cent. Dig. tit. "Judgment," § 884.

Rule stated.— In Mulford *v.* Cohn, 18 Cal. 42, the rule is thus fully stated: The bill must show that the facts are of controlling force; that they were unknown to defendant at the time of the trial; that he used proper diligence in preparing for trial and procuring evidence, and without his fault or negligence was unable to procure it; that it is now within his control and can be produced on another trial; and the facts to be proved should be particularly stated, with the names of the witnesses, and the bearing and relevancy of the proposed proof; also the time and manner of discovery of the facts, and the reason why a motion for a new trial was not made during the term, in the court trying the case.

False testimony.— A petition in equity for a new trial at law on the ground that the judgment was recovered on the false testimony of a certain witness should state that the testimony of such witness was false, and should also give the names and residences of the witnesses by whom plaintiff can show a state of facts contrary to that testified to by the witness impeached. Dixon *v.* Graham, 16 Iowa 310.

As ground for relief see *supra*, X, B, 13.

12. Briesch *v.* McCauley, 7 Gill (Md.) 189; Hamel *v.* Grimm, 10 Abb. Pr. (N. Y.) 150; Alley *v.* Ledbetter, 16 N. C. 449.

13. Levan *v.* Patton, 2 Heisk. (Tenn.) 108. See also Freeman *v.* Wood, (N. D. 1905) 103 N. W. 392.

14. *Alabama.*— McDonald *v.* Pearson, 114 Ala. 630, 21 So. 534.

Arkansas.— King *v.* Clay, 34 Ark. 291.

Connecticut.— Gates *v.* Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268.

Delaware.— Kersey *v.* Rash, 3 Del. Ch. 321.

Georgia.— Coleman *v.* Coleman, 113 Ga. 149, 38 S. E. 400; McCook *v.* Bernd, 79 Ga. 391, 5 S. E. 75; Griffin *v.* Sketoe, 30 Ga. 300.

Illinois.— Elston *v.* Blanchard, 3 Ill. 420.

Iowa.— Blanchard *v.* Ware, 43 Iowa 537.

are so set forth, the bill is sufficient, although it lacks a specific allegation of fraud.[15]

(v) *Averments to Exonerate Complainant.* The complainant in a suit in equity for relief against a judgment at law must exonerate himself; that is, his bill must contain proper averments to show that the judgment against him was not attributable to his own negligence or fault, and that he has been diligent in seeking to make his defense, and he must set forth the facts which he relies on as showing such diligence.[16]

(vi) *No Adequate Remedy at Law.* Further the complainant must allege that he has no adequate remedy at law against the judgment, or if the case be so,

Kansas.— Ohio, etc., Mortg., etc., Co. *v.* Carter, 9 Kan. App. 621, 58 Pac. 1040.

Kentucky.— Bell *v.* Rucker, 4 B. Mon. 452

Louisiana.— Rooks *v.* Williams, 13 La. Ann. 374.

Nebraska.— Shufeldt *v.* Gandy, 25 Nebr. 602, 41 N. W. 553.

New York.— Whittlesey *v.* Delaney, 73 N. Y. 571; Smith *v.* Nelson, 62 N. Y. 286.

Ohio.— Pendleton *v.* Galloway, 9 Ohio 178, 34 Am. Dec. 434.

Tennessee.— McDowell *v.* Morrell, 5 Lea 278; Neil *v.* Smith, 1 Lea 371.

Texas.— Gulf, etc., R. Co. *v.* Henderson, 83 Tex. 70, 18 S. W. 432.

Vermont.— Perkins *v.* Cooper, 28 Vt. 729.

West Virginia.— Davis *v.* Landcraft, 10 W. Va. 718.

Wisconsin.— McLachlan *v.* Staples, 13 Wis. 448.

United States.— U. S. *v.* Atherton, 102 U. S. 372, 26 L. ed. 213.

See 30 Cent. Dig. tit. "Judgment," § 883.

Disqualification of judge.— A bill attacking a judgment as fraudulent by reason of the judge having been counsel before the trial should state on whose behalf he so acted, and that complainant objected to his sitting, or failed to object by reason of ignorance of the judge's disqualification. Griffith *v.* Griffith, (Tenn. Ch. App. 1898) 46 S. W. 340.

Fraud as ground for relief see *supra*, X, B, 12.

15. Oliver *v.* Riley, 92 Iowa 23, 60 N. W. 180; Shepherd *v.* Shepherd, 12 Heisk. (Tenn.) 275.

16. *Alabama.*— Raisin Fertilizer Co. *v.* McKenna, 114 Ala. 274, 21 So. 816; National Fertilizer Co. *v.* Hinson, 103 Ala. 532, 15 So. 844; Headley *v.* Bell, 84 Ala. 346, 4 So. 391; Beadle *v.* Graham, 66 Ala. 102; Robertson *v.* Walker, 51 Ala. 484; Taliaferro *v.* Montgomery Branch Bank, 23 Ala. 755; Bryan *v.* Cowart, 21 Ala. 92; Perrine *v.* Carlisle, 19 Ala. 686; Mobile Branch Bank *v.* Tillman, 10 Ala. 149; French *v.* Garner, 7 Port. 549.

Arkansas.—Dickson *v.* Richardson, 16 Ark. 114.

California.— Eldred *v.* White, 102 Cal. 600, 36 Pac. 944; Boston *v.* Haynes, 33 Cal. 31.

Georgia.— Sasser *v.* Olliff, 91 Ga. 84, 16 S. E. 312; Simmons *v.* Martin, 53 Ga. 620; Hill *v.* Harris, 42 Ga. 412.

Illinois.— Buntain *v.* Blackburn, 27 Ill. 406; Brady *v.* Horvath, 79 Ill. App. 17; Combs *v.* Hamlin Wizard Oil Co., 58 Ill. App. 123; Edwards *v.* Sams, 3 Ill. App. 168.

Indiana.— Warne *v.* Irwin, 153 Ind. 20, 53 N. E. 926; Ratliff *v.* Stretch, 130 Ind. 282, 30 N. E. 30; Schlemmer *v.* Rossler, 59 Ind. 326; Barnes *v.* Dewey, 58 Ind. 418; Parker *v.* Morton, 5 Blackf. 1; Deputy *v.* Tobias, 1 Blackf. 311, 12 Am. Dec. 243.

Kentucky.— Bishop *v.* Duncan, 3 Dana 15; Young *v.* Dorsey, 2 Litt. 202.

Louisiana.— Chinn *v.* New Orleans First Municipality, 1 Rob. 523.

Maryland.— Falls *v.* Robinson, 5 Md. 365; Dilly *v.* Barnard, 8 Gill & J. 170.

Minnesota.— Wieland *v.* Shillock, 23 Minn. 227.

Mississippi.— Leggett *v.* Morris, 6 Sm. & M. 723.

Missouri.— Cadwaleder *v.* Atchison, 1 Mo. 659.

Nebraska.— Van Antwerp *v.* Lathrop, (1904) 98 N. W. 35; Miller *v.* Miller, (1903) 95 N. W. 1010; Lincoln *v.* Bell, 65 Nebr. 351, 91 N. W. 287; Barr *v.* Post, 59 Nebr. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; Scofield *v.* State Nat. Bank, 9 Nebr. 316, 2 N. W. 888, 31 Am. Rep. 412.

New Jersey.— Hayes *v.* U. S. Phonograph Co., (Ch. 1903) 55 Atl. 84; Brick *v.* Burr, 47 N. J. Eq. 189, 19 Atl. 842.

New York.— Ross *v.* Wood, 70 N. Y. 8; Metropolitan El. R. Co. *v.* Johnston, 84 Hun 83, 32 N. Y. Suppl. 49.

Oregon.— Meinert *v.* Harder, 39 Oreg. 609, 65 Pac. 1056; Snyder *v.* Vannoy, 1 Oreg. 344.

Tennessee.— Griffith *v.* Griffith, (Ch. App. 1898) 46 S. W. 340; Noll *v.* Chattanooga Co., (Ch. App. 1896) 38 S. W. 287.

Texas.— Anderson *v.* Oldham, 82 Tex. 228, 18 S. W. 557; Burnley *v.* Rice, 21 Tex. 171; East Texas Land, etc., Co. *v.* Graham, 24 Tex. Civ. App. 521, 60 S. W. 472; Alexander *v.* Banner, 10 Tex. Civ. App. 111, 30 S. W. 563.

Virginia.— Slack *v.* Wood, 9 Gratt. 40; Yancy *v.* Fenwick, 4 Hen. & M. 423.

West Virginia.— Knapp *v.* Snyder, 15 W. Va. 434; Morehead *v.* De Ford, 6 W. Va. 316. *Compare* Ludington *v.* Tiffany, 6 W. Va. 11.

United States.— Cragin *v.* Lovell, 109 U. S. 194, 3 S. Ct. 132, 27 L. ed. 903; Massachusetts Ben. Life Assoc. *v.* Lohmiller, 74 Fed. 23, 20 C. C. A. 274; Pacific R. Co. *v.* Mis-

that he has unavailingly exhausted his legal remedies,[17] and an averment of the insolvency of the respondent may be a necessary part of this allegation.[18]

(VII) *PRAYER FOR RELIEF.* In a bill to obtain relief against the enforcement of a judgment the prayer for an injunction may be coupled with a demand for other relief germane to the purpose of the suit and within the power of equity to grant.[19]

(VIII) *VERIFICATION.* A bill for an injunction against a judgment must be verified[20] and by the complainant in person, unless there is some sufficient reason for its verification by his attorney.[21]

b. Exhibits. Where relief is sought in equity against the enforcement of a judgment, the complainant should incorporate in his bill or file as an exhibit a transcript of the judgment,[22] and any other documents which may be necessary to present the case fully and clearly to the mind of the court.[23]

c. Answer and Motion to Dismiss or Demurrer. The answer to a bill for an injunction against a judgment should be responsive to the charges of the bill,[24] and should answer its allegations specifically and in detail,[25] and negative every

souri Pac. R. Co., 12 Fed. 641, 2 McCrary 227 [*affirmed* in 111 U. S. 505, 4 S. Ct. 583, 28 L. ed. 498].

See 30 Cent. Dig. tit. "Judgment," § 882.

17. *Alabama.*— National Fertilizer Co. *v.* Hinson, 103 Ala. 532, 15 So. 844.

California.— Eldred *v.* White, 102 Cal. 600, 36 Pac. 944.

Nebraska.— Lininger *v.* Glenn, 33 Nebr. 187, 49 N. W. 1128.

Oklahoma.— Hockaday *v.* Jones, 8 Okla. 156, 56 Pac. 1054.

Rhode Island.— Opie *v.* Clancy, 27 R. I. 42, 60 Atl. 635.

United States.— Hungerford *v.* Sigerson, 20 How. 156, 15 L. ed. 869.

See 30 Cent. Dig. tit. "Judgment," § 882.

18. McLendon *v.* Hooks, 15 Ga. 533; McGehee *v.* Jones, 10 Ga. 127; Connery *v.* Swift, 9 Nev. 39; Townsend *v.* Quinan, 36 Tex. 548; Wamsley *v.* Stalnaker, 24 W. Va. 214.

Fraudulent judgment.—A bill to enjoin the execution of a judgment obtained by fraud need not aver that the respondent is insolvent. Smith *v.* Schwed, 6 Fed. 455, 2 McCrary 441.

19. Miller *v.* Curry, 53 Cal. 665, holding, however, that while a court of equity may in a proper case enjoin a sale of real property under an execution the bill cannot properly ask such relief against the enforcement of two separate executions in favor of different judgment creditors.

Injunction and vacation of judgment.— A bill praying for an injunction to restrain the collection of a judgment and the levy of an execution thereunder, and also that the judgment be decreed to be void and of no effect may be treated simply as a bill for an injunction, since the invalidity of the judgment would be implied in the grant of a perpetual injunction against it. Weaver *v.* Poyer, 70 Ill. 567.

Injunction and damages.— A bill for an injunction against a judgment on the ground of its having been obtained by fraud may also under the statute in Minnesota include a demand for damages against the judgment plaintiff for procuring the issue and levy of an execution on the judgment. Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704.

Vacation of mortgage.— A complaint in an action to set aside a judgment against a corporation, as being in fraud of its creditors and obtained by the collusion of certain directors, may also ask the court to set aside a mortgage and a bill of sale alleged to have been executed by the corporation with intent to defraud creditors. Cummings *v.* American Gear, etc., Co., 87 Hun (N. Y.) 598, 34 N. Y. Suppl. 541.

20. Ross *v.* Crews, 33 Ind. 120. See INJUNCTIONS, 22 Cyc. 931 *et seq.*

21. Smothers *v.* Meridian Fertilizer Factory, 137 Ala. 166, 33 So. 898; Boykin *v.* Holden, 6 La. Ann. 120. See, generally, PLEADING.

22. Parsons *v.* Wilkerson, 10 Mo. 713; Neville *v.* Pope, 95 N. C. 346. *Contra*, Nealis *v.* Dicks, 72 Ind. 374; Harbaugh *v.* Hohn, 52 Ind. 243; Collins *v.* Fraiser, 27 Ind. 477.

23. Wiggins *v.* Steiner, 103 Ala. 655, 16 So. 8 (pleadings in original action should be set out, when necessary to enable the court to judge of the validity of the judgment attacked); Fuller *v.* Indianapolis, etc., R. Co., 18 Ind. 91 (copy of the execution issued on the judgment need not be filed); Miller *v.* Baltimore County Marble Co., 52 Md. 642; Nesbit *v.* Martin, 4 Pa. Co. Ct. 95 (complainant, basing his right to relief on a lease of the land in controversy, should set forth the lease in his petition).

24. Hazelhurst *v.* Sea Isle City Hotel Co., (N. J. Ch. 1892) 25 Atl. 201.

Cross complaint.— In an action to enjoin a sheriff from executing a judgment in a suit in which plaintiff was not a party, the person in whose favor the judgment was rendered cannot file a cross complaint, setting up a new cause of action against plaintiff, independent of the judgment on which the execution is issued, and in which the original defendant has no interest. East Riverside Irr. Dist. *v.* Holcomb, 126 Cal. 315, 58 Pac. 817.

25. Washington *v.* Griffith, 1 J. J. Marsh. (Ky.) 101; Carneal *v.* Wilson, 3 Litt. (Ky.) 80; Daveiss *v.* McKee, 1 Bibb (Ky.) 331;

hypothesis on which the complainant's equity could be founded.[26] If want of jurisdiction in the equity court appears on the face of the bill, the objection may be taken by motion to dismiss,[27] or if the bill appears to lack equity, the respondent may demur.[28]

d. Issues, Proof, and Variance. To enable the court to act upon an application for relief against a judgment, it is necessary that the parties should frame and present distinct issues as to the matters they mean to contest,[29] and the hearing will be confined to the issues thus raised, excluding all collateral matters and questions lying outside the pleadings.[30] Thus if the judgment is assailed on the ground of fraud or want of jurisdiction, the court will not enter upon an inquiry as to the validity of the obligation sued on or the merits of the original action.[31]

9. Defenses — a. In General. A bill for an injunction against a judgment may be defended on any ground destructive of the equity set up by the complainant,[32] but the judgment attacked cannot be pleaded as a bar or as *res judicata*.[33]

b. Limitations. In the absence of a statute controlling the time of application to a court of equity for relief against a judgment, no particular lapse of time will

Moredock *v.* Williams, 1 Overt. (Tenn.) 325; Boyer *v.* Porter, 1 Overt. (Tenn.) 258.

26. Lockard *v.* Keyser, 18 Pa. Super. Ct. 172; Weed *v.* Hunt, 76 Vt. 212, 56 Atl. 980.

Answer of third parties.— Where judgment is recovered on a bill of exchange by the holder thereof, and a bill is filed to enjoin it, joining as defendants such holder and the drawer of the bill of exchange, the injunction ought not to be granted until the coming in of the answer of the judgment plaintiff, the holder of the bill as aforesaid, although the other respondent admits that he had paid the judgment, as stated in complainant's bill, and is the only person interested in it, for such admission may be false and collusive. Marshall *v.* Beverley, 5 Wheat. (U. S.) 313, 5 L. ed. 97.

27. Shaw *v.* Patterson, 2 Tenn. Ch. 171.

28. Stone *v.* Skerry, 31 Iowa 582.

29. Carpenter *v.* Devon, 6 Ala. 718; Riddell *v.* Harrell, 71 Cal. 254, 12 Pac. 67; Brown *v.* Toell, 5 Rand. (Va.) 543, 16 Am. Dec. 759; Bloss *v.* Hull, 27 W. Va. 503.

Matters admitted or not denied.— Where the bill alleges as a reason why the complainant did not make his defense at law that he was deceived by his attorney as to the time of the trial this fact must be proved, although it is not denied by the answer. Cowan *v.* Price, 1 Bibb (Ky.) 173, 4 Am. Dec. 627. So if the answer admits that the jury did not allow a credit to which the complainant was entitled, but it appears upon calculation upon the data on which the verdict was made that the credit was allowed, the judgment will not be enjoined. Pogue *v.* Shotwell, 2 Dana (Ky.) 281. On the other hand, where the bill charges the respondent with having failed to do an act on which the equity of his claim depends, and the answer is silent as to that allegation, the court will consider this an admission that he has not done the act in question, and will decree against him. Page *v.* Winston, 2 Munf. (Va.) 298.

Waiver of estoppel.— Where a bill filed to set aside a judgment showed that complainant had a meritorious defense, which without laches he had been prevented from making, but disclosed that the judgment had been so affirmed on writ of error as to preclude any injury into the merits, it was held that defendant, by an answer joining issue both on the allegation denying laches and those attacking the justice of the original judgment, waived the right to rely on the estoppel. Burem *v.* Foster, 6 Heisk. (Tenn.) 333.

30. *Iowa.*— Daniels *v.* Lindley, 44 Iowa 567.

Louisiana.— Williamson *v.* Richardson, 30 La. Ann. 1163.

Mississippi.— Herring *v.* Winans, Sm. & M. Ch. 466.

Missouri.— Smoot *v.* Judd, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738.

Oregon.— Heatherly *v.* Hadley, 4 Oreg. 1.

South Carolina.— Miller *v.* Klugh, 29 S. C. 124, 7 S. E. 67.

See 30 Cent. Dig. tit. "Judgment," § 890.

Matters subsequent to judgment.— In an action to set aside a judgment for fraud, where the answer is a general denial, evidence of matters occurring after the judgment was rendered is not admissible. Burnee *v.* Milnes, 148 Ind. 230, 46 N. E. 464.

31. Cicero Tp. *v.* Picken, 122 Ind. 260, 23 N. E. 763; Doughty *v.* Doughty, 27 N. J. Eq. 315; Finney *v.* Clark, 86 Va. 354, 10 S. E. 569.

32. Where property was sold under a judgment obtained without jurisdiction, the fact that the purchaser redeemed the property from a tax-sale is no defense to an action to set aside the judgment and proceedings under it. Keely *v.* East Side Imp. Co., 16 Colo. App. 365, 65 Pac. 456.

33. Davidson *v.* New Orleans, 32 La. Ann. 1245; Holbrook *v.* Holbrook, 32 La. Ann. 13; Edwards *v.* Edwards, 29 La. Ann. 597; Taylor's Succession, 25 La. Ann. 446; Price *v.* Cummings, 23 La. Ann. 209; Easton *v.* Collier, 3 Mo. 379; States *v.* Cromwell, (N. Y. 1887) 14 N. E. 448.

be marked off as barring the complainant's right to relief, the question being merely one of laches or diligence,[34] and the statutes authorizing courts of law to vacate or open their own judgments for fraud, mistake, surprise, or other cause, do not generally preclude relief in equity after the time which they fix as a limit.[35] But in many states there are now statutes of limitation specifically applicable to proceedings in equity for this purpose.[36] Such a statute, however,

34. Varnum *v.* Hart, 47 Hun (N. Y.) 18; Dinsmore *v.* Adams, 49 How. Pr. (N. Y.) 238; Franks *v.* Morris, 9 W. Va. 664. *Compare* De Riemer *v.* Coutillon, 4 Johns. Ch. (N. Y.) 85.

35. *California.*— Ex-Mission Land, etc., Co. *v.* Flash, 97 Cal. 610, 32 Pac. 600.

Georgia.— Snelling *v.* American Freehold Land Mortg. Co., 107 Ga. 852, 33 S. E. 634, 73 Am. St. Rep. 160.

Illinois.— Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342.

Iowa.— Iowa Sav., etc., Assoc. *v.* Chase, 118 Iowa 51, 91 N. W. 807; Larson *v.* Williams, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544.

Missouri.— Irvine *v.* Leyh, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10.

Contra.— See Tereba *v.* Standard Cabinet Mfg. Co., 32 Ind. App. 9, 68 N. E. 1033; Tice *v.* Adams County School Dist. No. 18, 14 Fed. 886.

Time for motion to vacate see *supra*, IX, D.

36. *Alabama.*— A bill to impeach or review a decree must be brought within three years, and a bill to set aside a decree for fraud, within one year after discovery of the facts. Heflin *v.* Ashford, 85 Ala. 125, 3 So. 760; Gordon *v.* Ross, 63 Ala. 363; Grier *v.* Campbell, 21 Ala. 327; Paulding *v.* Watson, 21 Ala. 279.

California.— An action to set aside a decree on the ground of fraud must be brought within three years after its rendition. Watkins *v.* Bryant, 91 Cal. 492, 27 Pac. 775; Lapham *v.* Campbell, 61 Cal. 296. The limitation of six months prescribed by Civ. Code, § 473, in suits for relief from a judgment taken against one through his mistake, etc., does not apply to suits for relief on account of fraud. McNeil *v.* McNeil, 78 Fed. 834. But a complaint for relief on this ground must show that plaintiff did not know of the facts in time to have applied for vacation of the judgment or decree within the six months. Heller *v.* Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016.

Colorado.— See Peck Lateral Ditch Co. *v.* Pella Irr. Ditch Co., 19 Colo. 222, 34 Pac. 988; Elder *v.* Richmond Gold, etc., Min. Co., 58 Fed. 536, 7 C. C. A. 354.

Georgia.— Crawford *v.* Cantrell, 40 Ga. 284.

Indiana.— The three-year statute of limitations does not apply to an action to set aside a judgment on the ground that it was obtained by fraud. Nealis *v.* Dicks, 72 Ind. 374; Quick *v.* Goodwin, 19 Ind. 438. See Underwood *v.* Deckard, 34 Ind. App. 198, 70 N. E. 383, exception as to minors.

Iowa.— Relief against a decree not sustained by the evidence cannot be granted in an action brought, after the time for appeal has expired, to set the decree aside. Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111.

Louisiana.— An action to annul a judgment must be brought within one year from its rendition; if on the ground of fraud, within one year from the discovery of the fraud. Dauphin's Succession, 112 La. 103, 36 So. 287; Shields *v.* Chase, 32 La. Ann. 409; Grivot *v.* Louisiana State Bank, 31 La. Ann. 467; Stevenson *v.* Weber, 29 La. Ann. 105; Bourlon *v.* Waggaman, 28 La. Ann. 481; Peyroux *v.* De Blanc, 24 La. Ann. 260; Weil *v.* St. Helena, 20 La. Ann. 247; Van Wickle *v.* Garrett, 14 La. Ann. 106; Wheat *v.* Union Bank, 7 Rob. 94; Farrar *v.* Peyroux, 7 Rob. 92; Stafford *v.* Smith, 6 La. 91; Berkery *v.* Carroll, McGloin 2. But payments and other matters arising since the rendition of the judgment may be inquired into, although more than a year has elapsed. Stafford *v.* Smith, *supra*. And see Martin *v.* Walker, 43 La. Ann. 1019, 10 So. 365. And prescription does not run against an action to annul a judgment confessed by a minor. De Moss *v.* Cobb, 23 La. Ann. 336. Continuous resistance to the enforcement of a judgment interrupts the statute of limitations from running as regards the action of nullity. De St. Romes *v.* Carondelet Canal, etc., Co., 24 La. Ann. 331. But a dismissal of an appeal on the ground that the judgment of the lower court was not signed by the judge will not interrupt the prescription of the action of nullity. Weber *v.* Frost, 22 La. Ann. 348.

Mississippi.— A bill of review must be filed within two years. Bowen *v.* Seale, 45 Miss. 30.

Nebraska.— An action to set aside a judgment on the ground of fraud must be brought within four years after the discovery of the facts constituting the fraud, or facts sufficient, if pursued, to lead to such discovery. Ritchey *v.* Seeley, (Nebr. 1905) 102 N. W. 256; Hughes *v.* Housel, 33 Nebr. 703, 50 N. W. 1127; Boone County *v.* Burlington, etc., R. Co., 139 U. S. 684, 11 S. Ct. 687, 35 L. ed. 319. And see Cushing *v.* Schoenemann, 1 Nebr. (Unoff.) 482, 96 N. W. 346.

North Carolina.— A statute provides that an injunction upon a judgment at law shall not issue more than four months after the rendition of the judgment; but this does not apply where the ground of the application for an injunction did not exist when the judgment was rendered. Kerns *v.* Chambers, 38 N. C. 576.

South Carolina.— Kibler *v.* McIlwain, 16 S. C. 550; McLure *v.* Ashby, 7 Rich. Eq. 430.

cannot be pleaded where the institution of proceedings within the time limited was prevented by the fraud of the adverse party,[37] or where he has been a non-resident during the running of the statutory period.[38] And laches is not imputable to a complainant who takes all the time which the statute allows him.[39]

c. Laches of Complainant. One who desires to invoke the assistance of equity as against a judgment at law must act with reasonable promptness, and relief will not be granted to a complainant who has delayed his application to equity, without adequate excuse, for such a considerable period of time as to be chargeable with laches.[40] But however great the lapse of time since the rendition of the

Texas.— In general, a suit for an injunction against a judgment must be brought within one year after its rendition. Miller *v.* Clements, 54 Tex. 351; Cook *v.* Baldridge, 39 Tex. 250; Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991. But this does not apply where the pretended judgment is a mere nullity (Cooke *v.* Burnham, 32 Tex. 129), or where the injunction is sought on account of some matter arising since the rendition of the judgment (Easley *v.* Bledsoe, 59 Tex. 488), or where the application is to reform the judgment by vacating a portion thereof, charging certain land with a lien (Kempner *v.* Jordan, 7 Tex. Civ. App. 275, 26 S. W. 870). If injunction is sought on the ground of fraud, the action may be brought within four years after the discovery of the fraud. Foust *v.* Warren, (Tex. Civ. App. 1903) 72 S. W. 404; Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899. But see Williams *v.* Lumpkin, 86 Tex. 641, 26 S. W. 493; Lumpkin *v.* Williams, 1 Tex. Civ. App. 214, 21 S. W. 967. In case of a person under disability, the limitation begins to run from the removal of the disability. Brown *v.* Brown, 61 Tex. 56; Snow *v.* Hawpe, 22 Tex. 168. And a direct suit to vacate a judgment by default rendered on constructive service by publication may be brought within four years. Rose *v.* Darby, 33 Tex. Civ. App. 341, 76 S. W. 799; State *v.* Dashiell, 32 Tex. Civ. App. 454, 74 S. W. 779.

See 30 Cent. Dig. tit. "Judgment," § 863.

37. Lumpkin *v.* Snook, 63 Iowa 515, 19 N. W. 333.

38. Hentig *v.* Sweet, 27 Kan. 172. See, generally, LIMITATION OF ACTIONS.

39. Independent School Dist. *v.* Schreiner, 46 Iowa 172.

40. *Alabama.*— Raisin Fertilizer Co. *v.* McKenna, 114 Ala. 274, 21 So. 816. But where a defense is not cognizable in an action at law, the fact that defendant waits until after judgment against him in such action before filing a bill for relief in equity does not constitute laches. Stevens *v.* Hertzler, 114 Ala. 563, 22 So. 121.

California.— Hildreth *v.* James, 109 Cal. 301, 41 Pac. 1039.

Georgia.— Hawks *v.* Hawks, 68 Ga. 832; Renew *v.* Darley, 49 Ga. 332.

Illinois.— Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Palmer *v.* Bethard, 66 Ill. 529; Mechanics' Nat. Bank *v.* Colehour, 44 Ill. App. 470.

Indiana.— Hollinger *v.* Reeme, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L. R. A. 46; Ratliff *v.* Stretch, 130 Ind. 282, 30 N. E. 30; Moon *v.* Baum, 58 Ind. 194.

Iowa.— Shehan *v.* Stuart, (1902) 90 N. W. 614; Bond *v.* Epley, 48 Iowa 600; Bryant *v.* Williams, 21 Iowa 329; Dixon *v.* Graham, 16 Iowa 310.

Kansas.— Cheney *v.* Hovey, 56 Kan. 637, 44 Pac. 605; Noble *v.* Butler, 25 Kan. 645; Sweet *v.* Hentig, 24 Kan. 497.

Kentucky.— Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477.

Michigan.— McVickar *v.* Filer, 31 Mich. 304.

Minnesota.—Myrick *v.* Edmundson, 2 Minn. 259.

Missouri.— Oxley Stave Co. *v.* Butler County, 121 Mo. 614, 26 S. W. 367; Heffernan *v.* Howell, 90 Mo. 344, 2 S. W. 470; Bartlett *v.* Pettus, 3 Mo. 345.

Nebraska.— Osborn *v.* Gehr, 29 Nebr. 661, 46 N. W. 84.

New Jersey.— Thompson *v.* Tilton, 34 N. J. Eq. 306. But where defendant in execution seeks to restrain the enforcement thereof by setting up facts which would not be sufficient as a defense at law, but which are particularly within the province of a court of equity, it is no objection to the bill that it was not filed pending the suit at law in enforcement of the judgment on which the execution was obtained. Quackenbush *v.* Van Riper, 1 N. J. Eq. 476.

New York.—Corwithe *v.* Griffing, 21 Barb. 9.

Pennsylvania.— Philadelphia *v.* Wallace, 7 Pa. Dist. 721.

Rhode Island.— Briggs *v.* Smith, 5 R. I. 213.

South Dakota.— Ft. Pierre *v.* Hall, (1905) 104 N. W. 470.

Tennessee.— Westbrook *v.* Thompson, 104 Tenn. 363, 58 S. W. 223; Jones *v.* Williamson, 5 Coldw. 371; West *v.* Magness, (Ch. App. 1898) 46 S. W. 469.

Texas.— Pillow *v.* Thompson, 20 Tex. 206; McLane *v.* San Antonio Nat. Bank, (Civ. App. 1902) 68 S. W. 63; Fox *v.* Robbins, (Civ. App. 1901) 62 S. W. 815; East Texas Land, etc., Co. *v.* Graham, 24 Tex. Civ. App. 521, 60 S. W. 472; McCray *v.* Freeman, 17 Tex. Civ. App. 268, 43 S. W. 37; Goliad *v.* Weisiger, 4 Tex. Civ. App. 653, 23 S. W. 694.

Virginia.— Barnett *v.* Barnett, 83 Va. 504, 2 S. E. 733; Culbertson *v.* Stevens, 82 Va. 406, 4 S. E. 607; Terry *v.* Dickinson, 75 Va. 475.

United States.— Rio Grande Irr., etc., Co. *v.* Gildersleeve, 174 U. S. 603, 19 S. Ct. 761,

judgment, the applicant is not to be charged with laches if he was ignorant of its existence, or of his defenses against it, and acts promptly after discovering the facts.[41] And so, where an infant proceeds promptly, upon attaining his majority, to show cause against a judgment, the defense of laches cannot be made.[42] Nor is laches imputable to a party who, during the interval, has been contesting the validity of the judgment in the courts of law or attempting to obtain relief against it in those courts.[43]

10. Evidence — a. Presumptions and Burden of Proof. On a bill in equity against a judgment at law, presumptions will be indulged in favor of the jurisdiction of the court, the regularity of its proceedings, and the validity of the judgment.[44] Also it will be presumed that an appearance entered for a party by an attorney was duly authorized,[45] and fraud in procuring the judgment will neither be presumed nor inferred from circumstances which are not inconsistent with good faith.[46] In general the burden of proof is upon the party demanding relief against the judgment to establish by sufficient evidence all the facts on which he relies as the basis of his application.[47]

43 L. ed. 1103; McQuiddy *v.* Ware, 20 Wall. 14, 22 L. ed. 311; Denton *v.* Baker, 93 Fed. 46, 35 C. C. A. 187; Furnald *v.* Glenn, 64 Fed. 49, 12 C. C. A. 27. See Hamburg-Bremen F. Ins. Co. *v.* Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283.

See 30 Cent. Dig. tit. "Judgment," § 863.

Laches in general see Equity, 16 Cyc. 157.

Negligence in preparing or presenting defendant's case at law, or in asserting his rights before the court of law as causing loss of right to equitable relief, see *supra*, X, A, 3, b.

41. *Colorado.*— Keely *v.* East Side Imp. Co., 16 Colo. App. 365, 65 Pac. 456.

Connecticut.— Jeffrey *v.* Fitch, 46 Conn. 601.

Iowa.— Jamison *v.* Weaver, 84 Iowa 611, 51 N. W. 65; Garrish *v.* Seaton, 73 Iowa 15, 34 N. W. 485.

Missouri.— Johnson *v.* Chilton, 111 Mo. App. 244, 85 S. W. 648.

South Carolina.— Beattie *v.* Pool, 13 S. C. 379, holding that an action to set aside a judgment because of fraud is not barred by the statute of limitations, if brought within six years after the discovery of the fraud, although plaintiff may have had a suspicion that something was wrong for a much longer time.

South Dakota.— Whitney *v.* Hazzard, (1904) 101 N. W. 346.

Texas.— Dashner *v.* Wallace, 29 Tex. Civ. App. 151, 68 S. W. 307.

United States.— U. S. *v.* Beebe, 180 U. S. 343, 21 S. Ct. 371, 45 L. ed. 563.

42. Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223. See, generally, Equity, 16 Cyc. 168.

43. Monroe *v.* Delavan, 26 Barb. (N. Y.) 16. And see Brooks *v.* Twitchell, 182 Mass. 443, 65 N. E. 843, 94 Am. St. Rep. 662. See, generally, Equity, 16 Cyc. 175.

44. *California.*— Riddell *v.* Harrell, 71 Cal. 254, 12 Pac. 67.

Illinois.— Tompkins *v.* Lang, 74 Ill. App. 500.

Indiana.— Adams School Tp. *v.* Irwin, 150 Ind. 12, 49 N. E. 806; Burke *v.* Pinnell, 93 Ind. 540.

Iowa.— Jamison *v.* Weaver, 84 Iowa 611, 51 N. W. 65.

Kentucky.— International Development Co. *v.* Howard, 113 Ky. 450, 68 S. W. 459, 24 Ky. L. Rep. 266.

Louisiana.— Stevenson *v.* Whitney, 33 La. Ann. 655.

South Dakota.— Cahn *v.* Farmers', etc., Bank, 1 S. D. 237, 46 N. W. 185.

Tennessee.— Westbrook *v.* Thompson, 104 Tenn. 363, 58 S. W. 223.

Washington.— Long *v.* Eisenbeis, 18 Wash. 423, 51 Pac. 1061.

United States.— Cornells *v.* Shannon, 63 Fed. 305, 11 C. C. A. 465; Hill *v.* Gordon, 45 Fed. 276.

See 30 Cent. Dig. tit. "Judgment," § 892.

45. Bond *v.* Epley, 48 Iowa 600; Kaufmann *v.* Drexel, 56 Nebr. 229, 76 N. W. 559; Handley *v.* Jackson, 31 Oreg. 552, 50 Pac. 915, 65 Am. St. Rep. 839; Turner *v.* Turner, 33 Wash. 118, 74 Pac. 55. But see Sneed *v.* Town, 9 Ark. 535, where the complainant in equity stated in his bill, under oath, that he authorized no attorney to appear for him in the action at law, and the respondent's answer did not affirm that an attorney appeared, and it appeared that it would have been against the interest of the complainant to appear, and it was held that the court would presume there was no appearance, or that, if there was, it was by an unauthorized attorney, although the record stated that the complainant, then defendant, appeared by attorney, and pleaded, without naming the attorney.

46. Irons *v.* Reyburn, 11 Ark. 378. But where in a direct proceeding a probate sale is attacked for fraud, and the record, unexplained, contains intrinsic evidence of the fraud, and no explanation is offered, the rule that presumptions will be indulged in favor of what does not appear is inapplicable. Herndon *v.* Kuykendall, 58 Tex. 341.

47. *Alabama.*— Dunklin *v.* Wilson, 64 Ala. 162; Stubbs *v.* Leavitt, 30 Ala. 352. But see Grier *v.* Campbell, 21 Ala. 327.

b. Admissibility.[48] On proceedings to enjoin the enforcement of a judgment, the record of the case in which the judgment was rendered is admissible in evidence,[49] including a transcript of the evidence, if properly authenticated,[50] and also the record of another judgment, bearing on the facts in controversy,[51] as well as any collateral memorandum or agreement between the parties,[52] or other evidence tending to establish the facts in issue.[53] Parol evidence will be admissible to prove such facts as naturally rest *in pais*,[54] such as the question of complainant's knowledge of the pendency of the action against him,[55] but not to modify or explain away the purport or terms of the judgment.[56] And an injunction will not be granted against a judgment on additional evidence which is not newly discovered.[57]

c. Pleadings as Evidence. Complainant's verified bill may be sufficient to justify a decree in his favor, if not contradicted;[58] but the answer of the respond-

Arkansas.— Lester *v.* Hoskins, 26 Ark. 63.

California.— Eichhoff *v.* Eichhoff, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110.

Illinois.— Off *v.* Jack, 204 Ill. 79, 68 N. E. 427; Stout *v.* Oliver, 40 Ill. 245; Daly *v.* Ogden, 28 Ill. App. 319.

Indiana.— Fitch *v.* Polke, 7 Blackf. 564, holding in a case where complainant sued to enjoin a judgment for part of the price of real estate, on the ground that he had been deceived as to title, and the answer alleged that complainant knew the facts and had pleaded the same in bar to the action at law, that the burden of proof was on defendant.

Iowa.— Aiken *v.* Thompson, 43 Iowa 506.

Kentucky.— Watson *v.* Stucker, 5 Dana 581; Fishback *v.* Woodford, 1 J. J. Marsh. 84, 19 Am. Dec. 55; Mills *v.* Rouse, 2 Litt. 203; Stephenson *v.* Taylor, 1 A. K. Marsh. 235.

Louisiana.— Baham *v.* Stewart, 109 La. 999, 34 So. 54; Mutual Nat. Bank *v.* Moore, 104 La. 150, 29 So. 103; Crow *v.* Watkins, 12 La. Ann. 845; Minor *v.* Stone, 1 La. Ann. 283.

Mississippi.— McDonald *v.* Myles, 12 Sm. & M. 279.

Missouri.— Johnson *v.* Stebbins-Thompson Realty Co., 167 Mo. 325, 66 S. W. 933.

Nebraska.— Lewis *v.* Lewis, 31 Nebr. 528, 48 N. W. 267.

Oregon.— Meinert *v.* Harder, 39 Oreg. 609, 65 Pac. 1056.

Pennsylvania.— Hennig *v.* Mann, 18 Pa. Co. Ct. 177.

Tennessee.— Driver *v.* Cobb, 1 Tenn. Ch. 490.

Texas.— Briseno *v.* International, etc., R. Co., (Civ. App. 1904) 81 S. W. 579.

Virginia.— Meem *v.* Rucker, 10 Gratt. 506; Grantland *v.* Wigbt, 5 Munf. 295.

West Virginia.— Black *v.* Smith, 13 W. Va. 780.

Wisconsin.—Sylvester *v.* Guernsey, 22 Wis. 569.

See 30 Cent. Dig. tit. "Judgment," § 892.

48. See, generally, EVIDENCE, 16 Cyc. 821.

49. Bauduc *v.* Conrey, 10 Rob. (La.) 407; Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223.

Affidavit and order for publication.— As the affidavit for publication of summons and the order directing its publication are made by statute a part of the judgment-roll, they are to be considered in determining whether the court obtained jurisdiction of the person on whom service was so made. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

50. Brown *v.* Luehrs, 79 Ill. 575.

51. Watson *v.* Rainey, 69 Tex. 319, 6 S. W. 840; Bilger *v.* Buchanan, (Tex. 1887) 6 S. W. 408.

52. Mason *v.* Holmes, 4 Bibb (Ky.) 263; Sanders *v.* Wagner, 32 N. J. Eq. 506.

53. Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730; Conover *v.* Hull, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810. But in an action to restrain defendant from collecting a certain judgment on the ground that, although standing in his name, it is in fact the property of plaintiff, defendant being but his agent, the insolvency of defendant is immaterial. Bennett Bros. Co. *v.* Congdon, 20 Mont. 208, 50 Pac. 556.

54. See Simpson *v.* Hope, 23 La. Ann. 557; Blakeslee *v.* Murphy, 44 Conn. 188. See, generally, EVIDENCE, 17 Cyc. 567.

Record not conclusive.— Recitals in the record of the original action are not conclusive, but may be contradicted by competent evidence, as a proceeding of this kind is not collateral but direct. See Randall *v.* Collins, 58 Tex. 231; State *v.* Dashiell, 32 Tex. Civ. App. 454, 74 S. W. 779. And see *supra*, X, C, 9, a. Where the clerk makes an erroneous entry in the record of a judgment, oral testimony is competent in a court of equity to show that the entry was incorrect in fact. Prussian Nat. Ins. Co. *v.* Chichocky, 94 Ill. App. 168. But *compare* Braden *v.* Reitzenberger, 18 W. Va. 286, holding that in a suit in equity for relief against a judgment by default it cannot be shown in contradiction of the statement in the record that no proof was heard in the former action.

55. Blakeslee *v.* Murphy, 44 Conn. 188.

56. Fowler *v.* Williams, 20 Ark. 641; Wilcoxson *v.* Burton, 27 Cal. 228, 87 Am. Dec. 66; Darcy *v.* Labennes, 31 La. Ann. 404.

57. Miller *v.* Doxey, Walk. (Miss.) 329; Marsh *v.* Edgerton, 2 Pinn. (Wis.) 230, 1 Chandl. 198.

58. Givens *v.* Tidmore, 8 Ala. 745. See Prather *v.* Prather, 11 Gill & J. (Md.) 110.

ent, if denying positively the charges of the bill, will be so far evidence in his favor that the bill must be dismissed unless complainant sustains his case by corroborative evidence.[59] But the answer of one defendant cannot be considered as evidence against another.[60]

d. Weight and Sufficiency. To justify a court of equity in enjoining the enforcement of a judgment, the complainant's case — including alike the specific grounds on which he asks equitable relief, his excuse for not making his defense in the original action, and the showing that he himself is free from fault or negligence — must be supported by clear, satisfactory, and convincing evidence, preponderating distinctly in his favor.[61]

59. *Alabama.*— Carpenter *v.* Devon, 6 Ala. 718.

Kentucky.— Burks *v.* Herndon, 3 Bibb 488; Ferguson *v.* Waters, 3 Bibb 303; Redding *v.* Hall, 1 Bibb 536.

Maryland.— Briesch *v.* McCauley, 7 Gill 189.

Mississippi.— Land *v.* Elliot, 1 Sm. & M. 608.

Ohio.— Wood *v.* Pratt, 2 Ohio 23.

Texas.— Scales *v.* Gulf, etc., R. Co., (Civ. App. 1896) 35 S. W. 205, the answer must be verified.

Virginia.— Faulkner *v.* Harwood, 6 Rand. 125.

See 30 Cent. Dig. tit. "Judgment," § 894. See also INJUNCTIONS, 22 Cyc. 945.

60. Timberlake *v.* Cobbs, 2 J. J. Marsh. (Ky.) 136.

61. *Alabama.*— Rice *v.* Tobias, 89 Ala. 214, 7 So. 765; Graham *v.* Gray, 87 Ala. 446, 6 So. 87; Freeman *v.* Swan, 22 Ala. 106.

Arizona.— MacRitchie *v.* Stevens, (1904) 76 Pac. 478.

California.— Reay *v.* Treadwell, 140 Cal. 412, 73 Pac. 1078, 74 Pac. 352; Mulcaby *v.* Dow, 131 Cal. 73, 63 Pac. 158. And see Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

Delaware.— Norwood *v.* Richardson, (1903) 57 Atl. 244; Oldham *v.* Cooper, 5 Del. Ch. 151.

Georgia.— Moore *v.* Garland, 87 Ga. 623, 13 S. E. 576; Trice *v.* Rose, 80 Ga. 408, 7 S. E. 109; Driskill *v.* Cobb, 66 Ga. 649.

Illinois.— Evans *v.* Woodsworth, 213 Ill. 404, 72 N. E. 1082; Kochman *v.* O'Neill, 202 Ill. 110, 66 N. E. 1047; Chapman *v.* Hurd, 67 Ill. 234; Ames *v.* Snider, 55 Ill. 498; Hewitt *v.* Lucas, 42 Ill. 296; Sullivan *v.* Niehoff, 27 Ill. App. 421.

Iowa.— Mosher *v.* McDonald, (1905) 102 N. W. 837; Omaha Nat. Bank *v.* Squire, 113 Iowa 365, 85 N. W. 624; Jamison *v.* Weaver, 84 Iowa 611, 51 N. W. 65; Wyland *v.* Frost, 75 Iowa 209, 39 N. W. 241; Ketchum *v.* White, 72 Iowa 193, 33 N. W. 627; Johnson *v.* Lyon, 14 Iowa 431.

Kansas.— Ohio, etc., Mortg., etc., Co. *v.* Carter, 9 Kan. App. 621, 58 Pac. 1040.

Kentucky.— Carter *v.* Leeper, 5 Dana 261; Turner *v.* Holman, 5 T. B. Mon. 410; Jones *v.* South, 3 A. K. Marsh. 352; Hardwick *v.* Forbes, 1 Bibb 212; Layton *v.* Prewitt, 25 S. W. 882, 15 Ky. L. Rep. 827.

Louisiana.— Dunlap *v.* Hundly, 2 La. Ann. 212; Hendricks *v.* Mon, 11 La. 137.

Maryland.— Hilton *v.* Tyrrell, 93 Md. 657, 49 Atl. 926; Hill *v.* Reifsnider, 46 Md. 555; Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600; Hoffman *v.* Baker, 2 Harr. & J. 486; Hitch *v.* Fenby, 4 Md. Ch. 190.

Michigan.— Cleveland Iron Min. Co. *v.* Husby, 72 Mich. 61, 40 N. W. 168.

Minnesota.— Kubesh *v.* Hanson, 93 Minn. 259, 101 N. W. 73; Geisberg *v.* O'Laughlin, 88 Minn. 431, 93 N. W. 310.

Mississippi.— Land *v.* Elliot, 1 Sm. & M. 608.

Missouri.— Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481; Johnson *v.* Stebbins-Thompson Realty Co., 167 Mo. 325, 66 S. W. 933.

Nebraska.— Klabunde *v.* Byron-Reed Co., (1904) 98 N. W. 182; MacCall *v.* Looney, 4 Nebr. (Unoff.) 715, 96 N. W. 238.

New Jersey.— Headley *v.* Leavitt, 66 N. J. Eq. 94, 57 Atl. 510; Hoboken First Baptist Church *v.* Syms, 51 N. J. Eq. 363, 28 Atl. 461; Glover *v.* Hedges, 1 N. J. Eq. 113.

New York.— Devlin *v.* Boyd, 16 N. Y. Suppl. 37; Hellburn *v.* Rosenson, 2 N. Y. St. 618; Moser *v.* Polhamus, 4 Abb. Pr. N. S. 442. See also Reich *v.* Cochran, 105 N. Y. App. Div. 542, 94 N. Y. Suppl. 404 [*reversing* 41 Misc. 621, 85 N. Y. Suppl. 247].

North Carolina.— Woodfin *v.* Smith, 21 N. C. 541.

Oregon.— Crews *v.* Richards, 14 Oreg. 442, 13 Pac. 67.

Pennsylvania.— Knarr *v.* Elgren, 7 Pa. Cas. 172, 9 Atl. 875; Lockard *v.* Keyser, 18 Pa. Super. Ct. 172; Bittenbender *v.* Biesecker, 7 Pa. Super. Ct. 41. There is no rule as to the precise measure of proof which will justify a chancellor in opening a judgment; but to permit the granting of such relief, the weight of the evidence must be with the party seeking the relief. Fisher *v.* Holbrook, 7 Pa. Super. Ct. 647.

Tennessee.— Deaderick *v.* Mitchell, 6 Baxt. 35; Grizzle *v.* Adams, (Ch. App. 1900) 61 S. W. 95; Evans *v.* International Trust Co., (Ch. App. 1900) 59 S. W. 373; Swanson *v.* Jordan, (Ch. App. 1898) 52 S. W. 1102. The same certainty of proof is not required to establish an excuse for not making a defense at law that would be required to establish the existence of that defense. Rice *v.* Railroad Bank, 7 Humphr. 39.

Texas.— Bergstrom *v.* Kiel, 28 Tex. Civ. App. 532, 67 S. W. 781; Missouri, etc., R. Co. *v.* Wade, (Civ. App. 1901) 62 S. W. 807; Corder *v.* Steiner, (Civ. App. 1899) 54 S. W.

11. Hearing, Determination, and Relief — a. Trial or Hearing. The hearing on a bill for an injunction against a judgment will be restricted to the issues raised and presented by the pleadings,[62] and it may be dismissed for failure of the complainant to appear and follow up his application,[63] or a perpetual injunction may be decreed if there is no issue of fact to be tried.[64] If there are disputed questions of fact involved, or the evidence appears to be conflicting or contradictory, it is in the discretion of the court to send the issues to a master or commissioner for determination,[65] or to a jury,[66] on interrogatories or under proper limitations as to the questions they are to consider,[67] and in this case the court should make its decree in accordance with the facts as found by the jury.[68]

b. Judgment or Decree. The decree or judgment of the court of equity upon a bill of this kind may according to the circumstances be so framed as to dissolve the preliminary injunction, leaving the complainant to prove his bill,[69] or make

277; Bailey *v.* Boydstun, (Civ. App. 1895) 33 S. W. 281.

Utah.— Benson *v.* Anderson, 10 Utah 135, 37 Pac. 256.

West Virginia.— Smith *v.* Johnson, 44 W. Va. 278, 29 S. E. 509.

Wisconsin.— Ableman *v.* Roth, 12 Wis. 81.

United States.— Clark *v.* Hackett, 1 Black 77, 17 L. ed. 69; Holton *v.* Davis, 108 Fed. 138, 47 C. C. A. 246; Renwick *v.* Wheeler, 48 Fed. 431; Wickham *v.* Morehouse, 16 Fed. 324.

See 30 Cent. Dig. tit. "Judgment," § 895.

Fraud.— Facts which might show a motive to fraud in procuring a judgment, but do not show fraud itself, are not sufficient to justify setting aside a judgment of a court of competent jurisdiction. Moore *v.* Parker, 25 Iowa 355.

Foreign judgment.— An order of seizure and sale, obtained on a foreign judgment purporting to have been rendered on the confession of defendant made through his attorney, will be enjoined, where the transcript of the foreign record has a suspicious appearance on its face, and where, although plaintiff in injunction denied under oath the authority of the attorney to confess judgment for him, and swore he never abandoned his defense, no evidence is offered to disprove these allegations. Dunlap *v.* Hundly, 2 La. Ann. 212.

62. See *supra*, X, C, 8, d. But in a suit to set aside a judgment as obtained by fraud, plaintiff's statement in his petition as to what was the issue in the action, the judgment in which is attacked, is a legal conclusion; and the court will examine the pleadings in such action as copied in the pleadings in the present suit, to ascertain what the issues really were. Hamilton *v.* McLean, 169 Mo. 51, 68 S. W. 930.

Merits of original action.— On an application of this kind, the equity court will not reëxamine matters determined in the suit at law. See *supra*, X, B, 10, a. But it is said that where the application to enjoin the judgment is based on the ground of surprise, the court may consider the merits of the original case. Philips *v.* Samuel, 76 Mo. 657.

Changing nature of bill.— A bill filed to set aside an alleged fraudulent judgment and deeds made thereunder, to which answers have been filed, on which issue has been joined, evidence presented, and hearing had, cannot on the argument be considered to be a bill to enforce specific performance of an agreement. Wilson *v.* Hoffman, (N. J. Ch. 1901) 50 Atl. 592.

63. Smothers *v.* Meridian Fertilizer Factory, 137 Ala. 166, 33 So. 898.

But it is error, in a suit to set aside a judgment against complainant on the ground that it was obtained by perjury, on dissolving a temporary injunction against a sale under the judgment, to dismiss the bill without a hearing on the merits. Avocato *v.* Dell' Ara, (Tex. Civ. App. 1904) 84 S. W. 443.

64. Jackson *v.* Miles, 98 Ga. 512, 25 S. E. 569.

65. Rust *v.* Ware, 6 Gratt. (Va.) 50, 52 Am. Dec. 100.

Reference of issues in equity in general see Equity, 16 Cyc. 429.

66. *Illinois.*— Campbell *v.* Goddard, 17 Ill. App. 382.

Maryland.— Key *v.* Knott, 9 Gill & J. 342.

Pennsylvania.— Wolf *v.* Kohr, 133 Pa. St. 13, 19 Atl. 284; Anderson *v.* Woodworth, 1 Lack. Leg. N. 264.

Tennessee.—Humphries *v.* Blevins, 1 Overt. 36.

Virginia.— In an action to enjoin a judgment for usury in the contract on which it is based, it is error to submit to a jury the issue of usury, if the answer denies the usury and there is no competent evidence of it. Wise *v.* Lamb, 9 Gratt. 294.

See 30 Cent. Dig. tit. "Judgment," § 896.

Submission of issues to jury in equity see Equity, 16 Cyc. 413.

67. McMurray *v.* McMurray, 78 Tex. 584, 14 S. W. 895.

68. Daly *v.* Milen, 14 Mont. 20, 35 Pac. 227. And see Lindsley *v.* Sparks, (Tex. Civ. App. 1897) 40 S. W. 605.

69. Where the temporary injunction is dissolved on an answer containing an unqualified denial of the charges of the bill the court should not dismiss the bill, if there is sufficient equity on its face to give the court jurisdiction, for the complainant has a right, after his injunction is dissolved, to prove his bill. Bettison *v.* Jennings, 8 Ark. 287;

the injunction perpetual,[70] or set aside the judgment complained of,[71] or grant a new trial in the action at law.[72]

c. Relief Awarded. On a bill for an injunction against a judgment at law, properly framed, the court has authority to grant the parties any and all relief to which they may appear to be entitled,[73] including the vacation or annulment of the judgment,[74] or a perpetual injunction against its enforcement,[75] and the restitution of money already collected on it,[76] although the decree should not go beyond the prayer of the petition or bill.[77] If the judgment is attacked on the ground of fraud, want of notice, or other like cause, a decree restraining its enforcement and putting the parties *in statu quo* will generally be proper,[78] remitting them to the court of law for a new trial, or other means of working out their rights,[79] although there are decisions favoring the power of the equity court to go into the whole case and hear and adjudicate finally upon the merits.[80] Relief may also be granted as to one of two or more complainants, and denied as to the rest,[81] and where it appears that any part of the judgment is justly due,

Thompson *v.* Adams, 2 Ind. 151; Barton *v.* Rushton, 4 Desauss. Eq. (S. C.) 373. On the other hand it is error to render a final judgment on overruling defendant's motion to dissolve the injunction. Knox *v.* Coroner, 13 La. Ann. 88.

70. But where a bill was brought to enjoin proceedings on a judgment at law, and it appeared that no injunction bond was executed, or process issued, it was held that a decree that "the injunction be perpetuated" was irregular. Pilcher *v.* Higgins, 2 J. J. Marsh. (Ky.) 16.

71. On setting aside a judgment obtained by fraud or mistake, no equitable element existing in the original controversy, the adjudication of the original controversy on the merits is omitted, and the parties are left to pursue their remedy in the legal forum. Lieserowitz *v.* West Chicago St. R. Co., 80 Ill. App. 248.

72. On a bill in chancery to enjoin a judgment at law and for a retrial, there must not be a decree before such retrial annulling the judgment and granting a new trial in the law court, but the judgment is allowed to stand as security for what may be found to be justly due, and the injunction allowed to stand until after the retrial, and the decree should direct an issue or issues to be tried in the law court to find what the nature of the case requires, and upon the verdict the equity court should perpetuate or dissolve the judgment, wholly or in part. Grafton, etc., R. Co. *v.* Davisson, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

73. Chandler *v.* Lyon, 8 Ala. 35; Yellow Pine Lumber Co. *v.* Carroll, (Tex. Civ. App. 1892) 21 S. W. 1002.

Where a decree is rendered affecting the interest of one not made a party, and he files a bill, either in the form of a bill of review on account of want of necessary parties, or of a bill for general relief, the original decree may be opened, and such party let in to defend, as though he had been made a party defendant, but this is all the relief to which he is entitled. Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256.

74. See Crippen *v.* X. Y. Irr. Ditch Co., 32 Colo. 447, 76 Pac. 794; Clark *v.* Ellsworth, 84 Iowa 525, 51 N. W. 31; Brooks *v.* Twitchell, 182 Mass. 443, 65 N. E. 843, 94 Am. St. Rep. 662.

75. Mason *v.* Chambers, 4 J. J. Marsh. (Ky.) 401; Fox *v.* Taliaferro, 4 Munf. (Va.) 243.

Mesne profits in ejectment.— Where an injunction is granted to restrain the enforcement of a judgment in ejectment, it should also forbid proceedings to collect the judgment for mesne profits. Cummins *v.* Latham, 4 T. B. Mon. (Ky.) 97.

Judgment on injunction bond.— Where an injunction is dissolved, and a judgment recovered on the injunction bond, but afterward, on a second bill for injunction against the same judgment at law, the bill is held sufficient and a perpetual injunction decreed, it should be so framed as to prevent the respondent from collecting his judgment on the injunction bond. Weaver *v.* Poyer, 79 Ill. 417; Crawford *v.* McDaniel, 1 Rob. (Va.) 448.

76. Bryan *v.* Primm, 1 Ill. 59; Ellis *v.* Kelly, 8 Bush (Ky.) 621; Henry *v.* Meighen, 46 Minn. 548, 49 N. W. 323, 646.

77. Leverich *v.* Adams, 11 La. Ann. 510.

78. Brown *v.* Byam, 59 Iowa 52, 12 N. W. 770; Carneal *v.* Wilson, 3 Litt. (Ky.) 80; Keran *v.* Trice, 75 Va. 690.

79. Hughes *v.* McCoun, 3 Bibb (Ky.) 254; Wellons *v.* Newell, 7 Sm. & M. (Miss.) 399; Headley *v.* Leavitt, (N. J. 1905) 60 Atl. 963 [*reversing* 66 N. J. Eq. 94, 57 Atl. 510]; Wynne *v.* Newman, 75 Va. 811.

Ordering new trial.— While the chancellor may enjoin a judgment at law unless the person in whose favor it is rendered submits to a new trial, he cannot in so doing order a new trial in the court of law. Little Rock, etc., R. Co. *v.* Newman, 73 Ark. 555, 84 S. W. 727.

80. Whittlesey *v.* Delaney, 73 N. Y. 571; Rathbone *v.* Warren, 10 Johns. (N. Y.) 587; Raymond *v.* Conger, 51 Tex. 536; Todd *v.* Bowyer, 1 Munf. (Va.) 447; Manion *v.* Fahy, 11 W. Va. 482.

81. Kennedy *v.* Evans, 31 Ill. 258; Huntington First Nat. Bank *v.* Williams, 126 Ind.

the injunction may be so framed as to permit the collection of that part, while forbidding proceedings to enforce it as to the residue.[82]

d. Operation and Effect of Injunction. An injunction against a judgment at law operates as a release of errors.[83] It is strictly *in personam* to restrain the respondent from using the judgment unconscientiously;[84] it does not necessarily negative the authority of the court rendering the judgment or the legality of its action, nor does it, by relation back, make the proceedings at law irregular,[85] or strip the judgment of its usual incidents and consequences, except in regard to proceedings to enforce it.[86] But the injunction will prevent the maintenance of an action upon the judgment,[87] whether at law or in equity.[88] But this does not prevent a proceeding to revive the judgment, upon the death of a party, by scire facias, although the injunction will operate upon the revived judgment as well as upon the original.[89] And an injunction effective only as to one of the parties to the judgment will not prevent its enforcement against the others.[90]

e. Conditions on Granting Relief. He who seeks relief in equity against a judgment must do equity; and it is competent and proper for the court to impose such terms upon him, or require him to submit to such orders or conditions, as may be necessary to adjust the rights of all parties in entire accordance with equity.[91] An order for an injunction to a sale under execution does not become

423, 26 N. E. 75; Poindexter *v.* Waddy, 6 Munf. (Va.) 418, 8 Am. Dec. 749; Comtois *v.* Dumontier, 8 Quebec Q. B. 293.

82. *Alabama.*— French *v.* Garner, 7 Port. 549.

California.— Thompson *v.* Laughlin, 91 Cal. 313, 27 Pac. 752.

Connecticut.— Goodsell *v.* Olmstead, 42 Conn. 354.

Delaware.— Small *v.* Collins, 5 Del. Ch. 234.

Kentucky.— Greathouse *v.* Hord, 1 Dana 105; Fishback *v.* Williams, 3 Bibb 342; Prewit *v.* Kenton, 3 Bibb 280; Bradford *v.* Allen, Hard. 1.

Louisiana.— Perry *v.* Kearney, 14 La. Ann. 400; Barrow *v.* Robichaux, 14 La. Ann. 207; Hart *v.* Cannon, 10 La. Ann. 721.

Maryland.— Weikel *v.* Cate, 58 Md. 105; Levy *v.* Steinbach, 43 Md. 212; Lyles *v.* Hatton, 6 Gill & J. 122.

Mississippi.— Hale *v.* Bozeman, 60 Miss. 965.

Ohio.— Lewis *v.* Sutliff, 8 Ohio 60.

Pennsylvania.— Lindley *v.* Ross, 137 Pa. St. 629, 20 Atl. 944, holding that the court may order satisfaction of the judgment on payment of the amount actually due.

Texas.— Criswell *v.* Bledsoe, 22 Tex. 656.

Virginia.— Booth *v.* Kesler, 6 Gratt. 350; Tapp *v.* Beverley, 1 Leigh 80. But where, on granting relief against a judgment, there is no means of ascertaining how far it is correct or justly due, but only that it is unconscionable to some extent, it will be set aside *in toto*. McRae *v.* Woods, 2 Wash. 80.

United States.— Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349; Kamm *v.* Stark, 14 Fed. Cas. No. 7,604, 1 Sawy. 547.

See 30 Cent. Dig. tit. "Judgment," § 898.

Joint defendants.— A judgment at law against two defendants may be annulled by a decree of a court of chancery as to one and remain binding as to the other. Barnett *v.* Lynch, 1 Marv. (Del.) 114, 40 Atl. 666; Kennedy *v.* Evans, 31 Ill. 258. *Compare* Fulliam *v.* Drake, 105 Iowa 615, 75 N. W. 479; Ellis *v.* Harrison, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984.

83. Price *v.* Johnson County, 15 Mo. 433; Henly *v.* Robertson, 4 Yerg. (Tenn.) 172; Overton *v.* Perkins, Mart. & Y. (Tenn.) 367.

84. Stanton *v.* Embry, 46 Conn. 65.

85. Young *v.* Davis, 1 T. B. Mon. (Ky.) 152.

86. The injunction, if not perpetual, does not destroy the lien of the judgment, but merely suspends it until the dissolution of the injunction. Smith *v.* Everly, 4 How. (Miss.) 178. And see Lynn *v.* Gridley, Walk. (Miss.) 548, 12 Am. Dec. 591. But where the collection of an execution is enjoined, and the officer has other junior executions in his hands, and proceeds to sell the property levied upon, he cannot apply the proceeds to the execution enjoined, although before the return of the process the injunction is dissolved by consent of parties. Newlin *v.* Murray, 63 N. C. 566. Where the execution of a judgment is restrained by injunction until the lien is lost by limitation, the party proceeding by injunction, upon its dissolution, cannot take advantage of such loss of the lien. Work *v.* Harper, 31 Miss. 107, 66 Am. Dec. 549.

87. Blair *v.* Caldwell, 3 Mo. 353; Palmer *v.* Palmer, 2 Miles (Pa.) 373.

88. Little *v.* Price, 1 Md. Ch. 182.

89. Richardson *v.* Prince George Justices, 11 Gratt. (Va.) 190.

90. Cumberland, etc., R. Co. *v.* Judge Washington County Ct., 10 Bush (Ky.) 564; Bohannon *v.* Combs, 12 B. Mon. (Ky.) 563; Penny *v.* Taylor, 19 Fed. Cas. No. 10,957.

91. *Georgia.*— Allen *v.* Etheredge, 84 Ga. 550, 11 S. E. 136.

Illinois.— Calumet River R. Co. *v.* Brown, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84.

Indiana.— Baragree *v.* Cronkhite, 33 Ind. 192.

effectual until any conditions required by the order, such as the execution of a bond, have been complied with.[92]

f. Damages on Dissolution of Injunction. Where an injunction granted to restrain the enforcement of a judgment is afterward dissolved as groundless, damages may be awarded to the respondent,[93] and in certain states the amount of such allowance is fixed by statute at a certain percentage on the amount of the judgment.[94] It is not proper to include in the award of damages the amount of the judgment enjoined, or the whole of the original debt,[95] or attorney's fees, if

Kentucky.— Edwards *v.* Strode, 2 J. J. Marsh. 506, holding that an injunction against a judgment at law, on a note given in payment of land, should not be perpetuated without decreeing restoration of the land.

Maryland.— Flickinger *v.* Hull, 5 Gill 60; Hodges *v.* Planters' Bank, 7 Gill & J. 306.

Minnesota.— Geisberg *v.* O'Laughlin, 88 Minn. 431, 93 N. W. 310.

Missouri.— Overton *v.* Stevens, 8 Mo. 622. The parties to a judgment may agree that it shall be set aside and enjoined on the condition that the original cause of action shall not be deemed merged in the judgment. Wilson *v.* St. Louis, etc., R. Co., 87 Mo. 431.

Nebraska.— McMurtry *v.* Edgerly, 20 Nebr. 457, 30 N. W. 417; Commercial State Bank *v.* Ketchum, 1 Nebr. (Unoff.) 454, 96 N. W. 614.

New Jersey.— Reeves *v.* Cooper, 12 N. J. Eq. 223.

New York.— Bostwick *v.* Beach, 105 N. Y. 661, 12 N. E. 32; Carpenter *v.* Acby, Hoffm. 311.

North Carolina.— Hadley *v.* Rountree, 59 N. C. 107; Heath *v.* Cobb, 17 N. C. 187.

Tennessee.— Creed *v.* Scruggs, 1 Heisk. 590.

United States.— Mechanics' Bank *v.* Lynn, 1 Pet. 376, 7 L. ed. 185; School Dist. Tp. *v.* Lombard, 21 Fed. Cas. No. 12,478, 2 Dill. 493.

See 30 Cent. Dig. tit. "Judgment," § 900.

92. Pell *v.* Lander, 8 B. Mon. (Ky.) 554.

93. Off *v.* Title, etc., Co., 87 Ill. App. 472; Tyler *v.* McCardle, 9 Sm. & M. (Miss.) 230 (holding that, where the court is of opinion that an injunction against a judgment was sued out for delay, damages may be awarded on its dissolution, but not otherwise); Claytor *v.* Anthony, 15 Gratt. (Va.) 518; Jeter *v.* Langhorne, 5 Gratt. (Va.) 193. *Contra*, Wingfield *v.* McLure, 48 Ark. 510, 3 S. W. 439; Coblentz *v.* Wheeler, etc., Mfg. Co., 40 Ark. 180.

Who liable.— The statute in Mississippi (Code, § 572), providing that five per cent damages shall be allowed on the dissolution of an injunction staying proceedings for the collection of a judgment, applies exclusively to injunctions sued out by parties to the judgment; and therefore only attorney's fees can be allowed where the injunction is sued out by a stranger to the judgment before final decree. Armstrong *v.* Fusz, (Miss. 1894) 16 So. 532. *Compare* Claytor *v.* Anthony, 15 Gratt. (Va.) 518.

94. *Alabama.*— Damages to the amount of six per cent on the judgment may be allowed where the injunction was obtained for delay. Wharton *v.* Jones, 49 Ala. 102; Weissinger *v.* Johnson, 13 Ala. 93; Crawford *v.* Mobile Bank, 5 Ala. 55.

District of Columbia.— Ten per cent per annum allowed as damages. Mason *v.* Muncaster, 16 Fed. Cas. No. 9,248, 3 Cranch C. C. 403.

Illinois.— Damages may be allowed not to exceed ten per cent of the amount of the judgment enjoined. Camp *v.* Bryan, 84 Ill. 250; Smith *v.* Powell, 50 Ill. 21; Off *v.* Title, etc., Co., 87 Ill. App. 472; Moriarity *v.* Galt, 23 Ill. App. 213.

Kentucky.— Ten per cent damages allowed. McIlvoy *v.* McIlvoy, 4 Dana 289; Elliot *v.* Krimbough, 6 J. J. Marsh. 634; Ward *v.* Davidson, 2 J. J. Marsh. 443; Southerland *v.* Crawford, 2 J. J. Marsh. 369; Noland *v.* Richards, 1 J. J. Marsh. 582; Davis *v.* Ballard, 7 T. B. Mon. 603. But the statute authorizes the allowance of damages only where the injunction was directed against a judgment at law, not where it was against a decree in chancery. Martin *v.* Wade, 5 T. B. Mon. 77; Head *v.* Perry, 1 T. B. Mon. 253. Earlier decisions in this state were disposed to deny the right to award damages in such a case. McCallister *v.* Dugan, 4 J. J. Marsh. 571; Wilkins *v.* Owings, 5 Litt. 239; Patterson *v.* Hobbs, 1 Litt. 275; Massie *v.* Sebastian, 4 Bibb 433.

Louisiana.— Damages may be awarded to an extent not greater than twenty per cent of the amount of the judgment. Armistead *v.* Ardis, 48 La. Ann. 320, 19 So. 278; Stewart *v.* Robinson, 24 La. Ann. 182; Williams *v.* Close, 14 La. Ann. 737; Beard *v.* Gresham, 5 La. Ann. 169; Dwight *v.* Richard, 4 La. Ann. 240; Stafford *v.* Mead, 9 Rob. 142; Dashiell *v.* Lesassier, 15 La. 101; Wilcox *v.* Bundy, 13 La. 380; Robertson *v.* Penn, 8 La. 61; Borie *v.* Borie, 5 La. 87. But where the judgment enjoined bears the highest conventional interest, the court on dissolving the injunction cannot add anything to that interest, but in a proper case will inflict the full penalty of twenty per cent damages. Raiford *v.* Wood, 14 La. Ann. 116.

See 30 Cent. Dig. tit. "Judgment." § 902.

95. *Illinois.*— Roberts *v.* Fahs, 36 Ill. 268; Richardson *v.* Prevo, 1 Ill. 216; Hubbard *v.* Hobson, 1 Ill. 190; Stirlem *v.* Neustadt, 50 Ill. App. 378.

Missouri.— Roach *v.* Burnes, 33 Mo. 319.

Texas.— Fernandez *v.* Casey, 77 Tex. 452, 14 S. W. 149.

the effect would be to make the damages greater than the statutory limit.[96] Further, such statutes relate only to judgments for money; when the judgment is of a different character, the amount of damages becomes a question of fact which must be determined in an action on the bond.[97] Where the injunction did not extend to the whole judgment, but only stayed the collection of a part of it, damages should be awarded on that part only, when the injunction is dissolved.[98]

g. Appeal and Review. The decision of the court of chancery on a bill for an injunction against a judgment will not be disturbed on appeal where the evidence was conflicting,[99] or for immaterial irregularities in its action,[1] or on objections to the judgment not presented to the equity court.[2] But a decree for complainant will be reversed where the bill states no cause of action, or its want of equity is apparent on its face.[3]

h. Costs and Fees. Where a judgment debtor seeks relief in equity, on the ground of his having been prevented from making his defense at law, he is generally chargeable with the costs of the proceeding,[4] and especially where he might have obtained the same relief on application to the court of law,[5] or where his injunction is dissolved;[6] but otherwise costs are allowable to a successful complainant.[7]

Virginia.— Medley *v.* Pannill, 1 Rob. 63.

West Virginia.— Howell *v.* Thomason, 34 W. Va. 794, 12 S. E. 1088; Kanawha, etc., R. Co. *v.* Ryan, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865.

See 30 Cent. Dig. tit. "Judgment," § 903.

Rule in North Carolina.— In ascertaining the damages sustained by reason of an injunction, reference must be had to the condition of the debt enjoined; and if, by reason of the delay, the judgment debtor has become insolvent, the whole debt would properly be included as damages sustained by it; but if his pecuniary circumstances remain unaltered, no damages will be allowed except the costs and disbursements. McKesson *v.* Hennessee, 66 N. C. 473.

96. Moriarity *v.* Galt, 125 Ill. 417, 17 N. E. 714; Dunn *v.* Wilkinson, 26 Ill. App. 26; Armistead *v.* Ardis, 48 La. Ann. 320, 19 So. 278; Williams *v.* Close, 14 La. Ann. 737; Brown *v.* Lambeth, 2 La. Ann. 822. See Garlington *v.* Copeland, 43 S. C. 389, 21 S. E. 317.

97. Green *v.* Reagan, 32 La. Ann. 974; Morris *v.* Bienvenu, 30 La. Ann. 878; Sheen *v.* Stothart, 29 La. Ann. 630; Nolan *v.* Babin, 2 La. Ann. 357; Bauduc *v.* Conrey, 10 Rob. (La.) 407.

98. Mitcherson *v.* Dozier, 7 J. J. Marsh. (Ky.) 53, 22 Am. Dec. 116; Woodburn *v.* Friend, 19 La. 496; Wells *v.* Gordon, 16 La. 219; Fisk *v.* Hart, 11 La. 479; Breedlove *v.* Johnston, 2 Mart. N. S. (La.) 517. So, where an order of seizure against two joint vendees is enjoined by one of them, damages are allowed only on the amount due by the vendee who enjoined the proceedings. Gorham *v.* Hayden, 6 Rob. (La.) 450.

99. Murrer *v.* Security Co., 131 Ind. 35, 30 N. E. 879. And see Squier *v.* Kearney, 121 N. Y. 651, 24 N. E. 1091. See, generally, APPEAL AND ERROR, 2 Cyc. 474.

Errors considered.— On appeal in a suit to set aside a judgment, assignments of error alleged to have been committed on the trial of the former case cannot be considered. MacRitchie *v.* Stevens, (Ariz. 1904) 76 Pac. 478.

Matters not in record.— Where all the evidence given on a former trial is not contained in the record under review, the court cannot determine whether the judgment on such trial was the result of false testimony. Barr *v.* Post, 59 Nebr. 361, 80 N. W. 1041, 80 Am. St. Rep. 680. Whether a given state of facts constitutes excusable neglect so as to warrant the vacation of a judgment, is a question of law which the supreme court cannot decide where the facts are not set out in the record. Jones *v.* Swepson, 79 N. C. 510.

Construction of findings of lower court.— A finding that by reason of certain facts defendant fraudulently took and obtained an unfair advantage over plaintiff will not be considered upon appeal as a finding that judgment was obtained by fraud. Reich *v.* Cochran, 105 N. Y. App. Div. 542, 94 N. Y. Suppl. 404 [*reversing* 41 Misc. 621, 85 N. Y. Suppl. 247].

1. Bradley *v.* Lamb, Hard. (Ky.) 527.

2. Smith *v.* Barkemeyer, McGloin (La.) 139.

3. Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639; Henderson *v.* Mitchell, Bailey Eq. (S. C.) 113, 21 Am. Dec. 526. See Kendig's Appeal, 82 Pa. St. 68.

4. Bleiler *v.* George, 2 Woodw. (Pa.) 401; Mosby *v.* Haskins, 4 Hen. & M. (Va.) 427; Degraffenreid *v.* Donald, 2 Hen. & M. (Va.) 10. See Hickman *v.* White, (Tex. Civ. App. 1895) 29 S. W. 692.

5. Gridley *v.* Garrison, 4 Paige (N. Y.) 647.

6. But where the injunction is dissolved, not because it was wrongfully issued, but because complainant has changed his bill, striking out the prayer for an injunction, and substituting one for a new trial, costs should not be allowed against the complainant. Fisher *v.* Tribby, 5 Ill. App. 335.

7. Reeves *v.* Dickey, 10 Gratt. (Va.) 138.

XI. COLLATERAL IMPEACHMENT.

A. General Rule. A judgment rendered by a court having jurisdiction of the parties and the subject-matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding.[8]

Counsel fees are not properly allowed to plaintiff as damages, in a suit to annul a judgment and enjoin its execution. Flynn *v.* Rhodes, 12 La. Ann. 239.

8. *Alabama.*— Alexander *v.* Nelson, 42 Ala. 462.

Arkansas.—Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783.

California.— Vassault *v.* Austin, 36 Cal. 691; Mulford *v.* Estudillo, 23 Cal. 94.

Colorado.— Hughes *v.* Cummings, 7 Colo. 138, 203, 2 Pac. 289, 928; Rawles *v.* People, 2 Colo. App. 501, 31 Pac. 941.

Connecticut.— Sears *v.* Terry, 26 Conn. 273.

Florida.— Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. 73; Lee *v.* Patten, 34 Fla. 149, 15 So. 775.

Georgia.— Walker *v.* Equitable Mortg. Co., 114 Ga. 862, 40 S. E. 1010; Archer *v.* Guill, 67 Ga. 195; Vickery *v.* Scott, 20 Ga. 795; Cochran *v.* Davis, 20 Ga. 581; Bridges *v.* Nicholson, 20 Ga. 90; Wiley *v.* Kelsey, 9 Ga. 117.

Illinois.— Harris *v.* Lester, 80 Ill. 307; Kern *v.* Strasberger, 71 Ill. 303; Thomson *v.* Morris, 57 Ill. 333; Goudy *v.* Hall, 30 Ill. 109; Cody *v.* Hough, 20 Ill. 43; Buckmaster *v.* Ryder, 12 Ill. 207; Kanorowski *v.* People, 113 Ill. App. 468; MacVeagh *v.* Locke, 23 Ill. App. 606.

Indiana — Spencer *v.* Spencer, 31 Ind. 321, 67 N. E. 1018, 99 Am. St. Rep. 260; Lucas *v.* Hawkins, 102 Ind. 64, 1 N. E. 358; Sauer *v.* Twining, 81 Ind. 366; Indianapolis First Nat. Bank *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054; Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126.

Iowa.— Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Hampson *v.* Weare, 4 Iowa 13, 66 Am. Dec. 116; Patterson *v.* Indiana, 2 Greene 492; Kerr *v.* Leighton, 2 Greene 196; Wright *v.* Marsh, 2 Greene 94; Reed *v.* Wright, 2 Greene 15; Telford *v.* Barney, 1 Greene 575.

Kansas.— Pritchard *v.* Madren, 31 Kan. 38, 2 Pac. 691.

Kentucky.— Paul *v.* Smith, 82 Ky. 451; Com. *v.* Morrison, 4 Bibb 336; McIlvoy *v.* Speed, 4 Bibb 85; Luckett *v.* Gwathmey, Litt. Sel. Cas. 121.

Louisiana.— Huyghe *v.* Brinkman, 34 La. Ann. 831; Factors', etc., Ins. Co. *v.* De Blanc, 31 La. Ann. 100; Compton *v.* Sandford, 30 La. Ann. 838; Broussard *v.* Bernard, 7 La. 216; Andrus *v.* Harman, 2 La. 587; Kilgour *v.* Ratcliff, 2 Mart. N. S. 292; Dufour *v.* Camfranc, 11 Mart. 607, 13 Am. Dec. 360.

Maine.— Woodman *v.* Smith, 37 Me. 21; Pease *v.* Whitten, 31 Me. 117; Smith *v.* Keen, 26 Me. 411; Granger *v.* Clark, 22 Me. 128.

Maryland.— Henkelman *v.* Smith, 42 Md. 164; Dorsey *v.* Thompson, 37 Md. 25; Davis *v.* Helhig, 27 Md. 452, 92 Am. Dec. 646; Ranoul *v.* Griffie, 3 Md. 54; Fridge *v.* State, 3 Gill & J. 103, 20 Am. Dec. 463; Pfeltz *v.* Pfeltz, 1 Md. Ch. 455; Estep *v.* Watkins, 1 Bland 486.

Massachusetts.— Hendrick *v.* Whittemore, 105 Mass. 23; Cook *v.* Darling, 19 Pick. 393.

Minnesota.—Hall *v.* Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497; Cone *v.* Hooper, 18 Minn. 531.

Mississippi.— Moore *v.* Ware, 51 Miss. 206; Scott *v.* Porter, 44 Miss. 364.

Missouri.— Yeoman *v.* Younger, 83 Mo. 424; Hardin *v.* Lee, 51 Mo. 241; Martin *v.* McLean, 49 Mo. 361; Callahan *v.* Griswold, 9 Mo. 784; Knoll *v.* Woelken, 13 Mo. App. 275.

Montana.— Burke *v.* Inter-State Sav., etc., Assoc., 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416.

Nebraska.— Miles *v.* Ballantine, 4 Nebr. (Unoff.) 171, 93 N. W. 708.

New Hampshire.— White *v.* Landaff, 35 N. H. 128; Lamprey *v.* Nudd, 29 N. H. 299; Gorrill *v.* Whittier, 3 N. H. 265.

New Jersey.— Vandyke *v.* Bastedo, 15 N. J. L. 224; Podesta *v.* Binns, (Ch. 1902) 60 Atl. 815; National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 52 N. J. Eq. 58, 28 Atl. 71; Diehl *v.* Page, 3 N. J. Eq. 143.

New York.— Blake *v.* Lyon, etc., Mfg. Co., 77 N. Y. 626; Harris *v.* Harris, 36 Barb. 88; Hyatt *v.* Bates, 35 Barb. 308; Bumstead *v.* Read, 31 Barb. 661; Crawford *v.* Tyng, 2 Misc. 469, 21 N. Y. Suppl. 1041; People *v.* Downing, 4 Sandf. 189; People *v.* Nevins, 1 Hill 154; Smith *v.* Shaw, 12 Johns. 257.

North Carolina.—Morris *v.* Gentry, 89 N. C. 248; Eure *v.* Paxton, 80 N. C. 17; Wade *v.* Dick, 36 N. C. 313; Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

Ohio.— Babcock *v.* Camp, 12 Ohio St. 11; Moore *v.* Robison, 6 Ohio St. 302; Newnam *v.* Cincinnati, 18 Ohio 323; Cochran *v.* Loring, 17 Ohio 409; Buell *v.* Cross, 4 Ohio 327; Bigelow *v.* Bigelow, 4 Ohio 138, 19 Am. Dec. 591; Hentz *v.* Ward, 1 Cinc. Super. Ct. 387.

Pennsylvania.— Haines *v.* Hall, 209 Pa. St. 104, 58 Atl. 125; Wood *v.* Bayard, 63 Pa. St. 320; Hartman *v.* Ogborn, 54 Pa. St. 120, 93 Am. Dec. 679; Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Kean *v.* McKinsey, 2 Pa. St. 30; Bank of North Liberties *v.* Munford, 3 Grant 232; Warden *v.* Eichbaum,

B. To What Judgments Rule Applies — 1. In General. The rule just stated as to the collateral impeachment of judgments applies generally to all varieties of judgments, decrees, or orders made by courts of competent jurisdiction, in all kinds of judicial proceedings,[9] such as, among others, decrees in equity,[10] judgments or decrees *in rem*,[11] eminent domain proceedings,[12] attachments,[13]

3 Grant 42; Baird *v.* Campbell, 4 Watts & S. 191; Postens *v.* Postens, 3 Watts & S. 127; Dauphin County Orphans' Ct. *v.* Groff, 14 Serg. & R. 181; *In re* McLane, 1 C. Pl. 117.

South Carolina.— Reese *v.* Meetze, 51 S. C. 333, 29 S. E. 73; Kirk *v.* Duren, 45 S. C. 597, 23 S. E. 954.

Tennessee.—Greenlaw *v.* Kernahan, 4 Sneed 371; Lewis *v.* Simonton, 8 Humphr. 185; Hall *v.* Heffty, 6 Humphr. 444; Thacker *v.* Chambers, 5 Humphr. 313, 42 Am. Dec. 431.

Texas.— Cooper *v.* Mayfield, 94 Tex. 107, 58 S. W. 827; Brown *v.* Hearon, 66 Tex. 63, 17 S. W. 395; Willis *v.* Ferguson, 46 Tex. 496; Thouvenin *v.* Rodrigues, 24 Tex. 468; Tadlock *v.* Eccles, 20 Tex. 782, 73 Am. Dec. 213; Goss *v.* McClaren, 17 Tex. 107, 67 Am. Dec. 646; Lee *v.* Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Yates *v.* Houston, 3 Tex. 433; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100; Brooks *v.* Powell, (Civ. App. 1895) 29 S. W. 809; McClesky *v.* State, 4 Tex. Civ. App. 322, 23 S. W. 518; Sharpleigh *v.* Cooper, 1 Tex. App. Civ. Cas. § 55.

Vermont.— Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976; Mussey *v.* White, 58 Vt. 45, 3 Atl. 319; Porter *v.* Gile, 47 Vt. 620; Eastman *v.* Curtis, 4 Vt. 616; Walbridge *v.* Hall, 3 Vt. 114; Tappan *v.* Nutting, Brayt. 137.

Virginia.— Fox *v.* Cottage Bldg. Fund Assoc., 81 Va. 677; Howison *v.* Weeden, 77 Va. 704; Wimbish *v.* Breeden, 77 Va. 324; Woodhouse *v.* Fillbates, 77 Va. 317; Lancaster *v.* Wilson, 27 Gratt. 624; Shelton *v.* Jones, 26 Gratt. 891; Wilson *v.* Smith, 22 Gratt. 493; Fisher *v.* Bassett, 9 Leigh 119, 33 Am. Dec. 227.

Washington.— Noerdlinger *v.* Huff, 31 Wash. 360, 72 Pac. 73; Baldwin *v.* Baer, 10 Wash. 414, 39 Pac. 117.

West Virginia.— McNeel *v.* Auldridge, 34 W. Va. 748, 12 S. E. 851.

Wisconsin.— Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Jackson *v.* Astor, 1 Pinn. 137, 39 Am. Dec. 281.

United States.— Dunham *v.* Jones, 159 U. S. 584, 16 S. Ct. 108, 40 L. ed. 267; Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304; McGoon *v.* Scales, 9 Wall. 23, 19 L. ed. 545; Secrist *v.* Green, 3 Wall. 744, 18 L. ed. 153; Gray *v.* Brignardello, 1 Wall. 627, 17 L. ed. 692; Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283; Elliott *v.* Peirsol, 1 Pet. 328, 7 L. ed. 164; U. S. Bank *v.* Voorhees, 2 Fed. Cas. No. 939, 1 McLean 221; Jones *v.* Brittan, 13 Fed. Cas. No. 7,455, 1 Woods 667; Smith *v.* Pomeroy, 22 Fed. Cas. No. 13,092, 2 Dill. 414.

See 30 Cent. Dig. tit. "Judgment," § 907.

9. See cases more specifically cited in this and following notes.

What constitutes judgment.— The entry of a judgment in the judgment book, including the date of the judgment and the date of the docketing, while standing as a part of the court's record, cannot be impeached collaterally. Ferguson *v.* Kumler, 25 Minn. 183.

A finding of the court, within the pleadings, on a material matter, and not on a matter merely incidental or collateral to issues tendered thereby, is final and conclusive and cannot be impeached in another proceeding. *In re* Harper, 133 Fed. 970.

Alteration of judgment.— Affidavits cannot be received to falsify a record by showing that an alteration, correcting it, was improperly made. Walker *v.* Armour, 22 Ill. 658.

Violation of police statute.—Harrod *v.* Dismore, 127 Ind. 338, 26 N. E. 1072.

10. *Iowa.*— Poole *v.* Seney, 70 Iowa 275, 24 N. W. 520, 30 N. W. 634.

Maryland.— Estep *v.* Watkins, 1 Bland 486.

New York.— Gomez *v.* Gomez, 81 Hun 566, 31 N. Y. Suppl. 206.

North Carolina.— Covington *v.* Ingram, 64 N. C. 123.

Ohio.— Sauer *v.* Cincinnati St. R. Co., 7 Ohio S. & C. Pl. Dec. 551, 5 Ohio N. P. 108.

Virginia.— Lemmon *v.* Herbert, 92 Va. 653, 24 S. E. 249.

United States.— Bryan *v.* Kennett, 113 U. S. 179, 5 S. Ct. 407, 28 L. ed. 908.

See 30 Cent. Dig. tit. "Judgment," § 913.

Decree of divorce.— *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

11. Shearer *v.* City Nat. Bank, 115 Ala. 352, 22 So. 151; Otis *v.* The Rio Grande, 18 Fed. Cas. No. 10,613, 1 Woods 279.

Condemning property in confiscation proceedings.— Bragg *v.* Lorio, 4 Fed. Cas. No. 1,800, 1 Woods 209.

12. *Indiana.*— Indiana, etc., R. Co. *v.* Allen, 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650.

Missouri.— Lovitt *v.* Russell, 138 Mo. 474, 40 S. W. 123.

New York.— Farrington *v.* New York, 83 Hun 124, 31 N. Y. Suppl. 371.

Ohio.— Tenney *v.* Cincinnati, 24 Ohio Cir. Ct. 237.

Texas.— Hopkins *v.* Cravey, 85 Tex. 189, 19 S. W. 1067.

13. *Colorado.*— Van Wagenen *v.* Carpenter, 27 Colo. 444, 61 Pac. 698.

Michigan.— Gill *v.* Backus, 108 Mich. 417, 66 N. W. 347.

New Jersey.— Diehl *v.* Page, 3 N. J. Eq. 143.

New York.— Ledoux *v.* East River Silk Co., 19 Misc. 440, 44 N. Y. Suppl. 489.

North Carolina.— Harrison *v.* Pender, 44 N. C. 78, 57 Am. Dec. 573.

Oregon.— Schlosser *v.* Beemer, 40 Oreg. 412, 67 Pac. 299.

garnishment,[14] foreclosure,[15] partition,[16] or relating to realty.[17] So the rule applies to orders or judgments dismissing the cause,[18] vacating, modifying, or setting aside former judgments,[19] setting aside sales on execution,[20] distributing proceeds of execution sales,[21] distributing assigned estates,[22] settling accounts,[23] authorizing a receiver to pay claims[24] or to levy an assessment,[25] to scire facias to revive a judgment,[26] to judgments or orders for costs[27] or fixing attorney's fees,[28] to judgments forfeiting recognizances,[29] or to orders of restitution on vacating or reversing judgments.[30] Even conflicting orders made by a court of superior jurisdiction cannot be collaterally attacked in a court of inferior jurisdiction.[31]

2. Judgments on Confession or Consent. The rule against collateral attack applies to judgments entered upon confession, either in open court or under warrants of attorney,[32] and also to such as are rendered by consent of parties, as the result of a compromise or settlement.[33]

United States.— Needham *v.* Wilson, 47 Fed. 97.

14. Bronzan *v.* Drobaz, 93 Cal. 647, 29 Pac. 254; Cooper *v.* Speiser, 34 Nebr. 500, 52 N. W. 403.

15. Martina *v.* Muhlke, 88 Ill. App. 12; Toothaker *v.* Greer, 92 Me. 546, 43 Atl. 498; Kopp *v.* Blessing, 121 Mo. 391, 25 S. W. 757.

16. Chrisman *v.* Divinia, 141 Mo. 122, 41 S. W. 920; Moore *v.* Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465.

17. Thomas *v.* Le Baron, 8 Metc. (Mass.) 355 (admitting a deed to record on testimony of persons not originally witnesses to it); Ransley *v.* Stott, 26 Pa. St. 126 (common recovery); Thacker *v.* Chambers, 5 Humphr. (Tenn.) 313, 42 Am. Dec. 431 (decree vesting title to land in a given person).

Assignment of dower.— Wood *v.* Sugg, 91 N. C. 93, 49 Am. Rep. 639; Devaughn *v.* Devaughn, 19 Gratt. (Va.) 556.

18. Westbay *v.* Gray, 116 Cal. 660, 48 Pac. 800; Houston *v.* Clark, 36 Kan. 412, 13 Pac. 739; Haug *v.* Great Northern R. Co., 102 Fed. 74, 42 C. C. A. 167.

19. Southern Bank *v.* Humphreys, 47 Ill. 227; Bender *v.* Askew, 14 N. C. 149, 22 Am. Dec. 714; Ashland Nat. Bank *v.* Gregory, 94 Wis. 455, 69 N. W. 168; Mootry *v.* Grayson, 104 Fed. 613, 44 C. C. A. 83.

20. Scranton *v.* Ballard, 64 Ala. 402; International Wood Co. *v.* National Assur. Co., 99 Me. 415, 59 Atl. 544, 105 Am. St. Rep. 288.

21. Noble *v.* Cope, 50 Pa. St. 17; Yerke's Appeal, 8 Watts & S. (Pa.) 224.

22. Com. *v.* Steacy, 100 Pa. St. 613. And see Hellebush *v.* Richter, 37 Ohio St. 222.

23. Mattingly *v.* Nye, 8 Wall. (U. S.) 370, 19 L. ed. 380.

24. Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 159, 42 Pac. 89.

25. Eichman *v.* Hersker, 170 Pa. St. 402, 33 Atl. 229.

26. Jackson *v.* De Lancey, 13 Johns. (N. Y.) 537, 7 Am. Dec. 403. And see Helms *v.* Marshall, 121 Ga. 769, 49 S. E. 733.

27. Howe *v.* Southrey, 144 Cal. 767, 78 Pac. 259; Duer *v.* Thweatt, 39 Ga. 578; State *v.* Lander County, 22 Nev. 71, 35 Pac. 300; Lesster *v.* Lawyers' Surety Co., 50 N. Y. App. Div. 181, 63 N. Y. Suppl. 804; Jack *v.* Robie, 48 Hun (N. Y.) 181; Washington Dist. Prob. Ct. *v.* St. Clair, 52 Vt. 24.

28. Vaughn *v.* Tealey, (Tenn. Ch. App. 1899) 58 S. W. 487.

29. Rubush *v.* State, 112 Ind. 107, 13 N. E. 877. And see Kelly *v.* Lank, 7 B. Mon. (Ky.) 220.

30. Hiler *v.* Hiler, 35 Ohio St. 645; Breading *v.* Blocher, 29 Pa. St. 347.

31. Hennessey *v.* Sweeney, 28 N. Y. Civ. Proc. 332, 57 N. Y. Suppl. 901.

Entry of second judgment.— Where across the face of a judgment it was written that it was vacated and set aside, and another judgment of later date was entered on the record, which record shows no irregularities, such second judgment is to be regarded in collateral proceedings as the final and only judgment, and it cannot be impeached by affidavits or matters outside the record. Galvin *v.* Palmer, 134 Cal. 426, 66 Pac. 572.

32. *California.*—Cloud *v.* El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

District of Columbia.—U. S. Electric Lighting Co. *v.* Leiter, 19 D. C. 575.

Georgia.— Jackson *v.* Tift, 15 Ga. 557.

Illinois.— Atwater *v.* American Exch. Nat. Bank, 152 Ill. 605, 38 N. E. 1017; Chase *v.* Tuckwood, 86 Ill. App. 70; Perisho *v.* Perisho, 71 Ill. App. 222; Bowman *v.* Wilson, 64 Ill. App. 73; Austin *v.* Austin, 43 Ill. App. 488.

Iowa.— Foster *v.* Bowman, 55 Iowa 237, 7 N. W. 513.

North Carolina.— Hooks *v.* Moses, 30 N. C. 88.

Wisconsin.— Mayer Boot, etc., Co. *v.* Falk, 89 Wis. 216, 61 N. W. 562.

United States.— Thomson *v.* Wooster, 114 U. S. 104, 5 S. Ct. 788, 29 L. ed. 105; Helena *v.* U. S., 104 Fed. 113, 43 C. C. A. 429; Wright *v.* Wright, 103 Fed. 580.

See 30 Cent. Dig. tit. "Judgment," § 917.

Void for want of jurisdiction.— Where a court assumes the power to punish a defendant for contempt by striking out his answer, and thereupon proceeds to enter a judgment *pro confesso*, it is void for want of jurisdiction, and may be impeached in a collateral proceeding. Hovey *v.* Elliott, 169 U. S. 409, 17 S. Ct. 841, 42 L. ed. 215.

33. *Georgia.*— Williams *v.* Simmons, 79 Ga. 649, 7 S. E. 133.

3. JUDGMENTS BY DEFAULT. A judgment entered by default, the court having jurisdiction, is as conclusive against collateral impeachment as any other form of judgment.[34]

4. TAX JUDGMENTS. Judgments rendered in statutory actions to enforce the payment of delinquent taxes are not impeachable in any collateral proceeding on account of errors or irregularities, or for anything less than a total want of jurisdiction.[35]

5. ADJUDICATIONS IN BANKRUPTCY. An adjudication of bankruptcy, made by the proper federal court, cannot be impeached in any collateral proceeding,[36]

Illinois.— Glos *v.* Brown, 194 Ill. 307, 62 N. E. 622.

Indiana.— Biddle *v.* Pierce, 13 Ind. App. 239, 41 N. E. 475.

Nebraska.— Horton *v.* Simon, 5 Nebr. (Unoff.) 172, 97 N. W. 604.

Texas.— Frisby *v.* Withers, 61 Tex. 134; Hartford F. Ins. Co. *v.* King, 31 Tex. Civ. App. 636, 73 S. W. 71.

United States.— Helena *v.* U. S., 104 Fed. 113, 43 C. C. A. 429.

England.— Ribble River Joint Committee *v.* Croston Urban Dist. Council, [1897] 1 Q. B. 251, 66 L. J. Q. B. 384, 45 Wkly. Rep. 348.

See 30 Cent. Dig. tit. "Judgment," § 917.

34. *Florida.*— Einstein *v.* Davidson, 35 Fla. 342, 17 So. 563.

Illinois.— French *v.* Baker, 21 Ill. App. 432.

Iowa.— Ruppin *v.* McLachlan, 122 Iowa 343, 98 N. W. 153.

Louisiana.— State *v.* Judge Third Dist Ct., 30 La. Ann. 229.

Michigan.— Griffin *v.* McGavin, 117 Mich. 372, 75 N. W. 1061, 72 Am. St. Rep. 564.

New Hampshire.— Pendexter *v.* Cole, 66 N. H. 270, 20 Atl. 331.

New York.— Trowbridge *v.* Hayes, 21 Misc. 234, 45 N. Y. Suppl. 635; Dreyfuss *v.* Seale, 18 Misc. 551, 41 N. Y. Suppl. 875.

Ohio.— Righter *v.* Thornton, 6 Ohio S. & C. Pl. Dec. 7.

Tennessee.— Fogg *v.* Gibbs, 8 Baxt. 464.

Texas.— Thorp *v.* Gordon, (Civ. App. 1897) 43 S. W. 323; Bordages *v.* Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726.

See 30 Cent. Dig. tit. "Judgment," § 918.

35. *Alabama.*— Driggers *v.* Cassady, 71 Ala. 529; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785.

Arkansas.— Burcham *v.* Terry, 55 Ark. 398, 18 S. W. 458, 29 Am. St. Rep. 42; McCarter *v.* Neil, 50 Ark. 188, 6 S. W. 731; Scott *v.* Pleasants, 21 Ark. 364.

California.— Hayward *v.* Pimental, 107 Cal. 386, 40 Pac. 545; Branson *v.* Caruthers, 49 Cal. 374; Mayo *v.* Foley, 40 Cal. 281; Eitel *v.* Foote, 39 Cal. 439.

Illinois.— People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Newman *v.* Chicago, 153 Ill. 469, 38 N. E. 1053; Clark *v.* Kern, 146 Ill. 348, 35 N. E. 60; Mix *v.* People, 116 Ill. 265, 4 N. E. 783; Chesnut *v.* Marsh, 12 Ill. 173; Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463; Job *v.* Tebbetts, 10 Ill. 376. In this state it was at one time held that a judgment by default, in a statutory proceeding for the condemnation and sale of land for delinquent taxes, was not conclusive on the taxpayer and might be collaterally impeached. See Gage *v.* Pumpelly, 115 U. S. 454, 6 S. Ct. 136, 29 L. ed. 449. But this rule is very much narrowed by an amendment to the revenue law, which provides that the tax judgment shall estop all parties from raising objections which existed at or before the rendition of the judgment and could have been presented in defense thereto, and which makes the judgment conclusive evidence of its own regularity and validity in all collateral proceedings, except where the tax had been paid or the land was not liable for it. Gage *v.* Goudy, 141 Ill. 215, 30 N. E. 320; Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511.

Indiana.— Duncan *v.* Lankford, 145 Ind. 145, 44 N. E. 12; Ellison *v.* Branstrator, 34 Ind. App. 410, 73 N. E. 146.

Minnesota.—Hennessy *v.* St. Paul, 54 Minn. 219, 55 N. W. 1123.

Missouri.— Charley *v.* Kelley, 120 Mo. 134, 25 S. W. 571; Gibbs *v.* Southern, 116 Mo. 204, 22 S. W. 713; Wellshear *v.* Kelley, 69 Mo. 343.

Oregon.— Clinton *v.* Portland, 26 Oreg. 410, 38 Pac. 407.

Pennsylvania.— Cadmus *v.* Jackson, 52 Pa. St. 295; Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. 40.

Tennessee.— Reinhardt *v.* Nealis, 101 Tenn. 169, 46 S. W. 446; Neely *v.* Buchanan, (Ch. App. 1899) 54 S. W. 995.

United States.— U. S. Trust Co. *v.* Mercantile Trust Co., 88 Fed. 140, 31 C. C. A. 427.

Taxes paid before suit.— It cannot be shown against such a judgment, in any collateral proceeding, that the taxes on the particular land had been actually paid before suit brought. Chauncey *v.* Wass, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; Cadmus *v.* Jackson, 52 Pa. St. 295.

Lack of assessment.— Such a judgment cannot be impeached collaterally on the ground that no assessment was made for the year in question. Gibbs *v.* Southern, 116 Mo. 204, 22 S. W. 713.

Invalidity of statute or ordinance.— It is not permitted to show in any collateral proceeding that the assessment on which the taxes were based was illegal and void, or that the statute or ordinance authorizing the assessment was unconstitutional or invalid. Mayo *v.* Foley, 40 Cal. 281; Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; People *v.* Lingle, 165 Ill. 65, 46 N. E. 10.

36. *Iowa.*— Wright *v.* Watkins, 2 Greene 547.

unless it be on the ground of a want of jurisdiction.[37] The rule applies also to a discharge in bankruptcy,[38] and no state court can properly hear objections or defenses against the legitimate effect of a discharge in bankruptcy, in any action proceeding before it.[39]

6. Judgments in Criminal Cases. A judgment rendered against defendant in a criminal prosecution cannot be collaterally impeached or contradicted in a subsequent proceeding, where it becomes material, even though it may appear to be erroneous unless it is absolutely void.[40]

7. Judgments and Orders in Special Proceedings. The rule against collateral attack applies to orders and judgments made by the courts in special proceedings taken before them, although not in the nature of contested actions, or purely *ex parte*, provided the matter involves a judicial determination and carries the sanction of the court's authority.[41]

8. Judgment Void on Its Face. If a judgment shows on its face that it is void for want of jurisdiction either of the person or the subject-matter, it is a mere

Michigan.— Benedict *v.* Smith, 48 Mich. 593, 12 N. W. 866.

New Jersey.— Mount *v.* Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726.

Virginia.— Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601.

United States.— Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 6 S. Ct. 1009, 30 L. ed. 196; Chapman *v.* Brewer, 114 U. S. 158, 5 S. Ct. 799, 29 L. ed. 83; Sloan *v.* Lewis, 22 Wall. 150, 22 L. ed. 832; Michaels *v.* Post, 21 Wall. 398, 22 L. ed. 520; *In re* Columbia Real Estate Co., 101 Fed. 965; Graham *v.* Boston, etc., R. Co., 14 Fed. 753; *In re* Getchell, 10 Fed. Cas. No. 5,371, 8 Ben. 256; Hobson *v.* Markson, 12 Fed. Cas. No. 6,555, 1 Dill. 421; *In re* Ives, 13 Fed. Cas. No. 7,115, 5 Dill. 146.

See Bankruptcy, 5 Cyc. 317.

37. Stuart *v.* Aumiller, 37 Iowa 102; Adams *v.* Terrell, 4 Fed. 796, 4 Woods 337; Fellows *v.* Hall, 8 Fed. Cas. No. 4,723, 3 McLean 487; *In re* Goodfellow, 10 Fed. Cas. No. 5,536, 1 Lowell 510.

38. Allen *v.* Thompson, 10 Fed. 116; U. S. *v.* Griswold, 8 Fed. 556, 7 Sawy. 311.

39. *Alabama.*— Milhous *v.* Aicardi, 51 Ala. 594; Oates *v.* Parish, 47 Ala. 157.

Georgia.— Brady *v.* Brady, 71 Ga. 71.

Indiana.— Wiley *v.* Pavey, 61 Ind. 457, 28 Am. Rep. 677.

Kentucky.— Thurmond *v.* Andrews, 10 Bush 400; Ewell *v.* Pitman, 27 S. W. 870, 16 Ky. L. Rep. 299.

Maine.— Corey *v.* Ripley, 57 Me. 69, 2 Am. Rep. 19; Stetson *v.* Bangor, 56 Me. 274.

Maryland.— Talbott *v.* Suit, 68 Md. 443, 13 Atl. 356.

Massachusetts.— Fuller *v.* Pease, 144 Mass. 390, 11 N. E. 694; Way *v.* Howe, 108 Mass. 502, 11 Am. Rep. 386.

Mississippi.— Stevens *v.* Brown, 4 Miss. 597.

Missouri.— Brown *v.* Covenant Mut. L. Ins. Co., 86 Mo. 51; Thornton *v.* Hogan, 63 Mo. 143.

Nebraska.— Seymour *v.* Street, 5 Nebr. 85.

New Hampshire.— Parker *v.* Atwood, 52 N. H. 181.

New York.— Ocean Nat. Bank *v.* Olcott, 46 N. Y. 12.

Ohio.— Howland *v.* Carson, 28 Ohio St. 625; Smith *v.* Ramsey, 27 Ohio St. 339.

Pennsylvania.— Sheets *v.* Hawk, 14 Serg. & R. 173, 16 Am. Dec. 486.

Tennessee.— Hennessee *v.* Mills, 1 Baxt. 38; Morris *v.* Creed, 11 Heisk. 155.

Texas.— Brown *v.* Causey, 56 Tex. 340; Alston *v.* Robinett, 37 Tex. 56.

Wisconsin.— Thomas *v.* Jones, 39 Wis. 124.

See Bankruptcy, 5 Cyc. 411.

40. Gandy *v.* State, 86 Ala. 20, 5 So. 420; Myers *v.* State, 92 Ind. 390; Johnson *v.* State, 39 Tex. Cr. 625, 48 S. W. 70.

41. This rule has been applied to judgments or orders rendered in the following classes of proceedings among others: Confiscation of real property (Bragg *v.* Lorio, 4 Fed. Cas. No. 1,800, 1 Woods 209), calling special elections (Jones *v.* Cullen, 142 Ind. 335, 40 N. E. 124; Shelby County Ct. *v.* Cumberland, etc., R. Co., 8 Bush (Ky.) 209; State *v.* Mackin, 51 Mo. App. 299; Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663), order for issue of municipal bonds (Orleans *v.* Platt, 99 U. S. 676, 25 L. ed. 404), levy of tax (Graham *v.* Parham, 32 Ark. 676), forfeiture of bond for stay of execution (Wishard *v.* Biddle, 64 Iowa 526, 21 N. W. 15), order for substituted service (Baker *v.* Stephens, 10 Abb. Pr. N. S. (N. Y.) 1), restoration of lost records (Branch *v.* Griffin, 99 N. C. 173, 5 S. E. 393, 398), disbarment of attorney (Smith *v.* State, 5 Tex. 578), naturalization (State *v.* Brandhorst, 156 Mo. 457, 56 S. W. 1094, 79 Am. St. Rep. 538; People *v.* Pease, 30 Barb. (N. Y.) 588), emancipation of minors (Cox *v.* Johnson, 80 Ala. 22), emancipation of slaves (Sampson *v.* Burgwin, 20 N. C. 21), adoption of child (Brown *v.* Brown, 101 Ind. 340), and the appointment of a guardian for a lunatic (McKenzie *v.* Donnell, 151 Mo. 431, 52 S. W. 214).

Special proceedings in general.— Where a court of general jurisdiction has exercised, according to the course of common law and proceedings in chancery, special powers conferred upon it by a special statute, its judgment cannot be collaterally impeached. Pulaski County *v.* Stuart, 28 Gratt. (Va.) 872.

nullity, and it may be collaterally impeached, by any person interested, wherever it is brought in question.[42]

9. Courts or Tribunals Rendering Judgment — a. Inferior Courts. The judgments and decisions of an inferior court, provided it had jurisdiction, are not open to collateral impeachment for alleged errors or irregularities,[43] except

42. *Arkansas.*— Evans *v.* Percifull, 5 Ark. 424.

California.— Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Pioneer Land Co. *v.* Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67; Smith *v.* Los Angeles, etc., R. Co., (1893) 34 Pac. 242; Junkans *v.* Bergin, 64 Cal. 203, 30 Pac. 627; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595.

Colorado.— Buchanan *v.* Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899.

Delaware.—Frankel *v.* Satterfield, 9 Houst. 201, 19 Atl. 898.

Florida.— McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228.

Georgia.— Jones *v.* Smith, 120 Ga. 642, 48 S. E. 134; Parish *v.* Parish, 32 Ga. 653; Georgia Cent. Bank *v.* Gibson, 11 Ga. 453; Towns *v.* Springer, 9 Ga. 130.

Illinois.— Bannon *v.* People, 1 Ill. App. 496.

Indiana.— Cavanaugh *v.* Smith, 84 Ind. 380; Cain *v.* Goda, 84 Ind. 209; Horner *v.* Doe, Smith 10.

Iowa.—Bonsall *v.* Isett, 14 Iowa 309; Dicks *v.* Hatch, 10 Iowa 380.

Kansas.— North *v.* Moore, 8 Kan. 143.

Kentucky.— Dorsey *v.* Kendall, 8 Bush 294.

Louisiana.— Conery *v.* Rotchford, 30 La. Ann. 692; Edwards *v.* Whited, 29 La. Ann. 647; Richardson *v.* Hunter, 23 La. Ann. 255; Gilbert *v.* Meriam, 2 La. Ann. 160.

Maine.— Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008; Penobscot R. Co. *v.* Weeks, 52 Me. 456.

Massachusetts.— Mercier *v.* Chace, 9 Allen 242.

Minnesota.— Duxbury *v.* Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408; Jewett *v.* Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555.

Mississippi.— McComb *v.* Doe, 8 Sm. & M. 505; Enos *v.* Smith, 7 Sm. & M. 85; Campbell *v.* Brown, 6 How. 106.

Missouri.— Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186; Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049.

Nebraska.— Aldrich *v.* Steen, (1904) 100 N. W. 311; Murphy *v.* Lyons, 19 Nebr. 689, 28 N. W. 328.

New Hampshire.— Gay *v.* Smith, 38 N. H. 171. And see Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

New Jersey.— Elmendorf *v.* Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164.

New York.— Gage *v.* Hill, 43 Barb. 44; Matter of Stewart, 39 Misc. 275, 79 N. Y. Suppl. 525; Latham *v.* Edgerton, 9 Cow. 227; Borden *v.* Fitch, 15 Johns. 121, 8 Am. Dec. 225.

North Carolina.— Hinton *v.* Penn Mut. L. Ins. Co., 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636; Carter *v.* Rountree, 109 N. C. 29, 13 S. E. 716.

Oregon.— Ferguson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Pennsylvania.— Fisher *v.* Longnecker, 8 Pa. St. 410.

Rhode Island.— Providence County Sav. Bank *v.* Hughes, 26 R. I. 73, 58 Atl. 254, 106 Am. St. Rep. 682.

South Carolina.— Woods *v.* Bryan, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688; James *v.* Smith, 2 S. C. 183.

Tennessee.— Summar *v.* Jarrett, 3 Baxt. 23.

Texas.— Morris *v.* Halbert, 36 Tex. 19; Jones *v.* Lasater, 2 Tex. Unrep. Cas. 435.

Wisconsin.— O'Malley *v.* Fricke, 104 Wis. 280, 80 N. W. 436.

United States.— Thompson *v.* Whitman, 18 Wall. 457, 21 L. ed. 897; Moore *v.* Edgefield, 32 Fed. 498; Farmers' L. & T. Co. *v.* McKinney, 8 Fed. Cas. No. 4,667, 6 McLean 1; Lincoln *v.* Tower, 15 Fed. Cas. No. 8,355, 2 McLean 473.

England.— Whyte *v.* Rose, 3 Q. B. 493, 2 G. & D. 312, 11 L. J. Exch. 457, 43 E. C. L. 835; Rogers *v.* Wood, 2 B. & Ad. 245, 22 E. C. L. 109; Briscoe *v.* Stephens, 2 Bing. 213, 3 L. J. C. P. O. S. 257, 9 Moore C. P. 413, 27 Rev. Rep. 597, 91 E. C. L. 550.

See 30 Cent. Dig. tit. "Judgment," § 919.

Want of jurisdiction of subject-matter.— Orders or judgments which the court has not the power under any circumstances to make or render are null and void, and their nullity can be asserted in any collateral proceeding where they are relied on in support of a claim. J. B. Watkins Land Mortg. Co. *v.* Mullen, 8 Kan. App. 705, 54 Pac. 921; Beaudrot *v.* Murphy, 53 S. C. 118, 30 S. E. 825; Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643.

43. *California.*— Bernal *v.* Lynch, 36 Cal. 135.

Connecticut.— Bell *v.* Raymond, 18 Conn. 91.

Illinois.— People *v.* Medart, 166 Ill. 348, 46 N. E. 1095 [*affirming* 63 Ill. App. 111].

Indiana.— Grusenmeyer *v.* Logansport, 76 Ind. 549.

Iowa.— Smith *v.* Engle, 44 Iowa 265; Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420; State *v.* Berry, 12 Iowa 58; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

Kansas.— Shoemaker *v.* Brown, 10 Kan. 383.

Mississippi.— Ross *v.* Mims, 7 Sm. & M. 121.

Missouri.— Jeffries *v.* Wright, 51 Mo. 215; Sedalia *v.* Missouri, etc., R. Co., 17 Mo. App. 105.

New York.— Jackson *v.* Robinson, 4 Wend. 436; Roosevelt *v.* Kellogg, 20 Johns. 208.

perhaps in cases where there is no remedy by appeal or any other form of review,[44] although the judgment of such a court may always be invalidated by showing a want of jurisdiction.[45] These rules apply to judgments rendered by justices of the peace,[46] or on appeal from,[47] or founded upon,[48] such judgments, and to the sentences of courts-martial.[49]

b. Probate Courts. Orders and decrees of a surrogate, or of a probate or orphans' court, in any case in which jurisdiction has attached, are not open to contradiction or reëxamination in any collateral proceeding.[50] This rule applies,

Oregon.— Thompson *v.* Multnomah County, 2 Oreg. 34.

Texas.— Dobbin *v.* San Antonio, 2 Tex. Unrep. Cas. 708. *Compare* Cordray *v.* Neuhaus, (Civ. App. 1901) 61 S. W. 415.

United States.— Comstock *v.* Crawford, 3 Wall. 396, 18 L. ed. 34.

See 30 Cent. Dig. tit. "Judgment," §§ 908, 909.

44. Davol *v.* Davol, 13 Mass. 264; Smith *v.* Rice, 11 Mass. 507; Sanborn *v.* Fellows, 22 N. H. 473.

45. Culver's Appeal, 48 Conn. 165; Beaudrias *v.* Hogan, 16 N. Y. App. Div. 38, 44 N. Y. Suppl. 785. See *infra*, XI, E, 2, h, (II).

46. See JUSTICES OF THE PEACE.

47. Breeze *v.* Ayres, 49 Cal. 208; Carpenter *v.* Doe, 2 Ind. 465.

48. Moore *v.* Martin, 38 Cal. 428.

49. See ARMY AND NAVY, 3 Cyc. 861, text and note 1 *et seq.*

50. *Alabama.*— Gamble *v.* Jordan, 54 Ala. 432; Ward *v.* Hudspeth, 44 Ala. 215; Offutt *v.* Vance, 42 Ala. 243; Morrison *v.* Morrison, 3 Stew. 444.

Arkansas.— Washington *v.* Govan, 73 Ark. 612, 84 S. W. 792; Currie *v.* Franklin, 51 Ark. 338, 11 S. W. 477; West *v.* Waddill, 33 Ark. 575; Borden *v.* State, 11 Ark. 519, 44 Am. Dec. 217.

California.— Satterlee *v.* Bliss, 36 Cal. 489; Halleck *v.* Moss, 22 Cal. 266; Haynes *v.* Meeks, 10 Cal. 110, 70 Am. Dec. 703.

Connecticut.— Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483; Gallup *v.* Smith, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353; Bush *v.* Sheldon, 1 Day 170.

Delaware.— Van Dyke *v.* Johns, 1 Del. Ch. 93, 12 Am. Dec. 76.

Georgia.— Grier *v.* McLendon, 7 Ga. 362; Smith *v.* Oliver, Dudley 190.

Idaho.— Clark *v.* Rossier, 10 Ida. 348, 78 Pac. 358.

Indiana.— Parsons *v.* Milford, 67 Ind. 489.

Iowa.— Barney *v.* Chittenden, 2 Greene 165.

Kansas.— Shoemaker *v.* Brown, 10 Kan. 383.

Louisiana.— Dupre *v.* Reggio, 6 La. 653.

Maine.— Pierce *v.* Irish, 31 Me. 254.

Massachusetts.—Tobin *v.* Larkin, 187 Mass. 279, 72 N. E. 985; Watts *v.* Watts, 160 Mass. 464, 36 N. E. 479, 39 Am. St. Rep. 509, 23 L. R. A. 187; Boston *v.* Robbins, 126 Mass. 384.

Minnesota.—Hadley *v.* Bourdeaux, 90 Minn. 177, 95 N. W. 1109; Bengtsson *v.* Johnson, 75 Minn. 321, 78 N. W. 3.

Mississippi.— Ward *v.* State, 40 Miss. 108; Grant *v.* Spann, 34 Miss. 294; McKee *v.* Whitten, 25 Miss. 31; Shropshire *v.* Amite County Prob. Judge, 4 How. 142.

Missouri.— *In re* Judy, 166 Mo. 13, 65 S. W. 993; Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088; Sherwood *v.* Baker, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 399; Camden *v.* Plain, 91 Mo. 117, 4 S. W. 86; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276; *In re* Davison, 100 Mo. App. 263, 73 S. W. 373; State *v.* Shipman, 87 Mo. App. 569.

Nebraska.— Wheeler *v.* Barker, 51 Nebr. 846, 71 N. W. 750.

New Hampshire.— Jones *v.* Chase, 55 N. H. 234; Stearns *v.* Wright, 51 N. H. 600; Wilson *v.* Edmonds, 24 N. H. 517; Tebbets *v.* Tilton, 24 N. H. 120.

New Jersey.— Ordinary *v.* Poulson, 43 N. J. L. 33.

New York.— Bensen *v.* Manhattan R. Co., 164 N. Y. 559, 58 N. E. 1085; Conant *v.* Wright, 19 Misc. 321, 44 N. Y. Suppl. 727; Murzynowski *v.* Delaware, etc., R. Co., 15 N. Y. Suppl. 841; Woodruff *v.* Cook, 2 Edw. 259; Curtis *v.* Williams, 3 Dem. Surr. 63.

North Carolina.— Redman *v.* Graham, 80 N. C. 231.

Ohio.— Woodward *v.* Curtis, 19 Ohio Cir. Ct. 15, 10 Ohio Cir. Dec. 400.

Pennsylvania.— Leedom *v.* Lemhaert, 80 Pa. St. 381; Torrance *v.* Torrance, 53 Pa. St. 505; Gilmore *v.* Rodgers, 41 Pa. St. 120; Welty *v.* Ruffner, 9 Pa. St. 224; Lockhart *v.* John, 7 Pa. St. 137; Painter *v.* Henderson, 7 Pa. St. 48; McPherson *v.* Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642; Brooks' Estate, 8 Pa. Co. Ct. 514; Seaman *v.* Hoover, 1 Chest. Co. Rep. 178.

South Carolina.— Gibson *v.* Brown, 1 Nott & M. 326.

Texas.— Thomas *v.* Bonnie, 66 Tex. 635, 2 S. W. 724; Murchison *v.* White, 54 Tex. 78; Dutton *v.* Wright, (Civ. App. 1905) 85 S. W. 1025; Hill *v.* Grant, (Civ. App. 1898) 44 S. W. 1016; Buchanan *v.* Park, (Civ. App. 1896) 36 S. W. 807; Corley *v.* Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839.

Vermont.— Driggs *v.* Abbott, 27 Vt. 580, 65 Am. Dec. 214; Lawrence *v.* Englesby, 24 Vt. 42. But a court of probate is one of special and limited jurisdiction, deriving all its authority from statutes; and if it appears on the face of its proceedings that it has exceeded its authority, its orders and decrees are void, and may be treated as nullities. Hendrick *v.* Cleaveland, 2 Vt. 329.

United States.— Veach *v.* Rice, 131 U. S. 293, 9 S. Ct. 730, 33 L. ed. 163; State Nat.

for example, to decrees of partition made by a probate court having jurisdiction for that purpose.[51]

c. Coördinate Courts. A judgment at law cannot be impeached collaterally in a court of equity,[52] nor can the validity of a decree rendered by a court of equity be impeached in a collateral action at law.[53] So also a judgment of a state court cannot be reviewed in a collateral proceeding in a federal court,[54] except that the jurisdiction may be inquired into,[55] and conversely, the judgments and decrees of the federal courts, within their jurisdiction, cannot be collaterally assailed in the state courts, however erroneous they may appear to be.[56]

d. Boards and Officers Acting Judicially. The rule against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers, who, although not constituting a court, are called upon to act judicially in matters of administration,[57] such as boards of county commissioners,[58] boards of land commissioners,[59] or railroad commissioners,[60] or a state board of equalization.[61]

C. What Constitutes Collateral Attack — 1. In General. The term "collateral" as used in this connection is opposed to "direct." If an action or proceeding is brought for the very purpose of impeaching or overturning the judgment, it is a direct attack upon it.[62] Such is a motion or other proceeding to

Bank *v.* Ellison, 75 Fed. 354; Loyd *v.* Waller, 74 Fed. 601, 20 C. C. A. 548.

See 30 Cent. Dig. tit. "Judgment," § 910.

Orders or decrees allowing or refusing probate of will see WILLS.

Orders granting or refusing administration see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 141.

Order removing executor or administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 171, text and note 47.

Granting allowance for support of widow and children see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 402, text and note 83.

Allowing or disallowing claims against estate see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 510, text and note 99.

Allowing or confirming sale to pay debts see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 749.

Order of final distribution see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 665, text and note 36.

Settlement of executor's or administrator's accounts see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1192.

Appointment of guardian for minor see GUARDIAN AND WARD, 21 Cyc. 49, text and notes 35 *et seq.*

51. Fowler *v.* Gordon, 24 La. Ann. 270; Snevily *v.* Wagner, 8 Pa. St. 396.

52. Redwine *v.* Brown, 10 Ga. 311; Bay *v.* Cook, 31 Ill. 336; Barnard *v.* Darling, 1 Barb. Ch. (N. Y.) 218; Pratt *v.* Weyman, 1 McCord Eq. (S. C.) 156.

53. *Alabama.*— Alexander *v.* Nelson, 42 Ala. 462; Davenport *v.* Bartlett, 9 Ala. 179.

Illinois.—Kenely *v.* Bryan, 110 Ill. 652.

Maryland.— Gardiner *v.* Miles, 5 Gill 94.

North Carolina.— Watson *v.* Williams, 43 N. C. 232.

United States.— Bryan *v.* Kennett, 113 U. S. 179, 5 S. Ct. 407, 28 L. ed. 908.

See 30 Cent. Dig. tit. "Judgment," § 913.

54. Kittredge *v.* Emerson, 15 N. H. 227; Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78; Griswold *v.* Hazard, 141 U. S. 260, 11 S. Ct. 972, 999, 35 L. ed. 678; Simmons *v.* Saul, 138 U. S. 439, 11 S. Ct. 369, 34 L. ed. 1054; Central Trust Co. *v.* Seasongood, 130 U. S. 482, 9 S. Ct. 575, 32 L. ed. 985; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18, 1 S. Ct. 614, 27 L. ed. 636; Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87; Holmes *v.* Oregon, etc., R. Co., 9 Fed. 229, 7 Sawy. 380.

55. Elliott *v.* Peirsol, 1 Pet. (U. S.) 328, 7 L. ed. 164; Wood *v.* Mobile, 99 Fed. 615; Kansas City, etc., R. Co. *v.* Morgan, 76 Fed. 429, 21 C. C. A. 468.

56. Sandwich Mfg. Co. *v.* Earl, 56 Minn. 390, 57 N. W. 938; Mead *v.* Weaver, 42 Nebr. 149, 60 N. W. 385; Ontario *v.* Andes First Nat. Bank, 59 Hun (N. Y.) 29, 12 N. Y. Suppl. 434; Kent *v.* Lake Superior Ship Canal R., etc., Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. ed. 352; Anderson *v.* Elliott, 101 Fed. 609, 41 C. C. A. 521; Washburn *v.* Pullman's Palace-Car Co., 76 Fed. 1005, 21 C. C. A. 598; Neill *v.* Jackson, 8 Fed. 144.

57. U. S. *v.* Doherty, 27 Fed. 730. And see Gaines *v.* Harvin, 19 Ala. 491; Grove's Estate, 2 Woodw. (Pa.) 182.

58. See COUNTIES, 11 Cyc. 405.

59. See PUBLIC LANDS.

60. See RAILROADS.

61. See TAXATION.

62. Nichols *v.* Wimmer, (Tex. 1884) 19 Reporter 475. And see Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007 (where it is said that a direct attack on a judgment is some proceeding in the action in which it was rendered, either by a motion before the court which rendered it or an appeal therefrom; that an attack on a judgment on the ground that it was procured by fraud is a direct attack, while an attempt to impeach it by matter *dehors* the record is a collateral attack); Exchange Bank *v.* Ault, 102 Ind. 322, 1 N. E. 562 (holding that, where a

vacate, annul, cancel, or set aside the judgment,[63] or any proceeding to review it in an appellate court, whether by appeal, error, or certiorari,[64] or a bill of review,[65] or, under some circumstances, an action to quiet title.[66] On the other hand, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral.[67]

party to a judgment or decree seeks to impeach its validity and have it declared void in a subsequent action by matter outside of the record, it is a collateral attack on the validity of the judgment.

Asserting title to judgment.— Where a party asks to be recognized as the true owner of a judgment, in opposition to the nominal judgment plaintiff, it is not a collateral attack on the judgment. Klein *v.* Dennis, 36 La. Ann. 284.

Correcting improper use of judgment.— On an accounting by a judgment creditor, it is permissible to show that the judgment (by confession) was not given for any absolute debt, but as a conditional obligation, this being not so much an offer to impeach the validity of the judgment, as to show that it was given for one purpose and used for another. Stark's Appeal, 128 Pa. St. 545, 18 Atl. 426.

Correcting misnomer.— To show that a judgment rendered against "Charles" is in fact against "Christian" is a collateral attack on the judgment against "Charles." Casper *v.* Kleppen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604.

Fraud.— A decision in Indiana holds that a judgment regular on its face, but fraudulently procured, may be attacked in an independent proceeding, an attack on that ground being regarded as direct. Cotterell *v.* Koon, 151 Ind. 182, 51 N. E. 235.

63. *California.*— Reinhart *v.* Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52.

Colorado.— Symes *v.* Charpiot, 17 Colo. App. 463, 69 Pac. 311.

Indiana.— Kirby *v.* Kirby, 142 Ind. 419, 41 N. E. 809; Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334. *Compare* Spencer *v.* Spencer, 31 Ind. App. 321, 67 N. E. 1018, 99 Am. St. Rep. 260.

Iowa.— Spencer *v.* Berns, 114 Iowa 126, 86 N. W. 209.

Kansas.— Lieberman *v.* Douglass, 62 Kan. 784, 64 Pac. 590.

Minnesota.— Vaule *v.* Miller, 69 Minn. 440, 72 N. W. 452.

New York.— Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Forrester *v.* Strauss, 18 N. Y. Suppl. 41, 21 N. Y. Civ. Proc. 166.

North Dakota.— Phelps *v.* McCollam, 10 N. D. 536, 88 N. W. 292.

Texas.— McCampbell *v.* Durst, 73 Tex. 410, 11 S. W. 380; Ross *v.* Drouilhet, (Civ. App. 1904) 80 S. W. 241; Carpenter *v.* Anderson, 33 Tex. Civ. App. 484, 77 S. W. 291; Schneider *v.* Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541; Stephens *v.* Hewett, 22 Tex. Civ. App. 303, 54 S. W. 301; Graham *v.* East Texas Land, etc., Co., (Civ. App. 1899) 50 S. W. 579. But see W. C. Belcher Land Mortg. Co. *v.* Bush, (Civ. App. 1902) 67 S. W. 444.

Utah.— Mosby *v.* Gisborn, 17 Utah 257, 54 Pac. 121.

See 30 Cent. Dig. tit. "Judgment," § 962.

But see Mayhew *v.* Snell, 33 Mich. 182; Johnson *v.* Jones, 2 Nebr. 126.

Ignoring judgment.— Where a will has been admitted to probate, an action to set aside the probate for defects or irregularities would be a direct attack on the probate decree; but a new petition for probate of the will, proceeding on the assumption that it has never been admitted to probate, is a collateral attack. *In re* Warfield, 22 Cal. 51, 83 Am. Dec. 49.

64. Soules *v.* Robinson, (Ind. App. 1901) 60 N. E. 726; Fortier's Succession, 51 La. Ann. 1562, 26 So. 554; Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Kalteyer *v.* Wipff, (Tex. Civ. App. 1899) 49 S. W. 1055; Wipff *v.* Heder, 6 Tex. Civ. App. 685, 26 S. W. 118; Moore *v.* Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113.

65. Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556, 73 Am. Dec. 688; De Cordova *v.* Rodgers, (Tex. Civ. App. 1902) 67 S. W. 1042; Scanlan *v.* Campbell, 22 Tex. Civ. App. 505, 55 S. W. 501. *Compare* Harman *v.* Moore, 112 Ind. 221, 13 N. E. 718.

66. Bergin *v.* Haight, 99 Cal. 52, 33 Pac. 760. And see Slidell *v.* Germania Nat. Bank, 27 La. Ann. 354; Bedell *v.* Hayes, 21 La. Ann. 643; Lewis *v.* Mauerman, 35 Wash. 156, 76 Pac. 737. *Compare* Lynch *v.* Rooney, 112 Cal. 279, 44 Pac. 565.

Removing cloud on title.— A complaint alleging that a judgment is void on its face, and yet is apparently a lien on plaintiff's land, and asking a decree annulling and avoiding such judgment, is not a collateral attack upon it. Penrose *v.* McKenzie, 116 Ind. 35, 18 N. E. 384. And see McCampbell *v.* Durst, 73 Tex. 410, 11 S. W. 380.

67. *Alabama.*— Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

California.— Stambach *v.* Emerson, 139 Cal. 282, 72 Pac. 991; Lynch *v.* Rooney, 112 Cal. 279, 44 Pac. 565.

Illinois.— Bennett *v.* Roys, 212 Ill. 232, 72 N. E. 380; People *v.* Lingle, 165 Ill. 65, 46 N. E. 10.

Indiana.— Cohee *v.* Baer, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270.

Louisiana.— Meyer *v.* Moss, 110 La. 132, 34 So. 332; Slidell *v.* Germania Nat. Bank, 27 La. Ann. 354.

This is the case where the proceeding is founded directly upon the judgment in question, or upon any of its incidents or consequences as a judgment,[68] or where the judgment forms a part of plaintiff's title or of the evidence by which his claim is supported.[69]

2. PROCEEDINGS TO ENFORCE JUDGMENT. A proceeding to enforce a judgment is collateral to the judgment, and therefore no inquiry into its regularity or validity can be permitted in such a proceeding, whether it be a direct action on the judgment,[70]

Maryland.— Richardson *v.* State, 2 Gill 439.

Tennessee.— Reeves *v.* Hager, 101 Tenn. 712, 50 S. W. 760; Pope *v.* Harrison, 16 Lea 82.

Texas.— Newman *v.* Mackey, (Civ. App. 1904) 83 S. W. 31; Scudder *v.* Cox, 35 Tex. Civ. App. 416, 80 S. W. 872.

Washington.— Kalb *v.* German Sav., etc., Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757.

United States.— Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397; Rhino *v.* Emery, 65 Fed. 826.

See 30 Cent. Dig. tit. "Judgment," § 962.

68. Thus the rule applies to a suit on an appeal-bond given on appeal from the judgment in question (Bostic *v.* Love, 16 Cal. 69; Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206; Sturgis *v.* Rogers, 26 Ind. 1), to a suit on a recognizance entered in attachment (Eimer *v.* Richards, 25 Ill. 289), to a proceeding to enforce an attorney's lien on the judgment (Guliano *v.* Whitenack, 9 Misc. (N. Y.) 562, 30 N. Y. Suppl. 415), to a proceeding to punish a person for contempt in disobeying the judgment (Ketchum *v.* Edwards, 6 N. Y. App. Div. 160, 39 N. Y. Suppl. 1012; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540), to an action to set aside the levy of execution under the judgment (Wilkinson *v.* Holton, 119 Ga. 557, 46 S. E. 620), or to vacate or set aside the sale made thereunder (Mann *v.* Jennings, 25 Fla. 730, 6 So. 771; Dryden *v.* Parrotte, 61 Nebr. 339, 85 N. W. 287), or to recover land sold under the execution (Brooks *v.* Powell, (Tex. Civ. App. 1895) 29 S. W. 809), or to recover damages against the sheriff for failure to return the execution (Vicksburg Grocery Co. *v.* Brennan, (Miss. 1896) 20 So. 845), to an action to recover costs awarded by the judgment (Maxwell *v.* Quimby, 90 Mo. App. 469), and to an action to recover money paid under the judgment, by defendant therein against the person ultimately liable (U. S. Trust Co. *v.* Mercantile Trust Co., 88 Fed. 140, 31 C. C. A. 427). But an action to set aside an invalid assignment or transfer of the judgment is not a collateral attack upon it. Lindsey *v.* State, 27 Tex. Civ. App. 540, 66 S. W. 332.

69. *Alabama.*— Shamblin *v.* Hall, 123 Ala. 541, 26 So. 285.

Missouri.— Lovitt *v.* Russell, 138 Mo. 474, 40 S. W. 123.

Nevada.— Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

New York.— Jones *v.* Blun, 145 N. Y. 333, 39 N. E. 954.

Washington.— Northwestern, etc., Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

West Virginia.— Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

Trespass to try title.— In this action any attack upon a judgment which forms the basis of the title of one of the parties, or enters into his title, will be considered a collateral impeachment of such judgment. Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325; Lee *v.* Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Bouldin *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. 133.

Garnishment.— The validity of a judgment cannot be questioned in garnishment proceedings based thereon. Whitworth *v.* Pelton, 81 Mich. 98, 45 N. W. 500; Cleveland Co-Operative Stove Co. *v.* Mehling, 21 Ohio Cir. Ct. 60, 11 Ohio Cir. Dec. 400.

Restoring lost record.— On proceedings to restore or reinstate a judgment, of which the record has been lost or destroyed, no attack upon the validity of the judgment can be allowed. Kanke *v.* Herrum, 48 Iowa 276; McFeeley *v.* Osborn, 19 La. Ann. 471.

Distribution of funds.— In a proceeding for the distribution of a fund in court among various claimants, no inquiry can be made into the validity of judgments on which their several claims are founded. Hall *v.* Sauntry, 80 Minn. 348, 83 N. W. 156, 384; Brantingham *v.* Brantingham, 12 N. J. Eq. 160; Titusville Second Nat. Bank's Appeal, 85 Pa. St. 528; Safe-Deposit, etc., Co. *v.* Wright, 105 Fed. 155, 44 C. C. A. 421.

70. *Colorado.*— People *v.* McKelvey, 19 Colo. App. 131, 74 Pac. 533.

Georgia.— Porter *v.* Rountree, 111 Ga. 369, 36 S. E. 761.

Kentucky.— Rogers *v.* Rogers, 15 B. Mon. 364; Couchman *v.* Bush, 26 Ky. L. Rep. 1277, 83 S. W. 1039, 27 Ky. L. Rep. 108, 83 S. W. 1136, so holding where the judgment was set up as a counter-claim in another suit.

Massachusetts.— Pearse *v.* Hill, 163 Mass. 493, 40 N. E. 765.

Pennsylvania.— Toomey *v.* Rosansky, 11 Pa. Super. Ct. 506.

See 30 Cent. Dig. tit. "Judgment," § 963.

Want of jurisdiction rendering the judgment void may be shown in an action upon it. Symes *v.* People, 17 Colo. App. 466, 69 Pac. 312; Taylor *v.* Pettibone, 16 Johns. (N. Y.) 66; Bailey *v.* Young, 20 Ohio Cir. Ct. 546, 11 Ohio Cir. Dec. 257.

Prayer for vacation of judgment.— Where defendant in an action on a judgment answers, asking to have the judgment set aside, the parties being the same, it amounts to a direct proceeding to have the judgment set

or on a note given in satisfaction of the judgment,[71] or a proceeding to revive the judgment,[72] or proceedings supplementary to execution,[73] or bill in equity in aid of execution or to enforce the lien of the judgment,[74] or an action of ejectment,[75] or a proceeding by mandamus to compel the levy and collection of a tax to provide funds for the payment of the judgment, the debtor being a muncipal corporation.[76]

3. PROCEEDINGS TO PREVENT ENFORCEMENT OF JUDGMENT. According to some of the decisions, a suit in equity to enjoin the enforcement of a judgment constitutes a direct attack upon it;[77] according to others, such a proceeding is collateral.[78]

aside. International, etc., R. Co. *v.* Moore, (Tex. Civ. App. 1895) 32 S. W. 379.

71. Mitchell *v.* State Bank, 2 Ill. 526; Wallace *v.* Usher, 4 Bibb (Ky.) 508.

72. Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027; Selders *v.* Boyle, 5 Kan. App. 451, 49 Pac. 320; Haupt *v.* Simington, 27 Mont. 480, 71 Pac. 672, 94 Am. St. Rep. 839; Foster *v.* Crawford, 80 Fed. 991.

73. Glover *v.* People, 188 Ill. 576, 59 N. E. 429 (an attack on a judgment confirming a special assessment made in an application for a judgment of sale is a collateral attack); Frost *v.* McLeod, 19 La. Ann. 69; O'Neil *v.* Martin, 1 E. D. Smith (N. Y.) 404; Lee *v.* Watkins, 3 Abb. Pr. (N. Y.) 243; Clinkscales *v.* Hall, 15 S. C. 602.

74. Morley *v.* Stringer, 133 Mich. 690, 95 N. W. 978; Baldwin *v.* Baer, 10 Wash. 414, 39 Pac. 117; Ceredo First Nat. Bank *v.* Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878.

Impeachment for fraud see Wilson Cotton Mills *v.* C. C. Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431, holding that it is permissible for defendant, by way of counterclaim, in answer to a creditor's bill, to impeach the judgment for fraud and demand that it be vacated.

75. Brewster *v.* Denison, 1 Root (Conn.) 231. And see Trope *v.* Kerns, (Cal. 1888) 20 Pac. 82.

76. *Colorado.*— Rio Grande County *v.* Burpee, 24 Colo. 57, 48 Pac. 539; People *v.* Rio Grande County, 11 Colo. App. 124, 52 Pac. 748.

Iowa.— Edmundson *v.* Independent School Dist., 98 Iowa 639, 67 N. W. 671, 60 Am. St. Rep. 224.

Kansas.— Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439.

Nebraska.— Stenberg *v.* State, 48 Nebr. 299, 67 N. W. 190.

New Mexico.— U. S. Trust Co. *v.* Territory, (1900) 62 Pac. 987.

New York.— People *v.* Buffalo, 21 N. Y. Suppl. 598.

North Carolina.— Bear *v.* Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711.

South Dakota.— Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493.

Texas.— Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258; Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120.

Washington.— Smith *v.* Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110; State *v.* Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373.

United States.— Harshman *v.* Knox County Ct., 122 U. S. 306, 7 S. Ct. 1171, 30 L. ed. 1152; U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225; Davenport *v.* U. S., 9 Wall. 409, 19 L. ed. 704; Supervisors *v.* U. S., 4 Wall. 435, 18 L. ed. 419; Helena *v.* U. S., 104 Fed. 113, 43 C. C. A. 429; Geer *v.* Ouray County, 97 Fed. 435, 38 C. C. A. 250; Fleming *v.* Trowsdale, 85 Fed. 189, 29 C. C. A. 106; Holt County *v.* National L. Ins. Co., 80 Fed. 686, 25 C. C. A. 469; Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87; New Orleans *v.* U. S., 49 Fed. 40, 1 C. C. A. 148; Hill *v.* Scotland County Ct., 32 Fed. 716; Moore *v.* Edgefield, 32 Fed. 498; Clews *v.* Lee County, 2 Woods 474, 5 Fed. Cas. No. 2,892.

Invalidity may be shown.— In a proceeding of this kind, it may be shown that the judgment is absolutely void for want of jurisdiction (Moore *v.* Edgefield, 32 Fed. 498. *Compare* Boasen *v.* State, 47 Nebr. 245, 66 N. W. 303), and the writ of mandamus will be refused where it appears on the face of the record, not that mere error supervened in the rendition of the judgment, but that it rested upon no cause of action whatever (Brownsville Taxing Dist. *v.* Loague, 129 U. S. 493, 9 S. Ct. 327, 32 L. ed. 780).

Action to enjoin tax.— The same principles apply in an action to enjoin the collection of a tax levied to pay a judgment against a municipal corporation; the validity of the claim on which the judgment rests cannot be questioned, the judgment being conclusive against collateral attack by the municipality or by any individual taxpayer. Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

77. *Colorado.*— Smith *v.* Morrill, 12 Colo. App. 233, 55 Pac. 824, 11 Colo. App. 284, 52 Pac. 1110.

Georgia.— Williams *v.* Lancaster, 113 Ga. 1020, 39 S. E. 471.

Iowa.— Brakke *v.* Hoskins, 98 Iowa 233, 67 N. W. 235.

Ohio.— Waite *v.* Ellis, 8 Ohio S. & C. Pl. Dec. 51, 5 Ohio N. P. 415.

Texas.— Dashner *v.* Wallace, 29 Tex. Civ. App. 151, 68 S. W. 307; Hamburger *v.* Kosminsky, (Civ. App. 1901) 61 S. W. 958; Fayssoux *v.* Kendall County, (Civ. App. 1900) 55 S. W. 583.

See 30 Cent. Dig. tit. "Judgment," § 964.

78. *California.*— Le Mesnager *v.* Variel, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91.

But conceding the latter view to be correct, it is no objection to the maintenance of a suit for that purpose that it involves a collateral impeachment of the judgment, provided the demand for relief is based on want of jurisdiction, fraud, or some other distinctive ground of equitable interference, although it is not permissible in such an action to review mere errors or overthrow the judgment for mere irregularities.[79] And the same is true of an application for a writ of prohibition to forbid the court to enforce its judgment,[80] and of a direct action to impeach and avoid the judgment,[81] or of a cross complaint[82] or cross bill attacking the judgment in an action in which it is sought to be enforced.[83] But the validity of a judgment cannot be impeached on a motion to quash an execution issued on it.[84]

4. SEPARATE ACTION AGAINST PARTY OR OFFICER. The validity or correctness of a judgment cannot be impeached in a subsequent action brought by the former defendant against the former plaintiff, involving the same issues,[85] or in an action to recover back the money paid under the judgment,[86] or for fraud and conspiracy in obtaining the judgment.[87] Nor can it be impeached in an action of

Indiana.— Davis *v.* Osborn, 156 Ind. 86, 59 N. E. 279; Duncan *v.* Lankford, 145 Ind. 145, 44 N. E. 12. But the rule is otherwise when fraud is asserted. Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687.

Maryland.— Peters *v.* League, 13 Md. 58, 71 Am. Dec. 622.

Missouri.— Missouri, etc., R. Co. *v.* Warden, 73 Mo. App. 117.

Oklahoma.— Crist *v.* Cosby, 11 Okla. 635, 69 Pac. 885.

Tennessee.— Wood *v.* Elam, 4 Baxt. 431.

See 30 Cent. Dig. tit. "Judgment," § 464.

79. *Indiana.*— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Krug *v.* Davis, 85 Ind. 309.

Mississippi.— A. B. Smith Co. *v.* Holmes County Bank, (1895) 18 So. 847.

Missouri.— Munday *v.* Leeper, 120 Mo. 417, 25 S. W. 381.

Montana.— Alexander *v.* Fransham, 26 Mont. 496, 68 Pac. 945.

South Carolina.— Kirk *v.* Duren, 45 S. C. 597, 23 S. E. 954.

Virginia.— Hudson *v.* Yost, 88 Va. 347, 13 S. E. 436.

Wisconsin.— Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571.

80. Davison *v.* Hough, 165 Mo. 561, 65 S. W. 731.

81. Penrose *v.* McKinzie, 116 Ind. 35, 18 N. E. 384. See also Reid *v.* Mitchell, 93 Ind. 469.

82. Hallack *v.* Loft, 19 Colo. 74, 34 Pac. 568; Relender *v.* Riggs, 20 Colo. App. 423, 79 Pac. 328.

83. Clevenger *v.* Mayfield, (Tex. Civ. App. 1905) 86 S. W. 1062.

84. Shorter *v.* Mims, 18 Ala. 655; Jones *v.* George, 80 Md. 294, 30 Atl. 635; State *v.* Berry, 9 Mo. App. 42; Merrick *v.* Merrick, 5 Mo. App. 123; Skidmore *v.* Bradford, 4 Pa. St. 296.

A motion to set aside an execution, on the ground that the judgment was obtained by fraud, is a direct attack on the judgment, and not collateral; but otherwise, where the ground of the motion is that the judgment was dormant and that it contained entries dated prior to its date. Kelsey *v.* Wyley, 10 Ga. 371.

85. Smith *v.* Kelly, 2 Hall (N. Y.) 217.

Ejectment.— In Indiana, under a statute providing that defendant in ejectment may show, under a general denial, any defence "either legal or equitable," where plaintiff's title in such action is based on a sheriff's sale under a judgment by default, defendant may attack the judgment by showing that it was rendered on matters not in issue. Richcreek *v.* Russell, 34 Ind. App. 217, 72 N. E. 617.

86. *Connecticut.*— Carter *v.* Canterbury First Ecclesiastical Soc., 3 Conn. 455; Peck *v.* Woodbridge, 3 Day 30; Brunson *v.* Bacon, 1 Root 210.

Maine.— Morton *v.* Chandler, 7 Me. 44.

Massachusetts.— Homer *v.* Fish, 1 Pick. 435, 11 Am. Dec. 218; Loring *v.* Mansfield, 17 Mass. 394.

Missouri.— New Madrid County *v.* Phillips, 125 Mo. 61, 28 S. W. 321.

Oregon.— See Pacific Lumber Co. *v.* Prescott, 40 Oreg. 374, 67 Pac. 207.

Texas.— Brooks *v.* Powell, (Civ. App. 1895) 29 S. W. 809.

See 30 Cent. Dig. tit. "Judgment," § 965.

Overpayment.— A purchaser having paid, by notes and in cash, for more goods than he received, allowed judgment to be recovered on the notes; but it was held that he might maintain an action for such overpayment, the judgment not being thereby impeached. Whitcomb *v.* Williams, 4 Pick. (Mass.) 228.

87. Peck *v.* Woodbridge, 3 Day (Conn.) 30; Shultz *v.* Shultz, 136 Ind. 323, 36 N. E. 126, 43 Am. St. Rep. 320; Stevens *v.* Rowe, 59 N. H. 578, 47 Am. Rep. 231. *Compare* Tate *v.* Conger, 89 Iowa 242, 56 N. W. 456; Cowen *v.* Bloomberg, 69 N. J. L. 462, 55 Atl. 36.

Breach of agreement to discontinue.— If a plaintiff agrees to discontinue the action, and in reliance thereon defendant makes no defense, but plaintiff nevertheless takes judgment, it is held, in Massachusetts, that an action will lie to recover damages for the fraud and breach of promise, as this does not

replevin or trespass,[88] or a suit against the officers concerned in the entry of the judgment or its execution.[89]

D. Parties Affected by Rule Against Collateral Attack — 1. Parties and Privies. The rule forbidding the collateral impeachment of judgments applies to all persons who were parties to the action in which the judgment was rendered[90] and to all those who are in privity with them.[91]

amount to a collateral impeachment of the judgment. Smith *v.* Palmer, 6 Cush. (Mass.) 513. *Contra*, Farrington *v.* Bullard, 40 Barb. (N. Y.) 512.

88. Thurston *v.* Boardman, Wils. (Ind.) 433; Russell *v.* Gray, 11 Barb. (N. Y.) 541.

89. Anderson *v.* Elliott, 101 Fed. 609, 41 C. C. A. 521.

For example the validity of the judgment cannot be impeached in an action against the sheriff for failure to return the execution (Vicksburg Grocery Co. *v.* Brennan, (Miss. 1896) 20 So. 845), nor in an action by one officer against another for the proceeds of a sale (Stephenson *v.* Newcomb, 5 Harr. (Del.) 150). But it is said that a suit on the bond of a clerk of court for charging illegal fees as costs is not a collateral attack on the judgment for costs. State *v.* Stevens, 103 Ind. 55, 2 N. E. 214, 53 Am. Rep. 482.

90. *California.*— Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849.

Connecticut.— Clark *v.* Platt, 30 Conn. 282; Haydock *v.* Cobb, 5 Day 527.

Georgia.— Hightower *v.* Williams, 38 Ga. 597.

Illinois.— Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206.

Indiana.— Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; Mannix *v.* State, 115 Ind. 245, 17 N. E. 565; Lantz *v.* Maffett, 102 Ind. 23, 26 N. E. 195.

Iowa.— Webster *v.* Reid, Morr. 467.

Louisiana.— Equitable Securities Co. *v.* Block, 51 La. Ann. 478, 25 So. 271; Canal, etc., Co. *v.* De Lizardi, 20 La. Ann. 285.

Maine.— Coffin *v.* Freeman, 84 Me. 535, 24 Atl. 986.

Maryland.— Taylor *v.* State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852.

Massachusetts.— Vose *v.* Morton, 4 Cush. 27, 50 Am. Dec. 750.

Michigan.— Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067.

New York.— Ashton *v.* Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619; Hess *v.* Smith, 16 Misc. 55, 37 N. Y. Suppl. 635; Griswold *v.* Stewart, 4 Cow. 457; Davoue *v.* Fanning, 4 Johns. Ch. 199.

Ohio.— Lofthouse *v.* Thornton, 1 Ohio Dec. (Reprint) 219 note, 4 West. L. J. 528.

Pennsylvania.— Miltimore *v.* Miltimore, 40 Pa. St. 151; Davidson *v.* Thornton, 7 Pa. St. 128; Ulrich *v.* Voneida, 1 Penr. & W. 245.

Texas.— Tadlock *v.* Eccles, 20 Tex. 782, 73 Am. Dec. 213.

Vermont.— Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976.

United States.— Laing *v.* Rigney, 160 U. S. 531, 16 S. Ct. 366, 40 L. ed. 525.

See 30 Cent. Dig. tit. "Judgment," § 923.

Party improperly joined.— A person made a party to a partition proceeding, who has no interest in the land and is not a necessary or a proper party to the proceeding, and as to whom no adjudication is made, is not estopped to deny the validity of the sale. Miller *v.* Wright, 109 N. Y. 194, 16 N. E. 205.

Joint defendants.— Where a judgment rendered against several defendants is invalid as to some of them, for want of jurisdiction over them, it is not void *in toto*, and cannot be impeached collaterally by those as to whom the court had jurisdiction. Murdock *v.* Browder, 5 Mart. N. S. (La.) 677; Jasper County *v.* Mickey, (Mo. 1887) 4 S. W. 424; Holton *v.* Towner, 81 Mo. 360; Bailey *v.* McGinniss, 57 Mo. 362.

91. Johnson *v.* Thaxter, 7 Gray (Mass.) 242.

Corporation and stock-holders.— A stockholder in a corporation against which a judgment has been recovered, who may be made liable for its payment, is a privy in law and cannot attack the judgment collaterally. Came *v.* Brigham, 39 Me. 35; National Foundry, etc., Works *v.* Oconto Water Co., 68 Fed. 1006; Graham *v.* Boston, etc., R. Co., 14 Fed. 753.

Bondholder and trustee in a corporation mortgage are in privity, and the former cannot impeach a judgment to which the latter was a party, at least without alleging actual fraud. Kent *v.* Lake Superior Ship Canal, etc., Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. ed. 352.

Municipal corporation and citizens.— A judgment against a school-district cannot be impeached collaterally by an inhabitant whose property has been taken to satisfy it. McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689.

Executor and heirs.— A judgment against an executor is *prima facie* evidence of the debt, as against the heirs of decedent, and cannot be attacked by them collaterally save on the ground of fraud. Sidener *v.* Hawes, 37 Ohio St. 532; Atherton *v.* Atherton, 2 Pa. St. 112; Schmidt's Estate, 4 Pa. Dist. 161. *Compare* Woolridge *v.* Page, 1 Lea (Tenn.) 135; Neal *v.* McComb, 2 Yerg. (Tenn.) 10. See also Executors and Administrators, 18 Cyc. 1054.

Assignee for creditors.— An assignee for the benefit of creditors cannot collaterally impeach a judgment against his assignor. Johnson *v.* Thaxter, 7 Gray (Mass.) 242; Finley *v.* Houser, 22 Oreg. 562, 30 Pac. 494;

2. THIRD PERSONS IN GENERAL. A stranger to the record — who was not a party to the action in which the judgment was rendered nor in privity with a party — is not prohibited from impeaching the validity of the judgment in a collateral proceeding;[92] but in order to do so he must show that he has rights, claims, or interests which would be prejudiced or injuriously affected by the enforcement of the judgment,[93] and which accrued prior to its rendition.[94] Thus situated he may attack the judgment on the ground of want of jurisdiction,[95] or for fraud or collu-

People's Bank *v.* Williams, (Tenn. Ch. App. 1896) 36 S. W. 983. And persons claiming land under such assignee cannot collaterally assail a judgment rendered against the assignee subjecting the land to the payment of a creditor's claim. Gonzales *v.* Batts, 20 Tex. Civ. App. 421, 50 S. W. 403.

Partners.— Where a partnership note is executed by one partner, without the knowledge or consent of the others, to secure his individual debt, and judgment is recovered on it against the firm, the other partners may show, even collaterally, that the judgment is fraudulent. McNaughton's Appeal, 101 Pa. St. 550.

92. *Alabama.*— Shamblin *v.* Hall, 123 Ala. 541, 26 So. 285.

Indiana.— Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

Louisiana.— Wolfe *v.* Jouhert, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772; Quinn's Succession, 30 La. Ann. 947.

Maine.— Buffum *v.* Ramsdell, 55 Me. 252, 92 Am. Dec. 589; Caswell *v.* Caswell, 28 Me. 232.

Massachusetts.— Vose *v.* Morton, 4 Cush. 27, 50 Am. Rep. 750; Downs *v.* Fuller, 2 Metc. 135, 35 Am. Dec. 393.

Michigan.— Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834.

New Jersey.— Vanderveere *v.* Gaston, 24 N. J. L. 818.

Pennsylvania.— *In re* Rowland Estate, 7 Pa. L. J. 312; Building Assoc. *v.* O'Connor, 3 Phila. 453.

South Carolina.— Waddle *v.* Cureton, 2 Speers 53.

Vermont.—Atkinson *v.* Allen, 12 Vt. 619, 36 Am. Dec. 361.

Contra.— Lathrop *v.* American Emigrant Co., 41 Iowa 547; Hardin *v.* Lee, 51 Mo. 241.

93. *Illinois.*— Allison *v.* Drake, 145 Ill. 500, 32 N. E. 537.

Kentucky.— Roberts *v.* Yancey, 94 Ky. 243, 21 S. W. 1047, 15 Ky. L. Rep. 10, 42 Am. St. Rep. 357.

Louisiana.— Wolf *v.* Joubert, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772.

Massachusetts.— Wellington *v.* Gale, 13 Mass. 483, holding that a mere disseizor in possession cannot object to the title of one claiming under a judgment against a prior owner that such judgment was fraudulently obtained.

Michigan.— Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834.

Mississippi.— Bergman *v.* Hutcheson, 60 Miss. 872; Velentine *v.* McGrath, 52 Miss. 112.

Missouri.— Russell *v.* Grant, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563.

Pennsylvania.— Glass *v.* Gilbert, 58 Pa. St. 266.

South Carolina.— Gregg *v.* Bigham, 1 Hill 299, 26 Am. Dec. 181.

Texas.—Grassmeyer *v.* Benson, 18 Tex. 753, 70 Am. Dec. 309; Grant *v.* Hill, (Civ. App. 1894) 30 S. W. 952.

Virginia.— Staunton Perpetual Bldg., etc., Co. *v.* Haden, 92 Va. 201, 23 S. E. 285; Young *v.* McClung, 9 Gratt. 336.

Garnishees.— A garnishee may impeach the validity of the judgment against the principal debtor on the ground of a want of jurisdiction over such debtor, but will not be permitted to assail it on the ground of any mere errors or irregularities. Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405; Debbs *v.* Dalton, (Ind. 1892) 32 N. E. 570; Schoppenhast *v.* Bollman, 21 Ind. 280; Matheny *v.* Galloway, 12 Sm. & M. (Miss.) 475; Whitehead *v.* Henderson, 4 Sm. & M. (Miss.) 704; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421; Nevatt *v.* Springfield Normal School, 79 Mo. App. 198.

94. Hogg *v.* Link, 90 Ind. 346; Johns *v.* Pattee, 55 Iowa 665, 8 N. W. 663; Brace *v.* Reid, 3 Greene (Iowa) 422; Hoy *v.* Scott, 22 La. Ann. 415; Bangs *v.* Beacham, 68 Me. 425.

95. *Arkansas.*— Borden *v.* State, 11 Ark. 519, 44 Am. Dec. 217.

Illinois.— Freydendall *v.* Baldwin, 103 Ill. 325; Martin *v.* Judd, 60 Ill. 78.

Indiana.— Deisner *v.* Simpson, 72 Ind. 435.

Louisiana.— Quine *v.* Mayes, 2 Rob. 510; Collins *v.* Batterson, 3 La. 242.

Maine.— Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Caswell *v.* Caswell, 28 Me. 232.

Massachusetts.— Vose *v.* Morton, 4 Cush. 27, 50 Am. Rep. 750.

Nebraska.— Colby *v.* Brown, 10 Nebr. 413, 6 N. W. 474.

Nevada.— Coffin *v.* Bell, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

New York.— Denman *v.* McGuire, 101 N. Y. 161, 4 N. E. 278.

North Carolina.— Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

Ohio.— Fahs *v.* Taylor, 10 Ohio 104; Bryans *v.* Taylor, Wright 245.

South Carolina.— Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736.

Virginia.— Staunton Perpetual Bldg., etc., Co. *v.* Haden, 92 Va. 201, 23 S. E. 285.

See 30 Cent. Dig. tit. "Judgment," § 932.

sion;[96] but he cannot object to it on account of mere errors or irregularities,[97] or for any matters which might have been set up in defense to the original action.[98]

3. Creditors — a. Rights in General. Creditors of a judgment defendant are within the rule stated in the preceding section, and may impeach the judgment collaterally within the limitations there laid down.[99]

b. Showing Fraud and Collusion. It is always open to creditors whose rights or claims would be injuriously affected by the enforcement of a judgment against their debtor, to impeach its validity on the ground that it is fraudulent as against them.[1] But the fraud which will justify such an attack must be fraud designed

96. *Connecticut.*— Cook *v.* Morris, 66 Conn. 137, 33 Atl. 594.
Georgia.— Wilson *v.* Williams, 115 Ga. 474, 41 S. E. 629.
Louisiana.— Meeker *v.* Williamson, 8 Mart. 365.
Maine.— Childs *v.* Ham, 23 Me. 74.
Pennsylvania.— Hanika's Estate, 138 Pa. St. 330, 22 Atl. 90, 21 Am. St. Rep. 907; Drexel's Appeal, 6 Pa. St. 272; Lowber's Appeal, 8 Watts & S. 387, 42 Am. Dec. 302.
South Carolina.— Sullivan *v.* Ball, 55 S. C. 343, 33 S. E. 486.
See 30 Cent. Dig. tit. "Judgment," § 957.

97. *California.*— Dunn *v.* Dunn, 114 Cal. 210, 46 Pac. 5.
Illinois.— Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418.
Indiana.— State *v.* Rogers, 131 Ind. 458, 31 N. E. 199.
Louisiana.— Baudin *v.* Roliff, 1 Mart. N. S. 165, 14 Am. Dec. 181.
Maine.— Blaisdell *v.* Pray, 68 Me. 269; Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527.
Maryland.— Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.
Missouri.— Mylar *v.* Hughes, 60 Mo. 105. *Compare* Hauser *v.* Hoffman, 32 Mo. 334.
Nebraska.— Connelly *v.* Edgerton, 22 Nebr. 82, 34 N. W. 76.
New Jersey.— Dean *v.* Thatcher, 32 N. J. L. 470; Hendrickson *v.* Norcross, 19 N. J. Eq. 417.
North Carolina.— Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924 (holding that a tenant in common, who was not a party to a suit brought by a cotenant to set aside a deed executed by their common ancestor to defendant in that suit, cannot take advantage of an error in the judgment rendered therein); Rollins *v.* Henry, 78 N. C. 342.
Pennsylvania.— Lair *v.* Hunsicker, 28 Pa. St. 115; Breading *v.* Boggs, 20 Pa. St. 33; Drexel's Appeal, 6 Pa. St. 272; Building Assoc. *v.* O'Connor, 3 Phila. 453.
South Carolina.— Mills *v.* Dickson, 6 Rich. 487.
Texas.— Carter *v.* Roland, 53 Tex. 540.
United States.— Secrist *v.* Green, 3 Wall. 744, 18 L. ed. 153; Gregg *v.* Forsyth, 24 How. 179, 16 L. ed. 731.
See 30 Cent. Dig. tit. "Judgment," § 950.

98. Black *v.* Pattison, 61 Miss. 599; Pollard *v.* Eckford, 50 Miss. 631; Lewis *v.* Rogers, 16 Pa. St. 18; Rogers *v.* Farfield, 36 Vt. 641.

99. *Georgia.*— Scott *v.* Pound, 61 Ga. 579.
Louisiana.— Bedell *v.* Hayes, 21 La. Ann. 643; Dinkgrave *v.* Norwood, 10 La. Ann. 564.
Maine.— Caswell *v.* Caswell, 28 Me. 232.
Michigan.— Hinchman *v.* Town, 10 Mich. 508.
Pennsylvania.— Reed's Appeal, 71 Pa. St. 378; Girard L. Ins., etc., Co. *v.* Farmers', etc., Nat. Bank, 57 Pa. St. 388.
South Carolina.— Darby *v.* Shannon, 19 S. C. 526.

1. *Alabama.*— Streety *v.* McCurdy, 104 Ala. 493, 16 So. 686; Kilgore *v.* Kilgore, 103 Ala. 614, 15 So. 897; Newlin *v.* McAfee, 64 Ala. 357.
California. — Hackett *v.* Manlove, 14 Cal. 85.
Connecticut.— Cook *v.* Morris, 66 Conn. 137, 33 Atl. 594.
Georgia.— Smith *v.* Cuyler, 78 Ga. 654, 3 S. E. 406; Hammock *v.* McBride, 6 Ga. 178.
Indiana.— De Armond *v.* Adams, 25 Ind. 455.
Kentucky.— Faris *v.* Durham, 5 T. B. Mon. 397, 17 Am. Dec. 77.
Louisiana.— Gilbert *v.* Nephler, 15 La. 59.
Maine.— Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Pierce *v.* Strickland, 26 Me. 277.
Maryland.—Allein *v.* Sharp, 7 Gill & J. 96.
Massachusetts.— Vose *v.* Morton, 4 Cush. 27, 50 Am. Dec. 750; Leonard *v.* Bryant, 11 Metc. 370; Downs *v.* Fuller, 2 Metc. 135, 35 Am. Dec. 393; Smith *v.* Saxton, 6 Pick. 483; Alexander *v.* Gould, 1 Mass. 165.
Michigan.— Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834.
Missouri.— Callahan *v.* Griswold, 9 Mo. 784; Myers *v.* Miller, 55 Mo. App. 338.
New Hampshire.— Great Falls Mfg. Co. *v.* Worster, 45 N. H. 110.
New Jersey.— Palmer *v.* Martindell, 43 N. J. Eq. 90, 10 Atl. 802.
New York.— Bridgeport F. & M. Ins. Co. *v.* Wilson, 34 N. Y. 275; Baker *v.* Byrn, 89 Hun 115, 35 N. Y. Suppl. 55; Childs *v.* Latham, 9 N. Y. Suppl. 619.
Ohio.— Raymond *v.* Whitney, 5 Ohio St. 201; Kit Carter Cattle Co. *v.* McGillin, 10 Ohio S. & C. Pl. Dec. 146, 7 Ohio N. P. 575.
Pennsylvania.— Sager *v.* Mead, 164 Pa. St. 125, 30 Atl. 284; Hanika's Estate, 138 Pa. St. 330, 22 Atl. 90, 21 Am. St. Rep. 907; Meckley's Appeal, 102 Pa. St. 536; Mc-

to injure the attacking creditor, or at least such as directly affects his interests; fraud practised upon the debtor is not sufficient.[2] And the privilege can be claimed only by a party having rights which had vested or accrued at the time the judgment was rendered, and which would be impaired or prejudiced if it were allowed full effect as against them.[3] Subsequent creditors cannot generally assail the prior judgment.[4]

E. Grounds For Collateral Impeachment — 1. Invalidity of Judgment — a. In General. A judgment which is absolutely void is entitled to no authority or respect, and therefore may be impeached in collateral proceedings by any one with whose rights or interests it conflicts.[5] But if the judgment is merely voidable, that is, so irregular or defective that it would be set aside or annulled on a proper direct application for that purpose, and not absolutely void, it is well

Naughton's Appeal, 101 Pa. St. 550; Titusville Second Nat. Bank's Appeal, 85 Pa. St. 528; Thompson's Appeal, 57 Pa. St. 175; Roemer *v.* Denig, 18 Pa. St. 482; Caldwell *v.* Walters, 18 Pa. St. 79, 55 Am. Dec. 592; Watson *v.* Willard, 9 Pa. St. 89; Mitchell *v.* Kintzer, 5 Pa. St. 216, 47 Am. Dec. 408; Hall *v.* Hamlin, 2 Watts 354; Com. *v.* Price, 15 Pa. Super. Ct. 342. See also Stevens *v.* Brown, 2 Pa. Cas. 540, 4 Atl. 384.

South Carolina.— Norton *v.* Wallace, 2 Rich. 460; Colhurn *v.* Matthews, 2 Rich. 386.

Tennessee.— Brightwell *v.* Mallory, 10 Yerg. 196.

Texas.— Blankenship *v.* Wartelsky, (1887) 6 S. W. 140; Murchison *v.* White, 54 Tex. 78; Whiteselle *v.* Texas Loan Agency, (Civ. App. 1894) 27 S. W. 309.

Vermont.— Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94; Atkinson *v.* Allen, 12 Vt. 619, 36 Am. Dec. 361.

United States.— Gaines *v.* Relf, 12 How. 472, 13 L. ed. 1071.

England.— Philipson *v.* Egremont, 6 Q. B. 587, 14 L. J. Q. B. 25, 51 E. C. L. 587; Perry *v.* Meddowcroft, 10 Beav. 122, 50 Eng. Reprint 529; Bandon *v.* Becher, 9 Bligh N. S. 532, 5 Eng. Reprint 1388, 3 Cl. & F. 479, 6 Eng. Reprint 1517; Crosby *v.* Leng, 12 East 409, 11 Rev. Rep. 437. *Compare* Kingston's Case, 20 How. St. Tr. 355.

See 30 Cent. Dig. tit. "Judgment," § 958. See also Fraudulent Conveyances, 20 Cyc. 397.

Confessed judgment.— A judgment confessed without any consideration and with a fraudulent intent may be attacked by any creditor whose interests are adversely affected by it. Chase *v.* Tuckwood, 86 Ill. App. 70; Atlas Nat. Bank *v.* More, 40 Ill. App. 336; Bryant *v.* Harding, 29 Mo. 347; Shallcross *v.* Deats, 43 N. J. L. 177; Chandler *v.* Thompson, 120 Fed. 940, 57 C. C. A. 230. But a confession of judgment for the express purpose of enabling the creditor to redeem from a sale under a prior judgment is not fraudulent as against the purchaser, for the policy of the law is to encourage redemptions. Karnes *v.* Lloyd, 52 Ill. 113. See Fraudulent Conveyances, 20 Cyc. 398.

Proof required.— As the law always favors the stability and finality of judgments, it is held that a stranger who seeks in a collateral action to impeach a judgment as a fraud upon his rights must show the fraud by clear and satisfactory proof. Hulverson *v.* Hutchinson, 39 Iowa 316; Clark *v.* Bailey, 2 Strobh. Eq. (S. C.) 143; American Nat. Bank *v.* Supplee, 115 Fed. 657, 52 C. C. A. 293.

2. McAlpine *v.* Sweetser, 76 Ind. 78; Miners' Trust Co. Bank *v.* Roseberry, 81 Pa. St. 309; Sheetz *v.* Hanbest, 81 Pa. St. 100; Thompson's Appeal, 57 Pa. St. 175; Lewis *v.* Rogers, 16 Pa. St. 18; *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Safe-Deposit, etc., Co. *v.* Wright, 105 Fed. 155, 44 C. C. A. 421.

3. Hackett *v.* Manlove, 14 Cal. 85; De Armond *v.* Adams, 25 Ind. 455; Spicer *v.* Waters, 65 Barb. (N. Y.) 227; Grant *v.* Hill, (Tex. Civ. App. 1894) 30 S. W. 952.

Attaching creditors.— If an attaching creditor's process has been levied on tangible property of the debtor, he may attack as fraudulent a prior judgment by confession, although his own claim has not yet been reduced to judgment. Bates *v.* Plonsky, 28 Hun (N. Y.) 112; Bentley *v.* Goodwin, 38 Barb. (N. Y.) 633 [*distinguished* in Bowe *v.* Arnold, 31 Hun (N. Y.) 256]; Tannenbaum *v.* Rosswog, 6 N. Y. Suppl. 578, 22 Abb. N. Cas. 346.

4. Lewis *v.* Peterkin, 39 La. Ann. 780, 2 So. 577; Zug *v.* Searight, 150 Pa. St. 506, 24 Atl. 746; *In re* Quickel, 11 York Leg. Rec. (Pa.) 150.

But in Indiana, by the provisions of a statute, subsequent as well as existing creditors can collaterally impeach for fraud a judgment entered on confession. Feaster *v.* Woodfill, 23 Ind. 493.

5. White County *v.* Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; Reed *v.* Wright, 2 Greene (Iowa) 15; Decuir *v.* Decuir, 105 La. 481, 29 So. 932; Rich *v.* Mentz, 134 U. S. 632, 10 S. Ct. 610, 33 L. ed. 1074; Kansas City, etc., R. Co. *v.* Morgan, 76 Fed. 429, 21 C. C. A. 468; Hatch *v.* Ferguson, 68 Fed. 43, 15 C. C. A. 201, 33 L. R. A. 759; Oswald *v.* Kampmann, 28 Fed. 36.

Against dissolved corporation.— A judgment against a national bank which has gone into voluntary liquidation, and to dissolve which proper steps have been taken, is void and may be attacked collaterally. Hodgson *v.* McKinstrey, 3 Kan. App. 412, 42 Pac. 929.

settled as a general rule that it is impregnable to collateral impeachment so long as it stands unreversed and in force.[6]

b. Insufficient or Illegal Cause of Action. A judgment cannot be impeached collaterally on account of any illegality or insufficiency in the cause of action on which it is founded, this not being a jurisdictional defect or sufficient to render the judgment void.[7] Thus under this rule it is not permissible to attack the judgment on the ground that the claim in suit had been paid or satisfied,[8] or was not supported by a consideration,[9] or was not yet due at the time the action was

6. *California.*— Johnson *v.* Friant, 140 Cal. 260, 73 Pac. 993; Bostic *v.* Love, 16 Cal. 69.

Indiana.— Ringgenberg *v.* Hartman, (1889) 20 N. E. 637.

Iowa.— Warren County *v.* Polk County, 89 Iowa 44, 56 N. W. 281.

Kentucky.— Cumberland Bank *v.* Simpson, 77 S. W. 695, 25 Ky. L. Rep. 1227.

Louisiana.— Ludeling *v.* Chaffe, 40 La. Ann. 645, 4 So. 586.

Maine.— Toothaker *v.* Greer, 92 Me. 546, 43 Atl. 498.

Massachusetts.— Gridley *v.* Harraden, 14 Mass. 497.

Missouri.— Reed *v.* Nicholson, 158 Mo. 624, 59 S. W. 977; Posthlewaite *v.* Ghiselin, 97 Mo. 420, 10 S. W. 482.

Nebraska.— Dryden *v.* Parrotte, 61 Nebr. 339, 85 N. W. 287.

New Hampshire.— Small *v.* Benfield, 66 N. H. 206, 20 Atl. 284.

New York.— Wilson *v.* Æolian Co., 170 N. Y. 618, 63 N. E. 1123; Livingston *v.* Livingston, 56 N. Y. App. Div. 484, 67 N. Y. Suppl. 789; Wooster Bank *v.* Spencer, Clarke 386.

North Carolina.— Rollins *v.* Love, 97 N. C. 210, 2 S. E. 166.

Pennsylvania.— Dauberman *v.* Hain, 196 Pa. St. 435, 46 Atl. 442.

West Virginia.— St. Lawrence Boom, etc., Co. *v.* Holt, 51 W. Va. 352, 41 S. E. 351; Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

Wisconsin.— Johnson *v.* Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363; Saunderson *v.* Lace, 1 Chandl. 231.

United States.— Mellen *v.* Moline Malleable Iron Works, 131 U. S. 352, 9 S. Ct. 781, 33 L. ed. 178; Walker *v.* Sturbans, 38 Fed. 298; Wittemore *v.* Malcomson, 28 Fed. 605.

See 30 Cent. Dig. tit. "Judgment." § 920.

Unconstitutional statute.— A judgment obtained under a statute which is afterward declared unconstitutional is valid until reversed, and cannot be impeached collaterally. Buckmaster *v.* Carlin, 4 Ill. 104; Cassel *v.* Scott, 17 Ind. 514.

Repealed statute.— Although a judgment was obtained under a law which had been virtually repealed by a treaty, declaring that no further proceedings should be taken under such law, still it cannot be avoided in a trial of title to lands claimed under such judgment. McNeil *v.* Bright, 4 Mass. 282.

Objections to jury.— A judgment rendered on the verdict of a jury, two of whose members were aliens, is erroneous and may be reversed on appeal, but is not subject to collateral attack. Foreman *v.* Hunter, 59 Iowa 550, 13 N. W. 659.

7. *Alabama.*— Allgood *v.* Whitley, 49 Ala. 215.

Georgia.— Lewis *v.* Armstrong, 45 Ga. 131; Delony *v.* Fort, 45 Ga. 122.

Illinois.— Rich *v.* Chicago, 187 Ill. 396, 58 N. E. 306; Martina *v.* Muhlke, 88 Ill. App. 12; Chase *v.* Tuckwood, 86 Ill. App. 70; Figge *v.* Rowlen, 84 Ill. App. 238.

Indiana.— White Water Valley Canal Co. *v.* Henderson, 3 Ind. 3.

Iowa.— Edmundson *v.* Jackson Independent School Dist., 98 Iowa 639, 67 N. W. 671, 60 Am. St. Rep. 224.

Maryland.— Gordon *v.* Baltimore, 5 Gill 231.

Missouri.— Knoll *v.* Woelken, 13 Mo. App. 275.

New York.— Nevitt *v.* Albany First Nat. Bank, 91 Hun 43, 36 N. Y. Suppl. 294.

North Carolina.— Bushee *v.* Surles, 77 N. C. 62.

Ohio.— Wooster Bank *v.* Stevens, 1 Ohio St. 233, 59 Am. Dec. 619; Gaw *v.* Glassboro Novelty Glass Co., 20 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec. 32.

Texas.— Holmes *v.* Buckner, 67 Tex. 107, 2 S. W. 452.

Wisconsin.— State *v.* Beloit, 20 Wis. 79.

Wyoming.— Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

See 30 Cent. Dig. tit. "Judgment," § 921.

Defective statement of cause of action in pleadings see *infra*, XI, E, 3, c.

Defective execution of mortgage.— Where judgment is entered on a mortgage, it will conclusively establish the due execution of the mortgage, although the latter may have been in fact void; the mortgage is merged in the judgment, which cannot be collaterally impeached unless for fraud. Woolery *v.* Grayson, 110 Ind. 149, 10 N. E. 935; Michaelis *v.* Brawley, 109 Pa. St. 7; Butterfield's Appeal, 77 Pa. St. 197; Hartman *v.* Ogborn, 54 Pa. St. 120, 93 Am. Dec. 679. See also MORTGAGES.

8. Hawley *v.* Simons, (Ill. 1887) 14 N. E. 7; Harrison *v.* Simmons, 44 N. C. 80; Hyder *v.* Smith, (Tenn. Ch. App. 1899) 52 S. W. 884.

9. Watson *v.* Camper, 119 Ind. 60, 21 N. E. 323; Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426.

A judgment recovered by a public officer for services rendered under a fixed employment cannot be impeached on the ground of

brought,[10] or that the creditor, proceeding by attachment, had no such demand as would entitle him to use that process,[11] or on the ground that the cause of action was based on a gambling transaction,[12] or was in violation of the Sunday laws,[13] or was otherwise tainted with illegality.[14]

c. Legal Disability of Parties. It is generally considered that a judgment against a person under the disability of coverture[15] or infancy,[16] or an insane person,[17] is not absolutely void, although it may be voidable, and therefore is not open to collateral attack. The same rule has been applied to a judgment obtained against a corporation after it had ceased to do business and transferred its property to a trustee for creditors.[18]

d. Death of Party Before Judgment. Where jurisdiction of the parties to an action has duly attached, the fact that one of them died before the rendition of the judgment, that fact not appearing of record, does not make the judgment absolutely void so as to permit its impeachment in a collateral proceeding.[19]

a subsequent discovery that no services were actually rendered, and that the official was wholly incompetent. Haskin *v.* New York, 11 Hun (N. Y.) 436.

10. Rockwell *v.* Jones, 21 Ill. 279; Robertson *v.* Huffman, 92 Ind. 247; Cornwell *v.* Hungate, 1 Ind. 156; Mikeska *v.* Blum, 63 Tex. 44.

11. Brantingham *v.* Brantingham, 12 N. J. Eq. 160; Harrison *v.* Pender, 44 N. C. 78, 57 Am. Dec. 573.

12. Chicago Driving Park *v.* West, 35 Ill. App. 496; Jacob *v.* Hill, 65 S. W. 21, 23 Ky. L. Rep. 1529. *Contra*, by statute. Campbell *v.* New Orleans Nat. Bank, 74 Miss. 526, 21 So. 400, 23 So. 25.

In New Jersey one who was not a party to the action in which the judgment was rendered may defend against it on the ground that it was founded on a gaming transaction. Sharp *v.* Stalker, 63 N. J. Eq. 596, 52 Atl. 1120. But this applies only in case of domestic judgments, not where the judgment was recovered in a foreign state on a gambling contract whose invalidity would have constituted a defense if pleaded in an action in New Jersey. McCanless *v.* Smith, 51 N. J. Eq. 505, 25 Atl. 211. See GAMING, 20 Cyc. 938.

13. Jenness *v.* Berry, 17 N. H. 549.

14. Wooster Bank *v.* Stevens, 1 Ohio St. 233, 59 Am. Dec. 619, usury.

Champerty.— In Kentucky, under a statute providing that neither party to a champertous contract shall have any right of action thereon, it is held that a judgment may be attacked, because of champerty, in a collateral proceeding. Roberts *v.* Yancey, 94 Ky. 243, 21 S. W. 1047, 15 Ky. L. Rep. 10, 42 Am. St. Rep. 357.

15. Equitable Securities Co. *v.* Bloch, 51 La. Ann. 478, 25 So. 271; Truesdail *v.* McCormick, 126 Mo. 39, 28 S. W. 885; Michaelis *v.* Brawley, 109 Pa. St. 7; Carson *v.* Taylor, 19 Tex. Civ. App. 177, 47 S. W. 395; Benson *v.* Cahill, (Tex. Civ. App. 1896) 37 S. W. 1088. And see HUSBAND AND WIFE, 21 Cyc. 1583.

16. Cohee *v.* Baer, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270; Smith *v.* Gray, 116 N. C. 311, 21 S. E. 200; Ludwick *v.* Fair, 29 N. C. 422, 47 Am. Dec. 333; Colt *v.* Colt, 111 U. S. 566, 4 S. Ct. 553, 28 L. ed. 520; Hatch *v.* Ferguson, 68 Fed. 43, 33 L. R. A. 759, 15 C. C. A. 201. And see INFANTS, 22 Cyc. 704.

17. Judd *v.* Gray, 156 Ind. 278, 59 N. E. 849; Thomas *v.* Hunsucker, 108 N. C. 720, 13 S. E. 221; Weaver *v.* Brenner, 145 Pa. St. 299, 21 Atl. 1010. And see INSANE PERSONS, 23 Cyc. 1245.

18. Temple *v.* Branch Saw Co., (Tex. Civ. App. 1905) 88 S. W. 442.

19. *Colorado.*— Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027.

Florida.— Collins *v.* Mitchell, 5 Fla. 364.

Illinois.— Claflin *v.* Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263; Davies *v.* Coryell, 37 Ill. App. 505.

Kentucky.— Case *v.* Ribelin, 1 J. J. Marsh. 29.

Minnesota.— Stocking *v.* Hanson, 22 Minn. 542.

Missouri.— Coleman *v.* McAnulty, 16 Mo. 173, 57 Am. Dec. 229.

Nebraska.— McCormick *v.* Paddock, 20 Nebr. 486, 30 N. W. 602; Jennings *v.* Simpson, 12 Nebr. 558, 11 N. W. 880.

Oregon.— Mitchell *v.* Schoonover, 16 Oreg. 211, 17 Pac. 867, 8 Am. St. Rep. 282.

Pennsylvania.— Murray *v.* Weigle, 118 Pa. St. 159, 11 Atl. 781; Carr *v.* Townsend, 63 Pa. St. 202; Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604.

Tennessee.— Buck *v.* Woods, 10 Heisk. 264. But where it was agreed in the court below that other cases should follow the judgment in a test case, such judgment may be shown to be invalid by evidence that defendant was dead when judgment was rendered. Nolan *v.* Cameron, 9 Lea 234.

Texas.— Howard *v.* McKenzie, 54 Tex. 171; Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336; Mills *v.* Alexander, 21 Tex. 154; Campbell *v.* Upson, (Civ. App. 1904) 81 S. W. 358.

Vermont.— Holt *v.* Thacher, 52 Vt. 592.

Virginia.— Evans *v.* Spurgin, 6 Gratt. 107, 52 Am. Dec. 105.

West Virginia.— Watt *v.* Bookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep.

Even where the party was dead before the institution of the suit, it is held that this does not make the judgment a mere nullity, within the meaning of the rule against collateral impeachment.[20]

2. Want of Jurisdiction — a. In General. A judgment void for want of jurisdiction is open to contradiction or impeachment in a collateral proceeding.[21]

811; King *v.* Burdett, 28 W. Va. 601, 57 Am. Rep. 687.

United States.— New Orleans *v.* Gaines, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102.

See 30 Cent. Dig. tit. "Judgment," § 922. And see *supra*, I, C, 2, a.

Contra.— Greenstreet *v.* Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735; Kager *v.* Vickery, 61 Kan. 342, 59 Pac. 628, 49 L. R. A. 153; Edwards *v.* Whited, 29 La. Ann. 647.

20. Fuqua *v.* Mullen, 13 Bush (Ky.) 467; McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227. But *compare* Thouvenin *v.* Rodrigues, 24 Tex. 468; Jones Lumber Co. *v.* Rhoades, 17 Tex. Civ. App. 665, 41 S. W. 102.

21. *Alabama.*— Wightman *v.* Karsner, 20 Ala. 446.

Arkansas.— Grimmett *v.* Askew, 48 Ark. 151, 2 S. W. 707; Evans *v.* Percifull, 5 Ark. 424.

Colorado.—Clayton *v.* Clayton, 4 Colo. 410; Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

Delaware.— Frankel *v.* Satterfield, 9 Houst. 201, 19 Atl. 898.

District of Columbia.— Tenney *v.* Taylor, 1 App. Cas. 223.

Georgia.— Central Bank *v.* Gibson, 11 Ga. 453; Mobley *v.* Mobley, 9 Ga. 247; Towns *v.* Springer, 9 Ga. 130.

Illinois.— Desnoyers Shoe Co. *v.* Litchfield First Nat. Bank, 89 Ill. App. 579 [*affirmed* in 188 Ill. 312, 58 N. E. 994]; Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418.

Indiana.— State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; Miller *v.* Snyder, 6 Ind. 1; Horner *v.* Doe, 1 Smith 10.

Iowa.— Beeman *v.* Kitzman, 124 Iowa 86, 99 N. W. 171; Ruppin *v.* McLachlan, 122 Iowa 343, 98 N. W. 153; Thornily *v.* Prentice, 121 Iowa 89, 96 N. W. 728, 100 Am. St. Rep. 317; Dicks *v.* Hatch, 10 Iowa 380.

Kansas.— Ewing *v.* Mallison, 65 Kan. 484, 70 Pac. 369.

Kentucky.— Kennedy *v.* Terrill, Hard. 490; Myers *v.* Pedigo, 72 S. W. 734, 24 Ky. L. Rep. 1923.

Massachusetts.— Smith *v.* Rice, 11 Mass. 507.

Michigan.— Tromble *v.* Hoffman, 130 Mich. 676, 90 N. W. 694; Adams *v.* Hubbard, 30 Mich. 104.

Minnesota — Thelen *v.* Thelen, 75 Minn. 433, 78 N. W. 108; Jewett *v.* Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555. *Compare* Kipp *v.* Fullerton, 4 Minn. 473.

Nebraska.— Banking House *v.* Dukes, (1903) 97 N. W. 805; Fogg *v.* Ellis, 61 Nebr. 829, 86 N. W. 494; Johnson *v.* Parrotte 46 Nebr. 51, 64 N. W. 363. But the court will scrutinize the record and if, from all parts of it, the facts necessary to confer jurisdiction can be gathered, the judgment will not be declared void. Jones *v.* Danforth, (1904) 99 N. W. 495.

New York.— Kamp *v.* Kamp, 59 N. Y. 212; Visscher *v.* Hudson River R. Co., 15 Barb. 37; Mattison *v.* Bancus, Lalor 321. *Compare* Porter *v.* Purdy, 29 N. Y. 106, 86 Am. Dec. 283; Muller *v.* Naumann, 85 N. Y. App. Div. 337, 83 N. Y. Suppl. 488, holding that where property is sold under a judgment which is void for jurisdictional defects, the judgment creditor, having obtained the purchase-money and appropriated it to his own use, is estopped to assail the validity of the judgment.

North Carolina.— Balk *v.* Harris, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257.

Ohio.— Spoors *v.* Coen, 44 Ohio St. 497, 9 N. E. 132; Bailey *v.* Young, 20 Ohio Cir. Ct. 546, 11 Ohio Cir. Dec. 257. The determination by a court of equity of matters of legal defense is not void for want of jurisdiction, so as to be collaterally assailable. Sauer *v.* Cincinnati St. R. Co., 7 Ohio S. & C. Pl. Dec. 551, 5 Ohio N. P. 108.

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Pennsylvania.— Cassel *v.* Seibert, 1 Dauph. Co. Rep. 16; Forster's Estate, 2 Lanc. L. Rev. 206.

South Carolina.— Turner *v.* Malone, 24 S. C. 398; Lyles *v.* Bolles, 8 S. C. 258; Hill *v.* Robertson, 1 Strobh. 1.

Texas.— Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643; Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728; Missouri, etc., R. Co. *v.* Chenault, 24 Tex. Civ. App. 481, 60 S. W. 55. But see State *v.* Cloudt, (Civ. App. 1904) 84 S. W. 415 (where it is said that a judgment cannot be attacked collaterally unless it affirmatively appears that the facts essential to the jurisdiction of the court did not exist); Barrett *v.* Eastham, 28 Tex. Civ. App. 189, 67 S. W. 198 (holding that in trespass to try title defendant is precluded from showing that a foreclosure judgment under which plaintiff claims title is void, in that the lien was on a homestead and the court was without jurisdiction, where the record does not disclose a lack of jurisdiction).

Vermont.— Tichout *v.* Cilley, 3 Vt. 415.

Virginia.— Lemmon *v.* Herbert, 92 Va. 653, 24 S. E. 249; Wade *v.* Hancock, 76 Va. 620.

Wisconsin.— O'Malley *v.* Fricke, 104 Wis. 280, 80 N. W. 436.

United States.— Phœnix Bridge Co. *v.* Castleberry, 131 Fed. 175, 65 C. C. A. 418; Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A.

And the defect of jurisdiction may be either in respect to the person, the subject-matter, or the authority to render the particular judgment or decree, a judicial determination outside the issues, or otherwise beyond the scope of the court's authority, being entirely void.[22] But there is a distinction between those facts which involve the jurisdiction of the court over the parties and subject-matter and those quasi-jurisdictional facts, without allegation of which the court cannot properly proceed, and without proof of which a decree should not be made; absence of the former renders the judgment void and assailable collaterally, but not so as to the latter.[23] And although a judgment may be so uncertain and incomplete as to be void on its face and incapable of execution, that does not go to the jurisdiction of the court, and is not cause for avoiding it on that ground in a collateral proceeding.[24]

b. Want of Jurisdiction of the Person. Where the court undertaking to try an action and render judgment never acquired jurisdiction of the person of defendant, the judgment is entirely void, and may be so held in a collateral proceeding,[25]

87; Moore *v.* Edgefield, 32 Fed. 498. *Compare Ex p.* Richards, 117 Fed. 658.

See 30 Cent. Dig. tit. "Judgment," § 924.

22. J. B. Watkins Land Mortg. Co. *v.* Mullen, 8 Kan. App. 705, 54 Pac. 921; Munday *v.* Vail, 34 N. J. L. 418; Beaudrot *v.* Murphy, 53 S. C. 118, 30 S. E. 825; Ritchie *v.* Sayers, 100 Fed. 520. And see *supra*, I, D, 4.

23. *California.*— Wood *v.* Jordan, 125 Cal. 261, 57 Pac. 997; Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285, 47 Pac. 60; Gregory *v.* Haynes, 13 Cal. 591.

Illinois.— Figge *v.* Rowlen, 185 Ill. 234, 57 N. E. 195.

Kentucky.— Jones *v.* Patterson, 66 S. W. 377, 23 Ky. L. Rep. 1838.

Michigan.— Peninsular Sav. Bank *v.* Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911.

Missouri.— Shea *v.* Shea, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779; Hamill *v.* Talbott, 72 Mo. App. 22.

South Dakota.— Phillips *v.* Phillips, 13 S. D. 231, 83 N. W. 94.

Tennessee.— Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834.

United States.— Chicago, etc., R. Co. *v.* Sturm, 174 U. S. 710, 19 S. Ct. 797, 43 L. ed. 1144; Reinach *v.* Atlantic, etc., R. Co., 58 Fed. 33.

Venue of action.— A judgment for the recovery of land, rendered by a court having general jurisdiction of such suits, is not subject to collateral attack because not rendered in the county where the land is situated, as required by statute. Stark *v.* Ratcliff, 111 Ill. 75; Johnson *v.* Evans, 1 Tenn. Ch. App. 603. And a justice's judgment, regular on its face, cannot be impeached in a collateral proceeding by showing that neither of the parties lived in the township adjoining the residence of the justice. Cole *v.* Potter, 135 Mich. 1, 97 N. W. 774, 106 Am. St. Rep. 398.

24. Wood *v.* Mobile, 99 Fed. 615.

25. *California.*— Pioneer Land Co. *v.* Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67.

Florida.— McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228.

Illinois.— Dickey *v.* Chicago, 152 Ill. 468, 38 N. E. 932; Haywood *v.* Collins, 60 Ill. 328; Oppenheimer *v.* Giershofer, 54 Ill. App. 38.

Indiana.— Cavanaugh *v.* Smith, 84 Ind. 380.

Kentucky.— Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222. *Compare* Myers *v.* Pedigo, 72 S. W. 734, 24 Ky. L. Rep. 1923.

Massachusetts.— Needham *v.* Thayer, 147 Mass. 536, 18 N. E. 429; Downs *v.* Fuller, 2 Metc. 135, 35 Am. Dec. 393.

Missouri.— Childs *v.* Shannon, 16 Mo. 331; Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

Nebraska.— Jaster *v.* Currie, (1903) 94 N. W. 995; Enewold *v.* Olsen, 39 Nebr. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573.

New York.— Bonnet *v.* Lachman, 65 Hun 554, 20 N. Y. Suppl. 514.

South Carolina.— Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675.

Texas.— Parker *v.* Spencer, 61 Tex. 155.

West Virginia.— Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447; Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260.

United States.— Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259; Pitts *v.* Clay, 27 Fed. 635; Citizens' Bank *v.* Brooks, 23 Fed. 21, 23 Blatchf. 137.

See 30 Cent. Dig. tit. "Judgment," § 925.

Contra.— Borden *v.* State, 11 Ark. 519, 54 Am. Dec. 217; Theriot *v.* Bayard, 37 La. Ann. 689; McCahill *v.* Equitable L. Assur. Soc., 26 N. J. Eq. 531. But *compare* Hess *v.* Cole, 23 N. J. L. 116.

A variation in the name of defendant, as stated in the decree and as stated in the bill, not of a nature to raise a substantial doubt of the identity of the person, is not sufficient, on collateral attack, to show that the court had no jurisdiction of his person. Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834.

Recitals of record.— Where the record of partition proceedings in the probate court failed to show that a minor interested was served with process, but the judgment recited that he was represented by guardian, and that the guardian qualified, the judgment

unless defendant, by appearance in the action, has waived the original want of jurisdiction.[26]

c. Want of Process or Service. It is generally held permissible to impeach a judgment collaterally by showing that no process was ever issued in the action in which it was rendered,[27] or that, if issued, it was never served on defendant either actually or constructively, so that he had no notice of the action,[28] provided he did not enter an appearance.[29] But there are numerous decisions refusing to permit a collateral attack upon a judgment on this ground.[30]

d. Defects in Process or Service. A defect in the form or matter of the summons or other process not absolutely destructive of its validity, or an irregularity or defect in the service of it upon defendant, although material and sufficient to cause the reversal of the judgment on a proper application, does not deprive the court of jurisdiction, and therefore does not expose the judgment to collateral impeachment.[31] But if the defect in the process is so radical that it amounts to

was not void or open to collateral attack. Penn *v.* Case, 36 Tex. Civ. App. 4, 81 S. W. 349.

26. See Danville First Nat. Bank *v.* Cunningham, 48 Fed. 510.

27. Harrington *v.* Wofford, 46 Miss. 31; Enos *v.* Smith, 7 Sm. & M. (Miss.) 85. But it is not sufficient merely to show that the record does not affirmatively state that a summons was issued. Colfax Bank *v.* Richardson, 54 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

28. *Florida.*— Haddock *v.* Wright, 25 Fla. 202, 5 So. 813.

Indiana.— Anderson *v.* Miller, 4 Blackf. 417.

Kansas.— Pray *v.* Jenkins, 47 Kan. 599, 28 Pac. 716.

Louisiana.— Simpson *v.* Hope, 23 La. Ann. 557; Gaiennie *v.* Akin, 17 La. 42, 36 Am. Dec. 604; Pilie *v.* Kenner, 16 La. 570; Thomas *v.* Breedlove, 6 La. 573; Abat *v.* Holmes, 8 Mart. N. S. 145; Bernard *v.* Vignaud, 1 Mart. N. S. 1.

Maine.— Penobscot R. Co. *v.* Weeks, 52 Me. 456.

Missouri.— Feurt *v.* Caster, 174 Mo. 289, 73 S. W. 576; McClanahan *v.* West, 100 Mo. 309, 13 S. W. 674; Smith *v.* Ross, 7 Mo. 463.

New York.— *In re* Stilwell, 139 N. Y. 337, 34 N. E. 777; Baldwin *v.* Kimmel, 16 Abb. Pr. 353; Porter *v.* Bronson, 29 How. Pr. 292.

North Carolina.— Isley *v.* Boon, 113 N. C. 249, 18 S. E. 174; Grubb *v.* Lookabill, 100 N. C. 267, 6 S. E. 390.

South Dakota.— Phillips *v.* Phillips, 13 S. D. 231, 83 N. W. 94.

Texas.— Roller *v.* Ried, 87 Tex. 69, 26 S. W. 1060; Green *v.* Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345; Galloway *v.* State Nat. Bank, (Civ. App. 1900) 56 S. W. 236. A judgment may be impeached collaterally for invalidity of the citation, provided this can be done without contradicting any recitals of the record. Babcock *v.* Wolffarth, 35 Tex. Civ. App. 512, 80 S. W. 642.

United States.— Webster *v.* Reid, 11 How. 437, 13 L. ed. 761.

See 30 Cent. Dig. tit. "Judgment," § 926.

Failure to serve certified copy of complaint, as required by statute, does not deprive the court of jurisdiction, so as to make the judgment impeachable collaterally. Munch *v.* McLaren, 9 Wash. 676, 38 Pac. 205.

29. Tyrrell *v.* Baldwin, 67 Cal. 1, 6 Pac. 867.

30. *Arkansas.*— King *v.* Clay, 34 Ark. 291; Jones *v.* Mason, 12 Ark. 687. But *compare Ex p.* Woods, 3 Ark. 532.

California.— Galvin *v.* Palmer, 134 Cal. 426, 66 Pac. 572; Bennett *v.* Wilson, 133 Cal. 379, 65 Pac. 880, 85 Am. St. Rep. 207.

Connecticut.— Hurlbut *v.* Thomas, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43.

Georgia.— Richardson *v.* Conn, 100 Ga. 39, 27 S. E. 978.

Iowa.— Morgan *v.* Zenor, 88 Iowa 175, 55 N. W. 197.

Pennsylvania.— Ferguson *v.* Yard, 164 Pa. St. 586, 30 Atl. 517; Thompson *v.* McKinley, 47 Pa. St. 353.

Tennessee.— Bell *v.* Williams, 4 Sneed 196.

See 30 Cent. Dig. tit. "Judgment," § 926.

31. *Alabama.*— Cantelou *v.* Whitely, 85 Ala. 247, 4 So. 610.

Georgia.— Baker *v.* Thompson, 75 Ga. 164.

Indiana.— Kleyla *v.* Haskett, 112 Ind. 515, 14 N. E. 387; Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490; Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; McCormick *v.* Webster, 89 Ind. 105.

Iowa.— Longueville *v.* May, 115 Iowa 709, 87 N. W. 432; Blair *v.* Wolf, 72 Iowa 246, 33 N. W. 669; Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340; Gregg *v.* Thompson, 17 Iowa 107; Prince *v.* Griffin, 16 Iowa 552; Tiffany *v.* Glover, 3 Greene 387.

Kansas.— Emporia First Nat. Bank *v.* Geneseo Town Co., 51 Kan. 215, 32 Pac. 902.

Kentucky.— Howard *v.* Lock, 22 S. W. 332, 15 Ky. L. Rep. 154.

Louisiana.— Johnson *v.* Carrere, 45 La. Ann. 847, 13 So. 195. See Abat *v.* Holmes, 8 Mart. N. S. 145.

Maine.— Cole *v.* Butler, 43 Me. 401.

Massachusetts.— McCormick *v.* Fiske, 138 Mass. 379; Foster *v.* Abbot, 8 Metc. 596.

Michigan.— Griffin *v.* McGavin, 117 Mich. 372, 75 N. W. 1061, 72 Am. St. Rep. 564.

Mississippi.— Sweatman *v.* Dean, 86 Miss. 641, 38 So. 231; Kelly *v.* Harrison, 69 Miss. 856, 12 So. 261.

no process at all — as where it wholly fails to give the party the information it is expected to convey — or if the attempted service is so faulty that it does not reach defendant at all, there is a want of jurisdiction, and the judgment will be impeachable collaterally.[32]

e. Service by Publication. A judgment rendered on constructive service of process, the requirements of the statute having been complied with, is as much

Missouri.— Martin *v.* Barron, 37 Mo. 301.

Nebraska.— Campbell Printing Press, etc., Co. *v.* Marder, 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573; Gandy *v.* Jolly, 35 Nebr. 711, 53 N. W. 658, 37 Am. St. Rep. 460; Hilton *v.* Bachman, 24 Nebr. 490, 39 N. W. 419.

New Hampshire.— Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

New Jersey.— Dickinson *v.* Trenton, 33 N. J. Eq. 416.

New York.— Treacy *v.* Ellis, 45 N. Y. App. Div. 492, 61 N. Y. Suppl. 600. *Compare* Baldwin *v.* Kimmel, 1 Rob. 109.

North Carolina.— Hafner *v.* Irwin, 26 N. C. 529.

Pennsylvania.— Murray *v.* Weigle, 118 Pa. St. 159, 11 Atl. 781; Allison *v.* Rankin, 7 Serg. & R. 269.

South Carolina.— Hunter *v.* Ruff, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907.

Texas.— Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838; Jones *v.* Lasater, 2 Tex. Unrep. Cas. 435.

Vermont.— Gilman *v.* Thompson, 11 Vt. 643, 34 Am. Dec. 714.

Virginia.— Terry *v.* Dickinson, 75 Va. 475.

United States.— Kerrison *v.* Stewart, 14 Fed. Cas. No. 7,734, 1 Hughes 67; Salisbury *v.* Sands, 21 Fed. Cas. No. 12,251, 2 Dill. 270.

See 30 Cent. Dig. tit. "Judgment," § 927.

Misnomer.— Where a party is named in a summons by a name other than his own, and which is not a customary designation of him, a judgment by default, based on service of such summons, is void. Durst *v.* Ernst, 45 Misc. (N. Y.) 627, 91 N. Y. Suppl. 13.

Unsealed writ.— A judgment is not void in collateral proceedings because the summons in the original suit was without a seal. Krug *v.* Davis, 85 Ind. 309; Newman *v.* Mackey, (Tex. Civ. App. 1904) 83 S. W. 31; Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838.

Want of attestation.— It cannot be objected collaterally to a judgment that the writ was not properly attested, because signed by a deputy instead of by the proper officer. Torrans *v.* Hicks, 32 Mich. 307.

Wrong date on a scire facias is not ground for collateral impeachment of the judgment. Chicago Dock, etc., Co. *v.* Kinzie, 93 Ill. 415.

Incorrect copy.— It is not a matter affecting the jurisdiction or exposing the judgmeut to collateral impeachment that the copy of the summons given to defendant was incorrect. Haughey *v.* Wilson, 1 Hilt. (N. Y.) 259.

Manner of service.— It is not ground for impeaching a judgment collaterally that service was made on defendant as an adult while he was an infant, that fact not appearing of record. Kennedy *v.* Baker, 159 Pa. St. 146, 28 Atl. 252. Nor that service was made by reading the summons to defendant instead of giving him a copy. Gandy *v.* Jolly, 35 Nebr. 711, 53 N. W. 658, 37 Am. St. Rep. 460.

Service by wrong persons.— Service of process by an officer not authorized to perform that function, or by one disqualified by interest in the suit, is an irregularity, but does not avoid the judgment collaterally. Russell *v.* Durham, 29 S. W. 16, 16 Ky. L. Rep. 516; Howard *v.* Lock, 22 S. W. 332, 15 Ky. L. Rep. 154; McLeod *v.* Harper, 43 Miss. 42; Burke *v.* Inter-State Sav., etc., Assoc., 25 Mont. 315, 64 Pac. 879; Noerdlinger *v.* Huff, 31 Wash. 360, 72 Pac. 73; Owens *v.* Gotzian, 18 Fed. Cas. No. 10,634, 4 Dill. 436.

Service on corporation.— Where defendant is a corporation, service of process on persons who are supposed to be, but who are not, its proper officers or agents, is an irregularity, but not such as to authorize the impeachment of the judgment by a third person, the parties to the action not objecting. Bennett *v.* Wilson, 133 Cal. 379, 65 Pac. 880, 85 Am. St. Rep. 207; Fahs *v.* Taylor, 10 Ohio 104.

Short notice.— That the writ was not served the requisite number of days before the hearing or judgment is not ground for impeaching the judgment collaterally. Ballinger *v.* Tarbell, 16 Iowa 491, 85 Am. Dec. 527; Armstrong *v.* Grant, 7 Kan. 285; Dutton *v.* Hobson, 7 Kan. 196; Leonard *v.* Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; Righter *v.* Thornton, 11 Ohio Dec. (Reprint) 817, 30 Cinc. L. Bul. 32.

32. *Louisiana.*— Williams *v.* Clark, 11 La. Ann. 761.

Mississippi.— Harrington *v.* Wofford, 46 Miss. 31.

Nebraska.— Campbell Printing Press, etc., Co. *v.* Marder, 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573; Haynes *v.* Aultman, 36 Nebr. 257, 54 N. W. 511.

New York.— McGill *v.* Weill, 10 N. Y. Suppl. 246, 19 N. Y. Civ. Proc. 43.

Texas.— Earnest *v.* Glaser, 32 Tex. Civ. App. 378, 74 S. W. 605; Caplen *v.* Compton, 5 Tex. Civ. App. 410, 27 S. W. 24.

See 30 Cent. Dig. tit. "Judgment," § 927.

Failure to state time and place.— A judgment rendered upon service of an original notice which does not state the time or place at which defendant is required to appear is not valid, and may be attacked collaterally. Kitsmiller *v.* Kitchen, 24 Iowa 163. But *compare* Wood *v.* Payea, 138 Mass. 61.

protected against collateral impeachment as any other,[33] and it cannot be shown collaterally that defendant was not in fact a non-resident as alleged,[34] or that he had no property subject to the jurisdiction of the court.[35] Failure to comply with the provisions of the statute in some essential and vital particular will deprive the court of jurisdiction, and so expose the judgment to collateral impeachment,[36] as where the published notice is wholly insufficient to warn the defendant of the action or to give him the information he is entitled to expect from it,[37] but a mere irregularity in making service by publication will not have this effect;[38] nor will the judgment be collaterally assailable, although the affidavit on which the order of publication was based was defective, insufficient, or false in fact,[39] more especially if the court has judicially considered or adjudicated its sufficiency.[40]

f. Defects in Return or Proof of Service. A judgment cannot be impeached in a collateral proceeding on the ground that the return or proof of service of process was defective, irregular, or informal,[41] although it is otherwise where the return or proof wholly fails to show the facts necessary to give the court jurisdiction.[42]

g. Unauthorized Appearance. Many decisions hold that it is not permissible, in any collateral proceeding, for a party to contest the validity of a judgment against him on the ground that an attorney who appeared for him in the action

33. Waltz *v.* Borroway, 25 Ind. 380; Co-operative Sav. etc., Assoc. *v.* McIntosh, 105 Iowa 697, 75 N. W. 520; Clinch Valley Coal, etc., Co. *v.* Tonkin, 9 Kulp (Pa.) 494; Thouvenin *v.* Rodrigues, 24 Tex. 468.

34. Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; Ogden *v.* Walters, 12 Kan. 282; Hammond *v.* Davenport, 16 Ohio St. 177.

35. Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104; Bunker *v.* Taylor, 13 S. D. 433, 83 N. W. 555.

36. Davis *v.* Reaves, 7 Lea (Tenn.) 585.

37. Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540; Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399. And see Douglass *v.* Byers, 59 Kan. 481, 53 Pac. 523.

Specifying time of appearance.— A published notice requiring defendant to appear on a specified day of "the next term" of the court, giving the year but not the month, is not so defective as to subject the judgment to collateral attack. Jasper County *v.* Mickey, (Mo. 1887) 4 S. W. 424; Jasper County *v.* Wadlow, 82 Mo. 172.

38. Spillman *v.* Williams, 91 N. C. 483.

39. *California.*— Sharp *v.* Daugney, 33 Cal. 505.

Indiana.— Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422.

Kansas.— Shippen *v.* Kimball, 47 Kan. 173, 27 Pac. 813; Ogden *v.* Walters, 12 Kan. 282; Bixby *v.* Bailey, 11 Kan. 359.

New York.— Salisbury *v.* McGibbon, 58 N. Y. App. Div. 524, 69 N. Y. Suppl. 258.

Ohio.— Laughlin *v.* Vogelsong, 5 Ohio Cir. Ct. 407, 3 Ohio Cir. Dec. 200.

Washington.— Christofferson *v.* Pfennig, 16 Wash. 491, 48 Pac. 264.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931.

See 30 Cent. Dig. tit. "Judgment," § 928.

Presumption as to affidavit.— It is not necessary, in order to support a judgment on service by publication, to show that an affidavit for publication was made, since the law will presume that much in aid of the judgment. Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Iiams *v.* Root, 22 Tex. Civ. App. 413, 55 S. W. 411.

40. Belmont *v.* Cornen, 82 N. Y. 256; Collins *v.* Ryan, 32 Barb. (N. Y.) 647; Rhodes *v.* Gunn, 35 Ohio St. 387; George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1.

41. *Arkansas.*— Scott *v.* Pleasants, 21 Ark. 364.

California.— Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; Peck *v.* Strauss, 33 Cal. 678.

Illinois.— Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813.

Indiana.— Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490.

Iowa.— Wilson *v.* Call, 49 Iowa 463.

Minnesota.— Brown *v.* Atwater, 25 Minn. 520.

Mississippi.— Kelly *v.* Harrison, 69 Miss. 856, 12 So. 261; Rigby *v.* Lefevre, 58 Miss. 639; Crizer *v.* Gorren, 41 Miss. 563; Campbell *v.* Hays, 41 Miss. 561; Smith *v.* Bradley, 6 Sm. & M. 485.

Missouri.— Draper *v.* Bryson, 17 Mo. 71, 57 Am. Dec. 257.

North Carolina.— McElrath *v.* Butler, 29 N. C. 398.

Oregon.— Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

Pennsylvania.— Sloan *v.* McKinstry, 18 Pa. St. 120; Cockley *v.* Rehr, 12 Pa. Co. Ct. 343.

Virginia.— Ferguson *v.* Teel, 82 Va. 690.

United States.—Oswald *v.* Kampmann, 28 Fed. 36.

See 30 Cent. Dig. tit. "Judgment," § 929.

42. Hyde *v.* Redding, 74 Cal. 493, 16 Pac. 380; People's Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727; Rosenberger *v.* Gibson, 165 Mo. 16, 65 S. W. 237; Harris *v.* Sargeant, 37 Oreg. 41, 60 Pac. 608.

had no authority to do so.[43] But on the other hand in several states the rule obtains that the authority of the attorney may always be controverted.[44] At any rate all presumptions are strongly in favor of the authority of an attorney professing to represent a party, and of the truth of recitals recognizing his appearance as authorized; and if a party is permitted at all to deny this fact in a collateral proceeding, he must support his contention by positive proof.[45]

h. Presumptions as to Jurisdiction — (I) *Courts of General or Superior Jurisdiction* — (A) *Jurisdiction Presumed in General.* In the case of a judgment rendered by a domestic court of general or superior jurisdiction, which is attacked in a collateral proceeding, there is a presumption, which can only be overcome by positive proof, that it had jurisdiction both of the person's and the subject-matter, and proceeded in the due exercise of that jurisdiction.[46]

43. *Arkansas.*— Denton *v.* Roddy, 34 Ark. 642.

California.— Carpentier *v.* Oakland, 30 Cal. 439.

Connecticut.— Butler *v.* Butler, 1 Root 275.

Iowa.— Willenburg *v.* Hersey, 104 Iowa 699, 74 N. W. 1; Aultman *v.* McLean, 27 Iowa 129; Prince *v.* Griffin, 16 Iowa 552.

Louisiana.— Brigot *v.* Brigot, 47 La. Ann. 1304, 17 So. 825.

Massachusetts.— Finneran *v.* Leonard, 7 Allen 54, 83 Am. Dec. 665. *Compare* Wright *v.* Andrews, 130 Mass. 149; Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356.

Missouri.— Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6; Baker *v.* Stonebraker, 34 Mo. 172. *Compare* Marx *v.* Fore, 51 Mo. 69, 11 Am. Rep. 432.

Nevada.— Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

New York.— Washbon *v.* Cope, 144 N. Y. 287, 39 N. E. 388; Brown *v.* Nichols, 42 N. Y. 26; Hamilton *v.* Wright, 37 N. Y. 502; Ward *v.* Barber, 1 E. D. Smith 423; Reed *v.* Pratt, 2 Hill 64; Hoffmire *v.* Hoffmire, 3 Edw. 173; American Ins. Co. *v.* Oakley, 9 Paige 496, 38 Am. Dec. 561. But see Korman *v.* Grand Lodge I. O. F. S. of I., 44 Misc. 564, 90 N. Y. Suppl. 120, holding that, where a judgment recites that the judgment debtor appeared by a certain attorney, it is conclusive as to the fact of the attorney's appearance for him, but the question of his authority to appear may be disputed by the judgment debtor on an attempt to enforce the judgment.

North Carolina.— Williams *v.* Johnson, 112 N. C. 424, 17 S. E. 496, 34 Am. St. Rep. 513, 21 L. R. A. 848.

Ohio.— Callen *v.* Ellison, 13 Ohio St. 446, 82 Am. Dec. 448.

Pennsylvania.— Cyphert *v.* McClune, 22 Pa. St. 195. *Compare* Blackwell *v.* Cameron, 46 Pa. St. 236.

South Carolina.— Sanders *v.* Price, 56 S. C. 1, 33 S. E. 731.

Texas.— Watson *v.* Hopkins, 27 Tex. 637. But *compare* Chapman *v.* Austin, 44 Tex. 133, holding that a recital in a decree that a party was represented by an attorney does not preclude him from showing want of authority in the attorney.

Vermont.— St. Albans *v.* Bush, 4 Vt. 58, 23 Am. Dec. 246; Coit *v.* Sheldon, 1 Tyler 300.

West Virginia.— Cabell *v.* Given, 30 W. Va. 760, 5 S. E. 442; Wandling *v.* Straw, 25 W. Va. 692.

Wisconsin.— Lowe *v.* Stringham, 14 Wis. 222.

United States.— Landes *v.* Brant, 10 How. 348, 13 L. ed. 449; Field *v.* Gibbs, 9 Fed. Cas. No. 4,766, Pet. C. C. 155. But see Shelton *v.* Tiffin, 6 How. 163, 12 L. ed. 387; Graham *v.* Spencer, 14 Fed. 603.

See 30 Cent. Dig. tit. "Judgment," § 930.

Judgment only voidable directly.— Certain cases hold that, while a judgment is voidable if obtained by an attorney acting without authority, yet it cannot be attacked collaterally; its validity may be assailed in a direct proceeding, but it remains valid until vacated or set aside. Corbitt *v.* Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; Sanders *v.* Price, 56 S. C. 1, 33 S. E. 731.

44. *Colorado.*— Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Illinois.— Anderson *v.* Hawhe, 115 Ill. 33, 3 N. E. 566; Chase *v.* Dana, 44 Ill. 262; Whittaker *v.* Murray, 15 Ill. 293.

Indiana.— Wiley *v.* Pratt, 23 Ind. 628; Sherrard *v.* Nevius, 2 Ind. 241, 52 Am. Dec. 508.

Nebraska.— Chicago, etc., R. Co. *v.* Hitchcock County, 60 Nebr. 722, 84 N. W. 97; Howell *v.* Gilt Edge Mfg. Co., 32 Nebr. 627, 49 N. W. 704; National Exch. Bank *v.* Wiley, 3 Nebr. (Unoff.) 716, 92 N. W. 582.

New Jersey.— Ward *v.* Price, 25 N. J. L. 225; Hess *v.* Cole, 23 N. J. L. 116.

Virginia.— Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933.

Washington.— Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

See 30 Cent. Dig. tit. "Judgment," § 930.

45. Scott *v.* Eaton, 26 Ark. 17; Heath *v.* Miller, 117 Ga. 854, 44 S. E. 13; Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

46. *Alabama.*— White *v.* Simpson, 124 Ala. 238, 27 So. 297; Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604; Weaver *v.* Brown, 87 Ala. 533, 6 So. 354; Wilson *v.* Wilson, 18 Ala. 176.

Arkansas.— Kelley *v.* Laconia Levee Dist., (1905) 85 S. W. 249; McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597.

(B) *As to Process and Service.* In support of the judgment of a court of general jurisdiction, as against a collateral attack, it will be presumed, unless expressly contrary to what is shown by the record, that legal and proper process was issued in the action and that it was duly and regularly served upon defend-

California.— Mesnager *v.* De Leonis, 140 Cal. 402, 73 Pac. 1052; Galvin *v.* Palmer, 134 Cal. 426, 66 Pac. 572; Eureka Mercantile Co. *v.* California Ins. Co., 130 Cal. 153, 62 Pac. 393; Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285, 47 Pac. 60; *In re* Eichhoff, 101 Cal. 600, 36 Pac. 11; Clark *v.* Sawyer, 48 Cal. 133; Drake *v.* Duvenick, 45 Cal. 455; Ryder *v.* Cohn, 37 Cal. 69; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Barrett *v.* Carney, 33 Cal. 530; Sharp *v.* Daugney, 33 Cal. 505. This presumption is the same where service of process was made by publication as where personal service was had. McHatton *v.* Rhodes, 143 Cal. 275, 76 Pac. 1036, 101 Am. St. Rep. 125.

Colorado.— Hughes *v.* Cummings, 7 Colo. 138, 203, 2 Pac. 289, 928.

Connecticut.— Bridgeport *v.* Blinn, 43 Conn. 274; Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244.

Florida.— Finley *v.* Chamberlin, 46 Fla. 581, 35 So. 1; Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. 73.

Georgia.— Jones *v.* Smith, 120 Ga. 642, 48 S. E. 134; Reinhart *v.* Blackshear, 105 Ga. 799, 31 S. E. 748; Mayer *v.* Hover, 81 Ga. 308, 7 S. E. 562.

Idaho.— Ollis *v.* Orr, 6 Ida. 474, 56 Pac. 162.

Illinois.— Hereford *v.* People, 197 Ill. 222, 64 N. E. 310; Nickrans *v.* Wilk, 161 Ill. 76, 43 N. E. 741; Wenner *v.* Thornton, 98 Ill. 156; Swearengen *v.* Gulick, 67 Ill. 208; Pardon *v.* Dwire, 23 Ill. 572; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Bermudez Asphalt Pav. Co. *v.* Gibson, 106 Ill. App. 6; Calhoun *v.* Ross, 60 Ill. App. 309; Law *v.* Grommes, 55 Ill. App. 312.

Indiana.— Boyer *v.* Robertson, 149 Ind. 74, 48 N. E. 7; Bateman *v.* Miller, 118 Ind. 345, 21 N. E. 292; Phillips *v.* Lewis, 109 Ind. 62, 9 N. E. 395; Cassady *v.* Miller, 106 Ind. 69, 5 N. E. 713; Jackson *v.* State, 104 Ind. 516, 3 N. E. 863; Exchange Bank *v.* Ault, 102 Ind. 322, 1 N. E. 562; McCormick *v.* Webster, 89 Ind. 105; Cavanaugh *v.* Smith, 84 Ind. 380; Bloomfield R. Co. *v.* Burress, 82 Ind. 83; Anderson *v.* Spence, 72 Ind. 315, 37 Am. Rep. 162; Dwiggins *v.* Cook, 71 Ind. 579; Hawkins *v.* Hawkins, 28 Ind. 66; Waltz *v.* Borroway, 25 Ind. 380; Wiley *v.* Pratt, 23 Ind. 628; Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355; Gates *v.* Newman, 18 Ind. App. 392, 46 N. E. 654; Indianapolis First Nat. Bank *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054.

Indian Territory.— Barbee *v.* Shannon, 1 Indian Terr. 199, 40 S. W. 584.

Iowa.— Spurgin *v.* Bowers, 82 Iowa 187, 47 N. W. 1029; Kendig *v.* Marble, 58 Iowa 529, 12 N. W. 584; Hunger *v.* Barlow, 39 Iowa 539; Boker *v.* Chapline, 12 Iowa 204; Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

Kansas.— National Bank of America *v.* Home Security Co., 65 Kan. 642, 70 Pac. 646; Gille *v.* Emmons, 61 Kan. 217, 59 Pac. 338; Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

Kentucky.— Jones *v.* Edwards, 78 Ky. 6; Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222; Shackleford *v.* Miller, 9 Dana 273; Bustard *v.* Gates, 4 Dana 429; Venable *v.* McDonald, 4 Dana 336; Miller *v.* Farmers' Bank, 75 S. W. 218, 25 Ky. L. Rep. 373; Northington *v.* Reed, 75 S. W. 206, 25 Ky. L. Rep. 354; McNew *v.* Martin, 60 S. W. 412, 22 Ky. L. Rep. 1275; Berry *v.* Foster, 58 S. W. 709, 22 Ky. L. Rep. 745; Sorrell *v.* Samuels, 49 S. W. 762, 20 Ky. L. Rep. 1498.

Maine.— Blaisdell *v.* Pray, 68 Me. 269; Penobscot R. Co. *v.* Weeks, 52 Me. 456.

Maryland.— Clark *v.* Bryan, 16 Md. 171; Walter *v.* Alexander, 2 Gill 204.

Massachusetts.— Hendrick *v.* Whittemore, 105 Mass. 23; Mercier *v.* Chace, 9 Allen 242.

Minnesota.— Gulickson *v.* Bodkin, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352; Hersey *v.* Walsh, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 689; Pierro *v.* St. Paul, etc., R. Co., 37 Minn. 314, 34 N. W. 38; Turrell *v.* Warren, 25 Minn. 9; Cone *v.* Hooper, 18 Minn. 531; Gemmell *v.* Rice, 13 Minn. 400; Holmes *v.* Campbell, 12 Minn. 221.

Mississippi.— Taggert *v.* Muse, 60 Miss. 870; Grinstead *v.* Foute, 26 Miss. 476; Hardy *v.* Gholson, 26 Miss. 70; Pender *v.* Felts, 2 Sm. & M. 535; Briggs *v.* Clark, 7 How. 457.

Missouri.— Talbot *v.* Roe, 171 Mo. 421, 71 S. W. 682; Hamer *v.* Cook, 118 Mo. 476, 24 S. W. 180; Coleman *v.* McKnight, 4 Mo. 83; McGirk *v.* Chauvin, 3 Mo. 236; Wise *v.* Loring, 54 Mo. App. 258; Kincaid *v.* Storz, 52 Mo. App. 564.

Montana.— Haupt *v.* Simington, 27 Mont. 480, 71 Pac. 672, 94 Am. St. Rep. 839.

Nebraska.—Banking House *v.* Dukes,(1903) 97 N. W. 805; Holt County Bank *v.* Holt County, 53 Nebr. 827, 74 N. W. 259; Gillilan *v.* Murphy, 49 Nebr. 779, 69 N. W. 98; Connell *v.* Galligher, 36 Nebr. 749, 55 N. W. 229; Hilton *v.* Bachman, 24 Nebr. 490, 39 N. W. 419; O'Brien *v.* Gaslin, 20 Nebr. 347, 30 N. W. 274.

New Hampshire.— Wingate *v.* Haywood, 40 N. H. 437; Carelton *v.* Washington Ins. Co., 35 N. H. 162; Morse *v.* Presby, 25 N. H. 299.

New Jersey.— Miller *v.* Dungan, 35 N. J. L. 389; National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 52 N. J. Eq. 58, 28 Atl. 71.

New York.— Blake *v.* Lyon, etc., Mfg. Co., 77 N. Y. 626; Hayes *v.* Kerr, 19 N. Y. App. Div. 91, 45 N. Y. Suppl. 1050; O'Connor *v.* Felix, 87 Hun 179, 33 N. Y. Suppl. 1074; Kundolf *v.* Thalheimer, 17 Barb. 506; Morse *v.* Cloyes, 11 Barb. 100; Wright *v.* Douglass,

ant.[47] And according to the weight of authority, this presumption applies where the service of process was constructive, as by publication.[48] Some of the decisions,

10 Barb. 97; Ray *v.* Rowley, 4 Thomps. & C. 43; Berkowitz *v.* Brown, 3 Misc. 1, 23 N. Y. Suppl. 792; Castle *v.* Matthews, Lalor 438; Foot *v.* Stevens, 17 Wend. 483.

North Carolina.— Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

Ohio.— Callen *v.* Ellison, 13 Ohio St. 446, 82 Am. Dec. 448; Trimble *v.* Longworth, 13 Ohio St. 431; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Morgan *v.* Burnett, 18 Ohio 535; Adams *v.* Jeffries, 12 Ohio 253, 40 Am. Dec. 477; Pillsbury *v.* Dugan, 9 Ohio 117, 34 Am. Dec. 427.

Oregon.— Strong *v.* Barnhart, 6 Oreg. 93.

Pennsylvania.— Hering *v.* Chambers, 103 Pa. St. 172.

South Carolina.— Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736; Cruger *v.* Daniel, Riley Eq. 102.

South Dakota.— Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891; Scaman *v.* Galligan, 8 S. D. 277, 66 N. W. 458.

Tennessee.— Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834; Pope *v.* Harrison, 16 Lea 82; Wilcox *v.* Cannon, 1 Coldw. 369; Wright *v.* Watson, 11 Humphr. 529; Kilcrease *v.* Blythe, 6 Humphr. 378.

Texas.— Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629; Hambel *v.* Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46; Kramer *v.* Breedlove, (1887) 3 S. W. 561; Murchison *v.* White, 54 Tex. 78; Horan *v.* Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Logan *v.* Robertson, (Civ. App. 1904) 83 S. W. 395; Campbell *v.* Upson, (Civ. App. 1904) 81 S. W. 358; Floyd *v.* Watkins, (Civ. App. 1903) 79 S. W. 612; Hodges *v.* Brice, 32 Tex. Civ. App. 358, 74 S. W. 590; East Texas Land, etc., Co. *v.* Graham, 24 Tex. Civ. App. 521, 60 S. W. 472; Iams *v.* Root, 22 Tex. Civ. App. 413, 55 S. W. 411; Parlin, etc., Co. *v.* Cantrell, (Civ. App. 1897) 40 S. W. 415; Higgins *v.* Bordages, (Civ. App. 1894) 28 S. W. 350; McClesky *v.* State, 4 Tex. Civ. App. 322, 23 S. W. 518; Wakefield *v.* King, 2 Tex. App. Civ. Cas. § 695; Mayfield *v.* Schrier, 1 Tex. App. Civ. Cas. § 47.

Virginia.— Hill *v.* Woodward, 78 Va. 765; Woodhouse *v.* Fillbates, 77 Va. 317; Pulaski County *v.* Stuart, 28 Gratt. 872; Cox *v.* Thomas, 9 Gratt. 323.

Washington.— Christofferson *v.* Pfennig, 16 Wash. 491, 48 Pac. 264. See also Morrison *v.* Berlin, 37 Wash. 600, 79 Pac. 1114.

West Virginia.— Wandling *v.* Straw, 25 W. Va. 692; Phelps *v.* Smith, 16 W. Va. 522.

Wisconsin.— Reinig *v.* Hecht, 58 Wis. 212, 16 N. W. 548; Ely *v.* Tallman, 14 Wis. 28; Falkner *v.* Guild, 10 Wis. 563; Tallman *v.* Ely, 6 Wis. 244.

United States.— Kennedy *v.* Georgia Bank, 8 How. 586, 12 L. ed. 1209; Voorhees *v.* Jackson, 10 Pet. 449, 9 L. ed. 490; McCormick *v.* Sullivant, 10 Wheat. 192, 6 L. ed. 300; Bump *v.* Butler County, 93 Fed. 290; Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625; Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638.

See 30 Cent. Dig. tit. "Judgment," § 933.

Suit involving patent.— A state court of general jurisdiction, in the absence of a showing in the record to the contrary, will be presumed to have had jurisdiction of an action involving conflicting claims to letters patent, where its judgment is collaterally attacked; since, where a cause of action in relation to letters patent depends primarily on some contract of the parties, jurisdiction exists in the state courts, although the validity of the patent may be drawn in question incidentally. Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332.

47. *California.*— Drake *v.* Duvenick, 45 Cal. 455.

Illinois.— Casey *v.* People, 165 Ill. 49, 46 N. E. 7; Nickrans *v.* Wilk, 161 Ill. 76, 43 N. E. 741; Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634; Botsford *v.* O'Conner, 57 Ill. 72; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457.

Indiana.— Woolery *v.* Grayson, 110 Ind. 149, 10 N. E. 935; Cassady *v.* Miller, 106 Ind. 69, 5 N. E. 713; Baltimore, etc., R. Co. *v.* North, 103 Ind. 486, 3 N. E. 144; Crane *v.* Kimmer, 77 Ind. 215; Indianapolis First Nat. Bank *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054.

Iowa.— Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

Missouri.— State *v.* Williamson, 57 Mo. 192; Dingee *v.* Kearney, 2 Mo. App. 515.

See 30 Cent. Dig. tit. "Judgment," § 934.

48. *California.*— Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742.

Iowa.— Co-Operative Sav., etc., Assoc. *v.* McIntosh, 105 Iowa 697, 75 N. W. 520; Sweeley *v.* Van Steenburg, 69 Iowa 696, 26 N. W. 78; Fanning *v.* Krapfl, 68 Iowa 244, 26 N. W. 133. *Compare* Bradley *v.* Jamison, 46 Iowa 68.

Kentucky.— Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222. *Compare* Brownfield *v.* Dyer, 7 Bush 505.

Minnesota.— Gemmell *v.* Rice, 13 Minn. 400.

Missouri.— Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74. *Compare* Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399.

Oregon.— Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664. *Compare* Odell *v.* Campbell, 9 Oreg. 298.

South Carolina.— Hunter *v.* Ruff, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907.

Tennessee.— Thoms *v.* King, 95 Tenn. 60, 31 S. W. 983. *Compare* Bains *v.* Perry, 1 Lea 37.

Texas.— Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Martin *v.* Burns, 80 Tex. 676, 16 S. W. 1072; Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295; Law-

however, are to the contrary in the case of constructive service by leaving a copy of the writ, or by publication, etc.[49]

(c) *Exercise of Special Statutory Powers.* When a court of general jurisdiction proceeds in the exercise of special powers, wholly derived from statute, and not exercised according to the course of the common law, or not pertaining to its general jurisdiction, its jurisdiction must appear in the record, and cannot be presumed in a collateral proceeding.[50] And this rule applies to judgments

ler *v.* White, 27 Tex. 250; Iiams *v.* Root, 22 Tex. Civ. App. 413, 55 S. W. 411; Meade *v.* Bartlett, 1 Tex. Civ. App. 342, 23 S. W. 186; Buse *v.* Bartlett, 1 Tex. Civ. App. 335, 21 S. W. 52.

Utah.— Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20.

Wisconsin.— Nash *v.* Church, 10 Wis. 303, 78 Am. Dec. 678.

See 30 Cent. Dig. tit. "Judgment," § 934.

49. *Illinois.*— Boyland *v.* Boyland, 18 Ill. 551.

Indiana.— Schissel *v.* Dickson, 129 Ind. 139, 28 N. E. 540.

New York.— Hallett *v.* Righters, 13 How. Pr. 43.

West Virginia.— Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

United States.— Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Cissell *v.* Pulaski County, 10 Fed. 891, 3 McCrary 46; Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

50. *Alabama.*— Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785; Foster *v.* Glazener, 27 Ala. 391.

Connecticut.— Sears *v.* Terry, 26 Conn. 273.

Illinois.— Donlin *v.* Hettinger, 57 Ill. 348.

Indiana.— Harris *v.* Stanton, 4 Ind. 120; Cone *v.* Cotton, 2 Blackf. 82.

Iowa.— Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

Maryland.— Shivers *v.* Wilson, 5 Harr. & J. 130, 9 Am. Dec. 497.

Michigan.— Allen *v.* Carpenter, 15 Mich. 25; Wright *v.* Warner, 1 Dougl. 384.

Missouri.— Eaton *v.* St. Charles County, 76 Mo. 492.

New Hampshire.— Carleton *v.* Washington Ins. Co., 35 N. H. 162; Morse *v.* Presby, 25 N. H. 299; Sanborn *v.* Fellows, 22 N. H. 473.

New York.— Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325; Macomber *v.* New York, 17 Abb. Pr. 35; Striker *v.* Kelly, 7 Hill 9; Smith *v.* Fowle, 12 Wend. 9; Denning *v.* Corwin, 11 Wend. 647.

North Carolina.— Isley *v.* Boon, 113 N. C. 249, 18 S. E. 174.

Ohio.— Adams *v.* Jeffries, 12 Ohio 253, 40 Am. Dec. 477; Miami Exporting Co. *v.* Brown, 6 Ohio 535; Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609; Edmiston *v.* Edmiston, 2 Ohio 251.

Oregon.— Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620; Odell *v.* Campbell, 9 Oreg. 298; Northcut *v.* Lemery, 8 Oreg. 316.

Tennessee.— Barry *v.* Patterson, 3 Humphr. 313; Earthman *v.* Jones, 2 Yerg. 494. See Crocker *v.* Balch, 104 Tenn. 6, 55 S. W. 307.

Texas.— Mitchell *v.* Runkle, 25 Tex. Suppl. 132.

Vermont.— Huntington *v.* Charlotte, 15 Vt. 46.

Virginia.— Pulaski County *v.* Stuart, 28 Gratt. 872.

Wisconsin.— *In re* McCormick, 108 Wis. 234, 84 N. W. 148. *Compare* Falkner *v.* Guild, 10 Wis. 563.

United States.— Secombe *v.* Milwaukee, etc., R. Co., 23 Wall. 108, 23 L. ed. 67; Webster *v.* Reid, 11 How. 437, 13 L. ed. 761; Thatcher *v.* Powell, 6 Wheat. 119, 5 L. ed. 221; Murray *v.* American Surety Co., 70 Fed. 341, 17 C. C. A. 138.

Jurisdiction of subject-matter.— It is stated that the rule respecting courts of special jurisdiction, that all necessary jurisdictional facts must be shown by the record, applies to the subject-matter and not to the person; and when jurisdiction as to the subject-matter has once vested in such a court, the rules which govern its exercise, as to the person, respecting process, evidence, etc., are generally the same as those applicable to courts of general jurisdiction. Cason *v.* Cason, 31 Miss. 578.

Cases not within the rule.— The rule stated in the text does not apply to a confession of judgment upon warrant of attorney (Bush *v.* Hanson, 70 Ill. 480), to a proceeding commenced by attachment (Van Wagenen *v.* Carpenter, 27 Colo. 444, 61 Pac. 698. *Compare* Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464; Star Brewery *v.* Otto, 63 Ill. App. 40), to an action for partition (Nickrans *v.* Wilk, 161 Ill. 76, 43 N. E. 741), to a proceeding by writ of ad quod damnum to assess damages for land taken under the power of eminent domain (Nolensville Turnpike Co. *v.* Quimby, 8 Humphr. (Tenn.) 476), to an inquisition of lunacy (Soules *v.* Robinson, 158 Ind. 97, 62 N. E. 999, 92 Am. St. Rep. 301), or to a proceeding to punish for contempt (*Ex p.* Cuddy, 131 U. S. 280, 9 S. Ct. 703, 33 L. ed. 154).

Ex parte proceedings in probate courts.— Although the authority of probate courts to appoint guardians for insane persons, to confirm the adoption of a child, and the like, is derived from statute, yet they exercise a general jurisdiction in such matters, and their orders and judgments therein are upheld by the usual presumptions of validity. McKenzie *v.* Donnell, 151 Mo. 431, 52 S. W. 214; Crocker *v.* Balch, 104 Tenn. 6, 55 S. W. 307.

rendered in summary proceedings, which must clearly show on their face everything necessary to sustain the jurisdiction.[51]

(II) *Courts of Inferior or Limited Jurisdiction.* Nothing is presumed in favor of the judgment of a court of inferior or limited jurisdiction, as against a collateral attack; but the record of its proceedings must show on its face that the court rendering the judgment had jurisdiction both of the person and subject-matter.[52] But although the court may be a limited or inferior tribunal, yet if it has general jurisdiction of any one subject, its proceedings and judgments in respect to that subject will be sustained by the same presumptions which obtain in the case of superior courts.[53] And if the record of the judgment of an inferior court does affirmatively show the facts necessary to confer jurisdiction, then

51. Crockett *v.* Parkison, 3 Coldw. (Tenn.) 219; Haynes *v.* Gates, 2 Head (Tenn.) 598.

Motion against tax-collector.— In a judgment on motion against a tax-collector and his sureties, rendered by *nil dicit*, the judgment entry must show the liability of defendants for the debt or penalty sought to be recovered, and that the facts were proved which were necessary to give the court jurisdiction. Graham *v.* Reynolds, 45 Ala. 578.

52. *Alabama.*— State *v.* Ely, 43 Ala. 568.

California.— *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Lowe *v.* Alexander, 15 Cal. 296.

Connecticut— Potwine's Appeal, 31 Conn. 381; Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244; Sears *v.* Terry, 26 Conn. 273; Hall *v.* Howd, 10 Conn. 514, 27 Am. Dec. 696.

Florida.— McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228.

Georgia.— Rutherford *v.* Crawford, 53 Ga. 138; Perkins *v.* Attaway, 14 Ga. 27; Gray *v.* McNeal, 12 Ga. 424.

Illinois.— Shufeldt *v.* Buckley, 45 Ill. 223; Langworthy *v.* Baker, 23 Ill. 484.

Indiana.— Newman *v.* Manning, 89 Ind. 422; Hopper *v.* Lucas, 86 Ind. 43; State *v.* Gachenheimer, 30 Ind. 63; Bennett *v.* Jones, 7 Blackf. 110.

Iowa.— State *v.* Berry, 12 Iowa 58; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

Kentucky.— Tompert *v.* Lithgow, 1 Bush 176; Adams *v.* Tiernan, 5 Dana 394.

Maine.— Crawford *v.* Howard, 30 Me. 422; Granite Bank *v.* Treat, 18 Me. 340.

Maryland.— Baltimore *v.* Porter, 18 Md. 284, 79 Am. Dec. 686; Clark *v.* Bryan, 16 Md. 171; Wickes *v.* Caulk, 5 Harr. & J. 36.

Massachusetts.— Henry *v.* Estes, 127 Mass. 474; Hendrick *v.* Whittemore, 105 Mass. 23; Wells *v.* Stevens, 2 Gray 115; Sayles *v.* Briggs, 4 Metc. 421; Smith *v.* Rice, 11 Mass. 507.

Michigan.— Chaddock *v.* Barry, 93 Mich. 542, 53 N. W. 785; Chandler *v.* Nash, 5 Mich. 409; Clark *v.* Holmes, 1 Dougl. 390.

Mississippi.— Martin *v.* Williams, 42 Miss. 210, 97 Am. Dec. 456; Steen *v.* Steen, 25 Miss. 513; Saffarans *v.* Terry, 12 Sm. & M. 690; Byrd *v.* State, 1 How. 163.

Missouri.— Bersch *v.* Schneider, 27 Mo. 101; State *v.* Metzger, 26 Mo. 65.

New Hampshire.— Tibbetts *v.* Tilton, 31 N. H. 273.

New Jersey.— Graham *v.* Whitely, 26 N. J. L. 254.

New York.— Beaudrias *v.* Hogan, 16 N. Y. App. Div. 38, 44 N. Y. Suppl. 785; Simmons *v.* De Barre, 4 Bosw. 547, 8 Abb. Pr. 269; Matter of Norton, 32 Misc. 224, 66 N. Y. Suppl. 317; Powers *v.* People, 4 Johns. 292; Storms *v.* Storms, 1 Edw. 586..

North Carolina.— Williams *v.* Whitaker, 110 N. C. 393, 14 S. E. 924.

Ohio.— State *v.* McClymon, 7 Ohio Dec. (Reprint) 109, 1 Cinc. L. Bul. 116.

Oregon.— Dick *v.* Wilson, 10 Oreg. 490.

Pennsylvania.— Cockley *v.* Rehr, 12 Pa. Co. Ct. 343.

South Carolina.— Harvey *v.* Huggins, 2 Bailey 267.

Tennessee.— Anderson *v.* Binford, 2 Baxt. 310; Hamilton *v.* Burum, 3 Yerg. 355.

Texas.— Wilkerson *v.* Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803; Easley *v.* McClinton, 33 Tex. 288; Horan *v.* Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Bohl *v.* Brown, 2 Tex. App. Civ. Cas. § 538.

Vermont.— Nye *v.* Kellam, 18 Vt. 594; Walbridge *v.* Hall, 3 Vt. 114; Clapp *v.* Beardsley, 1 Aik. 168.

United States.— Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283; Kempe *v.* Kennedy, 5 Cranch 173, 3 L. ed. 70; Turner *v.* Bank of North America, 4 Dall. 8, 1 L. ed. 718.

England.— Harris *v.* Willis, 15 C. B. 710, 3 C. L. R. 609, 24 L. J. C. P. 93, 3 Wkly. Rep. 238, 80 E. C. L. 710.

Canada.— Stewart *v.* Taylor, 31 Nova Scotia 503.

See 30 Cent. Dig. tit. "Judgment," § 936.

As to the distinction between superior and inferior courts see COURTS, 11 Cyc. 656; 1 Black Judgm. § 283.

Justices of the peace see JUSTICES OF THE PEACE. And see 1 Black Judgm. § 286.

Showing jurisdiction by outside evidence.— In some states the rule prevails that the jurisdictional facts necessary to support the judgment of an inferior court of limited jurisdiction, when it is attacked collaterally, may be shown by extrinsic evidence, except as to facts which the law expressly directs the court to spread upon its record. Jolley *v.* Foltz, 34 Cal. 321; Van Deusen *v.* Sweet, 51 N. Y. 378; Beaudrias *v.* Hogan, 23 N. Y. App. Div. 83, 48 N. Y. Suppl. 468.

53. Moffitt *v.* Moffitt, 69 Ill. 641.

the same presumptions are indulged in favor of the regularity and validity of its proceedings as are extended to the superior courts, and the record can be impeached and contradicted only in like cases and to the same extent.[54]

(III) *Federal Courts.* The courts of the United States, although of statutory and limited jurisdiction, are not inferior courts in the sense of this rule; their judgments and decrees stand on the same footing as those of state courts of general jurisdiction, and their authority and jurisdiction are presumed, although the facts conferring jurisdiction do not appear in the record.[55]

(IV) *Probate Courts.* In nearly all the states probate courts or surrogates' or orphans' courts now rank with the courts of general and superior jurisdiction, for the purposes of the rule under consideration; so that it is not necessary for their records to show the facts necessary to sustain them against collateral attack, but on the contrary their jurisdiction and authority will be presumed.[56]

54. Featherston *v.* Small, 77 Ind. 143; Reich *v.* Cochran, 105 N. Y. App. Div. 542, 94 N. Y. Suppl. 404 [*reversing* 41 Misc. 621, 85 N. Y. Suppl. 247]. And see *infra*, XI, E, 2, i, (III).

55. *Arkansas.*— McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731; Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271.

Minnesota.— Pierro *v.* St. Paul, etc., R. Co., 37 Minn. 314, 34 N. W. 38; Turrell *v.* Warren, 25 Minn. 9.

Missouri.— Reed *v.* Vaughan, 15 Mo. 137, 55 Am. Dec. 133.

New York.— Ruckman *v.* Cowell, 1 N. Y. 505; Matson *v.* Burt, 9 Hun 470; Morse *v.* Cloyes, 11 Barb. 100.

Ohio.— Kohl *v.* Hannaford, 5 Ohio Dec. (Reprint) 306, 4 Am. L. Rec. 372.

United States.— Cutler *v.* Huston, 158 U. S. 423, 15 S. Ct. 868, 39 L. ed. 1040; Evers *v.* Watson, 156 U. S. 527, 15 S. Ct. 430, 39 L. ed. 520; Page *v.* U. S., 11 Wall. 268, 20 L. ed. 135; Kennedy *v.* Georgia Bank, 8 How. 586, 12 L. ed. 1209; *Ex p.* Watkins, 3 Pet. 193, 7 L. ed. 650; McCormick *v.* Sullivant, 10 Wheat. 192, 6 L. ed. 300; Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535; W. B. Conkey Co. *v.* Russell, 111 Fed. 417; Haug *v.* Great Northern R. Co., 102 Fed. 74, 42 C. C. A. 167; Washburn *v.* Pullman Palace-Car Co., 76 Fed. 1005, 21 C. C. A. 598; Rice *v.* Adler-Goldman Commission Co., 71 Fed. 151, 18 C. C. A. 15; Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790; Skirving *v.* National L. Ins. Co., 59 Fed. 742, 8 C. C. A. 241; Livingston *v.* Van Ingen, 15 Fed. Cas. No. 8,420, 1 Paine 45; Salisbury *v.* Sands, 21 Fed. Cas. No. 12,251, 2 Dill. 270.

56. *Alabama.*— Duckworth *v.* Duckworth, 35 Ala. 70; Arnett *v.* Arnett, 33 Ala. 273; Key *v.* Vaughn, 15 Ala. 497.

Arkansas.— Osborne *v.* Graham, 30 Ark. 66; George *v.* Norris, 23 Ark. 121.

California.— Luco *v.* Commercial Bank, 70 Cal. 339, 11 Pac. 650; Reynolds *v.* Brumagim, 54 Cal. 254; McCauley *v.* Harvey, 49 Cal. 497; Kingsley *v.* Miller, 45 Cal. 95.

Illinois.— People *v.* Medart, 166 Ill. 348, 46 N. E. 1095; Paullissen *v.* Loock, 38 Ill. App. 510.

Louisiana.— Grevemberg *v.* Bradford, 44 La. Ann. 400, 10 So. 786.

Minnesota.— Hadley *v.* Bourdeaux, 90 Minn. 177, 95 N. W. 1109; Kurtz *v.* St. Paul, etc., R. Co., 61 Minn. 18, 63 N. W. 1; Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136; Dayton *v.* Mintzer, 22 Minn. 393.

Missouri.— Camden *v.* Plain, 91 Mo. 117, 4 S. W. 86; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276.

Nevada.— Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

New York.— *In re* Stilwell, 139 N. Y. 337, 34 N. E. 777; Bearns *v.* Gould, 77 N. Y. 455; Chipman *v.* Montgomery, 63 N. Y. 221; Taylor *v.* Syme, 17 N. Y. App. Div. 517, 45 N. Y. Suppl. 707; Bensen *v.* Manhattan R. Co., 14 N. Y. App. Div. 442, 43 N. Y. Suppl. 914; Rowe *v.* Parsons, 6 Hun 338; Murzynowski *v.* Delaware, etc., R. Co., 15 N. Y. Suppl. 841; Seymour *v.* Seymour, 4 Johns. Ch. 409.

North Carolina.— Wood *v.* Sugg, 91 N. C. 93, 49 Am. Rep. 639.

Ohio.— Shroyer *v.* Richmond, 16 Ohio St. 455; Woodward *v.* Curtis, 19 Ohio Cir. Ct. 15, 10 Ohio Cir. Dec. 400. And see State Nat. Bank *v.* Ellison, 75 Fed. 354, in which the rule is applied to an order of the Ohio probate court.

Pennsylvania.— Ferguson *v.* Yard, 164 Pa. St. 586, 30 Atl. 517; Lex's Appeal, 97 Pa. St. 289; Mussleman's Appeal, 65 Pa. St. 480; McPherson *v.* Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642.

Rhode Island.— Angell *v.* Angell, 14 R. I. 541. But an order of the probate court for the appointment of a guardian, expressly based on a petition which recites as ground for the appointment a fact which the statute does not recognize as such ground, cannot be aided by presumptions on a collateral attack. Providence County Sav. Bank *v.* Hughes, 26 R. I. 73, 58 Atl. 254, 106 Am. St. Rep. 682.

South Dakota.— Matson *v.* Swenson, 5 S. D. 191, 58 N. W. 570.

Texas.— Bouldin *v.* Miller, 87 Tex. 359, 28 S. W. 940; Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Martin *v.* Robinson, 67 Tex. 368, 3 S. W. 550; Guilford *v.* Love, 49 Tex. 715; Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735; Hines *v.* Givens, 29 Tex. Civ. App. 517, 68 S. W. 295; Hill *v.* Grant, (Civ. App. 1898) 44 S. W. 1016; Stone *v.* Ellis, (Civ. App. 1897) 40 S. W. 1077; Grant *v.* Hill, (Civ. App. 1894) 30

i. Jurisdictional Recitals — (I) *Effect in General* — (A) *Presumption From Recitals of Record.* Where a judgment or decree of a domestic court recites that proper notice of the action was given, that process was duly served, or that the parties were duly summoned or cited, it is presumed to be correct, and is *prima facie* evidence that the court had jurisdiction of the action.[57] And a similar presumption arises from a recital that the parties appeared.[58] Further an ambiguous or imperfect recital in the judgment will be so construed, if possible, as to make it show jurisdiction.[59]

(B) *As to Service by Publication.* In the case of a judgment against a non-resident defendant on service by publication of the summons, if the judgment recites that publication was "duly made," or was "in all respects regular and according to law," or that defendant was "duly notified," this is sufficient to sustain the validity of the judgment on collateral attack, in the absence of record evidence showing a failure to comply with the statute.[60] And the same effect has

S. W. 952; Corley *v.* Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839; McSpadden *v.* Farmer, (Civ. App. 1893) 23 S. W. 814. *Compare* Easley *v.* McClinton, 33 Tex. 288.

Vermont.— Townsend *v.* Downer, 32 Vt. 183; Doolittle *v.* Holton, 28 Vt. 819, 67 Am. Dec. 745.

See 30 Cent. Dig. tit. "Judgment," § 935.

Contra.— See Mercier *v.* Chace, 9 Allen (Mass.) 242; Peters *v.* Peters, 8 Cush. (Mass.) 529; Martin *v.* Williams, 42 Miss. 210, 97 Am. Dec. 456; Tebbetts *v.* Tilton, 31 N. H. 273.

57. *California.*— McCauley *v.* Fulton, 44 Cal. 355; Sharp *v.* Brunnings, 35 Cal. 528; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Alderson *v.* Bell, 9 Cal. 315.

Georgia.— McDaniel *v.* Westberry, 74 Ga. 380; Brown *v.* Redwyne, 16 Ga. 67.

Illinois.— Law *v.* Grommes, 158 Ill. 492, 41 N. E. 1080; Matthews *v.* Hoff, 113 Ill. 90; Coursen *v.* Hixon, 78 Ill. 339; Banks *v.* Banks, 31 Ill. 162; Goudy *v.* Hall, 30 Ill. 109; Tibbs *v.* Allen, 27 Ill. 119. But defects in the service or return of a summons cannot be cured by a recital in the decree. Boyland *v.* Boyland, 18 Ill. 551.

Indiana.— Doe *v.* Smith, 1 Ind. 451.

Iowa.— Toliver *v.* Morgan, 75 Iowa 619, 34 N. W. 858.

Kansas.—O'Driscoll *v.* Soper, 19 Kan. 574; Haynes *v.* Cowen, 15 Kan. 637.

Kentucky.—Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222; Bustard *v.* Gates, 4 Dana 429.

Mississippi.— Monk *v.* Horne, 38 Miss. 100, 75 Am. Dec. 94.

Missouri.— Nevatt *v.* Springfield Normal School, 79 Mo. App. 198; Leonard *v.* Sparks, 63 Mo. App. 585, holding, however, that in the case of an inferior court a recital that the parties had been duly notified is not conclusive as an adjudication of service, without a finding of the facts giving the court jurisdiction.

New York.— Mott *v.* Ft. Edward Waterworks Co., 79 N. Y. App. Div. 179, 79 N. Y. Suppl. 1100; Steinhardt *v.* Baker, 20 Misc. 470, 46 N. Y. Suppl. 707; Porter *v.* Bronson, 29 How. Pr. 292.

Oregon.— Ladd *v.* Higley, 5 Oreg. 296.

Tennessee.— Netherland *v.* Johnson, 5 Lea 340; Walker *v.* Cottrell, 6 Baxt. 257.

Utah.— Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 26.

Vermont.— Carpenter *v.* Millard, 38 Vt. 9.

Virginia.— Craig *v.* Sebrell, 9 Gratt. 131.

Loss of jurisdiction to render a particular judgment because of the death of a party does not make it subject to collateral attack, as being wholly void, unless the fact appears of record. Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027. And see *supra*, I, C, 2, a.

58. *Alabama.*— Owings *v.* Binford, 80 Ala. 421.

California.— Leese *v.* Clark, 28 Cal. 26. But where a general entry in a judgment record shows that the parties appeared it means only that those who were served appeared. Chester *v.* Miller, 13 Cal. 558.

Indiana.— Strange *v.* Prince, 17 Ind. 524.

Kentucky.— Bustard *v.* Gates, 4 Dana 429.

Texas.— Smith *v.* Wood, 37 Tex. 616.

"Came the parties." — A recital in a decree taken *pro confesso*, "now came the parties," renders the decree, when collaterally assailed, *prima facie* valid as against all defendants named in the decree. Hunt *v.* Ellison, 32 Ala. 173. *Compare* Bell *v.* Brinkmann, 123 Mo. 270, 27 S. W. 374.

59. Thus an entry that judgment was rendered "on the return of process" will be held to mean "on the return-day of process." Aldrich *v.* Maitland, 4 Mich. 205. And see Watson *v.* Hahn, 1 Colo. 385; Woodhouse *v.* Fillbates, 77 Va. 317.

60. *Arkansas.*— Beasley *v.* Equitable Securities Co., 72 Ark. 601, 84 S. W. 224.

California.— McCauley *v.* Fulton, 44 Cal. 355.

Illinois.— Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782; Swift *v.* Yanaway, 153 Ill. 197, 38 N. E. 589; Millett *v.* Pease, 31 Ill. 377.

Missouri.— Vincent *v.* Means, 184 Mo. 327, 82 S. W. 96; Brawley *v.* Ranney, 67 Mo. 280.

Ohio.— Winemiller *v.* Laughlin, 51 Ohio St. 421, 38 N. E. 111; Cincinnati, etc., R. Co. *v.* Belle Centre, 48 Ohio St. 273, 27 N. E. 464.

Texas.— Davis *v.* Robinson, 70 Tex. 394, 7 S. W. 749; Treadway *v.* Easthurn, 57 Tex.

been given a recital that a default judgment was regularly entered according to law.[61]

(II) *Silence or Incompleteness of the Record.* In a collateral attack upon a judgment or decree, it will be presumed that jurisdiction attached and the judgment is valid where the record, although failing to show jurisdiction affirmatively, yet does not distinctly show a want of jurisdiction,[62] as where the record of a judgment of a court of general jurisdiction is silent as to the facts conferring jurisdiction,[63] or is defective in consequence of the omission of proper recitals,[64]

209; Bassett *v.* Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312; Gillon *v.* Wear, 9 Tex. Civ. App. 44, 28 S. W. 1014, holding in a case where the publication alleged in the return to a writ of citation by publication was impossible, but the judgment recited that defendant "wholly made default, although duly cited with process," that such recital imported absolute verity, as against a collateral attack, and jurisdiction over the person of defendant was shown.

Utah.— Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121.

United States.— Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625; Beattie *v.* Wilkinson, 36 Pet. 646. *Compare* Preston *v.* Walsh, 10 Fed. 315.

See 30 Cent. Dig. tit. "Judgment," § 938.

61. Sacramento Bank *v.* Montgomery, 146 Cal. 745, 81 Pac. 138.

62. See cases cited in the following notes.

63. *California.*— *In re* Eichhoff, 101 Cal. 600, 36 Pac. 11; Bronzan *v.* Drobaz, 93 Cal. 647, 29 Pac. 254; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742.

Colorado.— Evans *v.* Young, 10 Colo. 316, 15 Pac. 424, 3 Am. St. Rep. 583.

Connecticut.— Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244.

Illinois.— Wenner *v.* Thornton, 98 Ill. 156; Swearengen *v.* Gulick, 67 Ill. 208.

Indiana.— Warring *v.* Hill, 89 Ind. 497; Horner *v.* State Bank, 1 Ind. 130, 48 Am. Dec. 355; Godfrey *v.* White, 32 Ind. App. 265, 69 N. E. 688.

Iowa.— Seely *v.* Reid, 3 Greene 374.

Kansas.— Axman *v.* Dueker, 45 Kan. 179, 25 Pac. 582.

Kentucky.— See Shaefer *v.* Gates, 2 B. Mon. 453, 38 Am. Dec. 164.

Minnesota.— Gulickson *v.* Bodkin, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352; Nye *v.* Swan, 42 Minn. 243, 44 N. W. 9.

Mississippi.— Cannon *v.* Cooper, 39 Miss. 784, 80 Am. Dec. 101.

Missouri.— Hamer *v.* Cook, 118 Mo. 476, 24 S. W. 180; McClanahan *v.* West, 100 Mo. 309, 13 S. W. 674; Rumfelt *v.* O'Brien, 57 Mo. 569.

Ohio.— Cleveland Co-Operative Stove Co. *v.* Mehling, 21 Ohio Cir. Ct. 60, 11 Ohio Cir. Dec. 400.

Oregon.— Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

Pennsylvania.— Sloan *v.* McKinstry, 18 Pa. St. 120; Messinger *v.* Kintner, 4 Binn. 97.

South Carolina.— Parr *v.* Lindler, 40 S. C. 193, 18 S. E. 636.

South Dakota.— Stearns *v.* Wright, 13 S. D. 544, 83 N. W. 587; Scaman *v.* Galligan, 8 S. D. 277, 66 N. W. 458.

Texas.— Guilford *v.* Love, 49 Tex. 715; Mitchell *v.* Meuley, 32 Tex. 460; Lawler *v.* White, 27 Tex. 250; Hatch *v.* Garza, 22 Tex. 176; Hutchinson *v.* Owen, 20 Tex. 287; Galloway *v.* State Nat. Bank, (Civ. App. 1900) 56 S. W. 236; Iiams *v.* Root, 22 Tex. Civ. App. 413, 55 S. W. 411.

Utah.— Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20.

Wisconsin.— Sommermeyer *v.* Schwartz, 89 Wis. 66, 61 N. W. 311.

United States.— Eltonhead *v.* Allen, 119 Fed. 126, 55 C. C. A. 671; Travelers' Protective Assoc. *v.* Gilbert, 101 Fed. 46, 41 C. C. A. 180; Elder *v.* Richmond Gold, etc., Min. Co., 58 Fed. 536, 7 C. C. A. 354.

Compare Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257.

See 30 Cent. Dig. tit. "Judgment," § 933 *et seq.*

Non-resident defendant.— When the judgment is against a non-resident defendant, and jurisdiction was acquired by publication of notice, the judgment is not impeachable collaterally because the record does not show compliance with all the requirements of the statute authorizing that manner of citation; a full compliance will be presumed. Figge *v.* Rowlen, 185 Ill. 234, 57 N. E. 195; Martin *v.* Burns, 80 Tex. 676, 16 S. W. 1072; Meade *v.* Bartlett, 1 Tex. Civ. App. 342, 23 S. W. 186; Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20; Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121. But *compare* Frazier *v.* Miles, 10 Nebr. 109, 4 N. W. 930; Furgeson *v.* Jones, 17 Oreg. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Joint defendants.— Where there are numerous parties the fact that the record is silent upon some matter touching the jurisdiction over some of defendants does not affect the presumption in its favor. Jackson *v.* Tift, 15 Ga. 557; Stearns *v.* Wright, 13 S. D. 544, 83 N. W. 587; Kramer *v.* Breedlove, (Tex. 1887) 3 S. W. 561.

Evidence.— Where nothing is shown by the record, if evidence was necessary to have authorized the particular decision rendered, it will be presumed that the evidence was before the court, and that it fully justified the conclusion reached. Credit Foncier of America *v.* Rogers, 10 Nebr. 184, 4 N. W. 1012.

64. Hannas *v.* Hannas, 110 Ill. 53; Stout *v.* Woods, 79 Ind. 108; Goar *v.* Maranda, 57 Ind. 339 (omission to recite service of process); Jenners *v.* Spraker, 2 Ind. App. 100,

or the loss or absence of parts of the record.[65] It will also be presumed under the same circumstances that the judgment was rendered at a regular term of the court,[66] and that the property in dispute was within the territorial jurisdiction of the court.[67]

(III) *Contradicting Recitals.* In the case of a judgment of a domestic court of general jurisdiction, the great majority of the decisions sustain the rule that its recitals concerning the service of process or the other facts on which its jurisdiction is founded import absolute verity, and cannot be contradicted or disproved, in a collateral proceeding, by any extrinsic evidence.[68] But still in some

27 N. E. 117; State *v.* Canal Bank, etc., Co., 114 La. 853, 38 So. 584 (omission of oaths of tutors *ad hoc* for minor heirs); Hart *v.* Seixas, 21 Wend. (N. Y.) 40.

65. O'Driscoll *v.* Soper, 19 Kan. 574; Meddis *v.* Dellinger, 68 S. W. 185, 23 Ky. L. Rep. 1803; Fogg *v.* Gibbs, 8 Baxt. (Tenn.) 464.

Judgment-roll defective.— It is not enough to overcome the presumption of validity and regularity that the judgment-roll is defective, or that some of the papers which should properly constitute a part of it are wanting. Berry *v.* Foster, 58 S. W. 709, 22 Ky. L. Rep. 745; Gulickson *v.* Bodkin, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352; Herrick *v.* Butler, 30 Minn. 156, 14 N. W. 794.

Part of record withheld.— Where only a part of the record is given in evidence, that part of it which relates to process and appearance being withheld by agreement of parties, it will be presumed that all parties who are named in the pleadings and judgment were properly before the court. Welsh *v.* Childs, 17 Ohio St. 319. But *compare* Hargis *v.* Morse, 7 Kan. 415, where it is said that no presumption arises from the mere production in evidence of part of the record of a court of general jurisdiction that the remaining portion would if produced contain the necessary facts to give the court jurisdiction.

66. Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

67. Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625, land.

68. *Alabama.*— Perry *v.* King, 117 Ala. 533, 23 So. 783; Whitlow *v.* Echols, 78 Ala. 206; Massey *v.* Smith, 73 Ala. 173; Elliott *v.* Holbrook, 33 Ala. 659.

California.— Stow *v.* Schiefferly, 120 Cal. 609, 52 Pac. 1000; Branson *v.* Caruthers, 49 Cal. 374; McCauley *v.* Fulton, 44 Cal. 355; Reily *v.* Lancaster, 39 Cal. 354; Quivey *v.* Porter, 37 Cal. 458; Sharp *v.* Brunnings, 35 Cal. 528; Sharp *v.* Lumley, 34 Cal. 611; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Carpentier *v.* Oakland, 30 Cal. 439. *Compare* Eureka Mercantile Co. *v.* California Ins. Co., 130 Cal. 153, 62 Pac. 393 (in which a judgment rendered in a foreign state was permitted to be attacked collaterally for want of jurisdiction); Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.

Connecticut.— Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244; Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556, 73 Am. Dec. 688.

Delaware.— Pritchett *v.* Clark, 5 Harr. 63.

Illinois.— Gage *v.* People, 207 Ill. 377, 69 N. E. 840; Casey *v.* People, 165 Ill. 49, 46 N. E. 7; Russell *v.* Baptist Theological Union, 73 Ill. 337; Moffitt *v.* Moffitt, 69 Ill. 641; Osgood *v.* Blackmore, 59 Ill. 261; Botsford *v.* O'Conner, 57 Ill. 72; Rivard *v.* Gardner, 39 Ill. 125; Ward *v.* White, 66 Ill. App. 155; Law *v.* Grommes, 55 Ill. App. 312. *Compare* Davis *v.* Hamilton, 53 Ill. App. 94.

Indiana.— Bateman *v.* Miller, 118 Ind. 345, 21 N. E. 292; Rogers *v.* Beauchamp, 102 Ind. 33, 1 N. E. 185; Reid *v.* Mitchell, 93 Ind. 469.

Iowa.— Day *v.* Goodwin, 104 Iowa 374, 73 N. W. 864, 65 Am. St. Rep. 465; Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112.

Kentucky.— Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222; Simmons *v.* McKay, 5 Bush 25; Bustard *v.* Gates, 4 Dana 429.

Louisiana.— Dufour *v.* Camfranc, 11 Mart. 607, 13 Am. Dec. 360.

Maine.— Blaisdell *v.* Pray, 68 Me. 269; Granger *v.* Clark, 22 Me. 128.

Maryland.— Clark *v.* Bryan, 16 Md. 171.

Massachusetts.— Cook *v.* Darling, 18 Pick. 393. *Contra*, Needham *v.* Thayer, 147 Mass. 536, 18 N. E. 429, where the judgment was against a non-resident not served personally with process within the state.

Michigan.— Belcher *v.* Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376; Allured *v.* Voller, 112 Mich. 357, 70 N. W. 1037; Clark *v.* Holmes, 1 Dougl. 390.

Mississippi.— Frisby *v.* Harrisson, 30 Miss. 452; Miller *v.* Ewing, 8 Sm. & M. 421. *Compare* Smith *v.* Tupper, 4 Sm. & M. 261, 43 Am. Dec. 483.

Missouri.— Nevatt *v.* Springfield Normal School, 79 Mo. App. 198.

Montana.— Edgerton *v.* Edgerton, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94.

Nevada.— Blasdel *v.* Kean, 8 Nev. 305.

New Hampshire.— Carlton *v.* Patterson, 29 N. H. 580; Morse *v.* Presby, 25 N. H. 299.

New Mexico.— Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 159, 42 Pac. 89.

North Carolina.— Sledge *v.* Elliott, 116 N. C. 712, 21 S. E. 797; State *v.* Ridley, 114 N. C. 827, 19 S. E. 149; Isley *v.* Boon, 113 N. C. 249, 18 S. E. 174; Brickhouse *v.* Sutton, 99 N. C. 103, 5 S. E. 380, 6 Am. St. Rep. 497; Reid *v.* Kelly, 12 N. C. 313. But *compare* Balk *v.* Harris, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257.

jurisdictions it is held that a record does not import uncontrollable verity when the want of jurisdiction is alleged, and that it is permissible in a collateral proceeding to controvert the recitals of the record on this point by evidence *aliunde*.[69] And it is always open to a party to contest the alleged jurisdiction by producing other parts of the record which contradict the recitals of the judgment; as for instance the original writ or the officer's return upon it, which in case of conflict will control the recitals of the judgment,[70] although the endeavor is always

Oklahoma.— Crist *v.* Cosby, 11 Okla. 635, 69 Pac. 885.

Oregon.— Heatherly *v.* Hadley, 4 Oreg. 1.

Pennsylvania.— Hartman *v.* Ogborn, 54 Pa. St. 120, 93 Am. Dec. 679.

South Carolina.— McCullough *v.* Hicks, 63 S. C. 542, 41 S. E. 761; Reese *v.* Meetze, 51 S. C. 333, 29 S. E. 73; Prince *v.* Dickson, 39 S. C. 477, 18 S. E. 33; Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736. *Compare* Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675.

South Dakota.— Phillips *v.* Phillips, 13 S. D. 231, 83 N. W. 94.

Tennessee.—Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834; Reinhardt *v.* Nealis, 101 Tenn. 169, 46 S. W. 446; Harris *v.* McClanahan, 11 Lea 181; Howard *v.* Jenkins, 5 Lea 176; Kindell *v.* Titus, 9 Heisk. 727; Witt *v.* Russey, 10 Humphr. 208, 51 Am. Dec. 701.

Texas.— Cooper *v.* Mayfield, 94 Tex. 107, 58 S. W. 827; Gilbough *v.* Stahl Bldg. Co., (1898) 45 S. W. 385; Letney *v.* Marshall, 79 Tex. 513, 15 S. W. 586; Heck *v.* Martin, 75 Tex. 469, 13 S. W. 51, 16 Am. St. Rep. 915; Tennell *v.* Breedlove, 54 Tex. 540; Fitch *v.* Boyer, 51 Tex. 336; Smith *v.* Wood, 37 Tex. 616; Greenway *v.* De Young, 34 Tex. Civ. App. 583, 79 S. W. 603; Mills *v.* Terry, 22 Tex. Civ. App. 277, 54 S. W. 780; Glasscock *v.* Price, (Civ. App. 1898) 45 S. W. 415; Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838; Gillon *v.* Wear, 9 Tex. Civ. App. 44, 28 S. W. 1014; Lyle *v.* Horstman, (Civ. App. 1894) 25 S. W. 802; Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613; Staller *v.* McDonald, 3 Tex. App. Civ. Cas. § 382. *Compare* Thouvenin *v.* Rodrigues, 24 Tex. 468; Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728; McCormick Harvesting Mach. Co. *v.* Wesson, (Civ. App. 1897) 41 S. W. 725.

Utah.— Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20.

Virginia.— Pugh *v.* McCue, 86 Va. 475, 10 S. E. 715; Wilcher *v.* Robertson, 78 Va. 602.

Washington.— Kalb *v.* German Sav., etc., Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; Kizer *v.* Caufield, 17 Wash. 417, 49 Pac. 1064.

United States.— McCormick *v.* Sullivant, 10 Wheat. 192, 6 L. ed. 300; Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625; Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402; U. S. *v.* Gayle, 45 Fed. 107; Walker *v.* Cronkhite, 40 Fed. 133; Lathrop *v.* Stewart, 14 Fed. Cas. No. 8,112, 6 McLean 630; Sargeant *v.* Indiana State Bank, 21 Fed. Cas. No. 12,360, 4 McLean 339. *Compare* Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453.

See 30 Cent. Dig. tit. "Judgment," § 940.

69. *Arkansas.*— Griffin *v.* State, 37 Ark. 437.

District of Columbia.— Tenney *v.* Taylor, 1 App. Cas. 223.

Georgia.— Dozier *v.* Richardson, 25 Ga. 90.

Kansas.— Thorn *v.* Salmonson, 37 Kan. 441, 15 Pac. 588; Mastin *v.* Gray, 19 Kan. 458, 27 Am. Rep. 149. *Compare* Mitchell *v.* Insley, 33 Kan. 654, 7 Pac. 201.

Minnesota.— Thelen *v.* Thelen, 75 Minn. 433, 78 N. W. 108.

Nebraska.— German Nat. Bank *v.* Kautter, 55 Nebr. 103, 75 N. W. 566, 70 Am. St. Rep. 371; Eayrs *v.* Nason, 54 Nebr. 143, 74 N. W. 408.

New York.— Ferguson *v.* Crawford, 86 N. Y. 609, 70 N. Y. 253, 26 Am. Rep. 589; Dutton *v.* Smith, 10 N. Y. App. Div. 566, 42 N. Y. Suppl. 80; Bonnet *v.* Lachman, 65 Hun 554, 20 N. Y. Suppl. 514; Brown *v.* Balde, 3 Lans. 283; Sire *v.* Merrick, 15 Daly 346, 6 N. Y. Suppl. 661; Porter *v.* Bronson, 29 How. Pr. 292; Putnam *v.* Man, 3 Wend. 202, 20 Am. Dec. 686. But see O'Connor *v.* Felix, 87 Hun 179, 33 N. Y. Suppl. 1074 [*affirmed* in 147 N. Y. 614, 42 N. E. 269] (where it is said that where the record shows due service or appearance, the judgment cannot be collaterally attacked by defendant therein, on the ground that he was not served with summons, except in a case in which relief cannot be had by a motion to open the judgment); Hayes *v.* Kerr, 19 N. Y. App. Div. 91, 45 N. Y. Suppl. 1050 (holding that a judgment cannot be collaterally attacked by showing that there is a doubt about the jurisdiction; the want of jurisdiction must be made to appear clearly by a fair preponderance of the evidence). *Compare* Maples *v.* Mackey, 89 N. Y. 146; Steinhardt *v.* Baker, 20 Misc. 470, 46 N. Y. Suppl. 707.

Ohio.— Kingsborough *v.* Tousley, 56 Ohio St. 450, 47 N. E. 541. But *compare* Callen *v.* Ellison, 13 Ohio St. 446, 82 Am. Dec. 448.

Wisconsin.— Pollard *v.* Wagener, 13 Wis. 569.

See 30 Cent. Dig. tit. "Judgment," § 940.

70. *Illinois.*— Harris *v.* Lester, 80 Ill. 307; Turner *v.* Jenkins, 79 Ill. 228; Barnett *v.* Wolf, 70 Ill. 76; Pardon *v.* Dwire, 23 Ill. 572; Davis *v.* Hamilton, 53 Ill. App. 94.

Indiana.— Coan *v.* Clow, 83 Ind. 417.

Kansas.— Mickel *v.* Hicks, 19 Kan. 578, 21 Am. Rep. 161.

Michigan.— Gould *v.* Jacobson, 58 Mich. 288, 25 N. W. 194.

Missouri.— Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391; Higgins

made to reconcile apparent inconsistencies by construction or the aid of presumptions.[71]

(IV) *Decision of Court on Its Own Jurisdiction.* Where the court judicially considers and adjudicates the question of its jurisdiction, and decides that the facts exist which are necessary to give it jurisdiction of the case, the finding is conclusive and cannot be controverted in a collateral proceeding.[72] Thus, when a writ or notice which is defective, or the service of which was irregular or informal, has been adjudged sufficient, the judgment rendered thereunder will not be held void in a collateral proceeding.[73] These rules apply where a statute confers general jurisdiction over a particular class of cases upon a certain tribunal,[74] as in the case of courts of the United States,[75] and probate courts;[76] and generally, if the jurisdiction of an inferior court depends upon the existence

v. Beckwith, 102 Mo. 456, 14 S. W. 931; Cloud *v.* Pierce City, 86 Mo. 357.

Oregon.— Harris *v.* Sargeant, 37 Oreg. 41, 60 Pac. 608.

Wisconsin.— Falkner *v.* Guild, 10 Wis. 563.

United States.— Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

71. Turner *v.* Jenkins, 79 Ill. 228; Treadway *v.* Eastburn, 57 Tex. 209; Smith *v.* Wood, 37 Tex. 616; Stephens *v.* Turner, 9 Tex. Civ. App. 623, 29 S. W. 937.

72. *Alabama.*— Wyatt *v.* Steele, 26 Ala. 639.

Georgia.— Milner *v.* Neel, 114 Ga. 118, 39 S. E. 890.

Illinois.— Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813; Swift *v.* Yanaway, 153 Ill. 197, 38 N. E. 589; Searle *v.* Galbraith, 73 Ill. 269; Bannon *v.* People, 1 Ill. App. 496.

Indiana.— Bruce *v.* Osgood, 154 Ind. 375, 56 N. E. 25; State *v.* Wenzel, 77 Ind. 428; Dequindre *v.* Williams, 31 Ind. 444.

Iowa.— Ketchum *v.* White, 72 Iowa 193, 33 N. W. 627.

Kansas.— Axman *v.* Dueker, 45 Kan. 179, 25 Pac. 582.

Minnesota.— Hotchkiss *v.* Cutting, 14 Minn. 537.

New Jersey.— Fairchild *v.* Fairchild, 53 N. J. Eq. 678, 34 Atl. 10, 51 Am. St. Rep. 650.

Ohio.— Merritt *v.* Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

Tennessee.— Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834.

Texas.— Brockenborough *v.* Melton, 55 Tex. 493; International, etc., R. Co. *v.* Moore, (Civ. App. 1895) 32 S. W. 379.

Wisconsin.— Johnson *v.* Brewers' F. Ins. Co., 51 Wis. 570, 8 N. W. 297, 9 N. W. 657.

United States.— White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113; Phelps *v.* Mutual Reserve Fund Life Assoc., 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717; Reinach *v.* Atlantic, etc., R. Co., 58 Fed. 33; Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453; Otis *v.* The Rio Grande, 18 Fed. Cas. No. 10,613, 1 Woods 279.

See 30 Cent. Dig. tit. "Judgment," § 939.

73. *Illinois.*— Davis *v.* Dresback, 81 Ill. 393.

Indiana.— Hiatt *v.* Darlington, 152 Ind. 570, 53 N. E. 825; Goodell *v.* Starr, 127 Ind. 198, 26 N. E. 793.

Iowa.— Rotch *v.* Humboldt College, 89 Iowa 480, 56 N. W. 658; State Ins. Co. *v.* Waterhouse, 78 Iowa 674, 43 N. W. 611; Schee *v.* La Grange, 78 Iowa 101, 42 N. W. 616; Schneitman *v.* Noble, 75 Iowa 120, 39 N. W. 224, 9 Am. St. Rep. 467; Farmers' Ins. Co. *v.* Highsmith, 44 Iowa 330; Woodbury *v.* Maguire, 42 Iowa 339; Lyon *v.* Vanatta, 35 Iowa 521; Shawhan *v.* Loffer, 24 Iowa 217; Bonsall *v.* Isett, 14 Iowa 309; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

Minnesota.— Hotchkiss *v.* Cutting, 14 Minn. 537; Kipp *v.* Fullerton, 4 Minn. 473.

Ohio.— Cincinnati, etc., R. Co. *v.* Belle Centre, 48 Ohio St. 273, 27 N. E. 464.

Washington.— Rogers *v.* Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20.

United States.— Sipe *v.* Copwell, 59 Fed. 970, 8 C. C. A. 419; Smith *v.* Pomeroy, 22 Fed. Cas. No. 13,092, 2 Dill. 414.

See 30 Cent. Dig. tit. "Judgment," § 939.

Proof of service.— The determination of the question of the sufficiency of the affidavits presented to the court as proof of the service of a summons and the failure of defendant to answer is a judicial determination of the question of jurisdiction, and therefore binding until set aside or reversed. Hotchkiss *v.* Cutting, 14 Minn. 537.

74. Flannery *v.* Baldwin Fertilizer Co., 94 Ga. 696, 21 S. E. 587; Delphi *v.* Startzman, 104 Ind. 343, 3 N. E. 937; Dequindre *v.* Williams, 31 Ind. 444.

75. When a federal court considers and determines the question whether the facts exist which are necessary to give it jurisdiction — such as diverse citizenship of the parties, the presentation of a federal question in the case, or the like — its finding in favor of its own jurisdiction is conclusive and cannot be controverted in a collateral proceeding. Kohl *v.* Hannaford, 5 Ohio Dec. (Reprint) 306, 4 Am. L. Rec. 372; Evers *v.* Watson, 156 U. S. 527, 15 S. Ct. 430, 39 L. ed. 520; Dowell *v.* Applegate, 152 U. S. 327, 14 S. Ct. 611, 38 L. ed. 463; Lacassagne *v.* Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. ed. 368; Kent *v.* Lake Superior Ship Canal, etc., Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. ed. 352.

76. Bumstead *v.* Read, 31 Barb. (N. Y.) 661. But *compare* Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237; Fowle *v.* Coe, 63 Me. 245.

of a certain fact or state of facts, and it is shown by the record that there was evidence tending to prove such facts, and that such evidence was adjudged sufficient, and the court judicially determined that such facts existed, then the judgment cannot be collaterally impeached or contradicted.[77] These rules also apply where the service of process was by publication.[78] But in some cases it is held that if the record discloses the evidence concerning jurisdictional facts on which the court acted, its finding that it had jurisdiction is not conclusive unless the facts shown support it.[79]

(v) *No Presumption Against the Record.* Where the facts upon which a court assumes jurisdiction are recited in the record, and appear by it to have been such as would not in law confer jurisdiction, the judgment may be impeached collaterally; for in this case there can be no presumption, in aid of the judgment, that the recitals of the record are incorrect or incomplete.[80]

(vi) *No Presumption of Validity on Direct Attack.* There is no presumption in favor of the validity of a judgment when it is assailed directly, as on a proceeding to vacate it or set it aside for want of jurisdiction,[81] or in an

77. *Connecticut.*— Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556, 73 Am. Dec. 688.

Indiana.— Ricketts *v.* Spraker, 77 Ind. 371; Stoddard *v.* Johnson, 75 Ind. 20; Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395; Strohmier *v.* Stumph, Wils. 304.

Iowa.— Shawhan *v.* Loffer, 24 Iowa 217; Bonsall *v.* Isett, 14 Iowa 309.

Maine.— Waterhouse *v.* Cousins, 40 Me. 333; Agry *v.* Betts, 12 Me. 415.

Massachusetts.— Betts *v.* Bagley, 12 Pick. 572.

Minnesota.— Kipp *v.* Fullerton, 4 Minn. 473.

New York.— Porter *v.* Purdy, 29 N. Y. 106, 86 Am. Dec. 283; Sheldon *v.* Wright, 5 N. Y. 497; Dyckman *v.* New York, 5 N. Y. 434; Bolton *v.* Brewster, 32 Barb. 389.

Rhode Island.— Angell *v.* Robbins, 4 R. I. 493.

Wisconsin.— Hungerford *v.* Cushing, 8 Wis. 324.

See 30 Cent. Dig. tit. "Judgment," § 939.

Contra.— *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. 354. But *compare* People *v.* Hagar, 52 Cal. 171.

78. Figge *v.* Rowlen, 185 Ill. 234, 57 N. E. 195; Goodell *v.* Starr, 127 Ind. 198, 26 N. E. 793; Essig *v.* Lower, 120 Ind. 239, 21 N. E. 1090; Dowell *v.* Lahr, 97 Ind. 146; Fowler *v.* Whiteman, 2 Ohio St. 270; Boswell *v.* Sharp, 15 Ohio 447; Laughlin *v.* Vogelsong, 5 Ohio Cir. Ct. 407, 3 Ohio Cir. Dec. 200; Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613.

79. Senichka *v.* Lowe, 74 Ill. 274; Barnett *v.* Wolf, 70 Ill. 76.

80. *California.*— Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742.

Colorado.— Hughes *v.* Cummings, 7 Colo. 138, 203, 2 Pac. 289, 928.

Illinois.— Osgood *v.* Blackmore, 59 Ill. 261; Botsford *v.* O'Connor, 57 Ill. 72; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457.

Kansas.— O'Driscoll *v.* Soper, 19 Kan. 574.

Maine.— Penobscot R. Co. *v.* Weeks, 52 Me. 456.

Michigan.— O'Flynn *v.* Holmes, 8 Mich. 95.

Minnesota.— Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836.

Missouri.— Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391.

Nebraska.— Cizek *v.* Cizek, (1904) 99 N. W. 28.

New York.— Bowler *v.* Ennis, 46 N. Y. App. Div. 309, 61 N. Y. Suppl. 686; Stuyvesant *v.* Weil, 41 N. Y. App. Div. 551, 58 N. Y. Suppl. 697.

Pennsylvania.— Hering *v.* Chambers, 103 Pa. St. 175; Messinger *v.* Kintner, 4 Binn. 97.

Texas.— Fowler *v.* Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370; Walker *v.* Myers, 36 Tex. 203.

Virginia.— Blanton *v.* Carroll, 86 Va. 539, 10 S. E. 329; Dillard *v.* Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124.

Wisconsin.— Ely *v.* Tallman, 14 Wis. 28; Pollard *v.* Wegener, 13 Wis. 569; Falkner *v.* Guild, 10 Wis. 563.

United States.— Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Ritchie *v.* Sayers, 100 Fed. 520; Newman *v.* Crowls, 60 Fed. 220, 8 C. C. A. 577.

Extrinsic evidence.— Where an order required publication of a notice to be made in a certain newspaper, and the final judgment of the court recited that the notice was published in another paper, it was held, on a collateral attack, that extrinsic evidence was admissible to show that the notice was in fact published in the paper designated in the original order. Schroeder *v.* Wilcox, 39 Nebr. 136, 57 N. W. 1031.

81. *California.*— Norton *v.* Atchison, etc., R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198.

Iowa.— Newcomb *v.* Dewey, 27 Iowa 381.

Kansas.— McNeill *v.* Edie, 24 Kan. 108; Hanson *v.* Wolcott, 19 Kan. 207; Chambers *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 270; Bond *v.* Wilson, 8 Kan. 228, 12 Am. Rep. 466.

Mississippi.— Duncan *v.* Gerdine, 59 Miss. 550.

Missouri.— Mullins *v.* Rieger, 169 Mo. 521, 70 S. W. 4.

action on the judgment where it is sought to be made the basis of a new recovery.[82]

3. Errors and Irregularities — a. As Ground For Impeaching Judgment — (i) *In General.* Where a court has jurisdiction of the parties and the subject-matter, its judgment, although irregular in form, or erroneous or mistaken in law, is conclusive, as long as it remains unreversed and in force, and cannot be impeached collaterally.[83]

North Carolina.— Ricaud *v.* Alderman, 132 N. C. 62, 43 S. E. 543.

Ohio.— Trimble *v.* Longworth, 13 Ohio St. 431.

82. Clark *v.* Little, 41 Iowa 497.

83. *Alabama.*— Driggers *v.* Cassady, 71 Ala. 529; Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334; Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; Lewis *v.* Gainesville, 7 Ala. 85; Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677.

Arkansas.— Arbuckle *v.* Matthews, 73 Ark. 27, 83 S. W. 326; Calhoun *v.* Adams, 43 Ark. 238; Evans *v.* Percifull, 5 Ark. 424; McKnight *v.* Smith, 5 Ark. 409.

California.— Koehler *v.* Holt Mfg. Co., 146 Cal. 335, 80 Pac. 73; Crane *v.* Cummings, 137 Cal. 201, 69 Pac. 984; Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667; Linehan *v.* Hathaway, 54 Cal. 251; Lucas *v.* Todd, 28 Cal. 182; Breeze *v.* Doyle, 19 Cal. 101.

Connecticut.— Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; De Forest *v.* Strong, 8 Conn. 513.

District of Columbia.— Willett *v.* Otterback, 20 D. C. 324.

Florida.— Finley *v.* Chamberlin, 46 Fla. 581, 35 So. 1; Einstein *v.* Davidson, 35 Fla. 342, 17 So. 563; Adams *v.* White, 23 Fla. 352, 2 So. 774; Rushing *v.* Thompson, 20 Fla. 583; Ponder *v.* Moseley, 2 Fla. 207, 48 Am. Dec. 194.

Georgia.— Stanford *v.* Bradford, 45 Ga. 97; Skrine *v.* Simmons, 36 Ga. 402, 91 Am. Dec. 771; Dickerson *v.* Powell, 21 Ga. 143; Mobley *v.* Mobley, 9 Ga. 247; Rodgers *v.* Evans, 8 Ga. 143, 52 Am. Dec. 390.

Illinois.— Millard *v.* Marmon, 116 Ill. 649, 7 N. E. 468; Miller *v.* Pence, 115 Ill. 576, 4 N. E. 496; Pestel *v.* Primm, 109 Ill. 353; Feaster *v.* Fleming, 56 Ill. 457; McBane *v.* People, 50 Ill. 503; Wales *v.* Bogue, 31 Ill. 464; Cody *v.* Hough, 20 Ill. 43; Lane *v.* Bommelmann, 17 Ill. 95; Chesnut *v.* Marsh, 12 Ill. 173; Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418; Pinkney *v.* Weaver, 115 Ill. App. 582 [*affirmed* in 216 Ill. 185, 74 N. E. 714]; Andrews *v.* Scott, 113 Ill. App. 581 [*affirmed* in 211 Ill. 612, 71 N. E. 1112] (suit improperly entitled); Brown *v.* Schintz, 109 Ill. App. 598; MacLachlan *v.* Pease, 66 Ill. App. 634; Johnson *v.* Miller, 55 Ill. App. 168; Agnew *v.* Lichten, 19 Ill. App. 79.

Indiana.— Winer *v.* Mast, 146 Ind. 177, 45 N. E. 66; Cosby *v.* Powers, 137 Ind. 694, 37 N. E. 321; Hawkins *v.* McDougal, 126 Ind. 539, 25 N. E. 820; Davis *v.* Lennen, 125 Ind. 185, 24 N. E. 885; Kleyla *v.* Haskett, 112 Ind. 515, 14 N. E. 387; Woolery *v.* Grayson, 110 Ind. 149, 10 N. E. 935; Spencer *v.* McGonagle, 107 Ind. 410, 8 N. E. 266; Young *v.* Sellers, 106 Ind. 101, 5 N. E. 686; Huffman *v.* Cauble, 86 Ind. 591; Sauer *v.* Twining, 81 Ind. 366; Marshall *v.* Gill, 77 Ind. 402; Walker *v.* Heller, 73 Ind. 46; Wiley *v.* Pavey, 61 Ind. 457, 28 Am. Rep. 677; Gale *v.* Parks, 58 Ind. 117; Evans *v.* Ashby, 22 Ind. 15; Stewart *v.* Nunemaker, 2 Ind. 47; Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355; Fruits *v.* Elmore, 8 Ind. App. 278, 34 N. E. 829; State *v.* Tow, 5 Ind. App. 261, 31 N. E. 1120.

Iowa.— Hunt *v.* Johnston, 105 Iowa 311, 75 N. W. 103; Witter *v.* Fisher, 27 Iowa 9; Hart *v.* Jewett, 11 Iowa 276; Burton *v.* Warren Dist. Tp., 11 Iowa 166; Delany *v.* Reade, 4 Iowa 292; Cameron *v.* Boyle, 2 Greene 154.

Kansas.— Clevenger *v.* Figley, 68 Kan. 699, 75 Pac. 1001; Garrett *v.* Struhle, 57 Kan. 508, 46 Pac. 943; Bradford *v.* Larkin, 57 Kan. 90, 45 Pac. 69; Santa Fé Bank *v.* Haskell County Bank, 51 Kan. 50, 32 Pac. 627; Barnum *v.* Kennedy, 21 Kan. 181; Selders *v.* Boyle, 5 Kan. App. 451, 49 Pac. 320.

Kentucky.— Bitzer *v.* Mercke, 111 Ky. 299, 63 S. W. 771, 23 Ky. L. Rep. 670; Derr *v.* Wilson, 84 Ky. 14; Dorsey *v.* Kendall, 8 Bush 294; Benningfield *v.* Reed, 8 B. Mon. 102; Bustard *v.* Gates, 4 Dana 429; Moore *v.* Tanner, 5 T. B. Mon. 42, 27 Am. Dec. 35.

Louisiana.— Weil *v.* Schwartz, 51 La. Ann. 1547, 26 So. 475; Folger *v.* Slaughter, 33 La. Ann. 341; Dupuy *v.* Bemiss, 2 La. Ann. 509.

Maine.— Banister *v.* Higginson, 15 Me. 73, 32 Am. Dec. 134.

Maryland.— Long *v.* Long, 62 Md. 33; Clark *v.* Bryan, 16 Md. 171; Hunter *v.* Hatton, 4 Gill 115, 45 Am. Dec. 117.

Michigan.— Newton *v.* Auditor-Gen., 131 Mich. 547, 91 N. W. 1030; Huyck *v.* Graham, 82 Mich. 353, 46 N. W. 781; Shickle, etc., Iron Co. *v.* Wiley Constr. Co., 61 Mich. 226, 28 N. W. 77, 1 Am. St. Rep. 571.

Minnesota.— West Duluth Land Co. *v.* Bradley, 75 Minn. 275, 77 N. W. 964; Hall *v.* Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497; Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540; Hotchkiss *v.* Cutting, 14 Minn. 537.

Mississippi.— State *v.* Ricketts, 67 Miss. 409, 7 So. 282; Moore *v.* Ware, 51 Miss. 206; Wall *v.* Wall, 28 Miss. 409.

Missouri.— Kelly *v.* Gebhart, 180 Mo. 588, 79 S. W. 427; Bedford *v.* Sykes, 168 Mo. 8, 67 S. W. 569; Reed *v.* Nicholson, 158 Mo. 624, 59 S. W. 977; State *v.* Wear, 145 Mo. 162, 46 S. W. 1099; Chrisman *v.* Divinia, 141 Mo. 122, 41 S. W. 920; Rosenheim *v.* Hartsock, 90 Mo. 357, 2 S. W. 473; Lewis *v.* Morrow, 89 Mo. 174, 1 S. W. 93; Castleman *v.* Relfe, 50 Mo. 583; State *v.* St. Gemme, 31 Mo. 230; Perryman *v.* State, 8 Mo. 208.

(II) *Special and Statutory Proceedings.* This rule applies not only in the case of formal suits at law or in equity, but also to the judicial determinations of the courts in special proceedings, out of the course of the common law, or founded wholly on statutes.[84]

Montana.— Burke *v.* Inter-State Sav., etc., Assoc., 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416.

Nebraska.— Fraaman *v.* Fraaman, 64 Nebr. 472, 90 N. W. 245, 97 Am. St. Rep. 650; Phillips *v.* Hogue, 63 Nebr. 192, 88 N. W. 180; Alter *v.* State, 62 Nebr. 239, 86 N. W. 1080; Maryott *v.* Gardner, 50 Nebr. 320, 69 N. W. 837; Gillilan *v.* Murphy, 49 Nebr. 779, 69 N. W. 98; Toogood *v.* Russell, 3 Nebr. (Unoff.) 189, 91 N. W. 249; Muchmore *v.* Guest, 2 Nebr. (Unoff.) 127, 96 N. W. 194.

New Hampshire.— Holland *v.* Laconia Bldg., etc., Assoc., 68 N. H. 480, 41 Atl. 178; Morrison *v.* Woolson, 23 N. H. 11; Smith *v.* Knowlton, 11 N. H. 191.

New Jersey.— Stothoff *v.* Dunham, 19 N. J. L. 181; Obert *v.* Hammel, 18 N. J. L. 73; Cammann *v.* Traphagen, 1 N. J. Eq. 230.

New York.— Bloomer *v.* Sturges, 58 N. Y. 168; Becker *v.* Studeman, 86 N. Y. App. Div. 94, 83 N. Y. Suppl. 538; Brown *v.* Beckmann, 53 N. Y. App. Div. 257, 65 N. Y. Suppl. 740; Brooks *v.* New York, 57 Hun 104, 10 N. Y. Suppl. 773; Althause *v.* Radde, 3 Bosw. 410; Trowbridge *v.* Hays, 21 Misc. 234, 45 N. Y. Suppl. 635; Stearns *v.* St. Louis, etc., R. Co., 2 N. Y. St. 391; Post *v.* Haight, 2 How. Pr. 32; Farrington *v.* King, 1 Bradf. Surr. 182.

North Carolina.— Carter *v.* Rountree, 109 N. C. 29, 13 S. E. 716; Tyson *v.* Belcher, 102 N. C. 112, 9 S. E. 634; Hinton *v.* Roach, 95 N. C. 106; Burgess *v.* Kirby, 94 N. C. 575; State *v.* Conoly, 28 N. C. 243; Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155; White *v.* Albertson, 14 N. C. 241, 22 Am. Dec. 719; Oxley *v.* Mizle, 7 N. C. 250.

North Dakota.— Nichols, etc., Co. *v.* Paulson, 10 N. D. 440, 87 N. W. 977.

Ohio.— Root *v.* Davis, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445; Sheldon *v.* Newton, 3 Ohio St. 494; Boswell *v.* Sharp, 15 Ohio 447; Cadwallader *v.* Evans, 1 Disn. 585, 12 Ohio Dec. (Reprint) 811; Berry *v.* Greenfield, Wright 348; Cleveland Co-Operative Stove Co. *v.* Mehling, 21 Ohio Cir. Ct. 60, 11 Ohio Cir. Dec. 400.

Pennsylvania.— Dauberman *v.* Hain, 196 Pa. St. 435, 46 Atl. 442; McFate's Appeal, 105 Pa. St. 323; Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Gilmore *v.* Rogers, 41 Pa. St. 120; Miltimore *v.* Miltimore, 40 Pa. St. 151; Cyphert *v.* McClune, 22 Pa. St. 195; Davidson *v.* Thornton, 7 Pa. St. 128; Lewis *v.* Smith, 2 Serg. & R. 142; Curry *v.* Curry, 8 Pa. Cas. 247, 11 Atl. 198.

South Carolina.— James *v.* Smith, 2 S. C. 183; Upson *v.* Horn, 3 Strobh. 108, 49 Am. Dec. 633; Camberford *v.* Hall, 3 McCord 345; Lyles *v.* Brown, Harp. 31.

South Dakota.— Green *v.* Sabin, 12 S. D. 496, 81 N. W. 904; Davis *v.* Cook, 9 S. D. 319, 69 N. W. 18.

Texas.— Sanger *v.* Roberts, 92 Tex. 312, 48 S. W. 1; Willis *v.* Ferguson, 46 Tex. 496; Boggess *v.* Howard, 40 Tex. 153; Thouvenin *v.* Rodrigues, 24 Tex. 468; Bowers *v.* Chaney, 21 Tex. 363; Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100; Campbell *v.* Upson, (Civ. App. 1904) 81 S. W. 358; Houston, etc., R. Co. *v.* De Barry, 34 Tex. Civ. App. 180, 78 S. W. 736; Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717; Carson *v.* Taylor, 19 Tex. Civ. App. 177, 47 S. W. 395; Rowlett *v.* Williamson, 18 Tex. Civ. App. 28, 44 S. W. 624; Thorp *v.* Gordon, (Civ. App. 1897) 43 S. W. 323; Hinzie *v.* Ward, 1 Tex. App. Civ. Cas. § 1314.

Vermont.— *Ex p.* Kellogg, 6 Vt. 509.

Virginia.— Turnbull *v.* Mann, 99 Va. 41, 37 S. E. 288; Lemmon *v.* Herbert, 92 Va. 653, 24 S. E. 249; Fox *v.* Cottage Bldg. Fund Assoc., 81 Va. 677; Howison *v.* Weeden, 77 Va. 704; Neale *v.* Utz, 75 Va. 480.

Washington.— Rohrer *v.* Snyder, 29 Wash. 199, 69 Pac. 748.

West Virginia.— Northwestern Bank *v.* Hays, 37 W. Va. 475, 16 S. E. 561.

Wisconsin.— Morrison *v.* Austin, 14 Wis. 601; Tallman *v.* McCarty, 11 Wis. 401; Thomas *v.* Savage, 8 Wis. 160.

United States.— Manson *v.* Duncanson, 166 U. S. 533, 17 S. Ct. 647, 41 L. ed. 1105; Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304; Parker *v.* Kane, 22 How. 1, 16 L. ed. 286; Huff *v.* Hutchinson, 14 How. 586, 14 L. ed. 553; Thompson *v.* Tolmie, 2 Pet. 157, 7 L. ed. 381; Hatcher *v.* Hendrie, etc., Mfg. Co., 133 Fed. 267, 68 C. C. A. 19; Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87; Pullman's Palace Car Co. *v.* Washburn, 66 Fed. 790; Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402; French *v.* Lafayette Ins. Co., 9 Fed. Cas. No. 5,102, 5 McLean 461; New York Cent., etc., R. Co. *v.* U. S., 24 Ct. Cl. 22.

See 30 Cent. Dig. tit. "Judgment," § 941.

An irregular judgment is one entered contrary to the method of procedure and practice of the court; and ordinarily the mode of relief against it is by motion in the cause, whether the action has been ended or is still pending. Such motion may be made at any time within a reasonable period. Carter *v.* Rountree, 109 N. C. 29, 13 S. E. 716.

84. *Alabama.*— Martin *v.* Hall, 70 Ala. 421, attachment.

Illinois.— Thompson *v.* People, 207 Ill. 334, 69 N. E. 842, confirmation of paving assessment.

Indiana.— Young *v.* Sellers, 106 Ind. 101, 5 N. E. 686, drainage proceedings.

New Hampshire.— Eastman *v.* Dearborn, 63 N. H. 364, attachment.

Ohio.— Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459, proceeding to set aside a judgment.

(III) *JUDGMENTS OF INFERIOR COURTS.* Although, as before stated, the validity of a judgment rendered by an inferior court is not sustained by any presumptions as to jurisdiction,[85] yet when it is established that such a court had jurisdiction of the parties and the subject-matter, it will be presumed to have proceeded in due order, and its judgment cannot be attacked in any collateral proceeding for error or irregularity.[86] This rule applies to the orders and judgments of probate courts.[87]

b. Defects and Objections as to Parties. A judgment or decree cannot be impeached collaterally on account of an alleged misjoinder or non-joinder of parties,[88] or a misnomer,[89] or for objections to an amendment adding new par-

Pennsylvania.— Jefferson County *v.* Reitz, 56 Pa. St. 44, appropriation of fines.

See 30 Cent. Dig. tit. "Judgment," § 941.

85. See *supra*, XI, E, 2, h, (II).

86. *Alabama.*— Wilson *v.* Wilson, 18 Ala. 176.

Connecticut.— Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

Georgia.— Gray *v.* McNeal, 12 Ga. 424.

Indiana.— Alexander *v.* Gill, 130 Ind. 485, 30 N. E. 525; Clay County *v.* Markle, 46 Ind. 96.

Iowa.— Pursley *v.* Hays, 22 Iowa 11, 92 Am. Dec. 350; State *v.* Berry, 12 Iowa 58; Little *v.* Sinnett, 7 Iowa 324; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

Kansas.—Vincent *v.* Davidson, 1 Kan. App. 606, 42 Pac. 390.

Maine.— Paul *v.* Hussey, 35 Me. 97.

Michigan.— Cole *v.* Potter, 135 Mich. 326, 97 N. W. 774, 106 Am. St. Rep. 398.

New Jersey.— Reeves *v.* Townsend, 22 N. J. L. 396.

Ohio.— Adams *v.* Jeffries, 12 Ohio 253, 40 Am. Dec. 477.

South Dakota.— Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

Tennessee.— McCarroll *v.* Weeks, 2 Overt. 215.

United States.— Beard *v.* Federy, 3 Wall. 478, 18 L. ed. 88; Comstock *v.* Crawford, 3 Wall. 396, 18 L. ed. 34.

87. *Alabama.*— Arnett *v.* Bailey, 60 Ala. 435; Todd *v.* Flournoy, 56 Ala. 99, 28 Am. Rep. 758; Ward *v.* Hudspeth, 44 Ala. 215; Lyon *v.* Odom, 31 Ala. 234; Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; Samuels *v.* Findley, 7 Ala. 635; Richardson *v.* Hobart, 1 Stew. 500, 18 Am. Dec. 70.

Arkansas.— Currie *v.* Franklin, 51 Ark. 338, 11 S. W. 477; Redmond *v.* Anderson, 18 Ark. 449.

California.— Lucas *v.* Todd, 28 Cal. 182; Haynes *v.* Meeks, 10 Cal. 110, 70 Am. Dec. 703.

Connecticut.—Bulkley *v.* Andrews, 39 Conn. 523.

Indiana.— Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387.

Kansas.— Bradford *v.* Larkin, 57 Kan. 90, 45 Pac. 69.

Louisiana.— Grevemberg *v.* Bradford, 44 La. Ann. 400, 10 So. 786; Neal's Successiou, 25 La. Ann. 125; Woods *v.* Lee, 21 La. Ann. 505.

Massachusetts.—Sumner *v.* Parker, 7 Mass. 79; Wales *v.* Willard, 2 Mass. 120.

Mississippi.— Hendricks *v.* Pugh, 57 Miss. 157.

Missouri.— Camden *v.* Plain, 91 Mo. 117, 4 S. W. 86; State *v.* St. Gemme, 31 Mo. 230.

New Jersey.— Van Kleek *v.* O'Hanlon, 21 N. J. L. 582; Maxwell *v.* Pittenger, 3 N. J. Eq. 156.

New York.— Rowe *v.* Parsons, 6 Hun 338; Bogardus *v.* Clark, 4 Paige 623; Woodruff *v.* Cook, 2 Edw. 259.

Pennsylvania.— Ohio *v.* Hinchman, 27 Pa. St. 479; Iddings *v.* Cairns, 2 Grant 88.

Texas.— Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325; Grant *v.* Hill, (Civ. App. 1894) 30 S. W. 952.

Vermont.— Probate Judge *v.* Fillmore, 1 D. Chipm. 420.

Washington.— Webster *v.* Seattle Trust Co., 7 Wash. 642, 33 Pac. 970, 35 Pac. 1082.

88. *Indiana.*— Dwiggins *v.* Cook, 71 Ind. 579; Doe *v.* Smith, Smith 381; Gates *v.* Newman, 18 Ind. App. 392, 46 N. E. 654.

Iowa.— Tod *v.* Crisman, 123 Iowa 693, 99 N. W. 686; Perry *v.* Miller, 54 Iowa 277, 5 N. W. 727, 6 N. W. 302.

Kentucky.— Clay *v.* Newton, 20 S. W. 305, 14 Ky. L. Rep. 445.

Louisiana.—Vicksburg, etc., R. Co. *v.* Tibbs, 112 La. 51, 36 So. 223. But *compare* Clark *v.* Hébert, 15 La. Ann. 279, holding that where suit is brought on a judgment of another court, defendant may allege the nullity of the judgment arising from the want of proper parties.

Missouri.— Yates *v.* Johnson, 87 Mo. 213.

New Hampshire.— Clifford *v.* Plumer, 45 N. H. 269.

Pennsylvania.— Levan *v.* Milholland, 114 Pa. St. 49, 7 Atl. 194.

United States.— Hefner *v.* Northwestern Mut. L. Ins. Co., 123 U. S. 747, 8 S. Ct. 337, 31 L. ed. 309.

See 30 Cent. Dig. tit. "Judgment," § 942.

89. *Alabama.*— Harrison *v.* Harrison, 19 Ala. 499.

California.— Campbell *v.* Adams, 50 Cal. 203.

Indiana.— McGaughey *v.* Woods, 106 Ind. 380, 7 N. E. 7.

Michigan.— Vicborn *v.* Pollock, 133 Mich. 524, 95 N. W. 576.

Nebraska.— Oakley *v.* Pegler, 30 Nebr. 628, 46 N. W. 920.

Wisconsin.— Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

ties,[90] or for any technical objection to plaintiff's capacity to sue,[91] or because the judgment may be irregular or voidable as against another person who was a joint plaintiff or defendant,[92] or because the judgment was rendered against a defendant personally instead of in the representative capacity in which he was sued,[93] or because minors were not properly represented in the action.[94]

c. Defects and Objections as to Pleadings. A judgment cannot be impeached collaterally on account of any defects in the pleadings.[95] Its validity cannot be impugned for instance by showing that a wrong form of action was chosen,[96]

See 30 Cent. Dig. tit. "Judgment," § 942.

Effect of misnomer on validity of judgment see *supra*, VI, C, 7, b.

Apparent identity of parties.— Where the record shows that the names of plaintiff and defendant in the action were identical, it will not be presumed, in a collateral proceeding, that the parties were the same person, thereby invalidating the judgment. Allen *v.* Evans, (Ariz. 1901) 64 Pac. 414; Bryan *v.* Kales, 3 Ariz. 423, 31 Pac. 517.

90. Alabama, etc., R. Co. *v.* Thomas, 86 Miss. 27, 38 So. 770.

91. Roberts *v.* Hill, 137 Ind. 215, 36 N. E. 843; Somers *v.* Losey, 48 Mich. 294, 12 N. W. 188.

Want of authority in an attorney on the other side cannot be urged collaterally by a person affected by a judgment. Guliano *v.* Whitenack, 30 N. Y. Suppl. 415, 24 N. Y. Civ. Proc. 55.

A sale under order of the probate court is not subject to collateral attack because made on application of the administrator in behalf of creditors, instead of being made on the application of the creditors themselves. Simpson *v.* Bailey, 80 Md. 421, 30 Atl. 622.

Administrators.— In case of a judgment recovered by an administrator, it cannot be objected in collateral proceedings that his letters were irregularly granted or granted without jurisdiction (Abbott *v.* Curran, 98 N. Y. 665), or that, being appointed in a foreign state, he had not filed copies of his letters before bringing suit (Marshall *v.* Charland, 109 Ga. 306, 34 S. E. 671).

Corporation.— It cannot be objected collaterally that plaintiff, being a corporation, had failed to allege the fact of its incorporation. McFall *v.* Buckeye Grangers' Warehouse Assoc., 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47.

Real party in interest.— It is no ground for collateral impeachment of a judgment that plaintiff was not the real party in interest. Cates *v.* Riley, (Tex. Civ. App. 1900) 55 S. W. 979. *Compare* National Exch. Bank *v.* Wiley, 3 Nebr. (Unoff.) 716, 92 N. W. 582.

92. *Alabama.*— Masterson *v.* Gibson, 56 Ala. 56.

Illinois.— Aldrich *v.* Housh, 71 Ill. App. 607.

Missouri.— Lenox *v.* Clarke, 52 Mo. 115; Ellis *v.* Jones, 51 Mo. 180.

New York.— Jackson *v.* Robins, 16 Johns. 537.

Pennsylvania.— Jones *v.* Raiguel, 97 Pa. St. 437.

Texas.— Riddle *v.* Turner, 52 Tex. 145. But *compare* Moore *v.* Perry, (Civ. App. 1900) 56 S. W. 120, where it appeared that the name of one defendant had been added to the judgment after its entry, and it was held that this rendered the judgment void and subject to collateral impeachment.

See 30 Cent. Dig. tit. "Judgment," § 942.

One party on both sides.— A judgment entered in favor of a plaintiff, against himself and others, and revived to the use of one to whom it has been assigned, is valid as against a creditor of plaintiff whose judgment was recovered after the revival. Sponsler's Appeal, 127 Pa. St. 410, 17 Atl. 1097.

Partners.— It is no ground for collateral attack upon a judgment rendered in an action against a partnership that the judgment was entered against one partner only (Hough *v.* Stover, 46 Nebr. 588, 65 N. W. 189), or was rendered on the confession of only one of the partners (Belcher *v.* Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376).

93. Barringer *v.* Boyd, 27 Miss. 473.

94. Weeks *v.* McPhail, 128 N. C. 130, 38 S. E. 472; Colt *v.* Colt, 11 U. S. 566, 4 S. Ct. 553, 28 L. ed. 520.

95. *Alabama.*— Shearer *v.* Birmingham City Nat. Bank, 115 Ala. 352, 22 So. 151.

California.— Hayward *v.* Pimentel, 107 Cal. 386, 40 Pac. 545; Aucker *v.* McCoy, 56 Cal. 524.

Connecticut.— Woodbridge *v.* Pratt, etc., Co., 69 Conn. 304, 37 Atl. 688.

Illinois.— Fitzpatrick *v.* Rutter, 160 Ill. 282, 43 N. E. 392; Cutright *v.* Stanford, 81 Ill. 240; Figge *v.* Rowlen, 84 Ill. App. 238; Johnson *v.* Miller, 55 Ill. App. 168.

Indiana.— Maynard *v.* Waidlich, 156 Ind. 562, 60 N. E. 348; Browing *v.* Smith, 139 Ind. 280, 37 N. E. 540.

Iowa.— Rotch *v.* Humboldt College, 89 Iowa 480, 56 N. W. 658; Hildreth *v.* Harney, 62 Iowa 420, 17 N. W. 584; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Michigan.— Allen *v.* Carpenter, 15 Mich. 25.

Missouri.— Dollarhide *v.* Parks, 92 Mo. 178, 5 S. W. 3.

Montana.— Burke *v.* Inter-State Sav., etc., Assoc., 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416.

Texas.— Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838.

Wisconsin.— Mayer Boot, etc., Co. *v.* Falk, 89 Wis. 216, 61 N. W. 562.

See 30 Cent. Dig. tit. "Judgment," § 943.

96. Johnson *v.* Miller, 55 Ill. App. 168; Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732,

that the complaint did not state facts sufficient to constitute a cause of action [97] or was not verified,[98] that there was a misjoinder of causes of action,[99] or that the action appeared from the face of the papers to have been barred by the statute of limitations,[1] although there is some authority for holding that the judgment will be void and impeachable collaterally if not supported by any pleadings at all.[2]

d. Irregularities in Procedure. A judgment may not be impeached in any collateral proceeding on account of informalities or irregularities in the proceedings had in the case antecedent to the rendition of the judgment.[3] Thus it is no

21 Ky. L. Rep. 1157, 50 L. R. A. 105; Brundred *v.* Egbert, 164 Pa. St. 615, 30 Atl. 503; Insley *v.* U. S., 150 U. S. 512, 14 S. Ct. 158, 37 L. ed. 1163.

97. *Kansas.*— Rowe *v.* Palmer, 29 Kan. 337.

Kentucky.— Bitzer *v.* Mercke, 111 Ky. 299, 63 S. W. 771, 23 Ky. L. Rep. 670.

Missouri.— Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Holt County *v.* Cannon, 114 Mo. 514, 21 S. W. 851.

Nebraska.— Logan County *v.* Carnahan, (1903) 95 N. W. 812; Howell *v.* Ross, 69 Nebr. 1, 94 N. W. 955; Dryden *v.* Parrotte, 61 Nebr. 339, 85 N. W. 287.

Oregon.— Altman *v.* School Dist. No. 6, 35 Oreg. 85, 56 Pac. 291, 76 Am. St. Rep. 468; North Pac. Cycle Co. *v.* Thomas, 26 Oreg. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

Pennsylvania.— Buehler *v.* Buffington, 43 Pa. St. 278.

Washington.— Kalb *v.* German Sav., etc., Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757.

Wisconsin.— Wood *v.* Blythe, 46 Wis. 650, 1 N. W. 341.

See 30 Cent. Dig. tit. "Judgment," § 943.

Contra.— Consolidated Electric Storage Co. *v.* Atlantic Trust Co., 50 N. J. Eq. 93, 24 Atl. 229; Laughlin *v.* Vogelsong, 5 Ohio Cir. Ct. 407, 3 Ohio Cir. Dec. 200; Griffith *v.* Hubbard, 9 S. D. 15, 67 N. W. 850; Colligan *v.* Cooney, 107 Tenn. 214, 64 S. W. 31.

Insufficient or illegal cause of action as ground for attack in general see *supra*, XI, E, 1, b.

98. Gilkeson *v.* Knight, 71 Mo. 403; McCoy *v.* Ayres, 2 Wash. Terr. 203, 3 Pac. 273.

99. Dime Sav. Bank *v.* McAlenney, 78 Conn. 208, 61 Atl. 476; Jones *v.* Levi, 72 Ind. 586.

Union of legal and equitable claims.— Although the distinction between actions at law and suits in equity is carefully maintained in the federal courts, and when a case which unites both legal and equitable grounds for relief, as permitted by the practice of the state in which it is brought, is removed into a federal court, the pleadings should be recast so as to separate the two causes of action, yet where an action to enforce a mechanic's lien and to recover the debt which it secures, in which plaintiff had also obtained an attachment, which had been served, was thereafter removed and proceeded with in the federal court on the original pleadings as a suit in equity, without objection, and a money judgment was rendered against defendant, such judgment is not void, even if erroneous, and cannot be collaterally attacked. Hatcher *v.* Hendrie, etc., Mfg., etc., Co., 133 Fed. 267, 68 C. C. A. 19.

1. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911; Jones *v.* Read, 1 Humphr. (Tenn.) 335; Christofferson *v.* Pfennig, 16 Wash. 491, 48 Pac. 264; Herron *v.* Dater, 120 U. S. 464, 7 S. Ct. 620, 30 L. ed. 748.

2. Spoors *v.* Cowen, 44 Ohio St. 497, 9 N. E. 132. *Compare* Sutherland *v.* St. Lawrence County, 42 Misc. (N. Y.) 38, 85 N. Y. Suppl. 696.

3. *Idaho.*— Ollis *v.* Kirkpatrick, 3 Ida. 247, 28 Pac. 435.

Iowa.— English *v.* Otis, 125 Iowa 555, 101 N. W. 293.

Louisiana.— Jeannet *v.* Ricker, 10 La. Ann. 66.

Massachusetts.— Chamberlain *v.* Preble, 11 Allen 370.

Oklahoma.— Smith *v.* Finger, 15 Okla. 120, 79 Pac. 759.

South Dakota.— Weiland *v.* Ashton, 18 S. D. 331, 100 N. W. 737.

See 30 Cent. Dig. tit. "Judgment," § 945.

Applications of text.— A judgment is not impeachable collaterally because of the failure to file a bond in an injunction suit (Lewis *v.* Rowland, 131 Ind. 103, 29 N. E. 922), or an affidavit in a proceeding by attachment (Slade *v.* Le Page, 8 Tex. Civ. App. 403, 27 S. W. 952; Barelli *v.* Wagner, 5 Tex. Civ. App. 445, 27 S. W. 17. *Compare* Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907); because of an insufficient affidavit (Rogers *v.* Ingersoll, 103 N. Y. App. Div. 490, 93 N. Y. Suppl. 140); because an administrator's sale ordered by the judgment was not made at the time required by law, if it was afterward confirmed by the court (Brown *v.* Christie, 27 Tex. 73, 84 Am. Dec. 607); because the claim in suit was directly passed on by the court, instead of being referred to a master in chancery (Youngstown Bridge Co. *v.* North Galveston, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. 420); or because of failure to treat a counter-claim as withdrawn, where defendant does not appear at the trial (Groton Bridge, etc., Co. *v.* Clark Pressed Brick Co., 136 Fed. 27, 68 C. C. A. 577 [*affirming* 126 Fed. 552]). So an order requiring a garnishee to pay money into court cannot be attacked by the judgment debtor in a collateral proceeding, although the property in

ground of collateral objection that the action was tried by the court alone, where it was properly triable by a jury or *vice versa*,[4] and the same applies to irregular action in regard to continuances or adjournments of the case,[5] or upon proceedings for a change of venue.[6]

e. Disqualification of Judge. Incompetence of a judge to act in a case, by reason of his interest in the subject-matter, personal or professional, will render the judgment void and open to collateral impeachment; but not so if the disqualification arises merely from a defect in his title to the judicial office.[7]

f. Insufficiency of Evidence. A judgment of a court having jurisdiction cannot be impeached collaterally by showing that the evidence on which it was based was illegal, improperly received, or insufficient to sustain the judgment.[8]

g. Defects in Entry or Contents of Judgment — (i) *In General.* No question of jurisdiction being raised, a judgment or decree cannot be collaterally impeached because it was prematurely rendered,[9] or entered in vacation without consent of the parties,[10] or based on defective findings by the court, or given without any findings at all;[11] nor because it appears from the record or the opinion of the

controversy may be exempt. Day *v.* Garden City First Nat. Bank, 6 Kan. App. 821, 49 Pac. 691.

Leave to sue receiver.—A judgment against a receiver, rendered by a court other than that which appointed him, is not impeachable collaterally merely because the record fails to show affirmatively that permission to sue the receiver was first obtained from the court which appointed him. Ridge *v.* Manker, 132 Fed. 599, 67 C. C. A. 596.

4. *Georgia.*— Georgia R., etc., Co. *v.* Pendleton, 87 Ga. 751, 13 S. E. 822; Henry *v.* Hill, 84 Ga. 283, 10 S. E. 742.

Kentucky.— Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222.

Nebraska.— Bannard *v.* Duncan, 65 Nebr. 179, 90 N. W. 947.

North Carolina.— Spencer *v.* Credle, 102 N. C. 68, 8 S. E. 901.

United States.— Maxwell *v.* Stewart, 21 Wall. 71, 22 Wall. 77, 22 L. ed. 564.

See 30 Cent. Dig. tit. "Judgment," § 945.

5. Hard *v.* Shipman, 6 Barb. (N. Y.) 621.

6. Broder *v.* Conklin, 98 Cal. 360, 33 Pac. 211; Gage *v.* Downey, 79 Cal. 140, 21 Pac. 527, 855; Littleton *v.* Smith, 119 Ind. 230, 21 N. E. 886; Work *v.* Harper, 24 Miss. 517; Stearns *v.* St. Louis, etc., R. Co., 94 Mo. 317, 7 S. W. 270; Chouteau *v.* Nuckolls, 20 Mo. 442.

7. See *supra*, I, B, 2. And see JUDGES, *ante*, p. 599.

8. *Colorado.*— Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291.

Georgia.— Brown *v.* Webb, 121 Ga. 281, 48 S. E. 917; Bartlett *v.* Russell, 41 Ga. 196.

Illinois.— MacLachlan *v.* Pease, 66 Ill. App. 634; Austin *v.* Austin, 43 Ill. App. 488.

Iowa.— Parker *v.* Albee, 86 Iowa 46, 52 N. W. 533; Stevenson *v.* Bonesteel, 30 Iowa 286; Arnold *v.* Grimes, 2 Iowa 1.

Louisiana.— Vaughn's Succession, 26 La. Ann. 149. But *compare* Bertie *v.* Walker, 1 Rob. 431.

Michigan.— Benjamin *v.* Early, 123 Mich. 93, 81 N. W. 973.

Mississippi.— Pollock *v.* Buie, 43 Miss. 140.

New York.— Skinnion *v.* Kelley, 18 N. Y. 355; Wilson *v.* Barney, 5 Hun 257; Moeschler *v.* Lochte, 12 N. Y. St. 855; Stearns *v.* St. Louis, etc., R. Co., 2 N. Y. St. 391.

Oregon.— State *v.* Thompson, 28 Oreg. 296, 42 Pac. 1002.

Tennessee.—Martin *v.* Porter, 4 Heisk. 407.

Texas.— Odle *v.* Frost, 59 Tex. 684; Benson *v.* Cahill, (Civ. App. 1896) 37 S. W. 1088.

See 30 Cent. Dig. tit. "Judgment," § 948.

9. *California.*— Alderson *v.* Bell, 9 Cal. 315; Whitwell *v.* Barbier, 7 Cal. 54.

Illinois.— Lyons *v.* Cooledge, 89 Ill. 529.

Indiana.— Essig *v.* Lower, 120 Ind. 239, 21 N. E. 1090.

Louisiana.— Anheuser-Busch Brewing Assoc. *v.* McGowan, 49 La. Ann. 630, 21 So. 766.

Missouri.— Reed *v.* Nicholson, 158 Mo. 624, 59 S. W. 977; Davis *v.* Wade, 58 Mo. App. 641.

Nebraska.— Bokhoof *v.* Stewart, (1902) 89 N. W. 759.

Oregon.— Altman *v.* School Dist., 35 Oreg. 85, 56 Pac. 291, 76 Am. St. Rep. 468; Woodward *v.* Baker, 10 Oreg. 491.

Pennsylvania.— Myers *v.* Clark, 3 Watts & S. 535.

Tennessee.— Porter *v.* Partee, 7 Humphr. 168.

Vermont.— Wells *v.* Atkins, 68 Vt. 191, 34 Atl. 694, 54 Am. St. Rep. 880.

Washington.— Belles *v.* Miller, 10 Wash. 259, 38 Pac. 1050.

United States.— White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113.

See 30 Cent. Dig. tit. "Judgment," § 946. And see *supra*, IV, E, 2.

10. Bracken *v.* Milner, 99 Mo. App. 187, 73 S. W. 225. And see *supra*, I, B, 3, b.

11. *California.*— Johnston *v.* San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129; Breeze *v.* Doyle, 19 Cal. 101.

Idaho.— McCornick *v.* Friedman, 7 Ida. 686, 65 Pac. 440.

Indiana.— Jones *v.* Swift, 94 Ind. 516.

Louisiana.— Whitehurst *v.* Hickey, 3 Mart. N. S. 589, 15 Am. Dec. 167.

Minnesota.— Brown *v.* Atwater, 25 Minn. 520.

court that there was a mistake, and that the judgment should have been different from that actually rendered,[12] or on account of any irregularity in the entry, record, or docketing of the judgment;[13] nor for any informality or incompleteness in the judgment itself, provided its defects or omissions are not such as to render it absolutely unintelligible and therefore void for uncertainty.[14] Neither can it be urged against a judgment collaterally that it was changed by way of amendment or correction after its entry or after the expiration of the term.[15]

(II) *Excessive Recovery or Relief.* If the relief awarded or recovery authorized by a judgment is excessive, either as being greater than the amount demanded, greater than the facts and the evidence would justify, or as improperly including interest, costs, or other items, it is erroneous and may be voidable, but it is not to be impeached on that ground in a collateral proceeding.[16]

Nebraska.— Maryott *v.* Gardner, 50 Nebr. 320, 69 N. W. 837.

See 30 Cent. Dig. tit. "Judgment," § 946.

12. *Indiana.*— Spencer *v.* McGonagle, 107 Ind. 410, 8 N. E. 266.

Iowa.— Cooley *v.* Smith, 17 Iowa 99.

Michigan.— Huyck *v.* Graham, 82 Mich. 353, 46 N. W. 781.

New York.— Anderson *v.* Carr, 65 Hun 179, 19 N. Y. Suppl. 992; Stuyvesant *v.* Weil, 26 Misc. 445, 57 N. Y. Suppl. 592.

North Carolina.— Jones *v.* Coffey, 97 N. C. 347, 2 S. E. 165.

West Virginia.—Braddock First Nat. Bank *v.* Hyer, 46 W. Va. 13, 32 S. E. 1000.

United States.— Ryan *v.* Staples, 76 Fed. 721, 23 C. C. A. 541.

See 30 Cent. Dig. tit. "Judgment," § 948.

13. *California.*— Todhunter *v.* Klemmer, 134 Cal. 60, 66 Pac. 75.

Georgia.— Griffin *v.* Smyly, 105 Ga. 475, 30 S. E. 416.

Maryland.— Clark *v.* Digges, 5 Gill 109.

Missouri.— Gibbs *v.* Southern, 116 Mo. 204, 22 S. W. 713; Winston *v.* Affalter, 49 Mo. 263; Black *v.* Ross, 37 Mo. App. 250.

Nebraska.— Bussing *v.* Taggart, (1905) 103 N. W. 430.

New York.— Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522; Bennett *v.* Couchman, 48 Barb. 73; Gilmore *v.* Ham, 5 Silv. Sup. 589, 10 N. Y. Suppl. 48; Roeber *v.* Dawson, 3 N. Y. Suppl. 122, 22 Abb. N. Cas. 73. And see Dreyfuss *v.* Seale, 18 Misc. 551, 41 N. Y. Suppl. 875. That a judgment duly entered in the judgment book was not signed by the clerk is an irregularity, but does not vitiate the judgment on collateral attack. Artisans' Bank *v.* Treadwell, 34 Barb. 553. But it seems that a judgment is invalidated by failure of the court to communicate its decision to the clerk within eight days, when that is required by law. Sire *v.* Merrick, 15 Daly 346, 6 N. Y. Suppl. 661, 17 N. Y. Civ. Proc. 325.

North Carolina.— Dowdle *v.* Corpening, 32 N. C. 58.

Pennsylvania.— Bowen *v.* Bowen, 6 Watts & S. 504.

United States.— Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304.

See 30 Cent. Dig. tit. "Judgment," § 946.

14. *Illinois.*— Schemerhorn *v.* Mitchell, 15 Ill. App. 418.

Kansas.— Rhodes *v.* Spears, 63 Kan. 218, 65 Pac. 228.

Nebraska.— Ayres *v.* Duggan, 57 Nebr. 750, 78 N. W. 296.

Nevada.— Ronnow *v.* Delmue, 23 Nev. 29, 41 Pac. 1074.

New York.— Gallarati *v.* Orser, 4 Bosw. 94.

Failure to name the parties in the judgment will not invalidate it on collateral attack, if they are ascertainable from the pleadings or other parts of the record. Smith *v.* Chenault, 48 Tex. 455; Wyche *v.* Clapp, 43 Tex. 543.

Omission to state the amount will not invalidate the judgment if it is ascertainable by mere calculation. Doe *v.* Pendleton, 15 Ohio 735.

Irregular description of the property affected by a decree does not lay it open to collateral impeachment. Sanger *v.* Roberts, 92 Tex. 312, 48 S. W. 1.

15. Hall *v.* Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; Tromble *v.* Hoffman, 130 Mich. 676, 90 N. W. 694; Reynolds *v.* Reynolds, 115 Mich. 378, 73 N. W. 425; Turner *v.* Ireland, 11 Humphr. (Tenn.) 447; Groton Bridge, etc., Co. *v.* Clark Pressed Brick Co., 126 Fed. 552 [*affirmed* in 136 Fed. 27, 68 C. C. A. 577]. But see Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418, holding a judgment void and impeachable collaterally because the costs, instead of being included in the judgment by the clerk at the time of its entry, as required by statute, were afterward inserted by him.

16. *California.*— Bond *v.* Pacheco, 30 Cal. 530. *Compare* Chapin *v.* Broder, 16 Cal. 403.

Delaware.— Solomon *v.* Loper, 4 Harr. 187.

District of Columbia.— Clark *v.* Barber, 21 App. Cas. 274.

Indiana.— Mott *v.* State, 145 Ind. 353, 44 N. E. 548.

Iowa.— Ketchum *v.* White, 72 Iowa 193, 33 N. W. 627; McCrillis *v.* Harrison County, 63 Iowa 592, 19 N. W. 679.

Maine.— Smith *v.* Keen, 26 Me. 411.

Michigan.— Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834.

Missouri.— Kansas City *v.* Winner, 58 Mo. App. 299.

Montana.— Botkin *v.* Kleinschmidt, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641.

Nevada.— Weil *v.* Howard, 4 Nev. 384.

(III) *JUDGMENTS BY CONFESSION OR CONSENT.* The rule prohibiting the collateral impeachment of judgments for mere errors or irregularities in their entry or rendition applies equally to judgments by confession as to any others,[17] and to judgments entered on consent or agreement.[18]

h. Unauthorized Judgments. Where want of jurisdiction is not alleged, a judgment cannot be impeached collaterally because it is not in accordance with the agreement of the parties,[19] or not such as the applicable statute authorizes,[20] or because it is inconsistent with later decisions of the same or another court.[21]

4. FRAUD, COLLUSION, AND PERJURY — a. In General. Where the fraud alleged was inherent in the cause of action, or in the character or procurement of the instrument sued on, it is conceded that it does not furnish a legitimate ground for impeaching the judgment in a collateral proceeding;[22] and there are many

New Hampshire.— Small *v.* Benfield, 66 N. H. 206, 20 Atl. 284.

New Jersey.—Lutes *v.* Alpaugh, 23 N. J. L. 165.

New York.— Batterman *v.* Albright, 6 N. Y. St. 334.

North Carolina.— Savage *v.* Hussey, 48 N. C. 149.

Ohio.— Campbell *v.* Campbell, 3 Ohio Cir. Ct. 449, 2 Ohio Cir. Dec. 256; Buck *v.* Huntley, 7 Ohio Dec. (Reprint) 155, 1 Cinc. L. Bul. 186.

Pennsylvania.— Holmes *v.* Frost, 125 Pa. St. 328, 17 Atl. 424; Yerke's Appeal, 8 Watts & S. 224.

South Carolina.— Winslow *v.* Ancrum, 1 McCord Eq. 100.

South Dakota.— Mach *v.* Blanchard, 15 S. D. 432, 90 N. W. 1042, 58 L. R. A. 811.

Tennessee.— Dornan *v.* Benham Furniture Co., 102 Tenn. 303, 52 S. W. 38.

Texas.— Livingstone *v.* Wright, 68 Tex. 706, 5 S. W. 407; Read *v.* Allen, 56 Tex. 182; Burford *v.* Rosenfield, 37 Tex. 42.

Vermont.— Chaffee *v.* Hooper, 54 Vt. 513.

Wisconsin.— Johnson *v.* Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363.

United States.— Rock Island County *v.* U. S., 4 Wall. 435, 18 L. ed. 419; Alston *v.* Munford, 1 Fed. Cas. No. 267, 1 Brock. 266.

See 30 Cent. Dig. tit. "Judgment," § 948.

17. *Florida.*— Rushing *v.* Thompson, 20 Fla. 583.

Illinois.—Goodwin *v.* Mix, 38 Ill. 115. But *compare* Gardner *v.* Bunn, 132 Ill. 403, 23 N. E. 1072, 7 L. R. A. 729, holding a confessed judgment void and impeachable collaterally because not accompanied by proof by affidavit of the execution of the power of attorney.

Iowa.— Grattan *v.* Matteson, 54 Iowa 229, 6 N. W. 298; Burchett *v.* Cassady, 18 Iowa 342.

Minnesota.— Marshall *v.* Hart, 4 Minn. 450.

Missouri.— Gilman *v.* Hovey, 26 Mo. 280.

New Jersey.— Vanderveere *v.* Gaston, 24 N. J. L. 818. *Compare* Cliver *v.* Applegate, 5 N. J. L. 479.

New York.— Bulger *v.* Rosa, 47 Hun 435.

See 30 Cent. Dig. tit. "Judgment," § 947.

Defective statement.— A judgment by confession may be attacked collaterally if the statement on which it is entered is so essentially defective that the court acquired no jurisdiction or authority to enter the judgment. Dunham *v.* Waterman, 17 N. Y. 9, 72 Am. Dec. 406. And see Hubbard *v.* Spencer, 15 Johns. (N. Y.) 244.

Premature entry.— One not a party to a judgment prematurely entered by confession on a warrant of attorney may impeach it collaterally, whenever it is attempted to be enforced against him or to prejudice his rights. Lewis *v.* Moon, 1 Ohio Cir. Ct. 211, 1 Ohio Cir. Dec. 116.

18. Biddle *v.* Pierce, 13 Ind. App. 239, 41 N. E. 475; Young *v.* Watson, 155 Mass. 77, 28 N. E. 1135; White *v.* Bogart, 73 N. Y. 256; Byers *v.* Brannon, (Tex. 1892) 19 S. W. 1091.

19. Hardy *v.* Marvin, 94 Ga. 681, 21 S. E. 833; Hughes *v.* Schreiner, 202 Pa. St. 488, 52 Atl. 30.

20. Seaver *v.* Fitzgerald, 23 Cal. 85.

Punitive damages.— Although at least nominal actual damages must be found to warrant the recovery of punitive damages, yet a judgment for plaintiff on a verdict for punitive damages only is not void or open to collateral impeachment. Brennan *v.* Maule, 108 Mo. App. 336, 83 S. W. 283.

21. *Ex p.* Henshaw, 73 Cal. 486, 15 Pac. 110; Stevenson *v.* Edwards, 98 Mo. 622, 12 S. W. 255.

Departure from mandate.— Where no appeal is prosecuted from a decree entered by the trial court, a claim that the decree is different from that directed by the appellate court will not be looked upon with favor by a court of equity, when such claim is made collaterally after the lapse of several years from the rendition of the decree. Vail *v.* Arkell, 146 Ill. 363, 34 N. E. 937.

22. *California.*—Langdon *v.* Blackburn, 109 Cal. 19, 41 Pac. 814.

Georgia.— Stewart *v.* Stisher, 83 Ga. 297, 9 S. E. 1041.

Illinois.— Bowman *v.* Wilson, 64 Ill. App. 73.

Massachusetts.— Homer *v.* Fish, 1 Pick. 435, 11 Am. Dec. 218.

Missouri.— Johnson *v.* Stebbins-Thompson Realty Co., 167 Mo. 325, 66 S. W. 933.

New York.— Nevitt *v.* Albany First Nat. Bank, 91 Hun 43, 36 N. Y. Suppl. 294; Turney *v.* Van Gelder, 18 N. Y. Suppl. 547.

decisions stating the broad general rule that it is not permissible for a party or privy to attack a judgment in a collateral proceeding on account of fraud.[23] It is

Oregon.— Finley *v.* Houser, 22 Oreg. 562, 30 Pac. 494.

Pennsylvania.— Hageman *v.* Salisberry, 74 Pa. St. 280. See also Phelps *v.* Benson, 161 Pa. St. 418, 29 Atl. 86. *Compare* Jackson *v.* Summerville, 13 Pa. St. 359.

Texas.— Hatch *v.* Garza, 22 Tex. 176.

United States.— Kansas City, etc., R. Co. *v.* Morgan, 76 Fed. 429, 21 C. C. A. 468; U. S. *v.* Chung Shee, 71 Fed. 277. The distinction between cases in which judgments may and those in which they may not be impeached collaterally may be stated thus: They may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered; but they may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon. The Acorn, 1 Fed. Cas. No. 29, 2 Abb. 434.

See 30 Cent. Dig. tit. "Judgment," § 951.

Right of third persons in general to assert fraud see *supra*, XI, D, 2.

Right of creditors to assert fraud see *supra*, XI, D, 3, b.

Action for damages.— A person against whom judgments have been obtained cannot maintain an action for damages against the parties who obtained them, the attorney who prosecuted, and the officer who served the writ, for fraudulently conspiring together to injure and defraud him in those proceedings, while the judgments remain unreversed. Smith *v.* Abbott, 40 Me. 442; White *v.* Merritt, 7 N. Y. 352, 57 Am. Dec. 527.

A composition in bankruptcy, under the federal statutes on the subject, cannot be impeached collaterally in an action at law in a state court, by a creditor who was a party to the proceedings, by showing that the composition was obtained by the fraudulent acts of the bankrupt. Farwell *v.* Raddin, 129 Mass. 7; Home Nat. Bank *v.* Carpenter, 129 Mass. 1.

Contested election.— After judgment in an election contest, rendered by agreement between the claimants and giving possession to the relator, defendant, in his answer to the relator's alternative writ of mandate demanding possession, cannot assail the judgment on the ground that, being rendered by agreement and in consideration of a sum paid to defendant, it was corrupt and fraudulent and therefore void. Mannix *v.* State, 115 Ind. 245, 17 N. E. 565.

23. *Alabama.*— Logan *v.* Central Iron, etc., Co., 139 Ala. 548, 36 So. 729.

Arkansas.—Bonner *v.* Gorman, 71 Ark. 480, 77 S. W. 602.

California.— In an action at law on a judgment, defendant cannot impeach the judgment for fraud, unless it appears on the face of the record. Carpentier *v.* Oakland, 30 Cal. 439.

Connecticut.— Bush *v.* Sheldon, 1 Day 170.

Georgia.— Porter *v.* Rountree, 111 Ga. 369, 36 S. E. 761; Williams *v.* Martin, 7 Ga. 377. But *compare* Williams *v.* Lancaster, 113 Ga. 1020, 39 S. E. 471.

Indiana.— Kirby *v.* Kirby, 142 Ind. 419, 41 N. E. 809; Shultz *v.* Shultz, 136 Ind. 323, 36 N. E. 126, 43 Am. St. Rep. 320.

Iowa.—Edmundson *v.* Jackson Independent School Dist., 98 Iowa 639, 67 N. W. 671, 60 Am. St. Rep. 224; Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853; Smith *v.* Smith, 22 Iowa 516; Mason *v.* Messenger, 17 Iowa 261; Telford *v.* Barney, 1 Greene 575; Webster *v.* Reid, Morr. 467. *Compare* Hulverson *v.* Hutchinson, 39 Iowa 316.

Kentucky.— Gaines *v.* Johnston, 15 S. W. 246, 12 Ky. L. Rep. 779.

Louisiana.— Smith *v.* Henderson, 23 La. Ann. 649; Hickey *v.* Duplantier, 4 La. 314.

Maine.— Granger *v.* Clark, 22 Me. 128.

Maryland.— James Clark Co. *v.* Colton, 91 Md. 195, 46 Atl. 386, 49 L. R. A. 698; Taylor *v.* State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852.

Massachusetts.— Boston, etc., R. Corp. *v.* Sparhawk, 1 Allen 448, 79 Am. Dec. 750; Greene *v.* Greene, 2 Gray 361, 61 Am. Dec. 454; McClees *v.* Burt, 5 Metc. 198; McRae *v.* Mattoon, 13 Pick. 53.

Michigan.— Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067.

Minnesota.— *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287.

Missouri.— State *v.* Ross, 118 Mo. 23, 23 S. W. 196; Cooper *v.* Duncan, 58 Mo. App. 5.

New Hampshire.— Blanchard *v.* Webster, 62 N. H. 467. *Compare* State *v.* Little, 1 N. H. 257.

New York.— Krekeler *v.* Ritter, 62 N. Y. 372; Rice *v.* Bruff, 87 Hun 511, 34 N. Y. Suppl. 501; People *v.* Townsend, 37 Barb. 520; People *v.* Downing, 4 Sandf. 189. *Compare* Mandeville *v.* Reynolds, 68 N. Y. 528.

North Carolina.—Earp *v.* Minton, 138 N. C. 202, 50 S. E. 624; Carter *v.* Rountree, 109 N. C. 29, 13 S. E. 716; Glover *v.* Flowers, 101 N. C. 134, 7 S. E. 579.

Ohio.— Anderson *v.* Anderson, 8 Ohio 108.

Oregon.— Morrill *v.* Morrill, 20 Oreg. 96, 25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155. But *compare* Murray *v.* Murray, 6 Oreg. 17, holding that where one party is allowed to offer a judgment in evidence without having pleaded it, the other ought to be allowed to impeach it by evidence of fraud, without being put to a direct suit to annul it, and notwithstanding it is regular on its face.

Pennsylvania.— McClain's Appeal, 180 Pa. St. 231, 36 Atl. 743; Otterson *v.* Middleton, 102 Pa. St. 78; Hoffman *v.* Coster, 2 Whart. 453; Benton *v.* Burgot, 10 Serg. & R. 240; Merchants', etc., Nat. Bank *v.* Kern, 8 Pa. Dist. 75. But *compare* Verner *v.* Carson, 66 Pa. St. 440; Hall *v.* Hamlin, 2 Watts 354;

quite generally held, however, that fraud practised in the very act of obtaining or procuring the judgment is so far destructive of its validity that it may be made the basis for a collateral attack upon the judgment,[24] although there are decisions to the contrary.[25]

b. Collusion. A party or privy to a judgment is not permitted to impeach it collaterally on the ground that it was obtained by means of collusion between the other parties to the action or the attorneys in the case,[26] although this may be done by a stranger to the proceeding, when his rights or interests in a subsequent litigation are threatened by the judgment.[27]

Middleton *v.* Norcross, 39 Leg. Int. 90; Woodward *v.* Schmitt, 5 Phila. 152.

South Carolina.— See Sanders *v.* Price, 56 S. C. 1, 33 S. E. 731.

Tennessee.— Kelley *v.* Mize, 3 Sneed 59.

Texas.— Mikeska *v.* Blum, 63 Tex. 44; Murchison *v.* White, 54 Tex. 78; Rankin *v.* Hooks, (Civ. App. 1904) 81 S. W. 1005; Kruegel *v.* Stewart, (Civ. App. 1904) 81 S. W. 365; Scudder *v.* Cox, 35 Tex. Civ. App. 416, 80 S. W. 872. *Compare* Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336.

West Virginia.— Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

United States.— Kent *v.* Lake Superior Ship Canal R., etc., Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. ed. 352; Christmas *v.* Russell, 5 Wall. 290, 18 L. ed. 475; King *v.* Davis, 137 Fed. 198; Rhino *v.* Emery, 65 Fed. 826.

See 30 Cent. Dig. tit. "Judgment," § 951.

24. *California.*— Amador Canal, etc., Co. *v.* Mitchell, 59 Cal. 168. But *compare* People *v.* Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399, 773.

Colorado.— Hallack *v.* Loft, 19 Colo. 74, 34 Pac. 568.

Connecticut.— Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

Indiana.— Cotterell *v.* Koon, 151 Ind. 182, 51 N. E. 235; Cline *v.* Murrell, 9 Ind. 516. But where a plaintiff brings and prosecutes an action, he cannot treat the judgment rendered therein in his favor as a nullity, because of fraud practised by defendant on the court in entering it, but can avoid it only by appeal or direct proceeding. Oster *v.* Broc, 161 Ind. 113, 64 N. E. 918.

Iowa.— Warthen *v.* Himstreet, 112 Iowa 605, 84 N. W. 702; Cowin *v.* Toole, 31 Iowa 513; Whetstone *v.* Whetstone, 31 Iowa 276; Pfiffner *v.* Krapfel, 28 Iowa 27.

Kentucky.— Ellis *v.* Kelly, 8 Bush 621; Ft. Jefferson Imp. Co. *v.* Greene, 65 S. W. 161, 23 Ky. L. Rep. 1342. See Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653, 11 Ky. L. Rep. 103, 21 Am. St. Rep. 356. And *compare* Gaines *v.* Johnston, 15 S. W. 246, 12 Ky. L. Rep. 779.

Louisiana.— Paxton *v.* Cobb, 2 La. 137. But *compare* Bruno *v.* Oviatt, 48 La. Ann. 471, 19 So. 464.

Maryland.— McCambridge *v.* Walraven, 88 Md. 378, 41 Atl. 928.

New York.— Johnson *v.* Girdwood, 143 N. Y. 660, 39 N. E. 21; Ward *v.* Southfield, 102 N. Y. 287, 6 N. E. 660; Baker *v.* Byrn, 89 Hun 115, 35 N. Y. Suppl. 55; Richardson *v.* Trimble, 38 Hun 409; Wheeler *v.* Sweet, 16 N. Y. Suppl. 836. *Compare* White *v.* Merritt, 7 N. Y. 352, 57 Am. Dec. 527; New York Cent. R. Co. *v.* Harrold, 65 How. Pr. 89.

Pennsylvania.— Meckley's Appeal, 102 Pa. St. 536; Monroe *v.* Monroe, 93 Pa. St. 520; Clark *v.* Douglass, 62 Pa. St. 408; Thompson's Appeal, 57 Pa. St. 175; *In re* Dougherty, 9 Watts & S. 189, 42 Am. Dec. 326. *Compare* Ogle *v.* Baker, 137 Pa. St. 378, 20 Atl. 998, 21 Am. St. Rep. 886; Philadelphia *v.* Dobson, 10 Pa. Co. Ct. 34.

Texas.— House *v.* Collins, 42 Tex. 486; Hutchins *v.* Lockett, 39 Tex. 165; Irwin *v.* Bexar County, (Civ. App. 1901) 63 S. W. 550. But see Storer *v.* Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

United States.— Daniels *v.* Benedict, 50 Fed. 347; Danville First Nat. Bank *v.* Cunningham, 48 Fed. 510.

See 30 Cent. Dig. tit. "Judgment," § 951.

25. *Illinois.*— Carr *v.* Miner, 42 Ill. 179.

Maine.— Davis *v.* Davis, 61 Me. 395; Dunlap *v.* Glidden, 31 Me. 435, 52 Am. Dec. 625.

Massachusetts.— Sherburne *v.* Shepard, 142 Mass. 141, 7 N. E. 719.

Missouri.— Field *v.* Sanderson, 34 Mo. 542, 86 Am. Dec. 124.

Montana.— Edgerton *v.* Edgerton, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94.

Nebraska.— Bryant *v.* Estabrook, 16 Nebr. 217, 20 N. W. 245.

Wisconsin.— Cody *v.* Cody, 98 Wis. 445, 74 N. W. 217.

See 30 Cent. Dig. tit. "Judgment," § 951.

26. *Colorado.*— Harter *v.* Shull, 17 Colo. App. 162, 67 Pac. 911.

Iowa.— Edmundson *v.* Jackson Independent School Dist., 98 Iowa 639, 67 N. W. 671, 60 Am. St. Rep. 224. *Compare* Thomas *v.* McDaneld, 88 Iowa 374, 55 N. W. 499.

New York.— People *v.* Townsend, 37 Barb. 520.

Texas.— Bryan *v.* Bowser, 77 Tex. 324, 14 S. W. 23.

United States.— Downs *v.* Allen, 22 Fed. 805, 23 Blatchf. 54.

See 30 Cent. Dig. tit. "Judgment," § 953.

27. Bonner *v.* Ogilvie, 24 Tex. Civ. App. 237, 58 S. W. 1027.

A shareholder in a corporation may impeach as collusive a judgment, in an action by the corporation against a stock-holder who was its president, a director and a trustee, by which the amount due from him to the corporation was adjudicated. Gund *v.* Ballard, (Nebr. 1905) 103 N. W. 309.

c. False Testimony. It is no ground for impeaching a judgment collaterally that the testimony on which it was based was false or perjured.[28] For this reason an action will not lie against a witness who swore falsely in the action in which the judgment was rendered, or against the party who procured the judgment by suborning the witness or conspiring with him.[29]

5. Defenses Available in Original Action. A judgment cannot be impeached collaterally by setting up any matter which was or might have been raised as a defense in the original action.[30] Thus when proceedings in mandamus are instituted to compel the levy and collection of a tax to pay a judgment against a

28. *Illinois.*—Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60.

Indiana.— Dilling *v.* Murray, 6 Ind. 324, 63 Am. Dec. 385.

Iowa.— Cottle *v.* Cole, 20 Iowa 481.

Maine.— Dunlap *v.* Glidden, 31 Me. 435, 52 Am. Dec. 625.

Massachusetts.— Greene *v.* Greene, 2 Gray 361, 61 Am. Dec. 454.

New Hampshire.— Demerit *v.* Lyford, 27 N. H. 541.

New York.— New York Cent. R. Co. *v.* Harrold, 65 How. Pr. 89.

Ohio.— McCafferty *v.* O'Brien, 1 Cinc. Super. Ct. 64.

Texas.— Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567; Fisk *v.* Miller, 20 Tex. 579; Word *v.* Schow, 29 Tex. Civ. App. 120, 68 S. W. 192; Moor *v.* Moor, (Civ. App. 1901) 63 S. W. 347.

Vermont.— Woodrow *v.* O'Conner, 28 Vt. 776.

United States.— U. S. *v.* Chung Shee, 71 Fed. 277; The Acorn, 1 Fed. Cas. No. 29, 2 Abb. 434.

See 30 Cent. Dig. tit. "Judgment," § 955.

Perjury as ground for vacating or opening judgments see *supra*, IX, E, 4, c. As ground for enjoining enforcement of judgment see *supra*, X, B, 12, g.

29. *Massachusetts.*— Engstrom *v.* Sherburne, 137 Mass. 153.

New Hampshire.— Lyford *v.* Demerritt, 32 N. H. 234.

New York.— Smith *v.* Lewis, 3 Johns. 157, 3 Am. Dec. 469.

Vermont.— Cunningham *v.* Brown, 18 Vt. 123, 46 Am. Dec. 140.

England.— Damport *v.* Sympson, Cro. Eliz. 520; Eyres *v.* Sedgewicke, Cro. Jac. 601.

30. *Alabama.*— Aderhold *v.* Bluthenthal, 95 Ala. 66, 10 So. 230.

California.— Hayes *v.* Shattuck, 21 Cal. 51.

Connecticut.—Huntington *v.* Newport News etc., Co., 78 Conn. 35, 61 Atl. 59; Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711.

Georgia.— Lewis *v.* Armstrong, 45 Ga. 131.

Illinois.— McDaniel *v.* Fox, 77 Ill. 343; Paullissen *v.* Loock, 38 Ill. App. 510.

Indiana.— Bates *v.* Spooner, 45 Ind. 489.

Iowa.— Kerr *v.* Kennedy, 119 Iowa 239, 93 N. W. 353; Warthen *v.* Himstreet, 112 Iowa 605, 84 N. W. 702.

Kansas.— Snow *v.* Mitchell, 37 Kan. 636, 639, 15 Pac. 224, 16 Pac. 737.

Kentucky.— Northington *v.* Reed, 75 S. W. 206, 25 Ky. L. Rep. 354; Clay *v.* Newton, 20 S. W. 305, 14 Ky. L. Rep. 445.

Louisiana.— Schulhoefer *v.* New Orleans, 40 La. Ann. 512, 4 So. 494; Drogre *v.* Moreau, 23 La. Ann. 173.

Maine.— Noble *v.* Merrill, 48 Me. 140.

Massachusetts.— Hamilton Mut. Ins. Co. *v.* Parker, 11 Allen 574; Cook *v.* Allen, 2 Mass. 462.

Michigan.— Adams *v.* Cameron, 40 Mich. 506.

Minnesota.— Schmitt *v.* Dahl, 88 Minn. 506, 93 N. W. 665, 67 L. R. A. 590.

Missouri.— Stewart *v.* Miles, (App. 1904) 79 S. W. 988.

New York.— Wilson *v.* Æolian Co., 64 N. Y. App. Div. 337, 72 N. Y. Suppl. 150; Treacy *v.* Ellis, 45 N. Y. App. Div. 492, 61 N. Y. Suppl. 600; Loud *v.* Sergeant, 1 Edw. 164; Donovan *v.* Finn, Hopk. 59, 14 Am. Dec. 531.

North Carolina.— Lee *v.* McKoy, 118 N. C. 518, 24 S. E. 210; Rogers *v.* Kimsey, 101 N. C. 559, 8 S. E. 159; Fuller *v.* Smith, 58 N. C. 192.

Ohio.— Covington, etc., Bridge Co. *v.* Sargent, 27 Ohio St. 233.

Pennsylvania.— Otterson *v.* Middleton, 102 Pa. St. 78; Cadmus *v.* Jackson, 52 Pa. St. 295; Seaman *v.* Hoover, 1 Chest. Co. Rep. 178.

South Carolina.— Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.

Tennessee.— Coe *v.* Nelson, (Ch. App. 1900) 59 S. W. 170.

Texas.— Tadlock *v.* Eccles, 20 Tex. 782, 73 Am. Dec. 213; Wyser *v.* Calhoun, 11 Tex. 323; Simmons *v.* Richards, 28 Tex. Civ. App. 112, 66 S. W. 687.

West Virginia.— McNeel *v.* Auldridge, 34 W. Va. 748, 12 S. E. 851.

Wisconsin.— Ketchum *v.* Breed, 54 Wis. 131, 11 N. W. 238.

United States.— Avegno *v.* Schmidt, 113 U. S. 293, 5 S. Ct. 487, 28 L. ed. 976.

See 30 Cent. Dig. tit. "Judgment," §§ 959, 960.

Payment.— The rule stated in the text applies to the defense of payment, entire or partial. Tilton *v.* Goodwin, 183 Mass. 236, 66 N. E. 802; Fuller *v.* Shattuck, 13 Gray (Mass.) 70, 74 Am. Dec. 622; Mathews *v.* Lawrence, 1 Den. (N. Y.) 212, 43 Am. Dec. 665.

Statute of limitations.— If the debt claimed in the original action was barred by the statute of limitations, it should be pleaded in that action, and cannot be made the basis of a collateral attack on the judgment. Cox *v.* Thomas, 9 Gratt. (Va.) 323.

municipal corporation, the judgment is conclusive as to the existence and validity of the debt, and cannot be controverted as to those facts.[31] And the rule also applies to proceedings on habeas corpus,[32] and to actions on securities given in satisfaction of the judgment.[33]

XII. CONSTRUCTION AND OPERATION OF JUDGMENTS.[34]

A. General Principles of Construction — 1. APPLICATION OF GENERAL RULES. A judgment should be so construed as to give effect to every word and part of it,[35] including such effects and consequences as follow by necessary legal implication from its terms, although not expressed;[36] and where there are two possible interpretations, that will be adopted which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered,[37] which brings it within the authority and jurisdiction of the court,[38] and which renders it the more reasonable, effective, and conclusive.[39] Further a construction adopted or acquiesced in by the parties will not be changed without strong reason.[40]

2. CONSTRUCTION OF RECITALS. Recitals in a judgment are presumed to be true and correct,[41] and they will be construed according to the proper legal import of

31. *Colorado.*— People *v.* Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032.

Illinois.— Chicago *v.* Sansum, 87 Ill. 182.

Kentucky.— Columbia Bank *v.* Taylor County, 112 Ky. 243, 65 S. W. 451, 23 Ky. L. Rep. 1483; Bell County *v.* Foley, 64 S. W. 433, 23 Ky. L. Rep. 835.

South Dakota.— Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493.

Washington.— State *v.* Gloyd, 14 Wash. 5, 44 Pac. 103.

West Virginia.— Wells *v.* Mason, 23 W. Va. 456.

Wisconsin.— State *v.* Beloit, 20 Wis. 79.

United States.— Louisiana *v.* St. Martin's Parish Police Jury, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574. *Compare* Brownsville Taxing Dist. *v.* League, 129 U. S. 493, 9 S. Ct. 327, 32 L. ed. 780.

See 30 Cent. Dig. tit. "Judgment," §§ 959, 960. And see *supra*, XI, C, 2.

32. People *v.* Arapahoe County Dist. Ct., 22 Colo. 422, 45 Pac. 402. And see HABEAS CORPUS, 21 Cyc. 294.

33. Bird *v.* Smith, 34 Me. 63, 56 Am. Dec. 635.

34. **In particular actions or proceedings** see cross-references at head of article.

35. *Ex p.* Beavers, 34 Ala. 71.

Several orders.— Where a decree is followed by other orders the same day, all are to be construed together in determining the legal effect of the court's action on that day. Hopkins *v.* Cofoid, 103 Ill. App. 167.

36. Thus a decree enjoining defendant from reasserting title to the property involved in the suit is in effect a decree that plaintiff is the owner of the same, although it may not so declare in express terms. Chadwick *v.* Gulf States Land, etc., Co., 49 La. Ann. 757, 22 So. 237. And see May *v.* Crawford, 150 Mo. 504, 51 S. W. 693; East Tennessee, etc., R. Co. *v.* Nashville, etc., R. Co., (Tenn. Ch. App. 1897) 51 S. W. 202.

37. Sharp *v.* Zeller, 114 La. 549, 38 So. 449; Milne Asylum *v.* Female Orphan Soc., 7 La. Ann. 19; Trepagnier *v.* Williams, 4 La. 99.

Applications of text.— Where a judgment recites notice to defendant, but the record shows service by publication only, the judgment will be construed as *in rem* only, and not as authorizing the issue of a general execution. Mayfield *v.* Bennett, 48 Iowa 194. So a mistake apparent on the face of a judgment, amounting to an impossibility, will not destroy the judgment, if enough remains, after it is corrected or eliminated, to disclose the actual judgment rendered. Evans *v.* McMahan, 1 Ala. 45. Again the presumption in support of a judgment extends to inferring the presence of plaintiff in court, for the purpose of an act which he only could perform, although the entry only recites the presence of his attorney. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

As between coördinate courts.— A court in construing the judgment of another court of equal rank in the same system, will presume, in the absence of clear expressions to the contrary, that such other court holds the same view of the law on which the judgment is based as that held by the construing court. Adoue *v.* Wettermark, 28 Tex. Civ. App. 593, 68 S. W. 553.

38. Copley *v.* Robertson, 6 La. Ann. 181.

39. Harrison *v.* Godhold, McGloin (La.) 178.

40. Mooney *v.* Mooney, 10 Misc. (N. Y.) 386, 31 N. Y. Suppl. 118.

Consent decree.— The court, in its decrees carrying into execution a consent decree, may construe the same when necessary; but it cannot set aside such consent decree, and enter one wholly different therefrom, under the guise of construing it. Seiler *v.* Union Mfg. Co., 50 W. Va. 208, 40 S. E. 547.

41. McKibbin *v.* McKibbin, 139 Cal. 448, 73 Pac. 143; Rodley *v.* Lyons, 129 Cal. 681, 62 Pac. 313; Hopkins County *v.* St. Bernard Coal Co., 114 Ky. 153, 70 S. W. 289, 24 Ky. L. Rep. 942.

the terms used, considering the judgment as a whole;[42] but not extended by interpretation beyond what is expressed or follows by necessary implication from the language employed.[43]

3. CONSTRUCTION WITH REFERENCE TO PLEADINGS. Where the language of a judgment is ambiguous or its meaning doubtful, reference may be had to the pleadings in the case, and the judgment interpreted in the light which they throw upon it.[44] But if the meaning of the judgment is clear and plain on its face, it cannot be changed, extended, or restricted by anything contained in the pleadings.[45]

4. CONSTRUCTION WITH REFERENCE TO VERDICT OR FINDINGS. A judgment should be interpreted with reference to the verdict of the jury,[46] and if possible so as to harmonize them;[47] and the same rules apply where the facts are found by the court.[48]

5. EXTRINSIC EVIDENCE TO AID CONSTRUCTION. Evidence outside the record — even parol — is admissible to show for what the judgment was recovered, that is, what was the real cause of action;[49] but not to modify or explain the judgment itself.[50]

B. Construction as to Particulars of Judgment — 1. Parties — a. Parties Recovering Judgment. If ambiguous as to the identity of the successful party,

42. Weeks *v.* McPhail, 129 N. C. 73, 39 S. E. 732.

43. *California.*— Eureka Mercantile Co. *v.* California Ins. Co., 130 Cal. 153, 62 Pac. 393.
Illinois.— Gilbert *v.* Sprague, 196 Ill. 444, 63 N. E. 993.
Indiana.— State *v.* Clinton County, (1903) 68 N. E. 295; Owens *v.* Dresback, 154 Ind. 392, 56 N. E. 22, 848.
Kentucky.— Wooley *v.* Miller, 71 S. W. 856, 24 Ky. L. Rep. 1542.
New York.— Depierris *v.* Slaven, 5 N. Y. App. Div. 147, 39 N. Y. Suppl. 114.
North Carolina.— Ferrell *v.* Underwood, 13 N. C. 111.
South Carolina.— Peeples *v.* Ulmer, 64 S. C. 496, 42 S. E. 429.

44. *California.*— Etter *v.* Hughes, (1895) 41 Pac. 790.
Connecticut.— Morgan *v.* Danbury, 67 Conn. 484, 35 Atl. 499.
Illinois.— Hofferbert *v.* Klinkhardt, 58 Ill. 450.
Indiana.— Fleenor *v.* Driskill, 97 Ind. 27.
Iowa.— Fowler *v.* Doyle, 16 Iowa 534.
Kansas.— Clay *v.* Hildebrand, 34 Kan. 694, 9 Pac. 466.
Kentucky.— Four Mile Land, etc., Co. *v.* Slusher, 107 Ky. 664, 55 S. W. 555, 21 Ky. L. Rep. 1427.
Louisiana.— Peniston *v.* Somers, 15 La. Ann. 679; Bell *v.* Massey, 14 La. Ann. 831; Regan's Succession, 12 La. Ann. 156; Durnford's Succession, 1 La. Ann. 92; Rochelle *v.* Cox, 5 La. 283; Prall *v.* Peet, 3 La. 274.
Nebraska.— Burke *v.* Unique Printing Co., 63 Nebr. 264, 88 N. W. 488.
Pennsylvania.— Reidenauer *v.* Killinger, 11 Serg. & R. 119.
Tennessee.— Custer *v.* Russey, (Ch. App. 1898) 51 S. W. 126.
Texas.— Texas Sav. Loan Assoc. *v.* Banker, 26 Tex. Civ. App. 107, 61 S. W. 724; Croom *v.* Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072.
Virginia.— Walker *v.* Page, 21 Gratt. 636.
United States.— National Foundry, etc., Works *v.* Oconto Water Supply Co., 183 U. S. 216, 22 S. Ct. 111, 46 L. ed. 157; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202.
See 30 Cent. Dig. tit. "Judgment," § 969.
Stipulations.— To explain an ambiguous judgment, recourse may be had to duly attested stipulations between the parties. Thayer *v.* McGee, 20 Mich. 195.

45. Minneapolis Trust Co. *v.* Eastman, 47 Minn. 301, 50 N. W. 82, 930; Williamson *v.* Wright, 1 Tex. Unrep. Cas. 711.

46. Treat *v.* Laforge, 15 Cal. 41; Burnett *v.* Whitesides, 15 Cal. 35; Kelly *v.* Davis, 37 Miss. 76; *In re* Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52; Messmore *v.* Williamson, 189 Pa. St. 73, 41 Atl. 1110, 69 Am. St. Rep. 791.

47. Armel *v.* Layton, 29 Kan. 576. And see Kansas City, etc., R. Co. *v.* Phillibert, 25 Kan. 582, holding that where, by a fair, although not the most obvious construction, of the language of the finding of a jury, a fact essential to support the judgment may be considered to be included therein, such construction will be adopted, especially if it is a fact of minor importance.

48. See Swift *v.* Muygridge, 8 Cal. 445; Plicque *v.* Perret, 19 La. 318; Poydras *v.* Taylor, 18 La. 12; Hill *v.* Bowman, 14 La. 445; Whiteside *v.* Noyac Cottage Assoc., 68 Hun (N. Y.) 565, 568, 23 N. Y. Suppl. 63; Texas Land, etc., Co. *v.* Winter, 93 Tex. 560, 57 S. W. 39.

49. Harvey *v.* Drew, 82 Ill. 606.
Evidence in aid of record see EVIDENCE, 17 Cyc. 578.

50. Barrett *v.* James, 30 S. C. 329, 9 S. E. 263. But see Lea *v.* Terry, 15 La. Ann. 159, where it is stated that judgments may be carried into effect by inquiries outside the decree, where there is a latent ambiguity.
Parol or extrinsic evidence to contradict or

or the capacity in which he recovers, the judgment will be read in the light of the pleadings and other parts of the record,[51] and a plural number will be read as singular, if necessary to make the judgment agree with the facts and law of the case.[52]

b. Parties Liable. Where a judgment is rendered against "the defendants" generally, it will be understood to be against those parties who appear, from the whole record, to be liable in the capacity of defendants;[53] and if there is only one defendant, a judgment in favor of plaintiff is equivalent to a judgment against that defendant.[54] On the other hand, where some of the defendants were not brought within the jurisdiction of the court, or not affected by the verdict, or otherwise not liable to the judgment, the fact that the judgment is expressed to be against "the defendants" will not enlarge its scope so as to include them, but it will be restricted to those properly liable;[55] and conversely, if the record shows that all defendants are liable, a judgment against "the defendants" will include them all.[56]

c. Particular Capacity. A judgment will in general bind a party only in the capacity in which he appears in the action, even though he is not described in the judgment in that capacity;[57] but the addition to a party's name, as it is recited in the judgment, of a title or designation which is merely *descriptio personæ* and therefore may be rejected as surplusage will not prevent the judgment from binding him personally.[58]

d. Joint or Several Liability. In the absence of express directions to the contrary, a judgment entered against two or more defendants jointly is a joint and several obligation, available against either of the judgment debtors separately.[59]

impeach, vary, or explain judgments see EVIDENCE, 17 Cyc. 571 *et seq.*

51. Gibbs *v.* Fuller, 66 N. C. 116; Com. *v.* Ford, 29 Gratt. (Va.) 683.

52. Barnes *v.* Michigan Air Line R. Co., 54 Mich. 243, 20 N. W. 36. And see Dunlap *v.* Southerlin, 63 Tex. 38, where it is said that it will not be presumed, where the record shows that certain named plaintiffs were seeking and entitled to a judgment, that the court rendered a judgment in favor of others not seeking the relief.

53. *Alabama.*— Bolling *v.* Speller, 96 Ala. 269, 11 So. 300.

Iowa.— Finnagan *v.* Manchester, 12 Iowa 521.

Kentucky.— Claggett *v.* Blanchard, 8 Dana 41.

Pennsylvania.— Heiler *v.* Spangler, 1 Leg. Gaz. 84.

Tennessee.—Myers *v.* Hammond, 6 Baxt. 61.

See 30 Cent. Dig. tit. "Judgment," § 974.

Judgment for defendant in a suit by one plaintiff for the use of another is a judgment against plaintiff of record only, not the use plaintiff. Herndon *v.* Bartlett, 7 T. B. Mon. (Ky.) 449; Boor *v.* Wilson, 48 Md. 305.

54. Aldrich *v.* Maitland, 4 Mich. 205.

55. *Alabama.*— Renfro *v.* Willis, 67 Ala. 488; Ice *v.* Manning, 3 Ala. 121.

Arkansas.— Neal *v.* Singleton, 26 Ark. 491.

Illinois.— Dawson *v.* Bridges, 19 Ill. App. 280.

Kentucky.— Clark *v.* Finnell, 16 B. Mon. 329; Morgan *v.* Morgan, 2 Bibb 388.

Minnesota.— City Nat. Bank *v.* Hager, 52 Minn. 18, 53 N. W. 867; Banning *v.* Sabin, 41 Minn. 477, 43 N. W. 329.

Mississippi.—Lamar *v.* Williams, 39 Miss. 342.

New Jersey.— Malaney *v.* Hughes, 50 N. J. L. 546, 14 Atl. 748.

Pennsylvania.— Erdman *v.* Stahlnecker, 12 Serg. & R. 325.

Tennessee.— Winchester *v.* Beardin, 10 Humphr. 247, 51 Am. Dec. 702; Boyd *v.* Baynham, 5 Humphr. 386, 42 Am. Dec. 438.

Virginia.— Moss *v.* Moss, 4 Hen. & M. 293.

West Virginia.— Perry *v.* McHuffman, 7 W. Va. 306.

Wisconsin.— Maxcy *v.* McCord, 120 Wis. 571, 98 N. W. 529, 923; Winner *v.* Kuehn, 97 Wis. 394, 72 N. W. 227.

United States.— Forsyth *v.* Van Winkle, 9 Fed. 247, 11 Biss. 108.

See 30 Cent. Dig. tit. "Judgment," § 974.

Contra.— Langley *v.* Grill, 1 Colo. 71.

56. New Mexico, etc., R. Co. *v.* Madden, 7 N. M. 215, 34 Pac. 50. And see Mason *v.* Alexander, 44 Ohio St. 318, 7 N. E. 435.

57. See Graham *v.* Lawyers' Title Ins. Co., 20 N. Y. App. Div. 440, 46 N. Y. Suppl. 1055.

58. *California.*— Rutan *v.* Wolters, 116 Cal. 403, 48 Pac. 385; O'Brien *v.* Ballou, 116 Cal. 318, 48 Pac. 130.

Florida.— Robinson *v.* Springfield Co., 21 Fla. 203.

Iowa.— Dougherty *v.* McManus, 36 Iowa 657.

Pennsylvania.— Rockwell *v.* Tupper, 7 Pa. Super. Ct. 174.

Texas.— Sass *v.* Hirschfeld, 23 Tex. Civ. App. 396, 56 S. W. 941.

West Virginia.— Thomson *v.* Mann, 53 W. Va. 432, 44 S. E. 246.

Wisconsin.— Prichard *v.* Bixby, 71 Wis. 422, 37 N. W. 228.

See 30 Cent. Dig. tit. "Judgment," § 975.

59. *Georgia.*— Willingham *v.* Field, 65 Ga. 440.

e. As Between Co-Defendants. As a general rule a judgment against two or more defendants decides nothing as to their rights or liabilities *inter sese*, but only their liability to plaintiff,[60] although in some circumstances a judgment for plaintiff may include affirmative relief to one defendant as against another, in which case its effect is to be determined by the ordinary rules of construction.[61]

2. Subject-Matter. In respect to its operation upon the subject-matter of the action a judgment is to be understood as including and determining whatever follows by necessary implication from its terms, although not specified in so many words,[62] and as disposing of all the issues and controversies raised in the case,[63] unless questions are reserved or leave given to the parties to take further proceedings, in which case the unadjudicated matters are left entirely open, except in so far as their determination in a particular way would be inconsistent with the general tenor of the original judgment.[64] But the scope of the judgment is not to be extended beyond the issues raised in the case, or the state of facts and situation of the parties existing at the time of the action.[65]

3. Amount of Recovery or Relief Granted. If the judgment is ambiguous or silent as to the amount of the recovery or the relief granted, reference may be had to the pleadings, the verdict, if any, and other parts of the record, and the judgment will be presumed to be in accordance with what they show to be due.[66]

Iowa.— Palmer *v.* Stacy, 44 Iowa 340.

Kansas.— Read *v.* Jeffries, 16 Kan. 534.

Louisiana.— Bonnafe *v.* Lane, 5 La. Ann. 225; Pemberton *v.* Grass, 1 La. 81; U. S. *v.* Hawkins, 4 Mart. N. S. 317.

New York.— Barnes *v.* Smith, 16 Abb. Pr. 420.

United States.— U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

See 30 Cent. Dig. tit. "Judgment," § 976.

But *compare* Hite *v.* Paul, 2 Munf. (Va.) 154.

60. Buffington *v.* Cook, 35 Ala. 312, 73 Am. Dec. 491; Cox *v.* Hill, 3 Ohio 411. And see *infra*, XIV, B, 11. *Compare* Barus *v.* Bidwell, 23 La. Ann. 296, holding that the effect of a judgment as between co-defendants must be determined with reference to the pleadings and the nature of the obligation in suit.

61. A judgment for plaintiff and an affirmative judgment in the same action in favor of one defendant against another constitute but one judgment, although separately written and attested. Hall *v.* Younts, 87 N. C. 285.

Affirmative relief to one defendant as against another see generally *supra*, VI, B, 9.

62. San Jose *v.* Uridias, 37 Cal. 339; Small *v.* Howland, 14 Ind. 592; Hancock *v.* Hancock, 22 N. Y. 568; Cline *v.* Sherman, 78 Hun (N. Y.) 298, 29 N. Y. Suppl. 909 [*affirmed* in 144 N. Y. 601, 39 N. E. 635].

Examples.— In detinue for several chattels, a judgment for plaintiff for all of them except one, as to which the judgment entry is entirely silent, is a judgment in favor of defendant for that one. Wittick *v.* Traun, 25 Ala. 317. So a judgment that a certain claimant is entitled to a fund in controversy is an adjudication that other claimants were not entitled to an injunction which they had obtained to prevent him from suing for the fund. Heyman *v.* Landers, 12 Cal. 107.

63. Rhoads *v.* Metropolis, 144 Ill. 580, 33 N. E. 1092, 36 Am. St. Rep. 468; Goodenow *v.* Litchfield, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86; Moore *v.* Kime, 43 Nebr. 517, 61 N. W. 736; Swann *v.* Clark, 110 U. S. 602, 4 S. Ct. 241, 28 L. ed. 256.

64. Hollingsworth *v.* Campbell, 28 Minn. 18, 8 N. W. 873; Paup *v.* Mingo, 4 Leigh (Va.) 163.

65. San Francisco *v.* Center, (Cal. 1900) 63 Pac. 35; Gunter *v.* Gunter, 2 Rich. (S. C.) 11; Kerr *v.* Hutchins, 46 Tex. 384; Robinson *v.* Dickey, 14 Tex. Civ. App. 70, 36 S. W. 499; Legrand *v.* Rixey, 83 Va. 862, 3 S. E. 864.

Application of text.— Where a church, to which funds had been bequeathed by the will of a decedent, applied to the probate court for an order directing payment of the legacy, but that court held that a trustee should be appointed to hold and manage the fund for the church, and on the resignation of the trustee who was at first appointed the church itself was appointed trustee, from which order the administratrix appealed, it was held that the probate court's order, pending such appeal, was not a conclusive determination that the church was not entitled to the fund, in a suit in the chancery court for directions as to the performance of certain conditions prescribed in the bequest. Congregational Church *v.* Cutler, 76 Vt. 338, 57 Atl. 387.

66. Ellis *v.* Dunn, 3 Ala. 632; Hastings *v.* Burning Moscow Co., 2 Nev. 93; Ransford *v.* Marvin, 8 Abb. Pr. N. S. (N. Y.) 432; Lillie *v.* Sherman, 39 How. Pr. (N. Y.) 287; Ulshafer *v.* Stewart, 71 Pa. St. 170.

Where a set-off is pleaded as a defense to an action, a judgment for defendant is in effect a judgment for the amount of the set-off. Shriver *v.* Bowen, 57 Ind. 266.

Adjudication controlling recital.— Where the record of the court recited that there was due to plaintiff from defendant a certain sum with interest, and therefore "it is

A decree directing the sale of premises unless a certain sum is paid within a limited time is not to be construed as a personal decree for the payment of the money, but as in the alternative.[67] And if it provides for periodical payments in the future, so long as a given relation or state of affairs continues, the amounts due from time to time may be fixed by successive applications to the court.[68]

C. Operation and Effect — 1. In General.[69] A judgment duly rendered creates an estoppel, barring any further suit upon the same cause of action between the parties or their privies,[70] and precluding any further litigation, between such parties, of a point or question once put in issue and decided.[71] Also it may create a lien upon the real property of the judgment debtor.[72] But while the debt or claim in suit becomes merged in the judgment, and the judgment itself becomes thereafter a new liability and a fresh cause of action;[73] yet as to the original debt the judgment neither creates, adds to, nor detracts from it; its only office is to declare the existence of the debt, fix its amount, and secure to the creditor the means of enforcing its payment.[74] But it may in certain circumstances operate to create a title to property, or to transfer the title,[75] and although it may be erroneous or voidable, still, before it is reversed or vacated, it will support proceedings taken under it.[76] As to its effect on pleadings in the case, it may be remarked that a judgment on a verdict virtually overrules all demurrers.[77]

2. Conflicting Judgments. Of two conflicting judgments rendered by the same court upon the same rights of the same parties, that which is later in time will prevail.[78]

ordered and adjudged" that plaintiff recover judgment against defendant for that sum and costs, it is a judgment only for the amount of damages and costs, exclusive of interest. Swisher *v.* Ellsworth, 66 Kan. 783, 71 Pac. 810.

67. Arentz *v.* Reilly, 67 Ill. App. 307.

68. Smith *v.* Barkemeyer, McGloin (La.) 139.

69. Operation in personam or in rem see *infra*, XVI.

70. See *infra*, XIII.

71. See *infra*, XIV.

72. See *infra*, XV.

73. See *infra*, XIII, A, 4.

74. Klein *v.* Dewees, 11 La. Ann. 194; Gustine *v.* Union Bank, 10 Rob. (La.) 412; Turner *v.* Parker, 10 Rob. (La.) 154; Green *v.* Glasscock, 9 Rob. (La.) 119; Bach *v.* Twogood, 18 La. 414. A judgment derives its force and effect from what is decreed by the court, not from what is admitted by the parties. Cuebas *v.* Venas, 8 Mart. N. S. (La.) 465.

75. *Louisiana.*— If, in a suit for damages to property, the full value be accorded to plaintiff, the property is thereby conveyed to defendant. Lawrence *v.* New Orleans Second Municipality, 12 Rob. 453; Story *v.* Luzenberg, 4 Rob. 240; Jourdan *v.* Patton, 5 Mart. 615.

Maryland.— Warner *v.* Sprigg, 62 Md. 14.

New Hampshire.— Satisfaction of a judgment recovered in an action of trespass for the conversion of chattels passes property in such chattels to defendant, and his title thus acquired takes effect by relation from the time of the conversion. Smith *v.* Smith, 51 N. H. 571.

New York.— In an action by the purchaser of a chattel against the seller to recover damages for false representations in making the sale, a judgment in favor of plaintiff which does not by its terms award the chattel to defendant, the seller, does not transfer to him the title thereto. McGloin *v.* Jones, 7 Misc. 163, 27 N. Y. Suppl. 254. And see Dawley *v.* Brown, 11 N. Y. St. 260. So where it is alleged in a complaint that the action is brought to recover for taking away plaintiff's horse, detaining him for a limited time, and injuring him, a judgment following such complaint does not have the effect of changing the property in the horse. Thurst *v.* West, 31 N. Y. 210.

Ohio.— A decree of a federal court for the conveyance of land does not operate as such conveyance in Ohio. Shepherd *v.* Ross County Com'rs, 7 Ohio 271.

South Carolina.— James *v.* Mayrant, 4 Desauss. Eq. 591, 6 Am. Dec. 630.

Texas.— Hillebrand *v.* Head, (Civ. App. 1905) 88 S. W. 438. In a suit between a lessee from the state of grazing lands and one claiming as a purchaser, to try the title, a judgment in favor of the latter has the effect of canceling the unexpired lease of the former. Watts *v.* Wheeler, 10 Tex. Civ. App. 117, 30 S. W. 297.

See 30 Cent. Dig. tit. "Judgment," § 983.

Judgment as color of title see Adverse Possession, 1 Cyc. 1100.

76. Sheldon *v.* Stryker, 34 Barb. (N. Y.) 116. And see *supra*, I, G, 1.

77. Fleming Oil, etc., Co. *v.* South Penn Oil Co., 37 W. Va. 645, 17 S. E. 203; Hood *v.* Maxwell, 1 W. Va. 219.

78. Cooley *v.* Brayton, 16 Iowa 10; Bateman *v.* Grand Rapids, etc., R. Co., 96 Mich. 441, 56 N. W. 28; Stoltz *v.* Coward, 10 Tex.

3. TIME OF TAKING EFFECT. In some states judgments take effect, by relation back, from the first day of the term at which they are rendered; in others, from the last day of the term; but in most, from the day of the actual rendition of the judgment.[79] As to the rights and titles of the parties to the action, a judgment takes effect upon them as they exist at the time of the trial and rendition thereof, and not as they existed at the commencement of the suit or before that time.[80]

4. CONDITIONS. The party who claims the benefit of a judgment rendered in his favor must comply with any terms or conditions which it may impose upon him, and failure to do so will destroy the effect of the adjudication.[81]

XIII. FORMER RECOVERY AS MERGER OR BAR.[82]

A. General Principles — 1. ESTOPPEL BY FORMER RECOVERY. A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies, upon the same cause of action, in the same or another court, so long as it remains unreversed and not in any way vacated or annulled.[83] This rule rests upon fundamental legal principles,

Civ. App. 295, 30 S. W. 935. But see Gage *v.* Downey, 94 Cal. 241, 29 Pac. 635, holding that where a court inadvertently determines two matters standing in such opposition as to be incapable of a harmonious construction, as for instance that the same property belongs absolutely to each of two persons, the decision is of no effect.

79. See *supra*, VI, A, 6, d.

Entry nunc pro tunc see *supra*, VII, F.

80. Thornton *v.* Perry, 101 Ga. 608, 29 S. E. 24; Bacon *v.* Kimmel, 14 Mich. 201; Johnson County School Dist. No. 2 *v.* Hart, 3 Wyo. 563, 27 Pac. 919, 29 Pac. 741.

81. Smith *v.* George, 52 Cal. 341; Aubry *v.* Folse, 11 Mart. (La.) 306. And see Treaster *v.* Fleisher, 7 Watts & S. (Pa.) 137; Old Dominion Bank *v.* McVeigh, 32 Gratt. (Va.) 530.

82. Pleading, evidence, and trial see *infra*, XXI.

Judgments in rem see *infra*, XVI, C.

Foreign judgments see *infra*, XXII, B, 1, e.

Conclusiveness of adjudication see *infra*, XIV.

83. *Alabama.*— Penny *v.* British, etc., Mtg. Co., 132 Ala. 357, 31 So. 96; Strang *v.* Moog, 72 Ala. 460; Tankersly *v.* Pettis, 71 Ala. 179; Mobile Bank *v.* Mobile, etc., R. Co., 69 Ala. 305; Gilbreath *v.* Jones, 66 Ala. 129; Cannon *v.* Brame, 45 Ala. 262; Mervine *v.* Parker, 18 Ala. 241.

Arizona.— Reilly *v.* Perkins, 6 Ariz. 188, 56 Pac. 734.

Arkansas.— Peay *v.* Duncan, 20 Ark. 85; Trammell *v.* Thurmond, 17 Ark. 203. See also McWhorter *v.* Andrews, 53 Ark. 307, 13 S. W. 1099.

California.— South San Bernardino Land, etc., Co. *v.* San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699; Keech *v.* Beatty, 127 Cal. 177, 59 Pac. 837; Chase *v.* Swain, 9 Cal. 130.

Colorado.— Denver *v.* Lobenstein, 3 Colo. 216; Smith *v.* Schlink, 15 Colo. App. 325, 62 Pac. 1044.

Connecticut.— Bell *v.* Raymond, 18 Conn. 91; Coit *v.* Tracy, 8 Conn. 268, 20 Am. Dec. 110; Dennison *v.* Hyde, 6 Conn. 508. *Compare* Church *v.* Leavenworth, 4 Day 274.

Delaware.— Solomon *v.* Loper, 4 Harr. 187.

District of Columbia.— Slack *v.* Perrine, 9 App. Cas. 128; Gray *v.* District of Columbia, 1 App. Cas. 20; Birdsall *v.* Welch, 6 D. C. 316. *Compare* Strong *v.* Grant, 2 Mackey 218.

Florida.— Thornton *v.* Eppes, 6 Fla. 546. See also Moore *v.* Felkel, 7 Fla. 44.

Georgia.— Cheney *v.* Selman, 71 Ga. 384; Grubb *v.* Kolb, 55 Ga. 630; Bradley *v.* Johnson, 49 Ga. 412; Russell *v.* Slaton, 38 Ga. 195; Crutchfield *v.* State, 24 Ga. 335; Kenan *v.* Miller, 2 Ga. 325.

Illinois.— Markley *v.* People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Stickney *v.* Goudy, 132 Ill. 213, 23 N. E. 1034; Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499; Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608; Ginsburg *v.* Morrall, 105 Ill. App. 213; Baxter *v.* Thede, 103 Ill. App. 57; Bachman *v.* Schertz, 73 Ill. App. 479.

Indiana.— Hord *v.* Bradbury, 156 Ind. 20, 59 N. E. 27; Wilson *v.* Buell, 117 Ind. 315, 20 N. E. 231; Bougher *v.* Scobey, 21 Ind. 365; Housemire *v.* Moulton, 15 Ind. 367.

Iowa.— Madison *v.* Garfield Coal Co., 114 Iowa 56, 86 N. W. 41; Hahn *v.* Miller, 68 Iowa 745, 28 N. E. 51; Goodenow *v.* Litchfield, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86; Street *v.* Beckman, 43 Iowa 496; Hart *v.* Jewett, 11 Iowa 276.

Kansas.— Missouri, etc., R. Co. *v.* Allen, 67 Kan. 838, 73 Pac. 98; Santa Fé Bank *v.* Haskell County Bank, 51 Kan. 50, 32 Pac. 627.

Kentucky.— Hall *v.* Forman, 82 Ky. 505; Campbell *v.* Mayhugh, 15 B. Mon. 142; Hayden *v.* Boothe, 2 A. K. Marsh. 353; Wallace *v.* Usher, 4 Bibb 508. And see Smith *v.* Belmont, etc., Iron Co., 11 Bush 390.

Louisiana.— Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740.

Maine.— Woodbury *v.* Portland Mar. Soc.,

and cannot be abrogated or waived at the will or discretion of any court or

94 Me. 122, 46 Atl. 797; Walker *v.* Chase, 53 Me. 258.

Maryland.— Tifel *v.* Jenkins, 95 Md. 665, 53 Atl. 429; Martin *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218; Barrick *v.* Horner, 78 Md. 253, 27 Atl. 111, 44 Am. St. Rep. 283; Trayhern *v.* Colburn, 66 Md. 277, 7 Atl. 459; Streeks *v.* Dyer, 39 Md. 424; Whitehurst *v.* Rogers, 38 Md. 503; Beall *v.* Pearre, 12 Md. 550.

Massachusetts.— Jamaica Pond Aqueduct Corp. *v.* Chandler, 121 Mass. 1; Foster *v.* The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125; Smith *v.* Whiting, 11 Mass. 445; Bigelow *v.* Winsor, 1 Gray 299.

Michigan.— Hanchett *v.* Auditor-Gen., 124 Mich. 424, 83 N. W. 163; Sayers *v.* Auditor-Gen., 124 Mich. 259, 82 N. W. 1045; Barker *v.* Cleveland, 19 Mich. 230; Wales *v.* Lyon, 2 Mich. 276.

Minnesota.— Keene *v.* Lobdell, 85 Minn. 110, 88 N. W. 251; Truesdale *v.* Farmers' L. & T. Co., 67 Minn. 454, 70 N. W. 568, 64 Am. St. Rep. 430; Bazille *v.* Murray, 40 Minn. 48, 41 N. W. 238.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956; Wall *v.* Wall, 28 Miss. 409. See also Perry *v.* Lewis, 49 Miss. 443; Agnew *v.* McElroy, 10 Sm. & M. 552, 48 Am. Dec. 772.

Missouri.— Chouteau *v.* Gibson, 76 Mo. 38; McKinney *v.* Davis, 6 Mo. 501; McKnight *v.* Taylor, 1 Mo. 282.

Nebraska.— State *v.* Broatch, (1903) 94 N. W. 1016; Wood *v.* Carter, 67 Nebr. 133, 93 N. W. 158; Hamilton Nat. Bank *v.* American L. & T. Co., 66 Nebr. 67, 92 N. W. 189; State *v.* Savage, 64 Nebr. 684, 90 N. W. 898, 91 N. W. 557; Dillon *v.* Chicago, etc., R. Co., 58 Nebr. 472, 78 N. W. 927; Creighton *v.* Keith, 50 Nebr. 870, 70 N. W. 406; Spear *v.* Tidball, 40 Nebr. 107, 58 N. W. 708; Miles *v.* Ballantine, 4 Nebr. (Unoff.) 171, 93 N. W. 708.

Nevada.— McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124; Sherman *v.* Dilley, 3 Nev. 21.

New Hampshire.— Hollister *v.* Abbott, 31 N. H. 442, 64 Am. Dec. 342; Claggett *v.* Simes, 25 N. H. 402; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

New Jersey.— Wooster *v.* Cooper, 59 N. J. Eq. 204, 45 Atl. 381.

New Mexico.— Lindauer Mercantile Co. *v.* Boyd, 11 N. M. 464, 70 Pac. 568; Territory *v.* Santa Fé Pac. R. Co., 10 N. M. 410, 62 Pac. 985; U. S. *v.* Maxwell Land Grant Co., 5 N. M. 297, 21 Pac. 153, 3 L. R. A. 751.

New York.— Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; People *v.* Smith, 51 Barb. 360; Kent *v.* Hudson River R. Co., 22 Barb. 278; Baker *v.* Rand, 13 Barb. 152; Miller *v.* Covert, 1 Wend. 487; Burt *v.* Sternburgh, 4 Cow. 559, 15 Am. Dec. 402; Gardner *v.* Buckbee, 3 Cow. 120, 15 Am. Dec. 256; Rice *v.* King, 7 Johns. 20.

North Carolina.— Durham Consol. Land, etc., Co. *v.* Guthrie, 123 N. C. 185, 31 S. E. 601; Albertson *v.* Williams, 97 N. C. 264, 1 S. E. 841; Long *v.* Jarratt, 94 N. C. 443; Gay *v.* Stancell, 76 N. C. 369; Falls *v.* Gamble, 66 N. C. 455.

Ohio.— Bell *v.* McColloch, 31 Ohio St. 397; Grant *v.* Ramsey, 7 Ohio St. 157; Moore *v.* Robson, 6 Ohio St. 302; Maloney *v.* Maloney, 12 Ohio Cir. Ct. 700, 4 Ohio Cir. Dec. 255; Atlas Nat. Bank *v.* Rheinstrom, 6 Ohio S. & C. Pl. Dec. 215, 4 Ohio N. P. 15.

Oklahoma.— Pratt *v.* Ratliff, 10 Okla. 168, 61 Pac. 523.

Oregon.— White *v.* Ladd, 41 Oreg. 324, 68 Pac. 739, 93 Am. St. Rep. 732; Crabill *v.* Crabill, 22 Oreg. 588, 30 Pac. 320; Glenn *v.* Savage, 14 Oreg. 567, 13 Pac. 442.

Pennsylvania.— Bell *v.* Allegheny County, 184 Pa. St. 296, 39 Atl. 227, 63 Am. St. Rep. 795; Bolton *v.* Hey, 168 Pa. St. 418, 31 Atl. 1097; Haneman *v.* Pile, 161 Pa. St. 599, 29 Atl. 113; Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Atl. 344, 19 Am. St. Rep. 604; Gordinier's Appeal, 89 Pa. St. 528; Finley *v.* Hanbest, 30 Pa. St. 190; Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380; Kelsey *v.* Murphy, 26 Pa. St. 78; Kennedy *v.* Lancaster County Bank, 18 Pa. St. 347; Man *v.* Drexel, 2 Pa. St. 202; Jatho *v.* Green, etc., R. Co., 4 Phila. 24; Bordley's Estate, 3 Phila. 127; Cleveland, etc., R. Co. *v.* Erie, 1 Grant 212.

Rhode Island.— Curry *v.* Swett, 13 R. I. 476.

South Carolina.— Smith *v.* Smith, 55 S. C. 507, 33 S. E. 583; Jones *v.* Weathersbee, 4 Strobh. 50, 51 Am. Dec. 653.

South Dakota.— Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803.

Tennessee.— Guthrie *v.* Connecticut Indemnity Assoc., 101 Tenn. 643, 49 S. W. 829; Carey *v.* Campbell, 3 Sneed 62; Ellis *v.* Staples, 9 Humphr. 238.

Texas.— Crane *v.* Blum, 56 Tex. 325; Cook *v.* Burnley, 45 Tex. 97; Watson *v.* Hopkins, 27 Tex. 637; Acres *v.* Tate, 1 Tex. App. Civ. Cas. § 1222.

Vermont.— Hodges *v.* Eddy, 52 Vt. 434; Pierson *v.* Catlin, 18 Vt. 77; Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345.

Virginia.— Martin *v.* Columbian Paper Co., 101 Va. 699, 44 S. E. 918; Saunders *v.* Grigg, 81 Va. 506; Howison *v.* Weeden, 77 Va. 704.

West Virginia.—Davis *v.* Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849; Kinports *v.* Rawson, 36 W. Va. 237, 15 S. E. 66; Burner *v.* Hevener, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948; Corrothers *v.* Sargent, 20 W. Va. 351.

Wisconsin.— Swennes *v.* Sprain, 120 Wis. 68, 97 N. W. 511; Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846; Dick *v.* Webster, 6 Wis. 481; Woodward *v.* Hill, 6 Wis. 143.

Wyoming.— Price *v.* Bonnifield, 2 Wyo. 80.

United States.— Hunt *v.* Blackburn, 128 U. S. 464, 9 S. Ct. 125, 32 L. ed. 488; Young *v.* Black, 7 Cranch 565, 3 L. ed. 440; Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190; Gordon *v.* Ware Nat Bank, 132 Fed. 444, 65 C. C. A. 580, 67

judge.[84] Nor can the rule be abrogated or waived by the consent of the parties themselves.[85]

2. Doctrine of Merger. A claim or demand, being put in suit and passing to final judgment, is merged or swallowed up in the judgment, loses its vitality, and cannot thereafter be used either as a cause of action or as a set-off.[86] Moreover

L. R. A. 550; Casey *v.* Pennsylvania Asphalt Pav. Co., 109 Fed. 744 [*affirmed* in 114 Fed. 189, 52 C. C. A. 145]; Linton *v.* National L. Ins. Co., 104 Fed. 584, 44 C. C. A. 54; Fish Bros. Wagon Co. *v.* Fish Bros. Mfg. Co., 95 Fed. 457, 37 C. C. A. 146; Ball *v.* Trenholm, 45 Fed. 588; Campbell *v.* Strong, 4 Fed. Cas. No. 2,367*a*, Hempst. 265; Hughes *v.* Blake, 12 Fed. Cas. No. 6,845, 1 Mason 515; Ramsey *v.* Herndon, 20 Fed. Cas. No. 11,546, 1 McLean 450.

England.— Phosphate Sewage Co. *v.* Molleson, 4 App. Cas. 801; Lockyer *v.* Ferryman, 2 App. Cas. 519; Hammond *v.* Schofield, [1891] 1 Q. B. 453, 60 L. J. Q. B. 539; *In re* May, 28 Ch. D. 516, 54 L. J. Ch. 338, 52 L. T. Rep. N. S. 79, 33 Wkly. Rep. 917; Newington *v.* Levy, L. R. 5 C. P. 607, 39 L. J. C. P. 334, 23 L. T. Rep. N. S. 70, 18 Wkly. Rep. 1198 [*affirmed* in L. R. 6 C. P. 180, 40 L. J. C. P. 29, 23 L. T. Rep. N. S. 595, 19 Wkly. Rep. 473]; Priestman *v.* Thomas, 9 P. D. 210, 53 L. J. P. & Adm. 109, 51 L. T. Rep. N. S. 843, 32 Wkly. Rep. 842; Stafford *v.* Clark, 2 Bing. 377, 9 E. C. L. 623, 1 C. & P. 24, 12 E. C. L. 27, 3 L. J. C. P. O. S. 48, 9 Moore C. P. 724; Peterborough *v.* Germaine, 6 Bro. P. C. 1, 2 Eng. Reprint 893; Buckland *v.* Johnson, 15 C. B. 145, 2 C. L. R. 704, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145; Nelson *v.* Couch, 15 C. B. N. S. 99, 108, 10 Jur. N. S. 366, 33 L. J. C. P. 46, 8 L. T. Rep. N. S. 577, 11 Wkly. Rep. 964, 109 E. C. L. 99; Kingston's Case, 20 How. St. Tr. 355, 538; King *v.* Hoare, 13 M. & W. 493.

Canada.— Davidson *v.* Belleville, etc., R. Co., 5 Ont. App. 315; Sloan *v.* Creasor, 22 U. C. Q. B. 127; McArthur *v.* Cool, 19 U. C. Q. B. 476; Stinson *v.* Branigan, 10 U. C. Q. B. 402.

See 30 Cent. Dig. tit. "Judgment," § 987 *et seq.*

Modification on appeal.—Where a judgment is affirmed on appeal, but on condition that the judgment creditor shall deduct or remit the amount of one item of his claim, the judgment is not a bar to a subsequent action for the amount of that item. Kerby *v.* Daly, 63 N. Y. 659.

Conclusiveness of adjudication see *infra*, XIV.

84. A judge who has tried and decided a case on the merits, rendering a final judgment, cannot give the parties leave to bring another action on the same matter. Bostwick *v.* Abbott, 40 Barb. (N. Y.) 331, 16 Abb. Pr. 417. And it is error for the court to state the extent to which its judgment may or may not prejudice the rights of plaintiff in prosecuting other actions against the same parties. Prondzinski *v.* Garbutt, 9 N. D. 239, 83 N. W. 23. See also Rochester *v.* Lee, 1 Macn. & G. 467, 47 Eng. Ch. 373, 41 Eng. Reprint 1346.

85. Walker *v.* Chase, 53 Me. 258; Long *v.* Jarratt, 94 N. C. 443; Raisig *v.* Graf, 17 Pa. Super. Ct. 509; Hammond *v.* Schofield, [1891] 1 Q. B. 453, 60 L. J. Q. B. 539.

Claims not intended to be litigated.— An adjudication of indebtedness on an item of account by one court will be a bar to an action upon it in another, even though it was not the intention of plaintiff to include it in the former action. The fact that it was presented and was submitted with the case will be enough to raise the estoppel. Street *v.* Beckman, 43 Iowa 496.

86. *Alabama.*— Davis *v.* Bedsole, 69 Ala. 362; Mobile Bank *v.* Mobile, etc., R. Co., 69 Ala. 305.

Connecticut.— Burritt *v.* Belfry, 47 Conn. 323, 36 Am. Rep. 79; Marlborough *v.* Sisson, 31 Conn. 332; Bank of North America *v.* Wheeler, 28 Conn. 433, 440, 73 Am. Dec. 683; Pinney *v.* Barnes, 17 Conn. 420; Boardman *v.* De Forest, 5 Conn. 1, 9.

District of Columbia.— National Metropolitan Bank *v.* Hitz, 1 Mackey 111.

Florida.— Moore *v.* Felkel, 7 Fla. 44; Ferrall *v.* Bradford, 2 Fla. 508, 50 Am. Dec. 293.

Illinois.— Peoria Sav., etc., Co. *v.* Elder, 165 Ill. 55, 45 N. E. 1083; Runnamaker *v.* Cordray, 54 Ill. 303; Wayman *v.* Cochrane, 35 Ill. 152; Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58.

Indiana.— Hord *v.* Bradbury, 156 Ind. 20, 59 N. E. 27; Wilson *v.* Buell, 117 Ind. 315, 20 N. E. 231; Indiana, etc., R. Co. *v.* Koons, 105 Ind. 507, 5 N. E. 549; North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821; Ward *v.* Haggard, 75 Ind. 381; Marshall *v.* Stewart, 65 Ind. 243; Pressler *v.* Turner, 57 Ind. 56; Ault *v.* Zehering, 38 Ind. 429; Crosby *v.* Jeroloman, 37 Ind. 264; Cissna *v.* Haines, 18 Ind. 496.

Iowa.— North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441.

Kansas.— Price *v.* Atchison First Nat. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419; Thisler *v.* Miller, 53 Kan. 515, 36 Pac. 1060, 42 Am. St. Rep. 302; Bolen Coal Co. *v.* Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810; Ashton *v.* Clayton, 27 Kan. 626.

Kentucky.— Smith *v.* Belmont, etc., Iron Co., 11 Bush 390; Scott *v.* Sander, 6 J. J. Marsh. 506.

Louisiana.— West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736, 68 Am. Dec. 778; Abat *v.* Buisson, 9 La. 417.

Maine.— Brown *v.* West, 73 Me. 23; Sweet *v.* Brackley, 53 Me. 346; Uran *v.* Houdlette, 36 Me. 15; Pike *v.* McDonald, 32 Me. 418, 54 Am. Dec. 597; White *v.* Philbrick, 5 Me. 147, 17 Am. Dec. 214.

as a general rule all the peculiar qualities of the claim are merged in the judgment, which then stands on the same footing as all other judgments.[87] And

Maryland.— Johnson *v.* Hines, 61 Md. 122, 136; Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423; Streeks *v.* Dyer, 39 Md. 424; Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708; U. S. Bank *v.* Merchants' Bank, 7 Gill 415; Moale *v.* Hollins, 11 Gill & J. 11, 33 Am. Dec. 684; Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158.

Massachusetts.— Wyman *v.* Fabens, 111 Mass. 77, 80; Bangs *v.* Watson, 9 Gray 211; Thatcher *v.* Gammon, 12 Mass. 268.

Michigan.— Town *v.* Smith, 14 Mich. 348.

Mississippi.— Agnew *v.* McElroy, 10 Sm. & M. 552, 48 Am. Dec. 772; Standifer *v.* Bush, 8 Sm. & M. 383.

Missouri.— Cooksey *v.* Kansas City, etc., R. Co., 74 Mo. 477; Moran *v.* Plankinton, 64 Mo. 337.

New Hampshire.— Andrews *v.* Varrell, 46 N. H. 17.

New Jersey.— New York Mut. L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756; Baker *v.* Baker, 28 N. J. L. 13, 75 Am. Dec. 243; Wooster *v.* Cooper, 59 N. J. Eq. 204, 45 Atl. 381.

New York.— Steinhach *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; Caylus *v.* New York, etc., R. Co., 76 N. Y. 609; Ives *v.* Goddard, 1 Hilt. 434. See also Gutta-Percha, etc., Mfg. Co. *v.* Houston, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412; Davies *v.* New York, 93 N. Y. 250; Goodrich *v.* Dunbar, 17 Barb. 644; Besley *v.* Palmer, 1 Hill 482; Miller *v.* Covert, 1 Wend. 487.

North Carolina.— Snow Steam Pump Co. *v.* Dunn, 119 N. C. 77, 25 S. E. 741; Grant *v.* Burgwyn, 88 N. C. 95; Gibson *v.* Smith, 63 N. C. 103; Platt *v.* Potts, 33 N. C. 266, 53 Am. Dec. 412.

Ohio.— Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991.

Pennsylvania.— Murray *v.* Weigle, 118 Pa. St. 159, 11 Atl. 781; Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131.

Tennessee.— Carey *v.* Campbell, 3 Sneed 62.

Texas.— Gibson *v.* Hale, 57 Tex. 405; Darragh *v.* Kaufman, 2 Tex. Unrep. Cas. 97.

Wisconsin.— Jameson *v.* Barber, 56 Wis. 630, 14 N. W. 859.

United States.— U. S. *v.* Price, 9 How. 83, 13 L. ed. 56; U. S. *v.* Leffler, 11 Pet. 86, 9 L. ed. 642; Manhattan Trust Co. *v.* Trust Co. of North America, 107 Fed. 328, 46 C. C. A. 322; Independent Electric Co. *v.* Jeffrey Mfg. Co., 76 Fed. 981; Ries *v.* Rowland, 11 Fed. 657, 4 McCrary 85.

England.— Lockyer *v.* Ferryman, 2 App. Cas. 519; Gregory *v.* Molesworth, 3 Atk. 626, 26 Eng. Reprint 1160; Bagot *v.* Williams, 3 B. & C. 235, 5 D. & R. 87, 27 Rev. Rep. 340, 10 E. C. L. 115; Stafford *v.* Clark, 2 Bing. 377, 9 E. C. L. 623, 1 C. & P. 24, 12 E. C. L. 27, 3 L. J. C. P. O. S. 48, 9 Moore C. P. 724; Buckland *v.* Johnson, 15 C. B. 145, 2 C. L. R. 704, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145; Nelson *v.* Couch, 15 C. B. N. S. 99, 108, 10 Jur. N. S. 366, 33 L. J. C. P. 46, 8 L. T. Rep. N. S. 577, 11 Wkly. Rep. 964, 109 E. C. L. 99; King *v.* Hoare, 13 M. & W. 493.

Canada.— Davidson *v.* Belleville, etc., R. Co., 5 Ont. App. 315; Sloan *v.* Creasor, 22 U. C. Q. B. 127; McKay *v.* Fee, 20 U. C. Q. B. 268; McArthur *v.* Cool, 19 U. C. Q. B. 476; Proudfoot *v.* Lawrence, 8 U. C. Q. B. 269. See also Hunt *v.* McCarthy, 6 U. C. Q. B. O. S. 434.

See 30 Cent. Dig. tit. "Judgment," § 1079 *et seq.*

Matters excepted.— A severable portion of a claim put in suit which is expressly excepted from the judgment thereon is not merged in the judgment. Hall *v.* Hall, 8 Vt. 156.

Judgment as collateral.—A judgment given merely as collateral security for a simple contract debt does not extinguish it. Davis *v.* Anable, 2 Hill (N. Y.) 339.

Lien.— The doctrine of merger will not be applied to destroy the security of a decree as a lien to defeat justice. Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924. And see Curtis *v.* Gooding, 99 Ind. 45; Pence *v.* Armstrong, 95 Ind. 191; Manns *v.* Brookville Nat. Bank, 73 Ind. 243.

Judgment in rem.— It has been held that a judgment against a steamboat — being a judgment *in rem* and not enforceable against the property of the owners — if unsatisfied, could not be pleaded as a bar to a subsequent action against the owners of the vessel on the same contract. Toby *v.* Brown, 11 Ark. 308. And see Tabor *v.* The Cerro Gordo, 54 Fed. 391.

Revival of merged debt.— To enable a plaintiff to recover on a debt barred by a former recovery, the debt must not only be acknowledged, but there must be a distinct promise to pay it. Anspach *v.* Brown, 7 Watts (Pa.) 139.

87. Temple *v.* Scott, 3 Minn. 419. But when the essential rights of the parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the original contract was. Owens *v.* Bowie, 2 Md. 457. Thus a city which has purchased with drainage warrants a plant to perfect its drainage system, under an agreement to collect the drainage assessments and apply the fund to the payment of the warrants, does not cease to be a trustee, with respect to the assessments against its own property, because they are reduced to judgments. New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96.

A claim for necessaries is merged in and extinguished by a judgment rendered in a suit upon the claim, and an action upon such judgment is not a suit for necessaries furnished within a statute relating to trustee

these rules apply to all species of demands, including contracts,[88] bonds,[89] promissory notes,[90] and according to some cases, even demands founded upon earlier judgments.[91]

3. MERGER OR BAR BY DECREES IN EQUITY.[92] A final decree in a court of equity is a bar to a second suit between the same parties or their privies upon the same cause of action; and when the decree orders the payment of money, it operates

process and exemptions. Brown *v.* West, 73 Me. 23.

Arrest; action for moneys received in fiduciary capacity.— By the obtaining of a judgment, the original cause of action is merged. Hence in an action upon a judgment defendant is not liable to arrest upon the ground that the judgment was obtained for moneys received by him in a fiduciary capacity. Goodrich *v.* Dunbar, 17 Barb. (N. Y.) 644.

Discharge in bankruptcy.— It has been held that a discharge in bankruptcy is no bar to a judgment recovered after defendant's application to be decreed a bankrupt, although founded upon a claim which, until merged in the judgment, would have been provable in bankruptcy. Uran *v.* Houdlette, 36 Me. 15; Pike *v.* McDonald, 32 Me. 418, 54 Am. Dec. 597. But where defendant applied to the court to have an execution against him stayed and the judgment satisfied, by reason of his discharge in insolvency proceedings, it was held that the court had a right to go behind the judgment and examine the pleadings, and where they showed that the original claim was created by a fraud, and therefore not barred by the discharge, it was not so merged in the judgment as to create a new debt subject to be discharged by the insolvency certificate. Carit *v.* Williams, 74 Cal. 183, 15 Pac. 751; Murphy *v.* Manning, 134 Mass. 488. See, generally, BANKRUPTCY.

Usury.— Although the original contract was tainted with usury, this blemish does not follow it into the judgment, and the new debt created by the judgment is not affected thereby. Thatcher *v.* Gammon, 12 Mass. 268. See, generally, USURY.

Penal laws of foreign state.— It is no objection to a recovery on a judgment rendered in a foreign state that it was originally rendered upon a forfeited recognizance taken in consequence of an alleged violation of the penal laws of that state. Spencer *v.* Brockway, 1 Ohio 259, 13 Am. Dec. 615.

As evidence.— The fact that a note secured by a deed of trust is merged in a decree in foreclosure proceedings in chancery, so that it could not form the basis of another action, does not destroy its character as evidence in ejectment founded on the trust deed. Brown *v.* Schintz, 203 Ill. 136, 67 N. E. 767.

Judgment recovered on a judgment see *infra*, this section, text and note 91.

88. North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441; Independent Electric Co. *v.* Jeffrey Mfg. Co., 76 Fed. 981; and other cases in the preceding notes.

89. Scott *v.* Sander, 6 J. J. Marsh. (Ky.) 506; New York Mut. L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756; Grant *v.* Burgwyn, 88 N. C. 95; U. S. *v.* Price, 9 How. (U. S.) 83, 13 L. ed. 56.

90. *Illinois.*— Peoria Sav., etc., Co. *v.* Elder, 165 Ill. 55, 45 N. E. 1083.

Indiana.— Marshall *v.* Stewart, 65 Ind. 243; Cissna *v.* Haines, 18 Ind. 496; Dunn *v.* Dilks, 31 Ind. App. 673, 68 N. E. 1035. A cause of action on a note is merged in a judgment thereon, so that after its rendition the note cannot be transferred by indorsement or assignment. Ward *v.* Haggard, 75 Ind. 381. But see Richmond Second Nat. Bank *v.* Townsend, 114 Ind. 534, 17 N. E. 116.

Iowa.— Harford *v.* Street, 46 Iowa 594.

Kansas.— Redden *v.* First Nat. Bank, 66 Kan. 747, 71 Pac. 578; Ashton *v.* Clayton, 27 Kan. 626.

Louisiana.— West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736, 68 Am. Dec. 778; Abat *v.* Buisson, 9 La. 417; Mackee *v.* Cairnes, 2 Mart. N. S. 599.

Massachusetts.— Thatcher *v.* Gammon, 12 Mass. 268.

Mississippi.— Standifer *v.* Bush, 8 Sm. & M. 383.

New Hampshire.— Andrews *v.* Varrell, 46 N. H. 17.

North Carolina.— Platt *v.* Potts, 33 N. C. 266, 53 Am. Dec. 412.

Ohio.— Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991.

Wisconsin.— Jameson *v.* Barber, 56 Wis. 630, 14 N. W. 859.

United States.— Schuler *v.* Israel, 27 Fed. 851; Connecticut Mut. L. Ins. Co. *v.* Jones, 8 Fed. 303, 1 McCrary 388.

See 30 Cent. Dig. tit. "Judgment," § 1079 *et seq.*

Confession of judgment on note.— After a judgment has been recovered before a justice of the peace on a judgment note, the warrant of attorney therein is *functus officio*, and no judgment can be entered thereon in the court of common pleas, the debt being merged in the higher security. Dixon *v.* Miller, 20 Pa. Co. Ct. 335. And see *supra*, II, B, 9.

Recovery against indorser.— Where, in an action against the maker and indorser of a note, judgment is obtained against the indorser alone, the note is not merged in the judgment so as to prevent an action thereon by the indorser. Still *v.* Lombardi, 8 Tex. Civ. App. 315, 27 S. W. 845. And see Tarleton *v.* Allhusen, 2 A. & E. 32, 4 L. J. K. B. 17, 29 E. C. L. 37; McLennan *v.* McMonies, 23 U. C. Q. B. 114.

91. Gould *v.* Hayden, 63 Ind. 443. The weight of authority, however, is to the contrary. See *infra*, XIX, D, 1, b.

92. Conclusiveness of adjudication see *infra*, XIV.

as a merger of the original debt in the same manner and to the same extent as a judgment at law.[93]

4. New Liability Created by Judgment. As a general rule the recovery of a judgment creates a new debt or liability, distinct from the original claim or demand, and this new liability is not merely the evidence of the creditor's claim, but is thereafter the substance of the claim itself.[94] Thus, where an administrator recovers judgment on a debt due to his intestate, the new debt thereby created is due to him, and he may sue upon it in the courts of another state, although as administrator he could not have sued upon the original claim outside of the state which granted his letters.[95] Still it has been broadly stated in a few decisions that a judgment will not be regarded as creating a new debt, but rather as an old debt in a new form, when justice to the parties requires such a course.[96] And there are some cases holding that an unsatisfied judgment is not a bar to a new action upon the same cause.[97]

5. Necessity of Identity of Parties[98] — a. In General. To make a former judgment a bar to the maintenance of a present suit, it must have been rendered in an action between the same parties, or between those in privity with them.[99]

93. *Alabama.*— Penny *v.* British, etc., Mtg. Co., 132 Ala. 357, 31 So. 96; Strang *v.* Moog, 72 Ala. 460; Tankersly *v.* Pettis, 71 Ala. 179.
Arkansas.— Peay *v.* Duncan, 20 Ark. 85.
Colorado.— Denver *v.* Lohenstein, 3 Colo. 216; Smith *v.* Schlink, 15 Colo. App. 325, 62 Pac. 1044.
Illinois.— Wayman *v.* Cochrane, 35 Ill. 152; Jones *v.* Smith, 13 Ill. 301; Meyer *v.* Meyer, 40 Ill. App. 94; Laur *v.* People, 17 Ill. App. 448.
Maryland.— Tifel *v.* Jenkins, 95 Md. 665, 53 Atl. 429.
Massachusetts.—Foster *v.* The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125; Bigelow *v.* Winsor, 1 Gray 299.
Michigan.— Sayers *v.* Auditor-Gen., 124 Mich. 259, 82 N. W. 1045.
New Jersey.— Mutual L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756; Wooster *v.* Cooper, 59 N. J. Eq. 204, 45 Atl. 381; Manley *v.* Mickle, 53 N. J. Eq. 155, 32 Atl. 210 [*affirming* 52 N. J. Eq. 712, 29 Atl. 434].
North Carolina.—Gibson *v.* Smith, 63 N. C. 103.
Ohio.— Babcock *v.* Camp, 12 Ohio St. 11.
Oklahoma.— Pratt *v.* Ratliff, 10 Okla. 168, 61 Pac. 523.
Pennsylvania.— Kelsey *v.* Murphy, 26 Pa. St. 78.
West Virginia.— Gallaher *v.* Moundsville, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942.
United States.— Manhattan Trust Co. *v.* Trust Co. of North America, 107 Fed. 328, 46 C. C. A. 322.

94. *Alabama.*— Aultman *v.* Gamble, 88 Ala. 424, 7 So. 248; Lee *v.* Fontaine, 10 Ala. 755, 44 Am. Dec. 505.
Illinois.— Mitchell *v.* Mayo, 16 Ill. 83.
New York.— Lytle *v.* Crawford, 69 N. Y. App. Div. 273, 74 N. Y. Suppl. 660; Peters *v.* Sanford, 1 Den. 224.
North Carolina.— Gregory *v.* Hooks, 33 N. C. 371.
Pennsylvania.— Work *v.* Prall, 26 Pa. Super. Ct. 104; Blystone *v.* Blystone, 51 Pa. St. 373.
See 30 Cent. Dig. tit. "Judgment," § 1082.

95. *Indiana.*— Slauter *v.* Chenowith, 7 Ind. 211.
Massachusetts.— Talmage *v.* Chapel, 16 Mass. 71.
Missouri.— Hall *v.* Harrison, 21 Mo. 227, 64 Am. Dec. 225.
Tennessee.— Young *v.* O'Neal, 3 Sneed 55.
Vermont.— Allen *v.* Lyman, 27 Vt. 20.
United States.— Biddle *v.* Wilkins, 1 Pet. 686, 7 L .ed. 315; Trecothick *v.* Austin, 24 Fed. Cas. No. 14,164, 4 Mason 16.

96. Madison Tp. *v.* Dunkle, 114 Ind. 262, 16 N. E. 593; Donald *v.* Kell, 111 Ind. 1, 11 N. E. 782. And see Borror *v.* Carrier, 34 Ind. App. 353, 73 N. E. 123, as to effect of an agreement of the parties that a vendor's lien shall not merge in a judgment of foreclosure of a mortgage on the premises.

97. *Indiana.*— Roose *v.* McDonald, 23 Ind. 157.
Minnesota.— Where plaintiff, on a judgment entered on service of summons by publication in an action against a non-resident, exhausts the property within the state without paying his judgment in full, he may sue again on the original consideration for the balance due. Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104.
New York.— Porter *v.* Kingsbury, 77 N. Y. 164.
Pennsylvania.— Robinson *v.* White, 39 Pa. St. 255.
South Carolina.— State Treasurer *v.* Bates, 2 Bailey 362.
Texas.— Nichols *v.* Able, 14 Tex. 532.
See 30 Cent. Dig. tit. "Judgment," § 1086.
Contra.— Burkham *v.* Cooper, 2 Ohio Cir. Ct. 77, 1 Ohio Cir. Dec. 371.

98. Conclusiveness of adjudication see *infra*, XIV, B.
Causes of action merged or barred; diversity of parties see *infra*, XIII, D, 1, f.
Who may take advantage of bar see *infra*, XIII, F.

99. *Alabama.*— Gilbreath *v.* Jones, 66 Ala. 129; Lawrence *v.* Ware, 37 Ala. 553; Hutchinson *v.* Dearing, 20 Ala. 798.

b. Effect of Additional Parties. But where a former judgment is pleaded in bar, it is no objection to its operation as an estoppel that the former action included some parties who are not joined in the present suit or *vice versa*, provided the judgment was rendered on the merits and not on an objection as to parties,[1] and provided the cause of action in the two suits is the same,[2] and the party

Arkansas.—Trammell *v.* Thurmond, 17 Ark. 203.

California.— Chase *v.* Swain, 9 Cal. 130.

Connecticut.— Cook *v.* Morris, 66 Conn. 137, 33 Atl. 594; Cowles *v.* Harts, 3 Conn. 516.

District of Columbia.— Strong *v.* Grant, 2 Mackey 218.

Georgia.— Alexander *v.* State, 56 Ga. 478.

Illinois.— Markley *v.* People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; American Percheron Horse Breeders' Assoc. *v.* American Percheron Horse Breeders', etc., Assoc., 114 Ill. App. 136; Illinois Cent. R. Co. *v.* Schwartz, 13 Ill. App. 490.

Indiana.— Harvey *v.* State, 94 Ind. 159; Kramer *v.* Matthews, 68 Ind. 172.

Iowa.— Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633.

Kansas.— Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 127.

Kentucky.— Bonta *v.* Clay, 5 Litt. 129.

Louisiana.— Semple *v.* Scarborough, 44 La. Ann. 257, 10 So. 860; State *v.* Jumel, 30 La. Ann. 861; Degelos *v.* Woolfolk, 21 La. Ann. 706; Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Wells *v.* Coyle, 20 La. Ann. 396; Spears *v.* Shropshire, 10 La. Ann. 218.

Massachusetts.—Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Gilbert *v.* Thompson, 9 Cush. 348.

Michigan.— Lemiette *v.* Starr, 66 Mich. 539, 33 N. W. 832.

Minnesota.— Gage *v.* Stimson, 26 Minn. 64, 1 N. W. 806.

Missouri.— State *v.* Kaye, 83 Mo. App. 678; McGill *v.* Wallace, 22 Mo. App. 675.

Nebraska.— Brigham *v.* McDowell, 19 Nebr. 407, 27 N. W. 384.

New Jersey.— Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449.

New York.— Tompkins *v.* Hyatt, 28 N. Y. 347; Savage *v.* Buffalo, 49 N. Y. App. Div. 577, 63 N. Y. Suppl. 477; Bunker *v.* Langs, 76 Hun 543, 28 N. Y. Suppl. 210; Rodman *v.* Devlin, 23 Hun 590; Hall *v.* Richardson, 22 Hun 444; Woodworth *v.* Seymour, 22 Hun 245; Kelsey *v.* Bradbury, 21 Barb. 531; Matter of Lansing, 31 Misc. 148, 64 N. Y. Suppl. 1125; Clay *v.* Hart, 25 Misc. 110, 55 N. Y. Suppl. 43; Hutchins *v.* Fitch, 4 Johns. 222; Neafie *v.* Neafie, 7 Johns. Ch. 1, 11 Am. Dec. 380; Griswold *v.* Jackson, 2 Edw. 461.

North Carolina.— Williams *v.* Clouse, 91 N. C. 322; Temple *v.* Williams, 91 N. C. 82; Shuster *v.* Perkins, 47 N. C. 217.

Ohio.— Crumb *v.* Treiber, 4 Ohio Dec. (Reprint) 492, 2 Clev. L. Rep. 257.

Pennsylvania.—Rhoads *v.* Armstrong County, 41 Pa. St. 92; Hocker *v.* Jamison, 2 Watts & S. 438.

Tennessee.—Harris *v.* Columbia Water, etc., Co., 114 Tenn. 328, 85 S. W. 897; Burton *v.* Dees, 4 Yerg. 4.

Texas.— Foster *v.* Wells, 4 Tex. 101.

Vermont.—Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

Virginia.— Cleaton *v.* Chambliss, 6 Rand. 86.

Wisconsin.— Ruth *v.* Oberbrunner, 40 Wis. 238.

United States.— Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059; Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209; Ransom *v.* Pierre, 101 Fed. 665, 41 C. C. A. 585; Adams Express Co. *v.* Davison, 1 Fed. Cas. No. 73; Burnham *v.* Webster, 4 Fed. Cas. No. 2,179, 1 Woodb. & M. 172; Smith *v.* Turner, 22 Fed. Cas. No. 13,119, 1 Hughes 373; Waite *v.* Triblecock, 28 Fed. Cas. No. 17,046, 5 Dill 547.

England.— Anderson *v.* Collinson, [1901] 2 K. B. 107, 70 L. J. K. B. 620, 84 L. T. Rep. N. S. 465, 49 Wkly. Rep. 623.

See 30 Cent. Dig. tit. "Judgment," §§ 1080, 1081.

Prior encumbrancers, not made parties to a bill in equity to subject the property to the payment of debts, are not affected by a decree ordering its sale for that purpose. Brooks *v.* Brooke, 12 Gill & J. (Md.) 306, 38 Am. Dec. 310.

The assignor's contract of assignment of notes secured by a mortgage is not merged by a judgment recovered by the assignee against the maker. Willson *v.* Binford, 81 Ind. 588.

Husband permitting wife to sue.— If a husband authorizes his wife to sue for expenses incurred in providing her with medicine and medical attendance while suffering from the effects of personal injuries, and permits her to recover for the same without interposing a claim in his own behalf, he is estopped afterward to sue upon the same cause of action. Neumeister *v.* Dubuque, 47 Iowa 465.

1. Girardin *v.* Dean, 49 Tex. 243.

2. *California.*— Aldrich *v.* Stephens, 49 Cal. 676.

Illinois.— Drake *v.* Perry, 58 Ill. 122. And see Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608.

Iowa.— Davis *v.* Milburn, 4 Iowa 246.

Kansas.— Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091.

Kentucky.— Curts *v.* Bardstown, 6 J. J. Marsh. 536.

Massachusetts.—Bigelow *v.* Winsor, 1 Gray 299; French *v.* Neal, 24 Pick. 55.

Mississippi.— Manly *v.* Kidd, 33 Miss. 141.

Oregon.— Neppach *v.* Jones, 28 Oreg. 286, 39 Pac. 999, 42 Pac. 519.

against whom the estoppel is set up was actually a party to the former litigation.[3] If the cause of action is substantially different, the judgment is no bar, although some of the parties to the present suit were parties to the former action.[4]

6. Time of Commencement of Action as Affecting Bar. By the weight of authority the fact that a judgment was obtained after the commencement of the suit in which it is pleaded does not prevent its being a bar. It is the first judgment for the same cause of action that constitutes an effective defense, without regard to the order of time in which the suits were commenced.[5]

B. Judgments Operative as a Bar — 1. Character or Rank of Court or Tribunal[6] — a. Coördinate Jurisdiction. The doctrine of estoppel by judgment does not rest upon any superior authority of the court rendering the judgment; and a judgment or decree of one court of competent jurisdiction may be pleaded in bar of an action in another court of coördinate or concurrent jurisdiction.[7]

Pennsylvania.— Butcher *v.* South, 10 Phila. 104. But see Philadelphia *v.* Stewart, 23 Pa. Co. Ct. 552, where it is said that the recovery of judgment against the principal debtor on a bond is not a bar to an action against him and his surety for the same debt.

Texas.— Girardin *v.* Dean, 49 Tex. 243.

Vermont.— Pierson *v.* Catlin, 18 Vt. 77.

See 30 Cent. Dig. tit. "Judgment," §§ 1080, 1081.

3. Larum *v.* Wilmer, 35 Iowa 244; Brizendine *v.* Frankfort Bridge Co., 2 B. Mon. (Ky.) 32, 36 Am. Dec. 587; Fell *v.* Bennett, 110 Pa. St. 181, 5 Atl. 17; Blackburn *v.* Crawford, 3 Wall. (U. S.) 175, 18 L. ed. 186.

In Louisiana it is said that where the principal parties in the two suits are different the judgment in one cannot be pleaded as a bar to the other. White *v.* Gaines, 29 La. Ann. 769.

Parties formerly co-defendants.— The fact that the present plaintiff and defendant were joined as co-defendants in an action relating to the same subject-matter, brought against them by a third person, does not make the former judgment a bar to the present suit, that judgment not having been rendered between the same parties, or even substantially the same parties. Gardner *v.* Raisbeck, 28 N. J. Eq. 71.

4. Bilsland *v.* McManomy, 82 Ind. 139.

Identity of causes of action see *infra*, XIII, D, 1.

5. *Alabama.*— Davis *v.* Bedsole, 69 Ala. 362.

Connecticut.— Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683.

Georgia.— A former recovery or the pendency of another suit for the same cause of action and between the same parties is matter in abatement, and must be taken advantage of at the first term, or if occurring afterward, in the progress of the trial, so soon as may be after it occurs. Merritt *v.* Bagwell, 70 Ga. 578.

Indiana.— Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441.

Iowa.— Estes *v.* Chicago, etc., R. Co., 72 Iowa 235, 33 N. W. 647.

Louisiana.— Bourgeois *v.* Jacobs, 45 La. Ann. 1310, 14 So. 68.

Maine.— Oxford *v.* Paris, 33 Me. 179.

Maryland.—U. S. Bank *v.* Merchants' Bank, 7 Gill 415.

Massachusetts.— Marble *v.* Keyes, 9 Gray 221.

Minnesota.— Allis *v.* Davidson, 23 Minn. 442.

Missouri.— Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421.

New Hampshire.— Andrews *v.* Varrell, 46 N. H. 17.

New York.— Mandeville *v.* Avery, 17 N. Y. Suppl. 429; Nicholl *v.* Mason, 21 Wend. 339.

Ohio.—North British, etc., Ins. Co. *v.* Cohn, 17 Ohio Cir. Ct. 185.

Oregon.— Barrell *v.* Title Guarantee, etc., Co., 27 Oreg. 77, 39 Pac. 992.

Pennsylvania.— Casebeer *v.* Mowry, 55 Pa. St. 419, 93 Am. Dec. 766; Finley *v.* Hanbest, 30 Pa. St. 190; Duffy *v.* Lytle, 5 Watts 120; Jones *v.* Ellison, 10 Wkly. Notes Cas. 205.

Vermont.— Morgan *v.* Barker, 26 Vt. 602; Small *v.* Haskins, 26 Vt. 209; Stevens *v.* Briggs, 14 Vt. 44, 39 Am. Dec. 209.

Virginia.— Jones *v.* Myrick, 8 Gratt. 179.

United States.— Schuler *v.* Israel, 120 U. S. 506, 7 S. Ct. 648, 30 L. ed. 707; Boatmen's Bank *v.* Fritzlen, 135 Fed. 650, 68 C. C. A. 288 [*reversing* 128 Fed. 608]; Penfield *v.* Potts, 126 Fed. 475, 61 C. C. A. 371; Bryar *v.* Bryar, 78 Fed. 657; David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661; Sharon *v.* Hill, 26 Fed. 337, 11 Sawy. 291; U. S. *v.* Dewey, 25 Fed. Cas. No. 14,956, 6 Biss. 501.

See 30 Cent. Dig. tit. "Judgment," § 1087.

Contra.— See State *v.* Spikes, 33 Ark. 801; Bateman *v.* Grand Rapids, etc., R. Co., 96 Mich. 441, 56 N. W. 28; Grier *v.* Comb, 1 N. C. 138.

6. Conclusiveness of adjudication see *infra*, XIV, A, 2.

7. Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; *In re* Livingston, 34 N. Y. 555; Allen *v.* International Text Book Co., 201 Pa. St. 579, 51 Atl. 323, 88 Am. St. Rep. 834; Wallace *v.* Stevenson, 25 Pittsb. Leg. J. N. S. (Pa.) 363; Schuler *v.* Israel, 120 U. S. 506, 7 S. Ct. 648, 30 L. ed. 707; Parrish *v.* Ferris, 2 Black (U. S.) 606, 17 L. ed. 317; Hargadine-McKittrick Dry Goods Co. *v.* Hudson, 122 Fed. 232, 58 C. C. A. 596. *Compare* Atty.-Gen. *v.* Eriché, [1893] A. C. 518, 63

b. Inferior Courts.[8] A judgment rendered by an inferior court, such as that of a justice of the peace, on a matter of which it had no jurisdiction is not conclusive for any purpose or to any extent.[9] But if there was no defect of jurisdiction, such a judgment, rendered on a consideration of the merits, is a bar to another suit between the same parties on the same cause of action, either in another court of the same grade or rank or in any other court.[10]

c. Probate Courts.[11] A judgment of a probate court on a matter over which it has no rightful jurisdiction, as determining the title to land, is not conclusive on the parties in another court.[12] But as to matters within its jurisdiction, its

L. J. P. C. 6, 69 L. T. Rep. N. S. 505, 1 Reports 440.

Supreme and superior court.— The supreme court, although it has original jurisdiction in habeas corpus, will not entertain a petition, where a like petition has before been presented to a judge of the superior court and refused. *In re* Graham, 7 Wash. 237, 34 Pac. 931.

Common pleas and orphans' court.— After unsuccessfully suing an administrator for a debt of the decedent in the court of common pleas plaintiff cannot enforce payment of the same claim in the orphans' court against the estate. Dyer's Appeal, 3 Grant (Pa.) 326.

Different territorial jurisdiction.— It has been held that where several suits ancillary to one another are brought in the several districts through which a railroad runs, to foreclose mortgages and marshal liens on it, a decree in one of such suits, not appealed from, is not conclusive on an appeal from the decree in another of such suits. Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397. And see Robinson *v.* Lamb, 131 N. C. 229, 42 S. E. 701, holding that a judgment in one county in proceedings to establish a ferry is not an estoppel of proceedings by the same parties in another county to establish a ferry at the same place, provided the commissioners in the second county could give any relief not given by the commissioners of the county where the first suit was brought.

Consular courts.— It was held that a judgment of a British consular court, established abroad under 6 & 7 Vict. c. 94, in an action of debt properly brought by plaintiff in that court, together with payment by defendant to plaintiff of the sum awarded to the latter by such judgment, was a bar to an action in a court in England for the same subject-matter. Barber *v.* Lamb, 8 C. B. N. S. 95, 6 Jur. N. S. 981, 29 L. J. C. P. 234, 2 L. T. Rep. N. S. 238, 8 Wkly. Rep. 461, 98 E. C. L. 95.

8. Conclusiveness of adjudication see *infra*, XIV, A, 2, b.

9. *Delaware.*— Green *v.* Clawson, 5 Houst. 159.

Indiana.— McCarty *v.* Kinsey, 154 Ind. 447, 57 N. E. 108; Newman *v.* Manning, 89 Ind. 422.

Michigan.— Clark *v.* Holmes, 1 Dougl. 390.

New York.— Gage *v.* Hill, 43 Barb. 44.

North Carolina.— Springs *v.* Schenck, 106 N. C. 153, 11 S. E. 646.

Pennsylvania.— Gobble *v.* Minnich, 10 Pa. St. 488.

England.— Atty.-Gen. *v.* Erichê, [1893] A. C. 518, 63 L. J. P. C. 6, 1 Reports 440, 69 L. T. Rep. N. S. 505; Reg. *v.* Hutchins, 6 Q. B. D. 300, 45 J. P. 504, 50 L. J. M. C. 35, 44 L. T. Rep. N. S. 364, 29 Wkly. Rep. 724.

Judgments void for want of jurisdiction see *infra*, XIII, B, 4, a.

10. *Alabama.*— Davis *v.* Bedsole, 69 Ala. 362.

Indiana.— Pressler *v.* Turner, 57 Ind. 56.

Michigan.— Town *v.* Smith, 14 Mich. 348.

Missouri.— Cooksey *v.* Kansas City, etc., R. Co., 74 Mo. 477; Hendrickson *v.* St. Louis, etc., R. Co., 34 Mo. 188, 84 Am. Dec. 76; Langford *v.* Doniphan, 61 Mo. App. 288.

New York.— Blum *v.* Hartman, 3 Daly 47; Thayer *v.* Hamilton, 5 Hill 443.

North Carolina.— Brunhild *v.* Freeman, 80 N. C. 212; Platt *v.* Potts, 33 N. C. 266, 53 Am. Dec. 412.

Ohio.— Moore *v.* Robison, 6 Ohio St. 302; Cavanaugh *v.* Bloom, 10 Ohio S. & C. Pl. Dec. 222, 8 Ohio N. P. 6.

Pennsylvania.— Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Atl. 344, 19 Am. St. Rep. 604; Nalen *v.* Burke, 12 Pa. Co. Ct. 490; Spoonhour *v.* Endler, 8 Kulp 62.

Texas.— Foster *v.* Wells, 4 Tex. 101.

West Virginia.— Davis *v.* Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

England.— Wright *v.* London General Omnibus Co., 2 Q. B. D. 271, 46 L. J. Q. B. 429, 36 L. T. Rep. N. S. 590, 25 Wkly. Rep. 647; Behrens *v.* Pauli, 1 Keen 456, 15 Eng. Ch. 456, 48 Eng. Reprint 382, judgment in lord mayor's court.

Judgment on appeal from justice.— The fact that an action originated before a justice of the peace, and that the judgment was rendered by the superior court on appeal, does not affect the conclusiveness of the matter litigated. Koehler *v.* Holt Mfg. Co., 146 Cal. 335, 80 Pac. 73.

11. Conclusiveness of adjudication see *infra*, XIV, A, 2, b; XIV, D, 1.

12. *District of Columbia.*— Perry *v.* Sweeny, 11 App. Cas. 404.

New York.— Sweeney *v.* Warren, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468; Neilley *v.* Neilley, 89 N. Y. 352.

South Carolina.— Anderson *v.* Cave, 49 S. C. 505, 27 S. E. 478.

Texas.— Mayo *v.* Tudor, 74 Tex. 471, 12 S. W. 117.

Washington.— Reese *v.* Murnan, 5 Wash. 373, 31 Pac. 1027.

judgment on the merits is a bar to any further proceedings between the same parties on the same cause of action in any other court,[13] unless where a special form of proceeding for the particular case, to be pursued in another court, is provided by statute, so that the matter could only come incidentally before the probate court.[14]

d. Boards and Officers Acting Judicially.[15] A decision rendered by an officer or a board of state or municipal officers, when acting judicially, and which has by law the force and effect of a judgment, is a bar to further actions on the same matter between the parties or their privies.[16] And this may include the decisions of referees and auditors,[17] and the sentences of military commissions or courts established by the authority of a military commander.[18] But if such an officer or board does not act judicially in the particular matter, but ministerially, or if the decision is not recognized by the law of the forum as a judgment, it is no bar to further proceedings in relation to the same matter.[19]

e. Appellate Courts.[20] The doctrine of *res judicata* applies as well to judgments of courts of last resort as to those of *nisi prius* courts; and a decision of the appellate court will preclude any further action upon the same matter between the parties.[21] Moreover if the same subject-matter comes in question in a second action between the same parties before an appellate court, it is bound by its own former decision.[22]

Want of equitable jurisdiction.— A judgment of a probate court is not a bar to an equitable proceeding respecting matters of which the probate court had not equitable jurisdiction requisite to determine the facts and adjudge the relief to which the parties were entitled. Gordon *v.* Kennedy, 36 Iowa 167. And see Baldwin *v.* Davidson, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460.

Judgments void for want of jurisdiction see *infra*, XIII, B, 4, a.

13. *Iowa.*— Hart *v.* Jewett, 11 Iowa 276.
Louisiana.— Allen's Succession, 49 La. Ann. 1096, 22 So. 319; Womack *v.* Womack, 23 La. Ann. 351.
Missouri.— Townsend *v.* Townsend, 60 Mo. 246; McKinney *v.* Davis, 6 Mo. 501.
Wisconsin.— Jameson *v.* Barber, 56 Wis. 630, 14 N. W. 859.
United States.— Tate *v.* Norton, 94 U. S. 746, 24 L. ed. 222.
England.— Priestman *v.* Thomas, 9 P. D. 210, 53 L. J. P. & Adm. 109, 51 L. T. Rep. N. S. 843, 32 Wkly. Rep. 842.

14. State *v.* Salem Water Co., 5 Ohio Cir. Ct. 58, 3 Ohio Cir. Dec. 30.

15. Conclusiveness of adjudication see *infra*, XIV, A, 2, c.

16. *California.*— Sanders *v.* Whitesides, 10 Cal. 88.
Louisiana.— Villars *v.* Kennedy, 5 La. Ann. 724.
New York.— Barber *v.* New Scotland, 64 N. Y. App. Div. 229, 71 N. Y. Suppl. 1052.
Rhode Island.— Burlingame *v.* Brown, 5 R. I. 410.
Vermont.— Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.
See 30 Cent. Dig. tit. "Judgment," § 992.

17. Demarest *v.* Daig, 11 Abb. Pr. (N. Y.) 9; Abington Bldg. Assoc. *v.* Melcher, 2 Walk. (Pa.) 499. See Warner *v.* Scott, 39 Pa. St. 274.

18. Hefferman *v.* Porter, 6 Coldw. (Tenn.) 391, 98 Am. Dec. 459. But *compare* Walt *v.* Thomasson, 10 Heisk. (Tenn.) 151.

19. *Connecticut.*— Hartford First Nat. Bank *v.* Hartford L., etc., Ins. Co., 45 Conn. 22.
Kentucky.— Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496.
Nebraska.— Custer County *v.* Chicago, B., etc., R. Co., 62 Nebr. 657, 87 N. W. 341.
North Carolina.— Koonce *v.* Butler, 84 N. C. 221.
Ohio.— Miller *v.* Longview Asylum, 7 Ohio Dec. (Reprint) 650, 4 Cinc. L. Bul. 690.
See 30 Cent. Dig. tit. "Judgment," § 992.

20. Conclusiveness of adjudication see *infra*, XIV, A, 2, d.

21. *Georgia.*— Atlanta *v.* First Methodist Church, 83 Ga. 448, 10 S. E. 231.
Maine.— Atkins *v.* Wyman, 45 Me. 399.
Missouri.— Miller *v.* Bernecker, 46 Mo. 194.
Nebraska.— Stutzner *v.* Printz, 43 Nebr. 306, 61 N. W. 620.
North Carolina.— Herndon *v.* Ætna Ins. Co., 108 N. C. 648, 13 S. E. 188.
Pennsylvania.— Walker Tp. *v.* West Buffalo Tp., 11 Pa. St. 95; Koons' Estate, 6 Kulp 520.
Tennessee.— McNairy *v.* Nashville, 2 Baxt. 251.
Texas.— Wiren *v.* Nesbitt, 85 Tex. 286, 20 S. W. 128; Stelle *v.* Shannon, 62 Tex. 198; Crane *v.* Blum, 56 Tex. 325; State *v.* Hodges, 25 Tex. Suppl. 63.
Virginia.— Findlay *v.* Trigg, 83 Va. 539, 3 S. E. 142; Campbell *v.* Campbell, 22 Gratt. 649; Price *v.* Campbell, 5 Call 115.
West Virginia.— Kinports *v.* Rawson, 36 W. Va. 237, 15 S. E. 66.
See 30 Cent. Dig. tit. "Judgment," § 993.

22. Lucas *v.* San Francisco, 28 Cal. 591; Sturgis *v.* Rogers, 26 Ind. 1; Wilkes *v.* Coopwood, 39 Miss. 348; Choutean *v.* Gibson, 76 Mo. 38.

2. Nature or Form of Action[23] — **a. In General.** The principle of estoppel by judgment is in no way dependent on the form or the object of the litigation in which the adjudication was made; it is only essential that there should have been a judicial determination of rights in controversy with a final decision thereon.[24] The rule applies in real as well as personal actions,[25] in proceedings *in rem*,[26] in proceedings for injunction[27] or mandamus,[28] and in proceedings by attachment or garnishment;[29] and it is immaterial whether the question alleged to be concluded by the former adjudication was presented as a cause of action or a defense or by way of intervention.[30]

b. Actions at Law and Suits in Equity.[31] A final judgment on the merits in an action at law will bar any further action between the same parties on the same cause of action in a court of chancery,[32] except in cases where the subject-matter

Identity of parties necessary.— It is only where the parties and the subject-matter are the same that an appellate court is absolutely and technically bound by its own former decision. For instance a decision of such a court holding a statute to be constitutional when attacked in one action does not prevent the court from declaring it to be unconstitutional, when assailed in another action, between different parties and on other grounds. Anderson *v.* Fowler, 48 S. C. 8, 25 S. E. 900. If in such a case the court should decide to abide by its former decision, without reëxamination of the validity of the statute, it would be an application of the rule of *stare decisis* not that of *res judicata*. And on the other hand a final judgment in a court of last resort remains valid and binding, although the court in subsequent actions of a similar character may have determined that it has no jurisdiction over the subject-matter. State *v.* Waupaca County Bank, 20 Wis. 640.

23. **Conclusiveness of adjudication** see *infra*, XIV, A, 3.

24. Matter of Roberts, 59 How. Pr. (N. Y.) 136. And see U. S. *v.* Moore, 3 MacArthur (D. C.) 226 (judgment of court of claims; action for making false claim); Connor *v.* Ashley, 41 S. C. 67, 19 S. E. 201 (judgment in favor of attorney against executor for his fees as attorney for minors).

Mechanic's lien.— A judgment obtained under the statute relating to mechanics' liens will bar the recovery of another judgment for the same cause of action. Capelle *v.* Baker, 3 Houst. (Del.) 344.

25. Manley *v.* Union Bank, 1 Fla. 160; Paul *v.* Thorndike, 97 Me. 87, 53 Atl. 877.

26. Nebraska L. & T. Co. *v.* Domon, 4 Nebr. (Unoff.) 334, 93 N. W. 1022. See *infra*, XVI, C.

27. Denver *v.* Lobenstein, 3 Colo. 216.

But a suit by claimants to an office of a corporation for an injunction to prevent others from acting as its officers is no bar to a suit for mandamus to obtain certificates of election, since in the former neither the certificates nor the possession of the office could be obtained. People *v.* White, 11 Abb. Pr. (N. Y.) 168.

28. State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506.

29. Matthews *v.* Houghton, 11 Me. 377; Miller *v.* Rohrer, 127 Pa. St. 384, 18 Atl. 2. *Compare* Bacon Academy *v.* De Wolf, 26 Conn. 602.

30. Sewell *v.* Scott, 35 La. Ann. 553.

Defenses and counter-claims barred see *infra*, XIII, E.

But a suit by the personal representative of an estate against a former agent of the decedent for an accounting is not the same as a suit against the legatees and creditors of the estate, for the purpose of settling the same, in which suit the agent is made a party in order that he may set up any claim due him from the estate, and to the former suit the pendency of the latter cannot be pleaded as a bar. Botto *v.* Botto, 80 S. W. 174, 25 Ky. L. Rep. 2130.

31. **Conclusiveness of adjudication** see *infra*, XIV, A, 3, b.

32. *Alabama.*— Waring *v.* Lewis, 53 Ala. 615; Cullum *v.* Bloodgood, 15 Ala. 34.

California.— San Francisco *v.* Spring Valley Water Works, 39 Cal. 473.

District of Columbia.— Birdsall *v.* Welch, 6 D. C. 316.

Florida.— Moore *v.* Felkel, 7 Fla. 44.

Georgia.— Grubb *v.* Kolb, 55 Ga. 630; Russel *v.* Slaton, 38 Ga. 195; Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Kenan *v.* Miller, 2 Ga. 325.

Illinois.— Telford *v.* Brinkerhoff, 163 Ill. 439, 45 N. E. 156; Wayman *v.* Cochrane, 35 Ill. 152.

Kentucky.— Sharp *v.* Carlile, 5 Dana 487.

Maine.— Jordan *v.* Chase, 83 Me. 540, 22 Atl. 394; Alley *v.* Chase, 83 Me. 537, 22 Atl. 393; Lane *v.* Lane, 80 Me. 570, 16 Atl. 323.

Michigan.— Spoon *v.* Baxter, 31 Mich. 279.

Nebraska.— Stocker *v.* Nemaha County, (1904) 100 N. W. 308.

New Jersey.— West New York Silk Mill Co. *v.* Laubsch, 53 N. J. Eq. 65, 30 Atl. 814.

New York.— Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; Orcutt *v.* Orms, 3 Paige 459; Southgate *v.* Montgomery, 1 Paige 41; Holmes *v.* Remsen, 7 Johns. Ch. 286; Gregory *v.* Burrall, 2 Edw. 417; Atwater *v.* Fowler, 1 Edw. 417.

Oregon.— Wells *v.* Wall, 1 Oreg. 295.

Pennsylvania.— Haneman *v.* Pile, 161 Pa. St. 599, 29 Atl. 113, holding that where a party has been heard, or has had the opportunity of being heard in a court of law, even though his claim or defense be an

is within the exclusive cognizance of equity, so that it could not rightfully have been determined in the action at law,[33] or where fraud or some other special ground for equitable interference is shown.[34] And conversely, a final decree on the merits in a suit in equity will operate as a bar to any further litigation between the same parties on the same subject-matter in a court of law.[35] In order, how-

equitable one, he cannot be reheard on a bill in equity, and therefore, where a rule to set aside a judgment and a sale thereunder has been discharged, defendant cannot be heard as to the same matters on a bill in equity.

South Carolina.— Tate *v.* Hunter, 3 Strobh. Eq. 136; Henderson *v.* Mitchell, Bailey Eq. 113, 21 Am. Dec. 526.

Tennessee.— Overton *v.* Searcy, Cooke 36, 5 Am. Dec. 665. But *compare* Robnett *v.* Howard, (Ch. App. 1901) 61 S. W. 1082. And see Winchester *v.* Gleaves, 3 Hayw. 213, holding that where one may sue in ejectment or in equity, a judgment in ejectment is not a bar to a subsequent proceeding in equity.

Vermont.— Hall *v.* Dana, 2 Ark. 381.

West Virginia.— Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

United States.— Blanchard *v.* Brown, 3 Wall. 245, 18 L. ed. 69; U. S. *v.* Price, 9 How. 83, 13 L. ed. 56; Price *v.* Dewey, 11 Fed. 104, 6 Sawy. 493; Reynolds *v.* Badger, 20 Fed. Cas. No. 11,726. *Compare* Bryant *v.* Hunter, 4 Fed. Cas. No. 2,068, 3 Wash. 48.

England.— Hellam *v.* Grave, Rep. t. Finch 205, 23 Eng. Reprint 112; Pitt *v.* Hill, Rep. t. Finch 70, 23 Eng. Reprint 37.

See 30 Cent. Dig. tit. "Judgment," § 996.

Reversing position of parties.— In an early case in Virginia it was said that a verdict at law against a party is not a bar to a decree in his favor in equity, where he is brought into equity by the opposite party; but otherwise, where he is himself the complainant in equity. Jones *v.* Jones, 4 Hen. & M. (Va.) 447.

Bill to enforce judgment.— The plea of *res judicata* cannot be successfully interposed by the respondent to a bill brought in a court of equity to enforce a judgment obtained against him when defending an action at law. New Orleans First Nat. Bank *v.* Bohne, 8 Fed. 115, 4 Woods 74.

Second action allowed by statute.— Where the statute allows a second action of trespass to try title to be brought after a verdict of not guilty in the first, it is no objection to the maintenance of such second action that it is cast in the form of a suit in equity to annul defendant's title and recover the property. Allen *v.* Stephanes, 18 Tex. 658.

33. *Alabama.*— Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611.

Georgia.— Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732.

Massachusetts.— Weeks *v.* Edwards, 176 Mass. 453, 57 N. E. 701.

Michigan.— Bush *v.* Merriman, 87 Mich. 260, 49 N. W. 567.

New Jersey.— Metropolitan Sav., etc., Assoc. *v.* Dughi, (1901) 49 Atl. 542.

North Carolina.— Gash *v.* Ledbetter, 41 N. C. 183; Blue *v.* Patterson, 21 N. C. 457; Blanchard *v.* Pasteur, 3 N. C. 393.

Ohio.— Elliott *v.* Lawhead, 43 Ohio St. 171, 1 N. E. 577.

Oregon.— Starr *v.* Stark, 7 Oreg. 500.

Tennessee.— Danforth *v.* Lowry, 3 Hayw. 61.

Virginia.— Hawkins *v.* Depriest, 4 Munf. 469.

See 30 Cent. Dig. tit. "Judgment," § 996.

Reformation of contract.— It has been held that when a party has elected to sue upon a written contract as it is, and has been defeated, he is bound by that election, and cannot thereafter bring an action to reform the contract. Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655. But in Nebraska it was held that a suit to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed, may be maintained after the termination of an unsuccessful action at law to recover on the policy in its original form. Grand View Bldg. Assoc. *v.* Northern Assur. Co., (Nebr. 1905) 102 N. W. 241. See, generally, REFORMATION OF INSTRUMENTS.

34. Gallagher *v.* Roberts, 9 Fed. Cas. No. 5,194, 1 Wash. 320. And see Isaac *v.* Johnson, 5 Munf. (Va.) 95; Hawkins *v.* Depriest, 4 Munf. (Va.) 469.

35. *Alabama.*— Collier *v.* Alexander, 142 Ala. 422, 38 So. 244; Penny *v.* British, etc., Mortg. Co., 132 Ala. 357, 31 So. 96 (decree in equity against claim of homestead as a bar to an action of ejectment); Strang *v.* Moog, 72 Ala. 460.

California.— Wolverton *v.* Baker, 86 Cal. 591, 25 Pac. 54.

District of Columbia.— Stevens *v.* Du Barry, 1 Mackey 294.

Florida.— Sanford *v.* Cloud, 17 Fla. 532.

Georgia.— Baldwin *v.* McCrea, 38 Ga. 650.

Illinois.— Stickney *v.* Goudy, 132 Ill. 213, 23 N. E. 1034; Laur *v.* People, 17 Ill. App. 448.

Iowa.— Madison *v.* Garfield Coal Co., 114 Iowa 56, 86 N. W. 41, adverse decision in a suit for an injunction as a bar to an action for damages.

Kentucky.— Price *v.* Sthreshly, 2 Bibb 588.

Maryland.— Tifil *v.* Jenkins, 95 Md. 665, 53 Atl. 429; Martin *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218.

Massachusetts.— Bigelow *v.* Winsor, 1 Gray 299; Mills *v.* Gore, 20 Pick. 28.

Michigan.— Hanchett *v.* Auditor-Gen., 124 Mich. 424, 83 N. W. 103 (decree for complainant in a suit to quiet title under a tax deed bars an application by a defendant in such suit or his privies for a writ of mandamus to compel the auditor-general to cancel

ever, that a final decree in equity may thus operate as a bar to further litigation, the decree, as will be seen, must be on the merits.[36]

e. Special Proceedings Other Than Actions.[37] An order or ruling made in a special proceeding, if it is in the nature of a final adjudication of some contested claim or right, has the same conclusive effect as a formal judgment.[38] This rule applies to proceedings in bankruptcy or insolvency,[39] to proceedings supplementary to execution,[40] to proceedings by scire facias to revive a judgment,[41] and also to proceedings by attachment for contempt, when instituted as a means of private redress and resulting in satisfaction.[42]

such deed); Sayers *v.* Auditor-Gen., 124 Mich. 259, 82 N. W. 1045 (decree dismissing a bill to set aside a tax deed bars mandamus to cancel the deed).

Missouri.— Barnett *v.* Smart, 158 Mo. 167, 59 S. W. 235.

New Jersey.— Putnam *v.* Clark, 34 N. J. Eq. 532. A judgment for defendant in a suit to foreclose a mortgage bars an action on a bond given for the same debt. New York Mut. L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756.

New York.— Young *v.* Farwell, 165 N. Y. 341, 59 N. E. 143.

Ohio.— Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991.

Oklahoma.— Pratt *v.* Ratliff, 10 Okla. 168, 61 Pac. 523.

Vermont.— Pierson *v.* Catlin, 18 Vt. 77; Pelton *v.* Mott, 11 Vt. 148, 34 Am. Dec. 678.

England.— Tredegar *v.* Windus, L. R. 19 Eq. 607, 44 L. J. Ch. 268; Longmead *v.* Maple, 18 C. B. N. S. 255, 11 Jur. N. S. 177, 12 L. T. Rep. N. S. 143, 13 Wkly. Rep. 469, 114 E. C. L. 255.

See 30 Cent. Dig. tit. "Judgment," § 996.

36. See *infra*, XIII, C.

The dismissal of a bill in equity on the specific ground that the complainant has an adequate remedy at law, not being a determination of the merits, will not bar a subsequent suit at law on the same cause of action. Barnett *v.* Smart, 158 Mo. 167, 59 S. W. 235; Porter *v.* Wagner, 36 Ohio St. 471; Cramer *v.* Moore, 36 Ohio St. 347. See *infra*, XIII, C, 7.

37. Conclusiveness of adjudication see *infra*, XIV, A, 3, c.

38. Societa di Mutuo Socorso *v.* Mantel, (Cal. App. 1905) 81 Pac. 659; Foss *v.* Brentel, 14 La. Ann. 798; State *v.* Boothe, 68 Mo. 546; Long *v.* Lebanon Nat. Bank, 211 Pa. St. 165, 60 Atl. 556; Importers', etc., Nat. Bank *v.* Lyons, 209 Pa. St. 136, 58 Atl. 148.

Applications of the rule.— A judgment of a county court confirming a special assessment made on abutting property for the improvement of a public street is conclusive. Rich *v.* Chicago, 187 Ill. 396, 58 N. E. 306. So of an order of removal of a pauper from one township to another (Cadwallader *v.* Durham, 46 N. J. L. 53), and of a decision in proceedings for the adjudication of priorities in the appropriation of water rights (Louden Irr. Canal Co. *v.* Handy Ditch Co., 22 Colo. 102, 43 Pac. 535). On the other hand where a plaintiff, employed by contract as a teacher in the public schools, was compelled to cease teaching because the provisional license issued to him had expired, and sought a mandamus to compel the board of education to accept his services, it was held that, as the grant of this writ was not an absolute right but was discretionary with the court, its refusal was no bar to an action for salary due for the time after his services were refused. Steinson *v.* Board of Education, 165 N. Y. 431, 59 N. E. 300.

Habeas corpus.— A judgment as to the custody of an infant in habeas corpus proceedings is *res judicata* between the same parties on the same facts. Slack *v.* Perrine, 9 App. Cas. (D. C.) 128. See also *infra*, XIII, B, 2, d, text and note 47.

39. Sunkler *v.* McKenzie, 127 Cal. 554, 59 Pac. 982, 78 Am. St. Rep. 86; Southern Planing Mill *v.* Doerhoefer, 78 S. W. 882, 25 Ky. L. Rep. 1834; *In re* Roberts, 10 Hun (N. Y.) 253; Matter of Smal, 53 How. Pr. (N. Y.) 432; Hargadine-McKittrick Dry Goods Co. *v.* Hudson, 111 Fed. 361. But *compare* Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591, holding that an adjudication of the amount of a joint bond, as a claim against the estate, assigned for the benefit of creditors, of one of the obligors, not being a common-law judgment, does not merge the cause of action on the bond so as to release the other obligor. And see Burnes *v.* St. Louis, etc., R. Co., 71 Mo. 163.

40. Societa di Mutuo Socorso *v.* Mantel, (Cal. App. 1905) 81 Pac. 659 (holding that an order in supplementary proceedings, directing payment of a debt owing by A to the judgment debtor, constituted a judgment on which an execution might have been issued, and from which an appeal might have been taken, so that, no appeal having been taken within the time provided, it was *res judicata* as between A and the judgment creditor, and estopped A from disputing its liability to such creditor in any other action); Baker *v.* State, 109 Ind. 47, 9 N. E. 711; Carter *v.* Clarke, 30 N. Y. Super. Ct. 43; Schrauth *v.* Dry Dock Sav. Bank, 8 Daly (N. Y.) 106.

41. Raub *v.* Otterback, 92 Va. 517, 23 S. E. 883.

Patents.— Where scire facias is issued to obtain the repeal of a patent, a decision in favor of the patentee will not prevent his right being contested in a suit subsequently instituted by him for its violation. Delano *v.* Scott, 7 Fed. Cas. No. 3,753, Gilp. 489.

42. Walker *v.* Fuller, 29 Ark. 448.

d. Summary Proceedings.[43] Where proceedings of a summary character afford the parties concerned an opportunity to be heard and to contest the issues raised, the decision is as conclusive as a judgment entered in a formal action. Such for instance is the case with summary proceedings between a landlord and tenant,[44] or by a client against an attorney at law to recover money or property collected by the latter,[45] or for the taxation of costs,[46] or on habeas corpus,[47] or by a person injured by the careless driving of another to recover compensation.[48] But if the proceedings are purely *ex parte*, they do not constitute a bar to the litigation of the same matters in a formal action.[49]

e. Decisions on Motions[50] — (i) *In General.* The determination of a motion or summary application is not *res judicata* so as to prevent the parties from litigating the same matters again in the more regular form of an action, especially if the matter affected by the motion was only incidental or collateral to the determination of the main controversy.[51] But orders affecting substantial

43. Conclusiveness of adjudication see *infra*, XIV, A, 3, d.

44. Nemetty *v.* Naylor, 100 N. Y. 562, 3 N. E. 497; McCotter *v.* Flinn, 30 Misc. (N. Y.) 119, 61 N. Y. Suppl. 786; Kelsey *v.* Ward, 16 Abb. Pr. (N. Y.) 98 [*affirmed* in 38 N. Y. 83]. *Compare* Lazarus *v.* Ludwig, 18 Misc. (N. Y.) 474, 41 N. Y. Suppl. 999; Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Atl. 344, 19 Am. St. Rep. 604 [*disapproving dictum*, in Ayres *v.* Novinger, 8 Pa. St. 412].

45. Hawk *v.* Evans, 76 Iowa 593, 41 N. W. 368, 14 Am. St. Rep. 247.

46. Onondaga *v.* Briggs, 2 Hill (N. Y.) 135; Hadwin *v.* Southern R. Co., 67 S. C. 463, 45 S. E. 1019.

47. State *v.* Whitcher, 117 Wis. 668, 94 N. W. 787, 98 Am. St. Rep. 968. And see Slack *v.* Perrine, 9 App. Cas. (D. C.) 128.

48. Wright *v.* London Gen. Omnibus Co., 2 Q. B. D. 271, 46 L. J. Q. B. 429, 36 L. T. Rep. N. S. 590, 25 Wkly. Rep. 647.

49. Craft *v.* Perkins, 83 Ga. 760, 10 S. E. 357; *In re* Morgan, 125 Iowa 247, 101 N. W. 127; Wilcox *v.* Johnson, 34 Kan. 655, 9 Pac. 610; Lampton's Succession, 35 La. Ann. 418; Dalton *v.* Wickliffe, 35 La. Ann. 355.

50. Conclusiveness of adjudication see *infra*, XIV, A, 3, d.

51. *California.*— Johnston *v.* Brown, 115 Cal. 694, 47 Pac. 686.

Iowa.— Ellis *v.* Soper, 111 Iowa 631, 82 N. W. 1041.

Kansas.— Dryden *v.* St. Joseph, etc., R. Co., 23 Kan. 525.

Kentucky.— Crockett *v.* Lashbrook, 5 T. B. Mon. 530, 17 Am. Dec. 98.

Massachusetts.— Nantasket Beach R. Co. *v.* Ransom, 147 Mass. 240, 17 N. E. 640.

Minnesota.— Kanne *v.* Minneapolis, etc., R. Co., 33 Minn. 419, 23 N. W. 854.

New Jersey.— Felz *v.* Roseberger, 10 N. J. L. J. 79.

New York.— Everett *v.* Everett, 180 N. Y. 452, 73 N. E. 231; Wing *v.* De la Rionda, 125 N. Y. 678, 25 N. E. 1064; Easton *v.* Pickersgill, 75 N. Y. 599; Reilly *v.* Provost, 98 N. Y. App. Div. 208, 90 N. Y. Suppl. 591; Acker *v.* Ledyard, 8 Barb. 514; Hahl *v.* Sugo, 27 Misc. 1, 57 N. Y. Suppl. 920; Mack *v.* Patchin, 29 How. Pr. 20; Dickenson *v.* Gilliland, 1 Cow. 481; Simson *v.* Hart, 14 Johns. 63.

Pennsylvania.— Ashton's Appeal, 73 Pa. St. 153; Wistar *v.* McManes, 54 Pa. St. 318, 93 Am. Dec. 700. *Compare* Heilman *v.* Kroh, 155 Pa. St. 1, 25 Atl. 751.

South Carolina.— Sims *v.* Davis, 70 S. C. 362, 49 S. E. 872.

Wisconsin.— Hart *v.* Godkin, 122 Wis. 646, 100 N. W. 1057.

United States.— Wills *v.* Chandler, 2 Fed. 273, 1 McCrary 276.

See 30 Cent. Dig. tit. "Judgment," § 998.

Right to intervene.— A ruling in a foreclosure suit denying the petition of stockholders to be made parties to the suit against their corporation does not operate as a bar to an independent suit to set aside the decree for fraud. Tazewell County *v.* Farmers' L. & T. Co., 12 Fed. 752. But *compare* Morrill *v.* Little Falls Mfg. Co., 46 Minn. 260, 48 N. W. 1124.

Appointment of receiver.— Denial of a motion to appoint a receiver is no bar to a similar application in a subsequent suit between the same parties. Anderson *v.* Powell, 44 Iowa 20.

Dissolving injunction.— A preliminary injunction having been obtained to restrain the prosecution of an action at law, its dissolution is not *res judicata* in the action, the effect being merely to allow the case to be tried on full evidence. Davis *v.* National Eagle Bank, (R. I. 1901) 50 Atl. 530.

Discharging attachment.— The decision on a motion to vacate or discharge an attachment, being merely incidental or collateral to the main controversy, is not such an adjudication as will prevent the parties in interest from renewing the same contentions in another form of action or proceeding.

Iowa.— Cox *v.* Allen, 91 Iowa 462, 59 N. W. 335.

Kansas.— Bishop *v.* Smith, 66 Kan. 621, 72 Pac. 220; Miami County Nat. Bank *v.* Barkalow, 53 Kan. 68, 35 Pac. 796; Frazer *v.* Barry, 4 Kan. App. 33, 45 Pac. 724.

Minnesota.— Bennett *v.* Denny, 33 Minn. 530, 24 N. W. 193 [*affirmed* in 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491].

Missouri.— State *v.* Bierwirth, 47 Mo. App. 551.

rights, fully litigated, and from which an appeal lies, are conclusive of the matter adjudged and a bar to further proceedings.[52] Overruling a motion to set aside a verdict and entering judgment thereon bars a similar motion in a subsequent suit between the same parties or their privies to set aside a verdict settling the same questions in the same way;[53] and by the weight of authority the denial of a motion to open a default, or to vacate or set aside a judgment, if not appealed from, is generally considered final and conclusive, and a bar to any further proceedings for the same purpose.[54] The rule has also been applied to a motion for a new trial,[55] and to a motion for leave to issue execution.[56] A motion to quash an execution[57]

Nebraska.— Quigley *v.* McEvony, 41 Nebr. 73, 59 N. W. 767.

See 30 Cent. Dig. tit. "Judgment," § 998.

Setting off judgments.— The denial of a motion to set off judgments is not a bar to an action to compel such set-off. Pignolet *v.* Geer, 19 Abh. Pr. (N. Y.) 264.

52. *Alabama.*— Walker *v.* Carroll, 65 Ala. 61; Lee *v.* State, 49 Ala. 43; Langdon *v.* Raiford, 20 Ala. 532.

Illinois.— Parrott *v.* Hodgson, 46 Ill. App. 232; Kaufman *v.* Schneider, 35 Ill. App. 256.

Iowa.— Dubuque Second Nat. Bank *v.* Haerling, 106 Iowa 505, 76 N. W. 826.

Kansas.— Wilson County *v.* McIntosh, 30 Kan. 234, 1 Pac. 572.

Minnesota.— Robitshek *v.* Swedish-American Nat. Bank, 72 Minn. 319, 75 N. W. 231.

North Carolina.— Wilson *v.* Craige, 113 N. C. 463, 18 S. E. 715; Sanderson *v.* Daily, 83 N. C. 67.

Ohio.— Ewing *v.* McNairy, 20 Ohio St. 315.

Oregon.— White *v.* Ladd, 41 Oreg. 324, 68 Pac. 739, 93 Am. St. Rep. 732.

Pennsylvania.— Long *v.* Lebanon Nat. Bank, 211 Pa. St. 165, 60 Atl. 556; Straw *v.* Smith, 179 Pa. St. 376, 36 Atl. 162; Com. *v.* Comrey, 174 Pa. St. 355, 34 Atl. 581; Haneman *v.* Pile, 161 Pa. St. 599, 29 Atl. 113; Gordinier's Appeal, 89 Pa. St. 528.

Rhode Island.— Curry *v.* Swett, 13 R. I. 476.

West Virginia.— Burner *v.* Hevener, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

United States.— McDonald *v.* Seligman, 81 Fed. 753; Buckles *v.* Chicago, etc., R. Co., 53 Fed. 566; Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43.

See 30 Cent. Dig. tit. "Judgment," § 998.

53. Grier *v.* Jones, 54 Ga. 154; Page *v.* Esty, 54 Me. 319.

54. *Georgia.*— Grier *v.* Jones, 54 Ga. 154. *Compare* Hayden *v.* Johnson, 59 Ga. 104; Crim *v.* Crawford, 47 Ga. 628.

Illinois.— Burritt *v.* Tidmarsh, 1 Ill. App. 571.

Indiana.— Moore *v.* Horner, 146 Ind. 287, 45 N. E. 341.

Minnesota.— Carlson *v.* Carlson, 49 Minn. 555, 52 N. W. 214.

Nebraska.— Oakes *v.* Ziemer, (1904) 98 N. W. 443.

Oregon.— Thompson *v.* Connell, 31 Oreg. 231, 48 Pac. 467, 65 Am. St. Rep. 818.

Pennsylvania.— Haneman *v.* Pile, 161 Pa. St. 599, 29 Atl. 113. *Compare* Royer *v.* Wolf, 8 Pa. Co. Ct. 641. Where the court has discharged a rule to set aside a writ of execution, an action of damages for an unlawful sale under such execution will not lie. Long *v.* Lebanon Nat. Bank, 211 Pa. St. 165, 60 Atl. 556.

South Dakota.— Weber *v.* Tschetter, 1 S. D. 205, 46 N. W. 201.

Washington.— Chezum *v.* Claypool, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955.

Wisconsin.— Dick *v.* Williams, 87 Wis. 651, 58 N. W. 1029. *Compare* Thompson *v.* Thompson, 73 Wis. 84, 40 N. W. 671.

See 30 Cent. Dig. tit. "Judgment," § 998.

Contra.— Wolff *v.* Canadian Pac. R. Co., 89 Cal. 332, 26 Pac. 825; Soper *v.* Manning, 158 Mass. 381, 33 N. E. 516; Jensen *v.* Barbour, 12 Mont. 566, 31 Pac. 592; Dutton *v.* Smith, 10 N. Y. App. Div. 566, 42 N. Y. Suppl. 80; Monroe *v.* Monroe, 21 N. Y. Suppl. 655. But see Bush *v.* O'Brien, 47 N. Y. App. Div. 581, 62 N. Y. Suppl. 685.

55. Denial of motion for new trial is a bar to further proceedings for the same relief on the same facts. Collins *v.* Butler, 14 Cal. 223; Metzger *v.* Wendler, 35 Tex. 378. See also Curry *v.* Swett, 13 R. I. 476.

56. Matters adjudicated and decided on a motion of this kind cannot be set up again in a proceeding to have the judgment declared satisfied. Reeves *v.* Plough, 46 Ind. 350. *Compare* Steers *v.* Daniel, 4 Fed. 587, 2 Flipp. 310.

57. A majority of the cases hold that the ruling on a motion to restrain the issuance of an execution, to quash the writ, or to set aside a sale made thereunder is a bar to any further litigation of the same issues.

Alabama.— Saint *v.* Ledyard, 14 Ala. 244.

Indiana.— Parker *v.* Obenchain, 140 Ind. 211, 39 N. E. 869.

Kentucky.— Reed *v.* Whitlow, 43 S. W. 686, 19 Ky. L. Rep. 1538.

Louisiana.— Trescott *v.* Lewis, 12 La. Ann. 197.

Missouri.— Johnson *v.* Latta, 84 Mo. 139. *Compare* State *v.* Bierwirth, 47 Mo. App. 551.

Nebraska.— Berkley *v.* Lamb, 8 Nebr. 392, 1 N. W. 320.

New York.— Sherman *v.* Grinnell, 159 N. Y. 50, 53 N. E. 674.

See 30 Cent. Dig. tit. "Judgment," § 998.

Contra.— Rockwell *v.* Lake County Dist. Ct., 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265; Mills *v.* Pettigrew, 45 Kan. 573, 26 Pac. 33; Rhoad *v.* Patrick, 37 S. C. 517, 16 S. E. 536.

or to dissolve an attachment[58] has also been held to be within the rule, although in some jurisdictions there have been decisions to the contrary.

(11) *Renewal of Motion in Same Cause.* Although the doctrine of *res judicata* does not apply in its strictest sense to incidental or interlocutory orders in the progress of a cause, yet the denial of a motion or petition for such an order will generally operate as a bar to its renewal in the same proceeding,[59] unless the action of the court was based on irregularities in the application or the insufficiency of the moving papers,[60] or unless leave of court is obtained to renew the motion, in consideration of new facts which have arisen since the former determination, or additional facts which were not before presented, through surprise or excusable neglect, or which have been since discovered.[61]

3. Form and Requisites of Judgment[62] — a. In General. In order that a judicial decision should operate as a bar to further proceedings on the same cause of action, it is necessary that it should be in the nature of a judgment, and a valid and subsisting judgment,[63] and that it should be so far specific and definite and

58. White *v.* Ladd, 41 Oreg. 324, 68 Pac. 739, 93 Am. St. Rep. 732.

59. *California.*— Wheeler *v.* Eldred, 137 Cal. 37, 69 Pac. 619. See also Ford *v.* Doyle, 44 Cal. 635.

District of Columbia.— Johnson *v.* Offutt, 2 MacArthur 168.

Georgia.— Obear *v.* Gray, 73 Ga. 455.

Kansas.— Sanford *v.* Weeks, 50 Kan. 339, 31 Pac. 1088.

Louisiana.— Jacobs *v.* Augustin, 3 La. Ann. 703. *Compare* Cheval *v.* Destez, 25 La. Ann. 338.

Maryland.— Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943.

Minnesota.— Griffin *v.* Jorgenson, 22 Minn. 92.

Nebraska.— Oakes *v.* Ziemer, (1904) 98 N. W. 443.

New Hampshire.— Claggett *v.* Simes, 25 N. H. 402.

New York.— Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228; Bangs *v.* Strong, 4 N. Y. 315; German Exch. Bank *v.* Kroder, 14 Misc. 179, 35 N. Y. Suppl. 380; Hall *v.* Emmons, 39 How. Pr. 187; Hoffman *v.* Livingston, 1 Johns. Ch. 211; Ray *v.* Connor, 3 Edw. 478.

North Carolina.— Wingo *v.* Hooper, 98 N. C. 482, 4 S. E. 463; Roulhac *v.* Brown, 87 N. C. 1; Mabry *v.* Henry, 83 N. C. 298.

Wisconsin.— Dick *v.* Williams, 87 Wis. 651, 58 N. W. 1029; Day *v.* Mertlock, 87 Wis. 577, 58 N. W. 1037. *Compare* Turner *v.* Nachtsheim, 71 Wis. 16, 36 N. W. 637; Schattschneider *v.* Johnson, 39 Wis. 387.

See 30 Cent. Dig. tit. "Judgment," § 998.

Petition for new trial.— Where the court of common pleas had concurrent jurisdiction with the supreme court of petitions for new trials, it was held that the decision of either court upon such a petition presented to it was conclusive and that another petition upon the same grounds would not be entertained by the other court. Curry *v.* Swett, 13 R. I. 476.

60. Hope *v.* Hurt, 59 Miss. 174; Oakes *v.* Ziemer, (Nebr. 1904) 98 N. W. 443; Whittaker *v.* Warren, 14 S. D. 611, 86 N. W. 638; Corwith *v.* Illinois State Bank, 15 Wis. 289.

61. *California.*— Ford *v.* Doyle, 44 Cal. 635, holding that the doctrine of *res adjudicata* in its strict sense does not apply to motions for alias writs and motions for orders requiring a sheriff to execute a writ; that the court may, on a proper state of facts, allow a renewal of such a motion, once decided; but that such leave will not be granted unless a new state of facts has arisen since the former hearing, or the facts were not then presented by reason of surprise or excusable neglect.

Montana.— Jensen *v.* Barbour, 12 Mont. 566, 31 Pac. 592.

New York.— Easton *v.* Pickersgill, 75 N. Y. 599; People *v.* Dalton, 52 N. Y. App. Div. 371, 65 N. Y. Suppl. 342; Chichester *v.* Cande, 3 Cow. 39, 15 Am. Dec. 238.

North Carolina.— Allison *v.* Whittier, 101 N. C. 490, 8 S. E. 338.

South Dakota.— Weber *v.* Tschetter, 1 S. D. 205, 46 N. W. 201.

Wisconsin.— Lego *v.* Shaw, 38 Wis. 401.

See 30 Cent. Dig. tit. "Judgment," § 998.

Diligence to discover facts.— But when the second motion is founded on grounds not raised on the first, it will be denied, if such grounds might have been ascertained and presented by the exercise of due diligence. Port Jervis Nat. Bank *v.* Hansee, 15 Abb. N. Cas. (N. Y.) 488.

62. Conclusiveness of adjudication see *infra*, XIV, A, 4.

63. Chattanooga, R., etc., R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109; Cackley *v.* Smith, 47 Kan. 642, 28 Pac. 617, 27 Am. St. Rep. 311; Dixon *v.* Sinclear, 4 Vt. 354, 24 Am. Dec. 610.

The mere setting aside of a verdict for plaintiff, with the remark by the court that a nonsuit should have been entered, but without showing why, is not such a judgment for defendant as may be availed of in bar of the same claim against his estate in the orphans' court. Dunlevy's Estate, 10 Pa. Co. Ct. 454.

An order directing interrogatories to be taken for confessed is not a judgment; and a motion to have such an order set aside is not an application for a new trial, in such

free from ambiguity or contradictions as to show clearly what was the claim or cause of action adjudicated;[64] and that it should be effective and enforceable, so that no injustice to the parties may result from recognizing the judgment as prohibitive of further proceedings.[65] But it makes no difference in the conclusive effect of the judgment that the circumstances are such that no appeal can be taken from it,[66] or that by reason of lapse of time it can no longer be enforced by

aense that its refusal will give to the original order the effect of *res judicata*. Cusachs *v.* Dugue, 113 La. 261, 36 So. 960.

Defects of form.— A regular judgment is none the lesa effective as a bar because it is defective in form and grammar. Davis *v.* Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

Want of signature.— In Louisiana a judgment not signed is no foundation for a plea of *res judicata*. Ferguson *v.* Chastant, 35 La. Ann. 485.

Effect of blanks.— Where the amount of a judgment is left blank, it constitutes no bar to another action on the same cause, unless the blank can be filled with certainty from other parts of the record. School Directors *v.* Newman, 47 Ill. App. 364; Wells *v.* Dench, 1 Mass. 232.

Discretionary action.— Petitions for laying out and discontinuing highways are not proceedings where a former adjudication may be asserted as an estoppel, since such petitions are of necessity addressed largely to the discretion of the court. Ferguson *v.* Sheffield, 52 Vt. 77. But see Straits of Dover Steamship Co. *v.* Munson, 100 Fed. 1005, 41 C. C. A. 156, holding that the refusal of a court, when within its equitable discretion, to award costs to a successful party is an adjudication which precludes him from maintaining an independent action for their recovery.

Ministerial acts.— An order of a probate court that a return of sale of land made by a guardian be recorded, under the statute, is simply a ministerial act, and does not conclude the parties in interest from investigating the conduct of the guardian in making the sale. Holbrook *v.* Brooks, 33 Conn. 347.

Allowance or rejection of claims.— The action of an assignee for creditors in rejecting a claim presented for allowance is a conclusive adjudication between the parties unless appealed from. Cody *v.* Vaughan, 53 Mo. App. 169. So of the rejection of a debt by an administrator within the time allowed by law for presentation of claims. Matter of Phyfe, 5 N. Y. Leg. Obs. 331.

64. *Indiana.*— Watson *v.* Lecklider, 147 Ind. 395, 45 N. E. 72.

Iowa.— Citizens' Nat. Bank *v.* Clinton City Nat. Bank, 111 Iowa 211, 82 N. W. 464.

Maryland.— Streeks *v.* Dyer, 39 Md. 424; Gray *v.* Swan, 1 Harr. & J. 142.

Michigan.— Tucker *v.* Rohrback, 13 Mich. 73.

Missouri.— Weese *v.* Brown, 28 Mo. App. 521.

New York.— Bowne *v.* Joy, 9 Johns. 221.

See 30 Cent. Dig. tit. "Judgment," § 999 *et seq.*

Inconsistent positions.— Where the judgment is based on two inconsistent grounds, or contains two positions so repugnant that they cannot be reconciled, it is of no effect as an estoppel. Knapp *v.* Crane, 14 N. Y. App. Div. 120, 43 N. Y. Suppl. 513; Union, etc., Bank *v.* Memphis, 107 Tenn. 66, 64 S. W. 13.

Conflicting decisions in same case.— It has been held that where there have been two adjudications of the same matter between the same parties, with opposite results, the estoppel of one judgment neutralizes that of the other, and both parties may assert their claims anew. Shaw *v.* Broadbent, 129 N. Y. 114, 29 N. E. 238. And see Johnson *v.* Hesser, 61 Nebr. 631, 85 N. W. 894. But in Minor *v.* New Orleans, 115 La. 301, 38 So. 999, it was held that where there are two conflicting judgments in the same cause, the later in point of time will prevail. And see *supra*, XII, C, 2.

Defects of declaration.— A judgment on the merits, remaining in force, is a bar to another suit for the same cause of action, although the declaration was so imperfect that it would not stand the test of a demurrer. Hughes *v.* Blake, 12 Fed. Cas. No. 6,845, 1 Mason 512. But see Conway *v.* Hall, 1 Va. Cas. 6, holding that the cause of action is not merged in a judgment, in an action thereon, where no declaration was filed.

Lack of proof.— A verdict and judgment against plaintiff is a bar to his subsequent suit, notwithstanding the fact that he offered no proof of his claim on the former trial. Ramsey *v.* Herndon, 20 Fed. Cas. No. 11,546, 1 McLean 450.

Unknown owners are concluded by a judgment against them regularly entered in an action of which the court had jurisdiction. Walker *v.* Ogden, 192 Ill. 314, 61 N. E. 403. See *infra*, XIV, B, 2, d.

65. Kirkhart *v.* Roberts, 123 Iowa 137, 98 N. W. 562; Pond *v.* Makepeace, 2 Metc. (Mass.) 114; Wixon *v.* Stephens, 17 Mich. 518, 97 Am. Dec. 205; Lloyd *v.* Lloyd, 34 Wash. 84, 74 Pac. 1061. But *compare* Sanford *v.* Cloud, 17 Fla. 532, where it is held to be no reply to a plea of *res judicata* that no damages were awarded and the decree cannot be enforced.

Inadequate recovery.— Where the cause of action is the same, a former judgment in a suit between the same parties, although an inadequate one, is a bar to a second recovery. Pinney *v.* Barnes, 17 Conn. 420.

66. Jungnitsch *v.* Michigan Malleable Iron Co., 121 Mich. 460, 80 N. W. 245; Griffin *v.* Long Island R. Co., 102 N. Y. 449, 7 N. E. 735; Dolan *v.* Scott, 25 Wash. 214, 65 Pac. 190; Johnson Steel St.-Rail Co. *v.* Wharton, 152 U. S. 252, 14 S. Ct. 608, 38 L. ed. 429.

execution;[67] nor is the scope of the estoppel to be determined by the reasoning of the court, the substantial effect of the actual decision being the only consideration.[68] And payment, satisfaction, or release of the judgment does not affect its conclusiveness as an estoppel.[69]

b. Verdict Without Judgment.[70] A verdict without a judgment entered upon it is generally held to be of no validity as an estoppel or bar,[71] although some cases have applied a contrary rule,[72] particularly where the verdict has become unassailable by the lapse of the time within which it might be set aside or a new trial granted,[73] or where the parties have acquiesced in the verdict or tacitly or expressly agreed to let it stand in the place of a judgment.[74]

c. Master's Report. A master's report is not evidence as an adjudication between the parties until it has been accepted and judgment rendered upon it.[75]

d. Decision of Court Without Jury. When a case is legally and properly tried by the court alone, without the aid of a jury, its judgment is as binding and conclusive upon the parties as if based upon a verdict,[76] and it makes no difference

67. Bazille *v.* Murray, 40 Minn. 48, 41 N. W. 238.

68. Fulton *v.* Welsh, 7 Mart. N. S. (La.) 256; Legendre *v.* McDonough, 6 Mart. N. S. (La.) 513; Harrison *v.* Godbold, McGloin (La.) 178; Denike *v.* Denike, 167 N. Y. 585, 60 N. E. 1110; Abraham *v.* Casey, 179 U. S. 210, 21 S. Ct. 88, 45 L. ed. 156. *Compare* State *v.* Eagle Ins. Co., 50 Ohio St. 252, 33 N. E. 1056.

69. Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180; Fogg *v.* Sanborn, 48 Me. 432; Hopkins *v.* West, 83 Pa. St. 109. *Compare* Osterhout *v.* Roberts, 8 Cow. (N. Y.) 43.

70. Conclusiveness of adjudication see *infra*, XIV, A, 4, a, (II).

71. *California.*— *In re* Holbert, 57 Cal. 257.

Dakota.— Pearson *v.* Post, 2 Dak. 220, 9 N. W. 684.

Georgia.— Harris *v.* Gano, 117 Ga. 934, 44 S. E. 11.

Illinois.— Stubbings *v.* Durham, 210 Ill. 542, 71 N. E. 586; Harnish *v.* Miles, 111 Ill. App. 105.

Kansas.— Stauffer *v.* Remick, 37 Kan. 454, 15 Pac. 584; Attica State Bank *v.* Benson, 8 Kan. App. 566, 54 Pac. 1037.

Louisiana.— Humphreys *v.* Browne, 19 La. Ann. 158.

Minnesota.— Schurmeier *v.* Johnson, 10 Minn. 319.

Mississippi.— Butler *v.* Stephens, Walk. 219.

Nebraska.— Gapen *v.* Bretternitz, 31 Nebr. 302, 47 N. W. 918; McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333.

New York.— Lorillard *v.* Clyde, 99 N. Y. 196, 1 N. E. 614; Denike *v.* Denike, 44 N. Y. App. Div. 621, 60 N. Y. Suppl. 110; De Forest *v.* Andrews, 27 Misc. 145, 58 N. Y. Suppl. 358. *Compare* Kane *v.* Dulex, 3 E. D. Smith 127; Brockway *v.* Kinney, 2 Johns. 210.

Ohio.— Dunlap *v.* Robinson, 12 Ohio St. 530.

Pennsylvania.— Dougherty *v.* Lehigh Coal Co., 202 Pa. St. 635, 52 Atl. 18, 90 Am. St. Rep. 660; Ferguson *v.* Staver, 40 Pa. St. 213; Saylor *v.* Hicks, 36 Pa. St. 392; Chester City Presb. Church *v.* Conlin, 11 Pa. Super. Ct. 413.

United States.— Smith *v.* McCool, 16 Wall. 560, 21 L. ed. 324; Reed *v.* Merrimac River, Locks, etc., 8 How. 274, 12 L. ed. 1077; Allen *v.* Blunt, 1 Fed. Cas. No. 217, 2 Woodb. & M. 121; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

England.— Needham *v.* Bremner, L. R. 1 C. P. 583, 1 Harr. & R. 731, 12 Jur. N. S. 434, 35 L. J. C. P. 313, 14 L. T. Rep. N. S. 437, 14 Wkly. Rep. 694.

Canada.— Twohy *v.* Armstrong, 15 U. C. C. P. 269; Gordon *v.* Robinson, 14 U. C. C. P. 566.

See 30 Cent. Dig. tit. "Judgment," § 1020.

72. Perry *v.* King, 117 Ala. 533, 23 So. 783; Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608 [with which *compare*, however, Gurnea *v.* Seeley, 66 Ill. 500]; Gaines *v.* Betts, 2 Dougl. (Mich.) 98.

73. Downer *v.* Cripps, 170 Mass. 345, 49 N. E. 644; Felter *v.* Mulliner, 2 Johns. (N. Y.) 181; Hume *v.* Schintz, 91 Tex. 204, 42 S. W. 543, 90 Tex. 72, 36 S. W. 429; Ball *v.* Trenholm, 45 Fed. 588. Where an action had been brought in a state court, and a verdict rendered for defendant, and plaintiff's motion for a new trial overruled, and a notice of appeal given, it was held in a federal court that the action of the court was *res adjudicata*, although the formal judgment had not been entered, and that the jurisdiction of the court was exhausted, and therefore that an order entered in the circuit court after appeal to the supreme court, giving plaintiffs leave to discontinue their cause on payment of costs, was *coram non judice* and would not enable them to maintain a libel in a court of admiralty on the same cause of action. Ball *v.* Trenholm, 45 Fed. 588.

74. Carstarphen *v.* Holt, 96 Ga. 703, 23 S. E. 904; Webster *v.* Dundee Mortg., etc., Co., 93 Ga. 278, 20 S. E. 310; Estep *v.* Hutchman, 14 Serg. & R. (Pa.) 435; Pollitz *v.* Schell, 30 Fed. 421; Bartels *v.* Redfield, 16 Fed. 336.

75. Nash *v.* Hunt, 116 Mass. 237.

76. Bissell *v.* Kellogg, 60 Barb. (N. Y.) 617; Dauchy *v.* Goodrich, 20 Vt. 127; Morgan *v.* Chicago, etc., R. Co., 83 Wis. 348, 53 N. W. 741; Kibbee *v.* Howard, 7 Wis. 150;

that the court's decision was wrong in law.[77] But the decision or findings of the court do not constitute a bar to a subsequent action unless followed by a judgment based thereon.[78]

4. Validity of Judgment — a. Void Judgments.[79] Where a judgment is void for want of jurisdiction, whether of the subject-matter or of the person of defendant, it is of no effect whatever as an estoppel, does not merge the cause of action, and constitutes no bar to further litigation upon the same cause of action.[80]

Bassett *v.* U. S., 9 Wall. (U. S.) 38, 19 L. ed. 548.

Judgment non obstante verdicto see *infra*, XIII, C, 10.

Scope of estoppel.— "It is the general duty of the court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment." Mitchell *v.* Insley, 33 Kan. 654, 657, 7 Pac. 201; Auld *v.* Smith, 23 Kan. 65.

77. Beall *v.* Pearre, 12 Md. 550. See *infra*, XIII, B, 4, b.

78. Gapen *v.* Bretternitz, 31 Nebr. 302, 47 N. W. 918; Lance *v.* Shaughnessy, 153 N. Y. 653, 47 N. E. 1108; Derby *v.* Yale, 13 Hun (N. Y.) 273; Young *v.* Rummell, 7 Hill (N. Y.) 503; Bouldin *v.* Phelps, 30 Fed. 547. Findings of fact by the judge trying a cause, and an order directing a conveyance "as decreed by this court," filed in different county clerks' offices, do not amount to a judgment, and are not admissible in evidence in support of a plea of *res judicata*. Oklahoma *v.* McMaster, 196 U. S. 529, 25 S. Ct. 324, 49 L. ed. 587 [*reversing* 12 Okla. 570, 73 Pac. 1012].

Conclusiveness of adjudication see *infra*, XIV, A, 4, a, (III).

79. Conclusiveness of adjudication see *infra*, XIV, A, 4, h, (I).

80. *Arkansas.*— Kansas City, etc., R. Co. *v.* Moon, 66 Ark. 409, 50 S. W. 996; McLain *v.* Taylor, 9 Ark. 358.

Connecticut.— Miles *v.* Strong, 68 Conn. 273, 36 Atl. 55; Blakeslee *v.* Murphy, 44 Conn. 188.

Delaware.— Green *v.* Clawson, 5 Houst. 159.

District of Columbia.— Perry *v.* Sweeny, 11 App. Cas. 404.

Georgia.— Yon *v.* Baldwin, 76 Ga. 769; Muller *v.* Rhuman, 62 Ga. 332; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351. And see Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827.

Illinois.— Richardson *v.* Aiken, 84 Ill. 221; Johnson *v.* Logan, 68 Ill. 313.

Indiana.— McCarty *v.* Kinsey, 154 Ind. 447, 57 N. E. 108; Joyce *v.* Whitney, 57 Ind. 550; Rhoades *v.* Delaney, 50 Ind. 468.

Iowa.— Zalesky *v.* Iowa State Ins. Co., 102 Iowa 512, 70 N. W. 187, 71 N. W. 433.

Kansas.— Powell *v.* Geisendorff, 23 Kan. 538.

Kentucky.— Reading *v.* Price, 3 J. J. Marsh. 61, 19 Am. Dec. 162.

Louisiana.— Labauve *v.* Slack, 31 La. Ann. 134; Wamsley *v.* Robinson, 28 La. Ann. 793.

Maryland.— Offutt *v.* Offutt, 2 Harr. & G. 178.

Massachusetts.— Bartlett *v.* Slater, 182 Mass. 208, 65 N. E. 73.

Michigan.— Shurte *v.* Fletcher, 111 Mich. 84, 69 N. W. 233; Gould *v.* Jacobson, 58 Mich. 288, 25 N. W. 194; Basom *v.* Taylor, 39 Mich. 682; Wixom *v.* Stephens, 17 Mich. 518, 97 Am. Dec. 205.

Minnesota.— Plummer *v.* Hatton, 51 Minn. 181, 53 N. W. 460.

Mississippi.— Fort *v.* Battle, 13 Sm. & M. 133.

Missouri.— Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Horn *v.* Mississippi River, etc., R. Co., 88 Mo. App. 469; Dailey *v.* Sharkey, 29 Mo. App. 518.

Montana.— Finlen *v.* Heinze, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517, holding that a decree of a trial court, designed to protect the rights of the parties pending an appeal to the supreme court from a final judgment, being void, does not estop the party at whose instance it is entered from applying to the supreme court for an injunction to preserve such subject pending the appeal.

Nebraska.— Colby *v.* Parker, 34 Nebr. 510, 52 N. W. 693.

New Jersey.— Richman *v.* Baldwin, 21 N. J. L. 395.

New York.— Reed *v.* Chilson, 142 N. Y. 152, 36 N. E. 884; Sweeney *v.* Warren, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468; Neilley *v.* Neilley, 89 N. Y. 352; Hancock *v.* Flynn, 5 Silv. Sup. 122, 8 N. Y. Suppl. 133; Kintz *v.* McNeal, 1 Den. 436; Blin *v.* Campbell, 14 Johns. 432.

North Carolina.— Springer *v.* Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708.

Ohio.— Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422, 60 N. E. 603.

Pennsylvania.— Enterline *v.* Comrey, 15 Pa. Co. Ct. 627. See Hinds *v.* Willis, 13 Serg. & R. 213. But in Levey *v.* Norton, 10 Pa. Co. Ct. 278, it is held that a plaintiff, having prosecuted his suit to judgment in a court having no jurisdiction, cannot afterward maintain an action for the same cause in a court of competent jurisdiction.

South Carolina.— Anderson *v.* Cave, 49 S. C. 505, 27 S. E. 478.

Tennessee.— McCadden *v.* Slauson, 96 Tenn. 586, 36 S. W. 378; Clark *v.* Stroud, 1 Swan 274; Johnston *v.* Ditty, 7 Yerg. 85.

Texas.— Missouri Pac. R. Co. *v.* Haynes, 82 Tex. 448, 18 S. W. 605; Mayo *v.* Tudor, 74 Tex. 471, 12 S. W. 117.

Virginia.— Linn *v.* Carson, 32 Gratt. 170.

b. Erroneous or Irregular Judgments.[81] This is not true, however, of erroneous judgments. So long as a judgment remains unappealed from and in full force, it does not detract from its effect as a bar to further suits upon the same cause of action that it may be erroneous, so as to be reversible on appeal or error, or so irregular that it would be vacated on a proper application for that purpose.[82]

Washington.— Reese *v.* Murnan, 5 Wash. 373, 31 Pac. 1027.

United States.— Missouri *v.* Tiedermann, 10 Fed. 20, 3 McCrary 399; Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,660, 5 Sawy. 394.

England.— Toronto R. Co. *v.* Toronto, [1904] A. C. 809, 73 L. J. P. C. 120, 91 L. T. Rep. N. S. 541, 20 T. L. R. 774; Atty.-Gen. *v.* Eriché, [1893] A. C. 518, 63 L. J. P. C. 6, 69 L. T. Rep. N. S. 505, 1 Reports 440; Reg. *v.* Hutchings, 6 Q. B. D. 300, 45 J. P. 504, 50 L. J. M. C. 35, 44 L. T. Rep. N. S. 364, 29 Wkly. Rep. 724; O'Grady *v.* Synam, [1900] 2 Ir. 602; Briscoe *v.* Stephens, 2 Bing. 213, 3 L. J. C. P. O. S. 257, 9 Moore C. P. 413, 27 Rev. Rep. 597, 9 E. C. L. 550.

See 30 Cent. Dig. tit. "Judgment," §§ 1004, 1005. And see *infra*, XIV, A, 4, h, (I).

Unauthorized judgments.— The effect of *res judicata* cannot be ascribed to a judgment rendered without authority of law, as where it assumes to determine the rights of a party not before the court (Westerly Prob. Ct. *v.* Potter, 26 R. I. 202, 58 Atl. 661), or where the court undertakes to decide a question not raised by the pleadings or submitted by the parties (Luck *v.* Chicago, 211 Ill. 183, 71 N. E. 878).

But where a cause has been removed from a state court to a federal court, appealed to the supreme court, and there decided on the merits, all without objection to the jurisdiction, it is a bar to a subsequent action between the same parties on the same cause of action. Des Moines Nav., etc., Co. *v.* Iowa Homestead Co., 123 U. S. 552, 8 S. Ct. 217, 31 L. ed. 202.

Waiver by pleading judgment.— Pleading a judgment in bar of an action on the original demand is a waiver of defendant's right to avoid it for want or insufficiency of service. Henderson *v.* Staniford, 105 Mass. 504, 7 Am. Rep. 551.

Failure to proceed to quash order.— Where an order, bad upon its face for want of jurisdiction, is sought to be enforced in a civil court, the failure to obtain relief on a collateral application for certiorari to quash the order does not conclude the party from showing that the order was void. O'Grady *v.* Synan, [1900] 2 Ir. 602.

Judgments of justices of the peace see *supra*, XIII, B, 1, b.

Judgments of probate courts see *supra*, XIII, B, 1, c.

81. Conclusiveness of adjudication see *infra*, XIV, A, 4, h, (II).

82. *Alabama.*— Penny *v.* British, etc., Mortg. Co., 132 Ala. 357, 31 So. 96; Tankersly *v.* Pettis, 71 Ala. 179; Hopkinson *v.* Shelton, 37 Ala. 306; Cole *v.* Conolly, 16 Ala. 271.

Arkansas.— Janes *v.* Williams, 31 Ark. 175.

California.— Wolverton *v.* Baker, 86 Cal. 591, 25 Pac. 54.

Delaware.— Solomon *v.* Loper, 4 Harr. 187.

Florida.— Thornton *v.* Eppes, 6 Fla. 546.

Georgia.— Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Pritchett *v.* Barton County Com'rs, 93 Ga. 736, 19 S. E. 896; Girardey *v.* Bessman, 77 Ga. 483; Crutchfield *v.* State, 24 Ga. 335; Bradwell *v.* Spencer, 16 Ga. 578; Preston *v.* Clark, 9 Ga. 244; Kenan *v.* Miller, 2 Ga. 325.

Illinois.— Frew *v.* Taylor, 106 Ill. 159; Andrews *v.* Scott, 113 Ill. 581 [*affirmed* in 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215].

Indiana.— Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Phillips *v.* Lewis, 109 Ind. 62, 9 N. E. 395; Carrico *v.* Tarwater, 103 Ind. 86, 2 N. E. 227; Parker *v.* Wright, 62 Ind. 398; Pressler *v.* Turner, 57 Ind. 56.

Iowa.— Iowa Union Tel. Co. *v.* Boylan, (1891) 48 N. W. 730; McCrillis *v.* Harrison County, 63 Iowa 592, 19 N. W. 679.

Kansas.—Santa Fé Bank *v.* Haskell County Bank, 51 Kan. 50, 32 Pac. 627.

Kentucky.— Stum Adm'r *v.* Stum, 116 Ky. 534, 76 S. W. 500, 25 Ky. L. Rep. 749; Breckinridge *v.* Quertemus, 4 Dana 493; Wallace *v.* Usher, 4 Bibb 508; Holliday *v.* Fields, 68 S. W. 624, 24 Ky. L. Rep. 413; Scott *v.* Louisville Banking Co., 62 S. W. 713, 23 Ky. L. Rep. 123.

Louisiana.— Heroman *v.* Louisiana Deaf, etc., Inst., 34 La. Ann. 805; Fluker *v.* Herbert, 27 La. Ann. 284.

Maryland.— Thomas *v.* Malster, 14 Md. 382; Beall *v.* Pearre, 12 Md. 550.

Michigan.— Carr *v.* Brick, 113 Mich. 664, 71 N. W. 1103; Town *v.* Smith, 14 Mich. 348.

Mississippi.—Perry *v.* Lewis, 49 Miss. 443; Wall *v.* Wall, 28 Miss. 409.

Missouri.— Barnett *v.* Smart, 158 Mo. 167, 59 S. W. 235; Asbury *v.* Odell, 83 Mo. 264; Jones *v.* Silver, 97 Mo. App. 231, 70 S. W. 1109; Eyermann *v.* Scollay, 16 Mo. App. 498.

Nevada.— Gulling *v.* Washoe County Bank, 24 Nev. 477, 56 Pac. 580.

New Jersey.— Manley *v.* Mickle, 53 N. J. Eq. 155, 32 Atl. 210 [*affirming* 52 N. J. Eq. 712, 29 Atl. 434].

New York.— Griffin *v.* Long Island R. Co., 102 N. Y. 449, 7 N. E. 735; Colburn *v.* Woodworth, 31 Barb. 381; Hecht *v.* Mothner, 4 Misc. 536, 24 N. Y. Suppl. 826; Spoor *v.* Cornell, 12 N. Y. Civ. Proc. 319; McLean *v.* Hugarin, 13 Johns. 184; Lawrence *v.* Houghton, 5 Johns. 129.

North Carolina.— Ladd *v.* Byrd, 113 N. C. 466, 18 S. E. 666; Winslow *v.* Stokes, 48 N. C. 285, 67 Am. Dec. 242.

Ohio.— Moore *v.* Robison, 6 Ohio St. 302;

There are a few isolated decisions, however, which are not in accord with the rule stated in the text.[83]

c. Judgments Procured by Fraud. By the weight of authority a judgment duly rendered by a competent court having jurisdiction is none the less a bar to the further litigation of the same cause of action between the parties, because it may have been procured by the fraud of the successful party,[84] or by the concoction and use of false testimony.[85] But if the suit in which the judgment was entered was merely collusive, and a fraudulent arrangement between some of the parties to trick the others out of their rights, it is not an estoppel or bar against the proper claims of the latter.[86]

5. Finality of Determination[87] — a. In General. A judgment cannot be set up in bar of a subsequent action unless it was a final judgment on the merits,[88] adjudicating the rights in litigation in a conclusive and definitive manner.[89]

b. Interlocutory Judgment or Decree. In order that a judgment should be

Le Grange *v.* Ward, 11 Ohio 257; Berry *v.* Greenfield, Wright 348.

Oregon.— Lovejoy *v.* Willamette Falls Electric Co., 31 Oreg. 181, 51 Pac. 197; Crabill *v.* Crabill, 22 Oreg. 588, 30 Pac. 320.

Pennsylvania.— Bolton *v.* Hey, 168 Pa. St. 418, 31 Atl. 1097; Kase *v.* Best, 15 Pa. St. 101, 53 Am. Dec. 573; Emery *v.* Nelson, 9 Serg. & R. 12.

Rhode Island.— Smith *v.* Borden, 17 R. I. 220, 21 Atl. 351, 33 Am. St. Rep. 867, 11 L. R. A. 585.

Tennessee.— McNairy *v.* Nashville, 2 Baxt. 251; Kelley *v.* Mize, 3 Sneed 59.

Texas.— Cook *v.* Burnley, 45 Tex. 97; Rankin *v.* Hooks, (Civ. App. 1904) 81 S. W. 1005; Powell *v.* Heckerman, 6 Tex. Civ. App. 304, 25 S. W. 166.

Virginia.— Howison *v.* Weeden, 77 Va. 704.

West Virginia.— Lee *v.* Smith, 54 W. Va. 89, 46 S. E. 352; Davis *v.* Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849; Sayre *v.* Harpold, 33 W. Va. 553, 11 S. E. 16.

Wisconsin.— Heath *v.* Frackleton, 20 Wis. 320, 91 Am. Dec. 405; Gale *v.* Best, 20 Wis. 44.

Wyoming.— Price *v.* Bonnifield, 2 Wyo. 80.

United States.— Milne *v.* Deen, 121 U. S. 525, 7 S. Ct. 1004, 30 L. ed. 980; U. S. *v.* Board of Auditors, 28 Fed. 407; Seat *v.* U. S., 18 Ct. Cl. 458; Osborn *v.* U. S., 9 Ct. Cl. 153.

England.— Clanmorris *v.* Clanmorris, 14 Ir. Ch. 420.

See 30 Cent. Dig. tit. "Judgment," § 1003 *et seq.*

83. Hamilton *v.* Fleming, 26 Nebr. 240, 41 N. W. 1002. See also Kansas City Southern R. Co. *v.* King, 74 Ark. 366, 85 S. W. 1131. In Kentucky it is said that a decree on appeal rendered on an incorrect copy of the record will not bar a new action at law. Davis *v.* Young, 5 J. J. Marsh. (Ky.) 165. In Massachusetts a decree of the probate court establishing a partition of land before a sum of money awarded by the commissioners to make the partition just and equal is paid or secured is erroneous, and is no bar to a subsequent partition on the petition of a party to whom the money was awarded, unless he has since accepted the money. Jenks *v.* Howland, 3 Gray (Mass.) 536.

84. *Delaware.*— Solomon *v.* Loper, 4 Harr. 187.

Nevada.— Gulling *v.* Washoe County Bank, 24 Nev. 477, 56 Pac. 580.

New York.— Whitaker *v.* Merrill, 28 Barb. 526.

Tennessee.— Kelley *v.* Mize, 3 Sneed 50.

United States.— Peninsular Iron Co. *v.* Eells, 68 Fed. 24, 15 C. C. A. 189.

Contra.— Hallack *v.* Loft, 19 Colo. 74, 34 Pac. 568; Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401. And see Campbell *v.* Sherley, 76 S. W. 540, 25 Ky. L. Rep. 904 (holding that where a subsequent suit between the same parties directly attacks the judgment in a former suit for fraud practised in obtaining it, the proceedings in the former suit are not a bar to the subsequent suit); Girdlestone *v.* Brighton Aquarium Co., 4 Ex. D. 107, 48 L. J. Exch. 373, 40 L. T. Rep. N. S. 473, 27 Wkly. Rep. 523; Spiers *v.* Reg., 4 Brit. Col. 388.

85. Gusman *v.* Hearsey, 28 La. Ann. 709, 26 Am. Rep. 104; Verplanck *v.* Van Buren, 11 Hun (N. Y.) 328; Ross *v.* Wood, 8 Hun (N. Y.) 185 [*affirmed* in 70 N. Y. 8]; Kelley *v.* Mize, 3 Sneed (Tenn.) 59.

86. Tennessee Coal, etc., Co. *v.* Hayes, 97 Ala. 201, 12 So. 98; Kerr *v.* Blodgett, 25 How. Pr. (N. Y.) 303; De Garcia *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. 275; Andes *v.* Ely, 158 U. S. 312, 15 S. Ct. 954, 39 L. ed. 996. And see Gray *v.* Richmond Bicycle Co., 40 N. Y. App. Div. 506, 58 N. Y. Suppl. 182; Kerr *v.* Webb, 9 Rich. Eq. (S. C.) 369; Girdlestone *v.* Brighton Aquarium Co., 4 Ex. D. 107, 48 L. J. Exch. 373, 40 L. T. Rep. N. S. 473, 27 Wkly. Rep. 523.

87. Conclusiveness of adjudication see *infra*, XIV, A, 4, g.

88. Judgment on the merits see *infra*, XIII, C.

89. *Alabama.*— McLane *v.* Spence, 11 Ala. 172.

Arizona.— Reilly *v.* Perkins, 6 Ariz. 188, 56 Pac. 734.

Arkansas.— Crump *v.* Starke, 23 Ark. 131.

Colorado.— Dusing *v.* Nelson, 7 Colo. 184, 2 Pac. 922.

Illinois.— Schmidt *v.* Glade, 126 Ill. 485,

final within the meaning of the rule just stated it must be such as puts an end to the particular litigation or definitely puts the case out of court;[90] otherwise it is merely interlocutory and constitutes no bar to a subsequent action.[91] The estop-

18 N. E. 762; Wadsworth *v.* Connell, 104 Ill. 369; Toledo, etc., R. Co. *v.* Eastburn, 79 Ill. 140; Kingsbury *v.* Buckner, 70 Ill. 514.

Indiana.— Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

Iowa.— McClelland *v.* Bennett, 106 Iowa 74, 75 N. W. 667; Woodin *v.* Clemons, 32 Iowa 280.

Kansas.— Buchanan County First Nat. Bank *v.* Linvill, (App. 1900) 62 Pac. 165.

Kentucky.— Hibler *v.* Shipp, 78 Ky. 64; Nickell *v.* Fallen, 23 S. W. 366, 15 Ky. L. Rep. 389.

Louisiana.— Peet *v.* Whitmore, 14 La. Ann. 408; Trescott *v.* Lewis, 12 La. Ann. 197; Kellam *v.* Rippey, 3 La. Ann. 202.

Maine.— Hobbs *v.* Staples, 19 Me. 219.

Maryland.— Grant Coal Co. *v.* Clary, 59 Md. 441; Turner *v.* Plowden, 5 Gill & J. 52, 23 Am. Dec. 596.

Missouri.— Strong *v.* Hamilton, 144 Mo. 668, 46 S. W. 439.

Nebraska.— Hart *v.* Bank of Commerce, 51 Nebr. 486, 71 N. W. 40; Hall *v.* Vanier, 7 Nebr. 397; Smith *v.* Smith, 2 Nebr. (Unoff.) 655, 89 N. W. 799.

New York.— Webb *v.* Buckelew, 82 N. Y. 555; Carlisle *v.* McCall, 1 Hilt. 399; Sans *v.* New York, 31 Misc. 559, 64 N. Y. Suppl. 681; Thorp *v.* Philbin, 2 N. Y. Suppl. 732.

North Carolina.— Shober *v.* Wheeler, 120 N. C. 353, 27 S. E. 29.

Ohio.— State *v.* Ottinger, 43 Ohio St. 457, 3 N. E. 298; White *v.* Herndon, 15 Ohio Cir. Ct. 290, 8 Ohio Cir. Dec. 292.

Pennsylvania.— Stedman *v.* Poterie, 139 Pa. St. 100, 21 Atl. 219; Reed *v.* Garvin, 7 Serg. & R. 354; Barton *v.* Reynolds, 17 Pa. Super. Ct. 504; Ohlinger *v.* Phillips, 2 Woodw. 53.

Texas.— Patrick *v.* Hopkins County, (1887) 6 S. W. 626.

Virginia.— Smith *v.* Blackwell, 31 Gratt. 291.

Washington.— Wilson *v.* Seattle Dry Dock, etc., Co., 26 Wash. 297, 66 Pac. 384.

West Virginia.— Bodkin *v.* Arnold, 45 W. Va. 90, 30 S. E. 154; Gallaher *v.* Moundsville, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942.

United States.— McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 13 S. Ct. 170, 36 L. ed. 1079; Hickey *v.* Stewart, 3 How. 750, 11 L. ed. 814; Australian Knitting Co. *v.* Gormly, 138 Fed. 92; O'Brien *v.* Wheelock, 78 Fed. 673; Hurst *v.* Everett, 21 Fed. 218; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

See 30 Cent. Dig. tit. "Judgment," § 1015 *et seq.*; and other cases cited under the sections following.

Denial of certiorari.— The decision of an inferior court refusing to allow a certiorari is not such a final judgment as will constitute an estoppel. State *v.* Wood, 23 N. J. L. 560.

90. Dusing *v.* Nelson, 7 Colo. 184, 2 Pac. 922.

Illustrations.— A decree dissolving an injunction on the merits, where no relief but injunction was sought, is final and *res judicata*. Fluharty *v.* Mills, 49 W. Va. 446, 38 S. E. 521. So of a judgment in favor of a garnishee on his answer. Joseph *v.* Boldridge, 43 Mo. App. 333. So where, on appeal from a judgment overruling plaintiff's demurrer to the answer for insufficiency, judgment is affirmed on the ground that such demurrer should have been carried back to the complaint and sustained. State *v.* Krug, 94 Ind. 366. And a judgment for defendant for want of a replication to his answer is a final judgment. Newman *v.* Newton, 14 Fed. 634, 4 McCrary 293. So of an order making distribution of a fund, which determines positively the rights of the various parties in interest. Clifford *v.* Gridley, 113 Ill. App. 164. And so of an interlocutory judgment of partition and sale, which determines and declares the interest of each party in the property. Place *v.* Rogers, 101 N. Y. App. Div. 193, 91 N. Y. Suppl. 912.

91. *Alabama.*— McCurdy *v.* Middleton, 90 Ala. 99, 7 So. 655.

Arizona.— Reilly *v.* Perkins, 6 Ariz. 188, 56 Pac. 734.

Kentucky.— Schafer-Meyer Brewing Co. *v.* Hasselback, 56 S. W. 971, 22 Ky. L. Rep. 218.

Maryland.— Levy *v.* Levy, 28 Md. 25.

Missouri.— Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809.

Pennsylvania.— Com. *v.* McCleary, 92 Pa. St. 188.

Virginia.— Quarles *v.* Kerr, 14 Gratt. 48. Where a commissioner's report, classifying the debt of decedent to J among those of the general creditors of decedent, was confirmed, and a distribution *pro rata* among such creditors decreed, and there was still a fund in court to be distributed, it was held that the decree classifying the debt to J was an interlocutory one, and that J, on subsequently becoming a party, was not precluded from setting up a claim as a fiduciary creditor of decedent. Smith *v.* Blackwell, 31 Gratt. 291.

United States.— Roemer *v.* Neumann, 26 Fed. 332. A decree of a circuit court sustaining the validity of a patent, awarding a permanent injunction against infringement, and referring the case to a master for an accounting as to damages and profits, is interlocutory merely, and not final, and is not conclusive of the validity of the patent in a subsequent suit between the same parties prior to the rendition of final decree in the cause, although, on appeal from such interlocutory decree it has been affirmed by the circuit court of appeals. Australian Knitting Co. *v.* Gormly, 138 Fed. 92.

England.— Massam *v.* Thorley's Cattle

pel, however, does not depend on the form of the judgment, but upon its nature and effect; and although it may be final in form, it is no bar if it is only interlocutory in its nature.[92] On the other hand a decree is none the less conclusive because it was merely interlocutory at the commencement of the action in which it is set up as a bar, if it afterward ripened into a final decree.[93]

c. Conditional Judgment. A judgment which is not to become effective unless certain conditions are complied with, or which may be defeated and annulled by the performance of conditions subsequent, is no bar to a second action on the same subject-matter, unless it has become absolute by performance of the conditions in the one case, or failure to perform in the other.[94]

d. Pendency of Motion For New Trial. It has been held that the mere pendency of a motion for a new trial does not rob the judgment of its conclusive effect;[95] but if the motion is granted it throws the whole matter open, and the judgment cannot be pleaded in bar of a second action while the new trial is pending.[96] And a defendant cannot plead in bar a judgment recovered against him in a former action for the same cause, while in another suit, still pending, he is seeking to have such judgment set aside as erroneous.[97]

e. Pendency of Appeal.[98] In many states it is held that the pendency of an

Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966.

See 30 Cent. Dig. tit. "Judgment," § 1016.

Judgments on demurrer see *infra*, XIII, C, 9.

92. McLane *v.* Spence, 11 Ala. 172.

Test of finality.— A judgment or decree is final where it settles the ultimate rights and liabilities of the parties, although it may leave details for further ascertainment or determination. Thus, where a suit to enforce liens is heard by the court, the parties are conclusively bound by a decree therein finding the existence of the liens and definitely adjudicating this point, although it may leave the question of the amount and priority of the liens to be afterward investigated and decided. Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740. On the other hand a decree in a suit in equity which merely determines the invalidity of a contract and refers the case to a master to state an account between the parties is interlocutory, and not a final adjudication which can be pleaded in bar. Ogden City *v.* Weaver, 108 Fed. 564, 47 C. C. A. 485.

93. David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661.

94. *Illinois.*— Schmidt *v.* Glade, 126 Ill. 485, 18 N. E. 762.

Kentucky.— Mattingly *v.* Louisville, etc., R. Co., 92 Ky. 463, 25 S. W. 830.

Maryland.— Shafer *v.* Shafer, 6 Md. 518.

Massachusetts.— Flanders *v.* Hall, 159 Mass. 95, 34 N. E. 178; Nettleton *v.* Beach, 107 Mass. 499; Com. *v.* Pejepscut Proprietors, 7 Mass. 399.

Missouri.— Gibson *v.* Chouteau, 7 Mo. App. 1.

Rhode Island.— Hicks *v.* Aylsworth, 13 R. I. 562.

See 30 Cent. Dig. tit. "Judgment," §§ 1015, 1017.

Compare Martin *v.* Chapman, 1 Ala. 278; Albertson *v.* Williams, 97 N. C. 264, 1 S. E. 841.

A judgment for costs in partition, awarding execution if not paid in sixty days, is a final and not a conditional judgment. Sprott *v.* Reid, 3 Greene (Iowa) 489, 56 Am. Dec. 549.

95. *California.*— Harris *v.* Barnhart, 97 Cal. 546, 32 Pac. 589. But *compare* Fresno Milling Co. *v.* Fresno Canal, etc., Co., (1894) 36 Pac. 412; Brown *v.* Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *In re* Blythe, 99 Cal. 472, 34 Pac. 108; Naftzger *v.* Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23; People *v.* Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186.

Delaware.— Chase *v.* Jefferson, 1 Houst. 257.

Nevada.— Young *v.* Brehe, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892.

New York.— Blanchard *v.* Pompelly, Lalor 198.

Pennsylvania.— Casebeer *v.* Mowry, 55 Pa. St. 419, 93 Am. Dec. 766.

United States.— Hubbell *v.* U. S., 171 U. S. 203, 18 S. Ct. 828, 43 L. ed. 136.

Contra.— Taylor *v.* Smith, 4 Ga. 133; Rudolph *v.* North Chicago German Mut. F. Ins. Co., 71 Ill. 190; Fulliam *v.* Drake, 105 Iowa 615, 75 N. W. 479; Snow *v.* Rich, 22 Utah 123, 61 Pac. 336.

96. *Illinois.*— Preachers' Aid Soc. *v.* England, 106 Ill. 125; Sheldon *v.* Van Vleck, 106 Ill. 45.

Indiana.— Brown *v.* Cody, 115 Ind. 484, 18 N. E. 9.

Maryland.— Mahoney *v.* Ashton, 4 Harr. & M. 295.

Texas.— Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

Vermont.— Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

United States.— Lamprey *v.* Pike, 28 Fed. 30.

97. Hughes *v.* Dundee Mortg., etc., Co., 28 Fed. 40.

98. Conclusiveness of adjudication see *infra*, XIV, A, 4, g, (II).

appeal from a judgment, although it stays the enforcement of the judgment, does not affect its conclusive effect as evidence, and therefore does not prevent the judgment from being pleaded in bar of a second action for the same cause.[99] But in several others it is considered that while an appeal is pending the judgment lacks that character of finality which is necessary to constitute it an estoppel, and for that reason it cannot be set up as a bar to a new suit.[1] But in any case if the appeal asked for is not allowed or perfected, or is abandoned or withdrawn, the proceedings will not affect the operation of the judgment as an estoppel.[2]

f. Effect of Affirmance. A general affirmance of a judgment on appeal makes it *res judicata* as to all the issues, claims, or controversies involved in the

99. *Arkansas.*— Burgess *v.* Poole, 45 Ark. 373; Cloud *v.* Wiley, 29 Ark. 80.

Colorado.— Rockwell *v.* Lake County Dist. Ct., 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265. But *compare* Lake County *v.* Schradsky, 31 Colo. 178, 71 Pa. 1104.

Florida.— Where a court on appeal tries the cause *de novo*, and enters a judgment, and enforces it by its own process, a writ of error therefrom will, while pending, prevent the judgment from being used as an estoppel; but otherwise where the court issuing the writ of error does not try the cause anew, but on errors assigned, having power to affirm, reverse, or modify the judgment appealed from, or enter its own judgment. Reese *v.* Damato, 44 Fla. 692, 33 So. 462.

Illinois.— People *v.* Rickert, 159 Ill. 496, 42 N. E. 884; Moore *v.* Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563; Gaddis *v.* Leeson, 55 Ill. 522.

Indiana.— Buchanan *v.* Logansport, etc., R. Co., 71 Ind. 265.

Kansas.— Willard *v.* Ostrander, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294.

Kentucky.— Small *v.* Reeves, 76 S. W. 395, 25 Ky. L. Rep. 729.

Massachusetts.— Merriam *v.* Whittemore, 5 Gray 316. *Compare* Lockhead *v.* Jones, 137 Mass. 25.

Montana.— Curtis *v.* Donnell, 3 Mont. 211.

Nebraska.— Creighton *v.* Keith, 50 Nebr. 810, 70 N. W. 406.

New York.— Sullivan *v.* Ringler, 69 N. Y. App. Div. 388, 74 N. Y. Suppl. 978; Mercantile Nat. Bank *v.* Corn Exch. Bank, 73 Hun 78, 25 N. Y. Suppl. 1068; Burns *v.* Howard, 9 Abb. N. Cas. 321; Wilkes *v.* Henry, 4 Sandf. Ch. 390.

Pennsylvania.— Garvin *v.* Dawson, 13 Serg. & R. 246. *Compare* Small's Appeal, (1888) 15 Atl. 807; Souter *v.* Baymore, 7 Pa. St. 415, 47 Am. Dec. 518; Moorehouse *v.* Moorehouse, 7 Pa. Super. Ct. 287.

Wisconsin.— Smith *v.* Schreiner, 86 Wis. 19, 56 N. W. 160, 39 Am. St. Rep. 869. But *compare* Hazeltine *v.* Case, 46 Wis. 391, 1 N. W. 66, 32 Am. Rep. 715.

United States.— Ransom *v.* Pierre, 101 Fed. 665, 41 C. C. A. 585; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277.

See 30 Cent. Dig. tit. "Judgment," § 1024.

Decree not superseded.— Where a decree in equity adjudged that a deed of trust had been executed by a married woman to secure her own debt, and not that of her husband and was a valid conveyance of her land, such decree, although appealed from, but not superseded, was held *res judicata* of such question in a subsequent ejectment suit by the purchaser on foreclosure of the deed. Collier *v.* Alexander, (Ala. 1905) 38 So. 244.

1. *California.*— Fresno Milling Co. *v.* Fresno Canal, etc., Co., (1894) 36 Pac. 412; Brown *v.* Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; Story *v.* Story, etc., Commercial Co., 100 Cal. 41, 34 Pac. 675; *In re* Blythe, 99 Cal. 472, 34 Pac. 108; Naftzger *v.* Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23; Harris *v.* Barnhart, 97 Cal. 546, 32 Pac. 589; McGarrahan *v.* Maxwell, 28 Cal. 75.

Louisiana.— Millaudon's Succession, 22 La. Ann. 12; Byrne *v.* Prather, 14 La. Ann. 653; Bacon *v.* Dahlgreen, 7 La. Ann. 599; Escurix *v.* Daboval, 7 La. 575; Turnbull *v.* Cureton, 9 Mart. 37; Seville *v.* Chretien, 5 Mart. 275. *Compare* Gaines' Succession, 45 La. Ann. 1237, 14 So. 233.

Missouri.— Ketchum *v.* Thatcher, 12 Mo. App. 185.

Nevada.— Sherman *v.* Dilley, 3 Nev. 21.

New Hampshire.— Haynes *v.* Ordway, 52 N. H. 284.

New Jersey.— De Camp *v.* Miller, 44 N. J. L. 617.

Tennessee.— Delk *v.* Yelton, 103 Tenn. 476, 53 S. W. 729; Southern R. Co. *v.* Brigham, 95 Tenn. 624, 32 S. W. 762; Turley *v.* Turley, 85 Tenn. 251, 1 S. W. 891; Chilton *v.* Wilson, 9 Humphr. 399; W. V. Davidson Lumber Co. *v.* Jones, (Ch. App. 1901) 62 S. W. 386; Hall *v.* Calvert, (Ch. App. 1897) 46 S. W. 1120.

Texas.— Texas Trunk R. Co. *v.* Jackson, 85 Tex. 605, 22 S. W. 1030; Cunningham *v.* Holt, 12 Tex. Civ. App. 150, 33 S. W. 981; New York, etc., Steamship Co. *v.* Wright, (Civ. App. 1894) 26 S. W. 106. *Compare* Thompson *v.* Griffin, 69 Tex. 139, 6 S. W. 410; Westmoreland *v.* Richardson, 2 Tex. Civ. App. 175, 21 S. W. 167.

United States.— Tampa Waterworks Co. *v.* Tampa, 124 Fed. 932; Eastern Bldg., etc., Assoc. *v.* Welling, 103 Fed. 352; Sharon *v.* Hill, 26 Fed. 337, 11 Sawy. 291; New Orleans Nat. Banking Assoc. *v.* Adams, 18 Fed. Cas. No. 10,184, 3 Woods 21; Robinson *v.* Tuttle, 20 Fed. Cas. No. 11,968, 2 Hask. 76; Green *v.* U. S., 18 Ct. Cl. 93.

See 30 Cent. Dig. tit. "Judgment," § 1024.

2. Warder *v.* Rivers, 64 Iowa 412, 20 N. W. 739; Hubbell *v.* U. S., 171 U. S. 203, 18 S. Ct.

action and passed upon by the court below, although the appellate court does not cousider or decide upon all of them.[3] Also it has the effect to cure any irregularities in the action of the court below which might have interfered with the effect of the judgment as an estoppel.[4]

g. Judgment Reversed or Vacated.[5] When a judgment has been reversed on appeal, or vacated or set aside by the court which rendered it, it is deprived of its conclusive character, and thereafter it no longer stands as a bar to a further suit on the same cause of action.[6] But a secondary or dependent judgment may in

828, 43 L. ed. 136; Southern Pac. R. Co. *v.* U. S., 133 Fed. 662, 66 C. C. A. 560.

3. *California.*— People *v.* Skidmore, 27 Cal. 287.

Iowa.— Finch *v.* Hollinger, 46 Iowa 216.

Virginia.— Stuart *v.* Heiskell, 86 Va. 191, 9 S. E. 984.

Wisconsin.— Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464.

United States.— Russell *v.* Russell, 134 Fed. 840, 67 C. C. A. 436 [*reversing* 129 Fed. 434]; Oglesby *v.* Attrill, 20 Fed. 570.

See 30 Cent. Dig. tit. "Judgment," § 1026.

Compare Maloney *v.* Nelson, 12 N. Y. App. Div. 545, 42 N. Y. Suppl. 418. And see Turley *v.* Turley, 85 Tenn. 251, 1 S. W. 891.

4. Missouri Pac. R. Co. *v.* Haynes, 82 Tex. 448, 18 S. W. 605.

5. Conclusiveness of adjudication see *infra*, XIV, A, 4, g, (III).

6. *Alabama.*— Pope *v.* Nance, 1 Stew. 354, 18 Am. Dec. 60; Nance *v.* Pope, 1 Stew. 220.

California.— People *v.* Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Board of Education *v.* Fowler, 19 Cal. 11; Stearns *v.* Aguirre, 7 Cal. 443.

Georgia.— Taylor *v.* Smith, 4 Ga. 133.

Illinois.— Stubbings *v.* Durham, 210 Ill. 542, 71 N. E. 586; Pittsburgh, etc., R. Co. *v.* Reno, 123 Ill. 273, 14 N. E. 195; Chicago *v.* Hulbert, 205 Ill. 346, 68 N. E. 786; Chicago, etc., R. Co. *v.* Lee, 87 Ill. 454; Bonner *v.* Peterson, 44 Ill. 253; Ottawa *v.* Chicago, etc., R. Co., 25 Ill. 47; Chicago Forge, etc., Co. *v.* Rose, 69 Ill. App. 123; Chicago, etc., R. Co. *v.* Berg, 57 Ill. App. 521.

Indiana.— Indiana, etc., R. Co. *v.* Allen, 113 Ind. 581, 15 N. E. 446; Clodfelter *v.* Hulett, 92 Ind. 426.

Iowa.— Stanbrough *v.* Cook, 86 Iowa 740, 53 N. W. 131; Poole *v.* Seney, 70 Iowa 275, 24 N. W. 520, 30 N. W. 634; Edgar *v.* Greer, 10 Iowa 279.

Kansas.— King *v.* Mollohan, 61 Kan. 683, 60 Pac. 731.

Kentucky.— Frankfort *v.* Frankfort Deposit Bank, 111 Ky. 950, 65 S. W. 10, 23 Ky. L. Rep. 1285, 98 Am. St. Rep. 444; Gordon *v.* Phelps, 7 J. J. Marsh. 619; Parish *v.* Wood, 6 J. J. Marsh. 600; Cook *v.* Vimont, 6 T. B. Mon. 284, 17 Am. Dec. 157.

Louisiana.— Surget *v.* Newman, 43 La. Ann. 873, 9 So. 561; Jackson *v.* Tiernan, 15 La. 485.

Maryland.— Borden Min. Co. *v.* Barry, 17 Md. 419.

Massachusetts.— Goodrich *v.* Bodurtha, 6 Gray 323.

Michigan.— Porter *v.* Leache, 56 Mich. 40, 22 N. W. 104.

Minnesota.— Daley *v.* Mead, 40 Minn. 382, 42 N. W. 85.

Missouri.— Lilly *v.* Tobbein, (1890) 13 S. W. 1060; Atkison *v.* Dixon, 96 Mo. 582, 10 S. W. 163.

Nebraska.— Colby *v.* Parker, 34 Nebr. 510, 52 N. W. 693; Van Etten *v.* Kosters, 31 Nebr. 285, 47 N. W. 916; Merriam *v.* Dovey, 25 Nebr. 618, 41 N. W. 550.

New York.— *In re* Patterson, 146 N. Y. 327, 40 N. E. 990; Smith *v.* Frankfield, 77 N. Y. 414; O'Hanlon *v.* Scott, 89 Hun 44, 35 N. Y. Suppl. 31; Vaughan *v.* O'Brien, 57 Barb. 491; Hunt *v.* Hoboken Land, etc., Co., 1 Hilt. 161; McElroy *v.* Mumford, 16 N. Y. Suppl. 691; People *v.* McClave, 8 N. Y. Suppl. 504; Onderdonk *v.* Ranlett, 3 Hill 323; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603, 18 Wend. 107; Close *v.* Stuart, 4 Wend. 95. *Compare* Sinclair *v.* Hollister, 16 N. Y. Suppl. 529; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1. And see Platz *v.* Burton, etc., Cider, etc., Co., 7 Misc. 473, 28 N. Y. Suppl. 385, holding that a judgment and order of a county court, reversing a judgment in favor of plaintiff reciting that the testimony shows no cause of action against defendant, is rendered on the merits, and bars a subsequent action for the same cause, although the case was one in which the county court could not order a new trial.

North Carolina.— Person *v.* Montgomery, 120 N. C. 111, 26 S. E. 645.

Oregon.— Trotter *v.* Stayton, 45 Oreg. 301, 77 Pac. 395.

Pennsylvania.— Spees *v.* Boggs, 204 Pa. St. 504, 54 Atl. 346; *In re* Smith, 204 Pa. St. 337, 54 Atl. 174; Roll *v.* Davison, 165 Pa. St. 392, 30 Atl. 987; Jenkinson *v.* Hilands, 146 Pa. St. 380, 23 Atl. 394; Small's Appeal, (1888) 15 Atl. 807; Earnest *v.* Hoskins, 100 Pa. St. 551; Fries *v.* Pennsylvania R. Co., 98 Pa. St. 142; Mannerback *v.* Pennsylvania R. Co., 16 Pa. Super. Ct. 622.

South Carolina.— Thew *v.* Southern Porcelain Mfg. Co., 8 S. C. 286.

Tennessee.— Rosenbaum *v.* Davis, 106 Tenn. 51, 60 S. W. 497.

Texas.— Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743. *Compare* Stipe *v.* Shirley, 33 Tex. Civ. App. 223, 76 S. W. 307.

Virginia.— Flemings *v.* Riddick, 5 Gratt. 272, 50 Am. Dec. 119.

United States.— Bucher *v.* Cheshire R. Co., 125 U. S. 555, 8 S. Ct. 974, 31 L. ed. 795; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105, 7 S. Ct. 841, 30 L. ed. 905; Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Hennessy *v.* Tacoma Smelting, etc., Co., 129 Fed. 40, 64

some cases stand, although the original or principal judgment fails.[7] And the fact that an execution issued upon a judgment has been quashed does not entitle plaintiff to another judgment for the same debt.[8] A judgment vacating a judgment entered on confession, on the ground that the debt was contracted without authority and is not a valid obligation, is not confined in its operation to removing the judgment set aside from the record, but precludes the creditor from any other or further proceeding to enforce the demand.[9]

C. Decision on the Merits — 1. Necessity For Adjudication of Merits. A former judgment will not operate as a bar to a subsequent suit upon the same cause of action unless the proceedings and judgment in the first case involved or afforded full legal opportunity for an investigation and determination of the merits of the suit.[10] But although a judgment may have been rendered on tech-

C. C. A. 54; Empire State-Idaho Min., etc., Co. *v.* Bunker Hill, etc., Min., etc., Co., 121 Fed. 973, 58 C. C. A. 311; Gilbert *v.* American Surety Co., 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253; Freeman *v.* Clay, 52 Fed. 1, 2 C. C. A. 587; French *v.* Edwards, 9 Fed. Cas. No. 5,097, 4 Sawy. 125.

England.— Partington *v.* Hawthorne, 52 J. P. 807.

See 30 Cent. Dig. tit. "Judgment," § 1025.

Conclusive effect of judgment of reversal.— A judgment reversing a judgment of the court below is binding and conclusive, in respect to the points decided by it, upon the parties to the action and upon the lower court. Miller *v.* Barkeloo, 18 Ark. 292; Lovell *v.* Cragin, 136 U. S. 130, 10 S. Ct. 1024, 34 L. ed. 372.

7. Thus a decree confirming the title of a purchaser of land at an execution sale is conclusive against the parties and their privies, although the judgment on which the execution was issued is afterward reversed on writ of error. Gould *v.* Sternberg, 128 Ill. 510, 21 N. E. 628, 15 Am. St. Rep. 138. So in another case it appeared that an inferior court of the state of Kentucky had rendered a judgment deciding that taxes imposed upon certain property for a certain year were invalid and uncollectable, because a statute of that state created an irrevocable contract of exemption from taxation with respect to that property, which, under the federal constitution, could not be impaired by subsequent legislation. A federal circuit court, accepting this decision as *res judicata*, made a final decree enjoining the collection of taxes on the same property for another year. Afterward the judgment of the Kentucky court was reversed by the highest court of that state, and both the latter court and, in another case, the supreme court of the United States repudiated the idea that there was any contract exemption. And moreover it appeared to be the settled law of Kentucky that an adjudication in respect to taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years. Notwithstanding these facts, it was held that the decree of the circuit court, so long as it remained in force, was conclusive in the further proceedings had in the state court. Frankfort Deposit Bank *v.* Frankfort, 191 U. S. 499, 24 S. Ct. 154, 48 L. ed. 276.

8. Cundiff *v.* Trimble, 52 S. W. 940, 21 Ky. L. Rep. 657.

9. Thew *v.* Southern Porcelain Mfg. Co., 8 S. C. 286.

10. *Alabama.*— Perkins *v.* Moore, 16 Ala. 9; Pace *v.* Dossey, 1 Stew. 20.

Arizona.— Reilly *v.* Perkins, 6 Ariz. 188, 56 Pac. 734.

Arkansas.— Cannon *v.* State, 17 Ark. 365; Moss *v.* Ashbrooks, 12 Ark. 369.

California.— Nevills *v.* Shortridge, 146 Cal. 277, 79 Pac. 972; Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Waterman *v.* Morrill, 72 Cal. 48, 13 Pac. 52; Gray *v.* Noon, 66 Cal. 186, 4 Pac. 1191; Gray *v.* Dougherty, 25 Cal. 266.

Connecticut.— Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637.

Florida.— Armstrong *v.* Manatee County, (1905) 37 So. 938.

Georgia.— Callaway *v.* Irvin, 123 Ga. 344, 51 S. E. 477.

Illinois.— Chicago Terminal Transfer R. Co. *v.* Winslow, 216 Ill. 166, 74 N. E. 815; Lundy *v.* Mason, 174 Ill. 505, 51 N. E. 614; Vanlandingham *v.* Ryan, 17 Ill. 25; Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79.

Iowa.— Randolph *v.* Cottage Hospital, (1905) 103 N. W. 157; The Telegraph *v.* Lee, (1904) 98 N. W. 364; Corwin *v.* Wallace, 17 Iowa 374; Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396; Delany *v.* Reade, 4 Iowa 292.

Kansas.— Myers *v.* Coonradt, 28 Kan. 211.

Kentucky.— Birch *v.* Funk, 2 Metc. 544; Thomas *v.* Hite, 5 B. Mon. 590; Kendal *v.* Talbot, 1 A. K. Marsh. 321.

Maine.— Damren *v.* American Light, etc., Co., 95 Me. 278, 49 Atl. 1092.

Maryland.— Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943; Field *v.* Malster, 88 Md. 691, 41 Atl. 1087.

Massachusetts.— Stone *v.* Addy, 168 Mass. 26, 46 N. E. 431; Foster *v.* The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125; Morton *v.* Sweetser, 12 Allen 134.

Michigan.— Tucker *v.* Rohrback, 13 Mich. 73.

Minnesota.— Terryll *v.* Bailey, 27 Minn. 304, 7 N. W. 261; Gerrish *v.* Pratt, 6 Minn. 53.

Mississippi.— Johnson *v.* White, 13 Sm. & M. 584; Agnew *v.* McElroy, 10 Sm. & M. 552, 48 Am. Dec. 772.

nical grounds, or by dismissal, or generally not on the merits, yet the admissions made by a party in his pleadings in that suit may be received as evidence against him, although not conclusive, in a subsequent action between the same parties.[11]

2. WHAT CONSTITUTES JUDGMENT ON THE MERITS. A judgment is on the merits when it amounts to a decision as to the respective rights and liabilities of the parties, based on the ultimate fact or state of facts disclosed by the pleadings or evidence, or both, and upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions.[12] If the case is brought to an issue, heard upon evidence submitted pro and con, and decided by the verdict of a jury or the findings of a court, the judgment rendered is upon the merits.[13] But it is not necessary that there should have been a trial. If the judgment is general, and not based on any technical defect or objection, and the parties had a full legal opportunity to be heard on their respective claims and contentions, it is upon the merits, although there was no actual hearing or argu-

Missouri.— Barnett *v.* Smart, 158 Mo. 167, 59 S. W. 235; Verhein *v.* Schultz, 57 Mo. 326; Wells *v.* Moore, 49 Mo. 229; Bell *v.* Hoagland, 15 Mo. 360; Taylor *v.* Larkin, 12 Mo. 103, 49 Am. Dec. 119; Winham *v.* Kline, 77 Mo. App. 36.

Nebraska.— Burkholder *v.* Hollicheck, 4 Nebr. (Unoff.) 655, 95 N. W. 860; Walsh *v.* Walsh, 1 Nebr. (Unoff.) 719, 95 N. W. 1024.

New Hampshire.— Brackett *v.* Hoitt, 20 N. H. 257.

New Jersey.— Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449.

New York.— Stowell *v.* Chamberlain, 60 N. Y. 272; Ladew *v.* Hart, 8 N. Y. App. Div. 150, 40 N. Y. Suppl. 509; Reynolds *v.* Garner, 66 Barb. 319; Miller *v.* McGuckin, 15 Abb. N. Cas. 204; Vaughan *v.* O'Brien, 39 How. Pr. 515; Skinner *v.* Dayton, 19 Johns. 513, 10 Am. Dec. 286; People *v.* Barrett, 1 Johns. 66.

North Carolina.— Coleman *v.* Howell, 131 N. C. 125, 42 S. E. 555.

Ohio.— Porter *v.* Wagner, 36 Ohio St. 471; Cramer *v.* Moore, 36 Ohio St. 347; Mahaffey *v.* Rogers, 10 Ohio Cir. Ct. 24, 6 Ohio Cir. Dec. 88.

Pennsylvania.— Buchanan *v.* Banks, 203 Pa. St. 599, 53 Atl. 500; Haws *v.* Tiernan, 53 Pa. St. 192; Heikes *v.* Com., 26 Pa. St. 513; Carmony *v.* Hoober, 5 Pa. St. 305; Levison *v.* Blumenthal, 25 Pa. Super. Ct. 55; Keeler *v.* Com., 1 Hall L. J. 156.

Rhode Island.— Sayles *v.* Tibbitts, 5 R. I. 79.

South Carolina.— Roberts *v.* Jones, 71 S. C. 404, 51 S. E. 240 (holding that where a circuit court on appeal from a magistrate does not hear the case on the merits, his findings are not binding on a succeeding judge on appeal from a new trial ordered by such judge); Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675.

Tennessee.— Harris *v.* Columbia Water, etc., Co., 114 Tenn. 328, 85 S. W. 897.

Texas.— Philipowski *v.* Spencer, 63 Tex. 604; Cook *v.* Burnley, 45 Tex. 97; Houston *v.* Musgrove, 35 Tex. 594; Weathered *v.* Mays, 4 Tex. 387; Foster *v.* Wells, 4 Tex. 101.

Vermont.— Dunklee *v.* Goodenough, 63 Vt. 459, 21 Atl. 494; Swift *v.* Hamblin, Brayt. 189.

Washington.— Bartelt *v.* Seehorn, 25 Wash. 261, 65 Pac. 185.

United States.— Gould *v.* Evansville, etc., R. Co., 91 U. S. 526, 23 L. ed. 416; Hughes *v.* U. S., 4 Wall. 232, 18 L. ed. 303; Robinson *v.* American Car, etc., Co., 135 Fed. 693, 68 C. C. A. 331 [*affirming* 132 Fed. 165]; Billing *v.* Gilmer, 62 Fed. 661, 10 C. C. A. 579.

England.— Reg. *v.* May, 5 Q. B. D. 382, 49 L. J. M. C. 67, 42 L. T. Rep. N. S. 772, 28 Wkly. Rep. 918; Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Brandlyn *v.* Ord, 1 Atk. 571, 26 Eng. Reprint 359; Jenkins *v.* Merthyr Tydvil Urban Dist. Council, 80 L. T. Rep. N. S. 600.

Canada.— Creelman *v.* Stewart, 28 Nova Scotia 185; Chisholm *v.* Morse, 11 U. C. C. P. 589; McPhedran *v.* Lusher, 3 U. C. Q. B. O. S. 602; Baker *v.* Booth, 2 U. C. Q. B. O. S. 373.

See 30 Cent. Dig. tit. "Judgment," § 1008 *et seq.*

11. Bore *v.* Quierry, 4 Mart. (La.) 545, 6 Am. Dec. 713.

12. *Alabama.*— Hanchey *v.* Croskrey, 81 Ala. 149, 1 So. 259.

California.— People *v.* Skidmore, 27 Cal. 287.

Connecticut.— Johnson *v.* Sandford, 13 Conn. 461.

Iowa.— Trescott *v.* Barnes, 51 Iowa 409, 1 N. W. 660.

Maryland.— Williams *v.* Annapolis, 6 Harr. & J. 529.

New York.— Young *v.* Overacker, 2 Johns. 191.

North Carolina.— Davie *v.* Davis, 108 N. C. 501, 13 S. E. 240, 23 Am. St. Rep. 71.

Pennsylvania.— Besecher *v.* Flory, 176 Pa. St. 23, 34 Atl. 926; Brazier *v.* Banning, 20 Pa. St. 345.

Tennessee.— Parkes *v.* Clift, 9 Lea 524.

Texas.— Horton *v.* Hamilton, 20 Tex. 606.

Virginia.— Supervisors *v.* Catlett, 80 Va. 158, 9 S. E. 999.

United States.— Fourniquet *v.* Perkins, 7 How. 160, 12 L. ed. 650. And see *In re* Reynolds, 133 Fed. 585.

See 30 Cent. Dig. tit. "Judgment," § 1010.

13. Zimmerman *v.* Zimmerman, 15 Ill. 34; Landers *v.* George, 49 Ind. 309; Hamilton

ment on the facts of the case.[14] On the other hand the judgment is not on the merits if the case went off on any preliminary, subsidiary, or technical plea or objection.[15] It is immaterial what the judgment is called or how it is framed, if it really involved a consideration and determination of the merits.[16]

8. Judgments by Confession[17]—a. In General. A judgment entered upon confession without action is as conclusive as any other judgment, and operates as a merger of the cause of action, and while it remains in force plaintiff cannot maintain an action for the same claim or demand.[18] But this rule does not apply

Bldg. Assoc. *v.* Reynolds, 5 Duer (N. Y.) 671.

14. State *v.* Padgett, 19 Fla. 518. And see Buck *v.* Collins, 69 Me. 445, where it is said that a judgment will be regarded as rendered "on the merits," so as to operate as an estoppel, if the status of the action was such that the parties might have had their lawsuit disposed of according to their respective rights, if they had presented all the evidence, and the court had properly understood the facts and correctly applied the law.

Judgments by confession and default may be regarded as on the merits so as to bar subsequent suits, although there was no actual trial of the issues. See *infra*, XIII, C, 3, 5.

Claims withdrawn from jury.— Judgment in an action in which defendant pleaded a counter-claim is a bar to an independent action brought by him on the subject-matter of the counter-claim, although the court in the first action withdrew from the jury the consideration of the counter-claim, where it does not appear that it was so withdrawn for any technical reason. Glenn *v.* Savage, 14 Oreg. 567, 13 Pac. 442.

15. Surget *v.* Newman, 43 La. Ann. 873, 9 So. 561; German Exch. Bank *v.* Kroder, 14 Misc. (N. Y.) 179, 35 N. Y. Suppl. 380; Witcher *v.* Oldham, 4 Sneed (Tenn.) 220. And see Mertz *v.* Press, 99 N. Y. App. Div. 443, 91 N. Y. Suppl. 264.

Several defenses.— Estoppel by judgment is no defense to a suit by plaintiff, where in a former suit, jointly instituted by him and others, as to the same matter, defendant interposed several distinct defenses, some going to the merits, and one to the right to maintain the action, and it does not appear on which defense the judgment in his favor was rendered. Callaway *v.* Irvin, 123 Ga. 344, 51 S. E. 477.

Contempt proceedings.— A judgment declaring a party guilty of contempt is not a judgment on the merits of the controversy involved in the principal proceeding, and does not constitute an adjudication of the rights of the litigants. Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

Plea of res judicata.— A decision that the subject-matter of the suit has already been determined by a valid and subsisting judgment between the parties is a decision on the "merits" of the case. Buck *v.* Spofford, 35 Me. 526.

A judgment dissolving an injunction is often tantamount to a judgment of nonsuit, and in that case is not a bar; but it is otherwise if rendered after the general issue. Wells *v.* Hunter, 5 Mart. N. S. (La.) 119.

16. Elwell *v.* McQueen, 10 Wend. (N. Y.) 519.

Form of judgment.— Where judgment was rendered in a suit "that the plaintiff from having and maintaining his action should be barred, and that the defendant recover his costs," this was considered to be a judgment on the merits of the action. Dixon *v.* Sinclear, 4 Vt. 354, 24 Am. Dec. 610.

17. Conclusiveness of adjudication see *infra*, XIV, A, 4, b.

18. *Arkansas.*— Jeffries *v.* Morgan, 1 Ark. 169.

Delaware.— Solomon *v.* Loper, 4 Harr. 187.

Illinois.— Hall *v.* Jones, 32 Ill. 38; Lagerquist *v.* Williams, 74 Ill. App. 17.

Indiana.— Chapin *v.* McLaren, 105 Ind. 563, 5 N. E. 688; Hopper *v.* Lucas, 86 Ind. 43; Mavity *v.* Eastridge, 67 Ind. 211; Kennard *v.* Carter, 64 Ind. 31; Barnett *v.* Juday, 38 Ind. 86; Campbell *v.* Baldwin, 6 Blackf. 364.

Iowa.— Twogood *v.* Pence, 22 Iowa 543.

Michigan.— Town *v.* Smith, 14 Mich. 348.

New Jersey.— Dean *v.* Thatcher, 32 N. J. L. 470.

New York.— Davies *v.* New York, 93 N. Y. 250; Kirby *v.* Fitzgerald, 31 N. Y. 417; Neusbaum *v.* Keim, 24 N. Y. 325; Stone *v.* Williams, 40 Barb. 322; Sheldon *v.* Stryker, 34 Barb. 116; Griffin *v.* Mitchell, 2 Cow. 548.

North Carolina.— State *v.* Mangum, 28 N. C. 369.

Pennsylvania.— Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387, 6 Atl. 696; Weikel *v.* Long, 55 Pa. St. 238; Davenport *v.* Wright, 51 Pa. St. 292; Braddee *v.* Brownfield, 4 Watts 474; Dixon *v.* Miller, 20 Pa. Co. Ct. 335; Dwyer *v.* Wright, 14 Pa. Co. Ct. 406; Campbell *v.* Canon, Add. 267. But see Wistar *v.* McManes, 54 Pa. St. 318, 93 Am. Dec. 700.

South Dakota.— Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803.

Tennessee.— Goff *v.* Dabbs, 4 Baxt. 300.

Vermont.— Barnes *v.* Lapham, 28 Vt. 307.

United States.— Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

England.— Newington *v.* Levy, L. R. 5 C. P. 607, 39 L. J. C. P. 334, 23 L. T. Rep. N. S. 70, 18 Wkly. Rep. 1198 [*affirmed* in L. R. 6 C. P. 180, 40 L. J. C. P. 29, 23 L. T. Rep. N. S. 595, 19 Wkly. Rep. 473]. But see Goucher *v.* Clayton, 11 Jur. N. S. 107, 34 L. J. Ch. 239, 13 Wkly. Rep. 336.

See 30 Cent. Dig. tit. "Judgment," § 1011.

to a judgment by confession which has been entered without the knowledge or consent of the creditor,[19] or which has been set aside.[20] And a judgment against a defendant by confession does not preclude him from suing for a counter-claim, since he is not bound to present it as a set-off in the first suit.[21]

b. In Case of Joint Defendants. At common law it was the rule that a confession of judgment by one of several joint debtors or joint defendants, accepted by plaintiff, released the others and merged the cause of action, so that a subsequent suit could not be maintained upon it against those not joining in the confession.[22] But this rule has generally been relaxed by statute, so that a confession so entered will not prevent plaintiff from pursuing his remedies against the other defendants.[23] Judgment confessed by one partner for the firm without authority binds only that partner, but it bars another action for the same cause against the firm.[24]

4. Judgments by Agreement or Consent.[25] A judgment settled and entered in whole or in part by the agreement, consent, or compromise of the parties is no less effective as a bar or estoppel than one rendered upon contest and trial.[26] And

A warrant of attorney to confess a judgment on a debt due directly from defendant to plaintiff is not a collateral security merging the original debt. Sloo *v.* Lea, 18 Ohio 279.

Merger.— Acceptance of an offer of judgment and entry thereof will bar an action for any part of the claim embraced in the complaint and which might have been litigated. Davies *v.* New York, 93 N. Y. 250. See *infra*, XIII, C, 4, text and note 27.

Fraud and mistake.— And it has been held that a judgment by confession is, while subsisting, conclusive as to the amount of plaintiff's claim, although it can be clearly shown that there was a mistake as to the amount and that the mistake was due to the false and fraudulent representations of defendant. Solomon *v.* Loper, 4 Harr. (Del.) 187. *Compare supra*, XIII, B, 4, c.

Confession of plea.— If, when the plaintiff could reply an avoidance of a release, instead of doing so, he confesses such plea and receives the cost of the cause up to the time of pleading such plea, as entitled to do by rule of court, he is estopped from bringing any fresh action for any claim which he might have thus set up in the first action; for the effect of such confession is not that of a mere *nolle prosequi*, but of a final judgment for defendant. Newington *v.* Levy, L. R. 5 C. P. 607, 39 L. J. C. P. 334, 23 L. T. Rep. N. S. 70, 18 Wkly. Rep. 1198 [*affirmed* in L. R. 6 C. P. 180, 40 L. J. C. P. 29, 23 L. T. Rep. N. S. 595, 19 Wkly. Rep. 473].

19. A judgment by confession entered without the knowledge or consent of the creditor is invalid for all purposes until ratified by him, and is operative neither as an estoppel nor as a merger of the demand. Haggerty *v.* Juday, 58 Ind. 154. And see Wolf *v.* Wyeth, 11 Serg. & R. (Pa.) 149, holding that if a third person confesses judgment to plaintiff, for a simple contract debt due from defendant to plaintiff, the debt is not merged in the judgment.

20. Judgment by confession set aside because entered for more than was due and without an affidavit of indebtedness affords no protection to the judgment creditor for the seizure of goods under an execution issued thereon. Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

21. Kauff *v.* Messner, 4 Brewst. (Pa.) 98.

22. Hutchinson *v.* Brown, 19 D. C. 136; Shimer *v.* Isaac, Smith (Ind.) 377.

23. *District of Columbia.*— Harris *v.* Leonhardt, 2 App. Cas. 318.

Iowa.— Sherman *v.* Christy, 17 Iowa 322.

Michigan.— Beals *v.* Clinton County Cir. Judge, 91 Mich. 146, 51 N. W. 885.

New York.— See Heckemann *v.* Young, 134 N. Y. 170, 31 N. E. 513, 30 Am. St. Rep. 655; Harbeck *v.* Pupin, 123 N. Y. 115, 25 N. E. 311; Candee *v.* Smith, 93 N. Y. 349; Robinson *v.* Marks, 19 Hun 325; Kantrowitz *v.* Kulla, 20 Abb. N. Cas. 321.

Pennsylvania.— Wallace *v.* Fairman, 4 Watts 378; Beltzhoover *v.* Com., 1 Watts 126; Miller *v.* Reed, 3 Grant 51; Welsh *v.* Hirst, 1 Phila. 50.

Virginia.— Cahoon *v.* McCulloch, 92 Va. 177, 23 S. E. 225; Beazley *v.* Sims, 81 Va. 644.

West Virginia.— Snyder *v.* Snyder, 9 W. Va. 415.

See 30 Cent. Dig. tit. "Judgment," § 1012.

24. North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441.

25. Conclusiveness of adjudication see *infra*, XIV, A, 4, b.

26. *Alabama.*— Adler *v.* Van Kirk Land, etc., Co., 114 Ala. 551, 21 So. 490, 62 Am. St. Rep. 133; Mobile Bank *v.* Mobile, etc., R. Co., 69 Ala. 305.

California.— McCreery *v.* Fuller, 63 Cal. 30.

Georgia.— Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430.

Illinois.— Dintleman *v.* Gilbert, 140 Ill. 597, 30 N. E. 766; Illinois Cent. R. Co. *v.* Allen, 39 Ill. 205.

Indiana.— A judgment, entered by agreement by a court of general jurisdiction, having power in a proper case to render such a judgment, and having the parties before it, will bind those by whose agreement it was entered, although the pleadings would not,

on the same principle a judgment entered on plaintiff's acceptance of defendant's offer of judgment for a certain amount, or admission that so much is due, will estop him from suing for the remainder of his claim, unless the judgment is rendered without prejudice to his right to do so, or on leave given him for that purpose.[27] It has been held in equity, however, that where a decree was the result of consent of the parties, and not of the judgment of the court, the court may, if its aid in enforcing the same is asked by a subsequent bill, refuse to treat it as *res judicata* and decree contrary to what it finds to be the right of the case.[28] And a consent judgment which has been set aside or vacated by consent will not operate as *res judicata*.[29]

5. JUDGMENTS BY DEFAULT.[30] A judgment rendered upon default, in a case where the court has full jurisdiction, operates as a merger of the cause of action and prevents any further suit upon the same subject-matter.[31] But this rule does

in a contested case, authorize such a judgment. Fletcher *v.* Holmes, 25 Ind. 458. See Louisville, etc., R. Co. *v.* Terrell, 12 Ind. App. 328, 39 N. E. 295.

Louisiana.— Dunn *v.* Pipes, 20 La. Ann. 276; Greenwood *v.* New Orleans, 12 La. Ann. 426; Girod *v.* Pargoud, 11 La. Ann. 329. But *compare* Luckett *v.* Canadian, etc., Mortg., etc., Co., 47 La. Ann. 1259, 17 So. 836. And see Peyton *v.* Enos, 16 La. Ann. 135, holding that a judgment by consent in a possessory action is no bar to a subsequent petitory action respecting the same property.

Massachusetts.— Chamberlain *v.* Preble, 11 Allen 370; Hanscom *v.* Hewes, 12 Gray 334; Sargent *v.* Fitzpatrick, 4 Gray 511.

Michigan.— Rayl *v.* Hammond, 100 Mich. 140, 58 N. W. 654.

Mississippi.—Blackbourn *v.* Senatobia Educational Assoc., 74 Miss. 852, 21 So. 798.

New Jersey.— Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York.— Brown *v.* Sprague, 5 Den. 545; French *v.* Shotwell, 5 Johns. Ch. 555.

North Carolina.— Donnelly *v.* Wilcox, 113 N. C. 408, 18 S. E. 339.

Ohio.— Weaver *v.* Carnahan, 37 Ohio St. 363.

Pennsylvania.— Powell *v.* Shank, 3 Watts 235.

Tennessee.— Fry *v.* Taylor, 1 Head 594; Wynne *v.* Spiers, 7 Humphr. 394.

Texas.— Patrick *v.* Roach, 21 Tex. 251.

Virginia.— Richmond, etc., R. Co. *v.* Shippen, 2 Patt. & H. 327.

West Virginia.— Lockwood *v.* Holliday, 16 W. Va. 651.

United States.— Harding *v.* Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. ed. 1066 [*reversing* 140 Cal. 690, 74 Pac. 284]; Derby *v.* Jacques, 7 Fed. Cas. No. 3,817.

England.— *In re* South American, etc., Co., [1895] 1 Ch. 37, 71 L. T. Rep. N. S. 594, 12 Reports 1, 43 Wkly. Rep. 131. And see Serrono *v.* Noel, 15 Q. B. D. 549; Parker *v.* Simpson, 18 Wkly. Rep. 204. *Compare*, however, Jenkins *v.* Robertson, L. R. 1 H. L. Sc. 117.

See 30 Cent. Dig. tit. "Judgment," § 1011.

But a judgment against a corporation based on admissions of its directors does not prevent an action by the corporation relating to the same matter. Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. 103.

27. Davies *v.* New York, 93 N. Y. 250; Duncan *v.* Ainslie, 26 Barb. (N. Y.) 199; Freudenheim *v.* Raduziner, 15 Misc. (N. Y.) 124, 36 N. Y. Suppl. 815 [*reversing* 12 Misc. 654 (*affirming* 10 Misc. 500, 31 N. Y. Suppl. 194)]; Powers *v.* McBride, 1 N. Y. City Ct. 481; Blydenstein *v.* Hazeltine, 140 Pa. St. 120, 21 Atl. 306; Stedman *v.* Poterie, 139 Pa. St. 100, 21 Atl. 219; Dodds *v.* Blackstock, 1 Pittsb. (Pa.) 46.

28. Lawrence Mfg. Co. *v.* Janesville Cotton Mills, 138 U. S. 552, 11 S. Ct. 402, 34 L. ed. 1005, holding therefore that a decree against a corporation entered by consent was not *res judicata* on a subsequent bill to carry it into execution by enforcing it against a successor of the former defendant, it appearing that the latter would have prevailed if it had defended the suit against it. See also Wadhams *v.* Gay, 73 Ill. 415; Lamb *v.* Gatlin, 22 N. C. 37; Edgerton *v.* Muse, 2 Hill Eq. (S. C.) 51; Texas, etc., R. Co. *v.* Southern Pac. R. Co., 137 U. S. 48, 11 S. Ct. 10, 34 L. ed. 614; Brownsville Taxing-Dist. *v.* Loague, 129 U. S. 493, 9 S. Ct. 327, 32 L. ed. 780; Gay *v.* Parpart, 106 U. S. 679, 1 S. Ct. 456, 27 L. ed. 256; Bean *v.* Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252; Jenkins *v.* Robertson, L. R. 1 H. L. Sc. 117; Hamilton *v.* Houghton, 2 Bligh 169, 4 Eng. Reprint 290; O'Connell *v.* McNamara, 2 C. & L. 266 note, 3 Dr. & War. 411.

29. Minor *v.* New Orleans, 115 La. 301, 38 So. 999, holding that where a consent judgment between plaintiff and defendant was vacated by their consent before the rendition of a final judgment on the merits, a warrantor, no party to the consent proceedings, was bound by the last judgment, and could not plead the consent decree as *res judicata*.

30. Conclusiveness of adjudication see *infra*, XIV, A, 4, c.

31. *California.*— Morenhout *v.* Higuera, 32 Cal. 289; Kittridge *v.* Stevens, 16 Cal. 381; Stearns *v.* Aguirre, 6 Cal. 176.

Georgia.— Harbig *v.* Freund, 69 Ga. 180.

Indiana.— Lawrence *v.* Beecher, 116 Ind. 312, 19 N. E. 143; Irwin *v.* Helgenberg, 21 Ind. 106; Patterson *v.* State, 12 Ind. 86.

Kansas.— Johnson *v.* Jones, 58 Kan. 745, 51 Pac. 224.

not apply where defendant was summoned by publication only,[32] nor in the case of a merely interlocutory judgment by default.[33] And where one of two joint defendants defaults, it does not merge the cause of action as to the other.[34] Although some cases maintain that a judgment by default is conclusive against all defenses which might have been pleaded or set up in the original action,[35] yet an exception is generally made as to such affirmative defenses as defendant might either have pleaded or reserved to serve as the basis for an independent action.[36]

6. JUDGMENTS OF NONSUIT[37] — a. In General. A judgment of nonsuit is not a judgment on the merits, and therefore it is no bar to another suit upon the same

Kentucky.— Ligon *v.* Triplett, 12 B. Mon. 283.

Louisiana.— Searcy *v.* Creditors, 46 La. Ann. 376, 14 So. 910; Waddell *v.* Judson, 12 La. Ann. 13; Gilman *v.* Hoseley, 5 Mart. N. S. 661.

Maine.— White *v.* Savage, 94 Me. 138, 47 Atl. 138.

Massachusetts.— Reid *v.* Holmes, 127 Mass. 326; Gaskill *v.* Dudley, 6 Metc. 546, 39 Am. Dec. 750; Briggs *v.* Richmond, 10 Pick. 391, 20 Am. Dec. 526; Minor *v.* Walter, 17 Mass. 237; Thatcher *v.* Gammon, 12 Mass. 268.

Minnesota.— Northern Trust Co. *v.* Crystal Lake Cemetery Assoc., 67 Minn. 131, 69 N. W. 708; Davison *v.* Harmon, 65 Minn. 402, 67 N. W. 1015; Doyle *v.* Hallam, 21 Minn. 515.

Missouri.— St. Louis *v.* Lang, 131 Mo. 412, 33 S. W. 54.

New York.— Argall *v.* Pitts, 78 N. Y. 239; Jarvis *v.* Driggs, 69 N. Y. 143; Brown *v.* New York, 66 N. Y. 385; O'Hanlon *v.* Scott, 89 Hun 44, 35 N. Y. Suppl. 31; Henriques *v.* Miriam Osborn Memorial Home, 22 Misc. 653, 51 N. Y. Suppl. 133.

North Carolina.— Brown *v.* McKee, 108 N. C. 387, 13 S. E. 8.

Ohio.— McCurdy *v.* Baughman, 43 Ohio St. 78, 1 N. E. 93.

Oklahoma.— Crawford *v.* Noble County, 8 Okla. 450, 58 Pac. 616.

South Dakota.— Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803.

Texas.— Ellis *v.* Mills, 28 Tex. 584.

Vermont.— Evarts *v.* Gove, 10 Vt. 161.

Wisconsin.— Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

United States.— Groton Bridge, etc., Co. *v.* Clark Pressed Brick Co., 126 Fed. 552; Garner *v.* Second Nat. Bank, 89 Fed. 636; Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87; Derby *v.* Jacques, 7 Fed. Cas. No. 3,817, 1 Cliff. 425. And see Philadelphia Third Nat. Bank *v.* Atlantic City, 130 Fed. 751, 65 C. C. A. 177.

England.— Leonard *v.* Simpson, 2 Bing. N. Cas. 176, 1 Hodges 251, 4 L. J. C. P. 302, 2 Scott 335, 29 E. C. L. 489.

See 30 Cent. Dig. tit. "Judgment," § 1013.

32. Clark *v.* Hammett, 27 Fed. 339. And see Smith *v.* Curtiss, 38 Mich. 393.

33. Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209. But an interlocutory judgment by default will prevent defendant from using, for the purpose of reducing the damages, any testimony which would have defeated the action had a plea in bar been put in. Garrard *v.* Dollar, 49 N. C. 175, 67 Am. Dec. 271. See *supra*, IV, D, 3.

34. Netso *v.* Foss, 21 Fla. 143; Johnson *v.* Vutrick, 14 Ind. 216.

Garnishment.— A judgment by default against a garnishee who failed to appear in the attachment proceeding in which he was garnished is no bar to a subsequent action against him on the debt for which he was garnished, by one claiming to own or hold the same by assignment from defendant in the attachment proceeding, prior to the garnishment. McPhail *v.* Hyatt, 29 Iowa 137.

35. McCalley *v.* Wilburn, 77 Ala. 549. And see Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803. *Contra*, Howlett *v.* Tarte, 10 C. B. N. S. 813, 31 L. J. C. P. 146, 9 Wkly. Rep. 368, 100 E. C. L. 813. And see State *v.* Cooley, 65 Minn. 406, 68 N. W. 66, 58 Minn. 514, 60 N. W. 338.

Same defense to two causes of action.— Where the maker of two notes, who has a valid defense common to both of them, allows judgment to be taken by default in an action on one of the notes, he is not thereby precluded from setting up said defense in an action on the other. Hughes *v.* Alexander, 5 Duer (N. Y.) 488.

36. Part payment.— Rowe *v.* Smith, 16 Mass. 306; Fowler *v.* Shearer, 7 Mass. 14; Smith *v.* Weeks, 26 Barb. (N. Y.) 463; Woodward *v.* Hill, 6 Wis. 143. *Contra*, Kent *v.* Riley, 47 S. W. 1082, 20 Ky. L. Rep. 912; Fuller *v.* Shattuck, 13 Gray (Mass.) 70, 74 Am. Dec. 622; Binck *v.* Wood, 43 Barb. (N. Y.) 315.

Set-off.— Litch *v.* Clinch, 35 Ill. App. 654; Wright *v.* Salisbury, 46 Mo. 26; Kezar *v.* Elkins, 52 Vt. 119.

Breach of covenant or warranty.— Riley *v.* Hale, 158 Mass. 240, 33 N. E. 491; Bodurtha *v.* Phelon, 13 Gray (Mass.) 413; Bascom *v.* Manning, 52 N. H. 132.

Dissolution of defendant corporation.— State *v.* Cooley, 58 Minn. 514, 60 N. W. 338.

Release.— A judgment for rent due under a lease, rendered upon default, without release pleaded, is not conclusive evidence, in an action for subsequently accruing rent, that the term had not been surrendered and the tenant released from liability prior to the commencement of the first action; for the release not having been set up, that question was not involved in the judgment. Hanham *v.* Sherman, 114 Mass. 19.

37. Conclusiveness of adjudication see *infra*, XIV, A, 4, d.

cause of action.[88] And in this particular it makes no difference how the judgment

88. *Alabama.*— Beadle *v.* Graham, 66 Ala. 99; Wise *v.* Falkner, 45 Ala. 471; Savage *v.* Gunter, 32 Ala. 467; Wyatt *v.* Judge, 7 Port. 37.

Arkansas.— Hallum *v.* Dickinson, 47 Ark. 120, 14 S. W. 477.

California.— Jacob *v.* Day, 111 Cal. 571, 44 Pac. 243; Gates *v.* McLean, (1886) 9 Pac. 938; Fleming *v.* Hawley, 65 Cal. 492, 4 Pac. 494; Merritt *v.* Campbell, 47 Cal. 542; Wood *v.* Ramond, 42 Cal. 643.

Colorado.— Westcott *v.* Bock, 2 Colo. 335.

Georgia.— Ryan *v.* Fulghum, 96 Ga. 234, 22 S. E. 940; Hendrick *v.* Clonts, 91 Ga. 196, 17 S. E. 119; Smith *v.* Floyd County, 85 Ga. 420, 11 S. E. 850.

Illinois.— Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371; Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439; Gibbs *v.* Jones, 46 Ill. 319; Howes *v.* Austin, 35 Ill. 396; Bates *v.* Jenkins, 1 Ill. 411.

Indiana.— Miller *v.* Mans, 28 Ind. 194; Crews *v.* Cleghorn, 13 Ind. 438; Daggett *v.* Robins, 2 Blackf. 415, 21 Am. Dec. 752.

Iowa.— Boyer *v.* Austin, 54 Iowa 402, 6 N. W. 585; Delany *v.* Reade, 4 Iowa 292; Mason *v.* Lewis, 1 Greene 494.

Kentucky.— Harris *v.* Tiffany, 8 B. Mon. 225; Dana *v.* Gill, 5 J. J. Marsh. 242, 20 Am. Dec. 255; Crawford *v.* Summers, 3 J. J. Marsh. 300.

Louisiana.— Johnson *v.* New Orleans, 50 La. Ann. 920, 24 So. 635; Weinberger *v.* Merchants' Ins. Co., 41 La. Ann. 31, 5 So. 728; Eastin *v.* Osborn, 26 La. Ann. 153; Andrew's Succession, 16 La. Ann. 197; Allinet *v.* His Creditors, 15 La. Ann. 130; Fisk *v.* Parker, 14 La. Ann. 491; D'Arensbourg *v.* Chauvin, 6 La. Ann. 778; Lynch *v.* Kitchen, 2 La. Ann. 843; Rutledge *v.* Barnes, 12 Rob. 160; Mills *v.* Webber, 7 Rob. 108; Gilbert *v.* Burg, 7 Rob. 15; Jordan *v.* Black, 1 Rob. 575; Perrillat *v.* Puech, 2 La. 428; Dicks *v.* Cash, 7 Mart. N. S. 362; Thomas *v.* Callihan, 6 Mart. N. S. 329; Baudin *v.* Roliff, 1 Mart. N. S. 165, 14 Am. Dec. 181.

Maine.— Pendergrass *v.* York Mfg. Co., 76 Me. 509; Haynes *v.* Jackson, 66 Me. 93; Jay *v.* Carthage, 48 Me. 353; Brett *v.* Marston, 45 Me. 401; Knox *v.* Waldoborough, 5 Me. 185.

Massachusetts.— Marsh *v.* Hammond, 11 Allen 483; Clapp *v.* Thomas, 5 Allen 158; Jones *v.* Howard, 3 Allen 223; Ensign *v.* Bartholomew, 1 Metc. 274; Bridge *v.* Sumner, 1 Pick. 371; Morgan *v.* Bliss, 2 Mass. 111.

Missouri.— Wiethaupt *v.* St. Louis, 158 Mo. 655, 59 S. W. 960; Ellington *v.* Crockett, 13 Mo. 72; Taylor *v.* Larkin, 12 Mo. 103, 49 Am. Dec. 119.

Nebraska.— Cheney *v.* Cooper, 14 Nebr. 415, 16 N. W. 471.

Nevada.— Van Vliet *v.* Olin, 1 Nev. 495.

New Hampshire.— Eaton *v.* George, 40 N. H. 258; Holton *v.* Gleason, 26 N. H. 501.

New Jersey.— Beckett *v.* Stone, 60 N. J. L. 23, 36 Atl. 880; Snowhill *v.* Hillyer, 9 N. J. L. 38.

New York.— Honsinger *v.* Union Carriage, etc., Co., 175 N. Y. 229, 67 N. E. 436; Wheeler *v.* Ruckman, 51 N. Y. 391; People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Audubon *v.* Excelsior Ins. Co., 27 N. Y. 216; Merrick *v.* Hill, 77 Hun 30, 28 N. Y. Suppl. 237; People *v.* Eckler, 19 Hun 609; Reynolds *v.* Garner, 66 Barb. 319; Bate *v.* Fellowes, 4 Bosw. 638; Galletto *v.* Serafino, 40 Misc. 671, 83 N. Y. Suppl. 184; Elwell *v.* McQueen, 10 Wend. 519; Youle *v.* Brotherton, 10 Johns. 363. *Compare* Sullivan *v.* Brewster, 1 E. D. Smith 681.

North Carolina.— Prevatt *v.* Harrelson, 132 N. C. 250, 43 S. E. 800; Wharton *v.* Currituck County Com'rs, 82 N. C. 11; Gibbs *v.* Williams, 53 N. C. 391.

Ohio.— Holland *v.* Hatch, 15 Ohio St. 464.

Oregon.— Hughes *v.* Walker, 14 Oreg. 481, 13 Pac. 450.

Pennsylvania.— Vought *v.* Sober, 73 Pa. St. 49; Haws *v.* Tiernan, 53 Pa. St. 192; Blair *v.* McLean, 25 Pa. St. 77; Fisher *v.* Longnecker, 8 Pa. St. 410; Fleming *v.* Insurance Co., Brightly 102.

Rhode Island.— Robinson *v.* Merchants', etc., Transp. Co., 16 R. I. 637, 19 Atl. 113.

South Carolina.— Whaley *v.* Stevens, 24 S. C. 479; McEwen *v.* Mazyck, 3 Rich. 210; Foreman *v.* Sandefur, 1 Brev. 474. *Compare* Napier *v.* Gidiere, 7 Rich. Eq. 254.

Tennessee.— Illinois Cent. R. Co. *v.* Bentz, 108 Tenn. 670, 69 S. W. 317, 91 Am. St. Rep. 763, 58 L. R. A. 690; Hooper *v.* Atlanta, etc., R. Co., 107 Tenn. 712, 65 S. W. 405.

Texas.— Foster *v.* Wells, 4 Tex. 101; Pillow *v.* Eliot, 25 Tex. Suppl. 322; Long *v.* Behan, 19 Tex. Civ. App. 325, 48 S. W. 555; Brainerd *v.* Bute, (Civ. App. 1898) 44 S. W. 575.

Utah.— Guthiel *v.* Gilmer, 27 Utah 496, 76 Pac. 628.

Virginia.— Wortham *v.* Com., 5 Rand. 669.

Washington.— Union Bank *v.* Nelson, 32 Wash. 208, 73 Pac. 372.

United States.— Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 14 S. Ct. 140, 37 L. ed. 1107; Manhattan L. Ins. Co. *v.* Broughton, 109 U. S. 121, 3 S. Ct. 99, 27 L. ed. 878; Haldeman *v.* U. S., 91 U. S. 584, 23 L. ed. 433; Homer *v.* Brown, 16 How. 354, 14 L. ed. 970; McClaine *v.* Rankin, 119 Fed. 110, 56 C. C. A. 160; Union Bank *v.* Oxford, 90 Fed. 7; Hammergen *v.* Schurmeier, 3 Fed. 77, 1 McCrary 436; Derby *v.* Jacques, 7 Fed. Cas. No. 3,817, 1 Cliff. 425; Evans *v.* White, 8 Fed. Cas. No. 4,572*a*, Hempst. 296; Greely *v.* Smith, 10 Fed. Cas. No. 5,749, 1 Woodb. & M. 181; Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262; Book *v.* U. S., 31 Ct. Cl. 272.

See 30 Cent. Dig. tit. "Judgment," § 1031.

Contra, under rule of court.— Poyser *v.* Minors, 7 Q. B. D. 329.

Test case.— But where several suits were pending between the same plaintiff and differ-

may be framed nor what it may be called.[39] Nor is it material that the nonsuit was compulsory or ordered upon the failure of plaintiff's evidence.[40] But it has been held that a compulsory nonsuit ordered by a justice of the peace, having no authority to give such a judgment, must be taken as equivalent to a judgment that plaintiff has no cause of action, and therefore will be a bar to another suit.[41]

b. Non Prosequitur. A judgment of *non prosequitur* has no greater effect as an estoppel than a judgment of nonsuit, and does not bar another action for the same cause.[42]

c. Retraxit. A retraxit is an open and voluntary renunciation by plaintiff in open court of his suit or cause of action, and a judgment entered thereon is a bar to any further suit upon the same cause of action.[43]

ent defendants, and it was agreed by all parties that the suits should be stayed and should await the event of a suit between other parties in which the same questions arose, it was held that a judgment in that suit would operate as an estoppel between the parties to the agreement, even though the judgment was one of nonsuit. Brown *v.* Sprague, 5 Den. (N. Y.) 545.

39. State *v.* Anderson, 26 Fla. 240, 8 So. 1; Smith *v.* McMillan, 90 Hun (N. Y.) 542, 36 N. Y. Suppl. 24. Thus the entry of "neither party," that is, neither party proceeds further with the action, is no evidence of an adjudication of the merits and no bar to a future action; it is merely equivalent to a nonsuit and default by consent. Marsh *v.* Hammond, 11 Allen (Mass.) 483. So of a record entry that plaintiff's writ, on his failing to appear, was "abated and dismissed." Haws *v.* Tiernan, 53 Pa. St. 192. And the same is true of a judgment simply dismissing the demand of an intervener, on the ground that he was absent and not represented at the trial of the cause. Bourg *v.* Gerding, 33 La. Ann. 1369.

40. *California.*— Wood *v.* Ramond, 42 Cal. 643.

Colorado.— Denver, etc., R. Co. *v.* Iles, 25 Colo. 19, 53 Pac. 222.

Illinois.— Howes *v.* Austin, 35 Ill. 396.

Maine.— Pendergrass *v.* York Mfg. Co., 76 Me. 509.

Massachusetts.— Morgan *v.* Bliss, 2 Mass. 111.

Missouri.— Hudson-Kimberly Pub. Co. *v.* Young, 90 Mo. App. 505; National Water Works Co. *v.* Kansas City School Dist., 23 Mo. App. 227.

New York.— Elwell *v.* McQueen, 10 Wend. 519. And see Reynolds *v.* Garner, 66 Barb. 319, holding that a judgment of nonsuit granted because the evidence failed to show that defendant made the contract sued on does not estop defendant from setting up the contract in a subsequent action by plaintiff against him thereon.

Pennsylvania.— Bournonville *v.* Goodall, 10 Pa. St. 133; Fleming *v.* Insurance Co., 4 Pa. L. J. Rep. 54.

Wisconsin.— Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; Gummer *v.* Omro, 50 Wis. 247, 6 N. W. 885.

Contra.— Ordway *v.* Boston, etc., R. Co., 69 N. H. 429, 45 Atl. 243.

41. Lawver *v.* Walls, 17 Pa. St. 75; Gould *v.* Crawford, 2 Pa. St. 89. And see Moreland Tp. *v.* Gordner, 109 Pa. St. 116. *Contra*, Gillilan *v.* Spratt, 3 Daly (N. Y.) 440.

42. Howes *v.* Austin, 35 Ill. 396; Lambert *v.* Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; Foster *v.* Wells, 4 Tex. 101; Gabrielson *v.* Waydell, 67 Fed. 342; Book *v.* U. S., 31 Ct. Cl. 272.

But in Maryland a verdict for nominal damages, followed by a judgment of *non pros.* is a conclusive adjudication of the amount of the debt. Berkley *v.* Wilson, 87 Md. 219, 39 Atl. 502.

43. *Alabama.*— Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Evans *v.* McMahan, 1 Ala. 45.

Arkansas.— Harris *v.* Preston, 10 Ark. 201.

Georgia.— Cunningham *v.* Schley, 68 Ga. 105.

Indiana.— Lambert *v.* Sandford, 2 Blackf. 137, 18 Am. Dec. 149.

Mississippi.— Coffman *v.* Brown, 7 Sm. & M. 125, 45 Am. Dec. 299.

Pennsylvania.— Lowry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501.

England.— Beecher *v.* Shirley, Cro. Jac. 211.

Canada.— Exchange Bank *v.* Gilman, 17 Can. Sup. Ct. 108.

What constitutes retraxit.— A judgment upon motion of defendant's attorney of record, with the consent of plaintiff's attorney, that "it appearing that the subject-matter of this suit has been adjusted and settled by the parties, it is therefore ordered that this cause be and the same is hereby dismissed," is held to be a judgment on the merits, final in form and nature, being in the nature of a retraxit, and therefore a bar to a subsequent suit against defendant on the same cause of action. U. S. *v.* Parker, 120 U. S. 89, 7 S. Ct. 454, 30 L. ed. 601. But it has been held that a judgment in the nature of a retraxit must be entered by plaintiff personally, and cannot be effected by stipulation of counsel, so as to bar plaintiff's subsequent action on the same claim. Hallack *v.* Loft, 19 Colo. 74, 34 Pac. 568.

A nominal plaintiff, assignor of a chose in action, suing for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with defendant, create a valid bar against any subsequent suit for the same cause of action. This, it is said,

7. Judgments on Dismissal or Discontinuance [44] — a. Dismissal of Bill or Suit in General. The dismissal of a complaint in an action at law, even after plaintiff has put in his evidence, when in the nature of a judgment of nonsuit or *non prosequitur* or a judgment on a plea in abatement, is not such a judgment on the merits as will bar a second suit on the same cause of action.[45] This is the case not only where the complaint is dismissed because of plaintiff's failure to appear,[46] but also where the dismissal is based on his failure to establish his cause of action by his evidence.[47] The same rule applies to suits in equity; if a bill was dismissed without a hearing or examination into the merits, it will be no bar to another bill or to an action at law for the same cause.[48]

would not be a retraxit, and if it were it would not avail the parties, being procured by fraud. Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 4 L. ed. 79.

44. Conclusiveness of adjudication see infra, XIV, A, 4, d.

45. *California.*— Parks *v.* Dunlap, 86 Cal. 189, 25 Pac. 916.

Colorado.— Charles *v.* People's Ins. Co., 3 Colo. 419; Fairbanks *v.* Kent, 16 Colo. App. 35, 63 Pac. 707.

Georgia.— Herndon *v.* Black, 97 Ga. 327, 22 S. E. 924; Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55.

Illinois.— McDonald *v.* Stark, 176 Ill. 456, 52 N. E. 37; Gerber *v.* Gerber, 155 Ill. 219, 40 N. E. 581; Durham *v.* Stubbings, 111 Ill. App. 10; Mobile, etc., R. Co. *v.* Healy, 100 Ill. App. 586; Jones *v.* Hunter, 32 Ill. App. 445.

Indiana.— Crews *v.* Cleghorn, 13 Ind. 438; McWhorter *v.* Norris, 9 Ind. App. 490, 34 N. E. 854, 37 N. E. 21.

Kentucky.— Hibler *v.* Shipp, 78 Ky. 64. But see Carlisle *v.* Howes, 43 S. W. 191, 19 Ky. L. Rep. 1238, holding that the dismissal of an action is conclusive unless the pleadings and judgment show that the case was not heard and determined on its merits.

Louisiana.— Bourg *v.* Gerding, 33 La. Ann. 1369; Fisk *v.* Parker, 14 La. Ann. 491.

Maine.— Tuck *v.* Moses, 58 Me. 461.

Missouri.— Murphy *v.* Creath, 26 Mo. App. 581.

Montana.— Dahler *v.* Steele, 1 Mont. 206.

Nebraska.— Maywood Bank *v.* McAllister, 56 Nebr. 188, 76 N. W. 552; Philpott *v.* Brown, 16 Nebr. 387, 20 N. W. 288.

New York.— Hauselt *v.* Patterson, 124 N. Y. 349, 26 N. E. 937; People *v.* Kingston, 101 N. Y. 82, 4 N. E. 348; Wheeler *v.* Ruckman, 51 N. Y. 391; MacArdell *v.* Olcott, 62 N. Y. App. Div. 127, 70 N. Y. Suppl. 930; Dexter *v.* Clark, 35 Barb. 271; Coit *v.* Beard, 33 Barb. 357; Mechanics' Banking Assoc. *v.* Mariposa Co., 7 Rob. 225; Harrison *v.* Wood, 2 Duer 50; Smith *v.* Ferris, 1 Daly 18; Gould *v.* Chicago, etc., R. Co., 15 N. Y. Suppl. 895; Coit *v.* Bland, 12 Abb. Pr. 462; Lightbody *v.* Potter, 10 Wend. 534.

North Carolina.— Campbell *v.* Potts, 119 N. C. 530, 26 S. E. 50; Bond *v.* McNider, 25 N. C. 440.

Ohio.— Lent *v.* Curtis, 24 Ohio Cir. Ct. 592.

Oregon.— Hughes *v.* Walker, 14 Oreg. 481, 13 Pac. 450.

Rhode Island.— Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639.

Tennessee.— Henderson *v.* King, 4 Hayw. 94.

Texas.— Jackson *v.* Elliott, 49 Tex. 62; Bailey *v.* Knight, 8 Tex. 58; Kopf *v.* Huckins, 11 Tex. Civ. App. 86, 32 S. W. 41.

Virginia.— Tate *v.* New York Bank, 96 Va. 765, 32 S. E. 476.

Wisconsin.— Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238; Hackett *v.* Bonnell, 16 Wis. 471.

United States.— Hukill *v.* Maysville, etc., R. Co., 72 Fed. 745.

See 30 Cent. Dig. tit. "Judgment," § 1028.

Dismissal on the merits see *infra*, XIII, C, 7, d.

46. Hibler *v.* Shipp, 78 Ky. 64; Miller *v.* McGuckin, 15 Abb. N. Cas. (N. Y.) 204.

47. Andrews *v.* School Dist. No. 4, 35 Minn. 70, 27 N. W. 303; Craver *v.* Christian, 34 Minn. 397, 26 N. W. 8; New York, etc., Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557; Woods *v.* Lindvall, 48 Fed. 62, 1 C. C. A. 37.

Dismissal on the merits see *infra*, XIII, C, 7, d.

48. *Alabama.*—Burgess *v.* American Mortg. Co., 119 Ala. 669, 24 So. 727; Fitzpatrick *v.* Featherstone, 3 Ala. 40.

Georgia.—Justices Morgan County Inferior Ct. *v.* Selman, 6 Ga. 432.

Illinois.— Gage *v.* Ewing, 114 Ill. 15, 28 N. E. 379; McKinney *v.* Finch, 2 Ill. 152; Follett *v.* Brown, 114 Ill. App. 14, holding that an action on the case for deceit is not barred by a decree in equity dismissing a bill based on the same matters for want of equity.

Indiana.— Estep *v.* Larsh, 21 Ind. 190.

Louisiana.—Clay *v.* His Creditors, 9 Mart. 519.

Michigan.— Detroit, etc., R. Co. *v.* McCammon, 108 Mich. 368, 66 N. W. 471.

Mississippi.— Nevill *v.* Matthews, Walk. 377.

Missouri.— Barnett *v.* Swart, 158 Mo. 167, 59 S. W. 235.

New Jersey.— Henninger *v.* Heald, 51 N. J. Eq. 74, 26 Atl. 449; Eastwood *v.* Worrall, (Ch. 1886) 5 Atl. 180.

Ohio.— Porter *v.* Wagner, 36 Ohio St. 471; Cramer *v.* Moore, 36 Ohio St. 347; Loudenback *v.* Collins, 4 Ohio St. 251.

Pennsylvania.— Tutton *v.* Addams, 45 Pa. St. 67; Yost *v.* Cowden, 7 Montg. Co. Rep. 73.

Tennessee.— Wallace *v.* Goodlett, 104 Tenn.

b. Voluntary Dismissal or Discontinuance. A voluntary discontinuance of a cause by plaintiff, or the dismissal of the action on his motion, does not amount to a judgment on the merits and therefore will not bar a new action on the same subject-matter.[49] Even after the sustaining of a demurrer to the declaration or

670, 58 S. W. 343; Mabry *v.* Churchwell, 1 Lea 416.

Texas.— Cook *v.* Burnley, 45 Tex. 97.

Wisconsin.— State *v.* Larrabee, 3 Pinn. 166, 3 Chandl. 179.

United States.— Hughes *v.* U. S., 4 Wall. 232, 18 L. ed. 303; Clark *v.* Bernhard Mattress Co., 82 Fed. 339; Grubb *v.* Clayton, 11 Fed. Cas. No. 5,849*a*, Brunn. Col. Cas. 30, 3 N. C. 378; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,267, 3 Story 299; Sarchet *v.* The General Isaac Davis, 21 Fed. Cas. No. 12,357, Crabbe 185. See Wright *v.* Deklyne, 30 Fed. Cas. No. 18,076, Pet. C. C. 199, holding that the dismissal of a bill in a court of chancery is not conclusive against the complainant in a court of law, although the subject-matter of the bill and the suit may be the same.

England.— Beere *v.* Fleming, 13 Ir. C. L. 506. But see Jones *v.* Nixon, Younge 359. See 30 Cent. Dig. tit. "Judgment," § 1028.

49. *Alabama.*—Burgess *v.* American Mortg. Co., 119 Ala. 669, 24 So. 727; Wise *v.* Falkner, 45 Ala. 471. But *compare* Strang *v.* Moog, 72 Ala. 460.

Arkansas.— Martin *v.* Hodge, 47 Ark. 378, 1 S. W. 694, 58 Am. Rep. 763.

California.— Pierce *v.* Hilton, 102 Cal. 276, 36 Pac. 595.

Colorado.— Martin *v.* McCarthy, 3 Colo. App. 37, 32 Pac. 551.

Connecticut.— Anderson *v.* Gregory, 43 Conn. 61.

Georgia.— Alabama Great Southern R. Co. *v.* Blevins, 92 Ga. 522, 17 S. E. 836; Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55; Walker *v.* Bivins, 57 Ga. 322.

Illinois.— Sheldon *v.* Van Vleck, 106 Ill. 45; Mey *v.* Gulliman, 105 Ill. 272.

Indiana.— Walker *v.* Heller, 73 Ind. 46; Miller *v.* Mans, 28 Ind. 194; McWhorter *v.* Norris, 9 Ind. App. 490, 34 N. E. 854, 37 N. E. 21. In a case where a complainant in chancery moved the court to dismiss the bill "without prejudice," but the court refused to do this and dismissed the bill "with prejudice," it was held that the dismissal would nevertheless be no bar to another suit for the same cause. Vaneman *v.* Fairbrother, 7 Blackf. 541. But see McFadden *v.* Schroeder, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711, holding that a judgment in replevin for the return of the property is none the less conclusive as to the title of the parties because plaintiff dismissed the action, as he thereby practically confessed that he had no right to the property.

Iowa.—Woodward *v.* Jackson, 85 Iowa 432, 52 N. W. 358; Smith *v.* Swan, 69 Iowa 412, 29 N. W. 402; Dalhoff *v.* Coffman, 37 Iowa 283; Delany *v.* Reade, 4 Iowa 292.

Kentucky.— Maddox *v.* Graham, 2 Metc. 56; Harris *v.* Tiffany, 8 B. Mon. 225; Griffin *v.* Griffin, 8 B. Mon. 120; Weingartner *v.* Missouri Lumber, etc., Co., 44 S. W. 355, 19 Ky. L. Rep. 1941.

Massachusetts.— White *v.* New Bedford Cotton Waste Corp., 178 Mass. 20, 59 N. E. 642.

Michigan.—Shank *v.* Woodworth, 111 Mich. 642, 70 N. W. 140.

Minnesota.— Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

Mississippi.— Coffman *v.* Brown, 7 Sm. & M. 125. But see Phillips *v.* Wormley, 58 Miss. 398, holding that if a suit in equity is dismissed by plaintiff after being set down for final hearing this is equivalent to a dismissal on the merits unless otherwise ordered by the court, and may be pleaded in bar of another suit.

Missouri.— Mumma *v.* Staudte, 36 Mo. App. 695. *Compare* Richardson *v.* Jones, 16 Mo. 177.

Nebraska.— Oliver *v.* Lansing, 48 Nebr. 338, 67 N. W. 195.

New Hampshire.— Cook *v.* Lee, 72 N. H. 569, 58 Atl. 511.

New York.— Loeb *v.* Willis, 100 N. Y. 231, 3 N. E. 177; White *v.* Whiting, 8 Daly 23; Conrow *v.* Branscom, 3 N. Y. St. 129; Jones *v.* Underwood, 13 Abb. Pr. 393; Gillilan *v.* Spratt, 41 How. Pr. 27.

Pennsylvania.—Blair *v.* McLean, 25 Pa. St. 77; Gibson *v.* Gibson, 20 Pa. St. 9; Lewry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501; Riddle *v.* Tidball, 2 Am. L. Reg. 120; Lancaster Bank *v.* McCall, 4 Pa. L. J. 287. But an entry by plaintiff in the docket, "Ended, and debt and costs paid," is a bar to a new suit for the same cause of action. Phillips *v.* Israel, 10 Serg. & R. 391.

Rhode Island.— Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639.

South Carolina.— Dunham *v.* Carson, 37 S. C. 269, 15 S. E. 960; Wadsworthville Poor School *v.* Meetze, 4 Rich. 50.

Tennessee.— Lindsay *v.* Allen, 112 Tenn. 637, 82 S. W. 171; Jones *v.* Walker, 6 Yerg. 427.

Texas.— Scherff *v.* Missouri Pac. R. Co., 81 Tex. 471, 17 S. W. 39, 26 Am. St. Rep. 828; Foster *v.* Wells, 4 Tex. 101; Kopf *v.* Huckins, 11 Tex. Civ. App. 86, 32 S. W. 41. And see Logan *v.* Stephens County, 88 Tex. 283, 83 S. W. 365.

Virginia.— Muse *v.* Farmers' Bank, 27 Gratt. 252; Coffman *v.* Russell, 4 Munf. 207.

West Virginia.— Seabright *v.* Seabright, 28 W. Va. 412.

United States.— Bryar *v.* Campbell, 177 U. S. 649, 20 S. Ct. 794, 44 L. ed. 926; Walden *v.* Bodley, 14 Pet. 156, 10 L. ed. 398; Badger *v.* Badger, 2 Fed. Cas. No. 717, 1 Cliff. 237; Bingham *v.* Wilkins, 3 Fed. Cas. No. 1,416, Crabbe 50; Grubb *v.* Clayton, 11

complaint, plaintiff may voluntarily dismiss his action, and if he does so the dismissal will not bar a new suit.[50] And the rule is the same where plaintiff dismisses after the rendition of a judgment and the taking of an appeal, or after a reversal of the judgment on appeal,[51] or after the setting aside of a verdict and the grant of a new trial.[52]

c. Dismissal Pursuant to Agreement. It is generally held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, amounts to a conclusive adjustment and adjudication of the merits of the controversy, in the absence of anything in the agreement or the judgment to the contrary, and therefore will bar another action for the same cause.[53] But to have this effect the judgment must have been upon the same identical cause of action as that presented in suit,[54] and the theory of the two actions with respect to the legal effect of the facts in issue must be the same.[55]

Fed. Cas. No. 5,849*a*, Brunn Col. Cas. 30, 3 N. C. 378; Holmes *v.* The Lodemia, 12 Fed. Cas. No. 6,642, Crabbe 434; Thompson *v.* Jewett, 23 Fed. Cas. No. 13,961.

See 30 Cent. Dig. tit. "Judgment," § 1030.

Contra.— See Fonda *v.* Denton, 13 La. Ann. 343.

50. *California.*— Sivers *v.* Sivers, 97 Cal. 518, 32 Pac. 571.

Colorado.— Gallup *v.* Lichter, 4 Colo. App. 296, 35 Pac. 985.

Iowa.— Harrison *v.* Hartford F. Ins. Co., (1899) 80 N. W. 309.

Maryland.— State *v.* Jenkins, 70 Md. 472, 17 Atl. 392.

Ohio.— McGatrick *v.* Wason, 4 Ohio St. 566.

Texas.— Scherff *v.* Missouri Pac. R. Co., 81 Tex. 471, 17 S. W. 39, 26 Am. St. Rep. 828.

See 30 Cent. Dig. tit. "Judgment," § 1041.

51. *Michigan.*— Franks *v.* Fechheimer, 44 Mich. 177, 6 N. W. 215.

Missouri.— Norton *v.* Bohart, 105 Mo. 615, 16 S. W. 598.

Nebraska.— Home F. Ins. Co. *v.* Deets, 54 Nebr. 620, 74 N. W. 1088.

Ohio.— Holland *v.* Hatch, 15 Ohio St. 464.

Pennsylvania.— Williamson *v.* Yarnall, 12 Phila. 198.

Tennessee.— Dossett *v.* Miller, 3 Sneed 72. But see Croft *v.* Johnson, 8 Baxt. 390.

See 30 Cent. Dig. tit. "Judgment," §§ 1042, 1043.

Contra.— Small *v.* Haskins, 26 Vt. 209.

52. Sheldon *v.* Van Vleck, 106 Ill. 45; Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867; Coffman *v.* Russell, 4 Munf. (Va.) 207; Fraser *v.* Weller, 9 Fed. Cas. No. 5,064, 6 McLean 11. But *compare* Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180; Cunningham *v.* Milwaukee, 13 Wis. 120.

53. *California.*—Crossman *v.* Davis, 79 Cal. 603, 21 Pac. 963; Merritt *v.* Campbell, 47 Cal. 542.

Colorado.— Ford *v.* Roberts, 14 Colo. 291, 23 Pac. 322.

Iowa.— Bowen *v.* Duffie, 66 Iowa 88, 23 N. W. 277; Heironymus *v.* Heironymus, 64 Iowa 81, 19 N. W. 855. *Compare* Allison *v.* Hess, 28 Iowa 388.

Kentucky.— Jarboe *v.* Smith, 10 B. Mon. 257, 52 Am. Dec. 541; Commonwealth Bank *v.* Hopkins, 2 Dana 395.

Maryland.— Tabler *v.* Castle, 22 Md. 94.

Minnesota.— Cameron *v.* Chicago, etc., R. Co., 51 Minn. 153, 53 N. W. 199.

Nevada.— Phillpotts *v.* Blasdel, 10 Nev. 19.

New Hampshire.— Bell *v.* New England Malt Co., 65 N. H. 25, 17 Atl. 1059. But a discontinuance by agreement, before a hearing on the merits, of a petition by one town against another for equitable contribution to the expense of building a bridge, is not a bar to another petition for the same purpose. Hudson *v.* Nashua, 62 N. H. 591.

New York.— Brooks *v.* New York, 57 Hun 104, 10 N. Y. Suppl. 773; Murray *v.* Jibson, 22 Hun 386; Woodford *v.* Rasbach, 6 N. Y. Civ. Proc. 315.

Texas.— Gee *v.* Burt, (Civ. App. 1895) 33 S. W. 553.

Vermont.— Pelton *v.* Mott, 11 Vt. 148, 34 Am. Dec. 678.

Virginia.— Wohlford *v.* Compton, 79 Va. 333; Hoover *v.* Mitchell, 25 Gratt. 387.

West Virginia.— Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199. *Compare* Stockton *v.* Copeland, 30 W. Va. 674, 5 S. E. 143.

United States.— U. S. *v.* Parker, 120 U. S. 89, 7 S. Ct. 454, 20 L. ed. 601; Nashville, etc., R. Co. *v.* U. S., 113 U. S. 261, 5 S. Ct. 460, 28 L. ed. 971. See Haldeman *v.* U. S., 91 U. S. 584, 23 L. ed. 433; Kelly *v.* Milan, 21 Fed. 842; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,266, 3 Story 181. *Compare* Hoffman *v.* Porter, 12 Fed. Cas. No. 6,577, 2 Brock. 156. A judgment of dismissal by consent which shows on its face that it is not the result of an adjustment of the controversy is not a bar to a subsequent suit. Marshall *v.* Otto, 59 Fed. 249.

See 30 Cent. Dig. tit. "Judgment," § 1033.

Contra.— Knox *v.* Waldoborough, 5 Me. 185; Butchers' Slaughtering, etc., Assoc. *v.* Boston, 137 Mass. 186; Jordan *v.* Siefert, 126 Mass. 25; Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234; Lowndes *v.* Fishburne, 69 S. C. 308, 48 S. E. 264; Lindsay *v.* Allen, 112 Tenn. 637, 82 S. W. 171; Bishop *v.* McGillis, 82 Wis. 120, 51 N. W. 1075.

54. Donahue *v.* Drexler, 82 Ky. 154, 56 Am. Rep. 886.

55. Thus the dismissal by consent of an action in which plaintiff claims lands as

d. Dismissal on the Merits.[56] A final decree in chancery regularly dismissing a bill on the merits, or the equivalent dismissal of a civil action, when the matters of the bill or complaint have been passed on, and without any reservation of the complainant's right to sue thereafter, is a bar to any new bill or complaint between the same parties on the same matter.[57] The general rule is that while a

owner under a conveyance will not estop him from maintaining a subsequent suit, brought on the theory that the same conveyance was a mortgage, and claiming payment thereunder or else foreclosure. Nevin *v.* Lulu, etc., Silver Min. Co., 10 Colo. 357, 15 Pac. 611. And see *infra*, XIII, D, 1, c.

56. Conclusiveness of adjudication see *infra*, XIV, A, 4, d.

57. *Alabama.*— Penny *v.* British, etc., Mortg. Co., 132 Ala. 357, 31 So. 96; Hale *v.* Goodbar, 81 Ala. 108, 2 So. 467; Strang *v.* Moog, 72 Ala. 460; Tankersly *v.* Pettis, 71 Ala. 179.

Arkansas.— Moss *v.* Ashbrooks, 12 Ark. 369.

Connecticut.— Munson *v.* Munson, 30 Conn. 425. But *compare* Neville *v.* Litchfield Carriage Co., 47 Conn. 167; Abbe *v.* Goodwin, 7 Conn. 377.

Delaware.— Cochran *v.* Couper, 2 Del. Ch. 27.

District of Columbia.— Wagenhurst *v.* Wineland, 22 App. Cas. 356.

Georgia.— Turner *v.* Cates, 90 Ga. 731, 16 S. E. 971; Kimbro *v.* Virginia, etc., Air Line R. Co., 56 Ga. 185; Black *v.* Black, 27 Ga. 40.

Illinois.— McChesney *v.* Chicago, 161 Ill. 110, 43 N. E. 702; Knowlton *v.* Hanbury, 117 Ill. 471, 5 N. E. 581; Tilley *v.* Bridges, 105 Ill. 336; Garrick *v.* Chamberlain, 97 Ill. 620; Armstead *v.* Blickman, 51 Ill. App. 470.

Indiana.— Stults *v.* Forst, 135 Ind. 297, 34 N. E. 1125.

Iowa.— Scully *v.* Chicago, etc., R. Co., 46 Iowa 528; Campbell *v.* Ayres, 18 Iowa 252.

Kansas.— Goodman *v.* Malcolm, 5 Kan. App. 285, 48 Pac. 439. An order on plaintiff's motion dismissing a case "with prejudice" is a final disposition of the controversy, and unless reversed is a bar to a future action. Hargis *v.* Robinson, 70 Kan. 589, 79 Pac. 119.

Kentucky.— Brothers *v.* Higgins, 5 J. J. Marsh. 658; Thompson *v.* Clay, 3 T. B. Mon. 359, 16 Am. Dec. 108.

Louisiana.— Bledsoe *v.* Erwin, 33 La. Ann. 615.

Maryland.— Tifel *v.* Jenkins, 95 Md. 665, 53 Atl. 429; Martin *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218; Barrick *v.* Homer, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283; Royston *v.* Horner, 75 Md. 557, 24 Atl. 25.

Massachusetts.— Bradley *v.* Bradley, 160 Mass. 258, 35 N. E. 482; Blackinton *v.* Blackinton, 113 Mass. 231; Lewis *v.* Lewis, 106 Mass. 309; Foote *v.* Gibbs, 1 Gray 412; Bigelow *v.* Winsor, 1 Gray 299.

Michigan.— Sayers *v.* Auditor-Gen., 124 Mich. 259, 82 N. W. 1045 (holding that a decree dismissing a bill to set aside a tax deed bars mandamus to compel the auditor-general to cancel the deed); Detroit, etc., R. Co. *v.* McCammon, 108 Mich. 368, 66 N. W. 471.

Minnesota.— Day *v.* Mountin, 89 Minn. 297, 94 N. W. 887; State *v.* Hard, 25 Minn. 460.

Mississippi.— Hodge *v.* Mitchell, 27 Miss. 560, 61 Am. Dec. 524; Pugh *v.* Holt, 27 Miss. 461.

Missouri.— McReynolds *v.* Kansas City, etc., R. Co., 34 Mo. App. 581.

Nebraska.— Carroll *v.* Patrick, 23 Nebr. 834, 37 N. W. 671.

New Hampshire.— Forist *v.* Bellows, 59 N. H. 229.

New York.— Maeder *v.* Wexler, 182 N. Y. 519, 74 N. E. 1120 [*affirming* 98 N. Y. App. Div. 68, 90 N. Y. Suppl. 598]; Bostwick *v.* Abbott, 40 Barb. 331; Lansing *v.* Russell, 13 Barb. 510; Vowell *v.* Twenty-Third St. R. Co., 14 Misc. 538, 35 N. Y. Suppl. 1082; Holmes *v.* Remsen, 7 Johns. Ch. 286; Neafie *v.* Neafie, 7 Johns. Ch. 1, 11 Am. Dec. 380; Perine *v.* Dunn, 4 Johns. Ch. 140.

North Carolina.— Jenkins *v.* Johnston, 57 N. C. 149. See also Massey *v.* Lemon, 27 N. C. 557.

Ohio.— Wilcox *v.* Balger, 6 Ohio 406.

Pennsylvania.— Kelsey *v.* Murphy, 26 Pa. St. 78; Evans *v.* Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

South Carolina.— State *v.* Chester, etc., R. Co., 13 S. C. 290.

Tennessee.— Williams *v.* Hollingsworth, 5 Lea 358.

Vermont.— Pelton *v.* Mott, 11 Vt. 148, 34 Am. Dec. 678.

Virginia.— Taylor *v.* Yarbrough, 13 Gratt. 183; Holliday *v.* Coleman, 2 Munf. 162.

West Virginia.— Watson *v.* Watson, 45 W. Va. 290, 31 S. E. 939; Kinports *v.* Rawson, 36 W. Va. 237, 15 S. E. 66.

United States.— Baker *v.* Cummings, 181 U. S. 117, 21 S. Ct. 578, 45 L. ed. 776; Albright *v.* Oyster, 140 U. S. 493, 11 S. Ct. 916, 35 L. ed. 534; Lyon *v.* Perin, etc., Mfg. Co., 125 U. S. 698, 8 S. Ct. 1024, 31 L. ed. 839; Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004; Durant *v.* Essex Co., 7 Wall. 107, 19 L. ed. 154; Parrish *v.* Ferris, 2 Black 606, 17 L. ed. 317; Hepburn *v.* Dunlop, 1 Wheat. 179, 4 L. ed. 65; Indian Land, etc., Co. *v.* Schoenfelt, 135 Fed. 484, 68 C. C. A. 196; Equitable Trust Co. *v.* Smith, 77 Fed. 677, 23 C. C. A. 394; Billing *v.* Gilmer, 60 Fed. 332, 8 C. C. A. 645; Messinger *v.* New England Mut. L. Ins. Co., 59 Fed. 416; Oyster *v.* Oyster, 28 Fed. 909; Barker *v.* Stowe, 11 Fed. 303, 20 Blatchf. 185. But *compare* Tyler *v.* Hyde, 24 Fed. Cas. No. 14,309, 2 Blatchf. 308.

England.— Lockyer *v.* Ferryman, 2 App. Cas. 519; *In re* May, 28 Ch. D. 516, 54 L. J.

dismissal in advance of any trial or hearing is not thus conclusive,[58] yet if both parties have been heard and have introduced testimony, or had an opportunity to do so, and the court, upon consideration of the law and facts as thus presented, dismisses the action, it is not a mere nonsuit, but a judgment on the merits and a bar to any further suit on the same cause of action.[59] But this consequence ensues only when the second action is upon the identical cause of action and between the same parties or their privies,[60] and is brought or prosecuted upon the

Ch. 338, 52 L. T. Rep. N. S. 79, 33 Wkly. Rep. 917; Tredegar *v.* Windus, L. R. 19 Eq. 607, 44 L. J. Ch. 268, 32 L. T. Rep. N. S. 596, 23 Wkly. Rep. 511; Bushby *v.* Ellis, 17 Beav. 279, 51 Eng. Reprint 1041; Peterborough *v.* Germaine, 6 Bro. P. C. 1, 2 Eng. Reprint 893; Jones *v.* Nixon, Younge 359.

See 30 Cent. Dig. tit. "Judgment," § 1028 *et seq.*

On hearing.— The decree must have been ordered upon a hearing of the parties or on the merits of the cause. Gage *v.* Ewing, 114 Ill. 15, 28 N. E. 379; Detroit, etc., R. Co. *v.* McCammon, 108 Mich. 368, 66 N. W. 471; Clark *v.* Bernhard Mattress Co., 82 Fed. 339; Sarchet *v.* The General Isaac Davis, 21 Fed. Cas. No. 12,357, Crabbe 185. See *supra*, XIII, C, 7, a. But when the cause has been set down for hearing after replication and an order closing the proofs, a decree dismissing the bill is a bar to a subsequent suit, although no proofs were in fact taken and the decree was taken by default at the hearing. Ogsbury *v.* La Farge, 2 N. Y. 113.

Dismissing amended bill.— A decree, in terms dismissing an amended bill for want of equity, dismisses the original bill as amended; and is therefore conclusive as to the claim made by the plaintiff in the original bill. Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332.

Voluntary dismissal.— Where the complainant in equity is allowed to have his bill dismissed, before the hearing, upon his own motion and the payment of costs, this is no adjudication of the merits, and has no greater effect than a nonsuit at law. Walden *v.* Bodley, 14 Pet. (U. S.) 156, 10 L. ed. 398; Badger *v.* Badger, 2 Fed. Cas. No. 717, 1 Cliff. 237. And see *supra*, XIII, C, 7, b.

Ground of dismissal.— Where an essential allegation was wanting in a complaint, to which a demurrer was sustained, a subsequent decree of dismissal is not a bar to a second suit to enforce the same right. O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004. See *infra*, XIII, C, 7, i, (v), 9.

Remedy at law.— In several cases it is held that the dismissal of a bill seeking equitable relief in respect to a cause of action or an instrument on which the party can sue at law is no bar to an action at law upon the same matter, although the decree does not state the dismissal to have been without prejudice. Porter *v.* Wagner, 36 Ohio St. 471; Cramer *v.* Moore, 36 Ohio St. 347; Beere *v.* Fleming, 13 Ir. C. L. 506. But *compare* Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694. See *infra*, XIII, C, 7, j, text and note 89.

Federal and state courts.— The dismissal of a bill by a federal court, appearing by the record to have been ordered on the merits, is a bar to a subsequent action in a state court. Scully *v.* Chicago, etc., R. Co., 46 Iowa 528.

Divided court.— A final decree of dismissal is none the less a bar because the record shows that it was passed by a divided court. Durant *v.* Essex Co., 8 Allen (Mass.) 103, 85 Am. Dec. 685.

Defect in pleading.— The force and effect of a decree of a court of equity dismissing a bill on the merits cannot be obviated by the complainant invoking his negligence or unskilfulness in pleading. Tankersly *v.* Pettis, 71 Ala. 179. *Compare infra*, XIII, C, 7, i, (v).

58. Burgess *v.* American Mortg. Co., 119 Ala. 669, 24 So. 727; Philpott *v.* Brown, 16 Nebr. 387, 20 N. W. 288.

59. *Colorado.*— Best *v.* Hoppie, 3 Colo. 137.

Illinois.— Dickson *v.* Todd, 43 Ill. 504.

Iowa.— Barkdull *v.* Callanan, 33 Iowa 391.

Kansas.— Goodman *v.* Malcolm, 5 Kan. App. 285, 48 Pac. 439.

Kentucky.— Brothers *v.* Higgins, 5 J. J. Marsh. 658.

Louisiana.— Granger *v.* Singleton, 32 La. Ann. 898; Keene *v.* McDonough, 8 La. 185.

Massachusetts.— Flanders *v.* Hall, 159 Mass. 95, 34 N. E. 178.

Michigan.— Schulmeister *v.* Blendon Tp., 126 Mich. 488, 86 N. W. 237.

Wisconsin.— Schultz *v.* Schultz, 118 Wis. 228, 95 N. W. 151; Amory *v.* Amory, 26 Wis. 152.

United States.— Hubbell *v.* U. S., 171 U. S. 203, 18 S. Ct. 828, 43 L. ed. 136.

See 30 Cent. Dig. tit. "Judgment," § 1028 *et seq.*

Contra.— See Phipps *v.* Alford, 95 Ga. 215, 22 S. E. 152; Louisville, etc., R. Co. *v.* Wylie, 1 Ind. App. 136, 27 N. E. 122; Wheeler *v.* Ruckman, 51 N. Y. 391.

Rule in New York.— In this state it is provided by statute (Code Civ. Proc. § 1209) that a judgment of dismissal after trial shall bar a new suit for the same cause of action only where it expressly appears that the dismissal was on the merits. See Genet *v.* Delaware, etc., Canal Co., 163 N. Y. 173, 57 N. E. 297; Stokes *v.* Stokes, 49 N. Y. App. Div. 302, 63 N. Y. Suppl. 887; Hirshbach *v.* Ketchum, 40 Misc. 306, 81 N. Y. Suppl. 957; Nicoll *v.* Karrick, 28 Misc. 199, 58 N. Y. Suppl. 1018; Vowell *v.* Twenty-Third St. R. Co., 14 Misc. 538, 35 N. Y. Suppl. 1082.

60. Pugh *v.* Holt, 27 Miss. 461; *In re* Townshend, 18 N. Y. Suppl. 905; Neafie *v.*

same theory as to the facts and law of the case.[61] According to the rule obtaining in many jurisdictions, the dismissal of a complaint or bill in equity will be presumed to have been upon the merits, unless the record expressly shows the contrary.[62] But in others this is denied.[63]

e. Dismissal Without Prejudice.[64] If a bill or complaint is dismissed "without prejudice," that is, without prejudice to the right to bring another suit or take further proceedings, it has not the force of an adjudication on the merits and cannot be pleaded in bar of another suit upon the same cause of action, even though plaintiff presents no better or stronger case;[65] and according to the better

Neafie, 7 Johns. Ch. (N. Y.) 1, 11 Am. Dec. 380.

61. Ballou *v.* Billings, 136 Mass. 307. And see *infra*, XIII, D, 1, c.

62. *Delaware.*— Cochran *v.* Couper, 2 Del. Ch. 27.

Iowa.— Scully *v.* Chicago, etc., R. Co., 46 Iowa 528.

Kentucky.— Curts *v.* Bardstown, 6 J. J. Marsh. 536; Carlisle *v.* Howes, 43 S. W. 191, 19 Ky. L. Rep. 1238.

Maryland.— Martin *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218. But see Chase's Case, 1 Bland 206, 17 Am. Dec. 277.

Massachusetts.— Thurston *v.* Thurston, 99 Mass. 39; Borrowscale *v.* Tuttle, 5 Allen 377; Foote *v.* Gibbs, 1 Gray 412; Bigelow *v.* Winsor, 1 Gray 299. But *compare* Foster *v.* The Richard Busteeds, 100 Mass. 409, 1 Am. Rep. 125.

Michigan.— Edgar *v.* Buck, 65 Mich. 356, 32 N. W. 644; Adams *v.* Cameron, 40 Mich. 506.

New Hampshire.— Gove *v.* Lyford, 44 N. H. 525.

Pennsylvania.— Kelsey *v.* Murphy, 26 Pa. St. 78.

Tennessee.— Williams *v.* Hollingsworth, 5 Lea 358. But where the record of a former suit shows *prima facie* that the judgment of dismissal was not on the merits, and no evidence is introduced to show that it was, and the opinion shows that it was not, it is not a bar to another action for the same cause. Fowlkes *v.* State, 14 Lea 14.

Virginia.— Taylor *v.* Yarbrough, 13 Gratt. 183.

West Virginia.— Carberry *v.* West Virginia etc., R. Co., 44 W. Va. 260, 28 S. E. 694.

United States.— Hubbell *v.* U. S., 171 U. S. 203, 18 S. Ct. 828, 43 L. ed. 136; Durant *v.* Essex Co., 7 Wall. 107, 19 L. ed. 154; Indian Land, etc., Co. *v.* Shoenfelt, 135 Fed. 484, 68 C. C. A. 196 (holding that a general decree of dismissal, without more, renders all the issues presented in the case *res judicata*, and constitutes a bar to an action at law for the same cause); Equitable Trust Co. *v.* Smith, 77 Fed. 677, 23 C. C. A. 394.

See 30 Cent. Dig. tit. "Judgment," § 1028 *et seq.*

63. *Arkansas.*— Jones *v.* Graham, 36 Ark. 383.

Georgia.— See Callaway *v.* Irvin, 123 Ga. 344, 51 S. E. 477, where in the former suit several defenses were interposed, some going to the merits of the controversy and one to the right to maintain the action as brought, and it did not appear upon which of these defenses the judgment was rendered.

Illinois.— Gerber *v.* Gerber, 155 Ill. 219, 40 N. E. 581.

New York.— Code Civ. Proc. § 1209, provides that a judgment of dismissal, either before or after trial, shall not prevent a new action for the same cause, unless the judgment expressly declares, or it appears by the judgment-roll, that it was rendered on the merits. Genet *v.* Delaware, etc., Canal Co., 170 N. Y. 278, 63 N. E. 350; Place *v.* Hayward, 117 N. Y. 487, 23 N. E. 25; Fritztuskie *v.* Wauroski, 83 N. Y. App. Div. 150, 82 N. Y. Suppl. 543; Nicoll *v.* Karrick, 28 Misc. 199, 58 N. Y. Suppl. 1018.

Ohio.— Lore *v.* Truman, 10 Ohio St. 45; Loudenback *v.* Collins, 4 Ohio St. 251. But *compare* Wilcox *v.* Balger, 6 Ohio 406.

Oregon.— Pruitt *v.* Muldrick, 39 Oreg. 358, 65 Pac. 20.

64. Conclusiveness of adjudication see *infra*, XIV, A, 4, d.

65. *Alabama.*— Brock *v.* South, etc., Alabama R. Co., 65 Ala. 79; Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533.

California.— Hibernia Sav., etc., Soc. *v.* Portener, 139 Cal. 90, 72 Pac. 716; Moore *v.* Russell, 133 Cal. 297, 65 Pac. 624, 85 Am. St. Rep. 166; Wolff *v.* Canadian Pac. R. Co., 89 Cal. 332, 26 Pac. 825.

Colorado.— Cupples *v.* Cupples, 39 Colo. 449, 80 Pac. 1039.

Florida.— Epstein *v.* Ferst, 35 Fla. 498, 17 So. 414; State *v.* Anderson, 26 Fla. 240, 8 So. 1.

Illinois.— Parlin, etc., Co. *v.* Hutson, 198 Ill. 389, 65 N. E. 93.

Indiana.— Elkhart Car Works Co. *v.* Ellis, 135 Ind. 205, 34 N. E. 11; Carmikel *v.* Cox, 58 Ind. 133; Crews *v.* Cleghorn, 13 Ind. 438; Louisville, etc., R. Co. *v.* Wylie, 1 Ind. App. 136, 27 N. E. 122.

Iowa.— Harrison *v.* Hartford F. Ins. Co., (1899) 80 N. W. 309.

Kansas.— Missouri, etc., R. Co. *v.* McWherter, 59 Kan. 345, 53 Pac. 135.

Kentucky.— O'Daniel *v.* O'Daniel, 88 Ky. 185, 10 S. W. 638, 10 Ky. L. Rep. 760; Magill *v.* Mercantile Trust Co., 81 Ky. 129; Royalty *v.* Shirley, 53 S. W. 1044, 21 Ky. L. Rep. 1015.

Louisiana.— Fisk *v.* Parker, 14 La. Ann. 491. But see Porter *v.* Morere, 30 La. Ann. 230, holding that the unexplained use of the

opinion, it is immaterial that the words "without prejudice" were erroneously or improperly added.[66] But it has been held that these or equivalent words clearly expressing a saving of rights must be expressed in the judgment or decree;[67] and if the dismissal is specified to be without prejudice to certain specified rights or claims, it may operate as an estoppel as to all rights or claims not embraced within the reservation.[68]

f. Judgment or Decree Expressly Reserving Rights. Where a judgment or decree expressly excepts or reserves from its operation specified rights or claims of the parties in suit, or the decision of questions in issue, or the right to take further proceedings in respect to certain matters, it constitutes no bar to a subse-

words "without prejudice" in a judgment dissolving an injunction will not convert the decree into a mere judgment of nonsuit.

Maryland.— O'Keefe *v.* Irvington Real Estate Co., 87 Md. 196, 39 Atl. 128.

Massachusetts.— Thurston *v.* Thurston, 99 Mass. 39.

Minnesota.— Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661.

Mississippi.— Tucker *v.* Wilson, 68 Miss. 693, 9 So. 898; Ragsdale *v.* Vicksburg, etc., R. Co., 62 Miss. 480; Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271; Nevitt *v.* Bacon, 32 Miss. 212, 66 Am. Dec. 609.

Missouri.— Long *v.* Long, 141 Mo. 352, 44 S. W. 341; McReynolds *v.* Kansas City, etc., R. Co., 34 Mo. App. 581.

Nebraska.— Agnew *v.* Omaha Nat. Bank, (1903) 96 N. W. 189; Cinfel *v.* Malena, 67 Nebr. 95, 93 N. W. 165; Kendall *v.* Selby, 66 Nebr. 60, 92 N. W. 178, 103 Am. St. Rep. 697.

New Jersey.— English *v.* English, 27 N. J. Eq. 579.

New Mexico.—See Lockhart *v.* Leeds, (1904) 76 Pac. 312.

New York.— Hawkins *v.* Mapes-Reeve Constr. Co., 82 N. Y. App. Div. 72, 81 N. Y. Suppl. 794.

North Dakota.— Prondzinski *v.* Garbutt, 10 N. D. 300, 86 N. W. 969.

Ohio.— Wanzer *v.* Self, 30 Ohio St. 378; Eaton *v.* French, 23 Ohio St. 560; Calvert *v.* Newberger, 20 Ohio Cir. Ct. 353, 11 Ohio Cir. Dec. 184.

Pennsylvania.— Ballentine *v.* Ballentine, (1888) 15 Atl. 859.

Rhode Island.— Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639.

South Carolina.— Bush *v.* Bush, 1 Strobh. Eq. 377.

Tennessee.— Young *v.* Cavitt, 7 Heisk. 18; Condon *v.* Knoxville, etc., R. Co., (Ch. App. 1895) 35 S. W. 781.

Texas.— Jocker *v.* Phytides, 27 Tex. Civ. App. 410, 65 S. W. 1129.

Vermont.— Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

Virginia.— Newberry *v.* Ruffin, 102 Va. 73, 45 S. E. 733. But see Innis *v.* Roane, 4 Call 379.

Washington.— Bates *v.* Drake, 28 Wash. 447, 68 Pac. 961.

West Virginia.— See Parsons *v.* Riley, 33 W. Va. 464, 10 S. E. 806.

United States.— Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706; Durant *v.* Essex Co., 7 Wall. 107, 19 L. ed. 154; Robinson *v.* American Car, etc., Co., 135 Fed. 693, 68 C. C. A. 331 [*affirming* 132 Fed. 165]; Southern Pac. R. Co. *v.* U. S., 133 Fed. 651, 66 C. C. A. 581; Cunningham *v.* Cleveland, 98 Fed. 657, 39 C. C. A. 211; Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 47 Fed. 536; Snyder *v.* McComb, 39 Fed. 292; Kimball *v.* Mobile County, 14 Fed. Cas. No. 7,774, 3 Woods 555.

England.— Longmead *v.* Maple, 18 C. B. N. S. 255, 11 Jur. N. S. 177, 12 L. T. Rep. N. S. 143, 13 Wkly. Rep. 469, 114 E. C. L. 255; Seymour *v.* Nosworthy, 1 Ch. Cas. 155. *Compare*, however, Rochester *v.* Lee, 1 Macn. & G. 467, 47 Eng. Ch. 373, 41 Eng. Reprint 1346.

See 30 Cent. Dig. tit. "Judgment," §§ 1018, 1019.

Dismissal of cross bill or cross complaint.— The fact that a wife has brought suit against her husband for separate maintenance and the custody of the children, in which the husband filed a cross complaint praying for a divorce, does not preclude the husband from bringing an independent suit for divorce after his cross complaint in the suit brought by his wife has been stricken by the court with leave to answer or take other action as he might deem advisable. Cupples *v.* Cupples, 33 Colo. 449, 80 Pac. 1039.

66. Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661; Wanzer *v.* Self, 30 Ohio St. 378. But *compare* Parsons *v.* Riley, 33 W. Va. 464, 10 S. E. 806; Rochester *v.* Lee, 1 Macn. & G. 467, 47 Eng. Ch. 373, 41 Eng. Reprint 1346.

67. Keown *v.* Murdock, 10 Ohio Dec. (Reprint) 606, 22 Cinc. L. Bul. 197; Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694. Where an order overruling a motion for a new trial has been entered of record without qualification, the statement of the judge in the bill of exceptions that it was his understanding that the order was made without prejudice cannot do away with the effect of such order on a second motion for a new trial. Rogers *v.* Hœnig, 46 Wis. 361, 1 N. W. 17. *Compare*, however, *supra*, XIII, C, 7, d, text and note 63.

68. Albright *v.* Oyster, 140 U. S. 493, 11 S. Ct. 916, 35 L. ed. 534; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 55 Fed. 701; Central Trust Co. *v.* Iowa Cent. R. Co., 40 Fed. 851. As to express reservation of rights see *infra*, XIII, C, 7, f.

quent action on the matters so reserved;[69] but on the contrary the reservation itself becomes *res judicata*, and prevents the raising of any question as to the right to bring or maintain such subsequent suit.[70]

g. Dismissal as to Part of Defendants. In all cases where the cause of action against two or more defendants is joint and several, either at common law or by force of a statute, or where their interests in the subject-matter are independent or disconnected, a discontinuance or dismissal as to one of such defendants will permit the bringing of a subsequent action against him alone.[71]

h. Dismissal as to Part of Causes of Action. If a plaintiff sues for several distinct items or causes of action, and takes a dismissal as to one of them and proceeds to judgment for the rest, it is no bar to a subsequent suit for the claim so withdrawn.[72]

i. Dismissal on Technical Grounds[73]—(i) *In General.* A judgment dismissing a suit on account of any technical defect, irregularity, or informality is not on the merits and is therefore no bar to subsequent actions.[74] This rule applies, for example, to the failure of plaintiff to perform any acts, or comply with any conditions, preliminary to his right to institute the action,[75] and it also applies to any

69. *Iowa.*— Hart *v.* Nonpareil Printing, etc., Co., 109 Iowa 82, 80 N. W. 217.

Kentucky.— Harrow *v.* Johnson, 3 Metc. 578.

Louisiana.— Point Coupee Police Jury *v.* Smith, 14 La. 68; Kemper *v.* Smith, 3 Mart. 622.

Massachusetts.— Low *v.* Low, 177 Mass. 306, 59 N. E. 57.

New York.— Stannard *v.* Hubbell, 56 Hun 450, 10 N. Y. Suppl. 254.

Ohio.— Upjohn *v.* Ewing, 2 Ohio St. 13.

Rhode Island.— Glidden *v.* Whipple, 23 R. I. 304, 49 Atl. 997.

Tennessee.— Wolfe *v.* Potts, (Ch. App. 1897) 42 S. W. 188.

Texas.— Haralson *v.* St. Louis Southwestern R. Co., (Civ. App. 1901) 62 S. W. 788.

See 30 Cent. Dig. tit. "Judgment," § 1019.

Estoppel as to rights or claims not within the reservation see *supra*, XIII, C, 7, e, text and note 68.

70. Bodkin *v.* Arnold, 45 W. Va. 90, 30 S. E. 154.

71. *California.*— Parks *v.* Dunlap, 83 Cal. 189, 25 Pac. 916; Altschul *v.* Doyle, 55 Cal. 633.

Colorado.— Hamill *v.* Ward, 14 Colo. 277, 23 Pac. 330.

Indiana.— West *v.* Asher, 38 Ind. 291.

Nebraska.— Runge *v.* Brown, 23 Nebr. 817, 37 N. W. 660.

Nevada.— James *v.* Leport, 19 Nev. 174, 8 Pac. 47.

North Carolina.— Crawford *v.* Class, 33 N. C. 118.

Texas.— Wooters *v.* Smith, 56 Tex. 198.

United States.— Hukill *v.* Maysville, etc., R. Co., 72 Fed. 745.

See 30 Cent. Dig. tit. "Judgment," § 1034.

72. Busch *v.* Jones, 94 Mich. 223, 53 N. W. 1051; Watson *v.* Cowdrey, 23 Hun (N. Y.) 169; Killion *v.* Wright, 34 Pa. St. 91; Johnson *v.* Murphy, 17 Tex. 216. And see *infra*, XIII, D, 4, e.

73. Conclusiveness of adjudication see *infra*, XIV, A, 4, d.

74. Randolph *v.* Dea Moines Cottage Hospital, (Iowa 1905) 103 N. W. 157; Stuber *v.* Louisville, etc., R. Co., 113 Tenn. 305, 87 S. W. 411; Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397; Baker *v.* Booth, 2 U. C. Q. B. O. S. 373. And see Vincent *v.* Mutual Reserve Fund Life Assoc., 77 Conn. 281, 58 Atl. 963; and cases cited in the notes following, and *supra*, XIII, C, 7, i, (II)–(VI).

75. Canandaigua *v.* Benedict, 24 N. Y. App. Div. 348, 48 N. Y. Suppl. 679.

Want of demand before suit.— Roberts *v.* Norris, 67 Ind. 386; Case *v.* Woleben, 52 Iowa 389, 3 N. W. 486; Tracy *v.* Merrill, 103 Mass. 280; Crosby *v.* Baker, 6 Allen (Mass.) 295; Oleson *v.* Merrihew, 45 Wis. 397.

Failure to notify defendant of claim or demand in suit.— Kern *v.* Wilson, 82 Iowa 407, 48 N. W. 919; New England Bank *v.* Lewis, 8 Pick. (Mass.) 113; Rose *v.* Hawley, 141 N. Y. 366, 36 N. E. 335; Rose *v.* Hawley, 133 N. Y. 315, 31 N. E. 236; Porter *v.* Kingsbury, 77 N. Y. 164.

Failure to give notice to quit.— Hart *v.* Lindley, 50 Mich. 20, 14 N. W. 682.

Failure to furnish security for costs.— Rosenthal *v.* McMann, 93 Cal. 505, 29 Pac. 121; Randolph *v.* Des Moines Cottage Hospital, (Iowa 1905) 103 N. W. 157; Dean *v.* Ridgway, (Miss. 1889) 6 So. 236.

Failure to pay costs of previous action as ordered.— Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76, 100 Am. St. Rep. 159; Kerrigan *v.* Chicago, etc., R. Co., 86 Minn. 407, 90 N. W. 976.

Want or informality in bond.— Morton *v.* Sweetser, 12 Allen (Mass.) 134; Walbridge *v.* Shaw, 7 Cush. (Mass.) 560; People *v.* Hall, 104 N. Y. 170, 10 N. E. 135.

Want or informality of affidavit.— Stockwell *v.* Byrne, 22 Ind. 6; Lebanon *v.* Knott, 72 S. W. 790, 24 Ky. L. Rep. 1992.

Failure to have guardian ad litem appointed. — Brown *v.* Whitmore, 71 Me. 65.

Failure to reduce claim to judgment.— Where a bill in equity brought by a general creditor of an insolvent is dismissed on the ground that it cannot be maintained until he has obtained a judgment at law on his debt,

irregularity in bringing the suit,[76] or any technical objection occurring in the course of the proceeding.[77]

(II) *Action Prematurely Brought.* The dismissal of a suit on the ground that it was prematurely brought, the cause of action not having yet accrued, is no bar to another action on the same demand after time has removed the objection.[78]

the decree dismissing the bill is no bar to an action at law on the debt. Maxwell *v.* Clarke, 139 Mass. 112, 29 N. E. 224.

Other preliminary matters.— A judgment or decree dismissing a suit is no bar to a subsequent proceeding where the dismissal was based on the ground that plaintiff, a foreign corporation, had not received the certificate necessary to enable it to do business in the state (Glencove Granite Co. *v.* City Trust, etc., Co., 118 Fed. 386, 55 C. C. A. 212), or that plaintiff is not in possession of the instrument sued on (Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Myers *v.* D'Meza, 17 Fed. Cas. No. 9,987, 2 Woods 160), or has failed to prove his claim before an assignee in insolvency before suing on it (State *v.* Kansas Ins. Co., 32 Kan. 649, 5 Pac. 187), or on account of a defect in the assignment to plaintiff of the mortgage in suit (Mitchell *v.* Cook, 29 Barb. (N. Y.) 243), or by reason of his failure to make or tender a deed, as bound, before suing (Whitlock *v.* Appleby, 49 Mo. App. 295; Carmony *v.* Hoover, 5 Pa. St. 305), or to rescind a contract before suing to recover back the consideration (Taylor *v.* Neys, 11 S. D. 605, 79 N. W. 998), or because he does not show damage by being obliged to pay a debt or demand on which he was secondarily liable (Anderson *v.* Trimble, 37 S. W. 71, 18 Ky. L. Rep. 507; Taylor *v.* Matteson, 86 Wis. 113, 56 N. W. 829).

76. Adams *v.* State, 9 Ark. 33.

77. Porges *v.* Cohen, 23 Misc. (N. Y.) 703, 52 N. Y. Suppl. 71 (failure to place cause on the calendar for trial); Barkwell *v.* Chatterton, 4 Wyo. 307, 33 Pac. 940 (failure to prosecute motion for change of venue); Cheney *v.* Stone, 29 Fed. 885 (failure of plaintiff to submit himself to examination).

78. *California.*— Nevills *v.* Shortridge, 146 Cal. 277, 79 Pac. 972; Hardin *v.* Dickey, 123 Cal. 513, 56 Pac. 258; Gray *v.* Dougherty, 25 Cal. 266.

Connecticut.— Peck *v.* Easton, 74 Conn. 456, 51 Atl. 134.

Georgia.— Ezzell *v.* Maltbie, 6 Ga. 495.

Illinois.— Bacon *v.* Schepflin, 185 Ill. 122, 56 N. E. 1123; Brackett *v.* People, 115 Ill. 29, 3 N. E. 723; Crabtree *v.* Welles, 19 Ill. 55; Farber *v.* National Forge, etc., Co., 50 Ill. App. 503.

Indiana.— Chicago, etc., R. Co. *v.* State, 153 Ind. 134, 51 N. E. 924; Kirkpatrick *v.* Stingley, 2 Ind. 269; Fordice *v.* Beeman, 10 Ind. App. 295, 36 N. E. 937.

Iowa.— Rivers *v.* Rivers, 65 Iowa 568, 22 N. W. 679; Boyer *v.* Austin, 54 Iowa 402, 6 N. W. 585.

Kansas.— Seaton *v.* Hixon, 35 Kan. 663, 12 Pac. 22; Krapp *v.* Eldridge, 33 Kan. 106, 5 Pac. 372.

Kentucky.— Yankey *v.* Sweeney, 85 Ky. 55, 2 S. W. 559, 562, 563, 8 Ky. L. Rep. 944; Barker *v.* Tennessee Pav. Brick Co., 71 S. W. 877, 24 Ky. L. Rep. 1524.

Louisiana.— Hewett *v.* Williams, 48 La. Ann. 686, 19 So. 604; Pasley *v.* McConnell, 40 La. Ann. 609, 4 So. 501.

Massachusetts.— Waterhouse *v.* Levine, 182 Mass. 407, 65 N. E. 822; Foster *v.* The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125; New England Bank *v.* Lewis, 8 Pick. 113.

Michigan.— Bresnahan *v.* Nugent, 92 Mich. 76, 52 N. W. 735.

Minnesota.— Ogden *v.* Ball, 40 Minn. 94, 41 N. W. 453.

Missouri.—Dillinger *v.* Kelley, 84 Mo. 561; McNees *v.* Southern Ins. Co., 69 Mo. App. 232; Shanklin *v.* Francis, 67 Mo. App. 457.

Montana.— Gassert *v.* Black, 18 Mont. 35, 44 Pac. 401.

Nebraska.— Hart *v.* Bank of Commerce, 51 Nebr. 486, 71 N. W. 40.

New York.— Moloney *v.* Nelson, 158 N. Y. 351, 53 N. E. 31; Van Keuren *v.* Miller, 144 N. Y. 636, 39 N. E. 495; Marcellus *v.* Countryman, 65 Barb. 201; Quackenbush *v.* Ehle, 5 Barb. 469; Wilcox *v.* Lee, 1 Rob. 355; Eden *v.* Hartt, 25 Misc. 493, 54 N. Y. Suppl. 1040; Bull *v.* Hopkins, 7 Johns. 22; Halsey *v.* Reed, 9 Paige 446.

Ohio.— Lauer *v.* Smith, 24 Ohio Cir. Ct. 47.

Pennsylvania.— Kane *v.* Fisher, 2 Watts 246. But where objection was made that the suit was prematurely brought, the debt not being due and plaintiff proceeded further with the suit, notwithstanding the point made, and judgment was rendered in favor of defendant, it will constitute a bar to another action after the debt matures. Buzzard *v.* Newhart, 4 Lanc. L. Rev. 61.

Rhode Island.— Slocom *v.* Wilbour, 23 R. I. 97, 49 Atl. 489; Jenson *v.* International Fraternal Alliance, 17 R. I. 471, 23 Atl. 15.

South Carolina.— Timmons *v.* Turner, 55 S. C. 490, 33 S. E. 571; McCelvy *v.* Noble, 13 Rich. 330.

Tennessee.— Hurst *v.* Means, 2 Sneed 546; Estill *v.* Taul, 2 Yerg. 467, 24 Am. Dec. 498.

Vermont.— Clark *v.* Harrington, 4 Vt. 69.

Wisconsin.— McFarlane *v.* Cushman, 21 Wis. 401.

Wyoming.—Tutty *v.* Ryan, 13 Wyo. 53, 134, 78 Pac. 657, 1119, 79 Pac. 920, 921.

United States.—Clark *v.* Young, 1 Cranch 181, 2 L. ed. 74.

Canada.— Chisholm *v.* Morse, 11 U. C. C. P. 589, holding that where, in an action for the price of goods sold, plaintiff failed to recover for a portion of the goods because the term of credit had not expired when the action was commenced, the judgment recovered therein did not bar a subsequent action for such goods, and that plaintiff was

But such a judgment finally and conclusively settles the point that the action was prematurely brought, and this question cannot be relitigated in a new action.[79]

(III) *Wrong Form of Action or Remedy.* A judgment against the plaintiff on the single ground that he has mistaken his remedy or form of action is no bar to his subsequent suit brought in the proper form.[80]

(IV) *Want or Defect of Parties*[81]—(A) *In General.* A judgment for defendant, or an order dismissing the suit, solely on the ground of a misjoinder, non-joinder, misnomer, or defect of parties, does not affect the merits and will not bar a subsequent suit on the same cause of action.[82]

not bound to take a nonsuit in the first action.

See 30 Cent. Dig. tit. "Judgment," §§ 1014, 1029.

79. Wilhelmi *v.* Des Moines Ins. Co., (Iowa 1896) 68 N. W. 782.

80. *Alabama.*— Johnson *v.* Amberson, 140 Ala. 342, 37 So. 273.

California.— Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

Georgia.— Reid *v.* Caldwell, 114 Ga. 676, 40 S. E. 712.

Illinois.— Lusk *v.* Chicago, 211 Ill. 183, 71 N. E. 878. Where it appeared that defendant was in possession as successor under a contract with plaintiff's grantor after she had parted with the title, it was held that an action in assumpsit by plaintiff for use and occupation under the license, which was dismissed, being an inappropriate remedy, was not a bar to a subsequent action of ejectment. Chicago Terminal Transfer R. Co. *v.* Winslow, 216 Ill. 166, 74 N. E. 815.

Maine.— Wyman *v.* Dorr, 3 Me. 185.

Massachusetts.— Walker *v.* Davis, 1 Gray 506; Livermore *v.* Herschell, 3 Pick. 33.

Mississippi.— Conn *v.* Bernheimer, 67 Miss. 498, 7 So. 345.

Missouri.— Massey *v.* McCoy, 79 Mo. App. 169.

New Hampshire.— Meredith Mechanic Assoc. *v.* American Twist Drill Co., 67 N. H. 450, 39 Atl. 330; Kittredge *v.* Holt, 58 N. H. 191.

New York.— Sager *v.* Blain, 44 N. Y. 445; Steinson *v.* New York Bd. of Education, 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128.

Oregon.— Huffman *v.* Knight, 36 Oreg. 581, 60 Pac. 207.

Pennsylvania.— Bigley *v.* Jones, 114 Pa. St. 510, 7 Atl. 54.

South Carolina.— Charles *v.* Charles, 13 S. C. 385.

Tennessee.— Donaldson *v.* Nealis, 108 Tenn. 638, 69 S. W. 732.

Texas.— Bertrand *v.* Bingham, 13 Tex. 266; Foster *v.* Wells, 4 Tex. 101.

Washington.— State *v.* Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373.

United States.— Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 12 S. Ct. 188, 35 L. ed. 1055; McNamara *v.* Home Land, etc., Co., 121 Fed. 797, 58 C. C. A. 245.

England.— Ferrers *v.* Arden, Cro. Eliz. 668; Hitchin *v.* Campbell, 2 W. Bl. 779.

See 30 Cent. Dig. tit. "Judgment," § 1028 *et seq.*

81. Judgment on plea in abatement see *infra*, XIII, C, 8.

82. *Alabama.*— McCall *v.* Jones, 72 Ala. 368.

Arkansas.— Geisreiter *v.* Sevier, 33 Ark. 522.

Colorado.— Union Pac. R. Co. *v.* Kelley, 4 Colo. App. 325, 35 Pac. 923.

Iowa.— Miller *v.* Langworthy, 3 Greene 347.

Kansas.— Union Terminal R. Co. *v.* State Railroad Com'rs, 54 Kan. 352, 38 Pac. 290; Smith *v.* Auld, 31 Kan. 262, 1 Pac. 626.

Louisiana.—Weinberger *v.* Merchants' Mut. Ins. Co., 41 La. Ann. 31, 5 So. 728.

Missouri.— Baker *v.* Lane, 137 Mo. 682, 39 S. W. 450.

New York.— O'Connor *v.* National Ice Co., 121 N. Y. 662, 24 N. E. 1092; Wheeler *v.* Ruckman, 51 N. Y. 391; Vaughan *v.* O'Brien, 57 Barb. 491, 39 How. Pr. 515; Robbins *v.* Wells, 1 Rob. 666.

Pennsylvania.— Fleming *v.* Insurance Co., 12 Pa. St. 391.

South Carolina.— Montgomery *v.* Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934.

Tennessee.— An adjudication in an action on a contract that the action could not be maintained because one of the necessary parties plaintiff was a foreign corporation, which had not complied with the laws of the state, is not on the merits, and hence is not *res judicata*. Harris *v.* Columbia Water, etc., Co., 114 Tenn. 328, 85 S. W. 897.

Texas.— Nickelson *v.* Ingram, 24 Tex. 630.

Wisconsin.— Tierney *v.* Abbott, 46 Wis. 329, 1 N. W. 94.

United States.— St. Romes *v.* Levee Steam Cotton Press Co., 127 U. S. 614, 8 S. Ct. 1335, 32 L. ed. 289; Belt *v.* U. S., 15 Ct. Cl. 92.

See 30 Cent. Dig. tit. "Judgment," § 1038.

Death of plaintiff.— A judgment abating the suit because of the death of plaintiff does not conclude the merits. Stuber *v.* Louisville, etc., R. Co., 113 Tenn. 305, 87 S. W. 411.

Rule in equity.— While it is error to dismiss a bill absolutely for want of sufficient parties defendant, and the decree ought to reserve the complainant's rights, and he can procure its reversal on appeal, yet if he fails to do so, it is as conclusive against him as a decree on the merits. Thompson *v.* Clay, 3 T. B. Mon. (Ky.) 359, 16 Am. Dec. 108.

(B) *Want of Capacity to Sue.* The dismissal of an action on the sole ground that plaintiff has not sufficient title or authority to bring the suit, or for want of legal capacity to sue on his part, is no bar to a subsequent action on the same subject-matter.[83]

(V) *Defects in Pleadings.* A judgment rendered on the ground of formal defects in the pleadings does not touch the merits of the controversy and therefore is no bar to a second suit on the same cause of action.[84] But where a demurrer to a complaint is sustained, its determination involving a consideration of the material issues in the case, and plaintiff fails to amend, leave being given to do so, a judgment thereupon entered dismissing the action is a final adjudication and a bar to another suit.[85] And a judgment is not the less conclusive because the matter settled thereby was improperly pleaded, if no objection was made at the time.[86]

(VI) *Want or Failure of Evidence.* Where an action is defeated because of the failure of plaintiff to prove some incidental, preliminary, or collateral matter, not going to the merits of the controversy, it is no bar to another action for the same cause.[87] And a dismissal of the action on defendant's motion for

83. *Arkansas.* — Hill *v.* Bryant, 61 Ark. 203, 32 S. W. 506.

California.— Wills *v.* Pauly, 116 Cal. 575, 48 Pac. 709; Morrell *v.* Morgan, 65 Cal. 575, 4 Pac. 580.

Iowa.— White *v.* Savery, 50 Iowa 515.

Louisiana.— Cook *v.* Doremus, 10 La. Ann. 679.

Michigan.— Sessions *v.* Sherwood, 78 Mich. 234, 44 N. W. 263.

Missouri.— Lilly *v.* Tobbein, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887.

Nebraska.— Rodgers *v.* Levy, 36 Nebr. 601, 54 N. W. 1080.

New York.— Mitchell *v.* Cook, 29 Barb. 243; Clay *v.* Hart, 25 Misc. 110, 55 N. Y. Suppl. 43; Robbins *v.* Wells, 26 How. Pr. 15.

Pennsylvania.— Dehart *v.* Kerlin, 4 Pa. Co. Ct. 396.

United States.— Cunningham *v.* Cleveland, 98 Fed. 657, 39 C. C. A. 211.

See 30 Cent. Dig. tit. "Judgment," § 1036.

84. *California.*— Naftzger *v.* Gregg, (1892) 31 Pac. 612.

Illinois.— Hoyt *v.* Chicago, etc., R. Co., 177 Ill. 617, 52 N. E. 1127 [*affirming* 50 Ill. App. 583]; Smalley *v.* Edey, 19 Ill. 207; Vanlandingham *v.* Ryan, 17 Ill. 25; Langmuir *v.* Landes, 113 Ill. App. 134. Dismissal of a bill because of failure to allege a matter essential to the jurisdiction of the court is no bar to a second bill in which such defect is cured or obviated by further and sufficient allegations. Gage *v.* Ewing, 114 Ill. 15, 28 N. E. 379.

Indiana.— Elkhart Car Works Co. *v.* Ellis, 135 Ind. 205, 34 N. E. 11.

Kansas.— McClung *v.* Hohl, 10 Kan. App. 93, 61 Pac. 507.

Kentucky.— Birch *v.* Funk, 2 Metc. 544; Kendal *v.* Talbot, 1 A. K. Marsh. 321. *Compare* Jones *v.* Henry, 3 Litt. 427.

Massachusetts.— Soper *v.* Manning, 158 Mass. 381, 33 N. E. 516.

Mississippi.— Perry *v.* Lewis, 49 Miss. 443.

Missouri.— Wells *v.* Moore, 49 Mo. 229.

Nebraska.— State *v.* Cornell, 52 Nebr. 25, 71 N. W. 961.

Ohio.— Fuher *v.* Villwock, 14 Ohio Cir. Ct. 389.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

South Carolina.— Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675; Salinas *v.* Aultman, 45 S. C. 283, 22 S. E. 889.

Virginia.— Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431.

Washington.— Von Tobel *v.* Stetson, etc., Mill Co., 32 Wash. 683, 73 Pac. 788.

West Virginia.— State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650.

Wisconsin.— Benware *v.* Pine Valley, 53 Wis. 527, 10 N. W. 695.

United States.— Muskegon *v.* Clark, 62 Fed. 694, 10 C. C. A. 591; Gilmer *v.* Morris, 30 Fed. 476; Keller *v.* Stolzenbach, 20 Fed. 47.

England.— Ingram *v.* Bray, 2 Lev. 210; Lampen *v.* Kedgewin, 1 Mod. 207.

Canada.— Baker *v.* Booth, 2 U. C. Q. B. O. S. 373.

See 30 Cent. Dig. tit. "Judgment," § 1039.

Judgment on demurrer see *infra*, XIII, C, 9.

Dismissal for want of equity.— Where, on account of its many defects, there is no equity on the face of a bill, and no relief could have properly been granted on it, the dismissal of the bill will be equivalent to a judgment in bar. Trapnall *v.* Burton, 24 Ark. 371.

Judgment for want of replication.— Where valid pleas in bar have been filed, a judgment dismissing the suit at the cost of plaintiff for his failure to reply to the pleas is altogether different from a judgment on a merely defective pleading. This is more like a judgment by default, and is a bar to the further prosecution of the same cause of action. Campbell *v.* Mayhugh, 15 B. Mon. (Ky.) 142.

85. Grant County *v.* Cross, (N. M. 1903) 73 Pac. 615.

Judgment on demurrer see *infra*, XIII, C, 9.

86. Thompson *v.* Wineland, 11 Mo. 243.

87. *New Hampshire.*— Brackett *v.* Hoitt, 20 N. H. 257.

plaintiff's failure to make out a *prima facie* case or to prove some material allegation is generally regarded as no more than a nonsuit and not conclusive.[88]

j. Dismissal For Want of Jurisdiction. Where an action is dismissed on the sole ground that the court has no jurisdiction of the subject-matter of the suit or of the parties, this is no adjudication of the merits and no bar to another action for the same cause.[89] But it is a conclusive determination of the fact that the court lacks jurisdiction.[90]

New York.— Converse *v.* Sickles, 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790; Lewis *v.* Davis, 8 Daly 185; *In re* Townshend, 18 N. Y. Suppl. 905.

Pennsylvania.— McLaughlin *v.* McGee, 79 Pa. St. 217; Royer *v.* Wolf, 8 Pa. Co. Ct. 641.

Tennessee.— Cole *v.* Nashville, 5 Coldw. 639.

United States.— Aylesworth *v.* Gratiot County, 43 Fed. 350.

88. *Georgia.*— Alabama Great Southern R. Co. *v.* Blevins, 92 Ga. 522, 17 S. E. 836.

Louisiana.— Alba *v.* Provident Sav. L. Assur. Soc., 112 La. 550, 36 So. 587.

New York.— Meader *v.* Wexler, 98 N. Y. App. Div. 68, 90 N. Y. Suppl. 598 [*affirmed* in 182 N. Y. 519, 74 N. E. 1120]; White *v.* Whiting, 8 Daly 23; Goldman *v.* Tobias, 88 N. Y. Suppl. 991. But *compare* Engel *v.* Union Square Bank, 94 N. Y. App. Div. 244, 87 N. Y. Suppl. 1070.

North Carolina.— Hood *v.* Western Union Tel. Co., 135 N. C. 622, 47 S. E. 607.

South Carolina.— Whaley *v.* Stevens, 24 S. C. 479.

United States.— Woods *v.* Lindvall, 48 Fed. 62, 1 C. C. A. 37.

And see *supra*, XIII, C, 6, a.

But *compare* Chiles *v.* Champenois, 69 Miss. 603, 13 So. 840; Morgan *v.* Chicago, etc., R. Co., 83 Wis. 348, 53 N. W. 741; *In re* May, 28 Ch. D. 516, 54 L. J. Ch. 338, 52 L. T. Rep. N. S. 79, 33 Wkly. Rep. 917; Jones *v.* Nixon, Younge 359.

89. *Alabama.*— Waddle *v.* Ishe, 12 Ala. 308.

Colorado.— Lake County *v.* Schradsky, 31 Colo. 178, 71 Pac. 1104.

Florida.— O'Neil *v.* Percival, 25 Fla. 118, 5 So. 809.

Illinois.—Jones *v.* Hunter, 32 Ill. App. 445.

Iowa.— Keokuk, etc., R. Co. *v.* Donnell, 77 Iowa 221, 42 N. W. 176; Weyand *v.* Atchison, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650; Roberts *v.* Hamilton, 56 Iowa 683, 10 N. W. 236; Arnold *v.* Grimes, 2 Iowa 1.

Kentucky.— Bitzer *v.* O'Bryan, 107 Ky. 590, 54 S. W. 951, 21 Ky. L. Rep. 1307; Lamaster *v.* Lair, 1 Dana 109.

Maryland.— Martin *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218; Schindel *v.* Suman, 13 Md. 310.

Michigan.— Way *v.* Stebbins, 47 Mich. 296, 11 N. W. 166.

Minnesota.— Goenen *v.* Schroeder, 18 Minn. 66.

Mississippi.— Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Nebraska.— Pence *v.* Uhl, 11 Nebr. 320, 9 N. W. 40; Irwin *v.* Gay, 3 Nebr. (Unoff.) 153, 91 N. W. 197.

New York.— Cauhape *v.* Parke, 46 Hun 306; Smith *v.* Adams, 24 Wend. 585.

Pennsylvania.— Champlin *v.* Smith, 164 Pa. St. 481, 30 Atl. 447; Weigley *v.* Coffman, 144 Pa. St. 489, 22 Atl. 919, 27 Am. St. Rep. 667.

South Carolina.— Gist *v.* Davis, 2 Hill Eq. 335, 29 Am. Dec. 89.

Tennessee.— Estill *v.* Taul, 2 Yerg. 467, 24 Am. Dec. 498.

Texas.— Adoue *v.* Wettermark, 28 Tex. Civ. App. 593, 68 S. W. 553; Jecker *v.* Phytides, 27 Tex. Civ. App. 410, 65 S. W. 1129; Seitz *v.* McKenzie, 4 Tex. Civ. App. 81, 22 S. W. 104; Hull *v.* Quest, 2 Tex. Unrep. Cas. 564.

Vermont.— Jericho *v.* Underhill, 67 Vt. 85, 30 Atl. 690, 48 Am. St. Rep. 804.

Wisconsin.— Gray *v.* Tyler, 40 Wis. 579.

United States.— Smith *v.* McNeal, 109 U. S. 426, 3 S. Ct. 319, 27 L. ed. 986; Hughes *v.* U. S., 4 Wall. 232, 18 L. ed. 303; Walden *v.* Bodley, 14 Pet. 156, 10 L. ed. 398; Bunker Hill, etc., Min., etc., Co. *v.* Shoshone Min. Co., 109 Fed. 504, 47 C. C. A. 200; U. S. *v.* Rand, 53 Fed. 348, 3 C. C. A. 556; Gilmer *v.* Grand Rapids, 16 Fed. 708; Green *v.* U. S., 18 Ct. Cl. 93.

See 30 Cent. Dig. tit. "Judgment," § 1037.

Compare Reedy *v.* Gift, 2 Kan. 392.

Where a court of law declines to determine a question of set-off, this is not *res judicata* so as to preclude an inquiry in a court of equity having concurrent jurisdiction of the matter. Hackett *v.* Connett, 2 Edw. (N. Y.) 73.

And where a court of equity dismisses a bill solely on the ground that there is an adequate remedy at law, the dismissal, not being on the merits, does not bar a subsequent action at law. Barnett *v.* Smart, 158 Mo. 167, 59 S. W. 235; Porter *v.* Wagner, 36 Ohio St. 471; Cramer *v.* Moore, 36 Ohio St. 347; Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694; Beere *v.* Fleming, 13 Ir. C. L. 506. It has been held, however, that a decree, on full hearing, dismissing a bill generally, without reservation of right to plaintiff to sue at law, is conclusive upon all the matters involved in the case, even though there was no jurisdiction in equity because of an adequate remedy at law; since, unless it otherwise appear from the decree, it will be taken that the dismissal was on a hearing of the merits. Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694. *Compare supra*, XIII, C, 7, d, text and notes 62, 63.

90. Glackin *v.* Zeller, 52 Barb. (N. Y.) 147.

k. Dismissal For Want of Prosecution. The dismissal of a bill in equity or of an action at law, not on the merits, but because plaintiff declines further prosecution of it, has no greater effect than a nonsuit, and is no bar to a subsequent suit founded on the same matters.[91]

l. Dismissal of Appeal. The dismissal of an appeal from a judgment leaves the judgment in full force as an estoppel,[92] except where the appeal involves a hearing *de novo*, in which case the dismissal of the appeal has the same effect as a dismissal of the action in the court below,[93] or where the appellate court orders the dismissal of the action in the court below.[94]

8. JUDGMENT ON PLEA IN ABATEMENT.[95] Judgment on a plea in abatement is not a final judgment on the merits in such sense that it will bar another action for the same cause.[96] But where a plea in abatement is joined with a plea in bar, a

91. *Alabama.*— McBroom *v.* Sommerville, 2 Stew. 515.
California.— Pyle *v.* Piercy, 122 Cal. 383, 55 Pac. 141.
District of Columbia.— Wagenhurst *v.* Wineland, 22 App. Cas. 356.
Illinois.— Chamberlain *v.* Sutherland, 4 Ill. App. 494.
Kansas.— Mills *v.* Pettigrew, 45 Kan. 573, 26 Pac. 33.
Kentucky.— Nickell *v.* Fallen, 23 S. W. 366, 15 Ky. L. Rep. 389.
Maryland.— Isaac *v.* Clarke, 2 Gill 1.
Mississippi.— Baird *v.* Bardwell, 60 Miss. 164; Nevill *v.* Matthews, Walk. 377.
Nebraska.— Philpott *v.* Brown, 16 Nebr. 387, 20 N. W. 288; Cheney *v.* Cooper, 14 Nebr. 415, 16 N. W. 471.
Nevada.— Laird *v.* Morris, 23 Nev. 34, 42 Pac. 11.
New York.— Porges *v.* Cohen, 23 Misc. 703, 52 N. Y. Suppl. 71; Miller *v.* McGuckin, 15 Abb. N. Cas. 204; Rosse *v.* Rust, 4 Johns. Ch. 300. But see Ogsbury *v.* La Farge, 2 N. Y. 113; Hayward *v.* Manhattan R. Co., 52 Hun 383, 5 N. Y. Suppl. 473.
Ohio.— Loudenback *v.* Collins, 4 Ohio St. 251.
Pennsylvania.— Vought *v.* Sober, 73 Pa. St. 49.
Tennessee.— Kelton *v.* Jacobs, 5 Baxt. 574; Renshaw *v.* Tullahoma First Nat. Bank, (Ch. App. 1900) 63 S. W. 194.
Texas.— Worst *v.* Sgitcovich, (Civ. App. 1898) 46 S. W. 72.
Vermont.— Porter *v.* Vaughn, 26 Vt. 624.
West Virginia.— Cornell *v.* Hartley, 41 W. Va. 493, 23 S. E. 789.
Wisconsin.— Spear *v.* Door County, 65 Wis. 298, 27 N. W. 60.
United States.— Whitaker *v.* Davis, 91 Fed. 720; Keller *v.* Stolzenbach, 20 Fed. 47; American Diamond Rock Boring Co. *v.* Sheldon, 1 Fed. Cas. No. 296, 17 Blatchf. 208.
England.— Brandlyn *v.* Ord, 1 Atk. 571, 26 Eng. Reprint 359; Magnus *v.* Scotland Nat. Bank, 57 L. J. Ch. 902, 58 L. T. Rep. N. S. 617, 36 Wkly. Rep. 602.
See 30 Cent. Dig. tit. "Judgment," § 1040.
Compare Farish *v.* New Mexico Min. Co., 5 N. M. 279, 21 Pac. 654.

92. *Arkansas.*— Burgess *v.* Poole, 45 Ark. 373.
Colorado.— Pueblo Chicago Lumber Co. *v.* Danziger, 7 Colo. App. 149, 42 Pac. 683.
Florida.— Duval County Com'rs *v.* Fries, 22 Fla. 303.
Iowa.— Austin *v.* Walker, 61 Iowa 158, 16 N. W. 65.
Michigan.— Cummerford *v.* Paulus, 66 Mich. 648, 33 N. W. 741.
Vermont.— Catlin *v.* Taylor, 18 Vt. 104.
See 30 Cent. Dig. tit. "Judgment," § 1044.
Compare McMillan *v.* Conrad, 16 Fed. 128, 5 McCrary 140. And see Cave *v.* Davis, 5 T. B. Mon. (Ky.) 392.
Want of jurisdiction.— Where the lower court was without jurisdiction, a judgment dismissing an appeal for want of jurisdiction is not a bar to a subsequent action. Reading *v.* Price, 3 J. J. Marsh. (Ky.) 61, 19 Am. Dec. 162. And see State *v.* Brooke, 29 Mo. App. 286.
Dismissal of appeal from justice's judgment.— A cause of action upon which a judgment is rendered becomes merged in the judgment and cannot be the basis of a new action so long as the judgment is in force. Where therefore upon appeal from a judgment of a justice of the peace plaintiff dismissed his suit in the circuit court, that did not save another action begun by him before the dismissal on the same cause of action. Cooksey *v.* Kansas City, etc., R. Co., 74 Mo. 477.

93. Phipps *v.* Alford, 95 Ga. 215, 22 S. E. 152; Fagan *v.* McTier, 81 Ga. 73, 6 S. E. 177.

94. Whitworth *v.* Sour, 57 Ind. 107; Davis *v.* Slaughter, 4 Ky. L. Rep. 999; Clay County *v.* Chickasaw County, 64 Miss. 534, 1 So. 753.

95. **Conclusiveness of adjudication** see *infra*, XIV, A, 4, e.

96. *Iowa.*— Atkins *v.* Anderson, 63 Iowa 739, 19 N. W. 323; Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396. And see Tyler *v.* Bowen, 124 Iowa 452, 100 N. W. 505.
Kentucky.— Birch *v.* Funk, 2 Metc. 544.
Louisiana.— *In re* Byland, 38 La. Ann. 756.
Massachusetts.— Jordan *v.* Siefert, 126 Mass. 25.
Missouri.— Garrett *v.* Greenwell, 92 Mo. 120, 4 S. W. 441 [*overruling* Stewart *v.* Nelson, 79 Mo. 524]; Caruthers *v.* Williams, 53 Mo. App. 181.
Tennessee.— Stuber *v.* Louisville, etc., R. Co., 113 Tenn. 305, 87 S. W. 411.
Texas.— Connellee *v.* Drake, (App. 1890) 16 S. W. 175.

general verdict for defendant and judgment entered thereon will bar a subsequent litigation on the merits of the issue in bar,[97] unless it clearly appears from the record that the judgment was on the plea in abatement only.[98]

9. Judgment on Demurrer[99] — a. In General. A judgment rendered on a demurrer is equally conclusive, by way of estoppel, of the facts confessed by the demurrer, as would be a verdict and judgment finding the same facts.[1] But a judgment on demurrer, based merely on formal or technical defects and raising only a question of pleading, is no bar to a second action for the same cause.[2] And

Vermont.— Jericho *v.* Underhill, 67 Vt. 85, 30 Atl. 690, 48 Am. St. Rep. 804; Dunklee *v.* Goodenough, 65 Vt. 257, 26 Atl. 988; Hilliker *v.* Loop, 5 Vt. 116, 26 Am. Dec. 286.

United States.— Clark *v.* Young, 1 Cranch 181, 2 L. ed. 74; Graham *v.* Spencer, 14 Fed. 603.

See 30 Cent. Dig. tit. "Judgment," § 1046.

Want or defect of parties see *supra*, XIII, C, 7, i, (IV).

Action prematurely brought see *supra*, XIII, C, 7, i, (II).

97. Sheldon *v.* Edwards, 35 N. Y. 279; Gundlin *v.* Hamburg-American Packet Co., 28 N. Y. Suppl. 572, 31 Abb. N. Cas. 437; The 420 Min. Co. *v.* Bullion Min. Co., 9 Fed. Cas. No. 4,989, 3 Sawy. 634.

98. If the judgment fails to state on which plea it was based, it will be presumed that it was based on the matter in bar. Garretson *v.* Ferrall, 92 Iowa 728, 61 N. W. 251. But an entry of judgment which recites that the court found that the suit was prematurely brought, and directed a verdict for defendant, sufficiently shows that judgment was rendered on a plea in abatement, and hence is no bar to another action for the same cause. Harrison *v.* Hartford F. Ins. Co., 102 Iowa 112, 71 N. W. 220, 47 L. R. A. 709.

99. Conclusiveness of adjudication see *infra*, XIV, A, 4, f.

1. *Arkansas.*—Luttrell *v.* Reynolds, 63 Ark. 254, 37 S. W. 1051.

Georgia.— Jordan *v.* Faircloth, 34 Ga. 47.

Illinois.— Nispel *v.* Laparle, 74 Ill. 306.

Indiana.— La Porte *v.* Organ, 5 Ind. App. 369, 32 N. E. 342.

Kansas.— Hyatt *v.* Challiss, 59 Kan. 422, 53 Pac. 467.

Kentucky.— McDowell *v.* Chesapeake, etc., R. Co., 90 Ky. 346, 14 S. W. 338, 12 Ky. L. Rep. 331.

Nebraska.— Parrotte *v.* Dryden, (1905) 102 N. W. 610.

New Jersey.— Van Horn *v.* Van Horn, 53 N. J. L. 514, 21 Atl. 1069.

North Carolina.— Johnson *v.* Pate, 90 N. C. 334.

Texas.— Cameron *v.* Hinton, (Civ. App. 1898) 48 S. W. 24.

United States.— Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 121 Fed. 313, 57 C. C. A. 9; Edwards *v.* Bates County, 55 Fed. 436.

Canada.— McKean *v.* Jones, 19 Can. Sup. Ct. 489.

See 30 Cent. Dig. tit. "Judgment," § 1047 *et seq.*

2. *Alabama.*— Crumpton *v.* **State,** 43 Ala. 31.

California.— Kirsch *v.* **Kirsch,** 113 Cal. 56, 45 Pac. 164.

Connecticut.— Chapin *v.* **Curtis,** 23 Conn. 388.

Dakota.— Pearson *v.* Post, 2 Dak. 220, 9 N. W. 684.

Florida.—Florida Southern **R.** Co. *v.* Brown, 23 Fla. 104, 1 So. 512.

Georgia.— Papworth *v.* Fitzgerald, 111 Ga. 54, 36 S. E. 311. And see Butler *v.* Tifton, etc., R. Co., 121 Ga. 817, 49 S. E. 763.

Illinois.— Walker *v.* Doane, 131 Ill. 27, 22 N. E. 1006.

Indiana.—Terre Haute, **etc.,** R. Co. *v.* State, 159 Ind. 438, 65 N. E. 401; Campbell *v.* Hunt, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879; Sherry *v.* Foresman, 6 Blackf. 56; Stevens *v.* Dunbar, 1 Blackf. 56.

Iowa.— Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396.

Kansas.— King *v.* Mollohan, 61 Kan. 683, 60 Pac. 731.

Kentucky.— Thomas *v.* Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240; Birch *v.* Funk, 2 Metc. 544.

Louisiana.— Culverhouse *v.* Marx, 38 La. Ann. 667; Levy *v.* Wise, 15 La. Ann. 38.

Massachusetts.— Calder *v.* Haynes, 7 Allen 387; Com. *v.* Goddard, 13 Mass. 455.

Mississippi.— Alabama, etc., R. Co. *v.* McCerren, 75 Miss. 687, 23 So. 423, 876.

New York.— Hoag *v.* Greenwich, 133 N. Y. 152, 30 N. E. 842; Porter *v.* Kingsbury, 77 N. Y. 164; Stowell *v.* Chamberlain, 60 N. Y. 272; Skinner *v.* Dayton, 19 Johns. 513, 10 Am. Dec. 286.

Ohio.— Lore *v.* Truman, 10 Ohio St. 45.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

Pennsylvania.— Detrick *v.* Sharrar, 95 Pa. St. 521; Foster *v.* Com., 8 Watts & S. 77.

Texas.— Nickelson *v.* Ingram, 24 Tex. 630; Jackson *v.* Finlay, (Civ. App. 1897) 40 S. W. 427; Gray *v.* Edwards, 3 Tex. Civ. App. 361, 22 S. W. 537.

West Virginia.— Poole *v.* Dilworth, 26 W. Va. 583.

Wisconsin.— Doctor *v.* Furch, 76 Wis. 153, 44 N. W. 648, 826; Watson *v.* Appleton, 62 Wis. 267, 22 N. W. 475.

United States.— Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 12 S. Ct. 188, 35 L. ed. 1055; Stewart *v.* Masterson, 131 U. S. 151, 9 S. Ct. 682, 33 L. ed. 114; Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Gilman *v.* Rives, 10 Pet. 298, 9 L. ed. 432; U. S. *v.* Coos Bay Wagon Road Co., 110 Fed. 864; Gilmer *v.*

where the ground of the demurrer is the omission of a material allegation from plaintiff's pleading, a judgment sustaining the demurrer will not prevent the maintenance of a new suit on the same cause of action, in which the declaration or complaint supplies the missing averment.[3] On the other hand a judgment on a demurrer which goes to the merits, raising a question of substance and not merely one of form, and disposing of the whole cause of action, is a complete bar to a subsequent suit on the same claim or demand.[4] But where the demurrer was

Morris, 30 Fed. 476; Spicer *v.* U. S., 5 Ct. Cl. 34.

Canada.— Baker *v.* Booth, 2 U. C. Q. B. O. S. 373.

See 30 Cent. Dig. tit. "Judgment," § 1047 *et seq.* And see *supra*, XIII, C, 7, i.

Statute of limitations.— Where a demurrer in one action was sustained to plaintiff's petition, for the reason that it appeared from the face of the petition that the cause of action was barred by the statute of limitations, and a second action was commenced for the same cause of action; but with the petition so drawn as not to raise upon its face the question of the statute of limitations, it was held that the judgment upon the demurrer in the first suit was no bar to the second proceeding. Bonnifield *v.* Price, 1 Wyo. 223.

3. *Arizona.*— Wilson *v.* Lowry, 5 Ariz. 335, 52 Pac. 777.

Arkansas.— State *v.* Roth, 47 Ark. 222, 1 S. W. 98.

California.— Terry *v.* Hammonds, 47 Cal. 32.

Florida.— Florida Southern R. Co. *v.* Brown, 23 Fla. 104, 1 So. 512.

Illinois.— Parker *v.* Smith, 6 Ill. 411.

Indiana.— Griffin *v.* Wallace, 66 Ind. 410.

Iowa.— Gregory *v.* Woodworth, 107 Iowa 151, 77 N. W. 837.

Kentucky.— Thomas *v.* Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240.

Mississippi.— Alabama, etc., R. Co. *v.* McCerren, 75 Miss. 687, 23 So. 423, 876.

Missouri.— Bennett *v.* Southern Bank, 61 Mo. App. 297.

Nebraska.— State *v.* Cornell, 52 Nebr. 25, 71 N. W. 961.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

South Carolina.—Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675; Whaley *v.* Lawton, 57 S. C. 198, 35 S. E. 741.

South Dakota.— Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588.

United States.— Post *v.* Pearson, 108 U. S. 418, 2 S. Ct. 799, 27 L. ed. 774; North Muskegon *v.* Clark, 62 Fed. 694, 10 C. C. A. 591; Spicer *v.* U. S., 5 Ct. Cl. 34.

See 30 Cent. Dig. tit. "Judgment," § 1047 *et seq.* And see *supra*, XIII, C, 7, i, (v).

4. *Alabama.*— Perkins *v.* Moore, 16 Ala. 17.

Arizona.— Wilson *v.* Lowry, 5 Ariz. 335, 52 Pac. 777.

California.— Peterson *v.* Weissbein, 75 Cal. 174, 16 Pac. 769; Terry *v.* Hammonds, 47 Cal. 32; Robinson *v.* Howard, 5 Cal. 428.

Colorado.— Schroers *v.* Fisk, 10 Colo. 599, 16 Pac. 285.

Connecticut.— Brennan *v.* Berlin Iron Bridge Co., 71 Conn. 479, 42 Atl. 625.

Georgia.— Gunn *v.* James, 120 Ga. 482, 48 S. E. 148; Fain *v.* Hughes, 108 Ga. 537, 33 S. E. 1012; Kimbro *v.* Virginia, etc., Air-Line R. Co., 56 Ga. 185; Gray *v.* Gray, 34 Ga. 499; Carey *v.* Giles, 10 Ga. 9.

Illinois.— Vanlandingham *v.* Ryan, 17 Ill. 25.

Indiana.— Nickless *v.* Pearson, 126 Ind. 477, 26 N. E. 478; Wilson *v.* Ray, 24 Ind. 156; Estep *v.* Larsh, 21 Ind. 190.

Iowa.— Felt *v.* Turnure, 48 Iowa 397; Keater *v.* Hock, 16 Iowa 23; Coffin *v.* Knott, 2 Greene 582, 52 Am. Dec. 537.

Kansas.— McLaughlin *v.* Doane, 40 Kan. 392, 19 Pac. 853, 10 Am. St. Rep. 210.

Kentucky.— Woolley *v.* Louisville Banking Co., 81 Ky. 527; Francis *v.* Wood, 81 Ky. 16.

Louisiana.— New Orleans City Bank *v.* Walden, 1 La. Ann. 46.

Mississippi.— Straw *v.* Illinois Cent. R. Co., 73 Miss. 446, 18 So. 847.

Missouri.— Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Freeman *v.* Camden, 7 Mo. 298; Coleman *v.* Dalton, 71 Mo. App. 14.

New Jersey.—Hale *v.* Lawrence, 22 N. J. L. 72.

New Mexico.— Lockhart *v.* Leeds, (1904) 76 Pac. 312.

New York.— Rogers *v.* Niagara Ins. Co., 2 Hall 559; Bouchaud *v.* Dias, 3 Den. 238.

North Carolina.— Willoughby *v.* Stevens, 132 N. C. 254, 43 S. E. 636.

Ohio.— Wilkinson *v.* Palmer, Tapp. 66.

Tennessee.— Parkes *v.* Clift, 9 Lea 524; Turner *v.* Carter, 1 Head 520.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; Bomar *v.* Parker, 68 Tex. 435, 4 S. W. 599; Parker *v.* Spencer, 61 Tex. 155; Dixon *v.* Zadek, 59 Tex. 529; Cameron *v.* Hinton, (Civ. App. 1898) 48 S. W. 616; Kansas, etc., R. Co. *v.* Patrons' Co-Operative Assoc., 2 Tex. App. Civ. Cas. § 502.

Vermont.— St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277.

Washington.— State *v.* Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373.

West Virginia.— South Branch R. Co. *v.* Long, 26 W. Va. 692. And see Carrothers *v.* Sargent, 20 W. Va. 351.

Wisconsin.— Ellis *v.* Northern Pac. R. Co., 80 Wis. 459, 50 N. W. 397, 27 Am. St. Rep. 44.

Wyoming.— Price *v.* Bonnifield, 2 Wyo. 80.

based on several grounds, some of which were merely formal and others going to the merits, and it was sustained generally, and the record does not show on what grounnd, it will not be presumed to have involved an adjudication of the merits, but on the contrary it will be intended that the action was dismissed on the technical objections set up by the demurrer.[5]

b. General Demurrer. It is generally held that a judgment sustaining a general demurrer to the declaration or complaint is a bar to a new suit upon the same state of facts;[6] but it will not prevent the maintenance of an action on a new declaration so amended by the insertion of new allegations or new facts as to raise a different issue.[7] It has been held that the overruling of a demnrrer to a complaint is a conclusive determination that a right of action exists;[8] but on the other hand it has been held that an interlocutory order overruling a general demurrer to a complaint is not *res judicata* of its sufficiency to support a judgment for plaintiff, and hence is no bar to the vacation of such order at a subsequent term and the entry of judgment on the pleadings in favor of defendant, since the doctrine of *res judicata* applies only to a final judgment on the merits.[9]

United States.— Bissell *v.* Spring Valley Tp., 124 U. S. 225, 8 S. Ct. 495, 31 L. ed. 411; Gould *v.* Evansville, etc., R. Co., 91 U. S. 526, 23 L. ed. 416; Bowdoin College *v.* Merritt, 63 Fed. 213; Billing *v.* Gilmer, 60 Fed. 332, 8 C. C. A. 645; U. S. *v.* Leverich, 9 Fed. 481; Brown *v.* District of Columbia, 19 Ct. Cl. 445.

See 30 Cent. Dig. tit. "Judgment," § 1047 *et seq.*

Demurrer to plea or answer.— A judgment on demurrer to an answer setting up a good defense, given in favor of the party pleading it, is a bar to a subsequent suit on the same claim. Wilson *v.* Ray, 24 Ind. 156; Bissell *v.* Spring Valley Tp., 124 U. S. 225, 8 S. Ct. 495, 31 L. ed. 411. See also Stinson *v.* Branigan, 10 U. C. Q. B. 210. But see Westerly Probate Ct. *v.* Potter, 26 R. I. 202, 58 Atl. 661, holding that a decree overruling a demurrer to a plea of release may not be pleaded as an adjudication of the fact of release or as determining the question whether the release, if any, was avoidable for fraud. Where, upon demurrer, the matter of a plea is adjudged no bar, and a writ of inquiry as to damages awarded, the case is not opened by the jury of inquiry returning a special verdict, finding the same facts. The judgment on the demurrer estops the party against whom it is given. Bush *v.* Critchfield, 5 Ohio 109.

Demurrer to bill in equity.— A decree dismissing a bill in equity, rendered on a demurrer which embraces the whole merits of the case, will support a plea of *res judicata*. New Orleans City Bank *v.* Walden, 1 La. Ann. 46. But where it amounts merely to a decision that the complainant has not shown facts entitling him to relief, and not to a decree upon the merits, it is no bar to a subsequent proceeding. Detrick *v.* Sharrar, 95 Pa. St. 521.

Demurrer to bill for want of equity.— Where a demurrer to a bill in equity on this ground is sustained and the bill dismissed it is an adjudication of the merits and bars any further action on the same cause. Turner *v.* Cates, 90 Ga. 731, 16 S. E. 971; Smith *v.* Hornsby, 70 Ga. 552; Ferguson *v.* Carter, 8 Ga. 524. And conversely, where a demurrer for want of equity in the bill is overruled, it is a conclusive adjudication of the equity of the bill, which cannot be disputed if the facts alleged are proved at the hearing. Kilpatrick *v.* Stozier, 67 Ga. 247.

5. Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396; Chrisman *v.* Harman, 29 Gratt. (Va.) 994, 26 Am. Rep. 387; Bissell *v.* Spring Valley Tp., 124 U. S. 225, 8 S. Ct. 495, 31 L. ed. 411. But *compare* Merrill *v.* Ness County, 7 Kan. App. 717, 52 Pac. 109; People *v.* Stephens, 51 How. Pr. (N. Y.) 235.

6. *Alabama.*— Perkins *v.* Moore, 16 Ala. 17.

Kansas.—Brown *v.* Kirkbride, 19 Kan. 588.

Minnesota.— Carlin *v.* Brackett, 38 Minn. 307, 37 N. W. 342.

Texas.— Bomar *v.* Parker, 68 Tex. 435, 4 S. W. 599.

United States.— Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277.

See 30 Cent. Dig. tit. "Judgment," § 1047 *et seq.*

Contra.— Satterfield *v.* Spier, 114 Ga. 127, 39 S. E. 930.

7. *Arkansas.*— State *v.* Roth, 47 Ark. 222, 1 S. W. 98.

California.— Los Angeles *v.* Mellus, 59 Cal. 444.

Kentucky.— Alexander *v.* De Kermel, 81 Ky. 345.

Massachusetts.— Wilbur *v.* Gilmore, 21 Pick. 250.

Michigan.— Rodman *v.* Michigan Cent. R. Co., 59 Mich. 395, 26 N. W. 651.

United States.— Gilman *v.* Rives, 10 Pet. 298, 9 L. ed. 432; Woodland *v.* Newhalls, 31 Fed. 434.

See 30 Cent. Dig. tit. "Judgment," § 1048.

8. Richmond Hosiery Mills *v.* Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290, holding that the overruling of a demurrer to a complaint filed was a conclusive determination that a right of action existed, but did not adjudge the measure of damages.

9. Reilly *v.* Perkins, 6 Ariz. 188, 56 Pac. 734.

c. **Demurrer to Cause of Action Stated.** A judgment sustaining a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action is an adjudication upon the merits, so far as the complaint goes, and may be pleaded in bar of another suit on the same facts;[10] but such a decision will not bar a subsequent suit on a new complaint, supplying the omissions to which objection was taken by the demurrer, or setting up new or different facts.[11]

d. **Demurrer to the Evidence.** On a demurrer to the evidence a judgment in favor of the demurrant is on the merits and is a bar to any future suit on the same cause of action.[12]

10. Judgment Non Obstante Veredicto. A judgment entered by the court *non obstante veredicto* is on the merits and is a bar to any further litigation of the same cause of action between the parties or their privies.[13]

D. Causes of Action Merged or Barred[14] **—1. Identity of Causes of Action — a. In General.** Although a judgment may be conclusive evidence on any point formerly litigated and decided between the same parties,[15] yet it is not pleadable in bar of a second action unless founded on the same identical cause of action. If this identity exists the former judgment may be interposed to prevent a second recovery by plaintiff on the same cause, or to bar the maintenance of a second

10. *California.*— Hardy *v.* Hardy, 97 Cal. 125, 31 Pac. 906; Los Angeles *v.* Mellus, 58 Cal. 16.

Connecticut.— Brennan *v.* Berlin Iron Bridge Co., 71 Conn. 479, 42 Atl. 625.

Illinois.— Vanlandingham *v.* Ryan, 17 Ill. 25.

Indiana.— Porter *v.* Fraleigh, 19 Ind. App. 562, 49 N. E. 863.

Iowa.— Lamb *v.* McConkey, 76 Iowa 47, 40 N. W. 77.

Louisiana.— Baker *v.* Frellsen, 32 La. Ann. 822.

Washington.— Plant *v.* Carpenter, 19 Wash. 621, 53 Pac. 1107.

United States.— Alley *v.* Nott, 111 U. S. 472, 4 S. Ct. 495, 28 L. ed. 491; Lindsley *v.* Union Silver Star Min. Co., 115 Fed. 46, 52 C. C. A. 640; Haug *v.* Great Northern R. Co., 102 Fed. 74, 42 C. C. A. 167; Messinger *v.* New England Mut. L. Ins. Co., 59 Fed. 416.

See 30 Cent. Dig. tit. "Judgment," § 1048.

11. *Arkansas.*— Pritchard *v.* Woodruff, 36 Ark. 196.

Colorado.— Gallup *v.* Lichter, 4 Colo. App. 296, 35 Pac. 985.

Idaho.— Lockett *v.* Lindsay, 1 Ida. 324.

Kansas.— McClung *v.* Hohl, 10 Kan. App. 93, 61 Pac. 507.

Kentucky.— Pepper *v.* Donnelly, 87 Ky. 259, 8 S. W. 441, 10 Ky. L. Rep. 140; Kendal *v.* Talbot, 1 A. K. Marsh. 321; Covington *v.* Taffee, 68 S. W. 629, 24 Ky. L. Rep. 373; Potter *v.* Benge, 67 S. W. 1005, 24 Ky. L. Rep. 24.

Minnesota.— Swanson *v.* Great Northern R. Co., 73 Minn. 103, 75 N. W. 1033; Gerrish *v.* Pratt, 6 Minn. 53.

Missouri.— Wells *v.* Moore, 49 Mo. 229.

Nebraska.— Garneau *v.* Moore, 39 Nebr. 791, 58 N. W. 438.

New York.— Stowell *v.* Chamberlain, 3 Thomps. & C. 374.

Ohio.— Moore *v.* Dunn, 41 Ohio St. 62; Rafferty *v.* Toledo Traction Co., 25 Ohio Cir. Ct. 411.

Tennessee.— Grotenkemper *v.* Carver, 4 Lea 375.

Wisconsin.— Taylor *v.* Matteson, 86 Wis. 113, 56 N. W. 829.

United States.— Gould *v.* Evansville, etc., R. Co., 91 U. S. 526, 23 L. ed. 416; Gilman *v.* Rives, 10 Pet. 298, 9 L. ed. 432; North Muskegon *v.* Clark, 62 Fed. 694, 10 C. C. A. 591; Gilmer *v.* Morris, 46 Fed. 333.

See 30 Cent. Dig. tit. "Judgment," §§ 1047, 1048.

Overruling demurrer.— Where a demurrer to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, is overruled with leave to answer, plaintiff's right to maintain the action is not *res judicata*, but defendant, by answering, withdraws the demurrer, and he may raise any objections to the maintenance of the action which he did not waive by answering. McCullough *v.* Pence, 85 Hun (N. Y.) 271, 32 N. Y. Suppl. 986. And so overruling a demurrer on this ground does not preclude another judge of the same court from subsequently directing a verdict for defendant on the pleadings and evidence. Kleckner *v.* Turk, 45 Nebr. 176, 63 N. W. 469.

12. Hunt *v.* Terril, 7 J. J. Marsh. (Ky.) 67.

13. Casey *v.* Pennsylvania Asphalt Paving Co., 109 Fed. 744 [*affirmed* in 114 Fed. 189, 52 C. C. A. 145].

14. Matters as to which judgment is conclusive see *infra*, XIV, C.

Matters concluded by judgment in particular actions or proceedings see *infra*, XIV, D.

Causes of action barred by judgment of sister state see *infra*, XXII, B, 1, e, (II).

Merger and bar of causes of action and defenses in suits for divorce see Divorce, 14 Cyc. 725 *et seq.*

Former recovery as defense in suit against heir to enforce debts of intestate see Descent and Distribution, 14 Cyc. 212.

15. Conclusiveness of adjudication see *infra*, XIV.

action upon a cause against which defendant has already successfully defended himself.[16] But to have this effect it must clearly appear or be demonstrated on what cause of action the former judgment was rendered and that it is the same

16. *Alabama.*— Pruitt *v.* Holly, 73 Ala. 369; Berringer *v.* Payne, 68 Ala. 154.

Arkansas.— Neal *v.* Brandon, (1905) 85 S. W. 776; Weis *v.* Meyer, 55 Ark. 18, 17 S. W. 339; McGee *v.* Overby, 12 Ark. 164.

California.— *In re* Wilson, 147 Cal. 108, 81 Pac. 313; People *v.* Holladay, (1885) 5 Pac. 798; Chase *v.* Swain, 9 Cal. 130.

Connecticut.— Waterbury Dime Sav. Bank *v.* McAlenney, 78 Conn. 208, 61 Atl. 476; Storrs *v.* Robinson, 77 Conn. 207, 58 Atl. 746; Wildman *v.* Wildman, 70 Conn. 700, 41 Atl. 1; Sargent *v.* New Haven Steamboat Co., 65 Conn. 116, 31 Atl. 543; Supples *v.* Cannon, 44 Conn. 424; Munson *v.* Munson, 30 Conn. 425; Cowles *v.* Harts, 3 Conn. 516.

District of Columbia.— Strong *v.* Grant, 2 Mackey 218.

Georgia.— McDougald *v.* Maddox, 32 Ga. 63.

Illinois.— Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79; Spring Valley Coal Co. *v.* Patting, 112 Ill. App. 4; Marshall *v.* John Grosse Clothing Co., 83 Ill. App. 338; Folz *v.* Nelke, 33 Ill. App. 370.

Indiana.— Hoosier Stone Co. *v.* Louisville, etc., R. Co., 131 Ind. 575, 31 N. E. 365; Balfe *v.* Lammers, 109 Ind. 347, 10 N. E. 92; Bougher *v.* Scobey, 21 Ind. 365; Athearn *v.* Brannan, 8 Blackf. 440; McClaskey *v.* McDaniel, (App. 1905) 74 N. E. 1023; Chicago, etc., R. Co. *v.* Yawger, 24 Ind. App. 460, 56 N. E. 50.

Iowa.— Blair *v.* Hemphill, 111 Iowa 226, 82 N. W. 501.

Kansas.— John V. Farwell Co. *v.* Lykins, 59 Kan. 96, 52 Pac. 99; Tracy *v.* Kerr, 47 Kan. 656, 28 Pac. 707; Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 19 Kan. 127.

Kentucky.— Newport *v.* Taylor, 11 B. Mon. 361; Campbell *v.* Sherley, 76 S. W. 540, 25 Ky. L. Rep. 904; Hazelrig *v.* Boarman, 2 S. W. 769, 8 Ky. L. Rep. 607; Steinharter *v.* Wolfstein, 13 Ky. L. Rep. 871.

Louisiana.— Baer *v.* Terry, 108 La. 597, 32 So. 353, 92 Am. St. Rep. 394; Semple *v.* Scarborough, 44 La. Ann. 257, 10 So. 860; State *v.* Jumel, 30 La. Ann. 861, Leatt *v.* Williams, 22 La. Ann. 81; Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Peyton *v.* Enos, 16 La. Ann. 135; Stadeker *v.* His Creditors, 12 La. Ann. 817; Shepherd *v.* Phillips, 7 La. Ann. 458; Osburn *v.* Planters Bank, 2 La. Ann. 494; State *v.* Atchafalaya R., etc., Co., 7 Rob. 447; Noble *v.* Cooper, 7 Rob. 44; Ganiott *v.* Harvard, 6 Mart. N. S. 290; Goodwin *v.* Chesneau, 3 Mart. N. S. 409; Hawkins *v.* Gravier, 9 Mart. 727; Cloutier *v.* Lecomte, 3 Mart. 481.

Maine.— Howard *v.* Kimball, 65 Me. 308.

Maryland.— Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Massachusetts.— Barnes *v.* Huntley, 188 Mass. 274, 74 N. E. 318; Hoseason *v.* Keegen, 178 Mass. 247, 59 N. E. 627; Harlow *v.* Bartlett, 170 Mass. 584, 49 N. E. 1014; Miller *v.* Miller, 150 Mass. 111, 22 N. E. 765; Gilbert *v.* Thompson, 9 Cush. 348; Jones *v.* Fales, 4 Mass. 245.

Mississippi.— Perry *v.* Lewis, 49 Miss. 443; Dunlap *v.* Edwards, 29 Miss. 41.

Missouri.— Browne *v.* Appleman, 83 Mo. App. 79; Winham *v.* Kline, 77 Mo. App. 36; Downing *v.* Missouri, etc., R. Co., 70 Mo. App. 657; Tutt *v.* Price, 7 Mo. App. 194.

Nebraska.— Brigham *v.* McDowell, 19 Nebr. 407, 27 N. W. 384.

New Jersey.— Traflet *v.* Empire L. Ins. Co., 64 N. J. L. 387, 46 Atl. 204; Richman *v.* Baldwin, 21 N. J. L. 395; Smock *v.* Throckmorton, 8 N. J. L. 216; Wooster *v.* Cooper, 59 N. J. Eq. 204, 45 Atl. 381.

New Mexico.— Lockhart *v.* Leeds, (1904) 76 Pac. 312.

New York.— Marsh *v.* Masterton, 101 N. Y. 401, 5 N. E. 59; Lorillard *v.* Clyde, 99 N. Y. 196, 1 N. E. 614; MacArdell *v.* Olcott, 104 N. Y. App. Div. 263, 93 N. Y. Suppl. 799; Engel *v.* Union Square Bank, 94 N. Y. App. Div. 244, 87 N. Y. Suppl. 1070; Parr *v.* Greenbush, 42 Hun 232; Ehle *v.* Bingham, 7 Barb. 494; Boyd *v.* Boyd, 26 Misc. 679, 56 N. Y. Suppl. 760.

North Carolina.— Scott *v.* Mutual Reserve Fund Life Assoc., 137 N. C. 515, 50 S. E. 221; Barringer *v.* Virginia Trust Co., 132 N. C. 409, 43 S. E. 910; Turner *v.* Rosenthal, 116 N. C. 437, 21 S. E. 198; Williams *v.* Clouse, 91 N. C. 322; Temple *v.* Williams, 91 N. C. 82; Tuttle *v.* Harrill, 85 N. C. 456; Shuster *v.* Perkins, 47 N. C. 217; Pass *v.* Lee, 32 N. C. 410.

Ohio.— Linke *v.* Walcutt, 26 Ohio Cir. Ct. 10 [*affirmed* without opinion in 69 Ohio St. 531, 70 N. E. 1125]; Dayton, etc., R. Co. *v.* Dayton, etc., Traction Co., 26 Ohio Cir. Ct. 1.

Oregon.— Ruckman *v.* Union R. Co., 45 Oreg. 578, 78 Pac. 748, 69 L. R. A. 480.

Pennsylvania.— Baker *v.* Bailey, 204 Pa. St. 524, 54 Atl. 326; Besecker *v.* Flory, 176 Pa. St. 23, 34 Atl. 926; Kaster *v.* Welsh, 157 Pa. St. 590, 27 Atl. 668; Susquehanna Mut. F. Ins. Co.'s Appeal, 105 Pa. St. 615; Cist *v.* Zeigler, 16 Serg. & R. 282, 16 Am. Dec. 573; Rudolph *v.* Sturgis, 17 Montg. Co. Rep. 13.

South Carolina.— Parrott *v.* Barrett, 70 S. C. 195, 49 S. E. 563.

Texas.— Foster *v.* Wells, 4 Tex. 101.

Utah.— Hall *v.* McNally, 23 Utah 606, 65 Pac. 724.

Vermont.— Wing *v.* Hall, 47 Vt. 182; Gates *v.* Goreham, 5 Vt. 317, 26 Am. Dec. 303.

Virginia.— Fishburne *v.* Ferguson, 85 Va. 321, 7 S. E. 361; McComb *v.* Lobdell, 32 Gratt. 185; Cleaton *v.* Chambliss, 6 Rand. 86.

West Virginia.— State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650; Pickens *v.* Love, 44 W. Va. 725, 29 S. E. 1018.

as the cause of action brought forward in the second suit; and no estoppel arises if this matter can be made out only by inference or conjecture.[17] If the causes of action involved in the two suits are not the same, identically or substantially, then, whatever may be the effect of the judgment as evidence, it is no bar to the maintenance of the subsequent suit.[18]

Wyoming.— Bonnifield *v.* Price, 1 Wyo. 223.

United States.— Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059; Ranken *v.* St. Louis, etc., R. Co., 98 Fed. 479; Steam-Gauge, etc., Co. *v.* Meyrose, 27 Fed. 213; Crandall *v.* Dare, 11 Fed. 902; Emma Silver Min. Co. *v.* Emma Silver Min. Co., 7 Fed. 401; U. S., etc., Felting Co. *v.* Asbestos Felting Co., 4 Fed. 813, 18 Blatchf. 312; Clark *v.* Gibboney, 5 Fed. Cas. No. 2,821, 3 Hughes 391; Smith *v.* Turner, 22 Fed. Cas. No. 13,119, 1 Hughes 373.

England.— Midland R. Co. *v.* Martin, [1893] 2 Q. B. 172, 17 Cox C. C. 687, 58 J. P. 39, 62 L. J. Q. B. 517, 69 L. T. Rep. N. S. 353, 5 Reports 480; Beck *v.* Pierce, 23 Q. B. D. 316, 54 J. P. 198, 58 L. J. Q. B. 516, 61 L. T. Rep. N. S. 448, 38 Wkly. Rep. 29; Williams *v.* Davies, 11 Q. B. D. 74, 47 J. P. 581, 52 L. J. M. C. 87; Peareth *v.* Marriott, 22 Ch. D. 182, 52 L. J. Ch. 221, 48 L. T. Rep. N. S. 170, 31 Wkly. Rep. 68; The Thyatira, 8 P. D. 155, 5 Aspin. 1477, 52 L. J. P. & Adm. 85, 49 L. T. Rep. N. S. 406, 32 Wkly. Rep. 276; Moore *v.* Battie, Ambl. 371, 27 Eng. Reprint 247, 1 Eden 273, 28 Eng. Reprint 689; Leicester *v.* Perry, 1 Bro. Ch. 305, 28 Eng. Reprint 1148; Mallock *v.* Galton, Dick. 65, 21 Eng. Reprint 192; Carter *v.* James, 2 D. & L. 236, 8 Jur. 912, 13 L. J. Exch. 373, 13 M. & W. 137; Dublin *v.* Trimleston, 12 Ir. Eq. 251; Bristow *v.* Fairclough, 9 L. J. C. P. 245, 1 M. & G. 143, 1 Scott N. R. 161, 39 E. C. L. 687; Ebbetts *v.* Conquest, 82 L. T. Rep. N. S. 560; Savile *v.* Jackson, McClell. 377, 11 Price 337, 13 Price 715; Atty.-Gen. *v.* Rochester, 6 Sim. 273, 9 Eng. Ch. 273, 58 Eng. Reprint 596; Holland *v.* Clark, 1 Y. & Coll. 151, 20 Eng. Ch. 151, 62 Eng. Reprint 831.

Canada.— Delorme *v.* Cusson, 28 Can. Sup. Ct. 66; Isbester *v.* Ray, 26 Can. Sup. Ct. 79; Russell *v.* Rowe, 7 U. C. Q. B. 484.

See 30 Cent. Dig. tit. "Judgment," §§ 1092, 1093. And see the cases cited *supra*, XIII, A, 1, 2.

Application technically different.— Where a divisional court has decided against an applicant on one application, a divisional court consisting of other judges will not overrule or review that decision on a second application by him, which, although technically different from the first, raises the identical point again. Reg. *v.* Eardley, 49 J. P. 551.

17. *Alabama.*— Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

California.— Lillis *v.* Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108; Flandreau *v.* Downey, 23 Cal. 354.

Iowa.— Griffith *v.* Fields, 105 Iowa 362, 75 N. W. 325.

Massachusetts.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454.

United States.— De Sollar *v.* Hanscome, 158 U. S. 216, 15 S. Ct. 816, 39 L. ed. 956; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214.

See 30 Cent. Dig. tit. "Judgment," § 1092.

18. *Alabama.*— Gilbreath *v.* Jones, 66 Ala. 129; Deens *v.* Dunklin, 33 Ala. 47; Stallsworth *v.* Stallsworth, 5 Ala. 143.

Arkansas.— Pillow *v.* King, 55 Ark. 633, 18 S. W. 764.

California.— Daniels *v.* Henderson, 49 Cal. 242; Gamble *v.* Voll, 15 Cal. 507.

Connecticut.— Chapman *v.* Brainard, 2 Root 375.

Illinois.— Markley *v.* People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; Wright *v.* Guffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Davis *v.* Kennedy, 105 Ill. 300; American Percheron Horse Breeders' Assoc. *v.* American Percheron Horse Breeders', etc., Assoc., 114 Ill. App. 136; Smith *v.* Rountree, 85 Ill. App. 161 [*affirmed* in 185 Ill. 219, 56 N. E. 1130].

Indiana.— Johnson *v.* Graves, 129 Ind. 124, 28 N. E. 315; Moore *v.* State, 114 Ind. 414, 16 N. E. 836; Bilsland *v.* McManomy, 82 Ind. 139; Jones *v.* Sweet, 77 Ind. 187.

Iowa.— Heins *v.* Wicke, 102 Iowa 396, 71 N. W. 345; Merrill *v.* Tobin, 82 Iowa 529, 48 N. W. 1044.

Kansas.— Washington Nat. Bank *v.* Woodrum, 60 Kan. 34, 55 Pac. 330.

Kentucky.— Webb *v.* Webb, 6 T. B. Mon. 163; Sebastian *v.* Booneville Academy Co., 56 S. W. 810, 22 Ky. L. Rep. 186; Schuster *v.* White, 44 S. W. 959, 19 Ky. L. Rep. 1861.

Louisiana.— McCaffrey *v.* Benson, 40 La. Ann. 10, 3 So. 393; Thoms *v.* Sewell, 30 La. Ann. 359; Brou *v.* Becnel, 22 La. Ann. 610; Thompson *v.* Nicholson, 12 Rob. 326; Mallard *v.* Borges, 5 Rob. 15; Maurin *v.* Toustin, 6 Mart. 496.

Massachusetts.— Eastman *v.* Symonds, 108 Mass. 567; McDowell *v.* Langdon, 3 Gray 513; Harding *v.* Hale, 2 Gray 399; Lehan *v.* Good, 8 Cush. 302.

Michigan.— Robinson *v.* Kunkleman, 117 Mich. 193, 75 N. W. 451.

Minnesota.— Lindgren *v.* Lindgren, 73 Minn. 90, 75 N. W. 1034.

Nebraska.— Linton *v.* Cathers, (1903) 97 N. W. 800.

New Jersey.— Pierce *v.* Old Dominion Copper Min., etc., Co., 67 N. J. Eq. 399, 58 Atl. 319.

New York.— Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; Brantingham *v.* Huff, 43 N. Y. App. Div. 414, 60 N. Y. Suppl. 157; McCarthy *v.* Hiller, 26 N. Y. App. Div. 588, 50 N. Y. Suppl. 626; Raven *v.* Smith, 87 Hun 90, 33 N. Y. Suppl. 972; Vinal *v.* Continental Constr., etc., Co.,

b. Identification of Causes of Action. A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first; if so the prior judgment is a bar.[19] But if the evidence offered in

53 Hun 247, 6 N. Y. Suppl. 595; Wilcox *v.* Lee, 1 Rob. 355; Scott *v.* Haines, 18 N. Y. Suppl. 163; Stearns *v.* St. Louis, etc., R. Co., 2 N. Y. St. 391.

North Carolina.— Ray *v.* Scott, 59 N. C. 283.

Ohio.— Hellebush *v.* Erdhouse, 11 Ohio Cir. Ct. 298, 5 Ohio Cir. Dec. 397; Anonymous, 7 Ohio Dec. (Reprint) 158, 1 Cinc. L. Bul. 186.

Oregon.— Knott *v.* Stephens, 5 Oreg. 235.

Pennsylvania.— Amrhein *v.* Quaker City Dye Works, 192 Pa. St. 253, 43 Atl. 1008; Van Dyke *v.* Van Dyke, 135 Pa. St. 459, 19 Atl. 1061; Jennings *v.* Hare, 104 Pa. St. 489; Woods *v.* White, 97 Pa. St. 222; Schriver *v.* Eckenrode, 87 Pa. St. 213; Finley *v.* Hanbest, 30 Pa. St. 190; Kelsey *v.* Murphy, 26 Pa. St. 78; Dicken *v.* Hays, 7 Pa. Cas. 147, 7 Atl. 58; Lewis *v.* Tams, 4 Phila. 276.

South Carolina.— Wagener *v.* Kirven, 52 S. C. 25, 29 S. E. 390; Pickens *v.* Bryant, 45 S. C. 17, 22 S. E. 750; People's Bldg., etc., Assoc. *v.* Mayfield, 42 S. C. 424, 20 S. E. 290; *Ex p.* Dunn, 8 S. C. 207.

South Dakota.— Pitts *v.* Oliver, 13 S. D. 561, 83 N. W. 591, 79 Am. St. Rep. 907.

Tennessee.— Coulter *v.* Davis, 13 Lea 451.

Texas.— Dority *v.* Dority, 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941; Blum *v.* Gaines, 57 Tex. 135.

Vermont.— Sawyer *v.* McIntyre, 18 Vt. 27.

Virginia.— Quarles *v.* Kerr, 14 Gratt. 48.

Wisconsin.— Rowell *v.* Smith, 125 Wis. 510, 102 N. W. 1; Lindeman *v.* Rusk, 125 Wis. 210, 104 N. W. 119; Case *v.* Hoffman, 100 Wis. 314, 75 N. W. 945, 44 L. R. A. 728; Rosenow *v.* Gardner, 99 Wis. 358, 74 N. W. 982; Boutin *v.* Lindsley, 84 Wis. 644, 54 N. W. 1017; Ellis *v.* Northern Pac. R. Co., 80 Wis. 459, 50 N. W. 397, 27 Am. St. Rep. 44; Logan *v.* Trayser, 77 Wis. 579, 46 N. W. 877.

United States.— Fuller *v.* Venable, 118 Fed. 543, 55 C. C. A. 309; Claflin *v.* Mether Electric Co., 98 Fed. 699, 39 C. C. A. 241; Osborn *v.* U. S., 9 Ct. Cl. 153.

England.— Whittaker *v.* Kershaw, 45 Ch. D. 320, 60 L. J. Ch. 9, 63 L. T. Rep. N. S. 203, 39 Wkly. Rep. 23; Peareth *v.* Marriott, 22 Ch. D. 182, 52 L. J. Ch. 221, 48 L. T. Rep. N. S. 170, 31 Wkly. Rep. 68; Bradshaw *v.* Lancashire, etc., R. Co., L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. Rep. N. S. 847, 23 Wkly. Rep. 310; Daly *v.* Dublin, etc., R. Co., L. R. 30 Ir. 514; Carnegie *v.* Carnegie, L. R. 17 Ir. 430; Hunter *v.* Stewart, 4 De G. F. & J. 168, 8 Jur. N. S. 317, 31 L. J. Ch. 346, 5 L. T. Rep. N. S. 471, 10 Wkly. Rep. 176, 65 Eng. Ch. 131, 45 Eng. Reprint 1148.

Canada.— Deacon *v.* Great Western R. Co., 6 U. C. C. P. 241.

See 30 Cent. Dig. tit. "Judgment," § 1094.

In trover for the conversion of chattels, a plea of former recovery in detinue, not alleging that the question of ownership entered into the issue on the former trial, and was then decided, and not negativing the idea that the recovery in that case was because of a failure to prove defendant's possession, is fatally defective. Gilbreath *v.* Jones, 66 Ala. 129.

New bill brought in different right.—A plea of a former bill being for the same matter was overruled, where the last was brought in a different right. Huggins *v.* York-Buildings Co., 2 Atk. 44, Barn. 83, 26 Eng. Reprint 423.

19. *Alabama.*— Cannon *v.* Brame, 45 Ala. 262.

California.— Woolverton *v.* Baker, 98 Cal. 628, 33 Pac. 731; Taylor *v.* Castle, 42 Cal. 367.

Connecticut.— Percy *v.* Foote, 36 Conn. 102.

Georgia.— Crockett *v.* Routon, Dudley 254.

Illinois.— People *v.* Rickert, 159 Ill. 496, 42 N. E. 884.

Massachusetts.— Smith *v.* Whiting, 11 Mass. 445.

Nebraska.— Gayer *v.* Parker, 24 Nebr. 643, 39 N. W. 845, 8 Am. St. Rep. 227.

New York.— Warren *v.* Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Dawley *v.* Brown, 79 N. Y. 390; Stowell *v.* Chamberlain, 60 N. Y. 272; Marsh *v.* Masterson, 50 N. Y. Super. Ct. 187; Miller *v.* Manice, 6 Hill 144; Johnson *v.* Smith, 8 Johns. 383; Rice *v.* King, 7 Johns. 20.

Oklahoma.— Pratt *v.* Ratliff, 10 Okla. 168, 61 Pac. 523.

Pennsylvania.— Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131.

Tennessee.— Motley *v.* Harris, 1 Lea 577.

Vermont.— Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646; Gates *v.* Goreham, 5 Vt. 317, 26 Am. Dec. 303.

Washington.— Bruce *v.* Foley, 18 Wash. 96, 50 Pac. 935.

United States.— Jones *v.* Hillis, 100 Fed. 355; Stone *v.* U. S., 64 Fed. 667, 12 C. C. A. 451; Snyder *v.* McComb, 39 Fed. 292; Clark *v.* Blair, 14 Fed. 812, 4 McCrary 311; Emma Silver Min. Co. *v.* New York Emma Silver Min. Co., 7 Fed. 401; Lawrence *v.* Vernon, 15 Fed. Cas. No. 8,146, 3 Sumn. 20.

England.— Martin *v.* Kennedy, 2 B. & P. 69; Hunter *v.* Stewart, 4 De G. F. & J. 168, 8 Jur. N. S. 317, 31 L. J. Ch. 346, 5 L. T. Rep. N. S. 471, 10 Wkly. Rep. 176, 65 Eng. Ch. 131, 45 Eng. Reprint 1148.

See 30 Cent. Dig. tit. "Judgment." § 1093.

In criminal cases.—The test of identity described in the text is equally applicable to

the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of plaintiff in the first suit is no bar to his recovery in the other suit, although it is for the same cause of action.[20]

c. Theory of Action or Recovery. Where a plaintiff is defeated in an action based upon a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his view of the case, this will not preclude him from renewing the litigation, without any change in the facts, but basing his claim on a new and more correct theory.[21] This rule applies where he bases his claim in the second suit upon a different right or title from that set up in the first action, provided the two titles are so inconsistent that they could not both have been brought forward in the same action;[22] where he

cases of successive prosecutions for the same criminal offense, to determine whether a plea of former conviction or acquittal is good in bar. Gordon *v.* State, 71 Ala. 315; Heikes *v.* Com., 26 Pa. St. 513. And see *In re* Campbell, 197 Pa. St. 581, 47 Atl. 860.

First cause of action merged in judgment.— A judgment on a judgment on a note of a firm, against a partner not served nor appearing in the first action, is not obtained on the same cause of action as the note, and is no bar to a subsequent action on the note. Albuquerque First Nat. Bank *v.* Lewinson, (N. M. 1904) 76 Pac. 288.

20. Stringer *v.* Adams, 98 Ind. 539; Indianapolis, etc., R. Co. *v.* Clark, 21 Ind. 150; Hargus *v.* Goodman, 12 Ind. 629; Kirkpatrick *v.* Stingley, 2 Ind. 269.

21. *Connecticut.*— Fisk *v.* Hartford, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147.

Georgia.— Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911.

Illinois.— People *v.* Gary, 196 Ill. 310, 63 N. E. 749; Pinneo *v.* Goodspeed, 120 Ill. 524, 12 N. E. 196; Taylor *v.* Indiana Paper Co., 64 Ill. App. 339; Dowdall *v.* Cannedy, 32 Ill. App. 207.

Indiana.—Chicago, etc., R. Co. *v.* State, 153 Ind. 134, 51 N. E. 924.

Massachusetts.— Jones *v.* Fales, 4 Mass. 245.

Michigan.— Brand *v.* Connery, 132 Mich. 88, 92 N. W. 784.

Minnesota.— Richardson *v.* Richards, 36 Minn. 111, 30 N. W. 457.

New Mexico.— Lockhart *v.* Leeds, (N. M. 1904) 76 Pac. 312.

New York.— People *v.* Dalton, 52 N. Y. App. Div. 371, 65 N. Y. Suppl. 342; Stokes *v.* Stokes, 49 N. Y. App. Div. 302, 63 N. Y. Suppl. 887; Buttling *v.* Hatton, 33 N. Y. App. Div. 551, 53 N. Y. Suppl. 1009; Osterman *v.* Goldstein, 32 Misc. 676, 66 N. Y. Suppl. 506; Kreitz *v.* Frost, 5 Abb. Pr. N. S. 277. And see Goldstein *v.* Asen, 46 Misc. 251, 91 N. Y. Suppl. 783.

Ohio.— Jones *v.* Kilbreth, 49 Ohio St. 401, 31 N. E. 346; Manns *v.* Cincinnati, 10 Ohio Cir. Ct. 549, 6 Ohio Cir. Dec. 824.

Oregon.— Nickum *v.* Burckhardt, 30 Oreg. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822.

Washington.— Commercial Bank *v.* Toklas, 21 Wash. 36, 56 Pac. 927.

Wisconsin.— Fordyce *v.* State, 115 Wis. 608, 92 N. W. 430; Andrew *v.* Schmitt, 64 Wis. 664, 26 N. W. 190.

United States.— Dexter *v.* Sayward, 84 Fed. 296. And see Hubbell *v.* U. S., 171 U. S. 203, 18 S. Ct. 828, 43 L. ed. 136, holding that a patentee cannot bring suit against an infringer on a certain state of facts, and after dismissal of his action bring another suit against the same party on the same state of facts, and recover upon a different theory; but the judgment in the first action is a complete estoppel in favor of the successful party in any subsequent action on the same state of facts.

See 30 Cent. Dig. tit. "Judgment," § 1089.

Contra.— McGrady *v.* Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

22. Watson *v.* St. Paul City R. Co., 76 Minn. 358, 79 N. W. 308; Parker *v.* Stephens, (Tex. Civ. App. 1899) 48 S. W. 878; Kroegher *v.* Calivada Colonization Co., 119 Fed. 641, 56 C. C. A. 257.

Applications of rule.— A judgment in an action for land against a party suing as the heir of one person is not a bar to his second action for the same land, in which he sues as the heir of another person. Downing *v.* Diaz, 80 Tex. 436, 16 S. W. 49. So a judgment dismissing for want of evidence a suit for obstructing a right of way in gross is not a bar to a similar suit alleging the way to be appendant or appurtenant. Whaley *v.* Stevens, 24 S. C. 479. And where a town borrowed money to pay certain expenses, giving notes therefor, and, in an action at law upon these notes the town was held not liable, for want of authority to borrow for that purpose, it was held that the judgment was not a bar to a subsequent action in equity by the person who made the loan, claiming as the equitable assignee of the debts to pay which the money was borrowed. Wells *v.* Salina, 71 Hun (N. Y.) 559, 25 N. Y. Suppl. 134.

Limitations of rule.— To prevent the estoppel of the judgment from attaching, there must be a real and substantial difference in the two titles set up, and it is not sufficient if it is the same title presented under a different aspect or with only nominal or technical variances. Werlein *v.* New Orleans, 177 U. S. 390, 20 S. Ct. 682, 44 L. ed. 817. Again the former judgment will be a bar if it really involved a determination of the title set up in

alleges a different ground of liability on the part of defendant;[23] where he has been defeated in an action to recover on an alleged express contract for services to be rendered or goods to be furnished, failing to prove such a contract, and afterward sues to recover the reasonable value of the services or goods;[24] where he fails to establish defendant's liability under a written instrument, and afterward seeks recovery as on a resulting trust or on the ground of fraud or mistake;[25] where, having failed to establish a specific lien on property, he sues again on the ground of the personal liability of defendant;[26] where, having sued for the price of property and failed to prove a sale, he brings a new action for its use or

the second action, or of a question underlying both titles, and subversive of plaintiff's right to recover under either. Carnes *v.* Carnes, 26 Tex. Civ. App. 610, 64 S. W. 877. Further a plaintiff must bring forward in one action all the titles or claims he may have to the property in suit, when they are not mutually exclusive; and the rule stated in the text applies only where he entirely abandons the title alleged in the first action, and brings forward, as the basis of his second action, a title wholly irreconcilable with that first alleged. Shinkle *v.* Vickery, 117 Fed. 916. And see *infra*, XIII, D, 1, d, 4, c.

23. *California.*— Heilig *v.* Parlin, 134 Cal. 99, 66 Pac. 186.

Georgia.— Huff *v.* Huff, 99 Ga. 371, 27 S. E. 699.

Iowa.— Keater *v.* Hock, 16 Iowa 23.

Massachusetts.— Harlow *v.* Bartlett, 170 Mass. 584, 49 N. E. 1014; Bridge *v.* Austin, 4 Mass. 115.

New York.— Belden *v.* State, 103 N. Y. 1, 8 N. E. 363.

Oregon.— Feldman *v.* McGuire, 34 Oreg. 309, 55 Pac. 872.

Texas.— American Freehold Land Mortg. Co. *v.* Macdonnell, 93 Tex. 398, 55 S. W. 737.

Illustrations.— An order discharging a person as garnishee of a judgment debtor is no bar to an action against the same person to set aside as fraudulent a conveyance to him by the judgment debtor, and to subject the property to a judgment against the grantor. Boyle *v.* Maroney, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657; Massey *v.* McCoy, 79 Mo. App. 169. A judgment for defendant, in an action on an unconditional promise to pay a debt from which he has been discharged in bankruptcy, is no bar to action on a conditional promise. Doom *v.* Snyder, 10 Ky. L. Rep. 281. A judgment dismissing a suit for specific performance of a promise to sign a lease is not a bar to a subsequent action on a verbal lease. Laroussini *v.* Werlein, 50 La. Ann. 637, 23 So. 467. And one sued as a joint maker of a note, and decided in that action to be liable in the character of a guarantor, cannot plead the judgment as a bar to an action to enforce his liability as guarantor. Hill *v.* Combs, 92 Mo. App. 242.

24. *Massachusetts.*— Salem India-Rubber Co. *v.* Adams, 23 Pick. 256.

Michigan.— Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436.

Minnesota.— Rossman *v.* Tilleny, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247.

Missouri.— Arthur Fritsch Foundry, etc., Co. *v.* Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136.

New Jersey.— Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539, 7 Atl. 647.

New York.— Marsh *v.* Masterson, 101 N. Y. 401, 5 N. E. 59; Maeder *v.* Wexler, 43 Misc. 16, 87 N. Y. Suppl. 400.

Ohio.— *In re* Ward, 21 Ohio Cir. Ct. 753, 12 Ohio Cir. Dec. 44.

Texas.— Henrietta Nat. Bank *v.* Barrett, (Civ. App. 1894) 25 S. W. 456.

Washington.— Buddress *v.* Schafer, 12 Wash. 310, 41 Pac. 43.

Wisconsin.— Manitowoc Steam Boiler Works *v.* Manitowoc Glue Co., 120 Wis. 1, 97 N. W. 515.

United States.— Gibboney *v.* Camden County, 122 Fed. 46, 58 C. C. A. 228; Davenport *v.* Allen, 120 Fed. 172.

Where the ground of the decision for defendant in the first action is that no such services were rendered, or that no such goods were furnished, as the case may be, it will of course be a bar to the second action. Randall *v.* Carpenter, 25 R. I. 641, 57 Atl. 865. And see Young *v.* Farwell, 165 N. Y. 341, 59 N. E. 143.

See 30 Cent. Dig. tit. "Judgment," §§ 1093, 1094.

25. *California.*— O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236.

Missouri.— Davidson *v.* Mayhew, 169 Mo. 258, 68 S. W. 1031.

New York.— Gutchess *v.* Whiting, 46 Barb. 139.

Rhode Island.— Horton *v.* Bassett, 17 R. I. 129, 20 Atl. 234.

Virginia.— Eaves *v.* Vial, 98 Va. 134, 34 S. E. 978.

Wisconsin.— Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

United States.— Elgin Nat. Watch Co. *v.* Meyer, 29 Fed. 225.

See 30 Cent. Dig. tit. "Judgment," § 1090.

But *compare* Emery *v.* Goodwin, 13 Me. 14, 29 Am. Dec. 475.

26. *Illinois.*— Geary *v.* Bangs, 138 Ill. 77, 27 N. E. 462.

New Mexico.— Texas, etc., R. Co. *v.* Saxton, 7 N. M. 302, 34 Pac. 532.

South Carolina.— Sease *v.* Dobson, 34 S. C. 345, 13 S. E. 530.

Texas.— Douglass *v.* Blount, (Civ. App. 1901) 62 S. W. 429.

West Virginia.— Brown *v.* Squires, 42 W. Va. 367, 26 S. E. 177.

detention;[27] or where an unsuccessful attempt to enforce a liability under a statute is followed by an action to hold the same defendant liable on the same facts as at common law.[28] And a similar rule obtains in equity; where the equities of a second bill are materially different from the first, although the origin of both is the same, the adjudication of the first is no bar to the second.[29] But there must be some essential difference in the two causes of action set up; and if the gist of both actions is the same, and the evidence sufficient to sustain the one would also authorize a recovery in the other, the former judgment will operate as a bar, notwithstanding nominal variances or verbal alterations of plaintiff's claims.[30] Moreover a plaintiff may be precluded from maintaining a second action by his election to pursue a given remedy, or by election between two or more causes of action.[31]

d. New Facts or Grounds of Recovery. The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined; and when new facts intervene before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and consequently the former judgment cannot be pleaded in bar.[32] But the

27. Desboulets *v.* Gravier, 7 Mart. N. S. (La.) 27; Rider *v.* Union India Rubber Co., 28 N. Y. 379.

28. Bassett *v.* Connecticut River R. Co., 150 Mass. 178, 22 N. E. 890; *In re* Campbell, 197 Pa. St. 581, 47 Atl. 860; Graham *v.* Chicago, etc., R. Co., 49 Wis. 532, 5 N. W. 944.

29. Morris *v.* Stuart, 1 Greene (Iowa) 375. When the allegations and equity of the one bill are different from the allegations and equity of the other bill, the plea of *res judicata* cannot be sustained. Hunter *v.* Stewart, 4 De G. F. & J. 168, 8 Jur. N. S. 317, 31 L. J. Ch. 346, 5 L. T. Rep. N. S. 471, 10 Wkly. Rep. 176, 65 Eng. Ch. 131, 45 Eng Reprint 1148.

30. *California.*— Quirk *v.* Rooney, 130 Cal. 505, 62 Pac. 825; Phelan *v.* Quinn, 130 Cal. 374, 62 Pac. 623.

Idaho.— King *v.* Sioux Falls Co-Operative Sav., etc., Assoc., 6 Ida. 760, 59 Pac. 557.

Illinois.— Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717; Monarch Cycle Mfg. Co. *v.* Mueller, 83 Ill. App. 359.

Kansas.— Remington Paper Co. *v.* Hudson, 64 Kan. 43, 67 Pac. 636.

Kentucky.— Holtheide *v.* Smith, 84 S. W. 321, 27 Ky. L. Rep. 60.

Massachusetts.— Hoseason *v.* Keegen, 178 Mass. 247, 59 N. E. 627.

New York.— Maeder *v.* Wexler, 98 N. Y. App. Div. 68, 90 N. Y. Suppl. 598.

Ohio.— Shaw *v.* Cincinnati, 1 Ohio S. & C. Pl. Dec. 91, 1 Ohio N. P. 88.

Texas.—Stuart *v.* Tenison Bros. Saddlery Co., 21 Tex. Civ. App. 530, 53 S. W. 83.

United States.— National Foundry, etc., Works *v.* Oconto City Water Supply Co., 183 U. S. 216, 22 S. Ct. 111, 46 L. ed. 157; Riedinger *v.* Diamond Match Co., 123 Fed. 244, 60 C. C. A. 1; Lake Erie, etc., R. Co. *v.* Smith, 61 Fed. 885.

31. Covington, etc., R., etc., Co. *v.* Kleymeier, 105 Ky. 609, 49 S. W. 484, 20 Ky. L. Rep. 1415; Russell *v.* McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; Maeder *v.* Wexler, 98 N. Y. App. Div. 68, 90 N. Y. Suppl. 598 [*affirmed* in 182 N. Y. 519, 74 N. E. 1120]. *Compare* Ware *v.* McCormack, 96 Ky. 139, 28 S. W. 157, 959, 16 Ky. L. Rep. 385.

32. *Arkansas.*— Weis *v.* Meyer, 55 Ark. 18, 17 S. W. 339.

California.— Newhall *v.* Hatch, 134 Cal. 269, 99 Pac. 266, 55 L. R. A. 673, where, after a judgment on demurrer on the ground that the action was barred by the statute of limitations, the second action was brought on a new promise to pay the debt in controversy in the first. And see Naftzger *v.* Gregg, (1892) 31 Pac. 612.

Connecticut.— Peck *v.* Easton, 74 Conn. 456, 51 Atl. 134.

Illinois.— Ligare *v.* Chicago, etc., R. Co., 166 Ill. 249, 46 N. E. 803; Gage *v.* Ewing, 114 Ill. 15, 28 N. E. 379; Hyde Park *v.* Waite, 2 Ill. App. 443.

Indiana.—Terre Haute, etc., R. Co. *v.* State, 159 Ind. 438, 65 N. E. 401.

Iowa.— Linton *v.* Crosby, 61 Iowa 293, 16 N. W. 113; Dwyer *v.* Goran, 29 Iowa 126.

Kentucky.— Louisville, etc., R. Co. *v.* Schmidt, 112 Ky. 717, 66 S. W. 629, 23 Ky. L. Rep. 2097.

Louisiana.— Martin *v.* Walker, 43 La. Ann. 1019, 10 So. 365; Cantrelle *v.* St. James Roman Catholic Congr., 16 La. Ann. 442.

Minnesota.— Wayzata *v.* Great Northern R. Co., 67 Minn. 385, 69 N. W. 1073; Irish American Bank *v.* Ludlum, 56 Minn. 317, 57 N. W. 927.

New Jersey.— Ashurst *v.* Lippincott, 56 N. J. Eq. 840, 42 Atl. 1017.

New York.— Reynolds *v.* Ætna L. Ins. Co., 160 N. Y. 635, 55 N. E. 305; Carter *v.* Beckwith, 128 N. Y. 312, 28 N. E. 582; Hasbrouck *v.* Lounsbury, 26 N. Y. 598.

North Carolina.— Cabe *v.* Vanhook, 127 N. C. 424, 37 S. E. 464.

Ohio.— State *v.* Eagle Ins. Co., 50 Ohio St.

change of facts will not affect the estoppel, if no new element is introduced, and the legal rights and relations of the parties remain as before.[33] Nor can a party avoid the estoppel of a former judgment by bringing forward in a second action new or additional reasons or grounds in support of his case or defense, or new arguments or evidence to sustain it, the facts remaining the same.[34]

252, 33 N. E. 1056; Shepherd *v.* Willis, 19 Ohio 142; Wright *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 588, 6 Ohio N. P. 450.

Pennsylvania.— Amrhein *v.* Quaker City Dye Works, 192 Pa. St. 253, 43 Atl. 1008; Elliott *v.* Smith, 23 Pa. St. 131.

Rhode Island.— Crafts *v.* Crafts, 23 R. I. 5, 52 Atl. 890; Sayles *v.* Tibbitts, 5 R. I. 79.

South Carolina.— Anderson *v.* Cave, 49 S. C. 505, 27 S. E. 478.

Tennessee.— McKissick *v.* McKissick, 6 Humphr. 75.

Texas.— Walsh *v.* Ford, 27 Tex. Civ. App. 573, 66 S. W. 854.

Washington.— Ryan *v.* Sumner, 17 Wash. 228, 49 Pac. 487.

United States.— Memphis City Bank *v.* Tennessee, 161 U. S. 186, 16 S. Ct. 468, 40 L. ed. 664; Dennison Mfg. Co. *v.* Scharf Tag, etc., Co., 121 Fed. 313, 57 C. C. A. 9; Reinecke Coal Min. Co. *v.* Wood, 112 Fed. 477; Steele County *v.* Erskine, 98 Fed. 215, 39 C. C. A. 173; Gilmer *v.* Morris, 35 Fed. 682; Spicer *v.* U. S., 5 Ct. Cl. 34.

England.—Heath *v.* Weaverham Tp., [1894] 2 Q. B. 108, 58 J. P. 557, 63 L. J. M. C. 187, 70 L. T. Rep. N. S. 729, 10 Reports 274, 42 Wkly. Rep. 478; *In re* Anglo-French Co-Operative Soc., 14 Ch. D. 533, 49 L. J. Ch. 388, 28 Wkly. Rep. 580; Hall *v.* Leroy, L. R. 10 C. P. 154, 44 L. J. C. P. 89, 31 L. T. Rep. N. S. 727, 23 Wkly. Rep. 393; Cotter *v.* Barrymore, 4 Bro. P. C. 203, 2 Eng. Reprint 138. And see Harris *v.* Mulkern, 1 Ex. D. 31, 45 L. J. Exch. 244, 34 L. T. Rep. N. S. 99, 24 Wkly. Rep. 208.

See 30 Cent. Dig. tit. "Judgment," §§ 1090, 1094.

A record works an estoppel only as to those matters capable of being controverted between the parties at the time of the proceedings in the action. Hall *v.* Levy, L. R. 10 C. P. 154, 44 L. J. C. P. 89, 31 L. T. Rep. N. S. 727, 23 Wkly. Rep. 393.

A judgment dismissing a suit by an adjoining property-owner against certain of his neighbors and the city to compel the building of sidewalks along the street at a particular grade is not a bar to an action by certain of such owners to enjoin the city and its officers from removing the sidewalk constructed on the natural ungraded surface and from lowering such grade. Kemp *v.* Des Moines, 125 Iowa 640, 101 N. W. 474.

Suit on new title.— A party ousted of possession under one title is not estopped from purchasing another outstanding title subsequent to the first action, and asserting his right thereunder. Meyendorf *v.* Frohner, 3 Mont. 282.

Leave of court to bring new action.—Where a petition for the retransfer of stock has been heard on the merits, and is dismissed on the ground that the petitioner has failed to make out his title, he cannot, on the subsequent discovery of fresh evidence to support it, present a fresh petition for the same object without the leave of the court previously obtained. *In re* May, 28 Ch. D. 516, 54 L. J. Ch. 338, 52 L. T. Rep. N. S. 79, 33 Wkly. Rep. 917.

33. *California.*— Montgomery *v.* Harrington, 58 Cal. 270.

Illinois.— Knowlton *v.* Warner, 25 Ill. App. 211.

Indiana.— Rarey *v.* Lee, 7 Ind. App. 518, 34 N. E. 749.

Louisiana.— Hargrave *v.* Mouton, 109 La. 533, 33 So. 590; Aiken *v.* Robinson, 108 La. 267, 32 So. 415; Canal, etc., R. Co. *v.* Crescent City R. Co., 47 La. Ann. 314, 16 So. 844; Broussard *v.* Broussard, 43 La. Ann. 921, 9 So. 910.

Minnesota.— Thomas *v.* Joslin, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624.

Missouri.— Givens *v.* Thompson, 110 Mo. 432, 19 S. W. 833.

New York.— Keller *v.* Feldman, 81 Hun 593, 31 N. Y. Suppl. 41.

North Carolina.— McElwee *v.* Blackwell, 101 N. C. 192, 7 S. E. 893; Edwards *v.* Baker, 99 N. C. 258, 6 S. E. 255.

Pennsylvania.— Vankirk *v.* Patterson, 204 Pa. St. 317, 54 Atl. 175; Bell *v.* Allegheny County, 184 Pa. St. 296, 39 Atl. 227, 63 Am. St. Rep. 795; Fidelity Ins., etc., Co. *v.* Fridenberg, 175 Pa. St. 500, 34 Atl. 848, 52 Am. St. Rep. 851; Nelson *v.* Nelson, 117 Pa. St. 278, 11 Atl. 61.

Texas.— Thomas *v.* Junction City Irr. Co., 80 Tex. 550, 16 S. W. 324; Santleben *v.* Alamo Cement Co., (Civ. App. 1894) 25 S. W. 143.

Virginia.— Diehl *v.* Marchant, 87 Va. 447, 12 S. E. 803.

Wisconsin.— Greenleaf *v.* Ludington, 15 Wis. 558, 82 Am. Dec. 698.

United States.— Case *v.* Beauregard, 101 U. S. 688, 25 L. ed. 1004.

England.— Phosphate Sewage Co. *v.* Molleson, 4 App. Cas. 801; *In re* May, 28 Ch. D. 516, 54 L. J. Ch. 338, 52 L. T. Rep. N. S. 79, 33 Wkly. Rep. 917.

See 30 Cent. Dig. tit. "Judgment," § 1093.

34. *Alabama.*— Balkum *v.* Satcher, 51 Ala. 81. In this case it appeared that an application had been made to set aside a judicial sale of land as void for want of jurisdiction, which was refused. Afterward the same party brought a bill to set aside the same sale, alleging the same facts, but now claiming that the sale was void for fraud. It was held that the former decision was a bar.

Colorado.— Breeze *v.* Haley, 11 Colo. 351, 18 Pac. 551.

Georgia.— Greene *v.* Georgia Cent. R. Co., 112 Ga. 859, 38 S. E. 360.

Illinois.— Tinker *v.* Babcock, 204 Ill. 571,

e. Defense in One Suit as Cause of Action in Another.[35] Matters alleged by way of defense to an action, and fully negatived by the judgment therein, cannot afterward be made the basis of a new action by the former defendant against the former plaintiff.[36] But it is otherwise if such matters, although they might have been used as a defense in the first suit, constituted a substantive and distinct cause of action which defendant in the former suit was not bound to plead or set up.[37]

68 N. E. 445; Ruegger *v.* Indianapolis, etc., R. Co., 103 Ill. 449; Rogers *v.* Higgins, 57 Ill. 244.

Indiana. — Nickless *v.* Pearson, 126 Ind. 477, 26 N. E. 478.

Kansas. — Price *v.* Atchison First Nat. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419.

Louisiana. — Buck *v.* Massie, 109 La. 776, 33 So. 767; Florance *v.* Wilcox, 14 La. 58.

Massachusetts. — Barnes *v.* Huntley, 188 Mass. 274, 74 N. E. 318.

Ohio. — Martin *v.* Roney, 41 Ohio St. 141.

Pennsylvania. — Bell *v.* Allegheny County, 184 Pa. St. 296, 37 Atl. 227, 63 Am. St. Rep. 795.

South Carolina. — Newell *v.* Neal, 50 S. C. 68, 27 S. E. 560.

Texas. — Girardin *v.* Dean, 49 Tex. 243.

United States. — U. S. *v.* California, etc., Land Co., 192 U. S. 355, 24 S. Ct. 266, 48 L. ed. 476; Ross *v.* Portland, 105 Fed. 682; Columb *v.* Webster Mfg. Co., 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195; Patterson *v.* Wold, 33 Fed. 791; Price *v.* Dewey, 11 Fed. 104, 6 Sawy. 493.

England. — Phosphate Sewage Co. *v.* Molleson, 4 App. Cas. 801; Macdougall *v.* Knight, 25 Q. B. D. 1, 54 J. P. 788, 59 L. J. Q. B. 517, 63 L. T. Rep. N. S. 433, 38 Wkly. Rep. 553; *In re* May, 28 Ch. D. 516, 54 L. J. Ch. 338, 52 L. T. Rep. N. S. 79, 33 Wkly. Rep. 917.

See 30 Cent. Dig. tit. "Judgment," § 1093 *et seq.*

Compare Simson *v.* Hart, 14 Johns. (N. Y.) 63.

Different theory as to same facts.—The rule stated in the text must be taken subject to that set forth in the preceding section, as to the right of a plaintiff, unsuccessful in one action, to maintain a new suit on a new and more correct theory as to the legal effects or consequences of the same state of facts. See *supra*, XIII, D, 1, c.

Facts additional but not new.— It is a general rule that a judgment is conclusive of whatever might have been litigated in the action in which it was rendered, and that a party must bring forward in one suit all the claims or defenses which he has, which are included in or applicable to the cause of action in suit. See *infra*, XIII, D, 4, c. Hence in general additional facts bearing on the original cause of action, and which might have been presented in the first action, as distinguished from facts which have occurred since that action, will not be sufficient to sustain a new suit. Thus a judgment on the merits in an action for personal injuries, on the ground of defendant's negligence, is a bar to a second action between the same parties for the same injury, although additional acts of negligence are charged. McCain *v.* Louisville, etc., R. Co., 22 S. W. 325, 15 Ky. L. Rep. 80; Colum *v.* Webster Mfg. Co., 84 Fed. 592, 28 C. C. A. 225, 43 L. R. A. 195. But certain cases hold the former judgment conclusive only as to the facts actually set up and litigated. Thus where plaintiff brought an action to set aside a tax-sale on the ground that the property was exempt from taxation, and was defeated, and afterward brought another suit against the same defendant, alleging not only the exemption of the property but also errors and irregularities in the levy and assessment of the tax, it was held that he was barred by the former judgment from raising the question of exemption, but not barred from litigating the question of irregularities. Bode *v.* New England Inv. Co., 6 Dak. 499, 42 N. W. 658, 45 N. W. 197. And see Moore *v.* Snowball, 98 Tex. 218, 81 S. W. 5.

35. Defenses and counter-claims barred by former judgment see *infra*, XIII, E.

36. *Alabama.* — Wood *v.* Wood, 134 Ala. 557, 33 So. 347.

Arkansas. — Walker *v.* Byers, 19 Ark. 323.

Illinois. — Rork *v.* McDavid, 91 Ill. App. 262.

Kentucky. — Home Constr. Co. *v.* Duncan, 111 Ky. 914, 64 S. W. 997, 23 Ky. L. Rep. 1225.

Louisiana. — Barr *v.* Henderson, 107 La. 323, 31 So. 762.

Minnesota. — Skordal *v.* Stanton, 89 Minn. 511, 95 N. W. 449.

Mississippi. — Miller *v.* Bulkley, 85 Miss. 706, 38 So. 99.

Missouri. — Sturgeon *v.* Mudd, 190 Mo. 200, 88 S. W. 630.

New Hampshire. — Haynes *v.* Ordway, 58 N. H. 167.

New York. — Nemetty *v.* Naylor, 100 N. Y. 562, 3 N. E. 497; Smith *v.* Kelly, 2 Hall 217.

Rhode Island. — Hodges *v.* Bullock, 15 R. I. 592, 10 Atl. 643.

United States. — Thayer *v.* Kansas L. & T. Co., 100 Fed. 901, 41 C. C. A. 106.

Canada. — Leinster *v.* Stabler, 17 U. C. C. P. 532.

See 30 Cent. Dig. tit. "Judgment," § 1095.

37. *California.* — Gregory *v.* Clabrough, 129 Cal. 475, 62 Pac. 72; Hills *v.* Sherwood, 48 Cal. 386.

Georgia. — Chappell *v.* Boyd, 61 Ga. 662.

Illinois. — Umlauf *v.* Umlauf, 117 Ill. 580, 6 N. E. 455, 57 Am. Rep. 880; Briscoe *v.* Power, 85 Ill. 420.

The same rule applies where such matters, after having been pleaded, were withdrawn before judgment.[38]

f. Effect of Diversity of Parties — (i) *In General.* Where distinct causes of action grow out of the same transaction or state of facts in favor of different parties, and are separately prosecuted, a judgment in one of such actions will not bar another, plaintiffs or defendants being different,[39] unless the point in issue — the gravamen of plaintiff's case or the substance of the defense — is identically the same; in which case, if it was litigated and decided in the one action, the judgment will be binding on any subsequent parties who are in privity with the original plaintiff or defendant;[40] and the rule does not apply where the party

Indiana.— Hildebrand *v.* McCrum, 101 Ind. 61.

Kansas.— Waite *v.* Teeters, 36 Kan. 604, 14 Pac. 146.

Massachusetts.— Vanuxem *v.* Burr, 151 Mass. 386, 24 N. E. 773, 21 Am. St. Rep. 458.

Michigan.— McEwen *v.* Bigelow, 40 Mich. 215.

Nebraska.— Richardson *v.* Halstead, 44 Nebr. 606, 62 N. W. 1077; Owen *v.* Udall, 39 Nebr. 14, 57 N. W. 761.

New Hampshire.— Towns *v.* Nims, 5 N. H. 259, 20 Am. Dec. 578.

New York.— Felix *v.* Devlin, 50 N. Y. App. Div. 331, 64 N. Y. Suppl. 214; Boyd *v.* Boyd, 26 Misc. 679, 56 N. Y. Suppl. 760.

Pennsylvania.— Bauder's Appeal, 115 Pa. St. 480, 10 Atl. 41; Stevenson *v.* Kleppinger, 5 Watts 420.

South Carolina.— Davis *v.* Schmidt, 22 S. C. 128.

South Dakota.— Turner Tp. *v.* Williams, 17 S. D. 548, 97 N. W. 842.

Texas.—Norwood *v.* Inter-State Nat. Bank, 92 Tex. 268, 48 S. W. 3; Hunt *v.* Butterworth, 21 Tex. 133, 73 Am. Dec. 223.

Vermont.— Felt *v.* Davis, 48 Vt. 506.

See 30 Cent. Dig. tit. "Judgment," § 1095.

And see Deacon *v.* Great Western R. Co., 6 U. C. C. P. 241.

38. Hough *v.* Waters, 30 Cal. 309; Cockerill *v.* Stafford, 102 Mo. 57, 14 S. W. 813; Grady *v.* McCorkle, 57 Mo. 172, 17 Am. Rep. 676.

39. *Arkansas.*— McGee *v.* Overby, 12 Ark. 164.

Georgia.— Greer *v.* Willis, 67 Ga. 43. And see Adel *v.* Woodall, 122 Ga. 535, 50 S. E. 481.

Illinois.— Bannon *v.* Thayer, 124 Ill. 451, 17 N. E. 54; Cooper *v.* Corbin, 105 Ill. 224, See American Percheron Horse Breeders' Assoc. *v.* American Percheron Horse Breeders', etc., Assoc., 114 Ill. App. 136.

Indiana.— Hoosier Stone Co. *v.* Louisville, ers', etc., Assoc., 114 Ill. App. 136.
Harvey *v.* State, 94 Ind. 159.

Iowa.— Malette *v.* Arnold, 83 Iowa 55, 48 N. W. 1060

Kentucky.— Conwell *v.* Sandidge, 8 Dana 273.

Louisiana.— Amet *v.* Boyer, 43 La. Ann. 562, 9 So. 622.

Maryland.— Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Massachusetts.— McClellan *v.* Fisher, 16 Gray 185; Buttrick *v.* Holden, 8 Cush. 233; Hawes *v.* Waltham, 18 Pick. 451.

Michigan.— Kingsbury *v.* Kettle, 90 Mich. 476, 51 N. W. 541.

Missouri.— Ford *v.* Hennessy, 70 Mo. 580.

Nebraska.— Morse *v.* Traynor, 26 Nebr. 594, 42 N. W. 719.

New York.— Verplanck *v.* Van Buren, 76 N. Y. 247; Douglass *v.* Ireland, 73 N. Y. 100; Zink *v.* Buffalo, 6 Hun 611; McDonald *v.* Rainor, 8 Johns. 442.

Pennsylvania.— Eshelman *v.* Shuman, 13 Pa. St. 561; Burnside *v.* Miskelly, 5 Watts 506.

Texas.— Torrey *v.* Schneider, 74 Tex. 116, 11 S. W. 1068.

Wisconsin.— Lampson *v.* Bowen, 41 Wis. 484.

United States.— New Orleans *v.* Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102; Gaines *v.* Hennen, 24 How. 553, 16 L. ed. 770; Bailey *v.* Sundberg, 49 Fed. 583, 1 C. C. A. 387; U. S. *v.* Hoyt, 26 Fed. Cas. No. 15,409, 1 Blatchf. 326.

England.— Reeve *v.* Dalby, 4 L. J. Ch. O. S. 117, 2 Sim. & St. 464, 1 Eng. Ch. 464, 57 Eng. Reprint 423.

Actions by persons in different capacities.— An action by an administratrix for damage caused to the personal estate of the intestate through the negligence of defendant in causing his death is not brought in the same right as an action under Lord Campbell's Act (9 & 10 Vict. c. 93), to recover compensation to the family of the deceased for his death, and an admission in the latter action creates no estoppel in the former. Leggott *v.* Great Northern R. Co., 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. Rep. N. S. 334, 70 Wkly. Rep. 784. And see Hacking *v.* Lee, 9 Wkly. Rep. 70.

See 30 Cent. Dig. tit. "Judgment," § 1096.

Bankruptcy — avoiding fraudulent transfer. — Where creditors sue to set aside an alleged preferential transfer of property by their debtor and are unsuccessful, the judgment will not prevent a trustee in bankruptcy of the debtor, subsequently appointed on an adjudication made by another court, from maintaining an action against the alleged preferred creditor to recover the property. *In re* Sears, 128 Fed. 275, 62 C. C. A. 623.

40. *Iowa.*— Goodenow *v.* Litchfield, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86.

Kentucky.— Lindsay *v.* Sayre, 2 S. W. 678, 8 Ky. L. Rep. 603.

Michigan.— Bates *v.* Alpena Cir. Judge, 82

sought to be bound in the second suit is the successor in interest, title, or office to the party bound by the first judgment;[41] and a former judgment will operate as a bar if the parties to the two suits are really and substantially in interest the same, although they may nominally be different, or although nominal parties may be added in the second suit.[42]

(11) *Recovery by Part of Several Claimants.* Where one of several joint owners or creditors, having claims against a common debtor, sues alone, he is of course bound by the result of the action;[43] but the judgment is not conclusive upon the other claimants, nor a bar to the prosecution of their subsequent actions.[44]

2. Identity of Subject-Matter.[45] The rule is frequently stated that a former judgment may be pleaded in bar of a subsequent action if the subject-matter of the two suits was identically the same, but not otherwise.[46] But identity of the subject-matter is not a sufficient test. The true requirement is that the causes of

Mich. 91, 45 N. W. 1125, 21 Am. St. Rep. 554.

New York.— Beloit Bank *v.* Beale, 34 N. Y. 473.

United States.— Bailey *v.* Sundberg, 43 Fed. 81.

See 30 Cent. Dig. tit. "Judgment," § 1096.

41. St. Joseph, etc., R. Co. *v.* Steele, 63 Fed. 867, 11 C. C. A. 470.

Assignee.— Where a claim which has been reduced to judgment is assigned, the assignee is not entitled to a second judgment, but can only enforce the first one by remedies provided by law for the satisfaction of judgments. Smith *v.* Belmont, etc., Iron Co., 11 Bush (Ky.) 390.

42. *Illinois.*— Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228.

Indiana.— Bass Foundry, etc., Works *v.* Parke County, 141 Ind. 68, 32 N. E. 1125.

Kansas.— Gapen *v.* Stephenson, 17 Kan. 613.

Kentucky.— Lowry *v.* McMurtry, Ky. Dec. 251; Phillips *v.* Queen, 3 S. W. 146, 8 Ky. L. Rep. 772.

Michigan.— Curtis *v.* Fowler, 99 Mich. 240, 58 N. W. 68; Hoppin *v.* Avery, 87 Mich. 551, 49 N. W. 887.

Mississippi.— Manly *v.* Kidd, 33 Miss. 141.

New York.— Verplanck *v.* Van Buren, 76 N. Y. 247.

Pennsylvania.— Follansbee *v.* Walker, 74 Pa. St. 306.

Texas.— McClesky *v.* State, 4 Tex. Civ. App. 322, 23 S. W. 518.

See 30 Cent. Dig. tit. "Judgment," § 1096.

Principal and agent.— Where the master of a ship signs a bill of lading in his own name, and is sued upon it, and judgment is obtained against him, an action will not lie against the owner of the ship upon the same bill of lading, although satisfaction has not been obtained on the judgment against the master. Priestly *v.* Fernie, 3 H. & C. 977, 11 Jur. N. S. 813, 13 Wkly. Rep. 1089.

43. One joint owner of property, suing for its destruction and having judgment given against him, cannot afterward join with the other joint owners in suing for the recovery of damages. Brizendine *v.* Frankfort Bridge Co., 2 B. Mon. (Ky.) 32, 36 Am. Dec. 587.

44. Wheeler *v.* Clinton Canal Bank, Harr. (Mich.) 449; Clark *v.* Dinsmore, 5 N. H. 136; Mobile Ins. Co. *v.* Columbia, etc., R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725. *Compare* Hopkinson *v.* Shelton, 37 Ala. 306.

Where a judgment has been confessed in favor of one creditor, intended also to secure the claims of other creditors, it operates as a merger of the debt due to the former; but as to the others, it is a mere collateral security, and leaves them at liberty to prosecute any remedy which they might have sustained previously to the judgment. Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

45. **Construction of judgments as to subject-matter** see *supra*, XII, B, 2.

Conclusiveness of adjudication as to subject-matter see *infra*, XIV, C, 2.

46. *Alabama.*— Gilbreath *v.* Jones, 66 Ala. 129.

Connecticut.—Supples *v.* Cannon, 44 Conn. 424.

District of Columbia.— Strong *v.* Grant, 2 Mackey 218.

Florida.— Lake *v.* Hancock, 38 Fla. 53, 20 So. 811, 56 Am. St. Rep. 159.

Georgia.— Ross *v.* Battle, 117 Ga. 877, 45 S. E. 252.

Illinois.— Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786; Markley *v.* People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Cooper *v.* Corbin, 105 Ill. 224; American Percheron Horse Breeders' Assoc. *v.* American Percheron Horse Breeders', etc., Assoc., 114 Ill. App. 136; Steele *v.* People, 88 Ill. App. 186.

Indiana.— Hord *v.* Bradbury, 156 Ind. 20, 59 N. E. 27.

Iowa.— Madison *v.* Garfield Coal Co., 114 Iowa 56, 86 N. W. 41.

Kansas.— Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 127.

Kentucky.— Maize *v.* Bowman, 93 Ky. 205, 19 S. W. 589, 14 Ky. L. Rep. 121, 17 L. R. A. 81.

Louisiana.— Semple *v.* Scarborough, 44 La. Ann. 257, 10 So. 860; Lewis *v.* New Orleans Sav. Inst., 33 La. Ann. 1463; State *v.* Jumel, 30 La. Ann. 861; White *v.* Gaines, 29 La. Ann. 769; Slocomb *v.* De Lizardi, 21 La. Ann.

action in the two suits shall be the same.[47] Undoubtedly the subject-matter involved in the two actions must be the same, for otherwise there could not possibly be an identity of the causes of action. But the same transaction or state of facts may give rise to distinct causes of action, and a judgment upon one will not bar a suit upon another.[48] Therefore a judgment in a former suit, although between the same parties and relating to the same subject-matter, is not a bar to a subsequent action, when the cause of action is not the same.[49] Again a judgment may be binding and conclusive evidence upon some particular point or question involved in the action in which it was rendered, although not a bar to the subsequent suit; and to have this effect it is not necessary that the two suits should relate to the same subject-matter, but only that the same issue should be involved in both.[50] Hence the fact that in the former action additional property was involved does not affect the conclusiveness of the judgment upon the property involved in the suit on trial.[51]

355, 99 Am. Dec. 740; Edwards *v.* Ballard, 14 La. Ann. 362.

Massachusetts.— Gilbert *v.* Thompson, 9 Cush. 348.

Michigan.— Metropolitan Lumber Co. *v.* McColeman, (1905) 103 N. W. 809.

Mississippi.— Greene *v.* Merchants', etc., Bank, 73 Miss. 542, 19 So. 350; Manly *v.* Kidd, 33 Miss. 141.

Missouri.— Cook *v.* Basom, 164 Mo. 594, 65 S. W. 227; Clemens *v.* Murphy, 40 Mo. 121; Parks *v.* Richardson, 35 Mo. App. 192.

Nebraska.— State *v.* Broatch, (1903) 94 N. W. 1016; Brigham *v.* McDowell, 19 Nebr. 407, 27 N. W. 384.

New Jersey.— Matthews *v.* Roberts, 2 N. J. Eq. 338.

New York.— Gedney *v.* Gedney, 160 N. Y. 471, 55 N. E. 1; Stowell *v.* Chamberlain, 60 N. Y. 272; Clift *v.* Mercer, 79 N. Y. App. Div. 369, 79 N. Y. Suppl. 622; Reed *v.* Provident Sav. L. Assur. Soc., 79 N. Y. App. Div. 163, 79 N. Y. Suppl. 665; Stearns *v.* St. Louis, etc., R. Co., 4 N. Y. St. 715.

North Carolina.— Shuster *v.* Perkins, 47 N. C. 217.

Ohio.— Gibson *v.* McNeely, 11 Ohio St. 131.

Pennsylvania.— Siebert *v.* Steinmeyer, 204 Pa. St. 419, 54 Atl. 336; Finley *v.* Hanbest, 30 Pa. St. 190; City *v.* Fricke, 6 Phila. 578.

South Carolina.— Green *v.* Iredell, 31 S. C. 588, 10 S. E. 545.

Tennessee.— Gowan *v.* Graves, 10 Heisk. 579.

Texas.— Foster *v.* Wells, 4 Tex. 101; Marton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94; Bodeman *v.* Reinhard, (Civ. App. 1900) 54 S. W. 1051.

Virginia.— Shufflebarger *v.* Blanchard, 101 Va. 690, 44 S. E. 951.

Wisconsin.— Swennes *v.* Sprain, 120 Wis. 68, 97 N. W. 511.

United States.— Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307; Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059; Wilson *v.* Smith, 117 Fed. 707; Clark *v.* Gibboney, 5 Fed. Cas. No. 2,821, 3 Hughes 391.

England.— Balby-with Hexthorpe Dist. Council *v.* Millard, 68 J. P. 81, 2 Loc. Gov. 330.

Canada.— Deacon *v.* Great Western R. Co., 6 U. C. C. P. 241.

See 30 Cent. Dig. tit. "Judgment," § 1098 *et seq.*

Different property involved.— The subject-matter of two suits is not identical, within the meaning of this rule, when they relate to different items of property, although the title or claim or right set up may be the same in both suits. Brill *v.* Shively, 93 Cal. 674, 29 Pac. 324; Poor *v.* Darrah, 5 Houst. (Del.) 394; Fessenden *v.* Barrett, 50 Fed. 690. Thus in an action to recover for beer barrels a judgment against defendant for the beer contained in the barrels is no defense. Milligan *v.* Browarsky, 147 Pa. St. 155, 23 Atl. 398.

47. See *supra*, XIII, D, 1, a.

48. See Fisk *v.* Hartford, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147; Bilsland *v.* McManomy, 82 Ind. 139; Heins *v.* Wicke, 102 Iowa 396, 71 N. W. 345; Lindgren *v.* Lindgren, 73 Minn. 90, 75 N. W. 1034; —— *v.* Campbell, 3 Wils. C. P. 240. And see *infra*, XIII, D, 7, a.

49. Linne *v.* Stout, 44 Minn. 110, 46 N. W. 319.

For example a recovery in trespass for the use by defendant of a way for the benefit of one tract of land does not estop defendant from asserting in a subsequent action of trespass a right to the way for the benefit of another tract of land. Norman *v.* Sylvia, 26 R. I. 438, 59 Atl. 112.

50. *Iowa.*— Goodenow *v.* Litchfield, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86.

Louisiana.— Vascocu *v.* Pavie, 14 La. 135.

Massachusetts.— Johnson *v.* Morse, 11 Allen 540.

Ohio.— Curtis *v.* Cisna, 1 Ohio 429.

Oklahoma.— Nichols, etc., Co. *v.* Trower, 14 Okla. 461, 78 Pac. 575.

Pennsylvania.— Mack *v.* Logue, 23 Pa. Super. Ct. 160.

Tennessee.— Taylor *v.* Sledge, 110 Tenn. 263, 75 S. W. 1074.

United States.— Manhattan Trust Co. *v.* Trust Co. of North America, 107 Fed. 328, 46 C. C. A. 322.

See 30 Cent. Dig. tit. "Judgment," § 1098 *et seq.*

51. Rucker *v.* Steelman, 97 Ind. 222; Peter-

3. Nature and Form of Remedy — a. Varying Form of Action Does Not Affect Estoppel. A party cannot escape the bar of a judgment against him by bringing a new suit on the same cause of action, but in a different form of action or proceeding.[52] But this rule is subject to the following limitations: If plaintiff has misconceived his remedy, and the suit is dismissed on that ground, without an adjudication of the merits, it is no bar to a second action rightly brought;[53] nor is it a bar where the new action, although based on the same facts, proceeds upon a different theory as to their legal consequences or the relative rights of the

son *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091; Dyer *v.* Cranston Print Works, 21 R. I. 63, 41 Atl. 1015.

52. *Alabama.*— Cannon *v.* Brame, 45 Ala. 262, judgment in replevin bars trover.

California.— Taylor *v.* Castle, 42 Cal. 367.

Connecticut.— Betts *v.* Starr, 5 Conn. 550, 13 Am. Dec. 94.

District of Columbia.— Birdsall *v.* Welch, 6 D. C. 316.

Georgia.— Ferguson *v.* Carter, 8 Ga. 524.

Illinois.— Elmwood Cemetery Co. *v.* People, 204 Ill. 468, 68 N. E. 500; Hyde Park *v.* Corwith, 122 Ill. 441, 12 N. E. 238; Atty.-Gen. *v.* Chicago, etc., R. Co., 112 Ill. 520; Cole *v.* Favorite, 69 Ill. 457; Kreuchi *v.* Dehler, 50 Ill. 176; State Bank *v.* Wilson, 9 Ill. 57; Kapischke *v.* Koch, 79 Ill. App. 238.

Indiana.— Faught *v.* Faught, 98 Ind. 470; Bottorff *v.* Wise, 53 Ind. 32.

Kansas.— Council Grove State Bank *v.* Rude, 23 Kan. 143.

Kentucky.— Owens *v.* Rawleigh, 6 Bush 656; Hanley *v.* Foley, 18 B. Mon. 519.

Louisiana.— Sewell *v.* Scott, 35 La. Ann. 553.

Maine.— Ware *v.* Percival, 61 Me. 391, 14 Am. Rep. 565; Bunker *v.* Tufts, 57 Me. 417; Brown *v.* Moran, 42 Me. 44. A judgment recovered by plaintiff in trover bars trespass by the same plaintiff against the same defendant for taking the same goods. White *v.* Philbrick, 5 Me. 147, 17 Am. Dec. 214.

Maryland.— Harryman *v.* Roberts, 52 Md. 64.

Massachusetts.— Clare *v.* New York, etc., R. Co., 172 Mass. 211, 51 N. E. 1083; Harlow *v.* Bartlett, 170 Mass. 584, 49 N. E. 1014; Blackinton *v.* Blackinton, 113 Mass. 231; Merriam *v.* Woodcock, 104 Mass. 326; Goodrick *v.* Yale, 97 Mass. 15; Livermore *v.* Herschell, 3 Pick. 33.

Michigan.— Barker *v.* Cleveland, 19 Mich. 230.

Minnesota.— Robitshek *v.* Swedish-American Nat. Bank, 72 Minn. 319, 75 N. W. 231; Hardin *v.* Palmerlee, 28 Minn. 450, 10 N. W. 773.

Mississippi.— Perry *v.* Lewis, 49 Miss. 443.

Missouri.— Union R., etc., Co. *v.* Traube, 59 Mo. 355.

Nebraska.— Spear *v.* Tidball, 40 Nebr. 107, 58 N. W. 708.

New York.— Brown *v.* New York, 66 N. Y. 385; Collins *v.* Bennett, 46 N. Y. 490; Boyd *v.* Boyd, 53 N. Y. App. Div. 152, 65 N. Y. Suppl. 859; Baker *v.* Rand, 13 Barb. 152; McGuire *v.* Keeler, 2 N. Y. City Ct. 225; Miller *v.* Manice, 6 Hill 114; Gardner *v.* Buckbee, 3 Cow. 120, 15 Am. Dec. 256; Rice *v.* King, 7 Johns. 20.

Ohio.— Bell *v.* McColloch, 31 Ohio St. 397; Covington, etc., Bridge Co. *v.* Sargent, 27 Ohio St. 233.

Oklahoma.— Pratt *v.* Ratliff, 10 Okla. 168, 61 Pac. 523.

Pennsylvania.— Larkins *v.* Lindsay, 205 Pa. St. 534, 55 Atl. 184; Ahl *v.* Goodhart, 161 Pa. St. 455, 29 Atl. 82; Brenner *v.* Moyer, 98 Pa. St. 274; Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131; Cist *v.* Zeigler, 16 Serg. & R. 282, 16 Am. Dec. 573.

South Carolina.— Stroble *v.* Large, 3 McCord 112.

Texas.— Birdseye *v.* Schaeffer, (Civ. App. 1900) 57 S. W. 987; Stuart *v.* Tenison Bros. Saddlery Co., 21 Tex. Civ. App. 530, 53 S. W. 83.

Vermont.— Lindsey *v.* Danville, 46 Vt. 144; Spencer *v.* Dearth, 43 Vt. 98; Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345.

Virginia.— Shumate *v.* Fauquier County, 84 Va. 574, 5 S. E. 570; Hite *v.* Long, 6 Rand. 457, 18 Am. Dec. 719.

Washington.— Bruce *v.* Foley, 18 Wash. 96, 50 Pac. 935.

Wisconsin.— Shepardson *v.* Cary, 29 Wis. 34.

United States.— Marine Ins. Co. *v.* Young, 1 Cranch 331, 2 L. ed. 126; McDonald *v.* Seligman, 81 Fed. 753; New Jersey *v.* Boller, 47 Fed. 415; Case *v.* New Orleans, etc., R. Co., 5 Fed. Cas. No. 2,493, 2 Woods 236; Lawrence *v.* Vernon, 15 Fed. Cas. No. 8,146, 3 Sumn. 20.

England.— Slade's Case, 4 Coke 92*b*; Outram *v.* Morewood, 3 East 346, 7 Rev. Rep. 473; Routledge *v.* Hislop, 2 E. & E. 549, 6 Jur. N. S. 398, 29 L. J. M. C. 90, 2 L. T. Rep. N. S. 53, 8 Wkly. Rep. 363, 105 E. C. L. 549; Hancock *v.* Welsh, 1 Stark. 347, 2 E. C. L. 136.

See 30 Cent. Dig. tit. "Judgment," § 1100 *et seq.*

Illustrations.— An unsuccessful attempt to maintain trover for the recovery of damages for an alleged wrongful conversion of goods, the ownership and right of possession having been in issue, will bar a subsequent suit to recover possession of the specific property. Hatch *v.* Coddington, 32 Minn. 92, 19 N. W. 393. So a recovery in an action of trespass for taking away plaintiff's wife is a bar to a recovery in an action on the case for enticing her away. Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469.

53. Botsford *v.* Wallace, 72 Conn. 195, 44 Atl. 10; Puterbaugh *v.* Puterbaugh, 7 Ind.

parties;[54] nor where two or more distinct causes of action arise out of the same transaction or state of facts;[55] nor where the one action was *in rem* and the other *in personam*;[56] nor where the one proceeding was a criminal prosecution, in which no damages could be given, and the other a civil action for the recovery of damages.[57]

b. Action of Contract and of Tort. Where plaintiff has his option to bring an action of tort or one of contract to recover damages for a given injury upon a state of facts which would support either action, an adjudication in one action, whichever he may elect, is a bar to the other.[58] But this rule does not apply where the first action was dismissed by plaintiff,[59] nor where the second action is based upon a different theory as to the legal consequences of the facts or the relative rights of the parties.[60]

4. Nature and Extent of Relief Sought or Recovery[61] — a. In General. The

App. 280, 33 N. E. 808, 34 N. E. 611; Agnew *v.* McElroy, 10 Sm. & M. (Miss.) 552, 48 Am. Dec. 772; McQuade *v.* Williams, 101 Tenn. 334, 47 S. W. 427; Hadley *v.* Greene, 2 Cromp. & J. 374, 1 L. J. Exch. 137, 2 Tyrw. 390. And see *supra*, XIII, C, 7, i, (III).

54. South San Bernardino Land, etc., Co. *v.* San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699; Derleth *v.* Degraaf, 51 N. Y. Super. Ct. 369; Hahl *v.* Sugo, 27 Misc. (N. Y.) 1, 57 N. Y. Suppl. 920; Brown *v.* Squires, 42 W. Va. 367, 26 S. E. 177. And see *supra*, XIII, D, 1, c.

55. See *infra*, XIII, D, 7, a. And see Elliot *v.* Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689; Putt *v.* Rawstern, 3 Mod. 1.

56. The Odorilla *v.* Baizley, 128 Pa. St. 283, 18 Atl. 511.

57. Gould *v.* Langdon, 43 Pa. St. 365.

58. *Arkansas.*— Stanley *v.* Bracht, 42 Ark. 210.

Georgia.— Duncan *v.* Stokes, 47 Ga. 593.

Illinois.— Prince *v.* Quincy, 128 Ill. 443, 21 N. E. 768; Terre Haute, etc., R. Co. *v.* People, 41 Ill. App. 513.

Indiana.— Gutheil *v.* Goodrich, 160 Ind. 92, 66 N. E. 446; Cutler *v.* Cox, 2 Blackf. 178, 18 Am. Dec. 152. *Compare* Smith *v.* Scantling, 4 Blackf. 443.

Iowa.— Newhy *v.* Caldwell, 54 Iowa 102, 6 N. W. 154.

Kentucky.— Hall *v.* Forman, 82 Ky. 505.

Maine.— Ware *v.* Percival, 61 Me. 391, 14 Am. Rep. 565.

Maryland.— Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423, judgment in assumpsit bars trover.

Massachusetts.— Sullivan *v.* Baxter, 150 Mass. 261, 22 N. E. 895; Bradley *v.* Brigham, 149 Mass. 141, 21 N. E. 301, 3 L. R. A. 507; Smith *v.* Way, 9 Allen 472; Norton *v.* Doherty, 3 Gray 372, 63 Am. Dec. 758; Bigelow *v.* Winsor, 1 Gray 299; Salem India-Rubber Co. *v.* Adams, 23 Pick. 256.

Mississippi.— Agnew *v.* McElroy, 10 Sm. & M. 552, 48 Am. Dec. 772, judgment in trover bars assumpsit.

New Hampshire.— Andrews *v.* Varrell, 46 N. H. 17, judgment in trover bars assumpsit for money had and received.

New Mexico.— Lowenthal *v.* Baca, (1900) 62 Pac. 982.

New York.— Lee *v.* Corn, 2 Misc. 463, 21 N. Y. Suppl. 1073; Roome *v.* Collins, 2 N. Y. City Ct. 54; Jones *v.* Scriven, 8 Johns. 453. See Bowen *v.* Mandeville, 95 N. Y. 237.

Ohio.— Timmons *v.* Dunn, 4 Ohio St. 680.

Pennsylvania.— Floyd *v.* Browne, 1 Rawle 121, 18 Am. Dec. 602.

South Carolina.— Cook *v.* Cook, 2 Brev. 349.

Vermont.— Hill *v.* Barre Nat. Bank, 56 Vt. 582.

Washington.— Achey *v.* Creech, 21 Wash. 319, 58 Pac. 208.

England.— Buckland *v.* Johnson, 15 C. B. 145, 2 C. L. R. 704, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145, judgment in trover bars an action in assumpsit for money had and received.

Canada.— Where plaintiff sues C, a division court bailiff, and his sureties, on their covenant, alleging a judgment recovered by himself against C, for selling his goods under execution, contrary to the orders of plaintiff in the suit, it was held that the declaration was bad, as plaintiff, having recovered judgment against C for the tort, could not afterward sue upon the covenant for the same cause. Sloan *v.* Creasor, 22 U. C. Q. B. 127.

See 30 Cent. Dig. tit. "Judgment," § 1101.

Action on attachment bond.— Where a defendant has already recovered from plaintiff in an attachment damages in general for maliciously causing the attachment to be issued, he cannot afterward maintain an action on the attachment bond to recover special damages. Having chosen to sue for malice, etc., he is barred from his suit on the bond. The former includes the latter. Hall *v.* Forman, 82 Ky. 505.

Contempt proceedings.— Where a proceeding by attachment for contempt is instituted as a means of private redress, and results in satisfaction, it may be pleaded in bar of a subsequent action of trespass between the same parties, founded on the same subject-matter. Walker *v.* Fuller, 29 Ark. 448.

59. Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

60. Gayer *v.* Parker, 24 Nebr. 643, 39 N. W. 845, 8 Am. St. Rep. 227; Schriver *v.* Eckenrode, 87 Pa. St. 213. And see *supra*, XIII, D, 1, c.

61. **Conclusiveness of adjudication as to matters in issue but not decided** see *infra*, XIV, C, 6.

causes of action in two suits may be different, so as to prevent an estoppel, although the same relief be asked.[62] On the other hand if the causes of action in two suits are substantially the same a difference in the relief sought will not prevent the judgment in one from operating as an estoppel in the other.[63] But there is in general no identity of the causes of action in two suits where the relief demanded or appropriate in the one is such as would be entirely inconsistent or inadmissible in the other, although both actions may be founded on the same transaction or state of facts.[64]

b. Demands Adjudicated in Former Action. A former judgment is conclusive, in a subsequent action between the same parties, as to all demands, claims, or titles put in issue and adjudicated in the first suit, although the second has a different object or relates to a different subject-matter.[65] And although two distinct pieces or kinds of property or two separate claims or rights may be involved in the two suits, yet if the ground of recovery or relief in respect to them, or the right or title set up in respect to them, is identical, or founded on the same claim or source of title, and constitutes the basis of the adjudication in the one action, the judgment will operate as an estoppel in the other.[66]

Grounds of action or recovery as affecting merger see *supra*, XIII, D, 1, d.

Matters essential to adjudication as affecting conclusiveness of judgment see *infra*, XIV, C, 5.

62. Laroussini *v.* Werlein, 50 La. Ann. 637, 23 So. 467; Gilmer *v.* Morris, 35 Fed. 682 (holding that the dismissal of a bill to redeem pledged property, on the ground of staleness and the statute of limitations, is no bar to another bill seeking to redeem the same property under a pledge made four years after the first one); Hunter *v.* Stewart, 4 De G. F. & J. 168, 8 Jur. N. S. 317, 31 L. J. Ch. 346, 5 L. T. Rep. N. S. 471, 10 Wkly. Rep. 176, 65 Eng. Ch. 131, 45 Eng. Reprint 1148; Rattenbury *v.* Fenton, Coop. t. Brough. 60, 47 Eng. Reprint 22.

63. *Georgia.*— Fain *v.* Hughes, 108 Ga. 537, 33 S. E. 1012.

Iowa.— Bettys *v.* Chicago, etc., R. Co., 43 Iowa 602.

Louisiana.— Brady *v.* Ascension Parish, 26 La. Ann. 320.

Michigan.— Barker *v.* Cleveland, 19 Mich. 230.

New York.— Marsh *v.* Masterton, 101 N. Y. 401, 5 N. E. 59; Taylor *v.* Taylor, 63 Hun 303, 17 N. Y. Suppl. 161; Bouchaud *v.* Dias, 3 Den. 238.

Pennsylvania.— Lieberman *v.* Hoffman, 2 Pennyp. 211.

United States.— Oglesby *v.* Attrill, 20 Fed. 570.

See 30 Cent. Dig. tit. "Judgment," § 1102.

Damages for false return.— Where a person against whom a judgment by default has been rendered, based on a false return of service of process, recovers judgment against the sheriff for damages for such false return, even though the damages are only nominal, it will prevent him from maintaining an action to set aside the default judgment. Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481.

64. O'Connor *v.* Irvine, 74 Cal. 435, 16 Pac. 236; Nickerson *v.* California Stage Co., 10 Cal. 520; Bement *v.* Ohio Valley Banking, etc., Co., 99 Ky. 109, 35 S. W. 139, 18 Ky. L. Rep. 37, 59 Am. St. Rep. 445; Murdock's Case, 2 Bland (Md.) 461, 20 Am. Dec. 381. And see Guidici *v.* Kinton, 6 Beav. 517, 49 Eng. Reprint 926.

Recovery of damages and abatement of nuisance.— A recovery of double damages under a statute relating to the illegal construction of dams across watercourses will not prevent the same plaintiff from suing in equity for abatement of the nuisance created by the dam. Scheurich *v.* Southwest Missouri Light Co., 109 Mo. App. 406, 84 S. W. 1003.

65. *Iowa.*— Determann *v.* Luehrsmann, 74 Iowa 275, 37 N. W. 330.

Kentucky.— Stevenson *v.* Flournoy, 89 Ky. 561, 13 S. W. 210, 11 Ky. L. Rep. 745.

Maryland.— Bruner *v.* Ramsburg, 43 Md. 560; Chesapeake, etc., Canal Co. *v.* Gittings, 36 Md. 276.

Massachusetts.— Morse *v.* Elms, 131 Mass. 151; Whitman *v.* Boston, etc., R. Co., 16 Gray 530.

Michigan.— Hunt *v.* Middlesworth, 44 Mich. 448, 7 N. W. 57.

Mississippi.— Burkett *v.* Burkett, 81 Miss. 593, 33 So. 417.

New York.— Sullivan *v.* Miller, 106 N. Y. 635, 13 N. E. 772; Van Gelder *v.* Hallenbeck, 46 Hun 432; Bearnes *v.* Bearnes, 66 How. Pr. 456.

Texas.— Flippen *v.* Dixon, 83 Tex. 421, 18 S. W. 803, 29 Am. St. Rep. 653.

United States.— Gilmer *v.* Billings, 55 Fed. 775.

See 30 Cent. Dig. tit. "Judgment," § 1103.

66. *California.*— Freeman *v.* Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355; Toomy *v.* Hale, 100 Cal. 172, 34 Pac. 644.

Connecticut.—Sargent *v.* New Haven Steamboat Co., 65 Conn. 116, 31 Atl. 543.

Illinois.— People *v.* Rickert, 159 Ill. 496, 42 N. E. 884.

Iowa.— Watson *v.* Richardson, 110 Iowa 698, 80 N. W. 416, 80 Am. St. Rep. 331; Baxter *v.* Myers, 85 Iowa 328, 52 N. W. 234, 39 Am. St. Rep. 298.

c. Matters Which Might Have Been Litigated. A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.[67] A party therefore must present in one action all

New York.— Thayer *v.* Cable, 19 N. Y. App. Div. 558, 46 N. Y. Suppl. 850.

Pennsylvania.— Robb *v.* Van Horn, 150 Pa. St. 508, 24 Atl. 756.

United States.— Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; New Orleans *v.* Louisiana Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202; Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 15 S. Ct. 733, 39 L. ed. 859; Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., 55 Fed. 690, 5 C. C. A. 249; Neal *v.* Foster, 36 Fed. 29; Puetz *v.* Bransford, 32 Fed. 318.

See 30 Cent. Dig. tit. "Judgment," § 1103.

67. *California.*— Bingham *v.* Kearney, 136 Cal. 175, 68 Pac. 597.

Colorado.— Denver City Irr., etc., Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; Colorado Fuel, etc., Co. *v.* Sedalia Smelting Co., 13 Colo. App. 474, 59 Pac. 222.

Delaware.— Hollis *v.* Morris, 2 Harr. 128.

Florida.— Sauls *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190.

Georgia.— Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732.

Idaho.— Work *v.* Kinney, 8 Ida. 771, 71 Pac. 477.

Illinois.— Bailey *v.* Bailey, 115 Ill. 551, 4 N. E. 394; Peacock Iron, etc., Pub. Co., 114 Ill. App. 463; Marshall *v.* John Grosse Clothing Co., 83 Ill. App. 338; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 81 Ill. App. 435.

Indiana.— Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180; Howe *v.* Lewis, 121 Ind. 110, 22 N. E. 978; Kurtz *v.* Carr, 105 Ind. 574, 5 N. E. 692; Bates *v.* Spooner, 45 Ind. 489; Fischli *v.* Fischli, 1 Blackf. 360, 12 Am. Dec. 251; Vierling *v.* Leich, 29 Ind. App. 174, 64 N. E. 230.

Iowa.— Schupanitz *v.* Farwick, 115 Iowa 451, 88 N. W. 951; Hanson *v.* Manley, 72 Iowa 48, 33 N. W. 357; Everhart *v.* Holloway, 55 Iowa 179, 7 N. W. 506.

Kansas.— Chicago, etc., R. Co. *v.* Anderson County Com'rs, 47 Kan. 766, 29 Pac. 96.

Kentucky.— McCoy *v.* Martin, 4 Dana 580; Hackney *v.* Hoover, 87 S. W. 769, 27 Ky. L. Rep. 1003.

Louisiana.— Armistead *v.* Spring, 1 Rob. 567; Levy *v.* Flash, McGloin 124.

Maine.—Scammon *v.* Saco New Cong. Meeting-House, 1 Me. 262.

Minnesota.— Abrahamson *v.* Lamberson, 68 Minn. 454, 71 N. W. 676; Ebert *v.* Long, 43 Minn. 235, 45 N. W. 226; Thompson *v.* Myrick, 24 Minn. 4.

Mississippi.— State *v.* Morrison, 60 Miss. 74; Burford *v.* Kersey, 48 Miss. 642.

Missouri.— Hoyle *v.* Farquharson, 80 Mo. 377; Pugh *v.* Williamson, 61 Mo. App. 165; Burbridge *v.* Kansas City Cable R. Co., 36 Mo. App. 669.

New Hampshire.— Berry *v.* Whidden, 62 N. H. 473.

New Mexico.— Territory *v.* Santa Fé Pac. R. Co., 10 N. M. 410, 62 Pac. 985.

New York.— Pray *v.* Hegeman, 98 N. Y. 351; Smith *v.* Smith, 79 N. Y. 634; Shuman *v.* Strauss, 52 N. Y. 404; Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325; Wilson *v.* Sanger, 57 N. Y. App. Div. 323, 68 N. Y. Suppl. 124; Weiser *v.* Kling, 38 N. Y. App. Div. 260, 57 N. Y. Suppl. 48; Bracken *v.* Atlantic Trust Co., 36 N. Y. App. Div. 67, 55 N. Y. Suppl. 506; Shaw *v.* Broadbent, 4 Silv. Sup. 192, 7 N. Y. Suppl. 293; Swan *v.* Wheeler, 30 Misc. 225, 63 N. Y. Suppl. 328; Davidson *v.* Weed, 20 Misc. 147, 45 N. Y. Suppl. 718; Hughes *v.* United Pipe Lines, 12 N. Y. St. 704.

North Carolina.— Williams *v.* Batchelor, 90 N. C. 364; Murrill *v.* Murrill, 84 N. C. 182.

Ohio.— Desnoyers *v.* Dennison, 19 Ohio Cir. Ct. 320, 10 Ohio Cir. Dec. 430; Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320.

Oregon.— Ross *v.* Ross, 21 Oreg. 9, 26 Pac. 1007.

Pennsylvania.— Pennock *v.* Kennedy, 153 Pa. St. 579, 26 Atl. 217; Buck *v.* Wilson, 113 Pa. St. 423, 6 Atl. 97; Head *v.* Meloney, 111 Pa. St. 99, 2 Atl. 195; Raisig *v.* Graf, 17 Pa. Super. Ct. 509.

South Carolina.— Perkins *v.* Perkins, 49 S. C. 563, 27 S. E. 551; Barnes *v.* Cunningham, 9 Rich. Eq. 475; Eding *v.* Whaley, 1 Rich. Eq. 301.

Tennessee.— Lindsley *v.* Thompson, 1 Tenn. Ch. 272.

Texas.— Cameron *v.* Hinton, 92 Tex. 492, 49 S. W. 1047; Darragh *v.* Kaufman, 2 Tex. Unrep. Cas. 97.

Utah.— Everill *v.* Swan, 20 Utah 56, 57 Pac. 716.

Virginia.— Tilson *v.* Davis, 32 Gratt. 92.

West Virginia.— Northwestern Bank *v.* Hays, 37 W. Va. 475, 16 S. E. 561.

Wisconsin.— Rowell *v.* Smith, 123 Wis. 510, 102 N. W. 1; Driscoll *v.* Damp, 16 Wis. 106.

United States.—Townsend *v.* St. Louis, etc., Coal, etc., Co., 159 U. S. 21, 15 S. Ct. 997, 40 L. ed. 61; Green *v.* Bogue, 158 U. S. 478, 15 S. Ct. 975, 39 L. ed. 1061; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Stockton *v.* Ford, 18 How. 418, 15 L. ed. 395; Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190; Kilham *v.* Wilson, 112 Fed. 565, 50 C. C. A. 454; Landon *v.* Bulkley, 95 Fed. 344, 37 C. C. A. 96; Fayerweather *v.*

the reasons, grounds, and evidence which he may have in support of his claim or defense,[68] and if he has several claims or titles to the property in controversy he must assert them all.[69] Again if a party is brought into a case and has a fair legal opportunity to present and enforce any claim he may have in relation to the subject-matter he must avail himself of it,[70] and whether an original party or an intervener, he must present his whole case, extending his claim so as to embrace everything which properly constitutes a part of his cause of action or defense.[71] Further a plaintiff must recover in one action all he is entitled to; if dissatisfied with the result, he cannot bring a new suit to recover something more on the same cause of action.[72] But this rule does not require a plaintiff to join in one suit several distinct and separate causes of action which he may have against

Ritch, 91 Fed. 721, 34 C. C. A. 61; Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87; Chavent *v.* Schefer, 59 Fed. 231; David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661; Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., 55 Fed. 690, 5 C. C. A. 249; Bartels *v.* Schell, 16 Fed. 341.

England.— Lockyer *v.* Ferryman, 2 App. Cas. 519; Nelson *v.* Couch, 15 C. B. N. S. 99, 10 Jur. N. S. 366, 28 L. J. C. P. 46, 8 L. T. Rep. N. S. 577, 11 Wkly. Rep. 964, 109 E. C. L. 99; Henderson *v.* Henderson, 3 Hare 100, 25 Eng. Ch. 100.

Canada.— Davidson *v.* Belleville, etc., R. Co., 5 Ont. App. 315.

See 30 Cent. Dig. tit. "Judgment," § 1104.

Statement of rule.— "Where the cause of action is the same, and plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such former recovery a bar, however, it must be shown that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered, in the former suit that which he seeks to recover in the second action." Nelson *v.* Couch, 15 C. B. N. S. 99, 108, 10 Jur. N. S. 366, 33 L. J. C. P. 46, 8 L. T. Rep. N. S. 577, 11 Wkly. Rep. 964, 109 E. C. L. 99 [*quoted* in Davidson *v.* Belleville, etc., R. Co., 5 Ont. App. 315], per Wilkes, J.

Meaning of the rule.— "The parties to a suit must make the most of their day in court, and bring forward all claims and demands properly belonging to the cause of action, as well as all their evidence and all necessary parts of their case or defense, on pain of being barred in a subsequent controversy." 2 Black Judgm. § 731.

68. *Georgia.*— Craig *v.* Cosby, 81 Ga. 650, 8 S. E. 185.

Illinois.— Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717.

Kentucky.—Snapp *v.* Snapp, 87 Ky. 554, 9 S. W. 705, 10 Ky. L. Rep. 598.

Louisiana.— Porter *v.* Morere, 30 La. Ann. 230.

New York.— Port Jervis Nat. Bank *v.* Hansee, 15 Abb. N. Cas. 488.

Ohio.— Martin *v.* Roney, 41 Ohio St. 141.

South Carolina.— Newell *v.* Neal, 50 S. C. 68, 27 S. E. 560.

Wisconsin.— Swennes *v.* Sprain, 120 Wis. 68, 97 N. W. 511.

United States.— Landon *v.* Bulkley, 95 Fed. 344, 37 C. C. A. 96.

See 30 Cent. Dig. tit. "Judgment," § 1104.

69. Des Moines, etc., R. Co. *v.* Bullard, 89 Iowa 749, 56 N. W. 498. And see Wilcox *v.* Gilchrist, 85 Hun (N. Y.) 1, 32 N. Y. Suppl. 608.

70. *California.*— Brown *v.* Willis, 67 Cal. 235, 7 Pac. 682.

Illinois.— McGillis *v.* Willis, 39 Ill. App. 311.

Indiana.— Vail *v.* Rinehart, 105 Ind. 6, 4 N. E. 218.

Kansas.— Kirk *v.* Goodwin, 53 Kan. 610, 36 Pac. 1057.

Maryland.— Royston *v.* Horner, 86 Md. 249, 37 Atl. 718, 63 Am. St. Rep. 510.

Washington.— Achey *v.* Creech, 21 Wash. 319, 58 Pac. 208.

Wisconsin.— Pierce *v.* Kneeland, 9 Wis. 23.

See 30 Cent. Dig. tit. "Judgment," § 1104.

71. *Indiana.*— Shaw *v.* Barnhart, 17 Ind. 183.

Kentucky.— Watson *v.* Carmon, 6 S. W. 450, 10 Ky. L. Rep. 288.

Louisiana.— Fleitas *v.* Meraux, 47 La. Ann. 232, 16 So. 848.

Maryland.— Packham *v.* German F. Ins. Co., 91 Md. 515, 46 Atl. 1066, 80 Am. St. Rep. 461, 50 L. R. A. 828.

Michigan.— Hyde *v.* Leisenring, 107 Mich. 490, 65 N. W. 536.

Minnesota.— Pierro *v.* St. Paul, etc., R. Co., 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673.

Mississippi.— State *v.* Morrison, 60 Miss. 74; Stewart *v.* Stebbins, 30 Miss. 66.

See 30 Cent. Dig. tit. "Judgment," § 1104.

72. *Georgia.*— Atlanta Elevator Co. *v.* Fulton Bag, etc., Mills, 106 Ga. 427, 32 S. E. 541.

Indiana.— Campbell *v.* Monroe County, 71 Ind. 185; Jenkins *v.* Jenkins, 63 Ind. 120.

Iowa.— Hodge *v.* Shaw, 85 Iowa 137, 52 N. W. 8, 39 Am. St. Rep. 290.

Missouri.— Koenig *v.* Morrison, 44 Mo. App. 411.

New York.— Davies *v.* New York, 93 N. Y. 250.

Pennsylvania.— Wright *v.* Weber, 31 Pittsb. Leg. J. N. S. 115.

See 30 Cent. Dig. tit. "Judgment," § 1104.

the same defendant,[73] nor does it mean that the prior judgment is conclusive of matters not in issue or adjudicated, and which were not germane to, implied in, or essentially connected with, the actual issues in the case, although they may affect the ultimate rights of the parties and might have been presented in the former action.[74]

d. Demands Not in Issue.[75] Subject to the rule stated in the preceding section, it is held that rights, claims, or demands of the parties growing out of the same subject-matter, but which were not put in issue or adjudicated in the former action, are not barred by the judgment therein.[76] And *a fortiori* a judgment is

Injunction and accounting.— In a suit against a corporation to enjoin its use of complainant's trade-mark and to obtain an accounting of profits, it appeared that a previous suit had been brought by the same complainant against the selling agent of defendant for the same purpose, and that there had been a decree for an injunction, but that it was shown in that suit that the selling agent was employed upon a salary and received no share of the profits, and for that reason no decree for an accounting was made against him. It was held that such prior decree did not estop the complainant from obtaining an accounting in the second suit. Clark Thread Co. *v.* William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599.

73. Eastman *v.* Porter, 14 Wis. 39. And see *infra*, XIII, D, 7, a.

74. Fairchild *v.* Lynch, 99 N. Y. 359, 2 N. E. 20; Malony *v.* Horan, 12 Abb. Pr. N. S. (N. Y.) 289; Williams *v.* Clouse, 91 N. C. 322; Porter *v.* Wagner, 36 Ohio St. 471; Wilson *v.* Casey, 3 Tex. Civ. App. 141, 22 S. W. 118.

75. Conclusiveness of adjudication as to matters not in issue see *infra*, XIV, C, 8.

76. *California.*— Patterson *v.* Mills, 138 Cal. 276, 71 Pac. 177; McCormick *v.* Gross, 135 Cal. 302, 67 Pac. 766; Beronio *v.* Ventura County Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118; Journe *v.* Hewes, 124 Cal. 244, 56 Pac. 1032; National Carriage Mfg. Co. *v.* Story, etc., Commercial Co., 111 Cal. 531, 44 Pac. 157; Richardson *v.* Eureka, 110 Cal. 441, 42 Pac. 965.

Connecticut.— Lyon *v.* Robbins, 45 Conn. 513.

Illinois.— Schmidt *v.* Glade, 126 Ill. 485, 18 N. E. 762; Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899; Williams *v.* Walker, 62 Ill. 517; Quinn *v.* McMahan, 40 Ill. App. 593; Dowdall *v.* Cannedy, 32 Ill. App. 207.

Indiana.— Quick *v.* Brenner, 120 Ind. 364, 22 N. E. 326; Perrill *v.* Nichols, 89 Ind. 444.

Iowa.— Donahue *v.* McCosh, 81 Iowa 296, 46 N. W. 1008; Roberts *v.* Hamilton, 56 Iowa 683, 10 N. W. 236.

Kansas.— Salina First Nat. Bank *v.* Kingman, 62 Kan. 571, 64 Pac. 65.

Louisiana.— Wiemann's Succession, 106 La. 387, 30 So. 893; Cantrelle *v.* St. James Roman Catholic Cong., 16 La. Ann. 442; Gracie *v.* Gayoso, 7 Mart. N. S. 650.

Maryland.— Cummings *v.* Bannon, (1887) 8 Atl. 357; Shafer *v.* Stonebraker, 4 Gill & J. 345.

Massachusetts.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454; Gage *v.* Holmes, 12 Gray 428.

Mississippi.— Hubbard *v.* Flynt, 58 Miss. 266.

Missouri.— Wright *v.* Broome, 67 Mo. App. 32; Lawless *v.* Lawless, 47 Mo. App. 523. And see Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619.

Nebraska.— Hamilton Nat. Bank *v.* American L. & T. Co., 66 Nebr. 67, 92 N. W. 189.

New York.— Nelson *v.* Brown, 144 N. Y. 384, 39 N. E. 355; Jackson *v.* Andrews, 98 N. Y. 672; Weed *v.* Burt, 78 N. Y. 191; Lewis *v.* Smith, 9 N. Y. 502, 61 Am. Dec. 706; New Union Tel. Co. *v.* Marsh, 96 N. Y. App. Div. 122, 89 N. Y. Suppl. 79; De Graaf *v.* Wyckoff, 4 N. Y. St. 108. And see Levy *v.* Hohweisner, 101 N. Y. App. Div. 82, 91 N. Y. Suppl. 552.

Ohio.— Porter *v.* Wagner, 36 Ohio St. 471; Jones *v.* Ludlow, 6 Ohio Cir. Ct. 57, 3 Ohio Cir. Dec. 348.

Pennsylvania.— Fidelity Ins. Trust, etc., Co. *v.* Gazzam, 161 Pa. St. 536, 29 Atl. 264; Converse *v.* Colton, 49 Pa. St. 346.

South Carolina.— Deloach *v.* Turner, 9 Rich. 181; Davidson *v.* Graves, Bailey Eq. 268.

Texas.— East Line, etc., R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; Lucas *v.* Heidenheimer, 3 Tex. App. Civ. Cas. § 360.

Virginia.— Crutcher *v.* Crutcher, 4 Munf. 457.

Washington.— Allen *v.* Wall, 7 Wash. 316, 35 Pac. 65.

United States.— Slaughter *v.* La Compagnie Francaise Des Cables Telegraphiques, 113 Fed. 21; U. S. *v.* Oregon Cent. Military Road Co., 103 Fed. 549; Detroit *v.* Detroit City R. Co., 56 Fed. 867; Keator *v.* St. John. 42 Fed. 585; Crawford *v.* Edgerton, 39 Fed. 523.

England.— Serrao *v.* Noel, 15 Q. B. D. 549.

See 30 Cent. Dig. tit. "Judgment," § 1105.

And see Eldred *v.* Johnson, (Ark. 1905) 86 S. W. 670; Isbester *v.* Ray, 26 Can. Sup. Ct. 79.

A judgment for rents and profits against defendant in ejectment is not a bar to an action of trover for the cutting and removal of standing timber from the premises by defendant while in possession. Wilson *v.* Hoffman, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485.

A decree for specific performance of a con-

not a bar to the litigation of any demand or cause of action which, from the nature of the case, the form of the action, or the character of the pleadings, could not have been adjudicated in the former suit.[77]

e. Demands Withdrawn or Excluded. A judgment is not a bar to the further prosecution of claims or demands which, although set up in the action, were excluded by the court or withheld from the jury, and therefore formed no part of the verdict or judgment,[78] or which were withdrawn by plaintiff voluntarily before verdict,[79] or on being required to elect between two or more causes of action joined in his declaration,[80] or which for any reason were not submitted to the court or jury and not considered or passed upon,[81] provided always that the claim withdrawn or withheld was a distinct and independent matter, legally detachable from

tract to convey land does not prevent a subsequent adjudication between the parties as to the boundaries of the same land, where that question was not raised in the first suit because one party did not then know that the other claimed a different boundary. Peterson *v.* Sohl, 141 Ind. 466, 40 N. E. 910.

77. *Alabama.*— McLane *v.* Miller, 12 Ala. 643.

Georgia.— Matters which are cognizable only in equity are not concluded by the judgment in an action at law, where they could not be set up or tried. White *v.* Crew, 16 Ga. 416.

Illinois.— Quinn *v.* Ohlerking, 37 Ill. App. 315.

Indiana.— Indianapolis, etc., R. Co. *v.* Center Tp., 130 Ind. 89, 28 N. E. 439; Athearn *v.* Brannan, 8 Blackf. 440.

Michigan.— Perkins *v.* Oliver, 110 Mich. 402, 68 N. W. 245; Fifield *v.* Edwards, 39 Mich. 264.

Minnesota.— Hastings First Nat. Bank *v.* Rogers, 22 Minn. 224.

Missouri.— Scott *v.* Black, 96 Mo. App. 472, 70 S. W. 523.

New York.— Shaw *v.* Broadbent, 129 N. Y. 114, 29 N. E. 238; Burdick *v.* Post, 12 Barb. 168.

Oregon.— Holmes *v.* Wolford, (1905) 81 Pac. 819.

South Carolina.— Sease *v.* Dobson, 34 S. C. 345, 13 S. E. 530.

Tennessee.— Gudger *v.* Barnes, 4 Heisk. 570.

See 30 Cent. Dig. tit. "Judgment," § 1105.

Conclusiveness of adjudication as to matters withdrawn or not decided see *infra*, XIV, C, 7.

Dismissal as to part of causes of action see *supra*, XIII, C, 7, h.

78. Louisville *v.* Selvage, (Ky. 1902) 66 S. W. 376; Pelton *v.* Baker, 158 Mass. 349, 33 N. E. 394; Boston Blower Co. *v.* Brown, 149 Mass. 421, 21 N. E. 883; Reid *v.* Parks, 122 Mich. 363, 81 N. W. 252; Detroit, etc., R. Co. *v.* Griggs, 12 Mich. 45; Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799; National Hudson River Bank *v.* Reynolds, 57 Hun (N. Y.) 307, 10 N. Y. Suppl. 669. To the same effect see Baker *v.* Kelly, Ir. R. 9 Eq. 54. But see Murrell *v.* Citizens' Sav. Bank, 19 Ky. L. Rep. 693, 41 S. W. 564, where a former judgment was held to bar the further prosecution of portions of plaintiff's claim which were erroneously ruled out by the court in the original action. And *compare* McKay *v.* Fee, 20 U. C. Q. B. 268.

79. Wood *v.* Corl, 4 Metc. (Mass.) 203; Masten *v.* Olcott, 24 Hun (N. Y.) 587; Thompson *v.* Wood, 1 Hilt. (N. Y.) 93; Louw *v.* Davis, 13 Johns. (N. Y.) 227; Levy *v.* Solomon, 207 Pa. St. 478, 56 Atl. 1007; Steelman *v.* Sites, 35 Pa. St. 216; Killion *v.* Wright, 34 Pa. St. 91; Muirhead *v.* Kirkpatrick, 2 Pa. St. 425; McComb *v.* Frink, 149 U. S. 629, 13 S. Ct. 993, 37 L. ed. 876.

80. *Kentucky.*— Ware *v.* McCormack, 96 Ky. 139, 28 S. W. 157, 959, 17 Ky. L. Rep. 385.

Michigan.— Gott *v.* Judge Detroit Super. Ct., 42 Mich. 625, 4 N. W. 529.

New York.— Snider *v.* Croy, 2 Johns. 227.

Washington.— Allen *v.* Wall, 7 Wash. 316, 35 Pac. 65.

United States.— Starr *v.* Stark, 22 Fed. Cas. No. 13,317, 2 Sawy. 603, 642.

See 30 Cent. Dig. tit. "Judgment," § 1106.

Election of remedies.— The rule stated in the text applies only where plaintiff's election is between two or more claims or causes of action. It does not apply where he elects between different theories as to his legal rights in the premises, or between different remedies or methods of seeking redress. Thus, where a vendor elects rather to sue for the purchase-money than to disaffirm the contract, the judgment in the suit is conclusive as to the right of parties or privies to disaffirm the contract. Roberts *v.* Lovejoy, 60 Tex. 253. So where a contract was subject to two constructions, either of which was open to plaintiff at his election, it was held that having made his election and enforced it by suit he could not afterward maintain another action based on the other construction of the contract, as the judgment recovered in the first suit was a bar. Bickford *v.* Cooper, 41 Pa. St. 142.

81. Lake *v.* Hancock, 38 Fla. 53, 20 So. 811, 56 Am. St. Rep. 159; Mitchell *v.* Read, 19 Hun (N. Y.) 418; Burwell *v.* Knight, 51 Barb. (N. Y.) 267; Jones *v.* Underwood, 35 Barb. (N. Y.) 211; Crebbin *v.* Bryce, 24 Tex. Civ. App. 532, 60 S. W. 587; Rackley *v.* Fowlkes, (Tex. Civ. App. 1896) 36 S. W. 75; Bodemuller *v.* U. S., 39 Fed. 437. But see Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444, holding that a party may not present issues for determination, and then avoid the effect of an estoppel by withholding proof thereof.

the rest of plaintiff's case, and not an inseparable part of it.[82] The same rule, with a similar limitation, applies to matters of defense which were excluded or withdrawn.[83]

5. Splitting Causes of Action[84] — a. Entire and Inseverable Demands. Where a demand or right of action is in its nature entire and indivisible, it cannot be split up into several causes of action and sued piecemeal, or made the basis of as many separate suits; but a recovery for one part will bar a subsequent action for the whole, the residue, or another part.[85] A particular application of this rule is that a party who has an entire claim which exceeds in amount the jurisdiction of a justice of the peace, and who, to bring his action within such jurisdiction,

82. Dutton *v.* Shaw, 35 Mich. 431; Thompson *v.* Myrick, 24 Minn. 4; Smedly *v.* Tucker, 3 Phila. (Pa.) 259.

83. Finnegan *v.* Campbell, 74 Iowa 158, 37 N. W. 127; Cockerill *v.* Stafford, 102 Mo. 57, 14 S. W. 813; Duren *v.* Kee, 41 S. C. 171, 19 S. E. 492.

84. **Merger of cause of action** see *supra*, XIII, A, 2.

Dismissal as to part of causes of action see *supra*, XIII, C, 7, h.

Splitting demands or entire and separate causes of action in general see Actions.

85. *Alabama.*— Davis *v.* Bedsole, 69 Ala. 362; South, etc., Alabama R. Co. *v.* Henlein, 56 Ala. 368; O'Neal *v.* Brown, 21 Ala. 482; Oliver *v.* Holt, 11 Ala. 574, 46 Am. Dec. 288.

California.— Herriter *v.* Porter, 23 Cal. 385; Nightingale *v.* Scannell, 6 Cal. 506, 65 Am. Dec. 525.

Connecticut.— Wildman *v.* Wildman, 70 Conn. 700, 41 Atl. 1; Burritt *v.* Belfry, 47 Conn. 323, 36 Am. Rep. 79; Marlborough *v.* Sisson, 31 Conn. 332; Pinney *v.* Barnes, 17 Conn. 420; Avery *v.* Fitch, 4 Conn. 362.

Georgia.— Atlanta Elevator Co. *v.* Fulton Bag, etc., Mills, 106 Ga. 427, 32 S. E. 541.

Illinois.— Abbott *v.* Brown, 131 Ill. 108, 22 N. E. 813; Mallock *v.* Krome, 78 Ill. 110; Ross *v.* Weber, 26 Ill. 221.

Iowa.— Newby *v.* Caldwell, 54 Iowa 102, 6 N. W. 154; Amsden *v.* Dubuque, etc., R. Co., 32 Iowa 288; Davis *v.* Milburn, 4 Iowa 246.

Kansas.— Wells *v.* Hickox, 1 Kan. App. 485, 40 Pac. 821.

Kentucky.— Gatewood *v.* Long, 106 Ky. 721, 51 S. W. 569, 21 Ky. L. Rep. 356; Small *v.* Reeves, 76 S. W. 395, 25 Ky. L. Rep. 729; Louisville Bridge Co. *v.* Louisville, etc., R. Co., 75 S. W. 285, 25 Ky. L. Rep. 405; Cole *v.* Illinois Cent. R. Co., 87 S. W. 1082, 27 Ky. L. Rep. 1087.

Louisiana.— Bowman *v.* McElroy, 15 La. Ann. 663.

Maine.— Sibley *v.* Rider, 54 Me. 463.

Maryland.— Strike's Case, 1 Bland 57.

Massachusetts.—Goodrich *v.* Yale, 97 Mass. 15.

Michigan.— Andreas *v.* Leavitt Tp. School Dist. No. 4, 138 Mich. 54, 100 N. W. 1021; Dutton *v.* Shaw, 35 Mich. 431.

Minnesota.— Gilbert *v.* Boak Fish Co., 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735.

Missouri.— Edmondston *v.* Jones, 96 Mo. App. 83, 69 S. W. 741; Vancourt *v.* Moore, 26 Mo. 92; Stewart *v.* Dent, 24 Mo. 111.

Nebraska.— Beck *v.* Devereaux, 9 Nebr. 109, 2 N. W. 365.

New Jersey.— McGlade *v.* McCormick, 57 N. J. L. 430, 31 Atl. 460; Baker *v.* Baker, 28 N. J. L. 13, 75 Am. Dec. 243.

New York.— Hahl *v.* Sugo, 169 N. Y. 109, 62 N. E. 135, 88 Am. St. Rep. 539, 61 L. R. A. 226; Price *v.* Holman, 135 N. Y. 124, 32 N. E. 124; Montrose *v.* Wanamaker, 134 N. Y. 590, 31 N. E. 252; McCredy *v.* Thrush, 37 N. Y. App. Div. 465, 56 N. Y. Suppl. 68; Staples *v.* Goodrich, 21 Barb. 317; Clark *v.* Jones, 1 Den. 516, 43 Am. Dec. 706; Bendernagle *v.* Cocks, 19 Wend. 207, 32 Am. Dec. 448; Stevens *v.* Lockwood, 13 Wend. 644, 28 Am. Dec. 492; Guernsey *v.* Carver, 8 Wend. 492, 24 Am. Dec. 60; Miller *v.* Covert, 1 Wend. 487; Willard *v.* Sperry, 16 Johns. 121; Farrington *v.* Payne, 15 Johns. 432; Smith *v.* Jones, 15 Johns. 229. In Law *v.* McDonald, 62 How. Pr. 340, the rule is thus stated: A judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings in which it is rendered, whether the suit embraces the whole or any part of the demand constituting the cause of action. An entire claim, arising either on a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits are brought for different parts of such claim, the pendency of the first may be pleaded in abatement of the others, and a judgment on the merits in either will be available as a bar in the other suits.

Ohio.— North British, etc., Ins. Co. *v.* Cohn, 17 Ohio Cir. Ct. 185; Reynolds *v.* Pittsburgh, etc., R. Co., 7 Ohio Dec. (Reprint) 293, 2 Cinc. L. Bul. 83.

Pennsylvania.— Fell *v.* Bennett, 110 Pa. St. 181, 5 Atl. 17; Alcott *v.* Hugus, 105 Pa. St. 350; Sykes *v.* Gerber, 98 Pa. St. 179; Ingraham *v.* Hall, 11 Serg. & R. 78; Raisig *v.* Graf, 17 Pa. Super. Ct. 509; Eisenhower *v.* Centralia School Dist., 13 Pa. Super. Ct. 51; Buffington *v.* Burhman, 4 Pa. L. J. 418. But *compare* Pantall *v.* Rochester, etc., Coal, etc., Co., 18 Pa. Super. Ct. 341.

South Carolina.— State *v.* Sandifer, 68 S. C. 204, 46 S. E. 1006; Cartin *v.* South Bound R. Co., 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829; Steen *v.* Mark, 32 S. C. 286, 11 S. E. 93; Crips *v.* Talvande, 4 McCord 20; Bates *v.* Quattlebom, 2 Nott & M. 205.

Tennessee.— Saddler *v.* Apple, 9 Humphr. 342; Carraway *v.* Burton, 4 Humphr. 108; Vance *v.* Lancaster, 3 Hayw. 130.

divides it into several portions, is barred by his first recovery and cannot afterward sue for the remaining portions.[86] Neither can a party, by assigning a part of his claim to another, divide an entire cause of action so as to sustain more than one suit upon it.[87] But the rule forbidding the severance of a cause of action is for the benefit of defendant, and he may waive it or renounce it by agreement with plaintiff.[88]

b. Contracts in General.[89] As a general rule but one cause of action arises from the breach of a contract or agreement, and where an action is brought on a contract all claims arising under the same and then due constitute an entire and indivisible cause of action, and a judgment therein is a bar to any further action founded on such claims.[90] But where a contract contains several stipulations, to

Vermont.— Hayward *v.* Clark, 50 Vt. 612.
Virginia.— Hite *v.* Long, 6 Rand. 457, 18 Am. Dec. 719.
Wisconsin.— Borngesser *v.* Harrison, 12 Wis. 544, 78 Am. Dec. 757.
United States.— Baird *v.* U. S., 96 U. S. 430, 24 L. ed. 703; Watkins *v.* American Nat. Bank, 134 Fed. 36, 67 C. C. A. 110; Brown *v.* Newton First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293; Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 109 Fed. 411, 48 C. C. A. 455; Claflin *v.* Mather Electric Co., 87 Fed. 795; Hughes *v.* Dundee Mortg., etc., Inv. Co., 26 Fed. 831; Bartels *v.* Schell, 16 Fed. 341.
England.— Russell *v.* Waterford, etc., R. Co., L. R. 16 Ir. 314; Bagot *v.* Williams, 3 B. & C. 235, 5 D. & R. 87, 27 Rev. Rep. 340, 10 E. C. L. 115; Bawell *v.* Kensey, 3 Lev. 179; Fetter *v.* Beale, 1 Salk. 11.
Canada.— Davidson *v.* Belleville, etc., R. Co., 5 Ont. App. 315; McKay *v.* Fee, 20 U. C. Q. B. 268; Stinson *v.* Branigan, 10 U. C. Q. B. 402.
See 30 Cent. Dig. tit. "Judgment," § 1107.

A judgment is a single and indivisible cause of action, and separate suits cannot be maintained for different portions of the amount which it awards, merely because different interests in it have been assigned to different persons. Hopkins *v.* Stockdale, 117 Pa. St. 365, 11 Atl. 368.

Severable demands.— The rule against splitting causes of action cannot be applied unless the two claims separately sued on were both parts of one and the same cause of action, equally available for purposes of suit at the time of the first action, and equally within the scope and purview of that action. See Wheelock *v.* Svensgaard, 63 Minn. 486, 65 N. W. 937; Claflin *v.* Mather Electric Co., 98 Fed. 699, 39 C. C. A. 241. Thus the right of a creditor having various claims against a corporation to exact payment from a stock-holder is not such a single demand that, by placing one such claim in judgment against the stock-holder, he is precluded from proceeding against him upon the others. Manley *v.* Park, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967. So the rule does not prevent one whose property is taken by a single trespass from maintaining replevin for so much of the property as is owned absolutely by him, and trover for the remainder, owned by him in common with another. Huffman *v.* Knight, 36 Oreg. 581, 60 Pac. 207. And see Taub *v.* McClelland-Colt Commission Co., 10 Colo. App. 190, 51 Pac. 168.

86. *Alabama.*— Davis *v.* Bedsole, 69 Ala. 362.
Georgia.— Broxton *v.* Nelson, 103 Ga. 327, 30 S. E. 38, 68 Am. St. Rep. 97.
Illinois.— Mallock *v.* Krome, 78 Ill. 110; Thompson *v.* Sutton, 51 Ill. 213; Lucas *v.* Le Compte, 42 Ill. 303.
Kentucky.— Pilcher *v.* Ligon, 91 Ky. 228, 15 S. W. 513, 12 Ky. L. Rep. 860.
New York.— Willard *v.* Sperry, 16 Johns. 121.
North Carolina.— Evans *v.* Cumberland Mills, 118 N. C. 583, 24 S. E. 215.
South Carolina.— Catawba Mills *v.* Hood, 42 S. C. 203, 20 S. E. 91.
Tennessee.—Carraway *v.* Burton, 4 Humphr. 108.
Vermont.— Warren *v.* Newfane, 25 Vt. 250.
Wisconsin.— McCormick *v.* Robinson, 1 Chandl. 254.
See 30 Cent. Dig. tit. "Judgment," § 1107.

87. Ingraham *v.* Hall, 11 Serg. & R. (Pa.) 78.

88. Edmonston *v.* Jones, 96 Mo. App. 83, 69 S. W. 741; Little *v.* Portland, 26 Oreg. 235, 37 Pac. 911; Claflin *v.* Mather Electric Co., 98 Fed. 699, 39 C. C. A. 241. And see Christopher, etc., Iron Co. *v.* Kelly, 91 Mo. App. 93, holding that the rule against splitting accounts will not be applied where no injury can accrue to the debtor, or a second claim be made for the same demand, if its application will defeat a party's claim to a lien under the mechanics' lien law.

89. Conclusiveness of adjudication as to rights and liabilities under contracts see *infra*, XIV, C, 11.

90. *Connecticut.*— Burritt *v.* Belby, 47 Conn. 323, 36 Am. Rep. 79, several payments due on a single agreement.
Illinois.— Rosenmueller *v.* Lampe, 89 Ill. 212, 31 Am. Rep. 74; Nolte *v.* Lowe, 18 Ill. 437; Dalton *v.* Bentley, 15 Ill. 420.
Indiana.— Indianapolis, etc., R. Co. *v.* Koons, 105 Ind. 507, 5 N. E. 549; Cutler *v.* Cox, 2 Blackf. 178, 18 Am. Dec. 152.
Maine.— Willoughby *v.* Atkinson Furnishing Co., 96 Me. 372, 52 Atl. 756.
Massachusetts.— White *v.* Dingley, 4 Mass. 433.
Minnesota.— Bowe *v.* Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151.
Missouri.— Kerr *v.* Simmons, 82 Mo. 269.

be performed at different times, successive actions may be brought for successive breaches as they occur, provided that in each action everything then due under the

New Jersey.— Baker *v.* Baker, 28 N. J. L. 13, 75 Am. Dec. 243.

New York.— O'Beirne *v.* Lloyd, 43 N. Y. 248; Pakas *v.* Hollingshead, 99 N. Y. App. Div. 472, 86 N. Y. Suppl. 560, 91 N. Y. Suppl. 1105; Maeder *v.* Wexler, 98 N. Y. App. Div. 68, 90 N. Y. Suppl. 598; Samuel *v.* Fidelity, etc., Co., 76 Hun 308, 27 N. Y. Suppl. 741; Coggins *v.* Bulwinkle, 1 E. D. Smith 434; New York *v.* Constantine, 18 N. Y. Suppl. 788; Miller *v.* Covert, 1 Wend. 487; Stuyvesant *v.* New York, 11 Paige 414.

Ohio.— Stein *v.* The Prairie Rose, 17 Ohio St. 471, 93 Am. Dec. 631; Erwin *v.* Lynn, 16 Ohio St. 539.

Pennsylvania.— Hill *v.* Joy, 149 Pa. St. 243, 24 Atl. 293; Carvill *v.* Garrigues, 5 Pa. St. 152.

Texas.— Mallory *v.* Dawson Cotton Oil Co., 32 Tex. Civ. App. 294, 74 S. W. 953.

Vermont.— Morey *v.* King, 51 Vt. 383.

West Virginia.— Peerce *v.* Athey, 4 W. Va. 22.

United States.— De Weese *v.* Smith, 97 Fed. 309; Horton *v.* New York Cent., etc., R. Co., 63 Fed. 897; Chinn *v.* Hamilton, 5 Fed. Cas. No. 2,685, Hempst. 438; Culbertson *v.* Ellis, 6 Fed. Cas. No. 3,461, 6 McLean 248.

Canada.— Stinson *v.* Branigan, 10 U. C. Q. B. 402. And see McKay *v.* Fee, 20 U. C. Q. B. 268.

See 30 Cent. Dig. tit. "Judgment," § 1108.

Rent.— If a lessor to whom rent is payable quarterly brings an action and recovers judgment for a part of a quarter, he cannot afterward sue for the residue. Warren *v.* Comings, 6 Cush. (Mass.) 103.

Bonds.— As a general rule there can be only one recovery on a bond for breach of its conditions. Stephens *v.* Crawford, 3 Ga. 499; Hanes *v.* Planters' Cotton-Press, etc., Assoc., 55 Miss. 654; Stinson *v.* Branigan, 10 U. C. Q. B. 402. But where there are successive breaches of the conditions of a bond, a judgment recovered for such breaches as had occurred at the time of bringing the suit, and not embracing the penalty of the bond, but damages for such breaches will not bar a second action for subsequent breaches. Ahl *v.* Ahl, 60 Md. 207; Orendorff *v.* Utz, 48 Md. 298. And see White *v.* Smith, 47 N. C. 4.

Leases.— The lease of premises for a period of six months, although the rent is payable monthly, being an entire contract, there can be only one recovery for a breach; and the recovery of an instalment of the rent is a bar to any further action on the contract. Burckhardt *v.* Greene, 26 Ohio Cir. Ct. 315 [*affirmed* without opinion in 68 Ohio St. 711, 70 N. E. 1116].

Partial breach of contract.— A recovery of damages for a partial breach of a contract will bar a further claim for damages occasioned by the breach sued on. Crabtree *v.* Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324.

Contract for work and labor.— If a person performs work for another at various times under one entire contract, and brings an action and recovers a judgment for a portion of the sum due on it, he cannot recover in a second action for a further sum due him under the contract, although he shows that as to the part sought to be recovered in the second action no evidence was given in the first. Logan *v.* Caffrey, 30 Pa. St. 196. But where persons contract in writing for the performance of a piece of work, and extra work is afterward done with their verbal assent, the contractor cannot recover for it in an action of covenant on the agreement, and therefore the recovery in such suit for the work originally contracted for will not bar him from suing in assumpsit for the extra work. Baehler *v.* Hartman, 1 Pearson (Pa.) 500.

Partial performance of contract.— Where one contracts with a railroad to do grading and clearing on its road, and performs a portion of the work, but is prevented from completing it by the company's failure to acquire right of way, a judgment obtained for the work actually performed up to the time of such failure will not prevent a subsequent action for the damages sustained by reason of such failure. Chicago, etc., R. Co. *v.* Yawger, 24 Ind. App. 460, 56 N. E. 50. So also an action to foreclose a lien for the contract price of removal of buildings is not barred by a previous action by the laborers to foreclose a lien for the amount due them on account of work done for the contractor. Boucher *v.* Powers, 29 Mont. 342, 74 Pac. 942.

Principal and interest.— One who has sued for and recovered the principal of a debt cannot afterward maintain a separate action for interest on the debt. Harty *v.* Harty, 2 La. 518; Saul *v.* His Creditors, 7 Mart. N. S. (La.) 425; Nugent *v.* Delhomme, 2 Mart. (La.) 307; Faurie *v.* Pitot, 2 Mart. (La.) 83; Gordon *v.* Omaha, (Nebr. 1904) 99 N. W. 242.

Interest due under separate agreement.— Where plaintiff sued defendant as maker and A as indorser of two notes, adding a count for interest, and at the trial to support this count offered in evidence a separate written undertaking signed by defendant, and a similar one by A, to allow him interest at the rate of thirty per cent, until payment, in consideration of plaintiff allowing three months' time, and the court ruled that the action being joint evidence of a separate liability against either defendant could not be received, and plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent, and after judgment had been entered upon this and satisfied, he sued defendant on his undertaking, to recover twenty-four per cent, the balance of interest agreed to be paid by it, it was held that the judgment recovered was a bar to any further claim for interest

contract must be included.[91] Moreover separate causes of action may arise from the breach of separate covenants or undertakings in the same deed or contract.[92]

c. Contracts of Employment.[93] A servant or agent wrongfully dismissed from his employment has his election to treat the contract as rescinded and recover pay for his services rendered, or to sue for breach of the contract; but if he chooses the latter, he must recover all his damages in the one action, and cannot thereafter maintain an action either for wages earned or for such as would have been earned in the future.[94] Yet in some states it is held that if the stipulated wages or salary was to be payable in instalments the employee may bring a separate suit for each instalment on the day it would have fallen due, and one such recovery will not bar another.[95]

upon the same notes. McKay *v.* Fee, 20 U. C. Q. B. 268. See, however, to the contrary, Florence *v.* Jennings, 22 C. B. N. S. 454, 3 Jur. N. S. 772, 26 L. J. C. P. 274, 89 E. C. L. 454.

91. Whitaker *v.* Hawley, 30 Kan. 317, 1 Pac. 508; Byrnes *v.* Byrnes, 102 N. Y. 4, 5 N. E. 776; McCleary *v.* Malcolm Brewing Co., 56 N. Y. App. Div. 531, 67 N. Y. Suppl. 258. *Compare* Pakas *v.* Hollingshead, 42 Misc. (N. Y.) 287, 86 N. Y. Suppl. 560. And see *infra*, XIII, D, 6, a.

92. see *infra*, XIII, D, 7, b.

93. Breaches of continuing covenants see *infra*, XIII, D, 6, d.

94. *Alabama.*— Liddell *v.* Chidester, 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387.

Illinois.— Rosenmueller *v.* Lampe, 89 Ill. 212, 31 Am. Rep. 74; Monarch Cycle Mfg. Co. *v.* Mueller, 83 Ill. App. 359; Weill *v.* Fontanel, 31 Ill. App. 615.

Indiana.— Richardson *v.* Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; Hancock County *v.* Binford, 70 Ind. 208.

Kansas.— Madden *v.* Smith, 28 Kan. 798.

Maine.— Alie *v.* Nadeau, 93 Me. 282, 44 Atl. 891, 74 Am. St. Rep. 346.

Maryland.— Olmstead *v.* Bach, 78 Md. 132, 27 Atl. 501, 44 Am. St. Rep. 273, 22 L. R. A. 74; Keedy *v.* Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759. But see Gottlieb *v.* Fred W. Wolf Co., 75 Md. 126, 23 Atl. 198.

Missouri.— Booge *v.* Pacific R. Co., 33 Mo. 212, 82 Am. Dec. 160; Soursin *v.* Salorgne, 14 Mo. App. 486.

Nebraska.— Kahn *v.* Kahn, 24 Nebr. 709, 40 N. W. 135.

New York.— Montrose *v.* Wanamaker, 134 N. Y. 590, 31 N. E. 252; Maeder *v.* Wexler, 98 N. Y. App. Div. 68, 90 N. Y. Suppl. 598 [*affirmed* in 182 N. Y. 519, 74 N. E. 1120]; Wieland *v.* Willcox, 40 N. Y. App. Div. 213, 57 N. Y. Suppl. 1038; Waldron *v.* Hendrickson, 40 N. Y. App. Div. 7, 57 N. Y. Suppl. 561; Colburn *v.* Woodworth, 31 Barb. 381; Brodar *v.* Lord, 46 N. Y. Super. Ct. 205; Thompson *v.* Wood, 1 Hilt. 93; Landsberg *v.* Lewis, 6 N. Y. Suppl. 561, 22 Abb. N. Cas. 277; Parry *v.* American Opera Co., 19 Abb. N. Cas. 269; Moody *v.* Leverich, 14 Abb. Pr. N. S. 145. But see Levin *v.* Standard Fashion Co., 16 Daly 404, 11 N. Y. Suppl. 706. And note the ruling in Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663, where it appeared that plaintiff brought an action to recover damages for an alleged wrongful dismissal from defendant's employment before the expiration of the stipulated term, and it was held that the judgment therein was not a bar to a subsequent action to recover wages earned during the time plaintiff was actually employed, and due and payable before the wrongful dismissal.

Ohio.— James *v.* Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

Pennsylvania.— Jenkins *v.* Scranton, 205 Pa. St. 598, 55 Atl. 788; Eisenhower *v.* Centralia School Dist., 13 Pa. Super. Ct. 51.

South Carolina.— Watts *v.* Todd, 1 McMull. 26.

Tennessee.— Tarbox *v.* Hartenstein, 4 Baxt. 78.

Wisconsin.— Ornstein *v.* Yahr, etc., Drug Co., 119 Wis. 429, 96 N. W. 826.

United States.— Hughes *v.* Dundee Mortg. Trust Inv. Co., 26 Fed. 831.

England.— Dunn *v.* Murray, 9 B. & C. 780, 7 L. J. K. B. O. S. 320, 4 M. & R. 571, 17 E. C. L. 347.

See 30 Cent. Dig. tit. "Judgment," § 1109.

Wages and commissions.— A judgment for damages in an action by an employee for a wrongful discharge from an employment under which he was to receive both stipulated wages and commissions on sales will not bar a subsequent action for commissions earned at the time of such discharge. Landsberg *v.* Lewis, 6 N. Y. Suppl. 561, 22 Abb. N. Cas. 277; Perry *v.* Dickerson, 7 Abb. N. Cas. (N. Y.) 466 [*affirmed* in 85 N. Y. 345, 39 Am. Rep. 663].

95. Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Isaacs *v.* Davies, 68 Ga. 169; Blun *v.* Holitzer, 53 Ga. 82; McEvoy *v.* Bock, 37 Minn. 402, 34 N. W. 740; Williams *v.* Luckett, 77 Miss. 394, 26 So. 967.

The English rule appears to be the same as that stated in the text. Gandell *v.* Pontigny, 4 Campb. 375, 1 Stark. 198. But *compare* Goodman *v.* Pocock, 15 Q. B. 576, 14 Jur. 1042, 19 L. J. Q. B. 410, 69 E. C. L. 576.

Former judgment as evidence.— In an action for one instalment of wages, if defendant sets up a defense going to the entire cause of action, such as that there was no such contract of employment as alleged, and judgment is given in his favor, it will be a bar to a subsequent action for another instalment. Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8. On the other hand where defendant has unsuccessfully attempted to defend one such action on the ground of plain-

d. Actions on Running Accounts. A continuous running account for goods sold, money lent, work and labor, or the like, is an entire demand, not severable into distinct causes of action, and a recovery on such an account must include all that is due at the time, subsequent actions on it being barred.[96] But this rule does not apply where the subsequent action is for goods sold on credit, where the time for payment had not elapsed when the first suit was brought,[97] or for items of the account accruing subsequent to the commencement of the first action.[98]

e. Entire Claims Founded on Tort.[99] An entire claim arising from a single tort cannot be divided and made the subject of several suits; a judgment upon the merits in respect to any part will be available as a bar in other actions arising from the same cause,[1] the rule being that plaintiff must include in the one action all the various items or elements of his damage, and recover all the compensation

tiff's incompetence and his consequent right to discharge him, he will be precluded from setting up the same defense in a subsequent suit. Kennedy *v.* McCarthy, 73 Ga. 346.

96. *Alabama.*— Oliver *v.* Holt, 11 Ala. 574, 44 Am. Dec. 228.

Connecticut.— Bunnel *v.* Pinto, 2 Conn. 431; Lane *v.* Cook, 3 Day 255.

Iowa.— Manning *v.* Irish, 47 Iowa 650.

Kansas.— Manley *v.* Tufts, 59 Kan. 660, 54 Pac. 683; Bolen Coal Co. *v.* Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810.

Kentucky.— Hobson *v.* Com., 1 Duv. 172; Anderson *v.* Meredith, 9 S. W. 407, 10 Ky. L. Rep. 460.

Minnesota.— Memmer *v.* Carey, 30 Minn. 458, 15 N. W. 877.

Missouri.— Hermann *v.* Schwartz Bros. Commission Co., 59 Mo. App. 649; La Crosse Lumber Co. *v.* Audrain County Agricultural, etc., Soc., 59 Mo. App. 24; Piel *v.* Finck, 19 Mo. App. 338.

New York.— Bendernagle *v.* Cocks, 19 Wend. 207, 32 Am. Dec. 448; Stevens *v.* Lockwood, 13 Wend. 644, 28 Am. Dec. 492; Guernsey *v.* Carver, 8 Wend. 492, 24 Am. Dec. 60.

Pennsylvania.— Buck *v.* Wilson, 113 Pa. St. 423, 6 Atl. 97; Ingraham *v.* Hall, 11 Serg. & R. 78.

Tennessee.— Johnson *v.* Stalcup, 4 Baxt. 283.

Vermont.— Hayward *v.* Clark, 50 Vt. 612; Warren *v.* Newfane, 25 Vt. 250.

Wisconsin.— Borngesser *v.* Harrison, 12 Wis. 544, 78 Am. Dec. 757.

England.— Bagot *v.* Williams, 3 B. & C. 235, 5 D. & R. 87, 27 Rev. Rep. 340, 10 E. C. L. 115.

Canada.— Davidson *v.* Belleville, etc., R. Co., 5 Ont. App. 315.

See 30 Cent. Dig. tit. "Judgment," § 1110.

Contra.— Badger *v.* Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611.

Distinct accounts.— While all the items of a running account must be recovered in one action, it is important to note that plaintiff may have several distinct and separate accounts, each of which may include several items, against the same defendant, and in that case a recovery on one will not bar an action on another. Tommey *v.* Finney, 45 Ga. 155. Thus where plaintiff kept an establishment, one part of which was devoted to the sale of ships' stores, and another to the business of repairing ships, and he kept separate accounts for each branch of his business, and defendant bought stores and also had repairs made, and separate bills were sent to him, it was held that the two accounts constituted distinct causes of action, which might be separately sued. Secor *v.* Sturgis, 2 Abb. Pr. (N. Y.) 69 [*affirmed* in 16 N. Y. 548]. So where two separate bills of goods are bought from the same plaintiff, and different periods of credit are given on them. Stickel *v.* Steel, 41 Mich. 350, 1 N. W. 1046; Staples *v.* Goodrich, 21 Barb. (N. Y.) 317. And so where by an agreement for the sale of goods the amount of the account for sales during each month was due and payable at the end of the month, it was held that the account for each month constituted a separate cause of action, and a recovery on such account for one month did not bar an action on the account for the preceding month. Beck *v.* Devereaux, 9 Nebr. 109, 2 N. W. 365.

97. Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 151, 32 Am. Dec. 448; McLaughlin *v.* Hill, 6 Vt. 20.

98. Avery *v.* Fitch, 4 Conn. 362.

99. Successive causes of action see *infra*, XIII, D, 6, e.

1. *Alabama.*— Foster *v.* Napier, 73 Ala. 595.

California.— Herriter *v.* Porter, 23 Cal. 385.

Kentucky.— McCain *v.* Louisville, etc., R. Co., 97 Ky. 804, 22 S. W. 325, 15 Ky. L. Rep. 80; Cole *v.* Illinois Cent. R. Co., 87 S. W. 1082, 27 Ky. L. Rep. 1087.

Maryland.— Packham *v.* German F. Ins. Co., 91 Md. 515, 46 Atl. 1066, 80 Am. St. Rep. 461, 50 L. R. A. 828.

Massachusetts.— Stevens *v.* Pierce, 151 Mass. 207, 23 N. E. 1006; Goodrich *v.* Yale, 97 Mass. 15.

Michigan.— Jungnitsch *v.* Michigan Malleable Iron Co., 121 Mich. 460, 80 N. W. 245.

New York.— Barnard *v.* Devine, 34 Misc. 182, 68 N. Y. Suppl. 859.

Pennsylvania.— Long *v.* Long, 5 Watts 102.

Tennessee.— Saddler *v.* Apple, 9 Humphr. 342.

United States.— Ranken *v.* St. Louis, etc., R. Co., 98 Fed. 479.

See 30 Cent. Dig. tit. "Judgment," § 1112.

he is entitled to for each and all of such items,[2] including prospective damages in cases where the injury was single, complete, and not repeated.[3] Thus for a single and completed trespass upon and injury to an entire tract of land several actions for damages cannot be maintained, but a recovery for the damage to a part of the land will bar a similar action as to another part.[4] And on the same principle if several chattels are taken or injured at the same time and by the same tortious act, the right of action is single, and a recovery of judgment in respect to any of them will merge the whole cause of action and bar any subsequent suit for the residue.[5]

f. Distinct Trespasses.[6] Distinct and separate acts of trespass or other tort, committed at different times or in different places, although they may be more or less connected, will give rise to distinct causes of action.[7]

2. Covington, etc., El. R., etc., Co. *v.* Kleimerer, 49 S. W. 484, 20 Ky. L. Rep. 1415, holding that the whole of the injury to abutting property from the construction and prudent operation of a railroad constitutes one entire cause of action, and a recovery for a part of such injury bars an action for the remainder.

Overflowing lands.— A judgment for plaintiff in an action for wrongfully causing his land to be overflowed is a bar to another action for damages resulting from the same overflow to land which forms a part of the tract involved in the former action, although that action was for damages to growing crops, while the latter action is for preventing plaintiff from planting and cultivating the ground. Wichita, etc., R. Co. *v.* Beebe, 39 Kan. 465, 18 Pac. 502.

Conversion of a chattel.— A judgment in an action for the seizure and conversion of a chattel will bar a subsequent action of trespass for the wrongful entry upon plaintiff's premises or the forcible taking of the chattel. Palmer *v.* People, 111 Ill. App. 381; Finn *v.* Peck, 47 Mich. 208, 10 N. W. 202; Hite *v.* Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719. But *compare* Hattersley *v.* Burrows, 4 Colo. App. 538, 36 Pac. 889.

Malicious prosecution and slander.— A judgment in an action for malicious prosecution will bar a subsequent suit for the defamation of character involved in the false charge. Tidwell *v.* Witherspoon, 21 Fla. 359, 58 Am. Rep. 665; Sheldon *v.* Carpenter, 4 N. Y. 579, 55 Am. Dec. 301. And see Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514; Rockwell *v.* Brown, 36 N. Y. 207.

Repetitions of slander.— A judgment against a press association for sending out a libelous article to its customers, on a complaint which does not claim damages for the publication by the various newspapers to which it is sent, is not a bar to a judgment against one of such newspapers for the publication. Union Associated Press *v.* Heath, 49 N. Y. App. Div. 247, 63 N. Y. Suppl. 96. And although a defendant obtains a verdict and judgment in an action against him for slanderous words, plaintiff may sue him again for other words spoken previously to the commencement of the first action. Henson *v.* Veatch, 1 Blackf. (Ind.) 369.

The abatement of a nuisance by plaintiff does not preclude him from recovering damages sustained anterior to such abatement. Gleason *v.* Gary, 4 Conn. 418.

3. Watson *v.* Van Meter, 43 Iowa 76; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207. 32 Am. Dec. 448; Whitney *v.* Clarendon, 18 Vt. 252, 46 Am. Dec. 150; Hodsoll *v.* Stallebrass, 11 A. & E. 301, 9 C. & P. 63, 38 E. C. L. 49, 8 Dowl. P. C. 482, 9 L. J. Q. B. 132, 3 P. & D. 200, 38 E. C. L. 49; Fetter *v.* Beale, 1 Salk. 11. But see Jones, *v.* Seattle, 23 Wash. 753, 63 Pac. 553, holding that a decree in favor of a lot owner, assessing damages for the grading of a street, rendered before the grading was done, and specially confining the assessment to damages resulting from ordinary grading, is not a bar to a subsequent action by the same plaintiff for negligent grading, injuring his premises.

4. Beronio *v.* Southern Pac. R. Co., 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57; Cunningham *v.* Morris, 19 Ga. 583, 65 Am. Dec. 611; Knowlton *v.* New York, etc., R. Co., 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625; Pierro *v.* St. Paul, etc., R. Co., 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673. But *compare* Pantall *v.* Rochester, etc., Coal, etc., Co., 204 Pa. St. 158, 53 Atl. 751.

5. *Alabama.*— O'Neal *v.* Brown, 21 Ala. 482.

Kansas.— Burdge *v.* Kelchner, 66 Kan. 642, 72 Pac. 232; Thisler *v.* Miller, 53 Kan. 515, 36 Pac. 1060, 42 Am. St. Rep. 302.

Massachusetts.— McCaffrey *v.* Carter, 125 Mass. 330; Trask *v.* Hartford, etc., R. Co., 2 Allen 331.

Missouri.— Union R., etc., Co. *v.* Traube, 59 Mo. 355; Garth *v.* Everett, 16 Mo. 490; Skeen *v.* Springfield Engine, etc., Co., 42 Mo. App. 158.

New York.— Barnard *v.* Devine, 34 Misc. 182, 68 N. Y. Suppl. 859; Phillips *v.* Berick, 16 Johns. 136, 8 Am. Dec. 299; Farrington *v.* Payne, 15 Johns. 432. But see Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350.

Texas.— St. Louis, etc., R. Co. *v.* Moss, 9 Tex. Civ. App. 6, 28 S. W. 1038.

Wisconsin.— Stern *v.* Riches, 111 Wis. 591, 87 N. W. 555, 87 Am. St. Rep. 892.

See 30 Cent. Dig. tit. "Judgment," § 1112.

6. Successive causes of action see *infra*, XIII, D, 6, e, (II).

7. *California.*— De la Guerra *v.* Newhall, 55 Cal. 21.

g. Claims Omitted Through Ignorance or Mistake. The rule prohibiting a multiplicity of suits has no reference to a case where the party has no knowledge of his means of redress; and a former recovery does not bar claims of which plaintiff was ignorant, although they existed at the time and might have been joined.[8] And some of the decisions extend this exception to claims or items omitted by plaintiff, not through ignorance of them, but by mere mistake.[9] But the general rule is that a party who inadvertently, or by his own negligence or mistake, and without fault or fraud of the adverse party, takes judgment for a sum less than his actual claim, is estopped to bring a second action for the residue.[10] And the same result follows where claims or items were omitted in consequence of the mistake or erroneous decision of the court or a referee.[11]

h. Plaintiff Not Required to Join Distinct Demands. The rule against splitting causes of action does not require a plaintiff who has distinct and disconnected causes of action against the same defendant, each of which by itself would authorize independent relief, to join them in a single suit, although they exist at the same time and might permissibly be so joined.[12]

Kansas.— Missouri Pac. R. Co. *v.* Scammon, 41 Kan. 521, 21 Pac. 590.

Massachusetts.— Adams *v.* Haffards, 20 Pick. 127; White *v.* Moseley, 8 Pick. 356.

New York.— Bendernagle *v.* Cocks, 19 Wend. 207, 32 Am. Dec. 448.

Pennsylvania.— Amrhein *v.* Quaker City Dye Works, 192 Pa. St. 253, 43 Atl. 1008.

See 30 Cent. Dig. tit. "Judgment," § 1124.

But *compare* Fields *v.* Law, 2 Root (Conn.) 320, holding that a recovery in an action of trespass is a bar to actions for all trespasses of the same kind prior to the date of the writ.

8. *Arkansas.*— Alexander *v.* Bridgford, 59 Ark. 195, 27 S. W. 69.

Michigan.— Johnson *v.* Provincial Ins. Co., 12 Mich. 216, 86 Am. Dec. 49.

Missouri.— Moran *v.* Plankinton, 64 Mo. 337; Edmonston *v.* Jones, 96 Mo. App. 83, 69 S. W. 741.

New York.— Gedney *v.* Gedney, 160 N. Y. 471, 55 N. E. 1; Conklin *v.* Field, 37 How. Pr. 455; Farrington *v.* Payne, 15 Johns. 432.

North Carolina.— Jones *v.* Beaman, 119 N. C. 300, 25 S. E. 970, 117 N. C. 259, 23 S. E. 248.

Ohio.— Ruehlmann *v.* Eleventh Ward Bldg. Assoc., 1 Ohio S. & C. Pl. 428, 7 Ohio N. P. 296.

Vermont.— Post *v.* Smilie, 48 Vt. 185.

See 30 Cent. Dig. tit. "Judgment," § 1114.

Ignorance due to negligence.— This exception to the general rule will not be allowed in favor of a plaintiff who at the time of his first action was in possession of all the means of ascertaining all the facts and might have known the entire extent of his claim, his want of knowledge being due to his own fault and negligence. Macon, etc., R. Co. *v.* Garrard, 54 Ga. 327.

9. *Arkansas.*— Jefferson *v.* Dunavant, 53 Ark. 133, 13 S. W. 701.

Connecticut.— Kane *v.* Morehouse, 46 Conn. 300.

Florida.— Lake *v.* Hancock, 38 Fla. 53, 20 So. 811, 56 Am. St. Rep. 159.

Indiana.— State *v.* Brutch, 12 Ind. 381; Byrket *v.* State, 3 Ind. 248.

New Jersey.— Whiley *v.* Broadway, 3 N. J. L. 996.

Vermont.— Stevens *v.* Damon, 29 Vt. 521.

United States.— Phillips *v.* Bossard, 35 Fed. 99.

England.— Seddon *v.* Tutop, 1 Esp. 401, 6 T. R. 607, 3 Rev. Rep. 274.

See 30 Cent. Dig. tit. "Judgment," § 1114.

10. *Iowa.*— Keokuk County *v.* Alexander, 21 Iowa 377.

Kentucky.— Newport, etc., Bridge Co. *v.* Douglass, 12 Bush 673; Russell *v.* England, 50 S. W. 250, 20 Ky. L. Rep. 1879; Callahan *v.* Murrell, 45 S. W. 67, 20 Ky. L. Rep. 28; Russell *v.* McIlvoy, 41 S. W. 765, 19 Ky. L. Rep. 755.

Massachusetts.— Folsom *v.* Clemence, 119 Mass. 473.

Missouri.— Wickersham *v.* Whedon, 33 Mo. 561.

New Jersey.— Weber *v.* Morris, etc., R. Co., 36 N. J. L. 213.

New York.— Rockefeller *v.* St. Regis Paper Co., 39 Misc. 746, 80 N. Y. Suppl. 975. In this case the first judgment was vacated in order that it might not bar the second. And see Hayes *v.* Reese, 34 Barb. 151; Platner *v.* Best, 11 Johns. 530.

North Carolina.— Horner *v.* Dunnagan, 41 N. C. 371.

Ohio.— Ewing *v.* McNairy, 20 Ohio St. 315.

Pennsylvania.— Ahl's Estate, 169 Pa. St. 609, 32 Atl. 621; Buffington *v.* Burhman, 4 Pa. L. J. 418.

South Carolina.— Dukes *v.* Broughton, 2 Speers 620.

United States.— Stockton *v.* Ford, 18 How. 418, 15 L. ed. 395.

See 30 Cent. Dig. tit. "Judgment," § 1114.

11. Town *v.* Smith, 14 Mich. 348; Bancroft *v.* Winspear, 44 Barb. (N. Y.) 209; Winslow *v.* Stokes, 48 N. C. 235, 67 Am. Dec. 242. But *compare* Adams *v.* U. S., 33 Ct. Cl. 411.

12. *Alabama.*— Boyle *v.* Wallace, 81 Ala. 352, 8 So. 194; New Orleans, etc., R. Co. *v.* Castello, 50 Ala. 12; Robbins *v.* Harrison, 31 Ala. 160.

California.—Journe *v.* Hewes, 124 Cal. 244, 56 Pac. 1032; Hughes *v.* Mendocino County,

6. Successive Causes of Action — a. In General.[13] Where several claims, due or enforceable at different times, arise out of the same contract or transaction, separate actions may be brought as each liability accrues,[14] although all of such claims which may be due at the time of bringing a given action must be included in it.[15] Thus as a general rule a contract to do several things at several times is divisible in its nature, so as to authorize successive actions;[16] but if the contract is entire and its breach total, only one cause of action accrues to plaintiff, and he

(1884) 4 Pac. 236; Phelan *v.* Gardner, 43 Cal. 306.

Illinois.— Sherer *v.* Langford, 67 Ill. App. 342.

Indiana.— Indianapolis, etc., R. Co. *v.* Center Tp., 130 Ind. 89, 28 N. E. 439; Collier *v.* Cunningham, 2 Ind. App. 254, 28 N. E. 341.

Kentucky.— A judgment for defendant in an action on an express contract for board is not a bar to an action on an implied contract for nursing and attention during the same period, although the causes of action might have been joined. Schuster *v.* White, 106 Ky. 317, 50 S. W. 242, 20 Ky. L. Rep. 1852.

Maryland.— Gottlieb *v.* Fred. W. Wolf Co., 75 Md. 126, 23 Atl. 198.

Minnesota.— Wright *v.* Tileston, 60 Minn. 34, 61 N. W. 823; Reynolds *v.* Franklin, 47 Minn. 145, 49 N. W. 648.

Missouri.— Corby *v.* Taylor, 35 Mo. 447; Taylor *v.* Hines, 31 Mo. App. 622. Two separate and distinct sales of merchandise, although made on the same day, do not constitute a single or entire cause of action, in the absence of an agreement to that effect. Alkire Grocery Co. *v.* Tagart, 60 Mo. App. 389.

New Mexico.— Neher *v.* Armigo, 11 N. M. 67, 66 Pac. 517.

New York.— Gedney *v.* Gedney, 160 N. Y. 471, 55 N. E. 1; Secor *v.* Sturgis, 16 N. Y. 548; Mills *v.* Garrison, 3 Abb. Dec. 297, 3 Keyes 40; Govin *v.* De Miranda, 79 Hun 329, 29 N. Y. Suppl. 347; Gentles *v.* Finck, 23 Misc. 153, 50 N. Y. Suppl. 726; Scott *v.* Haines, 18 N. Y. Suppl. 163; Bache *v.* Purcell, 51 How. Pr. 270; Bendernagle *v.* Cocks, 19 Wend. 207, 32 Am. Dec. 448; Phillips *v.* Berick, 16 Johns. 136, 8 Am. Dec. 299. A person having two independent claims against the estate of a decedent is not bound to unite them in one action or proceeding. Gedney *v.* Gedney, 19 N. Y. App. Div. 407, 46 N. Y. Suppl. 590. The holder of several overdue promissory notes, all against the same parties, may bring a separate action upon each. Nathans *v.* Hope, 77 N. Y. 420.

North Carolina.— Tyler *v.* Capeheart, 125 N. C. 64, 34 S. E. 108; Snow Steam Pump Works *v.* Dunn, 119 N. C. 77, 25 S. E. 741; Gregory *v.* Hobbs, 93 N. C. 1.

Pennsylvania.— Terrerri *v.* Jutte, 159 Pa. St. 244, 28 Atl. 225; Milligan *v.* Browarsky, 147 Pa. St. 155, 23 Atl. 398; Daniels *v.* Heidenreich, 8 Kulp 413.

Texas.— A judgment in favor of a city for taxes on one of several parcels of land, all owned by the same person, is no bar to an action for taxes on the other parcels. Harris *v.* Houston, (Civ. App. 1900) 60 S. W. 440. So a judgment against a carrier for two bales of cotton that were burned will not bar a subsequent action for two other bales shipped at the same time, but converted by the carrier to his own use after the two bales were burned. Houston, etc., R. Co. *v.* Perkins, 2 Tex. App. Civ. Cas. § 520.

Vermont.— Mussey *v.* Bates, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 516.

West Virginia.— Flat Top Grocery Co. *v.* McClaugherty, 46 W. Va. 419, 33 S. E. 252.

Wisconsin.—Eastman *v.* Porter, 14 Wis. 39.

United States.— Stark *v.* Starr, 94 U. S. 477, 24 L. ed. 276; Olsen *v.* Whitney, 109 Fed. 80. The interest coupons attached to a municipal bond constitute distinct causes of action from the bond itself. Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 12 S. Ct. 746, 36 L. ed. 562.

See 30 Cent. Dig. tit. "Judgment," § 1107 *et seq.*

13. Distinct causes of action on separate clauses or conditions of contract see *infra*, XIII, D, 7, b.

Splitting causes of action on contract see *supra*, XIII, D, 5.

14. *California.*— Shanklin *v.* Gray, 111 Cal. 88, 43 Pac. 399.

Indiana.— Franke *v.* Franke, 15 Ind. App. 529, 43 N. E. 468.

Kentucky.— Louisville, etc., R. Co. *v.* Cumnock, 77 S. W. 933, 25 Ky. L. Rep. 1330.

Minnesota.—Reynolds *v.* Franklin, 47 Minn. 145, 49 N. W. 648.

Missouri.— Brown *v.* Chadwick, 32 Mo. App. 615.

Nebraska.— State *v.* Moores, (1903) 96 N. W. 1011.

New Jersey.— Edward C. Jones Co. *v.* Guttenberg, 66 N. J. L. 659, 51 Atl. 274.

New York.— Johnson *v.* Mecker, 96 N. Y. 93, 48 Am. Rep. 609.

Pennsylvania.— Wolf *v.* Welton, 30 Pa. St. 202.

See 30 Cent. Dig. tit. "Judgment," § 1115 *et seq.*

15. Union R., etc., Co. *v.* Traube, 59 Mo. 355. And see *supra*, XIII, D, 4, c.

16. Hanham *v.* Sherman, 114 Mass. 19; Perry *v.* Harrington, 2 Metc. (Mass.) 368, 37 Am. Dec. 98; Badger *v.* Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611; Stifel *v.* Lynch, 7 Mo. App. 326; Parmenter *v.* State, 135 N. Y. 154, 31 N. E. 1035; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Howe *v.* Harding, 84 Tex. 74, 19 S. W. 363.

must recover in one suit all his damages, present and prospective.[17] But in other cases a former judgment constitutes no defense to a cause of action accruing, between the same parties and upon the same subject-matter, after its rendition.[18]

b. Suits For Taxes. The decision in an action to recover the taxes on property for one year is not *res judicata* in regard to the taxes for another year on the same property, although the same claims and defenses are involved.[19] Thus a judgment for defendant on the ground that the property in question is exempt

Wages.— Upon a contract of employment at a fixed salary, payable at stated periods, an action and recovery for one of such periods is no bar to a subsequent action to recover salary becoming due after the commencement of the first action. McEvoy *v.* Bock, 37 Minn. 402, 34 N. W. 740.

Mortgage notes.— A party holding mortgage notes due at different times may institute a suit to foreclose as to only one note which has fallen due, and a judgment of foreclosure in such suit, satisfied without a sale of the mortgaged property, is no bar to a subsequent suit on the mortgage to enforce payment of another of the notes. Bressler *v.* Martin, 133 Ill. 278, 24 N. E. 518; Morgenstern *v.* Klees, 30 Ill. 422; Vansant *v.* Allmon, 23 Ill. 30; Crouse *v.* Holman, 19 Ind. 30; Bliss *v.* Weil, 14 Wis. 35, 80 Am. Dec. 766.

Official bonds.— Judgment in an action on a bond given by a county treasurer for one term of office would not be a bar to another action on a different bond given by the same officer for a separate and distinct term, where the parties in the latter action and the cause of action were different. Brady *v.* Pinal County, (Ariz. 1903) 71 Pac. 910.

Covenant against encumbrances.— A recovery of damages for breach of a covenant against encumbrances, the encumbrance being an assessment payable in instalments, is not a bar to a recovery in a subsequent suit for the damages which have accrued since the former action. Gardner *v.* Letson, 8 Ohio S. & C. Pl. Dec. 256, 5 Ohio N. P. 112.

17. Bowe *v.* Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151; Priest *v.* Deaver, 22 Mo. App. 276; New York *v.* Constantine, 60 N. Y. Super. Ct. 469, 18 N. Y. Suppl. 788.

18. *California.*— Wagner *v.* Wagner, 104 Cal. 293, 37 Pac. 935; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Jones *v.* Petaluma, 36 Cal. 230.

Connecticut.— Avery *v.* Fitch, 4 Conn. 362.

Illinois.— Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786; Chicago Opera House Co. *v.* Paquin, 70 Ill. App. 596.

Kentucky.— Maize *v.* Bowman, 93 Ky. 205, 19 S. W. 589, 14 Ky. L. Rep. 121.

Louisiana.— Glaude *v.* Peat, 43 La. Ann. 161, 8 So. 884.

Minnesota.— State *v.* Torinus, 28 Minn. 175, 9 N. W. 725.

New York.— Skinner *v.* Walter A. Wood Mowing, etc., Mach. Co., 140 N. Y. 217, 35 N. E. 491, 37 Am. St. Rep. 540; McCleary *v.* Malcolm Brewing Co., 56 N. Y. App. Div. 531, 67 N. Y. Suppl. 258; Montrose *v.* Wanamaker, 57 Hun 590, 11 N. Y. Suppl. 106; Cooper *v.* Brooklyn, 18 N. Y. Suppl. 438; Butler *v.* Wright, 2 Wend. 369.

North Carolina.— North Carolina University *v.* Maultsby, 55 N. C. 241.

Oregon.— Knott *v.* Stephens, 5 Oreg. 235.

Tennessee.— Underwood *v.* Smith, 93 Tenn. 687, 27 S. W. 1008, 42 Am. St. Rep. 946; McKissick *v.* McKissick, 6 Humphr. 75.

Vermont.— McLaughlin *v.* Hill, 6 Vt. 20.

United States.— Pittsburg, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 107 Fed. 781, 46 C. C. A. 639.

See 30 Cent. Dig. tit. "Judgment," § 1115 *et seq.*

New promise.— Where a defendant who has obtained a judgment in his favor admits after its rendition the justice of the claim sued on and promises to pay the same, the former judgment is no bar to an action on such new promise. Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

Actions concerning office.— An adjudication in a proceeding to contest defendant's right to a public office, declaring him ineligible, is not conclusive in an action by the state, on the relation of his predecessor, to obtain the office, brought after defendant was again elected to fill the unexpired term. People *v.* Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668. *Compare* Matter of Howard, 26 Misc. (N. Y.) 233, 56 N. Y. Suppl. 318.

19. *Iowa.*— Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633.

Kentucky.— Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357; Shuck *v.* Lebanon, 107 Ky. 252, 53 S. W. 655, 21 Ky. L. Rep. 969; Newport *v.* Com., 106 Ky. 434, 50 S. W. 845, 51 S. W. 433, 21 Ky. L. Rep. 42, 45 L. R. A. 518; Louisville Bridge Co. *v.* Louisville, 65 S. W. 814, 23 Ky. L. Rep. 1655; Bell County Coke, etc., Co. *v.* Pineville, 64 S. W. 525, 23 Ky. L. Rep. 933; Negley *v.* Henderson, 59 S. W. 19, 22 Ky. L. Rep. 912.

Louisiana.— New Iberia *v.* Moss Hotel Co., 113 La. 1022, 37 So. 913; State *v.* American Sugar Refining Co., 108 La. 603, 32 So. 965; State *v.* Citizens' Bank, 52 La. Ann. 1086, 27 So. 709; State *v.* Pilsbury, 31 La. Ann. 1; State *v.* Jumel, 30 La. Ann. 861.

Maryland.— Gittings *v.* Baltimore, 95 Md. 419, 52 Atl. 937, 54 Atl. 253.

Michigan.— Lake Shore, etc., R. Co. *v.* People, 46 Mich. 193, 9 N. W. 249.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

Nebraska.— Chicago, etc., R. Co. *v.* Cass County, (1904) 101 N. W. 11.

New York.— Cooper *v.* Brooklyn, 18 N. Y. Suppl. 438.

from taxation is not a bar to a suit to recover the taxes of a subsequent year,[20] although it may be conclusive on that particular question,[21] unless new facts are involved in the second action, as where there has been a change of ownership,[22] or the parties are different, as where the state sues in one action and a municipality in the other.[23]

c. Actions For Instalments[24] — (i) *In General.* Where money is payable by instalments, a distinct cause of action arises upon the falling due of each instalment, and they may be recovered in successive actions, no judgment in the series of actions operating as a bar to the recovery of any instalment not due at its rendition,[25] although it is generally incumbent upon plaintiff to include in each action all claims for any and all instalments which may be due and recoverable at the time of bringing the suit.[26] These rules apply in actions to recover rent, payable in monthly or other instalments;[27] in suits for successive instalments of

Tennessee.— Union, etc., Bank *v.* Memphis, 101 Tenn. 154, 46 S. W. 557; Buchanan *v.* Springer, (Ch. App. 1895) 35 S. W. 774.

Texas.— Red *v.* Morris, 72 Tex. 554, 10 S. W. 681.

United States.—Louisville Third Nat. Bank *v.* Stone, 174 U. S. 432, 19 S. Ct. 759, 43 L. ed. 1035. *Compare* Mercantile Nat. Bank *v.* Hubbard, 105 Fed. 809, 45 C. C. A. 66.

See 30 Cent. Dig. tit. "Judgment," § 1115 *et seq.*

Contra.— See New Jersey Junction R. Co. *v.* Jersey City, 70 N. J. L. 104, 56 Atl. 121; Jones *v.* St. John, 31 Can. Sup. Ct. 320. And see Keokuk, etc., Bridge Co. *v.* People, 185 Ill. 276, 56 N. E. 1049, where the validity of an assessment of taxes against part of a railroad bridge was questioned on the ground that the property was not situated within the state, and the court determined that it was so situated, and it was held that the question was *res judicata* in a proceeding between the same parties to determine the validity of a subsequent assessment of the same property.

20. Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450.

21. Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289, 41 Atl. 846, 42 L. R. A. 852; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202; St. Joseph, etc., R. Co. *v.* Steele, 63 Fed. 867, 11 C. C. A. 470.

22. *In re* Dille, 119 Iowa 575, 93 N. W. 571.

23. Carre *v.* New Orleans, 41 La. Ann. 996, 6 So. 893.

24. **Conclusiveness of adjudication in action on several instalments or causes of action** see *infra*, XIV, C, 1, f.

Distinct causes of action on separate clauses or conditions of contract see *infra*, XIII, D, 7, a.

Successive instalments due on continuing covenant see *infra*, XIII, D, 6, d.

25. *Colorado.*— Hallack *v.* Gagnon, 4 Colo. App. 360, 36 Pac. 70.

Kentucky.— Schmidt *v.* Louisville, etc., R. Co., 84 S. W. 314, 27 Ky. L. Rep. 21.

Louisiana.— Overton *v.* Gervais, 6 Mart. N. S. 685.

Maryland.— Ahl *v.* Ahl, 60 Md. 207.

Michigan.— Raymond *v.* White, 120 Mich. 165, 78 N. W. 1071.

Minnesota.— Doescher *v.* Spratt, 61 Minn. 326, 63 N. W. 736; Ramsey County Bldg. Soc. *v.* Lawton, 49 Minn. 362, 51 N. W. 1163.

Mississippi.— Armfield *v.* Nash, 31 Miss. 361.

Missouri.— Burnside *v.* Wand, 108 Mo. App. 539, 84 S. W. 995; Jones *v.* Silver, 97 Mo. App. 231, 70 S. W. 1109; West *v.* Moser, 49 Mo. App. 201; Priest *v.* Deaver, 22 Mo. App. 276.

New Hampshire.— Wheeler *v.* Bancroft, 18 N. H. 537.

New York.— Seed *v.* Johnston, 63 N. Y. App. Div. 340, 71 N. Y. Suppl. 579; Cashman *v.* Bean, 2 Hilt. 340; Bendernagle *v.* Cocks, 19 Wend. 207, 32 Am. Dec. 448.

Pennsylvania.— Hamm *v.* Beaver, 31 Pa. St. 58; Sterner *v.* Gower, 3 Watts & S. 136.

See 30 Cent. Dig. tit. "Judgment," § 1118.

And see Heming *v.* Wilton, 5 C. & P. 54, 24 E. C. L. 450.

26. *Connecticut.*— Burritt *v.* Belfy, 47 Conn. 323, 36 Am. Rep. 79.

Kentucky.— Outen *v.* Mitchels, 1 Bibb 360.

Missouri.— Union R., etc., Co. *v.* Trauhe, 59 Mo. 355.

New Hampshire.— Brown *v.* West, 64 N. H. 385, 10 Atl. 615.

New York.—Westfield Reformed Protestant Dutch Church *v.* Brown, 54 Barb. 191.

See 30 Cent. Dig. tit. "Judgment," § 1118.

Contrary decisions.— Some of the cases take the view that separate instalments, although they may all be past due at the time one of them is sued for, are distinct demands of such a nature that plaintiff is not required to join them all in one action, although he might do so (see *supra*, XIII, D, 5, h), and therefore the recovery on one or more will not bar subsequent actions on the others. See also Andover Sav. Bank *v.* Adams, 1 Allen (Mass.) 28; Williams *v.* Kitchen, 40 Mo. App. 604; Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470.

27. *Illinois.*— McDole *v.* McDole, 106 Ill. 452; Marshall *v.* John Grosse Clothing Co., 83 Ill. App. 338 [*affirmed* in 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181].

Indiana.— Epstein *v.* Greer, 85 Ind. 372.

Kentucky.— Webb *v.* Bailey, 33 S. W. 935, 17 Ky. L. Rep. 1117.

interest;[28] where several promissory notes, maturing at different times and constituting a series, are given as the consideration of a contract or conveyance,[29] where a debt secured by mortgage is to be repaid in instalments,[30] or where a similar contract is made in regard to the purchase-money of land.[31] But although a contract provides for the payment of the consideration in successive instalments, yet if plaintiff elects to sue for a breach of the contract rather than for the recovery of an instalment, he must recover all his damages in one action, and is barred from suing on the several instalments.[32]

(II) *EFFECT OF FORMER JUDGMENT AS EVIDENCE.* A former judgment for plaintiff in one of a series of actions for money due by instalments or other successive causes of action, although not a bar to a subsequent suit, will be final and conclusive evidence as to all points and questions actually litigated and determined by it.[33] But no estoppel results where the defense set up in the first action

Louisiana.— Elliott *v.* La Barre, 5 La. 223.
Massachusetts.— Stone *v.* St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623.
New York.— Holthausen *v.* Kells, 18 N. Y. App. Div. 80, 45 N. Y. Suppl. 471; Brennan *v.* Blath, 3 Daly 478; Underhill *v.* Collins, 15 N. Y. Suppl. 495; Smith *v.* Lehigh Zinc, etc., Co., 13 N. Y. Suppl. 449.
Ohio.— Fox *v.* Althorp, 40 Ohio St. 322.
Oregon.— Weiler *v.* Henarie, 15 Oreg. 28, 13 Pac. 614.
Pennsylvania.— Stiles *v.* Himmelwright, 16 Pa. Super. Ct. 649.
Tennessee.— Barnes *v.* Black Diamond Coal Co., 101 Tenn. 354, 47 S. W. 498.
Wyoming.— Bath *v.* Lindenmyer, 1 Wyo. 240.
See 30 Cent. Dig. tit. "Judgment," §§ 1117, 1118.

All instalments of rent due at the time of bringing suit must be included in the action, or else will be barred by the recovery therein. Warren *v.* Comings, 6 Cush. (Mass.) 103; Morrison *v.* De Donato, 76 Mo. App. 643; Kerr *v.* Simmons, 9 Mo. App. 376; Jex *v.* Jacob, 19 Hun (N. Y.) 105; Althof *v.* Fox, 6 Ohio Dec. (Reprint) 985, 9 Am. L. Rec. 381. *Compare* Brandagee *v.* Chamberlain, 2 Rob. (La.) 207.

28. Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573; Wehrly *v.* Morfoot, 103 Ill. 183; Dulaney *v.* Payne, 101 Ill. 325, 40 Am. Rep. 205; Andover Sav. Bank *v.* Adams, 1 Allen (Mass.) 28; Sparhawk *v.* Wills, 6 Gray (Mass.) 163; Near *v.* Donnelly, 93 Mich. 460, 53 N. W. 616; Kempner *v.* Comer, 73 Tex. 196, 11 S. W. 194.

Interest coupons attached to negotiable bonds are distinct and independent promises to pay the interest instalments, and a recovery on one is no bar to a suit on another, although the latter was past due when the first action was brought. Butterfield *v.* Ontario, 44 Fed. 171.

29. Buckner *v.* Thompson, 11 Ill. 563; Gammon *v.* Cottrell, 87 Ind. 213; Bayliss *v.* Deford, 73 Iowa 495, 35 N. W. 596; Wood *v.* Corl, 4 Metc. (Mass.) 203.

30. McDougal *v.* Downey, 45 Cal. 165; Bynum *v.* Gordon, 24 La. Ann. 160; Bliss *v.* Weil, 14 Wis. 35, 80 Am. Dec. 766.

31. Hamm *v.* Beaver, 1 Grant (Pa.) 448; Kane *v.* Fisher, 2 Watts (Pa.) 246.

32. Cooke *v.* Cook, 110 Ala. 567, 20 So. 64; Manton *v.* Gammon, 7 Ill. App. 201; Corbet *v.* Evans, 25 Pa. St. 310. And see De Weese *v.* Smith, 97 Fed. 309.

33. *California.*— Koehler *v.* Holt Mfg. Co., 146 Cal. 335, 80 Pac. 73; Wiese *v.* San Francisco Musical Soc., 82 Cal. 645, 23 Pac. 212; 7 L. R. A. 577; Love *v.* Waltz, 7 Cal. 250.
Georgia.— Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255.
Illinois.— Gross *v.* People, 193 Ill. 260, 61 N. E. 1012, 86 Am. St. Rep. 322; Keokuk, etc., Bridge Co. *v.* People, 185 Ill. 276, 56 N. E. 1049; Meiers *v.* Pinover, 21 Ill. App. 551.
Indiana.— French *v.* Howard, 14 Ind. 455. But *compare* Felton *v.* Smith, 88 Ind. 149, 45 Am. Rep. 454.
Iowa.— Defries *v.* McMeans, 121 Iowa 540, 97 N. W. 65; Whitaker *v.* Johnson County, 12 Iowa 595.
Louisiana.— Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294.
Massachusetts.— Hooker *v.* Hubbard, 102 Mass. 239.
Michigan.— Bond *v.* Markstrum, 102 Mich. 11, 60 N. W. 282; Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788.
Minnesota.— Geiser Threshing Mach. Co. *v.* Farmer, 27 Minn. 428, 8 N. W. 141.
Missouri.— Edgell *v.* Sigerson, 26 Mo. 583; Jones *v.* Silver, 97 Mo. App. 231, 70 S. W. 1109.
Nebraska.— Knorr *v.* Peerless Reaper Co., 23 Nebr. 636, 37 N. W. 465, 8 Am. St. Rep. 140.
Nevada.— Young *v.* Brehe, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892.
New York.— Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; Cockcroft *v.* Muller, 71 N. Y. 367; Ward *v.* Sire, 52 N. Y. App. Div. 443, 65 N. Y. Suppl. 101; Gallagher *v.* Kingston Water Co., 25 N. Y. App. Div. 82, 49 N. Y. Suppl. 250; Haskin *v.* New York, 11 Hun 436; Ibbotson *v.* Sherman, 42 N. Y. Super. Ct. 477; Treadwell *v.* Stebbins, 6 Bosw. 538; Everett *v.* New York Engraving, etc., Co., 19 Misc. 360, 43 N. Y. Suppl. 502; Graham, etc., Co. *v.* Van Horn, 49 N. Y. Suppl. 401; Bonn *v.* Steiger, 2 N. Y. St. 90; Higgins *v.* Mayer, 10 How. Pr. 363; Serjeant *v.* Holmes, 3 Johns. 428.

related merely to the particular instalment in suit,[34] where defendant sets up an entirely different defense, which was not presented or considered in the former action,[35] or where plaintiffs in the two actions are not the same.[36]

(III) *Successful Defense to Former Action.* A successful defense to one of a series of actions founded on the same transaction or subject-matter will operate as a complete estoppel in any subsequent actions of the series, if it involved

Pennsylvania.— Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438; Matthews *v.* Green, 12 Phila. 341.

United States.— Beloit *v.* Morgan, 7 Wall. 619, 19 L. ed. 205. *Compare* Stewart *v.* Lansing, 104 U. S. 505, 26 L. ed. 866.

Actions for rent.— Where judgment is recovered for an instalment of rent due under a lease, all questions concerning the validity or terms of the lease, the amount of the rental, the occupancy of the premises, and the like, which were or might have been litigated in the action, are conclusively settled in a subsequent action for another instalment of rent under the same lease.

Illinois.— Marshall *v.* John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Northwestern Brewing Co. *v.* Manion, 145 Ill. 182, 34 N. E. 50.

Iowa.— Mowry *v.* Wareham, 101 Iowa 28, 69 N. W. 1128; Davis *v.* Milburn, 4 Iowa 246.

Kansas.— Dixon *v.* Caster, 65 Kan. 739, 70 Pac. 871.

Michigan.— Jenkinson *v.* Wysner, 125 Mich. 89, 83 N. W. 1012.

Minnesota.— McClung *v.* Condit, 27 Minn. 45, 6 N. W. 399.

New York.— Kelsey *v.* Ward, 38 N. Y. 83; Huber *v.* Ryan, 57 N. Y. App. Div. 34, 67 N. Y. Suppl. 972; Hawkins *v.* Ringler, 47 N. Y. App. Div. 262, 62 N. Y. Suppl. 56; Zerega *v.* Will, 34 N. Y. App. Div. 488, 54 N. Y. Suppl. 361; Tysen *v.* Tompkins, 10 Daly 244; Dry Dock, etc., R. Co. *v.* North, etc., R. Co., 3 Misc. 61, 22 N. Y. Suppl. 556; Franke *v.* Adams, 86 N. Y. Suppl. 293; Koehler *v.* Scheider, 11 N. Y. St. 676.

Texas.— Racke *v.* Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167, 42 S. W. 774.

Employment.— Where judgment is recovered for an instalment of salary or wages, defenses adjudicated adversely to defendant in that action are concluded and cannot be set up in a subsequent action for another instalment.

California.— Freeman *v.* Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355.

Mississippi.— Williams *v.* Luckett, 77 Miss. 394, 26 So. 967.

New York.— Haskin *v.* New York, 11 Hun 436. But *compare* O'Brien *v.* New York, 28 Hun 250; Van Alstyne *v.* Indianapolis, etc., R. Co., 21 How. Pr. 175.

Pennsylvania.— Allen *v.* International Text-Book Co., 201 Pa. St. 579, 51 Atl. 323, 88 Am. St. Rep. 834.

Utah.— Everill *v.* Swan, 20 Utah 56, 57 Pac. 716.

Contra.— See Bernard *v.* Hoboken, 27 N. J. L. 412.

Failure of consideration.— If an action is brought for one of a series of payments, or series of notes, all based on the same consideration, such as the purchase-price of property, and defendant sets up a defense going to the whole of the original consideration, such as failure of title, breach of warranty, an undisclosed encumbrance, or the like, and it is adjudged against him, he cannot set up the same facts in defense to a subsequent suit on another note or instalment.

Georgia.— Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255.

Indiana.— Foster *v.* Konkright, 70 Ind. 123; French *v.* Howard, 14 Ind. 455.

Iowa.— Trescott *v.* Barnes, 51 Iowa 409, 1 N. W. 660.

Kansas.— Furneaux *v.* Whitewater First Nat. Bank, 39 Kan. 144, 17 Pac. 854, 7 Am. St. Rep. 541.

Massachusetts.— Black River Sav. Bank *v.* Edwards, 10 Gray 387.

Nebraska.— Gilmore *v.* Whiteman, 50 Nebr. 760, 70 N. W. 364.

New Jersey.— Bernard *v.* Hoboken, 27 N. J. L. 412.

New York.— De Wolf *v.* Crandall, 34 N. Y. Super. Ct. 14; Crompton, etc., Loom Works *v.* Brown, 27 Misc. 319, 57 N. Y. Suppl. 823.

Pennsylvania.— Kane *v.* Fisher, 2 Watts 246; Amshel *v.* Hosenfeld, 20 Pa. Super. Ct. 373.

34. Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204.

Actions on coupons and on bond.— A judgment against a municipal or other corporation on coupons from its bonds is not conclusive as to the validity of the bonds in a subsequent action on other coupons or on the bonds. Debnam *v.* Chitty, 131 N. C. 657, 43 S. E. 3; Shell *v.* Carter County, (Tenn. Ch. App. 1896) 42 S. W. 78; Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523; Skinner *v.* Franklin County, 56 Fed. 783, 6 C. C. A. 118; Nesbit *v.* Riverside Independent School Dist., 25 Fed. 635.

35. Richardson *v.* Eureka, 110 Cal. 441, 42 Pac. 965; Louisville Trust Co. *v.* Drennon Springs Co., 34 S. W. 1072, 17 Ky. L. Rep. 1382; Stone *v.* St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623; Henry *v.* Sansom, (Tex. Civ. App. 1896) 36 S. W. 122.

Defenses which might have been litigated. Some cases hold that any defenses which might have been interposed and decided in the first action are barred by the judgment therein, whether or not they were heard and decided. Henry *v.* Sansom, 2 Tex. Civ. App. 150, 21 S. W. 69. *Compare* Bond *v.* Markstrum, 102 Mich. 11, 60 N. W. 282. See *supra*, XIII, D, 4, c.

36. Dodd *v.* Mayfield, 99 Ga. 319, 25 S. E. 698.

the whole title or went to the whole merits of the underlying transaction;[37] but otherwise if it merely related to the particular claim or instalment then in suit.[38]

d. Breach of Continuing Covenant. A judgment recovered for a single breach of a continuing covenant is no bar to a suit for a subsequent breach of the same covenant.[39] But where the covenant or contract is entire, and the breach total, there can be only one action, and plaintiff must therein recover all his damages.[40]

e. Actions of Tort — (I) *In General.* A recovery of damages for a tort will not prevent plaintiff from suing again for damages arising from a distinct repetition of the same tortious act or a similar act.[41]

(II) *Continuing Damages From Tort.* Where the injury caused by a tort,

37. *Alabama.*— Rake *v.* Pope, 7 Ala. 161.
Illinois.— Markley *v.* People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234.
Indiana.— Cleveland *v.* Creviston, 93 Ind. 31, 47 Am. Rep. 367; Felton *v.* Smith, 88 Ind. 149, 45 Am. Rep. 454; Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Lacy *v.* Eller, 8 Ind. App. 286, 35 N. E. 847.
Iowa.— Aultman *v.* Mount, 62 Iowa 674, 18 N. W. 306; Goodenow *v.* Litchfield, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86; Clark *v.* Sammons, 12 Iowa 368.
Kansas.— Furneaux *v.* Whitewater First Nat. Bank, 39 Kan. 144, 17 Pac. 854, 7 Am. St. Rep. 541; Peru Plow, etc., Co. *v.* Ward, 6 Kan. App. 289, 51 Pac. 805.
Michigan.— Hazen *v.* Reed, 30 Mich. 331.
New York.— Coyle *v.* Ward, 36 N. Y. App. Div. 181, 55 N. Y. Suppl. 388; Burdick *v.* Cameron, 10 N. Y. App. Div. 589, 42 N. Y. Suppl. 78; Williams *v.* Fitzhugh, 44 Barb. 321; De Wolf *v.* Crandall, 34 N. Y. Super. Ct. 14; Bouchaud *v.* Dias, 3 Den. 238.
Pennsylvania.— Danziger *v.* Williams, 91 Pa. St. 234.
Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.
Utah.— Rio Grande Western R Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995.
Washington.— Dolan *v.* Scott, 25 Wash. 214, 65 Pac. 190.
United States.— Bissell *v.* Spring Valley Tp., 124 U. S. 225, 8 S. Ct. 495, 31 L. ed. 411; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Edwards *v.* Bates County, 55 Fed. 436; Johnson *v.* U. S., 4 Ct. Cl. 248.
See 30 Cent. Dig. tit. "Judgment," § 1118.
Special assessments.— A judgment refusing sale for a delinquent instalment of a special assessment is conclusive upon the parties on application for judgment of sale for another instalment of the same assessment, where it appears from the evidence that the court based its former judgment upon the fact that the assessment ordinance was wholly void. Markley *v.* People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234.

38. Hoover *v.* Kilander, 135 Ind. 600, 34 N. E. 697; Kilander *v.* Hoover, 111 Ind. 10, 11 N. E. 796; Knickerbocker *v.* Ream, 42 Kan. 17, 21 Pac. 795; Osborne *v.* Williams, 39 Minn. 353, 40 N. W. 165.
Statute of limitations.— In an action to recover an assessment on the stock of a corporation, a decision that the cause of action was barred by the statute of limitations is no bar to a subsequent action between the same parties to recover a subsequent assessment. Priest *v.* Glenn, 51 Fed. 405, 2 C. C. A. 311.
Several defenses pleaded.— Where, in defense to one of a series of actions, defendant pleads various matters, some of which go to the merits of the whole transaction and others only to the particular action, and it does not appear on what ground the judgment in his favor was based, such judgment will not bar another action of the same series. Augir *v.* Ryan, 63 Minn. 373, 65 N. W. 640.
Action for usury paid and to recover penalty for usury.— A judgment defeating the recovery of interest on a note to a national bank on a plea of usury (U. S. Rev. St. (1878) § 5198 [U. S. Comp. St. (1901) p. 3493]) does not bar a subsequent action to recover back, under such statute, twice the amount of usurious interest theretofore paid; since not only is the forfeiture of interest due, for usury in the contract, distinct from the recovery of usurious payments, but such payments are not ascertained to be usurious until judgment is rendered for an amount greater than the principal and legal interest. Gadsden First Nat. Bank *v.* Denson, 115 Ala. 650, 22 So. 518.

39. *Illinois.*— Just *v.* Greve, 13 Ill. App. 302.
Iowa.— Richmond *v.* Dubuque, etc., R. Co., 40 Iowa 264, 33 Iowa 422.
Maryland.— Orendorff *v.* Utz, 48 Md. 298.
Massachusetts.— Badger *v.* Titcomb, 15 Pick. 409, 26 Am. Dec. 611.
Missouri.— Menges *v.* Milton Piano Co., 96 Mo. App. 611, 70 S. W. 728.
New York.— Beach *v.* Crain, 2 N. Y. 86, 49 Am. Dec. 369; Stuyvesant *v.* New York, 11 Paige 414.
Ohio.— Gardner *v.* Letson, 8 Ohio S. & C. Pl. Dec. 256, 5 Ohio N. P. 112.
Pennsylvania.— Merchants' Ins. Co. *v.* Algeo, 31 Pa. St. 446.
Texas.— Howe *v.* Harding, 84 Tex. 74, 19 S. W. 363.
See 30 Cent. Dig. tit. "Judgment," § 1118.

40. Waterbury *v.* Graham, 4 Sandf. (N. Y.) 215; Fish *v.* Folley, 6 Hill (N. Y.) 54; Hancock *v.* White Hall Tobacco Warehouse Co., 102 Va. 239, 46 S. E. 288.

41. Chicago Sanitary Dist. *v.* Ray, 199 Ill.

such as a trespass or nuisance, is not permanent and final in its character, but is continuing, repetitive, or periodical, damages can only be recovered for the injury sustained up to the time of the commencement of the suit, and every repetition of the trespass or continuance of the nuisance is a fresh injury giving rise to a new cause of action.[42] On this principle a former recovery in an action for a nuisance is no bar to a subsequent action between the same parties for a continuance of the nuisance.[43] So a judgment in a former action against a railroad company or other corporation for damages to real property caused by the construction of its road or other works, sustained up to the time of bringing the suit, is not a bar to an action for such damages accruing subsequently.[44] And where the wrongful or faulty construction of a railroad, bridge, culvert, or other work causes it to obstruct the waters of a stream, so as to overflow the lands of an adjoining proprietor, a recovery by the latter for damages occasioned by one such overflow will not bar a subsequent suit for subsequent injuries arising from the same cause.[45]

63, 64 N. E. 1048, 93 Am. St. Rep. 102; Shepherd *v.* Thompson, 2 Bush (Ky.) 176; Rockwell *v.* Brown, 36 N. Y. 207; Shepherd *v.* Willis, 19 Ohio 142.

Repetition of libel.— Repetitions of a slander or successive publications of the same libel give rise to as many distinct causes of action, and the recovery of damages for one statement or publication of the defamatory charges will not prevent the injured party from recovering fresh damages for a repetition of it. Woods *v.* Pangborn, 14 Hun (N. Y.) 540; Underwood *v.* Smith, 93 Tenn. 687, 27 S. W. 1008, 42 Am. St. Rep. 946. But where evidence of repetitions of the same slander has been given to enhance the damages, the judgment is a bar to any further action for any such repetition. Leonard *v.* Pope, 27 Mich. 145.

42. Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

Applications of rule.— So where a railroad company, in constructing its track, permitted the timber cleared from its right of way to remain in a stream, obstructing the flow of water therein so as to cause the same to overflow adjacent land in time of heavy rains, the injury to the land is recurrent, authorizing the owner to sue as often as he suffers injury for the loss of the use of the land or loss of growing crops, but not for the difference in the market value of the land before and after the obstruction. Gulf, etc., R. Co. *v.* Roberts, (Tex. Civ. App. 1905) 86 S. W. 1052. Thus a judgment for the diversion of water which supplied plaintiff's mill, limited by its terms to damages sustained from the time of the diversion to the commencement of the action, does not bar an action for the damages afterward sustained. Covert *v.* Brooklyn, 13 N. Y. App. Div. 188, 43 N. Y. Suppl. 310. But see Porter *v.* Cobb, 22 Hun (N. Y.) 278, holding that a recovery of nominal damages and costs in trespass for wrongfully leaving on a certain day a wagon on plaintiff's premises is a bar to a recovery for allowing the wagon to remain there on succeeding days against plaintiff's commands to take it away.

43. *Georgia.*— Southern R. Co. *v.* Cook, 117 Ga. 286, 43 S. E. 697; Mulligan *v.* Augusta, 115 Ga. 337, 41 S. E. 604.

Illinois.— Kewanee *v.* Otley, 204 Ill. 402, 68 N. E. 388.

Iowa.— Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558.

Maine.— Russell *v.* Brown, 63 Me. 203, nuisance consisting of a structure tortiously erected on another's land.

Massachusetts.— Kent *v.* Gerrish, 18 Pick. 564 (obstructing plaintiff's way); Staple *v.* Spring, 10 Mass. 72.

Minnesota.— Byrne *v.* Minneapolis, etc., R. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; Sloggy *v.* Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656 (erecting and maintaining a nuisance on the land of an adjoining owner); Brakken *v.* Minneapolis, etc., R. Co., 32 Minn. 425, 21 N. W. 414 (obstructing plaintiff's access to his house).

Nebraska.— Omaha, etc., R. Co. *v.* Standen, 22 Nebr. 343, 35 N. W. 183.

New Hampshire.— Cheshire Turnpike *v.* Stevens, 13 N. H. 28.

New York.—Beckwith *v.* Griswold, 29 Barb. 291; Seigel *v.* Neary, 38 Misc. 297, 77 N. Y. Suppl. 854.

Pennsylvania.— Smith *v.* Elliott, 9 Pa. St. 345; Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

Wisconsin.— Hazeltine *v.* Case, 46 Wis. 391, 1 N. W. 66, 32 Am. Rep. 715.

England.— Holmes *v.* Wilson, 10 A. & E. 503, 37 E. C. L. 273. *Compare* Clarke *v.* Yorke, 52 L. J. Ch. 32, 47 L. T. Rep. N. S. 381, 31 Wkly. Rep. 62.

Defendant a public corporation.— The fact that defendant is a quasi-public corporation, invested with the right of eminent domain, is not of itself conclusive against the right of an adjacent landowner to maintain successive actions for injuries arising from a structure which, if maintained by a private person, would be a continuing nuisance. Hartman *v.* Pittsburgh Inclined Plane Co., 23 Pa. Super. Ct. 360.

44. Rumsey *v.* New York, etc., R. Co., 63 Hun (N. Y.) 200, 17 N. Y. Suppl. 672 [*affirmed* in 137 N. Y. 563, 33 N. E. 338]; Hoch *v.* Manhattan R. Co., 13 N. Y. Suppl. 633; Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

45. *Illinois.*— Chicago, etc., R. Co. *v.* Schaf-

(III) *Permanent Trespass or Nuisance.* On the other hand, where a trespass or nuisance is of a permanent character, so that the injury resulting from it is complete and final, a single recovery may and must be had for the whole damage resulting from the tort, and no second action will lie.[46]

(IV) *Former Judgment as Evidence.* According to some decisions where a plaintiff has recovered damages for a trespass or nuisance, the judgment for plaintiff is not admissible at all in a subsequent action for a continuance of the same tort, or at most is only *prima facie* evidence of his right to recover in the second action.[47] According to others defendant is estopped, in a subsequent action for a continuance of the same tort, to deny the existence or character of the nuisance or trespass or plaintiff's right to recover, provided the latter shows the continuance of the same conditions.[48] And conversely, a verdict for defendant in such an action will be conclusive against plaintiff's right to recover in a subsequent action,[49] unless the defense went only to the merits of the first action, or plaintiff shows fresh damages and a new cause of action.[50]

fer, 124 Ill. 112, 16 N. E. 239; Cleveland, etc., R. Co. *v.* Nuttall, 59 Ill. App. 639; Ohio, etc., R. Co. *v.* Dooley, 32 Ill. App. 228.

Indiana.— Rarey *v.* Lee, 7 Ind. App. 518, 34 N. E. 749.

Minnesota.— Bowers *v.* Mississippi, etc., Boom Co., 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 895.

Missouri.— McKee *v.* St. Louis, etc., R. Co., 49 Mo. App. 174.

North Carolina.—Candler *v.* Asheville Electric Co., 135 N. C. 12, 47 S. E. 114; Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708.

Texas.— Clark *v.* Dyer, 81 Tex. 339, 16 S. W. 1061; Texas, etc., R. Co. *v.* Long, 1 Tex. App. Civ. Cas. § 559.

Virginia.— Ellis *v.* Harris, 32 Gratt. 684.

United States.— Evey *v.* Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

See 30 Cent. Dig. tit. "Judgment," § 1120.

46. *California.*— Los Angeles *v.* Baldwin, 53 Cal. 469.

Colorado.— Denver City Irr., etc., Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234.

Georgia.— Clark *v.* Lanier, 104 Ga. 184, 30 S. E. 741.

Illinois.— Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Decatur Gaslight, etc., Co. *v.* Howell, 92 Ill. 19; Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312; Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626; Lake Erie, etc., R. Co. *v.* Purcell, 75 Ill. App. 573.

Indiana.— North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821.

Iowa.— Hodge *v.* Shaw, 85 Iowa 137, 52 N. W. 8, 39 Am. St. Rep. 290; Bizer *v.* Ottumwa Hydraulic Power Co., 70 Iowa 145, 30 N. W. 172; Stodghill *v.* Chicago, etc., R. Co., 53 Iowa 341, 5 N. W. 495; Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792.

Kentucky.— Oliver *v.* Illinois Cent. R. Co., 74 S. W. 1078, 25 Ky. L. Rep. 235.

Massachusetts.— Fowle *v.* New Haven, etc., Co., 112 Mass. 334, 17 Am. Rep. 106.

Minnesota.— Gilbert *v.* Boak Fish Co., 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735.

Nebraska.— Omaha, etc., R. Co. *v.* Standen, 22 Nebr. 343, 35 N. W. 183.

New Hampshire.— Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

Texas.— Brown *v.* Southwestern Tel., etc., Co., 17 Tex. Civ. App. 433, 44 S. W. 59; International, etc., R. Co. *v.* Geiselman, 12 Tex. Civ. App. 123, 34 S. W. 658.

Vermont.— Whitney *v.* Clarendon, 18 Vt. 252, 46 Am. Dec. 150.

England.— Clarke *v.* Midland Great Western R. Co., [1895] 2 Ir. 294.

See 30 Cent. Dig. tit. "Judgment," § 1120.

47. *Delaware.*— Nivin *v.* Stevens, 5 Harr. 272.

Maine.— Billings *v.* Berry, 50 Me. 31.

Massachusetts.— Standish *v.* Parker, 2 Pick. 20, 13 Am. Dec. 393.

North Carolina.— Burwell *v.* Cannaday, 48 N. C. 165.

Ohio.— Shepherd *v.* Willis, 19 Ohio 142.

Texas.—Houston, etc., R. Co. *v.* Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401.

United States.— Richardson *v.* Boston, 19 How. 263, 15 L. ed. 639.

See 30 Cent. Dig. tit. "Judgment," § 1120.

48. Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558; Whitehurst *v.* Rogers, 38 Md. 503; Plate *v.* New York Cent. R. Co., 37 N. Y. 472; Casebeer *v.* Mowry, 55 Pa. St. 419, 93 Am. Dec. 766; Smith *v.* Elliott, 9 Pa. St. 345; Kilheffer *v.* Herr, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658; Long *v.* Trexler, 5 Pa. Cas. 456, 8 Atl. 620; Hartman *v.* Pittsburg Incline Plane Co., 2 Pa. Super. Ct. 123; Schoch *v.* Foreman, 3 Brewst. (Pa.) 157.

49. Los Angeles *v.* Baldwin, 53 Cal. 469; Hahn *v.* Miller, 68 Iowa 745, 28 N. W. 51; Smith *v.* Brunswick, 80 Me. 189, 13 Atl. 890; McGrane *v.* New York El. R. Co., 67 N. Y. App. Div. 37, 73 N. Y. Suppl. 498.

50. Where plaintiff might, without any new act on the part of defendant after a former suit was commenced, have sustained damage between the time of instituting that suit and the time of bringing the present suit, and such damage might have resulted from the same positive acts complained of in the former suit by reason of the longer con-

7. Distinct Causes of Action From Same Act or Transaction[51] — **a. In General.** Causes of action which are distinct and independent, although growing out of the same contract, transaction, or state of facts, may be sued upon separately, and the recovery of judgment for one of such causes of action will not bar subsequent actions upon the others.[52]

b. Separate Clauses or Conditions of Contract.[53] Where a deed, lease, or contract contains several covenants or undertakings, which are distinct and independent and have no connection with each other except that they all relate to the same general subject-matter, the recovery of a judgment for a breach of one of them will not bar an action for a breach of another.[54] But all breaches of the

tinuance of the state of things which those acts established, a verdict for defendant in the former suit is not conclusive on plaintiff in the latter. Jones *v.* Lavender, 55 Ga. 228. And the fact that plaintiff recovered only nominal damages in an action for a continuing tort is not conclusive against his right to maintain another action for the same tort several years later. Stafford *v.* Maddox, 87 Ga. 537, 13 S. E. 559.

51. Conclusiveness of adjudication see *infra*, XIV, C, 1, f.

52. *California.*— Curtin *v.* Salmon River Hydraulic Gold Min., etc., Co., 141 Cal. 308, 74 Pac. 851, 99 Am. St. Rep. 75; Owens *v.* McNally, 124 Cal. 29, 56 Pac. 615; Gillis *v.* Cleveland, 87 Cal. 214, 25 Pac. 351.

Illinois.— Chicago Opera House Co. *v.* Paquin, 70 Ill. App. 596.

Indiana.— Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89.

Louisiana.— Preston *v.* Slocomb, 10 Rob. 361.

Massachusetts.— Gaylord *v.* Pelland, 169 Mass. 356, 47 N. E. 1019; Harding *v.* Hale, 2 Gray 399.

Michigan.— Chesebro *v.* Powers, 78 Mich. 472, 44 N. W. 290.

Minnesota.— State *v.* Torinus, 28 Minn. 175, 9 N. W. 725.

Missouri.— Belshe *v.* Batdorf, 98 Mo. App. 627, 73 S. W. 888.

Nebraska.— Latta *v.* Visel, 37 Nebr. 612, 56 N. W. 311.

New Mexico.— Texas, etc., R. Co. *v.* Saxton, 7 N. M. 302, 34 Pac. 532.

New York.— Butler *v.* Rice, 17 Hun 406; Morgan *v.* Powers, 66 Barb. 35; Derleth *v.* Degraaf, 51 N. Y. Super. Ct. 369; Tuck *v.* Cottkowsky, 47 Misc. 386, 93 N. Y. Suppl. 1112; Mincer *v.* Green, 47 Misc. 374, 94 N. Y. Suppl. 15.

North Carolina.— Tyler *v.* Capeheart, 125 N. C. 64, 34 S. E. 108; Pendleton *v.* Dalton, 92 N. C. 185.

Ohio.— Trout *v.* Marvin, 24 Ohio Cir. Ct. 333.

Pennsylvania.— Morrison *v.* Beckey, 6 Watts 349.

Texas.— West *v.* Cole, (Civ. App. 1899) 50 S. W. 151.

Wisconsin.— Kronshage *v.* Chicago, etc., R. Co., 45 Wis. 500.

United States.— Crockett *v.* Miller, 112 Fed. 729, 50 C. C. A. 447; Baltimore, etc., R. Co. *v.* Parrette, 55 Fed. 50; Muscatine *v.* Mississippi, etc., R. Co., 17 Fed. Cas. No. 9,971, 1 Dill. 536.

Applications of text.— Where a railroad passenger having a valise containing apparel and a trunk containing merchandise, of which fact he informed the agent on applying for checks, had paid extra for the transportation of the latter, and recovered of the company for the loss of the former, it was held that this did not preclude his recovery in a separate action for the loss of the latter, evidence thereof having been excluded at the first trial. Millard *v.* Missouri, etc., R. Co., 86 N. Y. 441. So an action by an administrator to recover personal property conveyed by the deceased to an agent, where the legal title alone was involved, is not a bar to an action in equity by an heir to enforce a constructive trust in certain real property conveyed at the same time. Kimball *v.* Tripp, 136 Cal. 631, 69 Pac. 428.

53. Conclusiveness of adjudication in action on several instalments or causes of actions see *infra*, XIV, C, 1, f.

Splitting causes of action on contract see *supra*, XIII, D, 5.

Successive causes of action on contract see *supra*, XIII, D, 6, c.

54. *Kentucky.*— Givens *v.* Peake, 1 Dana 225.

Maine.— Donnell *v.* Thompson, 10 Me. 170, 25 Am. Dec. 216.

Massachusetts.— Gilmore *v.* Williams, 162 Mass. 351, 38 N. E. 976.

Minnesota.— Wright *v.* Tileston, 60 Minn. 34, 61 N. W. 823; West *v.* Hennessey, 58 Minn. 133, 59 N. W. 984; Trautwein *v.* Twin City Iron Works, 55 Minn. 264, 56 N. W. 750.

New Hampshire.— Parker *v.* Roberts, 63 N. H. 431; Robinson *v.* Crowninshield, 1 N. H. 76.

Pennsylvania.— Merchants' Ins. Co. *v.* Algeo, 31 Pa. St. 446.

Wisconsin.— Andrew *v.* Schmitt, 64 Wis. 664, 26 N. W. 190.

United States.— Union Switch, etc., Co. *v.* Johnson, 72 Fed. 147, 18 C. C. A. 490.

See 30 Cent. Dig. tit. "Judgment," § 1122.

Covenants in deed.— The recovery of judgment in an action for breach of covenant of seizin is not a bar to an action for breach of the covenant in the same deed against encumbrances. Moore *v.* Johnston, 108 Ala. 324, 18 So. 825; Donnell *v.* Thompson, 10 Me. 170, 25 Am. Dec. 216. So where one who has no title to land sells it with covenant of

same covenant which have occurred up to the time of bringing the first action must be sued for therein and cannot be made the basis of separate actions.[55]

c. Actions on Contract and in Tort. Where the same act or transaction involves both a breach of contract and a tort, plaintiff will not always be required to elect his remedy; but may in some circumstances maintain separate or successive actions, neither operating as a bar to the other, although he can have but one satisfaction.[56]

warranty, the recovery and satisfaction of a judgment obtained by the vendee against the vendor for the purchase-money paid is not a bar to an action by the real owner against the vendor for fruits and revenues. New Orleans *v.* Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. ed. 1102. But see Leggett *v.* Lippincott, 50 N. J. L. 462, 14 Atl. 577, holding that a recovery of the consideration money and interest, in a suit on a covenant that the grantor is the lawful owner of the premises, bars a subsequent suit on the covenant of title.

Covenants in lease.— Where a lease contains several distinct and independent covenants, a recovery in a former action for a breach of one of them is no bar to an action for a breach of another. McIntosh *v.* Lown, 49 Barb. (N. Y.) 550; Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. 505.

55. *Georgia.*— Mitchell *v.* Gillespie, 25 Ga. 346.

Indiana.— Reid *v.* Huston, 55 Ind. 173.

Massachusetts.— Osborne *v.* Atkins, 6 Gray 423.

Missouri.— Taylor *v.* Heitz, 87 Mo. 660; Joyce *v.* Moore, 10 Mo. 271.

New York.— Coggins *v.* Bulwinkle, 1 E. D. Smith 434.

See 30 Cent. Dig. tit. "Judgment," § 1122.

56. A judgment in assumpsit between certain parties is not a bar to an action of tort by the same plaintiff against the same defendant, although some of the facts used in the latter action were relied on in the former. Linder *v.* Rowland, 122 Ga. 425, 50 S. E. 124.

Contract induced by fraud or deceit.— The recovery of a judgment on a contract, remaining unsatisfied, or a judgment for defendant in such an action, on a plea of limitations or other matters not going to the merits, will not be a bar to a separate action for fraud, deceit, or false representations whereby plaintiff was induced to enter into the contract, or to take the instrument in suit. Brumbach *v.* Flower, 20 Ill. App. 219; Union Cent. L. Ins. Co. *v.* Schidler, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; Norton *v.* Huxley, 13 Gray (Mass.) 285; Black *v.* Miller, 75 Mich. 323, 42 N. W. 837; Albany Hardware, etc., Co. *v.* Day, 11 N. Y. App. Div. 230, 42 N. Y. Suppl. 971, 4 N. Y. Annot. Cas. 90; Wanzer *v.* De Baun, 1 E. D. Smith (N. Y.) 261; Morgan *v.* Skidmore, 3 Abb. N. Cas. (N. Y.) 92; Fidelity Ins., etc., Co. *v.* Gazzam, 161 Pa. St. 536, 29 Atl. 264; Whittier *v.* Collins, 15 R. I. 90, 23 Atl. 47, 2 Am. St. Rep. 879; Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 474. And an action against the vendor upon a warranty in the sale of personal property, in which plaintiff is defeated on the ground that there was no warranty, is not a bar to an action against the vendor's agent, by whom the sale was made, for fraud therein. Gutchess *v.* Whiting, 46 Barb. (N. Y.) 139. On the other hand an action on the case for a deceit in falsely representing that a farm contained a certain number of acres is not a bar to an action of assumpsit upon a guaranty that the farm contained that number of acres. Schriver *v.* Eckenrode, 87 Pa. St. 213. And in an action of assumpsit on a due-bill given for whatever amount of encumbrances might be found against a tract of land conveyed by defendant to plaintiff, a judgment for defendant in a former action on the case between the same parties, for a deceit practised by defendant in representing himself as the owner of the said tract and inducing plaintiff to exchange valuable property for it, when in fact he was not the owner of it, and his title thereto was valueless to plaintiff, is not a bar to plaintiff's recovery, although the due bill was given in evidence in the former action. Finley *v.* Hanbest, 30 Pa. St. 190.

Wrongful taking of goods.— An unsatisfied judgment for damages for the tortious seizure or taking of plaintiff's goods will not bar an action to recover the value of the goods and *vice versa*. Lenoir *v.* Wilson, 36 Ala. 600; Henson *v.* Taylor, 108 Ga. 567, 33 S. E. 911; Greenfield *v.* Wilson, 13 Gray (Mass.) 384; Gens *v.* Hargadine, 56 Mo. App. 245; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508; Woody *v.* Jordan, 69 N. C. 189; Turner *v.* Brock, 6 Heisk. (Tenn.) 50; Pishaway *v.* Runnels, 71 Tex. 352, 9 S. W. 260. So a judgment in an action for conversion of goods is not a bar to an action between the same parties for the price of the same goods. Southern R. Co. *v.* Raney, 117 Ala. 270, 23 So. 29. And a judgment for the value of goods alleged to have been fraudulently conveyed by one defendant to another is not a bar to an action in tort for conspiracy between defendants to prevent plaintiff from collecting a judgment against one of them. Tams *v.* Lewis, 42 Pa. St. 402.

Other examples.— A recovery in an action for the hire of a horse and buggy is no bar to another action to recover damages for injuries done to the buggy while in possession of the hirer. Shaw *v.* Beers, 25 Ala. 449. So a judgment for the statutory penalty for illegal overcharge of fare on a railroad will not bar a suit for wrongful ejection from defendant's cars. St. Louis, etc., R. Co. *v.* Trimble, 54 Ark. 354, 15 S. W. 899. And an action on a contract settling the title to real estate will not bar an action between the

d. Distinct Injuries From Same Tort — (I) *In General.* Distinct causes of action, capable of being sued on separately and successively, may arise from one and the same tortious act in favor of the same plaintiff; as where damage to goods and injuries to the person are caused by the same negligent or wrongful act,[57] or where two separate portions or kinds of plaintiff's property are damaged by the same tort,[58] or he is injured thereby in respect to different rights or interests.[59] So an action for a civil penalty for a tortious act may lie in addition to a criminal prosecution therefor.[60] But generally, where a statute authorizes an action of debt for a penalty, to be brought in the name of the state, for the benefit of a person injured by a particular form of tort, he must choose whether he will sue under the statute or in a common-law action, and cannot prosecute both remedies.[61]

(II) *Separate Actions by Parent and Child For Injury to Child.* Where a minor child is injured by the negligence or fault of a third person, separate causes of action accrue, to the child for his own injuries, and to his parent for expenses incurred in consequence of the injury and for the loss of the child's services; and these may be prosecuted separately, and a recovery in one action will not bar the maintenance of the other.[62]

same parties for slander of title of the same real estate, although the allegd slander was connected with the title in the contract. Linville *v.* Rhoades, 73 Mo. App. 217. Nor will a judgment for defendant in an action for seduction under promise of marriage bar a subsequent action for breach of the same promise of marriage. Ireland *v.* Emmerson, 93 Ind. 1, 47 Am. Rep. 364. And judgment for the mortgagor in a suit to compel the mortgagee to discharge the mortgage and to restrain him from proceeding with an action to foreclose is no bar to a subsequent action to recover the statutory penalty for the mortgagee's refusal to execute a discharge and the special damages occasioned thereby. Mallory *v.* Mariner, 15 Wis. 177. On the other hand, where one who is sued on a note sets up a larger claim as a set-off and recovers judgment thereon, it will estop him from suing the former plaintiff for a malicious prosecution founded on the suit on the note. Dolan *v.* Thompson, 129 Mass. 205.

57. Reilly *v.* Sicilian Asphalt Pav. Co., 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176; Watson *v.* Texas, etc., R. Co., 8 Tex. Civ. App. 144, 27 S. W. 924; Brunsden *v.* Humphrey, 14 Q. B. D. 141, 49 J. P. 4, 53 L. J. Q. B. 476, 51 L. T. Rep. N. S. 529, 32 Wkly. Rep. 944.

58. *California.*— De la Guerra *v.* Newhall, 55 Cal. 21.

Massachusetts.— White *v.* Moseley, 8 Pick. 356.

Mississippi.— Illinois Cent. R. Co. *v.* Wilbourn, 74 Miss. 284, 21 So. 1.

Virginia.— Southside R. Co. *v.* Daniel, 20 Gratt. 344, injuries to plaintiff's land are distinct from injuries to crops grown and growing on it.

Wisconsin.— Hagan *v.* Casey, 30 Wis. 553, injury to plaintiff's close from a trespassing animal of defendant's, distinct from injury done by same animal to plaintiff's mare pasturing in the close.

But see *supra*, XIII, D, 5, e. And *compare* St. Louis Southwestern R. Co. *v.* Moss, 9 Tex. Civ. App. 6, 28 S. W. 1038, holding that a cause of action for damages for the negligent killing of two horses, at the same time and place, is entire and indivisible.

59. See cases cited in subsequent notes in this section. Thus recovery by a husband for injuries to himself is not a bar to a subsequent action for injuries to his wife, sustained at the same time and as a result of the same act or negligence. Texas, etc., R. Co. *v.* Nelson, 9 Tex. Civ. App. 156, 29 S. W. 78; St. Louis, etc., R. Co. *v.* Edwards, 3 Tex. App. Civ. Cas. § 346; Newbury *v.* Connecticut, etc., R. Co., 25 Vt. 377. So an action by an administrator for the wrongful killing of his intestate, for the benefit of the widow and next of kin, is not a bar to an action to recover for the benefit of the estate the medical and funeral expenses and damages for mental anguish suffered by deceased after receiving the injury. St. Louis, etc., R. Co. *v.* Sweet, 63 Ark. 563, 40 S. W. 463. But see Clare *v.* New York, etc., R. Co., 172 Mass. 211, 51 N. E. 1083. Again where a shipper, at the request of a carrier that has delivered the goods to a person not authorized to receive them, recovers judgment against such person for the value of the goods, it is not a bar to an action against the carrier for a conversion of the same property. St. Louis Southwestern R. Co. *v.* Hall, etc., Woodworking Mach. Co., 23 Tex. Civ. App. 211, 56 S. W. 140.

60. McDonald *v.* Stark, 176 Ill. 456, 52 N. E. 37; State *v.* Schoonover, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767.

61. Illinois Cent. R. Co. *v.* People, 84 Ill. App. 260; Terre Haute, etc., R. Co. *v.* People, 41 Ill. App. 513.

62. *Alabama.*— McNamara *v.* Logan, 100 Ala. 187, 14 So. 175; South, etc., Alabama R. Co. *v.* Donovan, 84 Ala. 141, 4 So. 142.

Arkansas.— Sibley *v.* Ratliffe, 50 Ark. 477, 8 S. W. 686.

California.— Durkee *v.* Central Pac. R. Co., 56 Cal. 388, 38 Am. Rep. 59; Karr *v.* Parks, 44 Cal. 46.

e. Effect of Rights of Several Persons. Where the same contract, transaction, or tortious act gives rise to causes of action in favor of two or more persons claiming separately and independently of each other, a judgment recovered by one will not bar an action by another;[63] but otherwise if the claim of the one

Connecticut.— Beebe *v.* Trafford, Kirby 215.

Georgia.— Hooper *v.* Southern R. Co., 112 Ga. 96, 37 S. E. 165; Central R. Co. *v.* Brinson, 64 Ga. 475.

Illinois.— Where the father acts as next friend in a suit brought by the minor, and insists on compensation for the loss of the minor's time caused by the injury, as an element of the minor's damages, he cannot afterward sue in his own name for the loss of the child's services. Chicago Screw Co. *v.* Weiss, 107 Ill. App. 39 [*affirmed* in 203 Ill. 536, 68 N. E. 54].

Indiana.— Bartlett *v.* Kochel, 88 Ind. 425; Rogers *v.* Smith, 17 Ind. 323, 79 Am. Dec. 483; Boyd *v.* Blaisdell, 15 Ind. 73.

Maine.— Bernard *v.* Merrill, 91 Me. 358, 40 Atl. 136.

Massachusetts.— Horgan *v.* Pacific Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504; Wilton *v.* Middlesex R. Co., 125 Mass. 130.

Michigan.— Baker *v.* Flint, etc., R. Co., 91 Mich. 298, 51 N. W. 897, 30 Am. St. Rep. 471, 16 L. R. A. 154, a decision similar to that cited above from Illinois.

Minnesota.— Bamka *v.* Chicago, etc., R. Co., 61 Minn. 549, 63 N. W. 1116, 52 Am. St. Rep. 618. *Compare* Lathrop *v.* Schutte, 61 Minn. 196, 63 N. W. 493.

New York.— Traver *v.* Eighth Ave. R. Co., 4 Abb. Dec. 422, 3 Keyes 497, 3 Transcr. App. 203, 6 Abb. Pr. N. S. 46; Lieberman *v.* Third Ave. R. Co., 25 Misc. 704, 55 N. Y. Suppl. 677.

Ohio.— Larwill *v.* Kirby, 14 Ohio 1.

South Carolina.— Bridger *v.* Asheville, etc., R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

Texas.— Texas, etc., R. Co. *v.* Morin, 66 Tex. 133, 18 S. W. 345; Texas, etc., R. Co. *v.* Howard, 2 Tex. Unrep. Cas. 429.

Vermont.— Bradley *v.* Andrews, 51 Vt. 525.

See 30 Cent. Dig. tit. "Judgment," § 1123.

But *compare* Graham *v.* Hannibal, etc., R. Co., 28 Fed. 744.

63. *Alabama.*— Allison *v.* Little, 85 Ala. 512, 5 So. 221.

Illinois.— Hoke *v.* Lowe, 48 Ill. App. 126.

New Jersey.— Kutzmeyer *v.* Ennis, 27 N. J. L. 371.

New York.— Dolbeer *v.* Stout, 139 N. Y. 486, 34 N. E. 1102; Calhoun *v.* Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248.

United States.— Lawrence *v.* Vernon, 15 Fed. Cas. No. 8,146, 3 Sumn. 20.

See 30 Cent. Dig. tit. "Judgment," § 1125.

Where two or more persons are injured by the negligent act of a railroad company, the recovery of exemplary damages for intentional wrong by one of them will not bar the claim of the others to recover exemplary damages. Griffin *v.* Southern R. Co., 65 S. C. 122, 43 S. E. 445. And it makes no difference that the two suits are brought by the same person in the character of administrator of the injured persons, their death having resulted from the injury. Illinois Cent. R. Co. *v.* Slater, 139 Ill. 190, 28 N. E. 830.

Partners.— A recovery of judgment by a partnership for injury to the firm's property is no bar to an action by one of the partners for damages to his private property, or to his person, sustained by the same act. Taylor *v.* Manhattan R. Co., 53 Hun (N. Y.) 305, 6 N. Y. Suppl. 488; Cahnmann *v.* Metropolitan St. R. Co., 35 Misc. (N. Y.) 127, 71 N. Y. Suppl. 317. And a joint judgment obtained by partners in a slander suit is no bar to a several suit by one of the partners on the same cause of action. Duffy *v.* Gray, 52 Mo. 528.

Husband and wife.— A wife's right of action for injuries from a tort is distinct from her husband's right of action for the loss of her services caused by the same injury. Denver Consol. Tramway Co. *v.* Riley, 14 Colo. App. 132, 59 Pac. 476; Brierly *v.* Union R. Co., 26 R. I. 119, 58 Atl. 451. And an action by a wife for damages to her separate estate is not barred by a judgment in a former action brought by her husband in his own right, on the same cause of action. San Antonio, etc., R. Co. *v.* Flato, 13 Tex. Civ. App. 214, 35 S. W. 859.

Parent and child.— The recovery of a judgment by a husband for injuries causing the death of his wife is no bar to an action by their children against the same defendant for the wrongful killing of their mother by the same act. Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127.

Landlord and tenant.— A stranger, committing waste on premises leased or held by a particular estate, is liable separately to the tenant for the injury to the possession and to the landlord or reversioner for the injury to the freehold or inheritance. California Dry-Dock Co. *v.* Armstrong, 17 Fed. 216, 8 Sawy. 523.

Principal and surety or guarantor.— A recovery against a sheriff for money had and received by him in his official capacity is no bar to an action on his bond against the sureties for the same money. State Treasurer *v.* Oswald, 2 Bailey (S. C.) 214. And a judgment against the principal, on a contract guaranteed, will not bar an action against him and another, on the contract of guaranty, executed by both of them jointly. White *v.* Smith, 33 Pa. St. 186, 75 Am. Dec. 589; Fischer *v.* Quigley, 8 Wash. 327, 35 Pac. 1071. And see Walden Nat. Bank *v.* Birch, 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211. So different parties interested may maintain successive actions on an executor's bond. People *v.* Randolph, 24 Ill. 324.

Different creditors.— A judgment foreclos-

plaintiff is derived from or subordinate to that of the other.[64] So the same facts may give rights of action to the parties mutually against each other,[65] or to one plaintiff against separate defendants.[66]

f. Extinguishment by One Satisfaction. Where a plaintiff has separate concurrent or successive rights of action on the same transaction or for the same injury, he can have only one full satisfaction; this obtained, his further actions or remedies will be barred.[67]

8. Cause of Action on Debt and Collateral Security[68] — a. In General. A judgment on a security held as collateral does not merge or extinguish the principal debt;[69] and conversely a collateral security will not be merged in a judgment on the debt, when equity requires it to be kept alive.[70]

b. Indebtedness and Lien. The recovery of judgment on a debt secured by a lien, so long as it remains unsatisfied, is no bar to an action to enforce the lien.[71] But a judgment or decree enforcing the lien will merge the cause of action on the original debt, at least if it is coextensive with the debt or provides for the collection of any deficiency.[72] A successful defense on the merits to an action

ing a mortgage in a suit in which the question whether or not the mortgage was executed to defraud the mortgagor's creditors was not in issue does not preclude a creditor of the mortgagor, who was not a party to the foreclosure suit, from attacking the mortgage on that ground. Brooks *v.* Wilson, 125 N. Y. 256, 26 N. E. 258. So where several insurance companies are subrogated to the right of the insured to sue a railroad company for causing the loss, the fact that the railroad company allowed one of the companies to take judgment against it, and paid the same, does not bar an action by the other companies to recover their proportion of the loss. Mobile Ins. Co. *v.* Columbia, etc., R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725.

64. Nouvet *v.* Vitry, 15 La. Ann. 653; O'Brien *v.* Browning, 11 Hun (N. Y.) 179. And see cases cited in the following note.

Owner and bailee.— Where goods in the possession of a common carrier, factor, or other bailee are injured, a recovery of damages by the owner will bar an action by the bailee and *vice versa*. The Farmer *v.* McCraw, 31 Ala. 659; Illinois Cent. R. Co. *v.* Miller, 32 Ill. App. 259; Green *v.* Clarke, 12 N. Y. 343; Green *v.* Clark, 13 Barb. (N. Y.) 57; Porter *v.* Schendel, 25 Misc. (N. Y.) 779, 55 N. Y. Suppl. 602.

65. Where A sued B for assault and battery and recovered judgment, which B paid, and B subsequently sued A for an assault and battery committed on him at the same time and in the same fight, the former judgment was held to be no bar, because *non constat*, but that each might have an independent right of action growing out of the same transaction. Cade *v.* McFarland, 48 Vt. 47.

66. See Beer *v.* Lindenthal, 1 Tex. App. Civ. Cas. § 307; Peters *v.* Duke, 1 Tex. App. Civ. Cas. § 304. *Compare* Kirk *v.* Goodwin, 53 Kan. 610, 36 Pac. 1057.

67. *Illinois.*— Kapischki *v.* Koch, 180 Ill. 44, 54 N. E. 179; Nolte *v.* Lowe, 18 Ill. 437.

Washington.— Dawson *v.* Baum, 3 Wash. Terr. 464, 19 Pac. 46.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459; Peerce *v.* Athey, 4 W. Va. 22.

United States.— Matthews *v.* Menedger, 16 Fed. Cas. No. 9,289, 2 McLean 145.

England.— Bird *v.* Randall, 3 Burr. 1345, 1 W. Bl. 373.

But see Post *v.* Hartford St. R. Co., 72 Conn. 362, 44 Atl. 547. In this case plaintiff sued for damages for personal injuries, exhibited all his injuries and recovered for all, concealing the fact that part of such injuries were sustained in a later accident of the same kind. Afterward he brought a suit against another defendant for such later injury, and it was claimed that the former judgment was a bar, on the ground that plaintiff had already been compensated for the injuries now in suit. But the court held otherwise, for the reason that the first defendant could recover the sum paid plaintiff.

68. **Judgment against corporation as bar to action to enforce individual liability** see Corporations.

69. *Connecticut.*— Fairchild *v.* Holly, 10 Conn. 474.

Iowa.— Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

Massachusetts.— Hervey *v.* Rawson, 164 Mass. 501, 41 N. E. 682. See Vanuxem *v.* Burr, 151 Mass. 386, 24 N. E. 773, 21 Am. St. Rep. 458.

New York.— Ackley *v.* Westervelt, 86 N. Y. 448; Hawks *v.* Hinchcliff, 17 Barb. 492; Chipman *v.* Martin, 13 Johns. 240.

England.— Drake *v.* Mitchell, 3 East 251, 7 Rev. Rep. 449.

See 30 Cent. Dig. tit. "Judgment," § 1126.

Successful defense.— Whether the first action be brought on the debt or on the security, a successful defense which goes to the merits of plaintiff's entire claim will bar a second action. Flagg *v.* St. Charles Parish, 48 La. Ann. 765, 19 So. 944.

70. Steele *v.* Lord, 28 Hun (N. Y.) 27. And see Fisher *v.* Fisher, 98 Mass. 303; White *v.* Smith, 33 Pa. St. 186, 75 Am. Dec. 589.

71. Palmer *v.* Harris, 100 Ill. 276; Waldrom *v.* Zacharie, 54 Tex. 503; Hyland *v.* Bohn Mfg. Co., 91 Wis. 574, 65 N. W. 369.

72. Kittridge *v.* Stevens, 16 Cal. 381; Toope

either on the debt or the lien will bar an action on the other,[73] but a judgment merely denying the lien claimed will not bar an action on the debt.[74]

c. Debt and Collateral Note or Bond. An unsatisfied judgment on a debt or claim cannot be pleaded in bar of an action on a note or bond given as collateral security for it,[75] nor will an unpaid judgment against an administrator, trustee, sheriff, constable, or other officer prevent a subsequent suit on his official bond.[76] Conversely a judgment recovered on the collateral note or bond, if unsatisfied, will not bar an action on the original debt.[77] A successful defense on the merits, in an action either on the principal debt or on the collateral, will bar an action on the other;[78] but where the defense successfully interposed to an action on the note or bond goes only to the validity of the instrument in suit, and is not inconsistent with the theory that there is a good cause of action on the original debt or *vice versa*, the former judgment is no bar.[79]

v. Prigge, 7 Daly (N. Y.) 208; Brigel *v.* Creed, 65 Ohio St. 40, 60 N. E. 991. *Compare* Bice *v.* Marquette Opera House Bldg. Co., 96 Mich. 24, 55 N. W. 382.

73. New York Mut. L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756 (holding that a judgment for defendant in a suit to foreclose a mortgage bars an action on a bond given for the same debt); Whelan *v.* Hill, 2 Whart. (Pa.) 118.

74. Geary *v.* Bangs, 138 Ill. 77, 27 N. E. 462.

75. Noble *v.* Cothran, 18 S. C. 439.

Where a bond and a note are both given as security for the same debt, a judgment on the bond will bar an action on the note. Seaman *v.* Haskins, 2 Johns. Cas. (N. Y.) 195.

Fidelity bond.— A judgment against a defaulting bank cashier for the embezzlement of a sum of money taken by him from the vaults of the bank does not bar the bank from suing on his bond for amounts subsequently discovered to have been appropriated by him by means of false entries. Phillips *v.* Bossard, 35 Fed. 99.

Liquor seller's bond.— The recovery of a judgment against a saloon-keeper and the owner of the premises on which the saloon was situated for illegally selling liquor to plaintiff's husband will not bar her subsequent action against the saloon-keeper's bondsmen, the judgment not having been satisfied. Wanack *v.* People, 187 Ill. 116, 58 N. E. 242.

76. *District of Columbia.*— U. S. *v.* Hine, 3 MacArthur 27.

Georgia.— Morton *v.* Gahona, 70 Ga. 569.

Illinois.— People *v.* Allen, 86 Ill. 166.

Iowa.— Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148.

Massachusetts.— Hawkes *v.* Davenport, 5 Allen 390; Greenfield *v.* Wilson, 13 Gray 384.

Mississippi.— McAllister *v.* Clopton, 60 Miss. 207.

Missouri.— Worley *v.* Heath, 1 Mo. App. 378.

New Jersey.— Richman *v.* Powell, 7 N. J. L. J. 45. But see Lower Alloways Creek *v.* Moore, 15 N. J. L. 146.

North Carolina.— Walton *v.* Pearson, 85 N. C. 34.

Pennsylvania.— Carmack *v.* Com., 5 Binn. 184; Com. *v.* Whitaker, 2 Del. Co. 36; Com. *v.* Lelar, 1 Phila. 173.

South Carolina.— State *v.* Cason, 11 S. C. 392.

Texas.— McKee *v.* Price, 3 Tex. App. Civ. Cas. § 335.

Contra.— See Hall *v.* Foreman, 82 Ky. 505. See 30 Cent. Dig. tit. "Judgment," § 1128.

Payment of a judgment recovered on the principal debt will bar a subsequent action on the collateral. National Security Bank *v.* Hunnewell, 124 Mass. 260; Blackwell *v.* Bragg, 78 Va. 529.

77. *Indiana.*— Merriman *v.* Barker, 121 Ind. 74, 22 N. E. 992.

Iowa.— Burnheimer *v.* Hart, 27 Iowa 19, 99 Am. Dec. 641, 1 Am. Rep. 209.

Maine.— Hill *v.* Crocker, 87 Me. 208, 32 Atl. 878, 47 Am. St. Rep. 321; Hill *v.* Stevenson, 63 Me. 364, 18 Am. Rep. 231.

Massachusetts.— Storer *v.* Storer, 6 Mass. 390.

New York.— Clapp *v.* Meserole, 1 Abb. Dec. 362, 1 Keyes 281, 27 How. Pr. 600 note; Hawks *v.* Hinchcliff, 17 Barb. 492; Chappell *v.* Potter, 11 How. Pr. 365; Davis *v.* Anable, 2 Hill 339. But *compare* Binck *v.* Wood, 43 Barb. 315; Moran *v.* Vredenburgh, Lalor 392; Rhinelander *v.* Barrow, 17 Johns. 538; Brockway *v.* Kinney, 2 Johns. 210.

Pennsylvania.— Myers *v.* Clark, 3 Watts & S. 535; Elbert *v.* Jeanes, 2 Pa. Co. Ct. 67.

United States.— Clark *v.* Young, 1 Cranch 181, 2 L. ed. 74; U. S. Bank *v.* Johnson, 2 Fed. Cas. No. 919, 3 Cranch C. C. 228.

See 30 Cent. Dig. tit. "Judgment," § 1128.

Judgment against the indorser of a note only extinguishes and merges the cause of action arising upon his contract of indorsement, leaving in full force the contract obligation of the debtor to pay the debt. Bunker *v.* Langs, 76 Hun (N. Y.) 543, 28 N. Y. Suppl. 210; Howell *v.* McCracken, 87 N. C. 399.

78. Bush *v.* Hampton, 4 Dana (Ky.) 83; Johnson *v.* Forstall, 3 La. Ann. 446; Sykes *v.* Gerber, 98 Pa. St. 179; Chapman *v.* Smith, 16 How. (U. S.) 114, 14 L. ed. 868.

79. *Indiana.*— Winningham *v.* State, 56 Ind. 243.

New York.— Wells *v.* Salina, 71 Hun 559, 25 N. Y. Suppl. 134; Slauson *v.* Englehart, 34 Barb. 198.

d. Note or Bond and Collateral Security.[80] The recovery of a judgment, without satisfaction, on a note, bond, or other evidence of debt will not bar proceedings on any security given as collateral to it, such as another note, a deed, or a mortgage.[81] And the foreclosure of a mortgage or other lien on property will not prevent a suit on the note or bond to which it is collateral, no satisfaction having been obtained,[82] except in cases where the decree of foreclosure makes provision for a possible deficiency and awards a personal judgment and execution for it.[83] A judgment in favor of defendant, on either the note or the collateral, will not bar an action on the other, unless his defense was such as to undermine plaintiff's entire claim;[84] but the creditor can have only one satisfaction, whether he obtains it in proceedings on the note or on the collateral.[85]

E. Defenses and Counter-Claims Barred by Former Judgment[86]—**1. Defenses Adjudicated in Former Action.** All defenses to plaintiff's cause of action

Pennsylvania.— Darlington *v.* Gray, 5 Whart. 487.

South Carolina.— Stoddard *v.* McIlwain, 9 Rich. 451.

Tennessee.— Betterton *v.* Roope, 3 Lea 215, 31 Am. Rep. 633.

Wisconsin.— Eastman *v.* Porter, 14 Wis. 39.

See 30 Cent. Dig. tit. "Judgment," § 1228.

Forged note.—A judgment in favor of sureties in an action against them on a note to which their names had been forged is not a bar to an action against them to recover on a prior genuine note which was surrendered to the principal on execution of the forged instrument. Bowman *v.* Humphrey, 37 S. W. 150, 18 Ky. L. Rep. 511.

80. Deficiency and personal liability for mortgage debt in general see MORTGAGES.

81. *Arkansas.*— Ford *v.* Burks, 37 Ark. 91.

Georgia.— Dykes *v.* McVay, 67 Ga. 502.

Indiana.— Jenkinson *v.* Ewing, 17 Ind. 505.

Minnesota.— Macomb Sewer-Pipe Co. *v.* Hanley, 61 Minn. 350, 63 N. W. 744.

New York.— Corn Exch. Ins. Co. *v.* Babcock, 51 Barb. 231.

Ohio.—Hanmond *v.* Deaver, 2 Ohio Dec. (Reprint) 395, 2 West. L. Month. 591.

Oregon.— McCullough *v.* Hellman, 8 Oreg. 191.

Pennsylvania.— Anderson *v.* Neef, 32 Pa. St. 379.

Wisconsin.— Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608.

See 30 Cent. Dig. tit. "Judgment," § 1129.

82. *Connecticut.*— Peck's Appeal, 31 Conn. 215.

Illinois.— The recovery of judgment on a scire facias to foreclose a mortgage does not extinguish the debt evidenced by the collateral note. Rockwell *v.* Servant, 63 Ill. 424. And see Russell *v.* Hamilton, 3 Ill. 56. And where a mortgage is given to secure several notes falling due at different times, a foreclosure on part of the land to satisfy the first note is no bar to a subsequent suit to foreclose the mortgage on the rest of the land to satisfy the other notes and an unsatisfied residue of the first note. Bressler *v.* Martin, 133 Ill. 278, 23 N. E. 518.

Indiana.—Rodman *v.* Rodman, 64 Ind. 65; Huston *v.* Fatka, 30 Ind. App. 693, 66 N. E. 74. But where the mortgagee sues on the mortgage and takes a judgment of foreclosure only, when he might have had a personal judgment for the deficiency, he cannot afterward maintain another action to recover a personal judgment for the unsatisfied balance of the debt after exhausting the premises. Crosby *v.* Jeroloman, 37 Ind. 264.

Michigan.— Goodrich *v.* White, 39 Mich. 489.

Missouri.— Watson *v.* Hawkins, 60 Mo. 550.

New York.— O'Dougherty *v.* Remington Paper Co., 81 N. Y. 496.

Ohio.— The stipulation in a mortgage securing several notes that on default as to one all shall become due relates to the remedy by foreclosure, and not to the notes in reference to demand and notice, and a foreclosure is no bar to an action against an indorser of a note subsequently falling due. McClelland *v.* Bishop, 42 Ohio St. 113. And a judgment in an action to foreclose a mortgage, executed by husband and wife to secure the payment of the wife's note, is no bar to a subsequent action to subject the wife's separate estate to the payment of a deficiency arising on the sale of the mortgaged premises. Avery *v.* Vansickle, 35 Ohio St. 270. But see Reedy *v.* Burgert, 1 Ohio 157, holding that a judgment on a scire facias on a mortgage is an extinguishment of the original mortgage debt.

Vermont.— Manly *v.* Slason, 28 Vt. 346. It is even held that a decree of foreclosure satisfied by payment is no bar to a suit on the mortgage securities to recover a sum not included in such decree. Smith *v.* Lamb, 1 Vt. 395.

83. Denistoun *v.* Payne, 7 La. Ann. 333; Fuller *v.* Eastman, 81 Me. 284, 17 Atl. 67; New York Mut. L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756.

84. Palmer *v.* Sanger, 143 Ill. 34, 32 N. E. 390; Lander *v.* Arno, 65 Me. 26; Longworth *v.* Flagg, 10 Ohio 300.

85. Very *v.* Watkins, 18 Ark. 546; Butler *v.* Miller, 1 N. Y. 496.

86. Conclusiveness of adjudication as to matters in issue but not decided see *infra*, XIV, C, 6.

Defenses concluded by judgment of revival see *infra*, XVIII, D, 8, b.

which were set up and adjudicated are concluded by a judgment for plaintiff, so that they cannot thereafter be urged as against further proceedings upon the same cause of action, or upon the judgment itself, or in further litigation between the same parties upon the same subject-matter.[87] But this does not apply to defenses which were not within the scope of the issues litigated in the former action, and which therefore were not considered or decided therein.[88]

2. DEFENSES WHICH MIGHT HAVE BEEN PLEADED[89] — a. In General. A valid judg-

Effect of dismissal of action on the merits see *supra*, XIII, C, 7, d.

Matters for defense in former action as cause of action in second see *supra*, XIII, D, 1, e.

Right to set up by supplemental answer judgment obtained in subsequent action see *infra*, XXI, A, 3.

Former recovery as defense to action for death see DEATH, 13 Cyc. 321.

87. *Alabama.*— Penny *v.* British, etc., Mortg. Co., 132 Ala. 357, 31 So. 96.

Connecticut.— Perkins *v.* Brazos, 66 Conn. 242, 33 Atl. 908; Betts *v.* Starr, 5 Conn. 550, 13 Am. Dec. 94.

Illinois.— Merki *v.* Merki, 212 Ill. 121, 72 N. E. 9; Stevens *v.* Hadfield, 178 Ill. 532, 52 N. E. 875.

Indiana.— Stanton *v.* Kenrick, 135 Ind. 382, 35 N. E. 19; Steves *v.* Frazee, 19 Ind. App. 284, 49 N. E. 385.

Iowa.— Strow *v.* Allen, (1904) 98 N. W. 141; Heichew *v.* Hamilton, 4 Greene 317, 61 Am. Dec. 122.

Louisiana.— Rice *v.* Garrett, 12 La. Ann. 755.

Massachusetts.— Sherer *v.* Collins, 106 Mass. 417.

Michigan.— Farr *v.* Lachman, 130 Mich. 40, 89 N. W. 688; Busch *v.* Wilcox, 106 Mich. 514, 64 N. W. 485.

Missouri.— Hickerson *v.* Mexico, 58 Mo. 61, dedication.

Nebraska.— Gilmore *v.* Whiteman, 50 Nebr. 760, 70 N. W. 364; Latta *v.* Visel, 37 Nebr. 612, 56 N. W. 311.

New Jersey.— Delaware, etc., R. Co. *v.* Breckenridge, 58 N. J. Eq. 581, 43 Atl. 1097; Manley *v.* Mickle, 53 N. J. Eq. 155, 32 Atl. 210 [*affirming* 52 N. J. Eq. 712, 29 Atl. 434].

New York.— Woodhouse *v.* Duncan, 106 N. Y. 527, 13 N. E. 334; Campbell *v.* Consalus, 25 N. Y. 613; Candee *v.* Burke, 10 Hun 350; Hartnett *v.* Adler, 15 Daly 69, 2 N. Y. Suppl. 713. *Compare* Bath Gas Light Co. *v.* Rowland, 178 N. Y. 631, 71 N. E. 1127.

Pennsylvania.— Allen *v.* International Text Book Co., 201 Pa. St. 579, 51 Atl. 323, 88 Am. St. Rep. 834; Rauwolf *v.* Glass, 184 Pa. St. 237, 39 Atl. 79; McClain's Estate, 180 Pa. St. 231, 36 Atl. 743; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387, 6 Atl. 696; Simes *v.* Zane, 24 Pa. St. 242; Man *v.* Drexel, 2 Pa. St. 202.

Rhode Island.— Mills *v.* Allen, 26 R. I. 177, 58 Atl. 622.

Tennessee.— Matilda *v.* Crenshaw, 4 Yerg. 299.

Texas.— Fricke *v.* Wood, 31 Tex. Civ. App. 167, 71 S. W. 784.

Vermont.— Carpenter *v.* Gleason, 58 Vt. 244, 4 Atl. 706; Gibson *v.* Bingham, 43 Vt. 410, 5 Am. Rep. 289.

West Virginia.— Sayre *v.* Harpold, 33 W. Va. 553, 11 S. E. 16; Coville *v.* Gilman, 13 W. Va. 314.

United States.— Wilcox, etc., Sewing Mach. Co. *v.* Sherborne, 123 Fed. 875, 59 C. C. A. 363; Fisher *v.* Rutherford, 9 Fed. Cas. No. 4,823, Baldw. 188.

England.— Dawson *v.* Gregory, 7 Q. B. 756, 9 Jur. 688, 14 L. J. Q. B. 286, 53 E. C. L. 756; Shoe Mach. Co. *v.* Cutlan, [1896] 1 Ch. 667, 65 L. J. Ch. 314, 74 L. T. Rep. N. S. 166.

Canada.—Leinster *v.* Stabler, 17 U. C. C. P. 532; Gordon *v.* Robinson, 14 U. C. C. P. 566.

See 30 Cent. Dig. tit. "Judgment," § 1130. *et seq.*

Illustrations.— A mortgagor against whom judgment has been rendered in an action at law on the bond for which the mortgage was given as security cannot, on a bill to foreclose the mortgage, avail himself of a defense which he had previously set up in the suit at law. Morris *v.* Floyd, 5 Barb. (N. Y.) 130. So a final judgment in an action against a city to recover on coupons attached to city bonds, where the defense was that the bonds were illegal, is a bar to the reconsideration of the same defenses in a subsequent action between the same parties on other coupons attached to the same bonds. Garden City *v.* Merchants', etc., Nat. Bank, 65 Kan. 345, 69 Pac. 325, 93 Am. St. Rep. 284. And where, in a proceeding to revive a judgment, defendant set up certain facts as constituting payment, and judgment was given against him, and defendant's land was sold under execution issuing thereon, and purchased by plaintiff, who brought ejectment to recover possession, defendant could not set up as a defense in the ejectment suit the fact of payment pleaded in the revival proceedings. Greer *v.* Major, 114 Mo. 145, 21 S. W. 481.

88. *Georgia.*— Henderson *v.* Fox, 80 Ga. 479, 6 S. E. 164.

Indiana.— Smith *v.* Downey, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 467.

Kentucky.—Falkenburg *v.* Johnson, 102 Ky. 543, 44 S. W. 80, 19 Ky. L. Rep. 1606, 80 Am. St. Rep. 369.

Missouri.— McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489.

New York.— Goodale *v.* Tuttle, 29 N. Y. 459.

See 30 Cent. Dig. tit. "Judgment," § 1130 *et seq.*

89. **Conclusiveness of adjudication as to**

ment for plaintiff definitely and finally negatives every defense, objection, or exception which might and should have been raised against the action; and this is true, not only with respect to further or supplementary proceedings in the same cause, but for the purpose of every subsequent suit between the same parties, whether founded upon the same or a different cause of action.[90] Exceptions to

matters which might have been litigated see *infra*, XIV, C, 1, g.

90. *Alabama.*— Brown *v.* Tillman, 121 Ala. 626, 25 So. 836; Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45; Murrell *v.* Smith, 51 Ala. 301; Mervine *v.* Parker, 18 Ala. 241; Crawford *v.* Simonton, 7 Port. 110.

California.— Johnson *v.* Reed, 125 Cal. 74, 57 Pac. 680; Byers *v.* Neal, 43 Cal. 210.

Colorado.— Rio Grande County *v.* Burpee, 24 Colo. 57, 48 Pac. 539.

Florida.— Mattair *v.* Card, 19 Fla. 455.

Georgia.— Ryan *v.* Kingsbery, 89 Ga. 228, 15 S. E. 302; Stiles *v.* Elliott, 68 Ga. 83; Desvergers *v.* Willis, 58 Ga. 388; Grubb *v.* Kolb, 55 Ga. 630; Field *v.* Price, 52 Ga. 469; Kenan *v.* Miller, 2 Ga. 325.

Illinois.— Harvey *v.* Aurora, etc., R. Co., 186 Ill. 283, 57 N. E. 857; Ruegger *v.* Indianapolis, etc., R. Co., 103 Ill. 449; Kelly *v.* Donlin, 70 Ill. 378; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 57 Ill. App. 430.

Indiana.— Turner *v.* Allen, 66 Ind. 252.

Iowa.— Fulliam *v.* Drake, 105 Iowa 615, 75 N. W. 479; Baxter *v.* Myers, (1891) 47 N. W. 879; Keokuk Gas Light, etc., Co. *v.* Keokuk, 80 Iowa 137, 45 N. W. 555; Mally *v.* Mally, 52 Iowa 654, 3 N. W. 670; Lawrence Sav. Bank *v.* Stevens, 46 Iowa 429; Dewey *v.* Peck, 33 Iowa 242; Heichew *v.* Hamilton, 4 Greene 317, 61 Am. Dec. 122.

Kentucky.— Hardwicke *v.* Young, 110 Ky. 504, 62 S. W. 10, 22 Ky. L. Rep. 1906; Shaw *v.* Milby, 63 S. W. 577, 23 Ky. L. Rep. 645; Hill *v.* Lancaster, 88 Ky. 338, 11 S. W. 74, 10 Ky. L. Rep. 954; Snapp *v.* Snapp, 87 Ky. 554, 9 S. W. 705, 10 Ky. L. Rep. 598; Bell County Coke, etc., Co. *v.* Pineville Graded School, 42 S. W. 92, 19 Ky. L. Rep. 789.

Louisiana.— Brigot *v.* Brigot, 49 La. Ann. 1428, 22 So. 641; Ludeling *v.* Chaffe, 40 La. Ann. 645, 4 So. 586; State *v.* Clinton, etc., R. Co., 21 La. Ann. 156; Franklin *v.* Warfield, 2 La. 126.

Maine.— White *v.* Savage, 94 Me. 138, 47 Atl. 138.

Maryland.— State *v.* Brown, 64 Md. 199, 1 Atl. 54, 6 Atl. 172.

Massachusetts.— Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733.

Michigan.— Napper *v.* Fitzpatrick, 139 Mich. 139, 102 N. W. 642; Sayers *v.* Auditor-Gen., 124 Mich. 259, 82 N. W. 1045; Hoppin *v.* Avery, 87 Mich. 551, 49 N. W. 887; Beam *v.* Macomber, 35 Mich. 455. But *compare* Jacobson *v.* Miller, 41 Mich. 90, 1 N. W. 1013. And see Bond *v.* Markstrum, 102 Mich. 11, 60 N. W. 282.

Minnesota.— Bazille *v.* Murray, 40 Minn. 48, 41 N. W. 238. But see Farrell *v.* St. Paul, 62 Minn. 271, 64 N. W. 809, 54 Am. St. Rep. 641, 29 L. R. A. 778; State *v.* Cooley, 58 Minn. 514, 60 N. W. 338.

Mississippi.— Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Missouri.— Swinford *v.* Teegarden, 159 Mo. 635, 60 S. W. 1089; Lyman *v.* Milwaukee Harvester Co., 68 Mo. App. 637.

New Hampshire.— Bergeron *v.* Dartmouth Sav. Bank, 62 N. H. 655.

New Jersey.— Brinkerhoff *v.* Ransom, 57 N. J. Eq. 312, 41 Atl. 725 [*reversing* 56 N. J. Eq. 149, 38 Atl. 919].

New York.—Foulke *v.* Thalmessinger, 158 N. Y. 725, 53 N. E. 1125; Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Woodhouse *v.* Duncan, 106 N. Y. 527, 13 N. E. 334; Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839; Chemung Canal Bank *v.* Judson, 8 N. Y. 254; Phipps *v.* Oprandy, 69 N. Y. App. Div. 497, 74 N. Y. Suppl. 985; Fritz *v.* Tompkins, 39 N. Y. App. Div. 73, 56 N. Y. Suppl. 847; Zerega *v.* Will, 34 N. Y. App. Div. 488, 54 N. Y. Suppl. 361; White *v.* Cuthbert, 10 N. Y. App. Div. 220, 41 N. Y. Suppl. 818; Wilcox *v.* Gilchrist, 85 Hun 1, 32 N. Y. Suppl. 608; Crompton, etc., Loom Works *v.* Brown, 27 Misc. 319, 57 N. Y. Suppl. 823; Barber *v.* Rutherford, 12 Misc. 33, 33 N. Y. Suppl. 89; Goldberg *v.* Ziegler, 92 N. Y. Suppl. 777; McLaughlin *v.* Great Western Ins. Co., 20 N. Y. Suppl. 536.

North Carolina.— Lee *v.* McKoy, 118 N. C. 518, 24 S. E. 210; Tysor *v.* Lutterloh, 57 N. C. 247; Bond *v.* Billups, 53 N. C. 423.

Ohio.— Mengert *v.* Brinkerhoff, 67 Ohio St. 472, 66 N. E. 530; Kunneke *v.* Mapel, 60 Ohio St. 1, 53 N. E. 259; Cincinnati *v.* Emerson, 57 Ohio St. 132, 48 N. E. 667; Bell *v.* McColloch, 31 Ohio St. 397; Covington, etc., Bridge Co. *v.* Sargent, 27 Ohio St. 233.

Oregon.—Morrill *v.* Morrill, 20 Oreg. 96, 25 Pac. 362, 23 Am. St. Rep. 95, 11 L. R. A. 155.

Pennsylvania.— Allen *v.* International Text Book Co., 201 Pa. St. 579, 51 Atl. 323, 88 Am. St. Rep. 834; Lancaster *v.* Frescoln, 192 Pa. St. 452, 43 Atl. 961; Lawrence's Estate, 169 Pa. St. 185, 32 Atl. 406; *In re* Schwartz, 14 Pa. St. 42.

Rhode Island.— Tucker *v.* Carr, 20 R. I. 477, 40 Atl. 1, 78 Am. St. Rep. 893.

South Carolina.— Crenshaw *v.* Julian, 26 S. C. 283, 2 S. E. 133, 4 Am. St. Rep. 719; Rice *v.* Mahaffey, 9 S. C. 281.

South Dakota.— Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803.

Tennessee.— Evans *v.* International Trust Co., (Ch. App. 1900) 59 S. W. 373; Daniel *v.* Gum, (Ch. App. 1897) 45 S. W. 468.

Texas.— Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120; Muhle *v.* New York, etc., R. Co., 86 Tex. 459, 25 S. W. 607; Thomas *v.* Junction City Irr. Co., 80 Tex. 550, 16 S. W. 324; Thompson *v.* Lester, 75 Tex. 521, 14 S. W. 20; Powell *v.* Davis, 19

this rule are found in cases where the judgment was rendered on constructive service only, which will not preclude defendant from setting up defenses which he might have made if he had had notice and had appeared in the action,[91] and where he had no knowledge at the time of the suit of facts which would have constituted a defense to it,[92] or was prevented from setting them up by the fraud or artifice of the adverse party,[93] or where a defense to the claim arises or accrues to the defendant after the rendition of the judgment.[94] But it is not sufficient to lift the bar that the court improperly rejected a good and sufficient defense; defendant should seek the correction of such an error by appeal or other appropriate proceeding.[95]

b. Adverse Title. In an action for the recovery of real property, or to try title, or to foreclose a mortgage, or for trespass, defendant must set up all the titles or claims to the property which he holds or can make available in his behalf; failure to assert any title or claim in such action will preclude him from setting it up afterward.[96]

Tex. 380; O'Connor *v.* Lucio, 14 Tex. Civ. App. 682, 39 S. W. 139; Cook *v.* Carroll Land, etc., Co., 6 Tex. Civ. App. 326, 25 S. W. 1034.

Utah.— Everill *v.* Swann, 20 Utah 56, 57 Pac. 716.

Vermont.— Spaulding *v.* Warner, 59 Vt. 646, 11 Atl. 186; Marshall *v.* Aiken, 25 Vt. 327.

Washington.— State *v.* Gloyd, 14 Wash. 5, 44 Pac. 103; Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

West Virginia.— State *v.* Boner, 57 W. Va. 81, 49 S. E. 944; Sayre *v.* Harpold, 33 W. Va. 553, 11 S. E. 16.

United States.— Werlein *v.* New Orleans, 177 U. S. 390, 20 S. Ct. 682, 44 L. ed. 817; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Brown *v.* Newton First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293; Allen *v.* Davenport, 132 Fed. 209, 65 C. C. A. 641; Hanley *v.* Beatty, 117 Fed. 59, 54 C. C. A. 445; Black *v.* Black, 77 Fed. 785; Warner *v.* George, 58 Fed. 435; Brooks *v.* O'Hara, 8 Fed. 529, 2 McCrary 644.

England.— *Re* Defries, 31 Wkly. Rep. 720.

Canada.— Leinster *v.* Stabler, 17 U. C. C. P. 532.

See 30 Cent. Dig. tit. "Judgment," § 1132.

Performance of conditions of contract.— Where there has been a previous recovery on the same contract, plaintiff may set up such previous recovery, by way of estoppel, to show that certain stipulations in the contract, as conditions precedent on his part, had been complied with, and defendant was estopped from denying all but the subsequent breach and damage. Heichew *v.* Hamilton, 4 Greene (Iowa) 317, 61 Am. Dec. 122.

Wrongful discharge of servant.— Where a person is employed for one year at a fixed salary payable in weekly instalments, and is discharged during the period, and two weeks afterward sues for two instalments of his salary and recovers a judgment which is paid, such a judgment conclusively establishes the wrongfulness of the discharge, and in an action brought after the period of employment had expired to recover salary for the balance of the year, the question of the wrongfulness of plaintiff's discharge cannot be inquired into, but defendant is confined to proof of payment, or release, or of facts in mitigation of damages. Allen *v.* International Text Book Co., 201 Pa. St. 579, 51 Atl. 323, 88 Am. St. Rep. 834.

91. Bliss *v.* Heasty, 61 Ill. 338. And see Bath Gas Light Co. *v.* Rowland, 84 N. Y. App. Div. 563, 82 N. Y. Suppl. 841.

92. White *v.* Smith, 174 Mo. 186, 73 S. W. 610. But *compare* Homer *v.* Fish, 1 Pick. (Mass.) 435, 11 Am. Dec. 218.

93. Dewey *v.* Peck, 33 Iowa 242. And see Cook *v.* Brown, 125 Mass. 503, 28 Am. Rep. 259, holding that it is no bar to an action for conspiring fraudulently to induce plaintiff to come into the state, with intent to cause his arrest and compel him to settle a disputed claim, that he submitted to the jurisdiction without pleading the illegality of his arrest in abatement.

94. Smith *v.* McCluskey, 45 Barb. (N. Y.) 610.

95. Collins *v.* Bennett, 46 N. Y. 490.

96. *California.*— Flynn *v.* Hite, 107 Cal. 455, 40 Pac. 749.

Indiana.— Masters *v.* Templeton, 92 Ind. 447; McCaffrey *v.* Corrigan, 49 Ind. 175.

Kentucky.— Ligon *v.* Triplett, 12 B. Mon. 283.

Louisiana.— Lindquist *v.* Maurepas Land, etc., Co., 112 La. 1030, 36 So. 843; Howcott *v.* Pettit, 106 La. 530, 31 So. 61; Shaffer *v.* Scuddy, 14 La. Ann. 575.

Michigan.— Pierson *v.* Conley, 95 Mich. 619, 55 N. W. 387.

Minnesota.— Bazille *v.* Murray, 40 Minn. 48, 41 N. W. 238.

Mississippi.— Jones *v.* Merrill, 69 Miss. 747, 11 So. 23.

Pennsylvania.— Church's Appeal, (1886) 7 Atl. 751; Eisenhart *v.* Slaymaker, 14 Serg. & R. 153.

South Carolina.— Jones *v.* Weathersbee, 4 Strobh. 50, 51 Am. Dec. 653; Caston *v.* Perry, 1 Bailey 533, 21 Am. Dec. 482.

Texas.—McCray *v.* Freeman, 17 Tex. Civ. App. 268, 43 S. W. 37.

c. Fraud. Fraud by which defendant was induced to enter into a contract sued on or otherwise tainting plaintiff's cause of action is a defense which must be set up when defendant has an opportunity to plead it, and if not asserted in due time, it will be barred by the judgment.[97]

d. Illegality of Claim or Contract. The same rule applies to a defense affecting the validity of the claim or contract in suit, as that it was founded on an illegal consideration, was contrary to public policy, or *ultra vires*, or was wrongfully acquired by plaintiff; these questions are concluded by the judgment if they might have been pleaded, whether they were or not.[98]

e. Agreement to Compromise. As a general rule an agreement to compromise a claim cannot be availed of if not pleaded in defense to an action on the claim.[99]

f. Payment. A defendant who omits to plead and prove a partial payment on the debt in suit is concluded by the judgment, and cannot afterward maintain

Virginia.— Simpson *v.* Dugger, 88 Va. 963, 14 S. E. 760.

United States.— Root *v.* Woolworth, 150 U. S. 401, 14 S. Ct. 136, 37 L. ed. 1123.

Canada.— Leinster *v.* Stabler, 17 U. C. C. P. 532.

See 30 Cent. Dig. tit. "Judgment," § 1132.

Constructive service on defendant.—Where, in a foreclosure suit, a party is joined as defendant, on the allegation that he claims some interest in the premises, but is served by publication only, the judgment will not operate to prevent him from afterward setting up a claim amounting to an adverse and paramount title. Provident Loan Trust Co. *v.* Marks, 6 Kan. App. 34, 49 Pac. 625.

Homestead.— A claim to a homestead in the property in litigation is one which must be asserted in the action, if the nature of the suit is such that it can be done, and cannot be reserved for future proceedings. Dodd *v.* Scott, 81 Iowa 319, 46 N. W. 1057, 25 Am. St. Rep. 492, 10 L. R. A. 360; Nichols *v.* Dibrell, 61 Tex. 539; Beer *v.* Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010.

Setting aside fraudulent conveyance.— In a suit against a judgment debtor and his two grantees to subject lands alleged to have been fraudulently conveyed, the grantees must set up all the defenses they have; and after a decree for complainant one of them cannot by a subsequent suit assert title to a part of the lands as a *bona fide* purchaser from the other, under a deed which he had received before the first suit was begun and which he failed to bring forward therein. Dowell *v.* Applegate, 152 U. S. 327, 14 S. Ct. 611, 38 L. ed. 463.

97. *California.*— Pavisich *v.* Bean, 48 Cal. 364.

Maryland.— Royston *v.* Horner, 86 Md. 249, 37 Atl. 718, 63 Am. St. Rep. 510.

Nebraska.— Gilmore *v.* Whiteman, 50 Nebr. 760, 70 N. W. 364.

Pennsylvania.— Rauwolf *v.* Glass, 184 Pa. St. 237, 39 Atl. 79.

South Carolina.— Pettus *v.* Smith, 4 Rich. Eq. 197.

Tennessee.— Arnold *v.* Kyle, 8 Baxt. 319.

United States.— McMullen *v.* Ritchie, 64 Fed. 253; Edmanson *v.* Best, 57 Fed. 531, 6 C. C. A. 471.

England.— *In re* Hilton, 67 L. T. Rep. N. S. 594, 9 Morr. Bankr. Cas. 286.

See 30 Cent. Dig. tit. "Judgment," §§ 1132, 1134.

Compare Myers *v.* Sander, 7 Dana (Ky.) 506.

In a mortgage foreclosure suit, fraud in the execution or procurement of the mortgage must be set up as a defense; whether alleged or not, it is *res judicata* in subsequent proceedings between the same parties or their privies. Flint *v.* Bodge, 10 Allen (Mass.) 128; Lewis *v.* Nenzel, 38 Pa. St. 222; Ruff *v.* Doty, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709.

98. Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45 (gambling contract); Gray *v.* Roberts, 2 A. K. Marsh. (Ky.) 208, 12 Am. Dec. 383 (contract contrary to public policy); Pitts *v.* Fugate, 41 Mo. 405 (illegal consideration); Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87 (indebtedness created by a county in excess of the constitutional limit); McMullen *v.* Ritchie, 64 Fed. 253 (suit on coupons alleged to have been taken from bonds before issue, and to have been surreptitiously acquired by plaintiff). But see Branham *v.* San Jose, 24 Cal. 585, where it was held that a city, which is the successor of a town, the council of which had illegally mortgaged its lands, is not estopped from setting up the invalidity of the mortgage, by being a party to former proceedings in which the foreclosure of the mortgage was ordered without objection.

99. Miller *v.* Bailey, 19 Oreg. 539, 25 Pac. 27; Henderson *v.* Moss, 82 Tex. 69, 18 S. W. 555; Smith *v.* Chilton, 84 Va. 840, 6 S. E. 142. But see Hunt *v.* Brown, 146 Mass. 253, 15 N. E. 587, holding that a debtor with whom his creditor has agreed to compromise on certain conditions, who fails to set up that agreement, after the conditions are performed, in an action on the debt, and suffers judgment for the full amount, is not estopped to sue on the agreement, since that was collateral, and, being executory merely, could not operate as a payment or satisfaction *pro tanto* of the debt.

a suit to recover back such payment,[1] the only exception to this rule being in cases where he was prevented from setting up the payment by fraud, accident, or surprise, without fault on his own part.[2]

g. Usury. It is generally held that a defendant who omits to plead usury in a suit on a note or other contract is barred from afterward setting it up as a defense or suing to recover the usurious interest paid or included in the judgment.[3] But there are some decisions to the contrary.[4]

h. Equitable Defenses. A decree in equity is conclusive of all defenses available to defendant, whether or not they were presented and litigated.[5] But a judgment at law will not conclude defenses which were of a purely equitable character and therefore not cognizable in the action at law,[6] except in those states

1. *Alabama.*— State *v.* McBride, 76 Ala. 51; Bobe *v.* Stickney, 36 Ala. 482; Mitchell *v.* Sanford, 11 Ala. 695; Broughton *v.* McIntosh, 1 Ala. 103; De Sylva *v.* Henry, 3 Port. 132.

Iowa.— Wright *v.* Leclaire, 3 Iowa 221.

Kentucky.— Callahan *v.* Murrell, 45 S. W. 67, 20 Ky. L. Rep. 28.

Maine.— Fuller *v.* Eastman, 81 Me. 284, 17 Atl. 67; Hagar *v.* Springer, 60 Me. 436; Baker *v.* Stinchfield, 57 Me. 363; Footman *v.* Stetson, 32 Me. 17, 52 Am. Dec. 634.

Massachusetts.— Fuller *v.* Shattuck, 13 Gray 70, 74 Am. Dec. 622; Sacket *v.* Loomis, 4 Gray 148; Loring *v.* Mansfield, 17 Mass. 394. These decisions overrule the earlier cases of Rowe *v.* Smith, 16 Mass. 306; Fowler *v.* Shearer, 7 Mass. 14.

Mississippi.— Williams *v.* Jones, 10 Sm. & M. 108.

Missouri.— Greenabaum *v.* Elliott, 60 Mo. 25.

New Hampshire.— Tilton *v.* Gordon, 1 N. H. 33.

New York.— Binck *v.* Wood, 43 Barb. 315; Weiser *v.* Weiser, 53 N. Y. Suppl. 578; Walker *v.* Ames, 2 Cow. 428; Loomis *v.* Pulver, 9 Johns. 244. The case of Smith *v.* Weeks, 26 Barb. 463, must be regarded as overruled by the foregoing decisions.

Ohio — Swenson *v.* Cresop, 28 Ohio St. 668.

Pennsylvania.— Ahl's Estate, 169 Pa. St. 609, 32 Atl. 621; Lawrence's Estate, 169 Pa. St. 185, 32 Atl. 406.

South Carolina.— Davis *v.* Murphy, 2 Rich. 560, 45 Am. Dec. 749.

Tennessee.— Kirklan *v.* Brown, 4 Humphr. 174, 40 Am. Dec. 635.

Vermont.— Corey *v.* Gale, 13 Vt. 639.

West Virginia.— Sayre *v.* Harpold, 33 W. Va. 553, 11 S. E. 16.

England.— Cadaval *v.* Collins, 4 A. & E. 858, 31 E. C. L. 376.

See 30 Cent. Dig. tit. "Judgment," § 1132.

Contra.— Woodward *v.* Hill, 6 Wis. 143.

2. Doyle *v.* Reilly, 18 Iowa 108, 85 Am. Dec. 582.

3. *Connecticut.*— Betts *v.* Starr, 5 Conn. 550, 13 Am. Dec. 94.

Illinois.— Lagerquist *v.* Williams, 74 Ill. App. 17.

Iowa.— Philips *v.* Gephart, 53 Iowa 396, 5 N. W. 683.

New York.— Reich *v.* Cochran, 151 N. Y. 122, 45 N. E. 367, 56 Am. St. Rep. 607, 37 L. R. A. 805; Davidson *v.* Weed, 20 Misc. 147, 45 N. Y. Suppl. 718.

Pennsylvania.— Montague *v.* McDowell, 99 Pa. St. 265.

Texas.— Henry *v.* Sansom, 2 Tex. Civ. App. 150, 21 S. W. 69.

West Virginia.— Snyder *v.* Middle States Loan, etc., Co., 52 W. Va. 655, 44 S. E. 250; Tracey *v.* Shumate, 22 W. Va. 474.

Wisconsin.— Heath *v.* Frackleton, 20 Wis. 320, 91 Am. Dec. 405.

See 30 Cent. Dig. tit. "Judgment," §§ 1133, 1134.

4. Chinn *v.* Mitchell, 2 Metc. (Ky.) 92; Wetherell *v.* Stewart, 35 Minn. 496, 29 N. W. 196; Wood *v.* Todd, 3 Baxt. (Tenn.) 89. And see Edinburgh L. Assur. Co. *v.* Clark, 10 U. C. C. P. 351.

5. Parnell *v.* Hahn, 61 Cal. 131; Oliver *v.* Oliver, 179 Ill. 9, 53 N. E. 304; Painter *v.* Hogue, 48 Iowa 426; Simpson *v.* Dugger, 88 Va. 963, 14 S. E. 760.

6. *Alabama.*— Stevens *v.* Hertzler, 114 Ala. 563, 22 So. 121.

California.— Hills *v.* Sherwood, 48 Cal. 386; Hough *v.* Waters, 30 Cal. 309; Lorraine *v.* Long, 6 Cal. 452. Where in an action an equitable defense is dismissed without being presented to the court, a judgment therein is not a bar to a subsequent action, begun in due time, embracing the subject-matter of such equitable defense. McCreary *v.* Casey, 45 Cal. 128.

Georgia.— Waters *v.* Perkins, 65 Ga. 32.

Michigan.— Petrie *v.* Badenoch, 102 Mich. 45, 60 N. W. 449, 47 Am. St. Rep. 503; Bush *v.* Merriman, 87 Mich. 260, 49 N. W. 567; Nims *v.* Vaughn, 40 Mich. 356.

Mississippi.— Moshy *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

North Carolina.— Mauney *v.* Hamilton, 132 N. C. 303, 43 S. E. 903. *Compare* Tuttle *v.* Harrill, 85 N. C. 456.

Oregon.— McMahan *v.* Whelan, 44 Oreg. 402, 75 Pac. 715; Hill *v.* Cooper, 6 Oreg. 181.

South Dakota.— Cassill *v.* Morrow, 13 S. D. 109, 82 N. W. 418.

Texas.— Owens *v.* Heidbreder, (Civ. App. 1898) 44 S. W. 1079.

United States.— People's Pure Ice Co. *v.* Trumbull, 70 Fed. 166, 17 C. C. A. 43; Tompkins *v.* Drennen, 56 Fed. 694, 6 C. C. A. 83; Hawkins *v.* Wills, 49 Fed. 506, 1 C. C. A. 339.

See 30 Cent. Dig. tit. "Judgment," § 1135.

where the blending of law and equity permits all defenses, of whatever character, to be set up in an action at law.[7]

3. Set-Off or Counter-Claim — a. Set-Off Barred by Former Judgment. One who brings suit on a claim, demand, or cause of action is estopped by the judgment therein from pleading the same matter as a set-off or counter-claim in a subsequent action brought against him by the former defendant, whether the former judgment was rendered against him, in which case it is conclusive,[8] or was in his favor, in which case the claim is merged in it,[9] or whether the former action was for a part only of a demand or claim not properly severable, in which case the rule against splitting causes of action applies.[10]

b. Set-Off Pleaded and Adjudicated. If a defendant, having a demand against plaintiff, pleads it as a set-off or counter-claim in the action, he must make the most of his opportunity and exhibit his whole damage, for the judgment in the action will prevent him from afterward using the same matter, or any part of it, as a separate cause of action against the former plaintiff,[11] or as a defense or

7. Fowler *v.* Atkinson, 6 Minn. 503; Winfield *v.* Bacon, 24 Barb. (N. Y.) 154; Foot *v.* Sprague, 12 How. Pr. (N. Y.) 355.

8. *Colorado.*— Worrel *v.* Smith, 6 Colo. 141.

Illinois.— Litch *v.* Clinch, 136 Ill. 410, 26 N. E. 579.

Indiana.— Nave *v.* Wilson, 33 Ind. 294.

Kentucky.— Campbell *v.* Mayhugh, 15 B. Mon. 142.

Massachusetts.— Stevens *v.* Miller, 13 Gray 283; Jones *v.* Richardson, 5 Metc. 247.

Missouri.— Union R., etc., Co. *v.* Traube, 59 Mo. 355.

See 30 Cent. Dig. tit. "Judgment," § 1136.

9. O'Connor *v.* Varney, 10 Gray (Mass.) 231; Andrews *v.* Varrell, 46 N. H. 17; Conover *v.* Scott, 11 N. J. L. 400; Smiley *v.* Dewey, 17 Ohio 156.

10. Miller *v.* Covert, 1 Wend. (N. Y.) 487.

11. *Alabama.*— McLane *v.* Miller, 12 Ala. 643. See Vincent *v.* Rogers, 33 Ala. 224.

Dakota.— Thompson *v.* Schuster, 4 Dak. 163, 28 N. W. 858.

Georgia.— Brown *v.* Everett-Ridley-Ragan Co., 111 Ga. 404, 36 S. E. 813.

Illinois.— Barnes *v.* Huffman, 113 Ill. App. 226; Miller *v.* Ticker, 14 Ill. App. 558.

Iowa.— Mum *v.* Shannon, 86 Iowa 363, 53 N. W. 263; Gunsaulis *v.* Cadwallader, 48 Iowa 48.

Maine.— Smith *v.* Berry, 37 Me. 298.

Massachusetts.— Sargent *v.* Fitzpatrick, 4 Gray 511; Burnett *v.* Smith, 4 Gray 50; White *v.* Dingley, 4 Mass. 433.

Missouri.— Thompson *v.* Wineland, 11 Mo. 243.

New Hampshire.— Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713.

New York.— Inslee *v.* Hampton, 11 Hun 156; Rogers *v.* Rogers, 1 Daly 194; Conkling *v.* Secor Sewing Mach. Co., 55 How. Pr. 269; Vanderbilt *v.* Vanderbilt, 54 How. Pr. 250.

Ohio.— Bell *v.* McColloch, 31 Ohio St. 397.

Pennsylvania.— Cox *v.* Hartranft, 154 Pa. St. 457, 26 Atl. 304; Boland *v.* Spitz, 153 Pa. St. 590, 26 Atl. 22; Simes *v.* Zane, 24 Pa. St. 242.

South Carolina.— Smith *v.* Smith, 1 Rich. Eq. 130.

Wisconsin.— Dorer *v.* Hood, 113 Wis. 607, 88 N. W. 1009; Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614.

United States.— Clement *v.* Field, 147 U. S. 467, 13 S. Ct. 358, 37 L. ed. 244; Smith *v.* U. S., 11 Ct. Cl. 707; Watkins *v.* American Nat. Bank, 134 Fed. 36, 67 C. C. A. 110.

England.— Danks *v.* Harley, 1 Wkly. Rep. 291.

See 30 Cent. Dig. tit. "Judgment," §§ 1083, 1084, 1085, 1136.

Set-off improperly pleaded.—Where a claim is pleaded as a set-off which is not properly available as such, but is submitted to the jury and passed on by them on the evidence, it cannot be again brought up in a suit by the party so pleading it; and if it is, the former judgment may be pleaded in bar. Wilder *v.* Case, 16 Wend. (N. Y.) 583; Skelding *v.* Whitney, 3 Wend. (N. Y.) 154. But *compare* Wolfe *v.* Washburn, 6 Cow. (N. Y.) 261.

Matter pleaded as defense only.— There is some authority for the statement that if a fact or state of facts be set up in the first action merely as a defense, and not as the foundation of a claim for affirmative relief, the judgment will not prevent the same matter from being used as a counter-claim in a subsequent suit. Osborne *v.* Williams, 39 Minn. 353, 40 N. W. 165. And see Gordon *v.* Van Cott, 38 N. Y. App. Div. 564, 56 N. Y. Suppl. 554. But the preponderance of authority is to the contrary. Bierer *v.* Fretz, 37 Kan. 27, 14 Pac. 558; O'Connor *v.* Varney, 10 Gray (Mass.) 231 (where the court said: "He cannot use the same defence, first as a shield, and then as a sword."); Patrick *v.* Shaffer, 94 N. Y. 423. And see *supra*, XIII, D, 1, e.

Part of claims withheld.— Some of the authorities countenance the view that some of the items of a counter-claim may be withheld from consideration, and afterward used as a cause of action or as a set-off. Smith *v.* Berry, 37 Me. 298.

Presumption.— It will be presumed that matters of set-off to a judgment, which occurred before its rendition, were included in the judgment, although such presumption

counter-claim in any subsequent action between them,[12] and if a verdict is found against defendant on his plea of set-off, it finally disposes of the matters so pleaded for the purposes of all future actions between the same parties.[13]

c. Available Set-Off Not Pleaded in Former Action. As a general rule, where a defendant has an independent claim against plaintiff, such as might be either the basis of a separate action or might be pleaded as a set-off or counter-claim, he is not obliged to plead it in plaintiff's action, although he is at liberty to do so; and if he omits to set it up in that action, this will not preclude him from afterward suing plaintiff upon it.[14] But this rule does not apply where the subject-matter of the set-off or counter-claim was involved and adjudicated in the former action in such wise that the judgment therein necessarily negatives the facts on

may be removed by proof to the contrary. Carter *v.* Hanna, 2 Ind. 45.

12. Rich *v.* Davis, 6 Cal. 141; Newman *v.* Gates, (Ind. App. 1903) 67 N. E. 468; Witlow *v.* Suarez, 46 La. Ann. 715, 15 So. 89; Hatch *v.* Benton, 6 Barb. (N. Y.) 28.

13. *Alabama.*— South, etc., Alabama R. Co. *v.* Henlein, 56 Ala. 368.

California.— Reed *v.* Cross, 116 Cal. 473, 48 Pac. 491.

Louisiana.— Glaude *v.* Peat, 43 La. Ann. 161, 8 So. 884.

Maine.— Smith *v.* Abbott, 40 Me. 442.

Nebraska.— Latta *v.* Visel, 37 Nebr. 612, 56 N. W. 311.

New York.— Wright *v.* Miller, 147 N. Y. 362, 41 N. E. 698.

North Carolina.— Evans *v.* Cumberland Mills, 118 N. C. 583, 24 S. E. 215.

Ohio.— Dougherty *v.* Cummings, 9 Ohio Cir. Ct. 718, 6 Ohio Cir. Dec. 714.

Texas.— Bemus *v.* Donigan, 18 Tex. Civ. App. 125, 43 S. W. 1052; Lewis *v.* Smith, (Civ. App. 1897) 43 S. W. 294; Hoefling *v.* Dobbin, (Civ. App. 1897) 40 S. W. 58.

Vermont.— Tillison *v.* Tillison, 63 Vt. 411, 22 Atl. 531; Peach *v.* Mills, 14 Vt. 371.

Wisconsin.— New London Bank *v.* Ketchum, 66 Wis. 428, 29 N. W. 216; Evans *v.* Ely, 55 Wis. 194, 12 N. W. 372.

United States.— Janney *v.* Smith, 13 Fed. Cas. No. 7,214, 2 Cranch C. C. 499.

England.— Eastmure *v.* Laws, 2 Arn. 54, 5 Bing. N. Cas. 444, 7 Dowl. P. C. 431, 3 Jur. 460, 8 L. J. C. P. 236, 7 Scott 461, 35 E. C. L. 241.

See 30 Cent. Dig. tit. "Judgment," § 1084.

14. *Alabama.*— Weaver *v.* Brown, 87 Ala. 533, 6 So. 354; Robbins *v.* Harrison, 31 Ala. 160; De Sylva *v.* Henry, 3 Port. 132; Garrow *v.* Carpenter, 1 Port. 359.

Arkansas.—Beaty *v.* Johnston, 66 Ark. 529, 52 S. W. 129.

California.— Hobbs *v.* Duff, 23 Cal. 596.

Connecticut.— Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637.

Georgia.— Johnson *v.* Reeves, 112 Ga. 690, 37 S. E. 980.

Illinois.— Smith *v.* Rountree, 185 Ill. 219, 56 N. E. 1130; Chicago, etc., R. Co. *v.* Field, 86 Ill. 270; Sheetz *v.* Baker, 38 Ill. App. 349.

Indiana.— Wright *v.* Anderson, 117 Ind. 349, 20 N. E. 247; Axtel *v.* Chase, 83 Ind. 546; Gates *v.* Newman, 18 Ind. App. 392, 46 N. E. 654; Manchester F. Assur. Co. *v.* Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231; Indiana Farmers' Live Stock Ins. Co. *v.* Stratton, 4 Ind. App. 566, 31 N. E. 380. *Compare* Morarity *v.* Calloway, 134 Ind. 503, 34 N. E. 226.

Iowa.— Jones *v.* Witousek, 114 Iowa 14, 86 N. W. 59; Savery *v.* Sypher, 39 Iowa 675; Fairfield *v.* McNany, 37 Iowa 75. Code, § 3440, provides that a judgment shall not prevent the recovery of any claim, although such claim might have been used by way of counter-claim in the action in which the judgment was recovered.

Kentucky.— Emmerson *v.* Herriford, 8 Bush 229; City Nat. Bank *v.* Gardner, 5 Ky. L. Rep. 682. *Compare* Rogers *v.* Wiggs, 12 B. Mon. 504.

Louisiana.— Mandell *v.* Stephens, 9 Rob. 491; Downing *v.* Delassize, 13 La. 256; Commercial Bank *v.* New Orleans, 11 La. 213; Richardson *v.* Gurney, 9 La. 285; Delahoussaye *v.* Julice, 6 Mart. N. S. 251.

Massachusetts.— Minor *v.* Walter, 17 Mass. 237.

Michigan.— Seventh Day Adventist Pub. Assoc. *v.* Fisher, 95 Mich. 274, 54 N. W. 759; Nichols *v.* Marsh, 61 Mich. 509, 28 N. W. 699; Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170; McEwen *v.* Bigelow, 40 Mich. 215.

Missouri.— Patillo *v.* Martin, 107 Mo. App. 653, 83 S. W. 1010; Mason *v.* Summers, 24 Mo. App. 174.

Nebraska.— Uppfalt *v.* Woermann, 30 Nebr. 189, 46 N. W. 419.

New Hampshire.— Parsons *v.* Crawford, 64 N. H. 23, 3 Atl. 632; Metcalf *v.* Gilmore, 63 N. H. 174.

New Jersey.— Baldwin *v.* Woodbridge, etc., Engineering Co., 59 N. J. L. 317, 36 Atl. 683; Longstreet *v.* Phile, 39 N. J. L. 63.

New York.— Brown *v.* Gallaudet, 80 N. Y. 413; Reiner *v.* Jones, 38 N. Y. App. Div. 441, 56 N. Y. Suppl. 423; Smith *v.* Weeks, 26 Barb. 463; Potter *v.* Gates, 2 Silv. Sup. 389, 9 N. Y. Suppl. 87; Halsey *v.* Carter, 1 Duer 667; Frost *v.* McGinnis, 15 Daly 113, 3 N. Y. Suppl. 241; Cuff *v.* Heine, 26 Misc. 859, 56 N. Y. Suppl. 393; Weston *v.* Turner, 8 N. Y. St. 296; Culver *v.* Barney, 14 Wend. 161; Moore *v.* Davis, 11 Johns. 144; Dean *v.* Allen, 8 Johns. 390; Allen *v.* Horton, 7 Johns. 23. *Compare* Ritchie *v.* Talcott, 10 Misc. 412, 31 N. Y. Suppl. 196; Collyer *v.* Collins, 17 Abb. Pr. 467; McKerras *v.* Gardner, 3 Johns. 137.

which defendant would have to rely in order to establish his demand.[15] And in several states the statutes now provide that if the demand or cross claim arises out of the transaction set forth in the complaint as the foundation of plaintiff's action, or is connected with the subject of the action, defendant must present it as a set-off, or forfeit his right to claim relief upon it;[16] and in some all matters available as a set-off or counter-claim must be presented by defendant, in answer to plaintiff's action, where the suit is before a justice of the peace,[17] except where

North Carolina.— Shankle *v.* Whitley, 131 N. C. 168, 42 S. E. 574; Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. C. 425.

Rhode Island.— Dewsnap *v.* Davidson, 18 R. I. 98, 26 Atl. 902.

South Carolina.— Rabb *v.* Patterson, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 473; Rowand *v.* Fraser, 1 Rich. 325.

Texas.— Norton *v.* Wochler, 31 Tex. Civ. App. 522, 72 S. W. 1025; Mayfield Lumber Co. *v.* Carver, 27 Tex. Civ. App. 467, 66 S. W. 216.

Vermont.— Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620; Taggart *v.* Rice, 37 Vt. 47. But see Kenney *v.* Howard, 67 Vt. 375, 31 Atl. 850.

Virginia.— Danner *v.* Frederick, 82 Va. 414, 5 S. E. 537; Ragsdale *v.* Hagy, 9 Gratt. 409.

West Virginia.— Kennedy *v.* Divisson, 46 W. Va. 433, 33 S. E. 291. But *compare* Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; Wandling *v.* Straw, 25 W. Va. 692; Hunter *v.* Stewart, 23 W. Va. 549.

United States.— Brown *v.* Newton First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293; Fitzhugh *v.* McKinney, 43 Fed. 461; Robinson *v.* Wiley, 20 Fed. Cas. No. 11,968*a*, 1 Hempst. 38. *Compare* Langston *v.* U. S., 26 Ct. Cl. 256.

England.— Davis *v.* Hedges, L. R. 6 Q. B. 687, 40 L. J. Q. B. 276, 25 L. T. Rep. N. S. 155, 20 Wkly. Rep. 60; Sintzenick *v.* Lucas, 1 Esp. 43.

See 30 Cent. Dig. tit. "Judgment," §§ 1084, 1085, 1136.

Exception as to ejectment.— In some states it is held that if defendant in ejectment has a claim against plaintiff for buildings or other improvements put by him upon the land, he must assert it in that action, and if he omits to do so, he cannot afterward bring an independent suit for the value of such improvements or be relieved in equity. Doak *v.* Wiswell, 33 Me. 355; Gaines *v.* Kennedy, 53 Miss. 103. And see Raymond *v.* Ross, 40 Ohio St. 343.

Submission of all matters in difference.— In case of a submission to arbitration of "all matters in difference," both parties are required to bring forward all their claims or demands against each other, and neither is at liberty to reserve any available claim or demand to be afterward used as a set-off or cause of action. Smith *v.* Johnson, 15 East 213, 13 Rev. Rep. 449.

15. "Where judgment goes against the defendant, and he afterwards sues the plaintiff on a cross-claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action, or in direct opposition to them, the former judgment is a bar. In other words, if the way to his own recovery lies through a negation of the facts alleged by the plaintiff, that negation must be made good when the facts are first set up. For afterwards he cannot deny what the judgment affirms to be true. But if, out of the same transaction or state of facts, each party may acquire a right of action,— so that the facts on which the plaintiff recovered may very well be true and yet the facts on which the defendant seeks to recover may be equally true,— then the former judgment is not a bar to the maintenance of the present suit." 2 Black Judgm. § 767. And see the following cases:

Indiana.— Reichert *v.* Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835.

New York.— Calrow *v.* Watson, 6 N. Y. St. 610.

Pennsylvania.— Armstrong *v.* Johnson, 2 Chest. Co. Rep. 64.

Texas.— Murphy *v.* Wallace, 3 Tex. App. Civ. Cas. § 432.

Vermont.— Gilson *v.* Bingham, 43 Vt. 410, 5 Am. Rep. 289.

Wisconsin.— Driscoll *v.* Damp, 17 Wis. 419.

See 30 Cent. Dig. tit. "Judgment," §§ 1084, 1085.

Usury.— An action for the recovery of usurious interest paid is barred by the recovery of a judgment on the note, bond, or other instrument. Dey *v.* Jackson, 39 N. J. L. 535; Schroeppel *v.* Corning, 10 Barb. (N. Y.) 576; Grow *v.* Albee, 19 Vt. 540. And see *supra*, E, 2, g.

16. Brosnan *v.* Kramer, 135 Cal. 36, 66 Pac. 979. A former statute of this state making a provision such as that stated in the text was held to be no longer in force. Douglas *v.* Hastings First Nat. Bank, 17 Minn. 35; Weiser *v.* Kling, 38 N. Y. App. Div. 266, 57 N. Y. Suppl. 48; Davis *v.* Aikin, 85 Hun (N. Y.) 554, 33 N. Y. Suppl. 103. See Fitzhugh *v.* McKinney, 43 Fed. 461.

17. Lathrop *v.* Hayes, 57 Ill. 279; Morton *v.* Bailey, 2 Ill. 213, 27 Am. Dec. 767; Johnson *v.* Pennington, 15 N. J. L. 188; Henry *v.* Milham, 13 N. J. L. 266; Righter *v.* Van Riper, 3 N. J. L. 715; Douglas *v.* Hoag, 1 Johns. (N. Y.) 283; Shoup *v.* Shoup, 15 Pa. St. 361; Herring *v.* Adams, 5 Watts & S. (Pa.) 459; Walsh *v.* Greenwood, 2 Pa. Dist. 64; Light *v.* Ringler, 1 Pa. Co. Ct. 156; White *v.* Johnson, 2 Ashm. (Pa.) 146; Slyhoof *v.* Flitcraft, 1 Ashm. (Pa.) 171; Arm-

the cross demand would exceed the jurisdiction of the justice,[18] or consists in a claim for unliquidated damages.[19] But in any case where the nature of plaintiff's claim is such that defendant's affirmative matter could not properly be pleaded by way of set-off, the judgment will not preclude him from bringing a separate action.[20]

d. Counter-Claim Not Adjudicated. A party is not barred from suing on a claim or demand because he pleaded it as a set-off in a former action, if it was not adjudicated or allowed in such action in consequence of being excluded or rejected by the court,[21] or voluntarily withdrawn by defendant himself.[22]

e. Voluntary Allowance of Credit or Counter-Claim. If a plaintiff, in making up his case, voluntarily allows credit to defendant for claims or items which might be set up by way of set-off or counter-claim, and obtains a judgment by default, it does not prevent defendant from showing in a subsequent action that he was not credited with the full value of such items or claims, and recovering the excess;[23] otherwise if the action was contested or the judgment was settled by offer and acceptance.[24]

strong *v.* Johnson, 2 Chest. Co. Rep. (Pa.) 64; Sample *v.* Crumptey, 13 Leg. Int. (Pa.) 85. See Axtell's Appeal, 3 Pa. Cas. 488, 6 Atl. 560.

18. Sipley *v.* Wass, 47 N. J. L. 187; Babcock *v.* Peck, 4 Den. (N. Y.) 292; Devinny *v.* Jelly, Tapp. (Ohio) 159; Simpson *v.* Lapsley, 3 Pa. St. 459; Gillum *v.* Kahnweiler, 2 Pa. Dist. 656.

19. Bush *v.* Kindred, 20 Ill. 93. And see Lamkin *v.* Burnett, 7 Ill. App. 143.

20. Parker *v.* Albee, 86 Iowa 46, 52 N. W. 533; Gay *v.* Riehmann Mantel Co., 53 N. Y. App. Div. 507, 65 N. Y. Suppl. 964; McMichael *v.* McFalls, 23 Pa. Super. Ct. 256.

21. *Alabama.*—Haas *v.* Taylor, 80 Ala. 459, 2 So. 633.

California.— Hobbs *v.* Duff, 23 Cal. 596.

Indiana.— Gates *v.* Newman, 18 Ind. App. 392, 46 N. E. 654.

Maryland.— Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965; Garrott *v.* Johnson, 11 Gill & J. 173, 35 Am. Dec. 272.

Massachusetts.— Clapp *v.* Thomas, 5 Allen 158.

Michigan.— Fifield *v.* Edwards, 39 Mich. 264.

New York.—De Graaf *v.* Wyckoff, 118 N. Y. 1, 22 N. E. 1118; Ives *v.* Goddard, 1 Hilt. 434; Beebe *v.* Bull, 12 Wend. 504, 27 Am. Dec. 150.

Pennsylvania.— Goodhart *v.* Bishop, 142 Pa. St. 416, 21 Atl. 876; Thropp *v.* Susquehanna Mut. F. Ins. Co., 125 Pa. St. 427, 17 Atl. 473, 11 Am. St. Rep. 909.

Virginia.— Niday *v.* Harvey, 9 Gratt. 454.

United States.— Central Trust Co. *v.* Clark, 81 Fed. 269, 26 C. C. A. 397.

See 30 Cent. Dig. tit. "Judgment," §§ 1084, 1136.

Grounds of rejection.— The rule stated in the text applies, not only where the set-off was excluded because not proper matter of set-off in such an action, but also where it was so ill pleaded that it could not be considered (Maillet *v.* Martin, 7 La. Ann. 635), where it was dismissed because defendant failed to present any proof in support of it (Jarvis *v.* New York House Wrecking Co., 84 N. Y. Suppl. 191), where he failed to appear at the trial (Litch *v.* Clinch, 35 Ill. App. 654; Anderson *v.* Rogge, (Tex. Civ. App. 1894) 28 S. W. 106), where the subject of his counter-claim was a debt not yet due (Crabtree *v.* Welles, 19 Ill. 55), and where he attempted to split up an indivisible claim into several portions, so as to bring a fragment of it within the jurisdiction of the court in which the action was brought (Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344). But if the set-off is well pleaded, is supported by evidence, and is submitted to the jury, and passed upon by them, the judgment will be a bar to any further prosecution of the same claim, although the jury decided not to allow it. Baker *v.* Stinchfield, 57 Me. 363.

22. McDonald *v.* Christie, 42 Barb. (N. Y.) 36; Muirhead *v.* Kirkpatrick, 2 Pa. St. 425.

Note used as evidence instead of counter-claim.— Where, in an action against the estate of a decedent to recover a sum of money, a note of plaintiff to the decedent for a much less sum than that sought to be recovered was introduced in evidence, but it did not appear to have been used as an offset or counter-claim, it was not discharged by any judgment or determination in favor of plaintiff. Leask *v.* Dew, 102 N. Y. App. Div. 529, 92 N. Y. Suppl. 891.

23. Minor *v.* Walter, 17 Mass. 237; McEwen *v.* Bigelow, 40 Mich. 215; Moloney *v.* Davis, 48 Pa. St. 512; Kauff *v.* Messner, 4 Brewst. (Pa.) 98; Kennedy *v.* Davisson, 46 W. Va. 433, 33 S. E. 291.

Full value credited.— A judgment by default, upon an account in which defendant is credited with the full value of certain items, will bar an action by him for the same items. Briggs *v.* Richmond, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; Minor *v.* Walter, 17 Mass. 237; Hudelmeyer *v.* Hughes, 13 Mo. 87.

24. Abbott *v.* Stevens, 117 Mass. 340; Loring *v.* Mansfield, 17 Mass. 394; Kafka *v.* Simon, 3 Oreg. 555. And see Hermann *v.* Schwartz Bros. Commission Co., 59 Mo. App. 649, holding that a judgment recovered on an account, in which the judgment debtor is

f. Cause of Action in One Suit as Counter-Claim in Another. When a claim of defendant against decedent's estate was after litigation allowed in part and paid, such allowance is a complete bar to a claim for the same services, as a counter-claim in a mortgage foreclosure by such estate against defendant.[25]

4. Cross Actions — a. In General. Where separate causes of action accrue to the parties out of the same transaction or state of facts, cross actions may be maintained, and neither will bar the other, provided the facts necessary to authorize a recovery in one action are not contrary to or inconsistent with those required to sustain a judgment in the other.[26]

b. Action For Price of Goods and Cross Action For Breach of Warranty. The purchaser of goods, when sued for the price, has his election to plead a breach of warranty in reduction of damages, or to bring a cross action; and if he chooses the latter course his action will not be barred by the recovery of judgment for the price.[27] But if he sets up the breach of warranty as a counter-claim or ground of recoupment in the first action, he cannot afterward sue on it as an independent cause of action.[28] Conversely, where an action for the breach of warranty is first brought, the vendor has his option to claim the purchase-price by way of set-off or recoupment, or to reserve it as the basis of a subsequent action.[29]

c. Action For Services and Cross Action For Negligence. Although there are some decisions to the contrary,[30] the probable weight of authority is that a recovery of judgment for the value of services rendered is no bar to a subsequent action for damages for the negligent or unskilful performance of the same services; as

credited with a certain amount as being due from him to a third person, is a bar to a subsequent action by the judgment creditor against the debtor to recover that amount, on the claim that it has not in fact been paid by the debtor.

25. Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614.

26. *Massachusetts.*— Riley *v.* Hale, 158 Mass. 240, 33 N. E. 491.

Missouri.— Lyman *v.* Milwaukee Harvester Co., 68 Mo. App. 637.

New Jersey.— Conine *v.* Scoby, 5 N. J. L. 510.

Pennsylvania.— Schwan *v.* Kelly, 173 Pa. St. 65, 33 Atl. 1107.

United States.— Thayer *v.* Kansas L. & T. Co., 100 Fed. 901, 41 C. C. A. 106.

Carriage of goods.— A judgment in favor of a carrier, in an action by him to recover freight, is a bar to an action by the owner of the goods shipped to recover damages for the destruction of the property, caused by a failure of the carrier to perform his contract of transportation; because if the goods were destroyed the shipper would not be liable for freight, so the facts authorizing recovery in the two actions would be inconsistent. Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570.

Recovery for work and labor.— A recovery of the price stipulated to be paid for certain work and labor is no bar to an action for damages for failure to complete the work within the limited time, or for negligent performance of it. Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620. And see Minnaugh *v.* Partlin, 67 Mich. 391, 34 N. W. 717; Foster *v.* Milliner, 50 Barb. (N. Y.) 385.

Recovery of over-payment.— Where a purchaser of goods, having paid for them partly in cash and partly by his note, discovered that he had paid for more than he had received, but suffered the recovery of a judgment against him on the note, and afterward brought an action to recover back the amount overpaid, the action was sustained. Whitcomb *v.* Williams, 4 Pick. (Mass.) 228.

27. *Massachusetts.*— Bodurtha *v.* Phelon, 13 Gray. 413. And see Gilmore *v.* Williams, 162 Mass. 351, 38 N. E. 976.

Minnesota.— Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156.

New Hampshire.— Parker *v.* Roberts, 63 N. H. 431; Bascom *v.* Manning, 52 N. H. 132.

Texas.— Standefer *v.* Aultman, etc., Mach. Co., 34 Tex. Civ. App. 160, 78 S. W. 552.

England.— Davis *v.* Hedges, L. R. 6 Q. B. 687, 40 L. J. Q. B. 276, 25 L. T. Rep. N. S. 155, 20 Wkly. Rep. 60; Mondel *v.* Steel, 1 Dowl. P. C. N. S. 1, 10 L. J. Exch. 426, 8 M. & W. 858; Rigg *v.* Buridge, 15 L. J. Exch. 309, 16 M. & W. 598.

Contra.— Davis *v.* Tallcott, 12 N. Y. 184; American Grocery Co. *v.* Pirkl, 25 Misc. (N. Y.) 727, 55 N. Y. Suppl. 606; Gilson *v.* Bingham, 43 Vt. 410, 5 Am. Rep. 289.

28. Earl *v.* Bull, 15 Cal. 421; Barth *v.* Burt, 43 Barb. (N. Y.) 628; Cook *v.* Moseley, 13 Wend. (N. Y.) 277; Timmons *v.* Dunn, 4 Ohio St. 680; Huff *v.* Broyles, 26 Gratt. (Va.) 283.

29. Barker *v.* Cleveland, 19 Mich. 230.

30. Merriam *v.* Woodcock, 104 Mass. 326; Blair *v.* Bartlett, 75 N. Y. 150, 31 Am. Rep. 455; Gates *v.* Preston, 41 N. Y. 113; White *v.* Merritt, 7 N. Y. 352, 57 Am. Dec. 527; Deane *v.* Loucks, 58 Hun (N. Y.) 555, 12

where a physician or surgeon recovers for his professional services and is afterward sued for malpractice.[31] But if the negligence or want of skill is set up in defense to an action for the services, or as a counter-claim therein, a judgment for plaintiff will bar any subsequent action for damages,[32] and the defense of malpractice is barred by a judgment on the merits rendered for a surgeon in a suit against him by the patient for the same alleged malpractice.[33]

F. Who May Take Advantage of the Bar[34] — **1. In General — a. Parties and Privies.** A former judgment can be pleaded as a bar only by those who were parties to the action in which it was rendered,[35] or who are in privity with such parties.[36] All persons who were parties of record, and participated in the prosecution or defense of the action, are estopped by the decision in the cause,[37] even though they are not personally included in the judgment.[38] But it is theoretically impossible that a defendant should be required to pay the same claim twice; and therefore he may defend an action against him by the creditor by showing that he had previously suffered judgment at the suit of one acting for or in behalf of such creditor, as an agent, a receiver, or a trustee.[39]

b. Strangers. Strangers to a record, neither parties thereto nor in privity

N. Y. Suppl. 903; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534; Edwards *v.* Stewart, 15 Barb. (N. Y.) 67.

31. *Michigan.*— Mimnaugh *v.* Partlin, 67 Mich. 391, 34 N. W. 717.

Minnesota.— Jordahl *v.* Berry, 72 Minn. 119, 75 N. W. 10, 71 Am. St. Rep. 469, 45 L. R. A. 541.

Ohio.— Sykes *v.* Bonner, 1 Cinc. Super. Ct. 464.

Tennessee.— Sale *v.* Eichberg, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894.

West Virginia.— Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

Wisconsin.— Ressequie *v.* Byers, 52 Wis. 650, 9 N. W. 779, 38 Am. Rep. 775.

32. South, etc., Alabama R. Co. *v.* Henlein, 56 Ala. 368; McNicholas *v.* Lake, 13 Colo. App. 164, 56 Pac. 987; Howell *v.* Goodrich, 69 Ill. 556; Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308.

33. Haynes *v.* Ordway, 58 N. H. 167.

34. Dismissal as to part of defendants see *supra*, XIII, C, 7, g.

Persons concluded by judgment see *infra*, XIV, B.

Persons who may attack judgment collaterally see *supra*, XI, D, 2.

Persons who may take advantage of bar by foreign judgment see *infra*, XXII, B, 2, d.

Pleading and evidence of judgment as estoppel or defense see *infra*, XXI.

35. Chadbourn *v.* Rahilly, 34 Minn. 346, 25 N. W. 633.

36. *California.*— Hibernia Sav., etc., Soc. *v.* London, etc., F. Ins. Co., 138 Cal. 257, 71 Pac. 334.

Georgia.— Garlington *v.* Fletcher, 111 Ga. 861, 36 S. E. 920, purchaser at sheriff's sale is in privity with plaintiff in execution.

Iowa.— Collins *v.* Jennings, 42 Iowa 447.

New Jersey.— Scott *v.* Hall, 60 N. J. Eq. 451, 46 Atl. 611, vendor and vendee of personalty.

New York.— Pray *v.* Hegeman, 98 N. Y. 351 (son of defendant in former action, who was not in being when former judgment was rendered); Bush *v.* Knox, 2 Hun 576, 5 Thomps. & C. 130.

South Carolina.— *Ex p.* Roberts, 19 S. C. 150, privies in blood and in estate.

Texas.— Kramer *v.* Breedlove, (1887) 3 S. W. 561; Hair *v.* Wood, 58 Tex. 77.

Vermont.— Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436.

United States.— Estill County *v.* Embry, 112 Fed. 882, 50 C. C. A. 573; Jonathan Mills Mfg. Co. *v.* Whitehurst, 65 Fed. 996.

See 30 Cent. Dig. tit. "Judgment," §§ 1138, 1141.

Meaning of privity.— By "privies," within the meaning of this rule, are meant persons who are represented by the parties, and who claim under them and in privity with them, who have mutual or successive relationship to the same right or thing. Goddard *v.* Benson, 15 Abb. Pr. (N. Y.) 191.

Community of interest in citizens of same municipality.— There is also a kind of privity which may subsist between citizens of the same municipal corporation, who have an equal and common interest in matters affecting the municipality, which may become the subject of litigation, although they do not in any sense claim through or under each other. Thus a decision on the merits, in a case involving the validity of an election for the location of a county-seat, instituted by one citizen, will bar all further proceedings by other citizens on the same question. Sabin *v.* Sherman, 28 Kan. 289.

37. Musgrave *v.* Staylor, 36 Md. 123; Lampson *v.* Hobart, 28 Vt. 697; Pollard *v.* Coleman, 4 Call (Va.) 245.

38. Gerrish *v.* Whitfield, 72 N. H. 222, 55 Atl. 551; Missouri Pac. R. Co. *v.* Smith, (Tex. 1891) 16 S. W. 803. *Compare* Jones *v.* Commercial Bank, 78 Ky. 413.

39. Shaw *v.* Thompson, 3 Mart. N. S. (La.) 392; Thomas *v.* Coe, 51 Hun (N. Y.) 481, 4 N. Y. Suppl. 253; Kent *v.* Hudson River R. Co., 22 Barb. (N. Y.) 278; Tinkham *v.* Borst, 24 How. Pr. (N. Y.) 246; Burkham *v.* Cooper, 2 Ohio Cir. Ct. 77, 1 Ohio Cir. Dec. 371;

with the parties, are not estopped by the judgment, nor can they take advantage of it as a bar;[40] and it is immaterial that they may claim under the same common source of title, if there is no privity in estate.[41] On the same principle a defendant cannot plead in bar of the action against him the fact that plaintiff has already recovered a judgment on the same cause of action against a stranger, not in privity with such defendant nor jointly bound with him, even though such

Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786.

Recovery by stranger.— Notwithstanding the decisions supporting the rule stated in the text, there are some cases in which the recovery of a judgment by a stranger has been held no bar to an action by the rightful claimant. See Griffith *v.* Happersberger, 86 Cal. 605, 25 Pac. 137, 487; Mount *v.* Scholes, 21 Ill. App. 192 [*affirmed* in 120 Ill. 394, 11 N. E. 401]. In Kennedy *v.* Holman, 19 Ala. 734, it was ruled that in ejectment a plea of a recovery by a stranger *puis darrein continuance* is no bar to a recovery by plaintiff; for defendant, if not estopped from denying plaintiff's title by some peculiar relation existing between them, may protect himself against a recovery by showing a superior outstanding title in a stranger, and, if plaintiff's title is superior, he ought not to be prevented from recovering against defendant by reason of a recovery of the premises by one who would in turn become liable to him for damages on entering into possession. And see Cornell *v.* Donovan, 14 Daly (N. Y.) 295, 14 N. Y. St. 687, holding that, in an action on an undertaking given on obtaining an order for plaintiff's arrest, which order has been set aside, defendant cannot plead in bar a judgment in another suit on the same undertaking brought by plaintiff's attorney for his costs. But in an action by an execution debtor against an officer, to recover the balance of proceeds of sale left in his hands after satisfying the execution, it is competent for the officer to show in defense the recovery of a judgment against him by a third person, who was the actual owner of the property, for its value. Etters *v.* Wilson, 12 Rich. (S. C.) 145.

40. *Alabama.*—Smith *v.* Gayle, 62 Ala. 446.

Arkansas.— Robinson *v.* Baskins, 53 Ark. 330, 14 S. W. 93, 22 Am. St. Rep. 202.

California.— Irving *v.* Cunningham, 77 Cal. 52, 18 Pac. 878; Chester *v.* Bakersfield Town Hall Assoc., 64 Cal. 42, 27 Pac. 1104.

Colorado.— Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

Connecticut.— Bethlehem *v.* Watertown, 51 Conn. 490.

Illinois.— Jones *v.* People, 19 Ill. App. 300.

Indiana.— Woodhull *v.* Freeman, 21 Ind. 229.

Iowa.— Tiffany *v.* Stewart, 60 Iowa 207, 14 N. W. 241; Barr *v.* Patrick, 52 Iowa 704, 3 N. W. 743.

Kansas.— Gleason *v.* Wilson, 48 Kan. 500, 29 Pac. 698; Boyd *v.* Moore, 34 Kan. 119, 8 Pac. 255; Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 127.

Kentucky.— Marshall *v.* Rough, 2 Bibb 628.

Maryland.— Cheveront *v.* Textor, 53 Md. 295.

Massachusetts.— Low *v.* Low, 177 Mass. 306, 59 N. E. 57.

Minnesota.— Nowak *v.* Knight, 44 Minn. 241, 46 N. W. 348.

Missouri.— Henry *v.* Woods, 77 Mo. 277; Trauerman *v.* Lippincott, 39 Mo. App. 478; State *v.* St. Louis, etc., R. Co., 29 Mo. App. 301.

Nebraska.— Thayer County School Dist. No. 34 *v.* Thompson, 51 Nebr. 857, 71 N. W. 728.

New York.— Boerum *v.* Schenck, 41 N. Y. 182; American Bank-Note Co. *v.* Metropolitan El. R. Co., 63 Hun 506, 18 N. Y. Suppl. 532.

North Carolina.— White *v.* Green, 50 N. C. 47.

Ohio.— State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Hardman *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 578, 15 Cinc. L. Bul. 164.

Texas.— Bertrand *v.* Bingham, 13 Tex. 266; Oaks *v.* West, (Civ. App. 1901) 64 S. W. 1033; Southern Pine Lumber Co. *v.* Rogers, 26 Tex. Civ. App. 535, 64 S. W. 794.

Vermont.— Parmelee *v.* Woodbridge, Brayt. 132.

Wisconsin.— Grafton *v.* Hinkley, 111 Wis. 46, 86 N. W. 859.

United States.— Beard *v.* Roth, 35 Fed. 397; Witters *v.* Sowles, 34 Fed. 119.

See 30 Cent. Dig. tit. "Judgment," § 1148.

Applications of rule.— A defendant cannot plead in bar to a suit for infringement a prior judgment, to which it was not nominally a party, on the ground that it in fact defended the action, where during its pendency, and until after the decision of the appellate court in favor of the defendant therein, it persistently refused to admit its connection therewith, and also during such time in another suit filed a sworn answer denying such connection. Westinghouse Electric, etc., Co. *v.* Jefferson Electric Light, etc., Co., 135 Fed. 365 [*affirmed* in 139 Fed. 385]. So an adjudication that a conveyance of real estate is fraudulent as against certain creditors of the grantor affects the title of the grantee only so far as concerns such creditors as were parties to the proceeding; and other creditors, not parties, cannot avail themselves of the adjudication. Huntington *v.* Jewett, 25 Iowa 249, 95 Am. Dec. 788.

41. Owingsville, etc., Turnpike Road Co. *v.* Hamilton, 53 S. W. 5, 21 Ky. L. Rep. 815; Ingersoll *v.* Jewett, 13 Fed. Cas. No. 7,039, 4 Ban. & A. 361, 16 Blatchf. 378.

recovery was wrong in law, the stranger not being legally liable, and may result in giving plaintiff a double satisfaction.[42]

c. Diversity of Parties. The effect of a former judgment as a bar or estoppel is not altered by the fact that the action in which it was rendered included more parties than are joined in the suit in which it is pleaded,[43] or that additional parties are joined in the second action; in either case a party or privy to the first action is bound by the judgment and a stranger is not.[44]

2. JOINT CONTRACTORS[45] — a. In General. Where a contract or obligation which is the subject of an action is a joint contract or obligation, a recovery against one of the joint contractors merges the entire cause of action, and bars any subsequent suit on the same obligation against any of the other debtors,[46] or against all

42. Ellis *v.* State, 2 Ind. 262; Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Mathews *v.* Lawrence, 1 Den. (N. Y.) 212, 43 Am. Dec. 665; Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592. The contrary has been held in Louisiana. Durham *v.* Williams, 32 La. Ann. 962; Louisiana Levee Co. *v.* State, 31 La. Ann. 250.

43. Best *v.* Hoppie, 3 Colo. 137; New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, 23 N. E. 187. A judgment in favor of several defendants is a bar to an action on the same cause against any one of them. State *v.* Krug, 94 Ind. 366.

44. Allard *v.* Lobau, 3 Mart. N. S. (La.) 293; Meagley *v.* Binghamton, 36 Hun (N. Y.) 171; Johnson *v.* Murphy, 17 Tex. 216.

45. Judgment by confession or offer of part of joint or joint and several obligors see *supra*, II, A, 5; XIII, C, 3, h.

Satisfaction by one jointly or severally liable see *infra*, XIX, C, 1.

46. *Colorado.*— Blythe *v.* Cordingly, 20 Colo. App. 508, 80 Pac. 495.

Florida.— Ferrall *v.* Bradford, 2 Fla. 508, 50 Am. Dec. 293.

Illinois.— Jansen *v.* Grimshaw, 125 Ill. 468, 17 N. E. 850; Nickerson *v.* Rockwell, 90 Ill. 460; People *v.* Harrison, 82 Ill. 84; Mitchell *v.* Brewster, 28 Ill. 163; Moore *v.* Rogers, 19 Ill. 347; Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58; King *v.* Orney, 114 Ill. App. 141.

Indiana.— Wilson *v.* Buell, 117 Ind. 315, 20 N. E. 231; Robinson *v.* Snyder, 74 Ind. 110; Odell *v.* Carpenter, 71 Ind. 463; Kennard *v.* Carter, 64 Ind. 31; Richardson *v.* Jones, 58 Ind. 240; Holman *v.* Langtree, 40 Ind. 349; Kittering *v.* Norville, 39 Ind. 183; Root *v.* Dill, 38 Ind. 169; Barnett *v.* Juday, 38 Ind. 86; Crosby *v.* Jeroloman, 37 Ind. 264; Archer *v.* Heiman, 21 Ind. 29; Henderson *v.* Reeves, 6 Blackf. 101; Taylor *v.* Claypool, 5 Blackf. 557.

Iowa.— North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441.

Kentucky.— Elliot *v.* Porter, 5 Dana 299, 30 Am. Dec. 689; Slaughter *v.* Ripperdan, 5 Litt. 337.

Maryland.— Moale *v.* Hollins, 11 Gill & J. 11, 33 Am. Dec. 684.

Massachusetts.— Gibbs *v.* Bryant, 1 Pick. 118; Ward *v.* Johnson, 13 Mass. 148.

Michigan.— Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

Minnesota.— Davison *v.* Harmon, 65 Minn. 402, 67 N. W. 1015.

New York.— Suydam *v.* Barber, 18 N. Y. 468, 75 Am. Dec. 254; Olmstead *v.* Webster, 8 N. Y. 413; Gray *v.* Palmer, 2 Rob. 500; Robertson *v.* Smith, 18 Johns. 459, 9 Am. Dec. 227; Penny *v.* Martin, 4 Johns. Ch. 567.

Ohio.— Clinton Bank *v.* Hart, 5 Ohio St. 33; Carr *v.* Beckett, 1 Ohio Cir. Ct. 72, 1 Ohio Cir. Dec. 43; Pfau *v.* Lorain, 1 Cinc. Super. Ct. 73.

Virginia.— Brown *v.* Johnson, 13 Gratt. 644.

West Virginia.— Armentrout *v.* Smith, 56 W. Va. 356, 49 S. E. 377.

Wisconsin.— Lauer *v.* Bandow, 48 Wis. 638, 4 N. W. 774; Bowen *v.* Hastings, 47 Wis. 232, 2 N. W. 301.

United States.— Sessions *v.* Johnson, 95 U. S. 347, 24 L. ed. 596; Mason *v.* Eldred, 6 Wall. 231, 18 L. ed. 783; Earl *v.* Raymond, 8 Fed. Cas. No. 4,243, 4 McLean 233; Trafton *v.* U. S., 24 Fed. Cas. No. 14,135, 3 Story 646; Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301; Woodworth *v.* Spafford, 30 Fed. Cas. No. 18,020, 2 McLean 168. The contrary decision in the early case of Sheehy *v.* Mandeville, 6 Cranch 253, 3 L. ed. 215, is impliedly overruled by later cases in the same court.

England.— Kendall *v.* Hamilton, 4 App. Cas. 504, 48 L. J. C. P. 705, 41 L. T. Rep. N. S. 418, 28 Wkly. Rep. 97; Hoare *v.* Niblett, [1891] 1 Q. B. 781, 55 J. P. 664, 60 L. J. Q. B. 565, 64 L. T. Rep. N. S. 659, 39 Wkly. Rep. 491; Hammond *v.* Schofield, [1891] 1 Q. B. 453, 60 L. J. Q. B. 539; Camheford *v.* Chapman, 19 Q. B. D. 229, 51 J. P. 455, 56 L. J. Q. B. 639, 57 L. T. Rep. N. S. 625, 35 Wkly. Rep. 838; McLeod *v.* Power, [1898] 2 Ch. 295, 67 L. J. Ch. 551, 79 L. T. Rep. N. S. 67, 47 Wkly. Rep. 74; *Ex p.* Higgins, 3 De G. & J. 33, 4 Jur. N. S. 595, 27 L. J. Bankr. 27, 6 Wkly. Rep. 406, 60 Eng. Ch. 26, 44 Eng. Reprint 1181; King *v.* Hoare, 2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 494.

See 30 Cent. Dig. tit. "Judgment," § 1144.

Contra, in South Carolina.— Union Bank *v.* Hodges, 11 Rich. (S. C.) 480; State Treasurer *v.* Bates, 2 Bailey (S. C.) 362; Collins *v.* Lemasters, 1 Bailey (S. C.) 348, 21 Am. Dec. 469.

Judgment against partner see PARTNERSHIP.

jointly;[47] and conversely a judgment against all the joint contractors bars a subsequent suit against any one of them separately.[48] The effect of this principle cannot be avoided by consent of the parties.[49]

b. Non-Resident Joint Contractor. An unsatisfied judgment against one of two joint debtors does not bar a subsequent action upon the original claim against the other, where the latter, at the time the first suit was brought, was without the jurisdiction of the state and beyond the reach of legal service.[50]

c. Effect of Statutory Provisions. In several states statutes have been enacted which reverse the common-law rule just stated, either by declaring all joint contracts to be joint and several in legal effect, or by providing that plaintiff may have a separate action against defendants joined in a previous suit on a joint obligation but who were not served with process in that action. In either case the cause of action is not merged by a recovery against one of the joint debtors.[51]

Exceptions to rule.— Where one of the two joint debtors is dead, a judgment recovered against the survivor which remains unsatisfied is no bar to proceedings on the original claim against the estate of the other. Devol *v.* Halstead, 16 Ind. 287; Weyer *v.* Thornburgh, 15 Ind. 24; *In re* Hodgson, 31 Ch. D. 177, 55 L. J. Ch. 241, 54 L. T. Rep. N. S. 222, 34 Wkly. Rep. 127.

Fraud.— Where the creditor is induced by the fraudulent statements of some of the joint debtors to omit them from his action, and proceed against the other alone, a judgment recovered in such action, remaining unsatisfied, will not bar a suit against those guilty of the fraud. Ferrall *v.* Bradford, 2 Fla. 508, 50 Am. Dec. 293.

Judgment vacated as to one.— Where judgment is entered by default against all the joint debtors, and one of them, against plaintiff's objection, procures it to be set aside as to himself, with leave given him to plead, he cannot then set up the subsisting judgment against his co-defendant as a bar to the action against himself, there being in such a case no election on plaintiff's part to pursue his remedy against a part of the debtors only. Heckemann *v.* Young, 134 N. Y. 170, 31 N. E. 513, 30 Am. St. Rep. 655. And see O'Hanlon *v.* Scott, 89 Hun (N. Y.) 44, 35 N. Y. Suppl. 31.

Judgment on collateral.— Where the first suit is brought, not on the joint contract or obligation, but on a collateral security given by one of the joint debtors, it does not stand in the way of an action against the other debtors or all jointly, if it has not resulted in full satisfaction. Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446, 76 N. W. 608; Wegg-Prosser *v.* Evans, [1895] 1 Q. B. 108; Drake *v.* Mitchell, 3 East 251, 7 Rev. Rep. 449.

Proof of claim in insolvency.— Where one of two obligors makes an assignment for the benefit of creditors, and the obligee files his claim on the bond with the assignee and obtains an adjudication thereof in his favor in the court having control of the assigned estate, this is not such a judgment as will merge the cause of action on the bond so as to release the other obligor. Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591.

Burden of proof.— Where two joint makers of a note are sued, and one claims to be released because a former judgment rendered on such note is still subsisting against his co-maker, the burden is on him to establish the fact. Robinson *v.* Snyder, 97 Ind. 56.

47. French *v.* Neal, 24 Pick. (Mass.) 55; Reynolds *v.* Pittsburgh, etc., R. Co., 29 Ohio St. 602.

48. Wilson *v.* Buell, 117 Ind. 315, 20 N. E. 231; Carr *v.* Beckett, 1 Ohio Cir. Ct. 72, 1 Ohio Cir. Dec. 43.

49. Where an application was made, by consent of plaintiff and defendant, to set aside a judgment and add as a party to the suit another person alleged to be a joint contractor with defendant, it was held that plaintiff's rights against defendant's joint contractor having been extinguished by the judgment, the consent of the parties thereto could not be allowed to revive them, and that the application must be refused. Hammond *v.* Schofield, [1891] 1 Q. B. 453, 60 L. J. Q. B. 539. See *supra*, XIII, A, 1, text and note 85.

50. *Connecticut.*— Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562.

Indiana.— Merriman *v.* Barker, 121 Ind. 74, 22 N. E. 992; Cox *v.* Maddux, 72 Ind. 206.

Maine.— West *v.* Furbish, 67 Me. 17; Rand *v.* Nutter, 56 Me. 339; Dennett *v.* Chick, 2 Me. 191, 11 Am. Dec. 59.

Massachusetts.— Odom *v.* Denny, 16 Gray 114; Tappan *v.* Bruen, 5 Mass. 193.

Michigan.— Hitchcock *v.* Frackelton, 116 Mich. 487, 74 N. W. 720; Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

New Hampshire.— Tibbetts *v.* Shapleigh, 60 N. H. 487; Burt *v.* Stevens, 22 N. H. 229; Olcott *v.* Little, 9 N. H. 259, 32 Am. Dec. 357.

New York.— Brown *v.* Birdsall, 29 Barb. 549.

Ohio.— Yoho *v.* McGovern, 42 Ohio St. 11; Whittaker *v.* Stone, 16 Ohio Cir. Ct. 635, 7 Ohio Cir. Dec. 591.

Pennsylvania.— Campbell *v.* Steele, 11 Pa. St. 394.

Tennessee.— Davis *v.* Reaves, 7 Lea 585.

United States.— Beck, etc., Lith. Co. *v.* Wacker, etc., Co., 76 Fed. 10, 22 C. C. A. 11.

See 30 Cent. Dig. tit. "Judgment," § 1144.

51. *District of Columbia.*— Harris *v.* Leonhardt, 2 App. Cas. 318.

d. Successful Defense by One Joint Debtor. A successful defense made by one of the joint debtors in an action against him, if it was not on a ground purely personal to himself, will bar a future action by the same plaintiff on the same obligation against another of the debtors.[52] But where plaintiff joins all the joint debtors in the first action and judgment is given in their favor, this will not bar a separate action against one of them.[53] Otherwise, however, where the statute provides that judgment may be rendered against one or more of several defendants sued on a join contract.[54]

3. Joint and Several Contractors[55] — a. In General. Where the contract or obligation is joint and several, it is not merged in a judgment recovered against one of the contractors, and such judgment, remaining unsatisfied, will not bar an action against another of the debtors.[56] Within the meaning of this rule the parties to a bill of exchange or promissory note, that is, the maker and indorser,

Georgia.— Ells *v.* Bone, 71 Ga. 466.
Illinois.— Finch *v.* Galigher, 181 Ill. 625, 54 N. E. 611.
Iowa.— Smith *v.* Coopers, 9 Iowa 376.
Maryland.— Westheimer *v.* Craig, 76 Md. 399, 25 Atl. 419; Thomas *v.* Mohler, 25 Md. 36.
Michigan.— Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.
Minnesota.—Ingwaldson *v.* Olson, 79 Minn. 252, 82 N. W. 579.
Missouri.— Knox County Sav. Bank *v.* Cottey, 70 Mo. 150; Cowan *v.* Leming, 111 Mo. App. 253, 85 S. W. 953.
New York.— Lane *v.* Salter, 51 N. Y. 1; Orleans County Nat. Bank *v.* Spencer, 19 Hun 569; Kramer *v.* Schatzkin, 27 Misc. 206, 57 N. Y. Suppl. 803; Dean *v.* Eldridge, 29 How. Pr. 218. *Compare* Oakley *v.* Aspinwall, 2 Sandf. 7.
North Carolina.— Rufty *v.* Claywell, 93 N. C. 306.
Ohio.— Whittaker *v.* Stone, 16 Ohio Cir. Ct. 635, 7 Ohio Cir. Dec. 591.
Pennsylvania.— Davis *v.* Sidle, 25 Pa. Co. Ct. 122; Herschberger *v.* Brown, 2 Woodw. 101.
Tennessee.— Lowry *v.* Hardwick, 4 Humphr. 188.
Texas.— Bute *v.* Brainerd, 93 Tex. 137, 53 S. W. 1017; Wooters *v.* Smith, 56 Tex. 198.
Virginia.— Cahoon *v.* McCullock, 92 Va. 177, 23 S. E. 225.
Wisconsin.— Dill *v.* White, 52 Wis. 456, 9 N. W. 404.

In Indiana the common-law rule that a judgment recovered against one of two joint debtors is a bar to an action against the other was not changed by Burns Rev. St. Ind. (1894) § 322 (Rev. St. (1881) § 320), providing that when the action is against two or more defendants, and the summons is served on one or more, plaintiff may, if the action be against defendants jointly indebted on contract, proceed against defendant served, and if he recover judgment enforce it against the joint property of all and the separate property of defendant served. Erwin *v.* Scotten, 40 Ind. 389; Archer *v.* Heiman, 21 Ind. 29; Capital City Dairy Co. *v.* Plummer, 20 Ind. App. 408, 49 N. E. 963; Martin *v.* Baugh, 1 Ind. App. 20, 27 N. E. 110.

52. *Arkansas.*— Nevill *v.* Hancock, 15 Ark. 511.
Illinois.— Mann *v.* Edwards, 34 Ill. App. 473.
Kentucky.— Hunt *v.* Terril, 7 J. J. Marsh. 67.
Maine.— Hill *v.* Morse, 61 Me. 541.
Ohio.— Pfau *v.* Lorain, 1 Cinc. Super. Ct. 73.
Vermont.— Spencer *v.* Dearth, 43 Vt. 98.
Virginia.— Brown *v.* Johnson, 13 Gratt. 644.
England.— Phillips *v.* Ward, 2 H. & C. 717, 9 Jur. N. S. 1182, 33 L. J. Exch. 7, 9 L. T. Rep. N. S. 345, 12 Wkly. Rep. 106.
See 30 Cent. Dig. tit. "Judgment," §§ 1144, 1145.
Contra.— McLelland *v.* Ridgeway, 12 Ala. 482; McCormack *v.* Barton, 19 Misc. (N. Y.) 625, 44 N. Y. Suppl. 393.
Non-resident defendant.— A judgment in favor of one or more joint contractors is no bar to a suit against another of the joint contractors, who neither voluntarily appeared nor was served with process in the first action, and who was not within the jurisdiction of the court. Larison *v.* Hager, 44 Fed. 49.

53. McLean *v.* Hansen, 37 Ill. App. 48; Detroit *v.* Houghton, 42 Mich. 459, 4 N. W. 171, 287.

54. Roby *v.* Rainsberger, 27 Ohio St. 674.

55. **Judgment by confession or offer of part of joint or joint and several obligors** see *supra*, II, A, 5, b; XIII, C, 3, b.
Satisfaction by one jointly or jointly and severally liable see *infra*, XIX, C, 1.

56. *Connecticut.*— Fairchild *v.* Holly, 10 Conn. 474; Morgan *v.* Chester, 4 Conn. 387.
Georgia.— Booth *v.* Huff, 116 Ga. 8, 42 S. E. 381, 94 Am. St. Rep. 98.
Illinois.— People *v.* Harrison, 82 Ill. 84; Moore *v.* Rogers, 19 Ill. 347; Orr *v.* Thompson, 9 Ill. 451; Joyce *v.* Spafford, 101 Ill. App. 422.
Indiana.— Giles *v.* Canary, 99 Ind. 116; Greathouse *v.* Kline, 93 Ind. 598; McClure *v.* McClure, 65 Ind. 482; Kirkpatrick *v.* Stingley, 2 Ind. 269.
Iowa.— Beall *v.* West, 13 Iowa 61; Smith *v.* Coopers, 9 Iowa 376; Harlan *v.* Berry, 4 Greene 212.
Kansas.— Plano Mfg. Co. *v.* Burrows, 40

or drawer, accepter, and indorser, as the case may be, are regarded as joint and several debtors, not joint, unless there is an express stipulation to the contrary.[57] But if plaintiff receives satisfaction from one of the joint and several contractors it will release the other.[58]

b. Joint Judgment on Joint and Several Contract. Where the obligation is joint and several, the creditor can elect either to sue and recover separately of each of the debtors or of all jointly, but he cannot do both; a separate judgment against one or more bars a subsequent joint action, and a joint judgment against all will bar subsequent separate suits.[59]

Kan. 361, 19 Pac. 809; Jenks *v.* Coffey County School Dist. No. 38, 18 Kan. 356.

Kentucky.— Burrus *v.* Anderson, 3 Metc. 500; Sayre *v.* Coleman, 9 Dana 173.

Louisiana.— Hite *v.* Vaught, 2 La. Ann. 970; Illinois State Bank *v.* Sloo, 16 La. 544; Williams *v.* Brent, 7 Mart. N. S. 205.

Massachusetts.—Hawkes *v.* Phillips, 7 Gray 284; Simonds *v.* Center, 6 Mass. 18.

Mississippi.— Scharff *v.* Noble, 67 Miss. 143, 6 So. 843.

Missouri.— Phillips *v.* Fitzpatrick, 34 Mo. 276; McLaurine *v.* Monroe, 30 Mo. 462; Armstrong *v.* Prewitt, 5 Mo. 476, 32 Am. Dec. 338.

Nebraska.— McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333.

New Hampshire.— Townsend *v.* Riddle, 2 N. H. 448.

New York.— Russell *v.* McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; Benson *v.* Paine, 2 Hilt. 552; Carter *v.* Howard, 17 Misc. 381, 39 N. Y. Suppl. 1060; Strauss *v.* Trotter, 6 Misc. 77, 26 N. Y. Suppl. 20.

North Carolina.— Hix *v.* Davis, 68 N. C. 231.

Ohio.— Clinton Bank *v.* Hart, 5 Ohio St. 33.

Oregon.— Handley *v.* Jackson, (1898) 51 Pac. 1098.

Pennsylvania.— Hayes *v.* Gudykunst, 11 Pa. St. 221; Miller *v.* Reed, 3 Grant 51; Vanemen *v.* Herdman, 3 Watts 202; Philadelphia *v.* Stewart, 23 Pa. Co. Ct. 552.

South Carolina.— Day *v.* Hill, 2 Speers 628, 42 Am. Dec. 390; Collins *v.* Lemasters, 1 Bailey 348, 21 Am. Dec. 469.

Tennessee.— Sully *v.* Campbell, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161.

Texas.— Wilson *v.* Casey, 3 Tex. Civ. App. 141, 22 S. W. 118.

Vermont.— Sawyer *v.* White, 19 Vt. 40.

United States.— U. S. *v.* Price, 9 How. 83, 13 L. ed. 56; Sheehy *v.* Mandeville, 6 Cranch 253, 3 L. ed. 215.

England.— King *v.* Hoare, 2 D. & L. 382, 14 L. J. Exch. 29, 13 M. & W. 494.

57. *Indiana.*— Morrison *v.* Fishel, 64 Ind. 177; Beard *v.* Adams, 8 Blackf. 469.

Iowa.— Citizens' Sav. Bank *v.* Oleson, 47 Iowa 492; Gilman *v.* Foote, 22 Iowa 560.

Massachusetts.— Porter *v.* Ingraham, 10 Mass. 88.

Michigan.— Hitchcock *v.* Frackelton, 116 Mich. 487, 74 N. W. 720; Beals *v.* Clinton County Cir. Judge, 91 Mich. 146, 51 N. W. 885.

Missouri.— Phoenix Mut. L. Ins. Co. *v.* Landis, 50 Mo. App. 116.

New York.— Russell, etc., Mfg. Co. *v.* Carpenter, 5 Hun 162.

Pennsylvania.— Allen *v.* Union Bank, 5 Whart. 420.

Texas.—Still *v.* Lombardi, 8 Tex. Civ. App. 315, 27 S. W. 845.

United States.— Brooklyn City, etc., R. Co. *v.* New York Nat. Bank of Republic, 102 U. S. 14, 26 L. ed. 61.

England.— Claxton *v.* Swift, 2 Show. 441. See 30 Cent. Dig. tit. "Judgment," § 1145.

Contra.— Brown *v.* Foster, 4 Ala. 282.

Joint makers of a note, including indorsers who sign at the making of the note, and before its delivery, and for the purpose of giving it credit, are considered as joint promisors, and not joint and several, unless it is otherwise specified. Wetherwax *v.* Paine, 2 Mich. 555.

58. Coonley *v.* Wood, 36 Hun (N. Y.) 559; Jameson *v.* Barber, 56 Wis. 630, 14 N. W. 859. But see Day *v.* Hill, 2 Speers (S. C.) 628, 42 Am. Dec. 390, where a judgment was recovered against one of the makers of a joint and several note, which by mistake was for a less sum than the note, and the judgment was satisfied, and it was held that it did not bar an action against the other maker for the balance due.

59. *Georgia.*— Fullington *v.* Killen, 65 Ga. 575.

Ohio.— Clinton Bank *v.* Hart, 5 Ohio St. 33. But a holder of a joint and several note who has obtained thereon a joint judgment may still resort to the original note for the purpose of showing and enforcing an equitable set-off. Baker *v.* Kinsey, 41 Ohio St. 403.

Pennsylvania.— McDivitt *v.* McDivitt, 4 Watts 384; Downey *v.* Farmers', etc., Bank, 13 Serg. & R. 288; Williams *v.* McFall, 2 Serg. & R. 280. See Taylor *v.* Henderson, 17 Serg. & R. 453.

United States.— Sessions *v.* Johnson, 95 U. S. 347, 24 L. ed. 596; U. S. *v.* Price, 9 How. 83, 13 L. ed. 56. *Compare* Trafton *v.* U. S., 24 Fed. Cas. No. 14,135, 3 Story 646; U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

England.— *Ex p.* Rowlandson, 3 P. Wms. 405, 24 Eng. Reprint 1121.

Contra.— People *v.* Harrison, 82 Ill. 84; Kirkpatrick *v.* Stingley, 2 Ind. 269; Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148.

Time of election.— In Pennsylvania plaintiff is understood to have made his election

4. Judgments Against Partners. The liability of partners for the firm debts is generally held to be joint, so that a judgment against one of the partners for such a debt will bar a subsequent action against another,[60] even where defendant in the second action was a dormant or secret partner, whose connection with the firm was unknown to plaintiff when the action was brought.[61] But in some states the liability of partners is joint and several.[62]

5. Joint Tort-Feasors[63] — a. General Rule. The rule generally followed in America is that the liability of two or more persons who jointly engage in the commission of a trespass, conversion, or other tort is joint and several, so that a judgment recovered against one of them, remaining unsatisfied, will not operate as a bar to an action against another for the same tort.[64] A contrary rule, how-

as to whether he will pursue all the debtors jointly or each of them separately, as soon as he brings his action. Beltzhoover *v.* Commonwealth, 1 Watts (Pa.) 126. But in Ohio the election is not conclusively determined by the commencement of an action, but becomes fixed only upon the recovery of a judgment. Clinton Bank *v.* Hart, 5 Ohio St. 33.

60. *Colorado.*—Denver Exch. Bank *v.* Ford, 7 Colo. 314, 3 Pac. 449.

Illinois.— Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58.

Indiana.— Crosby *v.* Jeroloman, 37 Ind. 264; Rose *v.* Comstock, 17 Ind. 1; Nicklaus *v.* Roach, 3 Ind. 78.

Michigan.— Candee *v.* Clark, 2 Mich. 255.

Nebraska.—Tootle *v.* Otis, 1 Nebr. (Unoff.) 360, 95 N. W. 681.

New York.— National Broadway Bank *v.* Hitch, 66 Hun 401, 21 N. Y. Suppl. 395, 29 Abb. N. Cas. 400; McMaster *v.* Vernon, 3 Duer 249; Benson *v.* Paine, 17 How. Pr. 407.

Ohio.— Sloo *v.* Lea, 18 Ohio 279.

Texas.— Gaut *v.* Reed, 24 Tex. 46, 76 Am. Dec. 94.

Wisconsin.— Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

United States.— U. S. *v.* Ames, 99 U. S. 35, 25 L. ed. 295; Sedam *v.* Williams, 21 Fed. Cas. No. 12,609, 4 McLean 51.

England.— *Ex p.* Higgins, 3 De G. & J. 33, 4 Jur. N. S. 595, 27 L. J. Bankr. 27, 6 Wkly. Rep. 406, 60 Eng. Ch. 26, 44 Eng. Reprint 1181.

See 30 Cent. Dig. tit. "Judgment," § 1144.

61. Moale *v.* Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Smith *v.* Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; U. S. *v.* Ames, 99 U. S. 35, 25 L. ed. 295; *In re* Herrick, 12 Fed. Cas. No. 6,420.

62. Valz *v.* Birmingham First Nat. Bank, 96 Ky. 543, 29 S. W. 329, 16 Ky. L. Rep. 624, 49 Am. St. Rep. 306; Williams *v.* Rogers, 14 Bush (Ky.) 776; Scott *v.* Colmesnil, 7 J. J. Marsh. (Ky.) 416 [but *compare* Nichols *v.* Burton, 5 Bush (Ky.) 320]; Hyman *v.* Stadler, 63 Miss. 362; Union Bank *v.* Hodges, 11 Rich. (S. C.) 480; Watson *v.* Owens, 1 Rich. (S. C.) 111. *Compare* Philson *v.* Bampfield, 1 Brev. (S. C.) 202.

Joint and several liability of partner and firm.— A judgment for plaintiff on a note signed by a firm and by one partner individually, in a suit against the latter alone, is no bar to an action against other members of the firm, unless satisfied. Gilman *v.* Foote, 22 Iowa 560.

63. W was injured by the furious driving of defendant's servant. The driver was summoned by the police, and W attended as a witness. The driver was fined, and was ordered by the magistrate to pay to W £5 by way of compensation, under the provisions of 6 & 7 Vict. c. 86, § 28. He was asked by the magistrate if that sum would compensate him, and he said it would not, but nevertheless he took it. In a subsequent action for damages by W against the driver's employers it was held that the order of the magistrate was a bar to the action, inasmuch as W must be taken to have accepted the £5 in full satisfaction of his claims in respect of his injuries. Wright *v.* London General Omnibus Co., 2 Q. B. D. 271, 46 L. J. Q. B. 429, 36 L. T. Rep. N. S. 590, 25 Wkly. Rep. 647.

Demand substantially the same.— A judgment recovered is a bar in another action, even of a different nature, if the demand in each action is substantially the same; and it is so, if the whole amount sought to be recovered in the second action was or might have been recovered in the first, even though the second action is against a different defendant, and is founded on a different matter of fact. And it makes no distinction that the sum sought in the second action is for a larger sum than was recovered in the first and the former recovery is a good bar even to the difference. Buckland *v.* Johnson, 15 C. B. 145, 2 C. L. R. 784, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145. So judgment recovered, although without satisfaction, against one, in an action for a conversion of goods by wrongfully selling, is a bar to an action for money had and received against another, for the proceeds of the same sale, whether he is a party to the conversion or a stranger. Buckland *v.* Johnson, *supra.* And see Bowden *v.* Beauchamp, 2 Atk. 82, 26 Eng. Reprint 450.

Satisfaction by one jointly or severally liable see *infra*, XIX, C, 1.

64. *Alabama.*— Du Bose *v.* Marx, 52 Ala. 506; Blann *v.* Crocheron, 26 Ala. 320, 19 Ala. 647, 54 Am. Dec. 203.

Arkansas.— McGee *v.* Overby, 12 Ark. 164.

California.— San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410; Williams *v.* Sutton, 43 Cal. 65.

ever, obtains in England,[65] and the English rule has been followed in a few cases in this country.[66]

b. Election Between Joint and Several Action. One injured by a tortious act shared in by several must elect whether he will prosecute them all in a joint action, or sue one or more separately; he cannot do both.[67]

c. Successful Defense by One Trespasser. Where suit is brought against one of two joint wrong-doers, and judgment is given for defendant on a defense which shows that plaintiff could have no cause of action against any of them, such judgment may be pleaded in bar by another of the tort-feasors when sued in a subsequent action;[68] but it is otherwise if the plea in the first action was per-

Connecticut.— Vincent *v.* McNamara, 70 Conn. 332, 39 Atl. 444; Atwater *v.* Tupper, 45 Conn. 144, 29 Am. Rep. 674; Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Morgan *v.* Chester, 4 Conn. 387; Sheldon *v.* Kibbe, 3 Conn. 214, 8 Am. Dec. 176.

Georgia.— Brooks *v.* Ashburn, 9 Ga. 297.

Illinois.— Roodhouse *v.* Christian, 158 Ill. 137, 41 N. E. 748.

Indiana.— Fleming *v.* McDonald, 50 Ind. 278, 19 Am. Rep. 711; Brady *v.* Ball, 14 Ind. 317.

Iowa.— Cushing *v.* Hederman, 117 Iowa 637, 91 N. W. 940, 94 Am. St. Rep. 320; Turner *v.* Hitchcock, 20 Iowa 310.

Kentucky.— United Shakers Soc. *v.* Underwood, 11 Bush 265, 21 Am. Rep. 214; Sharp *v.* Gray, 5 B. Mon. 4; Elliot *v.* Porter, 5 Dana 299, 30 Am. Dec. 689; Carpenter *v.* Laswell, 63 S. W. 609, 23 Ky. L. Rep. 686.

Louisiana.— Wallace *v.* Miller, 15 La. Ann. 449.

Maine.— Cleveland *v.* Bangor, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326; Jones *v.* Lowell, 35 Me. 538; Hopkins *v.* Hersey, 20 Me. 449.

Massachusetts.— Savage *v.* Stevens, 128 Mass. 254; Knight *v.* Nelson, 117 Mass. 458; Elliott *v.* Hayden, 104 Mass. 180; Stone *v.* Dickinson, 5 Allen 29, 81 Am. Dec. 727; Sprague *v.* Waite, 19 Pick. 455. *Compare* Campbell *v.* Phelps, 1 Pick. 62, 11 Am. Dec. 139.

Missouri.— Page *v.* Freeman, 19 Mo. 421.

New Hampshire.—Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508.

New Jersey.— Allen *v.* Craig, 13 N. J. L. 294.

New York.— Russell *v.* McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Union Associated Press *v.* Heath, 49 N. Y. App. Div. 247, 63 N. Y. Suppl. 96; Cohn *v.* Goldman, 43 N. Y. Super. Ct. 436; Wies *v.* Fanning, 9 How. Pr. 543; Marsh *v.* Berry, 7 Cow. 344; Guille *v.* Swan, 19 Johns. 381, 10 Am. Dec. 234; Livingston *v.* Bishop, 1 Johns. 290, 3 Am. Dec. 330.

Ohio.— Maple *v.* Cincinnati, etc., R. C., 40 Ohio St. 313, 48 Am. Rep. 685; Jack *v.* Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298; Wright *v.* Lathrop, 2 Ohio 33, 15 Am. Dec. 529.

Pennsylvania.— Floyd *v.* Browne, 1 Rawle 121, 18 Am. Dec. 602.

South Carolina.— Hawkins *v.* Hatton, 1 Nott & M. 318, 9 Am. Dec. 700; Whitaker *v.* English, 1 Bay 14. *Compare* Smith *v.* Singleton, 2 McMull. 184, 39 Am. Dec. 122.

Tennessee.— Turner *v.* Brock, 6 Heisk. 50; Knott *v.* Cunningham, 2 Sneed 204; Christian *v.* Hoover, 6 Yerg. 505.

Texas.— McGehee *v.* Shafer, 15 Tex. 198.

Vermont.— Chamberlin *v.* Murphy, 41 Vt. 110; Preston *v.* Hutchinson, 29 Vt. 144; Sanderson *v.* Caldwell, 2 Aik. 195.

West Virginia.— Griffie *v.* McClung, 5 W. Va. 131; Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

United States.— Albright *v.* American Bell Tel. Co., 136 U. S. 629, 10 S. Ct. 1064, 34 L. ed. 557; Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129; Power *v.* Baker, 27 Fed. 396; Collard *v.* Delaware, etc., R. Co., 6 Fed. 246; Long *v.* Conner, 15 Fed. Cas. No. 8,479; Smith *v.* Rines, 22 Fed. Cas. No. 13,100, 2 Sumn, 338.

See 30 Cent. Dig. tit. "Judgment," § 1146.

65. Brinsmead *v.* Harrison, L. R. 7 C. P. 547, 41 L. J. C. P. 190, 27 L. T. Rep. N. S. 99, 20 Wkly. Rep. 784; Buckland *v.* Johnson, 15 C. B. 145, 2 C. L. R. 704, 18 Jur. 775, 23 L. J. C. P. 204, 2 Wkly. Rep. 565, 80 E. C. L. 145; Brown *v.* Wootton, Cro. Jac. 73; King *v.* Hoare, 2 D. & L. 382, 8 Jur. 1127, 14 L. J. Exch. 29, 13 M. & W. 494; Lendall's Case, Leon. 19; Day *v.* Porter, 2 M. & Rob. 151.

66. Hunt *v.* Bates, 7 R. I. 217, 82 Am. Dec. 592 [but *compare* Bennett *v.* Fifield, 13 R. I. 139, 43 Am. Rep. 17]; Petticolas *v.* Richmond, 95 Va. 456, 28 S. E. 566, 64 Am. St. Rep. 811; Wilkes *v.* Jackson, 2 Hen. & M. (Va.) 355.

67. *District of Columbia.*— Hutchinson *v.* Brown, 19 D. C. 136.

Illinois.— Davis *v.* Taylor, 41 Ill. 405.

New York.— McCredy *v.* Thrush, 37 N. Y. App. Div. 465, 56 N. Y. Suppl. 68; O'Hanlon *v.* Scott, 89 Hun 44, 35 N. Y. Suppl. 31.

Ohio.— Zigler *v.* Rommel, 4 Ohio S. & C. Pl. Dec. 472.

Virginia.— Ammonett *v.* Harris, 1 Hen. & M. 488.

United States.— Sessions *v.* Johnson, 95 U. S. 347, 24 L. ed. 596; Smith *v.* Rines, 22 Fed. Cas. No. 13,100, 2 Sumn. 338.

See 30 Cent. Dig. tit. "Judgment," § 1146.

Contra.— See Gilbreath *v.* Jones, 66 Ala. 129; Davis *v.* Caswell, 50 Me. 294.

68. Anderson *v.* Fleming, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119; Williams *v.* McGrade, 13 Minn. 46; Featherson *v.* Newburgh, etc., Turnpike Road Co., 71 Hun (N. Y.) 109,

sonal to defendant therein; in such a case the former judgment cannot be set up by the other tort-feasor as a bar.[69]

6. Satisfaction by One Jointly Liable. As a plaintiff can have but one satisfaction for a joint wrong, if he recovers a judgment against one of the tort-feasors and obtains satisfaction this operates as a discharge of the others.[70] If separate judgments have been recovered for the same tort against the different persons who participated in it, plaintiff will be required to elect *de melioribus damnis*, and the satisfaction of one judgment will satisfy the others.[71] Hence some cases hold that the issuing of execution on one of the several judgments, whether it results in satisfaction or not, will release the others.[72] But the prevalent opinion is that nothing short of actual satisfaction received will produce this result.[73]

24 N. Y. Suppl. 603; Sonnentheil *v.* Moody, (Tex. Civ. App. 1900) 56 S. W. 1001. *Compare* Sprague *v.* Waite, 19 Pick. (Mass.) 455.

69. Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308.

70. *Alabama.*— The Farmer *v.* McCraw, 26 Ala. 189, 72 Am. Dec. 718.

Illinois.— Karr *v.* Barstow, 24 Ill. 580; Stanley *v.* Leahy, 87 Ill. App. 465.

Iowa.— Miller *v.* Beck, 108 Iowa 575, 79 N. W. 344.

Maine.— Mitchell *v.* Libbey, 33 Me. 74.

Maryland.— Berkley *v.* Wilson, 87 Md. 219, 39 Atl. 502.

Massachusetts.— Luce *v.* Dexter, 135 Mass. 23; Savage *v.* Stevens, 128 Mass. 254; Stoue *v.* Dickinson, 5 Allen 29, 81 Am. Dec. 727; Gilmore *v.* Carr, 2 Mass. 171.

Michigan.— Blackman *v.* Simpson, 120 Mich. 377, 79 N. W. 573, 58 L. R. A. 410; Grimes *v.* Williams, 113 Mich. 450, 71 N. W. 835.

Missouri.— Garner *v.* Henzig, 15 Mo. App. 591.

Nebraska.— Bryant *v.* Reed, 34 Nebr. 720, 52 N. W. 694.

New Hampshire.— Farwell *v.* Hilliard, 3 N. H. 318.

New York.— Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Dexter *v.* Broat, 16 Barb. 337; Union Associated Press *v.* Press Pub. Co., 24 Misc. 610, 54 N. Y. Suppl. 183; Pasthoff *v.* Banendahl, 6 N. Y. St. 613; Mathews *v.* Lawrence, 1 Den. 212, 43 Am. Dec. 665.

Pennsylvania.— Fox *v.* Northern Liberties, 3 Watts & S. 103.

South Carolina.— Smith *v.* Singleton, 2 McMull. 184, 39 Am. Dec. 122.

United States.— Sessions *v.* Johnson, 95 U. S. 347, 24 L. ed. 596; Duane *v.* Goodall, 7 Fed. Cas. No. 4,105.

See 30 Cent. Dig. tit. "Judgment," § 1147.

What constitutes satisfaction — Return of goods.— A recovery in replevin with a return of the goods bars an action of trespass against the same and other parties for damages, whether the damages awarded in the replevin suit have been paid or not. Karr *v.* Barstow, 24 Ill. 580.

Partial payment of the judgment, accompanied by a discharge of the debtor against whom it stands, will release the other. Hyde *v.* Long, 4 Vt. 531. But a partial execution of the judgment against one is not such a satisfaction as will release the other. McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548.

Settlement and discontinuance.— Where separate suits are pending against several joint trespassers, and one suit is settled and defendant discharged, this will discharge the entire cause of action, and there can be no recovery in the other suits, either of nominal damages or costs. Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154. And see Spurr *v.* North Hudson County R. Co., 56 N. J. L. 346, 28 Atl. 582. But *compare* Barrett *v.* Third Ave. R. Co., 8 Abb. Pr. N. S. (N. Y.) 205 [*affirmed* in 45 N. Y. 628], where an injury was caused to a passenger by the concurring negligence of two railroad companies, and it was held that the fact that he had brought an action against both, and discontinued it as to one on the payment of a small sum, was no bar to an action against the other, where there was no evidence that the money was received in satisfaction of damages.

Tender not accepted.— A plea setting forth a former recovery against a co-trespasser and a voluntary payment of the damages and costs to the clerk in open court by defendant in that judgment, without averring that plaintiff accepted such payment in satisfaction of his recovery, is had on demurrer. Blann *v.* Cocheron, 20 Ala. 320.

71. Putney *v.* O'Brien, 53 Iowa 117, 4 N. W. 891. And see United Shakers Soc. *v.* Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214.

72. Fleming *v.* McDonald, 50 Ind. 278, 19 Am. Rep. 711; Allen *v.* Wheatley, 3 Blackf. (Ind.) 332; Davis *v.* Scott, 1 Blackf. (Ind.) 169; White *v.* Philbrick, 5 Me. 147, 17 Am. Dec. 214; Kenyon *v.* Woodruff, 33 Mich. 310; Boardman *v.* Acer, 13 Mich. 77, 87 Am. Dec. 736; Smith *v.* Singleton, 2 McMull. (S. C.) 184, 39 Am. Dec. 122.

73. *Connecticut.*—Sheldon *v.* Kibbe, 3 Conn. 214, 8 Am. Dec. 176.

Delaware.— Norfolk Lumber Co. *v.* Simmons, 2 Marv. 317, 43 Atl. 163.

Missouri.— Page *v.* Freeman, 19 Mo. 421.

New York.— Davis *v.* Anable, 2 Hill 339.

Tennessee.— Knott *v.* Cunningham, 2 Sneed 204.

United States.—Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129.

See 30 Cent. Dig. tit. "Judgment," § 1147.

7. Waiver of Bar.[74] If a party fails to take advantage of a former recovery which would be available to him as a defense, he will be held to have waived the benefit of the estoppel, and the case may be determined as if no such former judgment had been rendered.[75]

XIV. Conclusiveness of Adjudication.[76]

A. General Principles — 1. Doctrine of Res Judicata — a. Rule Stated. A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them,[77] and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action.[78]

74. Waiver of estoppel see *infra*, XIV, C, 12.

75. McArthur *v.* Oliver, 53 Mich. 299, 305, 19 N. W. 5, 8; Blanchard *v.* Richly, 7 Johns. (N. Y.) 198; Kenner *v.* Postens, 21 Leg. Int. (Pa.) 21; Mack *v.* Levy, 60 Fed. 751. See David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661.

76. Pleading and evidence see *infra*, XXI.
Judgments in rem see *infra*, XVI, C.
Foreign judgments see *infra*, XXII.
Former recovery as merger or bar see *supra*, XIII.

77. Persons concluded by judgments see *infra*, XIV, B.

78. *Alabama.*— Callan *v.* Anderson, 131 Ala. 228, 31 So. 427; Cannon *v.* Brame, 45 Ala. 262; Mervine *v.* Parker, 18 Ala. 241.
Arkansas.— Peay *v.* Duncan, 20 Ark. 85.
California.— Harrington's Estate, 147 Cal. 124, 81 Pac. 546; Alison *v.* Goldtree, 117 Cal. 545, 49 Pac. 571; Santa Cruz Gap Turnpike Joint Stock Co. *v.* Santa Clara County, 62 Cal. 40; Geary *v.* Simmons, 39 Cal. 224; Jackson *v.* Lodge, 36 Cal. 28; Caperton *v.* Schmidt, 26 Cal. 479, 85 Am. Dec. 187.
Connecticut.— New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57; Freeman's Appeal, 74 Conn. 247, 50 Atl. 748; Cox *v.* McClure, 73 Conn. 486, 47 Atl. 757; Bell *v.* Raymond, 18 Conn. 91; Coit *v.* Tracy, 8 Conn. 268, 20 Am. Dec. 110; Dennison *v.* Hyde, 6 Conn. 508; Betts *v.* Starr, 5 Conn. 550, 13 Am. Dec. 94; Church *v.* Leavenworth, 4 Day 274.
Florida.— Moore *v.* Felkel, 7 Fla. 44.
Georgia.— Wilson *v.* Williams, 115 Ga. 474, 41 S. E. 629; Hollis *v.* Nelms, 115 Ga. 5, 41 S. E. 263; Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; La Motte *v.* Harper, 88 Ga. 26, 13 S. E. 804; Wilkinson *v.* Thigpen, 71 Ga. 497; Young *v.* Harrison, 21 Ga. 584; Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488.
Illinois.— Taylor *v.* Seiter, 199 Ill. 555, 65 N. E. 433; People *v.* Hill, 182 Ill. 425, 55 N. E. 542; Markley *v.* People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247, 48 N. E. 402; Wright *v.* Guffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634; Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608; Noyes *v.* Kern, 94 Ill. 521; Gardner *v.* Ladue, 47 Ill. 211, 95 Am. Dec. 487; Martin *v.* Martin, 101 Ill. App. 640; Hess *v.* Miller, 99 Ill. App. 225; Reynolds *v.* Mandel, 73 Ill. App. 379; Webber *v.* Mackey, 31 Ill. App. 369.
Indiana.— Armstrong *v.* Hufty, 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; Bruce *v.* Osgood, 154 Ind. 375, 56 N. E. 25; Ulrich *v.* Drischell, 88 Ind. 354; Sutherlin *v.* Mullis, 17 Ind. 19; Hargus *v.* Goodman, 12 Ind. 629.
Iowa.— Madison *v.* Garfield Coal Co., 114 Iowa 56, 86 N. W. 41; Moy *v.* Moy, 111 Iowa 161, 82 N. W. 481; Watson *v.* Richardson, 110 Iowa 698, 80 N. W. 416, 80 Am. St. Rep. 331; Hahn *v.* Miller, 68 Iowa 745, 28 N. W. 51; Reynolds *v.* Babcock, 60 Iowa 289, 14 N. W. 321; Goodenow *v.* Litchfield, 59 Iowa 226, 9 N. W. 107, 13 N. W. 86; Neumeister *v.* Dubuque, 47 Iowa 465; Street *v.* Beckman, 43 Iowa 496; Heichew *v.* Hamilton, 4 Greene 317, 61 Am. Dec. 122.
Kansas.— Union Pac. R. Co. *v.* Wyandotte County, 69 Kan. 572, 77 Pac. 274; Atchison, etc., R. Co. *v.* Cross, 63 Kan. 564, 66 Pac. 620; Sanford *v.* Oberlin College, 50 Kan. 342, 31 Pac. 1089.
Kentucky.— Hardin *v.* Smith, 7 B. Mon. 390; Hayden *v.* Boothe, 2 A. K. Marsh. 353; Wallace *v.* Usher, 4 Bibb 508; Delany *v.* Vaughn, 3 Bibb 379. And see Home Constr. Co. *v.* Duncan, 68 S. W. 15, 24 Ky. L. Rep. 94; Owingsville, etc., Turnpike Road Co. *v.* Hamilton, 54 S. W. 175, 21 Ky. L. Rep. 1150.
Louisiana.— Corrigan's Succession, 42 La. Ann. 65, 7 So. 74; Morgan *v.* Kinnard, 23 La. Ann. 645; Trescott *v.* Lewis, 12 La. Ann. 197; Durnford's Succession, 1 La. Ann. 92; Horwin *v.* Clark, 8 Rob. 27; Montesquieu *v.* Heil, 4 La. 51, 23 Am. Dec. 471. And see Meyer *v.* Moss, 110 La. 132, 34 So. 332.
Maine.— Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793; Walker *v.* Chase, 53 Me. 258; Thatcher *v.* Young, 3 Me. 67.
Maryland.— Tibel *v.* Jenkins, 95 Md. 665, 53 Atl. 429; Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488; Barrick *v.* Horner, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283; Troyhern *v.* Colburn, 66 Md. 277, 7 Atl. 459; Clagett *v.* Easterday, 42 Md.

b. Difference Between Conclusiveness of Judgment and Bar by Former Recovery. A former judgment between the same parties is a bar to the main-

617; Whitehurst *v.* Rogers, 38 Md. 503; Groshon *v.* Thomas, 20 Md. 234; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Beall *v.* Pearre, 12 Md. 550.

Massachusetts.— Sly *v.* Hunt, 159 Mass. 151, 34 N. E. 187, 38 Am. St. Rep. 403, 21 L. R. A. 403; Butler *v.* Suffolk Glass Co., 126 Mass. 512; Jamaica Pond Aqueduct Corp. *v.* Chandler, 121 Mass. 1; Hood *v.* Hood, 110 Mass. 463; Barry *v.* Adams, 14 Allen 208; Sawyer *v.* Woodbury, 7 Gray 499, 66 Am. Dec. 518; Minor *v.* Walter, 17 Mass. 237; Gridley *v.* Harradan, 14 Mass. 497; Robinson *v.* Jones, 8 Mass. 536, 5 Am. Dec. 114; McNeil *v.* Bright, 4 Mass. 282.

Michigan.— Sayers *v.* Auditor-Gen., 124 Mich. 259, 82 N. W. 1045; Scudder *v.* Andrus, 124 Mich. 252, 82 N. W. 1050; Barker *v.* Cleveland, 19 Mich. 230; Wales *v.* Lyon, 2 Mich. 276.

Minnesota.— Clark *v.* Gaar, 84 Minn. 270, 87 N. W. 777; Wagener *v.* St. Paul, 82 Minn. 148, 84 N. W. 734; Prendergast *v.* Searle, 81 Minn. 291, 84 N. W. 107; Johnson *v.* Johnson, 57 Minn. 100, 58 N. W. 824.

Mississippi.— Wall *v.* Wall, 28 Miss. 409.

Missouri.— Edmonston *v.* Carter, 180 Mo. 515, 79 S. W. 459; Fiene *v.* Kirchoff, 176 Mo. 516, 75 S. W. 608; Hickerson *v.* Mexico, 58 Mo. 61; Offutt *v.* John, 8 Mo. 120, 40 Am. Dec. 125; Erwin *v.* Henry, 5 Mo. 469; Parker *v.* Straat, 39 Mo. App. 616.

Nebraska.— Hamilton Nat. Bank *v.* American L. & T. Co., (1904) 100 N. W. 202; Agnew *v.* Omaha Nat. Bank, 69 Nebr. 654, 96 N. W. 189; State *v.* Savage, 64 Nebr. 684, 90 N. W. 898, 91 N. W. 557; Upton *v.* Betts, 59 Nebr. 724, 82 N. W. 19; Dillon *v.* Chicago, etc., R. Co., 58 Nebr. 472, 78 N. W. 927; Fuller *v.* Brownell, 48 Nebr. 145, 67 N. W. 6; Chase *v.* Miles, 43 Nebr. 686, 62 N. W. 35; McCarthy *v.* Birmingham, 5 Nebr. (Unoff.) 537, 99 N. W. 266; Schlemme *v.* Omaha Gas Mfg. Co., 4 Nebr. (Unoff.) 817, 96 N. W. 644.

Nevada.— Gulling *v.* Washoe County Bank, 24 Nev. 477, 56 Pac. 580; McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124; Sherman *v.* Dilley, 3 Nev. 21.

New Hampshire.— Gregg *v.* Page Belting Co., 69 N. H. 247, 46 Atl. 26; Clark *v.* Nichols, 52 N. H. 298; Divoll *v.* Atwood, 41 N. H. 443; Wingate *v.* Haywood, 40 N. H. 437; Hollister *v.* Abbott, 31 N. H. 442, 64 Am. Dec. 342; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675; Towns *v.* Nims, 5 N. H. 259, 20 Am. Dec. 578.

New Jersey.— Hawkshurst *v.* Asbury Park, 65 N. J. Eq. 496, 56 Atl. 697; Condit *v.* Bigalow, 64 N. J. Eq. 504, 54 Atl. 160; Scott *v.* Hall, 60 N. J. Eq. 451, 46 Atl. 611; Smith *v.* Smith, 55 N. J. Eq. 222, 37 Atl. 49.

New York.— Westerfield *v.* Rogers, 174 N. Y. 230, 66 N. E. 813; Williamsburgh Sav. Bank *v.* Solon, 136 N. Y. 465, 32 N. E. 1058; Lorrillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; Peck *v.* Callaghan, 95 N. Y. 73; Brooklyn City Bank *v.* Dearborn, 20 N. Y. 244; Burhans *v.* Van Zandt, 7 N. Y. 523; Bangs *v.* Strong, 4 N. Y. 315; Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; Craig *v.* Ward, 1 Abb. Dec. 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235; Stearns *v.* Shepard, etc., Lumber Co., 91 N. Y. App. Div. 49, 86 N. Y. Suppl. 391; Cook *v.* Casler, 76 N. Y. App. Div. 279, 78 N. Y. Suppl. 661; Malone *v.* Weill, 67 N. Y. App. Div. 169, 73 N. Y. Suppl. 700; Socialistic Co-Operative Pub. Assoc. *v.* Kuhn, 54 N. Y. App. Div. 241, 66 N. Y. Suppl. 607; Western Union Tel. Co. *v.* Shepard, 49 N. Y. App. Div. 345, 63 N. Y. Suppl. 435; Matter of Nottingham, 88 Hun 443, 34 N. Y. Suppl. 404; Matter of Hynes, 51 Hun 340, 4 N. Y. Suppl. 691; Hyatt *v.* Bates, 35 Barb. 308; Birckhead *v.* Brown, 5 Sandf. 134; Cabnmann *v.* Metropolitan St. R. Co., 37 Misc. 475, 75 N. Y. Suppl. 970; People *v.* Banfield, 36 Misc. 13, 72 N. Y. Suppl. 35; McCotter *v.* Flinn, 30 Misc. 119, 61 N. Y. Suppl. 786; Goetschius *v.* Shapiro, 88 N. Y. Suppl. 171; Beach *v.* Elmira, 11 N. Y. Suppl. 913; McRoberts *v.* Pooley, 12 N. Y. Civ. Proc. 139; Keene *v.* Clark, 2 Abb. Pr. N. S. 341; Mathews *v.* Duryee, 17 Abb. Pr. 256; Burt *v.* Sternburgh, 4 Cow. 559, 15 Am. Dec. 402; Gardner *v.* Buckbee, 3 Cow. 120, 15 Am. Dec. 256; Wright *v.* Butler, 6 Wend. 284, 21 Am. Dec. 323; Gelston *v.* Hoyt, 1 Johns. Ch. 543; Simpson *v.* Hart, 1 Johns. Ch. 91. And see Waggoner *v.* Finch, 1 Thomps. & C. 145.

North Carolina.— Bear *v.* Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; Ladd *v.* Byrd, 113 N. C. 466, 18 S. E. 666; Moore *v.* Garner, 109 N. C. 157, 13 S. E. 768; Brunhild *v.* Freeman, 80 N. C. 212; Gay *v.* Stancell, 76 N. C. 369; Armfield *v.* Moore, 44 N. C. 157.

Ohio.— Hixson *v.* Ogg, 53 Ohio St. 361, 42 N. E. 32; Hellebush *v.* Richter, 37 Ohio St. 222; Bell *v.* McColloch, 31 Ohio St. 397; Babcock *v.* Camp, 12 Ohio St. 11; Grant *v.* Ramsey, 7 Ohio St. 157.

Oklahoma.— Pratt *v.* Ratliff, 10 Okla. 168, 61 Pac. 523; Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976.

Oregon.— White *v.* Ladd, 41 Oreg. 324, 68 Pac. 739, 93 Am. St. Rep. 732; Hall *v.* Zeller, 17 Oreg. 381, 21 Pac. 192; Woods *v.* Courtney, 16 Oreg. 121, 17 Pac. 745; Glenn *v.* Savage, 14 Oreg. 567, 13 Pac. 442.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Altoona, etc., R. Co., 203 Pa. St. 108, 52 Atl. 13; Allen *v.* International Text Book Co., 201 Pa. St. 579, 51 Atl. 323, 88 Am. St. Rep. 834; Bell *v.* Allegheny County, 184 Pa. St. 296, 39 Atl. 227, 63 Am. St. Rep. 795; Ahl's Estate, 171 Pa. St. 317, 33 Atl. 66; Bolton *v.* Hey, 168 Pa. St. 418, 31 Atl. 1097; Lewis *v.* Nenzel, 38 Pa. St. 222; Peterson *v.* Lothrop, 34 Pa. St. 223; Finley *v.* Hanbest, 30 Pa. St. 190; Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380; Lentz *v.* Wallace, 17 Pa. St. 412, 55 Am. Dec. 569; Man *v.* Drexel, 2

tenance of the second action only when the causes of action in the two suits

Pa. St. 202; Wimmer's Appeal, 1 Whart. 96; Clayton's Estate, 1 Chest. Co. Rep. 21; *In re* Keely, 46 Leg. Int. 67.

Rhode Island.— Curry *v.* Swett, 13 R. I. 476.

South Carolina.— Meares *v.* Finlayson, 63 S. C. 537, 41 S. E. 779; Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504; Allen *v.* Cooley, 60 S. C. 353, 38 S. E. 622; Willoughby *v.* Northeastern R. Co., 52 S. C. 166, 29 S. E. 629; Newell *v.* Neal, 50 S. C. 68, 27 S. E. 560; Davis *v.* Murphy, 2 Rich. 560, 45 Am. Dec. 749; Starke *v.* Woodward, 1 Nott & M. 329 note.

South Dakota.— Child *v.* McClosky, 14 S. D. 181, 84 N. W. 769; Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803.

Tennessee.— Borches *v.* Arbuckle, 111 Tenn. 498, 78 S. W. 266; Latimer *v.* Rogers, 3 Head 692; Estill *v.* Taul, 2 Yerg. 467, 24 Am. Dec. 498; Bowman *v.* Rector, (Ch. App. 1900) 59 S. W. 389.

Texas.— Ft. Worth Nat. Bank *v.* Daugherty, 81 Tex. 301, 16 S. W. 1028; Watson *v.* Hopkins, 27 Tex. 637; Foster *v.* Wells, 4 Tex. 101; Tolleson *v.* Wagner, 35 Tex. Civ. App. 577, 80 S. W. 846; Silliman *v.* Taylor, 35 Tex. Civ. App. 490, 80 S. W. 651; Beardsley *v.* Thomas, 31 Tex. Civ. App. 452, 72 S. W. 411; Gordon *v.* Thorp, (Civ. App. 1899) 53 S. W. 357; Carson *v.* McCormick Harvesting Mach. Co., 18 Tex. Civ. App. 225, 44 S. W. 406.

Utah.— Rio Grande Western R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995.

Vermont.— Bacon *v.* Hunt, 72 Vt. 98, 47 Atl. 394; Hodges *v.* Eddy, 52 Vt. 434; Porter *v.* Gile, 47 Vt. 620; Lindsey *v.* Danville, 46 Vt. 144; Spencer *v.* Dearth, 43 Vt. 98; Pierson *v.* Catlin, 18 Vt. 77; Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345. And see Herrick *v.* Richardson, 17 Vt. 375.

Virginia.— Harrison *v.* Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; Currie *v.* Chowning, (1895) 21 S. E. 809; Johnson *v.* Jennings, 10 Gratt. 1, 60 Am. Dec. 323. And see Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320.

Washington.— Bond *v.* Chapman, 34 Wash. 606, 76 Pac. 97; Russell *v.* Blair, 18 Wash. 339, 51 Pac. 477; Stern *v.* Washington Nat. Bank, 14 Wash. 511, 45 Pac. 37.

West Virginia.— State *v.* Irwin, 51 W. Va. 192, 41 S. E. 124; Ohio River R. Co. *v.* Johnson, 50 W. Va. 499, 40 S. E. 407; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809; Corrothers *v.* Sargent, 20 W. Va. 351; Coville *v.* Gilman, 13 W. Va. 314; Henry *v.* Davis, 13 W. Va. 230; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

Wisconsin.— Fulton *v.* Pomeroy, 111 Wis. 663, 87 N. W. 831; Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589; Baker *v.* Baker, 57 Wis. 382, 15 N. W. 425; Dahlman *v.* Forster, 55 Wis. 382, 13 N. W. 264.

United States.— Harding *v.* Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. ed. 1066 [*reversing* 140 Cal. 690, 74 Pac. 284]; Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202; Hunt *v.* Blackburn, 128 U. S. 464, 9 S. Ct. 125, 32 L. ed. 488; Branson *v.* Wirth, 17 Wall. 32, 21 L. ed. 566; Parrish *v.* Ferris, 2 Black 606, 17 L. ed. 317; Jeter *v.* Hewitt, 22 How. 352, 16 L. ed. 345; Smith *v.* Kernochen, 7 How. 198, 12 L. ed. 666; Hopkins *v.* Lee, 6 Wheat. 109, 5 L. ed. 218; Eastern Bldg., etc., Assoc. *v.* Welling, 116 Fed. 100; Linton *v.* Vermont Nat. L. Ins. Co., 104 Fed. 584, 44 C. C. A. 54; Voorheis *v.* Blanton, 96 Fed. 497; Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., 55 Fed. 690, 5 C. C. A. 249; Odorless Excavating Co. *v.* Lauman, 12 Fed. 788, 4 Woods 129; Holmes *v.* Oregon, etc., R. Co., 9 Fed. 229, 7 Sawy. 380; Radford *v.* Folsom, 3 Fed. 199; Campbell *v.* Strong, 4 Fed. Cas. No. 2,367*a*, Hempst. 265; Janes *v.* Buzzard, 13 Fed. Cas. No. 7,206*a*, Hempst. 240; Society for Propagation, etc., *v.* Hartland, 22 Fed. Cas. No. 13,155, 2 Paine 536. And see Clark *v.* Blair, 14 Fed. 812, 4 McCrary 311.

England.— Beardsley *v.* Beardsley, [1899] 1 Q. B. 746, 68 L. J. Q. B. 270, 80 L. T. Rep. N. S. 51, 47 Wkly. Rep. 284; Reg. *v.* Ambergate, etc., R. Co., 17 Q. B. 957, 16 Jur. 777, 79 E. C. L. 957; Flitters *v.* Allfrey, L. R. 10 C. P. 29, 44 L. J. C. P. 73, 31 L. T. Rep. N. S. 878, 23 Wkly. Rep. 442; Aslin *v.* Parkin, 2 Burr. 665; Waters *v.* Waters, 2 De G. & Sm. 591, 64 Eng. Reprint 263; Outram *v.* Morewood, 3 East 346, 7 Rev. Rep. 473; Reg. *v.* Hartington Middle Quarter Tp., 4 E. & B. 780, 82 E. C. L. 780; Kingston's Case, 20 How. St. Tr. 355, 538, 3 Smith Lead. Cas. 2028; Barrs *v.* Jackson, 9 Jur. 609, 14 L. J. Ch. 433, 1 Phil. 582, 19 Eng. Ch. 582, 41 Eng. Reprint 754; Magrath *v.* Reichel, 57 L. T. Rep. N. S. 850.

Canada.— Rider *v.* Snow, 20 Can. Sup. Ct. 12; Smith *v.* Strange, 2 Manitoba 101; *Re* Hague, 13 Ont. 727; Mills *v.* Kelly, 2 U. C. C. P. 1; Harris *v.* Dunn, 18 U. C. Q. B. 352; Adams *v.* Mulligan, 20 Quebec Super. Ct. 251. See Sulis *v.* Ferguson, 10 N. Brunsw. 110; Wallace *v.* Orangeville, 5 Ont. 37.

See 30 Cent. Dig. tit. "Judgment," §§ 1150, 1152.

An estoppel by verdict occurs where each of two causes of action, although not identical, include some identical fact or circumstance, and there is a verdict and judgment in an action on one of them, whereby the parties are estopped to allege anything concerning such fact or circumstance contrary to such verdict. Canifax *v.* Chapman, 7 Mo. 175; Henderson *v.* Kenner, 1 Rich. (S. C.) 474; U. S. *v.* Schneider, 35 Fed. 107, 13 Sawy. 295; Shoe Mach. Co. *v.* Cutlan, [1896] 1 Ch. 667, 65 L. J. Ch. 314, 74 L. T. Rep. N. S. 166; Eastmure *v.* Laws, 2 Arn. 54, 5 Bing. N. Cas.

are identical.[79] But it will be conclusive and final as to any issue litigated and determined in the former suit, and coming again in question in the second suit, although the latter is brought upon an entirely different cause of action.[80]

c. What Constitutes Estoppel. The force of the estoppel resides in the judgment itself; it is not the finding of the court or verdict of the jury which concludes the parties, but the judgment entered thereon.[81] The reasoning of the court in rendering a judgment forms no part of the judgment, as regards its conclusive effect,[82] nor are the parties bound by remarks made or opinions expressed by the court in deciding the cause, which do not necessarily enter into the judgment;[83] neither is it proper for the court to undertake to define the extent to

444, 7 Dowl. P. C. 431, 3 Jur. 460, 8 L. J. C. P. 236, 7 Scott 461, 35 E. C. L. 241; Strutt *v.* Bovingdon, 5 Esp. 56, 8 Rev. Rep. 834; Butler *v.* Butler, 63 L. J. P. & Adm. 1, 69 L. T. Rep. N. S. 545, 1 Reports 535, 42 Wkly. Rep. 49 [*affirming* [1893] 1 P. 185, 62 L. J. P. & Adm. 105, 69 L. T. Rep. N. S. 54, 1 Reports 521]; Hancock *v.* Welsh, 1 Stark. 347, 2 E. C. L. 136; Renwick *v.* Berryman, 3 Manitoba 387; Pierce *v.* Canavan, 29 Grant Ch. (U. C.) 32; Campbell *v.* Campbell, 25 U. C. C. P. 368; Proudfoot *v.* Lawrence, 8 U. C. Q. B. 269; Russell *v.* Rowe, 7 U. C. Q. B. 484; Hunt *v.* McCarthy, 6 U. C. Q. B. O. S. 434. And see Wagener *v.* St. Paul, 82 Minn. 148, 84 N. W. 734. *Compare* National F. Ins. Co. *v.* McLaren, 12 Ont. 682.

A judgment rendered in an action brought to annul a judgment rendered in the same court is *res judicata* as to the grounds of nullity alleged and tried. Hoggatt *v.* Crandall, 39 La. Ann. 976, 3 So. 89; State *v.* Judge Twenty-Sixth Dist. Ct., 35 La. Ann. 214. The judgment sought to be annulled cannot be pleaded in bar of the action. *In re* Bruce, 10 La. Ann. 586. And see Davidson *v.* New Orleans, 32 La. Ann. 1245. See also *supra*, X, C, 9, a.

A judgment of restitution given on the reversal of an erroneous judgment is conclusive of the matters adjudicated by it. The right of plaintiff in error to be restored to all things which he has lost by reason of the erroneous judgment is thereby established beyond question. Breading *v.* Blocher, 29 Pa. St. 347.

Suit for malicious prosecution of first action.— Where, in an action on a note, defendant pleaded payment and plaintiff denied the same and there was a finding on the issue in favor of plaintiff and judgment thereon, the issue could not be retried in an action by defendant against plaintiff for malicious prosecution. Hixson *v.* Ogg, 53 Ohio St. 361, 42 N. E. 32. See MALICIOUS PROSECUTION.

A decree ascertaining and fixing the amounts and priorities of liens on real estate, and providing for the sale thereof by a special commissioner, unless such liens are paid by a future day, is *res judicata* as to all payments made prior to its date, on account of any claim therein decreed to be paid. Lehman *v.* Hinton, 44 W. Va. 1, 29 S. E. 984.

Litigation of claim.— A final judgment dismissing a claim is none the less conclusive because no evidence was offered to support the claim. Bradford *v.* Cook, 4 La. Ann. 229.

Recording.— A decree in chancery, establishing the fact of the former existence and the loss of an unrecorded deed, need not be recorded in the registry of deeds in order to be conclusive on all parties to the proceeding and those claiming under them. McCamant *v.* Patterson, 39 Mo. 100.

Payment of a judgment rendered in a suit for foreclosure, or redemption from the foreclosure sale, does not extinguish the judgment, nor affect its conclusiveness as to the questions tried and determined in the action. Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180.

79. **Former recovery as merger or bar** see *supra*, XIII.

80. *Arizona.*— Stevens *v.* Wadleigh, (1899) 57 Pac. 622.

Georgia.— Christian *v.* Penn, 7 Ga. 434.

Maine.— Woodbury *v.* Portland Mar. Soc., 94 Me. 122, 46 Atl. 797; Lynch *v.* Swanton, 53 Me. 100.

Massachusetts.— Harlow *v.* Bartlett, 170 Mass. 584, 49 N. E. 1014; Merriam *v.* Whittemore, 5 Gray 316.

Nevada.— Adams *v.* Smith, 19 Nev. 259, 9 Pac. 337, 10 Pac. 353.

New York.— Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; Taylor *v.* Taylor, 14 N. Y. Suppl. 420, 26 Abb. N. Cas. 360.

Vermont.— Lindsey *v.* Danville, 46 Vt. 144; Spencer *v.* Dearth, 43 Vt. 98.

United States.— Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Beloit *v.* Morgan, 7 Wall. 619, 19 L. ed. 205; Stufflebeam *v.* De Lashmutt, 101 Fed. 367; Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., 55 Fed. 690, 5 C. C. A. 249.

81. Denike *v.* Denike, 44 N. Y. App. Div. 621, 60 N. Y. Suppl. 110.

82. Citizens' Bank *v.* Brigham, 61 Kan. 727, 60 Pac. 754; Lafourche Parish Police Jury *v.* Terrebonne Parish Police Jury, 48 La. Ann. 1299, 20 So. 708; Pepper *v.* Dunlap, 5 La. Ann. 200.

83. Penouilh *v.* Abraham, 43 La. Ann. 214, 9 So. 36; Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196.

A doubt intimated by the chancellor as to his right to entertain jurisdiction of the suit will not lessen the effect of his judgment, when he did exercise jurisdiction. Williams *v.* Tomlin, (Va. 1898) 28 S. E. 883.

which its judgment may or may not prejudice the rights of the parties in prosecuting other actions.[84]

2. Organization and Character of Court[85] — a. In General. To constitute a matter *res judicata*, it is necessary that the judgment should have been rendered by a legally constituted court, or a body known to the law as possessing the right to hear and adjudicate controversies.[86] Subject to this limitation the character of conclusiveness attaches to the judgments and decrees of courts of equity,[87] of admiralty,[88] and of bankruptcy,[89] and to the adjudications of probate courts,[90] courts-martial,[91] ecclesiastical courts,[92] and church judicatories;[93] and the governing bodies of voluntary societies, clubs, and fraternal orders.[94] The principle of *res judicata* is applied as between federal and state courts,[95] and different coördinate branches of the same court,[96] and to the awards of arbitrators,[97] and the rulings and decisions of the United States land-office.[98]

b. Limited or Inferior Courts.[99] If jurisdiction appears on the face of the pro-

84. Prondzinski *v.* Garbutt, 9 N. D. 239, 83 N. W. 23; Holland *v.* Preston, (Tex. Civ. App. 1897) 41 S. W. 374.

85. Former recovery as merger or bar see *supra*, XIII, B, 1.

86. Rose *v.* Himely, 4 Cranch (U. S.) 241, 2 L. ed. 608; Rogers *v.* Wood, 2 Barn. & Ad. 245.

The judgments of a de facto court, made in the course of regular proceedings, are generally held valid and binding on the parties, although afterward such court is declared to be an unlawful and unconstitutional body. Masterson *v.* Matthews, 60 Ala. 260; Mayo *v.* Stoneum, 2 Ala. 390; State *v.* Porter, 1 Ala. 688; State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409; Gilliam *v.* Reddick, 26 N. C. 368; State *v.* Alling, 12 Ohio 16; State *v.* Anone, 2 Nott & M. (S. C.) 27.

Exclusive jurisdiction.— While the judgments of courts of concurrent jurisdiction are only evidence where the very same matter comes distinctly in issue between the same parties, the judgments of courts of exclusive jurisdiction are evidence whether the matter arises incidentally or is the matter directly in issue. Mackintosh *v.* Smith, 4 Macq. H. L. 913, 924; Kingston's Case, 20 How. St. Tr. 355.

87. *Alabama.*— McDonald *v.* Mobile L. Ins. Co., 65 Ala. 358.

Illinois.— Meyer *v.* Meyer, 40 Ill. App. 94.

Iowa.— Poole *v.* Seney, 70 Iowa 275, 24 N. W. 520, 30 N. W. 634.

Kentucky.— Moore *v.* Lockitt, 2 A. K. Marsh. 526.

Ohio.— Babcock *v.* Camp, 12 Ohio St. 11.

Pennsylvania.— Evans *v.* Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

Vermont.— Low *v.* Mussey, 41 Vt. 393.

United States.— Pennington *v.* Gibson, 16 How. 65, 14 L. ed. 847; U. S. Bank *v.* Beverley, 1 How. 134, 11 L. ed. 75.

88. A judgment of a common-law court may be pleaded as an estoppel in a court of admiralty and *vice versa*. Wager *v.* Providence Ins. Co., 150 U. S. 99, 14 S. Ct. 55, 37 L. ed. 1013; The Rio Grande *v.* Otis, 23 Wall. (U. S.) 458, 23 L. ed. 158; Goodrich *v.* Chicago, 5 Wall. (U. S.) 566, 12 L. ed. 511; Cupisino *v.* Perez, 2 Dall. (U. S.) 194, 1 L. ed. 345. But *compare* Carmody *v.* Rome, 49 Fed. 392; Murphy *v.* Granger, 32 Mich. 358; People *v.* Wayne Cir. Judge, 27 Mich. 406, 15 Am. Rep. 195. And see Admiralty, 1 Cyc. 891.

89. See Bankruptcy, 5 Cyc. 317.

90. See *infra*, XIV, D, 1.

91. Swaim *v.* U. S., 165 U. S. 553, 17 S. Ct. 448, 41 L. ed. 823; *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; Dynes *v.* Hoover, 20 How. (U. S.) 625, 15 L. ed. 838; Weirman *v.* U. S., 36 Ct. Cl. 236.

92. Meadows *v.* Kingston, Ambl. 756, 27 Eng. Reprint 487; Kenn's Case. 7 Coke 42*b*.

93. The decisions of the tribunals established by religious societies for the adjudication of questions of faith and discipline as to their own jurisdiction in ecclesiastical matters will receive great weight in the civil courts; and where such tribunals have jurisdiction, civil courts will not inquire whether they have proceeded according to the laws and usages of their church, or whether they have decided correctly, but their decisions are final and binding upon the parties and courts. Connitt *v.* New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551. And see Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Gable *v.* Miller, 10 Paige (N. Y.) 627; Hartford Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; German Reformed Church *v.* Com., 3 Pa. St. 282. But when property rights are concerned, the ecclesiastical courts have no power to pass upon them so as to bind the civil courts. Watson *v.* Garvin, 54 Mo. 353.

94. Woolsey *v.* I. O. O. F., 61 Iowa 492, 16 N. W. 576. And see State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760.

95. German Savings, etc., Soc. *v.* Tull, 136 Fed. 1, 69 C. C. A. 1. And see *infra*, XXII, C.

96. Marvin *v.* Weider, 31 Nebr. 774, 48 N. W. 825; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202.

97. See Arbitration and Award, 3 Cyc. 728 *et seq.*

98. See Public Lands.

99. Former recovery as merger or bar see *supra*, XIII, B, 1, b.

ceedings or is affirmatively shown, the judgment of a justice of the peace or of an inferior court is conclusive upon the parties in the same manner and to the same extent as that of a court of record.[1]

c. Boards and Officers Acting Judically.[2] The rulings and decisions of certain executive or administrative officers, acting in the discharge of duties which involve judicial or quasi-judicial action on their part, are accorded the effect of *res judicata* so far as to make them conclusive unless duly appealed from or directly brought before the courts for review, and to protect them against collateral impeachment.[3] And the same rule applies to boards of municipal officers, when acting in a similar capacity.[4]

1. *Arkansas.*— Kelley, etc., Milling Co. *v.* Adams, 72 Ark. 657, 78 S. W. 49; Shaver *v.* Shell, 24 Ark. 122.

California.— Wiese *v.* San Francisco Musical Soc., 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577; Bernal *v.* Lynch, 36 Cal. 135.

Connecticut.— Bell *v.* Raymond, 18 Conn. 91.

Georgia.— La Motte *v.* Harper, 88 Ga. 26, 13 S. E. 804.

Illinois.— Bostwick *v.* Skinner, 80 Ill. 147; Barnett *v.* Wolf, 70 Ill. 76; Hanna *v.* Yocum, 17 Ill. 387.

Indiana.— Pressler *v.* Turner, 57 Ind. 56. And see Reed *v.* Whitton, 78 Ind. 579.

Iowa.— Cory *v.* King, 49 Iowa 365; Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

Kentucky.— Stewart *v.* Thomson, 97 Ky. 575, 31 S. W. 133, 17 Ky. L. Rep. 381, 53 Am. St. Rep. 431, 36 L. R. A. 582.

Maine.— Stone *v.* Augusta, 46 Me. 127.

Maryland.— Cumberland Coal, etc., Co. *v.* Jeffries, 27 Md. 526.

Missouri.— Fischer *v.* Anslyn, 30 Mo. App. 316. But *compare* Leonard *v.* Sparks, 63 Mo. App. 585.

New Jersey.— Amerman *v.* Briggs, 50 N. J. L. 114, 11 Atl. 423; Van Doren *v.* Horton, 25 N. J. L. 205; Schooley *v.* Thorne, 1 N. J. L. 71.

New York.— Hallock *v.* Dominy, 69 N. Y. 238; Gates *v.* Preston, 41 N. Y. 113; Boyer *v.* Schofield, 1 Abb. Dec. 177, 2 Keyes 628; Woods *v.* Garcewich, 67 N. Y. App. Div. 53, 73 N. Y. Suppl. 472; Mitchell *v.* Hawley, 4 Den. 414, 47 Am. Dec. 260; Andrews *v.* Montgomery, 19 Johns. 162, 10 Am. Dec. 213; Pease *v.* Howard, 14 Johns. 479.

North Carolina.— Springs *v.* Schenck, 106 N. C. 153, 11 S. E. 646; Brunhild *v.* Freeman, 80 N. C. 212; Ludwick *v.* Fair, 29 N. C. 422, 47 Am. Dec. 333; Burke *v.* Elliott, 26 N. C. 355, 42 Am. Dec. 142.

Oregon.— Thompson *v.* Multnomah County, 2 Oreg. 34.

Pennsylvania.— Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Carey *v.* Watson, 2 Walk. 534; Hazelett *v.* Ford, 10 Watts 101; Emery *v.* Nelson, 9 Serg. & R. 12; Galbraith *v.* Black, 4 Serg. & R. 207.

Vermont.— Johnson *v.* Williams, 48 Vt. 565; Farr *v.* Ladd, 37 Vt. 156; Spaulding *v.* Chamberlin, 12 Vt. 538, 36 Am. Dec. 358.

United States.— Mohr *v.* Manierre, 17 Fed. Cas. No. 9,695, 7 Biss. 419 [*affirmed* in 101 U. S. 417, 25 L. ed. 1052].

England.— Flitters *v.* Allfrey, L. R. 10 C. P. 29, 44 L. J. C. P. 73, 31 L. T. Rep. N. S. 878, 23 Wkly. Rep. 442. See also Rex *v.* Grundon, Cowp. 315. But *compare* Bottings *v.* Firby, 9 B. & C. 762, 7 L. J. K. B. O. S. 329, 4 M. & R. 566, 17 E. C. L. 339.

See 30 Cent. Dig. tit. "Judgment," § 1153.

But *compare* Pettus *v.* Atlantic Sav., etc., Assoc., 94 Va. 477, 26 S. E. 834.

No jurisdiction of subject-matter.— In an action of ejectment, the record of a judgment in an action for a trespass on real estate, between the same parties, before a justice of the peace, is not evidence against defendant. Gobble *v.* Minnich, 10 Pa. St. 488.

2. Former recovery as merger or bar see *supra*, XIII, B, 1, d.

3. See Beall *v.* State, 9 Ga. 367. *Compare* Barker *v.* Jackson, 2 Fed. Cas. No. 989, 1 Paine 559.

Illustrations.— This rule has been applied to the decisions of the following officers: United States commissioner of patents (Eureka Clothes Wringing Mach. Co. *v.* Bailey Washing, etc., Mach. Co., 11 Wall. (U. S.) 488, 20 L. ed. 209; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566), controller of the currency (Casey *v.* Galli, 94 U. S. 673, 680, 24 L. ed. 168, 307), collector of customs (U. S. *v.* McDowell, 21 Fed. 563), superintendent of state banking department (People *v.* Preston, 62 Hun (N. Y.) 185, 16 N. Y. Suppl. 488), state funding board (Longinette *v.* Shelton, (Tenn. Ch. App. 1898) 52 S. W. 1078), commissioner of schools (Crandall *v.* James, 6 R. I. 144), board of land commissioners (Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544; Gregory *v.* McPherson, 13 Cal. 562).

The decision of the secretary of the interior that a preëmption claim is valid is not an estoppel upon one who contested the same, not as a preëmption claimant, but claiming under an act of congress donating land to a state, even if it is binding upon contesting claimants of the right to preëmption. Megerle *v.* Ashe, 33 Cal. 74.

The inquisition of a coroner's jury is not admissible to prove that the county commissioners were negligent in not providing a safe and suitable crossing over a creek while they were repairing a bridge over the same. State *v.* Cecil County Com'rs, 54 Md. 426.

4. See the cases cited *infra*, this note.

Illustrations.— The rule stated in the text has also been applied in the following cases:

d. Appellate Courts.[5] The decision of an appellate court is binding and conclusive upon the parties, as to the matter or point adjudged, in subsequent litigation between them in the same or any other court,[6] and this is true even though the appellate court has since decided differently in other cases.[7]

3. Nature or Form of Action[8]**—a. In General.** On the question of *res judicata*, it is immaterial that the questions alleged to have been settled by a

Decisions of road commissioners, in adjudicating upon the necessity of a road, and locating and making assessments for it (Thomas *v.* Churchill, 84 Me. 446, 24 Atl. 899; Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525. *Compare* Winchester *v.* Cecil County, 78 Md. 266, 27 Atl. 1075. But see Elkhart *v.* Simonton, 71 Ind. 7), common council of a city, canvassing the returns of an election and determining its result (Hadley *v.* Albany, 33 N. Y. 603, 88 Am. Dec. 412), board of police commissioners acting as a court for the trial of members of the police force (Queen *v.* Atlanta, 59 Ga. 318), commissioners of sewers, requiring repair of sea-walls (Reg. *v.* Leigh, 10 A. & E. 398, 2 P. & D. 357, 37 E. C. L. 224).

Auditing claims against municipality.— Where the statutes commit to a board of county commissioners or supervisors or auditors, or to a town council, the duty of auditing and examining claims against the municipality, their action in auditing, adjusting, allowing, or rejecting such a claim is judicial in its nature, and their decision is binding and conclusive unless reversed on appeal. Placer County *v.* Campbell, (Cal. 1886) 11 Pac. 602; Colusa County *v.* De Jarnett, 55 Cal. 373; Maxwell *v.* Fulton County, 119 Ind. 20, 23, 19 N. E. 617, 21 N. E. 453; Kelly *v.* Wimberly, 61 Miss. 548; Carroll *v.* Tishamingo County Bd. of Police, 28 Miss. 38; Sioux City *v.* Jameson, 43 Nebr. 265, 61 N. W. 596; State *v.* Buffalo County, 6 Nebr. 454; Osterhoudt *v.* Rigney, 98 N. Y. 222. *Compare* Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; Jackson County *v.* Nichols, 12 Ind. App. 315, 40 N. E. 277, 54 Am. St. Rep. 520; Staples *v.* Brown, (Tenn. 1905) 85 S. W. 254. But see Sears *v.* Stone County, 105 Mo. 236, 16 S. W. 878, 24 Am. St. Rep. 378, holding that an order auditing and settling a claim against a municipality is not a judicial act, although performed by a court under statutory authority.

5. Former recovery as merger or bar see *supra*, XIII, B, 1, e.

6. *Alabama.*— Thomason *v.* Dill, 34 Ala. 175.

Colorado.— Clark *v.* Knox, 32 Colo. 342, 76 Pac. 372. *Compare* Clemes *v.* Fox, 6 Colo. App. 377, 40 Pac. 843.

Georgia.— Ingram *v.* Mercer University, 102 Ga. 226, 29 S. E. 273.

Illinois.— Rhodes *v.* Ashhurst, 176 Ill. 351, 52 N. E. 118; Doyle *v.* Sanford, 26 Ill. App. 156.

Kentucky.— Ford *v.* Gregory, 10 B. Mon. 175; Jenkins *v.* Headley, 40 S. W. 460, 19 Ky. L. Rep. 290.

Louisiana.— State *v.* McGuire, 40 La. Ann. 378, 4 So. 222; Campbell *v.* Woolfolk, 37 La. Ann. 320.

Maryland.— Mitchell *v.* Mitchell, 6 Md. 224.

Mississippi.— Stewart *v.* Stebbins, 30 Miss. 66.

Missouri.—Stevens *v.* Kansas City, 146 Mo. 460, 48 S. W. 658; Brown *v.* Woody, 22 Mo. App. 253.

Montana.— Priest *v.* Eide, 19 Mont. 53, 47 Pac. 206, 958.

New York.— Genet *v.* Delaware, etc., Canal Co., 14 N. Y. App. Div. 177, 43 N. Y. Suppl. 589; Ruthven *v.* Patten, 1 Rob. 416; Matter of Broderick, 25 Misc. 534, 56 N. Y. Suppl. 99.

Pennsylvania.— Bolton *v.* Hey, 168 Pa. St. 418, 31 Atl. 1097.

Texas.— Crane *v.* Blum, 56 Tex. 325; Settegast *v.* Blount, (Civ. App. 1898) 46 S. W. 268.

Virginia.— Findlay *v.* Trigg, 83 Va. 539, 3 S. E. 142; Terry *v.* Dickinson, 75 Va. 475; Campbell *v.* Campbell, 22 Gratt. 649; Cottom *v.* Cottom, 4 Rand. 192; Price *v.* Campbell, 5 Call. 115.

West Virginia.— McGraw *v.* Roller, 53 W. Va. 75, 44 S. E. 248; Kinports *v.* Rawson, 36 W. Va. 237, 15 S. E. 66; Henry *v.* Davis, 13 W. Va. 230.

United States.—Duncan *v.* Gegan, 101 U. S. 810, 25 L. ed. 875; Martin *v.* Hunter, 1 Wheat. 304, 4 L. ed. 97; Smith *v.* Maryland, 6 Cranch 286, 3 L. ed. 225; Oregon R., etc., Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57; Central Ohio R. Co. *v.* Thompson, 5 Fed. Cas. No. 2,550, 2 Bond 296.

England.— See Farquharson *v.* Seton, 5 Russ. 45, 5 Eng. Ch. 45, 38 Eng. Reprint 944.

See 30 Cent. Dig. tit. "Judgment," § 1156.

7. Where on an appeal from an order refusing to enter a judgment on a scire facias *sur* mechanic's lien for want of a sufficient affidavit of defense, the supreme court construed the agreements between the parties as not conferring the right to file liens, and the judgment was affirmed and a plea filed in the lower court, but before the trial the supreme court applied in other cases a different rule of construction with a different result to contracts of like tenor and effect, it was held that the trial court was bound by the rule laid down by the supreme court in affirming the judgment, notwithstanding the different rule laid down in subsequent cases. Bolton *v.* Hey, 168 Pa. St. 418, 31 Atl. 1097.

8. Former recovery as merger or bar see *supra*, XIII, B, 2.

former adjudication were determined in a different kind of proceeding or a different form of action from that in which the estoppel is set up, the parties and the issues being the same.[9]

b. Actions at Law and Suits in Equity.[10] A judgment on the merits in a court of law will be conclusive upon the parties as to all issues litigated and adjudged, in any subsequent proceedings between them in a court of equity,[11] except as to claims or defenses which were of a purely equitable character, and

9. *Illinois.*— Knickerbocker *v.* Crosby, 86 Ill. App. 246.

Iowa.— Carbiener *v.* Montgomery, 97 Iowa 659, 66 N. W. 900.

Louisiana.— McNeely *v.* Hyde, 46 La. Ann. 1083, 15 So. 167; Jamison *v.* New Orleans, 12 La. Ann. 346.

Maryland.— Taylor *v.* Sindall, 34 Md. 38.

New Jersey.— North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258.

New York.— Tenement House Dept. *v.* Moeschen, 89 N. Y. App. Div. 526, 85 N. Y. Suppl. 704; Beach *v.* Elmira, 11 N. Y. Suppl. 913; Matter of Roberts, 59 How. Pr. 136.

Ohio.— Hellebush *v.* Richter, 37 Ohio St. 222.

Tennessee.— Bugg *v.* Norris, 4 Yerg. 326.

Texas.— McCord-Collins Commerce Co. *v.* Levy, 21 Tex. Civ. App. 109, 50 S. W. 606.

Washington.— Seattle Nat. Bank *v.* School Dist. No. 40, 20 Wash. 368, 55 Pac. 317.

United States.— Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293; New Jersey *v.* Boller, 47 Fed. 415.

See 30 Cent. Dig. tit. "Judgment," § 1157.

Mandamus.— The decision on application for writ of mandamus, if on the merits, is a conclusive adjudication of the issues and questions involved. Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183.

A decision in contempt proceedings that a certain device is not an infringement of a patent is not an estoppel in a subsequent suit between the same parties for infringement by the manufacture or use of the same device. Mack *v.* Levy, 59 Fed. 468.

Habeas corpus.— A judgment rendered in another state in habeas corpus proceedings for the custody of a child is not conclusive where there has been a material change of conditions and circumstances. *In re* Barnes, 11 Ohio Dec. (Reprint) 848, 30 Cinc. L. Bul. 164.

A judgment against plaintiff in attachment is not conclusive evidence, in a subsequent suit on the bond, that the attachment was wrongfully sued out. Sackett *v.* McCord, 23 Ala. 851.

A decree of interpleader will conclude a defendant thereto as to the fund in controversy, although his right to sue at law on his claim is not enjoined. McMurray *v.* St. Elizabeth S. of C., 68 N. J. L. 312, 53 Atl. 389.

Suit to impeach decree.— Where one brings a suit to impeach a decree on the ground of fraud, and it is dismissed for want of equity, he will not be permitted, in a subsequent suit in which such decree is relied on as evidence of title, to assail it again as fraudulent. Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332.

Judgments and decisions under burnt record statutes are conclusive on parties and privies. Higgins *v.* Mulvey, 136 Ill. 636, 27 N. E. 58; Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 606.

A judgment of deportation of a Chinese person by a court having jurisdiction of the controversy and the parties cannot be impeached on habeas corpus by proof of a different state of facts from that on which the judgment was based. *In re* Gut Lun, 83 Fed. 141.

Where the rights of a party are fully determined upon exceptions to a sheriff's return on sale of real property under execution, the decision is as conclusive as any other judgment. Com. *v.* Comrey, 174 Pa. St. 355, 34 Atl. 581.

An order allowing execution to issue upon a judgment against a deceased defendant, on the ground that he had fraudulently conveyed his property, is not conclusive upon the question whether the conveyance was fraudulent. *In re* Holmes, 131 N. Y. 80, 29 N. E. 1003.

10. Former recovery as merger or bar see *supra*, XIII, B, 2, b.

11. *Alabama.*— Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45; Strang *v.* Moog, 72 Ala. 460; Alabama Warehouse Co. *v.* Jones. 62 Ala. 550.

Arkansas.— Hempstead *v.* Watkins, 6 Ark. 317, 42 Am. Dec. 696.

Georgia.— Baldwin *v.* McCrea, 38 Ga. 650.

Illinois.— Hofmann *v.* Burris, 110 Ill. App. 348; Brinkerhoff *v.* Telford, 58 Ill. App. 56.

Kentucky.— Abbott *v.* Traylor, 11 Bush 335; Troutman *v.* Vernon, 1 Bush 482; Price *v.* Boyd, 1 Dana 434; Triplett *v.* Gill, 7 J. J. Marsh. 432; Hunt *v.* Terril, 7 J. J. Marsh. 67; Cave *v.* Davis, 5 T. B. Mon. 392; McCampbell *v.* McCampbell, 5 Litt. 92, 15 Am. Dec. 48; Keith *v.* Humphries, 1 A. K. Marsh. 13. *Compare* McClain *v.* French, 3 T. B. Mon. 385.

Maine.— Cowan *v.* Wheeler, 25 Me. 267, 43 Am. Dec. 283.

Michigan.— Codde *v.* Mahiat, 109 Mich. 186, 66 N. W. 1093.

Mississippi.— Houston *v.* Royston, 1 Sm. & M. 238; Green *v.* Robinson, 5 How. 80; Hooke *v.* Wood, 2 How. 867.

New Hampshire.— Hollister *v.* Barkley, 11 N. H. 501.

New Jersey.— Phillips *v.* Pullen, 45 N. J. Eq. 830, 18 Atl. 849; Hendrickson *v.* Norcross, 19 N. J. Eq. 417. And see Atty.-Gen. *v.* New Jersey Cent. R. Co., 68 N. J. Eq. 198, 59 Atl. 348.

therefore not properly cognizable at law;[12] and conversely, when a cause has been heard and decided on the merits in chancery, this will preclude the parties from any further controversy concerning the same questions in a court of law.[13]

c. Special Proceedings Other Than Actions.[14] Decisions made in the course of special or ancillary proceedings, not formally to be classed as actions at law, but incidental to the progress of litigation, are conclusive upon the points or questions actually decided, provided they are not made purely *ex parte*,[15] but

New Mexico.— Robbins *v.* Collier, 3 N. M. 231, 5 Pac. 538.

New York.— Orcutt *v.* Orms, 3 Paige 459; Donovan *v.* Finn, Hopk. 59, 14 Am. Dec. 531; Hawley *v.* Mancius, 7 Johns. Ch. 174; Shottenkirk *v.* Wheeler, 3 Johns. Ch. 275; Gregory *v.* Burrall, 2 Edw. 417. *Compare* Arden *v.* Patterson, 5 Johns. Ch. 44.

Ohio.— Starr *v.* Starr, 1 Ohio 321.

Pennsylvania.— Philadelphia *v.* Terry, 17 Phila. 275.

South Carolina.— Forsythe *v.* McCreight, 10 Rich. Eq. 308; Edings *v.* Whaley, 1 Rich. Eq. 301; Gillett *v.* Powell, Speers Eq. 142; Redheimer *v.* Pyron, Speers Eq. 134; Pratt *v.* Weyman, 1 McCord Eq. 156.

Tennessee.—Greenfield *v.* Frierson, 7 Heisk. 633; Bumpass *v.* Reams, 1 Sneed 595; Rogers *v.* Waller, 4 Hayw. 205, 9 Am. Dec. 758.

Virginia.— Tilson *v.* Davis, 32 Gratt. 92; Hoomes *v.* Kuhn, Wythe 136.

West Virginia.— Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

United States.— Tilton *v.* Cofield, 93 U. S. 163, 23 L. ed. 858; Davenport *v.* U. S., 9 Wall. 409, 19 L. ed. 704; Sheets *v.* Selden, 7 Wall. 416, 19 L. ed. 166; Rachal *v.* Smith, 101 Fed. 159, 42 C. C. A. 297; Tompkins *v.* Drennen, 56 Fed. 694, 6 C. C. A. 83.

See 30 Cent. Dig. tit. "Judgment," § 1158.

12. *Alabama.*— A judgment at law against the validity of a deed, for want of delivery, is not a bar to a bill in equity to enforce it as a contract to convey. Jenkins *v.* Harrison, 66 Ala. 345.

California.—Hills *v.* Sherwood, 48 Cal. 386.

Georgia.— Merritt *v.* Gill, 68 Ga. 209.

Iowa.— Arnold *v.* Grimes, 2 Iowa 1.

Kentucky.— Givens *v.* Peake, 1 Dana 225; Burchet *v.* Faulkner, 1 Dana 99.

North Carolina.— Love *v.* Belk, 36 N. C. 163.

Tennessee.— Appleton *v.* Harwell, Cooke 242.

See 30 Cent. Dig. tit. "Judgment," § 1158.

13. *Arkansas.*— Harris *v.* Townsend, 52 Ark. 411, 13 S. W. 283.

California.— Wolverton *v.* Baker, 86 Cal. 591, 25 Pac. 54. *Compare* Flandreau *v.* Downey, 23 Cal. 354.

Georgia.— H. B. Claflin Co. *v.* De Vaughn, 106 Ga. 282, 32 S. E. 108.

Illinois.— Stickney *v.* Goudy, 132 Ill. 213, 23 N. E. 1034; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 81 Ill. App. 435.

Iowa.— Moy *v.* Moy, 111 Iowa 161, 82 N. W. 481.

Kentucky.—Morgan *v.* Patton, 4 T. B. Mon. 453. *Compare* Rice *v.* Lowan, 2 Bibb 149.

Maryland.— Trayhern *v.* Colburn, 66 Md. 277, 7 Atl. 459.

Massachusetts.— Powers *v.* Chelsea Sav. Bank, 129 Mass. 44; Bigelow *v.* Winsor, 1 Gray 299.

New Hampshire.— Hall *v.* Dodge, 38 N. H. 346.

New Jersey.— Putnam *v.* Clark, 34 N. J. Eq. 532.

Oklahoma.— Randolph *v.* Hudson, 12 Okla. 516, 74 Pac. 946.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Fridenberg, 175 Pa. St. 500, 34 Atl. 848, 52 Am. St. Rep. 851; Myers *v.* Kingston Coal Co., 126 Pa. St. 582, 17 Atl. 891; Westcott *v.* Edmunds, 68 Pa. St. 34; Williams *v.* Row, 62 Pa. St. 118; Herr *v.* Herr, 5 Pa. St. 428, 47 Am. Dec. 416; City *v.* Fricke, 6 Phila. 578.

Vermont.— Pierson *v.* Catlin, 18 Vt. 77.

Virginia.— Pleasants *v.* Clements, 2 Leigh 474.

Washington.— Bruce *v.* Foley, 18 Wash. 96, 50 Pac. 935.

West Virginia.—Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

United States.— Parker *v.* Kane, 22 How. 1, 16 L. ed. 286; Washington Bridge Co. *v.* Stewart, 3 How. 413, 11 L. ed. 658; Stewart *v.* Ashtabula, 98 Fed. 516.

See 30 Cent. Dig. tit. "Judgment," § 1158.

But see Davidson *v.* Sharpe, 28 N. C. 14.

Dismissal because of adequate remedy at law.— Where a suit in equity was dismissed on the ground that it appeared from the facts found that complainant had an adequate remedy at law, the facts found and the court's conclusions of law thereon were not determinations estopping defendant from asserting otherwise in a subsequent action at law. Barnett *v.* Smart, 158 Mo. 167, 59 S. W. 235. And generally a decision by a court of equity that it will not interfere between the parties, but will leave them to their legal remedies, determines nothing with respect to their rights in any such sense as to be binding upon them in subsequent proceedings at law. Lewis *v.* Baker, 151 Pa. St. 529, 25 Atl. 99.

Refusal to award costs, etc.— The refusal of a court, when within its equitable discretion, to award costs or disbursements to a successful party, is an adjudication which precludes him from maintaining an independent action for their recovery. Munson *v.* Straits of Dover Steamship Co., 99 Fed. 787.

14. Former recovery as merger or bar see *supra*, XIII, B, 2, c.

15. Brown *v.* Lambe, 119 Iowa 404, 93 N. W. 486; Ivers *v.* Ivers, 61 Iowa 721,

upon a contest or upon opportunity given to the parties concerned to be heard, and involving judicial action on the facts presented.[16]

d. Motions and Summary Proceedings.[17] A distinction is to be made between orders made on motions respecting collateral questions arising in the course of litigation, or on summary applications to the court, and final orders affecting substantial rights and from which an appeal lies. The former are not generally considered conclusive so as to prevent a reëxamination of the same questions in subsequent proceedings,[18] except so far as to bar a renewal of the same motion in

17 N. W. 149; Van Alstyne *v.* Wimple, 4 Cow. (N. Y.) 547; Brooks *v.* Miller, 29 W. Va. 499, 2 S. E. 219. *Compare* Bolles *v.* Duff, 17 Abb. Pr. (N. Y.) 448 (holding that an *ex parte* order giving a receiver leave to sue does not bar a motion by defendant to require him to file security for costs); Talcott *v.* Harris, 18 Hun (N. Y.) 567 (holding that the granting of an order to arrest defendant, in an action to recover for goods sold and delivered, is not *res judicata* in such sense as to exclude evidence offered to disprove the averments of fraud in the affidavits on which the order was granted); Anderson *v.* Piercy, 20 W. Va. 282 (holding that proceedings for the assignment of dower being *ex parte*, an adjudication therein that the parties making the motion for the assignment were heirs of the decedent is not conclusive on the widow, even though she had notice of the motion).

16. *Arkansas.*— The decree of confirmation of a donation title is conclusive, even against an absent claimant. Worthen *v.* Ratcliffe, 42 Ark. 330.

California.— Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45 (decision on petition for writ of mandate); Semple *v.* Ware, 42 Cal. 619 (confirming survey of Mexican land grant).

Illinois.— Frew *v.* Taylor, 106 Ill. 159, overruling objections to collector's report of delinquent lands.

Louisiana.— Mithoff *v.* Dewees, 9 La. Ann. 550.

Massachusetts.— Loring *v.* Bridge, 9 Mass. 124, assessment for making and laying out road.

Nebraska.— Sutton First Nat. Bank *v.* Ashley, 4 Nebr. (Unoff.) 185, 93 N. W. 685, trial of right of homestead on application for appointment of receiver.

New Jersey.— Berry *v.* Chamberlain, 53 N. J. L. 463, 23 Atl. 115, trial of claim of third person to property taken on execution.

New York.—Wilcox *v.* Gilchrist, 85 Hun 1, 32 N. Y. Suppl. 608 (confirmation of referee's report on claim against decedent's estate); Carpenter *v.* Allen, 45 N. Y. Super. Ct. 322 (hearing on rule to show cause why attorneys should not be compelled to produce their authority for commencing the suit); Matter of Clapp, 30 Misc. 395, 63 N. Y. Suppl. 1096 (hearing on objections to accounts of executor).

North Carolina.— Langston *v.* Weil, 116 N. C. 205, 21 S. E. 111.

Oklahoma.— Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976.

Pennsylvania.— Frauenthal's Appeal, 100 Pa. St. 290 (hearing on rule to show cause why execution should not be stayed); Bain *v.* Lyle, 68 Pa. St. 60 (verdict and judgment on issue under a sheriff's interpleader); Aitkin *v.* Young, 12 Pa. St. 15 (proceeding to enable executors to convey realty contracted for with their decedent); Com. *v.* Patterson, 13 Pa. Super. Ct. 136 (adjudicating account of committee of a lunatic); Todd *v.* Maffit, 3 Hall L. J. 30 (judgment on case stated).

Texas.— Thompson *v.* State, 23 Tex. Civ. App. 370, 56 S. W. 603, proceedings on application to county judge for the incorporation of a town.

See 30 Cent. Dig. tit. "Judgment," § 1159.

Feigned issue.— Where plaintiff applied to the orphans' court to make partition of real estate, and defendant resisted on the ground that the land belonged to him by virtue of a parol gift, and the court ordered an amicable ejectment to try the right, which resulted in a verdict for defendant, it was held that this was only a feigned issue, to inform the conscience of the court, and of no conclusive effect. Wible *v.* Wible, 1 Grant (Pa.) 406.

17. Former recovery as merger or bar see *supra*, XIII, B, 2, d, e.

18. *Alabama.*— Hanson *v.* Patterson, 17 Ala. 738.

California.— Herd *v.* Tuohy, 133 Cal. 55, 65 Pac. 139.

Georgia.— Benton *v.* Benson, 32 Ga. 354.

Iowa.— Jones *v.* Field, 80 Iowa 281, 45 N. W. 753.

Kansas.— Santa Fé Bank *v.* Haskell County Bank, 59 Kan. 354, 53 Pac. 132; Frazer *v.* Barry, 4 Kan. App. 33, 45 Pac. 724.

Minnesota.— Volmer *v.* Stagerman, 25 Minn. 234.

Mississippi.— Carmichael *v.* Governor, 3 How. 236.

Nebraska.— State *v.* Horton, (1904) 99 N. W. 501.

New York.— St. James Church *v.* Church of the Redeemer, 45 Barb. 356; Acker *v.* Ledyard, 8 Barb. 514; Alkus *v.* Rodh, 4 Daly 397; Bonnell *v.* Henry, 13 How. Pr. 142.

Pennsylvania.— West Buffalo *v.* Walker Tp., 8 Pa. St. 177.

Texas.— Davis *v.* Schaffner, 3 Tex. Civ. App. 121, 22 S. W. 822.

Wisconsin.— Turner *v.* Pierce, 31 Wis. 342.

United States.— Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43.

See 30 Cent. Dig. tit. "Judgment," § 1160.

the same case upon the same grounds;[19] but the latter are *res judicata* and binding upon the parties in all subsequent proceedings, unless reversed or modified by an appellate court.[20] As distinguished from motions and rulings thereon, judgments rendered in contested actions are none the less conclusive because the proceedings were summary.[21]

4. Form and Requisites of Judgment[22] — a. Essentials of Conclusive Judgment — (I) *In General.* In considering the effect of a judgment as *res judicata*, its form or style is not very material,[23] provided it embodies the essential features of an actual sentence or decision of the court;[24] nor is the date or time of the rendition of the judgment important,[25] except where it was entered too late to be pleadable in the suit at bar;[26] and although the judgment cannot be enforced as an obligation, for reasons not affecting its inherent validity, this will not affect its

Rulings as to the admission or exclusion of evidence have no force or effect as to either party, by way of estoppel, where there was a mistrial. Walton *v.* Mather, 15 Misc. (N. Y.) 453, 37 N. Y. Suppl. 26.

19. Irvine *v.* Meyers, 6 Minn. 558. And see *supra*, XIII, B, 2, e, (II).

The denial of a motion does not prevent the making of a similar motion afterward, in the same case where it is founded on matters arising or discovered since the first motion (Cazneau *v.* Bryant, 6 Duer (N. Y.) 668, 4 Abb. Pr. 402), or where the second motion raises an entirely different question (Kelsey *v.* Wyley, 10 Ga. 371).

20. *California.*— White *v.* Fresno Nat. Bank, 98 Cal. 166, 32 Pac. 979. And see *In re* Harrington, 147 Cal. 124, 81 Pac. 546.

Georgia.— Moore *v.* Allen, 55 Ga. 67.

Indiana.— Moore *v.* Horner, 146 Ind. 287, 45 N. E. 341.

Iowa.— Bedwell *v.* Gephart, 67 Iowa 44, 24 N. W. 585.

Kansas.— Wilson County *v.* McIntosh, 30 Kan. 234, 1 Pac. 572.

Louisiana.— Gerrish *v.* Pope, 39 La. Ann. 517, 2 So. 227.

Maine.— Page *v.* Esty, 54 Me. 319.

Maryland.— Thomas *v.* Malster, 14 Md. 382.

Michigan.—Vincent *v.* Sherwood, 118 Mich. 64, 76 N. W. 107; People *v.* Muskegon County Cir. Judge, 40 Mich. 63.

Missouri.— Poorman *v.* Mitchell, 48 Mo. 45.

Nebraska.— Findley *v.* Bowers, 9 Nebr. 72, 2 N. W. 349.

New York.— New York *v.* Brady, 115 N. Y. 599, 22 N. E. 237; Demarest *v.* Darg, 32 N. Y. 281; Dwight *v.* St. John, 25 N. Y. 203; Hollister *v.* Sinclair, 89 Hun 421, 35 N. Y. Suppl. 407; Kaufman *v.* Keenan, 2 N. Y. Suppl. 395; New York *v.* Lyons, 24 How. Pr. 280.

Ohio.— Mayer *v.* Wick, 15 Ohio St. 548; Carlin *v.* Hower, 24 Ohio Cir. Ct. 153.

Pennsylvania.—Straw *v.* Smith, 179 Pa. St. 376, 36 Atl. 162; Haneman *v.* Pile, 161 Pa. St. 599, 29 Atl. 113; *In re* Ralston, 158 Pa. St. 645, 28 Atl. 139; Heilman *v.* Kroh, 155 Pa. St. 1, 25 Atl. 751; Reiff *v.* Pennsylvania R. Co., 1 Pa. Co. Ct. 443.

Texas.— Zadek *v.* Dixon, (1886) 3 S. W. 247.

Wisconsin.— Cothren *v.* Connaughton, 24 Wis. 134.

United States.— Buckles *v.* Chicago, etc., R. Co., 53 Fed. 566; Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43.

See 30 Cent. Dig. tit. "Judgment," § 1160.

21. Hawk *v.* Evans, 76 Iowa 593, 41 N. W. 368, 14 Am. St. Rep. 247; Nemetty *v.* Naylor, 100 N. Y. 562, 3 N. E. 497; Mutual Reserve Fund Life Assoc. *v.* Cordero, 33 Misc. (N. Y.) 387, 67 N. Y. Suppl. 464; Jermain *v.* Langdon, 8 Paige (N. Y.) 41.

22. Former recovery as merger or bar see *supra*, XIII, B, 3.

23. Lane *v.* Cook, 3 Day (Conn.) 255; Leberman *v.* Hill, 1 Tex. App. Civ. Cas. § 26.

Wanting date.— A record of a replevin suit, without the date of the writ, is conclusive evidence of the right of property of plaintiff at the date of the judgment only. Sexton *v.* Brock, 15 Ark. 345.

Unsigned judgment.— A judgment on a rule to distribute proceeds may serve as a basis for a claim of *res judicata*, although not signed. State *v.* Alexander, 106 La. 460, 31 So. 60.

24. Otis *v.* Crouch, 89 Hun (N. Y.) 548, 35 N. Y. Suppl. 291; Carroll County *v.* Collier, 22 Gratt. (Va.) 302.

An incomplete proceeding in equity, consisting of a bill and certain orders taken by complainant's solicitor, binds nobody as a decree. Hill *v.* Parker, 5 Rich. (S. C.) 87.

Agreement approved by court.— Where an agreement entered into between some of the creditors, as to a certain mode of dealing with the assigned property to pay their debts, is sanctioned by the court, it becomes in substance a decree of the court in the administration of the estate, and is conclusive on all parties to the assignment. Taylor *v.* Seiter, 100 Ill. App. 643.

25. Grover *v.* Buck, 34 Mich. 519; Bank of North America *v.* Crandall, 87 Mo. 208.

Judgment nunc pro tunc.— Where defendant dies after a verdict for plaintiff, a judgment *nunc pro tunc* as of the term when the verdict was rendered is conclusive against a surety on a bond to dissolve an attachment, in the absence of any showing of fraud or collusion. Tapley *v.* Goodsell, 122 Mass. 176.

26. McGill *v.* Holmes, 168 N. Y. 647, 61 N. E. 1131; Lawrence *v.* Church, 57 Hun (N. Y.) 585, 10 N. Y. Suppl. 566.

conclusiveness as evidence.[27] But it must appear that the judgment was rendered upon a legal trial of the action, or at least a full opportunity for such trial,[28] involving a consideration of the merits of the case,[29] and settling the issues alleged to be concluded by it by a judicial decision, entered either on the findings of the court, the verdict of the jury, or notwithstanding the verdict.[30] Further it is essential that the judgment should be entered in a genuine and honest litigation, and not merely collusive or simulated,[31] and that it should be free from irreconcilable contradictions and from ambiguities which cannot be cleared away,[32] and it will not be conclusive against the right to maintain another action when the

27. Jenkins *v.* International Bank, 111 Ill. 462 (judgment conclusive as evidence, although the right to bring suit on it is barred by the statute of limitations); Fisk *v.* Miller, 20 Tex. 579 (enforcement of judgment enjoined).

28. Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291. *Compare* Kellogg *v.* Maddocks, 1 Wash. Terr. 407, holding that a losing party cannot try his case over again in a counter suit merely because he was unprepared originally.

29. William Brown Estate Co. *v.* Wayne County, 123 Mo. 464, 27 S. W. 322; Menude *v.* Delaire, 3 Desauss. Eq. (S. C.) 43; Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

A determination as to matters pleaded or questions involved, or an adjudication on the facts found is absolutely necessary before an estoppel can become effective.

Delaware.— Sharp *v.* Swayne, 1 Pennew. 210, 40 Atl. 113.

Hawaii.— Bright *v.* Kawananakoa, 15 Hawaii 622; *In re* Nakuapa, 3 Hawaii 400. See also Akeni *v.* Wong Ka Mau, 5 Hawaii 91.

Kansas.— Beeson *v.* Shively, 28 Kan. 574; Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091.

Maine.— McClure *v.* Livermore, 78 Me. 390, 6 Atl. 11.

Massachusetts.— Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733; Beatty *v.* Randall, 5 Allen 441.

Minnesota.— Schurmeir *v.* Johnson, 10 Minn. 319.

New Hampshire.— Thompson *v.* Currier, 70 N. H. 259, 47 Atl. 76.

New York.— Leonard *v.* Barker, 5 Den. 220.

Pennsylvania.— Lash *v.* Spayd, 141 Pa. St. 360, 21 Atl. 641; Werkheiser *v.* Werkheiser, 3 Rawle 326.

Rhode Island.— Holcomb *v.* Brickley, 12 R. I. 255.

England.— Robinson *v.* Duleep Singh, 11 Ch. D. 798, 48 L. J. Ch. 758, 39 L. T. Rep. N. S. 313, 27 Wkly. Rep. 21; Hitchin *v.* Campbell, 2 W. Bl. 831, 3 Wils. C. P. 304; Carnegie *v.* Carnegie, L. R. 17 Ir. 430.

Canada.— Elliott *v.* Elliott, 20 Ont. 134; Flatt *v.* Waddell, 18 Ont. 539; Gordon *v.* Robinson, 14 U. C. C. P. 566; Deacon *v.* Great Western R. Co., 6 U. C. C. P. 241; Eccles *v.* Lowry, 32 U. C. Q. B. 635. See, however, Carpenter *v.* Commercial Bank, 8 Can. L. J. 268.

But see Carlisle *v.* Foster, 10 Ohio St. 198; Sullivan *v.* Colby, 71 Fed. 460, 18 C. C. A. 193.

30. Aiken *v.* Lyon, 127 N. C. 171, 37 S. E. 199 (judgment notwithstanding the verdict); Cates *v.* Riley, (Tex. Civ. App. 1900) 55 S. W. 979 (findings of fact); Sowles *v.* Sartwell, 76 Vt. 70, 56 Atl. 282 (verdict with a special finding); Dauchy *v.* Goodrich, 20 Vt. 127 (trial by court instead of jury); Casey *v.* Pennsylvania Asphalt Pav. Co., 114 Fed. 189, 52 C. C. A. 145 (judgment notwithstanding the verdict).

31. Thomas *v.* McDaneld, 88 Iowa 374, 55 N. W. 599; Shannon *v.* Shannon, 4 Allen (Mass.) 134; Andes *v.* Ely, 158 U. S. 312, 15 S. Ct. 954, 39 L. ed. 996; Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539; Bandon *v.* Becher, 9 Bligh N. S. 532, 5 Eng. Reprint 1388, 3 Cl. & F. 479, 6 Eng. Reprint 1517.

32. Lea *v.* Lea, 99 Mass. 493, 96 Am. Dec. 772, holding that a decree dismissing a bill for divorce, which may have been entered on the ground of either one of three sufficient defenses relied on by defendant, is not conclusive between the parties as to either of them. *Compare* Harrison *v.* Godhold, McGloin (La.) 178 (holding that where the parties present claims and counter-claims, a judgment in favor of one for a specific sum, without reservation, is not ambiguous, but concludes the whole controversy); Van Kleek *v.* Eggleston, 7 Mich. 511 (holding that a judgment which appears to have been rendered on a note is conclusive on the parties, although the docket does not show to whom the note was payable or that it was negotiable); Eccles *v.* Lowry, 32 U. C. Q. B. 635; Crooks *v.* Bowes, 22 U. C. Q. B. 219.

Conflicting judgments.— Where there have been two conflicting independent decisions between the same parties on the same question, the question will be considered open in a subsequent suit. Shaw *v.* Broadbent, 129 N. Y. 114, 29 N. E. 238; Ward *v.* Stow, 17 N. C. 509, 27 Am. Dec. 238. But see Mill Creek Valley St. R. Co. *v.* Carthage, 18 Ohio Cir. Ct. 216, 9 Ohio Cir. Dec. 833, holding that in such a case the later of the two judgments will in effect annul the earlier and will govern the rights of the parties. On the other hand a decision of the highest court of the state binds the parties, although in a later case between other parties a different doctrine was announced, the earlier case not being overruled. Frost *v.* Frost, 21 S. C. 501.

right to do so was expressly reserved by the judgment itself or by an agreement of parties sanctioned by the court.[33]

(II) *VERDICT WITHOUT JUDGMENT.*[34] A verdict on which no judgment was entered cannot be given in evidence as conclusive on the parties in a subsequent suit.[35]

(III) *FINDINGS OR DECISION WITHOUT JUDGMENT.*[36] Findings of fact made by the court, or decisions on contested issues, when made the basis of a judgment or decree, are conclusive on the parties in subsequent litigation;[37] but unless followed by a judgment, or incorporated in or covered by a judgment, findings by the court, special findings of a jury, reports of referees and masters, and the like are not conclusive adjudications.[38]

(IV) *JUDGMENT BY DIVIDED COURT.* It does not detract from the conclusive force of a judgment that it was rendered by a divided court; and where an appellate court affirms the judgment below, because the judges are equally

33. Indianapolis, etc., R. Co. *v.* Center Tp., 130 Ind. 89, 28 N. E. 439.

34. Former recovery as merger or bar see *supra*, XIII, B, 3, b.

35. *Kentucky.*— Donaldson *v.* Jude, 2 Bibb 57.

Massachusetts.— Hawks *v.* Truesdell, 99 Mass. 557.

Minnesota.— Schurmeier *v.* Johnson, 10 Minn. 319.

Nebraska.— McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333.

Pennsylvania.—Middletown Furniture Mfg. Co. *v.* Philadelphia, etc., R. Co., 145 Pa. St. 187, 22 Atl. 747, 748. The record of a verdict for damages, to be released on the performance of a certain act by defendant, where no motion for a new trial or in arrest of judgment is made, but judgment is not entered on the verdict, in consequence of the performance of such act, is conclusive as to the same matters coming directly in question in another suit, unless obtained by fraud or collusion. Estep *v.* Hutchman, 14 Serg. & R. 435.

Tennessee.— Read *v.* Staton, 3 Hayw. 159, 9 Am. Dec. 740.

United States.— Smith *v.* McCool, 16 Wall. 560, 21 L. ed. 324.

See 30 Cent. Dig. tit. "Judgment," § 1168. And see *supra*, XIII, B, 3, b.

Effect of verdict.— While a declaration and a verdict thereon in plaintiff's favor, on which no judgment was ever entered, are not admissible to show an adjudication of the matters set forth in such declaration, or as a conclusive estoppel against defendant therein as to such matters, they are competent for the purpose of showing, as between the parties and their privies in estate, the independent fact that such a verdict was rendered in the case in which that declaration was filed, and are admissible, if otherwise relevant, to show that the parties were at that time at issue on the particular facts therein pleaded, and as a circumstance, in connection with other and independent evidence, tending to show acquiescence in the verdict and its consequences, to be weighed by the jury in determining whether such acquiescence was attributable to the verdict itself, or to other and distinct causes. Carstarphen *v.* Holt, 96 Ga. 703, 23 S. E. 904. And see Hoppaugh *v.* McGrath, 53 N. J. L. 81, 21 Atl. 106.

A verdict which has been paid without entry of judgment is conclusive. Willcocks *v.* Howell, 8 Ont. 576.

36. Former recovery as merger or bar see *supra*, XIII, B, 3, d.

37. Culver *v.* Phelps, 130 Ill. 217, 22 N. E. 809; Smith *v.* Stevens, 82 Ill. 554; Parrott *v.* Hodgson, 46 Ill. App. 232; Montine *v.* Deake, 57 Me. 37; Bissell *v.* Kellogg, 60 Barb. (N. Y.) 617.

As against strangers.— An opinion in one case, so far as it is a deduction from facts, cannot be authoritative in any other case, although the subject-matter be the same and the facts chiefly the same, as to persons who were neither parties nor privies in the former case. May *v.* Fenton, 7 J. J. Marsh. (Ky.) 306.

38. *California.*— *In re* Holbert, 57 Cal. 257. But *compare* Martin *v.* Durand, 63 Cal. 39.

Connecticut.— Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179.

Indiana.— Crum *v.* Rea, 14 Ind. App. 379, 42 N. E. 1033.

Kansas.— Auld *v.* Smith, 23 Kan. 65.

Massachusetts.— Nash *v.* Hunt, 116 Mass. 237; Hawks *v.* Truesdell, 99 Mass. 557.

Michigan.— Whitney *v.* Bayer, 101 Mich. 151, 59 N. W. 414.

Minnesota.— Child *v.* Morgan, 51 Minn. 116, 52 N. W. 1127.

New Hampshire.— Hunter *v.* Carroll, 67 N. H. 262, 29 Atl. 639.

New York.— Cauhape *v.* Parke, 121 N. Y. 152, 24 N. E. 185; Leonard *v.* Barker, 5 Den. 220. See McRoberts *v.* Pooley, 12 N. Y. Civ. Proc. 139.

Pennsylvania.— Bennett Water Co. *v.* Millvale, 200 Pa. St. 613, 50 Atl. 155.

See 30 Cent. Dig. tit. "Judgment," § 1169.

An inquisition taken by the authority of the chancellor without a formal order of approval by him on its return is *prima facie* evidence of what it purports to find. Wall *v.* Hill, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578.

divided in opinion, it is *res judicata* to the same extent as if affirmed on the merits.[39]

b. Judgment by Confession or Consent.[40] A judgment entered on the confession of defendant is conclusive evidence of the existence, validity, and amount of the debt, and of the rights of the parties so far as they are necessarily implied in the rendition of such a judgment.[41] So also a judgment rendered upon the consent, stipulation, or agreement of the parties is binding and conclusive upon them in the absence of fraud,[42] although its estoppel cannot be extended beyond

39. Kolb *v.* Swann, 68 Md. 516, 13 Atl. 379; McAlister *v.* Hamilton, 61 S. C. 6, 39 S. E. 182; Durant *v.* Essex Co., 7 Wall. (U. S.) 107, 19 L. ed. 154. *Compare* Anderson *v.* Valentine, 15 La. Ann. 379, holding that a certificate of division of opinion of the judges in the federal circuit court, accompanied by a statement of facts, to serve as the basis for an appeal to the supreme court, is not a final judgment which will support the plea of *res judicata*.

40. Former recovery as merger or bar see *supra*, XIII, C, 3, 4.

41. *Arkansas.*— Jeffries *v.* Morgan, 1 Ark. 169.

Colorado.—Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505, holding that a judgment by confession is not conclusive as to the date of its entry.

Delaware.— Worknot *v.* Millen, 1 Harr. 139.

Georgia.— Davant *v.* Carlton, 57 Ga. 489.

Illinois.— Frear *v.* Commercial Nat. Bank, 73 Ill. 473; Lagerquist *v.* Williams, 74 Ill. App. 17. Defendant in a bill for partition is not concluded by a decree *pro confesso* as to an allegation in the bill that he has no right, title, or interest in the land, this being not an averment of a fact, but of a legal conclusion. Ames *v.* Holmes, 190 Ill. 561, 60 N. E. 858.

Indiana.— Kingman *v.* Paulson, 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611.

New Jersey.— Cook *v.* McCahill, 41 N. J. Eq. 69, 3 Atl. 82; Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York.— Rusk *v.* Soutter, 67 Barb. 371.

Pennsylvania.— Stayton *v.* Graham, 139 Pa. St. 1, 21 Atl. 2; Weaver *v.* Adams, 132 Pa. St. 392, 19 Atl. 271; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387, 6 Atl. 696; Schoch *v.* Foreman, 3 Brewst. 157. But see Waters *v.* Bates, 44 Pa. St. 473.

South Carolina.— Fowler *v.* Henry, 2 Bailey 54.

Tennessee.— Atkins *v.* Baily, 9 Yerg. 111.

Texas.— Wootters *v.* Hall, 67 Tex. 513, 3 S. W. 725; Garner *v.* Burleson, 26 Tex. 348.

Vermont.— Barney *v.* Goff, 1 D. Chipm. 304. But *compare* Read *v.* Barlow, 1 Aik. 145.

Virginia.— Syme *v.* Johnston, 3 Call 558.

United States.— Pittsburg Safe-Deposit, etc., Co. *v.* Wright, 105 Fed. 155, 44 C. C. A. 421.

See 30 Cent. Dig. tit. "Judgment," § 1163.

42. *Alabama.*— Adler *v.* Van Kirk Land, etc., Co., 114 Ala. 551, 21 So. 490, 62 Am. St. Rep. 133.

California.— Partridge *v.* Shepard, 71 Cal. 470, 12 Pac. 480; McCreery *v.* Fuller, 63 Cal. 30. *Compare* Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277, holding that a city having no power to alienate lands is not estopped by a consent decree to claim title to land that has previously been dedicated to public use as a street or for other purposes.

Illinois.— Minneapolis Trust Co. *v.* Verhulst, 74 Ill. App. 350.

Indiana.— Lemmon *v.* Osborn, 153 Ind. 172, 54 N. E. 1058.

Kansas.— Townsdin *v.* Schrader, 39 Kan. 286, 18 Pac. 186.

Louisiana.— Greenwood *v.* New Orleans, 12 La. Ann. 426. But *compare* Lockett *v.* Canadian, etc., Mortg., etc., Co., 47 La. Ann. 1259, 17 So. 836.

Mississippi.— Gattman *v.* Gunn, (1890) 7 So. 285.

Missouri.— Glasner *v.* Weisberg, 43 Mo. App. 214.

New Hampshire.— Hillsborough *v.* Nichols, 46 N. H. 379; Goodrich *v.* Eastern R. Co., 38 N. H. 390.

New York.— Mutual L. Ins. Co. *v.* O'Donnell, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796; Culross *v.* Gibbons, 130 N. Y. 447, 29 N. E. 839; Rust *v.* Hauselt, 8 Abb. N. Cas. 148; French *v.* Shotwell, 5 Johns. Ch. 555.

North Carolina.— Union Bank *v.* Oxford, 116 N. C. 339, 21 S. E. 410; Harper *v.* McCombs, 109 N. C. 714, 14 S. E. 41; Rollins *v.* Henry, 78 N. C. 342, 84 N. C. 569.

Pennsylvania.— West Philadelphia Pass. R. Co. *v.* Philadelphia, etc., Turnpike Road Co., 186 Pa. St. 459, 40 Atl. 787.

Tennessee.— Fry *v.* Taylor, 1 Head 594; Wynne *v.* Spiers, 7 Humphr. 394.

Texas.— Madry *v.* Cox, 73 Tex. 538, 11 S. W. 541; Cannon *v.* Hemphill, 7 Tex. 184.

United States.— Burgess *v.* Seligman, 107 U. S. 20, 2 S. Ct. 10, 27 L. ed. 359; Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. 741, 24 L. ed. 190; David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661; Tomkinson *v.* Willetts Mfg. Co., 23 Fed. 895. But see Kent *v.* Lake Superior Ship Canal, etc., Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. ed. 352.

England.— *In re* South American, etc., Co., [1895] 1 Ch. 37, 71 L. T. Rep. N. S. 594, 12 Reports 1, 43 Wkly. Rep. 131. And see Ribble River *v.* Croston Urban Dist. Council, [1897] 1 Q. B. 251, 66 L. J. Q. B. 384, 45 Wkly. Rep. 348.

See 30 Cent. Dig. tit. "Judgment," § 1163.

But *compare* Fletcher *v.* Dysart, 9 B. Mon. (Ky.) 413; Trigg *v.* Lewis, 3 Litt. (Ky.) 129.

the scope of the stipulation or agreement,[43] and the judgment cannot be used for a different purpose from that contemplated by the arrangement of the parties,[44] and is not binding on one who, although he was a party to the action, was not a party to the compromise or settlement effected by the others.[45]

c. Judgment by Default.[46] A judgment by default is conclusive as to all matters well pleaded and necessary to support the judgment,[47] provided it is regular

A decree for the separate maintenance of the wife in a suit brought under Ill. Laws (1877), p. 115, is not less *res judicata* in Illinois on the question of her desertion because it was rendered by consent, where the appellate court and the supreme court of that state have affirmed the decree and the finding therein made that the wife was living separate and apart from her husband without fault on her part. Harding *v.* Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. ed. 1066 [*reversing* 140 Cal. 690, 74 Pac. 284].

Invalid consent judgment.— While what purports to be a consent verdict and decree may fail to operate as a judgment binding upon the parties, on account of want of jurisdiction in the court or other valid reason, still, if the terms of the same were, upon sufficient consideration, agreed to by the parties, with a full knowledge of its contents, or if it was carried into effect, and a fund thus arising was distributed among the parties, who received their shares being cognizant of all the facts, the same might be pleaded in bar of the rights of the parties assenting to or ratifying the agreement contained therein. Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430.

43. *Alabama.*— Barron *v.* Paulling, 38 Ala. 292.

Georgia.— Savannah *v.* Feeley, 66 Ga. 31.

Iowa.— Burlington, etc., R. Co. *v.* Benton County, 56 Iowa 89, 8 N. W. 797.

New York.— Shepherd *v.* Moodhe, 150 N. Y. 183, 44 N. E. 963.

Wisconsin.— Phillips *v.* Root, 68 Wis. 128, 31 N. W. 712.

United States.— Kain *v.* Gibboney, 101 U. S. 362, 25 L. ed. 813.

See 30 Cent. Dig. tit. "Judgment," § 1163.

44. Wright *v.* Barr, 53 Mo. 340; Simon *v.* Edmundson, 10 Pa. Co. Ct. 315.

45. Marsee *v.* Middlesborough Town, etc., Co., 65 S. W. 118, 23 Ky. L. Rep. 1258. And see Lawrence Mfg. Co. *v.* Janesville Cotton-Mills, 138 U. S. 552, 11 S. Ct. 402, 34 L. ed. 1005.

46. Former recovery as merger or bar see *supra*, XIII, C, 5.

47. *Alabama.*— McCalley *v.* Wilburn, 77 Ala. 549.

California.— Hartson *v.* Shanklin, 57 Cal. 558; Kittridge *v.* Stevens, 16 Cal. 381. *Compare* Maddux *v.* San Luis Obispo County Bank, 129 Cal. 665, 62 Pac. 264, 79 Am. St. Rep. 143.

Illinois.— Sholl *v.* German Coal Co., 139 Ill. 21, 28 N. E. 748; Dyer *v.* Hopkins, 112 Ill. 168; Underbill *v.* Kirkpatrick, 26 Ill. 84.

Indiana.— Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; Hutchinson *v.* Lemcke, 107 Ind. 121, 8 N. E. 71; Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420; Davenport *v.* Barnett, 51 Ind. 329; Fletcher *v.* Holmes, 25 Ind. 458; Howe *v.* McBride, 17 Ind. 501.

Kansas.— Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260.

Kentucky.— Kimbrough *v.* Harbett, 110 Ky. 94, 60 S. W. 836, 22 Ky. L. Rep. 1578; Ligon *v.* Triplett, 12 B. Mon. 283; Kent *v.* Riley, 47 S. W. 1082, 20 Ky. L. Rep. 912.

Louisiana.— Dunn *v.* Pipes, 20 La. Ann. 276; Morton *v.* Reynolds, 4 Rob. 26; Bayoujon *v.* Criswell, 5 Mart. N. S. 232; Kling *v.* Fish, 4 Mart. N. S. 391.

Maryland.— Walsh *v.* McIntire, 68 Md. 402, 13 Atl. 348; Loney *v.* Bailey, 43 Md. 10; Mailhouse *v.* Inloes, 18 Md. 328; Green *v.* Hamilton, 16 Md. 317, 77 Am. Dec. 295.

Massachusetts.— Gaskill *v.* Dudley, 6 Metc. 546, 39 Am. Dec. 750; Briggs *v.* Richmond, 10 Pick. 391, 20 Am. Dec. 526; Minor *v.* Walter, 17 Mass. 237; Thatcher *v.* Gammon, 12 Mass. 268.

Minnesota.— Doyle *v.* Hallam, 21 Minn. 515.

Mississippi.— Claiborne *v.* Planters' Bank, 2 How. 727.

Nebraska.— Kloke *v.* Gardels, 52 Nebr. 117, 71 N. W. 955; Lincoln Nat. Bank *v.* Virgin, 36 Nebr. 735, 55 N. W. 218, 38 Am. St. Rep. 747.

New Jersey.— Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York.— Sheridan *v.* Linden, 81 N. Y. 182; Brown *v.* New York, 66 N. Y. 385; Newton *v.* Hook, 48 N. Y. 676; Barker *v.* Miller, 32 N. Y. App. Div. 364, 53 N. Y. Suppl. 283; Henriques *v.* Yale University, 28 N. Y. App. Div. 354, 51 N. Y. Suppl. 284; Barber *v.* Kendall, 1 N. Y. App. Div. 247, 37 N. Y. Suppl. 141; Ferris *v.* Fisher, 67 Hun 134, 21 N. Y. Suppl. 1114; Maltonner *v.* Dimmick, 4 Barb. 566; Mutual Reserve Fund Life Assoc. *v.* Cordero, 33 Misc. 387, 67 N. Y. Suppl. 464; Crompton, etc., Loom Works *v.* Brown, 28 Misc. 513, 59 N. Y. Suppl. 556; Millard *v.* Adams, 1 Misc. 431, 21 N. Y. Suppl. 424; Lee *v.* Clark, 1 Hill 56; Thompson *v.* Hammond, 1 Edw. 497.

North Carolina.— Parker *v.* House, 66 N. C. 374.

Ohio.— McCurdy *v.* Baughman, 43 Ohio St. 78, 1 N. E. 93; Marks *v.* Sigler, 3 Ohio St. 358. *Compare* Smith *v.* Whistler, 16 Ohio Cir. Ct. 130, 8 Ohio Cir. Dec. 768.

Rhode Island.— King *v.* Ross, 21 R. I. 413, 45 Atl. 146.

South Dakota.— Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803.

Tennessee.— Taylor *v.* Sledge, 110 Tenn. 263, 75 S. W. 1074; Hillman *v.* Chester, 12

and valid,[48] and shows distinctly on what count or cause of action it was rested.[49] But a default judgment is not conclusive, in a subsequent suit on a different cause of action, against any defenses defendant may have, although the same defenses, if pleaded and proved in the former action, would have defeated plaintiff's recovery, because in the absence of a trial and hearing in the first suit, it cannot be said that such matters were adjudicated therein.[50] And where one of several defendants suffers default, the judgment is not conclusive upon the others.[51]

d. Judgment of Nonsuit or Dismissal.[52] A judgment of nonsuit is no bar to a second action upon the same claim or demand,[53] neither is it conclusive upon the parties as to the issues which were or might have been involved in the action;[54] and the same is true of a dismissal of the action, when brought about by the voluntary action of the party or ordered by the court on some preliminary or technical matter without a trial or hearing,[55] except that it is conclusive as to the

Heisk. 34; Mississippi, etc., R. Co. *v.* Green, 9 Heisk. 588.

Texas.— Ellis *v.* Mills, 28 Tex. 584; Grassmeyer *v.* Beeson, 18 Tex. 753, 70 Am. Dec. 309; Clark *v.* Compton, 15 Tex. 32.

Virginia.— Burbridge *v.* Higgins, 6 Gratt. 119.

Washington.— Seattle Nat. Bank *v.* School Dist. No. 40, 20 Wash. 368, 55 Pac. 317; Plant *v.* Carpenter, 19 Wash. 621, 53 Pac. 1107.

Wisconsin.— Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Sturtevant *v.* Milwaukee, etc., R. Co., 11 Wis. 63.

United States.— Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 15 S. Ct. 733, 39 L. ed. 859; Hale *v.* Hardon, 95 Fed. 747, 37 C. C. A. 240; Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. 505; Lippincott *v.* Shaw Carriage Co., 25 Fed. 577; Emma Silver Min. Co. *v.* Emma Min. Co., 7 Fed. 401; Derby *v.* Jacques, 7 Fed. Cas. No. 3,817, 1 Cliff. 425. *Compare* Hayes *v.* Leton, 5 Fed. 521.

England.— Leonard *v.* Simpson, 2 Bing. N. Cas. 176, 1 Hodges 251, 4 L. J. C. P. 302, 2 Scott 335, 29 E. C. L. 489.

See 30 Cent. Dig. tit. "Judgment," § 1164.

But *compare* Baker *v.* Baer, 59 Ark. 503, 28 S. W. 28; Taylor *v.* Auditor, 4 Ark. 574; Sherwood *v.* Haight, 26 Conn. 432; Dunlap *v.* Glidden, 34 Me. 517; Green *v.* Thompson, 5 Me. 224; Dengler *v.* Kiehner, 13 Pa. St. 38, 53 Am. Dec. 441.

48. Sammis *v.* Poole, 188 Ill. 396, 58 N. E. 934; Choate *v.* Sutton, 39 Iowa 308; Farmers' L. & T. Co. *v.* Essex, 66 Kan. 100, 71 Pac. 268; Schenck *v.* Griffin, 38 N. J. L. 462.

49. Sawyer *v.* Nelson, 160 Ill. 629, 43 N. E. 728.

50. *Indiana.*—Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Talbott *v.* Barber, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491.

Kansas.— Mariner *v.* Mackey, 25 Kan. 669.

Massachusetts.— Hanham *v.* Sherman, 114 Mass. 19; Brown *v.* Neale, 3 Allen 74, 80 Am. Dec. 53.

Minnesota.— State *v.* Cooley, 65 Minn. 406, 68 N. W. 66.

New York.— Frost *v.* Koon, 30 N. Y. 428; Dickinson *v.* Price, 64 Hun 149, 18 N. Y. Suppl. 801; Van Alstyne *v.* Indiana, etc., R. Co., 34 Barb. 28.

Tennessee.— Jordan *v.* Maney, 10 Lea 135.

Texas.— Ingram *v.* Phillips, 10 Tex. Civ. App. 17, 29 S. W. 915.

Virginia.— Mason *v.* Peters, 1 Munf. 437.

West Virginia.— Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

United States.— Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Skinner *v* Franklin County, 56 Fed. 783, 6 C. C. A. 118.

England.— A judgment by default may operate by estoppel, but the ground and extent of that estoppel must be found on the face of the judgment itself, and cannot be inferred or deduced from the pleadings of the party who has obtained the judgment where the defendant has said nothing, and has merely allowed the judgment to go by default. An unnecessary averment in a record that is neither pleaded to nor admitted cannot be used as an estoppel. Irish Land Commission *v.* Ryan, [1900] 2 Ir. 565. A plaintiff in ejectment, who enters judgment by default against several, is not estopped by the record from showing that some of them were not in possession, and were unnecessary parties. Le Clerc *v.* Greene, L. R. 7 Eq. 371, 22 Wkly. Rep. 428.

See 30 Cent. Dig. tit. "Judgment," § 1164.

51. Montgomery *v.* Road, 34 Kan. 122, 8 Pac. 253. And see Nichols *v.* Smith, 22 Pick. (Mass.) 316.

52. Former recovery as merger or bar see *supra*, XIII, C, 6, 7.

53. See *supra*, XIII, B, 6, a.

54. *Alabama.*— Hardy *v.* Montgomery Branch Bank, 15 Ala. 722.

Georgia.— Hendrick *v.* Clonts, 91 Ga. 196, 17 S. E. 119.

Illinois.— Gibbs *v.* Jones, 46 Ill. 319.

Iowa.— Zugenbuhler *v.* Gilliam, 3 Iowa 391.

Louisiana.— Smith *v.* Harrell, 16 La. Ann. 190; Gerber *v.* Viosca, 8 Rob. 150; Levistone *v.* Bona, 4 Rob. 459.

See 30 Cent. Dig. tit. "Judgment," § 1165.

55. *Alabama.*— Webb *v.* Kelly, 37 Ala. 333.

California.— Davenport *v.* Turpin, 43 Cal. 597; Hamm *v.* Arnold, 23 Cal. 373.

Colorado.— McNicholas *v.* Lake, 13 Colo. App. 164, 56 Pac. 987.

Florida.— Marvin *v.* Hampton, 18 Fla. 131.

Georgia.— Huntress *v.* Portwood, 116 Ga. 351, 42 S. E. 513; Walker *v.* Wyse, 77 Ga. 234, 2 S. E. 749.

particular ground on which the dismissal was ordered.[56] But a judgment dismissing a suit on the merits — that is, on a judicial consideration and determination of the ultimate facts in controversy, as distinguished from mere preliminary or technical issues — is conclusive to the same extent as if rendered on a verdict.[57]

e. Judgment on Plea in Abatement.[58] A judgment rendered upon a plea in abatement is conclusive as to the matter of the plea — the jurisdiction of the court, the capacity of the parties, and the like;[59] but not as to the merits of the

Illinois.— Lanphier *v.* Desmond, 187 Ill. 370, 58 N. E. 343; Howell *v.* Barnard, 32 Ill. App. 120.

Indiana.— Reddick *v.* Keesling, 129 Ind. 128, 28 N. E. 316; Winship *v.* Winship, 43 Ind. 291; Stockwell *v.* Byrne, 22 Ind. 6.

Iowa.— Wilson *v.* Trowbridge, 71 Iowa 345, 32 N. W. 373.

New York.— Smith *v.* Ferris, 1 Daly 18.

Pennsylvania.— Himes *v.* Kiehl, 154 Pa. St. 190, 25 Atl. 632; Ballentine *v.* Ballentine (1888) 15 Atl. 859.

Texas.— Guthrie *v.* Pierson, (Civ. App. 1896) 35 S. W. 405.

Vermont.— Collamer *v.* Page, 35 Vt. 387; Small *v.* Haskins, 26 Vt. 209.

Virginia.— Seamster *v.* Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262; Carter *v.* Campbell, Gilm. 159.

Wisconsin.— Fischbeck *v.* Mielenz, 119 Wis. 27, 96 N. W. 426.

United States.— Rincon Water, etc., Co. *v.* Anaheim Union Water Co., 115 Fed. 543; Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397.

See 30 Cent. Dig. tit. "Judgment," § 1165.

Dismissal for want of prosecution.— Where an action is dismissed because plaintiff has abandoned it, or for his failure to prosecute, it amounts to no more than a nonsuit and is not conclusive in a subsequent action. Chamberlain *v.* Sutherland, 4 Ill. App. 494; McQuesney *v.* Hiester, 33 Pa. St. 435. But it has been held that it is competent to give in evidence the fact that one of the parties to an action formerly instituted a suit in which the same subject-matter was involved and permitted it to abate, when this fact can be taken as an admission against his interest, although it does not operate as an estoppel unless it has been acted upon by the party who sets up the estoppel. Gwynn *v.* Hamilton, 29 Ala. 233. And where a suit is filed by a duly licensed attorney, the fact that he abandoned it before it came to trial will not prevent a decree therein, rendered in favor of defendant, from being *prima facie* binding on the party in whose behalf the suit was filed. Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303.

56. Hall *v.* Rice, 64 Cal. 443, 1 Pac. 891; Higdon *v.* Vaughn, 58 Miss. 572; Lancaster Bank *v.* McCall, 2 Pa. L. J. Rep. 498.

57. *Alabama.*— Strang *v.* Moog, 72 Ala. 460.

Connecticut.— Huntley *v.* Holt, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71.

Illinois.— Armstead *v.* Blickman, 51 Ill. App. 470.

Kentucky.— Cromwell *v.* Mason, 2 Bush 439; Thompson *v.* Thompson, 65 S. W. 457, 23 Ky. L. Rep. 1535.

Maryland.— Hitch *v.* Davis, 8 Md. 524.

Michigan.— Farmers', etc., Bank *v.* Bronson, 14 Mich. 361.

Minnesota.— Johnson *v.* Vaule, 61 Minn. 401, 63 N. W. 1039.

Mississippi.— Chiles *v.* Champenois, 69 Miss. 603, 13 So. 840; Bay *v.* Shrader, 50 Miss. 326; Commercial Bank *v.* Lewis, 13 Sm. & M. 226.

North Carolina.— Davie *v.* Davis, 108 N. C. 501, 13 S. E. 240, 23 Am. St. Rep. 71; Anderson *v.* Rainey, 100 N. C. 321, 5 S. E. 182.

Tennessee.— Gainus *v.* Bowman, 10 Heisk. 600.

Washington.— Peyton *v.* Peyton, 28 Wash. 278, 68 Pac. 757.

United States.— Franklin County *v.* German Sav. Bank, 142 U. S. 93, 12 S. Ct. 147, 35 L. ed. 948; Garner *v.* Second Nat. Bank, 89 Fed. 636; Kingman *v.* Holthaus, 59 Fed. 305.

See 30 Cent. Dig. tit. "Judgment," § 1165.

Dismissal without prejudice.— A suit dismissed without prejudice is not a bar to a second suit, nor conclusive of any issue joined in favor of the complainant. Robinson *v.* American Car, etc., Co., 135 Fed. 693, 68 C. C. A. 331 [*affirming* 132 Fed. 165]. See *supra*, XIII, C, 7, e. But where a bill was dismissed on the merits it was held that the insertion of a clause that the dismissal should be without prejudice to any question but that specifically put in issue by the pleadings was superfluous; for the dismissal of the bill without such reservation would only be a bar as to matters in issue in that suit between the same parties, and the court has no power to interfere with the effect which such a decree may have as a matter of evidence in any future proceeding in which it might without such reservation be legitimately used as evidence. Rochester *v.* Lee, 1 Macn. & G. 467, 47 Eng. Ch. 373, 41 Eng. Reprint 1346.

A decree in equity dismissing a bill on the ground that the complainant has an adequate remedy at law, and amounting to no more than a refusal by the equity court to interfere between the parties, is not conclusive in a subsequent action, although it was passed after a full hearing. Cramer *v.* Moore, 36 Ohio St. 347.

The dismissal of an appeal leaves the judgment below in full force as a conclusive adjudication between the parties. Rasberry *v.* Harville, 90 Ga. 530, 16 S. E. 299; Seay *v.* Treadwell, 43 Ga. 564.

58. Former recovery as merger or bar see *supra*, XIII, C, 8.

59. *Alabama.*— Hill *v.* Huckabee, 70 Ala. 183.

action, although they may have been incidentally drawn in question on the trial of the plea;[60] nor is it a bar to a new action for the same cause.[61]

f. Judgment on Demurrer.[62] A judgment rendered on a demurrer is conclusive as to the facts confessed by the demurrer,[63] but not as to issues raised by new pleadings after the decision on the demurrer.[64] If the demurrer is directed against technical defects, or goes to the sufficiency of the declaration in point of form or to the sufficiency of its allegations, the judgment thereon is conclusive on the point thus raised,[65] but not on the merits of the action.[66] But if the objection raised by the demurrer goes to the sufficiency of the facts on which the declaration is based, it is as conclusive as a judgment on a verdict would be.[67]

g. Finality of Determination[68] — (i) *In General.* The character of conclusiveness, by way of estoppel, attaches only to final judgments, not to interlocutory judgments or orders, which remain under the control of the court,[69] except where

Michigan.— *In re* Wrisley, 126 Mich. 109, 85 N. W. 456.

Missouri.— McClure *v.* Paducah Iron Co., 90 Mo. App. 567.

New York.— Dows *v.* McMichael, 6 Paige 139.

Vermont.— *Ex p.* Kellogg, 6 Vt. 509.

See 30 Cent. Dig. tit. "Judgment," § 1166.

60. Dawson *v.* Quillen, 43 Mo. App. 118. But see Dole *v.* Boutwell, 1 Allen (Mass.) 286.

61. See *supra*, XIII, C, 8.

62. Former recovery as merger or bar see *supra*, XIII, C, 9.

63. Nispel *v.* Laparle, 74 Ill. 306; Wilson *v.* Ray, 24 Ind. 156; Hyatt *v.* Challiss, 59 Kan. 422, 53 Pac. 467; Cameron *v.* Hinton, (Tex. Civ. App. 1898) 48 S. W. 24. See also Richmond Hosiery Mills *v.* Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290. And see *supra*, XIII, C, 9, a.

64. Keater *v.* Hock, 16 Iowa 23; Clegg *v.* American Newspaper Union, 59 How. Pr. (N. Y.) 122; Milwaukee, etc., R. Co. *v.* Milwaukee, etc., R. Co., 6 Wall. (U. S.) 742, 18 L. ed. 856; Ohio River R. Co. *v.* Fisher, 115 Fed. 929, 53 C. C. A. 411.

65. Jordan *v.* Faircloth, 34 Ga. 47; Miller *v.* Dupuy, 19 La. Ann. 166; Abbeville Electric Light, etc., Co. *v.* Western Electrical Supply Co., 66 S. C. 328, 44 S. E. 952; Bowdoin College *v.* Merritt, 63 Fed. 213.

A court is not concluded by a ruling on a demurrer from holding differently at some subsequent time during the trial, when the same question properly arises. Norton *v.* Knapp, 64 Iowa 112, 19 N. W. 867; Woosley *v.* McMahan, 46 Tex. 62.

66. *Connecticut.*— Chapin *v.* Curtis, 23 Conn. 388.

Mississippi.— Alabama, etc., R. Co. *v.* McCerren, 75 Miss. 687, 23 So. 423, 876; Agnew *v.* McElroy, 10 Sm. & M. 552, 48 Am. Dec. 772.

Missouri.— Shanklin *v.* Francis, 67 Mo. App. 457.

South Dakota.— Sioux Falls Sav. Bank *v.* Lien, 14 S. D. 410, 85 N. W. 924.

United States.— Card *v.* Hines, 35 Fed. 598.

See 30 Cent. Dig. tit. "Judgment," § 1167.

67. *Alabama.*— Stein *v.* McGrath, 128 Ala. 175, 30 So. 792; McDonald *v.* Mobile L. Ins. Co., 65 Ala. 358; *Ex p.* Lawrence, 34 Ala. 446; Perkins *v.* Moore, 16 Ala. 17.

Arkansas.— Luttrell *v.* Reynolds, 63 Ark. 254, 37 S. W. 1051.

Indiana.— Porter *v.* Fraleigh, 19 Ind. App. 562, 49 N. E. 863.

Iowa.— Lamb *v.* McConkey, 76 Iowa 47, 40 N. W. 77.

Louisiana.— Irish *v.* Wright, 12 Rob. 571.

New Jersey.— Van Horn *v.* Van Horn, 53 N. J. L. 514, 21 Atl. 1069.

New York.— Phyfe *v.* Masterson, 45 N. Y. Super. Ct. 338; Recknagel *v.* Steinway, 33 Misc. 633, 68 N. Y. Suppl. 957. But *compare* McCullough *v.* Pence, 85 Hun 271, 32 N. Y. Suppl. 986.

Tennessee.— Murdock *v.* Gaskill, 8 Baxt. 22.

Texas.— Parker *v.* Spencer, 61 Tex. 155.

Vermont.— St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277.

Virginia.— Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433.

United States.— Gould *v.* Evansville, etc., R. Co., 91 U. S. 526, 23 L. ed. 416; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277, 28 Fed. 505.

See 30 Cent. Dig. tit. "Judgment," § 1167.

68. Former recovery as merger or bar see *supra*, XIII, B, 5.

69. *Alabama.*— Capell *v.* Landano, 34 Ala. 135.

Georgia.— Sumner *v.* Sumner, 121 Ga. 1, 48 S. E. 727; Collins *v.* Carr, 116 Ga. 39, 42 S. E. 373; Heard *v.* Illinois Nat. Bank, 114 Ga. 291, 40 S. E. 266; Conquest *v.* Brunswick Nat. Bank, 97 Ga. 500, 25 S. E. 343.

Iowa.— Collins *v.* Jennings, 42 Iowa 447.

Kansas.— Manley *v.* Park, 62 Kan. 553, 64 Pac. 28; Blair *v.* Anderson, 58 Kan. 97, 48 Pac. 562, 62 Am. St. Rep. 606; Buchanan County First Nat. Bank *v.* Linvill, (App. 1900) 62 Pac. 165.

Kentucky.— Mitchell *v.* Chenault, 112 Ky. 267, 65 S. W. 447, 23 Ky. L. Rep. 1544; Scherer *v.* Christian-Moerlein Brewing Co., 65 S. W. 448, 23 Ky. L. Rep. 1613; Philadelphia Fire Assoc. *v.* Dickey, 3 S. W. 372, 8 Ky. L. Rep. 774.

Louisiana.— Hockaday *v.* Skeggs, 18 La. Ann. 681; Kemp *v.* Kemp, 15 La. 517.

Maine.— Shaw, Appellant, 81 Me. 207, 16 Atl. 662.

they dispose finally of some distinct branch or part of the case, or are appealable as being orders affecting the substantial rights of the parties.[70]

(II) *PENDENCY OF APPEAL.*[71] In many jurisdictions it has been held that the pendency of an appeal suspends the operation of a judgment in respect to all its usual effects, and prevents it from being pleaded or used in evidence as a conclusive estoppel.[72] But in others the conclusiveness of the judgment is not affected by an appeal, its force as a plea or as evidence remaining unimpaired

Nebraska.— Hamilton Nat. Bank *v.* American L. & T. Co., (1904) 100 N. W. 202; Agnew *v.* Omaha Nat. Bank, (1903) 96 N. W. 189; Wilcox *v.* Saunders, 4 Nebr. 569.

New York.— Stevens *v.* Melcher, 152 N. Y. 551, 46 N. E. 965; Converse *v.* Sickles, 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790; Ackley *v.* Westervelt, 86 N. Y. 448; Webb *v.* Buckelew, 82 N. Y. 555; Tompkins *v.* Hyatt, 28 N. Y. 347; Metropolitan El. R. Co. *v.* Manhattan R. Co., 14 Abb. N. Cas. 103.

Oklahoma.— Brakefield *v.* Lucas, 10 Okla. 584, 64 Pac. 10.

Pennsylvania.— Coleman's Estate, 7 Pa. Dist. 731.

South Carolina.— Pell *v.* Ball, 1 Rich. Eq. 361.

Tennessee.— Childs *v.* Dennis, (Ch. App. 1901) 61 S. W. 1092; Thompson *v.* Thompson, (Ch. App. 1899) 54 S. W. 145; Clariday *v.* Reed, (Ch. App. 1898) 53 S. W. 302.

Texas.— Henderson *v.* Moss, 82 Tex. 69, 18 S. W. 555; Ledyard *v.* Brown, 27 Tex. 393; Glaze *v.* Johnson, 27 Tex. Civ. App. 116, 65 S. W. 662.

Virginia.— Yates *v.* Wilson, 86 Va. 625, 10 S. E. 976.

United States.— McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 13 S. Ct. 170, 36 L. ed. 1079; Harmon *v.* Struthers, 48 Fed. 260; *In re* Vetterlein, 44 Fed. 57.

See 30 Cent. Dig. tit. "Judgment," § 1162.

An interlocutory judgment by default, where the damages remain to be assessed, determines every fact alleged in the declaration which, but for such judgment, plaintiff would have to prove to establish his right to recover, and precludes the parties from introducing any evidence to enlarge, lessen, or defeat the right so determined. Morey *v.* King, 49 Vt. 304. And see *supra*, XIV, A, 4, c.

Judgment of court of claims.— Where an act of congress refers a claim against the United States to the court of claims for "adjudication according to law" and requires that court to "report the same to congress," it contemplates a complete and final judgment by the court of claims, and the requirement to report to congress does not affect the conclusiveness thereof. U. S. *v.* Irwin, 127 U. S. 125, 8 S. Ct. 1033, 32 L. ed. 99.

When a case is appealed, the final adjudication, and not the one below, is the one which binds the parties in another suit. Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396.

Decree in equity.— Where a decree in equity passes upon the issues between the parties, and finally determines their rights in respect to the main facts in controversy, or the principal object of the action, although it orders a reference as to specific items, or reserves a right to apply for further relief, or continues the cause for such further action as may prove to be necessary, it is conclusive as to the matters judicially and finally determined, although the reserved or postponed questions may still be open. Christie *v.* Iowa L. Ins. Co., 111 Iowa 177, 82 N. W. 499; Strike *v.* McDonald, 2 Harr. & G. (Md.) 191; Low *v.* Low, 177 Mass. 306, 59 N. E. 57; Younkin *v.* Younkin, 44 Nebr. 729, 63 N. W. 31; Lawton *v.* Perry, 45 S. C. 319, 23 S. E. 53; Green *v.* Bogue, 158 U. S. 478, 15 S. Ct. 975, 39 L. ed. 1061; O'Brien *v.* Wheelock, 78 Fed. 673. But see Brush Electric Co. *v.* Western Electric Co., 76 Fed. 761, 22 C. C. A. 543, holding that a decree awarding a perpetual injunction in a patent suit, but with an order of reference to a master to ascertain the damages suffered by the infringement, is interlocutory and not a final decree, and therefore does not operate as an estoppel in a subsequent suit.

See 30 Cent. Dig. tit. "Judgment," § 1162.

70. *Alabama.*— Griffin *v.* Doe, 12 Ala. 783.

Georgia.— McLendon *v.* McGlaun, 60 Ga. 244.

Maryland.— Norris *v.* Baumgardner, 97 Md. 534, 55 Atl. 619; Groome *v.* Lewis, 23 Md. 137, 87 Am. Dec. 563.

New York.— Bangs *v.* Strong, 4 N. Y. 315.

Ohio.— Reiff *v.* Mulholland, 65 Ohio St. 178, 62 N. E. 124.

Pennsylvania.— Harris *v.* Shuster, 3 Pa. Super. Ct. 331.

South Carolina.— Quick *v.* Campbell, 44 S. C. 386, 22 S. E. 479.

West Virginia.— Burner *v.* Hevener, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948.

See 30 Cent. Dig. tit. "Judgment," § 1162.

71. Former recovery as merger or bar see *supra*, XIII, B, 5, e.

72. *California.*— Purser *v.* Cady, 120 Cal. 214, 52 Pac. 489; Murray *v.* Green, 64 Cal. 363, 28 Pac. 118; Woodbury *v.* Bowman, 13 Cal. 634. Where, in an action to quiet title, defendant's title rested on a deed, the validity of which depended on a judgment in divorce proceedings granting alimony, such deed and judgment were held admissible in evidence, although an appeal from the judgment was pending, since the judgment would in no way be enforced thereby. Smith *v.* Smith, 134 Cal. 117, 66 Pac. 81. And see Greer *v.* Greer, 142 Cal. 519, 77 Pac. 1106. And under Code Civ. Proc. § 942, providing that an appeal does not stay the execution of a judgment unless an undertaking is

until it is reversed.[73] And the mere fact that a judgment is liable to be appealed from never detracts from its effect as an estoppel.[74]

(III) *JUDGMENT REVERSED OR VACATED.*[75] A judgment which has been reversed on appeal or vacated or set aside on motion is of no force whatever as an estoppel.[76]

given, the judgment may be used as evidence where no undertaking was given on appealing from it. Colton Land, etc., Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878.

Colorado.— Glenn *v.* Brush, 3 Colo. 26.

Kentucky.— Smith *v.* Farmers' Bank, 51 S. W. 451, 21 Ky. L. Rep. 375.

Louisiana.— Byrne *v.* Prather, 14 La. Ann. 653. But see Harvin *v.* Blackman, 112 La. 24, 36 So. 213, holding that judgments against a tenant for rent and eviction, while not technically *res judicata*, because the delay for taking a devolutive appeal has not expired, preclude any further action by the same court on the matters litigated; the sole remedy of the party cast being by appeal.

Michigan.— Day *v.* De Jonge, 66 Mich. 550, 33 N. W. 527.

Montana.— Boucher *v.* Barsalou, 27 Mont. 99, 69 Pac. 555.

Nevada.— Sherman *v.* Dilley, 3 Nev. 21. *Compare* Rogers *v.* Hatch, 8 Nev. 35.

New Hampshire.— Haynes *v.* Ordway, 52 N. H. 284.

Tennessee.— Delk *v.* Yelton, 103 Tenn. 476, 53 S. W. 729; Hall *v.* Calvert, (Ch. App. 1897) 46 S. W. 1120.

Texas.—Texas Trunk R. Co. *v.* Jackson, 85 Tex. 605, 22 S. W. 1030; Cline *v.* Hackbarth, 30 Tex. Civ. App. 591, 71 S. W. 48; Buckner *v.* Lancaster, (Civ. App. 1897) 40 S. W. 631; Cunningham *v.* Holt, 12 Tex. Civ. App. 150, 33 S. W. 981; Maxwell *v.* Cisco First Nat. Bank, (Civ. App. 1894) 24 S. W. 848. *Compare* Thompson *v.* Giffin, 69 Tex. 139, 6 S. W. 410; Westmoreland *v.* Richardson, 2 Tex. Civ. App. 175, 21 S. W. 167.

Vermont.— Small *v.* Haskins, 26 Vt. 209.

See 30 Cent. Dig. tit. "Judgment," § 1174.

73. *Alabama.*— Gee *v.* Nicholson, 2 Stew. 512.

Arkansas.— Cloud *v.* Wiley, 29 Ark. 80.

Georgia.— Macon *v.* Shaw, 14 Ga. 162; Allen *v.* Savannah, 9 Ga. 286.

Illinois.— Brown *v.* Schintz, 203 Ill. 136, 67 N. E. 767; Moore *v.* Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563.

Indiana.— Scheible *v.* Slagle, 89 Ind. 323; Burton *v.* Burton, 28 Ind. 342.

Iowa.— Watson *v.* Richardson, 110 Iowa 698, 80 N. W. 416, 80 Am. St. Rep. 331.

Kansas.— Willard *v.* Ostrander, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294.

Massachusetts.— Faber *v.* Hovey, 117 Mass. 107, 19 Am. Rep. 398.

Missouri.— Rodney *v.* Gibbs, 184 Mo. 1, 82 S. W. 187; Hudelmeyer *v.* Hughes, 13 Mo. 87. *Compare* Ketchum *v.* Thatcher, 12 Mo. App. 185.

New York.— *In re* Peaslee, 146 N. Y. 378, 41 N. E. 90; Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384; Mercantile Nat. Bank *v.* Corn Exch. Bank, 73 Hun 78, 25 N. Y. Suppl. 1068; Stevens *v.* Stevens, 69 Hun 332, 23 N. Y. Suppl. 520; Sage *v.* Harpending, 49 Barb. 166; Van Vleck *v.* Clark, 38 Barb. 316; Tyler *v.* Willis, 13 Abb. Pr. 369; Harris *v.* Hammond, 18 How. Pr. 123. A judgment by a justice for the removal of a tenant, if transferred to a higher court by certiorari, cannot be offered in a collateral suit to show that the tenancy has ceased. Launitz *v.* Dixon, 5 Sandf. 249.

Oregon.— Day *v.* Holland, 15 Oreg. 464, 15 Pac. 855.

Pennsylvania.— Columbia Nat. Bank *v.* Dunn, 207 Pa. St. 548, 56 Atl. 1087; Woodward *v.* Carson, 86 Pa. St. 176; Woodward *v.* Garey, 2 Walk. 447. *Compare* Souter *v.* Baymore, 7 Pa. St. 415, 47 Am. Dec. 518.

Rhode Island.— Paine *v.* Schenectady Ins. Co., 11 R. I. 411.

South Dakota.— *In re* Kirby, 10 S. D. 322, 414, 73 N. W. 92, 907, 39 L. R. A. 856, 859.

Utah.— Garland *v.* Bear Lake, etc., Waterworks, etc., Co., 9 Utah 350, 34 Pac. 368.

Wisconsin.— Smith *v.* Schreiner, 86 Wis. 19, 56 N. W. 160, 39 Am. St. Rep. 869.

United States.— In the federal courts the rule appears to be that, when a case is removed to an appellate court by writ of error or appeal, if it is not there tried *de novo*, but the record made below is simply reëxamined and the judgment either reversed or affirmed, such an appeal does not vacate the judgment below, or prevent it from being pleaded and given in evidence as an estoppel upon the issues which were tried and determined, in the absence of a local statute providing that it shall not be so used pending an appeal; a supersedeas bond merely stays process for the enforcement of the judgment, and does not vacate the judgment, or change its effect as an estoppel. Ransom *v.* Pierre, 101 Fed. 665, 41 C. C. A. 585; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277. And see Grisar *v.* McDowell, 6 Wall. 363, 18 L. ed. 863. *Compare* Sharon *v.* Hill, 26 Fed. 337, 11 Sawy. 291. But it has been held that the judgment of a supreme court of a state cannot be pleaded as an adjudication in bar of a subsequent suit in a federal court, where it has been removed for review to the supreme court of the United States by writ of error, and is there pending and undetermined. Eastern Bldg., etc., Assoc. *v.* Welling, 103 Fed. 352.

See 30 Cent. Dig. tit. "Judgment," § 1174.

74. Cook *v.* Rice, 91 Cal. 664, 27 Pac. 1081.

75. Former recovery as merger or bar see *supra*, XIII, B, 5, g.

76. *Alabama.*— Paulling *v.* Watson, 26 Ala. 205.

h. Validity of Judgment — (i) *VOID JUDGMENTS.*[77] No conclusive effect can be given to a judgment which is absolutely void,[78] whether its invalidity results from a want of jurisdiction over the parties,[79] or over the subject-matter of the

Connecticut.— Brennan *v.* Berlin Iron Bridge Co., 73 Conn. 412, 47 Atl. 668.

Illinois.— West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 427; Pells *v.* People, 159 Ill. 580, 42 N. E. 784; Delaunay *v.* Burnett, 9 Ill. 454; Baker *v.* Hess, 53 Ill. App. 473.

Kentucky.— McCallister *v.* Bridges, 40 S. W. 70, 19 Ky. L. Rep. 107.

Maine.— Sargent *v.* Hampden, 38 Me. 581.

Maryland.—Richardson *v.* Parsons, 1 Harr. & J. 253.

Massachusetts.— Graef *v.* Bernard, 162 Mass. 300, 38 N. E. 503.

Montana.— Mattingly *v.* Lewisohn, 13 Mont. 508, 35 Pac. 111.

New Hampshire.— Stevens *v.* Sabin, 20 N. H. 529.

New York.— Commercial Bank *v.* Sherwood, 162 N. Y. 310, 56 N. E. 834; Smith *v.* Frankfield, 77 N. Y. 414; Gilchrist *v.* Comfort, 26 How. Pr. 394; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603; Wood *v.* Genet, 8 Paige 137.

North Carolina.— Stewart *v.* Register, 108 N. C. 588, 13 S. E. 234.

Ohio.— Zanesville Gas-Light Co. *v.* Zanesville, 47 Ohio St. 35, 23 N. E. 60.

Pennsylvania.— Small's Appeal, (1888) 15 Atl. 807; Ridgely *v.* Spenser, 2 Binn. 70.

South Carolina.— Agnew *v.* Adams, 26 S. C. 101, 1 S. E. 414.

Tennessee.— Rosenbaum *v.* Davis, 106 Tenn. 51, 60 S. W. 497.

Texas.— Halbert *v.* Alford, (1889) 12 S. W. 77; Mills County *v.* Brown County, 10 Tex. Civ. App. 356, 30 S. W. 476; Best *v.* Nix, 6 Tex. Civ. App. 349, 25 S. W. 130; Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33.

Virginia.— Omohundro *v.* Omohundro, 27 Gratt. 824.

Wisconsin.— Mowry *v.* Barahco First Nat. Bank, 66 Wis. 539, 29 N. W. 559. But see Sturtevant *v.* Milwaukee, etc., R. Co., 11 Wis. 63.

United States.— Butler *v.* Eaton, 141 U. S. 240, 11 S. Ct. 985, 35 L. ed. 713; Four Hundred and Twenty Min. Co. *v.* Bullion Min. Co., 9 Fed. Cas. No. 4,989, 3 Sawy. 634.

England.— Reg. *v.* Drury, 3 C. & K. 193, 3 Cox C. C. 544, 18 L. J. M. C. 189.

See 30 Cent. Dig. tit. "Judgment," § 1175.

Right to have judgment opened.— The fact that a judgment is liable, under the local statute, to be opened at any time within five years after its entry, as, where it was rendered on constructive service, will not impair its conclusive force so long as it remains unopened. Stevens *v.* Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422.

Appeal from order of vacation.— An appeal from an order vacating a judgment does not reinstate the judgment so as to give it operation as an estoppel. Hershey *v.* Meeker County Bank, 71 Minn. 255, 73 N. W. 967.

The title of third persons to property acquired in good faith under an erroneous judgment or decree vesting the legal right to the property in the party claiming it is not affected by its reversal. Wadhams *v.* Gay, 73 Ill. 415.

Judgment of reversal as law of the case.— On appeal in an action by a discharged employee to recover for the unexpired term under a contract to render "satisfactory services," a judgment for plaintiff was reversed, on the ground that his employers were the sole judges whether the services were satisfactory. It was held that on a new trial where the evidence was the same, it was proper to direct a verdict for defendants. Koll *v.* Bush, 6 Colo. App. 294, 40 Pac. 579.

77. Former recovery as merger or bar see *supra*, XIII, B, 4, a.

78. *Alabama.*— Dunklin *v.* Wilson, 64 Ala. 162.

Arkansas.— Miller *v.* Barkeloo, 8 Ark. 318.

California.— *In re* Smith, 122 Cal. 462, 55 Pac. 249.

Georgia.— Moore *v.* O'Barr, 87 Ga. 205, 13 S. E. 464.

Michigan.— Portsmouth Sav. Bank *v.* Gratiot Cir. Judge, 83 Mich. 646, 47 N. W. 595.

Montana.— Finlen *v.* Heinze, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517.

New Jersey.— Richman *v.* Baldwin, 21 N. J. L. 395.

New York.— Gage *v.* Hill, 43 Barb. 44; Hancock *v.* Flynn, 5 Silv. Sup. 122, 8 N. Y. Suppl. 133; People *v.* Eggleston, 13 How. Pr. 123.

Utah.— *In re* Christensen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504.

England.— Toronto R. Co. *v.* Toronto, [1904] A. C. 809, 73 L. J. P. C. 120, 91 L. T. Rep. N. S. 541, 20 T. L. R. 774; Atty.-Gen. *v.* Eriché, [1893] A. C. 518.

79. *Colorado.*— Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027.

Georgia.— Knox *v.* Bates, 79 Ga. 425, 5 S. E. 61; Georgia Cent. Bank *v.* Gibson, 11 Ga. 453.

Indiana.— Abbott *v.* Union Mut. L. Ins. Co., 127 Ind. 70, 26 N. E. 153; Rhoades *v.* Delaney, 50 Ind. 468.

Iowa.— Mohler *v.* Shank, 93 Iowa 273, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161.

Maine.— Trembly *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

Nebraska.— Sackett *v.* Montgomery, 57 Nebr. 424, 77 N. W. 1083, 73 Am. St. Rep. 522.

New York.— Carswell *v.* Alden, 12 N. Y. Civ. Proc. 137.

North Carolina.— Springer *v.* Shavender,

controversy,[80] or from a want of authority in the court to go beyond the pleadings and evidence and render a judgment on a matter not in issue or not submitted to it.[81] There are also authorities holding that a judgment obtained by fraud is so far invalid that it is not of conclusive force as an estoppel.[82]

(II) *Erroneous or Irregular Judgments.*[83] Jurisdiction having attached, the conclusive effect of the judgment is not impaired by the fact that it is voidable for irregularities[84] or so erroneous in point of law that it would be reversed

118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708.

Tennessee.— Rockhold *v.* Blevins, 6 Baxt. 115.

Texas.— Franz Falk Brewing Co. *v.* Hirsch, 78 Tex. 192, 14 S. W. 450; Thaxton *v.* Smith, (Civ. App. 1896) 38 S. W. 820.

United States.— Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116; Laredo Imp. Co. *v.* Stevenson, 66 Fed. 633, 13 C. C. A. 661.

England.— See Bonaparte *v.* Bonaparte, [1892] P. 402, 62 L. J. P. & Adm. 1, Reports 490, 67 L. T. Rep. N. S. 531.

See 30 Cent. Dig. tit. "Judgment," § 1171.

But see Semple *v.* Anderson, 9 Ill. 546, holding that, where a case has once been determined on its merits, and the cause shall at a subsequent time be brought before the same tribunal, the court will not go behind its former adjudications, even though it shall appear on the record that the court acted without jurisdiction.

80. *Alabama.*— Caperton *v.* Hall, 83 Ala. 171, 3 So. 234.

California.— *In re* Freud, 134 Cal. 333, 66 Pac. 476; Dickey *v.* Gibson, 121 Cal. 276, 53 Pac. 704.

Colorado.— Meldrum *v.* Meldrum, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65.

Georgia.— Ponce *v.* Underwood, 55 Ga. 601.

Minnesota.— Dobberstein *v.* Murphy, 44 Minn. 526, 47 N. W. 171.

Missouri.— Wilson *v.* Lubke, 176 Mo. 210, 75 S. W. 602, 98 Am. St. Rep. 503.

New Jersey.— Richman *v.* Baldwin, 21 N. J. L. 395.

New York.— Halstead *v.* Striker, 144 N. Y. 705, 39 N. E. 857; Barnes *v.* Gilmore, 6 N. Y. Civ. Proc. 286; Matter of Hemiup, 3 Paige 305.

Pennsylvania.— Morgan's Appeal, 110 Pa. St. 271, 4 Atl. 506.

South Carolina.— McMaster *v.* Arthur, 33 S. C. 512, 12 S. E. 308.

Texas.— Ingram *v.* Phillips, 10 Tex. Civ. App. 17, 29 S. W. 915; Gatewood *v.* Laughlin, 2 Tex. App. Civ. Cas. § 149.

England.— Toronto R. Co. *v.* Toronto, [1904] A. C. 809, 73 L. J. P. C. 120, 91 L. T. Rep. N. S. 541, 20 T. L. R. 774.

See 30 Cent. Dig. tit. "Judgment," § 1171.

81. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800; Houston *v.* Musgrove, 35 Tex. 594.

82. Erwin *v.* Henry, 5 Mo. 469; Central Trust Co. *v.* Bridges, 57 Fed. 753, 6 C. C. A. 539. But *compare* Bruce *v.* Osgood, 154 Ind. 375, 56 N. E. 25 [*disapproving* Kirby *v.* Kirby, 142 Ind. 419, 41 N. E. 809]; Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94. And see *supra*, XIII, B, 4, c.

83. Former recovery as merger or bar see *supra*, XIII, B, 4, b.

84. *Alabama.*— Cole *v.* Conolly, 16 Ala. 271; Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677.

California.— Gillmore *v.* American Cent. Ins. Co., 65 Cal. 63, 2 Pac. 882.

Colorado.— Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027.

Connecticut.— Dennison *v.* Hyde, 6 Conn. 508.

Florida.— Ponder *v.* Moseley, 2 Fla. 207, 48 Am. Dec. 194.

Georgia.— Crutchfield *v.* State, 24 Ga. 335; Vickery *v.* Scott, 20 Ga. 795; Bryan *v.* Walton, 20 Ga. 480; Peterman *v.* Watkins, 19 Ga. 153; Ragland *v.* Justices Inferior Ct., 10 Ga. 65; Rodgers *v.* Evans, 8 Ga. 143, 52 Am. Dec. 390; Kenan *v.* Miller, 2 Ga. 325.

Illinois.—Heacock *v.* Lubukee, 108 Ill. 641; Kern *v.* Strausberger, 71 Ill. 303.

Indiana.— Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83; Ridgway *v.* Morrison, 28 Ind. 201.

Iowa.— Hart *v.* Jewett, 11 Iowa 276; Delany *v.* Reade, 4 Iowa 292; Reed *v.* Wright, 2 Greene 15.

Kentucky.— Reed *v.* Bryant, 67 S. W. 42, 23 Ky. L. Rep. 2255; Com. *v.* Louisville Water Co., 37 S. W. 576, 18 Ky. L. Rep. 620. But see Creager *v.* Walker, 7 Bush 1.

Massachusetts.— Minor *v.* Walter, 17 Mass. 237.

Michigan.— Bigalow *v.* Barre, 30 Mich. 1.

Mississippi.— Moore *v.* Ware, 51 Miss. 206.

Missouri.— Haygood *v.* McKoon, 49 Mo 77.

New Hampshire.— Claggett *v.* Simes, 31 N. H. 56; Gorrill *v.* Whittier, 3 N. H. 265.

New Jersey.— Evans *v.* Adams, 15 N. J. L. 373.

New York.— Lynch *v.* Rome Gas Light Co., 42 Barb. 591; Wilkinson *v.* Vorce, 41 Barb. 370; Smith *v.* Shaw, 12 Johns. 257.

North Carolina.— White *v.* Albertson, 14 N. C. 241, 22 Am. Dec. 719.

Pennsylvania.— Baily *v.* Baily, 44 Pa. St. 274, 84 Am. Dec. 439; Myers *v.* Clark, 3 Watts & S. 535.

South Carolina.— Camberford *v.* Hall, 3 McCord 345.

Tennessee.— Nelson *v.* Trigg, 3 Tenn. Cas. 733.

Texas.— Willis *v.* Ferguson, 46 Tex. 496; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100; Cook *v.* Carroll Land, etc., Co., 6 Tex. Civ. App. 326, 25 S. W. 1034.

on appeal or error.[85] But persons adversely interested may take advantage of errors or irregularities in a judgment, where they were not made parties or not served with notice.[86]

B. Persons Concluded by Judgments[87] — 1. In General — a. Identity of Parties. To constitute a judgment an estoppel, there must be an identity of parties as well as of the subject-matter; that is, it is necessary that the parties as between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered, in the same capacities and in the same antagonistic relation, or else they must be in privity with the parties in such former action.[88]

b. Persons Collaterally Interested in Former Action. Persons having liens upon or claims to property which is the subject-matter of an action, or rights of action against one or more of the parties thereto, are not bound by the judgment

Virginia.— Lancaster *v.* Wilson, 27 Gratt. 624.

Washington.— Parker *v.* Dacres, 1 Wash. 190, 24 Pac. 192.

Wisconsin.— Rogan *v.* Walker, 1 Wis. 597.

United States.— Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 15 S. Ct. 733, 39 L. ed. 859; Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304; Elliott *v.* Peirsol, 1 Pet. 328, 7 L. ed. 164; Stevelie *v.* Read, 22 Fed. Cas. No. 13,389, 2 Wash. 274.

See 30 Cent. Dig. tit. "Judgment," § 1171.

85. *California.*— Lamb *v.* Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66; Keech *v.* Beatty, 127 Cal. 177, 59 Pac. 837; Wolverton *v.* Baker, 86 Cal. 591, 25 Pac. 54.

Illinois.— Chicago, etc., R. Co. *v.* Watson, 113 Ill. 195; Jenkins *v.* International Bank, 111 Ill. 462; Stempel *v.* Thomas, 89 Ill. 146; Wadhams *v.* Gay, 73 Ill. 415.

Indiana.— Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; Fiscus *v.* Guthrie, 125 Ind. 598, 25 N. E. 285; Phillips *v.* Lewis, 109 Ind. 62, 9 N. E. 395; Davenport *v.* Barnett, 51 Ind. 329; Doe *v.* Rue, 4 Blackf. 263, 29 Am. Dec. 368.

Iowa.— McCrillis *v.* Harrison County, 63 Iowa 592, 19 N. W. 679.

Kansas.—Santa Fé Bank *v.* Haskell County Bank, 51 Kan. 50, 32 Pac. 627.

Kentucky.— Cates *v.* Woodson, 2 Dana 452; Wallace *v.* Usher, 4 Bibb 508.

Louisiana.—Lafourche Police Jury *v.* Terrebonne Police Jury, 40 La. Ann. 1331, 22 So. 376.

Maryland.— Barrick *v.* Horner, 78 Md. 253, 27 Atl. 1111, 44 Am. St. Rep. 283; State *v.* Ramshurg, 43 Md. 325.

Michigan.— Carr *v.* Brick, 113 Mich. 664, 71 N. W. 1103.

New Jersey.— Manley *v.* Mickle, 53 N. J. Eq. 155, 32 Atl. 210.

New York.—Livingston *v.* Tucker, 107 N. Y. 549, 14 N. E. 443; Smith *v.* Kelly, 2 Hall 217.

North Carolina.— Preiss *v.* Cohen, 117 N. C. 54, 23 S. E. 162; Granbery *v.* Mhoon, 12 N. C. 456.

Pennsylvania. — Northampton County *v.* Herman, 119 Pa. St. 373, 13 Atl. 277; Gratz *v.* Lancaster Bank, 17 Serg. & R. 278.

Tennessee.— Kelley *v.* Mize, 3 Sneed 59.

Texas.— Watson *v.* Hopkins, 27 Tex. 637.

Virginia.— Howison *v.* Weeden, 77 Va. 704.

West Virginia.— State *v.* Irwin, 51 W. Va. 192, 41 S. E. 124; Northwestern Bank *v.* Hays, 37 W. Va. 475, 16 S. E. 561; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809; Carrothers *v.* Sargent, 20 W. Va. 351.

Wisconsin.— State *v.* Helms, 101 Wis. 280, 77 N. W. 194; Walker *v.* Daly, 80 Wis. 222, 49 N. W. 812.

United States.— Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; Nations *v.* Johnson, 24 How. 195, 16 L. ed. 628; The J. W. French, 13 Fed. 916, 5 Hughes 429; McCall *v.* Harrison, 15 Fed. Cas. No. 8,671, 1 Brock. 126. But see Mercantile Nat. Bank *v.* Hubbard, 105 Fed. 809, 45 C. C. A. 66.

England.— Clanmorris *v.* Clanmorris, 14 Ir. Ch. 420.

See 30 Cent. Dig. tit. "Judgment," § 1171.

86. Watson *v.* May, 8 Ala. 177; Clark *v.* Moore, 64 Ill. 273; Falls *v.* Hawthorn, 30 Ind. 444.

87. Former recovery as merger or bar see *supra*, XIII, A, 5; XIII, D, 1, f; XIII, F.

88. *Kentucky.*— Grundy *v.* Drye, 49 S. W. 469, 20 Ky. L. Rep. 1337. And see Duff *v.* Cornett, 82 S. W. 1004, 26 Ky. L. Rep 935.

Louisiana.— Lefebvre *v.* De Montilly, 1 La. Ann. 42; Henderson *v.* Western M. & F. Ins. Co., 10 Rob. 164, 43 Am. Dec. 176.

New Jersey.— Zurbrugg *v.* Reed, (Ch. 1896) 35 Atl. 298.

New York.— A. T. Albro Co. *v.* Fountain, 15 N. Y. App. Div. 351, 44 N. Y. Suppl. 150.

Pennsylvania.— *In re* Lightner, 187 Pa. St. 237, 41 Atl. 46.

Tennessee.— Harris *v.* Columbia Water, etc., Co., 114 Tenn. 328, 85 S. W. 897.

Texas.— Campbell *v.* Upson, 88 Tex. 442, 84 S. W. 817.

United States.— Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209.

England.—Reg. *v.* Hartington Middle Quarter Tp., 4 E. & B. 780, 82 E. C. L. 780.

And see the other cases under the sections following.

Identity of names is presumptive evidence of identity of persons, but not conclusive. Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209. See, generally, Names.

if they were not made parties to the suit, although their claims were brought into issue in such action, or although their rights depend upon the same transaction or facts which were litigated and decided in that action.[89]

c. Mutuality of Estoppel. It is a rule that estoppels must be mutual; and therefore a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely no person can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case.[90]

89. *California.*— Hovey *v.* Bradbury, 112 Cal. 620, 44 Pac. 1077. An order of the probate court setting aside certain premises as a homestead does not affect the holder of a mortgage on such premises, if he was not made a party to the proceeding. Lies *v.* De Diablar, 12 Cal. 327.

Connecticut.—Burdick *v.* Norwich, 49 Conn. 225.

Delaware.— Burton *v.* Hazzard, 4 Harr. 100.

Illinois.— Mail *v.* Maxwell, 107 Ill. 554. A decree, at the suit of taxpayers, enjoining the collection of a tax levied to pay a demand against the town does not conclude the holder of such demand, if he was not made a party to the suit. Lyons *v.* Cooledge, 89 Ill. 529.

Indiana.— Abbott *v.* Union Mut. L. Ins. Co., 127 Ind. 70, 26 N. E. 153.

Kentucky.— Sutor *v.* Miles, 2 B. Mon. 489; Darland *v.* Governor, 2 Bibb 541.

Maine.— Small *v.* Gilman, 48 Me. 506.

Massachusetts.— Hubert *v.* Fera, 99 Mass. 198, 96 Am. Dec. 732.

Mississippi.— Buntyn *v.* Shippers' Compress Co., 63 Miss. 94.

Missouri.— Middleton *v.* Kansas City, etc., R. Co., 62 Mo. 579.

New York.— Gilman *v.* Healy, 46 Hun 310; Clark *v.* Baird, 9 N. Y. 183; Knauth *v.* Bassett, 34 Barb. 31. And see Pentz *v.* Ætna F. Ins. Co., 9 Paige 568.

Pennsylvania.— Hatch *v.* Bartle, 45 Pa. St. 166, 84 Am. Dec. 484. A judgment recovered against a railroad company for negligently setting fire to property is not conclusive on the owner of the property, as to the amount of his loss, as against an insurance company seeking to recover money paid to him on account of such loss before the recovery of the judgment. Ætna Ins. Co. *v.* Confer, 158 Pa. St. 598, 28 Atl. 153.

South Carolina.— Whitmore *v.* Casey, 2 Brev. 422; Alexander *v.* Maxwell, Rich. Eq. Cas. 302.

Texas.— Groesbeck *v.* Golden, (1887) 7 S. W. 362; Grant *v.* Smith, 51 Tex. 562; Chapman *v.* Lacour, 25 Tex. 94; Hall *v.* Harris, 11 Tex. 300; Jackson *v.* Andrews, 3 Tex. Civ. App. 563, 22 S. W. 1045.

Wisconsin.— Mabbett *v.* Vick, 53 Wis. 158, 10 N. W. 84.

United States.— Flanders *v.* Seelye, 105 U. S. 718, 26 L. ed. 1217.

See 30 Cent. Dig. tit. "Judgment," § 1179.

90. *Alabama.*— Louisville, etc., R. Co. *v.* Brinckerhoff, 119 Ala. 606, 24 So. 892; Harris *v.* Plant, 31 Ala. 639; Gwynn *v.* Hamilton, 29 Ala. 233; Phillips *v.* Thompson, 3 Stew. & P. 369.

Arkansas.— Bell *v.* Wilson, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370.

California.— Valentine *v.* Mahoney, 37 Cal. 389.

Georgia.— Bradley *v.* Johnson, 49 Ga. 412.

Illinois.— Lamar Ins. Co. *v.* Pennell, 19 Ill. App. 212.

Iowa.— Woodward *v.* Jackson, 85 Iowa 432, 52 N. W. 358; Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 63 Iowa 285, 19 N. W. 231; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226; Stoddard *v.* Burton, 41 Iowa 582; McDonald *v.* Gregory, 41 Iowa 513; Myers *v.* Johnson County, 14 Iowa 47.

Kansas.— Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 127.

Kentucky.— Bridges *v.* McAlister, 106 Ky. 791, 51 S. W. 603, 21 Ky. L. Rep. 428, 90 Am. St. Rep. 267, 45 L. R. A. 800; Chiles *v.* Conley, 2 Dana 21.

Maine.— Biddle, etc., Co. *v.* Burnham, 91 Me. 578, 40 Atl. 669.

Maryland.— Groshon *v.* Thomas, 20 Md. 234.

Minnesota.— Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263; Nowak *v.* Knight, 44 Minn. 241, 46 N. W. 348.

Missouri.— Bell *v.* Hoagland, 15 Mo. 360.

Nebraska.— Sickler *v.* Mannix, (1903) 93 N. W. 1018; Densmore *v.* Tomer, 14 Nebr. 392, 15 N. W. 734.

New Hampshire.— Tibbetts *v.* Shapleigh, 60 N. H. 487; Parker *v.* Moore, 59 N. H. 454; Child *v.* Eureka Powder Works, 45 N. H. 547.

New Jersey.— Coney *v.* Harney, 53 N. J. L. 53, 20 Atl. 736.

New York.— Pfeffer *v.* Kling, 171 N. Y. 668, 64 N. E. 1125; Van Camp *v.* Fowler, 133 N. Y. 600, 30 N. E. 1147; Moore *v.* Albany, 98 N. Y. 396; Starbuck *v.* Starbuck, 62 N. Y. App. Div. 437, 71 N. Y. Suppl. 104; New York *v.* Fay, 53 Hun 553, 6 N. Y. Suppl. 400; Todd *v.* Kerr, 42 Barb. 317; Deck *v.* Johnson, 30 Barb. 283; Bissick *v.* McKenzie, 4 Daly 265; Hardy *v.* Eagle, 25 Misc. 471, 54 N. Y. Suppl. 1045; Lansing *v.* Montgomery, 2 Johns. 382; Southgate *v.* Montgomery, 1 Paige 41. *Compare* Holmes *v.* Holmes, 4 Lans. 388.

North Carolina.— Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924; Redmond *v.* Coffin, 17 N. C. 437.

Pennsylvania.— Chandler's Appeal, 100 Pa. St. 262.

South Carolina.— Crews *v.* McKinnie, 2 Nott & M. 52.

d. Persons Under Disabilities. The binding force of a judgment against a married woman, an infant, or a lunatic depends on the question whether it is to be held void or merely voidable; in the former case it has no effect as an estoppel, but in the latter it is conclusive, however irregular or erroneous it may be.[91]

2. Parties of Record — a. In General. As a general rule a valid and final judgment is binding and conclusive on all the parties of record in the action or proceeding in which the judgment was rendered.[92] It is conclusive on all the

Tennessee.— Simpson *v.* Jones, 2 Sneed 36.
Virginia.— Payne *v.* Coles, 1 Munf. 373.
West Virginia.— Buford *v.* Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854.
United States.— Wood *v.* Davis, 7 Cranch 271, 3 L. ed. 339; Penfield *v.* Potts, 126 Fed. 475, 61 C. C. A. 371; Four Hundred and Twenty Min. Co. *v.* Bullion Min. Co., 9 Fed. Cas. No. 4,989, 3 Sawy. 634; Wright *v.* Stanard, 30 Fed. Cas. No. 18,094, 2 Brock. 311.
England.— Wenman *v.* Mackenzie, 5 E. & B. 447, 1 Jur. N. S. 1015, 25 L. J. Q. B. 44, 3 Wkly. Rep. 626, 85 E. C. L. 447; Petrie *v.* Nuttall, 11 Exch. 569, 25 L. J. Exch. 200.
Canada.— Smith *v.* Wallbridge, 6 U. C. C. P. 324.
See 30 Cent. Dig. tit. "Judgment," § 1180.
But see Concordia Parish *v.* Hernandez, 31 La. Ann. 158, holding that where plaintiff in a suit formally avers that the defendant had collected certain warrants, the property of plaintiff, and prays defendant's condemnation for the amount of the warrants, he thereby estops himself from subsequently suing another person as the collector of the warrants.

91. See *supra*, I, C, 1.
Married women.— Judgments against married women have been held binding and conclusive in Robinson *v.* Walker, 81 Ala. 404, 1 So. 347; Ketchum *v.* Christman, 128 Mo. 38, 30 S. W. 313; Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Rammelsberg *v.* Mitchell, 29 Ohio St. 22; Jones *v.* Taylor, 7 Tex. 240, 56 Am. Dec. 48; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; Turner *v.* Turner, 2 De G. M. & G. 28, 21 L. J. Ch. 422, 51 Eng. Ch. 20, 42 Eng. Reprint 781. And see Husband and Wife.
Insane person.— Where one who had never been adjudged to be incompetent in any legal sense was a party to an action, and was furnished by the court with a competent attorney on suggestion that she was incompetent, she is fully bound by the judgment. Livingston *v.* Livingston, 166 N. Y. 601, 59 N. E. 1125. And see Insane Persons.
Infants.— An infant who is represented in the action by a guardian or next friend is bound by the judgment. Archer *v.* Archer, 115 Ga. 950, 42 S. E. 219; Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294; Towles *v.* Conrad, 3 Rob. (La.) 69; Broussard *v.* Bernard, 7 La. 216; Grounx *v.* Abat, 7 La. 17; Martin *v.* Martin, 5 Mart. N. S. (La.) 165; Frene *v.* Kirchoff, 176 Mo. 516, 75 S. W. 608; Corker *v.* Jones, 110 U. S. 317, 4 S. Ct. 19, 28 L. ed. 161. And see Infants.

92. *California.*— Wise *v.* Walker, 81 Cal. 11, 20 Pac. 81, 22 Pac. 293.
Georgia.— Archer *v.* Archer, 115 Ga. 950, 42 S. E. 219; White *v.* Bleckley, 114 Ga. 155, 39 S. E. 946; Middlebrooks *v.* Warren, 59 Ga. 230.
Illinois.— Bowers *v.* Bloch, 129 Ill. 424, 21 N. E. 807; Nichols *v.* Murphy, 36 Ill. App. 205.
Indiana.— Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050; Young *v.* Stevens, 28 Ind. App. 654, 63 N. E. 721.
Iowa.— Fulliam *v.* Drake, 105 Iowa 615, 75 N. W. 479; McGregor *v.* McGregor, 21 Iowa 441.
Kansas.— Gresham *v.* Owens, 6 Kan. App. 459, 50 Pac. 69.
Kentucky.— Elliot *v.* Threlkeld, 16 B. Mon. 341; Rice *v.* Rice, 14 B. Mon. 417; Masterson *v.* Marshall, 5 Dana 412; Hisle *v.* Witherspoon, 42 S. W. 842, 19 Ky. L. Rep. 1013.
Michigan.— Going *v.* Oakland County Agricultural Soc., 117 Mich. 230, 75 N. W. 462.
Minnesota.— Breault *v.* Merrill, etc., Lumber Co., 72 Minn. 143, 75 N. W. 122.
Missouri.— Menefee *v.* Beverforden, 95 Mo. App. 105, 68 S. W. 972; Fischer *v.* Anslyn, 30 Mo. App. 316; Magwire *v.* Labeaume, 7 Mo. App. 179.
New Jersey.— Eisele *v.* Schmitz, 67 N. J. L. 58, 50 Atl. 438.
New York.— Livingston *v.* Livingston, 166 N. Y. 601, 59 N. E. 1125; Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533; Pratt *v.* Johnston, 59 N. Y. App. Div. 52, 69 N. Y. Suppl. 86; Kager *v.* Brenneman, 47 N. Y. App. Div. 63, 62 N. Y. Suppl. 339; Paff *v.* Kinney, 5 Sandf. 380; Eberle *v.* Bryant, 31 Misc. 814, 63 N. Y. Suppl. 963; Ostrander *v.* Hart, 8 N. Y. Suppl. 809; Manolt *v.* Petrie, 65 How. Pr. 206.
North Carolina.— Wood *v.* Sugg, 91 N. C. 93, 49 Am. Rep. 639; Howerton *v.* Wimbish, 55 N. C. 328; Armfield *v.* Moore, 44 N. C. 157.
South Carolina.— Reese *v.* Meetze, 51 S. C. 333, 29 S. E. 73.
Tennessee.— Melton *v.* Pace, 103 Tenn. 484, 53 S. W. 939; Blair *v.* Blair, (Ch. App. 1896) 41 S. W. 1078.
Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; Bridgens *v.* West, 35 Tex. Civ. App. 277, 80 S. W. 417. And see Sanger *v.* Corsicana Nat. Bank, (Civ. App. 1905) 87 S. W. 737.
Virginia.— Williams *v.* Tomlin, (1898) 28 S. E. 883; Gibson *v.* Green, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888.
West Virginia.— Mann *v.* Peck, 45 W. Va. 18, 30 S. E. 206.

parties,[93] and upon each of them,[94] and even, according to the doctrine of one case, against persons who but for their own laches might have been parties,[95] without regard to their position on the record as plaintiffs or defendants,[96] and without regard to the fact that some persons were not made parties who should have been joined.[97] And generally third persons who are brought in as parties, on account of their claiming some interest in the subject-matter of the suit, are concluded by the result of the litigation, whether or not they set up their claims or titles.[98]

b. Who Are Parties. In the larger sense all persons are parties to an action who have a direct interest in its subject-matter and have a right to control the proceedings, make defense, examine witnesses, and appeal if any appeal lies.[99] In a stricter sense only those are parties whose names appear on the record as such,[1]

United States.— *In re* Van Alstyne, 100 Fed. 929.

England.— Gandy *v.* Gandy, 30 Ch. D. 57, 54 L. J. Ch. 1154, 53 L. T. Rep. N. S. 306, 33 Wkly. Rep. 803; Style *v.* Martin, 1 Ch. Cas. 150, 22 Eng. Reprint 737; Boileau *v.* Rutlin, 2 Exch. 665, 12 Jur. 899; Ford *v.* Tynte, 3 New Rep. 559. See also Roe *v.* Mutual Loan Fund, 19 Q. B. D. 347, 56 L. J. Q. B. 541, 35 Wkly. Rep. 723.

See 30 Cent. Dig. tit. "Judgment," § 1181.

93. Brooklyn City, etc., R. Co. *v.* New York Nat. Bank of Republic, 102 U. S. 14, 26 L. ed. 61. And see H. B. Claflin Co. *v.* De Vaughn, 106 Ga. 282, 32 S. E. 108, holding that where there are several plaintiffs, and a decree is made in favor of some of them only, it is conclusive that the others are not entitled to relief, although it does not expressly so declare, where it is clearly inferable, from the decree as a whole, that such was the intention of the court.

94. Mobile Bank *v.* Mobile, etc., R. Co., 69 Ala. 305, holding that a judgment is conclusive against defendant that the amount adjudged is due, and against plaintiff that no more is due on account of the contract or liability put in suit.

95. *In re* Piper, 208 Pa. St. 636, 57 Atl. 1118.

96. Weeks *v.* McPhail, 129 N. C. 73, 39 S. E. 732. And see Brown *v.* Tillman, 121 Ala. 626, 25 So. 836; Fiene *v.* Kirchoff, 176 Mo. 516, 75 S. W. 608.

Estoppel.— Where plaintiffs alleged that a prior action, in which a deed to their ancestor under which they claimed title was construed, was brought about by the misconduct of defendant in requiring such ancestor to give a mortgage to secure defendant's debt, and afterward fraudulently contriving to have the holder of the mortgage bring such prior suit to foreclose the same, in order that defendant might purchase the land, and thereby cut out plaintiffs' rights in the property, plaintiffs were estopped to plead that plaintiffs and defendant were not adversary parties in such prior suit, and that therefore the judgment therein was not *res judicata* as to them. Fiene *v.* Kirchoff, 176 Mo. 516, 75 S. W. 608.

97. Mills *v.* Buttrick, 4 Colo. 123; Salter *v.* Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

98. Stockwell *v.* State, 101 Ind. 1; Benjamin *v.* Elmira, etc., R. Co., 49 Barb. (N. Y.) 441. But see McNaughton *v.* Thayer, 17 Wis. 290. See, however, Gaylor *v.* Harding, 37 Conn. 508; Dillard *v.* Dillard, 97 Va. 434, 34 S. E. 60.

99. *Georgia.*— Brown *v.* Chaney, 1 Ga. 410.

Maryland.— Courtney *v.* William Knabe, etc., Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Missouri.— Rieschick *v.* Klingelhoefer, 91 Mo. App. 430.

Pennsylvania.— Peterson *v.* Lothrop, 34 Pa. St. 223.

United States.— American Bell Tel. Co. *v.* National Improved Tel. Co., 27 Fed. 663.

1. *Indiana.*— Isbell *v.* Stewart, 125 Ind. 112, 25 N. E. 160; Walling *v.* Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Glaze *v.* Citizens' Nat. Bank, 116 Ind. 492, 18 N. E. 450; Smith *v.* Downey, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 467.

Iowa.— Walters *v.* Wood, 61 Iowa 290, 16 N. W. 116.

Kentucky.— Allin *v.* Hall, 1 A. K. Marsh. 525.

Maine.— Glass *v.* Nichols, 35 Me. 328.

Nebraska.— Little *v.* Giles, 27 Nebr. 179, 42 N. W. 1044; White *v.* Bartlett, 14 Nebr. 320, 15 N. W. 702.

New York.— Dyett *v.* Hyman, 13 N. Y. Suppl. 895.

Pennsylvania.— Com. *v.* Comrey, 174 Pa. St. 355, 34 Atl. 581; Samees Appeal, 26 Pa. St. 184.

South Carolina.— Marshall *v.* Drayton, 2 Nott & M. 25.

Texas.— Campbell *v.* Upson, (1905) 84 S. W. 817.

United States.— Audenreid *v.* Woodward, 4 Fed. 173.

England.— Beardsley *v.* Beardsley, [1899] 1 Q. B. 746, 68 L. J. Q. B. 270, 80 L. T. Rep. N. S. 51, 47 Wkly. Rep. 284.

See 30 Cent. Dig. tit. "Judgment," § 1182.

Consolidation of actions.— As a general rule, where several pending actions are consolidated, all parties of record to all the actions are bound by the judgment ultimately rendered. Tharp *v.* Cotton, 7 B. Mon. (Ky.) 636. But see Estill *v.* Deckerd, 4 Baxt. (Tenn.) 497.

and who have continued in the case, without being dismissed or stricken out,[2] including those who intervene or connect themselves with the record by entering an appearance or filing an answer or other pleading,[3] and recitals showing a person to have been formally a party to the record cannot be contradicted,[4] although parol evidence is admissible to identify the parties, or explain an apparent discrepancy in the names,[5] or to show that a third person, although not appearing on the record as a party to the former action, was in fact the real party in interest and the actual manager of the case.[6]

c. Parties Not Served With Process. A person is not bound or estopped by a judgment, although he was formally made a party to the action in which it was rendered, if the court never acquired jurisdiction of him by the service of effective process or by his voluntary appearance.[7]

d. Unknown Owners. In proceedings concerning realty, persons designated as "unknown owners" and who are personally served, or who are served by publication and whose connection with the land is such that they are bound to take notice of the proceedings, will be concluded by the judgment.[8]

Judgment on amended bill.— Where a hearing is had on a bill as amended, but the decree makes no mention of the hearing having been had on the amended bill, parties to the bill as amended, who were not parties to the original bill, are not bound by the decree. Renick *v.* Ludington, 20 W. Va. 511.

Impleading claimant as defendant.— If one who is in privity with the complainant in a suit in equity, and who does not join as complainant, is properly impleaded as a defendant, and all rights can be adjudicated without a cross bill, he is concluded by the decree. Waldo *v.* Waldo, 52 Mich. 91, 94, 17 N. W. 709, 710.

A person made a party to a cause for one purpose only is not bound by the decision of a question therein arising between other parties to the action, and not affecting him. Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506.

Effect of misnomer.— If a party sued by a wrong name is rightly served and makes no objection to the misnomer, and is afterward connected with the record by proper averments, he will be conclusively bound by the judgment. Barry *v.* Carothers, 6 Rich. (S. C.) 331. And see Allison *v.* Chicago, etc., R. Co., 76 Iowa 209, 40 N. W. 813; McCormick *v.* Brannan, 24 Pa. Co. Ct. 497.

Corporations.— In determining a question of *res judicata*, no distinction will be made in favor of corporations, which are as much bound by judgments against them as natural persons. Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294.

2. See West *v.* Asher, 38 Ind. 291; Mackey *v.* Fisher, 36 Minn. 347, 31 N. W. 363. And see *infra*, XIV, B, 2, h.

3. Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813. See also Bates *v.* Ruddick, 2 Iowa 423, 65 Am. Dec. 774. And see *infra*, XIV, B, 4, a, b, c, d.

4. Hillegass *v.* Hillegass, 5 Pa. St. 97; Westerwelt *v.* Lewis, 29 Fed. Cas. No. 17,446, 2 McLean 511.

5. Garwood *v.* Garwood, 29 Cal. 514; Bailey *v.* Crittenden, (Tex. Civ. App. 1897) 44 S. W. 404; Warner *v.* Mullane, 23 Wis. 450; Greely *v.* Smith, 10 Fed. Cas. No. 5,750, 3 Woodb. & M. 236.

6. Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515.

7. *Alabama.*— Gee *v.* Williamson, 1 Port. 313, 27 Am. Dec. 628.

Arkansas.— Clark *v.* Grayson, 2 Ark. 149.

Connecticut.— Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562.

Georgia.— Cowart *v.* Williams, 34 Ga. 167.

Illinois.— Garrigue *v.* Arnott, 80 Ill. App. 24.

Indiana.— Paulus *v.* Latta, 93 Ind. 34.

Iowa.— Goodnow *v.* Plumbe, 64 Iowa 672, 21 N. W. 133; McCormick *v.* Grundy County, 24 Iowa 382.

Kentucky.— Shaefer *v.* Gates, 2 B. Mon. 453, 38 Am. Dec. 164; Downing *v.* Collins, 2 B. Mon. 95; Moore *v.* Farrow, 3 A. K. Marsh. 41.

Mississippi.— Englehard *v.* Sutton, 7 How. 99.

New York.— Sperry *v.* Reynolds, 65 N. Y. 179; New York, etc., R. Co. *v.* Kyle, 5 Bosw. 587.

Ohio.— Cox *v.* Hill, 3 Ohio 411.

Oregon.— Handley *v.* Jackson, (1898) 51 Pac. 1098.

Pennsylvania.— Updegraff *v.* Cooke, 8 Phila. 336.

Wisconsin.— Fitch *v.* Huntington, 125 Wis. 204, 102 N. W. 1066.

United States.— Roberts *v.* Bolles, 101 U. S. 119, 25 L. ed. 880; Empire Tp. *v.* Darlington, 101 U. S. 87, 25 L. ed. 878; Webster *v.* Reid, 11 How. 437, 13 L. ed. 761.

8. Walker *v.* Ogden, 192 Ill. 314, 61 N. E. 403; Cook *v.* Allen, 2 Mass. 462; Nash *v.* Church, 10 Wis. 303, 78 Am. Dec. 678. And see Burlingham *v.* Vanderventer, 47 W. Va. 804, 35 S. E. 835. *Compare* Skinner *v.* Franklin County, 56 Fed. 783, 6 C. C. A. 118. See also Page *v.* W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

Unidentified beneficiaries.— Where a will provides a fund for the benefit of the "superannuated preachers" of a certain religious denomination, and an action to construe the will makes the beneficiaries defendants under

e. Nominal and Real Parties. The conclusive effect of a judgment is upon the real party in interest, and it makes no difference that there were nominal parties on the record, or that the action was prosecuted or defended by a nominal party.[9] Conversely a person who was a mere nominal party to the action, and against whom no relief was sought, and who made no defense, is not bound by the judgment.[10] And the same is true of parties who were improperly joined in the action and whose rights were not actually litigated.[11]

f. Use Plaintiff. Where a suit is prosecuted by one person for the use of another, the latter being the assignee or equitable owner of the claim and the real party in interest, it is the latter who is bound by the judgment.[12] But if plaintiff of record had no real interest in the subject-matter of the action, either personally or as trustee of the title for the benefit of the true owner, so that he was not entitled to represent the latter for the purposes of the action, the real owner will not be concluded by the judgment.[13]

g. Effect of Additional Parties.[14] Where both the party offering a judgment as an estoppel and the party against whom it is so offered were parties to the action in which the judgment was rendered, it is no objection that the action included some additional parties who are not joined in the present suit, or that there are additional parties in the present action.[15] But this does not make the

that designation, but they do not constitute a corporate body, and no person answering to the description appears to the action, the judgment is not conclusive upon any of the persons intended to be benefited by the will. Hood *v.* Dorer, 107 Wis. 149, 82 N. W. 546.

9. *Indiana.*— Faust *v.* Baumgartner, 113 Ind. 139, 15 N. E. 337.

Kentucky.— Johnston *v.* Churchills, Litt. Sel. Cas. 177.

Maine.— Rogers *v.* Haines, 3 Me. 362.

New York.— Keller *v.* Mt. Vernon, 23 N. Y. App. Div. 46, 48 N. Y. Suppl. 370.

Pennsylvania.— Walker *v.* Philadelphia, 195 Pa. St. 168, 45 Atl. 657, 78 Am. St. Rep. 801; Taylor *v.* Cornelius, 60 Pa. St. 187.

Tennessee.— Kennedy *v.* Security Bldg., etc., Assoc., (Ch. App. 1900) 57 S. W. 388.

Texas.— McClesky *v.* State, 4 Tex. Civ. App. 322, 23 S. W. 518.

Wisconsin.— Smith *v.* Milwaukee, 18 Wis. 369.

United States.— Stone *v.* Kentucky Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187; Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322; Maloy *v.* Duden, 86 Fed. 402, 30 C. C. A. 137; U. S. *v.* Des Moines Valley R. Co., 84 Fed. 40, 28 C. C. A. 267.

England.— Wright *v.* Doe, 1 A. & E. 3, 28 E. C. L. 28, 3 L. J. Exch. 366, 3 N. & M. 268.

See 30 Cent. Dig. tit. "Judgment," § 1184.

10. Kelly *v.* Hancock, 75 Ala. 229.

11. *California.*— Beronio *v.* Ventura County Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118.

Illinois.— A judgment in an action upon a written instrument against a plaintiff, who in no event could recover thereon, is not a bar to a subsequent action by the party in whom the right of action really lies. McLean *v.* Hansen, 37 Ill. App. 48.

Montana.— School Dist. No. 1 *v.* Whalen, 17 Mont. 1, 41 Pac. 849.

Nebraska.— Western Land Co. *v.* Buckley, 3 Nebr. (Unoff.) 776, 92 N. W. 1052.

New York.— Dodge *v.* Zimmer, 110 N. Y. 43, 17 N. E. 399.

West Virginia.— McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809; McClure *v.* Mauperture, 29 W. Va. 633, 2 S. E. 761.

See 30 Cent. Dig. tit. "Judgment," § 1184.

12. *Connecticut.*— Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177, 28 L. R. A. 143.

Illinois.— Cheney *v.* Patton, 144 Ill. 373, 34 N. E. 416; Cheney *v.* Cross, 80 Ill. App. 640. *Compare* Carlyle *v.* Carlyle Water, etc., Co., 140 Ill. 445, 29 N. E. 556.

Kentucky.— Crowley *v.* Vaughan, 11 Bush 517.

Louisiana.— Citizens' Bank *v.* Miller, 45 La. Ann. 493, 12 So. 516.

New York.— Southgate *v.* Montgomery, 1 Paige 41.

Pennsylvania.— Follansbee *v.* Walker, 74 Pa. St. 306.

Texas.— Jackson *v.* West, 22 Tex. Civ. App. 483, 54 S. W. 297.

United States.— Sanders *v.* Peck, 87 Fed. 61; 30 C. C. A. 530; Union Pac. R. Co. *v.* U. S., 67 Fed. 975, 15 C. C. A. 123; York Bank *v.* Asbury, 30 Fed. Cas. No. 18,142, 1 Biss. 230; Gill *v.* U. S., 7 Ct. Cl. 522.

As between assignor and assignee of the cause of action, the judgment may not be conclusive. See O'Connor *v.* Walter, 37 Nebr. 267, 55 N. W. 867, 40 Am. St. Rep. 486, 23 L. R. A. 650; Winegard *v.* Fanning, 76 Hun (N. Y.) 170, 27 N. Y. Suppl. 566.

13. Stephens *v.* Motl, 82 Tex. 81, 18 S. W. 99.

14. Former recovery as merger or bar see *supra*, XIII, A, 5, b; XIII, D, 1, f.

15. *California.*— Delano *v.* Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201.

Illinois.— Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608.

Indiana.— Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Davenport *v.* Barnett, 51 Ind. 329.

judgment admissible as evidence either for or against parties to the pending action, who were not parties to the action in which it was rendered.[16] And the estoppel arising from a judgment does not apply in a subsequent suit where a new plaintiff comes in, seeking to litigate matters not determined in the former suit, although otherwise the parties are the same.[17]

h. Effect of Severance as to Parties. Where one of several plaintiffs or defendants in an action is put out of the case by a dismissal or discontinuance as to him, the judgment thereafter rendered is not conclusive on such party nor a merger of the cause of action for or against him.[18] And the same rule applies where a severance is had and separate trials as to the different parties,[19] where the action abates as to one,[20] or where one is permitted to withdraw from the case,[21] but not where a party merely abandons or neglects to present his case or defense.[22] Where one of two defendants in an action in a state court removes so much of the controversy therein as lies between plaintiff and himself into a federal court, he will not be bound by any adjudication made against his co-defendant in the state court after the removal.[23]

i. Personal and Representative Capacity. To raise an estoppel by judgment, it is not only necessary that the party sought to be bound should have been a party to both actions, but he must have appeared in both in the same character or capacity.[24] Hence a party is not bound by a former judgment where he sued or

Iowa.— Larum *v.* Wilmer, 35 Iowa 244; Campbell *v.* Ayres, 18 Iowa 252.

Kansas.— Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091.

Kentucky.— Hawkins *v.* Lambert, 18 B. Mon. 99.

Minnesota.— Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263.

Missouri.— Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Glasner *v.* Weisberg, 43 Mo. App. 214; Parker *v.* Straat, 39 Mo. App. 616.

New York.— Tauziede *v.* Jumel, 133 N. Y. 614, 30 N. E. 1000; Palmer *v.* Great Western Ins. Co., 10 Misc. 167, 30 N. Y. Suppl. 1044; Lawrence *v.* Hunt, 10 Wend. 80, 25 Am. Dec. 539; Dows *v.* McMichael, 6 Paige 139.

North Carolina.— Fowler *v.* Osborne, 111 N. C. 404, 16 S. E. 470.

South Carolina.— Parker *v.* Legett, 12 Rich. 198.

Texas.— Russell *v.* Farquhar, 55 Tex. 355.

Vermont.— Pierson *v.* Catlin, 18 Vt. 77.

Washington.— Leggett *v.* Ross, 14 Wash. 41, 44 Pac. 111.

West Virginia.— Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

Wisconsin.— Marshall *v.* Pinkham, 73 Wis. 401, 41 N. W. 529.

United States.— Thompson *v.* Roberts, 24 How. 233, 16 L. ed. 648.

16. Lord *v.* Thomas, (Cal. 1894) 36 Pac. 372; Ingwaldson *v.* Olson, 79 Minn. 252, 82 N. W. 579; Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263; Kelly *v.* Hamblen, 98 Va. 383, 36 S. E. 491; Kerr *v.* Watts, 6 Wheat. (U. S.) 550, 5 L. ed. 328; Baring *v.* Fanning, 2 Fed. Cas. No. 982, 1 Paine 549.

17. Cleveland *v.* Spencer, 73 Fed. 559, 19 C. C. A. 559.

18. *California.*— Biggins *v.* Raisch, 107 Cal. 210, 40 Pac. 333; Miller *v.* Thayer, 74 Cal. 351, 16 Pac. 187; Browner *v.* Davis, 15 Cal. 9. See also Page *v.* W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

Illinois.— Berber *v.* Kerzinger, 23 Ill. 346; Minneapolis Trust Co. *v.* Verbulst, 74 Ill. App. 350.

Iowa.— Atlee *v.* Bullard, 123 Iowa 274, 98 N. W. 889; Ocheltree *v.* Hill, 77 Iowa 721, 42 N. W. 523; McReynolds *v.* McReynolds, 74 Iowa 89, 36 N. W. 903.

Massachusetts.— Wilson *v.* Mower, 5 Mass. 407.

Nebraska.— Fred Krug Brewing Co. *v.* Healey, (1904) 101 N. W. 329; Gilbert *v.* Garber, (1903) 95 N. W. 1030.

New Jersey.— Baxter *v.* Carrol, (Ch. 1898) 41 Atl. 407.

New York.— Earl *v.* Campbell, 14 How. Pr. 330.

Ohio.— Burt *v.* Wilcox Silver Plate Co., 41 Ohio St. 204.

Oregon.— Coughanour *v.* Hutchinson, 41 Oreg. 419, 69 Pac. 68.

Texas.— Sawyer *v.* Wieser, (Civ. App. 1904) 84 S. W. 1101.

United States.— Bloch *v.* Price, 32 Fed. 447. See 30 Cent. Dig. tit. "Judgment," § 1187.

19. Parker *v.* Campbell, 95 Tex. 82, 65 S. W. 482. And see Eikenberry *v.* Edwards, 71 Iowa 82, 32 N. W. 183; Thompson *v.* Chicago, etc., R. Co., 71 Minn. 89, 73 N. W. 707.

20. Martin *v.* Hill, 8 Ala. 43.

21. Owens *v.* Alexander, 78 N. C. 1.

22. Coates *v.* Roberts, 4 Rawle (Pa.) 100; Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 15 S. Ct. 733, 39 L. ed. 859.

23. Missouri *v.* Teidermann, 10 Fed. 20, 3 McCrary 399.

24. *California.*— Stoops *v.* Woods, 45 Cal. 439.

Connecticut.— Fuller *v.* Metropolitan L. Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84.

defended in the one action in his individual capacity and in the other in the character of a guardian or next friend,[25] or as an executor or administrator,[26] as a trustee for others,[27] as an attorney in fact,[28] as an assignee in bankruptcy or insolvency,[29]

Georgia.—Davis *v.* Davis, 30 Ga. 296; Brooking *v.* Dearmond, 27 Ga. 58.

Illinois.— Mansfield *v.* Hoagland, 46 Ill. 359.

Indiana.— Kitts *v.* Willson, 140 Ind. 604, 39 N. E. 313; McBurnie *v.* Seaton, 111 Ind. 56, 12 N. E. 101; Erwin *v.* Garner, 108 Ind. 488, 9 N. E. 417.

Louisiana.— Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Martin *v.* Boler, 13 La. Ann. 369.

Maine.— Lander *v.* Arno, 65 Me. 26.

New York.— Rathbone *v.* Hooney, 58 N. Y. 463; Jennings *v.* Jones, 2 Redf. Surr. 95.

Pennsylvania.—Sample *v.* Coulson, 9 Watts & S. 62.

England.— Leggott *v.* Great Northern R. Co., 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. Rep. N. S. 334, 24 Wkly. Rep. 784; Robinson's Case, 5 Coke 32b; Fenwick *v.* Thornton, M. & M. 51, 22 E. C. L. 470; Hacking *v.* Lee, 9 Wkly. Rep. 70.

See 30 Cent. Dig. tit. "Judgment," § 1185.

Heir of different persons.— A judgment in an action concerning property against a party suing as the heir of one person is not a bar to another action by the same party, for the same property, but claiming in a different right, as the heir of another person. Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213; Kitts *v.* Willson, 140 Ind. 604, 39 N. E. 313; Johnson *v.* Graves, 129 Ind. 124, 28 N. E. 315; Melton *v.* Pace, 103 Tenn. 484, 53 S. W. 939; Downing *v.* Diaz, 80 Tex. 436, 16 S. W. 49; Caruth *v.* Grigsby, 57 Tex. 259.

As legatee and as heir.— A decree in chancery affecting the right of legatees of a decedent is not binding upon them as his heirs at law in an action of ejectment. Wooster *v.* Fitzgerald, 61 N. J. L. 687, 40 Atl. 599, 41 Atl. 251. But *compare* Lebrew's Succession, 31 La. Ann. 212.

Officers and trustees of corporation.— A judgment in an action for trespass in cutting trees on lands of a church, recovered by one who brought the action as a deacon of the church, cannot be pleaded by defendant as an adjudication in a subsequent action against him for the same trespass brought by the trustees of the church. Allison *v.* Little, 93 Ala. 150, 9 So. 388.

Sheriff justifying under two writs.— Where suit is brought against a sheriff for taking certain goods, and he justifies under an execution in favor of A, this is no bar to a second suit, by the same plaintiff for the same goods, in which the sheriff justifies under an execution in favor of B. Although a party to both suits, he is not a party in respect to the same interest in the two. Stoops *v.* Woods, 45 Cal. 439. And see Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116.

25. *California.*— Karr *v.* Parks, 44 Cal. 46.

Indiana.— McBurnie *v.* Seaton, 111 Ind. 56, 12 N. E. 101.

Louisiana.— Duhe's Succession, 41 La. Ann. 209, 6 So. 502.

Michigan.— Baker *v.* Flint, etc., R. Co., 91 Mich. 298, 51 N. W. 897, 30 Am. St. Rep. 471, 16 L. R. A. 154.

Missouri.— Terrill *v.* Boulware, 24 Mo. 254.

Nebraska.— Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

New York.— Furlong *v.* Banta, 80 Hun 248, 29 N. Y. Suppl. 985; Anderson *v.* Third Ave. R. Co., 9 Daly 487; Gerstein *v.* Fisher, 12 Misc. 211, 33 N. Y. Suppl. 1120.

Tennessee.— Buchanan *v.* Kimes, 2 Baxt. 275.

See 30 Cent. Dig. tit. "Judgment," § 1185.

26. *Connecticut.*—Clarke's Appeal, 70 Conn. 195, 39 Atl. 155.

Georgia.— Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213; Davis *v.* Davis, 30 Ga. 296. See Braswell *v.* Hicks, 106 Ga. 791, 32 S. E. 861.

Illinois.— Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801.

Maine.— Lander *v.* Arno, 65 Me. 26.

Mississippi.— Washburn *v.* Phillips, 6 Sm. & M. 425.

New York.— Matter of Yetter, 44 N. Y. App. Div. 404, 61 N. Y. Suppl. 175; Hall *v.* Richardson, 22 Hun 444.

South Carolina.— Jones *v.* Blake, 2 Hill Eq. 629.

Tennessee.— Gibson *v.* Willis, (Ch. App. 1895) 36 S. W. 154.

Virginia.— Blakey *v.* Newby, 6 Munf. 64.

United States.— Carey *v.* Roosevelt, 102 Fed. 569, 43 C. C. A. 320.

See 30 Cent. Dig. tit. "Judgment," § 1185.

27. Collins *v.* Hydron, 135 N. Y. 320, 32 N. E. 69; McGuckin *v.* Milbank, 83 Hun (N. Y.) 473, 31 N. Y. Suppl. 1049; Henry *v.* Pittsburgh, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 118; Sonnenberg *v.* Steinbach, 9 S. D. 518, 70 N. W. 655, 62 Am. St. Rep. 885; McNutt *v.* Trogden, 29 W. Va. 469, 2 S. E. 328. But *compare* Daniel *v.* Gum, (Tenn. Ch. App. 1897) 45 S. W. 468; Hartford F. Ins. Co. *v.* King, 31 Tex. Civ. App. 636, 73 S. W. 71; Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. 741, 24 L. ed. 190.

28. Baudin *v.* Dubourg, 4 Mart. N. S. (La.) 496. But see Shaw *v.* Padley, 64 Mo. 519.

29. Landon *v.* Townshend, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712; Schneider-Davis Co. *v.* Brown, (Tex. Civ. App. 1893) 46 S. W. 108; Santleben *v.* Alamo Cement Co., (Tex. Civ. App. 1894) 25 S. W. 143. But see Wagner *v.* Hodge, 34 Hun (N. Y.) 524, holding that the interest of an assignee for the benefit of creditors, who is a necessary party to a foreclosure suit, is bound, although he is not described as assignee, he having

or as a member of a corporate board,[30] unless in any of these instances he was made a party to the first action in both capacities, or the scope of the litigation was such that all his rights or interests, held in any of his capacities, were before the court and involved in its decision.[31]

3. Persons Represented by Parties — a. In General. Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interests in the subject-matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such person.[32]

b. Contingent and Expectant Interests in Realty. Persons having a remote, contingent, or expectant interest in realty are bound by the judgment rendered in an action concerning the property, although not made parties to the suit, if the holder of the first estate of inheritance is a party, as he represents them.[33] And estates limited over to persons not *in esse* are represented by the living owner of the first estate of inheritance, so that a decree in a suit to which the first

in no other capacity an interest in the property.

30. Nuttall *v.* Simis, 22 Misc. (N. Y.) 19, 47 N. Y. Suppl. 1097.

31. *California.*— Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556.

Georgia.— La Pierre *v.* Webb, 113 Ga. 820, 39 S. E. 344; Braswell *v.* Hicks, 106 Ga. 791, 32 S. E. 861; Sparks *v.* Etheredge, 89 Ga. 790, 15 S. E. 672; Jenkins *v.* Nolan, 79 Ga. 295, 5 S. E. 34.

Kansas.— Heyl *v.* Donifelser, (1898) 54 Pac. 1059.

Kentucky.— Maddox *v.* Williams, 87 Ky. 147, 7 S. W. 907, 9 Ky. L. Rep. 975.

Maryland.— Hughes *v.* Jones, 2 Md. Ch. 178.

Massachusetts.— Flint *v.* Bodge, 10 Allen 128.

Pennsylvania.— Com. *v.* Cochran, 146 Pa. St. 223, 23 Atl. 203; Miller *v.* Springer, 88 Pa. St. 203; Robinett's Appeal, 36 Pa. St. 174.

South Carolina.— Manigault *v.* Holmes, Bailey Eq. 283.

United States.— Colt *v.* Colt, 111 U. S. 566, 4 S. Ct. 553, 28 L. ed. 520; Brown *v.* Howard, 92 Fed. 537; Cornell *v.* Green, 43 Fed. 105.

See 30 Cent. Dig. tit. "Judgment," § 1185.

An unsuccessful suit to compel a receiver to pay additional fees to his attorney above what he had already paid will bar an action against him as an individual by the same attorney to recover such additional fees. Walsh *v.* Raymond, 58 Conn. 251, 20 Atl. 464, 18 Am. St. Rep. 264.

32. *Alabama.*— Frank *v.* Myers, 97 Ala. 437, 11 So. 832; Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515.

District of Columbia.— Birdsall *v.* Welch, 6 D. C. 316.

Georgia.— Pace *v.* Maxwell, 62 Ga. 97; Russell *v.* Slaton, 25 Ga. 193.

Iowa.— McNamee *v.* Moreland, 26 Iowa 96.

Kentucky.— Warfield *v.* Davis, 14 B. Mon. 40.

Louisiana.— Citizens' Bank *v.* Miller, 45 La. Ann. 493, 12 So. 516; Holmes *v.* Dabbs, 15 La. Ann. 501; Johnson *v.* Weld, 8 La. Ann. 126.

Maryland.— Keene *v.* Van Reuth, 48 Md. 184; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Michigan.— Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576.

Missouri.— Landis *v.* Hamilton, 77 Mo. 554; Dunham *v.* Wilfong, 69 Mo. 355.

New Hampshire.— Spear *v.* Hill, 54 N. H. 87.

New York.— Peck *v.* State, 137 N. Y. 372, 33 N. E. 317, 33 Am. St. Rep. 738; Cooper *v.* Platt, 45 N. Y. Super. Ct. 242; Greenwood *v.* Marvin, 11 N. Y. St. 235. But see Wheeler *v.* Ruckman, 24 N. Y. Super. Ct. 408.

Pennsylvania.— Third Reformed Dutch Church's Appeal, 88 Pa. St. 503.

South Carolina.— Fraser *v.* Charleston, 23 S. C. 373.

Texas.— American Cotton Co. *v.* Simmons, (Civ. App. 1905) 87 S. W. 842.

Virginia.— Finney *v.* Bennett, 27 Gratt. 365.

Wisconsin.— Iowa County *v.* Mineral Point R. Co., 24 Wis. 93.

United States.— McCarty *v.* Lehigh Valley R. Co., 160 U. S. 110, 16 S. Ct. 240, 40 L. ed. 358; Green *v.* Boguc, 158 U. S. 478, 15 S. Ct. 975, 39 L. ed. 1061; Stout *v.* Lye, 103 U. S. 66, 26 L. ed. 428; Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. ed. 474; McArthur *v.* Allen, 3 Fed. 313.

Canada.— See Dingwall *v.* McBean, 30 Can. Sup. Ct. 441, holding that a party who has been in any way represented is estopped.

See 30 Cent. Dig. tit. "Judgment," § 1193.

Compare Piper *v.* Richardson, 9 Metc. (Mass.) 155.

33. *Illinois.*— Gavin *v.* Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; McCampbell *v.* Mason, 151 Ill. 500, 38 N. E. 672.

Kentucky.— Hermann *v.* Parsons, 117 Ky. 239, 78 S. W. 125, 25 Ky. L. Rep. 1344.

Minnesota.—Mathews *v.* Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558.

South Carolina.— Clyburn *v.* Reynolds, 31 S. C. 91, 9 S. E. 973. *Compare* Moseley *v.* Hankinson, 22 S. C. 323.

United States.— Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 10 S. Ct. 206, 33 L. ed. 487.

holder, a living person, is made a party, will conclude the rights of after-born remainder-men.[34]

c. One Plaintiff Suing For Class. Where one plaintiff belonging to a numerous class, as creditors, bondholders, beneficiaries, and the like, brings an action in behalf of himself and all others similarly situated, the judgment which may be rendered is binding on others of the class who accept the representation, and who connect themselves with the litigation, either by coming into the suit or seeking to share in the fruits of the judgment,[35] or by acquiescing in it.[36] But it can have no binding effect on those who do not participate in the proceedings, prove their claims, or otherwise join with plaintiff.[37]

d. Trustee and Cestui Que Trust. The general rule is that, in all proceedings affecting the trust estate, whether brought by or against third persons, the trustee and *cestui que trust* are so far independent of each other that the latter must be made a party to the suit in order to be bound by the judgment or decree rendered therein.[38] But it has been held that the beneficiary will be bound by the judgment in a suit prosecuted or defended by the trustee with his knowledge and con-

34. *Illinois.*— Gavin *v.* Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776. *Compare* Detrick *v.* Migatt, 19 Ill. 146, 68 Am. Dec. 584; McConnel *v.* Smith, 39 Ill. 279.

Minnesota.— Ladd *v.* Weiskopf, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785.

New Jersey.— Dunham *v.* Doremus, 55 N. J. Eq. 511, 37 Atl. 62.

New York.— Kirk *v.* Kirk, 137 N. Y. 510, 33 N. E. 552; Kent *v.* St. Michael Church, 136 N. Y. 10, 32 N. E. 704, 32 Am. St. Rep. 693, 18 L. R. A. 331; Fox *v.* Fee, 24 N. Y. App. Div. 314, 49 N. Y. Suppl. 292; Goebel *v.* Iffla, 48 Hun 21.

North Carolina.— Irvin *v.* Clark, 98 N. C. 437, 4 S. E. 30.

Virginia.— Harrison *v.* Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; Baylor *v.* Dejarnette, 13 Gratt. 152.

Wisconsin.— Perkins *v.* Burlington Land, etc., Co., 112 Wis. 509, 88 N. W. 648.

United States.— Gray *v.* Smith, 76 Fed. 525; Franklin Sav. Bank *v.* Taylor, 53 Fed. 854, 4 C. C. A. 55; McArthur *v.* Allen, 3 Fed. 313. *Compare* McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015.

Contra.— *In re* De Leon, 102 Cal. 557, 36 Pac. 864.

35. Hurlbutt *v.* Butenop, 27 Cal. 50; Kerr *v.* Blodgett, 48 N. Y. 62; Carpenter *v.* Cincinnati, etc., Canal Co., 35 Ohio St. 307.

36. Johnson *v.* De Pauw University, 116 Ky. 671, 76 S. W. 851, 25 Ky. L. Rep. 959.

37. *Iowa.*— Hansen's Empire Fur Factory *v.* Teabout, 104 Iowa 360, 73 N. W. 875.

Kansas.— Holderman *v.* Hood, 70 Kan. 267, 78 Pac. 838.

Louisiana.— Ledoux *v.* Lavedan, 49 La. Ann. 913, 22 So. 214.

New York.— McNaney *v.* Hall, 159 N. Y. 544, 54 N. E. 1093; Brower *v.* Bowers, 1 Abb. Dec. 214; Derby *v.* Yale, 13 Hun 273; Heywood *v.* Thacher, 19 N. Y. Suppl. 882; O'Brien *v.* Browning, 49 How. Pr. 109. And see Reid *v.* Evergreens, 21 How. Pr. 319.

Ohio.— Kit Carter Cattle Co. *v.* McGillin, 10 Ohio S. & C. Pl. Dec. 146, 7 Ohio N. P. 575; Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15.

United States.— *Ex p.* Howard, 9 Wall. 175, 19 L. ed. 634; Williams *v.* Gibbs, 17 How. 239, 15 L. ed. 135; Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397; Coann *v.* Atlanta Cotton Factory Co., 14 Fed. 4, 4 Woods 503.

Where a general right is established against a representative class, persons not actually parties may be bound so far as such right is established. London Sewer Com'rs *v.* Gellatly, 3 Ch. D. 610, 45 L. J. Ch. 783, 24 Wkly. Rep. 1059.

38. *Alabama.*— Lebeck *v.* Ft. Payne Bank, 115 Ala. 447, 22 So. 75, 67 Am. St. Rep. 51; Sprague *v.* Tyson, 44 Ala. 338.

Illinois.— Nevitt *v.* Woodburn, 190 Ill. 283, 60 N. E. 500; Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145; Webber *v.* Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748.

Iowa.— Wilcox *v.* Mann, 115 Iowa 91, 87 N. W. 748; Kelly *v.* Norwich F. Ins. Co., 82 Iowa 137, 47 N. W. 986. See, however, Perry *v.* Mills, 76 Iowa 622, 41 N. W. 378.

Kentucky.— Helm *v.* Hardin, 2 B. Mon. 231.

Massachusetts.— Morse *v.* Hill, 136 Mass. 60.

Mississippi.— Rembert *v.* Key, 58 Miss. 533.

Missouri.— Evangelical Synod of North America *v.* Schoeneich, 143 Mo. 652, 45 S. W. 647.

New Jersey.— Dunn *v.* Seymour, 11 N. J. Eq. 220; Stillwell *v.* McNeely, 2 N. J. Eq. 305.

New York.— Matter of Turner, 34 Misc. 366, 69 N. Y. Suppl. 1019; Kerr *v.* Blodgett, 25 How. Pr. 303; Whelan *v.* Whelan, 3 Cow. 537; Fish *v.* Howland, 1 Paige 20; Schenck *v.* Ellingwood, 3 Edw. 175. See, however, *In re* Straut, 126 N. Y. 201, 27 N. E. 259; Thompson *v.* Hammond, 1 Edw. 497.

North Carolina.— Mebane *v.* Mebane, 66 N. C. 334.

sent,[39] or at his request or with his participation,[40] and even that the trustee may represent the *cestui que trust* generally in litigation affecting the subject of the trust.[41] The latter rule is generally applied where the action is to redeem or to foreclose a mortgage on the trust estate, or to enforce a debt of the trust which is specifically chargeable upon, or payable out of, particular property,[42] and also where the beneficiaries are so numerous that it would be impossible or impracticable to bring them all before the court.[43] A deed of trust in the nature of a mortgage should be foreclosed in the name of the trustee, and he will represent the holders of the obligations secured.[44] This rule applies in the case of a mort-

Pennsylvania.— Williams *v.* Tozer, 185 Pa. St. 302, 39 Atl. 947, 64 Am. St. Rep. 650.

South Carolina.— Rabb *v.* Patterson, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 473; Sollee *v.* Croft, 7 Rich. Eq. 34.

Virginia.— Collins *v.* Lofftus, 10 Leigh 5, 34 Am. Dec. 719.

United States.— Caldwell *v.* Taggart, 4 Pet. 190, 7 L. ed. 828. See, however, Keely *v.* Weir, 38 Fed. 291; Beals *v.* Illinois, etc., R. Co., 27 Fed. 721.

England.— Adams *v.* St. Ledger, 1 Ball & B. 181; Bifield *v.* Taylor, Beatty 234, 1 Molloy 193; Morse *v.* Sadler, 1 Cox Ch. 352, 29 Eng. Reprint 1199; Calverley *v.* Phelp, 6 Madd. 229, 56 Eng. Reprint 1078.

See 30 Cent. Dig. tit. "Judgment," § 1214.

39. Glass *v.* Concordia Parish, 113 La. 544, 37 So. 189; Hornsby *v.* City Nat. Bank, (Tenn. Ch. App. 1900) 60 S. W. 160; Jackson *v.* West, 22 Tex. Civ. App. 483, 54 S. W. 297.

40. Bracken *v.* Atlantic Trust Co., 36 N. Y. App. Div. 67, 55 N. Y. Suppl. 506; Plumb *v.* Crane, 123 U. S. 560, 8 S. Ct. 216, 31 L. ed. 268.

41. Miller *v.* Butler, 121 Ga. 758, 49 S. E. 754; Smith *v.* Cook, 71 Ga. 705; Felkner *v.* Dooley, 27 Utah 350, 75 Pac. 854.

42. *California.*— Watkins *v.* Bryant, 91 Cal. 492, 27 Pac. 775.

Georgia.— Wegman Piano Co. *v.* Irvine, 107 Ga. 65, 32 S. E. 898, 73 Am. St. Rep. 109; Clark *v.* Flannery, 99 Ga. 239, 25 S. E. 312; Henderson *v.* Williams, 97 Ga. 709, 25 S. E. 395; Adams *v.* Franklin, 82 Ga. 168, 8 S. E. 44.

Indiana.— Davis *v.* Barton, 130 Ind. 399, 30 N. E. 512; Robertson *v.* Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

Maryland.— Johnson *v.* Robertson, 31 Md. 476.

Missouri.— Miles *v.* Davis, 19 Mo. 408; Barton *v.* Martin, 60 Mo. App. 351. But see Coe *v.* Ritter, 86 Mo. 277, holding that both the trustee and the *cestui que trust* should be made parties to a proceeding brought to enforce a mechanic's lien against the trust estate; and that, if they are not both made parties thereto neither they nor a purchaser at the trustee's sale will be affected by the judgment.

New Jersey.— New Jersey Franklinite Co. *v.* Ames, 12 N. J. Eq. 507; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377.

New York.— Tauziede *v.* Jumel, 15 N. Y. Suppl. 24; Van Vechten *v.* Terry, 2 Johns. Ch. 197.

South Carolina.— Price *v.* Krasnoff, 60 S. C. 172, 38 S. E. 413.

United States.— Manson *v.* Duncanson, 166 U. S. 533, 17 S. Ct. 647, 41 L. ed. 1105.

See 30 Cent. Dig. tit. "Judgment," § 1214.

Contra.— Henley *v.* Stone, 3 Beav. 355, 43 Eng. Ch. 355, 49 Eng. Reprint 139; Lowe *v.* Morgan, 1 Bro. Ch. 368, 28 Eng. Reprint 1183; Thomas *v.* Dunning, 5 De G. & Sm. 618, 64 Eng. Reprint 1269; Calverley *v.* Phelp, 6 Madd. 229, 56 Eng. Reprint 1078; Palmer *v.* Carlisle, 1 Sim. & St. 423, 1 Eng. Ch. 423, 57 Eng. Reprint 169.

Personal debt of trustee.— Where a suit is brought against a trustee, seeking to charge the trust estate with a debt for which the trustee is only personally liable, this fact being known to the plaintiff, a judgment rendered therein against the trustee is not conclusive on the beneficiaries of the trust, unless they were *sui juris* and were parties to the suit or consented to the judgment. Snelling *v.* American Freehold Land Mortg. Co., 107 Ga. 852, 33 S. E. 634, 73 Am. St. Rep. 160.

43. Shaw *v.* Norfolk County R. Co., 5 Gray (Mass.) 162; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377; Kerr *v.* Blodgett, 48 N. Y. 62; Egberts *v.* Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619; Van Vechten *v.* Terry, 2 Johns. Ch. (N. Y.) 197; Franklin Sav. Bank *v.* Taylor, 53 Fed. 854, 4 C. C. A. 55; Piatt *v.* Oliver, 19 Fed. Cas. No. 11,115, 2 McLean (U. S.) 267.

Several beneficiaries representing all.— A few of the beneficiaries cannot be allowed to represent the rest, unless there is one general right in all, that is, unless their beneficial interests are entirely homogeneous; otherwise they must all be made parties in order to be bound. Bainbridge *v.* Burton, 2 Beav. 539, 17 Eng. Ch. 539, 48 Eng. Reprint 1290; Richardson *v.* Larpent, 7 Jur. 691, 2 Y. & Coll. 507, 21 Eng. Ch. 507, 63 Eng. Reprint 227; Evans *v.* Stokes, 1 Keen 24, 48 Eng. Reprint 215; Newton *v.* Egmont, 4 Sim. 574, 6 Eng. Ch. 574, 58 Eng. Reprint 215; Long *v.* Yonge, 2 Sim. 369, 2 Eng. Ch. 369, 57 Eng. Reprint 827.

44. Marriott *v.* Givens, 8 Ala. 694; Glide *v.* Dwyer, 83 Cal. 477, 23 Pac. 706; Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408.

The trustee is a necessary party in such a suit and a bill which fails to make him a

gage made by a railroad or other corporation to a trustee to secure an issue of bonds.[45]

e. Assignees and Receivers. An assignee for the benefit of creditors or a receiver will be bound by a judgment against the assignor or debtor,[46] and conversely a judgment for or against the receiver or assignee will be conclusive on the debtor or assignor, at least if the latter was made a party to the suit.[47] It is also generally held that the assignee or receiver represents the whole body of creditors, so that all of them are bound by the result of proceedings by or against him, whether joined as parties or not.[48]

4. Interveners and Persons Participating in Suit — a. Intervening Claimants. A third person who comes into a pending action, by intervention or interpleader, setting up a claim to the subject of the controversy, is concluded by the judgment,[49] and if it is in his favor he may take advantage of it in any subsequent

party is demurrable. Harlow *v.* Mister, 64 Miss. 25, 8 So. 164; Maher *v.* Tower Hotel Co., 94 Fed. 225. But *compare* Green *v.* Gaston, 56 Miss. 748.

45. International Trust Co. *v.* United Coal Co., 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59; Grant *v.* Winona, etc., Ry. Co., 85 Minn. 422, 89 N. W. 60; Woods *v.* Woodson, 100 Fed. 515, 40 C. C. A. 525; Pollitz *v.* Farmers' L. & T. Co., 53 Fed. 210; Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605, 25 L. ed. 757; Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. 741, 24 L. ed. 190.

46. Hopkins *v.* Taylor, 87 Ill. 436; U. S. Express Co. *v.* Smith, 35 Ill. App. 90; Merchants' Nat. Bank *v.* Hagemeyer, 4 N. Y. App. Div. 52, 38 N. Y. Suppl. 626; McCulloch *v.* Norwood, 36 N. Y. Super. Ct. 180; Stearns *v.* Lawrence, 83 Fed. 738, 28 C. C. A. 66. *Compare* Sweetser *v.* Davis, 26 N. Y. App. Div. 398, 49 N. Y. Suppl. 874. But see Lawson *v.* Dunn, (N. J. Ch. 1901) 49 Atl. 1087.

A trustee in bankruptcy who procures himself to be substituted for the bankrupt in a pending action begun by the latter, and prosecutes the suit to final judgment, will be bound by the result, and cannot reopen the questions adjudicated, by any subsequent proceeding in the court of bankruptcy. *In re* Van Alstyne, 100 Fed. 929.

47. *In re* Baird, 84 Cal. 95, 24 Pac. 167; *In re* Skinner, 97 Fed. 190. *Compare* Abbey *v.* International, etc., R. Co., 5 Tex. Civ. App. 261, 23 S. W. 934.

48. *Alabama.*— Frank *v.* Myers, 97 Ala. 437, 11 So. 832.

California.— Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47.

Michigan.— Farrell Foundry, etc., Co. *v.* Preston Nat. Bank, 93 Mich. 582, 53 N. W. 831.

New York.— Herring *v.* New York, etc., R. Co., 105 N. Y. 340, 12 N. E. 763; Russell *v.* Lasher, 4 Barb. 232.

United States.— Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 62 C. C. A. 657. *Compare* Farrel *v.* National Shoe, etc., Bank, 43 Fed. 123.

See 30 Cent. Dig. tit. "Judgment," § 1193.

Contra.— Southern L. & T. Co. *v.* Benbow, 131 N. C. 413, 42 S. E. 896.

49. *Alabama.*— Malone *v.* Marriott, 64 Ala. 486.

Arkansas.— Burgess *v.* Poole, 45 Ark. 373; State *v.* Spikes, 33 Ark. 801.

Georgia.— Walker *v.* Equitable Mortg. Co., 114 Ga. 862, 40 S. E. 1010.

Illinois.— Stevens *v.* Dillman, 86 Ill. 233.

Iowa.— Des Moines Sav. Bank *v.* Morgan Jewelry Co., 123 Iowa 432, 99 N. W. 121; Sutherland First Nat. Bank *v.* Clements, 87 Iowa 542, 54 N. W. 197; German Bank *v.* American F. Ins. Co., 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316; Stoddard *v.* Thompson, 31 Iowa 80; Witter *v.* Fisher, 27 Iowa 9.

Kansas.— Merchants' Nat. Bank *v.* Kopplin, 1 Kan. App. 599, 42 Pac. 263. *Compare* Dilley *v.* McGregor, 24 Kan. 361.

Kentucky.— Tolle *v.* Owensboro, etc., R. Co., 111 Ky. 623, 64 S. W. 455, 23 Ky. L. Rep. 864; Hamilton *v.* Cole, 18 S. W. 13, 13 Ky. L. Rep. 663.

Louisiana.— State *v.* New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205; Frellsen *v.* Strader Cypress Co., 110 La. 877, 34 So. 857; Markham *v.* O'Connor, 23 La. Ann. 688; Aleix *v.* Derbigny, 22 La. Ann. 385; Shelton *v.* Brown, 22 La. Ann. 162; Dosson *v.* Bieller, 10 La. Ann. 570.

Maine.— Huntress *v.* Tiney, 46 Me. 83.

Missouri.— Richardson *v.* Watson, 23 Mo. 34; Richardson *v.* Jones, 16 Mo. 177; Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501.

New Jersey.— Berry *v.* Chamberlain, 53 N. J. L. 463, 23 Atl. 115.

North Carolina.— Piedmont Wagon Co. *v.* Byrd, 119 N. C. 460, 26 S. E. 144; McKesson *v.* Mendenhall, 64 N. C. 502.

Pennsylvania.— Order of Solon *v.* Gaskill, 192 Pa. St. 484, 43 Atl. 1085; Baker *v.* Cochran, 1 Del. Co. 29.

South Carolina.— Boyce *v.* Boyce, 6 Rich. Eq. 302; State Bank *v.* Rose, 1 Strobh. Eq. 257. But see Gilchrist *v.* Martin, 1 Bailey Eq. 492.

West Virginia.— Renick *v.* Ludington, 20 W. Va. 511.

United States.— Gumbel *v.* Pitkin, 113 U. S. 545, 5 S. Ct. 616, 28 L. ed. 1128; Martin *v.* People's Bank, 115 Fed. 226; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150; Austin *v.* Hamilton County, 76 Fed. 208, 22 C. C. A. 128.

See 30 Cent. Dig. tit. "Judgment," § 1186.

In equity, where one not originally a party

litigation in which the same questions are raised and the same parties concerned.[50] But in order that an intervener should be bound by the judgment it is necessary that he should make himself actively and substantially a party,[51] and he will not be concluded if he withdrew or abandoned his claim,[52] or if for any reason it was not considered or adjudicated.[53]

b. Stranger Promoting the Litigation. A third person who virtually makes himself a plaintiff in an action between other parties, by assuming the conduct of the litigation and actively prosecuting it, for the benefit or protection of interests of his own, is bound by the judgment, although not a party of record.[54] But no one is bound by a decree against another party, although acting in his behalf, unless he has a real interest in the subject-matter of the litigation.[55]

c. Person Assuming the Defense. A person who is not made a defendant of record may still subject himself to be concluded by the result of the litigation, if he openly and actively, and in respect to some interest of his own, assumes and manages the defense of the action.[56] But to bring about this result it is necessary that the person so intervening should do so for the assertion or protection of some

is permitted to file a petition in a pending suit, and to set up new and different rights from any involved in the original bill, such petition, at least as against a stranger to the suit, who, during its pendency and before the filing of the petition, has acquired possession of the property in litigation, must be treated as the commencement of a new suit; and such person must be brought in by process, or he will not be concluded by a decree in favor of the petitioner. Hook *v.* Mercantile Trust Co., 95 Fed. 41, 36 C. C. A. 645.

Scope of estoppel.— An intervening claimant is bound by the judgment only so far as it affects his own rights or claims; with its correctness as between the original parties he has nothing to do. Wright *v.* Steed, 10 La. Ann. 238.

Effect of nonsuit.— The fact that plaintiff suffers a nonsuit does not preclude a judgment against him in favor of an intervening defendant asking affirmative relief. Long *v.* Behan, 19 Tex. Civ. App. 325, 48 S. W. 555.

50. Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177, 28 L. R. A. 143; Austin *v.* Hamilton County, 76 Fed. 208, 22 C. C. A. 128. But see Clark *v.* Brott, 71 Mo. 473.

51. Treadwell *v.* Pitts, 64 Ark. 447, 43 S. W. 142; China Mut. Ins. Co. *v.* Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576.

52. Deering *v.* Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801; Wilson *v.* Trowbridge, 71 Iowa 345, 32 N. W. 373; Guthrie *v.* Pierson, (Tex. Civ. App. 1896) 35 S. W. 405.

53. Kern *v.* Wilson, 82 Iowa 407, 48 N. W. 919.

54. *Alabama.*— Pope *v.* Nance, 1 Stew. 354, 18 Am. Dec. 60.

Illinois.— Lightcap *v.* Bradley, 186 Ill. 510, 58 N. E. 221; Cole *v.* Favorite, 69 Ill. 457; McDonald *v.* Western Refrigerating Co., 35 Ill. App. 283.

Indiana.— Roby *v.* Eggers, 130 Ind. 415, 29 N. E. 365; Burns *v.* Gavin, 118 Ind. 320, 20 N. E. 799; Palmer *v.* Hayes, 112 Ind. 289, 13 N. E. 882.

Iowa.— Conger *v.* Chilcote, 42 Iowa 18; Stoddard *v.* Thompson, 31 Iowa 80.

Maryland.— Kerr *v.* Union Bank, 18 Md. 396.

Missouri.— Landis *v.* Hamilton, 77 Mo. 554; Wood *v.* Ensel, 63 Mo. 193.

Pennsylvania.— Peterson *v.* Lothrop, 34 Pa. St. 223.

Texas.— Cleveland *v.* Heidenheimer, (Civ. App. 1898) 44 S. W. 551.

Wisconsin.— Logan *v.* Trayser, 77 Wis. 579, 46 N. W. 877.

United States.— Hauke *v.* Cooper, 108 Fed. 922, 48 C. C. A. 144; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Sanders *v.* Peck, 87 Fed. 61, 30 C. C. A. 530; Frank *v.* Wedderin, 68 Fed. 818, 16 C. C. A. 1; Claflin *v.* Fletcher, 7 Fed. 851, 10 Biss. 281.

See 30 Cent. Dig. tit. "Judgment," § 1190.

But *compare* McWilliams *v.* Gulf States Land, etc., Co., 111 La. 194, 35 So. 514; Stamp *v.* Franklin, 75 Hun (N. Y.) 373, 27 N. Y. Suppl. 84.

55. Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256.

56. *Alabama.*— Gatchell *v.* Foster, 94 Ala. 622, 10 So. 434.

California.— Tyrrell *v.* Baldwin, 67 Cal. 1, 6 Pac. 867; McCreery *v.* Everding, 54 Cal. 168.

Colorado.— McClellan *v.* Hurd, 21 Colo. 197, 40 Pac. 445 [*affirming* 1 Colo. App. 327, 29 Pac. 181].

Illinois.— Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373; Leathe *v.* Thomas, 109 Ill. App. 434; Marquardt Sav. Bank *v.* Sheppleman, 97 Ill. App. 31.

Indiana.— Montgomery *v.* Vickery, 110 Ind. 211, 11 N. E. 38; Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260.

Iowa.— Baxter *v.* Myers, 85 Iowa 328, 52 N. W. 234, 39 Am. St. Rep. 298.

Kentucky.— Kaye *v.* Louisville, 14 S. W. 679, 13 Ky. L. Rep. 114.

Maryland.— National Mar. Bank *v.* Heller, 94 Md. 213, 50 Atl. 521; Parr *v.* State, 71 Md. 220, 17 Atl. 1020.

Massachusetts.— Elliott *v.* Hayden, 104

interest or right of his own, or to escape some ultimate liability on his own part;[57] that he should defend the action openly and avowedly and with notice to the adverse party;[58] and that he should be practically substituted for defendant in the management and control of the case, as it is not sufficient to bind him that he merely advised or aided in the trial, gave evidence, cross-examined witnesses, or joined in an appeal,[59] or that he employed and paid defendant's attorney or otherwise contributed to the expense.[60]

Mass. 180; Valentine *v.* Farnsworth, 21 Pick. 176.

Michigan.— Carpenter *v.* Carpenter, 136 Mich. 362, 99 N. W. 395; Grant Tp. *v.* Reno Tp., 107 Mich. 409, 65 N. W. 376; Estelle *v.* Peacock, 48 Mich. 469, 12 N. W. 659; Bachelder *v.* Brown, 47 Mich. 366, 11 N. W. 200; Jennings *v.* Sheldon, 44 Mich. 92, 6 N. W. 96.

Minnesota.— Reed *v.* McGregor, 62 Minn. 94, 64 N. W. 88.

Missouri.— Wood *v.* Ensel, 63 Mo. 193; Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Sturdivant Bank *v.* Wilson, 87 Mo. App. 534.

Nebraska.— Missouri Pac. R. Co. *v.* Twiss, 35 Nebr. 267, 53 N. W. 76, 37 Am. St. Rep. 437.

Nevada.— Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69.

New York.— Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422; Castle *v.* Noyes, 14 N. Y. 329. *Compare* Jackson *v.* Griswold, 4 Hill 522.

North Dakota.— Boyd *v.* Wallace, 10 N. D. 78, 84 N. W. 760.

Ohio.— Board of Education *v.* Cosgrove, 11 Ohio Cir. Ct. 163, 5 Ohio Cir. Dec. 343.

Pennsylvania.— Himes *v.* Jacobs, 1 Penr. & W. 152.

Washington.— Shoemake *v.* Finlayson, 22 Wash. 12, 60 Pac. 50; Wolverton *v.* Glasscock, 15 Wash. 279, 46 Pac. 253; Douthitt *v.* MacClusky, 11 Wash. 601, 40 Pac. 186.

Wisconsin.— Daskam *v.* Ullman, 74 Wis. 474, 43 N. W. 321.

United States.— Anderson *v.* Watts, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078; Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129; Tootle *v.* Coleman, 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120; Carey *v.* Roosevelt, 91 Fed. 567; Alkire Grocery Co. *v.* Richesin, 91 Fed. 79; Theller *v.* Hershey, 89 Fed. 575; Bank of Commerce *v.* Louisville, 88 Fed. 398; Carey *v.* Roosevelt, 83 Fed. 242; Empire State Nail Co. *v.* American Solid Leather Button Co., 71 Fed. 588; Frank *v.* Wedderin, 68 Fed. 818, 16 C. C. A. 1; David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661; Bailey *v.* Sundberg, 49 Fed. 583, 1 C. C. A. 387; Goldsmith *v.* Greve, 10 Fed. Cas. No. 5,521; U. S., etc., Salamander Felting Co. *v.* Asbestos Felting Co., 28 Fed. Cas. No. 16,787*a*, 5 Ban. & A. 622, 18 Blatchf. 310.

See 30 Cent. Dig. tit. "Judgment," § 1190.

But see Boles *v.* Smith, 5 Sneed (Tenn.) 105; Clark *v.* Lyman, 8 Vt. 290.

57. Cannon River Manufacturers' Assoc. *v.* Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497; Schroeder *v.* Lahrman, 26 Minn. 87, 1 N. W. 801; Cramer *v.* Singer Mfg. Co., 93 Fed. 636, 35 C. C. A. 508.

58. Cannon River Manufacturers' Assoc. *v.* Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497; Schroeder *v.* Lahrman, 26 Minn. 87, 1 N. W. 801; Hanks Dental Assoc. *v.* International Tooth Crown Co., 122 Fed. 74, 58 C. C. A. 180; Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528; Cramer *v.* Singer Mfg. Co., 93 Fed. 636, 35 C. C. A. 508; Andrews *v.* National Foundry, etc., Works, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139; Lacroix *v.* Lyons, 33 Fed. 437.

59. *California.*— Majors *v.* Cowell, 51 Cal. 478.

Florida.— Ottensoser *v.* Scott, 47 Fla. 276, 37 So. 161, 66 L. R. A. 346.

Georgia.— Williamson *v.* White, 101 Ga. 276, 28 S. E. 846, 65 Am. St. Rep. 302; Brady *v.* Brady, 71 Ga. 71.

Indiana.— Koehring *v.* Aultman, 7 Ind. App. 475, 34 N. E. 30.

Iowa.— Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506.

Kansas.— Thomas *v.* Baker, 41 Kan. 350, 21 Pac. 252.

Kentucky.— Allin *v.* Hall, 1 A. K. Marsh. 525.

Missouri.— State *v.* Johnson, 123 Mo. 43, 27 S. W. 399; Koontz *v.* Kaufman, 31 Mo. App. 397.

Nebraska.— Schribar *v.* Platt, 19 Nebr. 625, 28 N. W. 289.

New Hampshire.— Gage *v.* McGregor, 61 N. H. 47; Thrasher *v.* Haines, 2 N. H. 443.

North Carolina.— No estoppel of record is created against one not a party to the record, even though he had instigated the trespass, on account of which the action was brought, aided in the defense of the action, employed counsel, introduced his deeds in evidence and paid the costs, and although he and the other present defendant claimed by deeds under the present trespasser. Falls *v.* Gamble, 66 N. C. 455.

Pennsylvania.— Manayunk Fifth Mut. Bldg. Soc. *v.* Holt, 184 Pa. St. 572, 39 Atl. 293.

Rhode Island.— Central Baptist Church, etc. *v.* Manchester, 17 R. I. 492, 23 Atl. 30. 33 Am. St. Rep. 893.

Virginia.— Turpin *v.* Thomas, 2 Hen. & M. 139, 3 Am. Dec. 615.

United States.— Northern Bank *v.* Stone, 88 Fed. 413; Wilgus *v.* Germain, 72 Fed. 773, 19 C. C. A. 188. And see Australian Knitting Co. *v.* Gormly, 138 Fed. 92.

See 30 Cent. Dig. tit. "Judgment," § 1190.

60. *California.*— Loftis *v.* Marshall, 134 Cal. 394, 66 Pac. 571, 86 Am. St. Rep. 286;

d. Persons Submitting or Claiming Interest. A judgment may be binding as an estoppel upon a person who, although not nominally or formally a party to the action in which it was rendered, submitted his interest in the subject-matter of the litigation to the consideration of the court and invited its adjudication thereon.[61] And all persons brought into the suit as additional parties, on account of interests claimed by them, whether by original process or by order of court on motion of the original parties, or by interpleader or cross petition, will be as fully bound by the judgment as if they had been parties from the inception of the suit.[62] But a person so intervening or brought in is not bound by the judgment if he withdraws his appearance by leave of court.[63]

e. Participation Through Agent or Attorney. The fact that a third person

Williams *v.* Cooper, 124 Cal. 666, 57 Pac. 577.

Indiana.— Gross *v.* Whitley County, 158 Ind. 531, 64 N. E. 25, 58 L. R. A. 394.

Iowa.— Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 63 Iowa 285, 19 N. W. 231; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226.

Minnesota.— Schroeder *v.* Lahrman, 26 Minn. 87, 1 N. W. 801.

North Carolina.— Falls *v.* Gamble, 66 N. C. 455.

United States.— Litchfield *v.* Crane, 123 U. S. 549, 8 S. Ct. 210, 31 L. ed. 199; Cramer *v.* Singer Mfg. Co., 93 Fed. 636, 35 C. C. A. 508; Theller *v.* Hershey, 89 Fed. 515; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381.

61. *Alabama.*— McDougall *v.* Rutherford, 30 Ala. 253.

California.— Johnston *v.* San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129; Valentine *v.* Mahoney, 37 Cal. 389.

Georgia.— H. B. Claflin Co. *v.* De Vaughn, 106 Ga. 282, 32 S. E. 108; Hidell *v.* Dwinell, 89 Ga. 532, 16 S. E. 79.

Illinois.— Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813; Pepper *v.* Pepper, 24 Ill. App. 316. See Ledford *v.* Weber, 7 Ill. App. 87.

Indiana.— Hawkins *v.* Taylor, 128 Ind. 431, 27 N. E. 1117.

Iowa.— McNamee *v.* Moreland, 26 Iowa 96.

Louisiana.— Reinach *v.* New Orleans Imp. Co., 50 La. Ann. 497, 23 So. 455.

Maine.— Sevey *v.* Chick, 13 Me. 141.

Maryland.— Albert *v.* Hamilton, 76 Md. 304, 25 Atl. 341; Farmers' Bank *v.* Thomas, 37 Md. 246.

Massachusetts.— Nash *v.* D'Arcy, 183 Mass. 30, 66 N. E. 606.

Minnesota.— St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

New Hampshire.— Parker *v.* Moore, 59 N. H. 454.

New York.— Conant *v.* Jones, 50 N. Y. App. Div. 336, 64 N. Y. Suppl. 189; Fletcher *v.* Barber, 82 Hun 405, 31 N. Y. Suppl. 239; Van Knoughnet *v.* Dennie, 68 Hun 179, 22 N. Y. Suppl. 823; Newcomb *v.* St. Peter's Church, 2 Sandf. Ch. 709.

Pennsylvania.— Ahl *v.* Goodhart, 161 Pa. St. 455, 29 Atl. 82; Otterson *v.* Gallagher, 88 Pa. St. 355.

Tennessee.— Goss *v.* Singleton, 2 Head 67. 26 S. W. 933; Cooper *v.* Mayfield, (Civ. App. 1900) 57 S. W. 48; Bomar *v.* Ft. Worth Bldg. Assoc., 20 Tex. Civ. App. 603, 49 S. W. 914; Converse *v.* Davis, (Civ. App. 1896) 37 S. W. 247. *Compare* Gulf City Trust Co. *v.* Hartley, 20 Tex. Civ. App. 180, 49 S. W. 902.

Texas.— Sandoval *v.* Rosser, 86 Tex. 682.

Virginia.— Doggett *v.* Helm, 17 Gratt. 96. See Peters *v.* Anderson, 88 Va. 1051, 14 S. E. 974.

United States.— Smith *v.* St. Paul, 111 Fed. 308, 49 C. C. A. 357; Huntington *v.* Little Rock, etc., R. Co., 16 Fed. 906, 3 McCrary 581.

See 30 Cent. Dig. tit. "Judgment," § 1192.

62. *Indiana.*— Satterwhite *v.* Sherley, 127 Ind. 59, 25 N. E. 1110; Isbell *v.* Stewart, 125 Ind. 112. 25 N. E. 160.

Kentucky.— Swope *v.* Schwartz, 15 S. W. 251, 12 Ky. L. Rep. 853.

Maryland.— Riley *v.* Grafton First Nat. Bank, 81 Md. 14, 31 Atl. 585.

Minnesota.— Breault *v.* Merrill, etc., Lumber Co., 72 Minn. 143, 75 N. W. 122.

North Carolina.— Brown *v.* McKee, 108 N. C. 387, 13 S. E. 8.

Ohio.— Desnoyers *v.* Dennison, 19 Ohio Cir. Ct. 320, 10 Ohio Cir. Ct. 430.

Virginia.— Gardner *v.* Stratton, 89 Va. 900, 17 S. E. 553.

Proceeding to enforce judgment against adverse claimant.— Where an adverse claimant was cited to show cause why the judgment should not be enforced against the land in dispute, he cannot afterward be permitted to say that the judgment of the court ordering the sale of the land for such purpose was not a bar to his title. Bruce *v.* Osgood, 154 Ind. 375, 56 N. E. 25. And see Scott *v.* Wagner, 2 Kan. App. 386, 42 Pac. 741.

Joinder of appellees.— Where persons who were not parties to the action in the lower court were named as appellees on an appeal, they did not thereby become parties, so as to entitle them, in a subsequent action between them and the appellant, to plead in bar the judgment which was affirmed on that appeal. Owingsville, etc., Turnpike Road Co. *v.* Hamilton, 53 S. W. 5, 54 S. W. 175, 21 Ky. L. Rep. 815, 1150.

63. Swamscot Mach. Co. *v.* Walker, 22 N. H. 457, 55 Am. Dec. 172. And see Woods

took part in the conduct of a case or in the trial or hearing through an agent or attorney in fact or through counsel is not enough to connect him with the litigation in such manner as to make the judgment an estoppel against him,[64] unless his interference amounted to assuming practical control of the whole prosecution or defense of the action.[65]

f. Effect of Notice and Opportunity to Intervene. Where a stranger to a suit has such an interest in the subject-matter as would be injuriously affected by the judgment rendered therein, supposing it to be admissible against him at all, he may be bound by the result of the litigation if he has notice of the suit and an opportunity to come in, where he is in privity with one of the parties, or bound to indemnify him;[66] but otherwise mere notice of the action, coupled with the fact that he might have been allowed to intervene if he had chosen to do so, does not make him a party to the judgment.[67]

g. Witnesses. The fact that a person appeared merely as a witness in the former action or proceeding, and not as a party thereto, does not make him

v. White, 97 Pa. St. 222; Sergeant *v.* Ewing, 30 Pa. St. 75; Denny *v.* Bennett, 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491.

64. Walters *v.* Chamberlin, 65 Mich. 333, 32 N. W. 440; State *v.* Johnson, 123 Mo. 43, 27 S. W. 399; Acker *v.* Ledyard, 8 Barb. (N. Y.) 514; Pendleton *v.* Russell, 144 U. S. 640, 12 S. Ct. 743, 36 L. ed. 574.

65. *Alabama.*— Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515.

California.— Sampson *v.* Ohleyer, 22 Cal. 200.

Colorado.— Hurd *v.* McClellan, 1 Colo. App. 327, 29 Pac. 181.

Georgia.— Linton *v.* Harris, 78 Ga. 265, 3 S. E. 278.

Illinois.— Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9, 7 N. E. 498; McDonald *v.* Western Refrigerating Co., 35 Ill. App. 283.

Indiana.— Roby *v.* Eggers, 130 Ind. 415, 29 N. E. 365; Shugart *v.* Miles, 125 Ind. 445, 25 N. E. 551; Burns *v.* Gavin, 118 Ind. 320, 20 N. E. 799.

Iowa.— Baxter *v.* Myers, 85 Iowa 328, 52 N. W. 234, 39 Am. St. Rep. 298; Bellows *v.* Litchfield, 83 Iowa 36, 48 N. W. 1062.

Maryland.— Parr *v.* State, 71 Md. 220, 17 Atl. 1020.

Minnesota.— St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

New Jersey.— Lyon *v.* Stanford, 42 N. J. Eq. 411, 7 Atl. 869.

New York.— Castle *v.* Noyes, 14 N. Y. 329.

South Carolina.— Holbrook *v.* Colburn, 6 Rich. Eq. 289.

See 30 Cent. Dig. tit. "Judgment," § 1191. And see *supra*, XIV, B, 4, c.

66. *California.*— Drinkhouse *v.* Spring Valley Water Works, 87 Cal. 253, 25 Pac. 420.

Indiana.— Hawkins *v.* Taylor, 128 Ind. 431, 27 N. E. 1117.

Iowa.— Conger *v.* Chilcote, 42 Iowa 18.

Louisiana.— Saul *v.* His Creditors, 7 Mart. N. S. 425.

Maine.— Emery *v.* Davis, 17 Me. 252.

Maryland.— Albert *v.* Hamilton, 76 Md. 304, 25 Atl. 341.

Michigan.— Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

Missouri.— Koontz *v.* Kaufman, 31 Mo. App. 397.

Ohio.— Cincinnati *v.* Wright, 7 Ohio Dec. (Reprint) 234, 1 Cinc. L. Bul. 387.

Pennsylvania.— Minier *v.* Saltmarsh, 5 Watts 293; Kiehner *v.* Dengler, 1 Watts 424; Mehaffy *v.* Lytle, 1 Watts 314; Osner *v.* Vollrath, 2 Pa. Co. Ct. 184. *Compare* Mitchell *v.* Hamilton, 8 Pa. St. 486.

Wisconsin.— Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125.

United States.— McIntosh *v.* Pittsburg, 112 Fed. 705.

See 30 Cent. Dig. tit. "Judgment," § 1194.

67. *Colorado.*— Fisk *v.* Cathcart, 16 Colo. 238, 27 Pac. 711.

Georgia.— Clayton *v.* West, 97 Ga. 328, 22 S. E. 901.

Illinois.— Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Oetgen *v.* Ross, 54 Ill. 79.

Indiana.— Burton *v.* Reagan, 75 Ind. 77.

Mississippi.— McPike *v.* Wells, 54 Miss. 136.

Missouri.— State *v.* Johnson, 123 Mo. 43, 27 S. W. 399; Ford *v.* O'Donnell, 40 Mo. App. 51.

New York.— Cassidy *v.* New York, 62 Hun 358, 17 N. Y. Suppl. 71; King *v.* Buffalo, 10 N. Y. Suppl. 564.

South Carolina.— Whitesides *v.* Barber, 24 S. C. 373.

Texas.— Masterson *v.* Little, 75 Tex. 682, 13 S. W. 154, holding that oral promises of a person in interest, who is not joined as a party to a suit for land, that if he is not so joined he will hold himself bound by the judgment as if he had been made a party, cannot estop him from afterward setting up that he was not a party and that the judgment did not bind him, where it appears that, if he had been made a party, he had a good defense, since in such case failure to make him a party did not prejudice the party relying on his promises.

Wisconsin.— Carney *v.* Emmons, 9 Wis. 114.

See 30 Cent. Dig. tit. "Judgment," § 1194.

privy to the judgment rendered therein, so as to render such judgment binding upon him in a subsequent suit.[68]

5. Privies — a. Judgments Binding on Privies. A judgment is conclusive and binding, not only upon the parties to the action in which it was rendered, but also upon persons who are in privity with them in respect to the subject-matter of the litigation.[69]

b. What Constitutes Privity. Privity means a mutual or successive relationship to the same rights of property;[70] and within the rules relating to the conclusiveness of judgments all persons are privies to a judgment whose succession to the rights of property thereby adjudicated or affected[71] were derived through

68. *Kansas.*— Goodin *v.* Newcomb, 6 Kan. App. 431, 49 Pac. 821.

Kentucky.— Atkison *v.* Hackney, 13 Ky. L. Rep. 975.

Massachusetts.— Wright *v.* Andrews, 130 Mass. 149.

Michigan.— Blackwood *v.* Brown, 32 Mich. 104.

Minnesota.— Schroeder *v.* Lahrman, 26 Minn. 87, 1 N. W. 801.

New Hampshire.— Lebanon *v.* Mead, 64 N. H. 8, 4 Atl. 392.

New York.— Yorks *v.* Steele, 50 Barb. 397; O'Brien *v.* Browning, 49 How. Pr. 109.

Pennsylvania.— *In re* Miller, 159 Pa. St. 562, 28 Atl. 441.

United States.— Griffin *v.* Reynolds, 17 How. 609, 15 L. ed. 229; Buck *v.* Hermance, 4 Fed. Cas. No. 2,081, 1 Blatchf. 332.

See 30 Cent. Dig. tit. "Judgment," § 1190.

69. *Alabama.*— Craig *v.* King, 132 Ala. 345, 31 So. 482.

California.— Flandreau *v.* Downey, 23 Cal. 354; Cunningham *v.* Harris, 5 Cal. 81. *Compare* Blood *v.* Marcuse, 38 Cal. 590, 99 Am. Dec. 435.

Connecticut.— Chapin *v.* Curtis, 23 Conn. 388.

Idaho.— Schuler *v.* Ford, (1905) 80 Pac. 219.

Illinois.— Cole *v.* Favorite, 69 Ill. 457; Pinkney *v.* Weaver, 115 Ill. App. 582 [*affirmed* in 216 Ill. 185, 74 N. E. 714]; American Percheron Horse Breeders' Assoc. *v.* American Percheron Horse Breeders', etc., Assoc., 114 Ill. App. 136.

Iowa.— Adams County *v.* Graves, 75 Iowa 642, 36 N. W. 889; Sobey *v.* Beiler, 28 Iowa 323.

Kansas.— Bishop *v.* Smith, (1899) 58 Pac. 493; Ellis *v.* Crowl, 46 Kan. 100, 26 Pac. 454.

Kentucky.— Duerson *v.* Semonin, 29 S. W. 635, 17 Ky. L. Rep. 51; Soward *v.* Coppage, 9 S. W. 389, 10 Ky. L. Rep. 436.

Louisiana.— Hargrave *v.* Mouton, 109 La. 533, 33 So. 590; Martinez *v.* Layton, 4 Mart. N. S. 368.

Missouri.— Stoutimore *v.* Clark, 70 Mo. 471.

Montana.— Wagner *v.* St. Peter's Hospital, 32 Mont. 206, 79 Pac. 1054.

New York.— Beebe *v.* Elliott, 4 Barb. 457; Bush *v.* Knox, 5 Thomps. & C. 130; Baldwin *v.* Rice, 44 Misc. 64, 89 N. Y. Suppl. 738; Ludington's Petition, 5 Abb. N. Cas. 307.

Pennsylvania.— Towers *v.* Tuscarora Academy, 8 Pa. St. 297.

Texas.— Hair *v.* Wood, 58 Tex. 77; Webster *v.* Mann, 56 Tex. 119, 42 Am. Rep. 688.

Wisconsin.— Grunert *v.* Spalding, (1899) 78 N. W. 606; Finney *v.* Boyd, 26 Wis. 366; Emmons *v.* Dowe, 2 Wis. 322.

United States.— Reed *v.* Proprietors Merrimac River Locks, etc., 8 How. 274, 12 L. ed. 1077; Porterfield *v.* Clark, 2 How. 76, 11 L. ed. 185; Tilton *v.* Barrell, 17 Fed. 59, 9 Sawy. 84.

England.— Blakemore *v.* Glamorganshire Canal Co., 2 C. M. & R. 133, 1 Gale 78, 5 Tyrw. 603; Borough *v.* Whichcote, 3 Bro. P. C. 595, 1 Eng. Reprint 1520; Rex *v.* York, 5 T. R. 66.

See 30 Cent. Dig. tit. "Judgment," § 1195.

Persons whose interests not quite identical. — If parties litigate a question in a court of competent jurisdiction, and a final decision is given thereon, such parties or those claiming through them cannot afterward reopen the same question in another court. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such party. Spencer *v.* Williams, L. R. 2 P. & D. 230, 40 L. J. P. & M. 45, 24 L. T. Rep. N. S. 513, 19 Wkly. Rep. 703.

70. McDonald *v.* Gregory, 41 Iowa 513; Rieschick *v.* Klingelhoefer, 91 Mo. App. 430; Mohr *v.* Langan, 77 Mo. App. 481; Sorensen *v.* Sorensen, (Nebr. 1904) 98 N. W. 837; 2 Greenleaf Ev. § 189; Black L. Dict.; Bouvier L. Dict.

Where the interests of parties are mutual, although the suit is in the name of one of the parties, both are represented, and both are equally estopped to deny any of the issues adjudicated therein in any suit between them jointly or singly on the one side and the same defendant on the other side; but they are not estopped in a controversy between themselves to deny the correctness of the findings or of the recitals of the judgment. Carmody *v.* Hanick, 85 Mo. App. 659.

Person whose estate liable for judgment. — Where a statute provides that the estate of a person not named as a party to a judgment may be taken to satisfy such judgment, and it is so taken, he becomes a privy in law to the judgment. Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

71. Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881, holding that

or under one or other of the parties to the action,[72] and accrued subsequent to the commencement of that suit.[73]

while the decision in an action becomes a rule of property as to the subject-matter thereof, and passes with it to all persons subsequently claiming under the parties to the action, it does not attach to any other property, the limit of its effect as to privies being the limit of the particular property, right, subject-matter, or thing involved in the litigation. And see Davidson *v.* Barclay, 63 Pa. St. 406; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381.

Grantees of separate parcels of land by separate deeds from the same grantor are all in privity with the common grantor, but not with each other. Stryker *v.* Crane, 123 U. S. 527, 8 S. Ct. 203, 31 L. ed. 194. And see Leonard *v.* O'Hara, 1 Cinc. Super. Ct. (Ohio) 42.

72. *Alabama.*— Comer *v.* Shehee, 129 Ala. 588, 30 So. 95, 87 Am. St. Rep. 78.

California.—Satterlee *v.* Bliss, 36 Cal. 489; Semple *v.* Wright, 32 Cal. 659; Cunningham *v.* Harris, 5 Cal. 81. A recovery in ejectment by plaintiff is not evidence against a party not claiming under defendant, unless it is shown that he bore such a relation to the latter's title that it was his duty to defend the action, on the requisite notice thereof being given, and that he had a proper opportunity to make a defense founded on his title. Calderwood *v.* Brooks, 28 Cal. 151.

Georgia.— Willingham *v.* Slade, 112 Ga. 418, 37 S. E. 737; Barfield *v.* Jefferson, 84 Ga. 609, 11 S. E. 149, holding that a judgment against the head of a family on a claim of homestead is binding on the members of the family.

Illinois.— Wood *v.* Rawlings, 76 Ill. 206.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732, holding that a judgment for the recovery of land is as binding on a purchaser from the heirs of the party against whom it was rendered as if he had been himself a party.

Iowa.— Mehlhop *v.* Ellsworth, 95 Iowa 657, 64 N. W. 638, holding that where an assignee defended a suit to foreclose a mortgage, on the ground that it was withheld from record in order to defraud creditors, a creditor cannot afterward, in a suit against the mortgagor, raise the same issue.

Kansas.— Provident Loan Trust Co. *v.* Marks, 6 Kan. App. 34, 49 Pac. 625.

Massachusetts.— Merriam *v.* Sewell, 8 Gray 316.

Missouri.— Hanlon *v.* Goodyear, 103 Mo. App. 416, 77 S. W. 481.

New Jersey.— Taylor *v.* Wahl, 69 N. J. L. 471, 55 Atl. 40; Slack *v.* John, 63 N. J. Eq. 126, 51 Atl. 151.

New York.—Williams *v.* Barkley, 165 N. Y. 48, 58 N. E. 765; Shultes *v.* Sickels, 70 Hun 479, 24 N. Y. Suppl. 145; Thompson *v.* Clark, 4 Hun 164; Calkins *v.* Allerton, 3 Barb. 171; Scott *v.* Drennen, 9 Daly 226; Harrison *v.* McAdam, 38 Misc. 18, 76 N. Y. Suppl. 701; Hoguet *v.* Berkman, 6 N. Y. Suppl. 214. Where one claiming under a tax-sale is not made a party to proceedings to foreclose a mortgage made previous to the levy of the taxes for which the sale was made, he is not affected by a decree foreclosing the mortgage, or by a sale and conveyance thereunder. Chard *v.* Holt, 136 N. Y. 30, 32 N. E. 740. The fact that an assessment has been vacated on the petition of one property-owner as to his premises does not make the question *res judicata* on the petition of another to vacate the same assessment as to his premises adjoining. Horn's Case, 12 Abb. Pr. 124.

North Carolina.— Carter *v.* White, 131 N. C. 14, 42 S. E. 442; Harris *v.* Bryant, 83 N. C. 568.

Pennsylvania.— Youngman *v.* Linn, 52 Pa. St. 413; Patterson *v.* Anderson, 40 Pa. St. 359, 80 Am. Dec. 579; Lloyd *v.* Barr, 11 Pa. St. 41.

South Carolina.— Hyatt *v.* McBurney, 18 S. C. 199; Campbell *v.* Briggs, 4 Rich. Eq. 370.

Tennessee.— Browder *v.* Jackson, 3 Lea 151.

Texas.— Stacey *v.* Henke, 32 Tex. Civ. App. 462, 74 S. W. 925. *Compare* Coleman *v.* Davis, (Civ. App. 1896) 36 S. W. 103.

Utah.— Hodson *v.* Union Pac. R. Co., 14 Utah 402, 47 Pac. 859, 60 Am. St. Rep. 902.

Vermont.— Eaton *v.* Cooper, 29 Vt. 444.

Virginia.— Southern R. Co. *v.* Gregg, 101 Va. 308, 43 S. E. 570; Miller *v.* Wills, 95 Va. 337, 28 S. E. 337.

Washington.— Isensee *v.* Austin, 15 Wash. 352, 46 Pac. 394.

West Virginia.— Armentrout *v.* Smith, 52 W. Va. 96, 43 S. E. 98.

Wisconsin.— Grunert *v.* Spalding, (1899) 78 N. W. 606.

United States.— Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 51 C. C. A. 267; Holt County *v.* National L. Ins. Co., 80 Fed. 686, 25 C. C. A. 469; Pullman's Palace Car Co. *v.* Washburn, 66 Fed. 790; Barlow *v.* Delaney, 40 Fed. 97; Dayton *v.* Wright, 7 Fed. Cas. No. 3,693, 2 Ban. & A. 449; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381; Smith *v.* Trabue, 22 Fed. Cas. No. 13,116, 1 McLean 87, holding that tenants who enter under other tenants, on whom notice in ejectment has been served, will be concluded by the judgment.

See 30 Cent. Dig. tit. "Judgment," § 1196.

73. *Arkansas.*— Roulston *v.* Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97.

California.— Gregory *v.* Clabrough, 129 Cal. 475, 62 Pac. 72; Satterlee *v.* Bliss, 36 Cal. 489.

Georgia.— Patapsco Guano Co. *v.* Hurst, 106 Ga. 184, 32 S. E. 136; Elwell *v.* New England Mortg. Security Co., 101 Ga. 496, 28

c. Several Creditors of Same Debtor or Estate. There is in general no such privity between several creditors of the same debtor that proceedings taken by one against the fund, estate, or specific property to which all must look for satisfaction will raise an estoppel against the others,[74] unless such others were made parties to the action or were adequately represented therein.[75]

d. Attaching and Other Creditors. Creditors proceeding by attachment, execution, foreclosure, or other form of action to obtain satisfaction of their claims are not affected by the result of litigation between their debtor and other creditors, not having been joined in the action, nor can they bind other creditors by the outcome of their own proceedings.[76] A judgment confirming an authorized exchange of property between a guardian and his ward is conclusive between the parties and the creditors of the guardian.[77]

S. E. 833; Garrard *v.* Hull, 92 Ga. 787, 20 S. E. 357.

Illinois.— Gage *v.* Parker, 178 Ill. 455, 53 N. E. 317.

Kansas.— Provident L. & T. Co. *v.* Marks, 6 Kan. App. 34, 49 Pac. 625.

Kentucky.— Goldsmith *v.* Clark, 78 S. W. 405, 25 Ky. L. Rep. 1618.

Louisiana.— Hargrave *v.* Mouton, 109 La. 533, 33 So. 590; Foutelet *v.* Murrell, 9 La. 291.

Maryland.—Oliver *v.* Caton, 2 Md. Ch. 297.

Minnesota.— Minnesota Debenture Co. *v.* Johnson, 94 Minn. 150, 102 N. W. 381.

New Hampshire.—Hunt *v.* Haven, 52 N. H. 162.

New York.— Bennett *v.* Gray, 92 Hun 86, 36 N. Y. Suppl. 372; Wilson *v.* Davol, 5 Bosw. 619.

Pennsylvania.— Moreland *v.* H. C. Frick Coke Co., 170 Pa. St. 33, 32 Atl. 634.

South Carolina.— Hodge *v.* Hodge, 56 S. C. 263, 34 S. E. 517.

West Virginia.— Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

Wisconsin.— Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

United States.— Dull *v.* Blackman, 169 U. S. 243, 18 S. Ct. 333, 42 L. ed. 733; Carroll *v.* Goldschmidt, 83 Fed. 508, 27 C. C. A. 566; Southern Bank, etc., Co. *v.* Folsom, 75 Fed. 929, 21 C. C. A. 568; Cook *v.* Lasher, 73 Fed. 701, 19 C. C. A. 654; Central Nat. Bank *v.* Hazard, 30 Fed. 484.

England.— Doe *v.* Derby, 1 Ad. & El. 783, 3 L. J. K. B. 191, 3 N. & M. 783, 28 E. C. L. 363.

See 30 Cent. Dig. tit. "Judgment," § 1196.

74. *Alabama.*— Gary *v.* Hathaway, 6 Ala. 161.

Indiana.— Goodall *v.* Mopley, 45 Ind. 355.

Louisiana.— Levy *v.* Winter, 43 La. Ann. 1049, 10 So. 198; Converse *v.* The Lucy Robinson, 15 La. Ann. 433; Broderick's Succession, 12 La. Ann. 521.

Mississippi.— Pickett *v.* Doe, 5 Sm. & M. 470, 43 Am. Dec. 523.

New Mexico.— Ortiz *v.* Las Vegas First Nat. Bank, (1904) 78 Pac. 529.

New York.— Reid *v.* Evergreens, 21 How. Pr. 319.

South Carolina.— Clyburn *v.* Reynolds, 31 S. C. 91, 9 S. E. 973.

Vermont.— Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84.

United States.— Morgan County *v.* Allen, 103 U. S. 498, 26 L. ed. 498; Kinney *v.* Eastern Trust, etc., Co., 123 Fed. 297, 59 C. C. A. 586.

See 30 Cent. Dig. tit. "Judgment," § 1197.

But see Ceredo First Nat. Bank *v.* Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878, holding that, in a suit in equity to enforce a judgment lien against real estate of the debtor, the judgment is, as between the judgment creditor and other judgment creditors of the debtor, conclusive of the justness and amount of the debt, and cannot be impeached except for fraud.

A judgment rendered in an action to set aside a general assignment as being in fraud of creditors is not conclusive either for or against another creditor, who was not made a party to that action. Mower *v.* Hanford, 6 Minn. 535; McNaney *v.* Hall, 86 Hun (N. Y.) 415, 33 N. Y. Suppl. 518; Heywood *v.* Thacher, 19 N. Y. Suppl. 882. But see Curlee *v.* Rembert, 37 S. C. 214, 15 S. E. 954.

75. Moore *v.* Sloan, 71 Ark. 599, 76 S. W. 1058.

76. *Alabama.*— McLemore *v.* Nuckolls, 37 Ala. 662.

Illinois.— Palmer *v.* Woods, 149 Ill. 146, 35 N. E. 1122.

Indiana.— Goodrich *v.* Friedersdorff, 27 Ind. 308.

Massachusetts.— Munroe *v.* Luke, 19 Pick. 39.

Michigan.— Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430; Hale *v.* Chandler, 3 Mich. 531.

Pennsylvania.— Rittispaugh *v.* Lewis, 103 Pa. St. 1; Williams *v.* Williams, 34 Pa. St. 312.

United States.— Smith *v.* Harvey, 13 Fed. 16; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

See 30 Cent. Dig. tit. "Judgment," § 1199.

The creditors of a party defrauded by a contract are concluded by a judgment on the contract, in so far as it establishes its validity against their debtor, unless the fraud was perpetrated with intent to affect them. Pettus *v.* Smith, 4 Rich. Eq. (S. C.) 197.

77. Rawlins *v.* Giddens, 46 La. Ann. 1136, 15 So. 501, 17 So. 262.

e. Cotenants. Joint tenants or tenants in common do not claim through or under each other, and therefore there is no such privity between them that a judgment for or against one of them affecting the land will bind the other.[78]

f. Successive Estates or Interests — (I) *In General.* A judgment determining the title to land, claimed by two persons, runs with the land, and binds all persons claiming through either party to the suit by title acquired after the rendition of the judgment.[79] And as to property generally, both real and personal, a successor in interest is concluded by a judgment for or against him from whom he derives his title, whether it be by purchase, inheritance, devise, or otherwise.[80]

(II) *Remainder-Men and Reversioners.* All remainder-men claiming under the same deed or will are in privity with each other, and mutually bound by a judgment for or against one of their number.[81] But a remainder-man or rever-

78. *California.*— Williams *v.* Sutton, 43 Cal. 65.

Georgia.— Stokes *v.* Morrow, 54 Ga. 597; Walker *v.* Perryman, 23 Ga. 309.

Kentucky.—Brizendine *v.* Frankfort Bridge Co., 2 B. Mon. 32, 36 Am. Dec. 587.

Louisiana.— Levy *v.* Winter, 43 La. Ann. 1049, 10 So. 198.

Massachusetts.— Colton *v.* Smith, 11 Pick. 311, 22 Am. Dec. 375; Ramsdell *v.* Creasey, 10 Mass. 170.

New Jersey.— Steward *v.* Middleton, (Ch. 1889) 17 Atl. 294.

New York.— New York Cent., etc., R. Co. *v.* Brennan, 12 N. Y. App. Div. 103, 42 N. Y. Suppl. 529; Preston *v.* Fitch, 19 N. Y. Suppl. 849. *Compare* Nemetty *v.* Naylor, 100 N. Y. 562, 3 N. E. 497.

North Carolina.— Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924.

Texas.— Walker *v.* Read, 59 Tex. 187; Bass *v.* Sevier, 58 Tex. 567; Read *v.* Allen, 56 Tex. 182; Johnson *v.* Foster, (Civ. App. 1896) 34 S. W. 821.

United States.— Miller *v.* Blackett, 47 Fed. 547.

See 30 Cent. Dig. tit. "Judgment," § 1201.

A judgment in ejectment, brought against only one of the tenants in common, is not binding on the other, and the latter cannot be dispossessed under such judgment, although the proceedings embrace the whole premises and treat defendant as the sole occupant. Stokes *v.* Morrow, 54 Ga. 597. But *compare* Hanson *v.* Armstrong, 22 Ill. 442. But a judgment in ejectment in favor of a tenant in common against his cotenant, claiming adversely, is conclusive on the parties and their privies, whether adults or minors, in a subsequent suit for partition. Estes *v.* Nell, 140 Mo. 639, 41 S. W. 940.

Nuisance.— The record of a suit in which damages for a nuisance were recovered by one of two tenants in common is admissible in evidence in a subsequent suit for the same cause by both tenants, for the time covered by the *continuando*, and is conclusive that the nuisance existed at that time, when the declaration includes the time covered by the former adjudication; but plaintiff states that they claim no damages prior to the former suit. Fell *v.* Bennett, 110 Pa. St. 181, 5 Atl. 17.

79. Wilson *v.* Davol, 5 Bosw. (N. Y.) 619.

80. *California.*— Riverside Land, etc., Co. *v.* Jensen, 108 Cal. 146, 41 Pac. 40; Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

Nebraska.— Baldridge *v.* Foust, 28 Nebr. 259, 44 N. W. 110.

New York.— Freer *v.* Stotenbur, 2 Abb. Dec. 189, 2 Keyes 467, 34 How. Pr. 440; Hurrell *v.* Hurrell, 65 N. Y. App. Div. 527, 72 N. Y. Suppl. 902; Tyng *v.* Clarke, 9 Hun 269.

Pennsylvania.— Merklein *v.* Trapnell, 34 Pa. St. 42, 75 Am. Dec. 634.

Tennessee.— Vaughn *v.* Law, 1 Humphr. 123.

West Virginia.— Maxwell *v.* Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875.

United States.— Hall *v.* Dexter, 11 Fed. Cas. No. 5,929, 3 Sawy. 434.

See 30 Cent. Dig. tit. "Judgment," § 1202.

Grantee under deed not signed by wife.— A person holding land under a conveyance made by a husband during coverture and in which the wife did not join is not concluded by proceedings to which he was not a party, instituted by such wife, after the death of the husband, for setting apart to her a child's part in the land. Reddick *v.* Meffert, 32 Fla. 409, 13 So. 894.

Purchaser of bonds.— After a court has declared the validity of bonds issued by a county in aid of a railroad, persons purchasing such bonds become privies to the decree, with the right to rely on its estoppels, and are bound by its terms. State *v.* Chester, etc., R. Co., 13 S. C. 290.

81. Johnson *v.* Jacob, 11 Bush (Ky.) 659; Goebel *v.* Iffla, 111 N. Y. 170, 18 N. E. 649; Mead *v.* Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Doe *v.* Tyler, 6 Bing. 390, 19 Eng. Reprint 181; Rushworth *v.* Pembroke, Hardres 472; Pyke *v.* Crouch, 1 Ld. Raym. 730. *Compare* Bedon *v.* Davie, 144 U. S. 142, 12 S. Ct. 665, 36 L. ed. 380.

Representation of unborn remainder-men and persons holding contingent and expectant interests see *supra*, XIV, B, 3, b.

sioner is not thus in privity with the tenant for life,[82] or with a tenant in dower,[83] or a tenant by the curtesy.[84]

(III) *VENDOR AND PURCHASER*[85]—(A) *In General.* A judgment in an action respecting real property or titles or rights thereto, against a grantor of such property, is binding on his grantee, provided the latter acquired his interests after the institution of the suit, or after the judgment was rendered;[86] but not where the rights of the grantee vested before the commencement of the action, unless he is made a party thereto.[87] A judgment against the grantee of land is not conclusive

82. *Georgia.*— Womack *v.* White, 30 Ga. 696.

Illinois.— Peterson *v.* Jackson, 196 Ill. 40, 63 N. E. 643; Nevitt *v.* Woodburn, 82 Ill. App. 649.

Kentucky.— Caldwell *v.* Jacob, 22 S. W. 436, 27 S. W. 86, 16 Ky. L. Rep. 21. But see Gatewood *v.* Long, 106 Ky. 721, 51 S. W. 569, 21 Ky. L. Rep. 356.

Missouri.— Allen *v.* De Groodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626; Haile *v.* Hill, 13 Mo. 612.

Rhode Island.— Gardner *v.* Whitford, 23 R. I. 396, 50 Atl. 642.

United States.— Hull *v.* Chaffin, 54 Fed. 437, 4 C. C. A. 414. But see Printup *v.* Hill, 107 Fed. 789.

See 30 Cent. Dig. tit. "Judgment," § 1202.

Contra.— See Reese *v.* Holmes, 5 Rich. Eq. (S. C.) 531; Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241.

A judgment in favor of a remainder-man as to his right to property as against the representative of the life-tenant is conclusive as against persons claiming under such representative. Simms *v.* Freiherr, 100 Ga. 607, 28 S. E. 288.

83. Adams *v.* Butts, 9 Conn. 79. But see Willey *v.* Larraway, 64 Vt. 559, 25 Atl. 436.

84. Hubbell *v.* Hubbell, 22 Ohio St. 208; Lineberger *v.* Newkirk, 179 Pa. St. 117, 36 Atl. 193.

85. Purchasers pendente lite see LIS PENDENS.

86. *California.*— Riverside Land, etc., Co. *v.* Jensen, 108 Cal. 146, 41 Pac. 40; Peterson *v.* Weissbein, 80 Cal. 38, 22 Pac. 56; McCormick *v.* Sutton, 78 Cal. 232, 20 Pac. 541.

Connecticut.—Richmond *v.* Stahle, 48 Conn. 22.

Georgia.— Burks *v.* Yorkshire Guarantee, etc., Corp., 108 Ga. 783, 33 S. E. 711.

Illinois.— Equitable Trust Co. *v.* Wilson, 200 Ill. 23, 65 N. E. 430; Schumann *v.* Sprague, 189 Ill. 425, 59 N. E. 945; Buckmaster *v.* Ryder, 12 Ill. 207.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

Indian Territory.— Davenport *v.* Buffington, 1 Indian Terr. 424, 45 S. W. 128.

Iowa.— Cushing *v.* Edwards, 68 Iowa 145, 25 N. W. 940; Tredway *v.* McDonald, 51 Iowa 663, 2 N. W. 567; Woodin *v.* Clemous, 32 Iowa 280.

Kansas.— Irish *v.* Foulks, 42 Kan. 370, 22 Pac. 315.

Kentucky.— Reardon *v.* Searcy, 1 Litt. 53; Day, etc., Lumber Co. *v.* Mack, 69 S. W. 712, 24 Ky. L. Rep. 640.

Louisiana.— Daughters *v.* Guice, 1 Rob. 37; Brownson *v.* Richard, 11 La. 414.

Maine.— Smith *v.* Keen, 26 Me. 411.

Massachusetts.— Adams *v.* Barnes, 17 Mass. 365; Gerrish *v.* Bearce, 11 Mass. 193; Cushing *v.* Hacket, 10 Mass. 164.

Michigan.— People's Sav. Bank *v.* Eberts, 96 Mich. 396, 55 N. W. 996; Whitford *v.* Crooks, 54 Mich. 261, 20 N. W. 45.

Minnesota.—Connolly *v.* Connolly, 26 Minn. 350, 4 N. W. 233.

Missouri.— Ervin *v.* Brady, 48 Mo. 560.

New Jersey.— Le Herisse *v.* Hess, (Ch. 1904) 57 Atl. 808.

New York.— Bohn *v.* Hatch, 133 N. Y. 64, 30 N. E. 659; Neusbaum *v.* Keim, 24 N. Y. 325; Spencer *v.* Berdell, 45 Hun 179; Savage *v.* Sherman, 24 Hun 307; Dunckle *v.* Wiles, 6 Barb. 515. *Compare* Hailey *v.* Ano, 136 N. Y. 569, 32 N. E. 1068, 32 Am. St. Rep. 764.

North Carolina.— Skinner *v.* Terry, 134 N. C. 305, 46 S. E. 517; Weeks *v.* McPhail, 128 N. C. 130, 38 S. E. 472.

North Dakota.— Salemonson *v.* Thompson, (1904) 101 N. W. 220.

Pennsylvania.— Strayer *v.* Johnson, 110 Pa. St. 21, 1 Atl. 222; Caldwell *v.* Walters, 18 Pa. St. 79, 55 Am. Dec. 592.

Tennessee.— Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834.

Texas.— Timon *v.* Whitehead, 58 Tex. 290; Henry *v.* Thomas, (Civ. App. 1903) 74 S. W. 599.

Virginia.— Field *v.* Brown, 24 Gratt. 74.

Washington.— Eakin *v.* McCraith, 2 Wash. Terr. 112, 3 Pac. 838.

Wisconsin.— Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279; Smith *v.* Chicago, etc., R. Co., 83 Wis. 271, 50 N. W. 497, 53 N. W. 550.

United States.— Hefner *v.* Northwestern Mut. L. Ins. Co., 123 U. S. 747, 8 S. Ct. 337, 31 L. ed. 309; Whiteside *v.* Haselton, 110 U. S. 296, 4 S. Ct. 1, 28 L. ed. 152; Collins *v.* Goldsmith, 71 Fed. 580; Central Nat. Bank *v.* Hazard, 30 Fed. 484. But see Thompson *v.* Schenectady R. Co., 131 Fed. 577, 65 C. C. A. 325.

See 30 Cent. Dig. tit. "Judgment," § 1203.

In Texas under a statute providing that a judgment against plaintiff in an action for the possession of lands shall not be conclusive if another action is begun within a year, grantees of such plaintiff are not estopped by the former judgment, where defendant in such former action brings suit against them within the year. Brownsville *v.* Cavazos, 100 U. S. 138, 25 L. ed. 574.

87. *Alabama.*— Nunnelly *v.* Barnes, 139

on his grantor, unless the latter was notified to come in and defend the action and had an opportunity to do so.[88]

(B) *Purchasers at Judicial Sale.* Purchasers of property at a judicial sale thereof and all persons claiming under purchasers at a judicial sale are to be

Ala. 657, 36 So. 763; Coles *v.* Allen, 64 Ala. 98; Donley *v.* McKiernan, 62 Ala. 34; Floyd *v.* Ritter, 56 Ala. 356; Todd *v.* Flournoy, 56 Ala. 99, 28 Am. Rep. 758.

California.— Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Hall *v.* Boyd, 60 Cal. 443.

Florida.— Austin *v.* Hoxsie, 44 Fla. 199, 32 So. 878.

Georgia.— Washington Exch. Bank *v.* Holland, 121 Ga. 305, 48 S. E. 912; Elwell *v.* New England Mortg. Security Co., 101 Ga. 496, 28 S. E. 833.

Indiana.— Sample *v.* Rowe, 24 Ind. 208; Myers *v.* Bell, 5 Blackf. 249.

Iowa.— Hays *v.* Marsh, 123 Iowa 81, 98 N. W. 604; Chase *v.* Kaynor, 78 Iowa 449, 43 N. W. 269; Montgomery County *v.* Severson, 64 Iowa 326, 17 N. W. 197, 20 N. W. 458.

Kentucky.— Clarkson *v.* Morgan, 6 B. Mon. 441; Sutor *v.* Miles, 2 B. Mon. 489.

Louisiana.— McWilliams *v.* Gulf States Land, etc., Co., 111 La. 194, 35 So. 514; Peters *v.* Spitzfaden, 24 La. Ann. 111.

Maine.— Winslow *v.* Grindal, 2 Me. 64.

Maryland.— Syester *v.* Brewer, 27 Md. 288.

Massachusetts.— Stone *v.* Stone, 179 Mass. 555, 61 N. E. 268; Shores *v.* Hooper, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308.

Minnesota.—Windom *v.* Schuppel, 39 Minn. 35, 38 N. W. 757.

Missouri.— Bartero *v.* Real Estate Sav. Bank, 10 Mo. App. 76. And see Bristow *v.* Thackston, 187 Mo. 332, 86 S. W. 94, 106 Am. St. Rep. 472.

New Jersey.— Thompson *v.* Williamson, (Ch. 1904) 58 Atl. 602.

New York.— Bissell *v.* Kellogg, 65 N. Y. 432; Bennett *v.* Gray, 92 Hun 86, 36 N. Y. Suppl. 372; Armstrong *v.* Munday, 5 Den. 166.

North Carolina.— Aydlett *v.* Pendleton, 114 N. C. 1, 18 S. E. 971.

Pennsylvania.— Soles *v.* Hickman, 29 Pa. St. 342, 72 Am. Dec. 635; Snyder *v.* Berger, 5 Pa. Cas. 580, 9 Atl. 147.

South Carolina.— Hodge *v.* Hodge, 56 S. C. 263, 34 S. E. 517.

South Dakota.— State *v.* Coughran, (1905) 103 N. W. 31.

Tennessee.— Montgomery *v.* Rich, 3 Tenn. Ch. 660.

Texas.— Stephens *v.* Motl, 81 Tex. 115, 16 S. W. 731; Randall *v.* Snyder, 64 Tex. 350; Glaze *v.* Watson, 55 Tex. 563; Poland *v.* Davenport, 50 Tex. 276; Peters *v.* Clements, 46 Tex. 114; Nicholson *v.* Campbell, 15 Tex. Civ. App. 317, 40 S. W. 167; Looney *v.* Simpson, (Civ. App. 1894) 25 S. W. 476; Rhine *v.* Hodge, 1 Tex. Civ. App. 368, 21 S. W. 140.

Virginia.— Carter *v.* Washington, 2 Hen. & M. 345.

West Virginia.— Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

Wisconsin.— Cypreanson *v.* Berge, 112 Wis. 260, 87 N. W. 1081.

United States.— Dull *v.* Blackman, 169 U. S. 243, 18 S. Ct. 333, 42 L. ed. 733; Carroll *v.* Goldschmidt, 83 Fed. 508, 27 C. C. A. 566; Cook *v.* Lasher, 73 Fed. 701, 19 C. C. A. 654. And see Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305.

See 30 Cent. Dig. tit. "Judgment," § 1203.

Executory contract of purchase.— One who is in possession of land under an agreement of another to sell it to him, and to convey it to him on payment of the purchase-price, is not bound by the decree in an action against his vendor to quiet title, if he was not a party to the suit. Steel *v.* Long, 104 Iowa 39, 73 N. W. 470. A party in possession of land under contract to purchase is not in privity with the party who contracts to sell, in the sense that he will be bound by a judgment affecting such property, where the action was commenced after the entry into such contract. Schuler *v.* Ford, 10 Ida. 739, 80 Pac. 219.

Purchaser under unrecorded deed.— It has been held that a purchaser of land to whom the deed has been delivered, although it has not yet been recorded, is not affected by a judgment in an action subsequently brought against his grantor by a third person, if he was not made a party. Masterson *v.* Little, 75 Tex. 682, 13 S. W. 154. But see Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834.

Purchaser with notice.— Where a purchaser of real estate gave his notes in part payment, secured by a judgment bond, and thereafter sold the land to C, with notice of the notes yet due, and, one of them not being met at maturity, judgment was entered up for the balance unpaid in accordance with the terms of the bond, it was held that the judgment was binding and conclusive on C. Verner *v.* Carson, 66 Pa. St. 440. And see Johnson *v.* Stebbins-Thompson Realty Co., 177 Mo. 581, 76 S. W. 1021.

88. *Alabama.*— Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426; Graham *v.* Tankersley, 15 Ala. 634.

New Hampshire.— Warren *v.* Cochran, 27 N. H. 339.

Pennsylvania.— Jackson *v.* Summerville, 13 Pa. St. 359.

Tennessee.— Winchester Bank *v.* White, 114 Tenn. 62, 84 S. W. 697.

Texas.— McKelvain *v.* Allen, 58 Tex. 383; Foster *v.* Andrews, 4 Tex. Civ. App. 429, 23 S. W. 610.

United States.— Waples *v.* U. S., 16 Ct. Cl. 126.

See 30 Cent. Dig. tit. "Judgment," § 1203.

But see Gathe *v.* Broussard, 49 La. Ann. 312, 21 So. 839; Castellano *v.* Peillon, 2 Mart. N. S. (La.) 466.

regarded as privies to the judgment authorizing the sale, and therefore all such persons are concluded by the judgment.[89]

(c) *Seller and Buyer of Personal Property.* As in the case of real property, so also in the case of personal property a purchaser thereof is estopped or concluded by the judgment rendered in an action by or against his vendor, concerning the ownership of the property or the right to use it or claims upon it, provided he acquired his interest during the pendency of the suit, or after the rendition of the judgment therein.[90] This rule, however, does not apply where he took title before the suit was begun;[91] and a judgment against the vendee is not

89. *Georgia.*— Faulkner *v.* Vickers, 94 Ga. 531, 21 S. E. 233; Gunn *v.* Wades, 62 Ga. 20; Means *v.* Sanders, 14 Ga. 113.

Iowa.— Spurgin *v.* Bowers, 82 Iowa 187, 47 N. W. 1029; Blake *v.* Koons, 71 Iowa 356, 32 N. W. 379.

Louisiana.— Dismukes *v.* Musgrove, 2 La. 335.

Mississippi.— Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375.

Pennsylvania.— Soper *v.* Guernsey, 71 Pa. St. 219. *Compare* Thompson *v.* Stitt, 56 Pa. St. 156.

West Virginia.— Hurxthal *v.* St. Lawrence Boom, etc., Co., 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954; State *v.* Irwin, 51 W. Va. 192, 41 S. E. 124.

United States.— St. Louis, etc., R. Co. *v.* Stark, 55 Fed. 758, 5 C. C. A. 264; Beattie *v.* Wilkinson, 36 Fed. 646; Boston Cent. Nat. Bank *v.* Hazard, 30 Fed. 484.

See 30 Cent. Dig. tit. "Judgment," § 1205. And see JUDICIAL SALES.

Administrator and probate purchaser.— There is no privity between an administrator and a purchaser under a sale by order of the probate court; and consequently a decree in a suit to which the administrator was a party is not available to estop the purchaser who was not a party. Crandall *v.* Gallup, 12 Conn. 365.

Sheriff and vendee.— A sheriff and the purchaser at his sale are so far in privity that, where a plaintiff has unsuccessfully sued the sheriff for seizing the property, he cannot afterward maintain an action against the purchaser of the same property at the sheriff's sale. Prentiss *v.* Holbrook, 2 Mich. 372. But *compare* Wilson *v.* Campbell, 33 Ala. 249, 70 Am. Dec. 586. But there is no such privity between a sheriff and plaintiff in an attachment as to render a judgment recovered against the sheriff by a keeper of attached property, for services as such keeper, a bar in favor of plaintiff in the writ, when sued on a contract to pay for another part of the same services. Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592.

Purchaser at tax-sale.— It has been held that a purchaser at a tax-sale of land is in privity with the title, if any, that is divested by the sale and passes to him; and hence he is bound by concurrent verdicts and judgments in prior actions of ejectment, to which his predecessors in title were parties, as to the location and title of the land in question. Strayer *v.* Johnson, 110 Pa. St. 21, 1 Atl. 222.

90. *Connecticut.*— Gould *v.* Stanton, 16 Conn. 12.

Illinois.— Merritt *v.* Eagan, 59 Ill. 212; Arenz *v.* Reible, 2 Ill. 340; Illinois Cent. R. Co. *v.* Miller, 32 Ill. App. 259.

New York.— Huber *v.* Ehlers, 76 N. Y. App. Div. 602, 79 N. Y. Suppl. 150; Shufelt *v.* Shufelt, 9 Paige 137, 37 Am. Dec. 381.

Pennsylvania.— Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131.

Texas.— Lehman *v.* Stone, (App. 1891) 16 S. W. 784.

Virginia.— Nichols *v.* Campbell, 10 Gratt. 560.

United States.— Mellen *v.* Moline Malleable Iron Works, 131 U. S. 352, 9 S. Ct. 781, 33 L. ed. 178; Scotland County *v.* Hill, 112 U. S. 183, 5 S. Ct. 93, 28 L. ed. 692; Louis *v.* Brown Tp., 109 U. S. 162, 3 S. Ct. 92, 27 L. ed. 892; Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. 741, 24 L. ed. 170; Gorham *v.* Broad River Tp., 118 Fed. 1016 [*affirming* 109 Fed. 772]; Norton *v.* San José Fruit-Packing Co., 79 Fed. 793, 25 C. C. A. 194; Jonathan Mills Mfg. Co. *v.* Whitehurst, 72 Fed. 496, 19 C. C. A. 130.

See 30 Cent. Dig. tit. "Judgment," § 1204.

But see McKay *v.* Kilburn, 42 Mich. 614, 4 N. W. 539.

Patent infringement suit.— In a suit against a manufacturer of a machine for infringing a patent, a judgment for defendant on the merits on the question of infringement is conclusive in a suit by the same complainant against a purchaser of the identical machine from said manufacturer. Norton *v.* San José Fruit-Packing Co., 79 Fed. 793, 25 C. C. A. 194.

Purchaser of municipal bonds.— A judgment rendered in an action on coupons from municipal bonds, adjudging the bonds void, is conclusive against a subsequent purchaser of such bonds, unless it is shown that he bought before maturity and without notice of the judgment. Corliss *v.* Pulaski County, 109 Fed. 843.

91. *Alabama.*— Bloodgood *v.* Grasey, 31 Ala. 575; Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505.

Pennsylvania.— Moreland *v.* H. C. Frick Coke Co., 170 Pa. St. 33, 32 Atl. 634.

Texas.— Liles *v.* Woods, 58 Tex. 416.

Wisconsin.— Whitney *v.* Brunette, 15 Wis. 61.

United States.— St. Romes *v.* Levee Steam Cotton-Press Co., 127 U. S. 614, 8 S. Ct. 1335, 32 L. ed. 289.

See 30 Cent. Dig. tit. "Judgment," § 1204.

binding on the vendor, unless the latter had notice of the suit and an opportunity to assume the defense of it.[92]

g. Mortgagor and Mortgagee. A judgment against a mortgagor of realty, rendered prior to the execution of the mortgage, binds the mortgagee as a privy and is conclusive upon him;[93] but a mortgagee is not bound by any proceedings against his mortgagor which were not begun until after the execution of the mortgage, unless he was made a party thereto.[94] And a judgment against the mortgagee is not binding on the mortgagor, where the latter was not in any way joined in the action.[95]

h. Assignor and Assignee. The assignee of a right of property or chose in action is concluded by a judgment for or against his assignor in a suit begun before the assignment,[96] but not where his rights vested prior to the commencement of the

92. *Illinois.*— Danforth *v.* Clary, 49 Ill. App. 523.

Missouri.— Fallon *v.* Murray, 16 Mo. 168.

Tennessee.— Roper *v.* Rowlett, 7 Lea 320.

Vermont.— Gerrish *v.* Bragg, 55 Vt. 329.

United States.— Davis *v.* Wood, 1 Wheat. 6, 4 L. ed. 22.

See 30 Cent. Dig. tit. "Judgment," § 1204.

Compare Volant *v.* Lambert, 6 Mart. N. S. (La.) 555; Pickett *v.* Ford, 4 How. (Miss.) 246.

Vendor repurchasing.— Where a judgment debtor transfers personal property to a third person and then repurchases it, he is bound by a judgment rendered in the mean time, in an action between the sheriff holding an execution against him and such third person, in which the issue was as to the validity of the transfer as against his creditors. Jones *v.* Dipert, 123 Ind. 594, 23 N. E. 944.

93. American Mortg. Co. *v.* Boyd, 92 Ala. 139, 9 So. 166; Cook *v.* Parham, 63 Ala. 456; Wilson *v.* Tompkins, 24 Misc. (N. Y.) 598, 54 N. Y. Suppl. 6; Schnepf's Appeal, 47 Pa. St. 37.

94. *Alabama.*— Bolling *v.* Pace, 99 Ala. 607, 12 So. 796; Boutwell *v.* Steiner, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375.

California.— Hewlett *v.* Pilcher, 85 Cal. 542, 24 Pac. 781.

Connecticut.— White *v.* Wheaton, 16 Conn. 530; Hough *v.* Ives, 1 Root 492.

Florida.— Logan *v.* Stieff, 36 Fla. 473, 18 So. 762.

Kansas.— Provident Loan Trust Co. *v.* Marks, 59 Kan. 230, 52 Pac. 449, 68 Am. St. Rep. 349.

Kentucky.— Caumiser *v.* Humpich, 64 S. W. 851, 23 Ky. L. Rep. 1133.

Louisiana.— Wheelright *v.* St. Louis, etc., Canal, etc., Co., 47 La. Ann. 533, 17 So. 133.

Michigan.— Vincent *v.* Hansen, 113 Mich. 173, 71 N. W. 488; Damm *v.* Mason, 102 Mich. 545, 61 N. W. 3.

Minnesota.— Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988.

Nebraska.— Goff *v.* Byers, (1903) 96 N. W. 1037.

New Jersey.— Slack *v.* John, 63 N. J. Eq. 126, 51 Atl. 151.

New York.— Campbell *v.* Hall, 16 N. Y. 575; Mechanics' Sav. Bank *v.* Selye, 83 Hun 282, 31 N. Y. Suppl. 921.

Texas.— Reagan *v.* Evans, 2 Tex. Civ. App. 35, 21 S. W. 427.

Virginia.— Gentry *v.* Allen, 32 Gratt. 254.

United States.— Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; Columbia Ave. Sav. Fund, etc., Co. *v.* Dawson, 130 Fed. 152; Bancroft *v.* Wicomico County Com'rs, 121 Fed. 874; Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Southern Bank, etc., Co. *v.* Folsom, 75 Fed. 929, 21 C. C. A. 568; Wabash, etc., R. Co. *v.* Central Trust Co., 33 Fed. 238.

See 30 Cent. Dig. tit. "Judgment," § 1208.

But see Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813; Loeh *v.* Chicago, etc., R. Co., 60 Miss. 933.

Foreclosure of mechanic's lien.— A judgment rendered in an action to enforce a mechanic's lien on property is not binding on a prior mortgagee of the same property, unless he was made a party to the action. Gamble *v.* Voll, 15 Cal. 507; Fleming *v.* Prudential Ins. Co., 19 Colo. App. 126, 73 Pac. 752; Bannon *v.* Thayer, 124 Ill. 451, 17 N. E. 54; National Foundry, etc., Works *v.* Oconto City Water Supply Co., 113 Fed. 793, 51 C. C. A. 465. But see State *v.* Eads, 15 Iowa 114, 83 Am. Dec. 399.

Attaching creditor.— In a suit between a mortgagee and an attaching creditor of the mortgagor, a judgment in the attachment suit in favor of the creditor is not admissible against the mortgagee, if he was not a party thereto. Haller *v.* Parrott, 82 Iowa 42, 47 N. W. 996. And see Foster *v.* Andrews, 4 Tex. Civ. App. 429, 23 S. W. 610.

A second mortgagee is not bound by recitals in a decree foreclosing a first mortgage to which he was not a party. Harper *v.* East Side Syndicate, 40 Minn. 381, 42 N. W. 86.

Replevin of mortgaged chattels.— A judgment in replevin against a mortgagor of chattels is not binding on the mortgagee, not being a party thereto, even though he defended the suit as attorney for the mortgagor. Tyres *v.* Kennedy, 126 Ind. 523, 26 N. E. 394; Vincent *v.* Hansen, 113 Mich. 173, 71 N. W. 488.

95. Shattuck *v.* Bascom, 105 N. Y. 39, 12 N. E. 283. And see Williams *v.* Cooper, 124 Cal. 666, 57 Pac. 577.

96. *Connecticut.*— Chapin *v.* Curtis, 23 Conn. 388.

action.[97] As to a judgment for or against the assignee, some cases hold it conclusive on the assignor, on the general ground of the privity between them;[98] but the general rule is not to give it that effect unless the assignor was made a party to the action or at least notified of it,[99] except where he made the assignment for the very purpose of having an action brought in the name of the assignee.[1]

i. Landlord and Tenant. In some states it is held that, where ejectment is brought against a tenant in possession, and he gives due and legal notice to his landlord, and the latter has an opportunity to come in and defend, the landlord is bound by the judgment against the tenant;[2] but in others it is held that the lessor is not estopped or concluded by the judgment in a former action against his tenant, although he may have been notified and have even put his title in issue and

Kansas.— Goodin *v.* Newcomb, 6 Kan. App. 431, 49 Pac. 821.

Kentucky.— Bitzer *v.* Mercke, 111 Ky. 299, 63 S. W. 771, 23 Ky. L. Rep. 670.

Louisiana.— Bisland *v.* Griffin, 9 La. Ann. 150; Judice *v.* Kerr, 8 La. Ann. 462.

New York.— Tauziede *v.* Jumel, 138 N. Y. 431, 34 N. E. 274; Butterly *v.* Deering, 102 N. Y. App. Div. 395, 92 N. Y. Suppl. 675; Field *v.* Sands, 8 Bosw. 685; Brown *v.* Brown, 2 E. D. Smith 153; Southgate *v.* Montgomery, 1 Paige 41. And see Matter of Roberts, 98 N. Y. App. Div. 155, 90 N. Y. Suppl. 731. *Compare* Nathan *v.* Uhlmann, 101 N. Y. App. Div. 388, 92 N. Y. Suppl. 13.

Ohio.— Mengert *v.* Brinkerhoff, 67 Ohio St. 472, 66 N. E. 530.

Tennessee.— Buckner *v.* Geodeker, (Ch. App. 1897) 45 S. W. 448.

Texas.— Bonner *v.* Green, 6 Tex. Civ. App. 96, 24 S. W. 835.

Utah.— Snyder *v.* Murdock, 26 Utah 233, 73 Pac. 22.

Washington.— Davis *v.* Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526.

United States.—Adams *v.* Preston, 22 How. 473, 16 L. ed. 273.

See 30 Cent. Dig. tit. "Judgment," § 1206.

The assignee of an agreement is concluded in equity by a decision at law against his assignor, the assignee having notice of the suit. Rogers *v.* Haines, 3 Me. 362; Southgate *v.* Montgomery, 1 Paige (N. Y.) 41; Curtis *v.* Cisna, 1 Ohio 429.

97. *California.*— Gregory *v.* Clabrough, 129 Cal. 475, 62 Pac. 72.

Michigan.— Aultman *v.* Sloan, 115 Mich. 151, 73 N. W. 123.

Ohio.— Kilgour *v.* Pendleton St. R. Co., 6 Ohio Dec. (Reprint) 1157, 11 Am. L. Rec. 38.

Texas.— Cunningham *v.* Holt, 12 Tex. Civ. App. 150, 33 S. W. 981.

Wisconsin.— Smith *v.* Milwaukee, 18 Wis. 369.

United States.— Richardson *v.* Warner, 28 Fed. 343.

See 30 Cent. Dig. tit. "Judgment," § 1206.

These rules are applied in case of the assignment of mortgages (Zion Church *v.* Parker, 114 Iowa 1, 86 N. W. 60; Boteler *v.* Beall, 7 Gill & J. (Md.) 389; Aultman *v.* Sloan, 115 Mich. 151, 73 N. W. 123; Bailey *v.* Wells, 68 S. C. 150, 46 S. E. 768; Smith *v.* Kernochen, 7 How. (U. S.) 198, 12 L. ed. 666; Richardson *v.* Warner, 28 Fed. 343), mechanics' liens (Shryock *v.* Hensel, 95 Md. 614, 53 Atl. 412), judgments (Porter *v.* Bagby, 50 Kan. 412, 31 Pac. 1058; Hart *v.* Bates, 17 S. C. 35), contracts (Lawrence *v.* Milwaukee, 45 Wis. 306; Brown *v.* District of Columbia, 127 U. S. 579, 8 S. Ct. 1314, 32 L. ed. 262), leases (Ruppel *v.* Patterson, 1 Fed. 220), patents (Pennington *v.* Hunt, 20 Fed. 195), municipal bonds or coupons therefrom (Bourbon County *v.* Block, 99 U. S. 686, 25 L. ed. 491), corporate stock (Barrowcliffe *v.* Cummins, 2 Silv. Sup. (N. Y.) 59, 6 N. Y. Suppl. 228), and warrants or other municipal obligations (Hartson *v.* Shanklin, 58 Cal. 248; State *v.* Benson, 70 Ind. 481).

98. *In re* Baird, 84 Cal. 95, 24 Pac. 167; Godding *v.* Colorado Springs Live-Stock Co., 4 Colo. App. 14, 34 Pac. 942.

99. Schmidt *v.* Louisville, etc., R. Co., 99 Ky. 143, 35 S. W. 135, 36 S. W. 168, 18 Ky. L. Rep. 65; Gaines *v.* Patterson, 3 Dana (Ky.) 408; Hunt *v.* Lucas, 68 Mo. App. 518; Johnson *v.* Union Switch, etc., Co., 129 N. Y. 653, 29 N. E. 964; Bloomer *v.* Sturges, 58 N. Y. 168; Tyree *v.* Magness, 1 Sneed (Tenn.) 276.

1. Cheney *v.* Patton, 144 Ill. 373, 34 N. E. 416; Garretson *v.* Ferrall, 92 Iowa 728, 61 N. W. 251.

2. *California.*— McCreery *v.* Everding, 54 Cal. 168; Chant *v.* Reynolds, 49 Cal. 213; Douglas *v.* Fulda, 45 Cal. 592; Calderwood *v.* Brooks, 45 Cal. 519; Valentine *v.* Mahoney, 37 Cal. 389.

Illinois.— Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373; Orthwein *v.* Thomas, (1887) 13 N. E. 564; Oetgen *v.* Ross, 47 Ill. 142, 95 Am. Dec. 468; Hanson *v.* Armstrong, 22 Ill. 442.

Kentucky.— Pleak *v.* Chambers, 5 Dana 60.

Maine.— Smith *v.* Hall, 8 Me. 348.

Maryland.— Western Tel. Co. *v.* Baltimore, etc., R. Co., 69 Md. 211, 14 Atl. 531.

Michigan.— Powers *v.* Scholtens, 79 Mich. 299, 44 N. W. 613.

Missouri.— Harvie *v.* Turner, 46 Mo. 444.

Ohio.— Bates *v.* Neski, 6 Ohio Dec. (Reprint) 1064, 10 Am. L. Rec. 50.

Pennsylvania.— Chambers *v.* Lapsley, 7 Pa. St. 24.

Vermont.— Knapp *v.* Marlboro, 31 Vt. 674. See Brush *v.* Cook, Brayt. 89.

defended it, unless he was made a party of record.[3] On the other hand a judgment in ejectment against the landlord cannot affect a tenant who was in possession of the premises at the beginning of the suit, unless he is made a defendant.[4] Where the action is brought by the tenant, the conclusiveness of the judgment will inure equally to the benefit and protection of the landlord;[5] but since they hold different estates in the property, and may be separately injured by the same act, a judgment for or against one will not be evidence for or against the other, in respect to matters not affecting the title or right of possession.[6] There is no privity between a sublessee and the original lessor, and hence the sublessee is a stranger to an action by the original lessor against the original lessee for restitution of the premises.[7]

j. Husband and Wife. There is no legal privity between husband and wife in such sense that a judgment for or against the one will conclude the other, where the action concerns their separate property, rights, or interests not derived from each other;[8] but either may be concluded by being joined as a party with the

West Virginia.— Clark *v.* Perdue, 40 W. Va. 300, 21 S. E. 735.

See 30 Cent. Dig. tit. "Judgment," § 1207.

3. *Alabama.*— Wilson *v.* State, 115 Ala. 129, 22 So. 567; Stanley *v.* Johnson, 113 Ala. 344, 21 So. 823; Smith *v.* Gayle, 58 Ala. 600.

Florida.— Elizabethport Cordage Co. *v.* Whitlock, 37 Fla. 190, 20 So. 255.

Indiana.— Wilson *v.* Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792; Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830.

Indian Territory.— Lochner *v.* Garborina, 3 Indian Terr. 664, 64 S. W. 570.

Louisiana.— State *v.* Morgan's Louisiana, etc., R., etc., Co., 106 La. 513, 31 So. 115.

Missouri.— Hughes *v.* Carson, 90 Mo. 399, 2 S. W. 441; Magwire *v.* Labeaume, 7 Mo. App. 179.

New Jersey.— Baxter *v.* Carrol, (Ch. 1898) 41 Atl. 407.

New York.— Bradt *v.* Church, 110 N. Y. 537, 18 N. E. 357; Bennett *v.* Leach, 25 Hun 178; New York L. Ins. Co. *v.* Cutler, 9 How. Pr. 407; Ryerss *v.* Rippey, 25 Wend. 432. See Van Alstine *v.* McCarty, 51 Barb. 326.

South Carolina.— Samuel *v.* Dinkins, 12 Rich. 172, 75 Am. Dec. 729. See Lamar *v.* Raysor, 7 Rich. 509.

Tennessee.— Cope *v.* Payne, 111 Tenn. 128, 76 S. W. 820, 102 Am. St. Rep. 746; Boles *v.* Smith, 5 Sneed 105.

Texas.— Stout *v.* Taul, 71 Tex. 438, 9 S. W. 329; Moser *v.* Hussey, 67 Tex. 456, 3 S. W. 688; Read *v.* Allen, 58 Tex. 380; Hart *v.* Meredith, 27 Tex. Civ. App. 271, 65 S. W. 507; Haney *v.* Brown, (Civ. App. 1898) 46 S. W. 55; Penfield *v.* Harris, 7 Tex. Civ. App. 659, 27 S. W. 762.

Wisconsin.— Coe *v.* Manseau, 62 Wis. 81, 22 N. W. 155; Kent *v.* Lasley, 48 Wis. 257, 4 N. W. 23; Mariner *v.* Chamberlain, 21 Wis. 251.

See 30 Cent. Dig. tit. "Judgment," § 1207.

Judgment as evidence.— Where an action is brought against a tenant by a stranger to recover possession of the premises, without notice to the landlord, and judgment is rendered for the stranger, the possession is adversely and completely changed by virtue of the judgment, and to that extent the landlord is bound by the judgment in spite of his want of notice, although he is not concluded as to the title or future right of possession. Stridde *v.* Saroni, 21 Wis. 173.

4. Lankford *v.* Green, 62 Ala. 314; Satterlee *v.* Bliss, 36 Cal. 489; Moores *v.* Townshend, 54 N. Y. Super. Ct. 245; Burkman *v.* Jamieson, 25 Wash. 606, 66 Pac. 48. But *compare* Clark *v.* Gale, 5 J. J. Marsh. (Ky.) 313; Sawyer *v.* McAdie, 70 Mich. 386, 38 N. W. 292; Blew *v.* Ritz, 82 Minn. 530, 85 N. W. 548; Hessel *v.* Johnson, 124 Pa. St. 233, 16 Atl. 855.

Judgment as evidence in favor of tenant.— A judgment on the merits for defendant in an action against a railroad company which has leased its lines to another founded on the alleged negligence of the lessee is conclusive against the right of plaintiff in that action to recover in a subsequent suit against the lessee based on the same act of negligence. Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717.

Tenant having notice of suit.— If a tenant has taken possession with actual notice of the pendency of an action of ejectment against his landlord, he will be estopped by the judgment as if he were a party. Fogarty *v.* Sparks, 22 Cal. 142. And see Stanbrough *v.* Cook, 83 Iowa 705, 49 N. W. 1010; Bradley *v.* McDaniel, 48 N. C. 128.

5. Freer *v.* Stolenbur, 2 Abb. Dec. (N. Y.) 189, 2 Keyes 467, 34 How. Pr. 440. *Compare* Wilson *v.* Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792.

6. Bartlett *v.* Boston Gas Light Co., 122 Mass. 209. And see Baker *v.* Sanderson, 3 Pick. (Mass.) 348; Broadwall *v.* Banks, 134 Fed. 470.

7. Wray-Austin Mach. Co. *v.* Flower, (Mich. 1905) 103 N. W. 873.

8. *Alabama.*— Leinkauff *v.* Munter, 76 Ala. 194; Sloan *v.* Frothingham, 72 Ala. 589; Walker *v.* Elledge, 65 Ala. 51; Michan *v.* Wyatt, 21 Ala. 813.

Arkansas.— McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731.

Delaware.— Doe *v.* Prettyman, 1 Houst. 334.

other in an action where such joinder would not be improper;[9] and a wife will be concluded by a judgment in an action for or against her husband in respect to any right or interest which she claims through or under him.[10] A judgment in an action against a husband only, to determine adverse claims to land, bars an

Georgia.— Moore *v.* O'Barr, 87 Ga. 205, 13 S. E. 464.

Illinois.— Franklin Sav. Bank *v.* Taylor, 131 Ill. 376, 23 N. E. 397; Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434; Price *v.* Hudson, 125 Ill. 284, 17 N. E. 817; McCann *v.* O'Connell, 54 Ill. App. 209.

Iowa.— Hamilton *v.* Wright, 30 Iowa 480.

Kentucky.— Murray *v.* Fishback, 5 B. Mon. 403; Greer *v.* Simrall, 59 S. W. 759, 22 Ky. L. Rep. 1037; Black *v.* Black, 51 S. W. 456, 21 Ky. L. Rep. 403; Durst *v.* Amyx, 13 S. W. 1087, 12 Ky. L. Rep. 246; Jacobs *v.* Case, 1 S. W. 6, 8 Ky. L. Rep. 54.

Nebraska.— Silk *v.* McDonald, 4 Nebr. (Unoff.) 34, 93 N. W. 212.

New York.— Zimmermann *v.* Rapp, 20 Wend. 100.

Ohio.— McArthur *v.* Franklin, 16 Ohio St. 193.

Pennsylvania.— Ewing *v.* Alcorn, 40 Pa. St. 492. But see McClelland *v.* Patterson, 4 Pa. Cas. 264, 10 Atl. 475.

Rhode Island.— Baxter *v.* Brown, 26 R. I. 381, 59 Atl. 73.

Tennessee.— McKinney *v.* Street, 107 Tenn. 526, 64 S. W. 482.

Texas.— Wilson *v.* Johnson, 94 Tex. 272, 60 S. W. 242; Overand *v.* Menczer, 83 Tex. 122, 18 S. W. 301; Read *v.* Allen, 56 Tex. 182; Seay *v.* Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181; Owens *v.* New York, etc., Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189; Frank *v.* Frank, (Civ. App. 1894) 25 S. W. 819.

See 30 Cent. Dig. tit. "Judgment," § 1216.

Action for personal injuries.— Where husband and wife bring separate and successive actions against the same defendant, for damages for personal injuries sustained by the wife, the judgment in one action is not evidence in the other. Neumeister *v.* Dubuque, 47 Iowa 465; Groth *v.* Washburn, 39 Hun (N. Y.) 324; Neeson *v.* Troy, 29 Hun (N. Y.) 173; Berg *v.* Third Ave. R. Co., 89 N. Y. Suppl. 433. But see Ballou *v.* Ballou, 110 N. Y. 394, 18 N. E. 118, 1 L. R. A. 462; Walker *v.* Philadelphia, 195 Pa. St. 168, 45 Atl. 657, 78 Am. St. Rep. 801; Galveston, etc., R. Co. *v.* Kutac, 72 Tex. 643, 11 S. W. 127; Selleck *v.* Janesville, 104 Wis. 770, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691. But judgment in a joint action by husband and wife for personal injuries to the wife is *res judicata*, on every issue determined therein, in an action by the husband for injuries accruing to him from the same injuries. Brown *v.* Missouri Pac. R. Co., 96 Mo. App. 164, 70 S. W. 527. And see Harkness *v.* Louisiana, etc., R. Co., 110 La. 822, 34 So. 791.

Recovery of wife's property or earnings.— It is a good defense to an action by husband and wife to recover her earnings that the same services by her were pleaded by the husband and allowed as a set-off in a former action against the husband. Cranor *v.* Winters, 75 Ind. 301. And a judgment for defendant, in a suit prosecuted in the name of the wife alone to recover property belonging to her, is a bar to a second suit, brought in the name of husband and wife, for the same subject-matter. Hawkins *v.* Lambert, 18 B. Mon. (Ky.) 99. But where a wife sued for services rendered and board furnished to a decedent, a judgment by which she recovered for the services, but which denied a recovery for the board, on the ground that it would be presumed to have been furnished by her husband, does not bar an action by the husband for the board. Stamp *v.* Franklin, 75 Hun (N. Y.) 373, 27 N. Y. Suppl. 84 [*affirmed* in 144 N. Y. 607, 39 N. E. 634].

An adjudication awarding the custody of a minor to the respondent in a habeas corpus proceeding sued out by a married man is not binding on his wife, and does not estop her from prosecuting a like proceeding against the same respondent. Taylor *v.* Neither, 108 Ga. 765, 33 S. E. 420.

9. Carpenter *v.* Green, 11 Allen (Mass.) 26; Anderson *v.* Watts, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078.

10. *Arkansas.*— McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731.

California.— Cook *v.* Rice, 91 Cal. 664, 27 Pac. 1081.

Georgia.— Ezzard *v.* Estes, 95 Ga. 712, 22 S. E. 713; Webster *v.* Dundee Mortg., etc., Co., 93 Ga. 278, 20 S. E. 310; Gill *v.* Mizell, 43 Ga. 589.

Indiana.— Tanguey *v.* O'Connell, 132 Ind. 62, 31 N. E. 469; Hanna *v.* Scott, 84 Ind. 71.

Iowa.— Campbell *v.* Ayres, 18 Iowa 252; Lummery *v.* Braddy, 8 Iowa 33.

Kentucky.— Frazier *v.* Brashears, 66 S. W. 1038, 23 Ky. L. Rep. 2232.

New York.— Ballou *v.* Ballou, 110 N. Y. 394, 18 N. E. 118, 1 L. R. A. 462.

South Carolina.— Pledger *v.* Ellerbe, 6 Rich. 266, 60 Am. Dec. 123.

Texas.— Smith *v.* Garza, 15 Tex. 150, 65 Am. Dec. 147; Mexia *v.* Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016. A judgment against a husband as to exemption of personal property is conclusive against his wife. Whitselle *v.* Jones, (Civ. App. 1897) 39 S. W. 405. But where a husband, after paying for his homestead, takes a deed reserving a vendor's lien, a judgment foreclosing such lien in a suit to which his wife is not a party is not binding on her. Seay *v.* Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181.

action by the husband and wife against plaintiff therein, involving the same questions, although the land is community property.[11]

k. Parent and Child. Children are not bound by judgments for or against their parents, where they have separate rights or interests;[12] but only where they claim from, through, or under their parents.[13]

l. Guardian and Ward. A ward is concluded by the judgment in any action concerning his interests in which he was legally represented by his guardian;[14] but not where the judgment is against the guardian alone, on an obligation which binds only the guardian and not the ward's estate.[15]

See 30 Cent. Dig. tit. "Judgment," § 1216.

Separate rights as widow and heir.— A judgment rendered by default on the foreclosure of a mortgage executed by a husband alone concludes his widow only as to her rights as his heir, and not as to rights vesting in her as his widow. Unfried *v.* Heberer, 63 Ind. 67.

Dower.— Where a judgment against a husband determines his interest in land to be that of a mortgagee, notwithstanding that the legal title is in him, it may be set up in bar of his wife's action for dower in the land, although she was not a party to the prior suit. Lea *v.* Woods, 67 Iowa 304, 25 N. W. 255.

11. Lichty *v.* Lewis, 77 Fed. 111, 23 C. C. A. 59.

12. *Alabama.*— Hawes *v.* Rucker, 94 Ala. 166, 10 So. 85.

Georgia.— Cason *v.* Walton, 62 Ga. 427; Lynch *v.* Jackson, 31 Ga. 668.

Illinois.— Breit *v.* Yeaton, 101 Ill. 242.

Louisiana.— Michie *v.* Armat, 15 La. Ann. 225, holding that a father and mother cannot bind their minor children by confessing judgment in a court that has no jurisdiction over their domicile.

Maryland.— Butler *v.* Craig, 2 Harr. & M. 214; Toogood *v.* Scott, 2 Harr. & M. 26.

Massachusetts.— Holland *v.* Cruft, 3 Gray 162.

New York.— Downey *v.* Seib, 102 N. Y. App. Div. 317, 92 N. Y. Suppl. 431.

Pennsylvania.— Heft *v.* McGill, 3 Pa. St. 256.

Texas.— Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629; Boles *v.* Walton, 32 Tex. Civ. App. 595, 74 S. W. 81.

Virginia.— Talbert *v.* Jenny, 6 Rand. 159.

See 30 Cent. Dig. tit. "Judgment," § 1217.

Children as remainder-men.— Where a deed, will, or settlement vests in children an estate in remainder, their father or mother being the life-tenant, a judgment for or against the latter, in respect to the property, does not bind the children unless they are made parties. Nevitt *v.* Woodburn, 82 Ill. App. 649; Brewer *v.* Hardy, 22 Pick. (Mass.) 376, 33 Am. Dec. 747; Hall *v.* Want, 61 N. C. 502; Katzenberger *v.* Weaver, 110 Tenn. 620, 75 S. W. 937; Kirklin *v.* Atlas Sav., etc., Assoc., (Tenn. Ch. App. 1900) 60 S. W. 149. And see *supra*, XIV, B, 5, f, (II).

Action for personal injuries.— Where a father and a minor son maintain separate and successive actions against the same defendant, for damages for personal injuries alleged to have been sustained by the minor while in the defendant's employ and through the latter's negligence, a judgment rendered in the one action cannot be used to prove the fact of negligence or the circumstances of the accident in the other action. Malsky *v.* Schumacher, 7 Misc. (N. Y.) 8, 27 N. Y. Suppl. 331; Guy *v.* Fisher, etc., Lumber Co., 93 Tenn. 213, 23 S. W. 972. *Contra*, Anderson *v.* Third Ave. R. Co., 9 Daly (N. Y.) 487.

13. Rafferty *v.* Buckler, 23 S. W. 947, 15 Ky. L. Rep. 490; Johnson *v.* Hurst, 9 S. W. 828, 10 Ky. L. Rep. 622; Murray *v.* Bronson, 1 Dem. Surr. (N. Y.) 217; Cabot *v.* Washington, 41 Vt. 168.

A judgment either establishing or rejecting a claim of homestead, set up by the father of a family in an action to which he is a party, concerning the land in which such homestead is claimed, is conclusive on his children. Tadlock *v.* Eccles, 20 Tex. 782, 73 Am. Dec. 213.

14. *Georgia.*— Barclay *v.* Kimsey, 72 Ga. 725.

Illinois.— Hickenbotham *v.* Blackledge, 54 Ill. 316; Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491. But *compare* Swift *v.* Yanaway, 153 Ill. 197, 38 N. E. 589.

Indiana.—Loehr *v.* Colborn, 92 Ind. 24.

Louisiana.— Ross *v.* Enaut, 46 La. Ann. 1250, 15 So. 803. See, however, Sexton *v.* McMahon, 28 La. Ann. 898.

Mississippi.— Burkett *v.* Burkett, 81 Miss. 593, 33 So. 417.

Missouri.— Fiene *v.* Kirchoff, 176 Mo. 516, 75 S. W. 608.

North Carolina.— Sinclair *v.* Williams, 43 N. C. 235.

See 30 Cent. Dig. tit. "Judgment," § 1215.

Suit between successive guardians.— A judgment regularly rendered between the new tutor and the former tutor of a minor will sustain the plea of *res judicata* in an action brought by the minor, after attaining his majority, against his former tutor. Porche *v.* Ledoux, 12 La. Ann. 350.

Sureties on guardian's bond.— A judgment that a guardian's bond is invalid for want of jurisdiction of the court to appoint him is, although rendered in a proceeding to which the ward was not a party, available to the sureties in the ward's separate suit against them. Crum *v.* Wilson, 61 Miss. 233.

15. Cochran *v.* Violet, 57 La. Ann. 221; Morris *v.* Garrison, 27 Pa. St. 226.

m. Principal and Agent. Although there is in general no privity of estate between a principal and an agent,[16] yet a judgment against the principal is conclusive on the agent as to rights which he can claim only under his principal;[17] and where an agent as defendant in a suit sets up his principal's title, and judgment goes for plaintiff, the principal is concluded, at least if he had notice of the action and an opportunity to defend it.[18] So where plaintiff sues the agent and is defeated, and then sues the principal, the latter may take advantage of the estoppel against plaintiff.[19] But a judgment against a principal for damages caused by the negligence of his agent, while it is evidence to show the *quantum* of damages in an action by the former against the latter to recover for the damages sustained by the principal, is not admissible to show that the alleged damages were attributable to the agent's negligence.[20] A recovery by the agent in replevin is generally admissible as evidence in favor of his principal.[21] A person who, after ascertaining all the material facts of the agency of another with whom he has contracted recovers a judgment against the agent on such contract is barred from suing the principal thereon; the taking of judgment is conclusive evidence of an election to resort to the agent to whom the credit was originally given.[22] An action by an agent for a conversion, in which the jury found the title to be in the principal and therefore gave the agent nominal damages, is no bar to an action by the principal.[23]

n. Master and Servant. Where a master defends an action against his servant, or has an opportunity to assume the defense, and is under an obligation to do so, because the acts complained of were done under his orders, he is bound by the judgment.[24] And an unsuccessful action of trespass against the master may be shown in bar of a subsequent action against the servant for the same acts of trespass.[25] But there is no privity between master and servant where the subject of the litigation does not concern the employment, or the relation of employer and employee is not a feature of the case.[26]

o. Bailor and Bailee. Where the owner of property brings an action for injury to it or conversion of it, and there is a judgment against him, it is a bar to a suit by the bailee of the property founded on the same facts;[27] and conversely a recovery and satisfaction by either the bailor or bailee may be pleaded in bar

16. Phillips *v.* Jamieson, 51 Mich. 153, 16 N. W. 318; Fogg *v.* Plumer, 17 N. H. 112; Goundie *v.* Northampton Water Co., 7 Pa. St. 233.

17. Moore *v.* Richardson, 100 Ill. App. 134 [*affirmed* in 197 Ill. 437, 64 N. E. 330], recovery in forcible entry and detainer.

18. *Kentucky.*— Warfield *v.* Davis, 14 B. Mon. 40. *Compare* McCallister *v.* Bridges, 40 S. W. 70, 19 Ky. L. Rep. 107.

Louisiana.— Guidry *v.* Jenneaud, 25 La. Ann. 634.

Maryland.— McKinzie *v.* Baltimore, etc., R. Co., 28 Md. 161.

Missouri.— Lippman *v.* Campbell, 40 Mo. App. 564.

Tennessee.— Farnsworth *v.* Arnold, 3 Sneed 252.

See 30 Cent. Dig. tit. "Judgment," § 1218.

But see Warner *v.* Comstock, 55 Mich. 615, 22 N. W. 64.

19. Lake Shore, etc., R. Co. *v.* Goldberg, 2 Ill. App. 228; Emma Silver Min. Co. *v.* Emma Silver Min. Co., 7 Fed. 401. And see Green *v.* Clarke, 12 N. Y. 343.

20. Baynard *v.* Harrity, 1 Houst. (Del.) 200; Erie Second Nat. Bank *v.* Ocean Nat. Bank, 21 Fed. Cas. No. 12,602, 11 Blatchf. 362. And see Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421.

21. Hoppin *v.* Avery, 87 Mich. 551, 49 N. W. 887.

22. Kingsley *v.* Davis, 104 Mass. 178.

23. Pico *v.* Webster, 12 Cal. 140.

24. Snyder *v.* Trumpbour, 38 N. Y. 355; Castle *v.* Noyes, 14 N. Y. 329. But *compare* Berg *v.* Parsons, 84 Hun (N. Y.) 60, 31 N. Y. Suppl. 1091; Alexander *v.* Taylor, 4 Den. (N. Y.) 302; Landa *v.* Obert, 78 Tex. 33, 14 S. W. 297.

25. Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

26. McCarty *v.* Lehigh Valley R. Co., 160 U. S. 110, 16 S. Ct. 240, 40 L. ed. 358.

Master of vessel and owners.— In the admiralty law, it is held that no privity, in this sense, exists between the master of a vessel and her owners. Bailey *v.* Sundberg, 49 Fed. 583, 1 C. C. A. 387; Gillingham *v.* Charleston Tow-Boat, etc., Co., 40 Fed. 649; Swett *v.* Black, 23 Fed. Cas. No. 13,690, 1 Sprague 574. And see State *v.* Judge Orleans Civ. Dist. Ct., 39 La. Ann. 499, 2 So. 37, 4 Am. St. Rep. 274; McEachern *v.* Cochran, 1 McCord (S. C.) 338.

27. Green *v.* Clarke, 12 N. Y. 343.

of an action by the other for the same injury.[28] And the bailor may be concluded by the result of an action by a stranger against the bailee, concerning the title to the property or the possession of it, at least if he had notice of the suit and could have defended it.[29]

p. Parties to Bills and Notes. There is in general no such privity between the maker, indorser, accepter, and holder of a bill or note that a judgment in one action upon the instrument will bar another, or raise an estoppel against a particular allegation or defense in the subsequent suit.[30] But where the indorsee or holder of a note is defeated in an action on the note against the maker, and thereupon sues his indorser or assignor, the latter is bound by the judgment if he had notice of the prior suit and an opportunity to participate in it,[31] although he is not concluded in the absence of such notice.[32] It is also generally held that a judgment on the merits in favor of the maker of a note, in an action against him by the holder of the note, whether payee or indorsee, will be conclusive in his favor in a subsequent suit against him by another plaintiff, whether indorsee or payee.[33]

q. Partners, Surviving Partners, and Representatives of Deceased. A partner cannot attack a judgment against the firm on grounds which might have been set up in the action against the firm,[34] except where the judgment against the firm

28. The Farmer *v.* McCraw, 26 Ala. 189, 62 Am. Dec. 718; Bissell *v.* Huntington, 2 N. H. 142; Chesley *v.* St. Clair, 1 N. H. 189. And see Chew *v.* Brumagen, 13 Wall. (U. S.) 497, 20 L. ed. 663, holding that where, in a suit by an assignee of a bond and mortgage, who holds it as collateral, the debtor recoups a certain amount from the mortgage debt, the assignor is concluded by the judgment.

29. Hughes *v.* United Pipe Lines, 119 N. Y. 423, 23 N. E. 1042; Byrne *v.* Crooks, 2 N. Y. City Ct. 148. But *compare* Standard Foundry Co. *v.* Schloss, 43 Mo. App. 304; Morgan's Estate, 11 Pa. Co. Ct. 536.

30. *Alabama.*— Lawrence *v.* Ware, 37 Ala. 553; Schaefer *v.* Adler, 14 Ala. 723.

Arkansas.— Jordan *v.* Ford, 7 Ark. 416.

Georgia.— Whitney *v.* Butts, 91 Ga. 124, 16 S. E. 649.

Illinois.— See Campbell *v.* Goodall, 8 Ill. App. 266.

Indiana.—Greathouse *v.* Kline, 93 Ind. 598; Boling *v.* Howell, 93 Ind. 329; Fordice *v.* Hardesty, 36 Ind. 23.

Kentucky.— Crabb *v.* Larkin, 9 Bush 154; Doyle *v.* Armstrong, 2 Duv. 534.

Louisiana.— Wells *v.* Coyle, 20 La. Ann. 396. See Williams *v.* Gilkerson-Sloss Commission Co., 45 La. Ann. 1013, 13 So. 394.

Maine.— Cobb *v.* Little, 2 Me. 261, 11 Am. Dec. 72.

Mississippi.— Wright *v.* Bixler, Walk. 256.

Missouri.— Corrigan *v.* Bell, 73 Mo. 53; Fenn *v.* Dugdale, 31 Mo. 580.

New York.— Barker *v.* Cassidy, 16 Barb. 177; Carter *v.* Howard, 17 Misc. 381, 39 N. Y. Suppl. 1060.

Pennsylvania.— Allen *v.* Union Bank, 5 Whart. 420. But see Lloyd *v.* Barr, 11 Pa. St. 41.

Texas.— Black *v.* Black, 62 Tex. 296. And see Scott *v.* American Nat. Bank, (Civ. App. 1904) 84 S. W. 445.

Virginia.— Chrisman *v.* Harman, 29 Gratt. 494, 26 Am. Rep. 387; Hooe *v.* Wilson, 5 Call 61.

United States.— Brooklyn City, etc., R. Co. *v.* New York Nat. Bank, 102 U. S. 14, 26 L. ed. 61.

Judgment fixing character of liability.— When a judgment has been rendered against a person on the verdict of a jury, finding him to be an original promisor of the note in that suit, instead of an indorser, as he alleged himself to be in his defense, he is estopped to deny that relation in any litigation with any other party to the note. Sturtevant *v.* Randall, 53 Me. 149.

A judgment on a note lost after maturity is a complete bar to another action brought by any person who should receive it after maturity. Elliott *v.* Woodward, 18 Ind. 183.

Judgment as proof of recovery.— The record of a suit against indorsers is admissible, in a suit by them against the maker, to prove a recovery from them. Chance *v.* Summerford, 25 Ga. 662.

Purchaser without notice.— An indorsee who acquires a negotiable note before maturity, for a valuable consideration and without notice, is not bound by a decree in a chancery suit to which his indorser was a party, although he acquired the note after the rendition of the decree. Winston *v.* Westfeldt, 22 Ala. 760, 58 Am. Dec. 278.

31. Bullock *v.* Winter, 10 Ga. 214; Cressey *v.* Kimmel, 78 Ill. App. 27; Cross *v.* Pearson, 17 Ind. 612.

32. Morris *v.* Lucas, 8 Blackf. (Ind.) 9; Morgan *v.* Simmons, 3 J. J. Marsh. (Ky.) 611; Maupin *v.* Compton, 3 Bibb (Ky.) 214. See, however, Hagerthy *v.* Bradford, 9 Ala. 567; Ewing *v.* Sills, 1 Ind. 125.

33. Illinois Conference, etc. *v.* Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252; Leslie *v.* Bonte, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62; Hackleman *v.* Harrison, 50 Ind. 156; Levi *v.* McCraney, Morr. (Iowa) 91; Soward *v.* Coppage, 9 S. W. 389, 10 Ky. L. Rep. 436.

34. Winters *v.* Means, 50 Nebr. 209, 69 N. W. 753.

was taken on service on his copartner alone.[35] But a partnership is not bound by a judgment against a member of the firm in a suit to which it was not a party.[36] A judgment against a surviving partner for a partnership debt is not evidence against the representatives of a deceased partner in a suit to charge his estate, unless they were made parties to the action,[37] although it is admissible to prove the simple fact of a recovery against such surviving partner.[38]

r. Corporation and Stock-Holders. A judgment recovered against a corporation is generally held to be conclusive evidence in a subsequent suit against a stock-holder to collect the balance due on his subscription for stock, or to enforce his personal liability for the debts of the corporation,[39] although there are certain defenses still open to him not inconsistent with the judgment.[40] But there are

35. Lloyd *v.* Tracy, 53 Mo. App. 175; Latham *v.* Kenniston, 13 N. H. 203; Richardson *v.* Case, 3 N. Y. Civ. Proc. 295.

36. Pate *v.* Wyly, 118 Ga. 262, 45 S. E. 217.

37. *Alabama.*— Marr *v.* Southwick, 2 Port. 351.

Connecticut.— Barber *v.* Hartford Bank, 9 Conn. 407; Sturges *v.* Beach, 1 Conn. 507.

Indiana.— Newcome *v.* Wiggins, 78 Ind. 306.

Michigan.— Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182.

New Jersey.— Buckingham *v.* Ludlum, 37 N. J. Eq. 137.

New York.— Preston *v.* Fitch, 137 N. Y. 41, 33 N. E. 77; Leake, etc., Orphan House *v.* Lawrence, 11 Paige 80.

Pennsylvania.— Moore's Appeal, 34 Pa. St. 411; Runkel *v.* Phillips, 9 Phila. 619.

See 30 Cent. Dig. tit. "Judgment," § 1225.

38. Sturges *v.* Beach, 1 Conn. 567.

39. *California.*— Welch *v.* Sargent, 127 Cal. 72, 59 Pac. 319.

Illinois.— Singer *v.* Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; McCormick *v.* Seeberger, 73 Ill. App. 87; Schertz *v.* Chester First Nat. Bank, 47 Ill. App. 124. But see Lamar Ins. Co. *v.* Gulick, 102 Ill. 41.

Indiana.— Hatfield *v.* Cummings, 152 Ind. 537, 53 N. E. 761; Aimen *v.* Hardin, 60 Ind. 119. *Compare* Stewart *v.* Marion Trust Co., 155 Ind. 174, 57 N. E. 911.

Iowa.—Donworth *v.* Coolbaugh, 5 Iowa 300. *Compare* Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317, 89 Am. St. Rep. 351.

Kansas.— Ball *v.* Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638.

Kentucky.— Calloway *v.* Glenn, 105 Ky. 648, 49 S. W. 440, 20 Ky. L. Rep. 1447; Otter View Land Co. *v.* Bowling, 70 S. W. 834, 24 Ky. L. Rep. 1157.

Maine.— Barron *v.* Paine, 83 Me. 312, 22 Atl. 218; Milliken *v.* Whitehouse, 49 Me. 527; Came *v.* Brigham, 39 Me. 35; Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

Maryland.— Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367.

Massachusetts.— Thayer *v.* New England Lith. Steam Printing Co., 108 Mass. 523; Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385; Johnson *v.* Somerville Dyeing, etc., Co., 15 Gray 216; Farnum *v.* Ballard Vale Mach. Shop, 12 Cush. 507; Holyoke Bank *v.* Goodman Paper Mfg. Co., 9 Cush. 576; Lane *v.* Weymouth Fourth School Dist., 10 Metc. 462; Gaskill *v.* Dudley, 6 Metc. 546, 39 Am. Dec. 750; Brewer *v.* New Gloucester, 14 Mass. 216.

Minnesota.— Holland *v.* Duluth Iron Min., etc., Co., 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480.

Missouri.— Johnson *v.* Stebbins-Thompson Realty Co., 177 Mo. 581, 76 S. W. 1021; Nichols *v.* Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

Nebraska.— Com. Mut. F. Ins. Co. *v.* Hayden, 60 Nebr. 636, 83 N. W. 922, 83 Am. St. Rep. 545. But *compare* Gund *v.* Ballard, (1905) 103 N. W. 309.

New Jersey.— Willoughby *v.* Chicago Junction R., etc., Co., 50 N. J. Eq. 656, 25 Atl. 277.

North Carolina.— Heggie *v.* People's Bldg., etc., Assoc., 107 N. C. 581, 12 S. E. 275.

Ohio.— Gaw *v.* Glasshoro Novelty Glass Co., 20 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec. 32.

Pennsylvania.— Wilson *v.* Pittsburgh, etc., Coal Co., 43 Pa. St. 424.

Texas.— Cole *v.* Adams, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Utah.— Hearst *v.* Putnam Min. Co., 28 Utah 184, 77 Pac. 753, 66 L. R. A. 784.

United States.— Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184; James *v.* New York Cent. Trust Co., 98 Fed. 489, 39 C. C. A. 126; Hendrickson *v.* Bradley, 85 Fed. 508, 29 C. C. A. 303; Wilson *v.* Seymour, 76 Fed. 678, 22 C. C. A. 477; National Foundry, etc., Works *v.* Oconto Water Co., 68 Fed. 1006; Secor *v.* Singleton, 41 Fed. 725.

England.— Australasia Bank *v.* Nias, 16 Q. B. 717, 15 Jur. 967, 20 L. J. Q. B. 284, 71 E. C. L. 717.

See 30 Cent. Dig. tit. "Judgment," § 1226. See also CORPORATIONS, 10 Cyc. 733 *et seq.*

Pledgees of the stock of a corporation to secure a debt of the stock-holder are stockholders and not creditors of the corporation, and are therefore bound by a judgment against the corporation. Farmers' Bank *v.* Ohio River Line Steamboat Co., 108 Ky. 447, 56 S. W. 719, 22 Ky. L. Rep. 132.

40. Hudson *v.* Carman, 41 Me. 84, holding that the organization and existence of the

some cases holding that judgment against the corporation is only *prima facie* evidence against the stock-holder,[41] and in a few states it is not admissible in evidence at all.[42] In respect to rights arising out of contracts other than subscriptions for stock, a shareholder is not bound by a judgment against the corporation in any proceeding to which he was not a party.[43]

s. Corporation and Bondholders. There is no such privity between a corporation and the holders of its bonds as to make a judgment against the former conclusive on the latter,[44] although a bondholder who intervenes in litigation against the corporation and so makes himself a party is bound by the result;[45] and where the bonds are secured by a mortgage or deed of trust, the holders are represented by the trustee in any suit involving the validity of the mortgage or its foreclosure, and will be concluded by the decree, although not formally made parties.[46]

corporation must be proved as an independent fact in a suit against a stock-holder; that matter not being conclusively established by the first judgment.

Fraud and collusion in procuring the judgment against the corporation may be shown by the stock-holder, to escape the personal liability sought to be fixed upon him for the debt. Schertz *v.* Chester First Nat. Bank, 47 Ill. App. 124; Ball *v.* Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; Barron *v.* Paine, 83 Me. 312, 22 Atl. 218; Heggie *v.* People's Bldg., etc., Assoc., 107 N. C. 581, 12 S. E. 275; Wilson *v.* Kiesel, 9 Utah 397, 35 Pac. 488; James *v.* New York Cent. Trust Co., 98 Fed. 489, 39 C. C. A. 126.

Not a stock-holder.— Defendant may avoid the effect of the judgment by showing that he ceased to be a stock-holder of the corporation before it was rendered. Handrahan *v.* Cheshire Iron Works, 4 Allen (Mass.) 396; Commonwealth Mut. F. Ins. Co. *v.* Hayden, 60 Nebr. 636, 83 N. W. 922, 83 Am. St. Rep. 545.

Character of claim.— Where the stock-holder is liable only for a specified class of debts or claims, he may show that the claim on which the judgment was founded was not of that description. Wilson *v.* Pittsburgh, etc., Coal Co., 43 Pa. St. 424. And see Larrabee *v.* Baldwin, 35 Cal. 155; Conant *v.* Van Schaick, 24 Barb. (N. Y.) 87.

Ultra vires.— A stock-holder cannot show that the contract sued on was *ultra vires* of the corporation, that being a defense which should have been set up in the original action. Baines *v.* Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Singer *v.* Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133. But see Ward *v.* Joslin, 105 Fed. 224, 44 C. C. A. 456.

Release of corporation.— A judgment on the guaranty of a bank in liquidation is not conclusive on a stock-holder of the bank, who is shown to have had no knowledge of the release of the principal at the time the judgment was obtained. Schrader *v.* Manufacturers' Nat. Bank, 133 U. S. 67, 10 S. Ct. 238, 33 L. ed. 564.

Default of receiver.— The fact that a general receiver for a corporation, who was made defendant and served with process in the action against the corporation, suffered a default, will not affect the conclusive character of the adjudication. Hale *v.* Hardon, 95 Fed. 747, 37 C. C. A. 240.

41. Grund *v.* Tucker, 5 Kan. 70; Merchants' Bank *v.* Chandler, 19 Wis. 434; Berger *v.* Williams, 3 Fed. Cas. No. 1,341, 4 McLean 577. See also CORPORATIONS, 10 Cyc. 734.

42. Bradford *v.* Columbus Water Lot Co., 58 Ga. 280; Hopkins *v.* Connel, 2 Tenn. Ch. 323. But *compare* Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

In New York, after a long series of conflicting decisions, it appears to be now settled that the judgment against the corporation is not conclusive, and not even *prima facie* evidence, against the stock-holder. McMahon *v.* Macy, 51 N. Y. 155; Torbett *v.* Godwin, 62 Hun 407, 17 N. Y. Suppl. 46; Strong *v.* Wheaton, 38 Barb. 616; Wetter *v.* Lewis, 22 Misc. 122, 48 N. Y. Suppl. 617. Earlier decisions, vacillating from one side of the question to the other, and not consistent with each other, may be seen in the following cases: Stephens *v.* Fox, 83 N. Y. 313; Miller *v.* White, 50 N. Y. 137; Lowry *v.* Inman, 46 N. Y. 119; Belmont *v.* Coleman, 21 N. Y. 96; Wheeler *v.* Miller, 24 Hun 541; Miller *v.* White, 59 Barb. 434; Hoagland *v.* Bell, 36 Barb. 57; Hall *v.* Sigel, 13 Abb. Pr. N. S. 178; Conklin *v.* Furman, 8 Abb. Pr. N. S. 161; Moss *v.* McCullough, 5 Hill 131; Moss *v.* Oakley, 2 Hill 265; Slee *v.* Bloom, 20 Johns. 669. See also CORPORATIONS, 10 Cyc. 733, 734.

43. State Bank *v.* Bobo, 11 Rich. (S. C.) 597; Clausen *v.* Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933; Andrews *v.* National Foundry, etc., Works, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139. See also CORPORATIONS, 10 Cyc. 734.

44. State *v.* Wichita County, 59 Kan. 512, 53 Pac. 526; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; Bancroft *v.* Wicomico County Com'rs, 121 Fed. 874 [*affirmed* in 135 Fed. 977]; Central Trust Co. *v.* Hennen, 90 Fed. 593, 33 C. C. A. 189; Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

45. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

46. Woods *v.* Woodson, 100 Fed. 515, 40 C. C. A. 525; Pollitz *v.* Farmers' L. & T. Co., 53 Fed. 210. See *supra*, XIV, B, 3, e.

t. **Municipal Corporation and Citizens or Taxpayers.** A judgment for or against a municipal corporation, in a suit concerning a matter which is of general interest to all the citizens or taxpayers thereof, as the levy and collection of taxes, or public contracts or other obligations,[47] or public property, its title, character or boundaries,[48] is binding, not only on the municipality and its officers, but also upon such citizens or taxpayers, in so far as concerns their rights or interests as members of the general public, although not in respect to rights which they hold as individuals, peculiar to themselves and not shared with the public. And subject to similar limitations, a judgment between certain residents or taxpayers and the municipality may be conclusive on all other citizens similarly situated,[49] and where an action between individuals concerns public interests or rights, and the municipality is represented in the litigation by its proper officers and takes part in the prosecution or defense of the action, it is estopped by the result.[50] Again a judgment against one officer of a municipality will be conclusive in an action by the same plaintiff against another officer of the same municipality, the issues being

47. *Florida.*— Sauls *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190.

Illinois.— Lyons *v.* Cooledge, 89 Ill. 529; Sampson *v.* Chestnut Tp., 115 Ill. App. 443.

Iowa.— Cannon *v.* Nelson, 83 Iowa 242, 48 N. W. 1033; Dicken *v.* Morgan, 59 Iowa 157, 13 N. W. 57; Clark *v.* Wolf, 29 Iowa 197. But *compare* Kane *v.* Rock Rapids Independent School-Dist., 82 Iowa 5, 47 N. W. 1076.

Kansas.— McEntire *v.* Williamson, 63 Kan. 275, 65 Pac. 244.

Louisiana.— Taxpayers *v.* O'Kelly, 49 La. Ann. 1039, 22 So. 311.

Maine.— Mt. Desert *v.* Tremont, 72 Me. 348.

Massachusetts.— Gaskill *v.* Dudley, 6 Metc. 546, 39 Am. Dec. 750.

Missouri.— State *v.* Rainey, 74 Mo. 229.

Nebraska.— Shanahan *v.* South Omaha, 2 Nebr. (Unoff.) 466, 89 N. W. 285. And see State *v.* Savage, 64 Nebr. 684, 90 N. W. 898, 91 N. W. 557.

New York.— Nichols *v.* MacLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730.

North Carolina.— Bear *v.* Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; Young *v.* Henderson, 76 N. C. 420.

See 30 Cent. Dig. tit. "Judgment," § 1227.

But *compare* Price *v.* Gwin, 144 Ind. 105, 43 N. E. 5; Barton *v.* Long, 45 N. J. Eq. 841, 19 Atl. 623; Bode *v.* New England Inv. Co., 1 N. D. 121, 45 N. W. 197.

Holders of municipal bonds are not affected by a judgment against the municipality or its officers, in a proceeding to enjoin the issue of the bonds or their payment, or to restrain the levy of a tax to pay them, if not made parties to the action (State *v.* Wichita County, 59 Kan. 512, 53 Pac. 526; Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 127; Morrill *v.* Smith County, (Tex. Civ. App. 1895) 33 S. W. 899; Kelley *v.* Milan, 127 U. S. 139, 8 S. Ct. 1101, 32 L. ed. 77; Coler *v.* Stanly County, 89 Fed. 257; Chilton *v.* Gratton, 82 Fed. 873; Laird *v.* De Soto, 22 Fed. 421), except perhaps where they took with notice of the pending action (Scotland County *v.* Hill, 112 U. S. 183, 5 S. Ct. 93, 28 L. ed. 692).

Purchasers at tax-sales are not concluded by judgments against the municipality or its officers invalidating or enjoining the tax, if not made parties. State *v.* Batt, 40 La. Ann. 582, 4 So. 495; Helphrey *v.* Redick, 21 Nebr. 80, 31 N. W. 256; Rork *v.* Smith, 55 Wis. 67, 12 N. W. 408.

The rights of abutting property-owners to the use of a street, or to have it maintained at a certain width, are not affected by a judgment for or against the city to which they were not parties. Long *v.* Wilson, 119 Iowa 267, 93 N. W. 282, 97 Am. St. Rep. 315; James *v.* Louisville, 40 S. W. 912, 19 Ky. L. Rep. 447.

48. O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Elson *v.* Comstock, 150 Ill. 303, 37 N. E. 207; Xiques *v.* Bujac, 7 La. Ann. 498.

Title of state not affected.— A decision as to the right of soil between individual citizens cannot affect the right of the state to jurisdiction, being *res inter alios acta*; and if the state has the right of soil, it may contest that right at any time, notwithstanding such decision. Fowler *v.* Lindsey, 3 Dall. (Pa.) 411, 1 L. ed. 658.

49. Harmon *v.* Auditor Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502; State *v.* Chester, etc., R. Co., 13 S. C. 290; Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

Invalidity of assessment.— The fact that some of the persons whose lands were assessed for a local improvement have procured a decree declaring the assessment void as to them does not render it void as to other persons. Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; Zink *v.* Buffalo, 6 Hun (N. Y.) 611.

50. Morgan *v.* Miami County, 27 Kan. 89; Conover *v.* New York, 25 Barb. (N. Y.) 513. And see Lindsay *v.* Allen, 112 Tenn. 637, 82 S. W. 171.

Location of county-seat.— In mandamus on the relation of a county attorney to compel the county officers to hold their offices at a certain place as the permanent county-seat, a judgment in a suit by electors and taxpayers that such place was not the county-

the same.[51] One county is not generally bound by a judgment against another county relating to the same subject-matter.[52]

u. Municipal Corporation and Officers. A judgment for or against a public officer, in an action brought against him in his official capacity, is conclusive on the municipal corporation which he represents and under which he serves, it being the real party in interest.[53] But this rule does not apply where the officer, although performing functions in behalf of the municipality, is officially independent of it,[54] nor where he is sued in his individual capacity or for acts done in his individual character.[55]

v. Officers and Deputies or Successors. An officer and his deputy are not in such legal privity that a judgment for or against one will be conclusive in an action by or against the other.[56] But an incumbent of an office is in privity with his predecessor in the same office, so as to be concluded by a judgment for or against his predecessor in any suit touching the powers, privileges, or duties of the office.[57]

6. Persons Responsible Over — a. In General. Where a person who is responsible over, either by operation of law or express contract, to another, has notice of a suit against the latter and an opportunity to appear and defend, the judgment rendered in the action, if obtained without fraud, will be conclusive on

seat is not conclusive. State *v.* Burton, 47 Kan. 44, 27 Pac. 141; State *v.* Stock, (Kan. 1887) 16 Pac. 106, 38 Kan. 184, 16 Pac. 799.

51. Zimmerman *v.* Savage, 145 Ind. 124, 44 N. E. 252.

52. Jefferson County *v.* State Bd. of Valuation, etc., 117 Ky. 531, 78 S. W. 443, 25 Ky. L. Rep. 1637; St. Paul, etc., R. Co. *v.* Robinson, 40 Minn. 360, 42 N. W. 79.

53. *Illinois.*— Lyons *v.* Cooledge, 89 Ill. 529.

Indiana.— Huntington County *v.* Beaver, 156 Ind. 450, 60 N. E. 150; Millikan *v.* Lafayette, 118 Ind. 323, 20 N. E. 847.

New York.— Ashton *v.* Rochester, 133 N. Y. 187, 30 N. E. 695, 31 N. E. 334, 28 Am. St. Rep. 619; Keller *v.* Mt. Vernon, 23 N. Y. App. Div. 46, 48 N. Y. Suppl. 370. *Compare* Clay *v.* Hart, 25 Misc. 110, 55 N. Y. Suppl. 43.

Wisconsin.— Fulton *v.* Pomeroy, 111 Wis. 663, 87 N. W. 831.

United States.— Stone *v.* Kentucky Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187; Ransom *v.* Pierre, 101 Fed. 665, 41 C. C. A. 585; Kentucky Bank *v.* Stone, 88 Fed. 383.

See 30 Cent. Dig. tit. "Judgment," § 1227.

But see Luckett *v.* Buckman, 1 S. W. 391. 8 Ky. L. Rep. 255; State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981.

54. San Francisco Bd. of Education *v.* Martin, 92 Cal. 209, 28 Pac. 799; People *v.* Zundel, 157 N. Y. 513, 52 N. E. 570.

55. Douglass *v.* New York, 56 How. Pr. (N. Y.) 178; Adams *v.* Bradley, 1 Fed. Cas. No. 48, 5 Sawy. 217.

56. Johnson *v.* Thompson, 4 Bibb (Ky.) 294; Lewis *v.* Knox, 2 Bibb (Ky.) 453; Wilkins *v.* Dingley, 29 Me. 73; Geekie *v.* Kirby Carpenter Co., 106 U. S. 379, 1 S. Ct. 315, 27 L. ed. 157. *Compare* Campbell *v.* Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139 (holding that a judgment for plaintiff in trespass against a deputy sheriff, execution being taken out thereon, although not satisfied, may be pleaded in bar to an action against the sheriff for the same trespass); King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675 (holding that a verdict and judgment for defendant, in an action against a deputy sheriff, may be given in evidence by the sheriff, in a subsequent action against him for the same alleged act or default of the deputy).

A judgment against a sheriff for the default of his deputy may be used in evidence in an action by the sheriff against the deputy, the latter being presumed to be notified and to be substantially a party to the suit. Tyler *v.* Ulmer, 12 Mass. 163. And see Morgan *v.* Chester, 4 Conn. 387.

57. *Indiana.*— State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

Kentucky.— Taylor *v.* Hardin, 4 B. Mon. 363.

Maryland.— Heckart *v.* McPhail, 12 Md. 96.

Nebraska.— State *v.* Savage, 64 Nebr. 684, 90 N. W. 898, 91 N. W. 557; State *v.* Kennedy, 60 Nebr. 300, 83 N. W. 87; Holsworth *v.* O'Chander, 49 Nebr. 42, 68 N. W. 334.

United States.— New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3; Vance *v.* Wesley, 85 Fed. 157, 29 C. C. A. 63.

England.— Brounker *v.* Atkyns, Skin. 14.

See 30 Cent. Dig. tit. "Judgment," § 1228.

Void judgment.— A judgment against a public officer who before its rendition had gone out of office, being void, cannot be enforced against his successor. Secretary *v.* McGarrahan, 9 Wall. (U. S.) 298.

Discretionary action.— A judgment against a public officer, enjoining him from taking certain action, will not preclude his successor from taking the same action, where the question is addressed to his legislative and discretionary capacity. Greenleaf *v.* Pasquotank County, 123 N. C. 30, 31 S. E. 264.

him, whether he appeared or not.[58] And further the party secondarily liable may take advantage of an unsuccessful attempt to recover damages from the person primarily responsible, resulting in a judgment on the merits in the latter's favor.[59] But while a judgment against the person to be indemnified will be conclusive on the person responsible to him, so far as concerns the facts of the rendition of the judgment, its amount, and the cause of action on which it was rendered, it will not determine the question whether or not the one person is in fact responsible over to the other;[60] nor will it preclude the person responsible over from setting up any defenses which from the nature of the action or the pleadings he could not have interposed in the first action had he been a formal party to it.[61]

b. Warrantors and Covenantors — (i) *In General.* Whether or not a judgment against a covenantee is conclusive against his covenantor is fully discussed elsewhere.[62]

(ii) *Defenses.* Where a purchaser of real property is evicted by a recovery

58. *Alabama.*— Pope *v.* Nance, 1 Stew. 354, 18 Am. Dec. 60.

Connecticut.— Bailey *v.* Bussing, 37 Conn. 349.

Georgia.— Bullock *v.* Winter, 10 Ga. 214; Holley *v.* Wallace, 10 Ga. 158; Brown *v.* Chaney, 1 Ga. 410.

Illinois.— Vigeant *v.* Scully, 35 Ill. App. 44; Lamar Ins. Co. *v.* Pennell, 19 Ill. App. 212.

Indiana.— Hoosier Stone Co. *v.* Louisville, etc., R. Co., 131 Ind. 575, 31 N. E. 365; South Bend Pulley Co. *v.* Fidelity, etc., Co., 32 Ind. App. 255, 67 N. E. 269, 68 N. E. 688.

Maine.— Davis *v.* Smith, 79 Me. 351, 10 Atl. 55; Hardy *v.* Nelson, 27 Me. 525.

Maryland.— Chesapeake Lighterage, etc., Co. *v.* Western Assur. Co., 99 Md. 433, 58 Atl. 16.

Massachusetts.— Prichard *v.* Farrar, 116 Mass. 213; Valentine *v.* Farnsworth, 21 Pick. 176; Shrewsbury *v.* Boylston, 1 Pick. 105; Hamilton *v.* Cutts, 4 Mass. 349, 3 Am. Dec. 222.

Michigan.— Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

Mississippi.— Cartwright *v.* Carpenter, 7 How. 328, 40 Am. Dec. 66.

Missouri.— Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417.

New York.— Prescott *v.* Le Conte, 178 N. Y. 585, 70 N. E. 1108; Oceanic Steam Nav. Co. *v.* Compania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; Jackson *v.* St. Paul F. & M. Ins. Co., 99 N. Y. 124, 1 N. E. 539; Heiser *v.* Hatch, 86 N. Y. 614; New York *v.* Brady, 70 Hun 250, 24 N. Y. Suppl. 296; Kip *v.* Brigham, 6 Johns. 158.

Ohio.— Cincinnati *v.* Diekmeier, 31 Ohio St. 242; Cincinnati *v.* Wright, 7 Ohio Dec. (Reprint) 234, 1 Cinc. L. Bul. 387; Brown County Com'rs *v.* Butt, 2 Ohio 348.

Pennsylvania.— Lloyd *v.* Barr, 11 Pa. St. 41; Mehaffy *v.* Lytle, 1 Watts 314.

South Carolina.— Ward *v.* Bond, 1 Nott & M. 201; Goodwyn *v.* Taylor, 2 Brev. 171.

Tennessee.— Tyree *v.* Magness, 1 Sneed 276.

Vermont.— Spencer *v.* Dearth, 43 Vt. 98; Bramble *v.* Poultney, 11 Vt. 208; Walker *v.* Ferrin, 4 Vt. 523.

Wisconsin.— Rowell *v.* Smith, 123 Wis. 510, 102 N. W. 1.

United States.— Clark *v.* Carrington, 7 Cranch 308, 3 L. ed. 354; Lawrence *v.* Stearns, 79 Fed. 878; Bailey *v.* Sundberg, 44 Fed. 807.

See 30 Cent. Dig. tit. "Judgment," §§ 1223, 1224.

Surety.— Where the liability of a surety is contingent and to be ascertained by an assessment of damages, a judgment against him, with proof of payment of the amount recovered, is competent, at least *prima facie*, evidence in a suit by him against the principal to recover the money so paid, even though the principal was not joined in the suit or notified of it. Bone *v.* Torry, 16 Ark. 83; Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

Where the assignor of a mortgage covenants with the assignee that the property covered will produce a given sum over and above the cost of foreclosing, and that if it does not he will pay the deficiency, the proceedings in the suit to foreclose will be conclusive evidence against the assignor, in an action on the covenant, to show the amount of the deficiency. Rapelye *v.* Prince, 4 Hill (N. Y.) 119, 40 Am. Dec. 267.

59. Featherston *v.* Newburgh, etc., Turnpike Co., 71 Hun (N. Y.) 109, 24 N. Y. Suppl. 603. And see Hill *v.* Bain, 15 R. I. 75, 23 Atl. 44, 2 Am. St. Rep. 873.

60. Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217. And see Missouri Pac. R. Co. *v.* Twiss, 35 Nebr. 267, 53 N. W. 76, 37 Am. St. Rep. 437; New York *v.* Brady, 70 Hun (N. Y.) 250, 24 N. Y. Suppl. 296.

61. Consolidated Hand-Method Lasting-Mach. Co. *v.* Bradley, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409; Churchill *v.* Holt, 127 Mass. 165, 34 Am. Rep. 355; Garrison *v.* Babbage Transp. Co., 94 Mo. 130, 6 S. W. 701; Oceanic Steam Nav. Co. *v.* Compania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685; St. John *v.* St. John's Church, 15 Barb. (N. Y.) 346; Ætna Ins. Co. *v.* Confer, 158 Pa. St. 598, 28 Atl. 153.

62. See Covenants, 11 Cyc. 1156 *et seq.*

of judgment on a paramount title, such judgment is evidence in his subsequent suit against his vendor on the latter's covenants and for title; but the vendor is not precluded by the judgment against his vendee from showing that the recovery was on a title derived from the vendee himself, or in consequence of some fact occurring after the date of the covenant, or that his covenant was special or did not run with the land, or that he made no covenant,[63] or that he has already responded to a suit on the covenant brought by a proper party.[64]

(III) *Requisites of Notice to Warrantor.* In order to bind the warrantor, it is necessary that notice of the pending action should have been given to him;[65] but the notice need not have been in writing,[66] or in any particular form of words, it being sufficient if it is unequivocal, certain, and explicit,[67] and calls upon the warrantor to defend the title which he conveyed.[68]

(IV) *Opportunity to Defend.* In order that the warrantor should be bound by the judgment, it is essential that he should have a fair and full opportunity to defend his title and to avail himself of every legal means of avoiding an adverse judgment.[69]

(V) *Warrantors of Personal Property.* Where chattels are sold with an express or implied warranty of title, and are taken from the vendee by a judgment in a suit against him by a third person, of which action the vendor was duly notified and was requested to defend, the latter is conclusively bound by such judgment.[70] It has been held that this rule does not apply where the action

63. *Illinois.*— Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217.

Kentucky.— Davenport *v.* Muir, 3 J. J. Marsh. 310, 20 Am. Dec. 143.

Massachusetts.— Twambly *v.* Henley, 4 Mass. 441.

South Carolina.— Middleton *v.* Thompson, 1 Speers 67.

Texas.— Monks *v.* McGrady, 71 Tex. 134, 8 S. W. 617.

64. Brady *v.* Spurck, 27 Ill. 478; Vancourt *v.* Moore, 26 Mo. 92.

65. Lebanon *v.* Mead, 64 N. H. 8, 4 Atl. 392; Paul *v.* Witman, 3 Watts & S. (Pa.) 407.

If the warrantor actually appears and actively assumes the defense, it will be presumed that he was duly notified. Harding *v.* Larkin, 41 Ill. 413.

66. *California.*— Ferrea *v.* Chabot, 63 Cal. 564.

Massachusetts.— Richmond *v.* Ames, 164 Mass. 467, 41 N. E. 671.

Minnesota.— Hersey *v.* Long, 30 Minn. 114, 14 N. W. 508.

Mississippi.— Cummings *v.* Harrison, 57 Miss. 275.

Nebraska.— Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. 737.

New York.— Miner *v.* Clark, 15 Wend. 427.

But see Mason *v.* Kellogg, 38 Mich. 132; Somers *v.* Schmidt, 24 Wis. 417, 1 Am. Rep. 191.

67. *Arkansas.*— Boyd *v.* Whitfield, 19 Ark. 447.

Indiana.— South Bend Pulley Co. *v.* Fidelity, etc., Co., 32 Ind. App. 255, 67 N. E. 269, 68 N. E. 688.

Iowa.— Marsh *v.* Smith, 73 Iowa 295, 34 N. W. 866.

Kentucky.— Hardee *v.* Hall, 12 Bush 327.

Missouri.— Collins *v.* Baker, 6 Mo. App. 588.

New Hampshire.— Lebanon *v.* Mead, 64 N. H. 8, 4 Atl. 392.

New York.— Oceanic Steam Nav. Co. *v.* Compania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360.

South Carolina.— Davis *v.* Wilbourne, 1 Hill 27, 26 Am. Dec. 154.

Tennessee.— Williams *v.* Burg, 9 Lea 455; Greenlaw *v.* Williams, 2 Lea 533.

Texas.— Patrick *v.* Laprelle, (Civ. App. 1897) 40 S. W. 552.

See 30 Cent. Dig. tit. "Judgment," § 1224.

68. Teague *v.* Whaley, 20 Ind. App. 26, 50 N. E. 41; Consolidated Hand-Method Lasting-Mach. Co. *v.* Bradley, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409.

69. Axford *v.* Graham, 57 Mich. 422, 24 N. W. 158; Saveland *v.* Green, 36 Wis. 612; Eaton *v.* Lyman, 26 Wis. 61.

70. *Alabama.*— Salle *v.* Light, 4 Ala. 700, 39 Am. Dec. 317.

Arkansas.— Marlatt *v.* Clary, 20 Ark. 251; Boyd *v.* Whitfield, 19 Ark. 447.

Maine.— Thurston *v.* Spratt, 52 Me. 202.

Michigan.— De Witt *v.* Prescott, 51 Mich. 298, 16 N. W. 656.

Mississippi.— Pickett *v.* Ford, 4 How. 246.

Missouri.— Fallon *v.* Murray, 16 Mo. 168.

New York.— Dubois *v.* Hermance, 56 N. Y. 673; Kelly *v.* Forty-Second St., etc., R. Co., 37 N. Y. App. Div. 500, 55 N. Y. Suppl. 1096; Baltimore Steam Packet Co. *v.* Garrison, 6 Daly 246; Barney *v.* Dewey, 13 Johns. 224, 7 Am. Dec. 372; Blasdale *v.* Babcock, 1 Johns. 517.

Pennsylvania.— Jacob *v.* Pierce, 2 Rawle 204.

South Carolina.— Brown *v.* McMullen, 1 Hill 29.

Texas.— Buchanan *v.* Kauffman, 65 Tex. 235.

Vermont.— Farnham *v.* Chapman, 60 Vt.

against the vendor is on a warranty of soundness of the chattel sold;[71] but that it applies where a note or other obligation is assigned with a warranty that it is valid and genuine,[72] or that it is free from set-off.[73] If the vendor is not notified of the action against his vendee, the judgment recovered in such action is not evidence against him.[74]

c. Indemnitors.[75] An obligation to indemnify another against liability at the suit of third persons implies an obligation to defend such suit when brought, and the judgment will bind the indemnitor when he was notified of the action and called upon to defend it.[76] This rule applies to actions on indemnifying bonds given to sheriffs and other officers by their deputies[77] or by attachment or execution creditors or claimants of goods under levy.[78]

d. Judgment Against City as Evidence Against Person Liable Over. A judgment recovered against a municipal corporation, for injuries caused by a defect or obstruction in a highway or other public place or other nuisances, is conclusive evidence of its necessary facts and conditions, in a subsequent action by the municipality against a third person, the author of the defect or nuisance, who is liable over, and who was notified of the first suit;[79] but it is necessary to lay a foundation for the action by showing such third person to have caused the

338, 14 Atl. 690; Brown *v.* Haven, 37 Vt. 439.

See 30 Cent. Dig. tit. "Judgment," §§ 1223, 1224.

71. See Smith *v.* Moore, 7 S. C. 209, 24 Am. Rep. 479; Morgan *v.* Winston, 2 Swan 472.

72. Jennings *v.* Whittemore, 2 Thomps. & C. (N. Y.) 377; Carpenter *v.* Pier, 30 Vt. 81, 73 Am. Dec. 288.

73. Walker *v.* Ferrin, 4 Vt. 523.

74. Roper *v.* Rowlett, 7 Lea (Tenn.) 320. But see Marlatt *v.* Clary, 20 Ark. 251, holding that the judgment is *prima facie* evidence of the vendor's want of title, so as to throw upon him the burden of proving his title.

75. See INDEMNITY, 22 Cyc. 78.

76. *California.*— Commercial Union Assur. Co. *v.* American Cent. Ins. Co., 68 Cal. 430, 9 Pac. 712.

Illinois.— Drennan *v.* Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354; Crow *v.* Bowlby, 68 Ill. 23.

Indiana.— Taylor *v.* Williams, 120 Ind. 414, 22 N. E. 118.

Massachusetts.— Minneapolis First Nat. Bank *v.* City Nat. Bank, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637.

New Hampshire.— Morris *v.* Bowen, 52 N. H. 416.

New York.— Taylor *v.* Barnes, 69 N. Y. 430; Konitzky *v.* Meyer, 49 N. Y. 571; Conant *v.* Jones, 50 N. Y. App. Div. 336, 64 N. Y. Suppl. 189; Peet *v.* Kent, 5 N. Y. St. 134; Newburgh *v.* Galatian, 4 Cow. 340; Kip *v.* Brigham, 6 Johns. 158.

Ohio.— Mt. Vernon First Nat. Bank *v.* Lincoln First Nat. Bank, 68 Ohio St. 43, 67 N. E. 91.

Pennsylvania.— Mehaffy *v.* Lytle, 1 Watts 314; Gochenauer *v.* Good, 3 Penr. & W. 274; Reed *v.* Orton, 3 Pa. Cas. 371, 6 Atl. 369.

Texas.— Pierce *v.* Wright, 33 Tex. 631.

Virginia.— Allebaugh *v.* Coakley, 75 Va. 628; Lee County *v.* Fulkerson, 21 Gratt. 182.

Wyoming.— Bolln *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898.

England.— King *v.* Norman, 4 C. B. 884, 11 Jur. 824, 17 L. J. C. P. 23, 56 E. C. L. 884. And see Gray *v.* Lewis, L. R. 8 Ch. 1035, 43 L. J. Ch. 281, 29 L. T. Rep. N. S. 199, 21 Wkly. Rep. 923, 928.

See 30 Cent. Dig. tit. "Judgment," §§ 1223, 1224.

Reinsurer.— A judgment against the original insurer is binding on a reinsuring company which had notice of the suit and an opportunity to defend it. Gantt *v.* American Cent. Ins. Co., 68 Mo. 503; Strong *v.* American Cent. Ins. Co., 4 Mo. App. 7.

77. Kettle *v.* Lipe, 6 Barb. (N. Y.) 467; Crawford *v.* Turk, 24 Gratt. (Va.) 176. And see SHERIFFS AND CONSTABLES.

78. *California.*— Showers *v.* Wadsworth, 81 Cal. 270, 22 Pac. 663.

Colorado.— Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

Kentucky.— Jones *v.* Henry, 3 Litt. 427.

Massachusetts.— Boynton *v.* Morrill, 111 Mass. 4; Train *v.* Gold, 5 Pick. 380.

Missouri.— Stewart *v.* Thomas, 45 Mo. 42.

New Hampshire.— Burrill *v.* West, 2 N. H. 190.

New York.— Carter *v.* Bowe, 41 Hun 516.

Ohio.— Miller *v.* Rhoades, 20 Ohio St. 494.

United States.— Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129.

See 30 Cent. Dig. tit. "Judgment," §§ 1223, 1224.

But see Gist *v.* Davis, 2 Hill Eq. (S. C.) 335, 29 Am. Dec. 89; Williams *v.* Warren, 82 Tex. 319, 18 S. W. 560.

79. *District of Columbia.*— District of Columbia *v.* Baltimore, etc., R. Co., 1 Mackey 314.

Illinois.— Todd *v.* Chicago, 18 Ill. App. 565.

Indiana.— McNaughton *v.* Elkhart, 85 Ind. 484; Catterlin *v.* Frankfort, 79 Ind. 547, 41 Am. Rep. 627.

Maine.— Portland *v.* Richardson, 54 Me. 46, 89 Am. Dec. 720; Veazie *v.* Penobscot R. Co., 49 Me. 119.

obstruction or defect,[80] and the judgment will not be conclusive against defenses which he may have, and which could not have been litigated in the first action.[81] Some decisions hold that he need not have received express notice of the action, it being sufficient if he had actual knowledge of it;[82] but the general rule is that express notice is necessary to make the judgment conclusive.[83]

7. Parties Interested in Decedents' Estates — a. Decedent and Heirs or Devisees. An heir is in privity with his ancestor, and a devisee with his testator, and next of kin with the decedent, so that either is concluded by an adjudication which was an estoppel upon his source of title.[84]

b. Decedent and Personal Representatives. An administrator is in privity with his intestate, at least so far as concerns the personalty,[85] and an executor is

Massachusetts.— Milford *v.* Holbrook, 9 Allen 17, 85 Am. Dec. 735; Boston *v.* Worthington, 10 Gray 496, 71 Am. Dec. 678.

Missouri.— Kansas City *v.* Mitchener, 85 Mo. App. 36.

New Hampshire.— Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759.

New York.— New York *v.* Brady, 151 N. Y. 611, 45 N. E. 1122 [*affirming* 81 Hun 440, 30 N. Y. Suppl. 1121]; Rochester *v.* Montgomery, 72 N. Y. 65; Port Jervis *v.* Port Jervis First Nat. Bank, 31 Hun 107; Seneca Falls *v.* Zalinski, 8 Hun 571.

United States.— Washington Gaslight Co. *v.* District of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. ed. 712; Robbins *v.* Chicago, 4 Wall. 657, 18 L. ed. 427.

See 30 Cent. Dig. tit. "Judgment," § 1224. And see Municipal Corporations.

80. Cohoes *v.* Morrison, 42 Hun (N. Y.) 216.

81. *Georgia.*— Faith *v.* Atlanta, 78 Ga. 779, 4 S. E. 3; Western, etc., R. Co. *v.* Atlanta, 74 Ga. 774.

Missouri.— St. Joseph *v.* Union R. Co., 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626.

Nebraska.— Lincoln *v.* Lincoln First Nat. Bank, 67 Nebr. 401, 93 N. W. 698, 60 L. R. A. 923.

New Hampshire.— Hearn *v.* Boston, etc., R. Co., 67 N. H. 320, 29 Atl. 970.

Virginia.— Richmond *v.* Sitterding, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 879, 65 L. R. A. 445.

Wisconsin.— Schaefer *v.* Fond du Lac, 99 Wis. 333, 74 N. W. 810, 41 L. R. A. 287.

See 30 Cent. Dig. tit. "Judgment," § 1224.

82. Robbins *v.* Chicago, 4 Wall. (U. S.) 657, 18 L. ed. 427; Chicago *v.* Robbins, 2 Black (U. S.) 418, 17 L. ed. 298.

83. Oskaloosa *v.* Pinkerton, 51 Iowa 697, 1 N. W. 689; Lebanon *v.* Mead, 64 N. H. 8, 4 Atl. 392; Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550.

84. *Alabama.*— Boykin *v.* Cook, 61 Ala. 472.

California.— Ladd *v.* Durkin, 54 Cal. 395.

Illinois.— Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604.

Kentucky.— Waring *v.* Reynolds, 3 B. Mon. 59. *Compare* Goatley *v.* Crow, 66 S. W. 1029, 23 Ky. L. Rep. 2237.

Louisiana.— Sharkey *v.* Bankston, 30 La. Ann. 891.

New York.— Wadsworth *v.* Murray, 161 N. Y. 274, 55 N. E. 910, 76 Am. St. Rep. 265; Lythgoe *v.* Lythgoe, 145 N. Y. 641, 41 N. E. 89; *In re* Straut, 126 N. Y. 201, 27 N. E. 259; Matter of Fidelity Trust Co., 27 Misc. 118, 57 N. Y. Suppl. 361; Christie *v.* Bishop, 1 Barb. Ch. 105. And see Wood *v.* Byington, 2 Barb. Ch. 387.

Pennsylvania.— West Hickory Min. Assoc. *v.* Reed, 80 Pa. St. 38; Davis *v.* Evans, 2 Leg. Rec. 249.

South Carolina.— Schmidt *v.* Schmidt, 7 Rich. Eq. 201.

Tennessee.— Ridley *v.* Halliday, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477.

Virginia.— Williams *v.* Tomlin, (1898) 28 S. E. 883.

United States.— Shields *v.* Shiff, 124 U. S. 351, 8 S. Ct. 510, 31 L. ed. 445; Avegno *v.* Schmidt, 113 U. S. 293, 5 S. Ct. 487, 28 L. ed. 976.

See 30 Cent. Dig. tit. "Judgment," § 1209.

But see Young *v.* Reynolds, 4 Md. 375.

Foreclosure of liens.— A judgment foreclosing a mortgage or other lien has been held not to be binding on the heirs of the deceased mortgagor, for the reason that the title is not generally in litigation in such an action. Beer *v.* Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010. And see Dodd *v.* Hewitt, 69 S. W. 955, 24 Ky. L. Rep. 708; Dunning *v.* Crane, (N. J. 1900) 47 Atl. 420.

After-acquired title.— A judgment against the decedent does not estop his heir from claiming the land under a subsequently accruing title. Whitney *v.* Morrow, 36 Wis. 438; Whitney *v.* Nelson, 33 Wis. 365.

Debt due by decree binds heir with assets. — A debt due by decree in equity, although but a personal demand, will bind the heir or devisee having assets, and such heir or devisee refusing to perform a decree against him will be subject to an attachment. Connor *v.* Browne, 1 Ridg. 139.

85. *Illinois.*— Thompson *v.* Frew, 107 Ill. 478.

Iowa.— Wolfinger *v.* Betz, 66 Iowa 594, 24 N. W. 228; Senat *v.* Findley, 51 Iowa 20, 50 N. W. 575.

Louisiana.— Wilson's Succession, 12 La. Ann. 591.

Nebraska.— Madison First Nat. Bank *v.* Tompkins, 3 Nebr. (Unoff.) 328, 91 N. W. 551.

in privity with his testator in so far as, by the terms of the will, he succeeds to the position of the decedent.[86]

c. Executor or Administrator and Heir or Devisee.[87] There is no privity of estate between the executor or administrator of a decedent and his heirs at law or devisees, and a judgment at law against the former, while it may bind the latter so far as concerns the personal estate,[88] and be *prima facie* evidence against them as to the realty,[89] is not a conclusive estoppel upon them in respect to lands devised or descended to them,[90] either on the administrator's application for leave to sell

Pennsylvania.— Steele *v.* Lineberger, 59 Pa. St. 308.

Virginia.— Dabney *v.* Kennedy, 7 Gratt. 317.

Wisconsin.— Button *v.* Cole, 109 Wis. 247, 85 N. W. 338.

See 30 Cent. Dig. tit. "Judgment," § 1210.

But see Governor *v.* Shelby, 2 Blackf. (Ind.) 26; Vaughan *v.* Morrison, 55 N. H. 580.

86. Ladd *v.* Durkin, 54 Cal. 395; Richardson *v.* Adams, 4 Mo. 311; Paterson *v.* Baker, 51 N. J. Eq. 49, 26 Atl. 324; Manigault *v.* Deas, Bailey Eq. (S. C.) 283.

Suit continued by plaintiff's executor.— Where an action pending at the time of plaintiff's death is continued in the name of his executor, the latter is bound by the judgment. Gregory *v.* Haynes, 13 Cal. 591.

Suit continued against defendant's executor.— Where a defendant dies and his executor is substituted in his place, on motion of plaintiff, but no notice is served on the executor, and he does not appear or adopt the answer of the testator as his own, and the testator is named in the judgment, the judgment is a nullity as to the executor, and he is not bound by it. McCreery *v.* Everding, 44 Cal. 284.

87. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1061.

88. *Georgia.*— Barclay *v.* Kimsey, 72 Ga. 725.

Illinois.— People *v.* Lease, 71 Ill. App. 380.

Kentucky.— Head *v.* Perry, 1 T. B. Mon. 253.

Louisiana.— Durnford's Succession, 8 Rob. 488; Randal *v.* Baldwin, 4 Mart. 456.

Michigan.— Luttermoser *v.* Zeuner, 110 Mich. 186, 68 N. W. 117.

United States.— Pittel *v.* Fidelity Mut. Life Assoc., 86 Fed. 255, 30 C. C. A. 21; Logan *v.* Greenlaw, 25 Fed. 299.

See 30 Cent. Dig. tit. "Judgment," § 1211.

Compare Wright *v.* Phillips, 56 Ala. 69.

89. Stone *v.* Wood, 16 Ill. 177; Stevenson *v.* Flournoy, 89 Ky. 561, 13 S. W. 210, 11 Ky. L. Rep. 745; Hopkins *v.* Stout, 6 Bush (Ky.) 375; Sergeant *v.* Ewing, 36 Pa. St. 156; Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185.

In West Virginia a judgment against the personal representative is not even *prima facie* evidence against the heir or devisee. Board *v.* Callihan, 33 W. Va. 209, 10 S. E. 382; Broderick *v.* Broderick, 28 W. Va. 378; Laidley *v.* Kline, 8 W. Va. 218. And the rule is the same even where the heir and personal representative are the same person. Merchants' Nat. Bank *v.* Good, 21 W. Va. 455. But this last point is elsewhere denied. See Donifelser *v.* Heyl, 7 Kan. App. 606, 52 Pac. 468.

90. *Alabama.*— Lehman *v.* Bradley, 62 Ala. 31; Boykin *v.* Cook, 61 Ala. 472; Darrington *v.* Borland, 3 Port. 9.

California.— Chant *v.* Reynolds, 49 Cal. 213; Willis *v.* Farley, 24 Cal. 490.

Connecticut.— Sheldon *v.* Bird, 2 Root 509.

District of Columbia.— Hunt *v.* Russ, 7 Mackey 527.

Iowa.— Dorr *v.* Stockdale, 19 Iowa 269.

Kentucky.— Bigstaff *v.* Lumkins, 16 S. W. 449, 13 Ky. L. Rep. 248.

Maryland.— Tabler *v.* Castle, 22 Md. 94; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Michigan.— Beeson *v.* Comly, 19 Mich. 103.

Mississippi.— Andrews *v.* Anderson, (1894) 16 So. 346; McCoy *v.* Nichols, 4 How. 31. But see Blue *v.* Watson, 59 Miss. 619.

Missouri.— Clark *v.* Bettelheim, 144 Mo. 258, 46 S. W. 135; Collins *v.* Warren, 29 Mo. 236; Beck *v.* Kallmeyer, 42 Mo. App. 563.

Nebraska.— Eayrs *v.* Nason, 54 Nebr. 143, 74 N. W. 408.

New Jersey.— Hazen *v.* Tillman, 5 N. J. Eq. 363.

New York.— Matter of Clark, 62 Hun 275, 17 N. Y. Suppl. 93; Stephenson *v.* Cotter, 5 N. Y. Suppl. 749; Moss *v.* McCullough, 5 Hill 131; Osgood *v.* Manhattan Co., 3 Cow. 612, 15 Am. Dec. 304.

Pennsylvania.— Steele *v.* Lineberger, 59 Pa. St. 308; Stewart *v.* Montgomery, 23 Pa. St. 410; *In re* Mergan, 43 Leg. Int. 282. See Yocum *v.* Commercial Nat. Bank, 195 Pa. St. 411, 46 Atl. 94; Philadelphia *v.* Girard, 45 Pa. St. 9, 84 Am. Dec. 470.

South Carolina.— Mauldin *v.* Gossett, 15 S. C. 565.

Tennessee.— Charles *v.* Spears, 9 Lea 725. See Hodsden *v.* Caldwell, 1 Lea 48.

Texas.— Armstrong *v.* Oppenheimer, 84 Tex. 365, 19 S. W. 520; Bracken *v.* Neill, 15 Tex. 109. See Lawson *v.* Kelley, 82 Tex. 457, 17 S. W. 717.

Virginia.— Robertson *v.* Wright, 17 Gratt. 534; Mason *v.* Peters, 1 Munf. 437.

West Virginia.— Dower *v.* Seeds, 28 W. Va. 113, 57 Am. Rep. 646; Merchants' Nat. Bank *v.* Good, 21 W. Va. 455; Laidley *v.* Kline, 8 W. Va. 218.

United States.— Jones *v.* Wilkey, 78 Fed. 532; Alston *v.* Munford, 1 Fed. Cas. No. 267, 1 Brock. 266; Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 6 Call (Va.) 308.

See 30 Cent. Dig. tit. "Judgment," § 1211.

Heirs and legatees.— A judgment rendered

real estate to pay such a judgment as a debt of the estate,[91] or on a bill by the judgment creditor against the heirs or devisees to subject the land to his judgment,[92] except where the statutes regarding the powers and duties of personal representatives have changed the law so as to establish a contrary rule,[93] and save also in a few well defined and exceptional cases.[94] Under ordinary circumstances therefore the heirs or devisees may set up any meritorious defense against the judgment when it is sought to be enforced against their interests.[95] And con-

in an action had between the administrator and the heirs is not binding or conclusive on the legatees. Valsain *v.* Cloutier, 3 La. 170, 22 Am. Dec. 179.

If the heirs or devisees are joined as parties in a suit to which the executor or administrator is the principal party, they will be equally concluded by the adjudication. Judd *v.* Ross, 146 Ill. 40, 34 N. E. 631; Lantz *v.* Maffett, 102 Ind. 23, 26 N. E. 195; Martin *v.* Barnhill, 56 S. W. 160, 21 Ky. L. Rep. 1666.

91. Stone *v.* Wood, 16 Ill. 177; Brown *v.* Bear, 97 Ill. App. 342; Gaither *v.* Welch, 3 Gill & J. (Md.) 259; Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358; Wood *v.* Byington, 2 Barb. Ch. (N. Y.) 387. But see Faran *v.* Robinson, 17 Ohio St. 242, 93 Am. Dec. 617.

92. *Alabama.*— Scott *v.* Ware, 64 Ala. 174; Lehman *v.* Bradley, 62 Ala. 31; Teague *v.* Corbitt, 57 Ala. 529; Darrington *v.* Borland, 3 Port. 9.

Illinois.— Gibson *v.* Gibson, 82 Ill. 61.

Kentucky.— Hobbs *v.* McMakin, 4 S. W. 793, 9 Ky. L. Rep. 221.

New York.— Burnham *v.* Burnham, 165 N. Y. 659, 59 N. E. 1119; Kent *v.* Kent, 62 N. Y. 560, 20 Am. Rep. 502; Sharpe *v.* Freeman, 45 N. Y. 802; Lauby *v.* Gill, 42 Misc. 334, 86 N. Y. Suppl. 718.

South Carolina.— Holladay *v.* Holladay, 27 S. C. 622, 3 S. E. 80; Wilson *v.* Kelly, 19 S. C. 160. See Huggins *v.* Oliver, 21 S. C. 147.

Virginia.— Daingerfield *v.* Smith, 83 Va. 81, 1 S. E. 599; Watts *v.* Taylor, 80 Va. 627; Brewis *v.* Lawson, 76 Va. 36.

See 30 Cent. Dig. tit. "Judgment," § 1211.

93. *California.*— Gage *v.* Downey, (1888) 19 Pac. 113; Cunningham *v.* Ashley, 45 Cal. 485.

Florida.— Merritt *v.* Daffin, 24 Fla. 320, 4 So. 806.

Georgia.— Gunn *v.* James, 120 Ga. 482, 48 S. E. 148; Morris *v.* Murphey, 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81; Barclay *v.* Kimsey, 72 Ga. 725. But see Gairdner *v.* Tate, 110 Ga. 456, 35 S. E. 697.

Indiana.— Chicago, etc., R. Co. *v.* Harshman, 21 Ind. App. 23, 51 N. E. 343.

Louisiana.— Genella *v.* McMurray, 49 La. Ann. 988, 22 So. 198; Woodward *v.* Thomas, 38 La. Ann. 238; Neal *v.* Faggert, 28 La. Ann. 322; Bodechtel *v.* Frelinghuysen, 24 La. Ann. 104; Texas, etc., R. Co. *v.* Smith, 91 Fed. 483, 33 C. C. A. 648. But see Baldwin *v.* Carleton, 11 Rob. (La.) 109; Guidry *v.* Guidry, 16 La. 157; Benoit *v.* Benoit, 8 La. 228.

North Carolina.— Hinton *v.* Pritchard, 126 N. C. 8, 35 S. E. 127; Hardee *v.* Williams, 65 N. C. 56; Molton *v.* Mumford, 10 N. C. 490; Ward *v.* Vickers, 3 N. C. 164.

United States.— Meeks *v.* Olpherts, 100 U. S. 564, 25 L. ed. 735 (under Cal. St.); Lloyd *v.* Ball, 77 Fed. 365 (under Cal. St.).

See 30 Cent. Dig. tit. "Judgment," § 1211.

94. Wadsworth *v.* Murray, 161 N. Y. 274, 55 N. E. 910, 76 Am. St. Rep. 265 (holding that a final judgment in an action of account between co-executors is binding on their heirs and representatives); Hodges *v.* Bauchman, 8 Yerg. (Tenn.) 186 (holding that where a will is offered for probate by the executor, and an issue of *devisavit vel non* is made up, contested by one of the heirs, and decided, it is conclusive on all parties interested in the estate, whether parties to the issue or not); Shannon *v.* Taylor, 16 Tex. 413 (holding that in a suit for specific performance of a contract for the sale of land, against an executor, a decree against him is binding on the heirs in the absence of fraud).

Construction of will.— A judgment construing a will, in an action brought by the executor for that purpose, is binding on the devisees who have notice of the proceedings. Martin *v.* Barnhill, 56 S. W. 160, 21 Ky. L. Rep. 1666; Westbrook *v.* Thompson, 104 Tenn. 363, 58 S. W. 223.

As to descendible realty.— In a proceeding by a representative of a deceased partner for a settlement of the affairs of the partnership, the court may determine whether or not there is any real property which could descend to the heirs, and its decision as to such matter is conclusive on the heirs, although they were not parties. Darrow *v.* Calkins, 6 N. Y. App. Div. 28, 39 N. Y. Suppl. 527.

Foreclosure of liens.— A judgment against an executor or administrator for the foreclosure of a mortgage or vendor's lien created by the decedent is binding on the heirs. Harsh *v.* Griffin, 72 Iowa 608, 34 N. W. 441; Moody *v.* Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604.

A decree of insolvency merely ascertains, as between the personal representative and the creditors, the status of the estate; as to the heirs at law or legatees, it is not evidence of any fact ascertained by it. Randle *v.* Carter, 62 Ala. 95.

95. Buntyn *v.* Holmes, 9 Lea (Tenn.) 319, holding that the heir's right of defending against the judgment does not extend to mere technical defects or irregularities or objections, not going to the question of the liability of the ancestor for the debt, sufficiency of assets, or other meritorious defenses.

The statute of limitations is a meritorious

versely a judgment rendered in an action to which the heirs only were parties is not binding on the administrator.[96]

d. Executor and Legatee. A legatee is concluded by a judgment against the executor,[97] except in so far as the legacy is charged on and payable out of realty,[98] and except in cases of fraud or collusion on the part of the executor,[99] or where the suit is commenced or revived after the executor's accounts have been settled and the property distributed.[1]

e. Successive Personal Representatives. As there is no technical privity between an executor or an administrator in chief and a succeeding administrator *de bonis non*, a judgment rendered against the former is not conclusive against the latter;[2] and conversely a judgment against the administrator *de bonis non* of a debtor is not evidence of the debt as against the representative of the administrator in chief.[3]

f. Principal and Ancillary Administrators. Where administration is granted in different states to different persons, they are so far independent of each other that a judgment against one is no evidence against the other to affect assets in his hands to be administered.[4]

g. Coheirs or Distributees. As the several heirs or distributees of an estate do not claim through or under one another, there is no such privity between them that one will be bound by a judgment rendered in an action prosecuted or defended by another, in which he was not made a party or represented,[5] although all may

defense which the heir may set up as against a judgment recovered against the personal representative. Starke *v.* Wilson, 65 Ala. 576; Champion *v.* Cayce, 54 Miss. 695; Saddler *v.* Kennedy, 26 W. Va. 636.

96. Green *v.* Brown, (Ind. 1894) 38 N. E. 519; Cole *v.* Lafontaine, 84 Ind. 446; Douglass *v.* McCarer, 80 Ind. 91; Dorr *v.* Stockdale, 19 Iowa 269; Forbes *v.* Douglass, 175 Mass. 191, 55 N. E. 847. But *compare* Hardaway *v.* Drummond, 27 Ga. 221, 73 Am. Dec. 730.

97. *Georgia.*— Morris *v.* Murphey, 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81; Castellaw *v.* Guilmartin, 54 Ga. 299.

New York.— Cline *v.* Sherman, 144 N. Y. 601, 39 N. E. 635.

North Carolina.— Redmond *v.* Coffin, 17 N. C. 437.

South Carolina.— Bell *v.* Bell, 25 S. C. 149; Fraser *v.* Charleston, 19 S. C. 384.

West Virginia.— Hooper *v.* Hooper, 32 W. Va. 526, 9 S. E. 937.

See 30 Cent. Dig. tit. "Judgment," § 1211.

Contra.— Gourjon's Succession, 10 Rob. (La.) 541; Milne's Succession, 2 Rob. (La.) 382; Valsain *v.* Cloutier, 3 La. 170, 22 Am. Dec. 179.

One of two claimants of a legacy is not bound by a judgment in an action to which he was not a party, against the executor to recover such legacy for the estate of the other claimant. Weeks *v.* Weeks, 16 Abb. N. Cas. (N. Y.) 143.

Construction of will.— In a suit brought by executors for the construction of the will, a bequest was adjudged valid. It was held that the judgment did not conclude legatees not parties to the proceeding. Shipman *v.* Rollins, 98 N. Y. 311. But *compare* Buckingham's Appeal, 60 Conn. 63, 22 Atl. 509.

98. Hoboken First Baptist Church *v.* Syms, 51 N. J. Eq. 363, 28 Atl. 461.

99. John *v.* Tate, 7 Humphr. (Tenn.) 388.

1. Carey *v.* Roosevelt, 81 Fed. 608, 83 Fed. 242.

2. *Alabama.*— Martin *v.* Ellerbe, 70 Ala. 326; Graves *v.* Flowers, 51 Ala. 402, 23 Am. Rep. 552; Thomas *v.* Sterns, 33 Ala. 137; Rogers *v.* Grannis, 20 Ala. 247. *Compare* Hunter *v.* Shelby Iron Co., (1895) 18 So. 107.

California.— *In re* Rathgeb, 125 Cal. 302, 57 Pac. 1010.

Colorado.— Hummel *v.* Central City First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72.

Connecticut.— Alsop *v.* Mather, 8 Conn. 584, 21 Am. Dec. 703.

Vermont.— Perkins *v.* Blood, 36 Vt. 273.

Virginia.— Coleman *v.* McMurdo, 5 Rand. 51.

See 30 Cent. Dig. tit. "Judgment," § 1212.

But see Yocum *v.* Commercial Nat. Bank, 195 Pa. St. 411, 46 Atl. 94; Manigault *v.* Holmes, Bailey Eq. (S. C.) 283; Green *v.* Huggins, (Tenn. Ch. App. 1898) 52 S. W. 675.

3. Thomas *v.* Sterns, 33 Ala. 137.

4. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1227.

5. *Georgia.*— Equitable Mortg. Co. *v.* McWaters, 119 Ga. 337, 46 S. E. 437; Barksdale *v.* Hopkins, 23 Ga. 332; Walker *v.* Perryman, 23 Ga. 309.

Indiana.— Farmer *v.* Farmer, 93 Ind. 435.

Kentucky.— Harper *v.* Baird, 35 S. W. 638, 18 Ky. L. Rep. 110.

Michigan.— Weeks *v.* Downing, 30 Mich. 4.

New York.— Earle *v.* Earle, 173 N. Y. 480, 66 N. E. 398; Brower *v.* Bowers, 1 Abb. Dec. 214; Robertson *v.* Caw, 3 Barb. 410; Weeks *v.* Ostrander, 52 N. Y. Super. Ct. 512; Purdy *v.* Doyle, 1 Paige 558.

Pennsylvania.—Good *v.* Good, 7 Watts 195.

South Carolina.— Murray *v.* Stephens, 4 Strobh. 352.

be bound by a judgment affecting their common source of title, that is, the rights of the ancestor or the will under which they all claim.[6]

8. Principal and Surety[7] — a. In General. Whether or not a surety is concluded by a judgment against his principal is fully discussed elsewhere.[8]

b. Sureties on Bonds Given in Legal Proceedings. The surety on a bond given in the course of legal proceedings submits himself to the acts of the principal, and to the judgment, as itself a legal consequence, falling within the suretyship, and therefore is conclusively bound by a judgment against the principal, to the exclusion of all defenses which were or might have been set up by the latter.[9]

9. Garnishees. A garnishment proceeding is a suit *inter partes*, and not *in rem*, and therefore can affect only the parties thereto and those in privity with them.[10]

10. General and State Governments and Municipal Corporations. The United States, in the character of a plaintiff or when sued by its permission in one of its own courts, is bound by the estoppel of the judgment like any private suitor;[11] but it is not estopped by judgments against its officers, agents, or tenants.[12] In Canada it has been held that the government of the dominion is bound by the

Vermont.— Howe *v.* Chesley, 56 Vt. 727.

Virginia.— Chapman *v.* Chapman, 1 Munf. 398.

United States.— Kearney *v.* Sansbury, 15 Wall. 51, 21 L. ed. 41; Cuyler *v.* Ferrill, 6 Fed. Cas. No. 3,523, 1 Abb. 169.

See 30 Cent. Dig. tit. "Judgment," § 1213.

Devisees and legatees.— Where real estate charged with the payment of legacies had been partitioned among the devisees, the legatees not being parties to the partition, and never acceding to any apportionment of the legacies, they are not estopped from asserting their paramount lien against a fund arising from a judicial sale of a portion of the realty. Allegheny Nat. Bank *v.* Hays, 12 Fed. 663.

A posthumous child takes directly from the parent, his estate remaining meanwhile in abeyance, so that he is not bound by a decree had against the other heirs before his birth. McConnel *v.* Smith, 23 Ill. 611. And see Hotaling *v.* Marsh, 132 N. Y. 29, 30 N. E. 249.

Representation of after-born children by living heirs see Thompson *v.* Adams, 205 Ill. 552, 69 N. E. 1; Kirk *v.* Kirk, 137 N. Y. 510, 33 N. E. 552; Kent *v.* St. Michael's Church, 136 N. Y. 10, 32 N. E. 704, 32 Am. St. Rep. 693, 18 L. R. A. 331. And see *supra*, XIV, B, 3, b.

6. Regan *v.* West, 115 Ill. 603, 4 N. E. 365; Newberry *v.* Blatchford, 106 Ill. 584; Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613; Wills *v.* Spraggins, 3 Gratt. (Va.) 555; Seabright *v.* Seabright, 33 W. Va. 152, 10 S. E. 265.

7. Sureties of guardians see Guardian and Ward, 21 Cyc. 238 *et seq.*

Sureties on official bonds see Officers.

Sureties of personal representatives see Executors and Administrators, 18 Cyc. 1272 *et seq.*

8. See Principal and Surety.

9. Giltinan *v.* Strong, 64 Pa. St. 242. *Compare* Macready *v.* Schenck, 41 La. Ann. 456, 6 So. 517. See Pasewalk *v.* Bollman, 29 Nebr. 519, 45 N. W. 780, 26 Am. St. Rep. 399.

Bail-bond.— Riddle *v.* Baker, 13 Cal. 295; Keane *v.* Fisher, 10 La. Ann. 261; Way *v.* Lewis, 115 Mass. 26; Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94. But see Respublica *v.* Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366, holding that, in an action against the surety on a recognizance for the good behavior of the principal, a judgment in a civil suit on the same recognizance against the principal, in favor of the state, is not admissible in evidence.

Claim bond.— Harvey *v.* Head, 68 Ga. 247.

Injunction bond.— Shenandoah Nat. Bank *v.* Read, 86 Iowa 136, 53 N. W. 96; Jones *v.* Mastin, 60 Mo. App. 578; Towle *v.* Towle, 46 N. H. 431; New York Methodist Churches *v.* Barker, 18 N. Y. 463.

Bond for costs.— McClaskey *v.* Barr, 79 Fed. 408; Washburn *v.* Pullman's Palace-Car Co., 76 Fed. 1005, 21 C. C. A. 598.

Receiver's bond.— Clark *v.* Harrisonville First Nat. Bank, 57 Mo. App. 277.

Bond to perform a decree.— Riddle *v.* Baker, 13 Cal. 295.

Attachment bond.— Tapley *v.* Goodsell, 122 Mass. 176; Cutter *v.* Evans, 115 Mass. 27. But *compare* Bunt *v.* Rheum, 52 Iowa 619, 3 N. W. 667.

Replevin or redelivery bond.— Craig *v.* Herring, 80 Ga. 709, 6 S. E. 283; Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591; Lyon *v.* Northrup, 17 Iowa 314; Boyd *v.* Huffaker, 40 Kan. 634, 20 Pac. 459; Richardson *v.* People's Nat. Bank, 57 Ohio St. 299, 48 N. E. 1100; Cheatham *v.* Morrison, 37 S. C. 187, 15 S. E. 924; Thomson *v.* Joplin, 12 S. C. 580.

10. See Garnishment, 20 Cyc. 1147 *et seq.*

11. U. S. *v.* O'Grady, 22 Wall. (U. S.) 641, 22 L. ed. 772; Atlantic Dredging Co. *v.* U. S., 35 Ct. Cl. 463; Fendall *v.* U. S., 14 Ct. Cl. 247.

12. Carr *v.* U. S., 98 U. S. 433, 25 L. ed. 209; John Shillito Co. *v.* McClung, 51 Fed. 868, 2 C. C. A. 526; Langford *v.* U. S., 12 Ct. Cl. 338.

judgment of a court of justice in a suit to which the attorney-general, as representing the government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit.[13] So also a state, when invoking or consenting to the jurisdiction of the courts, or when made a defendant by compulsory process, in the rare instances where that is lawful, is conclusively bound by the judgment which may be rendered;[14] and a state may also be bound by the judgment rendered in an action by or against one of its municipal corporations,[15] but not by a judgment between private parties,[16] although a question affecting the public interests or public domain was litigated therein.[17] The record of a previous action to which the state was not a party is not available against it as *res judicata*, unless it appears that the state by statute expressly authorized the action to be brought or defended, and that the officer having the action in charge acted within the scope of the authority given by the statute.[18] A municipal corporation is in no sense sovereign, and the doctrine of *res judicata* applies to it as to any private party;[19] but it is not estopped by a judgment for or against another municipal corporation of the same state, although the same question is at issue.[20]

11. Co-Plaintiffs or Co-Defendants. Although a judgment is conclusive upon all the parties to the action, so that no one can allege anything contrary to it merely because his co-plaintiff or co-defendant is not joined with him in the second suit,[21] yet the estoppel is raised only between those who were adverse parties in the former suit, so that the judgment therein settles nothing as to the relative rights or liabilities of the co-plaintiffs or co-defendants *inter sese*,[22] unless their

13. Fonseca *v.* Atty.-Gen., 17 Can. Sup. Ct. 612.

14. State *v.* Adler, 67 Ark. 469, 55 S. W. 851; People *v.* Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86; State *v.* Kennedy, 60 Nebr. 300, 83 N. W. 87; Stone *v.* Kentucky Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202.

Suits for taxes.— A judgment in a suit for the collection of taxes operates as an estoppel against the state, or any agency of the state, in suits concerning the same taxes or those subsequently accruing under the same statute. Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673; Stone *v.* Kentucky Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187; Kentucky Bank *v.* Stone, 88 Fed. 383.

15. People *v.* Holladay, 102 Cal. 661, 36 Pac. 927, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; People *v.* Beaudry, 91 Cal. 213, 27 Pac. 610. *Compare* People *v.* Loeffler, 175 Ill. 585, 51 N. E. 785.

16. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726 (holding that the state is not concluded by a judgment rendered in an action between individuals, to which it was no party and in which it was not represented, as to the constitutionality of a statute); Madden *v.* State, 68 Kan. 658, 75 Pac. 1023.

17. Platt *v.* Vermillion, 99 Fed. 356, 39 C. C. A. 555. And see Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

18. State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68.

19. Illinois Cent. R. Co. *v.* Champaign, 163 Ill. 524, 45 N. E. 120; Kentucky Bank *v.* Stone, 88 Fed. 383.

20. Northern Bank *v.* Stone, 88 Fed. 413.

21. Wilkins *v.* Judge, 14 Ala. 135; Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Riley *v.* Grafton First Nat. Bank, 81 Md. 14, 31 Atl. 585; People *v.* Stephens, 71 N. Y. 527; Lawrence *v.* Hunt, 10 Wend. (N. Y.) 80, 25 Am. Dec. 539.

22. *Alabama.*— Buffington *v.* Cook, 35 Ala. 312, 73 Am. Dec. 491.

California.— *In re* Heydenfeldt, 127 Cal. 456, 59 Pac. 839.

Georgia.— Cleveland *v.* Chambliss, 64 Ga. 352. But see Dearing *v.* Charleston Bank, 5 Ga. 497, 48 Am. Dec. 300.

Illinois.— Conwell *v.* Thompson, 50 Ill. 329.

Indiana.— Voss *v.* Lewis, 126 Ind. 155, 25 N. E. 892; Duncan *v.* Holcomb, 26 Ind. 378; Westfield Gas, etc., Co. *v.* Noblesville, etc., Gravel Road Co., 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244.

Iowa.— Eikenberry *v.* Edwards, 71 Iowa 82, 32 N. W. 183; Kennedy *v.* Derby Independent School Dist., 48 Iowa 189.

Kansas.— Montgomery *v.* Road, 34 Kan. 122, 8 Pac. 253.

Louisiana.— Smith Bros. *v.* New Orleans, etc., R. Co., 109 La. 782, 33 So. 769.

Massachusetts.— Goff *v.* Hathaway, 180 Mass. 497, 62 N. E. 722.

Minnesota.— Pioneer Sav., etc., Co. *v.* Bartsch, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511.

Missouri.— O'Rourke *v.* Lindell R. Co., 142 Mo. 342, 44 S. W. 254; State Bank *v.* Bartle, 114 Mo. 176, 21 S. W. 816; McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489; Corl *v.* Riggs, 12 Mo. 430; Springfield *v.* Plummer, 89 Mo. App. 515; Kansas City *v.* Mitchener, 85 Mo. App. 36.

conflicting or hostile claims were brought into issue by cross petitions or separate and adversary answers, and were thereupon actually litigated and adjudicated.[23]

12. STRANGERS — a. Not Concluded by Judgment. A judgment is not pleadable in bar nor admissible in evidence against strangers to the litigation in which it was rendered, that is, those who were neither parties nor interveners in that suit, nor represented by parties therein, nor in privity with the parties or any of them.[24] Participation in the trial by right of an interest in the subject-matter

New Jersey.— Gardner *v.* Raisbeck, 28 N. J. Eq. 71.

New York.— Rudd *v.* Cornell, 171 N. Y. 114, 63 N. E. 823; Denike *v.* Denike, 167 N. Y. 585, 60 N. E. 1110; Earle *v.* Earle, 73 N. Y. App. Div. 300, 76 N. Y. Suppl. 851; Wagstaff *v.* Marcy, 25 Misc. 121, 54 N. Y. Suppl. 1021; O'Connor *v.* New York, etc., Land Imp. Co., 8 Misc. 243, 28 N. Y. Suppl. 544; Mahoney *v.* Prendergast, 12 N. Y. Suppl. 869; New Jersey Zinc Co. *v.* Blood, 8 Abb. Pr. 147. But see Craig *v.* Ward, 1 Abb. Dec. 454.

Ohio.— Koelsch *v.* Mixer, 52 Ohio St. 207, 39 N. E. 417; Wood *v.* Butler, 23 Ohio St. 520; McCrory *v.* Parks, 18 Ohio St. 1; Cox *v.* Hill, 3 Ohio 412.

Oklahoma.— Keagy *v.* Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811.

Texas.— Hoxie *v.* Farmers', etc., Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637; Cohen *v.* Simpson, (Civ. App. 1895) 32 S. W. 59; Sandoval *v.* Rosser, (Civ. App. 1894) 26 S. W. 930. But see Carnes *v.* Carnes, 26 Tex. Civ. App. 610, 64 S. W. 877.

Virginia.— See Kent *v.* Kent, 82 Va. 205.

See 30 Cent. Dig. tit. "Judgment," § 1229.

But see Lambert *v.* Hutchinson, 1 Beav. 277, 8 L. J. Ch. 196, 17 Eng. Ch. 277, 48 Eng. Reprint 947.

Suretyship.— A judgment recovered against two defendants jointly does not preclude one of them, when sued by the other, from showing that he was only a surety for the payment of the original debt, and his co-defendant the principal debtor. Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; Dent *v.* King, 1 Ga. 200, 44 Am. Dec. 638; Joyce *v.* Whitney, 57 Ind. 550; Harvey *v.* Osborn, 55 Ind. 535; McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489; Lockhart *v.* Gillis, (Tex. 1885) 20 Reporter 477.

Action between indorsers.—A judgment obtained by the holder of a note against all the indorsers is conclusive in a subsequent action by an indorser who has paid the judgment against a prior indorser; for all the points which the second indorser would have to prove as against the prior indorser must have been established in the suit brought by the holder. Lloyd *v.* Barr, 11 Pa. St. 41.

23. *Illinois.*— Baldwin *v.* Haneey, 204 Ill. 281, 68 N. E. 560.

Iowa.— Devin *v.* Ottumwa, 53 Iowa 461, 5 N. W. 552. And see Cook *v.* Des Moines, 125 Iowa 611, 101 N. W. 434.

Kansas.— Osage City Bank *v.* Jones, 51 Kan. 379, 32 Pac. 1096.

Kentucky.— Prentice *v.* Buxton, 3 B. Mon. 35.

Massachusetts.— Richardson *v.* Wolcott, 10 Allen 439.

Minnesota.— Goldschmidt *v.* Noble County, 37 Minn. 49, 33 N. W. 544.

Missouri.— Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421.

Nebraska.— Hapgood *v.* Ellis, 11 Nebr. 131, 7 N. W. 845.

New Hampshire.— Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688.

New York.— Ostrander *v.* Hart, 130 N. Y. 406, 29 N. E. 744; Leavitt *v.* Wolcott, 95 N. Y. 212; Craig *v.* Ward, 1 Abb. Dec. 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235.

North Carolina.— Baugert *v.* Blades, 117 N. C. 221, 23 S. E. 179.

Wisconsin.— Logan *v.* Trayser, 77 Wis. 579, 46 N. W. 877; Bowen *v.* Hastings, 47 Wis. 232, 2 N. W. 301.

United States.— Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. 741, 24 L. ed. 190; O'Hara *v.* Mobile, etc., R. Co., 75 Fed. 130.

See 30 Cent. Dig. tit. "Judgment," § 1229.

24. *Alabama.*— Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 606, 24 So. 892; Fuller *v.* Whitlock, 99 Ala. 411, 13 So. 80; Trimble *v.* Fariss, 78 Ala. 260; Miller *v.* Vaughn, 73 Ala. 312; Junkins *v.* Lovelace, 72 Ala. 303; Dunklin *v.* Wilson, 64 Ala. 162; Dunklin *v.* Harvey, 56 Ala. 177; McLemore *v.* Nuckolls, 37 Ala. 662; Winston *v.* Westfeldt, 22 Ala. 760, 58 Am. Dec. 278; Rowland *v.* Day, 17 Ala. 681; Lang *v.* Waring, 17 Ala. 145; McLelland *v.* Ridgeway, 12 Ala. 482; St. John *v.* O'Connel, 7 Port. 466.

Arkansas.— Garland County *v.* Hot Spring County, 68 Ark. 83, 56 S. W. 636; Avera *v.* Rice, 64 Ark. 330, 42 S. W. 409; Memphis, etc., R. Co. *v.* State, 37 Ark. 632.

California.— Bell *v.* Solomons, 142 Cal. 59, 75 Pac. 649; Rowe *v.* Hibernia Sav., etc., Soc., 134 Cal. 403, 66 Pac. 569; Hallinan *v.* Hearst, 133 Cal. 645, 66 Pac. 17, 25 L. R. A. 216; Cloverdale *v.* Smith, 128 Cal. 230, 60 Pac. 851; Williams *v.* Cooper, 124 Cal. 666, 57 Pac. 577; Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254; Purser *v.* Cady, 120 Cal. 214, 52 Pac. 489; Griffith *v.* Happersberger, 86 Cal. 605, 25 Pac. 137, 487; Roman Catholic Archbishop *v.* Shipman, 69 Cal. 586, 11 Pac. 343; Mayo *v.* Wood, 50 Cal. 171; People *v.* Smyth, 28 Cal. 21; Haffley *v.* Maier, 13 Cal. 13.

Colorado.— Lower Latham Ditch Co. *v.* Louden Irr. Canal Co., 27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80; Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440; Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505; Fairbanks *v.* Kent, 16 Colo. App. 35, 63 Pac. 707.

may make one a party to it in the legal sense; but when a person is a mere volun-

Connecticut.— Cook *v.* Morris, 66 Conn. 137, 33 Atl. 594; Southington Ecclesiastical Soc. *v.* Gridley, 20 Conn. 200; Dennison *v.* Hyde, 6 Conn. 508; Stevens *v.* Curtiss, 3 Conn. 260; Fowler *v.* Collins, 2 Root 231; Edy *v.* Williams, 1 Root 185.

Delaware.— Burton *v.* Hazzard, 4 Harr. 100; Lowher *v.* Beauchamp, 2 Harr. 139.

Florida.— Reddick *v.* Meffert, 32 Fla. 409, 13 So. 894; Knox *v.* Spratt, 19 Fla. 817; Caro *v.* Pensacola City Co., 19 Fla. 766; Marvin *v.* Hampton, 18 Fla. 131.

Georgia.— Brenau Assoc. *v.* Harbison, 120 Ga. 929, 48 S. E. 363; Hart *v.* Manson, 119 Ga. 865, 47 S. E. 345; Ballard *v.* James, 117 Ga. 823, 45 S. E. 68; Sanford *v.* Tanner, 114 Ga. 1005, 41 S. E. 668; Lamar *v.* Gardner, 113 Ga. 781, 39 S. E. 498; Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; Patapsco Guano Co. *v.* Hurst, 106 Ga. 184, 32 S. E. 136; Dodd *v.* Mayfield, 99 Ga. 319, 25 S. E. 698; Clayton *v.* West, 97 Ga. 328, 22 S. E. 901; Turner *v.* Cates, 90 Ga. 731, 16 S. E. 971; Lillenthal *v.* Champion, 58 Ga. 158; Craft *v.* Diamond, 23 Ga. 418; Westfall *v.* Scott, 20 Ga. 233; Brock *v.* Garrett, 16 Ga. 487; Mays *v.* Compton, 13 Ga. 269.

Idaho.— Stocker *v.* Kirtley, 7 Ida. 795, 59 Pac. 891.

Illinois.— Bollnow *v.* Roach, 210 Ill. 364, 71 N. E. 454; Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493; Peoria First Nat. Bank *v.* Peoria Watch Co., 191 Ill. 128, 60 N. E. 859; Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751; Franklin Sav. Bank *v.* Taylor, 131 Ill. 376, 23 N. E. 397; Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256; Samuel *v.* Agnew, 80 Ill. 553; Harris *v.* Cornell, 80 Ill. 54; Bond *v.* Ramsey, 72 Ill. 550; Clark *v.* Moore, 64 Ill. 273; Kelley *v.* Chapman, 13 Ill. 530, 56 Am. Dec. 474; Edwards *v.* McCurdy, 13 Ill. 496; Hauskins *v.* Pike, 97 Ill. App. 382; Gottfred *v.* Woodruff, 96 Ill. App. 295; McLean *v.* Hansen, 37 Ill. App. 48.

Indiana.— Brown *v.* Clow, 158 Ind. 403, 62 N. E. 1006; Goss *v.* Wallace, 140 Ind. 541, 39 N. E. 920; Proctor *v.* Cole, 120 Ind. 102, 22 N. E. 101; Platt *v.* Brickley, 119 Ind. 333, 21 N. E. 906; Cook *v.* Frederick, 77 Ind. 406; Maple *v.* Beach, 43 Ind. 51; Cox *v.* Vickers, 35 Ind. 27; Brown *v.* Wyncoop, 2 Blackf. 230; Krotz *v.* A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273; Cray *v.* Wright, 16 Ind. App. 258, 44 N. E. 1009.

Iowa.— Busse *v.* Schaeffer, (1905) 103 N. W. 947; Jasper County *v.* Sparham, 125 Iowa 464, 101 N. W. 134; Dows Real Estate, etc., Co. *v.* Emerson, 125 Iowa 86, 99 N. W. 724; Guedert *v.* Emmet County, 116 Iowa 40, 89 N. W. 85; Palmer *v.* Osborne, 115 Iowa 714, 87 N. W. 712; Bush *v.* Herring, 113 Iowa 158, 84 N. W. 1036; Steel *v.* Long, 104 Iowa 39, 73 N. W. 470; Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319; Melhop *v.* Seaton, 77 Iowa 151, 41 N. W. 600; Hume *v.* Franzen, 73 Iowa 25, 34 N. W. 490; Spurgin *v.* Adamson, 62 Iowa 661, 18 N. W. 293; Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506; Preston *v.* Turner, 36 Iowa 671; Armstrong *v.* Borland, 35 Iowa 537; Bleidorn *v.* Abel, 6 Iowa 5; Veach *v.* Schaup, 3 Iowa 194.

Kansas.— Stough *v.* Badger Lumber Co., 70 Kan. 713, 79 Pac. 737; Manley *v.* Debentures "B" Liquidation Co., 64 Kan. 573, 68 Pac. 31; Kansas Pac. R. Co. *v.* McBratney, 12 Kan. 9; Chittenden *v.* Croshy, 5 Kan. App. 534, 48 Pac. 209.

Kentucky.— Malona *v.* Schwing, 101 Ky. 56, 39 S. W. 523, 19 Ky. L. Rep. 145; Weigelman *v.* Bronger, 96 Ky. 132, 28 S. W. 334, 16 Ky. L. Rep. 401; Crabb *v.* Larkin, 9 Bush 154; Landers *v.* Beauchamp, 8 B. Mon. 493; Fenwick *v.* Macey, 2 B. Mon. 469; Banks *v.* Sharp, 6 J. J. Marsh. 180; Clarke *v.* Redman, 5 J. J. Marsh. 31; Buford *v.* Rucker, 4 J. J. Marsh. 551; Newson *v.* Lycan, 3 J. J. Marsh. 440, 20 Am. Dec. 156; Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Wilson *v.* Bowen, 5 T. B. Mon. 33; Rees *v.* Lawless, 4 Litt. 218; Trigg *v.* Lewis, 3 Litt. 129; Owings *v.* Beall, 3 Litt. 103; Shadburn *v.* Jennings, 1 A. K. Marsh. 179; Fishback *v.* Major, 1 A. K. Marsh. 147; McKee *v.* Bodley, 2 Bibb 481; Sanders *v.* McCracken, Hard. 258; Monroe *v.* Mattox, 85 S. W. 748, 27 Ky. L. Rep. 575; Smith *v.* Cornett, 80 S. W. 1188, 26 Ky. L. Rep. 265; McCallister *v.* Bridges, 40 S. W. 70, 19 Ky. L. Rep. 107; Norton *v.* Norton, 25 S. W. 750, 27 S. W. 85, 15 Ky. L. Rep. 872. And see German Protestant Orphan Asylum *v.* Barber Asphalt Pav. Co., 82 S. W. 632, 26 Ky. L. Rep. 805.

Louisiana.— Harrison *v.* Ottman, 111 La. 730, 35 So. 844; Thompson *v.* Vance, 111 La. 548, 35 So. 741; Swain *v.* Webre, 106 La. 161, 30 So. 331; Chretien *v.* Bienvenu, 41 La. Ann. 728, 6 So. 553; Ashbey *v.* Ashbey, 41 La. Ann. 138, 5 So. 546; Logan *v.* Herbert, 30 La. Ann. 727; Ledoux *v.* Burton, 30 La. Ann. 576; Carroll *v.* Hamilton, 30 La. Ann. 520; Kennett *v.* Union Ins. Co., 27 La. Ann. 26; Keith *v.* Renard, 18 La. Ann. 734; Mestier *v.* New Orleans, etc., R. Co., 16 La. Ann. 354; Gales *v.* Christy, 4 La. Ann. 293; McNeil's Succession, 2 La. Ann. 567; Sturges *v.* Kendall, 2 La. Ann. 565; Lefebvre *v.* De Montilly, 1 La. Ann. 42; Henderson *v.* Western M. & F. Ins. Co., 10 Rob. 164, 43 Am. Dec. 176. The early cases in this state held that a judgment was *prima facie* evidence against third persons, unless directly attacked for fraud or collusion. Lesassier *v.* Dashiell, 17 La. 194; Gilbert *v.* Nephler, 15 La. 59; Adams *v.* His Creditors, 14 La. 454; Winter *v.* Thibodeaux, 8 La. 193; Laralde *v.* Derbigny, 1 La. 85.

Maine.— Adams *v.* Clapp, 99 Me. 169, 58 Atl. 1043; Snow *v.* Russell, 94 Me. 322, 47 Atl. 536; Biddle, etc., Co. *v.* Burnham, 91 Me. 578, 40 Atl. 669; Milford *v.* Veazie, (1888) 14 Atl. 730; Stowe *v.* Merrill, 77 Me.

teer at the trial, and has no legal right to control the proceedings in the action,

550, 1 Atl. 684; Morse *v.* Machias Water Power, etc., Co., 42 Me. 119; Sheldon *v.* White, 35 Me. 233; Putnam Free School *v.* Fisher, 34 Me. 172; Parsons *v.* Copeland, 33 Me. 370, 54 Am. Dec. 628; Jackson *v.* Myrick, 29 Me. 490; Hammat *v.* Russ, 16 Me. 171; Burgess *v.* Lane, 3 Me. 165.

Maryland.— Niller *v.* Johnson, 27 Md. 6; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Cockey *v.* Milne, 16 Md. 200; McClellan *v.* Kennedy, 8 Md. 230; American Exch. Bank *v.* Inloes, 7 Md. 380; Alexander *v.* Walter, 8 Gill 239, 50 Am. Dec. 688; Frazer *v.* Palmer, 2 Harr. & G. 469; Tongue *v.* Morton, 6 Harr. & J. 21; Dorsey *v.* Gassaway, 2 Harr. & J. 402, 3 Am. Dec. 557; McKim *v.* Mason, 3 Md. Ch. 186. See Williams *v.* Snebly, 92 Md. 9, 48 Atl. 43.

Massachusetts.—Com. *v.* Newton, 186 Mass. 286, 71 N. E. 699; *In re* Butrick, 185 Mass. 107, 69 N. E. 1044; Steuer *v.* Maguire, 182 Mass. 575, 66 N. E. 706; Forbes *v.* Douglass, 175 Mass. 191, 55 N. E. 847; Penney *v.* Com., 173 Mass. 507, 53 N. E. 865; Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669; Shores *v.* Hooper, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308; Hood *v.* Hood, 110 Mass. 463; Wing *v.* Bishop, 3 Allen 456; Vose *v.* Morton, 4 Cush. 27, 50 Am. Dec. 750; Colton *v.* Smith, 11 Pick. 311, 22 Am. Dec. 375; Shrewsbury *v.* Boylston, 1 Pick. 105; Chase *v.* Hathaway, 14 Mass. 222; Perkins *v.* Pitts, 11 Mass. 125; Copp *v.* McDougall, 9 Mass. 1; Andrews *v.* Herring, 5 Mass. 210; Twambly *v.* Henley, 4 Mass. 441.

Michigan.— Willsie *v.* Ionia, 137 Mich. 445, 100 N. W. 605; Detroit *v.* Detroit R. Co., 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. Rep. 600; Wright *v.* Hubbard, 126 Mich. 239, 85 N. W. 572; Fisher *v.* Wineman, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192; Seymour *v.* Wallace, 121 Mich. 402, 80 N. W. 242; Aultman *v.* Sloan, 115 Mich. 151, 73 N. W. 123; Rouse *v.* Detroit Cycle Co., 111 Mich. 251, 69 N. W. 511, 38 L. R. A. 794; Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 23 Am. St. Rep. 182.

Minnesota.— Minnesota Debenture Co. *v.* Johnson, 94 Minn. 150, 102 N. W. 381; Falconer *v.* Cochran, 68 Minn. 405, 71 N. W. 386; Kurtz *v.* St. Paul, etc., R. Co., 65 Minn. 60, 67 N. W. 808; Brown *v.* Markham, 60 Minn. 233, 62 N. W. 123, 30 L. R. A. 84; Maloney *v.* Finnegan, 40 Minn. 281, 41 N. W. 979. See Willius *v.* St. Paul, 82 Minn. 273, 84 N. W. 1009.

Mississippi.— Simpson County *v.* Buckley, 85 Miss. 713, 38 So. 104; Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956; Foster *v.* Gulf Coast Canning Co., 71 Miss. 624, 15 So. 931; McPike *v.* Wells, 54 Miss. 136; Pouns *v.* Gartman, 29 Miss. 133; Phipps *v.* Tarpley, 24 Miss. 597; Goddard *v.* Long, 5 Sm. & M. 782; Gridley *v.* Denney, 2 How. 820; Moore *v.* Cason, 1 How. 53.

Missouri.— Packard *v.* Hannibal, etc., R. Co., 181 Mo. 421, 80 S. W. 951, 103 Am. St. Rep. 607; Overshiner *v.* Britton, 169 Mo. 341, 69 S. W. 17; Bartlett *v.* Kauder, 97 Mo. 356, 11 S. W. 67; McDonald *v.* Matney, 82 Mo. 358; Dugge *v.* Stumpe, 73 Mo. 513; Dobbins *v.* Hyde, 37 Mo. 114; Norcross *v.* Hudson, 32 Mo. 227; Perkins *v.* Goddin, 111 Mo. App. 429, 85 S. W. 936; McCrillis *v.* Thomas, 110 Mo. App. 699, 85 S. W. 673; Holland *v.* Cunliff, 96 Mo. App. 67, 69 S. W. 737; Pfaff *v.* Gruen, (App. 1902) 69 S. W. 405; Bonnell *v.* Pack, 79 Mo. App. 496; Hunt *v.* Lucas, 68 Mo. App. 518; Griffith *v.* Gillum, 31 Mo. App. 33; Watson *v.* Walther, 23 Mo. App. 263.

Montana.— Butte Land, etc., Co. *v.* Merriman, 32 Mont. 402, 80 Pac. 675; Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

Nebraska.— Agnew *v.* Montgomery, (1904) 99 N. W. 820; State *v.* Savage, 64 Nebr. 684, 90 N. W. 898, 91 N. W. 557; Sarpy County State Bank *v.* Hinkle, 53 Nebr. 108, 73 N. W. 462; Lederer *v.* Union Sav. Bank, 52 Nebr. 133, 71 N. W. 954; Belknap *v.* Stewart, 38 Nebr. 304, 56 N. W. 881, 41 Am. St. Rep. 729; McCord-Brady Co. *v.* Krause, 36 Nebr. 764, 55 N. W. 215; Connell *v.* Galligher, 36 Nebr. 749, 55 N. W. 229; Tarkington *v.* Link, 27 Nebr. 826, 44 N. W. 35; Citizens' State Bank *v.* Porter, 4 Nebr. (Unoff.) 73, 93 N. W. 391.

New Hampshire.— Wingate *v.* Haywood, 40 N. H. 437; Ham *v.* Ayres, 22 N. H. 412; Stevens *v.* Thompson, 17 N. H. 103; Lawrence *v.* Haynes, 5 N. H. 33, 20 Am. Dec. 554.

New Jersey.— Lehigh Zinc, etc., Co. *v.* New Jersey Zinc, etc., Co., 55 N. J. L. 350, 26 Atl. 920; Prall *v.* Patton, 3 N. J. L. 570; Bacon *v.* Fay, 63 N. J. Eq. 411, 51 Atl. 797; Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919; Rice *v.* Rice, (Ch. 1892) 23 Atl. 946; Cox *v.* Flanagan, (Ch. 1885) 2 Atl. 33.

New York.—McNaney *v.* Hall, 159 N. Y. 544, 54 N. E. 1093; Beveridge *v.* New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; Hoopes *v.* Auburn Water-Works Co., 109 N. Y. 625, 16 N. E. 681; Moores *v.* Townshend, 102 N. Y. 387, 7 N. E. 401; Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; People *v.* Murray, 73 N. Y. 535; Excelsior Petroleum Co. *v.* Lacey, 63 N. Y. 422; Forbes *v.* Halsey, 26 N. Y. 53; Clark *v.* Durland, 93 N. Y. Suppl. 249, 104 N. Y. App. Div. 615; Ironwood *v.* Wickes, 93 N. Y. App. Div. 164, 87 N. Y. Suppl. 554; O'Donohue *v.* Cronin, 62 N. Y. App. Div. 379, 70 N. Y. Suppl. 737; Sweetser *v.* Davis, 26 N. Y. App. Div. 398, 49 N. Y. Suppl. 874; Gray *v.* Daniels, 18 N. Y. App. Div. 465, 45 N. Y. Suppl. 1106; New York Cent., etc., R. Co. *v.* Brennan, 12 N. Y. App. Div. 103, 42 N. Y. Suppl. 529; Matter of Patterson, 79 Hun 371, 29 N. Y. Suppl. 451; Stanton *v.* Hennessey, 78 Hun 287, 28 N. Y. Suppl. 855, 29 N. Y. Suppl. 615; Flagler *v.* Schoeffel, 40 Hun, 178; Hirsch

to make any defense, to examine the witnesses, or to prosecute proceedings in error from the rulings and judgment in the case, he is to be considered as a

v. Livingston, 3 Hun 9; Van Buskirk *v.* Warren, 34 Barb. 457; Deck *v.* Johnson, 30 Barb. 283; Reynolds *v.* Brown, 15 Barb. 24; Ainslie *v.* New York, 1 Barb. 168; Beyer *v.* Schultze, 54 N. Y. Super. Ct. 212; Chapman *v.* Frank, 15 Daly 282, 5 N. Y. Suppl. 448; Thorp *v.* Philpin, 15 Daly 155, 3 N. Y. Suppl. 939; Brennan *v.* Blath, 3 Daly 478; Hardy *v.* Eagle, 25 Misc. 471, 54 N. Y. Suppl. 1045; Matter of Fritts, 19 Misc. 402, 44 N. Y. Suppl. 344; Stimmel *v.* Swan, 17 Misc. 354, 39 N. Y. Suppl. 1074; Davis *v.* Bonn, 13 Misc. 331, 34 N. Y. Suppl. 465; McVity *v.* Stanton, 10 Misc. 105, 30 N. Y. Suppl. 934; Malsky *v.* Schumacher, 7 Misc. 8, 27 N. Y. Suppl. 331; *In re* Mellen, 21 N. Y. Suppl. 811; Matter of Wright, 6 N. Y. Suppl. 773, 1 Connoly Surr. 287; Willett's Estate, 15 N. Y. St. 445; Clark's Case, 15 Abb. Pr. 227; Fuller *v.* Van Geesen, 4 Hill 171; Lawrence *v.* Hunt, 10 Wend. 80, 25 Am. Dec. 539; Maybee *v.* Avery, 18 Johns. 352; Jackson *v.* Vedder, 3 Johns. 8.

North Carolina.— Fisher *v.* Southern L. & T. Co., 138 N. C. 90, 50 S. E. 592; Causey *v.* Snow, 122 N. C. 326, 29 S. E. 359; Turner *v.* Rosenthal, 116 N. C. 437, 21 S. E. 198; Vickers *v.* Henry, 110 N. C. 371, 15 S. E. 115; Falls *v.* Gamble, 66 N. C. 455; Weaver *v.* Parker, 61 N. C. 479; Miller *v.* Twitty, 20 N. C. 7; Bennett *v.* Holmes, 18 N. C. 486.

Ohio.— State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68; Stewart *v.* Wheeling, etc., R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; Holt *v.* Lamb, 17 Ohio St. 374; Irvin *v.* Smith, 17 Ohio 226; Ermston *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 657, 7 Ohio N. P. 635; Block *v.* Peebles, 10 Ohio Dec. (Reprint) 3, 18 Cinc. L. Bul. 36; McKinzie *v.* Bailie, 7 Ohio Dec. (Reprint) 607, 4 Cinc. L. Bul. 209.

Oregon.— Poley *v.* Lacert, 35 Oreg. 166, 58 Pac. 37; Maffett *v.* Thompson, 32 Oreg. 546, 52 Pac. 565, 53 Pac. 854; Nickum *v.* Burckhardt, 30 Oreg. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. Rep. 822; De Lashmutt *v.* Sellwood, 10 Oreg. 319.

Pennsylvania.— Crawford *v.* Pyle, 190 Pa. St. 263, 42 Atl. 687; West Philadelphia Pass. R. Co. *v.* Philadelphia, etc., Turnpike Road Co., 186 Pa. St. 459, 40 Atl. 787; Pittsburgh, etc., R. Co. *v.* Marshall, 85 Pa. St. 187; Mackey *v.* Coates, 70 Pa. St. 350; Davidson *v.* Barclay, 63 Pa. St. 406; Morrison *v.* Mullin, 34 Pa. St. 12; Pounder *v.* Foos, 1 Walk. 27; Kauffelt *v.* Leber, 9 Watts & S. 93; Rose *v.* Klinger, 8 Watts & S. 290; Timbers *v.* Katz, 6 Watts & S. 290; Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733; Rhodes *v.* Rhodes, 18 Pa. Super. Ct. 231; Slayman *v.* Clark, 15 Pa. Super. Ct. 591; Com. *v.* Keystone Electric Light Co., 2 Dauph. Co. Rep. 1; Mahon *v.* Luzerne County, 9 Kulp 453; Building Assoc. *v.* O'Connor, 3 Phila. 453.

Rhode Island.— Richmond *v.* James, 27 R. I. 154, 61 Atl. 54; Gill *v.* Read, 5 R. I. 343, 73 Am. Dec. 73.

South Carolina.— Anderson *v.* Fowler, 48 S. C. 8, 25 S. E. 900; Patterson *v.* Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831; Hardin *v.* Clark, 32 S. C. 480, 11 S. E. 304; Kennedy *v.* Simson, Harp. 370; Koogler *v.* Huffman, 1 McCord 495; McEachern *v.* Cochran, 1 McCord 338; Marshall *v.* Drayton, 2 Nott & M. 25; Dorn *v.* Beasley, 7 Rich. Eq. 84; Long *v.* Cason, 4 Rich. Eq. 60; Manigault *v.* Deas, Bailey Eq. 283.

South Dakota.— Bowdle *v.* Jencks, (1904) 99 N. W. 98; McPherson *v.* Julius, 17 S. D. 98, 95 N. W. 428. And see Chapman *v.* Greene, (1904) 101 N. W. 351.

Tennessee.— Walter *v.* Hartman, (1902) 67 S. W. 476; Arnold *v.* Harris, (Ch. App. 1898) 52 S. W. 715; Guy *v.* Fisher, etc., Lumber Co., 93 Tenn. 213, 23 S. W. 972; Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 204, 15 S. W. 737; Simpson *v.* Jones, 2 Sneed 36; Stephens *v.* Jack, 3 Yerg. 403, 24 Am. Dec. 583; Edwards *v.* McConnel, Cooke 305.

Texas.— Ellis *v.* Le Bow, 96 Tex. 532, 74 S. W. 528; McDonald *v.* Miller, 90 Tex. 309, 39 S. W. 89; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; Pacific Mut. L. Ins. Co. *v.* Williams, 79 Tex. 633, 15 S. W. 478; McCamant *v.* Roberts, 66 Tex. 266, 1 S. W. 260; Foster *v.* Powers, 64 Tex. 247; Black *v.* Black, 62 Tex. 296; Henderson *v.* Terry, 62 Tex. 281; Hanrick *v.* Dodd, 62 Tex. 75; Hardin *v.* Blackshear, 60 Tex. 132; Spring *v.* Eisenach, 51 Tex. 432; Johns *v.* Northcutt, 49 Tex. 441; McCoy *v.* Crawford, 9 Tex. 353; Parlin, etc., Co. *v.* Vawter, (Civ. App. 1905) 88 S. W. 407; Citizens' Nat. Bank *v.* Strauss, 29 Tex. Civ. App. 407, 69 S. W. 86; Leary *v.* Interstate Nat. Bank, (Civ. App. 1901) 63 S. W. 149; Sutherland *v.* Elmendorf, 24 Tex. Civ. App. 137, 57 S. W. 890; Gulf City Trust Co. *v.* Hartley, 20 Tex. Civ. App. 180, 49 S. W. 902; Clemons *v.* Clemons, (Civ. App. 1898) 45 S. W. 199; Yochum *v.* McCurdy, (Civ. App. 1897) 39 S. W. 210; Bassett *v.* Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312; McCollum *v.* Wood, (Civ. App. 1896) 33 S. W. 1087; Morrill *v.* Smith County, (Civ. App. 1895) 32 S. W. 899.

Vermont.— Wright *v.* Hazen, 24 Vt. 143; Nason *v.* Blaisdell, 12 Vt. 165, 36 Am. Dec. 331.

Virginia.— Reusens *v.* Cassell, 100 Va. 143, 40 S. E. 616; Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354; Omohundro *v.* Omohundro, 27 Gratt. 824; Stinchcomb *v.* Marsh, 15 Gratt. 202; Winston *v.* Starke, 12 Gratt. 317; Downer *v.* Morrison, 2 Gratt. 250; Bailey *v.* Robinson, 1 Gratt. 4, 42 Am. Dec. 540; Erskine *v.* Henry, 9 Leigh 188;

stranger to the cause, and is not concluded by the judgment rendered therein.[25] Neither can a stranger take advantage of a judgment between other parties as evidence of his own rights.[26]

Frazier *v.* Frazier, 2 Leigh 642; Kitty *v.* Fitzhugh, 4 Rand. 600; Loop *v.* Summers, 3 Rand. 511. *Compare* Hooe *v.* Tebbs, 1 Munf. 501.

Washington.— Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572, 73 Pac. 680.

West Virginia.— Long *v.* Willis, 50 W. Va. 341, 40 S. E. 340; St. Lawrence Boom, etc., Co. *v.* Price, 49 W. Va. 432, 38 S. E. 526; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827; Renick *v.* Ludington, 20 W. Va. 511; Adams *v.* Alkire, 20 W. Va. 480; Cady *v.* Gale, 5 W. Va. 505.

Wisconsin.— Connor *v.* Sheridan, 116 Wis. 666, 93 N. W. 835; Lenz *v.* Chicago, etc., R. Co., 111 Wis. 198, 86 N. W. 607; Carpenter *v.* Meachem, 111 Wis. 60, 86 N. W. 552; Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881; Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589; Landauer *v.* Espenhain, 95 Wis. 169, 70 N. W. 287; Coleman *v.* Hunt, 77 Wis. 263, 45 N. W. 1085; Shores *v.* Doherty, 75 Wis. 616, 44 N. W. 747; Goodwin *v.* Snyder, 75 Wis. 450, 44 N. W. 746; Sanger *v.* Mellon, 51 Wis. 560, 8 N. W. 487; Saveland *v.* Green, 36 Wis. 612; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652; Green *v.* Dixon, 9 Wis. 532; Carney *v.* Emmons, 9 Wis. 114.

United States.— Pardee *v.* Aldridge, 189 U. S. 429, 23 S. Ct. 514, 47 L. ed. 883; New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96; Hale *v.* Finch, 104 U. S. 261, 26 L. ed. 732; Noyes *v.* Hall, 97 U. S. 34, 24 L. ed. 909; Sessions *v.* Johnson, 95 U. S. 347, 24 L. ed. 596; Humes *v.* Scruggs, 94 U. S. 22, 24 L. ed. 51; Mutual Benefit L. Ins. Co. *v.* Tisdale, 91 U. S. 238, 23 L. ed. 314; *Ex p.* Howard, 9 Wall. 175, 19 L. ed. 634; Williams *v.* Gibbs, 17 How. 239, 15 L. ed. 135; Gaines *v.* Relf, 12 How. 472, 13 L. ed. 1071; Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059; Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. ed. 474; Hopkins *v.* Lee, 6 Wheat. 109, 5 L. ed. 218; De Farconnet *v.* Western Ins. Co., 110 Fed. 405; Ritchie *v.* Burke, 109 Fed. 16; Burlington Sav. Bank *v.* Clinton, 106 Fed. 269; Platt *v.* Vermillion, 99 Fed. 356, 39 C. C. A. 555; Hook *v.* Mercantile Trust Co., 95 Fed. 41, 36 C. C. A. 645; Chilton *v.* Gratton, 82 Fed. 873; Jones *v.* Wilkey, 78 Fed. 532; Cleveland *v.* Spencer, 73 Fed. 559, 19 C. C. A. 559; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 71 Fed. 245; Michigan Land, etc., Co. *v.* Rust, 68 Fed. 155, 15 C. C. A. 335; Hull *v.* Chaffin, 54 Fed. 437, 4 C. C. A. 414; Matthews *v.* Iron-Clad Mfg. Co., 19 Fed. 321; Simplot *v.* Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158; Scottish-American Mortg. Co. *v.* Follansbee, 14 Fed. 125, 9 Biss. 482; Day *v.* Combination Rubber Co., 2 Fed. 570; Hurst *v.* McNeil, 12 Fed. Cas. No. 6,936, 1 Wash 70; Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*c*, Hempst. 251; McCall *v.* Harrison, 15 Fed. Cas. No. 8,671, 1 Brock. 126; Smith *v.* Turner, 22 Fed. Cas. No. 13,119, 1 Hughes 373; Society for Propagation, etc. *v.* Hartland, 22 Fed. Cas. No. 13,155, 2 Paine 536; Taber *v.* Perrot, 23 Fed. Cas. No. 13,721, 2 Gall. 565; Tompkins *v.* Tompkins, 24 Fed. Cas. No. 14,091, 1 Story 547; Winter *v.* Ludlow, 30 Fed. Cas. No. 17,891, 3 Phila. (Pa.) 464; Sevier *v.* U. S., 7 Ct. Cl. 387.

England.— Anderson *v.* Collinson, [1901] 2 K. B. 107, 70 L. J. K. B. 620, 84 L. T. Rep. N. S. 465, 49 Wkly. Rep. 623; Muskerry *v.* Skeffington, L. R. 3 H. L. 144; Natal Land, etc., Co. *v.* Good, L. R. 2 P. C. 121, 5 Moore P. C. N. S. 132, 16 Wkly. Rep. 1086, 16 Eng. Reprint 465; *In re* Bowling, [1895] 1 Ch. 663, 64 L. J. Ch. 427, 72 L. T. Rep. N. S. 411, 2 Manson 257, 12 Reports 218, 43 Wkly. Rep. 417; Mercantile Inv., etc., Co. *v.* River Plate Trust L., etc., Co., [1894] 1 Ch. 578, 63 L. J. Ch. 366, 70 L. T. Rep. N. S. 131, 8 Reports 791, 42 Wkly. Rep. 365; Needham *v.* Bremner, L. R. 1 C. P. 583, 1 Harr. & R. 731, 12 Jur. N. S. 434, 35 L. J. C. P. 313, 14 L. T. Rep. N. S. 437, 14 Wkly. Rep. 694; Poore *v.* Clarke, 2 Atk. 515, 26 Eng. Reprint 710; Everard *v.* Aston, 3 Bro. P. C. 561, 1 Eng. Reprint 1498; Thirveton *v.* Collier, 1 Ch. Cas. 48, 22 Eng. Reprint 688; Anonymous, 3 Ch. Rep. 5, 21 Eng. Reprint 711, Nels. 78, 21 Eng. Reprint 794; Kingston's Case, 20 How. St. Tr. 355; Goucher *v.* Clayton, 11 Jur. N. S. 107, 34 L. J. Ch. 239, 13 Wkly. Rep. 336; Doe *v.* Brydges, 13 L. J. C. P. 209, 6 M. & G. 282, 7 Scott N. R. 333, 46 E. C. L. 282; Katama Natchier *v.* Shivagunga, 9 Moore Indian App. 543, 19 Eng. Reprint 843. And see Strutt *v.* Borringdon, 5 Esp. 58, 8 Rev. Rep. 834; Evans *v.* Evans, 1 Rob. 165; Jenkyn *v.* Jenkyn, 5 Wkly. Rep. 43.

Canada.— Cassidy *v.* Ingoldsby, 36 U. C. Q. B. 339; Hurlbert *v.* Sleeth, 27 Nova Scotia 375 [*affirmed* in 25 Can. Sup. Ct. 620]. And see McLellan *v.* McIntyre, 12 U. C. C. P. 546.

See 30 Cent. Dig. tit. "Judgment," §§ 1177, 1230.

Bastardy and seduction.— An order quashing a bastardy order in affiliation proceedings, on the ground that defendant was not the father of the child, is not a bar to an action for seduction by the parent or employer of the woman who had obtained the bastardy order. Anderson *v.* Collinson, [1901] 2 K. B. 107, 70 L. J. K. B. 620, 84 L. T. Rep. N. S. 465, 49 Wkly. Rep. 623.

25. Wilkie *v.* Howe, 27 Kan. 518; Hale *v.* Finch, 104 U. S. 261, 26 L. ed. 732. And see McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809. See *supra*, XIV, B, 4.

26. Winston *v.* Starke, 12 Gratt. (Va.) 317.

b. Principle of Stare Decisis. This principle, or the doctrine of adherence to precedents, is not properly a branch of the rule of *res judicata*; it relates only to questions of law, not of fact; although there are decisions to the effect that a title previously passed upon, although in a suit between different parties, will not be again examined and adjudicated, in a case proceeding upon the same state of facts, and presenting the same question, in the absence of a showing that the former decision was manifestly erroneous.[27]

c. Judgment as Evidence of Its Own Existence. Although a judgment is not admissible against strangers to prove the facts on which it is based, it is always admissible to prove the fact or time of its own rendition and its necessary legal consequences, so far as they affect the rights of others than the immediate parties.[28]

27. Kolb *v.* Swann, 68 Md. 516, 13 Atl. 379. And see Matter of Howard, 26 Misc. (N. Y.) 233, 56 N. Y. Suppl. 318. But *compare* Groesbeck *v.* Golden, (Tex. 1887) 7 S. W. 362, holding that the fact that a stranger to a suit has been induced to locate certain land by reason of a decision of the supreme court which declared that the title of a party to the suit was void will not estop such party from asserting his title to the property in a subsequent action brought by such stranger to try title.

28. *Alabama.*— Taylor *v.* Means, 73 Ala. 468; Harrison *v.* Harrison, 39 Ala. 489; McGill *v.* Monette, 37 Ala. 49; Anderson *v.* Bright, 12 Ala. 478; Ansley *v.* Carlos, 9 Ala. 973.

California.— Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811.

Connecticut.— Smith *v.* Chapin, 31 Conn. 530.

Illinois.— Koren *v.* Roemheld, 7 Ill. App. 646.

Indiana.— Maple *v.* Beach, 43 Ind. 51; Jenners *v.* Oldham, 6 Blackf. 235.

Iowa.— Burdick *v.* Chicago, etc., R. Co., 87 Iowa 384, 54 N. W. 439; Magoon *v.* Warfield, 3 Greene 293.

Kentucky.— Head *v.* McDonald, 7 T. B. Mon. 203; Roberts *v.* Smiley, 5 T. B. Mon. 270; Lewis *v.* Knox, 2 Bibb 453.

Louisiana.— Louis *v.* Ricard, 4 La. Ann. 87; Gillett *v.* Landis, 17 La. 470; Morgan *v.* Yarborough, 13 La. 74, 33 Am. Dec. 553; Richardson *v.* Scott, 6 La. 54; Canonge *v.* Louisiana State Bank, 7 Mart. N. S. 583; Thompson *v.* Chauveau, 6 Mart. N. S. 458.

Maine.— Atkinson *v.* Parks, 84 Me. 414, 24 Atl. 891.

Maryland.— Key *v.* Dent, 14 Md. 86.

New Hampshire.— Harrington *v.* Wadsworth, 63 N. H. 400; Chesterfield *v.* Perkins, 58 N. H. 573; Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

New Jersey.— Spurr *v.* North Hudson County R. Co., 56 N. J. L. 346, 28 Atl. 582.

New York.— Farmers', etc., Nat. Bank *v.* Erie R. Co., 72 N. Y. 188.

South Carolina.— Hill *v.* Parker, 5 Rich. 87.

Tennessee.— Stephens *v.* Jack, 3 Yerg. 403, 24 Am. Dec. 583.

Texas.— McCamant *v.* Roberts, 66 Tex. 260, 1 S. W. 260.

Vermont.— Spencer *v.* Dearth, 43 Vt. 98.

West Virginia.— Waggoner *v.* Wolf, 28 W. Va. 820, 1 S. E. 25.

United States.— Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 36 L. R. A. 823.

See 30 Cent. Dig. tit. "Judgment," § 1231.

Date and course of litigation.— The record of a judgment is admissible in evidence, as between strangers, to show the time of the commencement of the action in which it was rendered (Tappan *v.* Beardsley, 10 Wall. (U. S.) 427, 19 L. ed. 974), or that such a proceeding was pending at a given time (Bayne *v.* Suit, 1 Md. 80), or that the action has been terminated, and at what time (Walsh *v.* Agnew, 12 Mo. 520; Chamberlain *v.* Carlisle, 26 N. H. 540; Baker *v.* Deliesseline, 4 McCord (S. C.) 372).

Right to sue.— A judgment may be given in evidence, even against strangers, in support of plaintiff's right or title to sue. Hardwick *v.* Hook, 8 Ga. 354. Thus when the action is by a receiver he may give in evidence the decree by which he was appointed. Hardwick *v.* Hook, *supra*; Goodhue *v.* Daniels, 54 Iowa 19, 6 N. W. 129.

Knowledge of plaintiff's rights.— In an action for wrongful obstruction of a right of way, for the purpose of showing that defendant acted with full knowledge of plaintiff's rights, the record of a former recovery by him against defendant for the obstruction of the right of way is admissible. Dexter *v.* Whitbeck, 46 Conn. 224.

Payment of money.— The record of a judgment is admissible to show the fact of a recovery, and its satisfaction, where the rights of either party depend on the fact of payment having been forced under legal proceedings. Love *v.* Gibson, 2 Fla. 598; Koontz *v.* Kaufman, 31 Mo. App. 397; Davis *v.* Louisiana Tow-Boat Co., 9 La. 575; Walsh *v.* Ostrander, 22 Wend. (N. Y.) 178.

Priority of liens.— As against strangers, a judgment is admissible in evidence as showing the fact and time of its rendition, when those facts become material in establishing the lien of the judgment on property or fixing its rank in competition with other liens. Naylor *v.* Mettler, (N. J. Ch. 1888) 11 Atl. 859; Southern R. Co. *v.* Bouknight, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823. *Compare* Hartman *v.* Weiland, 36 Minn. 223, 30 N. W. 815.

For this purpose it is not necessary to put in evidence the entire record; a transcript of so much of the record as will show the existence of the judgment and the time of its rendition will be sufficient.[29]

d. Judgment as Evidence of Indebtedness. It is generally held that, where no fraud or collusion has been shown in the recovery of a judgment, it is conclusive of the fact and the amount of the indebtedness of the judgment debtor, and cannot be collaterally impeached by third persons in a subsequent suit where such indebtedness is called in question.[30] In an action by a judgment creditor against his debtor and the latter's grantee of land, to set aside the conveyance as fraudulent, the judgment is conclusive evidence against the grantor that he owed the amount of the debt when the suit was brought, and it is at least *prima facie* evidence of

Partition.— Where plaintiff in ejectment claims through the heir of a decedent, the record of a partition suit between the heirs of such person which shows that there had been a final decree of the court for the partition of the land is admissible in evidence. Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

Eviction.— A judgment recovered against the vendee of land by a stranger, in ejectment, is evidence against the vendor of the vendee's eviction under an adverse title. Chiles *v.* Bridges, Litt. Sel. Cas. (Ky.) 420.

Existence of encumbrance.— In an action by a vendee against his vendor for fraudulently representing that the land was not subject to a mortgage, when in fact it was, the judgment on the mortgage obtained by the mortgagee against the vendee is admissible to show the validity and amount of the mortgage. Haight *v.* Hayt, 19 N. Y. 464.

Right of claimant to fund.— A judgment that a certain person is entitled to a fund in controversy is an adjudication that other claimants were not entitled to an injunction which they had obtained to prevent him from suing for the fund. Heyman *v.* Landers, 12 Cal. 107. And see Ilg *v.* Burbank, 59 Ill. App. 291; McDonald *v.* Hannah, 51 Fed. 73.

29. Lee *v.* Lee, 21 Mo. 531, 64 Am. Dec. 247. And see Young *v.* Harrison, 21 Ga. 584; Whitmore *v.* Johnson, 10 Humphr. (Tenn.) 610.

30. *Alabama.*— Bain *v.* Wells, 107 Ala. 562, 19 So. 774; Moore, etc., Hardware Co. *v.* Curry, 106 Ala. 284, 18 So. 46; Sibley *v.* Alba, 95 Ala. 191, 10 So. 831. *Compare* Jones *v.* Kolisenski, 11 Ala. 607; Hooper *v.* Pair, 3 Port. 401, 29 Am. Dec. 258.

California.— Welch *v.* Sargent, 127 Cal. 72, 59 Pac. 319; Mosgrove *v.* Harris, 94 Cal. 162, 29 Pac. 490; Harvey *v.* Ward, 49 Cal. 124. *Compare* Horn *v.* Jones, 28 Cal. 194.

Illinois.— Rice *v.* Rice, 108 Ill. 199; Truesdale Mfg. Co. *v.* Hoyle, 39 Ill. App. 532.

Iowa.— Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74.

Kansas.— Harrison *v.* Shaffer, 60 Kan. 176, 55 Pac. 881.

Louisiana.— Bothick *v.* Greves, 34 La. Ann. 907; Judson *v.* Connolly, 5 La. Ann. 400; Fox *v.* Fox, 4 La. Ann. 135; Turner *v.* Luckett, 2 La. Ann. 885.

Maine.— Sidensparker *v.* Sidensparker, 52 Me. 481, 83 Am. Dec. 527. But see Sargent *v.* Salmond, 27 Me. 539, holding that a judgment is not conclusive evidence of the indebtedness of the judgment debtor to the creditor, as to third persons not parties or privies thereto.

Minnesota.— Pabst Brewing Co. *v.* Jensen, 68 Minn. 293, 71 N. W. 384. But see Fuller *v.* Roller, 45 Minn. 152, 47 N. W. 615; Henkle *v.* Aldrich, 40 Minn. 468, 42 N. W. 298; Corser *v.* Kindred, 40 Minn. 467, 42 N. W. 297; Hartman *v.* Weiland, 36 Minn. 223, 30 N. W. 815.

Mississippi.— Aron *v.* Chaffe, 72 Miss. 159, 17 So. 11.

Missouri.— Dempsey *v.* Schawacker, (1897) 38 S. W. 954; Foster *v.* Nowlin, 4 Mo. 18.

New Hampshire.— Vogt *v.* Ticknor, 48 N. H. 242. But see Jenness *v.* Berry, 17 N. H. 549.

New York.— Raymond *v.* Richmond, 78 N. Y. 351; Candee *v.* Lord, 2 N. Y. 269, 51 Am. Dec. 294; Ledoux *v.* Bank of America, 24 N. Y. App. Div. 123, 48 N. Y. Suppl. 771; Merchants' Nat. Bank *v.* Hagemeyer, 4 N. Y. App. Div. 52, 38 N. Y. Suppl. 626; Voorhees *v.* Seymour, 26 Barb. 569; St. Nicholas Bank *v.* De Rivera, 3 N. Y. Suppl. 666; Rosenfield's Estate, 10 N. Y. Civ. Proc. 201. But *compare* Burnham *v.* Burnham, 165 N. Y. 659, 59 N. E. 1119; Van Valkenburg *v.* Lasher, 53 Hun 594, 6 N. Y. Suppl. 775.

North Carolina.— Belding *v.* Archer, 131 N. C. 287, 42 S. E. 806.

Tennessee.— Memphis First Nat. Bank *v.* Oldham, 6 Lea 718; Mowry *v.* Davenport, 6 Lea 80.

Texas.— Lehman *v.* Stone, (App. 1891) 16 S. W. 784; Conwell *v.* Hartsell, (App. 1890) 16 S. W. 541.

Virginia.— Cox *v.* Thomas, 9 Gratt. 323; Garland *v.* Rives, 4 Rand. 282, 15 Am. Dec. 756.

West Virginia.— Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924; Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774. *Compare* Houston *v.* McCluney, 8 W. Va. 135.

Wisconsin.— Clasgens Co. *v.* Silber, 93 Wis. 579, 67 N. W. 1122.

United States.— Central Trust Co. *v.* Charlotte, etc., R. Co., 65 Fed. 257.

See 30 Cent. Dig. tit. "Judgment," § 1232.

Contra.— Beers *v.* Broome, 4 Conn. 247; Davis *v.* Howard, 56 Ga. 430; Com. *v.* Whitaker, 2 Del. Co. (Pa.) 36.

the same fact against the grantee.[31] So a judgment obtained without fraud or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the fact and amount of the indebtedness.[32] Where a person has been compelled by a judgment to pay over moneys in his hands, the record of the judgment may be given in evidence by him, in a subsequent suit against him for the recovery of the same money, by one who was not a party to the former proceeding, for the purpose of proving that he has paid over such money by order of a competent tribunal.[33]

e. Judgment as Evidence of Facts Provable by General Reputation. Even against strangers, a judgment is admissible in evidence as *prima facie*, although not conclusive, proof of any fact which from its nature is provable by evidence of general reputation,[34] such as the death of a person at or before a given time,[35] or a question of pedigree,[36] or color,[37] or of freedom or slavery,[38] or a right of ferry,[39] or of free warren.[40]

f. Judgment as Link in Chain of Title. Although a party cannot prove the ultimate facts on which his title depends by a judgment rendered in an action to which his present opponent was not a party, or in cases where the latter does not claim under parties to the former action,[41] yet a judgment is admissible, even

The judgment recovered in an attachment suit is admissible in evidence in a suit brought against the sheriff, as proof of the existence of the debt of the attaching creditor. Mosgrove *v.* Harris, 94 Cal. 162, 29 Pac. 490; Joshua Hendy Mach. Works *v.* Connolly, 76 Cal. 305, 18 Pac. 327; Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324.

31. *Louisiana.*— Lanata *v.* Planas, 2 La. Ann. 544.

Massachusetts.— Inman *v.* Mead, 97 Mass. 310; Goodnow *v.* Smith, 97 Mass. 69.

New York.— New York, etc., R. Co. *v.* Kyle, 5 Bosw. 587.

Ohio.— Swihart *v.* Shaum, 24 Ohio St. 432.

Vermont.— Church *v.* Chapin, 35 Vt. 223.

United States.— Alkire Grocery Co. *v.* Richesin, 91 Fed. 79; Gottlieb *v.* Thatcher, 34 Fed. 435.

See 30 Cent. Dig. tit. "Judgment," § 1232.

Contra.— Troy *v.* Smith, 33 Ala. 469; Posten *v.* Posten, 4 Whart. (Pa.) 27.

32. Farrell Foundry, etc., Co. *v.* Preston Nat. Bank, 93 Mich. 582, 53 N. W. 831; Candee *v.* Lord, 2 N. Y. 269, 51 Am. Dec. 294.

33. Barkaloo *v.* Emerick, 18 Ohio 268.

34. Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98; Pile *v.* McBratney, 15 Ill. 314; Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553; Evans *v.* Rees, 10 A. & E. 151, 9 L. J. M. C. 83, 2 P. & D. 626, 37 E. C. L. 101; Brisco *v.* Lomax, 8 A. & E. 198, 2 Jur. 682, 7 L. J. Q. B. 1482, 3 N. & P. 308, 35 E. C. L. 551; Reed *v.* Jackson, 1 East 355, 6 Rev. Rep. 283.

35. Pile *v.* McBratney, 15 Ill. 314. But *compare* Koch *v.* West, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394.

36. Chirac *v.* Reinecker, 2 Pet. (U. S.) 613, 7 L. ed. 538. But see Chamberlain *v.* New Orleans, 48 La. Ann. 1055, 20 So. 169; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Freeman *v.* Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. Rep. 769.

37. McCollum *v.* Fitzsimons, 1 Rich. (S. C.) 252.

38. Vaughan *v.* Phebe, Mart. & Y. (Tenn.) 5, 17 Am. Dec. 770; Pegram *v.* Isabell, 2 Hen. & M. (Va.) 193. See Wood *v.* Davis, 7 Cranch (U. S.) 271, 3 L. ed. 339.

39. Pim *v.* Curell, 6 M. & W. 234.

40. Carnarvon *v.* Villebois, 14 L. J. Exch. 233, 13 M. & W. 313.

41. *Alabama.*— Johnson *v.* Marshall, 34 Ala. 522.

California.— Enos *v.* Cook, 65 Cal. 175, 3 Pac. 632; Bracia *v.* Nelson, 42 Cal. 107.

Colorado.— Nichols *v.* McIntosh, 19 Colo. 22, 34 Pac. 278.

Georgia.— Bond *v.* Whitfield, 32 Ga. 215.

Illinois.— Whitaker *v.* Wheeler, 44 Ill. 440; Woodward *v.* Woodward, 14 Ill. 370.

Iowa.— Corbin *v.* Minchen, 81 Iowa 682, 47 N. W. 879.

Kentucky.— McClary *v.* Bowmar, 3 Litt. 248.

Louisiana.— Chamberlain *v.* New Orleans, 48 La. Ann. 1055, 20 So. 169; Levy *v.* Landry, 46 La. Ann. 1360, 16 So. 188; Snapp *v.* Porterfield, 14 La. Ann. 405; Sophie *v.* Duplessis, 2 La. Ann. 724.

Maine.— Sheldon *v.* White, 35 Me. 233.

Minnesota.— Morin *v.* St. Paul, etc., R. Co., 33 Minn. 176, 22 N. W. 251.

Missouri.— Cravens *v.* Jameson, 59 Mo. 68.

New York.— Dingley *v.* Bon, 130 N. Y. 607, 29 N. E. 1023.

Oregon.— Lattie-Morrison *v.* Holladay, 27 Oreg. 175, 39 Pac. 1100.

South Carolina.— Warren *v.* Simon, 16 S. C. 362; Gist *v.* McJunkin, 1 Speers 157.

Texas.— Ellis *v.* Le Bow, 96 Tex. 532, 74 S. W. 528; Bradford *v.* Knowles, 78 Tex. 109, 14 S. W. 307; Freeman *v.* Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. Rep. 769; Pratt *v.* Jones, 64 Tex. 694; Colman *v.* Reavis, (Civ. App. 1896) 34 S. W. 645.

Vermont.— Tarbell *v.* Tarbell, 57 Vt. 492.

Virginia.— Duncan *v.* Helms, 8 Gratt. 68; Lovell *v.* Arnold, 2 Munf. 167.

Wisconsin.— Bailey *v.* O'Donnel, 77 Wis. 677, 46 N. W. 876.

See 30 Cent. Dig. tit. "Judgment," § 1233.

against a stranger, where it is offered as a link in a chain of title, or as a document connected with the title in issue.[42]

g. Judgment as an Admission. A record may be admissible in behalf of a stranger, on the ground of admissions contained in the pleadings of a party therein,[43] or because, the judgment being by default, it may be taken as an admission of the material facts well pleaded by plaintiff; but in neither case will it be conclusive or possess any greater weight than any other species of admission.[44]

h. Judgment as Evidence of Collateral Facts. Although a judgment was rendered in an action between other parties, it is admissible for the purpose of proving a merely collateral fact.[45]

C. Matters Concluded by Judgment[46] — **1. Scope and Extent of Estoppel — a. In General** — (i) *Former Decision of Same Point or Question.* A judg-

42. *Alabama.*— Steele *v.* Tutwiler, 57 Ala. 113; Bumpass *v.* Webb, 3 Ala. 109.

California.— Richardson *v.* McNulty, 24 Cal. 339.

Connecticut.— Fowler *v.* Savage, 3 Conn. 90.

Georgia.— Bussey *v.* Dodge, 94 Ga. 584, 21 S. E. 151; Clayton *v.* Roe, 36 Ga. 321.

Illinois.— Gage *v.* Goudy, 141 Ill. 215, 30 N. E. 320, 29 N. E. 896; Delano *v.* Bennett, 90 Ill. 533; Hill *v.* Reitz, 24 Ill. App. 391.

Maryland.— House *v.* Wiles, 12 Gill & J. 338; Barney *v.* Patterson, 6 Harr. & J. 182.

Massachusetts.— Chamberlain *v.* Bradley, 101 Mass. 188, 3 Am. Rep. 331.

Minnesota.— Kurtz *v.* St. Paul, etc., R. Co., 61 Minn. 18, 63 N. W. 1.

New York.— Railroad Equipment Co. *v.* Blair, 145 N. Y. 607, 39 N. E. 962; Bowe *v.* McNab, 11 N. Y. App. Div. 386, 42 N. Y. Suppl. 938; Skelly *v.* Jones, 33 Misc. 304, 68 N. Y. Suppl. 422.

North Carolina.— Finch *v.* Finch, 131 N. C. 271, 42 S. E. 615.

Ohio.— Little *v.* Eureka Ins. Co., 5 Ohio Dec. (Reprint) 285, 6 Am. L. Rec. 228.

Pennsylvania.— Martin *v.* Rutt, 127 Pa. St. 380, 17 Atl. 993; Hartman *v.* Stahl, 2 Penr. & W. 223.

Rhode Island.— Glezen *v.* Haskins, 23 R. I. 601, 51 Atl. 219.

South Carolina.— Wardlaw *v.* Hammond, 9 Rich. 454; Turpin *v.* Brannon, 3 McCord 261; Hall *v.* Carruth, 1 McCord 507.

Texas.— Ellis *v.* Le Bow, 96 Tex. 532, 74 S. W. 528; Thornton *v.* Murray, 50 Tex. 161.

Virginia.— Building, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58; Baylor *v.* Dejarnette, 13 Gratt. 152; Masters *v.* Varner, 5 Gratt. 168, 50 Am. Dec. 114; Hunter *v.* Jones, 6 Rand. 541.

United States.— Webb *v.* Weatherhead, 17 How. 576, 15 L. ed. 35; Barr *v.* Gratz, 4 Wheat. 213, 4 L. ed. 553.

England.— Davies *v.* Lowndes, 1 Bing. N. Cas. 597, 4 L. J. C. P. 214, 2 Scott 90, 27 E. C. L. 780.

See 30 Cent. Dig. tit. "Judgment," § 1233.

What judgments admissible.— The rule that a judgment is admissible against all the world as a link in a party's chain of title applies more particularly to judgments in partition, probate decrees, foreclosures of mortgages, and judgments which operate to transfer title, or to render valid a link which without such judgment would be invalid. The rule does not apply to judgments in ordinary actions to determine adverse claims which are not of the character stated. Minnesota Debenture Co. *v.* Johnson, 94 Minn. 150, 102 N. W. 381.

Limitation of rule.— Plaintiff in a writ of entry cannot by way of rebuttal show the verdict and judgment in an action of trespass concerning the same land, brought by one through whom plaintiff does not deraign title, although the judgment therein was rendered against the same defendants. Fogg *v.* Plumer, 17 N. H. 112. And see McClung *v.* Steen, 32 Fed. 373.

43. Graves *v.* Currie, 132 N. C. 307, 43 S. E. 897.

44. Cragin *v.* Carleton, 21 Me. 492; Ellis *v.* Jameson, 17 Me. 235; St. Louis Mut. L. Ins. Co. *v.* Cravens, 69 Mo. 72; Millard *v.* Adams, 1 Misc. (N. Y.) 431, 21 N. Y. Suppl. 424. But *compare* Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353.

45. *California.*— Gilfillan *v.* Shattuck, 142 Cal. 27, 75 Pac. 646; Crane *v.* Pacific Bank, 106 Cal. 64, 39 Pac. 215, 27 L. R. A. 562.

Connecticut.— Lee *v.* Stiles, 21 Conn. 500. But see Coleman *v.* Wolcott, 1 Conn. 285.

Illinois.— O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355.

New York.— Mansfield *v.* New York Cent., etc., R. Co., 102 N. Y. 205, 6 N. E. 386; Jennings *v.* Whittemore, 2 Thomps. & C. 377.

Pennsylvania.— Appleton *v.* Donaldson, 3 Pa. St. 381.

South Carolina.— Phillips *v.* Yon, 61 S. C. 426, 39 S. E. 618.

Texas.— White *v.* Leavitt, 20 Tex. 703.

United States.— The City of Lincoln, 25 Fed. 835.

But see Dorsey *v.* Gassaway, 2 Harr. & J. (Md.) 402, 3 Am. Dec. 557.

46. Causes of action and defenses merged, barred or concluded in general see *supra*, XIII, D, E.

Matters concluded by judgment in rem see *infra*, XVI, C.

Matters concluded by judgment of sister state see *infra*, XXII, B, 2.

Matters concluded by accounting and settlement of personal representative see Execu-

ment rendered by a court having jurisdiction of the parties and subject-matter,[47] whether correct or not,[48] is conclusive and indisputable evidence as to all the points or questions in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies in proceedings upon the same or a different cause of action,[49] in so far as it settles

TORS AND ADMINISTRATORS, 18 Cyc. 1190 *et seq.*

Matters concluded by award of arbitrators see ARBITRATION AND AWARD, 3 Cyc. 677 *et seq.*

Matters concluded by decisions of appellate court see APPEAL AND ERROR, 3 Cyc. 422 *et seq.*, 424 *et seq.*, 460 *et seq.*

Matters concluded by judgment in action by or against personal representative see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1054 *et seq.*

Matters concluded by mortgage foreclosure see MORTGAGES.

Matters concluded in suits for divorce see DIVORCE, 14 Cyc. 725 *et seq.*

Nature and extent of relief sought and granted as constituting merger and bar see *supra*, XIII, D, 4.

47. *In re* Smith, 122 Cal. 462, 55 Pac. 249; Manley *v.* Park, 62 Kan. 553, 64 Pac. 28; American Hardwood Lumber Co. *v.* Nickey, 89 Mo. App. 270. See *supra*, XIV, A, 4, h, (I).

48. Levison *v.* Blumenthal, 25 Pa. Super. Ct. 55. See *supra*, XIV, A, 4, h, (II).

49. *Arizona.*— Valley Bank *v.* Brodie, (1904) 76 Pac. 617.

California.— Reed *v.* Cross, 116 Cal. 473, 48 Pac. 491; People *v.* Rodgers, (1896) 46 Pac. 740. But see *In re* Newman, 124 Cal. 688, 57 Pac. 686, 45 L. R. A. 780, holding a probate decree declaring one the widow of a decedent not conclusive as to such question, so as to bar her right as the widow of another to administer his estate.

Connecticut.— Canaan *v.* Greenwoods Turnpike Co., 1 Conn. 1.

Georgia.— Price *v.* Carlton, 121 Ga. 12, 48 S. E. 721; Wright *v.* Jett, 120 Ga. 995, 48 S. E. 345; Evans *v.* Piedmont Nat. Bldg., etc., Assoc., 117 Ga. 940, 44 S. E. 2; White *v.* Bleckley, 114 Ga. 155, 39 S. E. 946; Anthanissen *v.* Dart, 94 Ga. 543, 20 S. E. 124.

Illinois.— Roby *v.* Calumet, etc., Canal, etc., Co., 165 Ill. 277, 46 N. E. 214; Cicero *v.* People, 105 Ill. App. 406; Charles E. Henry Sons Co. *v.* Mahoney, 97 Ill. App. 313; Heffron *v.* Knickerbocker, 51 Ill. App. 291.

Indiana.— Greenfield Gas Co. *v.* Trees, (1905) 75 N. E. 2; Marshall *v.* Stewart, 80 Ind. 189; Millikan *v.* Werts, 14 Ind. App. 223, 42 N. E. 820.

Indian Territory.— Barbee *v.* Shannon, 1 Indian Terr. 199, 40 S. W. 584.

Iowa.— Reynolds *v.* Lyon County, 121 Iowa 733, 96 N. W. 1096.

Kansas.— Security Inv. Co. *v.* Richmond Nat. Bank, 58 Kan. 414, 49 Pac. 521.

Kentucky.— Smith *v.* Holtheide, 84 S. W. 346, 27 Ky. L. Rep. 51; Maxwell *v.* England, 115 Ky. 783, 74 S. W. 1091, 25 Ky. L. Rep. 143.

Louisiana.— Hays' Succession, 49 La. Ann. 742, 22 So. 248.

Maine.— Lynch *v.* Swanton, 53 Me. 100.

Maryland.— National Mar. Bank *v.* Heller, 94 Md. 213, 50 Atl. 521.

Michigan.— Rausch *v.* Briefer, (1904) 101 N. W. 523; Campbell *v.* Western Electric Co., 113 Mich. 333, 71 N. W. 644; Detroit *v.* Ellis, 103 Mich. 612, 61 N. W. 886; Mayhue *v.* Snell, 37 Mich. 305; Barker *v.* Cleveland, 19 Mich. 230.

Minnesota.— Thompson *v.* Crosby, 62 Minn. 324, 64 N. W. 823.

Missouri.— Bierman *v.* Crecelius, 135 Mo. 386, 37 S. W. 121; Carmody *v.* Hanick, 99 Mo. App. 357, 73 S. W. 344; Freeman *v.* Lavenue, 99 Mo. App. 173, 72 S. W. 1085.

Nebraska.— Chicago, etc., R. Co. *v.* Cass County, (1904) 101 N. W. 11; Upton *v.* Betts, 59 Nebr. 724, 82 N. W. 19; Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Battle Creek Valley Bank *v.* Collins, 3 Nebr. (Unoff.) 38, 90 N. W. 921.

New Jersey.— Belvidere *v.* Warren R. Co., 34 N. J. L. 193; Wooster *v.* Cooper, 59 N. J. Eq. 204, 45 Atl. 381; Gerard *v.* Birch, 28 N. J. Eq. 317.

New York.— Stokes *v.* Foote, 172 N. Y. 327, 65 N. E. 176; Shaw *v.* Broadbent, 129 N. Y. 114, 29 N. E. 238; Decker *v.* Decker, 108 N. Y. 128, 15 N. E. 307; Livingston *v.* Tucker, 107 N. Y. 549, 14 N. E. 443; Sizer *v.* Ray, 87 N. Y. 220; Brown *v.* New York, 66 N. Y. 385; People *v.* Mercantile Co-operative Bank, 104 N. Y. App. Div. 219, 93 N. Y. Suppl. 521; Riley *v.* Ryan, 103 N. Y. App. Div. 176, 93 N. Y. Suppl. 386; Bowe *v.* McNab, 11 N. Y. App. Div. 386, 42 N. Y. Suppl. 938; Erickson *v.* Quinn, 3 Hun 549; Van Dolsen *v.* Abendroth, 43 N. Y. Super. Ct. 470; Dobson *v.* Pearce, 1 Duer 142; Cailleux *v.* Hall, 1 E. D. Smith, 5; Merscheim *v.* Musical Mut. Protective Union, 8 N. Y. Suppl. 702; Wright *v.* Butler, 6 Wend. 284, 21 Am. Dec. 323; Kingsland *v.* Spalding, 3 Barb. Ch. 341.

North Carolina.— Fagan *v.* Armistead, 33 N. C. 433.

Ohio.— Grant *v.* Ramsey, 7 Ohio St. 157.

Pennsylvania.— Wiley's Appeal, 90 Pa. St. 173; *In re* Carpenter, 4 Pa. St. 222; Marks *v.* Marks, 8 Kulp 292; City *v.* Fricke, 6 Phila. 578.

Rhode Island.— Hazard *v.* Coyle, 26 R. I. 361, 58 Atl. 987.

South Carolina.— Aultman *v.* Utsey, 49 S. C. 399, 27 S. E. 405.

Tennessee.— Estill *v.* Taul, 2 Yerg. 467, 24 Am. Dec. 498.

Texas.— Moore *v.* Snowball, 98 Tex. 16, 81 S. W. 5, 66 L. R. A. 745; Delaney *v.* West, (Civ. App. 1905) 88 S. W. 275; Scott *v.* American Nat. Bank, (Civ. App. 1904) 84

and determines questions of fact as distinguished from abstract propositions of law.[50]

(II) *Limitation of Estoppel to Essential Facts.* The estoppel of a judgment cannot be extended beyond the particular facts on which it was based; it determines only such points or questions as are sufficient to sustain the legal conclusion that judgment must be given for one or other of the parties in the particular form and amount in which it was rendered, not additional matters, unnecessary to the decision of the case, although they may come within the scope of the pleadings, unless they were actually litigated and passed upon.[51]

(III) *New or Changed Facts.* The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reëxamination of the same questions between the same parties

S. W. 445; Glass *v.* Shapard, (Civ. App. 1904) 83 S. W. 880; Bond *v.* Carter, (Civ. App. 1903) 73 S. W. 45.

Utah.— Jensen *v.* Montgomery, 29 Utah 89, 80 Pac. 504.

Vermont.— Morey *v.* King, 49 Vt. 304.

Virginia.— Baker *v.* Watts, 101 Va. 702, 44 S. E. 929; Sheldon *v.* Armstead, 7 Gratt. 264.

West Virginia.— Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544; Guffy *v.* Hukill, 34 W. Va. 49, 11 S. E. 754, 26 Am. St. Rep. 901, 8 L. R. A. 759.

Wisconsin.— Arnold *v.* Randall, 124 Wis. 1, 102 N. W. 340; Donkle *v.* Milem, 88 Wis. 33, 59 N. W. 586; Smeaton *v.* Austin, 82 Wis. 76, 51 N. W. 1090.

United States.— Union Steam-Pump Co. *v.* Battle Creek Steam-Pump Co., 104 Fed. 337, 43 C. C. A. 560; Miller *v.* Perris Irr. Dist., 99 Fed. 143; Grape Creek Coal Co. *v.* Farmers' L. & T. Co., 80 Fed. 200, 25 C. C. A. 376; Maloy *v.* Duden, 77 Fed. 935; Hayner *v.* Stanley, 13 Fed. 217, 8 Sawy. 214; Wright *v.* Deklyne, 30 Fed. Cas. No. 18,076, Pet. C. C. 199. And see Groton Bridge, etc., Co. *v.* Clark Pressed Brick Co., 136 Fed. 27, 68 C. C. A. 577 [*affirming* 126 Fed. 552]; *In re* Howard, 135 Fed. 721, 68 C. C. A. 359.

England.— Whittaker *v.* Jackson, 2 H. & C. 926, 33 L. J. Exch. 181, 11 L. T. Rep. N. S. 155; Williams *v.* Richardson, 36 L. T. Rep. N. S. 505; Ford *v.* Tynte, 3 New Rep. 559; Huffer *v.* Allen, L. R. 2 Exch. 15, 4 H. & C. 634, 12 Jur. N. S. 930, 36 L. J. Exch. 17, 15 L. T. Rep. N. S. 225, 15 Wkly. Rep. 281; *In re* Graydon, [1896] 1 Q. B. 417, 65 L. J. Q. B. 328, 44 Wkly. Rep. 495; Douglas *v.* Cooper, 3 Myl. & K. 378, 10 Eng. Ch. 378, 40 Eng. Reprint 144.

See 30 Cent. Dig. tit. "Judgment," § 1234 *et seq.*; and cases cited *supra*, XIV, A, 1, a.

50. State *v.* Broatch, 68 Nebr. 687, 94 N. W. 1016.

51. *Alabama.*— Saltmarsh *v.* Bower, 34 Ala. 613.

California.— Downing *v.* Rademacher, (1900) 62 Pac. 1055.

Colorado.— Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4; Haraszthy *v.* Shandel, 1 Colo. App. 137, 27 Pac. 876.

District of Columbia.— American Bonding, etc., Co. *v.* U. S., 23 App. Cas. 535.

Florida.— Croom *v.* Swann, 1 Fla. 211.

Illinois.— Dinsmoor *v.* Bressler, 164 Ill. 211, 45 N. E. 1086.

Indiana.— Anderson Bldg., etc., Assoc. No. 2 *v.* Hoppes, 90 Ind. 250; Stumph *v.* Gœpper, 76 Ind. 323; Fromm *v.* Lawrence, 28 Ind. App. 388, 62 N. E. 1017.

Iowa.— Thomas *v.* McDaneld, 88 Iowa 374, 55 N. W. 499; Morrison *v.* Morrison, 38 Iowa 73.

Louisiana.— Ledoux *v.* Lavedan, 49 La. Ann. 913, 22 So. 214.

Maine.— Pierce *v.* Rodliff, 95 Me. 346, 50 Atl. 32.

Massachusetts.— Bugbee *v.* Davis, 167 Mass. 33, 44 N. E. 1055; Porter *v.* Shaw, 98 Mass. 505; Burlen *v.* Shannon, 14 Gray 433; Good *v.* Lehan, 8 Cush. 299; Spooner *v.* Davis, 7 Pick. 147.

Michigan.— People *v.* Auditor-Gen., 30 Mich. 12.

Nebraska.— Chicago, etc., R. Co. *v.* Cass County, (1904) 101 N. W. 11.

New York.— House *v.* Lockwood, 137 N. Y. 259, 33 N. E. 595; Stannard *v.* Hubbell, 123 N. Y. 520, 25 N. E. 1084; Cauhape *v.* Parke, 121 N. Y. 152, 24 N. E. 185; *In re* Rosenbaum, 119 N. Y. 24, 23 N. E. 172; Amory *v.* Amory, 6 Rob. 514; Burns *v.* Monell, 7 N. Y. Suppl. 624; Ferris *v.* Crawford, 2 Den. 595. See North Hempstead *v.* Hempstead, Hopk. 288.

North Dakota.— Carter *v.* Carter, (1905) 103 N. W. 425.

Ohio.— Binder *v.* Finkbone, 25 Ohio St. 103.

Pennsylvania.— Black *v.* Nease, 37 Pa. St. 433; Magauran *v.* Patterson, 6 Serg. & R. 278.

South Carolina.— Odom *v.* Beverly, 32 S. C. 107, 10 S. E. 835; Warren *v.* Raymond, 17 S. C. 163.

Texas.— Kountze *v.* Bonner, 12 Tex. Civ. App. 131, 34 S. W. 163.

Washington.— Hitchcock *v.* Nixon, 16 Wash. 281, 47 Pac. 412.

United States.— Abendroth *v.* Van Dolsen, 131 U. S. 66, 9 S. Ct. 619, 33 L. ed. 57; St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., 89 Fed. 648, 32 C. C. A. 284.

England.— *In re* Deeley, [1895] 1 Ch. 687, 64 L. J. Ch. 480, 72 L. T. Rep. N. S. 702, 12 Reports 272, 43 Wkly. Rep. 517; Farrow *v.*

where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.[52]

(iv) *Additional Arguments or Evidence.* But if a point or question was in issue and adjudicated in a former suit, a party bound by the judgment cannot escape the estoppel by producing at a second trial new arguments or additional or different evidence in support of the proposition which was decided adversely to him.[53]

(v) *Additional Property Involved in First Suit.* The fact that in the former suit additional property, rights, or interests were involved does not affect the conclusiveness of the judgment as to that portion involved in the suit in which the estoppel is set up.[54]

(vi) *Decision Affecting Title or Right to Different Property.* The estoppel of a judgment extends only to the particular property or right in

Tobin, 10 Ont. App. 69; Deacon *v.* Great Western R. Co., 6 U. C. C. P. 241.

See 30 Cent. Dig. tit. "Judgment," §§ 1235, 1236.

Illustration.— Thus, where an official bond, with the record thereof, has been lost or destroyed, and a statutory proceeding is taken for a substitution as a record of the probate court, a decree substituting the lost bond as proposed is not conclusive as to the execution of the bond, but only ascertains that such a bond once existed of record, that it was lost or destroyed, and that it is replaced. Tanner *v.* Mills, 50 Ala. 356.

Facts specially found are not conclusive between the parties unless they are essential to or shown to be involved in the verdict and judgment. Hawks *v.* Truesdell, 99 Mass. 557.

52. *Illinois.*— Ligare *v.* Chicago, etc., R. Co., 166 Ill. 249, 46 N. E. 803.

Indiana.— Erwin *v.* Garner, 108 Ind. 488, 9 N. E. 417; Miles *v.* Wingate, 6 Ind. 458; Haller *v.* Pine, 8 Blackf. 175, 44 Am. Dec. 762.

Kentucky.— Newport *v.* Masonic Temple Assoc., 103 Ky. 592, 45 S. W. 881, 46 S. W. 697, 20 Ky. L. Rep. 266; Arnold *v.* Arnold, (1891) 17 S. W. 203.

Louisiana.— Lemunier *v.* McCearly, 37 La. Ann. 133.

New York.— Crabb *v.* Young, 92 N. Y. 56; Fitzgerald *v.* Topping, 48 N. Y. 438.

Pennsylvania.— Connery *v.* Brooke, 73 Pa. St. 80; Whetstone *v.* Bowser, 29 Pa. St. 59.

Washington.— Lauman *v.* Hoofer, 37 Wash. 382, 79 Pac. 953; Ryan *v.* Sumner, 17 Wash. 228, 49 Pac. 487.

United States.— Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190.

England.— Norton *v.* Levy, 48 L. T. Rep. N. S. 703.

And see *supra*, XIII, D, 1, d.

Applications of text.— A judgment in a former action for the same relief is not *res judicata* that plaintiff is not now entitled to it except on the conditions then imposed, where, during the intervening time, the situation has been materially changed. Guilford *v.* Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407. So a decree finding that the proceedings of a judicial sale were so defective that no title was acquired by the purchaser is not *res judicata* of his rights, under deeds from the prior owners acquired subsequent to the decree, in another suit, although between the same parties and affecting the same property. Gore *v.* Gore, 101 Tenn. 620, 49 S. W. 737. And a decree entered in a suit brought by a national bank to enjoin the collection of taxes imposed on it by a city, establishing the existence of an irrevocable contract between the bank and the state, which exempted it from the taxes in question, cannot constitute an adjudication of the right of the bank to exemption from taxes imposed after the charter under which it was operating when the former taxes were levied and the suit was commenced had expired and had been renewed. Louisville Third Nat. Bank *v.* Stone, 174 U. S. 432, 19 S. Ct. 759, 43 L. ed. 1035.

53. *California.*—*In re* Harrington, 147 Cal. 124, 81 Pac. 546.

Colorado.— Breeze *v.* Haley, 11 Colo. 351, 18 Pac. 551.

Louisiana.— Lindquist *v.* Maurepas Land, etc., Co., 112 La. 1030, 36 So. 843.

New Jersey.— Harper, etc., Co. *v.* Mountain Water Co., 65 N. J. Eq. 479, 56 Atl. 297.

Ohio.— McCafferty *v.* O'Brien, 1 Cinc. Super. Ct. 64.

Pennsylvania.— Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

Texas.— Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20.

Wisconsin.— Grunert *v.* Spalding, (1899) 78 N. W. 606.

United States.— Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; Glencove Granite Co. *v.* City Trust, etc., Co., 114 Fed. 978; Union Sav., etc., Assoc. *v.* Byrne, 114 Fed. 831, 52 C. C. A. 465; Smith *v.* Ontario, 4 Fed. 386, 18 Blatchf. 454; Dubois *v.* Philadelphia, etc., R. Co., 7 Fed. Cas. No. 4,109.

England.— Shoe Mach. Co. *v.* Cutlan, [1896] 1 Ch. 667, 65 L. J. Ch. 314, 74 L. T. Rep. N. S. 166.

54. Rucker *v.* Steelman, 97 Ind. 222; Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091; Dyer *v.* Cranston Print Works, 21 R. I. 63, 41 Atl. 1015.

controversy,[55] except where it determines the title or right under which the party claims, in which case it is decisive as to any other property or right claimed under the same title.[56]

(VII) *Determining Scope of Estoppel.* The extent of an estoppel by judgment depends upon the principles of law applied to the facts of the case; it is not determined by the court rendering the judgment, which has no power to say how far its judgment shall or shall not be conclusive;[57] and if the judgment itself does not show what matters were litigated and decided, the fact may be shown from other parts of the record or by competent evidence,[58] although the estoppel cannot be extended to matters which the judgment expressly declares not to have been in issue in the action in which it was rendered or to have been omitted from consideration therein.[59]

(VIII) *Party Estopped by Judgment in His Favor.* A judgment is an estoppel upon a party not only in so far as it decides a question adversely to his claim or contention in the suit in which it is rendered but where it recognizes or sustains his theory or claim it estops him from afterward taking a different position in litigation with the same opponent.[60]

b. Recitals of Judgment.[61] The recitals of a judgment are conclusive evidence in regard to the form of action, the time of bringing the suit, the various proceedings taken in it, and the disposition finally made of it;[62] but not in regard to facts affecting the substantial rights of the parties, except in so far as they were at issue and adjudicated.[63]

c. Judgment as Evidence of Jurisdiction. Where the jurisdiction of the court is challenged, and the question contested and decided, a judgment on that issue, unless reversed or set aside, is as conclusive as on any other, and a ruling of the court that jurisdiction duly attached is generally held conclusive on the

55. Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589.

56. Brack *v.* Boyd, 211 Ill. 290, 71 N. E. 995, 103 Am. St. Rep. 200; Malona *v.* Schwing, 101 Ky. 56, 39 S. W. 523, 19 Ky. L. Rep. 145; Preston *v.* Harvey, 2 Hen. & M. (Va.) 55; Stone *v.* Kentucky Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202. But see Bordwell *v.* Snow, 119 Mich. 421, 78 N. W. 468, holding that the determination of the probate court that a person seeking the allowance provided for by law to widows is the widow of deceased is not conclusive as to her right to the widow's distributive share of the estate.

57. Holland *v.* Preston, (Tex. Civ. App. 1897) 41 S. W. 374; Williamson *v.* Wright, 1 Tex. Unrep. Cas. 711.

58. Unglish *v.* Marvin, 128 N. Y. 380, 28 N. E. 634; Thompson *v.* N. T. Bushnell Co., 80 Fed. 332. But a former decree for the partition of land, including the land in controversy in a subsequent partition suit, while evidence therein, has no binding force as to facts therein incorrectly stated and incompatible with each other. Cronkhite *v.* Strain, 210 Ill. 331, 71 N. E. 392.

59. Vicksburg, etc., R. Co. *v.* Tibbs, 112 La. 51, 36 So. 223; Wilcox *v.* Saunders, 4 Nebr. 569.

60. Brown *v.* Tillman, 121 Ala. 626, 25 So. 836; Andruss *v.* Doolittle, 11 Conn. 283; Butler *v.* Tifton, etc., R. Co., 121 Ga. 817, 49 S. E. 763; Holt *v.* Schneider, 61 Nebr. 370, 85 N. W. 280; Bollong *v.* Schuyler Nat. Bank, 26 Nebr. 281, 41 N. W. 990, 18 Am. St. Rep. 781, 3 L. R. A. 142.

61. Admissibility of judgment in evidence in general see *infra*, XXI, B.

Judgment as evidence of title or right to property see *infra*, XIV, C, 10.

Conclusiveness of judgment as evidence of eviction in action for breach of covenant see COVENANTS, 11 Cyc. 1129.

62. *Georgia.*— Gray *v.* Hodge, 50 Ga. 262.

Illinois.— Clark *v.* People, 146 Ill. 348, 35 N. E. 60; Schertz *v.* People, 105 Ill. 27. The record of a case is competent evidence to prove that a suit was brought, and to show what plaintiff claimed therein. Fusselman *v.* Worthington, 14 Ill. 135.

North Carolina.— Henry *v.* Hilliard, 120 N. C. 479, 27 S. E. 130.

Pennsylvania.— Hawbicker's Estate, 6 Pa. Co. Ct. 570. But although a justice's record speaks of an action as "trover," defendant may have the cause of action investigated, for the purpose of showing that it was really assumpsit, and therefore that he was entitled to an exemption as against the judgment rendered therein. McCormick *v.* Alexander, 3 Pa. Dist. 149.

Tennessee.— Galt *v.* Dibrell, 10 Yerg. 146.

Texas.— Haynie *v.* McAnally, (Civ. App. 1894) 27 S. W. 431.

United States.— Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11.

63. Smith *v.* Silliman, 8 Conn. 111 (holding that, although a judgment recites that defendant had "absconded from the state," it

parties in subsequent litigation,[64] although, according to the doctrine of some cases, the decision is only *prima facie* evidence on this point.[65]

d. Judgment as Evidence of Indebtedness or Liability.[66] As between the same parties, a former judgment is conclusive of the indebtedness or liability which it adjudges, both as to fact and amount, in any subsequent proceeding,[67] as

does not estop him from showing that he had returned to the jurisdiction before the rendition of judgment); Breedlove *v.* Turner, 9 Mart. (La.) 353; Currier *v.* Richardson, 63 Vt. 617, 22 Atl. 625.

64. *Alabama.*— Lehman *v.* Glenn, 87 Ala. 618, 6 So. 44.

California.— Vassault *v.* Austin, 36 Cal. 691. See Santa Monica *v.* Eckert, (1893) 33 Pac. 880.

Connecticut.— See Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556, 73 Am. Dec. 688.

Georgia.— Connor *v.* Hall, 91 Ga. 62, 16 S. E. 266.

Indiana.— Powell *v.* Bunger, 91 Ind. 64.

Louisiana.— Singer *v.* McGuire, 40 La. Ann. 638, 4 So. 578.

Minnesota.— La Crosse, etc., Packet Co. *v.* Reynolds, 12 Minn. 213.

Missouri.— Baisley *v.* Baisley, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726; Dunham *v.* Wilfong, 69 Mo. 355; Latrielle *v.* Dorleque, 35 Mo. 233. See Bell *v.* Brinkman, (1893) 24 S. W. 205.

New York.— Welde *v.* Henderson, 53 Hun 633, 6 N. Y. Suppl. 176; Monell *v.* Dennison, 17 How. Pr. 422. See Stephens *v.* Santee, 51 Barb. 532.

South Carolina.— Beasley *v.* Newell, 40 S. C. 16, 18 S. E. 224.

Virginia.— Cox *v.* Thomas, 9 Gratt. 323.

West Virginia.— State *v.* Cunningham, 33 W. Va. 607, 11 S. E. 76.

United States.— Lawrence *v.* Nelson, 143 U. S. 215, 12 S. Ct. 440, 36 L. ed. 130; Jeter *v.* Hewitt, 22 How. 352, 16 L. ed. 345.

See 30 Cent. Dig. tit. "Judgment," § 1237.

Collateral impeachment of judgment for want of jurisdiction and effect therein of decision of court on its own jurisdiction see *supra*, XI, E, 2, i, (IV).

65. Bowen *v.* Bond, 80 Ill. 351; Secrist *v.* Green, 3 Wall. (U. S.) 744, 18 L. ed. 153; Inman *v.* The Lindrup, 70 Fed. 718 (jurisdiction not properly decided); Newman *v.* Crowls, 60 Fed. 220, 8 C. C. A. 577 (jurisdiction insufficient on record).

66. Judgment on issues as to indebtedness or liability see *infra*, XIV, C, 4, a.

Issues on pleadings see *infra*, XIV, C, 4, b, (II).

67. *Alabama.*— Liddell *v.* Chidester, 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387.

Connecticut.— Bigelow *v.* Lawrence, 16 Conn. 207.

Illinois.— Brinton *v.* Einhaus, 21 Ill. App. 328; Vandolah *v.* Kanouse, 15 Ill. App. 454. See Jenkins *v.* International Bank, 111 Ill. 462.

Indiana.— Lieb *v.* Lichtenstein, 121 Ind. 483, 23 N. E. 284.

Iowa.— Pierce *v.* Early, 79 Iowa 199, 44 N. W. 890; Hall *v.* Ætna Mfg. Co., 30 Iowa 215. But see Hull *v.* Alexander, 26 Iowa 569.

Kansas.— Whitaker *v.* Hawley, 30 Kan. 317, 1 Pac. 508.

Kentucky.— Price *v.* Higgins, 1 Litt. 273.

Louisiana.— Bisland *v.* Griffin, 9 La. Ann. 150. But see Timberlake *v.* Brand, 5 La. Ann. 715, holding that a minor's judgment against his tutrix is but *prima facie* evidence of her indebtedness against her creditors, who may show that the amount is not due.

Massachusetts.— Burke *v.* Miller, 4 Gray 114.

Michigan.— Bond *v.* Margstrum, 102 Mich. 11, 60 N. W. 282; Hoppin *v.* Avery, 87 Mich. 551, 49 N. W. 887.

Montana.— Nelson *v.* Donovan, 16 Mont. 85, 40 Pac. 72.

New Hampshire.— Charles *v.* Davis, 62 N. H. 375.

New York.— Thomson *v.* Sanders, 118 N. Y. 252, 23 N. E. 374; Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324; Campbell *v.* Consalus, 25 N. Y. 613; Vail *v.* Tuthill, 10 Hun 31; Rockwell *v.* Geery, 4 Hun 606; Bulkly *v.* Healy, 12 N. Y. Suppl. 54; Wood *v.* Byington, 2 Barb. Ch. 387.

North Carolina.— Moore *v.* Garner, 109 N. C. 157, 13 S. E. 768.

Pennsylvania.— Holmes *v.* Frost, 125 Pa. St. 328, 17 Atl. 424; Tams *v.* Richards, 26 Pa. St. 97; Johnson's Appeal, 9 Pa. St. 416.

Texas.— Morrison *v.* Clark, 55 Tex. 437.

Virginia.— Montague *v.* Turpin, 8 Gratt. 453; Sheldon *v.* Armstead, 7 Gratt. 264.

Washington.— Cloud *v.* Lawrence, 12 Wash. 163, 40 Pac. 741.

Wisconsin.— Strong *v.* Hooe, 41 Wis. 659.

United States.— Riverside County *v.* Thompson, 122 Fed. 860, 59 C. C. A. 70; Ries *v.* Rowland, 11 Fed. 657, 4 McCrary 85; Tillou *v.* U. S., 1 Ct. Cl. 220.

See 30 Cent. Dig. tit. "Judgment," § 1238.

Suit to recover money paid under judgment.— Where money has been paid under a judgment of a court of competent jurisdiction, it can never be recovered back by another action; the judgment rendered being, so long as it remains in full force, conclusive to all intents and purposes, of the rights of the parties. Kirklan *v.* Brown, 4 Humphr. (Tenn.) 174, 40 Am. Dec. 635.

Landlord and tenant cases.— A judgment in a summary proceeding by a landlord, dispossessing a tenant for non-payment of rent, is conclusive of the tenant's liability for rent in a subsequent action against him to collect it. Blaufus *v.* People, 69 N. Y. 107, 25 Am. Rep. 148; Grafton *v.* Brigham, 70 Hun (N. Y.) 131, 24 N. Y. Suppl. 54; Powers *v.* Witty, 42 How. Pr. (N. Y.) 352. And see Lowenstein *v.* Helfrich, 7 Kulp (Pa.) 533.

a proceeding by mandamus to enforce the judgment;[68] a creditor's suit to avoid a fraudulent conveyance and obtain satisfaction out of the property;[69] or an action on an administrator's bond,[70] a replevin bond,[71] or an appeal-bond,[72] or against a sheriff for failure to collect the judgment.[73]

e. Judgment Conclusive of Fraud or Validity of Contract. A decision adjudging a conveyance, contract, or other instrument to be fraudulent or invalid is conclusive of that fact in all further litigation between the same parties;[74] and on the other hand, a judgment giving effect to a deed, mortgage, judgment, or contract is conclusive evidence that it is free from fraud or illegality,[75] even though that issue was not raised in the action, since in that case the judgment necessarily implies a finding that the cause of action was valid and enforceable,[76] except where the party objecting was ignorant of the fraud or illegality before the judgment, or was prevented from pleading it.[77]

68. Cairo *v.* Campbell, 116 Ill. 305, 5 N. E. 114, 8 N. E. 688; Hicks *v.* Cleveland, 106 Fed. 459, 45 C. C. A. 429; New Orleans *v.* U. S., 49 Fed. 40, 1 C. C. A. 148.

Action against sureties.— Pryor *v.* Beck, 21 Ala. 393; De Forest *v.* Strong, 8 Conn. 513. And see *supra*, XIV, B, 8.

Garnishment proceedings.— Union Nat. Bank *v.* Hickey, 34 Nebr. 300, 51 N. W. 825. And see *supra*, XIV, B, 9.

Persons responsible over.— Henderson *v.* Sevey, 2 Me. 139. And see *supra*, XIV, B, 6.

69. *Alabama.*— Pickett *v.* Pipkin, 64 Ala. 520.

Iowa.— Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74.

Montana.— Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

New York.— Candee *v.* Lord, 2 N. Y. 269, 51 Am. Dec. 294; Hersey *v.* Benedict, 15 Hun 282. See Sharpe *v.* Freeman, 45 N. Y. 802.

South Carolina.— Lawton *v.* Perry, 45 S. C. 319, 23 S. E. 53.

United States.— Thomson *v.* Crane, 73 Fed. 327.

See 30 Cent. Dig. tit. "Judgment," § 1238.

70. Tunnell *v.* Burton, 4 Del. Ch. 382; Bond *v.* Billups, 53 N. C. 423.

71. Smith *v.* Mosby, 98 Ind. 445; Overstreet *v.* Root, 84 Tex. 26, 19 S. W. 298.

72. Morris *v.* Horrell, 35 Mo. 467.

73. Armour Packing Co. *v.* Richter, 42 Minn. 188, 43 N. W. 1114.

74. *Louisiana.*— Bowman *v.* McElroy, 15 La. Ann. 663.

Maine.— Chase *v.* Walker, 26 Me. 555.

Maryland.— Summers *v.* Oberndorf, 73 Md. 312, 20 Atl. 1068.

Massachusetts.— Stockwell *v.* Silloway, 113 Mass. 384.

Missouri.— Case *v.* Gorton, 33 Mo. App. 597.

New York.— Hawks *v.* Swett, 4 Hun 146. But see *In re* Holmes, 131 N. Y. 80, 29 N. E. 1003.

Wisconsin.— See Goodwin *v.* Snyder, 75 Wis. 450, 44 N. W. 746.

United States.— Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293; Hartje *v.* Vulcanized Fibre Co., 44 Fed. 648.

See 30 Cent. Dig. tit. "Judgment," § 1239.

75. *Alabama.*— Holden *v.* Rison, 77 Ala. 515.

District of Columbia.— Clark *v.* Krause, 6 Mackey 108; Birdsall *v.* Welch, 6 D. C. 316.

Georgia.— Rountree *v.* Rentz, 119 Ga. 885, 47 S. E. 328; Bush *v.* Thomasville Bank, 111 Ga. 664, 36 S. E. 900.

Illinois.— Reynolds *v.* Mandel, 175 Ill. 615, 51 N. E. 649 [*affirming* 73 Ill. App. 379].

Kansas.— McEntire *v.* Williamson, 63 Kan. 275, 65 Pac. 244.

Kentucky.— Morgan *v.* Patton, 4 T. B. Mon. 453.

Nebraska.— Kloke *v.* Gardels, 52 Nebr. 117, 71 N. W. 955.

New York.— Barber *v.* Kendall, 158 N. Y. 401, 53 N. E. 1.

North Carolina.— Brunhild *v.* Freeman, 80 N. C. 212.

Tennessee.— Irby *v.* McKissack, 8 Yerg. 42; Vance *v.* McNabb Coal, etc., Co., (Ch. App. 1897) 48 S. W. 235.

Texas.— W. C. Belcher Land-Mortg. Co. *v.* Norris, 34 Tex. Civ. App. 111, 78 S. W. 390.

United States.— Hadden *v.* Natchaug Silk Co., 84 Fed. 80.

See 30 Cent. Dig. tit. "Judgment," § 1239.

But in successive actions arising against a sheriff for conversion of personalty, each based on a distinct levy and sale against plaintiff's father, where defendant claims that the property was fraudulently conveyed to plaintiff, the verdict in the first case cannot be shown in the second as fixing the *bona fides* of such conveyance, although the record may operate as a bar. Wheeler *v.* Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37. But *compare* Coyle *v.* Ward, 36 N. Y. App. Div. 181, 55 N. Y. Suppl. 388, holding that where three transactions at different times are alleged to be the product of the same fraud, and in a proper proceeding the first transaction was held not to be fraudulent, the parties and their privies are estopped to show fraud in the two subsequent transactions.

76. Foulke *v.* Thalmessinger, 158 N. Y. 725, 53 N. E. 1125; Ruff *v.* Doty, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709; Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803; Black *v.* Caldwell, 83 Fed. 880; Edmanson *v.* Best, 57 Fed. 531, 6 C. C. A. 471.

77. Sacia *v.* Decker, 10 Daly (N. Y.) 204.

f. Actions on Instalments or Successive Causes.[78] Where a series of actions are brought for instalments due under a contract, or successive actions on a continuing or recurring cause, an adjudication in the first action on the fundamental state of facts on which they all rest will be conclusive in the rest, precluding inquiry into such ultimate facts or grounds of recovery.[79]

g. Matters Which Might Have Been Litigated.[80] The rule is often stated in general terms that a judgment is conclusive not only upon the question actually contested and determined, but upon all matters which might have been litigated and decided in that suit;[81] and this is undoubtedly true of all matters properly belonging to the subject of the controversy and within the scope of the issues, so that each party must make the most of his case or defense, bringing forward all

78. Merger of separate actions on one of several notes and instalments or distinct causes of action on contract see *supra*, XIII, D, 6.

Merger of defenses in separate actions on instalments see *supra*, XIII, E.

79. Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247, 48 N. E. 402; Rankin *v.* Big Rapids, 133 Fed. 670, 66 C. C. A. 568. And see *supra*, XIII, D, 6, c, (II), e, (IV).

Instalments of rent.— A judgment in favor of plaintiff for instalments of rent, which was affirmed on appeal and which established the validity of the lease under which the instalments accrued, is conclusive, in a suit between the same parties for subsequent instalments, as to all questions concerning the validity of the lease which were or might have been raised and determined under the issues in the former suit. Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247, 48 N. E. 402.

80. Defenses which might have been pleaded in former action as affecting bar see *supra*, XIII, E, 2.

Issues on pleadings see *infra*, XIV, C, 4, b, (II).

81. *Alabama.*—Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Murrell *v.* Smith, 51 Ala. 301; Chamberlain *v.* Gaillard, 26 Ala. 504; Wittick *v.* Traun, 25 Ala. 317.

California.— Pavisich *v.* Bean, 48 Cal. 364; Phelan *v.* Gardner, 43 Cal. 306.

Georgia.— Latimer *v.* Irish-American Bank, 119 Ga. 887, 47 S. E. 322; Barksdale *v.* Greene, 29 Ga. 418.

Illinois.— *In re* Assessment of Property, 206 Ill. 64, 69 N. E. 75; Harvey *v.* Aurora, etc., R. Co., 186 Ill. 283, 57 N. E. 857; Kelly *v.* Donlin, 70 Ill. 378; Rogers *v.* Higgins, 57 Ill. 244; McKinney *v.* Finch, 2 Ill. 152; Nilson *v.* Home Bldg., etc., Assoc., 96 Ill. App. 235.

Indiana.— Elwood *v.* Beymer, 100 Ind. 504; Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239; Marshall *v.* Stewart, 80 Ind. 189.

Kentucky.— Locke *v.* Com., 113 Ky. 864, 69 S. W. 763, 24 Ky. L. Rep. 654; Klenke *v.* Noonan, 81 S. W. 241, 26 Ky. L. Rep. 305.

Maryland.— Chesapeake, etc., Canal Co. *v.* Gittings, 36 Md. 276.

Mississippi.— Gaines *v.* Kennedy, 53 Miss. 103.

Missouri.— Caldwell *v.* White, 77 Mo. 471. And see Pickel Stone Co. *v.* Wall, 108 Mo. App. 495, 83 S. W. 1018.

Nebraska.— Plattsmouth First Nat. Bank *v.* Gibson, (1905) 104 N. W. 174; Slater *v.* Skeirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

New Hampshire.— Hale *v.* Manchester, etc., R. Co., 61 N. H. 641.

New Mexico.— Armijo *v.* Mountain Electric Co., 11 N. M. 235, 67 Pac. 726.

New York.— Harris *v.* Harris, 36 Barb. 88; Masten *v.* Olcott, 60 How. Pr. 105; Le Guen *v.* Gouverneur, 1 Johns. Cas. 436, 1 Am. Dec. 121. And see Sterling *v.* Sterling, 98 N. Y. App. Div. 426, 90 N. Y. Suppl. 306.

North Carolina.—Tuttle *v.* Harrill, 85 N. C. 456.

Ohio.— Petersine *v.* Thomas, 28 Ohio St. 596; Roby *v.* Rainsberger, 27 Ohio St. 674; Covington, etc., Bridge Co. *v.* Sargent, 27 Ohio St. 233; Desnoyers *v.* Dennison, 19 Ohio Cir. Ct. 320, 10 Ohio Cir. Dec. 430.

Oregon.— Neil *v.* Tolman, 12 Oreg. 289, 7 Pac. 103. And see Ruckman *v.* Union R. Co., 45 Oreg. 578, 78 Pac. 748, 69 L. R. A. 480. But *compare* Clark *v.* Hindman, (1905) 79 Pac. 56.

Pennsylvania.—Long *v.* Lebanon Nat. Bank, 211 Pa. St. 165, 60 Atl. 556; Rauwolf *v.* Glass, 184 Pa. St. 237, 39 Atl. 79.

South Carolina.— McDowall *v.* McDowall, Bailey Eq. 324; Kenner *v.* Caldwell, Bailey Eq. 149, 21 Am. Dec. 538.

Tennessee.—Knight *v.* Atkisson, 2 Tenn. Ch. 384.

Texas.— Cook *v.* Burnley, 45 Tex. 97; Hatch *v.* De la Garza, 22 Tex. 176; Acres *v.* Tate, Tex. App. Civ. Cas. § 1222.

Vermont.— Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94.

Virginia.— Diamond State Iron Co. *v.* Alex K. Rarig Co., 93 Va. 595, 25 S. E. 894; Beale *v.* Gordon, (1895) 21 S. E. 667; Shenandoah Valley R. Co. *v.* Griffith, 76 Va. 913.

West Virginia.— Cresap *v.* Cresap, 54 W. Va. 581, 46 S. E. 582.

Wisconsin.— Roberts *v.* Moody, 107 Wis. 245, 83 N. W. 307; Shepardson *v.* Cary, 29 Wis. 34; Danaher *v.* Prentiss, 22 Wis. 311.

United States.— Brooks *v.* O'Hara, 8 Fed. 529, 2 McCrary 644; *Ex p.* Turpin, 5 Fed. 465; Howards *v.* Selden, 5 Fed. 465, 4 Hughes 300.

See 30 Cent. Dig. tit. "Judgment," § 1241.

In Louisiana the doctrine of the common law that the estoppel of a judgment applies not only to everything pleaded in a case, but

his facts, grounds, reasons, or evidence in support of it, on pain of being barred from showing such omitted matters in a subsequent suit;[82] and it is also true that, where the second suit is upon the same cause of action, all matters which might have been litigated are conclusively settled by the judgment;[83] and that generally the estoppel applies where matters which should have been urged as a defense in the first suit are attempted to be made the basis of a second action,[84] or, according

even that which might have been pleaded, does not obtain. Woodcock *v.* Baldwin, 110 La. 270, 34 So. 440.

Every question of fact involved in the issues and adjudicated in a suit is res judicata in a subsequent suit between the same parties or their privies, whether such adjudication is contained in the final judgment or not. Strong *v.* Hooe, 41 Wis. 659.

82. *Illinois.*— Hofmann *v.* Burris, 210 Ill. 587, 71 N. E. 584; Boddie *v.* Brewer, etc., Brewing Co., 107 Ill. App. 357; Baldwin *v.* Haney, 104 Ill. App. 84; Jennings *v.* Jennings, 94 Ill. App. 26.

Iowa.— Ruppin *v.* McLachlan, 122 Iowa 343, 98 N. W. 153; Wilhelmi *v.* Des Moines Ins. Co., (1896) 68 N. W. 782; Campbell *v.* Ayres, 1 Iowa 257.

Kentucky.— A judgment declaring a statute valid is conclusive, even as to objections not then specifically urged, as it is to be presumed that they were considered. Bell County Coke, etc., Co. *v.* Pineville Graded School, 42 S. W. 92, 19 Ky. L. Rep. 789.

Louisiana.— Rareshide *v.* Enterprise Ginning, etc., Co., 43 La. Ann. 820, 9 So. 642.

Maryland.— Slingluff *v.* Hubner, 101 Md. 652, 61 Atl. 326; Marine Bank *v.* Heller, 94 Md. 213, 50 Atl. 521; Anderson *v.* Anderson, 89 Md. 1, 42 Atl. 207; Wagoner *v.* Wagoner, 76 Md. 311, 25 Atl. 338; Brown *v.* State, 64 Md. 199, 1 Atl. 54, 6 Atl. 172.

New York.— *In re* Stilwell, 139 N. Y. 337, 34 N. E. 777; Griffin *v.* Long Island R. Co., 102 N. Y. 449, 7 N. E. 735; Fairchild *v.* Lynch, 99 N. Y. 359, 2 N. E. 20; Jordan *v.* Van Epps, 85 N. Y. 427.

North Carolina.— Wilkinson *v.* Brinn, 124 N. C. 723, 32 S. E. 966.

Oregon.— Barrett *v.* Failing, 8 Oreg. 152.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Gazzam, 2 Pa. Dist. 569.

South Carolina.—Gerald *v.* Gerald, 31 S. C. 171, 9 S. E. 792.

Tennessee.— Boyd *v.* Robinson, 93 Tenn. 1, 23 S. W. 72.

Virginia.— McCullough *v.* Dashiell, 85 Va. 37, 6 S. E. 610.

United States.— David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661.

England.— Shoe Mach. Co. *v.* Cutlan, [1896] 1 Ch. 667, 65 L. J. Ch. 314, 74 L. T. Rep. N. S. 166; Henderson *v.* Henderson, 3 Hare 100, 25 Eng. Ch. 100.

See 30 Cent. Dig. tit. "Judgment," § 1241.

Additional facts do not make different issues; a judgment is conclusive on the questions which were at issue, and if the issue in the second action is the same, the former judgment is decisive not only as to the facts then pleaded, but as to any other facts, then known to plaintiff, and which would properly have been within the scope of the issue then raised. Sullivan *v.* Triunfo Gold, etc., Min. Co., 39 Cal. 459; Hightower *v.* Cravens, 70 Ga. 475.

83. *Connecticut.*— Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179.

Indiana.— Griffin *v.* Hodshire, 119 Ind. 235, 21 N. E. 741.

Kansas.— Chicago, etc., R. Co. *v.* Anderson County Com'rs, 47 Kan. 766, 29 Pac. 96.

Kentucky.— Moran *v.* Vicroy, 117 Ky. 195, 77 S. W. 668, 25 Ky. L. Rep. 1305.

Louisiana.— McMicken *v.* Morgan, 9 La. Ann. 208.

Nebraska.— Schlemme *v.* Omaha Gas Mfg. Co., 4 Nebr. (Unoff.) 817, 96 N. W. 644.

New York.— De Biase *v.* Hartfield, 33 Misc. 316, 68 N. Y. Suppl. 468.

Pennsylvania.— McHenry *v.* Finletter, 23 Pa. Super. Ct. 636.

Washington.— Smith *v.* Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

West Virginia.— Biern *v.* Ray, 49 W. Va. 129, 38 S. E. 530.

United States.— Dowell *v.* Applegate, 152 U. S. 327, 14 S. Ct. 611, 38 L. ed. 463; Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 12 S. Ct. 746, 36 L. ed. 562; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Ætna L. Ins. Co. *v.* Hamilton County, 117 Fed. 82, 54 C. C. A. 468; Fish Bros. Wagon Co. *v.* Fish Bros. Mfg. Co., 95 Fed. 457, 37 C. C. A. 146; Radford *v.* Folsom, 3 Fed. 199.

England.— Jewsbury *v.* Mummery, L. R. 8 C. P. 56, 42 L. J. C. P. 22, 27 L. T. Rep. N. S. 618, 21 Wkly. Rep. 270.

See 30 Cent. Dig. tit. "Judgment," § 1241.

Former judgment as bar to second suit on same cause of action, including all matters which might have been litigated in the first action, see *supra*, XIII, D, 4, c.

84. *Georgia.*— McWilliams *v.* Walthall, 77 Ga. 7.

Illinois.— McDonald *v.* Holdom, 208 Ill. 128, 70 N. E. 21.

Indiana.— Cannon *v.* Castleman, 162 Ind. 6, 69 N. E. 455.

Maine.— Paul *v.* Thorndike, 97 Me. 87, 53 Atl. 877.

Michigan.— Drewyour *v.* Merrell, 112 Mich. 681, 71 N. W. 486.

Montana.— Maloney *v.* King, 30 Mont. 414, 76 Pac. 939.

New York.— Poillon *v.* Poillon, 90 N. Y. App. Div. 71, 85 N. Y. Suppl. 689; Weiser *v.* Weisel, 53 N. Y. Suppl. 578, 5 N. Y. Annot. Cas. 196.

South Carolina.— Haddon *v.* Lenhardt, 54 S. C. 88, 31 S. E. 883.

See 30 Cent. Dig. tit. "Judgment," § 1241.

to some of the authorities, where defenses which were available against an adverse claim in the first suit, but not then set up, are sought to be used in a second action, either by way of defense or as the foundation of a claim for relief.[85] But the weight of authority is that, where the second action, although between the same parties, is on a different cause of action, the judgment is not conclusive on all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated therein.[86]

h. Inferences From Judgment. The estoppel of a judgment does not extend to matters not expressly adjudicated and which can only be inferred by argument or construction from the judgment,[87] except where they are necessary and inevit-

85. *California.*— Rucker *v.* Langford, 138 Cal. 611, 71 Pac. 1123.

Colorado.— Lake County *v.* Johnson, 31 Colo. 184, 71 Pac. 1106.

Georgia.— Latimer *v.* Irish-American Bank, 119 Ga. 887, 47 S. E. 322; Spinks *v.* Glenn, 67 Ga. 744.

Illinois.— Hilgerson *v.* Hicks, 201 Ill. 374, 66 N. E. 360; Singer *v.* Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133.

Iowa.— Fulliam *v.* Drake, 105 Iowa 615, 75 N. W. 479; Corliss *v.* Conable, 74 Iowa 58, 36 N. W. 891.

Maryland.— Archer *v.* State, 74 Md. 410, 22 Atl. 737.

Michigan.— Free *v.* Beatley, 95 Mich. 426, 54 N. W. 910.

Mississippi.— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769.

Nebraska.— Martin *v.* Abbott, 1 Nebr. (Unoff.) 59, 95 N. W. 356.

New Jersey.— Le Herisse *v.* Hess, (Ch. 1904) 57 Atl. 808.

New York.— Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335; McLaughlin *v.* Great Western Ins. Co., 20 N. Y. Suppl. 536.

North Dakota.— Foogman *v.* Patterson, 9 N. D. 254, 83 N. W. 15.

Ohio.— Toledo Loan Co. *v.* Larkin, 25 Ohio Cir. Ct. 209.

Vermont.— Bradley *v.* Chamberlin, 35 Vt. 277.

West Virginia.— State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650.

United States.— Holt County *v.* National L. Ins. Co., 80 Fed. 686, 25 C. C. A. 469.

See 30 Cent. Dig. tit. "Judgment," § 1241.

86. *California.*— Lord *v.* Thomas, (1894) 36 Pac. 372.

Illinois.— Rogers *v.* Higgins, 57 Ill. 244.

Indiana.— Duncan *v.* Holcomb, 26 Ind. 378.

Iowa.— Everling *v.* Holcomb, 74 Iowa 722, 39 N. W. 117.

Kansas.— Stroup *v.* Pepper, 69 Kan. 241, 76 Pac. 825.

Mississippi.—Scully *v.* Lowenstein, 56 Miss. 652.

Missouri.— Spurlock *v.* Missouri Pac. R. Co., 76 Mo. 67.

Nebraska.— Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

New York.— People *v.* Johnson, 37 Barb. 502; Smith *v.* Weeks, 26 Barb. 463; Burdick *v.* Post, 12 Barb. 168.

Ohio.— Cleveland, etc., R. Co. *v.* Reid, 6 Ohio S. & C. Pl. Dec. 273, 4 Ohio N. P. 127.

Wisconsin.— Wentworth *v.* Racine County, 99 Wis. 26, 74 N. W. 551.

United States.— Fidelity Trust, etc., Co. *v.* Louisville, 174 U. S. 429, 19 S. Ct. 875, 43 L. ed. 1034; Dennison *v.* U. S., 168 U. S. 241, 18 S. Ct. 57, 42 L. ed. 453; Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 15 S. Ct. 733, 39 L. ed. 859; Wilmington, etc., R. Co. *v.* Alsbrook, 146 U. S. 279, 13 S. Ct. 72, 36 L. ed. 972; Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 12 S. Ct. 746, 36 L. ed. 562; Ætna L. Ins. Co. *v.* Hamilton County, 117 Fed. 82, 54 C. C. A. 468; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Linton *v.* National L. Ins. Co., 104 Fed. 584, 44 C. C. A. 54; Chicago, etc., R. Co. *v.* St. Joseph Union Depot Co., 92 Fed. 22; Union Mill, etc., Co. *v.* Dangberg, 81 Fed. 73; Thompson *v.* N. T. Bushnell Co., 80 Fed. 332; Lawrence *v.* Stearns, 79 Fed. 878; Geneva Nat. Bank *v.* Independent School Dist., 25 Fed. 629; Bartels *v.* Schell, 16 Fed. 341; Radford *v.* Folsom, 3 Fed. 199.

See 30 Cent. Dig. tit. "Judgment," § 1241.

Statement of rule.— In Cromwell *v.* Sac County, 94 U. S. 351, 354, 24 L. ed. 195, it is said: "Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." This is a leading case.

87. *Alabama.*— Callan *v.* Anderson, 131 Ala. 228, 31 So. 427; McCravey *v.* Remson, 19 Ala. 430, 54 Am. Dec. 194; Phillips *v.* Thompson, 3 Stew. & P. 369.

Connecticut.— Dickinson *v.* Hayes, 31 Conn. 417; Crandall *v.* Gallup, 12 Conn. 365.

Georgia.— Evans *v.* Birge, 11 Ga. 265.

Illinois.— Weidner *v.* Lund, 105 Ill. App. 454.

Massachusetts.—Watts *v.* Watts, 160 Mass. 464, 36 N. E. 479, 39 Am. St. Rep. 509, 23 L. R. A. 187; Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110.

able inferences, in the sense that the judgment could not have been rendered as it was without deciding such points.[88]

2. IDENTITY OF SUBJECT-MATTER.[89] Identity of the subject-matter is not the true test to determine whether a judgment in one action is conclusive in another, although some of the cases have stated this as a general rule.[90] It is undoubtedly true that a judgment is evidence, in a second action between the same parties or their privies concerning the same subject-matter, as to all questions litigated and decided;[91] that a former judgment cannot operate as a bar to a second suit unless it concerns the same subject-matter and is upon the same cause of action,[92] and that the estoppel of a judgment, whatever may be its extent as between the parties, is confined, as to their privies, to the particular subject of the litigation.[93] But still it is a well settled rule that the judgment of a court of competent jurisdiction on a question directly involved in the suit is conclusive in a second suit between the same parties, where the same question comes again in issue, although the second action relates to a different subject-matter.[94] Thus the former judg-

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

Missouri.— Ridgley *v.* Stillwell, 27 Mo. 128. But see Laummeier *v.* Steel, 77 Mo. App. 456.

North Carolina.— *In re* Thomas, 111 N. C. 409, 16 S. E. 226.

Pennsylvania.— Lentz *v.* Wallace, 17 Pa. St. 412, 55 Am. Dec. 569; Kapp *v.* Shields, 17 Pa. Super. Ct. 524.

Tennessee.— Vance *v.* McNabb Coal, etc., Co., (Ch. App. 1897) 48 S. W. 235.

Texas.— Eans *v.* Sawyer, 27 Tex. 448; Sawyer *v.* Boyle, 21 Tex. 28; Morris *v.* Housley, (Civ. App. 1898) 47 S. W. 846.

Washington.— Budlong *v.* Budlong, 32 Wash. 672, 73 Pac. 783, 31 Wash. 228, 71 Pac. 751.

Wisconsin.— Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; Williams *v.* Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253.

United States.— Hopkins *v.* Lee, 6 Wheat. 109, 5 L. ed. 218; California, etc., Land Co. *v.* Worden, 85 Fed. 94; Belleville, etc., R. Co. *v.* Leathe, 84 Fed. 103, 28 C. C. A. 279; Mack *v.* Levy, 60 Fed. 751; Mallett *v.* Foxcroft, 16 Fed. Cas. No. 8,989, 1 Story 474.

See 30 Cent. Dig. tit. "Judgment," § 1263 *et seq.*

And see Hudson *v.* Remington Paper Co., (Kan. 1905) 80 Pac. 568.

Exceptions to rule.— Where plaintiff sought to enjoin defendants from using a corporate name consisting of his name with the addition of the word "company," and especially from using his autograph signature as a part thereof, a judgment enjoining defendants from using the script facsimile of the autograph signature of plaintiff was in effect a determination that defendants had the right to use the corporate name in Roman letters, and therefore their right to use the corporate name in that way is *res judicata*. Geo. T. Stagg Co. *v.* Taylor, 68 S. W. 862, 24 Ky. L. Rep. 495. In another case it was held that where the fundamental inquiry in a suit in equity was whether plaintiff or defendant owned certain bonds and the bill was dismissed, but the decree did not show the grounds of dismissal, it will be presumed that the issue was disposed of on its merits, and the question of ownership is therefore *res judicata*. Martin *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218. So again a decree in an action against a railroad company to establish title to land, and to have all clouds removed therefrom, which cancels "all interest, claim, or privilege" of the company in the land, is conclusive that it has no right of way over such land. Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 650, 21 So. 760.

88. See *infra*, XIV, C, 5, a.

89. Identity of subject-matter as affecting merger and bar see *supra*, XIII, D, 2.

90. See State *v.* Jumel, 30 La. Ann. 861; Mershon *v.* Williams, 63 N. J. L. 398, 44 Atl. 211.

91. Flandreau *v.* Downey, 23 Cal. 354; Currie *v.* Chowning, (Va. 1895) 21 S. E. 809.

92. See *supra*, XIII, D, 2. And see Pattison *v.* Jones, 27 Ind. 457; Stults *v.* Huntington Waterworks Co., 33 Ind. App. 242, 71 N. E. 172; State *v.* James, 82 Mo. 509; Garrison *v.* Tinley, 112 N. C. 652, 17 S. E. 423; Reed *v.* Whipple, (Mich. 1905) 103 N. W. 548; Binda *v.* Benbow, 11 Rich. (S. C.) 24; McLennon *v.* Fenner, (S. D. 1905) 104 N. W. 218.

93. Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881, stating that the doctrine of *res judicata* extends to and binds privies of the parties to the litigation, as well as the parties themselves; but privity under such rule exists only in relation to the subject-matter of the litigation. The decision in an action becomes a rule of property as to the subject-matter thereof and passes with it to all persons subsequently claiming under such parties, but does not attach to any other property, the limit of its effect as to privies being the limit of the particular property, right, subject, or thing involved in the litigation. And see Oster *v.* Broe, (Ind. 1902) 64 N. E. 918.

94. *Arizona.*— Stevens *v.* Wadleigh, 5 Ariz. 351, 57 Pac. 622.

Minnesota.— Phelps *v.* Western Realty Co., 89 Minn. 319, 94 N. W. 1085.

ment will be an estoppel where the same question or issue, depending on the same transaction or state of facts, arises also in the second suit, although in relation to different rights or different property,[95] but not where the question in the second suit, although similar to that in the first, grows out of a different transaction of state or facts,[96] nor where the second action, although relating to the

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

Missouri.— Piper *v.* Boonville, 32 Mo. App. 138.

New Jersey.— Smith *v.* Smith, 55 N. J. Eq. 222, 37 Atl. 49.

New York.— Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; White *v.* Coatsworth, 6 N. Y. 137; Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; Matter of Gall, 40 N. Y. App. Div. 114, 57 N. Y. Suppl. 835; Matter of Irvin, 24 Misc. 353, 53 N. Y. Suppl. 715; Jenkins *v.* Smith, 21 Misc. 750, 48 N. Y. Suppl. 126; Goldberg *v.* Schlessinger, 86 N. Y. Suppl. 209.

Ohio.— Keown *v.* Murdock, 10 Ohio Dec. (Reprint) 606, 22 Cinc. L. Bul. 197.

Pennsylvania.— Hartman *v.* Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360; Myton *v.* Wilson, 11 Pa. Super. Ct. 645.

South Carolina.— Willoughby *v.* North Eastern R. Co., 52 S. C. 166, 29 S. E. 629.

Texas.— Zapeda *v.* Rahm, 19 Tex. Civ. App. 648, 48 S. W. 212; Carson *v.* McCormick Harvesting Mach. Co., 18 Tex. Civ. App. 225, 44 S. W. 406.

Virginia.— Harrison *v.* Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703.

See 30 Cent. Dig. tit. "Judgment," §§ 1242, 1243.

95. *California.*— Last Chance Water Ditch Co. *v.* Heilbron, 86 Cal. 1, 26 Pac. 523.

Colorado.— Clark *v.* Knox, 32 Colo. 342, 76 Pac. 372.

Illinois.— Reynolds *v.* Mandel, 73 Ill. App. 379.

Iowa.— Baxter *v.* Myers, 85 Iowa 328, 52 N. W. 234, 39 Am. St. Rep. 298. Thus a judgment in an action involving an interest in real estate is conclusive in an action involving title to personalty, the parties being identical, and the vital issue in both suits being whether plaintiff might inherit as the sole heir of a certain person, and the same evidence being required in both. Watson *v.* Richardson, 110 Iowa 698, 80 N. W. 416, 80 Am. St. Rep. 331.

Kansas.— Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091; Peru Plow, etc., Co. *v.* Ward, 6 Kan. App. 289, 51 Pac. 805.

Maryland.— Robertson *v.* Parks, 76 Md. 118, 24 Atl. 411.

Nebraska.— Hanson *v.* Hanson, 64 Nebr. 506, 90 N. W. 208.

New Jersey.— Breckenridge *v.* Delaware, etc., R. Co., 58 N. J. Eq. 581, 43 Atl. 1097 [*affirming* 57 N. J. Eq. 154, 41 Atl. 966].

New York.— Gallagher *v.* Kingston Water Co., 25 N. Y. App. Div. 82, 49 N. Y. Suppl. 250. Where it was adjudged in a former action that the contract in suit was void and unenforceable, such judgment is a bar to a subsequent action upon the same contract, although the second action is to recover other and different moneys. Hirshbach *v.* Ketchum, 84 N. Y. App. Div. 258, 82 N. Y. Suppl. 739.

South Dakota.— Noyes *v.* Belding, 6 S. D. 629, 62 N. W. 953.

Texas.— Cole *v.* Adams, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Washington.— Port Angeles *v.* Lauridsen, 26 Wash. 153, 66 Pac. 403.

United States.— Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Lake County *v.* Sutliff, 97 Fed. 270, 38 C. C. A. 167; Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., 55 Fed. 690, 5 C. C. A. 249.

See 30 Cent. Dig. tit. "Judgment," §§ 1242, 1243.

Contra, in New Hampshire.— See Cassidy *v.* Mudgett, 71 N. H. 491, 53 Atl. 441; Metcalf *v.* Gilmore, 63 N. H. 174.

96. *Alabama.*— Gee *v.* Williamson, 1 Port. 313, 27 Am. Dec. 628.

Arkansas.— Ozark Land Co. *v.* Lane-Bodley Co., 64 Ark. 301, 42 S. W. 281.

Connecticut.— Southington Eccleciastical Soc. *v.* Gridley, 20 Conn. 200.

Georgia.— Savannah *v.* Feeley, 66 Ga. 31.

Louisiana.— State *v.* Citizens' Bank, 52 La. Ann. 1086, 27 So. 709.

Maine.— Morrison *v.* Clark, 89 Me. 103, 35 Atl. 1034, 56 Am. St. Rep. 395.

New York.— Stokes *v.* Stokes, 155 N. Y. 581, 50 N. E. 342; Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co., 24 N. Y. App. Div. 335, 48 N. Y. Suppl. 842; Gall *v.* Gall, 17 N. Y. App. Div. 312, 45 N. Y. Suppl. 248; Bracken *v.* Atlantic Trust Co., 23 Misc. 579, 51 N. Y. Suppl. 1007.

Ohio.— Where, in an action for the maintenance of a nuisance, it appears that the operative cause of the injury is not identical with the operative cause in a similar previous action between the same parties, the judgment for plaintiff therein does not conclude defendant from entering again into the question as to what constitutes the alleged nuisance. Wright *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 588, 6 Ohio N. P. 450.

Pennsylvania.— Stockdale *v.* Maginn, 207 Pa. St. 229, 56 Atl. 440; Simon's Estate, 20 Pa. Super. Ct. 450.

Texas.— Oaks *v.* West, (Civ. App. 1901) 64 S. W. 1033.

Wisconsin.— Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439; Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

United States.— New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed.

same subject-matter, is between different parties,[97] or grows out of the same subject-matter, but involves a different question or claim in regard to it.[98]

3. Identity of Issues[99] — a. In General. The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not.[1] Or as the rule is other-

202; Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 12 S. Ct. 746, 36 L. ed. 562; Norton *v.* Jensen, 90 Fed. 415, 33 C. C. A. 141; Pierpoint Boiler Co. *v.* Penn Iron, etc., Co., 75 Fed. 289.

See 30 Cent. Dig. tit. "Judgment," §§ 1242, 1243.

97. Davis *v.* Bonn, 13 Misc. (N. Y.) 331, 34 N. Y. Suppl. 465. And see Boyd *v.* Frankfort, 117 Ky. 199, 77 S. W. 669, 25 Ky. L. Rep. 1311; King *v.* Henderson, 29 Tex. Civ. App. 601, 69 S. W. 487.

98. Hoag *v.* Greenwich, 133 N. Y. 152, 30 N. E. 842.

99. Identity of issues as affecting merger and bar see *supra*, XIII, D, 1.

1. *Alabama.* — Hieronymus *v.* Bienville Water Supply Co., 138 Ala. 577, 36 So. 453; Henderson *v.* Hall, 134 Ala. 455, 32 So. 840; Brown *v.* Tillman, 121 Ala. 626, 25 So. 836; Pope *v.* Nance, 1 Stew. 354, 18 Am. Dec. 60.

Arkansas.— Trammell *v.* Thurmond, 17 Ark. 203.

California.— Lillis *v.* People's Ditch Co., (1892) 29 Pac. 780; Hamil *v.* McIlroy, 76 Cal. 312, 18 Pac. 377; Love *v.* Waltz, 7 Cal. 250.

Colorado.— Clark *v.* Knox, 32 Colo. 342, 76 Pac. 372; McNicholas *v.* Lake, 13 Colo. App. 164, 56 Pac. 987.

Connecticut.— Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179; Kennedy *v.* Scovil, 14 Conn. 61; Smith *v.* Sherwood, 4 Conn. 276, 10 Am. Dec. 143.

Georgia.— Hendrix *v.* Webb, 113 Ga. 1028, 39 S. E. 461; Woods *v.* Jones, 56 Ga. 520.

Illinois.— Herschbach *v.* Cohen, 207 Ill. 517, 69 N. E. 932, 99 Am. St. Rep. 233; Torrence *v.* Shedd, 202 Ill. 498, 67 N. E. 168; West Chicago Park Com'rs *v.* Farber, 171 Ill. 146, 49 N. E. 427; Doty *v.* Irwin, (1897) 47 N. E. 768; Evans *v.* Woodsworth, 115 Ill. App. 202 [*affirmed* in 213 Ill. 404, 72 N. E. 1082]; Baxter *v.* Thede, 96 Ill. App. 499; Bachman *v.* Schertz, 73 Ill. App. 479; Webber *v.* Mackey, 31 Ill. App. 369.

Indiana.— Roby *v.* Eggers, 130 Ind. 415, 29 N. E. 365; Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239; Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457; Beidenkoff *v.* Brazee, 28 Ind. App. 646, 61 N. E. 954, 63 N. E. 577.

Indian Territory.— Webb *v.* Hunt, 2 Indian Terr. 612, 53 S. W. 437.

Iowa.— Harmont *v.* Sullivan, (1905) 103 N. W. 951; Loetscher *v.* Dillon, 119 Iowa 202, 93 N. W. 98; State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414; Griffith *v.* Fields, 105 Iowa 362, 75 N. W. 325; Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572; Carbiener *v.* Montgomery, 97 Iowa 659, 66 N. W. 900; Smith *v.* Baldwin, 85 Iowa 570, 52 N. W. 495; Sac County Bank *v.* Hooper, 77 Iowa 435, 42 N. W. 636; Warfield *v.* Warfield, 76 Iowa 633, 41 N. W. 383; Estes *v.* Chicago, etc., R. Co., 72 Iowa 235, 33 N. W. 647; Hunt *v.* Collins, 4 Iowa 56.

Kansas.— Missouri, etc., R. Co. *v.* Labette County, 62 Kan. 550, 64 Pac. 56; Provident Loan Trust Co. *v.* Marks, 59 Kan. 230, 52 Pac. 449, 68 Am. St. Rep. 349; Neuber *v.* Schoel, 8 Kan. App. 345, 55 Pac. 350.

Kentucky.— Hasty *v.* Berry, (1886) 1 S. W. 8; Sander *v.* Buskirk, 1 Dana 410; Stilwell *v.* Duncan, 62 S. W. 898, 23 Ky. L. Rep. 261.

Louisiana.— State *v.* New Orleans Warehouse Co., 109 La. 64, 33 So. 81; Fush *v.* Egan, 48 La. Ann. 60, 19 So. 108.

Maine.— Lynch *v.* Swanton, 53 Me. 100.

Maryland.— Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Garrott *v.* Johnson, 11 Gill & J. 173, 35 Am. Dec. 272.

Massachusetts.— Crossman *v.* Griggs, 188 Mass 217, 74 N. E. 359; Cox *v.* Wiley, 183 Mass. 410, 67 N. E. 367; Coghlan *v.* Dana, 173 Mass. 421, 53 N. E. 890.

Michigan.— Hallett *v.* Gordon, 128 Mich. 364, 87 N. W. 261; Ward *v.* Obenauer, 119 Mich. 17, 77 N. W. 305; Burrows *v.* Leech, 116 Mich. 32, 74 N. W. 296; Kellogg *v.* Thompson, 115 Mich. 618, 73 N. W. 893; Sullivan *v.* Ross, 113 Mich. 311, 71 N. W. 634, 76 N. W. 309.

Minnesota.— Thompson *v.* Crosby, 62 Minn. 324, 64 N. W. 823; Dixon *v.* Merritt, 21 Minn. 196.

Mississippi.— Alabama, etc., R. Co. *v.* McCerren, 75 Miss. 687, 23 So. 423, 876.

Missouri.— Smoot *v.* Judd, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738; Bierman *v.* Crecelius, 135 Mo. 386, 37 S. W. 121; State *v.* Baldwin, 31 Mo. 561; State *v.* Adams, 101 Mo. App. 468, 74 S. W. 497; Jones *v.* Hamm, (App. 1903) 74 S. W. 150; Lawless *v.* Lawless, 47 Mo. App. 523.

Montana.— Flannery *v.* Campbell, 30 Mont. 172, 75 Pac. 1109.

Nebraska.— Agnew *v.* Montgomery, (1904) 99 N. W. 820; State *v.* Haverly, 62 Nebr. 767, 87 N. W. 959; Anderson *v.* Kreidler, 56 Nebr. 171, 76 N. W. 581.

New Hampshire.— Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688; Horne *v.* Hutchins, 72 N. H. 77, 54 Atl. 1024; Cassidy *v.* Mudgett, 71 N. H. 491, 53 Atl. 441; Gregg *v.* Page Belting Co., 69 N. H. 247, 46 Atl. 26; Taylor *v.* Dustin, 43 N. H. 493; Hall *v.* Dodge, 38 N. H. 346; Fogg *v.* Plumer, 17 N. H. 112.

wise stated, in a second action between the same parties on a demand different from that in the first action, the judgment in the first action is an estoppel only as to the points controverted, on the determination of which the finding or verdict was rendered.[2] And in order that this rule should be applied, it must clearly and

New Jersey.— Commercial Union Assur. Co. *v.* New Jersey Rubber Co., (1902) 51 Atl. 451; Richmond *v.* Hays, 3 N. J. L. 492; Newcomb *v.* Lubrasky, 65 N. J. Eq. 125, 55 Atl. 89; Scott *v.* Hall, 58 N. J. Eq. 42, 43 Atl. 50; Mutual Ben. L. Ins. Co. *v.* Jackson, 31 N. J. Eq. 50; Giveans *v.* McMurtry, 16 N. J. Eq. 468.

New York.— Thorn *v.* De Breteuil, 179 N. Y. 64, 71 N. E. 470; Williams *v.* Barkley, 165 N. Y. 48, 58 N. E. 765; Gallagher *v.* Kingston Water Co., 164 N. Y. 602, 58 N. E. 1087; Reynolds *v.* Ætna L. Ins. Co., 160 N. Y. 635, 55 N. E. 305; Sherman *v.* Grinnell, 159 N. Y. 50, 53 N. E. 674; Williamsburgh Sav. Bank *v.* Solon, 136 N. Y. 465, 32 N. E. 1058; Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663; Manning *v.* Keenan, 73 N. Y. 45; McCollum *v.* Williamson, 96 N. Y. App. Div. 638, 89 N. Y. Suppl. 119; Farmers' L. & T. Co. *v.* Hoffman House, 96 N. Y. App. Div. 301, 89 N. Y. Suppl. 281; Tolmie *v.* Fidelity, etc., Co., 95 N. Y. App. Div. 352, 88 N. Y. Suppl. 717; Matter of Turner, 79 N. Y. App. Div. 495, 80 N. Y. Suppl. 573; Randel *v.* Vanderbilt, 75 N. Y. App. Div. 313, 78 N. Y. Suppl. 124 [*affirmed* in 180 N. Y. 547, 73 N. E. 1131]; Ogle *v.* Dershem, 67 N. Y. App. Div. 221, 73 N. Y. Suppl. 592; Rudd *v.* Cornell, 58 N. Y. App. Div. 207, 68 N. Y. Suppl. 757; Sterrit *v.* Lee, 44 N. Y. App. Div. 619, 60 N. Y. Suppl. 219; Young *v.* Farwell, 30 N. Y. App. Div. 489, 52 N. Y. Suppl. 283; Aultman, etc., Co. *v.* Syme, 23 N. Y. App. Div. 344, 48 N. Y. Suppl. 231; Knauth *v.* Bassett, 34 Barb. 31; Wagstaff *v.* Marcy, 25 Misc. 121, 54 N. Y. Suppl. 1021; Stimmel *v.* Swan, 16 Misc. 495, 38 N. Y. Suppl. 963; Stearns *v.* St. Louis, etc., R. Co., 2 N. Y. St. 391; Maybee *v.* Avery, 18 Johns. 352; Matter of Wright, 1 Connoly Surr. 287, 6 N. Y. Suppl. 773.

North Carolina.— McCall *v.* Webb, 135 N. C. 356, 47 S. E. 802.

Ohio.— Brigel *v.* Creed, 10 Ohio S. & C. Pl. Dec. 214, 8 Ohio N. P. 456.

Oregon.— Underwood *v.* French, 6 Oreg. 66, 25 Am. Rep. 500.

Pennsylvania.— Seabury *v.* Fidelity Ins., etc., Co., 205 Pa. St. 234, 54 Atl. 898; Order of Solon *v.* Gaskill, 192 Pa. St. 484, 43 Atl. 1085; Lancaster *v.* Frescoln, 192 Pa. St. 452, 43 Atl. 961; Lentz *v.* Wallace, 17 Pa. St. 412, 55 Am. Dec. 569; Kilheffer *v.* Herr, 17 Serg. & R. 319, 17 Am. Dec. 658; Carmack *v.* Com., 5 Binn. 184; Howe *v.* Corry First Nat. Bank, 1 Pa. Cas. 57, 1 Atl. 787; Wharton *v.* Harlan, 24 Pa. Super. Ct. 61; Becker *v.* Lebanon, etc., R. Co., 11 Pa. Super. Ct. 649; Moorehouse *v.* Moorehouse, 19 Pa. Co. Ct. 484; Stockley *v.* Pollock, 10 Kulp 83.

Rhode Island.— Schæffer *v.* Brown, 23 R. I. 216, 49 Atl. 895.

South Carolina.— Smith *v.* Smith, 55 S. C. 507, 33 S. E. 583; State *v.* Moses, 20 S. C. 465.

South Dakota.— Sanford *v.* King, (1905) 103 N. W. 28.

Tennessee.— Moore *v.* Wood, (Ch. App. 1901) 61 S. W. 1063.

Texas.— Horton *v.* Hamilton, 20 Tex. 606; Moor *v.* Moor, 31 Tex. Civ. App. 137, 71 S. W. 794; Griffin *v.* Barbee, 29 Tex. Civ. App. 325, 68 S. W. 698; Ellison *v.* Yates, 25 Tex. Civ. App. 41, 60 S. W. 999; McCord-Collins Commerce Co. *v.* Levi, 21 Tex. Civ. App. 109, 50 S. W. 606; Schneider-Davis Co. *v.* Brown, (Civ. App. 1898) 46 S. W. 108; Hartford F. Ins. Co. *v.* Cameron, 18 Tex. Civ. App. 237, 45 S. W. 158; Frankel *v.* Heidenheimer, 1 Tex. App. Civ. Cas. § 307.

Utah.— Bonanza Consol. Min. Co. *v.* Golden Head Min. Co., 29 Utah 159, 80 Pac. 736.

Vermont.— Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646.

Virginia.— Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

Washington.— Hanna *v.* Kasson, 26 Wash. 568, 67 Pac. 271; Brier *v.* Traders' Nat. Bank, 24 Wash. 695, 64 Pac. 831; State *v.* Headlee, 18 Wash. 220, 51 Pac. 369.

West Virginia.— Coville *v.* Gilman, 13 W. Va. 314; Henry *v.* Davis, 13 W. Va. 230; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

Wisconsin.— Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691; Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589; Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; Kalisch *v.* Kalisch, 9 Wis. 529.

United States.— Hubbell *v.* U. S., 171 U. S. 203, 18 S. Ct. 828, 43 L. ed. 136; Douglas *v.* Com., 168 U. S. 488, 18 S. Ct. 199, 42 L. ed. 553; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202; Hornbuckle *v.* Stafford, 111 U. S. 389, 4 S. Ct. 515, 28 L. ed. 468; Hill *v.* Farmers', etc., Nat. Bank, 97 U. S. 450, 24 L. ed. 1051; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; U. S. *v.* McConnaughey, 135 Fed. 350, 68 C. C. A. 58; Stewart *v.* Ashtabula, 107 Fed. 857, 47 C. C. A. 21; Newton Mfg. Co. *v.* Wilgus, 90 Fed. 483; Flannery *v.* The Alexander Barkley, 83 Fed. 846; Stearns *v.* Lawrence, 83 Fed. 738, 28 C. C. A. 66; Schwarzchild *v.* National Steamship Co., 74 Fed. 257; Jefferson Police Jury *v.* U. S., 60 Fed. 249, 8 C. C. A. 607; Rocker Spring Co. *v.* William D. Gibson Co., 58 Fed. 217; Brusie *v.* Peck, 54 Fed. 820, 4 C. C. A. 597; Young *v.* Fox, 37 Fed. 385; Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,493, 4 Wash. C. C. 86.

See 30 Cent. Dig. tit. "Judgment," §§ 1244–1246.

2. Geneva Nat. Bank *v.* Independent School Dist., 25 Fed. 629.

positively appear, either from the record itself or by the aid of competent extrinsic evidence,[3] that the precise point or question in issue in the second suit was involved and decided in the first.[4]

b. Effect of Diversity of Parties.[5] Generally there cannot be said to be an identity of issues in two suits, within the meaning of this rule, when the parties are not really and substantially the same, although their separate claims or rights may grow out of the same subject-matter or be founded on the same facts.[6] Thus, where one creditor has been defeated in a suit against the common debtor, this does not estop another creditor from suing him on a similar or identical state of facts.[7] But the presence in the one suit of additional parties not included in the other does not prevent the estoppel of the judgment from binding those who were parties to it and are also parties to the suit in which it is set up.[8]

4. Matters in Issue[9]**— a. General Rule.** The general rule is that a judgment is conclusive, for the purposes of a second action between the same parties or their privies, of all facts, questions, or claims which were directly in issue and adjudicated, whether the second suit be upon the same or a different cause of action.[10]

b. What Constitutes Matter in Issue[11]**—** (i) *In General.* A point or question is "in issue" in a suit, in such sense that it will be concluded by the judgment therein, when an issue concerning it is directly tendered and accepted by the pleadings in the case;[12] or when it is fairly within the scope of the plead-

3. *Alabama.*— Greenwood *v.* Warren, 120 Ala. 71, 23 So. 686.

Connecticut.— Stevens *v.* Curtiss, 3 Conn. 260.

Illinois.— Chicago Theological Seminary *v.* People, 189 Ill. 439, 59 N. E. 977.

Minnesota.— Recovery in a former action, apparently for the same cause, is only *prima facie* evidence that the subsequent demand was tried therein. Estes *v.* Farnham, 11 Minn. 423.

Nebraska.— Morgan *v.* Mitchell, 52 Nebr. 667, 72 N. W. 1055.

New Jersey.— Taylor *v.* Hutchinson, 61 N. J. L. 440, 39 Atl. 664.

North Dakota.—Fahey *v.* Esterley Harvesting Mach. Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554.

Pennsylvania.— Hartman *v.* Pittsburgh Inclined Plane Co., 23 Pa. Super. Ct. 360.

South Dakota.— Selbie *v.* Graham, (1904) 100 N. W. 755.

Vermont.— Aiken *v.* Peck, 22 Vt. 255.

United States.— Ætna L. Ins. Co. *v.* Hamilton County, 117 Fed. 82, 54 C. C. A. 468; Kruger *v.* Constable, 116 Fed. 722.

See 30 Cent. Dig. tit. "Judgment," § 1244.

4. Althrop *v.* Beckwith, 14 Ill. App. 628; Chamberlain *v.* Cuming, 65 N. Y. App. Div. 474, 72 N. Y. Suppl. 928. But see Ætna L. Ins. Co. *v.* Hamilton County, 117 Fed. 82, 54 C. C. A. 468, holding that, where the same issues are made and the same defenses interposed in two actions, and there is nothing to show that any new issue or right is involved in the second action, it is immaterial on what defense or issue the judgment in the first action was based.

5. Effect of diversity of parties as to merger and bar see *supra*, XIII, D, 1, f.

6. *Illinois.*— Pennsylvania Co. *v.* Chicago, etc., R. Co., 44 Ill. App. 132.

Louisiana.— Palfrey *v.* Francois, 8 Mart. N. S. 260.

Maryland.— Heaver *v.* Lanahan, 74 Md. 493, 22 Atl. 263.

New York.— Pentz *v.* Ætna F. Ins. Co., 9 Paige 568.

North Carolina.— Houston *v.* Bibb, 50 N. C. 83.

See 30 Cent. Dig. tit. "Judgment," § 1247.

In Pennsylvania it is said that, in an action by a third person against a landlord for property levied on for rent, as belonging to the tenant, a judgment in a former action by the tenant, against the landlord, who had distrained the property, to have the account for rent settled, where the amount of rent due by the tenant was determined, is admissible. Kessler *v.* McConachy, 1 Rawle 435.

7. Illinois Cent. R. Co. *v.* Schwartz, 13 Ill. App. 490. But see Blum *v.* Lynch, 2 Tex. App. Civ. Cas. § 779.

8. McCleary *v.* Menke, 109 Ill. 294; Hartman *v.* Pickering, 84 Miss. 427, 36 So. 529; Walsh *v.* Ostrander, 22 Wend. (N. Y.) 178. And see *supra*, XIII, A, 5, h; XIII, F, 1, c; XIV, B, 2, g.

9. Matters in issue as affecting merger and bar see *supra*, XIII, D, 4.

Judgment as evidence of jurisdiction see *supra*, XIV, C, 1, c.

10. See *supra*, XIV, A, 1, a. And see Continental Title, etc., Co. *v.* Devlin, 209 Pa. St. 380, 58 Atl. 843.

11. Judgment on matters not in issue see *infra*, XIV, C, 8.

12. *California.*—Lamb *v.* Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66; Kline *v.* Mohr, 142 Cal. 673, 76 Pac. 650; Caperton *v.* Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

Georgia.— Brown *v.* Wilson, 56 Ga. 534.

Kansas.— Redden *v.* Metzger, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97.

Nebraska.— State *v.* Broatch, (1903) 94 N. W. 1016.

ings,[13] unless the judgment went off on a preliminary question,[14] or the particular point was excluded from the consideration of the jury or was not actually decided because not brought to the attention of the court;[15] and if the matter was "in issue" in this sense, it is not essential to the conclusiveness of the judgment that it should have been actually contested at the trial, if it was included in and settled by the decision in the case;[16] and some cases hold that the estoppel of the judgment applies to any point raised by the pleadings, argued by counsel, and deliberately passed on by the court, although it was unnecessary to the decision of the case.[17]

(II) *Issues Raised by Pleadings.* A few decisions hold that, in order that a former adjudication upon a particular point should be available as an estoppel,

Nevada.— McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

New York.— Roarty *v.* McDermott, 146 N. Y. 296, 41 N. E. 30; Anhalt *v.* Lightstone, 39 Misc. 822, 81 N. Y. Suppl. 288.

Texas.— American Cotton Co. *v.* Heierman, (Civ. App. 1904) 83 S. W. 845; McGrady *v.* Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

United States.— New Orleans *v.* Fisher, 180 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485.

See 30 Cent. Dig. tit. "Judgment," § 1248 *et seq.*

Form of proceeding immaterial.— It matters not under what form, whether by petition, exception, rule, or intervention, the question is presented; whenever the same question recurs between the same parties, even under a different form of procedure, the principle of *res judicata* applies. Trescott *v.* Lewis, 12 La. Ann. 197; Plicque *v.* Perret, 19 La. 318.

Tender of issue.— In an action to foreclose a mortgage, allegations showing the existence of other mortgages, but that plaintiff's mortgage has, and of right ought to have, precedence and priority over such other mortgages, sufficiently tender the issue of priority to render a decree in such suit conclusive against the parties thereto. Iowa County *v.* Mineral Point R. Co., 24 Wis. 93.

Judgment for damages.— The limited nature of a judgment for damages only does not prevent its operation as an estoppel as to all questions embraced in the pleadings. Casler *v.* Shipman, 35 N. Y. 533.

Matters appearing in a petition and decree by way of narration, and which are beyond their scope and purpose, are not concluded by the decree in such sense as to prevent a subsequent inquiry into them at the suit of parties interested. Gaffield *v.* Plumber, 175 Ill. 521, 51 N. E. 749.

13. *Alabama.*— Chamberlain *v.* Gaillard, 26 Ala. 504.

California.— Boston *v.* Haynes, 33 Cal. 31.

Indiana.— McFadden *v.* Schroeder, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711.

Louisiana.— Erwin *v.* Bissell, 17 La. 92.

United States.— Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42.

See 30 Cent. Dig. tit. "Judgment," § 1250.

14. For instance a judgment on a former appeal that a complaint states a good cause of action is not *res judicata* as to the truth of the allegations therein. Wolverton *v.* Taylor, 54 Ill. App. 380.

15. Brothers *v.* Beck, 75 Miss. 482, 22 So. 944 (the record of a chancery suit is not admissible to show that a certain issue was *res judicata,* if such matter was set up only in an amendment therein, which was stricken out on motion of the adverse party); Boston, etc., R. Co. *v.* Sargent, 70 N. H. 299, 47 Atl. 605; Bingham *v.* Honeyman, 32 Oreg. 129, 51 Pac. 735, 52 Pac. 755; New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96.

But on the other hand the exclusion of evidence properly admissible under the issues in a case is as complete an adjudication of a claim sought to be supported thereby as if it were admitted and then discredited by the findings in the case. Hord *v.* Bradbury, 156 Ind. 20, 59 N. E. 27. But *compare* Sherman *v.* Dilley, 3 Nev. 21, holding that to make a former judgment evidence in a subsequent suit it must appear that the facts constituting the estoppel were actually passed on by the jury in the former case.

16. Harmon *v.* Auditor Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502; O'Brien *v.* Manwaring, 79 Minn. 86, 81 N. W. 746, 79 Am. St. Rep. 426; Roller *v.* Pitman, 98 Va. 613, 36 S. E. 987. And see Louisville, etc., R. Co. *v.* Carson, 66 Ill. App. 262 [*affirmed* in 169 Ill. 247, 48 N. E. 402], where it was said that, where plaintiff alleges and proves the validity of the lease sued on, an adjudication in his favor is conclusive on that point in a subsequent suit on the same lease, although he was not bound to prove such allegation because defendant failed to verify his plea of the general issue. But *compare* Freeman *v.* Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355, where an action was brought by a public officer against a county for his salary for a certain month, and the court conceded that the question of the constitutionality of the statute under which he was appointed was necessarily involved in the case and must have been determined, and yet held that as it had not been actually litigated the judgment was not conclusive of the question in a subsequent suit for salary for another month.

17. Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654. But *compare* East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652.

the fact determined must have been in issue on the face of the pleadings,[18] and some others maintain that the "matter in issue" includes only that upon which plaintiff proceeds in his action and which defendant controverts by his pleadings, and not facts offered in evidence to establish the matters in issue, although they may be the only points controverted.[19]

(III) *Questions Actually Litigated and Decided.* The great preponderance of authority sustains the rule that the estoppel of the judgment covers all points which were actually litigated and which actually determined the verdict or finding, whether or not they were technically in issue on the face of the pleadings.[20] But a matter is not in issue in the suit which was neither pleaded nor

18. *Connecticut.*— Crandall *v.* Gallup, 12 Conn. 365.

Indiana.— Duncan *v.* Holcomb, 26 Ind. 378.

Iowa.— Haight *v.* Keokuk, 4 Iowa 199.

Louisiana.— Saul *v.* His Creditors, 7 Mart. N. S. 425.

Massachusetts.— Newell *v.* Carpenter, 118 Mass. 411.

New Hampshire.— Towns *v.* Nims, 5 N. H. 259, 20 Am. Dec. 578.

England.— Sintzenick *v.* Lucas, 1 Esp. 43; Blackham's Case, 1 Salk. 290.

See 30 Cent. Dig. tit. "Judgment," § 1250.

19. *California.*— Garwood *v.* Garwood, 29 Cal. 514.

Connecticut.— Hannon *v.* O'Dell, 71 Conn. 698, 43 Atl. 147.

Maine.— Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290.

Massachusetts.— Stapleton *v.* Dee, 132 Mass. 279.

Michigan.— Perkins *v.* Oliver, 110 Mich. 402, 68 N. W. 245.

New Hampshire.— Sanderson *v.* Peabody, 58 N. H. 116; Vaughan *v.* Morrison, 55 N. H. 580; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

Pennsylvania.— Lentz *v.* Wallace, 17 Pa. St. 412, 55 Am. Dec. 569.

Texas.— Keesey *v.* Old, 3 Tex. Civ. App. 1, 21 S. W. 693.

Utah.— Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590.

West Virginia.— Henry *v.* Davis, 13 W. Va. 230; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

See 30 Cent. Dig. tit. "Judgment," § 1250.

20. *Alabama.*— Chamberlain *v.* Gaillard, 26 Ala. 504.

California.— Ivancovich *v.* Weilenman, 144 Cal. 757, 78 Pac. 268; Greer *v.* Greer, 142 Cal. 519, 77 Pac. 1106; Ferrea *v.* Chabot, 63 Cal. 564.

Georgia.— Ashley *v.* Cook, 109 Ga. 653, 35 S. E. 89; Hidell *v.* Funkhouser, 96 Ga. 85, 22 S. E. 708; Evans *v.* Birge, 11 Ga. 265.

Illinois.— Campbell *v.* Wilson, 195 Ill. 284, 63 N. E. 103; Litch *v.* Clinch, 136 Ill. 410, 26 N. E. 579; Brown *v.* Schintz, 109 Ill. App. 598; Baldwin *v.* Haneey, 104 Ill. App. 84. In Weidner *v.* Lund, 105 Ill. App. 454, the rule is well stated as follows: The doctrine of *res judicata* does not rest entirely on the fact that a particular proposition has been affirmed and denied in the pleadings, but rather on the fact that such proposition has been fully and fairly investigated and tried, that the parties have had an opportunity to say and propose all that they can in relation to it, and that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated.

Indiana.— Lemmon *v.* Osborn, 153 Ind. 172, 54 N. E. 1058; Walker *v.* Houlton, 5 Blackf. 348.

Iowa.— Muecke *v.* Barrett, 104 Iowa 413, 73 N. W. 880.

Kansas.— Redden *v.* Metzger, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97; Shepard *v.* Stockham, 45 Kan. 244, 25 Pac. 559; Bishop *v.* Smith, 9 Kan. App. 602, 58 Pac. 493.

Louisiana.— Logan *v.* Herbert, 30 La. Ann. 727.

Maine.— Young *v.* Pritchard, 75 Me. 513.

Maryland.— Trayhern *v.* Colburn, 66 Md. 277, 7 Atl. 459.

Massachusetts.— Foye *v.* Patch, 132 Mass. 105; Baxter *v.* New England Mar. Ins. Co., 6 Mass. 277, 4 Am. Dec. 125.

Minnesota.— Johnson *v.* Johnson, 57 Minn. 100, 58 N. W. 824.

Mississippi.— Moody *v.* Harper, 38 Miss. 599.

Missouri.— Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Murphy *v.* De France, 101 Mo. 151, 13 S. W. 756; Ridgley *v.* Stillwell, 27 Mo. 128; Dodge *v.* Knapp, 112 Mo. App. 513, 87 S. W. 47; Case *v.* Gorton, 33 Mo. App. 597.

Nebraska.— Upton *v.* Betts, 59 Nebr. 724, 82 N. W. 19; Martin *v.* Abbott, 1 Nebr. (Unoff.) 59, 95 N. W. 356.

Nevada.— Sherman *v.* Dilley, 3 Nev. 21.

New Jersey.— Annan *v.* Hill Union Brewery Co., 59 N. J. Eq. 414, 46 Atl. 563; Breckenridge *v.* Delaware, etc., R. Co., 58 N. J. Eq. 581, 43 Atl. 1097; Paterson *v.* Baker, 51 N. J. Eq. 49, 26 Atl. 324.

New York.— Lorillard *v.* Clyde, 102 N. Y. 59, 6 N. E. 104; Pray *v.* Hegeman, 98 N. Y. 351; Sheldon *v.* Edwards, 35 N. Y. 279; Demarest *v.* Darg, 32 N. Y. 281; O'Connor *v.* Byrne, 86 N. Y. App. Div. 627, 83 N. Y. Suppl. 665 [*affirmed* in 180 N. Y. 565]; Brawner *v.* Fahy, 64 N. Y. App. Div. 122, 71 N. Y. Suppl. 834; Bush *v.* Coler, 60 N. Y. App. Div. 47, 69 N. Y. Suppl. 684; Bulmer *v.* Young, 47 N. Y. App. Div. 464, 62 N. Y. Suppl. 406; Reiner *v.* Jones, 38 N. Y. App. Div. 441, 56 N. Y. Suppl. 423; Quinn *v.*

brought into contest therein, although within the general scope of the litigation, and although it might have determined the judgment if it had been set up and tried.[21]

Jenks, 88 Hun 428, 34 N. Y. Suppl. 962; *In re* Howe, 61 Hun 608, 16 N. Y. Suppl. 465; Bissell *v.* Kellogg, 60 Barb. 617; Hudson *v.* Smith, 39 N. Y. Super. Ct. 452; Steele *v.* Martin, 10 N. Y. St. 154; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603. And see Ellis *v.* Cole, 105 N. Y. App. Div. 48, 94 N. Y. Suppl. 1031.

North Carolina.— Best *v.* British American Mortg. Co., 133 N. C. 20, 45 S. E. 343; Preiss *v.* Cohen, 117 N. C. 54, 23 S. E. 162; Southern Fertilizer Co. *v.* Reams, 105 N. C. 283, 11 S. E. 467; Bennett *v.* Holmes, 18 N. C. 486.

Ohio.— Hazzard *v.* Nottingham, Tapp. 114; Keown *v.* Murdock, 10 Ohio Dec. (Reprint) 606, 22 Cinc. L. Bul. 197.

Oklahoma.— Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976.

Oregon.— White *v.* Ladd, 41 Oreg. 324, 68 Pac. 739, 93 Am. St. Rep. 732.

Pennsylvania.— Wetherald *v.* Van Stavoren, 125 Pa. St. 535, 17 Atl. 450; Cyphert *v.* McClune, 22 Pa. St. 195; Kapp *v.* Shields, 17 Pa. Super. Ct. 524.

South Carolina.— Edwards *v.* Edwards, 11 Rich. 537.

Texas.— Oldham *v.* McIver, 49 Tex. 556; Lee *v.* Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Acres *v.* Tate, 1 Tex. App. Civ. Cas. § 1222. But see Keesey *v.* Old, 3 Tex. Civ. App. 1, 21 S. W. 693.

Washington.— Vulcan Iron Works *v.* Kent Lumber Co., (1905) 81 Pac. 913; Lilly *v.* Eklund, 37 Wash. 532, 79 Pac. 1107; *In re* MacDonald, 29 Wash. 422, 69 Pac. 1111; Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

United States.— Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118, 26 L. ed. 327; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204; Miles *v.* Caldwell, 2 Wall. 35, 17 L. ed. 755; German Sav., etc., Soc. *v.* Full, 136 Fed. 1, 69 C. C. A. 1; Stufflebeam *v.* De Lasbmutt, 101 Fed. 367; Empire State Nail Co. *v.* American Solid Leather Button Co., 74 Fed. 864, 21 C. C. A. 152; Groves *v.* Sentell, 69 Fed. 223, 16 C. C. A. 217; Peninsular Iron Co. *v.* Eells, 68 Fed. 24, 15 C. C. A. 189; Smith *v.* Ontario, 4 Fed. 386, 18 Blatchf. 434. And see Fayerweather *v.* Ritch, 195 U. S. 276, 25 S. Ct. 58, 49 L. ed. 193. Thus a decree formally declaring the validity of a patent sued on, although entered on a plea raising only an issue of title, no answer being afterward put in, is conclusive of that question in a subsequent suit on the same patent between the same parties or their privies. Empire State Nail Co. *v.* American Solid Leather Button Co., *supra*.

England.— Reg. *v.* Hartington, 4 El. & Bl. 780.

See 30 Cent. Dig. tit. "Judgment," § 1251.

Rule differently stated.— Another statement of the same rule, found in some of the cases, is that the matter in issue or point in controversy, which is concluded by a former judgment, is that ultimate fact or state of facts on which the verdict was based. Oglesby *v.* Attrill, 20 Fed. 570; Smith *v.* Ontario, 4 Fed. 386, 18 Blatchf. 454.

The point decided, not the reasons given for a finding, is what is fixed by the judgment. Burke *v.* Table Mountain Water Co., 12 Cal. 403. Nor does a remark made *obiter* or *arguendo* by the court operate as an estoppel upon the point adverted to. Union, etc., Bank *v.* Allen, 77 Miss. 442, 27 So. 631.

Point ill pleaded.— A plea of *res judicata* cannot be avoided by plaintiff on the ground that the facts relied on by him for a recovery were not sufficiently pleaded in the former action, and hence were inadmissible in defense thereof, it appearing that the issue was raised therein and decided in favor of the admission of the evidence and that it was admitted. Chouteau *v.* Gibson, 76 Mo. 38.

Judgment on demurrer.— Where a special demurrer to a petition, raising the question of jurisdiction, is overruled, and a general demurrer to the merits is sustained, a defendant cannot, after a reversal of the decision on the general demurrer, again raise the question of jurisdiction by answer. McDowell *v.* Chesapeake, etc., R. Co., 90 Ky. 346, 14 S. W. 338, 12 Ky. L. Rep. 331.

21. *Colorado.*— Buckers Irr., etc., Co. *v.* Platte Valley Irr. Co., 28 Colo. 187, 63 Pac. 305.

Iowa.— Ocheltree *v.* Hill, 77 Iowa 721, 42 N. W. 523.

Michigan.— Jacobson *v.* Miller, 41 Mich. 90, 1 N. W. 1013. But see Sayers *v.* Auditor General, 124 Mich. 259, 82 N. W. 1045.

New York.— Van Camp *v.* Fowler, 133 N. Y. 600, 30 N. E. 1147; Wilcox's Estate, 11 N. Y. Civ. Proc. 115. But see Barth *v.* Burt, 17 Abb. Pr. 349.

Oregon.— Gentry *v.* Pacific Livestock Co., 45 Oreg. 233, 77 Pac. 115; Adams *v.* Church, 42 Oreg. 270, 70 Pac. 1037, 95 Am. St. Rep. 740, 59 L. R. A. 782.

Pennsylvania.— Neumoyer *v.* Andreas, 57 Pa. St. 446.

United States.— Fidelity Trust Co. *v.* Louisville, 174 U. S. 429, 19 S. Ct. 875, 43 L. ed. 1034; Williams *v.* U. S., 26 Ct. Cl. 132.

See 30 Cent. Dig. tit. "Judgment," § 1251.

As to the conclusiveness of a judgment upon matters which might have been litigated see *supra*, XIV, C, 1, g.

Two grounds for judgment.— The fact that the judgment of a court might have been based on a ground other than that on which it actually was based does not prevent the determination that such ground existed from being conclusive in a subsequent suit, if its existence was in issue in the former suit, and properly formed the basis of the judgment

c. Numerous Issues in Same Case. If the questions involved in a suit are tried and decided, no matter how numerous they may be, the estoppel of the judgment will apply to each point so settled, in the same degree as if it were the sole issue in the case;[22] and some decisions maintain that a general verdict or finding is conclusive upon all the matters at issue in the suit,[23] although the majority hold that where the pleadings present two or more distinct propositions, and the verdict may be referred to either, both, or all, it is not conclusive but only *prima facie* evidence on any one of the questions involved, until proper evidence is introduced to show that the particular point was tried and adjudicated.[24]

5. Matters Essential to Adjudication[25] — a. Necessary Conditions to Adjudication. Matters which follow by necessary and inevitable inference from the judgment — findings or determinations of the court in relation to the subject-matter of the suit which are necessarily implied from its final decision, as being determinations which it must have made in order to justify the judgment as rendered — are equally covered by the estoppel as if they were specifically found in so many words;[26] or, in other words, it is allowable to reason back from the

therein. Covington First Nat. Bank *v.* Covington, 129 Fed. 792.

22. *Illinois.*— Ingwersen *v.* Buchholz, 88 Ill. App. 73.

Maryland.— Whitehurst *v.* Rogers, 38 Md. 503.

Utah.— Hoagland *v.* Hoagland, 25 Utah 56, 69 Pac. 471.

Wisconsin.— Rowell *v.* Smith, 123 Wis. 510, 102 N. W. 1.

United States.— Manhattan Trust Co. *v.* Trust Co. of North America, 107 Fed. 328, 46 C. C. A. 322.

23. *Illinois.*— Clevenger *v.* Dunaway, 84 Ill. 367.

Nebraska.— Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

Ohio.— Toplin *v.* Toplin, 8 Ohio Cir. Ct. 55, 4 Ohio Cir. Dec. 312.

Oregon.— Hall *v.* Zeller, 17 Oreg. 381, 21 Pac. 192.

West Virginia.— Tennant *v.* Divine, 24 W. Va. 387.

See 30 Cent. Dig. tit. "Judgment," § 1248.

24. *California.*— Kidd *v.* Laird, 15 Cal. 161, 76 Am. Dec. 472.

Massachusetts.— Sawyer *v.* Woodbury, 7 Gray 499, 66 Am. Dec. 518.

South Carolina.— Henderson *v.* Kenner, 1 Rich. 474.

Wisconsin.— Bergeron *v.* Richardott, 55 Wis. 129, 12 N. W. 384.

United States.— Starling *v.* Weir Plow Co., 53 Fed. 119, 3 C. C. A. 471.

See 30 Cent. Dig. tit. "Judgment," § 1248 *et seq.*

Several defenses.— A judgment or decree dismissing a bill generally, or expressed to be in favor of defendant in general terms, does not necessarily establish the truth of all the defenses which he may have pleaded. Leathe *v.* Thomas, 109 Ill. App. 434; De Sollar *v.* Hanscome, 158 U. S. 216, 15 S. Ct. 816, 39 L. ed. 956; Belleville, etc., R. Co. *v.* Leathe, 84 Fed. 103, 28 C. C. A. 279. But where a local statute authorizes defendant to set up in the same answer as many defenses as he has, a judgment entered generally in his favor amounts to a special finding in his favor of all the issues raised by the answer, and if the judgment contains no provision that it shall be without prejudice, or any other limitation or restriction, the estoppel raised by it will extend to every matter of fact in issue, which was actually found by the court in favor of defendant. Four Hundred & Twenty Min. Co. *v.* Bullion Min. Co., 9 Fed. Cas. No. 4,989, 3 Sawy. 634. And where an appellate court finds distinctly on a given issue, the estoppel arising from its judgment cannot be escaped by contending that the determination of such question was unnecessary, since, defendant being authorized to interpose as many defenses as he has, the court may determine them all, although the decision of any one may be sufficient to determine the whole cause. Clark *v.* Knox, 32 Colo. 342, 76 Pac. 372.

Alternative defenses.— In an action against the maker of a note, the answer set up that the note was originally void, and also that, if originally valid, it was afterward discharged by agreement of the parties, and judgment was given for defendant. It was held that such judgment was not evidence in a subsequent suit that the note was originally void, as it did not appear on which ground of defense the judgment was based. Littlefield *v.* Huntress, 106 Mass. 121.

25. Judgment as evidence of jurisdiction see *supra*, XIV, C, 1, c.

Nature and extent of relief sought and granted as affecting merger and bar see *supra*, XIII, D, 4.

26. *Alabama.*— Perry *v.* King, 117 Ala. 533, 23 So. 783; Bloodgood *v.* Grasey, 31 Ala. 575; Hutchinson *v.* Dearing, 20 Ala. 798.

California.— Reed *v.* Cross, 116 Cal. 473, 48 Pac. 491; People *v.* Beaudry, 91 Cal. 213, 27 Pac. 610; People *v.* San Francisco, 27 Cal. 655; Hayes *v.* Shattuck, 21 Cal. 51.

Connecticut.— Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179; Sargent *v.* New Haven Steamboat Co., 65 Conn. 116, 31 Atl. 543.

Georgia.— Maynard *v.* Newton, 116 Ga. 195, 42 S. E. 376.

judgment to the basis on which it stands, and, regarding the judgment as a conclusion, and finding it to be one which could have been drawn only from certain

Idaho.— Elliott *v.* Porter, 6 Ida. 684, 59 Pac. 360.

Illinois.— Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Harmon *v.* Auditor Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502; Mueller *v.* Henning, 102 Ill. 646.

Indiana.— Lemmon *v.* Osborn, 153 Ind. 172, 54 N. E. 1058; Ashmead *v.* Hurt, 125 Ind. 566, 25 N. E. 709.

Iowa.— Osthy *v.* Secor, (1903) 94 N. W. 571; Hornish *v.* Ringen Stove Co., 116 Iowa 1, 89 N. W. 95; Brant *v.* Plumer, 64 Iowa 33, 19 N. W. 842; Keokuk State Nat. Bank *v.* Northwestern Union Packet Co., 35 Iowa 226.

Kansas.— Sanford *v.* Oberlin College, 50 Kan. 342, 31 Pac. 1089.

Kentucky.— Lee *v.* Hughes, 77 S. W. 386, 25 Ky. L. Rep. 1201; Hamilton *v.* Spalding, 76 S. W. 517, 25 Ky. L. Rep. 847; Sorrell *v.* Samuels, 49 S. W. 762, 20 Ky. L. Rep. 1498.

Louisiana.— Hamlet *v.* Fletcher, 36 La. Ann. 551; Goodrich *v.* Hunton, 31 La. Ann. 582; Mahan *v.* Accommodation Bank, 26 La. Ann. 34; Neidhardt *v.* Hunterheimer, 24 La. Ann. 174; Opothlarholer *v.* Gardiner, 15 La. 512.

Massachusetts.— Duncan *v.* Bancroft, 110 Mass. 267; Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733.

Michigan.— Gould *v.* Vaughan, 30 Mich. 376.

Missouri.— Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; State *v.* Barker, 26 Mo. App. 487.

New Jersey.— Warren County School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115; Reiner *v.* Brown, (Ch. 1899) 42 Atl. 329; Delaware, etc., R. Co. *v.* Breckenridge, 57 N. J. Eq. 154, 41 Atl. 966; Manning *v.* Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. 802.

New York.— Thayer *v.* Cable, 165 N. Y. 632, 59 N. E. 1131; Allen *v.* Clark, 141 N. Y. 584, 36 N. E. 345; Tuska *v.* O'Brien, 68 N. Y. 446; Collins *v.* Bennett, 46 N. Y. 490; Hudson Valley R. Co. *v.* Boston, etc., R. Co., 106 N. Y. App. Div. 375, 94 N. Y. Suppl. 545; Chester *v.* Buffalo Car Mfg. Co., 70 N. Y. App. Div. 443, 75 N. Y. Suppl. 428; Conant *v.* Jones, 50 N. Y. App. Div. 336, 64 N. Y. Suppl. 189; Hawkins *v.* Ringler, 47 N. Y. App. Div. 262, 62 N. Y. Suppl. 56; Zerega *v.* Will, 34 N. Y. App. Div. 488, 54 N. Y. Suppl. 361; Case *v.* Phœnix Bridge Co., 58 N. Y. Super. Ct. 435, 11 N. Y. Suppl. 724; Schrenkeisen *v.* Kroll, 85 N. Y. Suppl. 1072; Frost *v.* Flint, 2 How. Pr. 125; Hosford *v.* Nichols, 1 Paige 220.

North Carolina.—Windley *v.* Bonner, 99 N. C. 54, 5 S. E. 233.

Ohio.— Goodman *v.* Hailes, 59 Ohio St. 342, 52 N. E. 829; Babcock *v.* Camp, 12 Ohio St. 11.

Oregon.— Caseday *v.* Lindstrom, 44 Oreg. 309, 75 Pac. 222.

Pennsylvania.— Bell *v.* Allegheny County, 184 Pa. St. 296, 39 Atl. 227, 63 Am. St. Rep. 795; Donaghy's Estate, 152 Pa. St. 92, 25 Atl. 238; Dorris *v.* Erwin, 101 Pa. St. 239; Laporte Borough *v.* Hillsgrove Tp., 95 Pa. St. 269; Schenck's Appeal, 94 Pa. St. 37; Diehl *v.* Holben, 39 Pa. St. 213; Hamner *v.* Griffith, 1 Grant 193.

Rhode Island.— Bradford *v.* Burgess, 20 R. I. 290, 38 Atl. 975. But see Baxter *v.* Brown, 26 R. I. 381, 59 Atl. 73, holding that, in an action for trespass for carrying away wood, in which defendant pleaded that the land on which the wood was cut helonged to him, describing it, a finding that defendant was guilty was not conclusive that the title to the land described was not in him.

South Carolina.— Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. C. 445, 35 S. E. 745; Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617; Faust *v.* Faust, 31 S. C. 576, 10 S. E. 262; Prather *v.* Owens, Cheves 236; Charleston *v.* Price, 1 McCord 299.

Tennessee.— Daniel *v.* Gum, (Ch. App. 1897) 45 S. W. 468.

Texas.— Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629; Holt *v.* Clemmons, 3 Tex. 423; Hammer *v.* Woods, 6 Tex. Civ. App. 179, 24 S. W. 942.

Vermont.— Perkins *v.* Walker, 19 Vt. 144; St. Albans *v.* Bush, 4 Vt. 58, 23 Am. Dec. 246.

Virginia.— Findlay *v.* Trigg, 83 Va. 539, 3 S. E. 142.

Washington.— State *v.* Headlee, 18 Wash. 220, 51 Pac. 369; Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

West Virginia.— Blake *v.* Ohio River R. Co., 47 W. Va. 520, 35 S. E. 953.

Wisconsin.— McFarland *v.* Rogers, 1 Wis. 452.

United States.— National Foundry, etc., Works *v.* Oconto City Water Supply Co., 183 U. S. 216, 22 S. Ct. 111, 46 L. ed. 157; Werlein *v.* New Orleans, 177 U. S. 390, 20 S. Ct. 682, 44 L. ed. 817; Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247; New Dunderberg Min. Co. *v.* Old, 97 Fed. 150, 38 C. C. A. 89; Carter *v.* Couch, 84 Fed. 735, 28 C. C. A. 520; O'Hara *v.* Mobile, etc., R. Co., 75 Fed. 130; Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 18 C. C. A. 122; Conklin *v.* Wehrman, 43 Fed. 12.

England.—Reg. *v.* Hartington Middle Quarter, 3 C. L. R. 554, 4 E. & B. 780, 1 Jur. N. S. 586, 24 L. J. M. C. 98, 3 Wkly. Rep. 285, 82 E. C. L. 780. See *In re* Hindustan, etc., Bank, 43 L. J. Ch. 1, 29 L. T. Rep. N. S. 519, 22 Wkly. Rep. 113.

Canada.— Leinster *v.* Stahler, 17 U. C. C. P. 532.

See 30 Cent. Dig. tit. "Judgment," §§ 1254–1256.

Jurisdiction.— The judgment necessarily implies a finding or assumption that the

premises, the premises are equally *res judicata* with the conclusion itself.[27] As an application of this rule a judgment authorizing a recovery on a written instrument necessarily involves an adjudication of its validity and due execution.[28] And so of a judgment foreclosing a mortgage.[29] Again, where a judgment which awards some portion of the relief demanded, or grants it as against some of the parties, silently dismisses or ignores the demand for other relief, it is a conclusive adjudication that such demand is not well founded.[30]

b. Points Necessary to Sustain the Judgment. In the absence of proof that a particular issue actually was tried and determined in arriving at a former judg-

court had jurisdiction. Com. *v.* Comrey, 174 Pa. St. 355, 34 Atl. 581.

Authority of attorney.— A judgment confessed by an attorney is conclusive evidence of his authority. Cyphert *v.* McClune, 22 Pa. St. 195.

Evidence that party was alive at a given date.— A recital in a decree of a probate court for the distribution of property that one of the heirs was present in court is evidence in a suit between other parties that such heir was then alive, but it is not conclusive. Sawyer *v.* Boyle, 21 Tex. 28.

Validity of assignment.— Where a decree was entered in an action between the assignor and assignee of a mortgage, adjudging that the former owed the latter, as the holder of the mortgage, the validity of the assignment is *res judicata*. Smith *v.* Lusk, 119 Ala. 394, 24 So. 256.

Joinder of parties.— An order of a federal court dismissing a bill against the members of a partnership, on the ground that some of the partners are citizens of the same state with the complainant, necessarily determines that such defendants are necessary parties. Raphael *v.* Trask, 118 Fed. 678.

Compensation implied.— Judgment for A in an action against B for storage of wood put by the latter on the land of the former, by his permission, is conclusive, in an action by B against A for conversion of the wood, that the storage was not to be gratuitous. Merritt *v.* Peirano, 10 N. Y. App. Div. 563, 42 N. Y. Suppl. 97.

Ultra vires.— In a judgment against a corporation on a contract, the court necessarily determines whether the corporation had power to make the contract. Lake County *v.* Platt, 79 Fed. 567, 25 C. C. A. 87.

Landlord and tenant.— A judgment by which a tenant is dispossessed is conclusive as to the existence and validity of the lease, the occupation by defendant, and that the rent was due. Jacob *v.* Thompson, 73 N. Y. App. Div. 224, 76 N. Y. Suppl. 802.

Navigability of waters.— Where plaintiff recovered a verdict in an action for damages for maintaining a causeway over the waters of a cove, so as to obstruct access to plaintiff's land, the jury must have found that the waters of such cove were navigable waters and their verdict renders that fact *res judicata*. Sherman *v.* Sherman, 18 R. I. 504, 30 Atl. 459.

Contract for sale of land.— An adjudication which conclusively determines the legal obligation of a vendee of lands to pay therefor also conclusively establishes his right to a specific performance of the contract. Young *v.* Griffith, 84 N. C. 715.

A judgment on habeas corpus is *res judicata* as to all points which were necessarily involved in the general question of the legality or illegality of the arrest and detention, whether all of them were actually presented or not. Perry *v.* McLendon, 62 Ga. 598.

Rights of defendants inter sese.— A decree in favor of complainant against several defendants does not render the relative rights and liabilities of defendants among themselves *res judicata*, when such rights are not necessarily involved in the determination of the original cause. Jackson *v.* Lemler, 83 Miss. 37, 35 So. 306. And see *supra*, XIV, B, 11.

27. Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733; Shelby *v.* Creighton, 65 Nebr. 485, 91 N. W. 369, 101 Am. St. Rep. 630.

28. *Georgia.*— Vaughn *v.* Drewry, 79 Ga. 761, 4 S. E. 879.

Illinois.— Union Pac. R. Co. *v.* Chicago, etc., R. Co., 164 Ill. 88, 45 N. E. 488.

Michigan.— Peters *v.* Youngs, 122 Mich. 484, 81 N. W. 263.

New York.— Conant *v.* Jones, 50 N. Y. App. Div. 330, 64 N. Y. Suppl. 189.

South Dakota.— Howard *v.* Huron, 6 S. D. 180, 60 N. W. 803.

Texas.— Norton *v.* Wochler, 31 Tex. Civ. App. 522, 72 S. W. 1025.

United States.— Geer *v.* Ouray County, 97 Fed. 435, 38 C. C. A. 250.

See 30 Cent. Dig. tit. "Judgment," § 1255; and *supra*, XIV, C, 1, e.

29. *Georgia.*— Flannery *v.* Baldwin Fertilizer Co., 94 Ga. 696, 21 S. E. 587.

Indiana.— Marshall *v.* Stewart, 80 Ind. 189; Johnson *v.* Gibson, 78 Ind. 282.

Iowa.— Prouty *v.* Matheson, 107 Iowa 259, 77 N. W. 1039.

Massachusetts.— Haven *v.* Grand Junction R., etc., Co., 12 Allen 337.

Michigan.— Adams *v.* Cameron, 40 Mich. 506.

Minnesota.— Northern Trust Co. *v.* Crystal Lake Cemetery Assoc., 67 Minn. 131, 69 N. W. 708.

Oregon.— Finley *v.* Houser, 22 Oreg. 562, 30 Pac. 494.

Texas.— Cameron *v.* Hinton, (Civ. App. 1898) 48 S. W. 24.

See 30 Cent. Dig. tit. "Judgment," § 1256.

30. Kenyon *v.* Wilson, 78 Iowa 408, 43 N. W. 227; Vance *v.* McNabb Coal, etc., Co., (Tenn. Ch. App. 1897) 48 S. W. 235; Nalle

ment, it is conclusive by way of estoppel only as to those facts without the existence and proof or admission of which it could not have been rendered;[31] in other words it is conclusive evidence of whatever it was necessary for the court or jury to have found in order to warrant the decision or verdict in the former action, and no further,[32] so that a finding or judgment upon a point or issue that was immaterial to the decision of the case does not make it *res judicata*.[33] But in some jurisdictions it is held that if a question of title was decided in a former suit, although it was not strictly necessary for the court to pass on the question, yet if the issue was raised by the pleadings, fully argued, and actually considered by the court, it is *res judicata*.[34]

c. Incidental and Collateral Matters. The estoppel of a judgment extends only to the points directly involved in the action and decided, and not to any matter which was only incidentally cognizable or which came collaterally in question, although it may have arisen in the case and have been judicially passed on.[35]

v. Young, 160 U. S. 624, 16 S. Ct. 420, 40 L. ed. 560. Thus in a suit to restrain any interference with an irrigation ditch the record of a former suit for the same purpose by plaintiff's grantors against some of the defendants, where interference with the ditch was enjoined during certain months of the year, is admissible to show that defendants were entitled to use the ditch during other months. Lehi Irr. Co. *v.* Moyle, 4 Utah 327, 9 Pac. 867.

31. Waterhouse *v.* Levine, 182 Mass. 407, 65 N. E. 822; Leonard *v.* Whitney, 109 Mass. 265; House *v.* Lockwood, 137 N. Y. 259, 33 N. Y. Suppl. 595; Stannard *v.* Hubbell, 123 N. Y. 520, 25 N. E. 1084; Hartman *v.* Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360; Blake *v.* Ohio River R. Co., 47 W. Va. 520, 35 S. E. 953.

32. *California.*— *In re* Heydenfeldt, 127 Cal. 456, 59 Pac. 839; Reed *v.* Cross, 116 Cal. 473, 48 Pac. 491; Lord *v.* Thomas, (1894) 36 Pac. 372.

Connecticut.— Bell *v.* Raymond, 18 Conn. 91; Kennedy *v.* Scovil, 14 Conn. 61; Fairman *v.* Bacon, 8 Conn. 418; Coit *v.* Tracy, 8 Conn. 268, 20 Am. Dec. 110.

Georgia.— Hunter *v.* Davis, 19 Ga. 413.

Illinois.— Chicago *v.* Cameron, 120 Ill. 447, 11 N. E. 899; McIntyre *v.* Storey, 80 Ill. 127.

Indiana.— Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180.

Kansas.— John V. Farwell Co. *v.* Lykins, 59 Kan. 96, 52 Pac. 99.

Kentucky.— Carlisle *v.* Howes, 43 S. W. 191, 19 Ky. L. Rep. 1238.

Maine.— Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

Massachusetts.— Lea *v.* Lea, 99 Mass. 493, 96 Am. Dec. 772; Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733; Withington *v.* Warren, 12 Metc. 114.

Minnesota.— Neilson *v.* Pennsylvania Coal, etc., Co., 78 Minn. 113, 80 N. W. 859; Morrill *v.* Little Falls Mfg. Co., 46 Minn. 260, 48 N. W. 1124; Bowe *v.* Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151.

New York.— Palmer *v.* Hussey, 87 N. Y. 303; Rowland *v.* Hobby, 26 N. Y. App. Div. 522, 50 N. Y. Suppl. 629; Burns *v.* Monell, 7 N. Y. Suppl. 624; *In re* Zeitz, 12 N. Y. Civ. Proc. 423; Coutant *v.* Feaks, 2 Edw. 330.

North Carolina.— Wilkinson *v.* Brinn, 124 N. C. 723, 32 S. E. 966.

Ohio.— Lore *v.* Truman, 10 Ohio St. 45; Trout *v.* Marvin, 24 Ohio Cir. Ct. 333.

South Carolina.— Hart *v.* Bates, 17 S. C. 35.

Texas.— Bradford *v.* Knowles, 78 Tex. 109, 14 S. W. 307.

Vermont.— Church *v.* Chapin, 35 Vt. 223; Town *v.* Lamphere, 34 Vt. 365.

West Virginia.— Corrothers *v.* Sargent, 20 W. Va. 351.

See 30 Cent. Dig. tit. "Judgment," §§ 1255, 1256.

Inference not necessary.— The fact that plaintiff was unlawfully expelled from a certain society, a fact necessary for his recovery of damages in the present action, is not shown by a mere order for judgment for him in a prior action by him against the society for reinstatement. Cuccurullo *v.* Societa Italiana, etc., 102 N. Y. App. Div. 276, 92 N. Y. Suppl. 420.

33. *Connecticut.*— Hotchkiss *v.* Nichols, 3 Day 138.

Minnesota.— Irish American Bank *v.* Ludlum, 56 Minn. 317, 57 N. W. 927.

New York.— House *v.* Lockwood, 137 N. Y. 259, 33 N. E. 595; Stannard *v.* Hubbell, 123 N. Y. 520, 25 N. E. 1084; People *v.* Johnson, 38 N. Y. 63, 97 Am. Dec. 770; Lance *v.* Shaughnessy, 86 Hun 411, 33 N. Y. Suppl. 515.

Ohio.— Zanesville Gas-light Co. *v.* Zanesville, 47 Ohio St. 35, 23 N. E. 60.

Pennsylvania.— Tams *v.* Lewis, 42 Pa. St. 402.

South Carolina.— Hardin *v.* Clark, 32 S. C. 480, 11 S. E. 304.

West Virginia.— Doonan *v.* Glynn, 28 W. Va. 715.

34. Almy *v.* Daniels, 15 R. I. 312, 4 Atl. 753, 10 Atl. 654. And see Franklin County *v.* German Sav. Bank, 142 U. S. 93, 12 S. Ct. 147, 35 L. ed. 948; Empire State Nail Co. *v.* American Solid Leather Button Co., 74 Fed. 864, 21 C. C. A. 152.

35. *Alabama.*— Watts *v.* Rice, 75 Ala. 289; Ford *v.* Ford, 68 Ala. 141.

d. Expressions in Opinion Not Essential to Determination of Case. General expressions in an opinion which are not essential to the disposition of the case cannot control the judgment in subsequent suits.[36]

e. Estoppel to Deny Determination of Fact. A party who seeks and obtains a particular judgment cannot afterward repudiate or impeach it or avoid its conclusive effect by setting up claims or alleging facts inconsistent with his former contention.[37] But some of the cases hold that a party who alleges but fails to estab-

Arkansas.— Shall *v.* Biscoe, 18 Ark. 142.

California.— *In re* Freud, 134 Cal. 333, 66 Pac. 476; Gregory *v.* Clabrough, 129 Cal. 475, 62 Pac. 72; Chapman *v.* Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Bosquett *v.* Crane, 51 Cal. 505; Fulton *v.* Hanlow, 20 Cal. 450.

Colorado.— Campbell *v.* Milliken, 20 Colo. App. 299, 78 Pac. 690.

Connecticut.—Dickinson *v.* Hayes, 31 Conn. 417; Kennedy *v.* Scovil, 14 Conn. 61.

Georgia.— Brady *v.* Prior, 69 Ga. 691; Bradley *v.* Briggs, 55 Ga. 354; Evans *v.* Birge, 11 Ga. 265.

Illinois.— Smith *v.* Rountree, 185 Ill. 219, 56 N. E. 1130; Wahle *v.* Wahle, 71 Ill. 510; Ryan *v.* Potwin, 62 Ill. App. 134; Voge *v.* Breed, 14 Ill. App. 538; Pittard *v.* Foster, 12 Ill. App. 132. And see Chicago Title, etc., Co. *v.* Yates, 211 Ill. 99, 71 N. E. 820.

Iowa.— Haight *v.* Keokuk, 4 Iowa 199; Wilson *v.* Stripe, 4 Greene 551, 61 Am. Dec. 138.

Kansas.— State *v.* Hornaday, 62 Kan. 334, 62 Pac. 998.

Maine.— Howard *v.* Kimball, 65 Me. 308; Hobbs *v.* Parker, 31 Me. 143.

Maryland.— Singery *v.* Atty.-Gen., 2 Harr. & J. 487.

Massachusetts.— Smith *v.* Stoughton, 185 Mass. 329, 70 N. E. 195; Dallinger *v.* Richardson, 176 Mass. 77, 57 N. E. 224; Jennison *v.* West Springfield, 13 Gray 544; Gilbert *v.* Thompson, 9 Cush. 348; Badger *v.* Titcomb, 15 Pick. 409, 26 Am. Dec. 611; Eastman *v.* Cooper, 15 Pick. 276, 26 Am. Dec. 600.

Michigan.— Perkins *v.* Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495; Zabel *v.* Harshman, 68 Mich. 273, 42 N. W. 44. And see People *v.* Albers, 137 Mich. 678, 100 N. W. 908.

Minnesota.— Marvin *v.* Dutcher, 26 Minn. 391, 4 N. W. 685.

Mississippi.— Union, etc., Bank *v.* Allen, 77 Miss. 442, 27 So. 631; Land *v.* Keirn, 52 Miss. 341; Fisher *v.* Leach, 10 Sm. & M. 313.

Missouri.— State *v.* Butler County, 164 Mo. 214, 64 S. W. 176; Fish *v.* Lightner, 44 Mo. 268; Ridgley *v.* Stillwell, 27 Mo. 128.

New Hampshire.— Potter *v.* Baker, 19 N. H. 166; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

New Jersey.— Mullaney *v.* Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086.

New York.— Russ *v.* Maxwell, 94 N. Y. App. Div. 107, 87 N. Y. Suppl. 1077; Matter of Haight, 51 N. Y. App. Div. 310, 64 N. Y. Suppl. 1029; Commercial Pub. Co. *v.* Beckwith, 36 N. Y. App. Div. 629, 55 N. Y. Suppl. 157; Lawrence *v.* Hunt, 10 Wend. 80, 25 Am. Dec. 539; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603.

Ohio.— Gatch *v.* Simkins, 25 Ohio St. 89; Miehle Printing Press, etc., Co. *v.* Andrews-Jones Printing Co., 18 Ohio Cir. Ct. 158, 10 Ohio Cir. Dec. 1.

Oregon.— La Follett *v.* Mitchell, 42 Oreg. 465, 69 Pac. 916, 95 Am. St. Rep. 780; King *v.* Brigham, 23 Oreg. 262, 31 Pac. 601, 18 L. R. A. 361.

Pennsylvania.— Cavanaugh *v.* Buehler, 120 Pa. St. 441, 14 Atl. 391; Forcey's Appeal, 106 Pa. St. 508; Tams *v.* Lewis, 42 Pa. St. 402; Poorman *v.* Kilgore, 37 Pa. St. 309; Lentz *v.* Wallace, 17 Pa. St. 412, 55 Am. Dec. 569; Stevenson *v.* Kleppinger, 5 Watts 420; Hibshman *v.* Dulleban, 4 Watts 183.

Texas.— State *v.* O'Connor, (1903) 74 S. W. 899; Horton *v.* Hamilton, 20 Tex. 606; Faires *v.* McLellan, (Civ. App. 1893) 24 S. W. 365.

Virginia.— Houck *v.* Kerfoot, 99 Va. 658, 39 S. E. 590.

West Virginia.— Henry *v.* Davis, 13 W. Va. 230.

United States.— Hughes *v.* Blake, 6 Wheat. 453, 5 L. ed. 303; Hopkins *v.* Lee, 6 Wheat. 109, 5 L. ed. 218; *In re* Henry Ulfelder Clothing Co., 98 Fed. 409; Mallett *v.* Foxcroft, 16 Fed. Cas. No. 8,989, 1 Story 474.

England.— North Eastern R. Co. *v.* Dalton Parish, [1898] 2 Q. B. 66, 62 J. P. 484, 67 L. J. Q. B. 715, 78 L. T. Rep. N. S. 524, 46 Wkly. Rep. 582; Reg. *v.* Hutchings, 6 Q. B. D. 300, 45 J. P. 504, 50 L. J. M. C. 35, 44 L. T. Rep. N. S. 364, 29 Wkly. Rep. 724; Kingston's Case, 20 How. St. Tr. 355, 538; *Re* Alsop, 61 L. T. Rep. N. S. 213; Barrs *v.* Jackson, 2 Smith Lead. Cas. 807.

See 30 Cent. Dig. tit. "Judgment," § 1258.

36. Harriman *v.* Northern Securities Co., 197 U. S. 244, 25 S. C. 493, 49 L. ed. 739 [*affirming* 134 Fed. 331 (*affirming* 132 Fed. 464)]; Carroll *v.* Carroll, 16 How. (U. S.) 275, 14 L. ed. 936; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257. And see Union Bank *v.* Allen, 77 Miss. 442, 27 So. 631; Louisville, etc., R. Co. *v.* Davidson County Court, 1 Sneed (Tenn.) 636, 695; Griffin *v.* Woolford, 100 Va. 473, 41 S. E. 949; Black Interpretation of Laws, p. 391.

37. *Georgia.*— McCandless *v.* Yorkshire Guaranty, etc., Corp., 101 Ga. 180, 28 S. E. 663.

Louisiana.—Vicksburg, etc., R. Co. *v.* Tibbs, 112 La. 51, 36 So. 223.

Minnesota.— Thomas *v.* Joslin, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624.

lish a certain state of facts is not estopped in a subsequent suit between the same parties and concerning the same subject-matter from alleging a different and inconsistent state of facts.[38]

6. Matters in Issue But Not Decided. Numerous cases, particularly among the earlier decisions, have held that a judgment is conclusive as to all questions within the issues raised in the case, whether or not they were formally contested or argued or specifically included in the decision.[39] But the later decisions generally hold that no question or contention is finally settled by a judgment, although it may have been fairly within the issues, as raised by the pleadings, if it was not actually litigated, that is, supported or attacked by evidence, made the subject of the trial, submitted to the jury, or pressed upon the consideration of the court.[40]

New York.— Toope *v.* Prigge, 7 Daly 208; Turney *v.* Van Gelder, 18 N. Y. Suppl. 547.

Pennsylvania.— Kiern *v.* Ainsworth, 95 Pa. St. 310; Miller *v.* Springer, 88 Pa. St. 203; Baily *v.* Baily, 44 Pa. St. 274, 84 Am. Dec. 439.

South Carolina.— Jefferies *v.* Allen, 34 S. C. 189, 13 S. E. 365.

Utah.— Hailey First Nat. Bank *v.* Lewis, 12 Utah 84, 41 Pac. 712.

Virginia.— Washington, etc., R. Co. *v.* Casenove, 83 Va. 744, 3 S. E. 433; Chapman *v.* Armistead, 4 Munf. 382.

United States.— Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 55 Fed. 701.

See 30 Cent. Dig. tit. "Judgment," § 1257.

But *compare* People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 11 Am. St. Rep. 297, 2 L. R. A. 92; People *v.* Lowden, (Cal. 1885) 8 Pac. 66.

38. McQueen's Appeal, 104 Pa. St. 595, 49 Am. Rep. 592. And see Chaffe *v.* Morgan, 30 La. Ann. 1307.

39. *Illinois.*— Springer *v.* Darlington, 198 Ill. 121, 64 N. E. 709.

Iowa.— Schmidt *v.* Zahensdorf, 30 Iowa 498; McGregor *v.* McGregor, 21 Iowa 441; Keokuk County *v.* Alexander, 21 Iowa 377.

Kentucky.— New York L. Ins. Co. *v.* Weaver, 114 Ky. 295, 70 S. W. 628, 24 Ky. L. Rep. 1086.

Louisiana.— Villars *v.* Faivre, 36 La. Ann. 398.

Maine.— Blodgett *v.* Dow, 81 Me. 197, 16 Atl. 660.

Missouri.—Donnell *v.* Wright, 147 Mo. 639, 49 S. W. 874.

Nebraska.— Brand *v.* Garneau, 3 Nebr. (Unoff.) 879, 93 N. W. 219.

New York.— Lowenstein *v.* McIntosh, 37 Barb. 251.

North Carolina.— Casey *v.* Cooper, 99 N. C. 395, 6 S. E. 653.

Ohio.— Werner *v.* Cincinnati, 23 Ohio Cir. Ct. 475.

Oregon.— Belle *v.* Brown, 37 Oreg. 588, 61 Pac. 1024; Barrett *v.* Failing, 8 Oreg. 152.

Texas.— Flippen *v.* Dixon, 83 Tex. 421, 18 S. W. 803, 29 Am. St. Rep. 653; Flewellen *v.* Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. 775; Sulphur Springs Ice, etc., Co. *v.* McKinley, (Civ. App. 1897) 39 S. W. 1098.

Wisconsin.— Roberts *v.* Moody, 107 Wis. 245, 83 N. W. 307.

United States.— Werlein *v.* New Orleans, 177 U. S. 390, 20 S. Ct. 682, 44 L. ed. 817; Samuels *v.* Reviere, 108 Fed. 718, 47 C. C. A. 634; Sicard *v.* Buffalo, etc., R. Co., 22 Fed. Cas. No. 12,831, 15 Blatchf. 525.

See 30 Cent. Dig. tit. "Judgment," §§ 1259–1261.

The testimony of jurors who tried the case to the effect that a particular question was not considered by the jury cannot be admitted for the purpose of removing such question from the estoppel of the judgment. Underwood *v.* French, 6 Oreg. 66, 25 Am. Rep. 500.

40. *California.*— Johnson *v.* Vance, 86 Cal. 110, 24 Pac. 862.

Connecticut.—Hollister *v.* Lefevre, 35 Conn. 456.

Illinois.— Hopkins *v.* Cofoid, 103 Ill. App. 167.

Indiana.— Grim *v.* Griffith, 34 Ind. App. 559, 73 N. E. 197.

Iowa.— Zook *v.* Thompson, 111 Iowa 463, 82 N. W. 930; Christie *v.* Iowa L. Ins. Co., 111 Iowa 177, 82 N. W. 499; Kern *v.* Wilson, 82 Iowa 407, 48 N. W. 919; Linton *v.* Crosby, 61 Iowa 401, 16 N. W. 342; Davis *v.* Clinton, 58 Iowa 389, 10 N. W. 768; Keokuk County *v.* Alexander, 21 Iowa 377.

Kansas.— Stroup *v.* Pepper, 69 Kan. 241, 76 Pac. 825; Brury *v.* Smith, 8 Kan. App. 52, 53 Pac. 74.

Kentucky.— Henderson County *v.* Henderson Bridge Co., 116 Ky. 164, 75 S. W. 239, 25 Ky. L. Rep. 421; Arnold *v.* Arnold, 11 B. Mon. 81; Thomas *v.* Hite, 5 B. Mon. 590; Hughes *v.* Wood, 48 S. W. 152, 20 Ky. L. Rep. 977.

Louisiana.— Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Rose's Succession, 48 La. Ann. 418, 19 So. 450; Hoggatt *v.* Thomas, 35 La. Ann. 298; Fink *v.* Martin, 5 La. Ann. 103.

Massachusetts.— Hamlin *v.* New York, etc., R. Co., 176 Mass. 514, 57 N. E. 1006; Baker *v.* Tompson, 151 Mass. 390, 24 N. E. 399; Howard *v.* Albro, 100 Mass. 236.

Minnesota.— McLaughlin *v.* Betcher, 87 Minn. 1, 91 N. W. 14.

Missouri.— State *v.* Hunter, 98 Mo. 386, 11 S. W. 756; American Hardwood Lumber Co. *v.* Nickey, 89 Mo. App. 270.

7. MATTERS WITHDRAWN OR WITHHELD.[41] A point or question is not concluded by a judgment, although it was involved in the action or was placed in issue therein, if it was withdrawn or abandoned, stricken out on motion, or ruled out by the court, and therefore constituted no part of the verdict or final judgment in the case.[42] But this rule does not render it permissible for a party to

Montana.— Gassert *v.* Black, 18 Mont. 35, 44 Pac. 401.

New Hampshire.— Hearn *v.* Boston, etc., R. Co., 67 N. H. 320, 29 Atl. 970.

New York.—Stannard *v.* Hubbell, 123 N. Y. 520, 25 N. E. 1084; Sweet *v.* Tuttle, 14 N. Y. 465; Colwell *v.* Bleakley, 1 Abb. Dec. 400, 1 Keyes 62; Muller *v.* Naumann, 85 N. Y. App. Div. 337, 83 N. Y. Suppl. 488; Steinson *v.* New York Bd. of Education, 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128; Barber *v.* Kendall, 1 N. Y. App. Div. 247, 37 N. Y. Suppl. 141; Revoir *v.* Barton, 71 Hun 457, 24 N. Y. Suppl. 985; Robinson *v.* New York, etc., R. Co., 64 Hun 41, 18 N. Y. Suppl. 728; Dunckle *v.* Wiles, 5 Den. 296; Lawrence *v.* Hunt, 10 Wend. 80, 25 Am. Dec. 539.

Oregon.— Baker *v.* Williams, etc., Banking Co., 42 Oreg. 213, 70 Pac. 711.

Pennsylvania.— Reese *v.* Reese, 157 Pa. St. 200, 27 Atl. 703; Lewis *v.* Baker, 151 Pa. St. 529, 25 Atl. 99; Holloway *v.* Jones, 143 Pa. St. 564, 22 Atl. 710; Blackmore *v.* Gregg, 10 Watts 222, 36 Am. Dec. 171. And see Lengert *v.* Chaninel, 26 Pa. Super. Ct. 626.

South Carolina.— State *v.* Jennings, 68 S. C. 411, 47 S. E. 683; Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663.

Texas.— Converse *v.* Davis, 90 Tex. 462, 39 S. W. 277; Blessing *v.* Edmonson, 49 Tex. 333; Teal *v.* Terrell, 48 Tex. 491; Wood *v.* Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071; Brown *v.* Reed, 20 Tex. Civ. App. 74, 48 S. W. 537.

Vermont.— Stowell *v.* Hastings, 59 Vt. 494, 8 Atl. 738, 59 Am. Rep. 748.

Virginia.— Max Meadows Land, etc., Co. *v.* McGavock, 96 Va. 131, 36 S. E. 460.

Washington.—McGee *v.* Wineholt, 23 Wash. 748, 63 Pac. 571; Long *v.* Eisenbeis, 21 Wash. 23, 56 Pac. 933; Allen *v.* Wall, 7 Wash. 316, 35 Pac. 65.

West Virginia.— Renick *v.* Ludington, 20 W. Va. 511.

Wisconsin.— Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

United States.— Fayerweather *v.* Ritch, 88 Fed. 713; Belleville, etc., R. Co. *v.* Leathe, 84 Fed. 103, 28 C. C. A. 279; Central Trust Co. *v.* Clark, 81 Fed. 269, 26 C. C. A. 397; Bell *v.* U. S., 28 Ct. Cl. 65.

See 30 Cent. Dig. tit. "Judgment," §§ 1259–1261.

In appellate court.— The questions concluded by a decree in equity, where the cause was appealed, are determined by the opinion of the appellate court; the parties are not concluded as to questions which were left open by such opinion, although they may have been passed on by the court below. Russell *v.* Russell, 129 Fed. 434.

41. Withdrawal of cause or election of remedy as affecting merger and bar see *supra*, XIII, D, 4, e.

42. *Alabama.*— Haas *v.* Taylor, 80 Ala. 459, 2 So. 633; Hoyt *v.* Murphy, 23 Ala. 456.

Arkansas.— Smith *v.* Talbot, 11 Ark. 666.

California.— Johnson *v.* Vance, 86 Cal. 110, 24 Pac. 862.

Colorado.— Johnson *v.* Johnson, 20 Colo. 143, 36 Pac. 898; McNicholas *v.* Lake, 13 Colo. App. 164, 56 Pac. 987.

Illinois.— Parker *v.* Shannon, 137 Ill. 376, 27 N. E. 525.

Iowa.— Purslow *v.* Jackson, 93 Iowa 694, 62 N. W. 12.

Michigan.— Busch *v.* Jones, 94 Mich. 223, 53 N. W. 1051.

Minnesota.— Banning *v.* Sabin, 45 Minn. 431, 48 N. W. 8.

Mississippi.— Brothers *v.* Beck, 75 Miss. 482, 22 So. 944; Davis *v.* Davis, 65 Miss. 498, 4 So. 554.

New York.— Middleworth *v.* Blackwell, 85 N. Y. App. Div. 613, 82 N. Y. Suppl. 704; Jones *v.* Underwood, 35 Barb. 211; Coutant *v.* Feaks, 2 Edw. 330.

North Carolina.— Faison *v.* Grandy, 128 N. C. 438, 38 S. E. 897, 83 Am. St. Rep. 693.

Oregon.— Bingham *v.* Honeyman, 32 Oreg. 129, 51 Pac. 735, 52 Pac. 755. But *compare* Glenn *v.* Savage, 14 Oreg. 567, 13 Pac. 442; Barrett *v.* Failing, 8 Oreg. 152.

Pennsylvania.— Kaster *v.* Welsh, 157 Pa. St. 590, 27 Atl. 668; Croft *v.* Steele, 6 Watts 373.

South Carolina.— Salinas *v.* Aultman, 45 S. C. 283, 22 S. E. 889.

Tennessee.— Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

Texas.— Patrick *v.* Hopkins County, (1887) 6 S. W. 626; Crehbins *v.* Bryce, 24 Tex. Civ. App. 532, 60 S. W. 587; Wood *v.* Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071.

United States.— McComb *v.* Frink, 149 U. S. 629, 13 S. Ct. 993, 37 L. ed. 876; Tyler Min. Co. *v.* Sweeney, 54 Fed. 284, 4 C. C. A. 329. *Contra*, Farwell *v.* Brown, 35 Fed. 811.

England.— Seddon *v.* Tutop, 1 Esp. 401, 6 T. R. 607, 3 Rev. Rep. 274.

Canada.— Reg. *v.* Victoria Lumber, etc., Co., 5 Brit. Col. 288.

See 30 Cent. Dig. tit. "Judgment," § 1262.

Contra.— See Stern *v.* Washington Nat. Bank, 14 Wash. 511, 45 Pac. 37.

Limitation of rule.— Of course this rule does not permit a party to withhold from consideration defenses or claims which he is bound to plead as a part of his case or defense. *In re* Dutton, 208 Pa. St. 350, 57 Atl. 719; Eastern Bldg., etc., Assoc. *v.* Welling, 116 Fed. 100. And see *supra*, XIV, C, 1, g.

present issues for determination in a case and then avoid the effect of an estoppel by withholding proof thereof.[43]

8. MATTERS NOT IN ISSUE[44] — a. In General. If a particular point was not in issue in the former suit, either on the face of the pleadings or in the sense of being actually tried as the decisive question in the case, it is not concluded for the purposes of a subsequent suit on a different cause of action; and it makes no difference in the application of the rule that it may be expressly or tacitly involved in the judgment, or may arise on an analogous or similar state of facts.[45]

43. Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

44. Matters not in issue as affecting merger and bar see *supra*, XIII, D, 1.

Identity of issues as dependent on question decided see *supra*, XIV, C, 3.

Nature and extent of relief sought and granted as affecting merger and bar see *supra*, XIII, D, 4.

45. *Alabama.*— State *v.* Williams, 131 Ala. 56, 30 So. 782, 90 Am. St. Rep. 17; Crowder *v.* Red Mountain Min. Co., 127 Ala. 254, 29 So. 847; Rake *v.* Pope, 7 Ala. 161; Davidson *v.* Shipman, 6 Ala. 27.

Arkansas.— Woman's Christian Nat. Library Assoc. *v.* Fordyce, (1904) 86 S. W. 471.

California.— Visalia Bank *v.* Smith, 146 Cal. 398, 81 Pac. 542; Ephraim *v.* Pacific Bank, 136 Cal. 646, 69 Pac. 436; Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40; More *v.* More, 133 Cal. 489, 65 Pac. 1044; Barber *v.* Mulford, 117 Cal. 356, 49 Pac. 206; Dietz *v.* Mission Transfer Co., 95 Cal. 92, 30 Pac. 380; Wixson *v.* Devine, 80 Cal. 385, 22 Pac. 224; Golson *v.* Dunlap, 73 Cal. 157, 14 Pac. 576.

Connecticut.— Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3; Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179; Hollister *v.* Lefevre, 35 Conn. 456; Ryer *v.* Atwater, 4 Day 431. A fact cannot be urged as *res judicata* where the record itself shows that the party's contention that it was in issue was ruled upon by the trial court and denied, and that the fact was not tried and determined because it was not a fact in issue. Fuller *v.* Metropolitan L. Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84.

Georgia.— Jenkins *v.* Forbes, 121 Ga. 383, 49 S. E. 284; Steed *v.* Savage, 115 Ga. 97, 41 S. E. 272; Hendrix *v.* Webb, 113 Ga. 1028, 39 S. E. 461.

Illinois.— Merrifield *v.* Canal Com'rs, 212 Ill. 456, 72 N. E. 405, 67 L. R. A. 369; Henderson *v.* Kibbie, 211 Ill. 556, 71 N. E. 1091; Barkman *v.* Barkman, 209 Ill. 269, 70 N. E. 652; Stone *v.* Salisbury, 209 Ill. 56, 70 N. E. 605; Metropolis First Nat. Bank *v.* Leech, 207 Ill. 215, 69 N. E. 890; People *v.* Hathaway, 206 Ill. 42, 68 N. E. 1053; Pennsylvania Co. *v.* Bond, 202 Ill. 95, 66 N. E. 941; Cramer *v.* Wilson, 202 Ill. 83, 66 N. E. 869; Bliss *v.* Ward, 198 Ill. 104, 64 N. E. 705; Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; Kitson *v.* Farwell, 132 Ill. 327, 23 N. E. 1024; Bentley *v.* O'Bryan, 111 Ill. 53; Russell *v.* Epler, 10 Ill. App. 304; Stanton *v.* McMullen, 7 Ill. App. 326.

Indiana.— Clements *v.* Davis, 155 Ind. 624, 57 N. E. 905; Peterson *v.* Sohl, 141 Ind. 466, 40 N. E. 910; Sanders *v.* Farrell, 83 Ind. 28; Conyers *v.* Mericles, 75 Ind. 443; Keightley *v.* Walls, 27 Ind. 384; Allen *v.* Rice, 16 Ind. App. 572, 45 N. E. 800.

Iowa.— Williams *v.* Des Moines L. & T. Co., 126 Iowa 22, 101 N. W. 277; Owen *v.* Higgins, 113 Iowa 735, 84 N. W. 713; Des Moines Nat. Bank *v.* Harding, 86 Iowa 153, 53 N. W. 99; Lindley *v.* Snell, 80 Iowa 103, 45 N. W. 726; Walters *v.* Wood, 61 Iowa 290, 16 N. W. 116; Crum *v.* Boss, 48 Iowa 433; White *v.* Watts, 18 Iowa 74.

Kentucky.—Mitchell *v.* Tyler, 49 S. W. 422, 20 Ky. L. Rep. 1249; Louisville, etc., R. Co. *v.* Orr, 15 S. W. 8, 12 Ky. L. Rep. 756. And see Hamilton *v.* Hamilton, 84 S. W. 1156, 27 Ky. L. Rep. 298.

Louisiana.— Sharp *v.* Zellar, 114 La. 549, 38 So. 449; Aucoin *v.* New Orleans Police Bd., 111 La. 745, 35 So. 888; Cochran *v.* Violet, 38 La. Ann. 525.

Maine.— Parks *v.* Libby, 90 Me. 56, 37 Atl. 357.

Maryland.— Shryock *v.* Hensel, 95 Md. 614, 53 Atl. 412; Hughes *v.* Jones, 2 Md. Ch. 178.

Massachusetts.—Watts *v.* Watts, 160 Mass. 464, 36 N. E. 479, 39 Am. St. Rep. 509, 23 L. R. A. 187; West *v.* Platt, 127 Mass. 367; Newell *v.* Carpenter, 118 Mass. 411; Com. *v.* Sutherland, 109 Mass. 342; Finn *v.* Western R. Corp., 102 Mass. 283.

Michigan.— Cockerline *v.* Fisher, (1905) 103 N. W. 522; Bordwell *v.* Snow, 119 Mich. 421, 78 N. W. 468; Bonker *v.* Charlesworth, 33 Mich. 81.

Minnesota.— Hibbs *v.* Marpe, 84 Minn. 10, 86 N. W. 612; Thompson *v.* Chicago, etc., R. Co., 71 Minn. 89, 73 N. W. 707; Wayzata *v.* Great Northern R. Co., 67 Minn. 385, 69 N. W. 1073; Tykeson *v.* Bowman, 60 Minn. 108, 61 N. W. 909; Irish American Bank *v.* Ludlum, 56 Minn. 317, 57 N. W. 927; Baker *v.* Wyman, 47 Minn. 177, 49 N. W. 649; Bowe *v.* Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151. But see Thompson *v.* Myrick, 24 Minn. 4, holding that a judgment determines every matter pertaining to the cause of action or defense, or involved in the measure of relief to which the cause of action or defense entitles the party, even though not set out in the pleadings, so as to authorize the admission of evidence thereon and call for an actual decision, and is conclusive be-

A judgment is not and cannot be an estoppel as to facts which did not occur until

tween the parties as to such matters in the second action for the same cause of action.

Mississippi.— Hart *v.* Picard, 75 Miss. 651, 23 So. 450; Hamilton *v.* State, (1891) 8 So. 761, 67 Miss. 217, 7 So. 282.

Missouri.— Harrison *v.* McReynolds, 183 Mo. 533, 82 S. W. 120; Garland *v.* Smith, 164 Mo. 1, 64 S. W. 188; Short *v.* Taylor, 137 Mo. 517, 38 S. W. 952, 59 Am. St. Rep. 508; Foote *v.* Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861; Henderson *v.* Henderson, 21 Mo. 379; Lindell *v.* Liggett, 1 Mo. 432, 14 Am. Dec. 298; Calvert *v.* Hobbs, 107 Mo. App. 7, 80 S. W. 681; State *v.* St. Louis Bd. of Health, 16 Mo. App. 8.

Nebraska.— Malone *v.* Garver, (1902) 92 N. W. 726; Upton *v.* Betts, 59 Nebr. 724, 82 N. W. 19.

New Hampshire.— Horne *v.* Hutchins, 71 N. H. 117, 51 Atl. 645.

New Jersey.— Hoppaugh *v.* McGrath, 53 N. J. L. 81, 21 Atl. 106; Longstreet *v.* Phile, 39 N. J. L. 63; Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919; Stevens *v.* Dewey, 55 N. J. Eq. 232, 36 Atl. 825.

New York.— Rowley *v.* Feldman, 173 N. Y. 607, 66 N. E. 1116; Commercial Pub. Co. *v.* Beckwith, 167 N. Y. 329, 60 N. E. 642; Stokes *v.* Stokes, 155 N. Y. 581, 50 N. E. 342; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335; Campbell *v.* Consalus, 25 N. Y. 613; Sweet *v.* Tuttle, 14 N. Y. 465; Koeppel *v.* Macbeth, 97 N. Y. App. Div. 299, 89 N. Y. Suppl. 969; Lytle *v.* Crawford, 90 N. Y. App. Div. 605, 86 N. Y. Suppl. 90; Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 83 N. Y. Suppl. 849; Rowley *v.* Feldman, 74 N. Y. App. Div. 492, 77 N. Y. Suppl. 453; Allen *v.* Farmers' L. & T. Co., 18 N. Y. App. Div. 27, 45 N. Y. Suppl. 398; Lindsay *v.* Gager, 11 N. Y. App. Div. 93, 42 N. Y. Suppl. 851; Edson *v.* Bartow, 10 N. Y. App. Div. 104, 41 N. Y. Suppl. 723; Carleton *v.* Lombard, 72 Hun 254, 25 N. Y. Suppl. 570; Arnold *v.* Norfolk, etc., Hosiery Co., 63 Hun 176, 17 N. Y. Suppl. 646; Ferguson *v.* Massachusetts Mut. L. Ins. Co., 22 Hun 320; Matthews *v.* Duryee, 45 Barb. 69; Shaw *v.* Broadbent, 4 Silv. Sup. 192, 7 N. Y. Suppl. 293; Jacoby *v.* Stephenson Silver Min. Co., 3 Silv. Sup. 130, 6 N. Y. Suppl. 371; Weston *v.* Turner, 3 Silv. Sup. 70, 22 N. Y. Suppl. 141; Avery *v.* Starbuck, 56 N. Y. Super. Ct. 465, 4 N. Y. Suppl. 630; Phalen *v.* U. S. Trust Co., 44 Misc. 57, 89 N. Y. Suppl. 699; Bracken *v.* Atlantic Trust Co., 23 Misc. 579, 51 N. Y. Suppl. 1007; Minkoff *v.* Lipschuetz, 88 N. Y. Suppl. 139; Skinner *v.* Walter A. Wood Mowing, etc., Mach. Co., 20 N. Y. Suppl. 251; St. Nicholas Bank *v.* De Rivera, 3 N. Y. Suppl. 666; Bonaffe *v.* Fowler, 7 Paige 576.

North Carolina.— Burwell *v.* Brodie, 134 N. C. 540, 47 S. E. 47; Austin *v.* Austin, 132 N. C. 262, 43 S. E. 827, 95 Am. St. Rep. 637; Harrington *v.* Hatton, 130 N. C. 89, 40 S. E. 848; State *v.* Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844; *In re* Thomas, 111 N. C. 409, 16 S. E. 226.

North Dakota.— Sobolisk *v.* Jacobson, 6 N. D. 175, 69 N. W. 46.

Ohio.— Davenport *v.* Sovil, 6 Ohio St. 459; Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320.

Oklahoma.— Hawkins *v.* Overstreet, 7 Okla. 277, 54 Pac. 472.

Oregon.— Hammer *v.* Downing, 39 Oreg. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30; Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130; Applegate *v.* Dowell, 15 Oreg. 513, 16 Pac. 651.

Pennsylvania.— *In re* Appleton, 203 Pa. St. 80, 52 Atl. 12; Maloney *v.* Bartlett, 172 Pa. St. 284, 33 Atl. 553; *In re* Cawley, 162 Pa. St. 520, 29 Atl. 701; Cavanaugh *v.* Bueheler, 120 Pa. St. 441, 14 Atl. 391; Williams *v.* Row, 62 Pa. St. 118; Howe *v.* Corry First Nat. Bank, 1 Pa. Cas. 57, 1 Atl. 787.

Rhode Island.— Providence *v.* Adams, 11 R. I. 190.

South Carolina.— McKenzie *v.* Sifford, 48 S. C. 458, 26 S. E. 706; Gourdin *v.* Trenholm, 25 S. C. 362; Whaley *v.* Stevens, 24 S. C. 479; Hart *v.* Bates, 17 S. C. 35; Stoddard *v.* McIlwain, 9 Rich. 451.

South Dakota.— Wyman *v.* Hallock, 4 S. D. 469, 57 N. W. 197.

Tennessee.— State *v.* Frost, 103 Tenn. 685, 54 S. W. 986; Coulter *v.* Davis, 13 Lea 451; Brewster *v.* Galloway, 4 Lea 558; Williams *v.* Palmer, 2 Baxt. 488; Johnston *v.* Osmont, (Ch. App. 1900) 59 S. W. 644; Daniels *v.* Pickett, (Ch. App. 1900) 59 S. W. 148. And see Provident Sav. L. Assur. Soc. *v.* Duncan, 1 Tenn. Ch. App. 562.

Texas.— Norris *v.* W. C. Belcher Land Mortg. Co., 98 Tex. 176, 82 S. W. 500, 83 S. W. 799; James *v.* James, 81 Tex. 373, 16 S. W. 1087; Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244; American Cotton Co. *v.* Heierman, (Civ. App. 1904) 83 S. W. 845; Hatch *v.* Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411; Dilley *v.* Ratcliffe, 29 Tex. Civ. App. 545, 69 S. W. 237; Houston *v.* Walsh, 27 Tex. Civ. App. 121, 66 S. W. 106; Leslie *v.* Elliott, 26 Tex. Civ. App. 578, 64 S. W. 1037; Noel *v.* Clark, 25 Tex. Civ. App. 136, 60 S. W. 356; Moore *v.* Moore, (Civ. App. 1899) 52 S. W. 565; Robinson *v.* Dickey, 14 Tex. Civ. App. 70, 36 S. W. 499; Gray *v.* Edwards, 3 Tex. Civ. App. 361, 22 S. W. 537.

Utah.— U. S. *v.* Gardo House, 9 Utah 285, 34 Pac. 59; Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590.

Vermont.— Priest *v.* Foster, 69 Vt. 417, 38 Atl. 78; Burton *v.* Barlow, 55 Vt. 434.

Virginia.— Southern R. Co. *v.* Washington, etc., R. Co., 102 Va. 483, 46 S. E. 784; Kelly *v.* Hamblen, 98 Va. 383, 36 S. E. 491; Eaves *v.* Vial, 98 Va. 134, 34 S. E. 978; Tarter *v.* Wilson, 95 Va. 19, 27 S. E. 818; Pettus *v.* Atlantic Sav., etc., Assoc., 94 Va. 477, 26 S. E. 834. General expressions of the court in an opinion, if they go beyond the case, do

after the judgment was rendered and which were not involved in the suit in which

not control the judgment in a subsequent suit when the very point is presented. Griffin *v.* Woolford, 100 Va. 473, 41 S. E. 949.

Washington.— Dunsmuir *v.* Port Angeles Gas, etc., Co., 30 Wash. 586, 71 Pac. 9; Bingham *v.* Keylor, 25 Wash. 156, 64 Pac. 942; Brier *v.* Traders' Nat. Bank, 24 Wash. 695, 64 Pac. 831; Fogg *v.* Hoquiam, 23 Wash. 340, 63 Pac. 234; Payette *v.* Ferrier, 20 Wash. 479, 55 Pac. 629; De Mattos *v.* Jordan, 15 Wash. 378, 46 Pac. 402.

West Virginia.— Sibley *v.* Stacey, 53 W. Va. 292, 44 S. E. 420; Dent *v.* Pickens, 50 W. Va. 382, 40 S. E. 572; Biern *v.* Ray, 49 W. Va. 129, 38 S. E. 530; Coville *v.* Gilman, 13 W. Va. 314; Henry *v.* Davis, 13 W. Va. 230; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

Wisconsin.— Boutin *v.* Lindsley, 84 Wis. 644, 54 N. W. 1017.

United States.— Dennison *v.* U. S., 168 U. S. 241, 18 S. Ct. 57, 42 L. ed. 453; Abendroth *v.* Van Dolsen, 131 U. S. 66, 9 S. Ct. 619, 33 L. ed. 57; Werckmeister *v.* American Tobacco Co., 138 Fed. 162; Williamson *v.* McCaldin Bros. Co., 122 Fed. 63, 58 C. C. A. 399; Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 102 Fed. 710; Empire State Nail Co. *v.* American Solid Leather Button Co., 71 Fed. 588; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 50 Fed. 151; McClaskey *v.* Barr, 47 Fed. 154; Putnam *v.* New Albany, 20 Fed. Cas. No. 11,481, 4 Biss. 365.

England.— Werman *v.* Werman, 43 Ch. D. 296, 61 L. T. Rep. N. S. 637, 38 Wkly. Rep. 442; Goucher *v.* Clayton, 11 Jur. N. S. 107, 34 L. J. Ch. 239, 11 L. T. Rep. N. S. 732, 13 Wkly. Rep. 336.

See 30 Cent. Dig. tit. "Judgment," § 1263.

Defenses common to two actions.— Where two or more notes are given in one and the same transaction, and, in an action on the first, the defense pleaded did not extend to the whole subject-matter of the controversy, so as to litigate and determine defendant's liability in respect to the whole transaction, the judgment in the first action is a finality only as to so much of the claim and defenses as was actually litigated therein. Worth *v.* Carmichael, 114 Ga. 699, 40 S. E. 797; Baltes Land, etc., Co. *v.* Sutton, 30 Ind. App. 648, 66 N. E. 916; Adams *v.* Adams, 25 Minn. 72.

Actions on bonds and coupons.— A decision establishing the validity of coupons does not estop a party from setting up the invalidity of the bond itself in a subsequent action on it. Shell *v.* Carter County, (Tenn. Ch. App. 1896) 42 S. W. 78; Nesbit *v.* Riverside Independent School Dist., 25 Fed. 635.

Legality of consideration.— A judgment against a municipal corporation is not conclusive as to the legality of the debt on which it was rendered, where it does not appear that that question was put in issue by the pleadings. Wilder *v.* Rio Grande County, 41 Fed. 512. And see Elmwood Cemetery Co. *v.* People, 204 Ill. 468, 68 N. E. 500.

Constitutionality of statute.— The fact that a statute or ordinance has been construed and enforced, without question as to its validity, does not make its constitutionality *res judicata* in subsequent actions. Pebnam *v.* Chitty, 131 N. C. 657, 43 S. E. 3; Philadelphia *v.* Ridge Ave. R. Co., 142 Pa. St. 484, 21 Atl. 982; Gribble *v.* Wilson, 101 Tenn. 612, 49 S. W. 736. And although the validity of the statute has been sustained as against particular objections, it seems this will not estop a party in interest from assailing its validity in a subsequent suit for reasons not advanced or considered in the prior suit. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 64 N. J. Eq. 588, 54 Atl. 819. And see State *v.* Kaufman, 45 Mo. App. 656.

Statutory construction.— The doctrine of *res judicata* cannot be applied to judgments or decrees which merely interpret general statutes, and the obligations of citizens under them, except in so far as they involve findings of fact to which such interpretation has been applied. A decree enjoining the collection of taxes levied in one year cannot be given effect as an adjudication of the nonliability of the complainant for similar taxes levied on the same property for a subsequent year, although there has been no change in the laws, since the complainant cannot, by such decree, acquire a vested and permanent right to have such laws interpreted in the same way as applied to him, although they may be enforced as to others in accordance with a later and different interpretation. Mercantile Nat. Bank *v.* Lander, 109 Fed. 21.

Actions of tort.— In actions of trespass or for torts generally nothing is conclusively settled by the verdict and judgment, except the points put directly in issue. Standish *v.* Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393.

Divorce.— Where in proceedings for divorce the question of the rights of the parties to the common property does not come before the court, and the decree granted is for divorce simply, neither party will be concluded thereby in respect to his claims otherwise existing to such property. De Godey *v.* Godey, 39 Cal. 157.

Sufficiency of pleadings.— Where the sufficiency of a complaint has not been tested by demurrer, the judgment in the action will not be conclusive, in a subsequent action founded on an identical complaint, as to its sufficiency. Phenix Ins. Co. *v.* Rogers, 11 Ind. App. 72, 38 N. E. 865.

Conditions in note.— Where a note is given for borrowed money, although the purpose for which the money was borrowed is expressed in the note, a judgment on the note as such is no adjudication on any right of the lender growing out of that part of the instrument. Darke *v.* Bush, 57 Ga. 180.

Patent infringement suits.— Where, in a patent infringement suit, defendants did not deny the validity of the patent, but claimed

it was rendered;[46] nor does its conclusive effect extend to references made by a party in his pleadings to matter not involved in the controversy, such references being made merely for the purpose of elucidating the points really at issue.[47]

b. Title or Right to Property. On this principle, where the title or right to property was not directly put in issue in a suit, the judgment concludes nothing in regard to it, although the property formed the subject-matter of the suit, and although certain titles or rights of the parties were alleged in the pleadings or tacitly assumed as the basis of the judgment.[48]

a license under it to sell the patented articles, and the existence of such license was the only issue litigated, it was held that a decision in favor of complainant did not estop defendants in a subsequent suit from questioning the validity of the patent. Lublin *v.* Stewart, etc., Co., 75 Fed. 294. And see Thompson *v.* N. T. Bushnell Co., 80 Fed. 332.

Facts offered in evidence at a trial to establish the issue presented by the pleadings are not themselves in issue, and the judgment is no evidence in regard to them. Belden *v.* State, 103 N. Y. 1, 8 N. E. 363.

46. *California.*— Freman *v.* Marshall, 137 Cal. 159, 69 Pac. 986.

Florida.— Tampa *v.* Tampa Water Works Co., 45 Fla. 600, 34 So. 631.

Indiana.— Mitchell *v.* French, 100 Ind. 334; Franke *v.* Franke, 15 Ind. App. 529, 43 N. E. 468.

Louisiana.— New Orleans Warehouse Co. *v.* Marrero, 106 La. 130, 30 So. 305.

Pennsylvania.— Morrison *v.* Beckey, 6 Watts 349.

Tennessee.— Gore *v.* Gore, 101 Tenn. 620, 49 S. W. 737.

Sec 30 Cent. Dig. tit. "Judgment," § 1263.

47. Hobbs *v.* Parker, 31 Me. 143. And see Reese *v.* Reese, 157 Pa. St. 200, 27 Atl. 703.

48. *Alabama.*— Bishop *v.* Blair, 36 Ala. 80; Anderson *v.* Brooks, 11 Ala. 953.

Arkansas.— Hannah *v.* Carrington, 18 Ark. 85.

Connecticut.— Kinney *v.* Farnsworth, 17 Conn. 355; Bradford *v.* Bradford, 5 Conn. 127.

Georgia.— Garrard *v.* Hull, 92 Ga. 787, 20 S. E. 357; Sloan *v.* Price, 84 Ga. 171, 10 S. E. 601, 20 Am. St. Rep. 354; McCurry *v.* Robinson, 23 Ga. 321.

Illinois.— Harris *v.* Miner, 28 Ill. 135; Dulin *v.* Prince, 29 Ill. App. 209.

Iowa.— Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572; Shirland *v.* Union Nat. Bank, 65 Iowa 96, 21 N. W. 200; Pope *v.* Durant, 26 Iowa 233.

Kansas.— Wilkie *v.* Howe, 27 Kan. 518.

Kentucky.— Beverly *v.* Waller, 114 Ky. 596, 74 S. W. 264, 24 Ky. L. Rep. 2505, 103 Am. St. Rep. 342.

Louisiana.— Prescott *v.* Payne, 44 La. Ann. 650, 11 So. 140; Martin *v.* Walker, 43 La. Ann. 1019, 10 So. 365. But in a petitory action, defendant is bound to plead all the titles under which he claims to be owner, and a final judgment rendered in favor of plaintiff may be pleaded as *res judicata* against any title which defendant was possessed of at the time, but omitted to plead. Shaffer *v.* Scuddy, 14 La. Ann. 575.

Maryland.— Shryock *v.* Hensel, 95 Md. 614, 53 Atl. 412.

Massachusetts.— Daggett *v.* Daggett, 143 Mass. 516, 10 N. E. 311; Gilbert *v.* Thompson, 9 Cush. 348; Williams *v.* Ingell, 21 Pick. 288.

Michigan.— Love *v.* Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290.

Minnesota.— Smith *v.* Buse, 35 Minn. 234, 28 N. W. 220.

Mississippi.— Decell *v.* McRee, 83 Miss. 423, 35 So. 940; Majors *v.* Majors, 58 Miss. 806; Selser *v.* Ferriday, 13 Sm. & M. 698.

Missouri.— Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989; Sampson *v.* Mitchell, 125 Mo. 217, 28 S. W. 768.

New Hampshire.— Potter *v.* Baker, 19 N. H. 166; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

New York.— Amherst College *v.* Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; King *v.* Townshend, 141 N. Y. 358, 36 N. E. 513 [*affirming* 65 Hun 567, 20 N. Y. Suppl. 602]; Fancher *v.* Bonfils, 44 N. Y. App. Div. 637, 60 N. Y. Suppl. 837; Fern *v.* Osterhout, 11 N. Y. App. Div. 319, 42 N. Y. Suppl. 450; People *v.* Johnson, 37 Barb. 502.

South Carolina.— Jones *v.* Muldrow, Cheves 254.

Tennessee.— Upchurch *v.* Anderson, (Ch. App. 1898) 52 S. W. 917.

Texas.— Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244; Penn *v.* Case, 36 Tex. Civ. App. 4, 81 S. W. 349; Gordon *v.* Hall, 29 Tex. Civ. App. 230, 69 S. W. 219; Evans *v.* Borchard, 8 Tex. Civ. App. 276, 28 S. W. 258; Bradford *v.* Knowles, (Civ. App. 1893) 24 S. W. 1095.

Washington.— Field *v.* Greiner, 11 Wash. 8, 39 Pac. 259.

Wisconsin.— Swennes *v.* Sprain, 120 Wis. 68, 97 N. W. 511.

United States.— Harriman *v.* Northern Securities Co., 197 U. S. 244, 25 S. Ct. 493, 49 L. ed. 739; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873; Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706; Colton *v.* Colton, 127 U. S. 300, 8 S. Ct. 1164, 32 L. ed. 138; Anglo-Florida Phosphate Co. *v.* McKibben, 65 Fed. 529, 13 C. C. A. 36; Starr *v.* Stark, 22 Fed. Cas. No. 13,318, 2 Sawy. 641.

England.— Maine *v.* Crocker, 3 De G. F. & J. 421, 31 L. J. Ch. 285, 5 L. T. Rep. N. S. 702, 10 Wkly. Rep. 204, 64 Eng. Ch. 330, 45 Eng. Reprint 941.

See 30 Cent. Dig. tit. "Judgment," § 1264.

c. Matters Which Could Not Have Been Adjudicated. A judgment is not conclusive on any point or question which from the nature of the case, the form of action, or the character of the pleadings could not have been adjudicated in the suit in which it was rendered;[49] nor, the action having been at law, of a claim or defense which would be cognizable only in equity;[50] nor as to any matter which must necessarily have been excluded from consideration in the case as being beyond the jurisdiction of the particular court.[51]

Partition.— A decree in partition is not *res judicata* as to the title and interest of the parties to it in the land partitioned where the pleadings are not so framed as to raise and settle the question of title. Sauer *v.* Schenck, 159 Ind. 373, 64 N. E. 84; Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331; Jerauld *v.* Dodge, 127 Ind. 600, 25 N. E. 186; Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182. And see *infra*, XIV, D, 2, e.

Ejectment.— A judgment in ejectment is not conclusive, except as against defenses actually made, or legal defenses which might have been made, on the trial. Mann *v.* Rogers, 35 Cal. 316.

Foreclosure.— In foreclosure the mortgagor's title cannot be put in issue, and hence the judgment is not *res judicata* against a party claiming independently of the mortgagor. Walraven *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1899) 53 S. W. 1028.

Attachment.— A decree foreclosing an attachment lien does not conclude the debtor's homestead rights, if they were not put in issue nor adjudicated in the attachment proceedings. Seligson *v.* Collins, 64 Tex. 314; Willis *v.* Matthews, 46 Tex. 478.

A suit construing certain deeds and the rights of the parties thereunder will not be considered *res judicata* in an action of ejectment founded on an alleged breach of the conditions in the deeds. King *v.* Norfolk, etc., R. Co., 99 Va. 625, 39 S. E. 701.

Property claimed under different title.— A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the dividends of other shares claimed under a different title. Muir *v.* Carter, 11 Can. Sup. Ct. 473.

49. *Alabama.*— Bates *v.* Crowell, 122 Ala. 611, 25 So. 217; Jenkins *v.* Harrison, 66 Ala. 345; McLane *v.* Miller, 12 Ala. 643.

California.— Ramsbottom *v.* Bailey, 124 Cal. 259, 56 Pac. 1036; People *v.* Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Earl *v.* Bull, 15 Cal. 421.

Colorado.— Water Supply, etc., Co. *v.* Larimer, etc., Reservoir Co., 25 Colo. 87, 53 Pac. 386.

Indiana.— Stringer *v.* Adams, 98 Ind. 539; Doddridge *v.* Doddridge, 24 Ind. App. 60, 56 N. E. 112.

Iowa.—Union Terminal Co. *v.* Wilmar, etc., R. Co., 116 Iowa 392, 90 N. W. 92; Spinney *v.* Miller, 114 Iowa 210, 86 N. W. 317, 89 Am. St. Rep. 351; Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572.

Louisiana.— Meyer *v.* Moss, 110 La. 132, 34 So. 332.

Maine.— Ingraham *v.* Camden, etc., Water Co., 82 Me. 335, 19 Atl. 861.

Massachusetts.— McIntire *v.* Linehan, 178 Mass. 263, 59 N. E. 767; Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534; Quinn *v.* Lowell Electric Light Corp., 144 Mass. 476, 11 N. E. 732; Rollstone Nat. Bank *v.* Carleton, 136 Mass. 226; Harding *v.* Hale, 2 Gray 399.

Mississippi.— Jackson *v.* Lemler, 83 Miss. 37, 35 So. 306; Scully *v.* Lowenstein, 56 Miss. 652; Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Missouri.— Baker *v.* Lane, 137 Mo. 682, 39 S. W. 450; Barkhoefer *v.* Barkhoefer, 93 Mo. App. 373, 67 S. W. 674; State *v.* William Barr Dry-Goods Co., 45 Mo. App. 96.

New Jersey.— Mershon *v.* Williams, 63 N. J. L. 398, 44 Atl. 211; Headley *v.* Leavitt, 65 N. J. Eq. 748, 55 Atl. 731.

New York.— McGillis *v.* McGillis, 154 N. Y. 532, 49 N. E. 145; Farmers' L. & T. Co. *v.* Hoffman House, 96 N. Y. App. Div. 301, 89 N. Y. Suppl. 281; Baker *v.* Rand, 13 Barb. 152.

North Carolina.— McCall *v.* Zachary, 131 N. C. 466, 42 S. E. 903.

North Dakota.— Teigen *v.* Drake, (1904) 101 N. W. 893.

Pennsylvania.—Martin *v.* Gernandt, 19 Pa. St. 124; Seibert *v.* Fernstler, 2 Lanc. L. Rev. 415.

South Carolina.— Horry *v.* Frost, 10 Rich. Eq. 109.

South Dakota.— Cassill *v.* Morrow, 13 S. D. 109, 82 N. W. 418.

Texas.— Teal *v.* Terrell, 48 Tex. 491.

Washington.— Harding *v.* Atlantic Trust Co., 26 Wash. 536, 67 Pac. 222.

West Virginia.— State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650.

United States.— Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190; Wyman *v.* Bowman, 127 Fed. 257, 62 C. C. A. 189; Newburyport Water Co. *v.* Newburyport, 85 Fed. 723; Oliver *v.* Cunningham, 7 Fed. 689.

See 30 Cent. Dig. tit. "Judgment," § 1267.

Judgment not a bar to second suit as to matters which could not have been adjudicated see *supra*, XIII, D, 4, d.

50. White *v.* Crew, 16 Ga. 416; Featherstone *v.* Betlejewski, 75 Ill. App. 59.

51. *California.*— Bath *v.* Valdez, 70 Cal. 350, 11 Pac. 724.

Georgia.— Harris *v.* Colquit, 44 Ga. 663.

Indiana.— Puterbaugh *v.* Puterbaugh, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611.

d. Judgment on Matters Not in Issue. Since a judgment is not valid which is rendered without jurisdiction of the question or issue decided,[52] and since a void judgment creates no estoppel,[53] it follows that if the court assumes to pass judgment upon a point or question not submitted to its decision by the parties in their pleadings, nor drawn into controversy by the course of the evidence, the judgment to that extent is not conclusive in a subsequent proceeding.[54]

e. Facts Conceded or Assumed. A judgment is conclusive as to facts admitted by the pleadings or assumed by the decision, where they were essential to the judgment, and such that it could not legally have been rendered without them;[55] but not where they were only incidentally or collaterally in question in the suit, or were not necessary to its determination.[56]

New York.— Sanders *v.* Soutter, 126 N. Y. 193, 27 N. E. 263; Territt *v.* Cowenhoven, 79 N. Y. 400; Willis *v.* McKinnon, 37 Misc. 386, 75 N. Y. Suppl. 770.

North Carolina.— Craft *v.* Mechanics' Home Assoc., 127 N. C. 163, 37 S. E. 190.

See 30 Cent. Dig. tit. "Judgment," § 1267.

52. See *supra*, I, D, 4.

53. See *supra*, XIV, A, 4, h, (I).

54. *California.*— McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Fulton *v.* Hanlow, 20 Cal. 450.

Connecticut.— *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

Illinois.— White *v.* Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132.

Indiana.— Whitney *v.* Marshall, 138 Ind. 472, 37 N. E. 964.

Iowa.— Collins *v.* Jennings, 42 Iowa 447.

Kansas.— Mitchell *v.* Insley, 33 Kan. 654, 7 Pac. 201.

Kentucky.— Gillim *v.* Daviess County, 14 S. W. 838, 12 Ky. L. Rep. 596.

Louisiana.— Bonvillain *v.* Bourg, 16 La. Ann. 363.

Mississippi.— Lorance *v.* Platt, 67 Miss. 183, 6 So. 772.

New Hampshire.— Palmer *v.* Russell, 43 N. H. 625.

New York.— Stokes *v.* Foote, 172 N. Y. 327, 65 N. E. 176; House *v.* Lockwood, 137 N. Y. 259, 33 N. E. 595; Matter of Metropolitan R. Co., 58 Hun 563, 12 N. Y. Suppl. 859; People *v.* Johnson, 37 Barb. 502; Harrison *v.* McAdam, 38 Misc. 18, 76 N. Y. Suppl. 701; Johnson *v.* Gillette, 16 Misc. 431, 39 N. Y. Suppl. 733; Fox *v.* McComb, 17 N. Y. Suppl. 783.

Ohio.— Spoors *v.* Coen, 44 Ohio St. 497, 9 N. E. 132.

South Carolina.— Akers *v.* Rowan, 36 S. C. 87, 15 S. E. 350; Garrett *v.* Day, 2 McCord Eq. 27, 16 Am. Dec. 629.

Tennessee.— East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652. See also Hume *v.* Commercial Bank, 1 Lea 220.

Virginia.— Tarter *v.* Wilson, 95 Va. 19, 27 S. E. 818.

United States.— Semple *v.* British-Columbia Bank, 21 Fed. Cas. No. 12,660, 5 Sawy. 394; Ward *v.* The Fashion, 29 Fed. Cas. No. 17,155, 6 McLean 195. *Compare* Farmers' Nat. Bank *v.* Green, 4 Fed. 609.

See 30 Cent. Dig. tit. "Judgment," § 1268.

Applications of rule.— In an action to restrain defendant's use of a name which plaintiff claims as his trade-mark, where the judgment is that defendant be restrained as prayed, and that he account to plaintiff for all the contracts procured by him under the name in question, a finding of fact that defendant had been employed to sell plaintiff's goods at a certain compensation is irrelevant, and is not *res judicata* on the rate of commissions in a subsequent action by defendant for such commissions. Springer *v.* Bien, 128 N. Y. 99, 27 N. E. 1076. So a judgment obtained in an action to have a deed declared to be merely a mortgage, which declares it to be a deed, and not a mortgage, although it also declares that the grantor is tenant of the grantee, is not evidence on this latter question, which was not in issue in that suit, the fact being wholly immaterial to support the judgment. People *v.* Johnson, 14 Abb. Pr. (N. Y.) 416. So again the fact that an appellate court has once passed on the legality of a local option law and declared it to be valid will not control the court as to a question not raised and decided therein. State *v.* Kaufman, 45 Mo. App. 656.

55. *Georgia.*— McCandless *v.* Yorkshire Guarantee, etc., Corp., 101 Ga. 180, 28 S. E. 663.

Indian Territory.— Davenport *v.* Buffington, 1 Indian Terr. 424, 45 S. W. 128.

Kentucky.— Burnett *v.* Com., 52 S. W. 965, 21 Ky. L. Rep. 695.

New York.— Miller *v.* Union Switch, etc., Co., 13 N. Y. Suppl. 711.

North Carolina.— Green *v.* Bennett, 120 N. C. 394, 27 S. E. 142; Fowler *v.* Osborne, 111 N. C. 404, 16 S. E. 470.

West Virginia.— Beckwith *v.* Thompson, 18 W. Va. 103.

United States.— Harper *v.* Harper, 53 Fed. 35, 3 C. C. A. 415.

See 30 Cent. Dig. tit. "Judgment," § 1266.

A proposition assumed or decided by the court to be true, and which must be so assumed to establish another proposition, which expresses the conclusion of the court, is as effectually passed on as the matter directly decided. Warren County School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115; Blake *v.* Ohio River R. Co., 47 W. Va. 520, 35 S. E. 953.

56. *California.*— McDonald *v.* Bear River, etc., Water, etc., Co., 15 Cal. 145.

9. Personal Status or Right. A judgment or decree with regard to the personal status of an individual is equally conclusive as a decision on a right of property.[57] And so of a decision as to the capacity, joinder, or right to sue of a party to the action,[58] or a decision as to the existence of a corporation,[59] or a partnership.[60]

10. Title or Right to Property[61] — a. In General. Where the right, title, or ownership of property is directly put in issue, whether by the pleadings or the course of the litigation, and is tried and determined, the judgment is conclusive thereon in all further litigation between the same parties or their privies, whatever may have been the nature or purpose of the action in which the judgment was rendered or of that in which the estoppel is set up;[62] *aliter*, if the right or

Connecticut.— Fairman *v.* Bacon, 8 Conn. 418.

Kansas.— Brungardt *v.* Leiker, 42 Kan. 206, 21 Pac. 1065.

Louisiana.— Johns *v.* Race, 48 La. Ann. 1170, 20 So. 660.

Minnesota.— Heidel *v.* Benedict, 61 Minn. 170, 63 N. W. 490, 52 Am. St. Rep. 592, 31 L. R. A. 422.

Missouri.— Dickey *v.* Heim, 48 Mo. App. 114.

New Jersey.— Hodge *v.* U. S. Steel Corp., 64 N. J. Eq. 90, 53 Atl. 601.

New York.— Mason *v.* Alston, 9 N. Y. 28, 59 Am. Dec. 515; Nelson *v.* Brown, 66 Hun 311, 20 N. Y. Suppl. 978; Dickinson *v.* Price, 64 Hun 149, 18 N. Y. Suppl. 801; Varnum *v.* Hart, 2 Silv. Sup. 478, 6 N. Y. Suppl. 346.

West Virginia.— Houser *v.* Ruffner, 18 W. Va. 244.

See 30 Cent. Dig. tit. "Judgment," § 1266.

57. Thornton *v.* Lane, 11 Ga. 459; Clemens *v.* Clemens, 37 N. Y. 59.

Applications of rule.— This rule applies to a decree for the appointment or removal of an administrator or guardian. Clemens *v.* Clemens, 37 N. Y. 59. To a judgment entered in favor of a plaintiff as a public officer. Joh *v.* Collier, 11 Ohio 422. To a decision that one is a stock-holder in an insolvent corporation. Reading Iron Works' Estate, 149 Pa. St. 182, 24 Atl. 202. To a finding of the status of one as the divorced wife of another. Wottrich *v.* Freeman, 71 N. Y. 601. To a finding that a party is a minor. McConologue's Case, 107 Mass. 154. But it is held that a court is not bound to recognize a certain person as its clerk by the fact that on a former occasion it punished him for a contempt of its authority. Lynne *v.* New Orleans, 26 La. Ann. 48.

As to the conclusiveness of judgments on questions of identity, legitimacy, and pedigree see *infra*, XVI, E, 2.

58. Deslonde *v.* Darrington, 29 Ala. 92; Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228; Willis *v.* Fairchild, 51 N. Y. Super. Ct. 405.

59. *In re* Brooklyn, etc., R. Co., 19 Hun (N. Y.) 314.

60. Dutton *v.* Woodman, 9 Cush. (Mass.) 255, 57 Am. Dec. 46; Wood *v.* Byington, 2 Barb. Ch. (N. Y.) 387; Hayes *v.* Gudykunst, 11 Pa. St. 221. But see Coville *v.* Gilman, 13 W. Va. 314.

61. Judgment as evidence of title or right to property see *infra*, XIV, D, 2, 3.

Conclusiveness of judgment in particular class of actions relating to property see *infra*, XIV, D.

Matters in issue but not decided see *supra*, XIV, C, 6.

Matters not in issue see *supra*, XIV, C, 8.

62. *Alabama.*— McGrantt *v.* Baggett, 128 Ala. 483, 29 So. 199; Wooten *v.* Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 547; Lee *v.* Thompson, 99 Ala. 95, 11 So. 672; Ewing *v.* Sanford, 21 Ala. 157.

Arkansas.— Bagley *v.* Rowland, 44 Ark. 165.

California.— White *v.* Costigan, 134 Cal. 33, 66 Pac. 78; Green *v.* Thornton, 130 Cal. 482, 62 Pac. 750; Lorenz *v.* Jacobs, (1884) 3 Pac. 654; Shinn *v.* Young, 57 Cal. 525; Clink *v.* Thurston, 47 Cal. 21; Nieto *v.* Carpenter, 7 Cal. 527.

Connecticut.— Storrs *v.* Robinson, 77 Conn. 207, 58 Atl. 746; Bell *v.* Raymond, 18 Conn. 91; Gould *v.* Stanton, 16 Conn. 12.

District of Columbia.— Clark *v.* Krause, 17 D. C. 108.

Florida.— McMillan *v.* Lacy, 6 Fla. 526.

Georgia.— Earnest *v.* Sherwood, 115 Ga. 299, 41 S. E. 640; Hammond *v.* Thornton, 107 Ga. 259, 33 S. E. 183; Linton *v.* Harris, 78 Ga. 265, 3 S. E. 278; Tomlinson *v.* Driver, 53 Ga. 9; Johnson *v.* Lancaster, 5 Ga. 39.

Illinois.— Peterson *v.* Nehf, 80 Ill. 25; Kelly *v.* Donlin, 70 Ill. 378; Briscoe *v.* Lloyd, 64 Ill. 33.

Indiana.— Bruce *v.* Osgood, 154 Ind. 375, 56 N. E. 25; Smock *v.* Reichwine, 117 Ind. 194, 19 N. E. 776; McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120; Rarey *v.* Lee, 7 Ind. App. 518, 34 N. E. 749.

Iowa.— Sketchley *v.* Smith, 78 Iowa 542, 43 N. W. 524; Pool *v.* Paul, 26 Iowa 591.

Kansas.— Pennell *v.* Felch, 55 Kan. 78, 39 Pac. 1023; Shepard *v.* Stockham, 45 Kan. 244, 25 Pac. 559.

Kentucky.— Honaker *v.* Cecil, 84 Ky. 202, 1 S. W. 392, 8 Ky. L. Rep. 188; Elliott *v.* Haun, 74 S. W. 743, 25 Ky. L. Rep. 139; Worsham *v.* Lancaster, 47 S. W. 448, 20 Ky. L. Rep. 701.

Louisiana.— Sadler *v.* Henderson, 112 La. 518, 36 So. 549; State *v.* Rost, 50 La. Ann. 995, 23 So. 978; Wilson *v.* Curtis, 13 La. Ann. 601; Peale *v.* Routh, 13 La. Ann. 254; Remy *v.* Municipality No. 2, 8 La. Ann. 27; Landry *v.* Gamet, 9 La. 246.

Maine.— Eldridge *v.* Preble, 34 Me. 148.

Michigan.— Clink *v.* Gunn, 90 Mich. 135, 51 N. W. 193.

title was not directly in issue in the former suit, or if the latter action arises upon a materially different state of facts.[63] In the former case the judgment is as

Minnesota.— Mitchell *v.* Chisholm, 57 Minn. 148, 58 N. W. 873; Byrne *v.* Minneapolis, etc., R. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668.

Missouri.—Wainwright *v.* Rowland, 25 Mo. 53; Franklin *v.* Stagg, 22 Mo. 193.

New York.— Webster *v.* Kings County Trust Co., 145 N. Y. 275, 39 N. E. 964; Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; Upham *v.* Paddock, 23 Hun 377; Evans *v.* Post, 5 Hun 338; Hopkins *v.* Cameron, 34 Misc. 688, 70 N. Y. Suppl. 1027; Etheridge *v.* Osborn, 12 Wend. 399; Wendell *v.* Lewis, 6 Paige 233.

North Carolina.— Bryan *v.* Alexander, 111 N. C. 142, 15 S. E. 1031.

Oregon.— Dowell *v.* Applegate, 24 Oreg. 440, 33 Pac. 937.

Pennsylvania.—Robb *v.* Van Horn, 150 Pa. St. 508, 24 Atl. 756.

South Carolina.— Smith *v.* Smith, 55 S. C. 507, 33 S. E. 583; Manigault *v.* Holmes, Bailey Eq. 283.

Texas.— Von Rosenberg *v.* Haynes, 85 Tex. 357, 20 S. W. 143; New York, etc., Land Co. *v.* Votaw, (Civ. App. 1899) 52 S. W. 125; Gillett *v.* Lee, 2 Tex. App. Civ. Cas. § 743.

Vermont.— Morgan *v.* Baker, 26 Vt. 602; Perkins *v.* Walker, 19 Vt. 144.

Virginia.— Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241; Spotts *v.* Com., 85 Va. 531, 8 S. E. 375.

Washington.— Denny *v.* Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341; Potvin *v.* Denny Hotel Co., 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002.

West Virginia.— St. Lawrence Boom, etc., Co. *v.* Holt, 51 W. Va. 352, 41 S. E. 351; Beckwith *v.* Thompson, 18 W. Va. 103.

United States.— Minneapolis Agricultural, etc., Assoc. *v.* Canfield, 121 U. S. 295, 7 S. Ct. 887, 30 L. ed. 962; Fossat *v.* U. S., 2 Wall. 649, 17 L. ed. 739; U. S. *v.* Billing, 2 Wall. 444, 17 L. ed. 848; Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322; White *v.* Keller, 68 Fed. 796, 15 C. C. A. 683. But see Bradstreet *v.* Thomas, 12 Pet. 174, 9 L. ed. 1044.

Canada.— Leinster *v.* Stabler, 17 U. C. C. P. 532.

See 30 Cent. Dig. tit. "Judgment," § 1275 *et seq.*

Form of action immaterial.— A judgment for defendant in an action on a note, tried on the issue whether a deed to a tract of land had been given by the principal to pay the note, is *res judicata*; and, in an action between the same parties to recover the possession of the land, the same matter cannot again be litigated. Jackson *v.* Lodge, 36 Cal. 28; Bradford *v.* Knowles, 78 Tex. 109, 14 S. W. 307.

Foreclosure.—Defendant cannot contest the right to an execution for the collection of a deficiency arising on a sale under a decree of foreclosure, on grounds set up and determined in the foreclosure suit. Haldane *v.* Sweet, 58 Mich. 429, 25 N. W. 383.

Water-rights.— Decrees determining the priorities and the amount of the appropriations of the several ditches in an irrigation district are not intended to designate the person or persons entitled to the use of the water thus appropriated; and such decrees are not *res judicata* as to the parties entitled to the control of a ditch, or to the use of the water conveyed through the same, but only as to the priority and amount of appropriation of the ditch. Oppenlander *v.* Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854. And see Lillis *v.* Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108. But where one to whom a decree awards the right to appropriate a certain quantity of water in excess of what he is entitled to from a natural stream for irrigation, after decree continuously asserts that right by user, the decree is, as to the parties to it, *res judicata* in a subsequent action between them for the same quantity. Boulder, etc., County Ditch Co. *v.* Lower Boulder Ditch Co., 22 Colo. 115, 43 Pac. 540.

Wife's separate property.— In an action by attachment against defendant's wife's property, the record of a court of equity decreeing that the property shall be deemed her separate estate is admissible. Smith *v.* McAtee, 27 Md. 420, 92 Am. Dec. 641.

Liability of property to execution.—A finding of the court that property was not subject to execution is conclusive of that fact in trespass by the owner of the property against the execution creditor for an illegal levy. Holton *v.* Taylor, 80 Ga. 508, 6 S. E. 15.

63. *California.*— Loftis *v.* Marshall, 134 Cal. 394, 66 Pac. 571, 86 Am. St. Rep. 286; McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Baker *v.* Baker, (1892) 31 Pac. 355.

Connecticut.— Gunn *v.* Scovil, 5 Day 113.

Georgia.— Witkowski *v.* Stubbs, 91 Ga. 440, 17 S. E. 609.

Illinois.— McIntyre *v.* Storey, 80 Ill. 127.

Iowa.— Gardner *v.* Early, 72 Iowa 518, 34 N. W. 311.

Kentucky.— Rice *v.* Lowan, 2 Bibb 149; Reed *v.* Reed, 80 S. W. 520, 25 Ky. L. Rep. 2324.

Louisiana.— Goodrich *v.* Pattingill, 7 La. Ann. 664.

Massachusetts.—Parker *v.* Standish, 3 Pick. 288; Standish *v.* Parker, 2 Pick. 20, 13 Am. Dec. 393.

Mississippi.— Hart *v.* Picard, 75 Miss. 651, 23 So. 450.

New York.— Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335.

Pennsylvania. — Pullen *v.* Rianhard, 1 Whart. 514; Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733.

Tennessee.— Gibson *v.* Willis, (Ch. App. 1895) 36 S. W. 154.

Texas.— Liberty *v.* Paul, (Civ. App. 1899) 51 S. W. 657; Colonial, etc., Mortg. Co. *v.* Tubbs, (Civ. App. 1898) 45 S. W. 623.

United States.— St. Romes *v.* Levee Steam Cotton-Press Co., 127 U. S. 614, 8 S. Ct. 1335,

effectual as a release or confirmation by one party to the other; its estoppel constitutes a part of the title, and runs with the land, extending to all who are privies in estate to either of the parties.[64] Moreover a decision on a question of title to lands is conclusive in a subsequent suit between the same parties in respect to other lands, when the lands in both suits have a common source of title, and the title depends upon the existence or non-existence of a fact directly adjudicated in the former case.[65]

b. Personal Property. Similar rules obtain in the case of personal property. A judgment in an action in which the title to a chattel was directly in issue and adjudicated is conclusive on that point between the parties and their privies, without regard to the form or purpose of the action;[66] but not as between other parties, or where the question of title was only incidentally or collaterally in issue, or where its determination was unnecessary to the suit.[67]

11. Rights and Liabilities Under Contracts[68] — a. In General. In an action on an express contract, the relative rights and duties of the parties thereto are conclusively fixed by the judgment, in so far as they were within the issues raised in

32 L. ed. 289; California, etc., Land Co. *v.* Worden, 85 Fed. 94; Last Chance Min. Co. *v.* Tyler Min. Co., 61 Fed. 557, 9 C. C. A. 613.

See 30 Cent. Dig. tit. "Judgment," § 1275 *et seq.*

64. Kelly *v.* Donlin, 70 Ill. 378; Heck *v.* Findlay Window Glass Co., 16 Ohio Cir. Ct. 111, 8 Ohio Cir. Dec. 757.

65. Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355. And see Hoisington *v.* Brakey, 31 Kan. 560, 3 Pac. 353. *Contra*, Long *v.* Louisville, etc., R. Co., 51 S. W. 807, 21 Ky. L. Rep. 463.

66. *Alabama.*— Roberts *v.* Heim, 27 Ala. 678; Derrett *v.* Alexander, 25 Ala. 265; Reed *v.* Brashers, 3 Port. 375.

Illinois.— Pool *v.* Tucker, 36 Ill. App. 377.

Indiana.— Limpus *v.* State, 7 Blackf. 43.

Louisiana.— Bogan *v.* Finlay, 19 La. Ann. 94; Skipworth *v.* His Creditors, 19 La. 198.

Minnesota.— Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253, 22 N. W. 538.

Missouri.— Penrose *v.* Green, 1 Mo. 774; Edmonston *v.* Jones, 96 Mo. App. 83, 69 S. W. 741.

Nebraska.— Lewis *v.* Mills, 47 Nebr. 910, 66 N. W. 817; Thomas *v.* Markmann, 43 Nebr. 823, 62 N. W. 206.

New Jersey.— Vandoren *v.* Bellis, 7 N. J. L. 137.

New York.— Campbell Printing Press, etc., Co. *v.* Walker, 114 N. Y. 7, 20 N. E. 625; Fields *v.* Bland, 81 N. Y. 239; Brady *v.* Beadleston, 62 Hun 548, 17 N. Y. Suppl. 42; Calkins *v.* Allerton, 3 Barb. 171; Bates *v.* Stanton, 1 Duer 79; Hadcock *v.* O'Rowke, 4 N. Y. Suppl. 185.

South Carolina.— Allen *v.* Roundtree, 1 Speers 80.

Texas.— Walcott *v.* Brander, 10 Tex. 419.

Washington.— Sayward *v.* Thayer, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137.

United States.— Consolidated Fruit Jar Co. *v.* Whitney, 6 Fed. Cas. No. 3,134, 2 Ban. & A. 375.

See 30 Cent. Dig. tit. "Judgment," § 1277.

Where only a portion of property involved. — A judgment affirming the validity of a sale and transfer of property is conclusive on the parties thereto with respect to all the property covered by the transaction in question, although but part thereof was in fact the subject-matter of the issues in the case in which the judgment was rendered. Peterson *v.* Warner, 6 Kan. App. 298, 50 Pac. 1091.

67. *Alabama.*— Porter, etc., Hardware Co. *v.* Lee, 105 Ala. 361, 17 So. 216; Spencer *v.* Godwin, 30 Ala. 355.

California.— Sheldon *v.* Loomis, 28 Cal. 122; Perkins *v.* Thornburgh, 10 Cal. 189.

Louisiana.— Farwell *v.* Harris, 12 La. Ann. 50.

Maryland.— Courtney *v.* William Knabe, etc., Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456.

Michigan.— Lansing *v.* Sherman, 30 Mich. 49.

Missouri.— Almond *v.* Miller, 83 Mo. App. 597.

New York.— Olmstead *v.* Olmstead, 177 N. Y. 579, 69 N. E. 1128; Read *v.* Marine Bank, 136 N. Y. 454, 32 N. E. 1083, 32 Am. St. Rep. 758.

Ohio.— Armstrong *v.* Harvey, 11 Ohio St. 527.

Pennsylvania.— Hoopes *v.* Worrall, 1 Del. Co. 111.

Texas.— Stoltz *v.* Coward, 10 Tex. Civ. App. 295, 30 S. W. 935.

A decree on a libel in rem against a ship for supplies furnished her does not necessarily determine the title of the ship, and therefore is not competent in a subsequent action as evidence of the ownership of the supplies so obtained, without other proof of the title of the ship. Van Vechten *v.* Griffiths, 4 Abb. Dec. (N. Y.) 487, 1 Keyes 104.

68. Causes of action on indebtedness and collateral security as affecting merger and bar see *supra*, XIII, D, 8.

Distinct causes of action on separate clauses or conditions of contract as affecting merger and bar see *supra*, XIII, D, 7, b.

Splitting causes of action on contract as affecting merger and bar see *supra*, XIII, D, 5.

the suit and were adjudicated by the court;[69] but the judgment is not conclusive as to questions arising under the contract which were not in issue, or were only incidentally or collaterally considered.[70]

b. Validity. When the validity of a contract is adjudicated in an action upon it, either in the sense of being necessarily determined by a judgment enforcing the contract,[71] or by being put in issue and tried, the question is conclusively settled by the judgment, for the purposes of all further litigation between the parties,[72] as in actions for further instalments due under the contract;[73] and conversely if the contract is once adjudged invalid it cannot be sustained in a second action between the same parties.[74]

c. Consideration. Similarly a judgment enforcing a note or contract settles all questions as to the validity and amount of its consideration.[75]

Successive causes of action on contract as affecting merger and bar see *supra*, XIII, D, 6.

69. *Alabama.*— Heard *v.* Pulaski, 80 Ala. 502, 2 So. 343.

Massachusetts.— Turnbull *v.* Pomeroy, 154 Mass. 481, 29 N. E. 51.

Minnesota.— Nash *v.* Adams, 55 Minn. 46, 56 N. W. 241; Drea *v.* Cariveau, 28 Minn. 280, 9 N. W. 802.

Missouri.— Kitchen *v.* Clark, 1 Mo. App. 430.

New Hampshire.— Parker *v.* Brown, 15 N. H. 176.

New York.— Case *v.* Phœnix Bridge Co., 58 N. Y. Super. Ct. 435, 11 N. Y. Suppl. 724.

See 30 Cent. Dig. tit. "Judgment," § 1278.

Rescission of contract.— In an action on a contract to recover royalties on patented articles, it appeared that in a prior action in the federal court brought by defendants against plaintiff to enjoin infringement on their patents, the judgment of that court turned mainly on the question whether such contract was in force or had been previously rescinded. It was held that such question was *res judicata*. Topliff *v.* Topliff, 8 Ohio Cir. Ct. 55, 4 Ohio Cir. Dec. 312.

Deduction from contract price.— A bought goods from B and gave eleven notes therefor, each for one hundred dollars. In a suit on one note, A claimed a deduction of twenty per cent on the price of said goods, and the verdict was for seventy-eight dollars and seventy-two cents. It was held that in that suit the whole damage and consequent deduction from the price of the goods was passed on, and therefore defendant must pay the other notes without deduction. Taylor *v.* Chambers, 1 Iowa 124.

70. Drake *v.* Vorse, 42 Iowa 653; Sage *v.* McAlpin, 11 Cush. (Mass.) 165; Ross *v.* Woodville, 4 Munf. (Va.) 324; Ebbetts *v.* Conquest, 82 L. T. Rep. N. S. 560. And see Ferguson *v.* Epperly, 127 Iowa 214, 103 N. W. 94.

Division of profits.— Where a jury finds specially that defendants agreed to divide with plaintiff certain profits in the proportion alleged by plaintiff and not in that alleged by defendant, and that said profits, although earned, have not been received by defendants, and the court thereupon enters judgment for the defendants *non obstante veredicto*, defendants are not in a subsequent suit concluded as to the proportion of the profits to which they are entitled. Whitney *v.* Bayer, 101 Mich. 151, 59 N. W. 414.

Occupant pendente lite.— Where a third party acquires the right to occupy and use for a specified purpose property which is the subject of litigation, by agreement with both parties to the suit, his right to such occupation and use cannot be affected by the judgment in which such litigation results. Ward *v.* Congress Constr. Co., 99 Fed. 598, 39 C. C. A. 669.

71. Russel *v.* Rosenbaum, 24 Nebr. 769, 40 N. W. 287; Brooks *v.* Wilson, 53 Hun (N. Y.) 173, 6 N. Y. Suppl. 116; Miner *v.* Graham, 24 Pa. St. 491. And see *supra*, XIV, C, 1, e.

72. Carpenter *v.* Osborn, 102 N. Y. 552, 7 N. E. 823; Hamilton Bldg. Assoc. *v.* Reynolds, 5 Duer (N. Y.) 671; Ellis *v.* Lyceum, 16 N. Y. Suppl. 924; Parker *v.* Kane, 22 How. (U. S.) 1, 16 L. ed. 286.

Usury.— The defense of usury in a note or contract is cut off by a judgment giving it recognition and effect. Philips *v.* Gephart, 53 Iowa 396, 5 N. W. 683; Miller *v.* Clarke, 37 Iowa 325.

Statute of frauds.— A judgment in favor of plaintiff in an action on a contract which by its terms was not to be performed within a year is conclusive between the parties as to the validity of the contract, although the statute of frauds was not pleaded. Foulke *v.* Thalmessinger, 1 N. Y. App. Div. 598, 37 N. Y. Suppl. 563.

73. Ward *v.* Sire, 52 N. Y. App. Div. 443, 65 N. Y. Suppl. 101; Milne *v.* Deen, 121 U. S. 525, 7 S. Ct. 1004, 30 L. ed. 980; Mason Lumber Co. *v.* Buchtel, 101 U. S. 638, 25 L. ed. 1073; Laird *v.* De Soto, 32 Fed. 652.

74. But on an issue as to the fraudulent character of a mortgage, a judgment for plaintiff in an action for conspiracy to defraud, where the *bona fides* of such mortgage and of other conveyances was attacked, is not conclusive evidence of the fraudulent character of the mortgage, unless the judgment was such as to exclude the possibility of a finding by the jury that the other conveyances were the only ones infected with fraud. Zoeller *v.* Riley, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157. And see Foote *v.* Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861.

75. Thaxton *v.* Roberts, 66 Ga. 704; Black

d. Construction. Where the meaning or scope of a contract, deed, or mortgage has been made the subject of contest and judicial determination in one action, the construction then placed upon it is *res judicata*, and will not be departed from in subsequent litigation between the same parties or their privies.[76]

12. Waiver of Estoppel. An estoppel by judgment may be waived by the party entitled to claim the benefit of it;[77] as where he joins issue on the very questions settled by the judgment,[78] or voluntarily opens an investigation of the matters which he might claim to be concluded by it.[79]

D. Judgments in Particular Classes of Actions or Proceedings — 1. Probate Proceedings.[80] The character of finality and conclusiveness attaches to the judgments and decrees of a probate court,[81] provided it had jurisdiction of the

River Sav. Bank *v.* Edwards, 10 Gray (Mass.) 387; Divoll *v.* Atwood, 41 N. H. 443; Rublee *v.* Chaffee, 8 Vt. 111.

As between indorsers.—A judgment against a second indorser of a note in favor of an innocent holder for value does not preclude the prior indorser, when sued on the contract by which he transferred the note to the second indorser and guaranteed its payment, from showing that, as between them, the consideration for the transfer was invalid, being based on a gambling debt. Pearce *v.* Rice, 142 U. S. 28, 12 S. Ct. 130, 35 L. ed. 925.

76. *Illinois.*— Taylor *v.* Field, 22 Ill. App. 436.

Maryland.— Oursler *v.* Baltimore, etc., R. Co., 60 Md. 358.

Missouri.— Buchanan *v.* Smith, 75 Mo. 463; Hoyt *v.* Greene, 33 Mo. App. 205.

New York.— Henck *v.* Barnes, 84 Hun 546, 32 N. Y. Suppl. 840; Consaulus *v.* McConihe, 2 N. Y. Suppl. 89; Morrison *v.* Bauer, 4 N. Y. St. 701.

Texas.— Monks *v.* McGrady, 71 Tex. 134, 8 S. W. 617; Thorn *v.* Newsom, 64 Tex. 161, 53 Am. Rep. 747.

United States.— Tioga R. Co. *v.* Blossburg, etc., R. Co., 20 Wall. 137, 22 L. ed. 331; Nichol *v.* Levy, 5 Wall. 433, 18 L. ed. 596. And see Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190.

Compare Lewis' Appeal, 67 Pa. St. 153.

See 30 Cent. Dig. tit. "Judgment," § 1281.

77. *Illinois.*— Chicago Theological Seminary *v.* People, 189 Ill. 439, 59 N. E. 977.

Louisiana.— Pearce *v.* Frantum, 16 La. 414.

New York.— House *v.* Lockwood, 17 N. Y. Suppl. 817. But see Pray *v.* Hegeman, 98 N. Y. 351.

Pennsylvania.— French *v.* Burns, 19 Pa. Super. Ct. 333.

United States.— Pratt *v.* Wilcox Mfg. Co., 64 Fed. 589.

See 30 Cent. Dig. tit. "Judgment," § 1282.

78. Seymour *v.* Hubert, 92 Pa. St. 499. But the fact that an action to recover back money paid to satisfy a valid judgment, brought on grounds which would have been sufficient to reverse the judgment, is submitted on agreed facts, so that all objections to the form of the action are waived, will not authorize the court to disregard the effect of the judgment, which is still unreversed. People's Sav. Bank *v.* Heath, 175 Mass. 131, 55 N. E. 807, 78 Am. St. Rep. 481.

79. Megerle *v.* Ashe, 33 Cal. 74.

80. Conclusiveness of: Decree construing will see Wills. Decree of distribution of decedent's estate see Executors and Administrators, 18 Cyc. 663 *et seq.* Settlement of guardian see Guardian and Ward, 21 Cyc. 178 *et seq.* Settlement of personal representative see Executors and Administrators, 18 Cyc. 1188 *et seq.* Probate of will see Wills.

Operation and effect of: Allowance or rejection of claim by personal representative see Executors and Administrators, 18 Cyc. 509 *et seq.* Appointment of personal representative see Executors and Administrators, 18 Cyc. 139 *et seq.* Order of sale of land of decedent see Executors and Administrators, 18 Cyc. 749 *et seq.*

81. *Alabama.*— Hutton *v.* Williams, 60 Ala. 107; Morrow *v.* Allison, 39 Ala. 70; Duckworth *v.* Duckworth, 35 Ala. 70; Arnett *v.* Arnett, 33 Ala. 273; Kyle *v.* Mays, 22 Ala. 673; Herbert *v.* Hanrick, 16 Ala. 581. And see Martin *v.* Tally, 72 Ala. 23.

Arkansas.— Osborne *v.* Graham, 30 Ark. 66; Dooley *v.* Dooley, 14 Ark. 122.

Connecticut.— Willetts' Appeal, 50 Conn. 330; Kellogg *v.* Johnson, 38 Conn. 269; Dickinson *v.* Hayes, 31 Conn. 417; Gates *v.* Treat, 17 Conn. 388; Goodrich *v.* Thompson, 4 Day 215; Bush *v.* Sheldon, 1 Day 170.

Delaware.— Roach *v.* Martin, 1 Harr. 548, 28 Am. Dec. 746.

Georgia.— Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133; Davie *v.* McDaniel, 47 Ga. 195; Harris *v.* Colquit, 44 Ga. 663; Watson *v.* Warnock, 31 Ga. 694; Churchill *v.* Corker, 25 Ga. 479. But *compare* Smith *v.* Smith, 101 Ga. 296, 28 S. E. 665, holding that a judgment of the ordinary, setting apart realty as a year's support, does not, as against third persons claiming title to the property, but who had not filed with the ordinary any objections to the allowance, adjudicate that the title was in the estate of the applicant's deceased husband.

Illinois.— Burton *v.* Gagnon, 180 Ill. 345, 54 N. E. 279. But see Hopkins *v.* McCann, 19 Ill. 113, holding that judgments in a probate court are but *prima facie* evidence of just demands against an estate, and do not conclude the heir.

Iowa.— Gordon *v.* Kennedy, 36 Iowa 167.

persons concerned,[82] and the subject-matter of the proceeding was within its peculiar and limited jurisdiction;[83] and if these conditions exist, such judgments

Kentucky.— Johnson *v.* Beauchamp, 5 Dana 70.

Louisiana.— Womack *v.* Womack, 23 La. Ann. 351; Millaudon's Succession, 22 La. Ann. 12; Addison *v.* New Orleans Sav. Bank, 15 La. 527. An *ex parte* decree ordering property to be inventoried is only *prima facie* evidence of title in the decedent. Wilson *v.* Smith, 14 La. Ann. 368.

Maine.— May *v.* Boyd, 97 Me. 398, 54 Atl. 938, 94 Am. St. Rep. 509; Simpson *v.* Norton, 45 Me. 281; Potter *v.* Webb, 2 Me. 257.

Maryland.— Long *v.* Long, 62 Md. 33; Shultz *v.* Houck, 29 Md. 24; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Massachusetts.— Watts *v.* Watts, 160 Mass. 464, 36 N. E. 479, 39 Am. St. Rep. 509, 23 L. R. A. 187; Sly *v.* Hunt, 159 Mass. 151, 34 N. E. 187, 38 Am. St. Rep. 403, 21 L. R. A. 680; Cummings *v.* Cummings, 123 Mass. 270; Crippen *v.* Dexter, 13 Gray 330; Sever *v.* Russell, 4 Cush. 513, 50 Am. Dec. 811; Paine *v.* Stone, 10 Pick. 75; Jenison *v.* Hapgood, 7 Pick. 1, 19 Am. Dec. 258; Laughton *v.* Atkins, 1 Pick. 535. But see Darcy *v.* Kelley, 153 Mass. 433, 26 N. E. 1110, holding that a former decree allowing part of the proceeds of a fund for "the aid of my poor relations" to testator's sister and niece will not be held to determine conclusively that none but the testator's heirs at law are relatives that are entitled to share in the fund.

Minnesota.— Greenwood *v.* Murray, 26 Minn. 259, 2 N. W. 945.

Mississippi.— Ward *v.* State, 40 Miss. 108; McKee *v.* Whitten, 25 Miss. 31; Fort *v.* Battle, 13 Sm. & M. 133; Bailey *v.* Dilworth, 10 Sm. & M. 404, 48 Am. Dec. 760.

Missouri.— Covington *v.* Chamblin, 156 Mo. 574, 57 S. W. 728; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276; Sheetz *v.* Kirtley, 62 Mo. 417; Williams *v.* Reed, 74 Mo. App. 331.

New Hampshire.— Simmons *v.* Goodell, 63 N. H. 458, 2 Atl. 897; Spofford *v.* Smith, 59 N. H. 366; Merrill *v.* Harris, 26 N. H. 142, 57 Am. Dec. 359; Bryant *v.* Allen, 6 N. H. 116.

New Jersey.— Boulton *v.* Scott, 3 N. J. Eq. 231.

New York.— Chipman *v.* Montgomery, 63 N. Y. 221; Spreen's Estate, 1 N. Y. Civ. Proc. 375; Gardner *v.* Gardner, 22 Wend. 526, 34 Am. Dec. 349; Seymour *v.* Seymour, 4 Johns. Ch. 409. But see Washbon *v.* Cope, 144 N. Y. 287, 39 N. E. 388; Van Camp *v.* Fowler, 133 N. Y. 600, 30 N. E. 1147; Matter of Sanford, 100 N. Y. App. Div. 479, 91 N. Y. Suppl. 706; Moorehouse *v.* Hutchinson, 2 N. Y. Suppl. 215. A decree of a surrogate in relation to the disposition of personal estate under a will is not conclusive in an action in the supreme court in relation to the disposition of real estate under the same provisions. Corse *v.* Chapman, 153 N. Y. 466, 47 N. E. 812.

North Carolina.— Granbery *v.* Mhoon, 12 N. C. 456.

Ohio.— Jones *v.* Willis, 72 Ohio St. 189, 74 N. E. 166.

Oklahoma.— Greer *v.* McNeal, 11 Okla. 526, 69 Pac. 893.

Pennsylvania.— *In re* Watts, 158 Pa. St. 1, 27 Atl. 861; High's Estate, 136 Pa. St. 222, 20 Atl. 421, 423; Lex's Appeal, 97 Pa. St. 289; Mussleman's Appeal, 65 Pa. St. 480; Com. *v.* Shuman, 18 Pa. St. 343; *In re* Brinton, 10 Pa. St. 408; Thompson *v.* McGaw, 2 Watts 161; McPherson *v.* Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642; Vensel *v.* Colner, 31 Leg. Int. 373.

Rhode Island.— King *v.* Ross, 21 R. I. 413, 45 Atl. 146; Blake *v.* Butler, 10 R. I. 133.

South Carolina.— Turner *v.* Malone, 24 S. C. 398; Irby *v.* McCrae, 4 Desauss. Eq. 422.

Texas.— Mott *v.* Maris, (Civ. App. 1894) 29 S. W. 825.

Vermont.— Lawrence *v.* Englesby, 24 Vt. 42; Adams *v.* Adams, 22 Vt. 50; Robinson *v.* Swift, 3 Vt. 283. But see *In re* Hodges, 63 Vt. 661, 22 Atl. 725.

Virginia.— Connolly *v.* Connolly, 32 Gratt. 657.

Wisconsin.— Huebschmann *v.* Cotzhausen, 107 Wis. 64, 82 N. W. 720; Liginger *v.* Field, 78 Wis. 367, 47 N. W. 613. But see Walker *v.* Daly, 80 Wis. 222, 49 N. W. 812.

United States.— Canjolle *v.* Curtiss, 13 Wall. 465, 20 L. ed. 507; Cheesman *v.* Watson, 8 How. 263, 12 L. ed. 1072; Kendall *v.* Hardenbergh, 94 Fed. 911; Parsons *v.* Lyman, 18 Fed. Cas. No. 10,780, 5 Blatchf. 170, 32 Conn. 566; Tompkins *v.* Tompkins, 24 Fed. Cas. No. 14,091, 1 Story 547.

England.— Beardsley *v.* Beardsley, [1899] 1 Q. B. 746, 68 L. J. Q. B. 270, 80 L. T. Rep. N. S. 51, 47 Wkly. Rep. 284; Barrs *v.* Jackson, 9 Jur. 609, 14 L. J. Ch. 433, 1 Phil. 582, 19 Eng. Ch. 582, 41 Eng. Reprint 754.

See 30 Cent. Dig. tit. "Judgment," § 1302.

In California the probate court is regarded as an inferior court, and it cannot take jurisdiction or administer remedies except as provided by statute. Grimes *v.* Norris, 6 Cal. 621, 65 Am. Dec. 545. But its adjudications upon matters which are within its jurisdiction are binding and conclusive. Reynolds *v.* Brumagim, 54 Cal. 254; Kingsley *v.* Miller, 45 Cal. 95; Garwood *v.* Garwood, 29 Cal. 514.

82. Crosley *v.* Calhoon, 45 Iowa 557; Mickel *v.* Hicks, 19 Kan. 578, 21 Am. Rep. 161; Dallinger *v.* Richardson, 176 Mass. 77, 57 N. E. 224.

83. *California.*— Dickey *v.* Gibson, 121 Cal. 276, 53 Pac. 704.

Iowa.— Gordon *v.* Kennedy, 36 Iowa 167.

Michigan.— Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

Minnesota.— Dobberstein *v.* Murphy, 44 Minn. 526, 47 N. W. 171.

North Dakota.— Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

or decrees cannot be reviewed or reëxamined in a collateral proceeding even on the ground of fraud.[84]

2. ACTIONS CONCERNING REAL PROPERTY — a. In General. At common law, where there were many forms of actions concerning real property, some involving the mere possession, others the right of possession, and others the right of property, it was a general rule that a judgment in an action of inferior grade, while conclusive on the matters actually involved, was no bar to an action of a superior grade.[85] But under modern systems the question of the title to land may be conclusively settled, like any other question, by its actual trial and adjudication, without regard to the form or nature of the action in which it arises,[86] provided only that it is actually and fairly at issue in the suit,[87] and that the adjudication

Pennsylvania.— Work *v.* Work, 14 Pa. St. 316.

84. State *v.* McGlynn, 20 Cal. 233, 81 Am. Dec. 118.

In England it has been held from early times that the court of chancery has no power to set aside or disregard a lawful decree of the probate court even on the ground of fraud. Meadows *v.* Kingston, Ambl. 756, 27 Eng. Reprint 487; Barnesley *v.* Powell, Ambl. 102, 27 Eng. Reprint 63; Hindson *v.* Waetherill, 5 De G. M. & G. 301, 18 Jur. 499, 23 L. J. Ch. 820, 2 Wkly. Rep. 507, 54 Eng. Ch. 239, 43 Eng. Reprint 886; Jones *v.* Gregory, 2 De G. J. & S. 83, 67 Eng. Ch. 66, 46 Eng. Reprint 306; Allen *v.* McPherson, 1 H. L. Cas. 191, 11 Jur. 785, 9 Eng. Reprint 727; Noell *v.* Wells, Lev. 235. But the opinion has been intimated that equity might afford relief in a case where the fraud alleged had been practised in procuring the probate of a will, as distinguished from fraud practised upon the testator. Kennell *v.* Abbott, 4 Ves. Jr. 802, 4 Rev. Rep. 351, 31 Eng. Reprint 416; Barnesley *v.* Powel, 1 Ves. 284, 27 Eng. Reprint 1034.

Decisions contra.— In this country we have a few rulings and some *dicta* to the effect that fraud may be collaterally alleged against the order or judgment of a probate court. See Kilgore *v.* Kilgore, 103 Ala. 614, 15 So. 897; Covington *v.* Chamblin, 156 Mo. 574, 57 S. W. 728; Tebbets *v.* Tilton, 24 N. H. 120; Dauphin County Orphans' Ct. *v.* Groff, 14 Serg. & R. (Pa.) 181; McPherson *v.* Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642.

85. Smith *v.* Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Mattox *v.* Helm, 5 Litt. (Ky.) 185, 15 Am. Dec. 64; Arnold *v.* Arnold, 17 Pick. (Mass.) 4; Ferrer's Case, 6 Coke 7*a*; Outram *v.* Morewood, 3 East 346, 7 Rev. Rep. 473.

A recovery in an action for mesne profits is no bar to an action of trespass *quare clausum* for the removing of fence rails during the period of use and occupation by defendant. Gill *v.* Cole, 1 Harr. & J. (Md.) 403, 2 Am. Dec. 527.

86. *Alabama.*— Hall *v.* Caperton, 87 Ala. 285, 6 So. 388.

Georgia.— Johnson *v.* Lovelace, 61 Ga. 62; Rushin *v.* Gause, 54 Ga. 536.

Illinois.—Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332.

Iowa.— Adams County *v.* Graves, 75 Iowa 642, 36 N. W. 889.

Kentucky.— Craig *v.* Bagby, 1 T. B. Mon. 148.

New York.— Hudson *v.* Smith, 39 N. Y. Super. Ct. 452.

Ohio.— Hites *v.* Irvine, 13 Ohio St. 283.

West Virginia.— Rogers *v.* Rogers, 37 W. Va. 407, 16 S. E. 633.

United States.— Calhoun *v.* American Emigrant Co., 93 U. S. 124, 23 L. ed. 826.

See 30 Cent. Dig. tit. "Judgment," § 1284.

Confirmation of Mexican grant.—De Amesti *v.* Castro, 49 Cal. 325; Bernal *v.* Lynch, 36 Cal. 135; Meader *v.* Norton, 11 Wall. (U. S.) 442, 20 L. ed. 184; Manning *v.* San Jacinto Tin Co., 9 Fed. 726, 7 Sawy. 418.

Creditors' suit to avoid conveyance.— Cincinnati, etc., R. Co. *v.* Wynne, 14 Ind. 385.

Action to redeem from mortgage in form an absolute deed.— Allen *v.* Allen, 106 Cal. 137, 39 Pac. 436.

Suit to construe a will.— Newark City Nat. Bank *v.* Crane, 60 N. J. Eq. 121, 45 Atl. 975.

Decree declaring deed to be void.— Murphy *v.* Orr, 32 Ill. 489.

Other applications of text.— The conclusiveness of any judgment actually involving a determination of the title to real estate has been sustained in the following cases: Bill to enjoin sheriff from issuing deed to execution purchaser (Smith *v.* Schlink, 15 Colo. App. 325, 62 Pac. 1044), decree in chancery for sale of realty (Burlingham *v.* Vandevender, 47 W. Va. 804, 35 S. E. 835), action to recover statutory penalty for selling pretended title (Hyde *v.* Morgan, 14 Conn. 104).

The denial of a petition by a purchaser of land at sheriff's sale, for a rule to obtain possession under a local statute, is no bar to an action of ejectment for the land. Bartolet *v.* Saylor, 8 Pa. Cas. 570, 12 Atl. 854.

A judgment on a scire facias quare executio non, against one whose interest in the land was not bound by the judgment, although summoned as a terre-tenant, will not preclude him from setting up an adverse title in an ejectment brought by the sheriff's vendee. Drum *v.* Kelly, 34 Pa. St. 415.

87. *Alabama.*— Ashford *v.* Prewitt, 102 Ala. 264, 14 So. 663, 48 Am. St. Rep. 37.

California.— People *v.* Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186, 68 Cal. 439, 9 Pac. 655.

is made by a court having jurisdiction of the subject-matter,[88] and that the proceedings are legal and valid.[89]

b. Common Recovery. A judgment in common recovery at common law notwithstanding the fictitious character of the proceedings was held conclusive for its own purposes as in any other form of action. It could not be impeached collaterally except for fraud, or as in other real actions because defendant was not a tenant of the freehold.[90]

c. Writ of Entry. At common law the writ of entry was only a possessory action, and determined nothing with respect to the right of property.[91] But in the states where this form of action survives, it has been so modified that the judgment is now conclusive of whatever was tried and determined, including the title if that was put in issue.[92]

d. Ejectment[93]**—(i)** *At Common Law.* By the common-law rule, and wherever that rule has not been abrogated or changed by statute, a judgment in ejectment is not conclusive upon the question of title in any other action between the same parties, or a bar to any number of successive actions of the same kind for the same land,[94] unless, after the title has been fairly and fully tried, equity will

Iowa.— Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112.

Maine.— Jackson *v.* Myrick, 29 Me. 490.

Maryland.— West *v.* Jarrett, 3 Harr. & J. 485.

Virginia.— Christian *v.* Cabell, 22 Gratt. 82.

See 30 Cent. Dig. tit. "Judgment," § 1284.

88. Goenen *v.* Schroeder, 18 Minn. 66.

89. Bradley *v.* Rodelsperger, 17 S. C. 9.

90. Ransley *v.* Stott, 26 Pa. St. 126; 2 Blackstone Comm. 362.

91. 3 Blackstone Comm. 180.

92. Sibley *v.* Rider, 54 Me. 463; Sevey *v.* Chick, 13 Me. 141; *In re* Butrick, 185 Mass. 107, 69 N. E. 1044; Jamaica Pond Aqueduct Corp. *v.* Chandler, 121 Mass. 1; Stevens *v.* Taft, 8 Gray (Mass.) 419; Batchelder *v.* Robinson, 6 N. H. 12; Withington *v.* Corey, 2 N. H. 115. *Compare* Plummer *v.* Walker, 24 Me. 14.

Title established.— A judgment in an action by writ of entry does not establish title to any other land than that described in the writ. *In re* Butrick, 185 Mass. 107, 69 N. E. 1044.

Extent of land recovered.— Judgment in a writ of entry is not conclusive as to the extent of the land recovered, unless the land is described in the writ or judgment with great certainty. Melvin *v.* Proprietors Merrimac River Locks, etc., 5 Metc. (Mass.) 15, 38 Am. Dec. 384.

Equitable title.— A judgment on a writ of entry, putting in issue the legal title only, does not bar a suit to obtain a deed of the property, in which only the equitable title is in issue. Ryder *v.* Loomis, 161 Mass. 161, 36 N. E. 836.

Trespass by real owner.— Judgment on a writ of entry for a mortgagee in fee of a tenant at will is not a bar to trespass by the owner, who was not a party to the mortgagee's action. Little *v.* Palister, 4 Me. 209.

Easement.— A tenant in a writ of entry, claiming a fee unsuccessfully under the general issue, is not estopped to claim an easement in the premises. Tyler *v.* Hammond, 11 Pick. (Mass.) 193.

93. See Ejectment, 15 Cyc. 183.

94. *Alabama.*— Southern R. Co. *v.* Cowan, 129 Ala. 577, 29 So. 985; Harper *v.* Campbell, 102 Ala. 342, 14 So. 650; Jones *v.* De Graffenreid, 60 Ala. 145; Mitchell *v.* Robertson, 15 Ala. 412; Camp *v.* Forrest, 13 Ala. 114.

Arkansas.— Dawson *v.* Parham, 55 Ark. 286, 18 S. W. 48.

California.— Calderwood *v.* Brooks, 45 Cal. 519.

Connecticut.— Bradford *v.* Bradford, 5 Conn. 127; Smith *v.* Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Comes *v.* Prior, Kirby 395.

Delaware.— Hawkins *v.* Hayes, 3 Harr. 489. But see Dean *v.* Dazey, 5 Harr. 440.

Kentucky.— Sutton *v.* Pollard, 96 Ky. 640, 29 S. W. 637, 16 Ky. L. Rep. 685; Troutman *v.* Vernon, 1 Bush 482; Speed *v.* Braxdell, 7 T. B. Mon. 568. Some other decisions in this state admit a prior judgment in ejectment to be *prima facie* evidence on the question of title, although liable to be controlled by other testimony in the case. Cecil *v.* Johnson, 11 B. Mon. 35.

Louisiana.— Kling *v.* Sejour, 4 La. Ann. 128.

Maine.— Rogers *v.* Haines, 3 Me. 362.

Maryland.— Walsh *v.* McIntire, 68 Md. 402, 13 Atl. 348; MacKenzie *v.* Renshaw, 55 Md. 299.

Missouri.— Speed *v.* St. Louis Merchants Bridge Terminal R. Co., 163 Mo. 111, 63 S. W. 393; Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; Bailey *v.* Winn, 101 Mo. 649, 12 S. W. 1045; Sutton *v.* Dameron, 100 Mo. 141, 13 S. W. 497; St. Louis *v.* Schulenberg, etc., Lumber Co., 98 Mo. 613, 12 S. W. 248; Avery *v.* Fitzgerald, 94 Mo. 207, 7 S. W. 6; Ekey *v.* Inge, 87 Mo. 493; Kimmel *v.* Benna, 70 Mo. 52; Holmes *v.* Carondelet, 38 Mo. 551; Slevin *v.* Brown, 32 Mo. 176; Drev *v.* Doyle, 28 Mo. App. 249; Hogan *v.* Smith, 11 Mo. App. 314. *Compare* Foster *v.* Evans, 51 Mo. 39. Where defend-

interfere by injunction to restrain the unsuccessful claimant from bringing further suits.[95]

(II) *Ejectment on an Equitable Title.* In some states a judgment in an action of ejectment brought to compel the payment of money or the specific performance of a contract of sale, or generally on an equitable title, or in which an equitable defense is set up, is as conclusive as any other judgment.[96]

(III) *In Action For Mesne Profits.* A recovery in ejectment is conclusive evidence, in a subsequent action of trespass for the mesne profits, as to plaintiff's right to such profits accruing after the date of the demise laid in the declaration in ejectment sets up an equitable defense, and the cause is tried, and plaintiff has judgment, such equitable defense is *res judicata*, and defendant cannot thereafter recover by a proceeding to establish his equitable title so passed on in the former suit. Preston *v.* Rickets, 91 Mo. 320, 2 S. W. 793. And a finding for plaintiff in ejectment is conclusive against defendant as to the possession. Clarkson *v.* Stanchfield, 57 Mo. 573. So in proceedings under the statute for improvements made in good faith by one against whom judgment in ejectment has been rendered, such judgment is a merger of all injuries resulting from the adverse occupancy and accruing rents and profits down to the time of obtaining possession. Lee *v.* Bowman, 55 Mo. 400.

New Jersey.— Van Blarcom *v.* Kip, 26 N. J. L. 351; Ruckelshaus *v.* Oehme, 48 N. J. Eq. 436, 22 Atl. 184. *Compare* Breckenridge *v.* Delaware, etc., R. Co., 58 N. J. Eq. 581, 43 Atl. 1097. But see Obert *v.* Obert, 10 N. J. Eq. 98, holding that a court of chancery should look at the questions which were really involved in the ejectment suit, and if the legal question as to the title, which was raised by the bill in equity, was decided by the court of law, equity should not require better proof of legal title.

New York.— King *v.* Townshend, 141 N. Y. 358, 36 N. E. 513; Jackson *v.* Wood, 3 Wend. 27; Jackson *v.* Tuttle, 9 Cow. 233; Eldridge *v.* Hill, 2 Johns. Ch. 281. See, however, Van Wyck *v.* Seward, 1 Edw. 327.

North Carolina.— Jordan *v.* Farthing, 117 N. C. 181, 23 S. E. 244; White *v.* Cooper, 53 N. C. 48.

Ohio.— Hinton *v.* McNeil, 5 Ohio 509, 24 Am. Dec. 315.

Oregon.— Spaur *v.* McBee, 19 Oreg. 76, 23 Pac. 818.

Pennsylvania.— Eichert *v.* Schaffer, 161 Pa. St. 519, 29 Atl. 393; Stevens *v.* Hughes, 31 Pa. St. 381; Ross *v.* Pleasants, 19 Pa. St. 157; Brown *v.* Nickle, 6 Pa. St. 390; Pederick *v.* Searle, 5 Serg. & R. 236; White *v.* Kyle, 1 Serg. & R. 515; Bailey *v.* Fairplay, 6 Binn. 450, 6 Am. Dec. 486; Weller *v.* Dilley, 12 Pa. Co. Ct. 84; Kennedy *v.* Whalen, 5 Kulp 35. And see Rambler *v.* Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444.

Rhode Island.— Young *v.* Smith, 10 R. I. 372.

Tennessee.— Driver *v.* White, (Ch. App. 1898) 51 S. W. 994.

Vermont.— Rider *v.* Alexander, 1 D. Chipm. 267.

Virginia.— Pollard *v.* Baylors, 6 Munf. 433; Chapman *v.* Armistead, 4 Munf. 382.

Wisconsin.— Wilson *v.* Henry, 40 Wis. 594. See Smith *v.* Pretty, 22 Wis. 655.

United States.— Merryman *v.* Bourne, 9 Wall. 592, 19 L. ed. 683; Strother *v.* Lucas, 12 Pet. 410, 9 L. ed. 1137; Henderson *v.* Griffin, 5 Pet. 151, 8 L. ed. 79.

England.— Doe *v.* Harlow, 12 A. & E. 40, 40 E. C. L. 31; Taylor *v.* Horde, 1 Burr. 114; Doe *v.* Preece, 1 Tyrw. 410. And see Lomax *v.* Ryder, 7 Bro. P. C. 145, 3 Eng. Reprint 94.

See 30 Cent. Dig. tit. "Judgment," §§ 1051, 1285.

Defenses on subsequent trial.— An attempt on a trial of ejectment to establish a certain defense will not preclude defendant on a second trial from setting up another defense. Fuller *v.* Fletcher, 44 Fed. 34. Defendant may repudiate a defense set up in first action and defeat recovery on another ground. Rice *v.* Bixler, 1 Watts & S. (Pa.) 445. Where a defendant in ejectment pleaded a general denial merely, supposing that the deed which plaintiff claimed conveyed only an undivided one half of the land and that a subsequent deed to defendant conveyed the other half, and the former deed was construed as conveying the whole, it has been decided that defendant may on the second trial set up an equitable counter-claim asking for a reformation of the deed to plaintiff to effectuate the intention of the parties apparent on the face. Green Bay, etc., Co. *v.* Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

Admissibility of former judgment.— A judgment recovered by defendant in a former ejectment is admissible in evidence against the lessor of plaintiff on the trial of a second ejectment, where the lessor of plaintiff and defendant are the same parties. Doe *v.* Seaton, 2 C. M. & R. 728, 1 Gale 303, 5 L. J. Exch. 73, Tyrw. & G. 19.

95. Miles *v.* Caldwell, 2 Wall. (U. S.) 35, 17 L. ed. 755. And see Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464.

96. Clark *v.* Bettelheim, 144 Mo. 258, 46 S. W. 135; St. Louis *v.* Schulenberg, etc., Lumber Co., 98 Mo. 613, 12 S. W. 248; Emmel *v.* Hayes, (Mo. 1889) 12 S. W. 521; Preston *v.* Rickets, 91 Mo. 320, 2 S. W. 793; Chouteau *v.* Gibson, 76 Mo. 38; Budd *v.* Finley, 151 Pa. St. 540, 25 Atl. 120; Schive *v.* Fausold, 137 Pa. St. 82, 20 Atl. 403; Nelson *v.* Nelson, 117 Pa. St. 278, 11 Atl. 61; Winpenny *v.* Winpenny, 92 Pa. St. 440; Treftz *v.* Pitts, 74 Pa. St. 343; Meyers *v.* Hill, 46

ration in ejectment.[97] But it is not evidence of the length of time defendant has been in possession.[98] In an action of trespass for mesne profits, a judgment recovered in ejectment for part of the premises is an estoppel against defendant's denial of plaintiff's interest in such portion.[99]

(IV) *Confession of Judgment in Ejectment.* In some states it is considered that the fact that a judgment in ejectment was rendered on the confession of defendant adds nothing to its conclusiveness;[1] but in Pennsylvania this circumstance alters the general rule, and makes the judgment as conclusive as one rendered in any other form of action,[2] and elsewhere a similar effect has been attributed to defendant's disclaimer of title.[3]

(V) *Statutory Provisions.* In several states statutes have been enacted providing that two concurrent verdicts and judgments for the same party in ejectment shall end the litigation and be conclusive of the title,[4] or that two successive

Pa. St. 9; Taylor *v.* Abbott, 41 Pa. St. 352; Peterman *v.* Huling, 31 Pa. St. 432; Cox *v.* Henry, 32 Pa. St. 18; Amick *v.* Oyler, 25 Pa. St. 506; Seitzinger *v.* Ridgway, 9 Watts (Pa.) 496; Sparks *v.* Walton, 4 Phila. (Pa.) 93.

This rule applies only where the action is to be regarded as practically a bill in equity, and not as a possessory ejectment at common law. Taylor *v.* Abbott, 41 Pa. St. 352. And see Weller *v.* Dilley, 12 Pa. Co. Ct. 84, 6 Kulp 499. And in order to give the judgment this effect, it must be shown distinctly that the equitable title was directly in issue and decided upon. Meyers *v.* Hill, 46 Pa. St. 9.

97. *Alabama.*— Shumake *v.* Nelm, 25 Ala. 126.

California.—Avery *v.* Contra Costa County Super. Ct., 57 Cal. 247; Clark *v.* Boyreau, 14 Cal. 634.

Kentucky.— Crockett *v.* Lashbrook, 5 T. B. Mon. 530, 17 Am. Dec. 98.

Mississippi.— Gillum *v.* Case, 71 Miss. 848, 16 So. 236; Brewer *v.* Beckwith, 35 Miss. 467.

New Jersey.— Den *v.* McShane, 13 N. J. L. 35; Mershon *v.* Williams, (Ch. 1895) 31 Atl. 778.

New York.— Leland *v.* Tousey, 6 Hill 328; Lion *v.* Burtis, 5 Cow. 408; Graves *v.* Joice, 5 Cow. 261; Hopkins *v.* McLaren, 4 Cow. 667; Jackson *v.* Randall, 11 Johns. 405; Baron *v.* Abeel, 3 Johns. 481, 3 Am. Dec. 515; Benson *v.* Matsdorf, 2 Johns. 369; Van Alen *v.* Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 113.

North Carolina.— Brothers *v.* Hurdle, 32 N. C. 490, 51 Am. Dec. 400; Poston *v.* Jones, 19 N. C. 294.

Pennsylvania.— Kille *v.* Ege, 82 Pa. St. 102; Drexel *v.* Man, 2 Pa. St. 271, 44 Am. Dec. 195; Man *v.* Drexel, 2 Pa. St. 202; Postens *v.* Postens, 3 Watts & S. 182, 38 Am. Dec. 752.

Virginia.— Whittington *v.* Christian, 2 Rand. 353.

United States.— Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. ed. 474.

England.— Aslin *v.* Parkin, 2 Burr. 665, 2 Ld. Ken. 376; Wilkinson *v.* Kirby, 15 C. B. 430, 2 C. L. R. 1387, 1 Jur. N. S. 164, 23 L. J. C. P. 224, 2 Wkly. Rep. 570, 80 E. C. L. 430; Matthew *v.* Osborne, 13 C. B. 919, 17 Jur. 696, 22 L. J. C. P. 241, 1 Wkly. Rep. 151, 76 E. C. L. 919.

98. Bailey *v.* Fairplay, 6 Binn. (Pa.) 450, 6 Am. Dec. 486.

In England, since the Common Law Procedure Act of 1852, the judgment in ejectment is not conclusive, in a subsequent action for mesne profits, of plaintiff's title from the day of the demise, but only of his title at the date of the writ. Harris *v.* Mulkern, 1 Ex. D. 31, 45 L. J. Exch. 244, 34 L. T. Rep. N. S. 99, 24 Wkly. Rep. 208.

99. Doe *v.* Langs, 9 U. C. Q. B. 676.

1. Hawkins *v.* Hayes, 3 Harr. (Del.) 489; Botts *v.* Shields, 3 Litt. (Ky.) 32.

2. Dwyer *v.* Wright, 14 Pa. Co. Ct. 406; Secrist *v.* Zimmerman, 55 Pa. St. 446. *Contra,* see Pederick *v.* Searle, 5 Serg. & R. (Pa.) 236.

Not binding on stranger.— But a judgment confessed in ejectment cannot bind a party not a defendant and holding by an independent title. King *v.* Wimley, 26 Leg. Int. (Pa.) 254.

A confession of judgment in ejectment by a tenant for years does not affect the title. Helfenstein *v.* Leonard, 50 Pa. St. 461.

3. Wootters *v.* Hall, 67 Tex. 513, 3 S. W. 725.

4. Chase *v.* Irvin, 87 Pa. St. 286; McLaughlin *v.* McGee, 79 Pa. St. 217; Union Petroleum Co. *v.* Bliven Petroleum Co., 72 Pa. St. 173; Sopp *v.* Winpenny, 68 Pa. St. 78; Woolston's Appeal, 51 Pa. St. 452 (although the statute provides that two verdicts and judgments in ejectment, between the same parties or their privies, shall be conclusive on the rights of possession claimed by the other, such fact determines nothing as to the right of property, and does not prevent one against whom two verdicts have been rendered from asserting his right to proceeds of the premises sold on foreclosure); Kinter *v.* Jenks, 43 Pa. St. 445; Hill *v.* Oliphant, 41 Pa. St. 364; Lykens *v.* Tower, 27 Pa. St. 462; Hinman *v.* Kent, 15 Pa. St. 14; Bratton *v.* Mitchell, 3 Pa. St. 44; Drexel *v.* Man, 2 Pa. St. 267; Hood *v.* Hood, 2 Grant (Pa.) 229; Treaster *v.* Fleisher, 7 Watts & S. (Pa.) 137 (to give effect to two verdicts

judgments for defendant shall bar a new ejectment upon the same title,[5] or that the defeated party shall be entitled, on payment of costs, to have the verdict set aside or the judgment vacated and a new trial granted.[6] Such a statute establishes a rule of property in lands within the state, and is binding on the federal courts sitting within the state;[7] and conversely the courts of the state will consider themselves bound by such concurrent or successive judgments in ejectment suits brought in the federal courts as would bar further proceedings if the actions had been maintained before them.[8]

(VI) *MODERN ACTIONS FOR RECOVERY OF REAL PROPERTY.* In many states the statutes have freed the action of ejectment from the fictions and artificialities of the common law which rendered the judgment inconclusive, and in others codes of practice have abolished the separate forms of action and provided a single remedy, which applies to the recovery of land as well as to any other cause of action. In either case the judgment is conclusive of all points and questions litigated and determined — of titles put in issue and tried, as well as the right of possession — and will bar any subsequent action between the same parties or their privies for the same land.[9] And the fact that by reason of lapse of time

and judgments in ejectment as a bar to another, it is necessary not only that they should have been for the same land, and between the same parties, or those claiming under them, but they must have been on the same title); Mercer *v.* Watson, 1 Watts (Pa.) 330 (a verdict and judgment for plaintiff in one action of ejectment, a verdict in favor of defendant in a second action, and the reversal of the second judgment by the supreme court are no bar to a third action of ejectment); Ives *v.* Leet, 14 Serg. & R. (Pa.) 301; Gehr *v.* Miller, 5 Pa. Cas. 365, 8 Atl. 926; Crea *v.* Hertzler, 8 Phila. (Pa.) 644 (a verdict in one action and a disclaimer in a second action involving the same land amount to two verdicts and are conclusive of the title); Evans *v.* Patterson, 4 Wall. (U. S.) 224, 18 L. ed. 393.

5. Smart *v.* Kennedy, 123 Ala. 627, 26 So. 198; Williamson *v.* Mayer, 117 Ala. 253, 23 So. 3; Carlisle *v.* Killebrew, 89 Ala. 329, 6 So. 756, 6 L. R. A. 617; Somerville *v.* Donaldson, 26 Minn. 75, 1 N. W. 808; Baze *v.* Arper, 6 Minn. 220.

6. Hammond *v.* Carter, 161 Ill. 621, 44 N. E. 274; Stafford *v.* Cronkhite, 114 Ind. 220, 16 N. E. 596; Miles *v.* Ballantine, 4 Nebr. (Unoff.) 171, 93 N. W. 708.

7. Britton *v.* Thornton, 112 U. S. 526, 5 S. Ct. 291, 28 L. ed. 816; Equator Min., etc., Co. *v.* Hall, 106 U. S. 86, 1 S. Ct. 128, 27 L. ed. 114; Miles *v.* Caldwell, 2 Wall. (U. S.) 35, 17 L. ed. 755.

8. Strayer *v.* Johnson, 110 Pa. St. 21, 1 Atl. 222.

9. *Arkansas.*— Sturdy *v.* Jackaway, 4 Wall. (U. S.) 174, 18 L. ed. 387. But see Dawson *v.* Parham, 55 Ark. 286, 18 S. W. 48.

California.— Graves *v.* Hebbron, 125 Cal. 400, 58 Pac. 12; Scott *v.* Rhodes, (1895) 41 Pac. 878; Flynn *v.* Hite, 107 Cal. 455, 40 Pac. 749; Gage *v.* Downey, 79 Cal. 140, 21 Pac. 527, 855; Phelan *v.* Tyler, 64 Cal. 80, 28 Pac. 114; Amesti *v.* Castro, 49 Cal. 325; Doyle *v.* Franklin, 40 Cal. 106; Marshall *v.* Shafter, 32 Cal. 176; Caperton *v.* Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Grady *v.* Early, 18 Cal. 108; Yount *v.* Howell, 14 Cal. 465. But see Dietz *v.* Mission Transfer Co., 95 Cal. 92, 30 Pac. 380; Coburn *v.* Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Burke *v.* Table Mountain Water Co., 12 Cal. 403. A judgment for defendant for costs on finding that plaintiff is owner and entitled to possession, and that defendant has never withheld possession, is not conclusive as to plaintiff's title. Hughes *v.* Wheeler, 76 Cal. 230, 18 Pac. 386. And where two actions are pending at the same time and between the same parties to recover possession of the same land, and in the absence of plaintiff one is tried and judgment given for defendant, and defendant then pleads the judgment as a bar in the other action, plaintiff is still entitled to have the other action tried. People *v.* De la Guerra, 43 Cal. 225. Where, during the pendency of an action of ejectment, a new plaintiff is substituted for the original one, and judgment is rendered for defendant, the substituted plaintiff is not estopped by the judgment from afterward maintaining an action on a title not derived from the original plaintiff in the first action, and which was not tried in that action. Barrett *v.* Birge, 50 Cal. 655.

Colorado.— New Dunderberg Min. Co. *v.* Old, 97 Fed. 150, 38 C. C. A. 89. But see Arnold *v.* Woodward, 14 Colo. 164, 23 Pac. 444.

Connecticut.— Kashman *v.* Parsons, 70 Conn. 295, 39 Atl. 179.

Georgia.— Parker *v.* Salmons, 113 Ga. 1167, 39 S. E. 475; Lamar *v.* Knott, 74 Ga. 379; Parker *v.* Stambaugh, 71 Ga. 735; McCurry *v.* Robinson, 23 Ga. 321; Dickerson *v.* Powell, 21 Ga. 143; Cunningham *v.* Morris, 19 Ga. 583, 65 Am. Dec. 611; Sims *v.* Smith, 19 Ga. 124. But see Ryan *v.* Fulghum, 96 Ga. 234, 22 S. E. 940; Glover *v.* Stamps, 73 Ga. 209, 54 Am. Rep. 870; Jordan *v.* Faircloth, 27 Ga. 372. A judgment recovered against a plaintiff in ejectment, who set up merely his own equitable title, is no bar to a suit by a third party for the use of

a judgment for the recovery of real property can no longer be enforced by

plaintiff in the first suit. Brooking *v.* Dearmond, 27 Ga. 58. The judgment in ejectment is not conclusive on the question of title if the jury find for plaintiff less than the fee. Lamar *v.* Knott, 74 Ga. 379; Parker *v.* Stambaugh, 71 Ga. 735; Craig *v.* Watson, 68 Ga. 114.

Illinois.— Gage *v.* Eddy, 186 Ill. 432, 57 N. E. 1030; Regan *v.* West, 115 Ill. 603, 4 N. E. 365; Barger *v.* Hobbs, 67 Ill. 592; Oetgen *v.* Ross, 54 Ill. 79. While the judgment is conclusive upon legal titles, it is not so as to an equitable title which was not set up and tried, or which could not be shown under the issues as framed. Parker *v.* Shannon, 137 Ill. 376, 27 N. E. 525; Hawley *v.* Simons, 102 Ill. 115; Smith *v.* Sheldon, 65 Ill. 219; Mills *v.* Lockwood, 42 Ill. 111. By statute in this state, the party against whom a verdict in ejectment is returned is entitled on payment of costs to have the judgment vacated and a new trial granted; and when this is done the judgment in the original action becomes wholly inoperative and the doctrine of *res judicata* does not apply. Hammond *v.* Carter, 161 Ill. 621, 44 N. E. 274.

Indiana.— Ferris *v.* Berkshire L. Ins. Co., 139 Ind. 486, 38 N. E. 609; Jarboe *v.* Severin, 112 Ind. 572, 14 N. E. 490; Millikan *v.* Werts, 14 Ind. App. 223, 42 N. E. 820. The unsuccessful party in an action of ejectment may have the judgment vacated and a new trial granted. See Stafford *v.* Cronkhite, 114 Ind. 220, 16 N. E. 596.

Iowa.— Baker *v.* Davenport First Nat. Bank, 77 Iowa 615, 42 N. W. 452; Cushing *v.* Edwards, 68 Iowa 145, 25 N. W. 940; Sobey *v.* Beiler, 28 Iowa 323.

Kansas.— Peterson *v.* Albach, 51 Kan. 150, 32 Pac. 917; Hentig *v.* Redden, 46 Kan. 231, 26 Pac. 701, 26 Am. St. Rep. 91; Challiss *v.* Atchison, 45 Kan. 22, 25 Pac. 228. See Neuber *v.* Shoel, 8 Kan. App. 345, 55 Pac. 350.

Kentucky.—Seiler *v.* Northern Bank, 86 Ky. 128, 5 S. W. 536, 9 Ky. L. Rep. 497; Gailey *v.* Tygart Val. Iron Works, (1887) 2 S. W. 503; Morris *v.* Shannon, 12 Bush 89; Troutman *v.* Vernon, 1 Bush 482; Walker *v.* Mitchell, 18 B. Mon. 541; Cecil *v.* Johnson, 11 B. Mon. 35; Myers *v.* Sanders, 8 Dana 65; Moore *v.* Wilcox, 4 Dana 532; Holcomb *v.* Combs, 76 S. W. 847, 25 Ky. L. Rep. 957. But *compare* Sutton *v.* Pollard, 96 Ky. 640, 29 S. W. 637, 16 Ky. L. Rep. 685. The rule was otherwise before the enactment of the statute of 1825. See McClain *v.* French, 3 T. B. Mon. 385. And at present a judgment for the recovery of land and for damages for being kept out of possession is no bar to an action for damages for trespasses committed by the destruction of property on the land. Burr *v.* Woodrow, 1 Bush 602; Cecil *v.* Johnson, *supra*.

Louisiana.—Fleitas *v.* Meraux, 47 La. Ann. 232, 16 So. 848; Broussard *v.* Broussard, 43 La. Ann. 921, 9 So. 910; Harvey *v.* Pflug, 37 La. Ann. 904; Davis *v.* Young, 36 La. Ann. 374; Compton *v.* Sandford, 30 La. Ann. 838; Williams *v.* Leblanc, 14 La. Ann. 757; Moore *v.* Pontalba, 13 La. 571. In this state a judgment in a possessory action, in which the right of possession of the thing in dispute is the only issue, or a recovery of damages for a disturbance of the possession is no bar nor conclusive in a petitory action, that is, one in which plaintiff puts in issue and seeks to enforce his right of property or title to the subject-matter of the action. Lafayette *v.* Holland, 18 La. 286; Jones *v.* Purvis, 9 La. 288; Esteve *v.* Rochon, 4 Mart. 481.

Minnesota.— Eide *v.* Clarke, 65 Minn. 466, 68 N. W. 98; Bazille *v.* Murray, 40 Minn. 48, 41 N. W. 238; Doyle *v.* Hallam, 21 Minn. 515.

Mississippi.— Moring *v.* Ables, 62 Miss. 253, 52 Am. Rep. 186; Gaines *v.* Kennedy, 53 Miss. 103.

Nebraska.— Van Etten *v.* Test, 64 Nebr. 407, 89 N. W. 1052.

Nevada.—Sherman *v.* Dilley, 3 Nev. 21.

New Jersey.— Van Blarcom *v.* Kip, 26 N. J. L. 351; Larison *v.* Polhemus, (Ch. 1886) 5 Atl. 129.

New York.— Dawley *v.* Brown, 79 N. Y. 390; Cagger *v.* Lansing, 64 N. Y. 417 [*affirming* 4 Hun 812]; Kelsey *v.* Ward, 38 N. Y. 83; Campbell *v.* Hall, 16 N. Y. 575; Castle *v.* Noyes, 14 N. Y. 329; Skelly *v.* Jones, 61 N. Y. App. Div. 173, 70 N. Y. Suppl. 447 [*affirming* 33 Misc. 304, 68 N. Y. Suppl. 422] (not conclusive against defendant who was not a party to the action); King *v.* Townshend, 65 Hun 567, 20 N. Y. Suppl. 602; Sheridan *v.* Andrews, 3 Lans. 129; Briggs *v.* Wells, 12 Barb. 567; Beebe *v.* Elliott, 4 Barb. 457; Shearer *v.* Field, 6 Misc. 189, 27 N. Y. Suppl. 29. Previous to the enactment of the Revised Statutes the common-law rule as to the inconclusiveness of a judgment in ejectment was followed in this state. Bates *v.* Stearns, 23 Wend. 482; Van Wyck *v.* Seward, 6 Paige 62. And see Jackson *v.* Dieffendorf, 3 Johns. 269.

North Carolina.— Benton *v.* Benton, 95 N. C. 559; Johnson *v.* Pate, 90 N. C. 334. See Jordan *v.* Farthing, 117 N. C. 181, 23 S. E. 244; Gregory *v.* Hobbs, 93 N. C. 1.

Ohio.— Hinton *v.* McNeil, 5 Ohio 509, 24 Am. Dec. 315. A defendant, relying solely on his legal title, in an action to recover real estate, and failing, is not estopped to maintain an action to correct mistakes in the deed under which the former parties plaintiff claimed. Witte *v.* Lockwood, 39 Ohio St. 141.

Oregon.— Hoover *v.* King, 43 Oreg. 281, 72 Pac. 880; Hill *v.* Cooper, 8 Oreg. 254; Collins *v.* Goldsmith, 71 Fed. 580; Fitch *v.* Cornell, 9 Fed. Cas. No. 4,834, 1 Sawy. 156. See Spaur *v.* McBee, 19 Oreg. 76, 23 Pac. 818.

South Carolina.— Duren *v.* Kee, 41 S. C. 171, 19 S. E. 492. See Hammett *v.* Farmer, 26 S. C. 566, 2 S. E. 507.

Tennessee.— Mobile, etc., R. Co. *v.* Dono-

execution will not affect its force as an estoppel against the unsuccessful party.[10]

(VII) *AFTER-ACQUIRED TITLE.* A judgment in ejectment against a party does not deprive him of the right, on acquiring a new and distinct title, to bring or defend another action for the same land on his new title, without prejudice from the former suit.[11] Thus a party against whom such a judgment is rendered, he having then only an equitable title to the land, is not estopped thereby if he afterward acquires the legal title.[12] But a title acquired pending the action will be barred by the judgment if it was not set up in the action;[13] and where a party, before the judgment, had done everything necessary to entitle him to a patent of the land, the mere fact that the patent issues to him after the suit does not create a new title in him, within the meaning of this rule, being nothing more than a confirmation of his previous title.[14]

e. Partition— (I) *CONCLUSIVENESS OF JUDGMENT IN GENERAL.* At common law, partition was a mere possessory action, not involving the title to the property, and therefore could not bar a subsequent action of a higher grade or dignity, such as a writ of right.[15] But still it was conclusive of all matters actually and

van, 104 Tenn. 465, 58 S. W. 309; Gordon *v.* Weaver, (Ch. App. 1899) 53 S. W. 740. See Maxwell *v.* King, 3 Yerg. 460; Childs *v.* Dennis, (Ch. App. 1901) 61 S. W. 1092.

Texas.— Cooper *v.* Mayfield, 94 Tex. 107, 58 S. W. 827; Terry *v.* O'Neal, 71 Tex. 592, 9 S. W. 673; Nichols *v.* Dibrell, 61 Tex. 539. In this state a statute allows a second action of ejectment to be brought, provided it is within twelve months. See Sickles *v.* Largent, 57 Tex. 164; Cassidy *v.* Kluge, 73 Tex. 155, 12 S. W. 13; Lewis *v.* San Antonio, 26 Tex. 316.

Vermont.— Hodges *v.* Eddy, 52 Vt. 434; Davis *v.* Judge, 44 Vt. 500; Hunt *v.* Payne, 29 Vt. 172, 70 Am. Dec. 402; Adams *v.* Dunklee, 19 Vt. 382; Edwards *v.* Roys, 18 Vt. 473; Parks *v.* Moore, 13 Vt. 183, 37 Am. Dec. 589; Strong *v.* Garfield, 10 Vt. 502; Marvin *v.* Dennison, 16 Fed. Cas. No. 9,180, 1 Blatchf. 159, 20 Vt. 662.

Wisconsin.— Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279. And see Webster *v.* Pierce, 108 Wis. 407, 83 N. W. 938; Wolf River Lumber Co. *v.* Brown, 88 Wis. 638, 60 N. W. 996.

Wyoming.— Graham *v.* Culver, 3 Wyo. 639, 29 Pac. 270, 30 Pac. 957, 31 Am. St. Rep. 105.

United States.— Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; Bedon *v.* Davie, 144 U. S. 142, 12 S. Ct. 665, 36 L. ed. 380; Sturdy *v.* Jackaway, 4 Wall. 174, 18 L. ed. 387; Miles *v.* Caldwell, 2 Wall. 35, 17 L. ed. 755; King *v.* Davis, 137 Fed. 198, construing Va. Code (1904), § 1414; Rachal *v.* Smith, 101 Fed. 159, 42 C. C. A. 297.

See 30 Cent. Dig. tit. "Judgment," §§ 1051, 1285.

In Ontario, since the enactment of the Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defense of *res judicata* to an action subsequently brought by defendant to try the same question. Ball *v.* Cathcart, 16 Ont. 525; Cochrane *v.* Hamilton Provident Loan Soc., 15 Ont. 128. *Compare* Clubine *v.* McMullen, 11 U. C. Q. B. 250, judgment between different parties.

10. Bazille *v.* Murray, 40 Minn. 48, 41 N. W. 238.

11. *California.*— Thrift *v.* Delaney, 69 Cal. 188, 10 Pac. 475; Murray *v.* Green, 64 Cal. 363, 28 Pac. 118; People's Sav. Bank *v.* Hodgdon, 64 Cal. 95, 27 Pac. 938; Burns *v.* Hodgdon, 64 Cal. 72, 28 Pac. 61; De Amesti *v.* Castro, 49 Cal. 325; Emerson *v.* Sansome, 41 Cal. 552; Mann *v.* Rogers, 35 Cal. 316; Mahoney *v.* Van Winkle, 33 Cal. 448.

Connecticut.— Bradford *v.* Bradford, 5 Conn. 127.

Illinois.— Hawley *v.* Simons, 102 Ill. 115.

Indiana.— Taylor *v.* McCrackin, 2 Blackf. 260.

Nevada.— Sherman *v.* Dilley, 3 Nev. 21.

New Jersey.— Hunt *v.* O'Neill, 44 N. J. L. 564.

New York.— See Bennett *v.* Couchman, 48 Barb. 73.

North Carolina.— State University *v.* Maultsby, 55 N. C. 241. See Bickett *v.* Nash, 101 N. C. 579, 8 S. E. 350.

Ohio.— Woodbridge *v.* Banning, 14 Ohio St. 328.

South Carolina.— State Bank *v.* Bridges, 11 Rich. 87.

Wisconsin.— Whitney *v.* Morrow, 36 Wis. 438; McLane *v.* Bovee, 35 Wis. 27; Whitney *v.* Nelson, 33 Wis. 365.

United States.— Merryman *v.* Bourne, 9 Wall. 592, 19 L. ed. 683; Barrows *v.* Kindred, 4 Wall. 399, 18 L. ed. 383; Northern Pac. R. Co. *v.* Smith, 69 Fed. 579, 16 C. C. A. 336. *Compare* Peyton *v.* Stith, 5 Pet. 485, 8 L. ed. 200.

See 30 Cent. Dig. tit. "Judgment," § 1052.

12. Brown *v.* Roberts, 24 N. H. 131.

13. Hentig *v.* Redden, 46 Kan. 231, 26 Pac. 701, 26 Am. St. Rep. 91.

14. Phelan *v.* Tyler, 64 Cal. 80, 28 Pac. 114; Byers *v.* Neal, 43 Cal. 210; Magwire *v.* Tyler, 40 Mo. 406.

15. *Massachusetts.*— Nash *v.* Cutler, 16 Pick. 491; Pierce *v.* Oliver, 13 Mass. 211.

necessarily involved in the suit, and hence if the title of the property came in issue, it was bound by the judgment.[16] And now in most of the states partition has ceased to be regarded as a mere possessory action, and the judgment is generally held to be conclusive upon every right or title which either of the parties presented, or might have put in issue, in the litigation.[17] It therefore establishes the title of the parties to the land partitioned, and is conclusive as to any adverse

New Jersey.— Richman *v.* Baldwin, 21 N. J. L. 395.

New York.— See Sharp *v.* Pratt, 15 Wend. 610.

Pennsylvania.— McClure *v.* McClure, 14 Pa. St. 134; Goundie *v.* Northampton Water Co., 7 Pa. St. 233.

Tennessee.— Whillock *v.* Hale, 10 Humphr. 64; Nicely *v.* Boyles, 4 Humphr. 177, 40 Am. Dec. 638.

United States.— Mallett *v.* Foxcroft, 16 Fed. Cas. No. 8,989, 1 Story 474.

See 30 Cent. Dig. tit. "Judgment," § 1286.

16. *Indiana.*— Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331; Cooter *v.* Baston, 89 Ind. 185.

Kansas.— Pennell *v.* Felch, 55 Kan. 78, 39 Pac. 1023.

Maine.— Foxcroit *v.* Barnes, 29 Me. 128.

Massachusetts.— Burghardt *v.* Van Deusen, 4 Allen 374.

Mississippi.— McAlexander *v.* Coopwood, (1899) 25 So. 488.

New York.— Ferris *v.* Fisher, 67 Hun 134, 21 N. Y. Suppl. 1114.

North Carolina.— Dixson *v.* Warters, 53 N. C. 449.

Pennsylvania.— Ihmsen *v.* Ormsby, 32 Pa. St. 198; Herr *v.* Herr, 5 Pa. St. 428, 47 Am. Dec. 416.

South Carolina.— Rabb *v.* Aiken, 2 McCord Eq. 118.

Texas.— Rice *v.* Aiken, 3 Tex. Civ. App. 143, 22 S. W. 101.

See 30 Cent. Dig. tit. "Judgment," § 1286.

17. *California.*— Lloyd *v.* Davis, 123 Cal. 348, 55 Pac. 1003; Christy *v.* Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110; Burroughs *v.* De Couts, 70 Cal. 361, 11 Pac. 734; Linehan *v.* Hathaway, 54 Cal. 251; Hancock *v.* Lopez, 53 Cal. 362; Morenhout *v.* Higuera, 32 Cal. 289.

Delaware.— Schoen *v.* McComb, 4 Houst. 213; Doe *v.* Prettyman, 1 Houst. 334; Stean *v.* Anderson, 4 Harr. 209.

Illinois.— Hicks *v.* Chapin, 67 Ill. 375; Doolittle *v.* Don Maus, 34 Ill. 457.

Indiana.— L'Hommedieu *v.* Cincinnati, etc., R. Co., 120 Ind. 435, 22 N. E. 125; Watson *v.* Camper, 119 Ind. 60, 21 N. E. 323; Fleenor *v.* Driskill, 97 Ind. 27; Crane *v.* Kimmer, 77 Ind. 215; Schee *v.* McQuilken, 59 Ind. 269; Beaver *v.* Irwin, 6 Ind. App. 285, 33 N. E. 462. See Simpson *v.* Pearson, 31 Ind. 1, 99 Am. Dec. 577.

Iowa.— Oliver *v.* Montgomery, 39 Iowa 601; Barney *v.* Miller, 18 Iowa 460; Telford *v.* Barney, 1 Greene 575.

Kentucky.— Prince *v.* Antle, 90 Ky. 138, 13 S. W. 436, 11 Ky. L. Rep. 927; Prather *v.* Prather, 29 S. W. 623, 16 Ky. L. Rep. 727; Singleton *v.* Singleton, 5 Ky. L. Rep. 420. *Compare* Benton *v.* Ragan, 11 S. W. 430, 12 S. W. 155, 11 Ky. L. Rep. 298.

Louisiana.— Choppin *v.* Union Nat. Bank, 47 La. Ann. 660, 17 So. 201; Hooke *v.* Hooke, 14 La. 22.

Maine.— By statutory provision in this state, the judgment on a petition for partition is not conclusive on an older and better title than that of the person holding by virtue of the partition. Argyle *v.* Dwinel, 29 Me. 29.

Maryland.— See Glenn *v.* Davis, 35 Md. 208, 6 Am. Rep. 389; Howard *v.* Carpenter, 11 Md. 259.

Massachusetts.— Weeks *v.* Edwards, 176 Mass. 453, 57 N. E. 701; Pierce *v.* Oliver, 13 Mass. 211; Cook *v.* Allen, 2 Mass. 462. See De Witt *v.* Harvey, 4 Gray 486.

Michigan.— Hunt *v.* Hunt, 109 Mich. 399, 67 N. W. 510; Pierson *v.* Conley, 95 Mich. 619, 55 N. W. 387.

Mississippi.— McAlexander *v.* Coopwood, (1899) 25 So. 488. See Cohea *v.* Johnson, 69 Miss. 46, 13 So. 40.

Missouri.— Bartley *v.* Bartley, 172 Mo. 208, 72 S. W. 521; Ketchum *v.* Christman, 128 Mo. 38, 30 S. W. 313; Hart *v.* Steedman, 98 Mo. 452, 11 S. W. 993; Pentz *v.* Kuester, 41 Mo. 447; Forder *v.* Davis, 38 Mo. 107. See Tyler *v.* Cartwright, 40 Mo. App. 378. A decree in partition which expressly excludes an adjudication of the right to rents is not *res judicata* in a subsequent suit for such rents. Loessing *v.* Loessing, 88 Mo. App. 494.

Nebraska.— Curtis *v.* Zutavern, 67 Nebr. 183, 93 N. W. 400.

New Hampshire.— Davis *v.* Durgin, 64 N. H. 51, 5 Atl. 908; Whittemore *v.* Shaw, 8 N. H. 393.

New York.— Parish *v.* Parish, 175 N. Y. 181, 67 N. E. 298; Masten *v.* Olcott, 101 N. Y. 152, 4 N. E. 274; Jordan *v.* Van Epps, 85 N. Y. 427; Jenkins *v.* Fahey, 73 N. Y. 355; Clapp *v.* Bromagham, 9 Cow. 530. See Meriam *v.* Harsen, 2 Barb. Ch. 232. A refusal of a motion to set aside a partition sale of land on the ground of fraud and inadequacy of price does not preclude the movant from subsequently moving to set aside the judgment in which the sale was ordered, as being rendered in violation of Code Civ. Proc. § 1533, prohibiting a sale in an action to partition land, where several persons hold vested remainders as tenants in common. Prior *v.* Hall, 13 Civ. Proc. 83.

North Carolina.— Archibald *v.* Davis, 49 N. C. 133; Mills *v.* Witherington, 19 N. C. 433.

Ohio.— Landon *v.* Payne, 41 Ohio St. 303;

claim of title or of possession on their part existing at the time of its rendition.[18] And a petitioner for partition will be barred or estopped by a judgment on a former petition, provided the parties and the titles in issue are the same.[19]

(II) *AFTER-ACQUIRED TITLE.* A new title acquired pending the proceedings in partition must be set up before the final judgment or decree,[20] but the proceeding has no effect on an independent title vesting in a party after judgment.[21]

Dabney *v.* Manning, 3 Ohio 321, 17 Am. Dec. 597. See Woodbridge *v.* Banning, 14 Ohio St. 328.

South Carolina.— McGowan *v.* Reid, 33 S. C. 169, 11 S. E. 685; Phillips *v.* Rivers, 1 S. C. 448; Barnes *v.* Cunningham, 9 Rich. Eq. 475; Reese *v.* Holmes, 5 Rich. Eq. 531; Edgerton *v.* Muse, Dudley Eq. 179.

Tennessee.— Luttrell *v.* Fisher, 11 Heisk. 101.

Texas.— Jones *v.* Lee, 86 Tex. 25, 22 S. W. 386, 1092; Pearce *v.* Jackson, 84 Tex. 515, 19 S. W. 690; De la Vega *v.* League, 64 Tex. 205; Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20; Baumbach *v.* Cook, 2 Tex. App. Civ. Cas. § 508. But see Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156; Mayo *v.* Tudor, 74 Tex. 471, 12 S. W. 117.

Vermont.—See Sowles *v.* Rugg, 65 Vt. 142, 26 Atl. 111.

Virginia.— Newberry *v.* Sheffey, 89 Va. 286, 15 S. E. 548; Bradley *v.* Zehmer, 82 Va. 685; Shanks *v.* Lancaster, 5 Gratt. 110, 50 Am. Dec. 108.

Wisconsin.— Allie *v.* Schmitz, 17 Wis. 169. See Gillett *v.* Treganza, 13 Wis. 472.

United States.— Pacific Bank *v.* Hannah, 90 Fed. 72, 32 C. C. A. 522, holding that a decree making partition of land, in a suit which was not adversary as to the title of the different parties, is not conclusive of the title of one of the parties to whom a share was allotted, as against claimants who were not parties.

See 30 Cent. Dig. tit. "Judgment," §§ 1053, 1286.

In Pennsylvania "it is settled, that partition operates merely on the lines of division, leaving the title unaffected. Where, therefore, partition is not followed by actual occupancy of the purpart, or the verdict is adverse to the demandant, there is nothing to bar a subsequent ejectment to try a disputed title." Ross *v.* Pleasants, 19 Pa. St. 157, 168. And see McClure *v.* McClure, 14 Pa. St. 134; Mitchell *v.* Harris, 4 Pa. L. J. 231.

18. *California.*— Phillips *v.* Winter, (1894) 37 Pac. 154.

Indiana.— Beaver *v.* Irwin, 6 Ind. App. 285, 33 N. E. 462.

Iowa.— Moy *v.* Moy, 111 Iowa 161, 82 N. W. 481.

Louisiana.— Choppin *v.* Union Nat. Bank, 47 La. Ann. 660, 17 So. 201.

Missouri.— Bobb *v.* Graham, 89 Mo. 200, 1 S. W. 90.

Texas.— Pearce *v.* Jackson, 84 Tex. 515, 19 S. W. 690.

See 30 Cent. Dig. tit. "Judgment," §§ 1053, 1286.

Compare, however, Grice *v.* Randall, 23 Vt. 239, holding that a decree partitioning real estate among heirs or devisees is only conclusive as to the matter of division among them of whatever estate exists which they have a right to have thus divided, and has no effect on the question as to the title of the land.

Only severs unity of possession.— While the judgment is conclusive as to the title under which the parties hold in common, it does not invest them with any new title, or have the effect of changing their title, its only legal effect being to sever the unity of possession. Christy *v.* Spring Valley Water-Works, 68 Cal. 73, 8 Pac. 849; Fleenor *v.* Driskill, 97 Ind. 27. Hence a judgment in partition, assigning a share in the land to one for life, who is really seized of the share in fee simple, gives the share in fee, having the effect merely to part the land, without otherwise affecting the title, unless an issue had been made and directly decided as to the title. Kenney *v.* Phillipy, 91 Ind. 511.

Equitable titles.— In some states it is held that a judgment in partition is not conclusive as to an equitable claim or title of one of the parties, unless it was actually set up and litigated, and under some systems this cannot be done, the action being concerned only with legal titles. Louvalle *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161; Esterbrook *v.* Savage, 21 Hun (N. Y.) 145.

As to tenancy in common.— A judgment of partition is conclusive on the parties and their privies that they were tenants in common of land set off to the petitioner as well as of a spring situated on the same. Edson *v.* Munsell, 12 Allen (Mass.) 600.

Homestead.— In an action for partition by a divorced wife against the husband, the question as to whether the land is the homestead of defendant and his family, and therefore not subject to partition, is within the issues, and a decree for plaintiff is conclusive against defendant on this point. Rice *v.* Aiken, 3 Tex. Civ. App. 143, 22 S. W. 101.

Rights of purchaser at partition sale.— A purchaser of land from one deriving title under a partition sale is not bound to look behind the decree to ascertain whether the commissioners' report that the land was not susceptible of division was procured by fraud, or whether the land was sold for an adequate price; he may rely on the decree as conclusive until it is set aside or reversed. Hunter *v.* Stoneburner, 92 Ill. 75.

19. Colton *v.* Smith, 11 Pick. (Mass.) 311, 22 Am. Dec. 375.

20. Phillips *v.* Winter, (Cal. 1894) 37 Pac. 154; Christy *v.* Spring Valley Water-Works, 84 Cal. 541, 24 Pac. 307, 97 Cal. 21, 31 Pac. 1110; Holladay *v.* Langford, 87 Mo. 577.

21. Thorp *v.* Hanes, 107 Ind. 324, 6 N. E.

(III) *Parties Bound by Partition.* A judgment in partition is conclusive upon all persons having any interest who were made parties to the proceeding,[22] including persons summoned by publication only,[23] persons only cited as "unknown owners,"[24] infants and married women,[25] and those having contingent or expectant interests or possibilities, even though not *in esse*, if represented on the record by the person entitled to the first estate of inheritance.[26]

f. Trespass — (I) *In General.* A judgment in trespass does not necessarily settle anything beyond the particular facts of the trespass sued for. It is conclusive of whatever was actually litigated and determined;[27] but so far as concerns the land itself, this generally includes nothing more than the right of possession,[28] so that the judgment is not conclusive upon the title to the premises,[29] unless the title of one or both of the parties was actually put in issue and tried and adjudi-

920; Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52; Elston *v.* Piggott, 94 Ind. 14; Case *v.* Mitzenburg, 109 Mo. 311, 19 S. W. 40; Bobb *v.* Graham, 15 Mo. App. 289.

22. Foxcroft *v.* Barnes, 29 Me. 128; Jenkins *v.* Fahey, 73 N. Y. 355; Blakely *v.* Calder, 13 How. Pr. (N. Y.) 476; Vensel's Appeal, 77 Pa. St. 71.

Strangers.— A decree of partition is not *res judicata* on the question of title as against claimants or other persons who were strangers to the partition suit. Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; Pacific Bank *v.* Hannah, 90 Fed. 72, 32 C. C. A. 522. But see Hassett *v.* Ridgely, 49 Ill. 197, holding that a judgment of a proper court making partition, although a part of the tenants in common may not have been made parties, is color of title, and where the other requirements of the statute have been complied with may be effectually interposed as a bar.

Mortgagee.— A judgment of partition on a petition by one tenant in common against a cotenant, who has mortgaged his interest in the land, is not binding on the mortgagee if he is not made a party to the suit, and does not elect to confirm the partition. Lewis *v.* Atkinson, 15 Iowa 361, 83 Am. Dec. 417; Colton *v.* Smith, 11 Pick. (Mass.) 311, 22 Am. Dec. 375.

23. Rogers *v.* Tucker, 7 Ohio St. 417.

In Iowa persons so summoned are entitled within a limited time to have the judgment set aside and a new trial granted. Fleming *v.* Hutchinson, 36 Iowa 519.

24. Cook *v.* Allen, 2 Mass. 462; Guyer *v.* Raymond, 8 Misc. (N. Y.) 606, 29 N. Y. Suppl. 395; Kane *v.* Rock River Canal Co., 15 Wis. 179. See also *supra*, XIV, B, 2, d.

25. Grantham *v.* Kennedy, 91 N. C. 148. See also *supra*, XIV, B, 1, d.

26. Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163; Gaskell *v.* Gaskell, 6 Sim. 643, 9 Eng. Ch. 643, 58 Eng. Reprint 735; Wills *v.* Slade, 6 Ves. Jr. 498, 31 Eng. Reprint 1163. And see Goodess *v.* Williams, 7 Jur. 1123, 2 Y. & Coll. 595, 63 Eng. Reprint 266. See also *supra*, XIV, B, 3, h.

In New York this is true only when the judgment provides for and protects such interests, by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests. Monarque *v.* Monarque, 80 N. Y. 320. And see Mead *v.* Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Nodine *v.* Greenfield, 7 Paige 544, 34 Am. Dec. 363; Cheesman *v.* Thorne, 1 Edw. 629.

27. *Delaware.*— Nivin *v.* Stevens, 5 Harr. 272.

Kentucky.—Walker *v.* Leslie, 90 Ky. 642, 14 S. W. 682, 12 Ky. L. Rep. 581.

Massachusetts.— Morse *v.* Marshall, 97 Mass. 519.

New Hampshire.—Smith *v.* Smith, 50 N. H. 212.

Tennessee.—Warwick *v.* Underwood, 3 Head 238, 75 Am. Dec. 767.

Wisconsin.— Dick *v.* Webster, 6 Wis. 481.

Canada.— See Leinster *v.* Stabler, 17 U. C. C. P. 532.

See 30 Cent. Dig. tit. "Judgment," §§ 1054, 1287.

Right of entry.— If issued is joined upon the particular question of a right of entry in the land at the time of the alleged trespass, the judgment will prove the same point in a subsequent action of trespass between the same parties concerning the same land. Pleak *v.* Chambers, 7 B. Mon. (Ky.) 565.

28. Parker *v.* Hotchkiss, 25 Conn. 321; Steam *v.* Anderson, 4 Harr. (Del.) 209; Illinois, etc., R., etc., Co. *v.* Cobb, 82 Ill. 183; White *v.* Chase, 128 Mass. 158.

29. *California.*— Millett *v.* Lagomarsino, (1894) 38 Pac. 308.

Connecticut.— Carver *v.* Staples, 52 Conn. 21.

Indiana.— Sharkey *v.* Evans, 46 Ind. 472.

Kentucky.— Rice *v.* West, 42 S. W. 116, 19 Ky. L. Rep. 832.

Maine.— Morrison *v.* Clark, 89 Me. 103, 35 Atl. 1034, 56 Am. St. Rep. 395.

Massachusetts.— Morse *v.* Marshall, 97 Mass. 519; Wade *v.* Lindsey, 6 Metc. 407; Standish *v.* Parker, 2 Pick. 20, 13 Am. Dec. 393.

Michigan.— Keyser *v.* Sutherland, 59 Mich. 455, 26 N. W. 865.

New Hampshire.— Hunter *v.* Carroll, 67 N. H. 262, 29 Atl. 639.

New York.— Masten *v.* Olcott, 101 N. Y. 152, 4 N. E. 274.

Pennsylvania.— Holloway *v.* Jones, 143 Pa. St. 564, 22 Atl. 710.

Tennessee.— Cherry *v.* York, (Ch. App. 1898) 47 S. W. 184.

cated.[30] According to some of the decisions the title, to make the judgment conclusive upon it, must have been put in issue by a plea of *liberum tenementum* or some other equivalent plea,[31] but others hold it sufficient if the title was actually tried and determined, although it may have arisen upon the general issue.[32] It is also a rule in the action of trespass that plaintiff must recover in one action all the damages, present and prospective, to which he may be entitled, so that one judgment in his favor in such action will bar any further suit for claims or items of damage which might have been set up and made the basis of a recovery in the first suit.[33]

(11) *Judgment in Trespass as Evidence in Subsequent Real Action.* In some states it is held that a judgment in an action of trespass will not be a bar to a subsequent ejectment or other action for the recovery of the land itself;[34] in others such judgment will be conclusive evidence of title in a real action between

See 30 Cent. Dig. tit. "Judgment," §§ 1054, 1287.

30. *California.*— Bosquett *v.* Crane, 51 Cal. 505. A judgment in a suit by two for a trespass alleged to be on firm property is conclusive as to the joint ownership in a subsequent proceeding by defendant to set off against it a debt due from one plaintiff individually. Collins *v.* Butler, 14 Cal. 223.

Colorado.—Williams *v.* Hacker, 16 Colo. 113, 26 Pac. 143.

Illinois.— Illinois, etc., R., etc., Co. *v.* Cobb, 82 Ill. 183; Rhoads *v.* Metropolis, 36 Ill. App. 123.

Indiana.— Campbell *v.* Cross, 39 Ind. 155.

Maine.— Merrill *v.* Stowe, (1886) 3 Atl. 649; Chick *v.* Rollins, 44 Me. 104.

Massachusetts.—White *v.* Chase, 128 Mass. 158; Johnson *v.* Morse, 11 Allen 540; Sawyer *v.* Woodbury, 7 Gray 499, 66 Am. Dec. 518; Dutton *v.* Woodman, 9 Cush. 255, 57 Am. Dec. 46; Eastman *v.* Cooper, 15 Pick. 276, 26 Am. Dec. 600. See Worcester *v.* Green, 2 Pick. 425.

New Jersey.— See Richmond *v.* Hays, 3 N. J. L. 492.

New York.— Dunckel *v.* Wiles, 11 N. Y. 420; Fritz *v.* Tompkins, 39 N. Y. App. Div. 73, 56 N. Y. Suppl. 847; Burt *v.* Sternburgh, 4 Cow. 559, 15 Am. Dec. 402.

Pennsylvania.— Stevens *v.* Hughes, 31 Pa. St. 381.

Rhode Island.— Schæffer *v.* Brown, 23 R. I. 364, 50 Atl. 640; Providence *v.* Adams, 11 R. I. 190.

South Carolina.— Parker *v.* Leggett, 13 Rich. 171; Thomas *v.* Geiger, 2 Nott & M. 528.

Vermont.—Atwood *v.* Robbins, 35 Vt. 530; Small *v.* Haskins, 26 Vt. 209.

England.— Outram *v.* Morewood, 3 East 346, 7 Rev. Rep. 473.

Canada.— Hunter *v.* Birney, 27 Grant Ch. (U. C.) 204.

See 30 Cent. Dig. tit. "Judgment," §§ 1054, 1287.

Defendant's plea of freehold.— Where defendant pleads soil and freehold, setting forth his claim by metes and bounds, and there is a verdict upon that plea in his favor, the record is conclusive evidence of his title in a subsequent action of trespass to try title brought by him against plaintiff for the land included in the plea. Parker *v.* Leggett, 13 Rich. 171. *Compare* Kimball *v.* Hilton, 92 Me. 214, 42 Atl. 394. Where plaintiff brought an action of trespass, to which defendant pleaded the general issue and *liberum tenementum*, which issues were found for plaintiff, it was held that, in an action of ejectment brought by the same plaintiff against the same defendant for the same land, the former finding did not estop defendant from denying plaintiff's title, for that title was not put in issue by the pleadings in the trespass case, but only defendant's title. Stokes *v.* Straley, 50 N. C. 377.

31. *Delaware.*— Cann *v.* Warren, 1 Houst. 188.

Maine.— Young *v.* Pritchard, 75 Me. 513.

Massachusetts.— Standish *v.* Parker, 2 Pick. 20, 13 Am. Dec. 393. And see Stapleton *v.* Dee, 132 Mass. 279.

New Hampshire.—Potter *v.* Baker, 19 N. H. 166.

New York.— Dunckle *v.* Wiles, 5 Den. 296.

Pennsylvania.— Stevens *v.* Hughes, 31 Pa. St. 381.

See 30 Cent. Dig. tit. "Judgment," § 1287.

32. Shettlesworth *v.* Hughey, 9 Rich. (S. C.) 387. And see Parker *v.* Hotchkiss, 25 Conn. 321; Rhoads *v.* Metropolis, 144 Ill. 580, 33 N. E. 1092, 36 Am. St. Rep. 468.

33. McGillis *v.* Willis, 39 Ill. App. 311; Swantz *v.* Muller, 27 Ill. App. 320; Goodrich *v.* Yale, 8 Allen (Mass.) 454; Pierro *v.* St. Paul, etc., R. Co., 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673; Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583. See also Illinois, etc., R., etc., Co. *v.* Cobb, 82 Ill. 183. And see *supra*, XIII, D, 5, e, f.

34. Kimball *v.* Hilton, 92 Me. 214, 42 Atl. 394; Keyser *v.* Sutherland, 59 Mich. 455, 26 N. W. 865.

In Pennsylvania a judgment in an action of trespass *quare clausum*, on a plea of not guilty and *liberum tenementum*, is not conclusive in a subsequent action of ejectment for the same land. McKnight *v.* Bell, 135 Pa. St. 358, 19 Atl. 1036; Sabins *v.* McGhee, 36 Pa. St. 453; Kerr *v.* Chess, 7 Watts 367; Calhoun *v.* Dunning, 4 Dall. 120, 1 L. ed. 767. But *compare* Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

In Massachusetts it is held that where the trial of an action of trespass turns upon the

the same parties, or a bar to its maintenance, if the question of title was actually in issue and adjudicated in the action of trespass,[35] but not otherwise.[36]

g. Trespass to Try Title. This statutory form of action is intended to afford the means for a complete determination of disputed questions of title to realty, and therefore the judgment is generally held to be final and conclusive on the losing party,[37] and also on the successful party, in so far as that he is entitled to recover rents or mesne profits, if any, and if he neglects to claim them, he will be barred from suing for them afterward.[38] But in those jurisdictions in which this action is merely an allowable substitute for ejectment, the judgment has no greater force than one rendered in an action in the latter form.[39]

h. Action to Quiet Title. In this form of action all matters affecting the title of the parties to the action may be litigated and determined, and the judgment is final and conclusive,[40] and cuts off all claims or defenses of the losing party, going

question of title, and the title is put in issue and passed upon, the judgment is competent evidence of title in a subsequent writ of entry between the same parties, but not conclusive by way of estoppel. White *v.* Chase, 128 Mass. 158; Johnson *v.* Morse, 11 Allen 540; Sawyer *v.* Woodbury, 7 Gray 499, 66 Am. Dec. 518; Arnold *v.* Arnold, 17 Pick. 4; Eastman *v.* Cooper, 15 Pick. 276, 26 Am. Dec. 600.

35. *Indiana.*— Campbell *v.* Cross, 39 Ind. 155.

Kentucky.— Moran *v.* Vickroy, 117 Ky. 195, 77 S. W. 668, 25 Ky. L. Rep. 1305.

New Hampshire.— Moran *v.* Mansur, 63 N. H. 377.

New York.—Dunckle *v.* Wiles, 6 Barb. 515; McKnight *v.* Dunlop, 4 Barb. 36; Masten *v.* Olcott, 60 How. Pr. 105; Rice *v.* King, 7 Johns. 20.

South Carolina.— Parker *v.* Leggett, 13 Rich. 171.

See 30 Cent. Dig. tit. "Judgment," §§ 1054, 1287.

36. Hargus *v.* Goodman, 12 Ind. 629; Hunter *v.* Carroll, 67 N. H. 262, 29 Atl. 639; Central Baptist Church *v.* Manchester, 21 R. I. 357, 43 Atl. 845.

37. Farmer *v.* Miller, 5 Rich. (S. C.) 480; Henderson *v.* Kenner, 1 Rich. (S. C.) 474 (where the general issue alone is pleaded, a verdict for defendant is not conclusive, but only *prima facie* evidence against plaintiff on the question of title); Dyson *v.* Leek, 5 Strobh. (S. C.) 141; Caston *v.* Perry, 1 Bailey (S. C.) 533, 21 Am. Dec. 482; Bradley *v.* McBride, Rich. Eq. Cas. (S. C.) 202 (a recovery in trespass to try title, based on a title acquired under a sheriff's sale, is no bar to a bill brought by defendant to set aside the sale); Fisk *v.* Miller, 20 Tex. 579; Allen *v.* Foster, 32 Tex. Civ. App. 332, 74 S. W. 800; Birdseye *v.* Schaeffer, (Tex. Civ. App. 1900) 57 S. W. 987; Zapeda *v.* Rahm, 19 Tex. Civ. App. 648, 48 S. W. 212; New York, etc., Land Co. *v.* Votaw, 16 Tex. Civ. App. 585, 42 S. W. 138; Cotton *v.* Jones, (Tex. Civ. App. 1894) 27 S. W. 191; Wallis *v.* Wofford, (Tex. Civ. App. 1894) 26 S. W. 739. And see Stephens *v.* Motl, 82 Tex. 81, 18 S. W. 99; Manius *v.* Petri, (Tex. Civ. App. 1900) 58 S. W. 733. But see Sanchez *v.* Ramirez, 58 Tex. 310; Hall *v.* Wooters, 54 Tex. 231; Edgar *v.* Galveston City Co., 46 Tex. 421, all holding that under the earlier statutes in this state a defeated plaintiff in this form of action was entitled as of right to bring a second suit to try the same title.

After-acquired title.—Judgment in trespass to try title is conclusive only on the particular title put in issue and adjudicated, and therefore does not bar a new action on an after-acquired title. State Bank *v.* Bridges, 11 Rich. (S. C.) 87.

Title not adjudicated.— Where the action is trespass to try title and for partition, and defendant does not dispute the title, but defends only against the trespass and partition, a judgment in his favor does not bar plaintiff from again asserting title, because it shows on its face that the title was not adjudicated. Brown *v.* Reed, 20 Tex. Civ. App. 74, 48 S. W. 537. So where the record shows a judgment in favor of plaintiff because defendant in possession was plaintiff's tenant, and therefore estopped to deny his title, such judgment is no bar to a subsequent action by the other defendants against plaintiff to recover the same land. Linberg *v.* Finks, 7 Tex. Civ. App. 391, 25 S. W. 789.

Extent of estoppel.— The judgment in this action is *res judicata* only as to the particular land in issue, although plaintiff's claim thereto is based on his claim to a larger tract including it. Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

38. Coleman *v.* Parish, 1 McCord (S. C.) 264; Lehie *v.* Sumter, 1 Treadw. (S. C.) 102; Edings *v.* Whaley, 1 Rich. Eq. (S. C.) 301. And see Rackley *v.* Fowlkes, 89 Tex. 613, 36 S. W. 77.

39. Shumake *v.* Nelms, 25 Ala. 126; Mitchell *v.* Robertson, 15 Ala. 412; Camp *v.* Forrest, 13 Ala. 114. And see Rice *v.* West, 42 S. W. 116, 19 Ky. L. Rep. 832.

40. *California.*— San Francisco *v.* Itsell, 80 Cal. 57, 22 Pac. 74. See Fulton *v.* Hanlow, 20 Cal. 450.

Colorado.—Gordon *v.* Johnson, 3 Colo. App. 139, 32 Pac. 347.

Georgia.— Dickerson *v.* Powell, 21 Ga. 143.

Indiana.— Skelton *v.* Sharp, 161 Ind. 383, 67 N. E. 535; Morarity *v.* Calloway, 134 Ind. 503, 34 N. E. 226; Hall *v.* Craig, 125 Ind. 523, 25 N. E. 538; Davis *v.* Lennen, 125 Ind. 185, 24 N. E. 885; Indiana, etc., R. Co. *v.* Allen, 113 Ind. 308, 15 N. E. 451, 3 Am.

to show title in himself, from whatever source derived, and which existed at the time of the suit, whether pleaded therein or not.[41]

i. Forcible Entry and Detainer.[42] The immediate right of possession is all that is generally involved in this action, and therefore the judgment cannot be pleaded in bar of an action of ejectment or trespass, or of a suit to quiet title or foreclose a lien.[43] But the judgment is conclusive of all points or questions actually put in issue and determined,[44] including the right of possession of the

St. Rep. 650; Farrar *v.* Clark, 97 Ind. 447; Puterbaugh *v.* Puterbaugh, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611. See Muffley *v.* Turner, 141 Ind. 580, 40 N. E. 913.

Iowa.— Reed *v.* Douglas, 74 Iowa, 244, 37 N. W. 181, 7 Am. St. Rep. 476; Hackworth *v.* Zollars, 30 Iowa 433.

Kansas.— Oldham *v.* Stephens, 45 Kan. 369, 25 Pac. 863; Marion County *v.* Welch, 40 Kan. 767, 20 Pac. 483; Utley *v.* Fee, 33 Kan. 683, 7 Pac. 555.

Michigan.— Hanchett *v.* Auditor-Gen., 124 Mich. 424, 83 N. W. 103.

Minnesota.— Doyle *v.* Hallam, 21 Minn. 515.

New York.— Boylston *v.* Wheeler, 2 Hun 622.

North Carolina.— Bryan *v.* Alexander, 111 N. C. 142, 15 S. E. 1031.

Ohio.— Desnoyers *v.* Dennison, 19 Ohio Cir. Ct. 320, 10 Ohio Cir. Dec. 430.

Washington.— Griffin *v.* Warburton, 23 Wash. 231, 62 Pac. 765.

Wisconsin.— Smith *v.* Chicago, etc., R. Co., 83 Wis. 271, 50 N. W. 497, 53 N. W. 559.

United States.— San Francisco *v.* Le Roy, 138 U. S. 656, 11 S. Ct. 364, 34 L. ed. 1096; Woolworth *v.* Root, 40 Fed. 723; Starr *v.* Stark, 22 Fed. Cas. No. 13,316, 1 Sawy. 270.

See 30 Cent. Dig. tit. "Judgment," §§ 1056, 1289.

41. Hackworth *v.* Zollars, 30 Iowa 433; Marion County *v.* Welch, 40 Kan. 767, 20 Pac. 483; Burton *v.* Huma, 37 Fed. 738.

42. See FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1174 *et seq.*

43. *Alabama.*—Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604; Abrams *v.* Watson, 59 Ala. 524; Belshaw *v.* Moses, 49 Ala. 283.

Arizona.— Bishop *v.* Perrin, 4 Ariz. 190, 35 Pac. 1059.

California.—Millett *v.* Lagomarsino, (1894) 38 Pac. 308; Fish *v.* Benson, 71 Cal. 428, 12 Pac. 454.

Florida.— Walls *v.* Endel, 20 Fla. 86.

Illinois.— Lancaster *v.* Snow, 184 Ill. 534, 56 N. E. 813; Vahle *v.* Brackenseik, 145 Ill. 231, 34 N. E. 524; Riverside Co. *v.* Townshend, 120 Ill. 9, 9 N. E. 65; Cochran *v.* Fogler, 116 Ill. 194, 5 N. E. 383; Equitable Trust Co. *v.* Fisher, 106 Ill. 189.

Indiana.— Buntin *v.* Duchane, 1 Blackf. 26.

Iowa.— McDonald *v.* Lightfoot, Morr. 450.

Kansas.— Redden *v.* Tefft, 48 Kan. 302, 29 Pac. 157; Deisher *v.* Gehre, 45 Kan. 583, 26 Pac. 3; Soden *v.* Roth, 9 Kan. App. 826, 61 Pac. 500.

Kentucky.— Swanson *v.* Smith, 117 Ky. 116, 77 S. W. 700, 25 Ky. L. Rep. 1260; Mattox *v.* Helm, 5 Litt. 185, 15 Am. Dec. 64; Fain *v.* Miles, 60 S. W. 939, 22 Ky. L. Rep. 1584.

Maine.— Linnell *v.* Lyford, 72 Me. 280.

Minnesota.— Goenen *v.* Schroeder, 18 Minn. 66.

Mississippi.— Richardson *v.* Callihan, 73 Miss. 4, 19 So. 95.

Missouri.— Harvie *v.* Turner, 46 Mo. 444; Carter *v.* Scaggs, 38 Mo. 302; Williams *v.* Newcomb, 16 Mo. App. 185; Wanborg *v.* Karst, 4 Mo. App. 563.

Ohio.— Gladwell *v.* Hume, 18 Ohio Cir. Ct. 845, 9 Ohio Cir. Dec. 767.

Texas.— House *v.* Reavis, 89 Tex. 626, 35 S. W. 1063; Westmoreland *v.* Richardson, 2 Tex. Civ. App. 175, 21 S. W. 167. See Rankin *v.* Hooks, (Civ. App. 1904) 81 S. W. 1005.

United States.— Peyton *v.* Stith, 5 Pet. 485, 8 L. ed. 200; People's Pure Ice Co. *v.* Trumbull, 70 Fed. 166, 17 C. C. A. 43.

See 30 Cent. Dig. tit. "Judgment," § 1291.

44. St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384, 54 Am. Rep. 243.

Relation of landlord and tenant.— Where forcible entry and detainer is brought to recover possession of leased premises, the judgment is conclusive of the relation of landlord and tenant between the parties, of the expiration of the term on a certain date, and of a wrongful holding over. Norwood *v.* Kirby, 70 Ala. 397; Champ Spring Co. *v.* B. Roth Tool Co., 96 Mo. App. 518, 70 S. W. 506. But see Keating *v.* Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544.

Rents.— It is generally held, however, that the judgment is no evidence as to the amount of rent claimed to be due, or that plaintiff has any right to recover rents. Keating *v.* Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; Shunick *v.* Thompson, 25 Ill. App. 619; Casey *v.* McFalls, 3 Sneed (Tenn.) 115; Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354. But *compare* Simmons *v.* Taylor, 91 Tenn. 363, 18 S. W. 867.

Ownership of crop.— A judgment for the possession of land, rendered in an action of forcible detainer, is not conclusive as to the ownership of a crop planted on the land before the action was commenced and grown during the pendency thereof. McKean *v.* Smoyer, 37 Nebr. 694, 56 N. W. 492. But one claiming possession of land as tenant cannot recover of the alleged landlord for conversion of a crop planted after judgment for the landlord in an action of forcible entry and detainer. Rankin *v.* Hooks, (Tex. Civ. App. 1904) 81 S. W. 1005.

premises,[45] and will bar a second action of the same kind between the same parties, provided it be shown that the cause of action is the same.[46]

j. Recovery of Possession Against Tenant. Judgment in a summary proceeding by a landlord to evict the tenant and recover possession is conclusive of the relation of landlord and tenant, including questions as to the existence and validity of the lease, its alleged cancellation or renewal, the amount of rent in arrear, and the landlord's right to regain possession.[47] But it is not conclusive on any questions concerning the title to the premises.[48] A judgment recovered in the action for "use and occupation" is admissible in evidence against defendant, on the trial of a writ of entry brought against him by plaintiff in the former action to recover possession of the same land, although probably not conclusive.[49]

k. Suit to Enforce Lien. A judgment rendered in an action to enforce a lien against land, such as a vendor's lien or a mechanic's lien, may be conclusive on questions concerning the title to the premises, if such questions were brought into issue and determined,[50] but not otherwise.[51] It does not bar an after acquired title,[52] nor is it conclusive on other claimants, as to the priority of the lien foreclosed, or the amount due thereon, unless they were made parties to the action.[53]

l. Mortgage Foreclosure. The judgment in a foreclosure suit is conclusive of all questions actually tried and determined or necessarily involved in the adjudication,[54] including questions concerning the title to the premises if they were

45. Brady *v.* Huff, 75 Ala. 80; Mitchell *v.* Davis, 23 Cal. 381; Bradley *v.* West, 68 Mo. 69; Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544.

46. Merrin *v.* Lewis, 90 Ill. 505. But see Ullman *v.* Herzberg, 91 Ala. 458, 8 So. 408, holding that a judgment for possession of the premises in an action of unlawful detainer is no bar to a subsequent action to recover a statutory penalty for the same detainer.

47. Monteith *v.* Gehrig, 43 Ill. App. 465; Reich *v.* Cochran, 151 N. Y. 122, 45 N. E. 367, 56 Am. St. Rep. 607, 37 L. R. A. 805; Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301; Nemetty *v.* Naylor, 100 N. Y. 562, 3 N. E. 497; Grafton *v.* Brigham, 70 Hun (N. Y.) 131, 24 N. Y. Suppl. 54; Kelsey *v.* Murray, 49 Barb. (N. Y.) 231; McCotter *v.* Flinn, 30 Misc. (N. Y.) 119, 61 N. Y. Suppl. 786; Provost *v.* Donohue, 3 N. Y. Suppl. 299; McClelland *v.* Patterson, 4 Pa. Cas. 264, 10 Atl. 475; Racke *v.* Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167, 42 S. W. 774; Hammer *v.* Woods, 6 Tex. Civ. App. 179, 24 S. W. 942. *Compare* Boller *v.* New York, 40 N. Y. Super. Ct. 523. But see Chamberlain *v.* Hopper, 34 N. J. L. 220. See also *supra*, XIV, A, 3, d.

In the action of formedon in the descender, a judgment that the tenant recover his costs is a bar to an action of entry *sur* disseizin, for the same lands, against the heir of such tenant. Kent *v.* Kent, 2 Mass. 338.

In an action on notes given for rent, a finding that previous summary proceedings brought by the lessor against the tenant, and the judgment therein, were for the recovery of possession of the property and damages for the detention thereof, will not support a conclusion that the notes were merged in such judgment. Campbell *v.* Nixon, 2 Ind. App. 463, 28 N. E. 107.

Identity of lessee.— Summary proceedings for the possession of demised property being against the person in possession or claiming possession, the landlord is not precluded by such proceedings from showing a different person to have been in fact his lessee. La Farge *v.* Park, 1 Edm. Sel. Cas. (N. Y.) 223.

Taxes.— Judgment for possession of the leased premises and for one year's rent will not bar a subsequent suit for taxes which the lessee was bound to pay. Schuricht *v.* Broadwell, 4 Mo. App. 160.

Crops.— A judgment for the possession of land worked on shares does not bar an action to recover the lessee's portion of the crops. Stancer *v.* Roe, 55 Mich. 169, 20 N. W. 889.

48. Abdil *v.* Abdil, 33 Ind. 460; Huyghe *v.* Brinkman, 34 La. Ann. 1179; Kenniston *v.* Hannaford, 58 N. H. 28.

49. Cobb *v.* Arnold, 12 Metc. (Mass.) 39; Jones *v.* Reynolds, 7 C. & P. 355, 32 E. C. L. 642. And see Hurley *v.* Lamoreaux, 29 Minn. 138, 12 N. W. 447. *Compare* Finnegan *v.* Campbell, 74 Iowa 158, 37 N. W. 127.

50. Willis *v.* Smith, 72 Tex. 565, 10 S. W. 683.

51. Shryock *v.* Hensel, 95 Md. 614, 53 Atl. 412; Gibson *v.* Miln, 1 Nev. 526.

52. Flandreau *v.* Downey, 23 Cal. 354.

53. Crosby *v.* Winter, 54 Iowa 652, 7 N. W. 89; Southard *v.* Smith, 8 S. D. 230, 66 N. W. 316.

54. Clark *v.* Boyreau, 14 Cal. 634. See, generally, MORTGAGES.

Validity and due execution of mortgage.— Morris *v.* Winkles, 88 Ga. 717, 15 S. E. 747; Northern Trust Co. *v.* Crystal Lake Cemetery Assoc., 67 Minn. 131, 69 N. W. 708; Finley *v.* Houser, 22 Oreg. 562, 30 Pac. 494; Black *v.* Caldwell, 83 Fed. 880.

Power of mortgagor to execute. — Craighead *v.* Dalton, 105 Ind. 72, 4 N. E. 425.

made actual issues in the case and passed upon.[55] It is also conclusive upon all who were parties to the proceeding,[56] including other mortgagees, whether senior or junior to plaintiff, and other lien claimants, if they were joined as parties, although not otherwise;[57] but not upon general creditors of the mortgagor, except in so far as their interests came into controversy, and then only if they were parties to the record or represented.[58]

m. Proceeding For Dower. In an action for dower in the lands of a decedent,

Description of premises in mortgage.— Stevens *v.* Overturf, 62 Ind. 331.

Amount remaining due.— Sibley *v.* Alba, 95 Ala. 191, 10 So. 831; Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200; Roswell *v.* Simonton, 2 Ind. 516; Kloke *v.* Gardels, 52 Nebr. 117, 71 N. W. 955.

Right to redeem.— Allen *v.* Allen, 106 Cal. 137, 39 Pac. 436; Benton *v.* O'Fallon, 8 Mo. 650.

Disposition of proceeds.— McWilliams *v.* Morrell, 23 Hun (N. Y.) 162.

Liability of mortgagor for deficiency.— Ward *v.* Obenauer, 119 Mich. 17, 77 N. W. 305.

Merger of lien.— Where a mortgagee obtains judgment in a foreclosure proceeding under the statute, his lien as a mortgagee does not become merged in the judgment. Riley *v.* McCord, 21 Mo. 285.

55. *Arkansas.*— Reagan *v.* Hodges, 70 Ark. 563, 69 S. W. 581.

Georgia.— Dickerson *v.* Powell, 21 Ga. 143.

Illinois.— Goltra *v.* Green, 98 Ill. 317.

Indiana.— Bundy *v.* Cunningham, 107 Ind. 360, 8 N. E. 174; Ulrich *v.* Drischell, 88 Ind. 354.

Massachusetts.— Shears *v.* Dusenbury, 13 Gray 292.

Missouri.— Fiene *v.* Kirchoff, 176 Mo. 516, 75 S. W. 608.

New York.— Witherbee *v.* Stower, 23 Hun 27; Bennett *v.* Couchman, 48 Barb. 73.

Pennsylvania.— Schwan *v.* Kelly, 173 Pa. St. 65, 33 Atl. 1107.

South Carolina.— Hill *v.* Gray, 45 S. C. 91, 22 S. E. 802.

United States.— Graydon *v.* Hurd, 55 Fed. 724, 5 C. C. A. 258.

See 30 Cent. Dig. tit. "Judgment," §§ 1060, 1294.

Title in third person.— A party is not estopped by a judgment in foreclosure proceedings from asserting an interest in or title to a portion of the property under a third person who was not a party to the foreclosure. Watts *v.* Blalock, 17 S. C. 157. And see Weil *v.* Uzzell, 92 N. C. 515.

56. *In re* James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774, holding that if the mortgagor is a non-resident, and is not personally served within the jurisdiction and does not appear, the judgment will be conclusive as to the ownership of the mortgage and as to the right of the mortgagee to enforce it against the lands encumbered, but will not prevent the mortgagor from contesting the question of his liability for a deficiency.

Representation.— If all the persons having vested estates in the mortgaged premises and some of those having contingent remainders are parties to the foreclosure suit, the decree binds a person born pending the action, whose only interest is a contingent remainder of the same class with those held by parties to the action, since he is before the court by virtual representation. McCampbell *v.* Mason, 151 Ill. 500, 38 N. E. 672.

Deceased mortgagor.— It seems that the judgment is not binding on the widow, heir, or administrator of the deceased mortgagor, if they were not made parties to the action. Beer *v.* Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010.

Assignor and assignee of mortgage.— Where the assignee of a mortgage agrees that the assignor shall foreclose in his own name, the judgment is not an estoppel, as between the assignor and assignee, as to the questions involved in an action by the assignee to recover the proceeds of the mortgage from the assignor. Winegard *v.* Fanning, 76 Hun (N. Y.) 170, 27 N. Y. Suppl. 566.

57. *Alabama.*— Pruitt *v.* Holly, 73 Ala. 369.

Indiana.— English *v.* Aldrich, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; Jones *v.* Vert, 121 Ind. 140, 22 N. E. 882, 16 Am. St. Rep. 379.

Iowa.— Stanbrough *v.* Cook, 83 Iowa 705, 49 N. W. 1010.

Kansas.— Case *v.* Bartholow, 21 Kan. 300.

Kentucky.— Swope *v.* Schwartz, 15 S. W. 251, 12 Ky. L. Rep. 853.

Nebraska.— Haines *v.* Flinn, 26 Nebr. 380, 42 N. W. 91, 18 Am. St. Rep. 785.

New York.— Jacobie *v.* Mickle, 24 N. Y. Suppl. 87.

West Virginia.— Mann *v.* Peck, 45 W. Va. 18, 30 S. E. 206.

See 30 Cent. Dig. tit. "Judgment," §§ 1060, 1294.

58. Johnston *v.* Riddle, 70 Ala. 219; Jones *v.* Lake, 43 La. Ann. 1024, 10 So. 204; Jones *v.* Pashby, 62 Mich. 614, 29 N. W. 374.

General creditors cannot question the construction placed on a mortgage of their debtor's property, in a suit to foreclose, to which all persons having an interest in the mortgaged property are made parties. Omaha, etc., R. Co. *v.* O'Neill, 81 Iowa 463, 46 N. W. 1100. But a judgment foreclosing a mortgage in a suit in which the question whether or not the mortgage was executed to defraud the mortgagor's creditors is not in issue does not preclude a creditor who was not a party to the foreclosure suit from attacking the mortgage on that ground. Brooks *v.* Wilson, 125 N. Y. 256, 26 N. E.

the judgment is conclusive of all questions litigated or necessarily involved in the judgment,[59] including the title and seizin of the decedent,[60] and the claimant's right to be endowed in the lands in question.[61]

n. Location of Boundaries. An adjudication in a proceeding to ascertain or settle disputed boundaries is final and conclusive as to the points at issue and determined, including the location of the boundary;[62] but does not generally settle anything as to the titles of the parties.[63]

3. Actions Concerning Personal Property — a. In General. Where the ownership of personal property becomes an issue in a case, it is settled by the judgment therein;[64] and generally a decision adverse to the claimant of property will bar him from afterward suing either for the specific property or for damages for its conversion or detention,[65] while a recovery of the value of the property will bar a suit for damages growing out of the circumstances of its taking or detention.[66]

b. Trespass. A recovery in trespass for the wrongful taking of property, where damages are given for the taking only, will not bar an action to recover

258. And see Clements *v.* Davis, 155 Ind. 624, 57 N. E. 905; Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572.

59. Maddocks *v.* Jellison, 11 Me. 482; Jackson *v.* Aspell, 20 Johns. (N. Y.) 411; Jackson *v.* Hixon, 17 Johns. (N. Y.) 123; Gay *v.* Stancell, 76 N. C. 369.

60. Sellman *v.* Bowen, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524; Boyd *v.* Redd, 118 N. C. 680, 24 S. E. 429; Sigmon *v.* Hawn, 86 N. C. 310.

61. Crowley *v.* Mellon, 52 Ark. 1, 11 S. W. 876; Bemis *v.* Conley, 49 Mich. 392, 13 N. W. 789.

62. Satterwhite *v.* Sherley, 127 Ind. 59, 25 N. E. 1100; Smith *v.* Scoles, 65 Iowa 733, 23 N. W. 146; Hurst *v.* Combs, 14 S. W. 378, 12 Ky. L. Rep. 385; Barbee *v.* Stinnett, 60 Tex. 167; San Patricio Corp *v.* Mathis, 58 Tex. 242; Spence *v.* McGowan, 53 Tex. 30. And see Taylor *v.* Davis, 65 S. W. 7, 23 Ky. L. Rep. 1266; Jones *v.* Andrews, 72 Tex. 5, 9 S. W. 170.

Processioning proceedings in North Carolina see Vandyke *v.* Farris, 126 N. C. 744, 36 S. E. 171.

Boundary between towns.— A judgment under a statute empowering a court to establish a disputed boundary line between adjoining towns is an adjudication not only of where the line is, but where it always has been since it was established by the incorporation of the towns, and therefore is conclusive on the parties, in a suit against one of the towns pending when the judgment was rendered, in which is involved an inquiry into the location of the boundary. Pitman *v.* Albany, 34 N. H. 577.

63. White *v.* Purnell, 14 La. Ann. 232; King *v.* Brigham, 23 Oreg. 262, 31 Pac. 601, 18 L. R. A. 361.

64. Jones *v.* Clark, 37 Iowa 586; Bailey *v.* Foster, 9 Pick. (Mass.) 139; Haskell *v.* Sumner, 1 Pick. (Mass.) 459; Tuska *v.* O'Brien, 68 N. Y. 446. But see Burgin *v.* Raplee, 100 Ala. 433, 14 So. 205; Morrill *v.* Miller, 3 Greene (Iowa) 104.

A judgment for defendant in an action of claim and delivery, entered on the ground that, from the complaint and reply, it appeared affirmatively that plaintiff had no cause of action, but nothing appearing to show why this was the case, is no bar to a recovery in an action of trover between the same parties and involving the same subject-matter. Woodcock *v.* Carlson, 49 Minn. 536, 52 N. W. 142.

Estoppel of vendor.— A judgment by which it was decided, in an action between the same parties, that defendant had not purchased the property in question from plaintiff, does not preclude defendant from the defense that plaintiff, having allowed, without objection, a third person to sell the property as his own to defendant, was therefore estopped to claim it. Rider *v.* Union India Rubber Co., 4 Bosw. (N. Y.) 169.

In a suit by an administratrix on unindorsed notes executed to her intestate it is not necessarily implied that the estate has the beneficial interest in such notes, so that her recovery will afterward prevent her from claiming the proceeds of the notes under a gift from the intestate to herself. Gibson *v.* Willis, (Tenn. Ch. App. 1895) 36 S. W. 154.

Distress.— Where a party obtains a judgment in distress proceedings, and no appeal is taken, the right to distrain becomes *res judicata*, and cannot be questioned in a subsequent action of trespass by defendant for the removal of the goods. Monteith *v.* Gehrig, 43 Ill. App. 465.

Attachment.— A judgment and accompanying order to sell attached property does not bar an action of replevin for the property exempt from seizure. Wilson *v.* Stripe, 4 Greene (Iowa) 551, 61 Am. Dec. 138.

65. Kreuchi *v.* Dehler, 50 Ill. 176. But see Claton *v.* Ganey, 63 Ga. 331, holding that a judgment for defendant in a search warrant is no bar to a possessory warrant sued out against him for the same property.

66. Delahaye *v.* Pellerin, 2 Mart. (La.) 141; Brown *v.* Moran, 42 Me. 44; Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423; Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745. But *compare* Hotchkiss *v.* Hunt, 49 Me 213; Wanborg *v.* Karst, 4 Mo. App. 563.

the value of the goods;[67] but where the recovery in the first instance is for the value of the chattels, this will bar a subsequent suit for damages for the taking or conversion,[68] and a judgment for defendant in this action will preclude the plaintiff from afterward maintaining an action to recover the value of the same goods.[69] In general a judgment in trespass will not be conclusive upon the question of ownership, unless it appears that that was the issue actually litigated and passed upon.[70] But judgment and satisfaction, either in trespass or trover for personal property, against the wrong-doer, will confirm the latter's title to the property.[71]

c. Trover. A judgment in the action of trover concludes all questions tried and determined,[72] and plaintiff's recovery in this action will bar any further action on his part for the same goods, whether in trespass, detinue, or assumpsit,[73] while a judgment in favor of defendant is conclusive on plaintiff in a subsequent attempt to recover the same goods or their value.[74]

d. Replevin. Although a judgment in replevin is conclusive on the facts in issue or necessary to sustain the adjudication,[75] and as to any special matter set up to defeat the claim,[76] it ordinarily determines nothing more than the right of the successful party to the immediate possession of the property in question,[77] and

67. Belch *v.* Holloman, 3 N. C. 328; Turner *v.* Brock, 6 Heisk. (Tenn.) 50; Stewart *v.* Martin, 16 Vt. 397. And see Lovejoy *v.* Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129, holding that a judgment against a sheriff for property wrongfully attached, without full satisfaction, is no bar to an action of trespass against the attaching creditor. But see Thompson *v.* Lothrop, 21 Pick. (Mass.) 336; McClousky *v.* Farley, 9 N. Y. St. 534; Packer *v.* Johnson, 1 Nott & M. (S. C.) 1.

68. Johnson *v.* Smith, 8 Johns. (N. Y.) 383; Sanders *v.* Egerton, 2 Brev. (S. C.) 45; Rembert *v.* Hally, 10 Humphr. (Tenn.) 513.

69. Rice *v.* King, 7 Johns. (N. Y.) 20.

70. *Connecticut.*— Dennison *v.* Hyde, 6 Conn. 508.

Georgia.— Greaves *v.* Middlebrooks, 59 Ga. 240.

Illinois.— Harris *v.* Miner, 28 Ill. 135; Ilg *v.* Burbank, 59 Ill. App. 291.

New Hampshire.— Burrill *v.* West, 2 N. H. 190.

New York.— Stowell *v.* Chamberlain, 60 N. Y. 272.

See 30 Cent. Dig. tit. "Judgment," § 1298.

Action by nominal plaintiff.— A judgment for plaintiff, in an action of trespass brought in the name of one who owned the goods at the time of the trespass, but for the benefit and by the authority of a vendee of the goods, is a bar to a subsequent action for the same cause by such vendee. Boynton *v.* Willard, 10 Pick. (Mass.) 166.

71. Williams *v.* Otey, 8 Humphr. (Tenn.) 563, 47 Am. Dec. 632.

72. Pettit *v.* Marble, 35 S. W. 906, 18 Ky. L. Rep. 167; Bogan *v.* Wilburn, 1 Speers (S. C.) 179.

73. *Alabama.*— Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; White *v.* Martin, 1 Port. 215, 26 Am. Dec. 365. See, however, Spivey *v.* Morris, 18 Ala. 254, 52 Am. Dec. 224.

Maine.— Atkinson *v.* White, 60 Me. 396; White *v.* Philbrick, 5 Me. 147, 17 Am. Dec. 214.

Maryland.— Stirling *v.* Garritee, 18 Md. 468.

Minnesota.—Hatch *v.* Coddington, 32 Minn. 92, 19 N. W. 393.

Mississippi.— Agnew *v.* McElroy, 10 Sm. & M. 552, 48 Am. Dec. 772.

Missouri.— Union R., etc., Co. *v.* Traube, 59 Mo. 355; Skeen *v.* Springfield Engine, etc., Co., 42 Mo. App. 158.

Rhode Island.— Hunt *v.* Bates, 7 R. I. 217, 82 Am. Dec. 592.

South Carolina.— Thompson *v.* Rogers, 2 Brev. 410.

See 30 Cent. Dig. tit. "Judgment," § 1298.

Compare Miller *v.* Hyde, 161 Mass. 472, 37 N. E. 760, 42 Am. St. Rep. 424, 25 L. R. A. 42.

74. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159. But see Wright *v.* Walker, 3 N. C. 16, holding that a verdict for defendant in trover is only *prima facie* evidence of property in him, which will stand until the contrary is proven by showing the particular fact in evidence which occasioned the verdict for defendant.

75. Carothers *v.* Jones, 1 Colo. 196; Roberts *v.* Robeson, 27 Ind. 454; Ewald *v.* Waterhont, 37 Mo. 602.

76. Bresnahan *v.* Nugent, 92 Mich. 76, 52 N. W. 735; Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501. *Compare* Wright *v.* Broome, 67 Mo. App. 32, holding that a judgment for plaintiff in replevin will not debar defendant from asserting against plaintiff personally a claim for compensation for the care of the property replevied, which was not set up in the replevin suit.

77. *Maine.*— Moulton *v.* Smith, 32 Me. 406.

Maryland.— Babylon *v.* Duttera, 89 Md. 444, 43 Atl. 938.

Massachusetts.— Allen *v.* Butman, 138 Mass. 586.

Michigan.— Deyoe *v.* Jamison, 33 Mich. 94.

does not settle anything as to the title or ownership,[78] unless that particular matter is the issue on which the decision actually turns.[79] In any event the issues tried and determined in the replevin suit cannot be presented for reëxamination in an action on the replevin bond.[80] The replevin judgment is binding on all the original parties and on any others who came in for the defense of interests of their own.[81] If it goes in favor of defendant, it will not bar a second replevin for the same property if the judgment was merely one of nonsuit;[82] but if it was tried and decided on the merits, the judgment will bar, not only a second action of replevin, but also one of trespass or trover for the same goods.[83] On the other hand the rule against splitting causes of action requires plaintiff in replevin to join in the one action his claims and demands concerning all the property which

New York.— Schwenk *v.* Widemeyer, 14 N. Y. Suppl. 456.

Ohio.— Schaeffer *v.* Marienthal, 17 Ohio St. 183.

Oklahoma.— Geiser Mfg. Co. *v.* Berry, 12 Okla. 183, 70 Pac. 202.

See 30 Cent. Dig. tit. "Judgment," § 1299.

78. *Arkansas.*— Robinson *v.* Kruse, 29 Ark. 575.

Colorado.— Westcott *v.* Bock, 2 Colo. 335.

Indiana.— Williams *v.* Lewis, 124 Ind. 344, 24 N. E. 733; McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161. But *compare* Fromlet *v.* Poor, 3 Ind. App. 425, 29 N. E. 1081.

Iowa.— Buck *v.* Rhodes, 11 Iowa 348.

Massachusetts.— Leonard *v.* Whitney, 109 Mass. 265.

New York.— Angel *v.* Hollister, 38 N. Y. 378; Yates *v.* Fassett, 5 Den. 21.

Oregon.— Huffman *v.* Knight, 36 Oreg. 581, 60 Pac. 207.

Wisconsin.— Pfennig *v.* Griffith, 29 Wis. 618; Emmons *v.* Dowe, 2 Wis. 322.

See 30 Cent. Dig. tit. "Judgment," § 1299.

A defendant in replevin is not estopped by a judgment for the return of a certain deed from asserting title to the real estate therein described. Daggett *v.* Daggett, 143 Mass. 516, 10 N. E. 311.

79. *California.*— Nickerson *v.* California Stage Co., 10 Cal. 520.

Illinois.— Wells *v.* McClenning, 23 Ill. 409.

Iowa.— Hayden *v.* Anderson, 17 Iowa 158.

Kentucky.— Owens *v.* Rawleigh, 6 Bush 656.

Missouri.— Sconce *v.* Long Bell Lumber Co., 54 Mo. App. 509.

New York.— Russell *v.* Gray, 11 Barb. 541; Manderville *v.* Avery, 17 N. Y. Suppl. 429.

See 30 Cent. Dig. tit. "Judgment," § 1299.

80. *Colorado.*— Colorado Springs Co. *v.* Hopkins, 5 Colo. 206.

Connecticut.— Ormsbee *v.* Davis, 16 Conn. 567.

Illinois.— McMurchy *v.* O'Hair, 67 Ill. 242; Warner *v.* Matthews, 18 Ill. 83.

Indiana.— Woods *v.* Kessler, 93 Ind. 356; Denny *v.* Reynolds, 24 Ind. 248.

New York.— Christiansen *v.* Mendham, 26 Misc. 662, 56 N. Y. Suppl. 655.

Pennsylvania.— Cox *v.* Hartranft, 154 Pa. St. 457, 26 Atl. 304.

See 30 Cent. Dig. tit. "Judgment," § 1299.

Title to property.—If the question of ownership was tried and decided in plaintiff's favor in the replevin suit, the judgment will estop defendant and his sureties from asserting to the contrary in an action on the replevin bond. McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120; Sconce *v.* Long Bell Lumber Co., 54 Mo. App. 509; Brady *v.* Beadleston, 62 Hun (N. Y.) 548, 17 N. Y. Suppl. 42. And see Wolf River Lumber Co. *v.* Brown, 88 Wis. 638, 60 N. W. 996. But if the judgment merely decides that plaintiff is entitled to the possession of the property, evidence showing that he is not the owner is competent for defendant, on the question of damages. Hawley *v.* Warner, 12 Iowa 42; Buck *v.* Rhodes, 11 Iowa 348. And a finding of title in plaintiff is not conclusive, in a subsequent action on the bond, as to the fact of the ownership of the goods at a date prior to that on which the suit was brought. Henry *v.* Ferguson, 55 Mich. 399, 21 N. W. 381.

81. Witter *v.* Fisher, 27 Iowa 9, holding that an intervening claimant is as much bound by the judgment in replevin as either of the primary parties.

The plea of property in a third person in an action of replevin does not involve the question of such third person's title, in such sense that he may take advantage of the judgment in a subsequent action in which he is plaintiff. Warfield *v.* Walter, 11 Gill & J. (Md.) 80.

An attaching plaintiff is bound by the result of an action of replevin brought against the officer who took the goods under his attachment. Carlton *v.* Davis, 8 Allen (Mass.) 94. And see McDowell *v.* Gibson, 58 Kan. 607, 50 Pac. 870.

Carrier and consignee.— A judgment in replevin against the carrier of goods, replevied while in transit, does not estop the consignee, who in no wise participated therein, from setting up his claim to the goods. Frank *v.* Jenkins, 22 Ohio St. 597.

82. Daggett *v.* Robins, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752.

83. Hardin *v.* Palmerlee, 28 Minn. 450, 10 N. W. 773; Ewald *v.* Waterhout, 37 Mo. 602.

Where a person claims the whole of a stock of goods by virtue of a chattel mortgage, and different portions of it are taken by separate attaching creditors of the mortgagor, and the mortgagee brings separate actions of replevin against them, which actions are all defended by the officer who levied the attachments, in his official right and without join-

can properly be brought under the one cause of action.[84] And a judgment in replevin for the return of the goods will bar a further action for damages arising out of their illegal taking or detention,[85] and a recovery of damages for the wrongful detention will bar a subsequent action for damage on account of depreciation or injury to the property,[86] although it seems that where the owner recovers judgment merely for the value of the property and not for its return, such judgment, while unsatisfied, will not bar another action to recover the identical property from a vendee of the judgment debtor.[87]

e. Detinue.[88] Judgment for plaintiff in this action is conclusive that the right of property, either absolute or special, was in him at the institution of the suit, but shows nothing as to the ownership of the property at an antecedent date.[89] It bars any further action of the same kind for the same property,[90] but not, while it remains unsatisfied, an action of trover.[91]

f. Chattel Mortgage Foreclosure.[92] A judgment for the foreclosure of a chattel mortgage affirms the validity of the mortgage and plaintiff's right to satisfaction out of the specific property covered by it;[93] but it is not conclusive as to any incidental or collateral questions, unless they were actually put in issue and adjudicated.[94]

g. Judgment in Action For Land as Bar to Action For Personalty. Where claims for the recovery of chattels or for injury to them or for waste are joined without objection in a real action, the judgment will be conclusive as to such per-

ing the creditors, a final judgment on the merits against the mortgagee in the action first tried will be a bar to his prosecution of the others. McDowell *v.* Gibson, 58 Kan. 607, 50 Pac. 870.

84. Bennett *v.* Hood, 1 Allen (Mass.) 47, 79 Am. Dec. 705. See Blaisdell *v.* Scally, 84 Mich. 149, 47 N. W. 585.

Exceptions.— This rule does not require the joinder of a claim for the conversion of money or other irrepleviable property taken at the same time (Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511), or for goods, part of the general lot, which were not in defendant's possession when the writ issued (Reid *v.* Ferris, 112 Mich. 693, 71 N. W. 484, 67 Am. St. Rep. 437). And if judgment went for defendant as to part of the property on the ground that he had a lien on it this will not prevent a second action of replevin for such part brought after tender of the amount of the lien. Wheelock *v.* Svensgaard, 63 Minn. 486, 65 N. W. 937. So replevin for grass wrongfully taken is not barred by the fact that plaintiff might have recovered the value of the grass in an action of trespass previously brought for the cutting and carrying away. Burley *v.* Pike, 62 N. H. 495. And judgment for plaintiff in replevin for the recovery of hotel furniture, claimed by him as head of a family, is not a bar to an action for the value of the use of similar furniture in the hotel, as to which defendant had wrongfully deprived him of the use. Mathews *v.* Herron, 102 Iowa 45, 67 N. W. 226, 70 N. W. 736.

Separate claim for tortious taking.—Where the property which is sought to be recovered in an action of replevin was taken from the owner's possession by an act of trespass and with violence, the judgment in replevin for the return of the property will not bar an action of damages for the tort. Briggs *v.* Milburn, 40 Mich. 512. And see Robinson *v.* Kruse, 29 Ark. 575.

Lien for boarding.— A judgment for the lienholder in replevin, brought to recover possession of goods held as a lien for board, will not bar an action by him on the board bill. Rosenow *v.* Gardner, 99 Wis. 358, 74 N. W. 982.

85. *Illinois.*— Karr *v.* Barstow, 24 Ill. 580.

Kansas.— Ellis *v.* Crowl, 46 Kan. 100, 26 Pac. 454. But *compare* Johnson *v.* Boehme, 66 Kan. 72, 71 Pac. 243, 97 Am. St. Rep. 357.

Minnesota.— Velin *v.* Dahlquist, 64 Minn. 119, 66 N. W. 141.

New York.— Shepherd *v.* Moodhe, 8 Misc. 607, 29 N. Y. Suppl. 392. But see Brady *v.* Beadleston, 62 Hun 548, 17 N. Y. Suppl. 42.

Pennsylvania.— Bower *v.* Tallman, 5 Watts & S. 556.

Rhode Island.— Davis *v.* Fenner, 12 R. I. 21.

United States.— Clement *v.* Field, 147 U. S. 467, 13 S. Ct. 358, 37 L. ed. 244.

86. Teel *v.* Miles, 51 Nebr. 542, 71 N. W. 296. *Contra*, Colby *v.* Yeates, 12 Heisk. (Tenn.) 267.

87. Ledbetter *v.* Embree, 12 Ind. App. 617, 40 N. E. 928. And see Nickerson *v.* California Stage Co., 10 Cal. 520.

88. See DETINUE, 14 Cyc. 276 *et seq.*

89. Wittick *v.* Traun, 25 Ala. 317; Hughes *v.* Jones, 2 Md. Ch. 178; Long *v.* Baugas, 24 N. C. 290, 38 Am. Dec. 694.

90. Jennings *v.* Gibson, Walk. (Miss.) 234; Murrell *v.* Johnson, 1 Hen. & M. (Va.) 450.

91. Elliot *v.* Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689.

92. See CHATTEL MORTGAGES, 7 Cyc. 101.

93. Boswell *v.* Carlisle, 70 Ala. 244.

94. Vogel *v.* Wadsworth, 48 Iowa 28; Collingsworth *v.* Bell, 56 Kan. 338, 43 Pac. 252; Scott *v.* Wagner, 2 Kan. App. 386, 42 Pac. 741.

sonalty and a bar to a subsequent separate action concerning it.[95] But ordinarily questions concerning the right to chattels are not in issue in an action for realty, such as ejectment,[96] or an action for the foreclosure of a mortgage on land.[97]

4. CONDEMNATION PROCEEDINGS[98] — a. In General. In a proceeding for the condemnation of property under the power of eminent domain, the judgment is conclusive between the parties as to all facts and matters in issue or necessarily implied in the decision,[99] including the validity of the law under which the action is taken,[1] the fact of compliance with the various steps required to be taken in the proceedings,[2] the necessity of the purpose for which the appropriation is made and the appropriator's right to proceed with it,[3] the liability of the appropriator for damages or compensation as fixed by the court,[4] the extent and manner of the appropriation,[5] the value of the property or extent of the injury to it,[6] and the ownership and condition of the title.[7] Further the award and payment of compensation for the taking of the property, or injury to it, will bar an action for

95. Bottorff *v.* Wise, 53 Ind. 32; Doak *v.* Wiswell, 33 Me. 355. See Savage *v.* French, 13 Ill. App. 17.

96. Manldin *v.* Clark, 79 Cal. 51, 21 Pac. 361, holding that where plaintiff recovers in ejectment, including a claim for damages for waste in selling timber from the land, he is thereby compensated for the injury to the realty, but this does not bar a subsequent action for the conversion of the same timber, being personal property.

Growing crops.— A judgment in ejectment determines nothing as to the right to the crops growing on the land, unless this question was actually put in issue and tried. Collier *v.* Cunningham, 2 Ind. App. 254, 28 N. E. 341; Stancer *v.* Roe, 55 Mich. 169, 20 N. W. 889.

97. Boyle *v.* Wallace, 81 Ala. 352, 8 So. 194; Crippen *v.* Morrison, 13 Mich. 23.

98. See EMINENT DOMAIN, 15 Cyc. 922 *et seq.*

99. Hardy *v.* Gascoignes, 6 Port. (Ala.) 447; Norristown, etc., Turnpike Co. *v.* Burket, 26 Ind. 53; Dodge *v.* Burns, 6 Wis. 514.

Proceedings lapsed or abandoned.— Where proceedings to take private property for public use are dismissed, abandoned, or never consummated, they constitute no bar to new proceedings taken at a later date for the same purpose, and are not evidence in such later action. Chicago *v.* Goodwillie, 208 Ill. 252, 70 N. E. 228; Trotter *v.* Stayton, 45 Oreg. 301, 77 Pac. 395.

1. People *v.* Buffalo, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563.

2. Lehmer *v.* People, 80 Ill. 601. But see Stringham *v.* Oshkosh, etc., R. Co., 33 Wis. 471.

3. Watson *v.* Van Meter, 43 Iowa 76; Kerr *v.* West Shore R. Co., 2 N. Y. Suppl. 686. See Ray *v.* Fletcher, 12 Cush. (Mass.) 200.

4. Adams *v.* Pearson, 7 Pick. (Mass.) 341, 19 Am. Dec. 290. And see Blake *v.* Ohio River R. Co., 47 W. Va. 520, 35 S. E. 953.

5. Adams *v.* Pearson, 7 Pick. (Mass.) 341, 19 Am. Dec. 290; Johnson *v.* Kittredge, 17 Mass. 76; Atchison, etc., R. Co. *v.* Forney, 35 Nebr. 607, 53 N. W. 585, 37 Am. St. Rep. 450; Seward *v.* Morris Canal, etc., Co., 23 N. J. L. 219.

A railway having been constructed along a street on which plaintiff owned two lots, a few hundred feet apart, he obtained judgment for damages to one of them arising from the construction and operation of the road, and it was held that this was a bar to a suit for damages to the other lot, accruing prior to the filing of the complaint in the first suit, from the same cause. Beronio *v.* Southern Pac. R. Co., 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57.

A judgment on a special assessment to pay for grading, rendered in a proceeding where the lot owner did not appear, will not estop him from suing the city for grading the street below the established grade. Farrell *v.* St. Paul, 62 Minn. 271, 64 N. W. 809, 54 Am. St. Rep. 641, 29 L. R. A. 778.

Right of action to compel construction of crossings.— Nor is a plaintiff estopped to maintain an action to compel a railroad company to construct an undergrade crossing on his farm by the fact that the award in condemnation proceedings was without his consent made on the assumption that there were to be no undercrossings. Van Wagner *v.* Central New England, etc., R. Co., 80 Hun (N. Y.) 278, 30 N. Y. Suppl. 165.

6. Cincinnati *v.* Jung, 5 Ohio S. & C. Pl. Dec. 549, 7 Ohio N. P. 665, holding that the value of land as fixed by the court in a suit to enforce assessments for street improvements is not conclusive in an action to enforce assessments for the construction of a sewer.

7. See Parker *v.* Hotchkiss, 25 Conn. 321; *In re* Opening of One Hundred and Sixtieth Street, 13 N. Y. Suppl. 51.

Boundaries.— The determination of boundary lines of property taken in condemnation proceedings is conclusive in a subsequent suit between the same parties and concerning the same subject-matter. Cincinnati *v.* Hosea, 19 Ohio Cir. Ct. 744, 10 Ohio Cir. Dec. 618.

Liens.— In condemnation proceedings in the supreme court questions as to the validity of the liens and encumbrances of certain taxes on the land having been decided, no appeal taken, are conclusive between the parties. Cottle *v.* New York, etc., R. Co., 27 N. Y. App. Div. 604, 50 N. Y. Suppl. 1008.

damages for trespass upon the land, or injury to it, or unlawful occupation of it, by the appropriating company, in connection with the purposes of the appropriation, but before the formal institution of the proceedings.[8]

b. Amount of Damages. Where land is taken for public use, the owner must recover in the one proceeding all the damages which are necessary to compensate him fully; no subsequent action can be maintained for elements of damages omitted from the first suit.[9] Similarly, where part of plaintiff's land is taken, and compensation is to be made for injury to the remainder by the public work in question, or where no land is appropriated, but injury to plaintiff's property is to be assessed, the award must include every item and element of damage, present as well as prospective, and including such injuries as inconvenience, difficulty of access, or increased danger, which may result from the construction of the work in question according to the plans submitted and in a prudent and proper manner, and from its proper maintenance and careful operation in the future; and no subsequent action will lie for damages from any of these causes which might have been claimed and included in the original award.[10] But plaintiff may sue afterward for injuries resulting from the construction of the work in question in a manner different from that originally contemplated,[11] from its improper, defective,

8. Fitzgerald *v.* Chicago, etc., R. Co., 48 Kan. 537, 29 Pac. 703; Lewis *v.* Boston, 130 Mass. 339; Bethlehem South Gas, etc., Co. *v.* Yoder, 112 Pa. St. 136, 4 Atl. 42; Curtis *v.* Vermont Cent. R. Co., 23 Vt. 613. But *compare* Summy *v.* Mulford, 5 Blackf. (Ind.) 202; Harlow *v.* Marquette, etc., R. Co., 41 Mich. 336, 2 N. W. 48; Powers *v.* Hurmert, 51 Mo. 136; Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 12 S. Ct. 188, 35 L. ed. 1055.

9. *Colorado.*— Denver City Irr., etc., Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234.

Illinois.— Illinois Cent. R. Co. *v.* Champaign, 163 Ill. 524, 45 N. E. 120.

Massachusetts.— Hatch *v.* Hawkes, 126 Mass. 177.

New Jersey.— Van Riper *v.* Essex Public Road Bd., 38 N. J. L. 23; Van Schoick *v.* Delaware, etc., Canal Co., 20 N. J. L. 249.

New York.— Matter of New York Cent. R. Co., 11 N. Y. St. 866. See Hoch *v.* Metropolitan El R. Co., 59 Hun 541, 13 N. Y. Suppl. 633; Matter of Metropolitan El. R. Co., 58 Hun 563, 12 N. Y. Suppl. 859.

England.— Barber *v.* Nottingham, etc., R. Co., 15 C. B. N. S. 726, 10 Jur. N. S. 260, 33 L. J. C. P. 193, 9 L. T. Rep. N. S. 829, 12 Wkly. Rep. 376, 109 E. C. L. 726; Read *v.* Victoria Station, etc., R. Co., 1 H. & C. 826, 9 Jur. N. S. 1061, 32 L. J. Exch. 167, 11 Wkly. Rep. 1032.

See 30 Cent. Dig. tit. "Judgment," § 1306.

Compare Com. *v.* Faris, 5 Rand. (Va.) 691.

10. *Illinois.*— Miller *v.* Chicago, etc., R. Co., 60 Ill. App. 51; Chicago, etc., R. Co. *v.* Brinkman, 47 Ill. App. 287.

Indiana.— White *v.* Chicago, etc., R. Co., 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246.

Kansas.— St. Louis, etc., R. Co. *v.* McAuliff, 43 Kan. 185, 23 Pac. 102.

Kentucky.— Louisville, etc., R. Co. *v.* Barrett, 13 Ky. L. Rep. 232. But see Louisville, etc., R. Co. *v.* Orr, 91 Ky. 103, 15 S. W. 8, 12 Ky. L. Rep. 756.

Maine.— Morrison *v.* Bucksport, etc., R. Co., 67 Me. 353.

Massachusetts.— Fowle *v.* New Haven, etc., R. Co., 107 Mass. 352.

Michigan.— Barnes *v.* Michigan Air-Line R. Co., 65 Mich. 251, 32 N. W. 426.

Minnesota.— See Proetz *v.* St. Paul Water Co., 17 Minn. 163.

Missouri.— McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433. But see Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161.

Nebraska.— Atchison, etc., R. Co. *v.* Boerner, 34 Nebr. 240, 51 N. W. 842, 33 Am. St. Rep. 637.

New Hampshire.— Clark *v.* Boston, etc., R. Co., 24 N. H. 114; Cate *v.* Nutter, 24 N. H. 108; Aldrich *v.* Cheshire R. Co., 21 N. H. 359, 53 Am. Dec. 212.

New York.— Chapman *v.* Albany, etc., R. Co., 10 Barb. 360; Furniss *v.* Hudson River R. Co., 5 Sandf. 551; *In re* Alexander Ave., 17 N. Y. Suppl. 933; Kerr *v.* West Shore R. Co., 6 N. Y. Suppl. 958. But see Buffalo Stone, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. 121.

Texas.— International, etc., R. Co. *v.* Pape, 62 Tex. 313; International, etc., R. Co. *v.* Gieselman, 12 Tex. Civ. App. 123, 34 S. W. 658.

Virginia.— Coleman *v.* Moody, 4 Hen. & M. 1. But see Calhoun *v.* Palmer, 8 Gratt. 88.

See 30 Cent. Dig. tit. "Judgment," § 1306.

Compare Schaible *v.* Lake Shore, etc., R. Co., 10 Ohio Cir. Ct. 334, 6 Ohio Cir. Dec. 505.

11. Lane *v.* Boston, 125 Mass. 519.

Change of grade.— Judgment for damages occasioned by the widening of a street, claim for which only was made, is no bar to a subsequent action for damages occasioned by a change of grade. Walters *v.* Borough, 4 Lanc. L. Rev. (Pa.) 385.

or negligent construction,[12] from the neglect or failure to keep it in good repair,[13] or from its negligent or unskilful operation.[14]

5. Tax Proceedings — a. In General. A judgment in an action to enforce the collection of delinquent taxes is conclusive as to all matters actually litigated, and also as to all questions and objections which might have been raised against its rendition, including the fact of non-payment, the liability of the land to taxation, and the regularity of the assessment and subsequent proceedings.[15] And a judgment for plaintiff in an action for the foreclosure of a tax deed concludes all persons bound thereby from afterward questioning the validity of the deed.[16] In some states tax proceedings are considered as proceedings *in rem*, so that the judgment binds all parties in interest, whether they have actual notice or are only constructively served.[17] But in others they do not possess this character, and the judgment is conclusive only upon parties brought in by actual notice and those in privity with them.[18]

b. Requiring Municipal Corporation to Collect. Where a judgment creditor

Subsequent injury to remainder of land.— And the fact that compensation for a right of way taken by defendant was submitted to arbitration at the time the work was constructed does not preclude a recovery for subsequent injury to the remainder of the land. Consolidated Home Supply Ditch, etc., Co. *v.* Hamlin, 6 Colo. App. 341, 40 Pac. 582.

12. Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626; Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, 52 N. W. 668, 41 Am. St. Rep. 473; Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517; Southside R. Co. *v.* Daniel, 20 Gratt. (Va.) 344.

13. Steele *v.* Western Inland Lock Nav. Co., 2 Johns. (N. Y.) 283.

14. San Antonio, etc., R. Co. *v.* Lougorio, (Tex. Civ. App. 1894) 25 S. W. 1020; Waterman *v.* Connecticut, etc., R. Co., 30 Vt. 610, 73 Am. Dec. 326.

15. *Arkansas.*— Worthen *v.* Ratcliffe, 42 Ark. 330; Lincoln County *v.* Simmons, 39 Ark. 485. And see Geisreiter *v.* McCoy, (1905) 85 S. W. 86.

Illinois.— Mix *v.* People, 116 Ill. 265, 4 N. E. 783; Graceland Cemetery Co. *v.* People, 92 Ill. 619; Job *v.* Tebbetts, 10 Ill. 376. But *compare* Lovell *v.* Sny Island Levee Drainage Dist., 150 Ill. 188, 42 N. E. 600.

Iowa.— Lyman *v.* Faris, 53 Iowa 498, 5 N. W. 621.

Kentucky.— Courier-Journal Job Printing Co. *v.* Columbia F. Ins. Co., 54 S. W. 966, 21 Ky. L. Rep. 1258, 1259.

Louisiana.— Sewell *v.* Watson, 31 La. Ann. 589; Daily *v.* Newman, 14 La. Ann. 580.

Minnesota.— Otis *v.* St. Paul, 94 Minn. 57, 101 N. W. 1066.

Missouri.— State *v.* Hunter, 98 Mo. 386, 11 S. W. 756; Allen *v.* Ray, 96 Mo. 542, 10 S. W. 153; Weber *v.* Schergens, 28 Mo. App. 587, holding that a final judgment for defendant on an irregular and amendable tax bill will bar a subsequent action on the same tax bill when properly amended.

New Jersey.— Shields *v.* Paterson, 58 N. J. L. 550, 33 Atl. 947.

New York.— See Matter of Long Beach Land Co., 101 N. Y. App. Div. 159, 91 N. Y. Suppl. 503.

Pennsylvania.— Hodges *v.* Board of Revision, 3 L. T. N. S. 77.

United States.— Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. ed. 586.

Canada.— Les Commissaires, etc. *v.* Toussignant, 7 Quebec Q. B. 270.

See 30 Cent. Dig. tit. "Judgment," §§ 1073, 1307.

As a bar.— A judgment in favor of a city for taxes is not a bar to another suit for other taxes, which had been assessed at the time of the rendition of the former judgment, but were not put in issue in the former suit. Harris *v.* Houston, (Tex. Civ. App. 1900) 59 S. W. 579.

16. Warner *v.* Trow, 36 Wis. 195.

17. Scott *v.* Pleasants, 21 Ark. 364; Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; Oldham *v.* Stephens, 45 Kan. 369, 25 Pac. 863.

18. *Illinois.*— Gage *v.* Bailey, 102 Ill. 11; Belleville Nail Co. *v.* People, 98 Ill. 399; People *v.* Brislin, 80 Ill. 423; Job *v.* Tebbetts, 10 Ill. 376.

Indiana.— Grigsby *v.* Akin, 128 Ind. 591, 28 N. E. 180.

Louisiana.— Jamison *v.* New Orleans, 12 La. Ann. 346.

Wisconsin.— Rork *v.* Smith, 55 Wis. 67, 12 N. W. 408.

United States.— Gage *v.* Pumpelly, 115 U. S. 454, 6 S. Ct. 136, 29 L. ed. 449.

See 30 Cent. Dig. tit. "Judgment," §§ 1073, 1307.

Where a county is not a party to a suit to foreclose the state's lien for taxes on swamp land patented by it to the county, and by the county sold, with a reservation of title until the purchase-money is paid in full, a decree in that suit works no estoppel, as against the county, to bring ejectment against the purchaser at the sale, where the price has not been paid in full. Neither the vendee of the county nor the purchaser at the tax-sale will take, under such circumstances, more than a right to a deed. Jasper County *v.* Mickey, (Mo. 1887) 4 S. W. 424.

A judgment in favor of a tax-sale purchaser, enforcing by mandamus against the

of a municipal corporation sues for mandamus to compel the municipal officers to levy and collect a tax for the purpose of paying his judgment, the action cannot be defended on any grounds going to the validity of the debt on which the judgment was founded, or which would have defeated a recovery in the original action, all such matters being *res judicata*.[19]

c. Exemption. A judgment for taxes, rendered against a claim of exemption, is not conclusive as to the liability of the same property for the taxes of a subsequent year, as against a similar claim,[20] unless it appears that the facts on which the decision of the claim of exemption must rest are identical with those which were in issue in the former suit, and were then tried and adjudicated.[21]

6. Actions For Penalties. Judgment for a statutory penalty will not generally preclude a separate action for special damages suffered by plaintiff in connection with the illegal act.[22] But in a penal action which any person has a right to prosecute, a recovery of judgment by one person may be pleaded in bar to a prosecution by another person for the same offense.[23] A judgment dismissing an action for a penalty on the ground that the statute under which it was brought was invalid will conclude plaintiff in a subsequent action under the same statute for a second violation thereof.[24]

7. Criminal Prosecutions — a. Application of Doctrine of Res Judicata. A judgment or sentence in a criminal proceeding is receivable as evidence of a relevant fact in another criminal proceeding against the same person.[25] But such a

sheriff his right to a deed, is not a judgment *in rem*, and is not admissible in evidence against one who was neither a party nor privy to the proceeding. Waters *v.* Spofford, 58 Tex. 115.

19. Coy *v.* Lyons City, 17 Iowa 1, 85 Am. Dec. 539; Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439; Stenberg *v.* State, 48 Nebr. 299, 67 N. W. 190; U. S. *v.* Knox County Ct., 122 U. S. 306, 7 S. Ct. 1171, 30 L. ed. 1152; Davenport *v.* U. S., 9 Wall. (U. S.) 409, 19 L. ed. 704; Jefferson Police Jury *v.* U. S., 60 Fed. 249, 8 C. C. A. 607; Hill *v.* Scotland County Ct., 32 Fed. 716; Clews *v.* Lee County, 5 Fed. Cas. No. 2,892, 2 Woods 474.

Pleading matters in avoidance of the original judgment in a proceeding of this character as an unpermissible collateral impeachment of it see *supra*, XI, C, 2.

20. *Iowa.*— Tubbesing *v.* Burlington, 68 Iowa 691, 24 N. W. 514, 28 N. W. 19.

Kentucky.— Shuck *v.* Lebanon, 107 Ky. 252, 53 S. W. 655, 21 Ky. L. Rep. 969; Louisville Bridge Co. *v.* Louisville, 58 S. W. 598, 22 Ky. L. Rep. 793.

Missouri.— Kansas City Exposition Driving Park *v.* Kansas City, 174 Mo. 425, 74 S. W. 979.

Tennessee.— Union, etc., Bank *v.* Memphis, 101 Tenn. 154, 46 S. W. 557.

United States.— Lander *v.* Mercantile Nat. Bank, 186 U. S. 458, 22 S. Ct. 908, 46 L. ed. 1247; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202; Memphis City Bank *v.* Tennessee, 161 U. S. 186, 16 S. Ct. 468, 40 L. ed. 664; Mercantile Nat. Bank *v.* Lander, 109 Fed. 21; Louisville Trust Co. *v.* Stone, 88 Fed. 407.

21. Baltimore, etc., R. Co. *v.* Wicomico County, 93 Md. 113, 48 Atl. 853; Kansas City Exposition Driving Park *v.* Kansas City, 174 Mo. 425, 74 S. W. 979; Baldwin *v.* Maryland, 179 U. S. 220, 21 S. Ct. 105, 45 L. ed. 160; Kentucky Bank *v.* Stone, 88 Fed. 383; Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 18 C. C. A. 122.

Sustaining exemption.— A judgment sustaining a claim to exemption from taxation as to certain property is conclusive as to its non-taxable character in all subsequent suits, although involving taxes levied for a different year or under a different statute, where the claim to exemption still rests on the same grounds. Chicago, etc., R. Co. *v.* Racine, 123 Wis. 102, 100 N. W. 1033; Georgia R., etc., Co. *v.* Wright, 132 Fed. 912.

22. St. Louis, etc., R. Co. *v.* Trimble, 54 Ark. 354, 15 S. W. 899, holding that a judgment for the statutory penalty for illegal overcharge of fare on a railroad will not bar a suit for wrongful ejection from defendant's cars.

23. Crosby *v.* Gipps, 16 Ill. 352.

Where a statute prohibits clandestine marriages, under a stated penalty for each offense, only one penalty can be recovered against a magistrate for uniting two persons in marriage, contrary to the act, and not a penalty for each of the two persons. Hill *v.* Williams, 14 Serg. & R (Pa.) 287.

24. De Dowal *v.* Legault, 21 Quebec Super. Ct. 197.

25. Lambert *v.* People, 43 Ill. App. 223; Com. *v.* Ellis, 160 Mass. 165, 35 N. E. 773.

Application of text.— On the trial of an indictment for an assault on a police officer, committed while defendant was under arrest for drunkenness, the record of a conviction and sentence of defendant for drunkenness at the time of his arrest is conclusive evidence of that fact. Com. *v.* Feldman, 131 Mass. 588. So a judgment acquitting defendant of an offense is a bar to a prosecution against him for perjury, based upon his testimony given on the trial for that offense, to the effect that he had not committed the acts

judgment or sentence is not admissible in a subsequent criminal proceeding against another person.[26]

b. Concurrent Liability to Civil and Criminal Proceedings. Where the same act may constitute a criminal offense, and also a civil injury, in the nature of a tort or under a statute, the two actions are so distinct that a judgment in the one will not bar the prosecution of the other.[27]

c. Criminal Sentences as Evidence in Civil Issues. A judgment or sentence in a criminal prosecution is not admissible in evidence in a subsequent civil suit, although the facts in controversy may be the same, or although the rights of the parties may depend upon the same circumstances,[28] except where the mere fact of a conviction or acquittal becomes a relevant circumstance in the civil suit,[29] and

charged. Petit *v.* Com., 57 S. W. 14, 22 Ky. L. Rep. 262.

Sanity of defendant.— The fact that after conviction and sentence a motion for a new trial was made on the ground that the accused was insane at the time of the alleged crime and at the time of his trial, and that the judge overruled this motion after a hearing on the same, which judgment was affirmed, does not operate as a bar to a proceeding afterward instituted on behalf of the convict for a trial before a jury on the question of his sanity. Sears *v.* State, 112 Ga. 382, 37 S. E. 443.

Motion for discharge.— Where, on a mistrial of a criminal prosecution, defendant moves for his discharge, which motion is refused, and he is required to give bail for his appearance at the next term, the judge presiding at such next term has no right to entertain the same motion and discharge defendant, the matter being *res judicata*. State *v.* Evans, 74 N. C. 324.

Plea of autrefois convict.— The order in arrest for alleged insufficiency of the record is not conclusive that such record is fatally defective, but the court in which the plea of *autrefois convict* is pleaded must determine for itself the sufficiency of such record. State *v.* Parish, 43 Wis. 395.

26. Justice *v.* Com., 81 Va. 209. See, however, Reg. *v.* Brightside Bierlow, 13 Q. B. 933, 14 Jur. 174, 19 L. J. M. C. 50, 4 New Sess. Cas. 47, 66 E. C. L. 933; Reg. *v.* Blakemore, 2 Den. C. C. 410, 16 Jur. 154, 21 L. J. M. C. 60.

27. Towle *v.* Blake, 48 N. H. 92 (assault and battery); People *v.* Yonkers Bd. Excise Com'rs, 18 N. Y. Suppl. 884; Bly *v.* U. S., 3 Fed. Cas. No. 1,581, 4 Dill. 464 (cutting timber on the public lands).

28. *California.*—Marceau *v.* Travellers' Ins. Co., 101 Cal. 338, 35 Pac. 856, 36 Pac. 813.

Connecticut.— Betts *v.* New Hartford, 25 Conn. 180.

Delaware.—Jarvis *v.* Manlove, 5 Harr. 452.

Illinois.— Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98; Illinois Cent. R. Co. *v.* Quirk, 51 Ill. App. 607.

Kentucky.— Ellison *v.* Louisville, 31 S. W. 723, 17 Ky. L. Rep. 593.

Louisiana.—Bankston *v.* Folks, 38 La. Ann. 267; Hyde *v.* Henry, 4 Mart. N. S. 51; Lewis *v.* Petayvin, 4 Mart. N. S. 4; Steel *v.* Cazeaux, 8 Mart. 318, 13 Am. Dec. 288.

Massachusetts.— Cluff *v.* Mutual Ben. L. Ins. Co., 99 Mass. 317; Mead *v.* Boston, 3 Cush. 404.

Michigan.— Smith *v.* Brown, 2 Mich. 161.

Montana.— Doyle *v.* Gore, 15 Mont. 212, 38 Pac. 939.

New York.— Johnson *v.* Girdwood, 7 Misc. 651, 28 N. Y. Suppl. 151; People *v.* Yonkers Bd. Excise Com'rs, 18 N. Y. Suppl. 884; Maybee *v.* Avery, 18 Johns. 352.

Ohio.— Clark *v.* Irvin, 9 Ohio 131.

Pennsylvania.— Summers *v.* Bergner Brewing Co., 143 Pa. St. 114, 22 Atl. 707, 24 Am. St. Rep. 518; Hahn *v.* Bealor, 132 Pa. St. 242, 19 Atl. 74; Bennett *v.* Fulmer, 49 Pa. St. 155; Hutchinson *v.* Merchants', etc., Bank, 41 Pa. St. 42, 80 Am. Dec. 596; Breinig *v.* Breinig, 26 Pa. St. 161.

Tennessee.— Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943.

Texas.— Landa *v.* Obert, 78 Tex. 33, 14 S. W. 297; Gulf, etc., Co. *v.* Moody, (Civ. App. 1895) 30 S. W. 574.

Vermont.— Robinson *v.* Wilson, 22 Vt. 35, 52 Am. Dec. 77.

Wisconsin.— U. S. Express Co. *v.* Jenkins, 64 Wis. 542, 25 N. W. 549.

United States.— Chamberlain *v.* Pierson, 87 Fed. 420, 31 C. C. A. 157; Countryman *v.* U. S., 21 Ct. Cl. 474.

England.— Petrie *v.* Nuttall, 11 Exch. 569, 25 L. J. Exch. 200, 4 Wkly. Rep. 234; Jones *v.* White, 1 Str. 68.

See 30 Cent. Dig. tit. "Judgment," § 1310.

Contra.— See Anderson *v.* Anderson, 4 Me. 100, 16 Am. Dec. 237, holding that in a libel for divorce on the ground of adultery the record of the conviction of the respondent for the offense is sufficient evidence of the offense and also of the marriage.

29. Orleans Parish *v.* Morgan, 6 Mart. N. S. (La.) 3; Quinn *v.* Quinn, 16 Vt. 426.

Applications of text.— The record of a conviction, showing that defendant was present in court when the judgment was rendered, is conclusive evidence of that fact. Holcomb *v.* Cornish, 8 Conn. 375. So, where a town offers a reward for the detection and conviction of an incendiary, the record of a conviction is competent evidence of the identity of the offender, in an action to recover the reward. York *v.* Forscht, 23 Pa. St. 391. And on the trial of an indictment for manslaughter, the record of a conviction of de-

with the further exception that a criminal sentence or acquittal will be admissible in evidence in a subsequent suit, civil in form but penal in character, to enforce a penalty or forfeiture of property against the same defendant, on the same state of facts;[30] and the judgment in the criminal proceedings may be admissible as a species of admission, particularly when entered on a plea of "guilty."[31] Conversely a judgment in a civil action is not ordinarily admissible as evidence in a subsequent criminal prosecution.[32]

d. Acquittal as Bar to Civil Action. Where the same acts or transactions constitute a crime and also give to a private individual a right of action for damages or for a penalty, the acquittal of defendant, when tried for the criminal offense,

fendant for the assault which caused the death is conclusive evidence that the assault was unjustifiable. Com. *v.* Evans, 101 Mass. 25.

Action for malicious prosecution.— In an action of tort for malicious prosecution, the record of the criminal proceedings had against plaintiff and the judgment of acquittal in which those proceedings resulted are admissible in evidence to show what became of the prosecution and the fact of plaintiff's acquittal. Basebé *v.* Matthews, L. R. 2 C. P. 684, 36 L. J. M. C. 93, 16 L. T. Rep. N. S. 417, 15 Wkly. Rep. 839; Legatt *v.* Tollervey, 14 East 302, 12 Rev. Rep. 518; Taddy *v.* Barlow, 6 L. J. M. C. O. S. 19, 1 M. & R. 275. 31 Rev. Rep. 325, 17 E. C. L. 667; Arundell *v.* Tregono, Yelv. 116. But the record would not be admissible to prove plaintiff's innocence of the crime charged; not only on the general principle that criminal sentences are not evidence in civil suits, but also because in the latter action the issue is not so much the party's guilt or innocence, but whether or not the prosecutor had probable cause for believing him guilty. Skidmore *v.* Bricker, 77 Ill. 164. And see Wilson *v.* Manhattan R. Co., 2 Misc. (N. Y.) 127, 20 N. Y. Suppl. 852. *Compare* Maybee *v.* Avery, 18 Johns. (N. Y.) 352. And even though defendant in the criminal proceeding was found guilty, he may still bring his action for malicious prosecution and therein prove his innocence if he can. That is, a judgment of conviction in a criminal court of one who was innocent of the crime charged does not bar a civil action against the person who maliciously procured the conviction. Johnson *v.* Girdwood, 143 N. Y. 660, 39 N. E. 21.

30. Coffey *v.* U. S., 116 U. S. 436, 6 S. Ct. 437, 29 L. ed. 684; Cooke *v.* Sholl, 5 T. R. 255. *Compare* U. S. *v.* Schneider, 35 Fed. 107, 13 Sawy. 295. Where defendant was acquitted in a criminal prosecution for causing to be transported certain casks containing bottled beer falsely marked as containing bottled soda water, such acquittal was a bar to the subsequent maintenance of an action by the United States to forfeit the property and recover a penalty for the same act imposed by U. S. Rev. St. (1878) § 3449 [U. S. Comp. St. (1901) p. 2277]. U. S. *v.* Seattle Brewing, etc., Co., 135 Fed. 597. It has been held, however, that an acquittal in a criminal prosecution against a merchant for the alleged violation of a town ordinance prohibiting a person from engaging in the business of a merchant without obtaining a license was no bar to a subsequent civil action to recover a penalty for violating such ordinance. Canton *v.* McDaniel, 188 Mo. 207, 86 S. W. 1092.

Unlawful keeping of intoxicating liquors see State *v.* Cobb, 123 Iowa 626, 99 N. W. 299; State *v.* Intoxicating Liquors, 72 Vt. 253, 47 Atl. 779, 82 Am. St. Rep. 937.

Facts necessary to jurisdiction see *Ex p.* Stephen, 114 Cal. 278, 46 Pac. 86.

31. *Maine.*— Woodruff *v.* Woodruff, 11 Me. 475; Bradley *v.* Bradley, 11 Me. 367.

New Hampshire.—Green *v.* Bedell, 48 N. H. 546.

Ohio.— Clark *v.* Irvin, 9 Ohio 131.

Pennsylvania.— Moses *v.* Bradley, 3 Whart. 272.

England.— Reg. *v.* Fontaine-Moreau, 11 Q. B. 1028, 12 Jur. 626, 17 L. J. Q. B. 187, 66 E. C. L. 1028. And see Anonymous [*cited* in 1 Phil. Ev. 320].

See 30 Cent. Dig. tit. "Judgment," § 1310.

Conclusiveness.— Several cases hold that if the criminal judgment is admissible at all under such circumstances it is not conclusive, but may be contradicted by other evidence. Schreiner *v.* High Ct. I. C. O. of F., 35 Ill. App. 576; Crawford *v.* Bergen, 91 Iowa 675, 60 N. W. 205; Clark *v.* Irwin, 9 Ohio 131.

Plea of nolo contendere.— A plea of *nolo contendere* to an indictment with a protestation of defendant's innocence will not conclude him in a civil action from disputing the facts charged in the indictment. Com. *v.* Horton, 9 Pick. (Mass.) 206.

32. *Alabama.*— Britton *v.* State, 77 Ala. 202.

California.— People *v.* Beevers, 99 Cal. 286, 33 Pac. 844.

Connecticut.— State *v.* Bradneck, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620.

Michigan.— People *v.* Kenyon, 93 Mich. 19, 52 N. W. 1033.

New York.— People *v.* Leland, 73 Hun 162, 25 N. Y. Suppl. 943.

Pennsylvania.— Com. *v.* Shoener, 25 Pa. Super. Ct. 526.

Texas.—Dunagain *v.* State, 38 Tex. Cr. 614, 44 S. W. 148.

Vermont.— See Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646.

But see Jackson *v.* Maner, 95 Ga. 702, 22 S. E. 705; Dorrell *v.* State, 83 Ind. 357.

is no bar to the prosecution of the civil action against him, nor is it evidence of his innocence in such action.[33]

8. Proceeding to Try Title to Office. Where rival claimants to a public office contest their rights as against each other, in any form of action or proceeding, they are concluded by the judgment in all further controversies;[34] but the judgment is not conclusive on a subsequent writ of quo warranto, filed by the proper officer of the state against the incumbent of the office, if the state was not represented in the former proceeding.[35]

XV. LIEN OF JUDGMENTS.

A. Nature and Creation of Lien — 1. Nature of Lien in General. The lien of a judgment does not constitute or create an estate, interest, or right of property in the lands which may be bound for its satisfaction; it only gives a right to levy on such lands to the exclusion of adverse interests subsequent to the judgment.[1] Nor is it ordinarily a specific lien upon any specific real estate of the

33. *Alabama.* — Carlisle *v.* Killebrew, 89 Ala. 329, 6 So. 756, 6 L. R. A. 617.

Georgia.— Tumlin *v.* Parrott, 82 Ga. 732, 9 S. E. 718; Cottingham *v.* Weeks, 54 Ga. 275.

Idaho.— Small *v.* Harrington, 10 Ida. 499, 79 Pac. 461.

Illinois.— Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98.

Louisiana.— Beausoliel *v.* Brown, 15 La. Ann. 543.

Massachusetts.— Cluff *v.* Mutual Ben. L. Ins. Co., 99 Mass. 317.

New York.— People *v.* Rohrs, 49 Hun 150, 1 N. Y. Suppl. 672; Von Hoffman *v.* Kendall, 17 N. Y. Suppl. 713; Rosenberg *v.* Salvatore, 1 N. Y. Suppl. 326; *In re* Smith, 10 Wend. 449.

North Carolina.—Powers *v.* Davenport, 101 N. C. 286, 7 S. E. 747.

Pennsylvania.— Morch *v.* Raubitschek, 159 Pa. St. 559, 28 Atl. 369; Summers *v.* Bergner Brewing Co., 143 Pa. St. 114, 22 Atl. 707, 24 Am. St. Rep. 518; Hutchinson *v.* Merchants', etc., Bank, 41 Pa. St. 42, 80 Am. Dec. 596; Rohm *v.* Borland, 4 Pa. Cas. 319, 7 Atl. 171.

Tennessee.— Dyer County *v.* Paducah, etc., R. Co., 87 Tenn. 712, 11 S. W. 943; Massey *v.* Taylor, 5 Coldw. 447, 98 Am. Dec. 429.

Texas.— Shook *v.* Peters, 59 Tex. 393.

United States.— Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451]; Coffey *v.* U. S., 116 U. S. 436, 6 S. Ct. 437, 29 L. ed. 684; Wilkes *v.* Dinsman, 7 How. 89, 12 L. ed. 618; U. S. *v.* Jaedicke, 73 Fed. 100; Alexander *v.* Galloway, 1 Fed. Cas. No. 167, 1 Abb. Adm. 261.

England.— Anderson *v.* Collinson, [1901] 2 K. B. 107, 70 L. J. K. B. 620, 84 L. T. Rep. N. S. 465, 49 Wkly. Rep. 623; Virgo *v.* Virgo, 69 L. T. Rep. N. S. 460.

See 30 Cent. Dig. tit. "Judgment," § 1078.

But see Leavensworth *v.* Tomlinson, 1 Root (Conn.) 436.

34. Conover *v.* New York, 25 Barb. (N. Y.) 513.

35. Giles *v.* Hardie, 23 N. C. 42.

1. *Arkansas.*— Whiting *v.* Beebe, 12 Ark. 421.

Georgia.— Kollock *v.* Jackson, 5 Ga. 153.

Kansas.— Swarts *v.* Stees, 2 Kan. 236, 85 Am. Dec. 588.

Louisiana.— Young *v.* Templeton, 4 La. Ann. 254, 50 Am. Dec. 563.

Maryland.— Hampson *v.* Edelen, 2 Harr. & J. 64, 3 Am. Dec. 530.

Minnesota.— Ashton *v.* Slater, 19 Minn. 347. See also Burwell *v.* Tullis, 12 Minn. 572.

Mississippi.— Foute *v.* Fairman, 48 Miss. 536; Dozier *v.* Lewis, 27 Miss. 679; Michie *v.* Planters' Bank, 4 How. 130, 34 Am. Dec. 112.

North Carolina.— Bruce *v.* Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; Dail *v.* Freeman, 92 N. C. 351; Murchison *v.* Williams, 71 N. C. 135.

Ohio.— Neff *v.* Cox, 5 Ohio S. & C. Pl. Dec. 377.

Pennsylvania.— Sill *v.* Swackhammer, 103 Pa. St. 7; Reed's Appeal, 13 Pa. St. 476; Cover *v.* Black, 1 Pa. St. 493; Clawson *v.* Eichbaum, 2 Grant 130.

United States.— Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. ed. 189; Kemper *v.* Adams, 14 Fed. Cas. No. 7,688, 5 McLean 507.

England.— Brace *v.* Marlborough, Moseley 50, 2 P. Wms. 491, 24 Eng. Reprint 829; Finch *v.* Winchelsea, 1 P. Wms. 277, 24 Eng. Reprint 387.

See 30 Cent. Dig. tit. "Judgment," § 1311.

"A judgment lien in any case is nothing more or less than an auxiliary in the collection of the amount due upon the judgment, by execution in the hands of a proper officer. It simply causes the force of the execution to relate back to the date of the judgment." Haeussler *v.* Scheitlin, 9 Mo. App. 303, 308.

As distinct from attachment lien.— A lien authorized by a statute providing that a judgment creditor may place a lien for his judgment upon the real estate of the debtor, by causing a certificate to be recorded, is not regarded as mere continuance of the attach-

judgment debtor, but it is a general lien upon all his real property.[2] And the lien being merely an incident of the judgment, its loss does not necessarily impair the validity of the judgment as a personal security.[3] Further, as the lien of a judgment is a creature of the law, the kind or extent of the lien which shall result from a given judgment, or the nature or identity of the property to which the judgment shall attach, cannot ordinarily be prescribed or regulated by the court pronouncing or rendering the judgment,[4] Nor, for the same reason, can the

ment when placed upon land attached in the suit in which the judgment was rendered, and is not dissolved by proceedings in insolvency on the part of the debtor, although an attachment made within sixty days next preceding is. Beardsley *v.* Beecher, 47 Conn. 408.

The legal title or seizin may be conveyed by defendant to a third person, notwithstanding the judgment. Doe *v.* McKnight, 2 N. Brunsw. 376.

Judgment creditor not a purchaser.— A judgment creditor is not considered a "purchaser" of the lands bound by the lien of his judgment, in such sense as to have any advantage or superior claim or equity which the judgment debtor had not. Reed's Appeal, 13 Pa. St. 476; Rodgers *v.* Gibson, 4 Yeates (Pa.) 111. And the lien of a judgment is not a "conveyance" within the meaning of the recording acts (Wilcoxson *v.* Miller, 49 Cal. 193), although it is an "encumbrance," within the meaning of an injunction against encumbrances on the property pending litigation (Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 63 N. W. 546).

Subrogation to contract of purchase.— If A makes a verbal contract with B to sell him a tract of land and puts him in possession, judgment creditors of B do not thereby, by virtue of the liens of their judgments or the levy of execution, acquire such an interest in the land as to entitle them to be subrogated to the rights of B, and to compel A to make a conveyance to them upon paying him the purchase-price which B was to pay. Logan *v.* Hale, 42 Cal. 645.

Removing of cloud from title.— A judgment creditor has the right to proceed by ancillary proceedings, in any court of competent jurisdiction, to remove clouds from titles to any property which he deems to be subject to the lien of his judgment. Scottish-American Mortg. Co. *v.* Follansbee, 14 Fed. 125, 9 Biss. 482. See, generally, QUIETING TITLE.

Lis pendens.— A judgment for a sum of money, which may be satisfied by a sale of real estate if not otherwise satisfied, is not *lis pendens* in regard to the title to the real estate of the defendant in the judgment; either it is a lien or the real estate is not affected by it. St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556. See, generally, LIS PENDENS.

Right to personalty.— Since a judgment lien constitutes no property in the land itself, the judgment debtor has the right, previous to levy, to cut timber and firewood, which, if not removed, are his personal property and do not pass by execution sale. West Point Independent School Dist. *v.* Werner, 43 Iowa 643. And so, although machinery sold under an agreement that title shall remain in the seller till full payment becomes attached to realty, so as to be subject to the lien of a judgment against the owner of the land, the lien gives the creditor no right of possession of the machinery. Raymond *v.* Schoonover, 181 Pa. St. 352, 37 Atl. 524.

2. *Kentucky.*— Com. *v.* Jackson, 10 Bush 424.

Mississippi.— Dozier *v.* Lewis, 27 Miss. 679.

Nebraska.— Mansfield *v.* Gregory, 11 Nebr. 297, 9 N. W. 87.

New York.— Lanning *v.* Carpenter, 48 N. Y. 408; Rodgers *v.* Bonner, 45 N. Y. 379.

Texas.— Morris *v.* Jay, 37 Tex. 17.

Virginia.— Kent *v.* Matthews, 12 Leigh 573.

See 30 Cent. Dig. tit. "Judgment," § 1352.

Exceptions.— Where mortgaged premises have been sold under a judgment junior to the mortgage, and the time for redemption has not expired, the general lien of the judgment is turned into a specific lien upon the premises, to the extent of the amount of the bid at the sheriff's sale and the interest thereon. Snyder *v.* Stafford, 11 Paige (N. Y.) 71. So in a scire facias against the heir and a terre-tenant, on a judgment against the ancestor, a judgment entered generally, without specifying the lands which it is to affect, binds only the lands of the ancestor in the hands of such heir or terre-tenant. Coyle *v.* Reynolds, 7 Serg. & R. (Pa.) 328. And see Hill *v.* Sutton, 47 Ind. 592. And if a judgment against executors, for a legacy charged on land, is entered against the land of certain only of the devisees, and the land of another devisee is sold on execution issued on such judgment, it will not pass by such sale. Lapsley *v.* Lapsley, 9 Pa. St. 130.

Purchase-money note.— A judgment on an ordinary note, although given for the purchase-money of real estate, should not contain provisions declaring that the debt is a lien on such real estate, and ordering that the same be sold to satisfy it, even if the real estate is occupied as a homestead. It should be an ordinary personal judgment against defendant, authorizing an ordinary execution to be issued against the property in general of the judgment debtor subject to execution. Greeno *v.* Barnard, 18 Kan. 518.

3. Esterly's Appeal, 109 Pa. St. 222.

4. Hadwin *v.* Fisk, 1 La. Ann. 43; Castro *v.* Illies, 13 Tex. 229. Where a judgment is a legal lien upon real estate, such lien is enforceable by sale of the property, and does not require the aid of a court of equity to

nature or extent of the lien or the property which shall be subject thereto be regulated or prescribed by the agreement of the parties.[5]

2. CREATION AND EXISTENCE OF LIEN. At common law the lands of a debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment.[6] But as early as the year 1285, a British statute, by providing the writ of elegit, created for judgment creditors a rudimentary form of lien on lands, out of which the modern judgment lien has been evolved.[7]

3. STATUTORY PROVISIONS. Judgment liens are the creatures of statute; and in the absence of express legislative enactment judgments do not attach as liens upon real property in the modern sense of the term.[8] Further their character and extent, the steps necessary to secure them, and the means of their enforcement are very largely under the control of the legislature, although statutes affecting such liens are not usually to be construed retroactively.[9]

enforce it. Davis *v.* Harper, 14 App. Cas. (D. C.) 463.

5. Wells *v.* Benton, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; Houston *v.* Houston, 67 Ind. 276; Hoy *v.* Peterman, 28 La. Ann. 289; Lanning *v.* Carpenter, 48 N. Y. 408; Belmont *v.* Ponvert, 35 N. Y. Super. Ct. 208.

6. Mitchell *v.* Wood, 47 Miss. 231; Shrew *v.* Jones, 22 Fed. Cas. No. 12,818, 2 McLean 78.

7. By the statute of Westminster II, 13 Edw. I, c. 18 (1285), the judgment creditor was given his election to sue out a writ of fieri facias against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant, except oxen and beasts of the plow, and a moiety of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an "elegit" and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by elegit. See Jones *v.* Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327; Hutcheson *v.* Grubbs, 80 Va. 251; U. S. *v.* Morrison, 4 Pet. (U. S.) 124, 7 L. ed. 804; *In re* Boyd, 3 Fed. Cas. No. 1,746, 4 Sawy. 262; Scriba *v.* Deane, 21 Fed. Cas. No. 12,559, 1 Brock. 166. And see 2 Coke Inst. 394; 3 Blackstone Comm. 418; Bacon Abr. tit. "Execution" D.

8. *Alabama.*— Street *v.* Duncan, 117 Ala. 571, 23 So. 523; Carlisle *v.* Godwin, 68 Ala. 137; Walker *v.* Elledge, 65 Ala. 51.

Connecticut.— Ives *v.* Beecher, 75 Conn. 564, 54 Atl. 207.

Indiana.— Black *v.* Wilson, 7 Blackf. 532.

Iowa.— Woods *v.* Mains, 1 Greene 275.

Kansas.— Kiser *v.* Sawyer, 4 Kan. 503.

Louisiana.— Holmes *v.* Holmes, 9 Rob. 117.

Mississippi.— Mitchell *v.* Wood, 47 Miss. 231.

New York.— The declaration in the New York statute of March 19, 1787, that no judgment should affect land but upon the filing of the roll and docketing the judgment implied that a lien should attach when this was done. Koning *v.* Bayard, 14 Fed. Cas. No. 7,924, 2 Paine 251.

Pennsylvania.— Riland *v.* Eckert, 23 Pa. St. 215; *In re* Lowrie, 5 Lanc. L. Rev. 295. In divorce proceedings an order for the payment of the wife's expenses and support *pendente lite* is not a judgment such as to create a lien on the husband's lands, there being no statutory authority for so regarding it. Groves' Appeal, 68 Pa. St. 143.

Tennessee.— Bridges *v.* Cooper, 98 Tenn. 394, 39 S. W. 723; Stahlman *v.* Watson, (Ch. App. 1897) 39 S. W. 1055.

Texas.— Nicholas *v.* Hester, 42 Tex. 180.

Utah.— Thompson *v.* Avery, 11 Utah 214, 39 Pac. 829.

Virginia.— The statute of Westminster II was substantially adopted in this state at an early day, and in consequence of this right to subject a moiety of defendant's lands, the courts held that a lien was acquired by the judgment, which extended to all defendant's lands within the state, and which was superior to the claims of subsequent purchasers, although for valuable consideration and without notice. The lien thus acquired was a legal lien, and remained so long as the capacity to sue out an elegit continued, whether the writ was sued out or not. Hutcheson *v.* Grubbs, 80 Va. 251; Price *v.* Thrash, 30 Gratt. 515; Borst *v.* Nalle, 28 Gratt. 423; Leake *v.* Ferguson, 2 Gratt. 419; Taylor *v.* Spindle, 2 Gratt. 44.

United States.— U. S. *v.* Morrison, 4 Pet. 124, 7 L. ed. 804; Converse *v.* Michigan Dairy Co., 45 Fed. 18.

See 30 Cent. Dig. tit. "Judgment," § 1312.

9. *Alabama.*— Enslen *v.* Wheeler, 98 Ala. 200, 13 So. 473; Irvine *v.* Armistead, 46 Ala. 363.

Illinois.— Rock Island Nat. Bank *v.* Thompson, 74 Ill. App. 54.

North Carolina.— Sharpe *v.* Williams, 76 N. C. 87.

South Carolina.— Walton *v.* Dickerson, 4 Rich. 568.

Texas.— Woodson *v.* Collins, 56 Tex. 168. *Compare* Moore *v.* Letchford, 35 Tex. 185, 14 Am. Rep. 363.

Virginia.— McCance *v.* Taylor, 10 Gratt. 580.

United States.— Massingill *v.* Downs, 7 How. 760, 12 L. ed. 903. *Compare* Thompson

4. Recording and Docketing Judgment — a. In General. In many states it is provided by statute that judgments shall be duly recorded or docketed before they can become liens on the debtor's realty, and unless this requirement is complied with the judgment will not attach as a lien,[10] at least as against subse-

v. Phillips, 23 Fed. Cas. No. 13,974, Baldw. 246.

See 30 Cent. Dig. tit. "Judgment," § 1312.

Compare Lowenstein *v.* Young, 8 Okla. 216, 57 Pac. 164; Baltimore Annual Conference *v.* Schell, 17 Wis. 308.

Legislative control of judgment liens.— A law requiring a judgment to be docketed in each county where it is sought to bind real estate of defendant, although previously it was a lien throughout the state without this, is valid and constitutional (Tarpley *v.* Hamer, 9 Sm. & M. (Miss.) 310; Spencer *v.* Rippe, 7 Okla. 608, 56 Pac. 1070. *Compare* Rock Island Nat. Bank *v.* Thompson, 74 Ill. App. 54), and so is a statute changing the mode of acquiring a lien under an existing judgment upon the property of the debtor, for example, by substituting the lien of a docketed judgment for that formerly created by a fieri facias (Whitehead *v.* Latham, 83 N. C. 232), or a statute, operating retroactively as well as prospectively, which provides that a judgment shall lose its lien unless execution is taken out and levied before the expiration of a year from the rendition of the judgment (Ray *v.* Thompson, 43 Ala. 434, 94 Am. Dec. 696; McCormick *v.* Alexander, 2 Ohio 65; U. S. Bank *v.* Longworth, 2 Fed. Cas. No. 923, 1 McLean 35. And see Gimbel *v.* Stolte, 59 Ind. 446). But the statute giving the right to a judgment lien is to be regarded as a part of the contract on which the judgment is based; and hence it is now held that a law which absolutely destroys the lien of a judgment, or provides that it shall cease and determine at the end of a limited period after the date of the judgment, is unconstitutional, so far as it relates to judgments rendered prior to its passage, as impairing the obligation of contracts and invading vested rights. Merchants' Bank *v.* Ballou, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715, 44 L. R. A. 306; Raught *v.* Lewis, 24 Wash. 47, 63 Pac. 1104; Palmer *v.* Laheree, 23 Wash. 409, 63 Pac. 216. A statute denying to final judgments thereafter rendered the incident of a lien on real property does not impair the obligation of contracts made before its enactment. Moore *v.* Holland, 16 S. C. 15. And see *In re* Kennedy, 2 S. C. 216. And conversely it is competent for the legislature to invest existing judgments, as well as future judgments, with the incidents of a lien, by retrospective laws. Enslen *v.* Wheeler, 98 Ala. 200, 13 So. 473; Woods *v.* Mains, 1 Greene (Iowa) 275; Trout *v.* Marvin, 62 Ohio St. 132, 56 N. E. 655; Moore *v.* Letchford, 35 Tex. 185, 14 Am. Rep. 363. Further see Constitutional Law, 8 Cyc. 1015.

10. *Alabama.*— Bland *v.* Putman, 132 Ala. 613, 32 So. 616; Duncan *v.* Ashcraft, 121 Ala. 552, 25 So. 735; Reynolds *v.* Collier, 103 Ala. 245, 15 So. 603.

Iowa.— Callanan *v.* Votruba, 104 Iowa 672, 74 N. W. 13, 65 Am. St. Rep. 538, 40 L. R. A. 375.

Louisiana.— *In re* Immanuel Presb. Church, 112 La. 548, 36 So. 408; Baker *v.* Atkins, 107 La. 490, 32 So. 69; Adle *v.* Anty, 5 La. Ann. 631; Cassidy *v.* His Creditors, 2 Rob. 47; Brou *v.* Kohn, 12 La. 102; Sinnott *v.* Michel, 7 Mart. N. S. 577.

Montana.— Sklower *v.* Abbott, 19 Mont. 228, 47 Pac. 901.

Nebraska.— Filley *v.* Duncan, 1 Nebr. 134, 93 Am. Dec. 337.

New Jersey.— Roll *v.* Rea, 57 N. J. L. 647, 32 Atl. 214.

New York.— Sweetland *v.* Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676; Moyer *v.* Hinman, 13 N. Y. 180; Arnot *v.* Beadle, Lalor 181; Blydenburgh *v.* Northrop, 13 How. Pr. 289; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475; Sears *v.* Mack, 2 Bradf. Surr. 394.

North Carolina.— Wilson *v.* Beaufort County Lumber Co., 131 N. C. 163, 42 S. E. 565; Hardy *v.* Carr, 104 N. C. 33, 10 S. E. 128; Whitehead *v.* Latham, 83 N. C. 232.

Oklahoma.— Lowenstein *v.* Young, 8 Okla. 216, 57 Pac. 164.

Oregon.— Western Sav. Co. *v.* Currey, 39 Oreg. 407, 65 Pac. 360, 87 Am. St. Rep. 660.

Pennsylvania.— Brooke *v.* Phillips, 83 Pa. St. 183.

South Carolina.— Reid *v.* McGowan, 28 S. C. 74, 5 S. E. 215; De Saussure *v.* Zeigler, 6 S. C. 12.

Texas.— Spence *v.* Brown, 86 Tex. 430, 25 S. W. 413; Gullett Gin Co. *v.* Oliver, 78 Tex. 182, 14 S. W. 451; Flanagan *v.* Oberthier, 50 Tex. 379; Hart *v.* Russell, 32 Tex. 31; Gunter *v.* Buckler, (Civ. App. 1895) 32 S. W. 229.

Washington.— Lamey *v.* Coffman, 11 Wash. 301, 39 Pac. 682.

West Virginia.— Duncan *v.* Custard, 24 W. Va. 730. See Renick *v.* Ludington, 14 W. Va. 367.

Wisconsin.— Helms *v.* Chadbourne, 45 Wis. 60.

United States.— *In re* Boyd, 3 Fed. Cas. No. 1,746, 4 Sawy. 262.

See 30 Cent. Dig. tit. "Judgment," § 1323.

Contra.— See Johnson *v.* Schloesser, 146 Ind. 509, 45 N. E. 702, 58 Am. St. Rep. 367, 36 L. R. A. 59.

What judgments.— This rule does not apply to any judgments which, although capable of creating a lien on land, are for any reason not of the sort which are entitled under the statutes to be recorded or docketed. Branley *v.* Dambly, 69 Minn. 282, 71 N. W. 1026; Barry *v.* Niessen, 114 Wis. 256, 90 N. W. 166.

On affirmance of the judgment on appeal, it remains a lien upon the real estate to which its lien may have attached, without redocketing; but to constitute it a lien for

quent purchasers or encumbrancers in good faith and without actual notice,[11] although it may be otherwise as between the original parties.[12] Under this rule it is the duty of the judgment creditor to see to it that his judgment is rightly and properly recorded or docketed, under penalty of losing his lien.[13]

b. Sufficiency to Create Lien. The record or docket of a judgment for the purposes of a lien should be sufficiently full, accurate, and explicit to inform intending purchasers or mortgagees of the facts which it is essential for them to know, and such that a reasonably careful search in the proper quarters will not fail to disclose the judgment.[14] To this end the judgment should be entered in the proper book,[15] and in the proper county or district,[16] and the record should show the court in which the judgment was rendered,[17] its date,[18] the name of the judgment creditor or owner of the judgment,[19] and that of the debtor[20] and whether the judgment is against him personally or in a representative capacity.[21]

5. Transcript or Abstract — a. In General. In many states the statutes authorize a transcript of a judgment recovered in one county to be recorded or docketed in another, for the purpose of binding lands of the judgment debtor situated in the latter county;[22] for as a general rule unless this is done the lien of a judgment

the amount of damages and costs awarded on appeal, it must be redocketed. Daniels *v.* Winslow, 4 Minn. 318.

11. Gurnee *v.* Johnson, 77 Va. 712; Redd *v.* Ramey, 31 Gratt. (Va.) 265. See Gordon *v.* Rixey, 76 Va. 694.

Actual notice to a subsequent purchaser or encumbrancer will supply the place of a record or docketing of the judgment, so as to make its lien attach to the lands, as against him. Smith's Appeal, 47 Pa. St. 128; Stephen's Appeal, 38 Pa. St. 9; York Bank's Appeal, 36 Pa. St. 458; Craige *v.* Sebrell, 9 Gratt. (Va.) 131.

Creditors.— In Virginia it is held that an undocketed judgment is good against a subsequent creditor, with or without notice, even though such creditor may have trusted the debtor on the faith of his ownership of the estate, and believing it to be unencumbered. Gordon *v.* Rixey, 76 Va. 694.

12. Wheeler *v.* Heermans, 3 Sandf. Ch. (N. Y.) 597; York Bank's Appeal, 36 Pa. St. 458; Worrell *v.* Vandusen Oil Co., 1 Leg. Gaz. (Pa.) 53.

13. Wood *v.* Reynolds, 7 Watts & S. (Pa.) 406. And see Hesse *v.* Mann, 40 Wis. 560. It makes no difference that the judgment is not enrolled through the fault of the clerk, and not of the creditor; the lien will nevertheless be lost. Planters' Bank *v.* Conger, 12 Sm. & M. (Miss.) 527. But the judgment debtor cannot set up errors in the docketing of the judgment as destroying its lien, when the property has been sold on execution under the judgment. If the property sold is his the levy operated as a lien; if not, he has no right to complain. Low *v.* Adams, 6 Cal. 277.

14. *Alabama.*— Reynolds *v.* Collier, 103 Ala. 245, 15 So. 603.

Iowa.— Waldron *v.* Dickerson, 52 Iowa 171, 2 N. W. 1088.

Mississippi.— Josselyn *v.* Stone, 28 Miss. 753.

Nebraska.— Metz *v.* Brownsville State Bank, 7 Nebr. 165. *Compare* Smith *v.* Hawley, 2 Nebr. 280.

Pennsylvania.— Mellon's Appeal, 96 Pa. St. 475; Mann's Appeal, 1 Pa. St. 24.

Wisconsin.— Hesse *v.* Mann, 40 Wis. 560.

See 30 Cent. Dig. tit. "Judgment," § 1324.

15. See Hesse *v.* Mann, 40 Wis. 560.

16. See Lanning *v.* Carpenter, 48 N. Y. 408.

17. Western Sav. Co. *v.* Currey, 39 Oreg. 407, 65 Pac. 360, 87 Am. St. Rep. 660.

18. Western Sav. Co. *v.* Currey, 39 Oreg. 407, 65 Pac. 360, 87 Am. St. Rep. 660. See Sears *v.* Mack, 2 Bradf. Surr. (N. Y.) 394.

19. Appling *v.* Stovall, 123 Ala. 398, 26 So. 212.

20. Douglass *v.* Curtis, 5 Mart. N. S. (La.) 112.

21. Douglass *v.* Curtis, 5 Mart. N. S. (La.) 112.

22. *Illinois.*— See Yackle *v.* Wightman, 103 Ill. 169.

Indiana.— Berry *v.* Reed, 73 Ind. 235.

Iowa.— Seaton *v.* Hamilton, 10 Iowa 394.

Louisiana.— Bowman *v.* McKleroy, 14 La. Ann. 587.

Maryland.— Farmers' Bank *v.* Heighe, 3 Md. 357.

Mississippi.— Bergen *v.* State, 58 Miss. 623.

North Carolina.— Perry *v.* Morris, 65 N. C. 221.

Pennsylvania.— Neil *v.* Colwell, 66 Pa. St. 216.

South Dakota.— Bostwick *v.* Benedict, 4 S. D. 414, 57 N. W. 78.

Texas.— Vidor *v.* Rawlins, 93 Tex. 259, 54 S. W. 1026.

Wisconsin.— Goodell *v.* Blumer, 41 Wis. 436.

See 30 Cent. Dig. tit. "Judgment," § 1325. And see the statutes of the various states.

Transfer of judgment by transcript from one county to another generally see *supra*, VII, L, 1.

Where an attachment issued by the court in one county was levied on real estate in another, it was not essential to the establishment of a lien to file a transcript of the

falls only on the lands within the territorial jurisdiction of the court which rendered it.[23] Such a transfer does not destroy the lien of the judgment in the original county;[24] and on the other hand the lien remains good in the second county for the length of time prescribed by the statute, although meanwhile it may have expired by limitation in the first county.[25] And the judgment may be transferred in like manner to a third or other county.[26] In some states also the lien of a judgment does not attach to any lands until an abstract of the judgment or certificate has been recorded in the proper office.[27]

b. From Inferior Court. Judgments rendered by justices of the peace and other inferior courts do not generally create liens on realty; but it is commonly provided that they may be transferred by transcript to a superior court, and such

judgment in such other county. A. M. Holter Hardware Co. *v.* Ontario Min. Co., 24 Mont. 184, 61 Pac. 3.

Sufficiency of transcript.— To create a lien on lands in the county in which it is filed, the transcript should contain all the essential particulars of the judgment, so as to give reasonably certain and definite information to subsequent purchasers or lienors. See State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62; Hubbard *v.* Jones, 61 Kan. 722, 60 Pac. 743; Hastings School-Dist. *v.* Caldwell, 16 Nebr. 68, 19 N. W. 634; Hutchinson *v.* Gorham, 37 Oreg. 347, 61 Pac. 431.

Land in two counties.— To affect purchasers, a decree for the partition of land lying partly in one county and partly in another must be recorded in the county in which the land purchased lies. Nelson *v.* Moon, 17 Fed. Cas. No. 10,111, 3 McLean 319.

Unorganized county.— In order to operate as a lien on land situated in an unorganized county, attached to another county for judicial purposes only, the judgment must be recorded in the county to which the unorganized county is attached, since the recording of a judgment is for judicial purposes. Folts *v.* Ferguson, 77 Tex. 301, 13 S. W. 1037.

Land in subsequently incorporated city.— Where real estate in a county, affected by the lien of a judgment, is included in the corporate limits of a city afterward incorporated, the judgment must be docketed in the clerk's office of the proper court of the city. Wicks *v.* Scull, 102 Va. 290, 46 S. E. 297.

Judgment not a lien in original county.— Where a judgment failed to become a lien on lands in the county where it was rendered, because of a failure to state the time when it was docketed in the lien docket, the filing of a transcript in another county will not be effectual to create a lien on lands therein. Wood *v.* Fisk, 45 Oreg. 276, 77 Pac. 128, 738.

23. *Indiana.*— State *v.* Record, 80 Ind. 348; Bell *v.* Davis, 75 Ind. 314; Rosser *v.* Bingham, 17 Ind. 542.

New Jersey.— Close *v.* Close, 28 N. J. Eq. 472.

New York.— *Ex p.* Becker, 4 Hill 613.

Ohio.— See Smithfield First Nat. Bank *v.* Wheeling, etc., Coal Co., 11 Ohio Cir. Ct. 412, 5 Ohio Cir. Dec. 421.

Tennessee.— Branner *v.* Nance, 3 Coldw. 299.

Virginia.— Logan *v.* Pannill, 90 Va. 11, 17 S. E. 744. *Compare* Gatewood *v.* Goode, 23 Gratt. 880.

See 30 Cent. Dig. tit. "Judgment," § 1325.

Territorial extent of lien see *infra*, XV, D, 1.

Purchaser acknowledging lien.— Where a judgment debtor sells lands, both he and the purchaser supposing them to be bound by the lien of the judgment, and the purchaser undertaking to pay the judgment as a part of the consideration, the latter cannot afterward refuse to pay the judgment on discovering that it was never recorded in the county where the lands lie. Haverly *v.* Becker, 4 N. Y. 169.

24. Perry *v.* Morris, 65 N. C. 221.

25. Donner *v.* Palmer, 23 Cal. 40. But *compare* Bradfield *v.* Newby, 130 Ind. 59, 28 N. E. 619. And see Brandt's Appeal, 16 Pa. St. 343, holding that, where the original judgment is set aside for irregularity, the judgment on the transcript falls with it; and if thereafter plaintiff obtains a new judgment in the case, he must transfer it by a new transcript to the other county, or it will have no lien there.

26. In Pennsylvania, if it is desired to bind lands in a third county, a transcript must be taken directly from the first; it cannot be done by filing in such third county a transcript of the transcript which was filed in the second county. Mellon *v.* Guthrie, 51 Pa. St. 116. But in Nebraska, where a judgment is rendered in a county court, and a transcript filed in the district court, and a transcript of this transcript is filed in the district court of another county, it creates a valid lien on lands in the latter county. Lamb *v.* Sherman, 19 Nebr. 681, 28 N. W. 319.

27. *Alabama.*— Sorrell *v.* Vance, 102 Ala. 207, 14 So. 738.

Connecticut.— Beardsley *v.* Beecher, 47 Conn. 408.

Idaho.— Moore *v.* Taylor, 1 Ida. 630.

Texas.— Boyd *v.* Ghant, 93 Tex. 543, 57 S. W. 25; Spence *v.* Brown, 86 Tex. 430, 25 S. W. 413; Gullett Gin Co. *v.* Oliver, 78 Tex. 182, 14 S. W. 451.

Washington.— Lamey *v.* Coffman, 11 Wash. 301, 39 Pac. 682.

See 30 Cent. Dig. tit. "Judgment," § 1325.

transcript being duly filed and entered the judgment will have the same effect as a lien and upon the same property as if originally rendered in the superior court;[28] and this is so, although the clerk may neglect to enter the judgment in the docket of the court.[29] The transcript must be filed in the proper court of the county where the judgment was recovered, and cannot in the first instance be filed in the court of another county.[30]

6. INDEX OF JUDGMENTS — a. Necessity in General. Under statutes requiring indexes of judgments to be made, a judgment, although duly filed and recorded, is no lien on real estate, unless it is also properly indexed.[31]

28. *California.*— Bagley *v.* Ward, 27 Cal. 369.

Colorado.— Laughlin *v.* Hawley, 9 Colo. 170, 11 Pac. 45.

Connecticut.— Parmalee *v.* Bethlehem, 57 Conn. 270, 18 Atl. 94.

Illinois.— O'Brien *v.* Gooding, 194 Ill. 466, 62 N. E. 898. But to entitle a party to file a transcript of a justice's judgment in the circuit court, for the purpose of obtaining a lien on land, it is necessary that execution should first be issued by the justice and returned *nulla bona*. Cramer *v.* Bode, 24 Ill. App. 219.

Indiana.— American Ins. Co. *v.* Gibson, 104 Ind. 336, 3 N. E. 892.

Iowa.— State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62.

Kentucky.— See Easterling *v.* Chiles, 93 Ky. 315, 20 S. W. 227, 14 Ky. L. Rep. 287.

Mississippi.— Wise *v.* Thread, 84 Miss. 200, 36 So. 244.

Missouri.— Bunding *v.* Miller, 10 Mo. 445; Tracy *v.* Whitsett, 51 Mo. App. 149.

Nebraska.— Moores *v.* Peycke, 44 Nebr. 405, 62 N. W. 1072; Work *v.* Brown, 38 Nebr. 498, 56 N. W. 1082.

New York.— Blossom *v.* Barry, 1 Lans. 190; Dickinson *v.* Smith, 25 Barb. 102; Brown *v.* Hyman, 27 N. Y. Suppl. 436; Jackson *v.* Jones, 9 Cow. 182.

North Carolina.— Dysart *v.* Brandreth, 118 N. C. 968, 23 S. E. 966; Adams *v.* Guy, 106 N. C. 275, 11 S. E. 535.

Oregon.— White *v.* Espey, 21 Oreg. 328, 28 Pac. 71; Dearborn *v.* Patton, 4 Oreg. 58.

Pennsylvania.— *In re* Dimond, 14 Pa. St. 323; Ritter *v.* Leonard, 2 Pars. Eq. Cas. 255; Bannan *v.* Rathbone, 3 Grant 259.

Texas.— Hamilton *v.* Beard, (Civ. App. 1895) 33 S. W. 252.

United States.— Hawkins *v.* Wills, 49 Fed. 506, 1 C. C. A. 339.

See 30 Cent. Dig. tit. "Judgment," § 1326.

In the absence of such a statute the clerk of a county court has no authority to issue an execution upon the judgment of a justice. Candler *v.* Fisher, 11 Md. 332.

After the death of defendant, the filing of a transcript of a judgment obtained in a justice's court with the county clerk does not render the judgment a lien on the real estate of such defendant. Henderson *v.* Brooks, 3 Thomps. & C. (N. Y.) 445.

Operation and effect of justice of the peace judgments see JUSTICES OF THE PEACE.

Judgments of probate courts do not generally create liens on real estate until certified by transcript to a superior court of general jurisdiction. Stone *v.* Wood, 16 Ill. 177; Kennerly *v.* Shepley, 15 Mo. 640, 57 Am. Dec. 219; Spencer *v.* Rippe, 7 Okla. 608, 56 Pac. 1070. But see Haeussler *v.* Scheilin, 9 Mo. App. 303.

Although time for appeal has not expired a judgment of a justice may be docketed. Minshew *v.* Davidson, (Miss. 1905) 38 So. 315.

Pendency of an appeal from a justice to the circuit court stays execution, but does not prevent plaintiff from docketing his judgment so as to create a lien on defendant's land. Steckmesser *v.* Graham, 10 Wis. 37.

Judgment without personal service.— A judgment in attachment before a justice of the peace, without personal service on defendant or appearance by him, cannot be transferred to the office of the clerk of the circuit court, so as to create a lien on the debtor's realty. Goodwin *v.* Anderson, 17 Ark. 36.

29. Petray *v.* Howell, 20 Ark. 615.

30. Blaney *v.* Hanks, 14 Iowa 400; Pemberton *v.* Pollard, 18 Nebr. 435, 25 N. W. 582; Bowman *v.* Silvus, 6 Kulp (Pa.) 496.

31. *Iowa.*— Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 381, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122; Sterling Mfg. Co. *v.* Early, 69 Iowa 94, 28 N. W. 458.

Nebraska.— German Nat. Bank *v.* Atherton, 64 Nebr. 610, 90 N. W. 550; Metz *v.* Brownville State Bank, 7 Nebr. 165. *Compare* Hamilton *v.* Whitney, 19 Nebr. 303, 27 N. W. 125.

North Carolina.— Valentine *v.* Britton, 127 N. C. 57, 37 S. E. 74.

Pennsylvania.— McIntire *v.* Irwin, 1 Chest. Co. Rep. 457.

Texas.— Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247; Nye *v.* Gribble, 70 Tex. 458, 8 S. W. 608; Nye *v.* Moody, 70 Tex. 434, 8 S. W. 606; Corbett *v.* Redwood, (Civ. App. 1900) 58 S. W. 550; Oppenheimer *v.* Robinson, (Civ. App. 1894) 26 S. W. 320.

See 30 Cent. Dig. tit. "Judgment," § 1327.

Contra.— Old Dominion Granite Co. *v.* Clarke, 28 Gratt. (Va.) 617; Calwell *v.* Prindle, 19 W. Va. 604.

Actual notice.— A purchaser or encumbrancer who had actual knowledge of the judgment cannot take advantage of the fact that it was not indexed or was not properly indexed. Cushing *v.* Edwards, 68 Iowa 145,

b. Certainty Required in Docket and Index—(i) *As to Names.* To make the lien of a judgment effective as against third persons, it is necessary that the index should disclose the names of the parties, and designate them with such a degree of accuracy as will furnish reasonably certain information to interested searchers.[32] A party may be designated by the name by which he is commonly known, if that corresponds with the name in the judgment;[33] but regularly the entry should set forth the correct names of both parties, plaintiff as well as defendant,[34] and the names of all the parties if there are several plaintiffs or defendants;[35] and this involves setting forth correctly both the christian name[36] and the sur-

25 N. W. 940; Butts *v.* Cruttenden, 14 Pa. Super. Ct. 449.

Joint defendants.— A judgment rendered and entered against two or more defendants jointly, but indexed as to only one of them, creates a lien on that defendant's property. Whitacre *v.* Martin, 51 Minn. 421, 53 N. W. 806; Blum *v.* Keyser, 8 Tex. Civ. App. 675, 28 S. W. 561.

Effect of new index.— Where the original index of a judgment was insufficient to create a lien, a new index, made on the transfer of the records of judgments to a new book, will not, as an original index, render the judgment a lien as of the date of the transfer. Glasscock *v.* Stringer, (Tex. Civ. App. 1895) 32 S. W. 920.

Two indexes.— Where two indexes of abstracts of judgments are kept by the clerk of the court, as is sometimes the case, it is necessary that each abstract should be entered in each index. Central Coal, etc., Co. *v.* Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383.

Noting fact of index.— When the index entry is properly made, the lien is not affected by the failure of the clerk to note on the face of the record the fact that he has indexed it. Gullett Gin Co. *v.* Oliver, 78 Tex. 182, 14 S. W. 451.

32. See Day *v.* Worland, 92 Ind. 75; Metz *v.* Brownville State Bank, 7 Nebr. 165; Schneider *v.* Dorsey, (Tex. Civ. App. 1903) 72 S. W. 1029; Noble *v.* Barner, 22 Tex. Civ. App. 357, 55 S. W. 382; Central Coal, etc., Co. *v.* Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383. The entry of the judgment must show on its face that the party to be affected by the lien is one of defendants; it is not sufficient that by reference to the records of the court the names of defendants may be ascertained; the names themselves must be set forth. Ford *v.* Tilden, 7 La. Ann. 533. It is not sufficient to create a lien if it fails to contain the name of the owner of the judgment. Travis *v.* Rhodes, (Ala. 1904) 37 So. 804. But see *contra*, Street *v.* Smith, 85 Miss. 359, 37 So. 837, holding that the failure of the record to show an assignment of the judgment or the name of the assignee did not affect the lien.

Ditto marks.—Where two judgments against the same defendant are entered successively in the index, it is a sufficient indexing of the second if the word "same" is written, or ditto marks are placed, under his name in the first. New England L. & T. Co. *v.* Avery, (Tex. Civ. App. 1897) 41 S. W. 673; Fulkerson *v.* Taylor, 102 Va. 314, 46 S. E. 309.

33. Jenny *v.* Zehnder, 101 Pa. St. 296; *In re* Jones, 27 Pa. St. 336; Work *v.* Darby, 13 Pa. Co. Ct. 269.

Fictitious name.— Where a judgment recovered against a person by a fictitious name is docketed in such name, although at the trial the true name was shown, a person who, without knowledge of the judgment, purchases the premises from defendant by his true name, after the judgment was docketed, may sue plaintiff in such judgment to have it declared no lien on the premises and to enjoin a sale on execution. Bernstein *v.* Schoenfeld, 37 Misc. (N. Y.) 610, 76 N. Y. Suppl. 140.

34. Ivy Coal, etc., Co. *v.* Alabama Nat. Bank, 123 Ala. 477, 26 So. 213; Appling *v.* Stovall, 123 Ala. 398, 26 So. 212; Duncan *v.* Ashcraft, 121 Ala. 552, 25 So. 735; Oppenheimer *v.* Robinson, 87 Tex. 174, 27 S. W. 95; Kanz *v.* Willis, 16 Tex. Civ. App. 12, 40 S. W. 171; Burnett *v.* Cockshatt, 2 Tex. Civ. App. 304, 21 S. W. 950. But see Franke *v.* Lone Star Brewing Co., 17 Tex. Civ. App. 9, 42 S. W. 861, holding that the index is sufficient to fix a lien on defendant's property if his name is correctly stated under the proper letter, although plaintiff's name is placed under a wrong letter.

Character of parties.— It is not necessary to specify the character in which the parties sued or defended; and the law is sufficiently complied with by placing defendant's name in its proper alphabetical position, followed by plaintiff's name, although neither party is designated as "defendant" or "plaintiff," and although neither the word "versus" nor "against" or any abbreviation is placed after either name. Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247; Von Stein *v.* Trexler, 5 Tex. Civ. App. 299, 23 S. W. 1047.

35. Hahn *v.* Mosely, 119 N. C. 73, 25 S. E. 713; Dewey *v.* Sugg, 109 N. C. 328, 13 S. E. 923, 14 L. R. A. 393; Noble *v.* Barner, 22 Tex. Civ. App. 357, 55 S. W. 382; Fuller *v.* Hull, 19 Wash. 400, 53 Pac. 666.

Nominal parties.— If there are several defendants, but some of them are merely formal or nominal parties, it is sufficient if the index contains the names of those only against whom a personal judgment, or judgment for money, is rendered. Fuller *v.* Hull, 19 Wash. 400, 53 Pac. 666.

36. Johnson *v.* Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Phillips *v.* McKaig, 36

name, and the entry must be placed under the letter which begins defendant's surname, and not under the initial of his first name.[37] An uncertainty or misspelling in the index in this particular may be aided by the principle of *idem sonans*,[38] but only where the names would be pronounced alike in the English language.[39] Further the erroneous omission or introduction of a middle initial in defendant's name, or a mistake in such middle initial, will prevent the judgment from having effect as a lien;[40] and a judgment against a firm recorded or indexed without setting out the names of the individual partners has no effect as a lien.[41]

(II) *As to Amount of Judgment.* The lien of a judgment is not effective unless the docket entry shows the amount of the judgment with such certainty that the precise sum due can be ascertained by mere inspection, or at most by a simple calculation;[42] and such showing must include, not only the

Nebr. 853, 55 N. W. 259; Pennsylvania Sav. Fund, etc., Assoc. *v.* George, 201 Pa. St. 43, 50 Atl. 300; Ridgway's Appeal, 15 Pa. St. 177, 53 Am. Dec. 586; Peck's Appeal, 11 Wkly. Notes Cas. (Pa.) 31. But *compare* Hibberd *v.* Smith, 50 Cal. 511, where it is said that, although the clerk in docketing a judgment omits the christian name of defendant, or omits to write the names in alphabetical order, this does not prevent the judgment from becoming a lien on the real estate of the judgment debtor.

Use of initials.— Although the christian name of defendant is abbreviated to a mere initial, this may be sufficient to put a subsequent purchaser or encumbrancer upon inquiry and so to charge him with notice. Pinney *v.* Russell, 52 Minn. 443, 54 N. W. 484; Green *v.* Meyers, 98 Mo. App. 438, 72 S. W. 128; Valentine *v.* Britton, 127 N. C. 57, 37 S. E. 74.

Married woman's christian name.— If defendant is a married woman, the judgment must be indexed in such manner as to show her own christian name; it is not sufficient to give constructive notice if it is indexed under the chrstian name of her husband. Bernstein *v.* Schoenfeld, 81 N. Y. App. Div. 171, 81 N. Y. Suppl. 11; Bankers' Loan, etc., Co. *v.* Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914.

37. Metz *v.* Brownville State Bank, 7 Nebr. 165; Avery *v.* Texas Loan Agency, (Tex. Civ. App. 1901) 62 S. W. 793; Willis *v.* Downes, (Tex. Civ. App. 1898) 46 S. W. 920.

The term "junior" may be a means of distinguishing between a father and son who bear the same name, but it is no part of the younger man's name, and hence is not required to be included in the docket entry of a judgment against him, although the "senior" of the same name resides in the same county. Bidwell *v.* Coleman, 11 Minn. 78. See, generally, NAMES.

38. Green *v.* Meyers, 98 Mo. App. 438, 72 S. W. 128; Myer *v.* Fegaly, 39 Pa. St. 429, 80 Am. Dec. 534. But see Thomas *v.* Desney, 57 Iowa 58, 10 N. W. 315 ("Helen" and "Ellen" are not the same name, within the meaning of this rule); Anthony *v.* Taylor, 68 Tex. 403, 4 S. W. 531 ("Bankhead" and "Burkhead" are not interchangeable names). See, generally, NAMES.

39. Heil's Appeal, 40 Pa. St. 453, 80 Am. Dec. 590. See, generally, NAMES.

40. Johnson *v.* Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Crouse *v.* Murphy, 140 Pa. St. 335, 21 Atl. 358, 23 Am. St. Rep. 232, 12 L. R. A. 58; Hutchinson's Appeal, 92 Pa. St. 186; Wood *v.* Reynolds, 7 Watts & S. (Pa.) 406; Delaney *v.* Becker, 14 Pa. Super. Ct. 392; Perkins *v.* Nichols, 2 Chest. Co. Rep. (Pa.) 229; Stott *v.* Irwin, 2 Chest. Co. Rep. (Pa.) 137; Davis *v.* Steeps, 87 Wis. 472, 58 N. W. 769, 41 Am. St. Rep. 51, 23 L. R. A. 818. *Contra,* Clute *v.* Emmerich, 26 Hun (N. Y.) 10; Geller *v.* Hoyt, 7 How. Pr. (N. Y.) 265.

Middle name or initial as part of name see, generally, NAMES.

41. Hughes *v.* Lacock, 63 Miss. 112; Hamilton's Appeal, 103 Pa. St. 368; Smith's Appeal, 47 Pa. St. 128; York Bank's Appeal, 36 Pa. St. 458; Ridgway's Appeal, 15 Pa. St. 177, 53 Am. Dec. 586; Steffens *v.* Cameron, (Tex. 1892) 19 S. W. 1068; Pierce *v.* Wimberly, 78 Tex. 187, 14 S. W. 454; Gullett Gin Co. *v.* Oliver, 78 Tex. 182, 14 S. W. 451; Glasscock *v.* Price, (Tex. Civ. App. 1898) 45 S. W. 415; Willis *v.* Nichols, 5 Tex. Civ. App. 154, 23 S. W. 1025. See Semple *v.* Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509. *Contra,* Hibberd *v.* Smith, 50 Cal. 511.

If the name of defendant is correctly given, it is not a material mistake that the names of plaintiffs, a firm, are set forth only in the style of the partnership. Oppenheimer *v.* Robinson, 87 Tex. 174, 27 S. W. 95; Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209.

A mistake made in setting out the firm-name of defendants appears to be immaterial, if their individual names are correctly given in the docket and index. See Willis *v.* Downes, (Tex. Civ. App. 1898) 46 S. W. 920; Semple *v.* Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509.

42. Glasscock *v.* Stringer, (Tex. Civ. App. 1895) 32 S. W. 920; *In re* Boyd, 3 Fed. Cas. No. 1,746, 4 Sawy. 262.

Use of figures alone.— Where the amount of the judgment is entered in figures alone, without any dollar mark or other distinguishing sign, it is ineffectual to create a lien on the debtor's realty. Bush *v.* Farris, 71 Fed. 770, 18 C. C. A. 315. But see Dyke *v.* Orange Bank, 90 Cal. 397, 27 Pac. 304, holding that

principal sum, but also interest[43] and costs,[44] and any part payments or credits on the judgment.[45]

7. Issuance of Execution. In several states it is necessary to the effectiveness of a judgment lien on land that an execution shall have been issued within a limited time after the rendition of the judgment;[46] but ordinarily the judgment attaches as a lien without the use of any process,[47] except as to property which is not commonly subject to the lien of a judgment, but can be made so by the levy of an execution, as trust property or personalty,[48] or where the lien is to be extended to the property of a person other than the principal defendant, such as a surety.[49]

B. What Judgments Create Liens — 1. Requisites in General. It is essential to the creation of a judgment lien that there shall be a judgment[50] which is final and not merely interlocutory,[51] capable of collection by execution against

it is sufficient if the columns of figures are separated by a vertical red line, marking off the cents from the dollars, in the usual manner of bookkeeping, although the dollar mark is omitted.

43. But it is enough if the rate of interest which the judgment bears is correctly specified, so that the amount of interest due at any given time can be ascertained by mere calculation. Willis *v.* Sommerville, 3 Tex. Civ. App. 509, 22 S. W. 781; Decatur First Nat. Bank *v.* Cloud, 2 Tex. Civ. App. 627, 21 S. W. 770.

44. Failure of the record of the judgment to include the amount of the costs will defeat the lien only to the extent of the costs. Lamey *v.* Coffman, 11 Wash. 301, 39 Pac. 682. See Green *v.* Meyers, 98 Mo. App. 438, 72 S. W. 128.

45. Evans *v.* Frisbie, 84 Tex. 341, 19 S. W. 510; Nohle *v.* Barner, 22 Tex. Civ. App. 357, 55 S. W. 382; Willis *v.* Sanger, 15 Tex. Civ. App. 655, 40 S. W. 229.

46. *Georgia.*— Crosby *v.* King Hardware Co., 109 Ga. 452, 34 S. E. 606; Harvey *v.* Sanders, 107 Ga. 740, 33 S. E. 713; Smith *v.* Howell, 101 Ga. 771, 29 S. E. 31.

Illinois.—Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137.

Kansas.— Jackson *v.* King, 62 Kan. 850, 62 Pac. 655.

Ohio.—Corwin *v.* Benham, 2 Ohio St. 36; Kentucky Northern Bank *v.* Roosa, 13 Ohio 334; Towner *v.* Wells, 8 Ohio 136; Smithfield First Nat. Bank *v.* Wheeling, etc., Coal Co., 11 Ohio Cir. Ct. 412, 5 Ohio Cir. Dec. 421.

Texas.— Pfeuffer *v.* Werner, 27 Tex. Civ. App. 288, 65 S. W. 888. And see Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247, holding that a statute requiring execution to issue within twelve months after the rendition of a judgment, to preserve its lien, has no reference to decrees establishing or foreclosing contract liens.

Canada.— Doe *v.* Hollister, 5 U. C. Q. B. O. S. 739; Doe *v.* Burtch, 2 U. C. Q. B. O. S. 514.

See 30 Cent. Dig. tit. "Judgment," § 1328. And see the statutes of the various states.

Necessity of execution to continue lien see *infra*, XV, G, 4.

47. Vansciver *v.* Bryan, 13 N. J. Eq. 434; Surratt *v.* Crawford, 87 N. C. 372; Maxwell *v.* Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875. *Compare* U. S. Bank *v.* Tyler, 4 Pet. (U. S.) 366, 7 L. ed. 888; *In re* Badenheim, 2 Fed. Cas. No. 716.

48. Arnot *v.* Beadle, Lalor (N. Y.) 181; Kellogg *v.* Wood, 4 Paige (N. Y.) 578; Selby *v.* Dixon, 11 N. C. 424.

Of two judgments, neither of which is a lien on the real estate of the judgment debtor, the first lien attaches in favor of that under which a levy is first made. Lathrop *v.* Brown, 23 Iowa 40.

49. Johnson *v.* Catron, 108 Ky. 568, 57 S. W. 13, 22 Ky. L. Rep. 275.

50. See Linsley *v.* Logan, 33 Ohio St. 376.

Decree in admiralty see Admiralty, 1 Cyc. 892.

Allowance of claims as creating lien against decedent's estate see Executors and Administrators, 18 Cyc. 510.

Decree of foreclosure as lien see Mortgages.

Award of arbitrators as creating lien see Arbitration and Award, 3 Cyc. 735.

Decree for alimony as creating lien see Divorce, 14 Cyc. 783.

Forfeited forthcoming bond as creating lien see Executions, 17 Cyc. 1228.

Recognizance or judgment thereon as creating lien see Recognizances.

Verdict.— Under a statute in Pennsylvania, directing the amount of a verdict to be entered in the judgment docket, the lien of a verdict partakes of the nature of a judgment lien. Fuellhart *v.* Blood, 21 Pa. Co. Ct. 601.

Registry of a twelve months' bond given by a purchaser at an execution sale gives no lien. Alexander *v.* Evans, 10 La. 132.

A rule absolute against a sheriff, requiring him to pay over money, is not such a judgment as will hind his property in the ordinary way. Speer *v.* McPherson, 24 Ga. 146.

51. *Delaware.*— Citizens' Loan Assoc. *v.* Martin, 1 Marv. 213, 40 Atl. 1108.

Illinois.— Grant *v.* Bennett, 96 Ill. 513.

Maryland.— Davidson *v.* Myers, 24 Md. 538.

North Carolina.— McCaskill *v.* Graham, 121 N. C. 190, 28 S. E. 264.

Ohio.— Linsley *v.* Logan, 33 Ohio St. 376.

South Carolina.— De Saussure *v.* Zeigler, 6 S. C. 12.

See 30 Cent. Dig. tit. "Judgment," § 1321.

the debtor's property,[52] rendered by a lawfully and validly constituted court,[53] and being a valid and subsisting judgment,[54] for the payment of a definite and certain sum of money.[55] These conditions being met the lien may arise from a judgment by confession or consent as well as one rendered adversely,[56] or from a final judgment by default.[57]

2. DECREES IN EQUITY. A decree in chancery may create a lien on lands equally with a judgment at law, but only where it is for the payment of a definite and liquidated sum of money.[58] Thus a decree merely setting aside a fraudulent

52. Hagan *v.* Chapman, 1 Pennew. (Del.) 445, 41 Atl. 974; Towner *v.* Wells, 8 Ohio 136; Heff *v.* Cox, 5 Ohio S. & C. Pl. Dec. 377, 5 Ohio N. P. 413; *In re* Boyd, 3 Fed. Cas. No. 1,746, 4 Sawy. 262.

A judgment against a municipal corporation is not a lien on its real estate, because no execution could issue against the land. People *v.* Cook County Super. Ct., 55 Ill. App. 376; Schaffer *v.* Cadwallader, 36 Pa. St. 126.

53. See Hill *v.* Armistead, 56 Ala. 118; Hill *v.* Huckabee, 52 Ala. 155; Parks *v.* Coffey, 52 Ala. 32; Barclay *v.* Plant, 50 Ala. 509; Noble *v.* Cullom, 44 Ala. 554; Martin *v.* Hewitt, 44 Ala. 418.

Courts whose judgments constitute liens see *infra*, XV, B, 5.

54. Beach *v.* Atkinson, 87 Ga. 288, 13 S. E. 591; Marchal *v.* Hooker, 27 La. Ann. 454.

Judgment against non-resident on service by publication.— A valid judgment *in personam* cannot be obtained against a non-resident of the state, who is not personally served with process and has not appeared in the action; and it is not competent for a state to authorize such a judgment which will bind property not within the state at the time, and not proceeded against *in rem* in satisfaction of the claim. Bartlett *v.* Spicer, 75 N. Y. 528; Osborne *v.* Barnett, 1 Tex. App. Civ. Cas. § 125; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. But *compare* Fulshear *v.* Lawrence, 1 Tex. App. Civ. Cas. § 631.

Effect of misnomer.— A judgment against a person by the name under which he is more commonly known constitutes a lien upon his property, although his real name was different. Mack *v.* Schlotman, 7 Ohio Dec. (Reprint) 525, 3 Cinc. L. Bul. 737. And see McCue *v.* McCue, 4 Phila. (Pa.) 295.

Judgment vacated or reversed see *infra*, XV, I, 7.

55. Hamberger *v.* Easter, 57 Ga. 71; Lea *v.* Yates, 40 Ga. 56; Eames *v.* Germania Turn Verein, 74 Ill. 54; Roane *v.* Hamilton, 101 Iowa 250, 70 N. W. 181; Dickson's Succession, 37 La. Ann. 795; Lirette *v.* Carrane, 27 La. Ann. 298.

Costs.— A final judgment of a court of record is a lien on the debtor's land, although the money judgment is for costs only. Bobb *v.* Graham, 15 Mo. App. 289. See Lind *v.* Adams, 10 Iowa 398, 77 Am. Dec. 123.

Damages on the dissolution of an injunction upon a judgment become a part of a judgment and are embraced within the lien thereof. Michaux *v.* Brown, 10 Gratt. (Va.) 612.

Where a judgment for a general sum is founded on two debts, one of which properly supports the lien of the judgment, while the other does not, the lien of the judgment obtains, if the two debts can be separated and distinguished. Carithers *v.* Venable, 52 Ga. 389.

56. *Iowa.*— Vannice *v.* Greene, 16 Iowa 574.

Louisiana.—Hewitt *v.* Stewart, 11 La. Ann. 100.

Missouri.— Gilman *v.* Hovey, 26 Mo. 280.

New Jersey.— See Wood *v.* Hopkins, 3 N. J. L. 263.

New York.— Steuhen County Bank *v.* Alberger, 78 N. Y. 252; White *v.* Bogart, 73 N. Y. 256; Jaffray *v.* Saussman, 52 Hun 561, 5 N. Y. Suppl. 629; Lansing *v.* Clapp, 3 How. Pr. 238; Nichols *v.* Chapman, 9 Wend. 452; James *v.* Morey, 2 Cow. 246, 14 Am. Dec. 475; Webster *v.* Wise, 1 Paige 319.

Pennsylvania.— Lauffer *v.* Cavett, 87 Pa. St. 479; Stanton *v.* White, 32 Pa. St. 358; Ramsey *v.* Linn, 2 Rawle 229; Gregg *v.* McAllister, 4 Pa. Co. Ct. 264; Snevely *v.* Tarr, 1 Phila. 220. A confession of judgment, "sum to be liquidated by attorney," operates as a lien upon defendant's real estate, although not afterward liquidated. Com. *v.* Baldwin, 1 Watts 54, 26 Am. Dec. 33. *Compare* Philadelphia Bank *v.* Craft, 16 Serg. & R. 347.

Virginia.— Shadrack *v.* Woolfolk, 32 Gratt. 707.

See 30 Cent. Dig. tit. "Judgment," § 1319.

Consent of creditor.— A judgment by confession entered without the knowledge or consent of the creditor in whose favor it is entered is invalid for all purposes, prior to a ratification by him, and is not operative as a lien. Haggerty *v.* Juday, 58 Ind. 154.

57. Sellers *v.* Burk, 47 Pa. St. 344; Hays *v.* Tryon, 2 Miles (Pa.) 208; Eastham *v.* Sallis, 60 Tex. 576. See Atchison *v.* Rosalip, 3 Pinn. (Wis.) 288, 4 Chandl. 12.

58. *Illinois.*— Eames *v.* Germania Turn Verein, 74 Ill. 54; Karnes *v.* Harper, 48 Ill. 527.

Ohio.— Myers *v.* Hewitt, 16 Ohio 449.

Pennsylvania.— Hohman's Appeal, 127 Pa. St. 209, 17 Atl. 902.

South Carolina.— Blake *v.* Heyward, Bailey Eq. 208.

United States.— Scriba *v.* Deane, 21 Fed. Cas. No. 12,559, 1 Brock. 166.

See 30 Cent. Dig. tit. "Judgment," § 1322.

Enforcement of specific lien.— A decree providing that if defendant does not in a given

conveyance of land without more does not give rise to a lien.[59] But equity may create a lien directly by decree for that purpose.[60]

3. Judgments Against Insane Persons. A judgment recovered before defendant was adjudged insane is a lien on his lands, even in the hands of his guardian or committee;[61] but not so where the judgment was not recovered until after the inquisition of lunacy.[62]

4. Judgments Against Personal Representatives. A judgment against an executor or administrator, in his representative character, has, in the absence of statute, no operation as a lien on realty belonging to the decedent's estate,[63] nor has a judgment sustaining an opposition to an administrator's account, where no personal judgment is entered against the administrator;[64] but if such a representative is sued in his individual capacity, a judgment recovered against him in that character is a lien on his own property.[65]

5. Organization and Character of Court — a. In General. The incident of a lien commonly attaches to the judgments of all courts of record having jurisdiction at law, including the superior and appellate courts as well as those of general original jurisdiction.[66]

b. United States Courts — (i) *Lien of Judgments in General.* In states where the judgments of state courts of record create a lien upon the lands of the judgment debtor, the judgment of a United States circuit or district court, sitting within the state, has the same operation as a lien.[67] This is in consequence of the

time pay plaintiff a certain sum of money, certain real and personal property of defendant, on which plaintiff has a specific lien, shall be sold, is not a judgment which creates a lien on other real estate of defendant. Linn *v.* Patton, 10 W. Va. 187.

59. State *v.* Chamberlain Banking House, (Nebr. 1904) 100 N. W. 205; New York L. Ins. Co. *v.* Mayer, 14 Daly (N. Y.) 318, 12 N. Y. St. 119.

60. Carmichael *v.* Abrahams, 1 Desauss. Eq. (S. C.) 114. And see Branley *v.* Dambly, 69 Minn. 282, 71 N. W. 1026.

61. Johnson *v.* Pomeroy, 31 Ohio St. 247; Wright's Appeal, 8 Pa. St. 57.

In New York, where judgment has been obtained and execution levied on the property of a lunatic, before the court of chancery obtains jurisdiction by the institution of proceedings for a commission, the court will not interfere to deprive plaintiff of his lien, unless perhaps where the judgment has been improperly recovered for claims not justly due. Matter of Hopper, 5 Paige 489. But where the judgment was recovered before inquisition found, but execution was not issued until afterward, the judgment creditor acquired no lien on the lunatic's property such as would entitle him to a preference over other creditors. Matter of Wing, 83 Hun 284, 31 N. Y. Suppl. 941.

62. Heff *v.* Cox, 5 Ohio S. & C. Pl. Dec. 377, 5 Ohio N. P. 413; Wright's Appeal, 8 Pa. St. 57. See, generally, Insane Persons.

63. See Executors and Administrators, 18 Cyc. 1062.

64. Comstock's Succession, 44 La. Ann. 427, 10 So. 850.

65. Jones *v.* Dodd, 108 Ga. 513, 34 S. E. 169.

66. Durham *v.* Heaton, 28 Ill. 264, 81 Am. Dec. 275; Whiteford *v.* Hootman, 104 Ill. App. 562; Bell *v.* Davis, 75 Ind. 314; Beach *v.* Reed, 55 Nebr. 605, 76 N. W. 22; Cabon *v.* Gruenig, 18 Nebr. 562, 26 N. W. 253; Roades *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621; Goodman *v.* McCall, 2 Cinc. Super. Ct. (Ohio) 159.

Validity of organization of court see *supra*, XV, B, 1.

Inferior courts see *supra*, XV, A, 5, b.

Municipal courts see Kirk *v.* Vonberg, 34 Ill. 440 (holding that the judgment of a municipal court has the same lien as a judgment of the circuit court); Andrews *v.* Mastin, 22 Misc. (N. Y.) 263, 49 N. Y. Suppl. 1118 (holding that a judgment for less than twenty-five dollars was not a lien upon land).

67. *Alabama.*— Pollard *v.* Cocke, 19 Ala. 188.

Arkansas.— Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271.

Illinois.—Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137.

Indiana.— Simpson *v.* Niles, Smith 104.

Mississippi.— Andrews *v.* Doe, 6 How. 554, 38 Am. Dec. 450.

New York.— Manhattan Co. *v.* Evertson, 6 Paige 457.

Ohio.— Lawrence *v.* Belger, 31 Ohio St. 175; Sellers *v.* Corwin, 5 Ohio 398, 24 Am. Dec. 301.

Pennsylvania.— Morris' Estate, 6 Phila. 134.

Utah.— Thompson *v.* Avery, 11 Utah 214, 39 Pac. 829.

United States.— Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134; Ward *v.* Chamberlain, 2 Black 430, 17 L. ed. 319; Williams *v.* Benedict, 8 How. 107, 12 L. ed. 1007; Massingill *v.* Downs, 7 How. 760, 12 L. ed. 903; Barth *v.* Makeever, 2 Fed. Cas. No. 1,069, 4 Biss. 206; Cropsey *v.* Crandall, 6 Fed. Cas. No. 3,418, 2 Blatchf. 341; Koning *v.* Bayard, 14

act of congress adopting the modes of process and proceeding in force in the several states,[68] and it follows that the liens of such judgments are regulated, in respect to their creation, incidents, and termination, by the laws of the respective states.[69]

(11) *Territorial Extent of Lien.* In the absence of restrictive legislation by congress, the lien of a judgment rendered by a federal court was held to extend to all chargeable property of the debtor throughout the federal judicial district,[70] or according to some authorities throughout the state,[71] and was not affected by state statutes requiring judgments to be recorded, for the purposes of a lien, in the county in which the land to be affected lay.[72] But in 1888 congress enacted a law restricting the lien of such judgments primarily to the county where rendered, and authorizing their transfer for purposes of lien to other counties of the district, where the state laws, authorizing this to be done in regard to judgments of the state courts, include the judgments of the federal courts, or make a similar provision for them, although leaving the territorial extent of the lien of federal judgments the same as before in the absence of such state statutes.[73]

Fed. Cas. No. 7,924, 2 Paine 251; Lombard *v.* Bayard, 15 Fed. Cas. No. 8,469, 1 Wall. Jr. 196; Shrew *v.* Jones, 22 Fed. Cas. No. 12,818, 2 McLean 78.

See 30 Cent. Dig. tit. "Judgment," § 1315.

68. Baker *v.* Morton, 12 Wall. (U. S.) 150, 20 L. ed. 262.

69. *Alabama.*— Perkins *v.* Brierfield Iron, etc., Co., 77 Ala. 403.

Illinois.— Jones *v.* Guthrie, 23 Ill. 421.

Mississippi.— Tarpley *v.* Hamer, 9 Sm. & M. 310, holding that where a lien is given by the state laws to the judgments of the federal courts, the liens of such judgments will be affected by any change in the law of the state, equally with those of judgments of the state courts, and in the same manner.

Pennsylvania.— Morris' Estate, 6 Phila. 134.

United States.— U. S. *v.* Sturgis, 14 Fed. 810. But see Carroll *v.* Watkins, 5 Fed. Cas. No. 2,457, 1 Abb. 474, holding that the effect of a judgment of a federal court as a lien on the lands of defendant cannot be restricted by state statutes or by the construction placed by state courts upon such statutes.

See 30 Cent. Dig. tit. "Judgment," § 1315.

Termination of lien.— The duration of the lien of a judgment of a federal court, or the time when and causes by which it ceases, is governed by the applicable statutes of the particular state. Perkins *v.* Brierfield Iron, etc., Co., 77 Ala. 403; Abbey *v.* Commercial Bank, 34 Miss. 571, 69 Am. Dec. 401; Cropsey *v.* Crandall, 6 Fed. Cas. No. 3,418, 2 Blatchf. 341.

70. *Arkansas.*— Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271.

Florida.— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Illinois.—Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; U. S. *v.* Duncan, 12 Ill. 523.

Indiana.— Simpson *v.* Niles, Smith 104.

New York.— Manhattan Co. *v.* Evertson, 6 Paige 457.

Texas.— Branch *v.* Lowery, 31 Tex. 96.

United States.— Massingill *v.* Downs, 7 How. 760, 12 L. ed. 903; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. ed. 189; Barth *v.* Makeever, 2 Fed. Cas. No. 1,069, 4 Biss. 206; Carroll *v.* Watkins, 5 Fed. Cas. No. 2,457, 1 Abb. 474; Cropsey *v.* Crandall, 6 Fed. Cas. No. 3,418, 2 Blatchf. 341; Lombard *v.* Bayard, 15 Fed. Cas. No. 8,469, 1 Wall. Jr. 196; Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25; Shrew *v.* Jones, 22 Fed. Cas. No. 12,818, 2 McLean 78; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607; U. S. *v.* Scott, 27 Fed. Cas. No. 16,242, 3 Woods 334.

See 30 Cent. Dig. tit. "Judgment." § 1339.

71. Sellers *v.* Corwin, 5 Ohio 398, 24 Am. Dec. 301; Prevost *v.* Gorrell, 19 Fed. Cas. No. 11,400.

72. Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334; Carroll *v.* Watkins, 5 Fed. Cas. No. 2,457, 1 Abb. 474. But see *contra*, Lathrop *v.* Brown, 23 Iowa 40; Hall *v.* Green, 60 Miss. 47; Tarpley *v.* Hamer, 9 Sm. & M. (Miss.) 310; Vance *v.* Johnson, 10 Humphr. (Tenn.) 214; Reid *v.* House, 2 Humphr. (Tenn.) 576.

Necessity of filing transcript in general see *supra*, XV, A, 5, a.

73. Act Cong. Aug. 1, 1888 (25 U. S. St. at L. 357 [U. S. Comp. St. (1901) p. 701]). The purport of this statute appears to be as follows: (1) The judgment of a federal court will become a lien upon real property situated in the county where the court was sitting at the time of its rendition, at all events and without any reference to docketing, etc., under state laws. (2) If the laws of the particular state, while restricting the lien of judgments of its own courts, in the first instance, to property in the county where rendered, provide for the transfer of such judgments, for the purposes of lien, to other counties of the state, these provisions will also apply to judgments of the federal courts, provided such laws expressly include judgments of the United States courts, or if there is a separate statute in the state assimilating federal judgments in this respect to the judgments of the state courts. (3) But where the laws of the state restrict judgment

C. Commencement of Lien — 1. Common-Law Rule. By the rule of the common law the judgments of a court of record all relate back to the first day of the term and are considered as rendered on that day, so that their lien will attach to the debtor's realty from the beginning of the term, and will override a conveyance or mortgage made on the second or any succeeding day, although actually prior to the rendition of the judgment.[74]

2. Present Statutory Rules. In several states the common-law rule is still in force, and judgment liens relate back to the first day of the term at which they are rendered.[75] In others judgments rendered at the same term are all of equal date and have no priority as against each other.[76] In a few a judgment is

liens to the county of rendition, and provide for their extension to other counties by filing transcripts or otherwise, but do not include the judgments of the federal courts or make no provision for them in this respect, then the act of congress of 1888 does not apply at all, and the lien of a federal judgment in such state will extend throughout the federal judicial district. See Dartmouth Sav. Bank *v.* Bates, 44 Fed. 546.

In several of the states since 1888 statutes have been enacted to meet and carry into effect the provisions of the above act of congress. They authorize judgments and decrees of the federal courts to be docketed, or transcripts to be filed, in the clerks' offices in the different counties of the state, in the same manner as judgments of the domestic courts, so as to attach as liens upon realty in the several counties where they are so recorded. Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137 (construing Ill. Laws (1889), p. 197); Alsop *v.* Moseley, 104 N. C. 60, 10 S. E. 124; Stewart *v.* Wheeling, etc., R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438 (holding Ohio Rev. St. § 5056, not to apply to judgments rendered by the United States courts); Dartmouth Sav. Bank *v.* Bates, 44 Fed. 546 (holding Kan. Gen. St. (1868) c. 80, § 419, to satisfy the requirements of the act of congress).

Act not retrospective.— The act of congress above referred to does not affect the lien of a judgment which had attached prior to its passage. Commercial Bank *v.* Eastern Banking Co., 51 Nebr. 766, 71 N. W. 1024. But see *contra*, Washington First Nat. Bank *v.* Clark, 55 Kan. 219, 40 Pac. 270.

A judgment in favor of the United States, recovered in one of the federal courts outside of a given state, is not a lien upon lands within that state from the docketing of the judgment, although by the laws of the United States an execution on such judgment may be issued against defendant's property in any state of the Union. Manhattan Co. *v.* Evertson, 6 Paige (N. Y.) 457.

74. Foust *v.* Trice, 53 N. C. 490; Harding *v.* Spivey, 30 N. C. 63; Farley *v.* Lea, 20 N. C. 307, 32 Am. Dec. 680; Hooton *v.* Will, 1 Dall. (Pa.) 450, 1 L. ed. 218; Waghorne *v.* Langmead, 1 B. & P. 571; Swann *v.* Broome, 3 Burr. 1595; Johnson *v.* Smith, 2 Burr. 950; Odes *v.* Woodward, 2 Ld. Raym. 766; Robinson *v.* Tonge, 3 P. Wms. 397, 24 Eng. Reprint 1117; Bragner *v.* Langmead, 7 T. R. 20; Fann *v.* Atkinson, Willes 427; Wynne *v.* Wynne, 1 Wils. C. P. 35.

75. *Kansas.*— Cramer *v.* Iler, 63 Kan. 579, 66 Pac. 617; Bowling *v.* Garrett, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377. But see Elwell *v.* Hitchcock, 41 Kan. 130, 21 Pac. 109.

Nebraska.— The lien of a judgment rendered otherwise than on confession, in an action which was commenced before the term at which the judgment was rendered, relates back to the first day of the term. Doe *v.* Startzer, 62 Nebr. 718, 87 N. W. 535; Hayden *v.* Huff, 60 Nebr. 625, 83 N. W. 920; Hoagland *v.* Green, 54 Nebr. 164, 74 N. W. 424; Ocobock *v.* Baker, 52 Nebr. 447, 72 N. W. 582, 66 Am. St. Rep. 519; Norfolk State Bank *v.* Murphy, 40 Nebr. 735, 59 N. W. 706, 38 L. R. A. 243; Colt *v.* Du Bois, 7 Nebr. 391; Kellerman *v.* Aultman, 30 Fed. 888. A judgment of the county court becomes a lien from the time of filing a transcript in the district court. Work *v.* Brown, 38 Nebr. 498, 56 N. W. 1082. A judgment revived is a lien from the date of the order of revivor. Horbach *v.* Smiley, 54 Nebr. 217, 74 N. W. 623.

North Carolina.— Holman *v.* Miller, 103 N. C. 118, 9 S. E. 429. But see Perry *v.* Morris, 65 N. C. 221.

Ohio.— Columbus Nat. Bank *v.* Tennessee Coal, etc., Co., 62 Ohio St. 564, 57 N. E. 450; Thompson *v.* Atherton, 6 Ohio 30; Riddle *v.* Bryan, 5 Ohio 48; Urbana Bank *v.* Baldwin, 3 Ohio 65; Jeffrey *v.* Moran, 101 U. S. 285, 25 L. ed. 785; Sturgess *v.* Cleveland Bank, 23 Fed. Cas. No. 13,571, 3 McLean 140. But a judgment by confession takes a lien only from the date of rendition. Riddle *v.* Bryan, *supra*.

Virginia.— New South Bldg., etc., Assoc. *v.* Reed, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858; Yates *v.* Robertson, 80 Va. 475; Brockenbrough *v.* Brockenbrough, 31 Gratt. 580; Skipwith *v.* Cunningham, 8 Leigh 271, 31 Am. Dec. 642; Mutual Assur. Soc. *v.* Stannard, 4 Munf. 539.

West Virginia.— Smith *v.* Parkersburg Co-Operative Assoc., 48 W. Va. 232, 37 S. E. 654. But see Anderson *v.* Nagle, 12 W. Va. 98.

Wyoming.— Coad *v.* Cowhick, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. Rep. 953.

See 30 Cent. Dig. tit. "Judgment," § 1333.

76. Hughes *v.* Berrien, 70 Ga. 273; Kirkpatrick *v.* Augusta Bank, 30 Ga. 465; Bailey *v.* Mizell, 4 Ga. 123. But Act (1889), p. 106, § 2, provides that the lien of a judgment, as to *bona fide* conveyances by the debtor, shall

regarded as having been entered on the last day of the term, unless it appears by the record to have been rendered on a different day.[77] But in a majority of the states the lien of a judgment commences either from the date of its actual rendition,[78] or from the day on which it is entered, recorded, docketed, or registered, the phraseology of the statutes varying in this respect, but all having substantially the same meaning.[79]

3. DOCTRINE OF RELATION BACK. Where the rule is in force which causes the lien attach only from the entry of execution on the docket, unless such entry be made within ten days after the rendition of the judgment. See Bailey v. Bailey, 93 Ga. 768, 21 S. E. 77; Morgan v. Sims, 26 Ga. 283; Jones v. Guthrie, 23 Ill. 421; Doughy v. Spanninger, 30 Ill. App. 302. And see Ryhiner v. Frank, 105 Ill. 326. In Cook county the liens of judgments attach from the date of the judgment, and not from the end of the term. Smith v. Lind, 29 Ill. 24.

77. Chase v. Gilman, 15 Me. 64; Goodall v. Harris, 20 N. H. 363; New Hampshire Strafford Bank v. Cornell, 2 N. H. 324; Bradish v. State, 35 Vt. 452; Huntington v. Charlotte, 15 Vt. 46.

78. Lawson v. Jordan, 19 Ark. 297, 70 Am. Dec. 596; Baltimore Annual Conference v. Schell, 17 Wis. 308.

79. *Alabama.*— Powe v. McLeod, 76 Ala. 418; *Ex p.* Dillard, 68 Ala. 594; Alabama Coal, etc., Co. v. State, 54 Ala. 36; Curry v. Landers, 35 Ala. 280; Daily v. Burke, 28 Ala. 328; Forrest v. Camp, 16 Ala. 642; Quinn v. Wiswall, 7 Ala. 645; Morris v. Ellis, 3 Ala. 560.

California.— McMann v. San Francisco Super. Ct., 74 Cal. 106, 15 Pac. 448; Barroilhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193. But where costs on appeal are not entered on the judgment docket, they do not become a lien until the levy of execution. Chapin v. Broder, 16 Cal. 403.

Indiana.— Julian v. Beal, 26 Ind. 220, 89 Am. Dec. 460.

Iowa.— Callanan v. Votruba, 104 Iowa 672, 74 N. W. 13, 65 Am. St. Rep. 538, 40 L. R. A. 375.

Louisiana.— Wolfe v. Joubert, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772; Spencer v. Amis, 12 La. Ann. 127; Lachomette v. Thomas, 5 Rob. 172; Brander v. Bowmar, 16 La. 370; Gayle v. Williams, 7 La. 162; Ingham v. Thomas, 6 La. 82; Hanna v. His Creditors, 12 Mart. 32; Weiller v. Blanks, McGloin 296.

Maryland.— Dyson v. Simmons, 48 Md. 207; Anderson v. Tuck, 33 Md. 225; Hanson v. Barnes, 3 Gill & J. 359, 22 Am. Dec. 322.

Minnesota.—Marshall v. Hart, 4 Minn. 450.

Mississippi.— Crane v. Richardson, 73 Miss. 254, 18 So. 542; Hamilton-Brown Shoe Co. v. Walker, 67 Miss. 197, 6 So. 713; Planters' Bank v. Conger, 12 Sm. & M. 527; Tarpley v. Hamer, 9 Sm. & M. 310; Burney v. Boyett, 1 How. 39. An office confession of judgment must be confirmed by the court before it becomes a judgment; and when confirmed the lien thereof does not relate back to the time of confession, but dates only from the confirmation. Bass v. Estill, 50 Miss. 300.

Missouri.— The statute provides that judgments shall be a lien on lands after their rendition, but if two or more judgments are rendered at the same term against the same person, their lien shall commence on the last day of the term. See Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095; Bradley v. Heffernan, 156 Mo. 653, 57 S. W. 763; Bunding v. Miller, 10 Mo. 445. *Compare* Dunscomb v. Maddox, 21 Mo. 144; Friar v. Ray, 5 Mo. 510.

Montana.— Sklower v. Abbott, 19 Mont. 228, 47 Pac. 901.

New Jersey.— Hunt v. Swayze, 55 N. J. L. 33, 25 Atl. 850; Reeves v. Johnson, 12 N. J. L. 20.

New York.— Buchan v. Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305. All judgments entered in the office of the county clerk out of office hours become liens upon real estate only from the subsequent legal commencement of office hours; and no priority of lien is created by priority of time in filing judgment-rolls out of office hours. France v. Hamilton, 26 How. Pr. 180.

Oregon.— Stannis v. Nicholson, 2 Oreg. 332.

Pennsylvania.—Hamilton's Appeal, 103 Pa. St. 368; Sellers v. Burk, 47 Pa. St. 344; Hays' Appeal, 8 Pa. St. 182; Welch v. Murray, 4 Yeates 197; Lowrie's Estate, 5 Lanc. L. Rev. 295. A judgment entered on the same day as a sheriff's sale of defendant's land, but at an hour subsequent to the sale, is a lien on the land at the time of the sale, and entitled to share in the proceeds as such. Small's Appeal, 24 Pa. St. 398. And a judgment by confession, entered on a note or bond payable at a future day, acquires a lien at once, although execution cannot issue until the debt becomes due. Lowrie's Estate, *supra.*

South Carolina.— Harrison v. Southern Porcelain Mfg. Co., 10 S. C. 278; Stokes v. Cane, 6 Rich. 513; Foster v. Chapman, 4 McCord 291; Dawson v. Scriven, 1 Hill Eq. 177.

Tennessee.— Berry v. Clements, 9 Humphr. 312; Battle v. Bering, 7 Yerg. 529, 27 Am. Dec. 526; Murfree v. Carmack, 4 Yerg. 270, 26 Am. Dec. 232. *Compare* Porter v. Earthman, 4 Yerg. 358; Clements v. Berry, 11 How. (U. S.) 398, 13 L. ed. 745.

Texas.— Belbaze v. Ratto, 69 Tex. 636, 7 S. W. 501; Willis v. Smith, 66 Tex. 31, 17 S. W. 247; Blum v. Keyser, 8 Tex. Civ. App. 675, 28 S. W. 561.

Washington.— Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

See 30 Cent. Dig. tit. "Judgment," § 1331. And see the statutes of the several states.

of a judgment to relate back to the first day of the term, exceptions are made in case the judgment could not have been given on that day, either because the case was not then ripe for it,[80] or because the court was not in session,[81] and also in the case of judgments by confession,[82] and generally, where it is necessary to protect the rights of an intervening purchaser in good faith.[83] On the other hand there are a few instances in which the lien of a judgment may relate back to a time anterior to its actual rendition, as in the case of a judgment enforcing a specific lien on property,[84] or of a judgment rendered on a bond payable to the state,[85] or on a forfeited writ of error bond,[86] or on a scire facias to revive an original judgment.[87] But generally, and except under the most exceptional circumstances, the lien cannot be considered as relating back to the time of the accrual of the cause of action.[88]

4. JUDGMENT OR AMENDMENT NUNC PRO TUNC. A judgment entered *nunc pro tunc* does not relate back, for the purpose of a lien, to the day as of which it is entered, but takes effect only from the time of its actual entry;[89] and a judgment by confession, invalid for want of a sufficient statement or for other defects, cannot be amended *nunc pro tunc* so as to make it effective from its original date, as against intervening purchasers or encumbrancers.[90]

80. Yates *v.* Robertson, 80 Va. 475; Withers *v.* Carter, 4 Gratt. (Va.) 407, 50 Am. Dec. 78; Dunn *v.* Renick, 40 W. Va. 349, 22 S. E. 66; Swann *v.* Broome, 3 Burr. 1595.

Judgment by default.— An interlocutory judgment does not raise a lien until it becomes final, and then does not relate back. Citizens' Loan Assoc. *v.* Martin, 1 Marv. (Del.) 213, 40 Atl. 1108; Davidson *v.* Myers, 24 Md. 538; Phillips *v.* Hellings, 5 Watts & S. (Pa.) 44.

A judgment upon a special verdict, or upon a verdict subject to the opinion of the court upon a case stated, does not relate back to the date of the verdict, rendered at a preceding term, so as to overreach an intermediate judgment against the same defendant in another cause. Metropolis Bank *v.* Walker, 2 Fed. Cas. No. 904, 2 Cranch C. C. 361.

Affirmance on appeal.— Where a judgment is reversed on appeal, but is then carried to a still higher court, and there affirmed, its lien does not relate back to the time of the original rendition, so as to cut out a mortgage given in good faith while the judgment stood reversed. Fulton Bldg. Assoc. *v.* Hooker, 6 Ohio Dec. (Reprint) 1123, 10 Am. L. Rec. 559. And see Snelling *v.* Parker, 8 Ga. 121.

81. Holliday *v.* Franklin Bank, 16 Ohio 533; Follett *v.* Hall, 16 Ohio 111, 47 Am. Dec. 365; Skipwith *v.* Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642. *Contra,* see Norwood *v.* Thorp, 64 N. C. 682.

82. Bass *v.* Estill, 50 Miss. 300; Welsh *v.* Murray, 4 Dall. (Pa.) 320, 1 L. ed. 850; Hockman *v.* Hockman, 93 Va. 455, 25 S. E. 534, 57 Am. St. Rep. 816.

83. Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; Morgan *v.* Sims, 26 Ga. 283; Emporia Mut. Loan, etc., Assoc. *v.* Watson, 45 Kan. 132, 25 Pac. 586.

84. Cockey *v.* Milne, 16 Md. 200 (a proceeding *in rem* by attachment on land); Boyer *v.* Webber, 22 Pa. Super. Ct. 35 (judgment founded on a statutory lien or mortgage debt); Smith *v.* Parkersburg Co-Operative Assoc., 48 W. Va. 232, 37 S. E. 645 (attachment).

85. Shane *v.* Francis, 30 Ind. 92.

86. Hickcock *v.* Bell, 46 Tex. 610; Berry *v.* Shuler, 25 Tex. Suppl. 140.

87. Betz's Appeal, 1 Penr. & W. (Pa.) 271. See *infra,* XVIII, D, 7, k, (II).

88. See White *v.* Keokuk, etc., R. Co., 52 Iowa 97, 2 N. W. 1016; Lentz *v.* Lamplugh, 12 Pa. St. 344; Evans *v.* Evans, 1 Phila. (Pa.) 113.

89. *Alabama.*— Acklen *v.* Acklen, 45 Ala. 609.

Florida.—Wilson *v.* Matheson, 17 Fla. 630.

Indiana.— Sheldon *v.* Arnold, 17 Ind. 165.

Iowa.— Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889.

Michigan.— Ninde *v.* Clark, 62 Mich. 124, 28 N. W. 765, 4 Am. St. Rep. 823.

Missouri.— Coe *v.* Ritter, 86 Mo. 277.

New Jersey.— McNamara *v.* New York, etc., R. Co., 56 N. J. L. 56, 28 Atl. 313.

North Carolina.—Ferrell *v.* Hales, 119 N. C. 199, 25 S. E. 821.

Pennsylvania.— Duffey *v.* Houtz, 105 Pa. St. 96; Zimmerman *v.* Briggans, 5 Watts 186.

Texas.— Eastham *v.* Sallis, 60 Tex. 576.

United States.— Gunn *v.* Plant, 94 U. S. 664, 24 L. ed. 304. But see Plant *v.* Gunn, 7 Fed. 751, holding that where a judgment was entered for principal and interest to a blank date, and the record also showed a verdict establishing the date from which interest ran, a *nunc pro tunc* amendment supplying the omission of the date in the entry of the judgment caused the lien for interest to relate back to the date of the original judgment, and to be superior to the lien of a mortgage taken between the dates of the original and amended judgments, by a creditor, to secure an antecedent debt.

See 30 Cent. Dig. tit. "Judgment," § 1334.

90. Lea *v.* Yates, 40 Ga. 56; Auerbach *v.* Gieseke, 40 Minn. 258, 41 N. W. 946; Wells *v.* Gieseke, 27 Minn. 478, 8 N. W. 380; Bryan

5. Effect of Stay of Execution. Upon the theory that the issuance of an execution is essential to the creation of a judgment lien,[91] it has been held that where a judgment is entered with a stay of execution, it does not become a lien until the stay of execution expires;[92] but where the time at which the lien attaches is not dependent upon the issuance of an execution or other act of the judgment creditor, the attachment of the lien is not postponed,[93] nor is the lien of a judgment destroyed by a stay of execution.[94]

6. Revived Judgments. The period during which the lien of a revived judgment exists is, it is usually held, to be computed from the date of the judgment or order of revivor, and not from the date of the writ instituting the proceedings for its revival.[95]

D. Property or Interests Affected by Lien — 1. Location of Property. Under the statutes now generally in force, the lien of a judgment is confined to the limits of the particular county in which it was rendered and docketed, and does not affect lands of the judgment debtor lying in another county,[96] unless it is transferred to such other county by filing a transcript of the judgment there.[97] But where a judgment lien attaches upon lands in a certain county, and afterward a new county is set off, within which these lands or part of them fall, the lien does not cease by reason of such new organization, but on the contrary it holds during the full statutory period without any further record.[98] A judgment

v. Miller, 28 Mo. 32, 75 Am. Dec. 107; Union Bank *v.* Bush, 36 N. Y. 631; Symson *v.* Silheimer, 40 Hun (N. Y.) 116; McKee *v.* Tyson, 10 Abb. Pr. (N. Y.) 392; Johnston *v.* Fellerman, 13 How. Pr. (N. Y.) 21; Boyden *v.* Johnson, 11 How. Pr. (N. Y.) 503.

91. See *supra*, XV, A, 7.

92. Reed *v.* Austin, 9 Mo. 722, 45 Am. Dec. 336; U. S. Bank *v.* Winston, 2 Fed. Cas. No. 944, 2 Brock. 252; Scriba *v.* Deane, 21 Fed. Cas. No. 12,559, 1 Brock. 166.

93. *Connecticut.*— Hobbs *v.* Simmonds, 61 Conn. 235, 23 Atl. 962.

Kansas.— Lisle *v.* Cheney, 36 Kan. 578, 13 Pac. 816.

Louisiana.—Toledano *v.* Ralf, 7 La. Ann. 60.

North Carolina.— Isler *v.* Brown, 66 N. C. 556.

Tennessee.— Love *v.* Harper, 4 Humphr. 113.

Texas.— Ayres *v.* Waul, 44 Tex. 549.

Suspension of limitations pending stay see *infra*, XV, H, 4.

94. Brewster *v.* Clamfit, 33 Ark. 72.

95. Hanly *v.* Adams, 15 Ark. 232; Cathcart *v.* Potterfield, 5 Watts (Pa.) 163; *In re* Meason, 4 Watts (Pa.) 341.

Where the writ is issued during the life of the judgment, it is held under some statutes, however, that the period is to be computed from the suing out of the writ. Hershy *v.* Rogers, 45 Ark. 304.

96. *Illinois.*— Sapp *v.* Wightman, 103 Ill. 150; Kirk *v.* Vonberg, 34 Ill. 440; Bustard *v.* Morrison, 2 Ill. 235; Hollahan *v.* Sowers, 111 Ill. App. 236.

Indiana.— Baker *v.* Chandler, 51 Ind. 85.

Maryland.— Farmers' Bank *v.* Highe, 3 Md. 357; Hayden *v.* Stewart, 1 Md. Ch. 459.

Minnesota.— Daniels *v.* Winslow, 4 Minn. 318.

Nebraska.— State Bank *v.* Carson, 4 Nebr. 498.

New York.—Fiske *v.* Anderson, 33 Barb. 71.

North Carolina.— Lowdermilk *v.* Corpening, 92 N. C. 333; King *v.* Portis, 77 N. C. 25.

Ohio.— Kilbreth *v.* Diss, 24 Ohio St. 379.

Pennsylvania.— McCullough's Appeal, 34 Pa. St. 248.

South Carolina.— Kerngood *v.* Davis, 21 S. C. 183.

South Dakota.— Bostwick *v.* Benedict, 4 S. D. 414, 57 N. W. 78.

Wisconsin.— Goodell *v.* Blumer, 41 Wis. 436.

See 30 Cent. Dig. tit "Judgment," § 1339.

Before the enactment of statutes providing for the transfer of judgment liens from one county to another by filing transcripts, it was held in several of the states that the lien of a judgment would extend to all lands of the debtor throughout the state. Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301; Commercial, etc., Bank *v.* Helderburn, 6 How. (Miss.) 536; Dawkins *v.* Smith, 1 Hill Eq. (S. C.) 369; Hickman *v.* Murfree, Mart. & Y. (Tenn.) 26. And this was particularly the rule with regard to judgments of the supreme court. Durham *v.* Heaton, 28 Ill. 264, 81 Am. Dec. 275; Clark *v.* Dakin, 2 Barb. Ch. (N. Y.) 36; Ralston *v.* Bell, 2 Dall. (Pa.) 158, 1 L. ed. 330.

Judgment in favor of state.— In Mississippi it appears that the lien of a judgment in favor of the state is not limited to the county where rendered. Josselyn *v.* Stone, 28 Miss. 753.

Judgment against railroad.— A judgment against a railroad company in a county in which the road is operated is a lien on the real estate of the company. Barnett *v.* East Tennessee, etc., R. Co., (Tenn. Ch. App. 1898) 48 S. W. 817.

97. See *supra*, XV, A, 5, a.

98. *California.*—People *v.* Hovious, 17 Cal. 471.

Missouri.— Dermott *v.* Carter, 109 Mo. 21, 18 S. W. 1121.

rendered in one state or country does not operate extraterritorially so as to constitute lien on lands in another state or country.[99]

2. Nature of Property Bound. As a general rule the lien of a judgment attaches only to the lands, tenements, and hereditaments of the judgment debtor,[1] and does not, in advance of the issue and levy of an execution, bind his personal property or choses in action.[2] Nor does it bind the rents, issues, and profits of

Ohio.— Davidson *v.* Root, 11 Ohio 98, 37 Am. Dec. 411.

Pennsylvania.— Hart's Appeal, 8 Pa. St. 185; West's Appeal, 5 Watts 87.

South Carolina.—Garvin *v.* Garvin, 34 S. C. 388, 13 S. E. 625.

99. Billan *v.* Hercklebrath, 23 Ind. 71; Smith *v.* Eyre, 149 Pa. St. 272, 24 Atl. 288; Reynolds *v.* Stockton, 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464.

Division of state.— The lien of a judgment which has attached to lands in a given county is neither lost nor impaired by reason of the division of the state into two states and the fact that such county falls within the limits of the new state. Gatewood *v.* Goode, 23 Gratt. (Va.) 880; Calwell *v.* Prindle, 19 W. Va. 604.

1. McFarran *v.* Knox, 5 Colo. 217; Van Rensselaer *v.* Albany County Sheriff, 1 Cow. (N. Y.) 501. But the lien of a judgment upon land covers the land with all its incidents and appurtenances, as used and enjoyed at the time the lien attaches. Morgan *v.* Mason, 20 Ohio 401, 55 Am. Dec. 464. And such lien may be enforced against lands of the judgment debtor at any time, without reference to whether or not he has personalty out of which the judgment might be made. Marling *v.* Robrecht, 13 W. Va. 440.

2. *Arkansas.*—Baldwin *v.* Johnston, 8 Ark. 260.

Georgia.— McGehee *v.* Cherry, 6 Ga. 550.

Indiana.— Ball *v.* Barnett, 39 Ind. 53.

Louisiana.—Voorhies *v.* De Blanc, 12 La. Ann. 864.

Minnesota.— Entrop *v.* Williams, 11 Minn. 381.

Mississippi.— Simpson *v.* Smith Sons' Gin, etc., Co., 75 Miss. 505, 22 So. 805; Robertson *v.* Demoss, 23 Miss. 298. *Contra*, see Brown *v.* Clarke, 4 How. (U. S.) 4, 11 L. ed. 850.

New Jersey.—McNamara *v.* New York, etc., R. Co., 56 N. J. L. 56, 28 Atl. 313; Dunham *v.* Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

New York.— Scudder *v.* Voorhis, 5 Sandf. 271. And see Muir *v.* Leitch, 7 Barb. 341.

Tennessee.—Stahlman *v.* Watson, (Ch. App. 1897) 39 S. W. 1055.

See 30 Cent. Dig. tit. "Judgment," § 1338.

Choses in action.— Armour Packing Co. *v.* Wynn, 119 Ga. 683, 46 S. E. 865; Baltimore Fidelity, etc., Co. *v.* Macon Exch. Bank, 100 Ga. 619, 28 S. E. 393.

Property not subject to lien.— The following species of property have been held to be personalty and therefore not subject to the lien of a judgment: The right of a licensee under an oil lease (Meridian Nat. Bank *v.* McConica, 8 Ohio Cir. Ct. 442, 4 Ohio Cir. Dec. 106), a parol license to mine (Blindert *v.* Kreiser, 81 Wis. 174, 51 N. W. 324), a judgment (Gray *v.* McCallister, 50 Iowa 497), franchises of a corporation (Martin *v.* Pittsburgh Southern R. Co., 28 Pittsb. Leg. J. (Pa.) 156), a railroad (Scogin *v.* Perry, 32 Tex. 21), tolls received on a railroad after the judgment (Leedom *v.* Plymouth R. Co., 5 Watts & S. (Pa.) 265), a turnpike road (Beam's Appeal, 19 Pa. St. 453), growing crops (Gaston *v.* Marengo Imp. Co., 139 Ala. 465, 36 So. 738; Planters' Bank *v.* Walker, 3 Sm. & M. (Miss.) 409), and timber cut from debtor's land after the judgment (Lanning *v.* Carpenter, 48 N. Y. 408). A mortgage of realty is personal property, so that a judgment against the mortgagee will not create any lien on the mortgaged premises. Scott *v.* Mewhirter, 49 Iowa 487; Butman *v.* James, 34 Minn. 547, 27 N. W. 66.

On the other hand permanent improvements on the land partaking of the character of realty are bound by the lien. Lessert *v.* Sieberling, 59 Nebr. 309, 80 N. W. 900. And the lien of a judgment against a corporation whose assets consist partly of real estate is an encumbrance on such real estate. Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 63 N. W. 546. If the laws of the state are so framed as to give the character of fixtures to the rolling-stock of a railroad, then such stock will be subject to the lien of a judgment. Milwaukee, etc., R. Co. *v.* James, 6 Wall. (U. S.) 750, 18 L. ed. 854.

Machinery.— Machinery which has not the character of a fixture is personalty, although attached to real property, and is not subject to the lien of a judgment which binds the land. Young *v.* Baxter, 55 Ind. 188. But if it is permanently attached to the realty, it may become subject to the lien of the judgment. Raymond *v.* Schoonover, 181 Pa. St. 352, 37 Atl. 524. But see Hutchman's Appeal, 27 Pa. St. 209, holding that a judgment creditor whose lien has attached may prevent the severance of machinery which is realty, but has no lien upon the fund raised by its sale as personal property.

Funds in court.— As a general rule a judgment is no lien on funds in court arising from a judicial sale of the debtor's property under other liens or claims. Ballard *v.* Burrowes, 2 Rob. (N. Y.) 206; Utley *v.* Jones, 92 N. C. 261; Henderson *v.* Henderson, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650; Potter's Estate, 6 Pa. Super. Ct. 633. But a judgment lien existing at the time an executor sells real estate is transferred from the land to the fund arising from the sale. Barkman *v.* Hain, 5 Ohio S. & C. Pl. 474, 5 Ohio N. P. 508. And where land has been appropriated in eminent domain proceedings, a prior judgment creditor of the owner of the land has a lien on the money awarded supe-

land.[3] Nor does the lien of the judgment attach to property which is exempt from execution,[4] nor upon homestead property, except as to the surplus value of the estate, if any, over the amount limited as a homestead exemption.[5]

3. Title or Interest of Judgment Debtor — a. In General. The lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the land; and the lien cannot be made effectual to bind or to convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated.[6]

rior to that of an assignee of the judgment of award. Yakima Water, etc., Co. *v.* Hathaway, 18 Wash. 377, 51 Pac. 471.

3. Fifield *v.* Gorton, 15 Ill. App. 458; Boggs *v.* Douglass, 105 Iowa 344, 75 N. W. 185; Payn *v.* Beal, 4 Den. (N. Y.) 405; Kohr's Estate, 9 Lanc. Bar (Pa.) 96. But where, on the filing of a bill to remove an encumbrance on land, so that it may be sold under plaintiff's judgment, a receiver is appointed of the rents and profits of the land, they are in equity subject to the lien and claim of the judgment, the same as the land itself. U. S. *v.* Butler, 25 Fed. Cas. No. 14,696, 2 Blatchf. 201.

4. King *v.* Easton, 135 Ind. 353, 35 N. E. 181; Dumbould *v.* Rowley, 113 Ind. 353, 15 N. E. 463. See Exemptions, 18 Cyc. 1369.

5. Rodgers *v.* Appleton City First Nat. Bank, 82 Mo. App. 377; Farmers' L. & T. Co. *v.* Schwenk, 54 Nebr. 657, 74 N. W. 1063; Horbach *v.* Smiley, 54 Nebr. 217, 74 N. W. 623; Roberts *v.* Robinson, 49 Nebr. 717, 68 N. W. 1035, 59 Am. St. Rep. 567; Bevan *v.* Ellis, 121 N. C. 224, 28 S. E. 471; Traders' Nat. Bank *v.* Schorr, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17. And see Homesteads, 21 Cyc. 448.

Rights in public lands see Public Lands.

6. *Arkansas.*— Doswell *v.* Adler, 28 Ark. 82.

Georgia.— Owens *v.* Atlanta Trust, etc., Co., 122 Ga. 521, 50 S. E. 379; Tripod Paint Co. *v.* Hamilton, 111 Ga. 823, 35 S. E. 696; Ponder *v.* Graflin, 88 Ga. 186, 14 S. E. 203; Harrold *v.* Morgan, 66 Ga. 398; Wimberly *v.* Collier, 50 Ga. 144.

Indiana.— Heberd *v.* Wines, 105 Ind. 237, 4 N. E. 457; Wright *v.* Jones, 105 Ind. 17, 4 N. E. 281; Sharpe *v.* Davis, 76 Ind. 17; Monticello Hydraulic Co. *v.* Laughry, 72 Ind. 562; Whitney *v.* Kimball, 4 Ind. 546, 58 Am. Dec. 638.

Iowa.— Craig *v.* Monitor Plow Works, 76 Iowa 577, 41 N. W. 364; Churchill *v.* Morse, 23 Iowa 229, 92 Am. Dec. 422; Denegre *v.* Haun, 13 Iowa 240.

Kansas.— Holden *v.* Garrett, 23 Kan. 98; Hawley *v.* Smeidling, 3 Kan. App. 159, 42 Pac. 841.

Louisiana.— Logan *v.* Herbert, 30 La. Ann. 727.

Maryland.— Glen Morris-Glyndon Supply Co. *v.* McColgan, 100 Md. 479, 60 Atl. 608; Ellicott *v.* U. S. Insurance Co., 7 Gill 307; Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Mississippi.— Rabb *v.* McKinnie, 27 Miss. 98.

Missouri.— Union Bank *v.* Manard, 51 Mo. 548.

Nebraska.— Nessler *v.* Neher, 18 Nebr. 649, 26 N. W. 471; Berkley *v.* Lamb, 8 Nebr. 392, 1 N. W. 320; Colt *v.* Du Bois, 7 Nebr. 391; Galway *v.* Malchow, 7 Nebr. 285; Uhl *v.* May, 5 Nebr. 157.

New York.— Millard *v.* McMullin, 68 N. Y. 345; Leonard *v.* Leonard, 56 How. Pr. 97; Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305; Sandford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773; Livingston *v.* Hubbs, 2 Johns. Ch. 512.

Ohio.— Hulshoff *v.* Bowman, 19 Ohio Cir. Ct. 554, 10 Ohio Cir. Dec. 343.

Pennsylvania.— Robisson *v.* Miller, 158 Pa. St. 177, 27 Atl. 887; Rusterholtz *v.* Brown, 10 Pa. Dist. 21; Weaver *v.* Keith, 3 Del. Co. 516.

South Carolina.— *Ex p.* Trenholm, 19 S. C. 126.

Tennessee.— Bryant *v.* Charleston Bank, 107 Tenn. 560, 64 S. W. 895; Coward *v.* Culver, 12 Heisk. 540.

Texas.— Blankenship *v.* Douglas, 26 Tex. 225, 82 Am. Dec. 608; Corbett *v.* Redwood, (Civ. App. 1900) 58 S. W. 550; Franke *v.* Lone Star Brewing Co., 17 Tex. Civ. App. 9, 42 S. W. 861.

Virginia.— Nelson *v.* Turner, 97 Va. 54, 33 S. E. 390; Coldiron *v.* Asheville Shoe Co., 93 Va. 364, 25 S. E. 238.

West Virginia.— Smith *v.* Gott, 51 W. Va. 141, 41 S. E. 175; Cleavenger *v.* Felton, 46 W. Va. 249, 33 S. E. 117; Pack *v.* Hansbarger, 17 W. Va. 313; Parker *v.* Clarkson, 4 W. Va. 407.

United States.— Baker *v.* Morton, 12 Wall. 150, 20 L. ed. 262; Brown *v.* Clarke, 4 How. 4, 11 L. ed. 850; *In re* Estes, 3 Fed. 134, 6 Sawy. 459.

Canada.— Yorkshire Guarantee, etc., Corp. *v.* Edmonds, 7 Brit. Col. 348.

See 30 Cent. Dig. tit. "Judgment," § 1340 *et seq.*

In Illinois it is held that a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of notice from other sources. Massey *v.* Westcott, 40 Ill. 160.

Lands held in fee simple conditional are bound, after the birth of issue, by the lien of a judgment against the tenant, in bar of the right of the issue to take *per formam doni.* Izard *v.* Middleton, Bailey Eq. (S. C.) 228.

Holding under voidable sale.— The title of an executor to land purchased by him at his own sale being voidable, and not void, it is

b. Inchoate Title of Purchaser at Judicial Sale. The inchoate or inceptive title of a purchaser at a judicial sale, in advance of its confirmation by the court, or before the issuance of a deed, may be bound by the lien of a judgment against him.[7]

c. Life-Estates. A judgment lien attaches upon a vested estate for life,[8] but binds only the tenant's actual interest, and therefore is liable to be extinguished by the breach of a condition subsequent which divests the life-estate,[9] or by the exercise of a power to sell.[10]

d. Estates by Curtesy. A judgment against a husband is a lien on his life-interest in the wife's lands, although execution is suspended until her death.[11]

e. Remainders and Reversions. Estates in reversion or remainder, if vested, are legal estates subject to the lien of judgments against the reversioner or remainder-man;[12] and in some states the same is true of contingent remainders,[13] although elsewhere this is denied.[14]

f. Leasehold Interests. At common law a leasehold interest or estate in land for years was regarded as only a chattel interest, and therefore not subject to the lien of a judgment; and this view is still held in some of the states.[15] But in others leasehold interests are regarded and treated as real estate, and hence are bound by judgment liens.[16]

4. Equitable Interests — a. In General. Following the common-law rule, it

subject to the lien of a judgment against him. Thornton *v.* Willis, 65 Ga. 184. And see Harp *v.* Patapsco Guano Co., 99 Ga. 752, 27 S. E. 181.

Land forfeited to the state, for non-payment of taxes or other cause, is not subject to the lien of a judgment against the former owner. Wiant *v.* Hays, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82.

Possession.— A judgment is not a lien upon land unless there is a legal or equitable seizin of the judgment debtor; but if he is in the actual possession, that is sufficient, for actual possession is *prima facie* evidence of title. Jackson *v.* Town, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405. But on the other hand, although the legal title to land is in one, yet if another has actual possession, a judgment against the former is a lien only upon his interest, whatever that may be, for the possession of the other is notice to all the world of his claims. Lumbard *v.* Abbey, 73 Ill. 177; Thomas *v.* Kennedy, 24 Iowa 397, 95 Am. Dec. 740; Uhl *v.* May, 5 Nebr. 157.

Property acquired by descent.— A judgment against an heir of a decedent is a lien on his undivided interest in the real property of the estate. Smith *v.* Charles, 27 La. Ann. 503; Diermond *v.* Robinson, 2 Yeates (Pa.) 324.

7. Holmes' Appeal, 108 Pa. St. 23; Slater's Appeal, 28 Pa. St. 169; Morrison *v.* Wurtz, 7 Watts (Pa.) 437.

But a purchaser who has utterly failed to comply with the terms of sale has no estate in the premises, legal or equitable, to be bound by a judgment lien. Jacobs' Appeal, 23 Pa. St. 477.

8. Verdin *v.* Slocum, 71 N. Y. 345; Bridge *v.* Ward, 35 Wis. 687.

9. Moore *v.* Pitts, 53 N. Y. 85.

10. Leggett *v.* Doremus, 25 N. J. Eq. 122.

11. Anderson *v.* Tydings, 8 Md. 427, 63 Am. Dec. 708; Lancaster County Bank *v.* Stauffer, 10 Pa. St. 398; Beard *v.* Deitz, 1 Watts (Pa.) 309. *Compare* Bankers' Loan, etc., Co. *v.* Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914.

12. *Arkansas.*— Real Estate Bank *v.* Watson, 13 Ark. 74.

Massachusetts.— Williams *v.* Amory, 14 Mass. 20.

New Hampshire.— Brown *v.* Gale, 5 N. H. 416.

New Jersey.— Rickey *v.* Hillman, 7 N. J. L. 180; Bockover *v.* Ayres, 22 N. J. Eq. 13.

New York.— Sayles *v.* Best, 140 N. Y. 368, 35 N. E. 636; Woodgate *v.* Fleet, 44 N. Y. 1. See Leonard *v.* Leonard, 56 How. Pr. 97.

Ohio.— Lawrence *v.* Belger, 31 Ohio St. 175.

Pennsylvania.— Humphreys *v.* Humphreys, 1 Yeates 427.

United States.— Burton *v.* Smith, 13 Pet. 464, 10 L. ed. 248; *In re* L'Hommedieu, 138 Fed. 606.

See 30 Cent. Dig. tit. "Judgment," § 1348.

Contra.— Brooks *v.* Brooks, 12 S. C. 422; Dargan *v.* Richardson, Dudley (S. C.) 62; Le Prince *v.* Guillemot, 1 Rich. Eq. (S. C.) 187.

13. Ogden *v.* Knepler, 1 Pearson (Pa.) 145; Wilson *v.* Langhorne, 102 Va. 631, 47 S. E. 871.

14. Jackson *v.* Middleton, 52 Barb. (N. Y.) 9; Watson *v.* Dodd, 68 N. C. 528; Allston *v.* State Bank, 2 Hill Eq. (S. C.) 235.

15. Summerville *v.* Stockton Milling Co., 142 Cal. 529, 76 Pac. 243; McDermott *v.* Burke, 16 Cal. 580; Stockett *v.* Howard, 34 Md. 121; Bismark Bldg., etc., Assoc. *v.* Bolster, 92 Pa. St. 123; Krause's Appeal, 2 Whart. (Pa.) 398; Lefever *v.* Armstrong, 15 Pa. Super. Ct. 565.

16. *Connecticut.*— Ives *v.* Beecher, 75 Conn. 564, 54 Atl. 207.

is held in many states that the lien of a judgment does not attach to or bind an equitable title or interest in real estate held by the judgment debtor.[17] But in several this rule has been changed by statute, or by the decisions of the courts assimilating legal and equitable remedies, so that an equitable estate will be subject to the lien of a judgment;[18] and it has always been held by the courts of chancery that for their purposes such an estate was just as much bound by the judgment as any legal estate, and could be subjected to its satisfaction through the process of equity.[19]

Iowa.— Hayden *v.* Goppinger, 67 Iowa 106, 24 N. W. 743; Sweezy *v.* Jones, 65 Iowa 272, 21 N. W. 603; Davenport First Nat. Bank *v.* Bennett, 40 Iowa 537.

New York.— In this state, by statute, the lien of a judgment attaches to a leasehold estate in case the lessee or his assignee is possessed of at least five years' unexpired term of the lease. See Parshall *v.* Shirts, 54 Barb. 99; Taylor *v.* Wynne, 8 N. Y. Suppl. 759; O'Rourke *v.* Henry Prouse Cooper Co., 11 N. Y. Civ. Proc. 321; Grosvenor *v.* Allen, Clarke 275. But the lien does not attach unless the lessee or his assignee is in possession. Crane *v.* O'Connor, 4 Edw. 409. The early decisions in this state accorded with the common-law rule. Vredenbergh *v.* Morris, 1 Johns. Cas. 223; Merry *v.* Hallet, 2 Cow. 497.

Ohio.— Northern Bank *v.* Roosa, 13 Ohio 334; Loring *v.* Melendy, 11 Ohio 355. But see Buckingham *v.* Reeve, 19 Ohio 399.

United States.— Steers *v.* Daniel, 4 Fed. 587, 2 Flipp. 310; McLean *v.* Rockey, 16 Fed. Cas. No. 8,891, 3 McLean 235.

Leases with privilege of purchase are generally regarded as giving a somewhat higher or stronger title, and therefore are subject to judgment liens. Gorham *v.* Farson, 119 Ill. 425, 10 N. E. 1; Ely *v.* Beaumont, 5 Serg. & R. (Pa.) 124. *Compare* Sweezy *v.* Jones, 65 Iowa 272, 21 N. W. 603.

17. *Alabama.*— Powell *v.* Knox, 16 Ala. 364.

California.— People *v.* Irwin, 14 Cal. 428.

Georgia.— Harvey *v.* West, 87 Ga. 553, 13 S. E. 693.

Indiana.— Terrell *v.* Prestel, 68 Ind. 86; Jeffries *v.* Sherburn, 21 Ind. 112; Russell *v.* Houston, 5 Ind. 180. See Elliott *v.* Armstrong, 2 Blackf. 198.

Kansas.— Kirkwood *v.* Koester, 11 Kan. 471.

Michigan.— Trask *v.* Green, 9 Mich. 358.

Nebraska.— Flint *v.* Chaloupka, (1904) 99 N. W. 825; Woolworth *v.* Parker, 57 Nebr. 417, 77 N. W. 1090; Nessler *v.* Neher, 18 Nebr. 649, 26 N. W. 471.

New Jersey.— Sipley *v.* Wass, 49 N. J. Eq. 463, 24 Atl. 233; Trusdell *v.* Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Vancleve *v.* Groves, 4 N. J. Eq. 330.

New York.— New York Dry Dock Co. *v.* Stillman, 30 N. Y. 174; Wood *v.* Robinson, 22 N. Y. 564; Jackson *v.* Chapin, 5 Cow. 485; Bogart *v.* Perry, 1 Johns. Ch. 52. *Compare* Jackson *v.* Walker, 4 Wend. 462; Jackson *v.* Bateman, 2 Wend. 570.

North Carolina.— Dixon *v.* Dixon, 81 N. C. 323.

Ohio.— Baird *v.* Kirtland, 8 Ohio 21; Jackman *v.* Hallock, 1 Ohio 318, 13 Am. Dec. 627; Warner *v.* York, 25 Ohio Cir. Ct. 310.

Oregon.— Bloomfield *v.* Humason, 11 Oreg. 229, 4 Pac. 332; Smith *v.* Ingles, 2 Oreg. 43.

Wisconsin.— Blackburn *v.* Lake Shore Traffic Co., 90 Wis. 362, 63 N. W. 289.

United States.— Brandies *v.* Cochrane, 112 U. S. 344, 5 S. Ct. 194, 28 L. ed. 760; Morsell *v.* Washington First Nat. Bank, 91 U. S. 357, 23 L. ed. 436; Withnell *v.* Courtland Wagon Co., 25 Fed. 372.

See 30 Cent. Dig. tit. "Judgment," § 1343.

The proceeds of the sale of an equitable title in land will be regarded as equitable and not legal assets, for the purpose of determining whether judgment creditors are to be paid before those by simple contract or specialty. Law *v.* Law, 15 Fed. Cas. No. 8,128, 3 Cranch C. C. 324.

18. *Delaware.*— McMullen *v.* Lank, 4 Houst. 648.

Illinois.— Barlow *v.* Cooper, 109 Ill. App. 375; Niantic Bank *v.* Dennis, 37 Ill. 381.

Iowa.— Lathrop *v.* Brown, 23 Iowa 40; Baldwin *v.* Thompson, 15 Iowa 504; Blain *v.* Stewart, 2 Iowa 378. *Compare* Hultz *v.* Zollars, 39 Iowa 589 (holding that a judgment is not a lien on an equitable interest in land in such a sense as to charge or affect a subsequent *bona fide* purchaser without notice); Harrington *v.* Sharp, 1 Greene 131, 48 Am. Dec. 365.

Maryland.— McMechen *v.* Marman, 8 Gill & J. 57.

Pennsylvania.— *In re* Fair Hope North Savage Fire-Brick Co., 183 Pa. St. 96, 38 Atl. 519; Robisson *v.* Miller, 158 Pa. St. 177, 27 Atl. 887; Drysdale's Appeal, 15 Pa. St. 457; Auwerter *v.* Mathiot, 9 Serg. & R. 397; Carkhuff *v.* Anderson, 3 Binn. 4; Schock *v.* Bankes, 1 Leg. Chron. 218; Semple *v.* Mown, 4 Phila. 85.

Tennessee.— In this state a judgment will be a lien on an equitable title or interest provided a memorandum of the judgment is registered in the register's office of the county where the land is situated within sixty days from the rendition thereof, and the lien will cease unless a hill in equity to enforce it is filed within thirty days from the return of the execution unsatisfied. Weaver *v.* Smith, 102 Tenn. 47, 50 S. W. 771; Chapron *v.* Cassaday, 3 Humphr. 661.

Canada.— Ralston *v.* Goodwin, 21 Nova Scotia 177.

See 30 Cent. Dig. tit. "Judgment," § 1343.

19. *Indiana.*— Whitney *v.* Kimball, 4 Ind. 546, 58 Am. Dec. 638.

b. Equity of Redemption. The equity of redemption remaining in the owner of property after he has executed a mortgage upon it is an interest which is subject to the lien of a judgment recovered against him; and this, whether the encumbrance is created by a mortgage in the ordinary form,[20] by a transaction lacking the essentials of a mortgage at law, but treated in equity as a mortgage,[21] by a deed of trust to secure the payment of a debt,[22] or it seems by a deed absolute in form, but intended by the parties merely as a security.[23] A judgment lien will likewise attach to the debtor's right of redemption from a sale of the land for unpaid taxes,[24] or from a sale under a prior judgment.[25]

c. Trust Estates and Legal Titles. The lien of a judgment does not attach to the mere legal title to land existing in the judgment debtor, when the equitable

Maryland.— Lee *v.* Stone, 5 Gill & J. 1, 23 Am. Dec. 589.

Mississippi.— Roach *v.* Bennett, 24 Miss. 98.

Virginia.— Michaux *v.* Brown, 10 Gratt. 612; Coutts *v.* Walker, 2 Leigh 268; Haleys *v.* Williams, 1 Leigh 140, 19 Am. Dec. 743.

United States.— Freedmans Sav., etc., Co. *v.* Earle, 110 U. S. 710, 4 S. Ct. 226, 28 L. ed. 301.

20. First Nat. Bank *v.* Morsell, 1 MacArthur (D. C.) 155; Martin *v.* Berry, 159 Ind. 566, 64 N. E. 912; Julian *v.* Beal, 26 Ind. 220, 89 Am. Dec. 460; McCormick *v.* Digby, 8 Blackf. (Ind.) 99; Macauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997; Kinports *v.* Boynton, 120 Pa. St. 306, 14 Atl. 135, 6 Am. St. Rep. 706; Taylor *v.* Cornelius, 60 Pa. St. 187.

Conveyance.— A judgment debtor cannot by conveying his equity of redemption to a prior mortgagee cut off the lien of a judgment. Walters *v.* Defenbaugh, 90 Ill. 241.

Surplus proceeds of foreclosure sale.— In some states a judgment obtained against the owner of an equity of redemption in mortgaged premises, after a decree of foreclosure but before the sale, has an equitable lien on the surplus moneys produced by the sale. McGuire *v.* Wilkinson, 72 Mo. 199; Sweet *v.* Jacocks, 6 Paige (N. Y.) 355, 31 Am. Dec. 252. *Contra,* Sullivan *v.* Leckie, 60 Iowa 326, 14 N. W. 355; Columbia Branch Bank *v.* Black, 2 McCord Eq. (S. C.) 344.

A judgment docketed after sale of the land under foreclosure, but before expiration of the period of redemption, becomes under the Oregon statute a lien on the property, subject to be defeated only by the execution and delivery of a sheriff's deed. Kaston *v.* Storey, (Oreg. 1905) 80 Pac. 217.

Land conveyed to receiver.— Where a court of equity, upon a creditor's bill, had ordered the debtor to convey his realty to a receiver appointed by the court, it was held that a judgment recovered against the debtor after his conveyance to the receiver did not create a lien upon the lands. Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442.

21. Bowery Nat. Bank *v.* Duncan, 12 Hun (N. Y.) 405; Kinports *v.* Boynton, 120 Pa. St. 306, 14 Atl. 135, 6 Am. St. Rep. 706.

22. Pahlman *v.* Shumway, 24 Ill. 127; Cook *v.* Dillon, 9 Iowa 407, 74 Am. Dec. 354; Trimble *v.* Hunter, 104 N. C. 129, 10 S. E. 291; McKeithan *v.* Walker, 66 N. C. 95; Hale *v.* Horne, 21 Gratt. (Va.) 112. *Contra,* Marlow *v.* Johnson, 31 Miss. 128; Morsell *v.* Washington First Nat. Bank, 91 U. S. 357, 23 L. ed. 436.

Remedy in equity.— In those jurisdictions where the lien of a judgment does not attach to the reversionary or equitable interest of the grantor in such a deed of trust, the judgment creditor may have his remedy in equity; for, by filing a bill for that purpose, he may secure a quasi-lien, which will give him an interest in any surplus which may remain from the estate after discharging the trusts and which would result to the grantor's benefit, paramount to that of the latter. McFerran *v.* Davis, 70 Ga. 661; Schroeder *v.* Gurney, 10 Hun (N. Y.) 413; Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442; Brandies *v.* Cochrane, 112 U. S. 344, 5 S. Ct. 194, 28 L. ed. 760; Freedman's Sav., etc., Co. *v.* Earle, 110 U. S. 710, 4 S. Ct. 226, 28 L. ed. 301.

Surplus proceeds.— After a sale by the trustee under the deed of trust, the debtor's right to redeem is removed from the land and is represented by the surplus in the hands of the trustee, against which the judgment lien is continued and may be enforced in equity. But if the judgment creditor suffers a sale to be made, without getting out execution on his judgment or otherwise giving the trustee actual notice of his claim, and the latter pays over the surplus in his hands, after satisfying the objects of the trust, to the grantor, the creditor cannot recover in an action against the trustee, for the latter is not bound to search the records for possible liens upon the fund. Cook *v.* Dillon, 9 Iowa 407, 74 Am. Dec. 354; Warner *v.* Veitch, 2 Mo. App. 459.

23. Macauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997. *Contra,* Phinizy *v.* Clark, 62 Ga. 623; Gibson *v.* Hough, 60 Ga. 588; Omaha Coal, etc., Co. *v.* Suess, 54 Nebr. 379, 74 N. W. 620.

24. McNeill *v.* Carter, 57 Ark. 579, 22 S. W. 94; Singer's Appeal, 4 Pa. Cas. 430, 7 Atl. 800; Hill *v.* Gordon, 45 Fed. 276.

25. Curtis *v.* Millard, 14 Iowa 128, 81 Am. Dec. 460.

and beneficial title is in another,[26] and a transitory seizin of lands by the judgment debtor, in trust for another, will not subject the lands to the lien of the judgment.[27] The same rule applies where the judgment debtor, although having the legal title to the land, holds it subject to a resulting trust in favor of another; as where the record title has been put in his name, but the purchase was really made by the

26. *Georgia.*— Dodd *v.* Bond, 88 Ga. 355, 14 S. E. 581.

Indiana.— Moore *v.* Thomas, 137 Ind. 218, 36 N. E. 712; Hays *v.* Reger, 102 Ind. 524, 1 N. E. 386.

Iowa.— Bucknell *v.* Deering, 99 Iowa 548, 68 N. W. 825; Boardman *v.* Willard, 73 Iowa 20, 34 N. W. 487; Atkinson *v.* Hancock, 67 Iowa 452, 25 N. W. 701; Thomas *v.* Kennedy, 24 Iowa 397, 95 Am. Dec. 740. In this state the doctrine is that a judgment is not a lien upon land to which the judgment debtor holds only the naked legal title, when the fact that a third person owns the equitable title is either disclosed by the record or is known to the judgment creditor. Brebner *v.* Johnson, 84 Iowa 23, 50 N. W. 35. And as an express trust cannot be established by parol evidence, such evidence is not admissible to show that the title of real estate in the name of a judgment defendant is held in trust for another, and that therefore the property is not subject to the lien of the judgment. Brown *v.* Barngrover, 82 Iowa 204, 47 N. W. 1082.

Kansas.— Harrison *v.* Andrews, 18 Kan. 535.

Louisiana.— Peters *v.* Toby, 10 La. Ann. 408.

Minnesota.— Fleming *v.* Wilson, 92 Minn. 303, 100 N. W. 4.

Mississippi.— McIntyre *v.* Agricultural Bank, Freem. 105.

Nebraska.— Cresswell *v.* McCaig, 11 Nebr. 222, 9 N. W. 52.

Nevada.— Rosina *v.* Trowbridge, 20 Nev. 105, 17 Pac. 751.

New Jersey.— Lillis *v.* Gallagher, 39 N. J. Eq. 93; Denzler *v.* O'Keefe, 34 N. J. Eq. 361.

New York.— Lounsbury *v.* Purdy, 11 Barb. 490; Frazier *v.* Town, 2 N. Y. City Ct. 298; Ells *v.* Tousley, 1 Paige 280.

North Dakota.— Dalrymple *v.* Security Imp. Co., 11 N. D. 65, 88 N. W. 1033.

Ohio.— Wright *v.* Franklin Bank, 59 Ohio St. 80, 51 N. E. 876; Birchard *v.* Edwards, 11 Ohio St. 84; Manley *v.* Hunt, 1 Ohio 257.

Oklahoma.— Baird *v.* Williams, 4 Okla. 173, 44 Pac. 217.

Oregon.— Dimmick *v.* Rosenfeld, 34 Oreg. 101, 55 Pac. 100.

Pennsylvania.— *In re* Fulton, 51 Pa. St. 204.

Tennessee.— Stinson *v.* Russell, 2 Overt. 40.

Washington.— Woodhurst *v.* Cramer, 29 Wash. 40, 69 Pac. 501.

Wisconsin.— Davenport *v.* Stephens, 95 Wis. 456, 70 N. W. 661.

United States.— Withnell *v.* Courtland Wagon Co., 25 Fed. 372.

See 30 Cent. Dig. tit. "Judgment," § 1346.

Land held under a power.— If land is held by one under a power of appointment which he might exercise for his own benefit, it is generally held that he has such an interest in the estate as will be bound by the lien of a judgment against him. Tallmadge *v.* Sill, 21 Barb. (N. Y.) 34; Brandies *v.* Cochrane, 112 U. S. 344, 5 S. Ct. 194, 28 L. ed. 760.

Confession of judgment by trustee.— A trustee cannot bind land held under the trust by a confession of judgment; the lien resulting from such judgment will attach to nothing but the personal interest, if any, which the trustee may have in the estate. Huntt *v.* Townshend, 31 Md. 336, 100 Am. Dec. 63.

Land purchased in part with trust funds.— Where a trustee, without the knowledge of his *cestui que trust*, purchased real estate, taking the title in his own name, and paying part of the consideration with trust funds in his hands, and gave his own note and mortgage for the remainder, it was held that even if there was a resulting trust it did not extend to the trustee's interest in the land, and the trustee had an interest therein upon which a judgment against him would attach as a lien. Martin *v.* Baldwin, 30 Minn. 537, 16 N. W. 449.

Subsequent title held in trust for vendee.— If one sells and conveys land to which he has no title, or an imperfect title, and afterward acquires a perfect title, the same then inures to the benefit of the grantee; and if, between the date of the conveyance and the acquisition of the good title, a judgment is recovered against the grantor, the title of the grantee is prior to the lien of the judgment. Watkins *v.* Wassell, 15 Ark. 73.

Property conveyed to an insolvent purchaser as trustee for his wife, the consideration being paid by the husband, becomes subject to the lien of a judgment against him, which is not divested by a return and cancellation of the deed, the same not having been recorded. Kline *v.* Triplett, (Va. 1896) 25 S. E. 886.

Property held by administrator.— The assets of an estate in the hands of an administrator cannot be sold on execution to pay his debts. Montgomery Branch Bank *v.* Wade, 13 Ala. 427; Halpin *v.* Barringer, 26 La. Ann. 170; Satterwhite *v.* Carson, 25 N. C. 549.

27. Aicardi *v.* Craig, 42 Ala. 311; Atkinson *v.* Hancock, 67 Iowa 452, 25 N. W. 701; Tallman *v.* Farley, 1 Barb. (N. Y.) 280; O'Donnell *v.* Kerr, 50 How. Pr. (N. Y.) 334; Huffaker *v.* Bowman, 4 Sneed (Tenn.) 89.

After cancellation of a deed the property which has once passed under it by transfer of possession does not revest; but in equity a judgment lien against the grantee subsequent

other person, and the judgment debtor has no substantial interest in the estate.[28] So where one conveys land to another by a deed absolute in form, but intended merely as a security, or subject to a parol agreement to reconvey, the grantee has no such interest in the property as will be subject to the lien of a judgment against him.[29]

d. Judgments Against Cestui Que Trust. The equitable estate or interest of a *cestui que trust* may be subject to the lien of a judgment against him where the trust is merely a dry or passive one;[30] but this is not the case where the property is held under an active trust,[31] although the creditor may obtain relief in equity, on a bill to subject the beneficiary's interest to the satisfaction of his judgment.[32]

5. Interests of Parties to Executory Contract of Sale — a. Vendor's Legal Title. A judgment recovered against a vendor of land, after the execution of a contract for its sale, but before the making and delivery of a deed, is a lien upon the legal title remaining in him and binds the land to the extent of the unpaid purchase-money.[33] But the equitable right of the vendee to require a conveyance on fulfilling his part of the contract is not cut out or set aside by the attach-

to the cancellation will not be enforced against the premises, where the cancellation was made in good faith. Blaney *v.* Hanks, 14 Iowa 400.

28. Carter *v.* Challen, 83 Ala. 135, 3 So. 313; Bucknell *v.* Deering, 99 Iowa 548, 68 N. W. 825; Coldiron *v.* Asheville Shoe Co., 93 Va. 364, 25 S. E. 238; Wade *v.* Sewell, 56 Fed. 129.

29. Michael *v.* Knapp, 4 Tex. Civ. App. 464, 23 S. W. 280; Main *v.* Bosworth, 77 Wis. 660, 46 N. W. 1043.

30. Doe *v.* Lank, 4 Houst. (Del.) 648. And see Ives *v.* Beecher, 75 Conn. 564, 54 Atl. 207; Ontario Bank *v.* McMicken, 7 Manitoba 203. See, generally, Trusts.

Termination of trust.— Where a trust provides for the collection of income up to a certain time, and then for the division of the property among the beneficiaries, the trustee having no power to sell the trust property, judgments which have been recovered against the beneficiaries will become liens on their interests in the property upon the arrival of the time of division. Moll *v.* Gardner, 214 Ill. 248, 73 N. E. 442.

31. Flanagin *v.* Daws, 2 Houst. (Del.) 476; Beckett *v.* Dean, 57 Miss. 232; Neff *v.* Cox, 5 Ohio S. & C. Pl. Dec. 377, 5 Ohio N. P. 413; Brandies *v.* Cochrane, 112 U. S. 344, 5 S. Ct. 194, 28 L. ed. 760.

32. Coutts *v.* Walker, 2 Leigh (Va.) 268; Freedman's Sav., etc., Co. *v.* Earle, 110 U. S. 710, 4 S. Ct. 226, 28 L. ed. 301.

In Indiana judgments are by statute liens on lands held in trust for the judgment debtor, in their chronological order, and a junior judgment obtains no priority by a decree in equity subjecting the lands to execution to satisfy it, where plaintiff in the senior judgment is not a party. Maxwell *v.* Vaught, 96 Ind. 136.

33. *Alabama.*— Sellers *v.* Hayes, 17 Ala. 749.

Georgia.— Bell *v.* McDuffie, 71 Ga. 264; Ware *v.* Jackson, 19 Ga. 452.

Indiana.— Gaar *v.* Lockridge, 9 Ind. 92.

Minnesota.—Coolbaugh *v.* Roemer, 30 Minn. 424, 15 N. W. 869; Welles *v.* Baldwin, 28 Minn. 408, 10 N. W. 427; Minneapolis, etc., R. Co. *v.* Wilson, 25 Minn. 382.

Mississippi.— Money *v.* Dorsey, 7 Sm. & M. 15. *Compare* Hoy *v.* Taliaferro, 8 Sm. & M. 727.

Nebraska.— Falls City First Nat. Bank *v.* Edgar, 65 Nebr. 340, 91 N. W. 404; Doe *v.* Startzer, 62 Nebr. 718, 87 N. W. 535; Welin *v.* Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 397; Olander *v.* Tighe, 43 Nebr. 344, 61 N. W. 633; Courtnay *v.* Parker, 21 Nebr. 582, 33 N. W. 262; Uhl *v.* May, 5 Nebr. 157; Filley *v.* Duncan, 1 Nebr. 134, 93 Am. Dec. 337.

New York.—Moyer *v.* Hinman, 13 N. Y. 180.

Ohio.— Lefferson *v.* Dallas, 20 Ohio St. 68.

Pennsylvania.— Stewart *v.* Coder, 11 Pa. St. 90; Catlin *v.* Robinson, 2 Watts 373; Fasholt *v.* Reed, 16 Serg. & R. 266; McMurlen *v.* Wenner, 16 Serg. & R. 18, 16 Am. Dec. 543; Richter *v.* Selin, 8 Serg. & R. 425.

Virginia.—Young *v.* Devries, 31 Gratt. 304. *Compare* Fulkerson *v.* Taylor, 100 Va. 426, 41 S. E. 863.

United States.— O'Neil *v.* Wabash Ave. Baptist Church Soc., 18 Fed. Cas. No. 10,531, 4 Biss. 482. *Compare* Georgetown *v.* Smith, 10 Fed. Cas. No. 5,347, 4 Cranch C. C. 93.

See 30 Cent. Dig. tit. "Judgment," §§ 1344, 1361.

Contra.— See Woodward *v.* Dean, 46 Iowa 499; Hampson *v.* Edelen, 2 Harr. & J. (Md.) 64, 3 Am. Dec. 530; Moore *v.* Byers, 65 N. C. 240.

In determining the sum necessary to be paid by the vendee to the execution purchaser, in order to obtain a conveyance of the land, the vendee cannot be credited with a payment made to the vendor after the execution sale but before the delivery of the sheriff's deed. Moyer *v.* Hinman, 17 Barb. (N. Y.) 137 [*modified* in 13 N. Y. 180]. But the mere docketing of the judgment is not notice of the lien to the purchaser in possession, and payments subsequently made by him to the judgment debtor, pursuant to the contract, without actual notice of the judgment are valid as against its lien on the land. Moyer *v.* Hinman, 13 N. Y. 180; Parks *v.*

ing of the judgment lien.[34] And if the whole of the purchase-money has been paid before the docketing of the judgment, there remains nothing but a naked legal title in the vendor, to which the lien does not attach.[35] On the other hand, although none of the purchase-money has been paid, the contract of sale will give the vendee an equitable interest in the estate which is not to be displaced by a subsequent judgment lien against the vendor.[36] In some states, however, a contract for the sale of lands will not prevail against a subsequent judgment lien unless recorded,[37] although actual possession of the land, on the part of the vendee under a valid contract, will be sufficient to secure his equitable rights as against the lien of the judgment.[38]

b. Vendee's Equitable Title. In pursuance of the common-law rule that equitable estates are not subject to the lien of judgments,[39] it is held in several states that the lien of a judgment cannot attach to an interest in land held by the debtor under a contract for its purchase, where no deed has been made, although part of the purchase-money may have been paid, but the only remedy of the judgment creditor is in equity.[40] In others, however, the land will be bound by

Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656.

34. Kraner *v.* Chambers, 92 Iowa 681, 61 N. W. 373; Berryhill *v.* Potter, 42 Minn. 279, 44 N. W. 251; Filley *v.* Duncan, 1 Nebr. 134, 93 Am. Dec. 337; Moyer *v.* Hinman, 13 N. Y. 180.

Surplus proceeds of execution sale.— If the land is sold at sheriff's sale, on a judgment against the vendor entered before the date of the contract, for a sum exceeding the amount the vendee was to pay, the latter will be entitled to the surplus, in preference to a creditor of the vendor whose judgment was obtained after the date of the contract. Crouse's Appeal, 28 Pa. St. 139; Siter's Appeal, 26 Pa. St. 178.

35. *Minnesota.*— Fleming *v.* Wilson, 92 Minn. 303, 100 N. W. 4.

North Dakota.—Dalrymple *v.* Security Imp. Co., 11 N. D. 65, 88 N. W. 1033.

Pennsylvania.— Hecker *v.* Mourer, 8 Pa. Super. Ct. 43.

Virginia.— Hurt *v.* Prillaman, 79 Va. 257; Young *v.* Devries, 31 Gratt. 304; Floyd *v.* Harding, 28 Gratt. 401.

West Virginia.— Pack *v.* Hansbarger, 17 W. Va. 313; Snyder *v.* Martin, 17 W. Va. 276, 41 Am. Rep. 670.

Wisconsin.— Goodell *v.* Blumer, 41 Wis. 436.

See 30 Cent. Dig. tit. "Judgment," § 1361.

Some of the earlier cases held that the lien of the judgment would attach upon the vendor's title, in this condition of affairs, although it could convey no beneficial interest to an execution purchaser, as he would be obliged to convey the legal title to the vendee on demand or at the stipulated time. Thomas *v.* Kennedy, 24 Iowa 397, 95 Am. Dec. 740; Niles *v.* Davis, 60 Miss. 750; Lounsberry *v.* Purdy, 11 Barb. (N. Y.) 490; Manley *v.* Hunt, 1 Ohio 257.

Notes for balance of purchase-price.— If a part of the purchase-money has been paid, and the purchaser's note given for the balance, the lien of a judgment will still attach to the vendor's interest. Bell *v.* McDuffie, 71 Ga. 264. *Compare* Moore *v.* Byers, 65 N. C. 240. But if the note given for such balance of the price is transferred before maturity to a *bona fide* holder for value without notice, and is duly paid in his hands, no injunction preventing either of these acts being done, then the vendor no longer has any interest in the property and the lien is gone. Riddle *v.* Berg, 3 Pa. Cas. 566, 7 Atl. 232; Logan *v.* Pannill, 90 Va. 11, 17 S. E. 744.

Purchase-money applied to judgments.— If by the agreement for the sale of the land the whole purchase-money is to be applied to the discharge of judgments prior to the agreement, and is so applied, a judgment subsequent to the agreement is not binding on the land. Foster *v.* Foust, 2 Serg. & R. (Pa.) 11. And see Smith *v.* Gage, 41 Barb. (N. Y.) 60.

36. Hampson *v.* Edelen, 2 Harr. & J. (Md.) 64, 3 Am. Dec. 530; Lane *v.* Ludlow, 14 Fed. Cas. No. 8,052, 2 Paine 591. See also *infra*, XV, E, 3, c, text and note 88.

37. Robertson *v.* Wood, 5 La. Ann. 197; Ferguson *v.* Kumler, 11 Minn. 104; Buchanan *v.* Kimes, 2 Baxt. (Tenn.) 275; Anderson *v.* Nagle, 12 W. Va. 98. *Contra*, Morgan *v.* Morgan, 3 Stew. (Ala.) 383, 21 Am. Dec. 638; Valentine *v.* Seiss, 79 Md. 187, 28 Atl. 892; Floyd *v.* Harding, 28 Gratt. (Va.) 401.

38. *Kansas.*— Elwell *v.* Hitchcock, 41 Kan. 130, 21 Pac. 109.

Minnesota.— Baker *v.* Thompson, 36 Minn. 314, 31 N. W. 51.

Ohio.— Minns *v.* Morse, 15 Ohio 568, 45 Am. Dec. 590.

Pennsylvania.— Gibbs *v.* Tiffany, 4 Pa. Super. Ct. 29.

South Carolina.— Adicks *v.* Lowry, 15 S. C. 128.

West Virginia.— Snyder *v.* Botkin, 37 W. Va. 355, 16 S. E. 591.

See 30 Cent. Dig. tit. "Judgment," §§ 1361, 1362.

Contra.— See Young *v.* Devries, 31 Gratt. (Va.) 304.

39. See *supra*, XV, D, 4, a.

40. *Connecticut.*— Sweney *v.* Pratt, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101.

Indiana.— Evans *v.* Feeny, 81 Ind. 532; Gentry *v.* Allison, 20 Ind. 481; Davis *v.* Cum-

a judgment against the purchaser under these circumstances to the extent of his interest in it, as measured by the amount of his payments already made and by his improvements on the premises.[41] But if the vendee, before completion of the purchase, sells and assigns his interest under his contract, to a third person, the land will not be bound in the hands of the latter by a judgment thereafter rendered against the assignor,[42] at least if the contract of sale or assignment was recorded.[43]

6. Interests of Partners and Cotenants. A judgment against a tenant in common is a lien upon the interest of the debtor in the land,[44] and in case of partition, the lien will attach to the purpart set off to such debtor,[45] or, if the land is sold on partition, to his share of the fund.[46] A judgment against a partnership is a lien on the real estate owned by the firm,[47] and also on the separate real estate of each partner;[48] and conversely a judgment against an individual partner is a lien upon

berland, 6 Ind. 380; Doe *v.* Cutshall, 1 Ind. 246; Modisett *v.* Johnson, 2 Blackf. 431.

New York.— Boughton *v.* Orleans Bank, 2 Barh. Ch. 458; Ellsworth *v.* Cuyler, 9 Paige 418; Grosvenor *v.* Allen, 9 Paige 74. *Compare* Jackson *v.* Parker, 9 Cow. 73.

South Carolina.—Roddy *v.* Elam, 12 Rich. Eq. 343.

Texas.—Merchants' Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227.

Virginia.—Nelson *v.* Turner, 97 Va. 54, 33 S. E. 390; Powell *v.* Bell, 81 Va. 222. *Compare* Burkholder *v.* Ludlam, 30 Gratt. 255, 32 Am. Rep. 668.

See 30 Cent. Dig. tit. "Judgment," § 1344.

41. *Alabama.*— The lien of a judgment will attach if the purchaser has acquired a perfect equity, but to do this it is necessary that he should have paid the whole of the purchase-money. Washington *v.* Bogart, 119 Ala. 377, 24 So. 245.

Georgia.— Harp *v.* Patapsco Guano Co., 99 Ga. 752, 27 S. E. 181; Stewart *v.* Berry, 84 Ga. 177, 10 S. E. 601; Ralston *v.* Field, 32 Ga. 453.

Iowa.— Rand *v.* Garner, 75 Iowa 311, 39 N. W. 515. *Compare* Sweezy *v.* Jones, 65 Iowa 272, 21 N. W. 603.

Maryland.— Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Mississippi.—Adams *v.* Harris, 47 Miss. 144.

Pennsylvania.—Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Russell's Appeal, 15 Pa. St. 319; Foster's Appeal, 3 Pa. St. 79; Pugh *v.* Good, 3 Watts & S. 56, 37 Am. Dec. 534; Catlin *v.* Robinson, 2 Watts 373; Episcopal Academy *v.* Frieze, 2 Watts 16; Auwerter *v.* Mathiot, 9 Serg. & R. 397; Winter *v.* Thompson, 3 Lack. Jur. 398; Addams *v.* Hoffman, 2 Woodw. 93. But where articles for the purchase of land were canceled by the vendee, who had paid no part of the purchase-money, with the consent of the vendor, the vendee had no property in the land on which a judgment against him would be a lien. Raffensberger *v.* Cullison, 28 Pa. St. 426.

West Virginia.—Davis *v.* Vass, 47 W. Va. 811, 35 S. E. 826; Damron *v.* Smith, 37 W. Va. 580, 16 S. E. 807; McFarland *v.* Fish, 34 W. Va. 548, 12 S. E. 548.

See 30 Cent. Dig. tit. "Judgment," § 1344.

42. Rosenberger *v.* Jones, 118 Mo. 559, 24 S. W. 203; Bogart *v.* Perry, 1 Johns. Ch. (N. Y.) 52; Lamprey *v.* Pike, 28 Fed. 30. *Contra,* see Van Camp *v.* Peerenboom, 14 Wis. 65.

43. Russell's Appeal, 15 Pa. St. 319; Damron *v.* Smith, 37 W. Va. 580, 16 S. E. 807.

44. Eldridge *v.* Post, 20 Fla. 579; Cummings' Appeal, 25 Pa. St. 268, 64 Am. Dec. 695; Garvin *v.* Garvin, 1 S. C. 55.

Liability of community property see Husband and Wife, 21 Cyc. 1094.

45. Argyle *v.* Dwinel, 29 Me. 29; Polhemus *v.* Empson, 27 N. J. Eq. 190; Williard *v.* Williard, 56 Pa. St. 119; Longwell *v.* Bentley, 23 Pa. St. 99; Bavington *v.* Clarke, 2 Penr. & W. (Pa.) 115, 21 Am. Dec. 432.

46. Eldridge *v.* Post, 20 Fla. 579.

47. *In re* Codding, 9 Fed. 849.

Confession of judgment by part of firm.— While a judgment against a firm may be entered on service on and confession by one partner only, yet it will be a lien only on the joint property of defendants and the individual property of defendant served. Matter of Lowenstein, 7 How. Pr. (N. Y.) 100; Kidd *v.* Brown, 2 How. Pr. (N. Y.) 20. The owner of a senior judgment confessed by two members of a firm of three is entitled to two thirds of a surplus after a sale of mortgaged property owned by the firm, while the owner of a junior judgment against all the members of the firm is entitled to one third thereof. Stevens *v.* Central New York Bank, 31 Barb. (N. Y.) 290.

48. Cummings' Appeal, 25 Pa. St. 268, 64 Am. Dec. 695; Com. *v.* Rogers, Brightly (Pa.) 450; Bean *v.* Mercer, 1 Chester Co. Rep. (Pa.) 335; Reid *v.* House, 2 Humphr. (Tenn.) 576; Pitts *v.* Spotts, 86 Va. 71, 9 S. E. 501. *Contra,* Stadler *v.* Allen, 44 Iowa 198.

Where a judgment against a firm does not show the names of the individual partners, it cannot be charged as a lien upon the land of a decedent who is alleged to have been a member of the firm. Fox's Appeal, 8 Pa. Cas. 393, 11 Atl. 228.

Competition with individual creditors.— Individual creditors of a partner are not entitled to priority of payment out of proceeds of his individual real estate, as against a judgment creditor of the firm who, by docketing his judgment, has acquired a prior lien

the firm's real estate, to the extent of his interest therein, although subordinate to the prior equities of firm creditors.[49]

7. Property Previously Transferred. A judgment does not attach as a lien upon land which before its rendition had been sold or aliened by the owner in good faith,[50] or given away by him under a valid donation,[51] or sold at judicial sale,[52] or which had passed under an assignment for the benefit of his creditors.[53]

8. Property Fraudulently Conveyed. In those jurisdictions where a conveyance in fraud of creditors is regarded as void, an after-acquired judgment against the vendor is usually held to attach as a lien upon the property conveyed. In those jurisdictions where the conveyance is merely voidable a contrary rule prevails.[54]

9. After-Acquired Property. It is generally held that the lien of a judgment attaches, not only to real estate owned by the debtor at the time of the rendition of the judgment, but also to all that he may subsequently acquire, so long as the judgment remains active and unsatisfied,[55] although in a few states it is held that

on such real estate. McDonald *v.* McDonald, 17 N. Y. Suppl. 230.

49. *Alabama.*— Coster *v.* Georgia Bank, 24 Ala. 37.

Georgia.—Hoskins *v.* Johnson, 24 Ga. 625; Green *v.* Ross, 24 Ga. 613; Dennis *v.* Green, 20 Ga. 386; *Ex p.* Stebbins, R. M. Charlt. 77.

Ohio.—Page *v.* Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788.

Pennsylvania.—Holt's Appeal, 98 Pa. St. 257; Meily *v.* Wood, 71 Pa. St. 488, 10 Am. Rep. 719; Wood *v.* Witherow, 8 Phila. 517. And see Gunnison *v.* Erie Dime Sav., etc., Co., 157 Pa. St. 303, 27 Atl. 747.

Wisconsin.—How *v.* Kane, 2 Pinn. 531, 54 Am. Dec. 152, 2 Chandl. 222.

See 30 Cent. Dig. tit. "Judgment," § 1347.

50. *California.*— Dayton *v.* McAllister, 129 Cal. 192, 61 Pac. 913.

Iowa.— Norton *v.* Williams, 9 Iowa 528.

Louisiana.—Taylor *v.* Rostrop, 3 La. Ann. 100.

New Jersey.—Mott *v.* Newark German Hospital, 55 N. J. Eq. 722, 37 Atl. 757.

Ohio.— Moore *v.* Herancourt, 10 Ohio Cir. Ct. 420, 6 Ohio Cir. Dec. 826.

Pennsylvania.—Mercur *v.* State Line, etc., R. Co., 171 Pa. St. 12, 32 Atl. 1126; Siltzell *v.* Michael, 3 Watts & S. 329; Benson *v.* Maxwell, 10 Pa. Cas. 380, 14 Atl. 161.

Tennessee.—Hurt *v.* Reeves, 5 Hayw. 50.

Virginia.—Bowman *v.* Hicks, 80 Va. 806.

See 30 Cent. Dig. tit. "Judgment," § 1342.

Voidable deed.— A deed made by an insane person not under guardianship is voidable only; it passes title so that a judgment thereafter rendered and docketed will not be a lien on the property till the conveyance is actually avoided. French Lumbering Co. *v.* Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910.

Cancellation or return of deed.— If, after the return of a deed to the grantor and its destruction by him, but before any reconveyance of the premises is made by the grantee, a judgment is recovered against the latter, it will become a valid lien on the premises. Parshall *v.* Shirts, 54 Barb. (N. Y.) 99.

Sale incomplete.— Where a grantor executes a deed in payment of a debt, and files it for record without the knowledge of the grantee, and without any previous agreement, it constitutes no delivery, and therefore if, before the grantee acquires knowledge of the deed, a judgment is rendered against the grantor, which is a lien on the land, a subsequent ratification and acceptance by the grantee will not relate back so as to cut off the judgment lien. Cravens *v.* Rossiter, 116 Mo. 338, 22 S. W. 736, 38 Am. St. Rep. 606.

51. Jones *v.* Clark, 59 Ga. 136.

52. Paddock *v.* Staley, 13 Colo. App. 363, 58 Pac. 363; Robinson *v.* Robinson, 3 Harr. (Del.) 391.

53. McFerran *v.* Davis, 70 Ga. 661.

54. See Fraudulent Conveyances, 20 Cyc. 655.

55. *Arkansas.*— Real Estate Bank *v.* Watson, 13 Ark. 74.

Florida.— Harrison *v.* Roberts, 6 Fla. 711.

Georgia.— Ralston *v.* Field, 32 Ga. 453; *Ex p.* Stebbins, R. M. Charlt. 77.

Indiana.— Campbell *v.* Martin, 87 Ind. 577; O'Harra *v.* Stone, 48 Ind. 417; Ridge *v.* Prather, 1 Blackf. 401.

Kansas.— Babcock *v.* Jones, 15 Kan. 296.

Louisiana.— Dickson *v.* Hynes, 36 La. Ann. 684; Gallaugher *v.* Hebrew Cong., 35 La. Ann. 829.

Maryland.— Ridgely *v.* Gartrell, 3 Harr. & M. 449; Hayden *v.* Stewart, 1 Md. Ch. 459. And see Glen Morris-Glyndon Supply Co. *v.* McColgan, 100 Md. 479, 60 Atl. 608.

Minnesota.— Steele *v.* Taylor, 1 Minn. 274.

Mississippi.— Cayce *v.* Stovall, 50 Miss. 396; Jenkins *v.* Gowen, 37 Miss. 444; Moody *v.* Doe, 25 Miss. 484.

Missouri.— Smith *v.* Thompson, 169 Mo. 553, 69 S. W. 1040.

Nebraska.— Lessert *v.* Sieberling, 59 Nebr. 309, 80 N. W. 900; Duell *v.* Potter, 51 Nebr. 241, 70 N. W. 932; Leonard *v.* White Cloud Ferry Co., 11 Nebr. 338, 7 N. W. 538; Colt *v.* Du Bois, 7 Nebr. 391.

New York.— Smith *v.* Gage, 41 Barb. 60.

South Carolina.— *Ex p.* Trenholm, 19 S. C. 126.

Tennessee.— Wamble *v.* Gant, 112 Tenn. 327, 79 S. W. 801; Chapron *v.* Cassaday, 3 Humphr. 661; Greenway *v.* Cannon, 3 Humphr. 177, 39 Am. Dec. 161.

Texas.— Barron *v.* Thompson, 54 Tex. 235; Thulemeyer *v.* Jones, 37 Tex. 560; Franke

the lien will not bind after-acquired lands until an execution is issued and levied on them.[56]

E. Priorities — 1. In General — a. Lien Subject to Prior Rights and Equities. The attaching of a judgment lien upon land does not disturb existing equities, interests, or liens; it takes rank subordinate and inferior to conveyances, mortgages, and other liens, whether legal or equitable, previously made or procured without fraud.[57] Where the lien of a judgment attaches to land, and the owner afterward marries, the lien is not thereby divested or postponed to the wife's inchoate right of dower;[58] *aliter* if the lien attaches subsequent to the marriage.[59]

v. Lone Star Brewing Co., 17 Tex. Civ. App. 9, 42 S. W. 861. See Schneider *v.* Dorsey, 96 Tex. 544, 74 S. W. 526.

Virginia.— Taylor *v.* Spindle, 2 Gratt. 44; McClung *v.* Beirne, 10 Leigh 394, 34 Am. Dec. 739.

West Virginia.— Handly *v.* Sydenstricker, 4 W. Va. 605.

Wyoming.— Coad *v.* Cowhick, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. Rep. 953.

United States.— Barth *v.* Makeever, 2 Fed. Cas. No. 1,069, 4 Biss. 206; Jackson *v.* U. S. Bank, 13 Fed. Cas. No. 7,131, 5 Cranch C. C. 1.

Canada.— Harris *v.* Rankin, 4 Manitoba 115; McClure *v.* Croteau, 18 Quebec Sup. Ct. 336.

See 30 Cent. Dig. tit. "Judgment," § 1351.

56. *Illinois.*— Where an execution is issued upon a judgment within one year from its rendition, it will become a lien upon any real estate the debtor may acquire subsequent to its rendition and within seven years, but if no execution is issued thereon within a year, no lien will exist. Breed *v.* Gorham, 108 Ill. 81; Wales *v.* Bogue, 31 Ill. 464; Curtis *v.* Root, 28 Ill. 367.

Iowa.— Woods *v.* Mains, 1 Greene 275; Harrington *v.* Sharp, 1 Greene 131, 48 Am. Dec. 365.

Kentucky.— Herrmann Saw Mill Co. *v.* Martin, 58 S. W. 524, 22 Ky. L. Rep. 651.

Ohio.— Stiles *v.* Murphy, 4 Ohio 92; McCormick *v.* Alexander, 2 Ohio 65; Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621.

Pennsylvania.— Ross' Appeal, 106 Pa. St. 82; Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Jacobs' Appeal, 23 Pa. St. 477; Moorehead *v.* McKinney, 9 Pa. St. 265; Lea *v.* Hopkins, 7 Pa. St. 492; Packer's Appeal, 6 Pa. St. 277; Colhoun *v.* Snider, 6 Binn. 135; Rundle *v.* Ettwein, 2 Yeates 23; Torrence *v.* Torrence, 24 Pa. Co. Ct. 408; Broomall *v.* Cochran, 1 Del. Co. 473; Abbott *v.* Remington, 4 Phila. 34. A judgment against the equitable estate which a vendee holds under a contract of sale attaches to the legal estate, when it vests in him. This is an exception to the general rule. Waters' Appeal, *supra*. So also where legatees agree to take land instead of the proceeds thereof, and a division is actually made, the land set apart to each is from that moment subject to the lien of any judgment against him. Brownfield *v.* Mackey, 27 Pa. St. 320.

See 30 Cent. Dig. tit. "Judgment," § 1351.

57. *Alabama.*— Martinez *v.* Lindsey, 91 Ala. 334, 8 So. 787.

Arkansas.— Apperson *v.* Burgett, 33 Ark. 328.

Georgia.— Horne *v.* Seisel, 92 Ga. 683, 19 S. E. 709.

Illinois.— Massey *v.* Westcott, 40 Ill. 160.

Indiana.— Heberd *v.* Wines, 105 Ind. 237, 4 N. E. 457; Foltz *v.* Wert, 103 Ind. 404, 2 N. E. 950; Armstrong *v.* Fearnaw, 67 Ind. 429; Wharton *v.* Wilson, 60 Ind. 591.

Iowa.— Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063; Jones *v.* Jones, 13 Iowa 276.

Mississippi.— Blumenfeld *v.* Seward, 71 Miss. 342, 14 So. 442; Whitfield *v.* Harris, 48 Miss. 710; Foute *v.* Fairman, 48 Miss. 536.

New York.—Towsley *v.* McDonald, 32 Barb. 604; Buchan *v.* Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305; Sweet *v.* Jacocks, 6 Paige 355, 31 Am. Dec. 252; Keirsted *v.* Avery, 4 Paige 9.

Pennsylvania.— Beekman's Appeal, 38 Pa. St. 385.

South Carolina.— State Bank *v.* Campbell, 2 Rich. Eq. 179.

Texas.— Willis *v.* Heath, (1891) 18 S. W. 801; Wynne *v.* Ft. Worth State Nat. Bank, 82 Tex. 378, 17 S. W. 918; Kennard *v.* Mabry, 78 Tex. 151, 14 S. W. 272; Frazer *v.* Thatcher, 49 Tex. 26.

Virginia.— Shipe *v.* Repass, 28 Gratt. 716.

West Virginia.— Huntington First Nat. Bank *v.* Simms, 49 W. Va. 442, 38 S. E. 525; Hutton *v.* Lockridge, 22 W. Va. 159; Pack *v.* Hansbarger, 17 W. Va. 313.

United States.— Georgetown *v.* Smith, 10 Fed. Cas. No. 5,347, 4 Cranch C. C. 91.

See also *infra*, XV, E, 3, a, text and notes 83, 85.

A subsequent judgment creditor, whose claim is jeopardized by an appropriation of payments to an earlier lien, has no equity which will authorize him to interfere in such distribution, where the security remains which he had when his judgment was recovered. Johnson's Appeal, 37 Pa. St. 268.

A lien by contract upon real property, prior in time to the judgment, is paramount to the judgment lien, although the judgment creditor had no notice or knowledge of such prior lien. Doswell *v.* Adler, 28 Ark. 82.

A chattel mortgage filed before the rendition of a judgment in a justice's court will prevail over an execution issued on such judgment. Woolner *v.* Levy, 48 Mo. App. 469.

58. See Dower, 14 Cyc. 924.

59. Gould *v.* Luckett, 47 Miss. 96. See Dower, 14 Cyc. 915.

b. Priority of Government Claims. The statutory priority in favor of claims of the United States in cases of bankruptcy or insolvency[60] does not cause such claims to override judgment liens attaching to the debtor's property before the insolvency or before the institution of bankruptcy proceedings.[61] And ordinary debts due to a state government have no priority over judgment liens previously attaching,[62] although it is otherwise as to the liens of unpaid taxes, which may be made paramount to all other liens and charges of every sort, and which in that case will cut out the lien of a judgment recovered before the levy or assessment of the taxes.[63]

2. Between Judgments — a. In General. In the absence of countervailing equities or the establishment of a different rule by statute, the liens of different judgments affecting the same land take rank and priority according to the dates when they were respectively entered or docketed, the elder being first entitled to satisfaction.[64] And in fixing this priority the relative position of the judgments

60. U. S. Rev. St. (1878) § 3466 [U. S. Comp. St. (1901) p. 2314]; Bankr. Act (1898), § 64, par. "h," cl. 5 (30 U. S. St. at L. 563 [U. S. Comp. St. (1901) p. 3447]).

61. Hoppock *v.* Shober, 69 N. C. 153; Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189; Cottrell *v.* Pierson, 12 Fed. 805, 2 McCrary 390; U. S. *v.* Lewis, 23 Fed. Cas. No. 15,595. In so far as the early case of Thelusson *v.* Smith, 2 Wheat. (U. S.) 396, 4 L. ed. 271, may have asserted a different doctrine, it must be regarded as overruled by the later decisions above cited.

62. Hollingsworth *v.* Patten, 3 Harr. & M. (Md.) 125; Finley *v.* Caldwell, 1 Mo. 512.

63. See Taxation.

64. *Alabama.*— Stover *v.* Herrington, 7 Ala. 142, 41 Am. Dec. 86.

Colorado.— Paddack *v.* Staley, 13 Colo. App. 363, 58 Pac. 363.

Georgia.— Griffith *v.* Posey, 98 Ga. 475, 25 S. E. 515; Osborne *v.* Hill, 91 Ga. 137, 16 S. E. 965; Mendleson *v.* Pardue, 57 Ga. 202; Johnson *v.* Mitchell, 17 Ga. 593. *Compare* Tripod Paint Co. *v.* Hamilton, 111 Ga. 823, 35 S. E. 696.

Indiana.— McMahon *v.* Thompson, 2 Ind. 114. But a judgment founded on an equitable claim against particular real estate of the debtor, and decreeing a specific lien against the same, will prevail over a prior general judgment against him. Wharton *v.* Wilson, 60 Ind. 591.

Iowa.— Sigworth *v.* Meriam, 66 Iowa 477, 24 N. W. 4.

Kansas.— Jackson *v.* King, (1902) 67 Pac. 1112.

Louisiana.— St. Dezier *v.* Michaud, 2 La. 271; Cuebas *v.* Venas, 8 Mart. N. S. 465.

Mississippi.— McKee *v.* Gayle, 46 Miss. 676; Wyatt *v.* Beaty, 10 Sm. & M. 463.

Missouri.— Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095. *Compare* Bradley *v.* Heffernan, 156 Mo. 653, 57 S. W. 763.

New York.— Hagadorn *v.* Hart, 62 Hun 94, 16 N. Y. Suppl. 625 [*affirmed* in 136 N. Y. 665, 33 N. E. 335]; De la Vergne *v.* Evertson, 1 Paige 181, 19 Am. Dec. 411.

North Carolina.— State *v.* Rhyne, 89 N. C. 64.

Ohio.— Stewart *v.* Wheeling, etc., R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; Babbett *v.* Morgan, 31 Ohio St. 273. But the lien of a judgment, rendered after the service of process in a foreclosure suit against the debtor, instituted at the same term of court, is subject to the decree of foreclosure, although the judgment, by force of statute, has a retroactive effect from the first day of the term. Applehy *v.* Mullaney, 9 Ohio S. & C. Pl. Dec. 765, 7 Ohio N. P. 120.

Pennsylvania.— *In re* Cake, 186 Pa. St. 412, 40 Atl. 568; Worman *v.* Wolfersbergers, 19 Pa. St. 59; Carneghan *v.* Brewster, 2 Pa. St. 41; Hance's Appeal, 1 Pa. St. 408; Dennison's Appeal, 1 Pa. St. 201; Stephen's Appeal, 8 Watts & S. 186; Wilson *v.* Stoxe, 10 Watts 434; Welsh *v.* Murray, 4 Dall. 320, 1 L. ed. 850.

South Carolina.— Reid *v.* McGowan, 28 S. C. 74, 5 S. E. 215; Bauskett *v.* Smith, 2 Rich. 164; Greenwood *v.* Bocquet, 2 Bay 86; Tucker *v.* Lowndes, 1 Bay 213. See Belknap *v.* Greene, 56 S. C. 119, 34 S. E. 26.

Tennessee.— Chapron *v.* Cassaday, 3 Humphr. 661; Hickman *v.* Murfree, Mart. & Y. 26.

Virginia.— Max Meadows Land, etc., Co. *v.* McGavock, 98 Va. 411, 36 S. E. 490; Blakemore *v.* Wise, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; Hill *v.* Rixey, 26 Gratt. 72; Puryear *v.* Taylor, 12 Gratt. 401.

United States.— *In re* Lacy, 14 Fed. Cas. No. 7,970.

Canada.— Case *v.* Bartlett, 12 Manitoba 280; Mills *v.* Mills, 9 N. Brunsw. 45.

See 30 Cent. Dig. tit. "Judgment," § 1353.

In Illinois, where the statute provides that "there shall be no priority of the lien of one judgment over that of another rendered at the same term of court or on the same day in vacation," it is held that executions on judgments confessed on different days in vacation are entitled to priorities. Coe *v.* Hallam, 173 Ill. 461, 50 N. E. 1072.

A judgment which has become dormant will be postponed to a junior judgment which is not dormant. Colson *v.* Kennedy, 88 Ga. 174, 14 S. E. 119.

As between a judgment at law and a decree in equity, where the law requires both to be docketed or enrolled, the same rule of

on the docket, although raising a presumption as to their seniority, is not controlling.[65] The lien of a judgment being dependent upon the condition of the record at the time of its entry, it cannot be affected by a subsequent revival of an earlier judgment, giving the holder thereof rights which did not exist at the time of the entry of the junior judgment.[66]

b. Judgments Entered on Same Day. Where two or more judgments are entered against the same debtor on the same day, it is held in some states that inquiry may be made into the fractional parts of the day, so as to give priority to the judgment first actually entered,[67] and in others that the creditor who first takes out execution will have a preference;[68] but generally the doctrine is that there can be no priority between judgments in this condition, but all must share *pro rata* in the proceeds of the property affected.[69]

c. Judgment For Purchase-Money. A judgment recovered or confessed for the purchase-money of land has no priority over older judgments which attached as liens on the same land at the time of its transfer to the debtor,[70] unless the execution and delivery of the deed for the land and the giving of a judgment for the purchase-money were inseparably connected as parts of the same continuous transaction.[71]

priority obtains. McKee *v.* Gayle, 46 Miss. 676; Briggs *v.* Planters' Bank, Freem. (Miss.) 574.

Partnership and individual debts.— A judgment for a firm debt has no priority over a judgment previously obtained against the several members of the firm on their individual liabilities. Davis *v.* Delaware, etc., Canal Co., 109 N. Y. 47, 15 N. E. 873, 4 Am. St. Rep. 418. And conversely the lien of a judgment for an individual debt is not superior to the lien of a prior judgment against the debtor on a partnership debt. Gillaspy *v.* Peck, 46 Iowa 461; Stevens *v.* Central New York Bank, 31 Barb. (N. Y.) 290.

As against decree for alimony.— The lien of a judgment rendered pending a petition for divorce, and before the rendition of a decree for alimony, is superior to that of the decree, where the petition does not allege a claim to any specific land, or pray for alimony by way of annuity upon the husband's real estate generally. Hamlin *v.* Bevans, 7 Ohio 161, 28 Am. Dec. 625. And see Comstock *v.* Brandon, 27 Ind. App. 475, 61 N. E. 686.

65. Glasgow *v.* Kann, 171 Pa. St. 262, 32 Atl. 1095; Buhl *v.* Wagner, 22 Pa. Co. Ct. 608.

Where two judgments are erroneously docketed and indexed the one first entered has the priority. Shaver's Estate, 18 Pa. Co. Ct. 202. See Delaney *v.* Becker, 29 Pittsb. Leg. J. N. S. (Pa.) 347.

66. Young *v.* Young, 20 Pa. Co. Ct. 45. But the equitable right of a judgment creditor whose judgment is recovered after an entry of satisfaction entitling him to priority over a senior judgment creditor, which satisfaction is set aside, can be enforced only where the property of the debtor is more than sufficient to pay intermediate judgments between his and that of the senior judgment creditor. McCune *v.* McCune, 164 Pa. St. 611, 30 Atl. 577.

67. German Security Bank *v.* Campbell, 99 Ala. 249, 12 So. 436, 42 Am. St. Rep. 55; Herron *v.* Walker, 69 Miss. 707, 12 So. 259; Johnson *v.* Edde, 58 Miss. 664; Smith *v.* Ship, 1 How. (Miss.) 234; Biggam *v.* Merritt, Walk. (Miss.) 430, 12 Am. Dec. 576; Lemon *v.* Staats, 1 Cow. (N. Y.) 592; Bates *v.* Hinsdale, 65 N. C. 423. See Burney *v.* Boyett, 1 How. (Miss.) 39; Adams *v.* Dyer, 8 Johns. (N. Y.) 347, 5 Am. Dec. 344.

68. Gay *v.* Rainey, 89 Ill. 221, 31 Am. Rep. 76; Kisterson *v.* Tate, 94 Iowa 665, 63 N. W. 350, 58 Am. St. Rep. 419; Lippencott *v.* Wilson, 40 Iowa 425; Tilford *v.* Burnham, 7 Dana (Ky.) 109. And see *infra*, XV, E, 2, f.

69. *Missouri.*— Bruce *v.* Vogel, 38 Mo. 100.

Pennsylvania.— Ladley *v.* Creighton, 70 Pa. St. 490; Claason's Appeal, 22 Pa. St. 359; Clawson *v.* Eichbaum, 2 Grant 130; Mechanics' Bank *v.* Gorman, 8 Watts & S. 304; Metzler *v.* Kilgore, 3 Penr. & W. 245, 23 Am. Dec. 76; Emerick *v.* Garwood, 1 Browne 20; Wheatland *v.* Wheatland, 18 Lanc. L. Rev. 62. See Vierheller's Appeal, 24 Pa. St. 105, 62 Am. Dec. 365.

South Carolina.— Bulows *v.* O'Neal, 4 Desauss Eq. 394.

Virginia.— Janney *v.* Stephens, 2 Patt. & H. 11.

United States.— McLean *v.* Rockey, 16 Fed. Cas. No. 8,991, 3 McLean 235; Rockhill *v.* Hanna, 20 Fed. Cas. No. 11,980, 4 McLean 554.

See 30 Cent. Dig. tit. "Judgment," § 1354.

70. Allen *v.* Sharp, 62 Ga. 183; Stevens *v.* Sellars, 59 Ga. 540; Crafton *v.* Toombs, 58 Ga. 343; Stoutenbourgh *v.* Konkle, 15 N. J. Eq. 33; Jacobs' Appeal, 107 Pa. St. 137; Cake's Appeal, 23 Pa. St. 186, 62 Am. Dec. 328; Watt *v.* Steel, 1 Pa. St. 386. But a purchaser at an orphans' court sale, who has not complied with the terms of sale, has no title, legal or equitable, on which a judgment would be a lien, as against subsequent judgment bonds, given for the purchase-money upon the conveyance to him of the legal title. Jacobs' Appeal, 23 Pa. St. 477.

71. Snyder's Appeal, 91 Pa. St. 477.

d. Judgment For Future Advances. Advances made on the faith of an antecedent judgment will have priority over creditors whose liens attached thereafter;[72] and some decisions hold that the lien of a judgment given to secure advances to be made will be good against intervening liens attaching after the judgment but before the advances.[73] But the generally accepted doctrine is that such a judgment will be postponed to a subsequent *bona fide* lien, except for such advances as had been made before the attaching of the junior lien,[74] at least where it was optional with the creditor to make the advances or not, and he was not absolutely bound to do so.[75]

e. Priority by Superior Diligence. Where several judgments are of equal rank or date, a priority is gained by that creditor who exercises superior activity and diligence, as where one is the first to discover and avoid a fraudulent conveyance of property by the common debtor,[76] or to levy an attachment on the property.[77]

f. Priority by Prior Levy. As between senior and junior judgments binding the same land, it is usually immaterial in what order executions may be issued, no priority accruing to the junior judgment merely because an execution thereon is first issued.[78] But priority for a junior judgment may thus be gained where the land affected was not subject to the lien of either judgment,[79] or where the statutes are so framed that if a judgment creditor allows more than a year to elapse without taking out execution on his judgment its lien will become inferior

72. Hulseman *v.* Houser, 4 Phila. (Pa.) 118.

73. Robinson *v.* Baltimore City Consol. Real Estate, etc., Co., 55 Md. 105; Truscott *v.* King, 6 N. Y. 147; Norton *v.* Whiting, 1 Paige (N. Y.) 578. But where a judgment by confession to secure future advances is entered on an insufficient statement, it will be postponed to the claims of subsequent *bona fide* purchasers or encumbrancers. Hammond *v.* Bush, 8 Abb. Pr. (N. Y.) 152.

74. Kerr's Appeal, 92 Pa. St. 236; Hamme's Estate, 12 York Leg. Rec. (Pa.) 129; Walker *v.* Arthur, 9 Rich. Eq. (S. C.) 397. But see Parmentier *v.* Gillespie, 9 Pa. St. 86.

Where a judgment on an existing debt is entered on the same day on which advances are made under a prior judgment, there is no priority but the two judgments must be paid *pro rata*. McClure *v.* Roman, 52 Pa. St. 458.

75. Ter-Hoven *v.* Kerns, 2 Pa. St. 96; Walker *v.* Arthur, 9 Rich. Eq. (S. C.) 397.

76. *Illinois.*— Lyon *v.* Robbins, 46 Ill. 276.

Iowa.— Boyle *v.* Maroney, 73 Iowa, 70, 35 N. W. 145, 5 Am. St. Rep. 657; Howland *v.* Knox, 59 Iowa 46, 12 N. W. 777; Bridgman *v.* McKissick, 15 Iowa 260.

Pennsylvania.— Armington *v.* Rau, 100 Pa. St. 165; Haak's Appeal, 100 Pa. St. 59.

Texas.— Matula *v.* Lane, 22 Tex. Civ. App. 391, 55 S. W. 504.

West Virginia.— Foley *v.* Ruley, 50 W. Va. 158, 40 S. E. 382, 55 L. R. A. 916.

United States.— *In re* Lowe, 19 Fed. 589.

Contra.— Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Wilkinson *v.* Paddock, 125 N. Y. 748, 27 N. E. 407; New York L. Ins. Co. *v.* Mayer, 19 Abb. N. Cas. (N. Y.) 92 [*affirmed* in 14 Daly 318]; Phillips *v.* O'Connor, 1 N. Y. City Ct. 372; Norwalk Bank *v.* Clinton Bank, 1 Ohio Dec. (Reprint) 219, 4 West. L. J. 538.

Priority of creditor suing to set aside conveyance in general see FRAUDULENT CONVEYANCES, 20 Cyc. 826.

But a creditor cannot by filing a creditor's bill acquire precedence over a judgment which already constitutes a lien on the property which the creditor seeks to subject. Eldridge *v.* Post, 20 Fla. 579. And where judgments against a *cestui que trust* are made by statute binding on the land in the order of their priority, a junior judgment creditor gains no priority by a proceeding in equity to subject the interest of the *cestui* to his judgment. Maxwell *v.* Vaught, 96 Ind. 136.

77. Langdon *v.* Raiford, 20 Ala. 532; Lackey *v.* Seibert, 23 Mo. 85; Sklower *v.* Abbott, 19 Mont. 228, 47 Pac. 901. *Compare* Litchton *v.* McDougald, 5 Ga. 176. See, generally, ATTACHMENTS, 4 Cyc. 652.

78. *Alabama.*— Decatur Charcoal Chemical Works *v.* Moses, 89 Ala. 538, 7 So. 637; Turner *v.* Lawrence, 11 Ala. 427.

Mississippi.— Lucas *v.* Stewart, 3 Sm. & M. 231.

North Carolina.— Gambrill Mfg. Co. *v.* Wilcox, 111 N. C. 42, 15 S. E. 885; Cannon *v.* Parker, 81 N. C. 320.

Pennsylvania.— Stewart *v.* Coder, 11 Pa. St. 90.

United States.— Howard *v.* Milwaukee, etc., R. Co., 101 U. S. 837, 25 L. ed. 1081; McLean *v.* Rockey, 16 Fed. Cas. No. 8,891, 3 McLean 235; Rockhill *v.* Hanna, 20 Fed. Cas. No. 11,980, 4 McLean 554.

See 30 Cent. Dig. tit. "Judgment," § 1357.

But in New Jersey the statute gives to judgments priority in the order in which executions are issued thereon. See Bogert *v.* Lydecker, 45 N. J. L. 314; Meeker *v.* Warren, 66 N. J. Eq. 146, 57 Atl. 421.

79. Kisterson *v.* Tate, 94 Iowa 665, 63

to the liens of other judgments which have been kept alive,[80] or where the two judgments entered the same day have no priority but only equality of lien, until execution issues on one of them.[81]

g. Order of Priority on After-Acquired Lands. If several judgments are entered against the same debtor at different times, and he afterward acquires the legal title to real estate, the liens of the several judgments attach together upon the property at the same instant; all stand upon the same footing, and the oldest judgment has no priority.[82]

3. Between Judgments and Other Liens or Claims — a. In General. The lien of a judgment, having once attached to specific property, is superior to all claims against it or liens upon it which accrued or were created after the rendition or docketing of the judgment,[83] unless the judgment lien is allowed to expire by lapse of time without enforcement, in which case subsequent liens or encumbrances will succeed, in their order, to its priority, and will take precedence of the judgment lien afterward renewed or revived.[84] On the other hand the judgment is

N. W. 350, 58 Am. St. Rep. 419; Lovejoy *v.* Lovejoy, 31 N. J. Eq. 55.

80. Toney *v.* Wilson, 51 Ala. 499; Excelsior Mfg. Co. *v.* Boyle, 46 Kan. 202, 26 Pac. 408; Lamme *v.* Schilling, 25 Kan. 92; Corwin *v.* Benham, 2 Ohio St. 36; Charbonneau *v.* Roberts, 24 Ohio Cir. Ct. 707; Bish *v.* Burns, 7 Ohio Cir. Ct. 285, 4 Ohio Cir. Dec. 598; Sullivan *v.* Hart, 2 Ohio S. & C. Pl. Dec. 591, 1 Ohio N. P. 187; Tinsley *v.* Anderson, 3 Call (Va.) 329; Pence *v.* Cochran, 6 Fed. 269, construing laws of Ohio.

81. Shirley *v.* Brown, 80 Mo. 244; Waterman *v.* Haskin, 11 Johns. (N. Y.) 228.

Priorities between executions see EXECUTIONS, 17 Cyc. 1054.

82. *Indiana.*— Michaels *v.* Boyd, 1 Ind. 259.

Iowa.— Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640; Kisterson *v.* Tate, 94 Iowa 665, 63 N. W. 350, 58 Am. St. Rep. 419; Ware *v.* Purdy, (1894) 60 N. W. 526.

Mississippi.— Cayce *v.* Stovall, 50 Miss. 396; Moody *v.* Doe, 25 Miss. 484.

New York.— *In re* Hazard, 141 N. Y. 586, 36 N. E. 739; Goetz *v.* Mott, 1 N. Y. Suppl. 153, 21 Abb. N. Cas. 246.

North Carolina.— Moore *v.* Jordan, 117 N. C. 86, 23 S. E. 259, 53 Am. St. Rep. 576, 42 L. R. A. 209.

South Carolina.— Belknap *v.* Greene, 56 S. C. 119, 34 S. E. 26.

Tennessee.— Relfe *v.* McComb, 2 Head 558, 75 Am. Dec. 748; Davis *v.* Benton, 2 Sneed 665; Chapron *v.* Cassaday, 3 Humphr. 661.

Texas.— Matula *v.* Lane, 22 Tex. Civ. App. 391, 55 S. W. 504; Willis *v.* Downes, (Civ. App. 1898) 46 S. W. 920.

Contra.— Wood *v.* Gary, 5 Ala. 43; Creighton *v.* Leeds, 9 Oreg. 215.

Where a statute requires an executor to pay judgments docketed against the deceased according to their priority, this rule must be observed, although the property sought to be applied was acquired by the judgment debtor after all the judgments had been docketed. Matter of Foster, 8 Misc. (N. Y.) 344, 29 N. Y. Suppl. 316.

Simulated sale and return of property.— Where a debtor has made a fraudulent and simulated sale of property, and afterward several judgments are recovered against him, and the property is then returned to him, the liens of the judgments will rank according to their several dates of recordation. Schwabacher *v.* Leibrook, 48 La. Ann. 821, 19 So. 758.

83. *Arkansas.*— Jackson *v.* Allen, 30 Ark. 110.

California.— Hibernia Sav., etc., Soc. *v.* London, etc., F. Ins. Co., 138 Cal. 257, 71 Pac. 334.

Florida.— Stockton *v.* Jacksonville Nat. Bank, 45 Fla. 590, 34 So. 897.

Georgia.— Humphrey *v.* Copeland, 54 Ga. 543.

Illinois.— McKinley *v.* Smith, 25 Ill. App. 168.

Indiana.— Dill *v.* Voss, 94 Ind. 590; Armstrong *v.* McLaughlin, 49 Ind. 370.

Louisiana.— Dickson *v.* Hynes, 36 La. Ann. 684.

Maryland.— Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364.

See 30 Cent. Dig. tit. "Judgment," § 1358.

Agricultural liens see AGRICULTURE, 2 Cyc. 64.

Assignment for benefit of creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 274.

Attachment liens see ATTACHMENT, 4 Cyc. 652.

Attorneys' liens see ATTORNEY AND CLIENT, 4 Cyc. 1017.

Bankruptcy.— As to the effect of bankruptcy upon a judgment lien see BANKRUPTCY, 5 Cyc. 364.

Factor's liens.— The lien of a judgment has precedence over the subsequently acquired lien of a factor on property in his possession. Kollock *v.* Jackson, 5 Ga. 153. See FACTORS AND BROKERS, 19 Cyc. 162.

Garnishment liens see GARNISHMENT, 20 Cyc. 1062.

Mechanics' liens see MECHANICS' LIENS.

Tax liens see TAXATION.

Vendor's liens see VENDOR AND PURCHASER.

84. Smith *v.* Schwartz, 21 Utah 126, 60 Pac. 305, 81 Am. St. Rep. 670. And see Hunt *v.* Bowman, 62 Kan. 448, 63 Pac. 747.

subordinate to all valid liens and claims existing on the property at the time of its rendition, of which the judgment creditor has notice, actual or constructive.[85]

b. Equitable Liens. The lien of a judgment is subject to all the equities which were held against the land in the hands of the judgment debtor at the time the judgment was rendered, and these will be protected by courts of equity as against the judgment lien, so that the latter may be confined to the interest remaining in the debtor after due recognition of the outstanding equities in their proper order.[86] And it is even held that judgment creditors are not protected against trusts of which they have no notice, or allowed in equity to hold against the *cestui que trust*.[87]

c. Contracts of Sale and Vendor's Lien. The rights of the vendee under an executory contract for the sale of land are not displaced or impaired by the subsequent accruing of a judgment lien against the vendor;[88] and conversely, the lien of a judgment recovered against the vendee, before the completion of the sale, is subordinate to the vendor's lien for unpaid purchase-money, whether reserved in the contract or equitable only,[89] although some of the cases are disposed to hold

85. Dotterer *v.* Harden, 88 Ga. 145, 13 S. E. 971; Ford *v.* Marcall, 107 Ill. 136; Groves *v.* Maghee, 64 Ill. 180. And see *supra*, XV, E, 1, a.

Secret lien.— Where a master's deed created a passive trust in favor of certain judgment debtors, which, by the statute of uses, was converted into an estate in fee in the *cestuis que trustent*, the lien of the judgment, which attached to such property on the filing of the deed for record, was superior to a parol secret lien existing between the *cestuis* and the trustee. Teller *v.* Hill, 18 Colo. App. 509, 72 Pac. 811.

86. *Alabama.*— Coster *v.* Georgia Bank, 24 Ala. 37.

Indiana.— Wells *v.* Benton, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601; Wharton *v.* Wilson, 60 Ind. 591.

Iowa.— Brebner *v.* Johnson, 84 Iowa 23, 50 N. W. 35.

Kentucky.— Griffin *v.* Gingell, 79 S. W. 284, 25 Ky. L. Rep. 2031.

Louisiana.— Smith *v.* His Creditors, 21 La. Ann. 241; Larthet *v.* Hogan, 1 La. Ann. 330.

Maryland.— Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

New Jersey.— Cook *v.* Bodine, 30 N. J. Eq. 470; Hoagland *v.* Latourette, 2 N. J. Eq. 254.

New York.— Dwight *v.* Newell, 3 N. Y. 185; Stevens *v.* Watson, 4 Abb. Dec. 402; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. 284; Lounsbury *v.* Purdy, 11 Barb. 490; Arnold *v.* Patrick, 6 Paige 310; Ells *v.* Tousley, 1 Paige 280; Wilkes *v.* Harper, 3 Sandf. Ch. 6.

North Carolina.— Walke *v.* Moody, 65 N. C. 599.

Ohio.— Reeder *v.* Metcalf, 1 Ohio Dec. (Reprint) 58, 1 West. L. J. 398.

Texas.— Blankenship *v.* Douglas, 26 Tex. 225, 82 Am. Dec. 608.

Virginia.— Floyd *v.* Harding, 28 Gratt. 401.

West Virginia.— Pack *v.* Hansbarger, 17 W. Va. 313.

Wisconsin.— Goodell *v.* Blumer, 41 Wis. 436.

United States.— Pierce *v.* Brown, 7 Wall. 205, 19 L. ed. 134.

England.— Finch *v.* Winchelsea, 1 P. Wms. 277, 24 Eng. Reprint 387.

See 30 Cent. Dig. tit. "Judgment," § 1360. See also *supra*, XV, D, 3; XV, E, 1.

The principle on which equitable liens are preferred to the lien of a judgment is that the contract out of which the equitable lien springs was made before the judgment was docketed. Cook *v.* Kraft, 3 Lans. (N. Y.) 512.

Agreement to give a mortgage.— A specific equitable lien, created to secure a debt previously contracted, such as an agreement by the debtor to execute a mortgage to his creditor, will not be preferred to a prior general lien by judgment, where both liens attach at the same time upon land which has become the property of the debtor subsequent to the time of their creation. Dwight *v.* Newell, 3 N. Y. 185.

Purchaser's claim for improvements.— Since a purchaser of land is affected with constructive notice of a judgment lien thereon, he is not entitled to an allowance for valuable improvements made by him on the land until the lien of the judgment is satisfied. Ritter *v.* Cost, 99 Ind. 80; Cook *v.* Kraft, 3 Lans. (N. Y.) 512. See, generally, IMPROVEMENTS.

87. Shryock *v.* Waggoner, 28 Pa. St. 430. But *compare* Teller *v.* Hill, 18 Colo. App. 509, 72 Pac. 811; Harner's Appeal, 94 Pa. St. 489.

88. Shinn *v.* Taylor, 28 Ark. 523; Vance *v.* Workman, 8 Blackf. (Ind.) 306; Brooks *v.* Dent, 1 Md. Ch. 523. And see *supra*, XV, D, 5.

89. *Maryland.*— Ringgold *v.* Bryan, 3 Md. Ch. 488; Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Mississippi.— Dunlap *v.* Burnett, 5 Sm. & M. 702, 45 Am. Dec. 269.

New York.— Johnson *v.* Strong, 65 Hun 470, 20 N. Y. Suppl. 392; Lamberton *v.* Van Voorhis, 15 Hun 336; Arnold *v.* Patrick, 6 Paige 310.

that this rule does not apply where the vendor's lien is secret, equitable, and unrecorded.[90]

4. Between Judgments and Conveyances — a. In General. The lien of a judgment attaches only to the actual interest of the debtor in the land and therefore is subordinate to conveyances, mortgages, or other liens made or created before the judgment.[91] But it is superior to a conveyance or encumbrance of real property of the debtor, to which the judgment lien had already attached before such conveyance or encumbrance was made,[92] provided, however, that the judgment will not prevail against a subsequent sale or lien on the property unless it has been

Tennessee.— Vaughn *v.* Vaughn, 12 Heisk. 472.

Virginia.— Shipe *v.* Repass, 28 Gratt. 716.

See 30 Cent. Dig. tit. "Judgment," § 1361.

Contra.— Whittington *v.* Simmons, 32 Ark. 377.

90. Cutler *v.* Ammon, 65 Iowa 281, 21 N. W. 604; Spring *v.* Short, 90 N. Y. 538; Hulett *v.* Whipple, 58 Barb. (N. Y.) 224; Tallman *v.* Farley, 1 Barb. (N. Y.) 280.

91. *California.*— Grigsby *v.* Schwarz, 82 Cal. 278, 22 Pac. 1041; Schwartz *v.* Cowell, 71 Cal. 306, 12 Pac. 252.

Florida.— McAdow *v.* Wachob, 45 Fla. 482, 33 So. 702.

Georgia.— Crawford *v.* Williams, 76 Ga. 792. And see O'Connor *v.* Georgia R. Bank, 121 Ga. 88, 48 S. E. 716.

Illinois.— A. R. Beck Lumber Co. *v.* Rupp, 188 Ill. 562, 59 N. E. 429, 80 Am. St. Rep. 190.

Indiana.— Clark *v.* Merriam, 83 Ind. 58.

Iowa.— Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063.

Minnesota.— Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614.

Nebraska.— Hoagland *v.* Green, 54 Nebr. 164, 74 N. W. 424.

New Jersey.— African M. E. Church *v.* Conover, 27 N. J. Eq. 157.

New York.— Mitchell *v.* Smith, 53 N. Y. 413.

Pennsylvania.— Riddle's Appeal, 37 Pa. St. 177; Lyon *v.* McGuffey, 4 Pa. St. 126, 45 Am. Dec. 675.

Virginia.— Bankers' Loan, etc., Co. *v.* Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914.

Washington.— Preston-Parton Milling Co. *v.* Dexter, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928.

See 30 Cent. Dig. tit. "Judgment," § 1363. And see *supra*, XV, D, 3, a.

Deed not delivered.— Where a judgment debtor executes a deed of his real estate before the judgment against him is docketed, but the deed is not delivered until after the docketing of the judgment, the lien of the judgment attaches to the land. Hibberd *v.* Smith, 50 Cal. 511.

Land omitted from mortgage by mistake. — Where land is omitted from a mortgage by mistake, the lien of a judgment subsequently filed against the mortgagor is subject to the equity of the mortgagee to have the mortgage reformed. Chadron Bldg., etc., Assoc. *v.* Hamilton, 45 Nebr. 369, 63 N. W. 808. A contrary doctrine prevails in Canada. Ralston *v.* Goodwin, 21 Nova Scotia 177.

Land in another county.— As between a judgment in another county and a mortgage, priority of lien is determined by priority of registration in the county where the land lies. Firebaugh *v.* Ward, 51 Tex. 409.

Growing crops.— A judgment lien takes effect on a growing crop only as the crop comes into existence, and hence it is second to a mortgage earlier made, under an enabling statute allowing a mortgage upon a growing crop to relate back. Cooper *v.* Turnage, 52 Miss. 431.

Judgment against corporation for tort.— N. C. Code, § 1255, provides that a judgment against a corporation for a tort shall take precedence over a prior mortgage on its property, but this does not operate to render railroad property in the hands of a purchaser at foreclosure sale subject to a judgment recovered against the mortgagor for a tort committed after the sale. Julian *v.* New York Cent. Trust Co., 115 Fed. 956, 53 C. C. A. 438.

92. *Arkansas.*— Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338.

Iowa.— See Seeberger *v.* Campbell, 88 Iowa 63, 55 N. W. 20.

Kansas.— See Kirkwood *v.* Koester, 11 Kan. 471.

Maryland.— Wright *v.* Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702; Reigle *v.* Leiter, 8 Md. 405; Hollida *v.* Shoop, 4 Md. 465, 59 Am. Dec. 88. A judgment debtor cannot be allowed to diminish the value of the creditor's security, by making a lease and anticipating the payments of rent, even though it is done without fraudulent intent. Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364.

New Jersey.— Edmunds *v.* Smith, 52 N. J. Eq. 212, 27 Atl. 827; Wait *v.* Savage, (Ch. 1888) 15 Atl. 225; Emson *v.* Polhemus, 28 N. J. Eq. 439.

New York.— Lynch *v.* Utica Ins. Co., 18 Wend. 236.

North Carolina.— Weil *v.* Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644; Vanstory *v.* Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483; Gulley *v.* Thurston, 112 N. C. 192, 17 S. E. 13. That one buys land for a full price, in good faith, and without notice, is of no avail against the lien of a prior judgment. Oates *v.* Munday, 127 N. C. 439, 37 S. E. 457.

docketed, filed, registered, or otherwise made a matter of public record, as the local statute may provide.[93]

b. Judgment For Purchase-Money. A judgment given or confessed for the purchase-money of land will have priority of lien on the land over mortgages or other encumbrances where the giving of the judgment and the execution and delivery of the deed for the land were simultaneous or parts of the same continuous transaction, but not otherwise.[94]

c. Contemporaneous Judgment and Conveyance. Where a conveyance and a judgment against the grantor are entered on the same day, some of the cases hold that the lien of the judgment will begin from the earliest hour of that day, and so override the conveyance;[95] but the generally accepted doctrine is that fractions of the day may be inquired into, and priority of right will be determined by actual priority in time.[96] The latter rule is also generally applied as between a judgment and a mortgage entered on the same day,[97] although in a few cases they are held to have equality of lien and to be entitled to share *pro rata* in the proceeds of the property.[98]

Ohio.— Columbus Nat. Bank *v.* Tennessee Coal, etc., Co., 62 Ohio St. 564, 57 N. E. 450; Bauman *v.* Goulet, 25 Ohio Cir. Ct. 473. See Loomis *v.* Second German Bldg. Assoc., 37 Ohio St. 392; Myers *v.* Hewitt, 16 Ohio 449.

Pennsylvania.— Lynch *v.* Dearth, 2 Penr. & W. 101; Anderson *v.* Neff, 11 Serg. & R. 208; Butts *v.* Cruttenden, 14 Pa. Super. Ct. 449; Vogel *v.* Hughes, 2 Miles 379.

Virginia.— Lee *v.* Swepson, 76 Va. 173; Kent *v.* Matthews, 12 Leigh 573.

West Virginia.— Parker *v.* Clarkson, 4 W. Va. 407.

See 30 Cent. Dig. tit. "Judgment," § 1363. See also *infra*, XV, F, 1.

93. *Georgia.*— Dotterer *v.* Harden, 88 Ga. 145, 13 S. E. 971.

Indiana.— Bell *v.* Davis, 75 Ind. 314.

New York.— Sweetland *v.* Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676.

North Carolina.— Holman *v.* Miller, 103 N. C. 118, 9 S. E. 429.

Pennsylvania.— Pennsylvania Sav. Fund, etc., Assoc. *v.* George, 24 Pa. Co. Ct. 100.

Texas.— Corley *v.* Renz, (Civ. App. 1894) 24 S. W. 935.

Wisconsin.—McKenna *v.* Van Blarcom, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895.

See *infra*, XV, E, 4, f.

Effect of actual notice.— It has been held that actual notice by a purchaser of land of the existence of an undocketed judgment does not render the judgment a lien on the land as against him. Sklower *v.* Abbott, 19 Mont. 228, 47 Pac. 901; Glasscock *v.* Stringer, (Tex. Civ. App. 1895) 32 S. W. 920. But see *contra*, Butts *v.* Cruttenden, 14 Pa. Super. Ct. 449. See also *infra*, XV, E, 4, f, (II).

If the judgment is actually recorded, the fact that a party is ignorant of it is due to his own negligence, against the consequences of which a court of equity cannot relieve him by interfering with the rights of others who are without fault. Bunn *v.* Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48. See also Oates *v.* Munday, 127 N. C. 439, 37 S. E. 457.

94. Bratton's Appeal, 8 Pa. St. 164; Lyon *v.* McGuffey, 4 Pa. St. 126, 45 Am. Dec. 675; Eckert *v.* Lewis, 4 Phila. (Pa.) 422.

95. Hollingsworth *v.* Thompson, 5 Harr. (Del.) 432; Hockman *v.* Hockman, 93 Va. 455, 25 S. E. 534, 57 Am. St. Rep. 816. And see *In re* Boyer, 51 Pa. St. 432, 91 Am. Dec. 129.

96. *New Jersey.*— Hoppock *v.* Ramsey, 28 N. J. Eq. 413.

Pennsylvania.— Ladley *v.* Creighton, 70 Pa. St. 490; Small's Appeal, 24 Pa. St. 398; Clawson *v.* Eichbaum, 2 Grant 130; Mechanics' Bank *v.* Gorman, 8 Watts & S. 304.

South Carolina.— *Ex p.* Stagg, 1 Nott & M. 405.

Tennessee.— Murfree *v.* Carmack, 4 Yerg. 270, 26 Am. Dec. 232.

Virginia.— Skipwith *v.* Cunningham, 8 Leigh 271, 31 Am. Dec. 642, holding that the day appointed by law for the commencement of a term of court is not necessarily the first day of the term and where a deed is admitted to record on the day appointed for the commencement of the term, but before the day on which the court actually begins its session, it will overreach a judgment rendered at that term.

See 30 Cent. Dig. tit. "Judgment," § 1336.

Time of rendition.— In a contest of this sort the lien of the judgment takes effect from its rendition by the judge, and not from the time of signing the minutes of the court. Clark *v.* Duke, 59 Miss. 575.

Evidence as to time.— In Pennsylvania it is held that the precise time of entry of the judgment may be shown by evidence *dehors* the record. Mechanics' Bank *v.* Gorman, 8 Watts & S. (Pa.) 304. But this is denied in Tennessee. Berry *v.* Clements, 9 Humphr. (Tenn.) 312; Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

97. Morris *v.* White, 36 N. J. Eq. 324; Holliday *v.* Franklin Bank, 16 Ohio 533; Follett *v.* Hall, 16 Ohio 111, 47 Am. Dec. 365; Berry *v.* Clements, 9 Humphr. (Tenn.) 312; Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

98. Hendrickson's Appeal, 24 Pa. St. 363; Claason's Appeal, 22 Pa. St. 359; Clawson *v.*

d. Precedence of Purchase-Money Mortgage. A mortgage or trust deed given to secure the purchase-money of land, executed simultaneously with the conveyance of the legal title and duly recorded, has priority of lien over judgments obtained against the purchaser anterior to the conveyance;[99] and this is so, whether the mortgage is given to the vendor himself or to a third person who advances the purchase-money for the vendee.[1]

e. Contemporaneous Mortgage to Secure Other Debts. Where a judgment debtor at the same time he acquires title to land executes a mortgage thereof to a third person, to secure any debt other than for the purchase-money of the land, the judgment lien will take precedence of the mortgage.[2]

f. Prior Unrecorded Deed or Mortgage — (i) *In General.* Where the statutes make a deed or mortgage invalid, as against subsequent *bona fide* purchasers and creditors, unless it is duly recorded, it is generally held that the lien of a judgment is to be preferred to a conveyance executed before the rendition of the judgment but not recorded until afterward, provided the judgment creditor had no actual notice of such prior conveyance.[3] But in a number of states a deed or

Eichbaum, 2 Grant (Pa.) 130; Doolittle *v.* Beary, 2 Phila. (Pa.) 354; Goetzinger *v.* Rosenfeld, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257. *Compare* Magaw *v.* Garrett, 25 Pa. St. 319.

But the parties may by agreement give priority either to a judgment or to a mortgage, where both are entered on the same day, and such agreement may be shown by parol. Maze *v.* Burke, 12 Phila. (Pa.) 335.

99. *Georgia.*— Courson *v.* Walker, 94 Ga. 175, 21 S. E. 287; Scott *v.* Warren, 21 Ga. 408.

Illinois.— Gorham *v.* Farson, 119 Ill. 425, 10 N. E. 1; Curtis *v.* Root, 20 Ill. 53. *Compare* Roane *v.* Baker, (1885) 2 N. E. 501.

Iowa.— Parsons *v.* Hoyt, 24 Iowa 154.

Louisiana.— Rochereau *v.* Colomb, 27 La. Ann. 337.

Massachusetts.— Clark *v.* Munroe, 14 Mass. 351.

Minnesota.— Banning *v.* Edes, 6 Minn. 402.

New Jersey.— Clark *v.* Butler, 32 N. J. Eq. 664.

New York.— Frelinghuysen *v.* Colden, 4 Paige 204.

Pennsylvania.— Cake's Appeal, 23 Pa. St. 186, 62 Am. Dec. 328; Foster's Appeal, 3 Pa. St. 79.

Texas.— Masterson *v.* Burnett, 27 Tex. Civ. App. 370, 66 S. W. 90.

Virginia.— Straus *v.* Bodeker, 86 Va. 543, 10 S. E. 570; Cowardin *v.* Anderson, 78 Va. 88; Summers *v.* Darne, 31 Gratt. 791.

See 30 Cent. Dig. tit. "Judgment," § 1371.

1. *Illinois.*— Curtis *v.* Root, 20 Ill. 53.

Iowa.— Kaiser *v.* Lemheck, 55 Iowa 244, 7 N. W. 519. *Compare* Gilman *v.* Dingeman, 49 Iowa 308.

Kansas.— Ransom *v.* Sargent, 22 Kan. 516.

Massachusetts.— Clark *v.* Munroe, 14 Mass. 351.

New York.— Haywood *v.* Nooney, 3 Barb. 643.

Virginia.— Cowardin *v.* Anderson, 78 Va. 88.

See 30 Cent. Dig. tit. "Judgment," § 1371.

But a mortgage given to a third person a month after the conveyance, to secure purchase-money advanced by him, has no priority where it appears that the advance was in the nature of a loan, there being no obligation on the part of the mortgagee to pay the debt, and no arrangement between the grantor and grantee that he should be subrogated to the vendor's rights. Cohn *v.* Hoffman, 50 Ark. 108, 6 S. W. 511.

2. Root *v.* Curtis, 38 Ill. 192; Ransom *v.* Sargent, 22 Kan. 516; Hawley *v.* Smeiding, 3 Kan. App. 159, 42 Pac. 841; Weil *v.* Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644. *Contra,* Tallman *v.* Farley, 1 Barb. (N. Y.) 280. And see Bradley *v.* Bryan, 43 N. J. Eq. 396, 13 Atl. 806; Benson *v.* Maxwell, 10 Pa. Cas. 380, 14 Atl. 161.

3. *Alabama.*— Motley *v.* Jones, 98 Ala. 443, 13 So. 782; King *v.* Paulk, 85 Ala. 186, 4 So. 825; De Vendell *v.* Hamilton, 27 Ala. 156; Mallory *v.* Stodder, 6 Ala. 801. *Compare* Avent *v.* Read, 2 Stew. 488, 2 Port. 480, 27 Am. Dec. 663.

Arkansas.— Cleveland *v.* Shannon, (1889) 12 S. W. 497; Hawkins *v.* Files, 51 Ark. 417, 11 S. W. 681.

District of Columbia.— Washington Nat. Metropolitan Bank *v.* Hitz, 1 Mackey 111.

Florida.— Eldridge *v.* Post, 20 Fla. 579.

Illinois.— Gary *v.* Newton, 201 Ill. 170, 66 N. E. 267; Smith *v.* Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Guiteau *v.* Wisely, 47 Ill. 433; Manly *v.* Pettee, 38 Ill. 128; Vause *v.* Templeton, 87 Ill. App. 455.

Kentucky.— Ring *v.* Gray, 6 B. Mon. 368; Strode *v.* Churchill, 2 Litt. 75. See Thomas *v.* Smith, 6 Ky. L. Rep. 737.

Louisiana.— Baker *v.* Atkins, 107 La. 490, 32 So. 69.

Michigan.— Belcher *v.* Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376.

Minnesota.— Hall *v.* Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497; Berryhill *v.* Smith, 59 Minn. 285, 61 N. W. 144; Coles *v.* Berryhill, 37 Minn. 56, 33 N. W. 213; Dutton *v.* McReynolds, 31 Minn. 66, 16 N. W. 468; Golcher *v.* Brisbin, 20 Minn. 453; Johnson *v.* Robinson, 20 Minn. 189.

Mississippi.— Mississippi Valley Co. *v.* Chicago, etc., R. Co., 58 Miss. 846; Hum-

mortgage being valid without record, and a judgment lien attaching only to the actual interest of the debtor, it is held that the judgment acquires no lien at all if the land has previously been conveyed away, although the deed is not on record,[4]

phreys *v.* Merrill, 52 Miss. 92; Bingaman *v.* Hyatt, Sm. & M. Ch. 437.

New Jersey.— Hunt *v.* Swayze, 55 N. J. L. 33, 25 Atl. 850; Westervelt *v.* Voorbis, 42 N. J. Eq. 179, 6 Atl. 665; Howell *v.* Brewer, (N. J. Ch. 1886) 5 Atl. 137; Vreeland *v.* Clafflin, 24 N. J. Eq. 313.

North Carolina.— London *v.* Bynum, 136 N. C. 411, 48 S. E. 764; Tarboro *v.* Micks, 118 N. C. 162, 24 S. E. 729.

Ohio.— Jackson *v.* Luce, 14 Ohio 514; Mayham *v.* Coombs, 14 Ohio 428. See Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585.

Oklahoma.— Lewis *v.* Atherton, 5 Okla. 90, 47 Pac. 1070.

Texas.— Lewis *v.* Johnson, 68 Tex. 448, 4 S. W. 644; Calvert *v.* Roche, 59 Tex. 463; Firebaugh *v.* Ward, 51 Tex. 409; Cavanaugh *v.* Peterson, 47 Tex. 197; Grace *v.* Wade, 45 Tex. 522; White *v.* Provident Nat. Bank, 27 Tex. Civ. App. 487, 65 S. W. 498; Walker *v.* Downs, (Civ. App. 1901) 61 S. W. 725; Russell *v.* Nall, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901. *Compare* Farley *v.* McAlister, 39 Tex. 602.

Virginia.— Price *v.* Wall, 97 Va. 334, 33 S. E. 599, 75 Am. St. Rep. 788; Blakemore *v.* Wise, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; Jones *v.* Byrne, 94 Va. 751, 27 S. E. 591; Heermans *v.* Montague, (1890) 20 S. E. 899; Robinson *v.* Commercial, etc., Bank, (1893) 17 S. E. 739; Young *v.* Devries, 31 Gratt. 304; Hill *v.* Rixey, 26 Gratt. 72; Withers *v.* Carter, 4 Gratt. 407, 50 Am. Dec. 78; McCance *v.* Taylor, 10 Gratt. 580; McClure *v.* Thistle, 2 Gratt. 182; McCullough *v.* Sommerville, 8 Leigh 415; Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519.

West Virginia.— Anderson *v.* Nagle, 12 W. Va. 98; Murdock *v.* Welles, 9 W. Va. 552.

United States.— Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682; McCoy *v.* Rhodes, 11 How. 131, 13 L. ed. 634; U. S. *v.* Devereux, 90 Fed. 182, 32 C. C. A. 564; Lash *v.* Hardick, 14 Fed. Cas. No. 8,097, 5 Dill. 505; Ludlow *v.* Clinton Line R. Co., 15 Fed. Cas. No. 8,600, 1 Flipp. 25; Ross *v.* Prentiss, 20 Fed. Cas. No. 12,078, 4 McLean 106.

See 30 Cent. Dig. tit. "Judgment," § 1368. See also *supra*, XV, E, 4, a, text and note 93.

An undelivered deed filed as an escrow in proceedings in a court of equity in the administration of a trust fund belonging to a married woman and her infant children is not within the meaning of the registry act, so that the lien of judgments subsequently recovered against the grantor do not attach to the land. Trout *v.* Warwick, 77 Va. 731.

United States as creditor.— It makes no difference in the application of the rule that the mortgage, which is postponed to the lien of a subsequent judgment because not recorded, was executed in favor of the United States. Benton *v.* Woolsey, 12 Pet. 27, 9 L. ed. 987.

Deed of trust.— The rule applies to a deed of trust, in the nature of a mortgage, given to secure the payment of a debt, and even where it has been executed by a sale and conveyance of the land. Campbell *v.* Nonpareil Fire-Brick, etc., Co., 75 Va. 291.

Resulting trust.— A statute placing judgment creditors on the same footing with *bona fide* purchasers, as against unrecorded conveyances, does not give them priority over a resulting trust which cannot be made a matter of record. School Dist. No. 10 *v.* Peterson, 74 Minn. 122, 76 N. W. 1126, 73 Am. St. Rep. 337.

Claims against decedents' estates.— In Illinois the rule does not apply to holders of judgments on claims allowed against the estate of a decedent, such judgments not being liens on lands left by the latter. Noe *v.* Montray, 170 Ill. 169, 48 N. E. 709. See, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 534.

4. *California.*— Wilcoxson *v.* Miller, 49 Cal. 193.

Georgia.— The lien of a judgment does not attach as against a prior unrecorded conveyance of the land by way of absolute sale. Lytle *v.* Black, 107 Ga. 386, 33 S. E. 414; Donovan *v.* Simmons, 96 Ga. 340, 22 S. E. 966; Bailey *v.* Bailey, 93 Ga. 768, 21 S. E. 77; Lowe *v.* Allen, 68 Ga. 225; Davie *v.* McDaniel, 47 Ga. 195.

Indiana.— Pierce *v.* Spear, 94 Ind. 127; Runyan *v.* McClellan, 24 Ind. 165; Orth *v.* Jennings, 8 Blackf. 420.

Iowa.— Bird *v.* Adams, 56 Iowa 292, 9 N. W. 224; Evans *v.* McGlasson, 18 Iowa 150; Bell *v.* Evans, 10 Iowa 353; Norton *v.* Williams, 9 Iowa 528. *Compare* Hopping *v.* Burnam, 2 Greene 39.

Kansas.— Bruce *v.* McBee, 23 Kan. 379; Smith *v.* Savage, 3 Kan. App. 556, 43 Pac. 847.

Missouri.— A deed or mortgage, not recorded before the rendition of the judgment, will still be good against the judgment if it is placed on the record before a sale on execution under the judgment. Shaw *v.* Padley, 64 Mo. 519; Black *v.* Long, 60 Mo. 181; Stillwell *v.* McDonald, 39 Mo. 282. But *compare* Frothingham *v.* Stacker, 11 Mo. 77; Reed *v.* Austin, 9 Mo. 722, 45 Am. Dec. 336.

New York.— Trenton Banking Co. *v.* Duncan, 86 N. Y. 221; Schroeder *v.* Gurney, 73 N. Y. 430; Jackson *v.* Post, 9 Cow. 120.

Oregon.— Baker *v.* Woodward, 12 Oreg. 3, 6 Pac. 173.

South Carolina.— Steele *v.* Mansell, 6 Rich. 437; Coleman *v.* Hamburg Bank, 2 Strobh. Eq. 285, 49 Am. Dec. 671.

Wisconsin.— Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48.

See 30 Cent. Dig. tit. "Judgment," § 1368.

and that the lien of the judgment is therefore subordinated to that of a prior unrecorded mortgage.[5]

(II) *Effect of Possession or Notice.* If at the time of docketing or entering a judgment, the creditor has actual notice of a prior unrecorded deed or mortgage, the lien of the judgment will be subordinated;[6] and actual, open, and notorious possession of the premises on the part of the grantee or mortgagee will be sufficient to charge the judgment creditor with such notice.[7] But the notice must be brought home to the judgment creditor at the time his judgment lien

But if there is a sale made under such subsequent judgment to a third person, for value paid and without notice, the rights of such purchaser will take priority over those of the grantee in an unrecorded deed or mortgage. Evans *v.* McGlasson, 18 Iowa 150.

5. *Indiana.*— Sparks *v.* State Bank, 7 Blackf. 469.

Iowa.— Evans *v.* McGlasson, 18 Iowa 150; Seevers *v.* Delashmutt, 11 Iowa 174, 77 Am. Dec. 139.

Kansas.— Swarts *v.* Stees, 2 Kan. 236, 85 Am. Dec. 588.

Missouri.— A mortgage deed unrecorded before a judgment is good against the judgment if recorded before an execution sale under the judgment. Shaw *v.* Padley, 64 Mo. 519; Valentine *v.* Havener, 20 Mo. 133.

Pennsylvania.— Mellon's Appeal, 32 Pa. St. 121; Larimer's Appeal, 22 Pa. St. 41.

South Carolina.— Barnwell *v.* Portens, 2 Hill Eq. 219; Hampton *v.* Levy, 1 McCord Eq. 107.

Washington.— Dawson *v.* McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841.

See 30 Cent. Dig. tit. "Judgment," § 1368.

But see Richards *v.* Myers, 63 Ga. 762; Andrews *v.* Mathews, 59 Ga. 466; Boston *v.* Cummins, 16 Ga. 102, 60 Am. Dec. 717; Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

6. *Arkansas.*— Byers *v.* Engles, 16 Ark. 543.

Illinois.— Columbus Buggy Co. *v.* Graves, 108 Ill. 459; Williams *v.* Tatnall, 29 Ill. 553.

Indiana.— Sinking Fund Com'rs *v.* Wilson, 1 Ind. 356.

Iowa.— Fords *v.* Vance, 17 Iowa 94.

Minnesota.— Lamberton *v.* Merchants' Nat. Bank, 24 Minn. 281.

Mississippi.— Bass *v.* Estill, 50 Miss. 300; Walker *v.* Gilbert, Freem. 85.

New Jersey.— Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 7 Atl. 873.

Pennsylvania.— Britton's Appeal, 45 Pa. St. 172. *Compare* Hulings *v.* Guthrie, 4 Pa. St. 123; Hibberd *v.* Bovier, 1 Grant 266.

Texas.— Barnett *v.* Squyres, (Civ. App. 1899) 52 S. W. 612; Stovall *v.* Odell, 10 Tex. Civ. App. 169, 30 S. W. 66.

United States.— U. S. *v.* Griswold, 8 Fed. 556, 7 Sawy. 311.

See 30 Cent. Dig. tit. "Judgment," § 1369. See also *supra*, XV, E, 4, a, note 93.

Contra.— Actual notice is not sufficient if the conveyance is not recorded. See Winston *v.* Hodges, 102 Ala. 304, 15 So. 528; Coward *v.* Culver, 12 Heisk. (Tenn.) 540; Lillard *v.* Rucker, 9 Yerg. (Tenn.) 64; March *v.* Chambers, 30 Gratt. (Va.) 299; Edison *v.* Huff, 29 Gratt. (Va.) 338.

What is sufficient notice.— Whatever is sufficient to charge a purchaser with notice is sufficient to charge a judgment creditor. H. C. Tack Co. *v.* Ayers, 56 N. J. Eq. 56, 38 Atl. 194. But not the mere fact that the land was inclosed and signs were posted stating that it was for sale and telling where to inquire. Clark *v.* Greene, 73 Minn. 467, 76 N. W. 263. And the mere statement of a debtor to his creditor, who is inquiring after the debtor's property with a view to compelling payment of his debt out of it, that his property or any particular part of it is mortgaged for all it is worth, is not notice of the existence of any particular mortgage, so as to give an unrecorded mortgage precedence over a judgment subsequently obtained. Condit *v.* Wilson, 36 N. J. Eq. 370. And the recording of a deed in one town, conveying land in such town, is of itself no notice of the conveyance, by the same deed, of lands lying in another town, in which such deed is not recorded. Perrin *v.* Reed, 35 Vt. 2.

Assignee of judgment.— An assignee of the judgment who buys in ignorance of an unrecorded conveyance, and in ignorance of the fact that his assignor knew of the conveyance, is not chargeable with such knowledge on the part of the assignor. Duke *v.* Clark, 58 Miss. 465.

Intervening mortgage.— While a mortgage imperfectly recorded is ineffective as a lien against subsequent judgment creditors, yet if there be a second mortgage, between the first and the judgments in point of time, to which the proceeds of the mortgaged premises when sold would be paid, and this mortgagee has actual notice of the first mortgage when he takes his own, the first mortgage is good as to him, and therefore is entitled to have the money appropriated to it. Manufacturers', etc., Bank *v.* Pennsylvania Bank, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240.

7. *Alabama.*— Burt *v.* Cassety, 12 Ala. 734; Powell *v.* Allred, 11 Ala. 318.

Illinois.— Adam *v.* Tolman, 180 Ill. 61, 54 N. E. 174 [*affirming* 77 Ill. App. 179]; Myers *v.* Maher, 33 Ill. App. 284.

Minnesota.— Northwestern Land Co. *v.* Dewey, 58 Minn. 359, 59 N. W. 1085.

Mississippi.— Taylor *v.* Eckford, 11 Sm. & M. 21; Walker *v.* Gilbert, 7 Sm. & M. 456.

New Jersey.— Gardom *v.* Chester, 60 N. J. Eq. 238, 46 Atl. 602.

Texas.— Collum *v.* Sanger, (1904) 82 S. W. 459, 83 S. W. 184.

Virginia.— Brown *v.* Butler, 87 Va. 621,

attaches, and his rights are not affected by the fact that he acquires knowledge of the prior deed or mortgage at the time he sells under an execution.[8]

g. Defects in Conveyance or Record. A subsequent judgment lien will take precedence of a prior deed or mortgage which was so fatally defective as to be inoperative as a conveyance,[9] or where the grantee or mortgagee had no knowledge of the instrument or its delivery until after the judgment, although he may then have assented to it.[10] Notice to a subsequent judgment creditor is not imparted by an illegal, unsuccessful, or incomplete attempt to record a prior deed or mortgage.[11]

5. Postponement of Lien — a. In General. Mere failure of the holder of a senior judgment to take active measures for enforcing his security within the time allowed him for that purpose will not cause a postponement of his lien to that of a junior judgment;[12] but such postponement will result from anything which invalidates or destroys his judgment,[13] or amounts to a satisfaction of it,[14] or from conduct on his part which amounts to fraud upon the rights or interests of junior lienors,[15] or from his voluntary release of his lien or agreement to postpone

13 S. E. 71; Long *v.* Hagerstown Agricultural Implement Mfg. Co., 30 Gratt. 665.

West Virginia.— Snyder *v.* Botkin, 37 W. Va. 355, 16 S. E. 591.

See 30 Cent. Dig. tit. "Judgment," § 1369.

8. Smith *v.* Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Davidson *v.* Cowan, 16 N. C. 470; Russell *v.* Nall, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901. And see Britton *v.* Bean, 4 Phila. (Pa.) 289.

9. Pratt *v.* Clemens, 4 W. Va. 443, holding that a paper purporting to be a deed of trust, but not under the seal of the grantor, is merely a contract for the lien, and is inoperative as against subsequent judgment creditors.

Where a deed had two acknowledgments, one of which was good and the other defective, and only the defective one was recorded, it was held that subsequent judgment creditors of the vendor could not take advantage of the defect, as the registry act was not intended to protect them. Pixley *v.* Huggins, 15 Cal. 127.

Mistake in description.— That a mistake in the description of lands in a deed or mortgage, or the omission of lands intended to be included, may be corrected as against subsequent judgment creditors see Dayton *v.* Citizens' Nat. Bank, 11 Ill. App. 501; Chadron Bldg., etc., Assoc. *v.* Hamilton, 45 Nebr. 369, 63 N. W. 808. *Contra,* Wilcox *v.* Leominster Nat. Bank, 43 Minn. 541, 45 N. W. 1136, 19 Am. St. Rep. 259; Wentz's Appeal, 10 Wkly. Notes Cas. (Pa.) 284.

10. Hibberd *v.* Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; Goodsell *v.* Stinson, 7 Blackf. (Ind.) 437.

11. Andrews *v.* Mathews, 59 Ga. 466. See Carper *v.* McDowell, 5 Gratt. (Va.) 212.

Deposit for record.— It is not sufficient to carry a deed to the clerk's office to be recorded to make it good. It must be left with the clerk to be recorded. Horsley *v.* Garth, 2 Gratt. (Va.) 471, 44 Am. Dec. 393.

12. Scharff *v.* Zimmerman, 60 Miss. 760; Robinson *v.* Green, 6 How. (Miss.) 223.

Neglect to satisfy a judgment out of the debtor's personal property does not subordinate the judgment lien on the debtor's land to that of a junior judgment. Leonard *v.* Broughton, 120 Ind. 536, 22 N. E. 731, 16 Am. St. Rep. 347.

13. Porter *v.* Cocke, Peck (Tenn.) 30.

What constitutes release or discharge of lien see *infra,* XV, I.

An injunction awarded at the instance of a stranger to prevent the collection of a judgment by sale of the property levied on does not impair the lien of the judgment; upon dissolution of the injunction the judgment will be entitled to priority as against judgments whose liens attached during the injunction. Bartlett *v.* Doe, 6 Ala. 305, 41 Am. Dec. 52.

Where a mortgage given to secure valid notes is set aside because of invalidity in the mortgage, this will not invalidate or affect the priority of judgments taken on the notes secured. Lippincott *v.* Shaw Carriage Co., 25 Fed. 577.

14. See Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Moseby's Appeal, 3 Pa. Cas. 108, 8 Atl. 165.

What constitutes a satisfaction see *infra,* XIX.

Where a sale on an execution is set aside for irregularity, and the land is ordered to be resold for the benefit of the purchaser, the lien of the original judgment continues in force as against the lien of any intervening judgment. McHany *v.* Schenck, 88 Ill. 357.

Merger by recovery of judgment on a judgment.— It has been held that a judgment creditor who prosecutes to judgment a suit on his judgment loses his lien under such prior judgment, and is postponed to all intervening encumbrances; but as to this there is a conflict of opinion. See *infra,* XIX, D, 1, b.

15. See Green *v.* Ingram, 16 Ga. 164. Where a judgment note was filed of record and a confession of judgment entered thereon, and subsequently the parties to the note in the presence of the prothonotary changed the terms thereof on the record, it was held that although this was an improper tampering with the record it would not, in the ab-

it.[16] Further, in those states where a judgment in order that its lien may continue must be periodically revived, the lien of a judgment not revived within the statutory time will be superseded by the lien of younger judgments in full original life or which have been duly revived.[17]

b. Stay of Execution. An extension of time for payment, or a stay of execution on a judgment, whether by agreement of parties, order of court, or injunction, for any time short of the statutory period of limitations, will not have the effect of postponing the lien of the judgment to other and junior judgment liens.[18] But it is said that a mortgage for a valuable consideration, made pending a stay of execution by order of plaintiff, will take precedence of the judgment.[19]

c. Effect of Appeal. An appeal from a judgment does not discharge its lien, although it may stay its enforcement; hence it does not postpone the judgment to mortgages, judgments, or other liens attaching while the appeal is pending.[20]

sence of actual fraud, postpone the judgment to the liens of subsequent creditors, as the note was merged in the judgment, and was a paper which was *functus officio*. Kimmel's Appeal, 91 Pa. St. 471.

16. See Van Duyne *v.* Shann, 41 N. J. Eq. 311, 7 Atl. 429; Bronner *v.* Loomis, 17 Hun (N. Y.) 439; Gardner's Appeal, 7 Watts & S. (Pa.) 295; Quakertown Bldg., etc., Assoc. *v.* Sorver, 11 Phila. (Pa.) 532. Under directions given by a party or his attorney to the sheriff not to consider his judgment in holding an inquisition of a debtor's lands, the judgment is postponed to all others then in existence against the debtor. Patterson *v.* Cummin, 2 Penr. & W. (Pa.) 520.

17. *Georgia.*— Colson *v.* Kennedy, 88 Ga. 174, 14 S. E. 119.

Louisiana.—Brady *v.* His Creditors, 43 La. Ann. 165, 9 So. 59.

North Carolina.—Whitehead *v.* Latham, 83 N. C. 232.

Oregon.— Davisson *v.* Mackay, 22 Oreg. 247, 29 Pac. 791.

Pennsylvania.— Miller *v.* Miller, 147 Pa. St. 545, 548, 23 Atl. 841; Pennsylvania Agricultural, etc., Bank *v.* Crevor, 2 Rawle 224. See Shunk's Estate, 1 Chest. Co. 535. The rule is the same, although the elder judgment was for purchase-money. Ruth's Appeal, 54 Pa. St. 173.

South Carolina.— Kaminsky *v.* Trantham, 45 S. C. 393, 23 S. E. 132.

Utah.— Smith *v.* Schwartz, 21 Utah 126, 60 Pac. 305, 81 Am. St. Rep. 670.

18. *Alabama.*— Doe *v.* Bates, 6 Ala. 480.

Arkansas.— Cook *v.* Martin, (1905) 87 S. W. 625, 1024; Shall *v.* Biscoe, 18 Ark. 142.

California.— Barroilhet *v.* Hathaway, 31 Cal. 395, 89 Am. Dec. 193.

Illinois.— Marshall *v.* Moore, 36 Ill. 321. But where execution is not issued on a judgment within one year, as required by statute, the lien of the judgment is subject to the right of a purchaser from the judgment debtor prior to a levy of the execution. Harris *v.* Cornell, 80 Ill. 54.

Kansas.— Lisle *v.* Cheney, 36 Kan. 578, 13 Pac. 816. See Thompson *v.* Hubbard, 3 Kan. App. 714, 44 Pac. 1095.

Kentucky.— Eubank *v.* Poston, 5 T. B. Mon, 285.

Maryland.— Murphy *v.* Cord, 12 Gill & J. 182.

New York.— Muir *v.* Leitch, 7 Barb. 341.

Pennsylvania.— Fricker's Appeal, 1 Watts 393; Righter *v.* Rittenhouse, 3 Rawle 273. *Compare* Kerper *v.* Hoch, 1 Watts 9; Moliere *v.* Noe, 4 Dall. 450, 1 L. ed. 905.

Tennessee.— Love *v.* Harper, 4 Humphr. 113. *Compare* Miller *v.* Estill, 8 Yerg. 452; Porter *v.* Cocke, Peck 30.

Texas.— Ayers *v.* Waul, 44 Tex. 549; Riddle *v.* Bush, 27 Tex. 675.

Virginia.— Craig *v.* Sebrell, 9 Gratt. 131.

United States.— Mercantile Trust Co. *v.* St. Louis, etc., R. Co., 69 Fed. 193.

See 30 Cent. Dig. tit. "Judgment," § 1375.

Contra.— Virden *v.* Robinson, 59 Miss. 28.

Intervening mortgage.— Where there is a judgment not levied within the year, a junior judgment levied within the year, thus acquiring a priority as against the senior judgment, and an intervening mortgage executed and recorded prior to the rendition of the second judgment, the senior judgment should be first paid, next the mortgage, and the junior judgment postponed to both. Fitch *v.* Mendenhall, 17 Ohio 578; Holliday *v.* Franklin Bank, 16 Ohio 533; Brazee *v.* Lancaster Bank, 14 Ohio 318.

Rule in New Jersey.— The statutes provides that judgments shall take precedence in the order in which executions shall be taken out and levied. Hence, although a judgment obtained before a mortgage is given is a prior lien, although no levy is made, yet where levy and sale have been made on a judgment subsequent to the mortgage the lien of the prior judgment is destroyed. Lambertville Nat. Bank *v.* Boss, (Ch. 1888) 13 Atl. 18; Clement *v.* Kaighn, 15 N. J. Eq. 47. And where a senior judgment creditor issues execution, but directs the sheriff to return it without levy, in order to found supplemental proceedings on it to reach assets not leviable, his judgment becomes junior not only to subsequent judgments under which executions are levied, but also to an intervening mortgage. Andrus *v.* Burke, 61 N. J. Eq. 297, 48 Atl. 228.

19. Whitfield *v.* Clark, 48 Ala. 555; Sanford *v.* Ogden, 34 Ala. 118.

20. Phillips *v.* Behn, 19 Ga. 298; Behn *v.* Phillips, 18 Ga. 466; Curtis *v.* Root, 28 Ill.

d. Erroneous Satisfaction or Vacation of Judgment. A judgment creditor who enters satisfaction of his judgment, or permits it to be done, although without actual satisfaction, authorizes others to consider the property as unencumbered, and will be postponed to their rights or liens.[21] And if he afterward procures the cancellation of the entry of satisfaction, although this will restore his judgment to full activity, it will not restore its priority of lien as against purchasers or encumbrancers whose rights attached after the entry of satisfaction and before its cancellation,[22] although it seems that the priority of the senior judgment may thus be regained as against junior judgment creditors whose judgments were recovered prior to the entry of satisfaction, and who were not in any way misled by such entry.[23]

e. Effect of Modification of Judgment. A modification of a judgment which leaves it in full force and only makes some change in its terms or conditions does not generally impair its rank or priority as a lien.[24]

6. Proceedings For Determination of Priority. Conflicting claims to priority as between judgments, mortgages, and other liens may be determined on a bill in equity for the purpose,[25] or an action by one claimant against another to fix their relative rights,[26] or a suit to quiet title as against an adverse claimant,[27] or a rule to show cause why the alleged conflicting lien should not be stricken off,[28] or an issue framed between judgment creditors to test the validity and rank of their respective judgments,[29] or in proceedings to distribute the funds raised by execution sale of the property affected.[30] So a judgment creditor, if made defendant to a mort-

367; Leonard's Appeal, 94 Pa. St. 180; McClung *v.* Beirne, 10 Leigh (Va.) 394, 34 Am. Dec. 739.

Suspension of judgment liens by appeal see *infra*, XV, H, 2.

In New York a statute (Code Civ. Proc. § 1256) provides for the procuring and entry on the docket of an order whereby the judgment, pending an appeal, shall cease to be a lien as against purchasers and mortgagees in good faith. See Bronner *v.* Loomis, 17 Hun 439. Where such an order has been made, and is afterward vacated by an order which purports to restore the lien *nunc pro tunc*, this does not restore it as against a creditor whose judgment was docketed in the interval between the two orders, and who was not a party to the original action, or to the proceeding vacating the order. Harmon *v.* Hope, 87 N. Y. 10.

Where a plaintiff appeals from an award in his favor, and recovers a judgment more favorable to himself, the lien of such judgment does not relate back to the date of the award. Lentz *v.* Lamplugh, 12 Pa. St. 344.

21. Mobile Branch Bank *v.* Ford, 13 Ala. 431; Page *v.* Benson, 22 Ill. 484; Parks *v.* Person, Sm. & M. Ch. (Miss.) 76.

22. *Georgia.*— Dougherty *v.* Marsh, 11 Ga. 277.

Illinois.— Burgett *v.* Paxton, 99 Ill. 288.

Iowa.— Head *v.* Newcomb, 89 Iowa 728, 53 N. W. 118, 57 N. W. 443.

New York.— King *v.* Harris, 34 N. Y. 330; Slocum *v.* Freeman, 4 Abb. Dec. 297 note, 1 Keyes 240; Bebee *v.* State Bank, 1 Johns. 529, 3 Am. Dec. 353.

Pennsylvania.— McCune *v.* McCune, 164 Pa. St. 611, 30 Atl. 577; Harner's Appeal, 94 Pa. St. 489.

Tennessee.— Mays *v.* Wherry, 3 Tenn. Ch. 80.

See 30 Cent. Dig. tit. "Judgment," § 1376.

23. McCune *v.* McCune, 164 Pa. St. 611, 30 Atl. 577; Renick *v.* Ludington, 14 W. Va. 367. And see *In re* McLane, 1 C. Pl. (Pa.) 117; Bullard's Estate, 1 Del. Co. (Pa.) 425.

24. Smith *v.* De Lanty, 11 Wash. 386, 39 Pac. 638, under Code Civ. Proc. § 1397.

In Pennsylvania a judgment, although first in right by its preceding revivals, becomes irregular and breaks the continuity of its lien by the addition, in the last revival, of a waiver of exemption and attorney's fees, which did not appear in the original judgment or the preceding revivals. Early *v.* Zeiders, 7 Pa. Co. Ct. 569.

25. McAfee *v.* Reynolds, 130 Ind. 33, 28 N. E. 423, 30 Am. St. Rep. 194, 18 L. R. A. 211; Howard *v.* Simmons, 43 Miss. 75.

26. In an action of this kind, neither the maker of the judgment notes nor the attorney who confessed judgment is a necessary party, but the sheriff, holding the funds realized on an execution sale, is a necessary party. Bible *v.* Voris, 141 Ind. 569, 40 N. E. 670.

27. Floyd *v.* Sellers, 7 Colo. App. 498, 44 Pac. 373. And see Gravier *v.* Baron, 4 La. 239.

28. Merrick *v.* McCausland, 24 La. Ann. 256; Larthet *v.* Hogan, 1 La. Ann. 330.

29. Duffy *v.* Duffy, 6 Pa. Co. Ct. 161; Boyd *v.* Roberts, 2 Pa. Co. Ct. 535.

The pleading in an issue between judgment creditors, to test the validity of a prior judgment, should be in the form of a count on a wager, with a special plea in bar and a joinder in the issue. Boyd *v.* Roberts, 2 Pa. Co. Ct. 535.

30. Coleman *v.* Slade, 75 Ga. 61; Blohme *v.* Lynch, 26 S. C. 300, 2 S. E. 136. But the court cannot, on a rule to show cause against

gage foreclosure suit, may set up the priority of his lien and have it determined.[31] As a general rule a question of this kind should be determined from the records, and not left to a jury to decide by extraneous evidence.[32]

F. Transfer of Property Subject to Lien — 1. In General. Where the lien of a judgment has once attached to land, it cannot be divested by any voluntary alienation of the property by the owner; but a purchaser from the judgment debtor who has actual or constructive notice of the judgment lien will take the estate charged therewith,[33] to the extent of the amount of the judgment as

a purchaser at a sheriff's sale, strike off a judgment, so as to make a mortgage otherwise divested a fixed lien; for if the judgment was no lien, the mortgage was not affected, and if the judgment was only voidable, it could not be attacked collaterally. Jenkins *v.* Luther, 17 Montg. Co. Rep. (Pa.) 37.

31. Book *v.* Willey, 8 Wash. 267, 35 Pac. 1098. See, generally, Mortgages.

32. Johnson *v.* Edde, 58 Miss. 664; Burney *v.* Boyett, 1 How. (Miss.) 39; Polhemus's Appeal, 32 Pa. St. 328; Adams *v.* Betz, 1 Watts (Pa.) 425, 26 Am. Dec. 79.

33. *Alabama.*— Fawcetts *v.* Kimmey, 33 Ala. 261. See Jordan *v.* Nashville, etc., R. Co., 131 Ala. 219, 31 So. 566.

Idaho.—Lewiston First Nat. Bank *v.* Hays, 7 Ida. 139, 61 Pac. 287.

Illinois.— Davenport *v.* Karnes, 70 Ill. 465.

Indiana.—Minnich *v.* Shaffer, 135 Ind. 634, 34 N. E. 987; Brooker *v.* Sprague, 99 Ind. 169; Ridge *v.* Prather, 1 Blackf. 401.

Iowa.— People's Sav. Bank *v.* McCarthy, 119 Iowa 586, 93 N. W. 583; Von Puhl *v.* Rucker, 6 Iowa 187.

Louisiana.— St. Charles St. R. Co. *v.* Fairex, 46 La. Ann. 1022, 15 So. 421; Hamilton *v.* State Nat. Bank, 39 La. Ann. 932, 3 So. 126; Flemming *v.* Rotchford, 11 La. Ann. 400.

Maryland.—Doub *v.* Barnes, 4 Gill 1; Murphy *v.* Cord, 12 Gill & J. 182.

Mississippi.— Heirmann *v.* Stricklin, 60 Miss. 234; Taylor *v.* Lowenstein, 50 Miss. 278. See Harper *v.* Bibb, 34 Miss. 472, 69 Am. Dec. 397; Stevens *v.* Mangum, 27 Miss. 481.

Missouri.— Stewart *v.* Perkins, 110 Mo. 660, 19 S. W. 989.

Nebraska.— Lessert *v.* Sieberling, 59 Nebr. 309, 80 N. W. 900.

New York.— Martin *v.* Wagener, 60 Barb. 435; Jackson *v.* Bradford, 4 Wend. 619.

North Carolina.— Oates *v.* Munday, 127 N. C. 439, 37 S. E. 457.

Oregon.—Kaston *v.* Storey, (1905) 80 Pac. 217.

Pennsylvania.—Fisher *v.* Kurtz, 28 Pa. St. 47; Specht *v.* Sipe, 15 Pa. Super. Ct. 207; Smith *v.* Eline, 5 Pa. Dist. 92; Matter of Gump, 13 Phila. 495.

South Carolina.—Dawkins *v.* Smith, 1 Hill Eq. 369; Blake *v.* Heyward, Bailey Eq. 208.

Tennessee.— Jobe *v.* O'Brien, 2 Humphr. 34.

Virginia.— Rodgers *v.* McCluer, 4 Gratt. 81, 47 Am. Dec. 715.

Canada.—Doe *v.* Hunter, 4 U. C. Q. B. 449.

See 30 Cent. Dig. tit. "Judgment," § 1363. And see *supra*, XV, E, 4.

Record title in another.— One purchasing land with knowledge that a judgment debtor is the owner of it takes it subject to the lien of the judgment, although the record title was in a trustee when the judgment was rendered, and the sale was not made to defraud creditors. Armstrong *v.* Elliott, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635.

Mistake in debtor's name.— When a judgment is taken in the name in which the debt was contracted, but which is not the true christian name of the debtor, and he afterward conveys his land in his true name, to one who knows him by no other name than his true one, and who is not aware of the judgment, the land will nevertheless be subject to the lien of the judgment. Mack *v.* Schlotman, 6 Ohio Dec. (Reprint) 749, 7 Am. L. Rec. 665.

Land fraudulently conveyed.— Where a creditor, in fraud of whom property has been conveyed, subsequently obtains judgment, issues execution, and sells the property so conveyed, only the title of the fraudulent grantee is sold, and, liens prior to such conveyance not being affected by it, the holders thereof can follow the land into whosesoever hands it may come. Fidler *v.* John, 178 Pa. St. 112, 35 Atl. 976.

Rights of purchaser after expiration of lien.— Where the statutes provide that the lien of a judgment shall expire after a certain number of years, this limitation will inure to the benefit of a purchaser from the judgment debtor, so that at the end of the statutory time such purchaser's title will be freed from the lien of the judgment. McCaskill *v.* Graham, 121 N. C. 190, 28 S. E. 264. See *infra*, XV, G, 1, d.

Improvements by purchaser.— An innocent purchaser of land subject to a judgment lien has an equitable right to be paid for improvements made by him on the land in ignorance of the judgment. Montgomery Branch Bank *v.* Curry, 13 Ala. 304. But see *contra*, Taylor *v.* Morgan, 86 Ind. 295. And see, generally, Improvements.

In Georgia a statute (Civ. Code, § 5355) provides that when any person has purchased real property, in good faith and for a valuable consideration, and has been in possession of the same for four years, it shall be discharged from the lien of any judgment against his grantor. See Hale *v.* Robertson, 100 Ga. 168, 27 S. E. 937; Blalock *v.* Denham, 85 Ga. 646, 11 S. E. 1038.

recorded at the time of his purchase,[34] and subject to any other judgment liens then existing on it,[35] unless the judgment creditor will waive or release his lien;[36] and the rule is the same in case of an alienation by way of mortgage,[37] or by a deed absolute in form but intended as a security,[38] although where a sale of the debtor's property is effected by order of court it is competent to direct that it shall be sold free of encumbrances, the liens being then transferred to the fund.[39] Conversely, it is not in the power of the judgment debtor to defeat or displace the judgment lien by conveying or mortgaging the land, or repudiating the title or attorning to a third person.[40]

2. SUBJECTION OF VENDOR'S REMAINING PROPERTY. Where part of the lands subject to the lien of a judgment have been sold, equity will require the judgment creditor seeking to enforce his lien to proceed first against that portion remaining unsold,[41] provided this can be done without injustice to him and without involving

34. This rule is not altered by the fact that the amount of the judgment is larger than was represented to the purchaser by the seller at the time of the transfer. Haverly *v.* Becker, 4 N. Y. 169. But the purchaser will take the property subject only to the amount of the judgment as recorded, not subject to an usurious increase under a subsequent agreement between the creditor and the judgment debtor. Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

35. Mercur *v.* State Line, etc., R. Co., 171 Pa. St. 12, 32 Atl. 1126.

36. See Freeman *v.* Brockway, 24 Colo. 441, 50 Pac. 32; Davis *v.* Tiffany, 1 Hill (N. Y.) 642; Reily *v.* Miami Exporting Co., 5 Ohio 333.

Agreement between debtor and purchaser. — A judgment creditor cannot be abridged of his right to enforce his claim against any land of his debtor by a special agreement of the latter with a purchaser to pay the judgment out of a particular tract. Wilson *v.* Wilson, 3 Del. Ch. 183.

37. Beach *v.* Reed, 55 Nebr. 605, 76 N. W. 22.

38. See Omaha Coal, etc., Co. *v.* Suess, 54 Nebr. 379, 74 N. W. 620; Michael *v.* Knapp, 4 Tex. Civ. App. 464, 23 S. W. 280; Main *v.* Bosworth, 77 Wis. 660, 46 N. W. 1043.

39. Nelson *v.* Jenks, 51 Minn. 108, 52 N. W. 1081; Garvin *v.* Garvin, 1 S. C. 55.

40. *Illinois.*— Walters *v.* Defenbaugh, 90 Ill. 241 (debtor cannot cut off judgment lien by conveying his equity of redemption to a prior mortgagee); Tinney *v.* Wolston, 41 Ill. 215.

Indiana.— Hawkins *v.* State, 125 Ind. 570, 25 N. E. 818 (debtor cannot defeat judgment lien by conveying the land to his ward and claiming to hold it as guardian); Brooker *v.* Sprague, 99 Ind. 169; Decker *v.* Gilbert, 80 Ind. 107.

Iowa.— Potter *v.* Phillips, 44 Iowa 353.

Maryland.— Anderson *v.* Tydings, 8 Md. 427, 63 Am. Dec. 708.

Mississippi.— Agricultural Bank *v.* Pallen, 8 Sm. & M. 357, 47 Am. Dec. 92.

New Jersey.— Edmunds *v.* Smith, 52 N. J. Eq. 212, 27 Atl. 827.

New York.— Morris *v.* Mowatt, 2 Paige 586, 22 Am. Dec. 661.

See 30 Cent. Dig. tit. "Judgment," § 1383.

A voluntary assignment for the benefit of creditors does not affect liens on the land assigned created by existing judgments against the assignor. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 274.

But in Florida, although a judgment is by law a lien on the land of defendant, yet he may after the judgment convey a good title, if he has at all times afterward a sufficient amount of property, subject to and within reach of an execution, to satisfy the judgment. Howse *v.* Judson, 1 Fla. 133.

41. *Alabama.*— Relfe *v.* Bibb, 43 Ala. 519.

Delaware.— Citizens' Nat. Bank *v.* Middletown Academy, 5 Del. Ch. 596; Wilson *v.* Wilson, 3 Del. Ch. 183.

Illinois.— Hurd *v.* Eaton, 28 Ill. 122.

Indiana.— Decker *v.* Gilbert, 80 Ind. 107; Edwards *v.* Applegate, 70 Ind. 325.

Iowa.— Jones *v.* Jones, 13 Iowa 276.

Mississippi.— Agricultural Bank *v.* Pallen, 8 Sm. & M. 357, 47 Am. Dec. 92.

New Jersey.— Daly *v.* Ely, 51 N. J. Eq. 104, 26 Atl. 263.

New York.— Reynolds *v.* Park, 53 N. Y. 36; Welch *v.* James, 22 How. Pr. 474; James *v.* Hubbard, 1 Paige 228.

Pennsylvania.— McCormick's Appeal, 57 Pa. St. 54, 98 Am. Dec. 191; Blasser *v.* Smith, 11 York Leg. Rec. 121.

Texas.— Semple *v.* Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509.

Virginia.— Kelly *v.* Hamblen, 98 Va. 383, 36 S. E. 491.

West Virginia.— Handly *v.* Sydenstricker, 4 W. Va. 605.

See 30 Cent. Dig. tit. "Judgment," § 1385.

Purchaser's means of redress.— Most of the cases hold that the purchaser, in the case stated in the text, must work out his rights through a court of equity; but in one case it was held that if a judgment creditor knew of the sale of the land to such purchaser before he levied his execution on it he would be bound to compensate the purchaser in damages. Clowes *v.* Dickenson, 9 Cow. (N. Y.) 403.

After-acquired lands.— Where a judgment is a lien both on land conveyed by the judgment debtor after its rendition to a third person, and also on land acquired by the debtor after the judgment, the execution

him in litigation or danger of loss.[42] So also where part of the land has been mortgaged the judgment creditor must first have recourse to that portion remaining in the hands of the debtor;[43] and where part of the land has been mortgaged and part aliened in fee, the judgment creditor must first proceed to sell the debtor's equity of redemption in the mortgaged lands, before coming upon the property conveyed in fee.[44]

3. ESTATES SUCCESSIVELY CONVEYED. Where lands subject to the lien of a judgment have been sold or encumbered by the owner at different times to different purchasers, there is no contribution among the successive purchasers, but the various tracts are liable to the satisfaction of the judgment in the inverse order of their alienation or encumbrance, the land last sold being first chargeable,[45] unless the judgment creditor breaks the order of liability by a voluntary release of one or more of the tracts.[46]

must first be levied on the after-acquired land, before resorting to that conveyed away. Handly *v.* Sydenstricker, 4 W. Va. 605.

Purchaser of land excepted from warranty in deed.— One who purchases land charged with the lien of a judgment, which is specifically excepted from the covenants of warranty in the deed, cannot insist that his grantor's chattels shall be exhausted before such land is sold under execution on the judgment. Wollam *v.* Brandt, 56 Nebr. 527, 76 N. W. 1081.

42. Jackson *v.* Sloan, 76 N. C. 306; Clark *v.* Wright, 24 S. C. 526.

43. Moore *v.* Trimmier, 32 S. C. 511, 11 S. E. 548, 552; Duncan *v.* Custard, 24 W. Va. 730.

But if the land remaining in the debtor is first levied on, and proves insufficient to satisfy the judgment, the mortgaged lands may then be sold under an alias execution. Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338.

44. McClung *v.* Beirne, 10 Leigh (Va.) 394, 34 Am. Dec. 739.

45. *Alabama.*— Relfe *v.* Bibb, 43 Ala. 519.

Connecticut.— Hunt *v.* Mansfield, 31 Conn. 488.

Delaware.— Citizens' Nat. Bank *v.* Middletown Academy, 5 Del. Ch. 596.

Georgia.— Fleishel *v.* House, 52 Ga. 60. *Compare* Barden *v.* Grady, 37 Ga. 660.

Indiana.— Merritt *v.* Richey, 97 Ind. 236; Houston *v.* Houston, 67 Ind. 276; Sidener *v.* White, 46 Ind. 588; Day *v.* Patterson, 18 Ind. 114. See Jenkins *v.* Craig, 22 Ind. App. 192, 52 N. E. 423, 53 N. E. 427.

Mississippi.— Wilkins *v.* Humphreys, 23 Miss. 311; Agricultural Bank *v.* Pallen, 8 Sm. & M. 357, 47 Am. Dec. 92.

New York.— Green *v.* Milbank, 3 Abb. N. Cas. 138; Northrup *v.* Metcalf, 11 Paige 570; Schryver *v.* Teller, 9 Paige 173; James *v.* Hubbard, 1 Paige 228; Clowes *v.* Dickenson, 5 Johns. Ch. 235.

Pennsylvania.— Nailer *v.* Stanley, 10 Serg. & R. 450, 13 Am. Dec. 691.

South Carolina.— Moore *v.* Trimmier, 32 S. C. 511, 552, 11 S. E. 548; Hamburg Bank *v.* Howard, 1 Strobh. Eq. 173.

Tennessee.— Meek *v.* Thompson, 99 Tenn. 732, 42 S. W. 685.

Virginia.— Shultz *v.* Hansbrough, 33 Gratt. 567; Michaux *v.* Brown, 10 Gratt. 612; Jones *v.* Myrick, 8 Gratt. 179; Rodgers *v.* McCluer, 4 Gratt. 81, 47 Am. Dec. 715; McClung *v.* Beirne, 10 Leigh 394, 34 Am. Dec. 739 [*overruling* Beverley *v.* Brooke, 2 Leigh 425].

West Virginia.— Hutton *v.* Lockridge, 22 W. Va. 159; Renick *v.* Ludington, 20 W. Va. 511.

United States.— National Sav. Bank *v.* Creswell, 100 U. S. 630, 25 L. ed. 713; Barth *v.* Makeever, 2 Fed. Cas. No. 1,069, 4 Biss. 206.

See 30 Cent. Dig. tit. "Judgment," § 1386.

Contra.— See Massie *v.* Wilson, 16 Iowa 390, holding that tracts of land successively conveyed are all alike liable to the satisfaction of the judgment and must contribute *pro rata* to it. And see also the exceptional case of Doub *v.* Barnes, 4 Gill (Md.) 1, where it appeared that the judgment debtors had assigned their lands to trustees, by a deed of trust, to be sold and the proceeds used in paying off judgments according to their priorities, and the trustees had made various sales. It was held that a purchaser who had not looked to the application of his purchase-money, in a contest with a judgment creditor who had not consented to the deed of trust or in any way acquiesced in it, could not require the latter to proceed in the regular manner, first against the land remaining unsold, and then against tracts sold after the sale to such purchaser.

Relative equities of first purchaser and subsequent judgment creditors see MARSHALING ASSETS AND SECURITIES.

46. Snyder *v.* Crawford, 98 Pa. St. 414; Davis *v.* Wood, 1 Del. Co. (Pa.) 382.

Where the judgment creditor himself becomes the owner of one of the tracts of land liable to the lien of his judgment, the other having been sold to a third person, he cannot release his own tract, with the effect of throwing the entire burden of the judgment upon that held by such third person. Wilson *v.* Beaufort County Lumber Co., 131 N. C. 163, 42 S. E. 565.

Where a judgment creditor has by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, he is not entitled to subject the lands next liable

G. Duration of Lien — 1. Effect of Statutes Limiting Lien — a. In General. Statutes in all the states limit the period during which a judgment shall continue to be a lien on real estate, and usually restrict it to a fixed number of years after the rendition or docketing of the judgment.[47] A statute of this kind applies to

for the whole amount of the judgment, but only for the balance after crediting thereon the value of the land first liable. Jones *v.* Myrick, 8 Gratt. (Va.) 179.

47. *Alabama.*— Street *v.* Duncan, 117 Ala. 571, 23 So. 523.

California.— Mann *v.* McAtee, 37 Cal. 11.

Illinois.— Thomas *v.* Van Meter, 164 Ill. 304, 45 N. E. 405; Dobbins *v.* Peoria First Nat. Bank, 112 Ill. 553; Fitts *v.* Davis, 42 Ill. 391; Riggin *v.* Mulligan, 9 Ill. 50.

Indiana.— Castle *v.* Fuller, 17 Ind. 402; Ridge *v.* Prather, 1 Blackf. 401; Taylor *v.* McGrew, 29 Ind. App. 324, 64 N. E. 651.

Iowa.— Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544; Polk County *v.* Nelson, 75 Iowa 648, 36 N. W. 911; Virden *v.* Shepard, 72 Iowa 546, 34 N. W. 325.

Kentucky.— See Short *v.* Bryant, 10 B. Mon. 10.

Louisiana.— Carroll *v.* Seip, 25 La. Ann. 141; Slocomb *v.* Williams, 23 La. Ann. 245.

Maryland.— Doub *v.* Barnes, 4 Gill 1; Murphy *v.* Cord, 12 Gill & J. 182.

Massachusetts.— Wyman *v.* Brigden, 4 Mass. 150; Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182.

Minnesota.— Davidson *v.* Barnes, 17 Minn. 69; Lamprey *v.* Davidson, 16 Minn. 480; Davidson *v.* Gaston, 16 Minn. 230; Grace *v.* Donovan, 12 Minn. 580; Entrop *v.* Williams, 11 Minn. 381. See also Ashton *v.* Slater, 19 Minn. 347.

Mississippi.— See Rupert *v.* Dantzler, 12 Sm. & M. 697; Emanuel *v.* Jones, 12 Sm. & M. 473; Planters' Bank *v.* Black, 11 Sm. & M. 43. But note that Code (1892), § 2462, providing that where the remedy to enforce any lien which is recorded appears by the record to have been barred by limitations, the lien shall cease as to creditors and *bona fide* purchasers, unless, within six months after such remedy is so barred, the fact that the lien has been renewed or extended appears by entry on the record, or by a new instrument filed for record within such time, has no application to judgment liens. Street *v.* Smith, 85 Miss. 359, 37 So. 837.

Missouri.— Riggs *v.* Goodrich, 74 Mo. 108; Crittenden *v.* Leitensdorfer, 35 Mo. 239.

Nebraska.— Dillon *v.* Chicago, etc., R. Co., 58 Nebr. 472, 78 N. W. 927; Horbach *v.* Smiley, 54 Nebr. 217, 74 N. W. 623; Cotton *v.* Superior First Nat. Bank, 51 Nebr. 751, 71 N. W. 711; Flagg *v.* Flagg, 39 Nebr. 229, 58 N. W. 109; Reynolds *v.* Cobb, 15 Nebr. 378, 19 N. W. 502.

New York.— Matter of Harmon, 79 Hun 226, 29 N. Y. Suppl. 555; Floyd *v.* Clark, 16 Daly 528, 17 N. Y. Suppl. 848. And see Tyler *v.* Ballard, 31 Misc. 540, 65 N. Y. Suppl. 557; Watson *v.* New York Cent. R. Co., 6 Abb. Pr. N. S. 91. The statutory provision that execution may be had on real estate after the ten years for which the lien continues by filing a notice, subscribed by the sheriff, describing the judgment, the execution, and the property levied on, does not extend the original lien of the judgment. Floyd *v.* Clark, *supra.*

North Carolina.— The lien of a judgment expires in ten years. Wilson *v.* Beaufort County Lumber Co., 131 N. C. 163, 42 S. E. 565; McCaskill *v.* Graham, 121 N. C. 190, 28 S. E. 264; Pipkin *v.* Adams, 114 N. C. 201, 19 S. E. 105; Whitehead *v.* Latham, 83 N. C. 232; Pasour *v.* Rhyne, 82 N. C. 149.

Ohio.— See Norton *v.* Beaver, 5 Ohio 178.

Pennsylvania.— Wetmore *v.* Wetmore, 155 Pa. St. 507, 26 Atl. 694; Steel *v.* Henry, 9 Watts 523; Ebright *v.* Philadelphia Bank, 1 Watts 397; Bank of North America *v.* Fitzsimons, 3 Binn. 342; Fuellhart *v.* Thompson, 11 Pa. Super. Ct. 273; Wien *v.* Albright, 10 Lanc. Bar 53; Ehrman *v.* Davis, 10 Pa. L. J. 351. The act of June 8, 1893 (Pamphl. Laws 392), limiting the lien of debts of a decedent not of record to two years, does not apply to judgments. Biesecker *v.* Cobb, 13 Pa. Super. Ct. 56.

South Carolina.— Henry *v.* Henry, 31 S. C. 1, 9 S. E. 726; Adickes *v.* Lowry, 12 S. C. 97.

Tennessee.— See Riddle *v.* Motley, 1 Lea 468; Chesnutt *v.* Frazier, 6 Baxt. 217; Branner *v.* Nance, 3 Coldw. 299; Davis *v.* Benton, 2 Sneed 665; Dickinson *v.* Collins, 1 Swan 516; Hickman *v.* Murfree, Mart. & Y. 26; Call *v.* Cozart, (Ch. App. 1898) 48 S. W. 312.

Texas.— Sampson *v.* Wyett, 49 Tex. 627; Jackson *v.* Butler, 47 Tex. 423; Hall *v.* McCormick, 7 Tex. 269; Crockett First Nat. Bank *v.* Adams, 31 Tex. Civ. App. 413, 72 S. W. 403; Johnson *v.* Weatherford, 31 Tex. Civ. App. 180, 71 S. W. 789; Terry *v.* Cutler, 14 Tex. Civ. App. 520, 39 S. W. 152.

Virginia.— McCarty *v.* Ball, 82 Va. 872, 1 S. E. 189; Hill *v.* Rixey, 26 Gratt. 72; Burton *v.* Smith, 13 Pet. (U. S.) 464, 10 L. ed. 248.

Washington.— Packwood *v.* Briggs, 25 Wash. 530, 65 Pac. 846.

West Virginia.— See Laidley *v.* Kline, 23 W. Va. 565; Shipley *v.* Pew, 23 W. Va. 487; Werdenbaugh *v.* Reid, 20 W. Va. 588.

See 30 Cent. Dig. tit. "Judgment," § 1389.

Day of commencement of lien.— The statute of limitations begins to run on a judgment by default from the entry of the judgment, and not from the entry of the default. Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218.

Day of expiration of lien.— Where the statute limits the lien of judgments to ten years, a sale may be made under the judgment on

the lien of judgments of the federal courts sitting within the state,[48] but not to a decree establishing a specific lien on particular property or ordering its sale,[49] or to a judgment or decree for the foreclosure of a mortgage,[50] or, it seems, to a judgment in favor of the state, the lien of which is never lost by lapse of time.[51] A statute abridging the time for the duration of judgment liens may constitutionally apply to existing judgments, if a reasonable time is accorded to the holders of such judgments in which to enforce their liens;[52] but not where the whole of the new period of limitation would have run, as to an existing judgment, before the passage of the act, so that its lien would instantly be cut off.[53]

b. As Against Judgment Debtor. Although the lien of a judgment may have expired, as against subsequent purchasers or encumbrancers, by the lapse of the statutory period, it will still continue, the judgment remaining unsatisfied, against the judgment debtor himself.[54]

c. As Against Junior Judgments. Where the period of limitations has run against the lien of a judgment, without its revival, it gives way to junior judgments, which thereupon succeed, in their order, to its priority.[55]

d. As Against Bona Fide Purchasers. Under the same circumstances the judgment ceases to be a lien on land which has been transferred to a purchaser in good faith and for value, or on which subsequent encumbrances have been

the tenth anniversary of the day on which it was rendered, and, if the ten years expire on a Sunday, then on the following day. Spencer *v.* Haug, 45 Minn. 231, 47 N. W. 794. But see Alderman *v.* Phelps, 15 Mass. 225, holding that the lien of the judgment will not in the case supposed be extended to the following Monday. But the issue and levy of an execution within the ten years will not be effectual to continue the lien of the judgment, if the sale does not take place until the ten years have expired. See *infra*, XV, G, 4. And where the statute makes the judgment lien continue for ten years, and provides for an action to enforce the lien on real estate, if the action is begun within the ten years, but not reached for trial until after their expiration, the lien is lost. Ruth *v.* Wells, 13 S. D. 482, 83 N. W. 568, 79 Am. St. Rep. 902.

The doctrine of dormant executions does not apply to real estate, the lien upon which depends upon the docketing of the judgment, and not upon the execution or levy. Muir *v.* Leitch, 7 Barb. (N. Y.) 341.

48. Dermott *v.* Carter, 109 Mo. 21, 18 S. W. 1121.

49. Watson *v.* Keystone Iron-Works Co., 70 Kan. 43, 74 Pac. 269; Beaumont *v.* Herrick, 24 Ohio St. 445; Canal Bank *v.* Hudson, 111 U. S. 66, 4 S. Ct. 303, 28 L. ed. 354.

50. Wing *v.* De la Rionda, 125 N. Y. 678, 25 N. E. 1064.

51. McKeehan *v.* Com., 3 Pa. St. 151; Com. *v.* Baldwin, 1 Watts (Pa.) 54, 26 Am. Dec. 33. But see Thompson *v.* Avery, 11 Utah 214, 39 Pac. 829, where it is said that the statutory limitation of judgment liens applies to a judgment recovered by the United States for a penalty in a criminal proceeding.

52. Burwell *v.* Tullis, 12 Minn. 572; McCormick *v.* Alexander, 2 Ohio 65; Henry *v.* Henry, 31 S. C. 1, 9 S. E. 726.

Constitutionality of retrospective laws affecting remedies generally see CONSTITUTIONAL LAW, 8 Cyc. 1021.

53. King *v.* Belcher, 30 S. C. 381, 9 S. E. 359; Merchants' Bank *v.* Ballou, 98 Va. 112, 32 S. E. 481, 81 Am. St. Rep. 715, 44 L. R. A. 306; Palmer *v.* Laberee, 23 Wash. 409, 63 Pac. 216.

Impairment of obligation of contract by laws relating to judgment liens see CONSTITUTIONAL LAW, 8 Cyc. 1015.

54. *Illinois.*— Stribling *v.* Prettyman, 57 Ill. 371.

Indiana.— Yeager *v.* Wright, 112 Ind. 230, 13 N. E. 707.

New York.— Tufts *v.* Tufts, 18 Wend. 621.

Pennsylvania.— McCahan *v.* Elliott, 103 Pa. St. 634; Aurand's Appeal, 34 Pa. St. 151; Hinds *v.* Scott, 11 Pa. St. 19, 51 Am. Dec. 506; Fetterman *v.* Murphy, 4 Watts 424, 28 Am. Dec. 729; Bank of North America *v.* Fitzsimons, 3 Binn. 342; Trego's Estate, 1 Chest. Co. Rep. 12.

West Virginia.— Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

Wisconsin.— Holmes *v.* McIndoe, 20 Wis. 657.

See 30 Cent. Dig. tit. "Judgment," § 1389.

Where real estate sold on execution under a judgment which is in full force realizes enough to pay that judgment in full and leave a surplus, the balance should be paid to the owner of a judgment which, as against the debtor, remains unsatisfied, although its lien has expired by lapse of time, rather than returned to the debtor. Brown's Appeal, 91 Pa. St. 485. But *compare* Nutt *v.* Cuming, 22 N. Y. App. Div. 92, 47 N. Y. Suppl. 800.

55. Brady *v.* His Creditors, 43 La. Ann. 165, 9 So. 59; Scott *v.* Howard, 3 Barb. (N. Y.) 319; Dickenson *v.* Gilliland, 1 Cow. (N. Y.) 481; Parke's Estate, 1 Chest. Co.

created;[56] and if the judgment was a lien on the land at the time of its alienation or encumbrance, but is not enforced or revived in due time, the running of the period of limitation will inure to the benefit of the purchaser or encumbrancer.[57] It is immaterial that the purchase was made or the encumbrance accepted with full knowledge that the judgment remained unpaid.[58] But this rule is not for the benefit of a grantee who gave no valuable consideration,[59] or who colluded with the debtor to deprive the judgment creditor of his lien, or took with a fraudulent intention as toward such creditor.[60]

2. LIEN OF TRANSFERRED JUDGMENT. Where a judgment is transferred from an inferior to a superior court for purposes of lien, or a transcript of it filed in another county, it is the rule in some states that the statute of limitations begins to run against the lien of the judgment from the date of such transfer or filing,[61] but in others from the date of its original rendition, nothing being added to its duration by the transfer.[62]

3. DEATH OF JUDGMENT DEBTOR.[63] In general the lien of a judgment on real estate

Rep. (Pa.) 308. *Compare* Hurst *v.* Hurst, 12 Fed. Cas. No. 6,931, 2 Wash. C. C. 69, construing an early statute of Pennsylvania.

56. *Indiana.*— Appelgate *v.* Edwards, 45 Ind. 329; Ridge *v.* Prather, 1 Blackf. 401.

Mississippi.— Fowler *v.* McCartney, 27 Miss. 509.

New York.— Nutt *v.* Cuming, 22 N. Y. App. Div. 92, 47 N. Y. Suppl. 800; Tufts *v.* Tufts, 18 Wend. 621; Roe *v.* Swart, 5 Cow. 294; Lansing *v.* Vischer, 1 Cow. 431; Mower *v.* Kip, 6 Paige 88, 29 Am. Dec. 748.

North Carolina.— Harrington *v.* Hatton, 130 N. C. 89, 40 S. E. 848; McCaskill *v.* Graham, 121 N. C. 190, 28 S. E. 264.

Oregon.— Davisson *v.* Mackay, 22 Oreg. 247, 29 Pac. 791.

Pennsylvania.— Long *v.* McConnell, 153 Pa. St. 573, 28 Atl. 233; Wetmore *v.* Wetmore, 155 Pa. St. 507, 26 Atl. 694; Bank of North America *v.* Fitzsimons, 3 Binn. 342; Windle *v.* Brown, 1 Chest. Co. Rep. 294; Schock *v.* Bankes, 1 Leg. Chron. 218.

South Carolina.— McRaa *v.* Smith, 2 Bay 339.

See 30 Cent. Dig. tit. "Judgment," § 1395.

57. Reynolds *v.* Cobb, 15 Nebr. 378, 19 N. W. 502; Roach *v.* Rutherford, 4 Desauss. (S. C.) 126, 6 Am. Dec. 606; Wooldridge *v.* Planters' Bank, 1 Sneed (Tenn.) 297.

Under Ga. Code, § 5355 (3583), where any person has in good faith and for a valuable consideration purchased real or personal property, and has been in the possession of the same for four years, the same shall be discharged from the lien of any judgment against the person from whom he purchased. Rosser *v.* Georgia Pac. R. Co., 102 Ga. 164, 29 S. E. 171; Trice *v.* Rose, 80 Ga. 408, 7 S. E. 109 (whether such purchaser had a paper title or not); Douglass *v.* Eblin, 57 Ga. 152; Braswell *v.* Plummer, 56 Ga. 594; Ruker *v.* Womack, 55 Ga. 399; Glanton *v.* Heard, 48 Ga. 410; Chapman *v.* Akin, 39 Ga. 347; Dooly *v.* Isbell, 39 Ga. 342. See Hammond *v.* Stovall, 17 Ga. 491 (construing act of 1822); Griffin *v.* McKenzie, 7 Ga. 163, 50 Am. Dec. 389 (formerly seven years). The operation of this statute depends upon the good faith of the purchaser and his open and notorious possession (Phinizy *v.* Porter, 70 Ga. 713; Taylor *v.* Morgan, 61 Ga. 46) and is not prevented by the fact that the vendor continues to reside on the premises with the vendee (Blalock *v.* Denham, 85 Ga. 646, 11 S. E. 1038) or by the fact that the vendor had notice of the judgment at the time of his purchase if he otherwise acted in good faith (Broughton *v.* Foster, 69 Ga. 712; Sanders *v.* McAffee, 42 Ga. 250. See Prater *v.* Cox, 64 Ga. 706). The four years under such statute is computed from the date of the final judgment on the appeal trial. Doe *v.* Roe, 47 Ga. 97. A "purchaser" within the meaning of such statute includes a pledgee of personal property who acquires possession of the same in good faith and without actual notice of a judgment against the pledgor. *In re* Johnson, 112 Fed. 619, 50 C. C. A. 398.

58. Little *v.* Harvey, 9 Wend. (N. Y.) 157.

59. Mohawk Bank *v.* Atwater, 2 Paige (N. Y.) 54.

"Purchasers." — An assignee in insolvency of the debtor is not a purchaser. Mower *v.* Kip, 2 Edw. (N. Y.) 165.

The term "subsequent encumbrancers" as used in these statutes is held to apply to creditors of a grantee of the judgment debtor, where the conveyance was made within the statutory period, and the debts were contracted after the grantee's investiture with the legal title. Gridley *v.* Watson, 53 Ill. 186.

60. Pettit *v.* Shepherd, 5 Paige (N. Y.) 493, 28 Am. Dec. 437.

61. Brockway *v.* Chicago Trinity M. E. Church, 205 Ill. 238, 68 N. E. 749; Rand *v.* Garner, 75 Iowa 311, 39 N. W. 515; Knauss' Appeal, 49 Pa. St. 419; Lowrie's Estate, 5 Lanc. L. Rev. (Pa.) 295.

62. Bradfield *v.* Newby, 130 Ind. 59, 28 N. E. 619; Mahoney *v.* Neff, 124 Ind. 380, 24 N. E. 152; Brown *v.* Wuskoff, 118 Ind. 569, 19 N. E. 463, 21 N. E. 243; Carpenter *v.* King, 42 Mo. 219; Young *v.* Remer, 4 Barb. (N. Y.) 442.

63. Lien of judgment obtained during lifetime of ancestor or intestate upon lands in

is not lost or destroyed by the death of the judgment debtor, but continues in force for the same length of time as if he had remained in life,[64] except that the time during which the collection of the judgment is prevented by the delays caused by the death of the debtor and the proceedings for administration on his estate is not to be counted in determining the duration of the lien.[65] But in some states special provisions are made for continuing or restricting the lien after the death of the judgment debtor.[66]

4. NECESSITY AND EFFECT OF ISSUE AND LEVY OF EXECUTION. In several states the statutes prescribe that after the lapse of a certain time the lien of a judgment shall be lost, unless within that time steps have been taken to enforce it, such as the levy of an execution on property of defendant.[67] Unless the terms of such

the hands of heirs see DESCENT AND DISTRIBUTION, 14 Cyc. 202.

64. *Alabama.*— Enslen *v.* Wheeler, 98 Ala. 200, 13 So. 473.

California.— *In re* Wiley, 138 Cal. 301, 71 Pac. 441; Morton *v.* Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53.

Georgia.— Lewis *v.* Smith, 99 Ga. 603, 27 S. E. 162; Carlton *v.* Davant, 58 Ga. 451.

Illinois.— Durham *v.* Heaton, 28 Ill. 264, 81 Am. Dec. 275; Bustard *v.* Morrison, 2 Ill. 235.

Indiana.— McAfee *v.* Reynolds, 130 Ind. 33, 28 N. E. 423, 30 Am. St. Rep. 194, 18 L. R. A. 211. *Compare* Berry *v.* Marshall, 1 Blackf. 340.

Kentucky.— Ritchey *v.* Buricke, 54 S. W. 173, 21 Ky. L. Rep. 1120.

Louisiana.— Boguille *v.* Faille, 1 La. Ann. 204.

Maryland.— Hanson *v.* Barnes, 3 Gill & J. 359, 22 Am. Dec. 322; Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Missouri.— Prewitt *v.* Jewell, 9 Mo. 732. See Miller *v.* Doan, 19 Mo. 650.

Oregon.— Barrett *v.* Furnish, 21 Oreg. 17, 26 Pac. 861.

See 30 Cent. Dig. tit. "Judgment," § 1425.

Joint debtors.— The death of one of two or more joint debtors in a judgment at law does not exonerate from the debt the lands of the decedent, but they continue subject to the lien of the judgment. *Ex p.* Dixon, 1 Del. Ch. 261, 12 Am. Dec. 92; Com. *v.* Vanderslice, 8 Serg. & R. (Pa.) 452; Johns *v.* Reinhart, 10 Lanc. Bar (Pa.) 105.

65. Applegate *v.* Edwards, 45 Ind. 329; *In re* Holmes, 131 N. Y. 80, 29 N. E. 1003.

66. See the statutes of the several states.

In New York the statutes give to docketed judgments a lien on land for ten years, and provide that a judgment lien, if existing at the death of the judgment debtor, shall "continue for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll." This is not an abridgment of the life of the lien, and it will not be limited to three years and a half from the debtor's death, if the original ten years would not expire within that time. Matter of Holmes, 59 Hun 369, 13 N. Y. Suppl. 100 [*affirmed* in 131 N. Y. 80, 29 N. E. 1003]. But when the time has fully run, the judgment ceases to be a lien or charge on the real estate, although it may still be enforced against the heirs or devisees. Platt *v.* Platt, 105 N. Y. 488, 12 N. E. 22.

In Pennsylvania the act of June 18, 1895 (Pamphl. Laws 197), provides that judgments shall continue to bind the realty of a decedent for five years after his death, and shall then cease to be a lien as against a *bona fide* purchaser, mortgagee, or other judgment creditor of such decedent or of his heirs or devisees, unless duly revived. But this does not limit the lien of the judgment as to the heirs and devisees of the decedent, but on the contrary the lien continues, as against them, without revivals, until presumption of payment arises from lapse of time, that is, for twenty years. See Colenburg *v.* Venter, 173 Pa. St. 113, 33 Atl. 1046; *In re* Searight, 163 Pa. St. 210, 29 Atl. 800; Shannon *v.* Newton, 132 Pa. St. 375, 19 Atl. 138; Baxter *v.* Allen, 77 Pa. St. 468; Shearer *v.* Brinley, 76 Pa. St. 300; *In re* Fulton, 51 Pa. St. 204; Aurand's Appeal, 34 Pa. St. 151; Nicholas *v.* Phelps, 15 Pa. St. 36; Konigmaker *v.* Brown, 14 Pa. St. 269; Moorehead *v.* McKinney, 9 Pa. St. 265; Jack *v.* Jones, 5 Whart. 321; Brobst *v.* Bright, 8 Watts 124; Pennsylvania Agricultural, etc., Bank *v.* Crevor, 2 Rawle 224; Fryhoffer *v.* Busby, 17 Serg. & R. 121; Stevenson *v.* Black, 1 Pa. Cas. 117, 1 Atl. 312; Biesecker *v.* Cobb, 13 Pa. Super. Ct. 56; Beck *v.* Frederick, 9 Pa. Dist. 593; Fuellhart *v.* Blood, 7 Pa. Dist. 575; Weist *v.* Koons, 2 Pa. Co. Ct. 317; Jackson's Estate, 1 Chest. Co. Rep. 309; Rigby's Estate, 1 Del. Co. 55; Hensler's Estate, 17 Lanc. L. Rev. 257; Marsh *v.* Haldeman, 2 Pa. L. J. Rep. 234; Judson *v.* Lyle, 8 Phila. 98; *In re* Phillips, 30 Pittsb. Leg. J. N. S. 77.

67. See the statutes of the various states. And see the cases cited *infra*, this note, and *supra*, XV, G, 1.

What is an execution within the statute. — The filing of an equitable petition for the purpose of enforcing a judgment is enough to prevent the running of the dormancy statute. Conley *v.* Buck, 100 Ga. 187, 28 S. E. 97. An order by a justice of the peace for the sale of property attached in a suit before him is an "execution." Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166. So also is a writ of mandamus to compel the levy and collection of a tax to pay the judgment, the debtor being a municipal corpora-

statutes are complied with, the lien of the judgment will expire and give place to junior liens.[68] And if the statute requires not merely the issue of an execution. Dempsey *v.* Oswego Tp., 51 Fed. 97, 2 C. C. A. 110. A testatum fieri facias to another county continues the lien of the judgment on all lands within the county for five years. Neil *v.* Colwell, 68 Pa. St. 216. But a capias ad satisfaciendum, taken out and returned *non est inventus*, does not preserve the lien of a judgment. Thompson *v.* Phillips, 23 Fed. Cas. No. 13,974, Baldw. 246.

Sufficiency of execution.— Although the execution taken out is ineffectual for want of a seal, equity will not annul the judgment or discharge its lien on land for that reason. Jilsum *v.* Stebbins, 41 Wis. 235.

Necessity of execution to create lien see *supra*, XV, A, 7.

68. *Georgia.*— Lewis *v.* Smith, 99 Ga. 603, 27 S. E. 162; Formby *v.* Shackleford, 94 Ga. 670, 21 S. E. 711; Smith *v.* Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67. An entry on an execution signed by a person as "former sheriff" does not satisfy the statute, as an ex-sheriff is not authorized to execute and return process. Orr *v.* Herring, 91 Ga. 148, 17 S. E. 287. Nor will the judgment be saved by an entry on the execution docket, made by the clerk without being thereto requested by the judgment creditor, that on a certain day the execution was handed by him to the sheriff. Daniel *v.* Haynes, 91 Ga. 123, 16 S. E. 649.

Illinois.— Thomas *v.* Van Meter, 164 Ill. 304, 45 N. E. 405; St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556. The time during which the creditor was prevented or restrained by judicial order from issuing execution or selling thereon is not to be included in computing the period. Wenham *v.* International Packing Co., 213 Ill. 397, 72 N. E. 1079.

Kansas.— Smalley *v.* Bowling, 64 Kan. 818, 68 Pac. 630; Thompson *v.* Hubbard, 3 Kan. App. 714, 44 Pac. 1095.

Minnesota.— Sherburne *v.* Rippe, 35 Minn. 540, 29 N. W. 322; Davidson *v.* Barnes, 17 Minn. 69.

Nebraska.— Halmes *v.* Dovey, 64 Nebr. 122, 89 N. W. 631; Horbach *v.* Smiley, 54 Nebr. 217, 74 N. W. 623; Godman *v.* Boggs, 12 Nebr. 13, 10 N. W. 403.

Ohio.— Smith *v.* Hogg, 52 Ohio St. 527, 40 N. E. 406; Thompson *v.* Atherton, 6 Ohio 30; Steel *v.* Katzenmyer, 26 Ohio Cir. Ct. 400; Sullivan *v.* Hart, 32 Cinc. L. Bul. 185; U. S. Bank *v.* Longworth, 2 Fed. Cas. No. 923, 1 McLean 35.

Pennsylvania.— Jameson's Appeal, 6 Pa. St. 280; Com. *v.* McKisson, 13 Serg. & R. 144.

Tennessee.— Gardenhire *v.* King, 97 Tenn. 585, 37 S. W. 548.

Texas.— The statute provides that a judgment whereon execution has not issued within twelve months after its rendition may be revived within ten years after its date, and not thereafter. But it is not necessary that an execution should issue every twelve months, in order to keep alive a judgment on which an execution has been taken out within the first year after its rendition. Evans *v.* Frisbie, 84 Tex. 341, 19 S. W. 510; Adams *v.* Crosby, 84 Tex. 99, 19 S. W. 355; Wylie *v.* Posey, 71 Tex. 34, 9 S. W. 87; Deutsch *v.* Allen, 57 Tex. 89; Williams *v.* Davis, 56 Tex. 250; Ficklin *v.* McCarty, 54 Tex. 370; North *v.* Swing, 24 Tex. 193; Shapard *v.* Bailleul, 3 Tex. 26; Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086; Central Coal, etc., Co. *v.* Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383; Mundine *v.* Brown, (Civ. App. 1893) 23 S. W. 90. But the issue of execution will not continue the lien of a judgment until the judgment becomes dormant, unless due diligence is used to enforce the lien. Barron *v.* Thompson, 54 Tex. 235.

Virginia.— Taylor *v.* Spindle, 2 Gratt. 44; Eppes *v.* Randolph, 2 Call 125.

United States.— Green *v.* Allen, 10 Fed. Cas. No. 5,753, 2 Wash. C. C. 280; U. S. *v.* Mechanics' Bank, 26 Fed. Cas. No. 15,756, Gilp. 51.

See 30 Cent. Dig. tit. "Judgment," § 1398.

On the other hand in several states the life of a judgment lien is limited to a fixed number of years, and cannot be extended by the issue or levy of an execution within that time. Brewster *v.* Clamfit, 33 Ark. 72; Lawson *v.* Jordan, 19 Ark. 297, 70 Am. Dec. 596; Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Roe *v.* Swart, 5 Cow. (N. Y.) 294; Pipkin *v.* Adams, 114 N. C. 201, 19 S. E. 105; Lytle *v.* Lytle, 94 N. C. 683; Pasour *v.* Rhyne, 82 N. C. 149; Isler *v.* Brown, 66 N. C. 556.

A decree in equity which merely prescribes the performance of a duty is not within either the letter or the spirit of these statutes. Butler *v.* James, 33 Ga. 148.

An officer's indorsement on the writ that he had received directions from plaintiff's attorney to collect it is not sufficient to keep the judgment alive. Hanks *v.* Pearce, 96 Ga. 159, 22 S. E. 676. Nor can that object be accomplished by making upon the execution a *nunc pro tunc* entry of a levy alleged to have been made before the judgment became dormant. Lewis *v.* Smith, 99 Ga. 603, 27 S. E. 162.

Levy ineffectual.— The purpose of the statute is met by the issue and levy of an execution, although it proves ineffectual for want of bidders at the sale. Lamprey *v.* Davidson, 16 Minn. 480.

Levy on personalty.— The levy of an execution on personalty, with a sale thereunder, and the application *pro tanto* of the proceeds in payment of the judgment, will suffice to preserve its lien on realty as to the unpaid balance. Davidson *v.* Gaston, 16 Minn. 230. But *compare* Montgomery Branch Bank *v.* Curry, 13 Ala. 304.

Partial levy.— It is not necessary, in order

tion but also its enforcement, the lien is not preserved by a levy of execution within the limited time, where the sale does not take place until after its expiration.[69] These laws are not merely statutes of limitation; hence a judgment lien is not saved by the mere fact that partial payments are made and receipted for within the limited time,[70] nor by the payment of the costs of the action to the clerk.[71] On the other hand the creditor may take all the time allowed him, and the lien of a judgment which has not become dormant is not lost or impaired by laches in issuing execution.[72] And if the statute requires no more than the issue of an execution, it is satisfied by that act, although the sole purpose of taking out the writ was to preserve the lien, and there was no expectation of collecting the money.[73] Where a judgment has become dormant by the laws of the state where it was rendered, and has not been revived or renewed, it cannot be fastened as a lien upon lands of the judgment debtor in another state.[74]

5. Continuance by Revival of Judgment. In several states while the lien of a judgment is limited to a certain number of years, there are additional provisions for the revival or renewal of the judgment for a like period by appropriate proceedings for that purpose.[75] Where such action is taken before the expiration of the statutory period, the lien of the judgment is continuous from the date of its rendition or entry, and its priority, relative to other liens, is preserved;[76] but a

to preserve the lien of the judgment by a levy, that the levy should have been for the full amount due; execution levied for a part may suffice. Lamprey *v.* Davidson, 16 Minn. 480; Davidson *v.* Gaston, 16 Minn. 230.

Execution lost.— If an execution is shown to have been issued and actually delivered to the sheriff in due time, the lien of the judgment is preserved, although the execution was lost or destroyed, and so never returned. Breed *v.* Gorham, 108 Ill. 81; Renick *v.* Ludington, 20 W. Va. 511.

69. *California.*— Isaac *v.* Swift, 10 Cal. 71, 70 Am. Dec. 698.

Illinois.— James *v.* Wortham, 88 Ill. 69.

Indiana.— Wells *v.* Bower, 126 Ind. 115, 25 N. E. 603, 22 Am. St. Rep. 570.

Iowa.— Lakin *v.* McCormick, 81 Iowa 545, 46 N. W. 1061; Albee *v.* Curtis, 77 Iowa 644, 42 N. W. 508.

Mississippi.— Kilpatrick *v.* Byrne, 25 Miss. 571; Beirne *v.* Mower, 13 Sm. & M. 427; Rupert *v.* Dantzler, 12 Sm. & M. 697.

New York.—Darling *v.* Littlejohn, 12 N. Y. Suppl. 205.

Pennsylvania.— Davis *v.* Ehrman, 20 Pa. St. 256.

Contra.— Real Estate Bank *v.* Watson, 13 Ark. 74; Davidson *v.* Barnes, 17 Minn. 69; Lamprey *v.* Davidson, 10 Minn. 480; Davidson *v.* Gaston, 16 Minn. 230.

See 30 Cent. Dig. tit. "Judgment," § 1398.

70. Blue *v.* Collins, 109 Ga. 341, 34 S. E. 598; Lewis *v.* Smith, 99 Ga. 603, 27 S. E. 162; Stanley *v.* McWhorter, 78 Ga. 37, 1 S. E. 260; Nelson *v.* Gill, 56 Ga. 536.

71. Lewis *v.* Smith, 99 Ga. 603, 27 S. E. 162.

72. De Vendell *v.* Hamilton, 27 Ala. 156; Watkins *v.* Wassell, 15 Ark. 73; Moseley *v.* Doe, 2 Fla. 429; Banks *v.* Evans, 10 Sm. & M. (Miss.) 35, 48 Am. Dec. 734.

Neglect of officer.—Plaintiff in a judgment does not lose his lien on real estate by the neglect of the sheriff to levy on personal property, which defendant is suffered to remove, so as to give priority to a subsequent judgment. Moore's Appeal, 7 Watts & S. (Pa.) 298.

73. McClarin *v.* Anderson, 104 Ala. 201, 16 So. 639; Murphy *v.* Klein, 71 Miss. 908, 15 So. 658. *Compare* Wuest *v.* James, 51 Ohio St. 230, 36 N. E. 832.

74. Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071. See *infra*, XXII, B.

75. Revival of judgments in general see *infra*, XVIII, D.

Evidence of revival.— In cases where the judgment must be periodically revived, it is held that the question whether the lien has been kept alive and remains in force must be determined by an inspection of the record; if the record does not show its existence, the lien is lost. Duffey *v.* Houtz, 105 Pa. St. 96.

76. *Maryland.*— Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Pennsylvania.— Wetmore *v.* Wetmore, 155 Pa. St. 507, 26 Atl. 694. An amicable agreement to revive, by one of two defendants, continues the lien as to his lands. Edwards' Appeal, 66 Pa. St. 89. Where a scire facias issues to revive a judgment within five years from the entry thereof, the lien continues for five years from the issue of the scire facias, and plaintiff has five years in which to obtain his judgment of revival. Lichty *v.* Hochstetler, 91 Pa. St. 444; Silverthorn *v.* Townsend, 37 Pa. St. 263. But an amicable scire facias will not avail to continue the lien as against a terre-tenant whose deed is on record and who is not made a party. Suter *v.* Findlay, 19 Pa. Co. Ct. 10. A substantial variance between the original judgment and the scire facias to revive will break the continuity of the lien. Zeiders' Appeal, 137 Pa. St. 457, 20 Atl. 805. But a judgment need not be revived to maintain its lien on money in the hands of the sheriff. Com. *v.* Gleim, 3 Penr. & W. 417.

revival of the judgment after it has once become dormant, or after its lien has expired by lapse of time, will not relate back, but the lien will then date only from the judgment or order of revival, and will be subordinated to intervening purchases or encumbrances.[77]

6. Extension of Lien by Action or Suit. In some states the commencement of a suit at law or in equity to enforce the judgment within the statutory period will extend or continue its lien;[78] but generally, if the statute fixes a definite limitation to the lien of a judgment, it is not saved or extended by the bringing of a creditor's bill or other suit, which remains undetermined when the statutory period expires.[79]

7. Extension of Lien by Agreement of Parties. In a few cases it has been held that the lien of a judgment might be extended beyond the statutory period by a mutual agreement between the parties,[80] or by partial payments or a written acknowledgment of the judgment debt as a subsisting obligation.[81] And it is said that, as between the parties to it, a judgment may be kept alive, although once paid, for the purpose of securing another loan, although no such arrangement could be permitted in prejudice of the rights of subsequent encumbrancers.[82]

South Carolina.— Verner *v.* Bookman, 53 S. C. 398, 31 S. E. 283, 69 Am. St. Rep. 870; Woodward *v.* Woodward, 39 S. C. 259, 17 S. E. 638, 39 Am. St. Rep. 716; *Ex p.* Witte, 32 S. C. 226, 10 S. E. 950; Cowan *v.* Neel, 17 S. C. 588.

United States.— Wonderly *v.* Lafayette County, 74 Fed. 702.

See 30 Cent. Dig. tit. "Judgment," § 1399.

Contra.— See Mower *v.* Kip, 6 Paige (N. Y.) 88, 29 Am. Dec. 748 note; Graff *v.* Kip, 1 Edw. (N. Y.) 619.

77. *Alabama.*— Perkins *v.* Brierfield Iron, etc., Co., 77 Ala. 403.

Georgia.— Foster *v.* Reid, 57 Ga. 609.

Illinois.— Cottingham *v.* Springer, 88 Ill. 90. See Turney *v.* Young, 22 Ill. 253.

Iowa.— Boyle *v.* Maroney, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657. See Bridgman *v.* Miller, 50 Iowa 392; Denegre *v.* Haun, 13 Iowa 240.

Maryland.— Cape Sable Co.'s Case, 3 Bland 606; Post *v.* Mackall, 3 Bland 486; Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Nebraska.— Horbach *v.* Smiley, 54 Nebr. 217, 74 N. W. 623.

New Jersey.— Traphagen *v.* Lyons, 38 N. J. Eq. 613.

Ohio.— Norton *v.* Beaver, 5 Ohio 178. A dormant judgment does not, by revivor, become a lien on land acquired by the debtor after its original recovery, unless a levy is made thereon, either before it became dormant or after its revivor. Smith *v.* Hogg, 52 Ohio St. 527, 40 N. E. 406.

Pennsylvania.— Miller *v.* Miller, 147 Pa. St. 545, 548, 23 Atl. 841; Ruth's Appeal, 54 Pa. St. 173; *In re* Fulton, 51 Pa. St. 204.

South Carolina.— Kaminsky *v.* Trantham, 45 S. C. 393, 23 S. E. 132; Woodward *v.* Woodward, 39 S. C. 259, 17 S. E. 638, 39 Am. St. Rep. 716.

Texas.— Robertson *v.* Coates, 65 Tex. 37.

Virginia.— Ayre *v.* Burke, 82 Va. 338, 4 S. E. 618.

United States.— Tracy *v.* Tracy, 3 Fed. Cas. No. 14,128, 5 McLean 456.

See 30 Cent. Dig. tit. "Judgment," § 1427.

78. Davidson *v.* Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; Wright *v.* Rhodes, 42 Tex. 523; Ryan *v.* Kanawha Valley Bank, 71 Fed. 912, 18 C. C. A. 384, so holding in the case of West Virginia.

Suit by assignee.— Under a statute providing that actions on judgments shall be brought within seven years after rendition, a suit in the name of an assignee of the judgment within the prescribed time is a full compliance, and extends the lien of the judgment. Street *v.* Smith, 86 Miss. 359, 37 So. 837.

79. *Indiana.*— McAfee *v.* Reynolds, 130 Ind. 33, 28 N. E. 423, 30 Am. St. Rep. 194, 18 L. R. A. 211.

Minnesota.— Newell *v.* Dart, 28 Minn. 248, 9 N. W. 732.

Mississippi.— See Ford *v.* Delta, etc., Land Co., 43 Fed. 181.

Nebraska.— Flagg *v.* Flagg, 39 Nebr. 229, 58 N. W. 109.

South Dakota.— Ruth *v.* Wells, 13 S. D. 482, 83 N. W. 568, 79 Am. St. Rep. 902.

Tennessee.— Bridges *v.* Cooper, 98 Tenn. 394, 39 S. W. 723; Barnett *v.* East Tennessee, etc., R. Co., (Ch. App. 1898) 48 S. W. 817.

See 30 Cent. Dig. tit. "Judgment," § 1403.

80. Applegate *v.* Edwards, 45 Ind. 329. A statute of Indiana limits the life of a judgment lien to ten years, but provides that this shall not include any time during which the right to enforce the judgment by execution shall be stayed "by agreement between the plaintiff and defendant, entered of record." But it is held that such an agreement must fix definitely the time during which execution is to be stayed, and not leave it to be determined by future events. Public policy requires that the public records shall afford definite information as to liens upon real estate. Ristine *v.* Early, 21 Ind. 103. And see Howell *v.* Edmonds, 47 Ill. 79. *Contra*, Cleveland Sav., etc., Co. *v.* Bear Valley Irr. Co., 89 Fed. 32.

81. Patterson *v.* Baxley, 33 S. C. 354, 11 S. E. 1065. *Contra*, Lewis *v.* Smith, 99 Ga. 603, 27 S. E. 162.

82. Peirce *v.* Black, 105 Pa. St. 342. But see *infra*, XV, I, 4.

H. Suspension of Lien — 1. In General. The lien of a judgment may under certain circumstances be permanently suspended, or entirely lost, by the negligence or delay of the creditor in seeking to enforce it,[83] or by orders of the court for the sale of the property affected, to be free from encumbrances,[84] or it may be temporarily suspended, in such sense as to bar the running of the statute against it, by circumstances preventing its enforcement in the ordinary way, and not within the control of the creditor.[85]

2. Effect of Appeal. It is generally held that the taking of an appeal from a judgment does not discharge its lien, but merely suspends it, so that the statute does not begin to run against it until final action in the appellate court;[86] but in some states the lien is not extended beyond the statutory period, although execution may be prevented during a part or even the whole of the time by an appeal.[87] If the judgment is vacated or reversed on appeal, this destroys the lien previously acquired;[88] and it has been held that if a new judgment is rendered, it merges the original judgment, and the lien dates only from such new judgment;[89] but a simple judgment of affirmance does not disturb the lien of the judgment from the time of its entry below,[90] and if a judgment is reversed in part and affirmed

83. Jones *v.* Detchon, 91 Ind. 154; Bassett *v.* Proetzel, 53 Tex. 569. And see Touhey *v.* Touhey, 151 Ind. 460, 51 N. E. 919, 68 Am. St. Rep. 233.

Loss or postponement of lien by failure to issue and levy execution see *supra*, XV, G. 4.

Negligence of assignee for creditors.— Liens subsisting on real estate assigned for the benefit of creditors are not lost by the delay of the assignee in making sale, although not revived within five years after their entry, but are entitled as they stood at the time of the assignment. Morrill's Estate, 1 Chest. Co. Rep. (Pa.) 305.

Attempt to defraud other creditors.— A judgment creditor who advises the debtor to make a fraudulent conveyance in order to cheat another creditor does not thereby lose the lien of his judgment. Fidler *v.* John, 178 Pa. St. 112, 35 Atl. 976.

84. See *In re* Coleman, 74 N. Y. 373, 66 N. E. 983; Ford *v.* Townsend, 1 Rob. (N. Y.) 39.

85. See Sheldon *v.* Arnold, 17 Ind. 165 (holding where the transcript of the judgment was destroyed by fire after filing, and a new transcript filed, the judgment lien did not relate back); McDonald *v.* Dickson, 85 N. C. 248 (a case in which a statute suspended the statute of limitations until the falling in of the reversionary estate in land embraced in a homestead); Swanson *v.* Tarkington, 7 Heisk. (Tenn.) 612 (holding the lien of a judgment not extended in consequence of the late Civil war); Hargrove *v.* De Lisle, 32 Tex. 170 (where there were executive and legislative orders forbidding the levy of executions).

86. *California.*— Englund *v.* Lewis, 25 Cal. 337; Dewey *v.* Latson, 6 Cal. 130. See Chapin *v.* Broder, 16 Cal. 403.

Georgia.— Hardee *v.* Stovall, 1 Ga. 92.

Illinois.— Rock Island Nat. Bank *v.* Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; Curtis *v.* Root, 28 Ill. 367; Schafer *v.* Buck, 76 Ill. App. 464; Dawson *v.* Cunning, 50 Ill. App. 286.

Indiana.— Applegate *v.* Edwards, 45 Ind. 329.

Mississippi.— Montgomery *v.* McGimpsey, 7 Sm. & M. 557.

New York.— Code Civ. Proc. § 1256, permits the suspension of a judgment lien pending an appeal by an entry to that effect on the docket. See Wronkow *v.* Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661, 16 L. R. A. 209; Livingston *v.* Roberts, 5 Duer 680; Emigrant Industrial Sav. Bank *v.* Lynch, 2 N. Y. St. 124; Orchard *v.* Binninger, 4 Abb. Pr. N. S. 368; Wells *v.* Kelsey, 25 How. Pr. 384. But the United States courts sitting in New York are not vested with the discretionary power possessed by the state courts under this statute. Myers *v.* Tyson, 17 Fed. Cas. No. 9,995, 13 Blatchf. 242.

North Carolina.— Adams *v.* Guy, 106 N. C. 275, 11 S. E. 535.

Ohio.— Moore *v.* Rittenhouse, 15 Ohio St. 310.

Pennsylvania.— Leonard's Appeal, 94 Pa. St. 180.

Tennessee.— Brinkley *v.* Welch, 7 Lea 278.

United States.— Gottlieb *v.* Thatcher, 151 U. S. 271, 14 S. Ct. 319, 38 L. ed. 157; U. S. *v.* Sturgis, 14 Fed. 810.

See 30 Cent. Dig. tit. "Judgment," § 1406.

87. Weiller *v.* Blanks, McGloin (La.) 296; Christy *v.* Flanagan, 87 Mo. 670; Sublette *v.* St. Louis, etc., R. Co., 96 Mo. App. 113, 69 S. W. 745.

In Texas the lien of a judgment is lost if an execution is not issued within a year, as provided by the statute, notwithstanding an appeal is taken and an appeal-bond given, unless a supersedeas bond has also been filed. Gruner *v.* Westin, 66 Tex. 209, 18 S. W. 512.

88. Earl *v.* Hart, 89 Mo. 263, 1 S. W. 238; Hastings *v.* Lolough, 7 Watts (Pa.) 540; Rubinsky *v.* Patrick, 2 Pa. Dist. 695; Drake *v.* Mitchell, 2 Lack. Leg. N. (Pa.) 186. See also *infra*, XV, I, 7, text and note 38.

89. Swift *v.* Conboy, 12 Iowa 444. See also *infra*, XV, I, 7, text and note 38.

90. Swift *v.* Conboy, 12 Iowa 444; Montgomery *v.* McGimpsey, 7 Sm. & M. (Miss.)

as to the residue, the partial reversal will not affect the lien of so much of the judgment as remains unreversed.[91]

3. Injunction Against Judgment. A perpetual injunction against the collection of a judgment will destroy its lien,[92] but a temporary injunction merely suspends the lien until its dissolution.[93] Whether the time covered by such an injunction is to be excluded from the period limited by law for the duration of judgment liens depends on the local statutes. In some states it is excepted from such period,[94] but in others the lien is lost if the statutory time expires while the injunction is in force.[95]

4. Stay of Execution. It is generally held that a stay of execution or of further proceedings on a judgment suspends the running of the statutes of limitations against it, whether the stay is by agreement of the parties or by order of court.[96]

5. Receivership. The lien of a judgment is not lost or affected by the appointment of a receiver for the judgment debtor and his taking possession of the property affected, the creditor being still at liberty to issue and levy his execution and sell thereunder, provided he first obtains leave of the court appointing the receiver.[97] Nor does the fact of the receivership continue the lien of the judgment beyond the statutory period, and if that period expires during the receivership, without any application by the creditor for leave to levy his execution, he loses his lien by his own neglect.[98]

I. Release or Discharge of Lien[99] — 1. In General. There are various ways in which the lien of a judgment on land may be discharged. It may be discharged by the voluntary act of the creditor in executing a release thereof,[1] or

557; Kilpatrick *v.* Dye, 4 Sm. & M. (Miss.) 289; Planters' Bank *v.* Calvit, 3 Sm. & M. (Miss.) 143, 41 Am. Dec. 616. *Compare* Shepherd *v.* Woodfolk, 10 Lea (Tenn.) 593.

91. Thomson *v.* Chapman, 83 Va. 215, 2 S. E. 273; Grafton, etc., R. Co. *v.* Davisson, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

92. Grafton, etc., R. Co. *v.* Davisson, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799, holding, however, that where an injunction to a judgment is perpetuated only as to a part of it, the lien of the part not affected continues from the date of the judgment.

93. Smith *v.* Everly, 4 How. (Miss.) 178; Lynn *v.* Gridley, Walk. (Miss.) 548, 12 Am. Dec. 591. See Anderson *v.* Tydings, 8 Md. 427, 63 Am. Dec. 708.

In Alabama a judgment lien is discharged by an injunction issued upon the execution of a bond with sureties by the judgment debtor, if the bond provides plaintiff with another security for the payment of his judgment. Bartlett *v.* Doe, 6 Ala. 305, 41 Am. Dec. 52; Mansony *v.* U. S. Bank, 4 Ala. 735.

94. Applegate *v.* Edwards, 45 Ind. 329.

95. Tucker *v.* Shade, 25 Ohio St. 355; Miller *v.* Estill, 8 Yerg. (Tenn.) 452.

But where a mortgagee applied for and obtained an injunction restraining the judgment creditor from enforcing his execution, and the injunction was subsequently dissolved, but not until after the expiration of the statutory time for the duration of the lien, it was held that the mortgagee could not take advantage of this fact; and as the lien of his mortgage was subordinate to that of the judgment, at the time the injunction was granted, he could not claim to hold the property discharged from the lien of the judgment. Work *v.* Harper, 31 Miss. 107, 66 Am. Dec. 549.

96. Barroilhet *v.* Hathaway, 31 Cal. 395, 89 Am. Dec. 193; Applegate *v.* Edwards, 45 Ind. 329; Mercantile Trust Co. *v.* St. Louis, etc., R. Co., 69 Fed. 193. And see Lowrie's Estate, 5 Lanc. L. Rev. (Pa.) 295; U. S. Bank *v.* Winston, 2 Fed. Cas. No. 944, 2 Brock. 252. *Contra*, Green *v.* Dougherty, 55 Mo. App. 217; Russell *v.* McCampbell, 29 Tex. 31.

In Pennsylvania the time during which a judgment continues a lien is to be decided by the record alone, and a stay of execution by agreement of parties not entered of record will not continue the lien beyond the statutory five years as against a *bona fide* purchaser. Bombay *v.* Boyer, 14 Serg. & R. 253, 16 Am. Dec. 494; Black *v.* Dobson, 11 Serg. & R. 94.

97. Southern Bank *v.* Ohio Ins. Co., 22 Ind. 181; Central Coal, etc., Co. *v.* Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383.

98. Cleveland Sav., etc., Co. *v.* Bear Valley Irr. Co., 89 Fed. 32. But *compare* Cramer *v.* Iler, 63 Kan. 579, 66 Pac. 617; Semple *v.* Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509.

99. Release of lien by discharge in bankruptcy see Bankruptcy, 5 Cyc. 401.

1. Snyder *v.* Crawford, 98 Pa. St. 414.

Release by holder of judgment as collateral security.— Where a judgment had been assigned to an attorney to be held by him as collateral security and the assignment was recorded, the recital of the terms upon which the judgment was held was sufficient to

even by a parol release,[2] by the operation of a statute divesting the lien or limiting its continuance,[3] by the termination of the estate subject to the lien, as in the case of an estate for life or a leasehold interest,[4] by a sale of the property free of encumbrances under orders of the court,[5] by a foreclosure of the lien in statutory proceedings for that purpose,[6] or generally, by anything which operates as a satisfaction of the debt or judgment or a renunciation of the privileges secured by the lien.[7] But the lien is not destroyed by the execution of a forthcoming bond, or a bond to try the right of property,[8] or by the withdrawal from the records of the certificate of the judgment upon which the lien was founded,[9] or by any transfer of the property other than a sale under order of the court.[10]

2. WAIVER AND ESTOPPEL. A judgment creditor may waive or lose the benefit of his lien by failing to claim it when it is incumbent on him to do so,[11] by failing to comply with the conditions of the judgment,[12] or by such conduct or representations to purchasers or subsequent encumbrancers as induce the belief that he has no claim upon the land, or has abandoned his claim, so as to make it inequitable that he should thereafter set up his lien in prejudice of their rights.[13] But

afford notice of an implied breach of trust affecting a purchaser and preventing a release executed by the attorney from discharging the lien on the judgment. Kirk's Appeal, 87 Pa. St. 243, 30 Am. Rep. 357.

2. Dalby *v.* Cronkhite, 22 Iowa 222, holding, however, that the proof must be clear.

3. See Houston *v.* Houston, 67 Ind. 276; Marshall *v.* Hart, 4 Minn. 450; Platt *v.* Platt, 15 N. Y. St. 217; Riddle *v.* Bryan, 5 Ohio 48; Dearborn *v.* Patton, 3 Oreg. 420. And see *supra*, XV, G, 1, a.

4. Stockett *v.* Howard, 34 Md. 121; Moore *v.* Pitts, 53 N. Y. 85.

Abandonment of mining claim.— But a judgment lien on an unpatented mining claim is not lost by the transfer of the claim by the judgment debtor, on the ground that such transfer is an abandonment thereof, since the transfer of an unpatented claim does not amount to an abandonment. Butte Hardware Co. *v.* Frank, 25 Mont. 344, 65 Pac. 1.

Equitable conversion.— Where lands devised are directed to be sold, and the proceeds distributed among the heirs, a person acquiring a judgment lien on the estate of one of the heirs in such land does not lose his lien by the conversion of the land into money, the lien attaching to the proceeds of sale. Sayles *v.* Best, 140 N. Y. 368, 35 N. E. 636.

Sale under power.— Where a devisee had given a mortgage on his interest or on the proceeds thereof if there should be a sale under a power, it was held that upon a sale the mortgagee would be entitled to the proceeds in preference to a judgment creditor of the devisee whose judgment antedated the mortgage, as the sale under the power defeated the lien of the judgment. Duryee *v.* Martin, 36 N. J. Eq. 444.

5. See *infra*, XV, I, 6. And see JUDICIAL SALES.

6. See Ives *v.* Beecher, 75 Conn. 564, 54 Atl. 207.

7. Waiver of lien see *infra*. XV, I, 2.

Termination of lien by satisfaction see *infra*, XV, I, 4.

Payment, release, and satisfaction of judgments see *infra*, XX.

A verbal promise of the debtor to a purchaser of the lands that he will pay the amount of the judgment will not release the lien. Krebs *v.* Hechler, 2 Leg. Rec. (Pa.) 363.

8. Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301.

9. Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

10. Matter of Gump, 13 Phila. (Pa.) 495. And see *supra*, XV, F, 1.

The assignment of property by a judgment debtor to a trustee, to be sold for the payment of the judgment, does not divest the lien of the judgment, where the creditor never assented to it, although he suspended execution for a time. Doub *v.* Barnes, 4 Gill (Md.) 1. But if a judgment creditor files his bill to enforce a trust executed by the debtor for the benefit of his creditors generally, it is a virtual waiver of his legal lien. Jones *v.* Dougherty, 10 Ga. 273. So if he receives part payment of his judgment out of funds in the hands of the trustee. Effinger *v.* Kenney, 92 Va. 245, 23 S. E. 742.

11. See Nicholson *v.* Citizens' Bank, 27 La. Ann. 369.

12. Drake *v.* Gilpin Min. Co., 16 Colo. 231, 27 Pac. 708.

13. *New Jersey.*— Borden *v.* Hutchinson, (Ch. 1901) 49 Atl. 1088; Williams *v.* Champion, 39 N. J. Eq. 350.

New York.— Barnes *v.* Mott, 64 N. Y. 397, 21 Am. Rep. 625; Ingalls *v.* Morgan, 10 N. Y. 178.

Ohio.— Beardsley *v.* Foot, 14 Ohio St. 414, 84 Am. Dec. 405; Knauber *v.* Fritz, 5 Ohio Dec. (Reprint) 410, 5 Am. L. Rec. 433

Pennsylvania.—Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354.

Tennessee.— Call *v.* Cozart, (Ch. App. 1898) 48 S. W. 312.

United States.— See Hill *v.* Gordon, 45 Fed. 276.

See 30 Cent. Dig. tit. "Judgment," § 1412.

But the lien is not waived by the taking of a mortgage for the same debt (Muir *v.* Leitch, 7 Barb. (N. Y.) 341) nor by the

this result does not follow from an unsuccessful attempt to obtain payment from another fund,[14] or from the fact that the creditor brings suit in equity to avoid a fraudulent transfer of the debtor's lands,[15] or causes his judgment to be docketed in another county.[16]

3. RELEASE OF OTHER PROPERTY. As between the debtor and creditor a release by the latter of part of the lands bound by the judgment will not prevent its enforcement against the rest.[17] But where portions of the land have been sold to different purchasers, or encumbered with subsequent mortgages, the creditor cannot release his lien upon the lands primarily liable, or release or surrender other securities primarily liable, without releasing at the same time the lands in the hands of such purchasers or encumbrancers, at least in proportion to the value of the portion first liable.[18] So also where he levies on sufficient personal property, but abandons the levy, fails to make the money, or applies it to other debts, it will release the judgment lien as to junior lienors or purchasers.[19]

4. PAYMENT OR SATISFACTION OF JUDGMENT. The lien of a judgment is discharged by payment of the amount due under it,[20] or by an entry of satisfaction on the record,[21] although not by a mere unaccepted tender;[22] and once paid, the judgment lien cannot be restored or continued by any mere agreement of the parties,[23] although equity may keep it alive for the benefit of a surety who has made the payment.[24]

creditor's accepting a sum of money paid to him by the clerk of the court to make good a fault or omission of his which was supposed to have invalidated the judgment (Hardin *v.* Melton, 28 S. C. 38, 4 S. E. 805, 9 S. E. 423).

14. Connelly *v.* Withers, 9 Lanc. Bar (Pa.) 117.

15. Wilkinson *v.* Paddock, 125 N. Y. 748, 27 N. E. 407.

16. Isler *v.* Colgrove, 75 N. C. 334; Perry *v.* Morris, 65 N. C. 221.

17. *Delaware.*— Wolfe *v.* Gardner, 4 Harr. 338.

Georgia.— Tucker *v.* Cornog, 58 Ga. 443.

Mississippi.— Pickens *v.* Marlow, 2 Sm. & M. 428.

Pennsylvania.— Burson *v.* Kincaid, 3 Penr. & W. 57.

South Carolina.— Curlee *v.* Rembert, 37 S. C. 214, 15 S. E. 954.

United States.— Scott *v.* Mead, 37 Fed. 865.

See 30 Cent. Dig. tit. "Judgment," § 1413.

Relief of sureties.— Before a judgment is enforced against the property of one who is only secondarily liable therefor, it will be credited with the value of property of the judgment debtor, released from levy by the judgment creditor, and then sold by the judgment debtor, unless it be shown that it was exempt. Mayberry *v.* Whittier, 144 Cal. 322, 78 Pac. 16.

18. *District of Columbia.*— Shepherd *v.* Brown, 3 Mackey 266.

New York.— Barnes *v.* Mott, 64 N. Y. 397, 21 Am. Rep. 625; Frost *v.* Koon, 30 N. Y. 428; Ingalls *v.* Morgan, 10 N. Y. 178; Northrup *v.* Metcalf, 11 Paige 570; James *v.* Hubbard, 1 Paige 228.

North Carolina.— Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200.

Pennsylvania.— Lowry *v.* McKinney, 68 Pa. St. 294. The rule is, however, qualified by the requirement that the judgment creditor shall have had notice of the subsequent sale or mortgage, before making the release; and the recording of a mortgage is not sufficient notice. Roebuck's Appeal, 133 Pa. St. 27, 19 Atl. 310; Taylor *v.* Maris, 5 Rawle 51; Davis *v.* Wood, 1 Del. Co. 382.

South Carolina.— Moore *v.* Trimmier, 32 S. C. 511, 11 S. E. 548, 552.

Virginia.— Jones *v.* Myrick, 8 Gratt. 179.

See 30 Cent. Dig. tit. "Judgment," § 1413.

19. Banta *v.* McClennan, 14 N. J. Eq. 120; Hayden *v.* Auburn Prison, 1 Sandf. Ch. (N. Y.) 195; Hunt *v.* Breading, 12 Serg. & R. (Pa.) 37, 14 Am. Dec. 665. And see Ford *v.* Geauga County, 7 Ohio, Pt. II, 148. But *compare* Feak's Appeal, 81* Pa. St. 76.

20. Purse *v.* Estes, 165 Mo. 49, 65 S. W. 245; Banks *v.* Evans, 10 Sm. & M. (Miss.) 35, 48 Am. Dec. 734; Truscott *v.* King, 6 N. Y. 147.

Part payment by joint debtor.— Where the judgment is against two debtors jointly, and the record shows that one of them has paid more than half the amount of it, the judgment constitutes no lien on the property of such debtor. Graves *v.* Hunter, 23 La. Ann. 132.

What constitutes a satisfaction see *infra*, XIX.

21. Mobile Branch Bank *v.* Ford, 13 Ala. 431; Page *v.* Benson, 22 Ill. 484.

22. People *v.* Beebe, 1 Barb. (N. Y.) 379; Law *v.* Jackson, 9 Cow. (N. Y.) 641; *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540; Lincoln Sav. Bank *v.* Ewing, 12 Lea (Tenn.) 598.

23. Adams *v.* Daunis, 29 La. Ann. 315; De la Vergne *v.* Evertson, 1 Paige (N. Y.) 181, 19 Am. Dec. 411. But see Peirce *v.* Black, 105 Pa. St. 342, holding that the lien may be kept alive by agreement of the parties for the purpose of securing further advances.

24. German-American Sav. Bank *v.* Fritz,

5. Arrest on Capias. The arrest of a judgment debtor on capias ad satisfaciendum precludes the creditor from pursuing any other remedies against his lands or good , and therefore suspends the lien of the judgment on lands.[25] But it does not absolutely extinguish it; for if this process fails to produce satisfaction, under circumstances which permit the creditor to resort to other remedies, the lien of the judgment on lands may then be enforced, as against the judgment debtor himself,[26] although not as against the intervening rights of third persons.[27]

6. Judicial Sale of Property — a. In General. A sale of land under execution extinguishes the lien of the judgment on which the execution issued;[28] and a judicial sale under a senior judgment cancels the lien of a junior judgment, which is thereafter transferred to the surplus proceeds of sale,[29] or if there be no surplus, the junior judgment creditor must save his debt by redeeming from the sale.[30] So also a sale ordered in partition proceedings will generally clear the land from the liens of judgments previously attaching to the undivided interests of the tenants in common.[31]

b. Under Junior Judgment. The effect of a sale under a junior judgment upon the lien of a senior judgment is fully discussed elsewhere in this work.[32]

c. Acquisition of Title by Judgment Creditor. Since a judgment is a general lien upon all the debtor's real estate, it does not merge when the judgment creditor acquires title to a particular portion of such lands, but may in ordinary cases be enforced against the remaining lands.[33]

7. Opening, Canceling, or Vacating Judgment. Opening a default judgment merely to let defendant in to a defense does not destroy its lien,[34] and where it is set aside for irregularity or error the court may order the lien retained for such amount as plaintiff may ultimately recover, or order the judgment to stand as security.[35] But the lien is extinguished where the judgment is vacated abso-

68 Wis. 390, 32 N. W. 123. See, generally, Subrogation.

25. Partridge *v.* Havens, 10 Paige (N. Y.) 618; McFadden *v.* Parker, 4 Dall. (Pa.) 275, 1 L. ed. 831; Freeman *v.* Ruston, 4 Dall. (Pa.) 214, 1 L. ed. 806; Brandon *v.* Gowing, 6 Rich. Eq. (S. C.) 5; Rogers *v.* Marshall, 4 Leigh (Va.) 425.

Joint debtors.— Where a judgment is recovered against several and a capias served on one of them, who executes a forthcoming bond, which is forfeited, this does not extinguish the lien of the judgment upon the lands of the others. Leake *v.* Ferguson, 2 Gratt. (Va.) 419.

26. *Ohio.*— Douglas *v.* Wallace, 11 Ohio 42.

Pennsylvania.—Jackson *v.* Knight, 4 Watts & S. 412.

South Carolina.— Mazyck *v.* Coil, 3 Rich. 235.

Virginia.— McClure *v.* Thistle, 2 Gratt. 182; McCullough *v.* Sommerville, 8 Leigh 415.

United States.— Griswold *v.* Hill, 11 Fed. Cas. No. 5,836, 2 Paine 492.

See 30 Cent. Dig. tit. "Judgment," § 1419.

27. Rockhill *v.* Hanna, 15 How. (U. S.) 189, 14 L. ed. 656.

28. Husted *v.* Dakin, 17 Abb. Pr. (N. Y.) 137; People *v.* Easton, 2 Wend. (N. Y.) 297.

29. Bradley *v.* Heffernan, 156 Mo. 653, 57 S. W. 763; Com. *v.* Rogers, 4 Pa. L. J. Rep. 252; Davis *v.* Landcraft, 10 W. Va. 718. *Contra,* Moore *v.* Trimmier, 32 S. C. 511, 11 S. E. 548, 552. And see Young *v.* Hays, 14 La. Ann. 654, holding that a forced sale of property made under execution of a judgment secured by a judicial mortgage (judgment lien) does not discharge concurrent judicial mortgages.

30. Newton First Nat. Bank *v.* Campbell, 123 Iowa 37, 98 N. W. 470; Wood *v.* Rankin, 119 Iowa 448, 93 N. W. 387.

31. Cradlebaugh *v.* Pritchett, 8 Ohio St. 646, 72 Am. Dec. 610; Stahl's Estate, 11 York Leg. Rec. (Pa.) 105; Burris *v.* Gooch, 5 Rich. (S. C.) 1. *Contra,* see Adkins *v.* Beane, 42 Ill. App. 366; Smith *v.* Piper, 118 Iowa 363, 92 N. W. 56.

32. See Executions, 17 Cyc. 1296.

33. Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790. And see *Ex p.* Voorhies, 46 S. C. 114, 24 S. E. 170. *Compare* Lamar *v.* Walker, 17 S. C. 589.

Acquisition of title under another judgment.— The lien of a judgment does not become merged in the title afterward acquired by the judgment creditor under another judgment, unless such is the expressed intention of the purchaser, where his interests require that such lien be kept alive. Sellers *v.* Floyd, 24 Colo. 484, 52 Pac. 674.

34. Kightlinger's Appeal, 101 Pa. St. 540; Kittanning Ins. Co. *v.* Scott, 101 Pa. St. 449; Cope's Appeal, 96 Pa. St. 294; Savage *v.* Kelly, 11 Phila. (Pa.) 525. And see Smith *v.* De Lanty, 11 Wash. 386, 39 Pac. 638. *Compare* Crane *v.* Richardson, 73 Miss. 254, 18 So. 542.

35. Lyon *v.* Boilvin, 7 Ill. 629; Bryant *v.*

lutely and finally,[36] or canceled and stricken off the record,[37] or reversed on appeal.[38]

8. Remedies of Creditor After Termination of Lien. After the lien of a judgment has expired at law, it cannot be enforced in equity,[39] or made the basis of a creditor's bill or a bill to subject property;[40] nor can the lien be revived or continued by the mere act of issuing an execution.[41] But the judgment continues a valid claim against the debtor,[42] and although it has no lien, it may be filed as a claim against his estate after his death,[43] or collected by means of an execution against property the title to which remains in the judgment debtor;[44] and it will entitle the creditor to redeem from a sale under a junior judgment,[45] or even according to one authority to take the money from the junior judgment creditor.[46]

XVI. JUDGMENTS IN REM.

A. Nature and Characteristics.[47] A judgment *in rem*, as distinguished from a judgment *in personam*, is an adjudication pronounced upon the status of

Williams, 21 Iowa 329; Holmes *v.* Bush, 35 Hun (N. Y.) 637. *Contra*, Farmers' L. & T. Co. *v.* Killinger, 46 Nebr. 677, 65 N. W. 790, 41 L. R. A. 222.

36. Owen *v.* Howard, 4 Ariz. 195, 35 Pac. 1057; Paxton *v.* Boyce, 1 Tex. 317.

Restoration of judgment illegally vacated. — A party whose judgment has been illegally vacated will not be deprived of his lien if he ultimately procures the reversal of the order which set it aside, unless the equities of *bona fide* purchasers or encumbrancers have intervened; and upon the restoration of the judgment it will resume its former priority, and take precedence of liens which were junior to it at the time when it was vacated, unless the holders of such liens have acquired new rights, by proceedings under their judgments, of which they cannot justly be deprived. King *v.* Harris, 34 N. Y. 330; Smith *v.* De Lanty, 11 Wash. 386, 39 Pac. 638.

37. Polk County *v.* Nelson, (Iowa 1888) 43 N. W. 80; Polk County *v.* Nelson, 75 Iowa 648, 36 N. W. 911.

38. Meyer *v.* Campbell, 12 Mo. 603; Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802; Foot *v.* Dillaye, 65 Barb. (N. Y.) 521. And see Borden *v.* Borden, 5 Mass. 67, 4 Am. Dec. 32, where it was held that a deed of land was a good and lawful conveyance, although an execution had been levied upon the land, when the judgment under which the execution issued, although not yet reversed, was so erroneous that it was "legally certain" that it would be reversed. See also *supra*, XV, H, 2.

The subsequent rendition of another judgment in the same cause will not revive the lien of a judgment reversed on appeal, so as to make it effective from the date of the original judgment. Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802. See also *supra*, XV, H, 2, text and note 89.

39. *Illinois.*— Bustard *v.* Morrison, 2 Ill. 235.

Maryland.—Smith *v.* Meredith, 30 Md. 429.

Minnesota.— Ashton *v.* Slater, 19 Minn. 347.

Ohio.— Pritchett *v.* Cradlebaugh, 1 Ohio Dec. (Reprint) 455, 10 West. L. J. 84.

Tennessee.— Harrison *v.* Wade, 3 Coldw. 505.

Virginia.— Sutton *v.* McKenney, 82 Va. 46; Hutcheson *v.* Grubbs, 80 Va. 251.

See 30 Cent. Dig. tit. "Judgment," § 1426.

40. Partee *v.* Mathews, 53 Miss. 140; Lakenan *v.* Robards, 9 Mo. App. 179. But if the judgment creditor during the life of the judgment files his bill in equity against the debtor and another to subject property to the payment of his judgment, he does not lose his lien on such property, although the general lien of the judgment expires before the entry of a final decree in the equity suit. Davidson *v.* Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197.

41. Roe *v.* Swart, 5 Cow. (N. Y.) 294; Stephen's Appeal, 38 Pa. St. 9.

42. Strorble *v.* Cleaver, 1 Hall L. J. (Pa.) 74. And see McVaugh *v.* Heist, 11 Montg. Co. Rep. (Pa.) 97, holding that it continues also against general creditors who have not obtained judgments.

43. Fisher *v.* Freeman, 65 Ind. 89.

Necessity of filing judgment as claim against estate see Executors and Administrators, 18 Cyc. 463.

44. Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544; Brown *v.* Bacon, 27 Miss. 589; Christy *v.* McKee, 94 Mo. 241, 6 S. W. 656; Miner *v.* Wallace, 10 Ohio 403.

Repeal of statute.— The clause, "the lien of the judgment shall be determined," and the clause, "and the property of the judgment debtor discharged therefrom," in a statute terminating the lien of a judgment on which no execution has been issued within five years from its entry, are substantially synonymous, and such a statute is not repugnant to, and therefore does not impliedly repeal, an earlier statute allowing the issue of execution by leave of court after five years from the entry of judgment. Entrop *v.* Williams, 11 Minn. 381.

45. *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540.

46. Jones *v.* Wright, 60 Ga. 364.

47. Foreign judgments in rem see *infra*, XXII, B, 7; XXII, D, 1.

some particular thing or subject-matter, being the subject of controversy, by a competent tribunal, and having the effect of binding all persons having interests, whether joined as parties to the proceeding or not.[48]

B. Jurisdiction. In a proceeding *in rem* jurisdiction rests upon the seizure or attachment of the property affected or the court's dominion or authority over

Appeal-bond and liability thereon see APPEAL AND ERROR, 2 Cyc. 952.

Judgment against heirs for debts of ancestor see DESCENT AND DISTRIBUTION, 14 Cyc. 220.

Judgment in proceeding to enforce agricultural lien see AGRICULTURE, 2 Cyc. 68.

Judgments and decrees of consuls see AMBASSADORS AND CONSULS, 2 Cyc. 276.

48. Woodruff *v.* Taylor, 20 Vt. 65; Cammell *v.* Sewell, 3 H. & N. 617, 4 Jur. N. S. 978, 27 L. J. Exch. 447 [*affirmed* in 5 H. & N. 728, 6 Jur. N. S. 918, 29 L. J. Exch. 350, 2 L. T. Rep. N. S. 799, 8 Wkly. Rep. 639]; Simpson *v.* Fogo, 1 Johns. & H. 18, 6 Jur. N. S. 949, 29 L. J. Ch. 657, 2 L. T. Rep. N. S. 594, 8 Wkly. Rep. 407, 1 H. & N. 195, 9 Jur. N. S. 403, 32 L. J. Ch. 249, 8 L. T. Rep. N. S. 61, 1 New Rep. 422, 11 Wkly. Rep. 418. In Woodruff *v.* Taylor, *supra*, it was further remarked that a judgment *in rem* differs from a judgment *in personam* in that the latter judgment "is, in form as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject matter itself, whose state, or condition, is to be determined. It is a proceeding to determine the state, or condition, of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be." And see a substantially similar definition in Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290. In Mankin *v.* Chandler, 16 Fed. Cas. No. 9,030, 2 Brock. 125, 127, it was said by Chief Justice Marshall: "Where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties." And see Morin *v.* St. Paul, etc., R. Co., 33 Minn. 176, 22 N. W. 251; Bartero *v.* Real Estate Sav. Bank, 10 Mo. App. 76; State *v.* Central Pac. R. Co., 10 Nev. 47, 80; Cross *v.* Armstrong, 44 Ohio St. 613, 10 N. E. 160; Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Bruff *v.* Thompson, 31 W. Va. 16, 6 S. E. 352; Sleeth *v.* Hurlhert, 25 Can. Sup. Ct. 620, 3 Can. Cr. Cas. 197.

Judgments held not to be in rem.—The following forms of judgments, although possessing some of the characteristics of judgments *in rem*, or appearing at first sight to be within the definitions of such judgments, are held nevertheless to be judgments *in personam*: a judgment determining the title to land lying in another state. Dull *v.* Blackman, 169 U. S. 243, 18 S. Ct. 333, 42 L. ed. 733. A judgment setting aside a deed or other conveyance, e. g. on the ground of its being fraudulent as to creditors. Collins *v.* Hydorn, 135 N. Y. 320, 32 N. E. 69; Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924. A decree declaring a certain strip of land to have been dedicated to the public. Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381. A judgment enforcing by mandamus against a public officer the right of a purchaser of land at a tax-sale to receive a deed. Waters *v.* Spofford, 58 Tex. 115. A decree declaring plaintiff to be the owner of goods stated by it to be in the hands of one not a party to the suit. Jenkins *v.* Wilkerson, 76 Miss. 368, 24 So. 700. And see Newlin *v.* McAfee, 64 Ala. 357. A decree reforming a marriage settlement. Montgomery Branch Bank *v.* Hodges, 12 Ala. 118. A judgment in an action by a widow for the recovery of dower. Bartero *v.* Real Estate Sav. Bank, 10 Mo. App. 76. An order to wind up a company. *In re* Bowling, [1895] 1 Ch. 663, 64 L. J. Ch. 427, 72 L. T. Rep. N. S. 411, 43 Wkly. Rep. 417. A judgment quashing a bastardy order in affiliation proceedings on the ground that defendant is not the father of the child. Anderson *v.* Collinson, [1901] 2 K. B. 107, 70 L. J. K. B. 620, 84 L. T. Rep. N. S. 465, 49 Wkly. Rep. 623. Where a judgment is rendered *in rem*, and the property attached is exhausted, a service of summons to renew the execution, and an order of the court granting a renewal, do not make the judgment one *in personam*. Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675.

A suit brought in equity against a married woman to recover a debt, although it does not seek a personal decree against her, but only to sell certain personal property, her separate estate, is just as much a suit *inter partes*, and not a proceeding *in rem*, as any other chancery suit brought by a plaintiff against a defendant in which plaintiff seeks no personal decree against defendant, but only to establish some claim to property, or interest in it, or to subject it to sale to pay some claim or lien. Bruff *v.* Thompson, 31 W. Va. 16, 6 S. E. 352.

A judgment on certiorari quashing a search warrant for intoxicating liquors issued under the Canada Temperance Act is not a judg- *in rem* in respect to the liquors seized, and is not *res judicata* as to the constable who executed the warrant if he was not a party to the certiorari proceedings and had no no-

the status in controversy, and it is not essential that there should be personal service of process or notice to any individual,[49] although there must be such published or constructive notice or proclamation as the law requires in the particular case, by which persons having interests to be affected are supposed to be informed of the proceeding.[50] Hence exclusive jurisdiction for the purposes of the particular suit is acquired by the court which first takes possession of the *res*.[51] But where the proceeding is not strictly and purely *in rem*, no valid judgment can be rendered against the rights of third persons unless they are served with process or appear and have an opportunity to be heard.[52]

C. Conclusiveness and Effect. A judgment *in rem* is conclusive and binding "upon all the world," that is, upon all persons who may have or claim any right or interest in the subject-matter of the litigation.[53] Like other judgments of competent courts it is not open to collateral impeachment;[54] it may be pleaded in bar of another action upon the same subject-matter if its effect is to merge a

tice of them. Sleeth *v.* Hurlbert, 25 Can. Sup. Ct. 620, 3 Can. Cr. Cas. 197.

A "general judgment" is a judgment *in personam*. Smith *v.* Colloty, 69 N. J. L. 365, 55 Atl. 805.

Rendition.— A judgment against defendant in a proceeding *in rem* to enforce a lien on land is not void because no personal judgment is taken against defendant on his personal obligation secured by such lien. Truitt *v.* Truitt, 38 Ind. 16.

49. *District of Columbia.*— Fraser *v.* Prather, 1 MacArthur 206.

Indiana.— Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

Nebraska.— Fowler *v.* Brown, 51 Nebr. 414, 71 N. W. 54.

New York.— Korman *v.* Grand Lodge, I. O. F. S. of I., 44 Misc. 564, 90 N. Y. Suppl. 120.

Texas.— Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

Washington.— Jennings *v.* Rocky Bar Gold Min. Co., 29 Wash. 726, 70 Pac. 136.

United States.— Goodman *v.* Niblack, 102 U. S. 556, 26 L. ed. 229; Boswell *v.* Otis, 9 How. 336, 13 L. ed. 164; The Globe, 10 Fed. Cas. No. 5,483, 2 Blatchf. 427; Mankin *v.* Chandler, 16 Fed. Cas. No. 9,030, 2 Brock. 125.

See 30 Cent. Dig. tit. "Judgment," §§ 1428, 1432.

50. Sheridan *v.* Ireland, 66 Me. 138; Woodruff *v.* Taylor, 20 Vt. 65. And see Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319.

Attachment of non-resident's property.— If a creditor obtains service on a non-resident defendant by publication, but waives attachment of his property within the state, and before the lien of his judgment and execution can attach the property is removed from the state, or sold to a purchaser in good faith, he is without remedy. Jarvis *v.* Barrett, 14 Wis. 591.

51. Heidritter *v.* Elizabeth Oil Cloth Co., 112 U. S. 294, 5 S. Ct. 135, 28 L. ed. 729.

52. Martin *v.* Darling, 78 Me. 78, 3 Atl. 118, action to enforce lien for labor on granite. See also Bartero *v.* Real Estate Sav. Bank, 10 Mo. App. 76 (action to recover dower); Byram *v.* McDowell, 15 Lea (Tenn.) 587 (suit against non-resident by attachment).

53. *Kansas.*— St. Joseph Nat. Bank *v.* Peters, 51 Kan. 62, 32 Pac. 637.

Louisiana.— Bauduc *v.* Nicholson, 4 La. 81. *Compare* Hart *v.* Lodwick, 8 La. 164.

Maryland.— Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Minnesota.— See Morin *v.* St. Paul, etc., R. Co., 33 Minn. 176, 22 N. W. 251.

Missouri.— Meriwether *v.* Block, 31 Mo. App. 170.

Nebraska.— Sorensen *v.* Sorensen, (1904) 98 N. W. 837.

Nevada.— State *v.* Central Pac. R. Co., 10 Nev. 47.

Pennsylvania.— Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66.

South Carolina.— *Ex p.* Kenmore Shoe Co., 50 S. C. 140, 27 S. E. 682; Street *v.* Augusta Ins. etc., Co., 12 Rich. 13, 75 Am. Dec. 714.

Texas.— Miller *v.* Foster, 76 Tex. 479, 13 S. W. 529.

West Virginia.— Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Bruff *v.* Thompson, 31 W. Va. 16, 6 S. E. 352.

United States.— The Rio Grande *v.* Otis, 23 Wall. 458, 23 L. ed. 158; Bailey *v.* Sundberg, 43 Fed. 81.

England.—Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455, 8 Aspin. 173, 65 L. J. Q. B. 616, 75 L. T. Rep. N. S. 95, 45 Wkly. Rep. 70; Cammell *v.* Sewell, 3 H. & N. 617, 4 Jur. N. S. 978, 27 L. J. Exch. 447 [*affirmed* in 5 H. & N. 728, 6 Jur. N. S. 918, 29 L. J. Exch. 350, 2 L. T. Rep. N. S. 799, 8 Wkly. Rep. 639]. See also Hart *v.* McNamara, 4 Price 154 note, 18 Rev. Rep. 690; Hughes *v.* Cornelius, 2 Show. 232; Cooke *v.* Sholl, 5 T. R. 255.

Canada.— Sleeth *v.* Hurlbert, 25 Can. Sup. Ct. 620, 3 Can. Cr. Cas. 197.

See 30 Cent. Dig. tit. "Judgment," § 1428. *et seq.*

Contra.— See De Witt *v.* Burnett, 3 Barb. (N. Y.) 89.

Persons not interested.— A judgment *in rem* cannot prejudice a party who has no interest in the subject-matter. Lerch *v.* Snyder, 112 Pa. St. 161, 4 Atl. 336.

54. *Louisiana.*— Pasteur *v.* Lewis, 39 La. Ann. 5, 1 So. 307.

North Carolina.— Corpening *v.* Kincaid, 82 N. C. 202.

distinct cause of action;[55] and it will operate as an estoppel, in a subsequent action, in respect to the points or questions adjudicated.[56] But such a judgment, without jurisdiction acquired by personal service, cannot be enforced against any other property than that specifically brought within the control of the court for the purposes of the particular proceeding.[57]

D. Judgments in Particular Classes of Proceedings — 1. Decrees in Admiralty. A decree rendered by a court of admiralty having jurisdiction of the *res* is conclusive upon all persons having interests to be affected, whether formally joined as parties or not,[58] but only as to matters actually in issue and adjudicated;[59] and a suit to enforce a maritime lien, being a proceeding *in rem*, is not barred by a personal judgment previously recovered for the same debt.[60]

2. Judgments in Prize Cases. A decree of a lawful prize court, having jurisdiction, condemning a vessel or other property as prize is binding and conclusive, as to the legality of the seizure and the grounds of condemnation, upon all persons whatsoever.[61]

3. Judgments in Collision Cases. Decrees in admiralty rendered in cases of collisions between vessels, ascertaining where the fault lay and awarding damages, stand upon the same footing with prize sentences in respect to their conclusiveness.[62]

Ohio.— Hamilton *v.* Merril, 25 Ohio St. 11.

Pennsylvania.— Shryock *v.* Buckman, 121 Pa. St. 248, 15 Atl. 480, 1 L. R. A. 533.

Texas.— Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735.

United States.— Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Needham *v.* Wilson, 47 Fed. 97.

See 30 Cent. Dig. tit. "Judgment, §§ 1435, 1439.

Collateral attack generally see *supra*, XI.

55. White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Treasurer *v.* Wygall, 51 Tex. 621. But a judgment against a vessel, being a judgment *in rem* and not enforceable against other property of the owner, if unsatisfied, cannot be pleaded in bar of a subsequent personal action against the owner on the same cause of action. Toby *v.* Brown, 11 Ark. 308. And see Tabor *v.* The Cerro Gordo, 54 Fed. 391. And a decree for the foreclosure of a mortgage, not seeking to impose any personal liability on the mortgagor, cannot be pleaded in bar of an action against a grantee of the mortgaged premises on his assumption of the mortgage debt. Ward *v.* Green, (Tex. Civ. App. 1894) 28 S. W. 574. See, generally, Mortgages.

Former recovery as merger or bar generally see *supra*, XIII.

56. Averill *v.* The Hartford, 2 Cal. 308; Nebraska L. & T. Co. *v.* Doman, 4 Nebr. (Unoff.) 334, 93 N. W. 1022; Wager *v.* Providence Ins. Co., 150 U. S. 99, 14 S. Ct. 55, 37 L. ed. 1013; Hart *v.* McNamara, 4 Price 154 note, 18 Rev. Rep. 690; Cooke *v.* Sholl, 5 T. R. 255. And see Sleeth *v.* Hurlbert, 25 Can. Sup. Ct. 620, 3 Can. Cr. Cas. 197. But see Dean *v.* Chapin, 22 Mich. 275; Durant *v.* Ahendroth, 97 N. Y. 132; Allen *v.* U. S., 1 Fed. Cas. No. 240; Taney 112.

Conclusiveness of adjudication generally see *supra*, XIV.

57. Toby *v.* Brown, 11 Ark. 308; Boswell *v.* Otis, 9 How. (U. S.) 336, 13 L. ed. 164.

A decree in rem against a vessel confers no priority over liens of equal degree to that on which the decree was obtained. The E. A. Barnard, 14 Phila. (Pa.) 556.

58. Averill *v.* Smith, 17 Wall. (U. S.) 95, 21 L. ed. 613; Commercial Transp. Co. *v.* Fitzhugh, 1 Black (U. S.) 574, 17 L. ed. 107; Providence Washington Ins. Co. *v.* Morse, 35 Fed. 363 (marine insurance case); The Globe, 10 Fed. Cas. No. 5,483, 2 Blatchf. 427 (libel for repairs to vessel); The Mary Anne, 16 Fed. Cas. No. 9,195, 1 Ware 104; Minna Craig Steamship Co. *v.* Chartered Mercantile Bank, [1897] 1 Q. B. 460, 66 L. J. Q. B. 339, 76 L. T. Rep. N. S. 310, 45 Wkly. Rep. 338 (enforcement of lien on vessel for damages for non-delivery of cargo); Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455, 8 Aspin. 173, 65 L. J. Q. B. 616, 75 L. T. Rep. N. S. 95, 45 Wkly. Rep. 95 (salvage case). And see China Mut. Ins. Co. *v.* Force, 20 N. Y. Suppl. 796. See also Admiralty, 1 Cyc. 891, 892.

59. Andrews *v.* Brown, 3 Cush. (Mass.) 130; Van Vechten *v.* Griffiths, 4 Abb. Dec. (N. Y.) 487; Morris *v.* Bartlett, 108 Fed. 675, 47 C. C. A. 578; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455, 8 Aspin. 173, 65 L. J. Q. B. 616, 75 L. T. Rep. N. S. 95, 45 Wkly. Rep. 95.

60. The Odorilla *v.* Baizley, 128 Pa. St. 283, 18 Atl. 511.

61. Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345; Jenkins *v.* Putnam, 1 Bay (S. C.) 8, 1 Am. Dec. 594; Croudson *v.* Leonard, 4 Cranch (U. S.) 434, 2 L. ed. 670; Rose *v.* Himely, 4 Cranch (U. S.) 241, 2 L. ed. 608; Penhallow *v.* Doane, 3 Dall. (U. S.) 54, 1 L. ed. 507; Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; Hughes *v.* Cornelius, 2 Show. 232. See, generally, War.

62. Thus in an action on a policy of insurance for loss occasioned by a collision at sea, a libel and decree against the vessel in-

4. Proceedings For Forfeiture Under Excise or Revenue Laws. A judgment rendered by a competent court, declaring the condemnation or forfeiture of goods seized for a breach of the excise or revenue laws, is *in rem*, and is binding and conclusive on all persons, so that the legality of the seizure or the ground of the action cannot be again contested in any proceeding.[63] And a sentence of acquittal is likewise conclusive on all persons as to the matters or points adjudged.[64]

E. Judgments Quasi In Rem — 1. Nature and Characteristics. Judgments dealing with the status, ownership, or liability of particular property, but which are intended to operate on these questions only as between the particular parties to the proceeding, and not to ascertain or cut off the rights or interests of all possible claimants, are so far *in rem* that jurisdiction may be acquired by the seizure or control of the court over the *res*, together with reasonable constructive notice to parties defendant, but, unlike judgments strictly *in rem*, they are binding only upon the parties joined in the action and thus notified, and have no effect upon the rights or liabilities of strangers.[65]

2. Judgments in Particular Classes of Proceedings. Judgments in the following classes of actions or proceedings are held to be quasi *in rem*, in so far as that jurisdiction may be acquired by constructive service of process, and that they are binding on all persons who were made parties to the proceeding, although not personally served, viz., actions founded on the attachment of real or personal property,[66] inquisitions of lunacy, the *res* being the status of the person under

sured, in a proceeding *in rem* in the admiralty court for damage done to the other vessel by the collision, are sufficient evidence against the insurers, both of the collision and of the negligence of the master and crew of the vessel insured. Street *v.* Augusta Ins., etc., Co., 12 Rich. (S. C.) 13, 75 Am. Dec. 714. See Bailey *v.* Sundberg, 49 Fed. 583, 1 C. C. A. 387. But a default decree against a tug for damages caused to her tow by stranding is not conclusive of negligence on the part of the pilot in charge of the tug, so as to preclude him, after obtaining a decree against the tug for his wages, from denying such negligence in a contest between himself and the owner of the tow as to whose decree should be first paid out of the proceeds of the tug. Flannery *v.* The Alexander Barkley, 83 Fed. 846.

63. *California.*— Kriess *v.* Faron, 118 Cal. 142, 50 Pac. 388, case of forfeiture of property for use in violation of United States internal revenue laws.

Massachusetts.—Whitney *v.* Walsh, 1 Cush. 29, 48 Am. Dec. 590.

New York.— Gelston *v.* Hoyt, 13 Johns. 561.

Pennsylvania.— Buchannan *v.* Biggs, 2 Yeates 232.

United States.— Windsor *v.* McVeigh, 93 U. S. 274, 23 L. ed. 914.

England.— Hart *v.* McNamara, 4 Price 154 note, 18 Rev. Rep. 690; Scott *v.* Shearman, 2 W. Bl. 977.

See, generally, Internal Revenue.

Confiscation acts.— It has been held that proceedings under the confiscation acts of congress, while in the nature of proceedings *in rem*, operated only to divest the title of the party alleged to be the owner of the property seized, and judgment of confiscation and forfeiture did not divest or affect the title of third persons originating prior to the seizure or of the real owner not proceeded against. Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421. And see Dean *v.* Chapin, 22 Mich. 275.

64. The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; Cooke *v.* Sholl, 5 T. R. 255.

65. Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924; Woodruff *v.* Taylor, 20 Vt. 65; Freeman *v.* Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. ed. 372.

66. State *v.* Spikes, 33 Ark. 801; Dubuque Second Nat. Bank *v.* Haerling, 106 Iowa 505, 76 N. W. 826; Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Wilson *v.* Stripe, 4 Greene (Iowa) 551, 61 Am. Dec. 138; St. Joseph Nat. Bank *v.* Peters, 51 Kan. 62, 32 Pac. 637; Southern California Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345; Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681. But a judgment in attachment is conclusive only upon the actual parties to the litigation and those in privity with them. Gleason *v.* Wilson, 48 Kan. 500, 29 Pac. 698; Peterson *v.* Willard, 17 La. Ann. 93; Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943; Sale *v.* French, 61 Miss. 170; Megee *v.* Beirne, 39 Pa. St. 50; Breading *v.* Siegworth, 29 Pa. St. 396; Childs *v.* Digby, 24 Pa. St. 23; Byram *v.* McDowell, 15 Lea (Tenn.) 581; Woodruff *v.* Taylor, 20 Vt. 65; Maxwell *v.* Stewart, 21 Wall. (U. S.) 71, 22 L. ed. 564; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; Mankin *v.* Chandler, 16 Fed. Cas. No. 9,030, 2 Brock. 125. And such a judgment operates only upon the property attached and imposes no sort of personal liability upon defendant, or upon any other property of his, where he was summoned by publication. Soulard *v.* Vac-

inquisition as sane or insane;[67] decrees of divorce, the marital status of plaintiff being here the *res*, the subject of the action, and jurisdiction of the court over that status, by the residence of plaintiff within its territorial jurisdiction, being sufficient to authorize a decree, with constructive notice to defendant;[68] orders of naturalization;[69] proceedings to determine the legal settlement of a pauper or for his removal to the place on which he is legally chargeable;[70] and decisions establishing a pedigree,[71] determining the identity of a party[72] or his legitimacy,[73] or his status as slave or free.[74] So also the judgments and decrees of probate courts acting within the scope of their peculiar jurisdiction are quasi *in rem*, and are binding and conclusive upon all parties in interest, without other process than

uum Oil Co., 109 Ala. 387, 19 So. 414; Baldwin *v.* Woodbridge, etc., Engineering Co., 59 N. J. L. 317, 36 Atl. 683; Fiske *v.* Anderson, 12 Abb. Pr. (N. Y.) 8; Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422, 60 N. E. 603. And see *infra*, XXII, B, 5, g, (III). But if defendant voluntarily appears, submits himself to the jurisdiction of the court, and defends on the merits, the action becomes one *in personam*, so that a personal judgment may be rendered. Arnold *v.* Frazier, 5 Strobh. (S. C.) 33. See, generally, ATTACHMENT, 4 Cyc. 368.

67. The decision in such an action, although final and binding for the purposes of the proceeding, is not conclusive on strangers. Aber *v.* Clark, 10 N. J. L. 217, 18 Am. Dec. 417; Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637; Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Newton *v.* Mutual Ben. L. Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335; Van Deusen *v.* Sweet, 51 N. Y. 378; Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Thomasson *v.* Kercheval, 10 Humphr. (Tenn.) 322. See, generally, INSANE PERSONS.

Retroactive effect.— An adjudication of mental unsoundness *per se* is evidence only of the mental condition of the subject at the time of such adjudication and thereafter; it cannot relate back presumptively to a prior date, as evidence of his insanity at such date. But where it is shown that the same condition of mind has existed in a person for a considerable period of time prior to the adjudication of insanity, such adjudication is competent evidence, where the act claimed to have been affected by such condition occurred within such prior time. Small *v.* Champeny, 102 Wis. 61, 78 N. W. 407. See, generally, INSANE PERSONS.

68. Hood *v.* Hood, 110 Mass. 463; Smith *v.* Smith, 13 Gray (Mass.) 209; Burlen *v.* Shannon, 3 Gray (Mass.) 387; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. See Garner *v.* Garner, 56 Md. 127; Corry *v.* Lackey, 105 Mich. 363, 63 N. W. 418. See, generally, DIVORCE, 14 Cyc. 725 *et seq.*

69. State *v.* Penney, 10 Ark. 621; McCarthy *v.* March, 5 N. Y. 263; State *v.* Hoeflinger, 35 Wis. 393; The Acorn, 1 Fed. Cas. No. 29, 2 Abb. 434. See, generally, ALIENS, 2 Cyc. 114.

70. Jennison *v.* West Springfield, 13 Gray (Mass.) 544; West Buffalo *v.* Walker Tp., 8 Pa. St. 177; Pittsford *v.* Chittenden, 58 Vt. 49, 3 Atl. 323; Cabot *v.* Washington, 41 Vt. 168; Dorset *v.* Manchester, 3 Vt. 370; Rex *v.* Cirencester, Burr. S. Cas. 17; Rex *v.* Bentley, Burr. S. Cas. 425; Reg. *v.* Hartington Middle Quarter Tp., 3 C. L. R. 554, 4 E. & B. 780, 1 Jur. N. S. 586, 24 L. J. M. C. 98, 3 Wkly. Rep. 285, 82 E. C. L. 780. *Contra*, Bethlehem *v.* Watertown, 47 Conn. 237. See, generally, POOR PERSONS.

71. Blythe's Estate, 112 Cal. 689, 45 Pac. 6; Whitman *v.* Heneberry, 73 Ill. 109; Sarniquet's Succession, 26 La. Ann. 419; Glover *v.* Doty, 1 Rob. (La.) 130; Clemens *v.* Clemens, 37 N. Y. 59; Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472; Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553. See Hollingsworth *v.* Barbour, 4 Pet. (U. S.) 466, 7 L. ed. 922. But the record of proceedings in partition among heirs is evidence of the fact of partition, but not of the heirship of the parties. Archer *v.* Bacon, 12 Mo. 149. And see Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

72. Vernenil *v.* Harper, 28 La. Ann. 893.

Where the question whether or not a child was born alive has been in issue and determined in the affirmative, on an application by his mother for leave to administer on his estate, such decision is conclusive on the parties to the proceeding in which it is made, in a subsequent proceeding to object to the mother's account as administrator. Garwood *v.* Garwood, 29 Cal. 514.

73. Bonella *v.* Madnel, 26 La. Ann. 112; Huebschmann *v.* Cotzhausen, 107 Wis. 64, 82 N. W. 720; Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175, 18 L. ed. 186. But a decision finding the legitimacy or illegitimacy of a person is not conclusive on those who were strangers to the proceeding in which it was made. Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Kearney *v.* Sansbury, 15 Wall. (U. S.) 51, 21 L. ed. 41. And see Ferrell *v.* Broadway, 127 N. C. 404, 37 S. E. 504.

74. Strayhorn *v.* Giles, 22 Ark. 517; Chancellor *v.* Milton, 1 B. Mon. (Ky.) 25; Alexander *v.* Stokely, 7 Serg. & R. (Pa.) 299; Shelton *v.* Barbour, 2 Wash. (Va.) 64. But a decision on this point is not strictly *in rem*, and therefore not conclusive on strangers. Talbot *v.* David, 2 A. K. Marsh. (Ky.) 603; Louis *v.* Ricard, 4 La. Ann. 87; Davis *v.* Wood, 1 Wheat. (U. S.) 6, 4 L. ed. 22.

such general notice as may be given by publication to all persons interested in the estate;[75] and the same is true of proceedings in tax cases,[76] and proceedings for the foreclosure of a mortgage or a mechanic's or other lien, in so far as concerns their conclusiveness between the parties to the action,[77] although they are not binding on third persons having interests in the property affected, unless they are made parties and duly served with process.[78] So also certain kinds of proceedings directly affecting real estate have been held to be in the nature of proceedings *in rem*,[79] and judgments have been held to have the conclusive effect of such adjudications when rendered in patent cases,[80] and in proceedings

But *compare* Davis *v.* Forrest, 7 Fed. Cas. No. 3,634, 2 Cranch C. C. 23.

75. *California.*— Mulcahey *v.* Dow, 131 Cal. 73, 63 Pac. 158; Hanley *v.* Hanley, 114 Cal. 690, 46 Pac. 736.

Tennessee.— Fry *v.* Taylor, 1 Head 594; Patton *v.* Allison, 7 Humphr. 320. *Compare* Brown *v.* Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640, holding that a suit for the construction of a testamentary writing is not in the nature of a proceeding *in rem*.

Texas.— Miller *v.* Foster, 76 Tex. 479, 13 S. W. 529; Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735.

West Virginia.— See Morin *v.* St. Paul, etc., R. Co., 33 Minn. 176, 22 N. W. 251.

Wisconsin.— Liginger *v.* Field, 78 Wis. 367, 47 N. W. 613.

United States.— McArthur *v.* Allen, 3 Fed. 313.

See DESCENT AND DISTRIBUTION, 14 Cyc. 101; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 140–144, 510, 534, 663–666, 749, 792, 1054–1062, 1188–1195; and, generally, WILLS.

76. See *supra*, XIV, D, 5. But judgment for plaintiff in an action against a city to recover an assessment paid, holding the assessment roll void, is not *in rem*, and therefore not conclusive or competent evidence in an action by another plaintiff against the city in which the validity of the same assessment roll is involved. Tifft *v.* Buffalo, 164 N. Y. 605, 58 N. E. 1093.

77. *Illinois.*— Williams *v.* Ives, 49 Ill. 512; Russell *v.* Brown, 41 Ill. 183.

Iowa.— Smith *v.* Moore, 112 Iowa 60. 83 N. W. 813.

Kansas.— Smith *v.* Kreager, 6 Kan. App. 271, 51 Pac. 813.

Louisiana.— Bailly *v.* Percy, 14 La. 17.

Nebraska.— Nebraska L. & T. Co. *v.* Doman, (1903) 93 N. W. 1022; South Omaha Lumber Co. *v.* Central Inv. Co., 32 Nebr. 529, 49 N. W. 429; Rector *v.* Rotton, 3 Nebr. 171.

New Jersey.— White *v.* Williams, 3 N. J. Eq. 376.

Texas.— McCollum *v.* Wood, (Civ. App. 1896) 33 S. W. 1087.

West Virginia.— Lehman *v.* Hinton, 44 W. Va. 1, 29 S. E. 984; Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

United States.— Oswald *v.* Kampmann, 28 Fed. 36.

See AGRICULTURE, 2 Cyc. 68; and, generally, MECHANICS' LIENS; MORTGAGES.

78. Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48; Stroupper *v.* McCauley, 45 Ga. 74; Douglass *v.* Bishop, 27 Iowa 214; Bowman *v.* McLaughlin, 45 Miss. 461; Falconer *v.* Frazier, 7 Sm. & M. (Miss.) 235; Chard *v.* Holt, 136 N. Y. 30, 32 N. E. 740; Fuller *v.* Van Geesen, 4 Hill (N. Y.) 171. And see, generally, MECHANICS' LIENS; MORTGAGES.

79. Such decisions have been made in regard to actions of partition, proceedings to quiet title or to remove clouds from title, and trespass to try title. See Loring *v.* Hildreth, 170 Mass. 328, 49 N. E. 652, 64 Am. St. Rep. 301, 40 L. R. A. 127; Pillsbury *v.* Dugan, 9 Ohio 117, 34 Am. Dec. 427; Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Meyer *v.* Kuhn, 65 Fed. 705, 13 C. C. A. 298. *Compare* Childs *v.* Hayman, 72 Ga. 791. See, generally, PARTITION; QUIETING TITLE; TRESPASS TO TRY TITLE.

Eminent domain.— In a proceeding by a railroad company to acquire the right to use the track of another company for the purposes of its business, the applicant will be concluded by a former adjudication against its corporate existence, had on a like application as to a third corporation. *In re* Brooklyn, etc., R. Co., 19 Hun (N. Y.) 314.

Confirming judicial sale.— In Louisiana a judgment confirming and homologating a judicial sale of realty has the force of *res judicata*, so as to operate as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property so sold, in consequence of any illegality or informality in the proceedings, whether before or after judgment. Montgomery *v.* Samory, 99 U. S. 482, 25 L. ed. 375; Jeter *v.* Hewitt, 22 How. (U. S.) 352, 16 L. ed. 345.

A decree for the sale of the estate of a lunatic for the payment of debts is a decree *in rem*, and the creditors are bound by it, although not parties to the proceeding. Latham *v.* Wiswall, 37 N. C. 294. See INSANE PERSONS.

Establishment of roads.— A proceeding had in the proper court for the laying out of a public road is in the nature of a proceeding *in rem* and binds all the world. Millcreek Tp. *v.* Reed, 29 Pa. St. 195. See Bradbury *v.* Walton, 94 Ky. 163, 21 S. W. 869, 14 Ky. L. Rep. 823. And see, generally, STREETS AND HIGHWAYS.

80. The construction of a patent in an action is conclusive in another action by the patentee against a third person, where no new defenses are interposed. American Paper

for the organization of irrigation districts, proceedings under the local option law, and a few other instances.[81]

XVII. ASSIGNMENT OF JUDGMENTS.[82]

A. Requisites and Validity — 1. ASSIGNABILITY IN GENERAL. At common law a judgment is not assignable so as to vest the legal title in the assignee;[83] but such an assignment operates to vest an equitable interest in the assignee which the law will protect.[84] By statute in some jurisdictions a judgment may be assigned so as to pass the legal title.[85]

2. JUDGMENTS ASSIGNABLE — a. In General. In reference to the assignability of a judgment, the cause of action on which it was founded is not generally material. Thus a judgment recovered for a tort is assignable to the same extent as one based on a contract.[86] A decree in equity, although not assignable at law, may

Pail, etc., Co. *v.* National Folding Box, etc., Co., 51 Fed. 229. 2 C. C. A. 165. But a decree declaring the invalidity of a patent is in no sense a proceeding *in rem*, and does not prevent the same or a different plaintiff from prosecuting a suit against another defendant, and establishing its validity upon different or even upon the same evidence. Consolidated Roller-Mill Co. *v.* George T. Smith Middlings Purifier Co., 40 Fed. 305. And see Ingersoll *v.* Jewett, 13 Fed. Cas. No. 7,039, 16 Blatchf. 378. See, generally, PATENTS.

81. **Proceedings for the organization of an irrigation district.**— People *v.* Linda Vista Irr. Dist., 128 Cal. 477. 61 Pac. 86.

Proceedings under the local option law.— McConkie *v.* Remley, 119 Iowa 512, 93 N. W. 505.

Order finally confirming an auditor's account in a receivership, ascertaining the balance on hand, and ordering distribution see Rogers *v.* Citizens' Nat. Bank, 93 Md. 613, 49 Atl. 843.

82. See, generally, ASSIGNMENTS.

Admissibility of evidence of assignee's title in action on judgment see *infra*, XX, G, 2, a.

Issue as to assignment in action on judgment see *infra*, XX, F, 4.

Setting out assignment in suit on judgment see *infra*, XX, F, 1, a.

Creditor's suit by assignee of judgment see CREDITORS' SUITS, 12 Cyc. 33; FRAUDULENT CONVEYANCES, 20 Cyc. 431, 711.

Validity of assignment by client or attorney see ATTORNEY AND CLIENT, 4 Cyc. 940, 941.

83. *Arkansas.*— Hanks *v.* Harris, 29 Ark. 323.

Illinois.— Schmidt *v.* Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250 [*reversing* 98 Ill. App. 421]; Hossack *v.* Underwood, 55 Ill. 123.

Indiana.— Richardville *v.* Cummins, 5 Blackf. 48. *Compare* Jones *v.* Burtch, 5 Blackf. 372.

Kentucky.— Millar *v.* Field, 3 A. K. Marsh. 104.

Missouri.— Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894.

North Carolina.— Ferebee *v.* Doxey, 28 N. C. 446.

South Carolina.— Bloomstock *v.* Duncan, 2 McCord 318, 13 Am. Dec. 728.

United States.— Coates *v.* Muse, 5 Fed. Cas. No. 2,918, 1 Brock. 551; U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118.

See 30 Cent. Dig. tit. "Judgment," § 1526.

84. *Illinois.*— Schmidt *v.* Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250 [*reversing* 98 Ill. App. 421]; Hossack *v.* Underwood, 55 Ill. 123.

Kentucky.— Pearson *v.* Talbot, 4 Litt. 435; Millar *v.* Field, 3 A. K. Marsh. 104.

Massachusetts.— Dunn *v.* Snell, 15 Mass. 481; Brown *v.* Maine Bank, 11 Mass. 153; Allen *v.* Holden, 9 Mass. 133, 6 Am. Dec. 46.

Missouri.— Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894.

North Carolina.—Moore *v.* Nowell, 94 N. C. 265; Hewett *v.* Outland, 37 N. C. 438.

United States.— Coates *v.* Muse, 5 Fed. Cas. No. 2,918, 1 Brock. 551; U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118.

See 30 Cent. Dig. tit. "Judgment," § 1526.

Equitable assignment see *infra*, XVII, A, 5, c.

85. *California.*— Curtin *v.* Kowalsky, 145 Cal. 431, 78 Pac. 962.

Iowa.— Edmonds *v.* Montgomery, 1 Iowa 143.

Missouri.— Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894.

New Jersey.— By statute enacted in 1890, all judgments are assignable, and the assignee may sue thereon in his own name. Lydecker *v.* Babcock, 55 N. J. L. 394, 26 Atl. 925.

New York.— Under Rev. St. § 1912, a judgment recovered on any cause of action may be assigned. Blake *v.* Griswold, 104 N. Y. 613, 11 N. E. 137.

86. Williams *v.* West Chicago St. R. Co., 199 Ill. 57, 64 N. E. 1024; Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148; Mackey *v.* Mackey, 43 Barb. (N. Y.) 58 [and see Risley *v.* Phœnix Bank, 11 Hun (N. Y.) 484; Kessel *v.* Albetis, 56 Barb. (N. Y.) 362; Bridge *v.* Johnson, 5 Wend. (N. Y.) 342]; Moore *v.* Nowell, 94 N. C. 265.

Breach of promise.— A judgment recovered in a breach of promise suit can be as-

be transferred for a valuable consideration, and the transfer will then be supported by a court of chancery.[87] But a judgment once fully paid off and satisfied is not thereafter capable of assignment.[88]

b. Future Judgments. In the case of actions *ex contractu*, a valid assignment may be made before the rendition of the judgment which will become operative as soon as the judgment is perfected.[89] But it is otherwise where the cause of action is in tort; there can be no assignment until the claim has been merged in an actual judgment;[90] and it makes no difference that a verdict has been given for plaintiff.[91]

3. Parties to Assignment. To effect a valid assignment of a judgment, the assignor must have a real and substantial interest in it.[92] But subject to this limitation any person who is the actual owner of the judgment, or has the right to enforce and collect it, may make an assignment of it.[93] So also any person, natural or artificial, may become the assignee of a judgment.[94] And while ordinarily the payment of a judgment by one primarily liable on it is an absolute satisfaction,

signed. Stewart *v.* Lee, 70 N. H. 181, 46 Atl. 31.

87. Coates *v.* Muse, 5 Fed. Cas. No. 2,918, 1 Brock. 551.

88. Cook *v.* Armstrong, 25 Miss. 63; Conor *v.* Hernstein, 6 Rob. (N. Y.) 552; Waters *v.* Largy, 5 Rawle (Pa.) 131.

89. *Georgia.*— Dugas *v.* Mathews, 9 Ga. 510, 54 Am. Dec. 361.

Iowa.— Wahl *v.* Phillips, 15 Iowa 478; Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132; Wright *v.* Parks, 10 Iowa 342.

New Jersey.— Dignan *v.* Dignan, (Ch. 1891) 22 Atl. 1092.

New York.— Robinson *v.* Weeks, 6 How. Pr. 161.

Pennsylvania.— Bechtel *v.* Lauer Brewing Co., 21 Pa. Co. Ct. 449.

Texas.— Hudson *v.* Morriss, 55 Tex. 595.

United States.— Rufe *v.* Commercial Bank, 99 Fed. 650, 40 C. C. A. 27; Commercial Bank *v.* Rufe, 92 Fed. 789.

90. Gamble *v.* Central R., etc., Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276; Crouch *v.* Gridley, 6 Hill (N. Y.) 250; Comegys *v.* Vasse, 1 Pet. (U. S.) 213, 7 L. ed. 108. But see North Chicago St. R. Co. *v.* Ackley, 58 Ill. App. 572; Mackey *v.* Mackey, 43 Barb. (N. Y.) 58.

91. Lawrence *v.* Martin, 22 Cal. 173; Gamble *v.* Central R., etc., Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276; Rice *v.* Stone, 1 Allen (Mass.) 566. *Compare* Pratt *v.* Wertheimer, 39 Hun (N. Y.) 463.

92. Thus the assignee of a judgment takes nothing when the record of the judgment itself apprises him that plaintiff therein had no beneficial interest, but was a mere trustee for others. Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854. But on the other hand, where A furnished money to B to purchase a judgment, and had it transferred to B, and the latter afterward assigned it to C, who had no knowledge of A's interest, it was held that C would hold the money collected on the judgment as against A. Garland *v.* Harrison, 17 Mo. 282.

Attorney at law.— The general retainer of an attorney at law gives him no power or authority to assign the judgment recovered by his client. See Attorney and Client, 4 Cyc. 961.

Agent.— Where the contract was made with an agent in his own name for the benefit of his principal, he is entitled, under the laws of New York, to sue on it in his own name, and is the legal owner of the judgment, with power to dispose of it for the benefit of his principal. Seymour *v.* Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683. And see Principal and Agent.

State agent.— A judgment in favor of the state, when paid by a surety, cannot be assigned to such surety by any officer or agent of the state. Peacock *v.* Pembroke, 8 Md. 348.

Receiver.— A receiver of a corporation may sell and assign a judgment in its favor. Rogers *v.* Dimon, 106 Ill. App. 201.

93. A joint owner of a judgment may assign his interest therein. Hunter *v.* Mauseau, 91 Minn. 124, 97 N. W. 651. And where a judgment is owned by two parties jointly, but held in the name of one only, an assignment by him to a third person, who has no knowledge of the joint ownership, will convey the title. Garland *v.* Harrison, 17 Mo. 282.

A corporation may assign a judgment in its favor. Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66. And it has been held that this may also be done by a national bank. Emory *v.* Joice, 70 Mo. 537.

Successor in interest.— Where a partnership, after recovering a judgment, becomes incorporated, an assignment of the judgment made in the name of the corporation is valid. Miller *v.* Cousins, (Iowa 1902) 90 N. W. 814.

Fraudulent creditor.— One who procures from a firm judgment notes in fraud of their creditors has no assignable interest in the judgments entered thereon. Taylor's Appeal, 45 Pa. St. 71.

94. A corporation may take an assignment of a judgment and sue thereon. Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792. So also may a constable, where no execution on the judgment comes to his hands. Spaugh *v.* Huffer, 14 Ind. 305. And so may an attorney at law

although the judgment is assigned to him,[95] yet a surety on the debt for which the judgment was recovered may hold the judgment under an assignment, after paying its amount, if his intention not to satisfy the judgment was clear.[96]

4. Consideration. The rights of an assignee of a judgment are not governed by the price he paid for it, and are not affected by the fact that the consideration was less than the face of the judgment.[97]

5. Mode and Sufficiency of Assignment — a. In General. In the absence of statutory directions as to the mode of assigning a judgment, this may be accomplished by an indorsement upon the record,[98] or by a separate written instrument.[99] The instrument need not be under seal[1] and ordinarily it is not required to be recorded, the mere filing it among the papers in the case being sufficient.[2] It

practising in the court where the judgment was rendered. Wilson *v.* Lemonde, 2 Quebec Pr. 156. And when one of several joint judgment defendants paid his aliquot part in cash, gave his note for the remainder, indorsed by a third person, not bound by the judgment, and procured the judgment to be assigned to a trustee for the benefit of such third person without his knowledge, it was held that such third person might affirm and enforce the assignment. Harbeck *v.* Vanderbilt, 20 N. Y. 395.

95. Zimmermann *v.* Gaumer, 152 Ind. 552, 53 N. E. 829; Kempt *v.* Macauley, 9 Ont. Pr. 582. And see Dickerson *v.* Campbell, 47 Fla. 147, 35 So. 986.

Joint debtors.— As to effect of payment by one of two joint defendants, and attempt to take an assignment as against his co-debtor see *infra*, XIX, C, 1, b.

96. Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063; Davis *v.* Wilson, 52 Iowa 187, 3 N. W. 52; Hartman's Appeal, 6 Pa. St. 76; McLean *v.* Jones, 2 Can. L. J. 206; Victoria Mutual *v.* Freel, 10 Ont. Pr. 45; Cockburn *v.* Gillespie, 11 Grant Ch. (U. C.) 465; Smith *v.* Burn, 30 U. C. C. P. 630.

97. Eaton *v.* Patterson, 2 Stew. & P. (Ala.) 9; Metropolitan Bank *v.* Blaise, 109 La. 92, 33 So. 95; Harmon *v.* Hope, 87 N. Y. 10; Inglehart *v.* Thousand Island Hotel Co., 32 Hun (N. Y.) 377. *Compare* Campion *v.* Friedberg, 55 Ill. App. 450.

The presumption in the absence of evidence to the contrary, is that the judgment was transferred for the full amount appearing to be due upon its face. Hawks *v.* Hinchcliff, 17 Barb. (N. Y.) 492.

"Without recourse." — Making an assignment of a judgment without recourse does not imply any want of consideration or of good faith. Harper *v.* Keys, 54 Ind. 510.

In California, by force of statutes, an assignment of a judgment vests in the assignee all the assignor's title, regardless of whether any consideration is paid for the assignment or not, and the assignor has nothing which he can subsequently assign, unless there be left in him some equitable interest by reason of a trust existing in his favor. Curtin *v.* Kowalsky, 145 Cal. 431, 78 Pac. 962.

98. Coon *v.* Reed, 79 Pa. St. 240; Cavender *v.* Grove, 5 Fed. Cas. No. 2,530, 4 Biss. 269.

An assignee who has caused the judgment to be marked to his use on the docket is not bound to see to it that the entry is duly copied when the cause is transferred to another docket. Gill *v.* Claggett, 4 Md. Ch. 153.

Where a transcript or certificate of the judgment is filed in a higher court, for the purpose of creating a lien on real estate, it is not necessary to transfer such transcript or certificate in order to effect an assignment of the judgment. Travis *v.* Rhodes, 142 Ala. 189, 37 So. 804.

99. An exchange of telegrams resulting in an agreement and the forwarding of the agreed price may constitute a valid assignment. Smith *v.* Peck, 128 Cal. 527, 61 Pac. 77. But see Strauss *v.* Seamon, 2 N. Y. Suppl. 716, holding that a paper purporting to be an assignment of a judgment for costs by a party to his attorney cannot have that effect where it is unacknowledged and unsupported by any proof of the signature, delivery, or time of execution, or by proof that anything was due the attorney.

Substituting lost assignment.— An assignment by S to R of a judgment, under an agreement between them and L, made for the purpose of transferring the interest which L had in the judgment under a written assignment to him by S, which was lost, is effectual. Snyder *v.* Malone, 124 Wis. 114, 102 N. W. 354.

The assignment of a claim secured by bond carries with it a judgment which had been already entered on the warrant of attorney accompanying the bond, although the judgment was not mentioned in the assignment. Booth *v.* Williams, 2 Wkly. Notes Cas. (Pa.) 504.

1. Becton *v.* Ferguson, 22 Ala. 599; Mitchell *v.* Hockett, 25 Cal. 538, 85 Am. Dec. 151; Ford *v.* Stuart, 19 Johns. (N. Y.) 342.

2. Schmidt *v.* Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250; Harris *v.* Frank, 29 Kan. 200; Tutt *v.* Couzins, 50 Mo. 152; Winberry *v.* Koonce, 83 N. C. 351.

Not a judicial proceeding.— An assignment of a judgment recovered in a United States court is not a "judicial proceeding" within the meaning of a statute giving full faith and credit to the judicial proceedings of the federal courts, when authenticated by the clerk and certified by the judge, and hence is not admissible in evidence without proper

may be executed under a power of attorney.[3] But in all such cases there must be a delivery of the instrument of assignment to the assignee or some one authorized by him to accept it.[4] A judgment may even be assigned by mere parol,[5] provided the intention to assign and the terms are clearly shown.[6] But a mere executory contract to assign a judgment does not vest any title in the assignee,[7] nor is a mere authority to collect the judgment, or an order for its payment, equivalent to an assignment.[8] A written assignment will not be vitiated by mistakes in the description of the judgment or in other particulars if it is capable of being made certain,[9] and if an entry of record is so ambiguous as not to show whether an assignment or a satisfaction was intended, it may be explained by parol.[10] But whatever mode of assignment is adopted, the assignment must be definitive and absolute.[11] An assignment of a judgment made in conformity to the laws of the state where the judgment was rendered is valid everywhere.[12]

b. Statutory Requirements. Where the statute provides a mode of assigning judgments, its requirements must be followed in order to pass the legal title and secure to the assignee any rights which depend solely on the statute;[13] but such a

proof of its execution. Wonderly *v.* Lafayette Co., 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386.

3. Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790; Rufe *v.* Commercial Bank, 99 Fed. 650, 40 C. C. A. 27.

A power of attorney to assign a judgment need not be recorded. Boos *v.* Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.

4. Williams *v.* West Chicago St. R. Co., 85 Ill. App. 305. See Baker *v.* Secor, 4 Silv. Sup. (N. Y.) 516, 7 N. Y. Suppl. 803.

5. *Alabama.*— Steele *v.* Thompson, 62 Ala. 323; Haden *v.* Walker, 5 Ala. 86; Brahan *v.* Ragland, 3 Stew. 247.

Arkansas.— Wright *v.* Yell, 13 Ark. 503, 58 Am. Dec. 336; Weir *v.* Pennington, 11 Ark. 745; Clark *v.* Moss, 11 Ark. 736.

California.— Smith *v.* Peck, 128 Cal. 527, 61 Pac. 77.

Colorado.— Stoddard *v.* Benton, 6 Colo. 508.

Indiana.— Cravens *v.* Duncan, 55 Ind. 347; Wood *v.* Wallace, 24 Ind. 226.

Louisiana.— Delassize's Succession, 8 Rob. 259. A judgment on a promissory note extinguishes its negotiability, and is only transferable as other credits are. Newman *v.* Irwin, 43 La. Ann. 1114, 10 So. 181.

New York.— Kessel *v.* Albetis, 56 Barb. 362; Baker *v.* Secor, 4 Silv. Sup. 516, 7 N. Y. Suppl. 803; Ford *v.* Stuart, 19 Johns. 342; Briggs *v.* Dorr, 19 Johns. 95; Prescott *v.* Hull, 17 Johns. 284.

North Carolina.— Bartlett *v.* Yates, 52 N. C. 615. *Compare* Winberry *v.* Koonce, 83 N. C. 351.

Texas.— Garvin *v.* Hall, 83 Tex. 295, 18 S. W. 731; Putnam *v.* Capps, 6 Tex. Civ. App. 610, 25 S. W. 1024.

West Virginia.— Hall *v.* Taylor, 18 W. Va. 544.

See 30 Cent. Dig. tit. "Judgment," § 1533.

Contra.— Dugas *v.* Mathews, 9 Ga. 510, 54 Am. Dec. 361; Parker *v.* Bacon, 26 Miss. 425.

Evidence of assignment.— The testimony of two plaintiffs, somewhat corroborated by the testimony of other witnesses, that the judgment had been assigned to one of plaintiffs, establishes such assignment as against the testimony of defendant alone. Mosher *v.* McDonald, (Iowa 1905) 102 N. W. 837.

6. Thomas *v.* Porter, 3 Bush (Ky.) 177.

7. Childs *v.* Jones, 42 N. J. Eq. 458, 11 Atl. 16; Smith *v.* Brownell, 39 Barb. (N. Y.) 370; Payton *v.* Wight, 2 Hilt. (N. Y.) 77; Ithaca Agricultural Works *v.* Eggleston, 4 N. Y. Suppl. 933; Ensworth's Appeal, 52 Pa. St. 465; Levering *v.* Phillips, 7 Pa. St. 387.

8. Teetor *v.* Abden, 2 Ind. 183; Thomas *v.* Porter, 3 Bush (Ky.) 177; Green *v.* Ashby, 6 Leigh (Va.) 135. But *compare* Hussey *v.* Culver, 3 Silv. Sup. (N. Y.) 126, 6 N. Y. Suppl. 466; Rufe *v.* Commercial Bank, 99 Fed. 650, 40 C. C. A. 27. And see Dunn *v.* Snell, 15 Mass. 481, holding that the delivery of an execution with intent to transfer the debt for a valuable consideration is a sufficient assignment of the judgment.

9. *Alabama.*— Griffin *v.* Camack, 36 Ala. 695, 76 Am. Dec. 344.

Iowa.— Klemme *v.* McLay, 68 Iowa 158, 26 N. W. 53; Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132.

Massachusetts.— Drury *v.* Morse, 3 Allen 445.

Minnesota.— Willis *v.* Jelineck, 27 Minn. 18, 6 N. W. 373.

New York.— People *v.* Fleming, 2 N. Y. 484; Aylesworth *v.* Brown, 10 Barb. 167.

See 30 Cent. Dig. tit. "Judgment," § 1533.

10. Emory *v.* Joice, 70 Mo. 537. See Cottrell *v.* Wheeler, 89 Iowa 754, 57 N. W. 433.

11. Pike *v.* Bright, 29 Ala. 332. See Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657.

12. Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66. See Baker *v.* Stonebraker, 34 Mo. 172.

13. *Alabama.*— Blackman *v.* Joiner, 81 Ala. 344, 1 So. 851. See Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84.

Delaware.— Farmers' Bank *v.* Wilson, 3 Houst. 220.

Indiana.— Kelley *v.* Love, 35 Ind. 106.

Missouri.— Turner *v.* Johnson, 95 Mo. 431, 7 S. W. 570, 6 Am. St. Rep. 62.

statute is not regarded as exclusive, and does not prevent the party from making an assignment, good at least in equity, in any other lawful way.[14]

c. Equitable Assignment. Equity will give effect to an attempted assignment of a judgment, made in good faith, and failing of its legal effect through some irregularity or informality, and will give the assignee the remedies to which he would have been entitled under a proper legal assignment.[15] And even where there has been no attempt to effect an assignment, equity will sometimes give effect to the transaction as an assignment in order to protect the rights of the assignee.[16]

6. Effect of Fraud.[17] As between the parties to it an assignment of a judgment may be vitiated by fraud or bad faith,[18] but the judgment debtor cannot impeach the assignment for fraud unless he can show that he was injured by the fraud.[19]

B. Operation and Effect — 1. In General. The effect of a valid assignment of a judgment is to divest the assignor of all interest in it and all control over it,[20] and to transfer to the assignee the ownership of the judgment debt and all remedies and means of enforcing and collecting it.[21] And however often a

New York.— People *v.* Fleming, 4 Den. 137.

See 30 Cent. Dig. tit. "Judgment," § 1534.

14. Dugas *v.* Mathews, 9 Ga. 510, 54 Am. Dec. 361; Adams *v.* Lee, 82 Ind. 587; Snell *v.* Maddox, 20 Ind. App. 169, 49 N. E. 856; Burgess *v.* Cave, 52 Mo. 43; Sweet Springs Chemical Bank *v.* Bulkley, 68 Mo. App. 327; Wise *v.* Loring, 54 Mo. App. 258; Knapp *v.* Standley, 45 Mo. App. 264; Putnam *v.* Capps, 6 Tex. Civ. App. 610, 25 S. W. 1024.

15. *Alabama.*— Brahan *v.* Ragland, 3 Stew. 247.

Indiana.— Chicago, etc., R. Co. *v.* Higgins, 150 Ind. 329, 50 N. E. 32; Shirts *v.* Irons, 54 Ind. 13; Kelley *v.* Love, 35 Ind. 106; Burson *v.* Blair, 12 Ind. 371.

Mississippi.— Harris *v.* Hazelhurst Oil Mill, etc., Co., 17 Miss. 603, 30 So. 273.

Missouri.— Emory *v.* Joice, 70 Mo. 537; Sweet Springs Chemical Bank *v.* Bulkley, 68 Mo. App. 327.

Ohio.— Pittsburgh, etc., R. Co. *v.* Volkert, 58 Ohio St. 362, 50 N. E. 924; Steele *v.* Lowry, 4 Ohio 72, 19 Am. Dec. 581.

Pennsylvania.— Tilden *v.* Evans, 3 Phila. 124.

Canada.— Chichester *v.* Gordon, 4 Ont. Pr. 92.

See 30 Cent. Dig. tit. "Judgment," § 1539.

Entry on wrong record.— Where a judgment creditor sells his judgment and attempts to assign it upon the record to the purchaser, but by mistake the assignment is made upon the wrong record, it will operate as an equitable assignment. Frybarger *v.* Andre, 106 Ind. 337, 7 N. E. 5.

16. See cases cited *infra*, this note.

Applications and limitations of rule.— Thus where A recovered judgment for possession in an action for real property against B, and afterward sold the property to C, without assigning the judgment on the record, it was held that C by the purchase of the property became the real party in interest, and was entitled to revive the judgment by scire facias. Wright *v.* Parks, 10 Iowa 342. So when a person having a future interest in property on which there is a judgment lien pays the debt of the judgment debtor for the purpose of protecting such interest he thereby becomes an equitable assignee of the judgment, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit. Sutton *v.* Sutton, 26 S. C. 33, 1 S. E. 19. But a refusal by a judgment creditor of a tender from a stranger to the judgment of his debt, interest, and costs, will not work an equitable assignment. Nesbit *v.* Martin, 4 Pa. Co. Ct. 95.

17. Fraud as ground for rescinding or setting aside assignment see *infra*, XVII, D.

18. Empire Land, etc., Co. *v.* Engley, 18 Colo. 388, 33 Pac. 153; Thompson *v.* Jones, 55 Hun (N. Y.) 268, 8 N. Y. Suppl. 373.

19. Long *v.* Klein, 35 La. Ann. 384; McAleer *v.* Young, 40 Md. 439; Bender *v.* Matney, 122 Mo. 244, 26 S. W. 950; Garvey *v.* Jarvis, 46 N. Y. 310, 7 Am. Rep. 335; Cowenhoven *v.* Onderdonk, 1 How Pr. (N. Y.) 60.

20. Howard *v.* Graybehl, 16 Colo. App. 80, 63 Pac. 953; Branch *v.* Wilkens, (Tex. Civ. App. 1901) 63 S. W. 1083. See Haden *v.* Walker, 5 Ala. 86.

The fact that the assignment is a fraud on creditors does not render the assignment any the less binding on the assignor, and he has no interest thereafter in the judgment which can be assigned. Ford *v.* Rosenthal, 74 Tex. 28, 11 S. W. 28.

Judgment on note.— The mere assignment of a judgment obtained by an indorsee against the maker of a promissory note does not transfer to the assignee of such judgment the cause of action theretofore existing against the indorsers (Cole *v.* Matchett, 78 Ind. 601; Kelsey *v.* McLaughlin, 76 Ind. 379; Ward *v.* Haggard. 75 Ind. 381); and after the holder of a note has assigned all his interest in the judgment recovered thereon against the maker he cannot sue the indorser (Moorman *v.* Wood, 117 Ind. 144, 19 N. E. 739).

21. Strout *v.* Natoma Water, etc., Co., 9 Cal. 78; Ives *v.* Addison, 39 Kan. 172, 17 Pac. 797; Norton *v.* Whiting, 1 Paige (N. Y.) 578.

judgment may be thus transferred, it does not become *functus officio*, where the intention of the parties to the transfers is evidently to keep it alive;[22] nor do such transactions furnish any reason why the judgment should not be enforced against the judgment debtor.[23]

2. PARTIAL ASSIGNMENT. Assignments of different portions of a judgment to different persons have no effect as against the judgment debtor unless made with his consent,[24] or unless ratified by him,[25] although in some states it is thought that such partial assignments may be enforced in equity.[26] The same principle applies where the judgment is in favor of joint plaintiffs or against joint defendants.[27] As against the assignor a partial assignment of a judgment is valid and binding, even when made without the debtor's consent.[28] As between successive assignees of portions of a judgment, their rights will depend upon priority of assignment, subject to their compliance with the directions of the statute as to making the assignment effectual.[29]

3. ASSIGNMENT AS SECURITY OR FOR COLLECTION. A third person taking an assignment of a judgment as collateral security for a debt acquires the right to control and enforce the judgment,[30] and to satisfy his claims out of the pro-

Remedies of assignee.— The assignee has all the equitable remedies of plaintiff in the judgment. Kimble *v.* Cummins, 3 Metc. (Ky.) 327.

Money previously collected on judgment.— The assignment does not pass any interest in money which the sheriff had previously collected on the judgment. Robinson *v.* Towns, 30 Ga. 818.

22. Carpenter *v.* Andrews, 9 N. Y. St. 427.

23. Aspen Min., etc., Co. *v.* Wood, 84 Fed. 48, 28 C. C. A. 276.

24. Loomis *v.* Robinson, 76 Mo. 488; Burnett *v.* Crandall, 63 Mo. 410; Love *v.* Fairfield, 13 Mo. 300, 53 Am. Dec. 148; Hopkins *v.* Stockdale, 117 Pa. St. 365, 11 Atl. 368; Dietrich's Appeal, 107 Pa. St. 174; Fullmer *v.* Pine Tp., 17 Pa. Co. Ct. 482; Smith *v.* Stockdale, 3 Pa. Co. Ct. 113; Lewis *v.* Third St., etc., R. Co., 26 Wash. 28, 66 Pac. 150.

The debtor's right to set off a cross judgment is not affected by a partial assignment of the judgment against him to which he has not consented. Crecelius *v.* Bierman, 72 Mo. App. 355.

In Minnesota a partial assignment of a judgment is valid if placed on the record as provided by the statute. Wheaton *v.* Spooner, 52 Minn. 417, 54 N. W. 372.

25. McMurray *v.* Marsh, 12 Colo. App. 95, 54 Pac. 852.

26. Line *v.* McCall, 126 Mich. 497, 85 N. W. 1089; Pittsburgh, etc., R. Co. *v.* Volkert, 58 Ohio St. 362, 50 N. E. 924. And see Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 757.

27. Where one joint owner of a decree executes an instrument transferring to a third person a part of his interest therein, the legal title and right to control the decree are not thereby changed, nor does the assignee become a partner in the decree. Hanks *v.* Harris, 29 Ark. 323. And where separate judgments are rendered against two joint defendants, an assignment of the judgment against one defendant gives the assignee no power to release the other defendant. Whittemore *v.* Judd Linseed, etc., Oil Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708.

28. McMurray *v.* Marsh, 12 Colo. App. 95, 54 Pac. 852.

Successive part purchases.— One who purchased part of a judgment from another, and the balance from the latter's sole heir, took good title thereto, no creditors objecting, without administration on the decedent's estate. Barker's Estate, 1 Lanc. L. Rev. (Pa.) 313.

Partial assignment with control of judgment.— Where a debtor assigned to a creditor so much of a judgment against a third person as would pay his debt, and placed the judgment under the creditor's control, it was held that the assignment was valid as against the debtor's administrator. Wood *v.* Wallace, 24 Ind. 226.

29. Thus if the assignee of a part of the judgment does not have his interest marked on the record, or on the bond on which the judgment was based, he will be postponed to a subsequent assignee of the whole judgment, taking without notice of the prior assignment, and who marks his assignment on the record. Fisher *v.* Knox, 13 Pa. St. 622, 53 Am. Dec. 503. But in Moore's Appeal, 92 Pa. St. 309, it is held that where parts of the same judgment debt are successively assigned to different persons, and a sale on execution does not produce enough to pay them all, they will share *pro rata* in the fund, and not be paid in full in the order of the assignments. So an assignment of a judgment which excepts therefrom a specific portion thereof, previously assigned to another as security for a debt, is not equivalent to an assignment subject to the interest of the first assignee. Cahn *v.* Carpless Co., 61 Nebr. 512, 85 N. W. 538.

30. Beale *v.* Mechanics' Bank, 5 Watts (Pa.) 529. But see Bast *v.* Bank, 1 Leg. Rec. (Pa.) 161, holding that the assignee of a judgment, holding it as collateral security, has no power to issue execution without the assignor's consent.

ceeds;[31] but he obtains no better rights than his assignor had, and takes the judgment subject to any equities or disabilities effective against it in the latter's hands;[32] and if he in turn sells or assigns the judgment, his assignee must hold it subject to the right of the original owner to redeem it on paying the amount for which it was pledged as security.[33] On the payment or release of the debt for which the judgment was pledged the assignee's rights determine by operation of law, and the judgment reverts to the original owner without a reassignment.[34] But one taking an assignment of a judgment merely under an authority or as a power to collect it for the assignor has no vested right in it other than as the assignor's agent.[35]

4. Priority of Assignments. Where a judgment is regularly assigned for value, the rights of the assignee are paramount to those of a subsequent attachment or execution creditor of the assignor.[36] But the assignee of a judgment takes no title if his assignor had previously assigned the same judgment to another party, whether or not he had notice of such previous assignment,[37] and the rightful assignee of a judgment may enjoin the collection of the same by one who claims the same judgment by a simulated assignment.[38]

C. Rights and Liabilities of Parties[39] **— 1. Rights and Liabilities of Assignee — a. In General.** On a valid assignment of a judgment the assignee

An assignee of a judgment who advanced money to one of several joint debtors to pay the same, and took an assignment as security, cannot maintain an action against the other debtors. Arnott *v.* Webb, 1 Fed. Cas. No. 562, 1 Dill. 362.

31. Carnes *v.* Platt, 6 Rob. (N. Y.) 270; Towanda First Nat. Bank *v.* Ladd, 126 Pa. St. 188, 17 Atl. 750; Godbold *v.* Kirkpatrick, 26 S. C. 607, 1 S. E. 156; Varnum *v.* Milford, 28 Fed. Cas. No. 16,891, 4 McLean 93.

Proceeds of sale.— A person purchasing property on judicial sale under a judgment assigned as security will be compelled to pay the money to the assignee. Varnum *v.* Milford, 28 Fed. Cas. No. 16,891, 4 McLean 93.

Further advances.— Where a judgment is assigned to secure advances, the assignee cannot include within its lien other advances made to the assignor, as to which there was no agreement on making the assignment. Miller *v.* Klugh, 29 S. C. 124, 7 S. E. 67

32. Datesman's Appeal, 77 Pa. St. 243.

33. Gray *v.* Green, 12 Hun (N. Y.) 598; Poe *v.* Foster, 4 Watts & S. (Pa.) 351.

34. Hossack *v.* Underwood, 55 Ill. 123; Taggart's Case, 17 Ct. Cl. 322.

35. McKee *v.* Murphy, 34 N. Y. Super. Ct. 261; Vanderpool *v.* Vanderpool, 162 Pa. St. 394, 29 Atl. 910.

36. Fore *v.* Manlove, 18 Cal. 436; Hutchinson *v.* Brown, 8 App. Cas. (D. C.) 157; Dinsmore *v.* Boyd, 6 Lea (Tenn.) 689 [*compare* Cole *v.* Brewer, 4 Lea (Tenn.) 318]; Greenhalgh *v.* The Alice Strong, 57 Fed. 249; Stockton *v.* Ford, 11 How. (U. S.) 232, 13 L. ed. 676.

37. *California.*— Cramer *v.* Tittle, 79 Cal. 332, 21 Pac. 750; Mitchell *v.* Hockett, 25 Cal. 538, 85 Am. Dec. 151. And see Curtin *v.* Kowalsky, 145 Cal. 431, 78 Pac. 962, stating that it is not necessary for the assignee of a judgment to file an assignment or give notice of it to other persons who may be about to take a second assignment, and subsequent assignees, although *bona fide* purchasers for value, acquire no title as against the original assignee.

Georgia.— Stonford *v.* Connery, 84 Ga. 731, 11 S. E. 507.

Illinois.—Williams *v.* West Chicago St. R. Co., 199 Ill. 57, 64 N. E. 1024.

New York.— Thompson *v.* Jones, 55 Hun 268, 8 N. Y. Suppl. 373.

West Virginia.— Clarke *v.* Hogeman, 13 W. Va. 718.

See 30 Cent. Dig. tit. "Judgment," § 1547.

See also Julian *v.* Calkins, 85 Mo. 202; Commercial Bank *v.* Rufe, 92 Fed. 789.

In Pennsylvania the subsequent purchase of a judgment, accompanied or followed by a transfer upon the record, will pass title against a prior purchase not docketed, and of which the second purchaser was ignorant. Campbell's Appeal, 29 Pa. St. 401, 72 Am. Dec. 641. And see Pratt's Appeal, 77 Pa. St. 378; Winton's Appeal, 2 Pa. Cas. 83, 3 Atl. 789, 5 Atl. 433. And generally in that state a subsequent assignee of a judgment is protected against a prior assignee who gives no notice of his purchase. Barker's Estate, 6 L. T. N. S. 165.

38. Klein *v.* Dennis, 36 La. Ann. 284.

39. Assigned judgment as set-off see *infra*, XIX, E, 3, e.

Revival of judgment see *infra*, XIX, D, 2, c, (II).

Right of assignee of judgment: Against administrator to enforce liability on administration bond see Executors and Administrators, 18 Cyc. 1276, note 2. To execution generally see Executions, 17 Cyc. 938. To execution against the person see Executions, 17 Cyc. 1502. To maintain a creditors' suit see Creditors' Suits, 12 Cyc. 33. To sue to set aside a fraudulent conveyance see Fraudulent Conveyances, 20 Cyc. 431, 711.

succeeds to all the rights, interests, and authority of his assignor,[40] including the debt or claim on which the judgment was based,[41] and the lien or security of the judgment on specific property,[42] and the right to stand in the creditor's place as regards the means of its collection and enforcement,[43] such as the right of proceeding with an attachment already issued.[44] But the assignee can acquire no other or superior rights than those vested in his assignor;[45] and if the judgment was fraudulently or wrongfully entered or obtained, he will take nothing under it which he can successfully defend.[46]

b. Right to Payment of Judgment. The assignment of a judgment transfers to the assignee the right to demand and receive payment of it, to the exclusion of all other persons;[47] and if at the time the sheriff holds an execution on the judg-

40. *Colorado.*— Barnum *v.* Green, 13 Colo. App. 254, 57 Pac. 575.

Illinois.— Pearson *v.* Luecht, 199 Ill. 475. 65 N. E. 363.

Nebraska.—Lederer *v.* Union Sav. Bank, 52 Nebr. 133, 71 N. W. 954.

New York.— Bishop *v.* Garcia, 14 Abb. Pr. N. S. 69.

Pennsylvania.— Bechtel *v.* Lauer Brewing Co., 21 Pa. Co. Ct. 449.

41. Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; Vila *v.* Weston, 33 Conn. 42; Bolen *v.* Crosby, 49 N. Y. 183; Pratt *v.* Wertheimer, 39 Hun (N. Y.) 463; Elsworth *v.* Caldwell, 18 Abb. Pr. (N. Y.) 20; Pattison *v.* Hull, 9 Cow. (N. Y.) 747.

Even if the judgment was void the assignment transfers the original debt or claim. Brown *v.* Scott, 25 Cal. 189.

42. Thompson *v.* First State Bank, 102 Ga. 696, 29 S. E. 610; Brown *v.* Maine Bank, 11 Mass. 153.

If the debt is secured by mortgage it carries also the mortgage interest. Pattison *v.* Hull, 9 Cow. (N. Y.) 747.

43. Applegate *v.* Mason, 13 Ind. 75; Burns *v.* Bangert, 16 Mo. App. 22; Wimpfheimer *v.* Perrine, 61 N. J. Eq. 126, 47 Atl. 769; Avery *v.* Ackart, 20 Misc. (N. Y.) 631, 46 N. Y. Suppl. 1085.

The assignee of a judgment for the recovery of certain specific articles or their value cannot it seems recover damages from third persons who convert the chattels to their own use. Timberlake *v.* Powell, 99 N. C. 233, 5 S. E. 410.

Where one of several joint wrong-doers pays the judgment obtained against them all, he acquires no right of contribution by taking an assignment of the judgment in the name of another, who is merely a man of straw. Boyer *v.* Bolender, 129 Pa. St. 324, 18 Atl. 127, 15 Am. St. Rep. 723.

Assignee not a necessary party to proceedings after decree.— After the rights of parties to a suit are determined and fixed, and a decree made for the payment of money, the assignment of the decree will not necessitate making the assignee a party to further proceedings. Bonner *v.* Illinois Land, etc., Co., 96 Ill. 546.

Where an attorney at law has taken an assignment of an interest in a judgment in payment for professional services in connection with the recovery of the judgment, and has been discharged by his client, his interest in the judgment will not be forfeited because he in good faith opposed a settlement between the parties to the judgment, which he deemed prejudicial to his interest. Shoup *v.* Shoup, 25 Pa. Super. Ct. 552.

44. *Florida.*— Ritch *v.* Eichelberger, 13 Fla. 169.

Indiana.— Perry *v.* Roberts, 30 Ind. 244, 95 Am. Dec. 689; Burson *v.* Blair, 12 Ind. 371.

Kentucky.— Forwood *v.* Dehoney, 5 Bush 174.

Mississippi.—Vanhouten *v.* Reily, 6 Sm. & M. 440.

New York.— Bolen *v.* Crosby, 49 N. Y. 183; Parmelee *v.* Dann, 23 Barb. 461.

Pennsylvania.— Richmond Bldg. Assoc. *v.* Richmond Bldg. Assoc., 100 Pa. St. 191.

45. *Iowa.*— Boggs *v.* Douglass, 105 Iowa 344, 75 N. W. 185; Rider *v.* Kelso, 53 Iowa 367, 5 N. W. 509.

Kentucky.—Jones *v.* Dulaney, 86 S. W. 547, 27 Ky. L. Rep. 702 [*modified* in 86 S. W. 977, 27 Ky. L. Rep. 810].

New York.— Thompson *v.* Jones, 55 Hun 268, 8 N. Y. Suppl. 373.

North Carolina.— Ricaud *v.* Alderman, 132 N. C. 62, 43 S. E. 543.

Tennessee.— Cunningham *v.* McGrady, 2 Baxt. 141.

Texas.— Dutton *v.* Mason, 21 Tex. Civ. App. 389, 52 S. W. 651.

Wisconsin.— Fischbeck *v.* Mielenz, 119 Wis. 27, 96 N. W. 426.

See 30 Cent. Dig. tit. "Judgment," § 1548 *et seq.*

Payments.— The assignee of a judgment is bound by payments which he knows have been made thereon. Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836.

The assignee of a judgment which has been released of record takes the judgment for what it is worth, and can have no greater rights than the assignor. Blythe *v.* Cordingly, 20 Colo. App. 508, 80 Pac. 495.

46. Meacham *v.* Sunderland, 10 Ill. App. 123; Devoll *v.* Scales, 49 Me. 320; Troup *v.* Wood, 4 Johns. Ch. (N. Y.) 228; Noyes *v.* Willard, 18 Fed. Cas. No. 10,374, 1 Woods 187.

47. *Alabama.*— Gayle *v.* Benson, 3 Ala. 234.

Kentucky.— Pearson *v.* Talbot, 4 Litt. 435.

New York.— As against the assignee, the

ment, or the proceeds of an execution, the assignee is entitled to receive the same from him, on notifying the sheriff of his rights in the premises.[48] Further as against the judgment debtor the assignee is entitled to claim and receive the entire amount of the judgment no matter how little he may have paid for it.[49] But it is said that one who at the request of the judgment debtor purchases the judgment cannot recover more than the amount paid for it, although he took an assignment.[50]

e. Enforcement of Judgment. At common law, since the assignment of a judgment did not pass the legal title, the assignee could not sue on it, or take out scire facias for its revival, in his own name and behalf, but must proceed in the name of the assignor.[51] But this rule has been changed by statute in most of the states, and it is now the general rule that the assignee may sue on the judgment, or proceed for its revival, in his own name.[52]

judgment is not discharged by payment to a third person who in equity was entitled to require the judgment creditor to account to him as agent for whatever should be realized on the judgment, although the assignee knew this when he took the assignment. Seymour *v.* Smith, 17 Abb. N. Cas. 387.

North Carolina.— Bartlett *v.* Yates, 52 N. C. 615. By the assignment of a judgment at law, the assignor becomes a bare trustee, and as between him and the assignee has no right to receive satisfaction of the judgment. Hewett *v.* Outland, 37 N. C. 438.

Pennsylvania.— Reynolds *v.* Reynolds Lumber Co., 175 Pa. St. 437, 34 Atl. 791.

Tennessee.— Clingman *v.* Barrett, 6 Humphr. 20.

Texas.— Rickards *v.* Bemis, (Civ. App. 1903) 78 S. W. 239; Roberts *v.* Powell, 22 Tex. Civ. App. 211, 54 S. W. 643.

See 30 Cent. Dig. tit. "Judgment," § 1459.

Reservation of right to collect.— Where part of the consideration for the assignment of a judgment was a promissory note, and to secure its payment it was agreed that the assignor should have a lien on the judgment as fully and perfectly as though it had not been assigned, it was held that the assignee had no authority to collect the money and discharge the judgment. Hudson Mfg. Co. *v.* Elmendorf, 9 N. J. Eq. 478. So an assignment of his judgment by a judgment creditor to his attorney for reasons of convenience and for his own benefit cannot prevail against a subsequent settlement by him with his judgment debtor. Baker *v.* Secor, 4 Silv. Sup. (N. Y.) 516, 7 N. Y. Suppl. 803.

On failure of title to part of the judgment the assignee may recover such a proportion of the whole amount to which he is entitled upon an entire failure of title, as the value of the part to which the title has failed bears to the value of the whole. Furniss *v.* Ferguson, 15 N. Y. 437 [*affirming* 3 Rob. 269].

48. Bryant *v.* Dana, 8 Ill. 343; Robinson *v.* Brennan, 11 Hun (N. Y.) 368; Muir *v.* Leitch, 7 Barb. (N. Y.) 341.

If the assignee permits the attorneys who recovered the judgment to issue and control an execution on it, he is bound by the act of the sheriff in paying over to such attorneys the money realized on the execution. Gill *v.* Truelsen, 39 Minn. 373, 40 N. W. 254.

49. Cottle *v.* Cole, 20 Iowa 481; Gowan *v.* Tunno, Rich. Eq. Cas. (S. C.) 369; Wood *v.* McFerrin, 2 Baxt. (Tenn.) 493. See also *supra*, XVII, A, 4.

50. Campion *v.* Friedberg, 55 Ill. App. 450. And see Shields *v.* Blanchard, 74 Ga. 805.

51. *Georgia.*— Macon *v.* Bibb County Academy, 7 Ga. 204; Robinson *v.* Schly, 6 Ga. 515.

Illinois.— McHany *v.* Schenk, 88 Ill. 357.

Indiana.— Reid *v.* Ross, 15 Ind. 265; Forbes *v.* Tiffany, 4 Ind. 204; Moore *v.* Ireland, 1 Ind. 531.

Kentucky.— Elliott *v.* Waring, 5 T. B. Mon. 338, 17 Am. Dec. 69.

Mississippi.— Rollins *v.* Thompson, 13 Sm. & M. 522; Wilson *v.* McElroy, 2 Sm. & M. 241.

New Jersey.— Sharp *v.* Moore, 3 N. J. L. 844.

Pennsylvania.— McKinney *v.* Mehaffey, 7 Watts & S. 276.

See 30 Cent. Dig. tit. "Judgment," § 1550.

Right to use assignor's name.— The presence of the assignor on the record being merely formal, and the assignee being the real party in interest, the latter's equitable title is sufficient to entitle him to sue in the name of the assignor whenever he may choose and to control the issue of final process and receive the money collected. Weir *v.* Pennington, 11 Ark. 745.

Jurisdiction of federal courts.— The assignee of a judgment founded on a contract cannot maintain a suit thereon in a court of the United States, unless such a suit might have been prosecuted in that court had the assignment not been made. Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729; 24 U. S. St. at L. 552 [U. S. Comp. St. (1901) p. 514].

52. *Florida.*— Sammis *v.* Wightman, 31 Fla. 45, 12 So. 536.

Indiana.— Reid *v.* Ross, 15 Ind. 265.

Iowa.— Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148; Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132; Edmonds *v.* Montgomery, 1 Iowa 143.

Kentucky.— Smith *v.* Belmont, etc., Iron Co., 11 Bush 390; Com. *v.* Barstow, 3 B. Mon. 290.

Louisiana.— Robb *v.* Potts, 2 La. Ann. 552.

Maine.— Ware *v.* Bucksport, etc., R. Co., 69 Me. 97; Wood *v.* Decoster, 66 Me. 542.

d. Rights Passing as Incidents. The assignment of a judgment carries with it all incidental or collateral rights, remedies, and advantages, existing at the time of the assignment and then available to the judgment creditor.[53]

2. Equities, Defenses, and Agreements Between Original Parties.[54] The assignee of a judgment takes it subject to all the equities, defenses, and agreements, subsisting between the original parties, whether he had notice of them or not, acquiring in this respect no stronger rights than his assignor possessed.[55] Thus he takes

Maryland.— Clark *v.* Digges, 5 Gill 109.

Michigan.— Moore *v.* Smith, 103 Mich. 387, 61 N. W. 538; Andrews *v.* Kibbee, 12 Mich. 94, 83 Am. Dec. 766.

Missouri.— Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894; Campbell *v.* Harrington, 93 Mo. App. 315.

New Jersey.— Willett *v.* Clark, 61 N. J. L. 696, 44 Atl. 515; Lydecker *v.* Babcock, 55 N. J. L. 394, 26 Atl. 925.

New York.— Robinson *v.* Brisbane, 7 Hun 180; Ross *v.* Clussman, 3 Sandf. 676; Murphy *v.* Cochran, 1 Hill 339.

North Carolina.— Timberlake *v.* Powell, 99 N. C. 233, 5 S. E. 410; Moore *v.* Nowell, 94 N. C. 265.

Ohio.— Spangenberg *v.* Zumstein, 24 Ohio Cir. Ct. 656.

South Dakota.— Case Threshing Mach. Co. *v.* Pederson, 6 S. D. 140, 60 N. W. 747.

Texas.— Bond *v.* Carter, (Civ. App. 1903) 73 S. W. 45. But a judgment transferred by parol must be enforced in the name of the original plaintiff. Garvin *v.* Hall, 83 Tex. 295, 18 S. W. 731.

United States.— Martin *v.* Wilson, 120 Fed. 202, 58 C. C. A. 181.

Canada.— Harper *v.* Culbert, 5 Ont. 152.

In Alabama the assignee of a judgment is not authorized to sue thereon in his own name, by a statute authorizing indorsees to sue on written contracts for payment of money, in their own names (Lovins *v.* Humphries, 67 Ala. 437; Johnson *v.* Martin, 54 Ala. 271); and the statutory provisions relating to mesne or final process upon an assigned judgment or decree (Code, §§ 2927–2928) have no application to suits on an assigned judgment (Moorer *v.* Moorer, 87 Ala. 545, 6 So. 289).

Right to execution see Executions, 17 Cyc. 938, 1502.

Right of assignee to revive judgment see *infra*, XVIII, D, 2, c, (II).

53. *Indiana.*— Applegate *v.* Mason, 13 Ind. 75.

Kentucky.— Kimble *v.* Cummins, 3 Metc. 327.

Louisiana.— Oakey *v.* Sheriff, 13 La. Ann. 273.

Mississippi.— Shotwell *v.* Webb, 23 Miss. 375.

New York.— Reed *v.* Lozier, 48 Hun 50.

Pennsylvania.— Richmond Bldg. Assoc. *v.* Richmond Assoc., 100 Pa. St. 191.

See 30 Cent. Dig. tit. "Judgment," § 1542.

Right to execution see Executions, 17 Cyc. 938, 1502.

Priority of lien.— The assignee of a judgment in favor of a municipal corporation takes with it the priority which its lien possessed in the hands of the municipality. Hagemann's Appeal, 88 Pa. St. 21.

Appeal-bond.— The benefit of an appeal-bond goes with a judgment on its assignment. Ullmann *v.* Kline, 87 Ill. 268; Burt *v.* Lustig, 137 N. Y. 538, 33 N. E. 336.

Attachment bond.— It seems that an assignment of the judgment does not carry the benefit of an attachment bond. Forrest *v.* O'Donnell, 42 Mich. 556, 4 N. W. 259. But it transfers to the assignee an undertaking executed in the action upon requisition made for the delivery of the property to plaintiff. Bowdoin *v.* Coleman, 3 Abb. Pr. (N. Y.) 431.

Damages on dissolution of an injunction pass to the assignee of the judgment. Marshall *v.* Craig, 3 Bibb (Ky.) 291. *Contra*, Tete *v.* Cantrelle, 6 La. Ann. 271.

Action against sheriff.— Assignment of a judgment carries the right of action for a false return (Goodrich *v.* Bowe, 1 N. Y. City Ct. 338), or for negligence in the care of property attached (Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443, 62 Am. St. Rep. 571), or for neglect in not collecting an execution (McGregor *v.* Walden, 14 Vt. 450); but not the right to proceed against the sheriff for neglect of duty in serving executions issued before the assignment (Com. *v.* Fuqua, 3 Litt. (Ky.) 41).

Action against clerk of court.— The mere assignment of a judgment does not carry with it a right of action which has accrued to the judgment creditor against the clerk of the court for his failure properly to index the judgment, so as to render it a lien on lands. Redmond *v.* Staton, 116 N. C. 140, 21 S. E. 186.

Collateral rights of action.— The assignment of a judgment recovered for the price of goods carries the right to maintain an action against the judgment debtor jointly with others, based on a conspiracy to obtain the goods from the judgment creditor by fraud. Pratt *v.* Wertheimer, 39 Hun (N. Y.) 463. So of the right to sue for a fraud intended to depreciate the assets of the judgment debtor and thereby defeat collection of the judgment. Sweet *v.* Converse, 88 Mich. 1, 49 N. W. 899.

Interest in property.— A purchaser at judicial sale, to whom is conveyed a judgment decreeing the nullity of a tax-sale, acquires no right, title, or interest in the property by virtue of such assignment. Cucullu *v.* Bilgery, 48 La. Ann. 1245, 20 So. 662.

54. **Right of set-off** see *infra*, XIX, E, 3, e.

55. *Alabama.*— Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611.

the judgment subject to any right of set-off which existed in the judgment debtor before the assignment, irrespective of his having notice thereof;[56] and also, if he has notice, subject to any agreement between the parties relative to the enforcement of the judgment.[57]

3. Equities of Third Persons. Many cases hold that the assignee of a judgment

California.— Porter *v.* Liscom, 22 Cal. 430, 83 Am. Dec. 76.

Delaware.— Hickman *v.* Hickman, 3 Harr. 511; Lattomus *v.* Garman, 3 Del. Ch. 232.

Georgia.— Scott *v.* Harkins, 32 Ga. 302; Rawson *v.* McJunkins, 27 Ga. 432; Colquitt *v.* Bonner, 2 Ga. 155.

Illinois.— Dobbins *v.* Cruger, 108 Ill. 188; Rea *v.* Forrest, 88 Ill. 275; Allen *v.* Watt, 79 Ill. 284; Hughes *v.* Trahern, 64 Ill. 48; Southern Bank *v.* Humphreys, 47 Ill. 227; McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Yarnell *v.* Brown, 65 Ill. App. 83.

Indiana.— Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687; Robeson *v.* Roberts, 20 Ind. 155, 83 Am. Dec. 308; Burson *v.* Blair, 12 Ind. 371; Anthony *v.* Masters, 28 Ind. App. 239, 62 N. E. 505.

Iowa.— Boggs *v.* Douglass, 105 Iowa 344, 75 N. W. 185; Rock Rapids Independent School Dist. *v.* Schreiner, 46 Iowa 172; Isett *v.* Lucas, 17 Iowa 503, 85 Am. Dec. 572; Burtis *v.* Cook, 16 Iowa 194. And see Rider *v.* Kelso, 53 Iowa 367, 5 N. W. 509.

Kansas.— Porter *v.* Bagby, 50 Kan. 412, 31 Pac. 1058.

Kentucky.— Bernard *v.* Prior, 5 Litt. 14; Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836.

Michigan.— Moore *v.* Smith, 103 Mich. 387, 61 N. W. 538.

Minnesota.— Irvine *v.* Myers, 6 Minn. 562; Brisbin *v.* Newhall, 5 Minn. 273.

Missouri.— Bobb *v.* Taylor, 56 Mo. 311.

New Jersey.— Traphagen *v.* Lyons, 38 N. J. Eq. 613; Starr *v.* Haskins, 26 N. J. Eq. 414; Stout *v.* Vankirk, 10 N. J. Eq. 78. See Cook *v.* McCahill, 41 N. J. Eq. 69, 3 Atl. 82.

New York.— Cutts *v.* Guild, 57 N. Y. 229; Hayes *v.* Carr, 44 Hun 372; Jaeger *v.* Koenig, 32 Misc. 244, 65 N. Y. Suppl. 795; McCotter *v.* McCotter, 16 Abb. Pr. 265; Graves *v.* Woodbury, 4 Hill 559, 40 Am. Dec. 296; Hawley *v.* Cramer, 4 Cow. 717; Webster *v.* Wise, 1 Paige 319.

North Carolina.— McKinnie *v.* Rutherford, 21 N. C. 14; Jordan *v.* Black, 6 N. C. 30.

North Dakota.— Minnesota Thresher Mfg. Co. *v.* Holz, 10 N. D. 16, 84 N. W. 581.

Ohio.— Clark *v.* Baltimore, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 173, 3 Ohio N. P. 172. See Wright *v.* Snell, 22 Ohio Cir. Ct. 86, 12 Ohio Cir. Dec. 308.

Pennsylvania.— Griffiths *v.* Sears, 112 Pa. St. 523, 4 Atl. 492; Mifflin County Nat. Bank's Appeal, 98 Pa. St. 150; Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Peele's Appeal, 3 Walk. 255; Filbert *v.* Hawk, 8 Watts 443; Work *v.* Prall, 26 Pa. Super. Ct. 104; Baldwin *v.* Jefferies, 2 Lanc. L. Rev. 20. But see Barker's Estate, 1 Lanc. L. Rev. 313, holding that the assignee of a judgment, in dealing with the judgment debtor, is not bound to look beyond the entry of the judgment as docketed by the prothonotary.

Rhode Island.— Shelton *v.* Hurd, 7 R. I. 403, 84 Am. Dec. 564.

South Carolina.—Sutton *v.* Sutton, 26 S. C. 33, 1 S. E. 19; Cantey *v.* Blair, 1 Rich. Eq. 41.

South Dakota.— Weber *v.* Tschetter, 1 S. D. 205, 46 N. W. 201.

Tennessee.— Brannon *v.* Curtis, (Ch. App. 1898) 53 S. W. 234.

Texas.— Bond *v.* Carter, (Civ. App. 1903) 73 S. W. 45; Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504.

Vermont.— Downer *v.* South Royalton Bank, 39 Vt. 25.

Wisconsin.— Blakesley *v.* Johnson, 13 Wis. 530.

United States.— U. S. *v.* Samperyac, 27 Fed. Cas. No. 16,216*a*, Hempst. 118.

Canada.— Shorey *v.* Stobart, 1 Terr. L. Rep. 262.

See 30 Cent. Dig. tit. "Judgment," § 1552.

The assignee is a necessary party to a suit for a perpetual stay of proceedings on the judgment, on the ground of equities existing between the complainant and the assignor previous to the assignment. Mumford *v.* Sprague, 11 Paige (N. Y.) 438.

Where a judgment once paid, but not satisfied of record, is assigned by the judgment creditor, the assignee takes it subject to all defenses and equities which the judgment debtor had against the assignor. Boice *v.* Conover, (N. J. Ch. 1905) 61 Atl. 159; Traphagen *v.* Lyons, 38 N. J. Eq. 613; Stout *v.* Vankirk, 10 N. J. Eq. 78; Sutton *v.* Sutton, 26 S. C. 33, 1 S. E. 19. *Compare* Doub *v.* Mason, 2 Md. 380.

Opposing execution. — Where an attorney purchases a litigious right in the form of a judgment, the remedy of defendant, if the transfer is a nullity, is to oppose its execution when the attorney attempts to enforce it. Kuck *v.* Johnson, 114 La. 781, 38 So. 559.

56. Hobbs *v.* Duff, 23 Cal. 596; Porter *v.* Liscom, 22 Cal. 430, 83 Am. Dec. 76; Hibbard *v.* Randolph, 72 Hun (N. Y.) 626, 25 N. Y. Suppl. 854; Childs *v.* Smith, 55 Barb. (N. Y.) 45; Graves *v.* Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; Neal *v.* Sullivan, 10 Rich. Eq. (S. C.) 276; Ellis *v.* Kerr, 11 Tex. Civ. App. 349, 32 S. W. 444. See Dutton *v.* Mason, 21 Tex. Civ. App. 389, 52 S. W. 651.

57. Borst *v.* Baldwin, 17 How. Pr. (N. Y.) 285; Bank *v.* Polk, 9 Lanc. Bar (Pa.) 133; Selz *v.* Unna, 6 Wall. (U. S.) 327, 18 L. ed. 799. Otherwise, however, if the assignee had no notice of the agreement. Starr *v.* Haskins, 26 N. J. Eq. 414; Hendrickson's Appeal, 24 Pa. St. 363; Barker's Estate, 6 L. T. N. S. (Pa.) 165.

takes it free from latent equities of third persons, not parties to the judgment, of which he has no notice at the time of the assignment.[58] But some decisions repudiate this doctrine altogether, holding that the assignee can by no means occupy a better position in this respect than his assignor,[59] and applying to his purchase the doctrine of *caveat emptor*.[60] At all events the assignee is chargeable with any equities of third parties of which he has actual notice[61] or such constructive notice as may be obtained from an inspection of the record of the judgment.[62] And to protect himself against such equities he must also show that he is a purchaser in good faith and for a valuable consideration,[63] and that he paid the purchase-money before the adverse equity was asserted.[64]

4. Vacation or Reversal of Judgment in Assignee's Hands. The assignee of a judgment stands in no better position than the original plaintiff, and the judgment may be reversed, vacated, set aside, or enjoined in the assignee's hands for the same reasons which would justify such action if it remained in the hands of

58. *California.*— Wright *v.* Levy, 12 Cal. 257.

Georgia.— Western Nat. Bank *v.* Maverick Nat. Bank, 90 Ga. 339, 16 S. E. 942, 35 Am. St. Rep. 210.

Indiana.— Ritter *v.* Cost, 99 Ind. 80. See Robeson *v.* Roberts, 20 Ind. 155, 83 Am. Dec. 308.

Iowa.— Hale *v.* First Nat. Bank, 50 Iowa 642; Isett *v.* Lucas, 17 Iowa 503, 85 Am. Dec. 572.

Kansas.— Ives *v.* Addison, 39 Kan. 172, 17 Pac. 797.

Missouri.— Garland *v.* Harrison, 17 Mo. 282.

New Jersey.— Traphagen *v.* Hand, 36 N. J. Eq. 384; Starr *v.* Haskins, 26 N. J. Eq. 414.

New York.— Bennett *v.* Buchan, 61 N. Y. 222; Thompson *v.* Jones, 55 Hun 268, 8 N. Y. Suppl. 373; McCotter *v.* McCotter, 16 Abb. Pr. 265; Murray *v.* Lylburn, 2 Johns. Ch. 441.

North Carolina.— Le Duc *v.* Slocomb, 124 N. C. 347, 32 S. E. 726.

Ohio.— Wright *v.* Snell, 22 Ohio Cir. Ct. 86, 12 Ohio Cir. Dec. 308.

Pennsylvania.— Mifflin County Nat. Bank's Appeal, 98 Pa. St. 150; Mellon's Appeal, 96 Pa. St. 475; Taylor's Appeal, 45 Pa. St. 71; Hendrickson's Appeal, 24 Pa. St. 363; Peele's Appeal, 3 Walk. 255; Hamburger's Appeal, 2 Walk. 320; Winton's Appeal, 2 Pa. Cas. 83, 3 Atl. 789, 5 Atl. 433; Barker's Estate, 1 Lanc. L. Rev. 313.

Texas.— Wintz *v.* Gordon, 2 Tex. Unrep. Cas. 212.

United States.— Greene *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201.

See 30 Cent. Dig. tit. "Judgment," §§ 1553, 1554.

Unrecorded deed.— The assignee of a judgment is not affected by his assignor's notice before its rendition of an unrecorded deed, but he must have the notice himself. Clark *v.* Duke, 59 Miss. 575.

Any evidence which impeaches the bona fides of the assignment puts the assignee to full proof of consideration. Rettig *v.* Becker, 11 Pa. Super. Ct. 395.

59. *Illinois.*— Wise *v.* Shepherd, 13 Ill. 41.

New York.— Heath *v.* Hand, 1 Paige 329; De la Vergne *v.* Evertson, 1 Paige 181, 19 Am. Dec. 411.

North Carolina.— Jordan *v.* Black, 6 N. C. 30.

Vermont.— Downer *v.* South Royalton Bank, 39 Vt. 25.

West Virginia.— Conaway *v.* Odbert, 2 W. Va. 25.

See 30 Cent. Dig. tit. "Judgment," § 1553, 1554.

Entry of satisfaction.— Where, after the assignment and after notice to the debtor, the assignor wrongfully enters satisfaction of the judgment, the assignee may have the entry set aside; but he will not be permitted to take proceedings to injure rights acquired by third persons on the faith of the entry of satisfaction. Beebe *v.* State Bank, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353; Wardell *v.* Eden, 2 Johns. Cas. (N. Y.) 258.

An attorney's lien on the judgment is superior to the claims of the assignee. Gill *v.* Truelsen, 39 Minn. 373, 40 N. W. 254.

60. Mitchell *v.* Hockett, 25 Cal. 538, 85 Am. Dec. 151; Cox *v.* Palmer, 60 Miss. 793.

61. *Indiana.*— Foltz *v.* Wert, 103 Ind. 404, 2 N. E. 950.

Massachusetts.— Peirce *v.* Partridge, 3 Metc. 44.

Pennsylvania.— Day's Estate, 21 Pa. Super. Ct. 118.

Texas.— Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504.

United States.— *In re* Carrier, 46 Fed. 850.

See 30 Cent. Dig. tit. "Judgment," § 1553.

Effect of knowledge of attorney.— The assignee of a judgment is chargeable with the knowledge of his attorney who negotiated the assignment concerning litigation affecting the judgment. Boice *v.* Conover, (N. J. Ch. 1905) 61 Atl. 159.

62. Hobbs *v.* Duff, 23 Cal. 596; Ruddleedin *v.* Smith, 36 Iowa 669; Griffith *v.* Sears, 112 Pa. St. 523, 4 Atl. 492; Dreifus *v.* Denmark, 11 Phila. (Pa.) 612.

63. Hanchett *v.* Kimbark, 118 Ill. 121, 7 N. E. 491; Lee *v.* Rogers, 14 Fed. Cas. No. 8,201, 2 Sawy. 549.

64. Christie *v.* Bishop, 1 Barb. Ch. (N. Y.) 105.

the original plaintiff,[65] and his interests are liable to be defeated thereby.[66] And when proceedings are instituted for any of these purposes, the assignor is not a proper or necessary party, as he has no longer an interest in the judgment.[67]

5. Notice of Assignment. Notice of the assignment must be given to the judgment debtor; for he will be protected, as against the assignee, in respect to any payments he may make to plaintiff in the judgment, or in respect to any release or satisfaction he may procure from him, before receiving such notice.[68] On the other hand, after notice to the debtor of a *bona fide* transfer of the judgment, the rights of the assignee will be protected from any and all acts of the original parties.[69] This notice need not be in any particular form, but is sufficient

65. Northam *v.* Gordon, 23 Cal. 255; Magin *v.* Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216; Mulford *v.* Stratton, 41 N. J. L. 466; Weber *v.* Tschetter, 1 S. D. 205, 46 N. W. 201.

66. Gore *v.* Poteet, 101 Tenn. 608, 50 S. W. 754; Sinclair *v.* Stanley, 69 Tex. 718, 7 S. W. 511; Parmelee *v.* Wheeler, 32 Wis. 429.

Applications of rule.— Upon the reversal of the judgment the assignee, if he has purchased property under his own execution, will lose his title thereto. Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459. And if he has acquired rights under the judgment, and it is subsequently reversed, he must make restitution, the same as if he were an original party. McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449.

67. Ritch *v.* Eichelberger, 13 Fla. 169; Ellis *v.* Kerr, (Tex. Civ. App. 1893) 23 S. W. 1050.

68. *Illinois.*— Page *v.* Benson, 22 Ill. 484; Vance *v.* Hickman, 95 Ill. App. 554; Ihorn *v.* Wallace, 88 Ill. App. 562.

Iowa.— McCarver *v.* Nealey, 1 Greene 360.

Kentucky.— Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836.

Louisiana.— Newman *v.* Irwin, 43 La. Ann. 1114, 10 So. 181; Johnson *v.* Boice, 40 La. Ann. 273, 4 So. 163, 8 Am. St. Rep. 528; Styles *v.* McNeil, 6 Mart. N. S. 296, 17 Am. Dec. 183.

Minnesota.— Dodd *v.* Brott, 1 Minn. 270, 66 Am. Dec. 541.

Missouri.— Frissell *v.* Haile, 18 Mo. 18; Richards *v.* Griggs, 16 Mo. 416, 57 Am. Dec. 240; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894; Knapp *v.* Standley, 45 Mo. App. 264.

New York.— Lee *v.* Delehanty, 25 Hun 197; Bishop *v.* Garcia, 14 Abb. Pr. N. S. 69; Richardson *v.* Ainsworth, 20 How. Pr. 521.

Ohio.— Clark *v.* Baltimore, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 647.

Pennsylvania.— Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Gaullagher *v.* Caldwell, 22 Pa. St. 300, 60 Am. Dec. 85; Work *v.* Prall, 26 Pa. Super. Ct. 104.

Tennessee.— Cantrell *v.* Ford, (Ch. App. 1898) 46 S. W. 581.

United States.— Cavender *v.* Grove, 5 Fed. Cas. No. 2,530, 4 Biss. 269; The Lulie D., 15 Fed. Cas. No. 8,602, 4 Biss. 249.

See 30 Cent. Dig. tit. "Judgment," §§ 1556, 1557.

Garnishment of judgment debtor.— In some states it is held that where the judgment debtor, being summoned as garnishee in an action against the judgment creditor, has paid to the sheriff the amount due on the judgment, without notice of its previous assignment, he is not protected from the claims of the assignee of the judgment. Brown *v.* Ayres, 33 Cal. 525, 91 Am. Dec. 655; Richardson *v.* Ainsworth, 20 How. Pr. (N. Y.) 521; Robinson *v.* Weeks, 6 How. Pr. (N. Y.) 161. But a different rule obtains in other states. Williams *v.* West Chicago St. R. Co., 199 Ill. 57, 64 N. E. 1024; Drumm *v.* Sherman, 20 La. Ann. 96; Dodd *v.* Brott, 1 Minn. 270, 66 Am. Dec. 541; Richards *v.* Griggs, 16 Mo. 416, 57 Am. Dec. 240.

As against an attaching creditor seeking to subject a judgment to the payment of his claims, notice to the judgment defendant of the assignment of the judgment is not necessary to perfect the assignee's right to the proceeds of the judgment. Hutchinson *v.* Brown, 8 App. Cas. (D. C.) 157.

Payment to wrong person.— Want of notice of the assignment of the judgment will not protect the debtor if he pays the money to a person who would not have been authorized to collect or receive it even if the judgment had remained the property of the original plaintiff. Seymour *v.* Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683.

69. *Alabama.*— Holland *v.* Dale, Minor 265.

Colorado.— Stoddard *v.* Benton, 6 Colo. 508.

Illinois.— Ullmann *v.* Kline, 87 Ill. 268; Hughes *v.* Trahern, 64 Ill. 48; Hodson *v.* McConnel, 12 Ill. 170; Germania L. Ins. Co. *v.* Koehler, 59 Ill. App. 592.

Indiana.— Branham *v.* Rose, 2 Ind. 26.

Maine.— Call *v.* Foster, 52 Me. 257.

Massachusetts.— Dunn *v.* Snell, 15 Mass. 481.

Missouri.— Laughlin *v.* Fairbanks, 8 Mo. 367.

New Hampshire.— Stewart *v.* Lee, 70 N. H. 181, 46 Atl. 31.

New York.— Wardell *v.* Eden, 2 Johns. Cas. 258.

Ohio.— Pittsburg, etc., R. Co. *v.* Volkert, 58 Ohio St. 362, 50 N. E. 924.

Pennsylvania.— Guthrie *v.* Bashline, 25 Pa. St. 80; Imhoff *v.* Fronhoeffer, 17 Pa. Super. Ct. 165.

if it advises the debtor that the person who recovered the judgment is no longer the owner of it or entitled to collect it.[70] It may be served on the debtor like ordinary civil process,[71] or it is sufficient if the information is given under circumstances and in terms calculated to arrest the attention of the debtor.[72] Even direct notice of the assignment is held unnecessary if the assignee can bring home to the debtor knowledge of such facts as should have put him upon inquiry.[73] But the entry of the assignment on the judgment record or appearance docket, or filing it among the papers in the case, is not constructive notice to the debtor, as he is under no obligation to search the records.[74]

6. REMEDIES OF ASSIGNEE AGAINST ASSIGNOR. The assignor of a judgment is held to an implied warranty that there is such a judgment, that he is the owner of it, that it is a valid and subsisting obligation, and that no payments have been made on it other than such as he discloses at the time,[75] even where the assignment is

See 30 Cent. Dig. tit. "Judgment," §§ 1556, 1558.

70. Delassize's Succession, 8 Rob. (La.) 259.

71. Aufenkolk *v.* Montegut, 29 La. Ann. 257; Blondin *v.* Christophe, 13 La. Ann. 324.

72. Guthrie *v.* Bashline, 25 Pa. St. 80.

Illustration.— Where the judgment debtor became surety for the prosecution of a bill to enjoin the judgment against him, and the bill contained an allegation of the assignment of the judgment, it was held that he was charged with notice of such assignment. Wilcox *v.* Morrison, 9 Lea (Tenn.) 699.

Refusal of judgment creditor to give information.— But where the debtor hears rumors of an assignment of the judgment, not understanding who was the assignee, and applies to the judgment creditor for information on that point, who declines to tell him, there is no such notice to him as the rule contemplates. The Lulie D., 15 Fed. Cas. No. 8,602, 4 Biss. 249.

73. Clark *v.* Baltimore, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 647. See Vance *v.* Hickman, 95 Ill. App. 554.

74. *Alabama.*— Steiner *v.* Scholze, 114 Ala. 88, 21 So. 428.

Illinois.— Chicago City R. Co. *v.* Blanchard, 37 Ill. App. 391.

Louisiana.— Johnson *v.* Boice, 40 La. Ann. 273, 4 So. 163, 8 Am. St. Rep. 528.

Ohio.— Miller *v.* Boston, etc., R. Co., 60 Ohio St. 374, 54 N. E. 369; Clark *v.* Baltimore, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 647.

Pennsylvania.— Henry *v.* Brothers, 48 Pa. St. 70.

See 30 Cent. Dig. tit. "Judgment," § 1556.

75. *Iowa.*— Miller *v.* Dugan, 36 Iowa 433.

Louisiana.— Johnson *v.* Boice, 40 La. Ann. 273, 4 So. 163, 8 Am. St. Rep. 528; Corcoran *v.* Riddell, 7 La. Ann. 268.

Mississippi.— Lile *v.* Hopkins, 12 Sm. & M. 299, 51 Am. Dec. 115.

Missouri.— Emerson *v.* Knapp, 75 Mo. App. 92; Budd *v.* Eyermann, 10 Mo. App. 437.

New York.— Bennett *v.* Buchan, 61 N. Y. 222; Furniss *v.* Ferguson, 15 N. Y. 437. See Underwood *v.* Morgan, 11 Johns. 425.

Tennessee.— Cunningham *v.* McGrady, 2 Baxt. 141.

United States.— See South Covington, etc., R. Co. *v.* Gest, 34 Fed. 628.

Canada.— Cole *v.* Montreal Bank, 39 U. C. Q. B. 54.

See 30 Cent. Dig. tit. "Judgment," §§ 1559, 1560.

Exceptions to rule.— A general warranty on a sale of a judgment, whether express or implied, does not extend to a defect known to the purchaser. Furniss *v.* Ferguson, 34 N. Y. 485. Neither will an implied warranty of non-payment be available when the judgment is transferred to a person who has had charge of its collection, under such circumstances as would raise a presumption that he was privy to payments actually made. Furniss *v.* Ferguson, 15 N. Y. 437.

Limited warranty.— A declaration, in the assignment of a judgment, that the assignor warrants his title and power to convey only to the extent of the consideration paid, is to be taken as a limitation, not upon the extent of the title impliedly warranted, but of the liability of the assignor in case of failure. Furniss *v.* Ferguson, 34 N. Y. 485.

Judgment invalid.— The implied warranty that the judgment assigned is valid is broken by the transfer of a voidable judgment; and hence, where the judgment is afterward reversed, vacated, or set aside, the purchaser may recover back his money. Emerson *v.* Knapp, 75 Mo. App. 92; Arnold *v.* Hickman, 6 Munf. (Va.) 15. *Compare* Lillibridge *v.* Tregent, 30 Mich. 105.

Measure of damages.— The measure of damages recoverable by the assignee against the assignor, upon the loss or annulment of the judgment, is the restitution of the price paid, together with costs paid by the assignee in defending the judgment. Corcoran *v.* Riddell, 7 La. Ann. 268. But where a judgment against several defendants was sold with a warranty that the full amount was due, whereas the assignor had secretly released one of the defendants, who was solvent, and the judgment could not be collected from the other defendants, they being insolvent, it was held that the measure of the assignee's damages was the difference in the value of the judgment as it was when transferred and its value as it would have been if the release had not been given. Bennett *v.* Buchan, 61 N. Y. 222.

expressed to be "without recourse,"[76] unless in the latter case it purports to transfer only the "right, title, and interest" of the assignor, without recourse to him.[77] But the assignment does not imply any warranty of the solvency of the judgment debtor or the collectability of the judgment from his assets,[78] although the assignor will be liable in damages to the assignee if he afterward receives payment of the judgment or enters satisfaction of it.[79]

D. Setting Aside Assignment. An action will lie to cancel or set aside an assignment of a judgment,[80] when it was made by a person having no right or authority to sell the judgment,[81] or was procured by false and fraudulent representations in regard to the validity of the judgment, the amount due upon it, or the property available for its satisfaction, made by either party to the other.[82]

XVIII. SUSPENSION, ENFORCEMENT, AND REVIVAL.

A. Suspension or Stay of Proceedings.[83] Although a judgment creditor is ordinarily entitled to take immediate steps for the collection of his judgment,[84] its enforcement may be suspended or stayed by the operation of subsequent proceedings taken in the case,[85] by an agreement of the creditor obtained fairly and

76. Miller *v.* Dugan, 36 Iowa 433; Corcoran *v.* Riddell, 7 La. Ann. 268; Bienvenu *v.* Citizens' Bank, 6 La. Ann. 523; Emerson *v.* Knapp, 75 Mo. App. 92. *Contra*, Redden *v.* First Nat. Bank, 66 Kan. 747, 71 Pac. 578; Glass *v.* Read, 2 Dana (Ky.) 168. And see Gore *v.* Poteet, 101 Tenn. 608, 50 S. W. 754; Rickards *v.* Bemis, (Tex. Civ. App. 1903) 78 S. W. 239.

77. Miller *v.* Dugan, 36 Iowa 433; Schofield *v.* Moore, 31 Iowa 241.

78. *Indiana.*— Reid *v.* Ross, 15 Ind. 265.
Kentucky.— Robinson *v.* White, 4 Litt. 237.
Mississippi.— Cox *v.* Palmer, 60 Miss. 793.
New York.— See Hohle *v.* Randrup, 39 Misc. 334, 79 N. Y. Suppl. 870.
Pennsylvania.— Mohler's Appeal, 5 Pa. St. 418, 47 Am. Dec. 413; Jackson *v.* Crawford, 12 Serg. & R. 165; Bechtel *v.* Hoffman, 1 Woodw. 130.
West Virginia.— Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370.
See 30 Cent. Dig. tit. "Judgment," §§ 1559, 1560.

79. Booth *v.* Farmers', etc., Bank, 50 N. Y. 396.

80. Rescission.— Where the purchaser of a judgment, with full knowledge of the facts on which he afterward relies as ground for a rescission of the sale, makes a positive and direct assertion of his ownership of the judgment in open court, it operates as an election to retain the judgment and a waiver of his right to rescind. Hume *v.* John B. Hood Camp C. V., (Tex. Civ. App. 1902) 69 S. W. 643.
Venue.— An action to set aside an assignment of a judgment to the grantee of land of the judgment debtor, and to reinstate the lien of the judgment, must be brought in the county where the land lies. Mahoney *v.* Mahoney, 70 Hun (N. Y.) 78, 23 N. Y. Suppl. 1097. *Compare* Baruch *v.* Long, 117 N. C. 509, 23 S. E. 447.
Parties.— An order setting aside an assignment of a judgment, and a satisfaction thereof obtained from the assignee, cannot be made without the presence in court of such assignee. Avery *v.* Ackart, 20 Misc. (N. Y.) 631, 46 N. Y. Suppl. 1085.

81. Padfield *v.* Green, 85 Ill. 529; Mayer *v.* Blease, 4 S. C. 10. See Pearson *v.* Luecht, 199 Ill. 475, 65 N. E. 363.
Limitations of rule.— But where an agent assigns a judgment, the fact that the assignee knew of the principal's interest in the judgment does not affect his good faith, in the absence of any evidence of collusion between the agent and the assignee, or of any intent on the part of the agent to convert the money to his own use. Seymour *v.* Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683. Where a judgment was given to a person absolutely, and shows no ear-marks of equities, an assignment thereof by him will not be disturbed on the petition of persons claiming to be equitable owners. Socks *v.* Socks, 1 Del. Co. Ct. (Pa.) 490.

82. *Kansas.*— Thayer *v.* Knote, 59 Kan. 181, 52 Pac. 433.
Louisiana.— Savoie *v.* Meyers, 40 La. Ann. 677, 4 So. 882.
Missouri.— Gottschalk *v.* Kircher, 109 Mo. 170, 17 S. W. 905.
Tennessee.— Pearcy *v.* Huddleston, 3 Yerg. 36; Ward *v.* Southerland, Peck 1 appendix.
Texas.— Texas Elevator, etc., Co. *v.* Mitchell, 7 Tex. Civ. App. 222, 28 S. W. 45.
Virginia.— Lowe *v.* Trundle, 78 Va. 65.
See 30 Cent. Dig. tit. "Judgment," § 1538.

83. Equitable relief against judgment see *supra*, X.
Supersedeas or stay by appeal or error see APPEAL AND ERROR, 2 Cyc. 885 *et seq.*
Stay of execution see EXECUTION, 17 Cyc. 1135.
Stay of execution on judgment in justice's court see JUSTICES OF THE PEACE.
Stay of proceedings in actions in general see ACTIONS.

84. See Moser *v.* Mayberry, 7 Watts (Pa.) 12.

85. Doggett *v.* Jordan, 4 Fla. 121 (petition for rehearing); Omaha L. & T. Co. *v.* Walenz,

in good faith,[86] or by an order of the court, under statutory authority or in the exercise of its discretionary power, when justified by the circumstances of the particular case and necessary to do justice between the parties,[87] and in the latter case the order of stay or suspension may be made conditional or upon terms,[88] or, if necessary, may be made final and perpetual, as where the judgment debt has been paid in full.[89]

B. Dormant Judgments[90] — **1. Definition.** A judgment not satisfied, or barred by lapse of time, but temporarily inoperative so far as the right to issue execution is concerned, is usually called a dormant judgment.[91]

2. Statutory Provisions and Judgments to Which They Are Applicable. In many of the states the statutes provide that judgments shall become "dormant" that is, incapable of execution by the ordinary process, if a certain length of time is allowed to elapse without the issuance, levy, or return of an execution upon them.[92]

64 Nebr. 89, 89 N. W. 623 (motion to vacate decree); Boyle *v.* Stivers, 109 Ky. 253, 58 S. W. 69, 22 Ky. L. Rep. 793 (motion for new trial).

Effect of appeal as stay see APPEAL AND ERROR, 2 Cyc. 885 *et seq.*

The death of a plaintiff does not abate a judgment, but merely suspends its operation until an administrator is appointed. Ritchey *v.* Buricke, 54 S. W. 173, 21 Ky. L. Rep. 1120.

86. Milmine *v.* Bass, 29 Fed. 632.

87. *Kentucky.*— Vaughn *v.* Gardner, 7 B. Mon. 326.

New York.— Carey *v.* Grant, 59 Barb. 574; Owen *v.* Jacobia, Sheld. 455 (partial payments alleged to have been made); Smith *v.* Matson, 47 How. Pr. 118 (order for service by publication made on insufficient proof). It is stated as the rule in New York that the supreme court has power in its discretion temporarily to suspend the operation of its judgments, or to stay proceedings on them for such time and on such terms as it may deem proper. Sponenburgh *v.* Gloversville, 42 Misc. 563, 87 N. Y. Suppl. 602 [*affirmed* in 96 N. Y. App. Div. 157, 89 N. Y. Suppl. 19]. But an *ex parte* order of a justice at chambers staying proceedings more than twenty days is null and may be disregarded. Huff *v.* Bennett, 2 Sandf. 703.

North Carolina.— Dowell *v.* Vannoy, 14 N. C. 43.

Tennessee.— Swan *v.* Roberts, 2 Coldw. 153, attachment against non-resident.

Virginia.— Ogden *v.* Brown, 83 Va. 670, 3 S. E. 236.

Wisconsin.— Williams *v.* Ely, 14 Wis. 236.

United States.— Atchison Sav. Bank *v.* Templar, 26 Fed. 580, unauthorized appearance by one partner for the firm after dissolution.

See 30 Cent. Dig. tit. "Judgment," § 1564.

After the term.— While a court may vacate or modify its judgments or orders, as provided by statute, after the close of the term of court at which they were rendered, it has no power, in the absence of proceedings under the statute, to suspend the operation of such judgments or orders after the close of such term, except in so far as that power was expressly reserved in the entry of the judgment. Cincinnati *v.* Cincinnati Inclined Plane R. Co., 56 Ohio St. 675, 47 N. E. 560.

Equities between defendants.— The execution of a final decree cannot be delayed by the affidavits of defendants, coming in after the decree, alleging equities as between themselves. Proudfit *v.* Picket, 7 Coldw. (Tenn.) 563.

Separate judgments.— Where a decree is rendered for plaintiff in a mortgage foreclosure suit, and a junior judgment also rendered against the mortgagor on a cross bill filed by a co-defendant, the judgments are separate, and the decree in favor of the mortgagee may be stayed, and the other enforced. Covert *v.* Bray, 26 Ind. App. 671, 60 N. E. 709.

88. Tiernan *v.* Murrah, 1 Rob. (La.) 443; Creed *v.* Scruggs, 1 Heisk. (Tenn.) 590.

89. Whitney *v.* McConnell, 30 Mich. 421. And see People *v.* Judge Calhoun Cir. Ct., 24 Mich. 408.

Indulgence to co-defendant.— The indulgence of a creditor to one of two defendants in a judgment, if they are not principal and surety as to each other, does not entitle the other defendant to a perpetual stay of proceedings on the judgment against him, although he has paid half the debt, and, but for the indulgence of plaintiff, the other half would have been collected from the other defendant. Lansingburgh Bank *v.* Russell, 5 Wend. (N. Y.) 128.

90. Effect of dormant judgment and rights of intervening lienors see *supra*, XV, G, 1, c.

Necessity for revival see *infra*, XVIII, D, 1, a.

Presumption of payment from lapse of time see *infra*, XIX, B.

Time for revival and limitation see *infra*, XVIII, D, 5.

Revival as condition precedent to creditors' suits see CREDITORS' SUITS, 12 Cyc. 15.

91. Draper *v.* Nixon, 93 Ala. 436, 8 So. 489; 1 Freeman Ex. § 81.

92. *Alabama.*— Perkins *v.* Brierfield Iron, etc., Co., 77 Ala. 403.

Georgia.— Columbus Fertilizer Co. *v.* Hanks, 119 Ga. 950, 47 S. E. 222; Bell *v.* Hanks, 55 Ga. 274; Rodgers *v.* Bell, 53 Ga. 94; McLaren *v.* McCarty, 53 Ga. 41; Bradford *v.* Columbus Water Lot Co., 52 Ga. 12; Horton *v.* Clark, 40 Ga. 412; Battle *v.* Shivers, 39 Ga. 405; Jones *v.* Tarver, 19 Ga. 279; Wiley *v.* Kelsey, 3 Ga. 274.

These acts generally apply only to judgments for the payment of money,[93] and do not impose a limitation upon the enforcement of judgments or decrees not within this description,[94] such for example as a decree for the foreclosure of a mortgage.[95] They apply, however, as well to foreign as to domestic judgments,[96] although they do not run against a judgment during any time when it was impossible to enforce it by final process,[97] nor under any circumstances against the state as judgment creditor.[98] But when a judgment has once become dormant, it cannot be enforced until it has been duly revived, as provided by the statute.[99]

3. ISSUE OF EXECUTION. In several states, to save a judgment from dormancy, it is necessary that an execution thereon should be issued, and in some that it should also be levied within a limited number of years after the rendition of the judgment or after the right to execution accrues.[1] Issuing the execution includes

Kansas.— Watson *v.* Keystone Ironworks Co., (1903) 74 Pac. 269. A judgment or decree for the sale of specific real property becomes dormant after five years, if execution is not sued out within that time. Killen *v.* Nebraska L. & T. Co., 70 Kan. 83, 78 Pac. 159.

Louisiana.— Beckham's Succession, 16 La. Ann. 352.

Maryland.— Farmers' etc., Bank *v.* Melvin, 8 Fed. Cas. No. 4,656, 2 Cranch C. C. 614.

Mississippi.— Brown *v.* Wilcox, 14 Sm. & M. 127.

Nebraska.— Farmers' State Bank *v.* Bales, 64 Nebr. 870, 90 N. W. 945.

North Carolina.— Johnston *v.* Jones, 87 N. C. 393; Lyon *v.* Russ, 84 N. C. 588; Harris *v.* Ricks, 63 N. C. 653; Neely *v.* Craige, 61 N. C. 187.

Ohio.— Shourds *v.* Allison, 7 Ohio S. & C. Pl. Dec. 25.

Virginia.— Straus *v.* Bodeker, 86 Va. 543, 10 S. E. 570.

See 30 Cent. Dig. tit. "Judgment," §§ 1565, 1566.

93. See cases cited *infra*, this note.

What is a money judgment.— A decree allowing a certain sum to a commissioner in partition for services and expenses is a money judgment, within the meaning of these statutes. Cortez *v.* San Francisco Super. Ct., 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37. So is a decree of a court of equity for a specific sum of money. Curry *v.* Piles, 8 Ga. 32. And a personal judgment for the amount of a drainage tax. Irwin's Succession, 33 La. Ann. 63.

94. Cain *v.* Farmer, 74 Ga. 38; Wall *v.* Jones, 62 Ga. 725; Redd *v.* Davis, 59 Ga. 823; Butler *v.* James, 33 Ga. 148; Jones *v.* Tarver, 19 Ga. 279; Lawrence *v.* Belger, 31 Ohio St. 175.

95. Stiles *v.* Elliott, 68 Ga. 83; Horton *v.* Clark, 40 Ga. 412; Butt *v.* Maddox, 7 Ga. 495; Herbage *v.* Ferree, 65 Nebr. 451, 91 N. W. 408; Moore *v.* Ogden, 35 Ohio St. 430. *Contra*, Stout *v.* Macy, 22 Cal. 647; Worsham *v.* Lancaster, 47 S. W. 448, 20 Ky. L. Rep. 701.

96. Spann *v.* Crummerford, 20 Tex. 216. And see Brown *v.* Peeples, 10 Rich. Eq. (S. C.) 475.

97. Beck *v.* Hamilton, 113 Ga. 273, 38 S. E. 754 (effect of death of party); State *v.* Royse, 3 Nebr. (Unoff.) 262, 91 N. W. 559 (collection of judgment enjoined during part of statutory period).

98. People *v.* Peck, 5 Ill. 404; Nimmo *v.* Com., 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

99. De Ford *v.* Green, 1 Marv. (Del.) 316, 40 Atl. 1120.

1. *District of Columbia.*— Thomson *v.* Beveridge, 3 Mackey 170.

Georgia.— Easterlin *v.* New Home Sewing Mach. Co., 115 Ga. 305, 41 S. E. 595; Smith *v.* Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67; Mosely *v.* Sanders, 76 Ga. 293; Turner *v.* Grubbs, 58 Ga. 278.

Illinois.— Hernandez *v.* Drake, 81 Ill. 34; Chase *v.* Frost, 60 Ill. 143; People *v.* Peck, 4 Ill. 118.

Kansas.— Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369; State *v.* McArthur, 5 Kan. 280. A decree in a suit to foreclose a mortgage is a "judgment," within the meaning of the Kansas statute, and an order of sale or special execution will prevent a money judgment in favor of one defendant against another from becoming dormant, if the judgment and the amount are referred to in the order of sale. Watson *v.* Keystone Iron-Works Co., 70 Kan. 61, 78 Pac. 156. On the other hand a proceeding in the probate court in aid of execution on a judgment in the district court does not extend the time within which such judgment becomes dormant. Denny *v.* Ross, 70 Kan. 720, 79 Pac. 502.

North Carolina.— Neely *v.* Craige, 61 N. C. 187.

North Dakota.— Merchants' Nat. Bank *v.* Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

Texas.— Millican *v.* Ware, 84 Tex. 308, 19 S. W. 475; Sampson *v.* Wyett, 49 Tex. 627; Phillips *v.* Lesser, 32 Tex. 741; McKinnon *v.* McGown, (Civ. App. 1895) 29 S. W. 696; Mundine *v.* Brown, (Civ. App. 1893) 23 S. W. 90; Gabel *v.* McMahan, 1 Tex. App. Civ. Cas. 716. But when suit is brought to subject property fraudulently conveyed to the payment of a judgment while it is still alive, it will not become dormant by failure to issue execution thereon pending the suit. Cole *v.* Terrell, 71 Tex. 549, 9 S. W. 668. The statute in this state provides that where execution has not issued within twelve months after the rendition of a judgment, it may be

the delivery of it to the sheriff or other proper officer;[2] but this is sufficient to arrest the running of the statute, although the writ is afterward quashed,[3] or although it is returned without a levy[4] or levied on property not then owned by defendant,[5] or on his homestead,[6] or although the levy is dismissed by the court.[7]

4. Return or Entry on Execution. In Georgia, by statute, the issue of an execution will not suffice to keep a judgment alive; but it becomes dormant if seven years elapse from the time of the last entry on the execution by an authorized officer and the recording of such entry on the docket.[8] This requires the entry and recording of a sufficient indorsement on the execution at least as often as once in every seven years,[9] unless where the statute has been arrested by the active conduct of proceedings to vacate or enjoin the judgment.[10] The "entry" which will avail to keep the judgment in force may be a written and signed statement of the officer that the writ is placed in his hands with orders to collect the money, or a return or other proper indorsement, of a character to show that the creditor is still endeavoring to enforce it;[11] but it must in all cases be made by an officer authorized to levy and return the execution.[12]

revived within ten years after its date, but not afterward; but this does not mean that execution must issue every year to keep the judgment alive; if the first execution is issued within a year after its rendition, it will not become dormant until ten years thereafter. Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086; Central Coal, etc., Co. *v.* Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383.

Vermont.— Hall *v.* Hall, 8 Vt. 156.

United States.— Irwin *v.* Henderson, 13 Fed. Cas. No. 7,084, 2 Cranch C. C. 167.

See 30 Cent. Dig. tit. "Judgment," § 1567.

The filing of an equitable petition for the purpose of enforcing the collection of a judgment is of itself sufficient to prevent the running of the dormancy statute as against such judgment, so long as the equitable action is pending. Conley *v.* Buck, 100 Ga. 187, 28 S. E. 97.

Mandamus.— Since the usual method of enforcing the payment of a judgment against a municipal corporation is by the writ of mandamus, issued to enforce the levy and collection of taxes for that purpose, this writ is to be considered as equivalent to a writ of execution, within the meaning and purpose of the dormancy statutes, when the question concerns a judgment against a municipality. Dempsey *v.* Oswego Tp., 51 Fed. 97, 2 C. C. A. 110.

2. Johnson *v.* Hines, 61 Md. 122; Hagerstown Bank *v.* Thomas, 35 Md. 511; Kelley *v.* Vincent, 8 Ohio St. 415.

3. Westbrook *v.* Hays, 89 Ga. 101, 14 S. E. 879; Smith *v.* Rust, 79 Ga. 519, 5 S. E. 250; Nye *v.* Cleveland, 31 Miss. 440. *Compare* Jackson *v.* Scanland, 65 Miss. 481, 4 So. 552.

4. Riddle *v.* Bush, 27 Tex. 675.

5. Long *v.* Wight, 82 Ga. 431, 9 S. E. 535.

6. McClarin *v.* Anderson, 104 Ala. 201, 16 So. 639. *Compare* Wuest *v.* James, 51 Ohio St. 230, 36 N. E. 832.

7. Banks *v.* Zellner, 77 Ga. 424, 3 S. E. 304.

8. Smith *v.* Bearden, 117 Ga. 822, 45 S. E. 59; Nowell *v.* Haire, 116 Ga. 386, 42 S. E. 719; Hollis *v.* Lamb, 114 Ga. 740, 40 S. E. 751; Dozier *v.* McWhorter, 113 Ga. 584, 39 S. E. 106; Daniel *v.* Haynes, 91 Ga. 123, 16 S. E. 649; Anderson *v.* Kilgo, 81 Ga. 699, 8 S. E. 189; Gross *v.* Mims, 63 Ga. 563; Powell *v.* Perry, 63 Ga. 417; Smith *v.* White, 63 Ga. 236; Aspinwall *v.* Treanor, 62 Ga. 176; Nelson *v.* Gill, 56 Ga. 536; Tanner *v.* Hollingsworth, 41 Ga. 133; Worthy *v.* Lowry, 19 Ga. 517; Neal *v.* Lamar, 18 Ga. 746; Mays *v.* Compton, 13 Ga. 269; Moore *v.* Ramsey, 10 Ga. 184; Stone *v.* Head, Dudley (Ga.) 166.

Two executions.— A judgment upon which two executions have been properly issued does not become dormant so long as the sheriff's entries on either execution follow each other at intervals of less than seven years. Kellogg *v.* Buckler, 17 Ga. 187.

9. Booth *v.* Williams, 2 Ga. 252.

10. Eagle, etc., Mfg. Co. *v.* Bradford, 59 Ga. 385.

11. Hatcher *v.* Gammell, 49 Ga. 576. And see Hanks *v.* Pearce, 96 Ga. 159, 22 S. E. 676.

Receipts of payments entered on an execution by plaintiff therein are not such entries as will prevent the judgment from becoming dormant. Blue *v.* Collins, 109 Ga. 341, 34 S. E. 598; Stanley *v.* McWhorter, 78 Ga. 37, 1 S. E. 260.

A receipt for costs, indorsed on an execution by a sheriff, is a sufficient entry or return to save the judgment from dormancy. Thrasher *v.* Foster, 42 Ga. 212.

A return of nulla bona, repeated within each period of seven years, will prevent the judgment from becoming dormant, whether the return be true or false. Prendergast *v.* Wiseman, 80 Ga. 419, 7 S. E. 228.

12. Formby *v.* Shackleford, 94 Ga. 670, 21 S. E. 711.

Ex-officer.— The entry is not sufficient if made by a sheriff or other officer whose term of office has expired at the time it is made. Black *v.* McAfee, 96 Ga. 811, 22 S. E. 903; Orr *v.* Herring, 91 Ga. 148, 17 S. E. 287.

Delegation of authority.— An officer has no power to delegate to another the authority, in his absence, either generally or in a special case, to make an entry for him on an execution to prevent the judgment's becoming dor-

5. Effect of Acknowledgment or Agreement Between Parties.[13] The running of the dormancy statute against a judgment will be arrested by an acknowledgment of the judgment and promise to pay it, or by an agreement of the parties as to the issue of execution,[14] although not by the mere fact of a partial payment.[15] And after the statute has fully run against the judgment, it cannot be revived by a mere parol promise to pay it.[16] But it may be revived by a written agreement of the parties entered upon the record.[17]

C. Proceedings to Enforce Judgment[18] — **1. In General.** Proceedings for the enforcement of a judgment are governed by the law in force at the time of the rendition of the judgment,[19] and by the law of the state or country where it was given.[20] Where the judgment is for the payment of money, the usual process of execution will ordinarily be the appropriate method of collecting it,[21] unless the right to issue this process has been limited or deferred by an agreement of the parties,[22] and subject to the condition that the amount, if uncertain, must be ascertained in a proper proceeding before the writ can issue.[23] If the judgment is rendered in pursuance of an agreement of the parties which directs a

mant. Weaver *v.* Wood, 103 Ga. 88, 29 S. E. 594.

Entry by coroner.— An entry by a coroner on an execution not directed to him will not save the judgment from dormancy, unless before the entry an affidavit of the sheriff's disqualification was properly made. Baldwin *v.* Hudson, 103 Ga. 96, 29 S. E. 601.

13. Amicable scire facias see *infra*, XVIII, D, 7, o.

14. Darsey *v.* Mumpford, 58 Ga. 119; Lee *v.* Tompkins, 1 How. Pr. (N. Y.) 44; Fulkerson *v.* Taylor, 100 Va. 426, 41 S. E. 863.

15. Blue *v.* Collins, 109 Ga. 341, 34 S. E. 598; Perkins *v.* Berry, 103 N. C. 131, 9 S. E. 621; McDonald *v.* Dickson, 87 N. C. 404.

16. Ludwig *v.* Huck, 45 Ill. App. 651.

17. Payne *v.* Craft, 7 Watts & S. (Pa.) 458; Boal's Appeal, 2 Rawle (Pa.) 37. And see Guignard *v.* Glover, Harp. (S. C.) 457.

18. Actions on judgments see *infra*, XX.

Attachments in actions on judgments see Attachments, 4 Cyc. 444.

Necessity of issuance and record of execution to create lien see *supra*, XV, A, 7.

Enforcement by assignees see *supra*, XVII, C, 1, c.

Enforcement of judgment against counties see Counties, 11 Cyc. 612.

Enforcement of judgment against replevin bail see Replevin.

Enforcement of judgment rendered in actions for injunctions and abatement of liquor nuisance and nuisances see Intoxicating Liquors.

Enforcement of judgment in proceedings for seizure and forfeiture of property under liquor laws see Intoxicating Liquors.

Enforcement of justice's judgment see Justices of the Peace.

Execution to enforce judgment see Executions.

Enforcement of judgment in action by or against assignee or trustee in insolvency see Insolvency.

Judgments on which supplementary proceedings are authorized see Executions.

Parties to actions to enforce lien or judgment against decedent see Executors and Administrators.

Effect of application for new trial see New Trial.

19. Carnes *v.* Red River Parish, 29 La. Ann. 608.

20. Mathuson *v.* Crawford, 16 Fed. Cas. No. 9,279, 4 McLean 540; Barker *v.* Central Vermont R. Co., 13 Quebec Super. Ct. 2.

21. White *v.* Clark, 29 Fed. Cas. No. 17,541, 5 Cranch C. C. 401, holding that where a decree in equity merely directs the payment of money, the court will not ordinarily issue an attachment, but will leave the creditor to his proper remedy by fieri facias.

Agreement to confess judgment.— Plaintiff's agreement in a consent judgment to confess judgment for certain amounts in favor of certain parties not parties to the suit does not authorize them to issue a fieri facias, being merely a stipulation *pour autrui*, which the beneficiaries must enforce by suit. De Blanc *v.* Mouton, 9 Rob. (La.) 48.

Joint defendants.— The owner of a judgment against two or more defendants rendered upon a joint cause of action may collect it out of the separate property of either. Crossitt *v.* Wiles, 13 N. Y. Civ. Proc. 327; Preston *v.* National Exch. Bank, 97 Va. 222, 33 S. E. 546. But a judgment entered against joint defendants, only one of whom was served, can be enforced only against the joint property of the defendants, and the separate property of the one served. Northern Bank *v.* Wright, 5 Rob. (N. Y.) 604; Lahey *v.* Kingon, 13 Abb. Pr. (N. Y.) 192; Pardee *v.* Haynes, 10 Wend. (N. Y.) 630.

22. See Lumpkin County *v.* Williams, 94 Ga. 657, 21 S. E. 849; Root *v.* Burton, 115 Ind. 495, 17 N. E. 194; Boulware *v.* Harrison, 4 Rich. Eq. (S. C.) 317.

23. *Louisiana.*— Smith *v.* Barkemeyer, McGloin 139.

New York.— Terrett *v.* Brooklyn Imp. Co., 18 Hun 6.

particular mode of satisfying it, it cannot be enforced in any way inconsistent with the agreement;[24] and where a judgment requires of a party the performance of any other act than payment of money or delivery of property, it is not to be enforced by motion for an order to compel performance; the judgment itself should embrace such an order, but plaintiff should proceed by serving on defendant personally a copy of the judgment requiring such act, after which, if he refuses to perform it, he may be punished for contempt.[25]

2. ENFORCEMENT IN EQUITY — a. In General. It is generally presumed that the court which renders a judgment is competent to enforce it, and equity will not entertain a bill to obtain satisfaction of the judgment,[26] unless under special circumstances, as where the judgment debtor is dead and recourse cannot be had against his estate without the aid of chancery,[27] or where the object is to reach equitable interests in land, not subject to execution,[28] or other property of defendant which cannot be made available in the ordinary way.[29] And in any case it must first be shown that the complainant has no adequate remedy at law,[30] or that his legal remedy has been lost without any fault or laches on his part,[31] or has been exhausted without avail.[32] On such a proceeding the regularity of the judgment will not be inquired into,[33] although the nature of the original cause of action may be investigated if its character would have any influence on the action of a court of equity in the premises.[34] The complainant must of course show himself

Pennsylvania.— Grubb *v.* Brooke, 47 Pa. St. 485.

Wisconsin.— Rusk *v.* Sackett, 28 Wis. 400.

United States.— Hancock *r.* Hillegas, 11 Fed. Cas. No. 6,010, 2 Dall. 380, 1 L. ed. 424.

See 30 Cent. Dig. tit. "Judgment," § 1571.

24. Nason *v.* Smalley, 8 Vt. 118.

25. Fero *v.* Van Evra, 9 How. Pr. (N. Y.) 148.

26. *District of Columbia.*— Davis *v.* Harper, 14 App. Cas. 463.

Georgia.— Macon, etc., R. Co. *v.* Parker, 9 Ga. 377.

Kansas.— Howe Mach. Co. *v.* Miner, 28 Kan. 441.

Ohio.— Douglass *v.* Huston, 6 Ohio 156.

United States.— Tilford *v.* Oakley, 23 Fed. Cas. No. 14,038*a*, Hempst. 197.

See 30 Cent. Dig. tit. "Judgment," § 1572.

Bill to revive.— Where an execution was levied on property which did not belong to the judgment debtor, the creditor may maintain an action in equity for the purpose of reviving the judgment. Scherr *v.* Himmelmann, 53 Cal. 312.

27. Enslen *v.* Wheeler, 98 Ala. 200, 13 So. 473; Griswold *v.* Johnson, 22 Mo. App. 466; James *v.* Life, 92 Va. 702, 24 S. E. 275.

Decisions per contra.— In some states it is held that a bill in equity will not lie in these circumstances, the creditor being able to work out his rights through the probate court, or by suits against purchasers of the decedent's lands. Branch *v.* Horner, 28 Ark. 341; Miami Exporting Co. Bank *v.* Turpin, 3 Ohio 514; Jackson *v.* Butler, 47 Tex. 423.

28. Ferguson *v.* Crowson, 25 Miss. 430; Chapron *v.* Cassaday, 3 Humphr. (Tenn.) 661; Stark *v.* Cheathem, 2 Tenn. Ch. 300; Laidley *v.* Hinchman, 3 W. Va. 423.

29. Hull *v.* Naumberg, 1 Tex. Civ. App. 132, 20 S. W. 1125; Keewatin Lumber Co. *v.* Wisch, 8 Manitoba 365.

Property subject.— The power of a court of equity to appropriate property to the payment of a judgment at law is limited to property subject to execution, not including choses in action. Stewart *v.* English, 6 Ind. 176.

Directing order of sale.— Where a judgment debtor sells a part of the property on which the judgment is a lien, and afterward sells his residue, a court of equity will direct that the execution issued on the judgment be levied first on the property last conveyed. Pallen *v.* Agricultural Bank, Freem. (Miss.) 419. See *supra*, XV, F, 3.

30. Howe Mach. Co. *v.* Miner, 28 Kan. 441; Davis *v.* Hoopes, 33 Miss. 173.

Remedy by mandamus.— Equity will not assist the holder of a judgment against a city in obtaining satisfaction thereof, the legal remedy by mandamus being adequate and complete. East St. Louis *v.* Millard, 14 Ill. App. 483.

Conditional judgment.— Where the judgment in ejectment was for plaintiff, on his tendering to defendant a certain sum, which he had paid out in acquiring outstanding mortgages, and plaintiff paid such sum, but defendant failed to satisfy the mortgages, a bill in equity is the proper remedy for plaintiff, as the common-law side of the court in which the judgment was entered has no appropriate process by which to enforce defendant's duty. German-American Title, etc., Co. *v.* Shallcross, 147 Pa. St. 485, 23 Atl. 770, 30 Am. St. Rep. 751.

31. Solomons *v.* Shaw, 25 S. C. 112.

32. Howe *v.* Whitney, 66 Me. 17; Upper Canada Bank *v.* Beatty, 9 Grant Ch. (U. C.) 321.

33. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

34. Hassall *v.* Wilcox, 130 U. S. 493, 9 S. Ct. 590, 32 L. ed. 1001; Gilchrist *v.* Helena

equitably entitled to the relief which he asks,[35] and his petition will be defeated by anything showing that it would be unjust or unfair to grant it.[36]

b. Jurisdiction and Limitations. To sustain a bill in equity for the enforcement of a judgment at law, it is necessary that defendant should be subject to the jurisdiction of the court, or, if he is a non-resident, that the particular property sought to be subjected to the judgment should be found within the state;[37] and equity will not entertain such a bill after the statute of limitations has run against the judgment at law.[38]

c. Parties. In such a proceeding all persons having interests in the particular property sought to be subjected should be joined as parties.[39]

d. Pleading and Evidence. The bill must set forth fully the judgment on which it is based[40] and the assignment of it, if any, to the complainant,[41] and must show the liability of the respondent to satisfy it,[42] and negative the existence of an adequate remedy at law,[43] and the evidence must clearly establish the complainant's right to the relief prayed.[44]

e. Decree. If the proceeding is merely to enforce the lien of the judgment, a personal decree for the payment of its amount will not be proper;[45] but otherwise the decree may be for the aggregate amount of the original judgment with interest and costs,[46] although this relief cannot be given against defendants who are joined merely as claiming under alleged fraudulent conveyances from the

Hot Springs, etc., R. Co., 58 Fed. 708; U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

35. Chisholm *v.* McDonald, 30 Ill. App. 176; Rhodes *v.* Farmer, 17 How. (U. S.) 464, 15 L. ed. 152.

36. Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 9 West. L. J. 215; Skillern *v.* May, 4 Cranch (U. S.) 137, 2 L. ed. 574.

37. Trabue *v.* Conners, 84 Ky. 283, 1 S. W. 470, 8 Ky. L. Rep. 288; De Wolf *v.* Mallett, 3 Dana (Ky.) 214.

38. *Arkansas.*— Brown *v.* Hanauer, 48 Ark. 277, 3 S. W. 27.

Kentucky.— Norton *v.* Marksberry, 5 S. W. 482, 9 Ky. L. Rep. 424.

Minnesota.— Dole *v.* Wilson, 39 Minn. 330, 40 N. W. 161.

Mississippi.— Hall *v.* Green, 60 Miss. 47; Dilworth *v.* Carter, 32 Miss. 206.

New York.— Caswell *v.* Kemp, 41 Hun 434.

Texas.— Boyd *v.* Ghent, 95 Tex. 46, 64 S. W. 929.

Virginia.— Brown *v.* Butler, 87 Va. 621, 13 S. E. 71; Braxton *v.* Wood, 4 Gratt. 25. See Kennerly *v.* Swartz, 83 Va. 704, 3 S. E. 348.

West Virginia.— Reilly *v.* Clark, 31 W. Va. 571, 8 S. E. 509.

See 30 Cent. Dig. tit. "Judgment," § 1571.

A foreign judgment does not make one a judgment creditor in California, within the rule permitting only judgment creditors to attack a conveyance for fraud; and until a judgment is obtained in California on the foreign judgment, the statute of limitations does not begin to run. Brown *v.* Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314.

39. See cases cited *infra*, this note.

Judgment debtor.— Where the suit is brought to subject property alleged to have been assigned by the judgment debtor without consideration, he is a necessary party. Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478.

Assignor of cause of action.— Where a vendor of land holding notes for the purchase-money assigns them, his heirs are necessary parties to a bill brought by the assignee to subject the equity of the vendee to the satisfaction of a judgment on the notes. Edwards *v.* Bohannon, 2 Dana (Ky.) 98.

Judgment creditors whose judgments are liens on the property are necessary parties. Rountree *v.* McKay, 59 N. C. 87; Feamster *v.* Tyree, 21 W. Va. 83.

Creditors by mortgage, deed of trust, or vendor's lien are also necessary parties. Georgetown Water Co. *v.* Central Thompson-Houston Co., 34 S. W. 435, 35 S. W. 636, 17 Ky. L. Rep. 1270; Bansimer *v.* Fell, 39 W. Va. 448, 19 S. E. 545; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390; Laidley *v.* Hinchman, 3 W. Va. 423.

Joint defendants.— Where the judgment is against two jointly, but the bill in equity is to enforce it against the lands of one only, the other need not be made a defendant. Howard *v.* Stephenson, 33 W. Va. 116, 10 S. E. 66.

40. Brookshire *v.* Lomax, 20 Ind. 512; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

41. Brookshire *v.* Lomax, 20 Ind. 512; List *v.* Pumphrey, 3 W. Va. 672.

42. Smith *v.* Ballantyne, 10 Paige (N. Y.) 101.

43. Knox *v.* Smith, 4 How. (U. S.) 298, 11 L. ed. 983.

44. Turner *v.* Jenkins, 79 Ill. 228.

45. Glasscock *v.* Stringer, (Tex. Civ. App. 1895) 32 S. W. 920.

46. Douglass *v.* McCoy, 24 W. Va. 722; Sinnett *v.* Cralle, 4 W. Va. 600.

Rents and profits.— A party coming into a court of equity to enforce a judgment lien is not entitled to a decree for the rents and

judgment defendant.[47] The decree should generally give the debtor time to redeem from the sale ordered, although this is not indispensable;[48] but it should not undertake to adjust equities or settle partnership accounts between defendants.[49]

3. SCIRE FACIAS TO ENFORCE.[50] Although a scire facias on a judgment is not ordinarily a prerequisite to the right to issue execution,[51] it may be employed as a process for obtaining the enforcement of the judgment when authorized by statute, or in special cases,[52] as where the judgment includes instalments of a debt subsequently to accrue,[53] or where it embodies an express condition or is to be released on performance of an act *in pais*.[54] As it is a judicial and not an original writ, it should issue from and be returned to the court which rendered judgment and has possession of the record.[55]

4. SCIRE FACIAS TO HAVE NEW EXECUTION. Where execution on a judgment has been levied and returned under circumstances which apparently satisfy the judgment, but there is no actual satisfaction by reason of a mistake in the levy or for other causes, scire facias will lie to obtain a new execution.[56]

5. PROCEEDINGS TO MAKE PARTIES — a. In General. Where judgment has been recovered against one or more of several persons jointly indebted on a contract, the others not having been served, it is provided in several states that the judgment may be made effective against those defendants not originally served, by summoning them afterward to show cause why they should not be bound by the judgment.[57]

profits prior to the decree. Leake *v.* Ferguson, 2 Gratt. (Va.) 419.

47. Lang *v.* Brown, 21 Ala. 179, 56 Am. Dec. 244; Roper *v.* Hackney, 15 Fla. 323.

48. Crawford *v.* Weller, 23 Gratt. (Va.) 835.

49. Kent *v.* Chapman, 18 W. Va. 485.

50. See, generally, SCIRE FACIAS.

Scire facias on forfeited recognizance see RECOGNIZANCE.

Scire facias to enforce judgment: Against garnishee see GARNISHMENT, 20 Cyc. 1120. Against trustee as against *cestui que trust* see TRUSTS. In action by or against personal representative see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1071. In bastardy proceedings see BASTARDS, 5 Cyc. 670.

51. Jones *v.* Dilworth, 63 Pa. St. 447; McCann *v.* Farley, 26 Pa. St. 173.

52. Fox *v.* Seal, 22 Wall. (U. S.) 424, 22 L. ed. 774. See Roller *v.* Caruthers, 5 App. Cas. (D. C.) 368.

A scire facias to obtain an execution on a replevin bond given by three persons is invalid unless they are all made parties. Blair *v.* Parker, 6 J. J. Marsh. (Ky.) 630.

A scire facias on a judgment nisi against a witness for non-attendance on a subpœna must state distinctly the legal grounds of his liability. Knott *v.* Smith, 2 Sneed (Tenn.) 244.

Amendment may be allowed to the same extent in the case of a scire facias as in the case of an ordinary execution. Otterback *v.* Patch, 5 App. Cas. (D. C.) 69.

53. Outen *v.* Mitchels, 1 Bibb (Ky.) 360. But in Pennsylvania scire facias is not necessary in such cases. Chambers *v.* Harger, 18 Pa. St. 15; Reynolds *v.* Lowry, 6 Pa. St. 465.

54. Templeton *v.* Shakley, 107 Pa. St. 370; Montelius *v.* Montelius, 5 Pa. L. J. 88.

55. Kennebec Steam Towage Co. *v.* Rich, 100 Me. 62, 60 Atl. 702, holding further that a statute which provides that the Kennebec superior court has exclusive jurisdiction of scire facias on judgments and recognizances not exceeding five hundred dollars does not take away the inherent jurisdiction of that court over scire facias to obtain execution on its judgments, although the debt and costs in the aggregate exceed five hundred dollars.

56. *Connecticut.*— Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371; Ensworth *v.* Davenport, 9 Conn. 390.

Kentucky.— Scott *v.* Maupin, Hard. 122.

Maine.— Prescott *v.* Prescott, 65 Me. 478; Soule *v.* Buck, 55 Me. 30; Grosvenor *v.* Chesley, 48 Me. 369; Pillsbury *v.* Smyth, 25 Me. 427; Steward *v.* Allen, 5 Me. 103.

Massachusetts.— Flagg *v.* Dryden, 7 Pick. 52; Kendrick *v.* Wentworth, 14 Mass. 57.

New Hampshire.— Green *v.* Bailey, 3 N. H. 33.

Vermont.— Baxter *v.* Tucker, 1 D. Chipm. 353.

See 30 Cent. Dig. tit. "Judgment," § 1578.

57. *California.*— Cooper *v.* Burch, 140 Cal. 548, 74 Pac. 37.

Kansas.— Robinson *v.* Kinney, 2 Kan. 184.

New York.— Long *v.* Stafford, 103 N. Y. 274, 8 N. E. 522; Maples *v.* Mackey, 89 N. Y. 146; Austin *v.* Rawdon, 44 N. Y. 63; Organ *v.* Wall, 19 Hun 184; Merchants' Exch. Nat. Bank *v.* Waitzfelder, 14 Hun 47; Freeman *v.* Barrowcliffe, 44 N. Y. Super. Ct. 313; Prince *v.* Cujas, 7 Rob. 76; Ticknor *v.* Kennedy, 4 Abb. Pr. N. S. 417; Townsend *v.* Newell, 14 Abb. Pr. 340; Kernochan *v.* Bland, 59 How Pr. 97; Broadway Bank *v.* Luff, 51 How. Pr. 479; Johnson *v.* Smith, 23 How. Pr. 444; Harper *v.* Bangs, 18 How. Pr. 457.

North Carolina.— Navassa Guano Co. *v.* Willard, 73 N. C. 521.

b. Scire Facias. Joint debtors not originally summoned may also be made liable to the judgment in those states where the common-law practice prevails by means of a scire facias requiring them to show cause why they should not be so bound.[58] This writ is also an appropriate common-law process for making a person a party defendant to the judgment who since its rendition has become chargeable to an execution thereon, or in some way accountable for the assets of the original defendant, as in the case of subsequent purchasers, heirs, and devisees.[59]

6. Scire Facias on Justice's Transcript — a. In General. Where a transcript of a justice's judgment is entered in a court of record for purposes of lien and execution, a scire facias either to revive it or to obtain an execution against lands must issue from the superior court and the new judgment be there granted.[60] In such a proceeding the merits and the validity of the justice's judgment cannot be inquired into, want of jurisdiction not being apparent.[61]

b. Requisites and Validity of Writ. The writ should be correctly entitled in the names of the parties to the original judgment,[62] and should show the rendition of a valid judgment by the justice,[63] and the amount due upon it,[64] and also the issue and return of execution upon it, if any,[65] and that the transcript was duly certified by the justice[66] and filed or recorded in the superior court.[67] If the scire facias appears on its face to be valid, a motion to quash it will be overruled.[68]

c. Pleading and Evidence. Defendant may deny the existence of the judg-

Wisconsin.— Dill *v.* White, 52 Wis. 456, 9 N. W. 404.

See 30 Cent. Dig. tit. "Judgment," § 1579.

58. Cleveland *v.* Skinner, 56 Ill. 500; Conwell *v.* Thompson, 50 Ill. 329; Day *v.* Gelston, 22 Ill. 102; Ryder *v.* Glover, 4 Ill. 547; Tiffany *v.* Breese, 4 Ill. 499; Ladd *v.* Edwards, 1 Ill. 182; Kleinschmidt *v.* Freeman, 4 Mont. 400, 2 Pac. 275; Clinton Bank *v.* Hart, 5 Ohio St. 33; U. S. *v.* Shellenberger, Tapp. (Ohio) 244; Lofthouse *v.* Thornton, 1 Ohio Dec. (Reprint) 219, 4 West. L. J. 528.

Where judgment could not have been rendered in original suit.— A defendant not originally served cannot thus be made liable to the judgment if it appears from the record that judgment could not have been legally rendered against him in the original suit if he had been served. Clinton Bank *v.* Hart, 19 Ohio 372.

59. *Georgia.*— Bryant *v.* Owen, 1 Ga. 355.

Illinois.— Colson *v.* Leitch, 110 Ill. 504; Firebaugh *v.* Hall, 63 Ill. 81; Ryder *v.* Glover, 4 Ill. 547; Harrison *v.* Hart, 21 Ill. App. 348.

Maryland.— Hanson *v.* Barnes, 3 Gill & J. 359, 22 Am. Dec. 322.

Mississippi.— Smith *v.* Winston, 2 How. 601.

North Carolina.— White *v.* Stanton, 48 N. C. 41; Falconer *v.* Jones, 14 N. C. 334.

Ohio.— McVickar *v.* Ludlow, 2 Ohio 246.

Pennsylvania.— Colwell *v.* Rockwell, 100 Pa. St. 133; Moore *v.* Skelton, 14 Pa. St. 359; Benner *v.* Phillips, 9 Watts & S. 13; Huber *v.* Culley, 4 Pa. Dist. 471; Gray's Estate, 3 Del. Co. 325; Britton *v.* Van Syckel, 24 Leg. Int. 276.

Tennessee.— Moore *v.* Webb, 6 Heisk. 301; Hillman *v.* Hickerson, 3 Head 575.

United States.— Ramsey *v.* Hanlon, 33 Fed. 425.

See 30 Cent. Dig. tit. "Judgment," § 1580.

60. Miller *v.* Shearer, 6 Ind. 50; Oungst *v.* Dils, 4 Ind. 545; Polson *v.* Simpson, 1 Ind. 492; Scott *v.* Williams, 7 Blackf. (Ind.) 370; Orput *v.* Hardy, 6 Blackf. (Ind.) 456; White *v.* Elkin, 6 Blackf. (Ind.) 123; Jebo *v.* Ewing, 5 Blackf. (Ind.) 563; Wilcox *v.* Ratliff, 5 Blackf. (Ind.) 561; Hamilton *v.* Matlock, 5 Blackf. (Ind.) 421; Commonwealth Bank *v.* Dunn, 4 Blackf. (Ind.) 513; Haggarty *v.* Burr, 22 Iowa 219; Glaze *v.* Lewis, 12 Oreg. 347, 7 Pac. 354; Rice *v.* Kitzelman, 1 Chest. Co. (Pa.) 173.

61. Hill *v.* Brown, 4 Harr. (Del.) 519; Commonwealth Bank *v.* Dunn, 4 Blackf. (Ind.) 513; Huffsmith *v.* Levering, 3 Whart. (Pa.) 110.

62. Codding *v.* Moore, 5 Blackf. (Ind.) 601; Barrackman *v.* Worthington, 5 Blackf. (Ind.) 213.

In case of the death of the judgment defendant, the scire facias should run against his executors or administrators, and terretenants, if any, as well as the heirs. Welborn *v.* Jolly, 4 Blackf. (Ind.) 279.

63. Roller *v.* Custer, 6 Blackf. (Ind.) 433 (showing official character of justice); Wilcox *v.* Ratliff, 5 Blackf. (Ind.) 561 (showing service of process on defendant); Robideau *v.* Ewing, 5 Blackf. (Ind.) 552; Wiley *v.* Logan, 5 Blackf. (Ind.) 11 (averment that judgment is in force not necessary).

64. Orput *v.* Hardy, 6 Blackf. (Ind.) 456.

65. Barrackman *v.* Worthington, 5 Blackf. (Ind.) 213. *Compare* Campbell *v.* Baldwin, 6 Blackf. (Ind.) 364. And see Shiel *v.* Ferriter, 7 Blackf. (Ind.) 574.

66. Nevils *v.* Campbell, 7 Blackf. (Ind.) 325.

67. Nowland *v.* Jackson, 1 Ind. 162; Shiel *v.* Ferriter, 7 Blackf. (Ind.) 574; Clifford *v.* Wright, 6 Blackf. (Ind.) 296; Codding *v.* Deal, 6 Blackf. (Ind.) 80.

68. Hoover *v.* Davenport, 5 Blackf. (Ind.) 230.

ment or transcript,[69] or allege its alteration in a material particular,[70] or deny its filing in the superior court.[71] The allegation that he has lands within the county which are subject to execution must be proved,[72] as also the issue and return of execution from the justice's court, the latter fact being provable by producing the original execution or a certified or sworn copy.[73]

D. Revival of Judgments[74]**— 1. Necessity For Revival**[75]**—a. Dormant Judgments.** Generally speaking the necessity for reviving a judgment arises only in connection with the extension of its lien on real property or the right to issue execution upon it.[76] The fact that it has not been revived in due time, and so has become dormant, does not prevent the maintenance of an action upon it, where plaintiff does not seek to maintain a lien growing out of it,[77] and is no obstacle to a writ of inquiry,[78] or to an amendment of the judgment *nunc pro tunc*.[79]

b. Right to Execution. By statutes in many of the states no execution or other final process for the enforcement of a judgment can issue upon it if a certain prescribed length of time from its rendition has been allowed to elapse without proceedings to revive the judgment.[80] Still it is held that an execution issued after

69. Scott *v.* Williams, 7 Blackf. (Ind.) 370.

70. Roller *v.* Custer, 6 Blackf. (Ind.) 433.

71. Bennett *v.* Jones, 7 Blackf. (Ind.) 110.

72. Shiel *v.* Ferriter, 7 Blackf. (Ind.) 574. See Roller *v.* Custer, 6 Blackf. (Ind.) 433.

Limitation of rule.— If defendant appears and suffers judgment by *nil dicit*, the averment that he has real property subject to execution need not be proved. Groves *v.* McCabe, 8 Blackf. (Ind.) 88.

73. Henkle *v.* German, 6 Blackf. (Ind.) 423.

74. Continuance of lien by revival see *supra*, XV, G, 5.

Death of party after judgment, abatement or survival of suit see Abatement and Revival.

Revival of action after judgment or death of party see Abatement and Revival.

Revival of bill in equity see Equity.

Revival of judgment in action by or against husband or wife, or both see Husband and Wife.

Revival of justice's judgment see Justices of the Peace.

Reviving judgment against corporation to reach property of non-resident members situated within the state see Corporations, 10 Cyc. 675 note 96.

Appeal from judgment of revivor see Appeal and Error, 2 Cyc. 952 note 5.

75. Dormant judgments in general see *supra*, XVIII, B.

76. An administrator cannot be held liable for not paying a judgment more than seven years old which has not been revived. Groves *v.* Williams, 68 Ga. 598. And see Bridges *v.* Adams, 32 Md. 577.

Foreclosure decree.— Inasmuch as a judgment *in rem* founded on the foreclosure of a mortgage does not become dormant, it needs no revival, and a proceeding for that purpose is unnecessary. Fowler *v.* American Bank, 114 Ga. 417, 40 S. E. 248.

77. *Georgia.*—Lockwood *v.* Barefield, 7 Ga. 393.

Maine.— Noble *v.* Merrill, 48 Me. 140.

New Jersey.—State *v.* Hamilton, 16 N. J. L. 153.

Ohio.— Goodin *v.* McArthur, 7 Ohio Dec. (Reprint) 611, 4 Cinc. L. Bul. 215.

Rhode Island.— Arkansas City First Nat. Bank *v.* Hazie, (1904) 56 Atl. 1032.

South Carolina.— Lawton *v.* Perry, 40 S. C. 255, 18 S. E. 861.

See 30 Cent. Dig. tit. "Judgment," § 1585.

Contra.— See Gagneux's Succession, 40 La. Ann. 701, 4 So. 869, holding that payment of a judgment not reinscribed or revived cannot be sought after the expiration of the ten years by which it is prescribed.

78. Cookson *v.* Turner, 3 Binn. (Pa.) 416.

79. Allen *v.* Bradford, 3 Ala. 281, 37 Am. Dec. 689.

80. *Arkansas.*— Hanly *v.* Carneal, 14 Ark. 524; Bracken *v.* Wood, 12 Ark. 605.

Illinois.— McIlwain *v.* Karstens, 152 Ill. 135, 38 N. E. 555; Weis *v.* Tiernan, 91 Ill. 27; Hernandez *v.* Drake, 81 Ill. 34.

Iowa.— Denegre *v.* Haun, 13 Iowa 240.

Kansas.— State *v.* McArthur, 5 Kan. 280.

Kentucky.— Pollard *v.* Pollard, 4 T. B. Mon. 359.

Maryland.— Mitchell *v.* Chesnut, 31 Md. 521.

Mississippi.— Bacon *v.* Red, 27 Miss. 469.

New Jersey.— Seely *v.* Norris, 3 N. J. L. 624.

New York.— Cary *v.* Clark, 3 Edw. 274.

Oregon.— After the lien of a judgment has expired, by the lapse of ten years, execution may still issue by leave of court. Murch *v.* Moore, 2 Oreg. 189.

Pennsylvania.— Manufacturers', etc., Bank *v.* Frederickson, 2 Miles 70; City Bldg., etc., Assoc. *v.* Nickey, 21 Pa. Co. Ct. 226; Albert *v.* March, 6 Pa. Co. Ct. 142; Brandon *v.* Lawrence, 1 Leg. Rec. Rep. 312; Bucher *v.* Pringle, 16 Montg. Co. Rep. 106; Marx *v.* Goldsmith, 14 Wkly. Notes Cas. 173; Huzzard *v.* Miller, 2 Woodw. 35. But note that the act of May 19, 1887 (Pamphl. Laws 132), provides that execution may issue upon any judgment of record in any of the courts of the commonwealth, notwithstanding the judgment may have lost its lien upon real estate,

the time without revival of the judgment is not void, but only voidable at the option of the judgment debtor, and may be levied and the property sold under it, if he does not take advantage of the irregularity.[81]

e. Effect of Execution or Revival. Dormancy of the judgment under the rule just stated may be avoided by the timely issue of an execution; that is, if such a writ has been issued within the limited time, successive executions may be issued at any time thereafter, during the life of the judgment, without the necessity of a revival.[82]

d. Filing Transcript in Another Court. A judgment recovered before a justice of the peace or other inferior court, and become dormant, is not revived by merely filing a transcript of it in a superior court; it must be duly revived by regular proceedings for that purpose before execution can issue on it.[83]

without a previous writ of scire facias to revive the same. This refers only to judgments originally obtained in courts of record, or which by regular proceedings according to the course of law before inferior courts have by transcript been given the force of judgments obtained in the common pleas, and was not intended to apply to a transcript of a judgment from an alderman's docket, filed more than five years after the judgment was rendered, without its revival by scire facias. Smith *v.* Wehrly, 157 Pa. St. 407, 27 Atl. 700.

Tennessee.— Hess *v.* Sims, 1 Yerg. 143. See Henry *v.* Wilson, 9 Lea 176.

Texas.— North *v.* Swing, 24 Tex. 193; Lubbock *v.* Vince, 5 Tex. 415.

Vermont.— Fletcher *v.* Mott, 1 Aik. 339.

Washington.— Hewitt *v.* Root, 31 Wash. 312, 71 Pac. 1021; Hardin *v.* Day, 29 Wash. 664, 70 Pac. 118.

Wisconsin.— Ansley *v.* Haney, 1 Pinn. 387.

United States.— Azcarati *v.* Fitzsimmons, 2 Fed. Cas. No. 690, 3 Wash. 134; Veitch *v.* Farmers' Bank, 28 Fed. Cas. No. 16,910, 3 Cranch C. C. 81; McDonald *v.* White, 16 Fed. Cas. No. 8,769, 1 Cranch C. C. 149.

See 30 Cent. Dig. tit. "Judgment," § 1586.

What judgments affected.— This statutory rule does not apply to a judgment recovered in a criminal court for a fine (Com. *v.* Snyder, 4 Pa. Co. Ct. 261), or to a conditional judgment, to be released on performance of a certain act, since execution could not issue upon it immediately, and a reasonable time must be allowed for performance (Miller *v.* Milford, 2 Serg. & R. (Pa.) 35), or, in Missouri, to a judgment of a county court, as it is not a court of common-law jurisdiction (Caldwell *v.* Lockridge, 9 Mo. 362).

What process intended.— The rule applies not only to the ordinary writ of execution or fieri facias, but also to an attachment (Boyd *v.* Talbott, 7 Md. 404), and to an attachment execution or garnishment (Wheelen *v.* Phillips, 140 Pa. St. 33, 21 Atl. 239. But *compare* Bohan *v.* Reap, 11 York Leg. Rec. (Pa.) 79), and also to a writ of mandamus to the officers of a municipal corporation, directing them to pay the judgment out of the public funds in their hands, since this takes the place of an ordinary execution (O'Donnell *v.* Cass Tp. School-Dist., 133 Pa. St. 162, 19 Atl. 358).

81. Brevard *v.* Jones, 50 Ala. 221; Jackson *v.* Bartlett, 8 Johns. (N. Y.) 361; Bailey *v.* Wagoner, 17 Serg. & R. (Pa.) 327; Vastine *v.* Fury, 2 Serg. & R. (Pa.) 426.

82. *Alabama.*— When execution has been issued on a judgment within a year after its rendition, and not returned satisfied, another execution may be issued at any time within ten years after the teste of the last, without a revival of the judgment. McCall *v.* Rickarby, 85 Ala. 152, 4 So. 414; Jewett *v.* Hoogland, 30 Ala. 716; Van Cleave *v.* Haworth, 5 Ala. 188.

District of Columbia.— Moses *v.* U. S., 19 App. Cas. 290; Crumbaugh *v.* Otterback, 20 D. C. 434; Jackson *v.* U. S. Bank, 13 Fed. Cas. No. 7,131, 5 Cranch C. C. 1; Johnson *v.* Glover, 13 Fed. Cas. No. 7,385, 2 Cranch C. C. 678; Ott *v.* Murray, 18 Fed. Cas. No. 10,615, 3 Cranch C. C. 323; Phillips *v.* Lowndes, 19 Fed. Cas. No. 11,103, 1 Cranch C. C. 283.

Kentucky.— Payne *v.* Payne, 8 B. Mon. 391.

Mississippi.— Stith *v.* Parham, 57 Miss. 289; Buckner *v.* Pipes, 56 Miss. 366; Abbey *v.* Commercial Bank, 31 Miss. 434; State Bank *v.* Catlett, 6 Miss. 175.

Missouri.— Clemens *v.* Brown, 9 Mo. 718; Lindell *v.* Benton, 6 Mo. 361; Dowsman *v.* Potter, 1 Mo. 518.

New York.— Swift *v.* Flanagan, 12 How. Pr. 438; Albany *v.* Evertson, 1 Cow. 36; Jackson *v.* Stiles, 9 Johns. 391.

North Carolina.— Williams *v.* Mullis, 87 N. C. 159.

Ohio.— Money made upon a younger execution cannot be distributed to elder judgments and levies, where five years have elapsed from the issue of execution, and the judgments are not revived. Lytle *v.* Cincinnati Mfg. Co., 4 Ohio 459.

Pennsylvania.— Lewis *v.* Smith, 2 Serg. & R. 142; Dodge *v.* Casey, 1 Miles 13; Landouzy *v.* Seelos, 4 Wkly. Notes Cas. 151; Huzzard *v.* Miller, 2 Woodw. 35. *Compare* Comstock *v.* Kilchenstein, 14 Wkly. Notes Cas. 388.

Tennessee.— Cowan *v.* Shields, 1 Overt. 64.

See 30 Cent. Dig. tit. "Judgment," § 1587.

Contra.— Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436; Allen *v.* Carpenter, 7 Vt. 397.

83. Right *v.* Martin, 11 Ind. 123; Lindgren *v.* Gates, 26 Kan. 135; Brown *v.* Joy, 61 Me. 564; Williams *v.* Williams, 85 N. C. 383. *Contra*, in Missouri (Corby *v.* Tracy, 62 Mo. 511), and in Pennsylvania since the

e. Suspension or Stay of Proceedings. Where the right to issue execution is stayed, suspended, or enjoined, the statutory period of limitation begins to run from the removal of the impediment, and revival of the judgment is not necessary to authorize an execution within the limited time thereafter, although more than that time has elapsed since the rendition of the judgment.[84]

f. Death of Party[85] — (I) *DEFENDANT.* If an execution issues and is dated after the death of defendant, it is irregular and void, and cannot be enforced against either the real or personal property of defendant; but the judgment must first be revived against the heirs or devisees in the one case, or the personal representatives in the other.[86] But it will be observed that the lien of the judgment may continue, although the right to issue execution is suspended by the death of

act of 1887 (see Homberger *v.* Whitely, 12 Pa. Co. Ct. 10; Lowrie's Estate, 5 Lanc. L. Rev. 295). Under earlier statutes the rule was as stated in the text. Beck *v.* Church, 113 Pa. St. 200, 6 Atl. 57; Crago *v.* Darte, 1 Pa. Co. Ct. 54; Barnard *v.* Worth, 1 Chest. Co. Rep. 239; Rice *v.* Kitzelman, 1 Chest. Co. Rep. 173.

84. *Kentucky.*— Long *v.* Morton, 2 A. K. Marsh. 39.

Maryland.— Salmon *v.* Yates, 1 Harr. & J. 488.

South Carolina.— *Ex p.* Graham, 54 S. C. 163, 32 S. E. 67.

Vermont.— Porter *v.* Vaughn, 24 Vt. 211.

Virginia.—Hutsonpiller *v.* Stover, 12 Gratt. 579; Noland *v.* Seekright, 6 Munf. 185.

See 30 Cent. Dig .tit. "Judgment," § 1589.

Compare Ashmore *v.* McDonnell, (Kan. 1888) 16 Pac. 687, holding that where a judgment debtor was convicted and confined in the penitentiary an execution issued on the judgment after his conviction without revival of the judgment was void.

85. Validity of judgment against party deceased see *supra*, I, C, 2, b.

86. *Alabama.*—Collier *v.* Windham, 27 Ala. 291, 62 Am. Dec. 767.

Arkansas.— Cunningham *v.* Burk, 45 Ark. 267.

Delaware.— Cooper *v.* May, 1 Harr. 18.

Illinois.— Meyer *v.* Mintonye, 106 Ill. 414; Coran *v.* Pittenger, 92 Ill. 241; Turney *v.* Young, 22 Ill. 253. The provisions of Rev. St. c. 57, § 37, for the issue of execution upon a judgment notwithstanding the death of defendant, without first reviving the judgment against the heirs and legal representatives, apply only to cases where the seven years have not expired during which a judgment is made an existing lien upon real estate. Scammon *v.* Swartwout, 35 Ill. 326.

Indiana.— State *v.* Michaels, 8 Blackf. 436.

Kansas.— Halsey *v.* Van Vliet, 27 Kan. 474.

Kentucky.— Calloway *v.* Eubank, 4 J. J. Marsh. 280.

Maryland.— Polk *v.* Pendleton, 31 Md. 118.

Mississippi.— Andrews *v.* Anderson, (1894) 16 So. 346; Faison *v.* Johnson, 70 Miss. 214, 12 So. 152; Davis *v.* Helm, 3 Sm. & M. 17; Hubert *v.* Williams, Walk. 175; Wilson *v.* Kirkland, Walk. 155; Hicks *v.* Murphy, Walk. 66. But where lands of the testator have been sold by the executors under a decree of a court, a judgment creditor of the testator need not revive his judgment by scire facias against the heirs before a levy upon the land thus previously sold, although the judgment was revived by scire facias against the executors before such sale; for by that sale the heirs were divested of all interest in the land. Smith *v.* Winston, 2 How. 601.

Missouri.— See Finley *v.* Caldwell, 1 Mo. 512.

New York.— Wallace *v.* Swinton, 64 N. Y. 188.

North Carolina.— Barfield *v.* Barfield, 113 N. C. 230, 18 S. E. 505; Aycock *v.* Harrison, 71 N. C. 432; Jordan *v.* Pool, 28 N. C. 288; Wood *v.* Harrison, 18 N. C. 356; Den *v.* McCullough, 4 N. C. 684.

Ohio.— Cartney *v.* Reed, 5 Ohio 221.

Pennsylvania.— McMurray *v.* Hopper, 43 Pa. St. 468; Colborn *v.* Trimpey, 36 Pa. St. 463; Bomberger *v.* Raymond, 12 Pa. Co. Ct. 460; Davey's Estate, 9 Pa. Co. Ct. 125; Webb *v.* Wiltbank, 1 Pa. L. J. Rep. 324.

Tennessee.— Puckett *v.* Richardson, 6 Lea 49; Harman *v.* Hann, 6 Baxt. 90; Ashworth *v.* Demier, 1 Baxt. 323; Overton *v.* Perkins, 10 Yerg. 328; Gwin *v.* Latimer, 4 Yerg. 22.

Texas.— Cain *v.* Woodward, 74 Tex. 549, 12 S. W. 319.

See 30 Cent. Dig. tit. "Judgment," § 1590.

Contra.— Smith *v.* Lockett, 73 Ga. 104; Williams *v.* Price, 21 Ga. 507; Harteaux *v.* Eastman, 6 Wis. 410; Jones *v.* Davis, 24 Wis. 229.

Execution antedated.— At common law an execution hearing date before the death of defendant, although not issued until afterward, is valid without joining the personal representatives of defendant. Collingworth *v.* Horn, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753.

Judgment after death of defendant.—Where a defendant died during the term, after the damages had been assessed, but before the judgment had been regularly entered, and the judgment was entered on the last day of the term, it was not necessary to issue scire facias to the executors or administrators. Miller *v.* Jones, 2 Speers (S. C.) 315.

Judgment for taxes.— A judicial sale of realty for taxes is not void because the owner died intestate before the entry of the decree for sale, leaving heirs, against whom the action was not revived. Dunham *v.* Harvey, 111 Tenn. 620, 69 S. W. 772.

defendant, so that the lien may be enforced in equity without a revival of the judgment.[87]

(II) *JOINT DEFENDANT.* Where one of two joint defendants dies, the judgment cannot be enforced by execution against the real estate of the survivor only; and as it must issue against the real estate of both, the property of the decedent is protected by the same law which would govern the case if he had been the sole defendant, and the judgment must therefore be revived by scire facias.[88]

(III) *PLAINTIFF.*[89] According to some of the decisions execution cannot issue on a judgment after the death of plaintiff until it has been revived.[90] But others hold that an execution so issued while irregular is not void,[91] and some that no revival is necessary in this case.[92]

2. RIGHT TO REVIVE — a. Judgments Which May Be Revived. To authorize the revival of a judgment the judgment must be a valid one.[93] It must also be a subsisting and unsatisfied obligation;[94] and it must be in the nature of a final

87. Maxwell *v.* Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875.

88. Woodcock *v.* Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568. *Compare* Baskin *v.* Huntington, 130 N. Y. 313, 29 N. E. 310; Com. *v.* Vanderslice, 8 Serg. & R. (Pa.) 452; Bressler *v.* Miller, 1 Leg. Chron. (Pa.) 127; Overton *v.* Perkins, 10 Yerg. (Tenn.) 328; Reams *v.* McNail, 9 Humphr. (Tenn.) 542; Erwin *v.* Dundas, 4 How. (U. S.) 58, 11 L. ed. 875. *Contra,* Martin *v.* Decatur Branch Bank, 15 Ala. 587, 50 Am. Dec. 147, holding that, where judgment is rendered against two defendants, and one dies, the lands of the survivor may be sold under an execution issued on the judgment, without its being revived by scire facias.

89. Validity of judgment for party deceased see *supra,* I, C, 2, d.

90. Mawhinney *v.* Doane, 40 Kan. 681, 20 Pac. 488; Harwood *v.* Murphy, 13 N. J. L. 193; Rhodes *v.* Crutchfield, 7 Lea (Tenn.) 518; Gregory *v.* Chadwell, 3 Coldw. (Tenn.) 390.

91. See cases cited *infra,* in this note.

The execution is good as against strangers. — Hughes *v.* Wilkinson, 37 Miss. 482. And the irregularity constitutes no ground for enjoining the execution. Ammons *v.* Whitehead, 31 Miss. 99.

92. Simmons *v.* Heman, 17 Mo. App. 444; Berryhill *v.* Wells, 5 Binn. (Pa.) 56.

The death of a judgment creditor, after he has assigned the judgment to sureties by whom it has been paid, and a failure to revive such judgment, cannot affect their rights and interests, or prevent them from enforcing the judgment by execution against the principal. Harris *v.* Frank, 29 Kan. 200.

93. See cases cited *infra,* this note.

A judgment which is void and a mere nullity cannot be revived. *In re* Fourth Drainage Dist., 37 La. Ann. 916; Conery *v.* Rotchford, 34 La. Ann. 520; Laurent *v.* Beelman, 30 La. Ann. 363; Phelps *v.* Hawkins, 6 Mo. 197; Hartle *v.* Long, 5 Pa. St. 491.

Revival of a fraudulent judgment may be perpetually enjoined. Cheek *v.* Taylor, 22 Ga. 127.

Gambling contract.— In Illinois a judgment at law obtained on a note given in settlement of a gambling debt contrary to the statute cannot be revived by scire facias. Butler *v.* Nohe, 98 Ill. App. 624.

94. See cases cited *infra,* this note.

Reversed judgment.— If the original judgment is reversed, a judgment upon a scire facias to revive it cannot be supported. Mills *v.* Conner, 1 Blackf. (Ind.) 7.

Payment or satisfaction.— A judgment which has been fully paid and extinguished cannot be revived. Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616. But a subsisting levy on land is no bar to a revival of the judgment. Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338. And a conditional appropriation by an auditor to a judgment creditor in the distribution of the proceeds of the debtor's real estate will not prevent the revival of the judgment for the whole amount, where no money has actually been received upon it. Masser *v.* Dewart, 46 Pa. St. 534.

Writ of error pending.— Scire facias may issue to revive a judgment which has been removed by writ of error sued out without bail and still pending, as this does not constitute a supersedeas. Boyer *v.* Rees, 4 Watts (Pa.) 201.

Effect of injunction.— A judgment suspended by an injunction may be revived on the death of either party. Richardson *v.* Prince George Justices, 11 Gratt. (Va.) 190.

Statute of limitations.— A judgment which has become barred by the statute of limitations cannot be revived by scire facias. Browne, etc., Co. *v.* Chavez, 9 N. M. 316, 54 Pac. 234.

After expiration of lien.— Scire facias to revive a judgment lies after the lien of the judgment has expired. Fowler *v.* Thurmond, 13 Ark. 259; Hubbard *v.* Bolls, 7 Ark. 442; Wonderly *v.* Lafayette County, 74 Fed. 702.

Present right to execution.— At common law scire facias to revive a judgment lay only where the time for issuing execution was past. Harmon *v.* Dedrick, 3 Barb. (N. Y.) 192. But according to modern decisions it is not a valid objection to a proceeding to revive that at the time of its commencement plaintiff could have proceeded by execution. Stille *v.* Wood, 1 N. J. L. 118; Stewart *v.*

judgment,[95] originally capable of enforcement by execution.[96] These conditions being met, scire facias or other appropriate proceedings may be maintained for the revival of any judgment or decree for the payment of money.[97]

b. Grounds For Revival. It is sufficient ground for proceedings to revive a judgment that there has been a change of parties,[98] that the lien of the judgment on realty has expired or is about to expire,[99] that an execution issued and levied under the judgment failed to produce satisfaction because the property seized did not belong to the judgment debtor, or was not subject to execution, or because the execution purchaser failed to get possession,[1] or that the judgment debtor has wrongfully caused the execution to be returned satisfied.[2]

c. Persons Who May Revive[3] — (i) *In General.* Proceedings to revive a judgment should ordinarily be brought in the name of plaintiff in the original judgment,[4] although they may also be maintained by sureties, or a joint defendant,

Peterson, 63 Pa. St. 230; Rogers *v.* Hollingsworth, 95 Tenn. 357, 32 S. W. 197. And if he unnecessarily sues out a scire facias when he might have an immediate execution, the writ should not be quashed for that reason, but execution should not issue until he obtains judgment under the writ. Lambson *v.* Moffett, 61 Md. 426.

95. Serles *v.* Cromer, 88 Va. 426, 13 S. E. 859.

Where the clerk has made no entry on the minutes of the court of a judgment in summary proceedings, there is nothing on which a scire facias to revive can issue. Brown *v.* Coward, 3 Hill (S. C.) 4.

96. Turner *v.* Dupree, 19 Ala. 198; Horton *v.* Clark, 40 Ga. 412.

In Missouri, the statutes having provided for the revival of judgments by scire facias, without making any exceptions, the courts cannot except a judgment from their operation on the ground that it is not a lien on property, or because no execution could issue thereon. Lafayette County *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360.

97. See cases cited *infra*, this note.

Default judgment may be revived. State Bank *v.* McRa, 2 Speers (S. C.) 639.

A delivery bond judgment may be revived by scire facias. Eddins *v.* Graddy, 28 Ark. 500.

An attachment lien upon land, perfected by a judgment in the life of defendant, is not cut off by his death, but can be enforced only by revivor of the judgment against his representatives. Cunningham *v.* Burk, 45 Ark. 267.

Judgment in favor of state.— An unsatisfied judgment in favor of the people may be revived by scire facias. Albin *v.* People, 46 Ill. 372.

A decree in equity is a judgment which may be revived. Hughes *v.* Shreve, 3 Metc. (Ky.) 547; McCoy *v.* Nichols, 4 How. (Miss.) 31. *Contra*, Isom *v.* McGehee, 45 Miss. 712; Jeffreys *v.* Yarborough, 16 N. C. 506.

Probate judgment or decrees may be revived. Sharp *v.* Herrin, 32 Ala. 502; Torrence *v.* Kerr, 27 Miss. 786. *Contra*, Rose *v.* Thompson, 36 Ark. 254.

Confession.— In Pennsylvania a scire facias does not lie to revive a judgment by confession entered on a warrant of attorney. Jones *v.* Dilworth, 63 Pa. St. 447.

98. See *supra*, XVIII, D, 1, f.

Application of rule.— The execution of a judgment note by a married woman jointly with her husband creates a moral obligation which is a sufficient consideration to support an amicable revival thereof by her after the death of the husband. Geiselbrecht *v.* Geiselbrecht, 8 Pa. Super. Ct. 183.

99. Masterson *v.* Cundiff, 58 Tex. 472; De Witt *v.* Jones, 17 Tex. 620.

1. Cross *v.* Zane, 47 Cal. 602; Cantwell *v.* McPherson, 3 Ida. 321, 29 Pac. 102; Edde *v.* Cowan, 1 Sneed (Tenn.) 290; Utah Nat. Bank *v.* Beardsley, 10 Utah 404, 37 Pac. 586. *Compare* Cunningham *v.* Doran, 18 Ill. 385.

2. McRoberts *v.* Lyon, 79 Mich. 25, 44 N. W. 160.

3. Revival by trustees of bank see Banks and Banking, 5 Cyc. 559 note 27.

4. Partnership.— A proceeding to revive a judgment entered in favor of a partnership should after the death of one partner be brought in the name of the surviving partner alone. Linn *v.* Downing, 216 Ill. 64, 74 N. E. 729 [*affirming* 116 Ill. App. 454]. A judgment in favor of a firm cannot be revived in favor of two persons who make affidavit that they are the surviving partners, when there is no suggestion in the record of the death of the other partner or of the appointment of an administrator. Boyd *v.* Platner, 5 Mont. 226, 2 Pac. 346. And see Copes *v.* Fultz, 1 Sm. & M. (Miss.) 623.

A married woman may bring a scire facias to continue the lien of a judgment against her husband, which was entered in her favor before they were married. Kincade *v.* Cunningham, 118 Pa. St. 501, 12 Atl. 410.

Use plaintiff.— The person for whose use a judgment was entered may prosecute a writ of scire facias to revive it in his own name. Clark *v.* Digges, 5 Gill (Md.) 109.

Public officers.— Where a judgment has been rendered in favor of an officer of a municipal corporation, it cannot be revived in the name of the municipality. Calais *v.* Bradford, 51 Me. 414.

An attorney who by special agreement with his client is entitled to a certain commission on the amount recovered, which amount is

on paying the judgment debt,[5] by the administrator of a deceased judgment creditor,[6] or by his trustee in bankruptcy.[7]

(II) *ASSIGNEES.* Proceedings to revive a judgment which has been assigned must be brought in the name of the original plaintiff, not of the assignee,[8] except where the statute authorizes such actions to be maintained in the name of the real party in interest.[9]

d. Persons Against Whom Revival May Be Had[10] — (I) *IN GENERAL.* All the parties to the original judgment must be parties to a proceeding to revive it,[11] and in particular the original judgment debtor if living must be made a defendant;[12] if he is dead the proceedings should be taken against his personal representatives,[13] or devisees or heirs taking realty.[14] Terre-tenants may and should also be joined as defendants.[15] Unless judgment absolute be entered on the lien docket, it cannot be continued by scire facias as against subsequent judgment creditors, without actual notice.[16] A judgment debtor who has paid a judgment cannot revive it against a mortgagee or judgment creditor who had a lien at the time of payment, or prior to the act by which it is sought to affect the lien.[17]

(II) *JOINT DEFENDANTS.* Where the judgment was recovered against two or more defendants jointly, proceedings for its revival must be against them all, if

evidenced by and embraced in the judgment, has a sufficient interest in the judgment to sue for its full revival. Martinez *v.* Vives, 32 La. Ann. 305.

5. Huckaby *v.* Sasser, 69 Ga. 603; Peters *v.* McWilliams, 36 Ohio St. 155; Baily *v.* Brownfield, 20 Pa. St. 41.

6. Baker *v.* Ingersoll, 37 Ala. 503; Challenor *v.* Niles, 78 Ill. 78; Durham *v.* Heaton, 28 Ill. 264, 81 Am. Dec. 275; Daisy Roller Mills *v.* Ward, 6 N. D. 317, 70 N. W. 271; McKinney *v.* Mehaffey, 7 Watts & S. (Pa.) 276. *Compare* Ireland *v.* Litchfield, 8 Bosw. (N. Y.) 634.

7. Brown *v.* Wygant, 163 U. S. 618, 16 S. Ct. 1159, 41 L. ed. 284.

8. *Arkansas.*— Brearly *v.* Peay, 23 Ark. 172.

Georgia.— Macon *v.* Bibb County Academy, 7 Ga. 204.

Indiana.— Forbes *v.* Tiffany, 4 Ind. 204.

Louisiana.— Marbury *v.* Pace, 30 La. Ann. 1330; Watt *v.* Hendry, 23 La. Ann. 594.

Michigan.— McRoberts *v.* Lyon, 79 Mich. 25, 44 N. W. 160.

Missouri.— Goddard *v.* Delaney, 181 Mo. 564, 80 S. W. 886; Bick *v.* Tanzey, 181 Mo. 515, 80 S. W. 902.

Ohio.— Welsh *v.* Childs, 17 Ohio St. 319.

Texas.— Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

West Virginia.— Wells *v.* Graham, 39 W. Va. 605, 20 S. E. 576.

See 30 Cent. Dig. tit. "Judgment," § 1596.

9. Wright *v.* Parks, 10 Iowa 342; Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698; Adams County School Dist. No. 34 *v.* Kountze, 3 Nebr. (Unoff.) 690, 92 N. W. 597.

Partial assignments.— Where scire facias is brought upon a judgment which has been assigned to several third persons in unequal portions, separate judgments of revival may be entered thereon in favor of the several assignees for the amounts respectively due to them. *In re* Ernst, 164 Pa. St. 87, 30 Atl. 371.

10. **Parties defendant on scire facias to revive** see *infra*, XVIII, D, 7, g.

11. Funderburk *v.* Smith, 74 Ga. 515; Messmore *v.* Williamson, 189 Pa. St. 73, 41 Atl. 1110, 69 Am. St. Rep. 791.

12. **A scire facias may be maintained to revive a judgment against a municipal corporation,** as, a township, although it owns no real estate. Conyngham Tp. *v.* Walter, 95 Pa. St. 85. And where the corporation has been dissolved by act of the legislature, and the same people and territory organized into a new corporation by a different name, scire facias to revive a judgment against the old municipality may be brought against the new one. Grantland *v.* Memphis, 12 Fed. 287.

Revival against wife and second husband.— A judgment against a former husband cannot be revived after his death against his wife and her second husband, over the latter's objection, merely because he is the husband of decedent's wife. Wessell *v.* Gross, (Tenn. Ch. App. 1900) 57 S. W. 372.

13. *Arkansas.*— Powell *v.* Macon, 40 Ark. 541.

Georgia.— Wright *v.* Harris, 24 Ga. 415.

Kansas.— Halsey *v.* Van Vliet, 27 Kan. 474.

Pennsylvania.— Brown *v.* Webb, 1 Watts 411; Righter *v.* Rittenhouse, 3 Rawle 273.

South Carolina.— Chester, etc., R. Co. *v.* Marshall, 40 S. C. 59, 18 S. E. 247; Leitner *v.* Metz, 32 S. C. 383, 10 S. E. 1082.

See 30 Cent. Dig. tit. "Judgment," § 1597.

14. Ogden *v.* Smith, 14 Ala. 428; Langston *v.* Abney, 43 Miss. 161; Clifton *v.* Anderson, 40 Mo. App. 616; Douglas *v.* Waddle, 8 Ohio 209; Miami Exporting Co. *v.* Halley, 7 Ohio 11.

15. Hill *v.* Sutton, 47 Ind. 592; Fursht *v.* Overdeer, 3 Watts & S. (Pa.) 470. See *infra*, XVIII, D, 7, g, (III).

16. Stephen's Appeal, 38 Pa. St. 9.

17. Stout *v.* Vankirk, 10 N. J. Eq. 78.

living.[18] If one be dead the proceedings may be taken against his personal representative, without joining the other defendant, or against the latter alone, or against both.[19] But plaintiff cannot travel out of the record to show that a given person was a party to the judgment, unless he shows a loss of some part of the record.[20]

3. DEFENSES OR GROUNDS OF OPPOSITION[21] — a. In General. In a proceeding to revive a judgment, the merits cannot be inquired into, and no matter can be pleaded in defense which was or might have been set up in defense to the original action.[22] As a general rule the only admissible pleas are *nul tiel record*, under

18. Bolinger *v.* Fowler, 14 Ark. 27; Fox *v.* Abbott, 12 Nebr. 328, 11 N. W. 303. *Contra*, Hammett *v.* Sprowl, 31 La. Ann. 325.

Defendant not bound.— Where a judgment in form runs against two parties, but there was no jurisdiction of one of them, and the latter was not in fact a party to the action or to the judgment, he need not be joined as a defendant in proceedings to revive the judgment. Adams County School Dist. No. 34 *v.* Kountze, 3 Nebr. (Unoff.) 690, 92 N. W. 597. And see Foster *v.* Merser, 30 How. Pr. (N. Y.) 284.

Where one of two joint defendants has been discharged from the judgment on payment of his part, it is impossible to revive the judgment against him, and proceedings to revive the judgment as to the unpaid portion thereof are properly brought against the other defendant alone. Long *v.* Thormond, 83 Mo. App. 227.

19. Finn *v.* Crabtree, 12 Ark. 597; Burton *v.* Rodney, 5 Harr. (Del.) 441; Wright *v.* Harris, 24 Ga. 415; U. S. *v.* Houston, 48 Fed. 207. *Contra*, Dowling *v.* McGregor, 91 Pa. St. 410; Stoner *v.* Stroman, 9 Watts & S. (Pa.) 85. And see *infra*, XVIII, D, 7, g, (II).

20. Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111.

21. Defenses concluded by judgment of revival see *infra*, XVIII, D, 8, b.

Discharge in bankruptcy as defense see BANKRUPTCY.

22. *Alabama.*— Betancourt *v.* Eberlin, 71 Ala. 461; Duncan *v.* Hargrove, 22 Ala. 150; Miller *v.* Shackelford, 16 Ala. 95.

Connecticut.— Bradford *v.* Bradford, 5 Conn. 127; Robbins *v.* Bacon, 1 Root 548; Hubbard *v.* Manning, Kirby 256.

District of Columbia.— Willett *v.* Otterback, 20 D. C. 324; Loeber *v.* Moore, 20 D. C. 1.

Georgia.— Camp *v.* Baker, 40 Ga. 148.

Iowa.— Vredenburgh *v.* Snyder, 6 Iowa 39.

Kentucky.— Harpending *v.* Wylie, 13 Bush 158.

Louisiana.— McCutchen *v.* Askew, 34 La. Ann. 340; McStea *v.* Rotchford, 29 La. Ann. 69; Carondelet Canal Nav. Co. *v.* De St. Romes, 23 La. Ann. 437.

Maine.— Smith *v.* Eaton, 36 Me. 298, 58 Am. Dec. 746.

Maryland.— Moore *v.* Garrettson, 6 Md. 444; Kemp *v.* Cook, 6 Md. 305.

Massachusetts.— Stephens *v.* Howe, 127 Mass. 164; Thayer *v.* Tyler, 10 Gray 164; Springfield Card Mfg. Co. *v.* West, 1 Cush. 388; Sigourney *v.* Stockwell, 4 Metc. 518.

Mississippi.— Roberts *v.* Weiler, 55 Miss. 249; Pollard *v.* Eckford, 50 Miss. 631; Bowen *v.* Bonner, 45 Miss. 10; Langston *v.* Abney, 43 Miss. 161; Anderson *v.* Williams, 24 Miss. 684; Mathews *v.* Mosby, 13 Sm. & M. 422.

Missouri.— Riley *v.* McCord, 24 Mo. 265; Watkins *v.* State, 7 Mo. 334.

Nebraska.— Stover *v.* Stark, 61 Nebr. 374, 85 N. W. 286, 87 Am. St. Rep. 460; Bankers' L. Ins. Co. *v.* Robbins, 59 Nebr. 170, 80 N. W. 484; Wright *v.* Sweet, 10 Nebr. 190, 4 N. W. 1043; Gillette *v.* Morrison, 7 Nebr. 263.

New York.— McFarland *v.* Irwin, 8 Johns. 77.

North Carolina.— Ferebee *v.* Doxey, 28 N. C. 448. *Contra*, McLeod *v.* Williams, 122 N. C. 451, 30 S. E. 129, holding that a defendant may set up any grounds he has in opposition to a motion to revive a judgment.

Ohio.— Nestlerode *v.* Foster, 8 Ohio Cir. Ct. 70, 4 Ohio Cir. Dec. 385.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Marshall, 85 Pa. St. 187; Weaver *v.* Wible, 72 Pa. St. 469; Carr *v.* Townsend, 63 Pa. St. 202; McVeagh *v.* Little, 7 Pa. St. 279; Davidson *v.* Thornton, 7 Pa. St. 128; Alden *v.* Bogart, 2 Grant 400; Cardesa *v.* Humes, 5 Serg. & R. 65; Weber *v.* Detwiller, 5 Pa. Cas. 555, 8 Atl. 910; Mulligan *v.* Devlin, 12 Pa. Co. Ct. 465; Wurzberger *v.* Carroll, 8 Kulp 266; John *v.* Reinhart, 10 Lanc. Bar 105; Shelly *v.* Shelly, 5 Lanc. L. Rev. 190.

South Carolina.— Keon *v.* Ivey, 8 Rich. 37; Lynch *v.* Inglis, 1 Bay 449.

Tennessee.— Bell *v.* Williams, 4 Sneed 196; Love *v.* Allison, 2 Tenn. Ch. 111.

Texas.— Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89; Gatesville City Nat. Bank *v.* Swink, (Civ. App. 1898) 49 S. W. 130.

Virginia.— May *v.* North Carolina State Bank, 2 Rob. 56, 40 Am. Dec. 726.

West Virginia.— Maxwell *v.* Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875.

United States.— Dickson *v.* Wilkinson, 3 How. 57, 11 L. ed. 491; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,487, Gilp. 614.

England.— Baylis *v.* Hayward, 4 A. & E. 256, 1 Harr. & W. 609, 5 L. J. K. B. 52, 5 N. & M. 613, 31 E. C. L. 127; Cook *v.* Jones, Cowp. 727; Allens *v.* Andrews, Cro. Eliz. 283; Thomas *v.* Williams, 3 Dowl. P. C. 655.

See 30 Cent. Dig. tit. "Judgment," § 1599.

which defendant may deny the existence of the original judgment or show its invalidity, and payment, including release, satisfaction, or discharge of the original judgment.[23] And a general denial of each and every allegation of the writ not admitted in the answer is not a form of defense permitted in a proceeding to revive a judgment.[24] It is not permissible to show in defense want or invalidity of consideration,[25] coverture or other disability of defendant,[26] usury,[27] pendency of an action of debt on the judgment,[28] recovery of another judgment on the same debt,[29] pending appeal by plaintiff from judgment in his favor,[30] or adverse possession.[31] But defendant may show that his position with reference to the judgment is that of a surety only,[32] and the statute of limitations is a good defense,[33] as is also the defense that the proceedings are prematurely brought.[34] And persons made defendants to a scire facias, founded on a judgment against a corporation, on the allegation that they are stock-holders and personally liable for its debts, may show that they are not stock-holders, or that the debt on which the judgment was recovered was not of the kind for which stock-holders are liable.[35]

b. Payment, Release, or Satisfaction. In defense to a proceeding to revive a judgment, defendant may plead that it has been paid[36] wholly or in part,[37] or he may plead the presumption of payment arising from lapse of time,[38] or both payment and presumption of payment,[39] or a voluntary release of the judgment without full payment,[40] or accord and satisfaction,[41] but not set-off or counterclaim.[42]

c. Invalidity of Judgment. It is a good defense to a proceeding to revive a

23. McCracken *v.* Swartz, 5 Oreg. 62; Dowling *v.* McGregor, 91 Pa. St. 410. And see *infra*, XVIII, D, 3, b.

24. Wonderly *v.* Lafayette County, 77 Fed. 665.

25. Kincade *v.* Cunningham, 118 Pa. St. 501, 12 Atl. 410; Mulligan *v.* Devlin, 12 Pa. Co. Ct. 465.

26. Lauer *v.* Ketner, 162 Pa. St. 265, 29 Atl. 908, 42 Am. St. Rep. 833; Taylor *v.* Harris, 21 Tex. 438.

27. Lysle *v.* Williams, 15 Serg. & R. (Pa.) 135; Bickel *v.* Cleaver, 13 Pa. Co. Ct. 314.

28. Lafayette County *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360.

29. McLean *v.* McLean, 90 N. C. 530.

30. Weiller *v.* Blanks, McGloin (La.) 296.

31. Smith *v.* Stevens, 133 Ill. 183, 24 N. E. 511. And see Penn *v.* Klyne, 19 Fed. Cas. No. 10,936, Pet. C. C. 446.

32. Nestlerode *v.* Foster, 8 Ohio Cir. Ct. 70, 4 Ohio Cir. Dec. 385.

33. Jones *v.* George, 80 Md. 294, 30 Atl. 635.

34. Tacoma Nat. Bank *v.* Sprague, 33 Wash. 285, 74 Pac. 393.

35. Wilson *v.* Pittsburgh, etc., Coal Co., 43 Pa. St. 424.

36. Hayden *v.* Sheriff, 43 La. Ann. 385, 8 So. 919; Blackburn *v.* Beal, 21 Md. 208; McCormick *v.* Carey, 62 Nebr. 494, 87 N. W. 172; Smith *v.* Coray, 196 Pa. St. 602, 46 Atl. 855; Phillips *v.* Beatty, 135 Pa. St. 431, 19 Atl. 1020; McCarty *v.* Springer, 3 Penr. & W. (Pa.) 157; Cowan *v.* Shields, 1 Overt. (Tenn.) 64.

Tender.—A judgment should not be revived when it appears that the judgment debtor tendered the full amount of the judgment and kept his tender good. Carr *v.* Miner, 92 Ill. 604.

Failure to plead.— If defendant fails to appear and set up a defense of part payment, the question of payment is *res judicata*. Babb *v.* Sullivan, 43 S. C. 436, 21 S. E. 277.

Payment of original debt.— Defendant cannot plead a payment of the debt on which the original judgment was rendered, or any payments anterior to such judgment, as that defense is concluded by the judgment. Trader *v.* Lawrence, 182 Pa. St. 233, 37 Atl. 812; McVeagh *v.* Little, 7 Pa. St. 279; Hancock *v.* Dickinson, 2 Pa. Co. Ct. 625; Nealon *v.* McNeal, 3 Lack. Jur. (Pa.) 117.

37. See Anderson *v.* Gage, Dudley (S. C.) 319.

38. Ringgold *v.* Randolph, 16 Ark. 212; Wittstruck *v.* Temple, 58 Nebr. 16, 78 S. W. 456; Van Loon *v.* Smith, 103 Pa. St. 238; Steltzer *v.* Steltzer, 10 Pa. Super. Ct. 310; Green *v.* Plattsburg, 13 Pa. Co. Ct. 335.

39. De Ford *v.* Green, 1 Marv. (Del.) 316, 40 Atl. 1120.

40. Blackburn *v.* Beall, 21 Md. 208; Salisbury First Nat. Bank *v.* Swink, 129 N. C. 255, 39 S. E. 962.

Release to coöbligor subsequent to judgment.— Where a separate judgment has been rendered against one obligor on a joint and several obligation, and a scire facias is issued to revive it, he cannot avail himself of a release given to his coöbligor subsequent to the original judgment. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,487, Gilp. 614.

41. McCullough *v.* Franklin Coal Co., 21 Md. 256; Sahl *v.* Wright, 6 Pa. St. 433; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,487, Gilp. 614.

42. Bishop *v.* Goodhart, 135 Pa. St. 374, 19 Atl. 1026; Jenkins *v.* Anderson, 8 Pa. Cas. 363, 11 Atl. 558. See Dorsheimer *v.* Bucher, 7 Serg. & R. (Pa.) 8.

judgment that is absolutely void, as for want of jurisdiction,[43] but not that it is irregular or erroneous.[44]

d. Collateral Agreements. Under the plea of payment defendant may show a prior agreement as to the mode of discharging the judgment,[45] or an agreement to cancel it upon an event which has since occurred,[46] or to restrict its lien;[47] but not a mere voluntary promise on the part of plaintiff to forbear enforcing the judgment.[48]

e. Defenses by Heirs, Executors, or Terre-Tenants. These persons may plead any defenses which would have been open to the original defendant,[49] and a defendant joined as heir or administrator may deny the character in which he is sued,[50] and plead want of assets or "nothing by descent,"[51] and a terre-tenant may plead that the judgment was never a lien on his land, or that the land has been discharged from it.[52]

4. Jurisdiction and Venue. A proceeding to revive a judgment must be brought in the court which rendered it,[53] except in the case of judgments of jus-

43. Harper *v.* Cunningham, 8 App. Cas. (D. C.) 430; Matter of Fourth Drainage Dist., 37 La. Ann. 916; Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456; Enewold *v.* Olsen, 39 Nebr. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573.

44. *Alabama.*— Betancourt *v.* Eberlin, 71 Ala. 461.

Arkansas.— Anthony *v.* Humphries, 9 Ark. 176.

District of Columbia.— Loeber *v.* Moore, 20 D. C. 1.

Missouri.— Kennedy *v.* Bambrick, 20 Mo. App. 630.

Nebraska.— Haynes *v.* Aultman, 36 Nebr. 257, 54 N. W. 511.

North Carolina.— Tripp *v.* Potter, 33 N. C. 121.

Pennsylvania.— Campbell's Appeal, 118 Pa. St. 128, 12 Atl. 299; Davidson *v.* Thornton, 7 Pa. St. 128; Hauer's Appeal, 5 Watts & S. 473; Weber *v.* Detwiller, 5 Pa. Cas. 555, 8 Atl. 910; Sayers *v.* Bayard, 8 Pa. Super. Ct. 174.

Tennessee.— Bell *v.* Williams, 4 Sneed 196.

Texas.— McFadden *v.* Lockhart, 7 Tex. 573; Ulmer *v.* Frankland, (Civ. App. 1894) 27 S. W. 766.

Fraud in the cause of action or in procuring the judgment is not a good defense. Bruno *v.* Oviatt, 48 La. Ann. 471, 19 So. 464; Supplee *v.* Halfmann, 161 Pa. St. 33, 28 Atl. 941.

45. Downey *v.* Forrester, 35 Md. 117. And see Thompson *v.* Hurley, 19 Iowa 331.

46. Hartzell *v.* Reiss, 1 Binn. (Pa.) 289. See Smith *v.* Smith, 135 Pa. St. 48, 21 Atl. 168.

47. Sankey *v.* Reed, 12 Pa. St. 95.

48. Codding *v.* Wood, 112 Pa. St. 371, 3 Atl. 455; Ladd *v.* Church, 6 Phila. (Pa.) 591.

49. Butler *v.* Slam, 50 Pa. St. 456; Hammond *v.* McClure, 9 Pa. Cas. 597, 14 Atl. 412; Sneed *v.* Mayfield, Cooke (Tenn.) 60; McKnight *v.* Craig, 6 Cranch (U. S.) 183, 3 L. ed. 193.

Non-joinder of parties.— To a scire facias against an executor to revive a judgment against his testator, defendant cannot plead that there are terre-tenants whose lands are also bound by the judgment, so as to oblige plaintiff to sue out a scire facias against them. Wilson *v.* Watson, 30 Fed. Cas. No. 17,847, Pet. C. C. 269. But where the proceeding is against a terre-tenant, he may plead in delay of execution that there are other terre-tenants in the same county not summoned. Mandeville *v.* McDonald, 16 Fed. Cas. No. 9,013, 3 Cranch C. C. 631.

50. White *v.* Brown, 1 Dana (Ky.) 104.

51. Burk *v.* Jones, 13 Ala. 167; Wilkinson *v.* Allen, 11 Ala. 128; Fulcher *v.* Mandell, 83 Ga. 715, 10 S. E. 582; Hatch *v.* Eustis, 11 Fed. Cas. No. 6,207, 1 Gall. 160. *Contra*, Commercial Bank *v.* Kendall, 13 Sm. & M. (Miss.) 278; Exum *v.* Sheppard, 6 N. C. 86. And see Colwell *v.* Rockwell, 100 Pa. St. 133, holding that it is no defense to a scire facias against heirs and devisees, to continue the lien of a judgment entered against an executor within five years of the decedent's death, that at the time of his death decedent had sufficient personal property to pay the judgment.

52. Colwell *v.* Easley, 83 Pa. St. 31; Silverthorn *v.* Townsend, 37 Pa. St. 263.

53. *Alabama.*— Griffin *v.* Spence, 69 Ala. 393.

Arkansas.— Blackwell *v.* State, 3 Ark. 320.

Connecticut.— Jarvis *v.* Rathburn, Kirby 220.

Georgia.— Funderburk *v.* Smith, 74 Ga. 515; Dickinson *v.* Allison, 10 Ga. 557.

Illinois.— Challenor *v.* Niles, 78 Ill. 78.

Indiana.— Conner *v.* Neff, 2 Ind. App. 364, 27 N. E. 645.

Iowa.— Carnes *v.* Crandall, 4 Iowa 151.

Louisiana.— Chapman *v.* Nelson, 31 La. Ann. 341; New Orleans Canal, etc., Co. *v.* Pike, 28 La. Ann. 896; Watt *v.* Hendry, 23 La. Ann. 594.

Maine.— State *v.* Brown, 41 Me. 535; Mitchell *v.* Osgood, 4 Me. 124; Vallance *v.* Sawyer, 4 Me. 62.

Massachusetts.— Osgood *v.* Thurston, 23 Pick. 110.

Michigan. — McRoberts *v.* Lyon, 79 Mich. 25, 44 N. W. 160.

Missouri.— Wilson *v.* Tiernan, 3 Mo. 577.

tices or other inferior courts removed by transcript to a superior court, where jurisdiction to revive the judgment resides in the latter court.[54] Such a proceeding cannot be brought in a court of chancery to revive a decree, unless under a statute authorizing executions to issue upon decrees in equity.[55]

5. Time For Revival and Limitations — a. In General. The general law as to the limitation of actions does not apply to proceedings to revive a dormant judgment,[56] but they are governed only by the special statutory provisions, if any, applicable to proceedings of that character.[57]

Nebraska.— Hunter *v.* Leahy, 18 Nebr. 80, 24 N. W. 680.

New Hampshire.— State *v.* Kinne, 39 N. H. 129.

New Jersey.—Tindall *v.* Carson, 16 N. J. L. 94; Boylan *v.* Anderson, 3 N. J. L. 529.

New York.— McGill *v.* Perrigo, 9 Johns. 259.

North Carolina.— Griffis *v.* McNeill, 61 N. C. 175.

Ohio.— Taylor *v.* Bonte, 5 Ohio Dec. (Reprint) 137, 3 Am. L. Rec. 220.

Pennsylvania.— McMurray *v.* Hopper, 43 Pa. St. 468; *In re* Dougherty, 9 Watts & S. 189, 42 Am. Dec. 326.

South Carolina.— Grimke *v.* Mayrant, 2 Brev. 202.

Tennessee.— McIntosh *v.* Paul, 6 Lea 45.

Texas.— Schmidtke *v.* Miller, 71 Tex. 103, 8 S. W. 638; Masterson *v.* Cundiff, 58 Tex. 472; Perkins *v.* Hume, 10 Tex. 50; City Nat. Bank *v.* Swink, (Civ. App. 1898) 49 S. W. 130.

Vermont.— Gibson *v.* Davis, 22 Vt. 374; Carlton *v.* Young, 1 Aik. 332.

See 30 Cent. Dig. tit. "Judgment," § 1603.

Where a judgment rendered in one county has been transferred by transcript to another county, proceedings to revive it must be brought in the first county and not in the second. Thompson *v.* Parker, 83 Ind. 96. *Compare* Kendig *v.* North, 7 Del. Co. (Pa.) 574.

Revival of foreign judgment see *infra*, XXII, B, 4, a, (I), text and note 18.

Judgment of supreme court.— A proceeding to revive a judgment rendered by a *nisi prius* court, and affirmed on error in the supreme court, must be brought in the lower court, not the higher. Barron *v.* Pagles, 6 Ala. 422. And such a proceeding may be brought in the trial court on a judgment of the supreme court rendered in favor of plaintiff on reversal of a judgment for defendant in an action on a money demand, although the judgment of the supreme court was never certified to the trial court, nor entered in its minutes, as in such case the judgment of the supreme court will be considered as the judgment of the trial court. Carothers *v.* Lange, (Tex. Civ. App. 1900) 55 S. W. 580.

Judge without jurisdiction.— An order purporting to revive a judgment, made by a judge who has no authority to entertain the application or grant the order, is a nullity, and the judgment will stand as though no step had been taken or order made. Berkley *v.* Tootle, 62 Kan. 701, 64 Pac. 620.

54. Green *v.* Mann, 19 App. Cas. (D. C.) 243; Garrison *v.* Aultman, 20 Nebr. 311, 30 N. W. 61; Dennis *v.* Omaha Nat. Bank, 19 Nebr. 675, 28 N. W. 512; Smith *v.* Wehrly, 157 Pa. St. 407, 27 Atl. 700; Brannan *v.* Kelley, 8 Serg. & R. (Pa.) 479; Reichenbauch *v.* Arnold, 4 Pa. L. J. 325; Ende *v.* Spencer, 38 Tex. 114.

Transfer of judgment already dormant.— The fact that the transcript of a judgment from a justice's court was filed in the district court after the judgment had become dormant will not deprive the district court of jurisdiction of proceedings to revive it. Furer *v.* Holmes, (Nebr. 1905) 102 N. W. 764.

55. Logan *v.* Cloyd, 1 A. K. Marsh. (Ky.) 201; Jeffreys *v.* Yarborough, 16 N. C. 506; Curtis *v.* Hawn, 14 Ohio 185.

56. *Arkansas.*— Montgomery *v.* Brittin, 23 Ark. 322; Brearly *v.* Peay, 23 Ark. 172; Evans *v.* White, 12 Ark. 133; Wayland *v.* Coulter, 11 Ark. 480; Brown *v.* Byrd, 10 Ark. 533. *Compare* Crane *v.* Crane, 51 Ark. 287, 11 S. W. 1.

Indiana.— See Strong *v.* State, 57 Ind. 428.

Kentucky.— Hord *v.* Marshall, 5 Dana 495.

Nebraska.—Bankers' L. Ins. Co. *v.* Robbins, 59 Nebr. 170, 80 N. W. 484; Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456.

South Carolina.— Colvin *v.* Phillips, 25 S. C. 228.

Virginia.— Randolph *v.* Randolph, 3 Rand. 490; Gee *v.* Hamilton, 6 Munf. 32. See Ayre *v.* Burke, 82 Va. 338, 4 S. E. 618.

See 30 Cent. Dig. tit. "Judgment," § 1604.

Contra.— Stewart *v.* Peterson, 63 Pa. St. 230; Simpson *v.* Lassalle, 22 Fed. Cas. No. 12,882, 4 McLean 352.

57. *Alabama.*— Presley *v.* McLean, 80 Ala. 309.

Georgia.— Seibels *v.* Hodges, 65 Ga. 245.

Illinois.— Gibbons *v.* Goodrich, 3 Ill. App. 590.

Iowa.— David *v.* Porter, 51 Iowa 254, 1 N. W. 528.

Kansas.— Angell *v.* Martin, 24 Kan. 334.

Maryland.— Mullikin *v.* Duvall, 7 Gill & J. 355.

Mississippi.— Mandeville *v.* Lane, 28 Miss. 312; Byrd *v.* Byrd, 28 Miss. 144.

Montana.— Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

New Mexico.— Browne, etc., Co. *v.* Chavez, 9 N. M. 316, 54 Pac. 234.

New York.— Thompson *v.* Jenks, 2 Abb. Pr. N. S. 229; Johnson *v.* Borrell, 2 Hill 238.

North Carolina.— Patterson *v.* Walton, 119 N. C. 500, 26 S. E. 43.

Pennsylvania.— Bell *v.* Ingram, 2 Pa. St. 490. See Kendig *v.* North, 7 Del. Co. 574.

b. Death of Party. In some states the death of a judgment defendant starts the running of a new period of limitations, and proceedings to revive the judgment must be brought within a limited time after that event;[58] but in others the statute is not interrupted thereby, but the revival proceedings must be instituted within the period originally limited after the rendition of the judgment.[59]

c. Computation of Period of Limitation. The limitation of the time of bringing proceedings for the revival of a judgment begins to run from the rendition of the judgment,[60] excluding the day of the entry of the judgment,[61] and unless the statute is interrupted by some sufficient cause,[62] the right to institute the pro-

South Carolina.— Chester, etc., R. Co. *v.* Marshall, 40 S. C. 59, 18 S. E. 247.

Tennessee.— Rogers *v.* Hollingsworth, 95 Tenn. 357, 32 S. W. 197.

Texas.— Willis *v.* Stroud, 67 Tex. 316, 3 S. W. 732; Langham *v.* Grigsby, 9 Tex. 493; Fossenden *v.* Barrett, 9 Tex. 475.

Virginia.—Fadeley *v.* Williams, 96 Va. 397, 31 S. E. 515.

United States.— Stewart *v.* St. Clair County Ct., 47 Fed. 482.

See 30 Cent. Dig. tit. "Judgment," § 1604.

United States courts held within the state are not within a statute of limitations as to proceedings on judgments of federal courts generally. Murch *v.* Moore, 2 Oreg. 189.

Retrospective operation may be given to statutes limiting right to revive judgments, if such effect results from fair and reasonable interpretation of the statute. Lauderdale *v.* Mahon, 41 S. C. 97, 19 S. E. 294; Wrightman *v.* Boone County, 88 Fed. 435, 31 C. C. A. 570.

Terre-tenants.— In Pennsylvania a terre-tenant may be connected with a scire facias to revive a judgment, although not named in it, by an alias writ, which latter may issue at any time within five years. Porter *v.* Hitchcock, 98 Pa. St. 625; Lichty *v.* Hochstetler, 91 Pa. St. 444; Silverthorn *v.* Townsend, 37 Pa. St. 263. And see Conklin *v.* Cleveland, 14 Pa. Co. Ct. 154. And there may be a revival against terre-tenants at any time within the period of five years, notwithstanding there may have been an intermediate revival by scire facias without notice to them. Fursht *v.* Overdeer, 3 Watts & S. (Pa.) 470. But an alias scire facias, issued after five years from the former, is not sufficient to preserve the lien of a judgment which had expired in the interval. Allen *v.* Liggett, 81 Pa. St. 486.

58. Mawhinney *v.* Doane, 40 Kan. 676, 17 Pac. 44; Markson *v.* Kothman, 29 Kan. 718; Myers *v.* Kothman, 29 Kan. 19; Scroggs *v.* Tutt, 23 Kan. 181; Champion *v.* Cayce, 54 Miss. 695; Pollard *v.* Eckford, 50 Miss. 631; Vick *v.* Chewning, 31 Miss. 201; *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762; Clark *v.* Sexton, 23 Wend. (N. Y.) 477.

Where the United States has recovered judgment against several defendants, its right to revive the judgment against the executor of one of them, since deceased, is not affected by a state statute providing that actions against executors and administrators shall be commenced within three years from the time of notice of appointment and giving bond. U. S. *v.* Houston, 48 Fed. 297.

59. *Nebraska.*— See Boyd *v.* Furnas, 37 Nebr. 387, 55 N. W. 865; Hunter *v.* Leahy, 18 Nebr. 80, 24 N. W. 680.

Texas.— Austin *v.* Reynolds, 13 Tex. 544.

Virginia.— Fleming *v.* Dunlop, 4 Leigh 338.

West Virginia.— Sherrard *v.* Keiter, 32 W. Va. 144, 9 S. E. 25; Handy *v.* Smith, 30 W. Va. 195, 3 S. E. 604. *Compare* Laidley *v.* Kline, 23 W. Va. 565; Werdenbaugh *v.* Reid, 20 W. Va. 588.

United States.— Deneale *v.* Stump, 8 Pet. 528, 8 L. ed. 1032.

See 30 Cent. Dig. tit. "Judgment," § 1605.

60. Scott *v.* Seelye, 39 La. Ann. 749, 2 So. 309; Browne, etc., Co. *v.* Chavez, 9 N. M. 316, 54 Pac. 234; Ayre *v.* Burke, 82 Va. 338, 4 S. E. 618.

After execution sale.— Under a statute allowing the revival of a judgment where the purchaser of real estate sold on execution under it fails to recover possession thereof "in consequence of some irregularity in the proceedings concerning the sale," the right to begin proceedings does not accrue until the period of redemption has expired. Cantwell *v.* McPherson, 3 Ida. 721, 34 Pac. 1095.

Judgment already revived.— Where a judgment has already been revived on scire facias, the period of limitation begins to run from the date of revival, instead of the date of the original judgment. Kratz *v.* Preston, 52 Mo. App. 251; Digges *v.* Eliason, 7 Fed. Cas. No. 3,904, 4 Cranch C. C. 619.

61. Lutz's Appeal, 124 Pa. St. 273, 16 Atl. 858; Green's Appeal, 6 Watts & S. (Pa.) 327.

62. See cases cited *infra*, this note.

Non-residence of defendant does not interrupt the running of the statute. Mann *v.* Cooper, 2 App. Cas. (D. C.) 226; Bartol *v.* Eckert, 50 Ohio St. 31, 33 N. E. 294.

Evading process.— A period of time during which defendant, a municipal corporation, had no qualified officers on whom process could be served, and purposely refrained from qualifying them, to avoid a judgment, should be omitted from the period of limitation for reviving the judgment, the creditor having exercised due diligence. Brockway *v.* Oswego Tp., 40 Fed. 612. See Dempsey *v.* Oswego Tp., 51 Fed. 97, 2 C. C. A. 110.

Injunction against the enforcement of the judgment stays the running of the statute against it. Thompson *v.* Dougherty, 3 J. J. Marsh. (Ky.) 564; Hutsonpiller *v.* Stover,

ceeding will expire on the last day of the statutory period, or, if that day is *dies non*, on the next succeeding business day.[63] But the statute is saved by beginning the proceedings within the limited time, although the judgment of revivor does not follow until after its expiration.[64]

d. Motions to Revive. The statute of limitations applicable to an action or writ of scire facias to revive a judgment will also bar a motion for the same purpose,[65] unless where there is a special statute applicable to such motions.[66]

6. Mode of Revival[67] — a. In General. The revival of a judgment is a judicial act, in the sense that it cannot generally be accomplished by the mere act or agreement of the parties;[68] but requires the action of the court in some form of proceeding involving notice to the adverse party and an opportunity to contest the application,[69] although given these conditions it may be brought about in a collateral action.[70] An action of debt on the judgment is always a proper form of proceeding; and where the statute provides a special remedy for the revival of judgments, as a writ of scire facias or a motion for that purpose, it is not exclusive of the common-law right of action on the judgment, but cumulative thereto,

12 Gratt. (Va.) 579. *Compare* Serles *v.* Cromer, 88 Va. 426, 13 S. E. 859.

Delay caused by an appeal will not be counted in favor of the judgment creditor, to defeat the plea of limitations. Walker *v.* Hays, 23 La. Ann. 176.

Stay of execution.— In Pennsylvania it was formerly held that where there was a stay of execution the five years within which the judgment must be revived did not begin to run until the expiration of the stay. Pennock *v.* Hart, 8 Serg. & R. (Pa.) 369. But this was afterward changed by a statute. Pa. Act, March 26, 1827.

Part payment of a judgment debt within the period of limitation will not prevent the statute from operating as a bar to proceedings to revive. Mann *v.* Cooper, 2 App. Cas. (D. C.) 226.

63. Lutz's Appeal, 124 Pa. St. 273, 16 Atl. 858.

64. Thomas *v.* Towns, 66 Ga. 78; Fitzpatrick *v.* Leake, 47 La. Ann. 1643, 18 So. 649; Weldon's Succession, 36 La. Ann. 851; Hammett *v.* Sprowl, 31 La. Ann. 325; Carroll *v.* Seip, 25 La. Ann. 141; Leitner *v.* Metz, 32 S. C. 383, 10 S. E. 1082; Wood *v.* Milling, 32 S. C. 378, 10 S. E. 1081; Adams *v.* Richardson, 32 S. C. 139, 10 S. E. 931; Lafayette County *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360. *Contra*, Newton *v.* Artbur, 8 Kan. App. 358, 55 Pac. 466.

65. Goff *v.* Robins, 33 Miss. 153; Lilly *v.* West, 97 N. C. 276, 1 S. E. 834; McDonald *v.* Dickson, 85 N. C. 248; Bartol *v.* Eckert, 50 Ohio St. 31, 33 N. E. 294; Barthrop *v.* Tucker, 29 Wash. 666, 70 Pac. 120. *Contra*, Creighton *v.* Gorum, 23 Nebr. 502, 37 N. W. 76; Burns *v.* Conner, 1 Wash. 6, 23 Pac. 836.

66. Kansas, etc., Coal Co. *v.* Carey, 65 Kan. 639, 70 Pac. 589; Berkley *v.* Tootle, 62 Kan. 701, 64 Pac. 620; Tefft *v.* Citizens' Bank, 36 Kan. 457, 13 Pac. 783.

67. **Proceedings on scire facias** see *infra*, XVIII, D, 7.

68. **Parol promise to pay.**— A judgment which has become barred by the statute of limitations cannot be revived by a mere parol promise to pay it. Ludwig *v.* Huck, 45 Ill. App. 651.

As to revival of judgments in Pennsylvania by amicable scire facias see *infra*, XVIII, D, 7, o.

69. See Welch *v.* Butler, 24 Ga. 445.

Supplementary proceedings on a judgment will not be effectual to keep it alive or take the place of an action to revive it. Merchants' Nat. Bank *v.* Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

An order for the issue of a writ of execution made ex parte by a judge of the court will not keep the judgment alive. Lefurgey *v.* Harrington, 36 Nova Scotia 88.

Municipality as defendant.— A judgment against a municipal corporation may be revived in the same manner as one against a private person. Brockway *v.* Oswego Tp., 40 Fed. 612. And see Devereaux *v.* Brownsville, 29 Fed. 742, holding that revivor of a judgment against the successor of an extinct municipal corporation may be accomplished by a mere suggestion of record.

In South Carolina the proper proceeding to revive a judgment is to issue a summons to renew execution, although an order giving permission to issue execution on the judgment will revive it. *Ex p.* Graham, 54 S. C. 163, 32 S. E. 67; Lawton *v.* Perry, 40 S. C. 255, 18 S. E. 861; Cash *v.* Lyle, 2 Brev. 183.

In Oklahoma a dormant judgment can be revived only by an order of the court or a judgment thereof. Neal *v.* Le Breton, 14 Okla. 538, 78 Pac. 376.

70. Kothman *v.* Skaggs, 29 Kan. 5.

Application and limitation of rule.— A decree ordering the sale of lands and the application of the proceeds to the payment of an existing judgment revives the judgment. Anderson *v.* Baughman, 69 S. C. 38, 48 S. E. 38. But the bringing of a suit by defendant in a foreclosure case to quiet his title against a deed, void because the judgment was not revived on the death of plaintiff, before execution was issued thereon, is not in any sense a revivor of the judgment. Havens *v.* Pope, 10 Kan. App. 299, 62 Pac. 538.

so that the creditor may pursue either remedy.[71] But it is held in some states that if revival is sought against the heirs of a deceased judgment debtor, plenary proceedings must be brought, and it is not permissible to proceed by motion or rule.[72] In some jurisdictions it is necessary for the personal representatives of a deceased judgment creditor to revive it, in order to be able to enforce it as against the judgment debtor; and whether this should be done by a formal action, or may be effected merely on motion, will depend upon the local statute.[73]

b. Scire Facias. In many states the provisions of the English statute giving a scire facias to revive a judgment in a personal action[74] have been adopted as a part of their common law, or incorporated in their statutes, so that the proper method of obtaining such a revival is by a proceeding begun by the issue of a scire facias requiring defendant to show cause why the judgment should not be revived and its lien continued.[75] This proceeding is not a new suit but a continuation of the original action,[76] and therefore it is not a substitute for an action of debt on the judgment, but may be maintained concurrently with such action and without regard to its pendency.[77] But each successive writ of scire facias must be founded on the judgment which immediately preceded it, for a recovery on this writ is a bar to any subsequent recovery on the original judgment.[78]

c. Action to Revive. In several states the proper method of reviving a judgment which has become dormant is by a formal suit or action brought for that purpose and having all the characteristics of a plenary proceeding.[79]

71. *Iowa.*— McGlassen *v.* Wright, 10 Iowa 591; Carnes *v.* Crandall, 10 Iowa 377; Haven *v.* Baldwin, 5 Iowa 503.

Kansas.— Baker *v.* Hummer, 31 Kan. 325, 2 Pac. 808.

Louisiana.— Pillet *v.* Edgar, 4 Rob. 274.

Montana.— Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

Texas.— Tarlton *v.* Weir, 1 Tex. App. Civ. Cas. § 142.

See 30 Cent. Dig. tit. "Judgment," § 1608.

72. Faulkner *v.* Larrabee, 76 Ind. 154; Reynolds *v.* Horn, 4 La. Ann. 187.

73. See Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412; Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105; Selders *v.* Boyle, 5 Kan. App. 451, 49 Pac. 320; Daisy Roller Mills *v.* Ward, 6 N. D. 317, 70 N. W. 271.

74. Statute Westminster II, 13 Edw. I, c. 45.

75. *Florida.*— Union Bank *v.* Powell, 3 Fla. 175, 52 Am. Dec. 367.

Iowa.— Carnes *v.* Crandall, 4 Iowa 151.

Maine.— Proprietors Kennebec Purchase *v.* Davis, 1 Me. 309.

Missouri.— Garner *v.* Hays, 3 Mo. 436.

North Carolina.— Kingsbury *v.* Hughes, 61 N. C. 328; Lewis *v.* Fagan, 13 N. C. 298.

Ohio.— See Piatt *v.* St. Clair, Wright 261.

Pennsylvania.— City Bldg., etc., Assoc. *v.* Nickey, 21 Pa. Co. Ct. 226.

Tennessee.— Keith *v.* Metcalf, 2 Swan 74.

United States.— Wonderly *v.* Lafayette County, 74 Fed. 702; Offutt *v.* Henderson, 18 Fed. Cas. No. 10,451, 2 Cranch C. C. 553.

See 30 Cent. Dig. tit. "Judgment," § 1609.

Under codes of practice.— In several states where all forms of action are abolished, or merged in the statutory "civil action," the writ of scire facias to revive a judgment is unknown or not authorized. Humiston *v.* Smith, 21 Cal. 129; Hughes *v.* Shreve, 3 Metc. (Ky.) 547; De Baca *v.* Wilcox, 11 N. M. 346, 68 Pac. 922; Browne *v.* Chavez, 181 U. S. 68, 21 S. Ct. 514, 45 L. ed. 752; Cameron *v.* Young, 6 How. Pr. (N. Y.) 372. Earlier cases in New York have been superseded by the code. Harmon *v.* Dedrick, 3 Barb. (N. Y.) 192; Anonymous, 1 Code Rep. (N. Y.) 118.

76. See *infra*, XVIII, D, 7, a. But a scire facias to revive a dormant judgment may be regarded as a suit on the judgment, so far as concerns plaintiff's right to discontinue as to parties not served. Hanson *v.* Jacks, 22 Ala. 549.

77. Lafayette County *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360.

78. Custer *v.* Detterer, 3 Watts & S. (Pa.) 28; Collingwood *v.* Carson, 2 Watts & S. (Pa.) 220.

79. *Alabama.*— Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412.

Indiana.— Bruce *v.* Osgood, 154 Ind. 375, 56 N. E. 25; Cox *v.* Stout, 85 Ind. 422; Wyant *v.* Wyant, 38 Ind. 48.

Kansas.— Reeves *v.* Long, 63 Kan. 700, 66 Pac. 1030.

Louisiana.— Burbridge *v.* Chinn, 34 La. Ann. 681; Patrick's Succession, 30 La. Ann. 1071; Smith *v.* Palfrey, 28 La. Ann. 615; Weiller *v.* Blanks, McGloin 296; Mitchell, etc., Furniture Co. *v.* Sampson, 45 Fed. 111. In Beckham's Succession, 16 La. Ann. 352, it is said that the necessity of resorting to a separate action to enforce a judgment exists in two cases: (1) When the judgment was rendered in a foreign state; and (2) when it is a domestic judgment but the judgment debtor is dead and his estate is under administration. In case the judgment debtor is a non-resident, the court may appoint a curator *ad hoc*, upon whom service may be made, and contradictorily with whom a judgment may be rendered, a suit to revive a judgment being one quasi *in rem*, and not an action *in personam*. Bertron *v.* Stuart, 43 La. Ann. 1171, 10 So. 295.

d. Motion to Revive. In some states the revival of a judgment may be ordered on motion.[80] But it is necessary that the judgment debtor, or person against whom the revival is sought, should have due and sufficient notice of such a motion and an opportunity to contest it.[81]

e. Summons to Show Cause. Another form of proceeding to revive a judgment, used generally in some of the states, and allowed in special cases in others, partakes both of the nature of a formal action and of a scire facias, since it is begun by a summons, but requires defendant to show cause why the judgment should not be revived or enforced as the case may be.[82]

7. Revival by Scire Facias[83] — a. In General. A proceeding by scire facias to revive a judgment is not regarded as a new suit; in contemplation of law it is

Maine.— Piscataquis County *v.* Kingsbury, 73 Me. 326.

Montana.— Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

New York.— Wallace *v.* Swinton, 64 N. Y. 188; Ireland *v.* Litchfield, 8 Bosw. 634.

North Carolina.— The right to proceed by scire facias is confined to judgments obtained at law, and hence where a decree was made for the payment of money against an administrator, and it was ascertained by the decree that he had no assets, it was held that the only remedy of plaintiff was by a bill against the heirs to have satisfaction out of the real assets. Jeffreys *v.* Yarborough, 16 N. C. 506.

Oklahoma.—Wilson *v.* McCornack, 10 Okla. 180, 61 Pac. 1068.

Texas.— Bridge *v.* Samuelson, 73 Tex. 522, 11 S. W. 539; Carson *v.* Moore, 23 Tex. 450; Huston *v.* Deen, 19 Tex. 236.

Utah.— Davidson *v.* Hunter, 22 Utah 117, 61 Pac. 556.

Washington.— Sears *v.* Kilbourn, 28 Wash. 194, 68 Pac. 450.

Wisconsin.— Ingraham *v.* Champion, 84 Wis. 235, 54 N. W. 398.

United States.— Shainwald *v.* Lewis, 46 Fed. 839.

See 30 Cent. Dig. tit. "Judgment," § 1610.

Suit on judgment distinguished.— An action to recover the amount of a judgment, with interest, in which a summons is issued and served as on a money demand, and in which a judgment for money alone is prayed for, is an action on the judgment, and not a proceeding to revive it. Mawhinney *v.* Doane, 40 Kan. 681, 20 Pac. 488; Lawton *v.* Perry, 40 S. C. 255, 18 S. E. 861.

Parties.— An action to revive a judgment, brought in the name of the judgment creditor after his death, is a nullity. Goreth *v.* Shipherd, 92 N. Y. App. Div. 611, 86 N. Y. Suppl. 849. If the judgment debtor is dead, all the heirs are necessary parties. Joyce *v.* Kearney, McGloin (La.) 243. But it seems that the heir at law of the judgment debtor and the administrator of his estate cannot be joined as defendants. Strong *v.* Lee, 2 Thomps. & C. (N. Y.) 441. Where a judgment against joint debtors is sought to be revived, all those jointly liable should be made parties; but where all are made parties and summons is issued against all, the fact that one or more cannot be found will not abate the action against those served. Clark *v.* Commercial Nat. Bank, (Nebr. 1903) 94 N. W. 958.

Burden of proof.— Plaintiff must establish the existence of the judgment and his ownership thereof. Drogre *v.* Moreau, 21 La. Ann. 639. But where defendant resists the revival on the ground that the judgment was null and void, the burden is on him to prove the fact. Levy *v.* Calhoun, 34 La. Ann. 413.

80. Cortez *v.* San Francisco Super. Ct., 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37; Chew *v.* Peale, 12 Sm. & M. (Miss.) 700; Neracher *v.* Geier, 12 Ohio Cir. Ct. 259, 4 Ohio Cir. Dec. 559; Pursel *v.* Deal, 16 Oreg. 295, 18 Pac. 461.

In Tennessee and Wisconsin this is not permissible. Fogg *v.* Gibbs, 8 Baxt. (Tenn.) 464; Ingraham *v.* Champion, 84 Wis. 235, 54 N. W. 398.

81. Hitchcock *v.* Caruthers, 100 Cal. 100, 34 Pac. 627; Gruble *v.* Wood, 27 Kan. 535. See Schultz *v.* American Clock Co., 39 Kan. 334, 18 Pac. 221.

82. Rowland *v.* Shockley, 43 S. C. 246, 21 S. E. 21; McDowall *v.* Reed, 28 S. C. 466, 6 S. E. 300. See Witherspoon *v.* Twitty, 43 S. C. 348, 21 S. E. 256.

Against executors.— The statute in New York provides that in case of the death of a judgment debtor after judgment his executors may be summoned to show cause why the judgment should not be enforced against the estate of the deceased in their hands. See Mills *v.* Thursby, 12 How. Pr. (N. Y.) 385.

Prayer for relief.— Although a summons in proceedings to revive a judgment is in terms limited to the renewal of the execution, there is no error in reviving the judgment as well as granting leave to renew the execution, where all the defenses were denials of the existence of the judgment. Leitner *v.* Metz, 32 S. C. 383, 10 S. E. 1082; Adams *v.* Richardson, 32 S. C. 139, 10 S. E. 931.

Hearing.—In a proceeding to revive a judgment, where the judgment debtor, on an order to show cause why the judgment should not be revived, for such cause shows, by affidavit, that the judgment has been paid and satisfied, it is error to render final order of revivor without hearing testimony as to the fact of such payment. Garrison *v.* Aultman, 20 Nebr. 311, 30 N. W. 61.

83. Scire facias to enforce in general see *supra*, XVIII, C, 3.

merely a continuation of the original action.[84] It is a remedy which plaintiff may pursue notwithstanding the fact that he has a present and immediate right to issue execution on the judgment,[85] or although an execution has already been issued, provided it has not resulted in full satisfaction of the judgment,[86] and which is not rendered unavailable by the existence of other remedies or means of making the judgment effective, but may be pursued concurrently with them.[87] Its purpose and effect is to continue the vitality of the judgment for a new term, and extend its lien, which otherwise would be lifted from the lands of the debtor by mere efflux of time.[88]

b. Application and Affidavits. In some states scire facias cannot issue to revive a judgment which is above a certain age, as ten years, except upon leave of court first obtained, and the filing of an affidavit that it remains unsatisfied.[89] But this

Scire facias to obtain new execution see *supra*, XVIII, C, 4.

Proceedings on scire facias in general see SCIRE FACIAS.

84. *Arkansas.*— Hanly *v.* Adams, 15 Ark. 232; Blackwell *v.* State, 3 Ark. 320.

Florida.— Brown *v.* Harley, 2 Fla. 159.

Georgia.— Funderburk *v.* Smith, 74 Ga. 515; Dickinson *v.* Allison, 10 Ga. 557.

Illinois.— Challenor *v.* Niles, 78 Ill. 78. *Contra*, Gibbons *v.* Goodrich, 3 Ill. App. 590.

Iowa.— Denegre *v.* Haun, 13 Iowa 240.

Maine.— Adams *v.* Rowe, 11 Me. 89, 25 Am. Dec. 266.

Maryland.— Kirkland *v.* Krebs, 34 Md. 93; Huston *v.* Ditto, 20 Md. 305.

Massachusetts.— Gray *v.* Thrasher, 104 Mass. 373; Comstock *v.* Holbrook, 16 Gray 111.

Missouri.— Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052 [*overruling* Milsap *v.* Wilman, 5 Mo. 425; Walsh *v.* Bosse, 16 Mo. App. 231; Simpson *v.* Watson, 15 Mo. App. 425]; Ellis *v.* Jones, 51 Mo. 180; Humphreys *v.* Lundy, 37 Mo. 320; Long *v.* Thormond, 83 Mo. App. 227; Kretz *v.* Preston, 52 Mo. App. 251.

Nebraska.— Bankers' L. Ins. Co. *v.* Robbins, 59 Nebr. 170, 80 N. W. 484; Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

Ohio.— Wolf *v.* Pounsford, 4 Ohio 397.

Pennsylvania.— Eldred *v.* Hazlett, 38 Pa. St. 16; Irwin *v.* Nixon, 11 Pa. St. 419, 51 Am. Dec. 559.

South Carolina.— Ingram *v.* Belk, 2 Strobh. 207, 47 Am. Dec. 591.

Tennessee.— Carter *v.* Carriger, 3 Yerg. 411, 24 Am. Dec. 585.

Texas.— Masterson *v.* Cundiff, 58 Tex. 472; Perkins *v.* Hume, 10 Tex. 50.

Vermont.— State Treasurer *v.* Foster, 7 Vt. 52.

United States.— Fitzhugh *v.* Blake, 9 Fed. Cas. No. 4,840, 2 Cranch C. C. 37; Hatch *v.* Eustis, 11 Fed. Cas. No. 6,207, 1 Gall. 160.

See 30 Cent. Dig. tit. "Judgment," § 1613.

Contra.— Ensworth *v.* Davenport, 9 Conn. 390.

85. *Alabama.*— Ogden *v.* Smith, 14 Ala. 428.

Georgia.— Fulcher *v.* Mandell, 83 Ga. 715, 10 S. E. 582.

Maryland.— Lambson *v.* Moffett, 61 Md. 426.

Mississippi.— Vick *v.* Chewning, 31 Miss. 201. *Compare* Locke *v.* Brady, 30 Miss. 21.

Missouri.— Goddard *v.* Delaney, 181 Mo. 564, 80 S. W. 886.

United States.— Brown *v.* Chesapeake, etc., Canal Co., 4 Fed. 770, 4 Hughes 584.

See 30 Cent. Dig. tit. "Judgment," § 1613.

86. Stille *v.* Wood, 1 N. J. L. 118; Stewart *v.* Peterson, 63 Pa. St. 230.

87. See cases cited *infra*, this note.

Applications of rule.— Scire facias to revive may be maintained concurrently with an action of debt on the judgment (Lafayette County *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360), or with a foreign attachment on the judgment (Hugg *v.* Brown, 6 Whart. (Pa.) 468). So a judgment creditor of a deceased person may present the claim for allowance in the probate court and at the same time maintain scire facias to revive the judgment against the administrator. Brearly *v.* Peay, 23 Ark. 172. And scire facias to revive a judgment against a city may be joined with an application for a mandamus to enforce its collection. Houston *v.* Emery, 76 Tex. 282, 13 S. W. 264. Again a scire facias to revive a judgment for costs may issue pending a motion to retax the costs. Garner *v.* Hays, 3 Mo. 436.

88. **Consolidation of judgments.**— In a proceeding by scire facias several judgments may be consolidated, all of which are for the use of plaintiff, although some of them were obtained in the names of other persons. Reed's Appeal, 7 Pa. St. 65. And so where the judgments are all against the same defendant, although one of them is also against another person. Yeager's Appeal, 129 Pa. St. 268, 18 Atl. 137.

Effect of opening judgment.— While the opening of a judgment to let defendant in to a defense does not destroy its lien, yet if plaintiff desires to extend it longer than five years he must issue his scire facias to revive. Cope's Appeal, 96 Pa. St. 294.

Property not owned by debtor.— A scire facias against the heirs and terre-tenants of the judgment debtor will not reach property never owned by the latter, but inherited by his children after his death from a third person. Adams *v.* Stake, 67 Md. 447, 10 Atl. 444.

89. Pears *v.* Bache, 1 N. J. L. 206; State Bank *v.* Eden, 17 Johns. (N. Y.) 105; Lans-

requirement is not usual, and generally the writ may issue without any application to the court.[90]

c. Requisites and Validity of Writ — (I) *In General.* The writ of scire facias should show the legal title of plaintiff to have execution of the judgment,[91] and correctly describe the parties to be charged,[92] the court from which it issues and to which it is returnable,[93] and the judgment on which it is founded.[94] The writ must also state the purpose for which it is issued, or the demand against which defendant is required to show cause.[95] It issues from the court rendering the judgment, but may run into any county in the state where defendant may be found.[96] Informalities in the writ or irregularities not going to the jurisdiction may be cured by the statute of jeofails, or will be deemed waived if not seasonably objected to.[97]

(II) *Averments and Allegations.* The scire facias must contain such allegations as will show a good and sufficient cause of action,[98] both in respect to plaintiff's legal title to have execution or to have the judgment revived,[99] and as

ing *v.* Lyons, 9 Johns. (N. Y.) 84; Hinton *v.* Oliver, 19 N. C. 519. And see Buker *v.* Carroll, 1 Pennew. (Del.) 112, 39 Atl. 784.

Sufficiency of affidavit.— Where the affidavit alleges the existence of the judgment, the fact that it has become dormant and that it remains unpaid is sufficient to justify the making of a conditional order of revival, and on proper service and default to sustain an order making the revivor absolute. Furer *v.* Holmes, (Nebr. 1905) 102 N. W. 764.

90. Hill *v.* Neal, 52 Ga. 92; Edwards *v.* Coleman, 2 A. K. Marsh. (Ky.) 249; Chambers *v.* Carson, 2 Whart. (Pa.) 365; Lesley *v.* Nones, 7 Serg. & R. (Pa.) 410; Fogg *v.* Gibbs, 8 Baxt. (Tenn.) 464.

91. Scire facias on an assigned judgment may be issued in the name of the assignor, if the writ itself shows that it was issued on behalf of and to the use of the assignee. Wonderly *v.* Lafayette County, 74 Fed. 702. And see Campbell's Estate, 22 Pa. Super. Ct. 432.

92. Pickett *v.* Pickett, 1 How. (Miss.) 267; Dougherty *v.* Hurt, 6 Humphr. (Tenn.) 430.

93. See Anthony *v.* Humphries, 9 Ark. 176.

Amendments of clerical errors.— Where a scire facias was issued and attested by the clerk of the circuit court, and recited a judgment of that court, but commanded defendant to appear before the "probate" court and show cause, it was held that the error was merely clerical and amendable. Anthony *v.* Humphries, 9 Ark. 176.

94. See *infra*, XVIII, D, 7, c, (III).

Joint and several judgments.—A joint scire facias upon several judgments is bad. Davidson *v.* State, 20 Tex. 649. And conversely if the judgment is joint the scire facias must also be joint. Carson *v.* Moore, 23 Tex. 450.

95. Starkweather *v.* West End. Nat. Bank, 21 App. Cas. (D. C.) 281; *In re* Cake, 186 Pa. St. 412, 40 Atl. 568.

Form of demand.— A scire facias on a judgment requires defendant to show cause either (1) why the judgment should not be revived and its lien continued, or (2) why plaintiff should not have execution. But it is said that, when used for the purpose of keeping the judgment alive, the writ need not be issued expressly and in terms for that object in order to have the effect of revival. Cornelius *v.* Junior, 5 Phila. (Pa.) 171. On the other hand a judgment against a decedent will not be revived against the heirs upon a scire facias summoning them to appear and show cause why the judgment should not be revived against them instead of requiring them to show cause why execution should not be issued against the real estate of the decedent descended to them. Frierson *v.* Harris, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220.

Joining motion to amend.—A judgment may be rendered *nunc pro tunc*, and revived by scire facias at the same term; and there is no impropriety in uniting a notice of the motion to amend in the scire facias to revive. Glass *v.* Glass, 24 Ala. 468.

96. Fowler *v.* Thurmond, 13 Ark. 259; Challenor *v.* Niles, 78 Ill. 78; Hammond *v.* Harris, 2 How. Pr. (N. Y.) 115.

Return.— The writ is returnable to a term of the court, and not before the clerk. Lee *v.* Eure, 82 N. C. 428. And see White *v.* Guthrie, 2 Pa. Co. Ct. 7.

97. Starkweather *v.* West End Nat. Bank. 21 App. Cas. (D. C.) 281; Locke *v.* Brady, 30 Miss. 21; Campbell's Appeal, 118 Pa. St. 128, 12 Atl. 299; McMurray *v.* Hopper, 43 Pa. St. 468; Dickerson's Appeal, 7 Pa. St. 255. Informalities in a writ of scire facias to revive a judgment cannot be taken advantage of by a stranger to the judgment. *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Smith *v.* Boatman Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119; Polnac *v.* State, 46 Tex. Cr. 70, 80 S. W. 381.

98. McKinney *v.* Mehaffey, 7 Watts & S. (Pa.) 276.

99. **Representative of judgment plaintiff.**— Where the scire facias is brought by the personal representatives of a deceased plaintiff, all the executors should be named in the writ, although only one of them has qualified as such. Carson *v.* Richardson, 3 Hayw. (Tenn.) 231. And see Keith *v.* Metcalf, 2 Swan (Tenn.) 74.

Judgment in ejectment.— On scire facias to revive a judgment in ejectment, where the

to the existence or occurrence of the facts which constitute the ground for issuing the writ and are relied on as justifying the relief demanded,[1] and as against the particular parties sought to be charged with the judgment.[2] Further in the case of heirs or terre-tenants the writ should specifically describe the lands sought to be charged.[3]

(III) *RECITAL OF JUDGMENT.* It is also necessary that the scire facias shall correctly set forth and describe the original judgment on which it is founded.[4] It must be described in respect to the amount of the recovery,[5] the date of the

original judgment does not show the nature or extent of plaintiff's estate in the land, it is necessary for the scire facias to allege and the evidence to prove that his title has not expired since the judgment. Smith *v.* Stevens, 133 Ill. 183, 24 N. E. 511. But this is not necessary where the judgment contained a finding that plaintiff had title to the land in fee simple. Wilson *v.* School Trustees, 144 Ill. 29, 33 N. E. 194.

1. Miller *v.* Shackelford, 16 Ala. 95; Griffith *v.* Wilson, 1 J. J. Marsh. (Ky.) 209; Wood *v.* Coghill, 7 T. B. Mon. (Ky.) 601; Hough *v.* Norton, 9 Ohio 45. But it is not necessary to aver that execution was not issued within a year and a day. Albin *v.* People, 46 Ill. 372; Weaver *v.* Reese, 6 Ohio 418.

Judgment unsatisfied.— The scire facias must clearly allege that the judgment remains unsatisfied, or that "execution remains to be done." Brown *v.* Harley, 2 Fla. 159; Albin *v.* People, 46 Ill. 372; Davidson *v.* Alvord, 3 Ind. 1. But see Carson *v.* Richardson, 3 Hayw. (Tenn.) 231, holding that a scire facias to revive a decree need not state the sum paid and balance due. If the statement accompanying the scire facias shows on its face that the judgment is more than twenty years old, and avers merely that no part of the debt has been paid, it does not rebut the presumption of payment of the judgment. Hummel *v.* Lilly, 188 Pa. St. 463, 41 Atl. 613, 68 Am. St. Rep. 879. *Compare* National Sav. Bank *v.* Welcker, 21 D. C. 324.

Judgment with stay of execution.— Where the judgment sought to be revived was rendered by agreement, with a stay of execution until a certain event should happen, the scire facias must allege that the event has happened. Waller *v.* Huff, 9 Tex. 530.

Arrest of defendant.— A scire facias which states the recovery of a judgment, the issuing of a capias thereon, and the arrest and commitment of defendant, but without showing how he was discharged, if discharged at all, shows no cause of action. Dozier *v.* Gore, 1 Litt. (Ky.) 163.

2. See cases cited *infra*, this note.

Joint defendants.— A scire facias against one of the three defendants in a judgment, which does not aver the death of the others and the survivorship of the one pursued, is bad on demurrer. Graham *v.* Smith, 1 Blackf. (Ind.) 414.

Executor.— A scire facias against an executor to revive a judgment recovered against his testator must suggest the death of the judgment debtor and show defendant's appointment as executor. Walker *v.* Hood, 5 Blackf. (Ind.) 266.

Heirs.— Scire facias to charge an heir with a judgment recovered against his ancestor must show that he is in possession of lands of which his ancestor died seized. Whiting *v.* Pritchard, 1 Rich. (S. C.) 304. But it need not allege proceedings taken ineffectually against the personal representatives. Rogers *v.* Denham, 2 Gratt. (Va.) 200. Where the heirs are only liable jointly with the personal representative, unless the ancestor has been dead a year, and there is no such representative, a scire facias against the heirs must show those facts. Huey *v.* Redden, 3 Dana (Ky.) 488.

Terre-tenants.— Where the object is to revive the judgment as against a terre-tenant, the writ must show when his title to the land vested. Warfield *v.* Brewer, 4 Gill (Md.) 265.

Trustee.— A scire facias to enforce a judgment rendered against a trustee is insufficient if it is only alleged therein that plaintiff recovered a judgment against defendant as trustee; it should appear for what the trustee was made chargeable. Gibson *v.* Davis, 22 Vt. 374.

3. Ogden *v.* Smith, 13 Ala. 428; Bish *v.* Williar, 59 Md. 382; Union Bank *v.* Meig, 5 Ohio 312. *Compare* Commercial Bank *v.* Kendall, 13 Sm. & M. (Miss.) 278.

4. *Alabama.*— Toulmin *v.* Bennett, 3 Stew. & P. 220.

Maryland.— McKnew *v.* Duvall, 45 Md. 501; Warfield *v.* Brewer, 4 Gill 265.

North Carolina.— Barrow *v.* Arrenton, 23 N. C. 223.

Ohio.— Wolf *v.* Pounsford, 4 Ohio 397.

Pennsylvania.— Richter *v.* Cummings, 60 Pa. St. 441; Arrison *v.* Com., 1 Watts 374.

South Carolina.— Cash *v.* Lyle, 2 Brev. 183.

United States.—Green *v.* Watkins, 6 Wheat. 260, 5 L. ed. 256.

See 30 Cent. Dig. tit. "Judgment," § 1617.

Degree of certainty required.— It is sufficient for a scire facias to contain such recitals as will point to the judgment intended to be revived with such certainty that defendant must know what judgment is meant. Ward *v.* Prather, 1 J. J. Marsh. (Ky.) 4; Davidson *v.* Hunter, 22 Utah 117, 61 Pac. 556. In other words irregularities in the recital of the original judgment will not avoid the scire facias if they are not misleading. Landon *v.* Brown, 160 Pa. St. 538, 28 Atl. 921.

5. *Alabama.*— Barron *v.* Tart, 19 Ala. 78.

Ohio.— Wolf *v.* Pounsford, 4 Ohio 397.

judgment,[6] the parties plaintiff and defendant,[7] and the court in which it was entered;[8] and a substantial variance between the recitals in the writ and the judgment to be revived will break the continuity of the lien, although it is otherwise if the objection is merely formal or technical.[9]

d. Amendment of Writ. A scire facias is amendable in respect to informalities or irregularities, or to make it conform to the record of the judgment,[10] but not as against parties not served with the writ;[11] nor can an amendment of the original judgment be effected on a plea of *nul tiel record* to the scire facias.[12]

e. Alias and Pluries Writs. An alias or pluries scire facias may issue where service of the first writ was not effected,[13] where it was served on some of the joint defendants and returned not served as to the others,[14] or where plaintiff desires to make an additional party,[15] as where the original scire facias was served on the judgment defendant and the alias is used to bring in terre-tenants.[16] An alias or pluries scire facias may also issue where plaintiff is nonsuited on the first scire facias.[17] But a recovery upon a scire facias is a bar to a recovery subsequently upon the original judgment, so that each successive scire facias to revive must be founded on that immediately preceding it.[18] So also it has been

Pennsylvania.— Dietrich's Appeal, 107 Pa. St. 174; Park *v.* Webb, 3 Phila. 32.

South Carolina.—Porter *v.* Brisbane, 1 Brev. 456.

United States.— Brown *v.* Chesapeake, etc., Canal Co., 4 Fed. 770, 4 Hughes 584.

See 30 Cent. Dig. tit. "Judgment," § 1617.

6. Bolinger *v.* Fowler, 14 Ark. 27.

7. Allen *v.* Chadsey, 1 Smith (Ind.) 200; Richardson *v.* Prince George Justices, 11 Gratt. (Va.) 190.

8. Wood *v.* Coghill, 7 T. B. Mon. (Ky.) 601; Coleman *v.* Edwards, 4 Bibb (Ky.) 347.

Transcript from inferior court.— A judgment recovered in an inferior court and transferred to a higher court should not be described in a scire facias as a judgment of the latter court, but the facts of its recovery before the lower court, and the issue and filing of the transcript should be set forth. Miller *v.* Fees, 3 Pa. L. J. 243. And see Lubker *v.* Grand Detour Plow Co., 53 Nebr. 111, 73 N. W. 457.

Judgment affirmed.— A scire facias to revive a judgment affirmed in the supreme court need not aver that the judgment of affirmance has been certified to the court below. An averment that the judgment of the lower court was affirmed, "as by the record and proceedings thereon remaining in the said circuit court will more fully appear," is sufficient on general demurrer. Duncan *v.* Hargrove, 18 Ala. 77.

9. *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326.

10. *Arkansas.*— Anthony *v.* Humphries, 11 Ark. 663.

Georgia.— Shepherd *v.* Ryan, 53 Ga. 563.

Kentucky.— Constantine *v.* Majer, 6 J. J. Marsh. 621; Thompson *v.* Dougherty, 3 J. J. Marsh. 564.

Maryland.— Garey *v.* Sangsten, 64 Md. 31, 20 Atl. 1034.

North Carolina.— Williams *v.* Lee, 4 N. C. 578.

South Carolina.— Smith *v.* Brisbane, 2 Bay 557.

See 30 Cent. Dig. tit. "Judgment," § 1636.

11. Lyon *v.* Ford, 20 D. C. 530.

12. Brown *v.* Gilles, 4 Fed. Cas. No. 2,007, 3 Cranch C. C. 363.

13. Cumming *v.* Eden, 1 Cew. (N. Y.) 70; Davidson *v.* Thornton, 7 Pa. St. 128; Root *v.* Frear, 11 Pa. Co. Ct. 342.

14. Baker *v.* French, 2 Fed. Cas. No. 767, 2 Cranch C. C. 539. See Bowie *v.* Neale, 41 Md. 124.

In Arkansas it is said that there is no statute authorizing separate writs of scire facias to revive a judgment, where defendants reside in different counties. They must all be included in the same writ, and a return of *non est* as to any one of the defendants will authorize service of notice by publication as to him. State Bank *v.* Terry, 13 Ark. 389.

15. A scire facias against an executor of defendant before final judgment is merely to make the executor a party to the record; and although the judgment be against the executor, it is not a judgment fixing him with assets, but a second scire facias is necessary for that purpose, to which the executor may plead a want of assets, or make any other defense which he might have made if sued on a judgment against his testator. Borden *v.* Thorpe, 35 N. C. 298.

16. Hughes *v.* Torrance, 111 Pa. St. 611, 4 Atl. 825; Kirby *v.* Cash, 93 Pa. St. 505; Lichty *v.* Hochstetler, 91 Pa. St. 444; Silverthern *v.* Townsend, 37 Pa. St. 263; Little *v.* Smyser, 10 Pa. St. 381; Salmon *v.* Bachman, 8 Pa. Co. Ct. 144. *Compare* Zerns *v.* Watson, 11 Pa. St. 260.

Defenses.— In an alias scire facias on a mortgage, it is error to reject special pleas offerred by terre-tenants of the mortgaged premises, who are made parties. Roberts *v.* Williams, 5 Whart. (Pa.) 170, 34 Am. Dec. 549.

17. Trice *v.* Turrentine, 35 N. C. 212.

18. Custer *v.* Detterer, 3 Watts & S. (Pa.) 28; Collingwood *v.* Carson, 2 Watts & S. (Pa.) 220.

held that on a second writ no defenses can be heard which might have been pleaded to the first.[19]

f. Service and Return. There can be no valid judgment upon a scire facias to revive a judgment, unless the writ was served upon defendants,[20] and it is held that the service must be personal, if defendant is within the jurisdiction,[21] and after the manner of serving a writ of summons;[22] and moreover, it must be served upon heirs, terre-tenants, or other persons sought to be bound.[23] If defendant is a non-resident, the service may be constructive.[24] The officer's return should set forth correctly the facts of the service,[25] but may be aided by reasonable intendments,[26] and may be corrected or amended.[27]

g. Parties Defendant[28] — (i) *In General.* All the parties to the original judgment must be parties to a proceeding to revive it.[29] In case of the death of the judgment defendant, it is the doctrine in some states that the heirs and terre-tenants must be made defendants, but that it is not necessary to join the executor or administrator.[30] In others the scire facias is properly brought against the per-

19. Wilson *v.* Hurst, 30 Fed. Cas. No. 17,809, Pet. C. C. 441.

20. Donaldson *v.* Dodd, 79 Ga. 763, 4 S. E. 157; Gruble *v.* Wood, 27 Kan. 535; Betts *v.* Johnson, 68 Vt. 549, 35 Atl. 489; Rice *v.* Talmadge, 20 Vt. 378.

Joint defendants.— Where the judgment to be revived is against two defendants jointly, the scire facias must be served on both; if served on only one of the joint debtors, it cannot afterward be amended to include both, so as to save the bar of the statute. Lyon *v.* Ford, 20 D. C. 530.

Sufficiency of process.— A scire facias properly entitled in the case, containing the matters required to be contained in a notice of an application of revivor, signed by the clerk of the court and attested by the seal of the court, and containing a command to the sheriff to serve the same upon defendants therein named, is a sufficient notice and is sufficiently signed. Selders *v.* Boyle, 5 Kan. App. 451, 49 Pac. 320.

21. Mendenhall *v.* Robinson, 56 Kan. 633, 44 Pac. 610; Feeter *v.* McCombs, 1 Wend. (N. Y.) 19; Betts *v.* Johnson, 68 Vt. 549, 35 Atl. 489. See Phillips *v.* Wait, 106 Ga. 589, 32 S. E. 842.

22. Phillips *v.* Wait, 106 Ga. 589, 32 S. E. 842; Andrews *v.* Buckbee, 77 Mo. 428; Buchanan *v.* Specht, 1 Phila. (Pa.) 252.

23. White *v.* Harden, 154 Pa. St. 387, 26 Atl. 312; Dickerson's Appeal, 7 Pa. St. 255; Crutchfield *v.* Stewart, 10 Yerg. (Tenn.) 237; Roberts *v.* Busby, 3 Hayw. (Tenn.) 299.

After assignment for creditors.— The service of a scire facias is good when made on defendant, who remains in possession of his real estate, although he has made an assignment for the benefit of his creditors. *In re* Dohner, 1 Pa. St. 101.

24. **Louisiana.**— When defendant resides in another state, the court may appoint a curator *ad hoc*, upon whom service may be made, and thereupon a judgment may be rendered binding on defendant, a suit to revive a judgment being considered as quasi *in rem*. Bertron *v.* Stuart, 43 La. Ann. 1171, 10 So. 295.

Massachusetts.— The law prescribing no particular form of notice to be given to a defendant beyond the jurisdiction of the court, it is for the court to cause such notice to be given to him as shall be reasonable and enable him to appear and defend his rights. Comstock *v.* Holbrook, 16 Gray 111.

South Carolina.— The act of 1792 to revive process against absent defendants requires "the rules or process" to be posted; the posting notice that a scire facias to revive a judgment has issued is not enough. Treasurers *v.* Tarrant, 1 Hill 7.

Service by sheriff of another county.— In Georgia if defendant resides in another county, the writ must be issued to the sheriff of that county, and be personally served by him. Dickinson *v.* Allison, 10 Ga. 557. In Indiana process cannot be issued to and served by the sheriff of another county. Walker *v.* Hood, 5 Blackf. (Ind.) 266.

25. Bruce *v.* Colgan, 2 Litt. (Ky.) 284; Thomas *v.* Farmers' Bank, 46 Md. 43; Chahoon *v.* Hollenback, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587; Ingram *v.* Belk, 2 Strobh. (S. C.) 207, 47 Am. Dec. 591.

26. Polnac *v.* State, 46 Tex. Cr. 70, 80 S. W. 381.

27. Berry *v.* Griffith, 2 Harr. & G. (Md.) 337, 18 Am. Dec. 309; Mandeville *v.* McDonald, 16 Fed. Cas. No. 9,013, 3 Cranch C. C. 631.

28. **Persons against whom judgment may be revived** see *supra*, XVIII, D, 2, d.

Persons who may revive judgment see *supra*, XVIII, D, 2, c.

29. Osborne *v.* Wainwright, 52 Cal. 312; Funderburk *v.* Smith, 74 Ga. 515.

Trustee.— The failure to make a naked trustee, who has no beneficial interest in the land, a party to the scire facias, will not destroy the hold of the judgment on a *cestui que trust* who is duly joined. Bowers *v.* Harner, 3 Phila. (Pa.) 146.

A stranger to a judgment has no right to appear on scire facias and give evidence of fraud in the recovery of the judgment. Heller *v.* Jones, 4 Binn. (Pa.) 61.

30. Tessier *v.* Wyse, 3 Bland (Md.) 40; Stewart *v.* Gibson, 71 Mo. App. 232; Walden *v.* Craig, 14 Pet. (U. S.) 147, 10 L. ed. 393.

sonal representatives alone, and the heirs or devisees are not necessary parties, even if they are proper parties.[31] In some the personal representative, heirs, and terre-tenants may and should all be joined in the action,[32] while in others this is not permitted.[33]

(II) *JOINT DEFENDANTS.* A scire facias to revive a judgment against two or more defendants must go against them all, if living, or against the heirs or representatives of any deceased defendant jointly with the survivors.[34] If plaintiff desires to revive a judgment against one or more defendants without joining all, his remedy is by an action of debt on the judgment, not a scire facias.[35]

(III) *TERRE-TENANTS.* It is generally held that in order to revive the lien of a judgment as against land which is in the possession of a terre-tenant, he must be made a party to the scire facias,[36] although this is not universally

31. Wilson *v.* Furey, 3 Pennew. (Del.) 278, 51 Atl. 875 [but *compare* Hallowell *v.* Brown, 8 Houst. (Del.) 500, 32 Atl. 392]; Messmore *v.* Williamson, 189 Pa. St. 73, 41 Atl. 1110, 69 Am. St. Rep. 791; Colenburg *v.* Venter, 173 Pa. St. 113, 33 Atl. 1046; Williamson's Appeal, (Pa. 1889) 17 Atl. 8; Grover *v.* Boon, 124 Pa. St. 399, 16 Atl. 885; Middleton *v.* Middleton, 106 Pa. St. 252; Bennett *v.* Fulmer, 49 Pa. St. 155; McMurray *v.* Hopper, 43 Pa. St. 468; Kessler's Appeal, 32 Pa. St. 390; McMillan *v.* Red, 4 Watts & S. (Pa.) 237; Brown *v.* Webb, 1 Watts (Pa.) 411; Specht *v.* Sipe, 15 Pa. Super. Ct. 207; Hauck *v.* Gundaker, 21 Pa. Co. Ct. 12; Callahan *v.* Fahey, 10 Pa. Co. Ct. 488; Davey's Estate, 9 Pa. Co. Ct. 125; Gray's Estate, 3 Del. Co. (Pa.) 325; Hoke *v.* Wentz, 13 York Leg. Rec. (Pa.) 101; U. S. *v.* Houston, 48 Fed. 207.

32. Fitzpatrick *v.* Edgar, 5 Ala. 499; Reynolds *v.* Henderson, 7 Ill. 110; Graves *v.* Skeels, 6 Ind. 107; Tiers *v.* Codd, 87 Md. 447, 39 Atl. 1044.

33. Barnes *v.* McLemore, 12 Sm. & M. (Miss.) 316; Strong *v.* Lee, 44 How. Pr. (N. Y.) 60.

34. *Arkansas.*—Bolinger *v.* Fowler, 14 Ark. 27; Hubbard *v.* Bolls, 7 Ark. 442.

Delaware.— Hallowell *v.* Brown, 8 Houst. 500, 32 Atl. 392.

Kentucky.— Murray *v.* Baker, 5 B. Mon. 172; Huey *v.* Redden, 3 Dana 488; Calloway *v.* Eubank, 4 J. J. Marsh. 280; Griffith *v.* Wilson, 1 J. J. Marsh. 209; Gray *v.* McDowell, 5 T. B. Mon. 501; Mitchell *v.* Smith, 1 Litt. 243.

Mississippi.— McAfee *v.* Patterson, 2 Sm. & M. 593.

Ohio.— Zanesville Canal, etc., Co. *v.* Granger, 7 Ohio 165.

Pennsylvania.— Grenell *v.* Sharp, 4 Whart. 344; Com. *v.* Mateer, 16 Serg. & R. 416; Callahan *v.* Fahey, 10 Pa. Co. Ct. 488. But see Evans *v.* Meylert, 19 Pa. St. 402.

Texas.— Henderson *v.* Vanhook, 24 Tex. 358; Carson *v.* Moore, 23 Tex. 450; Austin *v.* Reynolds, 13 Tex. 544; Rowland *v.* Harris, (Civ. App. 1895) 34 S. W. 295.

England.— Rex *v.* Chapman, 3 Anstr. 811; Sainsbury *v.* Pringle, 10 B. & C. 751, 21 E. C. L. 317; Fowler *v.* Rickerby, 9 Dowl. P. C. 682, 10 L. J. C. P. 149, 2 M. & G. 760, 3 Scott N. R. 138, 40 E. C. L. 843; Panton *v.* Hall, 2 Salk. 598.

See 30 Cent. Dig. tit. "Judgment," § 1619.

Contra.— Vredenburgh *v.* Snyder, 6 Iowa 39; Walden *v.* Craig, 14 Pet. (U. S.) 147, 10 L. ed. 393.

35. Carson *v.* Moore, 23 Tex. 450. But *compare* Patterson *v.* Walton, 119 N. C. 500, 26 S. E. 43, holding that where a judgment in favor of plaintiff is joint and several, he may elect as to which of defendants he will have it revived. And see Preston *v.* National Exch. Bank, 97 Va. 222, 33 S. E. 546.

Defendant not served.— Where a writ to revive a judgment against several is not served on one of them, plaintiff cannot discontinue the proceeding as to him and revive the judgment against the others. Greer *v.* State Bank, 10 Ark. 455; Coleman *v.* Edwards, 2 Bibb (Ky.) 595. *Compare* Hanson *v.* Jacks, 22 Ala. 549.

36. *Iowa.*— Von Puhl *v.* Rucker, 6 Iowa 187.

Maryland.— Wright *v.* Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702. *Compare* Murphy *v.* Cord, 12 Gill & J. 182.

New York.— Morton *v.* Croghan, 20 Johns. 106. *Compare* Campbell *v.* Rawdon, 18 N. Y. 412; Jackson *v.* Shaffer, 11 Johns. 513.

Pennsylvania.— Long *v.* McConnell, 158 Pa. St. 573, 28 Atl. 233; McCray *v.* Clark, 82 Pa. St. 457; Nicholas *v.* Phelps, 15 Pa. St. 36; Roberts *v.* Williams, 5 Whart. 170, 34 Am. Dec. 549; Lusk *v.* Davidson, 3 Penr. & W. 229; Stevenson *v.* Black, 1 Pa. Cas. 117, 1 Atl. 312; Barrell *v.* Adams, 26 Pa. Super. Ct. 635; Suter *v.* Findley, 5 Pa. Super. Ct. 163; Com. *v.* Rogers, 4 Pa. L. J. Rep. 252. In this state it was held that the issuing of a scire facias within five years after the judgment was rendered continued the lien on lands that had been conveyed by defendant, although no service of the writ was actually made on the terre-tenant. Meinweiser *v.* Hains, 110 Pa. St. 468, 2 Atl. 431; Porter *v.* Hitchcock, 98 Pa. St. 625; Geiger *v.* Hill, 1 Pa. St. 509; Duncan *v.* Flynn, 9 Pa. Co. Ct. 321. But an act of June 1, 1887, provides that no proceeding shall be available to continue the lien of a judgment against a terre-tenant whose deed for the land bound by such judgment has been recorded, unless the terre-tenant is named as such in the original scire facias. See Uhler *v.* Moses, 200 Pa. St. 498, 50 Atl. 231 [*reversing* 10 Pa. Super. Ct. 194]; Suter *v.* Findley, 5 Pa.

admitted.[37] Within the meaning of the rule a terre-tenant is one who has an estate in the land, coupled with the actual possession, which he derived mediately or immediately from the judgment debtor while the land was bound by the lien.[38]

h. Pleadings — (i) *In General.* A scire facias performs the double function of a summons and a pleading, and therefore it is not necessary for plaintiff to file with it a declaration or petition or rule defendant to plead.[39] But a good plea or answer on the part of defendant must be met by a replication.[40]

Super. Ct. 163. A revival by agreement with the judgment debtor alone does not continue the lien as against the terre-tenant after the expiration of the statutory period. Nyman's Appeal, 71 Pa. St. 447; Armstrong's Appeal, 5 Watts & S. 352; Baum *v.* Custer, 10 Pa. Cas. 199, 13 Atl. 771. But on the other hand an amicable revival of the judgment by the terre-tenant by an agreement to which defendant is not a party will continue the lien of the judgment on the land. Landon *v.* Brown, 160 Pa. St. 538, 28 Atl. 921; Sames' Appeal, 26 Pa. St. 184. And if the writ is served upon the terre-tenant, it matters not that the judgment is not formally entered against him on the scire facias. Duncan *v.* Flynn, 9 Pa. Co. Ct. 321; Day *v.* Willy, 3 Brewst. 43.

Texas.— Robertson *v.* Coates, 65 Tex. 37.

See 30 Cent. Dig. tit. "Judgment," § 1620.

Effect on surety.— The failure of a judgment creditor to preserve his lien by neglecting to give the terre-tenant notice of a scire facias to revive will not discharge the liability of a surety on the bond upon which the judgment was entered. Kindt's Appeal, 102 Pa. St. 441.

37. Lunsford *v.* Turner, 5 J. J. Marsh. (Ky.) 104, 20 Am. Dec. 248; Thompson *v.* Dougherty, 3 J. J. Marsh. (Ky.) 564; Williams *v.* Fowler, 3 T. B. Mon. (Ky.) 316; Maxwell *v.* Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875; Hamilton *v.* Jones, 11 Fed. Cas. No. 5,983, Brunn. Col. Cas. 24, 3 N. C. 291; Jackson *v.* U. S. Bank, 13 Fed. Cas. No. 7,131, 5 Cranch C. C. 1.

38. **Assignees in bankruptcy** and assignees for the benefit of creditors are not terre-tenants. Kepler *v.* Erie Dime Sav., etc., Co., 101 Pa. St. 602; *In re* Huddell, 47 Fed. 206.

A mortgagee is not a terre-tenant. Fox *v.* Seal, 22 Wall. (U. S.) 424, 22 L. ed. 774.

A lessee holding the property from year to year is not a terre-tenant in such sense that he must be joined in the proceedings to revive. Clippinger *v.* Miller, 1 Penr. & W. (Pa.) 64.

Assignee of a ground-rent is a terre-tenant. Davis *v.* Ehrman, 4 Pa. L. J. Rep. 523.

Adverse or paramount title.— A person not deriving title from the judgment debtor, but claiming the property under a title adverse and paramount to his, as under a tax-sale, is not a terre-tenant of the land, and should not be joined in a scire facias to revive the judgment. Polk *v.* Pendleton, 31 Md. 118; Jarrett *v.* Tomlinson, 3 Watts & S. (Pa.) 114.

Unrecorded deed.— In Pennsylvania the terre-tenant is not entitled to notice of the revival of the judgment as between the original parties unless he has at the time of such revival recorded his deed or taken such possession of the land as amounts to constructive notice to the judgment creditor, or unless the latter has actual notice that the land has been sold. Meinweiser *v.* Hains, 110 Pa. St. 468, 2 Atl. 431; Buck's Appeal, 100 Pa. St. 109; Porter *v.* Hitchcock, 98 Pa. St. 625; McCray *v.* Clark, 82 Pa. St. 457; Meehan *v.* Williams, 48 Pa. St. 238.

Fraudulent conveyance.— It is not necessary to join, in a scire facias to revive a judgment, the grantee in a secret or fraudulent conveyance of the land bound by the judgment lien. Lee *v.* Eure, 93 N. C. 5; Lyon *v.* Cleveland, 170 Pa. St. 611, 33 Atl. 143, 50 Am. St. Rep. 782, 30 L. R. A. 400.

Subsequent purchaser.— A purchaser after the lien has expired is not a terre-tenant, and is not bound by the judgment on the scire facias. Dengler *v.* Kiehner, 13 Pa. St. 38, 53 Am. Dec. 441. But a purchaser taking after the issue and service of the writ on the original defendant is not entitled to be served with the scire facias. Specht *v.* Sipe, 15 Pa. Super. Ct. 207; Biesecker *v.* Cobb, 13 Pa. Super. Ct. 56.

39. *Arkansas.*— Calhoun *v.* Adams, 43 Ark. 238.

Florida.— Brown *v.* Harley, 2 Fla. 159.

Illinois.— Farris *v.* People, 58 Ill. 26.

Maryland.— Bish *v.* Williar, 59 Md. 382; Bowie *v.* Neale, 41 Md. 124; Nesbit *v.* Manro, 11 Gill & J. 261.

Missouri.— Garner *v.* Hays, 3 Mo. 436; Merchants' Mut. Ins. Co. *v.* Hill, 17 Mo. App. 590.

Tennessee.— State *v.* Robinson, 8 Yerg. 370.

Texas.— Hopkins *v.* Howard, 12 Tex. 7; Polnac *v.* State, (Cr. App. 1904) 80 S. W. 381.

Virginia.— McVeigh *v.* Old Dominion Bank, 76 Va. 267; Williamson *v.* Crawford, 7 Gratt. 202.

England.— Nunn *v.* Claxton, 3 Exch. 712; Scotland Bank *v.* Fenwick, 1 Exch. 792; Blake *v.* Dodemead, 2 Str. 775.

Allegations as to heirs.— A petition for scire facias to revive a money judgment against a deceased defendant, which alleges that deceased left assets which came into the possession of his heirs, but does not show that there was no administration on his estate, or that there was no necessity for such administration, does not show a proper case for citing the heirs as defendants. Schmidtke *v.* Miller, 71 Tex. 103, 8 S. W. 638.

40. Wilkinson *v.* Allen, 11 Ala. 128; Hum-

(II) *Plea or Answer.* A scire facias to revive a judgment is an action to which defendant may plead.[41] But *nil debet* is not a good plea.[42] The only proper forms of the general issue are: (1) *Nul tiel record*,[43] under which defendant may take advantage of a failure to describe the judgment properly, or of a wrong statement as to the court in which it was rendered,[44] and also may show it to be void for want of jurisdiction, where this is manifest from an inspection of the record;[45] and (2) payment,[46] which includes any form of satisfaction or release of the judgment,[47] as well as an accord and satisfaction.[48] But it is permissible to plead specially the incapacity of plaintiff to maintain the proceeding,[49] or the statute of limitations.[50] And an executor or administrator made defendant may plead want of assets or *plene administravit*,[51] or invalidity of his appointment.[52] But to a scire facias to revive a judgment against a testator executors cannot plead that they have not accounted to the surrogate.[53] An heir or devisee may plead *riens per discent*.[54] In some states also an affidavit of defense is required in a proceeding of this character.[55]

(III) *Issues, Proof, and Variance.* The plea of *nul tiel record* raises but one question — whether there is such a record as that set out in the writ — and this is to be determined by the court upon inspection and examination of the record;[56] and there is a fatal variance unless the judgment produced corresponds

phries *v.* Anthony, 12 Ark. 136; Day *v.* Pickett, 4 Munf. (Va.) 104.

41. Hubbard *v.* Bolls, 7 Ark. 442.

42. Bergen *v.* Williams, 2 Fed. Cas. No. 1,340, 4 McLean 125.

43. The destruction of the record book in which judgments are written does not destroy the judgment debts, and although the judgments are wrongfully restored by the court without notice to the debtors, yet, when the judgments are revived by scire facias with notice to the debtors, they should make their objection by plea of *nul tiel record*. George *v.* Middough, 62 Mo. 549.

44. Duncan *v.* Hargrove, 22 Ala. 150; Barrow *v.* Pagles, 6 Ala. 462; Miller *v.* Fees, 3 Pa. L. J. 243; Booth *v.* Pickett, 53 Tex. 436.

45. Frankel *v.* Satterfield, 9 Houst. (Del.) 201, 19 Atl. 898. See Weyer *v.* Zane, 3 Ohio 305; Ulmer *v.* Frankland, (Tex. Civ. App. 1894) 27 S. W. 766. But a plea to a writ of scire facias to revive a judgment denying service of process is a collateral attack on the judgment, on which defendants are not entitled to contradict the record, showing a valid service, by evidence *aliunde*. King *v.* Davis, 137 Fed. 198.

46. De Ford *v.* Green, 1 Marv. (Del.) 316, 40 Atl. 1120 (defendant may plead both payment and presumption of payment); Dickerson *v.* Campbell, 47 Fla. 147, 35 So. 986; Blackburn *v.* Beall, 21 Md. 208.

Injunction.— Defendant may plead that he has obtained an injunction forbidding all further proceedings on the judgment in question. See Ross *v.* Gilmore, 3 Ohio 63.

Arrest and discharge of defendant.— On a scire facias to revive a judgment, if defendant pleads that he was formerly imprisoned for the same debt the plea is bad if it does not also show how he was discharged. Ballard *v.* Averitt, 1 N. C. 48.

Defenses available before judgment.— On a scire facias to revive a judgment no defenses can be made except such as have arisen since the rendition of the judgment. Philadelphia *v.* Peyton, 25 Pa. Super. Ct. 350.

47. Starkweather *v.* West End Nat. Bank, 21 App. Cas. (D. C.) 281; Velie *v.* Myers, 14 Johns. (N. Y.) 162; Smith *v.* Coray, 196 Pa. St. 602, 46 Atl. 855.

48. McCullough *v.* Franklin Coal Co., 21 Md. 256; Steltzer *v.* Steltzer, 10 Pa. Super Ct. 310.

49. See Brown *v.* Delafield, etc., Cement Co., 1 App. Cas. (D. C.) 232.

50. National Sav. Bank *v.* Welcker, 21 D. C. 324; Jones *v.* George, 80 Md. 294, 30 Atl. 635; Beanes *v.* Hamilton, 3 Gill (Md.) 275; Offutt *v.* Henderson, 18 Fed. Cas. No. 10,451, 2 Cranch C. C. 553.

51. National Sav. Bank *v.* Welcker, 21 D. C. 324; Tanner *v.* Freeland, 1 Harr. & M. (Md.) 34.

52. Coffin *v.* Cottle, 9 Pick. (Mass.) 287.

53. Clark *v.* Sexton, 23 Wend (N. Y.) 477, but otherwise if the scire facias be issued on a judgment against the executors themselves.

54. National Sav. Bank *v.* Welcker, 21 D. C. 324; Reynolds *v.* Dishon, 3 Ill. App. 173.

55. Loeber *v.* Moore, 20 D. C. 1; Oil City *v.* Hartwell, 164 Pa. St. 348, 30 Atl. 268; Smith *v.* Smith, 135 Pa. St. 48, 21 Atl. 168; Gamon *v.* McCappin, 2 Pa. Dist. 363; Kinports *v.* Kinports, 1 Pa. Co. Ct. 610; Railroad Co. *v.* Slemmer, 6 Wkly. Notes Cas. (Pa.) 451.

When affidavit of defense unnecessary.— But in a proceeding to revive a judgment obtained against a debtor in his lifetime his heirs and devisees are not required to file an affidavit of defense. Tracy *v.* Tracy, 18 Pa. Co. Ct. 398. Nor is such an affidavit required where the scire facias is issued more than twenty years after the entry of the original judgment. Hitchcock *v.* Washburn, 9 Pa. Dist. 272.

56. Hager *v.* Cochran, 66 Md. 253, 7 Atl. 462; Bergen *v.* Williams, 3 Fed. Cas. No. 1,340, 4 McLean 125.

in all essential particulars with that described;[57] nor can mere errors or irregularities be taken advantage of under this plea, although an entire want of jurisdiction may be shown.[58] So under the plea of payment the evidence must be confined to matters going in satisfaction, release, or discharge of the judgment.[59]

i. Evidence. On a scire facias there must be proof of the original judgment;[60] but this appearing, the revival will be ordered unless good cause to the contrary is shown.[61] The judgment will be sustained, in respect to its regularity and validity, by the ordinary presumptions.[62] Payment or release may be shown by any competent evidence,[63] and to disprove a plea of payment a sheriff's return on an execution showing satisfaction in full may be contradicted.[64] But as against heirs it is error to render judgment without proof that they inherited assets.[65] And to establish the liability of a party as a terre-tenant requires proof of facts outside of the record,[66] such as his acquisition of title to the land after the rendition of the judgment and while the judgment was a lien upon it,[67] while such a party may show a release or restriction of the lien of the judgment.[68]

j. Trial.[69] Although a scire facias to revive is in one sense but a continuation of the original suit, yet it is so far an independent proceeding that a motion to amend the original judgment cannot be entertained,[70] and that plaintiff may discontinue as to parties not served.[71] The plea of *nul tiel record* is triable by an inspection of the record;[72] but the plea of payment raises a question of fact which must be submitted to the jury,[73] whose verdict, however, may be set aside in a proper case.[74]

k. Judgment on Scire Facias — (i) *Form and Contents.* In a majority of the states the proper entry on a scire facias to revive is that plaintiff have execution of the judgment described in the writ, and it is error to render a new judgment for the recovery of a specific amount.[75] But in a few states the practice is to

57. Phillips *v.* Hunt, 1 N. J. L. 160. See Peterson *v.* Lothrop, 34 Pa. St. 223; *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Hersch *v.* Groff, 2 Watts & S. (Pa.) 449; Walker *v.* Pennell, 15 Serg. & R. (Pa.) 68.

58. Anthony *v.* Humphries, 9 Ark. 176; Barber *v.* Chandler, 17 Pa. St. 48, 55 Am. Dec. 533; Hersch *v.* Groff, 2 Watts & S. (Pa.) 449.

59. Calvert *v.* Stone, 10 Ark. 491; Booth *v.* Campbell, 15 Md. 569; Earle *v.* Earle, 20 N. J. L. 347.

60. Campbell *v.* Carey, 5 Harr. (Del.) 427.

61. Garrison *v.* Myers, 12 W. Va. 330. And see Smith *v.* Stevens, (Ill. 1890) 23 N. E. 594; Phelps *v.* Burton, 6 T. B. Mon. (Ky.) 36.

62. Lynch *v.* Sanders, 9 Dana (Ky.) 59; Teasdale *v.* Branton, 23 Fed. Cas. No. 13,813, Brunn. Col. Cas. 28, 3 N. C. 377.

63. Campbell *v.* Hamilton, 4 Fed. Cas. No. 2,359, 4 Wash. 92.

64. McRoberts *v.* Lyon, 79 Mich. 25, 44 N. W. 160.

65. Schmidtke *v.* Miller, 71 Tex. 103, 8 S. W. 638.

66. Kinports *v.* Kinports, 1 Pa. Co. Ct. 610.

67. Ford *v.* Gwinn, 3 Harr. & J. (Md.) 496; Saunders *v.* Webster, 3 Harr. & J. (Md.) 432; Kinports *v.* Boynton, 120 Pa. St. 306, 14 Atl. 135, 6 Am. St. Rep. 706; Maus *v.* Maus, 5 Watts (Pa.) 315.

68. Silverthorn *v.* Townsend, 37 Pa. St. 263; Sankey *v.* Reed, 12 Pa. St. 95.

69. Right to open and close see Trial.

70. Clark *v.* Digges, 5 Gill (Md.) 109.

71. Hanson *v.* Jacks, 22 Ala. 549; Davidson *v.* Alvord, 3 Ind. 1. *Contra*, Greer *v.* State Bank, 10 Ark. 455; Kennerly *v.* Walker, 1 McMull. (S. C.) 117.

72. See *supra*, XVIII, D, 7, h, (III).

73. Hartman *v.* Alden, 34 N. J. L. 518; Slusher *v.* Washington County, 27 Pa. St. 205; Lesley *v.* Nones, 7 Serg. & R. (Pa.) 410.

74. Wilson *v.* Wilson, 137 Pa. St. 269, 20 Atl. 644.

75. *Arkansas.*— Hanly *v.* Adams, 15 Ark. 232.

Florida.— Brown *v.* Harley, 2 Fla. 159.

Iowa.— Bertram *v.* Waterman, 18 Iowa 529; Denegre *v.* Haun, 13 Iowa 240.

Kentucky.— Hunter *v.* Miller, 6 B. Mon. 612; Murray *v.* Baker, 5 B. Mon. 172; Patrick *v.* Newel, 1 Bibb 323.

Mississippi.— Locke *v.* Brady, 30 Miss. 21.

Missouri.— Trimble *v.* Elkin, 88 Mo. App. 229; Humphreys *v.* Lundy, 37 Mo. 320. Judgment in proceedings by scire facias to revive should simply declare that the judgment revived is still in force for the amount remaining unpaid thereon; and a finding of the aggregate amount of principal and interest due at the date of revivor will be treated as surplusage. Sappington *v.* Lenz, 53 Mo. App. 44.

New Jersey.— Tindall *v.* Carson, 16 N. J. L. 94.

Tennessee.— Rogers *v.* Hollingsworth, 95 Tenn. 357, 32 S. W. 197.

Texas.— Houston *v.* Emery, 76 Tex. 282, 13

enter a new judgment, *quod recuperet*, for the amount then due, including the principal and accrued interest on the original judgment.[76] In any case the judgment should contain proper restrictions or limitations when given against other persons than the original defendant, as heirs or terre-tenants.[77] It may include interest on the original judgment,[78] and the costs of the proceeding to revive;[79] but plaintiff is not entitled to damages for delay in execution.[80]

(II) *VALIDITY AND EFFECT.* In order to be valid the judgment on scire facias must closely follow the original judgment,[81] particularly as to the names and description of the parties.[82] It is not valid without service on defendant or proper

S. W. 264; Waller *v.* Huff, 9 Tex. 530; Bullock *v.* Ballew, 9 Tex. 498; Camp *v.* Gainer, 8 Tex. 372. But where the judgment in a proceeding to revive failed to state that the former judgment was revived, but stated that "it is decreed, as heretofore, that plaintiff recover" a specified sum, which was the same as that recovered in the original judgment, and that "this judgment take the place and be, and the same is hereby substituted in the place of, the former judgment," it was held that the original judgment was properly revived. Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

Virginia.— Lavell *v.* McCurdy, 77 Va. 763. See 30 Cent. Dig. tit. "Judgment," § 1631 *et seq.*

Amendment.— A judgment purporting to revive the execution issued on the original judgment is amendable so as to make it recite that the judgment itself is revived. Phillips *v.* Wait, 105 Ga. 848, 32 S. E. 647.

A judgment for the possession of land may be revived the same as a judgment in a personal action, and the judgment as revived should be that plaintiff have execution and be given possession as against the defendants and their successors. Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

76. Kistler *v.* Mosser, 140 Pa. St. 367, 21 Atl. 357; Fogelsville Loan, etc., Assoc's Appeal, 89 Pa. St. 293; Duff *v.* Wynkoop, 74 Pa. St. 300; Slayton *v.* Smilie, 66 Vt. 197, 28 Atl. 871. And see Gregory *v.* Perry, 71 S. C. 246, 50 S. E. 787.

Revival by part owner of judgment.— Where a verdict is rendered on a scire facias sued out for the use of one having a limited interest in the judgment, it is error to enter judgment thereon for the whole amount of the original judgment; it should be for the amount found by the jury to be the interest of the equitable plaintiff therein; for, as against other parties, defendant may have a good defense. Peterson *v.* Lothrop, 34 Pa. St. 223.

A judgment of revival upon a scire facias quare executio non is erroneous; such a judgment can be had only upon a scire facias post annum et diem. Gasche *v.* Peterman, 3 Watts & S. (Pa.) 351.

77. See cases cited *infra*, this note.

Applications of rule.— Judgment against a terre-tenant should be entered *de terris*, and not against the tenant personally. Kinports *v.* Kinports, 1 Pa. Co. Ct. 610. So a judgment reviving a judgment after defendant's death, and for execution against his real estate, should require the money to be first made of the assets in the hands of the administrator, and failing in this then of the lands of the heirs. Graves *v.* Skeels, 6 Ind. 107. But a judgment against heirs to be levied of the lands descended generally, without designating any specific tract, is regular. Butterworth *v.* Brown, 7 Yerg. (Tenn.) 467.

78. Berryhill *v.* Wells, 5 Binn. (Pa.) 56. And see Kistler *v.* Mosser, 140 Pa. St. 367, 21 Atl. 357. But *compare* Hall *v.* Hall, 8 Vt. 156.

79. See Talbott *v.* Rudisill, 5 Ind. 240; Swallow *v.* Ives, 4 Lanc. L. Rev. (Pa.) 300; McIntosh *v.* Paul, 6 Lea (Tenn.) 45; Cosby *v.* Bell, 6 Munf. (Va.) 282.

80. Vredenburgh *v.* Snyder, 6 Iowa 39.

81. Zeiders' Appeal, 137 Pa. St. 457, 20 Atl. 805; Worman's Appeal, 110 Pa. St. 25, 20 Atl. 415.

Docket entry.— A revival of judgment by amicable scire facias must be noted on the docket entry of the original judgment, and must also be placed on the docket itself. Failing this, it does not continue the lien of the original judgment as against subsequent purchasers or lienors. It is not sufficient if it is simply filed among the papers of the original judgment. Worman's Appeal, 110 Pa. St. 25, 20 Atl. 415; McCleary's Appeal, 1 Watts & S. (Pa.) 299.

Docketing revival of judgment in federal court.— The recorder, on the judge's order, is bound to record proceedings by scire facias to revive a judgment in a federal court in another district, and to state such record in his certificate. Walden *v.* Duralde, 7 Mart. N. S. (La.) 462.

82. Sheftall *v.* Clay, T. U. P. Charlt. (Ga.) 227; Bonner *v.* Tier, 14 N. C. 533; White *v.* Albertson, 14 N. C. 241, 22 Am. Dec. 719; Carson *v.* Moore, 23 Tex. 450; Zumbro *v.* Stump, 38 W. Va. 325, 18 S. E. 443. But a scire facias may issue to revive a judgment against an executor, and a judgment be rendered thereon against the devisees. Moore *v.* Skelton, 14 Pa. St. 359. And scire facias against heirs and terre-tenants need not name them, but the judgment must be entered against them by name, and the execution must follow the judgment in this respect. Roberson *v.* Woollard, 28 N. C. 90.

Judgment assigned in portions.— Where a judgment is assigned to third persons in unequal portions, and a scire facias to revive it recites the names of the legal plaintiff and

notice to him;[83] and in case of joint defendants, some of whom are not served, it is error to render judgment against all or against those served.[84] The effect of the judgment on scire facias is not to change the legal consequences of the original judgment, but only to continue it in force,[85] and generally, if the original judgment is reversed, the judgment on scire facias will fall with it,[86] although in those states where a new judgment is entered on the scire facias it may be valid and enforceable even though the original judgment was void.[87] The judgment of revival is conclusive of the question of the right to revive, as against any objection based on facts existing prior to its rendition and which could then have been raised, and such matters are *res judicata* on application for a subsequent revival.[88]

(III) *Judgment by Confession or Default.* In a proceeding by scire facias to revive, judgment may be entered against defendant upon his confession,[89] or default,[90] although a judgment of the latter kind may be opened for cause shown to let in a defense.[91] At common law the rule is that two returns of *nihil* to a writ of scire facias are equivalent to a return of *scire feci*; that is, the court thereupon acquires jurisdiction of defendant, and may proceed to give judgment by default.[92] But in this case defendant may afterward present his defense by audita

defendant and the number, term, date, and amount of the judgment, separate judgments of revival entered thereon have priority over a subsequent judgment against the debtor, although the writ also recites the names of the use plaintiffs, and such judgments of revival are entered at different times for the sums respectively due to such use plaintiffs. *In re* Ernst, 164 Pa. St. 87, 30 Atl. 371.

83. Simmons *v.* Wood, 6 Yerg. (Tenn.) 518.

Application of rule. — A judgment rendered on scire facias in one state, without service or appearance, has no binding force as against a defendant who resides in another state. Owens *v.* McCloskey, 161 U. S. 642, 16 S. Ct. 693, 40 L. ed. 837.

Non-resident heirs. — A judgment on scire facias against non-resident heirs is invalid, unless it appears from the record that they have lands by descent situate within the jurisdiction of the court. It is in the nature of a judgment *in rem*, and is not binding on them as a judgment *in personam*; and it will only bind them to the extent of the lands descended to them. Planters' Bank *v.* Chester, 11 Humphr. (Tenn.) 578.

84. Funderhurk *v.* Smith, 74 Ga. 515; Case *v.* Day, 9 B. Mon. (Ky.) 47; Lynch *v.* Sanders, 9 Dana (Ky.) 59; Williams *v.* Fowler, 3 T. B. Mon. (Ky.) 316; Early *v.* Clarkson, 7 Leigh (Va.) 83.

85. Harrisburg *v.* Aughinbaugh, 2 Dauph. Co. Rep. (Pa.) 245.

86. Mills *v.* Conner, 1 Blackf. (Ind.) 7; Eldred *v.* Hazlett, 38 Pa. St. 16.

87. Duff *v.* Wynkoop, 74 Pa. St. 300; Buehler *v.* Buffington, 43 Pa. St. 278; Custer *v.* Detterer, 3 Watts & S. (Pa.) 28.

88. Witherspoon *v.* Twitty, 43 S. C. 348, 21 S. E. 256.

89. Weikel *v.* Long, 55 Pa. St. 238; Irwin *v.* Nixon, 11 Pa. St. 419, 51 Am. Dec. 559; Dickerson's Appeal, 7 Pa. St. 255; Reed's Appeal, 7 Pa. St. 65; Jones *v.* Doe, 6 Munf. (Va.) 105. And see Miller's Estate, 136 Pa. St. 349, 20 Atl. 565.

90. *Indiana.* — Comparet *v.* Hanna, 34 Ind. 74.

New Jersey. — Forest *v.* Price, 37 N. J. L. 177.

New York. — Whitney *v.* Camp, 3 Johns. 86.

Pennsylvania. — Middleton *v.* Middleton, 106 Pa. St. 252; Roberts *v.* Williams, 5 Whart. 170, 34 Am. Dec. 549.

South Carolina. — Lanier *v.* Smyth, 2 Bailey 359.

Virginia. — Williamson *v.* Crawford, 7 Gratt. 202.

See 30 Cent. Dig. tit. "Judgment," § 1633.

Against heirs. — Where judgment is recovered against a person, and after his death scire facias is brought against his heirs, it is error to render judgment generally against them on default. Holder *v.* Com., 3 A. K. Marsh. (Ky.) 407.

For want of affidavit of defense. — Where a scire facias was issued to revive a judgment, and no affidavit of defense was filed before the third term, and plaintiff did not sign judgment on that account, but put the cause down for trial at several terms, and afterward signed judgment for want of the affidavit, it was held that he had waived his right to such a judgment. Chew *v.* Griffith, 1 Ashm. (Pa.) 18.

91. Jones *v.* George, 80 Md. 294, 30 Atl. 635; Starr *v.* Heckart, 32 Md. 267; Green *v.* Plattsburg, 13 Pa. Co. Ct. 335; Swallow *v.* Ives, 4 Lanc. L. Rep. (Pa.) 300.

92. *Florida.* — Barrow *v.* Bailey, 5 Fla. 9.

Illinois. — Choate *v.* People, 19 Ill. 63; Sans *v.* People, 8 Ill. 327.

Indiana. — Walker *v.* Hood, 5 Blackf. 266.

Kentucky. — See Calloway *v.* Euhank, 4 J. J. Marsh. 280.

Maryland. — The entry of *fiat executio* upon a return of only one *nihil* to a scire facias to revive is clearly irregular. Bridendolph *v.* Zeller, 3 Md. 325.

Missouri. — Kratz *v.* Preston, 52 Mo. App. 251.

New York. — Cumming *v.* Eden, 1 Cow. 70.

querela, or on motion to the court, and may have the full benefit thereof, and is not concluded by the judgment as he would be in case of actual service.[93] And a revival on two returns of *nihil* merely operates to keep in force the local lien, and does not stop the running of the statute of limitations in another state, where defendant resides, or support a new action against him in another state.[94]

l. Execution and Enforcement. Scire facias being a mere continuation of the original proceeding, an execution issued after the revival is grounded on and supported by the original judgment;[95] and a waiver of inquisition given on the original confession of judgment will be available on execution after the revival.[96] The execution may be levied on the same property bound originally by the judgment,[97] except where the revival is had against the administrator of a deceased defendant, in which case it is leviable on the assets in his hands.[98]

m. Appeal and Certiorari. On review in an appellate court of a judgment of revival on scire facias, the regularity of the proceedings below will be supported by the ordinary presumptions;[99] and in respect of matters of practice not governed by any statute or rule of court, there will be no reversal except for a manifest abuse of discretion;[1] nor will the court on such review consider the validity of the original judgment.[2]

n. Quashing or Vacating. The writ of scire facias may be quashed on motion for failure to state a legal cause of action,[3] for want of the supporting affidavit of non-payment of the judgment, when that is required by law,[4] or for disability or defect of parties;[5] and if a scire facias has been improperly issued and a

North Carolina.— Woodfork *v.* Bromfield, 5 N. C. 187.

Ohio.— Dunlevy *v.* Ross, Wright 287.

Pennsylvania.— Chambers *v.* Carson, 2 Whart. 9; Warder *v.* Tainter, 4 Watts 270; Compher *v.* Anawalt, 2 Watts 490. But two returns of *nihil* on a scire facias do not authorize a judgment for want of an affidavit of defense, under the act of April 21, 1852. Miner *v.* Graham, 24 Pa. St. 491. And a judgment of revival entered on two returns of *nihil* will be opened to let in as a defense the presumption of payment arising from the lapse of twenty years. Maitland *v.* Landis, 1 Pa. Co. Ct. 144.

South Carolina.—Ingram *v.* Belk, 2 Strobh. 207, 47 Am. Dec. 591.

United States.— Brown *v.* Wygant, 163 U. S. 618, 16 S. Ct. 1159, 41 L. ed. 284.

England.— Randal *v.* Wale, Cro. Jac. 59; Barret *v.* Cleydon, 2 Dyer 168; Andrews *v.* Harper, 8 Mod. 227; Bromley *v.* Littleton, Yelv. 112.

See 30 Cent. Dig. tit. "Judgment," § 1633.

Contra.— Boyd *v.* Armstrong, 1 Yerg. (Tenn.) 40.

93. Barrow *v.* Bailey, 5 Fla. 9; Jones *v.* George, 80 Md. 294, 30 Atl. 635; Kratz *v.* Preston, 52 Mo. App. 251.

94. *Illinois.*— Robb *v.* Anderson, 43 Ill. App. 575.

Kansas.— Rice *v.* Moore, 48 Kan. 590, 30 Pac. 10, 30 Am. St. Rep. 318, 16 L. R. A. 198.

Nebraska.— Hepler *v.* Davis, 32 Nebr. 556, 49 N. W. 458, 29 Am. St. Rep. 457, 13 L. R. A. 565.

Vermont.— Betts *v.* Johnson, 68 Vt. 549, 35 Atl. 489.

United States.— Owens *v.* McCloskey, 161 U. S. 642, 16 S. Ct. 693, 40 L. ed. 837.

95. Grover *v.* Boon, 124 Pa. St. 399, 16 Atl. 885; Irwin *v.* Nixon, 11 Pa. St. 419, 51 Am. Dec. 559 [*compare* Connolly *v.* Jenkins, 1 Lack. Leg. N. (Pa.) 279]; Ingram *v.* Belk, 2 Strobh. (S. C.) 207, 47 Am. Dec. 591; Lain *v.* Lain, 3 Baxt. (Tenn.) 30; State Treasurer *v.* Foster, 7 Vt. 52. *Contra,* Hall *v.* Clagett, 63 Md. 57.

A judgment of revival entered without bringing necessary parties before the court has been held insufficient to support an execution issued on it. Rowland *v.* Harris, (Tex. Civ. App. 1895) 34 S. W. 295. But *compare* Mitchell *v.* Evans, 5 How. (Miss.) 548, 37 Am. Dec. 169, holding that an execution issued on a judgment not regularly revived is voidable merely, and not void.

96. Building, etc., Assoc. *v.* Flanagan, 1 C. Pl. (Pa.) 122.

97. Seals *v.* Benson, 81 Ga. 44, 6 S. E. 182; Colborn *v.* Trimpey, 36 Pa. St. 463.

98. Murray *v.* Baker, 5 B. Mon. (Ky.) 172; Carrier *v.* Hampton, 35 N. C. 436.

99. Buchanan *v.* King, 22 Gratt. (Va.) 414.

1. Knight *v.* Bunker, 7 Ohio St. 77.

2. Schuyler *v.* McCrea, 16 N. J. L. 248. And see Stille *v.* Wood, 1 N. J L. 224.

3. Evans *v.* Freeland, 3 Munf. (Va.) 119. But where the scire facias is not defective on its face, but sets forth a good judgment to be revived, a motion to quash will not avail a party who desires to show that by the error of the clerk an interlocutory judgment had been treated as final; but such error should be shown on plea of *nul tiel record.* Clark *v.* Digges. 5 Gill (Md.) 109.

4. Hinton *v.* Oliver, 19 N. C. 519; Lansing *v.* Lyons, 9 Johns. (N. Y.) 84. And see *supra,* XVIII, D, 7, b.

5. McCabe *v.* U. S., 4 Watts (Pa.) 325;

judgment rendered thereon, it is still competent for the court to review both on motion.[6]

o. Amicable Scire Facias. Under the practice in Pennsylvania an amicable scire facias to revive a judgment is a written agreement, signed by the judgment debtor or person to be bound by the revival,[7] in the nature of a writ of scire facias with a confession of judgment thereon, which must be duly docketed,[8] but which requires no judicial action on the part of the court, and which, when duly made and entered, has all the force and effect of a judgment rendered upon an adverse or contested writ of scire facias,[9] although it may be opened, for cause shown, to let defendant in to a defense.[10] Several judgments against the same person, owned by the same creditor, may be consolidated and revived in one amicable action of scire facias.[11]

8. Operation and Effect of Revival[12] — a. In General. The revival of a judgment by regular proceeedings reinvests it with all the effect and conditions which originally belonged to it, and which have been wholly or partly suspended by lapse of time, change of parties, or other cause,[13] and in particular it continues the lien of the judgment on real property beyond the period when, by statute, without such revival, it would expire.[14] But the revival adds nothing whatever

Moyer *v.* McNulty, 22 Pa. Co. Ct. 153. But in Cumming *v.* Eden, 1 Cow. (N. Y.) 70, it is said that an objection by devisees that the heirs were not made parties to a scire facias must be made by plea in abatement, and not by motion to set aside the writ. And see Whitney *v.* Camp, 3 Johns. (N. Y.) 86.

6. Locke *v.* Brady, 30 Miss. 21. And see Crumbaugh *v.* Otterback, 19 D. C. 1.

7. It is not necessary for plaintiff to sign an agreement for an amicable revival of a judgment. Campbell's Estate, 22 Pa. Super. Ct. 432. And it is sufficient to continue the lien of the judgment upon given realty, the record title and possession of which remains in defendant, if signed by him alone, although he has made a secret conveyance of it to his wife. Lyon *v.* Cleveland, 170 Pa. St. 611, 33 Atl. 143, 50 Am. St. Rep. 782, 30 L. R. A. 400.

Joint defendants.— The lien of a judgment against two persons may be continued against one by an amicable scire facias. Edwards' Appeal, 66 Pa. St. 89.

Executor or administrator.— The court may, with the consent of the personal representative of a decedent, permit an amicable scire facias to be filed *nunc pro tunc* to cure an irregular sale of land under a judgment obtained against the decedent in his lifetime. Diese *v.* Fackler, 58 Pa. St. 109.

Terre-tenants.— If it is desired to continue the lien of a judgment against lands in the possession of a terre-tenant by amicable scire facias, he must execute the agreement; it is not sufficient that he merely witnesses it. Nyman's Appeal, 71 Pa. St. 447. But on the other hand the judgment lien may be amicably revived by the terre-tenant without defendant's joining in such revival. Landon *v.* Brown, 160 Pa. St. 538, 28 Atl. 921; Sames' Appeal, 26 Pa. St. 184.

8. McCleary's Appeal, 1 Watts & S. (Pa.) 299.

9. Dreifus *v.* Denmark, 11 Phila. (Pa.) 612; Railroad Co. *v.* Mercer, 11 Phila. (Pa.) 226.

10. Featherman *v.* Davison, 4 Pa. Co. Ct. 545; Stark *v.* Overfield, 1 C. Pl. (Pa.) 36; Armstrong *v.* Barrowcliff, 1 C. Pl. (Pa.) 31.

11. Yeager's Appeal, 129 Pa. St. 268, 18 Atl. 137; Reed's Appeal, 7 Pa. St. 65.

12. **Date of commencement of lien on revived judgment** see *supra*, XV, C, 6.

Effect of revival of judgment after termination of lien as reviving lien see *supra*, XV, G, 5.

Effect of revival of judgment before termination of lien as continuing lien see *supra*, XV, G, 5.

Effect of revival on limitation of action on judgment see *infra*, XX, D, 4.

Equitable relief against judgment of revival see *supra*, X, A, 8, a.

Relief against judgment of revival on ground of payment or discharge of original judgment see *supra*, X, B, 6, b.

13. Manley *v.* Mayer, 68 Kan. 377, 75 Pac. 550; Huston *v.* Ditto, 20 Md. 305; Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

14. Topley's Appeal, 13 Pa. St. 424; Philadelphia Fire, etc., Co.'s Appeal, 2 Pa. St. 263; *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326 [and see Hagenman *v.* Fichthorn, 1 Woodw. (Pa.) 442]; Westmoreland Bank *v.* Rainey, 1 Watts (Pa.) 26; Vitry *v.* Dauci, 3 Rawle (Pa.) 9; *In re* Ahl's Estate, 6 Pa. Dist. 393; Bank *v.* Kauffman, 2 Leg. Rec. (Pa.) 33; Maxwell *v.* Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875.

Property bound.— Where a dormant judgment is revived, it operates as a lien only on the real estate which the judgment debtor owns at the time of the revival. Halmes *v.* Dovey, 64 Nebr. 122, 89 N. W. 631.

Lien originally restricted.— Where the lien of a judgment is restricted to certain specified real estate by an agreement accompanying its confession, but it is afterward revived generally, the restriction of the lien is thereby

to the validity or effect of the judgment, and cannot be invoked as curing any fault or defect which is of such a nature as to render it void,[15] although it cuts off defenses which might have been made to the original judgment before the revival.[16] The judgment on the scire facias to revive being of this character, it is no bar to an action of debt on the original judgment,[17] and a judgment for defendant on an insufficient and defective scire facias is no bar to another for the same cause.[18]

b. Defenses to Judgment of Revival. In an action on a judgment of revival, or any other proceeding to enforce it, such judgment is conclusive of all matters which were or might have been pleaded in the revival proceedings, and it is not permissible to set up defenses founded on any such matters.[19]

XIX. PAYMENT, RELEASE, AND SATISFACTION.

A. Satisfaction by Payment — 1. Persons to Whom Payment May Be Made — a. In General. As a general rule payment of a judgment must be made to the plaintiff of record[20] or to his attorney[21] or duly authorized agent,[22] unless the judg-

removed. Dean's Appeal, 35 Pa. St. 405. But *compare* Carson *v.* Ford, 6 Pa. Super. Ct. 17.

Priority.— Where the lien of a judgment is discharged by lapse of time before suit is brought to revive it, a mortgage which has been recorded before the institution of such suit is entitled to priority as against the lien of the new judgment. McKenna *v.* Van Blarcom, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895.

15. *Georgia.*— Vanderberg *v.* Threlkeld, 61 Ga. 16.

Louisiana.— Weiller *v.* Blanks, McGloin 296.

Pennsylvania.— Eldred *v.* Hazlett, 38 Pa. St. 16; Monroe *v.* Monroe, 9 Wkly. Notes Cas. 8.

South Carolina.— Where a judgment valid in its origin is fraudulently renewed for more than the balance unpaid on it, it will still be valid for the amount actually due. Arnold *v.* House, 12 S. C. 600.

Tennessee.— Carter *v.* Carriger, 3 Yerg. 411, 24 Am. Dec. 585.

Texas.— Roberts *v.* Landrum, 20 Tex. 471; McFadden *v.* Lockhart, 7 Tex. 573.

See 30 Cent. Dig. tit. "Judgment," § 1641.

Decisions to the contrary.— In Pennsylvania it is said that a judgment regularly revived by scire facias is not void even if the original judgment was void, the scire facias being there a substitute for an action of debt on the judgment, and the judgment given on the scire facias not being a mere award of execution, but a judgment *quod recuperet.* Duff *v.* Wynkoop, 74 Pa. St. 300; Buehler *v.* Buffington, 43 Pa. St. 278. And in Washington it is held that a revived judgment is in effect a new judgment. Brier *v.* Traders' Nat. Bank, 24 Wash. 695, 64 Pac. 831.

16. Doub *v.* Mason, 2 Md. 380.

17. Carter *v.* Colman, 34 N. C. 274; Lafayette County *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360. *Contra,* Withers *v.* Haines, 2 Pa. St. 435; Hayes *v.* Lentz, 15 Montg. Co. Rep. (Pa.) 39.

18. Huey *v.* Redden, 3 Dana (Ky.) 488.

19. *Alabama.*— Martin *v.* Tally, 72 Ala. 23.

Georgia.— Dunn *v.* Brogden, 68 Ga. 63; Thomas *v.* Towns, 66 Ga. 78; Foster *v.* Reid, 57 Ga. 609.

Ohio.— Doe *v.* Pendleton, 15 Ohio 735.

Pennsylvania.—Rutherford *v.* Boyer, 84 Pa. St. 347.

South Carolina.— Babb *v.* Sullivan, 43 S. C. 436, 21 S. E. 277; Witherspoon *v.* Twitty, 43 S. C. 348, 21 S. E. 256.

United States.— Snyder *v.* Bracben, 22 Fed. Cas. No. 13,153, 5 Biss. 60.

See 30 Cent. Dig. tit. "Judgment," § 1642.

But see Burton *v.* Look, 162 Mo. 502, 63 S. W. 112.

20. Wills *v.* Chandler, 2 Fed. 273, 1 McCrary 270.

Prochein ami of infant plaintiff.— Payment of a judgment may be made to the *prochein ami* of an infant plaintiff who has no regular guardian. Morgan *v.* Thorne, 9 Dowl. P. C. 228, 5 Jur. 294, 10 L. J. Exch. 125, 7 M. & W. 400; Collins *v.* Brook, 1 F. & F. 437, 4 H. & N. 270, 28 L. J. Exch. 143. And see Oody *v.* Roane Iron Co., 105 Tenn. 515, 58 S. W. 850.

21. See Attorney and Client, 4 Cyc. 940.

22. Vermont L. & T. Co. *v.* McGregor, 6 Ida. 134, 53 Pac. 399; Kallander *v.* Neidhold, 112 Mich. 329, 70 N. W. 892; Miller *v.* Preston, 154 Pa. St. 63, 25 Atl. 1041; Selinas *v.* Lee, 73 Vt. 363, 51 Atl. 5.

A parol assignment of a judgment constitutes the assignee an agent for plaintiff, and payment to such agent discharges the judgment. Bartlett *v.* Yates, 52 N. C. 615.

Bank as agent.— Where a party against whom a bank had obtained a judgment subsequently deposited money with a branch of the bank, which was lost by the insolvency of the bank, and the judgment passed by assignment to plaintiff, it was held that the deposits did not extinguish the judgment. Spillman *v.* Payne, 84 Va. 435, 4 S. E. 749.

Ascertaining authority of agent.— The judgment debtor must make sure that the agent really has authority to collect the judg-

ment was taken in the name of one who was merely a nominal party, in which case the settlement may be made with the real and beneficial owner of the judgment,[23] or unless it has been assigned to a third person, in which case the debtor, after notice of the assignment, must pay to the assignee.[24] Payment of the amount of the judgment to a creditor of the judgment plaintiff, under process of garnishment, will discharge it *pro tanto*.[25] In case there are several plaintiffs in the judgment, payment may be made to either, with the effect of discharging the whole obligation.[26]

b. Clerk of Court or Other Officer. The clerk of the court in which a judgment has been rendered has no right to receive money from defendant, in satisfaction of the judgment, without special authority.[27] Payment may of course be made to

ment. Payment of the judgment to one who, although authorized to loan money and take security for its payment, had not in his possession the securities or other evidence of authority to collect the money, will not discharge the debt, where as a fact no authority to collect existed. Crowden *v.* Bechlar, 6 Pa. Co. Ct. 8. And so where a stranger represents by a forged memorandum that he is plaintiff's agent and thus employs an attorney to satisfy the judgment, who thereupon satisfies it, and the stranger embezzles the money, if plaintiff is not in any fault, defendant must bear the loss. Guiles *v.* Murray, 22 Pa. Co. Ct. 99.

23. Triplett *v.* Scott, 12 Ill. 137; Matter *v.* Phillips, 52 Iowa 232, 3 N. W. 49; McGregor *v.* Comstock, 28 N. Y. 237.

Who is beneficial owner.— The party who has the exclusive right to merge a claim into a judgment, and after judgment to make money on execution, must be regarded in law as the owner of the judgment. Lacey *v.* Waples, 28 La. Ann. 158.

Defendant acts at his own risk.— The recovery of a money judgment is conclusive against defendant that the money is legally due to plaintiff; and if defendant assumes to pay it to a third person as beneficially entitled to receive it, he acts at his own peril. Mervine *v.* Parker, 18 Ala. 241.

Fictitious plaintiff.— In the absence of all evidence save such as the record furnishes, defendant must look upon the person for whose use the judgment was recovered as the true owner; and if he be a fictitious person, then the debtor may treat the nominal plaintiff as the real owner, and settle the demand with him. McGehee *v.* Gindrat, 20 Ala. 95.

24. Moore *v.* Red, (Miss. 1898) 22 So. 948; Seymour *v.* Smith, 17 Abb. N. Cas. (N. Y.) 387; The Lulie D., 15 Fed. Cas. No. 8,602, 4 Biss. 249. And see *supra*, XVII, C, 1, b, 5.

Disputed ownership of judgment.— Where money is paid into court on a judgment which different persons claim to own, and there are material questions of fact in dispute, the court may award an issue to determine the ownership. Mahon *v.* Rosenkrantz, 8 Kulp (Pa.) 334.

25. Brandenburgh *v.* Beach, 32 S. W. 168, 17 Ky. L. Rep. 560.

Garnishment after assignment.— Where a judgment debtor has had no notice of a transfer or assignment of the judgment to a third party, payment by him of the amount of the judgment, under process of garnishment, to a creditor of the judgment plaintiff, will discharge the debt. Drumm *v.* Sherman, 20 La. Ann. 96. *Compare* Richardson *v.* Ainsworth, 20 How. Pr. (N. Y.) 521; Robinson *v.* Weeks, 6 How. Pr. (N. Y.) 161. And so where the assignment was entirely void. Lawrence *v.* Martin, 22 Cal. 173. See, generally, GARNISHMENT, 20 Cyc. 969.

26. American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Erwin *v.* Rutherford, 1 Yerg. (Tenn.) 169.

27. *Florida.*— Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283.

Georgia.— Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676, 18 S. E. 109.

Illinois.— Seymour *v.* Haines, 104 Ill. 557; Lewis *v.* Cockrell, 31 Ill. App. 476.

Kentucky.— Chinn *v.* Mitchell, 2 Metc. 92; Durant *v.* Gabby, 2 Metc. 91.

Michigan.— Where a decree requires the payment of a certain sum to "the complainant," a deposit of such amount with the register of the court is not a compliance therewith. Lewis *v.* Kean, 102 Mich. 605, 61 N. W. 63.

Montana.— Matusevitz *v.* Hughes, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467.

New York.— Baker *v.* Hunt, 1 Wend. 103.

North Dakota.— Milburn-Stoddard Co. *v.* Stickney, (1905) 103 N. W. 752.

Pennsylvania.— Wells *v.* Baird, 3 Pa. St. 351; Tompkins *v.* Woodford, 1 Pa. St. 156; Baer *v.* Kistler, 4 Rawle 364.

South Carolina.— Mazyck *v.* McEwen, 2 Bailey 28.

Texas.— Whitesboro *v.* Diamond, (Civ. App. 1903) 75 S. W. 540.

See 30 Cent. Dig. tit. "Judgment," § 1644. And see also CLERKS OF COURT, 7 Cyc. 224 note 40.

But see Blake *v.* Hawkins, 19 Fed. 204, holding that where money is paid to a clerk, under a judgment of the court, he receives it, not as the agent of either party, but as the agent of the law.

Before issue of execution.— In some states it is held, however, that the clerk of the court may receive the money in payment of the judgment before an execution issues or after the return of an execution, although not while an execution is outstanding. Haynes *v.* Wheat, 9 Ala. 239; Murray *v.* Charles, 5 Ala. 678; Hawkeye Ins. Co. *v.* Luckow, 76

the sheriff holding an execution or other process for its enforcement, and the judgment will be discharged thereby, although the creditor never receives the money;[28] but an effectual payment cannot be made to the sheriff when he has no writ in his hands.[29]

2. Mode and Sufficiency of Payment. The owner of a judgment may receive property, securities, or any other thing of value in satisfaction of the same, if he so chooses, and when he has once accepted any substitute for money, his acceptance becomes irrevocable.[30] Also the judgment may be discharged by defendant's paying other claims or obligations on behalf of plaintiff to an equal or greater amount.[31] But in either case there must be a positive and express agreement to accept the substitute for direct payment of the judgment;[32] and no satisfaction of the judgment arises from the acceptance of collateral security for its payment,[33]

Iowa 21, 39 N. W. 923; Bynum *v.* Barefoot, 75 N. C. 576; Portland Constr. Co. *v.* O'Neil, 24 Oreg. 59, 32 Pac. 766.

Payment before judgment.— The clerk of the court has no authority to accept payment of plaintiff's debt until judgment is rendered; but if he receives the money from defendant and retains it until after judgment, and by some plain and unequivocal act shows an intention to hold the money in his official capacity, and appropriate it to the payment of the judgment, the judgment is discharged. Governor *v.* Read, 38 Ala. 252.

28. Beard *v.* Millikan, 68 Ind. 231.

29. Bobo *v.* Thompson, 3 Stew. & P. (Ala.) 385; Lofland *v.* Jefferson, 4 Harr. (Del.) 303; Irwin *v.* McKee, 25 Ga. 646; Wyer *v.* Andrews, 13 Me. 168, 29 Am. Dec. 497.

Deputy sheriff.— Payment of a judgment to a deputy sheriff who holds the judgment and assumes the right to receive payment does not release the debtor from liability, unless the deputy is authorized by a judicial mandate to proceed to collect and to acquit the debtor, or the collection is made by the deputy as agent of plaintiff, irrespective of office. Bailey *v.* Hester, 101 N. C. 538, 8 S. E. 164.

30. Lyon *v.* Northrup, 17 Iowa 314; Ives *v.* Phelps, 16 Minn. 451; Weston *v.* Clark, 37 Mo. 568. And see also Musser *v.* Gray, (Cal. 1892) 31 Pac. 568; Planters' Bank *v.* Calvit, 3 Sm. & M. (Miss.) 143, 41 Am. Dec. 616; Potter *v.* Hartnett, 148 Pa. St. 15, 23 Atl. 1007.

Real or personal property may be thus accepted in payment of the judgment. Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768; Gaffney *v.* Megrath, 23 Wash. 476, 63 Pac. 520; Morrison *v.* Rees, 1 Ont. Pr. 25; Whiteford *v.* McLeod, 28 U. C. Q. B. 349. But property delivered by the debtor to the creditor subsequent to the rendition of a judgment is not a part payment, unless both the delivery and the receipt were with the intention that it should be such, since a tender in personal property is not good. Lofland *v.* McDaniel, 1 Pennew. (Del.) 416, 41 Atl. 882.

Promissory notes may operate as payment. Phillips *v.* East, 16 Ind. 254; Bushong *v.* Taylor, 82 Mo. 660; Craft *v.* Merrill, 14 N. Y. 456; Maguire *v.* Carr, 28 Nova Scotia 431.

Debt payable in notes.— In an action on an obligation payable in certain notes, judgment for the sum will reserve to defendant the right to pay it in such notes. Roberts *v.* Stark, 3 La. Ann. 71.

A draft or bill of exchange may operate as payment. Woolfolk *v.* Degelos, 24 La. Ann. 199; Newman *v.* Meek, Sm. & M. Ch. (Miss.) 331. *Compare* Compton *v.* Blair, 46 Mich. 1, 8 N. W. 533.

The check of a third person if accepted as such operates as payment. Lyon *v.* Northrup, 17 Iowa 314.

A bond secured by mortgage may operate as payment. La Farge *v.* Herter, 11 Barb. (N. Y.) 159.

Depreciated paper.— Where defendants by the misrepresentations of their agent procured the deputy clerk to receive an assignment of a judgment and depreciated paper in payment of a judgment for which he gave a receipt, plaintiff is not bound by it and may have his execution. Weiddes *v.* Edsell, 29 Fed. Cas. No. 17,375, 2 McLean 366.

Confederate money.— Acceptance in payment of a judgment during the Civil war of Confederate money constituted a valid settlement. Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283.

The execution of a replevin bond is not a satisfaction of the judgment. Sheets *v.* Roe, 2 Blackf. (Ind.) 195.

An attorney's lien upon a judgment affects only his client's interests, and not the right of the opposite party to discharge the judgment with depreciated funds. Neil *v.* Staten, 7 Heisk. (Tenn.) 290.

Statutory provision for payment in instalments.— A state statute allowing defendants in execution to pay their judgments by instalments is unconstitutional. Jones *v.* McMahan, 30 Tex. 719.

31. Downey *v.* Forrester, 35 Md. 117; Neidig *v.* Whiteford, 29 Md. 178; Medford *v.* Dorsey, 16 Fed. Cas. No. 9,390, 2 Wash. C. C. 467.

32. McCoy *v.* Hazlett, 14 Kan. 430; Riggs *v.* Goodrich, 74 Mo. 108; Schneider *v.* Meyer, 56 Mo. 475.

33. Steffins *v.* Gurney, 61 Kan. 292, 59 Pac. 725; Lancaster *v.* Knight, 74 N. Y. App. Div. 255, 77 N. Y. Suppl. 488. But it seems that if plaintiff, on receiving collateral security for his judgment, covenants and agrees never to enforce it, this will operate as a

or from a note designed merely to fix the time of payment,[34] or the giving of a consideration for postponing the enforcement of the judgment,[35] or, where a judgment has been given to secure the payment of an accommodation note, from the renewal of the note at maturity.[36] The right to accept anything else as a substitute for money in satisfaction of the judgment is confined to the owner of it himself and does not belong to his attorney,[37] or to a sheriff or other officer holding process for its collection.[38] An application of payments to a judgment cannot be changed when it will affect the rights and interests of third persons.[39] A judgment plaintiff in lawful possession of lands on which his judgment is a lien has not the right to apply the rents and profits therefrom to the satisfaction of his judgment, as against the owner, who is not a judgment defendant.[40]

3. TENDER. An unaccepted tender of the amount due on a judgment is not of itself a satisfaction of the judgment or a discharge of its lien; but it gives the debtor, on paying the money into court, a right to apply to the court to restrain execution and enter satisfaction of the judgment.[41]

4. EVIDENCE OF PAYMENT — a. In General. The payment of a judgment may be proved by parol evidence,[42] by a written receipt or other paper passing between the parties.[43] Its payment may also be proved by a receipt upon the records of the

discharge of the judgment. Chambers *v.* McDowell, 4 Ga. 185.

34. Schneider *v.* Meyer, 56 Mo. 475.

35. Stout *v.* Rider, 12 Hun (N. Y.) 574.

36. Laucks *v.* Michael, 154 Pa. St. 355, 26 Atl. 314.

37. Portis *v.* Ennis, 27 Tex. 574. See Kallander *v.* Neidhold, 112 Mich. 329, 70 N. W. 892.

38. *Alabama.*— Ellis *v.* Smith, 42 Ala. 349; Aicardi *v.* Robbins, 41 Ala. 541, 94 Am. Dec. 614.

California.— Mitchell *v.* Hockett, 25 Cal. 538, 85 Am. Dec. 151.

Louisiana.— Wells *v.* Gordon, 16 La. 219.

Michigan.— Heald *v.* Bennett, 1 Dougl. 513.

New York.— Codwise *v.* Field, 9 Johns. 263.

North Carolina.— Collier *v.* Newbern Bank, 17 N. C. 525.

Tennessee.— Draper *v.* State, 1 Head 262; Crutchfield *v.* Robins, 5 Humphr. 15, 42 Am. Dec. 417.

Compare Trigg *v.* Harris, 49 Mo. 176.

39. Chancellor *v.* Schott, 23 Pa. St. 68.

40. Boggs *v.* Douglass, 105 Iowa 344, 75 N. W. 185.

41. *California.*— Ferrea *v.* Tubbs, 125 Cal. 687, 58 Pac. 308.

Illinois.— Campion *v.* Friedberg, 55 Ill. App. 450.

Minnesota.— Rother *v.* Monahan, 60 Minn. 186, 62 N. W. 263.

New Hampshire.— Rogers *v.* McDearmid, 7 N. H. 506.

New York.— Callanan *v.* Gilman, 55 N. Y. Super. Ct. 511, 2 N. Y. Suppl. 702.

Tennessee.— Thompson *v.* McMillan, 89 Tenn. 110, 14 S. W. 439; Lincoln Sav. Bank *v.* Ewing, 12 Lea 598.

See 30 Cent. Dig. tit. "Judgment," § 1660.

Tender by stranger.— A judgment creditor is not bound to accept even the full amount of his debt, interest, and costs from a stranger to the judgment, and the refusal of such tender is not equivalent to payment for the purpose of subrogation, nor will it work an equitable assignment. Nesbit *v.* Martin, 4 Pa. Co. Ct. 95.

42. *Iowa.*— Shaffer *v.* McCrackin, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465.

Montana.— Whiteside *v.* Hoskins, 20 Mont. 361, 51 Pac. 739.

Pennsylvania.— Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744; *In re* Stahl, 13 York Leg. Rec. 12.

Texas.— Peters *v.* Lawson, 66 Tex. 336, 17 S. W. 734.

Virginia.— Barrett *v.* Wilkinson, 87 Va. 442, 12 S. E. 885.

The acts of the parties prior to the rendition of the judgment are not admissible to show payment thereof. Lofland *v.* McDaniel, 1 Pennew. (Del.) 416, 41 Atl. 882.

Payments as admission.— Payments made on a judgment rendered sixteen years before admit that the judgment has not been discharged. Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

43. *Alabama.*— Pharis *v.* Leachman, 20 Ala. 662.

Georgia.— Merritt *v.* Gill, 68 Ga. 209.

Maryland.— Blackburn *v.* Beall, 21 Md. 208.

Minnesota.— Brisbin *v.* Farmer, 16 Minn. 215.

South Carolina.— Hunter *v.* Campbell, 1 Speers 53.

See 30 Cent. Dig. tit. "Judgment," § 1646.

Not conclusive.— A written receipt for the amount due on a judgment is not conclusive of the fact of payment, but may be contradicted or explained. Hughes *v.* O'Donnell, 2 Harr. & J. (Md.) 324; Earle *v.* Earle, 16 N. J. L. 273.

An agreement entered into prior to the date of a judgment, as to the mode of its discharge, but which was not to be executed until afterward, and all payments made in pursuance of such agreement, are admissible in evidence in support of a plea of payment to a scire facias to revive the judgment. Downey *v.* Forrester, 35 Md. 117.

court.[44] The return and receipts on the execution are also competent evidence of payment.[45] Where payment of the judgment is set up affirmatively in defense, defendant must assume the burden of proving it.[46]

b. Weight and Sufficiency. Payment or satisfaction of a judgment may be proved by presumptions as well as by positive evidence, and the sufficiency of the proofs must depend on the circumstances of each case,[47] a fair preponderance of the evidence or of corroborating circumstances being enough to establish the defense, or to disprove it, as the case may be,[48] and the court, in case of a conflict of testimony on this point on a rule or motion, being entitled to submit the issue of payment to a jury.[49]

B. Presumption of Payment From Lapse of Time — 1. In General. At common law, when twenty years have elapsed since the rendition of a judgment, without any payment or process upon it, or any acknowledgment of it or attempt to enforce it, there is a presumption of law that it has been paid;[50] and a similar

44. Hollenbeck *v.* Stanberry, 38 Iowa 325; Vestal *v.* Wicker, 108 N. C. 21, 12 S. E. 1037.

An unfiled order of the court declaring a judgment to be satisfied is of no more effect than an order for judgment, and is not admissible as evidence of satisfaction. Hall *v.* Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497.

45. Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54; Singer *v.* Given, 61 Iowa 93, 15 N. W. 858; Ramsey *v.* Johnson, 3 Penr. & W. (Pa.) 293.

Evidence of failure to issue or return execution.— After twenty years from the date of the judgment, evidence that no execution was ever issued on it is admissible on the question of payment. Jacoby *v.* Stephenson Silver Min. Co., 3 Silv. Sup. (N. Y.) 130, 6 N. Y. Suppl. 371. And evidence that the execution was never returned and cannot be found is admissible in connection with other circumstances. Gassner *v.* Sandford, 2 Sandf. (N. Y.) 440.

46. Collins *v.* Boyd, 14 Ala. 505; Sanders *v.* Etcherson, 36 Ga. 404; Lewis *v.* Lewis, 31 Nebr. 528, 48 N. W. 267; Portis *v.* Ennis, 27 Tex. 574.

Authority of assignee.— A party who claims to have paid a judgment, and offers in evidence a discharge by a person describing himself as assignee of the judgment, must prove the authority of the assignee. Platt *v.* St. Clair, Wright (Ohio) 526.

Burden on plaintiff.— Where, under the pleadings, the burden rests on plaintiff to prove that a judgment pleaded is unpaid, the burden is sustained by showing the rendition of the judgment, the presumption being in the absence of other proof that it has not been paid. Campbell *v.* American Surety Co., 129 Fed. 491. And see Southard *v.* Hall, 3 Dana (Ky.) 59.

47. Bethany *v.* His Creditors, 7 Rob. (La.) 61; Abat *v.* Buisson, 9 La. 417.

48. *Indiana.*— Hays *v.* Boyer, 59 Ind. 341.
Iowa.— Fuller *v.* Lendrum, 58 Iowa 353, 12 N. W. 340.
Kentucky.— Howard *v.* London Mfg. Co., 72 S. W. 771, 24 Ky. L. Rep. 1934.
Louisiana.— Abat *v.* Buisson, 9 La. 417.
Missouri.— Mercantile Bank *v.* Hawe, 33 Mo. App. 214; Sturdevant Bank *v.* Peterman, 21 Mo. App. 512.
New York.— Seaman *v.* Clarke, 75 N. Y. App. Div. 345, 78 N. Y. Suppl. 171; Miller *v.* Smith, 16 Wend. 425.
Pennsylvania.— Miller *v.* Overseers of Poor, 17 Pa. Super. Ct. 159; Security Title, etc., Co. *v.* Boll, 13 York Leg. Rec. 125.
Texas.— Terry *v.* O'Neal, 71 Tex. 592, 9 S. W. 673.
Virginia.— Barrett *v.* Wilkinson, 87 Va. 442, 12 S. E. 885.
Wisconsin.— Flanders *v.* Sherman, 19 Wis. 178.
United States.— Albright *v.* American Bell Tel. Co., 136 U. S. 629, 10 S. Ct. 1064, 34 L. ed. 557.
See 30 Cent. Dig. tit. "Judgment," § 1647.

49. Hottenstein *v.* Haverly, 185 Pa. St. 305, 39 Atl. 946; Jenkintown Nat. Bank's Appeal, 124 Pa. St. 337, 17 Atl. 2; Hess *v.* Frankenfield, 106 Pa. St. 440.

50. *Alabama.*— Rhodes *v.* Turner, 21 Ala. 210.
Delaware.— Maxwell *v.* Devalinger, 2 Pennew. 504, 47 Atl. 381; Moore *v.* Carey, 1 Marv. 401, 41 Atl. 75; Robinson *v.* Tunnell, 2 Houst. 387; Campbell *v.* Carey, 5 Harr. 427; Burton *v.* Cannon, 5 Harr. 13; Farmers' Bank *v.* Leonard, 4 Harr. 536; Morrow *v.* Robinson, 4 Del. Ch. 521.
Georgia.— Willingham *v.* Long, 47 Ga. 545; Tennessee *v.* Virgin, 36 Ga. 390; Burt *v.* Casey, 10 Ga. 178.
Indiana.— Bright *v.* Sexton, 18 Ind. 186.
Iowa.— Hendricks *v.* Wallis, 7 Iowa 224.
Maine.— Noble *v.* Merrill, 48 Me. 140; Thayer *v.* Mowry, 36 Me. 287.
New York.— Kendrick's Estate, 15 Abb. N. Cas. 189; Miller *v.* Smith, 16 Wend. 425; Henderson *v.* Henderson, 3 Den. 314.
Oregon.— Beekman *v.* Hamlin, 19 Oreg. 383, 24 Pac. 195, 20 Am. St. Rep. 827, 10 L. R. A. 454.
Pennsylvania.— Roberts *v.* Powell, 210 Pa. St. 594, 60 Atl. 258; Biddle *v.* Girard Nat. Bank, 109 Pa. St. 349; Cope *v.* Humphreys, 14 Serg. & R. 15; Miller *v.* Overseers of Poor, 17 Pa. Super. Ct. 159; Broomall *v.* Laird, 1 Del. Co. 161.
South Carolina.—Tobin *v.* Meyers, 18 S. C.

rule has been enacted by statute in several of the states.[51] These rules naturally apply only to judgments for the payment of money.[52] Except under the statutes mentioned, the lapse of any number of years less than twenty will not usually raise a presumption of law that the judgment has been paid;[53] but the running of a shorter period of time, when accompanied by corroborative or persuasive circumstances, may be submitted to a jury as a ground for a presumption of fact.[54]

2. SUSPENSION OF STATUTE AND COMPUTATION OF TIME. A statute declaring that a judgment shall be presumed to be paid after the lapse of a certain time is a statute of limitations,[55] and begins to run from the time the judgment is entered up.[56] In this view the running of the statute, or of the common-law period of twenty years, may be interrupted by a stay of execution,[57] by an injunction restraining the collection of the judgment,[58] by the disability of the party from infancy,[59] or by the institution of special or collateral proceedings to collect the judgment or uncover property subject to it.[60]

324; Sargent *v.* Hayne, Riley 293; Kennedy *v.* Denoon, 2 Treadw. 617; Pratt *v.* McLure, 10 Rich. Eq. 301.

See 30 Cent. Dig. tit. "Judgment," § 1648.

51. Jones *v.* Stockgrowers' Nat. Bank, 17 Colo. App. 79, 67 Pac. 177 (holding that Laws (1891), p. 246, raises a presumption of payment of a judgment after ten years; but it is prospective only); Tilghman's Succession, 7 Rob. (La.) 387; McFaul *v.* Haley, 166 Mo. 56, 65 S. W. 995; Clemens *v.* Wilkinson, 10 Mo. 97; Chiles *v.* Buckner School Dist., 103 Mo. App. 240, 77 S. W. 82; Wencker *v.* Thompson, 96 Mo. App. 59, 69 S. W. 743; Seaman *v.* Clarke, 60 N. Y. App. Div. 416, 69 N. Y. Suppl. 1002; Raphael *v.* Mencke, 28 N. Y. App. Div. 91, 50 N. Y. Suppl. 920.

52. The presumption of payment from lapse of time does not arise with reference to a decree in equity declaring a vendor's lien on land, and ordering its sale, but not adjudging any personal liability against defendant (Moore *v.* Williams, 129 Ala. 329, 29 So. 795); or, probably, with reference to the allowance of a claim by an assignee (Elsea *v.* Pryor, 87 Mo. App. 157); or to an order of court, made in proceedings to sell land of a habitual drunkard, which finds that he is indebted to a certain person in a named sum (Sheldon *v.* Mirick, 144 N. Y. 498, 39 N. E. 647); or to a judgment for the possession of land (Van Rensselaer *v.* Wright, 56 Hun (N. Y.) 39, 8 N. Y. Suppl. 885). But a judgment of foreclosure is within the statutory rule. Barnard *v.* Onderdonk, 98 N. Y. 158.

53. *Kentucky.*— Chiles *v.* Monroe, 4 Metc. 72.

Maine.— Cony *v.* Barrows, 46 Me. 497.

Mississippi.— Meyer *v.* Dorrance, 32 Miss. 263.

New York.— Daby *v.* Ericsson, 45 N. Y. 786; Camp *v.* Hallanan, 42 Hun 628.

South Carolina.— Carlton *v.* Felder, 6 Rich. Eq. 58.

See 30 Cent. Dig. tit. "Judgment," § 1648.

In Tennessee, however, it has been held from early times that if a judgment or decree is permitted to lie dormant for sixteen years, with no demand or payment of interest, and no attempt to enforce it, a presumption of its payment will arise. Yarnell *v.* Moore, 3 Coldw. 173; McDaniel *v.* Goodall, 2 Coldw. 391; Anderson *v.* Settle, 5 Sneed 202; Leiper *v.* Erwin, 5 Yerg. 97; Blackburn *v.* Squib, Peck 60.

54. *Arkansas.*— Rector *v.* Morehouse, 17 Ark. 131; Woodruff *v.* Sanders, 15 Ark. 143.

Iowa.— Hendricks *v.* Wallis, 7 Iowa 224.

Maine.— Thayer *v.* Mowry, 36 Me. 287.

Missouri.— Baker *v.* Stonebraker, 36 Mo. 338.

New York.— Imgard *v.* Ashley, 37 Misc. 857, 76 N. Y. Suppl. 987; Boyd *v.* Boyd, 9 Misc. 161, 29 N. Y. Suppl. 7.

Pennsylvania.— Murphy *v.* Philadelphia Trust Co., 103 Pa. St. 379; Van Loon *v.* Smith, 103 Pa. St. 238; Moore *v.* Smith, 81 Pa. St. 182.

South Carolina.— Kinsler *v.* Holmes, 2 S. C. 483; Cohen *v.* Thompson, 2 Mill 146; Wherry *v.* McCammon, 12 Rich. Eq. 337, 91 Am. Dec. 240; Sessions *v.* Stevenson, 11 Rich. Eq. 282; Foster *v.* Hunter, 4 Rich. Eq. 16; Barnwell *v.* Waring, Rich. Eq. Cas. 283.

Tennessee.— See Husky *v.* Maples, 2 Coldw. 25, 88 Am. Dec. 588.

Virginia.— James *v.* Life, 92 Va. 702, 24 S. E. 275.

United States.— Renwick *v.* Wheeler, 48 Fed. 431.

See 30 Cent. Dig. tit. "Judgment," § 1648.

55. Solomon *v.* Hinton, 50 Ga. 163; Akin *v.* Freeman, 49 Ga. 51; Black *v.* Burton, 47 Ga. 362; *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762; Herman *v.* Watts, 107 N. C. 646, 12 S. E. 437. *Contra*, Chiles *v.* Buckner School Dist., 103 Mo. App. 240, 77 S. W. 82.

56. Dillard *v.* Brian, 5 Rich. (S. C.) 501.

But in New York from the time of service of the summons. Seaman *v.* Clarke, 170 N. Y. 594, 63 N. E. 1122, holding, however, where a deficiency judgment in foreclosure proceedings is entered a year later than the judgment of foreclosure, the twenty-year-period of limitation begins to run from the docketing of the later judgment.

57. Kinsler *v.* Holmes, 2 S. C. 483.

58. Hutsonpiller *v.* Stover, 12 Gratt. (Va.) 579.

59. McQueen *v.* Fletcher, 4 Rich. Eq. (S. C.) 152.

60. St. Francis Mill Co. *v.* Sugg, 169 Mo.

3. EVIDENCE TO REBUT PRESUMPTION. The presumption of payment of a judgment from the lapse of twenty years is not conclusive, but may be rebutted by any competent and satisfactory evidence.[61] Thus the issue and return of an execution unsatisfied within the limited time may be shown,[62] or the revival of the judgment by scire facias or other process,[63] or the impossibility of proceeding for its collection by reason of the closing of the courts.[64] The presumption may also be rebutted by proof of partial payments on the judgment within the twenty years,[65] or by a distinct acknowledgment of the judgment as an existing debt, such as to import a promise to pay it or a recognition of its enforceability.[66] Proof that the judgment debtor could not have paid the judgment will also suffice to rebut the presumption; but evidence merely of his poverty, or of his failure in business, will not suffice for this purpose;[67] there must be proof of his continued insolvency.[68]

130, 69 S. W. 359; Palen *v.* Bushnell, 51 Hun (N. Y.) 423, 4 N. Y. Suppl. 63.

61. *Arkansas.*— Rector *v.* Morehouse, 17 Ark. 131; Woodruff *v.* Sanders, 15 Ark. 143.

Connecticut.— Fanton *v.* Middlebrook, 50 Conn. 44.

Delaware.— Moore *v.* Carey, 1 Marv. 401, 41 Atl. 75; Robinson *v.* Tunnell, 2 Houst. 387.

Georgia.— Burt *v.* Casey, 10 Ga. 178.

Indiana.— Bright *v.* Sexton, 18 Ind. 186; Barker *v.* Adams, 4 Ind. 574; Reddington *v.* Julian, 2 Ind. 224.

Maine.— Knight *v.* Macomber, 55 Me. 132; Noble *v.* Merrill, 48 Me. 140; Brewer *v.* Thomes, 28 Me. 81.

Massachusetts.— Walker *v.* Robinson, 136 Mass. 280; Denny *v.* Eddy, 22 Pick. 533.

New Hampshire.— Clark *v.* Clement, 33 N. H. 563.

New Jersey.— Johnson *v.* Tuttle, 9 N. J. Eq. 365.

North Carolina.— *In re* Walker, 107 N. C. 340, 12 S. E. 136.

Oregon.— Beekman *v.* Hamlin, 20 Oreg. 352, 25 Pac. 672.

Pennsylvania.— Van Loon *v.* Smith, 103 Pa. St. 238; Wall *v.* Stone, 3 Lack. Leg. N. 314.

South Carolina.— Anderson *v.* Baughman, 69 S. C. 38, 48 S. E. 38; Colvin *v.* Phillips, 25 S. C. 228.

See 30 Cent. Dig. tit. "Judgment," § 1650.

As against state.— The presumption that a judgment more than twenty years old has been paid cannot be rebutted in favor of a state merely on the ground that *nullum tempus occurrit regi*. Tennessee *v.* Virgin, 36 Ga. 388.

62. Black *v.* Carpenter, 3 Baxt. (Tenn.) 350.

But the presumption is not rebutted by proof of an *ex parte* renewal of the execution three days before the expiration of the twenty years. Tobin *v.* Myers, 18 S. C. 324.

63. Brearly *v.* Peay, 23 Ark. 172; Mower *v.* Kip, 2 Edw. (N. Y.) 165; James *v.* Jarrett, 17 Pa. St. 370.

64. Woodruff *v.* Sanders, 15 Ark. 143. And see Day *v.* Crosby, 173 Mass. 433, 53 N. E. 880; *In re* Walker, 107 N. C. 340, 12 S. E. 136.

65. Denny *v.* Eddy, 22 Pick. (Mass.) 533; Bissell *v.* Jaudon, 16 Ohio St. 498; Jenkins *v.* Anderson, 8 Pa. Cas. 363, 11 Atl. 558; Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

Evidence that plaintiff indorsed on the record as a credit on the judgment a sum which he owed to defendant will not rebut the presumption unless it further appears that the parties had a settlement of their dealings, after the recovery of the judgment, and agreed that said sum should be credited on the judgment. Vaughan *v.* Marshall, 1 Houst. (Del.) 604.

66. Burton *v.* Cannon, 5 Harr. (Del.) 13; Waddell *v.* Elmendorf, 10 N. Y. 170; Beekman *v.* Hamlin, 19 Oreg. 383, 24 Pac. 195, 20 Am. St. Rep. 827, 10 L. R. A. 454; McNair *v.* Ingraham, 21 S. C. 70.

Acknowledgment without promise.— In Missouri it is held that a mere written acknowledgment that the judgment is unpaid, although not accompanied by any promise to pay it, is sufficient to rebut the presumption, as the statute is not one of limitations, but merely prescribes a rule of evidence. Chiles *v.* Buckner School Dist., 103 Mo. App. 240, 77 S. W. 82. But elsewhere it is held that there must be at least a distinct admission of the subsisting legal obligation of the debt, unaccompanied by any expressions or conduct indicative of an unwillingness to pay. Stover *v.* Duren, 3 Strobh. (S. C.) 448, 51 Am. Dec. 634. And see *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762. In Pennsylvania it is said that the question whether declarations of the judgment debtor tending to show that the judgment has not been paid are sufficient to overcome the presumption of payment from lapse of time is for the jury. Smith *v.* Shoenberger, 176 Pa. St. 95, 34 Atl. 954.

67. Taylor *v.* Megargee, 2 Pa. St. 225. *Compare* Boyd *v.* Boyd, 9 Misc. (N. Y.) 161, 29 N. Y. Suppl. 7.

68. *Maine.*— Knight *v.* Macomber, 55 Me. 132; Jackson *v.* Nason, 38 Me. 85.

New York.— Waddell *v.* Elmendorf, 10 N. Y. 170; Henderson *v.* Cairns, 14 Barb. 15.

Oregon.— Beekman *v.* Hamlin, 23 Oreg. 313, 31 Pac. 707.

South Carolina.— Adams *v.* Richardson, 30 S. C. 215, 9 S. E. 95.

C. Payment by Joint Party or Third Person — 1. Payment by Joint Debtor — a. Effect in General. Payment of a judgment by one of two joint defendants operates as a satisfaction and extinguishment of the judgment as to all.[69] This rule applies to judgments against parties to negotiable paper.[70]

b. Assignment of Judgment. Under this rule it is not competent for one of the joint defendants on paying the judgment to take an assignment of it so as to wield it against his co-defendant, and it is none the less extinguished by the payment, although such an assignment be made.[71]

c. Rights of Party Paying. Defendant paying the judgment will generally be entitled to contribution from his co-defendants,[72] or according to some of the authorities to be subrogated to the rights of the judgment plaintiff to the extent to which the payment was for the benefit or on behalf of his co-defendant;[73] but

Tennessee.— Yarnell *v.* Moore, 3 Coldw. 173.

See 30 Cent. Dig. tit. "Judgment," § 1650.

69. *Alabama.*— Presler *v.* Stallworth, 37 Ala. 402.

Illinois.— Tompkins *v.* Chicago Fifth Nat. Bank, 53 Ill. 57; Russell *v.* Hugunin, 2 Ill. 562, 33 Am. Dec. 423.

Indiana.— Ashcraft *v.* Knoblock, 146 Ind. 169, 45 N. E. 69; Klippel *v.* Shields, 90 Ind. 81.

Iowa.— Bones *v.* Aiken, 35 Iowa 534.

Massachusetts.— National Security Bank *v.* Hunnewell, 124 Mass. 260.

Missouri.— Weston *v.* Clark, 37 Mo. 568.

New York.— Breslin *v.* Peck, 38 Hun 623; Booth *v.* Farmers', etc., Nat. Bank, 11 Hun 258; Storz *v.* Boyce, 34 Misc. 279, 69 N. Y. Suppl. 612; Morley *v.* Stevens, 47 How. Pr. 228.

North Carolina.— Dunn *v.* Beaman, 126 N. C. 764, 36 S. E. 174; Towe *v.* Felton, 52 N. C. 216; Sherwood *v.* Collier, 14 N. C. 380, 24 Am. Dec. 264.

Rhode Island.— Sager *v.* Moy, 15 R. I. 528, 9 Atl. 847.

Tennessee.— Baldwin *v.* Merrill, 8 Humphr. 132.

Vermont.— Porter *v.* Gile, 44 Vt. 520.

England.— The Morgengry, [1900] P. 1, 8 Aspin. 591, 69 L. J. P. & Adm. 3, 81 L. T. Rep. N. S. 417, 48 Wkly. Rep. 121.

See 30 Cent. Dig. tit. "Judgment," § 1653.

Compromise with one.— Where a decree is rendered against several defendants, and a compromise made by the complainant with one, as to his portion of the debt, the other defendants are not released. Molyneaux *v.* Marsh, 17 Fed. Cas. No. 9,703, 1 Woods 452. And see Penn *v.* Edwards, 50 Ala. 63; Boykin *v.* Buie, 109 N. C. 501, 13 S. E. 879.

70. Dessar *v.* Rich, Wils. (Ind.) 372; Somerville First Nat. Bank *v.* Hoffman, 68 N. J. L. 245, 52 Atl. 280; Westervelt *v.* Frech, 33 N. J. Eq. 451. And see Salina Bank *v.* Abbot, 3 Den. (N. Y.) 181; Topp *v.* Alabama Branch Bank, 2 Swan (Tenn.) 184.

71. *Indiana.*— Montgomery *v.* Vickery, 110 Ind. 211, 11 N. E. 38; Shields *v.* Moore, 84 Ind. 440.

Kansas.— Worden *v.* Jones, 1 Kan. App. 501, 40 Pac. 1071.

Nebraska.— Potvin *v.* Meyers, 27 Nebr. 749, 44 N. W. 25.

Texas.— Deleshaw *v.* Edelen, 31 Tex. Civ. App. 416, 72 S. W. 413; Smith *v.* Lang, 2 Tex. Civ. App. 683, 22 S. W. 197.

Wisconsin.— Snyder *v.* Malone, 124 Wis. 114, 102 N. W. 354.

Canada.— Potts *v.* Leask, 36 U. C. Q. B. 476; Brown *v.* Gossage, 15 U. C. C. P. 20.

See 30 Cent. Dig. tit. "Judgment," § 1654.

Contra.— Brown *v.* White, 29 N. J. L. 514.

Judgment against city.— Where the charter of a city requires that, in any action against the city for negligence, all parties jointly liable shall be joined as defendants, and that the execution shall be first collected from the other defendants, and from the city only when the other defendants are insolvent, a judgment recovered in such an action, of which the city took an assignment on paying it, is not satisfied, but may be enforced by the city against its co-defendants. Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187.

Right of indorser to keep judgment alive.— There are cases holding that where a judgment is recovered by the holder of negotiable paper against the maker and the first and second indorsers, and the first indorser purchases and takes an assignment of the judgment from the holder, the transaction does not operate as an extinguishment of the judgment as against the maker. Eno *v.* Crooke, 10 N. Y. 60; Corey *v.* White, 3 Barb. (N. Y.) 12. And see Johnson *v.* Webster, 81 Iowa 581, 47 N. W. 769; Des Moines Sav. Bank *v.* Colfax Hotel Co., 79 Iowa 497, 44 N. W. 718; Schleissman *v.* Kallenberg, 72 Iowa 338, 33 N. W. 459, 2 Am. St. Rep. 247.

72. *Delaware.*— Wilson *v.* Wilson, 3 Houst. 642.

Georgia.— Haupt *v.* Mills, 4 Ga. 543.

Illinois.— Harvey *v.* Drew, 82 Ill. 606.

Louisiana.— Beck *v.* Hunter, 3 La. Ann. 641.

Massachusetts.— Williams *v.* Mercer, 144 Mass. 413, 11 N. E. 720.

New Jersey.— Ruckman *v.* Decker, 28 N. J. Eq. 5.

Pennsylvania.— Mann *v.* Bellis, 4 Lanc. L. Rev. 163.

See 30 Cent. Dig. tit. "Judgment," § 1655. See also Contribution, 9 Cyc. 797.

And see Lombard *v.* Fiske, 24 Me. 56.

73. *California.*— Coffee *v.* Tevis, 17 Cal. 239.

Georgia.— Huckaby *v.* Sasser, 69 Ga. 603.

he cannot maintain an action on the judgment in the name of the original plaintiff against his co-defendants.[74]

2. Payment by Surety. Where judgment is rendered against two defendants, one of whom is surety for the other, a payment of the judgment by the surety will extinguish it,[75] unless the surety means to keep the judgment alive, for the purpose of forcing reimbursement from his principal, which may be done by causing an assignment of it to be made to a third person, or by seeking subrogation in equity.[76]

Maryland.— *In re* Wheeler, 1 Md. Ch. 80.
New Jersey.— Durand *v.* Trusdell, 44 N. J. L. 597.
Texas.— Tinsley *v.* Corbett, 27 Tex. Civ. App. 635, 66 S. W. 910.
Canada.— Honsinger *v.* Love, 16 Ont. 170.
See, generally, Subrogation.

74. Hammatt *v.* Wyman, 9 Mass. 138. See *infra*, XX, C, 1.

75. *Alabama.*— Preslar *v.* Stallworth, 37 Ala. 402.
Arkansas.— Newton *v.* Field, 16 Ark. 216.
Delaware.— Fulton *v.* Harrington, 7 Houst. 182, 30 Atl. 856.
Illinois.— Coggeshall *v.* Ruggles, 62 Ill. 401.
Indiana.— Shields *v.* Moore, 84 Ind. 440.
Iowa.— Drefahl *v.* Tuttle, 42 Iowa 177; Bones *v.* Aiken, 35 Iowa 534.
Maine.— Morse *v.* Williams, 22 Me. 17.
Maryland.— Grove *v.* Brien, 1 Md. 438.
Missouri.— Wyatt *v.* Fromme, 70 Mo. App. 613.
New York.— Tappen *v.* Van Wagenen, 3 Johns. 465.
North Carolina.— Briley *v.* Sugg, 21 N. C. 366, 30 Am. Dec. 172.
United States.— McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,888, 3 McLean 587.
See 30 Cent. Dig. tit. "Judgment," § 1656.

Payment returned to surety.— A judgment is not discharged, although paid by a surety on an appeal-bond, where it appears that the money was afterward returned to the surety on the judgment being vacated as to him. Rush *v.* Halcyon Steamboat Co., 84 N. C. 702.

Stipulation as to payment.— A deposit of money, made by a guarantor of notes on which a judgment has been taken, intended as security for the ultimate payment of the debt, and which it was stipulated should not operate as a payment of the debt, cannot be regarded as a payment of the judgment. Steffins *v.* Gurney, 61 Kan. 292, 59 Pac. 725.

Presumption as to suretyship.— Where a judgment is joint against two defendants both are regarded as principals, unless by proof *aliunde* one is shown to be a surety; and where one of them pays the whole amount of the judgment, he is not therefore entitled to an execution, for use against his co-defendant, unless he himself has been judicially determined to be only a surety. Laval *v.* Rowley, 17 Ind. 36.

Separate judgments.— Where individual judgments are entered against the principals of two promissory notes in which each appears as surety for the other, and one pays the judgment against himself, it will be presumed that the judgments are for separate debts, and the payment on the one judgment cannot be applied in satisfaction of the other. Caldwell *v.* Martin, 29 S. C. 22, 6 S. E. 857. And so where, in an action against a principal and surety in a title bond, upon which they are severally as well as jointly liable, separate judgments against them are obtained, but in different amounts, the judgment creditor may insist upon satisfaction of either, but if he accepts the amount of the smaller judgment, against the surety, and enters it satisfied in full, the debt itself is thereby extinguished, and all recourse on the larger judgment against the principal debtor is gone. Cox *v.* Smith, 10 Oreg. 418.

76. *Alabama.*— Lyon *v.* Bolling, 9 Ala. 463, 44 Am. Dec. 444.
Illinois.— Frankel *v.* Stern, 50 Ill. App. 54; Cleiman *v.* Murphy, 34 Ill. App. 633.
Iowa.— Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063.
Kentucky.— Roberts *v.* Bruce, 91 Ky. 379, 15 S. W. 872, 12 Ky. L. Rep. 932; Alexander *v.* Lewis, 1 Metc. 407.
Louisiana.— Sprigg *v.* Beaman, 6 La. 59.
Maryland.— Wilmer *v.* Brice, 91 Md. 71, 46 Atl. 322.
Missouri.— McDaniels *v.* Lee, 37 Mo. 204.
New York.— Storz *v.* Boyce, 34 Misc. 279, 69 N. Y. Suppl. 612; Waller *v.* Harris, 7 Paige 167; Hayes *v.* Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554.
North Carolina.— State *v.* Hearn, 109 N. C. 150, 13 S. E. 895; Jones *v.* McKinnon, 87 N. C. 294; Barringer *v.* Boyden, 52 N. C. 187; Sherwood *v.* Collier, 14 N. C. 380, 24 Am. Dec. 264; Hodges *v.* Armstrong, 14 N. C. 253.
Ohio.— Peters *v.* McWilliams, 36 Ohio St. 155; Dempsey *v.* Bush, 18 Ohio St. 376. *Compare* Skinner *v.* Lehman, 6 Ohio 430.
Pennsylvania.— Cottrell's Appeal, 23 Pa. St. 294; Fleming *v.* Beaver, 2 Rawle 128, 19 Am. Dec. 629; McCormick *v.* Allen, 9 Pa. Cas. 564, 14 Atl. 257; Ort *v.* Condon, 21 Pa. Co. Ct. 609.
Tennessee.— See Smith *v.* Alexander, 4 Sneed 482.
Texas.— Nichols *v.* Able, 14 Tex. 532; Smith *v.* Lang, 2 Tex. Civ. App. 683, 22 S. W. 197.
Vermont.— White River Bank *v.* Downer, 29 Vt. 332.
Virginia.— McClung *v.* Beirne, 10 Leigh 394, 34 Am. Dec. 739.

3. PAYMENT BY STRANGER — a. Effect in General. Although a judgment creditor is not bound to accept payment from a stranger,[77] yet if he does the judgment will be extinguished or not, according to the intention of the party paying; if such is the intention and agreement, the judgment may be kept alive for the latter's benefit, and he will succeed to the rights of the judgment creditor and be entitled to enforce it against the debtor,[78] except perhaps in cases where the money was furnished by the judgment debtor himself.[79] If the debtor joins with a stranger in paying off the judgment, taking an assignment to his attorney, the assignment will be valid as to the stranger, although void as to the debtor.[80]

Washington.— Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

See 30 Cent. Dig. tit. "Judgment," § 1656.

Agreement of parties.— Where, before becoming surety on a note given for money borrowed to pay a judgment against the principal, a party stipulated with the principal that the judgment should remain open against the latter in order to indemnify the surety, the payment of the judgment by the principal with money raised on a note on which the surety was indorser did not extinguish the same. Patterson *v.* Clark, 96 Ga. 494, 23 S. E. 496.

Where the administrator of a surety became the assignee of a judgment against his intestate and the latter's principal, although he had assets in his hands sufficient to pay the judgment, it was held that the judgment was not satisfied by the assignment, but that he could enforce it against the principal. King *v.* Aughtry, 3 Strobh. Eq. (S. C.) 149.

A judgment in favor of the state, when paid by a surety, cannot be assigned to such surety by any officer or agent of the state. Peacock *v.* Pembroke, 8 Md. 348.

77. James *v.* Markham, 128 N. C. 380, 38 S. E. 917.

Preventing redemption.— A stranger to a judgment has no right to pay the same for the purpose of extinguishing the lien and preventing the creditor from redeeming by virtue thereof property sold under a prior judgment. People *v.* Beebe, 1 Barb. (N. Y.) 379.

78. *Alabama.*— Eastern Bank *v.* Taylor, 41 Ala. 93.

Delaware.— Sydam *v.* Cannon, 1 Houst. 431.

Illinois.— Marshall *v.* Moore, 36 Ill. 321; People *v.* Weimer, 94 Ill. App. 112.

Indiana.— Owensby *v.* Platt, 3 Ind. 459.

Iowa.— Fretland *v.* Mack, 76 Iowa 434, 41 N. W. 64.

Louisiana.— See Buckley *v.* McClosky, 1 Rob. 312.

Maine.— Noble *v.* Merrill, 48 Me. 140.

Massachusetts.—Kimball *v.* Parker, 7 Metc. 63.

Minnesota.— Roberts *v.* Meighen, 74 Minn. 273, 77 N. W. 139.

Mississippi.— Rollins *v.* Thompson, 13 Sm. & M. 522.

Missouri.— Bender *v.* Matney, 122 Mo. 244, 26 S. W. 950.

New Jersey.— Giveans *v.* McMurtry, 17 N. J. Eq. 510.

New York.— Harbeck *v.* Vanderbilt, 20 N. Y. 395; More *v.* Trumpbour, 5 Cow. 488; Draper *v.* Gordon, 4 Sandf. Ch. 210. See Flagler *v.* Newcombe, 13 N. Y. Suppl. 299.

North Carolina.— Null *v.* Moore, 32 N. C. 324; Carter *v.* Halifax, 8 N. C. 483.

Ohio.— Brown *v.* Merchants Nat. Bank, 41 Ohio St. 445; Burkham *v.* Cooper, 2 Ohio Cir. Ct. 77, 1 Ohio Cir. Dec. 371; Knauber *v.* Fritz, 5 Ohio Dec. (Reprint) 410, 5 Am. L. Rec. 434.

Pennsylvania.— Delap *v.* Stewart, 2 Penr. & W. 285. *Compare* Riffle's Appeal, 3 Brewst. 94.

South Carolina.— Potts *v.* Richardson, 2 Bailey 15.

Wisconsin.— Downer *v.* Miller, 15 Wis. 612.

See 30 Cent. Dig. tit. "Judgment," § 1657.

Part payment.— The payment of part of a judgment by a person other than the debtor is a sufficient consideration for an agreement by the creditor to cancel the judgment. Smith *v.* Gould, 84 Hun (N. Y.) 325, 32 N. Y. Suppl. 373.

Taking other security.— Where a third person advances the amount due on a judgment, taking at the same time a mortgage from defendant as security for such advance, it must be presumed that he intended to extinguish the judgment and rely exclusively on the mortgage. Phillips *v.* Behn, 19 Ga. 298.

Agreement for reimbursement.— Where defendant's attorney paid a judgment against his client, agreeing with plaintiff's attorney that if defendant refused to reimburse him the payment was to be refunded, and the satisfaction of the judgment returned, and plaintiff supposed that his judgment had been satisfied, but did not know by whom it was done, and defendant's attorney took no assignment of the judgment to protect himself, it was held that the judgment was satisfied. Rogers *v.* Welte, 61 Mich. 258, 28 N. W. 86.

79. Hogan *v.* Reynolds, 21 Ala. 56, 56 Am. Dec. 236; Shaw *v.* Clark, 6 Vt. 507, 27 Am. Dec. 578; Felch *v.* Lee, 15 Wis. 265.

Trustee.— Payment of a judgment by a trustee out of the trust fund is as complete as if the debtor himself paid it. Keller *v.* Leib, 1 Penr. & W. (Pa.) 220.

Grantee of mortgaged premises.— Where a grantee assumes a mortgage, and on foreclosure pays the deficiency judgment, he cannot enforce the same as against the mortgagor. Matter of Browne, 35 Misc. (N. Y.) 362, 71 N. Y. Suppl. 1034. See, generally, MORTGAGES.

80. Harbeck *v.* Vanderbilt, 20 N. Y. 395.

b. Rights of Payer. A stranger paying the judgment will not be subrogated to the rights of the creditor as a matter of course, but only in pursuance of a specific agreement or understanding;[81] but it is not necessary that this should be evidenced by a formal and valid assignment of the judgment.[82]

4. Payment by Officer. Where the amount of a judgment is paid by a sheriff or other officer without any demand or request upon the part of defendant, the judgment is extinguished, and such officer cannot keep it alive for his own reimbursement,[83] unless he takes an assignment of the judgment in his own name, or to a third person in trust for himself.[84] But it has been held that the judgment is not extinguished, where the sheriff or other officer is compelled to pay it by legal proceedings,[85] nor where he pays a judgment recovered against himself, for his failure to enforce the first judgment.[86]

D. Merger, Assignment, and Release — 1. Merger of Judgments — a. In General. Where a judgment debtor buys in the title acquired on an execution sale under the judgment, the judgment is discharged, and a junior judgment will succeed to its priority of lien.[87] On the other hand a judgment being a general lien on all the debtor's real estate, it does not merge when the creditor acquires title to a particular portion of such lands, but may ordinarily be enforced against the remaining lands,[88] although as to the particular parcel the lien of the judgment is generally merged in the title.[89] The proposition last stated, however, does not apply where it is to the interest of the creditor to keep the lien alive, but in such case his intention to prevent a merger may be presumed.[90] There

81. Head *v.* Gervais, Walk. (Miss.) 431, 12 Am. Dec. 577; Sandford *v.* McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773.

The mere loaning of money to a judgment debtor to be applied in part satisfaction of the judgment does not operate to transfer the lien of the judgment to the lender, even though it was so agreed. Unger *v.* Leiter, 32 Ohio St. 210.

82. Harbeck *v.* Vanderbilt, 20 N. Y. 395; Campbell's Appeal, 29 Pa. St. 401, 72 Am. Dec. 641; Fox *v.* Ketterlinus, 10 Wkly. Notes Cas. (Pa.) 506; Sutton *v.* Sutton, 26 S. C. 33, 1 S. E. 19. *Contra*, St. Francis Mill Co. *v.* Sugg, 83 Mo. 476.

83. *Alabama.*— Boren *v.* McGehee, 6 Port. 432, 31 Am. Dec. 695.

Georgia.— Arnett *v.* Cloud, 2 Ga. 53.

Maine.—Whittier *v.* Heminway, 22 Me. 238, 38 Am. Dec. 309.

Missouri.— Garth *v.* McCampbell, 10 Mo. 154.

New Hampshire.— See Chester *v.* Plaistow, 43 N. H. 542.

New York.— Bigelow *v.* Provost, 5 Hill 566; Sherman *v.* Boyce, 15 Johns. 443; Reed *v.* Pruyn, 7 Johns. 426, 5 Am. Dec. 287.

Tennessee.— Lintz *v.* Thompson, 1 Head 456, 73 Am. Dec. 182.

Canada.—McLeod *v.* Fortune, 19 U. C. Q. B. 100.

See 30 Cent. Dig. tit. "Judgment," § 1658.

84. *Alabama.*— See Mooney *v.* Parker, 18 Ala. 708.

Delaware.— Farmers' Bank *v.* Grantham, 3 Harr. 289.

Georgia.— Arnett *v.* Cloud, 2 Ga. 53.

Maine.— Whittier *v.* Heminway, 22 Me. 238, 38 Am. Dec. 309.

Massachusetts.— Dunn *v.* Snell, 15 Mass. 481; Allen *v.* Holden, 9 Mass. 133, 6 Am. Dec. 46. *Compare* Simpson *v.* Mercer, 144 Mass. 413, 11 N. E. 720.

New Hampshire.— See Cheever *v.* Mirrick, 2 N. H. 376.

North Carolina.— Heilig *v.* Lemly, 74 N. C. 250, 21 Am. Rep. 489; Garrow *v.* Maxwell, 51 N. C. 529; Null *v.* Moore, 32 N. C. 324.

Tennessee.— Lintz *v.* Thompson, 1 Head 456, 73 Am. Dec. 182.

Virginia.— Rhea *v.* Preston, 75 Va. 757.

West Virginia.— Hall *v.* Taylor, 18 W. Va. 544.

See 30 Cent. Dig. tit. "Judgment," § 1658.

85. Burbank *v.* Slinkard, 53 Ind. 493; Allen *v.* Holden, 9 Mass. 133, 6 Am. Dec. 46.

86. Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196 (unless defendant adopts the payment and insists upon it as a satisfaction); Carpentier *v.* Stilwell, 12 Barb. (N. Y.) 128; Baker *v.* Martin, 3 Barb. (N. Y.) 634.

87. McCarty *v.* Christie, 13 Cal. 79.

88. Clark *v.* Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790; Van Horne *v.* McLaren, 8 Paige (N. Y.) 285, 35 Am. Dec. 685.

89. *Indiana.*— Thomas *v.* Simmons, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381.

Iowa.— Price *v.* Rea, 92 Iowa 12, 60 N. W. 208.

New York.— Benton *v.* Hatch, 122 N. Y. 322, 25 N. E. 486; Vroom *v.* Ditmas, 4 Paige 526.

Pennsylvania.—Koons *v.* Hartman, 7 Watts 20.

Wisconsin.— Mariner *v.* Milwaukee, etc., R. Co., 26 Wis. 84.

See 30 Cent. Dig. tit. "Judgment," § 1661.

90. Vaughn *v.* Comet Consol. Min. Co., 21 Colo. 54, 39 Pac. 422; Richards *v.* Ayres, 1 Watts & S. (Pa.) 485. And see Hancock *v.*

is ordinarily no merger of a judgment when additional security for the same debt is given, such as a mortgage.[91]

b. Cumulative Judgments.[92] According to the weight of authority, where an existing judgment is sued on as a cause of action, and a new judgment recovered on it, there is no merger of the first judgment, nor is it extinguished without satisfaction of the second;[93] and the rule is the same where the second judgment is auxiliary or collateral to the first.[94] But it is otherwise where two judgments are recovered upon the same cause of action; although the second be for a less amount than the first, its payment will extinguish both.[95]

Fleming, 103 Ind. 533, 3 N. E. 254; Gatling *v.* Dunn, 52 Ind. 498.

91. Johnson *v.* Hines, 61 Md. 122; Presley *v.* Lowry, 26 Minn. 158, 2 N. W. 61; Warren *v.* Taylor, 9 Grant Ch. (U. C.) 59. But where the creditor takes an assignment of property in trust to pay his own debt and those of certain other creditors and enters upon the execution of the trust and pays a portion of the debts, he cannot afterward proceed to enforce the judgment. Hawley *v.* Mancius, 7 Johns. Ch. (N. Y.) 174. And so where he accepts a deed of property, not as security, but as a conveyance. Matter of Fourth Avenue, 11 Abb. Pr. (N. Y.) 189.

92. **Merger by affirmance** see APPEAL AND ERROR, 3 Cyc. 423 note 70.

93. *Indian Territory.*—Armour Bros. Banking Co. *v.* Addington, 1 Indian Terr. 304, 37 S. W. 100.

New Hampshire.— Weeks *v.* Pearson, 5 N. H. 324.

New York.— Forman *v.* Lawrence, 6 Thomps. & C. 640; Mumford *v.* Stocker, 1 Cow. 178. But see Purdy *v.* Doyle, 1 Paige 558.

North Carolina.— Springs *v.* Pharr, 131 N. C. 191, 42 S. E. 590, 92 Am. St. Rep. 775.

South Carolina.— Lawton *v.* Perry, 40 S. C. 255, 18 S. E. 861, holding that where, in an action on a judgment which constituted the only lien on the whole estate of the debtor at the time of his death, a new judgment is obtained against his heirs, the first judgment is not merged in the second, so as to let in subsequent judgment creditors to rank equally with plaintiff as creditors of the estate. But where a person brings an action on a judgment which never was a lien on the land of the judgment debtor against his heirs, instead of suing to revive it, and obtains a new judgment, the old judgment is merged in the new, and he is entitled to rank only as a creditor of the estate holding a debt of record.

Virginia.— Kelly *v.* Hamblen, 98 Va. 383, 36 S. E. 491, holding that while a judgment may not be divided into different causes of action, yet a suit brought to enforce the lien thereof, prosecuted in good faith, although ineffectually, is not a bar to a subsequent suit by the same complainant against the same defendant to enforce satisfaction of the same judgment, although courts of equity, by their decrees for costs, will prevent the capricious or oppressive exercise of the right, and protect litigants against unnecessary and vexatious litigation.

United States.— Hay *v.* Alexandria, etc., R. Co., 20 Fed. 15; Griswold *v.* Hill, 11 Fed. Cas. No. 5,836, 2 Paine 492.

See 30 Cent. Dig. tit. "Judgment," § 1662.

Contra.—Gould *v.* Hayden, 63 Ind. 443 (holding that where a judgment is recovered upon a judgment, the latter is merged in the former and all of its liens and priorities are released, and holding further therefore that where a judgment was recovered in a court of competent jurisdiction in another state upon a judgment previously rendered in Indiana, the latter judgment was merged in the former and all of its liens and priorities upon lands in Indiana were abandoned, and that the owner of such lands might enjoin a sale of the same upon an execution issued on the judgment); Dunn *v.* Dilks, 31 Ind. App. 673, 68 N. E. 1035; Denegre *v.* Haun, 13 Iowa 240; Purdy *v.* Doyle, 1 Paige (N. Y.) 558 (holding that a judgment creditor who prosecutes to judgment a suit on his judgment loses his lien on the prior judgment and is postponed to all intervening encumbrances by judgment or otherwise).

Judgment against administrator.— Where plaintiff recovers a personal judgment against an administrator, and then recovers on such judgment a judgment on his bond, the judgments are not merged; they are separate securities for the same debt, and satisfaction of one discharges both. Townsend *v.* Whitney, 75 N. Y. 425; McLean *v.* McLean, 90 N. C. 530. Nor is the lien of a judgment released or divested by the recovery of a judgment against the administrator of the deceased judgment debtor. *In re* Wiley, 138 Cal. 301, 71 Pac. 441.

Where a judgment is revived upon a scire facias, the original judgment is not merged in the judgment of revivor. The judgment of revivor simply revives or gives vitality to the original judgment and does not become a new debt of record. Stockwell *v.* Walker, 3 Ind. 215. See also Gould *v.* Hayden, 63 Ind. 443; Armstrong *v.* McLaughlin, 49 Ind. 370.

Judgment of justice's court.—In Andrews *v.* Smith, 9 Wend. (N. Y.) 53, it is said that a judgment in court is not extinguished by a judgment subsequently obtained on it in another justice's court.

94. Roberts *v.* Rice, 71 Ala. 187; Price *v.* Higgins, 1 Litt. (Ky.) 273; Jackson *v.* Shaffer, 11 Johns. (N. Y.) 513; Collier *v.* Newbern Bank, 17 N. C. 525.

95. *California.*— Wheelock *v.* Godfrey, (1893) 35 Pac. 315.

c. Forfeited Forthcoming or Delivery Bond. In several states, where by statute the forfeiture of a forthcoming bond, or bond for the delivery of property under levy, creates *per se* a new judgment on the bond, it is held that the original judgment is merged in such statutory judgment and thereby satisfied.[96] But elsewhere the forfeiture of such a bond gives a right to take or enter a new judgment, but does not of itself amount to a judgment, and therefore there will be no merger of the original judgment upon the mere forfeiture of the bond, but only upon the entry of the new judgment.[97]

2. Assignment To or For Judgment Debtor. The assignment of a judgment to defendant therein satisfies and extinguishes it;[98] not so, however, where the assignee, although liable for the debt evidenced by the judgment, is not a party to the judgment,[99] or where he occupies the position of a surety only.[1]

3. Release or Discharge — a. In General.[2] It is clear of course that a judgment creditor may abandon or renounce his judgment,[3] or he may release and discharge

Georgia.— Tarver *v.* Rankin, 3 Ga. 210.

Kansas.— Price *v.* Atchison First Nat. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419.

Nebraska.— Johnson *v.* Hesser, 61 Nebr. 631, 85 N. W. 894.

Wisconsin.—Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846.

96. *Arkansas.*— Lipscomb *v.* Grace, 26 Ark. 231, 7 Am. Rep. 607; Black *v.* Nettles, 25 Ark. 606; Russell *v.* Shute, 25 Ark. 469; Douglas *v.* Twombly, 25 Ark. 124; Neale *v.* Jeter, 20 Ark. 98; Frazier *v.* McQueen, 20 Ark. 68; Kelly *v.* Garvin, 12 Ark. 613; Whiting *v.* Beebe, 12 Ark. 421.

Kentucky.— Chitty *v.* Glenn, 3 T. B. Mon. 424; Harrison *v.* Wilson, 2 A. K. Marsh. 547. And see Com. *v.* Merrigan, 8 Bush 131.

Mississippi.— Davis *v.* Hoopes, 33 Miss. 173; U. S. Bank *v.* Patton, 5 How. 200, 35 Am. Dec. 428; Witherspoon *v.* Spring, 3 How. 60, 32 Am. Dec. 310; McComb *v.* Ellett, 8 Sm. & M. 505. But where separate judgments were recovered against the maker and an indorser of a note and forthcoming bonds taken in each case, and the bond against the maker was given and forfeited before that of the security, it was held that such satisfaction of the judgment against the maker was not a satisfaction of the judgment against the surety. McNutt *v.* Wilcox, 3 How. 417.

Tennessee.— Young *v.* Read, 3 Yerg. 297. And see Brown *v.* Clarke, 4 How. (U. S.) 4, 11 L. ed. 850.

See 30 Cent. Dig. tit. "Judgment," § 1663.

Unauthorized bond.— Where a forthcoming bond is unauthorized and irregular because separate executions were taken out on a joint judgment, or separate judgments taken against parties who should have been jointly sued, its forfeiture will not work a satisfaction of the original judgment. Tanner *v.* Grant, 10 Bush (Ky.) 362; Benton *v.* Crowder, 7 Sm. & M. (Miss.) 185.

97. Patton *v.* Hammer, 33 Ala. 307; Crawford *v.* Mobile Bank, 5 Ala. 55; Cole *v.* Robertson, 6 Tex. 356, 55 Am. Dec. 784; Cooper *v.* Daugherty, 85 Va. 343, 7 S. E. 387; Rhea *v.* Preston, 75 Va. 757; Leake *v.* Ferguson, 2 Gratt. (Va.) 419; Randolph *v.* Randolph, 3 Rand. (Va.) 490.

Sheriff's interpleader.— When an execution is levied on personal property, but the sale is prevented by an interpleader issue at the instance of a claimant, who gives bonds and to whom the property is thereupon surrendered by the sheriff, the levy cannot be regarded as a satisfaction of the judgment. Rice *v.* Groff, 58 Pa. St. 116.

98. *Alabama.*— Preslar *v.* Stallworth, 37 Ala. 402.

District of Columbia.— Flagg *v.* Kirk, 20 D. C. 335.

Indiana.— Zimmerman *v.* Gaumer, 152 Ind. 552, 53 N. E. 829.

Mississippi.— Rollins *v.* Thompson, 13 Sm. & M. 522. But where a bank, holding a judgment, assigned it, and placed the amount to the credit of the debtor on its books, it was held not to be a satisfaction of the judgment in such sense as to affect the rights of the assignee. Tombigby R. Co. *v.* Bell, 7 How. 216.

Missouri.— Warren County Bank *v.* Kemble, 61 Mo. App. 215.

Nebraska.— Plattsmouth First Nat. Bank *v.* Gibson, 60 Nebr. 767, 84 N. W. 259.

New York.— Baker *v.* Secor, 4 Silv. Sup. 516, 7 N. Y. Suppl. 803; Carnes *v.* Platt, 6 Rob. 270. *Compare* Steele *v.* Babcock, 1 Hill 527.

Pennsylvania.— Thompson *v.* Sankey, 175 Pa. St. 594, 34 Atl. 1104.

South Carolina.— Fowler *v.* Wood, 31 S. C. 398, 10 S. E. 93, 5 L. R. A. 721.

Vermont.— Porter *v.* Gile, 44 Vt. 520.

See 30 Cent. Dig. tit. "Judgment," § 1664.

99. Owensby *v.* Platt, 3 Ind. 459; Bardon *v.* Savage, 1 Mo. 560. But see Morley *v.* Stevens, 47 How. Pr. (N. Y.) 228, holding that an assignment of a judgment against two joint defendants, to a firm in which one defendant is a member, is a satisfaction of the judgment in favor of both.

1. Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063; King *v.* Aughtry, 3 Strobh. Eq. (S. C.) 149. *Compare* Preslar *v.* Stallworth, 37 Ala. 402.

2. Authority of attorney to release judgment see Attorney and Client, 4 Cyc. 940.

3. Ramage *v.* Clements, 4 Bush (Ky.)

it,[4] either generally or so far as concerns its lien on particular property;[5] but the release must be supported by a consideration,[6] and may be avoided for fraud or deceit practised in obtaining it.[7] Such a release may be made by the equitable owner of the judgment,[8] or by one of several joint owners, so far as affects his interest.[9]

b. On Partial Payment. Payment of less than the full amount of a judgment does not satisfy or release it, unless such partial payment is expressly accepted for that purpose by the creditor.[10] While by some authorities it is held that a judgment is not discharged by a part payment under a parol agreement that such payment shall be accepted in full satisfaction,[11] or by an ordinary written receipt "in

161; Labbe *v.* Routhier, 8 Quebec Q. B. 263.

Cancellation of cause of action.— Where a vendor, after recovering a judgment against his vendee for a portion of the purchase-money, wrote to the vendee a letter which canceled the agreement, it was held that he could not thereafter enforce his judgment. Cameron *v.* Bradbury, 9 Grant Ch. (U. C.) 67.

Effect of delay.— A judgment defendant will not be relieved from liability on the judgment by the delay of the creditor in proceeding against defendant's debtor, who has been summoned as garnishee. Brice *v.* Carr, 13 Iowa 599.

4. See the cases cited *infra*, this note.

Parol release.— A parol release of a judgment is sufficient in equity. Whitehill *v.* Wilson, 3 Penr. & W. (Pa.) 405, 24 Am. Dec. 326. *Contra*, Scott *v.* Sander, 6 J. J. Marsh. (Ky.) 506.

Sufficiency of release.— Whether or not a writing placed in evidence is a discharge of a judgment is a question of law for the court. Agate *v.* Sands, 8 Daly (N. Y.) 66. Further as to what constitutes a release of a judgment see Plunkett *v.* Black, 117 Ind. 14, 19 N. E. 537; Hempstead *v.* Hempstead, 32 Mo. 134; Chancellor *v.* Schott, 23 Pa. St. 68.

Release of "all demands."— Where a judgment creditor executes to his debtor a release of all demands of whatever nature, it will not discharge a judgment unless under seal. Davis *v.* Bowker, 1 Nev. 487.

Marking judgment "satisfied" on the record is a release of it. Sullivan *v.* Latimer, 38 S. C. 158, 17 S. E. 701.

Conditional release.— Where a judgment debtor obtains possession of a discharge of the judgment, without complying with the conditions on which it was to be delivered, and the discharge is not filed with the clerk, nor satisfaction entered on the record, the judgment remains in full force. Crosby *v.* Wood, 6 N. Y. 369.

What law governs.— A release of a judgment is governed by the law of the state where it is executed and delivered, although the judgment was rendered in another state. Beam *v.* Barnum, 21 Conn. 200.

5. Beall *v.* Elder, 35 La. Ann. 1022. But the holder of a judgment lien cannot release land of his debtor, taken on execution on a junior judgment, so as to preserve his lien for its full amount against other land of the debtor, where the debtor files a refusal to accept the release. Fisler *v.* Stewart, 191 Pa. St. 323, 43 Atl. 396, 71 Am. St. Rep. 769.

6. Plunkett *v.* Black, 117 Ind. 14, 19 N. E. 537; Wray *v.* Chandler, 64 Ind. 146; McCleary *v.* Chipman, 32 Ind. App. 489, 68 N. E. 320; Collins *v.* Fawcett, 39 S. W. 250, 18 Ky. L. Rep. 1052; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173; Whitehill *v.* Wilson, 3 Penr. & W. (Pa.) 405, 24 Am. Dec. 326.

7. Maclary *v.* Reznor, 3 Del. Ch. 445; Wray *v.* Chandler, 64 Ind. 146.

8. Stilwell *v.* Carpenter, 62 N. Y. 639.

Assignment for collection.— The assignment of a judgment to the creditor's attorney, if shown to have been merely for the purpose of collection, although placed on the record, will not prevent the assignor from executing a release of it. Pease *v.* Sanderson, 188 Ill. 597, 59 N. E. 425.

9. Penn *v.* Edwards, 50 Ala. 63.

Suit to avoid fraudulent conveyance.— Before judgment in an action by a creditor on behalf of himself and all other creditors to set aside a fraudulent conveyance, the actual plaintiff may settle the action on any terms he thinks proper, and no other creditor can complain; but when judgment has been obtained by plaintiff, it inures to the benefit of all creditors, and defendant cannot get rid of it by settling with the actual plaintiff alone; if he does so any other creditor may obtain control of the judgment and enforce it. Canadian Bank of Commerce *v.* Tinning, 15 Ont. Pr. 401.

10. Sullivan *v.* Hugely, 48 Ga. 486; Rohr *v.* Anderson, 51 Md. 205; Moss *v.* Shannon, 1 Hilt. (N. Y.) 175; Mason *v.* Johnston, 20 Ont. App. 412.

Prior parol agreement.— A defendant in a litigated case who has consented to a judgment for a certain sum agreed upon as fixing the real amount of plaintiff's debt or damages cannot satisfy the judgment by the payment of a smaller sum, on the ground that there was a prior or contemporaneous agreement, by parol, that such smaller sum should be received in full satisfaction of the judgment. Knight *v.* Cherry, 64 Mo. 513.

11. *California.*— Deland *v.* Hiett, 27 Cal. 611, 87 Am. Dec. 102.

Illinois.— Maxton *v.* Mount, 86 Ill. App. 187.

Maryland.— Campbell *v.* Booth, 8 Md. 107.

Massachusetts.—Weber *v.* Couch, 134 Mass.

full,"[12] although it is otherwise if the agreement is evidenced by a sealed instrument acknowledging satisfaction,[13] it is now generally held that compromise and part payment of a judgment on a verbal agreement that the same shall discharge it in full will operate, especially under equitable circumstances, as a discharge of the judgment.[14] This is clearly the case where the partial payment is accompanied by an additional consideration, either in the shape of a thing of value or of some act burdensome or inconvenient to the debtor and possibly beneficial to the creditor,[15] or where the consideration is furnished by a third person.[16]

c. Joint Debtors. At common law a release given to one of several joint judgment debtors on his paying his proportionate share of the judgment or on other consideration releases the judgment as to all,[17] unless the creditor expressly reserves the right to enforce the judgment as to the others.[18] This also results where one of the debtors is released by operation of law, as in the case of a surety relieved from liability by an unauthorized extension of time to his principal.[19]

26, 45 Am. Rep. 274; Howe *v.* Mackey, 5 Pick. 44.

New York.— Garvey *v.* Jarvis, 54 Barb. 179.

United States.— Cavender *v.* Grove, 5 Fed. Cas. No. 2,530, 4 Biss. 269; The Lulie D., 15 Fed. Cas. No. 8,602, 4 Biss. 249.

See 30 Cent. Dig. tit. "Judgment," § 1666.

12. McArthur *v.* Dane, 61 Ala. 539; Madeley *v.* White, 2 Colo. App. 408, 31 Pac. 181; Bailey *v.* Day, 26 Me. 88.

13. Maclary *v.* Reznor, 3 Del. Ch. 445; Braden *v.* Ward, 42 N. J. L. 518; Beers *v.* Hendrickson, 45 N. Y. 665.

14. *Connecticut.*— Beam *v.* Barnum, 21 Conn. 200.

Indiana.— Jackson *v.* Olmstead, 87 Ind. 92.

Kansas.— Walrath *v.* Walrath, 27 Kan. 395; Clay *v.* Hoysradt, 8 Kan. 74.

Mississippi.— Case *v.* Hawkins, 53 Miss. 702.

North Carolina.— Boykin *v.* Buie, 109 N. C. 501, 13 S. E. 879.

Ohio.— Harper *v.* Graham, 20 Ohio 105.

Pennsylvania.— Hendrick *v.* Thomas, 106 Pa. St. 327.

South Carolina.— Pinson *v.* Puckett, 35 S. C. 178, 14 S. E. 393.

Texas.— Thurmond *v.* Georgia Bank, (Civ. App. 1894) 27 S. W. 317.

Wisconsin.— Reid *v.* Hibbard, 6 Wis. 175.

See 30 Cent. Dig. tit. "Judgment," § 1666.

Judgment for nominal damages.— Where defendant is liable only for nominal damages, payment by him of the costs may be considered a sufficient payment of the judgment. Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343.

Costs.— Payment of a judgment without the costs is a partial payment, and will not satisfy the judgment unless in pursuance of an agreement to that effect. Dorgan *v.* Piehn, 84 Iowa 564, 51 N. W. 34. See Stakke *v.* Chapman, 13 S. D. 269, 83 N. W. 261.

Joint debtors.— An agreement to accept a third of a judgment from one of three joint debtors, and to release him, is void for want of consideration. Molyneaux *v.* Collier, 13 Ga. 406; Fletcher *v.* Wurgler, 97 Ind. 223. And see Penn *v.* Remsen, 24 How. Pr. (N. Y.) 503. But *compare* Elliott *v.* Holbrook, 33 Ala. 659, holding that, where the owner of a judgment against several joint debtors releases one on his payment of a portion of the amount, this releases all.

15. *Illinois.*— Neal *v.* Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. St. Rep. 784.

Indiana.— Bilsland *v.* McManomy, 82 Ind. 139.

Iowa.— Stoutenberg *v.* Huisman, 93 Iowa 213, 61 N. W. 917.

Maryland.— Booth *v.* Campbell, 15 Md. 569. But the fact that the debtor traveled a considerable distance in order to make the payment does not amount to such additional consideration as will help out a payment of less than the amount due. Jones *v.* Ricketts, 7 Md. 108.

Washington.— Brown *v.* Kern, 21 Wash. 211, 57 Pac. 798.

See 30 Cent. Dig. tit. "Judgment," § 1666.

16. *Alabama.*— Sanders *v.* Decatur Branch Bank, 13 Ala. 353.

Indiana.— Jones *v.* Ransom, 3 Ind. 327.

Kentucky.— Hardesty *v.* Graham, 3 S. W. 909, 8 Ky. L. Rep. 954.

New Hampshire.— Colburn *v.* Gould, 1 N. H. 279.

New York.— Smith *v.* Gould, 84 Hun 325, 32 N. Y. Suppl. 373; Roberts *v.* Brandies, 44 Hun 468.

North Carolina.— Currie *v.* Kennedy, 78 N. C. 91.

See 30 Cent. Dig. tit. "Judgment," § 1666.

17. Allen *v.* Wheatley, 3 Blackf. (Ind.) 332; Collier *v.* Field, 1 Mont. 612; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,487, Gilp. 614. But *compare* Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

18. Hadley *v.* Bryan, 70 Ark. 197, 66 S. W. 921; Tillitt *v.* Mann, 104 Fed. 421, 43 C. C. A. 617; U. S. *v.* Murphy, 15 Fed. 589, 11 Biss. 415.

19. Gipson *v.* Ogden, 100 Ind. 20; Baird *v.* Rice, 1 Call (Va.) 18, 1 Am. Dec. 497.

But a mere failure to execute the judgment will no more release a co-debtor than a forbearance to sue would have discharged him as an indorser. Manice *v.* Duncan, 12 La. Ann. 715.

But in many states, either by force of statute or of the settled rulings of the courts, it is now held competent for the creditor to hold the other defendants liable on the judgment after having released one.[20]

d. Agreement to Release or Satisfy. Upon a sufficient consideration[21] a judgment creditor may make a valid and binding agreement, either at the time the judgment is entered,[22] or subsequently, to release and satisfy it on other terms than receiving payment of its amount, as where he agrees to accept real or personal property, services, the transfer of another debt, or an exchange of securities.[23] If the consideration is already vested, the agreement itself operates in law as a satisfaction of the judgment;[24] but if the contract is executory, there is no release of the judgment until it is performed,[25] and while the creditor cannot rescind it without good cause,[26] the debtor is bound to perform its conditions punctually and fully, in default of which the creditor is remitted to his original rights under the judgment.[27]

E. Set-Off of Judgments — 1. Right to Set-Off in General. The courts have power to order the set-off of mutual judgments when equity and justice will be promoted thereby, thus extinguishing both judgments if they are equal in

20. *California.*— Barnum *v.* Cochrane, 139 Cal. 494, 73 Pac. 242.

Delaware.— McDowell *v.* Wilmington, etc., Bank, 1 Harr. 27; Lockwood *v.* Bates, 1 Del. Ch. 435, 12 Am. Dec. 121.

Iowa.— Gegner *v.* Warfield, 72 Iowa 11, 33 N. W. 240, 2 Am. St. Rep. 226; Bell *v.* Perry, 43 Iowa 368.

Kansas.— Missouri, etc., R. Co. *v.* Haber, 56 Kan. 717, 44 Pac. 619; Meixell *v.* Kirkpatrick, 29 Kan. 679.

Michigan.— Beekman *v.* Sylvester, 109 Mich. 183, 66 N. W. 1093.

Missouri.— Hempstead *v.* Hempstead, 32 Mo. 134, holding that an agreement releasing a portion of the parties to a judgment, but reserving the right to use the judgment as against others affected thereby, does not release the judgment as to such other parties, in the absence of fraud or injury to their rights.

New York.— Marx *v.* Jones, 36 Hun 290; Irvine *v.* Millbank, 36 N. Y. Super. Ct. 264. See Lewy *v.* Fox, 54 N. Y. Super. Ct. 397.

North Carolina.— Smith *v.* Richards, 129 N. C. 267, 40 S. E. 5.

See 30 Cent. Dig. tit. "Judgment," § 1667.

Release of particular property.— The release by a judgment creditor of specific property belonging to one of the several judgment debtors from the lien of the judgment will not of itself discharge the other defendants. Council Bluffs Sav. Bank *v.* Griswold, 50 Nebr. 753, 70 N. W. 376.

Judgment against firm.— Where a judgment against a firm and its individual members was released as to one member, the judgment creditor had thereafter no right to have a receiver of the partnership property appointed in supplemental proceedings. Hunter *v.* Hunter, 67 N. Y. App. Div. 470, 73 N. Y. Suppl. 886.

21. Thayer *v.* Mowry, 36 Me. 287; Codding *v.* Wood, 112 Pa. St. 371, 3 Atl. 455.

22. Hardy *v.* Reynolds, 69 N. C. 5.

23. *California.*— Musser *v.* Gray, (1892) 31 Pac. 568.

Iowa.— German Bank *v.* Iowa Iron Works, 123 Iowa 516, 99 N. W. 174.

Nebraska.— Bax *v.* Hoagland, 13 Nebr. 571, 14 N. W. 514.

North Carolina.— Harris *v.* Mott, 97 N. C. 103, 1 S. E. 547.

Pennsylvania.— Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744; Potter *v.* Hartnett, 148 Pa. St. 15, 23 Atl. 1007.

See 30 Cent. Dig. tit. "Judgment," § 1668.

A complaint setting up a release of a judgment should so describe the contract of release as to make known its character and whether or not it imported a consideration; and if it does not import a consideration a consideration should be averred. Plunkett *v.* Black, 117 Ind. 14, 19 N. E. 537.

24. Ives *v.* Phelps, 16 Minn. 451; Brown *v.* Feeter, 7 Wend. (N. Y.) 301.

25. Plunkett *v.* Black, 117 Ind. 14, 19 N. E. 537; Earle *v.* Earle, 20 N. J. L. 347.

26. Casey *v.* Harris, 2 Litt. (Ky.) 172; Walker *v.* Crosby, 38 Minn. 34, 35 N. W. 475.

27. Pharis *v.* Leachman, 20 Ala. 662; Terrett *v.* Brooklyn Imp. Co., 87 N. Y. 92; Maute *v.* Gross, 56 Pa. St. 250, 94 Am. Dec. 62 (if a judgment creditor agrees to take a certain quality of oil in payment of the judgment, and a different kind is delivered, and for that reason refused, it is not a credit or payment); Schilling *v.* Durst, 42 Pa. St. 126; Young *v.* Fugett, 1 Lea (Tenn.) 447.

Payment in instalments.— Where judgment was confessed and execution was stayed, under an agreement that the judgment should be paid in four equal annual instalments, but that on failure to pay any instalment at the stipulated time the whole should at once become due, it was held that the latter provision was not in the nature of a penalty, and that the agreement became enforceable if default was made in the payment of an instalment when due, although it was paid soon afterward. Malone *v.* Philadelphia, etc., R. Co., 1 Pa. L. J. Rep. 380. And see Thurmond *v.* Georgia Bank, (Tex. Civ. App. 1894) 27 S. W. 317.

amount, or, if they are unequal, satisfying the smaller judgment in full and the larger *pro tanto*.[28] This power, although appertaining originally to the courts of equity, is now recognized as one which may be exercised equally by courts of law, proceeding on equitable principles,[29] and although in some states it is authorized by statute,[30] it does not fundamentally depend upon statutes, but is independent of them.[31] The set-off of judgment against judgment, unless in cases where a statute gives it as a matter of right, is not demandable as of course, but rests in the discretion of the court,[32] and no exception lies to the refusal of the court to

28. *Arkansas.*— Milner *v.* Camden Lumber Co., 74 Ark. 224, 85 S. W. 234.

California.— Coonan *v.* Loewenthal, 147 Cal. 218, 81 Pac. 527.

Georgia.— Skrine *v.* Simmons, 36 Ga. 402, 91 Am. Dec. 771.

Illinois.— Leathe *v.* Thomas, 109 Ill. App. 434.

Indiana.— Quick *v.* Durham, 115 Ind. 302, 16 N. E. 601.

Iowa.— Schnitker *v.* Schnitker, 109 Iowa 349, 80 N. W. 403.

Kansas.— Leavenson *v.* Lafontaine, 3 Kan. 523; Lloyd *v.* Russell First Nat. Bank, 5 Kan. App. 512, 47 Pac. 575.

Maine.— Harrington *v.* Bean, 94 Me. 208, 47 Atl. 147; Peirce *v.* Bent, 69 Me. 381; New Haven Copper Co. *v.* Brown, 46 Me. 418.

Massachusetts.— Ames *v.* Bates, 119 Mass. 397; Winslow *v.* Hathaway, 1 Pick. 211; Greene *v.* Hatch, 12 Mass. 195; Makepeace *v.* Coates, 8 Mass. 451; Goodenow *v.* Buttrick, 7 Mass. 140.

Minnesota.— Irvine *v.* Myers, 6 Minn. 562; Temple *v.* Scott, 3 Minn. 419.

Missouri.— Tice *v.* Fleming, 173 Mo. 49, 72 S. W. 689, 96 Am. St. Rep. 479; Johnson *v.* Hall, 84 Mo. 210; Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106.

New Hampshire.— Chase *v.* Woodward, 61 N. H. 79; Brown *v.* Warren, 43 N. H. 430.

New Jersey.— Hendrickson *v.* Brown, 39 N. J. L. 239.

New York.— Simson *v.* Hart, 14 Johns. 63.

Pennsylvania.— Miller *v.* Klopp, 141 Pa. St. 375, 21 Atl. 601; Matthews *v.* Russell, 17 Pa. Co. Ct. 590.

Texas.— Kelly Furniture, etc., Co. *v.* Shelton, (Civ. App. 1901) 62 S. W. 794; Brin *v.* Anderson, 25 Tex. Civ. App. 323, 60 S. W. 778.

West Virginia.— Zinn *v.* Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772.

Wisconsin.— Hart *v.* Godkin, 122 Wis. 646, 100 N. W. 1057.

United States.— Sowles *v.* Witters, 40 Fed. 413; U. S. *v.* Griswold, 30 Fed. 604.

See 30 Cent. Dig. tit. "Judgment," § 1669.

Judgments in actions by or against executor or administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1063.

29. *Kentucky.*— Palmateer *v.* Meredith, 4 J. J. Marsh. 74; Davidson *v.* Geoghagan, 3 Bibb 233.

Minnesota.— Temple *v.* Scott, 3 Minn. 419.

New Hampshire.— Wright *v.* Cobleith, 23 N. H. 32.

New York.— Simpson *v.* Hart, 1 Johns. Ch. 91.

Pennsylvania.— Leitz *v.* Hohman, 207 Pa. St. 289, 56 Atl. 868, 99 Am. St. Rep. 791; Dry *v.* Filbert, 2 Woodw. 134.

Texas.— Simpson *v.* Huston, 14 Tex. 476; Dutton *v.* Mason, 21 Tex. Civ. App. 389, 52 S. W. 651.

See 30 Cent. Dig. tit. "Judgment," § 1669.

Cases suitable in equity.— When cases arise where the rights of the parties and the questions involved are too complicated to admit of being adjusted except in equity, a court of law will not order the set-off. Story *v.* Patten, 3 Wend. (N. Y.) 331.

30. See the statutes of the several states. And see Bush *v.* Monroe, 47 S. W. 215, 20 Ky. L. Rep. 547; Franks *v.* Edinberg, 185 Mass. 49, 69 N. E. 1058.

A judgment is not a contract within the meaning of the statutes relating to set-off. Rae *v.* Hulbert, 17 Ill. 572.

Statutes of limitations.— Where plaintiff seeks to have a judgment obtained by him set off against a judgment in favor of defendant, he is seeking to recover on his judgment, within the meaning of the statute of limitations. Dieffenbach *v.* Roch, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829. See Clark *v.* Story, 29 Barb. (N. Y.) 295.

31. Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458; Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704; Coates' Appeal, 7 Watts & S. (Pa.) 99; Moser *v.* Quirk, 2 Leg. Rec. (Pa.) 1.

Jurisdiction of equity not limited.— The jurisdiction conferred by statute upon courts of law to set off judgments does not divest courts of equity of jurisdiction in the same cases. Whitehead *v.* Jessup, 7 Colo. App. 460, 43 Pac. 1042.

32. *Alabama.*— Scott *v.* Rivers, 1 Stew. & P. 24, 21 Am. Dec. 646.

Georgia.— Colquitt *v.* Bonner, 2 Ga. 155.

Kansas.— Schuler *v.* Collins, 63 Kan. 372, 65 Pac. 662; Herman *v.* Miller, 17 Kan. 328.

Kentucky.— Davidson *v.* Geoghagan, 3 Bibb 233.

Maine.— Bartlett *v.* Pearson, 29 Me. 9.

Massachusetts.— Makepiece *v.* Coats, 8 Mass. 451.

Minnesota.— Lundberg *v.* Davidson, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71; Temple *v.* Scott, 3 Minn. 419.

New Jersey.— Hendrickson *v.* Brown, 39 N. J. L. 239; Trenton State Bank *v.* Coxe, 8 N. J. L. 172, 14 Am. Dec. 417.

New York.— Smith *v.* Lowden, 1 Sandf. 696; Baker *v.* Hoag, 6 How. Pr. 201.

Pennsylvania.— Burns *v.* Thornburgh, 3 Watts 78.

grant such an application,[33] nor will it be allowed where it would infringe on any other right of equal grade,[34] such as a debtor's right of exemption,[35] nor where the applicant on equitable principles should be held to have waived his right of set-off or to be estopped from asserting it,[36] although, on the other hand, where cross actions are pending, the court may withhold judgment in the one case until the rendition of the judgment in the other, in order to allow their set-off, where such action will be in furtherance of justice.[37]

2. PERSONS ENTITLED TO SET-OFF. To enable a person to procure the setting off of one judgment against another, he must be the real and beneficial owner of the judgment;[38] it is not enough that it stands in his name, if it is for the use of another.[39] But equitable owners of judgments may set them off, although other parties appear as the nominal plaintiffs or defendants.[40]

3. JUDGMENTS SUBJECT TO SET-OFF — a. In General. In order that a judgment should be available as a set-off against another judgment, it must be a valid,[41] subsisting,[42] and final adjudication,[43] the pendency of an appeal from it destroying or

South Carolina.— *Ex p.* Wells, 43 S. C. 477, 21 S. E. 334; Meador *v.* Rhyne, 11 Rich. 631; Low *v.* Duncan, 3 Strobh. 195; Tolbert *v.* Harrison, 1 Bailey 599; Williams *v.* Evans, 2 McCord 203.

Vermont.— Conable *v.* Bucklin, 2 Aik. 221.

Wisconsin.— Gauche *v.* Milbrath, 105 Wis. 355, 81 N. W. 487.

See 30 Cent. Dig. tit. "Judgment," § 1669.

33. Chipman *v.* Fowle, 130 Mass. 352; Burns *v.* Thornburgh, 3 Watts (Pa.) 78.

34. Schuler *v.* Collins, 63 Kan. 372, 65 Pac. 662; De Camp *v.* Thomson, 22 Misc. (N. Y.) 385, 50 N. Y. Suppl. 454.

35. Cleveland *v.* McCanna, 7 N. D. 455, 75 N. W. 908, 66 Am. St. Rep. 670, 41 L. R. A. 852; Gieske *v.* Schrakamp, 8 Ohio S. & C. Pl. Dec. 610, 6 Ohio N. P. 299.

36. See Russell *v.* Conway, 11 Cal. 93; Adams *v.* Wear, 3 Luz. Leg. Reg. (Pa.) 134; Boykin *v.* Rosenfield, (Tex. Civ. App. 1893) 24 S. W. 323.

37. Smith *v.* Woodman, 28 N. H. 520. But *compare* Scott *v.* Scott, 17 Md. 78.

38. Hembree *v.* Glover, 93 Ala. 622, 8 So. 660; Lee *v.* Lee, 31 Ga. 26, 76 Am. Dec. 681; McGraw *v.* Pettibone, 10 Mich. 530; Mason *v.* Knowlson, 1 Hill (N. Y.) 218; Turner *v.* Satterlee, 7 Cow. (N. Y.) 480.

Co-plaintiffs.— Although a plaintiff may receive the money due on a judgment in favor of himself and other co-plaintiffs, he cannot, without authority from them, set off a judgment due them jointly against another judgment held by defendant in such joint judgment against himself alone. Corwin *v.* Ward, 35 Cal. 195, 95 Am. Dec. 93.

39. Meador *v.* Rhyne, 11 Rich. (S. C.) 631.

40. Norwood *v.* Norwood, 4 Harr. & J. (Md.) 112; Andrews *v.* Varrell, 46 N. H. 17; Wright *v.* Cobleigh, 23 N. H. 32. *Contra*, Harrel *v.* Petty, 11 Rich. (S. C.) 373.

41. Zerbe *v.* Missouri, etc., R. Co., 80 Mo. App. 414 (holding that a judgment cannot be set off, the finality and validity of which the other party is still contesting); Hamor *v.* Loeb, 9 Pa. Co. Ct. 609 (holding that a judgment cannot be set off if it is void on the face of the record because the court was without jurisdiction).

It is no objection that it is merely irregular, if rendered by a court of competent jurisdiction and not set aside by direct proceedings. Skrine *v.* Simmons, 36 Ga. 402, 91 Am. Dec. 771.

42. Spencer *v.* Johnson, 58 Nebr. 44, 78 N. W. 482; Firmenich *v.* Bovee, 1 Hun (N.Y.) 532.

Both judgments must have been entered of record.— Rupp *v.* Swartz, 3 Lack. Jur. (Pa.) 125.

A judgment which was annulled on appeal cannot be set off. Magarity *v.* Succop, 90 Va. 561, 19 S. E. 260.

Satisfied judgment.— A judgment which appears by the record to have been satisfied will not be ordered to be set off against another judgment, although the canceled judgment has not been in fact satisfied. Smith *v.* Briggs, 9 Barb. (N. Y.) 252.

Defendant in execution.— On application to set off judgments, it is no objection that plaintiff has taken defendant in execution upon his judgment. Utica Ins. Co. *v.* Power, 3 Paige (N. Y.) 365. *Contra*, Cooper *v.* Bigalow, 1 Cow. (N. Y.) 56.

Dormant judgment.— A dormant judgment will not be set off against another, unless there are peculiar equities in the case, or unless the refusal to allow a set-off would plainly work injustice to the owner of the dormant judgment. Camp *v.* Pace, 40 Ga. 45; Parker *v.* Rugg, 9 Gray (Mass.) 209. See Simpson *v.* Huston, 14 Tex. 476.

43. A judgment by confession or consent may be set off. Haskins *v.* Jordan, 123 Cal. 157, 55 Pac. 786; Fahey *v.* Howley, 22 Pa. Super. Ct. 472. But a judgment rendered upon an attachment without being contested is but *prima facie* evidence, like a bond or other specialty, and cannot be set off against a judgment in a court of record. People *v.* Delaware County, 6 Cow. (N. Y.) 598. And a final order allowing a receiver's account, and directing payment of a certain sum to one who rendered services to the receiver, is not a judgment, within the meaning of a statute allowing set-off of mutual judgments. Patterson *v.* Ward, 8 N. D. 87, 76 N. W. 1046.

at least suspending the right to use it as a set-off,[44] and it must be in the nature of a liquidated demand or direct the payment of money.[45] But if the two judgments meet these conditions, it is immaterial whether or not the claims on which they are founded could have been set off,[46] and a judgment recovered upon a debt or contract may be set off against one rendered in an action of tort.[47]

b. Judgments of Different Courts. If the party seeking the set-off moves for it in the court where the judgment against himself subsists, that court has power to order the judgment of any other court to be set off against its own.[48]

44. *Kentucky.*— Yarborough *v.* Fitzpatrick, 51 S. W. 172, 21 Ky. L. Rep. 208.

Missouri.— Zerbe *v.* Missouri, etc., R. Co., 80 Mo. App. 414; Gemmell *v.* Hueben, 71 Mo. App. 291.

Nebraska.— Spencer *v.* Johnston, 58 Nebr. 44, 78 N. W. 482.

New York.— De Camp *v.* Thompson, 31 N. Y. App. Div. 634, 54 N. Y. Suppl. 1098; *In re* Kloster, 40 Hun 374; De Figaniere *v.* Young, 2 Rob. 670; Pierce *v.* Tuttle, 51 How. Pr. 193.

Texas.— Weatherred *v.* Mays, 1 Tex. 472. See 30 Cent. Dig. tit. "Judgment," § 1672.

Contra.— Gaddis *v.* Leeson, 55 Ill. 522.

Retention until disposition of appeal.— In some states it is thought that the pendency of an appeal from one of the judgments will not warrant the court in refusing the set-off, although it should retain the motion until the determination of the appeal. Haskins *v.* Jordan, 123 Cal. 157, 55 Pac. 786; Irvine *v.* Myers, 6 Minn. 562.

Intention to appeal.— It is of course of no consequence that one party intends to appeal from the judgment against him (Sowles *v.* Witters, 40 Fed. 413), or that the time for appealing has not yet expired (Haskins *v.* Jordan, 123 Cal. 157, 55 Pac. 786).

45. Hobbs *v.* Duff, 23 Cal. 596; Gridley *v.* Garrison, 4 Paige (N. Y.) 647.

46. Levy *v.* Roos, 32 La. Ann. 1029; Temple *v.* Scott, 3 Minn. 419.

Applications of text.— A judgment for damages for the wrongful seizure of property on execution, the same being exempt, may be set off against the judgment on which the execution issued. Temple *v.* Scott, 3 Minn. 419. But *compare* Beckman *v.* Manlove, 18 Cal. 388. And a judgment for damages for breach of a covenant of warranty in a conveyance of property may be allowed in reduction of the mortgage debt for such conveyance. Harrington *v.* Bean, 94 Me. 208, 47 Atl. 147. Where a claim for usury against a bank has been reduced to judgment, it may be set off against a judgment on the note or other obligation on which the usurious interest was paid. Lloyd *v.* Russell First Nat. Bank, 5 Kan. App. 512, 47 Pac. 575; Barbour *v.* National Exch. Bank, 50 Ohio St. 90, 33 N. E. 542, 20 L. R. A. 192. One judgment may be set off against another, although the latter was entered on a note containing a waiver of homestead. Riehl *v.* Vockroth, 10 Pa. Co. Ct. 657. But two judgments held by adverse parties do not necessarily extinguish each other to the extent of the smaller, but one may be claimed as a personal property exemption, and cannot then be reached by set-off. Atkinson *v.* Pittman, 47 Ark. 464, 2 S. W. 114.

Judgment for wages.— In Pennsylvania an ordinary judgment cannot be set off against a judgment for wages. Bosche *v.* Maurer, 5 Pa. Co. Ct. 215.

47. Langston *v.* Roby, 68 Ga. 406; Leitz *v.* Hohman, 207 Pa. St. 289, 56 Atl. 868, 99 Am. St. Rep. 791; Pasek *v.* Vockroth, 13 Pa. Co. Ct. 593. *Contra,* McCormick *v.* Alexander, 3 Pa. Dist. 149; Duff *v.* Wells, 7 Heisk. (Tenn.) 17.

48. *Indiana.*— Brooks *v.* Harris, 41 Ind. 390.

Maine.— Howe *v.* Klein, 89 Me. 376, 36 Atl. 620.

Michigan.— Robinson *v.* Kunkleman, 117 Mich. 193, 75 N. W. 451.

New Jersey.— Hendrickson *v.* Brown, 39 N. J. L. 239; Trenton State Bank *v.* Coxe, 8 N. J. L. 172, 14 Am. Dec. 417.

New York.— Smith *v.* Lowden, 1 Sandf. 696; People *v.* New York C. Pl., 13 Wend. 649, 28 Am. Dec. 495; Ewen *v.* Terry, 8 Cow. 126; Brewerton *v.* Harris, 1 Johns. 144; Haff *v.* Spicer, 3 Cai. 190; Simpson *v.* Hart, 1 Johns. Ch. 91.

North Carolina.— Hogan *v.* Kirkland, 64 N. C. 250; Wright *v.* Mooney, 28 N. C. 22; Noble *v.* Howard, 3 N. C. 14.

Pennsylvania.— Best *v.* Lawson, 1 Miles 11.

South Carolina.— Bloomstock *v.* Duncan, 2 McCord 318, 13 Am. Dec. 728.

Vermont.— Rix *v.* Nevins, 26 Vt. 384.

Wisconsin.— Welscher *v.* Libby, 107 Wis. 47, 82 N. W. 693; Taylor *v.* Williams, 14 Wis. 155.

But *compare* Tenant *v.* Marmaduke, 5 B. Mon. (Ky.) 76.

Remedy in equity.— It was formerly held that if two judgments existed in different courts, neither of those courts had power to order the judgments to be set off, but the only remedy was in equity. Webster *v.* McDaniel, 2 Del. Ch. 297. And see Buckmaster *v.* Grundy, 8 Ill. 626.

Applications of text.— A judgment of a federal court may be set off against a judgment of a court of the state in which it sits. Schautz *v.* Kearney, 47 N. J. L. 56. And the court having control of the one judgment may order the set-off, although the other was rendered in another state. Phillips *v.* MacKay, 54 N. J. L. 319, 23 Atl. 941. A justice's judgment may be set off against a judgment

c. Judgments Between Different Parties. In order that one judgment may properly be set off against another, it is necessary that there should be mutuality of parties,[49] and a difference of parties in the two judgments will prevent their set-off, unless there are peculiar circumstances making it equitable.[50] If there are joint plaintiffs or defendants in one of the judgments, it cannot ordinarily be set off against a judgment in which only one of them is concerned,[51] although some of the authorities permit it where each of the joint defendants is liable for the whole amount of the judgment,[52] and the set-off is proper where one of them is liable only in the character of a surety,[53] or is a nominal or formal party,[54] or where the owner of the other judgment is insolvent.[55]

d. Judgment For Costs — (i) *In General.* A judgment for costs only may be set off against a judgment recovered by the adverse party,[56] provided the costs

of a court of record. Trenton State Bank *v.* Coxe, 8 N. J. L. 172, 14 Am. Dec. 417. But not where the justice's judgment has been removed to a superior court by certiorari. Willard *v.* Fox, 18 Johns. (N. Y.) 497. A judgment recovered before one justice can be ascertained and applied by another in satisfaction of a counter-claim recovered before him by the other party. McEwen *v.* Bigelow, 40 Mich. 215. And a court of last resort may set off two of its own judgments in a proper case. Sneed *v.* Sneed, 14 Lea (Tenn.) 13.

49. *Connecticut.*— Atkins *v.* Churchill, 19 Conn. 394.

Illinois.— Howe Mach. Co. *v.* Hickox, 106 Ill. 461.

Indiana.— Carter *v.* Compton, 79 Ind. 37.

Kentucky.— Dickinson *v.* Chism, 4 T. B. Mon. 1; Prior *v.* Richards, 4 Bibb 356.

New York.— Aikin *v.* Satterlee, 1 Paige 289.

North Dakota.— Patterson *v.* Ward, 8 N. D. 87, 76 N. W. 1046.

Ohio.— Holmes *v.* Robinson, 4 Ohio 90.

Oregon.— Richmond *v.* Bloch, 36 Oreg. 590, 60 Pac. 385; Ladd *v.* Ferguson, 9 Oreg. 180.

See 30 Cent. Dig. tit. "Judgment," § 1674.

Different capacities.— A judgment recovered or held by one as a trustee cannot be set off against another rendered against him as an individual. Daniel *v.* Wall, 80 Ga. 218, 4 S. E. 271. But a judgment recovered by an administrator, in an action originally brought by his decedent, may be set off against a judgment against the decedent. Martin County Nat. Bank *v.* Bird, 92 Minn. 110, 99 N. W. 780. See, generally, Executors and Administrators, 18 Cyc. 1063.

50. Hobbs *v.* Duff, 23 Cal. 596; Colquitt *v.* Bonner, 2 Ga. 155; Baker *v.* Hoag, 6 How. Pr. (N. Y.) 201; Johnson *v.* Taylor, 1 Disn. (Ohio) 168, 12 Ohio Dec. (Reprint) 553.

51. Phelps *v.* Reeder, 39 Ill. 172; Simmons *v.* Shaw, 172 Mass. 516, 52 N. E. 1087; Windecker *v.* Mutual L. Ins. Co., 12 N. Y. App. Div. 73, 43 N. Y. Suppl. 358.

52. *Iowa.*— Ballinger *v.* Tarbell, 16 Iowa 491, 85 Am. Dec. 527.

Massachusetts.— Allen *v.* Hall, 5 Metc. 263.

New Hampshire.— Hutchins *v.* Riddle, 12 N. H. 464.

Pennsylvania.— Darrah *v.* Bayard, 3 Yeates 152.

South Dakota.— Sweeney *v.* Bailey, 7 S. D. 404, 64 N. W. 188.

Vermont.— Downer *v.* Dana, 17 Vt. 518.

See 30 Cent. Dig. tit. "Judgment," § 1674.

Partnership and individual debts.— A judgment for or against a firm, and a judgment for or against one of its members, are not mutual debts, and cannot ordinarily be set off. Francis *v.* Rand, 7 Conn. 221. But *compare* Jeffries *v.* Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158; Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458.

53. *Maine.*— Prince *v.* Fuller, 34 Me. 122.

Michigan.— Bennett *v.* Hanley, 91 Mich. 143, 51 N. W. 885.

Missouri.— Skinker *v.* Smith, 48 Mo. App. 91.

New York.— Baker *v.* Hoag, 6 How. Pr. 201.

Ohio.— Johnson *v.* Taylor, 1 Disn. 168, 12 Ohio Dec. (Reprint) 553.

See 30 Cent. Dig. tit. "Judgment," § 1674.

54. Pike *v.* Sheve, 11 Ohio Dec. (Reprint) 891, 30 Cinc. L. Bul. 305; Rutherford *v.* Crabb, 5 Yerg. (Tenn.) 112.

55. Hunt *v.* Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512; Simson *v.* Hart, 14 Johns. (N. Y.) 63.

56. *Indiana.*— Keifer *v.* Summers, 137 Ind. 106, 35 N. E. 1103, 36 N. E. 894.

Massachusetts.— Jones *v.* Carpenter, 9 Metc. 509; Little *v.* Rogers, 2 Metc. 478. See Ocean Ins. Co. *v.* Rider, 22 Pick. 210.

Missouri.— Zerbe *v.* Missouri, etc., R. Co., 80 Mo. App. 414.

New Hampshire.— Hurd *v.* Fogg, 22 N. H. 98.

New York.— Purchase *v.* Bellows, 9 Bosw. 642; Fitch *v.* Baldwin, Clarke 426; Stuyvesant *v.* Davies, 3 Edw. 537. *Compare* Gihon *v.* Fryatt, 2 Sandf. 638.

Pennsylvania.— Howell *v.* Withers, 1 Pa. Dist. 62; Miles *v.* Morse, 4 L. T. N. S. 5.

Wisconsin.— Welsher *v.* Libby, 107 Wis. 47, 82 N. W. 693.

United States.— Henry *v.* Travelers' Ins. Co., 35 Fed. 15.

See 30 Cent. Dig. tit. "Judgment," § 1675.

Costs on creditor's bill.— Where a creditor's bill is dismissed with costs, such costs cannot be set off against the judgment on which the bill was founded. Brisley *v.* Jones, 5 N. J. Eq. 512; Mickles *v.* Brayton, 10 Paige (N. Y.) 138.

are liquidated or taxed at the time,[57] and that they belong to the party seeking the set-off,[58] and that he appears in the same capacity in the two judgments,[59] and that the debts are mutual.[60]

(II) *LIEN OR ASSIGNMENT.* A judgment for costs cannot be allowed to be set off against another judgment, where it would prejudice the attorney in the first judgment, owning the same or having a lien thereon for costs,[61] unless where proceedings for the set-off were begun without notice of the attorney's claims;[62] and generally a judgment cannot be set off against another judgment on which there is a lien in favor of a third person for costs,[63] or which has been assigned to the attorney or to another person as security for costs,[64] unless there was notice, on the one hand, of the claim to have a set-off of the judgments,[65] or on the other hand, of the claim upon the judgment for the costs,[66] although some of the decisions, on the principle that an assignee of a judgment takes it subject to rights and equities, hold that an equity to set off another judgment against it cannot be defeated by its assignment.[67]

e. Assigned Judgments — (I) *RIGHT OF ASSIGNEE TO SET-OFF.* Where a judgment debtor becomes the assignee of a judgment against his creditor, he may set it off against the judgment against himself,[68] unless there are special circum-

57. Ainslie *v.* Boynton, 2 Barb. (N. Y.) 258; Moloughney *v.* Kavanagh, 3 N. Y. Civ. Proc. 253.

58. Howell *v.* Withers, 11 Pa. Co. Ct. 630; Ruddell *v.* Sparks, 79 Tex. 308, 15 S. W. 239.

59. Willis *v.* Jones, 57 Md. 362.

60. Mclloy *v.* Burtis, 4 Pa. Co. Ct. 613.

61. *District of Columbia.*— Barrick *v.* Geyer, 5 Mackey 32.

Kansas.— Leavenson *v.* Lafontaine, 3 Kan. 523.

Maine.— Harrington *v.* Bean, 94 Me. 208, 47 Atl. 147; Howe *v.* Klein, 89 Me. 376, 36 Atl. 620. But see Prince *v.* Fuller, 34 Me. 122.

Massachusetts.—Barrett *v.* Barrett, 8 Pick. 342; Baker *v.* Cook, 11 Mass. 236.

Minnesota.— Morton *v.* Urquhart, 79 Minn. 390, 82 N. W. 653.

New Jersey.— Hendricksen *v.* Brown, 39 N. J. L. 239.

New York.— Ainslie *v.* Boynton, 2 Barb. 258; Purchase *v.* Bellows, 9 Bosw. 642; Jaeger *v.* Koenig, 33 Misc. 82, 67 N. Y. Suppl. 172; Linderman *v.* Foote, 5 N. Y. Civ. Proc. 154; Dunkin *v.* Vandenbergh, 1 Paige 622; Nicoll *v.* Nicoll, 2 Edw. 574. In Martin *v.* Kanouse, 17 How. Pr. 146, it is said that where an action is brought for the purpose of setting off a judgment owned by plaintiff against a judgment for costs in favor of defendant against plaintiff, the attorney's lien for costs on the latter judgment cannot be protected or let in to obstruct the set-off; but that it is otherwise where a motion is made to set off the judgments; for in the latter case the courts proceed without the statute, but in the former they are within it and must obey it.

Ohio.— Diehl *v.* Friester, 37 Ohio St. 473.

Pennsylvania.—Higgins *v.* Dunkleberger, 23 Pa. Co. Ct. 291.

See 30 Cent. Dig. tit. "Judgment," § 1676.

Contra.— Smith *v.* Evans, 110 Ga. 536, 35 S. E. 633; Langston *v.* Roby, 68 Ga. 406; Shirts *v.* Irons, 54 Ind. 13; Schnitker *v.* Schnitker, 109 Iowa 349, 80 N. W. 403.

62. Hill *v.* Brinkley, 10 Ind. 102; Morton *v.* Urquhart, 79 Minn. 390, 82 N. W. 653; Sweeney *v.* Bailey, 7 S. D. 404, 64 N. W. 188.

63. Hill *v.* Brinkley, 10 Ind. 102.

64. *Connecticut.*— Benjamin *v.* Benjamin, 17 Conn. 110.

Kansas.— Noble *v.* Hunter, 2 Kan. App. 538, 43 Pac. 994.

Michigan.— Bennett *v.* Hanley, 91 Mich. 143, 51 N. W. 885.

New Jersey.— Middlesex County *v.* New Brunswick State Bank, 38 N. J. Eq. 36.

New York.— Zogbaum *v.* Parker, 55 N. Y. 120; Ely *v.* Cooke, 28 N. Y. 365; Prouty *v.* Swift, 10 Hun 232; Jaeger *v.* Koenig, 33 Misc. 82, 67 N. Y. Suppl. 172; Winterson *v.* Hitchings, 38 N. Y. Suppl. 171, 1 N. Y. Annot. Cas. 193; Strauss *v.* Seamon, 2 N. Y. Suppl. 398, 716; Channing *v.* Moore, 13 N. Y. Civ. Proc. 349; Stilwell *v.* Carpenter, 2 Abb. N. Cas. 238; Wood *v.* Merritt, 45 How. Pr. 471. *Compare* Crocker *v.* Claughly, 2 Duer 684.

South Carolina.— *Ex p.* Wells, 43 S. C. 477, 21 S. E. 334; Simmons *v.* Reid, 31 S. C. 389, 9 S. E. 1058, 17 Am. St. Rep. 36.

West Virginia.— Payne *v.* Webb, 29 W. Va. 627, 2 S. E. 330.

Wisconsin.—Lundgreen *v.* Stratton, 79 Wis. 227, 48 N. W. 426.

United States.— Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 128 Fed. 332, 63 C. C. A. 62.

See 30 Cent. Dig. tit. "Judgment," § 1677.

65. Cooper *v.* Bigalow, 1 Cow. (N. Y.) 206.

66. Roediger *v.* Simmons, 2 Abb. N. Cas. (N. Y.) 279.

67. Haskins *v.* Jordan, 123 Cal. 157, 55 Pac. 786; Porter *v.* Liscom, 22 Cal. 430, 83 Am. Dec. 76; Hibbard *v.* Randolph, 72 Hun (N. Y.) 626, 25 N. Y. Suppl. 854; Dingee *v.* Shears, 29 Hun (N. Y.) 210; Sanders *v.* Gillett, 8 Daly (N. Y.) 183; Hopper *v.* Ersler, 38 N. Y. Suppl. 176, 1 N. Y. Annot. Cas. 192; Aber's Petition, 18 Pa. Super. Ct. 110; Wright *v.* Treadwell, 14 Tex. 255.

68. *California.*— Jones *v.* Chalfant, 55 Cal. 505; Hobbs *v.* Duff, 23 Cal. 596.

stances in the case rendering such a course inequitable.[69] But this will not be allowed where the judgment was purchased with the sole purpose of being used as a set-off and with an agreement to reassign it if a motion for such set-off should be refused.[70]

(II) *SET-OFF AS AGAINST ASSIGNEE.* On the principle that the assignee of a judgment takes it subject to all equities between the original parties, as a general rule one judgment may be set off against another, although one of the judgments has been assigned to a third person for value, provided the right of set-off existed at the time of the assignment.[71] But such right is claimable only when it will interfere with no right or equity of equal grade, and the court will refuse to allow a set-off to the prejudice of an assignee for value and in good faith, whose equities are prior to or superior to those of the party seeking the set-off,[72] as where

Indiana.— Frybarger *v.* Andre, 106 Ind. 337, 7 N. E. 5. See Harper *v.* Keys, 54 Ind. 510.

Kansas.— Herman *v.* Miller, 17 Kan. 328.

Kentucky.— Bush *v.* Monroe, 47 S. W. 215, 20 Ky. L. Rep. 547.

Louisiana.— Pattison *v.* Edmonston, 4 La. Ann. 157.

New Hampshire.— Wright *v.* Cobleigh, 23 N. H. 32.

New York.— Mason *v.* Knowlson, 1 Hill 218; Turner *v.* Satterlee, 7 Cow. 480. *Compare* Satterlee *v.* Ten Eyck, 7 Cow. 480.

Pennsylvania.— Jacoby *v.* Guier, 6 Serg. & R. 448; Dry *v.* Filbert, 2 Woodw. 134.

South Carolina.— Sexton *v.* Gee, 1 Hill 378.

Texas.— Simpson *v.* Huston, 14 Tex. 476.

See 30 Cent. Dig. tit. "Judgment," § 1679.

Contra.— Bunnell *v.* Magee, 9 Ala. 433; Reeves *v.* Hatkinson, 3 N. J. L. 751.

An executor cannot set off a judgment purchased by him against one obtained against him in his representative capacity. Dudley *v.* Griswold, 2 Bradf. Surr. (N. Y.) 24.

69. Dunkin *v.* Calbraith, 1 Browne (Pa.) 47 (holding that set-off will not be allowed where the assignee has previously conveyed all his property for the benefit of his creditors); Shoemaker *v.* Flosser, 8 Pa. Co. Ct. 479 (holding that the set-off will not be allowed where the assignee of the judgment has waived his exemption, while the other party has not).

70. Sprigg *v.* Granneman, 36 Ill. App. 102; Miller *v.* Gilman, 7 Cow. (N. Y.) 469. *Contra*, McBrayer *v.* Dean, 100 Ky. 398, 38 S. W. 508, 18 Ky. L. Rep. 847.

71. *Alabama.*— Skipper *v.* Stokes, 42 Ala. 255, 94 Am. Dec. 646.

California.— Coonan *v.* Loewenthal, 147 Cal. 218, 81 Pac. 527; McBride *v.* Fallon, 65 Cal. 301, 4 Pac. 17; Hobbs *v.* Duff, 23 Cal. 596; Porter *v.* Liscom, 22 Cal. 430, 83 Am. Dec. 76; Russell *v.* Conway, 11 Cal. 93.

Colorado.— Whitehead *v.* Jessup, 7 Colo. App. 460, 43 Pac. 1042.

Georgia.— Langston *v.* Roby, 68 Ga. 406.

Indiana.—Williams *v.* Taylor, 69 Ind. 48.

Iowa.—Gregory *v.* Cuppy, (1900) 82 N. W. 1016; Benson *v.* Haywood, 86 Iowa 107, 53 N. W. 85, 23 L. R. A. 335; Davis *v.* Milburn, 3 Iowa 163. *Compare* Gallaher *v.* Pendleton, 55 Iowa 142, 7 N. W. 512; Gray *v.* McCallister, 50 Iowa 497; Bell *v.* Perry, 43 Iowa 368.

Kentucky.— Jeffries *v.* Evans, 6 B. Mon. 119, 43 Am. Dec. 158; Merrill *v.* Souther, 6 Dana 305.

Maine.— Peirce *v.* Bent, 69 Me. 381; New Haven Copper Co. *v.* Brown, 46 Me. 418; Bartlett *v.* Pearson, 29 Me. 9; Hooper *v.* Brundage, 22 Me. 460.

Massachusetts.— Franks *v.* Edinberg, 185 Mass. 49, 69 N. E. 1058.

Missouri.— Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106; Skinker *v.* Smith, 48 Mo. App. 91.

Montana.— Wells *v.* Clarkson, 5 Mont. 336, 5 Pac. 894.

New Hampshire.— Chase *v.* Woodward, 61 N. H. 79; Hovey *v.* Morrill, 61 N. H. 9, 60 Am. Rep. 315.

New Jersey.— Hendrickson *v.* Brown, 39 N. J. L. 239. See Laubsch *v.* West New York Silk Mill Co., 57 N. J. L. 234, 30 Atl. 550.

New Mexico.—Scholle *v.* Pino, 9 N. M. 393, 54 Pac. 335.

New York.— Cormier *v.* Constantine, 5 N. Y. Suppl. 177; Stillings *v.* Smith, 8 N. Y. St. 106; Graves *v.* Woodbury, 4 Hill 559, 40 Am. Dec. 296; Chamberlin *v.* Day, 3 Cow. 353.

Ohio.— Johnson *v.* Taylor, 1 Disn. 168, 12 Ohio Dec. (Reprint) 553.

Pennsylvania.— Skinner *v.* Chase, 6 Pa. Super. Ct. 279.

West Virginia.— Nuzum *v.* Morris, 25 W. Va. 559.

Wisconsin.— Yorton *v.* Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.

Canada.— Orr *v.* Spooner, 19 U. C. Q. B. 601.

See 30 Cent. Dig. tit. "Judgment," § 1680.

72. *Illinois.*— Lockhart *v.* Wolf, 82 Ill. 37.

Kentucky.— Pheiffer *v.* Harris, 11 Bush 400.

Massachusetts.—Ames *v.* Bates, 119 Mass. 397; Makepeace *v.* Coates, 8 Mass. 451.

Michigan.— Ledyard *v.* Phillips, 58 Mich. 204, 24 N. W. 551; Huntoon *v.* Russell, 41 Mich. 316, 2 N. W. 38.

Minnesota.— Wyvell *v.* Barwise, 43 Minn. 171, 45 N. W. 11.

Mississippi.— Holly *v.* Cook, 70 Miss. 590, 13 So. 228.

New Hampshire.— Goodwin *v.* Richardson, 44 N. H. 125.

the assignor was insolvent at the time of the assignment;[73] but the rule does not apply where the assignment was fraudulently made for the very purpose of preventing a set-off.[74]

(III) *Effect of Notice or Knowledge.* Where the assignee has notice of a judgment against his assignor, such as may be set off against the assigned judgment, he takes subject to the right of set-off;[75] and where the person seeking the set-off has no notice or knowledge of a prior assignment of the judgment against himself, the set-off will be allowed;[76] but one who brings suit against his judgment creditor, or recovers judgment therein, after notice of an assignment of the judgment against him, cannot set off the judgment which he recovers.[77]

4. Proceedings to Compel Set-Off. One seeking a set-off of judgment against judgment must apply to the court in which the judgment against himself was recovered, that being the court which has control over that judgment, while he himself always has power to credit or satisfy the judgment in his favor.[78] Such application may ordinarily be made by motion,[79] on which no formal pleadings are necessary;[80] although a formal action or a bill in equity is proper where the rights of the parties are complicated or not definitely fixed, or where there are intervening equities,[81] and in such a case the court may meanwhile protect

New Jersey.— McAdams *v.* Randolph, 42 N. J. L. 332.

New York.— Roberts *v.* Carter, 38 N. Y. 107; Silver *v.* Krellman, 89 N. Y. App. Div. 363, 85 N. Y. Suppl. 945; Goldman *v.* Tobias, 88 N. Y. Suppl. 991; Hackett *v.* Connett, 2 Edw. 73.

North Carolina.—Sellers *v.* Bryan, 17 N. C. 358.

Pennsylvania.— Ramsey's Appeal, 2 Watts 228, 27 Am. Dec. 301; Marine Saw-Mill Co.'s Appeal, 1 Pa. Cas. 866, 2 Atl. 866; Matthews *v.* Russell, 17 Pa. Co. Ct. 590.

South Carolina.— *Ex p.* Wells, 43 S. C. 477, 21 S. E. 334.

United States.— Anglo-American Provision Co. *v.* Davis Provision Co., 112 Fed. 574.

See 30 Cent. Dig. tit. "Judgment," § 1680.

73. Henderson *v.* McVay, 32 Ala. 471; Davis *v.* Milburn, 3 Iowa 163.

74. Morris *v.* Hollis, 2 Harr. (Del.) 4; Hurst *v.* Sheets, 14 Iowa 322.

75. *California.*— Coonan *v.* Loewenthal, 147 Cal. 218, 81 Pac. 527, holding that a finding of knowledge would be presumed on appeal.

Delaware.— Morris *v.* Hollis, 2 Harr. 4.

Indiana.— Lammers *v.* Goodeman, 69 Ind. 76.

Minnesota.— Irvine *v.* Myers, 6 Minn. 562.

Missouri.— Skinker *v.* Smith, 48 Mo. App. 91.

New York.— Noxon *v.* Gregory, 5 How. Pr. 339.

United States.—Wood *v.* Carr, 30 Fed. Cas. No. 17,940, 3 Story 366.

See 30 Cent. Dig. tit. "Judgment," § 1681.

Contra.— Ullmann *v.* Kline, 87 Ill. 268.

76. Martin *v.* Wells, (Ariz. 1892) 28 Pac. 958; Finn *v.* Corbitt, 36 Mich. 318.

77. Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31; Goodwin *v.* Richardson, 44 N. H. 125; Horton *v.* Miller, 44 Pa. St. 256.

78. *California.*— Russell *v.* Conway, 11 Cal. 93.

New Hampshire.— Wright *v.* Cobleigh, 23 N. H. 32.

New Jersey.— Brookfield *v.* Hughson, 44 N. J. L. 285.

New York.— Hicks *v.* Ross, 11 Barb. 481; Stilwell *v.* Carpenter, 2 Abb. N. Cas. 238; Cooke *v.* Smith, 7 Hill 186.

Wisconsin.—Welsher *v.* Libby, 107 Wis. 47, 82 N. W. 693; Taylor *v.* Williams, 14 Wis. 155.

See 30 Cent. Dig. tit. "Judgment," § 1682.

Compare Scholle *v.* Pino, 9 N. M. 393, 54 Pac. 335, holding that the application may be made in the court where either judgment remains.

Judgments transferred from justice's court.—Where judgments have been transferred by transcript from an inferior to a superior court, an application to set them off against each other should be made in the latter court. Hicks *v.* Ross, 11 Barb. (N. Y.) 481; Hayden *v.* McDermott, 9 Abb. Pr. (N. Y.) 14.

Appellate courts.—The fact that only appellate jurisdiction is conferred on the supreme court does not prevent it from setting off one of its judgments against another. Sneed *v.* Sneed, 14 Lea (Tenn.) 13.

Entitling proceedings.— A motion to set off judgments should be entitled in all the causes in which such judgments have been entered, even where they are from different courts. Alcott *v.* Davison, 2 How. Pr. (N. Y.) 44.

79. Irvine *v.* Myers, 6 Minn. 562; Fitch *v.* Baldwin, Clarke (N. Y.) 426; Holmes *v.* Robinson, 4 Ohio 90; Hadley *v.* Hickman, 1 Yerg. (Tenn.) 501.

Motion to enter satisfaction.— By the practice at common law, a court might set off cross judgments in the same or different actions, and in the same or different courts, on the application of either party to enter satisfaction in both actions for the amount of the smaller debt. U. S. *v.* Griswold, 30 Fed. 604.

80. Quick *v.* Durham, 115 Ind. 302, 16 N. E. 601; McAllister *v.* Willey, 60 Ind. 195; Brooks *v.* Harris, 41 Ind. 390.

81. Hobbs *v.* Duff, 23 Cal. 596; Swift *v.* Prouty, 64 N. Y. 545; Barker *v.* Laney, 90

the rights of the parties by enjoining the collection of one or both of the judgments or otherwise.[82]

5. Operation and Effect of Set-Off. The allowance of a set-off of judgment against judgment extinguishes them both if they are equal in amount, or satisfies the smaller judgment in full and the larger proportionately.[83] But if the set-off is refused, it leaves the rights of the parties as before, and does not prejudice the right of one of them to require the sheriff to set off executions in his hands on the two judgments.[84]

6. Set-Off of Judgment Against Claim — a. In General. A judgment may ordinarily be pleaded as a set-off in an action between the same parties on a different claim or demand,[85] provided it appears to be in force and unsatisfied,[86] although some decisions refuse to allow this where the judgment was not recovered until after the commencement of the action in which it is pleaded.[87] Where a judgment is so pleaded, a recovery by plaintiff will either extinguish the judgment or satisfy it *pro tanto* according to its amount in relation to plaintiff's claim.[88]

b. Judgment Between Different Parties. The set-off of a judgment against a claim cannot be allowed unless there is a substantial identity of the parties;[89] but a judgment against two parties, each of whom is separately liable for it, may be set off against the individual claim of one of them.[90]

c. Assigned Judgments and Claims. The assignee of a judgment may use it by way of set-off in an action brought against him by the debtor in the judgment,[91] provided he acquired the judgment before the commencement of such

Hun (N. Y.) 108, 35 N. Y. Suppl. 626; Harris *v.* Palmer, 5 Barb. (N. Y.) 105; Story *v.* Patten, 3 Wend. (N. Y.) 331; Bare *v.* Hertzler, 16 Leg. Int. (Pa.) 108.

82. Frye-Bruhn Co. *v.* Meyer, 121 Fed. 533, 58 C. C. A. 529. See Butler *v.* Niles, 35 How. Pr. (N. Y.) 329.

83. McGuinty *v.* Herrick, 5 Wend. (N. Y.) 240; Schroeppel *v.* Jewell, 1 Cow. (N. Y.) 208.

Rights of surety.— Where a judgment recovered against a principal is allowed in set-off against a judgment in favor of the surety, it is not thereby extinguished, but the transaction amounts to an assignment of it to the surety. Herrick *v.* Bean, 20 Me. 51.

84. Gould *v.* Parlin, 7 Me. 82.

85. *Alabama.*— McMahan *v.* Crabtree, 30 Ala. 470.

Kentucky.— Carlisle *v.* Long, 1 A. K. Marsh. 486.

Maine.— Harrington *v.* Bean, 94 Me. 208, 47 Atl. 147.

New York.— Wells *v.* Henshaw, 3 Bosw. 625; Cornell *v.* Donovan, 3 N. Y. St. 261.

North Carolina.— Wright *v.* Mooney, 28 N. C. 22.

Pennsylvania.— Metzgar *v.* Metzgar, 1 Rawle 227; Benjamin *v.* Phelps, 2 L. T. N. S. 140.

Texas.— Sheldon *v.* Martin, 65 Tex. 409. But see Imperial Roller Milling Co. *v.* Cleburne First Nat. Bank, 5 Tex. Civ. App. 686, 27 S. W. 49.

Vermont.— Hassam *v.* Hassam, 22 Vt. 516.

United States.— Mendenhall *v.* Hall, 134 U. S. 559, 10 S. Ct. 616, 33 L. ed. 1012.

See 30 Cent. Dig. tit. "Judgment," § 1684.

Contra.— See King *v.* Conn, 25 Ind. 425; Woodruff *v.* Clark, 6 Blackf. (Ind.) 337; Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419.

86. O'Dougherty *v.* Remington Paper Co., 1 N. Y. St. 523; Miller *v.* Starks, 13 Johns. (N. Y.) 517.

87. Irvin *v.* Wright, 2 Ill. 135; Andrews *v.* Varrell, 46 N. H. 17.

88. Jones *v.* Melton, 6 Ala. 830; Seligman *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232. But where a party offers a judgment together with certain notes and accounts under a plea of payment, all of which are allowed, and the notes and accounts alone amount to a larger sum than the claim against him, the judgment remains in full force. Piatt *v.* St. Clair, 6 Ohio 227.

89. Cornell *v.* Donovan, 14 Daly (N. Y.) 295, 14 N. Y. St. 687.

Administrator.— A judgment against an administrator on a debt contracted by his intestate, or by a former administrator of the same estate, may be set off in a suit brought by him to recover a debt due to the estate. Crabtree *v.* Cliatt, 22 Ala. 181; Turner *v.* Tapscott, 30 Ark. 312. See, generally, Executors and Administrators, 18 Cyc. 897.

90. Spurr *v.* Snyder, 35 Conn. 172; Robinson *v.* Houston, 2 Houst. (Del.) 62; Rust *v.* Burke, 57 Tex. 341. *Contra*, see Lush *v.* Adams, 10 N. Y. Civ. Proc. 60, where it is said that, while a judgment may be the subject of a counter-claim, it is but a contract debt of record, and is governed by the general rule that a joint debt cannot be set off against a separate debt, or a separate debt against a joint debt.

91. Bonte *v.* Hall, 2 Cinc. Super. Ct. (Ohio) 33; Keagy *v.* Com., 43 Pa. St. 70; Henderson *v.* Irby, 1 Speers (S. C.) 43; Sexton *v.* Gee, 1 Hill (S. C.) 378.

action.[92] But on the other hand this right of set-off cannot be exercised to the prejudice of an assignee without notice.[93]

7. Set-Off of Claim Against Judgment — a. In General. In an action or other proceeding to collect a judgment, the debtor may set off any legal demands against plaintiff which he owned at the time of bringing the suit, and upon which he could have brought a suit in his own name;[94] but this is not allowed where the claim proposed to be set off is unliquidated or disputed,[95] nor where it is a matter which could have been pleaded in defense to the action in which the judgment was rendered,[96] nor where the claim is joint and the judgment several or *vice versa*.[97] In some jurisdictions it is held, however, contrary to the general rule that the claim cannot be set off unless reduced to judgment.[98]

b. Assigned Judgments. It is generally held that the assignee of a judgment takes it subject to the right of defendant to set off against it any valid claims which he has against the assignor, and which would be good as a set-off against the judgment in such assignor's hands.[99] But according to some of the cases the

92. Lee *v.* Lee, 31 Ga. 26, 76 Am. Dec. 681; Simpson *v.* Jennings, 15 Nebr. 671, 19 N. W. 473; Wilson *v.* Reaves, 4 Sneed (Tenn.) 173.

In some cases, however, it is held that the judgment may be used as a set-off whether it was acquired before or after the commencement of the suit. Vail *v.* Tuthill, 10 Hun (N. Y.) 31; Parrott *v.* Underwood, 10 Tex. 48.

93. Ely *v.* Cook, 28 N. Y. 365, 2 Abb. Dec. 14; Lucas *v.* East Stroudsburg Glass Co., 38 Hun (N. Y.) 581. See Diossy *v.* Heuberer, 1 N. Y. City Ct. 13.

94. *Alabama.*— Weaver *v.* Brown, 87 Ala. 533, 6 So. 354.

District of Columbia.— Fedarwisch *v.* Alsop, 18 App. Cas. 318.

Georgia.— See Rankin *v.* Dawson, 43 Ga. 595.

Indiana.— Bannister *v.* Jett, 83 Ind. 129. See Ault *v.* Zehering, 38 Ind. 429.

Kentucky.— Rowzee *v.* Gregg, Litt. Sel. Cas. 487; Mathews *v.* Mathews, 29 S. W. 862, 16 Ky. L. Rep. 788. But a prayer by the assignee of notes to have them set off against a judgment at law obtained against him by his assignor, without proof of the consideration, of his exertions to collect them, or of the obligor's insolvency, will not be granted. Moody *v.* Dowdal, 2 A. K. Marsh. 212.

Louisiana.— Gilmore's Succession, 12 La. Ann. 562.

Massachusetts.— Fiske *v.* Steele, 152 Mass. 260, 25 N. E. 291; Sheldon *v.* Kendall, 7 Cush. 217.

Mississippi.— Lockwood *v.* Rainey, (1896) 19 So. 294.

New Hampshire.— Maloney *v.* Waddle, 55 N. H. 227.

North Carolina.— Mann *v.* Blount, 65 N. C. 99.

Rhode Island.— Cole *v.* Shanahan, 24 R. I. 427, 53 Atl. 273.

United States.— Nashville, etc., R. Co. *v.* U. S., 101 U. S. 639, 25 L. ed. 1074; Central Appalachian Co. *v.* Buchanan, 90 Fed. 454, 33 C. C. A. 598; Rose *v.* Northwest F. & M. Ins. Co., 71 Fed. 649; Bonnafon *v.* U. S., 14 Ct. Cl. 484.

See 30 Cent. Dig. tit. "Judgment," § 1687.

95. *Indiana.*— Patten *v.* Stewart, 24 Ind. 332.

Louisiana.— Hereford *v.* Babin, 14 La. Ann. 333.

Maryland.— Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49.

Pennsylvania.— Kennedy *v.* Kennedy, 41 Pa. St. 185; Anderson's Appeal, 2 Walk. 491.

Texas.— Howard *v.* Randolph, 73 Tex. 454, 11 S. W. 495.

United States.— Lee *v.* Munroe, 7 Cranch 366, 3 L. ed. 373; Olyphant *v.* St. Louis Ore, etc., Co., 39 Fed. 308.

See 30 Cent. Dig. tit. "Judgment," § 1687.

But see Coonan *v.* Loewenthal, 147 Cal. 218, 81 Pac. 527, holding that the general right of set-off, by a judgment debtor, of his liability as a surety for the judgment creditor, was not affected by the fact that mortgages had been executed by the judgment creditor to indemnify the debtor, since their only effect was to make it uncertain how much of a claim the judgment debtor, as surety, would have against the creditor after the application of the securities toward canceling the indebtedness.

96. Corbin *v.* Minchen, 81 Iowa 682, 47 N. W. 879; McGraw *v.* Pettibone, 10 Mich. 530.

97. Anderson's Appeal, 1 Pa. Cas. 45, 1 Atl. 329; Cobb *v.* Haydock, 4 Day (Conn.) 472, 5 Fed. Cas. No. 2,923, Brunn. Col. Cas. 91.

98. Thorp *v.* Wegefarth, 56 Pa. St. 82, 93 Am. Dec. 789; Gardner's Appeal, 4 Pa. Cas. 251, 8 Atl. 176; Miller *v.* Bradford, 19 Pa. Super. Ct. 297; Bowman *v.* Davis, 11 Pa. Co. Ct. 644; Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011. And see Willis *v.* Jones, 57 Md. 362; Wintrock *v.* Zimmer, 30 Mo. App. 328; Bagg *v.* Jefferson Ct. C. Pl., 10 Wend. (N. Y.) 615. But *compare* Lloyd's Appeal, 95 Pa. St. 518; Evans *v.* Clover, 1 Grant (Pa.) 164; Faulconer *v.* Stinson, 44 W. Va. 546, 29 S. E. 1011.

99. *Maryland.*— Levy *v.* Steinbach, 43 Md. 212.

Minnesota.— Way *v.* Colyer, 54 Minn. 14, 55 N. W. 744.

judgment debtor can set off only such claims or demands as accrued to him or were acquired by him before receiving notice of the assignment of the judgment,[1] not those accruing or acquired with knowledge of the assignment.[2]

F. Satisfaction by Proceedings on Final Process — 1. Levy of Execution — a. In General. The levy of an execution upon sufficient personal property of the judgment debtor to pay the judgment amounts *prima facie* and so long as the levy continues in force to a satisfaction of the judgment, as between the parties thereto.[3] And if the judgment creditor denies the actual satisfaction of the judgment, the burden is on him to prove that the execution and levy for some sufficient reason failed to result in payment of the judgment.[4]

b. Levy Unproductive or Insufficient. The presumption of satisfaction of a judgment from levy on personal property is rebutted by proof that defendant was not in fact deprived of his property as the result of the levy,[5] that he tortiously

New York.— Littlefield *v.* Albany County Bank, 97 N. Y. 581; Weston *v.* Turner, 8 N. Y. St. 296. But *compare* Hopf *v.* Myers, 42 Barb. 270; Raymond *v.* Wheeler, 9 Cow. 295.

Pennsylvania.— Smith *v.* Stockdale, 3 Pa. Co. Ct. 113. But *compare* Hiller *v.* Good, 10 Lanc. Bar 151.

South Carolina.— Neal *v.* Sullivan, 10 Rich. Eq. 276.

Texas.— Ellis *v.* Kerr, 11 Tex. Civ. App. 349, 32 S. W. 444.

Virginia.— Gordon *v.* Rixey, 86 Va. 853, 11 S. E. 562.

See 30 Cent. Dig. tit. "Judgment," § 1688.

1. Himrod *v.* Baugh, 85 Ill. 435; Townsend *v.* Quinan, 47 Tex. 1. And see Coonan *v.* Loewenthal, 147 Cal. 218, 81 Pac. 527.

2. Berry *v.* Protestant Episcopal Church Convention, 7 Md. 564; Avery *v.* Russell, 125 Mass. 571.

3. *Alabama.*— Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301.

California.— Barber *v.* Reynolds, 44 Cal. 519; Mulford *v.* Estudillo, 23 Cal. 94; People *v.* Chisholm, 8 Cal. 29.

Delaware.— Fiddeman *v.* Biddle, 1 Harr. 500.

Georgia.— Marshall *v.* Morris, 13 Ga. 185; Lynch *v.* Pressley, 8 Ga. 327.

Illinois.— Martin *v.* Charter, 27 Ill. 294; Smith *v.* Hughes, 24 Ill. 270; Ambrose *v.* Weed, 11 Ill. 488; Pearl *v.* Wellman, 8 Ill. 311.

Indiana.— Burr *v.* Mendenhall, 80 Ind. 49; Frank *v.* Brasket, 44 Ind. 92; Freeman *v.* Smith, 7 Ind. 582; Barret *v.* Thompson, 5 Ind. 457; Stewart *v.* Nunemaker, 2 Ind. 47. And *compare* Johnson *v.* State, 80 Ind. 220.

Iowa.— Williams *v.* Gartrell, 4 Greene 287.

Massachusetts.— Wood *v.* Mann, 125 Mass. 319, holding, however, that a judgment is not satisfied by the judgment creditor causing an execution for costs only to be issued.

Minnesota.— Hastings First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239.

Mississippi.— Banks *v.* Evans, 10 Sm. & M. 35, 48 Am. Dec. 734; Bingaman *v.* Hyatt, Sm. & M. Ch. 437.

Missouri.— State *v.* Six, 80 Mo. 61; Lower *v.* Buchanan Bank, 78 Mo. 67; Trigg *v.* Harris, 49 Mo. 176; Blair *v.* Caldwell, 3 Mo. 353.

New Jersey.— Hanness *v.* Bonnell, 23 N. J. L. 159; Carr *v.* Weld, 19 N. J. Eq. 319; Banta *v.* McClennan, 14 N. J. Eq. 120.

New York.— Shepard *v.* Rowe, 14 Wend. 260; Ontario Bank *v.* Hallett, 8 Cow. 192; Cornell *v.* Cook, 7 Cow. 310; Jackson *v.* Bowen, 7 Cow. 13; *Ex p.* Lawrence, 4 Cow. 417, 15 Am. Dec. 386; Troup *v.* Wood, 4 Johns. Ch. 228.

Ohio.— Reynolds *v.* Rogers, 5 Ohio 169; Cass *v.* Adams, 3 Ohio 223.

Pennsylvania.— Cathcart's Appeal, 13 Pa. St. 416; Hamner *v.* Griffith, 1 Grant 193; Lytle *v.* Mehaffy, 8 Watts 267; Hunt *v.* Breading, 12 Serg. & R. 37, 14 Am. Dec. 665; Monongahela Nav. Co. *v.* Ledlie, 3 Pa. L. J. 179. But the levy of an execution before a sale is not a satisfaction of the debt as against creditors of the party owning the debt. Winternitz's Appeal, 40 Pa. St. 490.

South Carolina.— McElwee *v.* Jeffreys, 7 S. C. 228; Lewis *v.* Spann, 1 Rich. 429.

Tennessee.— Carroll *v.* Fields, 6 Yerg. 305; Camp *v.* Laird, 6 Yerg. 246; Young *v.* Read, 3 Yerg. 297.

Texas.— Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.

United States.— Campbell *v.* Pope, 4 Fed. Cas. No. 2,365*a*, Hempst. 271.

England.— Speak *v.* Richards, Hob. 288; Slie *v.* Finch, 2 Rolle 57; Clerk *v.* Withers, 1 Salk. 322.

See 30 Cent. Dig. tit. "Judgment," § 1689.

Garnishment.— The mere service of a garnishment under an execution is not such a levy on personalty as amounts to a satisfaction. Campbell's Appeal, 32 Pa. St. 88; Beaumont *v.* Eason, 12 Heisk. (Tenn.) 417.

4. Newsom *v.* McLendon, 6 Ga. 392.

5. *Connecticut.*— Tuttle *v.* Bishop, 31 Conn. 511.

Michigan.— Lustfield *v.* Ball, 103 Mich. 17, 61 N. W. 339.

Mississippi.— Wright *v.* Watt, 52 Miss. 634.

Pennsylvania.— Campbell's Appeal, 32 Pa. St. 88; Cathcart's Appeal, 13 Pa. St. 416.

Tennessee.— Murphy *v.* Partee, 7 Baxt. 373.

United States.— Foster *v.* Crawford, 80 Fed. 991.

See 30 Cent. Dig. tit. "Judgment," § 1690.

or fraudulently recovered it from the possession of the officer,[6] that it was taken under a senior execution or other prior lien[7] or otherwise removed from the possession of plaintiff or the officer by process of law,[8] that the property levied on did not in fact belong to defendant[9] or was insufficient to satisfy the judgment,[10] or generally that the property could not be made available for the satisfaction of plaintiff's claims,[11] without any fault or negligence on his part,[12] although if it is lost or wasted by the fault or neglect of the sheriff, the judgment is satisfied and plaintiff's remedy is against the officer.[13]

c. Levy on Real Estate. A levy of execution on real estate of the judgment debtor does not amount even *prima facie* to a satisfaction of the judgment, since it does not interfere with the title or possession of the debtor.[14] But it is otherwise

6. Nelson *v.* Rockwell, 14 Ill. 375; Mickles *v.* Haskin, 11 Wend. (N. Y.) 125.

7. *Georgia.*— Horn *v.* Ross, 20 Ga. 210, 65 Am. Dec. 621; Newsom *v.* McLendon, 6 Ga. 392.

New Jersey.— Hanness *v.* Bonnell, 23 N. J. L. 159.

New York.— People *v.* Hopson, 1 Den. 574.

South Carolina.— Peay *v.* Fleming, 2 Hill Eq. 97.

Texas.— Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.

See 30 Cent. Dig. tit. "Judgment," § 1690.

8. Peoria Sav., etc., Co. *v.* Elder, 165 Ill. 55, 45 N. E. 1083 (property taken from under execution and placed in hands of receiver); Alexander *v.* Polk, 39 Miss. 737; Banks *v.* Evans, 10 Sm. & M. (Miss.) 35, 48 Am. Dec. 734; Rice *v.* Groff, 58 Pa. St. 116; Bean *v.* Seyfert, 12 Phila. (Pa.) 224 (sheriff prevented from selling by interpleader suit).

9. Scherr *v.* Himmelmann, 53 Cal. 312.

10. *Arkansas.*— Caudle *v.* Dare, 7 Ark. 46.

Georgia.— Newsom *v.* McLendon, 6 Ga. 392.

Illinois.— Chandler *v.* Higgins, 109 Ill. 602.

Mississippi.— Moody *v.* Harper, 28 Miss. 615; Bibb *v.* Jones, 7 How. 397; McNutt *v.* Wilcox, Freem. 116.

United States.— Corning *v.* Burdick, 6 Fed. Cas. No. 3,246, 4 McLean 133; Smith *v.* Columbia Bank, 22 Fed. Cas. No. 13,011, 4 Cranch C. C. 143.

See 30 Cent. Dig. tit. "Judgment," § 1690.

11. Curtis *v.* Root, 28 Ill. 367; Smith *v.* Lozano, 1 Ill. App. 171; Whittemore *v.* Carkin, 58 N. H. 576; Green *v.* Burk, 23 Wend. (N. Y.) 490; McElwee *v.* Jeffreys, 7 S. C. 228. And see Stoyel *v.* Cady, 4 Day (Conn.) 222; Johnson *v.* State, 80 Ind. 220.

12. McCabe *v.* Goodwine, 65 Ind. 288; Lyon *v.* Hampton, 20 Pa. St. 46; Murphy *v.* Partee, 7 Baxt. (Tenn.) 373; Saunders *v.* Prunty, 89 Va. 921, 17 S. E. 231.

13. *Alabama.*— Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301.

Illinois.— Harris *v.* Evans, 81 Ill. 419.

Mississippi.— Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec. 70.

New York.— People *v.* Hopson, 1 Den. 574.

Tennessee.— Sewell *v.* Morgan, 2 Heisk. 672.

See 30 Cent. Dig. tit. "Judgment," § 1690.

Contra.— Banta *v.* McClennan, 14 N. J. Eq. 120.

14. *Alabama.*— Fry *v.* Mobile Branch Bank, 16 Ala. 282.

Arkansas.—Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338. *Contra,* Anthony *v.* Humphries, 9 Ark. 176.

Colorado.— New Zealand Ins. Co. *v.* Maaz, 13 Colo. App. 493, 59 Pac. 213.

Connecticut.— Clarkson *v.* Beardsley, 45 Conn. 196.

Delaware.— Farmers' Bank *v.* Leonard, 4 Harr. 536.

Georgia.— Overby *v.* Hart, 68 Ga. 493; Foster *v.* Rutherford, 20 Ga. 676; Hammond *v.* Myrick, 14 Ga. 77; Deloach *v.* Myrick, 6 Ga. 410.

Illinois.— Gold *v.* Johnson, 59 Ill. 62; Gregory *v.* Stark, 4 Ill. 611; Cassell *v.* Morrison, 8 Ill. App. 175.

Indiana.— Doe *v.* Dutton, 2 Ind. 309, 52 Am. Dec. 510. But *compare* Lindley *v.* Kelley, 42 Ind. 294; McIntosh *v.* Chew, 1 Blackf. 289.

Maine.— Parlin *v.* Churchill, 30 Me. 187; Ware *v.* Pike, 12 Me. 303; Chandler *v.* Furbish, 8 Me. 408.

Maryland.— Sasscer *v.* Walker, 5 Gill & J. 102, 25 Am. Dec. 272.

Massachusetts.— McLellan *v.* Whitney, 15 Mass. 137; Gooch *v.* Atkins, 14 Mass. 378; Tate *v.* Anderson, 9 Mass. 92; Ladd *v.* Blunt, 4 Mass. 402.

Michigan.— Spafford *v.* Beach, 2 Dougl. 150.

Minnesota.— Davidson *v.* Gaston, 16 Minn. 230.

Mississippi.— Peale *v.* Bolton, 24 Miss. 630; Beazley *v.* Prentiss, 13 Sm. & M. 97; Pickens *v.* Marlow, 2 Sm. & M. 428.

New Hampshire.— Sullivan *v.* McKean, 1 N. H. 371.

New York.— Taylor *v.* Ranney, 4 Hill 619; Shepard *v.* Rowe, 14 Wend. 260.

Ohio.— Reynolds *v.* Rogers, 5 Ohio 169.

Pennsylvania.— Gro *v.* Huntington Bank, 1 Penr. & W. 425; Patterson *v.* Swan, 9 Serg. & R. 16. And see Lyons *v.* Ott, 6 Whart. 163.

South Dakota.— Wood *v.* Conrad, 2 S. D. 405, 50 N. W. 903.

Tennessee.— Boyd *v.* Mann, 9 Baxt. 349; Hogshead *v.* Carruth, 5 Yerg. 227.

Texas.— Cundiff *v.* Teague, 46 Tex. 475; Townsend *v.* Smith, 20 Tex. 465, 70 Am. Dec. 400; White *v.* Graves, 15 Tex. 183.

if the creditor takes and retains possession of the land,[15] or if it is set off and delivered to him under an elegit or otherwise.[16]

d. Release or Surrender of Levy. If property levied on under execution is abandoned or surrendered or restored to the judgment debtor, either on his giving collateral security or voluntarily by the creditor, so that the latter derives no benefit from his execution, there is no satisfaction of the judgment,[17] at least as between the parties, although it is said to be otherwise as against other creditors of the judgment defendant.[18]

2. Sale on Execution — a. In General. Where property of the debtor is sold on execution, and the sale stands, the judgment is satisfied to the extent of the net proceeds of the sale,[19] and it is sufficient for this purpose if the money is actually collected by the sheriff or paid into court.[20] If the judgment creditor himself

Vermont.— Tarbell *v.* Downer, 29 Vt. 339.
Virginia.— See Gatewood *v.* Goode, 23 Gratt. 880.
See 30 Cent. Dig. tit. "Judgment," § 1691.

15. Lawrence *v.* Pond, 17 Mass. 433; McLellan *v.* Whitney, 15 Mass. 137; Moore *v.* McMillan, 54 Vt. 27.

16. Hinesly *v.* Hunn, 5 Harr. (Del.) 236; Thomas *v.* Platts, 43 N. H. 629.

17. *Alabama.*— Rapier *v.* Gulf City Paper Co., 69 Ala. 476.
Arkansas.— Biscoe *v.* Sandefur, 14 Ark. 568; Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338.
California.— People *v.* Chisholm, 8 Cal. 29.
Georgia.— Ryan *v.* Lieber, 30 Ga. 433; Wyley *v.* Stanford, 22 Ga. 385.
Illinois.— Baker *v.* Mansur, etc., Implement Co., 67 Ill. App. 357; Smith *v.* Lozano, 1 Ill. App. 171.
Kentucky.— Allen *v.* Johnson, 4 J. J. Marsh. 235.
Maine.— Grosvenor *v.* Chesley, 48 Me. 369.
Minnesota.— Hastings First Nat. Bank *v.* Rogers, 15 Minn. 381.
Mississippi.— Morton *v.* Walker, 7 How. 554.
Missouri.— Young *v.* Cleveland, 33 Mo. 126, 82 Am. Dec. 155; Blackburn *v.* Jackson, 26 Mo. 308; Williams *v.* Boyce, 11 Mo. 537; Hess *v.* Powell, 29 Mo. App. 411; Clarkson *v.* Guernsey Furniture Co., 22 Mo. App. 109.
New Hampshire.— Churchill *v.* Warren, 2 N. H. 298, 9 Am. Dec. 73.
New York.— Peck *v.* Tiffany, 2 N. Y. 451; Voorhees *v.* Gros, 3 How. Pr. 262; Ostrander *v.* Walter, 2 Hill 329; Ontario Bank *v.* Hallett, 8 Cow. 192; Holbrook *v.* Champlin, Hoffm. 148.
North Carolina.— Binford *v.* Alston, 15 N. C. 351.
Oregon.— Wright *v.* Young, 6 Oreg. 87.
Pennsylvania.— Cummin's Appeal, 9 Watts & S. 73; Porter *v.* Boone, 1 Watts & S. 251; Hunt *v.* Breading, 12 Serg. & R. 37, 14 Am. Dec. 665.
South Carolina.— Stone *v.* Tucker, 2 Bailey 495.
Tennessee.— Williams *v.* Bowdon, 1 Swan 282.
Texas.— Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.
United States.— U. S. *v.* Dashiel, 3 Wall. 688, 18 L. ed. 268.
See 30 Cent. Dig. tit. "Judgment," § 1692.

18. Newsom *v.* McLendon, 6 Ga. 392; Duncan *v.* Harris, 17 Serg. & R. (Pa.) 436; Kehler *v.* Miller, 4 Leg. Gaz. (Pa.) 125.

19. *Indiana.*— Burr *v.* Mendenhall, 80 Ind. 49; McIntosh *v.* Chew, 1 Blackf. 289.
Mississippi.— Peale *v.* Bolton, 24 Miss. 630.
Nebraska.— Washburn *v.* Osgood, 38 Nebr. 804, 57 N. W. 529.
New York.— Harrison *v.* Gibbons, 71 N. Y. 58; Knight *v.* Church, 73 Hun 314, 26 N. Y. Suppl. 423; Hamlin *v.* Boughton, 4 Cow. 65.
North Carolina.— Halcombe *v.* Loudermilk, 48 N. C. 491.
United States — Shainwald *v.* Lewis, 46 Fed. 839.
See 30 Cent. Dig. tit. "Judgment," § 1694.
Limited lien.— A judgment limited to be a lien only upon certain real estate is not satisfied by a sheriff's sale of the property to which its lien is restricted. McMurray *v.* Hopper, 43 Pa. St. 468.

20. McDevitt's Appeal, 70 Pa. St. 373. The judgment is discharged where the sheriff has received the proceeds of the sale, although the money is tied up in his hands by an injunction procured by another creditor. Daboval *v.* Escurix, 8 La. 96. So where the money was paid into court but lost by the failure of a bank in which by agreement of parties it was deposited. Cake *v.* Bird, (Pa. 1888) 15 Atl. 774. And see Jones *v.* Schmidt, 55 N. J. L. 504, 27 Atl. 902. Or where the clerk for an unexplained reason did not pay over to plaintiff the whole amount collected. Hamburger *v.* Kosminsky, (Tex. Civ. App. 1901) 61 S. W. 958. But the possession of money by the sheriff, arising from the sale of lands, sufficient to satisfy a judgment earlier than that under which the sale was made, is not *per se* a satisfaction of the earlier judgment. State Bank *v.* Winger, 1 Rawle (Pa.) 295, 18 Am. Dec. 633. And conversely the redemption by a junior judgment creditor of lands sold on execution is not a satisfaction of his judgment either at law or in equity, although the premises to which he acquires title by such redemption are worth more than the money paid to redeem. Van Horne *v.* McLaren, 8 Paige (N. Y.) 285, 35 Am. Dec. 685.

becomes the purchaser at the sale, the judgment is satisfied in full if he bids the whole amount due him, otherwise *pro tanto*.[21]

b. Void or Irregular Sale. If a sale on execution is set aside or held to be invalid by reason of any defects or irregularities, the judgment is not discharged, and if satisfaction has been entered it will be vacated.[22] But if the sale was invalid because the debtor had no title to the property levied on, it is generally held that the judgment is nevertheless satisfied, especially if the judgment creditor himself was the purchaser,[23] although this is denied in some jurisdictions,[24] and it appears that a court of equity may relieve him from the consequences of his ineffectual purchase.[25]

3. Payment of Execution. A judgment is satisfied by a payment made to the sheriff or other officer holding an execution on the judgment,[26] and having authority thereunder to receive the payment,[27] of a sufficient amount in lawful money;[28]

21. *Illinois.*— Graham *v.* Holloway, 44 Ill. 385.

Indiana.— Johnston *v.* Watson, 7 Blackf. 174.

Iowa.— Miller *v.* Felkner, 42 Iowa 458.

Kentucky.— Covington, etc., Bridge Co. *v.* Walker, 2 Duv. 150.

Louisiana.—Commissioners' Bank *v.* Hodge, 8 Rob. 450; Zacharie *v.* Winter, 17 La. 76.

Maine.— Keene *v.* Lord, 45 Me. 613.

New York.— Kleinhenz *v.* Phelps, 6 Hun 568. But *compare* Tullock *v.* Cunningham, 1 Cow. 256; Schermerhorn *v.* Barhydt, 9 Paige 28.

Pennsylvania.— Sahl *v.* Wright, 6 Pa. St. 433.

Tennessee.— Gonce *v.* McCoy, 101 Tenn. 587, 49 S. W. 754, 70 Am. St. Rep. 714.

Washington.— Hanna *v.* Savage, 21 Wash. 555, 58 Pac. 1069.

United States.— Walker *v.* Powers, 104 U. S. 245, 26 L. ed. 729.

See 30 Cent. Dig. tit. "Judgment," § 1694.

22. *Arkansas.*— Caudle *v.* Dare, 7 Ark. 46.

California.— Smith *v.* Reed, 52 Cal. 345.

Colorado.— Copeland *v.* Colorado State Bank, 13 Colo. App. 489, 59 Pac. 70.

Indiana.— Johnson *v.* State, 80 Ind. 220.

Iowa.— Farmer *v.* Sasseen, 63 Iowa 110, 18 N. W. 714.

Kentucky.— Duvall *v.* Waggener, 2 B. Mon. 183; Wilson *v.* Percival, 1 Dana 419.

Louisiana.— Baham *v.* Langfield, 16 La. Ann. 156; Dunlap *v.* Sims, 2 La. Ann. 239; Reboul *v.* Behren, 9 La. 90.

Massachusetts.— Gooch *v.* Atkins, 14 Mass. 378.

Minnesota.— Shelley *v.* Lash, 14 Minn. 498, holding that where it appears from the sheriff's return that a sale on execution was void, and no satisfaction of the judgment, the debtor may still show that the purchase-price at such sale was received by agreement in satisfaction of the judgment.

Ohio.— Arnold *v.* Fuller, 1 Ohio 458.

Pennsylvania.— Hoard *v.* Wilcox, 47 Pa. St. 51.

Texas.— Townsend *v.* Smith, 20 Tex. 465, 70 Am. Dec. 400.

See 30 Cent. Dig. tit. "Judgment," § 1694.

Compare De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666; Driggs *v.* Simson, 60 N. Y. 641.

23. *Alabama.*— Thomas *v.* Glazener, 90 Ala. 537, 8 So. 153, 24 Am. St. Rep. 830; Goodbar *v.* Daniel, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76.

New York.— Lansing *v.* Quackenbush, 5 Cow. 38. *Contra*, Adams *v.* Smith, 5 Cow. 280.

North Carolina.— Halcombe *v.* Loudermilk, 48 N. C. 491.

Ohio.— Hollister *v.* Dillon, 4 Ohio St. 197; Beall *v.* Price, 13 Ohio 368, 42 Am. Dec. 204.

Pennsylvania.— Freeman *v.* Caldwell, 10 Watts 9.

Texas.— O'Conner *v.* Silver, 26 Tex. 606.

See 30 Cent. Dig. tit. "Judgment," § 1694.

24. Scherr *v.* Himmelmann, 53 Cal. 312; Cross *v.* Zane, 47 Cal. 602; Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371; Ritter *v.* Henshaw, 7 Iowa 98; Tudor *v.* Taylor, 26 Vt. 444.

25. Warner *v.* Helm, 6 Ill. 220; Muir *v.* Craig, 3 Blackf. (Ind.) 293, 25 Am. Dec. 111; Price *v.* Boyd, 1 Dana (Ky.) 436; Henry *v.* Keys, 5 Sneed (Tenn.) 489.

26. Motz *v.* Stowe, 83 N. C. 434; Slusher *v.* Washington County, 27 Pa. St. 205.

But there is no discharge of the judgment where the funds are afterward withdrawn and the sheriff strikes out the entry of satisfaction. Tarkington *v.* Guyther, 35 N. C. 100.

27. The judgment is not satisfied by payment to the officer where the execution in his hands has lost its vitality (Chapman *v.* Cowles, 41 Ala. 103, 91 Am. Dec. 508; Harris *v.* Ellis, 30 Tex. 4, 94 Am. Dec. 296. But see Byrne *v.* Taylor, 2 Rob. (La.) 341), unless the creditor receives the money and accepts it in satisfaction of the judgment (Chapman *v.* Cowles, *supra*).

28. Payment to the officer in depreciated or uncurrent bank-notes does not satisfy the execution (Morton *v.* Walker, 7 How. (Miss.) 554; Anderson *v.* Carlisle, 7 How. 408), nor does payment in promissory notes (Cooney *v.* Wade, 4 Humphr. (Tenn.) 444, 40 Am. Dec. 657. *Compare* Howe *v.* Buffalo, etc., R. Co., 38 Barb. (N. Y.) 124). But it is said that the receipt of property by a sheriff in satis-

and this is true whether the payment is made by the debtor himself or the money is loaned or advanced to him.[29]

4. RETURN OF EXECUTION. The return of an execution "satisfied" is presumptive,[30] or according to some of the cases conclusive,[31] evidence of the satisfaction of the judgment; but not where it recites an irregular or unauthorized act on the part of the officer.[32] On the other hand no satisfaction is shown from the mere fact that an execution was issued and never returned.[33] But if the officer actually received satisfaction of the execution, the judgment is discharged, although he makes no return on the execution or makes a false return.[34]

5. PERSONS JOINTLY LIABLE. A joint judgment against two defendants is *prima facie* satisfied by levy of execution on the property of one of them;[35] but there is no absolute satisfaction if the levy proves unproductive or the property is released or restored to the debtor,[36] except in the case where the other defendant occupies the position of a mere surety.[37]

6. ARREST OF DEFENDANT ON CAPIAS OR EXECUTION — a. Effect in General. The arrest and imprisonment of a judgment debtor on an execution or a capias ad satisfaciendum is a satisfaction of the judgment in such sense that while the imprisonment lasts no proceedings can be taken against his property;[38] but it does not work an absolute discharge or extinguishment of the judgment.[39]

b. Release or Escape of Debtor. At common law the discharge of defendant from custody under a capias, by the voluntary act of plaintiff, operated as an absolute satisfaction of the judgment.[40] But the more modern rulings repudiate

faction of an execution satisfies the judgment also. Trigg *v.* Harris, 49 Mo. 176.

29. Thompson *v.* Wallace, 3 Ala. 132; Loughry *v.* Mail, 34 Ill. App. 523; Merritt *v.* Richey, 97 Ind. 236.

But where the money is paid by a third person with the expectation and intention that the judgment creditor shall assign the judgment to him, it is a purchase and not a payment of the judgment. Smith *v.* Miller, 25 N. Y. 619.

30. Ringgold *v.* Edwards, 7 Ark. 86; Parker *v.* Sedwick, 5 Md. 281; Todd *v.* Williamson, 1 McCord (S. C.) 148.

31. Walters *v.* Moore, 90 N. C. 41; Snead *v.* Rhodes, 19 N. C. 386; Estes *v.* Cooke, 12 R. I. 6.

32. Mitchell *v.* Hockett, 25 Cal. 538, 85 Am. Dec. 151; Hawkeye Ins. Co. *v.* Luckow, 76 Iowa 21, 39 N. W. 923; Aultman *v.* McGrady, 58 Iowa 118, 12 N. W. 233.

33. Runyan *v.* Weir, 8 N. J. L. 286.

34. Houston *v.* Crutchfield, 22 Ala. 76; State *v.* Salyers, 19 Ind. 432; Dubois *v.* Dubois, 2 Wend. (N. Y.) 416; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Fifield *v.* Richardson, 34 Vt. 410.

35. Kershaw *v.* Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70; Davis *v.* Barkley, 1 Bailey (S. C.) 140. *Contra*, Walker *v.* Bradley, 2 Ark. 578.

Separate judgments in trespass.— A plaintiff who has sued several joint trespassers in separate actions, recovered separate judgments, and taken out execution on one of them, without obtaining satisfaction, cannot maintain an action upon any of the other judgments. Boardman *v.* Acer, 13 Mich. 77, 87 Am. Dec. 736.

Actual satisfaction obtained by levy on property of one of defendants prevents any proceedings against the other, and entitles him to have satisfaction entered of record. Bowser's Appeal, 101 Pa. St. 466.

36. Slater's Appeal, 28 Pa. St. 169; Hyde *v.* Rogers, 59 Wis. 154, 17 N. W. 127.

37. Mulford *v.* Estudillo, 23 Cal. 94; La Farge *v.* Herter, 4 Barb. (N. Y.) 346; Bank *v.* Fordyce, 9 Pa. St. 275, 49 Am. Dec. 561; Finley *v.* King, 1 Head (Tenn.) 123; Brown *v.* McDonald, 8 Yerg. (Tenn.) 158, 29 Am. Dec. 112. *Contra*, Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

38. Queen Anne's County *v.* Pratt, 10 Md. 5; Miller *v.* Miller, 5 N. J. L. 508; Beloit Bank *v.* Beale, 7 Bosw. (N. Y.) 611; Fassett *v.* Tallmadge, 15 Abb. Pr. (N. Y.) 205; Noe *v.* Christie, 46 How. Pr. (N. Y.) 496; Stover *v.* Duren, 3 Strobh. (S. C.) 448, 51 Am. Dec. 634; Osborne *v.* Bowman, 2 Bay (S. C.) 208.

39. *Maine.*— Moor *v.* Towle, 38 Me. 133.

Massachusetts.—Clark *v.* Goodwin, 14 Mass. 237; Porter *v.* Ingraham, 10 Mass. 88.

Missouri.— Warrensburg *v.* Simpson, 22 Mo. App. 695.

New York.—Codwise *v.* Field, 9 Johns. 263. *Compare* Cooper *v.* Bigalow, 1 Cow. 56.

South Carolina.— Hamilton *v.* Bredeman, 12 Rich. 464; Conner *v.* Winn, 1 Brev. 185.

United States.— Tayloe *v.* Thomson, 5 Pet. 358, 8 L. ed. 154.

See 30 Cent. Dig. tit. "Judgment." § 1699.

40. *Connecticut.*— Loomis *v.* Storrs, 4 Conn. 440.

Illinois.— Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201.

Maryland.— Harden *v.* Campbell, 4 Gill 29.

Massachusetts.—King *v.* Goodwin, 16 Mass. 63; Forster *v.* Fuller, 6 Mass. 58, 4 Am. Dec. 87.

New Hampshire.— Abbott *v.* Osgood, 38 N. H. 280; Bunker *v.* Hodgdon, 7 N. H. 263.

this doctrine,[41] and it is held also that further proceedings on the judgment are not precluded if defendant regains his liberty by an escape,[42] by the act of the law,[43] by a discharge under the insolvency laws,[44] or by reason of plaintiff's refusing to pay the prison fees.[45]

c. Persons Jointly Liable. It was also the rule of the common law that the arrest of one of two joint defendants on capias suspended the right to take any proceedings on the judgment against the other,[46] and that the release or escape of defendant who was imprisoned discharged the judgment as to all defendants.[47] But the more recent decisions hold that neither the arrest of the one defendant nor his escape will operate as a satisfaction of the judgment as to the other.[48]

G. Satisfaction of One of Several Judgments on Same Cause of Action — 1. In General. Where two judgments are recovered upon the same cause of action against the same defendant, as where there are different judgments in different states, or where judgment is recovered on a security given for the payment of the original judgment, there can be but one satisfaction, and therefore the payment or discharge of either judgment satisfies the other.[49] This rule,

New Jersey.— Strong *v.* Linn, 5 N. J. L. 799.

New York.— Bonesteel *v.* Garlinghouse, 60 Barb. 338; Poucher *v.* Holley, 3 Wend. 184; Lathrop *v.* Briggs, 8 Cow. 171; Powers *v.* Wilson, 7 Cow. 274; Utica Ins. Co. *v.* Power, 3 Paige 365.

Pennsylvania.— Clark *v.* Everett, 2 Grant 416; Jordon *v.* Minster, 5 Pa. L. J. 542.

South Carolina.—Berry *v.* Hoke, 1 Rich. 76.

Virginia.— Windrum *v.* Parker, 2 Leigh 361.

United States.— U. S. *v.* Stansbury, 1 Pet. 573, 7 L. ed. 267.

See 30 Cent. Dig. tit. "Judgment," § 1700.

41. *Illinois.*— Lambert *v.* Wiltshire, 144 Ill. 517, 33 N. E. 538; Strode *v.* Broadwell, 36 Ill. 419.

Indiana.—Wakeman *v.* Jones, 1 Ind. 517; Prentiss *v.* Hinton, 6 Blackf. 35.

Louisiana.— Martin *v.* Ashcraft, 8 Mart. N. S. 313; Abat *v.* Whitman, 7 Mart. N. S. 162.

Maine.— Bates *v.* Tallman, 35 Me. 274.

New Hampshire.—Abbott *v.* Osgood, 38 N. H. 280.

New York.— Hoyle *v.* Murray, 42 N. Y. App. Div. 313, 59 N. Y. Suppl. 200; Rowe *v.* Guilleaume, 15 Hun 462; Hoyle *v.* McCrea, 26 Misc. 290, 55 N. Y. Suppl. 49; Pettengill *v.* Mather, 16 Abb. Pr. 399; Woodruff *v.* McGuire, 1 N. Y. City Ct. 281; Codwise *v.* Gelston, 10 Johns. 507.

See 30 Cent. Dig. tit. "Judgment," § 1700.

42. Ford *v.* Gwinn, 3 Harr. & J. (Md.) 496; Coburn *v.* Palmer, 10 Cush. (Mass.) 273; Appleby *v.* Clark, 10 Mass. 59; Jackson *v.* Hampton, 28 N. C. 34; Saunders *v.* McCool, 1 Strobh. (S. C.) 22.

43. Spencer *v.* Garland, 20 Me. 75; Bonesteel *v.* Garlinghouse, 60 Barb. (N. Y.) 338; People *v.* Rossiter, 4 Cow. (N. Y.) 143; Griswold *v.* Hill, 11 Fed. Cas. No. 5,836, 2 Paine 492.

44. Strode *v.* Broadwell, 36 Ill. 419; Owen *v.* Glover, 18 Fed. Cas. No. 10,630, 2 Cranch C. C. 578.

45. Lambert *v.* Wiltshire, 144 Ill. 517, 33 N. E. 538; Tatem *v.* Potts, 5 Blackf. (Ind.) 534; Hidden *v.* Saunders, 2 R. I. 391; Nadin *v.* Battie, 5 East 147. *Contra*, Strawsine *v.* Salsbury, 75 Mich. 542, 42 N. W. 966.

46. Koenig *v.* Steckel, 58 N. Y. 475; Chapman *v.* Hatt, 11 Wend. (N. Y.) 41; Wakeman *v.* Lyon, 9 Wend. (N. Y.) 241.

47. Kasson *v.* People, 44 Barb. (N. Y.) 347; Ransom *v.* Keyes, 9 Cow. (N. Y.) 128; McFadden *v.* Parker, 4 Dall. (Pa.) 275, 1 L. ed. 831; Dewey *v.* Bradbury, 2 Tyler (Vt.) 201; Bailey *v.* Kimbal, 1 D. Chipm. (Vt.) 151; Hamilton *v.* Holcomb, 7 Can. L. J. 40.

48. *Kentucky.*— Scott *v.* Colmesnil, 7 J. J. Marsh. 416.

Massachusetts.— Raymond *v.* Butterworth, 139 Mass. 471, 1 N. E. 126.

New York.— Hoyle *v.* McCrea, 42 N. Y. App. Div. 629, 59 N. Y. Suppl. 202.

Ohio.— King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

United States.—Hunter *v.* U. S., 5 Pet. 173, 8 L. ed. 86; U. S. *v.* Stansbury, 1 Pet. 573, 7 L. ed. 267.

See 30 Cent. Dig. tit. "Judgment," § 1701.

49. *California.*— Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317.

Connecticut.—Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154.

Georgia.— Tarver *v.* Rankin, 3 Ga. 210.

Illinois.— Everingham *v.* National City Bank, 25 Ill. App. 637 [*affirmed* in 124 Ill. 527, 17 N. E. 26].

Maine.— Bartlett *v.* Sawyer, 46 Me. 317.

Montana.—Work *v.* Northern Pac. R. Co., 11 Mont. 513, 29 Pac. 280.

New York.— Bowne *v.* Joy, 9 Johns. 221.

Pennsylvania.— Bowser's Appeal, 101 Pa. St. 466; Gross' Estate, 6 Pa. Co. Ct. 478.

Wisconsin.—Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846.

United States.— Lynch *v.* Burt, 132 Fed. 417, 67 C. C. A. 305.

See 30 Cent. Dig. tit. "Judgment," § 1702.

Judgment of affirmance.— Where the judgment of an appellate court merely affirms the judgment appealed from, and does not award a new judgment for the whole amount, but only for the costs of appeal, a satisfaction of the judgment of affirmance operates only to

however, does not apply to costs, but on the contrary the costs can be collected on all the judgments.[50]

2. Persons Jointly Liable. Where several judgments have been rendered against parties jointly and severally liable on the same obligation, and one of the judgments is paid, such payment operates as a satisfaction of all the judgments, except as to costs,[51] and except where the judgments are unequal in amount, in which case the payment of the smaller satisfies the larger only *pro tanto*.[52] So also in actions of tort, where plaintiff recovers separate judgments against the joint tort-feasors, the satisfaction of any one of the judgments will release the other defendants from liability,[53] saving plaintiff's right to elect *de melioribus damnis*, of which he cannot be deprived by the payment into court of the amount of the smaller judgment.[54]

discharge that judgment, and does not satisfy the judgment below. Beers *v.* Hendrickson, 6 Rob. (N. Y.) 53.

A judgment against a garnishee is ancillary to and dependent upon the judgment against the principal debtor; and when the latter is paid and satisfied, the former is *functus officio*, and ceases to be a valid obligation for any purpose, except as to costs. Hammett *v.* Morris, 55 Ga. 644.

50. Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Stevens *v.* Briggs, 14 Vt. 44, 39 Am. Dec. 209.

51. *Alabama.*— Abercrombie *v.* Conner, 10 Ala. 293. And see Lyon *v.* Bolling, 9 Ala. 463, 44 Am. Dec. 444. *Compare* Clements *v.* Crawford, 1 Ala. 531.

Georgia.— Newsom *v.* McLendon, 6 Ga. 392. *Compare* Stiles *v.* Eastman, 1 Ga. 205.

Indiana.— Indianapolis First Nat. Bank *v.* Indianapolis Piano Mfg. Co., 45 Ind. 5.

Kentucky.— Mason County *v.* Lee, 1 T. B. Mon. 247. *Contra*, Monticello Nat. Bank *v.* Bryant, 13 Bush 419.

Mississippi.— McNutt *v.* Wilcox, Freem. 116.

New York.— Booth *v.* Farmers', etc., Nat. Bank, 74 N. Y. 228; Craft *v.* Merrill, 14 N. Y. 456.

Oregon.— Cox *v.* Smith, 10 Oreg. 418.

South Carolina.— State Bank *v.* Mosely, 1 Strobh. 414; Noonan *v.* Gray, 1 Bailey 437; Davis *v.* Barkley, 1 Bailey 140. *Compare* Caldwell *v.* Martin, 29 S. C. 22, 6 S. E. 857; Wilson *v.* Wright, 7 Rich. 399, holding that where individual judgments are entered against the principals of two promissory notes, in which each appears as surety for the other, and no appeal is taken, and afterward one debtor pays the judgment against himself, it will be presumed that the judgments are for separate debts, and the payment on one judgment cannot be applied in satisfaction of the other.

Tennessee.—Topp *v.* Alabama Branch Bank, 2 Swan 184; Hewett *v.* Hill, 3 Yerg. 241.

Wisconsin.— Sherman *v.* Brett, 7 Wis. 139.

See 30 Cent. Dig. tit. "Judgment," § 1703.

Effect of release.— Where, in an action against two defendants, separate judgments are rendered, a release of one defendant, made with the consent of the other, does not release such other defendant, where the release expressly provides to the contrary. Whittemore *v.* Judd Linseed, etc., Oil Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708.

52. Guerry *v.* Perryman, 2 Ga. 63; Lumpkin *v.* Ferguson, 10 Rich. (S. C.) 424.

53. *California.*— Butler *v.* Ashworth, 110 Cal. 614, 43 Pac. 4, 386.

Indiana.—Ashcraft *v.* Knoblock, 146 Ind. 169, 45 N. E. 69.

Missouri.— Page *v.* Freeman, 19 Mo. 421.

Nebraska.— Bryant *v.* Reed, 34 Nebr. 720, 52 N. W. 694.

New York.—Woods *v.* Panghurn, 75 N. Y. 495; Gross *v.* Pennsylvania, etc., R. Co., 65 Hun 191, 20 N. Y. Suppl. 28; Knickerbacker *v.* Colver, 8 Cow. 111.

Ohio.—Wright *v.* Lathrop, 2 Ohio 33, 15 Am. Dec. 529.

Pennsylvania.— Dicken *v.* Balbach, 9 Pa. Dist. 449; Knox *v.* Work, 1 Browne 101.

Texas.— McGehee *v.* Shafer, 15 Tex. 198.

United States.— Shainwald *v.* Lewis, 46 Fed. 839; Keep *v.* Indianapolis, etc., R. Co., 9 Fed. 625, 3 McCrary 208.

See 30 Cent. Dig. tit. "Judgment," § 1703.

But in Kansas it is held that a cause of action against several, founded on tort, when reduced to judgment, becomes as to all a joint indebtedness, which may be discharged as to one, without releasing the others as to any unpaid balance. Missouri, etc., R. Co. *v.* Haber, 56 Kan. 717, 44 Pac. 619.

Partial satisfaction.— Where separate actions are prosecuted to judgment against joint tort-feasors, partial execution of the judgment against one is not such satisfaction as will release the others. McVey *v.* Manatt, 80 Iowa 132, 45 N. W. 548.

Costs.— Where separate judgments are recovered against joint tort-feasors, payment of one judgment will not deprive plaintiff of his right to costs in the other action. Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33.

Dismissal of one suit.— Where separate actions have been commenced against two joint wrong-doers, one of which has been prosecuted to judgment, a dismissal of the pending action upon payment of a sum intended to be in settlement of costs and an acknowledgment of satisfaction do not operate to satisfy the judgment either wholly or *pro tanto*. Bell *v.* Perry, 43 Iowa 368.

54. Blann *v.* Crocheron, 20 Ala. 320; Knott *v.* Cunningham, 2 Sneed (Tenn.) 204; Power *v.* Baker, 27 Fed. 396.

H. Operation and Effect of Satisfaction — 1. In General. The payment and satisfaction of a judgment operates to extinguish it and to put an end to its vitality for all purposes whatsoever,[55] and also to extinguish the original debt or claim,[56] except where the satisfaction was obtained wrongfully or fraudulently, in which case, on its being revoked or vacated, the judgment will again be in force.[57] It is also generally held that a judgment once fully paid and satisfied cannot be kept alive by the agreement of the parties to stand as security for other debts or liabilities, whether to the same or another plaintiff,[58] although in some states this is allowed.[59] But there can be no complete satisfaction of a judgment by payment unless the payment covers interest, if any,[60] and the costs chargeable against defendant.[61]

2. Recovery of Payments. Money collected on execution or paid in satisfaction of a judgment may be recovered back on the ground that the judgment has subsequently been reversed or vacated,[62] and as well against an assignee as against the original plaintiff,[63] or where it appears that by mistake the judgment has been paid twice;[64] but not on the ground that the execution was irregularly issued, both

55. *Indiana.*— Boos *v.* Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.

Iowa.— Cotter *v.* O'Connell, 48 Iowa 552.

Nebraska.— Ebel *v.* Stringer, (1905) 102 N. W. 466.

New Jersey.— Boice *v.* Conover, (Ch. 1905) 61 Atl. 159. See also Stout *v.* Vankirk, 10 N. J. Eq. 78.

New York.— Matter of Browne, 35 Misc. 362, 71 N. Y. Suppl. 1034; Storz *v.* Boyce, 34 Misc. 279, 69 N. Y. Suppl. 612.

Pennsylvania.— Taber *v.* Olmsted, 158 Pa. St. 351, 27 Atl. 971; Hendrick *v.* Thomas, 106 Pa. St. 327.

South Carolina.— See Fowler *v.* Wood, 31 S. C. 398, 10 S. E. 93, 5 L. R. A. 721.

Texas.— Singer Mfg. Co. *v.* Herman Herschlerode Mfg. Co., 1 Tex. App. Civ. Cas. § 741.

See 30 Cent. Dig. tit. "Judgment," § 1704.

Appeal.— After a judgment creditor has accepted the amount tendered in payment of the judgment, he cannot return the money and take an appeal on the ground that his recovery was not large enough, as the judgment is satisfied. Portland Constr. Co. *v.* O'Neil, 24 Oreg. 59, 32 Pac. 766.

Effect as to junior creditors.— Payment by the debtor operates for the benefit and as a release in favor of creditors having liens on the same fund bound by the judgment. Stout *v.* Vankirk, 10 N. J. Eq. 78.

56. Quimby *v.* Carter, 20 Me. 218; Noah *v.* German Ins. Co., 78 Mo. App. 370.

57. Crosby *v.* Wood, 6 N. Y. 369; Bowman *v.* Forney, 15 Pa. Co. Ct. 134. The court will protect a party interested in the judgment to be obtained in a suit, and who has control of the same by counsel, against any unjust discharge by plaintiff of record, who is interested in the remainder of the judgment. Sowles *v.* Plattsburgh First Nat. Bank, 133 Fed. 846.

58. Flagg *v.* Kirk, 20 D. C. 335; Warren County Bank *v.* Kemble, 61 Mo. App. 215; Craft *v.* Merrill, 14 N. Y. 456; Truscott *v.* King, 6 N. Y. 147; Winslow *v.* Clark, 2 Lans. (N. Y.) 377; Averill *v.* Loucks, 6 Barb. (N. Y.) 19; Troup *v.* Wood, 4 Johns. Ch. (N. Y.) 228; Fowler *v.* Wood, 31 S. C. 398, 10 S. E. 93, 5 L. R. A. 721.

59. Wood *v.* Currey, 49 Cal. 359; Peirce *v.* Black, 105 Pa. St. 342; Milligan's Appeal, 104 Pa. St. 503; Fleming *v.* Beaver, 2 Rawle (Pa.) 128, 19 Am. Dec. 629. But see Thompson *v.* Sankey, 175 Pa. St. 594, 34 Atl. 1104.

Assignment.— Where a judgment debtor pays to the creditor an amount equal to the judgment, and thereupon causes it to be assigned as a payment to another of his creditors, the transaction does not discharge the judgment, but it continues valid in the hands of the assignee. Howk *v.* Kimball, 2 Blackf. (Ind.) 309. But in Nebraska it is said that when payment of a judgment has been made by one who is primarily liable, it operates as an absolute satisfaction, even though an assignment be made to a third person with the intention of keeping the judgment alive. Plattsmouth First Nat. Bank *v.* Gibson, 60 Nebr. 767, 84 N. W. 259; Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616.

60. Manning *v.* Norwood, 2 Nott & M. (S. C.) 395.

61. Long *v.* Walker, 105 N. C. 90, 10 S. E. 858; Altman *v.* Klingensmith, 6 Watts (Pa.) 445.

62. *Alabama.*— Florence Cotton, etc., Co. *v.* Louisville Banking Co., 138 Ala. 588, 36 So. 456, 100 Am. St. Rep. 50.

Kentucky.— Smith *v.* Bohon, 12 Bush 448.

Massachusetts.— Stevens *v.* Fitch, 11 Metc. 248; Lazell *v.* Miller, 15 Mass. 207.

New Jersey.— Scott *v.* Conover, 10 N. J. L. 61.

New York.— Lott *v.* Swezey, 29 Barb. 87; Garr *v.* Martin, 1 Hilt. 358.

See 30 Cent. Dig. tit. "Judgment," § 1705.

63. Florence Cotton, etc., Co. *v.* Louisville Banking Co., 138 Ala. 588, 36 So. 456, 100 Am. St. Rep. 50. But *compare* Lyman *v.* Edwards, 2 Day (Conn.) 153.

64. Logan *v.* Sumter, 28 Ga. 242, 73 Am. Dec. 755; Williamson *v.* Johnson, 5 N. J. Eq. 537. And see Wilson *v.* Taylor, 9 Ohio St. 595, 75 Am. Dec. 488. But *compare* Deseret

parties at the time supposing it to be regular,[65] or on the ground of a newly discovered defense to the original demand.[66]

I. Entry of Satisfaction and Vacation Thereof — 1. Entry of Satisfaction of Record — a. In General. According to the usual practice, when a judgment is satisfied, an entry acknowledging or certifying that fact should be made on the record or judgment docket[67] by the holder of the judgment in person or his attorney of record,[68] although in some jurisdictions it is to be made by the clerk of the court on direction of the plaintiff or the owner of the judgment.[69]

b. Execution of Satisfaction Piece. A satisfaction piece is a written memorandum made by the holder of a judgment on receiving satisfaction of it,[70] duly executed by him,[71] and witnessed or otherwise proved,[72] acknowledging satisfaction of the judgment,[73] delivered to the judgment debtor,[74] and thereupon filed and entered on the judgment-roll.[75]

c. Entry of Credits on Partial Satisfaction. Partial payments on a judgment

Nat. Bank *v.* Nuckolls, 30 Nebr. 754, 47 N. W. 202.

65. Roth *v.* Schloss, 6 Barb. (N. Y.) 308.

66. White *v.* Ward, 9 Johns. (N. Y.) 232.

67. Booth *v.* Farmers', etc., Nat. Bank, 4 Lans. (N. Y.) 301; Lownds *v.* Remsen, 7 Wend. (N. Y.) 35.

An entry on the docket of the filing of a receipt of part of the sum due on a judgment against two, in full of the whole judgment against one, is not a legal entry of satisfaction or a release of the judgment. Campbell *v.* Booth, 8 Md. 107.

Indexing satisfaction.— Although it is a common practice in Pennsylvania to note the satisfaction of a judgment on the index, it is optional with the protbonotary to do so, as the judgment is the proper place to look for an entry of satisfaction. McIntire *v.* Irwin, 1 Chest. Co. Rep. (Pa.) 457.

A receipt in full given by plaintiff to a former sheriff upon an execution issued to his successor is not an acknowledgment of record to the satisfaction of the judgment. Spruill *v.* Bateman, 20 N. C. 627.

A quitclaim deed, purporting to release a judgment lien, but so recorded as to omit the particular tract of land on which the lien rests, does not satisfy the judgment. Huff *v.* Morton, 83 Mo. 399.

Payment of costs may be made a condition to entry of satisfaction. Naretti *v.* Scully, 133 Fed. 828.

68. See Rounsaville *v.* Hazen, 33 Kan. 71, 5 Pac. 422.

In Pennsylvania the proper method of entering satisfaction of a judgment obtained under the act of Feb. 24, 1806 (Purdon Dig. p. 825, pl. 32), on a judgment bond, recovered without the agency of an attorney or declaration filed, where the amount is not collected by execution, is that it shall be entered upon the record by the holder, personally or by attorney, such satisfaction to be attested by the prothonotary, who cannot be required upon plaintiff's order to enter such satisfaction. McIntire *v.* Irwin, 1 Chest. Co. Rep. (Pa.) 457.

69. Waters *v.* Engle, 53 Md. 179; Campbell *v.* Booth, 8 Md. 107; Faulkner *v.* Suydam, 7 Rob. (N. Y.) 614.

Authentication by clerk.— An entry made on the margin of a judgment, by the clerk, at a term subsequent to the entry of the judgment, stating that plaintiff appeared in open court and acknowledged satisfaction of the judgment, but not signed or attested by the clerk or any other person, is not a satisfaction of the judgment, under the statute. Cummins *v.* Webb, 4 Ark. 229.

70. Archbold Pr. 722; Black L. Dict.

71. See Earley *v.* St. Patrick's Church Soc., 81 Hun (N. Y.) 369, 30 N. Y. Suppl. 979.

Duty to prepare.— A judgment debtor demanding a satisfaction-piece is bound to offer the instrument to be executed to the creditor, and to offer to pay the expense of its execution. Pettengill *v.* Mather, 16 Abb. Pr. (N. Y.) 399; Carr *v.* Coulter, 2 Ont. Pr. 226.

Execution by corporation.— A satisfaction-piece of a judgment in favor of a corporation, which shows on its face that it was executed by its president in his official capacity, is binding upon the corporation, although not executed in its name or under its seal. Booth *v.* Farmers', etc., Nat. Bank, 50 N. Y. 396.

Execution by attorney.— Plaintiff's signature to the satisfaction-piece will be dispensed with, and his attorney in the cause be authorized to acknowledge satisfaction, upon its being shown that the attorney is authorized by plaintiff to arrange the claim, and that the delay in obtaining plaintiff's signature will be prejudicial (Rudall *v.* Hurd, 3 Can. L. J. 14; Pawson *v.* Wightman, 2 Can. L. J. 184), or where the amount of the judgment is small and plaintiff resides without the jurisdiction (Montreal Bank *v.* Cronk, 3 Can. L. J. 32), or where plaintiff resides abroad and has given a written authority to an attorney to acknowledge satisfaction for him (Darling *v.* Wright, 3 Can. L. J. 50).

72. Earley *v.* St. Patrick's Church Soc., 81 Hun (N. Y.) 369, 30 N. Y. Suppl. 979.

73. Matter of Wilcox, 1 Misc. (N. Y.) 55, 21 N. Y. Suppl. 780, holding such practice proper in acknowledging satisfaction of a surrogate's decree for the payment of money.

74. Earley *v.* St. Patrick's Church Soc., 81 Hun (N. Y.) 369, 30 N. Y. Suppl. 979.

75. Lownds *v.* Remsen, 7 Wend. (N. Y.) 35.

should be credited of record,[76] and it will be so ordered by the court on proper proceedings for that purpose,[77] and on the demand of a person entitled to such relief;[78] and conversely, a false or mistaken entry of a credit may be ordered corrected or vacated.[79]

d. Effect of Entry of Satisfaction. A satisfaction of a judgment, entered of record by the act of the parties, is *prima facie* evidence that the creditor has received payment of the amount of the judgment or its equivalent,[80] and operates as an extinguishment of the debt;[81] but as it is only in the nature of a receipt, it may be explained, qualified, or even contradicted by parol evidence.[82] But an order of court, made on due application and hearing, requiring satisfaction to be entered, is a judicial act, and entitled to all the respect due to a record,[83] although it may be impeached for fraud or collusion.[84]

2. Proceedings to Compel Satisfaction — a. Grounds For Relief. Where a judgment creditor has received actual payment of the judgment or any equivalent therefor, or the obligation of the judgment is otherwise discharged, but he refuses to acknowledge or enter satisfaction, the court having control of the judgment may compel him to satisfy it, or may order satisfaction to be entered officially.[85] But such action can only be based on matter arising subsequent to the

76. Wolford *v.* Bowen, 57 Minn. 267, 59 N. W. 195. Where a judgment debtor has been compelled by garnishment to pay a debt of his judgment creditor, the amount so paid should be allowed as a credit on the judgment. Brandenburgh *v.* Beach, 32 S. W. 168, 17 Ky. L. Rep. 560.

77. Perrine *v.* Carlisle, 19 Ala. 686; Hems *v.* Arnold, 188 Ill. 527, 59 N. E. 421; Colclough *v.* Rhodus, 2 Rich. (S. C.) 76.

Enjoining execution.— The fact that a judgment has been partially paid, without being satisfied of record to the extent of the payment, is no ground for enjoining an execution issued for the face of the judgment; the injunction should be limited to the amount paid. Jewell *v.* Thorn, 6 La. Ann. 95.

An entry of credit on a judgment by order of court, after the court has adjourned, has not the same effect as a remittitur. Rowan *v.* People, 18 Ill. 159.

Evidence.— The burden of proof is on the party asserting that payments have been made on a judgment and should be credited of record (Fuhrman *v.* Fuhrman, 13 Lanc. Bar (Pa.) 123), and the evidence should be clear and satisfactory (Bishop *v.* Goodhart, 135 Pa. St. 374, 19 Atl. 1026).

78. Whiting *v.* Beebe, 12 Ark. 421, holding that a junior judgment creditor has a right to demand that payments made on the senior judgment shall be duly credited.

79. Brunner *v.* Brennan, 49 Ind. 98; Indiana State Bank *v.* Harrow, 26 Iowa 426.

80. *Arkansas.*— Carter *v.* Adamson, 21 Ark. 287.

Indiana.— Downey *v.* Washburn, 79 Ind. 242.

New York.— Rochester Distilling Co. *v.* Devendorf, 72 Hun 622, 25 N. Y. Suppl. 529; Packard *v.* Hill, 7 Cow. 434.

North Carolina.— Isler *v.* Murphy, 83 N. C. 215.

Pennsylvania.— Kerr's Appeal, 104 Pa. St. 282.

Tennessee.— Gentry *v.* Wagner, 9 Lea 682.

See 30 Cent. Dig. tit. "Judgment," § 1718.

81. Weston *v.* Clark, 37 Mo. 568.

Effect on appeal-bond.— Satisfaction of a judgment in an unlawful detainer suit for restitution of premises and rent to date does not release liability on the appeal-bond, conditioned for payment of rents pending the appeal. Carmack *v.* Drum, 32 Wash. 236, 73 Pac. 377, 785.

82. Stewart *v.* Armel, 62 Ind. 593; Reynolds *v.* Magness, 24 N. C. 26.

83. State *v.* Martin, 20 Ark. 629; Coyne *v.* Souther, 61 Pa. St. 455.

But an unfiled order of the court declaring a judgment to be satisfied is of no more effect than an order for judgment, and is not admissible as evidence of a satisfaction. Hall *v.* Sauntry, 80 Minn. 348, 83 N. W. 156, 384.

84. Mandeville *v.* Reynolds, 68 N. Y. 528.

85. *Georgia.*— Watts *v.* Norton, R. M. Charlt. 353.

Illinois.— Reid *v.* O'Brien, 86 Ill. App. 128.

Indiana.— Kusler *v.* Crofoot, 78 Ind. 597; Beard *v.* Millikan, 68 Ind. 231.

Iowa.— Dunton *v.* McCook, 120 Iowa 444, 94 N. W. 942.

Minnesota.— Warren *v.* Ward, 91 Minn. 254, 97 N. W. 886; Lough *v.* Pitman, 26 Minn. 345, 4 N. W. 229; Ives *v.* Phelps, 16 Minn. 451.

Nebraska.— Manker *v.* Sine, 47 Nebr. 736, 66 N. W. 840.

New Jersey.— Jones *v.* Schmidt, 55 N. J. L. 504, 27 Atl. 902; Van Winkle *v.* Owen, 54 N. J. Eq. 253, 34 Atl. 400.

New York.— Trinity Church *v.* Higgins, 48 N. Y. 532; Holmes *v.* Van Sickle, 2 How. Pr. 184; Hamlin *v.* Boughton, 4 Cow. 65; Briggs *v.* Thompson, 20 Johns. 294.

North Carolina.— Foreman *v.* Bibb, 65 N. C. 128.

Pennsylvania.— Lindley *v.* Ross, 137 Pa. St. 629, 20 Atl. 944.

Texas.— Texas Cent. R. Co. *v.* Andrews, 28 Tex. Civ. App. 477, 67 S. W. 923.

judgment, not for causes accruing prior to its rendition or which might have been set up in defense to the action,[86] or which were litigated and decided on a previous motion or other proceeding.[87]

b. Proceedings. An application to the court to compel satisfaction of a judgment which has been paid should be in the form of a motion, entitled as of the original action,[88] or a rule to show cause why it should not be satisfied of record.[89] If the facts relied on are seriously disputed and controverted, the court should not undertake to decide the question in a summary manner, but should direct an issue to be tried by a jury,[90] or order a reference,[91] or dismiss the motion and remit the parties to a regular action.[92] On granting such an application the satisfaction of the judgment should be entered of record; it is not proper to cancel or strike off the judgment.[93] An order dismissing the motion is appealable.[94]

United States.— Medford *v.* Dorsey, 16 Fed. Cas. No. 9,390, 2 Wash. 467.

See 30 Cent. Dig. tit. "Judgment," § 1707.

Judgment on judgment.— Where an action is brought on a judgment of a federal circuit court, and a judgment recovered thereon in another court, if plaintiff is entitled to continue in force his judgment in the latter court, and enforce payment thereon, against the future-acquired property of defendant, satisfaction of the judgment of the federal court, which is the foundation of the second judgment, will not be entered of record. Griswold *v.* Hill, 11 Fed. Cas. No. 5,836, 2 Paine 492.

Rule in Pennsylvania.— A statute empowers the court itself to enter satisfaction of a judgment on due proof that it has been fully paid. But this, being in derogation of the common law, must be restricted to the very case of actual payment in full. Not everything which could be given in evidence under a plea of payment in a pending adversary proceeding before judgment may be treated as actual payment after verdict and judgment. Anderson *v.* Best, 176 Pa. St. 498, 35 Atl. 194; Melan *v.* Smith, 134 Pa. St. 649, 19 Atl. 738; Riddle's Appeal, 104 Pa. St. 171; Felt *v.* Cook, 95 Pa. St. 247; Philadelphia Third Nat. Bank *v.* Hunsicker, 8 Pa. Co. Ct. 635; Lancaster *v.* Clark, 12 Lanc. Bar 154.

86. McDonald *v.* Holdom, 208 Ill. 146, 70 N. E. 1112; Hawkins *v.* Harding, 35 Ill. App. 25; Jarman *v.* Saunders, 64 N. C. 367; Cavender *v.* Grove, 5 Fed. Cas. No. 2,530, 4 Biss. 269.

Substitution of collaterals.— A judgment, alleged to be collateral to certain bonds held by the judgment plaintiff, will not be canceled because new bonds are received in lieu of the former, where an agreement, signed by all parties, shows that the new bonds were given simply in substitution for the old ones. Coulter *v.* Kaighn, 30 N. J. L. 98.

87. Palmer *v.* Hays, 112 Ind. 289, 13 N. E. 882; Reeves *v.* Plough, 46 Ind. 350. And so, where a motion to discharge a judgment of record as having been satisfied was overruled on hearing, the adjudication is conclusive as to the satisfaction in a subsequent application to revive the judgment, the same having become dormant. Broadwater *v.* Foxworthy, 57 Nebr. 406, 77 N. W. 1103.

88. *Illinois.*— Reid *v.* O'Brien, 86 Ill. App. 128.

Iowa.— Dunton *v.* McCook, 120 Iowa 444, 94 N. W. 942.

Minnesota.— Warren *v.* Ward, 91 Minn. 254, 97 N. W. 886.

Nebraska.— Manker *v.* Sine, 47 Nebr. 736, 66 N. W. 840.

New Jersey.— Delaware, etc., R. Co. *v.* Blair, 28 N. J. L. 139.

New York.— Callanan *v.* Gilman, 55 N. Y. Super. Ct. 511, 2 N. Y. Suppl. 702.

North Carolina.— Foreman *v.* Bibb, 65 N. C. 128.

Oregon.— Provost *v.* Millard, 3 Oreg. 370.

See 30 Cent. Dig. tit. "Judgment," § 1707.

Limitations.— An action to have a judgment which has been paid declared satisfied is not barred by the fact that the person claiming benefits under the judgment has had it assigned to him more than six years before the action was brought. Wilson *v.* Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792.

89. Heidelbaugh *v.* Thomas, 11 Lanc. Bar (Pa.) 49; Com. *v.* Huber, 5 Pa. L. J. 331.

90. Hottenstein *v.* Haverly, 185 Pa. St. 305, 39 Atl. 946; Atkinson *v.* Harrison, 153 Pa. St. 472, 26 Atl. 294; McCutcheon *v.* Allen, 96 Pa. St. 319; Reynolds *v.* Barnes, 76 Pa. St. 427; Mahon *v.* Rosenkrantz, 8 Kulp (Pa.) 334; Heidelbaugh *v.* Thomas, 11 Lanc. Bar (Pa.) 49; Whitney *v.* Chandler, 2 Leg. Rec. (Pa.) 270; Cooley *v.* Gregory, 16 Wis. 303.

91. Dwight *v.* St. John, 25 N. Y. 203.

92. Mayer *v.* Sparks, 3 Kan. App. 602, 45 Pac. 249; Woodford *v.* Reynolds, 36 Minn. 155, 30 N. W. 757; Van Etten *v.* Hasbrouck, 4 N. Y. St. 803.

93. Dibble *v.* Briggs, 28 Ill. 48; Reynolds *v.* Barnes, 76 Pa. St. 427.

Where execution was issued on a judgment, and defendant tendered the debt, interest, and costs to plaintiff, and then obtained a rule why he should not be allowed to pay the same to the sheriff in full satisfaction of the judgment, and the rule was made absolute and the sheriff returned the execution "stayed by order of court," it was held that this amounted to no more than an inferential satisfaction of the judgment, as it would not be clear and sufficient notice to one searching the title that the lien of the judgment was discharged. Allen *v.* Conrad, 51 Pa. St. 487.

94. Ives *v.* Phelps, 16 Minn. 451.

c. Parties and Process. The court will not order satisfaction of a judgment to be entered unless all the parties interested therein are brought before it and have an opportunity to be heard,[95] and an order made without notice to a party in interest will be void.[96] But if the proceeding is by motion or rule, it must be solely between the original parties to the judgment, and no stranger can be brought in or intervene.[97]

d. Pleading and Evidence. In an action to have a judgment declared satisfied, the petition or complaint must clearly allege the fact of payment or the other circumstances relied on as discharging the judgment.[98] On a motion or rule for the same purpose the affidavits of the parties as to the alleged payment are admissible,[99] although not in contradiction of the record,[1] and an uncontradicted affidavit of payment will generally be sufficient to justify the relief asked,[2] unless it only shows grounds existing before the entry of the judgment;[3] but in case of controversy as to the facts the court will not grant the motion unless the evidence in support of it is entirely clear and satisfactory.[4] The burden of proving any ground relied on affirmatively in opposition to the motion falls on the judgment creditor.[5]

e. Actions and Penalties For Failure to Satisfy. In several of the states, by statute, penalties are provided against a judgment creditor who neglects or refuses to satisfy a judgment of record when the same has been paid, within a certain period after being requested to do so.[6] To sustain an action on such a statute

95. Parchman *v.* Conway, 28 Miss. 85; Long *v.* Shackleford, 25 Miss. 559; Matter of Beers, 5 Rob. (N. Y.) 643.

96. Armstrong *v.* Harper, 65 Ala. 523; Howard *v.* Richman, 1 N. J. L. 139; Wheeler *v.* Emmeluth, 121 N. Y. 241, 24 N. E. 285; Riley *v.* Harris, 2 Pa. Dist. 231.

Constructive service.— Where the judgment creditor resides in a foreign country, service of the notice on him may be made by delivering a copy to the attorney who appeared for him in the action and posting another in the clerk's office. Lee *v.* Brown, 6 Johns. (N. Y.) 132.

Service on attorney.— Notice of a motion to enter satisfaction of a judgment may be served on plaintiff's attorney of record. Flanders *v.* Sherman, 18 Wis. 575.

97. Budd *v.* Union Bank, 1 Houst. (Del.) 455.

An assignee of the judgment will not be permitted to intervene and tender an issue in his own name. Edwards *v.* Lewis, 16 Ala. 813. But an action to obtain satisfaction of a judgment may be brought directly against the assignee, joining as defendants the assignor and the officer holding an execution. Shields *v.* Moore, 84 Ind. 440.

98. Holliday *v.* Thomas, 90 Ind. 398.

99. Faulkner *v.* Chandler, 11 Ala. 725.

1. Haggin *v.* Clark, 71 Cal. 444, 9 Pac. 736, 12 Pac. 478. See Clark *v.* Rowling, 3 N. Y. 216, 53 Am. Dec. 290, where it is said that a judgment, although it technically merges the original debt, does not prevent the court from going behind it, in a proceeding to obtain satisfaction of the judgment, to see on what it was founded, in order that it may protect the equitable rights arising from the original relation of the parties.

2. Faulkner *v.* Chandler, 11 Ala. 725; Bartikowski *v.* Lambert, 9 Kulp (Pa.) 493.

3. Hawkins *v.* Harding, 35 Ill. App. 25.

4. *New Jersey.*— Hankinson *v.* Hummer, 12 N. J. L. 64.

New York.— Barker *v.* Crawford, 11 N. Y. Suppl. 337.

Pennsylvania.— Shaylor *v.* Parsons, 1 Pa. Super. Ct. 281; Philadelphia Third Nat. Bank *v.* Hunsicker, 8 Pa. Co. Ct. 635.

Texas.— Portis *v.* Ennis, 27 Tex. 574.

Canada.— Lewine *v.* Savage, 3 Can. L. J. 89.

See 30 Cent. Dig. tit. "Judgment," § 1709.

5. This rule applies where the amount of the judgment has been paid, but the creditor alleges an express agreement of the parties permitting him to keep the judgment alive (Wood *v.* Currey, 49 Cal. 359), or where he gave a written acknowledgment of satisfaction of the judgment, but alleges that it was void for want of consideration or otherwise (Cavender *v.* Grove, 5 Fed. Cas. No. 2,530, 4 Biss. 269). So there is a legal presumption that the person in whose favor the judgment was obtained is the owner thereof, and if he is not, it is a matter of defense. Kittles *v.* Williams, 64 S. C. 229, 41 S. E. 975.

6. See Henry *v.* Sims, 1 Whart. (Pa.) 187 (holding that a judgment in scire facias on a mortgage is such a judgment as comes within the statute); Marston *v.* Tryon, 108 Pa. St. 270 (holding that to sustain an action on the statute it must be shown that the creditor was personally requested to enter satisfaction, and that a request made to the attorney who conducted the suit for him is not sufficient).

An assignee of the judgment is subject to the statutory penalty for failure to credit partial payments on the record. But the judgment debtor cannot complain of such failure when the record of the judgment was so defective that it was insufficient to create

the refusal must be wilful, and not based on an honest contention that the judgment has not been paid,[7] and the failure to enter satisfaction must be due to the creditor's own fault or neglect, not to that of an officer over whom he has no control.[8] If the statute awards damages instead of a fixed penalty, the jury are at liberty to consider all the circumstances by which the debtor suffered vexation and inconvenience.[9] The remedy thus provided is exclusive;[10] but in the absence of such a statute, an action of trespass on the case will lie for the same purpose.[11]

3. VACATING ENTRY OF SATISFACTION — a. Grounds in General. An entry of satisfaction of a judgment may be vacated or stricken off in pursuance of an agreement of the parties to that effect,[12] or when it appears to have been irregularly or improperly entered,[13] when it operates to the disadvantage of a third person having a lien on the judgment or entitled to be protected or secured by it,[14] when the satisfaction was obtained without consideration or on a consideration which has failed,[15] or by duress or extortion,[16] or when there has been a failure to perform the conditions of a settlement between the parties on which the satisfaction was based,[17] but not on account of any matters antedating the judgment or affecting the original transaction.[18]

b. Mistaken or Fraudulent Entry. If an entry of satisfaction of a judgment on the record is made by mistake, fraud, or by falsely personating plaintiff, the court, on notice to the parties and proof of the facts, may order it vacated or stricken off.[19] So a creditor whose judgment is entered satisfied by an attorney

a valid lien on his property. Travis *v.* Rhodes, (Ala. 1904) 37 So. 804.

7. Johnson *v.* Huber, 117 Wis. 58, 93 N. W. 826.

8. Bratton *v.* Leyrer, 12 Pa. Co. Ct. 651. See Allen *v.* Conrad, 51 Pa. St. 487.

9. Allen *v.* Conrad, 51 Pa. St. 487.

10. Oberholtzer *v.* Hunsberger, 1 Mona. (Pa.) 543.

11. McLaughlin *v.* Pana First Nat. Bank, 72 Ill. App. 476.

12. Berdell *v.* Parkhurst, 6 N. Y. St. 12.

13. Wheeler *v.* Emmeluth, 121 N. Y. 241, 24 N. E. 285; Dundee Nat. Bank *v.* Wood, 9 N. Y. Suppl. 351.

14. Henry *v.* Traynor, 42 Minn. 234, 44 N. W. 11; Geissinger's Appeal, 8 Pa. Cas. 35, 4 Atl. 344; Sommerhill *v.* Cartwright, 7 Humphr. (Tenn.) 461.

Where the judgment creditor wrongfully applies funds realized from collateral security to the payment of his judgment, the entry of satisfaction may be stricken off and defendant admitted to a defense. Guthrie *v.* Reid, 107 Pa. St. 251.

15. Christian *v.* Clark, 10 Lea (Tenn.) 630; Hay *v.* Washington, etc., R. Co., 11 Fed. Cas. No. 6,255*a*, 4 Hughes 327. *Compare* Gowan *v.* Tunno, 1 Rich. Eq. Cas. (S. C.) 369.

16. Stewart *v.* Armel, 62 Ind. 593.

17. Stuart *v.* Peay, 21 Ark. 117; Fitzsimons *v.* Fitzsimons, 79 Hun (N. Y.) 13, 29 N. Y. Suppl. 510.

Acceptance or retention of payments.— But a satisfaction of judgment entered in pursuance of a compromise or settlement between the parties will not be vacated at the instance of plaintiff when he has enjoyed the avails of the settlement, with full knowledge of the facts, or except upon condition that he shall return to defendant all that he has received pursuant to the agreement. Lee *v.* Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018; Reid *v.* Hibbard, 6 Wis. 175.

18. Read's Appeal, 126 Pa. St. 415, 17 Atl. 621; Bare's Estate, 5 Lanc. L. Rev. (Pa.) 36; U. S. *v.* Biggert, 70 Fed. 38, 16 C. C. A. 616.

19. *Alabama.*— Armstrong *v.* Harper, 65 Ala. 523.

Kansas.— Bowersock *v.* Wickery, 61 Kan. 632, 60 Pac. 317; Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793; State *v.* Young, 32 Kan. 292, 4 Pac. 309; Chapman *v.* Blakeman, 31 Kan. 684, 3 Pac. 277; McNeal *v.* Hunt, 6 Kan. App. 670, 50 Pac. 63.

Maryland.— Wilmer *v.* Brice, 91 Md. 71, 46 Atl. 322; Waters *v.* Engle, 53 Md. 179.

Missouri.— Pannell *v.* Pannell, 100 Mo. App. 133, 73 S. W. 289; Wand *v.* Ryan, 166 Mo. 646, 65 S. W. 1025; Cohen *v.* Camp, 46 Mo. 179.

Nebraska.— Fox *v.* State, 63 Nebr. 185, 88 N. W. 176.

New Jersey.— Ackerman *v.* Ackerman, 44 N. J. L. 173.

New York.— Kley *v.* Healy, 149 N. Y. 346, 44 N. E. 150; Russell *v.* Nelson, 99 N. Y. 119, 1 N. E. 314; Hackley *v.* Draper, 60 N. Y. 88; Slocum *v.* Freeman, 4 Abb. Dec. 297 note; Anderson *v.* Nicholas, 4 Rob. 630; Gilpin *v.* Baltimore, etc., R. Co., 17 N. Y. Suppl. 520.

Pennsylvania.— McClurg *v.* Wilson, 43 Pa. St. 439; Murphy *v.* Flood, 2 Grant 411; Philadelphia *v.* Simon, 12 Pa. Super. Ct. 159; Stevenson *v.* Whitesell, 10 Pa. Super. Ct. 306; Paul *v.* Eurich, 3 Pa. Super. Ct. 299; Delta Bldg., etc., Assoc. *v.* McClune, 6 Pa. Dist. 569; Sullivan *v.* Gorsline, 17 Pa. Co. Ct. 205; Bowman *v.* Forney, 15 Pa. Co. Ct. 134; Bullard's Estate, 1 Del. Co. 495.

South Carolina.— Miller *v.* Newell, 20 S. C. 123, 47 Am. Rep. 833.

who had no authority to make the entry may maintain an action or application to have the entry canceled.[20] And the same rule applies where the entry of satisfaction is made by one of two joint judgment creditors without the authority of the other and without receiving the whole amount due.[21]

c. Void or Irregular Sale. Where property is sold under execution on a judgment and bought in by the judgment creditor, or the proceeds collected from the purchaser, and satisfaction entered, but the sale proves to be invalid or is afterward vacated, the entry of satisfaction will be stricken off on the application of the creditor.[22]

d. Proceedings. An application to vacate an entry of satisfaction of a judgment must be made in the court which rendered it, a court of another county having no authority in the premises,[23] and it must be seasonably made, plaintiff clearing himself of any imputation of laches.[24] Ordinarily such application may be summary, in the form of a motion or scire facias;[25] but where there is conflicting evidence upon material questions of fact, the parties should be remitted to a regular action.[26] In either case all parties affected by the judgment or claim-

Tennessee.— Shannon *v.* Woollard, 12 Lea 663.

Virginia.— Bradshaw *v.* Bratton, 96 Va. 577, 32 S. E. 56.

Wisconsin.— Voell *v.* Kelly, 64 Wis. 504, 25 N. W. 536.

United States.— Van Rensselaer *v.* Kelly, 28 Fed. Cas. No. 16,873, 2 Hask. 87.

See 30 Cent. Dig. tit. "Judgment," § 1715.

20. *Arkansas.*— Moore *v.* Cairo, etc., R. Co., 36 Ark. 262.

Illinois.— Turnan *v.* Temke, 84 Ill. 286.

Indiana.— Freeman *v.* Paul, 105 Ind. 451, 5 N. E. 754.

New Jersey.— Faughnan *v.* Elizabeth, 58 N. J. L. 309, 33 Atl. 212.

Pennsylvania.— Maxfield *v.* Carr, 8 Kulp 214.

Wisconsin.— Voell *v.* Kelly, 64 Wis. 504, 25 N. W. 536.

See 30 Cent. Dig. tit. "Judgment," § 1715.

Attorney's authority presumed.— The appearance of an attorney in a case, and a satisfaction of judgment by him, are presumed to be by the authority of the client; and such satisfaction will not be stricken off, years afterward, when the attorney is dead, on the ground of his want of authority in the premises. Miller *v.* Preston, 154 Pa. St. 63, 25 Atl. 1041.

Necessity of disavowing attorney's act.— Where a client is informed that his attorney has satisfied on the record a judgment in his favor and accepted securities for a part thereof, and does not then disavow the attorney's act, and the attorney afterward sues on such securities in the name and with the assent of the client, the latter cannot then repudiate the satisfaction of the judgment and have it stricken off. Whitesell *v.* Peck, 165 Pa. St. 571, 30 Atl. 933.

21. Haggin *v.* Clark, 61 Cal. 1; Potter *v.* Hunt, 68 Mich. 242, 36 N. W. 58.

22. *Illinois.*— Bressler *v.* Martin, 133 Ill. 278, 24 N. E. 518.

Indiana.— Hannon *v.* Hilliard, 83 Ind. 362; Kercheval *v.* Lamar, 68 Ind. 442; Mehrhoff *v.* Diffenbacher, 4 Ind. App. 447, 31 N. E. 41.

Iowa.— Kinports *v.* Oberholtzer, 111 Iowa 744, 82 N. W. 1012; Farmer *v.* Sasseen, 63 Iowa 110, 18 N. W. 714. *Compare* Holtzinger *v.* Edwards, 51 Iowa 383, 1 N. W. 600.

Minnesota.— Hastings First Nat. Bank *v.* Rogers, 22 Minn. 224.

Tennessee.— Hayes *v.* Cartwright, 6 Lea 139; Evans *v.* Holt, 4 Baxt. 389; Smith *v.* Hinson, 4 Heisk. 250; Mays *v.* Wherry, 3 Tenn. Ch. 80.

Restoring avails.— A judgment creditor is not entitled to have satisfaction of the judgment vacated for failure of title to property which he purchased under it, in satisfaction, where he refuses to account for what he has received from his purchase. Gonce *v.* McCoy, 101 Tenn. 587, 49 S. W. 754, 70 Am. St. Rep. 714.

See 30 Cent. Dig. tit. "Judgment," § 1710.

23. Burney *v.* Hunter, 32 Ill. App. 441. *Contra*, Darrow *v.* Darrow, 43 Iowa 411.

24. Wilmer *v.* Brice, 91 Md. 71, 46 Atl. 322; Howett *v.* Merrill, 1 N. Y. Suppl. 894; Flanders *v.* Sherman, 18 Wis. 575; Van Rensellaer *v.* Kelly, 28 Fed. Cas. No. 16,873, 2 Hask. 87.

25. Arnold *v.* Fuller, 1 Ohio 458. But see Henly *v.* Hastings, 3 Cal. 341.

Jurisdiction of equity.— In Kerr *v.* Kerr, 81 Ill. App. 35, it is said that the vacation of an apparent satisfaction of a judgment at law is a matter for the interposition of a court of equity.

Collateral proceeding.— A motion for the vacation of an entry of satisfaction cannot be made in a collateral proceeding, such as an action on the judgment, but only in a direct proceeding for the very purpose. Romain *v.* Garth, 3 Hun (N. Y.) 214, 49 How. Pr. 61.

26. *Illinois.*— Barrett *v.* Lingle, 33 Ill. App. 650.

Kansas.— Chapman *v.* Blakeman, 31 Kan. 684, 3 Pac. 277.

Mississippi.— Yeates *v.* Mead, 65 Miss. 89, 3 So. 651.

Nebraska.— Fox *v.* State, 63 Nebr. 185, 88 N. W. 176.

ing under or in relation to it must be made parties,[27] and must have due and sufficient notice of the application.[28] On a motion parol evidence and affidavits are admissible.[29]

XX. ACTIONS ON JUDGMENTS.[30]

A. Right of Action in General — 1. JUDGMENT AS CAUSE OF ACTION.[31] At common law and generally except in so far as the right has been restricted by local statutes,[32] the owner of a judgment may bring a suit upon it as a debt of record, in the court which rendered it or in any other court of competent jurisdiction, and prosecute the same to final judgment, notwithstanding his right to issue execution on the original judgment remains unimpaired,[33] or, on the other

New York.— Dwight *v.* St. John, 25 N. Y. 203.

South Carolina.— Alsobrook *v.* Watts, 19 S. C. 539.

Wisconsin.— McDonald *v.* Falvey, 18 Wis. 571.

See 30 Cent. Dig. tit. "Judgment," § 1717.

27. Blackburn *v.* Clarke, 85 Tenn. 506, 3 S. W. 505.

A stranger to a judgment, claiming to be the owner of it, cannot have an entry of satisfaction made by plaintiff set aside without first making himself a party to the record by having the judgment marked to his use. Long's Appeal, 134 Pa. St. 641, 19 Atl. 806.

28. Martin *v.* State Bank, 20 Ark. 636.

Notice to attorney.— Where an attorney is retained, service of notice of a motion to vacate a satisfaction must be made on him, and not on the party, although he was only constituted attorney to confess judgment. Wardell *v.* Eden, 2 Johns. Cas. (N. Y.) 121.

29. Stewart *v.* Armel, 62 Ind. 593; Wilson *v.* Stilwell, 14 Ohio St. 464; Wayne County Bank *v.* Abernethy, 1 Ohio Dec. (Reprint) 405, 9 West. L. J. 43.

30. Actions on foreign judgments see *infra*, XXII.

Appeal in action to enforce judgment; pecuniary limitation on jurisdiction see APPEAL AND ERROR, 2 Cyc. 546.

31. Merger of judgment in judgment recovered thereon see *supra*, XIX, D, 1, b.

32. See *infra*, XX, A, 4, a, b.

33. *Alabama.*— Field *v.* Sims, 96 Ala. 540, 11 So. 763; Elliott *v.* Holbrook, 33 Ala. 659; Kingsland *v.* Forrest, 18 Ala. 519, 52 Am. Dec. 232.

California.— Stuart *v.* Lander, 16 Cal. 372, 76 Am. Dec. 538; Ames *v.* Hoy, 12 Cal. 11.

Connecticut.— Ives *v.* Finch, 28 Conn. 112; Denison *v.* Williams, 4 Conn. 402. *Compare* Welles *v.* Dexter, 1 Root 253.

District of Columbia.— Raub *v.* Hurt, 24 App. Cas. 211.

Illinois.— Albin *v.* People, 46 Ill. 372; Greathouse *v.* Smith, 4 Ill. 541.

Indiana.— Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414; Palmer *v.* Glover, 73 Ind. 529; Gould *v.* Hayden, 63 Ind. 443; Davidson *v.* Nebaker, 21 Ind. 334, 83 Am. Dec. 350.

Iowa.— Simpson *v.* Cochran, 23 Iowa 81, 92 Am. Dec. 410; Thomson *v.* Lee County, 22 Iowa 206; Haven *v.* Baldwin, 5 Iowa 503.

Kansas.— Treat *v.* Wilson, 65 Kan. 729, 70 Pac. 893; Hummer *v.* Lamphear, 32 Kan. 439, 4 Pac. 865, 49 Am. Rep. 491; Burnes *v.* Simpson, 9 Kan. 658.

Louisiana.— Ducker's Succession, 10 La. Ann. 758.

Maine.— Moor *v.* Towle, 38 Me. 133.

Massachusetts.— Wilson *v.* Hatfield, 121 Mass. 551; Linton *v.* Hurley, 114 Mass. 76; O'Neal *v.* Kittredge, 3 Allen 470; Clark *v.* Goodwin, 14 Mass. 237.

Michigan.— Whelpley *v.* Nash, 46 Mich. 25, 8 N. W. 570; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396; McDonald *v.* Butler, 3 Mich. 558.

Missouri.— Sheehan, etc., Transp. Co. *v.* Sims, 28 Mo. App. 64.

Nebraska.— Eldredge *v.* Aultman, 35 Nebr. 884, 53 N. W. 1008, 37 Am. St. Rep. 476.

Nevada.— Mandlebaum *v.* Gregovich, 24 Nev. 154, 50 Pac. 849.

New Hampshire.— Morse *v.* Pearl, 67 N. H. 317, 36 Atl. 255, 68 Am. St. Rep. 672; Whittemore *v.* Carkin, 58 N. H. 576.

New York.— Forman *v.* Lawrence, 6 Thomps. & C. 640; Houghton *v.* Raymond, 1 Sandf. 682; Harris *v.* Steiner, 30 Misc. 624, 62 N. Y. Suppl. 752; Church *v.* Cole, 1 Hill 645; Smith *v.* Mumford, 9 Cow. 26; Goodrich *v.* Colvin, 6 Cow. 397; Hale *v.* Angel, 20 Johns. 342.

Ohio.— Headley *v.* Roby, 6 Ohio 521. And see Fox *v.* Burns, 2 Ohio Dec. (Reprint) 311, 2 West. L. Month. 387.

Pennsylvania.— Stewart *v.* Peterson, 63 Pa. St. 230; Harter *v.* Harter, 4 Pa. Dist. 211.

South Carolina.— Lawton *v.* Perry, 40 S. C. 255, 18 S. E. 861; Copeland *v.* Todd, 30 S. C. 419, 9 S. E. 341; Pinckney *v.* Singleton, 2 Hill 343.

Tennessee.— Gardner *v.* Henry, 5 Coldw. 458.

Texas.— Stevens *v.* Stone, 94 Tex. 415, 60 S. W. 959, 86 Am. St. Rep. 861; Hull *v.* Naumberg, 1 Tex. Civ. App. 132, 20 S. W. 1125.

Vermont.— White River Bank *v.* Downer, 29 Vt. 332.

Washington.— Bettman *v.* Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815.

United States.— Morgan *v.* Beloit, 7 Wall. 613, 19 L. ed. 203; Hickman *v.* Macon County, 42 Fed. 759.

Canada.— Hopkins *v.* Beckel, 4 Manitoba

hand, notwithstanding the time for issuing execution has expired;[34] and it is not necessary to allege or show any other cause for suing on the judgment than the fact that it remains unpaid.[35] In some states, although not in others, it is held that the validity of a judgment is not exhausted by one action thereon, but the creditor is entitled to pursue successive actions until satisfaction is obtained.[36] But where the judgment has been entered for an entire sum payable at one time, an assignee of a part of it cannot maintain an action on his interest.[37]

2. Judgments on Which Action May Be Brought[38] — a. In General. To be available as a cause of action the judgment must be a definitive and personal judgment for the payment of money,[39] final in its character and not merely interlocutory,[40] remaining unsatisfied,[41] and capable of immediate enforcement.[42]

408; Boyd *v.* Irwin, 3 Manitoba 90; Arnold *v.* McLaren, 1 Manitoba 313.

See 30 Cent. Dig. tit. "Judgment," § 1719 *et seq.*

In federal court.— An action can be maintained in a federal court on a money judgment recovered in a court of the same state wherein the federal court is sitting. Barr *v.* Simpson, 2 Fed. Cas. No. 1,038, Baldw. 543. See Davis *v.* Davis, 65 Fed. 380.

Under joint debtor acts.— Where a suit has been commenced against two persons as joint debtors, the process being served on only one of them, and plaintiff has proceeded to judgment under the joint debtor act of New York, in a subsequent action or proceeding instituted to charge both the alleged debtors, the cause of action does not arise upon the judgment. Oakley *v.* Aspinwall, 4 N. Y. 513.

Partition.— Where, in a partition of land, one share is charged with the payment of a certain sum to another share for equality of partition, a *venditioni exponas* can issue upon the decree, and it is not permissible for the creditor to obtain a personal judgment against the debtor for the sum so charged. Halso *v.* Cole, 82 N. C. 161.

Proceeding to revive distinguished.— An action to recover the amount of a judgment, with interest, in which a summons is issued and served as on a money demand, is an action on the judgment, and not an action to revive it. Mawhinney *v.* Doane, 40 Kan. 681, 20 Pac. 488.

34. Raub *v.* Hurt, 24 App. Cas. (D. C.) 211.

35. Denison *v.* Williams, 4 Conn. 402; Mandlebaum *v.* Gregovich, 24 Nev. 154, 50 Pac. 849.

36. See *supra*, XIX, D, 1, b.

37. Fullmer *v.* Pine Tp., 17 Pa. Co. Ct. 482.

38. Judgments of courts of sister states see *infra*, XXII, B, 4.

39. Seligman *v.* Kalkman, 17 Cal. 152; Smith *v.* Kander, 58 Mo. App. 61.

Foreclosure.—Where a decree of foreclosure of a trust mortgage requires the trustee to convey the property to the purchaser, and he refuses to do so, an action will not lie to compel him to convey, since the judgment in such an action would be merely a repetition of the decree already made. Harrison *v.* Union Trust Co., 144 N. Y. 326, 39 N. E. 353.

Scire facias.— Debt will not lie on a judgment for execution rendered in a scire facias on an original judgment. Webb *v.* Garner, 4 Mo. 10.

Account render.— Defendant in an action of account render, who has been found in surplusage, may bring an action of debt against plaintiff therein for the amount of such surplusage. McCall *v.* Crousillat, 3 Serg. & R. (Pa.) 7.

Costs.— An action of debt will lie on a judgment for costs. Ives *v.* Finch, 28 Conn. 112.

40. *New York.*— Hanover F. Ins. Co. *v.* Tomlinson, 3 Hun 630; MacDougall *v.* Hoes, 27 Misc. 590, 58 N. Y. Suppl. 209.

North Carolina.— English *v.* Reynolds, 4 N. C. 529.

Texas.— Ledyard *v.* Brown, 39 Tex. 402.

United States.— Corbin *v.* Graves, 27 Fed. 644.

England.— Biddell *v.* Dowse, 6 B. & C. 255. 9 D. & R. 404, 28 Rev. Rep. 574, 13 E. C. L. 125; Fry *v.* Malcolm, 4 Taunt. 705.

See 30 Cent. Dig. tit. "Judgment," § 1722.

41. An action of debt will not lie on a judgment which appears of record to have been satisfied by a levy of execution upon real estate, regular on its face. Pratt *v.* Jones, 22 Vt. 341, 54 Am. Dec. 80. *Contra*, Hutchinson *v.* Greenbush, 30 Me 450. But the rule does not apply if there is a defect of title apparent on the face of the return; in such case the creditor may waive the levy. Lawrence *v.* Pond, 17 Mass. 433. And numerous cases hold that an action on a judgment is not prevented by the issue and levy of an execution, if the execution for any reason proved fruitless or unproductive. Clarkson *v.* Beardsley, 45 Conn. 196; Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371; Fish *v.* Sawyer, 11 Conn. 545; Greene *v.* Hatch, 12 Mass. 195. But *compare* Grosvenor *v.* Chesley, 48 Me. 369; Green *v.* Bailey, 3 N. H. 33. And the levy of an execution on chattels, although they are of sufficient value to satisfy the judgment, is not a *prima facie* satisfaction of the judgment, and therefore no obstacle to the maintenance of an action upon it. Smith *v.* Condon, 174 Mass. 550, 55 N. E. 324, 75 Am. St. Rep. 372.

Payment or satisfaction as a defense see *infra*, XX, E, 5.

42. An action will not lie on a judgment pending an injunction to restrain its enforce-

The pendency of an appeal, writ of error, or petition for review will not deprive plaintiff of his right to sue on the judgment, unless there has been a stay of proceedings.[43] A judgment which is void will not sustain an action,[44] but it it not material in this connection that it may be erroneous.[45] Although a judgment rendered by an inferior court is not a debt of record, yet it is a legal obligation on which an action will lie.[46] Causes of action on several judgments cannot be united in one suit, unless all the debtors in the judgments are the same and are made defendants to the action.[47]

b. Decrees in Equity.[48] An action of debt will lie in a court of law upon a decree of a court of equity, provided it is for the payment of money only,[49] but

ment. Pollard *v.* Rogers, 1 Bibb (Ky.) 473; Blair *v.* Caldwell, 3 Mo. 353.

Dormant judgment.— In Kansas an action can be maintained on a dormant domestic judgment if commenced within one year after the judgment becomes dormant. Baker *v.* Hummer, 31 Kan. 325, 2 Pac. 808.

43. *California.*— Taylor *v.* Shew, 39 Cal. 536, 2 Am. Rep. 478.

Massachusetts.— Faber *v.* Hovey, 117 Mass. 107, 19 Am. Rep. 398; Gifford *v.* Whalon, 8 Cush. 428.

Missouri.— Sublette *v.* St. Louis, etc., R. Co., 66 Mo. App. 331.

Nebraska.— Riley Bros. Co. *v.* Melia, 3 Nebr. (Unoff.) 666, 92 N. W. 913.

New Jersey.— Suydam *v.* Hoyt, 25 N. J. L. 230.

Pennsylvania.— Woodward *v.* Carson, 86 Pa. St. 176.

United States.— Dawson *v.* Daniel, 7 Fed. Cas. No. 3,668, 2 Flipp. 301.

England.— If plaintiff sues and recovers on his judgment pending a writ of error, he cannot take out execution on the new judgment until the revisory proceedings are determined. Benwell *v.* Black, 3 T. R. 643.

Contra.— Curtiss *v.* Beardsley, 15 Conn. 518.

Pendency of writ of error as ground for abatement of action see ABATEMENT AND REVIVAL, 1 Cyc. 27 text and note 36.

Pendency of action to set judgment aside see ABATEMENT AND REVIVAL, 1 Cyc. 31 text and note 56.

After affirmance in the supreme court, and the entry of it below, and a judgment for costs, plaintiff may sue on the original judgment. Snoddy *v.* Maupin, 7 T. B. Mon. (Ky.) 51.

Reduction on appeal.— Debt will lie on a judgment which has been partially reduced on review. Hart *v.* Little, Smith (N. H.) 52.

44. *Massachusetts.*—Needham *v.* Thayer, 147 Mass. 536, 18 N. E. 429.

Missouri.— Bobb *v.* Graham, 4 Mo. 222.

New Hampshire.— Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

New York.— Ely *v.* Cook, 2 Hilt. 406, 9 Abb. Pr. 366.

United States.— Ellis *v.* Connecticut Mut. L. Ins. Co., 8 Fed. 81, 19 Blatchf. 383; Allen *v.* Blunt, 1 Fed. Cas. No. 215, 1 Blatchf. 480.

See 30 Cent. Dig. tit. "Judgment," § 1722.

Non-resident defendant.— Debt on a judgment recovered against a non-resident upon an attachment of his property, and notice by publication under the statute, may be maintained in the state where the original judgment was obtained. Kendrick *v.* Kimball, 33 N. H. 482. And see Hawes *v.* Hathaway, 14 Mass. 233.

45. Hazzard *v.* Nottingham, Tapp. (Ohio) 160; Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340. See also *supra*, XIII, B, 4, b.

46. Alexander *v.* Arters, 11 Pa. Co. Ct. 211; Diederich *v.* Nachtsheim, 33 Wis. 225; Williams *v.* Jones, 2 D. & L. 680, 14 L. J. Exch. 145, 13 M. & W. 628.

Probate court judgments.— In some of the states an action at law will not lie on a judgment or decree of the probate or orphans' court, its jurisdiction being exclusive. Fort *v.* Blagg, 38 Ark. 471; Black *v.* Black, 34 Pa. St. 354; Eichelberger *v.* Smyser, 8 Watts (Pa.) 181. But in New York a suit may be maintained on a surrogate's decree for the payment of money. Dubois *v.* Dubois, 6 Cow. (N. Y.) 494.

47. Barnes *v.* Smith, 1 Rob. (N. Y.) 699.

48. Decrees of courts of sister states see *infra*, XXII, B, 4, a, (III), (C).

49. *California.*— Ames *v.* Hoy, 12 Cal. 11.

Illinois.—Warren *v.* McCarthy, 25 Ill. 95; Blattner *v.* Frost, 44 Ill. App. 580.

Kentucky.—Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179.

Maine.— McKim *v.* Odom, 12 Me. 94.

New Jersey.— Mutual L. Ins. Co. *v.* Newton, 50 N. J. L. 571, 14 Atl. 756. *Compare* Van Buskirk *v.* Mulock, 18 N. J. L. 184.

New York.— People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Post *v.* Neafie, 3 Cai. 22.

Ohio.— Moore *v.* Adie, 18 Ohio 430.

Pennsylvania.— Evans *v.* Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

Vermont.— Thrall *v.* Waller, 13 Vt. 231, 37 Am. Dec. 592.

United States.— Nations *v.* Johnson, 24 How. 195, 16 L. ed. 628; Pennington *v.* Gibson, 16 How. 64, 14 L. ed. 847; Shainwald *v.* Lewis, 69 Fed. 487; Tilford *v.* Oakley, 23 Fed. Cas. No. 14,038*a*, Hempst. 197. *Contra*, Hugh *v.* Higgs, 8 Wheat. 697, 5 L. ed. 719.

England.—An action will lie on a decree in chancery rendered in a foreign country or in the colonies, if merely for the payment of money. Henderson *v.* Henderson, 6 Q. B. 288, 9 Jur. 755, 13 L. J. Q. B. 274, 51 E. C. L. 288; Henley *v.* Soper, 8 B. & C. 16, 6 L. J. K. B. O. S. 210, 2 M. & R. 153, 15 E. C. L.

it is otherwise where the decree requires the performance of some other act than the payment of money.[50]

c. Orders in Special Proceedings. An action may be brought on a final order in a special proceeding establishing of record the fact of an indebtedness.[51]

3. Form of Action. Debt is the proper form of action on a judgment,[52] although in some states it appears that assumpsit will lie.[53] It is an entirely new action and not a continuation of the former one.[54] It should be brought in a court of law; a court of equity cannot be called upon to carry into effect a judgment rendered at law,[55] unless there is some special ground of equity jurisdiction.[56]

4. Conditions and Limitations on Right to Sue — a. In General. It is not a condition precedent to the right to sue on a judgment that the creditor shall have exhausted his remedies by execution,[57] that an execution issued on the judgment shall have been returned,[58] or that there shall have been a demand and refusal of payment.[59] But in some states the courts, to avoid unnecessary and vexatious litigation, refuse to allow the maintenance of an action on a judgment without the showing of some special and adequate cause therefor, or else certain conditions and limitations are prescribed by statute.[60]

18; Sadler *v.* Robins, 1 Campb. 253. But on a decree of the English court of chancery no action will lie. Carpenter *v.* Thornton, 3 B. & Ald. 52, 22 Rev. Rep. 299, 5 E. C. L. 40.

Contra.— Elliott *v.* Ray, 2 Blackf. (Ind.) 31; Boyle *v.* Schindel, 52 Md. 1; Richardson *v.* Jones, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293.

50. Warren *v.* McCarthy, 25 Ill. 95; Harrison *v.* Union Trust Co., 144 N. Y. 326, 39 N. E. 353.

Foreclosure.— In a mortgage foreclosure suit, a decree that the amount found due be paid, or in default that the premises be sold and the proceeds paid into court is in the alternative and cannot form the basis for an action at law. Burges *v.* Souther, 15 R. I. 202, 2 Atl. 441. But see Rowe *v.* Blake, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45.

51. Fenlon *v.* Paillard, 46 Misc. (N. Y.) 151, 93 N. Y. Suppl. 1101.

52. Vail *v.* Mumford, 1 Root (Conn.) 142; Humphreys *v.* Buie, 12 N. C. 378; Woods *v.* Pettis, 4 Vt. 556. See Debt, Action of, 13 Cyc. 410.

53. Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396; Stanton *v.* Thomas, 24 Wend. (N. Y.) 70, 35 Am. Dec. 595; Fullmer *v.* Pine Tp., 17 Pa. Co. Ct. 482. *Compare* Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213. See Assumpsit, Action of, 4 Cyc. 323. The record of a judgment is not evidence to support the money counts in an action of debt. Runnamaker *v.* Cordray, 54 Ill. 303.

54. Baracliff *v.* Griscom, 1 N. J. L. 193.

55. Bubier *v.* Bubier, 24 Me. 42.

56. See, generally, Creditors' Suits; Fraudulent Conveyances. Where a judgment plaintiff, after an execution on his judgment has been returned unsatisfied, fails to sue out a new execution within a year and a day from the return of the first, he is driven to his action of debt on his judgment, but he is not precluded from filing a bill in equity to enforce the judgment at any time within the time saved by the statute of limitations; the bill being the equivalent of an action at law on the judgment to reëstablish it. Raub *v.* Hurt, 24 App. Cas. (D. C.) 211.

57. Backus *v.* Denison, Kirby (Conn.) 421; Clark *v.* Goodwin, 14 Mass. 237; Malloy *v.* Vanderbilt, 4 Abb. N. Cas. (N. Y.) 127; Fonseca *v.* Macdonald, 3 Manitoba 413. See Warne *v.* Housley, 3 Manitoba 547. See also *supra*, XX, A, 1. *Compare* U. S. *v.* Sturges, 27 Fed. Cas. No. 16,414, 1 Paine 525.

58. Wilson *v.* Hatfield, 121 Mass. 551; Linton *v.* Hurley, 114 Mass. 76; Tarbell *v.* Downer, 29 Vt. 339; White River Bank *v.* Downer, 29 Vt. 332.

59. Moss *v.* Shannon, 1 Hilt. (N. Y.) 175; Goodrich *v.* Barney, 2 Vt. 422.

60. *Kentucky.*— No action lies upon a judgment except one to enforce the collection thereof. Cundiff *v.* Trimble, 52 S. W. 940, 21 Ky. L. Rep. 657. And see Smith *v.* Belmont, etc., Iron Co., 11 Bush 390. And an equitable action to enforce a judgment lies only after execution has been returned "no property." Ritchey *v.* Buricke, 54 S. W. 173, 21 Ky. L. Rep. 1120.

Louisiana.— In this state it is said that the necessity of bringing a separate action to enforce a judgment exists in two cases: (1) Where it is a foreign judgment; and (2) where, in the case of a domestic judgment, the debtor is dead and his estate is under administration. Beckham's Succession, 16 La. Ann. 352.

Missouri.— An action may be brought on a judgment where the debtor has left the jurisdiction. Wood *v.* Newberry, 48 Mo. 322.

New York.— Code Civ. Proc. § 1913, declaring the conditions on which an action may be brought on a domestic judgment, does not affect the right of a party to sue on a final order in a special proceeding establishing of record the fact of an indebtedness. Fenlon *v.* Paillard, 46 Misc. 151, 93 N. Y. Suppl. 1101. Although as a general rule plaintiff in a judgment may bring suit thereon, yet a court will

b. Leave of Court to Sue. In several states it is provided by statute that an action at law upon a domestic judgment cannot be prosecuted without leave of the court first obtained, and generally upon a showing of good cause and after notice to the adverse party.[61] In some states it is held that the granting of such leave is a jurisdictional requisite which must precede the institution of the suit, so that if it is omitted a motion for leave to sue cannot be granted *nunc pro tunc*, and a judgment in the action is invalid;[62] but elsewhere it is considered that such leave may be granted retrospectively after suit brought, if defendant loses no substantial right thereby, and the order would have been made if regularly applied for.[63] The leave to sue must be obtained from the court which rendered the judgment,[64] and the fact of its having been granted must be set forth in the declaration or complaint.[65] These statutes generally apply only to actions between the original parties to the judgment, and therefore do not require an assignee of the judgment to obtain leave of court before suing on it.[66]

B. Jurisdiction and Venue.[67] An action on a judgment may be brought in the court which rendered it,[68] or in any other court having jurisdiction.[69] It was formerly thought that such an action was a local one, and must be brought in the county where the record remained;[70] but it is now held that the action may be

not allow its process to be perverted; and where several suits have been brought upon successive judgments, in different courts, for the avowed purpose of coercing payment by increasing costs, the court in which the last suit is brought will direct a stay of execution in all the cases which have been brought in that court, except the first. Keeler *v.* King, 1 Barb. 390.

Oregon.— A judgment creditor cannot sue upon his judgment as often as he may choose, without showing any necessity therefor; he has no absolute right of action on a domestic judgment, unless such action is necessary in order to enable him to have the full benefit of his judgment. Pitzer *v.* Russel, 4 Oreg. 124.

South Carolina.— An action will not lie on a justice's judgment until after the expiration of the time during which execution may issue on such judgment, that is, a year and a day. Ligon *v.* McNeil, 6 Rich. 377; Vandiver *v.* Hammet, 4 Rich. 509; Lee *v.* Giles, 1 Bailey 449, 21 Am. Dec. 476.

See 30 Cent. Dig. tit. "Judgment," § 1724.

61. *Iowa.*— Wilson *v.* Tucker, 105 Iowa 55, 74 N. W. 908; Morrison *v.* Springfield Engine, etc., Co., 84 Iowa 637, 51 N. W. 183; Matthews *v.* Davis, 61 Iowa 225, 16 N. W. 102.

Minnesota.— Costs cannot be allowed in an action on a domestic judgment, unless the action was brought with previous leave of the court for cause shown. Merchants' Nat. Bank *v.* Gaslin, 41 Minn. 552, 43 N. W. 483.

New York.— Matter of Van Beuren, 33 N. Y. App. Div. 158, 53 N. Y. Suppl. 349; Baldwin *v.* Roberts, 30 Hun 163; Lyon *v.* Manly, 32 Barb. 51. Baldinger *v.* Turkowsky, 36 Misc. 822, 74 N. Y. Suppl. 897; Van Arsdale *v.* King, 33 N. Y. Suppl. 858; U. S. Life Ins. Co. *v.* Gage, 13 N. Y. Suppl. 837, 26 Abb. N. Cas. 16.

North Carolina.— Kendall *v.* Briley, 86 N. C. 56; McDonald *v.* Dickson, 85 N. C. 248; Warren *v.* Warren, 84 N. C. 614.

South Carolina.— Brock *v.* Kirkpatrick, 60 S. C. 322, 38 S. E. 779, 85 Am. St. Rep. 847.

South Dakota.— Comp. Laws § 4831.

Wisconsin.— Cole *v.* Mitchell, 77 Wis. 131, 45 N. W. 948.

See 30 Cent. Dig. tit. "Judgment," § 1725.

Counter-claim.— Such a statute does not prevent the setting up of a judgment as a counter-claim without leave of court first obtained. McClenahan *v.* Cotten, 83 N. C. 332.

62. Farish *v.* Austin, 25 Hun (N. Y.) 430; Cook *v.* Thurston, 18 Misc. (N. Y.) 506, 42 N. Y. Suppl. 1084. Earlier cases in New York held that the failure to obtain leave of court was a mere irregularity which might be waived, and that leave might be granted *nunc pro tunc*. Lane *v.* Salter, 4 Rob. (N. Y.) 239; Finch *v.* Carpenter, 5 Abb. Pr. (N. Y.) 225; Church *v.* Van Buren, 55 How. Pr. (N. Y.) 489.

63. Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891.

64. Graham *v.* Scripture, 26 How. Pr. (N. Y.) 501.

65. Watts *v.* Everett, 47 Iowa 269; Underhill *v.* Phillips, 30 N. Y. App. Div. 238, 51 N. Y. Suppl. 801; Graham *v.* Scripture, 26 How. Pr. (N. Y.) 501. *Compare* Dean *v.* Eldridge, 29 How. Pr. (N. Y.) 218.

66. McGrath *v.* Maxwell, 17 N. Y. App. Div. 246, 45 N. Y. Suppl. 587; Carpenter *v.* Butler, 29 Hun (N. Y.) 251; Knapp *v.* Valentine, 33 N. Y. Suppl. 712, 24 N. Y. Civ. Proc. 331; Hedges *v.* Conger, 10 N. Y. St. 42; Tuffts *v.* Braisted, 1 Abb. Pr. (N. Y.) 83.

67. Judgments of courts of sister states see *infra*, XXII, B, 4, c.

68. Hansford *v.* Van Auken, 79 Ind. 157.

69. Craig *v.* Garnett, 9 Bush (Ky.) 97; McGuire *v.* Gallagher, 2 Sandf. (N. Y.) 402; Baldinger *v.* Turkowsky, 36 Misc. (N. Y.) 822, 74 N. Y. Suppl. 897.

70. Smith *v.* Clark, 1 Ark. 63; Barnes *v.* Kenyon, 2 Johns. Cas. (N. Y.) 381. And see Com. *v.* Ford, 29 Gratt. (Va.) 683.

brought in any county in which jurisdiction of the defendant's person can be obtained.[71]

C. Parties — 1. Plaintiffs. An action on a judgment must be prosecuted by the real and beneficial owner of it,[72] whose title to it must appear of record or by some formal transfer,[73] and the suit cannot be maintained by a third person not answering these conditions, although the judgment may in some way define his rights or inure to his benefit or protection.[74] In case of joint judgment creditors, all must join in a suit on the judgment.[75]

2. Defendants — a. In General. The action should be brought against the defendant of record in the judgment or his successor in interest,[76] although it is not necessary to join a merely nominal or formal party,[77] or a surety or indorser of the original contract or claim.[78] If the judgment was rendered against defendant by a wrong name, he may be sued on it in his right name with a proper allegation.[79] Where plaintiff sues in the character of an equitable assignee of the

71. Goodrich *v.* Colvin, 6 Cow. (N. Y.) 397; Johnson *v.* Skipworth, 59 Tex. 473; Townsend *v.* Smith, 20 Tex. 465, 70 Am. Dec. 400.

72. Tally *v.* Reynolds, 1 Ark. 99, 30 Am. Dec. 737; and other cases cited *infra*, this note and in the notes following.

Administrator.— In debt by an administrator on a judgment recovered by him, he need not declare as administrator, and the rule is the same where he was appointed administrator by a foreign jurisdiction and recovered the judgment there. Talmage *v.* Chapel, 16 Mass. 71. See Winham *v.* Kline, 72 Mo. App. 615.

Attorney's right to judgment for costs.— Where a judgment is for costs only, the attorney of record for the successful party is by force of law the owner thereof, and he may sue on the judgment or set it up as a counterclaim. Adams *v.* Stillman, 4 Misc. (N. Y.) 259, 23 N. Y. Suppl. 810.

Enforcement of judgment by attorney having lien thereon see Attorney and Client, 4 Cyc. 1021 text and note 28.

An assignee of the legal title to a judgment is as to the judgment debtor the real party in interest and entitled to sue, notwithstanding the existence of a trust between the assignee and his assignor. Curtin *v.* Kowalsky, 145 Cal. 431, 78 Pac. 962.

73. Masterson *v.* Gibson, 56 Ala. 56; Smith *v.* Harrison, 33 Ala. 706; Triplett *v.* Scott, 12 Ill. 137; McCardle *v.* Aultman Co., 31 Ind. App. 63, 67 N. E. 236; Davant *v.* Guerard, 1 Speers (S. C.) 242.

The mere possession of a transcript of a judgment raises no presumption that the possessor has any interest therein sufficient to enable him to sue on it. Tally *v.* Reynolds, 1 Ark. 99, 31 Am. Dec. 737.

Right of an assignee of a judgment to maintain suit thereon in his own name see *supra*, XVII, C, 1, c.

Mistake in name of plaintiff.— A judgment rendered in favor of A, by mistake for B, cannot be sued on by B, even if the mistake is proved. Gilbert *v.* Hanford, 13 Mich. 40. But a trifling misnomer of plaintiff will not defeat the action where there is no mistake as to the identity of the person. U. S. National Bank *v.* Venner, 172 Mass. 449, 52 N. E. 543.

74. Kohlberg *v.* Benton, 45 Cal. 265; Taylor's Appeal, 45 Pa. St. 71.

If an indorser pays a judgment against both him and the principal, he can sue the maker on the judgment, under the statute in Georgia, although he did not obtain the control of it under an order of court on his payment of it. Milledge *v.* Gardner, 29 Ga. 700.

Officer paying judgment.— If an officer holding an execution pays the amount thereof with his own money, an action on the judgment may be maintained for his benefit in the name of the judgment creditor, but not in the name of the officer himself. Whittier *v.* Heminway, 22 Me. 238, 38 Am. Dec. 309; Allen *v.* Holden, 9 Mass. 133, 6 Am. Dec. 46.

75. Jansen *v.* Hyde, 8 Colo. App. 38, 44 Pac. 760; Gilbert *v.* Allen, 57 Ind. 524; Willink *v.* Renwick, 23 Wend. (N. Y.) 63.

76. Ritchey *v.* Buricke, 54 S. W. 173, 21 Ky. L. Rep. 1120; Pfeifer *v.* Sheboygan, etc., R. Co., 18 Wis. 155, 86 Am. Dec. 751; Baltimore, etc., Tel. Co. *v.* Interstate Tel. Co., 54 Fed. 50, 4 C. C. A. 184.

Deceased judgment debtor.— If the judgment debtor is dead, the rule of the common law forbids the bringing of an action on the judgment against his personal representatives. U. S. *v.* Cushman, 25 Fed. Cas. No. 14,907, 2 Sumn. 310.

Administrators and executors.— A judgment against an administrator in one state will not support an action against a different administrator in another state. Creswell *v.* Slack, 68 Iowa 110, 26 N. W. 42. But it is otherwise when the successive defendants are executors. Latine *v.* Clements, 3 Ga. 426; Turley *v.* Dreyfus, 33 La. Ann. 885.

77. Wygal *v.* Myers, 76 Tex. 604, 13 S. W. 567.

78. Bunt *v.* Rheum, 52 Iowa 619, 3 N. W. 667; Wooten *v.* Maultsby, 69 N. C. 462. But in an action by an administrator on a judgment recovered by his intestate, it was proper to join the bail for stay of execution on such judgment, the stay having expired and the judgment being unsatisfied. Hansford *v.* Van Auken, 79 Ind. 157.

79. Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 15 L. ed. 451; Stevelie *v.* Read, 22 Fed. Cas. No. 13,389, 2 Wash. 274.

judgment, his assignor must be joined as a defendant,[80] but not where the assignment was legal, unconditional, and absolute.[81]

b. Joint Defendants. At common law, where an action is brought on a judgment rendered against joint defendants, they must all be made parties,[82] unless one of them is dead since the judgment;[83] but in several states, by force of statutes, such a judgment is a joint and several obligation, and therefore one or more of the debtors may be sued alone.[84] Also parties who were named as defendants in the original action, but who were not included in the judgment because not served with process, should not be made defendants to an action on the judgment.[85]

D. Time to Sue and Limitations[86] — **1. In General.** A judgment is not a "specialty" or "contract, agreement, or promise in writing," within the meaning of those terms as used in statutes of limitations;[87] but actions on judgments are commonly limited by statutes specially applicable to them, either proscribing such actions after the lapse of a certain number of years from the rendition of the judgment,[88] after the issuance of the last execution upon it, or after a motion

80. Chicago, etc., R. Co. *v.* Higgins, 150 Ind. 329, 50 N. E. 32; Shirts *v.* Irons, 54 Ind. 13; McCammock *v.* Clark, 16 Ind. 320; McCardle *v.* Aultman Co., (Ind. App. 1903) 66 N. E. 507; Elliott *v.* Waring, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69; McKinnie *v.* Rutherford, 21 N. C. 14.

81. Bruen *v.* Crane, 2 N. J. Eq. 347.

82. *Illinois.*— Thomas *v.* Adams, 30 Ill. 37.

Iowa.— Blake *v.* Burley, 9 Iowa 592.

Massachusetts.— Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356.

Missouri.— Sheehan, etc., Transp. Co. *v.* Sims, 28 Mo. App. 64.

New Hampshire.— Probate Judge *v.* Webster, 46 N. H. 518.

See 30 Cent. Dig. tit. "Judgment," § 1728.

One defendant not served.— But where suit is brought against several defendants upon a judgment rendered against them jointly on a contract on which they were jointly liable, the court is authorized to proceed against one defendant, without first obtaining jurisdiction of all, as in cases of original joint liability on contract. Mahoney *v.* Penman, 4 Duer (N. Y.) 603.

83. Johnson *v.* Huber, 34 Ill. App. 527; Hanley *v.* Donoghue, 59 Md. 239, 43 Am. Rep. 554; Roane *v.* Drummond, 6 Rand. (Va.) 182; U. S. *v.* Spiel, 8 Fed. 143, 3 McCrary 107.

84. *Kansas.*— Read *v.* Jeffries, 16 Kan. 534.

New York.— Stahl *v.* Stahl, 2 Lans. 60.

North Carolina.— Smith *v.* Richards, 129 N. C. 267, 40 S. E. 5.

Washington.— Bignold *v.* Carr, 24 Wash. 413, 64 Pac. 519; Olson *v.* Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855.

United States.— Belleville Sav. Bank *v.* Winslow, 30 Fed. 488.

See 30 Cent. Dig. tit. "Judgment," § 1728.

85. Tay *v.* Hawley, 39 Cal. 93; Lindh *v.* Crowley, 26 Kan. 47; Spencer *v.* Wait, 9 N. Y. Civ. Proc. 93; Johnson *v.* Smith, 23 How. Pr. (N. Y.) 444. See Carman *v.* Townsend, 6 Wend. (N. Y.) 206 [*affirmed* in 6 Cow. 695].

86. Judgments of courts of sister states see *infra*, XXII, B, 4, d.

87. Niblack *v.* Goodman, 67 Ind. 174; Kimball *v.* Whitney, 15 Ind. 280; David *v.* Porter, 51 Iowa 254, 1 N. W. 528; Tyler *v.* Winslow, 15 Ohio St. 364; Hazzard *v.* Nottingham, Tapp. (Ohio) 160; Goodin *v.* McArthur, 7 Ohio Dec. (Reprint) 611, 4 Cinc. L. Bul. 215.

88. *Alabama.*— An action may be commenced on a judgment within the year and day within which execution may issue on the same. Kaufman *v.* Richardson, (1904) 37 So. 673.

Arkansas.— Brearly *v.* Norris, 23 Ark. 169. A statute limiting the time within which an execution may be issued on a judgment does not make that time a limit for bringing an action on the judgment. Hicks *v.* Brown, 38 Ark. 469.

California.— Reay *v.* Heazelton, 128 Cal. 335, 60 Pac. 977; Mason *v.* Cronise, 20 Cal. 211. And see Harrier *v.* Bassford, 145 Cal. 529, 78 Pac. 1038.

Indiana.— Root *v.* Moriarty, 30 Ind. 85; King *v.* Manville, 29 Ind. 134.

Iowa.— Larned *v.* Dubuque, 86 Iowa 166, 53 N. W. 105. And see Wooster *v.* Bateman, 126 Iowa 552, 102 N. W. 521.

Kentucky.— Davidson *v.* Simmons, 11 Bush 330.

Louisiana.— Beckham's Succession, 16 La. Ann. 352; Rice's Succession, 15 La. Ann. 649; Kemp *v.* Cornelius, 14 La. Ann. 301.

Michigan.— Snyder *v.* Hitchcock, 94 Mich. 313, 54 N. W. 43.

Mississippi.— Kennard *v.* Alston, 62 Miss. 763.

Nebraska.— Code Civ. Proc. §§ 10, 16, providing that actions not thereinbefore mentioned can only be brought within four years after the cause of action shall have accrued, do not apply to actions on domestic judgments. Snell *v.* Rue, (1904) 101 N. W. 10.

New York.— Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585; Gray *v.* Seeber, 6 N. Y. Suppl. 802; Delavan *v.* Florence, 9 Abb. Pr. 277 note.

North Carolina.— Dickson *v.* Crawley, 112 N. C. 629, 17 S. E. 158; McDonald *v.* Dick-

or other proceeding to revive it.[89] A new statute of limitations may be made retrospectively applicable to existing judgments, without being unconstitutional for that reason, since it affects the remedy only;[90] and a state statute limiting the time within which actions may be brought in its courts on judgments of the federal courts does not deny to them the credit and efficacy which is due to them under the constitution.[91]

2. What Judgments Are Within Statute. If the statute of limitations is applicable to "judgments" generally, it includes domestic as well as foreign judgments.[92] But such statutes are ordinarily limited to judgments rendered by courts of record,[93] including the probate courts,[94] and to such as are final[95] and capable of enforcement by execution or in the nature of money judgments.[96] The statute as usually expressed will apply to judgments by confession,[97] to awards of damages in condemnation proceedings,[98] and to judgments in partition awarding owelty,[99] but not to judgments in tax cases.[1]

3. Accrual of Cause of Action. The statute of limitations begins to run against a judgment from the date of its rendition or of its entry,[2] provided it is

son, 85 N. C. 248; Barringer *v.* Allison, 78 N. C. 79.

Ohio.— Tyler *v.* Winslow, 15 Ohio St. 364.

Texas.— Stevens *v.* Stone, 94 Tex. 415, 60 S. W. 959, 86 Am. St. Rep. 861; Wilcox *v.* Austin First Nat. Bank, 93 Tex. 322, 55 S. W. 317.

Washington.— Bignold *v.* Carr, 24 Wash. 413, 64 Pac. 519.

Wisconsin.— Sullivan *v.* Miles, 117 Wis. 576, 94 N. W. 298.

United States.— Beall *v.* Leavenworth, 34 Fed. 113.

Canada.— Butler *v.* McMicken, 32 Ont. 422.

See 30 Cent. Dig. tit. "Judgment," § 1732 *et seq.*

Action against coöbligor.— The provisions of Minn. Gen. St. (1894) §§ 5436–5441, authorizing proceedings against the coöbligor of a judgment debtor not served in the action or a party thereto, must rest on a valid judgment, and no action can be brought under these statutes against such obligor after ten years from the docketing of such judgment. Brown *v.* Dooley, (Minn. 1905) 103 N. W. 894.

89. St. Louis Type Foundry Co. *v.* Jackson, 128 Mo. 119, 30 S. W. 521; McKinnon *v.* McGown, (Tex. Civ. App. 1895) 29 S. W. 696; Thatcher *v.* Lyons, 70 Vt. 438, 41 Atl. 428, 67 Am. St. Rep. 677; Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811; Herrington *v.* Harkins, 1 Rob. (Va.) 591.

A writ of garnishment issued by the judgment creditor is not equivalent to an execution, so as to prevent the running of the statute against the judgment. Shields *v.* Stark, (Tex. Civ. App. 1899) 51 S. W. 540.

90. Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585. And see Reinhold *v.* Kerrigan, 85 Mo. App. 256.

91. Waterman *v.* Waterloo, 69 Wis. 260, 34 N. W. 137.

92. Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698; Meek *v.* White, 26 Wash. 491, 67 Pac. 256; Citizens' Nat. Bank *v.* Lucas, 26 Wash. 417, 67 Pac. 252, 90 Am. St. Rep. 748, 56 L. R. A. 812.

93. See Mooers *v.* Kennebec, etc., R. Co., 58 Me. 279; Woodman *v.* Somerset County, 37 Me. 29; Mead *v.* Bowker, 168 Mass. 234, 46 N. E. 625; Bannegan *v.* Murphy, 13 Metc. (Mass.) 251; Vincent *v.* Watson, 40 Pa. St. 306.

94. Wright *v.* Dunklin, 83 Ala. 317, 3 So. 597; Barnes *v.* Maring, 23 Ill. App. 68; Walling *v.* Howell, 34 La. Ann. 1104; Preston *v.* Christin, 4 La. Ann. 102. *Contra,* Smith *v.* Shawhan, 37 Iowa 533; Schiml *v.* Schiml, 4 Ohio Cir. Ct. 38, 2 Ohio Cir. Dec. 406; Burd *v.* McGregor, 2 Grant (Pa.) 353.

95. Crim *v.* Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; Epperson *v.* Robertson, 91 Tenn. 407, 19 S. W. 230.

Judgment quando acciderint.— A judgment against an administrator, to be levied on assets of the estate "*quando acciderint*" is not a final judgment, and therefore not within the statute of limitations. Dickson *v.* Crawley, 112 N. C. 629, 17 S. E. 158; Gaither *v.* Sain, 91 N. C. 304. Otherwise as to a judgment to be levied on the goods of the estate, "if sufficient." Braxton *v.* Wood, 4 Gratt. (Va.) 25.

96. Coe *v.* Finlayson, 41 Fla. 169, 26 So. 704; Winter *v.* Tounoir, 25 La. Ann. 611; Clinton, etc., R. Co. *v.* Whitaker, 22 La. Ann. 209.

97. Payne *v.* Furlow, 29 La. Ann. 160.

98. Donnelly *v.* Brooklyn, 121 N. Y. 9, 24 N. E. 17. But in Maine a suit on a judgment recovered under the mill acts for yearly damages for flowing lands is not within the statute of limitations. Knapp *v.* Clark, 30 Me. 244.

99. McKibben *v.* Salines, 41 S. C. 105, 19 S. E. 302.

1. Greenwood *v.* La Salle, 137 Ill. 225, 26 N. E. 1089; Mercier's Succession, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817.

2. Johnson *v.* Foran, 59 Md. 460; Warner *v.* Bartle, 22 Misc. (N. Y.) 488, 50 N. Y. Suppl. 940.

In California the time prescribed for the limitation of an action upon a judgment begins to run from the entry of the judgment,

then final and suable,[3] and is not stayed or superseded for any cause,[4] and in computing the period of limitations the day on which the judgment was entered is to be excluded.[5] But where an action on a judgment is expressly prohibited or would not be entertained by the courts until after the lapse of a certain time or the occurring of a particular event the statute does not begin to run until the accrual of a cause of action upon it.[6] The statute does not run against a judgment in favor of the state; but if such a judgment is assigned it begins to run against the assignee from the date of the assignment.[7] When a judgment is rendered, payable in instalments, the statute of limitations begins to run against it from the time fixed for the payment of each instalment for the part then payable.[8]

4. CIRCUMSTANCES TOLLING THE STATUTE. As a general rule nothing is allowed to interrupt the running of the statute of limitations against a judgment save some exception found in the statute itself;[9] and for this reason it is commonly held that the statute is not tolled by an acknowledgment or new promise of payment,[10]

and not upon its rendition. Herrlich *v.* McDonald, 104 Cal. 551, 38 Pac. 360; Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218; Trenouth *v.* Farrington, 54 Cal. 273.

Entry nunc pro tunc.— Where a judgment is rendered *nunc pro tunc*, the statute begins to run from the date of the order therefor, not from the date as of which it is entered. Borer *v.* Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 L. ed. 532.

Right to issue execution.— The time within which an execution may issue is not to be excluded from the computation of the period of limitation against an action on the judgment. McConnico *v.* Stallworth, 43 Ala. 389; Citizens' Nat. Bank *v.* Lucas, 26 Wash. 417, 67 Pac. 252, 90 Am. St. Rep. 748, 56 L. R. A. 12.

Judgment partially satisfied on execution. — Where part of the amount due on a judgment has been collected on execution, the statute begins to run against an action to recover the unsatisfied balance from the return of the execution. Thatcher *v.* Lyons, 70 Vt. 438, 41 Atl. 428, 67 Am. St. Rep. 677.

3. See the cases *infra*, this note.

Time for appeal.— In California, under a statutory provision that an action is pending from the time of its commencement until the time for an appeal has passed, a right of action on a judgment does not accrue, and the statute of limitations does not begin to run from the entry of the judgment, but from the time of its finality, one year after entry, if no appeal is taken. Feeney *v.* Hinckley, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290. In Illinois, where a judgment is rendered in the circuit court, and an appeal is prayed but not perfected until after the adjournment of the court for the term, the statute of limitations begins to run from the last day of the term. Peoria County *v.* Gordon, 82 Ill. 435.

Judgment against non-resident.— Where seven years are allowed in which to reverse a judgment against an absent defendant, plaintiff is not meanwhile precluded from bringing debt on the judgment. Williams *v.* Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179.

Unliquidated amount.— Where judgment is confessed for a sum "to be ascertained by the prothonotary," the statute of limitations does not begin to run until the amount has been so ascertained. Wills *v.* Gibson, 7 Pa. St. 154.

4. Galt *v.* Todd, 5 App. Cas. (D. C.) 350.

5. Warren *v.* Slade, 23 Mich. 1, 9 Am. Rep. 70; Connecticut Nat. Bank *v.* Bayles, 17 N. Y. App. Div. 596, 45 N. Y. Suppl. 305. *Compare* Cook *v.* Moore, 95 N. C. 1.

6. In Iowa, it is provided by statute (Miller Code Iowa, § 2521) that no action shall be brought on any judgment within fifteen years after its rendition, except on leave of court for good cause shown, unless the record thereof is lost or destroyed; and in a case where there is no loss or destruction of the record, and no cause exists for suing on the judgment within the fifteen years, the statute of limitations does not begin to run against it until the expiration of the fifteen years. Weiser *v.* McDowell, 93 Iowa 772, 61 N. W. 1904. In Louisiana the statute begins to run from the death of the judgment debtor, as until then there is no necessity for bringing a suit on the judgment. Beckham's Succession, 16 La. Ann. 352.

7. Predohl *v.* O'Sullivan, 59 Nebr. 311, 80 N. W. 903.

8. De Uprey *v.* De Uprey, 23 Cal. 352.

9. Schuyler County Bank *v.* Bradbury, 56 Kan. 355, 43 Pac. 254.

But in Louisiana it is said that the current of prescription on a judgment for money may be interrupted in other modes than by the statutory action provided for by the code. Norres *v.* Hayes, 42 La. Ann. 857, 8 So. 606.

10. *Indiana.*— Niblack *v.* Goodman, 67 Ind. 174.

Louisiana.— Favrot *v.* Bates, McGloin 130.

Mississippi.— Berkson *v.* Cox, 73 Miss. 339, 18 So. 934, 55 Am. St. Rep. 539.

North Carolina.— Taylor *v.* Spivey, 33 N. C. 427.

United States.— McAleer *v.* Clay County, 38 Fed. 707.

See 30 Cent. Dig. tit. "Judgment," § 1736.

Contra.— Carshore *v.* Huyck, 6 Barb. 583; Pease *v.* Howard, 14 Johns. 479.

nor by the debtor's absence from the state.[11] But in some jurisdictions the statutes are so framed as to exclude from the period of limitations any time during which the right to execution is stayed or suspended by legal process;[12] and in others the statute begins to run from the date or return of the last execution issued on the judgment, so that it may be interrupted by taking out an execution,[13] or in some states by proceedings for the revival of the judgment by scire facias or otherwise.[14]

5. TRANSFERRED JUDGMENT OF JUSTICE'S COURT. Where a judgment rendered by a justice of the peace or other inferior court is transferred to a superior court by filing a transcript, it is held in some states that the statute of limitations begins to run from the time of filing the transcript;[15] but elsewhere it runs from the date of the rendition of the judgment in the inferior court.[16]

E. Defenses[17] — 1. IN GENERAL. In an action on a judgment defendant cannot set up any defense which accrued prior to the rendition of the judgment and which he might have made in the original suit,[18] unless, according to the excep-

11. Smalley *v.* Bowling, 64 Kan. 818, 68 Pac. 630. *Contra,* Berkley *v.* Tootle, 163 Mo. 584, 63 S. W. 681, 85 Am. St. Rep. 587.

Imprisonment.— In Vermont the statute of limitations to an action on a judgment begins to run from the discharge of a poor debtor under the act, and does not run while the judgment debtor is imprisoned on execution. Ferriss *v.* Barlow, 8 Vt. 90.

12. Dabney *v.* Shelton, 82 Va. 349, 4 S. E. 605. And see Work *v.* Harper, 31 Miss. 107, 66 Am. Dec. 549.

Necessity of obtaining leave to sue.—Under a statute excluding from the period of limitations any time during which the commencement of an action is stayed by injunction or order of court or by statutory prohibition, the fact that a judgment creditor cannot maintain an action on his judgment without first obtaining leave of court to sue on it does not amount to such a "stay" as the statute contemplates. Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715.

13. Swafford *v.* Howard, 50 S. W. 43, 20 Ky. L. Rep. 1793; Butts *v.* Patton, 33 N. C. 262; Graves *v.* Hall, 13 Tex. 379; Fessenden *v.* Barrett, 9 Tex. 475. *Contra,* King *v.* Manville, 29 Ind. 134.

14. Van Wickle *v.* Garrett, 14 La. Ann. 106; Walsh *v.* Bosse, 16 Mo. App. 231; Rogers *v.* Kimsey, 101 N. C. 559, 8 S. E. 159. *Contra,* Meek *v.* Meek, 45 Iowa 294; Peyton *v.* Carr, 1 Rand. (Va.) 436.

15. Burr *v.* Engles, 24 Ark. 283; Cole *v.* Potter, 135 Mich. 326, 97 N. W. 774, 106 Am. St. Rep. 398. But *compare* Wilcox *v.* Lantz, 107 Mich. 1, 64 N. W. 735.

16. Dieffenbach *v.* Roch, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829; Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585; Slocum *v.* Stoddard, 7 N. Y. Civ. Proc. 240; Adams *v.* Guy, (N. C. 1890) 10 S. E. 1102; Daniel *v.* Laughlin, 87 N. C. 433.

17. Judgments of courts of sister states see *infra,* XXII, B, 4, h.

18. *Alabama.*— Sims *v.* Herzfeld, 95 Ala. 145, 10 So. 227; Crawford *v.* Simonton, 7 Port. 110.

Arkansas.— Morris *v.* Curry, 41 Ark. 75; Ellis *v.* Clarke, 19 Ark. 420, 70 Am. Dec. 603.

Colorado.— Harter *v.* Shull, 17 Colo. App. 162, 67 Pac. 911.

Georgia.— McAllister *v.* Singer Mfg. Co., 64 Ga. 622.

Illinois.—Guinard *v.* Heysinger, 15 Ill. 288; Shadbolt *v.* Findeisen, 88 Ill. App. 432.

Indiana.— Bloomfield R. Co. *v.* Burress, 82 Ind. 83; Indianapolis, etc., R. Co. *v.* Risley, 50 Ind. 60; Burton *v.* Stewart, 11 Ind. 238.

Iowa.— Wright *v.* Leclaire, 3 Iowa 221; Jackson *v.* Fletcher, Morr. 230.

Kansas.— Snow *v.* Mitchell, 37 Kan. 636, 639, 15 Pac. 224, 16 Pac. 737.

Kentucky.— Maysville, etc., R. Co. *v.* Ball, 108 Ky. 241, 56 S. W. 188, 21 Ky. L. Rep. 1693; Walker *v.* Kendall, Hard. 404.

Maine.— Jones *v.* Jones, 87 Me. 117, 32 Atl. 779; Lancaster *v.* Richmond, 83 Me. 534, 22 Atl. 393; Noble *v.* Merrill, 48 Me. 140; Bird *v.* Smith, 34 Me. 63, 56 Am. Dec. 635.

Massachusetts.— Barton *v.* Radclyffe, 149 Mass. 275, 21 N. E. 374; Kittredge *v.* Martin, 141 Mass. 410, 6 N. E. 95; Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Thatcher *v.* Gammon, 12 Mass. 268.

Michigan.— Hammond *v.* Place, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543.

Missouri.— Poorman *v.* Mitchell, 48 Mo. 45.

New York.— Townsend *v.* Carman, 6 Cow. 695.

Texas.— Bridge *v.* Samuelson, 73 Tex. 522, 11 S. W. 539; Taylor *v.* Harris, 21 Tex. 438; Bullock *v.* Ballew, 9 Tex. 498.

Wisconsin.— Dudley *v.* Stiles, 32 Wis. 371; Morris *v.* Boomer, 16 Wis. 547.

United States.— Dickson *v.* Wilkinson, 3 How. 57, 11 L. ed. 491; Biddle *v.* Wilkins, 1 Pet. 686, 7 L. ed. 315; Wittemore *v.* Malcomson, 28 Fed. 605.

Canada.— Gault *v.* McNabb, 1 Manitoba 35.

See 30 Cent. Dig. tit. "Judgment," § 1726. See also *supra,* XIII, E.

Infancy.— In an action on a judgment defendant cannot plead that he was an infant at the time the judgment was rendered.

tion allowed in some states, he was prevented from making his defense in the original action, without any negligence or fault on his own part.[19] But this rule does not apply to a defense which did not exist at the time of the original action,[20] or to a counter-claim which defendant was not obliged to interpose, and did not interpose, in that suit, although he might have done so,[21] or where the action on the judgment is not between the original parties.[22]

2. WANT OF JURISDICTION. It is a good defense to an action on a judgment that the court which rendered it had no jurisdiction, either of the subject-matter of the action or of the person of the defendant,[23] and according to the majority of the decisions this may be shown even in contradiction of the record,[24] although some refuse to allow the plea except where the want of jurisdiction is apparent on the face of the record.[25] Where want of jurisdiction is thus set up, it is not necessary that the answer should also state a defense to the cause of action on which the judgment was founded.[26]

3. FRAUD.[27] Fraud in procuring a judgment is now generally admitted as a good defense to an action upon the judgment;[28] but not fraud in the original

Cauthorn *v.* Berry, 69 Mo. App. 404; Ludwick *v.* Fair, 29 N. C. 422, 47 Am. Dec. 333.

Misnomer.— Where a party suffers judgment to pass against him by a wrong name, he is estopped, in an action on such judgment, to take advantage of the misnomer. Guinard *v.* Heysinger, 15 Ill. 288.

Failure or illegality of consideration in the contract or transaction on which the judgment was founded cannot be set up in defense to an action on the judgment. Sims *v.* Herzfeld, 95 Ala. 145, 10 So. 227; Brown *v.* Trulock, 4 Blackf. (Ind.) 429. *Compare* Burwell *v.* Jackson, 9 N. Y. 535. The same is true of illegality of the original consideration. Allgood *v.* Whitley, 49 Ala. 215.

Statute of limitations.— In an action on a judgment it is no defense that the original claim was barred by the statute of limitations. Carey *v.* Roosevelt, 83 Fed. 242.

Estoppel.— The fact that a judgment was successfully set up by the judgment creditor in bar of an action against him by the debtor, on the ground that the action was based on the same facts which were adjudicated in the action in which the judgment was rendered, is no bar to an action on such judgment. Henry *v.* Allen, 82 Tex. 35, 17 S. W. 515.

Agreement not to use judgment.— A mere agreement by the judgment creditor not to use or enforce the judgment against the debtor, not founded on a good consideration, cannot be pleaded in bar of an action of debt on the judgment. Walker *v.* Kendall, Hard. (Ky.) 404; Sewall *v.* Sparrow, 16 Mass. 24; Greene *v.* Hallenbeck, 32 Hun (N. Y.) 469.

19. Spencer *v.* Vigneaux, 20 Cal. 442.

20. Burwell *v.* Jackson, 9 N. Y. 535.

21. Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672; Dudley *v.* Stiles, 32 Wis. 371; Rose *v.* Northwest F. & M. Ins. Co., 67 Fed. 439. See *supra*, XIII, E, 3.

22. Thus, in an action by a judgment creditor against the purchaser of lands from the debtor, to subject such lands to the payment of the judgment, the purchaser may contest, by pleading and proof, the lien sought to be enforced against the land. Coe *v.* Erb, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764.

23. See also *supra*, XIII, B, 4, a.

24. *Arkansas.*—Kimball *v.* Merrick, 20 Ark. 12.

California.— Hill *v.* City Cab, etc., Co., 79 Cal. 188, 21 Pac. 728.

Colorado.— Symes *v.* People, 17 Colo. App. 466, 69 Pac. 312.

Indian Territory.— Minter *v.* Green, 3 Indian Terr. 761, 49 S. W. 48.

Iowa.— Clark *v.* Little, 41 Iowa 497; Salladay *v.* Bainhill, 29 Iowa 555.

Minnesota.— Deering *v.* Poston, 78 Minn. 29, 80 N. W. 783; Vaule *v.* Miller, 69 Minn. 440, 72 N. W. 452.

Missouri.— Crone *v.* Dawson, 19 Mo. App. 214.

New Hampshire.— Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

New York.— Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Baldwin *v.* Kimmel, 16 Abb. Pr. 353. See Brown *v.* Balde, 3 Lans. 283.

Ohio.— Evans *v.* Instine, 6 Ohio 117.

Pennsylvania.— Hughes *v.* Schreiner, 202 Pa. St. 488, 52 Atl. 30.

25. *Indiana.*— Indianapolis, etc., R. Co. *v.* Harmless, 124 Ind. 25, 24 N. E. 369.

Kentucky.— Maysville, etc., R. Co. *v.* Ball, 108 Ky. 241, 56 S. W. 188, 21 Ky. L. Rep. 1693.

Massachusetts.— Kittredge *v.* Martin, 141 Mass. 410, 6 N. E. 95.

New Jersey.— Miller *v.* Dungan, 35 N. J. L. 389.

Vermont.— Holt *v.* Thacher, 52 Vt. 592.

26. Minter *v.* Green, 3 Indian Terr. 761, 49 S. W. 48; Greene *v.* Woodland Ave., etc., R. Co., 62 Ohio St. 67, 56 N. E. 642; Kingsborough *v.* Tousley, 56 Ohio St. 450, 47 N. E. 541.

27. See also *supra*, XIII, B, 4, c.

28. *Arkansas.*— Peel *v.* January, 35 Ark. 331, 37 Am. Rep. 27.

California.— Spencer *v.* Vigneaux, 20 Cal. 442. *Compare* Carpentier *v.* Oakland, 30 Cal. 439.

cause of action,[29] or the giving of false testimony by plaintiff or other witnesses, defendant having been present at the trial.[30]

4. Error or Irregularity. In defense to an action on a judgment it may be shown that it is illegal or void,[31] but not that it is erroneous or irregular in any particular not going to the jurisdiction.[32]

5. Payment or Satisfaction.[33] Defendant may plead payment of the judgment sued on,[34] or an accord and satisfaction;[35] but not payment of the original debt or claim before the rendition of the judgment,[36] nor can he properly be allowed, under a plea of payment, the benefit of a partial payment.[37] It has been held

Colorado.— Harter *v.* Shull, 17 Colo. App. 162, 67 Pac. 911.

Illinois.— Hopkins *v.* Woodward, 75 Ill. 62.

Indiana.— Duringer *v.* Moschino, 93 Ind. 495; Stone *v.* Lewman, 28 Ind. 97.

New York.— Gardiner *v.* Van Alstyne, 163 N. Y. 573, 57 N. E. 1110; Hackley *v.* Draper, 60 N. Y. 88; Michigan *v.* Phœnix Bank, 33 N. Y. 9; Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Greene *v.* Hallenbeck, 24 Hun 116.

Texas.— Miller *v.* Lovell, Civ. App. 1897, 40 S. W. 835.

See 30 Cent. Dig. tit. "Judgment," § 1726.

29. Cline *v.* Crump, 11 Ind. 125. See also *supra*, XIII, E, 2, c.

30. Cottle *v.* Cole, 20 Iowa 481; Demerit *v.* Lyford, 27 N. H. 541. *Compare supra*, XIII, B, 4, c.

31. Kinsey *v.* Ford, 38 Barb. (N. Y.) 195. See *supra*, XIII, B, 4, a; XX, E, 2.

32. *Massachusetts.*— Hawes *v.* Hathaway, 14 Mass. 233.

Michigan.— Hammond *v.* Place, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543.

Missouri.— Townsend *v.* Cox, 45 Mo. 401.

England.— Dick *v.* Tolhausen, 4 H. & N. 695.

Canada.— Frontenac Loan Co. *v.* Morice, 3 Manitoba 462.

See also *supra*, XIII, B, 4, b.

33. See also *supra*, XIX; *infra*, XX, F, 2, a, note 67.

34. *Connecticut.*— Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371.

Delaware.— Conner *v.* Pennington, 1 Del. Ch. 177.

Illinois.— Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347.

Indiana.— Wolcott *v.* Ensign, 53 Ind. 70; Thom *v.* Wilson, 27 Ind. 370.

New Jersey.— Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711.

North Carolina.— Briley *v.* Sugg, 21 N. C. 366, 30 Am. Dec. 172.

Texas.— Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567.

Vermont.— See Kinsman *v.* Page, 22 Vt. 628.

See 30 Cent. Dig. tit. "Judgment," § 1726; and *supra*, XIX, A.

Statute of limitations.— Under the plea of payment to an action on a judgment, advantage may be taken of the statute of limitations. Butts *v.* Patton, 33 N. C. 262.

Pleading payment and other defenses.— The payment or satisfaction of the judgment must be specially pleaded; it cannot be proved under the general issue or plea of *nul tiel record*. Tunstall *v.* Robinson, 24 Fed. Cas. No. 14,238*a*, Hempst. 229. And according to the strict theory defendant may plead either *nul tiel record* or payment of the judgment, but not both. Riley *v.* Riley, 20 N. J. L. 114. But in New Hampshire, under the practice as to double pleadings, defendant in an action of debt on a judgment may plead both *nul tiel record* and payment, and also a release. Chapman *v.* Sloan, 2 N. H. 464. And see to same effect Crawford *v.* Ellison, 1 Brev. (S. C.) 378.

35. *Indiana.*— Jones *v.* Ransom, 3 Ind. 327.

Maryland.— McCullough *v.* Franklin Coal Co., 21 Md. 256; Harden *v.* Campbell, 4 Gill 29.

New York.— La Farge *v.* Herter, 9 N. Y. 241; Cameron *v.* Fowler, 5 Hill 306; Evans *v.* Wells, 22 Wend. 324; Brown *v.* Feeter, 7 Wend. 301; Le Page *v.* McCrea, 1 Wend. 164, 19 Am. Dec. 469; Boyd *v.* Hitchcock, 20 Johns. 76, 11 Am. Dec. 247; Witherby *v.* Mann, 11 Johns. 518.

Pennsylvania.— Savage *v.* Everman, 70 Pa. St. 315, 10 Am. Rep. 676.

Vermont.— Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. 68.

Wisconsin.— Reid *v.* Hibbard, 6 Wis. 175.

United States.— Farmers Bank *v.* Groves, 12 How. 51, 13 L. ed. 889.

Compare Accord and Satisfaction, 1 Cyc. 309.

By parol.— In Mitchell *v.* Hawley, 4 Den. (N. Y.) 414, 47 Am. Dec. 260, it is held that debt on a judgment cannot be barred at common law by an accord and satisfaction by parol. See also Accord and Satisfaction, 1 Cyc. 309.

36. Bird *v.* Smith, 34 Me. 63, 56 Am. Dec. 635; Stephens *v.* Howe, 127 Mass. 164; Hyder *v.* Smith, (Tenn. Ch. App. 1899) 52 S. W. 884. See also *supra*, XIII, E, 2, f. But where a judgment is recovered upon a negotiable note after indorsement, in the name and with the consent of a nominal party, without interest, at the instance of one of several makers of the note, who paid the same before judgment, such maker might show, in an action on the judgment by the judgment plaintiff, that although nominally a debtor he was really a creditor in interest. Pratt *v.* Dow, 56 Me. 81.

37. Colclough *v.* Rhodus, 2 Rich. (S. C.) 76, where, however, it appeared that evidence

that it is no defense to such a suit that an execution issued on the judgment is in full life and in the officer's hands, if there is no plea or proof of payment.[38]

6. EQUITABLE DEFENSES. Under statutes permitting equitable defenses to be set up in actions at law, a suit on a judgment may be defeated by proof of any facts showing that it would be against conscience to allow a recovery on the judgment, provided defendant could not have availed himself of such facts in the original action, or shows a good and sufficient excuse for his failure to do so.[39] In the federal courts equitable defenses cannot be interposed in actions at law, such as an action on a judgment.[40]

F. Pleading — 1. DECLARATION OR COMPLAINT[41] — a. Requisites in General. In suing on a judgment it is not necessary to set out the judgment *in hæc verba*, but it is sufficient to set it forth according to its legal effect.[42] A complaint in such an action is sufficient if it describes the court in which the alleged judgment was rendered, the place where it was held, the names of the parties, the date at which it was entered, and the amount of the judgment.[43] The plaintiff, if not plaintiff in the original action, but claiming as assignee or otherwise, must allege facts showing his ownership of the judgment;[44] and if the defendant is not the same as in the original action, the nature and cause of his liability on the judgment must be set forth.[45] It is not necessary to allege that the judgment has not

was given of a partial payment under such a plea, without objection, and the jury allowed it, and the court of appeals refused to interfere with the verdict.

38. Reynolds *v.* Lyon, 20 Ga. 225; Wilson *v.* Hatfield, 121 Mass. 551; Linton *v.* Hurley, 114 Mass. 76; White River Bank *v.* Downer, 29 Vt. 332; Wells *v.* Vansickle, 112 Fed. 398. *Contra*, Ligon *v.* McNeil, 6 Rich. (S. C.) 377. And see Gassner *v.* Sandford, 2 Sandf. (N. Y.) 440.

39. Barton *v.* Radclyffe, 149 Mass. 275, 21 N. E. 374. See *supra*, XIII, E, 2, h.

40. Bennett *v.* Butterworth, 11 How. (U. S.) 669, 13 L. ed. 859; Buller *v.* Sidell, 43 Fed. 116; Parsons *v.* Denis, 7 Fed. 317, 2 McCrary 359; Montejo *v.* Owen, 17 Fed. Cas. No. 9,722, 14 Blatchf. 324.

41. In actions on judgments of courts of sister state see *infra*, XXII, B, 4, e, (I).

Showing leave of court to sue see *supra*, XX, A, 4, b, text and note 65.

42. Georgia Cent. Bank *v.* Veasey, 14 Ark. 671. But in Kansas, under a statute providing that, "in an action on a note, bill, or other written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleadings," a judgment is such an instrument as must be set out by copy. Oberlin Loan, etc., Co. *v.* Kitchen, 8 Kan. App. 445, 57 Pac. 494. As to practice in Pennsylvania see Hauck *v.* Gundaker, 21 Pa. Co. Ct. 12.

Pleadings.— A petition stating a decree entered in a former proceeding, either as matter of inducement or as the basis of plaintiff's action, need not set out the petition on which such decree was rendered. Davis *v.* Davis, 65 Fed. 380.

43. Ewing *v.* Jennings, 15 Nev. 379; Whitley *v.* General Electric Co., 18 Tex. Civ. App. 674, 45 S. W. 959. See Edwards *v.* Hellings, 99 Cal. 214, 33 Pac. 799.

Form held sufficient.— A complaint alleging that plaintiff claims of defendant a certain sum due from him on a judgment rendered in favor of plaintiff against defendant on a certain day in a certain justice's court, which judgment, with interest, is still unsatisfied, due, and unpaid, is sufficient. Kaufman *v.* Richardson, (Ala. 1904) 37 So. 673.

Amount of judgment must be correctly pleaded.— Shelton *v.* Clark, 7 Ark. 194; Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372.

Description of court see Moseley *v.* White, 1 Port. (Ala.) 410.

44. *Alabama.*—Hall *v.* Henderson, 126 Ala. 449, 28 So. 531, 85 Am. St. Rep. 53, 61 L. R. A. 621.

California.— Cobb *v.* Doggett, 142 Cal. 142, 75 Pac. 785. But in an action by an assignee on a money judgment, where the complaint alleges the assignment, it is not necessary for it further to state that plaintiff was the owner of the judgment at the commencement of the action. Curtin *v.* Kowalsky, 145 Cal. 431, 78 Pac. 962.

Illinois.— Where suit is brought upon a judgment in the name of A for the use of B, it is not necessary to file with the declaration a copy of the assignment. Love *v.* Fairfield, 10 Ill. 303.

Indiana.— Staats *v.* Burke, 16 Ind. 448; McCardle *v.* Aultman Co., 31 Ind. App. 63, 67 N. E. 236.

Montana.— Ryan *v.* Spieth, 18 Mont. 45, 44 Pac. 403.

New Jersey.— A pleading which alleges that A recovered judgment in the name of B cannot be true, and is bad on general demurrer. State *v.* Smith, 15 N. J. L. 84.

See 30 Cent. Dig. tit. "Judgment." § 1740.

45. Mathis *v.* Fordham, 114 Ga. 364, 40 S. E. 324; Low *v.* Felton, 84 Tex. 378, 19 S. W. 693; Bignold *v.* Carr, 24 Wash. 413, 64 Pac. 519.

been appealed from,[46] but the declaration must show that it remains in full force and unpaid.[47] It is of course not necessary to plead the contract or claim on which the judgment was rendered;[48] but on the contrary, care should be taken to declare on the judgment itself and not on the original demand.[49] In declaring on the judgment of an inferior court, it is not necessary to allege all the proceedings in full; but after setting out the jurisdictional facts, a general averment may cover the other steps up to the recovery.[50] A complaint on a judgment must be verified.[51]

b. Averments of Jurisdiction. In suing on a judgment rendered by a superior court of general jurisdiction, it is not necessary to set out the facts conferring jurisdiction;[52] but if the judgment was given by an inferior or limited court, all the facts necessary to establish its jurisdiction must be specifically set forth, unless dispensed with by statute, and a general averment of jurisdiction is not sufficient.[53] As to jurisdiction of the subject-matter, it is sufficiently averred if the facts pleaded as to the amount and nature of the claim bring it within the statutes conferring jurisdiction.[54]

c. Statutes Regulating Jurisdictional Averments. In many states statutes have been enacted prescribing that, in suing on a judgment, or on a judgment of a

46. Chaquette *v.* Ortet, 60 Cal. 594.

47. *California.*— Bronzan *v.* Drobaz, 93 Cal. 647, 29 Pac. 254.

Massachusetts.— O'Neil *v.* Kittredge, 3 Allen 470; Canfield *v.* Miller, 13 Gray 274; Dunning *v.* Owen, 14 Mass. 157.

Texas.— Simpson *v.* Huston, 14 Tex. 476.

Utah.— Vogel *v.* Walker, 3 Utah 227, 2 Pac. 210.

Vermont.— Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. 68.

See 30 Cent. Dig. tit. "Judgment," § 1740.

Contra.— Masterson *v.* Matthews, 60 Ala. 260.

Equivalent allegations.—In pleading a judgment, it is sufficient to allege either that it remains valid and in full force, or that it remains wholly unpaid and unsatisfied, as these two formulas are considered equivalent. Carter *v.* Paige, 80 Cal. 390, 22 Pac. 188; Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784; Wise *v.* Loring, 54 Mo. App. 258.

Alleging judgment to be operative.— A petition in an action on a judgment, alleging that it is absolute, sufficiently alleges that it is operative and effective. Brown *v.* Helsley, 2 Nebr. (Unoff.) 69, 96 N. W. 187.

Rebutting presumption of payment.— A complaint on a judgment is demurrable which shows on its face that no execution has been issued for twenty years, unless the complaint states facts which rebut the presumption of payment. Beekman *v.* Hamlin, 20 Oreg. 352, 25 Pac. 672.

48. Sims *v.* Herzfeld, 95 Ala. 145, 10 So. 227.

49. See Anderson *v.* Mayers, 50 Cal. 525; Krower *v.* Reynolds, 99 N. Y. 245, 1 N. E. 775; Thomas *v.* Snyder, 77 Hun (N. Y.) 365, 28 N. Y. Suppl. 877; Sheldon *v.* Mirick, 70 Hun (N. Y.) 41, 23 N. Y. Suppl. 1081.

50. Barnes *v.* Harris, 4 N. Y. 374; Cornell *v.* Barnes, 7 Hill (N. Y.) 35 note; Rowland *v.* Veale, Cowp. 18; Makareth *v.* Pollard, 1 Ld. Raym. 80; Higginson *v.* Martin, 2 Mod. 195.

51. Smith *v.* Mulliken, 2 Minn. 319.

Record destroyed.— The allegation of the amount of the recovery in the judgment sued on need not be sworn to in the petition, in an action of debt on a judgment alleged to have been destroyed by fire. Johnson *v.* Skipworth, 59 Tex. 473.

52. *California.*— McCoy *v.* Van Ness, 98 Cal. 675, 33 Pac. 761; Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Weller *v.* Dickinson, 93 Cal. 108, 28 Pac. 854.

Colorado.— Bruckman *v.* Taussig, 7 Colo. 561, 5 Pac. 152.

Indiana.— Hansford *v.* Van Auken, 79 Ind. 302; Spaulding *v.* Baldwin, 31 Ind. 376; Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784.

Kansas.— Burnes *v.* Simpson, 9 Kan. 658.

Minnesota.— Holmes *v.* Campbell, 12 Minn. 221.

New Hampshire.— Wilbur *v.* Abbot, 58 N. H. 272; Rogers *v.* Odell, 39 N. H. 452.

New York.—Springsteene *v.* Gillett, 30 Hun 260.

Vermont.— Probate Judge *v.* Fillmore, 1 D. Chipm. 420.

United States.— Pennington *v.* Gibson, 16 How. 65, 14 L. ed. 847; Lathrop *v.* Stuart, 14 Fed. Cas. No. 8,113, 5 McLean 167; Sevier *v.* White, 21 Fed. Cas. No. 12,681.

See 30 Cent. Dig. tit. "Judgment," § 1741.

53. *Illinois.*— Payne *v.* Taylor, 34 Ill. App. 491.

Indiana.— Willey *v.* Strickland, 8 Ind. 453.

Massachusetts.— Bridge *v.* Ford, 4 Mass. 641.

New York.— Turner *v.* Roby, 3 N. Y. 193; Barnes *v.* Harris, 3 Barb. 603; Cornell *v.* Barnes, 7 Hill 35; Sheldon *v.* Hopkins, 7 Wend. 435; Cleveland *v.* Rogers, 6 Wend. 438; Dakin *v.* Hudson, 6 Cow. 221. See Bennet *v.* Moody, 2 Hall 508.

Oregon.— Willits *v.* Walter, 32 Oreg. 411, 52 Pac. 24.

54. Masterson *v.* Matthews, 60 Ala. 260; Stiles *v.* Stewart, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142.

court of limited or inferior jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but merely that the judgment "was duly given or made."[55] This allegation is equivalent to and a substitute for the averment of jurisdictional facts required at common law,[56] and either the words of the statute or words of exactly equivalent import must be employed.[57] Such a statute applies to judgments of inferior courts of a sister state,[58] but not to judgments of courts in a foreign country,[59] and as a rule not to the judgments of superior domestic courts, whose jurisdiction is presumed and need not be pleaded.[60]

d. Setting Forth or Annexing Transcript.[61] A judgment is a "written instrument" within the meaning of statutes requiring that, when suit is brought on such an instrument, a copy thereof shall be annexed to the petition or filed with it,[62] and although the petition does not correctly describe the judgment, it is immaterial, where the error is corrected by the exemplification of the judgment filed with it.[63] Setting forth or annexing the judgment in this way does not make it a part of the record so as to enable defendant to demur for defects in the judgment.[64] At common law profert of the record in an action on a judgment is not necessary.[65]

55. See the statutes of the several states.

56. *California.*— Bronzan *v.* Drobaz, 93 Cal. 647, 29 Pac. 254; Weller *v.* Dickinson, 93 Cal. 108, 28 Pac. 854; Hanscom *v.* Tower, 17 Cal. 518.

Indiana.— Chicago, etc., R. Co. *v.* Higgins, 150 Ind. 329, 50 N. E. 32; Crake *v.* Crake, 18 Ind. 156; Willey *v.* Strickland, 8 Ind. 453.

Kentucky.— Garner *v.* Wills, 92 Ky. 386, 17 S. W. 1023, 13 Ky. L. Rep. 726.

Mississippi.— State *v.* Bowen, 45 Miss. 347.

Nevada.— Keys *v.* Grannis, 3 Nev. 548.

New York.— Springsteene *v.* Gillett, 30 Hun 260; Breen *v.* Henry, 34 Misc. 232, 69 N. Y. Suppl. 627; Wheeler *v.* Dakin, 12 How. Pr. 537.

United States.— Lee *v.* Terbell, 33 Fed. 850.

See 30 Cent. Dig. tit. "Judgment," § 1740 *et seq.*

57. Scanlan *v.* Murphy, 51 Minn. 536, 53 N. W. 799; Weaver *v.* English, 11 Mont. 84, 27 Pac. 396; People *v.* Bacon, 37 N. Y. App. Div. 414, 55 N. Y. Suppl. 1045; Hunt *v.* Dutcher, 13 How. Pr. (N. Y.) 538. Under Mont. Code Civ. Proc. § 745, providing that in pleading a judgment it is not necessary to state the facts conferring jurisdiction, but the judgment may be stated to have been "duly given or made," a complaint alleging that on a certain date certain parties were adjudged bankrupts by the district court of the United States at a term of the court held in a certain city, in proceedings then pending in the court, under the provisions of the Bankrupt Act of July 1, 1898, c. 541, 30 U. S. St. at L. 544 [U. S. Comp. St. (1901) p. 3418], was held an insufficient allegation of the rendition of the adjudication, in that it failed to allege that it was "duly given or made." Mears *v.* Shaw, 32 Mont. 575, 81 Pac. 338. But see Pierstoff *v.* Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881, holding that the statute is substantially complied with by alleging that plaintiff "recovered a judgment" and that such judgment "was duly docketed."

58. Toledo, etc., R. Co. *v.* McNulty, 34 Ind. 531; Crake *v.* Crake, 18 Ind. 156. But see Karns *v.* Kunkle, 2 Minn. 313.

59. McLaughlin *v.* Nichols, 13 Abb. Pr. (N. Y.) 244; Hollister *v.* Hollister, 10 How. Pr. (N. Y.) 539.

60. Ashton *v.* Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Memphis Medical College *v.* Newton, 2 Handy (Ohio) 163, 12 Ohio Dec. (Reprint) 382.

61. Sister state judgments see *infra*, XXII, B, 4, e, (II).

62. *Illinois.*— Lambert *v.* Jonte, 28 Ill. App. 591.

Iowa.— Latterett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

Kansas.— Burnes *v.* Simpson, 9 Kan. 658; Oberlin Loan, etc., Co. *v.* Kitchen, 8 Kan. App. 445, 57 Pac. 494.

New York.— Day *v.* New Lots, 107 N. Y. 148, 13 N. E. 915.

Ohio.— Memphis Medical College *v.* Newton, 2 Handy 163, 12 Ohio Dec. (Reprint) 382; Linehan *v.* Snyder, 8 Ohio S. & C. Pl. Dec. 394, 7 Ohio N. P. 132. *Contra*, Cox *v.* Farley, 2 Ohio Dec. (Reprint) 291, 2 West. L. Month. 315.

United States.— U. S. Bank *v.* Smith, 11 Wheat. 171, 6 L. ed. 443.

See 30 Cent. Dig. tit. "Judgment," § 1743.

Contra in Indiana.— Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414; Hopper *v.* Lucas, 86 Ind. 43; Lytle *v.* Lytle, 37 Ind. 281. But earlier decisions in this state were in accord with the rule prevailing elsewhere. See Snyder *v.* Snyder, 25 Ind. 399; State *v.* Pierce, 22 Ind. 116; Sugar Creek Tp. *v.* Johnson, 20 Ind. 280; Bates *v.* Simpson, 19 Ind. 388; Staats *v.* Burke, 16 Ind. 448; Reasor *v.* Raney, 14 Ind. 441.

63. Garvin *v.* St. Clair, 17 Tex. 435.

64. Deem *v.* Crume, 46 Ill. 69; Hall *v.* Harrison, 21 Mo. 227, 64 Am. Dec. 225; Linehan *v.* Snyder, 8 Ohio S. & C. Pl. Dec. 394, 7 Ohio N. P. 132.

65. Capp *v.* Gilman, 2 Blackf. (Ind.) 45; Gardner *v.* Henry, 5 Coldw. (Tenn.) 458.

2. Plea or Answer[66] — a. Requisites in General. Defendant may plead specially, or in abatement, in an action on a judgment, but the plea or answer must set forth with certainty and precision the facts relied on to defeat the action.[67]

b. Proper Form of General Issue. In an action on a domestic judgment, the only proper form of the general issue is *nul tiel record*,[68] or a general denial, its equivalent under the code system of pleading;[69] and this plea should conclude with a verification to the court only, not to the country, except in the case of a judgment of an inferior court not of record.[70] *Nil debet* is not an admissible plea.[71]

66. **Sister state judgments** see *infra*, XXII, B, 4, e, (III).

Pleading payment or satisfaction see *supra*, XX, E, 5.

67. **Plea in abatement.**— The pendency of a writ of error may be pleaded in abatement, but the plea must allege that such writ was brought before the commencement of the action and that it operates as a supersedeas. Jenkins *v.* Pepoon, 2 Johns. Cas. (N. Y.) 312. So the pendency of a former action on the same judgment may be pleaded (Lincoln *v.* Thrall, 34 Vt. 110), or the reversal of the judgment on appeal (McNulty *v.* Batty, 2 Pinn. (Wis.) 53).

Denying plaintiff's title to judgment.— A plea that plaintiff is not the owner of the judgment sued on, but that another person is, giving his name, is good without stating the particulars of the assignment. Holcombe *v.* Tracy, 2 Minn. 241. See Cottle *v.* Cole, 20 Iowa 481.

Failure to obtain leave to sue on the judgment, as required by statute, may be pleaded in defense to an action upon it. Lyon *v.* Manly, 32 Barb. (N. Y.) 51.

Defendant not a party.— In an action on a judgment, defendant may plead that he was not a party to the action in which such judgment was rendered, but the plea must be explicit. Stevenson *v.* Flournoy, 89 Ky. 561, 13 S. W. 210, 11 Ky. L. Rep 745.

Payment.— Under this plea defendant may show satisfaction of the judgment otherwise than by its direct payment to the judgment creditor or on execution; as, where the plaintiff has received, or become chargeable with, the amount of collaterals placed in his hands. Wolcott *v.* Ensign, 53 Ind. 70. But in such cases the facts relied on as constituting satisfaction must be set forth in the plea or answer. Black *v.* Everett, 5 Stew. & P. (Ala.) 60; Lake *v.* Steinbach, 5 Wash. 659, 32 Pac. 767. See also *supra*, XX, E, 5.

Discharge in insolvency should be pleaded with full particulars as to the court and proceeding in which it was obtained. Delevan *v.* Stanton, 2 Hall (N. Y.) 190.

Want of jurisdiction.— A plea denying the jurisdiction of the court which rendered the judgment should be specific and negative the facts out of which jurisdiction might arise. See Indianapolis, etc., R. Co. *v.* Harmless, 124 Ind. 25, 24 N. E. 369; Schwab Clothing Co. *v.* Cromer, 1 Indian Terr. 661, 43 S. W. 951; Mervin *v.* Kumbel, 23 Wend. (N. Y.) 293; Townsend *v.* Price, 19 Wash. 415, 53 Pac. 668. And see Evans *v.* Instine, 6 Ohio 117, holding that, if defendant would avail himself of the want of process or service, and of his non-appearance in the original suit, he must crave oyer of the record declared on and set it out.

A plea of plene administravit to an action on a judgment by confession against an administrator is bad, as the confession is an admission of assets. Hooks *v.* Moses, 30 N. C. 88. See, generally, Executors and Administrators.

68. *Alabama.*— Crawford *v.* Simonton, 7 Port. 110.

California.—Reynolds *v.* Robertson, (1884) 4 Pac. 1192.

New Hampshire.— Wilbur *v.* Abbott, 59 N. H. 132.

New York.— Gassner *v.* Sandford, 2 Sandf. 440.

North Carolina.— Purvis *v.* Jackson, 69 N. C. 474.

Vermont.—Clemons *v.* Clemons, 69 Vt. 545, 38 Atl. 314.

United States.— Westerwelt *v.* Lewis, 29 Fed. Cas. No. 17,446, 2 McLean 511.

See 30 Cent. Dig. tit. "Judgment," § 1745.

Form of plea.— A plea which alleges that "if there be a record of any such supposed judgment defendants were not made parties to the suit in which it was rendered, and therefore that the court had no jurisdiction to render the judgment against them" is bad because argumentative. Cannon *v.* Cooper, 39 Miss. 784, 80 Am. Dec. 101.

Joinder of pleas.— Notice of special matter of defense cannot be given with the plea of *nul tiel record*. Haverly *v.* Barheydt, 1 Wend. (N. Y.) 70; Raymond *v.* Smith, 13 Johns. (N. Y.) 329. Nor can a plea of discharge under the insolvency act be joined with the plea of *nul tiel record*. Delavan *v.* Stanton, 2 Hall (N. Y.) 190. As to joining a plea of payment with that of *nul tiel record* see *supra*, XX, E, 5.

69. Clarion First Nat. Bank *v.* Hamor, 47 Fed. 36.

70. Thornton *v.* Lane, 11 Ga. 459; Steele *v.* Hanna, 8 Blackf. (Ind.) 326; Wittemore *v.* Malcolmson, 9 N. J. L. 338.

71. *Colorado.*— Harter *v.* Shull, 17 Colo. App. 162, 67 Pac. 911.

Indiana.— Indianapolis, etc., R. Co. *v.* Risley, 50 Ind. 60.

Maine.— Dunn *v.* Hill, 63 Me. 174.

New Hampshire.— Tappan *v.* Heath, 16 N. H. 34.

3. SUBSEQUENT PLEADINGS AND DEMURRER. A plea setting up new matter affirmatively should be met by a replication,[72] unless it fails to traverse any material allegation of the complaint, in which case judgment may be given for plaintiff on his motion.[73] If the plea consists only of matter of record, the replication should reassert the record and pray that it may be inspected by the court.[74] The defect of concluding a plea of *nul tiel record* with a verification to the country,[75] or of misjoining another plea with it,[76] may be taken advantage of by special demurrer. But the failure to file a copy of the judgment with the petition is ground for a motion to dismiss, but not for demurrer.[77]

4. ISSUES, PROOF, AND VARIANCE.[78] Where the action is by an assignee of the judgment, an averment of the assignment is necessary, and its denial raises a material issue.[79] But an issue as to plaintiff's ownership of the judgment is not raised by a plea of *nul tiel record*,[80] nor can an issue as to the payment or satisfaction of the judgment be raised under this plea,[81] which in fact puts in issue nothing but the existence of the record declared on.[82] But under a plea of *nul tiel record*, the record proved must correspond fully with the judgment described in the declaration or complaint, and any material variance will be fatal.[83] This

New York.— Wheaton *v.* Fellows, 23 Wend. 375.

United States.— Reed *v.* Ross, 20 Fed. Cas. No. 11,652, Baldw. 36.

See 30 Cent. Dig. tit. "Judgment," § 1745.

Foreign attachment.— In an action on a judgment founded on a proceeding on a foreign attachment, a plea of *nil debet* is good on demurrer, as such proceedings are not of a common-law nature, but are special remedies given by statute to creditors against the rights, credits, and effects of their debtors in their absence. Curtis *v.* Martin, 2 N. J. L. 399.

Waiver of objection to plea.— Where plaintiff goes to trial in an action of debt on a judgment, on a plea of *nil debet*, he admits the validity of the plea as a general issue, and cannot have the verdict set aside because the court admitted special matter, to be given in evidence under a notice annexed to such plea. Meyer *v.* McLean, 1 Johns. (N. Y.) 509.

72. *Alabama.*— Penn *v.* Edwards, 50 Ala. 63.

Kentucky.— Spencer *v.* Parsons, 89 Ky. 577, 13 S. W. 72, 11 Ky. L. Rep. 769, 25 Am. St. Rep. 555.

Massachusetts.— Willington *v.* Stearns, 1 Pick. 497.

Mississippi.— Wright *v.* Weisinger, 5 Sm. & M. 210.

New York.— Welch *v.* Lynch, 7 Barb. 380.

See 30 Cent. Dig. tit. "Judgment," § 1746.

73. Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670.

74. Share *v.* Becker, 8 Serg. & R. (Pa.) 239. See Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340.

75. Steele *v.* Hanna, 8 Blackf. (Ind.) 326.

76. Delavan *v.* Stanton, 2 Hall (N. Y.) 190.

77. Burnes *v.* Simpson, 9 Kan. 658.

78. Sister state judgment see *infra*, XXII, B, 4, e, (v).

79. Hughes *v.* Brewer, 7 Colo. 583, 4 Pac. 1115. See Edmonds *v.* Montgomery, 1 Iowa 143; McLaughlin *v.* Alexander, 2 S. D. 226, 49 N. W. 99. But in an action on an assigned judgment, the question whether any equitable interest was left in the assignor after the assignment could not be litigated under a denial of the fact of the assignment. Curtin *v.* Kowalsky, 145 Cal. 431, 78 Pac. 962.

80. Marx *v.* Logue, 71 Miss. 905, 15 So. 890.

81. East St. Louis *v.* Canty, 65 Ill. App. 325.

Satisfaction by levy.— In an action of debt on a judgment, defendant pleaded that plaintiff had caused the amount ot the judgment to be levied and fully satisfied of the lands and estate of defendant, and this plea was traversed and issue joined. It was held that the issue did not involve any inquiry as to the validity of the levy which appeared to have been made, but only whether the execution appeared to be satisfied by a levy regular on its face. Pratt *v.* Jones, 22 Vt. 341, 54 Am. Dec. 80.

82. Stevens *v.* Fisher, 30 Vt. 200.

83. Walker *v.* Kendall, Hard. (Ky.) 404; Lancaster *v.* Richmond, 83 Me. 534, 22 Atl. 393; Lawrence *v.* Willoughby, 1 Minn. 87; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209. And see Cobb *v.* Doggett, 142 Cal. 142, 75 Pac. 785, as to variance held immaterial. When a plaintiff declared on a judgment generally to which defendant pleaded *nul tiel record*, it was held no variance that the judgment was alleged, in the record produced, to have been by default in consequence of defendant not having paid the debt by instalments, as directed by a judge's order obtained by consent. Hopkins *v.* Francis, 2 D. & L. 664, 7 Jur. 250, 14 L. J. Exch. 207, 13 M. & W. 668.

Character of judgment.— A judgment rendered upon constructive service only is not competent evidence in support of a counterclaim pleaded by answer alleging the recovery of a personal judgment against plaintiff.

rule is enforced strictly in regard to the amount of the judgment,[84] the names or descriptions of the parties,[85] and the time or date of rendition of the judgment.[86]

Smith *v.* Kreager, 6 Kan. App. 271, 51 Pac. 813.

Court where rendered.— Where a declaration on a judgment rendered in the United States circuit court for the district of Mississippi described it as rendered in a suit brought in that court, and it appeared that the suit originated in the district court for the same district, it was held that the variance was not fatal. Dudley *v.* Lindsey, 9 B. Mon. (Ky.) 486, 50 Am. Dec. 522. And where a declaration on a judgment described it as obtained in the court of our lady the queen, of her bench at Westminster, in the county of Middlesex, and it was pleaded that there was not any record of the recovery remaining in the court of our lady the queen, of her bench at Westminster, and a replication that there was such a record of the recovery remaining in the court of our lady the queen, of her bench, it was held that the issue was proved by the production of a judgment of the common pleas. Bradley *v.* Grey, 3 C. B. 726, 4 De G. & Sm. 458, 16 L. J. C. P. 26, 54 E. C. L. 726.

84. *Alabama.*— Ashley *v.* Robinson, 29 Ala. 112, 65 Am. Dec. 387.

Arkansas.— Butler *v.* Owen, 7 Ark. 369; Caldwell *v.* Bell, 3 Ark. 419.

Connecticut.— Beecher *v.* Chester, 2 Root 90.

Illinois.— Boynton *v.* Robb, 41 Ill. 349.

Indiana.— Hern *v.* Allison, 5 Blackf. 347.

Iowa.— Hight *v.* White, Morr. 45.

Missouri.— Wash *v.* Foster, 3 Mo. 205.

Pennsylvania.— Eichelberger *v.* Smyser, 8 Watts 181. *Compare* Repsher *v.* Shane, 3 Yeates 575.

United States.— Thompson *v.* Jameson, 1 Cranch 282, 2 L. ed. 109.

See 30 Cent. Dig. tit. "Judgment," § 1747.

Blank as to costs.— Where the declaration alleges the recovery of a sum certain for costs in the original action, but the judgment produced leaves the amount of costs blank, it is a fatal variance. Summers *v.* Mantz, Ga. Dec. 73; Noyes *v.* Newmarch, 1 Allen (Mass.) 51.

Medium of payment.— In an action on a judgment reciting that it is payable in gold, but based on a contract silent as to the medium of payment, a declaration omitting the clause in regard to payment in gold does not render the judgment record inadmissible on the ground of variance, since such clause may be rejected as surplusage. Belford *v.* Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593. And so, where the declaration was on a general judgment, and the judgment introduced was made payable out of certain public funds, the limitation in the manner of payment was held to be surplusage, and so there was no variance. East St. Louis *v.* Canty, 65 Ill. App. 325.

85. Larson *v.* Ross, 10 Colo. App. 267, 50 Pac. 730; Howell *v.* Shands, 35 Ga. 66; Dibrell *v.* Miller, 8 Yerg. (Tenn.) 476, 29 Am. Dec. 126. See Moulthrop *v.* Ruthland School Dist., 59 Vt. 381, 9 Atl. 608.

Misnomer.— A misnomer of either of the parties is a fatal variance (Ducommun *v.* Hysinger, 14 Ill. 249; Farrar *v.* Fairbanks, 53 Me. 143; Boyden *v.* Hastings, 17 Pick. (Mass.) 200), unless the declaration contains proper averments to identify the parties, as named in it, with those appearing in the record of the judgment sued on (Barry *v.* Carothers, 6 Rich. (S. C.) 331), or unless the difference in the names consists only in the addition of words of description in the judgment whch are not found in the declaration (Whitney *v.* Dolloff, 74 Me. 235).

Identifying plaintiff.— A corporation called "The United States National Bank of New York," suing on a judgment in favor of "The United States National Bank," is sufficiently identified as the judgment creditor where the judgment-roll shows that plaintiff was carrying on business as a national bank in New York city, and evidence is produced that plaintiff is the only bank of that name doing business in that city. U. S. National Bank *v.* Venner, 172 Mass. 449, 52 N. E. 543.

Discrepancy as to number of defendants.— Where the declaration alleges a judgment against a single defendant, and the judgment produced is against two or more jointly, there is a fatal variance, as also in the converse case. Schertz *v.* Chester First Nat. Bank, 47 Ill. App. 124; Newburg *v.* Munshower, 29 Ohio St. 617, 23 Am. Rep. 769; Clarion First Nat. Bank *v.* Hamor, 47 Fed. 36. But it is not a variance from the petition which alleges a judgment against "defendant" that the judgment offered in evidence was in an action against that defendant and another, as to whom the case was not disposed of, when the judgment itself was rendered against the named defendant alone, and there does not appear to have been any other action between the parties in the same court. Cole *v.* Terrell, 71 Tex. 549, 9 S. W. 668. And where, in an action against husband and wife, the declaration alleged that plaintiff recovered judgment against the wife, by the name of E R, on promises made by her *dum sola*; to which defendants pleaded *nul tiel record*, and on the record being produced, the judgment appeared to have been recovered against her and others it was held no variance. Cocks *v.* Brewer, 2 Dowl. P. C. N. S. 759, 7 Jur. 218, 12 L. J. Exch. 225, 11 M. & W. 51.

86. Howard *v.* Cousins, 7 How. (Miss.) 114; Gulick *v.* Loder, 14 N. J. L. 572 (discrepancy of a single day held a fatal variance); Vail *v.* Smith, 4 Cow. (N. Y.) 71. But *compare* Haynes *v.* Cowen, 15 Kan. 637; Farrar *v.* Carmichael, 1 Brev. (S. C.) 392.

Amendment.— But where there was a va-

5. Evidence Admissible Under Pleadings.[87] On the issue raised by a plea of *nul tiel record*, the evidence must be confined to the existence and terms of the judgment declared on,[88] and so under a general denial;[89] but the plea of payment admits any relevant evidence to show the satisfaction or discharge of the judgment.[90] A misnomer of the defendant in the judgment may be corrected by evidence produced under a proper allegation.[91] But an order or decree enjoining the collection of the judgment cannot be proved unless specially pleaded.[92]

G. Evidence — 1. Presumptions and Burden of Proof.[93] In an action on a judgment, where the general issue is pleaded or a general denial, the burden is on plaintiff to prove the record sued on;[94] and in this he will not be aided by presumptions as to the identity of the parties, where the names do not appear to be the same;[95] but he is not obliged to prove that an outstanding execution had become dormant as that is a matter of defense.[96]

2. Admissibility[97] **— a. In General.** In an action on a domestic judgment, the existence and terms of the judgment should be proved by the production of a transcript or exemplification of it, attested in accordance with the local law,[98] which must be sufficiently complete to exhibit the judgment as a complete cause of action,[99] and cannot be aided in this respect by parol evidence or by papers or documents filed in the case but not incorporated in the record,[1] although such

riance as to the date between the record produced and that stated in the declaration, the court allowed the latter to be amended. Noble *v.* Chapman, 14 C. B. 400, 18 Jur. 44, 23 L. J. C. P. 56, 2 Wkly. Rep. 154, 78 E. C. L. 400.

87. Sister state judgment see *infra*, XXII, B, 4, e, (VI).

88. *Kentucky.*— Error of the clerk in the taxation of costs is not available. Snoddy *v.* Maupin, 7 T. B. Mon. 51.

New York.— Defendant cannot show an entry in the minutes of the court subsequent to the judgment setting it aside for irregularity. Croswell *v.* Byrnes, 9 Johns. 287.

Ohio.— Want of service of process cannot be shown in contradiction of the record produced. Bennett *v.* Morley, 10 Ohio 100.

South Carolina.— Under the plea of *nul tiel record* the existence of the judgment sued on is denied, and, being thus denied, its existence can be determined alone by an inspection of the record itself; and, if such inspection shows an omission in the record of any essential feature, it is fatally defective, and no testimony *dehors* the record can supply the omission or cure the defect. Clark *v.* Melton, 19 S. C. 498.

United States.— Want of authority of attorney entering appearance cannot be shown. Hill *v.* Mendenhall, 21 Wall. 453, 22 L. ed. 616.

Plea of nil debet.— In an action of debt grounded upon an inquisition, defendant, under the plea of *nil debet*, may give evidence of fraud, partiality, or irregularity on the part of the jurors who took the inquest. Curtiss *v.* Georgetown, etc., Turnpike Co., 6 Fed. Cas. No. 3,506, 2 Cranch C. C. 81.

89. Union Pac. R. Co. *v.* McCarty, 8 Kan. 125; Carpenter *v.* Goodwin, 4 Daly (N. Y.) 89.

90. Welch *v.* Lynch, 7 Barb. (N. Y.) 380; O'Connor *v.* Silver, 26 Tex. 606; Cartwright *v.* Jones, 13 Tex. 1.

91. Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 15 L. ed. 451.

92. Palmer *v.* Palmer, 2 Miles (Pa.) 373.

93. Sister state judgments see *infra*, XXII, B, 4, f, (I).

94. Clarion First Nat. Bank *v.* Hamor, 47 Fed. 36.

Presumptions as to the facts necessary to establish jurisdiction of the inferior court which rendered the judgment see Frees *v.* Blyth, 99 N. Y. App. Div. 541, 91 N. Y. Suppl. 103.

95. Bennett *v.* Libhart, 27 Mich. 489.

96. Reynolds *v.* Lyon, 20 Ga. 225.

97. Sister state judgments see *infra*, XXII, B, 4, f, (II).

98. *Alabama.*— Flack *v.* Andrews, 86 Ala. 395, 5 So. 452.

Iowa.— Latterett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

Maine.— Wentworth *v.* Keazer, 30 Me. 336.

Massachusetts.— Day *v.* Crosby, 173 Mass. 433, 53 N. E. 880.

New York.— Smith *v.* Frost, 5 Hill 431.

North Carolina.— Fitch *v.* Porter, 30 N. C. 511.

See 30 Cent. Dig. tit. "Judgment," § 1750.

Another copy of the same record may be introduced by defendant, after plaintiff has introduced his copy, for the purpose of showing that the judgment had been vacated, and had been in fact unlawful, irregular, and void. Kinsey *v.* Ford, 38 Barb. (N. Y.) 195.

99. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

A verdict alone, without any words or act of the court from which a judgment could be inferred, is not admissible as evidence of a judgment. Hincle *v.* Carruth, 1 Treadw. (S. C.) 471. See also *supra*, XIII, B, 3, b.

1. Treat *v.* Maxwell, 82 Me. 76, 19 Atl. 98; Noyes *v.* Newmarch, 1 Allen (Mass.) 51; Sanford *v.* Edwards, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482. See also Clark *v.* Melton, 19 S. C. 498.

evidence may be resorted to in order to supplement or explain the judgment when defective or ambiguous.[2] Nor can the record or its recitals be contradicted by parol,[3] although extraneous evidence is admissible to show an agreement of the parties as to the effect of the judgment or the use to be made of it,[4] or in support of an affirmative defense, such as payment.[5] If plaintiff claims under a written assignment, its execution must be duly proved.[6]

b. Lost or Destroyed Record. Some decisions hold that no action can be maintained on a judgment of which the record has been lost or destroyed until it has been restored by proper proceedings in the court where the judgment was rendered.[7] But the preponderance of authority is in favor of the rule that in such a case secondary evidence is admissible to establish the fact of the existence of such a judgment and its contents.[8]

3. Weight and Sufficiency.[9] To prove a cause of action on a judgment, it is necessary to produce in evidence the whole record,[10] or at least so much thereof as will identify the parties in the action with the parties to the judgment,[11] show that the court which rendered it had jurisdiction of the parties and the subject-matter of the suit,[12] and disclose the nature and terms of the judgment and the amount of the recovery.[13] Also if the judgment is more than twenty years old

The minute-book of the court is not evidence of a judgment. Lehr *v.* Hall, 5 How. (Miss.) 54.

2. Hopper *v.* Lucas, 86 Ind. 43; Springsteene *v.* Gillett, 30 Hun (N. Y.) 260; Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. 68; Hubbard *v.* Dubois, 37 Vt. 94, 86 Am. Dec. 690.

3. Hubbard *v.* Fisher, 25 Vt. 539. But plaintiff may show his title to the judgment as assignee thereof, although it seems to contradict the recitals of the record. Allgood *v.* Whitley, 49 Ala. 215.

4. Cobb *v.* Doggett, 142 Cal. 142, 75 Pac. 785; Edwards *v.* Harvey, 2 Colo. App. 109, 29 Pac. 1024; Merchants' Bank *v.* Schulenburg, 48 Mich. 102, 11 N. W. 826.

5. Jacoby *v.* Stephenson Silver Min. Co., 3 Silv. Sup. (N. Y.) 130, 6 N. Y. Suppl. 371; Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. 68.

6. Wonderly *v.* Lafayette County, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386.

7. Foulk *v.* Colburn, 48 Mo. 225; Walton *v.* McKesson, 64 N. C. 77. And see Cox *v.* Stout, 85 Ind. 422.

8. *Arkansas.*— Mason *v.* Bull, 26 Ark. 164.
California.— Ames *v.* Hoy, 12 Cal. 11.
Indiana.— Jackson *v.* Cullum, 2 Blackf. 228, 18 Am. Dec. 158.
Massachusetts.— Stockbridge *v.* West Stockbridge, 12 Mass. 400.
Missouri.— Parry *v.* Walser, 57 Mo. 169.
New York.— Mandeville *v.* Reynolds, 68 N. Y. 528; Jackson *v.* Crawfords, 12 Wend. 533.
Virginia.— Newcomb *v.* Drummond, 4 Leigh 57.

9. Sister state judgments see *infra*, XXII, B, 4, f, (III).

10. *Arkansas.*— Hallum *v.* Dickinson, 47 Ark. 120, 14 S. W. 477.
Maine.— Vose *v.* Howard, 13 Me. 268.
Missouri.— Crone *v.* Dawson, 19 Mo. App. 214.
New Jersey.—Berry *v.* Mead, 3 N. J. L. 612
Vermont.— Wright *v.* Fletcher, 12 Vt. 431.
See 30 Cent. Dig. tit. "Judgment," § 1751.

Production of original record.— Where an action on a judgment is brought in the same court which rendered it, the original record should be produced in evidence, and not a transcript of it. Anderson *v.* Dudley, 5 Call (Va.) 529.

Executions are no part of the record of a judgment, and on a plea of *nul tiel record* it is not necessary to offer in evidence copies of the executions issued on the judgment in question. Stevens *v.* Hewitt, 30 Vt. 262.

Direction of verdict.— Where the only evidence introduced by plaintiff is an exemplification of the record of a foreign judgment, and defendant presents no testimony, it is proper to direct a verdict for plaintiff. Coskery *v.* Wood, 52 S. C. 516, 30 S. E. 475.

11. See Sanford *v.* Hodges, 11 Gray (Mass.) 485; Winham *v.* Kline, 72 Mo. App. 615; Lallman *v.* Hovey, 92 Hun (N. Y.) 419, 36 N. Y. Suppl. 662.

12. McCoy *v.* Van Ness, 98 Cal. 675, 33 Pac. 761; Newman *v.* Eldridge, 107 La. 315, 31 So. 688; Downer *v.* Dana, 22 Vt. 337; Cunningham *v.* Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235.

A promise to pay a judgment is no evidence, in an action on the judgment, of service of process in the original suit. Baldwin *v.* Kimmel, 16 Abb. Pr. (N. Y.) 353.

Affidavits upon which a substituted service of summons is ordered are not conclusive in a suit to enforce a judgment obtained on such service. Buswell *v.* Lincks, 8 Daly (N. Y.) 518.

Evidence disproving service.— In an action on a judgment regular on its face and rendered several years previous, the evidence to establish the defense that the summons was not served on defendant must be clear and practically conclusive. Vaule *v.* Miller, 69 Minn. 440, 72 N. W. 452.

13. In an action on a judgment, to which *nul tiel record* is pleaded, the introduction of the record of the judgment sued on, which

plaintiff must present evidence to rebut the presumption of payment.[14] But distinct admissions on the part of defendant will obviate the necessity of proving any of these particulars.[15]

H. Trial and Judgment — 1. TRIAL OR HEARING.[16] A plea of *nul tiel record* puts in issue only the existence of the judgment declared on, and is triable by the court upon an inspection of the record;[17] the record should go to the jury only when matter of fact as well as of law is properly put in issue, as upon a plea of payment, fraud, or the statute of limitations.[18] In some states when equitable defenses are set up to defeat a recovery on a judgment, the cause must be transferred to the equity docket.[19]

2. JUDGMENT.[20] The successful plaintiff in an action on a judgment will ordinarily recover the amount of the original judgment and in the medium, if any, therein provided,[21] together with the costs of the original suit,[22] and also of the action on the judgment,[23] and interest on the original judgment if allowed by statute;[24] but his means of enforcing the new judgment may be restricted in a proper case so that execution shall not issue against defendant's person.[25] The judgment recovered in an action on a judgment is not open to collateral impeachment on account of fraud or defects in the original judgment.[26]

shows that the court had jurisdiction of the parties, and that it awarded damages in plaintiff's favor, is sufficient to establish plaintiff's case, although the record does not disclose the nature of the action, or whether the case was decided on default or after issue joined, or whether any plea was filed; the presumption being that a court of general jurisdiction has jurisdiction to award the judgment shown to have been rendered by its record. Treat *v.* Maxwell, 82 Me. 76, 19 Atl. 98.

14. Day *v.* Crosby, 173 Mass. 433, 53 N. E. 880. See *supra*, XIX, B, 3.

15. Hyder *v.* Smith, (Tenn. Ch. App. 1899) 52 S. W. 884.

16. Sister state judgments see *infra*, XXII, B, 4, g.

17. East St. Louis *v.* Canty, 65 Ill. App. 325; White *v.* Elkin, 6 Blackf. (Ind.) 123; McCardle *v.* Aultman Co., 31 Ind. App. 63, 67 N. E. 236; Clemons *v.* Clemons, 69 Vt. 545, 38 Atl. 314; Stevens *v.* Fisher, 30 Vt. 200.

18. Reddington *v.* Julian, 2 Ind. 224; Greene *v.* Hallenbeck, 24 Hun (N. Y.) 116; Carr *v.* Woodleff, 51 N. C. 400; Pinson *v.* Puckett, 35 S. C. 178, 14 S. E. 393.

Statute of limitations.— Where the prescription of ten years is urged against a judgment, and the plea is tried in the court below on the face of the record, a judgment sustaining the plea may be annulled, and the case remanded, in order that, in a trial on the merits, plaintiff may have an opportunity to show an interruption of the prescription. Norres *v.* Hayes, 42 La. Ann. 857, 8 So. 606.

19. Peel *v.* January, 35 Ark. 331, 37 Am. Rep. 27. Equitable defenses to action on judgment at law see *supra*, XX, E, 6.

20. Sister state judgments see *infra*, XXII, B, 4, h.

Effect of judgment on a judgment as a merger or bar see *supra*, XIX, D, 1, b.

Appeal; pecuniary limitation see APPEAL AND ERROR, 2 Cyc. 546.

21. If the original judgment was expressed to be payable in gold coin only, a judgment recovered upon it will be entered payable only in the same money. Wallace *v.* Eldredge, 27 Cal. 498. Where the supreme court reversed a general judgment for plaintiff, and directed the entry of a restricted judgment to be satisfied out of certain funds, as in the case of a judgment against a city payable only out of the funds of a particular year, and plaintiff acquiesced therein, and had judgment entered in the superior court in accordance with the form prescribed by the supreme court, it was held that the judgment as so entered became conclusive upon the parties, and could not be altered or modified, and a general judgment procured by the bringing of another action founded thereon. Weaver *v.* San Francisco, 146 Cal. 728, 81 Pac. 119.

22. Cranor *v.* School Dist., 81 Mo. App. 152 [with which *compare* Meyer *v.* Mehrhoff, 19 Mo. App. 682, holding that plaintiff is entitled to recover the costs of the original action only when he shows that he has paid them]; Miller *v.* Miller, 5 N. J. L. 508; Green-Rea Co. *v.* Holman, 107 Tenn. 544, 64 S. W. 889. *Compare* Thompson *v.* Taylor, 13 Me. 420.

23. Harvey *v.* Wood, 5 Wend. (N. Y.) 221; Green-Rea Co. *v.* Holman, 107 Tenn. 544, 64 S. W. 889. *Compare* Swiler *v.* Casey, 1 Pearson (Pa.) 126; Keeler *v.* Brouse, 1 U. C. Q. B. 348.

24. Green-Rea Co. *v.* Holman, 107 Tenn. 544, 64 S. W. 889; Gordon *v.* Victoria, 7 Brit. Col. 339. As to interest on judgments in general see INTEREST, 22 Cyc. 1516.

A recovery on a revived judgment is the amount of the original judgment, with interest. Gregory *v.* Perry, 71 S. C. 246, 50 S. E. 787.

25. *In re* Foord, 5 N. H. 310; Phœnix *v.* Stagg, 1 Hall (N. Y.) 698.

26. Shanahan *v.* South Omaha, 2 Nebr. (Unoff.) 466, 89 N. W. 285.

XXI. PROCEDURE WITH RESPECT TO JUDGMENT AS ESTOPPEL.

A. Pleading in General — 1. NECESSITY OF PLEADING FORMER ADJUDICATION — a. In General. There are quite a number of decisions holding that a former judgment between the same parties, if relied on as a bar to a second suit upon the same cause of action, must be pleaded; if not, the benefit of the estoppel is lost, either because the judgment will not be admissible in evidence, or, if admitted, will not be conclusive;[27] but as will be seen hereafter there are many

27. *Alabama.*— Brown *v.* Tillman, 121 Ala. 626, 25 So. 836.

Arkansas.— State *v.* Spikes, 33 Ark. 801.

California.— McLean *v.* Baldwin, 136 Cal. 565, 69 Pac. 259; Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12.

Colorado.— Boston, etc., Smelting Co. *v.* Reed, 23 Colo. 523, 48 Pac. 515.

Georgia.— Sumner *v.* Sumner, 121 Ga. 1, 48 S. E. 727.

Illinois.— Evans *v.* Woodsworth, 213 Ill. 404, 72 N. E. 1082; Thrifts *v.* Fritz, 101 Ill. 457; Hahn *v.* Ritter, 12 Ill. 80; Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58. *Compare* Union Pac. R. Co. *v.* Chicago, etc., R. Co., 57 Ill. App. 430; Bennett *v.* Pulliam, 3 Ill. App. 185.

Indiana.— Huntington First Nat. Bank *v.* Williams, 126 Ind. 423, 26 N. E. 75; Brady *v.* Murphy, 19 Ind. 258; Picquet *v.* McKay, 2 Blackf. 465.

Iowa.— Woods *v.* Allen, 122 Iowa 695, 98 N. W. 499; Strow *v.* Allen, (1904) 98 N. W. 141; Van Orman *v.* Spafford, 16 Iowa 186; Cooley *v.* Brayton, 16 Iowa 10. *Compare* Larum *v.* Wilmer, 35 Iowa 244.

Kentucky.— Galloway *v.* Hamilton, 1 Dana 576; Royalty *v.* Shirley, 53 S. W. 1044, 21 Ky. L. Rep. 1015; Norton *v.* Norton, 25 S. W. 750, 27 S. W. 85, 15 Ky. L. Rep. 872.

Louisiana.— Thompson *v.* Vance, 111 La. 548, 35 So. 741; Brigot *v.* Brigot, 49 La. Ann. 1428, 22 So. 641; Mitchell *v.* Levi, 28 La. Ann. 946; Palmer *v.* Yarborough, 10 La. 167; Chew *v.* Keane, 2 La. 120; Williams *v.* Bethany, 1 La. 315.

Maryland.— E. J. Codd Co. *v.* Parker, 97 Md. 319, 55 Atl. 623. *Compare* Beall *v.* Pearre, 12 Md. 550.

Michigan.— Briggs *v.* Milburn, 40 Mich. 512.

Minnesota.— Reilly *v.* Bader, 50 Minn. 199, 52 N. W. 522.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

Missouri.— Trauerman *v.* Lippincott, 39 Mo. App. 478.

Montana.— Josephi *v.* Mady Clothing Co., 13 Mont. 195, 33 Pac. 1.

Nebraska.— Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741; Gregory *v.* Kenyon, 34 Nebr. 640, 52 N. W. 685; Kitchen Bros. Hotel Co. *v.* Hammond, 30 Nebr. 618, 46 N. W. 920.

Nevada.— State *v.* Washoe County, 12 Nev. 17.

New Jersey.— New Brunswick *v.* Cramer, 61 N. J. L. 270, 39 Atl. 671, 68 Am. St. Rep. 705.

New Mexico.— Ortiz *v.* Las Vegas First Nat. Bank, (1904) 78 Pac. 529.

New York.— Bryson *v.* St. Helen, 79 Hun 167, 29 N. Y. Suppl. 524; Reich *v.* Cochran, 74 Hun 551, 26 N. Y. Suppl. 443; Derby *v.* Yale, 13 Hun 273; Dennis *v.* Snell, 54 Barb. 411; Willis *v.* McKinnon, 37 Misc. 386, 75 N. Y. Suppl. 770; Wright *v.* Butler, 6 Wend. 284, 21 Am. Dec. 323; Fowler *v.* Hait, 10 Johns. 111. *Compare* Drake *v.* New York Suburban Water Co., 26 N. Y. App. Div. 499, 50 N. Y. Suppl. 826.

North Carolina.— Tatum *v.* Tatum, 36 N. C. 113; Redmond *v.* Coffin, 17 N. C. 437. *Compare* Weeks *v.* McPhail, 129 N. C. 73, 39 S. E. 732; Gilchrist *v.* Gilchrist, 21 N. C. 362.

Ohio.— Meiss *v.* Gill, 44 Ohio St. 253, 6 N. E. 656; White *v.* U. S. Bank, 6 Ohio 528; Ferguson *v.* Miller, 5 Ohio 459.

Oregon.— Bays *v.* Trulson, 25 Oreg. 109, 35 Pac. 26; Murray *v.* Murray, 6 Oreg. 26.

Pennsylvania.— Smith *v.* Elliott, 9 Pa. St. 345.

South Carolina.— Curtis *v.* Renneker, 34 S. C. 468, 13 S. E. 664.

Texas.— Aransas Lumber Co. *v.* Hines, (Civ. App. 1896) 38 S. W. 372. See Interstate Nat. Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604, 104 Am. St. Rep. 885, 65 L. R. A. 820.

Vermont.— Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345.

Virginia.— A former judgment cannot be given in evidence under a general replication to a plea of the statute of limitations, but must be replied specially. Bogle *v.* Conway, 3 Call 1.

West Virginia.— Beall *v.* Walker, 26 W. Va. 741.

United States.— Bryar *v.* Campbell, 177 U. S. 649, 20 S. Ct. 794, 44 L. ed. 926; U. S. *v.* Bliss, 172 U. S. 321, 19 S. Ct. 216, 43 L. ed. 463; Haldeman *v.* U. S., 91 U. S. 584, 23 L. ed. 433; Union, etc., Bank *v.* Memphis, 111 Fed. 561, 49 C. C. A. 455; Preferred Acc. Ins. Co. *v.* Barker, 93 Fed. 158, 35 C. C. A. 250; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529.

England.— Dimes *v.* Grand Junction Canal, 9 Q. B. 469, 11 Jur. 429, 16 L. J. Q. B. 107, 5 R. & Can. Cas. 34, 58 E. C. L. 469; Vooght *v.* Winch, 2 B. & Ald. 662, 21 Rev. Rep. 446; Stafford *v.* Clark, 2 Bing. 377, 9 E. C. L. 623, 1 C. & P. 24, 403, 12 E. C. L. 27, 238, 9 Moore C. P. 724; Magrath *v.* Hardy, 4 Bing. N. Cas. 782, 6 Dowl. P. C. 749, 2 Jur. 594, 7 L. J. C. P. 299, 6 Scott 627, 33 E. C. L. 974;

cases in which a former adjudication may be given in evidence under a plea of the general issue.[28] And the failure to plead a former adjudication may be waived by the parties by stipulation, or by their treating the case as if it were in issue.[29] Nor does the rule apply where the judgment, instead of being relied on in bar of the action, is set up merely as conclusive of some particular fact or question formerly in issue and adjudicated; in this instance it need not be pleaded in order to make it competent and conclusive evidence.[30] But even in this case the party may lose the benefit of the estoppel unless he so frames his pleadings as to bring it within the issues.[31] The defense of *res judicata* should be interposed in the proceedings claimed to be barred, and cannot be relied on by way of a bill in the nature of a bill of review.[32]

b. Where No Opportunity to Plead. If there was no opportunity to plead a former judgment as an estoppel — because special pleas were not admissible in the particular action, or because the judgment was not rendered until after a plea of the general issue — it may be given in evidence with the same conclusive effect as if pleaded.[33]

2. Demurrer or Motion. The defense of *res judicata* may be raised by demurrer, where the fact and the nature of the prior adjudication appear on the face of the

Hannaford *v.* Hunn, 2 C. & P. 148, 12 E. C. L. 499; Doe *v.* Huddart, 2 C. M. & R. 316, 4 Dowl. P. C. 437, 5 Tyrw. 846; Outram *v.* Morewood, 3 East 346, 7 Rev. Rep. 473.

Canada.— Cooper *v.* Molson's Bank, 26 Can. Sup. Ct. 611; Brown *v.* Yates, 1 Ont. App. 367; Hughes *v.* Rees, 9 Ont. 198; McIntosh *v.* Jarvis, 8 U. C. Q. B. 535.

See 30 Cent. Dig. tit. "Judgment," § 1787.

Same rule in equity.— A former decree, to be a defense, must be pleaded or relied on in the answer as a bar, and it is not enough to read it at the hearing. Lyon *v.* Tallmadge, 14 Johns. (N. Y.) 501; Turley *v.* Turley, 85 Tenn. 251, 1 S. W. 891.

Prior adjudication in same case.— A determination of an issue in an accounting preliminary to a sale in partition need not be pleaded in the final hearing after the sale to raise the question of *res judicata*, since it is part of the record in the same case. Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203.

Necessity of presenting objection of res judicata in trial court see Appeal and Error, 2 Cyc. 668.

Pleading foreign judgment see *infra*, XXII, B, 1, e, (IV); XXII, C, 2, d; XXII, D, 2, d.

28. See *infra*, XXI, A, 5.

29. Bowe *v.* Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151; Reich *v.* Cochran, 74 Hun (N. Y.) 551, 26 N. Y. Suppl. 443.

30. *Florida.*— Fulton *v.* Gesterding, 46 Fla. 150, 36 So. 56.

Minnesota.— Swank *v.* St. Paul City R. Co., 61 Minn. 423, 63 N. W. 1088.

New York.— Foulke *v.* Thalmessinger, 1 N. Y. App. Div. 598, 37 N. Y. Suppl. 563 [*affirmed* in 158 N. Y. 725, 53 N. E. 1125]; Krekeler *v.* Ritter, 62 N. Y. 372; Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; Lance *v.* Shaughnessy, 86 Hun 411, 33 N. Y. Suppl. 515; Burlingame *v.* Manderville, 7 N. Y. St. 858; Kelsey *v.* Sargent, 3 N. Y. St. 477; Kingsland *v.* Spalding, 3 Barb. Ch. 341.

North Dakota.— Persons *v.* Smith, 12 N. D. 403, 97 N. W. 551.

Ohio.— Werner *v.* Cincinnati, 23 Ohio Cir. Ct. 475.

Texas.— Neill *v.* Tarin, 9 Tex. 256.

United States.— Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355.

31. *New York.*— House *v.* Lockwood, 17 N. Y. Suppl. 817.

Pennsylvania.— Kilheffer *v.* Herr, 17 Serg. & R. 319, 17 Am. Dec. 658.

Tennessee.— Cherry *v.* York, (Ch. App. 1898) 47 S. W. 184.

West Virginia.— Crumlish *v.* Shenandoah Valley R. Co., 45 W. Va. 567, 32 S. E. 234.

United States.— Mack *v.* Levy, 60 Fed. 751.

32. Evans *v.* Woodsworth, 115 Ill. App. 202 [*affirmed* in 213 Ill. 404, 72 N. E. 1082].

33. *California.*— Clink *v.* Thurston, 47 Cal. 21; Jackson *v.* Lodge, 36 Cal. 28; Flandreau *v.* Downey, 23 Cal. 354.

Illinois.— Sheldon *v.* Patterson, 55 Ill. 507.

Maine.— Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627; Chase *v.* Walker, 26 Me. 555.

Missouri.— McNair *v.* O'Fallon, 8 Mo. 188.

Nevada.— Young *v.* Brche, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892.

New Hampshire.— King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675; Dame *v.* Wingate, 12 N. H. 291.

New Jersey.— Ward *v.* Ward, 22 N. J. L. 699.

New York.— Beebe *v.* Elliott, 4 Barb. 457; Young *v.* Rummell, 2 Hill 478, 38 Am. Dec. 594; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603; Wright *v.* Butler, 6 Wend. 284, 21 Am. Dec. 323; Dows *v.* McMichael, 6 Paige 139.

Vermont.— Perkins *v.* Walker, 19 Vt. 144; Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345; Isaacs *v.* Clark, 12 Vt. 692, 36 Am. Dec. 372.

Washington.— Wilkes *v.* Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

England.— Reg. *v.* Haughton, 1 E. & B. 501, 17 Jur. 455, 22 L. J. M. C. 89, 1 Wkly. Rep. 164, 72 E. C. L. 501.

See 30 Cent. Dig. tit. "Judgment," § 1787.

pleadings;[34] but otherwise this is not a proper mode of taking advantage of the estoppel.[35] Nor can the question of a former recovery be raised by a motion to dismiss.[36]

3. AMENDED AND SUPPLEMENTAL PLEADINGS. After pleadings filed in an action, or issue joined, a judgment rendered in another action between the same parties and upon the same cause of action or deciding the same points in issue may be set up as an estoppel by an amended or supplemental pleading filed by leave of court.[37]

4. ALLEGATIONS AND DENIALS — a. Form and Requisites of Plea. There is no special form for pleading a former adjudication, nor is it required to be pleaded with special strictness; but the plea should show the nature and scope of the former decision, and its applicability to the present controversy as a judicial determination of the points or questions in issue.[38] In particular it should show

34. *Florida.*— Keen *v.* Brown, 46 Fla. 487, 35 So. 401.

Georgia.— Williams *v.* Cheatham, 99 Ga. 301, 25 S. E. 698.

Kentucky.— Holtheide *v.* Smith, 84 S. W. 321, 27 Ky. L. Rep. 60.

New Mexico.— Lockhart *v.* Leeds, (1904) 76 Pac. 312.

Texas.— Fricke *v.* Wood, 31 Tex. Civ. App. 167, 71 S. W. 784.

35. Reid *v.* Caldwell, 120 Ga. 718, 48 S. E. 191; Huntington First Nat. Bank *v.* Williams, 126 Ind. 423, 26 N. E. 75; Beattie Mfg. Co. *v.* Gerardi, 166 Mo. 142, 65 S. W. 1035. And *compare* Peck *v.* Easton, 74 Conn. 456, 51 Atl. 134.

36. Attica State Bank *v.* Benson, 8 Kan. App. 566, 54 Pac. 1037; Philips *v.* Her Creditors, 37 La. Ann. 701; Reilly *v.* Bader, 50 Minn. 199, 52 N. W. 522. But see Cox *v.* McClure, 73 Conn. 486, 47 Atl. 757.

37. Nave *v.* Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Lytle *v.* Crawford, 69 N. Y. App. Div. 273, 74 N. Y. Suppl. 660; Mandeville *v.* Avery, 17 N. Y. Suppl. 429 [*affirmed* in 135 N. Y. 658, 32 N. E. 648]; Jex *v.* Jacob, 7 Abb. N. Cas. (N. Y.) 452; Robinson *v.* Satterlee, 20 Fed. Cas. No. 11,967, 3 Sawy. 134.

After remand for new trial.— A plea of former adjudication, based on a judgment rendered after trial and judgment in the case in which the plea is filed, is not too late when filed in the trial court after the case is remanded for trial. Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441.

38. *Alabama.*— Evans *v.* McMahan, 1 Ala. 45; Robinson *v.* Windham, 9 Port. 397.

Arkansas.—McWhorter *v.* Andrews, 53 Ark. 307, 13 S. W. 1099.

Illinois.— Reynolds *v.* Mandel, 175 Ill. 615, 51 N. E. 649; Gage *v.* Ewing, 107 Ill. 11; Toles *v.* Johnson, 72 Ill. App. 182.

Indiana.— McCarty *v.* Kinsey, 154 Ind. 447, 57 N. E. 108; Brown *v.* Cain, 79 Ind. 93; Wilson *v.* Vance, 55 Ind. 584; Maloney *v.* Griffin, 15 Ind. 213. An answer alleging that in a former action between the same parties the same facts were alleged as are alleged in the complaint, and a final judgment was rendered therein, is insufficient as a plea of *res judicata*. Crum *v.* Rea, 14 Ind. App. 379, 42 N. E. 1033.

Kentucky.— An averment that defendant "collected from and by rule of this court forced plaintiff to pay" a certain sum does not amount to an averment that he obtained a judgment. England *v.* Rountree, 44 S. W. 951, 19 Ky. L. Rep. 2003. So a plea to an action of deceit in selling a horse that plaintiff had filed a bill in chancery to enjoin the payment of the price of the horse, on an allegation of fraud in such sale, and that the bill was dismissed, is insufficient. Jarman *v.* Daniel, 1 J. J. Marsh. 198.

Louisiana.— *In re* Scarborough, 44 La. Ann. 288, 10 So. 858.

New Hampshire.— Divoll *v.* Atwood, 41 N. H. 446; Cheshire Bank *v.* Robinson, 2 N. H. 126.

New York.— Garrett *v.* Wood, 57 N. Y. App. Div. 242, 68 N. Y. Suppl. 157; Bracken *v.* Atlantic Trust Co., 36 N. Y. App. Div. 67, 55 N. Y. Suppl. 506; Dennis *v.* Snell, 54 Barb. 411; Ehle *v.* Bingham, 7 Barb. 494.

North Carolina.— Porter *v.* Armstrong, 134 N. C. 447, 46 S. E. 997.

Ohio.— Eversole *v.* Plank, 17 Ohio 61.

Oregon.— Heatherly *v.* Hadley, 2 Oreg. 269.

Tennessee.— Sidney *v.* White, 1 Sneed 91; Kirklin *v.* Atlas Sav., etc., Assoc., (Ch. App. 1900) 60 S. W. 149; Daniel *v.* Gum, (Ch. App. 1897) 45 S. W. 468.

Texas.— Belcher Land-Mortg. Co. *v.* Norris, 34 Tex. Civ. App. 111, 78 S. W. 390; Mallory *v.* Dawson Cotton Oil Co., 32 Tex. Civ. App. 294, 74 S. W. 953.

Vermont.— Brinsmaid *v.* Mayo, 9 Vt. 31. And see Stillman *v.* Barney, 4 Vt. 331.

United States.— Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; City Trust, etc., Co. *v.* Glencove Granite Co., 113 Fed. 177, 51 C. C. A. 139; Pittel *v.* Fidelity Mut. Life Assoc., 86 Fed. 255, 30 C. C. A. 21.

Canada.—See Twohy *v.* Armstrong, 15 U. C. C. P. 269, holding that where a verdict was alleged as a bar the entry of a judgment on the verdict must be pleaded.

See 30 Cent. Dig. tit. "Judgment," § 1795.

Former recovery as ground for special plea in assumpsit see ASSUMPSIT, ACTION OF, 4 Cyc. 350.

Form of plea.— The pendency of another suit must be pleaded in abatement, but the plea of a judgment recovered is not matter in abatement; it does not go to the form of

the date or time of the rendition of the prior decision,[39] or at least that it was given before the institution of the suit at bar,[40] the amount of the recovery or relief granted by the judgment,[41] and that the judgment was a final adjudication,[42] although it is not necessary to allege that the judgment is valid, that it remains in full force, or that it has not been reversed, vacated, or appealed from, as these things are presumed.[43] The plea should be verified.[44]

b. Filing Transcript. According to the practice in some states, when a former judgment is pleaded as an estoppel, a transcript or copy of the record must be annexed to or filed with the plea.[45]

c. Setting Out Record of Judgment. Some decisions hold it necessary, in support of a plea of former adjudication, to incorporate in or annex to the plea the whole record of the former suit;[46] but others, and particularly among the later cases, rule that it is sufficient if the plea contains enough to show clearly the scope of the former adjudication and the relation of the parties to it.[47]

the remedy, but to the right of plaintiff. Fields *v.* Walker, 23 Ala. 155; U. S. Bank *v.* Baltimore Merchants' Bank, 7 Gill (Md.) 415. But see Rodgers *v.* Hunter, 8 Sm. & M. (Miss.) 640. The defense of former adjudication may be raised by answer as well as by formal plea. Isham *v.* Cooper, 56 N. J. Eq. 398, 37 Atl. 462, 39 Atl. 760.

Judgment rendered after commencement of pending action should be pleaded as a bar to the further maintenance of the suit, or *puis darrein continuance*, according as it was given before or after issue joined or plea pleaded. McDougald *v.* Dawson, 30 Ala. 553.

Profert.—A former judgment is not pleaded with a profert, but a profert is rendered in reply to the plea or replication of *nul tiel record*. Burnham *v.* Webster, 4 Fed. Cas. No. 2,178, 2 Ware 240.

A plea of former adjudication to a bill for injunction need not confess or acknowledge any or all of the matters set forth in the bill. Detroit, etc., R. Co. *v.* McCammon, 108 Mich. 368, 66 N. W. 471. And see Huntington *v.* Laidley, 79 Fed. 865.

Alleging proceedings.— An averment in an affidavit of defense that a bill in equity, filed in the same court by the same plaintiff against defendant on the same cause of action, "was so proceeded in that it was by the court dismissed," is not sufficient to raise the question of *res judicata*. Blood *v.* Crew Levick Co., 177 Pa. St. 606, 35 Atl. 871, 55 Am. St. Rep. 742.

Duplicity.— A plea setting up, as former adjudications, judgments in two separate suits or proceedings, is bad for duplicity. But it is not double where the adjudication pleaded is comprised in the judgments of the court of original jurisdiction and of successive appellate courts to which the suit was carried. Fayerweather Will Cases, 103 Fed. 546, 548.

Amendment.— If a plea of a former adjudication is defective defendant may have leave to amend it. Wagenhurst *v.* Wineland, 22 App. Cas. (D. C.) 356.

39. Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401; Few *v.* Backhouse, 8 A. & E. 789, 8 L. J. Q. B. 30, 1 P. & D. 34, 1 W. W. & H. 658, 35 E. C. L. 844. And see Hord *v.* Bradbury, 156 Ind. 20, 59 N. E. 27; Wortham *v.* Com., 5 Rand. (Va.) 669; Power *v.* Izod, 1 Bing. N. Cas. 304, 3 Dowl. P. C. 140, 4 L. J. C. P. 5, 1 Scott 119, 27 E. C. L. 651; Brokenship *v.* Morgan, 5 Jur. 1200, 11 L. J. Exch. 90, 9 M. & W. 111.

40. Ludlow *v.* Marion Tp. Gravel Road Co., 101 Ind. 176; Thomas *v.* Thomas, 33 Nebr. 373, 50 N. W. 170, 29 Am. St. Rep. 483; Kenney *v.* Howard, 67 Vt. 375, 31 Atl. 850.

41. Mitchell *v.* Gibson, 14 Ark. 224; Dunn *v.* Barton, 2 Ind. App. 444, 28 N. E. 717. *Compare* Wells *v.* Dench, 1 Mass. 232.

42. Thomas *v.* Thomas, 33 Nebr. 373, 50 N. W. 170, 29 Am. St. Rep. 483; Southern R. Co. *v.* Brigman, 95 Tenn. 624, 32 S. W. 762. *Compare* Theller *v.* Hershey, 89 Fed. 575.

43. Illinois Cent. R. Co. *v.* Champaign, 163 Ill. 524, 45 N. E. 120; Hansford *v.* Van Auken, 79 Ind. 302; Mull *v.* McKnight, 67 Ind. 525; Campbell *v.* Cross, 39 Ind. 155; Fenn *v.* Roach, (Tex. Civ. App. 1903) 75 S. W. 361; Kenney *v.* Howard, 67 Vt. 375, 31 Atl. 850. *Contra*, Hornick *v.* Holtrup, 76 S. W. 874, 25 Ky. L. Rep. 1030; Thomas *v.* Thomas, 33 Nebr. 373, 50 N. W. 170, 29 Am. St. Rep. 483. And see Abbott *v.* Abbott, 70 Kan. 423, 78 Pac. 827.

44. Cates *v.* Loftus, 4 T. B. Mon. (Ky.) 439. *Contra*, Detroit, etc., R. Co. *v.* McCammon, 108 Mich. 368, 66 N. W. 471.

45. Lee *v.* Keister, 11 Iowa 480; Campbell *v.* Ayres, 6 Iowa 339; Jourolmon *v.* Massengill, 86 Tenn. 81, 5 S. W. 719. *Contra*, Berry *v.* Reed, 73 Ind. 235; McSweeney *v.* Carney, 72 Ind. 430. But see Pruitt *v.* Cox, 21 Ind. 15.

46. Wagenhurst *v.* Wineland, 22 App. Cas. (D. C.) 356; Ringle *v.* Weston, 23 Ind. 588; Williamson *v.* Foreman, 23 Ind. 540, 85 Am. Dec. 475; Adkins *v.* Hudson, 19 Ind. 392; Brady *v.* Murphy, 19 Ind. 258; Robbins *v.* Dishon, 19 Ind. 204; Norris *v.* Amos, 15 Ind. 365; Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924; U. S. Bank *v.* Beverley, 1 How. (U. S.) 134, 11 L. ed. 75.

47. Perkins *v.* Moore, 16 Ala. 17; Mull *v.* McKnight, 67 Ind. 525; Allen *v.* Randolph, 48 Ind. 496; Dixon *v.* Caster, 65 Kan. 739,

d. Jurisdiction and Regularity of Proceedings. In pleading a former judgment as a bar, it is necessary to allege that it was rendered by a court of competent jurisdiction; and in the case of a court of general jurisdiction, this will be sufficient without setting out the facts conferring jurisdiction or the steps taken to acquire it.[48] But where the judgment emanates from a court of inferior or special and limited jurisdiction, it is necessary to plead all the facts conferring jurisdiction of the subject-matter of the action and of the parties,[49] except where the statutes provide that an allegation that the judgment of an inferior court was "duly given or made" shall be sufficient without setting out the jurisdictional facts.[50]

e. Identity or Privity of Parties. A plea of former adjudication must aver that the parties are the same in the two suits, or allege facts which show that the relation of the pleader to the former action was such as to make the judgment conclusive in his favor, or that the party against whom the estoppel is alleged, if not directly a party to the former suit, was so connected with it in interest as to be bound by the result.[51]

f. Identity of Cause of Action. In pleading a former judgment in bar, it is necessary to show clearly and distinctly that the cause of action in the former

70 Pac. 871; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

48. *California.*— Clark *v.* Nordholt, 121 Cal. 26, 53 Pac. 400.

Illinois.— Dix *v.* Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576.

Indiana.— Spaulding *v.* Baldwin, 31 Ind. 376.

Missouri.— Wickersham *v.* Johnson, 51 Mo. 313; State *v.* Brooke, 29 Mo. App. 286.

Nebraska.— Bennett *v.* Bennett, 65 Nebr. 432, 91 N. W. 409, 96 N. W. 994.

Oregon.— Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146.

Texas.— Puckett *v.* Waco Abstract, etc., Co., 16 Tex. Civ. App. 329, 40 S. W. 812.

Vermont.— Bailey *v.* Gleason, 76 Vt. 115, 56 Atl. 537.

United States.— Lynde *v.* Columbus, etc., R. Co., 57 Fed. 993.

See 30 Cent. Dig. tit. "Judgment," § 1797.

Contra.— Moberly *v.* Peek, 67 Ala. 345.

Judgment of another state.— In an action on a foreign judgment for support money, a plea alleging a prior decree of divorce rendered in another state, which fails to allege that the court rendering the decree had in any way obtained jurisdiction over the person of the defendant, is demurrable. Schuler *v.* Schuler, 209 Ill. 522, 71 N. E. 16.

A venue is not necessary in pleading an order of the court or other matter of record. Thomas *v.* Cameron, 17 Wend. (N. Y.) 59.

49. *Arkansas.*— Vaden *v.* Ellis, 18 Ark. 355.

California.— Smith *v.* Andrews, 6 Cal. 652.

New Jersey.— Reeves *v.* Townsend, 22 N. J. L. 396.

New York.— Turner *v.* Roby, 3 N. Y. 193; Nicholl *v.* Mason, 21 Wend. 339; Dakin *v.* Hudson, 6 Cow. 221; Peebles *v.* Kittle, 2 Johns. 363; People *v.* Weston, 4 Park. Cr. 226.

Tennessee.— State *v.* Thompson, 2 Heisk. 147.

Vermont.— Holden *v.* Scanlin, 30 Vt. 177.

England.— See Harris *v.* Willis, 15 C. B. 710, 3 C. L. R. 609, 24 L. J. C. P. 93, 3 Wkly. Rep. 238, 80 E. C. L. 710.

See 30 Cent. Dig. tit. "Judgment," § 1797.

50. *California.*— Weller *v.* Dickinson, 93 Cal. 108, 28 Pac. 854; Beans *v.* Emanuelli, 36 Cal. 117.

Colorado.— Medano Ditch Co. *v.* Adams, 29 Colo. 317, 68 Pac. 431.

Kentucky.— Garner *v.* Wills, 92 Ky. 386, 17 S. W. 1023, 13 Ky. L. Rep. 726; Potter *v.* Lewis, 64 S. W. 958, 23 Ky. L. Rep. 1218.

Missouri.— State *v.* Johnson, 78 Mo. App. 569.

Montana.— Weaver *v.* English, 11 Mont. 84, 27 Pac. 396; Harmon *v.* Comstock Horse, etc., Co., 9 Mont. 243, 23 Pac. 470.

Nebraska.— Bennett *v.* Bennett, 65 Nebr. 432, 91 N. W. 409, 96 N. W. 994.

New York.— Schnitzer *v.* Fox, 31 Misc. 28, 62 N. Y. Suppl. 1127; Hunt *v.* Dutcher, 13 How. Pr. 538.

Wisconsin.— Pierstoff *v.* Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881.

See 30 Cent. Dig. tit. "Judgment," § 1787.

51. *Connecticut.*— Crandall *v.* Gallup, 12 Conn. 365.

Illinois.— Walker *v.* Ogden, 192 Ill. 314, 61 N. E. 403; Cheney *v.* Patton, 134 Ill. 422, 25 N. E. 792.

Mississippi.— St. John's Episcopal Church *v.* Berg, (1887) 2 So. 254.

Nebraska.— Spargur *v.* Romine, 38 Nebr. 736, 57 N. W. 523; Gibson *v.* Parlin, 13 Nebr. 292, 13 N. W. 405; Brandt *v.* Albers, 6 Nebr. 504.

New York.— Goddard *v.* Benson, 15 Abb. Pr. 191.

Texas.— Del Rio Bldg., etc., Assoc. *v.* King, 71 Tex. 729, 12 S. W. 65; Blagge *v.* Shaw, (Civ. App. 1897) 41 S. W. 756.

Vermont.— Goodrich *v.* Judevine, 40 Vt. 190; Peaslee *v.* Staniford, 1 D. Chipm. 170.

United States.— King *v.* Bender, 116 Fed. 813, 54 C. C. A. 317; Theller *v.* Hershey, 89 Fed. 575; Pittel *v.* Fidelity Mut. Life Assoc., 86 Fed. 255, 30 C. C. A. 21; Greely

suit is identical with that on which the present suit is based;[52] and if the prior judgment is pleaded as a conclusive adjudication upon some point or question in issue, the plea must make it clearly appear that the same point or question was actually litigated and decided in the former suit, or that it might have been litigated and determined under the issues in that suit.[53]

g. Decision on the Merits. Since a former judgment between the same parties does not bar a second suit upon the same cause of action unless it was rendered on the merits,[54] a plea of former adjudication must distinctly show that such former judgment was on the merits, and, if necessary to make this clear, specific facts must be alleged to show the consideration and determination of the merits.[55]

v. Smith, 10 Fed. Cas. No. 5,750, 3 Woodb. & M. 236.

See 30 Cent. Dig. tit. "Judgment," § 1798.

52. *Alabama.*— Karter *v.* Fields, 140 Ala. 352, 37 So. 204; Glaser *v.* Meyrovitz, 119 Ala. 152, 24 So. 514; Haas *v.* Taylor, 80 Ala. 459, 2 So. 633; Moberly *v.* Peek, 67 Ala. 345; Hopkinson *v.* Shelton, 37 Ala. 306.

Florida.— Keen *v.* Brown, 46 Fla. 487, 35 So. 401.

Indiana.— Cornwell *v.* Hungate, 1 Ind. 156; Athearn *v.* Brannan, 8 Blackf. 440; Dunn *v.* Barton, 2 Ind. App. 444, 28 N. E. 717.

Kansas.— Borin *v.* Johnsou, 4 Kan. App. 211, 45 Pac. 968.

Kentucky.— Cates *v.* Loftus, 4 T. B. Mon. 439; Bramlett *v.* Louisville, etc., R. Co., 70 S. W. 410, 24 Ky. L. Rep. 976.

Maryland.— Brooke *v.* Gregg, 89 Md. 234, 43 Atl. 38.

New Jersey.— Taylor *v.* Hutchinson, 61 N. J. L. 440, 39 Atl. 664.

Ohio.— Eversole *v.* Plank, 17 Ohio 61.

Pennsylvania.—Hampton *v.* Broom, 1 Miles 241.

Texas.— Mallory *v.* Dawson Cotton Oil Co., 32 Tex. Civ. App. 294, 74 S. W. 953; New York, etc., Land Co. *v.* Votaw, (Civ. App. 1899) 52 S. W. 125.

United States.— U. S. *v.* Parker, 120 U. S. 89, 7 S. Ct. 454, 30 L. ed. 601; Abilene *v.* Cornell University, 118 Fed. 379, 55 C. C. A. 205.

England.— Behrens *v.* Sieveking, 2 Myl. & C. 602, 14 Eng. Ch. 602, 40 Eng. Reprint 769. But *compare* Lawler *v.* Robertson, 1 F. & F. 307.

Canada.— Crooks *v.* Bowes, 22 U. C. Q. B. 219.

See 30 Cent. Dig. tit. "Judgment," § 1799.

Form and sufficiency of plea.— The plea is sufficient in this respect if it alleges that the former action was "for the same identical debts and causes of action as are set forth in the case at bar, the same identical debts and causes of action being pleaded in the complaint as were pleaded and charged in the complaint in the action first brought . . . and none other." Perkins *v.* Moore, 16 Ala. 17; Wilson *v.* Buell, 117 Ind. 315, 20 N. E. 231; Rynearson *v.* Parkhurst, 88 Ind. 264; Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. 263; Wythe *v.* Salem, 30 Fed. Cas. No. 18,121, 4 Sawy. 88. *Compare* The Farmer *v.* McCraw, 26 Ala. 189, 62 Am. Dec. 718; Crum *v.* Rea, 14 Ind. App. 379, 42 N. E. 1033. Where the complaint contains separate counts for each of several claims sued on, a plea alleging that plaintiff has heretofore recovered judgment for a portion of such claims, which judgment has not been reversed, is demurrable for failure to show which of the claims were embraced in such judgment. Scottish Union, etc., Ins. Co. *v.* Dangaix, 103 Ala. 388, 15 So. 956.

53. *Alabama.*— Gilbreath *v.* Jones, 66 Ala. 129; Chamberlain *v.* Gaillard, 26 Ala. 504.

Colorado.— Solly *v.* Clayton, 12 Colo. 30, 20 Pac. 351.

Florida.— Fulton *v.* Gesterding, 47 Fla. 150, 36 So. 56.

Georgia.— New England. Mortg. Security Co. *v.* Robson, 79 Ga. 757, 4 S. E. 251.

Indiana.— Krutsinger *v.* Brown, 72 Ind. 466; Griffin *v.* Wallace, 66 Ind. 410; Greenup *v.* Crooks, 50 Ind. 410; Columbus, etc., R. Co. *v.* Watson, 26 Ind. 50.

Nebraska.— Wilch *v.* Phelps, 16 Nebr. 515, 20 N. W. 840.

New York.— Montrose *v.* Wanamaker, 134 N. Y. 590, 31 N. E. 252.

Pennsylvania.— Kay *v.* Gray, 24 Pa. Super. Ct. 536.

Tennessee.— Riley *v.* Lyons, 11 Heisk. 246.

Texas.— Fenn *v.* Roach, (Civ. App. 1903) 75 S. W. 361.

Vermont.— Mussey *v.* Bates, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 516.

See 30 Cent. Dig. tit. "Judgment," § 1799.

54. See *supra*, XIII, C, 1.

55. *Alabama.*— Dobson *v.* Hurley, 129 Ala. 380, 30 So. 598; Perkins *v.* Moore, 16 Ala. 9.

Florida.— Armstrong *v.* Manatee County, (1905) 37 So. 938.

Indiana.— Gutheil *v.* Goodrich, 160 Ind. 92, 66 N. E. 446; McBurnie *v.* Seaton, 111 Ind. 56, 12 N. E. 101.

Kentucky.— Goff *v.* Wilhurn, 79 S. W. 232, 25 Ky. L. Rep. 1963.

Massachusetts.— Wade *v.* Howard, 8 Pick. 353.

Michigan.— Detroit, etc., R. Co. *v.* McCammon, 108 Mich. 368, 66 N. W. 471.

New Hampshire.— Taylor *v.* Barron, 35 N. H. 484.

New York.— Patchen *v.* Delaware, etc., Canal Co., 62 N. Y. App. Div. 543, 71 N. Y. Suppl. 122.

Rhode Island.— Crafts *v.* Crafts, 23 R. I. 5, 52 Atl. 890.

h. Denials and Defenses. When the party against whom a former judgment is pleaded as a bar or estoppel wishes to deny or avoid its effect, it is not proper to plead *nul tiel record*;[56] but he should plead specially and particularly whatever grounds he has for opposing its alleged effect, as that it was obtained by fraud,[57] that it was not a decision on the merits,[58] that the court was without jurisdiction, for want of notice to defendant,[59] that the judgment has been set aside, reversed, or vacated,[60] or that the cause of action was not the same, or the issues tried and determined were not identical with those now in suit.[61] Failure to reply to a plea of *res judicata* prevents plaintiff from attacking the judgment relied on for fraud.[62]

5. Issues, Proof, and Variance — a. Evidence Admissible, and Variance. Where issue has been properly taken upon a plea of *res judicata* or former recovery, the plea may and should be supported by the introduction in evidence of the record of the former judgment;[63] and for this purpose a mere entry of a rule for judgment is not sufficient.[64] The judgment produced in evidence must correspond in all essential particulars with that pleaded; any material variance will prevent its admission.[65]

Tennessee.— Fowlkes *v.* State, 14 Lea 14; Ellis *v.* Staples, 9 Humphr. 238; Bankhead *v.* Alloway, 1 Tenn. Ch. 207.

Texas.— Philipowski *v.* Spencer, 63 Tex. 604.

Vermont.— Dunklee *v.* Goodenough, 65 Vt. 257, 26 Atl. 988, 63 Vt. 459, 21 Atl. 494.

West Virginia.— Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366.

United States.—Whitaker *v.* Davis, 91 Fed. 720; Greely *v.* Smith, 10 Fed. Cas. No. 5,750, 3 Woodb. & M. 236.

See 30 Cent. Dig. tit. "Judgment," § 1801.

56. Thornton *v.* Lane, 11 Ga. 459; Baldwin *v.* Woodbridge, etc., Engineering Co., 59 N. J. L. 317, 36 Atl. 683; U. S. *v.* Litle, 26 Fed. Cas. No. 15,608, 3 Cranch C. C. 251. But see Davis *v.* Crow, 7 Blackf. (Ind.) 129; Boucher *v.* Williamson, 1 Dana (Ky.) 227; Bailey *v.* Turner, 6 D. & L. 730, 14 Jur. 432, 18 L. J. Q. B. 232.

A reply denying that the judgment pleaded in bar had any valid force or effect on plaintiff's rights is a mere averment of a conclusion of law and should be stricken out. Henriques *v.* Garson, 26 N. Y. App. Div. 35, 49 N. Y. Suppl. 1074.

57. Miner *v.* Reed, 25 Ill. App. 175; Edgell *v.* Sigerson, 20 Mo. 494.

58. Flynn *v.* Gorman, 22 R. I. 536, 48 Atl. 797.

59. Davis *v.* Green, 57 Ind. 493.

60. Campbell *v.* Cross, 39 Ind. 155; McCormick Harvesting Mach. Co. *v.* Stires, (Nebr. 1903) 94 N. W. 629.

61. Maeder *v.* Wexler, 98 N. Y. App. Div. 68, 90 N. Y. Suppl. 598; Lawton *v.* Hudson, 19 N. Y. App. Div. 522, 46 N. Y. Suppl. 617; Smith *v.* Atkins, 6 Baxt. (Tenn.) 318. And see Overton *v.* Harvey, 9 C. B. 324, 14 Jur. 902, 19 L. J. C. P. 256, 1 L. M. & P. 233, 67 E. C. L. 324.

62. Thomas *v.* Thomas, 33 Nebr. 373, 50 N. W. 170, 29 Am. St. Rep. 483.

63. Walker *v.* Redding, 40 Fla. 124, 23 So. 565; Botelcr *v.* State, 8 Gill & J. (Md.) 359; Mason *v.* Spurlock, 4 Baxt. (Tenn.) 554; Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330. See Crosswell *v.* Byrnes, 9 Johns. (N. Y.) 287.

Sufficiency of issue.— Where an answer pleads *res judicata*, setting forth with particularity pleadings, issues, and judgment, a general denial that the issues and the parties are identical with those in the former case does not put in issue the plea of *res judicata*. Small *v.* Reeves, 76 S. W. 395, 25 Ky. L. Rep. 729. But the recovery of a judgment in favor of defendant, against plaintiff, having been given in evidence by way of set-off, defendant is at liberty to avail himself of such recovery as an estoppel, if the records warrant it, without regard to the theory of the answer. Collyer *v.* Collins, 17 Abb. Pr. (N. Y.) 467.

Evidence showing grounds of decision.— A former judgment having been pleaded as an estoppel, the pleadings as well as the judgment in the proceedings in which it was entered are competent evidence to show the grounds on which the decision was based. Ryan *v.* State Bank, 10 Nebr. 524, 7 N. W. 276.

64. Croswell *v.* Byrnes, 9 Johns. (N. Y.) 287.

65. *Alabama.*— Quigley *v.* Campbell, 12 Ala. 58.

Illinois.— Mann *v.* Edwards, 138 Ill. 19, 27 N. E. 603; Cavener *v.* Shinkle, 89 Ill. 161; Miller *v.* McManis, 57 Ill. 126.

Indiana.— State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984, holding, however, that it is not a material variance that, in pleading a judgment, portions are omitted which have been vacated on appeal.

Kentucky.— Lowry *v.* McMurtry, Ky. Dec. 251.

Massachusetts.— Luce *v.* Dexter, 135 Mass. 23.

Ohio.— Block *v.* Peebles, 10 Ohio Dec. (Reprint) 3, 13 Cinc. L. Bul. 36.

Pennsylvania.— Sadler *v.* Slabaugh, 2 Watts 73.

b. Admissibility of Judgment Under General Issue — (i) *In General.* It is generally held that a former adjudication may be given in evidence under a plea of the general issue in all those cases where other matters in discharge of the action can be proved under that issue, as in assumpsit, ejectment, and actions on the case,[66] although not in the action of trespass, where all matters which admit the original wrong must be specially pleaded.[67]

(ii) *Under Code Practice.* Under the code system of pleading, requiring new matter or matter in avoidance to be specially pleaded, a former adjudication is not admissible in evidence under a general denial of the allegations of the complaint.[68]

West Virginia.— Sayre *v.* Edwards, 19 W. Va. 352.

United States.— Dow *v.* Humbert, 91 U. S. 294, 23 L. ed. 368; David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

See 30 Cent. Dig. tit. "Judgment," § 1804.

66. *Alabama.*— Cook *v.* Field, 3 Ala. 53, 36 Am. Dec. 436.

Illinois.— Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58.

Iowa.— George *v.* Gillespie, 1 Greene 421.

Kentucky.— Cook *v.* Vimont, 6 T. B. Mon. 284, 17 Am. Dec. 157; Lampton *v.* Jones, 5 T. B. Mon. 235.

Maine.— Whiting *v.* Burger, 78 Me. 287, 4 Atl. 694.

Massachusetts.— French *v.* Neal, 24 Pick. 55. In this state, under the statutes, if the judgment be a fact relied upon in avoidance of the action, it must be set forth in the answer; but if it be an adjudication between the same parties, and against plaintiff, of issues which tend directly to disprove the allegations contained in the declaration, then it is admissible in evidence under an answer denying those allegations. Foye *v.* Patch, 132 Mass. 105.

New Hampshire.— Gove *v.* Lyford, 44 N. H. 525.

New York.— Niles *v.* Totman, 3 Barb. 594; Miller *v.* Manice, 6 Hill 114; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603; Burt *v.* Sternburgh, 4 Cow. 559, 15 Am. Dec. 402; Gardner *v.* Buckbee, 3 Cow. 120, 15 Am. Dec. 256. In Young *v.* Rummell, 2 Hill 478, 38 Am. Dec. 594, it was admitted that Fowler *v.* Hait, 10 Johns. 111, was to the contrary of the rule here stated, but the court suggested that that decision was virtually overruled in Wilt *v.* Ogden, 13 Johns. 56, and Sill *v.* Rood, 15 Johns. 230.

Ohio.— Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459 [*overruling* Inman *v.* Jenkins, 3 Ohio 271]. But see Fanning *v.* Hibernia Ins. Co., 37 Ohio St. 344, holding that a former adjudication of the matter set up in the answer as an estoppel is not admissible in evidence under a general replication.

Pennsylvania.— Bruner *v.* Finley, 211 Pa. St. 74, 60 Atl. 488 (ejectment); Finley *v.* Hanbest, 30 Pa. St. 190; Carvill *v.* Garrigues, 5 Pa. St. 152; Gilchrist *v.* Bale, 8 Watts 355, 34 Am. Dec. 469. And see Cist *v.* Zeigler, 16 Serg. & R. 282, 16 Am. Dec. 573.

South Carolina.— Jones *v.* Weathersbee, 4 Strobh. 50, 51 Am. Dec. 653.

Tennessee.— Fowlkes *v.* State, 14 Lea 14; Renkert *v.* Elliott, 11 Lea 235.

Vermont.— Whitney *v.* Clarendon, 18 Vt. 252, 46 Am. Dec. 150.

United States.— Richardson *v.* Boston, 19 How. 263, 15 L. ed. 639; Young *v.* Black, 7 Cranch 565, 3 L. ed. 440; Bartels *v.* Schell, 16 Fed. 341; Ridgway *v.* Ghequier, 20 Fed. Cas. No. 11,816, 1 Cranch C. C. 87; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209.

England.— Stafford *v.* Clark, 2 Bing. 377, 9 E. C. L. 623, 1 C. & P. 24, 403, 12 E. C. L. 27, 238, 9 Moore C. P. 724; Bird *v.* Randall, 3 Burr. 1345, 1 W. Bl. 373, 387.

See 30 Cent. Dig. tit. "Judgment," § 1805.

Contra.— Porter *v.* Leache, 56 Mich. 40, 22 N. W. 104; Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192.

Under the plea of nil debet in an action of debt. Welsh *v.* Lindo, 29 Fed. Cas. No. 17,409, 1 Cranch C. C. 508.

Plea of non-assumpsit see Assumpsit, Action of, 4 Cyc. 353.

On a writ of audita querela under the plea of not guilty. Mussey *v.* White, 58 Vt. 45, 3 Atl. 319.

67. Jones *v.* Lavender, 55 Ga. 228; Briggs *v.* Milburn, 40 Mich. 512; Coles *v.* Carter, 6 Cow. (N. Y.) 691. And see Henderson *v.* Kenner, 1 Rich. (S. C.) 474. *Compare* Stancill *v.* James, 126 N. C. 190, 35 S. E. 245.

68. *California.*— Brown *v.* Campbell, 110 Cal. 644, 43 Pac. 12; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692. But where the answer sets up new matter, and plaintiff intends to rely on the estoppel of a former judgment, involving the determination of such matter, it is not necessary for him to reply specially. Wixson *v.* Devine, 67 Cal. 341, 7 Pac. 776.

Georgia.— Greaves *v.* Middlebrooks, 59 Ga. 240.

Indiana.— Brady *v.* Murphy, 19 Ind. 258; Norris *v.* Amos, 15 Ind. 365.

Louisiana.— *In re* Scarborough, 44 La. Ann. 288, 10 So. 858. And see Preferred Acc. Ins. Co. *v.* Barker, 93 Fed. 158, 35 C. C. A. 250.

New York.— Brazill *v.* Isham, 12 N. Y. 9; Lytle *v.* Crawford, 69 N. Y. App. Div. 273, 74 N. Y. Suppl. 660; Hendricks *v.* Decker, 35 Barb. 298. But in an action of tort, the

c. Conclusiveness of Judgment When Not Pleaded. Although there are numerous cases holding that a former adjudication, if not specially pleaded but given in evidence under the general issue, is not conclusive but only persuasive evidence,[69] yet the decided preponderance of authority is to the effect that such a judgment, if admissible at all under the pleadings, is just as conclusive when so presented as if it had been specially set up by a plea in bar,[70] or according to another line of decisions, when the judgment is relied on, not as a bar to the present action, but as a judicial determination of given facts, issues, or controversies, it is not necessary to plead it specially, but it is conclusive when given in evidence.[71]

record of a former recovery against others of the tort-feasors in an action *ex contractu*, estopping plaintiff to allege a tort in this case, may be given in evidence under a general denial. Terry *v.* Munger, 49 Hun 560, 2 N. Y. Suppl. 348 [*affirmed* in 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216]. And see Derby *v.* Hartman, 3 Daly 458.

United States.— Glenn *v.* Priest, 48 Fed. 19.

69. *Illinois.*— Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58.

Indian Territory.— Turner *v.* Gonzales, 3 Indian Terr. 649, 64 S. W. 565.

Iowa.— Cooley *v.* Brayton, 16 Iowa 10.

Louisiana.— Goodrich *v.* Pattingill, 7 La. Ann. 664.

New York.— Miller *v.* Manice, 6 Hill 114; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603; Jackson *v.* Wood, 3 Wend. 27.

North Carolina.— Redmond *v.* Coffin, 17 N. C. 437.

Ohio.— Meiss *v.* Gill, 44 Ohio St. 253, 6 N. E. 656; Ferguson *v.* Miller, 5 Ohio 459.

Pennsylvania.— Smith *v.* Elliott, 9 Pa. St. 345.

Texas.— Smith *v.* Bean, 36 Tex. Civ. App. 623, 82 S. W. 793.

Vermont.— Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345; Isaacs *v.* Clark, 12 Vt. 692, 36 Am. Dec. 372.

Virginia.— Cleaton *v.* Chambliss, 6 Rand. 86.

United States.— Richardson *v.* Boston, 19 How. 263, 15 L. ed. 639; Blandy *v.* Griffith, 3 Fed. Cas. No. 1,529.

England.— Vooght *v.* Winch, 2 B. & Ald. 662, 21 Rev. Rep. 446.

See 30 Cent. Dig. tit. "Judgment," § 1806.

70. *Alabama.*— Cannon *v.* Brame, 45 Ala. 262.

California.— Flandreau *v.* Downey, 23 Cal. 354.

Connecticut.— Bell *v.* Raymond, 18 Conn. 91; Betts *v.* Starr, 5 Conn. 550, 13 Am. Dec. 94.

Florida.— Little *v.* Barlow, 37 Fla. 232, 20 So. 240, 53 Am. St. Rep. 249.

Georgia.— Dardin *v.* Ogletree, Dudley 240.

Illinois.— Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 57 Ill. App. 430.

Indiana.— Gavin *v.* Graydon, 41 Ind. 559.

Maryland.— Beall *v.* Pearre, 12 Md. 550; Singery *v.* Atty.-Gen., 2 Harr. & J. 487.

Massachusetts.— Merriam *v.* Whittemore, 5 Gray 316; Sprague *v.* Waite, 19 Pick. 455; Adams *v.* Barnes, 17 Mass. 365.

Missouri.— Garton *v.* Botts, 73 Mo. 274; Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Offutt *v.* John, 8 Mo. 120, 40 Am. Dec. 125.

New Hampshire.— Hall *v.* Dodge, 38 N. H. 346; Chamberlin *v.* Carlisle, 26 N. H. 540; Dame *v.* Wingate, 12 N. H. 291.

New York.— White *v.* Coatsworth, 6 N. Y. 137; Drake *v.* New York Suburban Water Co., 26 N. Y. App. Div. 499, 50 N. Y. Suppl. 826; Beebe *v.* Elliott, 4 Barb. 457; Niles *v.* Totman, 3 Barb. 594; Fritz *v.* Tompkins, 18 Misc. 514, 41 N. Y. Suppl. 985; Wright *v.* Butler, 6 Wend. 284, 21 Am. Dec. 323; Burt *v.* Sternburgh, 4 Cow. 559, 15 Am. Dec. 402; Gardner *v.* Buckbee, 3 Cow. 120, 15 Am. Dec. 256.

North Carolina.— Stancill *v.* James, 126 N. C. 190, 35 S. E. 245.

Pennsylvania.— Westcott *v.* Edmunds, 68 Pa. St. 34; Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131.

Rhode Island.— Bradford *v.* Burgess, 20 R. I. 290, 38 Atl. 975.

South Carolina.— Jones *v.* Weathersbee, 4 Strobh. 50, 51 Am. Dec. 653.

Tennessee.— Warwick *v.* Underwood, 3 Head 238, 75 Am. Dec. 767.

Utah.— Rio Grande Western R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995.

United States.— Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 58 Fed. 721, 7 C. C. A. 442.

England.— Bird *v.* Randall, 3 Burr. 1345, 1 W. Bl. 373, 387; Kingston's Case, 20 How. St. Tr. 355.

Canada.— See Harmer *v.* Gouinlock, 21 U. C. Q. B. 260, holding a judgment under the Interpleader Act, Can. Sup. (U. C.) c. 30, § 5, conclusive although not replied.

See 30 Cent. Dig. tit. "Judgment," § 1806.

71. Bell *v.* Raymond, 18 Conn. 91; Walker *v.* Chase, 53 Me. 258; Lytle *v.* Chicago Great Western R. Co., 75 Minn. 330, 77 N. W. 975; Swank *v.* St. Paul City R. Co., 61 Minn. 423, 63 N. W. 1088; Foulke *v.* Thalmessinger, 158 N. Y. 725, 53 N. E. 1125; Marston *v.* Sweet, 66 N. Y. 206, 23 Am. Rep. 43; Krekeler *v.* Ritter, 62 N. Y. 372; Stearns *v.* Shepard, etc., Lumber Co., 91 N. Y. App. Div. 49, 86 N. Y. Suppl. 391; Willis *v.* McKinnon,

B. Admissibility of Judgment in Evidence Generally. Aside from the question of its conclusiveness as a bar or estoppel, a judgment is admissible and competent evidence to prove the fact of its rendition and its terms,[72] a proper foundation for such evidence having been laid,[73] or where it is relied on as a link in a chain of title,[74] or as persuasive although not conclusive evidence of the facts which it adjudges or determines,[75] even as against strangers.[76]

C. Evidence as to Judgment and Its Effect — 1. In General — a. Presumptions and Burden of Proof. The party relying on a judgment or decree as constituting a bar or estoppel in another suit must assume the burden of proving the existence and character of the judgment or decree, as well as its legal effect in relation to the matters alleged to be concluded by it.[77] But when its existence,

79 N. Y. App. Div. 249, 79 N. Y. Suppl. 936; Lance *v.* Shaughnessy, 86 Hun 411, 33 N. Y. Suppl. 515.

72. *Alabama.*— Randolph *v.* Jones, 10 Ala. 228.

Louisiana.— State *v.* New Orleans Waterworks Co., 107 La. 1, 31 So. 395.

Nebraska.— Wilcox *v.* Saunders, 4 Nebr. 569.

Pennsylvania.— Shamokin Valley, etc., R. Co. *v.* Malone, 85 Pa. St. 25.

Virginia.— Gibson *v.* Com., 2 Va. Cas. 111.

See 30 Cent. Dig. tit. "Judgment," § 1808.

Effect of judgment as evidence of its own existence see *supra*, XIV, B, 12, c.

Void judgment.— In a suit on a note on which a void judgment has been rendered, a transcript of the judgment is admissible to show that it is void on its face, as for want of proper service, in order to show that the note is not merged in the judgment. Richardson *v.* Aiken, 84 Ill. 221.

73. Bowles *v.* Delaney, 54 Ill. 290; Welsh *v.* Lindo, 29 Fed. Cas. No. 17,408, 1 Cranch C. C. 497.

Proceedings prior to judgment.— Where a decree is relied on as evidence, the proceedings on which it is based must accompany it. Goddard *v.* Long, 5 Sm. & M. (Miss.) 782. But it is held that a judgment entered by confession is admissible in evidence without proof of the existence of the affidavit required by the statute. Dean *v.* Thatcher, 32 N. J. L. 470.

74. Building, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58. And see *supra*, XIV, B, 12, f.

75. *Georgia.*— Ray *v.* Fleetwood, 106 Ga. 253, 32 S. E. 156.

Iowa.— Hunter *v.* Burlington, etc., R. Co., 76 Iowa 490, 41 N. W. 305.

Louisiana.—Bankston *v.* Folks, 38 La. Ann. 267.

Massachusetts.— Parker *v.* Brancker, 22 Pick. 40; Parker *v.* Standish, 3 Pick. 288.

New York.— Bowyer *v.* Schofield, 1 Abb. Dec. 177, 2 Keyes 628; Ellis *v.* Purvis, 10 N. Y. St. 628.

Tennessee.— James *v.* Jones, 10 Humphr. 384.

Texas.— Maverick *v.* Salinas, 15 Tex. 57.

Utah.— Bonanza Consol. Min. Co. *v.* Golden Head Min. Co., 29 Utah 159, 80 Pac. 736.

See 30 Cent. Dig. tit. "Judgment," § 1808.

76. Real Estate Inv. Co. *v.* Haseltine, 53 Mo. App. 308; McDonald *v.* Hannah, 51 Fed. 73; Brune *v.* Thompson, C. & M. 34, 41 E. C. L. 241. See also *supra*, XIV, B, 12.

77. *Georgia.*— Findley *v.* Johnson, 84 Ga. 69, 10 S. E. 594; Patterson *v.* Turner, 62 Ga. 674; Dardin *v.* Ogletree, Dudley 240.

Indiana.— Brown *v.* Street, 60 Ind. 8.

Kentucky.— McCormick *v.* McCormick, 5 S. W. 573, 9 Ky. L. Rep. 519.

Louisiana.— Otis *v.* Sweeney, 43 La. Ann. 1073, 10 So. 247.

Michigan.— Kenyon *v.* Baker, 16 Mich. 373, 97 Am. Dec. 158.

New York.— Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301; Cutting *v.* Massa, 15 N. Y. St. 316.

Oregon.— Abraham *v.* Owens, 20 Oreg. 511, 26 Pac. 1112.

Pennsylvania.— Baskin *v.* Seechrist, 6 Pa. St. 154.

See 30 Cent. Dig. tit. "Judgment," § 1809.

Degree of proof required.— Pleas like *res judicata*, precluding an examination of the merits, cannot be aided by inference, but must be established beyond all question. The legal presumption attaching to such an estoppel is of too grave a character to be recognized as resulting from any litigation in which its essential characteristics are not free from all doubt. Fink *v.* Martin, 5 La. Ann. 103; Clay *v.* His Creditors, 9 Mart. (La.) 519.

Not aided by presumptions.— In an action on a guaranty of rent, it will not be presumed that defenses which could have been set up under the pleadings in a former action for another instalment of rent were actually made and passed on, but the burden is on plaintiff to show it. Bond *v.* Markstrum, 102 Mich. 11, 60 N. W. 282.

Presumption of conformity to law.— On a showing of time and opportunity to do so, the presumption obtains that a district court has entered such judgment as required by the terms of a mandate from the supreme court. Abbott *v.* Lane, 4 Nebr. (Unoff.) 629, 95 N. W. 599.

Presumption that judgment remains in force.— It is not necessary to prove that a judgment exemplified has not been reversed; the burden is on the party interested to counteract its effect by showing its reversal. Schoonmaker *v.* Lloyd, 9 Rich. (S. C.) 173.

Ancient judgment.— Where the execution under which a sheriff sold land recited that a judgment had been recovered, it was held

character, and legal effect are shown, the correctness of the judgment as an adjudication will be presumed.[78]

b. Admissibility in General. The existence of a judgment relied on as a bar or estoppel, including the time and place of its rendition and also including the parties affected by the judgment which is relied on as a bar, is to be proved by the production and inspection of the record,[79] and in these particulars extraneous evidence in contradiction of the record is not admissible.[80] But it is otherwise as to the legal consequences of the judgment as a merger, bar, or estoppel; its apparent effect in this particular may be explained or limited by extrinsic evidence,[81]

that after forty years the existence of the judgment would be presumed. Dunham *v.* Townshend, 118 N. Y. 281, 23 N. E. 367 [*affirming* 43 Hun 580].

78. *California.*— See Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

Illinois.— Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333; Riely *v.* Barton, 32 Ill. App. 524.

Iowa.— Mallory *v.* Riggs, 76 Iowa 748, 39 N. W. 886.

Michigan.— Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

Mississippi.— Hardy *v.* Gholson, 26 Miss. 70.

New York.— Ray *v.* Rowley, 1 Hun 614; Coit *v.* Beard, 33 Barb. 357.

South Carolina.— Latimer *v.* Latimer, 22 S. C. 257.

See 30 Cent. Dig. tit. "Judgment," § 1809.

79. *Arkansas.*—Kimball *v.* Merrick, 20 Ark. 12.

Illinois.— Gurnea *v.* Seeley, 66 Ill. 500.

Indiana.— Beatty *v.* Gates, 4 Ind. 154.

Missouri.— St. Joseph *v.* Union R. Co., 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626.

Nebraska.— Tunnicliffe *v.* Fox, (1903) 94 N. W. 1032.

New Jersey.—Sharp *v.* Hamilton, 12 N. J. L. 109.

New York.— Phipps *v.* Oprandy, 69 N. Y. App. Div. 497, 74 N. Y. Suppl. 985; Colvin *v.* Corwin, 15 Wend. 557.

North Carolina.— Aiken *v.* Lyon, 127 N. C. 171, 37 S. E. 199.

Texas.— San Antonio, etc., R. Co. *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 76 S. W. 782.

See 30 Cent. Dig. tit. "Judgment," § 1810. See also EVIDENCE, 17 Cyc. 320.

Best and secondary evidence see EVIDENCE, 17 Cyc. 500 *et seq.*

Judgment of justice's court.— A transcript of a county clerk's docket of a judgment rendered in a justice's court, and a certified copy of the justice's transcript, are only presumptive evidence of such judgment. The docket and testimony of the justice are competent evidence to show that no such judgment was ever rendered. Stephens *v.* Santee, 49 N. Y. 35.

Lost records.— Where all the judicial records of two counties bearing on a certain litigation have been burned, except the minutes of the court in the one county, and an index of a judgment in the other, parol evidence is competent to show that the action was begun in one county and removed by change of venue to the other, where the judgment was rendered. Jones *v.* Robb, 35 Tex. Civ. App. 263, 80 S. W. 395.

Judgment by confession.—Where it appears by the record that a confession of judgment was entered by attorney, but not whether it was by an attorney in fact or an attorney at law, evidence *aliunde* is admissible to show that it was an attorney in fact. Calwell *v.* Shields, 2 Rob. (Va.) 305.

Jurisdiction.— Where defendant, against whom a judgment is pleaded, attacks the jurisdiction of the court rendering it, and introduces evidence to show service of process on a person not authorized to receive it, plaintiff may prove facts outside the record, not required to be part of the judgment-roll, to show that the court did have jurisdiction. Johnston *v.* Mutual Reserve L. Ins. Co., 43 Misc. (N. Y.) 251, 87 N. Y. Suppl. 438 [*affirmed* in 45 Misc. 316, 90 N. Y. Suppl. 539].

80. *Arkansas.*— McCoy *v.* State, 22 Ark. 308.

California.— Wishon *v.* Tulare County Super. Ct., 138 Cal. 73, 70 Pac. 1007.

Maryland.— Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159.

Missouri.— Jones *v.* Driskill, 94 Mo. 190, 7 S. W. 111.

Pennsylvania.— Buffington *v.* Burhman, 4 Pa. L. J. 418.

United States.— Sargeant *v.* Indiana State Bank, 12 How. 371, 13 L. ed. 1028.

See 30 Cent. Dig. tit. "Judgment," § 1810.

81. *Connecticut.*— De Forest *v.* Strong, 8 Conn. 513.

Iowa.— Keairnes *v.* Durst, 110 Iowa 114, 81 N. W. 238. But *compare* Crum *v.* Boss, 48 Iowa 433.

Maryland.— Groshon *v.* Thomas, 20 Md. 234.

Michigan.— Mack *v.* Cole, 130 Mich. 84, 89 N. W. 564.

New York.— Sans *v.* New York, 31 Misc. 559, 64 N. Y. Suppl. 681. But *compare* Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470.

South Dakota.— Humpfner *v.* Osborne, 2 S. D. 310, 50 N. W. 88.

Tennessee.— Borches *v.* Arbuckle, 111 Tenn. 498, 78 S. W. 266.

United States.— Newton Mfg. Co. *v.* Wilgus, 90 Fed. 483.

See 30 Cent. Dig. tit. "Judgment," § 1810.

and particularly in the case of a judgment entered by agreement or consent or on a compromise.[82]

c. Parol Evidence. Parol evidence is not admissible either to create or to annul the estoppel arising from a judgment;[83] but where the record is indefinite or ambiguous, such testimony may be received for the purpose of explaining and applying it.[84]

d. Weight and Sufficiency. Where the existence of a judgment becomes a material issue, it must be proved by the production of the original record of the judgment, or a duly authenticated copy or transcript of it, as the case may be;[85] and this point cannot be established by any collateral or extrinsic evidence.[86] Further it is not sufficient to produce the judgment entry alone, but it must be accompanied by the entire record,[87] unless, as may be the case with decrees in chancery, the judgment of the court contains such recitals as will exhibit fully not only the fact of the judgment, but also the whole scope and extent of the estoppel created by it.[88]

2. Evidence to Identify Cause of Action — a. Burden of Proof. The party pleading a former judgment as a bar to the present action must assume the burden

But *compare* Young *v.* Harrison, 21 Ga. 584.

Showing error.— The effect and operation of the record of an inferior court as *res judicata* cannot be controlled by proving that the reasons of the judge for entering the judgment were erroneous. Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555.

82. Stark *v.* Thompson, 3 T. B. Mon. (Ky.) 296; Packwood *v.* White, 7 La. Ann. 31; Idding *v.* Hiatt, 51 N. C. 402; Gee *v.* Burt, (Tex. Civ. App. 1895) 33 S. W. 553.

83. Repstine *v.* Nettleton, (Kan. App. 1897) 49 Pac. 617; Brooks *v.* New York, 57 Hun (N. Y.) 104, 10 N. Y. Suppl. 773; Royce *v.* Burt, 42 Barb. (N. Y.) 339; Jackson *v.* Wood, 3 Wend. (N. Y.) 27; Paull *v.* Oliphant, 14 Pa. St. 342.

84. *Alabama.*—Hanchey *v.* Coskrey, 81 Ala. 149, 1 So. 259. There having been two causes between the same parties, parol evidence is admissible to show in which of them a decree offered in evidence was rendered. Adams *v.* Olive, 62 Ala. 418.

California.— Lillis *v.* People's Ditch Co., (1892) 29 Pac. 780.

Connecticut.— Bailey *v.* Bussing, 28 Conn. 455.

Iowa.— State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 51 L. R. A. 414, 84 Am. St. Rep. 342.

Nebraska.— Burkholder *v.* Hollicheck, 4 Nebr. (Unoff.) 655, 95 N. W. 860.

Pennsylvania.— Goodman *v.* Moyer, 1 Woodw. 92.

Vermont.— Kezar *v.* Elkins, 52 Vt. 119.

See 30 Cent. Dig. tit. "Judgment," § 1811.

Contra.— Eaton *v.* Harth, 45 Ill. App. 355.

85. Hecht *v.* Mothner, 4 Misc. (N. Y.) 536, 24 N. Y. Suppl. 826; Levy *v.* Backer, 14 N. Y. Suppl. 792; Atchison *v.* Rosalip, 3 Pinn. (Wis.) 288, 4 Chandl. 12.

Mere proof that a former trial has been had between the same parties, without showing the result of it, will not sustain a plea of former adjudication. Morrill *v.* Whitehead, 4 E. D. Smith (N. Y.) 239.

Finality of judgment.— To sustain a plea of *res judicata*, it must be shown that the former judgment was final and conclusive as to the rights of the party sought to be concluded. Thompson *v.* Thompson, (Tenn. Ch. App. 1899) 54 S. W. 145. And see Clariday *v.* Reed, (Tenn. Ch. App. 1898) 53 S. W. 302.

Lost record.— The same testimony that would justify the reëstablishment of a lost record is sufficient to support a plea of *res judicata*, where the record has been lost. U. S. *v.* Price, 113 Fed. 851.

86. The existence of a judgment is not established by memoranda thereof contained in the judgment docket (Red Cloud *v.* Farmers', etc., Banking Co., 3 Nebr. (Unoff.) 544, 92 N. W. 160); by a rule for judgment entered in the minutes of the court (Rosenberg *v.* Stover, 67 N. J. L. 506, 51 Atl. 931), by affidavits or depositions (Walter *v.* Alexander, 2 Gill (Md.) 204; McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303), by an unsworn statement made by one of the parties in a subsequent bill in equity (Dunham *v.* Jones, 159 U. S. 584, 16 S. Ct. 108, 40 L. ed. 267), or by parol (Amundson *v.* Wilson, 11 N. D. 193, 91 N. W. 37). But see Claggett *v.* Simes, 31 N. H. 56, holding a written admission of a judgment by one of the parties to be competent evidence thereof.

87. *Arkansas.*— Hall *v.* Roulston, 70 Ark. 343, 68 S. W. 24.

Florida.— Clem *v.* Meserole, 44 Fla. 234, 32 So. 815, 103 Am. St. Rep. 145.

Indiana.— Thomas *v.* Stewart, 92 Ind. 246.

Iowa.— Campbell *v.* Ayres, 18 Iowa 252; Campbell *v.* Ayres, 6 Iowa 339.

South Carolina.— Brown *v.* Coney, 12 S. C. 144.

Texas.— Westmoreland *v.* Richardson, 2 Tex. Civ. App. 175, 21 S. W. 167.

See 30 Cent. Dig. tit. "Judgment." § 1812.

88. Starke *v.* Gildart, 4 How. (Miss.) 267; Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Winans *v.* Dunham, 5 Wend. (N. Y.) 47.

of proving, if the fact does not appear from the record, that the subject-matter or cause of action in the former suit was identical with that now in suit.[89]

b. Admissibility and Effect. If it does not appear from the record that the cause of action in the former suit was identical with that in the action in which it is pleaded in bar, this fact may be proved by evidence *aliunde*;[90] and similar evidence is admissible for the party against whom the estoppel is pleaded to show that the causes of action in the two suits are not the same;[91] but in either case the proof should be clear and satisfactory.[92]

c. Parol Evidence. Where a judgment pleaded as *res judicata* does not clearly show, on account of its generality or ambiguity, whether or not the cause of action on which it was rendered was identical with that set up in the suit in which it is so pleaded, parol evidence is admissible to establish the identity of the causes of action, or to rebut the allegation that they are identical.[93]

89. *District of Columbia.*— Langdon *v.* Evans, 3 Mackey 1.

Illinois.— Smalley *v.* Edey, 19 Ill. 207; Davis *v.* Sexton, 35 Ill. App. 407.

Iowa.— Searle *v.* Richardson, 67 Iowa 170, 25 N. W. 113.

Louisiana.— Goodrich *v.* Pattingill, 7 La. Ann. 664; West *v.* Creditors, 4 La. Ann. 447; Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624.

Texas.— Humason *v.* Lobe, 76 Tex. 512, 13 S. W. 382.

In New York it is held that the presumption that a former judgment between the same parties covered the cause of action in suit may be rebutted by evidence that the action brought is distinct from the one represented by the judgment. Fox *v.* Phyfe, 36 Misc. 207, 73 N. Y. Suppl. 149; Hale *v.* Andrus, 6 Cow. 225. And see Kauff *v.* Messner, 4 Brewst. (Pa.) 98.

90. *District of Columbia.*— Langdon *v.* Evans, 3 Mackey 1.

Illinois.— Hall *v.* Jones, 32 Ill. 38.

Indiana.— Miles *v.* Wingate, 6 Ind. 458.

Maine — Dingley *v.* Gifford, 87 Me. 362, 32 Atl. 974.

New York.— Royce *v.* Burt, 42 Barb. 655.

Pennsylvania.— Hartman *v.* Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360; Woodward *v.* Armstrong, 2 Chest. Co. Rep. 250.

Texas.— Hampton *v.* Dean, 4 Tex. 455.

Wisconsin.— Driscoll *v.* Damp, 16 Wis. 106.

But see Fowler *v.* Williams, 2 Treadw. (S. C.) 491; Wadsworth *v.* Bentley, 2 C. L. R. 127, 17 Jur. 1077, 23 L. J. Q. B. 3, 4 L. & M. 203, 2 Wkly. Rep. 56; Morgan *v.* Western Assur. Co., 13 Quebec K. B. 49 [*reversing* 24 Quebec Super. Ct. 88].

Identity of land in suit.— In an action on purchase-money notes given for land, where defendant alleges breach of warranty of title, and introduces in evidence a judgment against him in ejectment, the testimony of a surveyor is competent to show that the land described in the judgment was part of the tract described in the deed to defendant. Grantier *v.* Austin, 66 Hun (N. Y.) 157, 20 N. Y. Suppl. 968. But where the record of another suit is offered to show an estoppel as against plaintiff in ejectment, recitals in a deed to defendant from a third party are not evidence of the identity of the land sued for with the land referred to in the other suit. Garrison *v.* Tinley, 112 N. C. 652, 17 S. E. 423.

91. Jewett *v.* Locke, 6 Gray (Mass.) 233; Dunlap *v.* Edwards, 29 Miss. 41.

92. Kilpatrick *v.* O'Connell, 62 Md. 403.

93. *Alabama.*— Anniston First Nat. Bank *v.* Lippman, 129 Ala. 608, 30 So. 19; Strother *v.* Butler, 17 Ala. 733.

Arkansas.— Gates *v.* Bennett, 33 Ark. 475; Smith *v.* Talbot, 11 Ark. 666.

Connecticut.— Dexter *v.* Whitbeck, 46 Conn. 224.

Illinois.— Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112, 16 N. E. 239; Hall *v.* Jones, 32 Ill. 38; Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761.

Iowa.— Hollenbeck *v.* Stanberry, 38 Iowa 325.

Louisiana.— Steele's Succession, 7 La. Ann. 111.

Maine.—Sturtevant *v.* Randall, 53 Me. 149.

Maryland.— Streeks *v.* Dyer, 39 Md. 424; Whitehurst *v.* Rogers, 38 Md. 503; Federal Hill Steam Ferry Co. *v.* Mariner, 15 Md. 224.

Missouri.— Williams *v.* Dent Iron Co., 30 Mo. App. 662.

Nevada.— McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

New Jersey.—Davisson *v.* Gardner, 10 N. J. L. 289.

New York.— Walsh *v.* Ostrander, 22 Wend. 178; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603; Burt *v.* Sternburgh, 4 Cow. 559, 15 Am. Dec. 402; Gardner *v.* Buckbee, 3 Cow. 120, 15 Am. Dec. 256.

North Carolina.— Rollins *v.* Henry, 84 N. C. 569.

Pennsylvania.— McDermott *v.* Hoffman, 70 Pa. St. 31; Ruggles *v.* Gaily, 2 Rawle 232.

Tennessee.— Warwick *v.* Underwood, 3 Head 238, 75 Am. Dec. 767.

Vermont.— Post *v.* Smilie, 48 Vt. 185; Chase *v.* School Dist. No. 13, 47 Vt. 524; Perkins *v.* Walker, 19 Vt. 144.

Virginia.— Kelly *v.* Board of Public Works, 25 Gratt. 755; Shelton *v.* Ward, 1 Call 538.

Wisconsin.— Driscoll *v.* Damp, 16 Wis. 106.

See 30 Cent. Dig. tit. "Judgment," § 1817.

3. EVIDENCE TO SHOW CONSIDERATION OF MERITS. If a judgment or decree purports on its face to adjudicate the entire merits of the controversy, it cannot be contradicted in this respect by extrinsic evidence.[94] If it is doubtful whether the merits were considered, the fact may be shown by a comparison of the judgment with the pleadings or other parts of the record.[95] But if nothing can be discovered from the record, it will be presumed that the judgment was rendered on the merits;[96] but this presumption is not conclusive, and the party against whom the judgment is pleaded may show, by parol evidence if necessary, that there was no consideration of the merits,[97] being bound, however, to establish this fact by clear and satisfactory proof.[98]

4. EVIDENCE TO IDENTIFY ISSUES OR MATTERS DECIDED — a. Presumptions and Burden of Proof. When a former judgment is pleaded as an estoppel, which does not show on its face that the same issues were litigated as in the suit in which it is pleaded, the fact cannot be presumed, but evidence *aliunde* is required to establish the identity of the issues or matters in controversy.[99] And if it appears from the record of the former suit that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined.[1] In all such cases therefore the party setting up the former judgment as an estoppel must assume the burden of proving that the par-

94. Hatch *v.* Frazer, (Mich. 1904) 101 N. W. 228; Lyon *v.* Perrin, etc., Mfg. Co., 125 U. S. 698, 8 S. Ct. 1024, 31 L. ed. 839.

95. Gibson *v.* Miln, 1 Nev. 526.

96. Gunn *v.* James, 120 Ga. 482, 48 S. E. 148; Monticello Nat. Bank *v.* Bryant, 13 Bush (Ky.) 419. *Compare* Estep *v.* Larsh, 21 Ind. 190.

97. *Alabama.*—Hanchey *v.* Coskrey, 81 Ala. 149, 1 So. 259.

Maine.— Embden *v.* Lisherness, 89 Me. 578, 36 Atl. 1101, 56 Am. St. Rep. 442.

Michigan.— Munro *v.* Meech, 94 Mich. 596, 54 N. W. 290.

Mississippi.— Robinson *v.* Lane, 14 Sm. & M. 161.

Missouri.— Garnett *v.* Stacy, 17 Mo. 601; Haseltine *v.* Thrasher, 65 Mo. App. 334; Snorgrass *v.* Moore, 30 Mo. App. 232.

New York.— Dear *v.* Reed, 37 Hun 594. But *compare* Thomas *v.* Hubbell, 18 Barb. 9; Brintnall *v.* Foster, 7 Wend. 103.

North Carolina.— Davie *v.* Davis, 108 N. C. 501, 13 S. E. 240, 23 Am. St. Rep. 71; Justice *v.* Justice, 25 N. C. 58; Ferrell *v.* Underwood, 13 N. C. 111.

Rhode Island.— Jepson *v.* International Fraternal Alliance, 17 R. I. 471, 23 Atl. 15.

Texas.— Graves *v.* White, 13 Tex. 123; Easton *v.* Bratton, 13 Tex. 30.

See 30 Cent. Dig. tit. "Judgment," § 1824.

Evidence admissible.—The testimony of the justice of the peace by whom a judgment was rendered may be admitted to show that the cause was dismissed, and not tried on its merits, because the claim was not due at the time the suit was brought. Wood *v.* Faut, 55 Mich. 185, 20 N. W. 897. But see Terre Haute, etc., R. Co. *v.* State, 159 Ind. 438, 65 N. E. 401, holding that, where a judgment is rendered for defendant on sustaining a demurrer to the complaint for insufficient facts, evidence in a subsequent action involving the same subject-matter and between the same parties, of the opinions of the judges trying the former action, to the effect that the judgment was rendered on the merits, is not admissible.

98. Baxter *v.* Aubrey, 41 Mich. 13, 1 N. W. 897.

99. Strother *v.* Butler, 17 Ala. 733; Merchants' International Steamboat Line *v.* Lyon, 12 Fed. 63, 4 McCrary 145; Fendall *v.* U. S., 12 Ct. Cl. 305.

1. *Alabama.*— Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; Hamner *v.* Pounds, 57 Ala. 348.

California.— Lillis *v.* People's Ditch Co., (1892) 29 Pac. 780.

Florida.— Fulton *v.* Gesterding, 46 Fla. 150, 36 So. 56.

Illinois.— Ryan *v.* Potwin, 62 Ill. App. 134.

Indiana.— Dygert *v.* Dygert, 4 Ind. App. 276, 29 N. E. 490.

Massachusetts.— Lea *v.* Lea, 99 Mass. 493, 96 Am. Dec. 772; Sawyer *v.* Woodbury, 7 Gray 499, 66 Am. Dec. 518; McDowell *v.* Langdon, 3 Gray 513.

Mississippi.— Jones *v.* Brandon, 60 Miss. 556.

Missouri.— Brown *v.* Weldon, 34 Mo. App. 378.

Nebraska.— Morgan *v.* Mitchell, 52 Nebr. 667, 72 N. W. 1055; Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

North Carolina.— Jones *v.* Beaman, 117 N. C. 259, 23 S. E. 248.

Pennsylvania.— Hartman *v.* Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

Virginia.— Chrisman *v.* Harman, 29 Gratt. 494, 26 Am. Rep. 387.

United States.— Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Thompson *v.* N. T. Bushnell Co., 80 Fed. 332; Clark *v.* Blair, 14 Fed.

ticular point or question as to which he claims the estoppel was in issue and determined in the former suit.[2] Several cases, however, hold that, if it appears that the point or question presently in issue might have been determined in the former suit, it will be presumed that it was so determined, and the burden is upon the party seeking to avoid the estoppel to show that the matter is not *res judicata*.[3]

b. Admissibility in General. Certain early cases held that, where a former judgment was pleaded as an estoppel, it must appear from the record itself that the same subject-matter had been adjudicated in the former suit.[4] But this doctrine has been generally repudiated, and it is now held that extrinsic evidence, not inconsistent with the record and not impugning its verity, is admissible for the purpose of identifying the points or questions litigated and decided in the former action.[5]

812, 4 McCrary 311; The Vincennes, 28 Fed. Cas. No. 16,945, 3 Ware 171.

See 30 Cent. Dig. tit. "Judgment," § 1822.

2. *Alabama.*— Hanchey *v.* Coskrey, 81 Ala. 149, 1 So. 259; Pruitt *v.* Holly, 73 Ala. 369.

Arkansas.— McCombs *v.* Wall, 66 Ark. 336, 50 S. W. 876.

Georgia.— Draper *v.* Medlock, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 483.

Illinois.— Smalley *v.* Edey, 19 Ill. 207.

Michigan.— Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183; Bond *v.* Markstrum, 102 Mich. 11, 60 N. W. 282.

Montana.— Kleinschmidt *v.* Binzel, 14 Mont. 31, 35 Pac. 460, 43 Am. St. Rep. 604.

Nebraska.— Anderson *v.* Kreidler, 56 Nebr. 171, 76 N. W. 581.

New Hampshire.— Morgan *v.* Burr, 58 N. H. 470.

New York.— Rudd *v.* Cornell, 171 N. Y. 114, 63 N. E. 823; King *v.* Townshend, 141 N. Y. 358, 36 N. E. 513; Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; Campbell *v.* Butts, 3 N. Y. 173; Rowland *v.* Hobby, 26 N. Y. App. Div. 522, 50 N. Y. Suppl. 629; McKnight *v.* Dunlop, 4 Barb. 36; Yonkers, etc., F. Ins. Co. *v.* Bishop, 1 Daly 449; Eden *v.* Hartt, 25 Misc. 493, 54 N. Y. Suppl. 1040; Holden *v.* O'Donohue, 15 N. Y. Suppl. 402; Campbell Printing Press, etc., Co. *v.* Walker, 9 N. Y. St. 722; Vaughan *v.* O'Brien, 39 How. Pr. 515.

North Carolina.— Bennett *v.* Holmes, 18 N. C. 486.

Pennsylvania.— Cummings *v.* Colgrove, 25 Pa. St. 150; Moser *v.* Guarantee Trust, etc., Co., 2 Pa. Cas. 183, 3 Atl. 454.

South Dakota.— Sanford *v.* King, (1905) 103 N. W. 28.

Tennessee.— Cherry *v.* York, (Ch. App. 1898) 47 S. W. 184.

Texas.— Martin *v.* Weyman, 26 Tex. 460.

Wisconsin.— Grunert *v.* Spalding, 104 Wis. 193, 80 N. W. 589; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

United States.— Soderberg *v.* Armstrong, 116 Fed. 709; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214.

Canada.—O'Neill *v.* Leight, 3 U. C. Q. B. 70.

See 30 Cent. Dig. tit. "Judgment," § 1822.

Showing judgment not on the merits.— Where, to a plea of former recovery, plaintiff replies that the former recovery alleged was a voluntary nonsuit, and concludes to the country, the burden of proving that it was a voluntary nonsuit is on him. Barnard *v.* Babbitt, 54 Ill. App. 62.

3. *Delaware.*— Hollis *v.* Morris, 2 Harr. 128.

Indiana.— Day *v.* Vallette, 25 Ind. 42, 87 Am. Dec. 353.

Kentucky.— Moore *v.* Moore, (1890) 14 S. W. 339; Monticello Nat. Bank *v.* Bryant, 13 Bush 419.

Missouri.— State *v.* Morton, 18 Mo. 53.

Pennsylvania.— Rockwell *v.* Langley, 19 Pa. St. 502.

Vermont.— White *v.* Simonds, 33 Vt. 178, 78 Am. Dec. 620; Stearns *v.* Stearns, 32 Vt. 678.

See 30 Cent. Dig. tit. "Judgment," § 1822.

Statute in Iowa.— Under Miller Code Iowa, § 2851, requiring the judgment, in case matter in abatement is pleaded together with matter in bar, and it is based on the matter in abatement, to state such fact, the presumption in a subsequent action on the same claim is that a judgment which fails to state on which it was based was in fact based on the matter in bar. Garretson *v.* Ferrall, 92 Iowa 728, 61 N. W. 251. And see McConkie *v.* Remley, 119 Iowa 512, 93 N. W. 505.

4. *Connecticut.*— Smith *v.* Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Church *v.* Leavenworth, 4 Day 274.

Missouri.— Clemens *v.* Murphy, 40 Mo. 121.

New York.— Davis *v.* Talcott, 14 Barb. 611; Wood *v.* Jackson, 18 Wend. 107; Manny *v.* Harris, 2 Johns. 24, 3 Am. Dec. 386.

Ohio.— Miehle Printing Press, etc., Co. *v.* Andrews-Jones Printing Co., 18 Ohio Cir. Ct. 158, 10 Ohio Cir. Dec. 1.

South Carolina.— Fowler *v.* Williams, 3 Brev. 414.

England.— Sintzenick *v.* Lucas, 1 Esp. 43.

5. *Alabama.*— Barron *v.* Paulling, 38 Ala. 292; Rake *v.* Pope, 7 Ala. 161.

California.— Graves *v.* Hebbron, 125 Cal. 400, 58 Pac. 12.

Connecticut.— Storrs *v.* Robinson, 77 Conn. 207, 58 Atl. 746, 74 Conn. 566, 51 Atl. 516.

Florida.— Fulton *v.* Gesterding, 47 Fla. 150, 36 So. 56.

Georgia.— Glaze *v.* Bogle, 105 Ga. 295, 31 S. E. 169.

Indiana.— Bougher *v.* Scobey, 21 Ind. 365.

c. What Species of Evidence Receivable — (1) *In General.* If the grounds of a former judgment appear by the record, they must be proved by the record alone,[6] and the party relying on it must put the whole record in evidence, or at least so much of it, beside the judgment, as will show the litigation and decision of the question now at issue.[7] But if extrinsic evidence is admitted to identify the points or questions litigated, it is proper to receive for this purpose the pleadings in the former action,[8] or other documents prepared and filed in the case,[9] agreements of counsel on file,[10] stenographic reports or minutes of the testimony taken,[11] the testimony of the judge and jurors who tried the case,[12] or the evidence of a person who was present as a witness at the former trial,[13] the court's

Iowa.— Markham *v.* Buckingham, 21 Iowa 494, 89 Am. Dec. 590; George *v.* Gillespie, 1 Greene 421.

Louisiana.— Wells *v.* Compton, 3 Rob. 171.

Maine.— Walker *v.* Chase, 53 Me. 258.

Maryland.— Hughes *v.* Jones, 2 Md. Ch. 178.

Missouri.— Tutt *v.* Price, 7 Mo. App. 194.

Nebraska.— Slater *v.* Skirving, 51 Nebr. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

New Hampshire.— Eastman *v.* Clark, 63 N. H. 31.

New York.— Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422; Adams *v.* Conover, 87 N. Y. 422, 41 Am. Rep. 381; Treadwell *v.* Stebbins, 6 Bosw. 538; Steele *v.* Martin, 10 N. Y. St. 154; Blunt *v.* Hay, 4 Sandf. Ch. 362.

North Carolina.— Carr *v.* Woodleff, 51 N. C. 400.

Pennsylvania.— Hexter *v.* Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874; Erie Gas. Co. *v.* Haverstick, 56 Pa. St. 28.

South Carolina.— Henderson *v.* Kenner, 1 Rich. 474.

Texas.— Oldham *v.* McIver, 49 Tex. 556; Cook *v.* Burnley, 45 Tex. 97.

Vermont.— Gilbert *v.* Earl, 47 Vt. 9.

United States.— Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Davis *v.* Brown, 94 U. S. 423, 24 L. ed. 204; Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. 580, 18 L. ed. 550; Holford *v.* James, 136 Fed. 553, 69 C. C. A. 263 [*affirming* 4 Indian Terr. 632, 76 S. W. 261]; Fayerweather *v.* Ritch, 88 Fed. 713; Ricaud *v.* Tysen, 78 Fed. 561; Clark *v.* Blair, 14 Fed. 812, 4 McCrary 311; Fendall *v.* U. S., 14 Ct. Cl. 247. See Alabama Iron, etc., Co. *v.* Austin, 94 Fed. 897, 36 C. C. A. 536.

See 30 Cent. Dig. tit. "Judgment," § 1823.

6. Sturtevant *v.* Randall, 53 Me. 149; Armstrong *v.* St. Louis, 69 Mo. 309, 33 Am. Rep. 499.

7. *Indiana.*— Miller *v.* Deaver, 30 Ind. 371.

Iowa.— Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558.

Minnesota.— Lytle *v.* Chicago Great Western R. Co., 75 Minn. 330, 77 N. W. 975.

New York.— New York *v.* Brown, 27 Misc. 218, 57 N. Y. Suppl. 742.

Pennsylvania.— White *v.* Kyle, 6 Serg. & R. 107.

Effect of record as evidence.— Where defendant, to sustain his plea of *res judicata*, offered the entire record of a former trial between the parties to the present action, and such record showed affirmatively that the subject-matter of the later controversy was not involved in the former action, the evidence was properly rejected. Winans *v.* Rosecrans, 8 Kan. App. 455, 54 Pac. 508.

8. Bailey *v.* Crittenden, (Tex. Civ. App. 1897) 44 S. W. 404.

9. See cases cited *infra*, this note.

Findings of fact by the court are admissible and are very persuasive evidence of what the court decided. Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683, 14 S. Ct. 733, 39 L. ed. 859.

Report of referee.— On a plea of *res judicata*, where the former judgment was rendered pursuant to the findings and conclusions of a referee, the court may examine his entire report, to ascertain what issues were raised and decided. Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., 55 Fed. 690, 5 C. C. A. 249.

Briefs of counsel are not an unerring indication of the basis upon which the judgment was rendered, and it is not error to reject them when offered as evidence to show that a former judgment was not an adjudication of the merits. Greenlee *v.* Lowing, 35 Mich. 63.

An ex parte affidavit, made to lay the ground for a rule to show cause why a judgment should not be opened, may be given in evidence for the purpose of showing the grounds on which the judgment was opened. Kauffelt *v.* Leber, 9 Watts & S. (Pa.) 93.

10. Burr *v.* Woodrow, 1 Bush (Ky.) 602.

Admissions of counsel.— Where the answer of defendant sets up the same defense as the answer in the former suit, admissions of counsel, in connection with the offer of the record as evidence, that testimony upon both defenses to the former action was admitted and went to the jury, relieves the uncertainty in the record and shows the prior determination of the present question. Merchants' International Steam Boat Line *v.* Lyon, 12 Fed. 63, 4 McCrary 145.

11. Thurst *v.* West, 31 N. Y. 210. *Contra*, Arnold *v.* Grimes, 2 Iowa 1.

12. Burr *v.* Woodrow, 1 Bush (Ky.) 602.

The deposition of the judge who tried the former action, as to the issues therein tried, is admissible where the facts do not appear by the unaided record. Perkins *v.* Brazos, 66 Conn. 242, 33 Atl. 908.

13. Duggan *v.* Dalton City, 38 Ill. App. 25; Briggs *v.* Wells, 12 Barb. (N. Y.) 567.

charge or instructions to the jury,[14] the bill of exceptions or case prepared for appeal,[15] or the written opinion of the court filed in the case,[16] or evidence that the parties alleged to have been estopped sought to amend their pleadings so as to have the question determined, but that the amendment was disallowed.[17] But evidence as to the secret deliberations of the jury will not be admitted.[18]

(II) *Parol Evidence.* Parol evidence is admissible to identify the points or issues adjudicated in a former action, when the record thereof is silent or ambiguous on this point.[19]

14. Storrs *v.* Robinson, 74 Conn. 566, 51 Atl. 516; Charles E. Henry Sons Co. *v.* Mahoney, 97 Ill. App. 313; Follansbee *v.* Walker, 74 Pa. St. 306; Kapp *v.* Shields, 17 Pa. Super. Ct. 524; Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580, 18 L. ed. 550.

15. Sharp *v.* Carlile, 5 Dana (Ky.) 487; Brackett *v.* Hoitt, 20 N. H. 257. *Contra*, Robinson *v.* Lane, 14 Sm. & M. (Miss.) 161. And see St. Joseph *v.* Union R. Co., 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626, holding that if there is no ambiguity in the judgment, the bill of exceptions cannot be admitted in evidence to show the matters decided.

16. *District of Columbia.*—Strong *v.* Grant, 2 Mackey 218.

Kansas.— Tullock *v.* Mulvane, 61 Kan. 650, 60 Pac. 749.

Massachusetts.— Hood *v.* Hood, 110 Mass. 463.

New York.— Birckhead *v.* Brown, 5 Sandf. 134. But see Robinson *v.* New York, etc., R. Co., 64 Hun 41, 18 N. Y. Suppl. 728; Robinson *v.* Jewett, 18 N. Y. Suppl. 732, holding that in an action on a contract, the opinion of the judges of the supreme court and court of appeals, delivered at the time of the affirmance of the judgment in a former action on the same contract, were inadmissible to show that such affirmance was an adjudication of the question of the validity of the contract.

Oregon.— Gentry *v.* Pacific Livestock Co., 45 Oreg. 233, 77 Pac. 115.

Virginia.— Legrand *v.* Rixey, 83 Va. 862, 3 S. E. 864.

Wisconsin.— Fulton *v.* Pomeroy, 111 Wis. 663, 87 N. W. 831.

United States.— Stearns *v.* Lawrence, 83 Fed. 738, 28 C. C. A. 66; New Orleans, etc., R. Co. *v.* New Orleans, 14 Fed. 373.

See 30 Cent. Dig. tit. "Judgment," § 1823.

Contra.— Keech *v.* Beatty, 127 Cal. 177, 59 Pac. 837; Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509. And see Lafourche Parish Police Jury *v.* Terrebonne Police Jury, 48 La. Ann. 1299, 20 So. 708.

17. Draper *v.* Medlock, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 483.

18. Rubel *v.* Title Guarantee, etc., Co., 101 Ill. App. 439; Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580, 18 L. ed. 550. And see Rockwell *v.* Langley, 19 Pa. St. 502.

19. *Alabama.*— Strother *v.* Butler, 17 Ala. 733; Cave *v.* Burns, 6 Ala. 780.

Connecticut.— Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509; Supples *v.* Cannon, 44 Conn. 424.

Georgia.— Newton Mfg. Co. *v.* White, 47 Ga. 400; Ezzell *v.* Malthie, 6 Ga. 495. But see Du Bignon *v.* Tufts, 66 Ga. 59.

Illinois.— Herschbach *v.* Cohen, 207 Ill. 517, 69 N. E. 932, 99 Am. St. Rep. 233; Leopold *v.* Chicago, 150 Ill. 568, 37 N. E. 892; Barger *v.* Hobbs, 67 Ill. 592. And see Langmuir *v.* Landes, 113 Ill. App. 134.

Indiana.— Bottorff *v.* Wise, 53 Ind. 32.

Iowa.— Amsden *v.* Dubuque, etc., R. Co., 32 Iowa 288; George *v.* Gillespie, 1 Greene 421.

Maine.— Lander *v.* Arno, 65 Me. 26; Jones *v.* Perkins, 54 Me. 393; Rogers *v.* Libbey, 35 Me. 200; Dunlap *v.* Glidden, 34 Me. 517.

Massachusetts.— Waterhouse *v.* Levine, 182 Mass. 407, 65 N. E. 822; White *v.* Chase, 128 Mass. 158; Hood *v.* Hood, 110 Mass. 463; Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733; Perkins *v.* Parker, 10 Allen 22; Gage *v.* Holmes, 12 Gray 428; Doolittle *v.* Dwight, 2 Metc. 561; Eastman *v.* Cooper, 15 Pick. 276, 26 Am. Dec. 600.

Michigan.— Lyman *v.* Becannon, 29 Mich. 466.

Minnesota.— Irish American Bank *v.* Ludlum, 56 Minn. 317, 57 N. W. 927.

Mississippi.— Robinson *v.* Lane, 14 Sm. & M. 161.

Missouri.— Sweet *v.* Maupin, 65 Mo. 65; Hickerson *v.* Mexico, 58 Mo. 61; Spradling *v.* Conway, 51 Mo. 51; State *v.* Morton, 18 Mo. 53.

New Hampshire.— Cassidy *v.* Mudgett, 71 N. H. 491, 53 Atl. 441; Errol *v.* Bragg, 63 N. H. 620; Sanderson *v.* Peabody, 58 N. H. 116; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

New Jersey.— Richmond *v.* Hays, 3 N. J. L. 492.

New York.— Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839; Smith *v.* Smith, 79 N. Y. 634; Kerr *v.* Hays, 35 N. Y. 331; White *v.* Madison, 26 N. Y. 117; Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; Frantz *v.* Ireland, 4 Lans. 278; Stedman *v.* Patchin, 34 Barb. 218; Briggs *v.* Wells, 12 Barb. 567; Stowell *v.* Chamberlain, 3 Thomps. & C. 374; Anhalt *v.* Lightstone, 39 Misc. 822, 81 N. Y. Suppl. 288; Derum *v.* Carpenter, 7 N. Y. St. 840; Young *v.* Rummell, 2 Hill 478, 38 Am. Dec. 594; Wood *v.* Jackson, 8 Wend. 9, 22 Am. Dec. 603; Gardner *v.* Buckbee, 3 Cow. 120, 15 Am. Dec. 256; Snider *v.* Croy, 2 Johns. 227.

d. Record Cannot Be Contradicted. Extrinsic evidence is not admissible under any circumstances to impeach or contradict the recitals or statements of the record with reference to the points or matters in litigation and adjudicated in the action.[20]

e. Parol Evidence to Enlarge Estoppel. It has been held that parol evidence is not admissible to show that a judgment was founded upon matters or issues not presented by the pleadings.[21] But the better rule is that if the former suit, on the trial of it, had a wider range than the pleadings in it indicated, that fact may, under appropriate issues, be shown by parol proof.[22]

f. Parol Evidence in Case of General Declaration or Pleas. Under the systems admitting general declarations and general pleas, the record will usually fail to

North Carolina.— Yates *v.* Yates, 81 N. C. 397.

Ohio.— Mahaffey *v.* Rogers, 10 Ohio Cir. Ct. 24, 6 Ohio Cir. Dec. 88.

Pennsylvania.— Treftz *v.* Pitts, 74 Pa. St. 343; Follansbee *v.* Walker, 74 Pa. St. 306; Tams *v.* Lewis, 42 Pa. St. 402; Hess *v.* Heeble, 4 Serg. & R. 246; Hartman *v.* Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360; Kapp *v.* Shields, 17 Pa. Super. Ct. 524. But *compare* Buffington *v.* Burhman, 4 Pa. L. J. 418.

South Carolina.— McMakin *v.* Fowler, 34 S. C. 281, 13 S. E. 534; Gist *v.* McJunkin, 1 Speers 157.

Tennessee.— Warwick *v.* Underwood, 3 Head 238, 75 Am. Dec. 767; Estill *v.* Taul, 2 Yerg. 467, 24 Am. Dec. 498.

Texas.— Reast *v.* Donald, 84 Tex. 648, 19 S. W. 795; Foster *v.* Wells, 4 Tex. 101; Davis *v.* Schaffner, 3 Tex. Civ. App. 121, 22 S. W. 822.

Vermont.— Post *v.* Smilie, 48 Vt. 185; Atwood *v.* Robbins, 35 Vt. 530; Aiken *v.* Peck, 22 Vt. 255; Perkins *v.* Walker, 19 Vt. 144.

Washington.— Marble Sav. Bank *v.* Williams, 23 Wash. 766, 63 Pac. 511. See also Daly *v.* Everett Pulp, etc., Co., 31 Wash. 252, 71 Pac. 1014.

Wisconsin.— Ward *v.* Price, 1 Pinn. 101.

United States.— Milne *v.* Deen, 121 U. S. 525, 7 S. Ct. 1004, 30 L. ed. 980; Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214; Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059; Newton Mfg. Co. *v.* Wilgus, 90 Fed. 483; Clark *v.* Blair, 14 Fed. 812, 4 McCrary 311.

England.— Langmead *v.* Maple, 18 C. B. N. S. 255, 11 Jur. N. S. 177, 12 L. T. Rep. N. S. 143, 13 Wkly. Rep. 469, 114 E. C. L. 255; Ricardo *v.* Garcias, 12 Cl. & F. 368, 9 Jur. 1019, 8 Eng. Reprint 1450.

See 30 Cent. Dig. tit. "Judgment," § 1824.

20. *Alabama.*— Davidson *v.* Shipman, 6 Ala. 27.

California.— Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

Connecticut.— Fuller *v.* Metropolitan L. Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84.

Georgia.— Simpson *v.* Earle, 87 Ga. 215, 13 S. E. 446.

Illinois.— Rubel *v.* Title Guarantee, etc., Co., 199 Ill. 110, 64 N. E. 1033; Wabash, St. L., etc., R. Co. *v.* Peterson, (1886) 7 N. E. 485; Humphreyville *v.* Culver, 73 Ill. 485; Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Eaton *v.* Harth, 45 Ill. App. 355.

Indiana.— Pickrell *v.* Jerauld, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192.

Kansas.— Guttermann *v.* Schroeder, 40 Kan. 507, 20 Pac. 230; Winans *v.* Rosecrans, 8 Kan. App. 455, 54 Pac. 508.

Kentucky.— Pilcher *v.* Ligon, 91 Ky. 228, 15 S. W. 513, 12 Ky. L. Rep. 860.

Louisiana.— Bourg *v.* Gerding, 33 La. Ann. 1369.

Missouri.— West *v.* Moser, 49 Mo. App. 201; Armstrong *v.* St. Louis, 3 Mo. App. 100 [*affirmed* in 69 Mo. 309, 33 Am. Rep. 499].

New York.— Campbell *v.* Butts, 3 N. Y. 173; People *v.* Smith, 51 Barb. 360; Matter of Broderick, 25 Misc. 534, 56 N. Y. Suppl. 99.

North Carolina.— Albertson *v.* Williams, 97 N. C. 264, 1 S. E. 841; Bushee *v.* Surles, 77 N. C. 62.

Pennsylvania.— Hawbicker's Estate, 6 Pa. Co. Ct. 570.

Texas.— Lee *v.* Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Maddox *v.* Summerlin, (Civ. App. 1898) 47 S. W. 1020; Barnett *v.* Mahon, (Civ. App. 1895) 31 S. W. 329; McGrady *v.* Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

United States.— Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. 580, 18 L. ed. 550; Alabama Iron, etc., Co. *v.* Austin, 94 Fed. 897, 36 C. C. A. 536.

See EVIDENCE, 17 Cyc. 571.

But strangers to a judgment by confession are not concluded by its date or by its recitals; and they may, upon a complaint setting forth specific averments of fraud, introduce evidence, oral as well as documentary and record evidence, to impeach the judgment. Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505.

Contradictory recitals.— The rule that recitals in a judgment are *prima facie* evidence of the facts recited does not apply where the record discloses the falsity of the recitals. Stuyvesant *v.* Weil, 26 Misc. (N. Y.) 445, 57 N. Y. Suppl. 592.

21. *Alabama.*— Davidson *v.* Shipman, 6 Ala. 27.

Maine.— Jones *v.* Perkins, 54 Me. 393.

Michigan.— Rosema *v.* Porter, 112 Mich. 13, 70 N. W. 316.

New York.— Campbell *v.* Butts, 3 N. Y. 173; Manny *v.* Harris, 2 Johns. 24, 3 Am. Dec. 386.

Ohio.— Topliff *v.* Topliff, 8 Ohio Cir. Ct. 55, 4 Ohio Cir. Dec. 312.

See 30 Cent. Dig. tit. "Judgment," § 1824.

22. Chamberlain *v.* Gaillard, 26 Ala. 504; Indianapolis, etc., R. Co. *v.* Clark, 21 Ind. 150.

disclose the precise subject-matter of the suit or the precise point litigated; and therefore parol evidence will be admissible to show such subject-matter or point controverted.[23] But in such a case or in any action where there are numerous issues and a general verdict, the judgment will be *prima facie* an adjudication of every fact or demand which might have been drawn into controversy under the pleadings, although parol proof will be received to distinguish the particular issue tried and determined.[24]

g. Parol Evidence to Escape Estoppel. According to the doctrine generally accepted, where a former judgment is relied on as conclusive of a particular point or question, it may be shown by extrinsic evidence, not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground;[25] but there are

23. *Connecticut.*— Supples *v.* Cannon, 44 Conn. 424.

Illinois.— Sawyer *v.* Nelson, 160 Ill. 629, 43 N. E. 728; Evans *v.* Woodsworth, 115 Ill. App. 202 [*affirmed* in 213 Ill. 404, 72 N. E. 1082].

Indiana.— Haller *v.* Pine, 8 Blackf. 175, 44 Am. Dec. 762.

Massachusetts.— Merritt *v.* Morse, 108 Mass. 270; Sawyer *v.* Woodbury, 7 Gray 499, 66 Am. Dec. 518.

New York.— Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301; Stedman *v.* Patchin, 34 Barb. 218; Briggs *v.* Wells, 12 Barb. 567.

Vermont.— Atwood *v.* Robbins, 35 Vt. 530; Perkins *v.* Walker, 19 Vt. 144.

United States.— Miles *v.* Caldwell, 2 Wall. 35, 17 L. ed. 755; Belleville, etc., R. Co. *v.* Leathe, 84 Fed. 103, 28 C. C. A. 279.

24. *Connecticut.*— Hungerford's Appeal, 41 Conn. 322.

Illinois.— Ingwersen *v.* Buchholz, 88 Ill. App. 73.

Massachusetts.— Bridge *v.* Gray, 14 Pick. 55, 25 Am. Dec. 358.

Oregon.— Hall *v.* Zeller, 17 Oreg. 381, 21 Pac. 192.

South Carolina.— Henderson *v.* Kenner, 1 Rich. 474.

Compare Rockwell *v.* Langley, 19 Pa. St. 502.

In an action of trespass *quare clausum fregit*, defendant pleaded a former recovery, and the record of the former suit showed that the pleas were "not guilty" and a special plea of a right of way over the land in question, and that there was a general verdict and judgment for defendant; and it was held that parol evidence was admissible to show that the former trial was had on only one of said pleas. Aiken *v.* Stewart, 4 Wkly. Notes Cas. (Pa.) 180. And see Fendall *v.* U. S., 14 Ct. Cl. 247.

25. *Alabama.*— Haas *v.* Taylor, 80 Ala. 459, 2 So. 633.

Arkansas.— Smith *v.* Talbot, 11 Ark. 666.

Illinois.— Palmer *v.* Sanger, 143 Ill. 34, 32 N. E. 390; Atchison, etc., R. Co. *v.* Jones, 110 Ill. App. 626.

Indiana.— Bottorff *v.* Wise, 53 Ind. 32; Dessar *v.* Rich, Wils. 372.

Maine.— Embden *v.* Lisherness, 89 Me. 578, 36 Atl. 1101, 56 Am. St. Rep. 442; Cunningham *v.* Foster, 49 Me. 68. But where action is brought on several notes, each being described in a separate count, and on a reference a general award is made in favor of plaintiff, and a general judgment entered thereon, he cannot afterward show by parol that one of the notes sued on was not passed upon by the referee, and bring suit on such note. Blodgett *v.* Dow, 81 Me. 197, 16 Atl. 660.

Massachusetts.— Perkins *v.* Parker, 10 Allen 22; Bridge *v.* Gray, 14 Pick. 55, 25 Am. Dec. 358; Parker *v.* Thompson, 3 Pick. 429. But where judgment, in an action for nonperformance of an agreement and to recover advances thereon, has been rendered on a verdict for plaintiff for the alleged sums advanced to defendant, evidence is not admissible to show that the issue of performance was not submitted to the jury. Butler *v.* Suffolk Glass Co., 126 Mass. 512.

Mississippi.— Dunlap *v.* Edwards, 29 Miss. 41.

Missouri.— Sweet *v.* Maupin, 65 Mo. 65; Hull *v.* Lyon, 27 Mo. 570; State *v.* Morton, 18 Mo. 53; Brown *v.* King, 10 Mo. 56; West *v.* Moser, 49 Mo. App. 201; Lightfoot *v.* Wilmot, 23 Mo. App. 5.

New Hampshire.— Whittemore *v.* Whittemore, 2 N. H. 26.

New York.— Lawrence *v.* Cabot, 41 N. Y. Super. Ct. 122; Sans *v.* New York, 31 Misc. 559, 64 N. Y. Suppl. 681; Phillips *v.* Berick, 16 Johns. 136, 8 Am. Dec. 299. But see Davis *v.* Talcot, 12 N. Y. 184. Where an order dismissing a prior proceeding on the merits is pleaded in bar, it cannot be proved by extraneous evidence that the case was dismissed on a jurisdictional ground. Matter of Broderick, 25 Misc. 534, 56 N. Y. Suppl. 99.

Pennsylvania.— Susquehanna Mut. F. Ins. Co. *v.* Mardorf, 152 Pa. St. 22, 25 Atl. 234; Swayne *v.* Lyon, 67 Pa. St. 436; Coleman's Appeal, 62 Pa. St. 252; Sterner *v.* Gower, 3 Watts & S. 136.

Rhode Island.— Paine *v.* Schenectady Ins. Co., 12 R. I. 440.

Vermont.— Parks *v.* Moore, 13 Vt. 183, 37 Am. Dec. 589.

Virginia.— Allebaugh *v.* Coakley, 75 Va.

also decisions holding that evidence *aliunde* cannot be introduced to show that issues clearly made by the pleadings were not decided.[26] And if the judgment recites that all the matters at issue were considered and decided by the court this statement cannot be contradicted.[27]

h. Weight and Sufficiency of Evidence. Where the record of a former action shows on its face what questions or issues were litigated and decided, it is itself the sole and conclusive evidence on that point.[28] But if, by reason of its being doubtful or ambiguous on this matter, extrinsic evidence is heard, the question is to be decided by the aid of such evidence, and not by an inspection of the record alone.[29] Such outside evidence, however, is required to be very clear and satisfactory.[30]

5. Evidence to Identify Parties. Where the record of a former action, pleaded as a bar or estoppel, does not show on its face that the parties to such action were identical with the parties to the action in which it is so pleaded, this fact may be established by any competent evidence, including parol testimony;[31] and in like manner it may be shown that a person not named in the record was the real party in interest who assumed the prosecution or defense of the suit, so as to make the judgment conclusive upon him,[32] or that the person alleged to be

628; Southside R. Co. *v.* Daniel, 20 Gratt. 344.

Wisconsin.— Pfennig *v.* Griffith, 29 Wis. 618.

United States.— Page *v.* Holmes Burglar Alarm Tel. Co., 2 Fed. 330, 18 Blatchf. 118.

England.— Smith *v.* Johnson, 15 East 213.

See 30 Cent. Dig. tit. "Judgment," § 1824.

But see Pilcher *v.* Ligon, 91 Ky. 228, 15 S. W. 513, 12 Ky. L. Rep. 860.

Controverting denial of estoppel.— Where a plea of former recovery is put in, and plaintiff is permitted to show that the matters now in controversy were not litigated in the former suit, defendant must also be allowed to give evidence to show that the same matters were in fact passed upon and decided; and the refusal of the court to allow this privilege to defendant, while granting it to plaintiff, is reversible error. Haak *v.* Breidenbach, 6 Binn. (Pa.) 12.

26. Fromlet *v.* Poor, 3 Ind. App. 425, 29 N. E. 1081; Barrett *v.* Failing, 8 Oreg. 152; Roberts *v.* Johnson, 48 Tex. 133; Swearingen *v.* Williams, 28 Tex. Civ. App. 559, 67 S. W. 1061; New York, etc., Land Co. *v.* Votaw, (Tex. Civ. App. 1899) 52 S. W. 125. But *compare* Freeman *v.* McAninch, 87 Tex. 132, 27 S. W. 97, 47 Am. St. Rep. 79; Cook *v.* Burnley, 45 Tex. 97; Fayerweather *v.* Ritch, 195 U. S. 276, 25 S. Ct. 58, 49 L. ed. 193, holding that the effect as *res judicata* of a decree in a case in which the validity of certain releases was put in issue by the pleadings, and in which no judgment could properly have been rendered without a determination of that question, cannot be limited by the oral testimony of the trial judge, some six years after his decision, to the effect that, in deciding the case, he did not consider the validity of the releases.

27. Bunn *v.* Valley Lumber Co., 63 Wis. 630, 24 N. W. 403.

28. Thomas *v.* Merry, 113 Ind. 83, 15 N. E. 244; McConkie *v.* Remley, 119 Iowa 512, 93 N. W. 505; Agate *v.* Richards, 5 Bosw. (N. Y.) 456; Buckner *v.* Geodeker, (Tenn. Ch. App. 1897) 45 S. W. 448.

29. Hartman *v.* Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

30. *Illinois.*— Rubel *v.* Title Guarantee, etc., Co., 199 Ill. 110, 64 N. E. 1033.

Michigan.— Baxter *v.* Aubrey, 41 Mich. 13, 1 N. W. 897.

New York.— Holden *v.* O'Donohue, 15 N. Y. Suppl. 402.

North Carolina.— Dalton *v.* Webster, 82 N. C. 279.

Virginia.— Weaver *v.* Vowles, 2 Rob. 438.

Wisconsin.— Lamontagne *v.* T. W. Harvey Lumber Co., 84 Wis. 331, 54 N. W. 583.

Evidence held sufficient see Delaney *v.* West, (Tex. Civ. App. 1905) 88 S. W. 275, where it was held that a foreclosure suit was based on a note involved in a previous suit in which the note was adjudged void.

31. *California.*— Garwood *v.* Garwood, 29 Cal. 514.

District of Columbia.— Langdon *v.* Evans, 3 Mackey 1.

Illinois.— Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761.

Indiana.— Morris *v.* State, 101 Ind. 560, 1 N. E. 70.

Iowa.— Searle *v.* Richardson, 67 Iowa 170, 25 N. W. 113; Hollenbeck *v.* Stanherry, 38 Iowa 325.

Maryland.— Keechlept *v.* Hook, 10 Md. 173, 69 Am. Dec. 133.

Mississippi.— Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375.

Missouri.— State *v.* Burtis, 34 Mo. 92; Stone *v.* Powell, 5 Mo. 435; Gooch *v.* Hollan, 30 Mo. App. 450.

New York.— New York *v.* Ryan, 7 Daly 436.

Texas.— Bradford *v.* Rogers, 2 Tex. Unrep. Cas. 57.

See 30 Cent. Dig. tit. "Judgment," § 1821.

32. Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515; Bennitt *v.* Wilmington Star Min. Co., 18 Ill. App. 17; Westinghouse Elec-

estopped was not the same as the party to the judgment, although the names were identical.[33] But where the names of the parties are identical, it will be presumed from this fact that they are the same, so that, if the truth be otherwise, it will require evidence to establish it.[34]

D. Trial[35] — **1. Question For Court or Jury.** When a former judgment is set up as a bar or estoppel, the question whether there is such an identity of the parties and of the subject-matter or cause of action as will support the plea of *res judicata* is a question of law for the court when it is determinable from an inspection of the record alone;[36] but if extrinsic evidence is required to effect the necessary identification, it becomes a question of fact and must go to the jury.[37] In either case, when this point is established, or if it is not disputed, it is for the court to decide and declare the effect which shall be given to the former judgment as evidence in the pending action or as a bar to its maintenance.[38]

2. Instructions. Although it may be left to the jury to find whether a former judgment set up as an estoppel was between the same parties and involved a determination of the same point or question presently in issue, when extrinsic evidence on this question has been heard, the court should at the same time

tric, etc., Co. *v.* Jefferson Electric Light, etc., Co., 128 Fed. 751; Claflin *v.* Fletcher, 7 Fed. 851, 10 Biss. 281. But see Davidson *v.* Alexander, 84 N. C. 621, holding that where a judgment is confessed by a person against himself, and is so entered of record, parol evidence is not admissible to show that it was intended to have been entered against another person.

33. Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209.

34. Douglas *v.* Dakin, 46 Cal. 49; Spotten *v.* Keeler, 12 N. Y. St. 385; Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877; Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209.

35. Sufficiency of record on appeal to permit review of question of *res judicata* see Appeal and Error, 2 Cyc. 668; 3 Cyc. 172 note 88.

Review of question of res judicata on motion to dismiss appeal see Appeal and Error, 3 Cyc. 198 note 24.

36. *Connecticut.*— Avon Mfg. Co. *v.* Andrews, 30 Conn. 476.

Georgia.— Hill *v.* Freeman, 7 Ga. 211.

Iowa.— Munn *v.* Shannon, 86 Iowa 363, 53 N. W. 263; Hempstead *v.* Des Moines, 52 Iowa 303, 3 N. W. 123.

Mississippi.— Miller *v.* Buckley, 85 Miss. 706, 38 So. 99.

Missouri.— Tutt *v.* Price, 7 Mo. App. 194.

Pennsylvania.— Bitzer *v.* Killinger, 46 Pa. St. 44; Finley *v.* Hanbest, 30 Pa. St. 190.

Tennessee.— Coulter *v.* Davis, 13 Lea 451.

Texas.— Weathered *v.* Mays, 4 Tex. 387; Birdseye *v.* Shaeffer, (Civ. App. 1900) 57 S. W. 987; New York, etc., Land Co. *v.* Votaw, (Civ. App. 1899) 52 S. W. 125.

Washington.— Weatherwax Lumber Co. *v.* Ray, 38 Wash. 545, 80 Pac. 775.

See 30 Cent. Dig. tit. "Judgment," § 1827.

Mode of trial.— A plea of former judgment in bar, replied to by "No such judgment," should be tried by an inspection of the record by the court. Davis *v.* Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

Demurrer to plea of res judicata.— Where an answer alleges that the point in issue was adjudicated in a former suit, this is a question of fact, and the court cannot, on demurrer, go beyond such answer to determine whether the fact is so or not. McSweeney *v.* Carney, 72 Ind. 430.

37. *Alabama.*— Taylor *v.* Rogers, Minor 197.

Illinois.— Baxter *v.* Thede, 96 Ill. App. 499.

Indiana.— James *v.* Lawrenceburgh Ins. Co., 6 Blackf. 525.

Iowa.— Amsden *v.* Dubuque, etc., R. Co., 32 Iowa 288.

Louisiana.— Otis *v.* Sweeney, 43 La. Ann. 1073, 10 So. 247.

Maine.— Cunningham *v.* Foster, 49 Me. 68.

Massachusetts.— Foye *v.* Patch, 132 Mass. 105.

Missouri.— Tutt *v.* Price, 7 Mo. App. 194; State *v.* Morton, 18 Mo. 53.

New York.— Levy *v.* Backer, 14 N. Y. Suppl. 792.

North Carolina.— Belch *v.* Holloman, 3 N. C. 328.

Texas.— Bledsoe *v.* White, 42 Tex. 130; Anderson *v.* Rogge, (Civ. App. 1894) 28 S. W. 106; Birdseye *v.* Rogers, (Civ. App. 1894) 26 S. W. 841.

See 30 Cent. Dig. tit. "Judgment," § 1827.

Connecting party with former suit.— Where, in an action on a note by an assignee, the maker pleads a judgment rendered against him as garnishee in an action against plaintiff's assignor, in which plaintiff was not a party, the question whether plaintiff did not in fact defend in the garnishment suit, so as to make the judgment binding upon him, the evidence being conflicting, is for the jury. Wolverton *v.* Glasscock, 15 Wash. 279, 46 Pac. 253.

38. Shook *v.* Blount, 67 Ala. 301; Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Ehle *v.* Bingham, 7 Barb. (N. Y.) 494; Rockwell *v.* Langley, 19 Pa. St. 502.

instruct them as to the effect to be given to the former judgment if they find it to be in point.[39]

XXII. FOREIGN JUDGMENTS.[40]

A. Definition. Foreign judgments are judgments rendered by the courts of a country or state politically and judicially distinct from that in which the judgment or its effect is brought in question[41] — a judgment of a foreign tribunal.[42] In the United States judgments of the courts of one state or territory are in a sense foreign judgments in every other state or territory, and are often spoken of and to some extent treated as such;[43] but they are not so in the same sense as the judgments of a foreign country, since by the constitution of the United States and act of congress passed in pursuance thereof, it is required that they be given full faith and credit in every other state.[44] Federal courts in the state

39. White *v.* Simonds, 33 Vt. 178, 78 Am. Dec. 620; Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580, 18 L. ed. 550. And see cases cited in the preceding note.

Former judgment annulled.— Where a request for an instruction assumed the existence of a judgment as a bar to a defense of adverse possession, and the evidence showed that it had been annulled by a decree declaring it of no force, the instruction was properly refused. Lydick *v.* Gill, (Nebr. 1903) 94 N. W. 109.

40. **Dormancy of foreign judgment** see *supra*, XV, G, 4.

Merger see *supra*, XIX, D, 1.

Release see *supra*, XIX, D, 3.

Satisfaction see *supra*, XIX, A, F.

Set-off see *supra*, XIX, E, 3, b.

Presumption of payment from lapse of time see *supra*, XIX, B, 1.

Foreign judgment of divorce see DIVORCE, 14 Cyc. 814.

Foreign probate of will see WILLS.

Judgment or decree of foreign consul see AMBASSADORS AND CONSULS, 2 Cyc. 277 note 13.

41. Black L. Dict. See also McFarlane *v.* Derbishire, 8 U. C. Q. B. 12, where it is said that "all judgments are foreign judgments which are given by courts whose jurisdiction does not extend to the territories governed by our laws."

In Canada a judgment rendered in one province is a foreign judgment in every other province. Corse *v.* Moon, 22 Nova Scotia 191; Solmes *v.* Stafford, 16 Ont. Pr. 78; McFarlane *v.* Derbishire, 8 U. C. Q. B. 12; Cole *v.* Duncan, 12 Quebec Super. Ct. 152.

British empire.— A judgment rendered in one of the component parts of the British Empire is a foreign judgment in every other part. Houlditch *v.* Donegal, 8 Bligh N. S. 301, 5 Eng. Reprint 955, 2 Cl. & F. 470, 6 Eng. Reprint 1232. Thus a judgment or decree of a court in England is a foreign judgment or decree in Ireland, and *vice versa*. Houlditch *v.* Donegal, *supra*. And so in England of a judgment recovered in Scotland, and *vice versa* (Arnott *v.* Redfern, 3 Bing. 353, 11 E. C. L. 177, 2 C. & P. 88, 12 E. C. L. 466, 4 L. J. C. P. O. S. 89, 11 Moore C. P. 209), in Manitoba of a judgment recovered in England (International, etc., Corp. *v.* Great North West Cent. R. Co., 9 Manitoba 147) or Scotland (British Linen Co. *v.* McEwan, 8 Manitoba 99), and in England of a judgment recovered in the British West Indies (Walker *v.* Cuthbert, Dougl. 1; Tarleton *v.* Tarleton, 4 M. & S. 20), or New South Wales (Australasia Bank *v.* Nias, 16 C. B. 717, 15 Jur. 967, 20 L. J. Q. B. 284, 71 E. C. L. 717; Australasia Bank *v.* Harding, 9 C. B. 661, 14 Jur. 1094, 19 L. J. C. P. 345, 67 E. C. L. 661), and in New Brunswick of a Canadian judgment prior to the confederation of 1867 (McMillan *v.* Ritchie, 7 N. Brunsw. 242), etc.

42. Bouvier L. Dict.

43. Carter *v.* Bennett, 6 Fla. 214, 242; Joice *v.* Scales, 18 Ga. 725; Brosnaham *v.* Turner, 16 La. 433, 439; Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Karns *v.* Kunkle, 2 Minn. 313; Barney *v.* White, 46 Mo. 137; Elizabethtown Sav. Inst. *v.* Gerber, 34 N. J. Eq. 130; Betts *v.* Death, Add. (Pa.) 265; Coskery *v.* Wood, 52 S. C. 516, 30 S. E. 475; Shelton *v.* Johnson, 4 Sneed (Tenn.) 672, 682, 70 Am. Dec. 265; Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538; Walser *v.* Seligman, 13 Fed. 415, 21 Blatchf. 130. Although a judgment in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely *prima facie* evidence of a debt, to sustain an action of debt upon the judgment, it is to be considered only distinguishable from a foreign judgment in that by the first section of the fourth article of the United States constitution, and by the act of congress of May 26, 1790, section 1, the judgment is conclusive on the merits, as to which full faith and credit shall be given when authenticated as the act of congress has prescribed. McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177. See also *infra*, XXII, B, 3, a.

44. Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Barney *v.* White, 46 Mo. 137; Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711; McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177; Moore *v.* Paxton, 17 Fed. Cas. No. 9,772*a*, Hempst. 51. See also *infra*, XXII, B, 1.

in which they are held, while they may be considered foreign courts in the limited sense that they derive their existence and jurisdiction from the constitution and laws of the United States, are domestic courts in the exercise of their jurisdiction in the administration of justice;[45] and federal courts of other states are foreign only in the same sense as the state courts of such other states.[46]

B. Judgments of Courts of Sister States — 1. Operation and Effect — a. In General. Under the constitution and laws of the United States, each state is bound to give full faith and credit to the judgments of the courts of other states of the Union.[47] This prevents such judgments from being treated as foreign judgments in the strict sense and obliges the courts to give them equal recognition and effect, as a matter of pleading and evidence, with that accorded to similar judgments of the domestic courts;[48] and this, without inquiring whether the

45. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390, 415, 417. See also *infra*, XXII, C, 3.

46. Thomson *v.* Lee County, 22 Iowa 206; Niblett *v.* Scott, 4 La. Ann. 246. See also *infra*, XXII, C, 3.

47. U. S. Const. art. 4, § 1; Act Cong. May 26, 1790 (U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 667]).

48. *Alabama.*— Bogan *v.* Hamilton, 90 Ala. 454, 8 So. 186; Gunn *v.* Powell, 35 Ala. 144, 73 Am. Dec. 484; Crawford *v.* Simonton, 7 Port. 110.

Arkansas.— Hendry *v.* Cline, 29 Ark. 414; Buford *v.* Kirkpatrick, 13 Ark. 33.

California.— Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423.

Delaware.— Pritchett *v.* Clark, 3 Harr. 517, 4 Harr. 280, 5 Harr. 63.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Georgia.— Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Illinois.— Glos *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Belton *v.* Fisher, 44 Ill. 32; Smith *v.* Smith, 17 Ill. 482; McGilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Kimmel *v.* Shultz, 1 Ill. 169.

Indiana.— Davis *v.* Lane, 2 Ind. 548, 54 Am. Dec. 458; Holt *v.* Alloway, 2 Blackf. 108.

Iowa.— Clemmer *v.* Cooper, 24 Iowa 185, 95 Am. Dec. 720.

Kansas.— Ritter *v.* Hoffman, 35 Kan. 215, 10 Pac. 576; Dodge *v.* Coffin, 15 Kan. 277.

Kentucky.— Fletcher *v.* Ferrel, 9 Dana 372, 35 Am. Dec. 143; Rogers *v.* Coleman, Hard. 413, 3 Am. Dec. 733.

Maine.— Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415; Sweet *v.* Brackley, 53 Me. 346.

Maryland.— Zimmerman *v.* Helser, 32 Md. 274; Duvall *v.* Fearson, 18 Md. 502; Brengle *v.* McClellan, 7 Gill & J. 434; Wernway *v.* Pawling, 5 Gill & J. 500, 25 Am. Dec. 317.

Massachusetts.— Jacobs *v.* Hull, 12 Mass. 25; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88. And see Com. *v.* Green, 17 Mass. 515.

Minnesota.— Cone *v.* Hooper, 18 Minn. 531.

Mississippi.— Miller *v.* Ewing, 8 Sm. & M. 421.

Missouri.— Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619; Barney *v.* White, 46 Mo. 137; Destrehan *v.* Scudder, 11 Mo. 484; Smith *v.* Kander, 58 Mo. App. 61.

Nebraska.— Snyder *v.* Critchfield, 44 Nebr. 66, 62 N. W. 306; Keeler *v.* Elston, 22 Nebr. 310, 34 N. W. 819; Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

New Hampshire.— Kittredge *v.* Emerson, 15 N. H. 227.

New Jersey.— Gibbons *v.* Livingston, 6 N. J. L. 236; Orient Ins. Co. *v.* Rudolph, (Ch. 1905) 61 Atl. 26; Chew *v.* Brumagin, 21 N. J. Eq. 520; Robert *v.* Hodges, 16 N. J. Eq. 299.

New York.— Gottlieb *v.* Alton Grain Co., 181 N. Y. 563, 74 N. E. 1117 [*affirming* 87 N. Y. App. Div. 380, 84 N. Y. Suppl. 413]; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 89 N. Y. 412; Rocco *v.* Hackett, 2 Bosw. 579; Black's Case, 4 Abb. Pr. 162; Green *v.* Van Buskirk, 38 How. Pr. 52 [*reversing* 34 Barb. 457]; Shumway *v.* Stillman, 6 Wend. 447; Wheeler *v.* Raymond, 8 Cow. 311; Black *v.* Black, 4 Bradf. Surr. 174.

North Carolina.— Haywood *v.* Daves, 81 N. C. 8.

Ohio.— Arndt *v.* Arndt, 15 Ohio 33; Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197; Spencer *v.* Brockway, 1 Ohio 259, 13 Am. Dec. 615.

Pennsylvania.—Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131; Bowersox *v.* Gitt, 2 Pa. Dist. 100, 12 Pa. Co. Ct. 81; Curran *v.* Rowley, 2 Pa. Co. Ct. 539; Railroad Co. *v.* Mercer, 11 Phila. 226.

Rhode Island.— Rathbone *v.* Terry, 1 R. I. 73.

Tennessee.— Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100; Topp *v.* Alabama Branch Bank, 2 Swan 184; Taylor *v.* Smith, (Ch. App. 1896) 36 S. W. 970.

Washington.— Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556.

West Virginia.— Sayre *v.* Harpold, 33 W. Va. 553, 11 S. E. 16.

Wisconsin.— Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394; Anderson *v.* Chicago Title, etc., Co., 101 Wis. 385, 77 N. W. 710; Brown *v.* Parker, 28 Wis. 21.

United States.— Harding *v.* Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. ed. 1066 [*reversing* 140 Cal. 690, 74 Pac. 284]; Harris *v.* Balk, 198 U. S. 215, 25 S. Ct. 625, 49 L. ed.

domestic courts would or could have rendered such a judgment on such a cause of action, whether such a judgment would have been valid under the local laws,[49] whether the court rendering the judgment was right or wrong in the interpretation and application of the laws of its own state,[50] or even in its reading and application of the laws of the state where the judgment is brought in question.[51] Also the constitutional and statutory provisions referred to protect a judgment of a court of a sister state against collateral impeachment.[52] But they do not make it in all respects and for all purposes the equivalent of a domestic judgment, being limited to its effect as evidence or as a bar to further litigation,[53] and not purporting to give to such a judgment any extraterritorial force as a judgment.[54] Further these provisions have nothing to do with the recognition of foreign judgments as precedents; they come into effect only in connection with the doctrine of *res judicata*, not with that of *stare decisis*.[55]

b. Effect Similar to That in State of Rendition. The judgment of a court of one state, when sued on, pleaded, or introduced in evidence in another state, is entitled to receive the same faith, credit, and respect that is accorded to it in the state where rendered, so that if valid and conclusive there, it is so in all other states.[56] But a judgment from another state is entitled to no greater effect or

1023 [*reversing* 130 N. C. 381, 41 S. E. 940]; Christmas *v.* Russell, 5 Wall. 290, 18 L. ed. 475; Mills *v.* Duryee, 7 Cranch 481, 3 L. ed. 411; Sarchet *v.* The General Isaac Davis, 21 Fed. Cas. No. 12,357, Crabbe 185.

See 30 Cent. Dig. tit. "Judgment," § 1443 *et seq.*, § 1488 *et seq.*, and cases cited in the notes following.

Purchaser pendente lite.— A judgment rendered in one state, when sought to be enforced in another, is entitled to conclusive effect, not only as between the parties, but also as against purchasers who bought pending the suit in which the judgment was rendered, to the same extent as in the first state. Fletcher *v.* Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143. See, generally, LIS PENDENS.

49. Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 89 N. Y. 412; Phillips *v.* Godfrey, 7 Bosw. (N. Y.) 150; Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629 [*reversing* 60 N. H. 40].

Validity by lex fori.— The validity of the judgment must be determined by the laws of the state where it was rendered; and if it is valid and enforceable there, it must be accorded full faith and credit in the courts of another state, even though a judgment rendered and entered in the same manner and form, and under like circumstances, in the latter state, would be utterly void. Ritter *v.* Hoffman, 35 Kan. 215, 10 Pac. 576.

Garnishment of laborer's wages.— In some states, where wages of labor are exempt from garnishment, it is held that it is no bar to an action to recover such wages that a judgment therefor has been rendered against defendant, as garnishee, in an action brought in another state, where wages are not exempt. Chicago, etc., R. Co. *v.* Sturm, 5 Kan. App. 427, 49 Pac. 337; Singer Mfg. Co. *v.* Fleming, 30 Nebr. 679, 58 N. W. 226, 42 Am. St. Rep. 613, 23 L. R. A. 210. See GARNISHMENT, 20 Cyc. 1035–1037, 1142–1145.

Sufficiency of judgment.— If it is proved by the law, practice, and usage of the state from whence a transcript of a foreign judgment comes that it is entitled to the faith and credit of a judgment, this court will give it the same force and effect, although it is insufficient to constitute a judgment under our laws and practice. Clemmer *v.* Cooper, 24 Iowa 185, 95 Am. Dec. 720.

50. Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Haywood *v.* Daves, 81 N. C. 8; Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100.

51. Hudson-Kimberly Pub. Co. *v.* Young, 90 Mo. App. 505.

52. Anderson *v.* Chicago Title, etc., Co., 101 Wis. 385, 77 N. W. 710; Parker *v.* Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

53. Joice *v.* Scales, 18 Ga. 725; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538 [*affirming* 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657].

54. Elizabethtown Sav. Inst. *v.* Gerber, 34 N. J. Eq. 130. See also *infra*, XXII, B, 1, c, d, 3, a.

55. Hancock Nat. Bank *v.* Farnum, 20 R. I. 466, 40 Atl. 341; Eastern Bldg., etc., Assoc. *v.* Williamson, 189 U. S. 122, 23 S. Ct. 527, 47 L. ed. 735; Commercial Pub. Co. *v.* Beckwith, 188 U. S. 567, 23 S. Ct. 382, 47 L. ed. 598; Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 11 Fed. 381, 3 McCrary 609.

56. *Connecticut.*— Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683.

Georgia.— Tompkins *v.* Cooper, 97 Ga. 631, 25 S. E. 247; Harris *v.* Williams, Dudley 199.

Illinois.— Belton *v.* Fisher, 44 Ill. 32; McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Kimmel *v.* Schultz, 1 Ill. 169; Newman *v.* Greeley State Bank, 92 Ill. App. 638.

Indiana.— Davis *v.* Lane, 2 Ind. 548, 54 Am. Dec. 458.

Iowa.— Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529.

finality than would be accorded to it in the state where rendered; and hence if it would there be inconclusive, impeachable, or reëxaminable, it will receive no greater consideration or measure of finality in other states.[57] The validity and effect of a judgment must therefore be determined by reference to the laws of the state where it was rendered; and for this purpose it is held in some of the states that the courts of one state may take judicial notice of the laws of another state.[58]

Kansas.— Chicago, etc., R. Co. *v.* Campbell, 5 Kan. App. 423, 49 Pac. 321.

Kentucky.— Calloway *v.* Glenn, 105 Ky. 648, 49 S. W. 440, 20 Ky. L. Rep. 1447; Fletcher *v.* Ferrel, 9 Dana 372, 35 Am. Dec. 143.

Maine.— Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127; Sweet *v.* Brackley, 53 Me. 346.

Maryland.— Duvall *v.* Fearson, 18 Md. 502; U. S. Bank *v.* Merchants' Bank, 7 Gill 415; Brengle *v.* McClellan, 7 Gill & J. 434.

Massachusetts.— Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840.

Missouri.— Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619; Hudson-Kimberly Pub. Co. *v.* Young, 90 Mo. App. 505; Smith *v.* Kander, 58 Mo. App. 61.

New Jersey.— Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711; Gibbons *v.* Livingston, 6 N. J. L. 236; Orient Ins. Co. *v.* Rudolph, (Ch. 1905) 61 Atl. 26; Chew *v.* Brumagim, 21 N. J. Eq. 520 [*affirming* 19 N. J. Eq. 130].

New York.— Black's Case, 4 Abb. Pr. 162; Green *v.* Van Buskirk, 38 How. Pr. 52.

Ohio.— Arndt *v.* Arndt, 15 Ohio 33; Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197.

Pennsylvania.— Levison *v.* Blumenthal, 25 Pa. Super. Ct. 55; Curran *v.* Rowley, 2 Pa. Co. Ct. 539; Railroad Co. *v.* Mercer, 11 Phila. 226.

Virginia.— Piedmont, etc., L. Ins. Co. *v.* Ray, 75 Va. 821; Buford *v.* Buford, 4 Munf. 241, 6 Am. Dec. 511; De Ende *v.* Wilkinson, 2 Patt. & H. 663.

Washington.— Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556.

West Virginia.— Wells-Stone Mercantile Co. *v.* Truax, 44 W. Va. 531, 29 S. E. 1006.

Wisconsin.— Parker *v.* Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

United States.— Harris *v.* Balk, 198 U. S. 215, 25 S. Ct. 625, 49 L. ed. 1023 [*reversing* 130 N. C. 381, 41 S. E. 940]; Christmas *v.* Russell, 5 Wall. 290, 18 L. ed. 475; Mills *v.* Duryee, 7 Cranch 481, 3 L. ed. 411.

See 30 Cent. Dig. tit. "Judgment," § 1489.

Compare, however, St. Louis Expanded Metal Fireproofing Co. *v.* Beilharz, (Tex. Civ. App. 1905) 88 S. W. 512.

Conclusiveness see *infra,* XXII, B, 2.

57. *Alabama.*— Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45.

Arkansas.— Barkman *v.* Hopkins, 11 Ark. 157.

Connecticut.—Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562.

Illinois.— Newman *v.* Greeley State Bank, 92 Ill. App. 638.

Louisiana.— Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Bank of Commerce *v.* Mayer, 42 La. Ann. 1031, 8 So. 260; McLaren *v.* Kehler, 23 La. Ann. 80, 8 Am. Rep. 592; Tilghman's Succession, 7 Rob. 387; Maxwell *v.* Collier, 6 Rob. 86; Pillet *v.* Edgar, 4 Rob. 274; Briggs *v.* Spencer, 3 Rob. 265, 38 Am. Dec. 239; Tipton *v.* Mayfield, 10 La. 189.

Maryland.—Wernwag *v.* Pawling, 5 Gill & J. 500, 25 Am. Dec. 317.

Nebraska.— Jaster *v.* Currie, (1903) 94 N. W. 995.

Pennsylvania.— Bowersox *v.* Gitt, 12 Pa. Co. Ct. 81.

Texas.— Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

Wisconsin.— Brown *v.* Parker, 28 Wis. 21.

United States.— Danville First Nat. Bank *v.* Cunningham, 48 Fed. 510.

See 30 Cent. Dig. tit. "Judgment," § 1489.

Applications of rule.— If a judgment operates in the state where it was rendered only *in rem,* it will not elsewhere be enforced *in personam*; and if it has not the effect of binding personally defendant in the suit in which it was rendered, no greater effect will be given to it in any other state where it is sought to be enforced. Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562. So a judgment which is no bar to another suit in the state where it was rendered will not be a bar in another state. Matoon *v.* Clapp, 8 Ohio 248. And where a judgment against a corporation, by the laws of the state where it is rendered, is not conclusive against a stockholder who was not a party to the action, if it was obtained through fraud or collusion, no greater effect will be given to it in an action against a stock-holder in a court of another state. Ball *v.* Warrington, 108 Fed. 472, 47 C. C. A. 447. So where a judgment of another state consists of an entry to the effect that the cause having been settled it is discontinued by consent, without costs to either party, it may be shown that the discontinuance was not intended as a satisfaction of the cause of action, but was the result of a promissory agreement never complied with; and this is not denying "full faith and credit" to the judgment. Jacobs *v.* Marks, 182 U. S. 583, 21 S. Ct. 865, 45 L. ed. 1241.

Where a judgment has become dormant in the state where it was rendered and has not been revived or renewed, it will be treated as a dormant judgment in another state when it is sought to enforce it there. Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071.

58. *Alabama.*— Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711, 57 Am. St. Rep. 45.

Illinois.— Rae *v.* Hulbert, 17 Ill. 572; Hull

But this doctrine is not generally accepted. On the contrary, it is held that laws of a foreign state must be proved as facts, and if there is no evidence in regard to the laws of the state where the judgment was rendered, the court where it is sought to be enforced will presume that those laws are the same as the laws of its own state, and will give effect to the judgment accordingly.[59]

c. Extraterritorial Effect on Real Estate. Real property, being governed only by the law of its *situs*, and being subject only to the jurisdiction of the courts of the state where it is situated, cannot be directly affected by the judgment or decree of a court of any other state; nor do the provisions of the federal constitution and the act of congress require that a judgment of a state court should be accorded any extraterritorial force or effect as regards real estate.[60]

v. Webb, 78 Ill. App. 617; Kopperl *v.* Nagy, 37 Ill. App. 23.

Kansas.— Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446.

Pennsylvania.— Ohio *v.* Hinchman, 27 Pa. St. 479; Jones *v.* Quaker City Mut. F. Ins. Co., 9 Pa. Dist. 213.

Rhode Island.— Paine *v.* Schenectady Ins. Co., 11 R. I. 411.

Washington.— Trowbridge *v.* Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

See EVIDENCE, 16 Cyc. 894, 895.

Ground of this rule.— This rule, originally adopted in Pennsylvania and Rhode Island, as appears from the cases above cited, was based on the theory that the supreme court of the United States, in reviewing the judgment of the highest court of a state, on writ of error, would take notice of the laws of another state, for the purpose of determining whether "full faith and credit" had been given to the judgment of such other state, and therefore it was thought the court of first instance should do likewise. But this was shown to have been a mistake, the supreme court of the United States explaining that while it would take judicial notice of the laws of any and every state when proceeding in the exercise of its original jurisdiction, or of its appellate jurisdiction over the inferior courts of the United States, this was not so when it was reviewing the decision of a state supreme court on a writ of error. Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535. And see Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 7 S. Ct. 398, 30 L. ed. 519.

59. *Florida.*— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Illinois.— Baltimore, etc., R. Co. *v.* McDonald, 112 Ill. App. 391.

Louisiana.— Bank of Commerce *v.* Mayer, 42 La. Ann. 1031, 8 So. 260.

New Jersey.— Thompson *v.* Williamson, (Ch. 1904) 58 Atl. 602; Davis *v.* Headley, 22 N. J. Eq. 115.

New York.— People *v.* Dewey, 23 Misc. 267, 50 N. Y. Suppl. 1013.

Ohio.— Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197.

South Dakota.— Thomas *v.* Pendleton, 1 S. D. 150, 46 N. W. 180, 36 Am. St. Rep. 726.

Wisconsin.— Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

See EVIDENCE, 16 Cyc. 894, 895.

In Alabama the opinion has been stated that the record of a judgment from another state, in the absence of any showing as to the local law, should be tested by the rules and principles of the common law. Hinson *v.* Wall, 20 Ala. 298.

And in North Carolina a decision goes so far as to hold that it is not necessary to show by any extrinsic evidence that the judgment was warranted by the laws of the state where it was rendered, the judgment itself being the highest evidence of that fact. Davidson *v.* Sharpe, 28 N. C. 14.

60. *Connecticut.*— Clark's Appeal, 70 Conn. 195, 39 Atl. 155.

Delaware.— Pritchard *v.* Henderson, 2 Pennew. 553, 47 Atl. 376.

Illinois.— McCartney *v.* Osburn, 118 Ill. 403, 9 N. E. 210; City Ins. Co. *v.* Commercial Bank, 68 Ill. 348; Courtney *v.* Henry, 114 Ill. App. 635.

Indiana.— Cooper *v.* Hayes, 96 Ind. 386.

Iowa.— Blackman *v.* Wright, 96 Iowa 541, 65 N. W. 843.

Kentucky.— Short *v.* Galway, 83 Ky. 501, 4 Am. St. Rep. 168.

New Jersey.— Davis *v.* Headley, 22 N. J. Eq. 115.

North Carolina.— Picket *v.* Johns, 16 N. C. 123.

Ohio.— Price *v.* Johnston, 1 Ohio St. 390.

Pennsylvania.— Pittsburgh, etc., R. Co.'s Appeal, 8 Pa. Cas. 83, 4 Atl. 385.

Texas.— Fryer *v.* Meyers, (1890) 13 S. W. 1025.

West Virginia.— Piedmont Coal, etc., Co. *v.* Green, 3 W. Va. 54, 98 Am. Dec. 799.

United States.— Clarke *v.* Clarke, 178 U. S. 186, 20 S. Ct. 873, 44 L. ed. 1028; Carpenter *v.* Strange, 141 U. S. 87, 11 S. Ct. 960, 35 L. ed. 640; Watts *v.* Waddle, 6 Pet. 389, 8 L. ed. 437; Lynde *v.* Columbus, etc., R. Co., 57 Fed. 993.

See 30 Cent. Dig. tit. "Judgment," § 1490. And see COURTS, 11 Cyc. 681.

A decree setting aside a deed or other conveyance, or declaring it void or inoperative, cannot affect lands situated in another state. Blackman *v.* Wright, 96 Iowa 541, 65 N. W. 843; Carpenter *v.* Strange, 141 U. S. 87, 11 S. Ct. 960, 35 L. ed. 640.

But although incapable of acting directly on real estate beyond its jurisdiction, a court of equity in one state, having acquired jurisdiction of the litigants, may make orders and decrees affecting their dealing with such property, in such manner as to bind them personally, and such orders or decrees may be pleaded as a cause of action, a bar, or a defense in the state where the land lies.[61]

d. Rank and Priority. A judgment of one state, when sought to be enforced in another, is not entitled to any right of priority, privilege, or lien which it may enjoy in the state where rendered, but only that which the *lex fori* may give to it in the character of a foreign judgment.[62] Consequently if the laws of a state permit the judgments of its own courts to take rank as preferred claims in the distribution of decedents' estates, no such privilege will attach to judgments from another state unless they are expressly included in the statute.[63]

e. Merger and Bar of Cause of Action[64] — (i) *In General.* The recovery of

Ordering conveyance.— A judgment or decree of a state court ordering a conveyance or reconveyance of lands, on enforcement of a contract therefor or on setting aside a fraudulent transaction, cannot apply to lands outside the state. Davis *v.* Headley, 22 N. J. Eq. 115; Fryer *v.* Meyers, (Tex. 1890) 13 S. W. 1025. See, generally, SPECIFIC PERFORMANCE.

Mortgage foreclosure.— A state court has no authority to decree the foreclosure of a mortgage on realty situated in another state. Pittsburgh, etc., R. Co.'s Appeal, 8 Pa. Cas. 83, 4 Atl. 385; Lynde *v.* Columbus, etc., R. Co., 57 Fed. 993. *Compare* House *v.* Lockwood, 1 N. Y. St. 196. But where judgment is obtained in one state on a note made and payable there, and secured by a mortgage on land situated in another state, and plaintiff brings suit in the latter state on such judgment, the court in the latter state may thereupon enforce the mortgage lien on the land. Brown *v.* Todd, 29 S. W. 621, 16 Ky. L. Rep. 697. And the decision in the first state will be conclusive as to all questions concerning the ownership of the mortgage, the right to foreclose, and the amount due. *In re* James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774; Frank *v.* Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78. See, generally, MORTGAGES.

Enforcing lien.— The decree of a court in another state cannot avail to declare the existence or order the enforcement of a lien on land. Short *v.* Galway, 83 Ky. 501, 4 Am. St. Rep. 168; Piedmont Coal, etc., Co. *v.* Green, 3 W. Va. 54, 98 Am. Dec. 799. And see McGarvey *v.* Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861.

Receivership.— A decree appointing a receiver for an insolvent corporation, and investing him with title to all its property, has no effect whatever on the title to lands in another state, nor does it give the receiver any right to claim such lands as against an attaching creditor. City Ins. Co. *v.* Commercial Bank, 68 Ill. 348. See, generally, RECEIVERS.

Construction of will.— A decision in one state construing a will is not conclusive as to the title to land situated in another state, which title depends on the construction of the will. Clark's Appeal, 70 Conn. 195, 39 Atl. 155; Pritchard *v.* Henderson, 2 Pennew. (Del.) 553, 47 Atl. 376; McCartney *v.* Osburn, 118 Ill. 403, 9 N. E. 210; Cooper *v.* Hayes, 96 Ind. 386; Clapp *v.* Branch, 11 Tex. Civ. App. 203, 32 S. W. 735; Clarke *v.* Clarke, 178 U. S. 186, 20 S. Ct. 873, 44 L. ed. 1028; Branch *v.* Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92. See, generally, WILLS.

61. *Florida.*— Winn *v.* Strickland, 34 Fla. 610, 16 So. 606.

Iowa.— Blackman *v.* Wright, 96 Iowa 541, 65 N. W. 843.

New Jersey.— Bullock *v.* Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213.

New York.— Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

Texas.— Wallace *v.* Campbell, 53 Tex. 229.

United States.— Norton *v.* New York House of Mercy, 101 Fed. 382, 41 C. C. A. 396.

See, generally, COURTS, 11 Cyc. 681.

A decree of a court of equity in one state, directing a conveyance of land situate in another, may be pleaded as a cause of action or as a ground of defense in the courts of the state where the land lies, although no conveyance has been executed, and, unless impeached for fraud, is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined. Burnley *v.* Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621. So a court of equity having jurisdiction of the parties has power to compel defendant to release and discharge an apparent cloud upon the title to land situated in another state. Remer *v.* Mackay, 35 Fed. 86. Or if lands in another state have been converted into money, or money has been realized from them, by one acting under a fraudulent title or power, he can be compelled to account, either in law or equity. Rose *v.* Gibson, 71 Ala. 35.

62. Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538; McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177. And see McKenzie *v.* Havard, 12 Mart. (La.) 101.

63. Brengle *v.* McClellan, 7 Gill & J. (Md.) 434; Harness *v.* Green, 20 Mo. 316. And see Cameron *v.* Wurtz, 4 McCord (S. C.) 278.

64. Merger and bar generally see *supra*, XIII.

a judgment in one state merges the original cause of action, so that it cannot thereafter form the basis of a fresh suit in another state,[65] provided the judgment was valid and remains in full force and effect,[66] and provided that it was rendered on the merits[67] by a court having jurisdiction of the subject-matter and the parties.[68] And under the same conditions, where the plaintiff, after commencing an action in one state, sues the defendant on the same claim in another state

65. *Connecticut.*— Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433.

District of Columbia.— Slack *v.* Perrine, 9 App. Cas. 128.

Iowa.— Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 22 Am. St. Rep. 529.

Louisiana.— Denistoun *v.* Payne, 7 La. Ann. 333; Oakey *v.* Murphy, 1 La. Ann. 372.

Maine.— North Bank *v.* Brown, 50 Me. 214, 79 Am. Dec. 609; Cleaves *v.* Lord, 43 Me. 290.

Massachusetts.— Harrington *v.* Harrington, 154 Mass. 517, 28 N. E. 903; Stevens *v.* Gaylord, 11 Mass. 256.

Missouri.— Grimm *v.* Barrington, 109 Mo. App. 35, 84 S. W. 357.

New Hampshire.— Child *v.* Eureka Powder Works, 45 N. H. 547.

New Jersey.— Barnes *v.* Gibbs, 31 N. J. L. 317, 86 Am. Dec. 210. But see Kennealy *v.* Leary, 67 N. J. L. 435, 51 Atl. 475, holding that a New York statute, giving a right of action against a stakeholder and the principal to whom he pays over money, is a remedial statute, and a judgment against the stakeholder in New York, which is unsatisfied, is no bar to a suit in New Jersey against the principal.

New York.— Gray *v.* Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720; Merritt *v.* Fowler, 76 Hun 424, 27 N. Y. Suppl. 1047.

Pennsylvania.— Evans *v.* Cleary, 125 Pa. St. 204, 17 Atl. 440, 11 Am. St. Rep. 886; Hogg *v.* Charlton, 25 Pa. St. 200; Baxley *v.* Linah, 16 Pa. St. 241, 55 Am. Dec. 494; Downing *v.* Philips, 4 Yeates 274.

South Carolina.— Napier *v.* Gidiere, Speers Eq. 215, 40 Am. Dec. 613.

Vermont.— Green *v.* Starr, 52 Vt. 426.

See 30 Cent. Dig. tit. "Judgment," § 1492.

Contra.— Hays *v.* Cage, 2 Tex. 501; Turner *v.* Lambeth, 2 Tex. 365; Drane *v.* Gunymere, 2 Tex. Unrep. Cas. 496 (under a statute of the republic of Texas); Davis *v.* Morris, 76 Va. 21; Beall *v.* Taylor, 2 Gratt. (Va.) 532, 44 Am. Dec. 398. And see Blackstone *v.* Miller, 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439.

Under a statute in New York (Code Civ. Proc. § 552) which provides that a recovery of judgment in a foreign state for the price or value of property obtained by fraud or deceit does not affect plaintiff's right to arrest defendant, an action may be maintained in New York on the original cause of action, although a judgment has been recovered thereon in another state. Pitt *v.* Freed, 28 N. Y. Suppl. 863.

Judgment on judgment.— It has been held that where a judgment has been recovered in a court of competent jurisdiction in one state, on a judgment previously recovered in another state, the latter judgment is merged in the former, so that it cannot thereafter constitute a cause of action, and its liens or other privileges in the state of its rendition are abandoned. Gould *v.* Hayden, 63 Ind. 443. Other cases, however, are to the contrary. Wells *v.* Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809; Weeks *v.* Pearson, 5 N. H. 324. Where a judgment is recovered in a foreign state, on a judgment rendered in New York, plaintiff may sue in New York on the foreign judgment, the cause of action being the foreign judgment, and not the same cause of action that was litigated in the original action in New York. Merritt *v.* Fowler, 76 Hun (N. Y.) 424, 27 N. Y. Suppl. 1047.

66. Cackley *v.* Smith, 47 Kan. 642, 28 Pac. 617, 27 Am. St. Rep. 311 (case of a decision merely finding the amount due to plaintiff as one of a body of creditors, but not giving him a personal judgment against defendant); Harryman *v.* Roberts, 52 Md. 64 (motion to set the judgment aside); Sloo *v.* Lea, 18 Ohio 279 (judgment against joint debtors reversed ss to one); McCadden *v.* Slauson, 96 Tenn. 586, 36 S. W. 378 (judgment declared void).

Sufficiency of judgment.— A report of a commissioner of insolvency in one state, in favor of an administrator there, accepted and recorded by the probate court to which it is returned, and acquiesced in by the parties, is such a judgment that the same person as administrator in another state may plead it in bar to a suit by the same claimant upon the same cause of action. Lomas *v.* Hilliard, 60 N. H. 148.

67. *Kentucky.*— Brand *v.* Brand, 116 Ky. 785, 76 S. W. 868, 25 Ky. L. Rep. 987, 63 L. R. A. 206, case going off on plea of statute of limitations.

New Hampshire.— Taylor *v.* Barron, 30 N. H. 78, 64 Am. Dec. 281.

New York.— Gould *v.* Chicago, etc., R. Co., 15 N. Y. Suppl. 895.

North Carolina.— Carter *v.* Wilson, 19 N. C. 276.

Pennsylvania.— Haws *v.* Tiernan, 53 Pa. St. 192, nonsuit no bar.

Tennessee.— Trabue *v.* Short, 5 Coldw. 293, action dismissed without prejudice.

See 30 Cent. Dig. tit. "Judgment." § 1493.

68. Middlesex Bank *v.* Butman, 29 Me. 19; Whittier *v.* Wendell, 7 N. H. 257; Fitzsimmons *v.* Marks, 66 Barb. (N. Y.) 333; Campbell *v.* Steele, 11 Pa. St. 394.

Partial satisfaction.— A judgment recovered in another state, without jurisdiction of the person of defendant, if partially satisfied, will bar a recovery upon the original demand

and obtains a valid judgment against him, that judgment will constitute a bar to the further prosecution of the action first begun.[69]

(II) *Causes of Action Barred.*[70] Generally a judgment recovered in another state bars an action on any claims or items which might and should have been included in the first suit,[71] and cuts off all defenses which might and should have been made;[72] but this does not apply to a set-off or counter-claim which by the laws of that state defendant was not bound to set up.[73]

(III) *Persons Who May Take Advantage of Bar.*[74] A judgment against joint defendants, where only one was served, does not merge the original demand, and consequently an action in another state should be brought, not on the judgment, but on the original cause of action;[75] and where joint debtors reside in different states, they may be sued separately, each in the state having jurisdiction of his person or property, and a judgment against one in one state is no bar to a recovery against the other in another state.[76] If a plaintiff is defeated in a trial on the merits in an action in one state, he cannot afterward maintain a suit on the same cause of action against the same defendant in any other state, but the former judgment may be pleaded in defense.[77]

to the extent of the sum paid in such partial satisfaction, but no further. Rangely *v.* Webster, 11 N. H. 299.

69. *Alabama.*— Memphis, etc., R. Co. *v.* Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. Rep. 69.

Connecticut.— Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683.

Kansas.— Union Pac. R. Co. *v.* Baker, 5 Kan. App. 253, 47 Pac. 563.

Maine.— Whiting *v.* Burger, 78 Me. 287, 4 Atl. 694; North Bank *v.* Brown, 50 Me. 214, 79 Am. Dec. 609.

Maryland.—U. S. Bank *v.* Merchants' Bank, 7 Gill 415.

Massachusetts.— Graef *v.* Bernard, 162 Mass. 300, 38 N. E. 503.

New Hampshire.— Child *v.* Eureka Powder Works, 45 N. H. 547; Rogers *v.* Odell, 39 N. H. 452.

Rhode Island.— Paine *v.* Schenectady Ins. Co., 11 R. I. 411.

Vermont.— McGilvray *v.* Avery, 30 Vt. 538.

See 30 Cent. Dig. tit. "Judgment," §§ 1492, 1493.

70. See also *supra*, XIII, D.

71. Baker *v.* Rand, 13 Barb. (N. Y.) 152; Montford *v.* Hunt, 17 Fed. Cas. No. 9,725, 3 Wash. 28. But *compare* Bailey *v.* O'Connor, 19 N. H. 202, as to an item which was not set up or adjudicated in the foreign action, though it might have been. And see Carver *v.* Adams, 38 Vt. 500.

Assets in different states.— A judgment recovered in one state, and dealing only with property or assets situated within that state, is not a bar to a subsequent action between the same parties, to apply the same principle of recovery or ground of liability to assets or property in another state. Jones *v.* Gerock, 59 N. C. 190; Beall *v.* Taylor, 2 Gratt. (Va.) 532, 44 Am. Dec. 398.

Mortgage foreclosure.— A judgment foreclosing a mortgage on lands within the state, but not including any personal judgment against the mortgagor, on account of his being a non-resident and not served with process, will not bar an action against him in another state, to recover on the bond secured by the mortgage or for the deficiency. Spencer *v.* Sloo, 8 La. 290; Howard *v.* McNaught, 9 Wash. 355, 37 Pac. 455, 43 Am. St. Rep. 837.

72. Morris *v.* Burgess, 116 N. C. 40, 21 S. E. 27.

73. Roach *v.* Privett, 90 Ala. 391, 7 So. 808, 24 Am. St. Rep. 819; Folsom *v.* Winch, 63 Iowa 477, 19 N. W. 305; Glass *v.* Wheeliss, 24 La. Ann. 397; McFarland *v.* White, 13 La. Ann. 394. *Compare* Meredith *v.* Santa Clara Min. Assoc., 56 Cal. 178. But where plaintiff sues on a judgment recovered by him in another state, defendant cannot set up by way of counter-claim matters which had been set up and litigated in the previous suit by way of defense thereto. Patrick *v.* Shaffer, 94 N. Y. 423.

74. See also *supra*, XIII, F.

75. Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90; Suydam *v.* Barber, 18 N. Y. 468, 75 Am. Dec. 254; Reed *v.* Girty, 6 Bosw. (N. Y.) 567; Campbell *v.* Steele, 11 Pa. St. 394.

Partners.— A valid judgment recovered in another state against one of two partners, on a promissory note signed with their partnership name, is a merger of the note and an extinguishment of the joint liability, of which either partner may avail himself in a subsequent suit brought on the note against both. Candee *v.* Clark, 2 Mich. 255.

76. Dennett *v.* Chick, 2 Me. 191, 11 Am. Dec. 59; Brown *v.* Birdsall, 29 Barb. (N. Y.) 549.

77. *Iowa.*— Scott *v.* Luther, 44 Iowa 570.

Maine.— Sweet *v.* Brackley, 53 Me. 346.

Massachusetts.— Green *v.* Sanborn, 150 Mass. 454, 23 N. E. 224.

New Jersey.— Brown *v.* Lexington, etc., R. Co., 13 N. J. Eq. 191.

New York.— Baker *v.* Rand, 13 Barb. 152.

Pennsylvania.— Sevison *v.* Blumenthal, 9 Kulp 392.

Vermont.— Low *v.* Mussey, 41 Vt. 393.

Plea of statute of limitations as defense on the merits see Brand *v.* Brand, 116 Ky.

(IV) *PLEADING AND EVIDENCE.*[78] As a rule when a judgment recovered in another state is to be relied on as a bar or defense, it should be pleaded, if there is opportunity to do so.[79] But if there is no such opportunity, it is admissible under the general issue and is as conclusive as if pleaded.[80] It is not necessary to set out the facts or laws conferring jurisdiction,[81] which will be presumed, and can be controverted only by clear and full proof,[82] except where the judgment comes from an inferior court.[83] To determine what effect the judgment has in the state of its rendition, as a merger of the cause of action or a bar to further suits, the whole record in the case, and also the applicable statutes of that state, may be produced;[84] and to identify the cause of action adjudicated in the former action with that now in suit, the record of the former action is first to be looked to,[85] and if it is not sufficiently clear the point may be shown by parol.[86] Ambiguities in the judgment or unfamiliar features in its form or in the proceedings leading up to it may be explained by the record or by the laws of the state from which it comes.[87]

2. CONCLUSIVENESS[88] — a. Constitutional and Statutory Provisions. If it were not for the provisions of the federal constitution requiring "full faith and credit" to be given in each state to the judgments of other states,[89] and the supplementary legislation of congress,[90] judgments rendered in another state of the Union would

785, 76 S. W. 868, 25 Ky. L. Rep. 987, 63 L. R. A. 206; Wernse *v.* McPike, 100 Mo. 476, 13 S. W. 809; Fulton Iron Works *v.* Riggin, 14 Mo. App. 321; Weeks *v.* Harriman, 65 N. H. 91, 18 Atl. 87, 23 Am. St. Rep. 21, 4 L. R. A. 744.

78. See also *supra*, XXI.

79. Sheldon *v.* Patterson, 55 Ill. 507; Universal L. Ins. Co. *v.* Bachus, 51 Md. 28; Rogers *v.* Odell, 39 N. H. 452.

But in Pennsylvania it is said that it is not necessary to plead a judgment of a court of a sister state in order to make it admissible or conclusive between the same parties on the same subject-matter in a different form. Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131.

80. Sheldon *v.* Patterson, 55 Ill. 507; Taylor *v.* Smith, (Tenn. Ch. App. 1896) 36 S. W. 970.

81. Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260; U. S. Bank *v.* Merchants' Bank, 7 Gill (Md.) 415; Rogers *v.* Odell, 39 N. H. 452. But any statute or rule of court of another state authorizing its courts to proceed without notice or on publication must be affirmatively shown, or the proceeding will be held void for want of jurisdiction. Foster *v.* Glazener, 27 Ala. 391.

82. Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83; Black's Case, 4 Abb. Pr. (N. Y.) 162, 4 Bradf. Surr. 174; Lapham *v.* Briggs, 27 Vt. 26.

83. But under a statute making it sufficient to allege generally that a judgment of an inferior court was "duly given or made," it is not necessary, in pleading a judgment of a justice of the peace of another state, rendered in garnishment proceedings, to set out the statute conferring jurisdiction on the justice. Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83.

84. McLaren *v.* Kehler, 23 La. Ann. 80, 8 Am. Rep. 592; Beal *v.* Smith, 14 Tex. 305.

Presumption as to effect of judgment.— Where there is no evidence of any statutory modification, in the state from which the judgment comes, of the common-law rule as to the conclusiveness of a judgment on the merits and of the extinguishment of the original cause of action by its being merged in the judgment recovered thereon, it will be assumed that such is the legal effect of the judgment in that state. U. S. Bank *v.* Merchants' Bank, 7 Gill (Md.) 415.

85. Paine *v.* Schenectady Ins. Co., 11 R. I. 411.

86. Stevens *v.* Payne, 2 Root (Conn.) 83; Whiting *v.* Burger, 78 Me. 287, 4 Atl. 694; Parker *v.* Thompson, 3 Pick. (Mass.) 429.

87. Holton *v.* Gleason, 26 N. H. 501. See Hassell *v.* Hamilton, 33 Ala. 280; Scott *v.* Cleveland, 3 T. B. Mon. (Ky.) 62.

88. Conclusiveness of judgments generally see *supra*, XIV.

89. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const. art. 4, § 1.

90. "The records and judicial proceedings of the courts of any State . . . shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Act Cong. May 26, 1790 (U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677]). A subsequent statute

be regarded and treated, as they were before the constitution, as strictly foreign judgments, their effect being left to be determined by the principles of international law or the inclination of judicial opinion in the particular state;[91] and indeed many of the early cases decided soon after the adoption of the constitutional provision, thought that its requirement was complied with by according to a judgment from a sister state a *prima facie*, and not a conclusive, effect as evidence.[92]

b. Judgment Conclusive on the Merits. It is now held by all the state courts, following the lead of the federal decisions,[93] that a judgment rendered by a competent court, having jurisdiction, in one state, is conclusive on the merits in the courts of every other state, when made the basis of an action or defense, and the merits cannot be reinvestigated.[94]

extended the provisions of this act to the "territories of the United States and the countries subject to the jurisdiction of the United States." Act Cong. March 27, 1804 (U. S. Rev. St. (1878) § 906 [U. S. Comp. St. (1901) p. 677]).

The articles of confederation contained a similar provision, and under it a court in one of the states refused to inquire into the merits of a judgment rendered in another state, both because it was a sentence in a prize case, and because it was adjudged to be conclusive under the provision mentioned. Jenkins *v.* Putnam, 1 Bay (S. C.) 8, 1 Am. Dec. 594.

Any state statute conflicting with these provisions of the constitution and of the act of congress, by denying to judgments of other states the full measure of conclusiveness to which they are entitled, is unconstitutional and void. Dodge *v.* Coffin, 15 Kan. 277. See Singer Mfg. Co. *v.* Fleming, 39 Nebr. 679, 58 N. W. 226, 42 Am. St. Rep. 613, 23 L. R. A. 210.

But the provision of the constitution does not apply to a case where the decree of a state court is alleged to be in collision with a prior decree in the same case in the same court. Mitchell *v.* Lenox, 14 Pet. (U. S.) 49, 10 L. ed. 349.

91. *Maryland.*—Seevers *v.* Clement, 28 Md. 426.

Michigan.— Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

Mississippi.— Dorsey *v.* Maury, 10 Sm. & M. 298.

New Hampshire.— Taylor *v.* Barron, 30 N. H. 78, 64 Am. Dec. 281; Thurber *v.* Blackbourne, 1 N. H. 242.

Pennsylvania.— Smith *v.* Lathrop, 44 Pa. St. 326, 84 Am. Dec. 448.

Vermont.— Eastern Townships Bank *v.* Beebe, 53 Vt. 177, 38 Am. Rep. 665.

United States.— Buckner *v.* Finley, 2 Pet. 586, 7 L. ed. 528; Warren Mfg. Co. *v.* Etna Ins. Co., 29 Fed. Cas. No. 17,206, 2 Paine 501.

92. *Alabama.*— Bigger *v.* Hutchings, 2 Stew. 445.

Kentucky.— Rogers *v.* Coleman, Hard. 413, 3 Am. Dec. 733.

Massachusetts.— Gleason *v.* Dodd, 4 Metc. 333; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Bartlet *v.* Knight, 1 Mass. 401, 2 Am. Dec. 36.

New York.— Pawling *v.* Willson, 13 Johns. 192; Hitchcock *v.* Aicken, 1 Cai. 460. *Compare* Taylor *v.* Bryden, 8 Johns. 173.

Ohio.— Hazzard *v.* Nottingham, Tapp. 146.

South Carolina.— Hammon *v.* Smith, 1 Brev. 110.

Tennessee.— Winchester *v.* Evans, Cooke 420; Lawrence *v.* Roberts, 2 Overt. 236.

See 30 Cent. Dig. tit. "Judgment," § 1496.

93. Harding *v.* Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. ed. 1066 [*reversing* 140 Cal. 690, 74 Pac. 284]; Carpenter *v.* Strange, 141 U. S. 87, 11 S. Ct. 960, 35 L. ed. 640; Christmas *v.* Russell, 5 Wall. (U. S.) 290, 18 L. ed. 475; McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177; Hampton *v.* McConnel, 3 Wheat. (U. S.) 234, 4 L. ed. 378; Mills *v.* Duryee, 7 Cranch (U. S.) 481, 3 L. ed. 411 (the leading case); Lamb *v.* Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558; Logansport Gaslight, etc., Co. *v.* Knowles, 15 Fed. Cas. No. 8,467, 2 Dill. 421.

94. *Alabama.*— Bogan *v.* Hamilton, 90 Ala. 454, 8 So. 186; Cannon *v.* Brame, 45 Ala. 262; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785; Lucas *v.* Darien Bank, 2 Stew. 280.

Arkansas.— Nunn *v.* Sturges, 22 Ark. 389.

California.— Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Weir *v.* Vail, 65 Cal. 466, 4 Pac. 422.

Connecticut.— Freeman's Appeal, 71 Conn. 708, 43 Atl. 185; Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683.

Delaware.— Pritchett *v.* Clark, 4 Harr. 280.

District of Columbia.— Slack *v.* Perrine, 9 App. Cas. 128.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Braswell *v.* Downs, 11 Fla. 62.

Georgia.— Powell *v.* Davis, 60 Ga. 70; McCauley *v.* Hargroves, 48 Ga. 50, 15 Am. Rep. 660.

Illinois.— Zepp *v.* Hager, 70 Ill. 223; Belton *v.* Fisher, 44 Ill. 32; Smith *v.* Smith, 17 Ill. 482; McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Rust *v.* Frothingham, 1 Ill. 331; Leathe *v.* Thomas, 109 Ill. App. 434.

Indiana.— Anderson *v.* Fry, 6 Ind. 76; Elliott *v.* Ray, 3 Blackf. 384; Holt *v.* Alloway, 2 Blackf. 108; Union Sav. Bank, etc., Co. *v.* Indianapolis Lounge Co., 20 Ind. App. 325, 47 N. E. 846.

Iowa.— American Trading, etc., Co. *v.* Gottstein, 123 Iowa 267, 98 N. W. 770; State *v.* Helmer, 21 Iowa 370.

c. Nature and Character of Adjudication. In order that a judgment rendered in one state should be accepted as conclusive on the merits in the courts of another state, it is necessary that it shall be a final judgment, not merely interlocutory,[95] and that it shall be a valid and subsisting judgment in the state of its rendition, that is, not adjudged void, or vacated or reversed,[96] nor superseded by an appeal;[97] and that it shall have been given upon a trial of the action on the

Kansas.— French *v.* Pease, 10 Kan. 51.

Kentucky.— Rankin *v.* Barnes, 5 Bush 20; Rogers *v.* Rogers, 15 B. Mon. 364; Fletcher *v.* Ferrel, 9 Dana 372, 35 Am. Dec. 143; Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179.

Louisiana.— Walworth *v.* Routh, 14 La. Ann. 205; West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736, 68 Am. Dec. 778; Davis *v.* Dugas, 11 La. Ann. 118; Johnson *v.* Weld, 8 La. Ann. 126.

Maine.— Sweet *v.* Brackley, 53 Me. 346; Cleaves *v.* Lord, 43 Me. 290; Mitchell *v.* Osgood, 4 Me. 124.

Maryland.— Zimmerman *v.* Helser, 32 Md. 274; Duvall *v.* Fearson, 18 Md. 502; Wernwag *v.* Pawling, 5 Gill & J. 500, 25 Am. Dec. 317.

Massachusetts.— Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840; McMahon *v.* Eagle Life Assoc., 169 Mass. 539, 48 N. E. 339, 61 Am. St. Rep. 306; Brainard *v.* Fowler, 119 Mass. 262; Com. *v.* Green, 17 Mass. 515; Jacobs *v.* Hull, 12 Mass. 25; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88.

Michigan.— Wilcox *v.* Kassick, 2 Mich. 165. See also Mutual F. Ins. Co. *v.* Phœnix Furniture Co., 108 Mich. 170, 66 N. W. 1095, 62 Am. St. Rep. 693, 34 L. R. A. 694.

Minnesota.— Cone *v.* Hooper, 18 Minn. 531.

Mississippi.— Dorsey *v.* Maury, 10 Sm. & M. 298.

Missouri.— Barney *v.* White, 46 Mo. 137; Destrehan *v.* Scudder, 11 Mo. 484; Winham *v.* Kline, 77 Mo. App. 36; Hays *v.* Merkle, 70 Mo. App. 509.

Nebraska.— Tunnicliff *v.* Fox, 68 Nebr. 811, 94 N. W. 1032; Commonwealth Mut. F. Ins. Co. *v.* Hayden, 61 Nebr. 554, 85 N. W. 443; Snyder *v.* Critchfield, 44 Nebr. 66, 62 N. W. 306; Packer *v.* Thompson, 25 Nebr. 688, 41 N. W. 650; Keeler *v.* Elston, 22 Nebr. 310, 34 N. W. 891; Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

Nevada.— Phelps *v.* Duffy, 11 Nev. 80.

New Hampshire.— Taylor *v.* Barron, 30 N. H. 78, 64 Am. Dec. 281; Kittredge *v.* Emerson, 15 N. H. 227.

New Jersey.— Brooklyn First Nat. Bank *v.* Wallis, 59 N. J. L. 46, 34 Atl. 983; Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711; Elizabethtown Sav. Inst. *v.* Gerber, 34 N. J. Eq. 130; Chew *v.* Brumagim, 21 N. J. Eq. 520; Robert *v.* Hodges, 16 N. J. Eq. 299.

New York.— Everett *v.* Everett, 180 N. Y. 452, 73 N. E. 231; Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679; Smith *v.* Central Trust Co., 154 N. Y. 333, 48 N. E. 553; Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152 [*affirming* 1 Duer 142]; Rocco *v.* Hackett, 2 Bosw. 579; Shumway *v.* Stillman, 6 Wend. 447; Wheeler *v.* Raymond, 8 Cow. 311; Andrews *v.* Montgomery, 19 Johns. 162, 10 Am. Dec. 213; Black *v.* Black, 4 Bradf. Surr. 174. But see Matter of Gaines, 84 Hun 520, 32 N. Y. Suppl. 398.

North Carolina.— Edwards *v.* Jones, 113 N. C. 453, 18 S. E. 500; Walton *v.* Sugg, 61 N. C. 98, 93 Am. Dec. 580; McLure *v.* Benceni, 37 N. C. 513, 40 Am. Dec. 437.

Ohio.— Burnley *v.* Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621; Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197; Goodrich *v.* Jenkins, 6 Ohio 43; Spencer *v.* Brockway, 1 Ohio 259, 13 Am. Dec. 615.

Oklahoma.— Blumle *v.* Kramer, 14 Okla. 366, 373, 79 Pac. 215, 1134.

Oregon.— Swift *v.* Stark, 2 Oreg. 97, 88 Am. Dec. 463.

Pennsylvania.— Guthrie *v.* Lowry, 84 Pa. St. 533; Wetherill *v.* Stillman, 65 Pa. St. 105; Rogers *v.* Burns, 27 Pa. St. 525; Baxley *v.* Linah, 16 Pa. St. 241, 55 Am. Dec. 494; Marsh *v.* Pier, 4 Rawle 273, 26 Am. Dec. 131. Benton *v.* Burgot, 10 Serg. & R. 240; Levison *v.* Blumenthal, 25 Pa. Super. Ct. 55.

Rhode Island.—Rathbone *v.* Terry, 1 R. I. 73.

South Carolina.— Napier *v.* Gidiere, Speers Eq. 215, 40 Am. Dec. 613.

Tennessee.— Topp *v.* Branch Bank, 2 Swan 184; Taylor *v.* Smith, (Ch. App. 1896) 36 S. W. 970.

Texas.— Cook *v.* Thornhill, 13 Tex. 293, 65 Am. Dec. 63. But *compare* St. Louis Expanded Metal Fireproofing Co. *v.* Beilharz, (Civ. App. 1905) 88 S. W. 512.

Vermont.— Blodget *v.* Jordan, 6 Vt. 580; Hoxie *v.* Wright, 2 Vt. 263.

Virginia.— De Ende *v.* Wilkinson, 2 Patt. & H. 663.

West Virginia.— Sayre *v.* Harpold, 33 W. Va. 553, 11 S. E. 16; Stewart *v.* Stewart, 27 W. Va. 167.

Wisconsin.— Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394; Kellam *v.* Toms, 38 Wis. 592.

See 30 Cent. Dig. tit. "Judgment," § 1488 *et seq.*

95. Baugh *v.* Baugh, 4 Bibb (Ky.) 556; Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Griggs *v.* Becker, 87 Wis. 313, 58 N. W. 396. See also *supra*, XIII, B, 5; XIV, A, 4, g.

96. Kopf *v.* Huckins, 11 Tex. Civ. App. 86, 32 S. W. 41. See *supra*, XIII, B, 4, 5, g; XIV, A, 4, g, (III), h.

97. Lonergan *v.* Lonergan, 55 Nebr. 641, 76 N. W. 16. See *supra*, XIII, B, 5, e; XIV, A, 4, g, (II).

merits,[98] except in cases of judgment by confession[99] or upon default,[1] which are just as conclusive as those rendered upon a trial. These conditions being met, the form of the judgment or the nature of the proceeding in which it was rendered is not generally material;[2] and the rule applies as well to decrees in equity as to judgments at law.[3]

d. Persons Concluded. In determining what parties are concluded or estopped by the record of a judgment rendered in another state the same rules are applied as in the case of domestic judgments.[4] Thus such a judgment is not conclusive against strangers,[5] but the presence of additional parties on the record does not necessarily destroy the effect of the estoppel as against those who were parties in both actions.[6] And it is said that the fact that the plaintiff brought the action

98. Rankin *v.* Barnes, 5 Bush (Ky.) 20. See *supra*, XIII, C; XIV, A, 4.

99. Kitchen *v.* Bellefontaine Nat. Bank, 53 Kan. 242, 36 Pac. 344, 42 Am. St. Rep. 282; Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840; Athens First Nat. Bank *v.* Garland, 109 Mich. 515, 67 N. W. 559, 63 Am. St. Rep. 597, 33 L. R. A. 83; Randolph *v.* Keiler, 21 Mo. 557. See *supra*, XIII, C, 3; XIV, A, 4, b.

1. Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Davis *v.* Dugas, 11 La. Ann. 118; Stegall *v.* Wyche, 5 Yerg. (Tenn.) 83; Norwood *v.* Cobb, 20 Tex. 588. See *supra*, XIII, C, 5; XIV, A, 4, c.

2. **Replevin.**— Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619; Lowry *v.* Hall, 2 Watts & S. (Pa.) 129, 38 Am. Dec. 495.

Judgments and orders in probate proceedings.— Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100 (discharge of executor and entry of judgment against him); Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394. *Compare* Thorman *v.* Frame, 176 U. S. 350, 20 S. Ct. 446, 44 L. ed. 500 [*affirming* 102 Wis. 653, 79 N. W. 39].

Decree in suit by wife for separate maintenance.— Harding *v.* Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. ed. 1066 [*reversing* 140 Cal. 690, 74 Pac. 284].

Judgment entered on an award.— Wernwag *v.* Pawling, 5 Gill & J. (Md.) 500, 25 Am. Dec. 317.

Habeas corpus proceedings.— Slack *v.* Perrine, 9 App. Cas. (D. C.) 128; Com. *v.* Ebert, 24 Pa. Co. Ct. 648. *Contra*, People *v.* Dewey, 23 Misc. (N. Y.) 267, 50 N. Y. Suppl. 1013.

Naturalization of an alien.— State *v.* McDonald, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878.

Establishing copies of lost papers.— Foster *v.* Glazener, 27 Ala. 391.

Judgment on recognizance.— Elsasser *v.* Haines, 52 N. J. L. 10, 18 Atl. 1095.

Order denying injunction.— New York, etc., Tel. Co. *v.* Metropolitan Tel., etc., Co., 81 Hun (N. Y.) 453, 31 N. Y. Suppl. 213.

Order appointing receiver in supplementary proceedings.— Orient Ins. Co. *v.* Rudolph, (N. J. Ch. 1905) 61 Atl. 26.

Consent decree.— Fletcher *v.* Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143. See also *supra*, XIII, C, 4; XIV, A, 4, b.

Criminal cases.— But the rule does not apply to a sentence in a criminal case. Wilson *v.* Wilson, Wright (Ohio) 128.

Proceedings prior to judgment.— Nor does the rule apply to the proceedings in a case prior to the rendition of the judgment. Thomas *v.* Thomas, 4 Leg. Op. (Pa.) 440.

3. Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Hunt *v.* Lyle, 8 Yerg. (Tenn.) 412 [with which *compare* Glasgow *v.* Lowther, Cooke (Tenn.) 464]; Patrick *v.* Gibbs, 17 Tex. 275; Nations *v.* Johnson, 24 How. (U. S.) 195, 16 L. ed. 628.

4. **Parties concluded by judgments generally** see *supra*, XIV, B.

Principal and surety.— Thomas *v.* Beckman, 1 B. Mon. (Ky.) 29; Bacon *v.* Dahlgreen, 7 La. Ann. 599; Jones *v.* Jones, 8 Humphr. (Tenn.) 705. And see, generally, *supra*, XIV, B, 8.

Assignor and assignee.— Dobson *v.* Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Muller *v.* Ferry, 4 Silv. Sup. (N. Y.) 480, 7 N. Y. Suppl. 472; Woodward *v.* Moore, 13 Ohio St. 136. And see, generally, *supra*, XIV, B, 5, h.

Vendor and vendee.— Lampton's Succession, 35 La. Ann. 418; Baltimore Steam Packet Co. *v.* Garrison, 6 Daly (N. Y.) 246. And see, generally, *supra*, XIV, B, 5, f, (III), (A), (D).

Parties to negotiable paper.— Leslie *v.* Bonte, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62 [*affirming* 30 Ill. App. 288]; Sweet *v.* Brackley, 53 Me. 346. And see, generally, *supra*, XIV, B, 5, p.

Principal and agent.— Paul *v.* Rogers, 5 T. B. Mon. (Ky.) 164. And see, generally, *supra*, XIV, B, 5, m.

Joint contractors.— Washburn *v.* Pond, 2 Allen (Mass.) 474.

Partners.— Bennett *v.* Cadwell, 70 Pa. St. 253.

5. Expressman's Mut. Ben. Assoc. *v.* Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470; Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. St. 264. *Compare* Pickett *v.* Bates, 3 La. Ann. 627, holding that a judgment against a debtor in another state is *prima facie* evidence of the debt in a revocatory action in Louisiana, against a third person, who must rebut it.

6. Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608; Wells *v.* Compton, 3 Rob. (La.) 171.

which resulted in the judgment in another state does not estop him from denying its validity in the state of the forum.[7]

e. Matters Concluded.[8] A judgment rendered in another state by a court having jurisdiction is conclusive of all points or questions which were actually in issue and decided in that suit,[9] and of all facts necessarily implied in, or to be inferred from, the judgment, in the sense that the judgment could not have been rendered without the finding or determination of such facts;[10] but it is not conclusive as to matters arising incidentally or which were not within the scope of the issues or not actually tried and adjudicated.[11]

3. Enforcement in Another State — a. Foreign Judgment Not Executory. A judgment recovered in one state is not executory in any other state in the sense that final process for its enforcement could issue on merely filing or docketing the judgment, as in the case of a domestic judgment.[12] The constitutional provision for giving "full faith and credit" to such judgments relates only to their effect as

7. Middlesex Bank *v.* Butman, 29 Me. 19.

8. See *supra*, XIII, D, E; XIV, C, D.

9. Atlanta Hill Gold Min., etc., Co. *v.* Andrews, 120 N. Y. 58, 23 N. E. 987; Taylor *v.* Bryden, 8 Johns. (N. Y.) 173; Peak *v.* Ligon, 10 Yerg. (Tenn.) 469; Carpenter *v.* Strange, 141 U. S. 87, 11 S. Ct. 960, 35 L. ed. 640.

A decree in favor of the wife in a suit for her separate maintenance under Ill. Laws (1877), p. 115, authorizing such relief where the wife is living separate and apart from her husband without her fault, is conclusive upon the husband in the courts of California on the issue whether the same separation constitutes wilful desertion on her part. Harding *v.* Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. ed. 1066 [*reversing* 140 Cal. 690, 74 Pac. 284].

Supplementary proceedings.—Where, in supplementary proceedings in the state of New York, the court had jurisdiction over the debt which was recoverable in that state by the judgment debtor, and notice of the proceedings was actually given to an agent in that state of the corporation indebted to the judgment debtor, which person was on general principles a proper agent for that purpose, it was held that the decision of the New York court on the question that the agent actually served was the officer designated within the New York statutes could not be collaterally attacked elsewhere. Orient Ins. Co. *v.* Rudolph, (N. J. Ch. 1905) 61 Atl. 26.

10. *Alabama.*— Lehman *v.* Glenn, 87 Ala. 618, 6 So. 44.

Connecticut.— Freeman's Appeal, 71 Conn. 708, 43 Atl. 185.

Indiana.— Lieb *v.* Lichtenstein, 121 Ind. 483, 23 N. E. 284; Union Sav. Bank, etc., Co. *v.* Indianapolis Lounge Co., 20 Ind. App. 325, 47 N. E. 846.

Iowa.— Cook *v.* Steuben County Bank, 1 Greene 447.

Missouri.— Davidson *v.* Peck, 4 Mo. 438.

New York.— English *v.* McIntyre, 29 N. Y. App. Div. 439, 51 N. Y. Suppl. 697; Phillips *v.* Godfrey, 7 Bosw. 150.

Virginia.— Buford *v.* Buford, 4 Munf. 241, 6 Am. Dec. 511.

See 30 Cent. Dig. tit. "Judgment," § 1500.

11. *Georgia.*—Augusta Nat. Bank *v.* Southern Porcelain Mfg. Co., 59 Ga. 157.

Louisiana.— Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175.

Massachusetts.— Dooley *v.* Potter, 140 Mass. 49, 2 N. E. 935.

Mississippi.— Edge *v.* Keith, 13 Sm. & M. 295.

New York.— Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; Greene *v.* Niagara F. Ins. Co., 6 Hun 128.

Texas.— See St. Louis Expanded Metal Fireproofing Co. *v.* Beilharz, (Civ. App. 1905) 88 S. W. 512.

See 30 Cent. Dig. tit. "Judgment," § 1500.

The appointment of an administrator in a state where the decedent died, and where there are immovable property and effects of the estate, does not constitute an adjudication that the decedent was domiciled there at the time of his death, where the court did not make, and the letters did not recite, any finding as to his domicile. Thormann *v.* Frame, 176 U. S. 350, 20 S. Ct. 446, 44 L. ed. 500 [*affirming* 102 Wis. 653, 79 N. W. 39].

Property in different states.— Where an assignee is appointed for an insolvent corporation, and an ancillary receiver is appointed in another state, a decision of the courts of the latter state is binding on the courts of the former only in so far as it relates to assets of the corporation situated within the foreign state, although the assignee appeared in such proceedings. Bank Com'rs *v.* Granite State Provident Assoc., 70 N. H. 557, 49 Atl. 124.

12. *District of Columbia.*— Waddill *v.* Cabell, 21 D. C. 597.

Florida.— Carter *v.* Bennett. 6 Fla. 214.

Georgia.— Joice *v.* Scales, 18 Ga. 725.

Illinois.— Leathe *v.* Thomas, 109 Ill. App. 434; Dunham *v.* Dunham, 57 Ill. App. 475.

Louisiana.— Brigot *v.* Brigot, 49 La. Ann. 1428, 22 So. 641; Turley *v.* Dreyfus, 35 La. Ann. 510; Lucas's Succession, 11 La. Ann. 296. Statutory provisions in this state for rendering a foreign judgment executory without suing upon it were repealed by an act passed in 1846. Turley *v.* Dreyfus, *supra*.

Maine.— Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415.

evidence or as a bar to further litigation,[13] and in order to proceed for the collection of a judgment recovered in another state, the creditor must first sue upon it in the state where he wishes to enforce it and recover a judgment upon it.[14]

b. Restraining Enforcement. A court of equity has authority to enjoin an action at law or other proceedings for the enforcement of a judgment recovered in another state for such causes as would justify similar interference against a domestic judgment,[15] including fraud in its procurement;[16] but not for a want of jurisdiction in the court rendering the judgment, as that would be a good plea in defense to the action on the judgment.[17]

4. Actions on Sister State Judgments — a. Cause of Action in General — (i) *Right to Sue.* A judgment recovered in any state may be sued on in any other state,[18] without first obtaining leave of court to sue, although that is made

Maryland.— Zimmerman *v.* Helser, 32 Md. 274.

Massachusetts.— Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389, 25 L. R. A. 806; Cunningham *v.* Butler, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657; Arnold *v.* Roraback, 8 Allen 429; Stevens *v.* Gaylord, 11 Mass. 256.

Missouri.— Barney *v.* White, 46 Mo. 137.

Nebraska.— Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478.

New Jersey.— Bennett *v.* Bennett, (1901) 49 Atl. 501; Elizabethtown Sav. Inst. *v.* Gerber, 34 N. J. Eq. 130; Chew *v.* Brumagim, 21 N. J. Eq. 520.

North Carolina.— McLure *v.* Benceni, 37 N. C. 513, 40 Am. Dec. 437.

Pennsylvania.— Wilmer *v.* Lewis, 24 Pa. Co. Ct. 613.

Texas.— Jones *v.* Boulware, 39 Tex. 367.

Vermont.— Dimick *v.* Brooks, 21 Vt. 569.

United States.— Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18, 1 S. Ct. 614, 27 L. ed. 636; Frye-Bruhn Co. *v.* Meyer, 121 Fed. 533, 58 C. C. A. 529; Walser *v.* Seligman, 13 Fed. 415, 21 Blatchf. 130; Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522.

See 30 Cent. Dig. tit. "Judgment," § 501.

In Tennessee it is provided by statute that property of a foreign judgment debtor within the state may be made subject to the satisfaction of a judgment recovered against him in such foreign state, when the creditor has exhausted his legal remedies there. Milliken & V. Code Tenn. § 5040; Commercial Nat. Bank *v.* Motherwell Iron, etc., Co., 95 Tenn. 172, 31 S. W. 1002, 29 L. R. A. 164.

Creditor's bill.— A judgment recovered in one state cannot be the foundation for a creditor's bill in another state, when such bill can be maintained only by a judgment creditor. Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522. But *compare* Watkins *v.* Wortman, 19 W. Va. 78. See Creditors' Suits, 12 Cyc. 15; Fraudulent Conveyances, 20 Cyc. 689.

13. Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18, 1 S. Ct. 614, 27 L. ed. 636; Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522.

14. *Florida.*— Carter *v.* Bennett, 6 Fla. 214.

Louisiana.— Turley *v.* Dreyfus, 35 La. Ann. 510.

Maine.— Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415.

Nebraska.— Weaver *v.* Cressman, 21 Nebr. 675, 33 N. W. 478.

United States.— Buchanan County First Nat. Bank *v.* Duel County, 74 Fed. 373; Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522.

Want of jurisdiction.— A judgment rendered against a non-resident without any jurisdiction over his person cannot be enforced in the state of his residence. Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 66 Md. 511, 8 Atl. 265.

15. Restraining enforcement of judgments generally see *supra*, X.

16. *Connecticut.*— Stanton *v.* Embry, 46 Conn. 65; Pearce *v.* Olney, 20 Conn. 544.

Illinois.— Cooper *v.* Tyler, 46 Ill. 462, 95 Am. Dec. 442.

Missouri.— Payne *v.* O'Shea, 84 Mo. 129; Ward *v.* Quinlivin, 57 Mo. 425.

Nebraska.— Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

New Jersey.— Davis *v.* Headley, 22 N. J. Eq. 115.

New York.— Gray *v.* Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720; Barry *v.* Mutual L. Ins. Co., 49 How. Pr. 504. *Compare* Bicknell *v.* Field, 8 Paige 440.

Tennessee.— Winchester *v.* Jackson, 3 Hayw. 305; Wilson *v.* Robertson, 1 Overt. 266. See Winchester *v.* Evans, Cooke 420.

Texas.— Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

West Virginia.— Black *v.* Smith, 13 W. Va. 780.

See 30 Cent. Dig. tit. "Judgment," § 1503.

Contra.— Mooney *v.* Hinds, 160 Mass. 469, 36 N. E. 484. And see Harrison *v.* Jackson, Ky. Dec. 121.

17. Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Cincinnati, etc., R. Co. *v.* Emery, 9 Ohio Dec. (Reprint) 756, 17 Cinc. L. Bul. 154.

18. See the cases cited in the notes following.

In Texas, previous to the annexation to

necessary before suing on a domestic judgment,[19] and although plaintiff may have an available remedy in the state where the judgment was rendered.[20] The action may be maintained in his own behalf by the judgment creditor,[21] by an assignee of the judgment,[22] or by a trustee in insolvency authorized and directed by the foreign court to collect the judgment.[23] The suit should be brought against defendant in the judgment,[24] or, if he is dead, against his personal representative;[25] and in case of joint defendants, the action will lie against one alone, if the judgment is joint and several.[26]

(II) *FORM OF ACTION.* Assumpsit is not a proper form of action on a judgment recovered in another state; the declaration must be in debt, counting on the judgment as a record.[27] And in the absence of any peculiar grounds of

the United States, and subsequent to the act of the congress of the republic of Texas of 1841, an action could not be maintained on a judgment from a foreign state. Harper *v.* Nichol, 13 Tex. 151; Wilson *v.* Tunstall, 6 Tex. 221; Lambeth *v.* Turner, 1 Tex. 364.

Action to revive foreign judgment.— It has been held that where a judgment may by statute be revived by action in the state in which it was rendered, such an action can be brought in another state, if jurisdiction of the person of defendant is there obtained. Smith *v.* Kander, 58 Mo. App. 61.

In New York a statute prohibits the maintenance of an action by one foreign corporation against another, except where the cause of action arose within the state. Code Civ. Proc. § 1780. And this is construed to preclude a suit on a foreign judgment by a foreign corporation against another foreign corporation; but it is held that this does not make the statute unconstitutional. Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 24 S. Ct. 92, 48 L. ed. 225 [*affirming* 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608]. See FOREIGN CORPORATIONS, 19 Cyc. 1341.

What law governs.— An action on a foreign judgment is governed by the law of the state in which the suit is brought. Chicago Title, etc., Co. *v.* Smith, 185 Mass. 363, 70 N. E. 426, 102 Am. St. Rep. 350.

Foundation of action.— The action should be directly on the foreign judgment, and not on a parol acknowledgment of it. Dougherty *v.* Crumbaugh, 17 La. 452.

19. Goodyear Dental Vulcanite Co. *v.* Frisselle, 22 Hun (N. Y.) 174; Morton *v.* Palmer, 14 N. Y. Suppl. 912; Weber *v.* Yancy, 7 Wash. 84, 34 Pac. 473; Union Trust Co. *v.* Rochester, etc., R. Co., 29 Fed. 609. But see Hinman *v.* Hare, 13 Wkly. Notes Cas. (Pa.) 251.

20. Abbot *v.* Plainfield, 1 Root (Conn.) 405. In Yantis *v.* Burdett, 3 Mo. 457, it was said that a plea in an action on a judgment of a sister state which alleges that plaintiff is endeavoring to raise money by execution on the same judgment in the state of its rendition presents a good defense. But this decision is directly opposed by a later ruling in the same state. See Field *v.* Sanderson, 34 Mo. 542, 86 Am. Dec. 124.

21. An action may be brought by one in his own name on a judgment recovered by him in a foreign state as administrator. Nichols *v.* Smith, 7 Hun (N. Y.) 580.

Action on judgment recovered by administrator see *supra*, XIII, A, 4.

22. *California.*— Low *v.* Burrows, 12 Cal. 181.

Indiana.—Anthony *v.* Masters, 28 Ind. App. 239, 62 N. E. 505.

Kentucky.— Cobb *v.* Thompson, 1 A. K. Marsh. 507.

Mississippi.— Smedes *v.* Ilsley, 68 Miss. 590, 10 So. 75.

Missouri.— Baker *v.* Stonebraker, 34 Mo. 172.

New York.— Greene *v.* Republic F. Ins. Co., 84 N. Y. 572.

United States.— Buchanan County First Nat. Bank *v.* Duel County, 74 Fed. 373.

23. Poll *v.* Hicks, 67 Kan. 191, 72 Pac. 847.

24. On a judgment recovered in one state against a person in his representative capacity as administrator, there can be no recovery in another state against him in his personal capacity. Coates *v.* Mackey, 56 Md. 416.

25. Cherry *v.* Speight, 28 Tex. 503. But a judgment recovered against an ancillary administrator in one state gives no right of action against the principal administrator or the heirs in another state. Jones *v.* Jones, 15 Tex. 463, 65 Am. Dec. 174.

26. McIntyre *v.* Moore, 105 Ga. 112, 31 S. E. 144; Blake *v.* Burley, 9 Iowa 592; McElroy *v.* Ford, 81 Mo. App. 500.

Separate judgments against defendants.— Where it appears that an action was brought in one state against two defendants jointly, and a judgment was rendered against each of the defendants at different times but for the same amount and for the breach of a joint promise, an action may be maintained against the two defendants in another state, on the record from the first state showing the separate judgments. Oyster *v.* Peavy, 40 N. J. L. 401.

27. *Alabama.*— Carter *v.* Crews, 2 Port. 81.

Arkansas.— Morehead *v.* Grisham, 13 Ark. 431.

Connecticut.— Sterne *v.* Spalding, Kirby 177.

Illinois.— Belford *v.* Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593 [*affirming* 55 Ill. App. 307].

equity jurisdiction, a bill in equity is not a proper proceeding for the enforcement of a judgment from another state.[28]

(III) *Requisites of Judgment as Cause of Action*—(A) *In General.* In order that an action may be maintained in one state upon a judgment recovered in another state, it is necessary that the judgment should be a valid[29] and final adjudication,[30] remaining in full force and virtue in the state of its rendition,[31] and capable of being there enforced by final process,[32] and that it should be of a

Indiana.— Cole *v.* Driskell, 1 Blackf. 16.
Maine.— McKim *v.* Odom, 12 Me. 94.
Michigan.— Gooding *v.* Hingston, 20 Mich. 439.
Missouri.— Smith *v.* Kander, 58 Mo. App. 61.
New York.— Andrews *v.* Montgomery, 19 Johns. 162, 10 Am. Dec. 213.
Ohio.— Headley *v.* Roby, 6 Ohio 521. *Contra,* Hazzard *v.* Nottingham, Tapp. 114.
South Carolina.— McIntire *v.* Caruth, 1 Treadw. 457.
Vermont.— Boston India Rubber Factory *v.* Hoit, 14 Vt. 92.
United States.— Tompkins *v.* Craig, 102 Fed. 69.
See 30 Cent. Dig. tit. "Judgment," § 1757.
Contra.— Garland *v.* Tucker, 1 Bibb (Ky.) 361.

28. Haynes *v.* Colvin, 19 Ohio 392.

29. The validity of the judgment, within the meaning of this rule, must be tested by the laws of the state where rendered. Although it enforces provisions of a will which would be contrary to the policy of the state where it is sued on, still it will be upheld. Carruthers *v.* Corbin, 38 Ga. 75. But see Fletcher *v.* Ferrell, 9 Dana (Ky.) 372, 35 Am. Dec. 143, as to the propriety of refusing to enforce a foreign judgment founded on a champertous agreement.

Summary judgment.— Where, under the laws of a given state, a summary judgment without notice is obtained by the sureties on a bond against their principal, it can have no extraterritorial validity, so as to authorize a recovery in another state. Sevier *v.* Roddie, 51 Mo. 580.

30. Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Burnside *v.* Burnside, 2 Dauph. Co. Rep. (Pa.) 261.

A judgment is not interlocutory merely because it provides that the costs shall thereafter be taxed by the clerk. Clark *v.* Barber, 21 App. Cas. (D. C.) 274.

A judgment for alimony for a fixed sum in gross is a final judgment which may be sued on in another state, although it is in the power of the court rendering it, under the local statute, to vary the allowance from time to time. Trowbridge *v.* Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

31. A judgment reversed on appeal cannot be sued on in another state. See Cone *v.* Hooper, 18 Minn. 531. But it is no sufficient defense that the judgment is erroneous and that it seems probable that it may be reversed on appeal. Lonergan *v.* Lonergan, 55 Nebr. 641, 76 N. W. 16.

A judgment vacated or set aside cannot form the foundation of a suit in another state. Lawrence *v.* Jarvis, 32 Ill. 304; Kinsey *v.* Ford, 38 Barb. (N. Y.) 195; Cougill *v.* Farmers', etc., Ins. Co., 25 Oreg. 360, 35 Pac. 975; McCadden *v.* Slauson, 96 Tenn. 586, 36 S. W. 378.

But the mere pendency of proceedings to set the judgment aside in the state where it was rendered forms no obstacle to a suit on it in another state. Tompkins *v.* Cooper, 97 Ga. 631, 25 S. E. 247.

Pendency of appeal see *infra,* XXII, B, 4, b, (IV).

Payment of a judgment by a third person ultimately liable for the debt on which it is founded does not necessarily discharge it, or bar an action on it in another state. Sydam *v.* Cannon, 1 Houst. (Del.) 431. But if, under the laws of the state where rendered, it is conclusively presumed to have been paid, it cannot be sued on in another state. Baker *v.* Stonebraker, 36 Mo. 338. And see Dimick *v.* Brooks, 21 Vt. 569.

A revived judgment does not constitute a cause of action in another state; suit should be brought on the original judgment. Evans *v.* Reed, 2 Mich. N. P. 212.

32. Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071; Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

Dormant judgments cannot be sued on in the courts of another state. Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071; St. Louis Type Foundry Co. *v.* Jackson, 128 Mo. 119, 30 S. W. 521. *Compare* David *v.* Porter, 51 Iowa 254, 1 N. W. 528. And see Beer *v.* Simpson, 65 Hun (N. Y.) 17, 19 N. Y. Suppl. 578.

Stay of execution.— A judgment on which execution is stayed in the state of its rendition cannot be sued on in another state. Tipton *v.* Mayfield, 10 La. 189; Nazro *v.* McCalmont Oil Co., 36 Hun (N. Y.) 296. But a statutory provision in the state where the judgment was rendered, to the effect that, where judgment is recovered against a principal and surety, the creditor cannot have execution against the surety until an affidavit is filed that the principal has no available property, is a remedial statute without extraterritorial effect, and will not stand in the way of a suit on the judgment in another state. Briggs *v.* Campbell, 19 La. 524.

Judgment enjoined.— A judgment creditor cannot sue on the judgment in another state when a court of the state where it was rendered has granted an injunction forbidding him to take further proceedings on the judgment. Palmer *v.* Palmer, 2 Miles (Pa.) 373;

nature to create a definite and absolute indebtedness against the judgment defendant,[33] and must have been rendered by a court having jurisdiction of the parties and the subject-matter;[34] and when a judgment recovered in a lower court of another state has been appealed and passed upon by the appellate court, the action should be brought upon the record of the latter court, that being the final judgment in the case.[35]

(B) *Judgments by Confession.* A judgment rendered by confession of the defendant, whether in open court or on a warrant of attorney, will support an action in another state, if it is valid by the laws of the state where entered, and even though no such form of judgment is recognized or permitted by the laws of the state where it is put in suit.[36]

(C) *Decrees in Equity.* An action of debt will lie in the courts of one state on a decree in equity rendered in another, if it is for the payment of money only.[37]

Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

33. Dimick *v.* Brooks, 21 Vt. 569. And see Seaborn *v.* Henry, 30 Ark. 469; Campbell *v.* Campbell, 53 N. Y. Super. Ct. 299.

A decree for maintenance to a wife, on the legal separation of the parties, will authorize a recovery in another state for the amount due at the time. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

A judgment in the alternative, as in an action of replevin, will not support an action in another state, since no such alternative judgment could be rendered in an action of debt, in which form the judgment must be sued on. Thorner *v.* Batory, 41 Md. 593, 20 Am. Rep. 74.

If a deficiency decree for the unpaid balance of the price of land, rendered after sale on foreclosure proceedings, in favor of the vendor against the vendee, is valid under the laws of the state where rendered, an action may be maintained on it in another state. Tompkins *v.* Cooper, 97 Ga. 631, 25 S. E. 247. But *compare* Smith *v.* Moore, 53 Mo. App. 525.

34. *Alabama.*— Bigger *v.* Hutchings, 2 Stew. 445.

Arkansas.— Barkman *v.* Hopkins, 11 Ark. 157.

Connecticut.— Kibbe *v.* Kibbe, Kirby 119.

Delaware.— Mitchell *v.* Garrett, 5 Houst. 34.

Illinois.— Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689; Robb *v.* Anderson, 43 Ill. App. 575.

Maine.— McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666.

Maryland.— Weaver *v.* Boggs, 38 Md. 255.

Massachusetts.— Watson *v.* New England Bank, 4 Metc. 343.

Mississippi.— Wright *v.* Weisinger, 5 Sm. & M. 210.

Missouri.— Overstreet *v.* Shannon, 1 Mo. 529.

Texas.— Chunn *v.* Gray, 51 Tex. 112.

Vermont.— Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340.

Virginia.— Johnson *v.* Anderson, 76 Va. 766; Wilson *v.* Mt. Pleasant Bank, 6 Leigh 570.

See also *infra*, XXII, B, 4, b, (III), 5.

Statute conferring jurisdiction.— In New Jersey it is said that, in a suit founded on a judgment rendered in another state, if it shall appear that the law of the foreign state under which its court assumed jurisdiction is unreasonable, contrary to natural justice, and contrary to the principles of international law, comity will not compel the courts of New Jersey to treat such assumed jurisdiction as real. Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222.

35. McLaren *v.* Kehler, 23 La. Ann. 80, 8 Am. Rep. 592. See Griggs *v.* Becker, 87 Wis. 313, 58 N. W. 396. *Compare* Cougill *v.* Farmers', etc., Ins. Co., 25 Oreg. 360, 35 Pac. 975.

36. *Indiana.*— Kingman *v.* Paulson, 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611.

Kansas.— Ritter *v.* Hoffman, 35 Kan. 215, 10 Pac. 576.

Massachusetts.— Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840; Richards *v.* Barlow, 140 Mass. 218, 6 N. E. 68.

Nebraska.— Snyder *v.* Critchfield, 44 Nebr. 66, 62 N. W. 306; Nicholas *v.* Farwell, 24 Nebr. 180, 38 N. W. 820.

New York.— Teel *v.* Yost, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; Trebilcox *v.* McAlpine, 62 Hun 317, 17 N. Y. Suppl. 221.

Ohio.— Sipes *v.* Whitney, 30 Ohio St. 69.

West Virginia.— Coleman *v.* Waters, 13 W. Va. 278.

Canada.— Ritter *v.* Fairfield, 32 Ont. 350. See 30 Cent. Dig. tit. "Judgment," § 1448.

But *compare* Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 137 U. S. 287, 11 S. Ct. 92, 34 L. ed. 670. And see Giddings *v.* Whittlesey, 2 Mich. N. P. 240, holding that a defendant sued in Michigan on a judgment rendered in Ohio on a cognovit may prove any defense which in the latter state would be a good ground for setting aside the judgment, or for an order to deliver up the cognovit to be canceled.

37. *Alabama.*—Green *v.* Foley, 2 Stew. & P. 441.

Connecticut.— Drakesly *v.* Roots, 2 Root 138.

Illinois.— Warren *v.* McCarthy, 25 Ill. 95.

(D) *Judgments Under Penal or Police Statutes.* The federal constitution does not require a state to enforce the penal, criminal, or revenue laws, or the local police regulations, of another state; and a judgment founded on such laws or regulations is not ordinarily entitled to recognition or enforcement in another state.[38]

b. Defenses — (I) *In General.* In an action on a judgment recovered in another state, defendant may plead any matters absolutely impeaching the validity of the judgment,[39] or showing a payment, satisfaction, or release of it,[40]

Kentucky.— Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179.

Maine.—McKim *v.* Odom, 12 Me. 94.

Massachusetts.— Howard *v.* Howard, 15 Mass. 196.

Missouri.— Davis *v.* Cohn, 96 Mo. App. 587, 70 S. W. 727.

New York.— Dubois *v.* Dubois, 6 Cow. 494; Post *v.* Neafie, 3 Cai. 22.

Ohio.— Moore *v.* Adie, 18 Ohio 430.

Pennsylvania.— Evans *v.* Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

Rhode Island.— Wagner *v.* Wagner, 26 R. I. 27, 57 Atl. 1058, 65 L. R. A. 816.

England.— Sadler *v.* Robins, 1 Camph. 253.

See 30 Cent. Dig. tit. "Judgment," § 1758.

38. Arkansas *v.* Bowen, 20 D. C. 291; Sims *v.* Sims, 75 N. Y. 466; Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370, 32 L. ed. 239.

Statute imposing liability on officers of corporations.— Where a state statute provides that if any certificate or notice given by the officers of certain corporations shall be false in any material representation, all the officers who have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers, this is not a penal statute, in the sense of international law, so that a judgment recovered thereunder cannot be enforced in another state. Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123 [*reversing* 70 Md. 191, 16 Atl. 651, 14 Am. St. Rep. 344, 2 L. R. A. 779]. See CORPORATIONS, 10 Cyc. 854.

Qui tam actions.— A judgment recovered in one state in a *qui tam* action for a violation of the usury laws cannot be enforced in another. Bryant *v.* Ela, Smith (N. H.) 396. But *compare* Healy *v.* Root, 11 Pick. (Mass.) 389.

Bastardy laws are of this character of penal statutes, and cannot be enforced beyond the state; but a judgment recovered under a statute prescribing proceedings to enforce the support of bastard children is entitled to recognition and enforcement in another state. Indiana *v.* Helmer, 21 Iowa 370. And see Schuler *v.* Schuler, 209 Ill. 522, 71 N. E. 16.

Forfeited recognizance.— The objection that one state will not enforce the penal laws of another is not well taken where the action is upon a judgment rendered in such other state upon a forfeited recognizance taken for a violation of its penal laws. Spencer *v.* Brockway, 1 Ohio 259, 13 Am. Dec. 615. But *compare* Arkansas *v.* Bowen, 3 App. Cas. (D. C.) 537.

39. See Longueville *v.* May, 115 Iowa 709, 87 N. W. 432.

Lands out of the state.— A judgment in an administration suit in Virginia does not estop the same parties from pleading the Alabama statute of non-claim, in a suit to enforce satisfaction of the claim out of lands in Alabama. Jones *v.* Drewry, 72 Ala. 311.

Defects in the record.— In an action on a foreign judgment, questions in reference to alleged errors in the record of the judgment cannot be considered. Witbeck *v.* Marshall-Wells Hardware Co., 188 Ill. 154, 58 N. E. 929. On the same principle the insertion in a transcript of a foreign record of matters which do not properly belong there is no ground for rejecting the entire transcript; nor will it be rejected on the ground that a material part appears to have been fraudulently suppressed, where there is nothing in the record to show that the omitted part was attainable by the clerk. It will be presumed that the omitted papers had been lost or destroyed, rather than that they were fraudulently withheld. Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

Counter-claim for damages.— Where, in an action on a foreign judgment, nothing appears that would affect its validity in the state where rendered, defendant cannot claim damages for its rendition. Miller *v.* Lovell, (Tex. Civ. App. 1897) 40 S. W. 835.

40. Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365; Vaught *v.* Meador, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908; Buford *v.* Buford, 4 Munf. (Va.) 241, 6 Am. Dec. 511.

Garnishment of judgment.— Where defendant's indebtedness under the judgment has been attached or garnished in the state where the judgment was rendered, this will not prevent the rendition of a judgment on the judgment in another state; but all process for the enforcement of the judgment last rendered must be stayed until the determination of the garnishment proceedings. Magnolia Metal Co. *v.* Sterlingworth R. Supply Co., 6 North. Co. Rep. (Pa.) 358.

Payment of the original debt, before the rendition of the judgment, in the foreign state, cannot be pleaded, the judgment being conclusive against this defense. Drake *v.* Granger, 22 Fla. 348; Snyder *v.* Critchfield, 44 Nebr. 66, 62 N. W. 306; Lance *v.* Dugan, 10 Pa. Cas. 276, 13 Atl. 942. See *supra*, XIII, E, 2, f. But see Clay *v.* Clay, 13 Tex. 195, holding that in a suit on a judgment of

or, where equitable defenses are allowed, any matters which would justify the grant of an injunction to restrain the enforcement of the judgment against him;[41] but he cannot set up any defenses to the original cause of action which might and should have been interposed in the suit in which the judgment was rendered.[42]

(II) *Defense Cannot Be Taken on the Merits.* The judgment of a competent court in another state being final and conclusive on the merits,[43] no defense can be heard, in an action upon it, which goes to the merits of the original controversy, and no defense can be set up which might, with proper diligence, have been interposed in the original action.[44]

a sister state defendant can show payments made during the pendency of the suit in which the judgment was recovered.

Discharge in bankruptcy.— Where defendant fails to plead a discharge in bankruptcy which would have constituted a good defense, and judgment is rendered against him, he is concluded from pleading the discharge in an action on the judgment in another state. Dimock *v.* Revere Copper Co., 117 U. S. 559, 6 S. Ct. 855, 29 L. ed. 994. So if he pleaded the bankruptcy proceedings in the original action but afterward withdrew the plea and confessed judgment. Anderson *v.* Clark, 70 Ga. 362. But several cases hold that if, by the law of the state where the judgment was rendered, a discharge in bankruptcy is a good defense to a judgment recovered after such discharge was obtained, but founded on a claim which existed before the commencement of the bankruptcy proceedings, the discharge will be a good defense to an action on the judgment in another state. Haggerty *v.* Amory, 7 Allen (Mass.) 458. And see Anderson *v.* Anderson, 65 Ga. 518, 38 Am. Rep. 797; Bradford *v.* Rice, 102 Mass. 472, 3 Am. Rep. 483.

In a suit on a revived judgment, defendant may show in defense anything, except limitations, going to discharge him from the original judgment, occurring since its rendition. Kratz *v.* Preston, 52 Mo. App. 251.

41. Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728. But *compare* Montejo *v.* Owens, 56 How. Pr. (N. Y.) 202.

42. See *supra*, XIII, E.

Personal disability.— That defendant was an infant, or a married woman, or under other personal disability, at the time when the judgment was rendered, is not a defense pleadable in an action on the judgment in another state, as it should have been urged in defense to the original action. Sharman *v.* Morton, 31 Ga. 34; Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608; Milne *v.* Van Buskirk, 9 Iowa 558; Gilfry *v.* Saarbach, 12 Phila. (Pa.) 476.

Judgment in favor of foreign corporation not entitled to do business.— But it has been held that in an action on a judgment obtained by a foreign corporation in another state, defendant may show, in bar of recovery, and notwithstanding the provisions of the federal constitution and act of congress declaring that full faith and credit shall be given in each state to the records and judicial proceedings of every other state, that the cause of action merged in the judgment arose from a transaction entered into by the corporation in the state of the forum, without having had a permit to do business in that state. St. Louis Expanded Metal Fireproofing Co. *v.* Beilharz, (Tex. Civ. App. 1905) 88 S. W. 512.

Statute of limitations.— The statute, although available as a defense against the judgment (see *infra*, XXII, B, 4, d), is not so against the original cause of action. That is, in an action on a judgment rendered in another state, it is not a good defense that the cause of action was already barred by limitations at the time it was put in suit, as that is a defense which must be pleaded in the original suit; nor is it a defense that the cause of action would have been barred by the statute of limitations of the state where the judgment is sued on, for prescription against the original cause of action would be governed by the limitation law of the state where the cause of action arose. Carter *v.* Adamson, 21 Ark. 287; Tomlin *v.* Woods, 125 Iowa 367, 101 N. W. 135; Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506; Roberts *v.* Hinkle, 43 S. W. 233, 19 Ky. L. Rep. 1283; Reed *v.* Chilson, 16 N. Y. Suppl. 744 [*affirmed* in 142 N. Y. 152, 36 N. E. 884].

43. See *supra*, XXII, B, 2, b.

44. *California.*— Weir *v.* Vail, 65 Cal. 466, 4 Pac. 422.

Delaware.— Sydam *v.* Cannon, 1 Houst. 431.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Georgia.— McAllister *v.* Singer Mfg. Co., 64 Ga. 622; Powell *v.* Davis, 60 Ga. 70; Sharman *v.* Morton, 31 Ga. 34.

Kansas.— Snow *v.* Mitchell, 37 Kan. 636, 639, 15 Pac. 224, 16 Pac. 737.

Louisiana.— Walworth *v.* Routh, 14 La. Ann. 205; Davis *v.* Dugas, 11 La. Ann. 118.

Nebraska.— Snyder *v.* Critchfield, 44 Nebr. 66, 62 N. W. 306; Packer *v.* Thompson, 25 Nebr. 688, 41 N. W. 650.

New Hampshire.— Judkins *v.* Union Mut. F. Ins. Co., 37 N. H. 470.

New Jersey.— Brooklyn First Nat. Bank *v.* Wallis, 59 N. J. L. 46, 34 Atl. 983.

New York.— Pringle *v.* Woolworth, 90 N. Y. 502.

North Carolina.— Edwards *v.* Jones, 113 N. C. 453, 18 S. E. 500.

Ohio.— Goodrich *v.* Jenkins, 6 Ohio 43.

Texas.— Norwood *v.* Cobb, 20 Tex. 588.

(III) *WANT OF JURISDICTION.* It is a good defense to an action on a judgment recovered in another state that the court rendering the judgment had no jurisdiction of the person of the defendant or of the subject-matter of the action.[45]

(IV) *PENDENCY OF APPEAL.* If, by the law of the state in which a judgment is obtained, an appeal does not operate as a supersedeas or stay proceedings on the judgment in that state, the pendency of such appeal is no bar to an action on the judgment in another state;[46] and in order to ascertain the effect of an appeal in the state where the judgment was rendered, the court in which the action is brought will examine the laws and practice of that state.[47] But it will be proper to withhold final judgment, or to stay execution on the judgment, until the appeal shall have been determined, defendant giving bonds to satisfy the judgment in case he loses the appeal.[48]

c. Jurisdiction. The courts of record, possessing general original jurisdiction in civil matters, may take cognizance of an action on a judgment recovered in another state;[49] but such an action does not lie before a justice of the peace or other inferior court.[50]

d. Limitation of Actions — (I) *IN GENERAL.* The statute of limitations of the state of the forum may be pleaded in defense to an action on a judgment of a sister state, if the statute is so framed as to include judgments;[51] and the same rule

Vermont.— Bellows *v.* Ingham, 2 Vt. 575.
Virginia.— Draper *v.* Gorman, 8 Leigh 628.
See 30 Cent. Dig. tit. "Judgment," § 1457.

45. Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049; Dodd *v.* Groll, 19 Ohio Cir. Ct. 718, 8 Ohio Cir. Dec. 334. And see, generally, *infra*, XXII, B, 5.

46. *California.*— Taylor *v.* Shew, 39 Cal. 536, 2 Am. Rep. 478.
Connecticut.— Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683.
Illinois.— Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156.
Louisiana.— Gaines' Succession, 45 La. Ann. 1237.
Massachusetts.— Clark *v.* Child, 136 Mass. 344; Faher *v.* Hovey, 117 Mass. 107, 19 Am. Rep. 398.
Nebraska.— Lonergan *v.* Lonergan, 55 Nebr. 641, 76 N. W. 16.
Nevada.— Rogers *v.* Hatch, 8 Nev. 35.
Pennsylvania.— Falkner *v.* Franklin Ins. Co., 1 Phila. 183. Even where the pending appeal in the foreign state does act as a supersedeas, it does not operate on the judgment itself, which remains unimpaired until actually reversed, and therefore is no obstacle to a suit on the judgment. Magnolia Metal Co. *v.* Sterlingworth R. Supply Co., 6 North. Co. Rep. 358.
Rhode Island.— Paine *v.* Schenectady Ins. Co., 11 R. I. 411.
Virginia.— Piedmont, etc., L. Ins. Co. *v.* Ray, 75 Va. 821.
United States.— Woodbridge, etc., Engineering Co. *v.* Ritter, 70 Fed. 677; Union Trust Co. *v.* Rochester, etc., R. Co., 29 Fed. 609.
See APPEAL AND ERROR, 2 Cyc. 974.

47. Paine *v.* Schenectady Ins. Co., 11 R. I. 411; Cherry *v.* Speight, 28 Tex. 503.

48. Magnolia Metal Co. *v.* Sterlingworth R. Supply Co., 6 North. Co. Rep. (Pa.) 358; Paine *v.* Schenectady Ins. Co., 11 R. I. 411; Piedmont, etc., Life Ins. Co. *v.* Ray, 75 Va. 821.

49. McDugle *v.* Filmer, 82 Miss. 200, 34 So. 152.
A federal circuit court has jurisdiction of an action of debt on a judgment obtained in a state court by a citizen of another state. Barr *v.* Simpson, 2 Fed. Cas. No. 1,038, Baldw. 543.
Residence of parties.— A judgment of one state may be sued on in another state, although neither of the parties is a resident of the latter state, if jurisdiction of the person can be obtained. Reed *v.* Chilson, 142 N. Y. 152, 36 N. E. 884.
Effect of appearance.—Where plaintiff sued three defendants in a New York court on a judgment rendered in Virginia in his favor against them, and one defendant voluntarily appeared and answered, and it appeared that the Virginia judgment was joint, and rendered on a contract constituting a joint liability, it was held that the court secured jurisdiction by such voluntary appearance of one defendant. Mahaney *v.* Penman, 1 Abb. Pr. (N. Y.) 34.

50. Baldwin *v.* Coyle, 7 Houst. (Del.) 327, 32 Atl. 15; Ellsworth *v.* Barstow, 7 Watts (Pa.) 314.

51. *Illinois.*— Robb *v.* Anderson, 43 Ill. App. 575.
Missouri.— Pierce *v.* Davidson, 58 Mo. App. 106.
New Jersey.— Summerside Bank *v.* Ramsey, 55 N. J. L. 383, 26 Atl. 837.
New York.— Bissell *v.* Hall, 11 Johns. 168; Hubbell *v.* Coundrey, 5 Johns. 132.
South Carolina.— Napier *v.* Gidiere, Speers Eq. 215, 40 Am. Dec. 613.
Texas.— Reid *v.* Boyd, 13 Tex. 241, 65 Am. Dec. 61.

applies to actions on judgments of the federal courts.[52] But which clause of the statute is to be applied to an action on a foreign judgment must be determined by the wording of the statute and the applicability of its terms to judgments.[53]

(II) *What Law Governs.* The statute of limitations to be applied is as a rule the statute of the state where suit is brought on the judgment not that of the state where the judgment was rendered;[54] and even where the judgment

United States.— McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. ed. 177.

See 30 Cent. Dig. tit. "Judgment," § 1764 *et seq.*

Contra.— See Latourette *v.* Cook, 3 Greene (Iowa) 593.

Revived judgment.— The statute of limitations may be pleaded against the judgment in an action thereon, notwithstanding the fact that it has been revived in the state where rendered in time to save the bar of the statute, if the revival was ordered in merely *ex parte* proceedings, without notice to defendant, and was therefore a nullity. Kay *v.* Walter, 28 Kan. 111.

52. See Barber *v.* International Co., 74 Conn. 652, 51 Atl. 857; Waterman *v.* Waterloo, 69 Wis. 260, 34 N. W. 137; Metcalf *v.* Watertown, 153 U. S. 671, 14 S. Ct. 947, 38 L. ed. 861.

53. *Alabama.*— A judgment of another state is not a "contract" within the meaning of the statute of limitations. Keith *v.* Estill, 9 Port. 669.

Arkansas.— Actions on foreign judgments are limited to five years. Brian *v.* Tims, 10 Ark. 597. *Compare* Moore *v.* Paxton, 17 Fed. Cas. No. 9,772*a*, Hempst. 51.

California.— Action on a judgment of another state must be brought within four years; the provision as to actions on instruments of writing "executed" out of the state, does not apply. Dore *v.* Thornburgh, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100. And see Patten *v.* Ray, 4 Cal. 287; Cavender *v.* Guild, 4 Cal. 250.

Georgia.— Five years' limitation. Bishop *v.* Sanford, 15 Ga. 1; Alahama Branch Bank *v.* Kirkpatrick, 5 Ga. 34.

Illinois.— An action on a foreign judgment is governed by Rev. St. c. 83, § 15, which bars in five years "all civil actions not otherwise provided for." Ambler *v.* Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; Bemis *v.* Stanley, 93 Ill. 230; Robb *v.* Anderson, 43 Ill. App. 575; Swan *v.* Burk, 36 Ill. App. 555.

Kentucky.— An action on a judgment in another state is not within the clause of the statute which relates to "actions of debt grounded upon any lending or contract without specialty." Dudley *v.* Lindsey, 9 B. Mon. 486, 50 Am. Dec. 522.

Louisiana.— Limitation of ten years, except where the judgment debtor comes into Louisiana after the statute of limitations of the state where the judgment was rendered has run against it. Newman *v.* Eldridge, 107 La. 315, 31 So. 688. And see Deal *v.* Patterson, 12 La. Ann. 728.

Maine.— Foreign judgment not within the limitation as to "lending or contract, without specialty." Jordan *v.* Robinson, 15 Me. 167.

Maryland.— Limitation of twelve years. Duvall *v.* Fearson, 18 Md. 502.

Massachusetts.— Rev. St. c. 120, § 1, relating to judgments of courts of record, does not include a judgment of a justice of the peace of another state, and an action thereon is barred in six years. Mowry *v.* Cheesman, 6 Gray 515.

Mississippi.— Limitation of three years. Boyd *v.* Barrenger, 23 Miss. 269.

Missouri.— Limitation of five years. Coomes *v.* Moore, 57 Mo. 338; Pierce *v.* Davidson, 58 Mo. App. 106; Manning *v.* Hogan, 26 Mo. 570, to the contrary, is obsolete.

Nebraska.— Limitation of five years. Marx *v.* Kilpatrick, 25 Nebr. 107, 41 N. W. 111.

New Hampshire.— In Mahurin *v.* Bickford, 8 N. H. 54, an action of debt on a judgment of a justice of the peace in another state was held not to be within the statute of limitations of New Hampshire.

New Jersey.— There appears to be no limitation against judgments from other states, except the presumption of payment arising after twenty years. Little *v.* McVey, (Sup. 1900) 47 Atl. 61; Gulick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711. But *compare* Summerside Bank *v.* Ramsey, 55 N. J. L. 383, 26 Atl. 837.

Ohio.— A judgment from another state is a "specialty" within the clause of the statute which bars actions on specialties after fifteen years. Fries *v.* Mack, 33 Ohio St. 52; Stockwell *v.* Coleman, 10 Ohio St. 33; Reynolds *v.* Drake, 9 Ohio Dec. (Reprint) 246, 9 Cinc. L. Bul. 284.

Oklahoma.— Limitation of one year. Stockham Bank *v.* Weins, 12 Okla. 502, 71 Pac. 1073.

Pennsylvania.— The applicable provision of the statute is that relating to actions on judgments, not that relating to "lending or contracts." Evans *v.* Cleary, 125 Pa. St. 204, 17 Atl. 440, 11 Am. St. Rep. 886; Richards *v.* Bickley, 13 Serg. & R. 395; Weiseberger *v.* Nevil, 11 Pa. Co. Ct. 40.

South Carolina.— Action on a judgment from another state is not governed by the statute limiting actions on simple contracts. Napier *v.* Gidiere, Speers Eq. 215, 40 Am. Dec. 613.

Texas.— Limitation of ten years. Spann *v.* Crummerford, 20 Tex. 216; Allison *v.* Nash, 16 Tex. 560; Reid *v.* Boyd, 13 Tex. 241, 65 Am. Dec. 61; Clay *v.* Clay, 13 Tex. 195.

United States.— Randolph *v.* King, 20 Fed. Cas. No. 11,560, 2 Bond 104.

See 30 Cent. Dig. tit. "Judgment," § 1764.

54. *Illinois.*— Leathe *v.* Thomas, 109 Ill. App. 434.

would be barred by limitations in the state where rendered, yet an action may be maintained upon it in the courts of another state, if the statute of the latter state, affording a longer time, has not yet run against it.[55] But this last rule is changed by law in several of the states which do not allow an action to be maintained upon a judgment which is already barred in the state where rendered;[56] and on the other hand, in one state, a judgment obtained in another state is not barred, if not barred in the state where rendered.[57]

(III) *Constitutionality of Statutes.* The constitutional provision requiring "full faith and credit" to be given to the judgments of other states is not violated by a statute imposing a reasonable period of limitation upon the bringing of suits on such judgments,[58] although the statute would be unconstitutional if it should, by retroaction or otherwise, entirely cut off the remedy by suit on a judgment of another state, and so entirely prevent its enforcement.[59]

(IV) *Computation of Period of Limitation.* The period of limitation against an action on a foreign judgment begins to run from the date of rendition of the judgment,[60] or from the time an execution could issue on it.[61] The revival

Indiana.— Hendricks *v.* Comstock, 12 Ind. 238, 74 Am. Dec. 205.

Kansas.— Bauserman *v.* Charlott, 46 Kan. 480, 26 Pac. 1051.

Kentucky.— Cobb *v.* Thompson, 1 A. K. Marsh. 507.

Louisiana.— Lucas' Succession, 11 La. Ann. 296; Ducker's Succession, 10 La. Ann. 758; Taylor *v.* Joor, 7 La. Ann. 272.

Massachusetts.— Mowry *v.* Cheesman, 6 Gray 515.

New York.— Beer *v.* Simpson, 65 Hun 17, 19 N. Y. Suppl. 578.

Texas.— Robinson *v.* Peyton, 4 Tex. 276.

Virginia.— Jones *v.* Hook, 2 Rand. 303, 14 Am. Dec. 783.

United States.— Egberts *v.* Dibble, 8 Fed. Cas. No. 4,307, 3 McLean 86; Randolph *v.* King, 20 Fed. Cas. No. 11,560, 2 Bond 104.

See 30 Cent. Dig. tit. "Judgment," § 1765.

55. Stewart *v.* Spalding, 72 Cal. 264, 13 Pac. 661; Miller *v.* Brenham, 68 N. Y. 83.

56. Waddill *v.* Cabell, 21 D. C. 597; Bemis *v.* Stanley, 93 Ill. 230; Newman *v.* Eldridge, 107 La. 315, 31 So. 688; Walworth *v.* Routh, 14 La. Ann. 205; Bowersox *v.* Gitt, 12 Pa. Co. Ct. 81. Since, under the laws of Maryland, an action on a judgment is barred in twelve years from its date, an action by a foreign corporation cannot be maintained in New York on a Maryland judgment on a cause of action which did not originally accrue in favor of a resident of New York, but accrued against a person who was at the time of its accrual and thereafter a resident of Maryland, after the time limited by the laws of Maryland, under N. Y. Code Civ. Proc. § 390*a*, providing that, where a cause of action arises outside of the state, an action cannot be brought in the state to enforce it after the expiration of the time limited by the laws of the state where the cause of action arose, except where it originally accrued in favor of a resident of the state. Chesapeake Coal Co. *v.* Mengis, 102 N. Y. App. Div. 15, 92 N. Y. Suppl. 1003.

A judgment rendered in one state, based on the statute of limitations, where the court had jurisdiction, is a bar to an action in another state on the same cause and between the same parties. Sweet *v.* Brackley, 53 Me. 346; Weeks *v.* Harriman, 65 N. H. 91, 18 Atl. 87, 23 Am. St. Rep. 21, 4 L. R. A. 744.

57. Code W. Va. (1868) c. 104, § 13; Watkins *v.* Wortman, 19 W. Va. 78.

58. *Iowa.*— Meek *v.* Meek, 45 Iowa 294.

Louisiana.— Taylor *v.* Joor, 7 La. Ann. 272.

New Jersey.— Little *v.* McVey, (Sup. 1900) 47 Atl. 61.

Texas.— Pryor *v.* Moore, 8 Tex. 250.

Wisconsin.— Fields *v.* Mundy, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39.

United States.— Bacon *v.* Howard, 20 How. 22, 15 L. ed. 811; Randolph *v.* King, 20 Fed. Cas. No. 11,560, 2 Bond 104.

See 30 Cent. Dig. tit. "Judgment," § 1766.

59. Scarborough *v.* Dugan, 10 Cal. 305; Keyser *v.* Lowell, 117 Fed. 400, 54 C. C. A. 574. And see Dodge *v.* Coffin, 15 Kan. 277; Christmas *v.* Russell, 5 Wall. (U. S.) 290, 18 L. ed. 475.

60. Beckham's Succession, 16 La. Ann. 352; Arrington *v.* Arrington, 127 N. C. 190, 37 S. E. 212, 80 Am. St. Rep. 791, 52 L. R. A. 201; Johnson *v.* Anderson, 76 Va. 766.

In Michigan an action must be brought on a foreign judgment within ten years after the cause of action accrued thereon; but if the judgment debtor is out of the state at the time the cause of action accrued, the action may be commenced within ten years after he comes into the state. Belden *v.* Blackman, 124 Mich. 667, 83 N. W. 616.

61. Parke *v.* Williams, 7 Cal. 247; Gaumer *v.* Terrel, 65 Kan. 15, 68 Pac. 1071. If the action on the judgment is barred by the statute of limitations of the forum, it is not affected by the fact that an execution is thereafter issued on the judgment in the state where it was rendered. Waddill *v.* Cabell, 21 D. C. 597.

Judgment payable in instalments.— Where a foreign judgment is for the payment of money in instalments at fixed periods, limitations begin to run on each instalment only from the time the same so becomes payable.

of the judgment in the state where rendered does not interrupt the running of the statute against it in another state, or extend the time for suing on it, or give a new cause of action.[62]

e. Pleadings — (I) *Declaration or Complaint* — (A) *In General.* A declaration or complaint on a judgment of another state is sufficient in matter of description when it sets forth the court in which the judgment was rendered, the place where the court was held, the names of the parties, the date of the judgment, and the amount recovered.[63] It is enough to allege that the judgment was "duly rendered" without setting out the proceedings;[64] nor is it necessary to include in the declaration a copy of the contract, note, or other instrument on

Schuler *v.* Schuler, 209 Ill. 522, 71 N. E. 16 [*reversing* 104 Ill. App. 463].

62. *Kansas.*— Rice *v.* Moore, 48 Kan. 590, 30 Pac. 10, 30 Am. St. Rep. 318, 16 L. R. A. 198.

Michigan.— Evans *v.* Reed, 2 Mich. N. P. 212.

Nebraska.— Hepler *v.* Davis, 32 Nebr. 556, 49 N. W. 458, 29 Am. St. Rep. 457, 13 L. R. A. 565. *Compare* Packer *v.* Thompson, 25 Nebr. 688, 41 N. W. 650.

Vermont.— Betts *v.* Johnson, 68 Vt. 549, 35 Atl. 489.

United States.— Owens *v.* McCloskey, 161 U. S. 642, 16 S. Ct. 693, 40 L. ed. 837.

See 30 Cent. Dig. tit. "Judgment," § 1767.

Contra.— See Fagan *v.* Bently, 32 Ga. 534; Morton *v.* Valentine, 15 La. Ann. 150; Kratz *v.* Preston, 52 Mo. App. 251.

63. *Alabama.*— Andrews *v.* Flack, 88 Ala. 294, 6 So. 907.

Alaska.— Baker *v.* Healey, 1 Alaska 45.

Georgia.— Little Rock Cooperage Co. *v.* Hodge, 109 Ga. 434, 34 S. E. 667.

Indiana.— Wormer *v.* Smith, 2 Ind. 235.

Iowa.— Blake *v.* Burley, 9 Iowa 592.

Minnesota.— Smith *v.* Mulliken, 2 Minn. 319, a statute requiring an affidavit in suing on "written instruments for the payment of money" does not apply to actions on judgments from other states.

New Jersey.— Chemical Nat. Bank *v.* Kellogg, 71 N. J. L. 126, 58 Atl. 397. The place of session of the court which rendered the judgment must be set forth. Duyckinck *v.* Clinton Mut. Ins. Co., 23 N. J. L. 279.

New York.— Crane *v.* Crane, 19 N. Y. Suppl. 691.

Ohio.— Spencer *v.* Brockway, 1 Ohio 259, 13 Am. Dec. 615.

Pennsylvania.— Mink *v.* Shaffer, 124 Pa. St. 280, 16 Atl. 805.

Texas.— Whitley *v.* General Electric Co., 18 Tex. Civ. App. 674, 45 S. W. 959; Thurmond *v.* Georgia Bank, (Civ. App. 1894) 27 S. W. 317.

Washington.— Trowbridge *v.* Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

See 30 Cent. Dig. tit. "Judgment," § 1772.

Action by assignee.— In an action on a judgment of another state, brought by an assignee thereof, it is not necessary to exhibit a copy of the written assignment. Anthony *v.* Masters, 28 Ind. App. 239, 62 N. E. 505.

Alleging judgment by amendment to declaration.— Where actions on the same note against the same defendant are pending in two states at once, and judgment is recovered in one action, such judgment may be substituted in the other action, by way of amendment, as the cause of action in place of the note. Jones *v.* Murphy, 18 La. Ann. 634.

Averments as to court.— The character of the court rendering the judgment must be shown by proper averments; but it need not be distinctly stated to be a court of record, if that fact follows by necessary inference from the other allegations of the declaration. Davis *v.* Lane, 2 Ind. 548, 54 Am. Dec. 458. And if it is described as a "court of common pleas" of a named county of another state, it will be presumed, in the absence of evidence to the contrary, to be a court of general original jurisdiction. Pringle *v.* Woolworth, 90 N. Y. 502. If the court was held by a special judge, sitting because of the disqualification of the regular judge, the fact should be shown, but the manner of his selection or appointment need not be described. Henry *v.* Allen, 82 Tex. 35, 17 S. W. 515.

Allegation as to amount.— In an action on a foreign judgment, where the complaint consists of two or more counts, the counts may vary the amount alleged to have been recovered in such judgment. Andrews *v.* Flack, 88 Ala. 294, 6 So. 907. See Brady *v.* Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27.

Allegations that the judgment is "in full force and virtue" are not necessary; it is sufficient to aver that the amount claimed is due thereon. Blake *v.* Burley, 9 Iowa 592.

Allegations as to parties.— In a suit on a judgment against several as partners, it is not necessary to describe them as partners. Stephens *v.* Roby, 27 Miss. 744.

64. *Connecticut.*— Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

Iowa.— Blake *v.* Burley, 9 Iowa 592.

Mississippi.— Stephens *v.* Roby, 27 Miss. 744.

Ohio.— Dodd *v.* Groll, 19 Ohio Cir. Ct. 718, 8 Ohio Cir. Dec. 334. But if the action is on a revived judgment, it must be alleged that the judgment of revivor was duly rendered; an allegation that the original judgment was duly rendered is not sufficient. Linehan *v.* Snyder, 8 Ohio S. & C. Pl. Dec. 394, 7 Ohio N. P. 132.

Wyoming.— Martin *v.* Moore, 1 Wyo. 22.

See 30 Cent. Dig. tit. "Judgment," § 1772.

which the suit was brought,[65] nor the whole of the record in the foreign suit, if enough is included to show the essential facts in regard to the court, its jurisdiction, and the judgment actually rendered.[66]

(B) *Averring Jurisdiction.* In suing on a judgment from another state, if the declaration shows that the court rendering it was a court of record, or a court of general jurisdiction, it is not necessary to aver in terms that the court had jurisdiction of the parties or the subject-matter, or to set out the facts conferring jurisdiction, as this will be presumed until disproved.[67] But the rule is otherwise where the record shows that the judgment was against a non-resident defendant,[68] or where the court was one of limited, inferior, or special statutory jurisdiction,[69] although in the latter case statutes in some of the states have dispensed with the necessity of pleading the jurisdictional facts.[70]

65. Teel *v.* Yost, 56 N. Y. Super. Ct. 456, 5 N. Y. Suppl. 5; Omaha First Nat. Bank *v.* Crosby, 179 Pa. St. 63, 36 Atl. 155; Hogg *v.* Charlton, 25 Pa. St. 200; Wilbur *v.* Abbot, 6 Fed. 814.

66. Johnson *v.* Butler, 2 Iowa 535. And see Hall *v.* Mackay, 78 Tex. 248, 14 S. W. 615.

Abbreviated record.— Where a judgment by confession in another state is there entered in a condensed or abbreviated form, such as would not be sufficient to constitute a judgment under the laws and practice of the state where it is sued on, the complaint must set forth enough of the laws of the foreign state to explain the entry and show its sufficiency as a judgment. Thomas *v.* Pendleton, 1 S. D. 150, 46 N. W. 180, 36 Am. St. Rep. 726.

67. *Alabama.*— Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785; Mills *v.* Stewart, 12 Ala. 90.

California.— Meredith *v.* Santa Clara Min. Assoc., 56 Cal. 178; Low *v.* Burrows, 12 Cal. 181.

Colorado.— Bruckman *v.* Taussig, 7 Colo. 561, 5 Pac. 152.

Connecticut.— Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

Illinois.— Dunbar *v.* Hallowell, 34 Ill. 168; Horton *v.* Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Rae *v.* Hulbert, 17 Ill. 572.

Indiana.— Gates *v.* Newman, 18 Ind. App. 392, 46 N. E. 654.

Kansas.— Butcher *v.* Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446.

Kentucky.— Montgomery *v.* Consolidated Boat Store Co., 115 Ky. 156, 72 S. W. 816, 24 Ky. L. Rep. 2004, 103 Am. St. Rep. 302; Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179; Scott *v.* Coleman, 5 Litt. 349, 15 Am. Dec. 71. *Contra,* Gebhard *v.* Garnier, 12 Bush 321, 23 Am. Rep. 721.

Louisiana.— Graydon *v.* Justus, 24 La. Ann. 222.

Maryland.— U. S. Bank *v.* Merchants' Bank, 7 Gill 415.

Minnesota.— Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661 [*overruling* Karns *v.* Kunkle, 2 Minn. 313].

Nebraska.— Specklemeyer *v.* Dailey, 23 Nebr. 101, 36 N. W. 356, 8 Am. St. Rep. 119.

Nevada.— Phelps *v.* Duffy, 11 Nev. 80.

New York.— Crane *v.* Crane, 19 N. Y. Suppl. 691; Halstead *v.* Black, 17 Abb. Pr. 227; Shumway *v.* Stillman, 4 Cow. 292, 15 Am. Dec. 374.

Pennsylvania.— Mink *v.* Shaffer, 124 Pa. St. 280, 16 Atl. 805; Thompson *v.* Owen, 8 Kulp 36.

South Dakota.— Gude *v.* Dakota F. & M. Ins. Co., 7 S. D. 644, 65 N. W. 27, 58 Am. St. Rep. 860.

Texas.— Henry *v.* Allen, 82 Tex. 35, 17 S. W. 515; Reid *v.* Boyd, 13 Tex. 241, 65 Am. Dec. 61.

Wisconsin.— Kunze *v.* Kunze, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857; Jarvis *v.* Robinson, 21 Wis. 523, 94 Am. Dec. 560. But if the complaint pleads specially the facts on which the jurisdiction rests, a general averment of the court's jurisdiction is not sufficient, but it is necessary to plead the statute on which the jurisdiction is founded. Kellam *v.* Toms, 38 Wis. 592.

United States.— Pennington *v.* Gibson, 16 How. 64, 14 L. ed. 847; Tenney *v.* Townsend, 23 Fed. Cas. No. 13,832, 9 Blatchf. 274.

See 30 Cent. Dig. tit. "Judgment," § 1773.

Contra in Ohio.— Memphis Medical College *v.* Newton, 2 Handy 163, 12 Ohio Dec. (Reprint) 382; Dodd *v.* Groll, 19 Ohio Cir. Ct. 718, 8 Ohio Cir. Dec. 334; Wilhelm *v.* Parker, 17 Ohio Cir. Ct. 234, 9 Ohio Cir. Dec. 724.

68. Cone *v.* Cotton, 2 Blackf. (Ind.) 82; Gude *v.* Dakota F. & M. Ins. Co., 7 S. D. 644, 65 N. W. 27, 58 Am. St. Rep. 860; Wilbur *v.* Abbot, 6 Fed. 814.

69. *Alabama.*— Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785; Ellis *v.* White, 25 Ala. 540.

Iowa.— Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

Massachusetts.— Com. *v.* Blood, 97 Mass. 538.

New York.— McLaughlin *v.* Nichols, 13 Abb. Pr. 244; Sheldon *v.* Hopkins, 7 Wend. 435.

Ohio.— Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197.

Texas.— Grant *v.* Bledsoe, 20 Tex. 456.

See 30 Cent. Dig. tit. "Judgment," § 1773.

70. Toledo, etc., R. Co. *v.* McNulty, 34 Ind. 531; Snyder *v.* Snyder, 25 Ind. 399; Draggoo *v.* Graham, 9 Ind. 212 (the declaration must either allege generally that the judgment was

(II) *Transcript or Record of Judgment*—(A) *Pleading or Exhibiting.* In an action on a judgment of another state, if the declaration sufficiently sets forth or describes the judgment as a cause of action, it is not necessary to incorporate the whole record in the declaration or attach it,[71] or to file it with the declaration or petition,[72] or to make profert of the record.[73]

(B) *Authentication of Record.* The method of authenticating a record of a judgment from another state prescribed by the act of congress[74] is not exclusive, it being in the power of the states to authorize any other method of authentication deemed sufficient,[75] although no state could add to the requirements of the act of congress, or refuse recognition to a record authenticated as that act directs.[76] The act of congress does not apply to judgments of justices of the peace in other states, and therefore they must be authenticated as at common law, by the deposition of the justice or other sufficient evidence.[77]

(C) *Completeness of Record.* It is necessary that the transcript produced should be a complete copy of the record in the case, and not merely a transcript of the minutes or of part of the record.[78] But if the clerk certifies that the trans-

duly given or made, or the facts showing the jurisdiction must be specially set forth); Etz *v.* Wheeler, 23 Mo. App. 449; Archer *v.* Romaine, 14 Wis. 375.

71. Judds *v.* Dean, 2 Disn. (Ohio) 210; Renniman *v.* Dean, 3 Ohio Dec. (Reprint) 3, 2 Wkly. L. Gaz. 2 [with which *compare* Dougherty *v.* Longmore, 2 Cinc. Super. Ct. (Ohio) 134]; Hall *v.* Mackay, 78 Tex. 248, 14 S. W. 615. But see Ashley *v.* Laird, 14 Ind. 222, 77 Am. Dec. 67, holding that a declaration on a foreign judgment must set out not merely the judgment, but also the pleadings or a statement of the suit, sufficiently to show that the court had jurisdiction.

72. Campbell *v.* Wolf, 33 Mo. 459; Fordyce *v.* Marks, 5 Ohio Dec. (Reprint) 12, 1 Am. L. Rec. 257. See Memphis Medical College *v.* Newton, 2 Handy (Ohio) 163, 12 Ohio Dec. (Reprint) 382.

73. Stephenson *v.* McNary, 5 Blackf. (Ind.) 360; Kelly *v.* Lank, 7 B. Mon. (Ky.) 220.

Oyer of the record of a judgment of another state will not be given, if not prayed before the expiration of the rule to plead. Cull *v.* Allen, 6 Fed. Cas. No. 3,465, 1 Cranch C. C. 45.

74. "The records and judicial proceedings of the courts of any State . . . shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form." U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677].

Federal courts.—This statute governs the admissibility of records from the state courts when pleaded or given in evidence in the federal courts. U. S. *v.* Biebusch, 1 Fed. 213, 1 McCrary 42.

Seceded states.—If a state should go out of the Union, so as to stand in the relation of a foreign government for a time, yet, upon its return to the Union again, all judgments rendered in the interval must be authenticated in the same way as other state records. Steere *v.* Tenney, 50 N. H. 461.

When authentication unnecessary.—Where an action is brought on a judgment of a sister state, and a transcript of the judgment is attached to the petition and made a part thereof, it is not necessary that the transcript should be authenticated as prescribed by the act of congress or the state laws. White *v.* Treon, 25 Kan. 484.

Judgment not signed.—A transcript of a judgment from another state, duly authenticated by the proper officers, is admissible, and is sufficient evidence of the validity of the judgment, although it does not appear that the judgment or the minutes of the court were signed by the judge. McFarland *v.* Fricks, 99 Ga. 104, 24 S. E. 868; Dean *v.* Stone, 2 Okla. 1, 35 Pac. 578.

75. Latterett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428; *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287; Etz *v.* Wheeler, 23 Mo. App. 449.

76. Parke *v.* Williams, 7 Cal. 247; McMillen *v.* Lovejoy, 115 Ill. 498, 4 N. E. 772; Kingman *v.* Cowles, 103 Mass. 283.

77. *California.*—Banister *v.* Campbell, 138 Cal. 455, 71 Pac. 504, 703.

Delaware.—Graham *v.* Grigg, 3 Harr. 408.

Indiana.—Draggoo *v.* Graham, 9 Ind. 212.

Kentucky.—McElfatrick *v.* Taft, 10 Bush 160.

Missouri.—Holdridge *v.* Marsh, 30 Mo. App. 352.

New Hampshire.—Mahurin *v.* Bickford, 6 N. H. 567.

South Carolina.—Lawrence *v.* Gaultney, Cheves 7.

Vermont.—King *v.* Van Gilder, 1 D. Chipm. 59.

See 30 Cent. Dig. tit. "Judgment," § 1447.

Contra.—Case *v.* Huey, 26 Kan. 553.

78. *Arkansas.*—Hallum *v.* Dickinson, 54 Ark. 311, 15 S. W. 775.

Indiana.—Phelps *v.* Tilton, 17 Ind. 423.

Iowa.—Taylor *v.* Runyan, 3 Iowa 474.

Kentucky.—Montgomery *v.* Consolidated

cript is a true and correct copy of the record, it will be presumed that it copies the entire record.[79] It is, however, essential that the record should show jurisdiction by service of process on the defendant or an appearance by him,[80] and that the judgment was rendered against him.[81] If the record of the foreign action was lost or destroyed, and has been restored, it may be proved by the restored record; otherwise, by the evidence of the clerk of the court.[82]

(D) *Attestation and Seal.* The attestation of the clerk should be in the form prescribed for the court in which the judgment was rendered, and the judge's certificate that the clerk's attestation is in due form is conclusive.[83] The certifi-

Boat Store Co., 115 Ky. 156, 72 S. W. 816, 24 Ky. L. Rep. 2004, 103 Am. St. Rep. 302.

Louisiana.— See Hockaday *v.* Skeggs, 18 La. Ann. 681.

Minnesota.— Bowman *v.* Hekla F. Ins. Co., 58 Minn. 173, 59 N. W. 943; Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661.

Missouri.— Williams *v.* Williams, 53 Mo. App. 617.

New York.— Pepin *v.* Lachenmeyer, 45 N. Y. 27.

Pennsylvania.— Sevison *v.* Blumenthal, 9 Kulp 392.

Texas.— Missouri Glass Co. *v.* Gregg, (App. 1890) 16 S. W. 174.

United States.— Tompkins *v.* Craig, 102 Fed. 69.

See 30 Cent. Dig. tit. "Judgment," § 1447.

A verdict alone cannot be received as evidence of a judgment of another state. Hinckle *v.* Carruth, 3 Brev. (S. C.) 402.

Effect of variance.— Where sufficient appears in the transcript to identify the actual record with the record sued on, it is immaterial that there is a variance in the titles as given in the transcript and in the petition. Brady *v.* Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27.

Error in computation.— A clerical mistake, apparent on the face of the record, in the computation of the amount, does not exclude the transcript, but may and should be corrected. Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059.

Assignment.— Where the action is brought by an assignee of the judgment, a certified copy of the assignment recorded in the court where the judgment was rendered, and made a part of the record of the judgment, is competent evidence of the assignment. Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005.

Unessential parts of record.— No particular form of words is necessary to show the rendition of a judgment. Church *v.* Crossman, 41 Iowa 373. And it is not essential to the completeness of the record, for this purpose, that it should contain a statement of the reasons on which the judgment was founded (West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736, 68 Am. Dec. 778), the testimony in the case (Williams *v.* Lindblom, 90 Hun (N. Y.) 370, 35 N. Y. Suppl. 812), a copy of any execution that may have been issued (Erb *v.* Scott, 14 Pa. St. 20), the warrant of attorney (Rogers *v.* Burns, 27 Pa. St. 525), or the placita (McMillan *v.* Lovejoy, 115 Ill. 498, 4 N. E. 772). Nor should the transcript be rejected simply because it is without a caption (Taylor *v.* Smith, (Tenn. Ch. App. 1896) 36 S. W. 970), or because the judgment does not appear to have been signed by the judge (Waters *v.* Spencer, 44 Misc. (N. Y.) 15, 89 N. Y. Suppl. 693).

79. Reber *v.* Wright, 68 Pa. St. 471; Ferguson *v.* Harwood, 7 Cranch (U. S.) 408, 3 L. ed. 386. And see Blair *v.* Caldwell, 3 Mo. 353.

80. Louisville, etc., R. Co. *v.* Parish, 6 Ind. App. 89, 33 N. E. 122; Cunningham *v.* Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235, 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

Foreign corporation.— As to the sufficiency of the judgment-rolls to show jurisdiction of a foreign insurance company acquired by service of process on the commissioner of insurance, as provided by statute, see Johnston *v.* Mutual Reserve L. Ins. Co., 104 N. Y. App. Div. 544, 93 N. Y. Suppl. 1048, 104 N. Y. App. Div. 550, 93 N. Y. Suppl. 1052 [*affirming* 45 Misc. 316, 90 N. Y. Suppl. 539 (*affirming* 43 Misc. 251, 87 N. Y. Suppl. 438)].

Statutes as to process against foreign corporations.— In an action on foreign judgments against a non-resident insurance company, it was not essential to the validity of such judgments that the statutes of the state prescribing the manner in which process should be served should be either incorporated in or referred to in the judgment-roll. Johnston *v.* Mutual Reserve L. Ins. Co., 104 N. Y. App. Div. 550, 93 N. Y. Suppl. 1052 [*affirming* 45 Misc. 316, 90 N. Y. Suppl. 539 (*affirming* 43 Misc. 251, 87 N. Y. Suppl. 438)].

81. In an action on a foreign judgment, where the record showed action brought against the W Lumber company, and judgment recovered against one W, and the complaint did not show whether the W Lumber company was a firm or a corporation, and, if a firm, who composed it, and the sheriff, in the summons, was directed to summon the W Lumber company, and the return stated service on W, of such company, and that W denied that he was indebted, judgment was rendered against the W Lumber company, and the plea of W was not disposed of, it was insufficient to show a judgment against W. Whitman *v.* Hitt, (Ark. 1905) 87 S. W. 1032.

82. Bailey *v.* Martin, 119 Ind. 103, 21 N. E. 346; Poorman *v.* Crane, Wright (Ohio) 347.

83. Andrews *v.* Flack, 88 Ala. 294, 6 So.

cate to the transcript should be made by the clerk in person,[84] and is not sufficient if made by a deputy clerk.[85] The seal of the court is self-proving and need not be certified as such;[86] but if the court does not possess a seal, the fact must be stated by either the clerk or the judge in the certificate.[87]

(E) *Certificate of Judge.* The judge's certificate must be in the form prescribed by the act of congress, and state that the attestation is in due form,[88] and must sufficiently show that the person signing it is the judge of the court, or one of its several judges having authority to make such certificates.[89]

(III) *Plea or Answer*—(A) *In General.* The plea or answer in an action on a judgment of another state may deny the existence of the judgment alleged,[90] or plaintiff's right to sue on it,[91] or the jurisdiction of the court which rendered it,[92] or may allege its payment or satisfaction.[93] Such an action also comes within the provisions of a statute which authorizes judgment to be entered up by way of default if no affidavit of defense is filed.[94]

(B) *Proper Form of General Issue.* In an action on a judgment of a court of record in another state, *nil debet* is not a good plea, the judgment being entitled to the full dignity of a record, and the merits not being open to reëxamination; the only proper form of the general issue is *nul tiel record*;[95] or, under

907; Frisbee *v.* Seaman, 49 Iowa 95; Grover *v.* Grover, 30 Mo. 400; Ferguson *v.* Harwood, 7 Cranch (U. S.) 408, 3 L. ed. 386.

Transcript partly printed.— Where a copy of a judgment from another state is partly written and partly printed, and has the clerk's certificate at the end of the written part only, whether the certificate applies to the whole roll or to the written part alone is a question of fact to be determined by examination of the papers. Goodrich *v.* Stevens, 116 Mass. 170.

Plea curing defect.— Where the certificate was defective for want of the clerk's signature, but defendant pleaded payment, it was held that, as the plea admitted the cause of action, plaintiff was entitled to recover notwithstanding the defect. Curtis *v.* Hubbell, 8 Wkly. Notes Cas. (Pa.) 367.

84. Where the judge is *ex officio* clerk of his own court, his certificate to the correctness of the record, made in his character as judge, is sufficient. Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. *Compare* Bissell *v.* Edwards, 5 Day (Conn.) 363, 5 Am. Dec. 166; Catlin *v.* Underhill, 5 Fed. Cas. No. 2,523, 4 McLean 199. And where the records of the court in which the judgment was rendered have been transferred by law to another court, and are in the custody of the clerk of the latter, he is the proper officer to make the attestation. Folsom *v.* Blood, 58 N. H. 11; Thomas *v.* Tanner, 6 T. B. Mon. (Ky.) 52.

85. Williams *v.* Williams, 53 Mo. App. 617; Morris *v.* Patchin. 24 N. Y. 394, 82 Am. Dec. 311; Ensign *v.* Kindred, 163 Pa. St. 638, 30 Atl. 274. *Contra,* Hull *v.* Webb, 78 Ill. App. 617.

86. Ducommun *v.* Hysinger, 14 Ill. 249; Hull *v.* Webb, 78 Ill. App. 617.

87. Kirkland *v.* Smith, 2 Mart. N. S. (La.) 497; Flourenoy *v.* Durke, 2 Brev. (S. C.) 256; Craig *v.* Brown, 6 Fed. Cas. No. 3,328, Pet. C. C. 352.

88. Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19; Sheriff *v.* Smith, 47 How. Pr. (N. Y.) 470. The judge's certificate must be annexed to the exemplification of the record, and cannot be on a separate piece of paper. Norwood *v.* Cobb, 20 Tex. 588.

89. *Illinois.*— Hull *v.* Webb, 78 Ill. App. 617.

Kentucky.— Where a court comprises several judges, each of whom in turn acts as chief judge, on a system of rotation, a record of a judgment, to be sent into another state, must be certified by the one who is at the time acting as chief judge. Shaw *v.* Hurd, 3 Bibb 371.

Missouri.— Moyer *v.* Lyon, 38 Mo. App. 635.

Oregon.— Keyes *v.* Mooney, 13 Oreg. 179, 9 Pac. 400.

South Carolina.— Arnold *v.* Frazier, 5 Strohh. 33.

Texas.— Harper *v.* Nichol, 13 Tex. 151.

Certificate to character of judge.— It is not necessary that the official character of the judge should be evidenced by the certificate of the governor of the state, or by that of the clerk of the court. McAllister *v.* Singer Mfg. Co., 64 Ga. 622; Kinseley *v.* Rumbough, 96 N. C. 193, 2 S. E. 174.

90. But defects in the record or in its exemplification cannot avail, in an affidavit of defense, to prevent judgment. New York Sanitary, etc., Co. *v.* Hartman, 11 Phila. (Pa.) 308.

91. See Anthony *v.* Masters, 28 Ind. App. 239, 62 N. E. 505.

92. See *infra,* XXII, B, 5, d. An affidavit of defense to an action on a judgment of another state, alleging want of jurisdiction, must also show a defense on the merits. Luckenbach *v.* Anderson, 47 Pa. St. 123.

93. Corby *v.* Wright, 4 Mo. App. 443. See *supra,* XXII, B, 4, b, (I).

94. McCleary *v.* Faber, 6 Pa. St. 476; Motter *v.* Welty, 12 Pa. Co. Ct. 82.

95. *Alabama.*— Andrews *v.* Flack, 88 Ala. 294, 6 So. 907; Hunt *v.* Mayfield, 2 Stew. 124.

the code system of pleading, a plea of general denial.[96] But this plea is not applicable to a judgment rendered by a justice of the peace in another state, his transcript not being properly a record,[97] nor in an action on a decree in chancery.[98]

(c) *Averring Want of Jurisdiction.* In an action on a judgment recovered in another state, a plea denying the jurisdiction of the court rendering the judgment must negative by certain and positive averments every fact on which such jurisdiction could be legally predicated; and if, by any reasonable intendment, the facts alleged in the plea might be true and yet the court could have had jurisdiction, the plea is bad.[99] It is therefore not sufficient to allege generally

Arkansas.— Egan *v.* Tewksbury, 32 Ark. 43; Hensley *v.* Force, 12 Ark. 756.

Connecticut.— Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683.

Georgia.— Little Rock Cooperage Co. *v.* Hodge, 112 Ga. 521, 37 S. E. 743.

Illinois.— Zepp *v.* Hager, 70 Ill. 223; Knickerbocker L. Ins. Co. *v.* Barker, 55 Ill. 241; Lawrence *v.* Jarvis, 32 Ill. 304; Chipps *v.* Yancey, 1 Ill. 19.

Indiana.— Buchanan *v.* Port, 5 Ind. 264; Davis *v.* Lane, 2 Ind. 548, 54 Am. Dec. 458; Jackson *v.* Baxter, 1 Ind. 42; Cole *v.* Driskell, 1 Blackf. 16; Risley *v.* Indianapolis, etc., R. Co., Wils. 572.

Iowa.— Hindman *v.* Mackall, 3 Greene 170.

Maryland.—Duvall *v.* Fearson, 18 Md. 502; Hughes *v.* Davis, 8 Md. 271.

Massachusetts.— Brainard *v.* Fowler, 119 Mass. 262; Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356.

Mississippi.— Marx *v.* Logue, 71 Miss. 905, 15 So. 890; Wright *v.* Weisinger, 5 Sm. & M. 210.

New York.— Shumway *v.* Stillman, 4 Cow. 292, 15 Am. Dec. 374; Le Conte *v.* Pendleton, 1 Johns. Cas. 104.

North Carolina.— Carter *v.* Wilson, 18 N. C. 362.

Pennsylvania.— Benton *v.* Burgot, 10 Serg. & R. 240; Evans *v.* Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Jones *v.* Quaker City Mut. F. Ins. Co., 23 Pa. Co. Ct. 529.

Rhode Island.— Frothingham *v.* Barnes, 9 R. I. 474.

Tennessee.— Carlin *v.* Taylor, 7 Lea 666; Earthman *v.* Jones, 2 Yerg. 484.

Vermont.— Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340; St. Albans *v.* Bush, 4 Vt. 58, 23 Am. Dec. 246.

Virginia.— Kemp *v.* Mundell, 9 Leigh 12; Clarke *v.* Day, 2 Leigh 172. *Compare* Draper *v.* Gorman, 8 Leigh 628.

United States.— Maxwell *v.* Stewart, 21 Wall. 71, 22 Wall. 77, 22 L. ed. 564; Christmas *v.* Russell, 5 Wall. 290, 18 L. ed. 475; McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. ed. 177; Hampton *v.* McConnel, 3 Wheat. 234, 4 L. ed. 378; Mills *v.* Duryee, 7 Cranch 481, 3 L. ed. 411; Armstrong *v.* Carson, 2 Dall. 302, 1 L. ed. 391, 1 Fed. Cas. No. 543; Wittemore *v.* Malcomson, 28 Fed. 605; French *v.* Lafayette Ins Co., 9 Fed. Cas. No. 5,102, 5 McLean 461; Jacquette *v.* Hugunon, 13 Fed. Cas. No. 7,169, 2 McLean 129; Bastable *v.* Wilson, 17 Fed. Cas. No. 1,097, 1 Cranch C. C. 124; Short *v.* Wilkinson, 22 Fed. Cas. No. 12,810, 2 Cranch C. C. 22; Westerwelt *v.* Lewis, 29 Fed. Cas. No. 17,446, 2 McLean 511.

See 30 Cent. Dig. tit. "Judgment," § 1776.

Contra.— Some early decisions to the contrary of the rule stated in the text are not now of any authority, in view of the rulings of the United States supreme court. See Williams *v.* Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Hammon *v.* Smith, 1 Brev. (S. C.) 110. But in New Hampshire and New Jersey the courts adhere to the rule that *nil debet* is a good plea, although they do not, under this plea, permit a reëxamination of the merits. See Judkins *v.* Union Mut. F. Ins. Co., 37 N. H. 470; Wright *v.* Boynton, 37 N. H. 9, 72 Am. Dec. 319; Thurber *v.* Blackbourne, 1 N. H. 242; Beale *v.* Berryman, 30 N. J. L. 216; Lanning *v.* Shute, 5 N. J. L. 553.

Conclusion of plea.— In an action of debt on a judgment of a court of record of another state, a plea of *nul tiel record* should conclude with a verification, and not to the country. Endicott *v.* Morgan, 66 Me. 456. *Compare* Baldwin *v.* Hale, 17 Johns. (N. Y.) 272.

96. Little Rock Cooperage Co. *v.* Hodge, 112 Ga. 521, 37 S. E. 743.

97. *Delaware.*— Graham *v.* Grigg, 3 Harr. 408.

Indiana.— Collins *v.* Modisett, 1 Blackf. 60.

Kentucky.— McElfatrick *v.* Taft, 10 Bush 160.

Massachusetts.— Warren *v.* Flagg, 2 Pick. 448.

Ohio.— Silver Lake Bank *v.* Harding, 5 Ohio 545.

See 30 Cent. Dig. tit. "Judgment," § 1776.

98. Evans *v.* Tatem, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717.

99. *Alabama.*— Puckett *v.* Pope, 3 Ala. 552; McGee *v.* Sheffield, 3 Stew. & P. 351; Hunt *v.* Mayfield, 2 Stew. 124.

Connecticut.— Smith *v.* Rhoades, 1 Day 168.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Illinois.— Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689.

Iowa.— Latterett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

Kentucky.— Davis *v.* Connelly, 4 B. Mon. 136.

Missouri.— Wilson *v.* Jackson, 10 Mo. 329; Hays *v.* Merkle, 67 Mo. App. 55.

New York.— Rice *v.* Coutant, 38 N. Y. App.

that the court did not have jurisdiction of defendant, that being a mere conclusion of law,[1] or to state facts which only show error in the exercise of jurisdiction rather than a want of jurisdiction;[2] nor is it enough to negative the residence of defendant within the state and the service of process upon him, as this does not exclude the hypothesis that he may have voluntarily appeared;[3] nor can a plea be sustained which alleges that if any attorney appeared for defendant, he had no knowledge of it; for it must specifically deny the authority of the attorney.[4] Further an objection to the jurisdiction of the court rendering the judgment cannot be taken by demurrer,[5] except where the want of jurisdiction appears on the face of the record.[6]

(iv) *Replication and Other Pleadings.* A plea denying the jurisdiction of the court rendering the judgment may be met by a replication, but this must set out specifically the facts relied on as giving jurisdiction.[7] And if the record is relied on as an estoppel to a plea of want of notice, it must be pleaded.[8]

(v) *Issues, Proof, and Variance.* The inquiry in an action on a judgment from another state will be strictly confined to the issues raised by the pleadings;[9] and if the judgment alone is pleaded as a cause of action, and it shows that there cannot be a recovery upon it, neither can there be a recovery on the note or other

Div. 543, 56 N. Y. Suppl. 351; Cassidy *v.* Leetch, 53 How. Pr. 105; Shumway *v.* Stillman, 4 Cow. 292, 15 Am. Dec. 374.

Oregon.— Foshier *v.* Narver, 24 Oreg. 441, 34 Pac. 21, 41 Am. St. Rep. 874.

Pennsylvania.— Motter *v.* Welty, 12 Pa. Co. Ct. 82; Railroad Co. *v.* Mercer, 11 Phila. 226; Polk County Bank *v.* Fleming, 33 Wkly. Notes Cas. 75.

Vermont.— Waddams *v.* Burnham, 1 Tyler 233.

Virginia.— Bowler *v.* Huston, 30 Gratt. 266, 32 Am. Rep. 673; Wilson *v.* Mt. Pleasant Bank, 6 Leigh 570.

Washington.— Aultman *v.* Mills, 9 Wash. 68, 36 Pac. 1046; Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

United States.— Ritchie *v.* McMullen, 159 U. S. 235, 16 S. Ct. 171, 40 L. ed. 133; L'Engle *v.* Gates, 74 Fed. 513; Lincoln *v.* Tower, 15 Fed. Cas. No. 8,355, 2 McLean 473.

See 30 Cent. Dig. tit. "Judgment," § 1777.

Service on corporation.— In a suit on a judgment obtained in another state against a domestic corporation, it is not a good plea to allege that process was not served on any one authorized to act for it in the suit, for it may have had an office and transacted business in such foreign state and made the contract there, and the process may have been served on its president or other officer while in such state. Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222.

Form of plea held good.— The following is a good plea: "That the defendant was not served with process in the suit in which the said judgment was obtained; that he did not appear to the suit in person or by attorney; and that he was not resident nor present within the jurisdiction of the court in which the said judgment was rendered, at any time pending the suit or when judgment was rendered," and if attorneys did enter an appearance for him, "that A. & B. appeared in said suit for the defendant, but that neither they nor any other person or persons, were ever authorized by the defendant to do so." Ward *v.* Price, 25 N. J. L. 225. And see other pleas, substantially like the foregoing, held good in Barkman *v.* Hopkins, 11 Ark. 157; Shufeldt *v.* Buckley, 45 Ill. 223; Minter *v.* Green, 3 Indian Terr. 761, 49 S. W. 48; Wissler *v.* Herr, 162 Pa. St. 552, 29 Atl. 862.

1. Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

2. Williams *v.* Renwick, 52 Ark. 160, 12 S. W. 331, 20 Am. St. Rep. 158.

3. Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Struble *v.* Malone, 3 Iowa 586; Harrod *v.* Barretto, 1 Hall (N. Y.) 155; Shumway *v.* Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374.

4. Moore *v.* Phillips, 154 Pa. St. 204, 25 Atl. 829; Home Friendly Soc. *v.* Tyler, 2 Pa. Dist. 693.

5. McDermott Bunger Dairy Co. *v.* Dixon, 68 N. J. L. 49, 52 Atl. 283; Ferry *v.* Miltimore Elastic Steel Car Wheel Co., 71 Vt. 457, 45 Atl. 1035, 76 Am. St. Rep. 787.

6. Smith *v.* Smith, 17 Ill. 482; Ferry *v.* Miltimore Elastic Steel Car Wheel Co., 71 Vt. 457, 45 Atl. 1035, 76 Am. St. Rep. 787.

7. Buchanan *v.* Port, 5 Ind. 264; Long *v.* Long, 1 Hill (N. Y.) 597; Kohn *v.* Haas, 95 Ala. 478, 12 So. 577, where it is said that, where the reply alleges that the foreign court possessed powers which it would not have at common law, plaintiff must set forth the statute conferring powers.

8. Pritchett *v.* Clark, 3 Harr. (Del.) 241.

9. Cone *v.* Hooper, 18 Minn. 531. Where the declaration alleges the judgment sued on and a certain statute of the foreign state, a plea of *nul tiel record* admits the statute and it need not be proved. Jackson *v.* Baxter, Smith (Ind.) 15. Where defendant merely pleads a set-off, he cannot object to a transcript of the judgment produced in evidence. McLean *v.* Boyle, 19 Mo. 495.

evidence of debt which was the original cause of action.[10] The record of the judgment will not be admissible if there is a material variance between its terms or recitals and the declaration or petition, in respect to the names of the parties,[11] the court in which the judgment was rendered,[12] the amount of recovery,[13] or other particulars.[14]

(VI) *Evidence Admissible Under Pleadings.* A plea of *nul tiel record*, or the equivalent plea of a general denial, generally puts in issue nothing but the existence of the record, and consequently a want of jurisdiction in the court rendering the judgment cannot be shown under this plea, but must be specially pleaded.[15] So also it has been held that payment or satisfaction cannot be shown under the general issue, but must be specially pleaded;[16] and the same is true of fraud or misrepresentation in obtaining the judgment,[17] or an injunction granted in the foreign state restraining its enforcement,[18] although the defendant may give evidence of anything which would be sufficient cause for setting the judgment aside in the state where rendered.[19] No defense on the merits can be taken under the general issue or any other plea.[20]

f. Evidence — (I) *Presumptions and Burden of Proof.* The presumption is in favor of the jurisdiction of the court rendering the judgment and the validity of the judgment, and the burden is on defendant, if he denies this,[21] as also

10. Bordelais *v.* Maugars, 3 La. Ann. 375; Angle *v.* Manchester, 3 Nebr. (Unoff.) 252, 91 N. W. 501.

11. Lawrence *v.* Willoughby, 1 Minn. 87. But it is not a fatal variance that there were more parties to the suit than are named in the complaint, if the circumstance is not material to the cause of action (Stewart *v.* Spaulding, 72 Cal. 264, 13 Pac. 661; Brady *v.* Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27), that the judgment is alleged to have been given against defendant in his personal character, whereas it appears of record against him as administrator (Barringer *v.* Boyd, 27 Miss. 473), or that the judgment designates him by a certain name, while the action is brought against him under that name with an alias (Talamo *v.* Ermano, 62 N. Y. Suppl. 246).

12. Pearsall *v.* Phelps, 3 Ala. 525. But a trifling error in the description of the court, not calculated to mislead, or which is corrected by the record itself, is not fatal. Randolph *v.* Keiler, 21 Mo. 557; Chandler *v.* Garr, 8 Mo. 428. Nor is it a fatal variance to describe the judgment as rendered by a given superior court, although it appears that it originated in a lower court, and was transferred to the superior court, by filing a transcript or otherwise. Dudley *v.* Lindsey, 9 B. Mon. (Ky.) 486, 50 Am. Dec. 522; Rowley *v.* Carron, 117 Pa. St. 32, 11 Atl. 435. *Contra*, Allen *v.* Arguelles, 1 Fed. Cas. No. 213, 4 Cranch C. C. 170.

13. Lackland *v.* Pritchett, 12 Mo. 484. But an immaterial variance as to the amount of the costs recovered or allowed will not be fatal. Iglehart *v.* Hobart, 19 Ill. 637; Hunt *v.* Middlesworth, 44 Mich. 448, 7 N. W. 57; Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877. Nor is there a fatal variance between a judgment reciting that it is payable in gold and a declaration which omits this clause. Belford *v.* Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593.

14. But it is not a fatal variance that the declaration alleges the judgment to have been recovered on a cross petition, where the record shows an original petition instead. Brady *v.* Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27.

15. *Arkansas.*— Buford *v.* Kirkpatrick, 13 Ark. 33.

New York.— Hoffheimer *v.* Stiefel, 17 Misc. 236, 39 N. Y. Suppl. 714.

Ohio.— Goodrich *v.* Jenkins, 6 Ohio 43.

Pennsylvania.— Fritz *v.* Fisher, 5 Pa. L. J. Rep. 350.

Vermont.— Wood *v.* Agostines, 72 Vt. 51, 47 Atl. 108.

United States.— Hill *v.* Mendenhall, 21 Wall. 453, 22 L. ed. 616.

See 30 Cent. Dig. tit. "Judgment," § 1780.

Contra.— Hall *v.* Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Barrett *v.* Oppenheimer, 12 Heisk. (Tenn.) 298. And see Foster *v.* Glazener, 27 Ala. 391 (holding that a want of jurisdiction may be shown under the general issue, where jurisdiction does not appear on the face of the record); Hindman *v.* Mackall, 3 Greene (Iowa) 170 (holding that it is permissible to show, under this plea, that the attorney who appeared for defendant had no authority to do so).

16. Stephens *v.* Roby, 27 Miss. 744. *Contra*, Clark *v.* Mann, 33 Me. 268.

17. McRae *v.* Mattoon, 13 Pick. (Mass.) 53.

18. Pollard *v.* Rogers, 1 Bibb (Ky.) 473; Palmer *v.* Palmer, 2 Miles (Pa.) 373.

19. Giddings *v.* Whittlesey, 2 Mich. N. P. 240.

20. Judkins *v.* Union Mut. F. Ins. Co., 37 N. H. 470. See *supra*, XXII, B, 2, b.

21. *Alaska.*— Baker *v.* Healey, 1 Alaska 45.

Indiana.— American Mut. L. Ins. Co. *v.* Mason, 159 Ind. 15, 64 N. E. 525; Old Wayne

where he sets up payment or satisfaction, or any other affirmative defense.[22] But if the judgment was rendered in a manner unknown to the jurisprudence of the state where the action is brought, the existence of laws which render the judgment valid in the state where it was rendered must be both alleged and proved.[23] The identity of the person sued with the one against whom the judgment was recovered may be presumed if the names given in full are the same.[24]

(II) *ADMISSIBILITY.* A plea of the general issue must be met by the production in evidence of a transcript or exemplification of the record sued on, authenticated in due form;[25] and this is the only proper evidence on any issue as to the status or terms of the judgment,[26] except in so far as it may be aided by the confessions or admissions of defendant.[27] But plaintiff's ownership of the judgment, by assignment or otherwise, and his right to sue thereon may be shown by parol.[28]

(III) *WEIGHT AND SUFFICIENCY.* The transcript of the judgment sued on is *prima facie* evidence of the recovery of the judgment, and, in the absence of any irregularities on the face of it, of everything necessary to sustain plaintiff's recovery,[29] and is conclusive evidence if it appears or is shown that the court had full jurisdiction.[30] And ordinarily the record of the judgment will be sufficient without producing the record of the antecedent or subsequent proceedings in the case.[31] But if the judgment was rendered by a justice of the peace, the statute

Mut. Life Assoc. *v.* Flynn, 31 Ind. App. 473, 68 N. E. 327.

New York.— Gottlieb *v.* Alton Grain Co., 87 N. Y. App. Div. 380, 84 N. Y. Suppl. 413 [*affirmed* without opinion in 181 N. Y. 563, 74 N. E. 1117].

South Carolina.—Coskery *v.* Wood, 52 S. C. 516, 30 S. E. 475.

Texas.— Russell *v.* Butler, (Civ. App. 1898) 47 S. W. 406.

United States.— Hale *v.* Tyler, 104 Fed. 757; Hunt *v.* Woodward, 12 Fed. Cas. No. 6,901.

Contra.— Wilhelm *v.* Parker, 17 Ohio Cir. Ct. 234, 9 Ohio Cir. Dec. 724.

Presumption in favor of jurisdiction see *infra*, XXII, B, 5, c.

22. Witbeck *v.* Marshall-Wells Hardware Co., 188 Ill. 154, 58 N. E. 929; Jones *v.* Moore, 11 La. Ann. 616; Marx *v.* Kilpatrick, 25 Nebr. 107, 41 N. W. 111.

23. Angle *v.* Manchester, 3 Nebr. (Unoff.) 252, 91 N. W. 501.

24. Whiting *v.* Ivey, 3 La. Ann. 649; Campbell *v.* Wallace, 46 Mich. 320, 9 N. W. 432.

25. Rush *v.* Cobbett, 2 Johns. Cas. (N. Y.) 256; Silver Lake Bank *v.* Hardin, Wright (Ohio) 430. And see American Tube, etc., Co. *v.* Crafts, 156 Mass. 257, 30 N. E. 1024.

Amendment.— A foreign judgment which did not originally show service on the defendant is admissible in evidence in an action thereon, after having been amended on due notice so as to show that fact affirmatively. Cunningham *v.* Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

Judgment affirmed on appeal.— Where plaintiff pleads a judgment of a sister state and an affirmance thereof on error in the appellate court, and defendant pleads *nul tiel record* to the judgment mentioned, without specifying which one, an exemplification of the judgment of the appellate court, which recites the record of the judgment below, is sufficient. Phipps *v.* Nye, 34 Miss. 330.

26. Cone *v.* Hooper, 18 Minn. 531; Blodget *v.* Jordan, 6 Vt. 580. A judgment of a foreign state may be proved by a witness who has compared the copy offered in evidence with the original record entry thereof, or who has examined the copy while another person read the original. St. Louis Expanded Metal Fireproofing Co. *v.* Beilharz, (Tex. Civ. App. 1905) 88 S. W. 512.

27. Rea *v.* Scully, 76 Iowa 343, 41 N. W. 36. See Hallum *v.* Dickinson, 54 Ark. 311, 15 S. W. 775.

28. Lewis *v.* Wilder, 4 La. Ann. 574; Baker *v.* Stonebraker, 34 Mo. 172; Loop *v.* Gould, 25 Hun (N. Y.) 387; Baggs *v.* Hale, (Tex. Civ. App. 1901) 61 S. W. 525; Missouri Glass Co. *v.* Gregg, (Tex. App. 1890) 16 S. W. 174.

29. Rea *v.* Scully, 76 Iowa 343, 41 N. W. 36; Miles *v.* Collins, 1 Metc. (Ky.) 308.

30. Hays *v.* Merkle, 70 Mo. App. 509. And see Newman *v.* Eldridge, 107 La. 315, 31 So. 688; Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757; Leach *v.* Linde, 142 N. Y. 628, 37 N. E. 565; Shilling *v.* Seigle, 207 Pa. St. 381, 56 Atl. 957.

31. Rathbone *v.* Rathbone, 10 Pick. (Mass.) 1.

A final judgment is sufficiently shown by a transcript reciting: "Now, April 16, 1901, on motion of . . . [counsel] the court directs judgment for want of an appearance. . . . Whereupon judgment is entered against defendant in favor of plaintiff for the sum of one thousand two hundred and fifty dollars, with interest from November 14, 1898." Old Wayne Mut. Life Assoc. *v.* McDonough, 164 Ind. 321, 73 N. E. 703.

defining the jurisdiction of such magistrates and regulating their procedure must be shown.[32]

g. Trial. Questions as to the sufficiency or legal effect of the record presented in support of plaintiff's case are triable by the court alone,[33] including the measure of his recovery, if that depends upon the foreign judgment only, as will be the case in the absence of any plea of payment or set-off;[34] but questions of fact, such as the authorization of an attorney to appear for the defendant, or the circumstances alleged as conferring jurisdiction of his person, when disputed, must be submitted to a jury.[35]

h. Judgment. Where the record of the foreign judgment is in due form, and there is no countervailing evidence, a recovery thereon will be authorized,[36] and the judgment rendered should correspond in character, terms, and amount with the judgment sued on.[37] The recovery may include the costs of the foreign action if they constitute a part of the judgment,[38] and interest on the judgment from the date of its rendition, if the statutes allow it.[39] Judgment having been rendered on the foreign record, execution thereon may be stayed, pending an appeal from the judgment in the foreign state, or pending a new trial ordered there.[40]

i. Appeal. On appeal from a judgment rendered on a judgment from another state, the objection that the court rendering it had no jurisdiction is not avail-

32. Thomas *v.* Robinson, 3 Wend. (N. Y.) 267.

33. Stewart *v.* Sholl, 99 Ga. 534, 26 S. E. 757; Rea *v.* Scully, 76 Iowa 342, 41 N. W. 36; Carter *v.* Wilson, 18 N. C. 362.

34. Longueville *v.* May, 115 Iowa 709, 87 N. W. 432; Mudd *v.* Beauchamp, 4 Bibb (Ky.) 483.

35. Hindman *v.* Mackall, 3 Greene 170; Kahn *v.* Lesser, 18 N. Y. Suppl. 98, 28 Abb. N. Cas. 77.

36. Taylor *v.* Badoux, (Tenn. Ch. App. 1899) 58 S. W. 919.

37. Maxwell *v.* Collier, 6 Rob. (La.) 86.

Amount of recovery.— In an action on a judgment rendered in another state, on which an execution has there been returned satisfied in part, plaintiff can recover only the balance remaining due. Arnold *v.* Roraback, 8 Allen (Mass.) 429. And where the judgment in the other state was for the penalty of a bond, to stand as security for future as well as past breaches, plaintiff can recover only the amount of damages for past breaches, for which execution has there been awarded, and not the amount of the penalty. Battey *v.* Holbrook, 11 Gray (Mass.) 212.

Restriction to particular property.— Where a foreign judgment against a married woman limits its execution to her separate estate, the judgment rendered thereon should not be a general personal judgment, but should contain a like restriction. Sanguinnetti *v.* Roche, 15 N. Y. Suppl. 185.

Enforcing lien.— Where judgment is obtained in one state on a note made and payable there, but secured by a mortgage on land in another state, the court, in a suit in the latter state on such judgment, may enforce the mortgage lien. Brown *v.* Todd, 29 S. W. 621, 16 Ky. L. Rep. 697.

Medium of payment.— A clause in the foreign judgment designating the medium for its payment, as gold, may be disregarded in entering judgment upon it. Belford *v.* Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593; Swanson *v.* Cooke, 45 Barb. (N. Y.) 574, 30 How. Pr. 385.

38. Wetherill *v.* Stillman, 65 Pa. St. 105; Gatewood *v.* Palmer, 10 Humphr. (Tenn.) 466; Mellin *v.* Horlick, 31 Fed. 865. *Compare* Indiana *v.* Helmer, 21 Iowa 370.

39. In some states it is held that interest can be included in, or added to, the amount of the recovery on a foreign judgment only when it is shown that the statutes of the state where the judgment was rendered allow judgments to bear interest. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Cavender *v.* Guild, 4 Cal. 250; Thompson *v.* Monrow, 2 Cal. 99, 56 Am. Dec. 318; Brady *v.* Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27. But see to the contrary Warren *v.* McCarthy, 25 Ill. 95; Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059; Hopkins *v.* Shepard, 129 Mass. 600; Barringer *v.* King, 5 Gray (Mass.) 9; Williams *v.* American Bank, 4 Metc. (Mass.) 317; Mahurin *v.* Bickford, 6 N. H. 567. In others interest will be allowed on a foreign judgment where the domestic statute, which allows interest on judgments generally, is broad enough to include foreign judgments. Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274. And if the judgment sued on carries interest on the amount of the recovery, by its own terms, such interest may be recovered in an action on it in another state, without reference to the statutes of the state where it was rendered. Hudson *v.* Daily, 13 Ala. 722.

Interest on judgments generally see INTEREST, 22 Cyc, 1516.

40. Conframp *v.* Bunel, 4 Dall. (U. S.) 419, 1 L. ed. 891, 6 Fed. Cas. No. 3,098; Heckling *v.* Allen, 15 Fed. 196, 4 McCrary 303; Troy City Bank *v.* Lauman, 24 Fed. Cas. No. 14,194.

able,[41] nor the defense that plaintiff, an assignee of the judgment, had not shown his title to it.[42] Nor will the judgment ordinarily be disturbed in a case of conflicting evidence on a disputed question of fact.[43]

5. JURISDICTIONAL INQUIRIES — a. Effect of Want of Jurisdiction. If the court which rendered a judgment or decree had no jurisdiction of the person of the defendant, the judgment, being therefore void, is not entitled to recognition or enforcement in another state, and cannot be made the basis of an action there.[44] And the same is true where the court was without jurisdiction of the subject-matter of the action,[45] and where, although jurisdiction originally attached, it was definitely lost before the rendition of the judgment and not restored.[46]

41. Latterett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428. And see Wright *v.* Weisinger, 5 Sm. & M. (Miss.) 210.

42. Marx *v.* Logue, 71 Miss. 905, 15 So. 890.

43. See Hall *v.* Littleton, 13 N. Y. Suppl. 323.

44. *Alabama.*— Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785.

Connecticut.— Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Dennison *v.* Hyde, 6 Conn. 508; Aldrich *v.* Kinney, 4 Conn. 380, 10 Am. Dec. 151.

Idaho.— Thum *v.* Pyke, 8 Ida. 11, 66 Pac. 157.

Illinois.— Horton *v.* Critchfield, 18 Ill. 133.

Indiana.— Risley *v.* Indianapolis, etc., R. Co., Wils. 572.

Iowa.— McBride *v.* Harn, 48 Iowa 151.

Kansas.— Kay *v.* Walter, 28 Kan. 111; Looney *v.* Reeves, 5 Kan. App. 279, 48 Pac. 606.

Kentucky.— Rogers *v.* Rogers, 15 B. Mon. 364; Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179.

Louisiana.— Morris *v.* Bailey, 15 La. Ann. 2; Muncaster *v.* Bland, 11 La. Ann. 507; Dick *v.* Leverich, 11 La. 573.

Maryland.— Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 66 Md. 511, 8 Atl. 265.

Massachusetts.— Chicago Title, etc., Co. *v.* Smith, 185 Mass. 363, 70 N. E. 426, 102 Am. St. Rep. 350; Gillespie *v.* Commercial Mut. Mar. Ins. Co., 12 Gray 201, 71 Am. Dec. 743; Gleason *v.* Dodd, 4 Metc. 333; Woodward *v.* Tremere, 6 Pick. 354; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Bartlet *v.* Knight, 1 Mass. 401, 2 Am. Dec. 36.

Michigan.— Spiker *v.* American Relief Soc., (1905) 103 N. W. 611.

Mississippi.— Miller *v.* Ewing, 8 Sm. & M. 421.

Missouri.— McLaurine *v.* Monroe, 30 Mo. 462; Overstreet *v.* Shannon, 1 Mo. 529; Kincaid *v.* Storz, 52 Mo. App. 564.

Nebraska.— Commonwealth Mut. F. Ins. Co. *v.* Hayden, 61 Nebr. 454, 85 N. W. 443; Tessier *v.* Englehart, 18 Nebr. 167, 24 N. W. 734.

New Hampshire.— Downer *v.* Shaw, 22 N. H. 277.

New Jersey.— Jardine *v.* Reichert, 39 N. J. L. 165; Chew *v.* Brumagim, 21 N. J. Eq. 520.

New York.— Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; Martin *v.* Central Vermont R. Co., 50 Hun 347, 3 N. Y. Suppl. 82; Black's Case, 4 Abb. Pr. 162; Borden *v.* Fitch, 15 Johns. 121, 8 Am. Dec. 225.

North Carolina.— Davidson *v.* Sharpe, 28 N. C. 14; Irby *v.* Wilson, 21 N. C. 568.

Pennsylvania.— Wissler *v.* Herr, 162 Pa. St. 552, 29 Atl. 862; Com. *v.* Kirkbride, 2 Brewst. 419; Thomas *v.* Thomas, 4 Leg. Op. 440; Railroad Co. *v.* Mercer, 11 Phila. 226.

Vermont.— Carpenter *v.* Pier, 30 Vt. 81, 73 Am. Dec. 288.

Virginia.— Bowler *v.* Huston, 30 Gratt. 266, 32 Am. Rep. 673.

Washington.— Cunningham *v.* Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235.

United States.— Owens *v.* McCloskey, 161 U. S. 642, 16 S. Ct. 693, 40 L. ed. 837; Phelps *v.* Holker, 1 Dall. 261, 1 L. ed. 128; Cooper *v.* Brazelton, 135 Fed. 476, 68 C. C. A. 188.

See 30 Cent. Dig. tit. "Judgment," § 1458 *et seq.*

45. Reynolds *v.* Stockton, 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305 [*affirmed* in 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464]; Kerr *v.* Kerr, 41 N. Y. 272; Conant *v.* Deep Creek, etc., Irr. Co., 23 Utah 627, 66 Pac. 188, 90 Am. St. Rep. 721. *Compare* Hensley *v.* Force, 12 Ark. 756.

What law governs.— The validity of a judgment of a sister state, when questioned on the ground of a want of jurisdiction over the subject-matter in the court rendering it, must be determined by the law of the state where it was rendered. Stark *v.* Ratcliff, 111 Ill. 75.

46. Risley *v.* Indianapolis, etc., R. Co., Wils. (Ind.) 572.

Suspension of jurisdiction distinguished.— It is necessary to distinguish cases where the jurisdiction of the court is merely suspended instead of being lost. In such a case the court may resume its jurisdiction when the impediment is removed; and if the record of the foreign judgment does not show that any notice was given to the party affected, on thus resuming jurisdiction, it will be presumed that such notice was held unnecessary, or that if necessary it was in fact given. Sanford *v.* Sanford, 28 Conn. 6.

Appeal.— Where judgment is rendered against a party who is fully within the jurisdiction of the court, and an appeal is taken after he has removed from the state, the appellate court has jurisdiction to proceed with the case, although there can be no per-

b. Want of Jurisdiction Apparent on the Record. It follows that in an action on a judgment from another state there can be no recovery, nor any recognition of the judgment as evidence, if the record shows on its face that the court rendering the judgment had no jurisdiction.[47]

c. Presumption in Favor of Jurisdiction. In an action on a judgment recovered in another state, the record of which is duly authenticated and produced in evidence, it will be presumed that the court had jurisdiction of the subject-matter and the parties, in the absence of proof to the contrary, and although the record may be incomplete or ambiguous on this point;[48] and the presumption of regu-

sonal service of the process or notice of appeal. Cone *v.* Hooper, 18 Minn. 531; Nations *v.* Johnson, 24 How. (U. S.) 195, 16 L. ed. 628. *Compare* Meyer *v.* Hartman, 14 Mo. App. 130.

Scire facias to revive.— In cases where a scire facias is to be regarded as a continuation of the original action and not a new suit, a judgment on the scire facias against a non-resident who was not served with notice of that proceeding and did not appear will be held good in the courts of another state, provided the court had jurisdiction over him in the original suit. Adams *v.* Rowe, 11 Me. 89, 25 Am. Dec. 266. And see Delano *v.* Jopling, 1 Litt. (Ky.) 117; Poorman *v.* Crane, Wright (Ohio) 347. But *compare* Holt *v.* Alloway, 2 Blackf. (Ind.) 108; Robinson *v.* Ward, 8 Johns. (N. Y.) 86, 5 Am. Dec. 327. So again a judgment founded on a recognizance entered in the courts of a state on the return of two successive writs of scire facias nihil habet will be regarded as valid and conclusive in the courts of another state. Elsasser *v.* Haines, 52 N. J. L. 10, 18 Atl. 1095.

47. *Indiana.*— Old Wayne Mut. Life Assoc. *v.* Flynn, 31 Ind. App. 473, 68 N. E. 327.

Indian Territory.— Sibley *v.* Miller, 3 Ind. Terr. 688, 64 S. W. 577.

Maine.— Middlesex Bank *v.* Butman, 29 Me. 19.

Nebraska.— Tessier *v.* Englehart, 18 Nebr. 167, 24 N. W. 734.

New York.— Shumway *v.* Stillman, 6 Wend. 447.

Texas.— Summerhill *v.* McAlexander, 1 Tex. App. Civ. Cas. § 584.

Wisconsin.— Where the record shows that the court had no jurisdiction, it is immaterial that the judgment recites that the court did have jurisdiction. Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

But a recital in the original writ that defendant was an "absent and absconding debtor," where that is merely a form prescribed by law in that state, in case of trustee process, whether defendant is in the state or not, does not show a want of jurisdiction. Bissell *v.* Wheelock, 11 Cush. (Mass.) 277.

Contradicting recitals of record see *infra*, XXII, B, 5, f.

48. *Alabama.*— Bogan *v.* Hamilton, 90 Ala. 454, 8 So. 186; Mills *v.* Stewart, 12 Ala. 90.

Arkansas.— Lockhart *v.* Locke, 42 Ark. 17; Nunn *v.* Sturges, 22 Ark. 389.

California.— Collins *v.* Maude, 144 Cal. 289, 77 Pac. 945; McHatton *v.* Rhodes, 143 Cal. 275, 76 Pac. 1036, 100 Am. St. Rep. 125; Cummings *v.* O'Brien, 122 Cal. 204, 54 Pac. 742.

Georgia.— Shands *v.* Howell, 28 Ga. 222.

Illinois.— Glos *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Rosenthal *v.* Renick, 44 Ill. 202; Dunbar *v.* Hallowell, 34 Ill. 168; Horton *v.* Critchfield, 18 Ill. 133, 65 Am. Dec. 701.

Indiana.— Old Wayne Mut. Life Assoc. *v.* McDonough, 164 Ind. 321, 73 N. E. 703; Bailey *v.* Martin, 119 Ind. 103, 21 N. E. 346.

Iowa.— Woodworth *v.* McKee, 126 Iowa 714, 102 N. W. 777; Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005.

Kansas.— Ward *v.* Baker, 16 Kan. 31; Dodge *v.* Coffin, 15 Kan. 277; Westervelt *v.* Jones, 5 Kan. App. 35, 47 Pac. 322.

Kentucky.— Biesenthall *v.* Williams, 1 Duv. 329, 85 Am. Dec. 629; Davis *v.* Connelly, 4 B. Mon. 136; Tanner *v.* Allison, 3 Dana 422.

Louisiana.— Graydon *v.* Justus, 24 La. Ann. 222.

Maryland.— U. S. Bank *v.* Merchants' Bank, 7 Gill 415.

Massachusetts.— Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840; McMahon *v.* Eagle Life Assoc., 169 Mass. 539, 48 N. E. 339, 61 Am. St. Rep. 306; Buffum *v.* Stimpson, 5 Allen 591, 81 Am. Dec. 767; Barringer *v.* King, 5 Gray 9.

Michigan.— Wilcox *v.* Kassick, 2 Mich. 165.

Minnesota.— Stahl *v.* Mitchell, 41 Minn. 325, 43 N. W. 385.

Missouri.— Wilson *v.* Jackson, 10 Mo. 329; Seymour *v.* Newman, 77 Mo. App. 578.

New Jersey.— Orient Ins. Co. *v.* Rudolph, (Ch. 1905) 61 Atl. 26.

New York.— Smith *v.* Central Trust Co., 154 N. Y. 333, 48 N. E. 553; Pringle *v.* Woolworth, 90 N. Y. 502; Pacific Pneumatic Gas Co. *v.* Wheelock, 80 N. Y. 278; Johnston *v.* Mutual Reserve L. Ins. Co., 104 N. Y. App. Div. 544, 93 N. Y. Suppl. 1048 [*affirming* 45 Misc. 316, 90 N. Y. Suppl. 539 (*affirming* 43 Misc. 251, 87 N. Y. Suppl. 438)] (process served on commissioner of insurance in action against foreign insurance company); Gottlieb *v.* Alton Grain Co., 87 N. Y. App. Div. 380, 84 N. Y. Suppl. 413; Leach *v.* Linde, 70 Hun 145, 24 N. Y. Suppl. 176; McCulloch *v.* Norwood, 36 N. Y. Super. Ct. 180; Murphy *v.* Marscheider, 4 N. Y. Suppl. 799; Black's Case, 4 Abb. Pr. 162; Shumway *v.* Stillman, 4 Cow. 292, 15 Am. Dec. 374.

larity will also support a finding by the court which rendered the judgment on the subject of its own jurisdiction.[49] But this rule does not apply where the defendant was a non-resident of the state where the judgment was rendered, or is shown to have been absent from that state at the commencement of the action;[50] where the judgment was given by a justice of the peace or other inferior court not of record;[51] or where the jurisdiction was wholly dependent upon statute or the form of the proceeding unknown to the common law.[52]

d. Jurisdiction May Be Disproved. When a judgment recovered in one state is pleaded or presented in the courts of another state, whether as a cause of action or a defense or as evidence, the party sought to be bound or affected by it may always impeach its validity and escape its effect by showing that the court which rendered it had no jurisdiction over the parties or the subject-matter of the action.[53] So also a judgment of a state court although it is entitled to full faith

Ohio.— Wilhelm *v.* Parker, 17 Ohio Cir. Ct. 234, 9 Ohio Cir. Dec. 724.

Pennsylvania.— Reber *v.* Wright, 68 Pa. St. 471; Stewart *v.* Schaeffer, 33 Wkly. Notes Cas. 365; Veite *v.* McFadden, 3 Wkly. Notes Cas. 63.

Rhode Island.— Paine *v.* Schenectady Ins. Co., 11 R. I. 411.

South Carolina.— Coskery *v.* Wood, 52 S. C. 516, 30 S. E. 475.

Texas.— Henry *v.* Allen, 82 Tex. 35, 17 S. W. 515; Hall *v.* Mackay, 78 Tex. 248, 14 S. W. 615; Brown *v.* Mitchell, 75 Tex. 9, 12 S. W. 606; Harper *v.* Nichol, 13 Tex. 151.

Virginia.— Fisher *v.* March, 26 Gratt. 765.

Washington.— Trowbridge *v.* Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806; Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

West Virginia.— Stewart *v.* Stewart, 27 W. Va. 167.

United States.— Lincoln *v.* Tower, 15 Fed. Cas. No. 8,355, 2 McLean 473.

See 30 Cent. Dig. tit. "Judgment," § 1471 *et seq.*

Contra.— Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244.

49. Semple *v.* Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894; Nunn *v.* Sturges, 22 Ark. 389; Glos *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Hull *v.* Webb, 78 Ill. App. 617; Hall *v.* Mackay, 78 Tex. 248, 14 S. W. 615.

50. Green *v.* Equitable Mut. Life, etc., Assoc., 105 Iowa 628, 75 N. W. 635; Wilhelm *v.* Parker, 17 Ohio Cir. Ct. 234, 9 Ohio Cir. Dec. 724; Galpin *v.* Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

Even a recital in the record, that it appeared to the court that the defendant had notice of the pendency of the suit, is not presumptive evidence that the defendant, being a non-resident, was served with notice within the state. Downer *v.* Shaw, 22 N. H. 277.

51. See *infra*, XXII, B, 8, h.

52. Kohn *v.* Haas, 95 Ala. 478, 12 So. 577; Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389, 25 L. R. A. 806; Wilhelm *v.* Parker, 17 Ohio Cir. Ct. 234, 9 Ohio Cir. Dec. 724; Com. *v.* Taylor, 10 Lanc. Bar (Pa.) 20.

Supplementary proceedings.— But as it appeared that supplementary proceedings in the state of New York are not considered special proceedings before a court or officer of limited jurisdiction, but as a new remedy in an action in which the court has general jurisdiction, it was held that the production and proof in a New Jersey court of an order by a court of New York appointing a receiver in supplementary proceedings there, and reciting the facts necessary to give the court jurisdiction, furnished conclusive evidence of the regularity and validity of the order, and *prima facie* evidence of the jurisdictional facts. Orient Ins. Co. *v.* Rudolph, (N. J. Ch. 1905) 61 Atl. 26.

53. *Alabama.*— Kingsbury *v.* Yniestra, 59 Ala. 320.

Arkansas.— Barkman *v.* Hopkins, 11 Ark. 157. But see Hensley *v.* Force, 12 Ark. 756, denying the right of defendant to impeach the judgment so far as concerns a want of jurisdiction over the subject-matter of the suit.

California.— Greenzweig *v.* Strelinger, 103 Cal. 278, 37 Pac. 398. And see Kane *v.* Cook, 8 Cal. 449.

Colorado.— Marr *v.* Wetzel, 3 Colo. 2.

Connecticut.— Aldrich *v.* Kinney, 4 Conn. 380, 10 Am. Dec. 151.

Delaware.— Mitchell *v.* Garrett, 5 Houst. 34.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Drake *v.* Granger, 22 Fla. 348; Braswell *v.* Downs, 11 Fla. 62.

Georgia.— Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Idaho.— Thum *v.* Pyke, 8 Ida. 11, 66 Pac. 157.

Illinois.— Harvey *v.* Drew, 82 Ill. 606; Jones *v.* Warner, 81 Ill. 343; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Zepp *v.* Hager, 70 Ill. 223; Lawrence *v.* Jarvis, 32 Ill. 304; Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689; Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430.

Indiana.— Westcott *v.* Brown, 13 Ind. 83; Boylan *v.* Whitney, 3 Ind. 140; Holt *v.* Alloway, 2 Blackf. 108.

Indian Territory.— Raymond *v.* Raymond, 1 Indian Terr. 334, 37 S. W. 202.

Iowa.— O'Rourke *v.* Chicago, etc., R. Co.,

and credit in the federal courts, may nevertheless be attacked as void for want

55 Iowa 332, 7 N. W. 582; State *v.* Fleak, 54 Iowa 429, 6 N. W. 689.

Kansas.— Chicago, etc., R. Co. *v.* Campbell, 5 Kan. App. 423, 49 Pac. 321.

Kentucky.— Davis *v.* Connelly, 4 B. Mon. 136.

Louisiana.— Walworth *v.* Henderson, 9 La. Ann. 339.

Maine.— Endicott *v.* Morgan, 66 Me. 456.

Maryland.— U. S. Bank *v.* Merchants' Bank, 7 Gill 415; Wernwag *v.* Pawling, 5 Gill & J. 500, 25 Am. Dec. 317.

Massachusetts.— Rothrock *v.* Dwelling-House Ins. Co., 161 Mass. 423, 37 N. E. 206, 42 Am. St. Rep. 418, 23 L. R. A. 863; Wright *v.* Andrews, 130 Mass. 149; McDermott *v.* Clary, 107 Mass. 501; Mowry *v.* Chase, 100 Mass. 79; Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Haggerty *v.* Amory, 7 Allen 458; Carleton *v.* Bickford, 13 Gray 591, 74 Am. Dec. 652; Bissell *v.* Wheelock, 11 Cush. 277; Ewer *v.* Coffin, 1 Cush. 23, 48 Am. Dec. 587; Gleason *v.* Dodd, 4 Metc. 333; Woodward *v.* Tremere, 6 Pick. 354; Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356; Com. *v.* Green, 17 Mass. 515; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105; Bartlet *v.* Knight, 1 Mass. 401, 2 Am. Dec. 36. *Compare* McRae *v.* Mattoon, 13 Pick. 53.

Michigan.— People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260. And see Wilcox *v.* Kassick, 2 Mich. 165.

Minnesota.— Bryan *v.* Farnsworth, 19 Minn. 239.

Mississippi.— Miller *v.* Ewing, 8 Sm. & M. 421.

Missouri.— Bradley *v.* Welch, 100 Mo. 258, 12 S. W. 911; Barlow *v.* Steel, 65 Mo. 611.

Nebraska.— Jaster *v.* Currie, (1903) 94 N. W. 995; Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

New Hampshire.— Russell *v.* Perry, 14 N. H. 152.

New Jersey.— Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222.

New York.— Bell *v.* Bell, 157 N. Y. 719, 53 N. E. 1123; Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Kerr *v.* Kerr, 41 N. Y. 272; Matter of Norton, 32 Misc. 224, 66 N. Y. Suppl. 317; Hammond *v.* National Life Assoc., 31 Misc. 182, 65 N. Y. Suppl. 407; Black's Case, 4 Abb. Pr. 162; Sheriff *v.* Smith, 47 How. Pr. 470; Starbuck *v.* Murray, 5 Wend. 148, 21 Am. Dec. 172; Shumway *v.* Stillman, 4 Cow. 292, 15 Am. Dec. 374; Borden *v.* Fitch, 15 Johns. 121, 8 Am. Dec. 225; Pawling *v.* Willson, 13 Johns. 192.

Ohio.— Spier *v.* Corll, 33 Ohio St. 236; Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340.

Oregon.— Murray *v.* Murray, 6 Oreg. 17.

Pennsylvania.— Guthrie *v.* Lowry, 84 Pa. St. 533; Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Reel *v.* Elder, 62 Pa. St. 308, 1 Am. Rep. 414; Steel *v.* Smith, 7 Watts & S. 447.

Rhode Island.— Rathbone *v.* Terry, 1 R. I. 73.

South Carolina.— McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

Tennessee.— Barrett *v.* Oppenheimer, 12 Heisk. 298; Kelly *v.* Hooper, 3 Yerg. 395.

Texas.— Redus *v.* Burnett, 59 Tex. 576; Norwood *v.* Cobb, 15 Tex. 500; Morgan *v.* Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154.

Vermont.— Wood *v.* Augustins, 70 Vt. 637, 41 Atl. 583; Lapham *v.* Briggs, 27 Vt. 26; Fullerton *v.* Horton, 11 Vt. 425.

West Virginia.— Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120; Stewart *v.* Stewart, 27 W. Va. 167.

Wisconsin.— Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

Wyoming.— Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

United States.— Tiffin Nat. Exch. Bank *v.* Wiley, 195 U. S. 257, 25 S. Ct. 70, 49 L. ed. 184; Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538; Hill *v.* Mendenhall, 21 Wall. 453, 22 L. ed. 616; Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. 58, 22 L. ed. 70; Thompson *v.* Whitman, 18 Wall. 457, 21 L. ed. 897; Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. ed. 687; Bischoff *v.* Wethered, 9 Wall. 812, 19 L. ed. 829; Christmas *v.* Russell, 5 Wall. 290, 18 L. ed. 475; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. ed. 648; Cooper *v.* Brazelton, 135 Fed. 476, 68 C. C. A. 188; Danville First Nat. Bank *v.* Cunningham, 48 Fed. 510; Arnott *v.* Webb, 1 Fed. Cas. No. 562, 1 Dill. 362.

See 30 Cent. Dig. tit. "Judgment," § 1458 *et seq.*

Waiver and appearance.— But if a defendant waives a want of service, and appears, pleads, and goes to trial, he cannot allege want of jurisdiction, in an action on the judgment in another state. Smith *v.* Whittier, 9 N. H. 464.

And one who prosecutes an appeal from a judgment of a *nisi prius* court of a sister state to the supreme court of that state, and who submits himself to the jurisdiction of the appellate tribunal, cannot impeach its judgment, in an action brought thereon in this state, on the ground that the *nisi prius* court never obtained jurisdiction of his person, as the judgment of the supreme court merges that of the lower court. Roach *v.* Privett, 90 Ala. 391, 7 So. 808, 24 Am. St. Rep. 819.

Question of jurisdiction involved in "merits" of action.— Where a suit was brought in New York upon a judgment rendered by a court in Massachusetts, in an action in which the defendant had appeared after being person-

of jurisdiction of the parties or the subject-matter, when brought in question in a federal court, even when sitting in the same state.[54]

e. Extrinsic Evidence to Show Jurisdiction. If the jurisdiction of the court rendering the judgment is thus attacked, the party offering the judgment is not obliged to stand upon the record alone, but may present extraneous evidence to show that jurisdiction in fact attached.[55]

f. Contradicting Recitals of Record. Although many of the cases, particularly the earlier ones, refuse to permit a defendant, denying the jurisdiction of a court in another state which rendered the judgment in question, to present evidence contradictory of the recitals in the record on the subject of jurisdiction,[56] yet the preponderance of authority, following the lead of the United States supreme court,[57] is now in favor of the doctrine that the record in such a case is not conclusive on this point, but may be directly controverted by extraneous evidence.[58] Such evidence, however, cannot be introduced under the general issue,

ally served with process, and it appeared that the judgment sued on was itself rendered upon an earlier judgment against the same defendant in another court of Massachusetts; and he offered to prove that he never had notice of the original action, was not a resident of Massachusetts, and was not served with process in that suit, the court in New York refused to admit such evidence, for the reason that the merits of the judgment now in suit could not be inquired into again, and that, although the courts of New York might have held the original judgment void, yet as the Massachusetts court had not done so, but had rendered a new judgment upon it, that new judgment must be considered as conclusive of the question. Rocco *v.* Hackett, 2 Bosw. (N. Y.) 579.

Death of party.— To defeat an action on a foreign judgment, it is competent to show that the defendant was dead at the time of its rendition. Gerault *v.* Anderson, Walk. (Miss.) 30, 12 Am. Dec. 521.

54. Swift *v.* Meyers, 37 Fed. 37, 13 Sawy. 583.

55. American Tube, etc., Co. *v.* Crafts, 156 Mass. 257, 30 N. E. 1024; Sears *v.* Dacey, 122 Mass. 388; Stockwell *v.* McCracken, 109 Mass. 84; McDermott *v.* Clary, 107 Mass. 501; Wilhelm *v.* Parker, 17 Ohio Cir. Ct. 234, 9 Ohio Cir. Dec. 724; Russell *v.* Butler, (Tex. Civ. App. 1898) 47 S. W. 406; Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. (U. S.) 58, 22 L. ed. 70.

Contra.— Kimball *v.* Merrick, 20 Ark. 12; Noyes *v.* Butler, 6 Barb. (N. Y.) 613. And see Zepp *v.* Hager, 70 Ill. 223; Johnston *v.* Mutual Reserve Fund L. Ins. Co., 45 Misc. (N. Y.) 316, 90 N. Y. Suppl. 539 [*affirmed* in 104 N. Y. App. Div. 544, 93 N. Y. Suppl. 1048, 104 N. Y. App. Div. 550, 93 N. Y. Suppl. 1052], holding that, where a foreign judgment sued on does not show that the court rendering it had jurisdiction of the person, evidence *aliunde* is not admissible to show that fact.

Mode of service.— Where the record shows a certain kind of service on defendant, expert testimony is admissible to show that, by the usage and practice of the court rendering the judgment, such service is sufficient to support the judgment. Mowry *v.* Chase, 100 Mass. 79.

56. *Delaware.*— Pritchett *v.* Clark, 4 Harr. 280 [*overruling* 3 Harr. 517].

Illinois.— Firemen's Ins. Co. *v.* Thompson, 155 Ill. 204, 40 N. E. 488, 46 Am. St. Rep. 335; Zepp *v.* Hager, 70 Ill. 223; Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689. And see Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430.

Iowa.— Caughran *v.* Gilman, 72 Iowa 570, 34 N. W. 423.

Massachusetts.— Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356.

Michigan.— Wilcox *v.* Kassick, 2 Mich. 165.

Mississippi.— Miller *v.* Ewing, 8 Sm. & M. 421.

Missouri.— Wilson *v.* Jackson, 10 Mo. 329.

New Jersey.—Miller *v.* Dungan, 35 N. J. L. 389.

Vermont.— Farr *v.* Ladd, 37 Vt. 156; Lapham *v.* Briggs, 27 Vt. 26; Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340.

See 30 Cent. Dig. tit. "Judgment," §§ 1477, 1478.

57. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271; Knowles *v.* Logansport Gas Light Co., 19 Wall. (U. S.) 58, 22 L. ed. 70; Thompson *v.* Whitman, 18 Wall. (U. S.) 457, 21 L. ed. 897; Cooper *v.* Brazelton, 135 Fed. 476, 68 C. C. A. 188; Graham *v.* Spencer, 14 Fed. 603. Earlier decisions to the contrary must now be considered as overruled. See Dilworth *v.* Johnson, 6 Fed. 459; Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; Lincoln *v.* Tower, 15 Fed. Cas. No. 8,355, 2 McLean 473.

58. *Alabama.*— Kingsbury *v.* Yniestra, 59 Ala. 320.

California.— Kane *v.* Cook, 8 Cal. 449.

Connecticut.— Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244; Dennison *v.* Hyde, 6 Conn. 508.

Delaware.— Mitchell *v.* Garrett, 5 Houst. 34.

Indiana.— Old Wayne Mut. Life Assoc. *v.* Flynn, 31 Ind. App. 473, 68 N. E. 327; Pond *v.* Simons, 17 Ind. App. 84, 45 N. E. 48, 46 N. E. 153. But Westcott *v.* Brown, 13 Ind.

but if the party means to prove a want of jurisdiction, notwithstanding the recitals of the record, he must plead it specially.[59]

g. Sufficiency of Process or Service[60] — (i) *In General.* Except in certain cases where constructive service of process is sufficient to give jurisdiction,[61] a judgment recovered in another state will not be accorded recognition as a valid and binding adjudication unless there was actual personal service on defendant,[62] effected in some regular and proper manner,[63] of which the officer's return, being regular on its face, will be *prima facie* evidence,[64] or a voluntary appearance by defendant, at the commencement of the action, or by taking part in some subsequent proceeding;[65] and mere knowledge of the pendency of the suit is not sufficient.[66]

(ii) *Appearance by Attorney.* Where the record of a judgment of another state recites that defendant appeared by attorney, this furnishes *prima facie* evidence that the appearance was authorized, and will support the jurisdic-

83, to the contrary, cannot now be considered as authority.

Iowa.— Pollard *v.* Baldwin, 22 Iowa 328; Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520.

Kentucky.— Wood *v.* Wood, 78 Ky. 624.

Massachusetts.— Wright *v.* Andrews, 130 Mass. 149; Gilman *v.* Gilman, 126 Mass. 26, 30 Am. Rep. 646; McDermott *v.* Clary, 107 Mass. 501; Carleton *v.* Bickford, 13 Gray 591, 74 Am. Dec. 652; Bodurtha *v.* Goodrich, 3 Gray 508; Phelps *v.* Brewer, 9 Cush. 390, 57 Am. Dec. 56; Gleason *v.* Dodd, 4 Metc. 333.

Michigan.— People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260. *Compare*, however, Spiker *v.* American Relief Soc., (1905) 103 N. W. 611.

Missouri.— Napton *v.* Leaton, 71 Mo. 358; Eager *v.* Stover, 59 Mo. 87; Marx *v.* Fore, 51 Mo. 69, 11 Am. Rep. 432; Banister *v.* Weber Gas, etc., Engine Co., 82 Mo. App. 528.

New York.— Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Kerr *v.* Kerr, 41 N. Y. 272; Latham *v.* Delany, 59 N. Y. Super. Ct. 37, 12 N. Y. Suppl. 463; Black's Case, 4 Abb. Pr. 162; Starbuck *v.* Murray, 5 Wend. 148, 21 Am. Dec. 172.

Ohio.— Kingsborough *v.* Tousley, 56 Ohio St. 450, 47 N. E. 541; Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340.

Pennsylvania.— Price *v.* Schaeffer, 161 Pa. St. 530, 29 Atl. 279, 25 L. R. A. 699; Guthrie *v.* Lowry, 84 Pa. St. 533; Jones *v.* Quaker City Mut. F. Ins. Co., 23 Pa. Co. Ct. 529; Com. *v.* Bolich, 18 Pa. Co. Ct. 401. Earlier decisions to the contrary, not now of force, were Wetherill *v.* Stillman, 65 Pa. St. 105; Lance *v.* Dugan, 10 Pa. Cas. 276, 13 Atl. 942.

Rhode Island.— Frothingham *v.* Barnes, 9 R. I. 474.

Tennessee.— Chaney *v.* Bryan, 15 Lea 589.

Texas.— Norwood *v.* Cobb, 24 Tex. 551; League *v.* Scott, 25 Tex. Civ. App. 318, 61 S. W. 521.

Virginia.— Bowler *v.* Huston, 30 Gratt. 266, 32 Am. Rep. 673; Fisher *v.* March, 26 Gratt. 765.

Washington.— Aultman *v.* Mills, 9 Wash. 68, 36 Pac. 1046.

Wisconsin.— Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

See 30 Cent. Dig. tit. "Judgment," §§ 1477, 1478.

59. *New York.*— Rice *v.* Coutant, 38 N. Y. App. Div. 543, 56 N. Y. Suppl. 351; Hoffheimer *v.* Stiefel, 17 Misc. 236, 39 N. Y. Suppl. 714.

Ohio.— Bennett *v.* Morley, 10 Ohio 100.

Pennsylvania.— Fritz *v.* Fisher, 5 Pa. L. J. Rep. 350.

Vermont.— Ferry *v.* Miltimore Elastic Steel Car Wheel Co., 71 Vt. 457, 45 Atl. 1035, 76 Am. St. Rep. 787.

United States.— Hill *v.* Mendenhall, 21 Wall. 453, 22 L. ed. 616.

60. Sufficiency of process and service thereof see, generally, Process.

61. See *infra*, XXII, B, 5, g, (v).

62. Kane *v.* Cook, 8 Cal. 449; Sallee *v.* Hays, 3 Mo. 116; Rangely *v.* Webster, 11 N. H. 299.

63. Moulin *v.* Trenton Mut. Ins. Co., 24 N. J. L. 222.

Non-resident corporations see *infra*, XXII, B, 5, g, (viii).

64. Taylor *v.* Runyan, 3 Iowa 474; Hart *v.* Cummins, 1 Iowa 564; Latterett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428; Blackburn *v.* Jackson, 26 Mo. 308; Houston *v.* Dunn, 13 Tex. 476.

65. See Smith *v.* U. S. Express Co., 135 Ill. 279, 25 N. E. 525; Carson, etc., Lumber Co. *v.* Knapp, 80 Iowa 617, 45 N. W. 544; McDermott *v.* Clary, 107 Mass. 501.

Appearance by attorney see *infra*, XXII, B, 5, g, (ii).

66. Ewer *v.* Coffin, 1 Cush. (Mass.) 23, 48 Am. Dec. 587.

Sufficiency of process.— Where the statutes of a foreign state do not in terms require that the summons shall state the time and place to answer, and the summons in question did not furnish such information, a judgment rendered on default of defendant's appearance presupposes that such summons was sufficient under the laws of such state, and the judgment will not be deemed void for want of jurisdiction. Green *v.* Equitable Mut. Life, etc., Assoc., 105 Iowa 628, 75 N. W. 635. See, generally, Process.

tion unless controverted.[67] But it is not conclusive evidence that the attorney was authorized so to appear, and defendant may prove that the appearance was unauthorized or fraudulent, and consequently that there was no jurisdiction over him.[68] On the same principle, where a judgment is against plaintiff for costs, and he is sued upon it in another state, he may defend by showing that he gave no authority to institute the suit and had no knowledge thereof before judgment was rendered.[69]

(III) *JURISDICTION BY ATTACHMENT OF PROPERTY.* If jurisdiction in an action against a non-resident defendant is obtained by attachment of his property only, without personal service of process, the judgment rendered may bind the property attached and justify its disposition under execution;[70] but it can have no

67. *Illinois.*— Lawrence *v.* Jarvis, 32 Ill. 304.

Iowa.— Edmonds *v.* Montgomery, 1 Iowa 143.

Louisiana.— Tipton *v.* Mayfield, 10 La. 189.

Michigan.— Wilcox *v.* Kassick, 2 Mich. 165.

New York.— People *v.* Commercial Alliance L. Ins. Co., 5 N. Y. App. Div. 273, 39 N. Y. Suppl. 117; Reed *v.* Pratt, 2 Hill 64; Shumway *v.* Stillman, 6 Wend. 447.

Pennsylvania.— Reber *v.* Wright, 68 Pa. St. 471.

Texas.— Houston *v.* Dunn, 13 Tex. 476.

See 30 Cent. Dig. tit. "Judgment," §§ 1464, 1480.

Attorney's authority presumed to continue to end of proceedings see Walton *v.* Sugg, 61 N. C. 98, 93 Am. Dec. 580; Wilson *v.* Hilliard, 1 Pa. Cas. 425, 5 Atl. 258.

68. *Arkansas.*— Eaton *v.* Pennywit, 25 Ark. 144.

Connecticut.— Aldrich *v.* Kenney, 4 Conn. 380, 10 Am. Dec. 151.

Illinois.— Lawrence *v.* Jarvis, 32 Ill. 304; Thompson *v.* Emmert, 15 Ill. 415; Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689.

Indiana.— Boylan *v.* Whitney, 3 Ind. 140; Sherrard *v.* Nevius, 2 Ind. 241, 52 Am. Dec. 508.

Iowa.—Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Baltzell *v.* Nosler, 1 Iowa 588, 63 Am. Dec. 466. But see Tomlin *v.* Woods, 125 Iowa 367, 101 N. W. 135, a case where defendant, sued before a justice of the peace in another state, was personally served but did not appear. An attorney appeared for him, and judgment by default was entered. Defendant, sued on this judgment in Iowa, was not permitted to show that the attorney had no authority to appear for him, for if that was the fact he was at any rate in default and the judgment against him was proper.

Kansas.— Brinkman *v.* Shaffer, 23 Kan. 528.

Massachusetts.— Gilman *v.* Gilman, 126 Mass. 26, 30 Am. Rep. 646; Hall *v.* Williams, 6 Pick. 232, 17 Am. Dec. 356.

Missouri.— Bradley *v.* Welch, 100 Mo. 258, 12 S. W. 911; Eager *v.* Stover, 59 Mo. 87; Marx *v.* Fore, 51 Mo. 69, 11 Am. Rep. 432; Hays *v.* Merkle, 67 Mo. App. 55. *Compare* Baker *v.* Stonebraker, 34 Mo. 172; Warren *v.* Lusk, 16 Mo. 102.

Nebraska.— Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

New Jersey.— Ward *v.* Price, 25 N. J. L. 225.

New York.— Prichard *v.* Sigafus, 103 N. Y. App. Div. 535, 93 N. Y. Suppl. 152 (holding the evidence insufficient to show employment of the attorney who appeared); Howard *v.* Smith, 33 N. Y. Super. Ct. 124; Kahn *v.* Lesser, 16 N. Y. Suppl. 154; Shumway *v.* Stillman, 6 Wend 447.

North Carolina.— Koonce *v.* Butler, 84 N. C. 221.

Ohio.— Fordyce *v.* Marks, 5 Ohio Dec. (Reprint) 12, 1 Am. L. Rec. 257.

Pennsylvania.— Home Friendly Soc. *v.* Tyler, 12 Pa. Co. Ct. 623.

See 30 Cent. Dig. tit. "Judgment," §§ 1464, 1480. And see APPEARANCES, 3 Cyc. 534.

Early cases to the contrary cannot now be considered as of authority, since the decision of the United States supreme court in Thompson *v.* Whitman, 18 Wall. (U. S.) 457, 21 L. ed. 897, establishing the general rule that jurisdictional recitals in the record may be contradicted by parol. See Roberts *v.* Caldwell, 5 Dana (Ky.) 512; Whiting *v.* Johnson, 5 Dana (Ky.) 390; Wilcox *v.* Kassick, 2 Mich. 165; Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340; Field *v.* Gibbs, 9 Fed. Cas. No. 4,766, 1 Pet. C. C. (U. S.) 155.

Showing special authority.—Defendant may show that the authority given to his attorney was special and limited, and did not empower him to submit defendant to the jurisdiction generally, but only to plead to the jurisdiction. Wright *v.* Andrews, 130 Mass. 149; Graham *v.* Spencer, 14 Fed. 603.

69. Watson *v.* New England Bank, 4 Metc. (Mass.) 343. But citizens of one state who authorize a suit to be brought in another state are personally liable for the costs adjudged against them on their failure in such suit, although they may never have been in that state, and a judgment therefor may be enforced against them in the state of their residence. Walton *v.* Sugg, 61 N. C. 98, 93 Am. Dec. 580.

70. Melhop *v.* Doane, 31 Iowa 397, 7 Am. Rep. 147; Moore *v.* Spackman, 12 Serg. & R. (Pa.) 287.

Garnishment.— The jurisdiction of a state includes the power to appropriate debts, due by its citizens to non-residents, to the payment of debts due by such non-residents to

extraterritorial force or validity whatsoever as a personal judgment against defendant.[71] No action can be maintained in another state on a judgment so rendered,[72] nor will it constitute a merger of the original demand or a bar to an action in another state to recover the balance of such demand remaining unsatisfied after the sale of the property attached.[73]

(IV) *EXTRATERRITORIAL SERVICE OF PROCESS.* Personal service of process outside the boundaries of the state from whence it issues gives no jurisdiction of the person; hence such service, effected in another state, although authorized by the laws of the forum, gives no authority to render a personal judgment which will have any force or vitality beyond the state where the action is brought.[74]

other citizens of the state, and to prescribe the judicial proceedings by which such appropriation may be made; and when the proceedings in an action for that purpose are in conformity with the laws of the state, they are final and conclusive upon the non-resident, so far as the fund itself is concerned, although he was not served with process and did not appear in the action. Campbell *v.* Home Ins. Co., 1 S. C. 158.

71. *Kentucky.*—Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179; Rogers *v.* Coleman, Hard. 418, 3 Am. Dec. 733.

Maine.— McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666.

Massachusetts.— McDermott *v.* Clary, 107 Mass. 501.

Mississippi.— Chew *v.* Randolph, Walk. 1.

New Hampshire.— Young *v.* Ross, 31 N. H. 201; Bryant *v.* Ela, Smith 396.

New Jersey.— Miller *v.* Dungan, 36 N. J. L. 21; Curtis *v.* Martin, 2 N. J. L. 399.

New York.— Bartlett *v.* Spicer, 75 N. Y. 528; Pawling *v.* Wilson, 13 Johns. 192; Fenton *v.* Garlick, 8 Johns. 194; Robinson *v.* Ward, 8 Johns. 86, 5 Am. Dec. 327; Bates *v.* Delevan, 5 Paige 299.

North Carolina.— Peebles *v.* Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447; Battle *v.* Jones, 41 N. C. 567.

Ohio.— Arndt *v.* Arndt, 15 Ohio 33; Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197.

Pennsylvania.— Steel *v.* Smith, 7 Watts & S. 447; Phelps *v.* Holker, 1 Dall. 261, 1 L. ed. 128. Nor can such a judgment be enforced against any other property of the defendant than that bound by the original attachment. Glenny *v.* Boyd, 26 Pa. Super. Ct. 380.

Tennessee.— Earthman *v.* Jones, 2 Yerg. 484.

Texas.— Ward *v.* McKenzie, 33 Tex. 297, 7 Am. Rep. 261.

Vermont.— Price *v.* Hickok, 39 Vt. 292; Woodruff *v.* Taylor, 20 Vt. 65.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Green *v.* Van Buskirk, 7 Wall. 139, 19 L. ed. 109; Thompson *v.* Emmert, 23 Fed. Cas. No. 13,953, 4 McLean 96.

See 30 Cent. Dig. tit. "Judgment," § 1460 *et seq.* And see, generally, ATTACHMENT.

A personal judgment for costs may not be rendered against defendant, on default, in an action of trespass to try title to real estate, if citation was served on him by publication, as a non-resident, and not personally, and if such a judgment be entered, it cannot be enforced against other property of defendant even within the jurisdiction of the court. Freeman *v.* Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. ed. 372.

Attachment with personal service.— The doctrine that the judgment in an attachment proceeding creates no personal liability against defendant, outside the state where rendered, applies only where the proceeding is strictly *in rem*, and not where there was personal service of process on defendant or an appearance by him. Payne *v.* O'Shea, 84 Mo. 129.

72. Chamberlain *v.* Faris, 1 Mo. 517, 14 Am. Dec. 304; Pawling *v.* Wilson, 13 Johns. (N. Y.) 192; Kilburn *v.* Woodworth, 5 Johns. (N. Y.) 37, 4 Am. Dec. 321; Jones *v.* Spencer, 15 Wis. 583.

As evidence of debt.— The recitals of a judgment *in rem*, obtained in a sister state without personal service and on publication only, and where defendant did not enter an appearance, are not evidence of debt in a separate action pending in another state between the same parties. Iles *v.* Elledge, 18 Kan. 296. *Compare* Miller *v.* Pennington, 2 Stew. (Ala.) 399.

73. Fitzsimmons *v.* Marks, 66 Barb. (N. Y.) 333; National Bank *v.* Peabody, 55 Vt. 492, 45 Am. Rep. 632.

74. *Connecticut.*— Ward *v.* Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 42 L. R. A. 706, 71 Am. St. Rep. 207.

Maryland.— Garner *v.* Garner, 56 Md. 127.

Massachusetts.— Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Ewer *v.* Coffin, 1 Cush. 23, 48 Am. Dec. 587.

Michigan.— Howard *v.* Coon, 93 Mich. 442, 53 N. W. 513.

New York.— *In re* James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774; Fenton *v.* Garlick, 8 Johns. 194.

Ohio.— Cross *v.* Armstrong, 44 Ohio St. 613, 10 N. E. 160.

Pennsylvania.— Reber *v.* Wright, 68 Pa. St. 471; Scott *v.* Noble, 3 Pittsb. 138.

Texas.— Franz Falk Brewing Co. *v.* Hirsch, 78 Tex. 192, 14 S. W. 450.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Parrott *v.* Alabama Gold Ins. Co., 5 Fed. 391, 4 Woods 353.

See 30 Cent. Dig. tit. "Judgment," § 1462.

(v) *Constructive Service of Process*—(a) *On Non-Residents.* A judgment rendered in one state against a resident of another state who was not served with process and did not appear in the action either personally or by an authorized attorney is not valid or binding out of the state where rendered, although the attempt to acquire jurisdiction may have been in a mode, as, for example, by publication of summons in a newspaper, recognized as sufficient by the laws of that state; but such a judgment will be treated in the courts of other states as void for want of jurisdiction.[75]

(b) *On Residents.* If process is served upon a defendant according to the laws of the state of which he is a resident, and in which the action is brought, although it falls short of actual personal service, a judgment rendered against him is entitled to recognition as valid and binding in the courts of another state.[76]

But if defendant, after being so served, files an answer in the suit and sets up a defense on the merits, the judgment rendered will be valid and conclusive. Jones *v.* Jones, 36 Hun (N. Y.) 414.

75. *Arkansas.*— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Barkman *v.* Hopkins, 11 Ark. 157.

California.— Kane *v.* Cook, 8 Cal. 449.

Connecticut.—Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Aldrich *v.* Kinney, 4 Conn. 380, 10 Am. Dec. 151.

Delaware.— Mitchell *v.* Garrett, 5 Houst. 34.

Georgia.— Ponce *v.* Underwood, 55 Ga. 601; Howell *v.* Gordon, 40 Ga. 302; Dearing *v.* Charleston Bank, 5 Ga. 497, 48 Am. Dec. 300.

Illinois.—Zepp *v.* Hager, 70 Ill. 223; Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689.

Indiana.— Dunn *v.* Dilks, 31 Ind. App. 673, 68 N. E. 1035.

Kentucky.— Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179; Rogers *v.* Coleman, Hard. 413, 3 Am. Dec. 733.

Louisiana.— Feltus *v.* Starke, 12 La. Ann. 798.

Maine.— McVicker *v.* Beedy, 31 Me. 314, 50 Am. Rep. 666.

Maryland.— Expressman's Mut. Ben. Assoc. *v.* Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470.

Massachusetts.—Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6, 26 Am. St. Rep. 210, 12 L. R. A. 574; Carleton *v.* Bickford, 13 Gray 591, 74 Am. Dec. 652; Phelps *v.* Brewer, 9 Cush. 390, 57 Am. Dec. 56; Woodward *v.* Tremere, 6 Pick. 354.

Michigan.— Tyler *v.* Peatt, 30 Mich. 63; Outhwite *v.* Porter, 13 Mich. 533.

Minnesota.—Boyle *v.* Musser-Sauntry Land, etc., Co., 88 Minn. 456, 93 N. W. 520, 97 Am. St. Rep. 558.

Missouri.— Winston *v.* Taylor, 28 Mo. 82, 75 Am. Dec. 112; Rentschler *v.* Jamison, 6 Mo. App. 135.

New Hampshire.— Carleton *v.* Washington Ins. Co., 35 N. H. 162; Eaton *v.* Badger, 33 N. H. 228; Rangely *v.* Webster, 11 N. H. 299; Whittier *v.* Wendell, 7 N. H. 257.

New York.— Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Matter of Law, 56 N. Y. App. Div. 454, 67 N. Y. Suppl. 857; Rundle *v.* Van Inwegan, 9 N. Y. Civ. Proc. 328; Bicknell *v.* Field, 8 Paige 440.

North Carolina.— Davidson *v.* Sharpe, 28 N. C. 14.

Ohio.— Arndt *v.* Arndt, 15 Ohio 33.

Pennsylvania.— Scott *v.* Nohle, 72 Pa. St. 115, 13 Am. Rep. 663; Reher *v.* Wright, 68 Pa. St. 471.

Rhode Island.— Frothingham *v.* Barnes, 9 R. I. 474; Rathbone *v.* Terry, 1 R. I. 73.

South Carolina.— Miller *v.* Miller, 1 Bailey 242.

Tennessee.— Carlin *v.* Taylor, 7 Lea 666.

Vermont.— Price *v.* Hickok, 39 Vt. 292; Newcomb *v.* Peck, 17 Vt. 302, 44 Am. Dec. 340; Rider *v.* Alexander, 1 D. Chipm. 267.

West Virginia.— Stewart *v.* Northern Assur. Co., 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101.

Wisconsin.— Jones *v.* Spencer, 15 Wis. 583.

United States.— Hart *v.* Sansom, 110 U. S. 151, 3 S. Ct. 586, 28 L. ed. 101; Empire Tp. *v.* Darlington, 101 U. S. 87, 25 L. ed. 878; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. 58, 22 L. ed. 70; Thompson *v.* Whitman, 18 Wall. 457, 21 L. ed. 897; Cooper *v.* Reynolds, 10 Wall. 308, 19 L. ed. 931; Bischoff *v.* Wethered, 9 Wall. 812, 19 L. ed. 829; D'Arcy *v.* Ketchum, 11 How. 165, 13 L. ed. 648; Thompson *v.* Emmert, 23 Fed. Cas. No. 13,593, 4 McLean 96.

See 30 Cent. Dig. tit. "Judgment," § 1460 *et seq.* And see, generally, Process.

Judgment against administrator.— But it has been held that without any notice other than by publication, an administrator is chargeable with notice of the reversal of the probate decree discharging him as executor, and of the subsequent entry of a judgment against him in the probate court, and is bound thereby. Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100.

76. *Alabama.*— Hunt *v.* Mayfield, 2 Stew. 124.

Illinois.— Firemen's Ins. Co. *v.* Thompson, 155 Ill. 204, 40 N. E. 488, 46 Am. St. Rep. 335.

Iowa.— Green *v.* Equitable Mut. Life, etc., Assoc., 105 Iowa 628, 75 N. W. 635.

Kentucky.—Biesenthall *v.* Williams, 1 Duv.

But the judgment is liable to be impeached in the courts of another state by proof that defendant was not actually domiciled in the state where it was rendered, or subject to its laws.[77]

(VI) *VOLUNTARY APPEARANCE OF NON-RESIDENT.* No matter what may be the form or manner of service on a non-resident defendant, if he voluntarily enters an appearance in the action, the court acquires complete jurisdiction of him, so that a judgment based thereon must be accounted valid and binding in all other states.[78]

(VII) *DEFENDANT DECOYED INTO ANOTHER STATE.* It has been held that in an action on a judgment rendered in another state, it is a complete defense to show that defendant, by means of plaintiff's fraud and false representations, was decoyed into the jurisdiction of the court which rendered the judgment, and by such means was served with process.[79] But some of the cases hold that defendant in such a case should first exhaust his remedies against the judgment in the state where it was rendered, and if he fails to do this he cannot defend against it on such grounds.[80]

(VIII) *NON-RESIDENT CORPORATIONS.* Jurisdiction of a foreign corporation, in an action against it, must be acquired by proper and sufficient service within

329, 85 Am. Dec. 629; Delano *v.* Joplin, 1 Litt. 117.

Maryland.— Harryman *v.* Roberts, 52 Md. 64.

Massachusetts.— Henderson *v.* Staniford, 105 Mass. 504, 7 Am. Rep. 551; Gillespie *v.* Commercial Mut. Mar. Ins. Co., 12 Gray 201, 71 Am. Dec. 743.

Missouri.— Hamill *v.* Talbott, 72 Mo. App. 22.

New York.— Huntley *v.* Baker, 33 Hun 578; Cassidy *v.* Leitch, 2 Abb. N. Cas. 315, 53 How. Pr. 105.

Ohio.— Williams *v.* Guerney, 1 Ohio Dec. (Reprint) 233, 5 West. L. J. 212.

Pennsylvania.— Reber *v.* Wright, 68 Pa. St. 471; Stewart *v.* Schaeffer, 33 Wkly. Notes Cas. 365.

Vermont.— Fullerton *v.* Horton, 11 Vt. 425.

See 30 Cent. Dig. tit. "Judgment," § 1460 *et seq.*

Contra.— Bowler *v.* Huston, 30 Gratt. (Va.) 266, 32 Am. Rep. 673. And see Amsbaugh *v.* Exchange Bank, 33 Kan. 100, 5 Pac. 384. But *compare* Burtners *v.* Keran, 24 Gratt. (Va.) 42.

77. Cassidy *v.* Leitch, 2 Abb. N. Cas. (N. Y.) 315.

78. *Louisiana.*— New Orleans Mut. Nat. Bank *v.* Moore, 50 La. Ann. 1332, 24 So. 304.

Maine.— Cleaves *v.* Lord, 43 Me. 290.

Missouri.—Randolph *v.* Keiler, 21 Mo. 557; Harbin *v.* Chiles, 20 Mo. 314.

Utah.— Richardson, etc., Co. *v.* Utah Stove, etc., Co., 28 Utah 85, 77 Pac. 1.

Vermont.— Bellows *v.* Ingham, 2 Vt. 575.

United States.— Hubbard *v.* American Inv. Co., 70 Fed. 808.

79. *Indiana.*— Duringer *v.* Moschino, 93 Ind. 495.

Iowa.— Dunlap *v.* Cody, 31 Iowa 260, 7 Am. Rep. 129.

Kansas.— Abercrombie *v.* Abercrombie, 64 Kan. 29, 67 Pac. 539.

Ohio.— Pilcher *v.* Graham, 18 Ohio Cir. Ct. 5, 9 Ohio Cir. Dec. 825.

Pennsylvania.— An affidavit of defense, in a suit on a foreign judgment, which alleges that defendant was fraudulently enticed into the state where the judgment was rendered for the purpose of getting service on him is not sufficient unless it also shows a defense on the merits. Luckenbach *v.* Anderson, 47 Pa. St. 123.

Compare, however, Jaster *v.* Currie, 198 U. S. 144, 25 S. Ct. 614, 49 L. ed. 988 [*reversing* (Nebr. 1903) 94 N. W. 995], holding that the refusal of the Nebraska courts to permit an action to be maintained on an Ohio judgment denies the full faith and credit guaranteed by U. S. Const. art. 4, § 1, when based on the alleged fraud in acquiring jurisdiction of the defendant in the Ohio suit, in that the service of process therein was only made possible by giving defendant notice in Nebraska that plaintiff's deposition would be taken in Ohio for use in an action for the same cause then pending in Nebraska, in the hope that defendant would attend, and would delay his return to Nebraska after the deposition was taken long enough to permit service.

A mere request to defendant to go to the other state and defend a suit actually pending there is not a fraudulent device or trick such as will invalidate a judgment recovered against him after service of process in the state. Duringer *v.* Moschino, 93 Ind. 495.

80. Thus it is held in several states that defendant should first apply to the court which rendered the judgment to set it aside, on the ground of an abuse of process, or apply to a proper court for an injunction against it. Peel *v.* January, 35 Ark. 331, 37 Am. Rep. 27; Steele *v.* Bates, 2 Aik. (Vt.) 338, 16 Am. Dec. 720; Townsend *v.* Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793. And in a case in Massachusetts it is said that his remedy is to bring suit against the persons conspiring to lure him into the foreign jurisdiction. Cook *v.* Brown, 125 Mass. 503, 28 Am. Rep. 259.

the state to entitle the judgment to recognition abroad;[81] but such service may be made upon a duly authorized resident agent or officer of the company,[82] or upon the secretary of state, commissioner of insurance, or other officer, as provided by statute,[83] and the judgment will then be valid, provided the record shows on its face that the corporation was doing business within that state.[84] A judgment against a foreign corporation after its dissolution according to law in the state which created it is a nullity.[85]

(IX) *NON-RESIDENT STOCK-HOLDERS OF DOMESTIC CORPORATION.* A judgment against a corporation which by the laws of the state in which it is rendered is binding on the stock-holders must be given by a court of another state the same conclusive effect against a stock-holder who is sued therein, as upon his unpaid subscription or upon an assessment to pay debts; and the only defenses which he can make against it are those which he could make in the courts of the state where it was rendered;[86] and the rule is the same in regard to a decree or order levying an assessment upon the premium notes of members of a mutual insurance company.[87] But an order of court merely making an assessment or call upon stock-holders for unpaid subscriptions is not to be taken as a judgment against any individual stock-holder, so as to be conclusive against him in the courts of another state.[88]

(X) *IRREGULARITIES IN PROCESS OR SERVICE.* If defendant was personally served within the jurisdiction of the court, no mere irregularity in the service or in the process, unless so radical as to deprive it of all citatory effect, can be set up against the judgment when brought in question in another state.[89]

h. Sufficiency of Recitals in Record. To give validity to a judgment rendered

81. Ward *v.* Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 71 Am. St. Rep. 207, 42 L. R. A. 706; Gilchrist *v.* West Virginia Oil, etc., Co., 21 W. Va. 115, 45 Am. Rep. 555; St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222. See, generally, FOREIGN CORPORATIONS; PROCESS.

82. Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404, 15 L. ed. 451. See, generally, FOREIGN CORPORATIONS; PROCESS.

83. Johnston *v.* Mutual Reserve Fund L. Ins. Co., 104 N. Y. App. Div. 550, 93 N. Y. Suppl. 1052 [*affirming* 45 Misc. 316, 90 N. Y. Suppl. 539 (*affirming* 43 Misc. 251, 87 N. Y Suppl. 438)]. And see, generally, FOREIGN CORPORATIONS; PROCESS.

84. Hazeltine *v.* Mississippi Valley F. Ins. Co., 55 Fed. 743; Henning *v.* Planters' Ins. Co., 28 Fed. 440. And see Cunningham *v.* Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235. See, generally, PROCESS. Service on an officer of the corporation defendant who happens accidentally to be caught within the state is not sufficient, the corporation doing no business there. Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222. See, generally, FOREIGN CORPORATIONS; PROCESS.

85. Rodgers *v.* Adriatic F. Ins. Co., 148 N. Y. 34, 42 N. E. 515; People *v.* Mercantile Credit Guarantee Co., 65 N. Y. App. Div. 306, 72 N. Y. Suppl. 858; *In re* Norwood, 32 Hun (N. Y.) 196.

86. Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711; Mutual F. Ins. Co. *v.* Phœnix Furniture Co., 108 Mich. 170, 66 N. W. 1095, 62 Am. St. Rep. 693, 34 L. R. A. 694; Tompkins *v.* Blakey, 70 N. H. 584, 49 Atl. 111; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 20 S. Ct. 506, 44 L. ed. 619 [*reversing* 20 R. I. 466, 40 Atl. 341]. *Contra*, Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725. See also CORPORATIONS, 10 Cyc. 733.

Effect of local laws.— Where, under the laws of a given state, the only remedy provided for the enforcement of the liability of stock-holders in domestic corporations is a suit in equity in that state by a creditor in behalf of himself and all other creditors against the stock-holders who can be served with process, the courts of another state may refuse to entertain a further action against a stock-holder within their own jurisdiction. Finney *v.* Guy, 189 U. S. 335, 23 S. Ct. 558, 47 L. ed. 839 [*affirming* 111 Wis. 296, 87 N. W. 255].

87. Stevens *v.* Hein, 37 N. Y. App. Div. 542, 55 N. Y. Suppl. 491; Parker *v.* Stoughton Mill. Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881. *Contra*, Parker *v.* Lamb, 99 Iowa 265, 68 N. W. 686, 34 L. R. A. 704.

88. Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 986. And see Commonwealth Mut. F. Ins. Co. *v.* Hayden, 61 Nebr. 454, 85 N. W. 443.

89. *California.*— Greenzweig *v.* Strelinger, 103 Cal. 278, 37 Pac. 398.

Iowa.— Struble *v.* Malone, 3 Iowa 586.

New Jersey.— Jardine *v.* Reichert, 39 N. J. L. 165.

Oregon.— Foshier *v.* Narver, 24 Oreg. 441, 34 Pac. 21, 41 Am. St. Rep. 874, misnomer of defendant in summons.

Pennsylvania.— Shilling *v.* Seigle, 207 Pa. St. 381, 56 Atl. 957, summons served on Sunday, as allowed by the laws of the forum.

in one state and sued on in another, the transcript or record must show that defendant was summoned to appear, or that he did appear, in the court which rendered the judgment.[90] If the record shows neither service of process nor notice to or appearance by defendant, it will be treated as a nullity.[91] But if it recites or shows an actual appearance by him, it is immaterial whether or not it shows proper service of process upon him.[92]

i. Judgment Against Joint Defendants. In an action against several defendants, some of whom are not served with process, or are only constructively summoned, a judgment rendered jointly against all is not enforceable in another state against defendants jointly or against those not served;[93] and the same rule applies to a judgment against a partnership, where some of the partners are not served with process.[94] So far as concerns defendant who was served, the judgment may be valid in the state of its rendition, and if this is the case it must be accorded an equal measure of validity in all other states.[95] But some cases hold that the presumption is against its validity, even as to defendant legally before the court; and if it is valid as to him by the law of the state where it was rendered, this fact must be established by affirmative proof of the laws of that state; otherwise it will be held void.[96]

j. Joint Debtor Acts. These statutes provide that, where some of defendants

United States.— Laing *v.* Rigney, 160 U. S. 531, 16 S. Ct. 366, 40 L. ed. 525.

90. Drake *v.* Granger, 22 Fla. 348; Bissell *v.* Wheelock, 11 Cush. (Mass.) 277.

A recital that defendant was "legally summoned" is *prima facie* evidence that the method of service was in accordance with law. Williams *v.* Williams, 53 Mo. App. 617.

Contradictory transcripts.— A duly certified copy of a record from another state which shows proper service on defendant will support an action on the judgment, although defendant produces another duly certified copy of the record which contains no summons or return. Barringer *v.* King, 5 Gray (Mass.) 9.

Signature to summons.— In an action on a judgment of another state, it appeared that the original summons was signed "A. B., prothonotary, by C. D.," and it was objected that it did not appear that C D was a deputy; but as the summons was under the proper seal, and served by the proper officer, and the record elsewhere disclosed that defendant was summoned, the court held the objection not well taken. Hart *v.* Cummins, 1 Iowa 564.

91. Warren *v.* McCarthy, 25 Ill. 95; McLaurine *v.* Monroe, 30 Mo. 462.

92. Walker *v.* Lathrop, 6 Iowa 516; Noyes *v.* Butler, 6 Barb. (N. Y.) 613; Middletown Bank *v.* Huntington, 13 Abb. Pr. (N. Y.) 402; Wadsworth *v.* Letson, 2 Speers (S. C.) 277; Hoxie *v.* Wright, 2 Vt. 263.

93. *Connecticut.*— Duryee *v.* Hale, 31 Conn. 217; Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562.

Maine.— Hall *v.* Williams, 10 Me. 278.

Massachusetts.— Stone *v.* Wainwright, 147 Mass. 201, 17 N. E. 301.

Michigan.— Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

New Hampshire.— Wilbur *v.* Abbot, 60 N. H. 40.

New Jersey.— Gordon *v.* Mackay, 34 N. J. L. 286.

Pennsylvania.— Rogers *v.* Burns, 27 Pa. St. 525.

Rhode Island.— Frothingham *v.* Barnes, 9 R. I. 474.

South Carolina.— Menlove *v.* Oakes, 2 McMull. 162.

Virginia.— Bowler *v.* Huston, 30 Gratt. 266, 32 Am. Rep. 673.

United States.— Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535; Virginia Bd. of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. ed. 687.

See 30 Cent. Dig. tit. "Judgment," § 1463.

94. *Arkansas.*— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

Louisiana.— Scott *v.* Bogart, 14 La. Ann. 261. See Wetmore *v.* Daffin, 6 La. Ann. 292.

Massachusetts.— Phelps *v.* Brewer, 9 Cush. 390, 57 Am. Dec. 56.

New York.— Wilson *v.* Niles, 2 Hall 358; Hoffman *v.* Newell, 21 N. Y. Suppl. 912.

Pennsylvania.— Victor *v.* Abrams, 13 Pa. Co. Ct. 298.

Wisconsin.— A judgment in one state against one partner for a firm debt is a bar to an action in another state against another partner not served in the former action. Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

See 30 Cent. Dig. tit. "Judgment," § 1463.

95. Conley *v.* Chapman, 74 Ga. 709; Holt *v.* Johnson, 50 Mo. App. 373; Sheriff *v.* Smith, 47 How. Pr. (N. Y.) 470; Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629. *Compare* Smith *v.* Smith, 17 Ill. 482; Watson *v.* Steinau, 19 R. I. 218, 33 Atl. 4, 61 Am. St. Rep. 768. And see Dart *v.* Goss, 24 Mich. 266.

96. Wright *v.* Andrews, 130 Mass. 149; Knapp *v.* Abell, 10 Allen (Mass.) 485; Scott *v.* Noble, 72 Pa. St. 115, 13 Am. Rep. 663. Where suit is brought against two defendants on a judgment rendered in a sister state, one of such defendants can plead a want of jurisdiction in the foreign court over his

in an action are not served, judgment may be rendered against all, but so that execution shall only issue against their joint property and the separate property of defendant served.[97] And a judgment so rendered must be accorded the same force and effect in another state, when made the basis of an action, as it receives at home; so that defendant who was served cannot contest the validity of the judgment as to him nor the merits of the case.[98] But defendant not served is not bound by the judgment, and it will constitute no bar to a suit against him in another state on the original cause of action.[99] Nor in such an action is the judgment conclusive evidence, unless merely as to the amount of the indebtedness.[1]

6. FRAUD OR ERROR AS GROUND OF IMPEACHMENT — a. Judgment Not Reviewable For Error. Where jurisdiction of an action sufficiently appears or is satisfactorily shown, the judgment rendered therein cannot be impeached or avoided in another state on account of any alleged errors or mistakes committed by the court which rendered it.[2] Thus a court in another state will not listen to a contention that the judgment is contrary to the facts or not warranted by the evidence.[3] But it is otherwise where the alleged error is so radical as to amount to a want of jurisdiction over a necessary party.[4]

b. Irregularities. Irregularities which do not amount to jurisdictional defects, or which do not render a judgment absolutely void, cannot be pleaded in defense to an action on a judgment recovered in another state; but on the contrary every reasonable presumption will be indulged in support of the judgment.[5] It is, how-

co-defendant. Gordon *v.* Mackay, 34 N. J. L. 286.

97. See *supra*, I, E, 4, b; VI, C, 3, c.

98. Shirley *v.* Shattuck, 13 Metc. (Mass.) 256; Swift *v.* Stark, 2 Oreg. 97, 88 Am. Dec. 463; Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629; Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535.

99. Stone *v.* Wainwright, 147 Mass. 201, 17 N. E. 301; Odom *v.* Denny, 16 Gray (Mass.) 114. *Contra*, Hoffman *v.* Wight, 1 N. Y. App. Div. 514, 37 N. Y. Suppl. 262.

1. Duryee *v.* Hale, 31 Conn. 217. See Oakley *v.* Aspinwall, 4 N. Y. 513.

2. *Indiana.*— Anderson *v.* Fry, 6 Ind. 76.
Iowa.— Milne *v.* Van Buskirk, 9 Iowa 558; Olds *v.* Glaze, 7 Iowa 86; Edmonds *v.* Montgomery, 1 Iowa 143.
Kansas.— French *v.* Pease, 10 Kan. 51.
Kentucky.—Biesenthall *v.* Williams, 1 Duv. 329, 85 Am. Dec. 629; Whiting *v.* Johnson, 5 Dana 390.
Louisiana.— Muncaster *v.* Bland, 11 La. Ann. 507.
Mississippi.— Barringer *v.* Boyd, 27 Miss. 473.
Missouri.— Howland *v.* Chicago, etc., R. Co., 134 Mo. 474, 36 S. W. 29.
New York.— Chapin *v.* Dobson, 78 N. Y. 74, 34 Am. Rep. 512. *Compare* Teel *v.* Yost, 56 N. Y. Super. Ct. 456, 5 N. Y. Suppl. 5.
North Carolina.— Miller *v.* Leach, 95 N. C. 229; Walton *v.* Sugg, 61 N. C. 98, 93 Am. Dec. 580; Davidson *v.* Sharpe, 28 N. C. 14.
Oklahoma.— Blumle *v.* Kramer, 14 Okla. 366, 373, 79 Pac. 215, 1134.
See 30 Cent. Dig. tit. "Judgment," § 1482 *et seq.*

3. Ragan *v.* Cuyler, 24 Ga. 397; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129.

4. Dennison *v.* Hyde, 6 Conn. 508.

5. *Alabama.*— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Hassell *v.* Hamilton, 33 Ala. 280; McLendon *v.* Dodge, 32 Ala. 491; Crawford *v.* Simonton, 7 Port. 110.
Arkansas.— Hallum *v.* Dickinson, 54 Ark. 311, 15 S. W. 775; Nunn *v.* Sturges, 22 Ark. 389; Conway *v.* Ellison, 14 Ark. 360.
District of Columbia.— Slack *v.* Perrine, 9 App. Cas. 128.
Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.
Illinois.— Griffin *v.* Eaton, 27 Ill. 379, 81 Am. Dec. 233.
Indiana.— Keely *v.* Garner, 13 Ind. 399; Riley *v.* Murray, 8 Ind. 354; Horner *v.* Doe, Smith 10; Anthony *v.* Masters, 28 Ind. App. 239, 62 N. E. 505.
Iowa.— Tomlin *v.* Woods, 125 Iowa 367, 101 N. W. 135; Struble *v.* Malone, 3 Iowa 586.
Kansas.— Ward *v.* Baker, 16 Kan. 31; Dodge *v.* Coffin, 15 Kan. 277.
Kentucky.— Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059.
Louisiana.— McFarland *v.* White, 13 La. Ann. 394; Kyle *v.* Van Bibber, 7 La. Ann. 575; Jordan *v.* Black, 1 Rob. 575.
Maine.— Hall *v.* Williams, 10 Me. 278.
Missouri.— Payne *v.* O'Shea, 84 Mo. 129; Grover *v.* Grover, 30 Mo. 400; Harness *v.* Green, 19 Mo. 323.
New Hampshire.— Smith *v.* Whittier, 9 N. H. 464.
New Jersey.— Brooklyn First Nat. Bank *v.* Wallis, 59 N. J. L. 46, 34 Atl. 983.
New York.— Teel *v.* Yost, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Rocco *v.* Hackett, 2 Bosw. 579.
North Carolina.— Walton *v.* Sugg, 61 N. C. 98, 93 Am. Dec. 580.
Ohio.— Sipes *v.* Whitney, 30 Ohio St. 69;

ever, vitally necessary that the record offered should contain the essential elements of a judgment, or be sufficient to constitute a judgment at common law or under the laws of the state where rendered, which in the latter case must be proved.[6] And the rendering of a judgment on a subject not submitted for adjudication, or beyond the pleadings, is not a mere irregularity but a fatal jurisdictional defect.[7]

c. Fraud[8] — (i) *In General.* Although there are many decisions and *dicta* to the effect that a judgment of another state, when made the basis of an action, may be impeached on the ground that it was entered or procured by fraud,[9] the

Goodrich *v.* Jenkins, 6 Ohio 43; Hazzard *v.* Nottingham, Tapp. 160.

Pennsylvania.— Rogers *v.* Burns, 27 Pa. St. 525.

South Carolina.— Wadsworth *v.* Letson, 2 Speers 277; Negro Ben *v.* Coleman, 2 Bay 485; Fretwell *v.* Neal, 11 Rich. Eq. 559.

Tennessee.— Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100; Taylor *v.* Smith, (Ch. App. 1896) 36 S. W. 970.

Texas.— Henry *v.* Allen, 82 Tex. 35, 17 S. W. 515.

Vermont.— Carpenter *v.* Pier, 30 Vt. 81, 73 Am. Dec. 288.

Wisconsin.— Kellam *v.* Toms, 38 Wis. 592.

United States.— Chicago, etc., R. Co. *v.* Sturm, 174 U. S. 710, 19 S. Ct. 797, 43 L. ed. 1144; Ritchie *v.* McMullen, 159 U. S. 235, 16 S. Ct. 171, 40 L. ed. 133; Hearfield *v.* Bridges, 75 Fed. 47, 21 C. C. A. 212.

See 30 Cent. Dig. tit. "Judgment," § 1483 *et seq.*

Justice's judgment.— But the record of a judgment rendered by a justice of the peace in another state, on which action is brought, must show on its face all the requisites of validity. Perry *v.* Northern Ins. Co., 5 Phila. (Pa.) 188.

Time of entry.— Where a record from another state shows a judgment entered in vacation, it will be presumed, in the absence of any showing to the contrary, that such a judgment was authorized by the laws of that state. Dodge *v.* Coffin, 15 Kan. 277.

Trial by jury.— The judgment is not invalidated by the fact that the transcript shows that the case was tried without a jury, and does not show that a jury trial was waived. Stewart *v.* Maxwell, 1 N. M. 563.

Signature of judge.— The objection that the judgment was not signed by the judge is of no avail, for it will be presumed that, by the laws of the state where the judgment was rendered, such signature was unnecessary. French *v.* Pease, 10 Kan. 51.

Parties.— In an action on a foreign judgment, the court will not inquire whether the original action was by or against all the proper parties. Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Hearfield *v.* Bridges, 75 Fed. 47, 21 C. C. A. 212.

Amount of recovery.— If it appears from the record that the court had jurisdiction, defendant cannot show that he and his attorney made mistakes, and that the judgment was consequently for more than was due. Edwards *v.* Jones, 113 N. C. 453, 18 S. E. 500.

6. Hinson *v.* Wall, 20 Ala. 298; Terrill *v.* Van Bibber, 3 La. Ann. 634; Sherwood *v.* Miller, 37 Mo. App. 48; Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

The judgment of a justice of the peace in another state will not be enforced in this state unless it is certain in itself or is capable of being made so by intendment or presumption. Fritz *v.* Fisher, 5 Pa. L. J. Rep. 350.

7. Reynolds *v.* Stockton, 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464.

8. **Fraud in obtaining jurisdiction** see *supra*, XXII, B, 5, g, (VII).

9. *Arkansas.*— Conway *v.* Ellison, 14 Ark. 360.

Connecticut.— Pearce *v.* Olney, 20 Conn. 544.

Georgia.—Engel *v.* Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Sharman *v.* Morton, 31 Ga. 34; Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Illinois.— Lawrence *v.* Jarvis, 32 Ill. 304; Welch *v.* Sykes, 8 Ill. 197, 44 Am. Dec. 689; Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430. And see Baltimore, etc., R. Co. *v.* McDonald, 112 Ill. App. 391, stating that the law of comity forbids the use of the courts of one state to perpetrate a fraud on a citizen of another state.

Indiana.— Brown *v.* Eaton, 98 Ind. 591; Holt *v.* Alloway, 2 Blackf. 108; Anthony *v.* Masters, 28 Ind. App. 239, 62 N. E. 505.

Iowa.— Rogers *v.* Gwinn, 21 Iowa 58.

Kentucky.— Clark *v.* Ogilvie, 111 Ky. 181, 63 S. W. 429, 23 Ky. L. Rep. 552; Fletcher *v.* Ferrel, 9 Dana 372, 35 Am. Dec. 143.

Massachusetts.— Brainard *v.* Fowler, 119 Mass. 262.

Mississippi.— White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112; Fletcher *v.* Rapp, Sm. & M. Ch. 374.

Missouri.— Ward *v.* Quinlivin, 57 Mo. 425; Marx *v.* Fore, 51 Mo. 69, 11 Am. Rep. 432; Hudson-Kimberly Pub. Co. *v.* Young, 90 Mo. App. 505.

Nebraska.— Snyder *v.* Critchfield, 44 Nebr. 66, 62 N. W. 306; Keeler *v.* Elston, 22 Nebr. 310, 34 N. W. 891; Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

New Jersey.— Magowan *v.* Magowan, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645; Davis *v.* Headley, 22 N. J. Eq. 115.

New York.— Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Kerr *v.* Kerr, 41 N. Y.

more correct rule, as shown by the decisions of the United States supreme court,[10] is that such a plea is admissible only where fraud in the judgment could be set up against it in the courts of the state where it was rendered, the effect being to give the judgment just the degree of conclusiveness which it has at home and no more;[11] and some of the decisions refuse to admit the plea of fraud even in these circumstances, holding that the party defrauded must seek his remedy in the court which rendered the judgment.[12]

(II) *False Evidence and Conspiracy.* That a judgment recovered in another state was obtained by means of the false and fraudulent testimony of the prevailing party or other witnesses is no ground of defense to an action upon it, or for enjoining its enforcement.[13] But conspiracy to obtain a judgment against defendant without his knowledge, as by false personation, procuring a false return of service, or other fraudulent means, may be shown in defense to an action upon it in another state, since it strikes at the root of jurisdiction.[14]

(III) *Fraud Anterior to Judgment.* A plea of fraud in an action on a judgment from another state must show fraud practised in the very act of obtaining the judgment, not anterior to it; a defense founded on the fraudulent

272; Everett *v.* Everett, 75 N. Y. App. Div. 369, 78 N. Y. Suppl. 193; White *v.* Reid, 70 Hun 197, 24 N. Y. Suppl. 290; Fasnacht *v.* Stehn, 53 Barb. 650, 5 Abb. Pr. N. S. 338; Mussina *v.* Belden, 6 Abb. Pr. 165; Andrews *v.* Montgomery, 19 Johns. 162, 10 Am. Dec. 213; Borden *v.* Fitch, 15 Johns. 121, 8 Am. Dec. 225; Shumway *v.* Stillman, 4 Cow. 292, 15 Am. Dec. 374.

North Carolina.— Coleman *v.* Howell, 131 N. C. 125, 42 S. E. 555; Miller *v.* Leach, 95 N. C. 229.

Oregon.— Murray *v.* Murray, 6 Oreg. 17.

Pennsylvania.— Wright *v.* Tower, 1 Browne appendix 1.

Tennessee.— Turley *v.* Taylor, 6 Baxt. 376; Coffee *v.* Neely, 2 Heisk. 304.

Texas.— Norwood *v.* Cobb, 20 Tex. 588; Miller *v.* Lovell, (Civ. App. 1897) 40 S. W. 835.

Vermont.— Waddams *v.* Burnham, 1 Tyler 233.

Virginia.— Buford *v.* Buford, 4 Munf. 241, 6 Am. Dec. 511.

United States.— Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538; Amory *v.* Amory, 1 Fed. Cas. No. 333.

See 30 Cent. Dig. tit. "Judgment," § 1486.

10. Maxwell *v.* Stewart, 21 Wall. (U. S.) 71, 22 L. ed. 564; Christmas *v.* Russell, 5 Wall. (U. S.) 290, 18 L. ed. 475; Warrington *v.* Ball, 90 Fed. 464, 33 C. C. A. 609.

11. *Alabama.*— Lucas *v.* Copeland, 2 Stew. 151.

Connecticut.— Sanford *v.* Sanford, 28 Conn. 6.

District of Columbia.— Richmond, etc., R. Co. *v.* Gorman, 7 App. Cas. 91.

Illinois.— Ambler *v.* Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202.

Iowa.— Crawford *v.* White, 17 Iowa 560.

Maine.— Granger *v.* Clark, 22 Me. 128.

Maryland.— Hampleton *v.* Glenn, 72 Md. 331, 20 Atl. 115.

Massachusetts.— Mooney *v.* Hinds, 160 Mass. 469, 36 N. E. 484; Engstrom *v.* Sherburne, 137 Mass. 153; Goodrich *v.* Stevens, 116 Mass. 170; McRae *v.* Mattoon, 13 Pick. 53.

Mississippi.— Smedes *v.* Ilsley, 68 Miss. 590, 10 So. 75.

Nebraska.— Cox *v.* Barnes, 45 Nebr. 172, 63 N. W. 394.

New Hampshire.— McDonald *v.* Drew, 64 N. H. 547, 15 Atl. 148.

New Jersey.— Supreme Council R. A. *v.* Carley, 52 N. J. Eq. 642, 29 Atl. 813.

New York.— Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Bicknell *v.* Field, 8 Paige 440.

Ohio.— Anderson *v.* Anderson, 8 Ohio 108.

Pennsylvania.— Benton *v.* Burgot, 10 Serg. & R. 240; Johnson *v.* Dobbins, 5 Wkly. Notes Cas. 537.

Vermont.— Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

Wyoming.— Chadron Bank *v.* Anderson, 6 Wyo. 518, 48 Pac. 197.

See 30 Cent. Dig. tit. "Judgment," § 1486.

12. Peel *v.* January, 35 Ark. 331, 37 Am. Rep. 27; Leathe *v.* Thomas, 109 Ill. App. 434; Wyoming Mfg. Co. *v.* Mohler, (Pa. 1889) 17 Atl. 31; Hanley *v.* Donoghue, 116 U. S. 1, 6 S. Ct. 242, 29 L. ed. 535; Allison *v.* Chapman, 19 Fed. 488. And see Gray *v.* Richmond Bicycle Co., 26 Misc. (N. Y.) 165, 55 N. Y. Suppl. 787.

13. Riley *v.* Murray, 8 Ind. 354; Engstrom *v.* Sherburne, 137 Mass. 153; Smedes *v.* Ilsley, 68 Miss. 590, 10 So. 75; Metcalf *v.* Gilmore, 59 N. H. 417, 47 Am. Rep. 217.

Where jurisdiction of defendant's person is not denied, the mere fact that he expected that the testimony of an important witness would be in his favor, whereas on the trial the witness testified the other way, will not support a plea that the judgment was fraudulently obtained. Weir *v.* Vail, 65 Cal. 466, 4 Pac. 422.

14. Brown *v.* Eaton, 98 Ind. 591; Gilpin *v.* Baltimore, etc., R. Co., 17 N. Y. Suppl. 520; Rose *v.* Northwest F. & M. Ins. Co., 67 Fed.

character of the cause of action or subject-matter of the original suit is not admissible.[15]

7. Judgments In Rem[16] — a. In General. A judgment *in rem*, rendered by a court of competent jurisdiction in one state, cannot be collaterally assailed in another.[17] But if jurisdiction was based on the seizure or control of the *res*, without legal service of process on interested parties, while the judgment will be conclusive as to the status or disposition of such *res*, as in the case of a decree of divorce, where the *res* in controversy is the marital status of the petitioner,[18] yet it will not be a bar to an action in another state to enforce a personal liability on the original cause of action,[19] nor will it be evidence except as to the matters actually in issue and adjudicated.[20]

b. Probate Adjudications. A judgment or decree of a competent court in another state admitting a will to probate, or revoking probate already granted, is a "judicial proceeding" to the record of which full faith and credit is to be given when authenticated conformably to the act of congress.[21] So of a probate decree determining the question of the validity of a will,[22] or enforcing its provi-

439; Danville First Nat. Bank *v.* Cunningham, 48 Fed. 510.

15. *Louisiana.*— Hockaday *v.* Skeggs, 18 La. Ann. 681.

Missouri.— Crim *v.* Crim, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521.

Nebraska.— Packer *v.* Thompson, 25 Nebr. 688, 41 N. W. 650.

New York.— Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

Pennsylvania.— Jeter *v.* Fellowes, 32 Pa. St. 465.

See *supra*, XXII, B, 4, b.

16. Judgments in rem generally see *supra*, XVI.

Judgments in rem of foreign countries see *infra*, XXII, D, 1.

17. Moore *v.* Chicago, etc., R. Co., 43 Iowa 385; Stedman *v.* Patchin, 34 Barb. (N. Y.) 218. See also *supra*, XVI, C.

Mortgage foreclosure.— A suit to enforce the lien of a mortgage by sale of the property is in the nature of a proceeding *in rem*, and in case the mortgagor is a non-resident, or not found, so that he cannot be personally served with process within the state, the court may decree a sale of the property on such substituted or constructive service as the legislature may provide. Swift *v.* Meyers, 37 Fed. 37, 13 Sawy. 583. Under the constitution of the United States, requiring each state to give full faith and credit to the judicial proceedings of every other state of the Union, a judgment of another state rendered on service by publication in a proceeding to foreclose a mortgage on real estate is conclusive in Washington, where no personal judgment was sought or taken against the mortgagors. Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556.

18. See 17 Cent. Dig. tit. "Divorce," §§ 707–751, 1000–1041; 2 Black Judgm. (2d ed.) §§ 924–933. And see, generally, Divorce.

19. Mankato First Nat. Bank *v.* Grignon, 7 Ida. 646, 65 Pac. 365; Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620.

20. Iles *v.* Elledge, 18 Kan. 296.

21. *Alabama.*— Humes *v.* Bernstein, 72 Ala. 546.

Georgia.— Thomas *v.* Morrisett, 76 Ga. 384.

Missouri.— Haile *v.* Hill, 13 Mo. 612. *Compare* Gillett *v.* Camp, 23 Mo. 375, as to effect of probate on a party in interest who was a non-resident and only constructively notified.

Oregon.— Wells *v.* Neff, 14 Oreg. 66, 12 Pac. 84, 88.

Rhode Island.— The probate of a will in another state is only *prima facie* evidence of its validity on an application to a probate court of Rhode Island to allow a copy of the same to be filed and recorded. Olney *v.* Angell, 5 R. I. 198, 73 Am. Dec. 62; Bowen *v.* Johnson, 5 R. I. 112, 73 Am. Dec. 49.

See 30 Cent. Dig. tit. "Judgment," § 1451.

Adjudication as to domicile.— An adjudication of the fact of the domicile of a deceased person, made in the grant of letters of administration, has no probative force upon the question of domicile in a contest in another state, in proceedings for the administration of assets within the latter jurisdiction, where such adjudication was made without any contest *inter partes*, but in a proceeding *in rem* on an application under a statute authorizing notice by publication, the publication not being directed against named individuals, and not having for its object the obtaining of specific relief against any one, but being general, and for the purpose of warning all persons who may be concerned of the proposal to determine the question of appointing a legal representative. Overby *v.* Gordon, 177 U. S. 214, 20 S. Ct. 603, 44 L. ed. 741. And see to the same effect Plant *v.* Harrison, 36 Misc. (N. Y.) 649, 74 N. Y. Suppl. 411; Frame *v.* Thormann, 102 Wis. 653, 79 N. W. 39; Price *v.* Mace, 47 Wis. 23, 1 N. W. 336. But *compare* Thomas *v.* Morrisett, 76 Ga. 384.

22. Dalrymple *v.* Gamble, 68 Md. 523, 13 Atl. 156. But the probate of a will in one state is not conclusive as to the validity of a devise in another state. Nelson *v.* Potter, 50 N. J. L. 324, 15 Atl. 375.

sions,[23] or allowing or rejecting a claim against the estate,[24] or settling the final accounts of executors or administrators,[25] or distributing the estate, at least so far as regards persons who were parties to that proceeding.[26] A judgment recovered by or against a personal representative in the state of his appointment may be made the basis of an action in another state and is conclusive;[27] but there is no privity between a principal executor or administrator, appointed in the state of the decedent's domicile, and an ancillary administrator, appointed in another state, and therefore a judgment for or against the former will not be binding on the latter nor on assets in his hands or within his jurisdiction.[28] And no judgment or proceeding in a probate court can affect the title of parties to lands lying in another state, or charge such lands with any liability.[29]

c. Judgments in Attachment or Garnishment. A judgment duly and regularly rendered against a garnishee, in a court having jurisdiction, is binding and conclusive in all other states, and constitutes a complete defense to the garnishee when sued for the same debt by his original creditor.[30] And it makes no difference that the debt garnished would be exempt from such process in the state where the judgment is sought to be enforced.[31] But it is competent to show that the judgment against the principal defendant on which the garnishment proceeding

23. Caruthers *v.* Corbin, 38 Ga. 75, even though such provisions would be contrary to the policy of the laws of the state where sought to be enforced.

24. Sanborn *v.* Perry, 86 Wis. 361, 56 N. W. 337.

25. *In re* Crawford, 21 Ohio Cir. Ct. 554, 11 Ohio Cir. Dec. 605; Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100.

26. Napton *v.* Leaton, 71 Mo. 358.

27. *California.*— Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423.

Louisiana.— Turley *v.* Dreyfus, 33 La. Ann. 885; Tait *v.* Lewis, 7 Rob. 206.

North Carolina.—Moore *v.* Smith, 116 N. C. 667, 21 S. E. 506. See Edney *v.* Edney, 57 N. C. 127.

Ohio.— Brown *v.* Winstanley, 18 Ohio 67.

Virginia.— Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

Co-executor, not a party, not bound.— Gilman *v.* Healy, 46 Hun (N. Y.) 310.

Evidence against heirs.— A judgment recovered in one state against the administrator of an estate there is not conclusive as against the heirs in another state, at least so far as realty is concerned, there being no privity between them. McGarvey *v.* Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861.

28. McGarvey *v.* Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861; Ela *v.* Edwards, 13 Allen (Mass.) 48, 90 Am. Dec. 174; Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101; Hill *v.* Tucker, 13 How. (U. S.) 458, 14 L. ed. 223. But this rule does not apply where the same person takes out administration in both states (Creighton *v.* Murphy, 8 Nebr. 349, 1 N. W. 138), nor where the judgment sought to be enforced was recovered against the decedent in his lifetime (Cherry *v.* Speight, 28 Tex. 503).

29. *Delaware.*— Pritchard *v.* Henderson, 2 Pennew. 553, 47 Atl. 376; Pennel *v.* Weyant, 2 Harr. 501.

Illinois.— McGarvey *v.* Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861.

New Jersey.— Nelson *v.* Potter, 50 N. J. L. 324, 15 Atl. 375.

Texas.— Acklin *v.* Paschal, 48 Tex. 147; Clapp *v.* Branch, 11 Tex. Civ. App. 203, 32 S. W. 735.

West Virginia.— Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

See *supra*, XXII, B, 7, b.

30. *Alabama.*—East Tennessee, etc., R. Co. *v.* Kennedy, 83 Ala. 462, 3 So. 852, 3 Am. St. Rep. 755.

Georgia.— Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662.

Illinois.— S. Dwight Eaton Co. *v.* Kelly, 45 Ill. App. 533.

Massachusetts.— Ocean Ins. Co. *v.* Portsmouth Mar. R. Co., 3 Metc. 420; Meriam *v.* Rundlett, 13 Pick. 511; Hull *v.* Blake, 13 Mass. 153.

Pennsylvania.— Morgan *v.* Neville, 74 Pa. St. 52; Moore *v.* Spackman, 12 Serg. & R. 287.

Texas.— Texarkana, etc., R. Co. *v.* Gray, (Civ. App. 1901) 65 S. W. 85. *Compare* Smith *v.* Taber, 16 Tex. Civ. App. 154, 40 S. W. 156.

See 30 Cent. Dig. tit. "Judgment," §§ 1449, 1450.

Contra.— See Renier *v.* Hurlbut, 81 Wis. 24, 50 N. W. 783, 29 Am. St. Rep. 850, 14 L. R. A. 562.

31. Williams *v.* St. Louis, etc., R. Co., 109 La. 90, 33 So. 94; Roharge *v.* Central Vermont R. Co., 18 Abb. N. Cas. (N. Y.) 363; Gray *v.* Delaware, etc., Canal Co., 5 Abb. N. Cas. (N. Y.) 131.

Seaman's wages.— See McCarty *v.* New Bedford, 4 Fed. 818, holding that, the wages of a seaman being exempt from garnishment in an action in a state court, a judgment directing the payment of such wages to the creditor will not be regarded in a federal court, the state court having no jurisdiction in this case.

was based, or the judgment rendered against the garnishee, was void for want of jurisdiction.[32]

8. Judgments of Inferior Courts — a. Conclusiveness and Effect. Although many of the earlier cases held that a judgment rendered by a justice of the peace or other inferior court in another state was not conclusive on the merits, but was at most only *prima facie* evidence of debt,[33] it is now generally settled that such a judgment, when properly proved and when jurisdiction is shown to have existed, is entitled to "full faith and credit" in other states, and is as conclusive as the judgment of a court of record.[34]

b. Jurisdictional Inquiries. No presumption of validity can be indulged to support the judgment of an inferior court of another state; all the facts essential to jurisdiction must appear on the face of the record or be shown by competent evidence, before it can be accepted as a binding and conclusive adjudication.[35]

C. Conclusiveness and Effect of Judgments as Between State and Federal Courts — 1. Lis Pendens and Priority of Decision. The mere pendency

32. O'Rourke *v.* Chicago, etc., R. Co., 55 Iowa 332, 7 N. W. 582. In order to make the record of a court of limited jurisdiction in garnishee proceedings in a foreign state binding on the parties in courts of this state, it must affirmatively show that the garnishee, a foreign corporation, had submitted itself to such jurisdiction. Erwin *v.* Southern R. Co., 71 S. C. 225, 50 S. E. 778.

33. Graham *v.* Grigg, 3 Harr. (Del.) 408; Wood *v.* Wood, 78 Ky. 624; McElfatrick *v.* Taft, 10 Bush (Ky.) 160; Warren *v.* Flagg, 2 Pick. (Mass.) 448; Taylor *v.* Barron, 30 N. H. 78, 64 Am. Dec. 281; Mahurin *v.* Bickford, 6 N. H. 567; Robinson *v.* Prescott, 4 N. H. 450.

34. *Arkansas.*— Glass *v.* Blackwell, 48 Ark. 50, 2 S. W. 257.

California.— Banister *v.* Campbell, 138 Cal. 455, 71 Pac. 504, 703.

Connecticut.— Bissell *v.* Edwards, 5 Day 363, 5 Am. Dec. 166.

Iowa.— Morrison Mfg. Co. *v.* Pinniman, 127 Iowa 719, 104 N. W. 279; Danford *v.* Thompson, 34 Iowa 243; Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

Missouri.—Howland *v.* Chicago, etc., R. Co., 134 Mo. 474, 36 S. W. 29.

Ohio.— Stockwell *v.* Coleman, 10 Ohio St. 33; Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197; Silver Lake Bank *v.* Harding, 5 Ohio 545.

Pennsylvania.—Kean *v.* Rice, 12 Serg. & R. 203; Cleary *v.* Evans, 6 Pa. Co. Ct. 39. Where, by the statutes of another state, the transcript of a record of a justice of the peace filed in a court of common pleas is directed to be treated as a judgment thereof, such judgment, when transferred to another state as the judgment of the court of common pleas, is entitled to the same faith and credit as a judgment originally obtained in that court. Rowley *v.* Carron, 117 Pa. St. 52, 11 Atl. 435; Bright *v.* Smitten, 10 Pa. Co. Ct. 647.

South Carolina.— Lawrence *v.* Gaultney, Cheves 7. *Compare* Clark *v.* Parsons, 1 Rice 16.

Tennessee.— J. S. Menken Co. *v.* Brinkley, 94 Tenn. 721, 31 S. W. 92.

Texas.— Beal *v.* Smith, 14 Tex. 305.

Vermont.— Carpenter *v.* Pier, 30 Vt. 81, 73 Am. Dec. 288; Blodget *v.* Jordan, 6 Vt. 580; Starkweather *v.* Loomis, 2 Vt. 573. The early case of King *v.* Van Gilder, 1 D. Chipm. 59, is inconsistent with these later decisions, and no longer of force.

Wisconsin.— Anderson *v.* Chicago Title, etc., Co., 101 Wis. 385, 77 N. W. 710.

See 30 Cent. Dig. tit. "Judgment," § 1452.

35. *Illinois.*— Shufeldt *v.* Buckley, 45 Ill. 223; Kopperl *v.* Nagy, 37 Ill. App. 23.

Indiana.— Louisville, etc., R. Co. *v.* Parish, 6 Ind. App. 89, 33 N. E. 122.

Iowa.— Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

Michigan.— Campbell *v.* Wallace, 46 Mich. 320, 9 N. W. 432.

Missouri.— Hofheimer *v.* Losen, 24 Mo. App. 652.

New Hampshire.— Russell *v.* Perry, 14 N. H. 152.

New Jersey.— Godfrey *v.* Myers, 23 N. J. L. 197.

New York.— Cole *v.* Stone, Lalor 360.

Ohio.— Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197.

Pennsylvania.— Perry *v.* Northern Ins. Co., 5 Phila. 188.

See 30 Cent. Dig. tit. "Judgment," §§ 1452, 1473.

Pleading the judgment. — Where a state statute provides that "in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made," this provision applies to the judgments of inferior courts of other states as well as to judgments of domestic courts of that character. Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83; Archer *v.* Romaine, 14 Wis. 375.

Plea denying jurisdiction. — In an action on a judgment of an inferior court of another state, the plea of *nul tiel record* is not good, as it is no denial of the indebtedness, and cannot put in issue the existence of a record which if exhibited must be held to be no

of a prior suit in a state court, although it be between the same parties and upon the identical cause of action, will not prevent a federal court from taking jurisdiction or be effective as a plea in bar or in abatement and *vice versa*.[36] But where suits upon the same cause of action are pending simultaneously in a state court and in a federal court, a final judgment entered in either court will be binding and conclusive in the other, without any regard to the question which suit was first commenced.[37]

2. STATE JUDGMENTS IN FEDERAL COURTS — a. Operation and Effect in General. A judgment duly rendered by a state court of competent jurisdiction is entitled to receive in all courts of the United States, the "full faith and credit" which the courts of another state would be bound to accord to it; that is, it will be given the same credit, force, and effect which it would receive in the courts of the state where it was rendered, no more and no less.[38] Such a judgment will not indeed

record at all. McElfatrick *v.* Taft, 10 Bush (Ky.) 160.

36. *Connecticut.* — Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433.

Illinois.— Allen *v.* Watt, 69 Ill. 655; McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449.

Kentucky.— Davis *v.* Morton, 4 Bush 442, 96 Am. Dec. 309.

Maryland.— State *v.* Boyce, 72 Md. 140, 19 Atl. 366, 20 Am. St. Rep. 458, 7 L. R. A. 272.

New Jersey.— Pomeroy *v.* Chandler, (Ch. 1895) 30 Atl. 1092.

New York.— Cook *v.* Litchfield, 5 Sandf. 330; Litchfield *v.* Brooklyn, 13 Misc. 693, 34 N. Y. Suppl. 1090; Walsh *v.* Durkin, 12 Johns. 99.

Pennsylvania.— Smith *v.* Lathrop, 44 Pa. St. 326, 84 Am. Dec. 448.

Tennessee.— Lockwood *v.* Nye, 2 Swan 515, 58 Am. Dec. 73.

United States.— Gordon *v.* Gilfoil, 99 U. S. 168, 25 L. ed. 383; Stanton *v.* Embrey, 93 U. S. 548, 23 L. ed. 983; North Muskegon *v.* Clark, 62 Fed. 694, 10 C. C. A. 591; Liggett *v.* Glenn, 51 Fed. 381, 2 C. C. A. 286; Gilmour *v.* Ewing, 50 Fed. 656; Hospes *v.* O'Brien, 24 Fed. 145; Sharon *v.* Hill, 22 Fed. 28, 10 Sawy. 394; Hurst *v.* Everett, 21 Fed. 218; Latham *v.* Chafee, 7 Fed. 520; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,266, 3 Story 181; White *v.* Whitman, 29 Fed. Cas. No. 17,561, 1 Curt. 494.

See also ABATEMENT AND REVIVAL, 1 Cyc. 38, 39.

Federal courts.— Although a defendant in a suit brought in a federal court cannot demand as a matter of course that the action shall abate upon his showing the pendency of a similar suit in a state court, yet it is always competent for the federal court to refuse to entertain a suit between the same parties when the issues and interests involved in the two suits are the same. Martin *v.* Baldwin, 19 Fed. 340, 9 Sawy. 632. And it has been declared that in cases of concurrent jurisdiction it is a fixed rule of the federal courts never to take jurisdiction of a cause which presents the same issues and seeks the same relief as are presented and sought in a cause pending in a state court. State Trust Co. *v.* National Land Imp., etc., Co., 72 Fed. 575; Gates *v.* Bucki, 53 Fed. 961, 4 C. C. A. 116.

Federal court in same state.—It seems that the pendency of an action in a federal court may be pleaded in bar of a second suit for the same cause of action and between the same parties, begun in a court of the same state in which the federal court sits. Smith *v.* Atlantic Mut. F. Ins. Co., 22 N. H. 21.

37. *California.*— Ferris *v.* Coover, 11 Cal. 175.

Georgia.— Hartell *v.* Searcy, 32 Ga. 190.

Ohio.— Stunt *v.* The Steamboat Ohio, 3 Ohio Dec. (Reprint) 362, 4 Am. L. Reg. 49.

Texas.— Cook *v.* Burnley, 45 Tex. 97.

United States.— Mitchell *v.* Chicago First Nat. Bank, 180 U. S. 471, 21 S. Ct. 418, 45 L. ed. 627; Stout *v.* Lye, 103 U. S. 66, 26 L. ed. 428; Weber *v.* Lee County, 6 Wall. 210, 18 L. ed. 781; Riggs *v.* Johnson County, 6 Wall. 166, 18 L. ed. 768; Nugent *v.* Philadelphia Traction Co., 87 Fed. 251; Bryar *v.* Bryar, 78 Fed. 657; Lookout Mountain R. Co. *v.* Houston, 44 Fed. 449; Duden *v.* Maloy, 43 Fed. 407; U. S. *v.* Dewey, 25 Fed. Cas. No. 14,956, 6 Biss. 501. See Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873.

See 30 Cent. Dig. tit. "Judgment," §§ 1507, 1513.

Compare Smith *v.* Ford, 48 Wis. 115, 2 N. W. 134, 4 N. W. 462.

Case removed to federal court.— A surety for a building contractor is not bound by judgments obtained in suits on mechanics' liens on the building, if such judgments were rendered after he had removed so much of the controversy as was between plaintiff and himself to a federal court. Missouri *v.* Tiedermann, 10 Fed. 20, 3 McCrary 399.

Federal question involved.— The fact that a judgment in a state court is *res judicata* of the questions litigated in an action removed to the federal court does not deprive the latter court of jurisdiction, where a federal question is involved. Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 62 Fed. 945.

38. Covington *v.* Covington First Nat. Bank, 198 U. S. 100, 25 S. Ct. 562, 49 L. ed. 963 [*affirming* 129 Fed. 792]; Chase *v.* Curtis, 113 U. S. 452, 5 S. Ct. 554, 28 L. ed.

be executory in the federal courts nor authorize the exercise of auxiliary jurisdiction,[39] but it may be sued on as a cause of action in a federal court having jurisdiction;[40] it will be conclusive as to all points and questions actually put in issue and decided in the action in the state court[41] as between the parties and privies to the judgment, although not as against strangers;[42] and it will bar an action in a federal court upon the same cause of action between the same parties,[43] operating

1038; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Bailey *v.* Willeford, 136 Fed. 382, 69 C. C. A. 226; Cooper *v.* Brazelton, 135 Fed. 476, 68 C. C. A. 188; Israel *v.* Israel, 130 Fed. 237; Glencove Granite Co. *v.* City Trust, etc., Co., 118 Fed. 386, 55 C. C. A. 212; Union, etc., Bank *v.* Memphis, 111 Fed. 561, 49 C. C. A. 455; Kansas City, etc., R. Co. *v.* Morgan, 76 Fed. 429, 21 C. C. A. 468; Danville First Nat. Bank *v.* Cunningham, 48 Fed. 510; Galpin *v.* Page, 9 Fed. Cas. No. 5,206, 3 Sawy. 93; Warren Mfg. Co. *v.* Etna Ins. Co., 29 Fed. Cas. No. 17,206, 2 Paine 501. See 30 Cent. Dig. tit. "Judgment," § 1504 *et seq.*

Conclusiveness in state where rendered.— Although a given judgment of a state court would render a question *res judicata* in a subsequent suit between the same parties, under the rules of the federal courts, yet a federal court will not give it such effect where it would not be an estoppel under the rule of the highest court of the state. Covington First Nat. Bank *v.* Covington, 129 Fed. 792.

39. Walser *v.* Seligman, 13 Fed. 415, 21 Blatchf. 130.

40. See the cases above cited. But the federal court will look to the original cause of action so far as to ascertain whether the judgment is such as it has jurisdiction to enforce. Israel *v.* Israel, 130 Fed. 237. And see Thompson *v.* Emmert, 23 Fed. Cas. No. 13,953, 4 McLean 96.

Limitation of actions.— An action in a federal court on a judgment recovered in a state court will be barred by limitations after the same length of time which would bar such an action in the courts of the state. U. S. *v.* Ottawa, 28 Fed. 407.

41. Covington *v.* Covington First Nat. Bank, 198 U. S. 100, 25 S. Ct. 562, 49 L. ed. 963 [*affirming* 129 Fed. 792]; Bailey *v.* Willeford, 136 Fed. 382, 69 C. C. A. 226; State Trust Co. *v.* De la Vergne Refrigerating Mach. Co., 105 Fed. 468, 44 C. C. A. 556; Norton *v.* House of Mercy, 101 Fed. 382, 41 C. C. A. 396; *In re* Skinner, 97 Fed. 190; Montgomery *v.* McDermott, 87 Fed. 374; Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 62 Fed. 945; Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., 55 Fed. 690, 5 C. C. A. 249; De Chambrun *v.* Campbell, 54 Fed. 231; The Holladay Case, 27 Fed. 830; The Tubal Cain, 9 Fed. 834; Flanagin *v.* Thompson, 9 Fed. 177, 4 Hughes 421. See 30 Cent. Dig. tit. "Judgment," § 1504 *et seq.*

Question not concluded under law of the state.— An adjudication of a state court that a bank has a contract exemption from taxation on its capital stock is not *res judicata* in the federal courts as to taxes for years other than the one directly involved in the judgment, where, by the settled law of the state, an adjudication in respect of taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years. Covington *v.* Covington First Nat. Bank, 198 U. S. 100, 25 S. Ct. 562, 49 L. ed. 963 [*affirming* 129 Fed. 792].

42. Wabash, etc., R. Co. *v.* Central Trust Co., 33 Fed. 238; Fleisher *v.* Greenwald, 20 Fed. 547. See also *supra*, XIV, B.

No estoppel against United States.— An award or judgment which might be final against a state is neither obligatory on nor conclusive evidence against the United States. Williams *v.* U. S., 22 Ct. Cl. 116.

43. Bailey *v.* Willeford, 136 Fed. 382, 69 C. C. A. 226; Eau Claire Nat. Bank *v.* Benson, 128 Fed. 277, 62 C. C. A. 591; Gorham *v.* Broad River Tp., 118 Fed. 1016, 56 C. C. A. 140; Sherman *v.* American Cong. Assoc., 113 Fed. 609, 51 C. C. A. 329; Fayerweather *v.* Ritch, 91 Fed. 721, 34 C. C. A. 61; Billing *v.* Gilmer, 62 Fed. 661, 10 C. C. A. 579; Russell *v.* Lamb, 49 Fed. 770; Bloch *v.* Price, 32 Fed. 447; Derby *v.* Jacques, 7 Fed. Cas. No. 3,817, 1 Cliff. 425; Michigan Ins. Bank *v.* Eldred, 17 Fed. Cas. No. 9,528, 6 Biss. 370. See 30 Cent. Dig. tit. "Judgment," § 1504 *et seq.* Where the defendant in an action at law in a state court, who was a nonresident of the state and might have removed the cause, went to trial in the state court instead, and, after an adverse verdict and the overruling of his motion for a new trial, appealed to the supreme court of the state, which affirmed the judgment, and thereafter instituted a suit in equity in the same court to set aside the judgment and enjoin its enforcement, on the ground that it was procured by fraud and perjury, which suit was heard on motion for a preliminary injunction, which was denied, it was held that a federal court was justified in refusing to interfere by injunction to restrain collection of the judgment on practically the same ground that had been passed on by the state court, the application being supported by the same affidavits, with no additional evidence except such as was merely cumulative. Bailey *v.* Willeford, 136 Fed. 382, 69 C. C. A. 226 [*affirming* 126 Fed. 803].

Matters not in issue.— A decree of a state court is not a bar to a suit in a federal court on a question which, although it might possibly have been litigated in the state court if properly pleaded, was in fact neither pleaded nor litigated. De Chambrun *v.* Schermerhorn, 59 Fed. 504.

as a merger and extinguishment of the original claim or demand,[44] provided the judgment was upon the merits.[45]

b. Conclusiveness on the Merits. A judgment rendered by a state court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States, and cannot be collaterally impeached or reviewed or reëxamined as touching the merits of the original controversy.[46] Nor will a plea of fraud be admissible in defense to an

Land in two states.— On foreclosing a mortgage on a railroad situated partly in two states, a court of one state cannot merge into its judgment the lien on the property in the other state, and its judgment is therefore not a bar to a suit in a federal court for the other state, between the same parties to foreclose the same mortgage. Lynde *v.* Columbus, etc., R. Co., 57 Fed. 993.

Conflict of jurisdiction.— The fact that county officers have been enjoined by a state court from assessing a tax to pay a judgment rendered by a federal court is no defense to an application to the federal court for mandamus to compel the assessment of the tax for that purpose. Clews *v.* Lee County, 5 Fed. Cas. No. 2,892, 2 Woods 474. And see U. S. *v.* King, 74 Fed. 493; Hill *v.* Scotland County Ct., 32 Fed. 716.

Suits in admiralty.— The recovery of a personal judgment in a state court for a debt or claim is no bar to a subsequent proceeding in admiralty in a federal court to enforce the same demand as a maritime lien against a vessel. Tabor *v.* The Cerro Gordo, 54 Fed. 391; The Brothers Apap, 34 Fed. 352; Rogers *v.* The Reliance, 20 Fed. Cas. No. 12,019, 1 Woods 274.

Rule of following state decisions distinguished.— The rule of *res judicata* as between federal and state courts is entirely separate and distinct from the rule which requires the United States courts to adopt and follow the decisions of the state courts on questions involving the construction of state statutes and the like, but exempts them from following such decisions on questions of general commercial law, general equity jurisprudence, and some other subjects. A final decision by a state court bars a subsequent suit in a federal court on the same cause of action, when the issues involve questions of the latter class, just as effectually as when they involve questions of the former description. Following a precedent is one thing; giving effect to a judgment as a bar to a second suit is an altogether different thing. Fuller *v.* Hamilton County, 53 Fed. 411. But *compare* National Bank of Republic *v.* Brooklyn City, etc., R. Co., 17 Fed. Cas. No. 10,039, 14 Blatchf. 242 [*affirmed* in 102 U. S. 14, 26 L. ed. 61].

44. Green *v.* Sarmiento, 10 Fed. Cas. No. 5,760, Pet. C. C. 74, 3 Wash. 17. See also *supra*, XIII.

45. Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, 14 S. Ct. 140, 37 L. ed. 1107; Homer *v.* Brown, 16 How. (U. S.) 354, 14 L. ed. 970; Shelton *v.* Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387; Gabrielson *v.* Waydell, 67 Fed. 342. See *supra*, XIII, C.

46. Blythe *v.* Hinckley, 173 U. S. 501, 19 S. Ct. 497, 43 L. ed. 783; Forsyth *v.* Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. ed. 1095; Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. ed. 369; Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004; Simmons *v.* Saul, 138 U. S. 439, 11 S. Ct. 369, 34 L. ed. 1054; Gest *v.* South Covington, etc., R. Co., 131 U. S. 436, 9 S. Ct. 798, 33 L. ed. 223; Colt *v.* Colt, 111 U. S. 566, 4 S. Ct. 553, 28 L. ed. 520; Montgomery *v.* Samory, 99 U. S. 482, 25 L. ed. 375; Gaines *v.* New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950; Goodrich *v.* Chicago, 5 Wall. (U. S.) 566, 18 L. ed. 511; Parrish *v.* Ferris, 2 Black (U. S.) 606, 17 L. ed. 317; Nations *v.* Johnson, 24 How. (U. S.) 195, 16 L. ed. 628; Parker *v.* Kane, 22 How. (U. S.) 1, 16 L. ed. 286; Beauregard *v.* New Orleans, 18 How. (U. S.) 497, 15 L. ed. 469; McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177; Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190; Covington First Nat. Bank *v.* Covington, 129 Fed. 792; State Trust Co. *v.* Kansas City, etc., R. Co., 115 Fed. 367; U. S. *v.* Eisenbeis, 112 Fed. 190, 50 C. C. A. 179; Texas, etc., R. Co. *v.* Smith, 91 Fed. 483, 33 C. C. A. 648; Alkire Grocery Co. *v.* Richesin, 91 Fed. 79; Philbrook *v.* Newman, 85 Fed. 139; Louisville Trust Co. *v.* Cincinnati, 73 Fed. 716; Compton *v.* Jesup, 68 Fed. 263, 15 C. C. A. 397; Clay *v.* Deskins, 63 Fed. 330, 11 C. C. A. 229; Reinach *v.* Atlantic, etc., R. Co., 58 Fed. 33; Harper *v.* Harper, 53 Fed. 35, 3 C. C. A. 415; Central Trust Co. *v.* Iowa Cent. R. Co., 40 Fed. 851; Del Valle *v.* Welsh, 28 Fed. 342; Downs *v.* Allen, 22 Fed. 805, 23 Blatchf. 54; Dilworth *v.* Johnson, 6 Fed. 459; Howards *v.* Selden, 5 Fed. 465, 4 Hughes 300; Jones *v.* Miller, 3 Fed. 384, 1 McCrary 535; Barker *v.* Parkenhorn, 2 Fed. Cas. No. 993, 2 Wash. C. C. 142; Barras *v.* Bidwell, 2 Fed. Cas. No. 1,039, 3 Woods 5; Burt *v.* Delano, 4 Fed. Cas. No. 2,211, 4 Cliff. 611; Chaffin *v.* St. Louis, 5 Fed. Cas. No. 2,573, 4 Dill. 24; Consolidated Fruit-Jar Co. *v.* Whitney, 6 Fed. Cas. No. 3,133, 2 Ban. & A. 30; Dawson *v.* Daniel, 7 Fed. Cas. No. 3,668, 2 Flipp. 301; Galpin *v.* Page, 9 Fed. Cas. No. 5,206, 3 Sawy. 93; *In re* Hussman, 12 Fed. Cas. No. 6,951; Langdon *v.* Goddard, 14 Fed. Cas. No. 8,060, 2 Story 267; Owens *v.* Gotzian, 18 Fed. Cas. No. 10,634, 4 Dill. 436; Tompkins *v.* Tompkins, 24 Fed. Cas. No. 14,091, 1 Story 547; Whitaker *v.* Bramson, 29 Fed. Cas. No. 17,526, 2 Paine 209; Teasdale *v.* Branton, 30 Fed. Cas. No. 13,813, 2 Hayw. (N. C.) 377. See 30 Cent. Dig. tit. "Judgment," § 1504 *et seq.*

action on such a judgment, unless in cases where it could have been set up in the courts of the state where the judgment was rendered.[47]

c. Want of Jurisdiction[48] — (I) *Admissible as Defense.* When a judgment recovered in a state court is offered as a cause of action or as a defense in a federal court, the latter court may inquire into the jurisdiction of the former; and the effect of the judgment will be avoided if it is shown that the court rendering it lacked jurisdiction of the parties or of the subject-matter.[49] The federal courts do not regard as valid a judgment *in personam* rendered by a state court for the recovery of a debt or demand, unless defendant either entered a voluntary appearance, or he or someone authorized to receive service of process for him was personally cited, within the jurisdiction of the court, to appear in the action.[50] Hence a judgment of a state court rendered against a non-resident, who was cited by publication only, as directed by the local statute, has no validity or effect, except as against property of his which may have been attached at the commencement of the action.[51] But if the question of jurisdiction depends on some local law or statute, and is presented to and decided by the court rendering the judgment, such decision is binding on the federal courts.[52]

(II) *Effect of Recitals of Record.* Although some of the earlier decisions in the inferior courts of the United States were disposed to hold that they should not allow any contradiction of the record of a state judgment in respect to jurisdictional recitals,[53] this position has been abandoned and it is now held that the want of jurisdiction may be shown, notwithstanding the recitals of the record.[54]

d. Pleading and Evidence. In declaring on a judgment of a state court as a cause of action, all the essential elements of the judgment should be set forth, but

Form of judgment.— The fact that a judgment record of a state court is imperfect in some matters of form does not prevent it from being entitled to "full faith and credit" in a federal court. *In re* Robinson, 20 Fed. Cas. No. 11,939, 6 Blatchf. 253, 36 How. Pr. (N. Y.) 176.

Effect of erroneous decision of federal question.— The courts of the United States cannot lawfully treat as nullities the judgments of state courts, rendered in suits where the latter have jurisdiction, even if they are founded upon an erroneous construction of the bankrutpcy act or any other statute of the United States. Kittredge *v.* Emerson, 15 N. H. 227.

47. Christmas *v.* Russell, 5 Wall. (U. S.) 290, 18 L. ed. 475; Barras *v.* Bidwell, 2 Fed. Cas. No. 1,039, 3 Woods 5.

48. Sister state judgments see *supra*, XXII, B, 4, h, (III), 5.

49. Lytle *v.* Lansing, 147 U. S. 59, 13 S. Ct. 254, 37 L. ed. 78; Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271; D'Arcy *v.* Ketchum, 11 How. (U. S.) 165, 13 L. ed. 648; Hickey *v.* Stewart, 3 How. (U. S.) 750, 11 L. ed. 814; Cooper *v.* Brazelton, 135 Fed. 476, 68 C. C. A. 188; Wood *v.* Mobile, 107 Fed. 846, 47 C. C. A. 9; Hekking *v.* Pfaff, 91 Fed. 60, 33 C. C. A. 328, 43 L. R. A. 618; L'Engle *v.* Gates, 74 Fed. 513; Swift *v.* Meyers, 37 Fed. 37, 13 Sawy. 583; Downs *v.* Allen, 22 Fed. 805, 23 Blatchf. 54; Graham *v.* Spencer, 14 Fed. 603; The J. W. French, 13 Fed. 916, 5 Hughes 429; Moch *v.* Virginia F. & M. Ins. Co., 10 Fed. 696, 4 Hughes 61; The B. F. Woolsey, 7 Fed. 108; Arnott *v.* Webb, 1 Fed. Cas. No. 562, 1 Dill. 362; Galpin *v.* Page, 9 Fed. Cas. No. 5,206, 3 Sawy. 93; Lincoln *v.* Tower, 15 Fed. Cas. No. 8,355, 2 McLean 473; Warren Mfg. Co. *v.* Ætna Ins. Co., 29 Fed. Cas. No. 17,206, 2 Paine 501. *Contra*, Field *v.* Gibbs, 9 Fed. Cas. No. 4,766, Pet. C. C. 155. See 30 Cent. Dig. tit. "Judgment," § 1505.

50. St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. *Compare* Burt *v.* Delano, 4 Fed. Cas. No. 2,211, 4 Cliff. 611.

51. Cooper *v.* Newell, 173 U. S. 555, 19 S. Ct. 506, 43 L. ed. 808; Hart *v.* Sansom, 110 U. S. 151, 3 S. Ct. 586, 28 L. ed. 101; Barry *v.* Friel, 114 Fed. 989; Burt *v.* Delano, 4 Fed. Cas. No. 2,211, 4 Cliff. 611; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274 [*affirmed* in 95 U. S. 714, 24 L. ed. 565].

52. Hubbard *v.* American Inv. Co., 70 Fed. 808; Sipe *v.* Copwell, 59 Fed. 970, 8 C. C. A. 419. And see Colt *v.* Colt, 111 U. S. 566, 4 S. Ct. 553, 28 L. ed. 520 (as to conclusiveness of a finding that a minor defendant was duly represented by his guardian); Kimball *v.* Taylor, 14 Fed. Cas. No. 7,775, 2 Woods 37.

53. Field *v.* Gibbs, 9 Fed. Cas. No. 4,766, Pet. C. C. 155; Lincoln *v.* Tower, 15 Fed. Cas. No. 8,355, 2 McLean 473; Todd *v.* Crumb, 23 Fed. Cas. No. 14,073, 5 McLean 172.

54. Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. (U. S.) 58, 22 L. ed. 70; Hazeltine *v.* Mississippi Valley F. Ins. Co., 55 Fed. 743; Citizens' Bank *v.* Brooks, 23 Fed. 21, 23 Blatchf. 137; Downs *v.* Allen, 22 Fed. 805, 23 Blatchf. 54; Hunt *v.* Woodward, 12 Fed. Cas. No. 6,901.

not necessarily the pleadings on which it was founded;[55] and it may be alleged to have been duly given or made, without alleging jurisdictional facts, if the statutes of the state where the federal court sits permit that form of pleading a judgment generally.[56] As a defense the judgment is admissible in evidence under the general issue in assumpsit.[57]

3. FEDERAL JUDGMENTS IN STATE COURTS — a. Operation and Effect. Although judgments of the federal courts are not strictly speaking within the constitutional provision requiring state courts to give "full faith and credit" to judgments from other states,[58] yet the federal courts are not to be regarded by the state courts as strictly foreign tribunals;[59] but their judgments are to be accorded, in the courts of any state, the same effect, respect, and conclusiveness as would be accorded in similar circumstances to the judgments of a state tribunal of equal authority.[60] A judgment duly rendered by a federal court therefore cannot be impeached collaterally in a state court for any alleged irregularity or error;[61] and although it is not executory, so as to warrant the issue of final process,[62] it constitutes a cause of action on which a suit may be maintained in a state court,[63] and as evidence is conclusive and indisputable as to all points and questions in

55. Davis *v.* Davis, 65 Fed. 380.

56. Lee *v.* Terbell, 33 Fed. 850.

57. Mutual L. Ins. Co. *v.* Harris, 97 U. S. 331, 24 L. ed. 959.

58. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390; U. S. Const. art. 4, § 1.

59. Thomson *v.* Lee County, 22 Iowa 206; Niblett *v.* Scott, 4 La. Ann. 246; Barney *v.* Patterson, 6 Harr. & J. (Md.) 182; Embry *v.* Palmer, 107 U. S. 3, 2 S. Ct. 25, 27 L. ed. 346. It makes no difference that a judgment rendered by a federal court is such as could not have been recovered by plaintiff in a state court. Thus the fact that a judgment for personal injuries was recovered against a lessee in a federal court having jurisdiction, but could not have been recovered had the person injured sued in the state court, is no reason why the federal judgment should not receive full recognition in the courts of the state. Oceanic Steam Nav. Co. *v.* Compania Transatlantic Espanola, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685.

Limits of jurisdiction.— A decree of the United States circuit court sustaining a bill as a general creditors' bill, and appointing receivers to take possession of the property of a corporation for the purpose of reducing it to money and distributing it *pro rata* among the creditors has no effect of its own force beyond the territorial limits of the state in which the decree is entered, and, as a matter of comity, will not be allowed by courts of another state to prevail against any remedy which its laws afford to its own citizens against property of the corporation within its jurisdiction. Gerding *v.* East Tennessee Land Co., 185 Mass. 380, 70 N. E. 206.

60. Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 198 U. S. 188, 25 S. Ct. 629, 49 L. ed. 1008 [*reversing* 127 Fed. 497, 62 C. C. A. 295]; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 20 S. Ct. 506, 44 L. ed. 619; Pittsburgh, etc., R. Co. *v.* Long Island L. & T. Co., 172 U. S. 493, 19 S. Ct. 238, 43 L. ed. 528; Dupasseur *v.* Rochereau, 21 Wall. (U. S.) 130, 22 L. ed. 588.

Federal question.— And the question whether or not such due effect has been given in a particular case by a state court to a judgment or decree of a court of the United States is a federal question, and therefore within the jurisdiction of the United States supreme court on a writ of error to the highest court of the state. Crescent City Live-Stock, etc., Co. *v.* Butchers' Union Slaughter House, etc., Co., 120 U. S. 141, 7 S. Ct. 472, 30 L. ed. 614.

61. *California.*— Semple *v.* Hagar, 27 Cal. 163.

Indiana.— Harrison *v.* Phœnix Mut. L. Ins. Co., 83 Ind. 575.

Iowa.— Moore *v.* Jeffers, 53 Iowa 202, 4 N. W. 1084.

Louisiana.— Pasteur *v.* Lewis, 39 La. Ann. 5, 1 So. 307; Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556.

Missouri.— State *v.* Rainey, 74 Mo. 229; Reed *v.* Vaughan, 15 Mo. 137, 55 Am. Dec. 133.

Nebraska.— Mead *v.* Weaver, 42 Nebr. 149, 60 N. W. 385.

New York.— Baldwin *v.* Rice, 44 Misc. 64, 89 N. Y. Suppl. 738; Griswold *v.* Sedgwick, 6 Cow. 456.

North Carolina.— Pigot *v.* Davis, 10 N. C. 25.

See 30 Cent. Dig. tit. "Judgment," § 1511 *et seq.*

But strangers to a judgment rendered by a federal court are not precluded from assailing it collaterally when it is made the basis of an action in a state court. Boisse *v.* Dickson, 31 La. Ann. 741; McPike *v.* Wells, 54 Miss. 136.

62. See Bonnafe *v.* Lane, 5 La. Ann. 225.

63. Brown *v.* Bridge, 106 Mass. 563; Germania F. Ins. Co. *v.* Francis, 43 Hun (N. Y.) 621.

Nil debet not a good plea.— Since a federal court is neither a foreign court nor a court of inferior jurisdiction, *nil debet* is not a good plea to an action on a judgment rendered by such court. St. Albans *v.* Bush, 4 Vt. 58, 23 Am. Dec. 246.

issue and adjudicated,[64] if final,[65] and if properly presented to the state court by the pleadings or evidence.[66] Moreover such a judgment constitutes a bar to the maintenance of a suit in a state court on the same subject-matter and between the same parties,[67] provided it was rendered on the merits.[68]

b. Conclusiveness on the Merits. A judgment or decree duly rendered by a federal court of competent jurisdiction is binding and conclusive upon the parties in all subsequent litigation between them in the state courts, and is not subject to review or reëxamination on the merits in any state court.[69]

64. *Illinois.*— Seymour *v.* O. S. Richardson Fueling Co., 103 Ill. App. 625.

Louisiana.— Keene *v.* McDonough, 8 La. 185.

Minnesota.— Ames *v.* Slater, 27 Minn. 70, 6 N. W. 418.

Washington.— Hennessey *v.* Tacoma Smelting, etc., Co., 33 Wash. 423, 74 Pac. 584.

United States.— Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 198 U. S. 188, 25 S. Ct. 629, 49 L. ed. 1008 [*reversing* 127 Fed. 497, 62 C. C. A. 295].

65. Hennessey *v.* Tacoma Smelting, etc., Co., 33 Wash. 423, 74 Pac. 584, holding that a decree of a federal circuit court from which an appeal is pending is not *res judicata* of matters involved in a suit in a state court. See also *supra*, XIII, B, 5; XIV, A, 4, g.

66. Kilpatrick *v.* Kansas City, etc., R. Co., 38 Nebr. 620, 57 N. W. 664, 41 Am. St. Rep. 741; Hafner *v.* Enterprise Bank, 24 Ohio Cir. Ct. 652.

67. *Indiana.*— Cincinnati, etc., R. Co. *v.* Wynne, 14 Ind. 385.

Kentucky.— Reed *v.* Whitlow, 43 S. W. 686, 19 Ky. L. Rep. 1538.

Massachusetts.— Durant *v.* Essex Co., 8 Allen 103, 85 Am. Dec. 685.

New York.— Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; Baldwin *v.* Rice, 44 Misc. 64, 89 N. Y. Suppl. 738.

Rhode Island.— Rounds *v.* Providence, etc., Steamship Co., 14 R. I. 344.

Texas.— Henderson *v.* Cabell, 83 Tex. 541, 19 S. W. 287.

Vermont.— Hill *v.* Barre Nat. Bank, 56 Vt. 582.

See 30 Cent. Dig. tit. "Judgment," § 1511 *et seq.* See, generally, *supra*, XIII.

Decrees in admiralty.— A decree in a suit in admiralty, brought by a master to recover his wages, holding that he had deserted his vessel and had thereby forfeited his entire wages, is no bar to a common-law action in a state court to recover for the same services. Murphy *v.* Granger, 32 Mich. 358. So an action in a state court by one who has not submitted himself to the jurisdiction of the federal court against a steamship company for loss of goods by fire is not barred by a final decree of the latter court, rendered in a proceeding under the federal statute exempting shipowners from liability for loss by fire happening on board, although such decree debars all claimants in default from prosecuting their claims for losses. Hill Mfg. Co. *v.* Providence, etc., Steamship Co., 125 Mass. 292.

68. Wills *v.* Pauly, 116 Cal. 575, 48 Pac. 709; Foley *v.* Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284; Weyand *v.* Atchison, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650; Scully *v.* Chicago, etc., R. Co., 46 Iowa 528. See, generally, *supra*, XIII, C.

69. *Arkansas.*— Garland County *v.* Hot Spring County, 68 Ark. 83, 56 S. W. 636.

Connecticut.— Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509; Dennison *v.* Hyde, 6 Conn. 508.

Georgia.— Wilson *v.* Parr, 115 Ga. 629, 42 S. E. 5; Smith *v.* Walker, 77 Ga. 289, 3 S. E. 256; McCauley *v.* Hargroves, 48 Ga. 50, 15 Am. Rep. 660.

Illinois.— Knowlton *v.* Hanbury, 117 Ill. 471, 5 N. E. 581; Ruegger *v.* Indianapolis, etc., R. Co., 103 Ill. 449.

Iowa.— Rew *v.* Independent School Dist., (1904) 98 N. W. 802; Reynolds *v.* Lyon County, 121 Iowa 733, 96 N. W. 1096; Thomson *v.* Lee County, 22 Iowa 206.

Kansas.— Hyatt *v.* Challiss, 59 Kan. 422, 53 Pac. 467.

Kentucky.— Dudley *v.* Lindsey, 9 B. Mon. 486, 50 Am. Dec. 522; Thoms *v.* Southard, 2 Dana 475, 26 Am. Dec. 467.

Louisiana.— Bouchard *v.* Parker, 32 La. Ann. 535; Niblett *v.* Scott, 4 La. Ann. 246; Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556.

Michigan.— Detroit *v.* Ellis, 103 Mich. 612, 61 N. W. 886, 27 L. R. A. 211; Rothschild *v.* Burton, 57 Mich. 540, 25 N. W. 49.

Mississippi.— Shields *v.* Taylor, 13 Sm. & M. 127.

Missouri.— *In re* Copenhaver, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382; State *v.* Trammel, 106 Mo. 510, 17 S. W. 502; Bracken *v.* Milner, 99 Mo. App. 187, 73 S. W. 225. And see Cobe *v.* Ricketts, 111 Mo. App. 105, 85 S. W. 131.

Nebraska.— Gregory *v.* Kenyon, 34 Nebr. 640, 52 N. W. 685.

New York.— Woodhouse *v.* Duncan, 106 N. Y. 527, 13 N. E. 334; Lee *v.* Jefferson County, 62 How. Pr. 201; Hoyt *v.* Gelston, 13 Johns. 141. See Gardner *v.* Tyler, 25 How. Pr. 215.

Pennsylvania.— *In re* Williamson, 26 Pa. St. 9, 67 Am. Dec. 374; Buchannan *v.* Biggs, 2 Yeates 232.

South Carolina.— Holstein *v.* Edgefield County, 64 S. C. 374, 42 S. E. 180.

Tennessee.— The conclusiveness of a judgment of a federal court, when brought into question in an action between the same parties in a state court, is not affected by the

c. Authentication. Although the act of congress prescribing the mode of authenticating the judgments of a state court when intended to be used in the courts of another state[70] does not expressly include the judgments of the federal courts, yet it has always been the practice to authenticate such judgments in the same manner, and that form of authentication has been held sufficient.[71] Further some decisions hold that where the federal court sits in the same state in whose courts the judgment is to be presented the judgment is sufficiently authenticated merely by the seal of the court.[72]

d. Want of Jurisdiction. When a judgment of a federal court is made the basis of a claim or defense in a state court, it is open to the latter to inquire into the jurisdiction of the former court in respect to parties, subject-matter, diversity of citizenship, amount in controversy, or otherwise, and if a want of jurisdiction is shown the judgment will be treated as a nullity,[73] at least unless the fact upon which jurisdiction depends was admitted or adjudicated.[74] But the jurisdiction of the federal courts is presumed, and it is not necessary that their judgments should

fact that the proceedings in the federal court were not conducted according to the forms of practice obtaining in the state courts in similar cases. Keith *v.* Alger, 114 Tenn. 1, 85 S. W. 71.

Texas.— New York, etc., Land Co. *v.* Votaw, (Civ. App. 1899) 52 S. W. 125.

West Virginia.— Wandling *v.* Straw, 25 W. Va. 692.

Wisconsin.— Van Pelt *v.* Kimball, 18 Wis. 362.

United States.— Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46 Fed. 584; U. S. *v.* Lee County, 26 Fed. Cas. No. 15,589, 2 Biss. 77. And see Cramer *v.* Wilson, 195 U. S. 408, 25 S. Ct. 94, 49 L. ed. 256. In an action on a judgment recovered in a federal court in New York, a plea that the claim sued on was invalid under the laws of New Jersey, and that the suit was brought in New York only for the purpose of evading those laws, is not admissible, as its effect would be to reopen the judgment and permit a reëxamination of the merits. Wittemore *v.* Malcomson, 28 Fed. 605.

See 30 Cent. Dig. tit. "Judgment," § 1511 *et seq.*

70. U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677]. See *supra*, XXII, B, 4, e, (II), (B).

71. O'Hara *v.* Mobile, etc., R. Co., 76 Fed. 718, 22 C. C. A. 512. And see Dorsey *v.* Maury, 10 Sm. & M. (Miss.) 298.

72. Womack *v.* Dearman, 7 Port. (Ala.) 513; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

73. *Connecticut.*— Slocum *v.* Wheeler, 1 Conn. 429.

Georgia.— McCauley *v.* Hargroves, 48 Ga. 50, 15 Am. Rep. 660.

Louisiana.— Pasteur *v.* Lewis, 39 La. Ann. 5, 1 So. 307.

Massachusetts.— Gibson *v.* Manufacturers' F. & M. Ins. Co., 144 Mass. 81, 10 N. E. 729.

Missouri.— Corby *v.* Wright, 4 Mo. App. 443.

Nebraska.— Tzschuck *v.* Mead, 47 Nebr. 260, 66 N. W. 428.

New York.— Chemung Canal Bank *v.* Judson, 8 N. Y. 254; Hovey *v.* Elliott, 61 N. Y. Super. Ct. 409, 21 N. Y. Suppl. 108.

Ohio.— Hafner *v.* Enterprise Bank, 24 Ohio Cir. Ct. 652.

Texas.— Southern Ins. Co. *v.* Wolverton Hardware Co., (1892) 19 S. W. 615; League *v.* Scott, 25 Tex. Civ. App. 318, 61 S. W. 521.

Virginia.— Richardson *v.* Seevers, 84 Va. 259, 4 S. E. 712.

See 30 Cent. Dig. tit. "Judgment," § 1512.

Contra.— Pearce *v.* Winter Iron-Works, 32 Ala. 68, holding that a judgment of the district court of the United States cannot in a collateral proceeding be treated as a nullity on the ground that both the parties were citizens of the state in which the suit was brought. See also Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 198 U. S. 188, 25 S. Ct. 629, 49 L. ed. 1008 [*reversing* 127 Fed. 497, 62 C. C. A. 295].

Collusive transfer to give jurisdiction.— Where a creditor of a corporation, holding a judgment recovered against it in a federal court, sues in a state court to enforce the liability of stock-holders for unpaid subscriptions, they cannot defend on the ground that the claim sued on in the federal court was collusively assigned to plaintiff for the purpose of giving that court jurisdiction. Tuthill Spring Co. *v.* Smith, 90 Iowa 331, 57 N. W. 853.

Federal court in same state.— In Minnesota it is held that a judgment of a federal court cannot be collaterally attacked in a state court of the same state in which it was rendered, unless a want of jurisdiction appears on the face of the record, the theory being that it stands on the same footing as a judgment of a domestic court of record. Sandwich Mfg. Co. *v.* Earl, 56 Minn. 390, 57 N. W. 938; Turrell *v.* Warren, 25 Minn. 9.

74. Judgments or decrees of a federal court, whose jurisdiction is invoked on the ground of diverse citizenship, which is alleged and admitted, cannot be collaterally assailed in a state court on the ground that there was in fact no diverse citizenship. Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 198 U. S. 188, 25 S. Ct. 629, 49 L. ed. 1008 [*reversing* 127 Fed. 497, 62 C. C. A. 295].

show affirmatively the facts on which the jurisdiction is based, but on the contrary the want of jurisdiction must be affirmatively proved.[75]

4. As Foundation For Creditor's Suit. A creditor's bill in a state court may be based on a judgment recovered by plaintiff in a federal court;[76] and conversely the federal courts, a proper foundation for their jurisdiction being shown, will entertain a creditor's bill founded on the judgment of a state court.[77]

5. State Judgments in Territorial Courts. When a judgment of a state court is relied on as a claim or defense in a court of one of the territories, or of the District of Columbia, the rules governing its conclusiveness and effect are the same as would be operative if it were presented to the courts of another state.[78]

6. Judgments of Territories in State Courts. The act of congress regulating the authentication of judgments, for the purpose of founding a claim or defense upon them outside the jurisdiction where rendered, applies to the records and judicial proceedings of "any territory or country subject to the jurisdiction of the United States."[79] Under this statute judgments of the courts of the several territories and dependencies of the United States, when properly authenticated, stand upon the same footing as those of the courts of a state, and are equally conclusive, and equally entitled to faith and credit, in all courts within the United States, whether state or national,[80] although as in the case of a state judgment they may be impeached for want of jurisdiction, even in contradiction of the recitals of the record.[81] And although the District of Columbia is neither a "state" nor a "territory," it is held to be within the provisions of the act of congress, and the judgments of its supreme court are entitled to the same faith and credit as those of a state.[82]

75. McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731; Litchfield *v.* Iowa Homestead Co., 74 Iowa 758, 37 N. W. 326; Goodnow *v.* Burrows, 74 Iowa 251, 23 N. W. 251; Doran *v.* Davis, 43 Iowa 86; Bement *v.* Wisner, Code Rep. N. S. (N. Y.) 143 [but *compare* Germania F. Ins. Co. *v.* Francis, 43 Hun (N. Y.) 621]; Gillett *v.* Powell, Speers Eq. (S. C.) 142.

76. *Alabama.*—Brown *v.* Bates, 10 Ala. 432.

Illinois.— Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861 [*distinguishing* Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588; Steere *v.* Hoagland, 39 Ill. 264].

Kansas.— Chicago, etc., Bridge Co. *v.* Fowler, 55 Kan. 17, 39 Pac. 727.

Mississippi.— Bullitt *v.* Taylor, 34 Miss. 708, 69 Am. Dec. 412.

Missouri.— Bush *v.* Arnold, 50 Mo. App. 8.

Nebraska.— Chicago First Nat. Bank *v.* Sloman, 42 Nebr. 350, 60 N. W. 589, 47 Am. St. Rep. 707.

New Jersey.— Vanderveer *v.* Stryker, 8 N. J. Eq. 175.

See, generally, Creditors' Suits; Fraudulent Conveyances.

Contra.— Davis *v.* Bruns, 23 Hun (N. Y.) 648; Tarbell *v.* Griggs, 3 Paige (N. Y.) 207, 23 Am. Dec. 790.

77. Bidwell *v.* Huff, 103 Fed. 362; Alkire Grocery Co. *v.* Richesin, 91 Fed. 79; Merchants' Nat. Bank *v.* Chattanooga Constr. Co., 53 Fed. 314; Wilkinson *v.* Yale, 29 Fed. Cas. No. 17,678, 6 McLean 16. See, generally, Creditors' Suits; Fraudulent Conveyances.

Contra, in federal courts in New York.— Walser *v.* Seligman, 13 Fed. 415, 21 Blatchf. 130; Claflin *v.* McDermott, 12 Fed. 375, 20 Blatchf. 522.

78. Cheever *v.* Wilson, 6 D. C. 149; U. S. *v.* Maxwell Land Grant Co., 5 N. M. 297, 21 Pac. 153, 3 L. R. A. 751; Maxwell *v.* Stewart, 22 Wall. (U. S.) 71, 22 L. ed. 564; Dent *v.* Ashley, 7 Fed. Cas. No. 3,809*a*, Hempst. 54; Moore *v.* Paxton, 17 Fed. Cas. No. 9,772*a*, Hempst. 51; Ricketts *v.* Henderson, 20 Fed. Cas. No. 11,806, 2 Cranch C. C. 157; Barney *v.* Dekraft, 30 Fed. Cas. No. 18,230, 2 Hayw. & H. 404, 6 D. C. 361.

79. U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677].

80. *Iowa.*— Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005.

Louisiana.— Brosnaham *v.* Turner, 16 La. 433.

Maryland.— Hughes *v.* Davis, 8 Md. 271.

Minnesota.— Suesenbach *v.* Wagner, 41 Minn. 108, 42 N. W. 925.

Pennsylvania.— Betts *v.* Death, Add. 265.

Utah.— Ehrngren *v.* Gronlund, 19 Utah 411, 57 Pac. 268.

See 30 Cent. Dig. tit. "Judgment," § 1515.

81. Gibson *v.* Manufacturers' F. & M. Ins. Co., 144 Mass. 81, 10 N. E. 729.

82. *Indiana.*— English *v.* Smith, 26 Ind. 445.

Massachusetts.— Green *v.* Sanborn, 150 Mass. 454, 23 N. E. 224.

New York.— Hovey *v.* Elliott, 61 N. Y. Super. Ct. 409, 21 N. Y. Suppl. 108.

Pennsylvania.— Johnson *v.* Dobbins, 12 Phila. 518.

United States.— Embry *v.* Palmer, 107 U. S. 3, 2 S. Ct. 25, 27 L. ed. 346.

See 30 Cent. Dig. tit. "Judgment," § 1515.

7. Judgments of Indian Courts. Judgments rendered by the courts of the Indian nations in the Indian Territory, when proceeding within their jurisdiction, stand on the same footing with those of the federal territorial courts, and are entitled to the same faith and credit;[83] but they may be impeached collaterally by showing a want of jurisdiction.[84] However, in determining the validity of a judgment rendered by one of these courts, on a plea of *res judicata*, the court will disregard informalities and enforce the judgment according to its intent, gathered broadly from the entire proceeding.[85]

D. Judgments of Courts of Foreign Countries — 1. Judgments In Rem[86] — a. In General. A judgment duly rendered by a court in a foreign country, in a proceeding *in rem*, is binding and conclusive on all parties in interest, and not reëxaminable on the merits, provided the court had jurisdiction and there was no fraud in procuring the judgment or sentence.[87] This applies to decrees of divorce,[88] to probate adjudications,[89] and adjudications in bankruptcy,[90] and to judgments settling a question of pedigree.[91]

83. U. S. *v.* Cox, 18 How. (U. S.) 100, 15 L. ed. 299; Cornells *v.* Shannon, 63 Fed. 305, 11 C. C. A. 465; Standley *v.* Roberts, 59 Fed. 836, 8 C. C. A. 305; Exendine *v.* Pore, 56 Fed. 777, 6 C. C. A. 112; Mehlin *v.* Ice, 56 Fed. 12, 5 C. C. A. 403.

84. Raymond *v.* Raymond, 1 Indian Terr. 334, 37 S. W. 202.

The jurisdiction of these courts rests on treaties made by the United States with the Creeks, Cherokees, Choctaws, and other tribes of civilized Indians, giving them the right to establish and maintain courts of justice. These Indian courts have exclusive jurisdiction, both civil and criminal, where only members of the tribe, by nativity or adoption, are concerned, but jurisdiction of cases in which citizens of the United States are parties is reserved to the appropriate federal courts. See 7 U. S. St. at L. 478; 14 U. S. St. at L. 799; 25 U. S. St. at L. 783; 26 U. S. St. at L. 81. And see *Ex p.* Mayfield, 141 U. S. 107, 11 S. Ct. 939, 35 L. ed. 635. But it is competent for a white man to waive the treaty and statutory provisions which exempt him from the jurisdiction of an Indian court and submit himself to the jurisdiction, and when he does this, by entering a general appearance, pleading to the merits, and proceeding to trial, he cannot afterward contest the validity of the judgment on the ground of a want of jurisdiction of his person. Cornells *v.* Shannon, 63 Fed. 305, 11 C. C. A. 465; Exendine *v.* Pore, 56 Fed. 777, 6 C. C. A. 112; Mehlin *v.* Ice, 56 Fed. 12, 5 C. C. A. 403.

85. Barbee *v.* Shannon, 1 Indian Terr. 199, 40 S. W. 584.

86. Judgments in rem generally see *supra*, XVI.

87. *Illinois.*— Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81.

Kentucky.— Williams *v.* Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179.

New York.— Monroe *v.* Douglass, 4 Sandf. Ch. 126 [*affirmed* in 5 N. Y. 447].

Pennsylvania.— Cheriot *v.* Foussat, 3 Binn. 220.

Texas.— Wellborn *v.* Carr, 1 Tex. 463.

Vermont.— Woodruff *v.* Taylor, 20 Vt. 65.

United States.— Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472.

England.— Bernardi *v.* Motteux, Dougl. (3d ed.) 575; Simpson *v.* Fogo, 1 Hem. & M. 195, 9 Jur. N. S. 403, 32 L. J. Ch. 249, 8 L. T. Rep. N. S. 61, 11 Wkly. Rep. 418, 1 Johns. & H. 18, 6 Jur. N. S. 949, 29 L. J. Ch. 657, 2 L. T. Rep. N. S. 594, 8 Wkly. Rep. 407; Cammell *v.* Sewall, 3 H. & N. 617, 27 L. J. Exch. 447 [*affirmed* in 5 H. & N. 728, 29 L. J. Exch. 350, 2 L. T. Rep. N. S. 799, 8 Wkly. Rep. 639]; Hughes *v.* Cornelius, 2 Show. 232.

See 30 Cent. Dig. tit. "Judgment," § 1523.

88. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Shaw *v.* Gould, L. R. 3 H. L. 55, 37 L. J. Ch. 433, 18 L. T. Rep. N. S. 833. See, generally, Divorce.

89. Williams *v.* Saunders, 5 Coldw. (Tenn.) 60; Tompkins *v.* Tompkins, 24 Fed. Cas. No. 14,091, 1 Story 547; Doglioni *v.* Crispin, L. R. 1 H. L. 301, 35 L. J. P. & M. 129, 15 L. T. Rep. N. S. 44.

90. If a contract is made and to be performed in a foreign country, and a regular discharge in bankruptcy has been obtained by the debtor resident there, the discharge will constitute a valid defense to the contract, wherever the creditor may be domiciled, and wherever the contract may be put in suit. Ory *v.* Winter, 4 Mart. N. S. (La.) 277; Marsh *v.* Putnam, 3 Gray (Mass.) 551; Blanchard *v.* Russell, 13 Mass. 1, 7 Am. Dec. 106; Sherrill *v.* Hopkins, 1 Cow. (N. Y.) 133; Smith *v.* Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Potter *v.* Brown, 5 East 124, 7 Rev. Rep. 663, 1 Smith K. B. 351. But in respect to contracts not made or to be performed within the country granting the discharge, it can have no extraterritorial validity as against non-resident creditors, unless they come in and take part in the proceedings. Kuehling *v.* Leberman, 2 Wkly. Notes Cas. (Pa.) 616. But a foreign discharge in bankruptcy is *prima facie* evidence that proper steps were taken to obtain the discharge, and the party pleading it need not prove such facts in the first instance. Ohlemacher *v.* Brown, 44 U. C. Q. B. 366.

91. Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472.

b. Decrees in Admiralty — (1) *Conclusiveness in General.* A decree of a foreign court of admiralty, having jurisdiction, is binding and conclusive on all persons and in all countries, and cannot be disregarded or contradicted in any subsequent proceeding. This rule applies to a decree condemning a vessel as prize,[92] acquitting property claimed as prize or forfeited,[93] enforcing a maritime lien,[94] or awarding damages for injuries caused by a collision,[95] and to adjudications ordering the sale of wrecks and property left derelict.[96] Further, it has been held by some courts that a sentence condemning a vessel as prize is conclusive evidence of the ground of condemnation, as that she was enemies' property, in a subsequent action between the owners and the insurers.[97] And so where the ground of condemnation was a breach of blockade.[98] But the rule is subject to the qualification that the sentence is conclusive, in a collateral action, of the grounds on which it proceeded only when those facts are clearly stated in the decree itself.[99]

92. *Connecticut.*— Brown *v.* Union Ins. Co., 4 Day 179, 4 Am. Dec. 204.

Louisiana.— Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. 464, 16 Am. Dec. 199.

New York.— Ocean Ins. Co. *v.* Francis, 2 Wend. 64, 19 Am. Dec. 549.

Pennsylvania.— Cheriot *v.* Foussat, 3 Binn. 220.

South Carolina.— Walton *v.* Bethune, 2 Brev. 453, 4 Am. Dec. 597.

United States.— Williams *v.* Armroyd, 7 Cranch 423, 3 L. ed. 392 [*affirming* 1 Fed. Cas. No. 538, 2 Wash. 508]; Alexandria Mar. Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. ed. 200; Croudson *v.* Leonard, 4 Cranch 434, 2 L. ed. 670; Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; Juando *v.* Taylor, 13 Fed. Cas. No. 7,555, 2 Paine 652, 655, 3 Wheel. Cr. (N. Y.) 382; Lambert *v.* Smith, 14 Fed. Cas. No. 8,028, 1 Cranch C. C. 361; Marshall *v.* Union Ins. Co., 16 Fed. Cas. No. 9,135, 2 Wash. 452; Cushing *v.* U. S., 22 Ct. Cl. 1.

England.— Stringer *v.* English, etc., Mar. Ins. Co., L. R. 4 Q. B. 676; Bernardi *v.* Motteux, Dougl. (3d ed.) 575; Lumly *v.* Quarry, 7 Mod. 9; Fracis *v.* Carr, 81 L. T. Rep. N. S. 50; Hughes *v.* Cornelius, 2 Show. 232.

See 30 Cent. Dig. tit. "Judgment," § 1524.

Stipulation in policy.— A stipulation in a policy of marine insurance, warranting the property to be American, proof to be made here, is not set aside by the sentence of a foreign court against the neutrality, but may be vindicated here, notwithstanding such sentence. Calhoun *v.* Commonwealth Ins. Co., 1 Binn. (Pa.) 293; Sperry *v.* Delaware Ins. Co., 22 Fed. Cas. No. 13,236, 2 Wash. 243.

93. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Magoun *v.* New England Mar. Ins. Co., 16 Fed. Cas. No. 8,961, 1 Story 157; The Bennet, 1 Dods. 175.

94. Griswold *v.* Pitcairn, 2 Conn. 85; Minna Craig Steamship Co. *v.* Chartered Mercantile Bank, [1897] 1 Q. B. 460, 66 L. J. Q. B. 339, 76 L. T. Rep. N. S. 310, 45 Wkly. Rep. 338; Castrique *v.* Imrie, L. R. 4 H. L. 414, 39 L. J. C. P. 350, 23 L. T. Rep. N. S. 48; Van Every *v.* Grant, 21 U. C. Q. B. 542. *Compare* Owings *v.* Nicholson, 4 Harr. & J. (Md.) 66.

95. The East, 8 Fed. Cas. No. 4,251, 9 Ben. 76; Harmer *v.* Bell, 7 Moore P. C. 267, 13 Eng. Reprint 884. *Compare* New England Mut. Mar. Ins. Co. *v.* Dunham, 18 Fed. Cas. No. 10,155, 3 Cliff. 332, 371.

96. Grant *v.* McLachlin, 4 Johns. (N. Y.) 34.

97. Brown *v.* Union Ins. Co., 4 Day (Conn.) 179, 4 Am. Dec. 204; Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Blanque *v.* Peytavin, 4 Mart. (La.) 458, 6 Am. Dec. 705; Walton *v.* Bethune, 2 Brev. (S. C.) 453, 4 Am. Dec. 597. *Contra,* Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549 [*affirming* 6 Cow. (N. Y.) 404]; New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. (N. Y.) 56; Radcliff *v.* United Ins. Co., 9 Johns. (N. Y.) 277; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 451, 1 Am. Dec. 180; Bourke *v.* Granberry, Gilm. (Va.) 16, 9 Am. Dec. 589.

98. *Connecticut.*— Stewart *v.* Warner, 1 Day 142, 2 Am. Dec. 61.

Massachusetts.— Baxter *v.* New England Mar. Ins. Co., 6 Mass. 277, 4 Am. Dec. 125. But *compare* Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291, holding that a decree of a court of admiralty in the island of Hayti, not founded on a libel, and in which no trial was had, condemning a vessel and cargo belonging to a citizen of the United States, for an alleged breach of blockade, was not conclusive evidence of that fact.

Pennsylvania.— Dempsey *v.* Commonwealth Ins. Co., 1 Binn. 299 note.

South Carolina.— Groning *v.* Union Ins. Co., 1 Nott & M. 537.

United States.— Croudson *v.* Leonard, 4 Cranch 434, 2 L. ed. 670; Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600.

Decree erroneous on its face.— A sentence of condemnation by a foreign court of admiralty, which appears on the face of the proceedings to have been founded on facts which did not warrant the judgment, will not be conclusive of the legality of the condemnation as between the owner and underwriters. Williamson *v.* Tunno, 1 Brev. (S. C.) 151, 2 Am. Dec. 654.

99. *Massachusetts.*— Robinson *v.* Jones, 8

And a foreign sentence in admiralty is conclusive only upon the matters essential to the decree, and not as to matters which are merely incidental or collateral, or not necessarily involved in the adjudication.[1]

(II) *Grounds of Impeachment.* In order that a foreign judgment *in rem* may be binding and conclusive, it is necessary that it shall have been rendered by a duly organized and lawfully constituted court,[2] having jurisdiction of the cause and of the *res*,[3] and proceeding in a regular manner upon personal or published notice to parties in interest and an opportunity given them to appear and defend their rights.[4] Such a judgment is not impeachable on the ground of error, even where the foreign court proceeded upon a mistaken view of the law of the state in which its judgment is afterward called in question,[5] although fraud in its procurement may be urged as a defense against it.[6]

2. Judgments In Personam — a. Operation and Effect in General. A judgment *in personam* recovered in a foreign country is not executory here, in the sense of

Mass. 536, 5 Am. Dec. 114; Baxter *v.* New England Mar. Ins. Co., 6 Mass. 277, 4 Am. Dec. 125.

New York.— Johnston *v.* Ludlow, 1 Cai. Cas. xxix.

Pennsylvania.— Vasse *v.* Ball, 2 Dall. 270, 1 L. ed. 377.

South Carolina.— Bailey *v.* South Carolina Ins. Co., 1 Treadw. 381; Blacklock *v.* Stewart, 2 Bay 363; Campbell *v.* Williamson, 2 Bay 237.

United States.— Fitsimmons *v.* Newport Ins. Co., 4 Cranch 185, 2 L. ed. 591.

England.— Dalgleish *v.* Hodgson, 7 Bing. 495, 9 L. J. C. P. O. S. 138, 5 M. & P. 407, 20 E. C. L. 223; Fisher *v.* Ogle, 1 Camph. 418; Hohbs *v.* Henning, 17 C. B. N. S. 791, 11 Jur. N. S. 223, 34 L. J. C. P. 117, 12 L. T. Rep. N. S. 205, 5 New Rep. 406, 13 Wkly. Rep. 431, 112 E. C. L. 791; Bernardi *v.* Motteux, Dougl. (3d ed.) 575; Calvert *v.* Bovill, 7 T. R. 523, 4 Rev. Rep. 517.

1. Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. (Md.) 159; Fitzsimmons *v.* Newport Ins. Co., 4 Cranch (U. S.) 185, 2 L. ed. 591; Maley *v.* Shattuck, 3 Cranch (U. S.) 458, 2 L. ed. 498; Russel *v.* Union Ins. Co., 21 Fed. Cas. No. 2,142, 4 Dall. 421, 1 L. ed. 892; Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; Lambert *v.* Smith, 14 Fed. Cas. No. 8,028, 1 Cranch C. C. 361; Fisher *v.* Ogle, 1 Campb. 418; Bernardi *v.* Motteux, Dougl. (3d ed.) 575; Christie *v.* Secretan, 8 T. R. 192; Calvert *v.* Bovill, 7 T. R. 523, 4 Rev. Rep. 517.

2. Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Snell *v.* Faussatt, 22 Fed. Cas. No. 13,138, 1 Wash. 271; The Flad Oyen, 1 C. Rob. 135, 8 T. R. 270 note; The Griefswald, Swab. 430.

The presumption is in favor of the legitimacy of the foreign tribunal, at least when the authority under which it assumes to act is not made known and there are no circumstances to arouse suspicion. But if the source of the court's authority and the manner of its constitution are stated it is proper to scrutinize them, and if the circumstances are unusual or apparently illegal, it devolves upon the party who would support the decree to vindicate the rightfulness of the court's existence and authority. Snell *v.* Faussatt, 22 Fed. Cas. No. 13,138, 1 Wash. 271.

Place of session.— The sentence of a court of a belligerent power set up within the territory of a neutral state is entitled to no authority, since it acts under an usurped and illegal power and one contrary to the law of nations; but if the court sits within the domains of an allied nation, its jurisdiction is rightful and its constitution legal. 1 Marshall Ins. 388.

De facto court.— A foreign court acting under the authority of those in whom the power of the country is for the time being vested must be deemed to have the jurisdiction of a legitimate court; it is sufficient that it is a court *de facto*. Bank of North America *v.* McCall, 4 Binn. (Pa.) 371.

3. Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345; Cheriot *v.* Foussat, 3 Binn. (Pa.) 220; Rose *v.* Himely, 4 Cranch (U. S.) 241, 2 L. ed. 608; Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; The Flad Oyen, 1 C. Rob. 135, 8 T. R. 270 note.

4. Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291; China Mut. Ins. Co. *v.* Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576; Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126; Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; Magoun *v.* New England Mar. Ins. Co., 16 Fed. Cas. No. 8,961, 1 Story 157.

5. Castrique *v.* Imrie, L. R. 4 H. L. 414, 39 L. J. C. P. 350, 23 L. T. Rep. N. S. 48, 19 Wkly. Rep. 1. And see Williams *v.* Armroyd, 7 Cranch (U. S.) 423, 3 L. ed. 392; Imrie *v.* Castrique, 8 C. B. N. S. 405, 98 E. C. L. 405; Castrique *v.* Behrens, 3 E. & E. 709, 7 Jur. N. S. 1024, 30 L. J. Q. B. 163, 4 L. T. Rep. N. S. 52, 107 E. C. L. 709.

6. Bradstreet *v.* Neptune Ins. Co., 3 Fed. Cas. No. 1,793, 3 Sumn. 600; Godard *v.* Gray, L. R. 6 Q. B. 139, 40 L. J. Q. B. 62, 24 L. T. Rep. N. S. 89, 19 Wkly. Rep. 348; Messina *v.* Petrococchino, L. R. 4 P. C. 144, 41 L. J. P. C. 27, 26 L. T. Rep. N. S. 561, 20 Wkly. Rep. 451; Shand *v.* Du Buisson, L. R. 18 Eq. 283, 43 L. J. Ch. 508, 22 Wkly. Rep. 483. *Contra*, Stewart *v.* Warner, 1 Day (Conn.) 142, 2 Am. Dec. 61.

authorizing the issue of final process or of creating a lien on real property,[7] although it may give the creditor a sufficient standing to maintain a suit to set aside fraudulent conveyances;[8] but it constitutes a good cause of action on which a suit may be maintained.[9] Such a judgment does not merge the original cause of action, or prevent a suit on the original claim or demand,[10] although payment and satisfaction of it may be pleaded in bar of an action on the original cause in the domestic courts,[11] and if the foreign judgment was for defendant, it will bar a new suit against him in this country on the same demand.[12] The recognition thus accorded to foreign judgments may be based either on the ground of comity,[13] or on the ground of a legal obligation arising from the judgment to pay the debt which it adjudges.[14]

b. Conclusiveness — (i) *AMERICAN DOCTRINE.* All the earlier American cases and a few later ones hold that a foreign judgment is only *prima facie* evidence of debt, and not finally conclusive on the parties,[15] except in cases where it is

7. Buchanan *v.* Marsh, 17 Iowa 494.

8. Lilienthal *v.* Drucklieb, 80 Fed. 562.

9. Wright *v.* Chapin, 74 Hun (N. Y.) 521, 26 N. Y. Suppl. 825; Pearson's Estate, 6 Pa. Co. Ct. 298; Grant *v.* Easton, 13 Q. B. D. 302, 53 L. J. Q. B. 68, 49 L. T. Rep. N. S. 645, 32 Wkly. Rep. 239; Walker *v.* Witter, Dougl. (3d ed.) 1; Hadden *v.* Hadden, 6 Brit. Col. 340; Whitla *v.* McCuaig, 7 Manitoba 454; Ritter *v.* Fairfield, 32 Ont. 350; Davidson *v.* Cameron, 8 Ont. Pr. 61; McFarlane *v.* Derbishire, 8 U. C. Q. B. 12; Hall *v.* Armour, 5 U. C. Q. B. O. S. 3.

Form of action.— The American and English cases hold that an action upon a foreign judgment may be brought either in debt or assumpsit, the liability of defendant arising upon the implied contract to pay the amount of the judgment. Jordan *v.* Robinson, 15 Me. 167; Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105; McIntire *v.* Caruth, 3 Brev. (S. C.) 395; Mellin *v.* Horlick, 31 Fed. 865; Grant *v.* Easton, 13 Q. B. D. 302, 53 L. J. Q. B. 68, 49 L. T. Rep. N. S. 645, 32 Wkly. Rep. 239; Walker *v.* Witter, Dougl. (3d ed.) 1. But in Canada the courts hold that assumpsit only and not debt is the proper form of action. McFarlane *v.* Derbishire, 8 U. C. Q. B. 12. See ASSUMPSIT, 4 Cyc. 323.

Plea.— *Nul tiel record* is not a proper plea to an action on a foreign judgment, as it is not considered a record. Tourigny *v.* Houle, 88 Me. 406, 34 Atl. 158; Burnham *v.* Webster, 4 Fed. Cas. No. 2,178, 2 Ware 240; Philpott *v.* Adams, 7 H. & N. 888, 31 L. J. Exch. 421.

10. *Massachusetts.*— Wood *v.* Gamble, 11 Cush. 8, 59 Am. Dec. 135.

New York.— Arthurton *v.* Dalley, 20 How. Pr. 311. *Compare* Mallory *v.* Leach, 23 How. Pr. 507. And see Holmes *v.* Remsen, 4 Johns. Ch. 460, 8 Am. Dec. 581.

Texas.— Frazier *v.* Moore, 11 Tex. 755; Wilson *v.* Tunstall, 6 Tex. 221; Hays *v.* Cage, 2 Tex. 501; Turner *v.* Lambeth, 2 Tex. 365.

Vermont.— Eastern Townships Bank *v.* Beebe, 53 Vt. 177, 38 Am. Rep. 665.

United States.— New York, etc., R. Co. *v.* McHenry, 17 Fed. 414, 21 Blatchf. 400; The East, 8 Fed. Cas. No. 4,251, 9 Ben. 76; Lyman *v.* Brown, 15 Fed. Cas. No. 8,627, 2 Curt. 559.

England.— Australasia Bank *v.* Nias, 16 Q. B. 717, 15 Jur. 967, 20 L. J. Q. B. 284, 71 E. C. L. 717; Smith *v.* Nicolls, 1 Arn. 474, 5 Bing. N. Cas. 208, 7 Dowl. P. C. 282, 8 L. J. C. P. 92, 7 Scott 147, 35 E. C. L. 120; Australasia Bank *v.* Harding, 9 C. B. 661, 14 Jur. 1094, 19 L. J. C. P. 345, 67 E. C. L. 661; Hall *v.* Odber, 11 East 118, 10 Rev. Rep. 443.

Canada.— Trevelyan *v.* Myers, 26 Ont. 430.

See 30 Cent. Dig. tit. "Judgment," §§ 1520, 1521.

Contra.— Jones *v.* Jamison, 15 La. Ann. 35.

Lis pendens.— It is no ground for staying proceedings in an action or for a plea in bar that proceedings are pending between the same parties upon the same cause of action in a foreign country. Cox *v.* Mitchell, 7 C. B. N. S. 55, 6 Jur. N. S. 225, 29 L. J. C. P. 33, 1 L. T. Rep. N. S. 8, 8 Wkly. Rep. 45, 97 E. C. L. 55; Scott *v.* Seymour, 1 H. & C. 219, 9 Jur. N. S. 522, 33 L. J. Exch. 61, 8 L. T. Rep. N. S. 511, 1 New Rep. 129, 11 Wkly. Rep. 169; Bayley *v.* Edwards, 3 Swanst. 703, 19 Rev. Rep. 289; Russel *v.* Field, Stuart (L. C.) 558.

11. Taylor *v.* Hollard, [1902] 1 K. B. 676, 71 L. J. K. B. 278, 86 L. T. Rep. N. S. 228, 50 Wkly. Rep. 558; Barber *v.* Lamb, 8 C. B. N. S. 95, 6 Jur. N. S. 981, 29 L. J. C. P. 234, 8 Wkly. Rep. 461, 98 E. C. L. 95.

12. Lea *v.* Deakin, 15 Fed. Cas. No. 8,154, 11 Biss. 23.

13. New York, etc., R. Co. *v.* McHenry, 17 Fed. 414, 21 Blatchf. 400.

14. Hilton *v.* Guyott, 42 Fed. 249; Williams *v.* Jones, 2 D. & L. 680, 14 L. J. Exch. 145, 13 M. & W. 633.

15. *Connecticut.*— Aldrich *v.* Kinney, 4 Conn. 380, 10 Am. Dec. 151.

Delaware.— Pritchett *v.* Clark, 3 Harr. 517.

Illinois.— Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430.

Kentucky.— Garland *v.* Tucker, 1 Bibb 361.

Maine.— Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521; Tourigny *v.* Houle, 88 Me. 406, 34 Atl.

only incidentally involved in the controversy.[16] But judicial opinion has since been largely influenced by the English decisions hereinafter referred to; and the doctrine now almost universally prevails in this country that such a judgment, if it was rendered by a court of competent jurisdiction and if it was free from fraud, is conclusive on the merits and not open to review or reëxamination, unless some special ground for impeaching it be shown.[17] But the rule does not

158; Rankin *v.* Goddard, 54 Me. 28, 89 Am. Dec. 718; Middlesex Bank *v.* Butman, 29 Me. 19; Jordan *v.* Robinson, 15 Me. 167.

Maryland.— Taylor *v.* Phelps, 1 Harr. & G. 492; Barney *v.* Patterson, 6 Harr. & J. 182.

Massachusetts.— Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105; Bartlet *v.* Knight, 1 Mass. 401, 2 Am. Dec. 36.

New Hampshire.— Taylor *v.* Barron, 30 N. H. 78, 64 Am. Dec. 281.

New York.— Cummings *v.* Banks, 2 Barb. 602; Borden *v.* Fitch, 15 Johns. 121, 8 Am. Dec. 225; Pawling *v.* Willson, 13 Johns. 192; Smith *v.* Lewis, 3 Johns. 157, 3 Am. Dec. 469; Hitchcock *v.* Aicken, 1 Cai. 460; Smith *v.* Williams, 2 Cai. Cas. 110.

Pennsylvania.— Benton *v.* Burgot, 10 Serg. & R. 240.

Vermont.— Boston India Rubber Factory *v.* Hoit, 14 Vt. 92.

United States.— Burnham *v.* Webster, 4 Fed. Cas. No. 2,179, 1 Woodb. & M. 172; Green *v.* Sarmiento, 10 Fed. Cas. No. 5,760, Pet. C. C. 74, 3 Wash. 17.

See 30 Cent. Dig. tit. "Judgment," § 1519 *et seq.*

16. Taylor *v.* Phelps, 1 Harr. & G. (Md.) 492; Barney *v.* Patterson, 6 Harr. & J. (Md.) 182; Cummings *v.* Banks, 2 Barb. (N. Y.) 602.

17. *Alabama.*— Christian, etc., Co. *v.* Coleman, 125 Ala. 158, 27 So. 786.

Arkansas.— Glass *v.* Blackwell, 48 Ark. 50, 2 S. W. 257.

Connecticut.— Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

Illinois.— Baker *v.* Palmer, 83 Ill. 568. And see Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81.

Indiana.—Cincinnati, etc., R. Co. *v.* Wynne, 14 Ind. 385.

Louisiana.— State *v.* Orleans R. Co., 38 La. Ann. 312; Jones *v.* Jamison, 15 La. Ann. 35. But a judgment rendered by a Spanish tribunal under the former government of the state was not a foreign judgment. Terry *v.* Patton, 4 Mart. 301.

Massachusetts.— Barrow *v.* West, 23 Pick. 270.

Michigan.—Coveney *v.* Phiscator, 132 Mich. 258, 93 N. W. 619; McEwan *v.* Zimmer, 38 Mich. 765, 31 Am. Rep. 332.

New Hampshire.— MacDonald *v.* Grand Trunk R. Co., 71 N. H. 448, 52 Atl. 982, 93 Am. St. Rep. 550.

New York.— Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Monroe *v.* Douglass, 5 N. Y. 447. And see Dunstan *v.* Higgins, 138 N. Y. 70, 33 N. E. 729, 34 Am. St. Rep. 431, 20 L. R. A. 668; Konitzky *v.* Meyer, 49 N. Y. 571. *Compare* Matter of Gaines, 84 Hun 520, 32 N. Y. Suppl. 398.

United States.— Ritchie *v.* McMullen, 159 U. S. 235, 16 S. Ct. 171, 40 L. ed. 133 [*affirming* 41 Fed. 502, 8 L. R. A. 268]; Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95 [*reversing* 42 Fed. 249]; Mexican Cent. R. Co. *v.* Chantry, 136 Fed. 316, 69 C. C. A. 454; Strauss *v.* Conried, 121 Fed. 199; Gioe *v.* Westervelt, 116 Fed. 1017; Brownsville *v.* Cavazos, 5 Fed. Cas. No. 2,043, 2 Woods 293. *Compare* Hohner *v.* Gratz, 50 Fed. 369.

The supreme court of the United States in the case of Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95, laid down the following principles as applicable to actions on foreign judgments: Where an action is brought in an American court by an alien against a citizen, on a judgment recovered by the former against the latter in a foreign country, and it appears that the foreign court had jurisdiction of the cause and of the parties, the judgment is at least *prima facie* evidence of the truth of the matter adjudged, and it should be held conclusive on the merits, unless some special ground is shown for impeaching it. If there was opportunity for a fair trial before the foreign court, having jurisdiction as aforesaid, and the proceeding was conducted under a system of jurisprudence likely to secure an impartial administration of justice as between natives and foreigners, and if there is no special reason why the comity of the United States should not allow full effect to the judgment, the merits of the case should not be opened and tried afresh, in an action brought in this country on the foreign judgment, on the mere assertion that the judgment was erroneous in law or in fact. Nor can the foreign judgment be disregarded merely because the rules of evidence or of procedure in the country where it was rendered are more lax than ours, or do not accord with those principles which the American system of jurisprudence regards as essential to secure a just and impartial administration of justice. Thus, such a judgment cannot be impeached because plaintiff was permitted to testify without being sworn, and was not subjected to cross-examination, nor because documents were admitted in evidence with which defendant had no connection, and which would not be admissible in the United States, provided that the practice followed and the method of examining witnesses were according to the law of the forum. But it was also held in the case in which these rulings were made, although by a bare majority of the court, that judgments rendered in any foreign country, as, in this case, France, by the laws of

apply to a judgment of an inferior or petty court of another country, it being held that such a judgment is not conclusive.[18]

(II) *ENGLISH AND SCOTCH DOCTRINE.*[19] The earlier decisions in England generally held that while a foreign judgment in a personal suit was sufficient to give a ground of action, and amounted to *prima facie* evidence of debt, yet it was not conclusive, and the case might be reëxamined on the merits,[20] or, according to a variant of the doctrine, that while it might be conclusive when pleaded as a defense, it was not so when sued on as a cause of action.[21] But it is now settled that such judgments, when rendered by a court having jurisdiction, and without fraud, and while still remaining in force abroad, are binding and conclusive in the English courts, in all cases, and not open to impeachment or reëxamination on the merits.[22] In the law of Scotland it appears that a foreign judgment is final and conclusive if adverse to plaintiff in the action in which it was rendered, but only presumptively just if in his favor.[23]

(III) *CANADIAN DOCTRINE.*[24] The courts in Canada have generally adopted the principle that a foreign judgment, duly proven, is conclusive on the merits when made the basis of a suit or defense, in the absence of fraud or want of jurisdiction,[25]

which judgments rendered in the United States are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in the United States, but are only *prima facie* evidence of the justice of plaintiff's claim.

Garnishment.— The judgment of a foreign court of competent jurisdiction in a garnishment proceeding is binding and conclusive, and affords a complete protection to the garnishee, and the money paid under it cannot be recovered back in any action in another country. Barrow *v.* West, 23 Pick. (Mass.) 270; Holmes *v.* Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269; Messier *v.* Amery, 1 Yeates (Pa.) 533, 1 Am. Dec. 316; Gould *v.* Webb, 4 E. & B. 933, 1 Jur. N. S. 821, 24 L. J. Q. B. 205, 3 Wkly. Rep. 399, 82 E. C. L. 933.

18. Forbes *v.* Scannell, 13 Cal. 242; Kopperl *v.* Nagy, 37 Ill. App. 23.

19. **What are foreign judgments** see *supra*, XXII, A.

20. Arnott *v.* Redfern, 3 Bing. 353, 11 E. C. L. 177, 2 C. & P. 88, 12 E. C. L. 466, 4 L. J. C. P. O. S. 89, 11 Moore C. P. 209; Houlditch *v.* Donegal, 8 Bligh N. S. 301, 5 Eng. Reprint 955, 2 Cl. & F. 470, 6 Eng. Reprint 1232; Don *v.* Lippmann, 5 Cl. & F. 1, 7 Eng. Reprint 303; Walker *v.* Witter, Dougl. (3d ed.) 1; Hall *v.* Odber, 11 East 118, 10 Rev. Rep. 443; Philips *v.* Hunter, 2 H. Bl. 410, 2 Rev. Rep. 353; Sinclair *v.* Frazer, 20 How. St. Tr. 469; Bayley *v.* Edwards, 3 Swanst. 703, 19 Rev. Rep. 289; Herbert *v.* Cooke, Willes 36 note.

21. Plummer *v.* Woodburne, 1 B. & C. 625, 7 D. & R. 25, 4 L. J. K. B. O. S. 6, 10 E. C. L. 730; Reimers *v.* Druce, 23 Beav. 145, 3 Jur. N. S. 147, 26 L. J. Ch. 196, 5 Wkly. Rep. 211, 53 Eng. Reprint 57; Boucher *v.* Lawson, Cas. t. Hardw. 85; Philips *v.* Hunter, 2 H. Bl. 402, 2 Rev. Rep. 353; Tarleton *v.* Tarleton, 4 M. & S. 20; Burrows *v.* Jemino, 2 Str. 733.

22. Castrique *v.* Imrie, L. R. 4 H. L. 414, 39 L. J. C. P. 350, 23 L. T. Rep. N. S. 48, 19 Wkly. Rep. 1; Doglioni *v.* Crispin, L. R. 1 H. L. 301, 35 L. J. P. & M. 129, 15 L. T. Rep. N. S. 44; Messina *v.* Petrococchino, L. R. 4 P. C. 144, 41 L. J. P. C. 27, 26 L. T. Rep. N. S. 561, 20 Wkly. Rep. 451; Godard *v.* Gray, L. R. 6 Q. B. 139, 40 L. J. Q. B. 62, 24 L. T. Rep. N. S. 89, 19 Wkly. Rep. 348; Australasia Bank *v.* Nias, 16 Q. B. 717, 15 Jur. 967, 20 L. J. Q. B. 284, 71 E. C. L. 717; Pemberton *v.* Hughes, [1899] 1 Ch. 781, 68 L. J. Ch. 281, 80 L. T. Rep. N. S. 369, 47 Wkly. Rep. 354; Ferguson *v.* Mahon, 11 A. & E. 179, 9 L. J. Q. B. 146, 3 P. & D. 143, 39 E. C. L. 117; Guinness *v.* Carroll, 1 B. & Ad. 459, 9 L. J. K. B. O. S. 11, 20 E. C. L. 558; Paul *v.* Roy, 15 Beav. 433, 21 L. J. Ch. 361, 51 Eng. Reprint 605; Arnott *v.* Redfern, 3 Bing. 353, 11 E. C. L. 177, 2 C. & P. 88, 12 E. C. L. 466, 4 L. J. C. P. O. S. 89, 11 Moore C. P. 209; Hamilton *v.* Dutch East India Co., 8 Bro. P. C. 264, 3 Eng. Reprint 573; Scott *v.* Pilkington, 2 B. & S. 11, 8 Jur. N. S. 557, 31 L. J. Q. B. 81, 6 L. T. Rep. N. S. 21, 110 E. C. L. 11; Australasia Bank *v.* Harding, 9 C. B. 661, 14 Jur. 1094, 19 L. J. C. P. 345, 67 E. C. L. 661; Ricardo *v.* Garcias, 12 Cl. & F. 368, 9 Jur. 1019, 8 Eng. Reprint 1450; Vanquelin *v.* Bouard, 15 C. B. N. S. 341, 10 Jur. N. S. 566, 33 L. J. C. P. 78, 9 L. T. Rep. N. S. 582, 3 New Rep. 122, 12 Wkly. Rep. 128, 109 E. C. L. 341; Gould *v.* Webb, 4 E. & B. 933, 1 Jur. N. S. 821, 24 L. J. Q. B. 205, 82 E. C. L. 933; Patrick *v.* Shedden, 2 E. & B. 14, 17 Jur. 1154, 22 L. J. Q. B. 283, 75 E. C. L. 14; De Cosse Brissac *v.* Rathbone, 6 H. & N. 301, 30 L. J. Exch. 238; General Steam Nav. Co. *v.* Gouillou, 13 L. J. Exch. 168, 11 M. & W. 877; Tarleton *v.* Tarleton, 4 M. & S. 20; Martin *v.* Nicolls, 3 Sim. 458, 6 Eng. Ch. 458, 58 Eng. Reprint 1070; Kennedy *v.* Cassillis, 2 Swanst. 326 note.

23. 2 Kames Eq. (3d ed.) 365.

24. **What are foreign judgments** see *supra*, XXII, A.

25. Law *v.* Hansen, 25 Can. Sup. Ct. 69; Court *v.* Scott, 32 U. C. C. P. 148; Fowler *v.*

although this rule is not universally applied in all cases, but is subject to some local variations.[26]

c. Grounds of Impeachment — (I) *Want of Jurisdiction.* A judgment of a foreign court is always open to impeachment on the ground of a want of jurisdiction over the cause or the parties;[27] but the presumption is in favor of the jurisdiction of a court assuming to exercise it,[28] and the facts of jurisdiction need not be set out in the pleadings of the party relying on the judgment;[29] but on the contrary he who seeks to avoid it must plead the want of jurisdiction, and that not generally, but by explicitly negativing every fact or circumstance from which the jurisdiction of the court over his person might be inferred.[30] Where

Vail, 27 U. C. C. P. 417; Solmes *v.* Stafford, 16 Ont. Pr. 78; Warrener *v.* Kingsmill, 8 U. C. Q. B. 407; Vaughan *v.* Campbell, 5 L. C. Rep. 431.

26. Ontario.— In this province the rule originally followed was that a judgment rendered by a court of competent jurisdiction in another province or in a foreign country was conclusive between the parties and not liable to be questioned on the merits. But in 1860 a statute was adopted (23 Vict. c. 24) which enacted that in any suit upon a foreign judgment or decree "any defense set up or that might have been set up to the original suit may be pleaded to the suit on the judgment or decree." Under this it was held that such a judgment was only *prima facie* evidence. But this law was repealed by the Ontario statute (39 Vict. c. 7), and the courts have consequently reverted to their earlier position, and now hold foreign judgments to be conclusive on the merits unless impeached for fraud or want of jurisdiction. Fowler *v.* Vail, 4 Ont. App. 267; Paisley *v.* Broddy, 1 Ont. Pr. 202; Auckterlonie *v.* Arms, 25 U. C. C. P. 403; Manning *v.* Thompson, 17 U. C. C. P. 606; Barned's Banking Co. *v.* Reynolds, 40 U. C. Q. B. 435; Waydell *v.* Provincial Ins. Co., 21 U. C. Q. B. 612.

Quebec.— A judgment rendered in a foreign country is *prima facie* evidence, but not conclusive, and may be reëxamined as to matters adjudicated on. Bauron *v.* Davies, 6 Quebec Q. B. 547; Rice *v.* Holmes, 16 Quebec Super. Ct. 492; Cole *v.* Duncan, 12 Quebec Super. Ct. 152.

Manitoba.— A defendant in any action upon a judgment obtained in any court out of the province, or upon a foreign judgment, may plead to the action on the merits, or set up any defense which might have been pleaded to the original cause of action for which such judgment was recovered. International, etc., Corp. *v.* Great North West Cent. R. Co., 9 Manitoba 147; British Linen Co. *v.* McEwan, 8 Manitoba 99, 6 Monitoba 292; Rev. St. c. 1, § 39.

Nova Scotia.— A foreign judgment is only *prima facie* evidence in an action thereon in this province. Corse *v.* Moon, 22 Nova Scotia 191. But see Law *v.* Hansen, 25 Can. Sup. Ct. 69, holding that the local statute that evidence of a judgment recovered in a foreign country shall not be conclusive, in an action on such judgment in Nova Scotia, of its correctness, but that defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favor of defendant in Nova Scotia who has brought an unsuccessful action in a foreign court against plaintiff.

27. *Kansas.*— Thorn *v.* Salmonson, 37 Kan. 441, 15 Pac. 588.

Kentucky.— Wood *v.* Wood, 78 Ky. 624; Kerr *v.* Condy, 9 Bush 372.

Maine.— Rankin *v.* Goddard, 54 Me. 28, 89 Am. Dec. 718; Long *v.* Hammond, 40 Me. 204.

Massachusetts.— Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Carleton *v.* Bickford, 13 Gray 591, 74 Am. Dec. 652; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88.

New York.— Kerr *v.* Kerr, 41 N. Y. 272; Borden *v.* Fitch, 15 Johns. 121, 8 Am. Dec. 225.

United States.— Rose *v.* Himely, 4 Cranch 241, 2 L. ed. 608; Arnott *v.* Webb, 1 Fed. Cas. No. 562, 1 Dill. 362.

England.— Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. Rep. N. S. 93, 19 Wkly. Rep. 587; Robertson *v.* Struth, 5 Q. B. 941, Dav. & M. 773, 8 Jur. 404, 48 E. C. L. 941; Ferguson *v.* Mahon, 11 A. & E. 179, 9 L. J. Q. B. 146, 3 P. & D. 143, 39 E. C. L. 117; Novelli *v.* Rossi, 2 B. & Ad. 757, 9 L. J. K. B. O. S. 307, 22 E. C. L. 317; Don *v.* Lippmann, 5 Cl. & F. 1, 7 Eng. Reprint 303.

Canada.— Cole *v.* Duncan, 12 Quebec Super. Ct. 152; and other cases in the preceding notes.

See 30 Cent. Dig. tit. "Judgment," § 1520.

28. Bruckman *v.* Taussig, 7 Colo. 561, 5 Pac. 152; Thorn *v.* Salmonson, 37 Kan. 441, 15 Pac. 588; Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105; Ritchie *v.* McMullen, 159 U. S. 235, 16 S. Ct. 171, 40 L. ed. 133.

29. Horton *v.* Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661; Robertson *v.* Struth, 5 Q. B. 941, Dav. & M. 773, 8 Jur. 404, 48 E. C. L. 941.

30. Ritchie *v.* McMullen, 159 U. S. 235, 16 S. Ct. 171, 40 L. ed. 133; Smith *v.* Nicolls, 1 Arn. 474, 5 Bing. N. Cas. 208, 7 Dowl. P. C. 282, 8 L. J. C. P. 92, 7 Scott 147, 35 E. C. L. 120; Reynolds *v.* Fenton, 3 C. B. 187, 10 Jur. 668, 16 L. J. C. P. 15, 54 E. C. L. 187; Cowan *v.* Braidwood, 9 Dowl. P. C. 26, 10 L. J. C. P. 42, 1 M. & G. 882, 2 Scott N. R. 138, 39 E. C. L. 1078; McLean *v.* Shields, 9 Ont.

defendant was a citizen or subject of the foreign country in which the judgment was recovered, the court may have acquired jurisdiction over him by any mode of service or notice recognized as sufficient by the laws of that country;[31] but a judgment against a citizen or permanent resident of another country, without personal service upon him, or personal notice of the action to him, is null and void,[32] unless he had voluntarily submitted himself to the jurisdiction by appearance and contesting the action.[33]

(II) *Objections to Character of Proceedings or Judgment.* As a general rule a judgment valid by the laws and practice of the state or country where rendered constitutes a good cause of action in any other state or country.[34] But an exception is made where the judgment was rendered in summary proceedings,[35] and where it was repugnant to natural justice, in the sense that a party in interest sat as a judge in the cause or that defendant was deprived of notice or an opportunity to defend or was not apprised of the nature of the charge or demand against him,[36] although it is not a sufficient ground of objec-

699; Gauthier *v.* Blight, 5 U. C. C. P. 122; Montreal Min. Co. *v.* Cuthbertson, 9 U. C. Q. B. 78; Bacon *v.* McBean, 3 U. C. Q. B. 305; Addams *v.* Worden, 6 L. C. Rep. 237. See Kingsmill *v.* Warrener, 13 U. C. Q. B. 18.

31. Ouseley *v.* Lehigh Valley Trust, etc., Co., 84 Fed. 602; Rousillon *v.* Rousillon, 14 Ch. D. 351, 44 J. P. 663, 49 L. J. Ch. 338, 42 L. T. Rep. N. S. 679, 28 Wkly. Rep. 623; General Steam Nav. Co. *v.* Gouillou, 13 L. J. Exch. 168, 11 M. & W. 877; Fowler *v.* Vail, 4 Ont. App. 267.

32. *New York.*— China Bank *v.* Morse, 44 N. Y. App. Div. 435, 61 N. Y. Suppl. 268.

North Carolina.— Battle *v.* Jones, 41 N. C. 567.

Pennsylvania.— Moore *v.* Phillips, 10 Pa. Co. Ct. 552; Kuehling *v.* Leberman, 2 Wkly. Notes Cas. 616.

Vermont.— Eastern Townships Bank *v.* Beebe, 53 Vt. 177, 38 Am. Rep. 665.

United States.— Bischoff *v.* Wethered, 9 Wall. 812, 19 L. ed. 829.

England.— Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T. Rep. N. S. 93, 19 Wkly. Rep. 587; Voinet *v.* Barrett, 55 L. J. Q. B. 39, 34 Wkly. Rep. 161.

Canada.— Bugbee *v.* Clergue, 27 Ont. App. 96; McLean *v.* Shields, 9 Ont. 699; Beaty *v.* Cromwell, 9 Ont. Pr. 547; Kerby *v.* Elliot, 13 U. C. Q. B. 367.

Service on traveler.— It is no defense to an action on a foreign judgment that defendant was served with process in the action while transiently stopping in the country, and that such service was made and timed for the purpose of embarrassing him, and obtaining an unjust advantage, by preventing his having a fair opportunity to make his defense unless he should indefinitely prolong his stay abroad. Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

Service on agent.— Personal service on an agent of defendant resident within the country where the judgment was rendered, and having charge of defendant's business there, may be sufficient to confer jurisdiction. Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95.

Extraterritorial service.— Service of process outside the jurisdiction of the court rendering the judgment, although made personally upon the non-resident defendant at his own place of domicile, is of no effect and cannot give jurisdiction. McEwan *v.* Zimmer, 38 Mich. 765, 31 Am. Rep. 332; Shepard *v.* Wright, 113 N. Y. 582, 21 N. E. 724; Smith *v.* Grady, 68 Wis. 215, 31 N. W. 477; Turnbull *v.* Walker, 67 L. T. Rep. N. S. 767, 5 Reports 132.

Publication of notice.— Constructive service of process, by published advertisement, public proclamation, or the like, may be effective to confer jurisdiction where defendant was a citizen of the country and amenable to its laws and jurisdiction. Douglas *v.* Forrest, 4 Bing. 686, 6 L. J. C. P. O. S. 157, 1 M. & P. 663, 29 Rev. Rep. 695, 13 E. C. L. 693. But it cannot serve as the foundation for a personal judgment where the defendant was a non-resident alien. Buchanan *v.* Rucker, 1 Campb. 63, 9 East 192, 9 Rev. 531; Schneider *v.* Woodworth, 1 Manitoba 41.

Attachment of property within the jurisdiction and control of the court may authorize a judgment disposing of such property or applying it in payment of the debt adjudged, but cannot validate a judgment imposing a personal liability on defendant. London, etc., R. Co. *v.* Lindsay, 3 Macq. H. L. 99; Burn *v.* Bletcher, 23 U. C. Q. B. 28.

33. Christian, etc., Co. *v.* Coleman, 125 Ala. 158, 27 So. 786; Capling *v.* Herman, 17 Mich. 524.

34. Ritter *v.* Fairfield, 32 Ont. 350.

Judgment by confession.— A judgment in Pennsylvania on a warrant of attorney in favor of any attorney of a court of record, executed while the maker was a resident of the state, is valid, although entered up after he left the state, and may be enforced in Canada. Ritter *v.* Fairfield, 32 Ont. 350.

35. Anderson *v.* Haddon, 33 Hun (N. Y.) 435. And see China Bank *v.* Morse, 44 N. Y. App. Div. 435, 61 N. Y. Suppl. 268.

36. Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81; Liverpool Mar. Credit Co. *v.* Hunter,

tion that the methods of procedure in force in the foreign country or adopted by the foreign court, in reference to such matters as the manner of conducting the trial, the admissibility of evidence, or the mode of examining witnesses, would be contrary to the laws or practice of the state of the forum,[37] or that there were irregularities, not amounting to jurisdictional defects, in the conduct of the proceedings in the foreign court.[38] Further no country is bound to enforce the penal or revenue laws or police regulations of another country, by giving effect to judgments or sentences founded upon them,[39] or, according to some of the cases, to violate its own public policy or the principles of public order or morality by such recognition of foreign judgments.[40]

(III) *ERRORS OF LAW.* It is no ground for impeaching a judgment of a foreign court that it is erroneous in matter of law,[41] even where the foreign court proceeded upon a mistaken conception or application of the law of the country where the judgment is sought to be enforced.[42]

(IV) *FRAUD.* Fraud practised in the concoction or procurement of a foreign judgment, as distinguished from fraud in the transaction sued on, is a good defense against it, and will invalidate the judgment if successfully established.[43]

L. R. 3 Ch. 479, 37 L. J. Ch. 386, 18 L. T. Rep. N. S. 749, 16 Wkly. Rep. 1090; Crawley *v.* Isaacs, 16 L. T. Rep. N. S. 529; Turcotte *v.* Dawson, 30 U. C. C. P. 23. A judgment rendered in a foreign country without a statement of the cause of action in some form recognized by law is of no value and will not be recognized beyond the jurisdiction of the court which rendered it. Young *v.* Rosenbaum, 39 Cal. 646.

37. Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95 [*reversing* 42 Fed. 249]; Pemberton *v.* Hughes, [1899] 1 Ch. 781, 68 L. J. Ch. 281, 80 L. T. Rep. N. S. 369, 47 Wkly. Rep. 354.

38. Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Dunstan *v.* Higgins, 138 N. Y. 70, 33 N. E. 729, 34 Am. St. Rep. 431, 20 L. R. A. 668; McPherson *v.* McMillan, 3 U. C. Q. B. 34.

39. The Antelope, 10 Wheat. (U. S.) 66, 6 L. ed. 268; Hohner *v.* Gratz, 50 Fed. 369; De Brimont *v.* Penniman, 7 Fed. Cas. No. 3,715, 10 Blatchf. 436; Ogden *v.* Folliott, 3 T. R. 726; Addams *v.* Worden, 6 L. C. Rep. 237. But a statute which imposes upon officers of a corporation who make false representations in regard to certain matters a personal liability for the debts of the company is for the protection of private rights, not for the punishment of a public offense, and is therefore remedial, and not penal, in the sense here meant. Huntington *v.* Attrill, [1893] A. C. 150, 57 J. P. 404, 62 L. J. P. C. 44, 68 L. T. Rep. N. S. 326, 41 Wkly. Rep. 575 [*reversing* 18 Ont. App. 136, 17 Ont. 245].

40. See Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81; McDonald *v.* Grand Trunk R. Co., 71 N. H. 448, 52 Atl. 982, 93 Am. St. Rep. 550; McCurry *v.* Reid, 3 Quebec Pr. 165.

41. Messier *v.* Amery, 1 Yeates (Pa.) 533, 1 Am. Dec. 316; Rapalje *v.* Emory, 2 Dall. (Pa.) 51, 1 L. ed. 285; Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95; Scott *v.* Pilkington, 2 B. & S. 11, 8 Jur. N. S. 557, 31 L. J. Q. B. 81, 6 L. T. Rep. N. S. 21, 110 E. C. L. 11. But certain other cases hold that the proceedings in the foreign court will be presumed to be consistent with the foreign law until the contrary is distinctly shown. Becquet *v.* MacCarthy, 2 B. & Ad. 951, 22 E. C. L. 398; Alivon *v.* Furnival, 1 C. M. & R. 277, 3 Dowl. P. C. 202, 3 L. J. Exch. 241, 4 Tyrw. 751.

42. Castrique *v.* Imrie, L. R. 4 H. L. 414, 39 L. J. C. P. 350, 23 L. T. Rep. N. S. 48, 19 Wkly. Rep. 1; Godard *v.* Gray, L. R. 6 Q. B. 139, 40 L. J. Q. B. 62, 24 L. T. Rep. N. S. 89, 19 Wkly. Rep. 348. *Contra*, Lang *v.* Holbrook, 14 Fed. Cas. No. 8,057, Crabbe 179.

43. *Connecticut.*— Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

Illinois.— Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81. But see Ambler *v.* Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202.

Maine.— Rankin *v.* Goddard, 54 Me. 28, 89 Am. Dec. 718.

Missouri.— Ward *v.* Quinlivin, 57 Mo. 425.

United States.— Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95.

England.— Ochsenbein *v.* Papelier, L. R. 8 Ch. 695, 42 L. J. Ch. 861, 28 L. T. Rep. N. S. 459, 21 Wkly. Rep. 516; Abouloff *v.* Oppenheimer, 10 Q. B. D. 295, 52 L. J. Q. B. 1, 47 L. T. Rep. N. S. 325, 31 Wkly. Rep. 57; Godard *v.* Gray, L. R. 6 Q. B. 139, 40 L. J. Q. B. 62, 24 L. T. Rep. N. S. 89, 19 Wkly. Rep. 348; Australasia Bank *v.* Nias, 16 Q. B. 717, 15 Jur. 967, 20 L. J. Q. B. 284, 71 E. C. L. 717; Henderson *v.* Henderson, 6 Q. B. 288, 13 L. J. Q. B. 274, 9 Jur. 755, 51 E. C. L. 288; Reimers *v.* Druce, 23 Beav. 145, 3 Jur. N. S. 147, 26 L. J. Ch. 196, 5 Wkly. Rep. 211, 53 Eng. Reprint 57; Cammell *v.* Sewell, 3 H. & N. 617, 27 L. J. Exch. 447; Price *v.* Dewhurst, 8 Sim. 279, 8 Eng. Ch. 279, 59 Eng. Reprint 111.

Canada.— Hollender *v.* Ffoulkes, 26 Ont. 61. See Woodruff *v.* McLennan, 14 Ont. App. 242.

See 30 Cent. Dig. tit. "Judgment," § 1519 *et seq.*

(v) *Want of Finality.* A foreign judgment is not available as a cause of action or defense unless final and conclusive in the place where rendered.[44] The pendency of an appeal from the judgment in the foreign country will deprive it of this character of finality if such appeal suspends all remedies for its enforcement in that country, although not otherwise;[45] but it is none the less final merely because defendant might cause it to be vacated or set aside by the court which rendered it, if he has not taken steps to do so.[46]

(vi) *Statute of Limitations.* The statute of limitations of the country of the forum may be pleaded in bar of an action on a foreign judgment.[47]

d. Pleading and Exhibiting Foreign Judgment. A plea of a foreign judgment should contain enough to show the competence of the foreign court,[48] and should set forth that the judgment was duly given or made,[49] that it was on the merits and conclusive between the parties where rendered,[50] and that it remains in full force and unpaid.[51] Parol evidence is admissible to show what matters were submitted to and passed upon by the court,[52] but the construction and effect of the judgment itself is a matter of law for the court.[53] The judgment should be authenticated by the seal of the court, if any, the certificate of the officer in whose custody the record remains, the attestation of the principal judge of the court to

Perjury.— False testimony or the suppression of the truth does not constitute that kind of fraud by which a judgment is vitiated in the courts of another country. Hilton *v.* Guyott, 42 Fed. 249; Woodruff *v.* McLennan, 14 Ont. App. 242.

Enjoining judgment.— Since fraud is available as a defense to an action at law upon a foreign judgment, chancery will not interfere with the suit, but will leave defendant to make that defense at law. Ochsenbein *v.* Papelier, L. R. 8 Ch. 695, 42 L. J. Ch. 861, 28 L. T. Rep. N. S. 459, 21 Wkly. Rep. 516.

44. Munn *v.* Cook, 8 N. Y. Suppl. 698; Nouvion *v.* Freeman, 15 App. Cas. 1, 59 L. J. Ch. 337, 62 L. T. Rep. N. S. 189, 38 Wkly. Rep. 581; Smith *v.* Nicolls, 1 Arm. 474, 5 Bing. N. Cas. 208, 7 Dowl. P. C. 282, 8 L. J. C. P. 92, 7 Scott 147, 35 E. C. L. 120; Plummer *v.* Woodburne, 4 B. & C. 625, 7 D. & R. 25, 4 L. J. K. B. O. S. 6, 10 E. C. L. 730; Paul *v.* Roy, 15 Beav. 433, 21 L. J. Ch. 361, 51 Eng. Reprint 605; Frayes *v.* Worms, 10 C. B. N. S. 149, 100 E. C. L. 149; Graham *v.* Harrison, 6 Manitoba 210; Gauthier *v.* Routh, 6 U. C. Q. B. O. S. 602. See also XIII, B, 5; XIV, A, 4, g.

45. Trevino *v.* Fernandez, 13 Tex. 630; Scott *v.* Pilkington, 2 B. & S. 11, 8 Jur. N. S. 557, 31 L. J. Q. B. 81, 6 L. T. Rep. N. S. 21, 110 E. C. L. 11; Howland *v.* Codd, 9 Manitoba 435; Huntington *v.* Attrill, 12 Ont. Pr. 36. And see McGrew *v.* Mutual L. Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20. See also *supra*, XIII, B, 5, e; XIV, A, 4, g, (II).

46. Vanquelin *v.* Bouard, 15 C. B. N. S. 341, 10 Jur. N. S. 566, 33 L. J. C. P. 78, 9 L. T. Rep. N. S. 582, 3 New Rep. 122, 12 Wkly. Rep. 128, 109 E. C. L. 341.

47. McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177; Don *v.* Lippmann, 5 Cl. & F. 1, 7 Eng. Reprint 303; Duplex *v.* De Roven, 2 Vern. Ch. 540; North *v.* Fisher, 6 Ont. 206; Fowler *v.* Vail, 27 U. C. C. P. 417.

48. Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236; Ritchie *v.* McMullen, 159 U. S. 235, 16 S. Ct. 171, 40 L. ed. 133. In an action upon a foreign judgment rendered in an inferior court, it is not necessary to aver that the cause of action arose within the jurisdiction of that court. Prentiss *v.* Beemer, 3 U. C. Q. B. 270. The fact that the court rendering the judgment was a court of general original jurisdiction may be proved by a copy of the statute laws of the country, officially published, and identified by a solicitor practising in such court. Grant *v.* Birrell, 35 Misc. (N. Y.) 768, 72 N. Y. Suppl. 366.

49. Dore *v.* Thornburgh, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100. In an action on a judgment recovered in England, where the complaint alleges that the court had jurisdiction of the subject-matter of the action and of the parties thereto, and that the judgment was duly given, made, and entered in and by said court, it is a sufficient allegation of jurisdiction, at least in the absence of a demurrer. Murphy *v.* Murphy, 145 Cal. 482, 78 Pac. 1053.

50. McPhedran *v.* Lusher, 3 U. C. Q. B. O. S. 602.

51. Kelly *v.* McDermott, 10 U. C. C. P. 490.

Showing amount of judgment.— In an action on an English judgment, an allegation of the complaint that at the date of its rendition "the value of said judgment in lawful money of the United States of America was $7,055" sufficiently alleges the amount of the judgment; and where the court finds that the allegations of the complaint are true, the judgment to be rendered is properly calculated from the figures and allegations of the complaint. Murphy *v.* Murphy, 145 Cal. 482, 78 Pac. 1053.

52. Merchants' Bank *v.* Schulenburg, 48 Mich. 102, 11 N. W. 826.

53. Christian, etc., Co. *v.* Coleman, 125 Ala. 158, 27 So. 786.

the official character of the person certifying, and the whole fortified by the certificate of the executive department of the country and the impress of its great seal.[54]

JUDICANDUM EST LEGIBUS, NON EXEMPLIS. A maxim meaning "Judgment is to be given according to the laws, not according to examples or precedents."[1]

JUDICATORY. A court of justice.[2] (See, generally, COURTS.)

JUDICATURE. A court, or rather a power which distributes justice.[3] (See, generally, COURTS.)

JUDICATURE ACTS. Two acts of parliament,[4] together with their amendments of 1877,[5] 1879,[6] and 1881.[7] (See COMMON-LAW PROCEDURE ACTS.)

JUDICAT VIRUM MAGISTRATUS. A maxim meaning "The magistrate shows the man."[8]

JUDICES NON TENENTUR EXPRIMERE CAUSAM SENTENTIÆ SUÆ. A maxim meaning "Judges are not bound to explain the reason of their sentence."[9]

JUDICES RECENTER ET SUBTILITER EXCOGITATIS MINIME FAVENT CONTRA COMMUNEM LEGEM. A maxim meaning "Judges by no means favor things raised recently and subtilely against common law."[10]

JUDICIA IN CURIA REGIS NON ADNIHILENTUR, SED STENT IN ROBORE SUO QUOUSQUE PER ERROREM AUT ATTINCTUM ADNULLENTUR. A maxim meaning "Judgments in the king's courts are not to be annihilated, but to remain in force until annulled by error or attaint."[11]

JUDICIA IN DELIBERATIONIBUS CREBRO MATURESCUNT, IN ACCELERATO PROCESSU NUNQUAM. A maxim meaning "Judgments frequently become matured by deliberations, never by hurried process or precipitation."[12]

54. Capling *v.* Herman, 17 Mich. 524; Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404. See Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661.

Authentication.— If the foreign court possesses a seal, it must be used for the purpose of authenticating its judgment, even though it is so much worn as no longer to make a legible impression. Cavan *v.* Stewart, 1 Stark. 525, 2 E. C. L. 200. But if the seal is used, there is no need of proof that the exemplification was compared with the original papers on file or with the roll. Warener *v.* Kingsmill, 7 U. C. Q. B. 409. Where the action was on a judgment recovered in the tenth judicial district of California, but the exemplification bore the seal of the fourteenth district, and the clerk stated it to be under the seal of his office, not the seal of the court, the court in Canada, where the judgment was put in suit, held the proof insufficient. Junkin *v.* Davis, 22 U. C. Q. B. 369. Where a foreign judgment was authenticated by the signature of a person describing himself as "Secretary of State of Foreign Affairs," with the addition of a private seal, it was held not admissible. Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249. But on the other hand, a copy of a judgment rendered in a Cuban court was received in evidence in New York, upon proof that it was signed by the clerk of the court, that the court possessed no seal, that the seal used was that of the Royal College of Notaries, that the clerk's signature validated all the proceedings of the court, and that this was the usual method of authenticating records intended to be sent abroad. Packard *v.* Hill, 7 Cow. (N. Y.) 434. It has also been said that exemplifications of the record of judicial proceedings in a foreign country must be considered *prima facie* as correct; if incorrect, the *onus probandi* lies on the opposite party. Woodbridge *v.* Austin, 2 Tyler (Vt.) 364, 4 Am. Dec. 740.

1. Black L. Dict. [*citing* 4 Blackstone Comm. 405].

Applied in: Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 541, 10 Am. Dec. 286; Mitton's Case, 4 Coke 32*b*, 33*b*.

2. Macon *v.* Shaw, 16 Ga. 172, 185.

3. State *v.* Fry, 4 Mo. 120, 191.

The word is used to designate that department of government which it was intended should interpret and administer the law. State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424.

4. St. 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77.

5. St. 40 & 41 Vict. c. 9.

6. St. 42 & 43 Vict. c. 78.

7. St. 44 & 45 Vict. c. 68.

These statutes made most important changes in the organization of, and methods of procedure in, the superior courts of England, consolidating them together so as to constitute one supreme court of judicature, consisting of two divisions, her majesty's high court of justice, having chiefly original jurisdiction; and her majesty's court of appeal, whose jurisdiction is chiefly appellate. Black L. Dict.

8. Morgan Leg. Max.

9. Black L. Dict. [*citing* Jenkins Cent. 75].

10. Peloubet Leg. Max.

11. Black L. Dict. [*citing* 2 Inst. 539].

12. Black L. Dict. [*citing* 3 Inst. 210].

Applied in: Van Slyke *v.* Trempealeau

JUDICIAL.[13] Belonging to a cause, trial, or judgment;[14] belonging to or emanating from a judge as such; the authority vested in a judge;[15] of, or belonging to a court of justice; of, or pertaining to a judge; pertaining to the administration of justice, proper to a court of law; consisting of or resulting from legal inquiry or judgment, as judicial power or proceedings, a judicial decision, writ, sale, or punishment; determinative; giving judgment;[16] pertaining or appropriate to courts of justice or to a judge thereof, as judicial power or a judicial mind; practiced or employed in the administration of justice, as judicial proceedings; proceeding from a court of justice, as a judicial determination; ordered by a court, as a judicial sale;[17] relating to, practiced in, proceeding from, or issued by a court of justice, emanating from a judge, juridical,[18] relating to the dispensation of justice.[19] (Judicial: Act, see JUDICIAL ACT. Action, see JUDICIAL ACTION. Admission, see CRIMINAL LAW; ESTOPPEL; EVIDENCE. Authority, see JUDICIAL POWER, and Cross-References Thereunder. Attachment, see ATTACHMENT. Business, see HOLIDAYS; SUNDAY. Cause, see JUDICIAL CAUSE. Confession, see CRIMINAL LAW. Contempt, see CONTEMPT. Day, see JUDICIAL DAY. Cognizance, see EVIDENCE. Decision, see JUDICIAL DECISION. Decree, see EQUITY; JUDGMENTS. Department, see CONSTITUTIONAL LAW; COURTS; JUDGES. Deposit, see DEPOSITS IN COURT. Dictum, see COURTS; DICTUM. Determination, see JUDICIAL ACT; JUDICIAL ACTION. Discretion, see JUDICIAL DISCRETION. District, see JUDICIAL DISTRICT. Document, see JUDICIAL DOCUMENTS. Duty, see JUDICIAL DUTY. Error, see JUDICIAL ERROR. Evidence, see CRIMINAL LAW; EVIDENCE. Function, see JUDICIAL FUNCTION. Knowledge, see EVIDENCE. Legislation, see CONSTITUTIONAL LAW. Mortgage, see JUDICIAL MORTGAGE. Notice, see EVIDENCE. Oath, see OATHS AND AFFIRMATIONS. Office, see JUDICIAL OFFICE. Officer, see JUDICIAL OFFICER. Opinion, see JUDICIAL OPINION. Power, see JUDICIAL POWER. Proceeding, see JUDICIAL PROCEEDINGS. Process, see JUDICIAL PROCESS. Proof, see JUDICIAL PROOF. Purpose, see JUDICIAL PURPOSES. Question, see JUDICIAL QUESTION. Record,

County Farmers' Mut. F. Ins. Co., 39 Wis. 390, 393, 20 Am. Rep. 50.

13. **"Judicial" instead of "official"** see Larson *v.* Kelly, 64 Minn. 51, 53, 66 N. W. 130.

14. Bailey Dict. [*quoted* in Waldo *v.* Wallace, 12 Ind. 569, 572].

15. Bouvier L. Dict. [*quoted* in State *v.* Noble, 118 Ind. 350, 360, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101; Waldo *v.* Wallace, 12 Ind. 569, 572; Home Ins. Co. *v.* Flint, 13 Minn. 244; Merchants' Nat. Bank *v.* Jaffray, 36 Nebr. 218, 220, 54 N. W. 258, 19 L. R. A. 316; *In re* Cooper, 22 N. Y. 67, 82, 20 How. Pr. 1].

"Judicial" includes deciding upon a question of fact, viz., whether the act has been committed, and upon a question of law, viz., whether the injury was material. It is "judicial" to hear, adjudge, and condemn. State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228.

The word "judicial" implies the action of a court, or some agency thereof under its direction. Meetze *v.* Charlotte, etc., R. Co., 23 S. C. 1, 20.

"Whatever emanates from a judge as such, or proceeds from a court of justice, is, according to these authorities, judicial." *In re* Cooper, 22 N. Y. 67, 82, 20 How. Pr. 1.

16. Century Dict. [*quoted* in Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 420, 25 Pac. 1058].

17. Webster Dict. [*quoted* in whole or in part in State *v.* Noble, 118 Ind. 350, 360, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101; Waldo *v.* Wallace, 12 Ind. 569, 572.

18. Worcester Dict. [*quoted* in Mora *v.* Great Western Ins. Co., 10 Bosw. (N. Y.) 622, 626].

19. Worcester Dict. [*quoted* in Mora *v.* Great Western Ins. Co., 10 Bosw. (N. Y.) 622, 626].

The word "judicial" is used in two senses: The first to designate such bodies or officers "as have the power of adjudication upon the rights of persons and property. In the other class of cases it is used to express an act of the mind or judgment upon a proposed course of official action as to an object of corporate power, for the consequences of which the official will not be liable, although his act was not well judged. *In re* Zborowski, 68 N. Y. 88, 97. See also Royal Aquarium *v.* Parkinson, [1892] 1 Q. B. 431, 452, 56 J. P. 404, 61 L. J. Q. B. 409, 66 L. T. Rep. N. S. 513, 40 Wkly. Rep. 450, where it is said: "The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind — that is, a mind to determine what is fair and just in respect of the matters under consideration."

As used in speaking of a judicial department of government, the word "judicial" means that department of government which

see JUDICIAL RECORD. Remedy, see JUDICIAL REMEDIES. Sale, see JUDICIAL SALES. Sequestration, see SEQUESTRATION. Settlement, see JUDICIAL SETTLEMENT. Subdivision, see JUDICIAL SUBDIVISION. Trial, see JUDICIAL TRIAL. Writ, see JUDICIAL WRIT. See also EXTRAJUDICIAL.)

JUDICIAL ACT.[20] An act done by a member of the judicial department of government in construing the law or applying it to a particular state of facts presented for the determination of the rights of the parties thereunder;[21] an act done in furtherance of justice, or a judicial proceeding by a person having the right to exercise judicial authority;[22] an act that determines what the law is, and what the rights of the parties are, with reference to transactions that have been had; an act that undertakes to determine questions of right or obligation;[23] an act done or performed in the exercise of judicial power;[24] the performance of a duty which has been confided to judicial officers to be exercised in a judicial way.[25] While the term ordinarily imports the exercise of judicial power,[26] it may also involve within its meaning the exercise of judicial discretion or judgment.[27] As the qualities of the act,[28] and not the character of the actor, must determine the

interprets and applies laws. *In re* Railroad Com'rs, 15 Nebr. 679, 682, 50 N. W. 276.

20. **Distinguished from:** "Administrative act." *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337; Esmeralda County *v.* Third Judicial Dist. Ct., 18 Nev. 438, 439, 5 Pac. 64. "Dictation." *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337. "Discretion or discretionary act." *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337, 357. "Executive act." Esmeralda County *v.* Third Judicial Dist. Ct., *supra*. "Legislative act." People *v.* Oakland, 54 Cal. 375, 376; Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 420, 25 Pac. 1058; Zanesville *v.* Zanesville Tel., etc., Co., 63 Ohio St. 442, 446, 59 N. E. 109; Philomath College *v.* Wyatt, 27 Oreg. 390, 468, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68; Mabry *v.* Baxter, 11 Heisk. (Tenn.) 682, 690; Sinking Fund Cases, 99 U. S. 700, 761, 25 L. ed. 496 [*quoted* in Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 420, 25 Pac. 1058]; Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 660, 7 L. ed. 542; *In re* Chicago, 64 Fed. 897, 899. "Ministerial act." Merlette *v.* State, 100 Ala. 42, 45, 14 So. 562; Townsend *v.* Copeland, 56 Cal. 612, 615; Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 612, 44 Pac. 1074; Flournoy *v.* Jeffersonville, 17 Ind. 169, 173, 79 Am. Dec. 468; Abbott *v.* Mathews, 26 Mich. 176, 178; *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337; *In re* Rourke, 13 Nev. 253, 256; *In re* Zborowski, 68 N. Y. 88, 97; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, 467, 53 Am. Dec. 316; Perry *v.* Tynen, 22 Barb. (N. Y.) 137, 140; People *v.* Jerome, 36 Misc. (N. Y.) 256, 257, 73 N. Y. Suppl. 306; Multnomah County School Dist. No. 2 *v.* Lambert, 28 Oreg. 209, 224, 42 Pac. 221; General Land Office Com'rs *v.* Smith, 5 Tex. 471, 479 [*quoted* in Burnam *v.* Terrell, 97 Tex. 309, 315, 78 S. W. 500]; State *v.* Doyle, 40 Wis. 175, 188, 22 Am. Rep. 692. "Quasi judicial act." Multnomah County School Dist. No. 2 *v.* Lambert, 28 Oreg. 209, 223, 42 Pac. 221.

21. Smith *v.* Strother, 68 Cal. 194, 197, 8 Pac. 852.

22. Ross *v.* Fuller, 12 Vt. 265, 270, 36 Am. Dec. 342.

23. Sinking Fund Cases, 99 U. S. 700, 761, 25 L. ed. 496.

24. State *v.* Tippecanoe County, 45 Ind. 501, 506; Flournoy *v.* Jeffersonville, 17 Ind. 169, 173, 79 Am. Dec. 468; Armstrong *v.* Murphy, 65 N. Y. App. Div. 126, 127, 72 N. Y. Suppl. 475; Anderson L. Dict. [*quoted* in Arkle *v.* Ohio County, 41 W. Va. 471, 478, 23 S. E. 804]; Century Dict. [*quoted* in Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 420, 25 Pac. 1058]; Hawes Juris. 4 [*quoted* in Merchants' Nat. Bank *v.* Jaffray, 36 Nebr. 218, 220, 54 N. W. 258, 19 L. R. A. 316].

By this is meant the power to hear and determine controversies between adverse parties, or questions in litigation. People *v.* Murphy, 65 N. Y. App. Div. 126, 72 N. Y. Suppl. 475.

25. Onondaga *v.* Briggs, 2 Den. (N. Y.) 26, 32.

26. See cases cited *supra*, notes 21–25.

27. Merlette *v.* State, 100 Ala. 42, 44, 14 So. 562; Grider *v.* Tally, 77 Ala. 422, 424, 54 Am. Rep. 65; *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337; Mills *v.* Brooklyn, 32 N. Y. 489, 497; People *v.* Jerome, 36 Misc. (N. Y.) 256, 258, 73 N. Y. Suppl. 306; *Ex p.* Kellogg, 6 Vt. 509, 510. *Compare* State *v.* Hathaway, 115 Mo. 36, 21 S. W. 1081.

28. Whenever an act undertakes to determine a question of right or obligation or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one. Smith *v.* Strother, 68 Cal. 194, 197, 8 Pac. 852; Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 420, 25 Pac. 1058; Tanner *v.* Nelson, 25 Utah 226, 233, 70 Pac. 984. See also cases cited *supra*, notes 21–27.

Acts held to be judicial: "Allowance of accounts see People *v.* Livingston County, 26 Barb. (N. Y.) 118, 120. Allowance of attachment see Merchants' Nat. Bank *v.* Jaffray, 36 Nebr. 218, 220, 54 N. W. 258, 19 L. R. A. 316. An assignment of a suit by noting on an appearance docket that the suit was for the use of another than the plaintiff

nature of the act,[29] the term "judicial act" may, when the act itself warrants the designation, refer to an act done or performed by a court,[30] to an act done or

see Rowland *v.* Slate, 58 Pa. St. 196, 198. Appointment to serve process see *Ex p.* Kellogg, 6 Vt. 509, 510. Confirmation of assessment see People *v.* Brooklyn, 9 Barb. (N. Y.) 535, 542. Decision as to jurisdiction see Hilliard *v.* Brown, 103 Ala. 318, 323, 15 So. 605. Granting of appeal by a justice of the peace see Jordan *v.* Hanson, 49 N. H. 199, 204, 6 Am. Rep. 508. Naturalization see Green *v.* Salas, 31 Fed. 106, 107. Rejection of bid see Longinette *v.* Shelton, (Tenn. Ch. App. 1898) 52 S. W. 1078, 1084. Removal of officer see People *v.* Police Com'rs, 155 N. Y. 40, 43, 49 N. E. 257; People *v.* Jerome, 36 Misc. (N. Y.) 256, 258, 73 N. Y. Suppl. 306; Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 385, 40 Pac. 264. Taxation assessment see Prosser *v.* Secor, 5 Barb. (N. Y.) 607, 611. Taxation of costs see Voorhees *v.* Martin, 12 Barb. (N. Y.) 508, 510; Sibley *v.* Howard, 3 Den. (N. Y.) 72, 73, 45 Am. Dec. 448. Taxation of district attorney's account see Onondaga *v.* Briggs, 2 Den. (N. Y.) 26, 33.

Acts held not to be judicial: Adoption of school-books by board of education see People *v.* Oakland Bd. of Education, 54 Cal. 375, 376; Tanner *v.* Nelson, 25 Utah 226, 233, 70 Pac. 984. Appointment of an officer see People *v.* Bush, 40 Cal. 344, 346. Confirmation of a sale by the legislature see Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 660, 7 L. ed. 542. Issuance of an execution see State *v.* Bradley, 134 Ala. 549, 551, 33 So. 339. Issuance or refusal of license see Armstrong *v.* Murphy, 65 N. Y. App. Div. 126, 72 N. Y. Suppl. 475; State *v.* Doyle, 40 Wis. 175, 188, 22 Am. Rep. 692. Issuance of a summons see Weil *v.* Geier, 61 Wis. 414, 416, 21 N. W. 246. Making of a contract see State *v.* Washoe County, 23 Nev. 247, 45 Pac. 529. Making up his record by a magistrate see *In re* Rourke, 13 Nev. 253, 256. Rejection of a bid by a board of supervisors see Townsend *v.* Copeland, 56 Cal. 612, 615. Removal of officer see People *v.* Conway, 59 N. Y. App. Div. 329, 69 N. Y. Suppl. 837; People *v.* Ham, 59 N. Y. App. Div. 314, 69 N. Y. Suppl. 283. Taking the acknowledgment of deed see Lynch *v.* Livingston, 6 N. Y. 422, 429. Taxation assessments, valuation, etc. see Vandercook *v.* Williams, 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; Baltimore City *v.* Bonaparte, 93 Md. 156, 162, 48 Atl. 735; *In re* Chicago, 64 Fed. 897, 899. Taxation of costs see Abbott *v.* Mathews, 26 Mich. 176, 178.

Certified and acknowledged act of officer.—In Illinois it is held that an act of an officer certified to and acknowledged is a judicial act. In Tennessee it has been held that such act is in the nature of a judicial act. Kennedy *v.* Security Bldg., etc., Assoc., (Tenn. Ch. App. 1900) 57 S. W. 388, 394.

Other acts distinguished see *supra*, note 20.

29. Baltimore City *v.* Bonaparte, 93 Md. 156, 162, 48 Atl. 735; *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337; Esmeralda County *v.* Third Judicial Dist. Ct., 18 Nev. 438, 439, 5 Pac. 64, 65. In *Ex p.* Candee, 48 Ala. 386, 399 [*quoted* in Robey *v.* Prince George's County, *infra*], it was said: "It by no means follows that a duty is judicial because it is to be performed by a judge; if in its performance he does not exercise the powers that appropriately appertain to his judicial office, it is ministerial, and not judicial, although its performance requires the exercise of his judgment." In Robey *v.* Prince George's County, 92 Md. 150, 163, 48 Atl. 48, it was said: "If its qualities make the act a judicial act, it continues to be judicial, no matter what official undertakes to perform it; otherwise the test would be found not in the nature of the act done but in the official character of the person assuming to do it, and there could, then, never be a question as to whether a designated act was an invasion by one governmental department of the province of another, because if the act became judicial by reason of being assigned to a Judge for performance, you would have to go no farther than to ascertain that it had been so assigned, and thereupon, no matter how obviously executive it might be, it would have to be treated as judicial."

30. Pennington *v.* Straigbt, 54 Ind. 376, 377; Flournoy *v.* Jeffersonville, 17 Ind. 169, 173, 79 Am. Dec. 468; *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337; Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 25 Pac. 1058; *In re* Cooper, 22 N. Y. 67, 84; Arkle *v.* Ohio County Ct., 41 W. Va. 471, 23 S. E. 804; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 718, 9 L. ed. 1233.

"**A judicial act, then, must be an act performed by a court,** touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of ministerial officers, in short, by ministerial acts." State *v.* Tippecanoe County, 45 Ind. 501, 506; Anderson L. Dict. [*quoted* in Arkle *v.* Ohio County Ct., 41 W. Va. 471, 478, 23 S. E. 804]. In Flournoy *v.* Jeffersonville, 17 Ind. 169, 173, 79 Am. Dec. 468 [*quoted* in Schoultz *v.* McPheeters, 79 Ind. 373, 377], it was said: "Judicial acts, within the meaning of the Constitution of Indiana, are such as are performed in the exercise of judicial power. But the judicial power of this State is vested in courts. A judicial act then, must be an act performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of ministerial officers, in short, by ministerial acts."

What shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it. Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 718, 9 L. ed. 1233.

"**Where any power is conferred upon a court** of justice, to be exercised by it as a court, in the manner and with the formali-

performed by a judge,[31] or to the act done or performed by some other tribunal or officer.[32] (Judicial Act: By Clerk, see CLERKS OF COURTS. By Sheriff, see SHERIFFS AND CONSTABLES. Compelling Performance of, see MANDAMUS. Liability For, see JUDGES; JUSTICES OF THE PEACE. See also JUDICIAL; JUDICIAL DISCRETION; JUDICIAL POWER.)

JUDICIAL ACTION. An adjudication of the rights of parties who in general appear or are brought before the tribunal by notice or process, and on whose claims some decision is rendered;[33] the power to decide rights of person or property in specific cases.[34] (See JUDICIAL; JUDICIAL ACT; JUDICIAL POWER.)

JUDICIAL ADMISSION. See CRIMINAL LAW; ESTOPPEL; EVIDENCE.

JUDICIAL ATTACHMENT. See ATTACHMENT.

JUDICIAL AUTHORITY. See JUDICIAL ACT; JUDICIAL POWER.

JUDICIAL BUSINESS. See HOLIDAYS; SUNDAY.

JUDICIAL CAUSE. Proximate cause.[35] (See, generally, NEGLIGENCE.)

JUDICIAL COGNIZANCE. See EVIDENCE.

JUDICIAL CONFESSION. See CRIMINAL LAW.

JUDICIAL CONTEMPT. See CONTEMPT.

ties used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power." *In re* Cooper, 22 N. Y. 67, 84.

31. *Ex p.* Candee, 48 Ala. 386, 389; Baltimore City *v.* Bonaparte, 93 Md. 156, 163, 48 Atl. 735; Robey *v.* Prince George's County, 92 Md. 150, 163, 48 Atl. 48; Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 420, 25 Pac. 1058; Multnomah County School Dist. No. 2 *v.* Lambert, 28 Oreg. 209, 223, 42 Pac. 221. But see Mills *v.* Brooklyn, 32 N. Y. 489, 497.

32. State *v.* Clough, 64 Minn. 378, 380, 67 N. W. 202 [*quoted* in State *v.* Iverson, 92 Minn. 355, 361, 100 N. W. 91], where it was said: "To render the proceedings of special tribunals, commissioners, or municipal officers judicial in their nature, they must affect the rights of property of the citizen in a manner analogous to that in which they are affected by the proceedings of courts acting judicially."

The term "judicial," as applied to the actions of boards and officers authorized to prefer charges and remove officers, is not received in the sense ordinarily applied to courts of justice. The legislature may authorize boards of that character to perform judicial acts, though its judicial authority extends no farther than is necessary to an orderly and proper management of the affairs over which it has control. Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 385, 40 Pac. 264, 265.

Judicial acts done or performed by: Assessors see Prosser *v.* Secor, 5 Barb. (N. Y.) 607, 611. City council see Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463, 467, 53 Am. Dec. 316. Common council of a city see People *v.* Brooklyn, 9 Barb. (N. Y.) 535, 542. County judge see People *v.* Bush, 40 Cal. 344, 346. Deputy police commissioner see People *v.* Jerome, 36 Misc. (N. Y.) 256, 73 N. Y. Suppl. 306. District or county judge allowing an attachment on a claim not due see Merchants' Nat. Bank *v.* Jaffray, 36 Nebr. 218, 220, 54 N. W. 258, 19 L. R. A. 316. Inspectors of an election see People *v.* Hanes, 44 Misc. (N. Y.) 475, 477, 90 N. Y. Suppl. 61, 62. Justice of the peace see Jordan *v.* Hanson, 49 N. H. 199, 204, 6 Am. Rep. 508; Sibley *v.* Howard, 3 Den. (N. Y.) 72, 73, 45 Am. Dec. 448; *Ex p.* Kellogg, 6 Vt. 509, 510. Police commissioner see People *v.* New York Police Com'rs, 155 N. Y. 40, 43, 49 N. E. 257. State funding board see Longinette *v.* Shelton, (Tenn. Ch. App. 1898) 52 S. W. 1078, 1084. Supervisors of a county see People *v.* Livingston County, 26 Barb. (N. Y.) 118, 120. Supreme court commissioner see Onondaga *v.* Briggs, 2 Den. (N. Y.) 26, 33.

Acts not judicial in their nature done or performed by: Board of education see People *v.* Oakland Bd. of Education, 54 Cal. 375, 376. Board of supervisors see Townsend *v.* Copeland, 56 Cal. 612, 615. Commissioner of public safety see People *v.* Ham, 59 N. Y. App. Div. 314, 69 N. Y. Suppl. 283. County auditor see Vandercook *v.* Williams, 106 Ind. 345, 1 N. E. 619, 8 N. E. 113. County court see *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337. County superintendent see School Dist. Multnomah County No. 2 *v.* Lambert, 28 Oreg. 209, 42 Pac. 221, 225. Justice of the peace see *In re* Rourke, 13 Nev. 253, 256; Weil *v.* Geier, 61 Wis. 414, 416, 21 N. W. 246. Legislature see Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 660, 7 L. ed. 542. Mayor of city see People *v.* Conway, 59 N. Y. App. Div. 329, 330, 69 N. Y. Suppl. 837. Police commissioner see Armstrong *v.* Murphy, 65 N. Y. App. Div. 126, 127, 72 N. Y. Suppl. 475. School authorities see Tanner *v.* Nelson, 25 Utah 226, 233, 70 Pac. 984; Secretary of state see State *v.* Doyle, 40 Wis. 175, 188, 22 Am. Rep. 692. Town meeting see Guilford *v.* Chenango County, 13 N. Y. 143, 148.

33. *In re* Saline County Subscription, 45 Mo. 52, 53, 100 Am. Dec. 337; State *v.* Washoe County, 23 Nev. 247, 250, 45 Pac. 529; Kerosene Lamp Heater Co. *v.* Monitor Oil Stove Co., 41 Ohio St. 287, 293.

34. State *v.* Plass, 58 Mo. App. 148, 150.

35. Wharton Negl. §§ 303, 304 [*quoted* in Montgomery *v.* Wright, 72 Ala. 411, 422, 47 Am. Rep. 422].

JUDICIAL DAY. A day in which the court is in session.[36] (See DAY; DIES JURIDICUS; DIES NON JURIDICUS; LEGAL DAY. See also, generally, HOLIDAYS; SUNDAY.)

JUDICIAL DECISION.[37] The application by a court of competent jurisdiction of the law to a state of facts proved or admitted to be true, and a declaration of the consequences which follow.[38] The declaration of what the law is, and not what it shall hereafter be.[39] (Judicial Decision: Of Appellate Court, see APPEAL AND ERROR; COURTS. Of Other Courts, see COURTS; EQUITY; JUDGMENTS. See also JUDICIAL OPINION.)

JUDICIAL DECREE.[40] See EQUITY; JUDGMENTS.

JUDICIAL DEPARTMENT. See CONSTITUTIONAL LAW; COURTS; JUDGES.

JUDICIAL DEPOSIT.[41] See DEPOSITS IN COURT.

JUDICIAL DETERMINATION. See JUDICIAL ACT; JUDICIAL ACTION; JUDICIAL DECISION.

JUDICIAL DICTUM. See COURTS; DICTUM.

JUDICIAL DISCRETION. The option which a judge may exercise either to do or not to do that which is proposed to him that he shall do;[42] that discretion which is not, and cannot be, governed by any fixed principles or rules;[43] a discretion to be guided by the spirit, principles, and analogies of the law;[44] such an exercise of authority in the mode of proceeding for the enforcement of rights or the redress of wrongs as is reasonably designed to promote substantial justice.[45]

36. Heffner *v.* Heffner, 48 La. Ann. 1088, 1090, 20 So. 281, where this term is distinguished from "legal day."

37. Defined by statute see N. Y. Code Civ. Proc. § 3343, subd. 5.

38. Le Blanc *v.* Illinois Cent. R. Co., 73 Miss. 463, 468, 19 So. 211.

39. Thomson *v.* Gaillard, 3 Rich. (S. C.) 418, 424, 45 Am. Dec. 778. See also Wadsworth *v.* Green, 1 Sandf. (N. Y.) 78, 80; and 8 Cyc. 933.

40. An adjudication of bankruptcy in involuntary proceedings against the insured, and an assignment by the register pursuant to the bankrupt act, is a transfer and change of title by judicial decree, within the meaning of a policy of insurance declaring that it shall be void in case of a sale, transfer, or change in the title of the property, voluntary or by legal process or judicial decree. Perry *v.* Lorillard F. Ins. Co., 61 N. Y. 214, 218, 19 Am. Rep. 272.

A foreclosure of a mortgage by advertisement is not legal process or a judicial decree. Loy *v.* Home Ins. Co., 24 Minn. 315, 319, 31 Am. Rep. 346.

41. Defined by statute see La. Civ. Code (1900), art. 2979.

42. Alden *v.* Hinton, 6 D. C. 217, 223.

43. Rowley *v.* Van Benthuysen, 16 Wend. (N. Y.) 369, 378. Judicial discretion is not without elements or conditions, altogether these elements or conditions are not defined or established by fixed rules or principles of law. Alexander *v.* Smith, 20 Tex. Civ. App. 304, 305, 49 S. W. 916. But see Marsh *v.* Griffin, 123 N. C. 660, 668, 31 S. E. 840, where it is said: "However incapable of exact definition, that judicial discretion is not absolutely without limitation, is clearly recognized."

44. Coos Bay Nav. Co. *v.* Endicott, 34 Oreg. 573, 576, 57 Pac. 61; Powell *v.* Dayton, etc., R. Co., 14 Oreg. 22, 23, 12 Pac. 83; Halliburton *v.* Martin, 28 Tex. Civ. App. 127, 133, 66 S. W. 675.

In the language of Chief Justice Marshall, it is a legal discretion, to be exercised in discerning the force prescribed by law. It is to be exercised not to give effect to the will of the judge, but to that of the law. Tripp *v.* Cook, 26 Wend. (N. Y.) 143, 152.

Lord Coke defines judicial discretion to be, *discernere per legem, quid sit justum*, to see what would be just according to the laws in the premises. Faber *v.* Bruner, 13 Mo. 541, 543.

Lord Mansfield says: "'Discretion,' when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful, but legal and regular." Rex *v.* Wilkes, 4 Burr. 2527, 2539 [*quoted* in Marsh *v.* Griffin, 123 N. C. 660, 31 S. E. 840].

45. Linn County *v.* Morris, 40 Oreg. 415, 420, 67 Pac. 295.

Not an arbitrary discretion, power, or right see Moon *v.* Crowder, 72 Ala. 79, 89; Darling *v.* Westmoreland, 52 N. H. 401, 408, 13 Am. Rep. 55 [*quoted* in Bundy *v.* Hyde, 50 N. H. 116, 120]; Tripp *v.* Cook, 26 Wend. (N. Y.) 143, 152; Coos Bay Nav. Co. *v.* Endicott, 34 Oreg. 573, 576, 57 Pac. 61; Powell *v.* Dayton, etc., R. Co., 14 Oreg. 22, 23, 12 Pac. 83; Halliburton *v.* Martin, 28 Tex. Civ. App. 127, 133, 66 S. W. 675; Alexander *v.* Smith, 20 Tex. Civ. App. 304, 305, 49 S. W. 916.

Not a wild self-wilfulness see Faber *v.* Bruner, 13 Mo. 541, 543.

Not whim, caprice, or passion see Moon *v.* Crowder, 72 Ala. 79, 80; Alexander *v.* Smith, 20 Tex. Civ. App. 304, 49 S. W. 916; Hubbard *v.* Hubbard, 77 Vt. 73, 78, 58 Atl. 969, 67 L. R. A. 969.

The exercise of final judgment by the court in the decision of such questions of fact as from the nature and the circumstances of the case come peculiarly within the province of the presiding judge to determine, without the intervention and to the exclusion of the functions of the jury;[46] such matters in the course of a trial as are to be decided summarily by the judge, and cannot be questioned afterwards.[47] (Judicial Discretion: Compelling Performance of Matters Within, see MANDAMUS. In Matters of — Alimony, see DIVORCE; Appeal or Error, see APPEAL AND ERROR; Arrest, see ARREST; Attachment, see ATTACHMENT; Bail, see BAIL; Contempt, see CONTEMPT; Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES; Costs, see COSTS; Criminal Law and Procedure, see CRIMINAL LAW; Depositions, see DEPOSITIONS; Direction of Verdict, see APPEAL AND ERROR; DISMISSAL AND NONSUIT; Discontinuance, see DISMISSAL AND NONSUIT; Discovery, see DISCOVERY; Dismissal, see APPEAL AND ERROR; DISMISSAL AND NONSUIT; Garnishment, see GARNISHMENT; Injunction, see INJUNCTIONS; Judgment, see JUDGMENTS; Jury, see JURIES; New Trial, see NEW TRIAL; Nonsuit, see DISMISSAL AND NONSUIT; Parties, see PARTIES; Pleading, see PLEADING; Receivership, see RECEIVERS; Reference, see EQUITY; REFERENCES; Trial, see CRIMINAL LAW; TRIAL; Venue, see CRIMINAL LAW; VENUE. See also DISCRETION.)

JUDICIAL DISTRICT. A district created for judicial purposes, for defining jurisdiction of courts, and distributing judicial business;[48] the circuit or territory within which a person may be compelled to appear.[49] (See, generally, COURTS; JUDGES; VENUE.)

JUDICIAL DOCUMENTS. Inquisitions, examinations, depositions, affidavits, and other written papers, when they have become proofs of its proceedings and are found remaining on the files of a judicial court.[50] (See, generally, AFFIDAVITS; DEPOSITIONS; EVIDENCE; JUDGMENTS; PLEADING; RECORDS. See also TITLE.)

JUDICIAL DUTY.[51] Such a duty as legitimately pertains to an officer in the department designated by the constitution as judicial.[52] (See, generally, COURTS; JUDGES. See also JUDICIAL ACT; JUDICIAL DISCRETION; JUDICIAL POWER.)

In cases of pure equity the judicial discretion which is or should be brought into play means no more than that the judge will weigh and balance the equities, and decide in favor of that party on whose side he finds the preponderance (West New York Silk Mill Co. *v.* Laubsch, 53 N. J. Eq. 65, 67, 30 Atl. 814); a discretion reduced to rules and clearly defined, to call the powers of the chancery court into exercise (Moon *v.* Crowder, 72 Ala. 79, 89).

46. Darling *v.* Westmoreland, 52 N. H. 401, 408, 13 Am. Rep. 55; Bundy *v.* Hyde, 50 N. H. 116, 120.

A decision of questions of fact.— Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the court. Colburn *v.* Groton, 66 N. H. 151, 153, 28 Atl. 95, 22 L. R. A. 763.

47. Wharton L. Lex.

48. Abbott L. Dict. [*quoted* in State *v.* Atherton, 19 Nev. 332, 342, 10 Pac. 901]. See also Com. *v.* Hoar, 121 Mass. 375, 377 ("within the judicial district of said court"); Lindsley *v.* Coahoma County, 69 Miss. 815, 825, 11 So. 336 ("judicial district" in Miss. Const. § 260).

It is simply a political division provided for by the constitution, but arranged by the legislature, for the purpose of economizing in the number of judges. *Ex p.* Gardner, 22 Nev. 280, 284, 39 Pac. 570.

49. Rapalje & L. L. Dict. [*quoted* in State *v.* Atherton, 19 Nev. 332, 342, 10 Pac. 901].

By successive extensions of meaning this word has gradually lost its original and peculiar signification, and is now constantly used to denote any extent of territory for any purpose. Burrill L. Dict. [*quoted* in State *v.* Atherton, 19 Nev. 332, 342, 10 Pac. 901].

50. Hammatt *v.* Emerson, 27 Me. 308, 337, 46 Am. Dec. 598. See also Reg. *v.* Ganz, 9 Q. B. D. 93, 103, 51 L. J. Q. B. 419, 46 L. T. Rep. N. S. 592.

51. **Distinguished from "ministerial duty"** see Williams *v.* Weaver, 75 N. Y. 30, 31; Barhyte *v.* Shepherd, 35 N. Y. 238; East River Gaslight Co. *v.* Donnelly, 25 Hun (N. Y.) 614, 615; People *v.* Jerome, 36 Misc. (N. Y.) 256, 258, 73 N. Y. Suppl. 306.

"Judicial duties," in a bond construed as meaning "official duties" see Larson *v.* Kelly, 64 Minn. 51, 52, 66 N. W. 130.

52. State *v.* Hathaway, 115 Mo. 36, 49, 21 S. W. 1081. See also *In re* Newark Plank-road, etc., 63 N. J. Eq. 710, 716, 53 Atl. 5.

By this designation is meant the judiciary in the true sense of the term. State *v.* Noble, 118 Ind. 350, 366, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143.

JUDICIAL ERROR. An error growing out of a mistaken application of the law to the facts.[53] (See CLERICAL ERROR; and, generally, APPEAL AND ERROR; CRIMINAL LAW; TRIAL.)

JUDICIAL EVIDENCE.[54] See CRIMINAL LAW; EVIDENCE.

JUDICIAL FUNCTION.[55] The exercise of a judicial function is the doing of something in the nature of the action of the court.[56] (See JUDICIAL ACT; JUDICIAL POWER.)

JUDICIAL KNOWLEDGE. See EVIDENCE.

JUDICIAL LEGISLATION. See CONSTITUTIONAL LAW.

JUDICIALLY.[57] Belonging to or emanating from a judge, as such.[58] (See JUDICIAL.)

JUDICIAL MORTGAGE. A final or definite judgment, when recorded in the office of mortgages, gives a judicial mortgage.[59] (See, generally, JUDGMENTS.)

JUDICIAL NOTICE. See EVIDENCE.

JUDICIAL OATH. See OATHS AND AFFIRMATIONS.

JUDICIAL OFFICE. An office which relates to the administration of justice.[60] (See COURTS, and Cross-References Thereunder; JUDGES; JUSTICES OF THE PEACE; OFFICERS.)

JUDICIAL OFFICER. A term which may be used in two senses; one the popular sense which applies generally to an officer of a court; the other the strictly legal sense which applies only to an officer who determines causes *inter partes*.[61] (See, generally, COURT COMMISSIONERS; COURTS; JUDGES; JUSTICES OF THE PEACE; OFFICERS; UNITED STATES COMMISSIONERS.)

JUDICIAL OPINION. One that is on the question before the Court, the direct, solemn, and deliberate decision of the Court upon the issues raised by the record

That a duty is to be performed by a judge by no means constitutes the duty a judicial one. *Ex p.* Candee, 48 Ala. 386, 399.

The duty of the probate judge to approve a sheriff's official bond is in no proper sense a judicial duty. *Ex p.* Candee, 48 Ala. 386, 399.

53. Compton *v.* Cline, 5 Gratt. (Va.) 137, 139, where the term is distinguished from "clerical error."

54. Defined by statute see Cal. Code Civ. Proc. (1903) § 1823; Oreg. Annot. Codes & St. (1901) § 677.

55. Distinguished from "ministerial function" see Pickering *v.* Moore, 67 N. H. 533, 536, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.

56. State *v.* Washoe County, 23 Nev. 247, 249, 45 Pac. 529. Where the law confers a right, and authorizes an application to a court of justice for the enforcement of such right, the proceeding upon such an application is the exercise of a judicial function, though the order or judgment authorized be of such a nature that it can only be performed or its execution enforced progressively during a future period. Zanesville *v.* Zanesville Tel., etc., Co., 64 Ohio St. 67, 91, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150.

What is exercise of judicial function see Zanesville *v.* Zanesville Tel., etc., Co., 64 Ohio St. 67, 91, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150; Crossen *v.* Wasco County, 10 Oreg. 111, 116.

What is not exercise of judicial function see People *v.* Hayne, 83 Cal. 111, 116, 23 Pac. 1, 17 Am. St. Rep. 211, 7 L. R. A. 348; People *v.* Austin, 20 N. Y. App. Div. 1, 2, 46 N. Y. Suppl. 526; State *v.* Washoe County, 23 Nev. 247, 249, 45 Pac. 529.

57. "Judiciously" is not synonymous with "judicially." *In re* Saline County, 45 Mo. 52, 53, 100 Am. Dec. 337.

58. Com. *v.* Gane, 3 Grant (Pa.) 447, 459.

"Judicially ascertain" the amount due from a corporation to a creditor means to have the finding and judgment or decree of a court as to such amount. Globe Pub. Co. *v.* State Bank, 41 Nebr. 175, 194, 59 N. W. 683, 27 L. R. A. 854; Merchants' Nat. Bank *v.* Jaffray, 36 Nebr. 218, 220, 54 N. W. 258, 19 L. R. A. 316. See also 5 Cyc. 449 note 48.

59. Chaffe *v.* Walker, 39 La. Ann. 35, 40, 1 So. 290. See also La. Civ. Code (1900), art. 3321.

60. Waldo *v.* Wallace, 12 Ind. 569, 580; State *v.* Womack, 4 Wash. 19, 27, 29 Pac. 939.

Judicial office imports the legal capacity and obligation of the incumbent to render judicial service, by holding one or more courts of justice. Sharpe *v.* Robertson, 5 Gratt. (Va.) 518, 611; Bridges *v.* Shallcross, 6 W. Va. 562, 580.

Must be exercised by the person appointed for that purpose, and not by a deputy. Fitzpatrick *v.* U. S., 7 Ct. Cl. 290, 293.

61. *In re* Queen City Refining Co., 10 Ont. Pr. 415, 418.

The term "judicial officers" includes judges and justices of all courts and all persons exercising judicial powers by virtue of their office. Settle *v.* Van Evrea, 49 N. Y. 280, 284.

and presented in the argument.[62] The term is sometimes used as importing a judgment or decree.[63] (Judicial Opinion: Of Appellate Court, see APPEAL AND ERROR; COURTS. Of Other Courts, see COURTS; EQUITY; JUDGMENTS. See also DICTUM; JUDICIAL DECISION.)

JUDICIAL POWER.[64] The authority to determine the rights of persons or property by arbitrating between adversaries in specific controversies at the instance of a party thereto;[65] the authority vested in some court, officer, or person to hear and determine when the rights of persons or property or the propriety of doing an act is the subject-matter of adjudication;[66] the authority or power vested

62. Warner *v.* The Uncle Sam, 9 Cal. 697, 732, where the term is distinguished from "extra-judicial opinion."

63. See Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270, 311; Gardner *v.* State, 21 N. J. L. 557, 558.

64. As used in the federal or state constitutions the terms "judicial power" and "judicial powers" have been construed in Territory *v.* Cox, 6 Dak. 501; Gilbert *v.* Thomas, 3 Ga. 575, 579; Wilson *v.* Price-Raid Auditing Commission, 31 Kan. 257, 258, 1 Pac. 587; State *v.* Moulin, 45 La. Ann. 309, 313, 12 So. 142; State *v.* Le Clair, 86 Me. 522, 531, 30 Atl. 7; State *v.* Hathaway, 115 Mo. 36, 48, 21 S. W. 1081; U. S. *v.* Smith, 4 N. J. L. 33, 38; Gilbert *v.* Priest, 65 Barb. (N. Y.) 444, 448; De Camp *v.* Archibald, 50 Ohio St. 618, 625, 35 N. E. 1056, 40 Am. St. Rep. 692; Cameron *v.* Parker, 2 Okla. 277, 322, 38 Pac. 14; Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 53, 57, 54 Pac. 774; State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424; Callanan *v.* Judd, 23 Wis. 343, 349; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 287, 8 S. Ct. 1370, 32 L. ed. 239; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,261, 1 Blatchf. 635, 644.

Compared with and distinguished from: "Administrative and executive power" see Miller *v.* State, 149 Ind. 607, 627, 49 N. E. 894, 40 L. R. A. 109; State *v.* Hyde, 121 Ind. 20, 33, 22 N. E. 644; De Camp *v.* Archibald, 50 Ohio St. 618, 625, 35 N. E. 1056, 40 Am. St. Rep. 692; State *v.* Hawkins, 44 Ohio St. 98, 112, 5 N. E. 228; Cameron *v.* Parker, 2 Okla. 277, 322, 38 Pac. 14; Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 53, 57, 54 Pac. 774; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,261, 1 Blatchf. 635, 644. Discretionary power see 14 Cyc. 383 note 18. "Legislative power" see Sanders *v.* Cabaniss, 43 Ala. 173, 186; State *v.* Noble, 118 Ind. 350, 359, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101; Durham *v.* Lewiston, 4 Me. 140, 143; Lewis *v.* Webb, 3 Me. 326, 332; Crane *v.* Meginnis, 1 Gill & J. (Md.) 463, 473, 19 Am. Dec. 237; State *v.* Westfall, 85 Minn. 437, 446, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297; State *v.* Hampton, 13 Nev. 439, 442; *In re* Sticknoth, 7 Nev. 223, 229; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,261, 1 Blatchf. 635, 644. "Ministerial power" see Merlette *v.* State, 100 Ala. 42, 45, 14 So. 562; Grider *v.* Tally, 77 Ala. 422, 424, 54 Am. Rep. 65; Landowners *v.* People, 113 Ill. 296, 306; State *v.* Moulin, 45 La. Ann. 309, 313, 12 So. 142; De Camp *v.* Archibald, 50 Ohio St. 618, 625, 35 N. E. 1056, 40 Am. St. Rep. 692; Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 53, 57, 54 Pac. 774; *Ex p.* Garland, 4 Wall. (U. S.) 333, 378, 18 L. ed. 366. In England the judicial was not known as a separate power, but was, both in theory and practice, a part of the executive. U. S. *v.* Kendall, 26 Fed. Cas. No. 15,517, 5 Cranch C. C. 163. See also CONSTITUTIONAL LAW, 8 Cyc. 806 *et seq.*

Quasi-judicial power see *infra*, text and note 75.

The terms "discretionary power" and "judicial power" are often used interchangeably; but there are many acts requiring the exercise of judgment which may fairly be considered of a judicial nature, and yet do not in any proper sense come within the judicial power, as applicable to the courts. State *v.* Le Clair, 86 Me. 522, 532, 30 Atl. 7.

65. Century Dict. [*quoted* in Walker *v.* Maxwell, 68 N. Y. App. Div. 196, 199, 74 N. Y. Suppl. 94].

It is one of the striking and peculiar features of judicial power that it is displayed in the decision of controversies between contending parties, the settlement of their rights, and the redress of their wrongs. Durham *v.* Lewiston, 4 Me. 140, 143. It is the province of judicial power to decide private disputes between or concerning individuals. Sanders *v.* Cabaniss, 43 Ala. 173, 181. By the judicial power of courts is generally understood the power to hear and determine controversies between adverse parties and questions in litigation. State *v.* Le Clair, 86 Me. 522, 532, 30 Atl. 7; Armstrong *v.* Murphy, 65 N. Y. App. Div. 126, 127, 72 N. Y. Suppl. 475, O'Brien, J., delivering the opinion of the court.

66. Merlette *v.* State, 100 Ala. 42, 44, 14 So. 562; Grider *v.* Tally, 77 Ala. 422, 424, 54 Am. Rep. 65.

As power to hear and determine.—A judicial power is said to be a power to hear and determine; but this definition is too comprehensive. Cameron *v.* Parker, 2 Okla. 277, 322, 38 Pac. 14. "Judicial power," as used in the Constitution, is not capable of a precise definition. It is included in the power to hear and determine, but does not exhaust the power. That it embraces the hearing and determination of all suits and actions, whether public or private, there can be no doubt; but we think that it is equally clear that it does not necessarily include the power to hear and determine the matter that is not in the nature of a suit or action between parties. De Camp *v.* Archibald, 50 Ohio St. 618, 625, 35 N. E. 1056, 40 Am. St. Rep. 692;

in the judges[67] or in the courts;[68] the power belonging to or emanating from a judge as such;[69] the power conferred upon a public officer, involving the exercise of judgment and discretion in the determination of questions of right in specific cases affecting the interest of persons or property, as distinguished from ministerial power or authority to carry out the mandates of judicial power or of the law;[70] the power exercised by courts in hearing and determining cases before them, or some matter incidental thereto, and of which they have jurisdiction;[71] the power to interpret the constitution and the laws, and make decrees determining controversies;[72] the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws.[73] "Judicial power" is abstract or relative; in the latter sense it superintends and controls the conduct of other tribunals by a prohibitory or mandatory interposition.[74] Besides the mass of judicial power belonging exclusively to courts as a department of government, there is a considerable portion of power in its nature judicial — quasi judicial — invested from time to time by legislative authority in individuals,

Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 53, 57, 54 Pac. 774.

67. Bouvier L. Dict. [*quoted* in State *v.* Noble, 118 Ind. 350, 359, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101; Home Ins. Co. *v.* Flint, 13 Minn. 244; Gilbert *v.* Salt Lake City Police, etc., Com'rs, 11 Utah 378, 386, 40 Pac. 264; Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 53, 57, 54 Pac. 774].

68. State *v.* Hyde, 121 Ind. 20, 33, 22 N. E. 644; State *v.* Denny, 118 Ind. 382, 388, 21 N. E. 252, 4 L. R. A. 79; Edwards *v.* Dykeman, 95 Ind. 509, 518; People *v.* Salsbury, 134 Mich. 537, 546, 96 N. W. 936.

Judicial power exists only in the courts. — It cannot live elsewhere. Territory *v.* Cox, 6 Dak. 501; Edwards *v.* Dykeman, 95 Ind. 509, 518; Wilson *v.* Price-Raid Auditing Commission, 31 Kan. 257, 258, 1 Pac. 587; Cameron *v.* Parker, 2 Okla. 277, 322, 38 Pac. 14; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,261, 1 Blatchf. 635. But see *infra*, text and note 75, as to quasi-judicial powers.

69. State *v.* Noble, 118 Ind. 350, 360, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101.

As embracing all cases, criminal and civil, at common law and in equity see Gilbert *v.* Thomas, 3 Ga. 575, 579.

70. Century Dict. [*quoted* in Walker *v.* Maxwell, 68 N. Y. App. Div. 196, 199, 74 N. Y. Suppl. 94].

Ministerial power distinguished see *supra*, note 64.

71. Musser *v.* Adair, 55 Ohio St. 466, 473, 45 N. E. 903.

72. State *v.* Hyde, 121 Ind. 20, 33, 22 N. E. 644; State *v.* Denny, 118 Ind. 382, 388, 21 N. E. 252, 4 L. R. A. 79; People *v.* Salsbury, 134 Mich. 537, 546, 96 N. W. 936.

"Judicial powers" is used to designate with clearness that department of government which it was intended should interpret and administer the law. State *v.* Le Clair, 86 Me. 522, 532, 30 Atl. 7; State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424. See also Gilbert *v.* Priest, 65 Barb. (N. Y.) 444, 448.

73. Cooley Const. Lim. [*quoted* in People *v.* Simon, 176 Ill. 165, 169, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801; People *v.* Chase, 165 Ill. 527, 538, 46 N. E. 454, 36 L. R. A. 105; Land Owners *v.* People, 113 Ill. 296, 309]. See also Arms *v.* Ayer, 192 Ill. 601, 612, 61 N. E. 851, 85 Am. St. Rep. 357, 58 L. R. A. 277.

"Judicial power can mean nothing more nor less than the power which administers justice to the people, according to the prescribed forms of law — according to their rights as fixed by the law." State *v.* Fry, 4 Mo. 120, 191.

"Judicial power," as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law, and can will nothing. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law. Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 866, 6 L. ed. 204. See also White County *v.* Gwin, 136 Ind. 562, 575, 36 N. E. 237, 22 L. R. A. 402 [*citing* Hawes Juris. Courts].

Illustrations of judicial power see Sanders *v.* Cabaniss, 43 Ala. 173, 181; State *v.* Hyde, 121 Ind. 20, 33, 22 N. E. 644; State *v.* Noble, 118 Ind. 350, 359, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101; Alexandria *v.* Morgan's Louisiana, etc., R., etc., Co., 109 La. 50, 58, 33 So. 65; Lewis *v.* Webb, 3 Me. 326, 332 [*followed* in Durham *v.* Lewiston, 4 Me. 140, 143]; Parks *v.* Boston, 8 Pick. (Mass.) 218, 225, 19 Am. Dec. 322; State *v.* Westfall, 85 Minn. 437, 446, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297; Merchants' Nat. Bank *v.* Jaffray, 36 Nebr. 218, 220, 54 N. W. 258, 19 L. R. A. 316; People *v.* Russel, 19 Abb. Pr. (N. Y.) 136, 138; *Ex p.* Garland, 4 Wall. (U. S.) 333, 378, 18 L. ed. 366. *Compare* Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 53, 57, 54 Pac. 774; *In re* Ziebold, 23 Fed. 791, 794.

74. Lincoln-Lucky, etc., Min. Co. *v.* First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580. See also U. S. *v.* Peters, 3 Dall. (U. S.) 121, 127, 1 L. ed. 535.

Injunction generally see INJUNCTIONS.

Mandamus generally see MANDAMUS.

Prohibition generally see PROHIBITION.

separately or collectively, for a particular purpose and limited time.[75] (See Judicial; Judicial Act; Judicial Discretion; Judicial Function. See also, generally, Courts; Judges.)

JUDICIAL PROCEEDINGS. A general term for proceedings in courts; for the course authorized to be taken in various cases to secure the determination of a controversy; to obtain the enforcement of a right or the redress or prevention of a wrong;[76] proceedings before a competent court or magistrate in the due course of law or administration of justice, which are to result in any determination of the action by such court or magistrate;[77] proceedings in a court of justice established by law, wherein the rights of parties recognized and protected by law are involved and may be determined;[78] proceedings which take place in or under the authority of a court of justice, or which relate in some way to the administration of justice, or which legally ascertain any right or liability.[79]

JUDICIAL PROCESS. In its largest sense, the term comprehends all the acts of the court from the beginning of its proceedings to the end. In a narrower sense it is the means of compelling the defendant to appear in court for suing out the original writ in civil, and after indictment in criminal cases.[80] (See, generally, Process.)

JUDICIAL PROOF. A clear and evident declaration and demonstration of a

75. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,261, 1 Blatchf. 635. See also State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424.

Ministerial officers with judicial powers.— As ministerial powers are often vested in judicial officers (Bellingham Bay Imp. Co. *v.* New Whatcom, 20 Wash. 53, 57, 54 Pac. 774), so in a less technical and more liberal sense of the terms, it seems, ministerial officers or boards are sometimes required to exercise judicial or rather quasi powers (Grider *v.* Tally, 77 Ala. 422, 424, 54 Am. Rep. 65; Territory *v.* Cox, 6 Dak. 501; Parks *v.* Boston, 8 Pick. (Mass.) 218, 225, 19 Am. Dec. 322; State *v.* Hathaway, 115 Mo. 36, 49, 21 S. W. 1081; De Camp *v.* Archibald, 50 Ohio St. 618, 625, 35 N. E. 1056, 40 Am. St. Rep. 692; Cameron *v.* Parker, 2 Okla. 277, 322, 38 Pac. 14; State *v.* Whitford, 54 Wis. 150, 157, 11 N. W. 424; *In re* Ziehold, 23 Fed. 791, 794). *Compare* Land Owners *v.* People, 113 Ill. 296, 309, where it is said: "[Judicial power] has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power, nor has it ever been held the exercise of ministerial power by the courts, within the meaning of this article, where they have been compelled to exercise a ministerial act as an incident to the exercise of judicial power."

76. Abbott L. Dict. See also Hodson *v.* Pave, [1899] 1 Q. B. 455, 457, 68 L. J. Q. B. 309, 80 L. T. Rep. N. S. 13, 47 Wkly. Rep. 241. *Compare* State *v.* South Penn Oil Co., 42 W. Va. 80, 92, 24 S. E. 688.

77. Newfield *v.* Copperman, 47 How. Pr. (N. Y.) 87, 89. When a regularly constituted court of justice is clothed with authority to hear and determine a question of fact, or a mixed question of law and fact, upon evidence, written or oral, to be produced before such court, and thereupon to render a decision affecting the material rights or interests of one or more persons or bodies corporate, such proceedings by the court must be regarded as judicial. Martin *v.* Simpkins, 20 Colo. 438, 444, 38 Pac. 1092.

78. Mullen *v.* Reed, 64 Conn. 240, 29 Atl. 478, 42 Am. St. Rep. 174, 24 L. R. A. 664.

79. Hereford *v.* People, 197 Ill. 222, 228, 64 N. E. 310.

For proceedings considered judicial see Hendry *v.* Cline, 29 Ark. 414, 416; Martin *v.* Simpkins, 20 Colo. 438, 444, 38 Pac. 1092; Watkins *v.* Smith, 17 Ga. 68, 69; Beall *v.* Beall, 8 Ga. 210, 228; Ludwig *v.* State, 18 Ind. App. 518, 48 N. E. 390; Haile *v.* Hill, 13 Mo. 612, 618; Bright *v.* White, 8 Mo. 421, 422, 426; People *v.* Board of Police Com'rs. 155 N. Y. 40, 43, 49 N. E. 257; Matter of Hempstead, 32 N. Y. App. Div. 6, 7, 52 N. Y. Suppl. 618; Bissell *v.* Press Pub. Co., 62 Hun (N. Y.) 551, 553, 17 N. Y. Suppl. 393; People *v.* Russell, 29 How. Pr. (N. Y.) 176; Silver Lake Bank *v.* Harding, 5 Ohio 545, 547; Fitzsimmons *v.* Johnson, 90 Tenn. 416, 432, 17 S. W. 100; Wicks-Nease *v.* James, 31 Tex. Civ. App. 151, 152, 72 S. W. 87; Langford *v.* State, 9 Tex. App. 283, 285.

For proceeding considered not judicial see Mullin *v.* Reed, 64 Conn. 240, 29 Atl. 478, 42 Am. St. Rep. 174, 24 L. R. A. 664; Aldrich *v.* Kinney, 4 Conn. 380, 386, 10 Am. Dec. 151; Hebert *v.* Bulte, 42 Mich. 489, 491, 4 N. W. 215; Briam *v.* Sullivan, (Tex. Civ. App. 1902) 66 S. W. 572; U. S. *v.* Petersburg Distillery, 25 Fed. Cas. No. 14,961, 1 Hughes 533.

80. Bouvier L. Dict. [*quoted* in State *v.* Guilbert, 56 Ohio St. 575, 619, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519].

The filing of a petition in bankruptcy is judicial process, and operates as an attachment or sequestration from that time of the property of the bankrupt for the equal benefit of all of his creditors, and as a restraint to its disposition by him. *In re* Smith, 132 Fed. 301, 303.

matter which was before doubtful, conveyed in a judicial manner.[81] (See, generally, CRIMINAL LAW; EVIDENCE.)

JUDICIAL PURPOSES. Purposes of the courts and the administration of justice.[82] (See, generally, COURTS.)

JUDICIAL QUESTION. A question, where the validity of acts of a municipal council are involved, the determination of which under our form of government is intrusted to the judiciary, as distinguished from the other coördinate departments, when and only when such question is made by a person who has suffered or is threatened with some special injury which he seeks to redress or prevent.[83] (See JUDICIAL; JUDICIAL ACT; JUDICIAL FUNCTION; JUDICIAL POWER.)

JUDICIAL RECORD. A precise history of a suit from its commencement to its termination, including the conclusions of law thereon, drawn by the proper officer for the purpose of perpetuating the exact state of facts.[84] (See, generally, EVIDENCE; RECORDS.)

JUDICIAL REMEDIES. Such remedies as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of the state.[85]

81. Powell *v.* State, 101 Ga. 9, 21, 29 S. E. 309, 65 Am. St. Rep. 277.

82. Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 421, 25 Pac. 1058. See also Beehe *v.* Fridley, 16 Minn. 518, 519; Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233.

83. Patton *v.* Chattanooga, 108 Tenn. 197, 220, 65 S. W. 414.

84. Burge *v.* Gandy, 41 Nebr. 149, 152, 59 N. W. 359. See also Tustin *v.* Gaunt, 4 Oreg. 305, 309; Morgan *v.* Betterton, 109 Tenn. 84, 88, 69 S. W. 969; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

Defined by statute see Cal. Code Civ. Proc. (1903) § 1904; Utah Rev. St. (1898) § 3383; Oreg. Annot. Codes & St. (1901) § 741.

Blackstone says there is a "judicial record" where the acts and judicial proceedings are enrolled on parchment or paper, for a perpetual memorial and testimony, which rolls are called the "records of the court." 2 Chitty Blackstone Comm. 264; Smith *v.* Dudley, 2 Ark. 60, 62, 65.

85. Cal. Code Civ. Proc. (1903) § 20; Mont. Code Civ. Proc. (1895) § 3469.